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IN THE SUPREME COURT OF THE STATE OF ALASKA

ORUTSARARMIUT NATIVE COUNCIL and NATIVE VILLAGE OF EEK, *Appellants*, v. JOHN BOYLE, in his official capacity as Commissioner of the Department of Natural Resources; ALASKA DEPARTMENT OF NATURAL RESOURCES; and DONLIN GOLD, LLC, *Appellees*.	Supreme Court No. Superior Court No. 3AN-22-06374 CI (Administrative Appeal) Judge Dani Crosby Anchorage Superior Court

NOTICE OF APPEAL

Pursuant to Appellate Rules 202 and 204, and AS 22.05.010, Orutsararmiut Native Council and Native Village of Eek hereby appeal to the Alaska Supreme Court the Order and Decision on Administrative Appeal entered by the Honorable Dani Crosby, Superior Court Judge for the Third Judicial District at Anchorage, on August 31, 2023. A copy of the order is attached as Exhibit 1. The decision is the final judgment of the Superior Court.

Respectfully submitted this 2nd day of October, 2023.

s/ Olivia Glasscock

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CERTIFICATE OF SERVICE AND TYPEFACE

I certify that on October 2, 2023, a copy of the foregoing NOTICE OF APPEAL, with attachment, was served by email on the following:

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In accordance with Appellate Rule 513.5(c), I also certify that the typeface used in the foregoing document is 13-point Times New Roman.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ORUTSARARMIUT NATIVE COUNCIL and NATIVE VILLAGE OF EEK, Appellant, vs. JOHN BOYLE, in his official capacity as Commissioner of the Alaska Department of Natural Resources, ALASKA DEPARTMENT OF NATURAL RESOUCES, and DONLIN GOLD LLC, Appellees, and CALISTA CORPORATION, Intervenor-Appellee.	)	Case No. 3AN-22-06374 CI

ORDER AND DECISION ON ADMINISTRATIVE APPEAL

I. Introduction

In this administrative appeal, Appellants Orutsararmiut Native Council and the Native Village of Eek ("the Tribes") appeal multiple, final administrative decisions of the Commissioner of the Alaska Department of Natural Resources ("DNR") related to the agency's issuance of 12 permits allowing Appellee Donlin Gold, LLC ("Donlin Gold") to appropriate water for use in connection with the construction and operation of a proposed

gold mine. In particular, the Tribes ask that the court vacate an April 25, 2022 Final Decision and Order to issue the permits, an April 26, 2021 Review and Determination & Public Interest Finding, and the corresponding permits issued on April 26, 2021.

Appellees John Boyle, in his official capacity as Acting Commissioner of DNR, DNR, and Donlin Gold oppose. Intervenor-Appellee Calista Corporation also opposes.

Having considered the parties' briefing and the applicable law, the court affirms the challenged DNR decisions. As explained below, the court concludes that DNR's decision to grant the water appropriations without considering the cumulative impacts of the Donlin mine project did not violate the Alaska Constitution. Furthermore, DNR did not act arbitrarily or in violation of the Alaska Water Act by granting the appropriations without considering an eventual pit lake and its effects.

Accordingly, the challenged DNR actions are **AFFIRMED**.

II. Background

A. Facts

This appeal concerns 12 water use permits that DNR issued to Donlin Gold to appropriate water for use in a proposed mine project in the Yukon-Kuskokwim River Delta in southwestern Alaska. The appellants are two federally-recognized sovereign tribal governments – the Orutsararmiut Native Council and the Native Village of Eek – who have economic, social, and cultural interests in the region. Both are located downstream of the proposed mine site in the Kuskokwim River Delta region.

Appellees are the Department of Natural Resources and Donlin Gold, the proposed mine operator. Intervenor-Appellee Calista Corporation is an Alaska Native Regional Corporation that owns the subsurface mineral rights at the site of the proposed gold mine as part of its entitlement under the Alaska Native Claims Settlement Act.

1. Donlin Gold Proposed to Develop an Open Pit Gold Mine in Southwestern Alaska

Donlin Gold proposes to develop an open-pit, hard rock gold mine in the Yukon-Kuskokwim region in southwestern Alaska.[1] The proposed mine site is located 277 miles west of Anchorage, 145 miles northeast of Bethel, and 10 miles north of the village of Crooked Creek.[2]

The proposed mine (or "the mine project") includes the facilities that will be necessary to operate it. In addition to an open pit mine, the project site will house a waste rock facility, a tailing storage facility, an ore-processing plant, a 227-megawatt power plant, water management and treatment facilities, and employee housing.[3] The mine project also will require the construction of two port facilities on the Kuskokwim River, a mine access road, an airstrip, and a 316-mile buried natural gas pipeline that will run from the western shore of Cook Inlet to the site.[4] The U.S. Army Corp of Engineers anticipates that the project will take three to four years to construct and that the mine will operate for 27 years.[5]

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1 Exc. 124-279.
2 *Id.*
3 Exc. 124, 131.
4 Exc. 128-29.
5 Exc. 128.

The surface and subsurface within the mine site are privately owned by two Alaska Native Claims Settlement Act ("ANCSA") corporations and one family.[6] Calista Corporation ("Calista"), an ANCSA regional corporation, owns the subsurface mineral rights and a portion of the surface rights within the mine site.[7] The Kuskokwim Corporation ("TKC"), an ANCSA village corporation, owns the remaining portion of the surface rights within the mine site.[8]

2. *The Donlin Gold Project Affects Alaska Natives in the Yukon-Kuskokwim Region*

The Tribes, their members, and other Native Alaskan communities have historically lived, fished, and traded along the Kuskokwim River in the area where Donlin Gold proposes to construct its mine project.[9] To this day, native communities in the Yukon-Kuskokwim River Delta harvest subsistence resources in the region, including significant amounts of fish.[10] In fact, over three million pounds of subsistence resources are harvested in the Yukon-Kuskokwim region annually, including over two million pounds of fish.[11]

Some tribal communities, including the Appellants, have expressed concern about the impact of the proposed Donlin mine on subsistence resources and health. Over ten tribal

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6 Exc. 124, 128, 308. The Lyman family, a non-party, owns a small portion of the surface estate within the mine site.

7 *Id.*

8 *Id.*

9 Exc. 589-90.

10 Exc. 192-264 (detailing the subsistence patterns of native communities in the region).

11 *Id.*

governments have adopted resolutions in opposition to the project, including both the Orutsararmiut Native Council and the Native Village of Eek.[12] These resolutions emphasized the proposed mine's potential harm to the environment and impact on the availability of subsistence resources.[13]

The Tribes are concerned that the mine project presents health risks as well. In particular, they cite risks associated with the potential failure of the dam that will store mine tailings, acid-generating rock from the waste-rock facility leaching into waters, and other water quality issues that may result from the construction and operation of the mine.[14]

However, not all tribal entities oppose the mine project. Calista Corporation, the Alaska Native regional corporation that owns the subsurface and leases the project area to Donlin Gold, insists that the project advances the self-determination of Alaska Natives through their participation in decisions affecting their rights and property.[15] Calista states that it exercised its self-determination by carefully selecting the project area in a multi-step evaluation process over several years. Ultimately, it chose the proposed project site "because of its mineral content and economic potential in conformity with the real economic and social needs of its shareholders."[16]

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12 Exc. 289, 323.
13 *Id.*
14 Exc. 130-31, 144, 310.
15 43 U.S.C. § 1601.
16 Intervenor-Appellee's Br. at 8.

Calista maintains that the proposed mine is economically important as many communities in the Yukon-Kuskokwim are geographically isolated and lack reliable infrastructure for energy, potable water, and sewage treatment. It states that it has worked with Donlin Gold for over twenty years to develop this project in a way that respects the environmental and subsistence resource interests of its members as well as increases employment and other economic opportunities. And, it emphasizes that it will exercise significant oversight of the proposed project through a partnership with the mine operator.

3. Donlin Gold Sought Administrative Approval of the Mine Project

Since 2012, Donlin Gold has pursued administrative approval for the mine project. At the federal level, it has sought approval of the proposed project as a whole. At the state level, it has sought approval of necessary permits, including the water permits at issue in this appeal.

The process for federal administrative approval of the mine began in July 2012, when Donlin Gold submitted federal Clean Water Act and a Rivers and Harbors Act application to the U.S. Army Corp of Engineers to fill in wetlands.[17] This application triggered the National Environmental Policy Act's ("NEPA") requirement that federal agencies prepare an Environmental Impact Statement ("EIS") that addressed the project as a whole.[18] Over the course of six years, federal agencies examined the mine project,

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17 Exc. 121.

18 77 Fed. Reg. 74,470 (Dec. 14, 2012) (notice of intent to prepare an EIS to identify and analyze potential impacts associated with the proposed Donlin Gold Project).

identified issues that required analysis in the EIS, and completed an intra- and inter-agency review.

In 2018, the U.S. Army Corp of Engineers, the lead agency, issued a Final Environmental Impact Statement ("FEIS") and a Joint Record of Decision and Permit Evaluation ("JROD").[19] The FEIS addressed a wide range of potential impacts to the environment from the mine project.[20]

As relevant here, the FEIS discussed the project's effects on the aquatic ecosystem and the necessary federal and state permits that would be required to facilitate the project over its lifetime.[21] The JROD then determined there would be permanent effects on the aquatic ecosystem based on the FEIS but that "the Project when combined with past, present, and reasonably foreseeable future projects, with appropriate avoidance, minimization, and compensatory mitigation measures, would not resource in significant adverse cumulative impacts to aquatic resources."[22]

As the federal administrative review was taking place, Donlin Gold began seeking necessary state authorizations as well.[23]

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19 Exc. 124-279 (FEIS), 687-873 (JROD). Orutsararmiut Native Council and two other tribal governments are currently challenging the FEIS and JROD in a parallel lawsuit filed in the U.S. District Court for the District of Alaska. *See Orutsararmiut Native Council et al. v. U.S. Army Corps of Eng'rs et al.*, No. 3:23-cv-00071 (D. Alaska Apr. 5, 2023).

20 Exc. 125-27 (listing the concerns raised by the project and analyzed in the FEIS).

21 Exc. 136-80.

22 Exc. 794-95.

23 *See, e.g.*, Exc. 874-918 (fish habitat permits); 919-43 (reclamation plan); 329-582 (Aquatic Resources Monitoring plan).

On May 16, 2013, Donlin Gold applied to DNR for the right to appropriate water for anticipated operations at the mine site under the Alaska Water Use Act, AS 46.15.010 *et seq.*[24] The Act authorizes DNR to "determine and adjudicate rights in the waters of the State."[25] Consistent with Article VIII of the Alaska Constitution, the Act reserves state waters "to the people for common use . . . subject to appropriation and beneficial use . . . ."[26]

The right to appropriate water is acquired by application.[27] Applications to appropriate water must specify, among other things, where, when, how much water will be taken, used, and returned, and the maximum amount that will be used.[28] Further, they must describe any impoundment structures and provide a statement of the beneficial use of the appropriation.[29] Once an application is ready to be adjudicated, public notice of the application is made so that written objections may be submitted.[30] The Commissioner of the DNR must respond to the objections in writing and may hold a hearing.[31]

The Commissioner only issues a water rights permit upon a finding that "(1) rights of a prior appropriator will not be unduly affected; (2) the proposed means of diversion or construction are adequate; (3) the proposed use of water is beneficial; and (4) the proposed

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24 Exc. 14-23.
25 AS 46.15.010.
26 AS 46.15.030.
27 AS 46.15.040.
28 11 AAC 93.040.
29 *Id.*
30 11 AAC 93.080-090.
31 11 AAC 98.090 & 110.

appropriation is in the public interest." [32] In determining the public interest, the Commissioner must consider eight enumerated factors.[33]

Donlin Gold made 11 applications in May 2013 and one additional application in September 2013 under this framework. [34] These 12 applications requested water appropriations for various uses associated with the construction and operation of the mine site, including for dust control along access roads, fire suppression, use as potable water, use in the waste treatment plant, and use in the mill for processing ore. [35]

In addition, the applications sought appropriations for "dewatering" of the open pit. The proposed project contemplates that two open pits will be dug at the mine site in order to remove gold ore for processing.[36] During the construction and operation of the mine, Donlin Gold will "dewater" the pits – removing groundwater in the pits through wells at the perimeter of the two pits in order to ensure the stability of the pit walls.[37] At the conclusion of mining operations in each pit – after 22 years with respect to one and after 24 years with respect to the other – Donlin Gold will stop dewatering the pits, allowing them to fill with precipitation, groundwater, and surface runoff.[38] Additionally, water from the Tailings Storage Facility will be pumped into the pits.[39]

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32 AS 46.15.080(a).
33 AS 46.15.080(b).
34 Exc. 679.
35 Exc. 607-10.
36 Exc. 129.
37 Exc. 137.
38 Exc. 154.
39 *Id.*

Ultimately, the two pits will combine to create one two-square-mile pit lake as they fill.[40] Absent intervention, experts expect that the lake will reach capacity around 52 years after Donlin Gold stops dewatering the pits, requiring water to be discharged through an emergency spillway into Crooked Creek.[41] But the discharged water will not comply with water quality standards for heavy metals such as cadmium, arsenic, selenium, lead, and manganese.[42] As a result, Donlin Gold will be required to pump water from the pit lake to the treatment facility, after which it will be discharged into the Crooked Creek, in perpetuity.[43]

B. Procedural History

On November 30, 2020, after the federal agencies had completed their FEIS, DNR issued its first notice of intent to issue the proposed permits, opening the period for comments on the applications.[44] A second public notice was later issued on March 11, 2021.[45] Earthjustice, on behalf of the Tribes and other tribes in the Yukon-Kuskokwim region, submitted comments, expressing concern about the impact of the project on the water quality and fish habitat of the Crooked Creek.[46] In its second set of written comments, Earthjustice raised concerns about public health in the region, salmon habitat,

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40 *Id.*
41 *Id.*
42 *See id.*; *see also* Exc. 168-70.
43 Exc. 154-55.
44 Exc. 585-88.
45 Exc. 602.
46 Exc. 589-92; 593-600.

potential seepage of contaminated water, and the long term viability of the Tailings Storage Facility and the pit lake.[47]

On June 28, 2021, DNR responded to comments, including those submitted by the appellant Tribes.[48]

On April 26, 2021, DNR issued a Review and Determination & Public Interest Finding, which granted the 12 permits together.[49]

The appellant Tribes and others appealed the issuance of these water rights permits to the DNR Commissioner on July 22, 2021.[50] In their appeal, the Tribes and others argued that the Commissioner failed to consult with tribes on a government-to-government basis and violated Alaska Constitution by issuing the water rights permits without considering the effects of the proposed mine project as a whole.[51] They further argued that the Commissioner acted arbitrarily by issuing the 12 permits together without considering the need for an additional permit for appropriations related to the pit lake that would from the project, and that the permits were not in the public's best interest.[52] Donlin Gold responded to their appeal on August 20, 2021.[53]

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47 Exc. 593-600.
48 Exc. 655-6
49 Exc. 601-17; 650-51; *see also* Exc. 61-49 (issued permits).
50 Exc. 657-67.
51 *See id.*
52 *See id.*
53 Exc. 670-77.

On April 25, 2022, the Commissioner rejected the agency appeal.[54] DNR explained that government-to-government consultation was not legally mandatory, that it did not need to consider the cumulative effects of the proposed project, that it had considered the appropriate statutory factors, and that the permits were in the public interest.[55] It also stated that Donlin Gold did not need to apply for a permit for the pit lake water treatment works at the time it applied for the other permits associated with the project.[56]

On May 25, 2022, the Tribes filed this appeal. Before briefing was complete, the Appellees moved to supplement the record with Donlin Gold's Reclamation Plan for the mine, public comments to the plan, the Tribe's appeal of the plan's approval, and the DNR Commissioner's denial of the appeal. In an order, the court indicated it would not allow the record to be supplemented but would take judicial notice of these documents if necessary.

III. Issues

On appeal, the Tribes raise two issues:

1. Whether DNR's decision granting the 12 challenged water permits violated Article VIII of the Alaska Constitution because the agency failed to consider the cumulative impacts of the whole Donlin Gold Mine project?

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54 Exc. 678-86.
55 *See id.*
56 *See id.*

2. Whether DNR acted arbitrarily or violated AS 46.15.080 because the agency failed to consider a pit lake treatment works and a necessary water appropriation in its public interest analysis?

IV. Standards of Review

This court serves as an intermediate court of appeals in administrative matters.[57] Alaska courts review questions involving an agency's constitutional interpretation *de novo*.[58]

Alaska courts review an agency's statutory interpretation under one of two standards.[59] They "apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[60] In contrast, they substitute their own judgment in analyzing an agency's statutory interpretation "when the statutory interpretation does not involve agency expertise, or the agency's specialized knowledge and experience would not be particularly probative[.]"[61]

Finally, courts review challenges of a DNR decision regarding an application for water rights as "discretionary actions that do not require formal procedures under the

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57 AS 22.10.020(d).

58 *Eberhart v. Alaska Pub. Offs. Comm'n*, 426 P.3d 890, 894 (Alaska 2018).

59 *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

60 *Id.*

61 *Eberhart*, 426 P.3d at 894 (quoting *Lakloey, Inc. v. Univ. of Alaska*, 141 P.3d 317, 320 (Alaska 2006)).

arbitrary and capricious or abuse of discretion standard."[62] "[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[63]

To determine whether an agency action is arbitrary, the court asks "whether the agency has failed to consider an important factor or whether it has 'not really taken a hard look at the salient problems and has not genuinely engaged in reasoned decision making.'"[64] "An agency's decision will be regarded as arbitrary where it fails to consider an important factor."[65]

This court has jurisdiction over this administrative appeal under AS 22.10.020(d), AS 44.62.560, and AS 46.15.185.

V. Discussion

The Tribes argue that DNR violated Article VIII of the Alaska Constitution in granting 12 water rights permits because it failed to consider the cumulative impacts of the Donlin mine project as a whole. They further contend that the Commissioner's decision to grant the permits was arbitrary and violated the Alaska Water Use Act because it failed to

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62 *Id.* (quoting *Olson v. State, Dep't of Nat. Res.*, 799 P.2d 289, 293 (Alaska 1990)).

63 *Id.* (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

64 *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 693 (Alaska 2001), *superseded by statute on other grounds as recognized in State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 392 (Alaska 2007)).

65 *E.g., Ellingson v. Lloyd*, 342 P.3d 825, 830-31 (Alaska 2014); *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015).

account for the pit lake and an additional, necessary appropriation of water rights related to the operation of a water treatment works for the pit lake that the project will create.[66]

Appellees DNR and Donlin Gold, as well as Intervenor-Appellee Calista Corporation, respond that no cumulative impacts analysis was constitutionally required here and DNR properly limited the scope of its review of the water rights application to eight public interest factors specified in the Water Use Act. DNR and Donlin Gold also argue that the Water Use Act does not require DNR to consider the future pit lake or a related potential future water appropriation. Rather, they insist that DNR fully evaluated issues related to the pit lake when it approved the mining company's Reclamation Plan in a separate regulatory process governed by a separate statute. Calista Corporation suggests that a water rights application related to the pit lake can be made in the future.

As explained below, the court concludes that DNR was not required to conduct a cumulative impacts analysis that took into account the entirety of the mine project. Furthermore, it concludes that DNR did not violate the Water Use Act or act arbitrarily in granting the permits.

A. DNR Did Not Violate Article VIII of the Alaska Constitution in Issuing the Permits at Issue in this Appeal

The Tribes contend that DNR issued the 12 water permits challenged here in violation of the Alaska Constitution because the agency did not analyze the cumulative

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[66] In their Statement of Issues, the Tribes indicate that they also believe an issue in this appeal is whether DNR's failure to consider the pit lake violated Article VIII of the Alaska Constitution. However, the court could not find discussion of this issue elsewhere in the Appellants' Brief and does not address it.

impacts of the mine project as a whole and did not consider its development context. They argue that the Alaska Supreme Court's decision in *Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL)*, 311 P.3d 625 (Alaska 2013) mandates that, as a matter of Article VIII of the Alaska Constitution, agencies must consider the cumulative effects of a project as a whole before disposing of an interest in state resources. Furthermore, they assert that the "whole project" the cumulative effects of which DNR was required to analyze is the Donlin Gold mine project.

Appellees respond that neither *REDOIL*, nor the Alaska Constitution, require a cumulative impacts analysis in this case. They distinguish *REDOIL* and warn that the Tribes' proffered reading of *REDOIL* would require a sweeping, NEPA-like analysis for state permits related to private development.

The court reviews DNR's constitutional interpretation that Article VIII does not require a cumulative impacts analysis for the mine project here *de novo*.[67]

The court concludes that *REDOIL* does not require a cumulative impacts analysis in this case and, as a result, DNR's decision to grant the water permits did not violate Article VIII of the Alaska Constitution.

1. DNR May Issue Permits for Water Appropriations Consistent with the Public Interest

Article VIII of the Alaska Constitution provides that "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making

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[67] *Eberhart v. Alaska Pub. Offs. Comm'n*, 426 P.3d 890, 894 (Alaska 2018).

them available for maximum use consistent with the public interest."[68] As such, Article VIII directs that "[t]he legislature shall 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."[69]

With respect to water, the Alaska Constitution further provides that "[a]ll surface and subsurface waters reserved to the people for common use . . . are subject to appropriation."[70] "Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife."[71]

To effectuate this constitutional policy as instructed to by Article VIII, the Alaska legislature passed the Alaska Water Use Act, which in turn provides that the "Department of Natural Resources shall determine and adjudicate rights in the water of the state, and in its appropriation and distribution."[72] The Act and associated regulations establish the procedures through which DNR does so, directing that the Commissioner "shall issue a permit if the Commissioner finds that (1) rights of a prior appropriator will not be unduly affected; (2) the proposed means of diversion or construction are adequate; (3) the proposed use of water is beneficial; and (4) the proposed appropriation is in the public interest."[73]

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68 ALASKA CONST. art. VIII, § 1.
69 ALASKA CONST. art. VIII, § 2.
70 ALASKA CONST. art. VIII, § 13.
71 *Id.*
72 AS 46.15.010.
73 AS 46.15.080(a).

In determining the public interest, the Act directs the Commissioner to consider eight enumerated factors:

> (1) the benefit to the applicant resulting from the proposed appropriation;
> (2) the effect of the economic activity resulting from the proposed appropriation;
> (3) the effect on fish and game resources and on public recreational opportunities;
> (4) the effect on public health;
> (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
> (6) harm to other persons resulting from the proposed appropriation;
> (7) the intent and ability of the applicant to complete the appropriation; and
> (8) the effect upon access to navigable or public water.[74]

Although Article VIII delegates to the legislature the question of how the state will determine what use of natural resources maximizes the benefit to its people, courts also "have a duty to ensure compliance with constitutional principles."[75] Therefore, DNR's compliance with the statutory framework outlined above is not dispositive in determining whether its decision to permit a water appropriation was constitutional. Rather, "[w]hen an executive agency decision about natural resources is challenged under article VIII, [the court's] role . . . is limited to ensuring that the agency has 'taken a 'hard look' at all factors material and relevant to the public interest.'"[76]

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74 AS 46.15.080(b).

75 *Sagoonick v. State*, 503 P.3d 777, 798 (Alaska 2022), *reh'g denied* (Feb. 25, 2022) (citing *REDOIL*, 311 P.3d at 635).

76 *Id.* (quoting *REDOIL*, 311 P.3d at 635).

2. REDOIL *Does Not Require a Cumulative Impacts Analysis in All Cases*

The Tribes argue that the Alaska Supreme Court held in *REDOIL* that Article VIII of the Alaska Constitution requires agencies to conduct a cumulative impacts analysis of a project as a whole and its development context before they permit a disposal of a state resource. In their view, this requirement is separate from, and additional to, the appropriation process set out in the Water Use Act and a requisite element of the state's "hard look" at the public interest. They assert that DNR erred by not considering the cumulative impacts of the Donlin project in its entirety before issuing the water permits at issue. The appellees each insist that *REDOIL* does not create such a requirement and distinguish this case from *REDOIL*.

This court concludes that the Alaska Supreme Court's holding in *REDOIL* does not mandate that DNR consider the cumulative impacts of the mine project in this case. As discussed below, the Supreme Court's decision to require a cumulative impacts analysis in *REDOIL* was driven by the statutory scheme for oil and gas lease sales that allowed phased review of the public interest and thus created the possibility that DNR would not fully consider the public interest before making a decision as to the entire leasing project. No such analysis is required here as there is not a similar procedural process that might allow the state to appropriate water without considering the public interest in a particular appropriation.

In *REDOIL*, the Alaska Supreme Court reviewed a DNR decision to offer lease sales for oil and gas exploration, development, and production in the Beaufort Sea.[77] Before selling leases, DNR made a Best Interest Finding that selling area-wide leases was in the best interests of the state in accordance with the Alaska Land Act.[78] In making this finding, DNR recognized that some of the intended disposals of land might result in oil and gas development, but that future development could not be predicted at the initial lease sale phase because exploration of the area for its development potential would occur at a later phase.[79] As a result, DNR employed a phased review approach, focused its Best Interest Finding "only on the issues relating to the initial lease sale phase[,]" and discussed the later phases of exploration, development, production, and transportation of gas and oil "in general terms."[80]

On appeal, the Alaska Supreme Court determined that it was the court's duty to ensure that DNR complies with Article VIII of the Alaska Constitution when it disposes of a state resource.[81] The Court noted that "a bedrock principle in Article VIII of the Alaska Constitution mandates that the State's natural resources are to be made 'available for maximum use consistent with the public interest'" and that "[t]he constitution entrusts the legislature with the discretion to determine how to ensure that use of these natural resources

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77 *REDOIL*, 311 P.3d 625, 626-27 (Alaska 2013).
78 *Id.* at 627.
79 *Id.*
80 *Id.* (internal quotations omitted).
81 *Id.*

are 'for the maximum benefit of its people.'"[82] It then underscored DNR must take a "'hard look' at all factors material and relevant to the public interest" and that, in the case before the court, "this 'hard look' necessarily includes considering the cumulative impacts of a project."[83]

However, in requiring DNR to conduct a cumulative impacts analysis, the court was explicit that it was responding to a unique issue created by phased review of oil and gas projects. It wrote, "at the lease sale phase, DNR cannot assess and make a meaningful final determination whether the maximum benefit of the people of Alaska will be achieved throughout the course of the project because many of the potential impacts of the project are not known."[84] The court held that, although DNR did not need to speculate about the possible future effects of the project, it did need to consider known information about its effects and take "'continuing 'hard look' at future development' throughout the course of a project."[85]

In context, it is clear that the *REDOIL* court's requirement that the state's "hard look" at the public interest include a cumulative impact analysis was tied to the statutory framework for oil and gas leases. As Judge Zeman observed in a parallel appeal, "[c]entral to the court's analysis was its concern that dividing a project into phases can result in

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82 *Id.* at 635 (first quoting ALASKA CONST. art VIII, § 2; and then quoting ALASKA CONST. art VIII, § 1).

83 *Id.* at 635.

84 *Id.* at 636.

85 *Id.* at 636-37 (quoting *Kachemak Bay Conservation Soc. v. State, Dep't of Natural Res.*, 6 P.3d 270, 294 (Alaska 2000)).

'disregarding the cumulative potential environmental impacts of a project.'"[86] "The fact that the oil and gas lease was subject to phased review by DNR was a key reason the court held that while DNR was not required to make written best interest findings at every stage in the process, it was required to continue to take a 'hard look' at the cumulative environmental impacts throughout the lease process."[87]

In this case, there is no phased review or other statutory context that, if followed, might limit the state's "hard look." Accordingly, no cumulative impacts analysis is required.

The Tribes suggest that the state's hard look was limited here because it looked only at the water appropriations themselves and not to the much larger mining project of which they will be a part. They argue that this court should consider the Donlin mine project as the "whole project" akin to the oil and gas lease project at issue in *REDOIL*.

However, the "whole project" at issue in *REDOIL* and the Donlin Gold project are not alike. In *REDOIL*, the "whole project" for which the Alaska Supreme Court required a cumulative impacts analysis was a disposal of state lands that would unfold over several discrete phases. The Supreme Court ultimately required a cumulative impacts analysis because, without one, DNR would not have considered the public interest in later phases of the leasing project which would continue to dispose of state lands at each step.

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86 *Orutsararmiut Native Council et al. v. Feige*, 3AN-21-07684 CI, at *26-*27 (Alaska Sup. Ct. April 12, 2023) (internal alterations omitted) (quoting *REDOIL*, 311 P.3d at 631).

87 *Id.* at *27.

By contrast, the Tribes here seek to require DNR to analyze the cumulative impacts of a private development project of which the permitted water appropriations are a part. But, unlike the leases in *REDOIL*, the Donlin mine project is not itself a disposal of state resources. Where the later phases of the oil and gas leases in *REDOIL* disposed of state lands, the development of a mine made possible by the permitted water appropriations here will impact exclusively private resources. As such, it cannot be said that the Donlin mine is the "whole project" as the term was used in *REDOIL*. Therefore, the state's "hard look" at the public interest in these water appropriations does not risk being constricted.

At oral argument, the Tribes also insisted that *REDOIL*'s requirement that the State consider the cumulative impacts of the whole project was not limited to cases involving phased projects. Counsel argued that the constitutional language which the *REDOIL* court held required this analysis was general, not specific to phased projects. However, the language from which the "hard look" requirement is derived requires that the state's resources be made "available for maximum use consistent with the public interest."[88] Although the language is general, it does not provide any instruction to the state concerning how it must evaluate the public interest. And, as explained, the cumulative impacts analysis in *REDOIL* was a creature of the particular statutory scheme that regulated oil and gas leases. Therefore, this court is unpersuaded that the language of Article VIII indicates that

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[88] ALASKA CONST. art VIII, § 2.

a cumulative impacts analysis is appropriate in cases that do not involve phased projects or projects governed by a comparable statutory framework.

In its brief and at argument, Donlin Gold suggested that Article VIII deposits all decisionmaking authority with respect to water appropriations to the legislature and that the Alaska Water Act exclusively governs. It posits that compliance with the Act is itself compliance with the Alaska Constitution.

But that view cannot be harmonized with the Alaska Supreme Court's interpretation of Article VIII. As discussed, courts also "have a duty to ensure compliance with constitutional principles" which includes ensuring that the agency has 'taken a 'hard look' at all factors material and relevant to the public interest.'"[89]

Finally, DNR disputes whether water appropriations were "disposals" of resources to which the "hard look" imposed in *REDOIL* applies. But given that *REDOIL* derives the "hard look" requirement from the first two, general provisions of Article VIII and that water appropriations are specifically discussed in another section of Article VIII, there can be little dispute that the "hard look" described in *REDOIL* applies to water appropriations.

B. DNR's Decision Is Not Invalid Because the Agency Failed to Consider a Pit Lake and its Effects

The Tribes also argue that DNR's decision to issue the 12 water permits was arbitrary and violated the Alaska Water Act because it did not consider an inevitable lake that would form in pits created by mining as well as the lake's impacts. They contend that

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[89] *Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022), *reh'g denied* (Feb. 25, 2022) (quoting *REDOIL*, 311 P.3d at 635).

DNR should have considered the pit lake, a necessary water treatment facility, a necessary future appropriation, and other effects created by the pit lake as part of its public interest analysis of the water permits because they impact the public interest and will result from the appropriations here.

In opposition, DNR asserts that there is no requirement that it consider the pit lake in analyzing the water appropriations at issue, that the pit lake will not result from the current appropriations, and that it is not a foregone conclusion that the pit lake will need a permit in the future. Finally, the agency argues that the Tribes did not exhaust their administrative remedies with respect to this argument and therefore waived it.

Donlin Gold responds along similar lines, arguing both that DNR is not required to analyze whether other project components or future appropriations are in the public interest when considering whether a particular permit is in the public interest and that the pit lake is not an "inevitable" result of the current appropriations, but a measure evaluated and approved in 2019 in their Reclamation Plan.

1. The Tribes Did Not Waive Their Argument Respecting the Pit Lake

The court first addresses DNR's contention that the Tribes waived their argument that DNR's permitting decisions are arbitrary for failure to consider the pit lake because they did not raise the issue before the DNR Commissioner during their agency appeal. The Tribes insist that they raised the issue of the pit lake in front of the agency and have simply expanded and refined their argument. They alternatively argue that the court should

consider this argument even if it concludes it was not raised before the trial court because it fits within an exception to the waiver rule.

Generally, a party must exhaust its administrative remedies before bringing an action that challenges an agency action.[90] This allows an administrative agency "perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."[91] The administrative exhaustion requirement parallels and serves much the same function as the requirement that arguments not raised in the trial court are waived on appeal.

In superior court appeals, arguments "explicitly raised in the trial court may be expanded or refined in appellate argument."[92] Furthermore, a party may nonetheless make an argument not explicitly raised at the agency level if "the issue is 1) not dependent on any new or controverted facts; 2) closely related to the appellant's trial court arguments; and 3) could have been gleaned from the pleadings."[93]

Here, the Tribes' argument with respect to the pit lake may be raised in this court under the exception to the waiver rule. In their public comments related to the water appropriations, the Tribes raised as an issue that a water treatment facility would need to

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90 *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553, 560 (Alaska 2004).

91 *Smart v. State, Dep't of Health & Soc. Servs.*, 237 P.3d 1010, 1015 (Alaska 2010) (internal quotations omitted).

92 *Adkins v. Collens*, 444 P.3d 187, 195 (Alaska 2019).

93 *McConnell v. State, Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 991 P.2d 178, 183 (Alaska 1999) (internal quotations omitted).

be operated in perpetuity.[94] And in their appeal to the DNR Commissioner, they highlighted that the Donlin mine project would create a toxic pit lake, which would require pumping and treatment.[95] Their appeal argued that the pit lake was one of multiple impacts that the agency had improperly ignored in its decision to grant the requested permits and that the agency should have required Donlin to obtain a permit for the pit lake before mining starts.[96]

The argument the Tribes raise before this court relies on facts already within the record, is related to the Tribe's arguments in their appeal to the DNR Commissioner that the agency had not considered certain important impacts from the mine project, and could have been gleaned from their appeal to the Commissioner. Accordingly, it fits within the exception to the waiver rule and may be raised.

2. DNR's Decision Did Not Violate the Alaska Water Act

The Tribes argue that DNR's decision to grant the water permits should be vacated because it did not consider a pit lake that would form and its effects, including a necessary water treatment works and an associated appropriation. The Tribes make two separate arguments, which the court must review under different standards: that DNR's decision did not correctly apply the appropriate public interest analysis under the Alaska Water Act,

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94 Exc. 599.
95 Exc. 664.
96 Exc. 661-66.

and that it was arbitrary for failure to consider an important factor. The court addresses each argument separately.

The court first addresses whether DNR's decision violated the Alaska Water Act. The Tribes argue that DNR's decision granting the water appropriations violated the Alaska Water Act because the agency did not consider the pit lake as part of its statutorily required analysis of the public interest. In particular, they charge that the pit lake and its effects will "result from" the appropriations permitted by DNR and should have been considered in the analysis of those permits.

DNR responds that the Alaska Water Act provides an exhaustive list of the factors the agency must consider and the effect of future appropriations is not included. And it argues that the phrase "resulting from" refers to the direct results of a proposed appropriation, not broad and speculative effects. Finally, DNR asserts that the pit lake is a result of the broader Donlin mine project and a separate reclamation plan, not the water appropriations the agency permitted.

Donlin Gold further argues that the Act only requires an analysis of the specific appropriation proposed and that the permits at issue here will not make the pit lake inevitable. Moreover, it contends that it is premature to conclude that the pit lake will require another appropriation permit.

As discussed, Alaska courts review an agency's statutory interpretation under one of two standards.[97] They "apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[98] In contrast, they review *de novo* an agency's statutory interpretation "when the statutory interpretation does not involve agency expertise, or the agency's specialized knowledge and experience would not be particularly probative[.]"[99]

The parties dispute whether the court should apply review the agency's statutory public interest analysis for a reasonable basis or substitute its own judgment. The court applies the substitution of judgment standard as there is nothing about the interpretation of the enumerated public interest factors in AS 46.15.080(b) that requires DNR's special expertise or implicates fundamental policies within the agency's functions. The interpretative question here is whether the pit lake and its effect "result from" the appropriations at issue. This is a legal question involving no agency expertise as it relates the meaning of a term that does not have a particular trade usage.

The court concludes that DNR did not violate the Alaska Water Act by failing to consider the pit lake and its effects before granting the permits at issue here. The Alaska

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97 *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

98 *Id.*

99 *Eberhart*, 426 P.3d at 894 (quoting *Lakloey, Inc. v. Univ. of Alaska*, 141 P.3d 317, 320 (Alaska 2006)).

Water Act directs that, in determining the public interest in a water appropriation, the Commissioner shall consider eight enumerated factors:

> (1) the benefit to the applicant resulting from the proposed appropriation;
> (2) the effect of the economic activity resulting from the proposed appropriation;
> (3) the effect on fish and game resources and on public recreational opportunities;
> (4) the effect on public health;
> (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
> (6) harm to other persons resulting from the proposed appropriation;
> (7) the intent and ability of the applicant to complete the appropriation; and
> (8) the effect upon access to navigable or public water.[100]

In their initial brief, the Tribes did not point to one of these factors as encompassing the pit lake and its effects. Instead, they argued a common sense reading of the Water Use Act, which requires a proposed use of water be "beneficial" and "in the public interest," indicates that appropriations be analyzed in context.[101] In their Reply, the Tribes clarify that the pit lake fits comfortably within several of the enumerated factors, including those that reference economic activity, people, fish and game resources, and public health. They argue that the effects on these factors will "result from" the permitted appropriation because the appropriations will make inevitable the pit lake. In support, they cite a case that arises in another context where the court construed the phrase "results from" broadly.

As an initial matter, a plain reading of the statute leads the court to conclude that DNR need only consider the enumerated factors to comply with the Act. AS 46.15.080(a) provides that "[t]he Commissioner shall issue a permit if the Commissioner finds that . . .

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100 AS 46.15.080(b).
101 AS 46.15.080(a)(3)-(4).

the proposed use of water is beneficial; and the proposed appropriation is in the public interest."[102] The statute then immediately defines the scope of the required public interest analysis and directs the Commissioner that "[i]n determining the public interest, the Commissioner shall consider" eight factors.[103] DNR's failure to consider factors not enumerated in AS 46.15.080(b) does not violate the Alaska Water Act.

The operative question here is thus whether DNR was required to analyze the pit lake's effects on people, fish and game, public health, and other factors related to the public interest. The Tribes insist it must as these effects "result from" the appropriations permitted by DNR in the sense that these appropriations make possible the operation of the mine and inexorably will lead to the creation of the pit lake and its impacts. Specifically, by permitting appropriation of water to dewater the mine pits, DNR makes possible the construction of the pit itself, directly leading to the ultimate pit lake, a planned water treatment works, and a likely appropriation of water for water treatment.

DNR and Donlin Gold both contend that the effects of the pit lake do not "result from" the appropriations. They highlight that these effects could not occur until 50 years have passed after the mine closure, an estimated 80 years in the future. In oral argument, they underscored that the creation of the pit lake is not inevitable, given the significant passage of time and possibility of technological development. Counsel for DNR also made

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102 *Id.*

103 AS 46.15.080(b).

the point that DNR could not truly consider the necessity of an appropriation for a water treatment works so far in the future as it lacked the necessary information to do so.

The court concludes that the effects of the pit lake are too attenuated for DNR to be required to consider them as part of their public interest analysis under the Alaska Water Act. Although it is true that a pit lake will form and a water treatment works will be built under the reclamation plan, their effects cannot be said to "result from" the water appropriations permitted here. Instead, the pit lake and its effects are a likely result of the much larger Donlin mine project, of which the appropriations form a part. The appropriations are necessary for the pit lake as dewatering allows the pit to be dug, but they are not independently sufficient for the pit lake to form.

Furthermore, it is not consistent with the spirit of the statute to require such a far-reaching public interest analysis given that the Alaska Water Act carefully confines the factors which DNR to determine the public interest.

The cited cases do not offer helpful analogs. The Tribes argue that, in a different context, the Alaska Supreme Court has held that the relevant impacts that "result from" an agency action can be construed broadly. They contend that the Alaska Supreme Court's decision in *Trustees for Alaska, Alaska Center for Environment v. Gorsuch*, 835 P.2d 1239 (Alaska 1992), a case involving the Alaska Surface Coal Mining Control and Reclamation Act, illustrates how the Alaska courts have understood what "results from" an action.

The Tribes' argument that *Gorsuch* provides an example of an Alaskan court interpreting "result from" broadly is unconvincing. There, the court interpreted the phrase

"surface coal mining operation" broadly to include "more than the actual mining activities" because the statute contained express language defining the term to mean "a surface coal mining operation and the activities necessary and incidental to the reclamation of that operation . . . ."[104] The court's holding in *Gorsuch* is not helpful in this case as the statutory language at issue there was explicitly and broadly defined in the statute, which is not the case here. The court in *Gorsuch* does not rely on a generally applicable principle to construe a statutory phrase broadly; it merely reads the plain text of the statute.

Additionally, the Tribes suggest that *Tulkisarmute Native Community Council v. Heinze*, 898 P.2d 935 (Alaska 1995) demonstrates that DNR must account for the inevitable appropriations related to a project when authorizing an appropriation of water. DNR argues the case is factually distinct because it arises in the context of a different agency action and did not address the required public use factors.

In *Tulkisarmute Native Community Council*, the tribal government and its members challenged the extension of 13 water permits which approved water appropriations for use in gold mining.[105] The court found that DNR could extend a permit if the permittee demonstrated "diligent effort toward completing an appropriation" and examined whether this standard was met with respect to the mining project as a whole, rather than with respect to individual streams within the project.[106] It cited a Colorado Supreme Court case for the

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104 *Trustees for Alaska, Alaska Ctr. for Env't v. Gorsuch*, 835 P.2d 1239, 1243 (Alaska 1992).

105 *Tulkisarmute Native Community Council*, 898 P.2d at 938.

106 *Id.* at 945-46.

principle that the court could consider a larger project when examining whether diligence had been shown.[107]

Tulkisarmute Native Community Council does not provide particularly helpful authority that the court must consider the appropriations of the whole project together. It is also narrowly focused on the diligence inquiry, which lessens its persuasive weight in this context.

In the end, the court must determine whether the pit lake and any associated future appropriations "result from" the appropriations challenged in the absence of helpful case law instructing the court how best to interpret the phrase. As discussed, it concludes that the pit lake and its effect do not "result from" the challenged appropriations.

3. DNR's Decision Was Not Arbitrary

The Tribes argue that DNR's decision was arbitrary because it failed to consider an important factor: the eventual pit lake and its effects, including a planned water treatment works and a necessary permit. They insist that, notwithstanding the statutory public interest factors, that the pit lake, its effects, and necessary future appropriations are important factors which DNR should have considered before granting these permits.

DNR and Donlin do not directly respond to the argument that DNR's decision was arbitrary. But both parties assert that the pit lake is not an "inevitable result" of the water

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107 *Id.*

appropriation permits. Donlin also points out that DNR considered the pit lake when it reviewed and approved the mine project's reclamation plan in a separate regulatory process.

To determine whether an agency action is arbitrary, the court asks "whether the agency has failed to consider an important factor or whether it has 'not really taken a hard look at the salient problems and has not genuinely engaged in reasoned decision making.'"[108] "An agency's decision will be regarded as arbitrary where it fails to consider an important factor."[109] Alaska courts have not precisely defined what constitutes an "important factor" an agency must consider. However, courts have identified the "direct effects" of an agency's action as "important factors."[110]

The court concludes that DNR's issuance of these permits was not arbitrary. First, as detailed in the previous section, the pit lake and its effects are not "direct effects" of these permits. Rather, they are the anticipated effects of the Donlin project overall, which is furthered by these permits.

And, second, the pit lake and its effects are too remote from the appropriations here to broadly considered "important factors" which the agency must consider before their approval. As discussed, the permits are necessary, but not sufficient, to result in the creation of the pit lake, the water treatment works, and their effects. Moreover, they are several

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108 *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 693 (Alaska 2001), *superseded by statute on other grounds as recognized in State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 392 (Alaska 2007)).

109 *E.g., Ellingson v. Lloyd*, 342 P.3d 825, 830-31 (Alaska 2014); *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015).

110 *See Pacifica Marine, Inc.*, 356 P.3d at 790.

independent steps removed from and distant in time from the creation of the pit lake itself. With respect to future water appropriations that may be necessary, DNR lacks the requisite information to truly assess whether or not it will issue permits. Considering that these permits will not independently and invariably lead to the creation of the pit lake, the pit lake and its effects are not salient in the permitting decisions here. To require DNR to consider them in the context of these permits would subsume a much broader and more detailed analysis – which the agency has already conducted in part in a separate process related to a reclamation plan – within the process for issuing water rights permits. Therefore, DNR's failure to address the pit lake and its effects, including the water treatment works and related, potential water appropriations, is not arbitrary.

VI. Conclusion

For the foregoing reasons, DNR's April 25, 2022 Final Decision and Order to issue water permits to Donlin Gold, April 26, 2021 Review and Determination & Public Interest Finding, and April 26, 2021 issuance of permits are **AFFIRMED**.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 31 August 2023.

Dani Crosby
Superior Court Judge

I certify that on 9/1/23 a copy of the above was mailed to each of the following at their address of record:

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