

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11384 SENATE TRANSPORTATION

-- Make a good faith effort to come to agreement on all identified issues within the time frames identified below before proceeding. In the event the municipality is not satisfied with the project manager's formal disposition of comments, the municipality may elevate.<sup>58</sup>

Again, the Hartmans overlook the fact that a private developer will not have typically gone through the same multi-year review process, with the same level of prior MOA involvement, before filing for replat approval. The MOA is directly and substantially involved in road projects long before DOT&PF files for replat approval. The Hartmans' suggestion that DOT&PF somehow gets a "pass" on MOA scrutiny ignores the existing review process, and defies the very nature of the public road construction process.

DOT&PF's application of the extensive and detailed design criteria is the equivalent of the MOA's use of AMC 21.85 during the replat review process for a private developer.<sup>59</sup> For DOT&PF, however, that review process begins long before DOT&PF submits a request for replat approval. The design process includes MOA agency review, public review, regulatory review, and on-going modifications in response to input from all sources.

When the design work is approximately 70% complete, the right of way phase is initiated and funded.<sup>60</sup> At this time, at least three phases are operating concurrently: the design continues to be developed, the right-of-way process is initiated, and final utility

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<sup>58</sup> Id. at 11.

<sup>59</sup> Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 8 (collectively, these documents are to a highway engineer comparable to the standards set out in AMC 21.75-85).

<sup>60</sup> See generally id. at ¶ 9 (describes Right-of-Way stage).

relocation plans and agreements are prepared.<sup>61</sup> It is not until this phase that the DOT&PF will submit a request for replat approval pursuant to AS 09.55.275 and AMC 21.15.123.

By the time DOT&PF submits its right-of-way replat approval application, DOT&PF will have already wound its way through a veritable labyrinth of planning and regulatory reviews, and private and public meetings, over the span of many years. In addition, by this stage, the MOA (including multiple departments and personnel) will have seen and reviewed at least two C Street design plans prior to DOT&PF requesting replat approval.<sup>62</sup> Of course, the MOA also provided right-of-way input already through the AMATS process and resulting Official Streets and Highways Plan, a “primary purpose” of which is to “identify right-of-way requirements of the highway transportation system.”<sup>63</sup>

For the Hartmans to suggest that there was no public notice, or that MOA or the public had inadequate input, or that inadequate design review has occurred without the AMC 21.15.100-120 procedure, is to fundamentally miscomprehend the comprehensive regulatory structure underpinning the entire highway planning, development, environmental, design, right-of-way, and construction process.

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<sup>61</sup> Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.

<sup>62</sup> Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 6.

<sup>63</sup> Official Streets and Highways Plan, Section 3.3 (Right-of-Way Requirements).

### C. Application Of AMC 21.85

The requirements of AMC 21.85 only need to be addressed if the court finds that AS 09.55.275 requires substantively similar treatment of private landowners and government entities. DOT&PF believes that AS 09.55.275 only requires procedurally similar treatment of private landowners and the government, but addresses the substantive requirements of AMC 21.85 out of an abundance of caution.

As noted above, the MOA and DOT&PF take the position that the level of public notice, regulatory review, and long and short term planning and design work which occurs on a DOT&PF public project prior to submission for replat approval makes application of AMC 21.85 “unnecessary” and “duplicative.”<sup>64</sup> Submission of DOT&PF’s application for right-of-way acquisition replat to all the same MOA entities as a private landowner during the replat approval process is not necessary for the same reason.<sup>65</sup> Many MOA departments are already involved in the C Street project through the design review phase, as noted

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<sup>64</sup> Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 3; Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 10 (prior to submission for replat approval, DOT&PF has engaged in more in-depth, comprehensive and compatible standards than in AMC 21.85).

<sup>65</sup> Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 5. As part of the replat review process, the request for replat approval may not be circulated to certain Anchorage departments (utilities, traffic engineer, physical planning, etc.) that a private landowner request under AMC 21.15.100-120 might be circulated to. However, many of these committees are already members of the AMATS Technical Advisory Committee board whose task involves, in part, “recommendations to the Public Committee in its review of federal and state funded transportation projects and programs.” (From AMATS website.) Another review of projects by committee members involved in the public transportation review and scoping process is unnecessary as part of the replat approval process.

above. In addition, many of the MOA entities have been involved from an early stage in the AMATS process, and further review under AMC 21.15.123 is unnecessary for that reason as well.<sup>66</sup>

Analysis of AMC 21.85 compared to pre-existing requirements imposed on DOT&PF supports the conclusion that the AMC 21.85 requirements are indeed duplicative and unnecessary.

The streets listed in AMC 21.85.050-070 are classified as local and minor collector streets.<sup>67</sup> DOT&PF does not build, operate or maintain those kind of streets because they are not part of the National Highway System (NHS) back-bone. Generally, the standards have no direct applicability to DOT&PF.<sup>68</sup> DOT&PF does take the local or minor collector streets into consideration to the extent of their intersection, or encroachment, with DOT&PF owned, operated, or maintained streets.

Other AMC 21.85 requirements, such as erosion,<sup>69</sup> curbs and gutters, utilities,<sup>70</sup> sidewalks, traffic control,<sup>71</sup> lighting, and so on, are all addressed in AASHTO, or in other

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<sup>66</sup> Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 5 (given pre-construction review process, “it is not necessary for all of the municipal entities that review private landowner’s plat approval applications to review right-of-way acquisition replat applications”).

<sup>67</sup> See generally American Association of State Highway and Transportation Officials, *A Policy On Geometric Design of Highways and Streets* 11-12, 15 (1990) (introductory discussion of minor and major urban collector roads, and urban local roads).

<sup>68</sup> Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.

<sup>69</sup> See also erosion control requirements in 23 C.F.R. Part 650.

<sup>70</sup> See also utilities requirements in 23 C.F.R. Part 645.

relevant Code of Federal Regulation requirements.<sup>72</sup> The Alaska Preconstruction Manual expands on almost all of the foregoing requirements.<sup>73</sup> For example, utilities coordination is addressed at the pre-design phase in Sections 440.30.1 and 440.30.2; during the design phase, utilities coordination is addressed at 450.40.1.

Landscaping appears to be the only provision of AMC 21.85 which may not apply to DOT&PF directly by federal or state standards. However, landscaping is a decision in which the MOA is involved through AMATS, and through the budgeting process. Landscaping is a “political and monetary issue,” and is effectively analyzed on a case-by-case depending on the particular transportation project.<sup>74</sup> Accordingly, the MOA does get input into whether or not landscaping will be provided on a given project. DOT&PF would also note that AMC 21.85.190 is not necessarily intended to apply to government entities. Landscaping is only for lots wherein a “certificate of occupancy” is issued (AMC 21.85.190), and utilities are exempted under AMC 21.80.340. Furthermore, landscaping is optional under AMC 21.80.340 (the platting authority “may” require . . . ), and therefore

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<sup>71</sup> See also traffic control requirements in 23 C.F.R. Part 655.

<sup>72</sup> See, e.g., American Association of State Highway and Transportation Officials, *A Policy On Geometric Design of Highways and Streets* 531-32, 542-46, 558-59 (1990) (addressing curbs and shoulders, drainage, borders and sidewalks, pedestrian crossings, utilities, traffic control devices (which references the Manual on Uniform Traffic and Control Devices (MUTCD), also adopted by DOT&PF – see Design & Const. Standards/Traffic and Safety links at DOT&PF web page), erosion control, and lighting).

<sup>73</sup> See Alaska Preconstruction Manual, Section 410.1 (specifically adopting federal environmental and design requirements).

presents no more of a hard-and-fast rule than the case-by-case analysis which occurs under the AMATS review process.

Even if the court finds that each and every requirement of AMC 21.85 must apply to governmental entities in precisely the same way as applies to private landowners under AMC 21.15.100-120 or AMC 21.15.125 – and DOT&PF strongly believes AMC 21.85 should not be applied in this fashion – the requirements of AMC 21.85 have either been met, substantially met,<sup>75</sup> and/or exceeded through a thorough public review, and through an equally thorough environmental and design process prior to DOT&PF ever filing for replat approval.<sup>76</sup> This process incorporates local, state, and federal regulations and authorities which, when taken together, meet or exceed the requirements of AMC 21.85.

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<sup>74</sup> Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 11.

<sup>75</sup> The Alaska Supreme Court recognized the doctrine of substantial compliance in State, Dep't of Pub. Safety v. Vernandes, 946 P.2d 1259, 1261 (Alaska 1997). The doctrine has also been applied in the context of eminent domain when justified on the particular facts of the case. See, e.g., City of Winner v. Bechtold Investments, Inc., 488 N.W.2d 416, 418 (S.D. 1991) (strict compliance considered together with substantial compliance); District Bd. of Trustees of Dayton Beach Cmty. Coll. v. Allen, 428 So.2d 704, 706 (Fla. Dist. Ct. App. 1983); 6 Julius L. Sackman, Nichols on Eminent Domain § 24.06[3], at 24-51 (3d ed. rev. 2003).

<sup>76</sup> Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 6 (government right-of-way acquisition projects are subject to more scrutiny and review than a private landowners' subdivision projects in light of the procedures and review processes which apply to those projects, above and beyond the municipal replat process, and issues such as setbacks, drainage and landscaping are addressed as part of the overall design project during the review processes).

### III. DOT&PF Properly Coordinated With The MOA Consistent With The Intent Of AS 09.55.275

The MOA is satisfied that DOT&PF properly coordinated with it.<sup>77</sup> Prior to AS 09.55.275, DOT&PF did not necessarily coordinate with local governments when conducting right of way acquisitions.<sup>78</sup> Accordingly, DOT&PF would acquire right-of-way without the affected municipality or other local government entity having any say or input into the process.

In 1975, the legislature passed AS 09.55.275 which mandated that DOT&PF coordinate with local government agencies. This “clear” legislative purpose was described in some detail in the case of Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002). The Hartmans argue that if Suzuki is read with a “broad construction in favor of the interests of the landowner,” and a “strict” and “narrow” construction against DOT&PF, then a conflict exists between AS 09.55.275 and the last sentence of AMC 21.15.123.<sup>79</sup>

No such conflict is apparent based on any of the court’s statements in Suzuki. The court repeatedly emphasizes that the clear purpose of AS 09.55.275 is simply to require cooperation between state agencies and local governments. Absent such legislation, case

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<sup>77</sup> Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3 (“DOT&PF complied with municipal requirements, and properly coordinated with the Municipality on its request for replat approval”).

<sup>78</sup> Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 2; Ex. 9, Sharp Affidavit, January 23, 2004, at ¶ 2.

<sup>79</sup> Memorandum in Support of Motion to Dismiss, January 15, 2004, at 7.

law suggests that DOT&PF need not necessarily consult with local government agencies.<sup>80</sup>

The Suzuki court explains:

The legislative history for AS 09.55.275 is sparse. The primary source of legislative purpose for AS 09.55..275 is thus the act itself.

The municipality argues that the act's purpose is "abundantly clear"; it is to require coordination between state and local governments. The municipality concludes that Suzuki and Lim's interpretation of the statute does nothing to further this purpose. We agree that this clear purpose is evidenced by the session law. The act is introduced as "AN ACT Relating to state compliance with local planning, platting and zoning ordinances." Section of the act amends AS 35.10.020:

CONSULTATION WITH MUNICIPAL PLANNING COMMISSIONS. Before the construction of a public works in a municipality, the department shall confer with the planning commission of the municipality to determine that the welfare of the public is properly protected and its agencies and zoning ordinances and the local regulations in the same manner and to the same extent as other landowners. However if a state agency clearly demonstrates an overriding state interest, a waiver of the compliance requirement may be granted by the governor.

The language of section AS 09.55.275 makes it clear that the act was intended to require the state to confer with local governments on projects. Section two amends AS 09.55 by adding the replat approval section, quoted above in Part II. This act is evidence that the legislature intended the statute to be read broadly to achieve coordination between the state and

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<sup>80</sup> See generally, 29A C.J.S. Eminent Domain § 219, at 514 (1992) (in the absence of constitutional or statutory requirement, it is not necessary to obtain, as a condition precedent to the acquisition of private property, the consent of the municipality).

local governments. If it had been the state rather than the municipality improving the road, this purpose would have led us to interpret “boundary change” broadly, to **require coordination and cooperation between state agencies and local governments.**<sup>81</sup>

In this case there is no question that DOT&PF complied with the procedures set forth by the MOA. The MOA does not contest that DOT&PF properly coordinated and cooperated with the MOA in order to obtain the preliminary plat approval.<sup>82</sup> As noted in the introductory section of this brief, DOT&PF specifically submitted a request to the MOA trying to ensure that all applicable zoning rules and ordinances had been met:

Enclosed are the plans and specifications of the above mentioned project for your review and comment. Additionally please specifically review for compliance with:

**“Alaska Statute Compliance with municipal ordinances. A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.”**<sup>83</sup>

DOT&PF went on to request that if differences with local planning or zoning ordinances existed, that the MOA “identify any instances where the project fails to comply with AS 35.30.020.”<sup>84</sup> The overall legislative intent, which was to require DOT&PF to coordinate

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<sup>81</sup> Suzuki, 41 P.3d at 152-53 (bold and underline added)

<sup>82</sup> Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3.

<sup>83</sup> Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 8 & 6 of 24.

<sup>84</sup> Id.

with the MOA, and to make itself subject to local zoning laws, was fulfilled based on the facts of this case.

The Hartmans seek to employ the doctrine of “strict construction” to read into AS 09.55.275 a requirement that is simply not there, i.e., that municipalities must apply identical substantive and procedural zoning/platting requirements to private landowners as to governmental right-of-way acquisition replat approval requests. The Hartmans further maintain that the substantive and procedural requirements must be identical to those used in the long-plat application process (AMC 21.15.100-120), rather than the short plat process (AMC 21.15.125) discussed above.<sup>85</sup> Neither the requirement to use identical substantive and procedural standards, nor the requirement to only use long-plat procedures, are required by AS 09.55.275. Nor can the doctrine of strict construction be applied to read these requirements into AS 09.55.275:

[E]minent domain statutes are not so strictly construed as to defeat the evident purpose of the legislature in granting the power.<sup>86</sup> Statutes authorizing condemnation of property by counties will be so construed as to give effect to the intention of the legislature . . . Strict construction cannot be invoked in the matter of carrying out the provisions of a statute that plainly confers the power of eminent domain, but rather in such a case there should be a liberal and reasonable

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<sup>85</sup> The long-plat process basically applies to more complex subdivisions, and is described in Jerry Weaver’s affidavit. (Weaver Affidavit, February 2, 2004, at ¶ 6.)

<sup>86</sup> City of Tacoma v. Welcker, 399 P.2d 330, 335 (Wash. 1965).

construction so as to effectuate the purpose of the statute.<sup>87</sup>

“Strict construction” does not mean the opposite of “liberal construction”:

Strict construction is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.<sup>88</sup>

Applying strict construction in the manner suggested by the Hartmans would mean that in every instance where a municipality or other local government agency differentiates, to any degree, between state right-of-way replat applications and private landowner long-plat applications, authority would be lacking, and the condemnation would fail. This interpretation goes far beyond any reasonable reading of Suzuki.

#### **IV. DOT&PF Is Not The “Platting Authority” Referenced In The Last Sentence Of AS 09.55.275**

Even assuming that a violation of the last sentence of AS 09.55.275 occurred, DOT&PF is not the proper entity to target for relief. The last sentence of AS 09.55.275 is not directed at DOT&PF, but at the MOA platting authority:

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<sup>87</sup> 11 Eugene McQuillin, The Law of Municipal Corporations § 32.19 (3d ed. rev. 2000) (footnotes omitted).

<sup>88</sup> Coon v. City and County of Honolulu, 47 P.3d 348, 362 n. 18 (Haw. 2002).

The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners.<sup>89</sup>

The “platting authority” is not DOT&PF, but the MOA. To the extent that DOT&PF had a requirement in AS 09.55.275, it was to obtain replat approval from the MOA. DOT&PF did obtain replat approval.<sup>90</sup> The MOA’s responsibility, in turn, is to comply with the last sentence cited above. The MOA had a full and fair opportunity to identify to DOT&PF any particular instances where the department “did not comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.”<sup>91</sup> In addition, the Hartmans had an opportunity to provide comment either in response to the public notice, or in its person-to-person discussions with the DOT&PF assigned right-of-way agent.

The Hartmans have leveled an authority challenge against DOT&PF, but DOT&PF did all it was required to do by AS 09.55.275, and by local ordinance. At no time prior to the Hartmans’ authority challenge did either the Hartmans (or the MOA) express any zoning concerns to DOT&PF, express any notice concerns, or express any other procedural

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<sup>89</sup> The general rule is that a municipal zoning ordinance may not impinge on the sovereign’s right to exercise the power of eminent domain. 1 Julius L. Sackman, *Nichols on Eminent Domain* § 1.141[6] (3d ed. rev. 2003). However, the legislature can voluntarily choose to subject itself to local zoning rules. *Id.* at § 24.06[1].

<sup>90</sup> Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3.

<sup>91</sup> Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 8 & 6 of 24 (emphasis added).

or substantive concerns about the eminent domain process. The Hartmans' only expressed concern up until the point of filing an authority challenge was monetary.<sup>92</sup>

Municipal zoning authority is reserved to the MOA per AS 29.40.010-200. The general rule is that municipal ordinances are presumed to be constitutional and reasonable.<sup>93</sup> Furthermore, there is a "presumption that the proceedings of a local government are valid."<sup>94</sup> Given that recognized presumption, it is patently unfair to DOT&PF to dismiss this action where it complied with a presumptively correct ordinance.

Under any standard of interpretation, strict or liberal, the last sentence of AS 09.55.275 is a requirement on the "plating authority" only. Accordingly, filing an authority challenge against DOT&PF is to target the wrong entity. Assuming the Hartmans have suffered any damage, it is theoretically possible that the Hartmans may have a claim against the MOA.<sup>95</sup> However, given the multiple levels of MOA review, the extensive pre-construction planning and public notices, the environmental and design work and reviews which occur before and after replat approval, the likelihood of success of such a claim against the MOA is remote, to say the least.

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<sup>92</sup> Ex. 4, Williams Affidavit, January 22, 2004, at ¶ 3.

<sup>93</sup> Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n, 839 P.2d 1080, 1093 (Alaska 1992).

<sup>94</sup> City of St. Mary's v. St. Mary's Native Corp., 9 P.3d 1002, 1008 (Alaska 2000).

<sup>95</sup> It is not clear what the nature of that claim would be, and the MOA would appear to have many very valid defenses.

#### V. A Pre-Condensation Hearing Is Not A Procedural Due Process Requirement

The Hartmans imply that pre-condensation proceedings are a pre-requisite for procedural due process protections.<sup>96</sup> That is incorrect, and confuses the issues. Accordingly, DOT&PF separately addresses pre-condensation hearing requirements in this section of the brief.

The sole question presented is whether AS 09.55.275 requires a hearing based on the fact that the MOA's long-plat process (AMC 21.i5.100-120) includes a hearing requirement. As noted above, the Hartmans do not satisfactorily explain why the long plat process is the only appropriate "private landowner" procedure. The MOA believes that the short plat procedure more closely resembles right-of-way acquisitions.<sup>97</sup> A hearing is not always required for private landowners, and no hearing should be required in this case.

A more fundamental point, however, is that no hearing is necessary before an eminent domain action is filed. The case cited by the Hartmans, City of Homer v. Campbell, 719 P.2d 683 (Alaska 1986), was not an eminent domain proceeding. A pre-condensation hearing is not required by any statute, or by the rules of eminent domain.<sup>98</sup> Eminent domain authorities consistently hold that a pre-condensation hearing is not

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<sup>96</sup> Memorandum in Support of Motion to Dismiss, January 15, 2004, at 10.

<sup>97</sup> Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 6.

<sup>98</sup> See AS 09.55.270 (prerequisites to condemnation do not include a pre-condensation hearing).

required.<sup>99</sup> Of course, the eminent domain process contains, as part of that process, the right to an authority and necessity hearing, and the right to challenge compensation, but no separate pre-condemnation hearing is necessary.

**VI. Existing Case Law Leaves Unclear Whether A Local Government's Improper Replat Approval Can Be Imputed To The Condemnor To Deny Authority**

Most authority and necessity case law, and secondary authorities, address situations where either a local government agency, or the state, are alleged to have breached one, or more, of their statutory eminent domain obligations. Cases where the condemnor (whether state or local entities) is without authority,<sup>100</sup> because of actions undertaken by third parties, are more difficult to find.

In this case, a unique interaction exists: procedurally, DOT&PF must obtain replat approval from the MOA; pursuant to the last sentence of AS 09.55.275, the MOA must treat

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<sup>99</sup> See, e.g., Golden State Corp. v. Sullivan, 314 A.2d 152, 154 (R.I. 1974) (the right to a hearing before the taking of private property by eminent domain is not a right encompassed within the fourteenth amendment); 11A Eugene McQuillin, Municipal Corporations § 32.125 (3d ed. rev. 2003) (notice need not be given to property owners of proceedings, meetings, appointments, etc., which are preliminary or preparatory to condemnation unless the statute requires it, and due process of law is sufficiently afforded if the owner has notice and an opportunity to be heard at any time before final judgment); 7 Julius L. Sackman, Nichols on Eminent Domain § 2.03 (3d ed. rev. 2003) (the taking hearing generally occur at some point within, and is a part of, the condemnation proceeding itself).

<sup>100</sup> The Hartmans have not argued that DOT&PF does not have general authority to condemn. See generally 1A Julius L. Sackman, Nichols on Eminent Domain §§ 3.01-04 (3d ed. rev. 2003) (discussion of capacity to condemn); 29A C.J.S. Eminent Domain § 222, at 520 (1992) (when the right of petitioner to exercise the power of eminent domain is made out satisfactorily, the courts cannot deny it for any extraneous reasons which do not affect defendant, or the real merits of the case).

DOT&PF's application "in the same manner" as applications from private landowners which, as argued above, is also primarily a procedural requirement.

The Hartmans have cited no cases to suggest that the actions of the MOA can be imputed to DOT&PF in such a way as to deprive DOT&PF of authority. For the Hartmans' challenge to succeed, it would appear that the following must be true: (1) the MOA violated the last sentence of AS 09.55.275 by and through the MOA's application of AMC 21.15.123; (2) the MOA's violation of the last sentence of AS 09.55.275 deprived the Hartmans of due process; (3) the MOA's violation may be imputed to DOT&PF, where DOT&PF's only obligation was to obtain replat approval in accordance with what the local zoning laws required (AMC 21.15.123); (4) the imputed wrong-doing is of a kind that deprives DOT&PF of program authority to proceed with the condemnation action. The chain of proof required to deny authority is quite complex, and the Hartmans' arguments have been focused on the first step of the foregoing evidentiary chain, with the assumption that a violation of step one automatically denies due process under step two. The Hartmans' analysis is insufficient, and incomplete.

As applied to DOT&PF, the requirement to obtain replat approval from the MOA is procedural: DOT&PF does not actually apply a local governing authority's zoning provisions, and has no authority to do so. DOT&PF merely submits an application for approval consistent with what is required by municipal law (in this case, AMC

21.15.123),<sup>101</sup> and must cooperate, and coordinate, in good faith. A liberal interpretation is authorized where a question relates solely to a procedural matter.<sup>102</sup> Here, DOT&PF applied for and received a municipal replat approval, and under any standard of statutory construction, strict or liberal, DOT&PF had proper authority, notwithstanding MOA errors (if any) in treatment of DOT&PF's application.

If "non-compliance" exists in the MOA's application of AMC 21.15.123, such non-compliance by the MOA should not deprive DOT&PF of authority. Absent legal authority to impute the error (if any) of the MOA to DOT&PF, the court should find that DOT&PF had authority when it filed this condemnation action.<sup>103</sup>

## **VII. Neither AS 40.15.380, Nor The Bill Signature Letter, Has Any Relevance**

### **A. Alaska Statute 40.15.380 Cannot Be Used To Interpret AS 09.55.275**

The Hartmans note that the right-of-way acquisition plat procedure in AS 40.15.380 for areas not exercising land use regulation powers resembles the procedure in AMC

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<sup>101</sup> Only limited information needs to be submitted. Alaska Statute 09.55.275 provides that replat must show clearly the "location of the proposed public streets, easements rights-of-way, and other taking of private property."

<sup>102</sup> 6 Julius L. Sackman, Nichols on Eminent Domain § 24.06[3], at 24-48 to 24-49 (3d ed. rev. 2003).

<sup>103</sup> If the court finds that DOT&PF had authority, the court could nevertheless apply Alaska Civil Rule 72(h) to correct errors, if any, that the court believes may have occurred in the MOA replat review process.

21.15.123. The procedure in AS 40.15.380 (applying to areas not exercising land use regulation) differs from the procedure required in AS 09.55.275 (applying to areas that do exercise land use regulations). The Hartmans conclude that the doctrine of *expressio unius est exclusio alterius* “mandates . . . that the State must follow the replat procedures applicable to private landowners in areas subject to municipal control . . . .”<sup>104</sup>

The Hartmans’ reference to AS 40.15.380 does not help determine whether or not AMC 21.15.123 violates AS 09.55.275’s last sentence. The doctrine of *expressio unius est exclusio alterius* does not “mandate” anything at all in terms of what procedure DOT&PF was required to follow in this case. That doctrine has been described as follows:

Under the principle *expressio unius est exclusio alterius*, courts presume that a statute designating only certain things or acts, excludes all other things or acts not designated.<sup>105</sup>

Under AS 40.15.380, the commissioner of DNR has the authority to make reviews and determinations on right of way acquisition plats filed in areas not exercising land use controls. Applying the doctrine of *expressio unius est exclusio alterius*, one might assume that commissioners from other departments could not exercise that same authority, for example. The doctrine may aid in some basic, common sense construction of AS 40.15.380, but has no further applicability:

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<sup>104</sup> Memorandum in Support of Motion to Dismiss, January 15, 2004, at 15.

<sup>105</sup> *Agnabooguk v. State*, 26 P.3d 447, 455 (Alaska 2001) (footnote omitted).

Although the *expressio unius maxim* has had widespread legal application, there is nothing peculiarly legal about it. It is a product of “logic and common sense.” It acts merely as an aid to determine legislative intent and does not constitute a rule of law. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is not inflexible and should be applied to realize legislative intent.<sup>106</sup>

In 1998, the legislature specified certain right-of-way acquisition procedures in AS 40.15.380. This says nothing about the legislative intent in AS 09.55.275.

Alaska Statute 40.15.380(d) does not mention “applications,” but simply refers to analysis of the plat: “The commissioner shall review each right-of-way acquisition plat for compliance with this section.” The language in AS 09.55.275 is different, referring not to a government agency’s plat, but to the “applications for replat.”

The two statutory sections were drafted roughly 20 years apart, and address different topics, with different wording, in a different fashion. The two sections cannot be convincingly used to interpret each other.

**B. SB 125 Signature Letter<sup>107</sup>**

The Hartmans incorrectly indicate that they provided the court with a Governor’s transmittal letter as evidence of legislative intent. The letter is a bill signature letter, not a transmittal letter, and therefore only offers very limited evidence of legislative intent.

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<sup>106</sup> 2A Norman J. Singer, Sutherland Statutory Construction § 47.24, at 319-320 (6<sup>th</sup> ed. 2000) (footnotes omitted).

A transmittal letter is a letter from the governor which may accompany the bill introduction, and which provides evidence of legislative intent.<sup>108</sup> By contrast, a bill signature letter is written after the legislative debate has concluded, and although it may be still a part of the legislative process, is not itself evidence of legislative intent, although it may still be considered in determining such intent.<sup>109</sup>

DOT&PF also notes that the signature letter does nothing more than raise concerns about how complying with local zoning requirements might impact DOT&PF. Far from advancing the Hartmans' arguments, DOT&PF's concern demonstrates that it took its statutory obligation to comply with local zoning requirements seriously.

### VIII. Remedy

The Hartmans' authority challenge is essentially a negotiating gambit: if the Hartmans can succeed in outright dismissal on authority grounds, DOT&PF may be forced into a position where it must either resolve its differences on valuation immediately, or potentially sacrifice the C Street project. For a number of reasons, DOT&PF does not believe that dismissal is either appropriate, or necessary.

DOT&PF contends that there has been no violation of AS 09.55.275 either by it, or by the MOA. DOT&PF complied with AS 09.55.275. DOT&PF does not make local

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<sup>107</sup> The correct citation is 96 SLA 1975, not 97 SLA 1975.

<sup>108</sup> Sec. e.g., Hertz v. State, 8 P.3d 1144, 1147 n.11 (Alaska App. 2000).

<sup>109</sup> Hammond v. Hickel, 588 P.2d 256, 272 n. 33 (Alaska 1978).

zoning rules, and has no direct authority to make local zoning decisions. Indeed, there is nothing more that DOT&PF could have done on the facts of this case by way of compliance with MOA replat procedures.

If the court finds that AS 09.55.275 was, in fact, violated, dismissal is not the only possible remedy. Alaska Civil Rule 72(h)(2)(A) provides:

In the event the objections are found to be valid, the court may dismiss the action, remand to the condemning entity for further findings, or order such other relief as allowed by law.

(Emphasis added.) Accordingly, the court may fashion any remedy as it deems to be appropriate, without having to dismiss. DOT&PF is frankly unable to determine what additional notice, environmental, design, or other work could be provided by DOT&PF at this point in time. DOT&PF has complied with all the prerequisites necessary before filing this condemnation action, and there is really nothing more than can be required of DOT&PF.

If the Hartmans contend that the “plating authority” erred in the zoning review process, one possible remedy may be some form of direct action against the MOA, but DOT&PF should be allowed to continue with this condemnation action.

Another option is to find that, at the time of filing, DOT&PF did indeed have authority either by complying with AS 09.55.275 or, on the facts of this case, substantially complying with the spirit and intent of that statute.

If the court finds that the AMC 21.15.123 review process conducted by the MOA was, in some manner, flawed, the court may find that no basis exists to impute the wrongdoing to DOT&PF. Instead, the court could find that DOT&PF had authority at the time of filing.

Although there does not appear to be anything else that DOT&PF could have done by way of compliance with local ordinances administered by the MOA, if some form or corrective action is necessary, a stay is preferable to dismissal. Of course, the Hartmans would far prefer to dismiss this case because of the potential negotiating leverage they would have.<sup>110</sup> However, this action could be stayed, and the Hartmans could be afforded whatever remedy the court deems necessary or appropriate.<sup>111</sup> Given the broad discretion this court possesses under Alaska Civil Rule 72(h)(2), the court can craft an appropriate remedy which allows the C Street project to progress in a timely fashion but which, at the same time, allows for correction of any perceived violations of AS 09.55.275.

The Hartmans rely on a line of cases involving necessity (rather than authority)

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<sup>110</sup> As the Hartmans are well aware, dismissal would in all likelihood mean that the construction season would be missed, or funding for the project potentially jeopardized.

<sup>111</sup> DOT&PF points out that landowner concerns about impact to their property are not generally appropriate for pre-condemnation consideration. Questions pertaining to damages to property, and compensation, must be addressed in the context of the eminent domain proceedings. See, e.g., State ex rel. Dungan v. Superior Court, 279 P.2d 918, 921 (Wash. 1955).

challenges as a basis for supporting a finding that dismissal is appropriate.<sup>112</sup> Necessity challenges focus on whether or not a project has a proper public purpose, or whether or not it is reasonably necessary to take the property at issue<sup>113</sup>; an authority challenge, by contrast, generally attacks the condemnation on the ground that certain statutory conditions precedent have not been met.<sup>114</sup>

The cases cited by the Hartmans do not provide a helpful framework in the context of an authority challenge to a specific statute. The case cited by the Hartmans, State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), is distinguishable because it involved a challenge to the determination of necessity, rather than an authority challenge. In that case, the court found that DOT&PF had failed to consider “critical information,” and therefore failed to establish that the taking was compatible with the greatest public good and least private injury.<sup>115</sup> The court concluded that DOT&PF’s conduct was “arbitrary.”<sup>116</sup> The same standard of arbitrariness was applied in State, Dep’t of Transp. & Pub. Facilities v. 0.644 Acres, 613 P.2d 829 (Alaska 1980), where “critical information” was not considered. In both cases, the issue was one of necessity, and in each case, a “critical” error or omission

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<sup>112</sup> The Hartmans also spend considerable time on the issue of whether or not “shall” is mandatory or directory. However, no one would appear to dispute that the last sentence of AS 09.55.275 requires some type of review.

<sup>113</sup> See, e.g., 7 Julius L. Sackman, Nichols on Eminent Domain § 1.05, at 1-7 (3d ed. rev. 2004).

<sup>114</sup> Id. § 2.05[1].

<sup>115</sup> 2.072 Acres, 652 P.2d at 468-69.

<sup>116</sup> Id. at 469.

was made such that the court found that it should substitute its judgment for that of DOT&PF's judgment.<sup>117</sup>

Assuming that the foregoing cases did apply, DOT&PF's conduct hardly raises to the level of "arbitrary" conduct. Numerous public hearings were held; public comments were received, considered, and responded to; a right of way agent was hired to specifically work with, and negotiate with, the Hartmans; DOT&PF filed the request for replat approval mandated by the MOA; DOT&PF received replat approval.

### **IX. Hearing Status**

Given the compressed discovery schedule, DOT&PF reserves the right to supplement the record as additional information is received. The Hartmans have not listed any witnesses who have knowledge of facts supporting an authority and necessity challenge other than MOA or DOT&PF employees, and it is not clear at this time whether a hearing will be required under Alaska Civil Rule 72(h)(2)(A). The content of the Hartmans' reply brief may also largely dictate whether further discovery, or a hearing, is necessary.

### **CONCLUSION**

The C Street Extension project comes as a surprise to nobody. The proposed C Street Extension has received exhaustive public review and comment for many years, and

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<sup>117</sup> See State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, More or Less, 613 P.2d 829, 833 (Alaska 1980) (a court should not substitute its judgment for that of the condemnor, but may set aside the condemnor's decision if it is "arbitrary, capricious, and abuse of discretion").

has received public comments from MOA committees, from members of the public, and from other interested parties. Indeed, the Hartmans nowhere question the public need for this project. The project will eventually occur, regardless of whether the Hartmans are successful in their challenge to AS 09.55.275. The only apparent beneficiary of the Hartmans' authority challenge is the Hartmans, who seek negotiating leverage over DOT&PF.

DOT&PF submits that the Hartmans' challenge to DOT&PF's authority should be denied. DOT&PF already fulfilled its obligations under AS 09.55.275. DOT&PF's application to the MOA was not only treated in the same manner as private landowners, but overall, DOT&PF was held to much higher standards than private landowners. DOT&PF also engaged in far greater joint efforts with the MOA than private landowners, from planning, to environmental, to design, and to every other phase of the C Street project.

The Hartmans demand that the court read AS 09.55.275 as requiring an exactly identical replat review process; the Hartmans further demand that only one process – the long plat process – can apply. The Hartmans place form over substance. Alaska Statute 09.55.275 does not require identical substantive treatment. Alaska Statute 09.55.275 also does not specify either a particular process, or a particular process as matched to a particular class of private landowner.

If the court orders some form of corrective action – presumably directed at the MOA – DOT&PF requests a stay rather than dismissal. A stay would allow corrective action to be taken, while still theoretically keeping the existing funding, and construction schedule, in place.

Dismissal, on the other hand, would almost certainly mean that the 2004 construction season would be missed, and existing funding could be jeopardized. The C Street Extension project is necessary to address a number of existing problems in the Anchorage area including: (1) traffic congestion resulting from increasing traffic on Anchorage's north-south corridors; (2) reduced safety caused by congestion; (3) circuitous travel required between Anchorage's south residential and midtown commercial developments.<sup>118</sup> Dismissal would leave existing traffic patterns in place in Anchorage for the foreseeable future. The real loser if this case is dismissed is the Anchorage travelling public. Commuters would be deprived of all the benefits noted in the Decisional Document filed with DOT&PF's complaint.

DOT&PF properly followed the right-of-way acquisition replat approval process, and this court should deny the Hartman's authority challenge.

Dated: February 4, 2004.

GREGG D. RENKES  
ATTORNEY GENERAL

By

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Peter Putzier  
Assistant Attorney General  
Alaska Bar No. 9311089

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<sup>118</sup> See Complaint, Schedule D at 3.

SB

384

23-LS1847H  
Cook  
4/7/04

**CS FOR SENATE BILL NO. 384( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): SENATE TRANSPORTATION COMMITTEE**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to a portion of a natural gas pipeline with a terminus at the Cook Inlet**  
2 **Basin."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 **\* Section 1. AS 42.40.250(31) is amended to read:**

5 (31) provide financing for the acquisition, construction, improvement,  
6 maintenance, equipping, and operation of a natural gas pipeline and related facilities  
7 for the transportation of natural gas recovered from the North Slope of this state  
8 without regard to whether the facilities are or will be owned in whole or in part by the  
9 corporation or located on land owned by the corporation, except that a portion of the  
10 pipeline must follow the Alaska Railroad right-of-way from the City of Fairbanks  
11 to the pipeline terminus at the Cook Inlet Basin.



Official Business

# ALASKA STATE LEGISLATURE

## SENATOR THOMAS H. WAGONER

- Co-Chair, Senate Transportation Committee
- Vice-Chair, Senate Resources Committee
- Vice-Chair, Community & Regional Affairs
- Member, Legislative Council

Session: January – May  
State Capitol, #427  
Juneau, AK 99801  
Phone: 907-465-2828 Fax: 907-465-4779

Interim: May – December  
145 Main Street Loop; Suite 226  
Kenai, AK 99611  
Phone: 907-283-7996 Fax 907-283-8127

## SB 384 – Route of Natural Gas Line funded by Alaska Railroad

### Sponsor Statement

This bill amends legislation adopted last year that authorized use of Alaska Railroad bonds to construct a natural gas pipeline and related facilities.

The purpose of the legislation is to demonstrate that a natural gas pipeline from the Fairbanks area to the Cook Inlet Basin, following the Alaska Railroad right-of-way, is a viable route.

The Cook Inlet Basin holds the majority of the population of Alaska, who rely on natural gas for household consumption and also as a fuel for electrical generation.

Additionally, there is a billion dollar petrochemical industry along the Cook Inlet that relies heavily on natural gas.

Amendment #1

OFFERED IN SENATE BY: SENATOR WAGONER

To: **Draft CS for SB 384** (version 23-LS1847\H dated 4/7/04)  
An Act relating to a natural gas pipeline with a terminus at the Cook  
Inlet Basin

1 Page 1, lines 9 - 11, following "corporation," delete in its entirety and  
2 insert::

3 "except that any pipeline financed under this paragraph with a  
4 terminus in the Cook Inlet Basin must, where technically,  
5 economically, and environmentally feasible, follow the Alaska  
6 Railroad right-of-way for the portion of the project from the City of  
7 Fairbanks or from the point of a gas offtake valve on a pre-  
8 existing or proposed pipeline project, to the pipeline terminus in  
9 the Cook Inlet Basin."

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: CSSB 384(TRA)  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Revenue  
Title Route of Nat Gas Pipeline RDU Revenue Programs & Services  
Funded by RR Component Commissioner's Office  
Sponsor Senate Transportation  
Requester Senate Labor & Commerce Component No. 123

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation will not have a fiscal impact on the Department of Revenue.

Prepared by: Steve Porter, Deputy Commissioner Phone (907) 465-2365  
Division Department of Revenue Date/Time 4/21/04 2:06 PM  
Approved by: Steve Porter, Deputy Commissioner Date 4/21/2004  
Agency Department of Revenue

**SB**

**391**

# ALASKA STATE SENATE



Session:  
State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-2327  
(907) 465-5241 Fax

Interim:  
119 N. Cushman, Suite 201  
Fairbanks, Alaska 99701  
(907) 456-8161  
Senator\_Ralph\_Seekins@legis.state.ak.us

**Senator Ralph Seekins**  
District D

## MEMORANDUM

Date: April 20, 2004  
To: Office of Senator Cowdery  
From: Senator Ralph Seekins  
Re: Request for Hearing of SB 391

*AS for R.S.*

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Attached please find Senate Bill 391 along with concomitant Sponsor Statement and related information.

Senate Bill 391 amends AS 19.40.210 to allow trappers the use of snow machines within five miles of the right-of-way of the Dalton Highway for the purpose of accessing their traplines.

I respectfully request a hearing before your committee on this Bill at your earliest convenience. Thank you.



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Northern Field Office  
1150 University Avenue  
Fairbanks, Alaska 99709-3844  
<http://www.ak.blm.gov>



*In reply refer to*  
F-93144  
2920 (025)

### CERTIFIED MAIL RETURN RECEIPT

JAN 20 2004

Ace Patrick Calloway  
P.O. Box 70630  
Fairbanks, Alaska 99707

Dear Mr. Calloway;

This letter concerns permit F-93144 that you have with BLM for parking, access and a tent camp at the South Fork of the Koyukuk River. This permit expired on October 31, 2003.

We have become aware of Alaska Statute 19.40.210 that states regarding the Dalton Highway:

Off-road vehicles are prohibited on land within five miles of the right-of-way of the highway. However, this prohibition does not apply to

(1) off-road vehicles necessary for oil and gas exploration, development, production, or transportation;

(2) a person who holds a mining claim in the vicinity of the highway and who must use land within five miles of the right-of-way of the highway to gain access to the mining claim; or

(3) the use of a snow machine to travel across the highway corridor from land outside the corridor to access land outside the other side of the corridor; this paragraph does not permit the use of a snow machine for any purpose within the corridor if the use begins or ends within the corridor or within the right-of-way of the highway or if the use is for travel within the corridor that is parallel to the right-of-way of the highway; in this paragraph, "highway corridor" means land within five miles of the right-of-way of the highway.

The third subsection was added in 2000, and seems to make the permits we have issued you and others for snowmachine access off the Dalton Highway a violation of state law. Generally, state law regulating off-highway vehicle use prevails when it is more restrictive than our regulations. We have requested a legal opinion and guidance from our Solicitor's Office.

Meanwhile, we have decided to extend your permit and the others to May 1 to finish the trapping season, provided you pay the rent and are in compliance with the permit.

The rental to extend the permit to May 1 will be the minimum of \$100 in the permit.

We note that you have not submitted your report for the last half of the 2001, and all of the 2002 and 2003 season.

We also note that you do not have the \$1,000 bond required by the permit.

We hope to have a Solicitor's Opinion and guidance before May 1. If the outcome is that we cannot issue permits for snowmachine use off the Dalton Highway, you will have to use non-motorized access in the future. If non-motorized access is not practical or possible, you will need to tear down your cabin at the end of the season.

We offer to extend your permit to May 1, 2004, after you submit the \$100 rental, use reports, and proof of bonding. This offer expires thirty days after you receive this letter.

Please call Boyce Bush at 474-2334 or Martha Woodworth at 474-2323 if you have any questions.

Sincerely,

 AM - NFO  
Robert W. Schneider  
Northern Field Office Manager

# ALASKA STATE SENATE

Session:  
State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-2327  
(907) 465-5241 Fax



Interim:  
119 N. Cushman, Suite 201  
Fairbanks, Alaska 99701  
(907) 456-8161  
Senator\_Ralph\_Seekins@legis.state.ak.us

**Senator Ralph Seekins**  
District D

## **Senate Bill 391 Sponsor Statement**

**“An Act relating to use of a snow machine within the James Dalton Highway corridor to establish, maintain, and service traplines located outside the corridor.”**

Senate Bill 391 would allow trappers to use snow machines within the five mile corridor to access their traplines. Currently, Alaska Statute 19.40.210 bans, with limited exceptions, the use of off-road vehicles within five miles of the right-of-way of the Dalton Highway starting at mile 57 — the Yukon River crossing — and extending 357 miles north to the Arctic Ocean.

The fact is, the state has not actively enforced this statutory ban. Nevertheless, this has not stopped the federal government from co-opting the state law. Using the Alaska statute cited above, the Bureau of Land Management is closing long existing trap lines and threatening to tear down cabins unless the trappers resort to non-motorized access.

Senate Bill 391 seeks to remedy this situation by allowing for the use of snow machines within the corridor for the express purpose of establishing, maintaining, or servicing a trapline located outside the corridor. To the extent that trapping is a seasonal activity, each trapline needs to be re-established on an annual basis. However, it is the sponsor's intent to provide a measure of relief to those trappers who have been operating in the area over the last several years.

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

sb391.ins

Utermohle

4/28/04

INSERT # 1

Insert in lieu of current paragraph 3 of the bill

(3) the use of a snow machine to travel across the highway corridor from land outside the corridor to access land outside the other side of the corridor ~~or~~; this paragraph does not permit the use of a snow machine for any purpose within the corridor if the use begins or ends within the corridor or within the right-of-way of the highway or if the use is for travel within the corridor that is parallel to the right-of-way of the highway;

(4) the use of a snow machine by a person, who has a documented history of trapping within or adjacent to the highway corridor during the previous 24 months, to travel from within, or into, the for the purpose of establishing, maintaining, or servicing a trapline located outside of the corridor;

(b) In [IN] this section [PARAGRAPH], "highway corridor" means land within five miles of the right-of-way of the highway.

**Subject:** SB 391/question

**Date:** Wed, 28 Apr 2004 10:41:09 -0800

**From:** Shosh Seligman <Shosh\_Seligman@Legis.state.ak.us>

**Organization:** Alaska State Legislature

**To:** Richard Schmitz <Richard\_Schmitz@legis.state.ak.us>

*Mary Ellen*

Hi.

See the following (long) draft transcription; note that highlighted areas are as close as there was to actual language.

RE: SB 391

[Conceptual Amendment 1]

TAPE 04-20

Side A (end of)

Lincoln: I was trying to work around this for a proposed amendment, and I guess it's to the sponsor, who has acknowledged that this is meant to be for those who are the real trappers in the area...

Lincoln (#864): I've got some language to amend it, but I wondered if you might have some language because you wanted this to be for those who were already established trappers.

Seekins: The intent is that we not do anything to disrupt those people who are currently trapping in that area ... I like to amend bills too... go ahead and propose the amendment.

Lincoln: The wording isn't right on this, and I don't know exactly where it would go in here, but conceptually, **"that a trapper must have received a BLM permit for snowmobile access in the past 24 months to access their - or - this trapline."**

Seekins: I'd just as soon leave BLM out. If someone can show that they've trapped there, they should be able to access it. To the best of my knowledge that's less than 10 people...and if this were conceptually were to say, "those people who can show that they have trapped there, you know in the last 24 months, something like that, that adequately meets my intent. But we've had troubles struggling with this, with the drafters, as well, to make sure that we're taking care of those folks who have been doing this from this federal threat, without opening it up to somebody who says, "I've got two traps in the back of my snow machine and I'm going out there. That's not our intent, and I think you know that."

Wagoner?: Would I be correct in assuming ...

(More conversation)

Lincoln: Senator Seekins, As you would say to me, I'm trying to help you here now, so work with me. And I don't know if 'BLM permit' and I don't know if BLM permit, I'm not sure if that's where that permitting process comes from. But if the conceptual language could be **that a trapper must have received a permit for snowmobile access in the past 24 months to access this trapline - or - their trapline.**

SEEKINS: Let me suggest something for you. A trapper who has taken fur (correct me if I'm wrong, Mr. Robus) ... to report to the state...

LINCOLN: That's my concern too. If they can show that within the last 24 months that they have taken fur that they will have, be, continued access to their trapline. Mr. Robus ...

SEEKINS: That's up to us to do that.

LINCOLN: ... there's way that they can show ... assurance there's no way to get around this

ROBUS: on state forms... trapper has to report locality ... nobody wants to tell

(TAPE CHANGES SIDE.)

SENATOR LINCOLN: I would move that conceptual amendment.

Seekins: I believe Senator Lincoln & I are now on the same page ... If they can show that through their ceiling (ph) forms that they actually trapped within that vicinity, and accessed it from the Haul Road, that they're exempt from this restriction, and if that's where we're going, I have no problem with that, it's a friendly amendment.

WAGONER: any objection? [There was no objection] We know have CS for ...

LINCOLN: To the sponsor, you were speaking earlier about working with Senator Olson ... then, should this have a sunset clause?

SEEKINS: If Senator Olson & I work out this other ...

LINCOLN: I was thinking...

SEEKINS: Bill will go to Finance ... work out differences ...

COWDERY: I move SB 391 with conceptual amendment that was just stated to the next committee of referral.

Roll Call: 3:2. Bill passes out of committee.

SB

394

SENATOR  
JOHN J. COWDERY

Anchorage

Committees

Chair: Rules  
Chair: Transportation  
Chair: World Trade &  
State-Federal Relations  
Legislative Council  
State Affairs

Alaska State Legislature

Senate

January - May:  
State Capitol, Suite 101  
Juneau, Alaska 99801-1182  
Tel: 907-465-3879  
Toll Free: 888-269-3879  
Fax: 907-465-2069

May - December:  
716 W. 4th Avenue  
Anchorage, Alaska 99501  
Tel: 907-269-0222  
Fax: 907-269-0223

Senator\_John\_Cowdery@legis.state.ak.us

## **SPONSOR STATEMENT FOR SB 394**

*(Senate Rules Committee by request of Sen. Therriault)*

*"An Act relating to a port development project on Lynn Canal, providing legislative approval for the Alaska Industrial Development and Export Authority to issue bonds for the project ... ."*

Senate Bill 394 authorizes the Alaska Industrial Development and Export Authority (AIDEA) to issue tax-exempt bonds to finance port and port related projects on the Lynn Canal in Southeast Alaska. This authorization is required of AIDEA bonds for any project over \$10 million per AS 44.88.095(g). SB 394 grants AIDEA the authority to bond for the project, however; does not require them to fund the project. They will still have to go through their normal evaluation process that includes the requirements that:

- (1) The project and its development under this chapter will be economically advantageous to the state and the general public welfare and will contribute to the economic growth of the state;
- (2) The project applicant is financially responsible;
- (3) Provisions to meet increased demand upon public facilities that might result from the project; and
- (4) The project will provide, or retain, employment reasonably related to the amount of the financing by the authority, considering the amount of investment per employee for comparable facilities and other relevant factors.

This tax-exempt bonding authority is an integral part of the redesign of the Kensington gold project. The new design is meant to utilize less land, have less environmental impact, create less conflict with other industry groups and focus on a higher-grade ore area of the mine.

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: SB 394  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
Title AIDEA Bonds For Lynn Canal Port RDU AIDEA (125)  
Component AIDEA  
Sponsor Senate Rules  
Requester Senate Transportation Component No. 1234

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill provides \$20 million in bonding authorization to finance the acquisition, development, improvement, and construction of port and related facilities located on Lynn Canal in Southeast Alaska. Prior to issuing bonds, AIDEA will be required to conduct a feasibility, market and risk analysis of the project as outlined in AS 44.88.095(c).

Bonds sold to finance the project will have no impact on the General Fund.

Prepared by: Sara Fisher-Goad, Financial Analyst Phone 907-269-4623  
Division: Alaska Industrial Development & Export Authority Date/Time 4/26/04 4:19 PM  
Approved by: Edgar Blatchford, Commissioner Date 4/26/2004  
Agency: Department of Community and Economic Development

### Kensington (Alaska)

In 2004, Coeur's major gold project – Kensington in Alaska – neared completion of permitting and an updated feasibility study, with a construction decision expected by mid-year. Given an 18-month construction timeframe, Kensington could begin production as soon as 2006, increasing current company-wide gold production levels by 90%.

New optimization of the project, located 45 miles north of Juneau, enables the mine to be up and running more quickly, with a focus on the highest-grade material. Initial production is expected at 100,000 ounces of gold a year at an average cash cost of \$195 per ounce. Current reserves stand at 1.0 million ounces of gold, with an initial 10-year mine life and significant exploration upside. There are an additional 7.2 million tons of mineralized material measuring 0.12 ounces per ton of gold. Not all Kensington ore zones have been fully delineated at depth and several peripheral zones and veins remain to be explored. Coeur still views its interests in the district as holding up to five million ounces of gold.

Kensington is expected to cost approximately \$75 million to build. The updated feasibility study reduces the size of the mill facilities and has the potential to significantly reduce capital and operating costs while allowing for future expansion of production as market conditions warrant.

Early this year, the major Draft Supplemental Environmental Impact Statement was Issued for Kensington, and all necessary remaining permits expected to be in place by the second quarter.

The Kensington ore deposit consists of multiple, precious metals bearing, mesothermal, quartz, carbonate, pyrite vein swarms and discrete quartz-pyrite veins hosted in the Cretaceous age Jualin diorite. The gold-telluride-mineral calaverite is associated with the pyrite mineralization.

#### **Year-end Proven and Probable Ore Reserves - Kensington Property**

	<u>2003</u>	<u>2002</u>	<u>2001</u>
Tons (000's)	4,113	10,946	10,946
Ounces of gold per ton	0.24	0.16	0.16
Contained ounces of gold	1,003,000	1,751,000	1,751,000

#### **Year-end Mineralized Material**

	<u>2003</u>	<u>2002</u>	<u>2001</u>
Tons (000's)	7,262	12,014	12,014
Ounces of gold per ton	0.12	0.12	0.12

The reduction in the proven and probable reserves estimate in 2003, compared to 2002, is the result of the revised mine plan which focuses on higher-grade areas of the mine.

Not all Kensington ore zones have been fully delineated at depth and several peripheral zones and veins remain to be explored. In addition, the Company possesses the right to develop the Jualin property, an exploratory property located adjacent to the Kensington Property. The Jualin property consists of approximately 9,400 acres, of which approximately 345 acres are patented claims. The Company's rights to develop the Jualin property are subject to an agreement which must be renewed in May 2008.

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ORIGINAL  
COPIES



# KENSINGTON GOLD PROJECT

## Project Summary and Overview of Partnership Opportunities

April 2004





# KENSINGTON

## GOLD PROJECT

## Project Overview

### Summary

- Technically feasible, environmentally friendly, and economically viable
- Located 45 miles North of Juneau
- One million ounces of gold reserves: total potential of five million ounces
- Annual production of 100,000 ounces at cash costs under \$200 per ounce
- Capital costs expected to be \$90 million
- Owned by Coeur since 1987; over \$150 million invested in project to date
- Over 900 studies conducted; Over 50 permit applications
- Permitting expected to be completed in June; Construction to begin in July
- Current gold price, Coeur's renewed financial strength, and re-engineered project have created opportunity to rapidly develop project

### Significant Employment Impact in SE Alaska

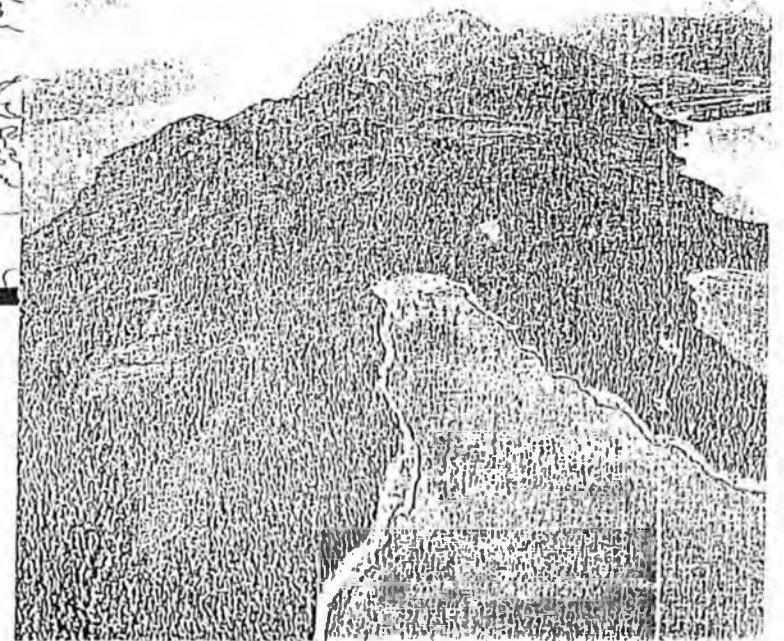
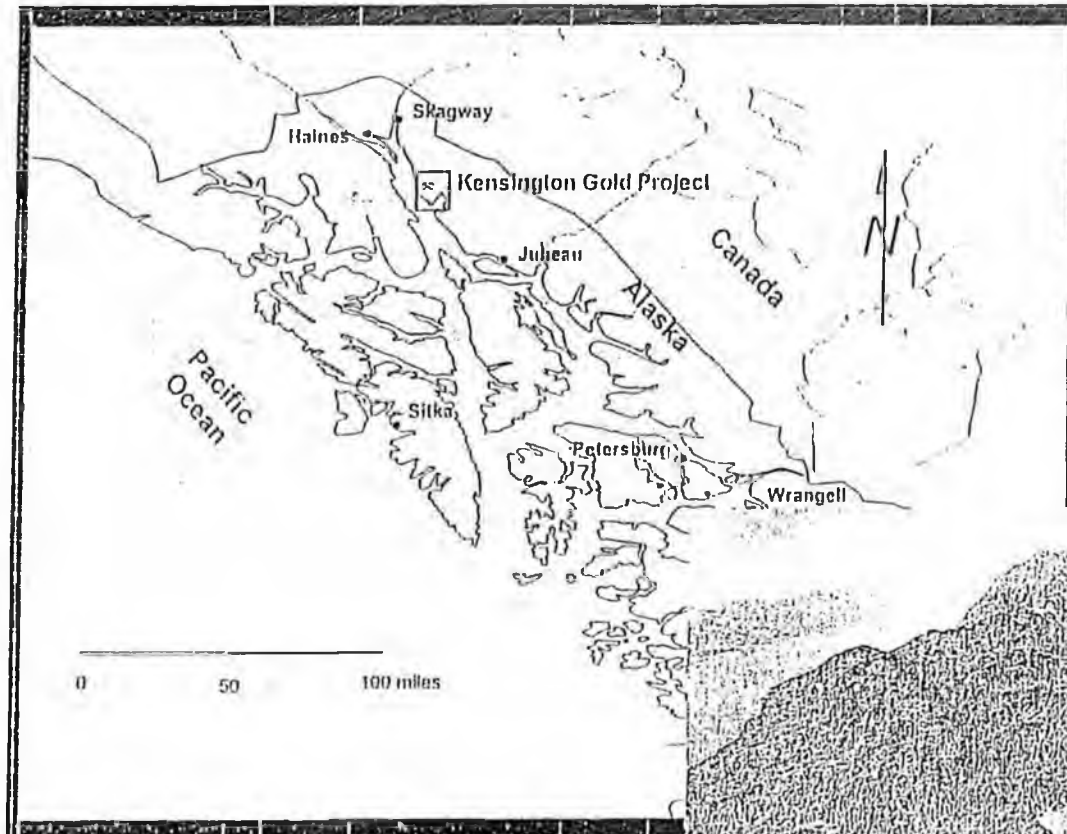
- 250-300 well-paying construction jobs over 18 month construction window
- 110-225 well-paying operating jobs over 10-20 year expected mine life
- Nearly 500 jobs expected to be created beyond direct mine employment (transportation, supplies, services)





# KENSINGTON GOLD PROJECT

## Location







# KENSINGTON GOLD PROJECT

## Summary of Potential Partnership Opportunities

- Training of Workforce
- Bus Transportation for Workers
- ✓• Cascade Point Dock Facilities
- Passenger Ferry Service Across Berners Bay
- ✓• Slate Creek Cove Dock Facilities
- ✓• 5.5 mile Slate Creek Road
- ✓• On-Site Power Plant
- ✓• 8,000ft Tunnel Connecting Kensington and Jualin
- ✓• Tailings Management Facility

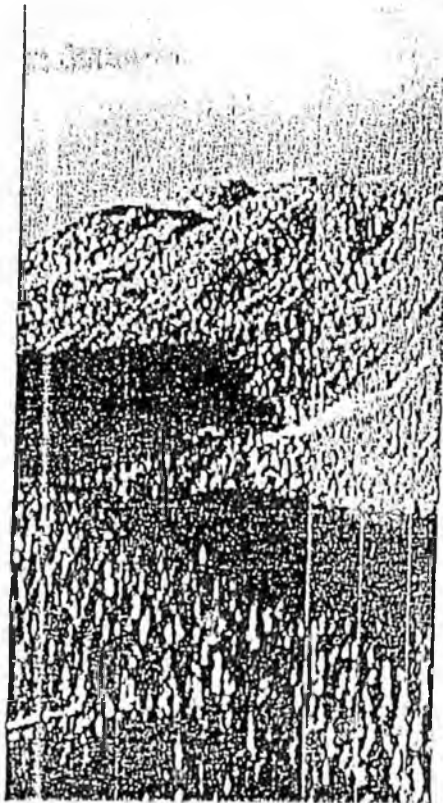




# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

## Training of Workforce





# KENSINGTON

## GOLD PROJECT

### Training of Workforce

#### Description

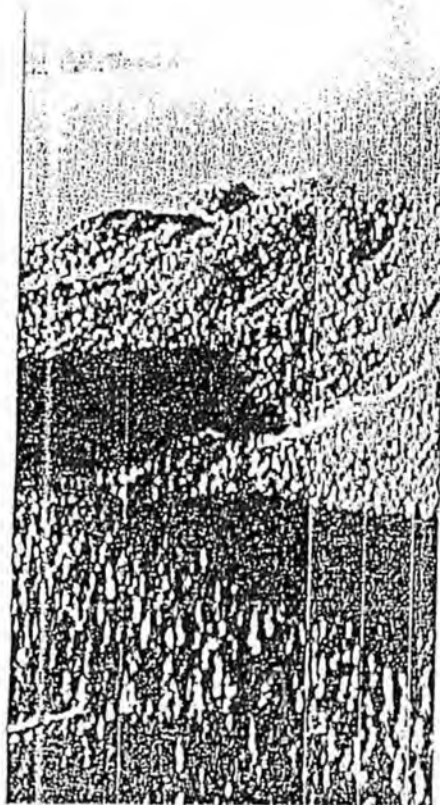
- Construction phase will employ a minimum of 300 people both in Coeur employees and contract employees
- Development on the Jualin tunnel and pre-mining development on the Kensington ore faces will coincide with construction. Required manpower will be approximately 25 people.
- Operational manpower will range from 125 to 230 people depending on production levels.

#### Request

- Funding assistance with the following training requirements:
  - New Miner Training required by MSHA is expected to cost \$500,000
  - Alaska Cultural training for employees is expected to cost \$200,000
  - Skill-based training is estimated to cost \$750,000

#### Contact

Gary W. Banbury  
Sr. Vice President of Human Resources, Safety, and Administration  
Coeur d'Alene Mines Corporation  
(800) 624-2824  
[gbanbury@coeur.com](mailto:gbanbury@coeur.com)

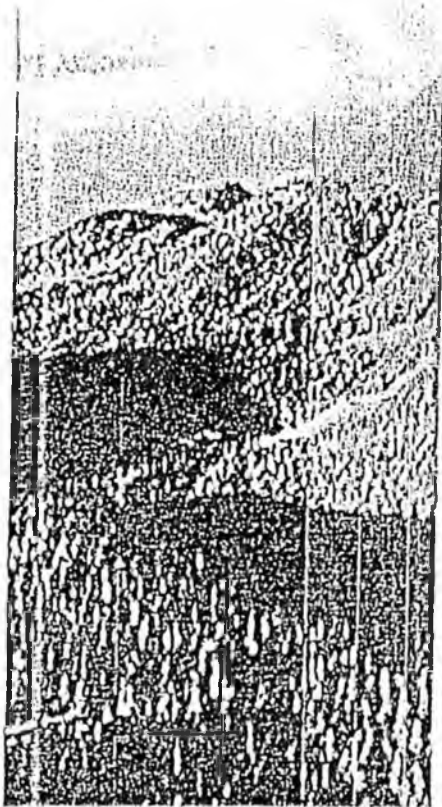




# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

## Bus Transportation for Employees





# KENSINGTON GOLD PROJECT

## Bus Transportation for Workers

### Description

- 2-3 busses will be required to transport workers from the Slate Creek marine terminal to the mine site on a 5.5 mile road
- Loading and trip from dock is assumed to take 30 minutes one way

### Request

- Third party to supply and operate busses
- User fee charged to Coeur for this service





# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

## Cascade Point Dock Facilities





# KENSINGTON GOLD PROJECT

## Cascade Point Dock Facilities

### Description

- The project requires a marine terminal at Cascade Point
- Kensington currently has no facilities to transfer freight, supplies, and personnel to and from the mine
- This marine terminal would be constructed on state tidelands.
- Goldbelt Inc. owns the surrounding uplands
- See following page for detailed design drawings. A detailed study was completed by Peratrovich, Nottingham and Drage, Inc. outlining the required construction and , which is available upon request.

### Cost of Facilities

- \$2,900,000

### Request

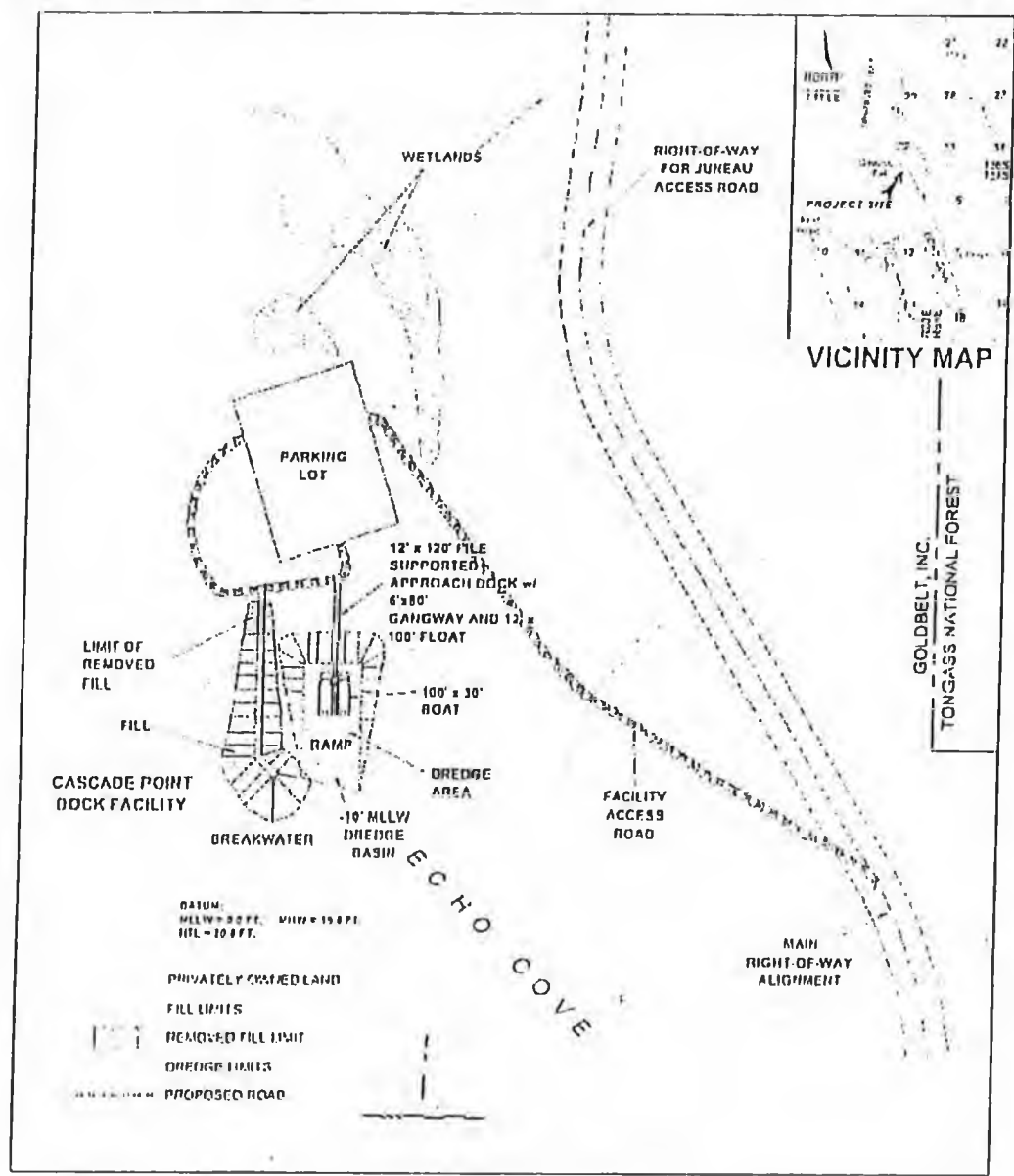
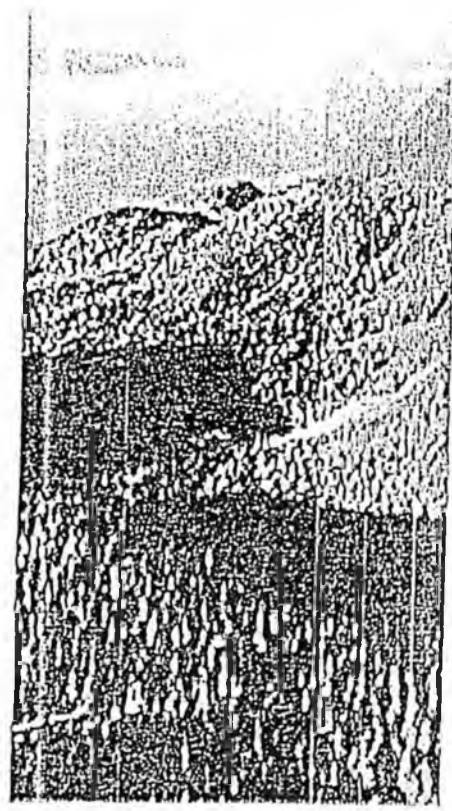
- Grants or financing to fund the construction and operation of this facility
- Outsource ownership and operation of facility to a third party





# KENSINGTON GOLD PROJECT

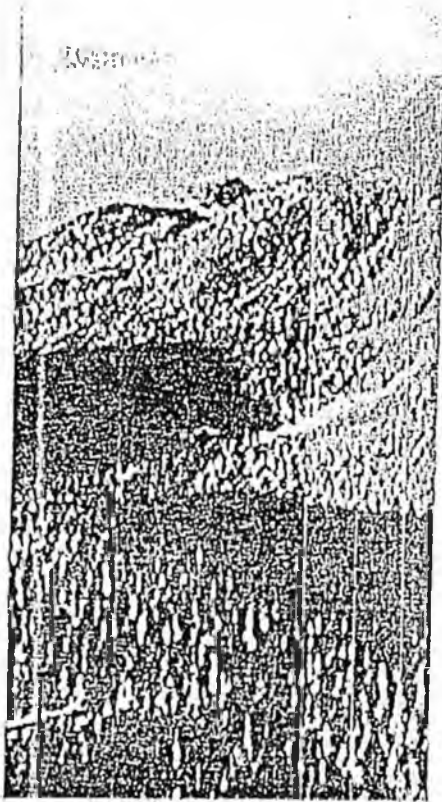
## Cascade Point Dock Facilities





# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities



## Passenger Ferry Service Across Berners Bay



# KENSINGTON GOLD PROJECT

## Passenger Ferry Service

### Description

- Kensington requires a ferry capable of transporting one full shift of workers (+/- 60 people plus freight) three times per day from a marine facility at Cascade Point to Slate Creek Cove
- Trip across Berners Bay is estimated to take fifteen minutes
- 365 days per year; 7 days per week

### Cost

- Adequate vessel estimated to cost approximately \$1.0 - \$1.5 million

### Request

- Third party to supply and operate ferry
- User fee charged to Coeur for this service
- During time not in use for transporting workers, vessel may be used for other activities





# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities



## Slate Creek Cove Dock Facilities



# KENSINGTON

## GOLD PROJECT

### Slate Creek Cove Dock Facilities

#### Description

- It is necessary to construct a port facility at Slate Creek Cove in order to transfer freight, supplies, and personnel to and from Cascade Point
- The concentrate handling, storage, and load-out facility will also be located at this dock

#### Cost

- \$4,400,000 million
  - \$3.3 million for dock facilities
  - \$1.1 million for concentrate handling facilities

#### Request

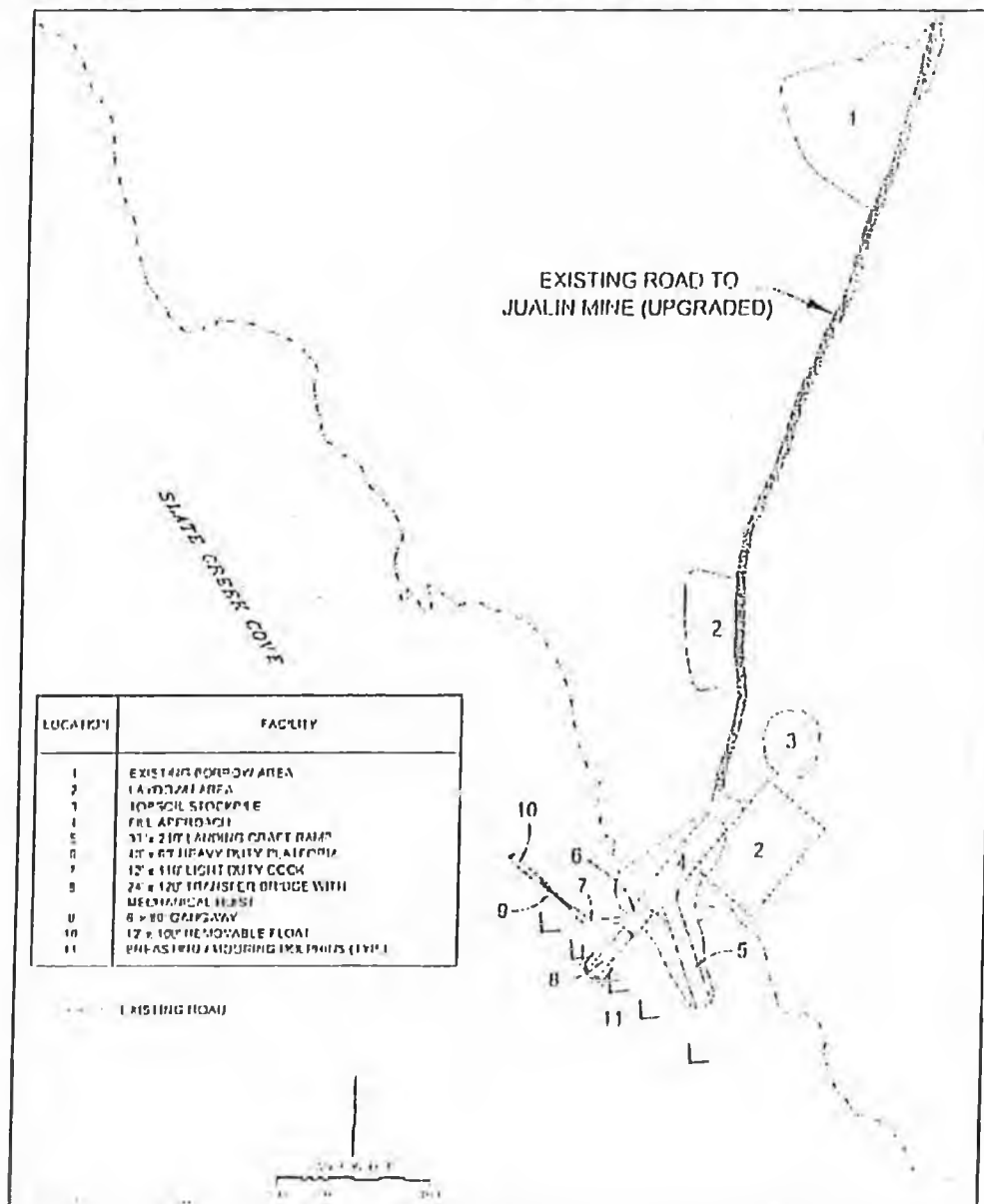
- Grants or financing to fund the construction and operation of this facility
- Outsource ownership and operation of facility to a third party



COEUR  
ALASKA

# KENSINGTON GOLD PROJECT

## Slate Creek Cove Dock Facilities





# KENSINGTON

## GOLD PROJECT

### Summary of Potential Partnership Opportunities

## Slate Creek Road





# KENSINGTON GOLD PROJECT

Slate Creek Road

## Description

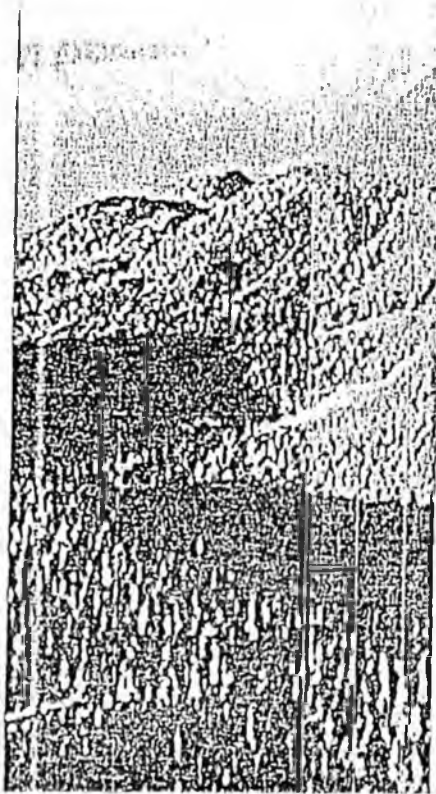
- In order to access the mill site and nearby ore body, Coeur needs to construct/improve the 5.5 mile road from Slate Creek Cove.

## Cost

- Road: \$2,028,000

## Request

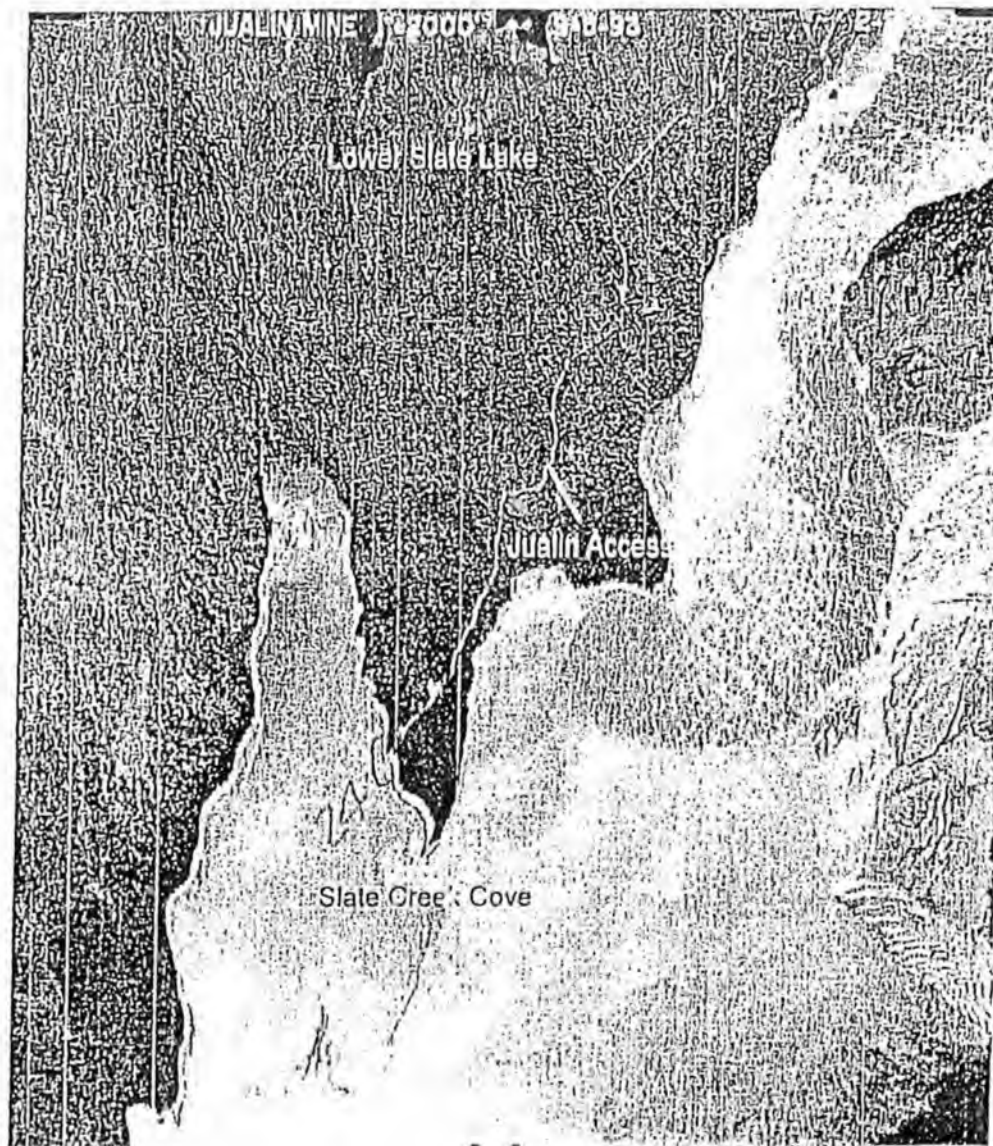
- Funding from ADOT under its "Roads to Resources" initiative to upgrade this road





# KENSINGTON GOLD PROJECT

## Slate Creek Road





# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

## On-Site Power Plant





# KENSINGTON

## GOLD PROJECT

### On-Site Power Plant

#### Description

- Power will be generated on site that will require a generating plant and stand-by generating capability
- The normal power demands for the mine, process plant and ancillary facilities are estimated to be 3.8 MW
- A 20% allowance for intermittent peak load is designed into the generation facility
- Four medium speed 1.5 MW diesel generator sets (three operating, one stand-by) are designed to satisfy Kensington's total requirements

#### Cost

- \$6,100,000

#### Request

- Grant money or alternative financing to purchase generators
- Outsourcing this component of the project to a third party to own and operate in exchange for a user fee





# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

Tunnel Connecting Jualin and Kensington





# KENSINGTON GOLD PROJECT

## Tunnel

### Description

- In order to access the ore body, Coeur needs to construct an 8,000 foot tunnel connecting the Jualin and Kensington areas of the mine
- Integral component to minimizing surface disturbance and allowing Coeur to re-locate processing facilities to Jualin side from the Kensington side
- Also makes commuting from other regions feasible for workers
- Necessary to access ore body

### Cost

- \$5,363,000

### Request

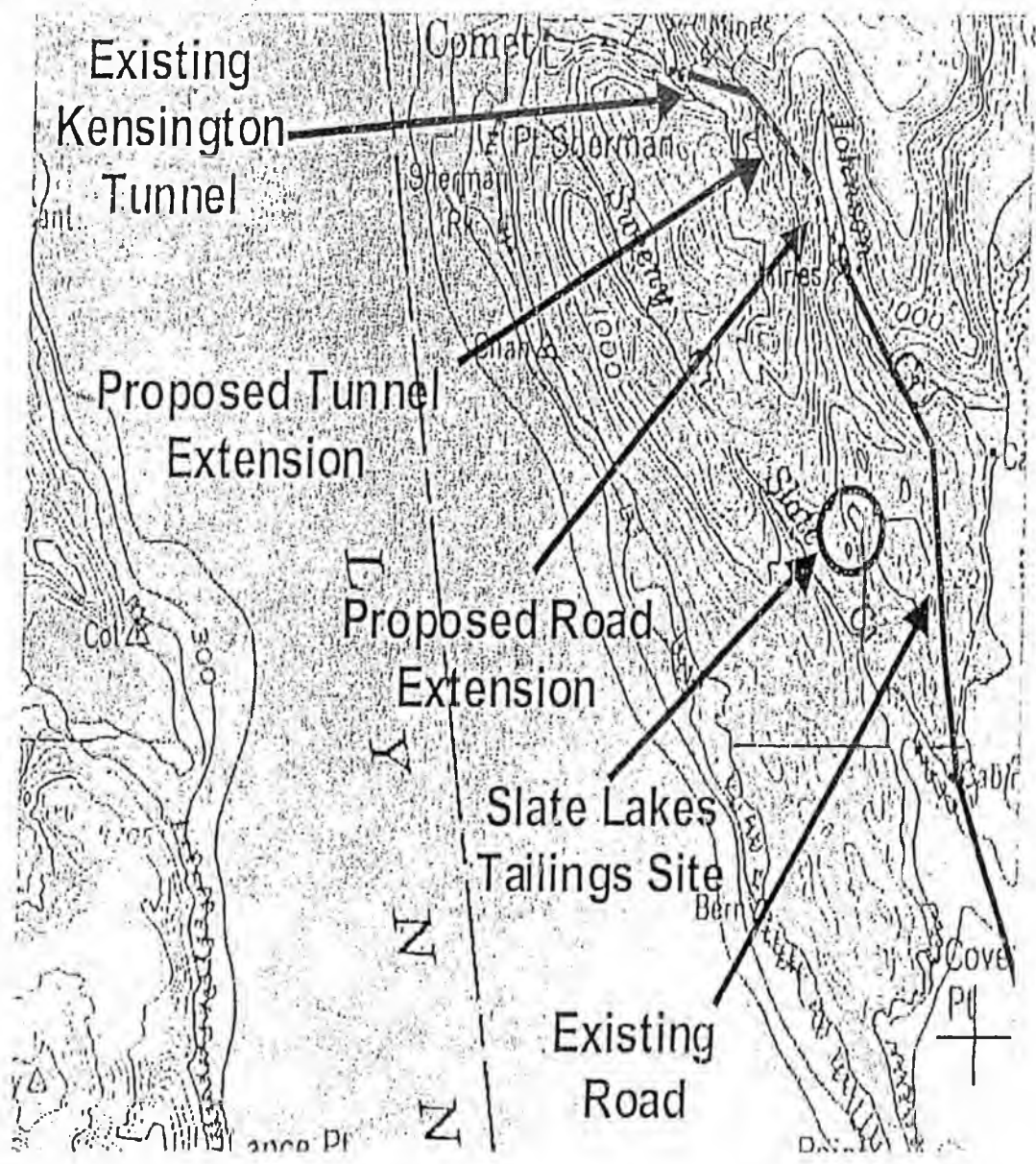
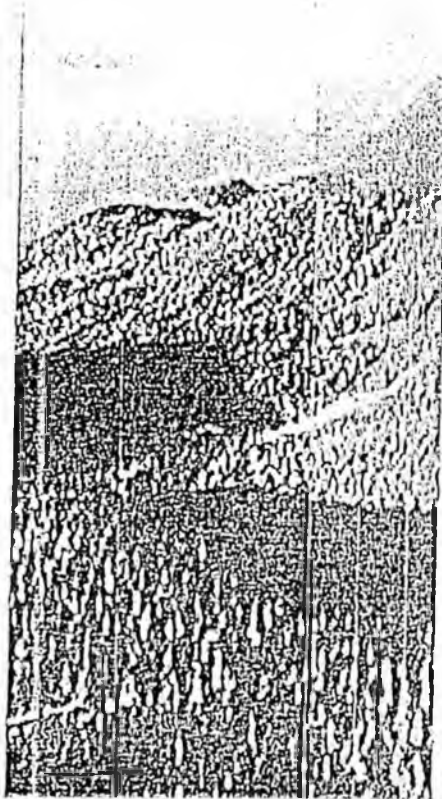
- Grant money or alternative financing to fund the development of this underground road to the ore body





# KENSINGTON GOLD PROJECT

## Tunnel

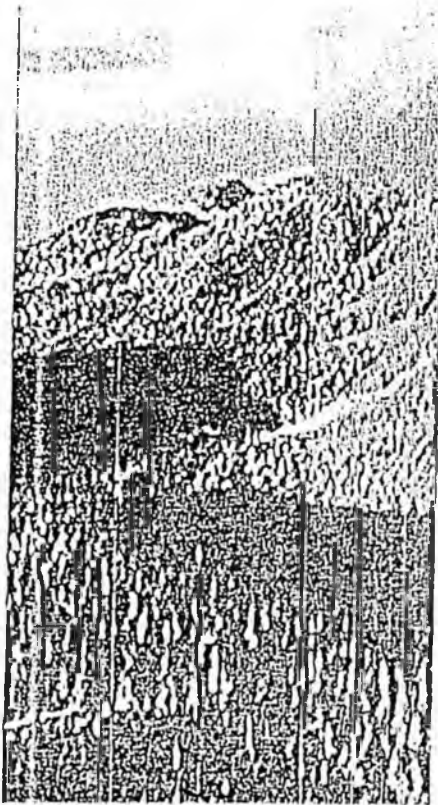




# KENSINGTON GOLD PROJECT

Summary of Potential  
Partnership Opportunities

## Tailings Management Facility





# KENSINGTON GOLD PROJECT

## Tailings Management Facility

### Description

- Construction of an environmentally sound tailings impoundment area that will be reclaimed to a natural state upon cessation of mining
- This facility will utilize new, environmentally friendly technology that will establish and confirm new restoration techniques that can be utilized at other tailings facilities.

### Cost

- Total capital costs: \$8,737,250
- Ongoing monitoring costs: \$1,365,000 (\$130,000 annually over 10.5 yrs)

### Request

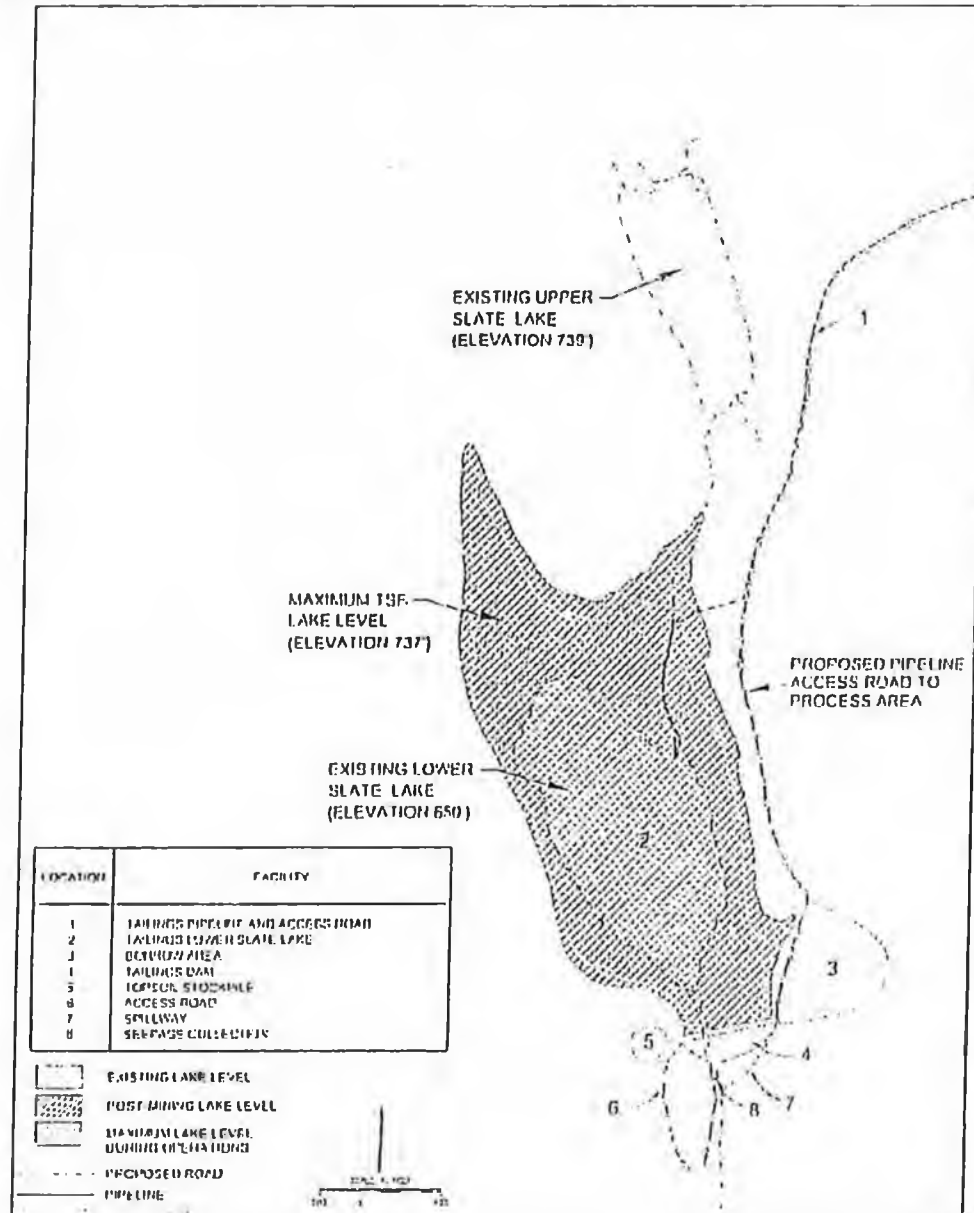
- Grant money or alternative financing to fund the development and operation of this facility
- Outsourcing this component of the project to a third party to own and operate in exchange for a user fee





# KENSINGTON GOLD PROJECT

## Tailings Management Facility





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# KENSINGTON GOLD PROJECT

## Tailings Management System

