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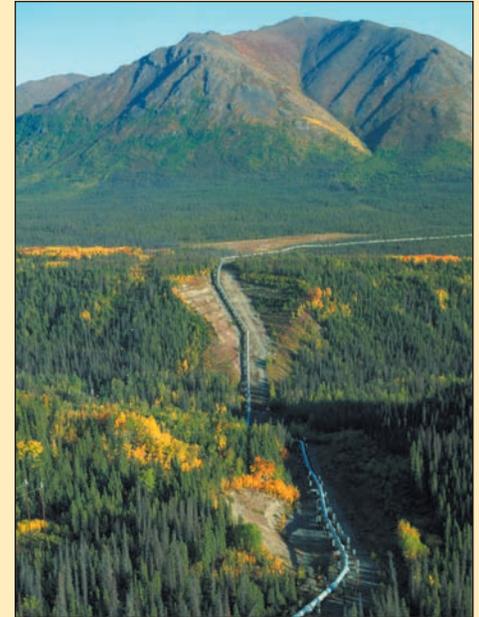


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# RESERVES TAX

## NEW TAX WOULD LIKELY KILL GAS PIPELINE, CHILL INVESTMENT AND ACCELERATE SLIDE IN OIL PRODUCTION

By Roger Marks, Petroleum Economist, Alaska Department of Revenue



The reserves tax on the November ballot could kill the gas line project if it passes.

The proposed citizens' initiative ballot measure for a natural gas reserves tax is propagated on two myths: that the North Slope producers have been "warehousing" the gas for the last 30 years, and that they are not interested in building the gas line project.

Evidence suggests otherwise: It did not become remotely viable to think about building the gas line until 2000. Before then, prices were too low in North America, and demand in Asia was not sufficient to justify the volume it would take to realize efficient pipeline economies of scale. Simply put, the line would have been a loser.

Since 2000 the producers have been quite active in developing the project: They conducted a \$125 million conceptual engineering study. They also successfully promoted federal enabling, regulatory, and tax legislation. And they negotiated a Stranded Gas Development Act contract.

Meanwhile, the gas has been hard at work on the North Slope. Gas use has resulted in the recovery of 25 to 50 percent of the oil produced at Prudhoe Bay. If gas had been commercialized sooner, much less oil would have been produced, and the State would have lost money on the gas.

The initiative is backed by a proposed

statute that would become law if the measure passes. Here is how the reserves tax would work: Beginning on January 1, 2007, each thousand cubic foot of gas, on State units with more than one trillion cubic feet, would pay 3 cents annually. Gas from leases less than 10 years old is

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## RDC'S VIEW ON THE GAS LINE CONTRACT

When viewed as a whole, RDC finds the draft fiscal contract for the Alaska gas pipeline, negotiated between the Murkowski administration and North Slope producers, as a positive step forward in Alaska's efforts to monetize the natural gas resources of the North Slope.

In extensive comments to Alaska Revenue Commissioner Bill Corbus, RDC stated that the proposed contract "balances the project's risks and rewards for all parties." RDC encouraged the Murkowski administration, the producers and the Legislature to work together to move the project forward now.

"The proposed contract is by definition an amalgamation of compromises and

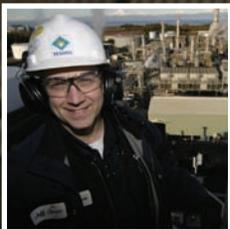
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IS IT POSSIBLE TO TAX GAS PIPELINE INTO EXISTENCE?

Is it possible to tax a development into existence? Apparently the sponsors of the gas reserves tax initiative think so, but I don't.

This initiative will appear on the November ballot and is also discussed in this month's cover story by Roger Marks of the Alaska Department of Revenue. Roger gives a thorough discussion of the technical aspects of the proposed law and delineates many of the problems that the proposal will create, if the voters choose to adopt it. I will try not to duplicate too much of what Roger has written, as I want to take a more philosophical view of what is facing us.

Most people I know think this proposition will pass in November. I am fearful these people are right, although I would be overjoyed to be proven wrong. It is in the hope I am doing more than tilting at windmills that I write this column.

The proponents of the measure are using two tools that may well sway the voters – intellectual and economic distortion.

Let's start with the intellectual distortion that begins in the title of the initiative, "The Alaska Gasline Now Act" (emphasis added). I think I know what "now" means, but I decided to check a dictionary, just to make sure. The adverb "now" is defined as "at the present time or moment" or "without further delay; immediately; at once."

As anyone who is the least bit familiar with this project knows, a project of this magnitude cannot be built "now," or in three years, or in five years, but with a little luck, in eight to ten years.

It was a little disconcerting to me to find the following usage example for "now" in the dictionary: "Either do it now or not at all." Although I know it was not the intent of the supporters of this measure, if things go badly, this phrase could serve as the epitaph for the gas pipeline.

There is a section in the measure entitled, "The All Alaska Gas Pipeline Escrow Provision." This piece of drafting sophistry has little if anything to do with the "All Alaska"

proposals, but does tug at the heart strings of those Alaskans opposed to a line through Canada.

Another bit of intellectual misrepresentation is the whining that I hear from people who say, "We have been waiting for the gas line for over 20 years," making it look as if the producers have been doing nothing with the gas. They have, of course, been using it to extract more oil, so building the gas line earlier would have resulted in lost oil revenue to the state.

In addition, the low price of gas during most of this period made the gas line uneconomic, even if the producers would have been willing to sacrifice oil production. This leads me into my second area of concern – economic distortion.

If the intellectual distortion is distressing, the economic distortion is frightening.

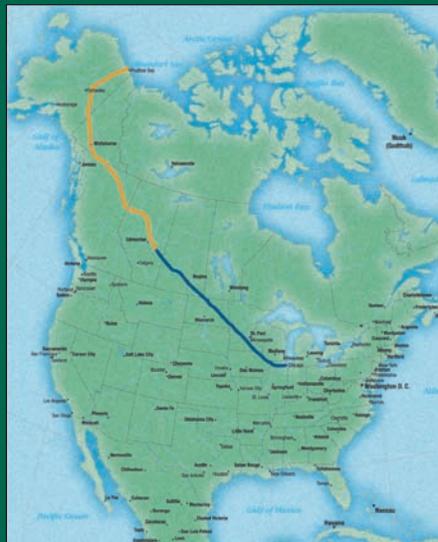
It is beyond me how anyone can believe that \$1 billion of new taxes annually improves the economics of this project. In fact, when it is combined with the new petroleum production tax, my fear is we will have made Alaska a very unattractive place for the oil industry to do business. For a more complete analysis of the economics of the reserves tax, see this month's cover story that I referenced earlier.

Another provision of the ballot measure allows the lessees to give back their leases to the state by the end of 2006, if they would like to avoid paying the reserves tax. This provision shows a complete lack of understanding of how the North Slope operates.

With the exception of Point Thomson, the vast majority of these leases are currently producing oil. No lessee in a right mind is going to give back a producing lease, so whoever drafted this provision was just wasting paper.

As I stated at the beginning of this column, I do not believe it is possible to tax a project into being, but I do know it is possible to tax it out of existence. The sponsors of this measure have claimed their intent is to help get a gas line built. I hope Alaska voters are not deceived into "helping" the project to death.

"I do not believe it is possible to tax a project into being, but I do know it is possible to tax it out of existence. The sponsors of this measure have claimed their intent is to help get a gas line built. I hope Alaska voters are not deceived into "helping" the project to death."



# RESERVES TAX IS BAD FOR ALASKA'S ECONOMY

*(Continued from page 1)*

exempt. At 35 trillion cubic feet, the tax would amount to \$1 billion annually. The tax stays in effect until gas begins to flow. It would even be payable while pipe is being laid. (In that regard it can hardly function as an incentive.)

Once the gas line starts, there is a credit to recover past reserves tax payments, capped at 50 percent of the gas production tax each year, until 2030. But this mechanism is weak.

Consensus long-term price forecasts are around \$5.50/million btu. At this price, gas production taxes would be about \$600 million annually. Fifty percent of that is \$300 million recovered per year. If everything goes right, the pipeline would start in 2016. By then, \$10 billion in reserve taxes would have been paid by 2016. With \$300 million recovered annually between 2016 and 2030, only about \$4.5 billion would be recovered, or 45 percent.

The most chilling aspect of the tax is that it is unavoidable, regardless of behavior. Yes, more tax is paid if the project is not built, but a lot is still paid if it is. If the gas line is built, the tax will have reduced its value by one-third.

Pt. Thomson, an undeveloped field, has 8 trillion cubic feet of gas and underpins the gas project. If Pt. Thomson



*Industry has been investing more than \$1 billion each year on the North Slope to stem the decline in North Slope production to six percent annually. The State estimates the industry will need to double its annual investment to keep production even. But if industry is hit with a \$1 billion reserves tax, money for capital spending will fall, exacerbating an already troubling decline in the rate of production.*

has to start hemorrhaging a quarter billion dollars per year for an indeterminable amount of time, it may well become worthless. If its leases were surrendered, who on earth would buy them?

At Prudhoe Bay, the tax will add \$6 per barrel to the cost of oil production. The tax creates a bad gas project and worse oil economics. Given the gas line uncertainties, the tax could result in a spiraling decay of investment, the hastening of oil field shutdown, and no gas line.

In addition, the tax could very well cause all exploration, for gas AND oil, to cease. A lease is only protected for its first 10 years. Explorers understand that

until gas actually flows, the start-up date is uncertain. Thus any gas they may find prior to start-up may be subject to the tax. And no one will look for oil because they might find gas.

Moreover, the tax would set up a profound misalignment between the State and producers for advancing the project. Why would the State promote a gas line if it can sit back and get \$1 billion per year by doing nothing?

No other jurisdiction in the history of the planet has ever had such a structure; internationally it would put us in a severe competitive disadvantage for investment.

The reserves tax punishes the producers for a crime that wasn't committed.

## GOVERNOR SIGNS NEW OIL TAX BILL INTO LAW

Governor Frank Murkowski recently signed into law HB 3001, an historic reform of the way Alaska taxes its oil and gas industry. The much-debated bill changes the State's oil and gas production tax from a gross tax to a net profits tax.

The bill sets the tax rate at 22.5% of a company's net profits, with a "progressivity" provision that increases the tax by 0.25% for each dollar the price rises above \$40 net per barrel. The tax is expected to raise \$2.4 billion at today's oil prices, a sharp increase in the oil production tax the industry paid under the old system. The higher rate could discourage reinvestment in Alaska. The new law does include a tax credit of up to 20% of the cost of capital investments companies make in exploration and development.

# RDC: GAS LINE CONTRACT IS POSITIVE STEP

(Continued from page 1)

trade-offs,” said RDC Executive Director Tadd Owens. “Every observer can no doubt find fault with particular aspects of the document or argue that certain policy choices could have been made differently. In fact, since the proposed contract was made public, many of the concerns voiced by Alaskans, legislators and various consultants have focused on particular provisions and suggested that the administration could have negotiated more favorable terms for one or more of those particular provisions. While this may be true, it must also be said that other provisions could have been negotiated more favorably for the sponsor group.”

Beginning shortly after the proposed contract was made public, the RDC Board of Directors worked diligently to understand and evaluate the proposal. Six separate board meetings and work sessions totaling more than 25 direct hours of board analysis and deliberation occurred, in addition to hundreds of man-hours spent by staff and individual board members in research and preparation. During this period, RDC worked extensively with key members of Governor Murkowski’s negotiating team, as well as representatives from BP, ConocoPhillips and ExxonMobil.

Additionally, RDC met with former Alaska Department of Natural Resources officials Tom Irwin, Marty Rutherford and Mark Myers; Legislative Budget and Audit Committee co-chairs Senator Gene Therriault and Representative Ralph Samuels; and an array of other interested or impacted stakeholders, including representatives from independent oil and gas companies, local governments, local utilities and industry support firms.

RDC believes the project contemplated in the proposed contract is the right project at the right time for Alaska. Construction of a gas pipeline is absolutely critical to the future of the state. The potential benefits of such a project are massive – billions of dollars in investment, billions of dollars in tax revenue and thousands of new direct and indirect jobs will be generated throughout the life of the project.

A successful project will create a new industry in Alaska – a gas exploration and production industry on the North Slope and along the pipeline corridor. This new gas industry is likely to be the pillar of the state’s economy over the next generation since North Slope oil production is forecasted to drop 50 percent from today’s levels by 2016. New revenues from a gas line would kick in about that time if the project moves forward now. Without those revenues, the state budget could be in dire straits due to much lower oil production.

The proposed contract outlines a number of public policy decisions, perhaps the most significant of which is state ownership – holding an interest in the project’s assets, receiving gas royalties and payments in lieu of gas production taxes in the form of gas and owning the capacity to transport the State’s gas volumes to market. Each of these elements creates a new set of risk/reward dynamics for the state.

RDC acknowledges the risks associated with state ownership are real and should not be discounted. However, RDC believes the potential benefits achieved through a state ownership position exceed the downside risks over the life of the

project. Because the economic benefits to Alaska from a successful project are so vast, it is both acceptable and appropriate for the state to assume some risk. RDC views the state ownership structure defined in the proposed contract as a powerful lever to move the project forward.

As a group, the RDC board was able to come to terms with the vast majority of the contract provisions and to support the contract as a balance of interests among the various parties. However, the board did identify three issues of concern – a provision defining state-initiated expansion of the pipeline, other provisions which may prevent the state from initiating or supporting decisions of the Regulatory Commission of Alaska, and a provision limiting oil and gas leases eligible for the benefits of the uniform upstream fiscal contract to the North Slope. RDC recommended these provisions be removed from the contract or significantly modified.

For details, please see RDC’s comments posted online at [www.akrdc.org/alerts/2006/gaspipelinecomments.html](http://www.akrdc.org/alerts/2006/gaspipelinecomments.html).

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# COMMON GROUND

## CAN THE MAYORS OF ANCHORAGE AND SEATTLE HELP EASE THE REGIONAL RIFT?

By Dave Gering, Executive Director, Seattle Manufacturing Industrial Council



Seattle Mayor Greg Nickels and Anchorage Mayor Mark Begich are working together to forge a new era of cooperation between Alaska and the Pacific Northwest.

Japan, Canada, China, and Taiwan rank as the four biggest trade partners of Washington state. But take airplane sales out of the export mix and the state's number two trade partner becomes Alaska, a state that generates about \$4 billion in sales for the meat-and-potato sectors of the Washington state economy.

But although the Washington state government maintains full-time trade offices in six countries, it has no office in Alaska. And while Seattle elected officials have circled the globe for decades in pursuit of world peace and Sister City relationships, it appears that no official city government delegation has paid a formal courtesy call on Seattle's great neighbors to the north – until now.

In June, Seattle Mayor Greg Nickels led a Seattle trade mission to Anchorage as part of a new effort to promote better business and cultural relations between the two regions. The trip was organized under the auspices of a new Anchorage Seattle Economic Cooperation Council formed in 2004 by Nickels and Anchorage Mayor Mark Begich.

"The economic and cultural ties between our two cities stretch back for decades," Nickels said. "I'm looking forward to working with Mayor Begich to forge a new era of cooperation that will create jobs and opportunities for Seattle and Anchorage."

Said Begich: "Even with our rich historic connections, there are still many misconceptions in Seattle about Anchorage. By actually coming here, Mayor Nickels can dispel those first-

hand and help open new opportunities between our two cities."

The trip produced no news but it helped firm up a good timeline to guide future efforts.

Nickels is organizing a 2009 centennial celebration of the 1909 Alaska-Yukon-Pacific Exposition, an event similar to a world's fair. Alaska's 50th anniversary of statehood also takes place in 2009. One highlight of the trade mission was a joint meeting between the Seattle and Alaska organizers of each event. That meeting produced lots of good ideas for complementary ways to tie the two events together. So, the countdown to 2009 provides three years for the regions to work together, enough time to actually accomplish something.

### Toxic

The timing of the mayors' initiatives couldn't be more opportune, given the angry feelings generated in both states by the issue of oil exploration in ANWR. Washington's junior U.S. Senator, Maria Cantwell, is leading the Congressional charge against ANWR. She faces a tough re-election battle this fall against Republican challenger Mike McGavick, who is receiving highly visible support from Alaskans.

Against such a backdrop, can the two mayors make a difference? They think so. They struck up a friendship at a mayors' conference a few years ago and their regional initiative grew from there. In spite of the 2,000 miles of stunning topography that separates Anchorage and Seattle, the two cities share much common ground.

"At the end of the day, politics is all about local issues," Begich said. "There are many opportunities for our two communities to work together. We're not separate communities really. We're connected in many ways. We can learn from each other. As mayors, we have the capacity to bring people together."

To help establish more specific near-term objectives, the mayors formed the Anchorage Seattle Economic Cooperation Council comprised of business and community representatives from each region. The council held its



*In 2005, oil refineries in Washington state reported gross sales of \$18 billion. With an additional \$8 billion in retail sales reported by gas stations, the combined \$26 billion in petroleum sales exceeded the \$25.4 billion in sales reported for commercial airplanes made in Washington. While Washington has become a major oil refining state, the vast majority of the oil comes from Alaska.*

first meeting last January and its first act was to recommend the trade mission to Anchorage.

### Low Point?

It's easy to assume the present marks the low point in the historic relationship between Alaska and Washington. Yet, history shows this is not the low point – or that the cause of improved relations is hopeless.

The true nadir of the relationship was reached after World War II when Alaskans mounted a drive for statehood. The effort was chronicled by Ernest Gruening, an Alaskan territorial governor who became one of Alaska's first U.S. senators. According to Gruening, the statehood drive hit a major roadblock that was erected by Seattle-based seafood and shipping companies that were worried statehood might reduce their clout in the Alaskan territory.

Gruening gave much credit to Henry "Scoop" Jackson for clearing the barriers to statehood after Jackson was elected a U.S. senator from Washington in 1952. After statehood was achieved in 1959, Jackson and Washington's legendary senator, Warren Magnuson, quickly forged a successful partnership with the Alaskan Congressional delegation.

When Ted Stevens was added to the

mix in 1969, he joined Magnuson and Jackson to form a power trio that was highly successful in winning federal legislation and aid that were extremely beneficial to both Washington and Alaska. But Magnuson left office in 1980, Jackson died in 1983 and relations between the two Congressional delegations haven't been the same since. In the fight over ANWR, Stevens often laments the loss of his old pals, "Maggie" and "Scoop."

Nickels and Begich both possess ties to the "good old days" that could prove helpful to their endeavors.

Nickels worked as a Washington D.C. intern for Magnuson while he was a college student. It was a life-changing experience that inspired Nickels to leave school early and devote himself full-time to a career in public service and politics. His admiration for Magnuson and lack of personal pretense should put him on firm footing among community leaders in the north.

Begich is the first person who grew up in Anchorage to become the city's mayor. His father, Nick Begich, was an Alaskan congressman who died in an airplane crash in 1972. His father was succeeded by Don Young, who has held the Alaskan Congressional post for more than 30 years. Except for his sup-

port of ANWR exploration, Begich could pass for a Seattle-style Democrat and he can easily mix with community leaders in the south.

### A Starting Point

So, the mayors possess good historical connections and fine intentions. What they need is something that could help pull the Congressional leaders together for a project that makes everybody happy while benefiting the good citizens of both Alaska and Washington. We hereby offer – for free – a potential starting place.

In almost every way that counts, Washington and Alaska function just like foreign nations that both profit from the exchange of exports with each other. Washington sends consumer goods and business supplies north while Alaska sends seafood and oil south.

A private study by the chambers of commerce for Seattle and Tacoma estimate that this trade creates about 50,000 direct jobs in Puget Sound while oil production and seafood are the largest sources of private employment in Alaska.

The chamber study estimated in 2003 that the dollar value of this trade was about \$3.8 billion per year for businesses in Puget Sound. Sounds impressive but with the dramatic increases in oil prices, it is actually now absurdly low.

In 2005, oil refineries in Washington reported gross sales to the state of \$18 billion for tax purposes. That's nearly double the \$9.9 billion in oil sales reported in 2003. And the vast majority of the oil refined in Washington is still Alaskan crude. The Alaskan boost becomes even more dramatic when you include the \$8 billion in additional retail sales reported by Washington gas stations.

The combined \$26 billion value of these products compares to the \$25.4 billion in sales reported for commercial airplanes made in Washington during the same time. Yes, petroleum products in Washington state are presently generating more dollars than Boeing jetliners.

True, Washingtonians are also paying much higher prices at the pump, but they are also enjoying a huge rebate based on their role as an oil refining

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## PRUDHOE BAY PRODUCTION MAY BE RESTORED EARLIER THAN EXPECTED

North Slope production of 800,000 barrels per day comprises 16 percent of U.S. domestic oil supplies. Prudhoe Bay itself accounts for 8 percent of U.S. production.



Oil production at Prudhoe Bay could return to normal earlier than expected as a portion of a pipeline idled by corrosion concerns may be useable at least temporarily and other sections may be bypassed.

BP initiated an orderly and phased shutdown of the entire field in early August after the discovery of unexpected severe corrosion and a small spill from a Prudhoe Bay oil transit line. That decision followed an inspection revealing 16 anomalies in 12 locations in an oil transit line on the east side of the field.

BP backed away from shutting down the entire field after testing of flow lines and transit lines on Prudhoe's western half provided evidence the company could safely operate that half of the field.

The shutdown of the eastern side reduced daily production by approximately 200,000 barrels, half of Prudhoe's 400,000 barrels of daily production. The field accounts for half of the North Slope's daily production of 800,000 barrels. Prudhoe provides 8 percent of U.S. domestic production while all North

Slope oil fields combined account for 16 percent of domestic supplies.

BP is replacing all 16 miles of the larger transit lines in question, which carry oil to the 800-mile long Trans-Alaska pipeline. Leading up to the partial shutdown, BP spent over \$71 million in 2006 on corrosion prevention in Alaska, an increase of 15 percent from 2005 and 80 percent from 2001.

"Given our decades of past operating experience, we did not expect to see the degree of corrosion we found in the eastern transit line," said BP Alaska President Steve Marshall in testimony before a joint Alaska Senate and House Resources Committee hearing last month. Marshall said BP was continuing its inspection programs and have added additional aerial and ground infra-red monitoring of the field.

BP currently has more than 340 engineers and inspection experts working on the project and it has ordered new pipe from U.S. suppliers for the replacement of the transit line.

Marshall noted his company conducts

more than 100,000 inspections across the North Slope each year, utilizing a combination of ultrasonic testing radiography, pigging and many other tools to maintain an ongoing assessment of corrosion. Every year the company typically makes repairs to 250 to 300 sections of pipe. Last year it replaced about 5,000 feet of pipeline after tests showed it no longer met operating standards.

"We can't eliminate the risk of corrosion, but we do manage it in a most professional manner," said Marshall. "Given our performance history and our existing programs, we believed we had an effective corrosion management program and as strong as any program in a similar setting anywhere on the globe. Clearly, recent events have shown that there was a gap in that program and we are examining and analyzing it closely. We will utilize smart pigging in the future on the new transit lines. We will reanalyze our entire corrosion program. It is happening already and if more changes are needed, we will make them."

## WHEN ALASKA DOES WELL, SO DOES WASHINGTON STATE

*(Continued from page 7)*

state. Petroleum sales in Washington generate state tax revenues of more than \$160 million per year and when you throw in the usual job multipliers, the oil industry in Washington produces more than 21,000 well-paid jobs.

Attach dollar and job figures like these to trade between two nations, and you'd find federal and state agencies falling all over themselves to record it, study it, and support it. And the benefits would extend down to the very grassroots of the economy.

Right now, any mom-and-pop business in Washington or Alaska that wants to do business in a foreign country qualifies for all kinds of help from trained

professionals employed by the U.S. Export Service. But if mom or pop want to do business between Alaska and Washington, there's no federal support and the government leaves it up to the private sector to keep track of the trade.

Of course, it would take an act of Congress to fix this situation. And aren't we fortunate to have access to some of the most powerful people on both sides of the aisle in the U.S. Congress? So, somebody should ask U.S. Senator Patty Murray and Ted Stevens to sponsor the Stevens-Murray Trade Act to create an ongoing program to track trade between Alaska and Washington and to support mom-and-pop companies in each state that want to

do business in the other state.

Document everything that goes back and forth between the two states, from all the tons of seafood to all the cartons of milk, containers full of clothes and the tankers full of oil. As the data piles up, it may well identify new economic opportunities that would benefit both Alaskans and Washingtonians. Even if it doesn't, it is guaranteed that the data will provide Seattle's civic leadership with two extremely valuable lessons:

When Alaska does well, Washington prospers, and we shouldn't have to wait another century for the next Washington-Alaskan trade mission.

# COURT ISSUES KENSINGTON INJUNCTION

The U.S. Ninth Circuit Court of Appeals issued an injunction last month that temporarily halts construction activities for the Kensington Mine's tailings impoundment at Lower Slate Lake.

The injunction was issued by the Court while it awaits a decision on an appeal filed by the Southeast Alaska Conservation Council (SEACC) and two other environmental groups working to prevent the mine from disposing of rock tailings in the subalpine lake.

The injunction for now prevents the mine operator, Coeur Alaska, from building a dam at the lake. However, Coeur may continue construction at the mine and the mill.

Governor Murkowski was outraged over the injunction, saying the decision could shut down much of the work on the project for at least this construction season, resulting in negative impacts to the Juneau and Southeast Alaska economy.

"The community of Juneau stands behind this project as an environmentally-responsible development," the governor said. "There are better ways than court action to resolve differences of opinion. Stopping the project through an injunction will have a devastating impact on the Goldbelt Native Corporation, on Juneau and on Alaska."

Murkowski said the injunction was a totally unnecessary delay of a quality, permitted project.

The Kensington Mine currently employs about 300 workers, 73 percent of them Alaska residents.



*A federal judge ruled in August that the government properly issued a permit allowing Kensington to put its tailings in a lake, but the appeals court has since issued an injunction. Pictured is the mill building under construction.*

The lawsuit is not about the mine itself, but about Coeur's plans to use Lower Slate Lake for mine tailings, according to SEACC. If allowed to use the lake for tailings, SEACC argues the Kensington Mine would be the first in a generation to dispose treated tailings in a lake.

**Management of tailings in Lower Slate Lake was the permitted alternative for the project as it had the least environmental impact, according to Coeur and government agencies. After mining, the lake will have improved productivity and aquatic habitat. Native wild fish will be restocked into what is currently a relatively unproductive lake.**

The Kensington legal challenge has been closely watched around Alaska because of possible implications for other mining projects.

Earlier in August, Judge James Singleton of the U.S. Federal Court ruled that the Corps of Engineers properly issued a permit allowing Coeur to put its rock in the lake. In addition, Singleton

affirmed a U.S. Forest Service record of decision for the mine, as well as a federal discharge permit issued to Goldbelt, Juneau's urban Native corporation, to build a dock to service a ferry for Kensington workers.

Singleton's ruling upholding the Corps' permit focused on the definition of fill

in federal statutes. The Corps had classified Kensington's tailings as a benign fill. Environmentalists say the tailings should not be regulated as fill.

Meanwhile, the appeals court has agreed to issue an expedited ruling on the case.

Management of tailings in Lower Slate Lake was the permitted alternative for the

project as it had the least environmental impact, according to Coeur and government agencies. After mining, the lake will have improved productivity and aquatic habitat. Native wild fish will be restocked into what is currently a relatively unproductive lake.

After nurturing the project since the 1980s, Coeur finally obtained all of its permits and shifted to full construction mode last year. An independent survey revealed more than 76 percent of Juneau's residents support the mine.

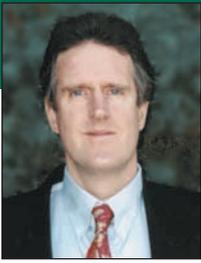
The mine has been granted more than 60 environmental and regulatory permits.

Last month the Bureau of Land Management selected Kensington to receive the 2006 Hardrock Mineral Community Outreach and Economic Security Award. The agency's director, Kathleen Clarke, noted that the award is presented "to those hard-rock mining projects that have shown responsible mineral resource development while demonstrating an understanding of sustainable development."

Coeur is known in the industry as a responsible operator and has received more than 20 such awards.

Plans call for the \$190 million development to be completed by late 2007 with annual gold production of 100,000 ounces beginning in 2008. The mine will have some 200 permanent workers with \$16 million of annual payroll and benefits.

The Kensington Mine is expected to generate millions more in state and local tax revenues and provide major private sector business opportunities.



## A MAJOR VICTORY IN U.S. SUPREME COURT, BUT NO END IS IN SIGHT FOR LITIGATION

Once again, the United States Supreme Court has told the Corps of Engineers it has been wrong to claim jurisdiction over wetlands far removed from navigable waterways. Also, once again, the Court's lack of precision and clarity will lead to more litigation. Thus, after last June's decision in *Rapanos v. United States*, landowners are much better off than before, but we would have been even better off if the Court decided to speak with one voice.

*Rapanos* was the follow-up to *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, a 2001 case where the Court told the Corps it could not regulate an isolated wetland just because a duck, flying errands on interstate commerce, might someday glance down and decide to land on that wetland. The Clean Water Act provides the Corps with jurisdiction over "waters of the United States" which are not defined. After the Corps decided such "waters" are anything that has any impact on interstate commerce – such as the pond with the proverbial duck flying overhead – the Court said no, flying ducks are not good enough.

Following its 2001 defeat, the Corps adopted a new rationale: migrating molecules. This time, the Corps decided it had jurisdiction over a wetland if any molecules might someday migrate from the wetland to a navigable waterway. Not being one to take kindly to unlawful jurisdiction, John Rapanos objected when the Corps asserted authority over several of his parcels even though they are dry for much of the year and even though they were some distance from the nearest navigable waterway. In fact, one of his properties was 20 miles from the nearest navigable waterway – and connected only by a series of drainage ditches and tributary streams.

After *Rapanos* disturbed his wetlands, he was charged with civil and criminal penalties. While the trial court expressed a great deal of sympathy for his plight, he lost repeatedly in the Sixth Circuit Court of Appeals. Finally, in 2005, represented by Pacific Legal Foundation attorneys, the United States Supreme Court took his case.

In a split decision, the Court found the Corps had once again overstepped its bounds. But, because the Court did not speak with one voice, there will be much debate over exactly what those bounds are. Four members of the Court, led by Justice Scalia, were emphatic the Corps could not regulate damp places that lack an obvious connection to a navigable water. For example, the Corps lacks the ability to regulate

nonnavigable, isolated, intrastate waters, channels and streams with intermittent or ephemeral flows (but not seasonal flows), dry arroyos, coulees and washes, directional sheet flow, wet meadows, storm sewers and culverts and man-made drainage ditches. Under Justice Scalia's reasoning, the Corps would also lack jurisdiction over most permafrost wetlands.

Justice Kennedy, however, was much more equivocal. He agreed the Corps had not made its case to regulate John Rapanos's wetlands. However, he was not clear in what sort of case the Corps needs to make in order to regulate wetlands that are not adjacent to a navigable water. Under his reasoning, only a water that possesses "a significant nexus to waters that are navigable-in-fact or that could reasonably be so made" are subject to regulation under the Clean Water Act. Unfortunately, this "significant nexus" test harkens back to 1964, when Justice Stewart tried to define obscenity by saying "I shall not today attempt further to define the kinds of material I understand to be embraced . . . but I know it when I see it." Unlike obscenity, however, many wetlands cannot be identified even by looking at them, and the significance of their nexus to navigable waters is even more obscure than an art critic's line between art and pornography.

Four members of the court dissented, saying that, so long as the Corps was doing Gaia's work by furthering the "intent" of Congress when it passed the Clean Water Act – the Corps could do what it pleased.

With the four plus one split in the opinions in favor of John Rapanos, the obvious question is from which opinion will the Corps and lower courts craft a definitive test.

There are two schools of thought. One holds that when there is a split opinion, the opinion that reaches the result on the "narrowest ground" holds. The problem with this approach, however, is that it is rarely obvious what the "narrowest ground" may be. The second approach holds the opinion that garnered the most votes should control. In this case, that would be Justice Scalia's opinion. Indeed, already one district court in Texas has ruled that Justice Scalia's approach controls in an analogous situation.

In short, while at least five members of the Court found the Corps had gone too far in trying to justify its regulation of John Rapanos's wetlands, the final chapter on the regulation of millions of acres of wetlands in Alaska and the rest of the United States has yet to be written.

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## BHP BILLITON AND ASRC UNITE ON ARCTIC COAL

International mining giant BHP Billiton and Arctic Slope Regional Corporation have signed a series of agreements providing BHP an exclusive right to explore and possibly develop coal bearing land held by the Native corporation in northwestern Alaska.

BHP will begin an exploration program on ASRC lands north of the Brooks Range in the Western Arctic, inland from the Inupiat communities of Point Lay and Point Hope, later this year. In addition to exploration, BHP is committing to continuation of ASRC's environmental studies of the area and establishing a community consultation process. Should exploration results prove positive, BHP will begin project concept studies to determine preliminary feasibility and possible mine development.

ASRC believes the Northern Alaska Coal Province, a broad belt extending 300 miles eastward from the Chukchi Sea, contains 4 trillion tons of high quality bituminous coal – one ninth of the world's known coal reserves and one-third of U.S. reserves.

ASRC estimates 2 billion tons of high-rank bituminous coal lies in the Western Arctic, but the corporation has focused its efforts up to now on one coal deposit. That deposit, six miles from the Chukchi Sea, contains an estimated 68 million tons of measured coal reserves for underground mining, with an additional 23 million tons that could be mined from the surface.

BHP brings extensive arctic exploration and mining experience gained through the development of the Ekati Diamond Mine in the Northwest Territories of Canada.

## AMEREF SELECTS TRAINING DIRECTOR

Leland A. (Lee) Clune was recently selected as the Director of Training by the Alaska Mineral and Energy Resource Education Fund (AMEREF) Board of Directors. Mr. Clune began his extensive career in Alaska K-12 education as a middle school teacher in Fairbanks in 1972. He served as the State Director of Vocational & Technical Education and as the State Administrator for the landmark Molly Hootch consent decree. He also served as assistant to the Superintendent for Nome Public Schools, and Superintendent of Schools for both the Yakutat and Delta/Greely School Districts. He will continue as an Adjunct Faculty member of the University of Alaska Anchorage, College of Education.

AMEREF's mission is to provide Alaskan students and teachers with the knowledge and skills to make informed and objective decisions relating to mineral, energy, and forest resources.

## ROCK CREEK, BIG HURRAH GET KEY PERMITS

Two mining projects near Nome, which the RDC Board of Directors plan on visiting in late September, recently received key permits from state and federal agencies.

The Alaska departments of Natural Resources and Environmental Conservation issued construction permits for the Rock Creek and Big Hurrah gold mines last month. In addition, the U.S. Army Corps of Engineers issued a key wetlands permit for the projects

which are being developed by NovaGold Resources. The state permits cover fish habitat, water use authorizations, dam construction, waste management, water quality and reclamation plans.

NovaGold envisions first gold production at Rock Creek beginning next year at a rate of 100,000 ounces annually.

Rock Creek and Big Hurrah are six miles north and 42 miles east of Nome, respectively. They are being constructed jointly by Alaska Gold Company, a subsidiary of NovaGold, which also owns part of the Donlin Creek gold project in Southwest Alaska.

The known gold resource at Rock Creek is owned 66 percent by Alaska Gold and 34 percent by Bering Straits Native Corporation. Alaska Gold owns 100 percent of the Big Hurrah deposit, but it is surrounded by lands owned by Solomon Native Corporation.

Alaska Gold is planning two open pits, with a mill at Rock Creek to process ore from both mines.

## PEBBLE MINE AWARENESS HIGH, SUPPORT STRONG

A poll conducted by Dittman Research this summer revealed that 71 percent of Alaskans have heard of the Pebble mine project near Iliamna and that support for the project outweighs opposition.

The research was sponsored by Northern Dynasty Mines in an effort to learn Alaskans' views regarding the project.

Some 45 percent of the 509 Alaskans surveyed were in favor of the project while 31 percent were opposed and 24 percent were unsure. The survey went on to measure the effects of additional detailed information, presenting both potentially positive, as well as potentially negative characteristics of the project. The additional information on benefits had a major effect – most of the “unsure” transitioned to support, which increased to 67 percent. Only six percent remained “unsure” and opposition declined to 27 percent.

When informed of the large number of jobs the project would create, support climbed to 78 percent. And 80 percent were more likely to support the proposed project based on the utilization of the most up-to-date scientific methods to minimize the disturbance to the environment.

## RDC COMMENTS ON PROPOSED WETLANDS RULE

In comments to the Environmental Protection Agency, RDC said it is vital a proposed rule governing compensatory mitigation for wetland losses reflect Alaska's unique circumstances and the flexibility exercised through the 1990s Alaska Wetlands Initiative.

While scarcity is an overriding concern elsewhere in the nation, the sheer abundance of wetlands in Alaska is an important element to take into consideration in the regulatory process, RDC noted. Alaska is a state with substantial conserved wetlands. More than 99 percent of its intact historical wetlands still exist today and more than half of the state is considered wetlands. They are most abundant where Alaskans live – along the rivers, in the Interior and along the coast. Virtually every port and harbor in the state uses wetlands and nearly every airport is built on them.

“The abundance of wetlands in Alaska, coupled with unique land ownership patterns, and the fact that only a fraction of the state's wetlands have been developed, present significant challenges to the implementation of compensatory mitigation requirements,” RDC said. “Standardization of compensatory mitigation in Alaska with Lower 48 requirements will present serious problems for our members, including local communities.”

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