



4. **MINING:** Court denies emergency appeal by Army Corps for Alaskan project

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In a harshly written ruling, the 9th U.S. Circuit Court of Appeals has maintained an injunction against further construction work at the planned Kensington Gold Mine on Lower Slate Lake in the Tongass National Forest in Alaska. The court on March 16 issued a preliminary ruling that rejects an emergency motion from the U.S. Army Corps of Engineers that would have allowed mine owner Coeur Alaska to build a diversion ditch to protect a temporary dam that it built last summer.

The court also signaled its intention to vacate permits that had been issued for the overall project.

The work is all part of a proposed water- and tailings-discharge system for the mine, which has been challenged in court by the Southeast Alaska Conservation Coalition (SEACC) and other activist groups on the grounds that the Army Corps and the U.S. Forest Service issued permits to Coeur Alaska in violation of the Clean Water Act [*Southeast Alaska Conservation Council, et al., v. U.S. Army Corps of Engineers, et al.*; No. 06-35679].



An aerial view of the site for the planned Kensington Gold Mine in the Tongass National Forest. Photo courtesy of U.S. Forest Service.

The project involves building a 90-foot high and 500-foot long dam that would triple the surface area of the lake to allow dumping of mine tailings that would eventually raise the bottom of the lake some 50 feet higher than its current high water mark.

The groups alleged -- and defendants admitted -- that the discharge of 210,000 gallons of slurry per day with some 1,444 tons of tailings into Lower Slate Lake "will kill all of the fish and nearly all other aquatic life," according to court documents. Because of long-term toxicity, it is also unclear whether life in the lake could be restored, the court noted.

The groups also alleged that the Army Corps was using the Kensington Mine as a test case to reverse decades of settled law and return to the days when mines dumped their tailings in clean lakes, rivers and streams. If allowed to proceed as planned, the Kensington Mine would have been the first mine in a generation to dispose of its chemically treated mine

tailings in a lake or stream, according to SEACC.

Although a federal district judge last summer upheld the legality of the permits, the 9th Circuit quickly issued an injunction against further work while it took on the environmentalists' appeal. The injunction was affirmed in December even though the company had asked to be able to shore up the temporary dam before expected heavy rains ([Land Letter](#), Dec. 14, 2006).

Although the 9th Circuit panel expressed displeasure that the coffer dam had been hastily built in the 20-day period between the lower court ruling and the issuance of the injunction, the judges directed parties to meet to try to work out "how best to address the perceived threat posed by weather conditions" to the coffer dam. No agreement was reached.

Instead, Coeur Alaska proposed building a diversion ditch, called the Western Interceptor Ditch. The Army Corps gave its conditional approval and asked the court to lift the injunction so that work could proceed.

The 9th Circuit panel, however, declared that "the plan violates both the letter and the spirit of the injunction." The stay had prohibited the agencies from authorizing any further construction on the project that would disturb surrounding lands and waterways. "Yet, Coeur Alaska's plan would require cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3,000-foot ditch, filling in 4.5 acres of nearby wetlands with 28,800 cubic feet of fill material, diverting natural surface water and groundwater flow, altering the natural level of the lake ... bypassing a portion of the creek and altering the natural flow of the creek," the court found. "This plan clearly does not comply with the injunction."

Rather than removing the dam, building spillways or finding some other means of resolving the problem, the court observed, "Coeur Alaska seeks to fashion a remedy that furthers its intention of disposing of tailings in Lower Slate Lake."

The court's displeasure with the situation was even more explicit in its guidance to the parties: "We believe it is appropriate at this time to announce that we intend to reverse the district court, vacate the permits and the Record of Decision authorizing Lower Slate Lake as a disposal facility, and remand to the district court with instructions to enter summary judgment in favor of SEACC."

The panel said it will soon publish an opinion to explain its reasoning in greater detail, but it told the parties that all construction-related activities related to the disposal facility "should cease and not be undertaken."

While cautioning that the ruling was not the final word, SEACC executive director Russell Heath told *Land Letter*, "We're glad to be confirmed" in the belief that the tailings facility is illegal. "Even though we told them of this four and a half years ago, Coeur Alaska gambled that neither citizens nor the courts would protect the environment of the lake," he said. Heath expressed hope that the company would work with the groups to fashion a better solution to the disposal problem. "They always had the option of doing it legally," he said.

Company officials could not be reached for comment this week.

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