



OMBUDSMAN
Legislative Assembly
Province of British Columbia

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Tom Schroets

*June 23/97
(via JP)*

June 16, 1997
 Ref 9356268

*→ Windy
(raggy)*

Mr. Jack M. Patterson
 Managing Director
 British Columbia & Yukon Chamber of Mines
 840 West Hastings Street
 Vancouver, British Columbia
 V6C 1C8

889644

Dear Mr. Patterson:

Enclosed is my concluding report and recommendation on my investigation into the complaints we received regarding the process leading to the Tatshenshini/Alsek land use decision made by the Government of British Columbia.

On page 28 of the enclosed Report, I recommend that government acknowledge to the Chamber of Mines that you were not given sufficient opportunity to present and receive a response to your concerns with the CORE Interim Report and the Tatshenshini/Alsek land use decision process, and express regret at that oversight. As stated in my report, I consider that this acknowledgement from government would resolve the last remaining issue arising from my investigation.

We will not be providing a copy of this report to the other complainants or to the Legislative Assembly, until it is clear as to whether or not you will receive a letter from government and you have had an opportunity to comment on my report. I earlier indicated my willingness to meet with you to discuss my report. That offer is still open to you.

If you do wish to meet, please make arrangements with my Senior Executive Assistant, Ms. Sussi Arason, who can be reached at the above toll free telephone number.

Yours very truly,

Dulcie McCallum

Dulcie McCallum
 Ombudsman for the Province of B.C.

cc: Mr. Douglas McArthur
 Office of the Premier

Enclosure



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URGENT

June 16, 1997
Ref: 9356268

Mr. Douglas McArthur
Deputy Minister
Office of the Premier and Cabinet Secretary
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Mr. McArthur:

Re: Investigation into the Tatshenshini/Alsek Land Use Decision

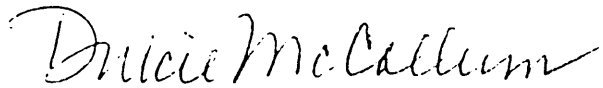
It appears that we may have resolved the remaining issue of lack of sufficient consultation with the Chamber of Mines through correspondence and consultation with Mr. Timothy Leadem of your office. I am enclosing our final report under s. 23 of the **Ombudsman Act**.

My recommendation is that government acknowledge to the Chamber of Mines that it was not given sufficient opportunity to present and receive a response to your concerns with the CORE Interim Report and the Tatshenshini/Alsek Land Use decision process, and that government express regret at that oversight. A copy of my report with its findings and recommendation is enclosed. In making your final decision please review the enclosed report and be cognizant of the distinct lack of consultation undertaken by CORE.

I have also provided a copy of this report to the Chamber of Mines. As indicated in the enclosed copy of my letter to Mr. Patterson, I will delay forwarding a copy of the report to the other complainants. This is in order that government have another opportunity to implement what is now a formal recommendation and which I am optimistic we can report as a satisfactory resolution of this aspect of the Chamber of Mine's complaint.

I hope to be able to report shortly to the other complaints that my investigation is concluded and my recommendation implemented by government.

Yours very truly,

A handwritten signature in cursive script that reads "Dulcie McCallum".

Dulcie McCallum
Ombudsman for the Province of B.C.

Cc: Mr. Jack Patterson
Managing Director
Chamber of Mines

Enclosure

THE COMPLAINT

On August 17, 1993, the British Columbia & Yukon Chamber of Mines ("Chamber of Mines") lodged a complaint with the Ombudsman regarding the decision to preserve the Tatshenshini/Alsek region as a wilderness park, thereby precluding mining in the area. Specifically, the Chamber of Mines requested a review of the process leading to the decision and sought its reversal in order to provide for integrated use, including mining.

The Chamber of Mines also complained that the Commissioner on Resources and Environment (CORE) Interim Report was deficient because it did not present a balanced view of the relative values of mining development and wilderness preservation and did not examine how mining activity could be made compatible with other uses. This Office also received complaints from others who felt that the process leading to the decision was unfair to them, including tenure holders.

This Office began its investigation by meeting with representatives of the Chamber of Mines to discuss its complaint. At the conclusion of that meeting, the Chamber undertook to outline its specific concerns with the CORE Interim Report and the process leading to the land use decision.

I do not intend to review the merits of this land-use decision. The responsibility for making a land-use decision of this magnitude and significance rightfully rests with the provincial Cabinet which has both the authority, by Convention, to make the decision and the political mandate and accountability necessary to determine and safeguard the public interest. This investigation is limited to the process leading to the Tatshenshini/Alsek land-use decision.

Cabinet is free to choose the process by which it will make a land-use decision, within the provisions of applicable legislation. As head of the executive branch of government, Cabinet has the power to manage public property under its executive power, without the necessity of legislation. However, while Cabinet's power in this regard is not derived from legislation, it is subject to existing legislation.

PROCESS LEADING TO THE TATSHENSHINI/ALSEK LAND-USE DECISION

The Tatshenshini/Alsek area is a wilderness of mountains and glaciers located between the Yukon Territory to the north and the Alaska Panhandle to the west and south. The area's major river, the Tatshenshini loops north from British Columbia through the Yukon Territory, then flows in a roughly southwesterly direction to its confluence with the Alsek River about twelve kilometres east of the border with Alaska. One of the tributaries of the Tatshenshini River is Tats Creek, which flows from the vicinity of Windy Craggy Mountain.

In 1988, after drill tests confirmed that Windy Craggy Mountain contained an unusually large copper ore deposit, Geddes Resources Limited ("Geddes") filed a proposal with the Mine Development Review Process ("MDRP" subsequently renamed the Mine Development Assessment Process "MDAP") administered by the former Ministry of Energy, Mines and Petroleum Resources (a discussion of the process that has since replaced "MDAP" is included later in this reporting letter). The proposal called for an open-pit mine at the peak of Windy Craggy Mountain, with the ore concentrate to be trucked to Haines, Alaska where it would be loaded onto freighters to be transported to Japan for processing.

Road access to the mine site was an essential component of the Windy Craggy project. A government Wilderness Advisory Committee report in 1986 had recommended that road access be permitted into the Tatshenshini Valley to support mine development. Both the Geddes proposal and the review of the proposal under MDRP were predicated on the basis that road access to the mine site was acceptable in principle, subject to ensuring the best possible location and design to minimize visual intrusion on the valley's viewscape and encroachment on fish and wildlife resources.

However, there was strong opposition from environmental groups to allowing road access in the area. A briefing note prepared by the Ministry of Environment, Lands and Parks dated October 10, 1991, recommended that the land-use issues be reviewed before a technical review of the project continued. The principal reasons given for this recommendation were:

1. to address agency and public concerns regarding impacts of the road on wilderness values, wildlife and water quality, and
2. that Geddes was not willing to commit any additional funding for the technical studies required by government agencies because of the uncertainty of government approval for road access.

By early 1992, government was considering commissioning an independent review of key land-use and technical issues regarding the Tatshenshini/Alsek

area. The review was to be conducted by a special commissioner approved by CORE. The information gathering and consultation processes were expected to take approximately twelve months to complete. A copy of the draft terms of reference was provided to the then CORE Commissioner, Stephen Owen, for his comment.

In April 1992, the Cabinet Committee on Sustainable Development endorsed the appointment of a special commissioner, but this decision was revised by Cabinet in early July 1992. Cabinet decided that CORE would assume complete responsibility for the review, including initial consultation with agency staff and stakeholders, as well as completion of a conceptual technical audit of the current mining proposals.

The CORE Commissioner was consulted on the process prior to the Cabinet decision to refer the matter to CORE. He reviewed a copy of the submission to Cabinet which recommended the referral to CORE and he also made a presentation to Cabinet regarding the referral. The Cabinet Submission outlined the mandate that was recommended:

This approach resembles [the option of appointing a special commissioner], but would be managed entirely by CORE. [The Cabinet Committee on Sustainable Development] would provide only general terms of reference, with CORE given considerable discretion to design, stage and budget for the work. CORE would focus on the key land use issues raised by Windy Craggy and nearby mineral opportunities, assessing mineral values from the perspective of potential impacts on wilderness and biophysical values. The process would provide for public involvement, recognition of aboriginal interests, and liaison with neighbouring jurisdictions.

It was contemplated that the detailed scope of the task would depend on CORE's judgment but that CORE might suggest both appropriate land-use principles and evaluative criteria for a range of land uses. It was also understood that CORE would not necessarily offer specific recommendations on the Windy Craggy project but would advise on the conditions, if any, under which mining might be considered an acceptable land use.

The Cabinet Submission outlined how CORE's review would proceed:

CORE's work would be staged. Initially, CORE would develop an approach, reporting to [Cabinet Committee on Sustainable Development] in September 1992 on how it proposes to address the issues after having:

- *held extensive discussions, workshops with officials of various Ministries and key stakeholders to clarify issues and concerns;*

- *evaluated both current availability of resource data and new inventory needs;*
- *completed a conceptual technical audit of the current Windy Craggy development plans, using independent experts; and*
- *developed a recommended program, budget and time frame for completing the assignment.*

Cabinet advised CORE of its decision to refer the matter to CORE by memorandum dated July 10, 1992. The memorandum included the expectation that CORE would report back to Cabinet in September with a detailed plan for how it intended to conduct its review and would make a submission to Treasury Board for the resources it required to carry out the task.

A news release was issued on July 20, 1992 to announce the referral of the land use issue to CORE. The news release also announced that comments submitted to the provincial MDRP on the proposed Windy Craggy project would be circulated, but the MDRP review itself would be suspended until CORE completed its report. A mineral claim-staking reserve over the region was also announced to ensure that options were kept open pending CORE's recommendations.

CORE circulated an internal memorandum dated July 24, 1992, regarding the Commission's approach to the project. The memorandum clearly contemplated both an interim and a final report. The purpose of the CORE Interim Report was described as follows:

To report to the public and Cabinet on the specific process, timing and cost to the Commission in an objective form.

The stated time line for the initial report was two to three months. The report was to include consultations, a review of major technical issues, identification of competing values, an overview of regulatory processes, a preliminary analysis of options, and recommendations on process, timing and budget for the final report.

The purpose of the final report was described as follows:

To report to the public and Cabinet with recommendations on the realistic options for land use in the Tatshenshini area, including the environmental, social and economic consequences and other issues that must be addressed by Cabinet in their final land use decision.

The final report was expected to take twelve to eighteen months to complete and was to cover issues, options, consequences, analysis and recommendations.

The CORE Interim Report on Tatshenshini/Alsek Land Use was issued six months later on January 20, 1993. The Interim Report identified three major options regarding land use in the area:

1. wilderness preservation and limited ecotourism;
2. integrated use, including mining; and
3. delaying a land-use decision.

CORE did not recommend a preferred land-use option in its Interim Report. It did make a recommendation regarding public input:

Recognizing that the objectives and interests in the area are diverse, the Commission recommends that government provide further opportunity to receive comments from interested parties on the issues raised in this report over the next six months. ... Government may wish to consider, perhaps guided by initial comments, providing for some public meetings in selected centres such as Vancouver, Smithers, Terrace and Prince George to hear and record the views of the public and particularly interested parties. Such meetings could be convened either by the Commission, by a legislative committee, or directly by government.

CORE's Interim Report was given broad distribution and received considerable press coverage. It was generally perceived that a public discussion of the land-use options presented in the report would take place both before CORE developed its final report and recommendations and before Cabinet made a land-use decision.

Government did not carry out the consultation process recommended in the Interim Report. CORE was not asked to do anything further after submitting its Interim Report. Government did not refer the matter back to CORE and CORE did not issue a final report. Cabinet made a provisional decision to endorse the wilderness preservation option on May 19, 1993, which was confirmed as a final decision on May 26, 1993.

The Honourable John Cashore, then Minister of Environment, Lands and Parks, met with the CORE Commissioner the evening before Cabinet's land-use decision was announced publicly. He advised the Commissioner of the decision and asked if he intended to do a follow-up report. The Commissioner advised the Minister that he did not intend to do a final report because he had already dealt with implementation issues in the Interim Report.

Cabinet's land-use decision was announced publicly by press release dated June 22, 1993. The main points in the press release were that:

1. The entire Tatshenshini/Alsek region would be permanently protected as a Class A provincial park and nominated as a World Heritage Site.
2. In making its decision, government was faced with a choice between preserving the area in its entirety and allowing mineral resource development in the heart of the area. The CORE report had made it clear to government that the two could not co-exist.
3. The decision was without prejudice to aboriginal treaty negotiations.
4. Government would compensate holders of mineral claims fairly when their ability to develop their claims is taken away by a provincial land-use decision and that government would begin discussions with claims holders in the Tatshenshini area on compensation issues.

The Order in Council establishing Tatshenshini-Alsek Wilderness Park and setting its boundaries was approved on October 15, 1993. The area, approximately 958,000 hectares, was declared a World Heritage Site by UNESCO in December 1994.

TECHNICAL REVIEWS AND STUDIES

Mine Development Assessment Process

The Chamber of Mines has complained that the Mine Development Assessment Process ("MDAP") for the Windy Craggy proposal had not proceeded much beyond the prospectus stage and that, therefore, the data and engineering studies relied on in the CORE process were of a very preliminary nature. The Chamber argues that the MDAP should have been allowed to proceed to allow evaluation of the mining option based on more complete studies.

In the Overview of the CORE Interim Report, the Commissioner stated:

This land use question must be distinguished from the permitting process under the Mine Development Assessment Process, in which the proponent of the Windy Craggy copper mine, Geddes Resources Ltd. (Geddes), was involved. ... If the land use decision is to protect the area from resource extraction, then the mine development permitting process will be cancelled and the issue of compensation to Geddes will have to be considered. If mining is determined to be an acceptable land use for the area, then the permitting process will continue to determine if the proposal can meet appropriate standards, in Canada and the U.S.

I am satisfied on the evidence that Geddes preferred to have a land-use decision made before proceeding further with the MDAP. Geddes was the applicant in that process and would bear the principal costs of further feasibility studies. If Geddes agreed that the MDAP be suspended until the land-use decision was made, government cannot be faulted for doing so. In any event, it was a reasonable course of action in the circumstances to proceed with the land-use question first.

I am, therefore, unable to substantiate the Chamber of Mines' complaint that the MDAP should have been allowed to continue.

Geological Survey Branch Study

In 1992, the Geological Survey Branch of the Ministry of Energy, Mines and Petroleum Resources undertook a systematic geological mapping of the Tatshenshini/Alsek area in order to assess its mineral potential. The geological survey was designed to be a two-year process, and the area of highest mineral potential was surveyed in the first year. The Chamber of Mines complained that the 1993 field work was not completed, and suggested that the decision to terminate the study may have been related to the timing of the land-use decision.

Documents provided by government show that, prior to the termination of the geological survey, CORE had made a recommendation that the Tatshenshini mineral evaluation field surveys not be funded. According to ministry documents, the reasons provided by CORE for its position were that "CORE has made its recommendation" and "Cabinet will soon make a land-use decision."

The decision to terminate the study was made in early March, after the CORE Interim Report was handed down and before the land-use decision was made by Cabinet. It was considered that the second year of the survey was not likely to add value to Cabinet's deliberations, since Cabinet had been advised that mineral values in the region were very exceptional, based on existing information. The survey was not needed under CORE's "mining" or "protection" options, only under its "defer decision" option. If Cabinet were to choose the latter option, there would be time in a future field season to complete the survey.

The cancellation of the second year of the geological survey in the Tatshenshini area shortly after the CORE Interim Report was released does not establish that a land-use decision had been made at that point of time. It does suggest that it was felt that existing geological information was sufficient for Cabinet to make a land-use decision. In that context, I find that the decision to cancel the geological survey at that time and in those circumstances was reasonable.

COMMITMENT TO PUBLIC INVOLVEMENT IN THE LAND-USE DECISION PROCESS

Ministerial Statements

On April 6, 1992, the Honourable Dan Miller made a Ministerial Statement to the Legislature on behalf of the Honourable Anne Edwards, Minister of Energy, Mines, and Petroleum Resources concerning "the Windy Craggy copper-mine project and the related issues of land use in the Alsek-Tatshenshini area." He outlined the concerns that had been raised regarding the project and stated:

First, before any decisions are made on the Windy Craggy project itself, this government will ensure that a full range of land and water use options for the Alsek-Tatshenshini are considered and evaluated. These will no doubt include an option for complete preservation of the area, options for carefully controlled mineral and resource development, and options for protection and preservation of key areas required for wildlife protection and tourism.

The process for evaluating the land use options will be public. It will be fair. It will consider economic, socioeconomic and environmental benefits, and implications of each option. Special attention will be given to aboriginal interests. ...

If, as a result of this evaluation, the government determines that mineral development is among the preferred land uses for the region, we will then be in a position to consider specific mining proposals such as Windy Craggy. In that event, rigorous review of the Windy Craggy project will resume. That review will include a formal public hearing by an independent panel.

In a news release issued on July 20, 1992 to announce CORE's involvement in the Tatshenshini-Alsek land-use issue, the Honourable Anne Edwards, Minister of Energy, Mines and Petroleum Resources, and the Honourable John Cashore, Minister of Environment, Lands and Parks, stated that the issue was referred to CORE "to help decide on the future land and water use of the area based on a fair, open and balanced process." Further, with respect to the need to make a decision and resolve uncertainty, Minister Cashore is quoted as stating "but only after full public evaluation of the facts and options."

The CORE Process

Public participation was intended to be a cornerstone of the CORE land-use planning process. Subsection 4(2) of the **Commissioner on Resources and Environment Act** states, in part, that: "The commissioner shall facilitate the development and implementation, and shall monitor the operation, of ...

community based participatory processes to consider land use and related resource and environmental management issues.”

In his overview of CORE's Interim Report on Tatshenshini/Alsek Land Use, the Commissioner outlined the mandate he was given by government regarding the Tatshenshini/Alsek land-use planning process:

The Commission has been asked to review and report publicly to Cabinet on the major options for land use in the area and on fair, open and balanced processes related to each. ...

The Commissioner's overview concludes as follows:

This report provides an initial review and analysis of the major factors to be considered by the Province of British Columbia in making the land use decision for the Tatshenshini/Alsek area. It also recommends processes which should be completed prior to the full adoption of any particular option in order to ensure that the requirements of fairness, balance and accountability are applied.

It is recommended that prior to deciding on an option and engaging the recommended processes, the provincial government provide an opportunity over the next six months for consultation and comment on this report, either through the Commission on Resources and Environment, or directly.

The overview, and the report itself, were clear that the report was intended by the Commissioner to be an interim report in the sense that CORE was not recommending a particular land-use option, and that it was based on preliminary data only. The consultants' reports, which CORE retained and incorporated into its Interim Report, and which comprised Volume Two of the report, were also clearly qualified and preliminary.

In view of the responsible Ministers' public statements on the purpose of CORE's involvement in the land-use review process, CORE's release of what it stated was an initial review based on preliminary data, CORE's recommendation of a period for consultation and comment on its report, and CORE's statutory mandate, it is reasonable that interested parties would have assumed that they would have an opportunity to comment on the issues raised in the Interim Report, and that CORE would issue a final report before the land-use decision was made.

→ This did not happen. CORE released its Interim Report on January 20, 1993. Cabinet made the decision to preserve the Tatshenshini/Alsek area in May 1993, and its decision was announced publicly on June 22, 1993. The expected open public consultation process did not occur and, since the land-use decision had been made, CORE did not make a final report.

Government's explanation to this Office for not engaging in the recommended public process following the release of CORE's Interim Report is as follows:

Delivery of the C.O.R.E. report to government in January of 1993 was given wide media coverage, and copies were supplied to all interested parties. In the six months following the receipt of the C.O.R.E. report in January 1993, the government received numerous representations on this issue.


The government did consider a further public process, but, given:

- that the preceding years of public discussion and debate on this issue (including the C.O.R.E. review) has allowed British Columbians a full opportunity to air their views;*
- that the C.O.R.E. report indicated that a consensus on this issue was unlikely; and*
- that the parties most directly involved in the dispute had made it very clear that they wanted a decision, not more discussion,*

government chose to make a land use decision for the area.

I make the following observations on this rationale:

1. Although government may have received numerous representations in the six months following the CORE Interim Report, the land-use decision was made less than four months after the release of the report. Government has advised this Office that there was no time for the Minister of Energy, Mines and Petroleum Resources to meet with the Chamber of Mines before the land-use decision was made.
2. The preceding years of public discussion and debate during the Mine Development Assessment Process were focused initially on the question of road access and, later in the process, on technical design problems at the mine site. This did not provide opportunity for full and open public debate on the broader range of issues and options identified in the CORE Interim Report as being relevant to the land-use decision.
3. As discussed below in this reporting letter, the CORE review leading to its Interim Report was not a comprehensive and open public process. CORE did recommend that the public be given an opportunity for consultation and comment on the Interim Report to be implemented by government or by CORE but this recommendation was not acted upon.

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4. Government's responses to this Office make it very clear that government considered that the parties "most directly involved in the dispute" were Geddes Resources Limited and the environmental groups opposed to development in the area. In stating that the "parties most directly involved in the dispute" wanted a decision, not more discussion, government failed to consider the perspectives of other parties with significant interests in the land-use issue, including smaller tenure holders, and the public generally.

CORE's Interim Report and Recommendations to Cabinet

Our investigation discloses that government and CORE appear to have had discordant views on whether the CORE Interim Report was, in essence, a final report. Despite being referred to as "interim", the Interim Report appears to have attained most of the Commissioner's intended objectives of CORE's land-use review.

In the Overview of its Interim Report, CORE outlined what it had accomplished to that point:

This report considers three major options for land use in the Tatshenshini/Alsek area: wilderness protection, integrated use including mining, and delaying a land use decision. The positive and negative aspects of each option are considered, and the processes which would have to be followed before any option could be realized are set out. The principles of fairness, balance and public accountability discussed above are applied.

The concluding observations on page 104 of the report note that:

To facilitate the analysis [of land use choices], three general options were identified and measures of the competing objectives were developed and applied to systematically outline the key environmental, economic and sociopolitical features of each option.

The evaluation of the land-use options in Chapter 7 of the Interim Report not only describes the land-use options for the Tatshenshini region, but also includes an analysis of the extent to which each option achieves the major objectives of the land-use evaluation process for the area. The implications of selecting each option are analyzed in terms of concerns that might arise and how they could be addressed, and the actions and processes that would be required to implement the decision.

The above coincides to a significant extent with CORE's objective for its final report, as determined when it commenced its review:

To report to the public and Cabinet with recommendations on the realistic options for land use in the Tatshenshini area, including the environmental, social and economic consequences and other issues that must be addressed by Cabinet in their final land use decision.

Notwithstanding the qualifications regarding the preliminary nature of the data and the recommendation for further consultation, it is my conclusion that the form and content of the Interim Report were essentially that of the anticipated final report.

This is consistent with government's understanding of the report. Government advised this Office:

Cabinet did not view this report as interim. Moreover, the Commissioner did not propose a specific schedule or subject for a "final" report.

The Commissioner on Resources and the Environment suggested three options for a land use decision in the Tatshenshini/Alsek region.

The Commissioner also noted several areas where more information would be useful, but did not propose to collect that information. He also noted, in his interim report, that "... The province is faced with a land use decision which is unlikely to be resolved through consensus negotiations ..." (p. 4)

Finally, the Commissioner said very clearly that, while "... Considering the options and recommending processes for land use planning in the Tatshenshini/Alsek area fit into the Commission's mandate ...[but]... it is important that the ultimate land use decision be taken by the provincial Cabinet which is politically accountable. In this context, the role of the Commission on Resources and the Environment is merely advisory ..." (pp. 4-5)

These were among the factors that led government to make a land use decision in the area in the spring of 1993.

There was no reference made in the CORE Interim Report to CORE issuing a final report nor to CORE's plans regarding the Tatshenshini/Alsek project beyond its Interim Report. The Interim Report made no recommendations on the process, timing or budget for its final report, as had been intended for the Interim Report. Its only recommendation was that government provide an opportunity for comment on the Interim Report before making a land-use decision.

It appears that the original objectives of the interim and final reports became compressed and blended to a large extent. The CORE employees who were

directly involved in the project have explained that the content of the Interim Report was affected once the scope and complexity of the issues emerged. They stated that the purpose of the report was to inform government's decision making on the land-use issues and that the question for CORE in drafting the report became what was achievable in terms of clarifying the options.

CORE decided that it would produce as complete a technical report as possible, given the preliminary nature of the data and the time constraints for producing an Interim Report. Once the Interim Report was released, there was little contact with government as CORE awaited direction from government on whether and how to proceed further with the project.

The Chamber of Mines took issue with the contents of the CORE Interim Report on a number of different grounds. The Chamber has also complained that the issuing of an Interim Report, before the factual assumptions and technical analysis could be tested and verified, was highly prejudicial to the land-use decision. They argued that only a complete and final report should be used in the decision-making process.

I do not consider that it was improper for CORE to issue the Interim Report. CORE's terms of reference envisioned an Interim Report that would include a review of major technical issues. In this respect, while the format of the report changed, it clearly stated that it was preliminary and clearly outlined the limitations of the technical information on which it was based.

FAILURE TO CONSULT

Chamber of Mines' Attempts to be Heard

As a representative of the mining industry in B.C., the Chamber of Mines had a substantial interest in the decision-making process regarding land use in the Tatshenshini/Alsek area. The Chamber had been identified in an assessment prepared for CORE as an "interested and involved" party who was one in a list of "proponents and supporters."

The Chamber of Mines also had serious concerns with the data used in the CORE Interim Report and the assessment of the data both in the CORE Interim Report and in the consultants' reports. Despite government assurances that the land use review process would be fair, open and public, the Chamber complained that it was frustrated in its attempts to have its views considered.

On April 23, 1993, the Chamber wrote to the Minister of Energy, Mines and Petroleum Resources with copies to the Premier, two other Ministers of the Crown and to CORE expressing "serious concerns" with the CORE Interim Report. The Chamber had appointed a committee of engineers, geo-scientists and other experts to carry out an analysis of the report. The analysis was expected to be ready for submission towards the end of May and, accordingly, the Chamber requested that any government reviews be deferred "pending [its] examination of the findings of our work."

On May 11, 1993, the Chamber again wrote to the Minister, with a copy to CORE, to forward the preliminary findings of the review committee. Their letter expressed concerns that the CORE Interim Report was "flawed and biased" and requested a meeting with the Minister and her staff.

The Minister of Energy, Mines and Petroleum Resources did not reply to the Chamber's letters until July 15, 1993, well after the final decision had been made by Cabinet and publicly announced. The Minister's offer to meet was rejected by the Chamber as the land-use decision had already been made.

The Chamber had similar difficulties in seeking the opportunity to make representations to CORE. On May 7, 1993, the Chamber sent a petition to CORE signed by more than fifty professional geologists and engineers. The petition and the Chamber's covering letter alleged breaches of the "code of professional conduct and standards for the preparation of technical reports" of the Association of Professional Engineers and Geoscientists of British Columbia, particularly in regard to the Appendices in Volume 2 of the CORE Interim Report. The petition and letter both requested that there be a professional review of the CORE Interim Report.

CORE did not respond directly to the Chamber's petition or letter. On May 26, 1993, however, the CORE Commissioner wrote to the Minister of Energy, Mines and Petroleum Resources, with a copy to the Chamber, to comment on the Chamber's preliminary findings on the CORE Interim Report. He concluded his letter as follows:

The controversial nature of current information about the Tatshenshini/Alsek area was recognized and discussed in the Commission's findings and description of land use options, and led the Commission to recommend a six-month public consultation process prior to a cabinet decision on land use in the area.

... [the Chamber's] conclusions about the Commission's report appear to lend support to implementation of the Commission's recommendation that further consultation take place. This would enable the Chamber, as well as other interests which take issue with information presented in the Commission's report, to amend and supplement that information in public forums, thus ensuring that Cabinet has the benefit from hearing from all parties prior to making a decision that best reflects the public interest.

The Chamber of Mines, and others, did not have sufficient opportunity to comment on the analysis of land-use options presented in the CORE Interim Report. I believe that the refusal of the Minister of Energy, Mines and Petroleum Resources to meet with the Chamber of Mines before the land-use decision was made was inconsistent with her commitment to a fair and public review process and that in the circumstances this amounted to an unfair omission on the part of the government.

At my suggestion, government has indicated it may be prepared to acknowledge in a letter to the Chamber of Mines that the Chamber of Mines was not given sufficient opportunity to present and receive a response to their concerns with the CORE Interim Report and the Tatschenshini/Alsek Land Use decision process. The letter ought to express regret at this oversight. The context of my investigation into the process leading to the land use decision, and of the subsequent efforts of the Minister of Energy, Mines and Petroleum Resources to improve consultation with the mining industry (described below), I would consider this a sufficient resolution to this aspect of the Chamber's complaint to this Office.

Interests of Significantly and Directly Affected Parties

Section 5 of the *Commissioner on Resources and Environment Act* states:

5. If the commissioner believes that a person or group will be significantly and directly affected by a land use issue or related resource or environmental issue under consideration by the commissioner, the commissioner shall inform that person or group and give that person or group an opportunity to make representations to the commissioner on the issue before the development of the recommendation or report.

The interests of approximately thirty tenure holders were affected by the Tatshenshini/Alsek land-use decision and the creation of the provincial park. These interests include mineral tenures, placer tenures and crown grants. The Chamber of Mines has complained that none of the tenure holders, other than Geddes, were notified that they might be subject to expropriation or termination of their interests by the province.

CORE has confirmed that there was no correspondence between CORE and any potentially affected tenure holders other than Geddes. Nor were there any background briefing materials prepared by or for CORE regarding the interests of the other tenure holders. There does not appear to be any specific mention of the interests of these tenure holders in the CORE Interim Report and it appears that there was little, if any, consultation with these tenure holders before CORE's interim recommendation was made. The CORE Interim Report identified, as a process issue for the wilderness option: "fair treatment and appropriate compensation to Geddes Resources." It did not mention the other tenure holders in this context.

CORE's Response

In response to our written inquiries regarding CORE's review of the land-use issues, CORE pointed out:

First, it was our intention, from the very beginning, to issue an interim report outlining the options that are available and recommending a process by which to select one of these options. At this stage, we did not intend to examine any of the available options on its merits. Rather, we intended to provide an overview of the issues and possible risks that required further study.

... As far as we were concerned, Geddes Resources Limited was the party who was potentially most seriously affected by a land use decision. Although some dialogue took place between our consultants and other interested parties, we spent considerable time meeting with Geddes representatives.

With respect to canvassing the interests of smaller tenure holders, CORE responded to my Office:

The recommendation made by the Commission in its interim report was that the government, prior to deciding on a land use option, provide an opportunity, over the next six months, for consultation and comment. ...

*This recommendation was intended to give those who might be affected by such a decision an opportunity to be heard. The Interim Report, a public report that was widely distributed, readily available to anyone, and the subject of much media discussion, served as the information required by s.5 of the **Commissioner on Resources and the Environment Act**.*

I acknowledge that CORE made a clear recommendation for further consultation before a land-use decision was made, and that the interests of tenure holders could have been canvassed as part of that process. In satisfying his duty under s.5 of the **Commissioner on Resources and the Environment Act**, the Commissioner had a duty to consult with those whose interests may be “significantly and directly affected” by a land-use decision. The latter are entitled to timely opportunity to be heard which is, in accordance with the statute, before the making of a recommendation or report.

Tenure holders were clearly within the class of “a person or group [that would] be significantly and directly affected by [the] land-use issue.”

CORE did recommend there be an opportunity for consultation and comment prior to the making of the land-use decision. However, the recommendation left it to government’s discretion whether the consultation took place. Secondly, CORE’s recommendation left it to government’s discretion whether CORE would even be involved in the consultation and comment process.

CORE’s recommendation, in part, was that **government** directly or through CORE provide interested parties such as the Chamber of Mines with an opportunity for comment on the Interim Report. Government did not refer the matter to CORE for the purpose of completing the consultations pursuant to s.5 of the **Commissioner on Resources and Environment Act** and preparation of a final report. As a result, CORE had not completed its statutory mandate by the time of Cabinet’s land-use decision. I do not believe, however, that this constituted a breach of any obligation on CORE’s part.

The CORE process was incomplete. CORE properly determined that, in the interests of “fairness, balance and public accountability,” the public should have the opportunity to comment on the Interim Report. In the end, the Chamber of Mines, and others, did not have sufficient opportunity to comment on the analysis of land-use options presented in the CORE Interim Report.

I consider that the decision not to complete CORE's review of the land-use issues resulted in a significant deficiency in the land-use review process. The fact that the CORE Interim Report had suggested that consensus on the land-use issues was unlikely was not a reason to deny interested parties their input into the decision, particularly given government's commitment to a fair, open and public process.

Remedy

Government has provided evidence that the interests of tenure holders were taken into consideration before the land-use decision was made. Government advised this Office that:

Cabinet was alerted to the existence of mineral claims located in the region. The presence of claims was alluded to by CORE, both in its summary report, and in the background report on potentially affected parties and interests prepared for CORE by Cormick and Associates. The issue was also flagged in the key Cabinet Submissions: ...

That Cabinet recognized the importance of the issue is also reflected in the Premier's commitment to compensate affected claims holders, made in his June 22, 1993 announcement that the Tatshenshini Park was to be created.

Government wrote to individual claims holders to advise them of the land-use decision, completed an analysis of the claims holders and contacted each of them to begin compensation negotiations. On August 18, 1995, government announced a settlement of the claims of Geddes, the largest tenure holder. Negotiations with other tenure holders are ongoing and this Office will continue to monitor those negotiations.

Although there was no direct consultation with tenure holders other than Geddes Resources Limited prior to the Cabinet decision to preserve the area, I consider that government's commitment to compensate tenure holders affected by the land-use decision constitutes an appropriate remedy to any concerns regarding lack of consultation with the smaller tenure holders.

CHANGES AND INITIATIVES

Since the Chamber of Mines made its complaint to this Office, there have been a number of changes in how environmental assessments and land-use planning are administered in British Columbia. There were also significant efforts by the Minister of Energy, Mines and Petroleum Resources to improve consultation with the mining industry and to encourage cooperation between the mining industry and the environmental community. Although CORE ceased operations in February 1996, the provincial government had already established two separate offices to deal with land-use planning and environmental reviews of proposed industrial projects.

Land Use Coordination Office

The Land Use Coordination Office (LUCO) was created in January 1994 to serve as the central agency for government land-use planning. It began as a division of the Ministry of Environment, Lands and Parks but evolved into a separate agency reporting to Cabinet's Environmental Land Use Committee (which is comprised of the Minister of Environment, Lands and Parks, the Minister of Forests and the Minister of Employment and Investment). LUCO coordinates the development of land-use policy by government ministries and ensures that land-use plans at the regional and sub-regional levels are well integrated and consistent with government's strategic land-use plans.

LUCO is the agency responsible for ensuring that all land-use values are identified and all relevant issues and impacts are set out objectively for land-use decisions. It sets out policies and processes to facilitate public involvement and participation, and coordinates public information processes to increase key stakeholders' awareness and understanding of land-use planning initiatives. More recently, LUCO was given responsibility to coordinate ministries' efforts in resolving compensation issues arising from designation of protected areas and as a result of treaty negotiations and settlements.

Environmental Assessment Office

The *Environmental Assessment Act* was proclaimed on June 30, 1995. It brought together environmental assessment processes for all major projects and development in the province. Formerly, environmental assessments for different industries were conducted under separate legislation and agencies. The Environmental Assessment Office (EAO) is responsible for the overall administration of project reviews and is headed by a Deputy Minister reporting to the Minister of Environment, Lands and Parks. Project reviews assess not only environmental and economic impacts but also potential social, cultural, heritage and health effects.

Depending on the nature and extent of the proposed project, the environmental assessment process can proceed through three stages. At each stage there is opportunity for the public to comment on the application. At the Application Review stage, the EAO sets up a Project Committee consisting of representatives of various levels of government and First Nations. The Project Committee may make a recommendation for the responsible Ministers to make a decision on the application or may request a more detailed proposal from the proponent. This second stage of review may again result in a recommendation by the Project Committee for a decision by the responsible Ministers. Projects that require a public hearing to assist in the resolution of technical issues proceed to the third stage: hearings by the Environmental Assessment Board. Following these hearings, the Board makes its report to Cabinet, which makes the decision on the project application.

Projects subject to review include aquaculture/food processing plants, energy projects, industrial projects, mining projects, tourism and recreation projects, transportation projects, waste disposal projects and water management projects. Projects that began a process of environmental review under previous procedures, such as the Mine Development Assessment Process, are continued under this new legislation.

Specific timelines are in place that are intended to ensure that the review proceeds in an efficient manner. The **Act** also allows for the simultaneous assessment of related permits and licences that a proponent will require. This process enables approved projects to begin more promptly following the issuance of a certificate approving the project.

Whitehorse Mining Initiative

Soon after the Tatshenshini/Alsek land-use issue was referred to CORE, the Canadian mining industry initiated a new process. This process was designed to improve the understanding of all stakeholders on the wide range of values and benefits to be recognized from a prosperous mining industry that accepts the importance of maintaining healthy and diverse ecosystems. This understanding was formalized in a comprehensive written strategic vision signed by a diverse alliance of stakeholder/participants in September 1994. This document of nearly two hundred pages was called the Whitehorse Mining Initiative.

The introduction to the document summarizes the genesis and outcome of the Whitehorse Mining Initiative:

The Mining Association of Canada, on behalf of the mining industry, took a suggestion for a multi-stakeholder process to the mines ministers of all senior

governments at their annual conference in Whitehorse in September 1992. The ministers agreed to become co-sponsors and trustees of the process and named it the Whitehorse Mining Initiative (WMI). Representatives of five sectors of society agreed to participate. They were the mining industry, senior governments, labour unions, Aboriginal peoples, and the environmental community.

Full-scale discussions began in February 1993 and, eighteen months later, culminated in this Accord.

The Accord adopts a strategic vision for a healthy mining industry in the context of maintaining healthy and diverse ecosystems in Canada, and for sharing opportunities with Aboriginal peoples. It calls for improving the investment climate for investors, streamlining and harmonizing regulatory and tax regimes, ensuring the participation of Aboriginal peoples in all aspects of mining; adopting sound environmental practices; establishing an ecologically based system of protected areas; providing workers with healthy and safe environments and a continued high standard of living; recognition and respect for Aboriginal treaty rights; settling Aboriginal land claims; guaranteeing stakeholder participation where public interest is affected; and creating a climate for innovative and effective responses to change.

British Columbia Advisory Council on Mining

The Honourable Anne Edwards, then British Columbia's Minister of Energy, Mines and Petroleum Resources, was Co-Chair of the Whitehorse Mining Initiative Leadership Council. In February 1995, Minister Edwards announced the establishment of the British Columbia Advisory Council on Mining to advise the Minister on the implementation of the recommendations of the Whitehorse Mining Initiative Accord in British Columbia. The Advisory Council was to provide the Minister with advice on new or proposed programs, serve as a forum for stakeholder concerns and develop a statement of commitment with respect to mining in British Columbia.

The Advisory Council represented the mining industry, labour, environmental groups, municipalities and the public. On June 2, 1995 the members of the Advisory Council signed a "Commitment to a Healthy, Sustainable and Environmentally Responsible Mining Industry" (Commitment on Mining) with the following statement of vision:

The British Columbia Advisory Council on Mining has been formed to further the spirit of cooperation which led to the Whitehorse Mining Initiative Accord and to proactively and cooperatively implement the accord in British Columbia.

Our vision is of a socially, economically and environmentally sustainable, accountable and prosperous mining industry in British Columbia, underpinned by political and community support.

Our approach is based upon our recognition that the natural environment, the economy, and British Columbia's many cultures and ways of life are complex and fragile, and each is critical to the survival of a modern society. Furthermore, no aspect of social, economic, and environmental sustainability can be pursued in isolation or be the subject of an exclusive focus without detrimentally affecting other aspects. These goals must be pursued in a manner that is flexible enough to accommodate changing economic, environmental and social requirements.

We, the British Columbia Advisory Council on Mining, are committed to our approach and are committed to achieving our vision.

The Commitment on Mining also lists the understandings and principles upon which the work of the Advisory Council is based. It was signed on behalf of the mining industry by Gary Livingstone, President and C.E.O. of the Mining Association of British Columbia, and by Jack Patterson, Managing Director of the British Columbia & Yukon Chamber of Mines. Minister Edwards, and then Premier, Mike Harcourt, were also signatories to the Commitment on Mining.

One of the major recommendations of the Advisory Council was to eliminate the duplication and overlap resulting from the jurisdiction shared by the federal and provincial governments over environmental issues. Some projects are subject to environmental review under both the B.C. **Environmental Assessment Act** and the **Canadian Environmental Assessment Act**. Both Acts enable agreements between jurisdictions to reduce or eliminate overlap and duplication.

The Advisory Council sent a letter to then federal Environment Minister, the Honourable Sheila Copps, to propose "harmonization" of the administration of the two Acts to achieve the objective of "one project - one assessment" rather than requiring separate assessments of a proposed project under both federal and provincial legislation. As a result, the federal and provincial governments are negotiating a Canada-British Columbia Agreement for Environmental Assessment Cooperation.

While the agreement has been under discussion for some time, it is expected shortly. It is expected that, for all projects subject to the B.C. **Environmental Assessment Act**, the provincial Environmental Assessment Office will administer the environmental assessment. As is currently required under the

provincial Act, the federal government will be entitled to comment on key documents submitted by the proponent of a reviewable project and to appoint representatives to sit on each Project Committee established by the Environmental Assessment Office.

At the conclusion of the environmental assessment process, each government will make its respective decisions regarding approval of the project. This allows each government to retain its decision-making role. However, the two decisions will be made on the basis of shared information gathered and analyzed through a single process.

The Advisory Council continued to meet until February 1996, when the Honourable Anne Edwards stepped down as Minister of Energy, Mines and Petroleum Resources. Since then, there has been a restructuring of government ministries. The Energy and Minerals Division is now a part of the Ministry of Employment and Investment. The Advisory Council has not been disbanded but does not appear to be currently active. I am hopeful that the Council will be reactivated when it is appropriate.

I believe that these various changes and initiatives will assist in ensuring significant participation and openness in future decision making regarding land use.

SUPPLEMENTARY ISSUES

Royal Oak Mines

On April 6, 1993, Royal Oak Mines Inc. announced that it had signed an agreement to acquire a 40% interest in Geddes Resources Limited. The Chamber of Mines has raised the concern that organized labour influenced Cabinet's land-use decision against the mining option because of Royal Oak's past labour relations disputes.

The considerations that Cabinet took into account in making the land-use decision relate to the merits of the decision, which are not under review in this investigation. Government's position is that the involvement of Royal Oak Mines with the project did not influence Cabinet's land-use decision and I accept this position.

United States Government Influence

The Chamber of Mines has expressed a concern that the Tatshenshini/Alsek land-use decision was unduly influenced by U.S. interests. There is no doubt that the U.S. federal government expressed a clear and strong concern in favour of protecting the area, which borders Glacier Bay National Park in Alaska, itself designated as a World Heritage Site by UNESCO in December 1992.

The CORE Interim Report gave considerable emphasis to U.S. interests. In defining groups of interests, the report stated: "American interest at the governmental level has already been expressed through the introduction of a joint congressional resolution calling for negotiations for wilderness preservation." The evaluation of options in the report repeats the theme that "recent statements by senior members of the incoming U.S. administration give a clear indication of emerging U.S. pro-preservation policy towards the area."

The CORE Commissioner met with U.S. Congressional officials in Washington, D.C. in the summer of 1992. He was advised that the U.S. Congress would strongly support measures to prevent the Windy Craggy project from proceeding and that all U.S. government agencies, with the exception of the Department of Mines, opposed the project.

Chapter 6 of the CORE Interim Report, entitled "The Regulatory Framework," outlined several reasons for considering U.S. interests in making the land-use decision. These included international treaty obligations and the requirement for U.S. regulatory approvals, since the Windy Craggy mine proposal was a cross-border project with a road, slurry pipeline and port facilities in the United States.

In my view, these were relevant considerations for CORE to identify in its report. The weight placed on those considerations when Cabinet made its land-use decision goes to the merits of the decision, which are not under review in this investigation. I therefore make no finding as to what extent, if any, the land-use decision was influenced by consideration of U.S. interests.

SUMMARY OF FINDINGS AND RECOMMENDATION

1. Government's decision to suspend the Mine Development Assessment Process review of the Windy Craggy project in favour of a review of the land-use issues by CORE was reasonable, given the nature of the issues and the preference of the major proponent (Geddes Resources Limited) for having a land-use decision made before proceeding further with the mine permitting process.
2. The decision to cancel the second year of the geological survey in the Tatshenshini area shortly after the CORE Interim Report was released was reasonable in the circumstances.
3. The public discussion and debate on the Windy Craggy project during the Mine Development Assessment Process was focused initially on the question of road access and, later in the process, on technical design problems at the mine site. This did not provide opportunity for full and open public debate on the broader range of issues and options identified in the CORE Interim Report as being important to the land-use decision.
4. In view of the responsible Ministers' public statements on the purpose of CORE's involvement in the land-use review process, CORE's release of what it stated was an initial review based on preliminary data, CORE's recommendation of a period for consultation and comment on its Interim Report, and CORE's statutory mandate, it is reasonable that interested parties would have assumed that they would have an opportunity to comment on the issues raised in the Interim Report, and that CORE would issue a final report before the land-use decision was made.
5. The refusal of the Minister of Energy, Mines and Petroleum Resources to meet with the Chamber of Mines before the land use decision was made was inconsistent with her prior and public commitment to a fair and public review process. I recommend that government acknowledge to the Chamber of Mines that the Chamber of Mines was not given sufficient opportunity to present and receive a response to their concerns with the CORE Interim Report and the Tatshenshini/Alsek Land Use decision, and that it express its regret at that oversight.
6. The decision by government not to complete CORE's review of the land-use issues or to undertake the kind of consultation recommended by CORE resulted in a significant deficiency in the land-use review process. In the end, the Chamber of Mines, and others, did not have sufficient opportunity to

comment on the analysis of land-use options presented in the CORE Interim Report.

7. CORE was not able to complete the consultation envisioned by s.5 of the **Commissioner on Resources and Environment Act** because of the timing of the land-use decision. I do not believe, however, that this constituted a breach of CORE's obligations.
8. Although there was no direct consultation with affected tenure holders other than Geddes Resources Limited prior to the Cabinet decision to preserve the area, I consider that government's commitment to compensate tenure holders affected by the land-use decision constitutes an appropriate remedy to any concerns regarding lack of consultation by government with the tenure holders.
9. Since the Tatshenshini/Alsek land-use decision, government has developed and implemented revised processes designed to ensure significant input and openness in future land-use decisions.
10. U.S. interests, including international treaty obligations and the requirement for U.S. regulatory approvals, were relevant considerations for CORE to identify in its Interim Report. The weight placed on those considerations when Cabinet made its land-use decision goes to the merits of the decision, which are not under review in this investigation. I therefore make no finding as to what extent, if any, the land-use decision was influenced by consideration of U.S. interests.