

Office of the Federal Inspector

Alaska Natural Gas Transportation System

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Federal Building, Suite 107
605 4th Avenue
Anchorage, Alaska 99501

18 JAN 1982

MEMORANDUM

TO: John T. Rhett, Federal Inspector

FROM: Peter Esposito, Attorney, Anchorage 

SUBJECT: Joint Agreement with State of Alaska, Philosophical
Issues Briefing Paper

PURPOSE

As you know, Chuck Behlke was sent the attached list of philosophical issues outstanding in negotiations between the OFI and SPCO on the joint agreement. These are proposed to be the topics of discussion when you, he, and Mo meet in Irvine this week. In order to give you a clearer idea of the specific areas of difference and still allow you to confine your discussion to philosophical issues, this memo lists the philosophical issues and gives a specific example of resultant language differences that have arisen in negotiations. For each philosophical issue, it also discusses my concerns (and Ned's) on the State's view and recommends an OFI position.

DISCUSSION

I. STATE LEGAL REQUIREMENTS: INCORPORATION OF ALL OR "APPLICABLE"

Issue: The State has requested inclusion of language in various provisions that would have the effect of, in one way or another, including all State legal requirements in OFI authorizations and enforcement actions. This could effectively preclude the OFI from exercising a veto based on federal preemption and may impinge on Federal Inspector discretionary authority.

Example: The State wants federal NTPs to be conditioned to include state legal requirements and vice-versa. ¶13, Permits and Authorizations.

OFI

Proposed language immediately preceding State-proposed addition (right column) calls for mutual review and comment. Then, "the party receiving these comments will reasonably consider the comments."

SPCO

"Each party will incorporate the legal requirements of the other as conditions to notices to proceed." (OR) "Each party's notice to proceed shall be conditioned on compliance with the legal requirements imposed by the other party."

Concerns: The problem with the State view is not the general concept, but the absolutist language proposed. While 99% of the State's legal requirements should be observed on federal and private lands, federal preemption may still apply. (Preemption may apply in more than one circumstance, e.g., when state and federal statutes expressly conflict or when a Congressional purpose would be frustrated if a state law were applied. The State has proposed language that would recognize preemption in the former example only.) Even where federal preemption would not apply, acceptance of the State's proposals on the philosophical issue would shrink OFI's discretionary authority, e.g., by giving the SPCO a mandatory role in the OFI design review and approval process.

Recommendation: Inclusion of qualifying language, such as "applicable" or "appropriate" would allay these concerns.

II. OFI AUTHORITY FOR DESIGN: "PIPELINE INTEGRITY" VERSUS BROADER AUTHORITY OF THE PRESIDENT'S DECISION

Issue: The State would like to limit OFI authority on state lands to issues of pipeline integrity, as to both NTP issuance and enforcement. "Pipeline integrity," as used by the State, would refer to physical integrity and safety issues, such as those addressed in DOT regulations.

Example: OFI 113 (State 112), Surveillance, Monitoring, and Enforcement.

OFI

"The Federal Inspector will monitor and enforce stipulations and laws relating to pipeline design and integrity over the entire pipeline route in Alaska."

SPCO

"The Federal Inspector will monitor and enforce stipulations and relating to pipeline integrity over the entire pipeline route in Alaska."

Concerns: This is not a preemption issue per se, but it would reduce OFI substantive authority on state lands. The Decision gives the OFI broad design authority over the whole route. Corps of Engineers permits will have environmental stipulations applicable to all lands. And, the FERC certificate gives OFI stop-work authority over the entire route, without subject-matter limitations.

Recommendation: State enforcement personnel are perceived as likely to be stricter than their OFI counterparts in the enforcement of environmental authorities. Thus, as a practical matter, it may be unnecessary for the OFI to enforce any but integrity-related stipulations. Nevertheless, OFI should not abrogate its authority, as unforeseen circumstances may necessitate its exercise, e.g., when cost consequences override unsubstantiated State environmental concerns. An option would be to recognize that the State will initiate actions on non-integrity concerns, and then provide a mechanism for quick resolution of any controversies.

III. RECOGNITION OF OFI AUTHORITY ON PRIVATE LANDS

Issue: To avoid the appearance that the SPCO has given authority to the OFI on private lands, the State does not want to mention OFI authority on those lands, even though they recognize verbally that it does exist.

Example: ¶18, Surveillance, Monitoring, and Enforcement.

OFI

"On privately-held lands, the Federal Inspector or designee may issue a stop-work order."

SPCO

Omit

Concerns: Just as the OFI has authority on state lands, it clearly has authority on private lands. Legally, the omission of a reference to OFI authority will not, in and of itself, reduce OFI authority. It may, however, lead to working-level disputes among staff not versed in the legal niceties.

Recommendation: Pursue recognition of OFI authority on private lands. If the agreement is meant to be a set of guidelines to be applied at the working level, leaving an authority gap for political-appearance purposes does not make practical sense.

IV. NTP APPROACH

Issue: This issue is hard to pin down. It has been muddled by an informal State proposal (later retracted) to have the OFI issue NTPs on federal lands after coordination with SPCO and have the SPCO issue NTPs on state lands with the concurrence of the OFI. The latest written position of the State would have OFI issuance on federal lands (with SPCO coordination) and SPCO issuance on state lands (with OFI concurrence limited to pipeline-integrity matters). At this point, I believe the State proposal is for joint NTPs to be issued on both state and federal lands.

Example: Because of the above, I include no example.

Concerns: As noted above, OFI authority on state lands goes beyond pipeline integrity. Furthermore, a joint-issuance approach should not be capable of being construed as giving the State veto power it does not have over NTP issuance on federal lands.

Recommendation: NWA's stated strategy for submission of NTP applications is to have NTPs correspond to a set segment of work, not to land ownership. As a result, a single NTP application may cover state, federal, and private lands. This probably makes joint issuance the best practical approach, particularly if the state ROW lease is virtually identical to the federal grant. However, by accepting a joint-issuance approach, the OFI should make it clear that the State does not have veto authority over NTP issuance on federal (or private) lands and that the OFI may issue NTPs for work on these lands if the State does not meet the schedule.

V. HAUL ROAD INTEGRITY

Issue: The State wants to include absolute assurance of haul road integrity as a principle. The OFI recognizes its importance, but would allow short-term disturbances.

Example: State #18, Principles.

OFI

OFI proposes incorporation of DOI/Alaska agreement, with Rhett-to-Horn caveat, i.e., only long-term adverse effects will be expressly prohibited.

SPCO

"[I]t is recognized that the physical integrity of [Alaska] roads and airports on federally-granted rights-of-way must not be adversely affected by other uses permitted within those rights-of-way."

Concerns: While integrity of the haul road should be maintained and expressly recognized in the agreement, the State's language could be construed as preventing any intrusion, even for a temporary period. The law expressly allows compatible uses of federally-granted rights-of-way.

Recommendation: Paraphrasing your letter to Horn, 'until final alignment is finished, the option of cutting through, or even running the pipeline in, the road must be retained.' This is what the proposed caveat is intended to accomplish.

VI. SOCIOECONOMICS

Issue: The State wants the OFI to commit to maximizing/minimizing socioeconomic benefits/adverse effects.

Example: State #17, Principles.

OFI

No proposal

SPCO

"It has been the express desire of all major participants in the ANGTS project to maximize the positive socioeconomic impacts and minimize the negative socioeconomic impacts of the project on the people of Alaska. To accomplish this goal and assure compliance with Federal and State laws and stipulations, the [parties] will coordinate actions and planning requirements relating to socioeconomics."

Concerns: It is difficult to define "socioeconomic impacts" so as to be able to describe just how far this provision would take us. The State's proposed socioeconomic stipulations, which the provision would arguably have the OFI help enforce, go well beyond the explicitly stated federal responsibilities in this area (subsistence, Native training and EEO). Moreover, the OFI has already agreed to a principle that would stress "optimal" protection of social and economic values.

Recommendation: Having been personally frustrated by the imprecise and emotional nature of socioeconomic issues, I advise against agreeing

to any language that would further involve the OFI in socioeconomic issues. If any socioeconomic language is to be agreed upon, it should be narrowly worded so as to strictly delineate OFI's responsibilities. To do otherwise will continually immerse the OFI in politically sensitive issues that are best handled by state and local governments and beyond the OFI's explicit authority.

VII. COST/ENVIRONMENT/SCHEDULE CONSIDERATIONS

Issue: State principles proposals emphasize environmental concerns, but the State is not willing to recognize that they must also consider cost effects and only grudgingly recognizes schedule concerns. */

Example: OFI ¶13, Surveillance, Monitoring, and Enforcement.

OFI

SPCO

"Except in emergency situations, before either party's requirements or stipulations which affect the project cost or schedule are imposed, the other party will be provided copies of the proposed requirements and its comments will be considered."

Omit

Concerns: The Decision and ANGTA envision a balance between the concerns. This is presently recognized in the optimization principle expressed in ¶12 of the Principles article. While there are no specific, overriding, legal problems with packing the principles article with statements of environment importance, my experience indicates that staff-level use of documents such as this agreement invariably ignores the distinction between principles and operational provisions. Furthermore, when controversies arise in interpreting operational provisions, gratuitous principles language is often used to cloud the real issue(s).

Recommendation: OFI should not agree to more environmental language without getting something in return. This could be either (1) cost and schedule language or (2) strengthening of the general federal position by recognizing that ANGTA was a Congressional exercise of its full Constitutional powers.

*/ At Ott, above the objection of Meg Greene, accepted an OFI proposal recognizing schedule considerations (to coordinate the timing of approval issuances, taking into account the overall ANGTS schedule), but the State has balked at committing itself to issue approvals on the same schedule called for by the federal ROW grant.

PHILOSOPHICAL ISSUES/examples

- I. STATE LEGAL REQUIREMENTS: INCORPORATION OF ALL OR "APPLICABLE"
Into Federal authorizations
Into design
Encouraging Federal agencies not to issue permits in violation
of State law (possibility of preemption)
State law enforcement on all lands (possible preemption)
- II. OFI AUTHORITY FOR DESIGN: "PIPELINE INTEGRITY" VERSUS BROADER
AUTHORITY OF PRESIDENT'S DECISION
Scope of Federal NTP authority on State lands
Scope of OFI stop-work authority on State lands
- III. RECOGNITION OF OFI AUTHORITY ON PRIVATE LANDS
NTP authority
Stop-work authority
- IV. NTP APPROACH
Joint or concurrence/coordination
- V. HAUL ROAD INTEGRITY
Incorporation of DOI/AK agreement with Rhett to Horn caveats
- VI. SOCIOECONOMICS
Extent of Federal authority/responsibility
- VII. COST/ENVIRONMENT/SCHEDULE CONSIDERATIONS
Recognition that both cost and schedule implications of actions
must be taken into account, as well as environmental