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MEMORANDUM

TO: John T. Rhett
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FROM: Ned Hengerer
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SUBJECT: Legal Authorities Vested in the Office of the Federal Inspector

SUMMARY

In terms of scope of authority, the Office of the Federal Inspector (OFI) is truly unique, with no analogue in past public administration. This authority -- while focused solely on the Alaska Natural Gas Transportation System (ANGTS) -- is expansive, entailing every conceivable Federal regulatory regime relating to gas pipelines. This authority includes design review, cost control, procurement review, assessment of management efficiency, project expedition, permit scheduling, pipeline integrity, environmental protection, public land use, work place and pipeline safety, equal employment opportunity, and consumer protection.

Moreover, this plenary authority is to be implemented during the preconstruction, construction, and initial operation phases of ANGTS. As such, the OFI will be totally involved, not only in field inspection of the actual construction, but also in project design and planning (primarily through a series of OFI approvals of the sponsors' plans, systems, and design).

In terms of how the agency was established, the OFI is also unique. The OFI concept arose in 1976 from a project-specific statute. The concept was expanded in 1977 by a project-specific decision of the President. In 1979 the OFI was established as an independent executive agency, and the myriad legal authorities were transferred to it by reorganization plan, which in turn was made effective by executive order.

STATUTORY BACKGROUND

A. ANGTA

In 1976 ANGTS was given priority status, and thus removed from the standard regulatory process, by the Alaska Natural Gas Transportation Act (ANGTA), Pub. L. 94-586, 15 U.S.C. Section 719. The Congressional purpose of ANGTA was twofold: to provide for a sound selection decision, involving the President, Congress, and many Federal agencies; and to expedite construction --once a system was selected -- through a number of administrative and judicial innovations. One such innovation was the Federal Inspector.

The President was authorized and directed by Section 7(a)(5) of ANGTA, 15 U.S.C. Section 719e, to appoint either a single officer or a board as Federal Inspector, following issuance of his decision selecting a transportation system. 1/ The authorities first envisioned by Congress for the Federal Inspector entail monitoring, as contrasted to actual enforcement. In addition to the authority to establish a joint monitoring agreement with Alaska, to monitor compliance with all Federal laws, to compel submission of information, and to report to the President and Congress, the Federal Inspector was authorized to monitor closely the technical aspects of project planning and execution. 2/

B. President's Decision

Then in 1977 the President selected the Alcan (since changed to Alaskan Northwest Natural Gas Transportation Company) project, as he issued his Decision. 3/ In Section 5 thereof, the President determined that, in order to ensure coordinated government oversight, the Federal Inspector must, in addition to the ANGTA authorities, have "field-level supervisory authority over enforcement of terms and conditions from those Federal agencies having statutory responsibilities over various aspects of (ANGTA)". pp. 41-42. He concluded, however, that the necessary transfer of authorities would have to await a reorganization plan, which of course necessitated compliance with the substantive and parliamentary requirements of the Reorganization Act of 1977, 5 U.S.C. Section 901, et seq.

1/ The Federal Inspector was to be a Presidential appointee. Thus, Senate confirmation was included in Section 7(a)(5).

2/ Specifically, Section 7(a)(5)(C) directs the Federal Inspector to "monitor actions taken to assure timely completion of construction schedules, and the achievement of quality of construction, cost control, safety, and environmental protection * * *"

3/ Decision and Report to Congress on the Alaska Natural Gas Transportation System, Executive Office of the President, Energy Policy and Planning, issued September 22, 1977.

In deferring appointment of the Federal Inspector until after transmitting a reorganization plan to Congress, the President substantially expanded the Federal Inspector concept, from Congress' watchdog to the focus of all enforcement of Federal laws related to ANGTS. 4/ Also as part of Section 5 of his Decision, the President further expanded the Federal Inspector's authority to include pre-approval of the many important planning decisions to be made by the ANGTS sponsors. This took the form of numerous terms and conditions governing construction costs and schedule, safety and design, environmental protection, financing, antitrust, and capacity of facilities. 5/

C. Reorganization Plan and Executive Order

In 1979 the OFI was actually established and the necessary transfer of authorities accomplished through Reorganization Plan No. 1 of 1979. First of all, the OFI was transferred "exclusive responsibility for enforcement of all Federal statutes relevant in any manner to pre-construction, construction, and initial operation" of ANGTS. Section 102 of the Reorganization Plan. 6/ Besides enforcing the legal requirements imposed by the many Federal agencies, 7/ the OFI was also charged with enforcing the terms and conditions found in Section 5 of the Decision, as well as fulfilling the monitoring duties set for the Federal Inspector in Section 7(a)(5) of ANGTA and the supplemental enforcement duties found in Section 11 of ANGTA. But enforcement and monitoring constitute only part of the OFI's authority under the Reorganization Plan. Under Section 202(b), for example, the OFI is to coordinate and expedite the permitting activities of the Federal agencies. This is a permit scheduling function.

The Reorganization Plan became effective as of July 1, 1979, as per Executive Order 12142 of June 21, 1979, 44 F.R. 36927 (June 25, 1979). And with the Executive Order, the OFI officially came into existence.

4/ In his Decision, however, the President contemplated a tripartite structure, in which the relevant Federal agencies would, through their agency authorized officers and membership on an executive policy board, share in the exercise of the Federal Inspector's enforcement authority.

5/ These myriad terms and conditions have the force of law. The President was authorized, by Section 7(a)(6) of ANGTA, to include them in his Decision. And because the Decision in its entirety was given full legal effect, under Section 8 of ANGTA, by joint resolution, H.J. Res. 621, Pub. L. 95-158, 95th Cong.; 1st Sess., these terms and conditions have in essence become statutory in nature.

6/ While the Federal Inspector would have shared his authority with the relevant Federal agencies under the structure conceived in the Decision (see note 5 above), the Reorganization Plan expressly placed full enforcement authority in the Federal Inspector, the Executive Policy Board becoming advisory only.

7/ EPA, the Corps of Engineers, DOT, DOE, FERC, DOI, USDA, and Treasury, and their respective legal authorities, are specifically enumerated, as the most likely to be enforced by the OFI relative to ANGTS.

FUNCTIONS PERFORMED UNDER OFI LEGAL AUTHORITY

When the several sources of OFI authority -- ANGTA, the President's Decision, and the Reorganization Plan -- are brought together and distilled, the product is a novel Federal agency, having functions associated with every aspect of ANGTS planning and execution. For ease of understanding, these functions (and the underlying legal authorities) are here enumerated under five major groupings: general monitoring and oversight; scheduling of permits and other governmental authorizations; review and approval of systems, plans, and design during planning; cost control; and enforcement of Federal statutes and related terms and conditions.

A. General Monitoring and Oversight

The OFI starts with several monitoring functions; the Federal government must be fully aware of all aspects of ANGTS development. 8/ While these functions are more precatory in effect than are the law enforcement functions discussed below, they give the OFI full and complete access to every aspect of ANGTS planning and execution. 9/ Monitoring and oversight entails the following OFI functions:

1.) Coordinating Efforts with Alaska

The OFI is to establish a "joint surveillance and monitoring agreement" with the State of Alaska. 10/ In this way Federal and State enforcement efforts can be coordinated, to avoid conflicts and to enhance efficiency.

2.) Monitoring Compliance with Federal Laws

Concerning enforcement of Federal regulatory laws, the OFI is to monitor compliance with the many Federal permits and other authorizations issued for ANGTS. 11/ This includes compliance with the terms and conditions attached to the authorizations.

3.) Monitoring for Effective Planning

Apart from the specific Federal laws, substantive technical values are also within the OFI's purview. Specifically, the OFI is to "monitor actions taken to assure timely completion of construction schedules and

8/ This monitoring role is authorized by Section 7(a)(5) of ANGTA, and is transferred to the OFI by Section 102(h)(2) of the Reorganization Plan.

9/ This access is reinforced by plenary authority to gather information, by subpoena if necessary. Section 7(a)(5)(D) of ANGTA.

10/ Section 7(a)(5)(A) of ANGTA.

11/ Section 7(a)(5)(B) of ANGTA.

the achievement of quality of construction, cost control, safety, and environmental protection * * *" 12/ The breadth of this monitoring function requires that the OFI closely follow -- which necessitates substantial interaction with the ANGTS sponsors -- all aspects of project planning and execution.

4.) Reporting to Congress and the President

The main purpose of such monitoring functions is to provide the informational support for the OFI's current and periodic reports to Congress and the President. 13/

B. Permit Scheduling and Coordination

The Reorganization Plan differentiates between permitting (so-called "nonenforcement") and enforcement, only the latter function being transferred to the OFI. Nevertheless, the OFI is responsible for scheduling and expediting the issuance of permits and other authorizations by the Federal agencies. 14/ OFI coordination can, for example, take the form of "requiring submission of scheduling plans for all permits;" and "serving as the 'one window' point for filing for and issuance of all necessary permits" and data requests.

This coordination function goes beyond mere permit scheduling. It also involves the OFI in evaluating the many discretionary terms and conditions which each Federal agency will impose on ANGTS, to assure that they do not impair project expedition. 15/ This role is unique in the administrative process.

C. Approval of Systems, Plans, and Design

While much of the OFI's function of enforcing the many permits and other authorizations will be performed during construction itself, a separate grouping of functions has the OFI review and approve every

12/ Section 7(a)(5)(C) of ANGTA.

13/ Section 7(a)(5)(E) of ANGTA.

14/ This scheduling function evolves first from Section 9 of ANGTA, directing all Federal agencies to expedite issuing permits, and then from Section 202(b) of the Reorganization Plan, requiring the OFI to coordinate "the compliance by all the Federal agencies with Section 9 * * *"

15/ Part of the OFI's function, under Section 202(b) of the Reorganization Plan, to coordinate compliance with Section 9 of ANGTA entails this control of discretionary authority exercised by the Federal agencies. Specifically, Section 9(c) of ANGTA precludes Federal agencies from attaching discretionary terms and conditions (those "permitted but not required" by law) which would "compel a change in the basic nature and general route of (ANGTS) * * * or prevent or impair in any significant respect the expeditious construction and initial operation" of ANGTS.

conceivable aspect of ANGTS planning. 16/ All significant systems, plans, and design are subject to OFI scrutiny, as a precondition to commencement of construction. Without listing every approval requirement, the following are the most significant:

1.) Management Plans

The ANGTS applicants must provide a "detailed overall management plan" for OFI approval. 17/ Thus, at the outset the applicant's overall strategy for prosecuting the project must be scrutinized.

2.) Execution Contracts

Several aspects of the contracts with execution contractors must be approved by the OFI. 18/ These include contract form (if other than fixed-price), bonding and other prequalification requirements, labor relations procedures, and dispute procedures.

3.) Cost and Schedule Control

The applicants must provide the OFI with detailed "cost and schedule control techniques." 19/ This requirement opens manpower, material, logistical, and equipment planning to OFI scrutiny.

4.) Operating Strategies

The OFI must approve the applicants' operating strategies. Equipment supply, repair facilities, and spare-part inventories are among the items to be reviewed.

5.) Design Review

The OFI's technical oversight is manifested most in approving "final design, design-cost estimate, and construction schedule" for the ANGTS applicants. 20/ Because construction may not start until this approval is given, final design review is perhaps the OFI's primary means for assuring proper design and planning.

16/ The President's terms and conditions, Section 5 of the Decision, are to be enforced by the OFI, both by the express language of Section 5, pp. 40-41, and also by Section 102(h)(3) of the Reorganization Plan.

17/ Decision, Section 5, Construction Costs and Schedule Condition I.1.

18/ Id., Conditions I. 2, 3, 7, and 8.

19/ Id., Condition I.4.

20/ Id., Condition I.5.

6.) Quality Control and Assurance

The OFI must also approve the procedures proposed for quality control and quality assurance during construction. 21/ Apart from these procedures, the OFI must approve technical construction specifications and seismic monitoring systems, to assure pipeline safety and integrity of design, as well as approve plans to assure environmental protection. 22/

7.) Procurement Review

As part of the bilateral agreement with Canada relative to ANGTS, the OFI, along with the Northern Pipeline Agency in Canada, is charged with endeavoring "to ensure that the supply of goods and services to (ANGTS) will be on generally competitive terms." 23/ Because sanctions for violation include reopening bids, this procurement review occurs during the planning process, not after the fact.

D. Cost Control

Although the desired effect of much of the OFI's monitoring function and of many of the OFI approvals, discussed above, is cost control, the OFI has additional cost control functions. The Incentive Rate of Return, developed by the FERC, is to be administered by the OFI during planning and construction. 24/ Moreover, both by transfer of enforcement function under the Reorganization Plan and also by contemplated delegation from the FERC, the OFI will exercise the consumer protection function of prudence and audit review of expenditures for rate base formation. 25/

21/ Id., Condition I.9.

22/ Id., Safety and Design Conditions II. 2 and 6, and Environmental Condition III.2.

23/ Decision, Section 7, Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, Paragraph 7(a).

24/ Determination of Incentive Rate of Return, Order No. 31, Docket No. RM78-12, issued June 8, 1979.

25/ Section 102(d) of the Reorganization Plan transfers enforcement of the Natural Gas Act, 15 U.S.C. Section 717, and Section 202(b) of the Reorganization Plan authorizes the FERC to delegate any other functions to the OFI.

E. Enforcement of Federal Laws

The OFI's enforcement function extends to "all Federal statutes relevant in any manner to pre-construction, construction, and initial operation" of ANGTS. The specific statutes that have already been identified in Section 102 span the full spectrum of Federal regulatory law. Be they concerned with environmental protection, 26/ pipeline integrity, 27/ public convenience and necessity, 28/ or public land use, 29/ these statutes, and the resulting regulations, permits, and terms and conditions, provide the OFI with the legal authority to oversee every aspect of ANGTS construction.

26/ Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Rivers and Harbors Act, Fish and Wildlife Coordination Act, National Historic Preservation Act, Wilderness Act, Endangered Species Act, Wild and Scenic Rivers Act, National Environmental Policy Act.

27/ Natural Gas Pipeline Safety Act.

28/ Natural Gas Act.

29/ Mineral Leasing Act, Federal Land Policy and Management Act, Materials Act, Rights of Way Through Indian Lands Act, National Wildlife Refuge System Administration Act, Land and Water Conservation Fund Act, National Forest Management Act, Multiple Use-Sustained-Yield Act.