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In-State Demand and AGIA's 500 MMcf/d "competing project " limit

✓ Antony Scott

Division of Oil and Gas

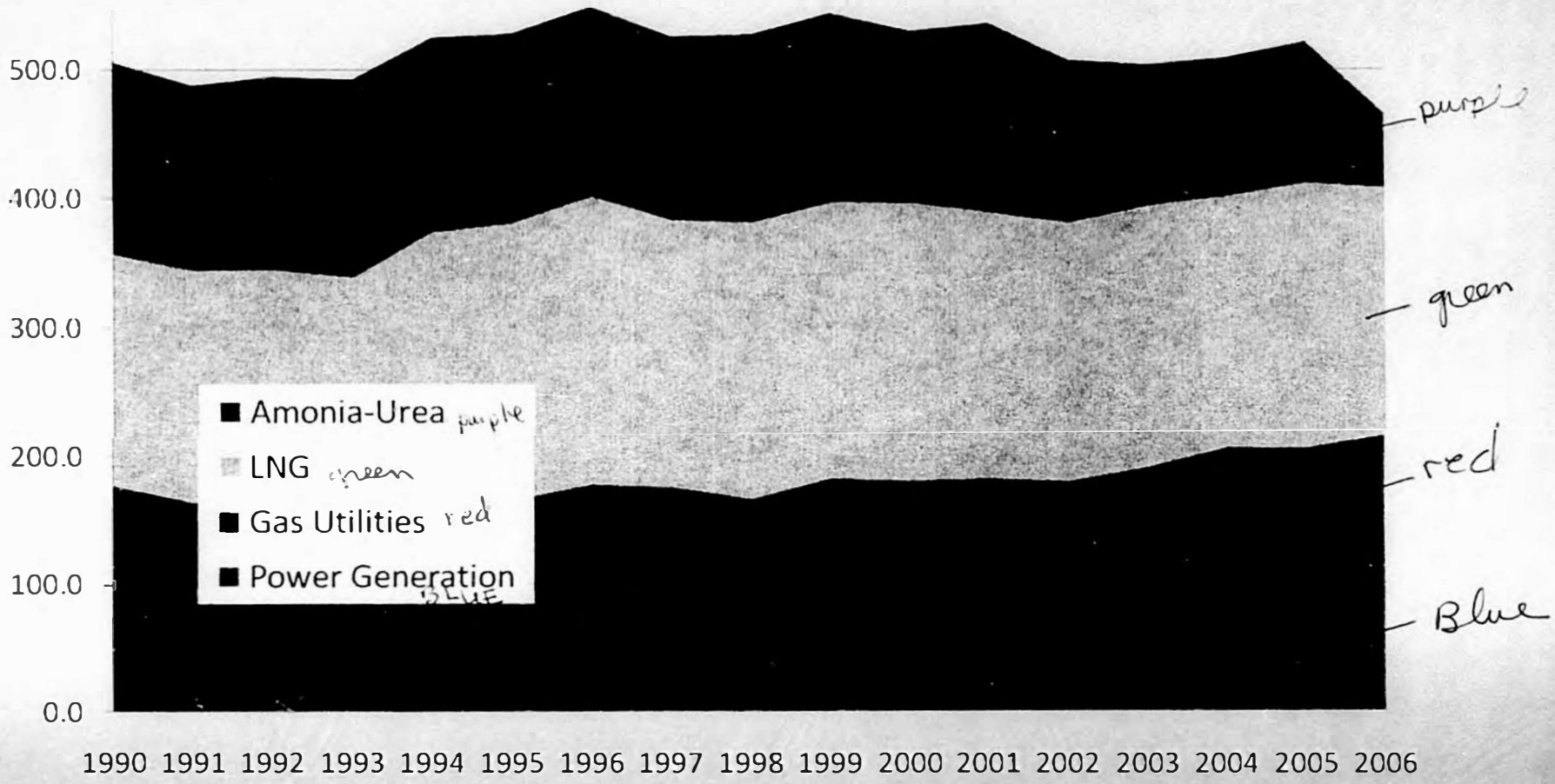
6/25/2008

Will 500 MMcf/d Project Assurance Limit Hinder Meeting In-state Needs?

Key Takeaways

- Average historical daily gas use for electricity and heating has been less than 220 MMcf/d
- Projections of future gas consumption for electricity and heating expected to stay under 300 MMcf/d through the year 2025
- Significant Cook Inlet production will expand opportunities to meet in-state needs

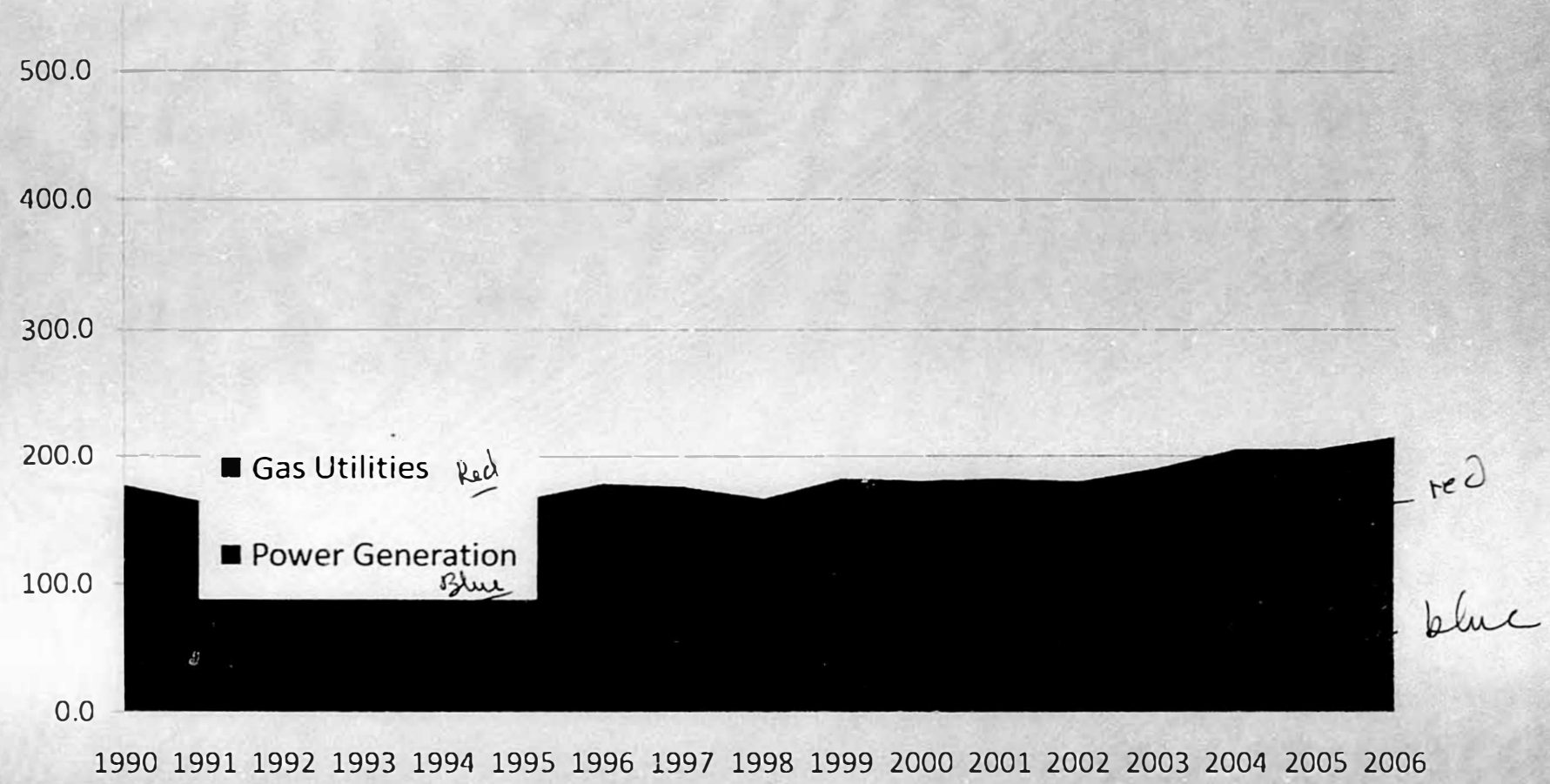
Historical Cook Inlet Gas Disposition, MMcf/d



Source: DNR 2007 Annual Report

Historical In-state Gas Use: Less than 220 MMcf/d

– mostly Cook Inlet (Fbx gas used today comes from C.I.)



Source: DNR 2007 Annual Report

Projected In-State Gas Use: SAIC

Potential Consumption and Prices by Sector

Potential Demand	Sector	Maximum Price $/MMBtu* (2005$)	Demand in 2025
	Residential / Commercial	$8.50	134 MMcf/d methane
	Power	$5.20	131 MMcf/d methane

Total projected in-state demand: 265 MMcf/d

Employed by U.S. D.O.E.

Source: Charles Thomas, SAIC, "Spur Line Analysis – Alaska Gas Needs and Assessment", South Central Energy Forum, 9/20/2006

Projected In-State Gas Use: ANGDA

Average Daily In-State Gas Uses
(mmscfpd)

	2006	Future
• Home Heating	100	115
• Electric Power	115	135
• Fairbanks		50
• Industrial	250	?

- fertilizer
- export of gas (is not "in state-use)

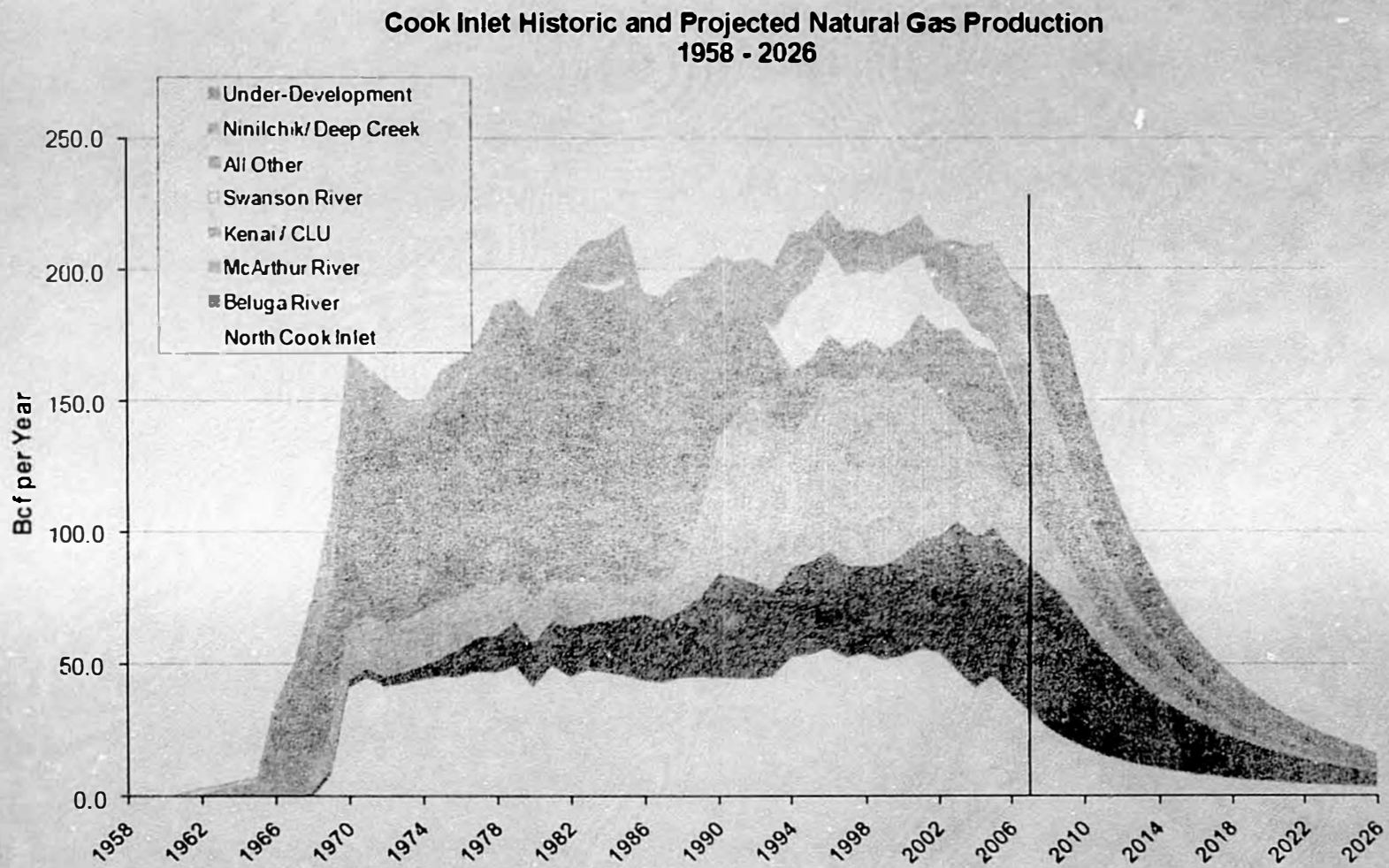
- by 2025

Total projected in-state demand: 300 MMcf/d

by 2025
w/ Industrial - > 500 M BCF/d

Source: Harold Heinz, ANGDA, "Connecting Gas to Alaskans", Legislative Hearing – AGIA; 6/20/2008

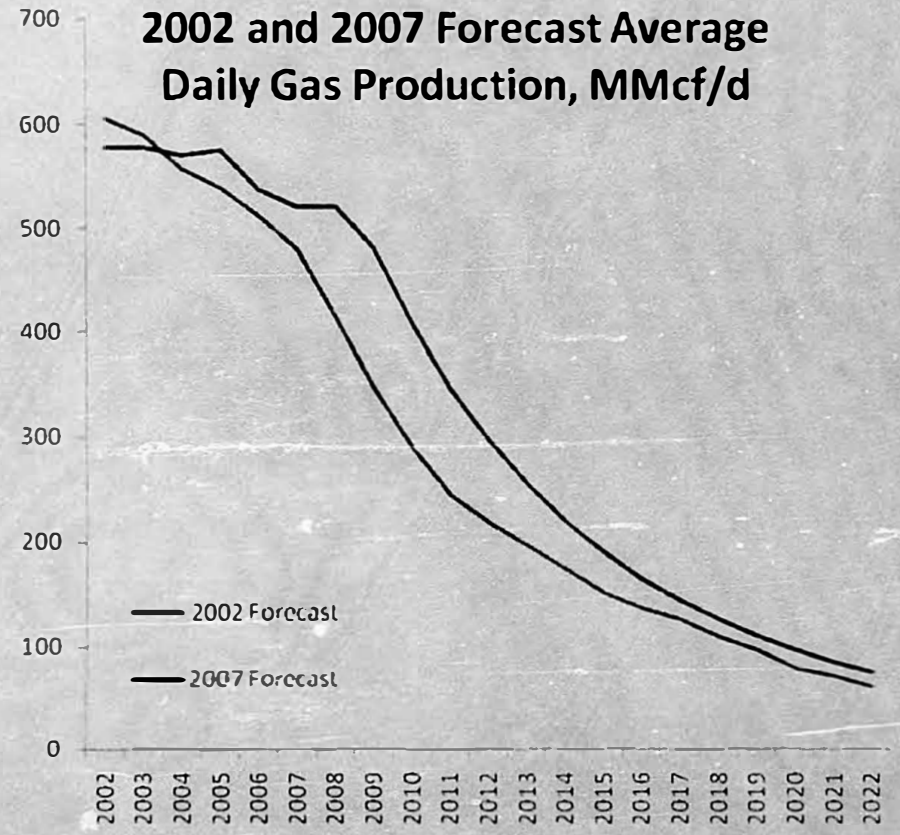
Future Cook Inlet Production?



Source: DNR 2007 Annual Report

Forecast Cook Inlet Production - DNR

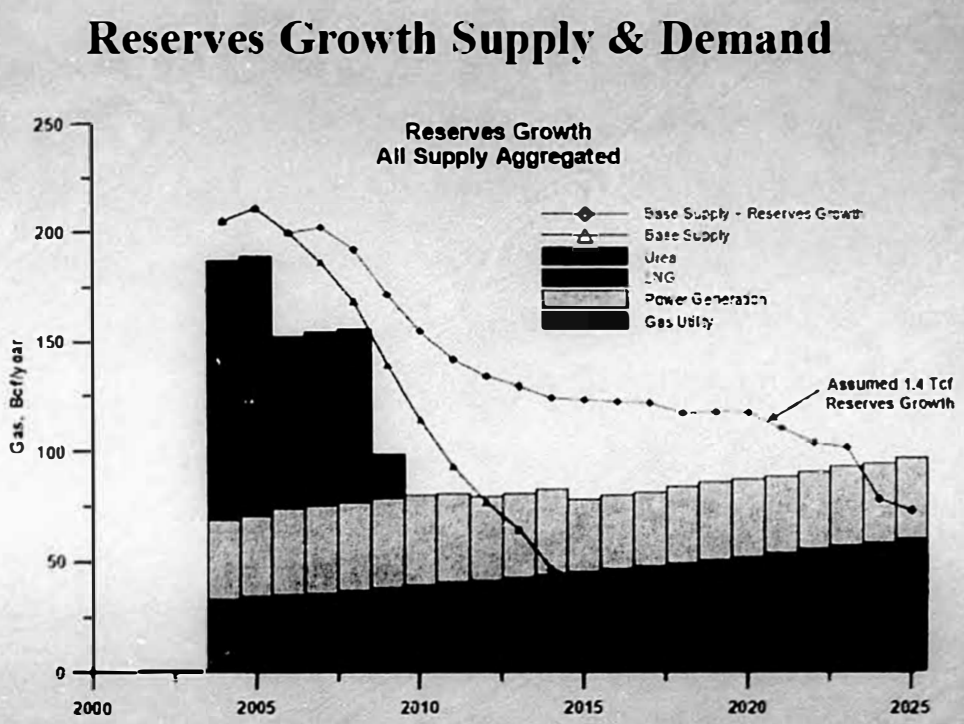
- DNR forecast increases over time
- DNR conservative - cumulative of 323 Bcf of "new gas" by 2020
- Even so, under 2007 forecast there will still be 100 MMcf/d produced from Cook Inlet in 2020



Source: DNR 2007 and 2002 Annual Reports

Forecast Cook Inlet Production - SAIC

- US DOE study of Cook Inlet suggested an additional 15 Tcf of undiscovered conventional reserves
- Given size of Cook Inlet market, perhaps 1.4 Tcf of reserves growth between 2006 and 2025
- Under favorable market conditions, CI could supply South Central needs past 2020



Source: Charles Thomas, SAIC, "South Central Alaska Natural Gas Supply and Demand", South Central Energy Forum, 9/20/2006

Conclusions

- 300 MMcf/d appears sufficient to meet Alaskans' in-state energy needs through 2025
- Cook Inlet production will continue.
  - Even under a pessimistic picture, CI production will still average 100 MMcf/d
  - With appropriate market conditions, CI production more than sufficient for heating and power needs
- Given 500 MMcf/d of North Slope gas and continuing CI production, in-state needs **plus** significant industrial use can be accommodated without any need for a "competing project"

presented SJUD 6-25-2008
Anch. AK Wednesday
Don Bullock online from Juneau

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MEMORANDUM June 24, 2008

SUBJECT: AS 43.90.440, the "treble damage" provision (Alaska Gasline Inducement Act)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Donald M. Bullock Jr.
Legislative Counsel

In anticipation of the hearing of your committee on June 25, 2008 regarding the treble damage provision in AS 43.90.440, I am providing you with the enclosed outline.

I have divided up the various concepts using the language of AS 43.90.440 and followed it up with comments and opinion regarding the meaning of each provision.

I will be available by telephone at the hearing scheduled for June 25, 2008, starting at 9 a.m.

If I may be of further assistance, please advise.

DMB:med
08-293.med

Enclosure

cc: Cindy Smith via e-mail

Sec. 43.90.440. Licensed project assurances. (a) Except as otherwise provided in this chapter,

> Are there exceptions to the assurance offered in this section? None stand out in AS 43.90, except for the particular exceptions within this section.

the state grants a licensee *assurances* that the licensee has *exclusive enjoyment of the inducements* provided under this chapter *before the commencement of commercial operations*.

> **AS 43.90.900(5):** "commencement of commercial operations" means the first flow of gas in the project that generates revenue to the owners;
>
> The state offers reimbursement of certain qualified expenditures and the benefits of an Alaska Gasline Inducement Act coordinator in **AS 43.90.110(a)**. Under **AS 43.90.250**, the function of the coordinator is to facilitate the expeditious review and agency action on issues related to the project.
>
> The assurance in the excerpt is the exclusive enjoyment of the inducements offered under AS 43.90. It would be reasonable for a court to read the statute completely and to interpret the "preferential royalty or tax treatment" and "grant of state money" consistent with the meaning of inducements provided to the licensee.

If, *before the commencement of commercial operations*,

> **AS 43.90.900(5):** "commencement of commercial operations" means the first flow of gas in the project that generates revenue to the owners;

the state *extends* to another person *preferential royalty or tax treatment*

> There may be a question as to what "extended" means in this context. Would the liability be triggered if the state made an offer of an inducement or does the inducement have to be implemented, either in the form of a grant or an agreement on tax or royalty terms.
>
> **AS 43.90.310.** Royalty Inducement.
> **AS 43.90.320.** Gas production tax exemption.
> **Note:** Under **AS 43.90.300**, the benefits in the above two sections are available to shippers that commit to the licensee's project during the first binding open season. The provision might also be read to trigger the penalty if the state extends to the developer of the competing project preferential royalty or tax treatment as an incentive to proceed.

or *grant of state money*

AS 43.90.110(a)(1) offers the licensee an inducement of up to $500,000,000 in matching funds. "[G]rant of state money" in **AS 43.90.440(a)** does not have a threshold amount, so it is unclear of how large the grant could be to trigger the state's liability.

for the *purpose* of *facilitating the construction*

Whatever incentive or inducement is offered or provided to a competing gas pipeline must have the purpose of "facilitating the construction" of the competing project. A grant to study the construction of a possible alternative project could, at first glance, be outside of the prohibition. However, proceeding with this type of study could be a basis for a potential shipper to withhold committing to the licensed project.

Determining the purpose of a grant or other inducement presents an interesting burden of proof issue: would the licensee carry the burden of proving that the purpose of the grant or other benefit is to facilitate construction, or would the state carry the burden of proving the grant or special royalty or tax treatment was for a purpose other than to facilitate the construction?

of a *competing natural gas pipeline project* in this state,

AS 43.90.440(c)(1) defines "competing natural gas pipeline project" to mean a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market. Thus, both the size of the pipeline and the source of the gas to be transported in that pipeline must be examined. A pipeline with smaller throughput or for transporting gas from anywhere outside of the North Slope would not trigger the liability.

AS 43.90.990(16) defines "North Slope" to mean "that part of the state that lies north of 68 degrees North latitude." The gas must be produced from a lease or property north of the line in the definition.

On April 18, 2007, Marcia Davis, deputy commissioner of revenue, explained to the Senate Judiciary Committee the reasoning behind the 500,000,000 cubic feet a day capacity in the context of version "O" of SB 104. An excerpt of the minutes for the meeting is as follows:

> MS. DAVIS explained that the definition for a competing natural gas pipeline project on page 25, lines 2-4, was developed with the understanding that in-state gas usage would be perhaps 400 mcf over the next 20 years. It was designed to capture pipeline pieces that truly wouldn't be competitive with a 3.5 to 4.5 bcf/day project so bullet lines and spur lines coming off a main pipeline were reviewed. Without the qualifier, competing pipeline projects were

> envisioned to be ones that actually started in the same location and ended in the same location. Because we have a comfort level that the major projects are looking to go out of state, we don't see spurs or bullet lines being competitive and affecting the economic considerations of the big projects, she said.

and if the licensee is *in compliance* with the *requirements of the license* and with the *requirements of state and federal statutes and regulations* relevant to the project,

> If the licensee is not "in compliance with the requirements of the license and with the requirements of state and federal statutes and regulations relevant to the project," the licensee may risk license revocation as well as not being eligible for damages under this section.
>
> **AS 43.90.230(a)** describes circumstances in which the licensee would be in violation. If the licensee is in violation of the license, the licensee may not be eligible for the treble damage award and may also be subject to revocation of the license, a remedy presented in **AS 43.90.230(e)(3)**. Included in the list of grounds for violation is a violation of any provision of AS 43.90, a violation of any other provision of state or federal law material to the license, or the violation of any material term of the license. It may be significant that **AS 43.90.230(a)** requires the violation be of a "material" term of the license or the violation of the state or federal law be "material" to the license, whereas under AS 43.90.440(a) the requirements of the state and federal statutes and regulations be only "relevant" to the project. Relevant is broader than "material"; a requirement may be "relevant" but not "material" to the success of the project.

the licensee is entitled to payment from the state of an amount equal to *three times the total amount of the expenditures incurred and paid* by the licensee that are *qualified expenditures* for the purposes of AS 43.90.110 that the licensee *incurred in developing the licensee's project*

> On April 18, 2007, Marcia Davis, deputy commissioner of revenue, explained to the Senate Judiciary Committee the reasoning behind the 500,000,000 cubic feet a day capacity threshold in the context of version "O" of SB 104. An excerpt from the minutes for that meeting is as follows:
>
> > MS. DAVIS explained that the purpose was to pique the attention of the applicants to let them know the state is serious. "In the totality of it, we just felt 300 percent had the zing and had the oomph that we needed to make sure that independents came forward."
>
> The term "qualified expenditures" is defined in **AS 43.90.110(a)(1)(C)** and includes the time during which a qualified expenditure may be made and a limitation on the type of expenditures that qualify.

The basis for determining the amount of the payment is the amount of expenditures "incurred and paid" by the licensee. Under **AS 43.90.110(a) and (b)**, the state makes matching contributions in the form of reimbursement for qualified expenditures; in other words, the cost of the qualified expenditures is borne by both the state and the licensee.

The issue of whether the penalty payment is based on the net amount after reimbursement will be decided based on the rules of statutory interpretation. Among the considerations in resolving this issue is how the legislature narrowed the basis for the payment from "three times the total of the reasonable costs that the licensee has incurred in developing the licensee's project," the language in SB 104 and HB 177 as originally introduced, to "three times the total amount of the expenditures incurred and paid by the licensee that are qualified expenditures," the language in the enacted law. Also, in an April 13, 2007 hearing before the Senate Judiciary Committee, Marcia Davis, deputy commissioner of revenue, referred to the expenditures that are the basis for the payment by the state as "the costs ponied up by the applicant." Bullock, legislative counsel, testified before the House Resources Committee on April 10, 2007, and referred to the basis as the "amount of qualified expenses the licensee spent." Both explanations, in conjunction with the apparent intent to narrow the state's risk, support the conclusion that the penalty payment is based on the amount of qualified expenditures ultimately borne by the licensee, that is the net amount after the state's reimbursement.

before the date that the state first extended preferential treatment to another person. The payment under this subsection is *subject to appropriation*.

The legislature must act to appropriate money for the payment should the state become liable.

Upon payment by the state of the amount owed under this section, the *licensee shall, at no additional cost to the state, assign to the state or the state's designee all engineering designs, contracts, permits, and other data related to the project that were acquired by the licensee during the term of the license.*

The items that the licensee must surrender to the state are the same as those that must be surrendered to the state under **AS 43.90.240(e)** if the project is abandoned.

The payment under this subsection is in *full satisfaction of all claims the licensee may bring in contract, tort, or other law* related to the events that gave rise to the payment.

If this part is implemented on its face, the treble damage payment is full satisfaction of any harm done to the licensee as a result of the state violating the

assurance that inducements would not be offered to a competing gas pipeline project.

(b) The review, processing, or facilitation of a permit, right-of-way, or authorization by a state agency in connection with a competing natural gas pipeline project does not create an obligation on the part of the state under this section.

This provision distinguishes the liability that arises from providing an inducement to a competing gas pipeline project and the state's normal administration of pipeline-related matters. For example, if a competing gas pipeline project is pursued, if the state does not offer an inducement and merely performs its obligations with regard to the competing project under state law, there is no penalty. The definition of "preferential royalty or tax treatment" in AS 43.90.440(c) further excludes certain state activity that does not trigger the liability for the penalty payment.

(c) In this section,

(1) "competing natural gas pipeline project" means a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market;

(2) "preferential royalty or tax treatment" does not include

(A) the state's exercise of its right to resolve disputes involving royalties and taxes; or

(B) the state's exercise of its right to modify royalties as authorized by law in effect on June 8, 2007.

DMB:med
08-293.med

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MEMORANDUM June 17, 2008

SUBJECT: Differential tax rates by destination or source
(Work Order No. 25-LS1724)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked whether imposing a higher tax on the production of natural gas destined outside of the state may be found unconstitutional. You also asked whether a different tax rate may be set for different fields.

With regard to your first question, it is most likely that a court would quickly strike down a rate structure that favors in-state use because the differential tax discriminates against interstate commerce. On the other hand, the state may impose a different tax rate on production from different fields, and has historically done so through the application of the economic limit factor (ELF) and a reduced tax on early production from a new field.

A reduced tax on gas production for gas used in the state probably would be found to discriminate against interstate commerce.

A tax that favors in-state use of a commodity by levying a higher tax on a commodity leaving the state violates the commerce clause in art. I, sec. 8 of the Constitution of the United States.

In 1977, the U.S. Supreme Court established four criteria for judging the validity of a state tax on interstate commerce. In that decision, the court held that a tax does not run afoul of the commerce clause if: (i) the activity taxed has a substantial nexus with the taxing state, (ii) the tax does not discriminate against interstate commerce, (iii) the tax is fairly apportioned, and (iv) the tax is fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 331 (1977).

Imposing a higher tax on the production of gas destined outside of Alaska compared with that used within the state violates the second part of the test, "the tax does not discriminate against interstate commerce." Accordingly, I expect a court would find that

it is unconstitutional to impose differential tax rates based on whether the gas is used within or outside of Alaska.[1]

Different fields and different tax rates would likely survive an equal protection-based challenge.

AS 43.55.011(e) imposes a tax on the producer of taxable oil or gas "produced each calendar year from each lease or property in the state." Historically, and under current law, the state has imposed oil and gas production taxes at different rates for different leases and properties in the state. The effective tax rate varied based on the age of the field,[2] the theoretical profitability of the field,[3] and the location of the field.[4] Variations in the effective tax rates were intended to extend the life of a field as production declined by reducing the effective tax rate, or to encourage new production by applying a lower effective tax rate for newly developed leases and properties. Whether or not these approaches have been successful in attaining their intentions is debatable, however the differential effective tax rates on production in the state have not been found to be unconstitutional. It is noteworthy that these differential rates were designed for particular public purposes and did not differentiate the tax rates on whether the production was to be used in the state or elsewhere. Compare these types of rate adjustments, primarily based on field economics, with AS 43.55.011(o), which caps the tax rate on gas produced outside of the Cook Inlet sedimentary basin, but only if the gas production is used in the state.

The United States Supreme Court considered whether differential tax rates on similar property pursuant to the adoption of Proposition 13 in California violated the equal protection clause of the Fourteenth Amendment in *Nordlinger v. Hahn*.[5] Proposition 13

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[1] AS 43.55.011(o) provides a tax cap for natural gas produced outside of Cook Inlet and used in the state. This subsection may be subject to challenge under the Commerce Clause if the rate is below the rate applicable to production that is not used within the state.

[2] AS 43.55.011(b) (repealed, sec. 34, ch. 2, TSSLA 2006) provided for a tax rate of 12.25 percent of the gross value at the point of production for the first five years after the start of commercial production and 15 percent thereafter.

[3] The economic limit factor (ELF) generally provided for a decrease in the effective tax rate as the value of production or volume of production declined or the cost of production increased. *See* AS 43.55.013 (Repealed, sec. 34, ch. 2, TSSLA 2006).

[4] *See, e.g.*, AS 43.55.011(f), which requires a minimum tax levy on the production of oil and gas north of 68 degrees North latitude, and AS 43.55.011(j) and (k), which provide for a maximum tax on gas and oil produced in the Cook Inlet sedimentary basin.

[5] *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

capped the state property tax rate at one percent of a property's "full cash value." "Full cash value" is defined as the assessed valuation as of the 1975 - 1976 tax year or "the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment."[6] Nordlinger purchased her home in 1988 and was assessed at $170,100 based on change in ownership, with a tax liability of $1,701. The prior owners had purchased the home two years previously for $121,500. The effect of the purchase price and Proposition 13 on Nordlinger was that her property tax had increased 36 percent compared to the previous owners. Nordlinger also discovered that she was paying about five times more in taxes than some of her neighbors who had owned comparable homes in the same residential development since 1975.[7]

The court upheld the assessment scheme after describing the appropriate standard of review as follows:[8]

> The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
>
> As a general rule, "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
>
> . . .
>
> The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been

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[6] 505 U.S. at 5. Proposition 13 provides exceptions to the increase incidents in the case of a person over 55 who sells a principal residence and replaces the residence with one of equal or lesser value and to the transfer of a principal residence from a parent to a child if the value of the residence does not exceed $1,000,000. *Id.*

[7] 505 U.S. at 6 - 7.

[8] 505 U.S. at 10, 11 - 12 (citations omitted).

> considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. This standard is especially deferential in the context of classifications made by complex tax laws. "In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

The differential production tax rates in the state would likely survive a constitutional challenge. Under *Nordlinger*, it is likely that a court would uphold the differential rates that are based on the intention of the legislature to use the differential rates and limitations to extend the economic life of fields, encourage new production, and to achieve other purposes based on plausible policy reasons.

If I may be of further assistance, please advise.

DMB:ljw
08-268.ljw

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MEMORANDUM June 20, 2008

SUBJECT: AGIA's treble damages provision (AS 43.90.440)
(Work Order No. 25-LS1727)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Alpheus Bullard
Legislative Counsel

You have inquired as to "what things are clearly covered or exempted under the treble damages provision in [the Alaska Gasline Inducement Act (AGIA)]" and to "identify any items that may be unclear."

What the section provides

The treble damages provision, AS 43.90.440, provides that the licensee has "exclusive enjoyment" of the inducements provided by the state under AGIA. If, before commencement of commercial operation of the licensee's pipeline project, the state provides preferential royalty or tax treatment[1] or a grant of state money for the purpose of facilitating a competing natural gas pipeline project[2] and the licensee is at that time in compliance with the requirements of the license and the applicable state and federal laws and regulations, then

> . . . the licensee is entitled to payment from the state of an amount equal to three times the total amount of the expenditures incurred and paid by the licensee that are qualified expenditures for the purposes of AS 43.90.110 that the licensee incurred in developing the licensee's project before the date that the state first extended preferential treatment to another person. See AS 43.90.440(a).

---

[1] AS 43.90.440(c)(2) provides that "preferential royalty or tax treatment" does not include the state's right to resolve disputes involving royalties or taxes or the state's right to modify royalties that were in effect on June 8, 2007.

[2] "Competing natural gas pipeline project" is defined by AS 43.90.440(c)(1) as a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market.

Upon such a payment by the state, the licensee is required to assign to the state, or the state's designee, "all engineering designs, contracts, permits, and other data related to the project that were acquired by the licensee during the term of the license." Id. The provision provides that the treble damages payment is in "full satisfaction of all claims the licensee may bring in contract, tort, or other law related to the events that gave rise to the payment." Id.

General analysis

The provision is probably best characterized as a statutory relation to a contractual "liquidated damages" clause, contractual penalty clause, or prenuptial agreement. The treble damages provision serves as a source of limited insurance for both the state and the licensee. It assures a measure of predictability for the licensee, allowing the licensee to balance the cost of its anticipated performance against its costs if the state chooses to back a competing gasline proposal. The state is similarly benefited in that if the state decides that it is in its best interest to support a different gasline project and leave its support of the AGIA licensee, the separation will occur according to terms and conditions already agreed upon. If AGIA did not specify what would happen if the state chose to back another pipeline proposal, and the state extended the "enjoyment of the inducements" provided under AGIA, "preferential treatment," or "grant of state money" to another pipeline project suitor, the circumstances would be ripe for a maelstrom of litigation, project delays, and not insignificant legal fees.

It is my opinion that the provision is plain and apparent in its language, and that there is little ambiguity that might serve as a source of disparate understandings between the state and its licensee. While clarity in the law is no guarantee against future litigation, the responsibilities of the state and its licensee are clear, whether it be what "qualified expenses" include,[3] what constitutes a "competing natural gasline project," or the licensee's duty to assign to the state its engineering designs, permits, and other data if the state extends to another person the preferential treatment reserved under AGIA for the licensee.

Possible source of ambiguity

The only question as to the provision's "cover[age]" or ambiguity that I might identify is what "expenditures incurred and paid by the licensee that are qualified expenditures [. . .] that the licensee incurred" would include for the purpose of calculating damages under the provision. It is my opinion that the "expenditures incurred and paid for by the licensee" language of AS 43.90.440's damages clause would be interpreted by a court to exclude any licensee expenditures that have been reimbursed by the state. As a matter of literal interpretation, expenditures that are reimbursed by the state would not be expenditures "that the licensee incurred in developing the licensee's project," but

[3] Qualified expenditures are defined at AS 43.90.110(a)(1)(C) and under the authority of AS 43.90.110(b) are further clarified by 15 AAC 90.030.

expenditures that were only *temporarily* incurred by the licensee.[4] However, if the meaning of "incurred" in AS 43.90.440(a) was found to be ambiguous, an Alaska court would examine the legislative history of the provision in ascertaining the intended meaning of the word.[5]

It is my opinion that a court would hold that the legislative history of the provision provides sufficient verification for an interpretation of "incurred" that does not include reimbursed costs. In testimony provided to the Legislature (during the Legislature's consideration of AGIA) concerning the origins of the treble damages provision, Marcia Davis of the Department of Revenue stated: "[s]o we came up with a three hundred percent times [sic] the costs ponied up by that applicant . . .", and "[after Senate Judiciary Chairman French] described [the treble damages provision] as making [the licensee] whole. [Marcia Davis] said yes. . . ."[6] These excerpts are consistent with an understanding of the licensee's "expenditures incurred" as the licensee's actual expenses,

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[4] "Incur" is defined as "To suffer or bring on oneself (a liability or expense)." Black's Law Dictionary, 782 (8th ed. 2004). In the calculation of any potential damages, I do not believe that costs that have been reimbursed can reasonably characterized as expenses that have been "suffer[ed]."

[5] In State v. Alex, 646 P.2d 203, 208-09 n. 4 (Alaska 1982), the Alaska Supreme Court adopted a "sliding scale" approach to statutory interpretation: the plainer the language of the law, the more convincing must be the evidence that the legislature intended something other than the plain meaning of the language. The plain meaning of the language of the statute can be modified by evidence contained in the legislative history of the provision, if the legislative history adequately shows that the legislature intended something other than what the plain language of the statute might seem to indicate. In Area G Home and Landowners Association, Inc. (HALO) v. Anchorage, 972 P.2d 728 (Alaska 1996); cert. den'd Area G Home and Landowners Association, Inc. (HALO) v. Anchorage, Alaska, 520 U.S. 1211 (1997), the Alaska Supreme Court recognized that statements made by legislators during legislative deliberations may provide relevant evidence when the court is trying to determine the meaning of ambiguous provisions in a legislative act. See also State v. McCallion, 875 P.2d 93 (Alaska App. 1994) (legislative history of a statute provides useful assistance in statutory interpretation).

[6] See "An Act relating to the Alaska Gas line Inducement Act; establishing the Alaska Gas line Inducement Act matching contribution fund; providing for an Alaska Gas line Inducement Act coordinator; making conforming amendments; and providing for an effective date." Hearing on SB 104, before the Senate Resources Comm. 2007 Leg, 25th Sess. 3/19/07, 2:19:45 PM (testimony of Marcia Davis, Deputy Commissioner, Department of Revenue). Note in Schwegmann v. Calvert Distillers Corp., 341 U.S. 384, 394-395 (1951), Justice Douglas wrote "it is the sponsors that we look to when the meaning of statutory words is in doubt."

instead of a sum total of licensee expenditures that includes expenses that are assumed, or ultimately paid for, by the State.

Such an interpretation of the provision's intended legal effect is corroborated by Department of Revenue's Commissioner Patrick Galvin's later statement (following the enactment of AGIA, but prior to the recommendation to award the license) that:

> . . . public discussion of the treble damages has been a bit misleading. People say it exposes the state to $1.5 billion. But if one does the math on the TransCanada application, the most extreme case - if it goes to the open season and the state continues to contribute at the higher percentage rate - could result in perhaps $640 million to get to the FERC certificate; the state would have contributed roughly $450 million. Treble damages only apply to the TransCanada outlay. So it would only be three times that amount, not three times the whole $500 million.[7]

It is my opinion that an Alaska court, in interpreting the language, the legislative history, and perhaps the Department of Revenue's interpretation of AS 43.90.440(a), would hold that the treble damages clause extends only to qualified expenditures under AS 43.90.110(a), the costs of which are not reimbursed by the State.

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw
08-273.ljw

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[7] See "Presented update on the gas pipeline and AGIA." Before the Senate Resources Comm. 2008 Leg, 25th Sess. 01/30/08, 4:40:30 PM (testimony of Commissioner Patrick Galvin, Department of Revenue). See also State, Department of Revenue v. Alaska Pulp America, 674 P.2d 268, at 274 (1983), and Wien Air Alaska v. Department of Revenue, 647 P.2d 1087, 1090 (1982) (contemporaneous administrative construction, while not dispositive, is a valuable aid in determining the meaning of a statute).

LEGAL SERVICES

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MEMORANDUM June 20, 2008

SUBJECT: AGIA (questions about competing projects)
(Work Order No. 25-LS1727)

TO: Senator Hollis French
Attn: Allison Biastock

FROM: Alpheus Bullard
Legislative Counsel

You have asked a number of additional questions concerning the interpretation of the Alaska Gasline Inducement Act's (AGIA) treble damages provision, AS 43.90.440. Below, please find answers to your e-mailed questions of earlier today. All of the following responses are grounded in the statutory language of AS 43.90.440 and that chapter's definition section, AS 43.90.900.

Could the state build a bullet line to Fairbanks? What about to Kenai?
The term "bullet line" is without a precise definition. If any such line is designed to carry not more than 500,000,000 cubic feet a day of North Slope gas to market, it is not a "competing natural gasline project"[1] which would trigger the treble damages provision.

What if the state partnered with Enstar in a 2.0 Bcf/day line?
If, before commencement of commercial operation[2] of the AGIA licensee's pipeline, the state extended to Enstar "preferential royalty or tax treatment or grant of state money for the purpose of facilitating the construction" of a 2,000,000,000 cubic feet a day line, and the AGIA licensee was in compliance with the requirements of the license and with the requirements of state and federal statutes and regulations relevant to the project, the licensee would be entitled to payment under the treble damages provision.

[What if] the state's assistance were confined to only 1/4 of the line, would [the state] be liable to [the AGIA licensee] for treble damages?
If, before the commencement of commercial operations of the AGIA licensee's pipeline, the state's extends any "preferential royalty or tax treatment or grant of state money for the purpose of facilitating the construction of a competing natural gas pipeline project in

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[1] "Competing natural gas pipeline project" is defined at AS 43.90.440(c)(1).

[2] "Commencement of commercial operations" for the purposes of AGIA is defined at AS 43.90.900 as "the first flow of gas in the project that generates revenue to the owners."

the state," whether that assistance be to the project in whole or in part, it would still trigger the treble damages provision.

What if the state wanted to build its own line, but started just after [the licensee] had commenced commercial operation?
If the state began building its own pipeline after the licensee's pipeline had commenced commercial operation, the state would not be liable under the treble damages provision. The state's assurance to the licensee that "the licensee has exclusive enjoyment of the inducements provided under this chapter" are limited by the provision to "before the commencement of [the AGIA licensee's pipeline's] commercial operations."

Can [the licensee] waive its rights?
Nothing prevents the licensee from waiving its rights at any time.

[W]hat if [the state began construction of] a bullet line after a successful open season, but before [the start of the licensee's pipeline project's] commercial operation?
If the bullet line was designed and constructed to carry less than 500,000,000 cubic feet of North Slope gas a day to market, the state could begin construction at any time without triggering the treble damages provision. If the bullet line was capable of carrying more than 500,000,000 cubic feet a day of North Slope gas to market, and construction of the line began after a successful open season, but before the "commencement of commercial operations" of the licensee's pipeline project, then the treble damages clause would be applicable.

If you have other questions, please do not hesitate to contact me.

TLAB:ljw
08-274.ljw

MEMORANDUM

State of Alaska

Department of Law

To: Marty Rutherford
Deputy Commissioner
Department of Natural Resources

Date: June 24, 2008

Tel. No.: 269-5255

From: Bonnie E. Harris and Lisa Weissler
Assistant Attorneys General
Oil, Gas & Mining-Anchorage

Subject: Review of the damages provision of AS 43.90.440 in relation to a bullet line or spur line for in-state use of gas. [Final]

You have asked whether the damages provision of the project assurances in the Alaska Gasline Inducement Act, AS 43.90.440, would be triggered by the state providing preferential tax or royalty treatment or monetary support to a bullet line or a spur line to provide in-state use of gas from the North Slope.

The short answer is that the damages provision would not be triggered by state support of an in-state bullet line that has an initial design capacity of no more than 500,000,000 cubic feet a day or by any in-state spur line off the AGIA main line. Also, the damages provision applies only before commencement of commercial operations and only if the licensee is in compliance with the license and relevant requirements of law.

The project assurances provision at AS 43.90.440 provides, in pertinent part:

> If, before the commencement of commercial operations, the state extends to another person preferential royalty or tax treatment or grant of state money for the purpose of facilitating the construction of a competing natural gas pipeline project in this state, and if the licensee is in compliance with the requirements of the license and with the requirements of state and federal statutes and regulations relevant to the project, the licensee is entitled to payment from the state of an amount equal to three times the total amount of the expenditures incurred and paid by the licensee that are qualified expenditures for the purposes of AS 43.90.110 that the licensee incurred in developing the licensee's project before he date that the state first extended preferential treatment to another person.
>
> ...
>
> "competing natural gas pipeline project" means a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market;

damages it may incur under AS 43.90.440 as a result of the recipient expanding its pipeline project. In this way the state can provide assistance for in-state gas projects while taking reasonable measures to assure it is not providing support to a competing natural gas pipeline project.

2) The damages clause would not apply to a spur line because it is not a competing project.

A spur line that transports and off-takes gas from the AGIA main line for in-state use would not be a competing pipeline, and state support should not trigger the damages provision of AS 43.90.440. A spur line, meaning a pipeline that off-takes North Slope gas at some point along the AGIA main line after transporting the gas on mainline capacity, does not compete with the AGIA project. Rather it supports the AGIA mainline by using mainline transportation capacity services to obtain the off-take gas. The spur line might be constructed while the AGIA main line is also under construction, but it cannot go into service until the AGIA main line has commenced commercial operations. Because a spur line would not be a competing natural gas pipeline project it would not trigger the damages provisions even if it were initially designed to accommodate throughput of more than 500,000,000 cubic feet a day.[2]

Even if a spur line were deemed to be a competing natural gas pipeline project, the damages provision would not be triggered by the state providing support unless the spur line accommodated throughput of more than 500,000,000 cubic feet a day of North Slope gas.

Because of the limited time that was available, this memorandum is not intended to provide an exhaustive and final analysis of the provision under discussion, nor is it a formal Attorney General's opinion. It does provide a reasonable analysis of the provision and review of the legislative history. We are available to provide a more in-depth analysis at your request.

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[2] We are informed that TransCanada has provided testimony to the effect that it does not consider spur lines off the AGIA mainline to be competing projects that would trigger the damages provisions of AS 43.90.440. Conversation with Marty Rutherford, June 23, 2008.

AGIA

Project Assurances

(Treble Damages)

May 25, 2008 Presentation to Senate Judiciary Committee

Question

- Are the damages provision in the Alaska Gasline Inducement Act triggered by the state providing support to a bullet line or a spur line to provide in-state use of gas?

Answer

- The damages provision would **not** be triggered by state support of:
  - an **in-state bullet line** that has a design capacity at any time prior to the commencement of commercial operations of the AGIA line of no more than 500,000,000 cubic feet a day;
  - nor by any **in-state spur line** off the AGIA main line.

Background

- AS 43.90.440 provides:

  If, before the commencement of commercial operations, the state extends preferential treatment in order to facilitate the construction of a **competing natural gas pipeline project**, the licensee is entitled to payment from the state of an amount equal to 3X the total amount of the expenditures paid by the licensee.

Definition

- "competing natural gas pipeline project" means a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market.

Discussion

- The statute does not further define the meaning of "a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market"

- A reasonable interpretation is the throughput design capacity, at any given time, of the pipeline project prior to the commencement of commercial operations of the AGIA line.

Bullet Lines

- The damages provision **would not** be triggered by the state providing support of a bullet line, unless it has a design capacity, at any given time, that would accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas.

Bullet Lines (continued)

- Thus, any state aid would have to prohibit any throughput of greater than 500,000,000 cubic feet a day *prior to the commencement of commercial operations of the AGIA licensed project*

Spur Lines

- The damages clause **would not** apply to a spur line **because it is not a competing project.**
- A spur line that off-takes gas from the AGIA main line for in-state use does not compete with the AGIA project because it supports the project by using mainline services to obtain the gas.

Treble Damages Exposure

$Millions (rounded)

Year	Annual Spend	State Expenditure	TC Alaska Expenditure	3x TC Alaska Expenditure	Cumulative State Exposure
2009	$41	$21	$21	$62	$82
2010*	**$42**	**$21**	**$21**	**$63**	**$166**
2010*	$34	$31	$3	$10	$207
2011	$141	$127	$14	$42	$376
2012	$144	$130	$14	$43	$549
2013	$147	$132	$15	$44	$726
2014	$75	$39	$36	$109	$874
Total	**$625**	**$500**	**$125**	**$374**	**$874**

***Scheduled Open Season**

2010 in Bold = Pre-Open Season (50/50)

2010 in Regular = Post-Open Season (90/10)

Expenditure Schedule Based on TC Alaska Application

Sharon Long

From: Portia Babcock

Sent: Wednesday, June 25, 2008 11:50 AM

To: Sen. Albert Kookesh; Sen. Bert Stedman; Sen. Bettye Davis; Sen. Bill Wielechowski; Sen. Charlie Huggins; Sen. Con Bunde; Sen. Donny Olson; Sen. Fred Dyson; Sen. Gary Stevens; Sen. Gary Wilken; Sen. Gene Therriault; Sen. Hollis French; Sen. Joe Thomas; Sen. John Cowdery; Sen. Johnny Ellis; Sen. Kim Elton; Sen. Lesil McGuire; Sen. Lyda Green; Sen. Lyman Hoffman; Sen. Tom Wagoner; Cindy Smith; Darwin Peterson; Deborah Grundmann; Denise Liccioli; Dirk Craft; Doug Letch; Ginger Blaisdell; Ginny Austerman; Heather Brakes; Jane Alberts; Janey Wineinger; Jeff Turner; Jesse Cross-Call; Jesse Kiehl; Julie Isom; Katrina Matheny; Kristen Bressette; Liz Williams; Mary Jackson; Miles Baker; Nancy Barnes; Portia Babcock; Richard Benavides; Ryan Makinster; Sandy Burd; Shalon Szymanski; Sharon Long; Sheila Peterson; Tim Grussendorf; Tim Lamkin

Cc: Kirsten Waid; Gary Stambaugh

Subject: *POSSIBLE* 4th Special Session Convening Information for the Alaska State Senate

Importance: High

MEMORANDUM

TO: **ALL SENATORS**

FROM: Senate President Lyda Green

DATE: June 25, 2008

RE: Possible 4th Special Session Call

Although the Alaska State Legislature has not yet received an executive proclamation regarding a 4th Special Session from Governor Palin, and it is completely within her purview to call or to not call a 4th Special Session, I would like to begin the planning process and establish a tentative convening date and time, so that Senators may make travel arrangements. If Governor Palin decides to call the Legislature on a different date or location, we will alert Senators to the change as soon as possible. Thank you for your understanding and cooperation as we establish a tentative schedule.

At this time, I am planning to convene the Alaska State Senate at **11:00am** on **Wednesday, July 9, 2008**. Senate and House Committee hearings will begin at 1:00pm on the same day. Please make travel arrangements so that you are in Juneau and available to conduct state business beginning at 11:00am on Wednesday, July 9, 2008. Thank you.

Please contact Portia in my office or me directly if you have questions or concerns. Thank you.

Portia C.K. Babcock
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Alaska State Legislature
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