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November 11, 1977

State Senator Mike Colletta
1016 West Sixth Avenue
Suite C
Anchorage, Alaska 99501

Dear Mike:

For your information I have included these two memoranda to keep you informed of the d-2 events in Washington. Judge John Pratt's decision in National Chamber of Commerce v. the Departmen' of Interior came as no surprise but I do not know if they plan to appeal it.

Sincerely,

BIRCH, HORTON, BITTNER & MONROE

Constance E. Brooks

Constance E. Brooks

CEB/mb
Enclosures - As indicated
cc: Sharon Long

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MEMORANDUM

To: Ronald G. Birch

Date: November 9, 1977

National Chamber of Commerce
versus
Department of Interior

On November 3, Judge Pratt ruled that the National Chamber of Commerce had no standing to challenge the Department of Interior's failure to comply with §102(2)(C) of the National Environmental Protection Act. Even though the Plaintiff lacked standing to sue, the Court addressed the substantive issues which pertained to the question of standing. More specifically, the Court found that the Plaintiff failed to prove that it would in fact suffer injury because the Department of Interior failed to file an environmental impact statement. Even if the Plaintiff had proven injury in fact, thereby meeting the standing requirements, the Court could not grant the relief which the Plaintiff sought without violating the constitutional doctrine of Separation of Powers by involving the judiciary in a political question.

While Judge Pratt never reached the question of whether the Morton Environmental Impact Statement met the requirements of NEPA, the Court did state, in its statement of facts, that the Morton Environmental Impact Statement covered the same areas as H.R. 39. The court also found that the Subcommittee asked the Department of Interior to appear to present its views on H.R. 39. Both of these findings are contradicted by the record. The court ignored

the fact that Secretary Andrus prepared comments on H.R. 39 pursuant to the statutory requirements of ANCSA, as a continuation of Secretary Morton's report to Congress in 1973. Interior was still under a statutory obligation to advise Congress on the classification of Alaskan public lands. The Subcommittee's formal invitation on August 2, 1977 for Secretary Andrus to appear was only a formality so Andrus could complete the presentation which he made in April. Similarly, the Judge did not dig very deeply into the substantive differences between the Andrus proposal and the Morton proposal. Nevertheless, the inaccuracy of these findings of fact are irrelevant because the holding is limited to the Plaintiff's failure to show that Interior would in fact injure his asserted economic injuries.

The Plaintiff won one aspect of the standing issue because the Court did find that the National Chamber of Commerce had asserted interests which were within the zone of interests protected under NEPA. However, the Court also required that Plaintiff show a causal connection between the Defendants' actions and the alleged injury to its own asserted interests. Despite the fact that the Chamber's economic interests may be adversely affected by the passage of H.R. 39, they failed to show that they were directly injured by Interior's failure to prepare an environmental impact statement for its report. In fact, the only injury actually shown was that of being excluded from the decision-making process in Congress and the Administration, and the Court found that the exclusion was not necessarily related to Interior's failure to file an EIS. Therefore, the Court ruled that the Plaintiff failed to show that it had a personal and individualized stake in the filing of an EIS by Interior and that any injury asserted was both speculative and conjectural.

Judge Pratt followed one of his most recent standing decisions, Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) which the D.C. Circuit Court affirmed, holding that the Plaintiff, a member of the United States House of Representatives, lacked standing to challenge the failure of the Central Intelligence Agency to submit detailed budget to the House Appropriations Committee. The decision divides

standing into four elements, each of which must be established. The first two are the requirements found in Associated Data Processing Companies Inc. v. Camp, 397 U.S. 150, (1970), injury in fact and that the Plaintiff's interests fall within the zones of interest protected by the particular statute. The third element requires that a causal relation exist between the Defendant's actions and the alleged injury to the protected interest. Fourth, a favorable decision should remedy the injury.

The D.C. Circuit is split on whether the last two elements must be proven separately or whether they are only aspects of the question of injury in fact. Judge Pratt chose to consider the four elements separately, and found that the Plaintiff failed to show a causal relation between injury to their asserted interests and the Defendant's failure to file an EIS. Further, Plaintiff never established how an injunction or declaratory judgment ordering Interior to prepare an EIS would protect the Plaintiff's economic interests in Alaska when Congress is not required to obey the recommendations in the EIS.

While discussing the consequences of possible remedies requested by the Plaintiff, Judge Pratt concluded that the Chamber's request for relief raised a political question, since the Plaintiff was asking the Court to enjoin a Congressional Subcommittee from conducting its investigations. The Court decided that such an injunction or even a declaratory judgment would violate the Doctrine of Separation of Powers, because the judiciary would be entering the political arena of Congress. It would be especially inappropriate for a District Court to enjoin a Congressional Subcommittee from considering information provided by Interior and, any ruling with respect to that information would interfere with Congress' broad power of investigation. Since Congress can act regardless of whether Interior files an environmental impact statement, and regardless of the recommendations in the EIS, Congress is also in the best position to correct any errors in the proposed legislation. The Court analogized this case to Ogunquit Village Corporation v. Davis, 553 F.2d 243, (1st Cir. 1977), in which the 1st Circuit denied relief to the Plaintiff because it should have been granted earlier to have done any good and the Court declined to require the Defendant to do a useless thing.

Judge Pratt's reliance on standing issue is not surprising in light of the present trend to limit access to federal courts by requiring the Plaintiff to prove a more particularized interest and injury. Here, the National Chamber of Commerce, like Representative Harrington, was held to lack a particular, specific, and concrete injury. Also like Harrington, the Chamber was held to have not shown a direct harm in the Defendant's illegal actions such as Interior's refusal to file an EIS. In fact, the National Chamber of Commerce went one step further than Harrington, because the Judge did find that the Plaintiff's interests were within the zones of interest protected by NEPA. In the Harrington decision, the Representative's asserted interest were held not necessarily to have been within the contemplated harms that the statutes sought to avoid.

At this time, the Plaintiff has not made a decision on whether to appeal.

Constance E. Brooks

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MEMORANDUM

To: Ronald G. Birch, Esq.

Date: September 28, 1977

National Chamber of Commerce
versus
<u>Department of Interior</u>

Judge Pratt heard oral argument on plaintiff's motion for a preliminary and permanent injunction on September 22. Mr. Schroeder of the Department of Justice, Division of Lands, appeared for the Interior. Mr. Ray Peck and Mr. Stanley Kaleczyc appeared for the National Chamber of Commerce. The Judge declined to make a formal ruling from the bench and set a hearing for Friday, September 30 at 10:00 a.m. to hear additional evidence on the following questions:

1. The circumstances under which Secretary Andrus appeared before Seiberling's subcommittee to determine whether the Andrus proposal originated from Interior or Congress; and

2. Whether the Morton Environmental Impact Statement is sufficient compliance with the NEPA requirements that a new environmental impact statement is not necessary.

The Court permitted the Plaintiff to defer the issue of standing and did not raise further questions on it. Consequently, the Plaintiff and Defendant addressed the questions of which agency initiated the proposal and the sufficiency of the Morton environmental impact statement. The Plaintiffs

did reach the standing question when they argued that they would suffer economic injury and that NEPA is not limited to federal action which is adverse to the environment. Since NEPA mandates a balanced assessment of the environmental effects, any significant federal action which has an environmental impact either beneficial or adverse is subject to NEPA.

The court's decision to focus on the origin of Interior's proposal presents two problems. First, the statutory language of §102(2)(C) does not expressly limit EIS requirement to agency-originated proposals or legislation. Nor does the Congressional history indicate that it was intended to apply to only agency-originated reports. Consequently, neither the regulations nor CEQ guidelines have made that distinction. Another significant point is that the Morton proposal which was mandated by ANCSA was believed to require an environmental impact statement and the Department of Interior spent two years preparing it. Even though the Morton proposal clearly originated with Congress, Interior still believed that an EIS was necessary. The second problem is that this question has not been resolved judicially. There are cases such as Wingfield v. OMB, which have held that to require an EIS would delay the consideration of legislation and would be an impermissible interference with the legislative branch.

In support of the argument that Andrus is responding to a Congressional mandate, the Defendants introduced the subcommittee's formal invitation to Secretary Andrus to present Interior's recommendations on H.R. 39. Even though the invitation to appear is more of a formality, the Department of Interior's decision to offer amendments to d-2 legislation is relevant to the question of the origin of the proposal. On the other hand, the purpose of NEPA should not be ignored merely because the sequence of events were such that the subcommittee asked the Department to make comments rather than the Department submitting a report as part of an administration proposal.

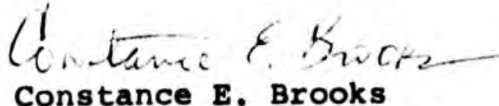
Assuming that the Plaintiffs are able to show that Interior is not merely responding to a request by Congress for information, the Plaintiffs must then prove that the Morton Environmental Impact Statement is no longer valid. This is probably the easier evidentiary problem due to the substantial revisions of the Morton proposal. The Plaintiffs effectively argued that Andrus proposes additional acreage, different classification of the land, and a different form of cooperative management, especially with respect to provisions for areas of ecological concern. Finally, the Morton EIS is no longer sufficient because there is much more information available on Alaska since 1973. For example, pursuant to the BLM Organic Act of 1976, Interior is conducting mineral and resource studies, whereas in 1973 Morton declined to designate more land for wilderness because of the lack of information. The Morton EIS proposal is clearly outdated and Interior's more current studies in no way resemble the indepth analysis required by NEPA.

The Defendants attempted to show that the information the Department of Interior has amassed since that time meets the spirit and requirements of NEPA. For example, Interior has 6,000 pages of comments with respect to the Andrus proposal and yet it is unclear from whom these were solicited or who solicited the comments. Similarly, while Interior held public hearings on the Andrus proposal, which were well attended by the Alaska Coalition, other interest groups failed to make their views known.

The sufficiency of the Morton Environmental Impact Statement will turn on how much overlap there is between the Morton proposal and the Andrus proposal. No one at the hearing really knew, especially the Justice Department. The Judge did not want to go over the proposals acre-by-acre, but he was interested in learning more about the substantive differences between the two proposals.

Judge Pratt is inclined to rule against the Plaintiffs on the grounds that the court cannot require the Department of Interior to file an environmental impact statement with respect to pending legislation which is not originated by the agency. He will rely on either or both of two grounds. One, that this is a political question because it pertains to legislation pending in Congress and that it is improper for the court to intervene and delay the political processes. Secondly, the doctrine of separation of power precludes the court from enjoining the right of a Congressional subcommittee to exercise its power of investigation. If Seiberling's subcommittee requested Interior to respond to H.R. 39, then they can argue that the environmental impact statement for the Morton proposal meets the requirements of NEPA and that the court cannot require additional environmental impact statement without infringing on Congress' power of investigation. In addition, the Judge can hold the case is not justiciable on other threshold issues, such as ripeness because nothing has been done and nothing will be done for quite some time.

The evidentiary hearing is to make certain that the record is complete because Judge Pratt expects the Plaintiffs to appeal the case. Theoretically, the Judge could rule on the two foregoing questions without additional evidence.



Constance E. Brooks

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Se[illegible]ember 20, 1977

Senator Mike Colletta
Steering Council for Alaska Lands
1016 West Sixth Avenue, Suite B
Anchorage, Alaska 99501

Dear Senator Colletta: Mike

As you know, the National Chamber of Commerce filed suit against the Department of the Interior on September 14, 1977, seeking the enjoin the Secretary of Interior from testifying on his D-2 proposal.

Attached please find a memorandum which delineates the action that occurred in Court.

We will continue to monitor this action, but I strongly suggest that the Steering Council not intervene as a party in this suit at this time. If it becomes necessary, at a later date, to consider intervention, the Steering Council might be better served by filing an action in Alaska.

We will continue to report to you as the case develops.

Yours very truly,

BIRCH, HORTON, BITTNER & MONROE

Ronald G. Birch

RGB:lra
encl.

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MEMORANDUM

To: Ronald G. Birch

Date: September 20, 1977

National Chamber of Commerce
versus
The Department of Interior

On September 14, the National Chamber of Commerce filed suit against the Department of Interior to enjoin Secretary Andrus from testifying on the d-2 proposal to the Subcommittee on General Oversight and Alaska Lands, on the grounds that the Department of Interior must file an environmental impact statement as required by NEPA §102(2)(C). The National Chamber of Commerce represents the various industries whose economic interests will be affected by d-2 legislation now pending before Congress. They petitioned for a temporary restraining order, a preliminary injunction, and declaratory judgment requiring the Department of Interior to file an environmental impact statement before recommending changes in H.R. 39 to Congress. The temporary restraining order was denied and a preliminary hearing was set for September 22.

The National Chamber of Commerce has several problems with respect to their lawsuit against the Department of Interior. Their first hurdle is to establish standing, and next, in order to get the injunction, they must show irreparable harm and injury in fact. While Judge Pratt only

made a brief ruling from the bench it was clear that he questioned whether the Plaintiff had standing. In order to win even a declaratory ruling that the Department of the Interior must file an environmental impact statement, the Plaintiff will have to establish its standing which will require proof that its interests are within the zone of interests protected by NEPA and that it will suffer injury in fact if relief is not granted. The National Chamber of Commerce will have difficulty in proving that their interests are within the zone of interests protected by NEPA, because its underlying purpose is to protect the environment and it only applies to any significant federal action affecting the quality of the environment. The statutory langugage does not distinguish between economic and environmental interests, so arguably anyone who may be adversely affected by proposed federal action should be able to compel filing of an EIS, so long as that federal action affects the quality of the environment. However, there is limited authority for trade associations or businesses to have standing under NEPA. Furthermore, under the Administrative Procedures Act, standing also requires that the Plaintiff's interests be within the zone protected by the particular piece of legislation. The Plaintiffs represent the economic interests which would be adversely affected by H.R. 39, and these interests are often at odds with the environmental interests that NEPA is generally read as intended to protect.

Possible arguments in favor of NCC's standing would include the fact that the statutory language does not exclude economic interests and the d-2 legislation may have an adverse impact on the Plaintiff's interests. On the other hand, d-2 has a direct impact on the interests of the Steering Council, so they would be able to meet the standing requirements of zone of interest and injury in fact more easily. A second argument is to find legislative history which would tend to show that Congress did not intend to limit the remedies under NEPA to environmental groups.

Even if NCC can show that their interests are within the zone of interests protected by NEPA, injunctive relief will probably be denied because NCC cannot show injury in fact. The National Chamber of Commerce (NCC) is asking the court to enjoin Department of Interior from testifying before a Congressional subcommittee, with respect to legislation which has not been enacted and probably will not be for quite some time. The impact that d-2 will have on the Plaintiff's asserted economic interests is both indirect and speculative. Therefore, it is almost impossible for the NCC to show how Andrus' testimony before the Subcommittee will in fact injure the Plaintiffs' interests at this time.

The Plaintiff might argue that failure to enforce NEPA, the regulations written by the Department of Interior, and the guidelines written by the Council on Environmental Quality (CEQ) injures the Plaintiff's economic interest, and nullifies entirely the purpose of NEPA. NCC would further contend that the Plaintiff's own participation in the legislative process has less weight than that of Department of Interior. Thus, the Plaintiff is effectively precluded from protecting its economic interests, and is also unable to make informed business decisions without an environmental impact statement. Again, the adverse impact on NCC's interests is an indirect injury which probably was not intended to be protected under NEPA and will not be protected by the courts.

In questioning NCC on the issue of injury in fact Judge Pratt also asked why the Morton EIS and the other reports on d-2 did not already comply with the spirit of the law. The only relevant EIS was written with respect to the Morton d-2 proposal which varies from that proposed by Secretary Andrus. Plaintiffs were able to show that the Morton proposal differed substantively on provisions for interior forests and reclassification of land. In addition the Andrus proposal does not account for departmental reports on minerals and oil reserves in the wilderness and refuge areas. The Plaintiffs' repeatedly stressed that the Interior had made no effort to comply with NEPA, even though with the Department of Interior has written its own regulations with respect to preparation of EIS.

Assuming that NCC could prove that they had standing to enforce the NEPA regulations, it is possible that the court will find this to be a nonjusticiable question because it involves legislation pending before the Congress. The question of whether an EIS is required for recommendations made on pending legislation remains unclear, and Judge Pratt also raised this issue. This has been a source of conflict because the statute itself does not distinguish between pending or enacted legislation. Nor does NEPA distinguish between the case where an agency makes a report or where it has actually submitted proposed legislation. However, the courts have held that when legislation is pending before Congress there is no need for an agency to file an EIS because that would be too much judicial interference in the legislative process. Moreover, a court order which would effectively delay the legislation would constitute judicial interference in Congress' power of investigation. This is judicial gloss on the statutory language and without more authority it cannot be read as a controlling rule of law.

Department of Interior's arguments were consistent with Judge Geselle's opinion in Wingfield v. OMB, 8 ERC 1011, 1976, which held that NEPA §102(2)(C) did not apply with respect to legislation pending before Congress. Without citing the Wingfield case, Interior also argued that NEPA requirement of an EIS did not apply to pending legislation which had not originated in the federal agency. There is judicial authority for this position and neither side raised the question of legislative history, to support or rebut it. By asserting that the Interior's regulations and the CEQ guidelines were limited to agency-originated proposals, the Department seeks to exempt agency reports or recommendations from NEPA merely because they relate to legislation originating in Congress.

This final argument is too simplistic because it would limit the EIS requirement to agency-originated legislation and thereby undercut the purpose of NEPA, because an agency would be able to avoid filing an EIS by merely asking a

Congressman to introduce the bill. Furthermore, the statutory language does not indicate that this was the intent of Congress and the regulation or guidelines do not limit their application to agency-originated legislation.

The chances of the Plaintiff getting a preliminary injunction are remote to say the least. The relatively small number of cases indicate that an injunction would be inappropriate because the courts are reluctant to put any limitation on Congress' power of investigation. This power has its origin in the Constitution and what judicial limits that have been imposed relate to cases where the investigative power violated individual civil rights. Otherwise, the Congressional authority of investigation has always been construed broadly. The interests asserted by the Plaintiffs here do not involve individual civil rights. Thus even if the Plaintiff could prove that the protection of economic interests was also contemplated under NEPA, that the failure to file an EIS is indirect injury causing irreparable harm, it is unlikely the Plaintiff would get an injunction in this case. Not only would the injunction give the plaintiff the ultimate relief that they seek, it would change the status quo which goes beyond the purpose of an injunction.

However the NCC would have a better chance of getting a declaratory judgment ordering the Department of Interior to file an EIS. The courts are willing to issue declaratory judgments with respect to pending legislation because it does not interfere with the Congressional power of investigation. Thus, the courts can avoid any questions of a nonjusticiability or violation of the doctrine of separation of powers. In this case, the declaratory judgment is better because it will lower the burden of proof for NCC. Otherwise it is very difficult for the Plaintiffs to show that the Andrus proposal will have a direct and adverse effect upon the economic interest of Plaintiffs. The courts are more than aware of the slowness of Congress in considering and enacting legislation and so that the need for immediate relief is difficult to prove even if the Plaintiffs would be able to show standing and irreparable harm.

CB

Constance Brooks

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September 15, 1977

file D-2

Steve Cowper
D-2 Steering Council
Suite D, Nerland Building
Fairbanks, Alaska 99701

Dear Steve:

Enclosed, please find a copy of a telex which I received from Ronald G. Birch this morning. The telex is self-explanatory. Please contact Ron Birch with further directions.

Sincerely yours,

BIRCH, HORTON, BITTNER & MONROE

Bill

William H. Bittner

WHB/kpo
Enclosure
cc: Mike Collett

ON SEPTEMBER 14, [illegible] NATIONAL CHAMBER OF COMMERCE FILED SUIT AGAINST THE DEPARTMENT OF INTERIOR TO ENJOIN THE SUBMISSION OF THE AGENCY'S PROPOSALS TO CONGRESS ON HR 39 BECAUSE THE DEPARTMENT HAS NOT PREPARED AN ENVIRONMENTAL IMPACT STATEMENT AS REQUIRED UNDER NEPA. PETITION FOR TEMPORARY RESTRAINING ORDER WAS DENIED AND A HEARING ON THE PETITION FOR A PRELIMINARY INJUNCTION WAS SET FOR SEPTEMBER 22. DENIAL OF THE TEMPORARY RESTRAINING ORDER WAS BASED ON THE FAILURE OF THE PLAINTIFF TO SHOW THAT WITHOUT A TEMPORARY RESTRAINING ORDER IRREPARABLE HARM WOULD RESULT TO THE PLAINTIFF'S ASSERTED ECONOMII INTERESTS.

THE NATIONAL CHAMBER OF COMMERCE SEEKS TO DELAY THE ADMINISTRATION'S REPORT ON THE D-2 LEGISLATION BY REQUIRING THE DEPARTMENT OF INTERIOR TO FILE AN ENVIRONMENTAL IMPACT STATEMENT WHICH NEPA SECTION 102(2)(C) REQUIRES..."IN EVERY RECOMMENDATION OR REPORT ON PROPOSALS FOR LEGISLATION OR FOR OTHER MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE ENVIRONMENT." NO ENVIRONMENTAL IMPACT STATEMENT HAS BEEN PREPARED REGARDING THE CARTER ADMINISTRATION'S POSITION ON D-2 AND TO REQUIRE IT WOULD DELAY THEIR REPORT SUBSTANTIALLY. THE ADMINISTRATION'S POINT OF VIEW IS THAT NONE IS REQUIRED BECAUSE ONE ENVIRONMENTAL IMPACT STATEMENT WAS PREPARED FOR MORTON'S D-2 PROPOSAL AND THE ANDRUS PROPOSAL IS ONLY AMENDMENTS TO HR 39-----------------

----------RATHER THAN LEGISLATION ORIGINATING FROM THE AGENCY. THE NATIONAL CHAMBER OF COMMERCE WILL HAVE DIFFICULTY IN WINNING ITS INJUNCTION NEXT WEEK BECAUSE IT IS DIFFICULT TO PROVE THAT THEY WILL SUFFER DIRECT INJURY IF THE DEPARTMENT DOES NOT FILE AN IMPACT STATEMENT BEFORE ANDRUS INCLUDES THE PROPOSED AMENDMENTS TO D-2 ALTHOUGH IT REPRESENTS THE ECONOMIC INTERESTS OF INDUSTRIES WHICH MAY BE ADVERSELY AFFECTED BY THE D-2 LEGISLATION, THE ANDRUS PROPOSAL IS IN THE FORM OF A REPORT WHICH WILL GO TO THE SUBCOMMITTEE CONSIDERING HR 39. HR 39 WILL AFFECT THE PLAINTIFF'S ECONOMIC INTERESTS ONLY IF IT IS PASSED. FURTHERMORE, SINCE HR 39 IS ONLY IN SUBCOMMITTEE THE NEED FOR A PRELIMINARY INJUNCTION IS MUCH LESS IMMEDIATE. FINALLY COURTS ARE RELUCTANT TO ENJOIN CONGRESSIONAL INVESTIGATIONS WHICH RELATE TO PENDING LEGISLATION AND THE ANDRUS PROPOSAL IS CONSIDERED TO BE PART OF THE INVESTIGATIVE PROCESS.---

---THE PETITION FOR DECLARATORY RELIEF ORDERING THE DEPARTMENT OF INTERIOR TO PREPARE AND FILE AN ENVIRONMENTAL IMPACT STATEMENT MAY BE MORE SUCCESSFUL.

WE ARE MONITORING THIS LITIGATION BUT HAVE NOT FILED AN APPEARANCE.

WE WILL NOT INTERVENE IN THIS CASE UNLESS THE COUNCIL SO DIRECTS.

END OF MESSAGE.