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J. WITHERSPOON
10/21/73

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

October 31, 1973

The attached transcript contains the remarks made by Professor Joseph Witherspoon on October 21, 1973 before the Senate Resources Committee. It is a verbatim transcript of Professor Witherspoon's remarks. There is occasionally a word missing or other minor gaps in certain places, which are due to the speaker's testimony being indecipherable at that point. However, it is believed that these occasions are rare and the transcript presents a fair picture of the thoughts expressed by the witness before the committee.

Senator John Sackett
Chairman
Resources Committee

SENATE RESOURCE COMMITTEE

October 21, 1973

TESTIMONY FROM PROFESSOR JOSEPH WITHERSPOON

CHAIRMAN: Today we have with us Professor Joseph Witherspoon; Professor Witherspoon is a professor in petroleum law and constitutional law.

PROF. WITHERSPOON: Constitutional law, administrative law, legislation, but not petroleum law.

CHAIRMAN: I have asked the professor to give us testimony initially and then be available for questioning.

PROF. WITHERSPOON: Mr. Chairman, it is a pleasure to be back in your wonderful state. I've had an opportunity to read the measures that have been proposed and I'm still in the process of learning. I'm sure that I'll learn more by further study which I will continue to do tonight and many of the days and hours that I'm here. So I preface all that I say at this point simply saying I have addressed myself to these materials since they were given to me last week, and I'll try to make as good a statement as I can in light of that.

The first proposition I think can be made is, and I have focused primarily upon the Alaska Pipeline Commission Act and the Alaska Pipeline Right-of-Way Leasing Act and to a lesser extent upon the common purchaser provision that has been proposed. I must say that the proposed legislation would largely, distinctly--substantially change--the character of the legislation and

although my testimony at the last hearing before a committee here, related to the Right-of-Way Leasing Act, I would like to start today with the proposals insofar as they affect the Alaska Pipeline Commission Act.

The first provision that I would like to note in the Act relating to oil and gas pipelines and the Alaska Pipeline Commission and providing for an effective date, is Sec. 42.06.150. That section as proposed would mean that Secs. 240 through 420 and Secs. 140 (3), 140 (8), 140 (9), on Senate Bill 6, page 1, line 48, do not apply to a pipeline or pipeline carrier--and I want to emphasize the phrase, "or pipeline carrier", subject to the jurisdiction of the Interstate Commerce Act or the Natural Gas Act. The focus here with respect to the emphasized language "pipeline carrier" is that that pipeline carrier so subject to one of these acts is not subject to this act. That means, as I read it, and as I think courts generally would read it, that--despite the language that follows--an intrastate activity of this pipeline simply is not subject to your law. To me, it seems that that creates a very anomalous situation. I think its clear that this, as I understand it-the way it was explained to me--that this act was originally adopted with a view to handling the activities of interstate carriers to the extent that they could be handled. It was the activities of interstate pipeline carriers that primarily presented the problem that you felt as a Legislature, should be addressed by this legislation. It

was expected, undoubtedly, that intrastate carriers might come into being, that they might increase, but the occasion for the legislation was the intrastate activities of an interstate pipeline carrier and to the extent that they could be reached without being in conflict with, or inconsistent with, federal legislation or federal administration of federal legislation that that too would be subject to the act and reached by the act. It seems to me that this principle here, which covers the main body of this act, what it is designed to do, this principle--this rule--really says that a pipeline carrier that is subject to the Interstate Commerce Act as would be the tremendous pipeline that is proposed to develop, simply would not be subject to your act at all, either as to its interstate activities or its intrastate activities. The remarkable thing is, it seems to me, the problem of constitutional law that this presents. It would seem to me that there would be a severe question of the constitutionality of such a provision insofar as the equal protection of law clause of the 14th amendment, which bears upon states of course, and says that they may not deny equal protection of the law to a person. It may be that that was not intended but I think it may well have been intended. In any event, I think the legal effect of this provision is to take the intrastate activities--pipeline activities--of this pipeline carrier subject to the Interstate Commerce Act, completely off from control of this act, as well as interstate activities. Get them totally out from under. Now that is one proposition, and I have state the reasons for it

and suggested a constitutional difficulty. I would think there would be a difficulty of legislative policy as well. That this act, which was designed to meet a great problem of the State of Alaska, now has its impact upon local intrastate pipelines. They are subjected to this regulation and the intrastate activities of interstate pipeline carriers or not, I should think perhaps one might feel that the act should be repealed if the intrastate activities of an interstate pipeline carrier are not to be subject at all to a piece of legislation that is designed to deal with intrastate pipeline activities, why have it at all? Why not treat everyone the same way?

The second proposition that it seems to me emerges and reveals that the philosophy that must have been in the mind of the draftsman of this act is, and I need to emphasize very carefully the language of that, its been very carefully drafted by a very excellent and a very agile draftsman. It says that--and I'll read again, but I want to talk about something else contained in that sentence. Secs. 240 through 420, and Secs. 140(3),(8) and (9) of this chapter do not apply to a pipeline or pipeline carrier, now I emphasize the words "subject to the jurisdiction of the Interstate Commerce Act or the Natural Gas Act." The words being emphasized then "subject to the jurisdiction." What is it to be subject to the jurisdiction of the Interstate Commerce Act. I have here Title 49, United States Code, Sec. 1. This

is the base provision of coverage, or jurisdiction, of the Interstate Commerce Act as it was amended in 1906 to apply to pipelines. This provision reads: "The provision of this chapter shall apply to common carrier engaged in. . .(b) the transportation of oils or other commodity. . .by pipeline or partly by pipeline and partly by railroad or by water. . .from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States." There's a lot of other language, but I think that is the basic information. To repeat it, this is saying that the provisions of the 1906 Act to the Interstate Commerce Act, applies only to common carriers insofar as they are engaged in the transportation of oil by pipeline, or partly by pipeline partly by railroad or water, from one state to another place--another state or territory, and so on. Now, that's what it is to be subject to this jurisdiction. You must be a common carrier, you must be engaged in transportation, and it must be by pipeline or partly by pipeline and something else indicated here, and it must be transportation which is interstate commerce--to pick a very important item of the kind of commerce that is covered. That's what it takes to be subject to the jurisdiction. Now, let us read another clause of this very important piece of this statute as proposed to be modified in subsection b. That states: "For purposes of this

chapter, the TransAlaska Pipeline and any other crude oil pipeline in the State submitting to the jurisdiction of the Inter-State Commerce Commission and transporting crude oil within the State for subsequent transportation outside the State, are considered to be subject to the jurisdiction of the Interstate Commerce Commission, under the Interstate Commerce Act." At this point, I want to emphasize that they're not saying that they are or that it is subject, they're saying its considered to be and unless and until a final determination is made by the Interstate Commerce Commission that the pipeline is not subject to the jurisdiction of the Interstate Commerce Commission. That is a remarkable piece of draftmanship, I suggest again, because it accomplishes a great deal and in voting for it or considering it favorably I think you should be very clear what this will do.

This has not a unit about what the oil or gas pipeline companies agree to do. Its just if something happens, if they submit to the jurisdiction of Interstate Commerce Commission and they are transporting, then they are to be considered subject to the Interstate Commerce Commission's jurisdiction. Now, suppose you enact this act, and suppose whatever submitting to the jurisdiction means--and that's another big question of interpretation--suppose they do not do so, what is the effect of this act. I'm not saying they would not do this, I think there are reasons why very well they would do it, but let us suppose something would

happen. That the TransAlaska pipeline interests or some other crude oil pipeline in the State did not submit--let's take a look at this first sentence which says, "subject to the jurisdiction of", it would mean that that pipeline, if it were subject to the jurisdiction, is not covered by this act, but if it did not in fact submit to the jurisdiction, it would not in fact be operating under the Interstate Commerce Act. You would have an unregulated entity. You would have perhaps the largest economic entity in your State or perhaps in any state of its kind in the nation subject to state regulations as to what it is doing and with respect to the saying that you put into this act to regulate such activities at the same time, it would not be operating under the Interstate Commerce Act. Let us take this a step further. Suppose the Interstate Commerce Commission elects not to exercise its jurisdiction. Now there's some good reasons why it may not exercise this jurisdiction here. First of all, it hasn't very vigorously exercised its jurisdiction over a period of 67 years. This is the language of scholars regularly in printed books of unquestioned authority, this is the common statement you see everywhere in the literature, that the Interstate Commerce Commission has not exercised its jurisdiction. So that if this TransAlaska Pipeline group does not in fact do the things that submits to the jurisdiction and yet have an agency that is reluctant to exercise doesn't act positively, you don't have any

regulation operating with respect to the activities of the pipeline. So that the assumption of this act on the surface seems to be that by not having it under the jurisdiction of this act, it will be under the jurisdiction of some other act, a federal act, and some federal agency created by that federal act. I'm simply saying there's nothing in this act that secures or requires the Trans-Alaska pipeline interests or any other crude oil line ___ ___ ___ in the State, asking them to go forward and submit to that jurisdiction. This was one of the things that the Alaska Pipeline Right-of-Way Leasing Act was designed to deal with. It doesn't leave a gap. We come later to discussing that if we do have time this afternoon, I would like very much to do so. But it was designed to make sure that if the Interstate Commerce Commission was not exercising its jurisdiction at all or not exercising it vigorously, or perhaps didn't even have jurisdiction--there's a very good argument that there is no jurisdiction really (thats another problem), that at least, you would have one act that would be focused upon it. Of course, I'm assuming right now that its not operated either, because the proposal with respect to the Alaska Pipeline Right-of-Way Leasing Act is that substantially its strange--I mean it doesn't really govern--it really doesn't speak to, it really doesn't solve the kinds of problems of which this is one kind of problem.

Now, suppose there is a submission to the Jurisdiction of

the Interstate Commerce Commission, and suppose there is this transporting of crude oil, which there is, from the state--or within the state for subsequent transportation outside the state and--in other words, there is the choice is made in accordance with what is here, that the TransAlaska pipeline group will submit to the jurisdiction. I assume they mean by that and there is a question as to what it means--it means apparently, that at least there would be a filing of a tariff and perhaps some other things, the filing of some reports--proving type reports. And this would be a submitting to the jurisdiction and that is to be treated as if it is subject to the jurisdiction, not that it is not contingent upon it really in fact being subject to the jurisdiction, this is to be treated as if it were. Now, this is a question really of federal and state relationships. Do you want to create an act that deals with a situation that is well within your power to deal and that most states deal with by state acts. Do you want to have that loss to you because papers are filed with a federal agency and that is treated as if it really is a jurisdictional matter for the Interstate Commerce Commission. It is a remarkable piece of legislation that is being proposed. There are some questions as to whether the Interstate Commerce Commission even has jurisdiction. First of all, this is a common carrier that it has to be. But is the TransAlaska pipeline a common carrier? I don't think you want

a total inquiry this afternoon into the cases that have handled this matter. I know the lawyers for TransAlaska pipeline group are well aware of decisions such as the pipeline cases of 1913 34 U.S. 548, but one of the clearest things decided by the Supreme Court is that if a producer of oil is shipping its own oil over its own pipeline this is not a common carrier situation.

I doubt if its changed at all by virtue of the fact that you have a producing company that wholly owns a subsidiary pipeline company. The Supreme Court has time and again pierced this corporate veil and I suggest to you that you do not have a common carrier. So what you have here is a draftsman who has proposed making this thing controlled within your state and I suggest wholly and completely within your power to regulate, is proposing a piece of legislation whereby, though it may well not and I do not think it is subject to this act as a common carrier, the federal act, the state act is treating it as if it were and you are, by this act, divesting yourself of jurisdiction which you have. This is the question then comes down to it, if I am correct in this reading of the case and of this federal act, what you're coming down to is a piece of faith legislation that is turning over to the federal government and one of the agencies created under an old act, that is not a very good agency and not a very vigorous act to protect the interests of the people. What you're doing is to turn over to that federal agency something that is well within your jurisdiction to regulate, you did create a vigorous act to deal with it, and the question then is one of policy. How wise is it to turn this thing over, this matter of jurisdiction, which

is within your jurisdiction, to the federal government which really doesn't have jurisdiction over it. I can imagine what a hard-pressed federal agency would say with not much of a budget, or, much of an interest in this. They'd see the filing, they wouldn't do anything about it. Why should they do anything about it? I mean, people file papers as an impact at the state level, but why should the federal government or the federal agency do anything about it. So that's another problem.

The fourth proposition--this goes to really what the Interstate Commerce Act as amended in 1906 is all about. You had a very able person before you earlier, a Mr. Furman of the firm of Cox, Langford & Brown, this is back in 1970 in comments upon an earlier bill. I simply want to confirm what he said--I have the book here in which it can be demonstrated that what he says is correct. The Interstate Commerce Commission is essentially created to regulate rates of an interstate pipeline and to prevent discrimination in the charging of these rates. It has some operation with respect to the tendering of oil to these pipelines that are subject to the Interstate Commerce Commission regulations. And it has some accounting requirements, but by way of comparison with the Natural Gas Act of 1938, which is a highly developed, sophisticated form of regulation of the Inter-State Natural Gas pipeline, its a very weak statute. It has very, very little in it to speak to the numerous regulatory

problems that are presented. All you'd need to do would be to compare Title 15 of the United States Code, Sec. 71784 through the Natural Gas Act with Title 49 United States Code, Sec. 1 of the Act with respect to crude oil and products pipeline. There just is very little resemblance. True, both of them cover the regulation of rates charged, they cover the problem, as I indicated of discrimination in rates and they cover the problem of accounting and thats about it. But there is no control no authority in the Interstate Commerce Commission at all to regulate crude oil pipeline to the same extent as it regulates other carriers, like railroads. There is no control over the construction of new pipelines. This is going to be a great problem for you and its something that you spoke to in the Alaska Pipeline Commission Act, and you spoke very well. You're going to face the ICC--they have no control over changes then, modifications of, or extensions of existing lines. And as you discover, if you do discover more crude oil in this state, this is going to become an extraordinarily important problem for you, particularly if you're going to confine your pipelines to a limited area in your state, for reasons that we all know. Its going to be terribly important for you to be able to speak to this problem of extending a line or expanding a line or modifying a line or getting a complete new line. In turning this over, allowing this entity, the TransAlaska pipeline entity to turn itself over to the ICC for regulation by it and non-regulation by it, you're really turning it over to an entity that has no

statutory authority whatsoever to deal with this. And you have statutory authority in the act that you passed last year to deal with it. There is no control over the abandonment of pipeline in the Interstate Commerce Act. There might be reasons why the Prudhoe pipeline or a portion of it were abandoned and that might have a serious adverse affect on this state. You can send the proposed new commissioners to warn them to advocate but they'll have nothing to advocate about because the Interstate Commerce Commission can do nothing about that. It has no statutory authority to do anything about it. The problem of extension, modification, existing lines and the building of new lines by existing carrier subject to this act or to the Alaska Pipeline Right-of-Way Leasing Act that was enacted about the same time, that problem was very thoroughly dealt with in those two acts and you would not be left without statutory authority to deal with them.

There is no control over security issues of pipeline companies. There is no regulation in the Interstate Commerce Act upon the failure of the pipeline or passing of pipeline interest in the pipeline by a carrier over to some other carrier. That was carefully spoken to especially in the Alaska Pipeline Right-of-Way Leasing Act. You've got the problem of inter-connection which is something that most of your state acts have--pipeline regulatory acts have--at the state level that was also in your act. What was put their by the draftsman was put there for your

consideration and adopting after looking at state acts elsewhere. But that goes by the board--its one of the things that goes by the board as I read the proposal. There is nothing in the Interstate Commerce Act that gives authority to the Interstate Commerce Commission to deal with it.

But now let us look at the thing that the Interstate Commerce Act does deal with. One of these is, of course, the rates charged by a pipeline common carrier engaged in interstate commerce. I don't claim to be any kind of expert at all in the economics of the oil pipeline industry. In the memorandum that I submitted to the joint pipeline impact committee in 1971-72, I did review the material that has been written about the effectiveness of rate regulation by the Interstate Commerce Act. It does have this authority and lets assume that this TransAlaska pipeline group submits itself to the jurisdiction of the ICC and you want its rates then regulated by filing its tariff; and lets assume further, which is a large assumption, that the Interstate Commerce Commission will then look at this set of rates and then will say this is worthy of investigation, will then hold hearings and will then come to a decision and the decision will be favorable to regulating the rates. Now, when thats all done, if that rate regulation is about what it has been with respect to other rates regulations, the authorities tell us, and I refer you to the specific authorities quoted in

March--that, by and large, this rate regulation is such that it operates in two ways. First of all, it gives a very considerable and happy return to the pipeline company. Its a high enough return that they can depreciate their crude oil pipelines and then have from 15 to 25 years of useful life of the pipeline left.

Secondly, these prices, the rates for transportation are so high that no one takes advantage of them. The truth of it is that your pipeline companies that are nominal common carriers, where there is no question of them being common carriers. There is a real question here whether they're common carriers. But where they are in law by virtue of facts that are not present here with respect to the TransAlaska pipeline group, where they are common carriers in fact, not talking about law, talking about in fact, they are not common carriers--nobody transports, or the great percentage of the oil they carry is not other people's oil. Other people's oil is disposed of otherwise than in the pipeline that are in law common carriers. I'm simply saying that because of the rates, because of their effects upon the competition between people who own oil that might go in those lines, these rates are assessed at a high enough level despite the decisions that limit their height, amount and character. These rates are sufficiently high that these pipelines are not really common carriers. And they are sufficiently high that they allow this amount of extra use of the pipeline after depreciation.

So, one can raise the question--how effective is the rate regulation? How effective is the rate regulation? Should you be turning rate regulation over--that isn't the right way to put it, that would be an incorrect way to put it--should you be relinquishing jurisdiction to fix the rates if you have it. Assuming that you have it. I have asserted that you would for many many purposes have it, if you don't have a common carrier here. Should you be turning rate regulation over to the Interstate Commerce Commission that produces that kind of rate structure.

Thats the four basic propositions that I have, Mr. Chairman, with respect to this act and I do suggest that it is important to see that there is nothing left as a result of the proposed amendments to the Alaska Pipeline Right-of-Way Leasing Act--theres nothing left in it and there's nothing left in (if there ever was anything in there) the original act to make this Trans-Alaska pipeline a common carrier. There is an extraordinarily good argument that the Alaska Pipeline Commission Act only applies to common carriers. So you've got to have a common carrier. The TransAlaska pipeline has to be a common carrier before its subject to this act. In one way, one could raise the question--why are they worried about this act if they're not a common carrier. One could raise that question. Perhaps they seem that it is just an anchor to windward, they're not going to be common carriers and they don't have to worry about this act, but if they have to worry about it, go ahead and make these arrangements and you don't have to worry anyway. That would be

one way of look at it, but I refer to page 176 of your 1972 Cumulative Supplement to your Alaska Statutes and definitions 9 and 10, 9 is of a pipeline or pipeline character. Three items are listed for coverage of a pipeline or pipeline facility. That it is a facility of a total system of points, used by a pipeline carrier for transportation for hire and as a common carrier. There are many decisions which I could cite to you, one of them, an outstanding decision of the Supreme Court of the United States which would say that you have to be a common carrier under that definition of pipeline or pipeline facility. Certainly I can tell you that at the time time of the joint pipeline impact committee was going through its consideration of this act in its original form--and it went through several forms--the Alaska Pipeline Right-of-Way Leasing Act as the Committee went through this and its staff went through this and as I attempted to assist them, it was clear that we weren't following who was a common carrier in this regulatory act. What we were relying upon essentially the agreement of a lessee carrier in a pipeline right-of-way lease to assume the status of a common carrier. We've seen this problem with respect to the TransAlaska pipeline group. That it probably would not be a common carrier, it probably, though it had transportation that would be subject to the Interstate Commerce Act, that didn't make it subject unless it was also a common carrier. If it wasn't a

the federal act that was designed for common carriers. And so in writing the state act, if you were going to write one for common carriers, it is very important to solve the problem of whether or not a crude oil pipeline like the TransAlaska pipeline group was a common carrier. So how better to solve it than for giving up something of value to the State of Alaska. Something that it owns and turning it over to a group for who knows how many years for common benefit of the lessee and the lessor,-- what better way to obtain common carrier status than to get an agreement by the lessee to be a common carrier. Thats how this problem was solved in the Alaska State legislation. Now, with these two acts to be--proposed to be--revised, if they are so revised, you have a state act even if you keep it intact which really doesn't apply anyway, because what you have is not a common carrier and you have no act left by which to bargain for and use your leverage for getting assumption of the status for common carrier by the TransAlaska pipeline group. This is the way I see it, it seems to me to be a fair way of reading the three statutes together; the Interstate Commerce Act as amended in 1906 and these two acts which the Alaska State Legislature enacted at its regular session.

I do think its important to see that this act was well-drafted and that it does follow the best of the state legislation to be found. It never was contemplated that this would regulate interstate rates of the TransAlaska pipeline company

this obviously is something that couldn't be regulated. Couldn't be regulated at all. It was handled by, however inefficiently, by the Interstate Commerce Act, a federal act. If the Trans-Alaska pipeline company is subject to the act, we've covered the questions with respect to that, then that act applies and covers that, and this act--the state act--the State pipeline Commission Act, simply does not apply, it so says. It applies to oil and gas pipeline carriers regulated under the Interstate Commerce Act only to the extent not preempted on the federal act. So its clear that this being something regulated by the federal act, the state is not attempting to exercise that jurisdiction. There really is no need to take that out of the act. Its clear that it isn't covered. Anything that is currently being regulated, and theres not much thats regulated in the federal Interstate Commerce Act, Sec. 15042.06.150 says its not covered here. The beauty of your carrier act and I had not contemplated until I got more deep into this regulatory act, that we would be talking about it as much as I am rather than the right-of-way leasing act, the more you go into it, the more you see the philosophy that seems to be there. What is also means, in addition to turning us over to the federal government and ICC, it represents a whole area of problems that you could regulate, you may want to regulate in the future and that you can't regulate because of this act.

It is clear from the most recent authorities, and I have here a summary by and large of the authorities with respect to

is a vast area of power in the state, authority in the state, in light of the commerce clause of the federalconstituti n to regulate the activities of interstate businesses, including interstate transportation businesses. If anything, the power is increasing. I think perhaps the Supreme Court of the United States is beginning to understand that there needs to be a redress in this relationship between state and federal government in our federalism. The latest cases seems to be going very definitely in that direction. I would just talk about a case like the Huron/Portland Cement Company vs City of Detroit, 362 U.S. 440 (1960) in which it was held that Detroit apply its smoke abatement code to ships that were just in the port for awhile. This called for rather substantial modification of the boilers of those ships. I could take you to another case, which involves very much the same reasoning, they're simply saying today state regulations based on the police power which does not discriminate against interstate commerce or operate to disrupt it uniformity may constitutionally stand. Thats almost the last statement of the Supreme Court of the United States. This act is going in the direction of turning loose the power that the court is trying to return to the states if there is a good place for it. It does seem to me here in the face of a weak federal statutue, weakly administered by a weak agency that is not seemingly interested in doing what it can do with the little power it has,

should do the job that the federal government has not done. I think that concludes, and I realize I've taken far more than 10 minutes, Mr. Chairman, but it does conclude my presentation on that act. Perhaps there would be questions.

MR. CHAIRMAN: Are there any questions of Prof. Witherspoon?

Q. Professor, I'm a little surprised at something. I'd always thought that such a pipeline as this existed automatically as a common carrier. There was no way that the State ___ ___ ___ ___ ___ ___ ___, but I gather from what you said that this act is being composed and __ ___ ___ _____ back automatically to common carrier. We could get out from under that just by a little old act ___ ___ ___ ___ ___ __. Do I understand you to say that there really is a question as to whether it would be a common carrier?

A. I would say there is a very substantial question. I don't say that it can't be argued on the other side, but I would start and I'd be glad to supply this committee with a memorandum on this. Its well documented in the law reviews and the law journals, but I will be glad to start with the pipeline cases and bring them down. Its a confused area of the law first of all, as I think ___ _____ on either side of this question would tell you, but there are very strong reasons for believing that this oil in this intercorporate relationship that is involved with each pipeline company with its parent company. There are very strong reasons for believeing that this is not a dealing with another persons oil. Its not a purchase of oil from someone who is

as one company dealing in its own oil, well within the Uncle Sam oil company exception in the pipeline case.

Q. Could you cite one or two elements that are missing in this situation that would make it not a common carrier.

A. I think I would rely primarily upon the notion that, and if it is the fact, that the oil produced is essentially the oil of an oil-producing company and that it is not purchased oil, it is oil that comes from its own wells and this oil is put into the line or a portion of the line that is owned by a subordinate or subsidiary company so that it represents, although it is in interstate commerce a dealing of a person, a corporate person, with its own oil.

Q. Wouldn't this line have to take the oil of non-owner producers.

A. No sir, not unless you make them do it as you would do it as you would get their agreement to do under the Alaska Pipeline Right-of-Way Leasing Act. That is the reason that it was designed to secure their agreement to become common carriers. They have to be either in law or by factual basis by which law is applicable common carriers. They are not without more just because they're transporting oil. It is law that makes a transporter of oil a common carrier.

Q. Aren't the stipulations made to the Secretary of the Interior such that it is in fact going to be a common carrier, or do you. . .

A. That would be true for the federal land that is involved, that is right. Under Title 30, Sec. 185, U. S. Code. But in that provision, they did not neglect to put in the condition in the lease or the permit, and this is specifically spelled out in that statute that they must be not only a common carrier, they must be a common purchaser, this is put into the statute.

Q. SENATOR GROH: Didnt the stipulations with the Department of the Interior require them to be a common carrier, for all purposes, not only that portion of the line which is over federal land. It requires them to be a common carrier subject to the ICC?

A. There is a limited provision, I'm not sure what the full scope of it is. There is a subordinate provision following this provision which does call for them specifically to agree that they will utilize. . . (tape stopped)

Q. . . .my recollection also is that they've also agreed to one of their provisions before they can get a federal permit is that they agree to be a common carrier under ICC. Isn't that correct?

A. No, there's no provision, if you're talking about the Alaska pipeline. . .

No sir, about the federal act. . .aren't they obligated. . under the federal pipeline act, doesn't that require them to be a common carrier under ICC?

A. No, it does not. Absolutely not. I mean there's nothing in the Interstate Commerce Act, in my opnion, under these circumstances that requires them to be a common carrier. Under Title 30, Sec. 185 with respect to federally owned lands, there is the requirement that ends with a permit or lease ___ _____ this stipulation.

Q. I'm sure its my fault, but I don't think we're communicating. I'm talking about the act of the federal Congress which allows the pipeline to be built, which is before Congress now. Doesn't that require them to be a common carrier under the Interstate Commerce Act.

A. This is what I've understood. I've asked for a copy of that bill and asked for it today because its been very difficult to get and I'm anxious to see it. I've not actually seen it. I've heard this, and of course, that would solve that particular problem. Then we would get back to some other questions and whether having the authority to deal with other activities of importance that are dealt with by the Alaska Pipeline Commission Act, whether it would be then important to have such an act as this, rather than lets say to turn it over to the regulation of the ICC under an act that may not be substantially different from the present one.

Q. To the extent though that you raise that question, there is a very substantial part of your comments on this act. If they are in fact required to be a common carrier under the Inter tate

Commerce Act, at least that objection would be . . .

A. About 25% of the objection would be modified.

Q. Isn't it also a fact, for example, that Cook Inlet pipeline which presently operates in the Cook Inlet area is under the jurisdiction of the Interstate Commerce Act.

A. I don't know the precise facts of that.

Q. There was testimony as I recall last year when you were here--Mr. Chairman, perhaps you recall it. . .by poeple from Cook Inlet pipeline in which they submitted to us copies of their tariffs and of their various submissions to the Interstate Commerce Act which indicates that at least that little pipeline, I don't remember how long it is, is already under the ICC act, and treated as a common carrier under that act. It was before one of the committees of the legislature, Mr. Chairman, I can't remember which one.

A. Senator, if youdirected that question to me, I would say that submitting a tariff goes to the other question--does this constitute really making one subject to the act without more? This is the whole problem and I would suggest at least in the circumstances that I've tried to describe today that that would not. In any event, it would still leave you with the problem of what does the federal act do; then it would leave you with the further problem, whatever it does still remains open to the state to speak to as it is spoken to by the Alaska Pipeline Commission Act.

Q. Was there any communication from the State to you, Professor, at the time that the discussions on settlement were going on to solicit your opinion as to what should be done in relationship to the settlement.

A. Yes, there was some indication that I would hear later; I did not hear. This was back in January, I offered my services without charge to the Attorney General and I did not hear further.

Q. Did you have an opportunity, by any chance, to read through the stipulations of fact, the pleadings, briefs--the papers that have been filed in the litigation.

A. I have not had anything other than the very first pleading. I believe I had the first proposed or unamended stipulation of fact that was filed.

Q. So your judgment as to what the legislature is going to be judges in the matter, which I suppose by the nature of the situation we are, is not related necessarily on the basis of what transpired in the litigation.

Q. Prof. Witherspoon, let's take a hypothetical case. Say that the federal pipeline act does not pass the Congress for some reason, or in the event that it might be vetoed, would you recommend this legislature passing then Senate Bill 6.

A. No sir, I would not.

Q. Any Portion thereof?

A. No sir, I would not.

MR. CHAIRMAN: We'll now take a ten minute break.

Q. Mr. Chairman, I'd like to ask the Professor about the _ ___ _____. Of course, we're speaking now of Sec. 38.35.120 which speaks to the various reported covenants to be included in any lease that is executed by the Commissioner administering the act and this would be subsection 7 which is now on page 102 of the Cumulative Supplement which has been using the Alaska Statute. If I may read it first: "The lessee carrier expressly covenants in the lease in consideration of the rights acquired by it under the lease that. . .the lessee grants to the state the right to purchase upon reasonable notice an undivided interest in the entire length of the pipeline within the state not to exceed 20%. The purchase price shall be a reasonable [at a reasonable] figure set out in the lease at the time of the lease's execution. The purchase of this interest may, at the option of the State, be made in stages. Exercise of an option to purchase an interest under this paragraph a project or facility _____ ___ ___ ____ approval.

Now the substitute for that is as follows, of course with the lead-in sentence about the express covenant that you have on page 7 of this bill--it is also subsection seven: This is an express covenant that it will afford the State an opportunity to negotiate for the purchase of any interest in the pipeline and here is the crucial language: ". . .offered for sale by it." This simply means that there is no opportunity to negotiate--there

is no duty to negotiate unless an interest in the pipeline is offered for sale by the owner of that interest, and until there is that offer, until it reaches a decision to offer it for sale, except for sales or transfers ofinterest in the pipeline among the owners of the pipeline, including their subsidiaries, parents, and affiliates. So if there is a sale or transfer of an interest in the pipeline from Owner A to Owner B, that is not an offer for sale that gives rise to this duty. Then there is another type of sale that is exempted, I mean an offer for sale--this is one where there is a sale or transfer resulting from merges or reoganization, providing the sale to the State. And then all of this is provided--the sale to the State will not interfere with exisitng contract rights or obligations among the owners of the pipeline or with any other third party. Of course, all I would suggest that it will always interfere. I mean, as it was contemplated here, it will always be an interference with a prior contract if the arrangement has been made for a joint venture pipeline, there will always be in a joint venture pipeline some contractual provision which speaks to the allocation of ownership among the particlpants in the joint venture. So I would say if there's any kind of change of a percentage ownership that this would be on appearances as would seem to be in the scope of this clause. Its difficult to conceive _ _____ interest in the total line. Then a further proviso provided the term of the offer for sale are solely at the discretion of the lessee. This means that