

116

SRES

SPAHR

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matters and choices, and they are going to see that of the bonds that they are considering, for us, that 20% of it is not going to have an assured base in terms of being outstanding or earning capacity, and very likely, some development that only the State will control, may find that they have the funds back on their hands to reinvest again. So this will have an effect upon their attitude about what the terms of their lending will be. It will have an effect upon their judgment as to whether this is a better issue than some other one where the same return is provided but where the risk is not there. Those are the kinds of things that will effect a lender's decisions in my view. And, in my view, which I had checked out with our financial advisor, Morgan Stanley, I feel I've got great support and confidence that with that kind of an option there, we're not going to get the pipeline financed on a reasonable basis, if at all. Now if we are also...

TUSSING: This is one of the things you can't live with?

SPAHR: That is one of the things we can't live with--one among many. I am trying to give you a picture of our financing story and I don't think I am getting in a position where you are getting me to say things I said I wouldn't say, but I do want you to understand the financing problem. That's one feature. If we are going to have a feature, such as the one you now have, on the pipeline leasing act, which puts a severe limitation on our retention of earnings as a pipeline company, when it gets beyond a certain percent, it has the automatic result of lowering the coverage of fixed charges and...(noise on tape--couldn't hear next two words)...and making it less attractive than would other-

wise be the case if we can go to 7%. Again, this is going to have an effect on the bond raising and so on--even though, as you might suggest, we enjoy a quasi-public utility status. There is no question about it in my mind. The money is going to be lent at the best terms for the best possible conditions of coverage and recoupment and gain that are going to exist and to the extent that we are handicapped up here, we'll be hurt. Now the pipeline has to be financed separately from the North Slope. We have to watch our total corporate credit arrangements. If financing is going to have to be supported by through-put agreements, they are going to have to be noted on the balance sheets and so on, but there are differences in the way, as I am sure you know, analysts evaluate things that are on your direct balance statement and your footnotes, and they will look at the totals too, so this is a very important element along with others.

SACKETT: I would like to call a ten minute recess. (TAPE OFF AND THEN ON AGAIN.) Are there any further questions from Committee members? From Senators? Senator Hensley.

HENSLEY: Mr. Spahr, one of the pieces of legislation that has caused some dissention in the members of the legislature is the ad valorem tax, and I don't believe there are many that quarrel with the idea of the tax, but in my opinion, I don't think it is a major portion of the agreement--in terms of time, and inasmuch as we have several pieces of legislation that are going to take some time to work out, I would like to know whether it is of any difference to you whether or not we, the Legislature,

enact the ad valorem tax now, or the next session.

SPAHR: Well, if you don't enact it now, we don't have to worry about paying it for awhile, I guess. If you enact it at the next session and the total amount isn't changed that soon, I don't think we would have a problem. We have no reason to interfere in, or suggest anything, with respect to how that tax is divided up, as I have previously said, so I guess I would have to say that non-action on the ad valorem tax, insofar as we are concerned would not be a problem, but it could very well be a problem for the Administration of the State, I suppose, because it is an important element to them. You know, I should add here, I think, make it crystal clear that my own view, which I think is accurate, of the way this legislative package developed was that through our discussions, the Governor got a clear idea of our concerns and ideas and attitudes and from that he developed a series of proposed laws which we said, in effect, we can accept in their entirety, and so if I have sounded as if I have been defending what my presentation to you--I certainly want to correct that impression. It is a technicality, but I think it is an important one for all of us to understand.

HENSLEY: Your feeling is that that portion of the package is not such major concern to you as some other aspects of the package...

SPAHR: If you would never pass it, I would be delighted!

HENSLEY: Fine. Then if we can convince the Governor that it may not be worth the Legislator's time at the moment to go into

a battle over the distribution of that and save that portion of it until such time as we can fully explore the impact on the State's communities between now and the next session.

SPAHR: It would be helpful, and I am sure that the answer to this will have to be, we can't do it -- it would be helpful if I were to know that even though you don't pass it, that your present intent isn't to delay and up it substantially.

PALMER: Why is that tax any different than any others? Well, in essence you are saying that if we pass it now at 30 mils, it might change things so much we can't build the pipeline. Isn't that what you are saying? That you would have to go back and look at the other things again and, therefore, cause a delay?

SPAHR: I have said that. Here you could put yourself in a position of giving us nothing to re-examine except the lack of a determination on your part and we would just have to decide on a hope that things wouldn't be greatly different. That could be done, I am sure. Some people might say we don't want to deal in a lack of security--we acted in good faith--at the present time it would appear that these taxes are adequate--we would expect in a passage of time, not necessarily just a few weeks, that you might find that you would have to do something else, but we wouldn't expect that you would have to do something more--and "you", I am speaking figuratively as if I were talking to the Governor again.

SACKETT: Correct me if I am wrong--is not the tax at the present time at a rate of 30 mils? Was this not taken into consideration by the oil companies and did they not know that if the pipeline were constructed that Boroughs under the existing tax method would probably have come into existence?

SPAHR: I think you'd better enunciate that again so I make sure I answer you.

SACKETT: Isn't the tax millage now at 30 mils?

SPAHR: I thought the tax millage now -- limit was at 30 mils, and I didn't understand that that was being applied everywhere by any means.

SACKETT: Wasn't this taken into consideration though initially by the pipeline, the oil companies, that anyone could have charged up to 30 mils and that as soon as --- even though there aren't Boroughs created along the entire route, that as soon as the pipeline were constructed, that Boroughs would definitely have been created?

SPAHR: Well, I can assure you we didn't look at it that way. Our thought was more like this. We are bringing to the State a vast new asset that can be taxed and I don't recall -- I don't think I ever knew when legislation affecting the 30 mil limit was passed. But, we are bringing more assets under the taxation possibility and, therefore, the total amount of tax available with 20 mils would, in our view, exceed what might have been available under the old circumstances that prevailed when the

30 mil, or upper limit, was enacted, whenever that was.

SACKETT: That has been enacted for quite a few years. Yes, Senator Croft.

CROFT: As I understand your statement, if we were to change the mil levy or the severance tax rate and pass the Governor's package, you are not in a position to say then that the Trans-Alaska Pipeline could still be built?

SPAHR: Senator Croft, you put the question in a way that I dislike answering. I am not in a position to say if you change the total tax base in any substantial way---what the reactions of other parties will be. And, therefore, I have tried to say I feel that we automatically will be involved in the use of some time to ascertain that and to find out what the consequences would be in terms of participation by everybody, or fall-out of some kind or other, etc.

CROFT: Suppose we raise the mill rate from 20 to 30 mils--what would be the position of SOHIO?

SPAHR: We would be dismayed.

CROFT: Would you still build the line?

SPAHR: I don't know.

CROFT: You really don't know whether you would still participate?

SPAHR: I think we would want to examine very carefully whether we would want to opt for trying to encourage some others to take a different percentage, get relief for some, consider the Federal

participation, much as I dislike some of the features of it, and so on.

CROFT: You indicated that you might encourage others to take a percentage of the present participation. Are there arrangements between the owner companies at this time regarding that?

SPAHR: There is a provision in an agreement that exists among the owner companies that provides for a means of reallocating ownership as the pipeline capacity is enlarged, that provides for their nominating capacity for determination of what the new capacity allocations will be up to 100% and that's all that we have. But this provision was put into the contract because the contract was prepared at a time when the potential of Prudhoe Bay wasn't very definite. People thought they had certain interest in the field, but they weren't sure, and, of course, as it has turned out, there have been differences from expectations.

CROFT: Is SOHIO free to sell its interest in the pipeline to anybody without obtaining approval of any of the TAPS.....

END OF TAPE.

CROFT: The exact terms of the options of the companies to purchase has not been worked out yet?

SPAHR: Oh, yes. Its all by formula, the price is established. For example, if we were to increase or decrease our ownership the price involved would recompense us for the costs we've paid or we'd have to recompense the other fellow, plus interest, for the time he had had the ownership for our benefit.

CROFT: That hasn't caused any financing problems?

SPAHR: No, its all very finite. It hasn't caused financing problems because we haven't tried to finance. We have to settle the issue of rearranging ownership before we go to financing. I know we won't have to. We'll do it promptly. We haven't gone to any of the financing companies. We've had lots of talk based on supposition.

CROFT: If that same arrangement were worked out with the State, would you still anticipate that that would cause financing problems as far as the option was concerned?

SPAHR: That would require the State to get in a position of putting or taking without option. We all have the same privilege for opting for new proposals of ownership as the pipeline increases to fit the realities of the development of the North Slope. In order to do it though, we have to pick up a hundred _____ or none of it works. There is a great deal worked into this to guarantee 100% performance,

unless there is unanimity on change.

CROFT: If the State had the same option, would that cause financing problems?

SPAHR: If the State had a similar option, I must qualify my words by deferring to lawyers who have read it more recently than I, then it would have to tie its obligation to its expected ownership of oil. It would have to expect that it would be forced to take 12 1/2% for example, or perhaps 20%, depending whether we are looking at royalty oil alone or the consequence of severance tax. And be prepared to take this base and pay for it and reimburse us for our expenses or pass the option up as soon as we decide what we are going to do. We are going to do this very quickly and before the construction starts I'm sure, or simultaneously with it as a practical matter. So the apparent options, we are probably using the term a little loosely, really are not going to exist.

CROFT: There will be an option as soon as you decide on the capacity and through put of 1.2, what happens when you get above 1.2, there will still be an option among the owner companies?

SPAHR: There will be another opportunity to determine whether we opt up to 1.2 or not, and as I recall, the full space has to be taken.

CROFT: At the time you obtain financing there will be an option among all of the companies to participate under certain circumstances in an increased or decreased ownership, and you don't anticipate that will cause any financing problems?

SPAHR: No because there will have to be complete coverage of it if it is to happen.

CROFT: Do you believe that the only financing problems faced by the companies are the 1972 oil legislation that we passed?

SPAHR: I have no idea what the other companies' financing problems are.

CROFT: What about SOHIO's.

SPAHR: We have a lot of difficulties that we have to manage in addition to this one.

CROFT: Of significant size?

SPAHR: Yes.

CROFT: You indicated that the public's attitude toward financing the line might cause financing problems. If the 1972 legislation is not resolved by adoption of the Governor's package you anticipate some financing problems, is that correct?

SPAHR: It would be more accurate to say that we would have to go ahead and ascertain what the results of the legal action

would be to a finite conclusion before we can evaluate what we can or should do.

CROFT: I thought you said this morning that the 1972 legislation caused some financing difficulties with some of the smaller companies.

SPAHR: No, I tried to say that the 1972 legislation caused financing problems for all of us, in terms of the quality of the financing proposal we would be able to bring to prospective lenders. The degree of difficulty would vary from company to company depending upon a lot of things.

CROFT: I understood you to say that some of the smaller companies might be forced out of the line and that this would cause anti-trust problems.

SPAHR: No, I believe I indicated that if this legislation were substantially changed that it would cause the smaller companies to reconsider their interest in continuing to participate in the line. But I wasn't trying to make a point about financing problems there. These companies, particularly those with small interests would have an opportunity to compare their prospects and opportunities resulting from investment in this pipeline with those resulting from investing in something else and they might well conclude that the interest they've had in the pipeline up to now is something they no longer wish to maintain and opt to get out. It would be a question of alternates that each would make for himself,

and there would probably be a difference of conclusions.

CROFT: Would you feel that potential investors would be skeptical of investing in these companies that participate in the Alyeska project until the 1972 legislation is resolved?

SPAHR: I have felt that way, yes.

CROFT: How does that tie in with the fact that SOHIO stock is selling at an all time high for the past decade?

SPAHR: Oh no. That is not true. Its been selling at new highs for the past couple of weeks. But since we made our agreement with BP in June of 1969, the stock has fluctuated. It went up when the lease sale went on up here, it then went down because the stock market interpreted that we must have missed the boat somehow, it got down to some pretty low rates, then it went back up, it fluctuated quite a bit, then its risen rather steadily this year as the prospects for difficulty in the Middle East have developed, this is my opinion now, and as the prospective position of a fully integrated oil company as we can conjecturably sometime be seem to get better by comparison with the other oil companies. So there has been quite a deal of speculation in our stock.

CROFT: I noticed on Foster & Marshall's Stock Guide that between the years 1960 and 1972 the highest price SOHIO stock ever sold at was between 119 7/8 dollars a share.

SPAHR: That 119 dollars was in August or September of 1969, wasn't that the year of last lease sale.

CROFT: Yes it was. And I noticed that the lowest it sold this year was 115 1/2 and that it closed at the end of September at 141.

SPAHR: That's right, but why don't you look at 1972 and 1971.

CROFT: My question had to do with whether investor confidence was shaken as far as SOHIO is concerned in the past year. Its selling at about 31 times earnings?

SPAHR: 31 times last years earnings. Its quite apparent that the investor who is buying that stock is either speculating in it on a prospect of making money buying, selling, short or otherwise, probably not in this instance; or he's buying it for the long term because he feels our prospects for earnings are quite good. We haven't raised our dividends in four years, we just today lost 40 thousand barrels out of Libya, we arn't running our refineries to capacity. The stock price does not reflect current situation or any concern at all over how the management is going to solve its problems over the next several years. These factors will probably have some influence, but its based on the future and the speculations of different investors vary. Its wild.

CROFT: I did also notice that over 10% of your common stock is owned by institutions.

SPAHR: Oh, yes. I think now that substantially more than 10% is now owned by institutions. But we still have a very substantial individual ownership, last time I looked at it, it was well over 40%.

CROFT: I understood in your remarks today that whether construction started today was contingent on a least five things: the final action by the U.S. Congress; the approval of the permit under that legislation by the Secretary of the Interior; the action of the Alaska Legislature; and then I think you added two more that I hadn't heard of: the Corps of Engineers and the EPA requirements on air and water emissions. What is the status of your application for a Corps Permit, and when do you anticipate that that might be approved. This is for the crossing of the rivers, is it not?

SPAHR: Yes. I can't answer you Senator. I'm sure the answers can be obtained from the Alyeska officials who are responsible for that and there are men in this room with me who can get that information.

CROFT: Have those permits been applied for?

SPAHR: I don't know. I am sure that all the things that have to be done for an application have been done to the extent that they could be. I have a sneaking recollection that the requirements that have to be met havn't been

clearly enunciated by the Corps yet so the application hasn't been totally presentable.

CROFT: So it may not have been applied for?

SPAHR: I don't think so. Not because of lack of diligence but because of lack of definition of what has to be contained in it.

CROFT: Have the EPA certificates been applied for?

SPAHR: I don't know.

CROFT: And those are essential before the pipeline construction can begin?

SPAHR: I think so. One of the things that concerns me is a matter that stems from a Supreme Court decision of earlier this year, as I recall, which made it clear that it was going to be non-permissible to indulge in industrial or other kinds of development in the undeveloped parts of our country in a way that would result in deterioration, of the atmosphere for example, from what it now is. The pressful problem that we face, other than during the construction phase which is temporary, and which concerns me in relation to this filing, is Valdez. Valdez is a high volume terminal, and the plans call for a sophisticated ^{vapor} recovery system and a lot of other things that are designed to minimize pollution of the atmosphere. I am no longer up to date as an engineer, but it is beyond my conception to visualize a possibility where there

will be no venting of any fuel, under any conditions, at Valdez. Without a lawyers advice, it is beyond my imagination to se how, technically, Valdez can conform to the apparent decision of the Supreme Court. Thus, I begin to worry, is Valdez a potential trouble source, with the trouble originating with those who do not want to see the trans-Alaska pipeline built. I think my concern is quite related to the EPA problem. What is their latitude in interpreting that Supreme Court decision? I don't know. Even though approaches have been made, I doubt, at the present time, that the applications have been put in to be formally acted upon. I expect that they have been very substantially prepared, and will be ready at the appropriate time. Now, I might find out that I'm wrong, and they've been submitted.

CROFT: Have you discussed with the various attorneys for SOHIO and Alyeska, whether or not there might be additional suits once those permits are applied for, under the Environmental Protection Act.

SPAHR: Oh, yes.

CROFT: Did they indicate that there is any possibility that that might happen?

SPAHR: For the most part and until recently, I think they had to hedge and say - well we have to be wary about what our predictions are. As I understand the content^{of the bill} that's come out of the conference yesterday, which I have not seen, there

is a provision in there that requires anyone who is going to oppose the pipeline, on grounds of the kind we are talking about, to file within 60 days, on either the issue of a permit or the passage of a law, I'm not sure what this says yet. And then there is a provision that such a suit will be heard by a U.S. District Court, and a further provision that any appeal therefrom will be directed to the Supreme Court. I don't think our lawyers could bring me any more up to date than that. With the passage of this law, presumably, we'll soon find out what our problems are.

CROFT: I would assume then that even if Congress approves the trans-Alaska pipeline bill as is indicated, and the President signs it, and the Secretary issues the permit, and the Alaska Legislature would concur in this package, that you could make no real assurance that construction could begin this spring because there are two essential permits that not only haven't been granted, but as far as you know haven't even been applied for?

SPAHR: You sound as if you might be trying to corner me. I believe I said that, with respect to timing, on those first three items: the Washington legislation, Alaskan legislation and the issue of the permit; in order that we might be assured of the best prospects of starting next spring, that the actions on those three things ought to be taken as soon as possible. I really believe that all three have to be taken, including the Interior permit, before we have any prospects of seeking

and getting action from the Corps, or from EPA. We have nothing to apply for really, until we get a right-of-way permit from the Department of the Interior. We'd promptly follow through as soon as we had that permit, if the permit is one that we can accept and go to work on.

CROFT: I understood two years ago when we talked to the Department of Interior officials that even after the right-of-way permit is issued that no construction can begin until after a construction authorization certificate is issued. They told me at that time that it was their intention to require the final detailed engineering design and specifications to be submitted, and that they would have a period of 90 to 180 days after that before they would issue the certificate to proceed with construction, and that if there were any significant changes in the plans or specifications that the period of time would commence running again. Do you know if that is still their intention?

SPAHR: I have no reason to believe anything has substantially changed their intention, other than perhaps that they too will try to minimize the amount of time they need to review those kind of things in light of our country's . . .

CROFT: Have those detailed plans and specifications been submitted finally, complete.

SPAHR: That again I can't answer exactly because I don't keep that close watch on Alyeska, but I'm quite certain

that a very great part, if not all, of that has been done. There has been a process of submittal, suggested amendment, re-submittal going on for quite a long time. And I really believe the work is very largely all done, to the extent it can be already. There is still a question, in our mind as to what the final stipulations attached to the basic permit will be.

CROFT: Regarding what?

SPAHR: All kinds of design requirements, regulations, liability provisions, things of that kind. The Department of Interior's administrative department has quite a lot of latitude under the law that will be passed I think to specify the requirements that we might want to debate with them.

CROFT: That might cause a delay in itself.

SPAHR: It might, but I think there would be a great compulsion on the part of both of us to get the debates over and done with and conclusions reached. I don't really think it will result in much delay, no.

ERICKSON: Did you say that the ownership interests in the line would be adjusted to equal the interests in the oil?

SPAHR: They may be adjusted at a time a nomination for

capacity . . . rease step is made. Then they will be adjusted only if the nominations for space total as much as 100% or more.

ERICKSON: There will be adjustments possibly made before you arrange financing though, as well. Is that a possibility or a certainty.

SPAHR: I think its a necessity.

ERICKSON: And this is to bring ownership interests into approximate line with what the companies think they have?

SPAHR: To illustrate, our present ownership is approximately 28% of the pipeline. Somebody might think that if that doesn't change we are getting a free ride on investment requirements and so on since our proportion of the oil field up there is substantially greater.

ERICKSON: So Humble, for instance, who might have an excess of pipeline capacity, wants you to take over some of that capacity.

SPAHR: Very likely. They would remind you that the name is now Exxon.

SACKETT: Would it be possible to make available to this Committee these agreements that you have on the option?

SPAHR: I would want to refer that question for advice to our lawyers.

RADER: When I was talking about the utility regulation, I was thinking of whether on a contractual basis, instead of a fee, like we were talking about on our right-of-way, for the purchase of the land, that we would contract with you that instead of paying a fee or a scale or something like that our rental that you would agree that the rate would not exceed that of a normal utility, on a utility type of accounting. That was what I was suggesting.

SPAHR: Yes, and for such an agreement we would get permission to use the land.

RADER: We would also assure you that the taxes we'd impose or anything else would not jeopardize a fair rate of return.

TUSSING: Mr. Chairman, for a point of information, the bill reported out by the House Senate Conference Committee requires the parties who are applicants to a pipeline permit to disclose all these operating agreements and agreements for change in shares

JOHN

FURMAN

10/24/1973

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 Mr. John Furman on October 24, 1973 before the Senate Resources Committee. It is a verbatim transcript of Mr. Furman'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 RESOURCES / COMMERCE

October 24, 1973

TESTIMONY OF MR. JOHN FURMAN

CHAIRMAN: As Senator Thomas indicated, many of us questioned the status of ICC and how far their regulations went and in what area. I asked Mr. John Furman of Washington D.C. to testify. Mr. Furman had previously under the governorship of Senator Miller did a memorandum for Arthur D. Little back in 1970 relative to ICC regulations. Mr. Furman is a member of the Bar of the United States Supreme Court, the District of Columbia and Maryland. He is a partner in Cox, Langford and Brown in Washington D.C. A Yale graduate of 1946, cum laude, he has served in the office of Price Administration, a department of State from 1956 to 1962 he was a consultant with Foster Associates, a firm with offices in Washington, Tulsa and Calgary Alberta specializing in problems of rate regulations. He is a member of the American Bar Association. At this time, I would like to turn over the floor to Mr. Furman.

MR. FURMAN: Thank you sir. I'm sorry to tell you the Chairman was reading from something I wrote, I think, three years ago, when I was asked to give my background. I want to make one change in it. I withdrew from the law firm of Cox, Langford & Brown in January of this year and now have my own office.

I assume that what I really am being asked to do here today is to say whether there have been any changes since I was here before and speak to the question of function and role and level

of activity of the ICC. First of all, I want to say that there has certainly been no changes which affect the right of Alaska to regulate intrastate pipelines or, and I think this is very important, intrastate activities on interstate pipelines. There is a tendency in the discussions and in the drafting of the House Bill No. 6 to support that there are two kinds of animals. Intrastate pipelines and interstate pipelines; and that while the State may have jurisdiction over the first, the ICC has jurisdiction over the latter and it therefore follows that the State has no jurisdiction over the latter. This is simply not the case, if only because of the responsibility of the State of Alaska to regulate intrastate pipelines and to regulate the intrastate activities of interstate pipelines. I feel very strongly that you need something like your existing Alaska Pipeline Commission Act. As I read the proposals for changing that act, I think the rate of escalation is not too strong. I think the consequences would be not only the limitation of your rights with reference to the intrastate activities of interstate pipelines, but to create a body with much less effectiveness in dealing with ___ ___ problems which are clearly within the jurisdiction of the State.

Now, have there been any changes in the last three years to indicate that the ICC has some new conception of its role. The first point might be that there's certainly been no changes in any of the statutory authorizations under which the ICC operates.

I think we have to recognize that the ICC is the oldest regulatory commission in Washington. Its also the least respected regulatory commission in Washington. And its the least self-confident regulatory commission in Washington. There's even talk in this administration about abolishing the ICC. Not necessarily have to do with its regulations of pipelines because thats pretty inoffensive, but because of the philosophy of this administration that much of the regulation that has been built up over the last generation is unnecessary and anti-competitive. And this, in fact, is true. The ICC for years has sought to protect railroads from competition from other forms of transport, it has sought to regulate motor carriers in ways that this administration would say is better left to the competitive process. So that you're not talking about what I would call a vigorous and effective agency even within its own terms.

Furthermore, the system and authority of the ICC resulting from the Hepburn Act is very limited. There's been no change in that since three years ago and I want to endorse what Professor Witherspoon told you yesterday about the authority of the ICC. I won't go through that with you. I do want to make one point-- and that is that the fault that the ICC has with reference to railroads and with reference to motor carriers is a fairly wide range of authority..For example, the case of _____ certificate authority does not mean that also it has the authority with reference to pipelines.

I went through the Interstate Commerce Act once, and x'd out all those provisions which because of the definition or because of their terms were applicable only to railroads or motor carriers. I ended up x'ing out most of it. There was really very little that the ICC has authority to do. Furthermore, there is now pending before the Senate a proposal by Senator Stevenson connected with the problems of how do you regulate natural gas producers and to what extent do you exempt them from federal regulations in the interest of getting more gas to market. A proposal which would transfer the jurisdiction of the ICC over all pipelines, such as it is, to Federal Power Commission. And I think this again is a reflection of the general view in Washington as to the very limited function which the ICC has been performing in this area. What I do think it means is that Governor Egan is right when he says that there are clear indications that the ICC may _____

If I were the ICC I would be doing a lot of re-examining, if only because of this proposal for the transfer of authority of pipelines to some other agency. This is the quickest way to get an agency in Washington to re-examine something.

I don't know, however, what he means when he says that the ICC has been primed to begin responding in a new way. It takes staff, as well as interest, to accomplish anything. It takes Statutory authority, and I know with reference to the ICC that there is no effort by the ICC to seek more money for the staff

it has working on pipelines and its hard for it to do it, because it doesn't have any staff that works on pipelines. Before I left Washington, I got ahold of a copy of the telephone directory of the Interstate Commerce Commission, which is arranged in functional order, with all the titles of the various offices and divisions and subsections and so forth. Now, you can go through that telephone directory and you can find that under the heading of _____, sections having particular responsibility for railroads or for motor carriers. You can look at the Bureau of Operations and you can find a section of Motor Carriers and a section of railroads. But there isn't one single mention of the word pipeline in the whole bureaucratic structure of the ICC--and that's from 1970. and In anticipation of my testifying here today, I've made and I've had my office make several efforts to make sure that I'm right in believing that there just isn't anybody at the ICC, who really devotes his time and attention to the problems that you're wrestling with here.

Now, it is true that because the ICC has certain limited functions to perform, and because in particular it performs a function for the pipelines with reference to the--specifically--pipeline's final form _____ back in 1940, when he was pursuing the oil industry with a rather broad anti-trust action and the war came along and the oil industry said, "if you want us to help you in the war effort, then we better settle this." And he settled for a one provision, relating

to the charges which oil pipelines make to their own affiliates in comparison to the charges they make to other parties for the transportation of oil. This has placed on the ICC the informal function of conducting evaluations to see whether the pipelines are making more than--I think the figure is 7%. It is also true that the ICC keeps house while by interstate pipelines, and that if a change is filed on a tariff, anyone who is interested has 15 days within which to make that interest known to try to persuade the ICC to prevent the change from going into effect. The ICC must be notified 30 days in advance of the proposed change in rate.

I know of no proceedings which has resulted from this particular procedure of the ICC, nor do I know of any effort the ICC since World War II, on its own initiative to investigate any of the aspects of a pipeline--of all pipelines--in the manner in which they are administered and their affect on the general public welfare. In an effort to confirm my impression, while I've been up here and in view of the statement of the Chairman of the ICC and the statements made by the Governor which have been circulating here, I asked my office to check around and see if they could find any basis for saying that the ICC is somehow taking on a new lease on life. They talked yesterday to the legislative counsel of ICC, Larry Reda, and we were told that the ICC is trying to see whether in fact it is using its power to the full. But I get the impression that again, that this is

a by-product more of the proposal to transfer the functions of the overall pipelines to the Federal Power Commission than it is because of the special problems that relate to the TransAlaska pipeline.

This leads me to the conclusion that you certainly ought not, as is proposed in Bill No. 6, to adopt a provision which says that you will not exercise whatever power you have waiting to see or until the ICC affirmatively decides that it has no jurisdiction. Even if the ICC were to begin a proceeding today to decide whether or not they had jurisdiction; if it took as long as the rate case they ran before World War II, it would take them ten years to come to a concrete and affirmative decision that they have jurisdiction over this or that or whatever the issue might be. I would say that quite apart from the merits of that particular drafting device, its not well-suited to the problem.

Now, I think you have a special problem here, that as far as I know the ICC has never fully faced. And that is, how do you regulate an undivided interest pipeline? When I talked to some people in the ICC in 1970, one thing that they really threw up their hands on was a regulation of undivided interest pipelines. And I think its worth pausing on that for a minute. To the extent that the ICC has jurisdiction, to the extent that the ICC has an interest in regulation, its interest is focused on the pipeline companies as companies. Exxon Pipeline Company, for example, rather than Exxon's particular piece of the braided

line, as its sometimes called, which is going to be the taps line. That means as to whether the Exxon pipeline is in a healthy condition or its rates are too high or too low, the ICC based on past cases is going to look at Exxon Pipeline Company as a whole. It has a national function to perform, and its not necessarily going to be raising the question as to the appropriateness of that portion of Exxon Pipelins Company's earnings which are attributable to the operation of Exxon's share in the taps line. For this reason, I like one proposal that I see in Senate Bill No. 6, and that's a sentence in Section 6 which proposes to add to your Sec. 42.06.430 (6), a sentence that would require a pipeline owning interest in an undivided interest pipeline to make reports to the commission on an individual pipeline basis, for any pipeline located wholly or in part in the State. I think as you go ahead into what I'm sure is going to be a very complicated and difficult problem, one of the things that you're going to need most desperately, are facts.--are going to be hard to come by and I think you have to rely on yourself to get those facts because I'm very doubtful of the extent to which you're going to be able to pick up the long distance phone and call an expert on oil pipelines in the ICC and get the facts from him.

I would leave, except for this one possible change, I would leave your existing pipeline Commission Act as it is.

It's not my understanding that the lawsuits which have been filed and I have read the briefs of both Mobile and the other plaintiffs, its' not my understanding that it is Pipeline Commission Act that is their principle target. I do understand that they have a problem with the certification section, but their main focus, as I understand it, are on other pieces of legislation. Its therefore hard, frankly, for me to understand how a negotiation to settle the lawsuits could have wound up with the proposals to make the drastic changes in the Alaska Pipeline Commission Act, which are embodied in Senate Bill No. 6.

For anyone like myself who practices law in Washington before the regulatory commission, its always a little confusing to see a piece of legislation such as the one you have before it, that treats natural gas pipelines and oil pipelines as though they were similar in character and as though the regulatory problems were similar. The Federal Power Commission and the Natural Gas Act are both a different commission and a very different regulatory statute from the ICC and the Hepburn Act. The way in which gas is bought and sold and taken to market is very different from the way in which oil is bought and sold and taken to market. I do think that the Natural Gas Act provides an instructive lesson as it were, how in our federal system, state commissions and a federal commission can work together to accomplish effective regulations. I don't believe that the most regulation is the most effective regulations and it

frequently is the worst. I think what you have to do in any case is to find some reasonable balance. Not only between how much regulation you need, but in our federal system between what the federal government is to do and what the state government is to do. And there is simply no constitutional black line that you can draw between the authority of the states and the authority of the federal government only because the facts are usually so complicated that you're dealing with. At the same time, both matters of federal interest and matters of state interest. The Federal Power Commission is a commission of limited jurisdiction in the sense that it was created in 1938, as to its jurisdiction over natural gas pipelines I should say, it was added in 1938, the Commission having existed since 1920 to regulate electric utilities. It was created to fill a gap between the state regulations at the production end of the pipeline and the state regulation at the distribution end of the pipeline, the consuming _____ end of the pipeline--the distribution end--and if you go through the Natural Gas Act, you will find, time and time again, conditions under which it is anticipated that the federal agency and the state commissions will work together. There are provisions for joint hearings, for example, over problems that affect both. There are provisions for the Federal Power Commission to provide assistance to State commissions. So that to think of the problem as one in

which it either belongs to the Alaska commission or it belongs to the ICC, I think, misses what is the real point. That what you need to do is to develop a method of regulation here in Alaska which would be appropriately complementary to whatever regulation exists in Washington, recognizing always that to the extent that Congress acts, and to the extent that the ICC acts, the action of the federal agencies will undoubtedly preempt the field. But until such action is taken by the federal government, and in areas where the federal government does not act, you're either going to have, as you did in the Natural gas pipeline field before 1938, a void where no regulations exist, or you're going to have state action.

I think this is not an easy line to draw, and I have no doubt that down the road in the process of drawing the line, there could very easily be situations in which the decision as to where to draw the line is one that everyone will _____.

I'm not sure that need necessarily be the case. I'm not sure that its necessary that the Alaska Pipeline Commission must from the day it starts out, push its powers to the full possible limit until it meets the ICC coming the other way. But for the Pipeline Commission to be effective, I think you have to have a strong commission. And I must say the proposals to reduce the Commission to a situation in which you would really have only one full-time Commissioner, I personally believe would be a great mistake. The Alaska Pipeline Commission does no more in the next several years

than to gather information, to gain a better understanding of what does in fact go on in Washington with reference to the regulation of oil pipelines, it will certainly be earning what little amount from your treasury it will take to pay a few more full-time commissioners with adequate staff personnel. I just don't think you can hope to deal with this set of problems by having this legislature, as able as it is, assemble on an ad hoc basis, from time to time, experts to tell them what would be a wise thing to do. I think you've got to have some continuity of expertise and I think a strong pipeline commission is exactly the place in which to attempt to accomplish that. To the extent to which the existing pipeline commission act conflicts with federal jurisdiction, or is in some sense unconstitutional, I frankly don't see it. I agree with the question Senator Rader posed the other day to Mr. Heard, when he pointed to Sec. 150 which says that the provisions apply only to the extent not preempted in federal legislation. From the point of view of an attorney, I think that solves the problem. I think the problem is also solved in the particular case of the taps line and the possibility that it may be required to jump over the same hurdles here that it had to jump over in Washington, because although you now have a TransAlaska pipeline authorization act, or will soon have, and although in that act in Sec. 212 the Congress has made certain determinations to

the effect that the taps line is in the national interest, that really accommodates itself very well to Sec. 240, where your existing legislation says that the requirements for a certificate shall not operate to impose state regulations which has been preempted under the Interstate Commerce Act of 1906, the Natural Gas Act of 1938. When federal law has preempted state regulation, the commission shall accept the finding made under the federal scheme of regulation. I can't imagine the Alaska Pipeline Commission not accepting the findings which Congress has now made to the effect that the taps line is in the national interest.

I agree with what Mr. Levy said a few moments ago. He is not award that the ICC has taken any steps in the recent past, to increase its sensitivity to oil pipeline problems. I do not agree with the next statement that he made, because I don't think it puts in quite right. He said I would not place my trust in princes, even if they are located in Washington. I think speaking to you as a friend of Alaskans, I would say I would not place my trust in princes, especially if they are located in Washington.

I would be glad to answer any question anyone would have:
SENATOR PALMER: The existing legislation specifically says then, that any certificate of authority that the state pipeline commission might have is null and void and preempted by the federal government in that respect. You're saying then that that really poses no

threat to Alyeska Pipeline companies, or should pose no threat but from the state standpoint might be quite important in the future when we do have intrastate pipelines not regulated by the federal government and this certificate of authority may be vital at that time. Is that what you're saying?

A. I quite agree with that, yes.

SENATOR KERTULIA: Once again,(rest of question unintelligible)

A. That's right.

SENATOR GROH: Mr. Furman, I really appreciate your comments and your help. Insofar as intrastate pipeline is concerned, there is no question is there, either about lines as to the effect of or existing regulatory legislation. It will work, won't it, in your opinion.

A. You're talking about the 1972 legislation--Yes I think it will.

Q. Senate Bill 6 has not endeavored to deal with that issue. That is the issue of intrastate pipeline.

A. Well, I'm in much the position that Mr. Levy is in, which is that I have not had time to take Senate Bill 6 and do what he recommended--that is to take all the existing legislation and lay it out then see exactly the way in which bill No. 6 would affect it.

Q. I might mention that Senator Lewis has done this; I don't know whether anybody shown where the changes are in the act.

Now, for intrastate pipelines, the regulatory _____

This is where I have a problem, and you're obviously an expert in this field. Would you say if the pipeline is interstate commerce and within the jurisdiction of the ICC, would you say that the State has the power to exercise concurrent regulatory jurisdiction?

A. I would, and I can illustrate that if you like most easily by reference to the way in which the federal-state system works with reference to natural gas pipelines. There's no question but what the Federal Power Commission has jurisdiction over natural gas companies, that is, those companies that transport gas in interstate commerce and _____ that gas for resale. But that doesn't mean that state commissions, who also have authority over exactly the same companies with reference to those activities, which don't come within the jurisdiction of the Federal Power Commission.

Q. Let's limit ourselves to oil pipelines, because that's our primary concern. Are you saying that in your view we have concurrent regulatory jurisdiction; then my question is, where does that concurrent regulatory jurisdiction end? Does it end as the courts have defined it at such point as that concurrent regulatory jurisdiction imposes a burden on interstate commerce-- is that the cut-off point that we can go to?

A. No sir. There is such a cut-off point, but its not the cut-off point that I would refer to. In other words, whether or not the Congress had seen fit in 1906 to adopt the Hepburn Act,

I think the State of Alaska is barred from imposing any burden on interstate commerce. That's a separate legal issue--an independent ground on which the State of Alaska operates subject to limitations. Before we go on from there, I would like to point out that the word concurrent was one of your choice, and not, I think, not _____ . Because what I-- I think the way I would put it is this: that it may well be that Congress under the Constitution has the power to limit even more severely, then, as the case with natural gas pipelines, the power of the State of Alaska to regulate in particular areas. The fact is, as I read the Hepburn Act, it hasn't come close to doing that and I think it would be a gross mis-construction of Congressional intent to say that that also represented a decision by Congress that no one should perform the regulatory function that the ICC does not perform.

Q. I'm trying to reach the point beyond which _____ . I won't use the term concurrent regulatory. In case, it is established that we cannot go beyond the point, that is the decisions of the Supreme Court of the United States, that we cannot go beyond the point where we create a burden on Interstate Commerce, is that a valid statement of the law?

A. That is correct.

Q. So that is the limit to which we can go, as I understand the state of the existing law, in your view.

A. That is one test; what I'm also trying to say is that I think you have an independent problem arising from the fact that Congress has, in fact, acted with reference to interstate pipelines.

But so much of this depends upon the particular fact situation. Let me suppose this fact situation: Suppose that for reasons of the economics of transporting oil products vs. crude oil that it is in the interest of the oil companies to build a highway at Valdez and to process all the oil coming down the taps line at Valdez. I think that would change the situation. I think there wouldn't be any question then, whether the oil was being transported from the North Slope to Valdez was all moving in interstate commerce in the sense that you would somehow be barred from regulating that commerce, quite apart from any other intrastate aspects of it. So that what you're doing here, as I see it is to try to create a structure of regulation _____ and you're dealing not only with the particular fact situation that you've got in front of you now, but you're trying to set up a system into which you will be able to deal with a whole variety of fact situations which may arise down the road.

Q. Let me ask this question and maybe. . . Assuming an interstate pipeline which presumably we're all agreed its going to carry oil in interstate commerce, do you think that its within our regulatory powers under the existing state of the law involving interstate commerce to require a certificate of public convenience in the form in which it exists in our present regulatory law?

A. I think you can, subject to the qualification which the law already provides for. . . that to the extent that the Congress or

any other branch of the federal government has made findings with _____ to this line as to its being in the public interest. I think that you are foreclosed from _____ those findings. And I think that your statute that contains the means of accommodation.

Q. I'm not sure I understand you. In fact, with the existing law the way it is and Congress acting on the pipeline bill, under our present regulatory bills, as I understand it, Sec. whatever it is--the one that sets up a certificate of public convenience and necessity and one that sets up the _____.

Do you think that under your understanding, that the State of Alaska has the present power to require, considering what this line is and what has transpired, a certificate of public convenience and necessity?

A. Yes, I think you probably can. Let me also say that what has been referred to as certificate provisions, includes a lot more than just getting an initial certificate of public convenience and necessity. Now I'm not addressing myself as to whether, with reference to the particular case of the taps line, that this legislature should or should not do something like Congress is in the process of doing. We've discussed this thing about whether its going to influence the environment for so long that there's no point in discussing it any further. we will therefore, as a legislative act, decide that in this one case we're not going to go through the legal procedures. For this

one case, because we've been discussing so long, because the Congress has acted in this unique and unusual fashion, we will make that effort as a legislative body, whatever determinations with reference to public convenience and necessity our statute requires. And thereby avoid, perhaps, an administrative proceeding which might otherwise be necessary.

SENATOR THOMAS: Is there anything at all in this new act that's coming out of Congress that tends to encourage cooperation between the state regulatory body and the ICC? Is there any language there at all to handle this?

A. I don't think there's anything off-hand. I think that certainly the Congress was looking at the problem of the taps line from a national point of view and the national shortage of oil, and its desperately needed. I think everyone in this room wants to see the taps line built as fast as possible.

Q. The reason I asked was that one of our senators back there had suggested that we could in fact do this very successfully to have a strong regulatory commission. . .(rest inaudible)

A. Yes, I certainly think so.

SENATOR KERTTULA: I'm not quite ready with my question.

SENATOR RETTIG: Mr. Furman, do you see any reason why, I think you made reference to _____, (rest of question inaudible)

A. I certainly think you're free to amend, to the extent which you can strengthen--of course, the more history _ _

the less you can influence that _____.

Q. Do you see any area in regulations that we could adopt in the future?

A. I think a legislative body like this is always free to amend previous legislative enactments.

Q. Is there something we're doing in considering this--if we should adopt this, or we shouldn't--that there's something we can't act on in the regular session next month.

A. That's right--or I assume that's right. Although I would say that how you approach this problem this session will be taken by all parties involved to be of great significance.

A. The matter of convenience and necessity certificate--in the case of interstate commerce, wouldn't that statute required to issue a certificate be an exercise in complete futility. There could be no way that such a hearing or such an exercise could stop the construction of that pipeline.

A. First, the Interstate Commerce Commission has no authority to issue, and therefore has no authority to refuse the issuance of a certificate. At the federal level, that question doesn't even arise. Furthermore, I think Congress is in the process of speaking formally, certainly at least with reference to the exercise of federal power with reference to this particular pipeline.

Q. Can't we seek through this device to impose a burden on the ICC?

A. No, and I think you. . .

Q. So, the provision is really inoperative at this time.

A. I'm not sure which provision we're talking about. Are you talking about the provision in your own legislation which calls for the issuance of a certificate. . .Yes. Well, I have in front of me the Title 2 of the federal Leasing Act amendments and I would hesitate to preempt the function of your own Attorney General. . .

Q. Can we through this device of requiring a certificate of convenience and necessity stop the construction of the pipeline? So isn't that certificate an automatic thing, anyway?

A. I would suppose that it was.

SENATOR PALMER: Is there any reasonable way of assuming that requiring this certificate as we have our 1972 legislation, requiring it when applicable, when it has already been preempted by the federal government, that this can be construed legally to be an _____?

A. I'm not sure I understood the point of the question; but if you are saying that the provision already in the statute which says that these _____ will apply only if not preempted, could lead to the commission taking the position that it has no function to perform in the issuance of a certificate. I can well imagine that line of reasoning.

Q. It seems the point the Senator was driving at was this would cause an undue burden, and therefore was impossible for us

to do. My question was, does it really constitute unde burden?

A. Well, I think it depends on--to be frank with you, I don't consider myself as master of the certificate provisions of your existing law, and I hesitate to address myself to the specifics.

SENATOR RADER: Have you any views that you could give us as to the Right-of-Way Leasing Act. . .

A. No, sir.

Q. Whether or not that would be in your opinion an undue burden on ICC?

A. I prefer not to speak to that, I simply haven't--to be frank with you, I have read the briefs of the oil companies on these issues, I have not read the state's briefs and I would hesitate under those circumstances to issue a ruling.

MR. CHAIRMAN: Are there any additional questions? If not, then thank you, Mr. Furman, very much.

SENATOR RETTIG: Mr. Chairman, I have one more question. Mr. Furman, I'm concerned about the oil getting through the Valdez terminal, the docking facilities--how far does ICC regulate? Does it regulate until it gets on the vessel, and therefore will prove itself part of the common carrier. Or do we have to worry about that? Must we concern ourselves with being a public dock?

A. I think you better concern yourself with it, because I doubt if anybody at the ICC will.

JOHN

LAMONT

10/25/1973

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 Mr. John Lamont on October 25, 1973 before the Senate Resources Committee. It is a verbatim transcript of Mr. Lamont'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

AGO 533828

MR. LAMONT'S TESTIMONY

October 25, 1973

Good morning, gentlemen.

The old show business parlance that's not only a heck of an act to follow but it's even harder to compete against. But to begin you have a problem here which in its own way has enormous consequences that will run a very long time in the future. You're trying to _____ enable a pipeline to be built. A pipeline must be built. The country needs the energy source. This you know. It is a matter of _____ importance not just to the state of Alaska but to the entire United States, but it is a matter of concern not just to have energy but to have energy under terms and conditions which will aid it to make our economy grow on fair and useful terms. I'm tired and retired Justice Department anti-trust lawyer. I spent many many years in this area working on the scene, as it were, between regulatory agencies and the anti-trust division. My particular specialty for the period from about 1955 until June 30, 1972 when I retired was pipelines. I speak then from the standpoint of someone who has had to consider what is the regulatory jurisdiction, how does it fit with the anti-trust laws which abhor regulation? In pretty much the same kind of way that you gentlemen have to consider the legislation that has been presented you. I might also add that after reviewing the testimony that I am about to give, Mr. Ralph Nader called this morning to say that with respect to my comments as to the ICC jurisdiction and the ICC

competance, he wishes to associate himself enthusiastically. In his terms, ICC is the classic case of regulatory abdication and within ICC pipeline regulation is the absolute quintessence of nonfeasance. What authority they have, they have not exercised. When they saw authority deficiencies they did not request legislation. You're here to accept a quick settlement in a form deemed acceptable by the companies involved and the state. You would be very well advised to consider this settlement will create more trouble than it will avoid. For you may remove some of the questions from the Alaska arena and the legislature but you will almost certainly remove those questions that are "settled" to the court where you will find a great deal of difficulty with respect to their ultimate solution. Let's review the main elements of the settlement which are relevant to what I'm about to say. The most important point is this: the state in settling did not have before it involved in the "settlement" all of the possible parties in the interest. It is my purpose to review some of those parties and interests that were left outside the settlement. Let me in doing this preface my remarks with the example of the Interior Department. Very long time ago when the pipeline was first proposed and Prudhoe strike was first made public, Interior accepted a quick and ready settlement from the companies involved as to what it would do by way of impact statement. As you know that has been rather extensively litigated. The lawyers on the environmental side, which include some of my personal friends, have told me that except for

except for Interior's eagerness to sweep all of the real issues under the rug by this quick settlement, they would never have had six months in court. They would barely have been able to get up the courthouse steps. This settlement, like that one, opens as many avenues of litigation as it closes. In fact, quite probably opens more. For it depends upon its validity entirely on the regulatory capability and competence of the ICC, a very weak reed, indeed. There are many other parties in interest who can litigate the TAPS issues in the anti-trust arena, and in litigating seek and possibly get injunction against the line. On this, I might add to those of you gentlemen who are practicing lawyers, I find myself in an extraordinarily uncomfortably objective position. I cannot represent either plaintiffs or defendants on any anti-trust suit respecting the pipeline. Quite simply, because for a matter of five years I was in charge of the anti-trust division extensive and still continuing investigation of the anti-trust issues that this tremendous combination of economic power represents.

Let me review quickly the possible interests who can seek litigation. Section 4 and 16 of the Clayton Act creates a wide area of private ability to sue for actual or prospective harm involved in violations of the anti-trust laws. Section 4 says in such instance that any person whose interests or property are harmed by a violation may sue to recover his damages trebled and his attorney's fees. Section 16 authorizes such private interests to sue for an injunction. Among the people who are still able, willing, possibly, to undertake

this kind of litigation we must place at the head of the class the federal government. Now I am aware of the fact that the companies here involved hope that by virtue of the emergency conditions of the energy crisis and the general political power which they enjoy that they will be able to stop the Justice Department in the initial phases, before any suit is ever brought. And in the ancient words of the courthouse lawyer to cop a plea that will leave them what they want. On this I would say it is entirely possible. It was my judgment that it was possible in June 1972, and it was the reason I left the Justice Department. Since June 1972 however, there has been quite a number of rather startling events with which you are as familiar as I, which have made the Justice Department rather considerably more independent than it has been for a number of years. Beyond the federal government, with its broad and sweeping powers to litigate to enforce the anti-trust laws, you have the states. Technically the states are private parties within the meaning of the anti-trust laws, although in truth to call a state a private corporation, as at least one of the TAPS members has done in other litigation, seems rather to derogate their standing as a public entity and a part of our federal system. The states, moreover, can sue as damage claimants but they can also sue _____ on behalf of all of their citizens for prospective damage to enjoin it. And so, if the state who has sought so hard to have this line go the MacKenzie Valley route rather than the TAPS route should actually undertake to do so, they may well be able to enjoin the line. Assuming that

the line is still an important part of the overall anti-trust case. You have also private interests who are suffering or anticipating damage. I think the likelihood of private interests suing under either section 4 or 16 is probably fairly remote, because until the line is operative, until the controlled market it involves has become a fact instead of a prospect, they will probably not feel quite so vigorous about the private enforcement. There is also however, a little known section or two little known sections of the Sherman Act which I think may well bode a great deal of trouble. Section 6 of the Sherman Act and Section 11 both passed in the 1890's - Section 6 applying to domestic commerce and Section 11 applying to foreign commerce - says in substance that any property owned under a contract or by any combination or pursuant to any conspiracy, and being the subject thereof, mentioned in Section 1 of this title, and being in the course of transportation from one state to another, or to a foreign country - shall be forfeited to the United States. What is very important here, however, are the further words - "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." The only difference between Section 6 and Section 11 lies in the words describing the type, the status of the property involved. Section 11 simply says "imported into and being within the United States." What makes this so terribly important is that the customs laws as they are now on the books, give to the informer a fee for his information and gives him a standing to enforce that fee. I may here tell you that there are a number of risks - environmental groups among others - which are looking

at this particular section very, very intently. And in so doing, they are reading the ancient history of the Sherman Act where it made is clear it was the purpose of these sections to give to the individual who saw a violation, a standing to do something about it on his own if the government did not do so. I have even had several tentative requests to represent such groups in such a suit. For the reasons I have states before, I have turned them down.

This then is quite a roster of the possible people who will have some standing to question these matters on anti-trust grounds.

Let's then turn quickly to something of the anti-trust grounds that exist for a suit here. Understand, that basically anti-trust concerned with pipelines comes because it is a "national monopoly" or very nearly so. There are economies in scale in a pipeline so that any large line that is built to accomodate the existing traffic can always be more easily and cheaply expanded to accomodate new incruments of shipment than it would be to build a competing pipeline. For that reason, it has very much the same characteristics as a railroad. For as you know, there are many railroads in the states which parallel each other - which compete directly for traffic - that are considered within this general framework of national monopoly. Both the Interstate Commerce Act and the Sherman Act originated at much the same set of problems. The unrest over the railroads which hauled only ^{from} the elevators that held grain that they owned - that they had bought at favorable prices. And the result of the farmers against this strangle-hold

on their operation. The coal companies had a great deal of dissatisfaction with the roads which hauled only coal which they produced. The Sherman Act is a little more complex, but it was aimed at the same thing - the aggravations of monopoly power whether held by transportation which is the most convenient stranglehold on the market or by other means, could not only themselves control the profits that they made, but could exclude others from wide areas of competition within the economy.

In all of these however, both from the standpoint of the ICC and from the standpoint of the anti-trust laws consider transportation as the most vital factor in market entry. If you can control the highway to a market, selecting who may or who may not use it, you control that market. Perhaps the best summary of what this means comes from an old case, not so old - 1920, the Redding Case - by coincident ownership of the largest single coal company operating within the Skoykiell Anthracite fields and the railway over which that coal must find its access to interstate markets, the Redding, said the Supreme Court, had the power to increase or decrease the output of coal from very extensive mines, the supply of it in the market, the cost to the consumer, to increase or lower the charge for transporting such coal to market, and to regulate car supply and other shipping conveniences and thereby to help or hinder the operations of independent miners and shippers of coal. In that particular case, Although the railroads were rather at that time regulated by the ICC as they still are, the Sherman Act, Section 2 monopolization provision was applied to Redding and they were compelled to divest themselves of

the coal. To bring this thought of transportation control as market control, in about the same period of time in United States versus Ohio Oil Company otherwise known as "The Pipeline Cases" Justice Homes described the reasoning behind the declaration originally the pipeline could be common carriers and regulated. But it also describes a basis, the basis, on which anti-trust concern exists with pipelines. And the quote is on 234 US 546 at 560 it says - itself of this monopoly as a means of transportation, the Standard Oil Company refused through its subordinate to carry any oil less sold, to it or to them, and through them to it. on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners but by the duress which Standard Oil Company was master, carrying it all as its own. The situation that then existed has not significantly changed. Despite the fact that a great effort was made in 1906 by amendment of the Interstate Act to declare pipeline to be common carriers. They were made common carriers in name, but not common carriers in fact, and they have not, with very, very few exceptions - they have not functioned in the sense of common carriers as we lawyers would recognize the concept from its meaning in common law. They are in terms common carriers as defined by the Interstate Commerce Act. The Interstate Commerce Act defines as common carriers a great number of different types of transportation modes. It then applies to each carrier, each type

of common carrier, the kind of regulation that the Congress at that time deemed appropriate for regulating that carrier. It applies to the pipeline carrier almost no regulation at all except that should a line permit you to ship, if in its excess of generosity it will give you a connection, then you may quarrel about the rate, if you do not care what happens to your connection afterward. On the basis of this, Justice Department over many, many years has been concerned with pipeline. The biggest case that was brought in this line after the temporary national economic hearings in the late 30's, the filed the Mother Hubbard case which was a monstrosity. It joined as defendants the American Petroleum Institute and every integrated company and its pipeline subsidiary. It was an untryable case, it was too large - and it was dropped. It was first postponed because of the war, then it was dropped totally because it was literally untryable. With that, and the fact that anti-trust division is a rather busy outfit with a rather large economy to police, there was no real concern with pipelines as such until the 60's. And we began a series of investigations in connection with the joint venture of pipeline cases. Now understand that when we are dealing with a single company line it is subject to a lot of different considerations under anti-trust than if you are dealing with a number of companies. The Colonial Pipeline Company, which came up in the course of Mr. Hurd's testimony the other day, was such a case. Nine large re-

finers on the gulf coast joined to build a 36 inch pipeline from Houston to Greensboro which was a 34 inch line from Greensboro to Dorsey, Maryland and a 32 inch line into the harbor. It carries a million-and-a-quarter barrels of light products a day and it dominates the Piedmont market of the United States to a dictatorial degree that is almost unimaginable. We began an investigation of that, recommendation was made, suit has never been brought. The reasons why have never been fully explained nor do I propose to explain them now. I will say this. Shortly before I retired in June 1972 the original recommendation to sue had by that time been given to various consultants outside the section in which I worked for an evaluation as to whether or not it represented a valid anti-trust case. The answer we had gotten in 23 separate instances was that it was. The case was still not brought.

We also investigated the Olympic Pipeline and presented recommendations. This is a line which runs from Ferndale, Anacortes, down the Cascade shelf to Portland. Again, the matter is still pending unresolved. They have never decided to go forward with it, they have never decided to drop it. The Explorer Pipeline, too, is still under investigation. There were two cases, however, in which we did have some success at the staff level. One was the Glacier Pipeline Company in which the predecessor of the - I hate to say predecessor, let's say Humble Oil and Refining Company and

Humble Pipe - proposed to join with Continental in a joint venture line covering all, or nearly all, the crude oil in Montana. They were told on Christmas Day in 1968 that if they proceeded with it the government would sue. The proposition was dropped. In the Gateway Product Line in which Humble, again, was a party, they were told that if they proceeded to complete the venture the government would sue. The case was dropped.

Among these pipeline cases that we have examined, however, none are of the undivided interest form that TAPS is constructed to be, or is organized to be. In this, Dr. Wither-
spoon makes a very serious error in his appraisal. That was not done because the Justice Department believed, or at least that the staff believed, that the undivided interest proposal was any different in its ultimate effect than the corporate proposal. It was just quite simply this: trying to dig the Panama Canal with one hand and clean the Aegean stables with the other, we were quite unable to take on a third variety of monstrosity and to explain to a court exactly what the undivided interest concept amounted to, as you gentlemen know it is a rather slippery concept and as a trial lawyer, the prospect of trying to explain that to a judge who didn't quite know what a pipeline was in the beginning, didn't seem like the most attractive prospect, at least until we had some solid litigation on the books with respect to corporate joint ventures.

This brings us then to the Alaska Pipeline investiga-

tion. I'm going to tell you only my own views as to the law. I do not intend to answer questions or give you information which has been supplied to the department under administrative subpoena or under other conditions of confidence. But let me explain to you in general the theory of violation on which this investigation was proceeding at the time that I left. It may have changed. First, the sheer size of the oil production held by three companies in very close joint venture. I do not just mean that they happen to have individual production within the same field. As was made very clear in litigation in California in 1969 Humble and Arco, Exxon and Arco were very close partners, sharing on a very detailed basis any activity that each took in an area north of the Brooks Range and east of Naval Petroleum Reserve No. 4. The Arctic slope agreement that was attached to the complaint filed in the middle district of California in 1969 is a most instructive document in terms of the closeness of the venture between these companies. The venture between BP and Arco, between BP and Sinclair originally, was acquired by Arco in its acquisition of Sinclair. And so you, therefore, have three companies with the overwhelming bulk of Prudhoe Bay which are involved in partnerships that are of a very, very close nature. The sheer size of the oil production which they will hold is something which anyone familiar in the remotest detail with the anti-trust laws must find of concern. They will have a

quarter of the U. S. proved reserves and presumably a corresponding producibility in the years when TAPS is built and that field comes onto production.

They will have very nearly two-thirds of District 5 alone, which is a valid market within which to judge the impact of such a joint venture. Exxon alone, outside of the Prudhoe and its other joint venture operations in District 5, has long recorded in its stockholders reports a degree of--an amount of--production which corresponds somewhere between six and ten percent of the United States. But in addition to that, Exxon, with Arco, shares in the Wilmington field in Long Beach Harbor, on contract with the city and the state, a field which controls--which produces--150,000 barrels a day. A recent preliminary impact statement has been filed with respect to the Santa Anez unit, a large producing field in the deep water offshore Point Conception, inshore Santa Barbara, on an inshore Anacapa Island; which according to the statement, may be more than a 1 billion barrel field and which according to press rumors that have had some currency recently, may be two to three times that. That means these people in close concert will control a monopoly share of oil in District 5. They will control a share of the total oil production in the United States, which is considerably above any amount that would be permitted if the production were of a commodity other than oil. There is no

exception in the anti-trust laws for oil production.

Section 7 of the Clayton Act prohibits merger; and a joint venture is a merger. Section 1 and Section 2 Sherman prohibit mergers combinations which approach monopoly proportions. And these may well be so held. That was the basic theory of the case, which we were investigating. To this would be added the control of the pipeline. This was an important, but not a critical element in the basic suit. The dominance of these concerns on the North Slope would be greatly enhanced if they controlled the only practicable outlet. If you, as a possible producer, are looking at North Slope drilling, you are not going to go very independently if you can be seriously inconvenienced or excluded from the only practicable method of transportation to get your oil out. You do not produce if you cannot sell, you cannot sell if you cannot move. If you do go north then, you will go as a vassal or as a partner of these companies which control the line. In other words, we on staff, viewed the pipeline as a factor in the overall anti-trust action as an important part of our investigation, exactly to the extent that the producers could control its use by others, by controlling its size, its rate of expansion, its connections, its input and output facilities, its operating cycle and its operating practices.

If, in fact, this line were wholly and effectively controlled by public authority, State or Federal, so that the companies did not have this degree of discretionary jurisdiction, there would still remain an anti-trust case, but it would not involve the

pipeline so deeply or so vitally.

In this examination, as in the other pipeline cases, the staff did not consider that the ICC controls were such an effective control effort, or that they were in fact a control effort at all. These controls do not, repeat not, effectively sway the discretion of the operator to run the line as a closed system. In this, our analysis parallels much of what you're trying to consider here. Just exactly what does the ICC control with respect to a pipeline. They do not control connections; they do not control inter-connections directly with other pipelines. Senator Silides in the earlier committee meeting asked what would happen if I came up to the TransAlaska Pipeline somewhere below Prudhoe Bay and asked to be flanged in, could I compel you to do it. The answer was not quite yes or no as given during Mr. Heard's testimony. Actually, the answer is no, you will not be given a connection unless you say "pretty please." In which case, you may but you will have one devil of a time enforcing a connection. Can the ICC compel the pipeline to build depots for loading tanks as it were--input and output tanks. Understand that in this, we are talking about the only transportation facility in the world which does not provide any conveniences for shippers. And I think this is probably the most significant part of a pipeline as a common carrier. It is as those a railroad said, we will take what you ship to us provided you throw it on the car as it goes by. We will give you no freight depots. There will be no passenger terminals. An airline without landing--without passenger loading

facilities. What in substance is done in virtually every major company-owned pipeline in the United States, you will see reflected in the tariffs, which they publish. The pipeline provides no facilities for shippers for input. Shipments will not be accepted unless shippers have provided adequate facilities for offtake from the line. And that, incidentally, is with respect to those shippers who through one means or another, have managed to gain the consent of the owners to access to the line.

If you have a regulatory system which fills these interstices, if you have an effective public agency control over the operating practices of this pipeline, then you will, to that extent, have eliminated a substantial amount of the problem which others may well soon to enjoy. If this pipeline in fact is publicly controlled as to its operating practices, if it is a common carrier in fact, not a common carrier in name as it would be under the Interstate Commerce Act; then you will have removed the pipeline. I will not say totally removed. You will have seriously mitigated the likelihood that someone may come along and enjoin it. Enjoin its construction, enjoin its operation.

Let's then turn for a moment to what authority do you have to regulate. Either by exercise of direct regulatory powers or by your leasing of public land power, or just in general by your situation as a sovereign state of the United States exercising a very considerable responsibility and power with respect to acts that are committed within the State of Alaska. You've already been bored and confused enough on preemption and concurrent

jurisdiction. Boiling them down, there are two main tests as to what a State may do within the Interstate Commerce clause. Did Congress so exercise its powers in a field as clearly and effectively to preempt it? That is, have they so completely legislated in an area, and deliberately so, that they express a clear intent that you had no power to operate within it? The second one was, if it did leave areas for state action, does the state action impose an undue and discriminatory burden on the free flow of commerce? Not as has been discussed here before, a burden on commerce, but an undue and discriminatory burden. Apply these tests here. As we have said, the Congress in the Interstate Commerce Act has enacted only the most fragmentary legislation. There is even a threshold question here. Is Alyeska subject to the Interstate Commerce Act at all, by the basic language of the law itself? I hate like the very devil to ask that you read carefully section 1. The reason I hesitate is because, as an old friend of mine who has worked Interstate Commerce Commission problems for forty years maintains, the Interstate Commerce Act is the most confusing and poorly written body of law that has existed since the code of Hammurabi. But section 1 says in substance, that (excuse me a moment) -- section 1 which is the critical part as regards pipelines, it says the provisions of this chapter shall apply to common carrier engaged in the transportation of oil or other commodity by pipeline or partly by pipeline and partly by water (I'm leaving out some words) from one state or territory to another or the District of Columbia... In other words, there is at the outset a very sharp difference

made between interstate commerce and interstate transportation. The Interstate Commerce Act relates only to interstate transportation and it calls a pipeline a common carrier if that pipeline is engaged in transportation interstate itself. Now, to accommodate to this definition, to make them squarely and completely within it, the Arco Pipeline Company, for example, which will be the common carrier, theoretically, on Alyeska will have to operate its own water carriage. As of now, neither Arco, nor Exxon, nor BP, operate any common carrier tankers nor are there any that I know of operated anywhere in the world. In fact, they do not operate tankers at all. Their refinery and other affiliates operate tankers. And so Exxon pipeline company is not engaged in the transportation of property by pipeline and by water. The oil will come tearing out at Valdez, drop into the tanks, sit there for awhile and somebody else's tanker, Exxon subsidiary No. 2, will come along and pick it up. But that is not the kind of connective transportation that the Congress spoke of in section 1 of the act. Moreover, to compound the difficulty, the provisions (says section 2), the provisions of this chapter, and again I'll leave out some words, shall also apply to such transportation of passengers and property but shall not apply (a) to the transportation of passengers or property or to the receiving, delivery, storage or handling of property, wholly within one state and not shipped to or from a foreign country, from or to any place in the United States as aforesaid, except as otherwise provided in this chapter. There are outstanding on the books, although

this clause has been in the act since 1906, there are outstanding on the Interstate Commerce Act decisions and the decisions of the federal court, not one single case which holds that a pipeline in this situation is in actual fact, by operation of this clause, subject to the chapter. But they say we will exceed the jurisdiction of the Interstate Commerce Act. And this brings me to the old riddle which I learned as a child -- if you call a tail a leg, does a cow have five legs? And of course the answer is, calling a tail a leg doesn't make it so. And exceeding voluntarily to the jurisdiction of the Interstate Commerce Commission does not mean that they may not later secede voluntarily from the jurisdiction of the Interstate Commerce Commission. Again, then, there is a very considerable problem at the very threshold. Is this under the Interstate Commerce Act? Reference has been made to the pipeline right-of-way bill. The bill which has just now cleared the Congress and which is in the process of possibly approval by the President, although I understand the gossip is that the Bureau of the Budget is trying to get it vetoed because it contains some authority which gives the Federal Trade Commission a better shot at getting information respecting oil transportation. In the pipeline right-of-way bill, the committee print, I do not have the final bill as enacted because it was not out when I left last Thursday. But I understand the text is identical. It proposes that the pipeline which is given a permit by the Secretary of Interior must be a common carrier. It does not say what common carrier means. It does, however,

say that whenever the Secretary, this is on page 16 of the committee print, it's actually section 28.R 5 of the Mineral Leasing Act if it becomes enacted. Sub-section 5 says whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating _____ the number of possibilities for suit against the pipeline. The number of interests of state, the federal government, private individuals, even informers who might have _____ beginning of the line. I have been making the point that in substance the anti-trust vulnerability of the pipeline is almost exactly the same proportion to which the pipeline owners have discretion to run the line as their own, and if that discretion can be demonstrated to be superseded by an effective public control, to that extent the vulnerability of the line to suit diminishes or disappears.

I have just completed, I hope completed, all that I have to say in terms of the general preemption of the field under the Interstate Commerce clause by the enactment of the Interstate Commerce Act. I have made the distinction between interstate transportation and interstate commerce and noted that Congress had here enacted only with respect to interstate transportation. Under section 1 I reviewed the doubts that exist that this line in fact is legally subject to the requirements of the Interstate Commerce Commission, that if that commission should by some enormous upsurge of vigor become an effective control agency, which it has never been, would the pipeline at that time be able to say "sorry, Charlie, we aren't

really an Interstate Commerce Act line after all." There is a very good argument can be made on that. I had just finished pointing out that in the pipeline right-of-way bill that Congress has just enacted there is a recognition, explicit recognition, that the Secretary of the Interior in enforcing the common carrier obligations under that act which are not clearly defined may go before the Interstate Commerce Commission or an appropriate state agency. Again, an explicit recognition in the overall regulatory scheme that Congress contemplated that there would be state action respecting such pipeline. Picking up from there that we have not really shown any evidence of a Congressional intent to oust the state jurisdiction, let's then go to the second leg of the question. Congress has, in part, applied some regulatory powers to interstate pipeline. This becomes basically a _____ question because under a long line of cases which you are as familiar with as I, the question comes whether or not the individual state regulation is one which completes or which contradicts the federal regulation. Even if you assume that Alyeska or the individual pipelines which each operate a share of Alyeska in this confusing undivided interest form, are subject to the Interstate Commerce Act, then you have to examine the degree to which that regulatory scheme applies. In the city of Burbank vs Lockheed Air Terminal decided this May by the Supreme Court the court said in reviewing a similar kind of question that when you look to see what the state may do in this confusing field you must examine "the peculiarities and special features" of

the federal regulatory scheme in question. And you do so in order to see whether or not what you propose to do is contrary to what they are in fact allowed to do. The entire settlement that has been proposed here rests, as I have said before, on the effectiveness and the scope and the vigor of ICC regulation. What are the peculiarities and special features of ICC regulation? You have read the press release I think that has been given by Chairman Stafford saying that the Interstate Commerce Commission will now become extremely vigorous in regulating pipelines within the full extent of its powers. A little over a year ago in June 1972 I believe, before the House Small Business Committee, a subcommittee under the chairmanship of Neil Smith from Iowa, Chairman Stafford accompanied by his principal subordinates from the Commission testified with respect to the anti-competitive impact of oil company ownership of joint product pipelines and he said, considering the size and economic significance of the oil pipeline industry the expenditure of regulatory effort is not large compared to that devoted to other types of carriers regulated by the commission. This reflects the fact that Congress has determined the nature of the industry is such as to require, for the protection of the public interest, a less comprehensive range of regulatory devices. For example, oil pipelines are not required to obtain certificates of public convenience and necessity for the commission. Additionally the Interstate Commerce Act does not give us jurisdiction over such aspects of pipeline operation as issuance of security, formation of interlocking directorates,

mergers, consolidations, construction and abandonment of line, the granting of credit. Pipelines are not subject to the commodities clause, as are railroads (that's my interjection) prohibiting transportation of the products of their owners. However, oil pipelines are subject to those provisions of the act which forbid unjust discrimination and undue preference that require just and reasonable rates, reasonable facilities for interchange of traffic, compliance with the long haul and short haul clause of section 4, compliance with accounting, reporting and valuation regulations and the procedural provisions of the act with respect to rates and tariffs. They are subject to section 1, sub 4 of the act imposing upon all common carriers the duty to provide and furnish transportation upon reasonable request therefore. There is a footnote on that last statement. The footnote reads, admittedly this section provides a rather cumbersome remedy for the courts have held that it is not a self-enforcing provision, that is, even though the Commission may have made a finding that a carrier has not met its duty to provide service, the complainant must still take some additional legal action to enforce the Commission's order, and in some 67 years in which this has theoretically been available there are no cases in which that unknown type of additional legal action has ever been taken. Under questioning by Congressman _____ Mr. Serra, who had accompanied Mr. Stafford as his deputy general counsel, again going to the question Senator Silides raised awhile ago, it is not necessarily true that an independent shipper, so to speak, cannot ship over that line

because the ICC can be complained to by such an independant requesting that established facilities permit him to ship over that line. We cannot require the owners to build a long extension down to his own oil field but we can require the owners to accept the traffic and ship it. And if that independant happened to have also an independant pipeline in the vicinity of a joint-owners line we would require them to connect and establish through routes and joint rates. I think that's clear under the ICC act. Mr. Finn, counsel to the committee; have you ever done that. Mr. Serra: We have never had an opportunity to do that. We have never had a complaint.

In Mr. Hurd's testimony he referred, incidentally, and his assistant gave a little more detail on the experience of Tenacle and Murphy connecting to the Colonial Pipeline. A great deal of this hearing dealt with precisely that point, and the committee reports, which unfortunately I do not have with me, goes into detail the difficulties those companies had in trying to get the same kind of access^{SS} to Colonial Pipeline that its owners had, and how they finally gained access only by arranging for a merger-joint relationship with one of the owners of the line as to the creation and operation of a substantial number of terminal facilities. In other words they said^{PLEASE.} - I might also say without going into any of the confidential information which we had with respect with that particular investigation, that there was an incident in which one of Exxon's subsidiaries known as PLANTATION Pipeline sought to get connections with something less than success.

I think that it does point up the specific problems Tenacle and Murphy had, in an appendage to it that was written by the Committee Council.

Again, to point up - I think probably the most significant foulup under the Interstate Commerce Act - they use the label "common carrier", but they do not give it CONTENT. Mr. Sarra was asked by Congressman SMITH, "in effect he is saying that a carrier that is only doing business with it's owners is not a common carrier," Mr. Sarra,

I'm not saying that all. I think that is clearly spelled out in ~~the~~ CHAMPLAIN WHEN YOU HAVE ONE PARTICULAR PIPELINE THAT SHIPS ITS OWN GOODS FOR ITS OWN PARTICULAR PURPOSES,

It They might be a carrier as defined in the act, They might be required to report full evaluation, to file an annual report, to establish UNIFORM ACCOUNTS ~~uniformity~~, but we cannot require them to publish rates. We cannot force them to accept goods of others. This refers to the two CHAMPLAIN CASES which I commend to you in sorrow, as an example of how the Supreme Court can read a very complex bill - very complex law, and arrive at some very contradictory results. There were two cases. In Champlin I, the Interstate Commission told Champlin that, IT MUST FILE BOOKS OF ACCOUNT, THAT it must conform to evaluation of principles of the Interstate Commerce Act, do all the minor things which the ICC requires of pipelines. Champlin resisted. They said we are not a common carrier. The case went to the

Supreme Court, and it said whether you are a common carrier ~~or~~ *IN FACT*
~~not~~ is irrelevant. You are called a common carrier under the
Act, and you are therefor required to file books of account.
The matter went back to the Commission and in Camplin II it
came back up. This ~~time~~ ^{PIPELINE} had been determined to be a common
carrier for the purpose of the Interstate Commerce Act. In the
Interstate Commerce Commission, they were then required to
file a tariff and Camplin refused, and carried it back again to
the Supreme Court. And the Supreme Court in a most complex
decision said as I said awhile ago - that calling a leg
does not make it a leg. You make call it a leg for purposes
of classification as long as it is not meaningful in any kind of
burden upon it. Camplin was held in the second case to be a
common carrier for the purposes of filing valuations and books
of account but it could not be required to be a common
carrier for purposes of accepting shipments from others.
This then, is something of the tangled, ~~is~~ complicated, vague,
uncertain, illusory and almost completely non-existent regul-
atory powers which you are asked to accept as being the public
control which would remove the discretionary power of the
pipeline owners to control the market, ^{ON THE NORTH SLOPE AND} from the North Slope to
market to Valdez with North Slope oil. This I would
submit, is a very weak reed indeed. If only I were not barred
from trying to challenge this particular line in this particular
~~way~~
~~case~~ - I would love to do it.

Having then said that you have a wide power to flush out the regulatory system by your own control provisions. How ~~to~~ should you proceed to regulate? In giving advise, please understand, I have not had enough opportunity to become familiar with the provisions of the individual proposal so that I can relate them to the whole. It is a confusing package in and of itself. Even to a lawyer who has spent years in trying to understand confusing things. You must, I think, express very clearly - and I think your existing statute does express very clearly, your intent to use whatever base of powers the state has, whether it is the power of eminent domain - the equivalent very similar power to permit use of public lands, your regulatory power, your power in general ^{to (1102)} ~~is~~ ^{PROTECTIVE} economic _A to the people and the economy of the State, but in doing so, may I call your attention to the fact, violating the rule I just said a moment ago, may I call attention to the fact that in the package of bills there is one part which I noted specifically. In SB 3 the Commissioner is given authority, in the event he deems it necessary, to call this pipeline a common carrier and to apply to it certain power. You will find on page 5 of the print that I have, sub 3 -- there the Commissioner may call it a ^{COMMON} _A carrier, but expressly, it may not require the lessees to accept tenders of crude oil except at points where there are existing pumping stations or other facilities for receipt of crude oil. In other words, if you come from the Coleville River crude, you have to go to the

INPUT
Prudhoe Bay ^A point or there is no acceptance for shipment. Senator
Silides thought--could I come at some mid-point between Prudhoe
and Valdez and flange up to the line--is expressly denied here,
unless Alyeska, ^{OR ALYESKA'S OWNERS} in their clear discretion choose to put an intake
there for you, but they cannot be compelled under either Federal
or State law to do so.

They can still accept or reject tenders of crude oil which are
not good merchantable oil due to gravity, viscosity and other
characteristics. Possibly this might be ~~true~~ ^{thru some} ~~from~~ litigation
through some interpretations made more meaningful, but I have in mind
some of the complaints that we have received in the Department of
Justice years ago concerning the failure to accept tender
shipments at appropriate points by pipeline from shippers who had
been on those lines. Because for some reason or other, the
shippers on the line were also the owners of the line. did not
want that particular oil on the line. It was merchantable oil.
It had a slightly different asphalt index, and it was refused.
There was nothing under the Interstate Commerce Act that the
complainant could do. We started an investigation - he got his
connection, for that reason. But not because the Interstate
Commission or the Interstate Commerce Act gave him a right. But
because the exclusion was purely an attempt to monopolize.

Even when an input point has been established. There was one
matter which came up in Mr. Stafford's testimony - they were
talking about the possibility that a man might have a connection

already established but for some reason or other the owners of the pipeline might decide to discontinue it. Mr. Serra, Deputy General Counsel was asked by Congressman Conti - "So if Colonial wanted to knock out its connection of Fairfax, Virginia, for example, it could do it." Mr. Serra, "Yes. They could do it without permission of ICC." Mr. Conti "How about cutting off tanks and pumps." Mr. Serra, "something."

In other words, those under S6 and under the Interstate Commerce Act there would be complete discretion in the owners of the line to put the input point where they chose, to drop them when they chose. In your enactment, in your existing law, you have some reasonably clear language. I would suggest in the interest of avoiding litigation, that you carry through with that fairly complete control system there spelled out rather than try to amend it. Rather than try to change it at least as it is proposed

here, in one respect particularly. On certification, there has been a great deal of dispute raised. I heard Mr. Furman yesterday - I heard others speak to the same question. I think that it is important that you understand that the legal certification covers a regulatory process by which approval is granted to the total service of a line. The question was raised yesterday whether or not that certification may have been completely superseded by the determination of the congress made in enacting the right-of-way act. It is easy in reading and it will be easy when you have the final text of that act to find what it was what congress said was to be built. Roughly speaking in the

language they have here - they have said our certification in effect, our determination of public convenience and necessity says that there will be a 48" pipeline from Prudhoe Bay to Valdez as described in the final environmental impact statement. Now as I recall that final environmental impact statement it did not trace the precise input point, it did not trace the input tank of the shipping companies, it did not and indeed as yet could not trace the output facilities that are given. In short all it said is - that there will be a trunk line. The certification process for a railroad, a bus line, air carrier or any other kind of a public utility of a public transportation company which is the same thing in substance as a public utility. That the certification process covers not only the trunk line but also the facilities by which access to that line will be given. In short, congress even by that certification has not totally ousted your certification requirements which would go also to the point to the facilities that are established for the input-output of the pipeline at various points along its system at its headend - at its tailend. One other thing which I would urge - as I say I am not that familiar with your clause but I would urge that you insist either by separate enactment or hopefully you have it in existing law on full powers to compel information to be produced for the legislature, if necessary for the regulatory commission where appropriate full information powers.

I listened with a great deal of interest to Mr. Hurd's opening remarks the other day in which he said "we will tell you anything you wish". This runs a little bit contrarv

to the situation in which the joint committee on public domain of the California State Legislature now finds it so. Exxon is a party to a contract covering the operation of the Long Beach unit producing a 150,000 barrels a day. One element of that contract provides that the companies would give to the state a full and complete access to all papers relating to the pricing of the oil. There is a rather considerable dispute before the committee as to whether the pricing of the oil - the price at which these companies have accounted to the state for the oil is a fair price. We have testimony from independant produces to the effect that the state oil was worth somewhere between \$.50 and \$1.27 a barrel more than it was being accounted for to the state. Hearings where held, the producers testified, the chairman of the committee invited the purchasers and the contractors to testify - they refused. Exxon declined because it was too minor a factor in the West Coast operation to have anything to testify to. The chairman there upon sent requests to the individuals - in substance leaning on them - would you please come in and testify. They still for the most part refused. We got from one or two of the companies some testimony which was rather misleading and therefore as any organization that is trying to find the facts must do - we went to what subpoena powers we had. Exxon is currently in the Superior

Court in and for the city and county of Los Angeles enjoining the subpoena of the joint committee on public domain, on grounds among other things, that the state in asking about this complex set of relationships is acted only as a oil producer in its preparatory capacity and has no right to the information. It is also saying that most of the records we sought are kept outside the state and the state has no authority to compel them to be brought within. I'm sorry to intrude another's states experience on you. I think however it points up the necessity of being absolutely certain as you police the operation of this entire thing make certain that you have access to the information on the basis of which you and your successors will be able to judge whether or not this is an operation in the public interest or not. Finally let me associate myself with Dr. Wither- spoon in one thing: I had not met him before we came here; I can associate myself with him gladly, and even with a little bit of modesty, say that I think really he has given you and extraordinarily excellent job of advice. But in closing his testimony he said that if you accept this package of bills that has been offered you you may end up with that horror of horrors a private government--an unregulated monopoly Now understand after a life time in antitrust I believe in free enterprise. I am a disciple of John Sherman; the gospel of Sherman won I think is the whole basis on which this country's economy rests, on which it should continue to rest.

The one thing that it says in substance is this: You shall have no public interference with business with the economy except to the extent it is absolutely necessary. You shall not permit private government to control areas of the economy. Monopolies--and Taps will be an monopoly--means the ability to control, the ability to govern; it is private government. If there must be regulation because of the natural monopoly characteristics of this pipeline, if there must be a monopoly, let it be publicly controlled. Do not leave that area of government to private interests for that I think is truly a horror of horrors.

Q by Senator Thomas: ...I understand YOUR POSITION very clearly but in a case like this, of this magnitude, I would certainly hesitate to think the public in COMPLETE control would be anything but just worse than private control.

Mr. Lamant:

I would say Sir, that if you have a government it is better to have a public government than a private one because you have at least some chance that the public interest will be more fully maintained. I do not like state ownership but I do not like private government, and as between the two it seems to me there is no choice but to have public control, not necessarily public ownership. There are a great many things, a great many decisions on the operation of this line where an independent private carrier could hustle a lot of business for the good of