Federal Decisionmaking and the Trans-Alaska Pipeline

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I
INTRODUCTION

In 1967 oil was discovered in Alaska on the North Slope of the Brooks Range in the vicinity of Prudhoe Bay. By early 1968 it was established that the discovery was one of major proportions. The oil lay underneath lands controlled by the State of Alaska, which since 1964 had awarded production rights by competitive bidding.

Following the discovery, companies with an interest in this and other potential petroleum resources in the area considered various means of transporting the product to market. Several pipeline routes were investigated, including routes across Alaska to an ice-free port for transfer to tankers, and overland routes via northern Alaska and Canada to Puget Sound or the North Central United States. The use of ice-breaking tankers operating out of Prudhoe Bay was also considered. In 1969, a group of oil companies decided their interests would best be served by a pipeline from Prudhoe Bay to a terminal near Valdez, located adjacent to a fjord on the Alaskan South Coast.

Their proposal called for a pipeline nearly 800 miles long, designed to transport over difficult terrain 2 million barrels of oil per day at temperatures up to 145° F through a region largely covered by permafrost. The route crossed several major mountain ranges and passed through areas subject to major earthquakes. At a currently estimated construction cost of $6.38 billion, the pipeline would be the

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4. This cost estimate includes construction of a tanker terminal at Valdez. It does not include the $2.8 billion cost of developing the North Slope oil production complex or the estimated $2 billion for a fleet of 35 new and used tankers. Alyeska Pipeline Service Co., private communication, Jan. 16, 1975.
largest ever built and one of the most massive engineering projects ever financed with private capital.

Government involvement followed from federal control of public lands needed for the pipeline and associated facilities. A pipeline could not be built until the oil companies obtained right-of-way and other land use permits from the Secretary of the Interior. Before granting such permits, the Secretary had to be satisfied that the proposed system would meet two categories of stipulations, the relatively well-defined conditions of the Mineral Leasing Act of 1920 and those conditions implicit in the National Environmental Policy Act (NEPA), enacted after the permit applications were originally filed in July 1969.

Proposed for construction in the largest remaining wilderness in the United States, along a route which many believed would lead to less than optimum use of North Slope crude oil, the pipeline project engendered considerable opposition from environmentalists and participants in energy affairs. As a result, the pipeline became a policy issue more than four years prior to the granting of necessary approvals. During this period there occurred numerous modifications in the original pipeline system design, and millions of dollars were expended on engineering and environmental studies. The matter was the subject of public hearings held by congressional committees and the Department of the Interior. Interior developed engineering and environmental stipulations to guide the pipeline system construction and operation and prepared draft and final environmental impact statements. Project opponents sought to delay commencement until the legal barriers they raised were eliminated in congressional legislation passed in 1973. Construction is now underway, with initial operation at 1.2 million barrels per day scheduled for 1977 and full operation at 2 million barrels per day expected in 1980.

Originally, the argument over the pipeline reflected a conflict between those who would develop North Slope oil and those who, as a matter of principle, would not. Proponents saw the pipeline as a narrow thread on the map, the environmental impact of which could be kept within acceptable bounds. When viewed as an important element in the national economy and as a major source of revenue to the State of Alaska, to Alaskan natives, and to the oil companies, development

of North Slope oil appeared eminently desirable. Arrayed against this view were those who saw the pipeline as a giant swath across a virtually untrammeled land, a source of oil spills on land and at sea. Opponents predicted its mere existence would open northern Alaska to uncontrolled development and argued that the economic benefits of North Slope oil development at that time were outweighed by its environmental costs.  

Analysis of the pipeline controversy is complicated by the manner in which the original issues and positions shifted over time. Assurance of an adequate supply of energy resources emerged as a critical national problem. Some who opposed any pipeline modified their position to implied acceptance of the alternative Canadian route to the Midwest United States as the lesser evil. As modification of the

8. Opponents' views are contained in the record of the Alaska Pipeline Hearings, held by the Department of the Interior in Fairbanks, Alaska (Aug. 29-30, 1969), in Anchorage, Alaska (Feb. 27-Mar. 1, 1971), and in Washington, D.C. (Feb. 16-18, 1971). Such views were also expressed in comments on the Final Environmental Impact Statement, infra note 16.

9. In order to place the trans-Alaska pipeline in perspective, it is useful to consider the extent of North Slope oil reserves and the role of 2 million barrels per day in satisfying domestic oil demand.

There are diverse estimates concerning the extent of reserves, with the oil companies estimating 9.6 billion barrels, and the Economic and Security Analysis quoting estimates of 9.6, 10 to 20, 40, and "between 150 and 300" billion barrels. Office of Economic Analysis, Department of the Interior, An Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline, at K-1-4 (1971) [hereinafter cited as Economic and Security Analysis]. At the present rate of demand, 9.6 billion barrels would represent approximately 1.5 years of domestic demand.

At present rates of consumption, 2 million barrels per day from the Alaskan North Slope would represent approximately 10% of domestic oil demand. The 1975 State of the Union Message forecasts 1975 demand at 18.0 million barrels per day. Of this amount, between 5.3 and 6.5 million barrels per day will be imports. Current projections are that total demand in 1985 will range between 20 and 24 million barrels per day. Id. Imports will be between 4.7 million and 12.7 million barrels per day. Both of the latter figures assume that by 1985, the trans-Alaska pipeline will supply 2 million barrels per day. The assumption that imports might be as low as 4.7 million barrels per day postulates that, in addition to presently planned North Slope production, there would be an additional 2 million barrels per day produced on the North Slope in Naval Petroleum Reserve Number 4. Such production would require construction of a second pipeline. Current projections are that with world oil prices at $11 per barrel, petroleum demand will be about constant between 1974 and 1977 and grow at a rate of between 1% and 2% thereafter. This projection is to be compared with the nearly 4% annual growth rate assumed in 1972 when the Economic and Security Analysis was being prepared. With a 4% growth rate, the contribution of the Alaskan North Slope seemed less significant than it does under the assumption of a 1% to 2% rate. The higher rate implies that a given level of dependence on foreign sources, or the need to develop 2 million additional barrels per day of domestic sources, would be deferred approximately 2.5 years by operation of the trans-Alaska pipeline. At a 1% to 2% growth rate, however, the need for additional supplies would be deferred 5 to 10 years. Thus, as predictions of the rate of demand growth have dropped, one argument against immediate construction of the pipeline lost strength, namely the argument that availability of North Slope oil would delay by only a short time the need for additional sources.
pipeline design invalidated certain early criticisms regarding the effect on permafrost, the focus of environmental objections shifted to the consequences of oil spills along the marine route.\(^\text{10}\)

While the debate shifted focus, nevertheless certain underlying elements were always present though not always acknowledged. One constant element of the debate derived from its unavoidable subjectivity. Analysis of the issues involved comparison of disparate quantities, i.e., the value of untouched wilderness and the value of oil. The weight accorded either naturally depended on the preferences of the evaluator. Moreover, many of the parameters were imprecisely known. Not surprisingly, disagreement arose over the pipeline's ability to withstand earthquakes, its interaction with permafrost, the likely amount of pollution along the marine leg, and even the probable extent of North Slope oil deposits. At the same time, the necessity of decreasing American reliance on foreign oil was said to call for expeditious construction; the actual significance of the pipeline in reducing such reliance was still a matter of debate. Thus the inherently subjective nature of the analysis meant that seemingly logical paths could lead to diverse conclusions concerning whether, where, and when the system could be constructed.

The second constant element was the predisposition of federal decisionmakers\(^\text{11}\) to grant the requested permits. The Department of the Interior operated under the assumption that the Mining Act of 1872 and the Mineral Leasing Act of 1920 called for approval of pipeline rights-of-way over public lands conditioned only on the reduction of adverse impact within "reasonable" limits, as defined by the Department. Further, the predisposition to grant permits was based in part on a general philosophy concerning where the line should be drawn between preservation of the environment and economic development, between public and private interest, and between total government control and unrestricted private activity. Because such predispositions were unlikely to be overcome by continuing study of the oil companies' proposal and alternatives, neither the Draft or Final Environmental Impact Statements nor additional study proposed in 1973 would alter basic conclusions derived from initial

\(^{10}\) Compare views expressed in hearings, supra note 8, with discussion in May 26, 1974 New York Times article, supra note 7.

\(^{11}\) Not only federal decisionmakers began with biases which substantially determined their position. The same was true for oil executives, environmentalists, and the interested public. Because this is a discussion of federal decisionmaking, the focus is on the preconceptions of federal officials. It should be noted that below the decisionmaking level there were federal officials who opposed the project, believing that there should be a greater guaranty of environmental protection before the project was allowed to proceed and that a pipeline to the Midwest would serve the national interest better.
consideration of the project, i.e., that a pipeline should be built and that the preferred route was to a port on the Alaskan South Coast.

The trans-Alaska pipeline represents more a negative than a positive example of decisionmaking on energy matters. Since no national energy policy was in force and decisionmakers did not generally recognize the supply of energy resources as a high priority issue, energy considerations were used primarily to substantiate positions reached for other reasons. Although the use of energy resources became a factor in the NEPA-required process of balancing economic benefits against environmental costs, the Secretary of the Interior had no explicit mandate to make the proposed project's approval contingent on its achieving the most efficient use of energy resources. Had there been a national energy policy, the development and transport of North Slope oil might have been more carefully directed toward optimum fulfillment of the nation's energy needs consistent with other national policies.

Section II of this article enumerates events leading to the issuance of permits in January 1974. Section III contains expanded discussion of the major substantive issues of more than ephemeral interest, namely the relevance of the Environmental Impact Statement and the relative merits of the trans-Alaska vis-a-vis the trans-Alaska-Canada route. Section IV contains conclusions. Where appropriate, such matters as the extent of North Slope oil reserves and their future role in satisfying national energy needs are referred to in footnotes. These matters, themselves worthy of discussion, were largely peripheral to the decisionmaking process. Although government officials recognized that 2 million barrels per day were significant, there was relatively little high level interest in establishing more clearly the magnitude of these reserves or in undertaking a more comprehensive analysis of how these reserves could best be exploited in the national interest.

II

THE TRANSPORT OF NORTH SLOPE OIL AND THE FEDERAL GOVERNMENT: MAJOR EVENTS AND ISSUES

A. The Initial Permit Application and the Federal Task Force

In February 1969, the Trans-Alaska Pipeline System (TAPS)\textsuperscript{12} announced its decision to construct a pipeline from Prudhoe Bay to

12. Initially, TAPS was a joint venture of Humble (now Exxon), Atlantic Richfield, and British Petroleum. On October 22, 1969, an agreement was signed by which TAPS was expanded to include Amerada Hess, Hope Pipeline Company, Mobil, Phillips, and Union Oil. In August 1970, parties of the TAPS agreement dissolved TAPS and incorporated the Alyeska Pipeline Service Company. Alyeska was authorized by the
the South Coast of Alaska. On April 18, then Secretary of the Interior Hickel established a departmental Task Force to deal with problems raised by the pipeline project, thereby formally recognizing federal interests which could not be handled in routine fashion. The decision to create the Task Force reflected an official view that transport of North Slope oil via a trans-Alaska pipeline posed special, but not insurmountable, problems.

At the suggestion of the President, the Task Force was expanded to include representatives of other federal agencies. The enlarged group, called the Federal Task Force on Alaskan Oil Development, was directed to "... consider new ways in which we can explore and develop, without destruction and with minimum disturbance, the oil resources of Northern Alaska."

The Federal Task Force and its subsequently established subsidiary advisory and working groups undertook to obtain for the Secretary of the Interior information on the pipeline's social, economic, and environmental impact. Such information would, in principle, be the basis for decisions on whether to grant the pipeline right-of-way and other land use permits and, if granted, the standards for design, operation, and construction. In practice, this information was more relevant to decisions on standards than to the basic question whether permits should be issued. The Task Force did not consider alternative

owner oil companies to design and construct the proposed trans-Alaska pipeline system and associated facilities. Present ownership interests in Alyeska are Amerada Hess Corporation (1.5%), Atlantic Richfield Pipeline Company (21%), Exxon Pipeline Company (20%), Phillips Petroleum Company (1.66%), Mobil Alaska Pipeline Company (5%), BP Pipelines, Inc. (15.84%), Union Alaska Pipeline Company (1.66%), and Sohio Pipeline Company (33.34%).

Home Oil did not exercise its prerogative to become a part of Alyeska. Joint Stipulations, Amerada Hess v. State of Alaska, supra note 1, at 26. In this discussion, no differentiation is made between a parent company such as British Petroleum and a subsidiary such as BP Alaska, which was specifically established to develop and transport North Slope oil.

15. Id.
16. These included: (1) the Menlo Park Working Group, headed by the Director of the USGS, established in August 1969 to perform detailed technical analyses and evaluations. Department of the Interior, Administrative Record, Trans-Alaska Pipeline Decision, 4.1.1 at 88-89, (2) the Technical Advisory Board (TAB), chaired by the Director of the USGS, established February 20, 1970 to advise the Secretary on technical matters (the Menlo Park Working Group then became an adjunct to the TAB). (3) the Ad Hoc Review Group, another TAB adjunct, established in mid-1971 to review the Alyeska Project Description. DEPARTMENT OF THE INTERIOR, 6 FINAL ENVIRONMENTAL IMPACT STATEMENT PROPOSED TRANS-ALASKA PIPELINE C-89 (1972) [hereinafter cited as FINAL EIS], (4) the 102 Statement Task Force, established in February 1971 to prepare the Final Environmental Impact Statement. 6 FINAL EIS at 7.
transportation systems, transport of oil by sea from the pipeline's southern terminus, or the question of transport of natural gas from the North Slope.17

On June 9, 1969, TAPS applied to the Bureau of Land Management, Department of the Interior for a pipeline right-of-way from Prudhoe Bay to Valdez. The application's covering letter noted that time was of the essence and ventured the hope that road construction could begin that summer, and actual pipeline construction as early as the first part of 1970.18 Having anticipated the pipeline permit application, the Department of the Interior responded in a letter from Under Secretary Train with 79 questions19 designed to assess the consortium's technological readiness to undertake the project. The answers indicated TAPS was not ready to proceed, and permits were not issued by the July date sought in the TAPS application.20 Instead, the Task Force reported to the President in September that the "... unanimous judgment by Interior Bureaus was that TAPS had not adequately finalized their own plans on a technological level for the construction of the pipeline or ancillary projects. Each bureau raised serious questions regarding the impending time frame and expressed concern over the industry's ability to use data from their own ongoing studies."21

From the initial deferral of permits, it could be inferred that the Department of the Interior was inclined to grant the oil companies' re-

19. Department of the Interior, Administrative Record, Trans-Alaska Pipeline Decision 1.2.1.1. Of the 79 questions, only two probed beyond the companies' trans-Alaska route proposal. Question 73 asked whether additional oil or gas pipelines were under consideration while question 74 asked whether thought was given to a pipeline from Prudhoe Bay through Canada. The answers to both questions were negative.
20. For example, then USGS Director Pecora wrote as follows in a June 27, 1969 memorandum commenting on TAPS's answers to the 79 questions:
TAPS' (sic.) replies to most of our questions are generalities, indicating that an effort will be made to cope with the problems, expressing confidence in their ability to do so, but giving a minimum of factual information on just how they plan to handle them. Efforts over many years to solve some of these problems have not yet been successful. Small scale degradation of the environment has continued progressively around settlements and in tundra areas that have been traversed by vehicles. The lack of specific solutions by TAPS suggests that despite hopeful intentions, the construction of the pipeline will be attended by moderate to severe damage to the environment. Grave questions also remain concerning the ability to adequately safeguard the pipeline once the ecological balance has been disturbed. Some of the changes induced by improper construction and transportation procedures are irreversible.
quest once officials were assured of the system's general compatibility with environmental values. The pipeline's owner companies demonstrated their confidence that a permit was around the corner by expending more than $400 million on pipe, construction equipment, and preparatory efforts. In addition, the predecessors of Alyeska and other oil companies on September 10, 1969, paid the State of Alaska some $900 million to obtain leases for production rights on 450,000 acres of North Slope lands where oil reserves were suspected but as yet largely unproved.

While there seemed to be no question that permits would be issued, Interior did adopt one means of insuring protection of the environment through the promulgation of stipulations to which TAPS would agree to adhere as a condition of permit approval. Designed to provide the "fullest possible protection for the integrity of the Alaskan environment and for the rights of Alaska Natives," the stipulations gave the federal government broad powers to impose conditions on construction and operation of the pipeline system. Among these powers was the authority "to suspend or terminate any or all activities if and when any of the terms and conditions of the permit are not met."

A first draft of the stipulations, completed on July 18, 1969, was circulated for comment among environmental groups and interested individuals. On August 29 and 30, the Department of the Interior held a public meeting in Fairbanks to obtain interested parties' views on the stipulations and the social, economic, and environmental implications of the proposed pipeline system. Revised stipulations were made effective in mid-September 1969, but further stipulations were added later. The total set of stipulations, which continues to evolve,

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23. N.Y. Times, Sept. 11, 1969, at 1, col. 3.
25. Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline, January 23, 1974, Section 31, "Termination or Suspension of Right-of-Way," Subsection A.
27. Hearing on an Application for a Trans-Alaska Pipeline Before the Department of the Interior (Fairbanks, Alas., 1969).
28. In November 1970, additional stipulations were developed by the Menlo Park Working Group, an adjunct of the Technical Advisory Board, itself part of the Task Force. See note 16 supra. The stipulations as of January 1971 were appended to the Draft Environmental Impact Statement for the Trans-Alaska Pipeline, note 159 infra.
forms the basis of the pipeline system's standards for design, construction, and operations.

**B. Modification of Public Land Order 4582**

Meanwhile, five months before NEPA and its Environmental Impact Statement requirement, the Department of the Interior had taken one of a series of steps indicating confidence that sooner or later the pipeline would be built. On July 29, 1969, Acting Secretary Carl Klein notified the House and Senate Interior Committees of his intention to modify Public Land Order 4582 to allow construction of a road some 53 miles in length from Livengood to the Yukon River. As one segment of a partially completed highway that would parallel the pipeline for its full length, this road would be essential for the transport of workers, equipment, and materials to the pipeline alignment. The congressional committees expressed no objection to the proposed modification. Contemporaneously, an arrangement was reached between the State of Alaska and Atlantic Richfield, BP, and Humble, whereby the oil companies, as contractors to the State of Alaska, would build the road at no expense to the State. In return, the companies would have preferential use during the pipeline construction period. Public Land Order 4582 was modified on August 13 and the Livengood-Yukon River road was constructed at a cost of $20 million.

On September 30, 1969, Secretary Hickel sent a second proposed modification of Public Land Order 4582 to the House and Senate Interior Committees. The proposal allowed the Department of the Interior to grant a pipeline right-of-way permit from Prudhoe Bay to Valdez. In notifying Congress, the Secretary was adhering to an

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agreement he had made to consult with the House and Senate Interior Committees before taking any action which would change significantly land use or ownership in Alaska. During December both congressional committees registered their acceptance of the second proposed modification although the Chairman of the Senate Interior Committee, Henry Jackson, noted his committee's concern that environmental damage to public lands be avoided and that further government action conform to the provisions of NEPA, passage of which was imminent. By not objecting to the land order modification, the congressional committees were handing responsibility for the modification and any adverse consequences to Mr. Hickel.

On January 7, 1970, Secretary Hickel signed the order modifying the land freeze. The Bureau of Land Management gave authority to TAPS to develop five construction camps and to mobilize for construction of the road from the Yukon to Prudhoe Bay. Environmental stipulations were attached to all permits, and compliance was monitored by Bureau of Land Management officials. Adding to the impression that permits would be forthcoming once environmental considerations were satisfied was the Secretary's assurance to TAPS chief executives that the "... pipeline will indeed be built."

C. Right-of-Way Width

On March 5, 1970, the Secretary informed the President of his intention to grant permits allowing construction of the remainder of the road from the Yukon River north to Prudhoe Bay. An eight page statement discussing the road's probable environmental impact was released on March 20.

In a suit filed a week later, three environmental groups asked that the Secretary be enjoined from issuing the road and pipeline per-

36. Letter from Senator Jackson, Chairman of the Senate Interior and Insular Affairs Committee, to Secretary Hickel, Dec. 11, 1969.
37. Jackson's letter urged that
   every precaution be taken to avoid environmental damage and degradation to the resources of the public lands in connection with the construction of the pipeline...
   and that in
   ... this regard the stipulations ... can be an extremely useful instrument providing they are strictly enforced, within the letter and spirit of their intent and that the Department provides highly professional supervision of activities connected with the pipeline.
   Id.
40. Appellants' Brief on NEPA Issues, supra note 17, at 17.
41. The Wilderness Society, Friends of the Earth, and the Environmental Defense Fund, Inc.
mits on the grounds that the project would violate the limit on pipeline rights-of-way width in section 28 of the Mineral Lands Leasing Act of 1920.\textsuperscript{42} Section 28 authorizes the Secretary of the Interior to grant rights-of-way through public lands . . . for pipeline purposes for the transportation of oil or natural gas . . . to the extent of the ground occupied by the said pipeline and twenty-five feet on each side of the same. . . . \textit{Provided further}, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations and conditions of this section. . . .\textsuperscript{43}

In order to build the proposed 4 foot diameter trans-Alaska pipeline, it would be necessary to make use of land outside the allowed 54 feet (width of pipe plus fifty feet) to permit the movement of construction machinery, to make cuts and fills on steep slopes, and to allow for maintenance. The original permit application, filed in June 1969, requested a 54-foot primary right-of-way and an additional 46-foot-wide right-of-way for construction purposes adjacent to the 54-foot right-of-way. The application also requested temporary use of 200 to 500 feet on each side of all river and stream crossings for temporary construction camps and an additional 100-foot right-of-way for construction along the Livengood-Prudhoe Bay road.\textsuperscript{44}

Official recognition of the problem presented by the Mineral Lands Leasing Act came soon after the permit application had been filed. In its preliminary report to the President, submitted on September 15, 1969, the North Slope Task Force noted that the proposed right-of-way width exceeded that specified in section 28 and that discussions with TAPS were continuing to determine how the consortium might acquire the additional land needed for the pipeline right-of-way.\textsuperscript{45} The outcome of these discussions was apparently a revised application, filed in December 1969, which requested a pipeline right-of-way 54 feet in width. Concurrently, two additional applications for Special Land Use Permits (SLUPs) were filed. The SLUPs would permit use of additional construction and access space: 46 feet along the entire length of the pipeline and the full 200-foot corridor along the Livengood-Prudhoe Bay road. Further, as originally specified, an additional 200 to 500 feet would be needed at river crossings.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{42} 30 U.S.C.A. § 185 (1971).
\item \textsuperscript{43} \textit{id.}
\item \textsuperscript{45} \textit{Federal Task Force on Alaskan Oil Development, Preliminary Report} 11 (1969).
\end{itemize}
In response to the environmentalists' lawsuit, the United States District Court for the District of Columbia issued a preliminary injunction against issuance of the right-of-way permit and the SLUPs on April 23, 1970.\(^{47}\)

The court found that the road was part of the pipeline system and that the total design width of the road (200 feet) plus pipeline (a minimum of 100 feet) was in excess of the 54 feet allowed by the Mineral Lands Leasing Act.\(^{48}\) In holding that the road was part of the pipeline system, the court also ruled that the environmental impact statement to be prepared on the road must consider the full scope of the pipeline project and its implications before the Secretary could decide whether to approve all or part of the project.\(^{48}\)

Nearly two years later, in February 1972, the permit application was again amended. Instead of requesting specific widths in addition to those allowed by section 28, the companies asked only for temporary use of such land as would be reasonably necessary for construction of a 48 inch diameter pipeline.\(^{50}\) The apparent purpose of the amendment was to emphasize the "temporary" nature of the proposed use so that it might fit more plausibly within the structure of a Special Land Use Permit.

While the February 4 amendment did not provide for specific widths, it did suggest the amount of land required: for approximately 85% of the distance, temporary use of 46 to 146 feet (in addition to the statutory 54 feet) would be needed; for most of the remaining 15%, the excess widths would range from 146 to 246 feet; along approximately 28 miles of the route, the excess width would exceed 246 feet.\(^{51}\)

The environmental groups, in their suit seeking to make permanent the April 1970 temporary injunction against issuance of a construction permit, claimed that the Secretary was not authorized to issue SLUPs for temporary use of lands beyond those specified by


\(^{48}\) Id. at 424, 1 ERC at 1337. In June 1971, the State of Alaska entered into an agreement with the Ayleska Pipeline Service Company, whereby Ayleska agreed to build at its expense a state highway from the Yukon to Prudhoe Bay (a continuation of the Livengood-Yukon road built by TAPS under a similar agreement signed July 29, 1969) along a route almost identical to the one Ayleska had sought to construct for its own purposes, namely those of building a pipeline. On February 9, 1973, the Court of Appeals for the District of Columbia ruled that the Yukon-Prudhoe Bay road could be built in accordance with the June 1971 agreement between the State and Ayleska. Wilderness Society v. Morton, 479 F.2d 842, 884, 4 ERC 1977, 2004 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973).


\(^{50}\) Supporting documents to Ayleska Brief, supra note 26, Vol. 2, Tab. 3.

\(^{51}\) Id.
section 28. They argued for a literal interpretation of the Mineral Lands Leasing Act that if use of additional lands were permitted for pipeline purposes, the Act would have so specified. Similarly, no other acts provided the Secretary with authority to issue SLUPs for pipelines.

On August 15, 1972, after Secretary Morton announced his decision to grant to the pipeline project all necessary permits, the District Court rejected the right-of-way arguments made by the environmental organizations and dissolved the temporary injunction.

On appeal, two questions relating to right-of-way were raised: (1) whether section 28 permitted construction activities outside the 54 foot width, and (2) whether use of the additional lands was temporary in fact. In its February 9, 1973 decision, the Circuit Court reversed the lower court, ruling unanimously that the use of lands outside the 54 foot strip would be permanent. A majority of 6 judges concluded that, notwithstanding actual practice to the contrary, Congress had intended to limit construction activities to the width specified in section 28. At the same time, the court ruled against the environmental groups on some collateral issues by holding that the Secretary could issue permits to the consortium for construction of pumping stations and communication facilities and permits to the State of Alaska for the Yukon River-Prudhoe Bay highway and airfields necessary for the pipeline and for free use of gravel in this construction.

The government's petition for Supreme Court review of the Court of Appeals decision was denied. Shortly thereafter, reports circulated that the President had ordered a maximum effort by the Administration to push through legislation which would allow issuance of permits for rights-of-way widths greater than those specified in the Mineral Lands Leasing Act of 1920. In light of the unanimous Court of Appeals decision that the right-of-way width would exceed that allowed by the Mineral Lands

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52. See text accompanying note 120, infra.
55. Discussing the § 28 limitation, the court stated:
[W]hether this restriction made sense then, or now, is not the business of the courts. And whether the width limitation should be discarded, enlarged, or placed in the discretion of an administrative agency is a matter for Congress, not for the courts.
Id. at 892, 4 ERC at 2010.
56. Id. at 875-84, 4 ERC at 1998-2005.
Leasing Act, the question arises why the Department of the Interior had assumed that the pipeline could be built and operated in accordance with the existing law. The Department apparently reasoned that since all modern pipelines fall under the same disability, the width restriction could be handled in this case as it had been with other pipelines—through issuance of Special Land Use Permits. The decision not to push for amendment of the Act was presumably motivated by the Department's belief that Congress would not be receptive to expanding the right-of-way authority.

The quandary facing Interior was that a request for congressional modification of the Act would be inconsistent with and would necessarily weaken the Department's position that permits could be issued under existing law, an argument that would be required were Congress to refuse assent to an expanded right-of-way.

In the summer of 1973, Congress voted to modify the width limitations of the Mineral Lands Leasing Act. These votes could be construed to indicate that the Department of the Interior's concern about congressional receptivity to modification may have been misplaced. More likely, the vote margins reflected a more recent worry about the manner in which national oil demand would be satisfied.

D. Draft Impact Statement

On January 1, 1970, the National Environmental Policy Act (NEPA) became effective, imposing new requirements, in addition to those implicit in the stipulations, as prerequisites to issuance. Although the implications of the new rules were not wholly appreciated at the time, under NEPA it was no longer sufficient for the federal government to be satisfied through enforcement of adherence to its stipulations that the pipeline would be built and operated in a manner to "... provide the fullest possible protection for the integrity of the Alaskan environment and for the rights of the Alaskan natives." The Secretary of the Interior was now obliged to consider alternatives to the pipeline and to compare the costs and benefits of such alternatives to the proposed system. Even were the Secretary satisfied with the design of the proposed project, he might be required to deny a permit on grounds that one or more of the alternatives was more desirable from the perspective of overall public costs and benefits.

59. On July 17, the Senate passed the Federal Right-of-Way Act of 1973 by a 77 to 20 majority while on August 2 substantially the same measure was approved by the House on a 356 to 60 vote. 119 CONG. REC. 13,702 (daily ed. July 17, 1973), 119 CONG. REC. 7,219 (daily ed. Aug. 2, 1973).
61. Alyeska Brief, supra note 26, at 15.
Specifically, NEPA required the Secretary to consider environmental implications of the proposed pipeline system by means of an environmental impact statement which addressed the items in NEPA section 102(2)(C). In addition, NEPA section 102(2)(D) required that prior to a decision the Secretary "... study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of resources."

A Draft Environmental Impact Statement was designed as the mechanism for fulfilling NEPA's mandate that the Secretary consult with and obtain the comments of any federal agency which had jurisdiction by law or special expertise with respect to any environmental impact before he issued the final statement. The Council on Environmental Quality guidelines for implementing NEPA required that the draft be circulated for comment not only to appropriate federal agencies but also to state agencies and to the interested public as well. Such comments were to be considered in the writing of the final impact statement. However, NEPA does not specify the extent to which comments on the draft need be taken into account in the final document.

Not until October, 1970, nine months after NEPA became effective, did the Department of the Interior commence preparation of the Draft Statement with the assistance of relevant bureaus and the Environmental Protection Agency Water Quality Office. The delay was explained by the lack of information available on the proposed system, particularly the engineering aspects. The kinds of information sought for the Draft Statement were a description of the proposed project, a description of the aspects of the environment which would be affected, and a discussion of the impact of the proposed project on the environ-

62. 42 U.S.C. § 4332(2)(C) (1970). These included the environmental impact of the proposed project, its unavoidable adverse impacts, and possible permanent commitments of resources that might be involved.
66. 6 Final EIS, supra note 16, at 1-2.
67. Jack Horton, then Assistant to the Under Secretary of the Interior, testified as to the reasons for the delay:
We determined at the time that until we know (sic) more about the engineering for the system it was very difficult for us to assess or project the environmental impact.
The draft gave little consideration to alternative modes of transportation and essentially no thought to alternative means of satisfying national energy needs. This failure reflected the prevailing view of the Department that NEPA did not require a discussion of alternatives beyond the Department's control. Instead, the Department assumed its job was to consider the proposal placed before it without suggesting alternative routes or system designs.

The first version of the Draft Impact Statement was completed in November 1970. Pipeline opponents maintain that Secretary Hickel, "facing imminent dismissal . . . was anxious for preliminaries to be completed so that he could authorize pipeline construction to start early in 1971." Early drafts were given to Alyeska for review, and the revisions suggested by this review, according to the environmentalists, " . . . radically changed many of the negative observations concerning the proposed pipeline contained in the Interior drafts."

The Draft Impact Statement was published on January 15, 1971. Although Alyeska noted that the 200 page Draft Statement was substantially more detailed than any previously drafted by a federal agency pursuant to NEPA, officials within the Department of the Interior and other federal agencies found the Statement seriously deficient nonetheless.

Secretary Hickel had left office on November 25, 1970. His replacement, Rogers Morton, seemed to disown the Draft Statement, terming it a "preliminary report" not endorsed by the Department, that was released to the public before there had been a thorough review. He acknowledged that the Draft was deficient in its evaluation of the environmental impact of tanker transport, the long term impact on the culture of the Alaskan Natives, and of alternative systems of oil transport.

69. Id. at 17.
70. Appellants' Brief on NEPA Issues, supra note 17, at 18.
72. Appellants' Brief on NEPA Issues, supra note 17, at 18.
73. Alyeska Brief, supra note 26, at 24.
74. The Draft, among other things, did not consider the alternative of deferral as required by NEPA.
75. Mr. Morton has since said that when he assumed office " . . . the status of the [pipeline] matter was in its infancy . . ." and that he had undertaken to have prepared a more objective analysis of the pipeline proposal than had been done under his predecessor, who was " . . . very prejudiced toward the pipeline system in Alaska." Appellants' Brief on NEPA Issues, supra note 17, at 20.
76. Id. at 22.
Other officials joined in discrediting the Draft Statement. Then Under Secretary of the Interior Pecora said it contained "self-imposed" deficiencies. The Department of the Defense commented that the technical and environmental stipulations were "... too general to support the positive assurances given throughout the report that adverse ecological changes and pollution potential will be eliminated or minimized by these stipulations." EPA found the Statement inadequate in its discussion of design details, alternative modes of transport, and the tanker leg of the transport system. Accordingly, that agency recommended further study before approval of the project.

Public hearings on the Draft Statement were held in Washington, D.C. on February 16-18, 1971, and in Anchorage from February 27 to March 1. Testimony was received from 297 witnesses while a total of 2731 individuals and organizations submitted statements for the record. The complete hearing record consisted of 37 volumes totalling over 10,000 pages, several three-dimensional models, and one suitcase-sized machine. Most comments were critical of the Draft Impact Statement.

In view of the wide criticism of the Draft Statement, one wonders how Secretary Hickel believed that he had satisfied NEPA requirements to assure himself that the pipeline’s benefits outweighed its environmental costs and that the proposed system was the best of all alternatives by early 1971. It appears that the Secretary, under great pressure from his Alaska constituency and uncertain of the scope and specificity required of impact statements in that early stage of their development, had decided that the Draft Impact Statement had come much closer to fulfilling NEPA’s requirements than actually was the case.

E. The Final Impact Statement

In February 1971, the 102 Statement Task Force was estab-

77. Id. at 19. David Brew, who became Chairman of the group that prepared the Final Impact Statement, expressed a similar sentiment that the Draft was "seriously deficient." Id. at 20.
79. EPA Administrator Ruckelshaus concluded:
The action as proposed in the draft statement and the resultant construction and operation of the Trans-Alaska pipeline may cause avoidable environmental degradation and pollution. Accordingly, it is recommended that the action as currently proposed not be consumated by the Department of the Interior until further study is completed.
Id. at A-44.
80. Id. at Appendix A.
lished to prepare a Final Environmental Impact Statement. The task was undertaken with the knowledge that the revision of the Draft Statement would have to be exceedingly thorough if it were to respond fully to all of the points raised during the public hearings and agency review process. To accomplish this, the 102 Task Force solicited information and comments from many other segments of the federal government and the State of Alaska, private consultants, and the Government of Canada.

The 102 Task Force was parent to three groups: Task Force A, which examined the environmental impact along the proposed land route; Task Force B, which dealt with the proposed marine route; and Task Force C, whose concern was the "abiotic framework of alternative routes through Canada." While not a part of the 102 Task Force, the Technical Advisory Board of the Federal Task Force on Alaskan Oil Development and its subsidiaries, the Menlo Park Working Group and the Ad Hoc Review Group, also made substantial contributions to the revision of the draft impact statement.

I. The Project Description

A major input to the Final Impact Statement was the massive Project Description compiled by Alyeska. In March 1971, the Technical Advisory Board had been directed to prepare topic headings which were the subjects to be discussed. The Project Description was intended

\[\ldots\ \text{(1) to provide the information necessary for the preparation of a legally, scientifically and technologically defensible environmental impact statement, and (2) to provide a systematic framework for continuing enlargement and modification of project information as it was developed and submitted in the future.}\]

81. The group's title was derived from NEPA § 102 which set forth the requirements for impact statements.

82. 6 Final EIS, supra note 16, at 4.

83. With regard to the latter, the Department of the Interior asked that any pertinent materials prepared by the Canadian government be forwarded for use in the impact analysis and (draft) statement revision. Id. at 5.

84. Id. at 4. Task Force A participants were drawn from seven Interior bureaus and offices and one bureau of the Department of Commerce (NOAA/EDS). Advisors were from the Department of Transportation (DOT), EPA, the Water Resources Council, and the Army Corps of Engineers. Task Force B participants were drawn from three Interior bureaus, the Coast Guard, and the Department of Commerce, with advisors from DOT, the Water Resources Council, Corps of Engineers, and EPA. Task Force C consisted entirely of Interior personnel, including the Geological Survey and the Bureaus of Land Management and Sport Fisheries and Wildlife.

85. The latter two groups included active representation from EPA, the Corps of Engineers, DOT, Water Resources Council, and Interior. Id. at 5-6.

86. Id. at C-97.
The Ad Hoc Review Group was established in mid-1971 as a subsidiary to the Technical Advisory Board in order to review the Project Description. The government's position was that the Project Description would not be adjudged completely adequate for impact analysis until all questions raised by the technical review had been resolved.\textsuperscript{87} The Project Description was submitted during the period of July 19 to August 8. It totaled 29 volumes, occupying over five feet of shelf space. It contained sections on all elements of the pipeline and included detailed descriptions, studies, sketches, and drawings.\textsuperscript{88}

As the Project Description was received, it was sent to the approximately 60 scientists and engineers who composed the Ad Hoc Review Group. During the middle half of September, 28 reviewers met at the Geological Survey offices in Menlo Park, California. Working long hours in a heat wave, the Review Group examined the Project Description for compliance with the Department of the Interior stipulations, for technical feasibility, and for its adequacy as a basis for preparing the Environmental Impact Statement.\textsuperscript{89} The outcome was a report which implied that the Project Description would require extensive revision before its purposes were satisfied. But Chairman Sanger of the Technical Advisory Board, under whose auspices the Review Group had been convened, sought to counter the latter's negative assessment. In forwarding the report to Under Secretary Pecora, Sanger noted that the review had "... concentrated on negative aspects of departures from the stipulations."\textsuperscript{90}

On September 29-30, representatives of the Department of the Interior and Alyeska met to clarify several items in the Project Description and to explain the Review Group's comments.\textsuperscript{91} Dr. Sanger summarized the proceedings:

Our comments were discussed seriatim in a valuable interchange of views. ... Many comments resulted from inadequate data and misunderstandings. Since Alyeska has been working and adding significantly to its data after the preparation of the Project Description, many of the issues should be soon resolvable. Where the company

\textsuperscript{87.} Id. at C-1.
\textsuperscript{88.} The Project Description did not encompass the marine transport system between the Valdez terminal and West Coast ports. This was discussed in Alyeska submissions directly to the 102 Task Force in July and September.
\textsuperscript{89.} 6 Final EIS, supra note 16, at C-89, 91.
\textsuperscript{90.} In order to convey positive comments made, the Technical Advisory Board appended to the review group report a two page statement which began by saying, The review group produced 0.2 inches of comments from a 60 inch presentation, which was thoroughly studied; hence most of the Project Description is acceptable. The Company can be complimented on its work.
\textsuperscript{Id. at C-90, 94.}
\textsuperscript{91.} Id. at C-90. Among those attending were Under Secretary Pecora, Deputy Under Secretary Horton, and Technical Advisory Board Chairman Sanger.
strayed too far from what we regard as a reasonable interpretation of the Stipulations, we received assurances of modifications, many of which might take some time. However, we think that the requested amendments of greatest importance to our writing of the Environmental Impact Statement should be forthcoming quite soon. [emphasis added]\(^9\)

In a letter to the Alyeska President one week after the meeting, Pecora reiterated that despite the admirable features of the Project Description as submitted, it did not completely conform to the stipulations as intended.\(^9\) The Under Secretary then requested that amendments to the Project Description be submitted as soon as practicable.\(^9\) Alyeska’s responses\(^9\) were analyzed by the Technical Advisory Board, which provided guidance to the 102 Statement Task Force in how the responses should be used in preparing the Impact Statement.\(^9\)

From the record it is unclear whether Alyeska’s responses reversed Dr. Pecora’s opinion that the Project Description had failed to provide the information necessary for preparation of an Impact Statement. On the one hand, Dr. Sanger implied that the 102 Task Force had been informed that the responses were adequate for purposes “of determining the feasibility of environmental protection.”\(^9\) Yet a comparison of the Ad Hoc Review Group comments and the Alyeska responses indicates that the latter did not remedy deficiencies noted by Pecora in his letter of October 7.\(^9\)

2. Discussion of Alternatives

The Draft Impact Statement had not addressed substantively the alternative of a pipeline route across northern Alaska and through

\(^{92}\) Id.
\(^{93}\) With regard to the Project Description’s usefulness in providing input to the Environmental Impact Statement, Pecora’s comments were:

The Project Description has too many options in the alignment construction modes and stream crossings for us to complete an adequate Environmental Impact Statement at this time. It would assist us if you would, to the best of your judgment at the present time, indicate sections of the line as either buried or elevated, and how individual streams might be crossed . . . Where the line is shown elevated, we would like your best estimate of the lengths of line where gravel pedestals might be used.

Id. at C-88.
\(^{94}\) Id.
\(^{95}\) On October 15, Alyeska submitted to the Department of Interior the first of its responses to the comments made in the Ad Hoc Review Group’s report. Supplemental responses were received on November 1, 10, 15 and 19. Id. at C-148, C-191, C-196 and C-201.
\(^{96}\) Id. at C-148, C-190.
\(^{97}\) Wilderness Society v. Morton, 479 F.2d 842, 4 ERC 1977 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973) (Deposition of Frederick Sanger at 101 (1972)).
\(^{98}\) 6 Final EIS, supra note 16, at C-97, C-205.
Canada to the Midwest United States vis-a-vis the Prudhoe Bay-Valdez system proposed by the oil companies. Following release of the Draft, the Department of Interior took several steps which it considered sufficient to satisfy its NEPA obligations.

One component of the 102 Task Force which prepared the Final Impact Statement was assigned the discussion of five Canadian routes. As the 102 Task Force was beginning its work in March 1971, Secretary Morton requested that the interested oil companies send representatives to Canada for discussions with Canadian officials on the feasibility of constructing and operating a Canadian pipeline. Representatives of five of Alyeska's owners who travelled to Ottawa reported to Secretary Morton and White House officials that the Canadians underestimated the delays and costs of a Canadian line. The oil company officials concluded that it would be undesirable to build a line which would be subject to Canadian control with priority for Canadian input.99

On July 9, 1971, the State Department sent an aide-memoire to the Government of Canada requesting information for use in the Impact Statement. The response of the Canadians100 dealt only with the environmental impact of oil transport between Valdez and Puget Sound; it did not provide information on a possible Canadian pipeline route. Whether a request for the latter had been implicit in the July 9 aide-memoire is a matter of dispute.

In mid-September Secretary Morton requested that the Director of Interior's Office of International Affairs, Mr. Shooshan, make specific inquiries regarding the Canadian Government's policy toward a Canadian pipeline, the status of Canadian studies on the matter, and Canadian estimates of time for completion of studies and for possible construction. The resulting report by Shooshan, dated September 22, concluded that the Canadian Government had no declared policy and that studies and construction might take six or seven years even if a "crash" effort were undertaken. The Canadian estimate had been five years.101 A point of dispute concerns whether the Government of Canada would have promulgated a pipeline policy if the United States had been able and willing to dictate to the oil companies that the pipeline be built through Canada subject only to the attainment of an acceptable arrangement with the Canadians.

Some evidence of the Canadian attitude arises out of a meeting

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100. The response delivered by the Counselor of the Canadian Embassy to the Department of State on August 20 reached Interior after August 26. Id. at 181. The reason and significance, if any, for the one week required to travel the two blocks from the Department of State to the Department of the Interior is unclear.
101. Alyeska Brief, supra note 26, at 183.
between Secretary Morton and Donald MacDonald, the Canadian Minister of Energy, Mines and Resources, held ten days after the release of the Final Impact Statement. Minister MacDonald had come to Washington to express his view that the Canadian Government would be able early in 1973 to process expeditiously applications for a trans-Canadian oil and/or gas pipeline.\textsuperscript{102} In a press conference following the meeting MacDonald estimated that there would be an added two year delay in placing a Canadian line in operation,\textsuperscript{103} whereas Secretary Morton estimated the delay over the Alaskan pipeline as in excess of three to five years.\textsuperscript{104} Also following release of the Final Impact Statement, the Secretary of the Interior received in the spring of 1972 three documents on the Canadian alternative compiled by his staff: Dr. Sanger prepared a memorandum on materials not covered in the Impact Statement;\textsuperscript{105} Deputy Under Secretary Horton prepared a paper in which he was instructed to put the Canadian alternative in its best light;\textsuperscript{106} Interior's Office of Economic Analysis completed a study of the economic advantages of a common corridor through Canada for gas and oil pipelines.\textsuperscript{107}

Prior to January 13, 1972, the Department of the Interior had operated under the assumption that NEPA did not require a discussion of project alternatives which were beyond the Department's control. On January 13, the United States Court of Appeals, in litigation against Interior involving Outer Continental Shelf Leasing, ruled that it was necessary to consider alternatives which were beyond the aegis of Interior.\textsuperscript{108} This decision led not only to establishment of a special

\textsuperscript{102} Appellants' Brief on NEPA Issues, \textit{supra} note 17, at 35.

\textsuperscript{103} Id.

\textsuperscript{104} Alyeska Brief, \textit{supra} note 26, at 232. These estimates assumed that if all went well, a minimum of 1\frac{1}{2} years would be required to acquire sufficient information for a construction permit, 1 year for the application to travel through the licensing process, and 3 years for construction. This 6 year period could stretch out for any of a variety of reasons: native claims might arise; environmental groups might bring suit against either the Canadian or Alaskan segments of the route; financing might be difficult to arrange; differences might arise between and among governments and oil companies. As compared to the minimum 6 years required to place the Alaska-Canada pipeline in operation, the trans-Alaska system would be scheduled to transport oil approximately 3 years after the necessary permits were issued.

\textsuperscript{105} Appellants' Brief on NEPA Issues, \textit{supra} note 17, at 34. Neither this memorandum nor its conclusions were ever made available for public comment, although they have been cited by Secretary Morton as important factors in the decisionmaking process.


\textsuperscript{107} This study had been intended for release with the Environmental Impact Statement, but had not been finished on time. At the time, a gas pipeline across Alaska was generally considered economically inefficient in view of the need for costly liquefaction facilities at Valdez where the gas would need to be converted to liquid form prior to transfer to tankers in which it would be transported to West Coast terminals. El Paso Natural Gas has since announced a plan to build a trans-Alaska gas pipeline.

\textsuperscript{108} NRDC v. Morton, 458 F.2d 827, 2 E.L.R. 20029 (D.C. Cir. 1972). The court
task force responsible directly to the Federal Task Force on Alaskan Oil Development, but also to the inclusion in the Final Statement of a 252 page discussion of alternatives to North Slope oil production and their environmental impacts. Among alternatives discussed were a reduction in energy consumption, increased oil imports, additional domestic oil production in areas other than the North Slope, modification of FPC natural gas pricing, nuclear stimulation of natural gas reservoirs, increased coal production, increased use and development of nuclear energy sources, and development of synthetic fossil fuel sources, of geothermal power and of other advanced power generation techniques. The Court of Appeals interpretation was probably responsible for Interior’s decision to undertake for inclusion in the Impact Statement a systematic analysis of the economic and environmental aspects of transportation of North Slope natural gas.

3. The Economic and Security Analysis

Because the Draft Environmental Statement had contained poorly documented contentions concerning benefits expected from the trans-Alaska pipeline, the Department of Interior Office of Economic Analysis was directed in May 1971 to prepare a detailed report on national security and economic aspects of the proposed project. To avoid creating a precedent for expanding the scope of all environmental impact statements to include detailed economic analysis, this analysis was carried out parallel to but independent of the 102 Task Force effort. It considered the supply and future demand for energy and alternative means of meeting the demand, the economics of alternative methods of bringing North Slope oil to market, national security implications of various decisions regarding North Slope oil, the economic impact of North Slope oil production upon the State of Alaska, balance of payments problems, and merchant marine impacts. One section compared the results of the Interior analysis with those done by others.

stated that, "When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened." 458 F.2d at 835, 2 ELR at 20033.

109. 5 FINAL EIS, supra note 16, at 243-95.

110. Wilderness Society v. Morton, 479 F.2d 842, 4 ERC 1977 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973) (Deposition of David Brew at 26 (1972)) [hereinafter cited as Brew Deposition]. There is disagreement over the adequacy with which analysis of the gas transport system was integrated with analysis of the oil pipeline.

111. Contributions to the Economic and Security Analysis, supra note 9, were received from the Departments of State, Defense, Commerce, and Treasury, the Office of Emergency Preparedness, and the Council of Economic Advisors. From within Interior, information was received from the Office of Oil and Gas, the Geological Survey, and the Bureau of Mines.
4. Release of the Documents

Originally the 102 Task Force aimed for a June 1, 1971 deadline for delivery of the Impact Statement to the printer. As time progressed, the sheer size of the task and slippage in the schedule for completion of the Alyeska Project Description produced delays. Subsequent deadlines also passed until a firm date of March 15, 1972 was set. On March 20, 1972, the six volume Final Environmental Impact Statement was released. A three volume Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline was released simultaneously with the Final Environmental Impact Statement. The initial decision to set an unrealistically early deadline and then to hold firm to the March 15 date prevented completion of what 102 Task Force Chairman Brew would have considered a more satisfactory comparison of the Alaskan and Canadian alternatives.

F. Announcement of Decision to Grant Permits

Upon release of the Impact Statements and Economic and Security Analysis, the Department of the Interior agreed to withhold decision on the permits for 45 days during which public comments on the Impact Statement would be accepted. The government was not altogether receptive to the comments; it deemed many to be mere exhortations to the Secretary while recognizing that many others contained specific comments on the Final Impact Statement. Among the latter were some 1000 pages of comments compiled into a single package by the plaintiff environmental groups.

Whether the comments were seriously evaluated is a point of contention. Then Under Secretary Pecora claimed that none of the public comments or the discussions with the review task force supported a conclusion that any of the alternatives involved environmental risks qualitatively different from those discussed in the Impact Statement. The environmental groups maintained that the expert comments were not seriously considered since comments were not distributed to reviewers until Monday morning, May 8, with reviews to be completed by Wednesday. Others said that the review of com-

112. Brew Deposition, supra note 110, at 27.
113. Appellants' Brief on NEPA Issues, supra note 17, at 54.
114. Government Brief, supra note 68, at 57.
115. These comments had been prepared by experts to whom the plaintiffs had distributed the Impact Statement. Appellants' Brief on NEPA Issues, supra note 17, at 37-38.
ments began on Saturday, May 6 and that a great deal of attention was paid to determine whether they contained information that would alter previous conclusions.119

In any event, the 45 day period allowed was inadequate considering the major effort required to produce meaningful comments. This suggests that the decision to grant permits had already been made and that comments on the Impact Statement could not have altered it, as does the failure of Interior to seek views of other departments and agencies. Positive comments would in this case have been of relatively little help in defense of the decision. But in the not unlikely event that other agencies were either critical of the Final Impact Statement, as they had been of the Draft, or non-committal on portions such as national security, as had been the Department of Defense, the net result of asking for comments could well have made it more difficult to defend the decision before the public.

On May 11, 1972 Secretary Morton announced his decision to grant the necessary permits for construction of the proposed trans-Alaska pipeline. Several days later, a 45 page Statement of Reasons for Approval was released, concluding, inter alia, (1) that the national interest required rapid development of North Slope oil, (2) that it was in the national interest to have the transport of this oil under total jurisdiction of the United States, (3) that, all factors considered, the trans-Alaska pipeline was preferable to any other transport system, (4) that rejection of the proposed Alaska pipeline would entail delays that were contrary to the national interest, and (5) that granting the necessary permits was consistent with all policies set forth by Congress.120

G. Subsequent Legislation

The lawfulness of Secretary Morton's May 11, 1972 decision was challenged by the same environmental groups which had obtained the preliminary injunction against issuance of permits and rights-of-way.121 In effect, the plaintiffs argued, as they had before, that issuance of the permits would violate section 28 of the Mineral Leasing Act of 1920. They further contended that the Secretary had not fulfilled the requirements of NEPA since he gave inadequate consideration to the alternatives of deferral or of a Canadian pipeline route,122 since there had been insufficient consideration of public and agency comments, and since the decision to issue the permits was ar-

120. Alyeska Brief, supra note 26, at 50-51.
121. See note 41 supra and accompanying text.
122. See note 113 supra and accompanying text.
bitr ary and capricious. The federal government, State of Alaska, and the oil companies naturally disagreed with all such arguments on fulfilling NEPA requirements. Instead, the government maintained that "... the Secretary ... accepted his responsibility to consider all aspects of the problem and followed a rational, reasoned approach to all the issues involved and reached a decision based on all the information before him."\(^{128}\)

The August 15, 1972 decision of the District Court rejected the NEPA arguments of the plaintiffs along with their contentions regarding excessive rights-of-way.\(^{124}\) On appeal, the Circuit Court focused only on the right-of-way issue and declined to consider the NEPA arguments, declaring that "since it is desirable that we expedite our decision, since the project will be enjoined in any event under our ruling on the Mineral Leasing Act issues, and since the posture of the NEPA issues may change before those issues are ripe for adjudication, we decline to pass on them at this time."\(^{125}\)

Following the February 1973 court of appeals decision, the Administration pressed Congress to enact new right-of-way legislation. In this period there were several proposals for further comparison of the Alaska and Canadian routes. Typical of these was that of Congressman Morris Udall of Arizona suggesting a one year "crash" study to "determine once and for all which parts of the country will experience the greatest demand for oil and how best to get it there. Tied to that would be a Congressionally mandated negotiation by the Interior Department with Canada to explore our neighbor's posture on rights-of-way."\(^{126}\) Within 60 days following receipt of the study and results of discussions with the Canadians, Congress would vote on which alternative should be pursued. The language of the Udall proposal would have made the decision of Congress not subject to judicial review. This approach was criticized on grounds that further study would not be likely to reveal an understanding better than that which then existed, that Congress would not as a practical matter commit itself to a specific vote on such a complex issue so far in the future, and that it was doubtful that Congress could legitimately enact legislation specifying that a mandated action not be subject to judicial review.

New right-of-way legislation was considered by the Senate on July 17, 1973 and by the House on August 2, and passed on November 16.\(^{127}\) This legislation not only took care of the width problem; it

\(^{123}\) Government Brief, supra note 68, at 4-5.


\(^{126}\) N.Y. Times, May 26, 1973, at 31, col. 4-5 (city ed.).

also sought to resolve conflicts with regard to whether the Environmental Impact Statement satisfied NEPA. Congress declared, in effect, that the Impact Statement was adequate and stated further that the legislation could only be challenged judicially within 60 days of its enactment.

In January 1974, permits were granted. Shortly thereafter, construction began on the road paralleling the pipeline route from the Yukon River to Prudhoe Bay.\(^{128}\)

III

EVALUATION OF THE PIPELINE DECISION

A. Interior's Treatment of the Canadian Alternative

Following filing of the original permit applications in June 1969, the Department of the Interior was confronted with four options: (1) to deny permits for any pipeline leading from the Alaskan North Slope, thereby effectively ruling out both the trans-Alaska and trans-Alaska-Canada systems, (2) to grant permits for a trans-Alaska pipeline, (3) to defer granting permits pending further study, and (4) to deny permits for the trans-Alaska system but to signify that the Department would provide all possible assistance to the oil companies in paving the way toward granting permits for a trans-Alaska-Canada pipeline.

To whatever extent the option of complete denial of permits might once have been a realistic one, it was no longer so by the time the applications were finally considered. Too much money had been committed to North Slope oil,\(^{129}\) and the energy crisis was too apparent for the oil conceivably to be left in the ground for the indefinite future. The same pressures, and the fact that further study at that point would not likely lead to improved understanding, militated against the option of deferral.

That left the options of granting the requested permits or of pressing for use of the Canadian route. A continuing complaint by pipeline opponents about the Department's treatment of the transport of North Slope oil was that insufficient consideration was being given

\(^{128}\) Additional chronological information is presented in the Appendix.

\(^{129}\) *Hearings on Rights-of-Way Across Federal Lands Before the Senate Comm. on Interior and Insular Affairs, 93rd Cong., 1st Sess., 204* (1973). In a prepared statement, Alyeska President E.L. Patton said:

They [the participating oil companies] have invested almost $400 million preparing for construction . . . Industry investment in purchases of leases and exploration and development on the North Slope of Alaska exceed a billion dollars.

Virtually all of these expenditures had been made before 1972.
to a pipeline route across northern Alaska and through Canada to the American Midwest. Although the Final Impact Statement contained a discussion of five Canadian routes, prepared by Task Force C, the environmental groups challenged the adequacy of the discussion:

The treatment of the Canadian alternative to the trans-Alaska proposal is a casebook example of failure to give adequate consideration to an alternative that is not merely feasible but from all appearances is vastly superior on environmental grounds to the proposal put forward by industry.

In response to this assertion, the government claimed that

[t]he Final Environmental Impact Statement—and its companion Economic and Security Analysis—brought squarely before the Secretary prior to any decision by him several alternatives for a pipeline through Canada, including one in a common corridor with a gas pipeline, together with the environmental and economic ramifications of those alternatives. . . . From an examination of the impact statement and the Economic and Security Analysis, it is clear the Secretary had before him the 'possible approach'—and its consequences—of a Canadian route and that the mandate of NEPA, as expressed (by the United States Court of Appeals) in (the) Calvert Cliffs (decision) had been met.

The interrelated political, environmental, economic, and national security factors involved in the comparison of Alaskan to Alaskan-Canadian routes are discussed in the following paragraphs. It should be noted that between 1969 and 1973, the focus of the debate changed from whether a pipeline should be built at all to the question along which route it should be built.

1. Trans-Alaska vs. Trans-Alaska-Canada: Political Considerations

Diverse interests involved in the resolution of the problem of the transport of North Slope oil included those represented by environmentalists, the oil industry, the State of Alaska, Midwest congressional delegations, and labor groups.

Some environmentalists believed the oil should be left in the ground for the indefinite future, arguing that any economic benefits were outweighed by the costs associated with environmental degrada-

130. See note 84 supra and accompanying text.
131. Appellants' Brief on NEPA Issues, supra note 17, at 52.
132. Government Brief, supra note 68, at 43.
Other environmentalists maintained that the project should be deferred until the potential environmental impact was better understood, while still others advocated a trans-Alaska-Canada route as the least destructive alternative.

Immediate construction of a trans-Alaska pipeline received support from the State of Alaska and the oil companies. The State, with an eye to its pressing economic needs, looked forward to production royalties on the order of $600 million per year once the system was in full operation. The oil companies were anxious to receive a return on the approximately $1.5 billion already invested in North Slope oil leases and in preliminary work on the pipeline system. In contrast, a number of Midwestern Congressmen, anticipating oil shortages in that region, came to support the trans-Alaska-Canada system.

Various labor unions favored immediate construction of the trans-Alaska system. Paul Hall of the Seafarers International Union argued that an Alaska pipeline would require construction of 33 new tankers and would provide about 74,000 man-years of employment in shipyards. Secretary Morton pointed out that at the peak of construction activity, the pipeline would provide a total of 26,000 jobs. A trans-Alaska-Canada project would also provide jobs for Americans, however, since 275 miles of pipeline would still pass through Alaska, and although the rest of the route would traverse Canada, Americans probably would be willing to cross the border to secure employment. Also noted in the Economic and Security Analysis was the fact that once construction [was] essentially complete, many of these [pipeline-related] jobs [would] no longer exist. Either new sources of jobs must be provided after construction or (because many construction jobs [would] have been occupied by workers who came to Alaska to work on the pipeline) Alaska [would] have a more serious employment problem by 1975 than it [had] in 1971.

In sum, the Economic and Security Analysis was pessimistic about any

134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
141. ECONOMIC AND SECURITY ANALYSES, supra note 9, Appendix E at 10.
long term beneficial impact on the unemployment situation in Alaska resulting from the pipeline.142

2. Trans-Alaska vs. Trans-Alaska-Canada: Environmental Considerations

Proponents of the trans-Alaska-Canada route contended that a common corridor for gas and oil would have less environmental impact than would the alternative, an oil line across Alaska and a gas line through Canada. The Canadian route, while of greater length, would be less exposed to earthquake hazards143 and would remove the need for marine transportation from Valdez to the West Coast, eliminating the potential for marine oil spills. Such spills are a concern of the Canadian government, which fears damage to the shores of British Columbia.

Those who favored the trans-Alaska system maintained that the added environmental impact arising from the greater length of the trans-Alaska-Canada route would offset whatever environmental benefits might be derived from avoiding the seismic and marine hazards of the trans-Alaska route.144 Proponents of the Alaska pipeline also noted that the degree by which the marine spill hazard would be reduced is not so obvious. Their point was that crude oil would be transported from Valdez to the West Coast in United States-built vessels rigorously controlled by the government, with a low probability of accidents. In the absence of a trans-Alaska line, imports to the West Coast via foreign tankers would be needed to compensate for the lack of Alaskan oil. Since foreign tankers are subject to less stringent controls, the probability of accidents in the vicinity of West Coast ports would be greater. This argument in favor of the trans-Alaska route is weakened by the fact that shipment of Alaskan oil to the Midwest would lead to a reduction of two million barrels per day of tanker traffic to East and Gulf Coast ports.145 While the amount by which the net marine hazard would be reduced by virtue of a trans-Canada system is one of the many unresolved intangibles, the Environmental Impact Statement implied that the common corridor Canadian alternative was preferable on overall environmental grounds to the trans-Alaska system.

142. Id. vol. 1 at 8.
144. Id.
145. This derives from the fact that the total amount of oil entering the lower 48 states would be constant. Increasing the amount arriving via a pipeline from Alaska to the Midwest would lead to a net decrease in the amount arriving by sea by 2 million barrels per day.
3. Trans-Alaska vs. Trans-Alaska-Canada: Economic Considerations

The Department of the Interior Economic and Security Analysis concluded that the trans-Alaska pipeline system and the Canadian alternative would be equally efficient economically. In other words, with regard to consumer prices and oil company revenues, North Slope oil delivered to Chicago via MacKenzie Valley [trans-Alaska-Canada] pipeline system as compared with North Slope oil delivered to the West Coast via trans-Alaska pipeline system is a matter of indifference with respect to the price paid for oil products by consumers and the value of crude oil at the field in the North Slope.

This result is explained by the fact that incremental supplies of North Slope crude oil will not affect prices in the markets to which delivery is made. Oil prices in a given market are determined by the price of the most expensive barrel delivered to the market. In either the West Coast or Midwest market, North Slope oil would not be the most expensive oil.

With regard to oil company revenues, the value of oil at the North Slope is the market price minus the cost of transportation to market. Because the added cost of transportation to Chicago approximately equals the market differential between the West Coast and Chicago, the amount of money received by the oil companies at the North Slope for a barrel of oil is approximately the same whether the oil is transmitted by a trans-Alaska or a trans-Alaska-Canada pipeline. Furthermore, the Economic and Security Analysis concluded that the annual cost of delay in terms of forfeited resource cost savings is in the range of $1.1 to $1.25 billion. This implies that in the absence of delay, it is a matter of economic indifference whether Alaskan oil is transported via Canada or Alaska, whereas to the extent that the Alaska system could be placed in operation at an earlier date, it would have an economic advantage over the Canadian alternative.

One of the purported advantages of the Alaska route was that there would be an earlier favorable impact upon the balance of payments, a question that is addressed in Appendix F of the Economic and Security Analysis where it is noted that conclusions are highly dependent upon assumptions concerning the return flow to the United

146. ECONOMIC AND SECURITY ANALYSIS, supra note 9, at 1.
147. Id. at 4.
148. Resource cost savings accrue because Alaskan oil can be obtained with a lower expenditure of American resources and capital than can foreign oil. For every year's delay in obtaining Alaskan oil, there need be an excessive expenditure of American resources to pay for oil imports. This excess, estimated in 1972 at $1.1 to $1.25 billion, is now estimated to be $3 to $5 billion per year. Id. at 6.
States of dollars expended upon foreign oil. Of some interest in this respect is the Economic and Security Analysis reference to the Department of Commerce report, Effects of Opening the Oil Reserves of Alaska Through the Trans-Alaska Pipeline System, September 24, 1971. Despite Secretary Stans' implication to the contrary, the Analysis suggested that Commerce did not have at that time strong feelings regarding the balance of payments:

The Department of Commerce report offers no analysis of the effects of Alaska oil on the U.S. balance of payments other than to cite the data provided in Interior's Environmental Impact Statement. The Commerce report did suggest, however, that a beneficial impact was anticipated as a result of the pipeline. Other than this assumption, their position was that recent international monetary arrangements and the potential impact of changes in the U.S. import patterns made any estimate extremely speculative at this time.

4. Trans-Alaska vs. Trans-Alaska-Canada: National Security

National security entered the picture in three respects. The first and most important concerned the desirability of minimizing United States dependence upon "insecure" foreign sources.

At the time that the alternatives were being considered, forecasts indicated that the United States would be dependent on Eastern Hemisphere sources for approximately 27 percent of its total 1980 demand in the absence of North Slope oil or for approximately 20 percent if 2 million barrels of North Slope oil were available. To the extent that it was desirable to minimize dependence on foreign sources at the earliest date, the trans-Alaska route was considered preferable to the Canadian alternative since it could be placed in operation sooner, by a period ranging from 3 to 8 years, depending primarily on the difficulties encountered in consummating the necessary international arrangements and in obtaining the necessary permits from both Canada and the United States. The practical significance of decreasing dependence on Eastern Hemisphere sources by 2 million barrels per day (e.g., from 27% to 20%) by 1978 rather than by 1981 or 1986 was not made clear in the various arguments put forth in favor of immediate construction along the trans-Alaska route.

The second national security argument hinged on the belief that it would be undesirable to allow Canadian control over the flow of North Slope oil. Secretary Morton made this point as follows:

149. In an undated letter, circa summer 1971, Secretary of Commerce Stans had noted, in forwarding to the Department of the Interior comments on the Final Impact Statement, that "... there were overwhelming reasons to urge that the project move forward at an early date."

150. Economic and Security Analysis, supra note 9, at F-17 (emphasis added).
(1) a majority of the equity interest in the line would have to be Canadian (in this connection, ownership by a Canadian subsidiary of an American company would not qualify as Canadian ownership); (2) the management would have to be Canadian; (3) a major portion (at least 50%) of the capacity of the line would have to be reserved for the transportation of Canadian-owned oil to Canadian—not United States—markets; and (4) at all times preference would be given to Canadian owned and controlled groups during the construction of the project and in supplying materials.151

Underlying such concern was the view that, as a matter of principle, it is wiser to avoid involvement with another government on a matter touching national security, even though relations with the foreign nation are intrinsically close. The unexpressed fear is that the Canadians might use their control over the system for purposes of coercion. The Economic and Security Analysis commented on this specter:

... In a larger sense, Canada does not pose the 'security problem' that other nations might. Indeed, one Canadian source152 has argued: 'The only objection which has been raised is that it [a Mackenzie Valley pipeline] is on foreign soil, and that the Canadian government might cut off supplies. Such action, in our view, would only be taken in the event of U.N. sanctions against the U.S., or unilaterally, if relations in our two countries had reached a point just short of a shooting war. A desire, on the part of the U.S., to preserve its security of supply under either of these eventualities can only lead to the gravest doubts about U.S. intentions. In view of the demonstrated capacity of Ontario Hydro to [inadvertently] turn off lights over the entire northeast, the attempt to preserve oil supplies would seem to be largely beside the point in any event.' And Appendix M, Part 5 notes that, 'If an agreement is eventually reached with Canada for the construction and operation of a pipeline we have no doubt whatever that Canada would honor it with the same scrupulousness as it honors its other international agreements'.153

Physical security is the third element in the national security argument relating to a preference between the Alaska and Canada routes. Because the Canadian alternative avoids a marine leg, North Slope oil transported via Canada would not be vulnerable to attack at sea. In a major war, either alternative would be subject to disruption by missile attack, and in a lesser skirmish either route would be subject to attacks by terrorists. The likelihood of major wars or terrorist attacks, or the probability that one route or the other would on bal-

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153. ECONOMIC AND SECURITY ANALYSIS, supra note 9, at D-5.
ance be less vulnerable to physical disruption, are matters too specula-
tive to have played a genuine role in the decisionmaking process. To
the extent that physical security is used to justify either route, it is an
ad hominem argument.

B. Relevance of the Impact Statement and Economic and Security
   Analysis

The following discussion addresses the question of the utility of
the Impact Statement as an aid to decisionmaking. The Environment-
tal Impact Statement was prepared by the Interior Department at a
cost of some $9 million and undoubtedly represents a sincere effort
to get the facts on the table. Nevertheless, most reviewers believe that
the Impact Statement had no effect on the ultimate decision to issue
the requested permits. The deficiencies of this particular effort, when
coupled with the problems common to all impact statements, severely
weakened the document's usefulness from the decisionmaker's per-
spective. In contrast, the Economic and Security Analysis appears to
have been more suited to the needs of decisionmakers. Governmental
predisposition in favor of permit issuance, however, made it unlikely
that the conclusions reached by either document would influence the
final outcome.

1. Intrinsic Limitations of the Environmental Impact Statement and
   the Economic and Security Analysis

Containing much specious material, the Final Impact Statement
was too long, badly organized, and had neither an index nor an ade-
quate summary. At the same time, it contained insufficient detail for
the expert reviewer; it raised more questions than it answered. The
potential hazards and the pros and cons of alternative routes were well
known before the Impact Statement was even released. Thus it was
exceedingly unlikely that the Impact Statement itself would place the
project in a sufficiently negative light to change the decisionmakers' minds. The writers also faced the problem of comparing the relative
values of quantities with different dimensions when the values of each
quantity, as measured in its own dimension, were uncertain. For ex-
ample, the Statement was supposed to enable the decisionmaker to
weigh the relative value of damage to caribou herds against the value
of oil at a particular point in time. Not only are disparate quantities

154. Statement of Dr. Pecora, Department of the Interior News Conference, Mar.
20, 1972: "Congress has appropriated to us nine million dollars since 1969—nine mil-
lion dollars for our work to assure maximum analysis of the proposed pipeline system."
Supporting Documents to Alyeska Brief, supra note 26, at Vol. 4, Tab. 26.
being compared, but neither the value of oil nor the damage to caribou can be estimated with a satisfactory degree of accuracy.

Intrinsic problems of impact statements aside, the reader is left with the impression that at the time of preparation the environmental impact of the project was not understood in sufficient detail to warrant the six volumes which were produced. But the very length gave the impression that problems were better comprehended than was the case. The following excerpts are typical of the inconclusive discussion prevalent in Volume IV, the section that attempts to present "... a detailed assessment of the impact of the proposed project (i.e., the pipeline) on the environment."155

... In addition, surface drainage could be impeded by the continuous gravel berm and working pad, consequently, final design must provide adequate drainage. ... 156

Interpreted, this says that unless "adequate drainage is provided" by the final design, there will be a drainage problem. It does not say what the consequences of inadequate drainage would be, nor does it say what would be required to produce an adequate design.

... In addition, the construction pad locally (in the segment, Mile 168.9-239.2) may not be thick enough to prevent the underlying permafrost from thawing. The problems associated with flood plains, alluvial fans, stream crossings and construction pads can be minimized and in some instances eliminated by the use of proper arctic construction procedures to protect the permafrost as required by the Stipulations.157

Is this intended to say that the construction pad will not be thick enough? If it is not sufficiently thick, what are the consequences? Does it mean there will or will not be problems if design and construction are in accordance with the Stipulations?

While it cannot be disputed that oil can be quite damaging, there are differences in opinion as to extent of damages and residual effects following actual spills. Each spill is an individual situation and the difficulties in evaluating the effects of oil require long range, competent scientific investigations. ... The conclusion reached is that because of the vulnerability of the fishery resource and the likelihood that oil would be unintentionally discharged during the lifetime of the pipeline system, some adverse but unquantifiable impacts of the freshwater fishery would occur.158

The above comment on oil spills might be compared with that which was presented in the Draft Impact Statement released in Janu-

155. 4 Final EIS, supra note 16, at 1.
156. Id. at 29.
157. Id. at 37.
158. Id. at 135-38.
ary 1971, 14 months prior to the release of the Final Impact Statement:

The duration of the effects of a particular spill would depend among other things, upon the extent of habitat damage. If waterfowl nesting habitat damage were minimal, locally reduced waterfowl numbers might reach original numbers after several years. On the other hand, extensive habitat damage or spills at certain times could decimate a population in the immediate area, and in doing so, eliminate production of the species in the spill area for many years or perhaps permanently.  

Thus, on the matter of damage from oil spills, it would seem that from the decisionmaker's point of view, the Final Statement is no more informative than the Draft Statement.

In sum, the Final Impact Statement enumerated a substantial number of possible adverse impacts. There is little indication of the likelihood of a given impact or its costs, in whatever terms cost might be measured, should it occur. In light of the minimal improvement over the Draft issued in January 1971, the release of the Final Statement suggests some combination of the following: real or imagined pressures from the White House, the oil companies, and the State of Alaska on the Secretary of the Interior to permit pipeline construction to get underway; despair of producing a more satisfactory document; a belief that the Statement in hand did in actuality satisfy NEPA. What appears clear, however, is that in spite of a massive effort devoted to its compilation, the Final Statement contributed little to the decision-making process which was not already available in the Draft.

The three volume Economic and Security Analysis, when compared with the Environmental Impact Statement, has the appearance of a more useful document for decisionmakers. The subject matter is organized in a more logical fashion and major findings are clearly stated. The more substantial air conveyed by the Economic Analysis probably reflects its preoccupation with a relatively limited question possessing more readily quantifiable parameters. The Economic Analysis asks how much oil will be needed as a function of time and what is the least costly means of obtaining it. The parameters are


160. There are, moreover, materials in Volume 6 of the Final Environmental Impact Statement which imply failure to satisfy one of Interior's conditions for compiling that Statement, i.e., the condition that the Alyeska Project Description would not be considered "... completely adequate for impact analysis purposes until all questions raised by the technical review had been completely resolved. ..." 6 FINAL EIS, supra note 16, at C-1. Analysis of this section indicates important questions raised by this review were not resolved.

161. See summary in volume I of the Economic and Security Analysis. ECONOMIC AND SECURITY ANALYSIS, supra note 9, volume 1 passim.
dollars and barrels of oil. Such questions can in principle be answered although the results may imply more certainty than is warranted by the underlying analysis, which rests on assumptions concerning imprecisely known quantities. The problem addressed by the Economic Analysis might be compared with the much less tangible nature of the environmental questions, which concern such matters as the value of unspoiled wilderness, the environmental costs of low-probability, high-damage marine oil spills, and the little understood phenomenon of the pipeline's impact on caribou migration.

The Environmental Statement in conjunction with the Economic Analysis represents analyses of a kind which are widely believed to generate consensus among reasonable persons. Those who consider these studies adequate contend that those who do not concur are not "reasonable." While many critics of the decision to proceed with the Alaska pipeline held that more extensive studies would have shown the overall desirability of the trans-Alaska-Canada route, the fact of the matter may be that this was a situation in which no amount of additional study would have indicated a solution acceptable to a substantial majority of the interested parties.

2. Governmental Predisposition to Grant Permits

While it is not possible to determine with precision how much the Department of Interior was influenced by its own studies or how decisions were different from what they might have been in the absence of pressures from various interests, some inferences can be drawn. Environmentalists tend to believe that Interior acted much in response to its constituencies, which included the oil industry and, particularly when Hickel was Secretary, the State of Alaska. In support of this contention environmentalists cite a single-minded devotion to the trans-Alaska route with relatively little attention paid to the Canadian alternative. As noted before, the Department justified its focus on the Alaska route as the proposal on which it had been asked to act.

The following events suggest that Interior believed the only impediments to issuance of permits for construction of a trans-Alaska

162. The uncertain quantities included such factors as future domestic oil demand as a function of region, and production and transportation costs of North Slope oil.

163. Recall, contra, the question of whether public funds should be used to support development and production of the supersonic transport. Economists of all persuasions argued that if the project were really economically viable, private capital would be available to finance it. There were strong reasons to believe that once produced, the aircraft would not be a commercial success; it was limited in where it could fly due to unresolvable sonic boom problems, and there were serious questions of effect on the upper atmosphere. Thus, a broadly based and effective opposition developed.
pipeline were satisfaction of the Department's NEPA obligations and demonstration by the oil companies of their ability to construct and operate the pipeline and simultaneously minimize the environmental impact:

1. The spring 1969 decision to establish the Federal Task Force on Alaska Oil. The Task Force focused on how best to build a trans-Alaska pipeline, not on what was the best way to transport North Slope oil.

2. The summer 1969 decision of Secretary Hickel to modify Public Land Order 4582 for purposes of allowing construction of the Livengood-Yukon Highway and the later proposed modification to permit construction of the Yukon-Prudhoe Bay portion of the road and the pipeline itself. While such decisions may have been in direct response to the pressures from the State of Alaska, the proposed modifications suggested that it would not be long before the pipeline permits themselves would be forthcoming.

3. The spring 1971 decision to ask Alyeska to prepare the Project Description. This required a major effort by the pipeline company and could be construed as another sign of the inevitability of permit issuance.

4. The failure to approach Canada with a clear statement to the effect (A) that the United States was seriously considering means by which the oil companies would be encouraged to transport North Slope oil via a trans-Alaska-Canada pipeline, and (B) that whether the United States did so encourage the oil companies would depend upon conditions which the Government of Canada might impose upon the licensing process for such a system and upon its construction and operation. The failure to approach Canada reflects the view that the U.S. Government believed that in the absence of overriding national interests, which in this instance did not exist, it was not the government's function to push the oil companies into a route which the companies believed was less desirable for their purposes.

At the same time that the Department of the Interior was working toward the issuance of the permits for the trans-Alaska pipeline, it also indicated through a variety of decisions its awareness of the environmental problems inherent in the project and the political influence of environmentalists and others opposed to the trans-Alaska route:

1. The decision to require the oil companies to accept technical and environmental stipulations as a condition for receiving land use permits. This indicates the Department recognized that special measures would have to be taken in order to minimize the environmental impact of the pipeline system.

2. The decision not to issue permits which, would have allowed construction to begin in the summer of 1969. This is an indication Interior
believed the pipeline builders had not yet obtained an adequate grasp of the problems which would be encountered in constructing the Alaska pipeline.

3. The decision in late 1969 by Secretary Hickel not to permit the project to proceed after the House and Senate Interior Committees had informed him that they would not object to modification of Public Land Order 4582—a change which would leave the Secretary free to issue all necessary permits. The decision suggests several elements in the Secretary's thinking. First, at the time he harbored serious doubts that the pipeline system could be built and operated in a manner such that the environmental impact would be kept within acceptable bounds. Second, being conscious that his concern for environmental values was suspect in some quarters, he desired that the Congress share responsibility for a decision to go ahead. Congressional participation in such a decision would mean greater public acceptance of the decision itself and less blame for the Secretary, should things go wrong. But by virtue of their non-committal “no objection” to modification of Public Land Order 4582, the members of the Interior Committees declined to place themselves in a position of accountability. The third suggested element is a consequence of the first two: having doubts about the environmental viability of the system as it was then proposed, and not wanting to be held solely to blame should disaster result and be traced back to a decision made by him with undue haste, the Secretary decided prudence dictated delay.

4. The decision to hold public hearings on the Stipulations in Anchorage in August 1969 and on the Draft Environmental Impact Statement in Washington and Anchorage in February 1971. This reflected an intention to get the views of all interested public into the record.

5. The decision to take the various steps discussed above in section E.2 with regard to exploring the feasibility and desirability of the trans-Alaska-Canada route.

IV

CONCLUSION

The foregoing review of the trans-Alaska pipeline matter was undertaken to provide insights into the federal decisionmaking process in a matter having a significant impact on the national energy situation. One major conclusion is that efficient development of energy resources requires a coherent national energy policy. The second major conclusion is that in a matter dominated by uncertainty, the usefulness of analysis is limited; a relatively superficial study of the situation provides as much insight as would a much more extensive examination.
A. Energy Resource Policy

The obvious and most important message in the matter is that efficient use of energy resources requires that plans be made for the development of a particular resource before the need becomes pressing. If transport of North Slope oil via a trans-Alaska pipeline should lead to the most efficient use of this oil, happenstance and not consideration of energy resource allocation will explain the outcome.

The pipeline matter was not approached initially by asking such questions as what the country's energy needs would be as a function of time and region, what the role of oil would be in satisfying those needs, and, specifically, what the role of North Slope reserves would be in the total oil picture. Although these questions were asked in the Department of the Interior Economic and Security Analysis, they arose more or less after the fact, i.e., after major investments had already been made in North Slope reserves and in efforts preliminary to the construction of the trans-Alaska pipeline.

Had there been in 1969 a national energy policy which gave federal officials the responsibility and authority to control development of energy resources, then plans for the development and transport of North Slope oil would have been part of a larger program. Had there been an overall plan, the common corridor for gas and oil lines to the mid-West, at some point in the planning process, would have been considered as serious a possibility as was the trans-Alaska system for oil in conjunction with a trans-Alaska-Canada pipeline for transport of gas.

As it was, from the time the oil companies announced their decision to construct the trans-Alaska pipeline, nothing in the government's attitude suggested that issuance of permits would be delayed beyond the point at which the oil companies provided adequate assurance that the pipeline would be constructed and operated in accordance with adequate environmental and engineering safeguards. In fact, the decision to go along with the oil companies' proposal itself became a factor mitigating pressures to reverse that decision. As momentum built behind the trans-Alaska pipeline, it was defended in part on grounds that it could be placed in operation at an earlier date than the trans-Alaska-Canada alternative and hence reduce more rapidly United States dependence upon foreign oil sources.

B. Decisionmaking in the Absence of an Energy Resource Policy

Lacking guidance regarding development of energy resources, the Department was, unless prohibited by court or congressional action, likely in the long run to grant permits allowing construction and
operation of a trans-Alaska pipeline. Interior did not view as its role passing judgment on whether the project itself was a good idea or recommending alternatives to the system specified by the oil companies. Moreover, there appears to have been an underlying faith that any technical obstacles could be overcome and that the environmental impact of the system would be acceptable. The belief was, in effect, that the earth was more resilient than some gave it credit for being and that if it were possible to place a man on the moon it was also possible to build a secure 48" diameter hot oil pipeline across Alaska.

What uncertainty there might have been regarding an eventual decision to issue permits arose from either of two unlikely possibilities. The first was that the environmental costs of any pipeline from the Alaskan North Slope would be demonstrated to outweigh the economic benefits of the production and marketing of more than 10 billion barrels of oil. The second possibility was that environmental and economic analyses would indicate a clear preference for a trans-Alaska-Canada pipeline—a preference so clear that the government would insert itself into the industrial decisionmaking process, exerting pressures on the oil companies to construct a pipeline along a route which the companies had already considered and rejected.

It was unlikely that either of the above mentioned possibilities would materialize. Whatever its shortcomings, the oil companies' proposal was based on sufficient analysis such that there was little probability of further study turning up information clearly justifying a reversal of the initial predisposition to grant permits subject to stipulations specified by the Secretary of the Interior.

The Draft Environmental Impact Statement served to focus public attention on the project and thereby to stimulate comments. The Final Statement served no apparent purpose beyond that already achieved by the Draft. There is little indication that either the Draft or Final Environmental Impact Statements or comments made upon them created serious doubt in the two Secretaries of the Interior concerning the wisdom of eventually granting permits for a trans-Alaska pipeline. It is not clear why anyone should have expected the Environmental Statement to have a drastic effect on the decisionmaking process. Major environmental impacts, of a kind that might have reversed the decision, were those that would have been revealed even if there were no requirement for an Environmental Statement; indeed it was the function of the North Slope Task Force, established prior to NEPA, to uncover such effects.

Even a cursory look at the problem would demonstrate that the environmental impact of a common corridor through Canada would be less adverse than a trans-Alaska oil pipeline and a trans-Alaska-
Canada gas line. But there was no satisfactory process for establishing the degree to which the impact of the Canadian alternative would be less, nor does NEPA direct how much weight decisionmakers should give to such findings. While the adverse environmental impact of the project would be real, it appears to have been of insufficient magnitude to generate deep concern beyond the environmental groups where opposition would be expected in any event. In sum, if there was an overwhelmingly “best” procedure for handling the transport of North Slope oil, it was not apparent from all that was written about the matter.

C. A Final Comment

Operation of a pipeline from the Alaskan North Slope has been delayed by at least four years beyond the oil companies’ target date. The resource cost to the American public of this delay will amount to something in excess of $12 to $15 billion. (See note 148 and accompanying text for definition of resource cost.) The costs to oil companies have run at several hundred million per year.

The delays—arising first from the government requiring more information than the oil companies were initially able to provide, second from the need to prepare Environmental Impact Statements, and third from environmental lawsuits—will give rise to both positive and negative effects. On the positive side are the reduced environmental impact of the modified pipeline and the procedural precedents established as the issue evolved, namely that the decisionmaking process must take into account a wide variety of alternatives to a proposed project.

On the debit side was an enhancement of the contesting parties’ intolerance for other views. This does not serve the public interest. Also, if the public should rightly or wrongly conclude that fuel shortages were in part due to delays in placing the pipeline in operation, there might be less acceptance of environmental restrictions with regard to more pressing problems. The future will indicate whether the benefits of the delay outweighed the costs.
Milestone Events

January, 1964. Exercise by State of Alaska of rights, provided for in Alaska Statehood Act, to select for State ownership 1,600,000 acres of then federally owned land on the North Slope bordering on the Arctic Sea. A primary criterion for this selection was potential of this land for oil and gas production.


1967-68. First discoveries of commercially significant quantities of oil on North Slope.

October 28, 1968. Trans Alaska Pipeline System (TAPS) was formed, consisting of Atlantic Richfield, Exxon and BP. Its purpose was to develop plans for and to construct a crude oil pipeline to move Prudhoe Bay oil to market.

January 16 and 17, 1969. Secretary Hickel testified at his confirmation hearing before the Senate Interior Committee that he would not lift the land freeze previously announced by Secretary Udall without prior consultation with the appropriate committees of the Senate and House.

January 17, 1969. The freeze on the selection of all public lands in Alaska until December 31, 1970, except as might be amended by the Secretary of the Interior for construction of "public or economic facilities in the public interest," ordered by Secretary Udall became effective.

February 1969. Oil companies' decision to apply for right-of-way permits to allow construction of a pipeline from the North Slope to the southern coast of Alaska.


April 18, 1969. Secretary of the Interior Hickel established "North Slope Task Force" composed of representatives of eight Interior bureaus and offices.

May 9, 1969. By Presidential directive, Department of the Interior North Slope Task Force was converted into an inter-departmental Task Force.

June 6, 1969. A formal application for a pipeline right-of-way permit filed by Atlantic, Humble and BP, as principals of TAPS.

June 10, 1969. Under Secretary of the Interior Train submitted 79 questions to TAPS with regard to technical and ecological information pertaining to the proposed pipeline.

June 19, 1969. TAPS submitted answers to Under Secretary Train's seventy-nine questions. The answers included information on the selection of a terminal site.
July 29, 1969. Secretary Hickel notified the House and Senate Interior Committees that he proposed to lift the land freeze for a road between the town of Livengood and the Yukon River needed for the construction of the pipeline.

July, 1969. Sub-group of North Slope Task Force undertakes development of stipulations, designed to ensure "... that the environmental impacts of the project would be mitigated, and the interests of Alaska natives would be protected."

August 8, 1969. Secretary Hickel was advised by Senator Jackson that there was no objection from the Senate Interior Committee to lifting the land freeze for the highway right-of-way between the town of Livengood and the Yukon River.

August 15, 1969. Secretary Hickel modified Public Land Order 4582 to allow the Department of the Interior to grant a permit for construction of a road from Livengood to the Yukon River.

August 29, 30, 1969. Public Hearings in Fairbanks to obtain views of interested persons on the proposed pipeline system.

September 15, 1969. Preliminary report from Task Force to President stressing need for solutions to a number of problems.

September 10, 1969. State of Alaska held a lease sale at which $900 million was obtained from sale of leases covering 450,000 acres on North Slope.

September, 1969. Proposal by Secretary Hickel to modify Public Land Order 4582 to allow issuance of pipeline right-of-way from Prudhoe Bay to Valdez.

December 11, 1969. Letter from Senator Jackson to Secretary Hickel saying the Senate Interior Committee "... does not object to the promulgation of the proposed modification of Public Land Order 4582." At the same time Senator Jackson expressed the Interior Committee's concern that "... every precaution should be taken to avoid environmental damage and degradation to the resources of the public lands in connection with the construction of the pipeline."

December 16, 1969. The House Interior Committee advised Secretary Hickel that it did not object to modification of Public Land Order 4582.

December 29, 1969. Amended application for pipeline right-of-way was filed with the Bureau of Land Management to include new owners of TAPS and to update the mapping. Applications for special land use permits, including a permit to build a haul road north of the Yukon, were also filed.

Throughout 1969. Seven camps erected along pipeline route.

January 1, 1970. NEPA comes into effect.

January 14, 1970. Department of the Interior press release quoting Secretary Hickel as assuring TAPS chief executives that the pipeline would be built.
February 20, 1970. Technical Advisory Board formed in order to assess scientific and engineering aspects of pipeline proposal.

March 5, 1970. Secretary Hickel informs the President that he is prepared to grant permits to the oil companies for construction of the Yukon-Prudhoe Bay segment of the road.


March 26, 1970. Wilderness Society, Friends of the Earth, and the Environmental Defense Fund file suit in federal district court seeking to enjoin Secretary Hickel from issuing haul road permits without complying with NEPA requirements.

April 23, 1970. United States District Court Judge Hart, finding that right-of-way widths applied for were in excess of those permissible under section 28 of the Mineral Leasing Act of 1920, issued a preliminary injunction against issuance of permits and rights-of-way. The court ruled also that the Secretary must consider the full scope of the project before making decisions to approve all or part of it.


December 1970. Secretary Hickel is replaced by Rogers Morton.


March 1971. Representatives of oil companies meet with Canadian ministers in Ottawa.

Spring 1971. Authorization by Secretary Morton to Technical Advisory Board to prepare topic headings for Project Description.


October 1971. Analysis of Alyeska's Project Description by federal and state scientists and engineers and by Technical Advisory Board results in request for Alyeska to clarify and amend certain sections of the Project Description.

December 1971. Alyeska completes submissions (begun in October) of clarification and amendment to the Project Description.


May 11, 1972. Department of Interior announcement of decision to grant permits for pipeline right-of-way.


October 6, 1972. U.S. Court of Appeals for Washington, D.C. held a hearing to consider the legality of the proposed trans-Alaska pipeline. Seven judges heard the case to decide whether the Department of the Interior had met the requirements of the National Environmental Policy Act. Judge James Skelly Wright told Alyeska lawyers that the consortium should have gone to Congress to have the width limit (54 feet) removed.


April 2, 1973. The Supreme Court declined to review the above finding of the Court of Appeals.


September 5, 1973. Conference began on trans-Alaska pipeline bill. The House version was basis for mark up.


January 16, 1974. Judge Hart entered an order dissolving the outstanding injunction and dismissing the lawsuit.

January 1974. Alyeska started moving 67.4 million pounds of material, supplies, and equipment by air and by truck crossings across the Yukon River ice bridge and up a winter highway to construction sites along the northern section of the pipeline road.

January 1974. Alaska Governor William A. Egan signed an agreement with federal officials to cooperate on environmental surveillance.


February 1974. Contract awarded for construction of $24.5 million bridge over the Yukon River. Cost to be shared by the State of Alaska and Alyeska Pipeline Company.

February 1974. Federal government hired Mechanics Research, Inc., a California engineering firm, as third-party contractor to work with federal coordinator General Andrew P. Rollins, Jr. to conduct environmental surveillance of the project.


April 29, 1974. Construction began, starting with 360-mile pipeline road from Yukon River to Prudhoe Bay.

May 1974. Alyeska authorized Fluor Alaska, Inc. to proceed (as general management contractors) with construction of a marine tanker terminal at Valdez and with pump stations.

June 1974. Standard Oil of Ohio, holder of a 49% interest in Alyeska, commissioned a study to determine the feasibility of constructing a pipeline to transport Alaska oil from West Coast ports to the Midwest.

August 1974. Road from Yukon River to Prudhoe Bay fifty percent complete.

1975. Construction of pipeline itself to begin and to continue through 1976.

Late 1977. The first tanker is scheduled to leave Valdez with oil bound for delivery to West Coast ports.