

State of California

MEMORANDUM

To: Hal Turner
Executive Officer
Board of Registration for
Professional Engineers and Land Surveyors

Date: September 18, 1995

Kevin Schunke
Special Assistant to the Executive Officer

From: Virginia J. Taylor
Staff Counsel
Legal Services Unit

Subject: RESPONSE TO QUESTIONS REGARDING NAFTA POSED BY BOARD
AT ITS MEETING ON AUGUST 25, 1995

At the August 25, 1995, meeting of the Board of Registration for Professional Engineers and Land Surveyors ("Board"), the Board requested that I research the following four questions: (1) is the North American Free Trade Agreement (NAFTA) a treaty or an executive agreement; (2) does NAFTA supersede state law; (3) what power does the Free Trade Commission ("the Commission") have to enforce its decisions; and (4) can California or the Board initiate a court challenge to a Commission decision? The Board requested that I provide responses to those questions prior to the September 22, 1995, meeting of its enforcement committee. This memorandum responds to that request.

ISSUE 1: Is the NAFTA a treaty or an executive agreement?

The United States Constitution empowers the President, by and with the advice and consent of the Senate, to make treaties provided that two-thirds of the senators present concur.¹ The Constitution proclaims treaties to be the supreme law of the land and binding upon states.² Treaties are equal in stature to congressional legislation, but do not supersede the Constitution.³

However, the Constitution does not expressly provide that the treaty-making power it confers on the President is the only means by which the United States may assume an international commitment. Through the use of executive agreements, Presidents have concluded a variety of international agreements on their own authority.

¹ U.S. Constitution, article II, section 2, clause 1.

² U.S. Constitution, article VI, clause 2.

³ *Geofroy v. Riggs* (1890) 354 U.S. 133 U.S. 258, 266-267 [10 S.Ct. 295, 296-297; *Missouri v. Holland* (1920) 252 U.S. 416, 433 (40 S.Ct. 382, 383); *Reid v. Covert* (1957) 354 U.S. 1, 16 [77 S.Ct. 1222, 1230].

There are four types of executive agreements, one of which is an agreement negotiated by the President for which he subsequently obtains approval from both Houses of Congress. NAFTA is that type of executive agreement (despite prior printed materials I reviewed to the contrary). As you may recall, the approval of both Houses of Congress was required in order for the United States to ratify NAFTA.

ISSUE 2: Does NAFTA supersede state law?

While the above discussion may be an interesting legal exercise, the implications for California are the same irrespective of whether NAFTA is a treaty or an executive agreement. Although executive agreements do not supersede inconsistent prior acts of Congress, **executive agreements do supersede inconsistent provisions of state law**. That conclusion is supported not only by case law⁴ and legal treatises⁵, but also in the House Report on the NAFTA Implementation Act.⁶ The implementing legislation is not quite as explicit⁷. Nonetheless, the conclusion is inescapable that to the extent that state law conflicts with the NAFTA, the NAFTA supersedes state law.⁸

ISSUE 3 What power does the Commission have to enforce its decisions?

The text of the NAFTA does not provide an answer to this question which is as explicit as the Board might like. As I stated during my presentation to the Board on August 25th, the text of the NAFTA reflects the clear intent of its drafters that disputes regarding NAFTA be resolved through modern dispute resolution processes. Its drafters clearly anticipate that the NAFTA will be enforced through a great deal of compromise, negotiation and consensus, rather than through the more traditional litigious means.

⁴ *United States v. Pink* (1942) 315 U.S. 203, 230-31 [62 S.Ct. 552, 565-566].

⁵ See e.g., Restatement of Law, (Second), Foreign Relations Law of the United States. section 144(1) (1965); Nowak, John E., Rotunda, Ronald D., and Young, J. Nelson, *Constitutional Law*, (3d ed. 1986) West Publishing, Chapter 6, International Affairs, section 6.9, at 212.

⁶ Congressional Record Volume 139 (1003), House Report No. 103-261(I), November 15, 1993, to accompany H.R. 3450, at 2553, states that "Title I [of NAFTA] establishes a Federal-State consultation process concerning NAFTA obligations affecting State laws. U.S. laws prevail over the Agreement if there is a conflict; the Agreement prevails over inconsistent State or local law. No person other than the United States has a cause of action or defense under the Agreement." [Emphasis added.]

⁷ See attached copy of 19 U.S.C.A. § 3312.

⁸ I confirmed the conclusions of my legal research today with Clayton Parker, Director of Intergovernmental Relations at the Office of the U.S. Trade Representative. Although Mr. Parker preferred to downplay that conclusion, pointing to the federal-state consultation process in 19 U.S.C.A. § 3312, he admitted that ultimately, in the event of any conflict with state law, the NAFTA would prevail.

As I explained to the Board at its August meeting, after a dispute proceeds through the extensive dispute resolution process established in NAFTA's Chapter 20, if the dispute resolution panel and the Commission render a decision that a state measure fails to comply with the NAFTA, the United States and the individual state have the following options: (1) the state may amend the measure to conform with the NAFTA, or eliminate it; (2) if the state refuses to amend the measure to conform with the NAFTA, and also refuses to eliminate the measure, the federal government may sue the state seeking to have the measure declared invalid for noncompliance with the NAFTA; (3) rather than amended or eliminate the state measure, the federal and state governments may reach a monetary settlement with the complaining country; or (4) the federal and state governments may do none of the above, in which case the complaining country may suspend benefits equivalent to those withheld pursuant to the nonconforming measure and/or impose appropriate sanctions against the offending country or state until such time as the measure is either amended to conform with the NAFTA or eliminated.⁹

Thus, the Commission's power to enforce its decisions is limited to its ability to successfully encourage the disputing parties to reach a mutually acceptable resolution of the dispute.

ISSUE 4: Can California or the Board initiate a court challenge to a Commission decision?

As specifically provided in 19 United States Code section 3(b)(2), no state law may be declared invalid on the ground that it is inconsistent with the NAFTA except in an action brought by the federal government for the purpose of declaring the law invalid. Moreover, as provided in 19 United States Code section 3(c), only the federal government has a right of action under the NAFTA, and only the federal government may challenge any action or inaction by a state on the ground that such action or inaction is inconsistent with the NAFTA. Thus, neither the Commission, nor any other country, nor any individual citizen of the U.S. or any other country, has a private right of action against a state for alleged noncompliance with the NAFTA.¹⁰

According to Clayton Parker, Director of Intergovernmental Relations at the Office of the U.S. Trade Representative (USTR), this provision also is interpreted to limit the right of any state to sue another state, the federal government, another NAFTA party, or the

⁹ For your convenience, attached is a copy of a synopsis of relevant portions of NAFTA Chapters 18, 20 and 21, which I provided to the Board at its recent meeting.

¹⁰ That is not to say that this provision precludes the type of suit about which the Board expressed concern in its letter to the national trade organization declining to support of the memorandum of understanding for the temporary licensing of engineers - a suit by California licensed engineers alleging discrimination on the basis that they are required to pass an examination in order to practice engineering in California, while engineers from NAFTA countries would be exempt from the examination.

Memorandum
September 18, 1995
Page 4

Commission. In other words, just as the Commission may not sue California should California fail to comply with a Commission decision, so also California cannot sue or otherwise judicially challenge a Commission decision on the basis that it contravenes state law.

Conclusion

I hope that this memorandum adequately responds to the Board's questions and concerns. Nancy Eissler, your staff liaison to the enforcement committee, invited me to attend the committee's meeting on September 22, 1995, and informed me that other commitments preclude your Board's counsel, Gary Duke, from attending that meeting. While I appreciate the invitation, my other work commitments make it difficult for me to accept that invitation. However, I anticipate being in the office most of that day, and will try to be available by telephone in the event that the committee needs some clarification. Additionally, in advance of the committee's meeting I am happy to respond to any questions or clarifications which you or your staff may need.

If availability for a conference call during the committee's meeting will not meet your needs, please let me know as soon as possible. If you would like the committee to engage in a conference call with me, it would be helpful if you can provide me with a time frame for when that might occur so that I can make every effort to be available.

“Virginia J Taylor”
VIRGINIA J TAYLOR
Staff Counsel

cc: Nancy Eissler
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