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Presidential Authority to Create a National Monument on the Coastal Plain of the Arctic National Wildlife Refuge, and Possible Effects of Designation

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Summary

In the Antiquities Act of 1906, Congress authorized the President to create National Monuments. Recently, there has been discussion of a possible monument designation involving the coastal plain of the Arctic National Wildlife Refuge in Alaska, an area rich in wildlife and quite possibly also rich in oil reserves. Several issues surround that possibility, including the potential size of such a monument, whether provisions of the Alaska National Interest Lands Conservation Act (ANILCA) might preclude or limit such a designation, and how protections afforded by monument designation might differ from current protection of the coastal plain. This report will be updated as circumstances warrant.

Background

In the Antiquities Act of 1906,¹ Congress authorized the President to create national monuments to protect historic landmarks, historic or prehistoric structures, and "other objects of historic or scientific interest." National monuments are to be created on lands "owned or controlled by the Government of the United States," and are to be "confined to the smallest area compatible with the proper care and management of the objects to be protected." Numerous Presidents have used this authority and President Clinton has recently created eleven new monuments and expanded two others.²

The coastal plain of the Arctic National Wildlife Refuge (ANWR) in Alaska has a great diversity of wildlife and includes the calving area of the Porcupine caribou herd and

¹ Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 16 U.S.C. §§431 *et seq.*

² For a discussion of monument issues, see CRS Report RL30528, *National Monuments and the Antiquities Act*, by (name redacted) and (name redacted).

nesting and feeding areas for many species of migratory birds. It also may have very large oil and gas deposits beneath it. In 1980 when Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Congress directed studies of the coastal plain and precluded oil and gas development in the Refuge unless development is specifically authorized by Congress.³ Therefore, the coastal plain currently is protected from development unless Congress enacts a law to permit it. Some have advocated wilderness designation for the coastal plain to give it more permanent protection from roads and development of any kind, and others have advocated opening it to oil and gas development, but no legislation has been enacted to date that accomplishes either of these alternatives.⁴

Monument designation issues

There has been discussion recently of the possibility that President Clinton might designate the coastal plain of ANWR as a national monument. Doing so could raise several issues.

Size. One issue might be the size of a coastal plain monument since that area is approximately 1.5 million acres. The Antiquities Act states that national monuments "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

Many national monuments have been large: e.g. the lands comprising and surrounding Grand Canyon were originally withdrawn as a national monument of over 800,000 acres; and the Wrangell-St. Elias National Monument was 10,950,000 acres. President Clinton recently created several large monuments, notably the Grand Staircase-Escalante National Monument, which is now approximately 1.9 million acres,⁵ and the Grand Canyon-Parashant National Monument, which is approximately 1,014,000 acres.⁶ Lawsuits have been filed that challenge these two recent monuments, in part because of their size, but there have not yet been rulings on this issue.

However, the Supreme Court upheld the creation of the Grand Canyon National Monument (before it later became a park),⁷ and another federal court has indicated that a president has considerable discretion as to what is protected with monument designations and as to the size compatible with the proper care of the protected objects.⁸ The size issue was raised when President Carter created the large monuments in Alaska before the

³ Pub. L. No. 96-487, 94 Stat. 2374, codified in part at 16 U.S.C. §§ 3101 *et seq.* Section 1002 of the Act (16 U.S.C. § 3142) directed studies of the coastal plain, and § 1003 (16 U.S.C. § 3143) precluded oil development in the Refuge unless authorized by Congress.

⁴ For a more complete discussion of the resources and policy considerations related to ANWR, see (name redacted) (name redacted), *The Arctic National Wildlife Refuge: The Next Chapter*; IB10055, updated regularly.

⁵ Proc. 6920, September 18, 1996; 61 Fed. Reg. 50,223 (September 24, 1996).

⁶ Proc. 7265, January 11, 2000; 65 Fed. Reg. 2825 (January 18, 2000).

⁷ *Cameron v. United States*, 252 U.S. 450 (1919).

⁸ *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).

enactment of ANILCA in 1980. Lawsuits were filed challenging the Alaska monuments, but only one, unreported, opinion on point resulted.⁹ Although courts today might prove to be less deferential to a president, it is still true that the president has broad discretion under the 1906 Act and, although the issue is not free from doubt, successfully challenging a monument based solely on its size appears difficult.

Purpose. Similarly, whether a particular national monument comports with the purposes of the Act could also be challenged. Historically, although many national monuments preserve historical sites, many have been made to protect natural and biological phenomena as well. The wildlife resources of the coastal plain are renowned. The authority to create national monuments to protect areas of natural or biological interest has been upheld by the Supreme Court on several occasions.¹⁰

Management. The Fish and Wildlife Service (FWS) currently manages ANWR. Whether the Fish and Wildlife Service (FWS) would continue to manage a coastal plain monument if one were to be created could present another issue. Presumably, management by FWS would be logical and desirable, given the wildlife resources of the area. Most monuments have been managed by the National Park Service (NPS), but management of some of the recent monuments created by President Clinton has been given to other agencies, including the FWS. The authority of the president to assign management of monuments to an agency other than the NPS may not be clear, especially if the managing agency is outside the Department of the Interior. (Both the NPS and Fish and Wildlife Service are in the Department of the Interior.) Some contend that the authority of the president encompasses the discretion to choose the managing agency; others allege that doing so may constitute a “reorganization” of the government, which the president currently lacks authority to do. However, the president may be able to assign management that previously has been that of the NPS to the Fish and Wildlife Service under the congressionally-approved authority allowing transfers of function within the Department of the Interior in Reorganization Plan No. 3 of 1950.

Protection of Resources and ANILCA Limitations

Some people who have urged President Clinton to create a monument on the coastal plain also urge that the area be withdrawn from all mineral development as part of the

⁹ The District Court for Alaska granted partial summary judgment for the United States on the issue of construction of the 1906 Act. The court concluded that, although the Act limited the authority of the President as to size and subject matter of withdrawals, the outermost parameters of that authority had not yet been articulated and the withdrawals before the court did not exceed the authority of the President. Unreported bench opinion, *Anaconda Copper Company v. Andrus*, A79-161 Civ., (D.Al. July 1, 1980).

¹⁰ *Cameron v. United States*, 252 U.S. 450 (1919), upheld the Grand Canyon National Monument and noted that the Grand Canyon was an object of unusual scientific interest; *Cappaert v. United States*, 426 U.S. 128, 142 (1975), upheld the Devil's Hole National Monument which protected a cave, pool and type of fish; and *United States v. California*, 436 U.S. 32 (1978), upheld Presidential action to protect fossils and examples of volcanism. See also *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wy. 1945), which dismissed for lack of a reviewable question (on whether the discretion given the President had been improperly exercised with regard to the size of the Jackson Hole National Monument and its protection of natural phenomena), and *Anaconda Copper, supra*.

protections provided. Presidents have broad discretion in fashioning protections for a national monument, and withdrawing monument lands from mineral development is commonly, but not always, done.¹¹ The exact protections that might be provided for the coastal plain, of course, cannot be known until a president makes such a designation. However, if a president were to withdraw the coastal plain from mineral leasing or mineral development, this withdrawal would appear to trigger § 1326 of ANILCA.

Section § 1326 of ANILCA limits the authority of the president or the Secretary of the Interior to create large withdrawals in Alaska. Subsection (a) of that section states that a withdrawal of public lands in Alaska larger than five thousand acres terminates unless Congress extends the withdrawal by approving it in legislation enacted within one year after the withdrawal is made:

No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.¹²

This provision appears to limit a “withdrawal” to create a national monument to one year duration unless Congress legislates to “approve” the withdrawal.¹³ Congress has acted in the past to terminate national monuments, (although often as part of strengthening the applicable conservation designation)¹⁴ and could terminate a new monument withdrawal in Alaska even before the expiration of the one-year period. Absent congressional approval, it appears the monument designation would terminate and the

¹¹ For example, new oil and gas leasing is allowed under some circumstances in the Canyons of the Ancients National Monument, Proc. No. 7317, June 9, 2000.

¹² 16 U.S.C. § 3213. Note that the section applies to withdrawals of “public lands” in Alaska. That term can have diverse meanings and inquiry must always be made as to its meaning in any particular instance. At times, “public lands” is interpreted as meaning unreserved federal public domain lands, and hence would not include ANWR lands as subject to §1326. However, ANILCA defines public lands as federal lands (title in the U.S.) situated in Alaska, except for certain Native lands and lands subject to selections by natives or the State. Therefore, even reserved lands in Alaska appear to be subject to §1326.

¹³ This provision seems to be a grant of temporary withdrawal authority, with the power reserved to Congress to extend or make permanent any such withdrawal through an act of Congress. (Joint resolutions are acted upon by both chambers and presented to the President and hence can become laws.) As such, this does not appear to present the same constitutional issues as did the partial congressional action (“legislative veto”) that was the subject of *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁴ Congress has sometimes converted a national monument into a national park, but also terminated some of the Carter monuments in ANILCA and replaced them with enacted conservation units.

situation as to the coastal plain would be as it is now - - that oil and gas development in the Refuge is prohibited unless and until Congress acts to approve development.

Some suggestions related to possible coastal plain designation raise the question of what constitutes a “withdrawal.” Some observers have suggested that the president might simply “prohibit” mineral development without “withdrawing” lands, thereby avoiding the limitations of § 1326. However, it could be argued that prohibiting mineral development, a significant land use, *is* a withdrawal, because the prohibition removes the lands from entry under the mining laws, in order to limit mineral activities. “Withdrawal” in the legal sense can be said to be the removing of lands from certain types of activities that the lands otherwise could be subject to.¹⁵ In other words, the ‘withdrawal’ is the management action with respect to the lands, as well as any paper indication of that legal action. If so, any action by a president to limit mineral development arguably would be the act that triggers § 1326, whether the word “withdrawal” is used or not.

Another option that has also been discussed is that a president might declare an area to be a national monument without either withdrawing the area or making any management directives. This action arguably would not trigger the § 1326 limitations. Such designation would not provide any greater legal protections than are currently available, but might make it more difficult politically to change the status quo. While Congress can modify or revoke a monument designation, to whatever extent designation might highlight the conservation values of the area, designation might serve to “raise the bar” for enacting legislation to change the designation or to open the area to development.

Another section of ANILCA also may be relevant to designation, no matter how constituted. Section 101(d) of ANILCA stated the sentiment of Congress in 1980 that ANILCA presented a balance between conservation units and economic development and disposal of lands:

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

¹⁵ See, e.g., the definition of “withdrawal” in the Federal Land Policy Management Act at 43 U.S.C. § 1702(j): “The term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general lands laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program;”

It could be argued that this section does not preclude a monument designation because, technically, this section speaks of types of conservation units other than national monuments,¹⁶ and one Congress cannot tie the hands of another. On the other hand, one could argue that a national monument is a type of conservation unit and that creation of a new monument would violate the spirit if not the letter of the law. It could also be argued that because the fate of the coastal plain was expressly left to be decided in the future after additional studies of the area, the possibility of additional protection for the coastal plain was contemplated as part of ANILCA, and designation of the coastal plain ought not to be subject to the § 101 policy. However, § 101 may ensure a lively debate if Congress is faced with considering an ANWR national monument, whether in the context of a joint resolution to approve its creation or otherwise.

¹⁶ Section 102 of ANILCA defines “national conservation unit” in a manner that does not include national monuments.

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