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## **Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge (ANWR)**

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## Summary

Congress is considering whether to permit drilling for oil and gas in the coastal plain of the Arctic National Wildlife Refuge (ANWR), Alaska, to designate the area as wilderness, or to retain the status quo. This area is rich in wildlife and wilderness values, but may also contain significant oil and gas deposits. Efforts were made in the 107<sup>th</sup> to authorize oil and gas leasing in the coastal plain, or to designate the area as wilderness, but none passed. In the 108<sup>th</sup> Congress, H.R. 6 (and the similar H.R. 39) would authorize leasing in the Refuge; H.R. 770 and S. 543 would designate the area as wilderness. This report provides background on the legal issues surrounding the ANWR development-related proposals, and will be updated as circumstances warrant.

H.R. 6, as passed by the House authorizes leasing in ANWR and contains a 2,000 acreage limitation on the “footprint” of federal leasing development in the coastal plain. If the current statutory prohibition against production of oil and gas anywhere in the Refuge is repealed, then oil and gas development and related activities could occur not only on the federal lands, but also on Native lands within the Refuge. Absent express language on the point, an acreage limitation would not apply to some, and possibly not to any, of the Native lands, in which case some or all of the more than 100,000 acres of such lands in the Refuge (inside and outside the officially designated coastal plain) could be developed. A 1983 Agreement with the Arctic Slope Regional Corporation (ASRC), a Native Regional Corporation, would govern oil development on ASRC subsurface holdings in the Refuge, unless these provisions are superseded, and some assert that the environmental terms of the agreement are lenient. If the relevant provisions of the Agreement are not superseded by statutory language, it also appears that the United States would have to obtain a court order to change an ASRC leasing plan whenever the United States and ASRC disagree as to environmental harm.

The environmental standard in H.R. 6, as passed by the House, — “no significant adverse effect” — has been used in the past, but could allow a range of adverse effects compared to other standards that have also been used. New leasing and environmental regulations would be developed without new environmental impact studies and without any express requirement to consult with the Fish and Wildlife Service. A limited environmental impact statement would be prepared on the leasing program, and site-specific analyses would be completed on proposed drilling and related activities. The conclusions of the Secretary as to environmental effects would be more difficult to challenge than usual under the strict standard of review in H.R. 6. Leasing under H.R. 6 would be under the Mineral Leasing Act, but revenues would be split 50/50 with Alaska. In addition, the bill would establish a special Fund to mitigate impacts in the area. H.R. 6 would direct the Secretary to prohibit export as one of the terms and conditions of leases. The conference version of H.R. 6 did not authorize drilling in ANWR and did not pass in the First Session of the 108<sup>th</sup> Congress. The new energy bill, S. 2095, does not authorize drilling in ANWR.

# Contents

Introduction .....	1
Background .....	1
Issues .....	3
I. Environmental Constraints. ....	3
(A). Administration of leasing .....	4
(B). Compatibility .....	7
(C). Environmental standard .....	7
(D). Technology standard .....	8
(E). Specific protections .....	8
(F). Possible Effects on International Polar Bear Agreement .....	11
(G). Discussion .....	13
II. Native Lands. ....	14
(A). The nature and history of Native rights in ANWR .....	14
(B). Current bill provisions and issues .....	21
III. Access, Rights of Way, and Exports. ....	27
IV. Compliance with NEPA. ....	29
V. Judicial Review. ....	30
VI. Disposition of Leasing Revenues. ....	30

# Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge (ANWR)

## Introduction

Congress is currently considering whether to permit drilling for oil and gas in the coastal plain of the Arctic National Wildlife Refuge (ANWR), to designate the area as wilderness, or to retain the status quo.<sup>1</sup> Current law prohibits the production of oil and gas in the Refuge, but high prices for oil and natural gas have renewed debate over whether to open the Refuge to development. H.R. 6, as passed by the House, would open the coastal plain for oil and gas leasing. H.R. 6 is similar in many respects to H.R. 39, also introduced in the 108<sup>th</sup> Congress. The conference version of H.R. 6 did not include leasing in ANWR and did not pass in the First Session of the 108<sup>th</sup> Congress. S. 2095, a new energy bill introduced in the Second Session, also does not authorize drilling in ANWR.

The land ownerships and laws relevant to possible development in the Refuge are complex, and the policy choices controversial.<sup>2</sup> The environmental protections provided in H.R. 6 or any other bills that might be proposed, and the effects on the Refuge and its wildlife that might result from oil and gas development are central to the debate on whether to open the Refuge to drilling. Legal issues that relate to possible development of the Refuge and the proposals regarding possible leasing in ANWR are discussed in this report. This report will be updated as circumstances warrant.

## Background

The Arctic National Wildlife Refuge is managed by the United States Fish and Wildlife Service (FWS) and consists of approximately 19 million acres located at the Northeast corner of Alaska directly adjacent to Canada. The coastal plain of the Refuge on the Beaufort Sea is approximately 1.5 million acres and is the part of the Refuge that is richest in wildlife and migratory birds, including the Porcupine caribou herd, polar bears, musk oxen, eagles, snow geese, and many others. The coastal plain is directly east of Prudhoe Bay, a state-owned oil field that has provided a large

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<sup>1</sup> See CRS Report RL31278, *Arctic National Wildlife Refuge: Background and Issues.*, M. Lynne Corn, coordinator.

<sup>2</sup> See CRS Issue Brief IB10111, *Arctic National Wildlife Refuge (ANWR): Controversies for the 108<sup>th</sup> Congress*, by M. Lynne Corn, Bernard A. Gelb, and Pamela Baldwin.

volume of oil, and many experts believe that significant deposits of oil and natural gas may exist under the Refuge as well. The presence of biological and wilderness values together with the potential for large hydrocarbon deposits results in the current controversy over whether to allow oil drilling in the Refuge.

All lands on the North Slope were withdrawn January 22, 1943 by PLO 82.<sup>3</sup> In November, 1957, an application for the withdrawal of lands to create an Arctic Wildlife Range was filed to protect the area's wealth of wildlife and migratory birds. Under the regulations in effect at that time, this application "segregated" the lands in question, removing them from disposal. This fact was important because on July 7, 1958, the Alaska Statehood Act was passed and on January 3, 1959, Alaska was formally admitted to the Union. On December 6, 1960 (after statehood), the Secretary of the Interior issued Public Land Order 2214, reserving the area as the Arctic National Wildlife Range.<sup>4</sup>

The Supreme Court has held that the initial segregation of lands before statehood was sufficient to prevent the passage of ownership of certain submerged lands within the Refuge to the State of Alaska at statehood.<sup>5</sup> If this ruling had been in favor of Alaska, certain lands beneath the rivers in the coastal plain might have belonged to the state, which could have developed the resources in them, including the oil, gas, gravel, and water.

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA)<sup>6</sup> to resolve Native claims against the United States. This Act provided the opportunity for the selection and conveyance of lands to Native groups – usually either the surface estate of lands to Native Village Corporations, or the subsurface estate to Native Regional Corporations, associated with the Village Corporations within each Region. Usually, the Regional Corporations could receive the lands beneath the Village Corporations in their area, but subsurface lands beneath pre-1971 refuges were not available, and in-lieu lands were substituted for them. Under § 22(g) of ANCSA, surface lands conveyed in such refuges were subject to the regulations applicable to the particular refuge of which they were a part.

In 1980 Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA),<sup>7</sup> which, among other things, renamed the Range<sup>8</sup> to be the Arctic National Wildlife Refuge, and expanded the Refuge to include an additional 9.2

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<sup>3</sup> 8 Fed. Reg. 1,599 (February 4, 1943).

<sup>4</sup> 25 Fed. Reg. 12,598 (December 6, 1960). Other actions have changed the boundaries of the Refuge, but are not relevant to this analysis of leasing on the coastal plain.

<sup>5</sup> *United States v. Alaska*, 521 U.S. 1 (1997).

<sup>6</sup> P.L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601 *et seq.*

<sup>7</sup> P.L. 96-487, 94 Stat. 2374, 16 U.S.C. §§ 3101 *et seq.*

<sup>8</sup> President Carter by Proclamation 4729 of February 29, 1980 had renamed the Range "The William O. Douglas Arctic Wildlife Range." ANILCA did not address this proclamation, but renamed the lands comprising the original Range and the added lands as the Arctic National Wildlife Refuge.

million acres, mostly to the south.<sup>9</sup> Section 702(3) of ANILCA designated much of the original Range as a wilderness area, but did not include the coastal plain. Instead, Congress postponed decisions on the development or further protection of the coastal plain. Section 1002 of ANILCA directed that all of the resources of the coastal plain of the Refuge be studied. (As a result, the coastal plain is sometimes referred to as the “1002 area.”) The 1002 area was administratively articulated as excluding the three townships of land belonging to the Kaktovik Inupiat Corporation (KIC), a Village Corporation. However, these lands *geographically* are on the coast of ANWR, and are very important to the wildlife and scenic resources of the area. Pursuant to § 1431(g) of ANILCA, KIC was entitled to receive approximately 19,588 additional acres within the Coastal Plain, making a total of more than 92,000 acres of KIC lands in the Refuge. Section 1003 of ANILCA prohibited oil and gas development in the Refuge as a whole, and “leasing or other development leading to production of oil and gas from the range” unless authorized by an Act of Congress.<sup>10</sup>

In 1983 the United States and the Arctic Slope Regional Corporation (ASRC), a Native Regional Corporation, executed an agreement (“the 1983 Agreement”) embodying an exchange of lands under which ASRC would receive title to the subsurface estate beneath the KIC surface lands. Normally, ASRC would not have received these lands because they were in a refuge. By the terms of the 1983 Agreement, the ASRC lands in ANWR cannot be developed unless Congress opens ANWR, the ASRC lands, or both to oil development. Conversely, if Congress opens ANWR, then the more than 92,000 acres of Native lands ( KIC surface/ASRC subsurface) in the four townships within the Refuge could be developed. These extensive Native holdings would be affected by the authorization of oil and gas development on the coastal plain, and, in turn, could also affect the Refuge and its resources. In addition, there are individually owned Native allotments within the Refuge that might be developed if oil and gas drilling is allowed. All types of Native lands within the Refuge total more than 100,000 acres.

As interest in the possible leasing of the coastal plain has increased, review of several legal aspects of possible drilling in the Refuge appears timely.

## Issues

### I. Environmental Constraints.

One of the most controversial aspects of any consideration of possible leasing in the Refuge is what the environmental effects of leasing are likely to be. There have been vigorous assertions on both sides — either that the bills are highly protective of the environment, or that they are not. Hence the environmental aspects of the current bills are of particular interest. Some of the most critical elements in an analysis of the environmental provisions of the bills are: 1) the agency that would administer the leasing program; 2) the compatibility of leasing with the purposes of

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<sup>9</sup> Section 303(2).

<sup>10</sup> It is not clear whether this language was intentional, but it may have been intended to allow preliminary activities in the additional lands that were added to the Refuge.

the Refuge; 3) the standard for environmental protection and how might it function in practice; 4) the level of industrial technology required; 5) the protections that would be statutorily provided with respect to the wildlife resources of the Refuge; and 6) the extent to which administrative decisions and actions implementing a leasing program would be judicially reviewable. This last item will primarily be discussed later in this report under the heading “Judicial Review.”

**(A). Administration of leasing.** Under the National Wildlife Refuge System Administration Act (“Refuge Administration Act”) on the management of the National Wildlife Refuge System, it is the Secretary of the Interior acting — “through the United States Fish and Wildlife Service” — who is to administer Refuge lands.<sup>11</sup> This language was added by Congress in 1976 to clarify that management of refuges could not be administratively assigned to other agencies.<sup>12</sup> Several provisions in the Refuge Administration Act address the management of refuges in Alaska. For example, planning for the management of refuge lands in Alaska is to be governed by the refuge planning provisions of ANILCA,<sup>13</sup> and § 304(g) of ANILCA provides planning procedures for refuges in Alaska and other provisions on refuge management.

Under current law applicable to non-Alaskan refuges, when evaluating whether to approve an activity in a refuge, the Director of the FWS (or an FWS officer to whom the duties are delegated) may approve an activity only if it is compatible with the *major* purposes for which the System and the particular unit were created. Longer-term uses must be compatible with all the purposes, major or otherwise, of both the System and the particular unit. (16 U.S.C. § 668dd(d)). Under § 304 of ANILCA, the Secretary is authorized to enter into cooperative management agreements with Native Corporations, the state, or political subdivisions of the state with respect to lands within, adjacent to or near any national wildlife refuge, which agreements shall provide that the land subject to the agreement shall be managed by the owner or occupant in a manner compatible with the major purposes of the refuge. Section 304 of ANILCA also generally withdraws all public lands including whatever submerged lands, if any, were retained in federal ownership at the time of statehood, but does not withdraw them from the operation of mineral leasing laws. Similarly, the Refuge Administration Act does not withdraw non-Alaskan refuges from possible oil and gas leasing, but many individual units are so withdrawn and leasing is allowed on very few.

Also with respect to refuges in Alaska, the Refuge Administration Act expressly subjects resource management by any other agency of the federal government under cooperative agreements to direct supervision by the FWS:

With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall

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<sup>11</sup> 16 U.S.C. § 668dd(a)(1).

<sup>12</sup> P.L. 94-223, 90 Stat. 199.

<sup>13</sup> Section 7(a) of P.L. 105-57; 16 U.S.C. § 668dd(e)(1)(A).

remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.<sup>14</sup>

Although the Bureau of Land Management (BLM), another agency also in the Department of the Interior, is currently the general mineral development manager for the United States,<sup>15</sup> the Mineral Leasing Act does not specify that the Secretary of the Interior is to administer leasing through that agency. Current mineral leasing regulations recognize the authority of FWS over the wildlife resources on refuge lands and reserve considerable authority to the Director of FWS with respect to oil and gas leasing in Refuges:

(a)... Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(b)... [t]here is to be no drilling or prospecting under any mineral lease heretofore or hereafter issued on lands within a wildlife refuge except with the consent and approval of the Secretary with the concurrence of the Fish and Wildlife Service as to the time, place and nature of such operations in order to give complete protection to wildlife populations and wildlife habitat on the areas leased, and all such operations shall be conducted in accordance with the stipulations of the Bureau on a form approved by the Director [of the National Wildlife Refuge System].<sup>16</sup>

This protective posture is repeated in another regulation that provides:

Leases shall be issued subject to stipulations prescribed by the Fish and Wildlife Service as to the time, place, nature and condition of such operations in order to minimize impacts to fish and wildlife populations and habitat and other refuge resources on the areas leased. The specific conduct of lease activities on any refuge lands shall be subject to site-specific stipulations prescribed by the Fish and Wildlife Service.<sup>17</sup>

Given that there are no statutory requirements that mineral leasing be through the BLM, and that since 1976 there is a statutory requirement that management of refuges be by the Secretary through the FWS, it is not clear by what authority BLM would be the lead agency with respect to leasing in refuges unless this is clearly stated in the ANWR leasing statute. Even if the Refuge Administration Act could be interpreted as only addressing the surface management of refuges, it can be asked whether the approval of the Secretary for leasing in refuges must be given through FWS, which is to say with the concurrence of the Director of FWS. We are not aware of any Departmental interpretation of these issues.

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<sup>14</sup> 16 U.S.C. § 668dd(a)(1).

<sup>15</sup> See Secretarial Order 3087, December 2, 1982, as amended February 7, 1983 (48 Fed. Reg. 8983).

<sup>16</sup> 43 C.F.R. § 3101.5-1.

<sup>17</sup> 43 C.F.R. § 3101.5-4.

Under current regulations, refuges in Alaska that are open to leasing are not to be available until the FWS has first completed compatibility determinations.<sup>18</sup> A new compatibility policy and new regulations were published on October 18, 2000, and became effective November 17, 2000.<sup>19</sup> “Compatible use” is defined as a “proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge.”<sup>20</sup> As will be discussed, Native lands in Alaskan refuges that are subject to certain restrictions under § 22(g) of ANCSA are expressly subject to the special regulations on compatibility in 50 C.F.R. 25 and 26.<sup>21</sup>

PLO 2214, which withdrew lands to create the original Arctic National Wildlife Range, withdrew the lands from operation of the mining laws, but not from the mineral leasing laws. Congress in § 1003 of ANILCA reserved to itself the decision of whether to lease the coastal plain area.<sup>22</sup> The current bills would authorize oil and gas leasing and address both management and compatibility.

H.R. 6 states in §30403(a) that leasing is to be under the Mineral Leasing Act (MLA)<sup>23</sup> and administered by the Secretary — which term is defined in § 30402(2) as the Secretary of the Interior or the Secretary’s designee. As noted above, generally leasing under the MLA is conducted by the BLM, with the concurrence of and under stipulations provided by the Director of FWS when the leasing is in a refuge. Because there is no reference to the usual powers of the Director of FWS, and because, under § 30403 of H.R. 6 the Secretary is to impose environmental constraints through new leasing regulations and other measures, the role of the FWS is ambiguous.

In 1981, a court found the *administrative* assignment of responsibility for studying the coastal plain area under § 1002 of ANILCA to the United States Geological Survey rather than to FWS to be unlawful because the Refuge Administration Act requires that the Refuge System be administered by the Secretary of Interior through FWS, absent a clearly expressed legislative intent to the contrary.<sup>24</sup> H.R. 6 does not expressly assign leasing responsibilities to the BLM, although that result may be implied by the reference to leasing being under the MLA. Arguably, placing BLM in charge of the leasing program for ANWR and evidently reducing the otherwise applicable role of FWS could divorce the mineral development aspects from the biological/wildlife purposes and the expertise of FWS

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<sup>18</sup> 43 C.F.R. § 3101.5-3.

<sup>19</sup> 65 Fed. Reg. 62484 and 65 Fed. Reg. 62458, respectively.

<sup>20</sup> 50 C.F.R. § 25.12(a) and see 16 U.S.C. § 668ee, which is nearly identical.

<sup>21</sup> 50 C.F.R. § 25.21(b).

<sup>22</sup> 16 U.S.C. § 3143.

<sup>23</sup> This language also raises issues in connection with the revenue-sharing provisions. See “Revenues” below.

<sup>24</sup> Trustees for Alaska v. Watt, 524 F. Supp. 1303 (D. Ak. 1981), *aff’d* 690 F. 2d 1279, 1307 (9th Cir. 1982).

personnel, and may result in the coastal plain of ANWR receiving less protection than lands in other refuges do under current law and regulations. However, the bill does not expressly modify the usual authority of FWS to manage and protect the Refuge resources and to condition mineral leases. Therefore, an argument can be made that FWS retains that authority, and would develop the environmental constraints on surface disturbance in the leasing regulations. However, the intent of Congress in this regard is not clear. As the legislation evolves, the respective jurisdictions of BLM and FWS in this context may be clarified.

Both the 1983 Agreement and many past bills in Congress continued responsibility for ANWR leasing with the FWS, subject to congressionally enacted direction. Pursuant to §1002 of ANILCA, the FWS adopted regulations (see 50 C.F.R. Part 37) governing the exploratory activities that took place in the Refuge.

**(B). Compatibility.** Section 30403(c)(1) of H.R. 6 states that for purposes of the National Wildlife Refuge Administration Act, *the oil and gas leasing program and activities* authorized in that section are deemed to be compatible with the purposes for which the Arctic National Wildlife Refuge was established, and that no further findings or decisions are required to implement this determination. (Emphasis added.) This provision both answers the compatibility question and appears to eliminate the usual compatibility determination processes for purposes of refuge management. Arguably too, it raises additional ambiguities as to what extent and by whom impacts resulting from activities occurring on federal and Native lands may be regulated. (See Native Lands section below.) The general statement that leasing “activities” are compatible arguably may encompass a great many actions such as construction and operation of port facilities, staging areas, personnel centers, etc.

**(C). Environmental standard.** H.R. 6 uses “no significant adverse effect” on fish and wildlife, their habitat, subsistence resources, and the environment as the standard that is to guide leasing. This phrase is not defined, but has been used in the past. It was used in § 1002 of ANILCA as the standard for the limited exploration allowed under that section, it is used throughout the 1983 Agreement, in past bills that would have authorized leasing in ANWR and it is used with respect to leasing in the NPRA.<sup>25</sup> Arguably, it could be seen as analogous to the standard used in the National Environmental Policy Act (NEPA), which is “significant effect on the quality of the human environment.” (In practice this has been interpreted as addressing only significant *adverse* effects.) Although the contexts are different, judicial interpretation of NEPA may provide guidance in applying the standard.

The standard of significant adverse effects might allow considerable environmental harm before the threshold is crossed. Although the standard has been

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<sup>25</sup> See H.R. 4 and S. 388 in the 107<sup>th</sup> Congress, and H.R. 1320 and S. 1220, 102<sup>d</sup> Congress. H.R. 1320 defined the term as follows: “The term ‘significant adverse effects’ means those effects on habitat quality or availability which, despite the reasonable application of mitigation measures involving appropriate technology, engineering, and environmental control measures, including siting and timing restrictions, are likely to result in widespread long-term reductions in the natural abundance or distribution of a species of fish or wildlife on the coastal plain.” See also, 42 U.S.C. § 6508 re APRA.

used before, Congress has also chosen other, more protective, language at times. For example, the language Congress used with respect to exploration in environmentally sensitive areas of the National Petroleum Reserve - Alaska was to “assure the maximum protection of such surface values consistent with the requirements of this Act for the exploration of the reserve.”<sup>26</sup> Another example of other language Congress has used is the Wilderness Act of 1964, which requires that mineral leases in wilderness areas “shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed.”<sup>27</sup> A statute that addresses already existing mining rights in national parks requires that mining rights be “subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.”<sup>28</sup> In ANWR, Congress would be authorizing new leasing in a special statute, and hence would have greater latitude to impose a protective standard without infringing upon existing rights.

**(D). Technology standard.** Section 30403(a) of H.R. 6 would require the use of the “best commercially available technology for oil and gas exploration, development, and production” and § 30407(a)(2) would require that standard for all *new* exploration, development, and production operations. A computer search indicates that the phrase “best commercially available technology” is not currently used in the U.S. Code, and does not have any available judicial interpretation.<sup>29</sup> Because it refers to technology that already is more widely available, it may be a more lenient standard than “best available technology economically achievable,” or “best practicable control technology” — both of which standards are used in the Clean Water Act.<sup>30</sup>

**(E). Specific protections.** H.R. 6 would provide some specific environmental protections, but would leave much to the discretion of the Secretary. The evaluations of environment effects made by the Secretary, and the particular actions taken by the Secretary in the exercise of the Secretary’s discretion would be insulated under § 30408 of H.R. 6 by the stringent provisions on judicial review. (See “Judicial Review” below.) This fact — that the Secretary’s environmental choices could be difficult to overturn — is relevant to many of the provisions discussed in this part.

Section 30403(e) of H.R. 6 provides that the Secretary, “after consultation with the State of Alaska, City of Kaktovik, and the North Slope Borough,” is authorized to designate up to a total of 45,000 acres of the 1002 area as “Special Areas” and to

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<sup>26</sup> 42 U.S.C. § 6504(b).

<sup>27</sup> Act of September 3, 1964, 78 Stat. 890, 893, 16 U.S.C. § 1133(d).

<sup>28</sup> P.L. 94-429, 90 Stat. 1342, 16 U.S.C. § 1902.

<sup>29</sup> Several provisions in current law use the phrase “commercially available technology” and at least two provisions call for technological improvements above that standard. See 42 U.S.C. § 5906(b)(1) re non-nuclear energy research; 42 U.S.C. §§ 13331 and 13351 re clean coal technology.

<sup>30</sup> 33 U.S.C. § 1311.

close such areas to leasing if the Secretary determines that they are of “such unique character and interest so as to require special management and regulatory protection.” However, closure is discretionary and designated areas may be leased if the Secretary prohibits surface occupancy by lessees.<sup>31</sup> This provision does not require consultation with the FWS, and the Secretary may implement the advice of state and local entities as to designation, special protection, and possible closure of unique and special areas.

This section would impose an acreage limit of 45,000 acres (out of the 1.5 million coastal plain acres) that could be designated as Special Areas for optional special protection or closure. The Secretary is directed to designate the Sadlerochit Spring area (approximately 4,000 acres), as a Special Area, and must manage the Special Areas “to protect and preserve the area’s unique and diverse character including its fish, wildlife, and subsistence resource values.” The closure authority in the bill is stated as being the sole source of closure authority. This may eliminate any separate authority under the Refuge Administration Act to close areas, and also raises the question of whether closure is an available option if it is determined to be necessary to avoid jeopardizing a species under the Endangered Species Act. Possibly ESA-necessitated closures could exhaust the acreage available for closure, making that tool unavailable where closure is merely desirable to avoid harm, rather than crucial to survival of a species.

Section 30406(a)(2) provides that the Secretary may close, on a seasonal basis, portions of the Coastal Plain to *exploratory* drilling activities as necessary to protect caribou calving areas and other species of fish and wildlife, and § 30407(d)(2) authorizes “[s]easonal limitations on exploration, development, and related activities, where necessary, to avoid significant adverse effects during periods of concentrated fish and wildlife breeding, denning, nesting, spawning, and migration,” language that does not expressly include the word “production.” It is not clear what would need to be shown to demonstrate the *necessity* of seasonal closures, or to demonstrate effects sufficiently significant and adverse to justify closure. It also is not clear whether seasonal closure areas count toward the acreage limitation on closures, but probably they would not.

Under §30403 of H.R. 6, the Secretary is to develop regulations to govern the leasing of the coastal plain within 15 months of enactment, and under § 30404(e)(1), the first lease sale is to be held within 22 months after enactment. See the heading “NEPA Compliance” below for a discussion of the fact that other bill provisions would eliminate comprehensive new environmental studies in order to achieve this accelerated leasing schedule.

The leasing regulations required under the House bill must include regulations that relate to the protection of the fish and wildlife, their habitat, subsistence resources, and the environment of the Coastal Plain. In addition, the Secretary must

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<sup>31</sup> Section 30403(e) of H.R. 6 also contains a paragraph (4) entitled “Directional Drilling,” which permits “horizontal drilling” under Special Areas. Although the two terms are similar in common usage, directional drilling may be the broader term and the same term should be used in both the caption and substance of the section.

impose terms and conditions on leases to address environmental concerns. The environmental provisions would undoubtedly provide some protections, but the net import of some of the provisions is unclear.

For example, the reclamation standard in §30406(a)(5) requires reclamation to a condition capable of supporting the uses which the lands were capable of supporting prior to exploration or development or “upon application by the lessee, to a higher or better use as approved by the Secretary.” Under general zoning law, “higher or better” uses are those that “bring the greatest economic return.”<sup>32</sup> Uses that are ‘higher and better’ than undeveloped wildlife habitat could include many conditions.

Under § 30406(a)(6), environmental conditions may be a part of a lease “as *required*” pursuant to § 30403(a)(2). (Emphasis added.) This language may mean only as required to avoid “significant adverse effects.”

Section 30407(d) of H.R. 6 requires that the proposed regulations and lease conditions comply with all applicable provisions of Federal and State environmental law, which would include a broad range of requirements. However, the applicable laws governing management of refuges may be modified by the instant legislation, as indicated. Section 30407(d)(1) requires protective standards “at least as effective as the safety and environmental mitigation measures set forth in items 1 through 29 at pages 167 - 169 of the “Final Legislative Environmental Impact Statement” (April 1987) on the Coastal Plain.” These measures also include many beneficial items, but some of the measures, by regulating certain activities may basically condone those activities – e.g. the provisions that address roads and other permanent infrastructure facilities, incinerators, marine facilities, docks, causeways, etc. Although the legislated language requires the new ANWR leasing standards to be “at least as effective as” the 1987 measures and therefore would allow more stringent measures, additional statutory requirements and guidance might provide clarity regarding some of those important infrastructure topics and to guide development on both the federal and the Native Lands in the Refuge.

H.R. 6 was amended to add an acreage limitation on surface area to be covered by production and support facilities. This language provides that the maximum amount of surface acreage covered by production and support facilities, including airstrips and any areas covered by gravel berms or piers for support of pipelines, not exceed 2,000 acres on the Coastal Plain. The reference to surface acreage “covered by” production and support facilities might exclude facilities that don’t touch the ground, e.g. the pipes in elevated pipelines. Two thousand acres is a small amount relative to the 1.5 million acre plain. However, given that the Secretary would be required to lease not less than 200,000 acres in the first lease sale, a greater footprint might prove necessary. Also, it is likely that oil development facilities would not be in a single, consolidated footprint, but would be scattered over a much larger area and be connected by pipelines and possibly roads that would impact a much larger area. Equally important, if oil and gas were discovered in commercial quantities, it appears that support and development facilities could be constructed on Native lands, and

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<sup>32</sup> Black’s Law Dictionary (6th ed. 1990).

such construction on those lands arguably would not be constrained by the 2,000 acre limitation.

Section 30407(b) of H.R. 6 would require a site-specific analysis of the probable effects, if any, that drilling or related activities will have on fish and wildlife, their habitat, and the environment. (See the discussion of NEPA Compliance below.) Section 30407(b)(2) requires that a plan be implemented to avoid, minimize, and mitigate (in that order and to the extent practicable) any significant adverse effect identified under paragraph (1). This preference of avoiding adverse effects is clearly a protective posture. However, under § 30407(b)(3) this plan is to be developed “after consultation with” the agency or agencies having jurisdiction over matters mitigated by the plan. Apparently, this last reference would be to the FWS, which under current law has the authority to develop and approve of such plans and activities, rather than to consult regarding them.

Section 30407(d)(3) requires that *exploration* activities be limited to the winter and be “supported” by ice roads etc., but then also provides that the Secretary may allow other exploration if the Secretary finds such exploration will have no significant adverse effect on the fish and wildlife, their habitat, and the environment of the Coastal Plain. A similar section in H.R. 4 in the 107<sup>th</sup> Congress also required that before other exploration could occur, the Secretary, after a public comment period, had to find that special circumstances existed.

Similarly, § 30407(d)(4),(5),(7), and (12) relate to potential controls of roads, transportation, and air traffic disturbance, but no specific controls are enacted. Here too, the regulations will depend on the Secretary’s interpretation. This is also true with respect to the requirements for “appropriate” controls on explosives, sand and gravel extraction, etc.

It may also be asked what penalties would be available to enforce the environmental protections and other lease requirements. H.R. 6 does not specifically address penalties for violation of lease terms by a lessee. However, the bill states that leasing in the Refuge would be under the MLA and that act provides for cancellation of leases for infractions,<sup>33</sup> and also provides civil and criminal penalties for leasing violations, including failure to comply with lease terms.<sup>34</sup> Because of the ambiguity about the role of FWS regarding leasing activities, it is not clear whether the penalties usually available for infractions on refuge lands would continue to apply in this context. If so, these include fines and imprisonment.<sup>35</sup> Penalties for a specific violation of another law, such as the Clean Air Act, arguably would still be available under that law.

#### **(F). Possible Effects on International Polar Bear Agreement.**

Beginning in the sixties, concern grew regarding the protection of marine mammals, including the polar bear. In 1972, the Marine Mammal Protection Act (MMPA) was

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<sup>33</sup> 30 U.S.C. § 188.

<sup>34</sup> 43 C.F.R. Subpart 3163.

<sup>35</sup> 16 U.S.C. 668dd(f) and (g).

enacted. In 1973, the United States, Canada, Denmark, Norway and the former Union of Soviet Socialist Republics developed an international agreement on polar bear conservation.<sup>36</sup> This Agreement was ratified by the United States in 1976.

The Agreement prohibits the “take” of polar bears, which term is defined as “hunting, killing and capturing.”<sup>37</sup> Article III sets out five exceptions to the taking prohibition, which a party to the Agreement may allow. These exceptions include several relating to traditional take by a party’s nationals; take for scientific purposes, for conservation purposes, or to prevent serious disturbance of the management of other living resources.

Article II of the Agreement requires certain actions to protect habitat of the bears. Parties are to:

- 1) take “appropriate action to protect the ecosystem of which polar bears are a part;”
- 2) give “special attention to habitat components such as denning and feeding sites and migration patterns;” and
- 3) manage polar bear populations in accordance with “sound conservation practices” based on the best available scientific data.

Recently, some critics have asserted that oil and gas development in the Arctic may be inconsistent with or violate the Agreement in that such development could result in the death of polar bears. A draft report to Congress raised questions in this regard.<sup>38</sup> One of the principal issues raised is that the MMPA permits the unintentional taking of polar bears incidental to other lawful activities. The draft report asserts that such take would be inconsistent with the Agreement because there is no exception for such take in Article I or III and “if a lethal take were to occur during activities conducted under incidental take authority, the United States arguably could be considered to not be in compliance with the Agreement.”<sup>39</sup>

However, the argument can be made that all references to killing or taking polar bears in the Agreement, whether in the prohibition or the exceptions sections, are to intentional take. Given this fact, the argument could continue, it is not inconsistent with the Agreement for an implementing law to permit but regulate incidental take. That this could be an appropriate interpretation is bolstered by the wording of the discussion accompanying the recommendation to ratify the Agreement, which also discusses only intentional takes – whether through hunting, or for other specified

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<sup>36</sup> Agreement on the Conservation of Polar Bears, T.I.A.S. No. 8409, 27 U.S.T. 3918 (Nov. 15, 1973) [hereinafter Polar Bear Agreement].

<sup>37</sup> *Id.*, art.I(2).

<sup>38</sup> Draft Report to Congress on Status of United States Implementation of the 1973 International Agreement on the Conservation of Polar Bears, Prepared by U.S. Fish and Wildlife Service, Alaska Region, October, 1997. (No final report yet available.)

<sup>39</sup> *Id.*, at 9.

reasons.<sup>40</sup> Furthermore, the State Department, in presenting the Agreement to the President for transmission to the Senate for its advice and consent, took the position that the MMPA provided adequate domestic legislation to implement the terms and provisions set forth in the Agreement.

However, a more generalized argument could be made that the opening of ANWR to leasing, with concomitant development of the Native coastal lands, either per se or as such development progressed in actuality, could violate the pledge by the United States to protect the ecosystem upon which the bears depend.<sup>41</sup> In such an eventuality recourse would be available to the other parties to the Agreement, but the argument exists as a policy argument against such leasing activities, and at least one commentator asserts that such leasing might result in an inconsistency with the Agreement, such that either the Agreement or the MMPA should be amended.

The Polar Bear Agreement does not authorize incidental take within the polar bear protection zone. Such takes are authorized under section 101(a)(5) of the MMPA. Because the Agreement does not now prohibit harassment, an inconsistency exists only to the extent such takes would be lethal, involve the capture of bears, or be a product of habitat degradation or destruction. Because there is potential for polar bears to be lethally taken incidental to activities such as oil and gas operations, it is necessary to either amend the Agreement or to amend the MMPA to prohibit such takes if consistency with the Agreement is the goal. Takes by harassment could still be allowed under the MMPA, consistent with the Agreement.<sup>42</sup>

**(G). Discussion.** There are no specific requirements in H.R. 6 that address particular items of environmental concern, such as port and support facilities, airstrips, disposal of wastes, gravel mining, water sources, etc. Many details of the environmental constraints would be left to the leasing regulations that are to be developed by the Secretary with very little advance study and little statutory guidance other than the avoidance of significant adverse effects. The role of the FWS is ambiguous, but appears to be less than under its current authority. Many decisions relating to the protection of the fish and wildlife resources of the Refuge and the protection of the environment in general would be committed to the discretion of the Secretary, whose choices would be difficult to challenge under the strict standards for judicial review in the H.R. 6. H.R. 6 would apparently rely principally on the penalties available under the MLA. It is unclear whether the currently available penalties for violations in refuges would be available. Arguably, the reclamation standard provides that at the end of the potentially lengthy period of mineral leasing activity, restoration of lands to current wildlife uses would not necessarily be required.

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<sup>40</sup> Executive Rep. No. 94-34 (1976).

<sup>41</sup> It is possible that if climatic warming continues to reduce ice in the Arctic Ocean, that on-shore denning might become increasingly important to the polar bears, thereby making development more significant.

<sup>42</sup> Donald C. Baur, *Reconciling Polar Bear Protection under United States Laws and the International Agreement for the Conservation of Polar Bears*, 2 ANIMAL LAW 9, 85 (1996)(footnote omitted).

## II. Native Lands.

Section 30403(b) of H.R. 6 would repeal § 1003 of ANILCA, thereby permitting oil and gas development on both the federal Refuge lands and on the Native lands within the Refuge. These Native lands total over 100,000 acres, and although some of the most important elements in assessing the possible impacts of opening ANWR to leasing involve the property interests of Native-Americans in the Refuge, this aspect of permitting leasing has been little discussed. Both Native individuals and Native Village and Regional Corporations have various interests relevant to the issue of oil drilling in ANWR.

### (A). The nature and history of Native rights in ANWR.

**ANCSA.** In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) to resolve Native aboriginal claims against the United States. ANCSA provided for monetary payments and also created Village Corporations that received the right to select the surface estate to approximately 22 million acres of lands in close proximity to villages. A village located in or adjacent to a refuge could select a certain amount of surface lands within the refuge,<sup>43</sup> thereby maintaining traditional ways of life. Under §22(g) of ANCSA, lands chosen in pre-ANCSA refuges were subject to the laws and regulations governing the use of the refuge of which they were a part.<sup>44</sup> The Kakovik Inupiat Corporation (KIC), a Village Corporation in the Refuge, received selection rights to three townships under ANCSA.<sup>45</sup>

ANCSA also created Regional Corporations which could receive subsurface rights to some lands and either surface rights or full title to others. The Regional Corporations typically were entitled to lands beneath the Village Corporation lands with which they were associated. However, subsurface rights in pre-1971 National Wildlife Refuges were not available, but in-lieu selection rights were provided to substitute for such lands.<sup>46</sup> Even though the shareholders of a Village Corporation shared in the profits of the relevant Regional Corporation, the interests of a Regional Corporation in maximizing the economic development of its subsurface estate may not always coincide with the interests of a Village Corporation in possibly using the surface estate for subsistence hunting and other traditional uses.

**ANILCA.** The 1980 ANILCA contained many provisions that followed up on ANCSA. Section 1002 of ANILCA designated the “coastal plain” of the Refuge as “the area identified as such in the map entitled ‘Arctic National Wildlife Refuge,’ dated August, 1980.” The map that is believed to be the original map referenced in the Act is a large foam-board panel that shows the three ANCSA-authorized KIC

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<sup>43</sup> Section 12(a)(1); 43 U.S.C. § 1611(a)(1).

<sup>44</sup> Section 22(g), 43 U.S.C. § 1621(g).

<sup>45</sup> A “township” is a unit of the federal surveying system that is a block of land 6 miles on a side, divided into 36 mile-square sections, each of which contains 640 acres. Therefore, a township consists of 23,040 acres.

<sup>46</sup> 43 U.S.C. § 1611(a)(1).

townships marked in the same manner as is the exterior boundary of the Refuge, but without any explanation of the intended meaning of the delineation. The boundaries of the pool of lands from which KIC selections could be made also is depicted, so the delineation could have been informational only, or could have been intended to connote something more. The KIC lands are not differentiated by color from the rest of the coastal plain or Refuge. The map depicted the large part of the Refuge designated as “wilderness,” and by default the remainder of the Refuge *is* the coastal plain. This map has now disappeared.

An agency map dated 1980 shows the boundaries of the KIC lands with those boundaries crossed out by hand, but without explanation of when and by what authority these marks appeared or what their intended significance was with respect to whether the KIC lands, and whether they were regarded as being within the coastal plain. Other maps also show the Refuge as a whole with the wilderness area so marked, again arguably showing the coastal plain as the remainder.

Section 103(b) of ANILCA authorized the publication of a map and legal description of each change in land management status effected by this Act and “each such description shall have the same force and effect as if included in this Act ...” However, only minor boundary adjustments (stated as an increase or decrease of not more than 23,000 acres) were authorized, and only after notice in writing to the Congress. The map published with the notice of the legal description of the boundaries of National Wildlife Refuges in Alaska<sup>47</sup> shows the Arctic National Wildlife Refuge as a whole, the wilderness area within it, and the coastal plain as the remainder. It does not show the native lands. The legal description of the boundaries of the coastal plain published on April 19, 1983 as Appendix I to the final rule on exploration of the coastal plain, excludes the three ANCSA-authorized townships of KIC lands. The introductory material to the legal description states: “By virtue of the map referred to in section 1002(b)(1), [which as discussed above does not clearly exclude the native lands from the coastal plain] lands in which the surface estate has already been conveyed to Kaktovik Inupiat Corporation ... are excluded from the coastal plain, and therefore, a permit issued pursuant to §1002(b)(1) cannot authorize exploration of those lands.”<sup>48</sup> However, at this time, the subsurface was still federal and its development was subject to federal regulation. Further, it is important to note that geographically the KIC lands are on the coastal plain and are important to the wildlife of the area.

Section 103(c) of ANILCA states that only the public lands within the boundaries of a conservation system unit are deemed to be included as a portion of the unit, and that non-public lands (*i.e.* conveyed Native (or state) lands) are not subject to the regulations applicable solely to the public lands within such units. This issue of separate regulations is addressed elsewhere in this report.

Under § 1431(g) of ANILCA, KIC was authorized to obtain additional lands, and obtained the rights to a fourth township in the 1002 area. As a result, KIC has surface rights to three townships along the coast of ANWR that are outside the 1002

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<sup>47</sup> 48 Fed. Reg. 7936, 7980 (February 24, 1983).

<sup>48</sup> 48 Fed. Reg. 16838, 16841, 16869 (April 19, 1983).

area, and one township inside that area, all totaling approximately 92,160 acres. However, all of the KIC lands are within the Refuge as a whole and hence are subject to: 1) the restrictions on oil and gas development in § 1003 of ANILCA; and 2) under § 22(g) of ANCSA and § 1431(g) of ANILCA, to the laws and regulations governing the Refuge, as possibly modified by the other sections of ANILCA discussed above.

Section 1431(o) of ANILCA, captioned “Future Option to Exchange, etc.,” authorized the Arctic Slope Regional Corporation (ASRC), whose shareholders are Inupiat Eskimos, to obtain subsurface rights beneath the KIC lands in ANWR upon the occurrence of certain events. ASRC could obtain subsurface rights beneath lands belonging to villages in the National Petroleum Reserve-Alaska or ANWR, if parts of those two areas within a certain proximity to Native village lands were opened for commercial oil and gas development within 40 years of the date of ANILCA. Under this authority, ASRC would not have been authorized to obtain the subsurface beneath the KIC lands in the Refuge *until* ANWR was opened for commercial development. Furthermore, any oil and gas development of ASRC interests would be subject to protective regulations “consistent with the regulations governing the development of those lands with the Reserve or Range which have been opened for purposes of development ...”

**1983 Agreement.** However, instead of proceeding at some future date with an exchange under the §1431(o) authority, then Secretary of the Interior James G. Watt on August 9, 1983 (four months after publishing the legal description of the 1002 area that excluded the KIC lands), entered into an exchange agreement (known as the 1983 Agreement or the “Chandler Lake Agreement” after lands acquired by the United States in the Gates of the Arctic National Park) using the general exchange authority of § 1302(h) of ANILCA. Under this Agreement, the United States received the surface rights to certain lands elsewhere in Alaska and ASRC received the subsurface rights beneath the KIC lands, but any oil and gas development of these lands was expressly contingent on Congress authorizing such development.

Section 1431(o)(4) of ANILCA provides that the Secretary may promulgate regulations regarding the subsurface estates acquired *pursuant to that subsection* to protect the environmental values of the Reserve or Range consistent with regulations governing the development of those lands within the Reserve or Range which have been opened for purposes of development, including § 22(g) regulations. However, that subsection of ANILCA did not apply to the ASRC exchange in ANWR since a different exchange authority was utilized. Instead, the 1983 Agreement contained considerable detail relating to exploration and environmental issues, thereby making those features a matter of contract law. ASRC also agreed in the 1983 Agreement that § 22(g) — and hence Refuge regulations — would apply to its lands, but with significant additional terms.

Also as part of the Chandler Lake Agreement, ASRC was given the contractual right to drill, within a certain window of time, up to three exploratory wells on the KIC lands outside the 1002 area. One test well was drilled within the specified time, but the results of that well have been kept confidential. However, full oil and gas development of the ASRC lands was prohibited until and unless Congress opened the

Refuge, the ASRC lands, or both for such development.<sup>49</sup> Conversely, if Congress opens the Refuge, the Agreement provides that ASRC may proceed with development of its subsurface interests.

***The Barrow Gas Field Transfer Act.*** The Barrow Gas Field Transfer Act of 1984<sup>50</sup> addresses several North Slope issues, primarily involving exchange agreements involving the Point Barrow gas fields, including a 1984 agreement on that subject. It also refers to the August 9, 1983 Agreement (the ASRC/ANWR Agreement), stating in §5(d):

All of the lands, or interest [sic] therein, conveyed to and received by Arctic Slope Regional Corporation pursuant to this section of the ASRC Agreement and pursuant to the August 9, 1983 agreement between Arctic Slope Regional Corporation and the United States of America shall, in addition to other applicable authority, be deemed conveyed and received pursuant to exchanges under section 22(f) of the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, 1621(f)).

The committee report accompanying this act states that one purpose of the act is to “ratify certain land exchanges and other agreements ....”<sup>51</sup> It also states that lands received by ASRC are to be regarded as though they had been obtained by an ANCSA exchange:

Subsection (d) provides that all lands or interests therein conveyed to the Arctic Slope Regional Corporation pursuant to this section or the Regional Corporation’s 1984 agreement and pursuant to the August 9, 1983 Agreement Between the Arctic Slope Regional Corporation and the United States are to be deemed conveyed and received pursuant to exchanges under section 22(f) of the Alaska Native Claims Settlement Act, as amended, in addition to other applicable authority. The purpose of this subsection is to ensure that the lands and interests in land received by Arctic Slope Regional Corporation in the two referenced exchanges are treated as lands received under section 22(f) exchanges, thereby, for example resulting in the applicability of subsection 21(c) and (d) [re taxation] and subsection 23(j) [re interim conveyances and underselections] of the Alaska Native Claims Settlement Act, as amended to the lands and interests in land so received.<sup>52</sup>

The floor debates in both the House and Senate are very brief and focus almost exclusively on the Barrow gas provisions and related exchange agreements.<sup>53</sup>

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<sup>49</sup> Provisions B-1 and B-2 at 5-6 of Appendix 2 of the 1983 Agreement.

<sup>50</sup> See P.L. 98-366, 98 Stat. 468, 471.

<sup>51</sup> H.Rept. 98-843 at 1 (1984).

<sup>52</sup> *Id.*, at 7.

<sup>53</sup> Rep. Seiberling describes the bill as “without controversy” and does not discuss the 1983 Agreement related to ANWR. 130 Cong. Rec. 16841 (June 18, 1984). Rep. Young states that the bill would ratify agreements, but only discusses the gas field agreements. *Id.*, at 16843. Similarly, discussion was brief on the Senate side and focused on the Barrow provisions. Sen. Stevens stated that the bill had been extensively reviewed by the Congress, (continued...)

Arguably, if the exchange is made under §22(f) of ANCSA, the ASRC lands received under the 1983 Agreement are subject to §22(g) constraints (those specifying that Native lands in refuges remain subject to the laws and regulations governing the refuge of which they are a part) as a matter of law, rather than being a matter of contractual obligation.

Subsequently, the Department of the Interior began negotiations with several other Native corporations and their oil company partners to develop other exchanges for subsurface rights in ANWR. These actions raised the issue at the time of whether such exchanges were valid and whether they would preempt the authority of Congress to make the decision of whether to lease and develop the oil and gas resources of the coastal plain of ANWR<sup>54</sup> by presenting Congress with exchanges that might result in pressure to open the Refuge. As a result, Congress addressed the issue in 1988.

**1988 ANILCA Amendment.** In 1988, Congress legislated to prevent any more exchanges by amending the general exchange authority in ANILCA that had been used as authority to complete the 1983 Agreement:

Nothing in this Act or any other provision of law shall be construed as authorizing the Secretary to convey, by exchange or otherwise, lands or interest in lands within the coastal plain of the Arctic National Wildlife Refuge (other than land validly selected prior to July 28, 1987), without prior approval by Act of Congress.<sup>55</sup>

The House Report addressed the validity of such exchanges, linked exchanges to the decision of whether to open the Refuge to oil and gas development, and reiterated the control of Congress over whether the coastal plain would be opened for oil and gas development. The Report states:

The committee believes that, under current law, the Secretary of the Interior does not have authority to administratively exchange lands within the coastal plain of the Arctic National Wildlife Refuge, as defined in Section 1002(b) of ANILCA. Congress clearly reserved to itself the sole prerogative to make the decision as to whether ANWR would be opened to oil and gas development and, if so, under what terms and conditions. Section 1003 of ANILCA states:

Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range [sic] shall be undertaken until authorized by an Act of Congress.

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<sup>53</sup> (...continued)

the House and Senate hearings, and stated that the bill confirms that the lands received by ASRC under the August 9, 1983 Agreement are to be treated as received under ANCSA. 130 Cong. Rec. 19738 (June 28, 1984).

<sup>54</sup> See, e.g. the GAO Report: GAO/RCED-88-179 (September, 1988), *Consideration of Proposed Alaska Land Exchanges Should Be Discontinued.*”

<sup>55</sup> P.L. 100-395, 102 Stat. 979, 981, amending § 1302(h) of ANILCA; 16 U.S.C. § 3192(h)(2).

It is the Committee's view that the 96<sup>th</sup> Congress did not intend the Secretary's general exchange authority under Section 1302(h) to apply to the coastal plain of ANWR.<sup>56</sup>

The Report goes on to discuss the fact that the Department continued to assert that it had complete and unilateral authority to trade away oil and gas rights, to allow exploratory drilling, and to waive the rights to bonus bids, rents and royalties without Congressional approval. Furthermore, it noted that the Department had engaged in "mega-trade" negotiations with six Alaska Native groups and their oil company partners for exchanges similar to the ASRC exchange of 1983, and had conducted a "conditional auction" for oil and gas rights to 73 tracts in the coastal plain of ANWR. Then the Report discussed the intent of the new provision:

Title II and section 201 are designed to preserve the status quo and to permit, as ANILCA intended, Congress to decide the future status of the coastal plain on the merits. Section 201 makes it clear that the "mega-trades" or any other exchanges, as well as any other prospective conveyances involving lands or interests in lands within the coastal plain may only be implemented after Congressional review and after securing legislative approval by an Act of Congress. However, this section is not intended to effect [sic] lands validly selected prior to July 28, 1987.<sup>57</sup>

This reiteration of Congress' authority to make the decision regarding oil and gas leasing in the coastal plain of ANWR is repeated on p. 12 of the Report: "The Committee would note that the decision of whether to open the Arctic National Wildlife Refuge for oil and gas development is a decision which Congress has reserved for itself."

The Senate Report repeats the language in the House report regarding the fact that Congress reserved to itself the right to decide if and when oil and gas leasing would be permitted in ANWR and that the new legislation "would insure that such a congressional prerogative is preserved."<sup>58</sup>

Subsequent legislative history (as in a later committee report commenting on a previous enactment) expressing an interpretation of a previous statute is not given much weight because, as the Supreme Court has put it, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."<sup>59</sup> However, the views of a later Congress incorporated into a later statute must be

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<sup>56</sup> H.Rept. 100-262, Part 1 at 7-8 (1987).

<sup>57</sup> *Id.*, at 8-9. The Report states that the committee is aware that KIC, some individual Natives, and ASRC "through a land exchange agreement with the Department" had selected lands in the Refuge before July 28, 1987, and states that the Secretary may adjudicate the validity of those land selections and convey lands to those parties "to the extent such conveyances are otherwise lawful and proper." *Id.*, at 13.

<sup>58</sup> S.Rept. 100-302 at 3 (1988).

<sup>59</sup> *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

interpreted and applied, and are given great weight in statutory construction.<sup>60</sup> Still other statutes may be premised on a particular interpretation of an earlier statute. If so, the interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual.<sup>61</sup>

The 1988 amendment to ANILCA seems somewhere between the latter two interpretive choices. The 1988 direction that no more lands could be conveyed in the coastal plain without congressional approval is stated as being premised on the fact that Congress reserved to itself, and reiterates the ANILCA authority, to make the decision regarding oil and gas development of that area. Exchanges like the 1983 one with ASRC were evidently regarded as predisposing the decision process, and hence Congress stepped in to legislate that no further conveyances were to take place unless and until Congress so authorized – in order to preserve its view of §1003 of ANILCA. This later enactment and the reasons for it arguably are entitled to weight in interpreting whether any modification of the ANILCA reservation of authority for Congress to decide the question of oil and gas development of the coastal plain has occurred with respect to ASRC.

***Final Selections.*** On March 17, 1993, lands were withdrawn by Public Land Order 6959 to allow KIC to make its final selections to complete its four townships in the Refuge.<sup>62</sup> Pursuant to § 22(h)(2) of ANCSA and § 1410 of ANILCA, the Order made more lands available than was KIC's entitlement, thereby providing some flexibility as to choices. This larger quantity of lands desired by KIC had been identified initially in an agreement effective January 22, 1993, before the PLO was issued. Those lands were withdrawn and, under the terms of the January agreement, KIC was then to have filed a selection application and simultaneously submitted a prioritization of land choices from which conveyances could be completed up to the amount of the entitlement.

In addition to the KIC and ASRC Native lands, there are also individual Native "allotments" within the coastal plain and elsewhere in the Refuge. Approval and conveyance of some allotments have been completed; other lands have been applied for, but may not be approved. BLM currently is compiling the exact locations, acreage, and status of these allotments and applications. It appears, based on a preliminary mapping, that allotments and applications for allotments are clustered primarily along the coast and near Sadlerochit Spring, both of which are considered vital wildlife areas. BLM reports that allotments range in size up to 160 acres each and that approximately 9,797 acres have been conveyed, with an additional 1,719.66 acres approved but still pending.

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<sup>60</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969).

<sup>61</sup> *Mount Sinai Hospital v. Weinberger*, 517 F. 2d 329, 343 (5<sup>th</sup> Cir. 1975), quoted with approval in *Bell v. New Jersey*, 461 U.S. 773, 785 n.12 (1983). See also *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382-387 (1982), relying on congressional intent to preserve an implied private right of action as the reason for a "savings clause" on court jurisdiction.

<sup>62</sup> 58 Fed. Reg. 14323 (March 17, 1993).

If allotments are conveyed under the provisions of ANCSA, they are expressly for the surface estate only. However, if a claimant qualified for and opted for a conveyance under previous statutes, the status of the mineral estate of a particular allotment would have to be checked. Nonmineral lands (in the sense of “hardrock” minerals such as gold, silver, etc.) were not to be available for selection, and typically the United States reserved any oil and gas.<sup>63</sup>

**(B). Current bill provisions and issues.**

**(1). Conveyances to KIC.** Section 30411(1) of H.R. 6 would authorize the conveyance of final land selections to KIC. It will be recalled that congressional authorization to complete the conveyances is required by the 1988 amendment to ANILCA. More than sufficient lands for identification of selections were made available in PLO 6959, as identified by KIC in the agreement effective January 22, 1993. H.R. 6 directs that conveyance of the selected lands be in accordance with the January 22, 1993 Agreement. Section 30411(2) directs that ASRC receive the remaining subsurface estate to which it is entitled under the August 9, 1983 agreement.

**(2). Environmental constraints on Native lands.** As discussed above, H.R. 6 addresses oil development activities in the coastal plain/1002 area, and provides some environmental controls. It is unclear to what extent the Native lands will be subject to the same or similar controls – whether whatever constraints are placed on the federal Refuge lands would also pertain to the Native lands within the Refuge, or, if not, what other constraints on environmental effects and development facilities might apply to the Native lands. These issues are vitally important to understanding the possible overall effects of oil development on the Refuge.

In considering this question, the various Native property interests must be considered separately: 1) the interests of KIC in the surface estate of lands, within the coastal plain and the Refuge as a whole; 2) the interests of ASRC in the subsurface (and related use of the surface), within the coastal plain and the Refuge; and 3) individual allotments in the coastal plain and Refuge.

As discussed above, one township of KIC lands is in the 1002/coastal plain; three townships are outside the coastal plain; all are within the Refuge as a whole.

**(3). ASRC lands and the 1983 Agreement.** Currently, ASRC has rights to the subsurface beneath the KIC lands, both within and outside the coastal plain. It is important to note that the 1983 Agreement and its appendices address oil exploration and development on the ASRC subsurface estate and provide that its terms will govern the development and oil production on those lands unless they are

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<sup>63</sup> 43 U.S.C. § 1617(a). BLM advises that all of the allotments are pursuant to the Act of May 17, 1906, ch. 2469, 34 Stat. 197, amended August 2, 1956, ch. 891, 70 Stat. 954, in which case they may be subject to restrictions on alienation. Oil and gas on all of these allotments is reserved to the United States. Other allotments are listed as approved pursuant to ANILCA; however, the status of the title of particular allotments and applications may not be clear at this time.

superseded by statutory provisions. Appendix 2, part 9 of the Agreement states that development and production activities undertaken on “ASRC lands” will be subject to statutory and regulatory constraints. Specifically ASRC development:

shall be in accordance with the substantive statutory and regulatory requirements governing oil and gas exploration, including exploratory drilling, and development and production that are designed to protect the wildlife, its habitat, and the environment of the *coastal plain*, or the ASRC Lands, or both. (Emphasis added.)

Other provisions of the 1983 Agreement also pertain to environmental effects. Appendix 1 provides that the grant of lands to ASRC is subject to:

1. the requirements of the second sentence of § 22(g) of ANCSA, (which requires compliance with the regulations of the Refuge).
6. the covenant that ASRC will use the lands “in conformance with the ‘Land Use Stipulations’ attached as Appendix 2.
7. the covenant that ASRC “shall not use those lands, or the surface of those lands, in any manner that significantly adversely affects the fish and wildlife, their habitats, or the environment of those lands or Arctic National Wildlife Refuge lands ....”

Therefore, it appears that as a general matter, the environmental constraints of the bills applicable to the coastal plain arguably would apply to development of all ASRC lands, both within the coastal plain and outside it.<sup>64</sup> The same standard — the avoidance of significant adverse effects — is used in the 1983 Agreement and in both bills.

However, absent express new statutory language that addresses the relationship of the new legislation to the 1983 Agreement and to particular management and land use considerations, issues may arise. Both bills currently speak in general terms on environmental constraints, leaving much to be fleshed out by the Secretary of the Interior in new leasing regulations for the Refuge. The 1983 Agreement contemplates that subsequent legislation and regulations may supersede its provisions. The current bills postpone many decisions and aspects of oil and gas development to possible coverage in the leasing regulations that are to be developed. To whatever extent the congressional acts and administrative regulations do not clearly supersede the 1983 Agreement, its terms will govern oil development on the ASRC lands. And other provisions of the 1983 Agreement may still operate despite the general legislated environmental constraints with respect to ASRC oil development.

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<sup>64</sup> See Paragraph 4, p. 10 of the Agreement that states that Appendix 1 applies to the lands to be conveyed to ASRC, thereby incorporating by reference Paragraph 1 of Appendix 1 that applies 22(g) to ASRC lands and Paragraph 6 of Appendix 1, which requires compliance with the Land Use Stipulations of Appendix 2.

For example, the 1983 Agreement qualifies its general statement that statutory language on oil development in the coastal plain will supersede the Agreement, by stating in Paragraph B.9 of Appendix 2 (pp. 28-29) that certain provisions in Paragraph B.3(c) - (m) — that set out an approval process for a “plan of operations” for oil development — will remain in effect.<sup>65</sup> This provision may mean that Congress would have to expressly address and change this plan approval process, or the terms of the Agreement may still govern. The referenced Paragraph B.3(c)-(m) provisions provide a special process for approval of a plan of operations for ASRC development under which if the Regional Director of Fish and Wildlife Service and ASRC disagree as to whether a part of a proposed plan would significantly adversely affect the wildlife, habitat, or environment of the ASRC lands or Refuge lands or would otherwise be inconsistent with any provision of the Agreement, ultimately (after some prescribed exchanges of written points of view and negotiations) the United States must obtain a *court order* restraining implementation of the plan of operations, or else ASRC will have the right to implement the plan of operations as originally proposed or as subsequently modified. In other words, the opinion of ASRC as to harm will prevail unless the United States obtains the agreement of a court with its views in every instance.

Should ASRC assert that this provision remains in effect even if the Director of BLM, rather than the Regional Director of FWS is the responsible leasing official, this language appears to impose a difficult burden on the United States to assert and control adverse effects of leasing on Native lands. This burden, combined with the fact that the current bills do not address the 1983 Agreement and which of its terms are superseded, and do not contain specific environmental controls that would supersede the provisions of the Agreement, may result in some Agreement provisions that were intended as “state of the art” environmental constraints in 1983 becoming less than desirable standards today, in light of technological changes since 1983. For example, provisions in Appendix 2 of the Agreement speak to “reserve pits” and ponds as means for the disposal of wastes on the surface of the Refuge, while current practice is to reinject wastes underground, rather than using reserve pits. Other provisions in the Agreement also address environmental considerations in ways that might not be considered acceptable today. The Agreement specifically addresses, for example, the use of explosives, aircraft, fires, disposal of gray water on the surface of the Refuge, removal of water from streams, incineration, fuel pits, extraction of sand and gravel, and the type and location of support facilities. Depending on the specificity of the oil development regulations that the Secretary is to develop, some of these provisions of the Agreement that are not expressly superseded may ultimately function to permit pollution and the siting and use of facilities that might not be permitted under current practices.

H.R. 6 does not clarify how it relates to the 1983 agreement with ASRC; it does not provide that any of its environmental constraints supersede the provisions of that

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<sup>65</sup> The agreement refers to “such” plans. This could refer either to exploration plans in Paragraph B.3, or it could refer to all plans — exploration or development — that are the subject of Paragraph B.9. A reading of B.9 as a whole would seem to indicate that the latter interpretation is more likely the correct one. Given the importance of this issue, Congress may wish to clarify this point.

agreement, and therefore, arguably, those agreement provisions apply. Some bills in previous Congresses have specifically addressed oil development-related activities on Native lands within the Refuge and expressly set out development limitations and specifications, together with expedited judicial review of possible Native claims for breach of contract or “takings” under the 5th Amendment of the Constitution. See *e.g.*, H.R. 3601 in the 100th Congress and H.R. 1320 in the 102d Congress, which limited port facilities and other development support activities and directed the promulgation of Refuge-wide regulations within a specified time.

**(4). Section 22(g) constraints.** Both the KIC and ASRC lands are currently subject to § 22(g) of ANCSA, and hence to the laws and regulations governing ANWR; the KIC lands by the terms of ANCSA, and ASRC lands by the terms of the 1983 Agreement and, arguably, the 1984 Barrow Gas Field Act. Beginning in 1973, analysis of how § 22(g) might apply to Native lands in a refuge concluded that, because the lands were privately-owned, separate regulations were appropriate: one set of regulations should govern the use of the public lands within a refuge and separate regulations should govern what could be done by Natives on their lands. The latter regulations should also reflect the fact that the Native lands had been conveyed under a statute (ANCSA) to accomplish a settlement “in conformity with the real economic and social needs of the Natives” and with their maximum participation.<sup>66</sup>

This interpretation – that separate regulations were appropriate – was confirmed by certain aspects of ANILCA, notably language in § 103(c) which states that only

those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units....

“Federal lands” is defined in §102(2) as lands the title to which is in the United States, and “public lands” is defined in §102(3) as federal lands, except lands selected by a Native Corporation but not yet conveyed, or lands referred to in section 19(b) of ANCSA (certain entitlements of Village Corporations). Therefore, it appears that the Department of the Interior concluded – before the enactment of the Barrow statute in 1984 – that special regulations applicable to Native lands in refuges are appropriate to implement 22(g).<sup>67</sup>

Before the development of separate compatibility regulations for lands subject to § 22(g), several exchanges, including the ASRC exchange, had contained land-use stipulations to attempt to clarify what could and could not be done on the Native lands. Because § 22(g) requires compliance with the laws and regulations pertaining

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<sup>66</sup> Opinion to the Director, Bureau of Sport Fisheries and Wildlife from the Acting Associate Solicitor for Conservation and Wildlife, September 11, 1973.

<sup>67</sup> See Memorandum from Attorney, Office of the Regional Solicitor, Alaska Region to the Regional Director, Alaska Region, Fish and Wildlife Service, February 17, 1983.

to the particular refuge of which the Native lands are a part, any law enacted to lease ANWR could impose some constraints on the Native lands and special regulations governing those lands might also be developed.

Current 43 C.F.R. § 2650.4-6 states that regulations governing the use and development of refuge lands conveyed pursuant to § 14 of ANCSA “shall permit such uses that will not materially impair the values for which the refuge was established.” This appears to be a standard that would allow a considerable range of activities.

The new compatibility regulations address §22(g) lands and state that compatibility determinations for those lands are to be made in compliance with the requirements stated in the regulations, several of which are relevant to this report. Notably, the regulations state, for example, that only the effects on refuge lands that result from a use made on Native lands, not the use on the Native lands itself, will be considered, and that the Refuge management plan will not include the Native lands:

(1)(i) Refuge managers will work with 22(g) landowners in implementation of these regulations. The landowners should contact the Refuge Manager in advance of initiating a use and request a compatibility determination. After a compatibility determination is requested, refuge managers have no longer than ninety (90) days to complete the compatibility determination and notify the landowner of the finding by providing a copy of the compatibility determination or to inform the landowner of the specific reasons for delay. If a refuge manager believes that a finding of not compatible is likely, the Refuge Manager will notify the landowner prior to rendering a decision to encourage dialog on how the proposed use might be modified to be compatible.

(ii) Refuge managers will allow all uses proposed by 22(g) landowners when the Refuge Manager determines the use to be compatible with refuge purposes.

(iii) Compatibility determinations will include only evaluations of how the proposed use would affect the ability of the refuge to meet its mandated purposes. The National Wildlife Refuge System mission will not be considered in the evaluation. Refuge purposes will include both pre-ANILCA purposes and those established by ANILCA, so long as they do not conflict. If conflicts arise, ANILCA purposes will take precedence.

(iv) A determination that a use is not compatible may be appealed by the landowner to the Regional Director. The appeal must be submitted in writing within forty-five(45) days of receipt of the determination. The appeals process provided for in 50 C.F.R. 36.41(i)(3) through (5) will apply.

(v) Compatibility determinations for proposed uses of 22(g) lands will only evaluate the effects of the use on the adjacent refuge lands, and the ability of that refuge to achieve its purposes, not on the effects of the proposed use to (sic) the 22(g) lands.

(vi) Compatibility determinations for 22(g) lands that a use is compatible are not subject to re-evaluation unless the use changes significantly, significant new information is made available that could affect the compatibility determination, or if requested by the landowner.

(vii) Refuge comprehensive conservation plans will not include 22(g) lands and compatibility determinations affecting such lands will not be automatically re-evaluated when the plans are routinely updated.

(viii) Refuge special use permits will not be required for compatible uses of 22(g) lands. Special conditions necessary to ensure a proposed use is compatible may be included in the compatibility determination and must be complied with for the use to be considered compatible.

.....

(g) Except for uses specifically authorized for a period longer than 10 years (such as rights-of-ways), we will re-evaluate compatibility determinations for all existing uses other than wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or at least every 10 years, whichever is earlier. In addition, a refuge manager always may re-evaluate the compatibility (sic) of a use at any time.

(h) For uses in existence on November 17, 2000 that were specifically authorized for a period longer than 10 years (such as rights-of-ways), our compatibility re-evaluation will examine compliance with the terms and conditions of the authorization, not the authorization itself. We will frequently monitor and review the activity to ensure that the permittee carries out all permit terms and conditions. However, the Service will request modifications to the terms and conditions of these permits from the permittee if the Service determines that such changes are necessary to ensure that the use remains compatible. After November 17, 2000 no uses will be permitted or re-authorized, for a period longer than 10 years, unless the terms and conditions for such long-term permits specifically allow for modifications to the terms and conditions, if necessary to ensure compatibility. We will make a new compatibility determination prior to extending or renewing such long-term uses at the expiration of the authorization. When we prepare a compatibility determination for re-authorization of an existing right-of-way, we will base our analysis on the existing conditions with the use in place, not from a pre-use perspective.<sup>68</sup>

These regulations, and the 1983 Agreement, could allow a considerable range of development on the KIC and ASRC lands, unless superseded or elaborated on by new statutory and regulatory leasing provisions. H.R. 6 provides that oil and gas leasing in the Refuge is compatible with the purposes of the Refuge and no further findings or decisions are required to implement this determination. The exact effect of this statutory finding on the scope of possible regulation under §22(g) is not clear.

**(5). Allotments.** Allotments, it will be recalled, are lands to which individuals have full or partial title. In most, if not all instances, the United States retained the oil and gas rights beneath allotments, but the surface is in non-federal ownership and can be developed. Allotments within the Refuge are not subject to the requirement of §22(g) of ANCSA that uses on Native lands chosen under that Act comply with the regulations of the Refuge.

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<sup>68</sup> 50 C.F.R. § 25.21 at 65 Fed. Reg. 62481-62482.

Therefore, the uses that an allottee might make of these lands or permit to be made of these lands could have significant impacts on the Refuge — if oil development were allowed, allotments could be used for staging areas, port development, or refuse storage. Therefore, the size and location of allotments is relevant to assessing the possible overall effects of oil development on the coastal plain and the Refuge. As noted above, some patented allotments are located on the coast and in the Sadlerochit Spring area. BLM advises that 9,797 allotment acres have been conveyed in the Refuge and another 1,720 acres have been approved.

Other statutes relating to the management of environmentally sensitive federal conservation units have provided for regulation of valid existing rights and inholdings. For example, the Wilderness Act authorizes mineral leasing under “such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased ....”<sup>69</sup> Congress also subjected existing mining rights in national parks to “such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.”<sup>70</sup>

H.R. 6 does not address individual allotments within the Refuge — e.g., by providing for regulated access and use, or for buying them out, etc.

**(6). Timing.** H.R. 6 would repeal the § 1003 prohibition against oil and gas development in the Refuge, thereby allowing such development, but does not place any time limitations on activities on Native lands leading to development or production, even though leasing regulations for the federal lands are not to be finalized for 15 months. As discussed above, the bill does not expressly address the 1983 Agreement and which of its provisions are expressly superseded. Therefore, it is not clear that ASRC must wait until the federal leasing regulations are completed before moving forward in accordance with the terms of the 1983 Agreement. It will be recalled that an exploratory well was already drilled on KIC lands and some oil companies could be ready to move forward immediately on the Native lands. Express provisions addressing this issue of timing could ensure a fair start under the same rules.

### III. Access, Rights of Way, and Exports.

Title XI of ANILCA provides for rights of way across federal conservation areas for transportation and utility systems. Section 30410(a) of H.R. 6 provides that Title XI of ANILCA “shall not apply to the issuance by the Secretary under section 28 of the Mineral Leasing Act ... of rights-of-way and easements across the Coastal Plain for the transportation of oil and gas.” Because the House bill also states that leasing is to be under the MLA, the intent appears to be that rights of way on the Coastal Plain be issued under the MLA.

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<sup>69</sup> 16 U.S.C. § 1133(d).

<sup>70</sup> 16 U.S.C. § 1902.

However, subsection (b) of § 30410 requires that terms and conditions on rights of way or easements to transport oil and gas ensure that such transportation does not result in a significant adverse effect on the fish and wildlife, subsistence resources, their habitat, and the environment of the Coastal Plain. Current 30 U.S.C. § 185(h), on rights of way under the MLA, requires that the Secretary impose stipulations on the right of way that are “designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), ....” This standard in current law appears to be more protective than that in the House language.

Subsection (s) of 30 U.S.C. § 185, allows the export of oil transported by pipeline through the Trans-Alaska Pipeline System (TAPS) unless the President determines that export is *not* in the national interest. It has generally been assumed that oil from ANWR would be piped over to the TAPS for transport south to the port of Valdez. If so, then the oil normally could be exported. However, § 30406(a)(8) of H.R. 6 would require that a lease prohibit the export of oil produced under it.

The rights of way language in H.R. 6 addresses only the transportation of oil and gas by pipeline. However, any use of the surface of the federal lands is a “right of way,” not just those uses for the transportation of oil and gas. The areas occupied by drilling pads or other oil development structures, for example, would require a right of way or easement, yet the bill does not address these other situations, and the MLA provisions on rights of way only address pipelines. As discussed in the first section of this report, ambiguities remain as to which agency would otherwise be the managing/permitting authority and with what scope of authority, hence it is not clear under the House bill which laws and regulations would pertain to non-pipeline rights of ways used in connection with leasing activities. Title XI of ANILCA provides a process for obtaining rights of way for transportation and utility systems in federal conservation areas in Alaska (which term includes refuges), and the Refuge Administration Act provides at 16 U.S.C. § 668dd(d)(1)(B) that the Secretary (acting through the FWS) may grant easements across or upon refuge lands. Whether this provision would come into play may depend on how the management division between BLM and FWS is interpreted.

H.R. 6 does not expressly address access to the Native inholdings in the Refuge. As discussed, there are individual allotments scattered in the Refuge that might be developed once the Refuge is open to oil and gas development. Under § 1110(b) of ANILCA, notwithstanding any other law, the Secretary is to grant access rights to the owner or occupier of inholdings in conservation system units.<sup>71</sup> The access rights are to be:

as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land .... Such rights shall be subject to

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<sup>71</sup> Under § 1323 of ANILCA, (16 U.S.C. § 3210), the Secretary of the Interior is to provide access to nonfederally owned land surrounded by national forests or public lands managed under the statute that usually governs BLM lands — the Federal Land Policy Management Act (FLPMA). However, because BLM would be administering leasing in the Refuge under the current bill proposals, rather than managing the Refuge lands under FLPMA, this ANILCA access provision appears not to apply.

reasonable regulations issued by the Secretary to protect the natural and other values of such lands.<sup>72</sup>

As noted, the Refuge Administration Act provides that the Secretary (acting through the FWS in that instance) may provide permit or grant easements across or upon areas within the Refuge System, but because of the “notwithstanding” language in the ANILCA access provision, arguably this statute would not apply to access easements.<sup>73</sup>

#### **IV. Compliance with NEPA.**

Some observers question whether the existing final legislative environmental impact statement (FLEIS), prepared in 1987 to comply with the National Environmental Policy Act (NEPA), is adequate to support development now, or whether an updated or new EIS should be prepared. A court in a declaratory judgment action in 1991<sup>74</sup> held that the DOI should have prepared a Supplemental Environmental Impact Statement (SEIS) at that time to encompass new information about the 1002 area in connection with the Department’s recommendation that Congress legislate to permit development. Therefore, it seems clear that either an SEIS or a new EIS would have to be prepared before development, unless Congress changes this requirement. H.R. 6 addresses the issue of the EIS and future application of NEPA.

Section 30403(c)(2) of H.R. 6 states that the Congress finds the 1987 EIS adequate to satisfy the legal and procedural requirements of [NEPA] with respect to the actions authorized to be taken by the Secretary of the Interior in developing and promulgating the regulations for the establishment of the leasing program, thereby eliminating the need to redo or update the EIS for the leasing regulations. Under § 30403(c)(3), the Secretary is directed to prepare an EIS with respect to actions other than the preparation of the regulations. This is noteworthy because only the smaller document, an environmental assessment, might normally be sufficient, depending on the magnitude of the action involved. The rest of that paragraph sets out limitations on the alternatives that the Secretary must consider as to *leasing*, as though this paragraph relates only to the leasing stage, rather than to all actions other than the development of regulations. The section goes on to say that the Secretary is to identify only a preferred action for leasing and a single alternative and analyze only those two choices, and to consider public comment only on the preferred alternative. Public comments must be submitted within 20 days of publication of the analysis. The analysis on the first lease sale is to be completed within 18 months of enactment. Compliance with paragraph (3) is stated as satisfying all requirements for consideration and analysis of environmental effects. However, paragraph (3) both

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<sup>72</sup> 16 U.S.C. § 3170(b).

<sup>73</sup> Congress has at times regulated access to inholdings in other conservation areas. For example, under 16 U.S.C. § 1134(b), access to inholdings in designated wilderness areas is allowed “by reasonable regulations consistent with the preservation of the area as wilderness, ... by means which have been or are customarily enjoyed with respect to other such areas similarly situated.”

<sup>74</sup> NRDC v. Lujan, 768 F. Supp. 870 (D.D.C. 1991)

directs the preparation of an EIS for all actions authorized by the act other than the development of coastal plain leasing regulations, yet also speaks as though it is only meant to address proposals for lease sales, so the intended import is not clear.

Section 30407(b)(1) of H.R. 6 requires a site-specific analysis to study the effects of any drilling or related activities, which analysis arguably must be an EIS under the § 30403(c)(3) requirement.

## **V. Judicial Review.**

H.R. 6 contemplates prompt action to put a leasing program in place. Toward that end, it expedites judicial review. Section 30408 requires that judicial review be sought within 90 days from the date of the action being challenged or the date the complainant knew or reasonably should have known of the grounds for the complaint. Section 30408(a)(1) requires filing in the appropriate district court, yet § 30408(a)(2) requires filing only in the U.S. Court of Appeals for the District of Columbia. The section also provides that actions of the Secretary that could have been reviewed under the section on judicial review may not be reviewed as part of a civil or criminal enforcement proceeding.

In addition, H.R. 6 also limits the scope of review by stating that review of a Secretarial decision to conduct a lease sale, including the environmental analysis thereof, shall be limited to whether the Secretary complied with the terms of the act and shall be based upon the administrative record of that decision. Furthermore, under §30408(a)(3), the Secretary's identification of a preferred course of leasing action and the Secretary's analysis of environmental effects is "presumed to be correct unless shown otherwise by clear and convincing evidence to the contrary." The requirement of clear and convincing evidence in this context differs from the usual standards for proof and may be confusing,<sup>75</sup> but appears to be intended to make overturning a decision difficult.

## **VI. Disposition of Leasing Revenues.**

Another issue that has arisen during debates over leasing in the ANWR is that of disposition of possible revenues — whether Congress may validly provide for a disposition of revenues other than the 90/10 percent split mentioned in the Alaska Statehood Act.

Under § 35 of the Mineral Leasing Act (MLA),<sup>76</sup> an act that applies to the leasing of oil and gas and certain other minerals from federal public lands, certain western states receive directly 50% of revenues. An additional 40% goes to those states indirectly through the construction and maintenance of irrigation projects under the Reclamation Act of 1902. These percentages previously were 37 ½% and 52 ½% respectively. Because the territory of Alaska did not benefit from the Reclamation Act, it initially received only a 37 ½% share of federal leasing revenues. Before

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<sup>75</sup> See Charles H. Koch, *ADMINISTRATIVE LAW AND PRACTICE*, § 10.8 (2d ed. 1997).

<sup>76</sup> Act of February 25, 1920, ch. 85, 41 Stat. 450, 30 U.S.C. §191.

enactment of the Alaska Statehood Act, Congress amended the MLA to provide that the territory of Alaska would receive an additional 52 ½% share, thereby putting Alaska on the same footing as the other states, receiving a total of 90% of revenues from leasing under the MLA.<sup>77</sup> Section 28(b) of the Alaska Statehood Act again amended the MLA to change the references from the territory of Alaska to State of Alaska.<sup>78</sup>

Section 317 of the Federal Land Policy Management Act of 1976 again amended the revenues section of MLA to direct payment of 90% to Alaska, rather than the separate percentages previously stated.<sup>79</sup> The committee report accompanying the 1976 change states, under a heading regarding changes to distribution of revenues from MLA operations, that the action was intended to clarify that Alaska was to continue to receive 90% of the mineral revenues taken in from lands in Alaska.<sup>80</sup>

Alaska has asserted that the 90% total referenced in the Statehood Act cannot be changed and must always be paid to the state because the Statehood Act is a compact between the prospective state and the federal government. Others assert that the Statehood Act provision was a technical one, meant to recognize that Alaska should receive a share comparable to that of other states sharing revenues *under the MLA*, but does not preclude the Congress from changing the MLA or at times making special provision for leasing certain areas under a different regimen.

Alaska sued in the U.S. Court of Federal Claims, asserting that because the United States had an obligation under the Statehood Act both to maximize mineral leasing in Alaska and to always pay a 90 % share of *gross* receipts to Alaska, the United States had either breached the contract established by the Statehood Act, or “taken” property of Alaska by withdrawing some lands in Alaska from leasing (notably ANWR), and by deducting administrative costs prior to the disbursement of the 90% revenues to the State. The court found that the Statehood Act and the previous statute providing the territory of Alaska with the same shares as the other states “simply plugged [Alaska] into the MLA, along with the other States.”<sup>81</sup> Therefore, Congress could amend the MLA, *e.g.*, to provide a different way of calculating receipts, and the changes would lawfully pertain to Alaska. Furthermore, the court concluded that the United States did not promise in the Statehood Act to make federal mineral lands productive of royalty revenues for the State, and that the

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<sup>77</sup> P.L. 85-88, 71 Stat. 282 (1957). 37 ½ % was to be spent for the construction and maintenance of public roads or for the support of public schools or other public educational institutions as the legislature of the territory may direct. The 52 ½ % was to be paid to the territory to be disposed of as the legislature directed.

<sup>78</sup> P.L. 85-508, 71 Stat. 339, 351.

<sup>79</sup> P.L. 94-579, 90 Stat. 2743, 2770-2771.

<sup>80</sup> H.R. Rep. No. 94-1724 at 62 (1976).

<sup>81</sup> *Alaska v. United States*, 35 Fed. Cl. 685, 701 (1996).

United States therefore retained discretion over leasing decisions.<sup>82</sup> Because of these findings, the court also granted the government’s motion for summary judgment on the takings claim. Although this case was in the context of the power of the United States to pay administrative costs before dividing MLA revenues with Alaska, arguably the same analysis of the provision in question would apply to a direct challenge to the authority of Congress to change the revenue shares under a particular statutory leasing regime as opposed to paying 90% as stated in the Statehood Act.

If the Statehood Act simply means that Alaska will be treated like other states under the MLA, the question may be asked whether Congress may legislate specially as to ANWR and prescribe different revenue-sharing provisions in that particular leasing context. Congress has directed a different split in the past with respect to leasing under particular statutes, e.g., the National Petroleum Reserves, in which situation all of the revenues go into the federal Treasury,<sup>83</sup> and the National Petroleum Reserve in Alaska, in which instance the revenue sharing is 50/50.<sup>84</sup> Therefore, arguably Congress has flexibility regarding revenue sharing in special legislation regarding oil and gas leasing in the Refuge. Absent new provisions, revenues might either be divided as currently provided under the MLA — if leasing in ANWR is under that statute — or go to the U.S. Treasury as miscellaneous receipts under 31 U.S.C. § 3302, or be divided in some other way Congress specifies. Issues may remain, however, because of the wording of the current bills.

H.R. 6 states in § 30403(a) that the leasing program is to be under the MLA. Therefore, it appears that the usual 90/10 split would pertain. However, § 30409 states that “[n]otwithstanding any other provision of law” 50% of revenues are to be paid to Alaska. Given that leasing is to be under the MLA, whether this language validly overrides the provisions in the Alaska Statehood Act is not clear. If not, and the language is stricken, the 90/10 split may pertain.

In addition, § 30412 would establish a new “Coastal Plain Local Government Impact Aid Assistance Fund” to ameliorate the impacts of leasing on the coastal plain. Money derived from bonuses, rentals, and royalty revenues received by the United States from the oil and gas leases and lease sales are to fund the Fund up to a total amount in the fund of not to exceed \$11,000,000. While the issue is not totally clear, arguably these funds are to come from the 50% share of the United States. Section 30410 provides that there are authorized to be appropriated from the Fund \$5,000,000 for each fiscal year.

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<sup>82</sup> *Id.*, at 706.

<sup>83</sup> 10 U.S.C. § 7433.

<sup>84</sup> P.L. 96-514, 94 Stat. 2964, 42 U.S.C. § 6508.