ANWR: The Legislative Quagmire Surrounding Stakeholder Control and Protection, and the Practical Consequences of Allowing Exploration

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ANWR: THE LEGISLATIVE QUAGMIRE SURROUNDING STAKEHOLDER CONTROL AND PROTECTION, AND THE PRACTICAL CONSEQUENCES OF ALLOWING EXPLORATION

Kristofer Pasquale*

Introduction

Along the freezing northern region of Alaska's coast lies approximately twenty million acres of land known as the Arctic National Wildlife Refuge, or better known by its acronym, ANWR. For the last thirty years, battles have raged between the state and the federal government, between environmentalists and oil companies, and between a variety of other stakeholders for control over the future of development of ANWR for oil exploration and production.¹ The ongoing, contentious debate on whether to explore and drill for oil in ANWR is at the forefront of national policy, concerning environmentalists and peaking oil industry interest still today.²

This comment explores the legislative history behind what has become ANWR, identifies possible stakeholders in the question of how ANWR should be treated, and analyzes the effect that exploration would have upon them. This comment also details the critical issues surrounding supply, economics, and the impact regarding the decision about whether to allow leasing and drilling in ANWR, particularly the Coastal Plain or the "1002 Area." Part I examines the legislative history surrounding the formation of ANWR and the legislation stemming from its creation. Part II considers the Native interests in ANWR from opposing perspectives; the Inupiat

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² Id.
Natives representing economic interests, and the Gwich'in Indians representing cultural and subsistence interests. Part III discusses Alaska’s great economic interest in controlling the future of ANWR and the State’s battle with the federal government for control of ANWR. Part IV briefly looks to the United States’ responsibility in honoring international treaties regarding potential impacts on migratory species if drilling is allowed. Part V explores the heart of the environmentalists’ concern regarding allowing development in ANWR, analyzing the impact development would have upon ANWR’s pristine ecosystems and its wildlife. Part VI considers the national interests surrounding ANWR, analyzing the truths behind the actual amount of recoverable oil and looking at proponents’ arguments for drilling. Part VII looks at the new developments in potential legislation during the 107th Congress and the steps it has taken thus far. Finally, this note ends by suggesting the best possible resolution based on current understanding of this issue.

Part I: Legislative History

Creation of the National Wildlife Refuge System

The National Wildlife Refuge System was unofficially created by President Theodore Roosevelt when he established the first Refuge in 1903— the Pelican Island Reserve in Florida. The original purpose of Pelican Island Reserve was to protect Florida’s dwindling bird population from further depletion, but this reserve would have significant impacts upon future legislation in the area of environmental protection, setting a standard for federal government interest in protecting the environment.

The official National Wildlife Refuge System stemmed from Roosevelt’s administration and began with the passage of the

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National Wildlife Refuge System Administration Act of 1966. This Act created administrative and managerial guidelines that required a refuge to meet an "original purpose" (a stated goal or purpose of the refuge) and for new refuges to be compatible with these stated purposes. Over thirty years later, Congress attempted to clarify this "compatibility standard" in the National Wildlife Refuge System Improvement Act of 1977. The 1977 Act identifies the System's mission as, "administer[ing] a national network of lands and waters for the conservation, management, and where appropriate, restor[ing]...the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." Today these National Wildlife Refuges are the only federal lands that are administered primarily with the goal of benefitting and protecting wildlife; they compromise over 520 individual units, and account for over ninety-three million acres of habitat.

ANILCA and the Creation of ANWR

ANWR’s history dates back to 1943, when President Franklin D. Roosevelt’s administration set aside 67,440,000 acres of land in Alaska’s North Slope for possible oil production for use in the war effort. The Arctic National Wildlife Range or "The Range" was officially created under President Dwight D. Eisenhower’s administration in 1960. Under President Eisenhower, Interior

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7 Id.
9 Sherman, supra note 6, at 217.
10 Public Land Order 82, 8 Fed. Reg. 1599 (1942).
Secretary Fred Seaton set aside nine million acres of the original 67,440,000 with the goal of "preserv[ing] the 'unique wildlife, wilderness and recreational values.'" The leftover acreage remained in its status as a "Range" while this nine million acres constituted a smaller subsection for increased protection under the same title.13 "The Range" continued under a limited level of federal protection (with the ability to be leased and explored) until the oil boom of the 1970's and the discovery of Prudhoe Bay's mineral wealth, raising industry interests in the area and giving Congress cause for concern regarding the "safety and status of federal land holdings in northern Alaska." With President Carter's support, Congress then took action in 1980 by passing the Alaska National Interest Lands Conservation Act (ANILCA).15 ANILCA's purpose was to provide more protection for areas designated as Ranges.16

14 Todd Grover, Arctic Equity?: The Supreme Court's Resolution of United States v. Alaska, 28 ENVTL. L. 1169, 1175 (1998) (the original 64 million acres was still available for exploration and the subset 9 million acres remained under this umbrella title. The concern was for the removed 9 million acres to refrain from exploration).
16 Eleanor A. Hunt, Drilling for Oil Underneath the Arctic's Coastal Plain: Proposal for Another Prudhoe Bay Environmental Disaster, 8 ENVTL. LAW. 189 (2001) ("It is the intent of Congress . . . to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, the wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered
ANILCA provides a basic "framework for managing subsistence uses, mining and timber harvesting, and oil leasing on lands of undeclared significance in Alaska."\(^{17}\)

After ratifying this legislation, Congress changed the status of ANWR as a "Range" to a "Wildlife Refuge," which allowed Congress to control mineral development and therefore provide greater federal protection.\(^{18}\) This change in status thus altered the title from its original Arctic National Wildlife Range, to Arctic National Wildlife Refuge. Congress also flexed its legislative muscle in the area of protection and designated some eight million acres of ANWR as Wilderness (Congressional action parallel to the President's authority to create a refuge) therefore prohibiting any possibility of oil exploration.\(^{19}\) At the same time, Congress also expanded ANWR's protected area from 9 million acres to include 19.8 million total acres, therefore extending their control over more valuable Alaskan land.\(^{20}\)

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arctic tundra, boreal forests, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities."); see also Alaska National Interest Lands Conservation Act, 16 U.S.C. § 301(b) (1994).


\(^{18}\) Todd Grover, Arctic Equity?: The Supreme Court's Resolution of United States v. Alaska, 28 ENVTL. L. 1169, 1175 (1998) (by altering the "Range" to a "Refuge" Congress comes closer to the original intent of conservation noted by Secretary Seaton in 1960 because Congress has the ability to prohibit mineral development in these Wildlife areas).


Protection of the "1002" Area and NEPA

After the passage of ANILCA and the designation of the former "Range" as a "Wilderness," Congress withheld for study and assessment some 1.5 million acres from the total 19.8 million acres of ANWR under Section 1002 ("1002 Area," "the Area," or "Coastal Plain") of the Act. This 1002 Area was to provide the government with:

Assessment[s] of the fish and wildlife resources of the coastal plain of the Arctic National Wildlife Refuge; an analysis of the impacts of oil and gas exploration, development and production, and...authorize exploratory activity within the coastal plain in a manner that avoids significant adverse effects on the fish and wildlife and other resources.

The 1002 Area is approximately 100 miles long and from 16 to 34 miles wide; almost 99% of the 1002 Area is classified as wetlands, and a layer of organic living vegetation that is habitat for many ecosystems covers much of the 1002 Area. Within the 1002 Area, there are four sections that have been identified as "areas with special characteristics," or areas with varying terrain, and fragile ecosystems, and the Area has been recognized as "warranting special attention." These were considerations in sectioning off the 1002 Area for greater federal control.

The federal government refrained from opening the 1002 Area to exploration and decided to utilize Section 1002 as a study area to

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22 N.K. Clough et al., supra note 19, at 105.
24 Id. at 50.
25 Id. at 50-51.
26 Id. at 51.
become informed about what steps should be taken in regards with exploration and development.\textsuperscript{27} Because it is situated between massive oil producing fields in Canada and the United States and therefore has the potential for successful oil exploration, the "1002 Area" was set aside for a decision about development to be made at a later date.\textsuperscript{28}

Section 1002 was set aside for study through two important mechanisms: first, through an assessment mechanism that requires an Environmental Impact Statement (EIS)\textsuperscript{29} before any decision be made on any proposed exploration; and second, through an enforcement mechanism in Section 1003 that expressly prohibits any leasing or exploration of the "1002 Area" without an Act of Congress.\textsuperscript{30} An EIS is required for federal actions or for private actions that are then approved by federal agencies which may "significantly affect [sic] the quality of the human environment,"\textsuperscript{31} under the National Environmental Policy Act (NEPA).\textsuperscript{32} The United States Circuit Court for the District of Columbia has interpreted NEPA's EIS requirement as fulfilling the important purposes of carefully considering detailed information, and making information available to audiences for

\begin{thebibliography}{99}
\bibitem{27} See Samantha K. Sherman, \textit{Information is Alaska's Greatest Untapped Resource}, 8 ENVTL. LAW. 215, 218 (2001) ("[T]he Senate - - caught between its interest in potential oil and gas resources in that area of ANWR and its concern about uncertain and conflicting information regarding the environmental risks of development - - the plain represented a difficult choice: it could designate that land as Wilderness, or it could reject that title and open the land to oil and gas extraction and development. Torn between the two options, Congress ultimately postponed making any final decision about the plain until further study.").
\end{thebibliography}
input. The actual implementation of NEPA regulations continually require a duty to update EIS reports when new information is available that concerns the environment in connection with the action proposal. Congressional action in the 1002 Area stemmed from both a Report to Congress and a legislative EIS that were published jointly by the Department of the Interior in 1987, constituting its Final Legislative Environmental Impact Statement (Final LEIS).

The Final LEIS, now 15 years old, is outdated and inaccurate. Newer, more relevant information is available concerning the environment and possible development strategies. The United States Circuit Court for the District of Columbia suggests in *Natural Resources Defense Council v. Lujan* that Congress must consider a supplemental EIS that would satisfy ANILCA requirements before any federal action could allow development in ANWR. In addition, the original Final LEIS was itself inadequate when issued. Fundamentally, the Department of the Interior has not updated the original 1987 Final LEIS or provided a supplemental NEPA EIS incorporating any new information about ANWR or provided any alternative proposals incorporating such information. After *Lujan,

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33 Natural Res. Def. Council, Inc. v. Lujan, 768 F. Supp. 870, 880 (D.D.C. 1991); see also Samantha K. Sherman, *Information is Alaska’s Greatest Untapped Resource*, 8 ENVTL. LAW. 215, 218 (2001) ("It ensures that the agency, in reaching its decision [whether to go forward with the project], will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.").


36 Grant, *supra* note 28, at 55.


38 Id. at 889.

potential plaintiffs could have standing for a NEPA challenge of the original 1987 LEIS.\textsuperscript{40} In general, the Final LEIS cannot be considered to be adequate after such a long period of time and with an abundance of new information surrounding the environmental affects of development in ANWR.\textsuperscript{41}

\textbf{Part II: Native Interests in Prudhoe Bay and Comparison with ANWR}

One of the main stakeholders in any exploration or possible development opportunities and subsequent consequences will be the Native populations that inhabit the northern regions of Alaska. The two main Native groups that will be reviewed here are the Gwich’in Indians and the Inupiat Natives because they represent opposite results from the experience in Prudhoe Bay’s oil production and the possible impact that exploration and development in ANWR may have. The Inupiat Natives have benefitted economically from their participation in the oil industry, but the Gwich’in Indians have seen no benefits and are likely to lose their land, their subsistence, and their culture if the oil industry prevails in exploration and production in the 1002 Area.

In 1968, Prudhoe Bay, Alaska was found to hold some approximately 10 billion barrels of oil.\textsuperscript{42} This discovery spurred oil companies like Atlantic-Richfield Company (ARCO) and British

\textsuperscript{40} Sherman, \textit{supra} note 33, at 220 (in Natural Res. Def. Council, Inc. v. Lujan, “[t]he U.S. Court of Appeals for the District of Columbia Circuit held that because ‘NEPA clearly contemplates that the public should have an opportunity to challenge the adequacy of environmental impact statements,’ the Court conclude[d] that plaintiffs have standing to challenge . . . [such reports].”).


\textsuperscript{42} Matthew W. Bornstein, \textit{The Economics of Mixed Blessings}, 8 ENVT. LAW. 215, 242 (2001).
Petroleum (BP) to quickly buy out land leases from the state of Alaska in 1969.\textsuperscript{43} With the land leases intact, and drilling production ready to begin, the companies worried that unsettled titles to these lands between the Alaska Federation of Natives (AFN), the State of Alaska, and the federal government might put their drilling operations in jeopardy.\textsuperscript{44} The oil companies wanted to end this debate and begin their operations under recognized absolute title to their leases and lobbied Congress for a prompt settlement of the title claims with those interested parties.\textsuperscript{45}

\textbf{ANC\textit{SA}}

\textbf{Passage of ANCSA}

In response to oil company lobbying to resolve the unsettled land titles, Congress passed the Alaska Native Claims Settlement Act of 1971\textsuperscript{46} which "extinguished native aboriginal rights to land in Alaska in exchange for a cash settlement of $963 million and fee title to 44 million acres of land."\textsuperscript{47} The Act created twelve Native Alaskan regional corporations and various smaller village corporations.\textsuperscript{48} The surface rights to these regional lands were to be controlled by the village corporations while the subsurface rights were to be controlled by the regional corporations.\textsuperscript{49} The Inupiat Natives fell under the guidelines of ANCSA provisions, and were entitled to leasing

\begin{footnotes}
\item[43] \textit{Id.} at 242-243.
\item[44] \textit{Id.} at 243.
\item[45] \textit{Id.} ("In September, 1970, Frank Richwood, the president of British Petroleum's Alaskan subsidiary, sent a letter to the House Interior Committee demanding claims 'be speedily resolved in a manner that is fair and equitable to the Natives, to the state of Alaska and to the U.S.'").
\item[48] 43 U.S.C. §§ 1606-1607.
\item[49] Chase, \textit{supra} note 47, at 48.
\end{footnotes}
revenues from mineral development. However, Gwich'in Native rights were governed by a pre-existing treaty that previously established their rights to certain lands and the group did not to participate in the Act’s settlement provisions. Therefore, the Gwich'in Natives retained rights to 1.8 million acres of land, but they had no revenue rights from leasing as would the Inupiats under the Terms of ANCSA; in addition, they stand to lose their subsistence and cultural basis if development of ANWR is allowed.

Terms of ANCSA

Basically, ANCSA was both a land settlement program, under which Native Alaskans received ownership to 40 million acres in fee simple absolute in exchange for their total relinquishment of any future claims, and a monetary compensation scheme. In the land settlement part of the program, as long as Native claims did not infringe on the claims of the federal government, state government, land the state previously leased, or pre-existing private claims, the Natives were given the opportunity to choose the lands they wanted. In effect, these restrictions provided that all land known or thought to have oil remained entirely within control of the federal government, Alaska, or leasees like ARCO and BP.

Anthony R. Chase, Imminent Threat to America’s Last Great Wilderness, 70 DENV. U. L. REV. 43, 48 (1992) (“The Gwich’in’s subsistence culture is rooted in 10,000 years tradition. In the tight organized societal structure of subsistence every member of the community plays a vital role in the mutual survival of the group. The Gwich’in fear that if their chief survival resource disappears, the entire social structure will erode.”).
Bornstein, supra note 53, at 244; see also Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1994).
Bornstein, supra note 53, at 244.
Native Alaskans were also awarded $962 million in the monetary part of the program. This money came as a $462 million direct payment from congress, and approximately $500 million as a two-percent share of profits from revenues of natural resources recovered due to drilling in Prudhoe Bay. After payment of this $962 million, all compensation to Natives in the settlement agreement ceased. The money is distributed and managed through the Alaska Native Fund (ANF) to the Regional Corporations, which take half and use them to fund community projects, and then distribute the remainder to the Village Corporations under each Regional Corporation. Because individual natives are a member of a corporate tribe, each native individual can enroll to acquire shares and thus hold stock in both the Regional and the Village Corporations. This acquisition of shares gives each individual a yearly dividend of approximately $600.

ASRC: Benefits and Limitations
The Inupiat Natives have benefitted the most from Prudhoe Bay oil production. The Inupiat formed the Arctic Slope Regional Corporation (ASRC), which holds the subsurface rights outside the 1002 Area. ASRC received their choice of land with no oil revenue possibilities after the settlement and received a distribution of $22.5 million from the Act’s funds. ASRC has profited by providing services to oil companies operating in Prudhoe Bay. These services include: building refineries for crude oil processing, building roads, and creating other construction jobs continually necessary for

56 Id.
57 Id.
58 Id. at 244-245.
60 Id.
62 Bornstein, *supra* note 59, at 245.
production. As a result of ASRC's resourcefulness, it is a major producer of revenue and employment in Alaska, creating some $661 million for Alaska and producing some 5,900 jobs for Natives throughout the region.

While ASRC has benefitted Natives in some respects, there are limitations and pitfalls in the structure and existence of ASRC as well. One example is that many of the 5,900 jobs created by ASRC for Inupiat Natives are only summer jobs and do not provide income during the winter. As a consequence of this non-permanent employment, Inupiats often rely completely on their savings and ASRC dividend checks (approximately $600 a year; most of the money is reallocated by the Regional Corporations into community projects).

Outside of the fact that most jobs are seasonal employment opportunities, the jobs are also mainly available to those immediately surrounding the oil activity itself, meaning that they are limited in scope geographically. The reality is that Inupiats must travel great distances from their villages to work for the oil industry and, "although some Native Alaskans have been willing to live hundreds of miles from home, others are unwilling to leave their families for several months." The farther from Prudhoe Bay one looks, the less likely that Inupiats will be involved in the oil industry and the higher the unemployment rate.

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63 Id.
64 Id.
66 Id. at 246.
67 Id.
68 Id. (An example of the lack of employment opportunities is the village of Wainwright, where only two Inupiat residents worked in the oil industry in 1990, and the village of Kaktovik, where resident Inupiat have a thirty percent unemployment rate).
Inupiat Opportunities Should Congress Allow Drilling in ANWR

The Prudhoe Bay experience suggests that, for Inupiats who live near ANWR, the relationship of ASRC to local oil companies and their hiring process will be somewhat beneficial to the Inupiat’s employment opportunities.\(^6\) As noted above, residents living west from the 1002 Area (Alaska’s Coastal Plain) would be less inclined to leave their families for months to obtain employment; therefore those most likely to obtain a benefit from the decision to allow drilling in ANWR would be those villages in the 1002 Area.\(^7\) Outside these areas employment opportunities would be scarce.\(^7\)

Inupiat ASRC members will obtain modest financial benefits through leasing revenues should ANWR be opened to drilling.\(^7\) Dividends will continue to grow for member shareholders but will create only limited job opportunities.\(^7\) Because dividends are distributed equally in the end, "[d]rilling in ANWR will create modest prosperity for some Inupiats, but few benefits through job opportunities for most."\(^7\) While all will receive some money because of their shareholding, few will receive any permanent benefits from the acquisition of jobs.

Gwich’in Opportunities Should Congress Allow Drilling in ANWR

Because the Gwich’in Natives had land rights under a pre-existing treaty, they opted out of the settlement agreement ANCSA created; this decision would keep them from benefitting from

\(^6\) Id.
\(^7\) Id. (The ASRC village, and Kaktovik are the major villages that would be considered in the 1002 Area).
\(^7\) Matthew W. Bornstein, The Economics of Mixed Blessings, 8 ENVTL. L. 215, 246 (2001).
economic opportunities that might arise from a decision to open ANWR for drilling.

Benefits received in the form of jobs are mainly based on participation in ASRC, and subsequently through ASRC's "preferential hiring practices." These preferential hiring practices give employment priority for ASRC members over other candidates and because the Gwich'in are not members of ASRC, they receive no preferential hiring status. These practices mainly benefit the Inupiat because of their status as ASRC members and because they are situated nearer to the current oil production facilities. The Gwich'in would be unable to participate because they are relatively isolated in the ASRC Village and have minimal experience in oil industry jobs, therefore it is less likely they would be qualified for employment over other, more experienced, and "preferred" ASRC Inupiat workers.

Furthermore, Gwich'in would not receive any dividend benefits from oil drilling. Because the Gwich'in opted out of the settlement agreement set forth in ANCSA, they also forfeited any right to future dividends that might be payable as part of that agreement. Finally, the only benefits the Gwich'in would find would be a small increase in job opportunities for those with prior work experience in the oil industry who live near these work sites. Outside this small benefit to a few Gwich'in, there are no positive gains to be achieved from their perspective. While it is not important to note all those groups who will not benefit from drilling in ANWR, the Gwich'in economic situation is just another example of the stark contrast to that of the Inupiat in the comparison between the two groups.

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73 Id. at 247.
76 Id.
Creation of NSB and Forecast for Opportunities in ANWR

After originally working with the Natives for a quick settlement, the oil companies’ and the Native’s mutual satisfaction over their economic relationship soon deteriorated because the Inupiats pushed for more economic gain.\(^79\)

To maximize their economic benefits in oil industry invasion into the North Slope, the Inupiat formed the North Slope Borough (NSB), a municipal unit with the right and authority to tax.\(^80\) The oil companies challenged the authority of the NSB in State court to create and impose tax obligations but lost as NSB was found to be a political unit with the authority to tax.\(^81\)

However, the oil companies efforts to limit NSB’s tax authority, or completely dismember it as a political unit, did give the oil companies a small victory; in 1972 Alaska implemented a tax ceiling upon NSB and defined how these taxes would be imposed.\(^82\) After years of battling the oil companies over NSB’s authority to exceed this tax cap, in 1976 Alaska found that NSB could exceed this tax ceiling.

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\(^{79}\) Id. at 248.

\(^{80}\) Id. at 249.

\(^{81}\) Mobil Oil Corp. v. Local Boundary Comm’n, 518 P.2d 92 (Alaska 1974) (the oil companies asserted that Alaska’s Local Boundary Commission had illegally created the North Slope Borough by ignoring the Alaska Legislature’s guidelines. The court found that the Commission had not abused its discretion and NSB was a valid political unit).

\(^{82}\) Bornstein, supra note 78, at 249-250 (Alaska law provides two means of limiting taxes under statute: “(b) A municipality may levy and collect a tax on the full and true amount of taxable property under AS 43.56 as valued by the Dept. of Revenue at a rate not to exceed that which produces an amount of revenue from the total municipal property tax equivalent to $1500 a year for each person residing within its boundaries. . . and . . . (c) [a] municipality may levy and collect a tax on the full and true value of that portion of that taxable property under AS 43.56 as assessed by the Dept. of Revenue which, when combined with the value of property otherwise taxable by the municipality, does not exceed the product of 225 percent of the average per capita assessed full and true value of property in the state multiplied by the number of residents of the taxing municipality.”); see ALASKA STAT. § 29.45.080 (b)-(c) (Michie 2000).
when using these tax revenues to pay debt services on bonds. Since this time, NSB has maintained the authority to tax Prudhoe Bay operations. The relationship this has to drilling in ANWR is that the NSB believes that the Prudhoe Bay operations have set precedent for them to continue their taxing scheme in ANWR as well; this may not be the case though, as ANWR is currently federally controlled and the state has no power over this land.

The result of NSB’s ability to tax has been great benefits and monetary profits for Inupiats. By the end of the 1970’s approximately two-thirds of NSB revenues originated from these taxes, accounting for nearly fifty million dollars yearly. NSB uses these profits by implementing Capital Improvement Projects (CIPs). From 1980 - 1985, NSB used $138.4 million in tax revenues to provide services in the community such as health facilities, firehouses, roads, schools, drainage systems, and houses. As well as monetary benefits that are transformed into CIP benefits for the community, these CIPs have created a great number of highly paid jobs for NSB residents, i.e., in the early 1980’s 159 full time jobs could be found in a village of 506 people, 31 part time jobs were available, and 120 jobs were created by NSB projects.

However, the improvements the ability to tax created have ultimately resulted in a community weakness: NSB is entirely dependent upon the oil industry for its economy; thus the municipality has been unable to form an economy that will provide for NSB residents independent of the oil industry. NSB’s profits are very sensitive to changes in oil prices, and since most of their profits are

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85 Id.
86 Id.
87 Id.
88 Id. at 250-251.
89 Id. at 251.
used to create CIPs, many of these projects are created or cancelled depending upon economic fluctuations.90

The forecast for taxing ANWR is, however, bleak. The benefits NSB has derived from the Prudhoe Bay might not continue with development in ANWR and Inupiats will suffer the same Gwich'in losses by being unable to recover any financial benefit from oil operations.91 Inupiats will suffer the same losses because there is currently no language in potential legislation that would grant NSB any authority to tax or receive monetary benefits from opening ANWR.92 The Native financial interests in opening ANWR are thus limited to jobs/revenues created through ASRC membership because it seems unlikely that NSB will have any taxing authority over ANWR development. The Native's stand on drilling thus relates to their perceived opportunities stemming from drilling. The Inupiats believe that drilling will bring them increased economic advantages and jobs, therefore they support drilling, and the Gwich'in perceive great consequences to their culture with relatively no opportunities, therefore they oppose drilling.

Part III: Alaska's Interest in ANWR

The state of Alaska has a significant interest in the decision to open ANWR for oil exploration and subsequent production:

Matthew W. Bornstein, *The Economics of Mixed Blessings*, 8 ENVTL. LAW. 215, 251 (2001) ("...in the mid-1980s, oil prices slumped, causing the cancellation of many CIP projects. The dip eliminated about ten percent of Wainwright's full-time jobs.").

91 *Id.* at 252.

92 *Id.* at 252-253 ("On August 1, 2001, the House passed the Arctic Coastal Plain Domestic Energy Security Act of 2001 ... [t]he bill is silent in reference to Native Alaskans ... it makes no mention of allowing NSB to tax the production of oil or of creating a revenue-sharing program with Native Alaskans. Without an explicit provision allowing taxation, NSB cannot tax the federal leases or the production of oil on federal land. No such revenue-sharing provision is included in the bill."); see also *Arctic Coastal Plain Domestic Energy Security Act of 2001, H.R. 39, 107th Cong.* (2001).
economics. Alaska has no income tax, and is highly dependent upon oil production royalties from current Prudhoe Bay operations for revenue and its budget. Oil is the driving force behind the state’s economy and accounts for three-quarters of the budget per year. These revenues prevent state citizens from having to pay a state income or sales tax and also provide to citizens a yearly dividend, which in year 2000 was a $1,963.86 payment.

The state’s interest is not with the environmental protection of the ecosystems, the preservation of the wildlife, or the conservation of what mineral resources lie beneath the surface, but with the economic benefits that oil production will bring to Alaska. Oil industry proponents believe that Alaska’s extreme climate, high living expenses, health care costs, and transportation costs justify Alaska’s dependence upon the oil industry. Despite Alaska’s dependency upon oil production for revenue, Alaska still receives the highest amount of federal money, lending to its reputation as "the last great welfare state." Opening ANWR to drilling would give Alaska a potential $2.5 billion annual benefit in royalties alone, with further benefits from resource sales of gravel and water to the oil industry and road construction. These interests further fuel the State’s desire to open ANWR. The state proponents (Representative Don Young, Senator’s Frank Murkowski and Ted Stevens, Governor Tony

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95 Id.
96 Id.
97 Id.
98 Id.
99 Id. ("However, this is far from certain: although the current statutory regime calls for Alaska to receive to ninety percent of certain revenues, many supporters of development are calling for an even split with the federal government, and a federal court has indicated Congress has the right to alter the percentage."); see also Alaska v. United States, 35 Fed. Cl. 685 (Fed. Cl. 1996), aff’d, 119 F.3d 16 (Fed. Cir. 1997).
Knowles, and a vast majority of the state legislature) base their argument simply on the grounds that opening ANWR for production will create a mass influx of jobs, bolstering the state economy. Because of its dependence upon oil revenue, Alaska has a great interest in maintaining its control over the economic benefits of any future developments in oil production within the state; the environmentalist voice is not great enough in Alaska to counteract the dependency upon oil revenue.

Alaska v. United States and Revenue Consequences

Alaska currently receives ninety-percent of all oil lease revenues, and would like to continue this incentive if production begins in ANWR. In Alaska v. United States, however, the Federal Claims Court held that the Alaska Statehood Act included neither a promise on the part of the federal government to pay the state ninety percent of gross mineral leasing revenues from federal mineral leases in perpetuity, nor an implied promise to make federal mineral lands productive of state royalty revenues. The State argued that statements made by former Interior Secretary Fred Seaton in 1958 that, "[since] early this year the Territory has received 90 percent of all oil lease revenues; the State of Alaska will continue to do so," was binding in law. The court held that to be enforceable, an obligation of the federal government to the state must be in writing, subsequently adopted by Congress and ratified by the State of

100 Eleanor A. Hunt, Drilling for Oil Underneath the Arctic’s Coastal Plain: Proposal for Another Prudhoe Bay Environmental Disaster, 8 ENVTL. LAW. 189, 207-208 (2001) (“Wharton Econometrics Forecasting Associates (WEFA) conducted an economic analysis, finding that as many 736,000 jobs would be created if oil development in ANWR occurred ... The probable types of employment include, manufacturing (128,000); mining, including oil (84,000); trade (225,000); services (145,000); construction (135,000); and finance, insurance real estate (19,000) jobs.”).


102 Id.
The court concluded that Alaska relied too heavily upon the Secretary’s words that carried very little permanent weight. The end result of *Alaska v. United States* is the probability that Alaska will not have as large a right to revenues in ANWR as it did in Prudhoe Bay should drilling be allowed; almost certainly not at its current ninety-percent share status.

*United States v. Alaska and Word Interpretation in the Alaska Statehood Act*

In July of 1958, Congress passed the Alaska Statehood Act. Within this act were two subsections of great importance in a future battle that would rage between federal and state control of the 1002 Area (Coastal Area) of ANWR: Sections 6(e) and 6(m) of the Alaska Statehood Act.

Section 6(e) gave Alaska all property "previously used by the federal government ‘for the sole purpose of conservation and protection’ of the territory’s fish and wildlife." This seemingly broad grant over lands that would have included ANWR was limited in Section 6(e)’s reservation clause, which reserved for the federal

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103 Id.
104 Id.
government all "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."108

Section 6(m) applied the Submerged Land Act of 1953 to Alaska.109 The Act gave Alaska rights to submerged lands within three miles of the state's northern coast.110 However, section 6(m) also included a reservation provision similar to that of section 6(e) that reserved all lands for the federal government that were "expressly retained" by the government.111 The importance of these clauses became apparent when Interior Secretary Fred Seaton, upon the establishment of ANWR, made formal withdrawal of these lands in 1960.112 This withdrawal suggested that these lands were, in fact, subject for withdrawal by the government, therefore upon passage of the Alaska Statehood Act, the government had already reserved these lands.113

Federal control over ANWR has continued since this withdrawal and management has successfully furthered the government's goals to preserve the unique wildlife, wilderness, and recreational values.114 The fact that the federal government controls ANWR is important because it means any decision to drill in ANWR would be

108 Alaska Statehood Act of 1958, Pub. L. No. 85-805, 72 Stat. 339, 340-341 (1958) (section 6(e) provides that: "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency . . . [p]rovided, [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith.").
109 Grover, supra note 106, at 1174.
110 Id.
111 Id. ("When read together, these provisions transferred all coastal submerged lands to the State, yet reserved any lands that the federal government had previously and expressly retained.").
113 Id.
114 Id.
a national decision rather than a state decision, suggesting that "[t]he Supreme Court was undoubtedly aware of this fact when it rendered its decision in United States v. Alaska."

United States v. Alaska maintained that the federal government retained control of ANWR and the submerged lands in question. Writing for the majority, Justice O'Connor differentiated, "withdrawn" from "otherwise set apart," as meaning two separate things to avoid redundancy in language. Justice O'Connor interpreted "otherwise set apart" not to mean that there must have been a refuge at time of the Alaska Statehood Act, but that there was in process a means of setting apart these lands. Because of the ambiguity in the language "withdrawn or otherwise set apart," the Court used a general canon of statutory construction, "construing ambiguous public land grants in favor of the federal grantor." The Court utilizes this canon to protect an overriding national interest, such as "maintaining public lands from particular grantees who seek additional rights beyond what was expressly granted." Because the State of Alaska here was openly expressing its intent to develop oil and gas operations in ANWR, the Court was more sympathetic to the federal government's interests in protecting the wildlife and wilderness as it has since 1960.

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115 Id. at 1177.
116 United States v. Alaska, 521 U.S. 1, 30 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (citations omitted).
117 Id. at 30 (The Court disagreed that the federal government would retain lands only if the wildlife or reservation existed at the passage of statehood. The Court reads Congress' intent as providing no limitation in §6(e) only to completed reservations, but to those areas that were also otherwise set apart as refuges for the protection of wildlife. "Accordingly, the application and regulation, taken together, placed the Range squarely within the proviso of §6(e), preventing a transfer of lands covered by the application to Alaska.").
119 Id.
120 Id. at 1181-1182.
Part IV: International Interests in ANWR

One of the more overlooked interests considered in whether or not to subject ANWR to oil development are international treaty obligations. United States international treaty obligations are one of the purposes behind creating ANWR, and another purpose was unambiguously identified in ANILCA through "fulfill[ing] international treaty obligations of the United States with respect to fish and wildlife and their habitats."\(^{121}\)

The Final LEIS submitted by the Secretary of the Interior in April, 1987, indicates that ANWR must be managed to fulfill all international treaty obligations of the United States with respect to fish, wildlife, and their habitats.\(^{122}\) Despite this clear obligation, the Secretary still recommended passing legislation to open ANWR's entire coastal plain basing his decision solely on the Final LEIS report and ignoring treaty obligations.\(^{123}\) Moreover, although the Final LEIS notes seven distinct treaties relating to fish and wildlife that use the ANWR coastal plain, it does not discuss the obligations such treaties would place on the United States, much less how these obligations and oil exploration could be met simultaneously.\(^{124}\) In recommending that ANWR be opened, the Secretary never even acknowledged the prior existence of such international agreements.\(^{125}\)

Treaties ratified through the advice and consent of the Senate are entered into by the President and have the same effect as an act of

\(^{123}\) Id.
\(^{124}\) Id. at 5.
\(^{125}\) Id.
It is important to note that breaching a treaty would, in all likelihood, not prevent any leasing and development strategies, but it may result in damages being paid to those countries showing harm. However, violating an international treaty is not considered a light matter and will not be inferred or recognized without express congressional intent. Therefore, Congress could make the decision to act through legislation that authorizes oil development, essentially voiding international obligations, and the Secretary would be relieved of any duty to both explore for oil and simultaneously protect international obligations. The United States, however, would still be liable for damages under any such violated treaties.

One of the largest groups of treaties at issue involves migratory birds and their habitat. The United States has entered into

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126 Id. at 6 (“If a treaty and an act of Congress are in conflict on an issue, then the most recently enacted is the valid authority and the earlier one is to be disregarded.”).


129 Id.

130 Id. at 7.
treaties with Japan,\textsuperscript{131} Mexico,\textsuperscript{132} and Canada\textsuperscript{133} regarding migratory birds. There are currently 135 species of birds that use ANWR’s coastal plain and these treaties protect 130 of them.\textsuperscript{134}

The Canada and Mexico treaties have no commitment to bird habitat protection and the Japan treaty only requires that the parties look to establish areas that will protect or manage these migratory birds.\textsuperscript{135} Opening ANWR to development would detrimentally impact the coastal plain habitat used by the birds protected under these international treaties because it affects the migratory patterns and feeding patterns of the birds themselves.\textsuperscript{136} This impact would subsequently affect the decision to develop in this area economically.


\textsuperscript{132} Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 1311; see also James Walker, \textit{Oil Development in the Arctic National Wildlife Refuge and its Impact on United States International Wildlife Commitments}, 4 \textit{INT'L LEGAL PERSP.} Fall 1992, at 8 n. 41 (“This treaty protects only birds that migrate between Mexico and the United States. It lists 31 protected families of birds. Members of 12 of these families (represented by 71 species) use the coastal plain of ANWR, however, it is not clear how many of these birds migrate to Mexico.”).


\textsuperscript{134} Walker, \textit{supra} note 133, at 9.

\textsuperscript{135} \textit{Id.} at 10.

\textsuperscript{136} \textit{Id.} at 11-13 (Walker uses Snow Geese as a prime example of how the treaty violation would affect these migratory birds: “Snow geese do not use the coastal plain of ANWR for nesting or during their spring migration north. However, up the 325,000 snow geese use the coastal plain for staging each year prior to their fall migration south. Staging is the process where the birds rest and feed so as to accumulate sufficient body fat to fly non-stop the 1,300 miles to the next staging area normally used. Failure of the geese to accumulate sufficient body fat results in increased mortality during migration. According to the U.S. Department of the Interior, opening the ANWR coastal plain for development of oil would result in direct loss of up to 47% of the snow geese grazing habitat in the coastal plain.”).
because of the substantial cost of international negotiations and required restitution damages.137

In addition to the treaties covering migratory birds, The United States is also a participant to a treaty protecting polar bears.138 This treaty was enacted in response to the decline in polar bear population in their traditional ranges in northern regions and because their chances of survival are limited due to their low birth rates.139 Again, the Final LEIS created by the Secretary of the Interior in 1987 recognized that this treaty existed, but took no additional steps to address any obligations or involvement in the Final LEIS.140 Because there would be a noted impact upon the polar bears in this region (the Northern Alaska sub-group) and because there are feasible options to avoid such adverse impacts, any development would be considered a material breach of treaty obligations.141

Finally, although the United States is not a party to any treaty protecting the Porcupine Caribou Herd (PCH), there is a current executive agreement142 between Canada and the United States with the goal of conserving the herd and protecting subsistence dependent Natives, "by minimizing long-term adverse impacts to the herd and its habitat so that opportunity for subsistence use of this resource by

137 Id. at 16.
138 Agreement on the Conservation of Polar Bears, Nov. 15, 1973, U.S.-Nor., 27 U.S.T. 3918 (The United States is party along with Canada, Denmark, and Norway).
140 Id. at 16-17.
141 Id. at 18 (“The population of this sub-group has been very stable at about 2,500-3,000, with mortality rates and birth rates being identical.” The fact that this group is at zero population growth and that any development would adversely affect the bears would be crucial in considering such a breach to be material and significant by other parties).
Canadian Native and rural Alaskans remains available. The executive agreement requires both Canada and the United States to, "take appropriate action to conserve the [PCH] and its habitat." Simply because there is no legally binding treaty protecting the PCH does not mean that this executive agreement can be ignored outright; in fact ANILCA states that, "the [PCH] has been acknowledged to be a significant international resource and thus the United States has an obligation under international customary law to protect this herd."

In considering whether to open ANWR to oil exploration and production, it is necessary to consider the cost of breaching these international obligations under the various migratory bird treaties, the polar bear treaties, and the executive agreement regarding care of the PCH and their habitat. Without considering these obligations, the decision whether to open ANWR is biased because:

> It fails to consider the political cost to the United States of blatantly violating a number of international obligations ... [which may] have an adverse impact on national security, but more importantly it would adversely impact the United States' ability to convince other countries to protect common resources. This could lead to environmental degradation, which in the long run may be the greatest threat to national security the United States faces.

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143 Walker, supra note 140, at 11.
144 Executive Agreement, supra note 139, at Art. III (3)(a).
145 Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, §306(a), 94 Stat. 2371 (1980); see also James Walker, Oil Development in the Arctic National Wildlife Refuge and its Impact on United States International Wildlife Commitments, 4 INT'L LEGAL PERSP. Fall 1992, at 12 (“The source of this customary international law appears to go back to the beginning of Christian civilization and the need of emerging nations to minimize conflicts. The obligation of a nation to not abuse natural resources to the detriment of others is a basic part of the English common law of torts, which both the United States and Canada have adopted. This obligation is recognized as a 'general principle of law' enforced under Article 38(1)(d) of the Statute of the International Court of Justice which both the United States and Canada are parties to.”).
146 Walker, supra note 146, at 15.
Part V: Wildlife Interests in ANWR

New Report

On March 28th, 2002, the U.S. Department of the Interior reported to Congress in a seventy-eight page report titled, "Arctic Refuge Coastal Plain Terrestrial Wildlife Research Summaries," the results of twelve years of biological research and assessment on the wildlife in ANWR. The report has stirred the political maelstrom surrounding ANWR once again, with the Bush administration seeking to require an additional U.S. Geological Survey review of the effects of drilling in ANWR, in essence denying the validity of the original report.

In response to the study, those in favor of protecting ANWR rallied around its scientific findings; Senator Joseph Lieberman (Democrat-Connecticut) stated, "[o]nce again the administration has released a report undermining its own case for opening the Arctic Refuge to oil drilling ... [the report] confirmed the environmental destruction that would occur." The science behind the biological assessment is

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147 U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, ARCTIC REFUGE COASTAL PLAIN TERRESTRIAL WILDLIFE RESOURCE SUMMARIES, (D.C. Douglas et al. eds., 2002) (“Contributions to this report were made by scientists affiliated with the U.S. Geological Survey; U.S. Fish and Wildlife Service; Alaska Department of Fish and Game; University of Alaska-Fairbanks; Canadian Wildlife Service; Yukon Department of Renewable Resources; and the Northwest Territories Department of Resources, Wildlife, and Economic Development. Sections of the report presenting new information on caribou and forage plants were peer-reviewed by three independent, non-affiliated scientists. The remaining sections summarize previously published peer-reviewed scientific papers and were reviewed by a single independent scientist. The U.S. Geological Survey and the U.S. Fish and Wildlife Service collaborated in the publication of this report.”).


150 Herbert supra note 149.
credible, as it is reviewed by a peer-review process and outside objective parties. The political efforts to discredit the biological assessment by requiring a new report would not be reviewed under such standards.\textsuperscript{151} The original report should be considered a good example of how science and policy-making should interplay and should not be discredited because of political desire to drill in ANWR.\textsuperscript{152}

\textit{Impact of Drilling}

\textbf{Pristine Ecosystems}

The U.S. Fish and Wildlife Service summarized the importance of ANWR as an example of a pristine ecosystem by saying:

[The Refuge is] America’s finest example of an intact, naturally functioning community of arctic/subarctic ecosystems...such a broad spectrum of diverse habitats occurring within a single protected unit is unparalleled in North America, and perhaps in the entire circumpolar north.\textsuperscript{153}

There are many reasons that ecosystems in ANWR would be subjected to severe detrimental impact should drilling occur. ANWR’s fragility is due to a multitude of factors relating to arctic

\textsuperscript{151} O’Rourke, supra note 150, at A3 ("Senator Lieberman, chairman of the Senate Governmental Affairs Committee, suggested that the call for the additional review was politically motivated: ‘In my view, any additional analyses should stem from the same exhaustive research and meet the same rigorous scientific analysis as that which the Department released last week, rather than meeting a politically motivated deadline.’").

\textsuperscript{152} \textit{Id.} at A3 (Lieberman states that the report was a “good example of how science can help provide policy-makers with objective, thorough, and unbiased information...[the report] made clear what other scientists have stated: that oil development in the Arctic Reserve coastal plain would pose a substantial risk to wildlife populations, including caribou, musk oxen, snow geese and polar bears. It also affirms the unique and incomparable ecological and wilderness values of the coastal plain.”).

temperatures, such as slow decomposition of pollutants, slow regeneration of vegetation, concentrations of species, greater significance of marine areas, susceptibility to global warming trends, and difficulty of cleanup.\textsuperscript{154} Perhaps the greatest detrimental effect would be the damage to water resources. A major purpose of creating the Arctic Refuge was to protect the quality and quantity of the Refuge's water system.\textsuperscript{155} Wetlands cover the Coastal Plain and low evaporation rates and permafrost layers allow the area to be very productive biologically during the summer months.\textsuperscript{156} As well as the importance of water in wetlands, the availability of water becomes a limiting factor for those who promote drilling based on new technology. These technologies create "ice roads"\textsuperscript{157} and require an abundance of water supply to construct—nearly some 1.35 million gallons of water per one mile of road.\textsuperscript{158} In addition, drilling for oil requires water resources; some 30,000 gallons of water a day is required to operate a single well for exploration.\textsuperscript{159} Among the nine major rivers that run through ANWR Coastal Plain in the summer, about 9 million gallons of water is available; the remaining water required for development would have to be piped in from the Beaufort Sea and subsequently treated in a desalinization plant.\textsuperscript{160}

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\begin{itemize}
\item \textsuperscript{154} Id. at 227.
\item \textsuperscript{155} Danny L. Eidson, \textit{Why Congress Should Grant Wilderness Status to the Coastal Plain of the Arctic National Wildlife Refuge}, 7 S.C. ENVT'L. L. J. 209, 223 (1998); see also Alaska National Lands Conservation Act, Pub. L. No. 96-487, §303(2)(B)(v), 94 Stat. 2371, 2390 (1980) ("to ensure, to the maximum extent practicable and in a manner with the consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.").
\item \textsuperscript{156} Eidson, supra note 156, at 223.
\item \textsuperscript{157} Sherman, supra note 154, at 227 ("temporary ice pads and six-inch thick ice roads that melt away in the spring.").
\item \textsuperscript{158} Eidson, supra note 156, at 224.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. (The requirements for such abundance of water in the development and production of oil extraction would cause an extremely detrimental impact upon the water resources in ANWR, Edison says, "[t]he negative effects of oil development
The damage upon the ecosystems from this overuse of natural water supplies would be borne mostly by fish. Danny Eidson, a prolific author on ANWR, suggests that "moderate" effects would be the result through "lost or reduced habitat values, inhibited movements and direct mortality," and "major" negative effects would result through oil spills in these water habitats. Considering that ANILCA's mandate is to avoid degradation and destruction of water quality and quantity, using all the resources of water in the Coastal Plain could be considered a "clear material impairment of ANILCA's purpose [in this goal]."

Vegetation and habitat are another aspect of this pristine ecosystem that would be greatly affected by drilling. As well as protecting water ecosystems, ANILCA also seeks to "conserve ... populations and habitats in their natural diversity." Because of the fragile nature of these arctic and subarctic ecosystems, ANILCA on the water resources of the Coastal Plain are undeniable. In its assessment of predicted water usage on the Coastal Plain, the Baseline Study stated that 'water for drilling and production requirements would be difficult to obtain in sufficient quantities on the study area, so combinations of some or all sources may be necessary.' The LEIS concluded that the 'dedicated industrial use of the limited natural fresh-water sources of the 1002 coastal plain area would have a major effect.'


Id. at 225.

Id.

Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, §303(2)(B)(i), 94 Stat. 2371, 2390 (1980) ("to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, the Porcupine caribou herd (including participation in coordinated ecological studies and management of this herd and the Western Arctic caribou herd), polar bears, grizzly bears, muskox, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds and Arctic char and grayling.")
seeks to protect the entire spectrum of ecosystems. The multiple and diverse species of vegetation is important for sustaining other wildlife species, thus the Refuge has a "relatively short food chain and the loss of one component can have disastrous consequences for other dependent species." The immediate and permanent damage to vegetation and habitat would be extensive and irreparable because of changes in drainage patterns, use of gravel in construction, conversion of land to roads and drilling platforms, oil and diesel spills, and a wide variety of other damaging consequences.

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165 Eidson, supra note 162, at 225 ("Arctic ecosystems are very sensitive to stress because the Arctic has low species diversity, and those species grow and mature slowly.").

166 Id. at 226 ("The Coastal Plain is continuously vegetated with sedges, grasses, mosses, lichens, small herbs, and dwarf shrubs, all of which are essential components of the tundra ecosystem. Plant production in the arctic is responsible for 90% of the energy flow. Arctic vegetation also provides food and shelter for wildlife and influences the hydrological cycle. Most vegetation in the Arctic Refuge is than one foot high, except along streambeds, or along south-facing slopes where the active layer of the permafrost is thicker. The plants are sensitive [and] a change in microtopography of less than one meter can have a 'major influence' on the distribution of plant communities in the arctic. In addition, minor changes in elevation create draining of water in lower areas, which in turn affects biomass production. As a result, a change in water and nutrient availability can create dramatic changes in biomass within the space of one meter.").

167 Sheila Weigert, Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge's Coastal Plain, the Environment is the Only True Loser, 8 ENVTL. LAW. 169, 175 (2001).

168 Id. at 176-177 ("Thousands of acres of existing vegetation would be lost due to coverage by 'roads, pipelines, airstrips and other support facilities.' The impact of drilling development could alter the 'natural drainage patterns, causing changes in vegetation.' Vegetation modification also could result from the 'secondary effects of gravel spray and dust deposition, altered snowmelt and erosion patterns.' For example, dust deposits along proposed roads in the coastal plain would alter vegetation in a much broader area than that of the actual size of the road. Additionally, any spills due to drilling exploration and development could cause negative effects on areas of vegetation. Leaks, ruptured lines and overturned tanks usually cause spills of diesel fuel, gasoline, oil, and antifreeze. Biologists conclude that 'diesel fuel is highly toxic and kills all plants on contact.' Furthermore, oil spills in direct contact with vegetation usually cause immediate
overall effects on vegetation and habitat ecosystems are a small segment of the irreversible results that would stem from drilling in ANWR’s Coastal Plain.

**Caribou**

The most recent and reliable source of information regarding the affect that drilling would have upon the caribou herds existing in ANWR’s 1002 Area is the new report noted earlier completed in
This report makes the following conclusions in regards to the Porcupine Caribou Herd (PCH) and ANWR’s Coastal Plain:

In summary, 4 research-based ecological arguments indicate that the PCH may be particularly sensitive to development within the 1002 portion of the calving ground—

**Low productivity of the PCH**—The PCH has had the lowest capacity for growth among Alaska barren ground herds (4.9%) and is the only barren ground herd in Alaska known to be in decline throughout the 1990s. This low growth rate indicates that the PCH has [a low] capacity to accommodate anthropogenic, biological, and abiotic stresses...

**Demonstrated shift of concentrated calving areas of the Central Arctic caribou herd away from petroleum development infrastructures**—It is assumed that the PCH caribou will avoid roads and pipelines during calving...if development of the 1002 Area occurs. Avoidance of petroleum development infrastructure by parturient caribou during the first few weeks of the lives of the calves is the most consistently observed behavioral response of caribou to development.

**Lack of high-quality alternate calving habitat**—...Diet quality on the Canadian portions of the calving ground was substantially lower than on the Arctic Refuge coastal plain and 1002 Area portions of the calving ground. When snow cover reduced access by females to the Arctic Refuge coastal plain and 1002 Area for calving, calf survival during June was 19% lower than when they could calve on the Arctic Refuge coastal plain and 1002 Area.

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Strong link between calf survival and free movement of females—The location of the annual calving grounds and concentrated calving areas was variable among years in response to variable habitat conditions and was often coincident with the 1002 Area. Empirical relationships between calf survival, forage available to females in the annual calving grounds, and predation risk derived from 17 years of ecological data predict that June calf survival for the PCH will decline if the calving grounds are displaced, and will increase with displacement distance.\(^ {170} \)

The reports' conclusions not only support the contention that drilling for oil would be mortally detrimental to the PCH, but also reaffirm the Final LEIS drafted by the Department of the Interior in 1987 that predicted a detrimental effect upon the herd if drilling were allowed in the coastal plain and 1002 Area.\(^ {171} \) Because the PCH are

\(^{170}\) Id. at 34.

\(^{171}\) U.S. Fish & Wildlife Service, U.S. Dep’t of the Interior, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment—Report and Recommendation to the Congress of the United States and Final Legislative Environmental Impact Statement, (N.K. Clough et al. eds., 1987); see also Sheila Weigert, Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge’s Coastal Plain, the Environment is the Only True Loser, 8 Envtl. Law. 169, 175 (2001) (“Any oil exploration, drilling and production in the coastal plain will have a detrimental effect on the Porcupine caribou herd. Drilling for oil would greatly alter the habitat of the Porcupine caribou, causing a loss in 'calving, insect-relief, foraging, and predator-avoidance habitats.' Disturbance due to activities associated with oil drilling, such as the ‘presence of pipelines and roads, aircraft operations, general construction, routine field operations and the presence of humans,’ is unavoidable. Because cows with newborn calves are particularly sensitive to human activity, human disturbance ‘could disproportionately affect cows with calves, which could be expected to reduce recruitment.’ Due to the unique terrain of the coastal plain, these displaced cows would have few alternative areas available to them for calving grounds. Even a reduction of five percent in annual calf survival ‘would be sufficient to cause a decline in the Porcupine caribou population.’ Displacing the Porcupine caribou from their traditional calving grounds in the coastal plain ‘could result in significant long-term changes in distribution, adversely affecting habitat use and behavior patterns.’”).
migratory and the most important use of the coastal plain and 1002 Area is during their calving season, the 2002 Report should be considered valid and conclusive in advocating against drilling in ANWR.

Muskoxen

Muskoxen are affected differently than caribou in that they are permanent residents of the coastal area. Muskoxen numbers have declined over time, with the current numbers dropping to approximately 300 living in the coastal plain area. Muskoxen have also produced offspring less over time. The 1987 Final LEIS report found that muskoxen would be affected by oil production because they are required to reduce their activity in the winter months and such production would require unnecessary movement, thus draining their energy reserves for the winter months and putting the survival of pregnant females in jeopardy. The 2002 report echoes these same conclusions, extending the detail of such harm to foraging capabilities and the damage that constant movement in deep snow would cause to the survival rates of the herd; the details of the report summary on muskoxen are provided in the footnote below.

172 Douglas, supra note 170, at 62.
173 Id.
174 Id.
175 Clough, supra note 172, at 124.
176 U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, ARCTIC REFUGE COASTAL PLAIN TERRESTRIAL WILDLIFE RESOURCE SUMMARIES, (D.C. Douglas et al. eds., 2002) at 62-63 (“Severe winters (deep snow and prolong snow seasons) and increasing rates of predation are important factors in the dynamics of this population. Muskoxen have expanded their range east and west of the Arctic Refuge coastal plain and emigration has contributed to declining numbers. Most calves are born in April and May, several weeks before green forage is available. To survive the long months of winter and to maintain body reserves needed for successful reproduction, muskoxen conserve energy in winter by reducing activity and movements. In winter, muskoxen feed on dried sedges and other low quality forage in areas of low snow. Windblown ridges adjacent to rivers are frequently used in winter. During the short weeks of summer, when green forage is available,
Polar Bears

The 2002 report notes a considerable shift in thinking about polar bears from the Final LEIS filed in 1987. This may be the only bright spot for proponents of oil drilling in their contention that drilling would have no significant impact upon wildlife. The 1987 Final LEIS suggested that polar bears would be at risk in the coastal plain and 1002 Area because these are their primary denning habitats and disturbances associated with drilling would detrimentally displace maternal polar bears, putting their survival rates at risk. The 2002 report reverses this previous concern, noting that after significant scientific research (using radio-collared polar bears) the disturbances of human activity may not displace the polar bears from their denning habitat as much as predicted.

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Sheila Weigert, *Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge’s Coastal Plain, the Environment is the Only True Loser*, 8 ENVTL. LAW. 169, 182 (2001) (“Overall, modification of the polar bears’ denning habitats would have a negative impact on the polar bear population, as the reproduction rate would decline.”).

U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, *ARCTIC REFUGE COASTAL PLAIN TERRESTRIAL WILDLIFE RESOURCE SUMMARIES*, (D.C. Douglas et al. eds., 2002) at 69 (“Available data indicate polar bears are relatively resilient to disturbances coming from outside their dens. Data showed that dens exposed to even high levels of activity did not suffer a detectable reduction in productivity. Perturbations resulting from capture, marking, and radio tracking maternal bears...”)
Birds

The greatest numbers of species that may be affected by oil exploration and production are birds. There are some 180 species of birds that have been detected in ANWR, of which, 135 species are known to use the 1002 Area. Drilling would have a major effect on feeding and migration by disturbing and modifying these habitats. Both the 1987 Final LEIS and the 2002 report focus on Snow Geese because of the large numbers that would be adversely affected by development in this region. The Final LEIS notes that the vegetation Snow Geese forage upon in order to build fat reserves for their migration south are small, patchy, and spread over a majority of the coastal plain. The Final LEIS also notes that Snow Geese are extremely sensitive to human disturbances and often leave their feeding grounds even when these disturbances are several miles away; in turn, this loss in feeding time and the increase in activity cumulatively and adversely impact their accumulation of energy reserves required for migration.

The new 2002 report supports the Final LEIS findings in both the areas of foraging and importance of building energy reserves. The 2002 report especially notes that increased development would also mean increased aircraft activity that would greatly impact bird

did not affect litter sizes or stature of cubs produced; and 10 of 12 denned polar bears exposed to exceptional levels of activity were not measurably affected. Hence, polar bears in dens may be less vulnerable to human disturbances than previously thought. This finding corroborates the observations of Blix and Lentfer (1992) who reported that polar bears in dens are well insulated from disruptions outside of their dens.

179 Weigert, supra note 178, at 182.
180 Id. at 83.
181 Id.
182 Id.
183 Sheila Weigert, Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge's Coastal Plain, the Environment is the Only True Loser, 8 ENVTL. L. 169, 183 (2001).
feeding and migratory patterns. The overall findings suggest that development in the coastal plain and 1002 Area would have a severe impact upon bird populations in terms of their feeding patterns and subsequent migration mortality rates.

Other Wildlife

The main populations of wildlife reviewed above are not the only animal wildlife that would suffer because of development in the coastal plains and 1002 Area; populations of wolf, grizzly bear, and fish populations would suffer as well. The 1987 Final LEIS and the new 2002 report both note the significant impacts of such development upon these groups. The Final LEIS concludes that coastal wolf populations, brown bear populations, and fish would be affected by

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184 U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, ARCTIC REFUGE COASTAL PLAIN TERRESTRIAL WILDLIFE RESOURCE SUMMARIES, (D.C. Douglas et al. eds., 2002) at 73 (“Staging snow geese are easily disturbed by aircraft activity. Repeated aircraft disturbance can reduce their rate of food intake due to disruption of feeding behavior and displacement from feeding habitats. Reduced fat accumulation and diminished survival during migration could result from repeated aircraft disturbance... Several studies suggest that human disturbance can displace staging snow geese from feeding habitats and possibly diminish the size of juvenile fat reserves... [an estimated] 20-30 aircraft overflights/day would reduce fat reserves of juvenile snow geese on the Arctic Refuge by up to 50%, assuming geese were unable to increase feeding time to compensate for disturbance. Aircraft disturbance would likely have a greater affect on juvenile snow geese because they spend a higher proportion of the day feeding, accumulate fat reserves at a slower rate, and depart with smaller reserves than adults. Displacement of geese from feeding areas on the Arctic Refuge is of special concern because feeding habitats are limited and a large proportion of the frequently used region is within the 1002 Area... We cannot assume that snow geese would be able to locate adequate feeding habitat in other regions if they were displaced from the Arctic Refuge coastal plain.”).

185 Id. at 51-53; see also U.S. FISH & WILDLIFE SERVICE, U.S. DEP’T OF THE INTERIOR, ARCTIC NATIONAL WILDLIFE REFUGE, ALASKA, COASTAL PLAIN RESOURCE ASSESSMENT -- REPORT AND RECOMMENDATION TO THE CONGRESS OF THE UNITED STATES AND FINAL LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT, (N.K. Clough et al. eds., 1987) at 126-129.
increased human activity and oil development. The 2002 report supports the Final LEIS findings but notes that it is an indirect impact and also that outside factors impacted these predator populations perhaps more directly than the distributions of their prey populations.

**Part VI: National Interests in ANWR**

*Amount of Recoverable Oil*

Whether to drill and create production facilities for oil in ANWR’s coastal plain or the 1002 Area may turn on the benefits to be derived from the amount of oil actually available from these areas. In the 1987 Final LEIS, there was a reported 19% chance of finding oil in the coastal plain with an estimated average of 3.2 billion barrels of oil recoverable. Based on the 1987 estimate, these 3.2 billion

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186 Clough, *supra* note 185, at 127, 129 (Wolf populations would decline because of “direct mortality and reduced production or survival of young caused by reduced prey availability.” Brown bears in the Coastal Plain would decline in population because of “additive effects of direct mortality, decreased prey availability, harassment, and disturbance of denning areas.” Fish populations would also decrease because of “lost or reduced habitat values, inhibited movements, and direct mortality.”); see also Weigert, *supra* note 184, at 184.

187 Douglas, *supra* note 185, at 51-53 (“Grizzly bear distributions during the caribou calving period in early June appeared to be influenced by a combination of factors including seasonal habitat selection patterns, annual variations in snowmelt, and annual distribution patterns of calving caribou. Within-year (1983-1993) spatial distribution patterns of radio-collared grizzly bears did not differ among time periods, whereas concurrent distributions of calving caribou did differ. This suggests that annual grizzly bear distributions were influenced less by the distribution of calving caribou than by other factors (e.g., annual snowmelt patterns) . . . During the caribou calving period, radio-collared wolves were located primarily in the mountains and foothills where their activity was associated with den sites. All known wolf den sites on the North Slope of the Arctic Refuge have been located in the mountains and foothills. Thus, the availability of suitable den sites appears to be the primary factor influencing wolf distributions during the calving period.”).

188 Anthony R. Chase, *Imminent Threat to America's Last Great Wilderness, 70 Denv. U. L. Rev. 43, 49 (1992).*
barrels of oil would meet current United States demand for a maximum of 195 days.

In April, 1991, the Bureau of Land Management reported an increased probability of finding oil in the coastal plain to a 46% chance of finding an estimated 3.23 to 3.57 billion barrels of oil and a 5% chance of finding at least 8.8 billion barrels of oil. However, this 1991 report was highly criticized because it did not "list references, identify studies, or explain the bases for the Department’s conclusions." The 1991 report was highly controversial in terms of credibility and therefore its findings should be highly scrutinized.

Finally, in 1998, the United States Geological Survey (USGS) completed a study of the coastal plain and found that between 4.3 and 11.8 billion barrels of oil could be recovered from the 1002 Area. The United States Fish and Wildlife Service, using these estimates

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191 Grant, supra note 190, at 52; see also Natural Res. Def. Council v. Lujan, 768 F. Supp. 870, 884 (D.D.C. 1991) (In Lujan, the Department of the Interior was found to have failed to circulate for public comment the Overview and therefore violated NEPA. The Department was ordered to circulate the Overview as a supplemental EIS because the changes it contained were significant. Here, the NRDC was particularly concerned that the Overview did not list references, identify sources, or explain the basis for the Department’s conclusions).

192 U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, ARCTIC NATIONAL WILDLIFE REFUGE, 1002 AREA, PETROLEUM ASSESSMENT, 1998, USGS Fact Sheet FS-040-98 (May 1998) at 1; see also Sheila Weigert, Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge’s Coastal Plain, the Environment is the Only True Loser, 8 ENVTL. LAW. 169, 171 (2001) ("this USGS estimate means that there is a 95% probability that more than 4.3 billion barrels of oil are technically recoverable, and that there is a 5% probability that more than 11.8 billion barrels of oil are technically recoverable. Notably, these ‘technically recoverable oil’ estimates and probability ranges do not consider the cost of discovery, development and production of oil in the coastal plain.").
has suggested that at $24 per barrel there is a "50% chance of finding a 9 month's supply of oil in the 1002 Area."\textsuperscript{193}

Regardless of which of these studies one relies upon, it is a poor choice to advocate drilling for oil in this pristine natural wilderness area and impacting the vast array of natural habitats, despite the short-term economic impacts, for a mere benefit of a nine month supply of oil.

\textit{United States Dependency on Foreign Oil}

One of the main arguments that proponents of ANWR drilling note is that the United States must become more self-sufficient in the area of oil production to ensure our progress and remain independent from foreign oil producers.\textsuperscript{194} The arguments for increasing domestic supply of oil and decreasing foreign imports is a hazy area of political and economic speculation. United States' dependency upon oil is not because it is foreign, but because it is a commodity that will open the United States to vulnerability of disruptions in a foreign market regardless of whether there is an increase its domestic production.\textsuperscript{195} In fact, "studies suggest 'reducing the nation's reliance on foreign oil by increasing domestic production would probably do little to decrease [disruptions]...because it would not substantially reduce their likelihood or cost.'"\textsuperscript{196} Increasing domestic production might not solve the United States dependency problem, in fact, the United States might actually become more dependent if it depleted its domestic resources faster by importing less.\textsuperscript{197}

\textsuperscript{193} Weigert, supra note 193, at 171.

\textsuperscript{194} Id. at 172; see also Samantha K. Sherman, Information is Alaska's Greatest Untapped Resource, 8 ENVTL. L. 215, 234 (2001) (Supporters of allowing drilling in ANWR "cite America's dependence on unstable supplies of foreign oil as a primary reason for promoting such a policy.").

\textsuperscript{195} Sherman, supra note 195, at 235.

\textsuperscript{196} Id.

\textsuperscript{197} Id.
ANWR and Effect on United States Oil Prices

Regardless of whether the United States decides to drill for oil in ANWR, the government will be unable to avoid the effect of oil supply fluctuations that stem from agreements and associations between the International Energy Agency (IEA) and the Organization of Petroleum Exporting Countries (OPEC).\textsuperscript{198} In addition, increasing domestic production and the therefore bolstering our domestic security and the related costs now associated with military and national security operations in the Middle-East are unknown.\textsuperscript{199} In the end, drilling for oil in ANWR "[would] not resolve the United States' overwhelming energy needs... 'would do nothing to address United States' long-term need for greater energy efficiency, would not affect the price of gasoline at the pump, and would not significantly reduce United States dependence upon foreign oil.'"\textsuperscript{200}

Part VII: New Developments and Contradictions

Securing America’s Future Energy Act of 2001

On August 1, 2001, the House of Representatives passed an extensive bill that looked to energy conservation, automobile fuel efficiency, nuclear power resources, hydroelectric energy, current fuels, renewable energy, alternative conservation programs, increased oil exploration, and incentive programs to solve the United States

\textsuperscript{198} \textit{Id.} at 234 (OPEC “produce[s] 40 percent of the world’s oil, hold[s] 77 percent of proved oil reserves, and control[s] most of the unused capacity capable of producing more oil.”).

\textsuperscript{199} \textit{Id.} at 236.

\textsuperscript{200} Sheila Weigert, \textit{Arctic National Wildlife Refuge: In the Debate Over Drilling in the Refuge’s Coastal Plain, the Environment is the Only True Loser}, 8 ENVTL. LAW. 169, 173 (2001).
current energy demands and future energy needs.\textsuperscript{201} Included within this bill was Title V, the Arctic Coastal Plain Domestic Security Act of 2001, introduced to the House on July 10, 2001, and subsequently passed as part of the Securing America’s Future Energy Act of 2001 on August 1, 2001.\textsuperscript{202}

\textbf{Arctic Coastal Plain Domestic Security Act of 2001}

This bill, passed by the House but subsequently killed in the Senate, looked to explore for oil and natural gas in ANWR’s coastal plain or "1002 Area" in a way that:

- Would result in an environmentally sound program for the exploration; development, and production of the oil and gas resources of the Coastal Plain; and (2) ...ensure the oil and gas exploration, development, and production activities on the Coastal Plain [would] result in no significant adverse effect on fish and wildlife, their habitat, subsistence resources, and the environment.\textsuperscript{203}

The goal of this bill could be considered impossible. The bill looks to achieve such noble goals through the use of, "best commercially available technology for oil and gas exploration, development and production,"\textsuperscript{204} and through requiring an additional EIS before conducting the first lease sales.\textsuperscript{205} The bill also gives the Secretary of the Interior special powers to designate up to 45,000 acres of the Coastal Plain as a "Special Area" if it is "of such unique character and interest so as to require special management and regulatory protection."\textsuperscript{206} This is interesting because the entire

\textsuperscript{203} Id. at § 502(a)(1)-(2).
\textsuperscript{204} Id. at § 502(a).
\textsuperscript{205} Id. at § 502(c)(3).
\textsuperscript{206} Id. at 502(d)(1).
Coastal Plain and arguably all of ANWR could be considered a Special Area under the bill's definition. In a clear contradiction, the bill identifies a goal of "avoiding any significant adverse impact" while at the same time having as its construction goals, "design[ing] safety and construction standards... (A) that minimize, to the maximum extent possible, adverse effects upon the passage of migratory species as caribou; and (B) minimize adverse effects upon the flow of surface water." Throughout the bill, its words and its intent are patently irreconcilable.

Environmentally Sensitive Drilling

The ultimate question remains; is it possible to drill for oil in some kind of environmentally sensitive manner? Proponents of drilling argue that there are new technologies that help reduce the "footprint" of exploration and development. These technologies: directional drilling, the re-injection of drilling wastes back into the ground, the use of three-dimensional seismic surveys to find oil, and the use of temporary ice roads for use in winter exploration, while cutting edge and, to a certain extent, "less intrusive" than traditional means, are still extremely detrimental to the environment. In the end, "oil development in a wilderness, no matter how sensitive, changes the very nature of it. It means it's no longer wilderness."
Conclusion

The final result of any decision to drill in ANWR is cumulative and complete disaster. Not only will the pristine habitats and ecosystems be irreparably damaged, thus impacting all wildlife that depends on these ecosystems for existence, but the economy at all levels will obtain no substantial benefit from such devastation. At the state level, the individual Native organizations that have been key players in the Prudhoe Bay experience, will fail to benefit in any substantial way from ANWR drilling. The state of Alaska, while greatly dependent upon oil for revenue, only continues a trend of dependence upon this commodity as the main staple in its economy; subject to disaster in a fluctuating market. At the national level there is no benefit from depleting what little reserves do exist in ANWR. The market will not bear any impact from an increased domestic oil production and the price of gasoline to consumers will not substantially change.

What may be the more reasonable, viable, and practical option would be to designate the remaining part of ANWR at issue, the coastal plain (1002 Area), as a wilderness area that would increase protection of the area as pristine wilderness. Changing the status from a wildlife refuge to a national wilderness area protects the area from commercial enterprise and permanent roads as well as maintenance roads, aircraft landing areas, and exploration for oil, gas, or minerals.212

Changing the status to a wilderness area also could be considered a technology forcing decision for the United States because it would look away from maintaining the dependence for energy on such non-renewable resources. Options for alternatives like a general decrease in fuel consumption, and increasing energy

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efficiency are two basic alternatives that could be considered.\textsuperscript{213} A simple technology forcing bill that would require automobile producers to increase light truck fuel efficiency a mile or two per gallon would save 20 billion barrels of oil per year, "six times the most likely amount of economically recoverable oil in the Refuge."\textsuperscript{214}

The current legislation is strongly opposed in the Senate by Democratic leaders who disagree with drilling in ANWR,\textsuperscript{215} and who have voted down the bill. However, despite the recent small victory, ANWR's coastal plain will continue in this stagnant debate until its status is either changed and the United States looks to alternative methods to meet its energy consumption needs, or there becomes no other alternative but to drill in the last great pristine wilderness for a few months' supply of oil.

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\textsuperscript{213} Eleanor A. Hunt, \textit{Drilling for Oil Underneath the Arctic's Coastal Plain: Proposal for Another Prudhoe Bay Environmental Disaster}, 8 ENVTL. L. 189, 212 (2001).
\textsuperscript{214} \textit{Id.} at 213.
\textsuperscript{215} \textit{Id.} at 212-213.
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