

Public Land & Resources Law Review

Volume 9

Article 6

June 1988

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9 Pub. Land L. Rev. 105 (1988)

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COMMENTS

ARCTIC NATIONAL WILDLIFE REFUGE: A CROWN JEWEL IN JEOPARDY

Lisa J. Booth

Alaska has been called a nursery to the world, providing nesting and feeding areas for some 400 million migratory birds which disperse each Fall to at least six continents; calving and denning sites for international populations of caribou and polar bear; and the spawning grounds for salmon, other fish and shellfish populations which feed the world.¹

I. INTRODUCTION

The question of whether or not to open the "Crown Jewel"² of wildlife refuges, the Arctic National Wildlife Refuge, to oil and gas development spurs much debate among conservationists, oil and gas companies, Alaskans, Canadians, and other private and public interest groups. Section 1003 of the Alaska National Interest Lands Conservation Act (ANILCA)³ prohibits oil and gas development unless authorized by an act of Congress. Ultimately, Congress will make this decision based on the Secretary of the Department of the Interior's recommendation, and the thorough investigative report and final legislative environmental impact statement completed by the United States Fish and Wildlife Service in cooperation with the United States Geological Survey and the Bureau of Land Management.

This comment sets out the processes, parties, and conflicts involved in making this decision. It begins with a brief description of the significant Congressional acts passed in reference to Alaska and the Arctic National Wildlife Refuge (ANWR). Then a detailed outline of the Secretary of Interior's duties under the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) is provided. This is followed by a summary of the

1. S. REP. NO. 413, 96th Cong., 2d Sess. 173-174 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5117-5118.

2. *Id.* at 179, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 5123.

3. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 43 U.S.C. §§ 3101-3233 (1982) and other scattered sections of 16 and 43 U.S.C.. If the Public Law is codified, the code is cited, if not, the Public Law section is cited.) [hereinafter ANILCA].

required investigative report⁴ which was submitted to the Congress of the United States in one document with the Final Legislative Environmental Impact Statement⁵ and Secretary Hodel's recommendation. The summary includes discussion of the following: the targeted area itself, the fish and wildlife resources, the human environment, an assessment of oil and gas potential, and the National need for domestic sources of oil and gas. The comment ends with an analysis of Secretary Hodel's recommendation for full leasing, allegedly based on the investigative report submitted to Congress, public comment, the Nation's need for energy, and the Nation's ability to develop oil and gas in Alaska in an environmentally sound manner. The analysis concludes that Secretary Hodel's recommendation is inconsistent and flawed.

II. HISTORY

The United States purchased Alaska from Russia in 1867 for \$7.2 million dollars.⁶ In 1958 Alaska became a member of the Union⁷, and received the right to 90% of all bonuses, royalties and rentals from oil and gas leasing of any federal public lands under the Mineral Leasing Act of 1920.⁸

Just two years later, at the request of Interior Secretary Seaton, President Eisenhower created the Arctic National Wildlife Refuge to preserve the unique wildlife, wilderness, and recreational values of the area.⁹ In original form the Refuge contained 8.9 million acres.¹⁰ With the exception of mineral leasing laws, the Land Order creating the Refuge specifically withdrew the area from all forms of appropriation under the public land laws.¹¹

Shortly thereafter, the National Wildlife Refuge System Administra-

4. 16 U.S.C. § 3142(h) (1982); *See supra* notes 34-47 and accompanying text.

5. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982 & Supp. III). An environmental impact statement is specifically required under 42 U.S.C. § 4332(2)(c). *See infra* note 46.

6. REPORT OF BRIG. GEN. ROUSEAU, H.R. EXEC. DOC. NO. 125, 40th Cong., 2d Sess. 2-8 (1867). This document contains the message from the President to Congress concerning the transfer of Alaska from Russia to the U.S.. Secretary of State Seward was the prime instigator of the Alaska Purchase. Because many were doubtful of Alaska's worth, Alaska was also known then as "Seward's Folly", or "Seward's Icebox".

7. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Section 6 of the Act entitled Alaska to select 104 million acres of her 375 million acres for her own. The Aleutian word for "Great Land" is Alaxsxaq. When the first Europeans reached the Aleutian Islands they came to pronounce the great land "Alaska".

8. *Id.* at § 28(a). *See also* Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982).

9. Public Land Order No. 2214, 25 Fed. Reg. 12,598 (1960).

10. *Id.*

11. *Id.*

tion Act of 1966¹² consolidated all national refuge units under one system.¹³ Other than consolidation, the Act did little to spell out standards to guide the administration of the System.¹⁴ However, the Act did authorize the Secretary to "permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established."¹⁵

Hence, the Act codified the illusive and quite flexible "compatible use" test. The National Wildlife Refuge System Administration Act fails to offer a definition of compatible use, as does ANILCA.¹⁶ However, the implementing regulations for conveyances of national wildlife refuge lands under the Alaska Native Claims Settlement Act of 1971¹⁷ expressly provide that compatibility means the proposed uses must not "materially impair the values for which the refuge was established."¹⁸ Consequently, each "use" must be compatible with all others. More specifically, oil and gas development must not materially impair the fish, wildlife, water resources, vegetation, subsistence, and other various uses presently existing within the particular wildlife refuge.

The most significant Act in Alaska's short history, passed during the Carter administration, is the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).¹⁹ ANILCA added approximately 103 million acres to the federal conservation systems to protect the lands' resource values through permanent federal ownership and management.²⁰

12. 16 U.S.C. §§ 668dd and 668ee (1982).

13. *Id.* § 668dd(a)(1).

14. M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 133 (1977).

15. 16 U.S.C. § 668dd(d)(1)(A) (1982). *See also* BEAN, *supra* note 14, at 133-134. The Act also placed restrictions on the transfer disposal of lands within the system and clarified the Secretary's authority to accept donation of money to be used for land acquisition. 16 U.S.C. §§ 668dd(a)(2) and 668dd(b)(2).

16. *See infra* text accompanying notes 19-27.

17. 43 U.S.C. §§ 1601-1628 (1982); *See infra* text accompanying notes 138-146.

18. 43 CFR 2650.4-6(b); *See also* National Audubon Society v. Hodel, 606 F.Supp. 825 (D.Alaska 1984); Schwenke v. Secretary of the Interior, 720 F.2d 571 (9th Cir. 1983). In *Schwenke* the court held that grazing of livestock is compatible with wildlife use, yet it also found that wildlife have a limited priority in access to forage resources reasonably necessary to maintain a balanced wildlife population. WEBSTER'S NEW COLLEGIATE DICTIONARY 277 (1979 ed.) defines "compatible" as "capable of existing together in harmony."

19. ANILCA, *supra* note 3. *See generally* Comment, *The Alaska Lands Act: A Delicate Balance between Conservation and Development*, 8 PUB. LAND L. REV. 143 (1987).

20. G. COGGINS AND C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 167 (2nd ed. 1986). ANILCA added 53.7 million acres to the National Wildlife Refuge System, 43.5 million acres to the National Park System, and 56.4 million acres to the National Wilderness Preservation System. Additionally, thirteen rivers were added to the National Wild and Scenic Rivers System, and two special BLM land designations were created, the 1.2 million acres Steese Conservation Area, and

The Act either established, or added to, 16 national wildlife refuges in Alaska.²¹ More specifically, ANILCA added approximately 10 million acres to the Arctic National Wildlife Refuge (ANWR), making it 18 million acres, the largest arctic wilderness sanctuary of the world.²² ANILCA then declared 8 million acres of ANWR, consisting primarily of the original Refuge created in 1960, wilderness.²³

ANILCA also redefined²⁴ ANWR's purpose:

(i) To conserve 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, muskoxen, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds, and Arctic char and grayling; (ii) To fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats; (iii) To provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and (iv) To ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.²⁵

Further, ANILCA reiterated the National Wildlife Refuge System Administration Act's test concerning ANWR stating, "the Secretary may not permit any use, or grant easements for any purpose. . . unless such use or purpose is *compatible* with the purposes of the refuge."²⁶

III. TITLE X - FEDERAL NORTH SLOPE LANDS STUDIES, OIL AND GAS LEASING PROGRAM AND MINERAL ASSESSMENTS

ANILCA put management of important oil and gas resources in federal hands. Title X of ANILCA instructs the Secretary of the Interior

the 1 million acre White Mountain National Recreation Area.

21. ANILCA, Pub. L. No. 96-487, §§ 302-303, 94 Stat. 2371, 2385-2393 (1980).

22. *Id.* at § 303(2), 94 Stat. at 2390; U.S. DEPT. OF INTERIOR, ARCTIC NATIONAL WILDLIFE REFUGE, ALASKA, COASTAL PLAIN RESOURCE ASSESSMENT, Volume 2—Appendix (Public comments and responses) 0-189 (1987). This comment came from a letter written by David Cline, Regional Vice President for Alaska National Audubon Society, Anchorage, Alaska.

23. ANILCA, Pub. L. No. 96-487, § 702(3), 94 Stat. 2371, 2418 (1980) (in accordance with The Wilderness Act 16 U.S.C. §§ 1131-1136 (1982). Eight million acres of ANWR is specifically listed as wilderness in the notes at 16 U.S.C. § 1132.); U.S. DEPT. OF INTERIOR, ARCTIC NATIONAL WILDLIFE REFUGE, ALASKA, COASTAL PLAIN RESOURCE ASSESSMENT, at 1 (1987) [hereinafter 1002 REPORT].

24. *See supra* text accompanying notes 9-11.

25. ANILCA, Pub. L. No. 96-487, § 303(2)(B), 94 Stat. 2371, 2390 (1980).

26. *Id.* at § 304(b), 94 Stat. at 2393. (emphasis added). *See also* Comment, *Preservation and Strategic Mineral Development in Alaska: Congress Writes a New Equation*, 12 ENVTL. L. 137 (1981); Sagalkin and Panitch, *Mineral Development under the Alaska Lands Act*, 10 UCLA-ALASKA L. REV. 117 (1981).

to conduct an overall study program of the federal north slope lands.²⁷ The study must include a synopsis of the following: potential oil and gas resources, impacts of development on the wildlife resources, particularly on the Arctic and Porcupine caribou herds and polar bear, and the national need for oil and gas in comparison to the national interest in preservation and protection of the wilderness and wildlife.²⁸ As mentioned, Section 1003 of ANILCA specifically prohibits all oil and gas leasing, development, or production in ANWR without Congressional authorization.²⁹

Section 1002 of ANILCA calls for a comprehensive and continuing inventory and assessment of the fish and wildlife resources on the coastal plain in ANWR, commonly referred to as the 1002 area, along with an analysis of the impact upon these resources if oil and gas exploration, development, and production proceeds.³⁰ The Secretary is responsible for conducting this continuing study, which includes assessing the size, range, habitats, carrying capacities, distribution, impacts of human activities, and potential impacts of oil and gas exploration, development and production on the populations of the fish and wildlife.³¹ Further, the Secretary must analyze the potential effects of such activities on the culture and lifestyle of affected Native and other people.³² Section 1002 allows the Secretary to authorize exploratory activity within ANWR in a manner that avoids significant adverse effects on the fish and wildlife and other resources.³³

IV. THE 1002 REPORT

Based on the above studies, the Secretary then must prepare and submit to Congress a report, commonly referred to as the 1002 Report, composed of information on the areas containing oil and gas production potential, including an estimate of the volume of oil and gas involved, how it can be transported, and how it relates to our national need.³⁴ Additionally, the report must contain information on the fish and wildlife concerned and any adverse effects exploration, development and production may have on them.³⁵ The Secretary then must recommend to Congress whether or not ANWR should be open for oil and gas development.³⁶ Included in this

27. 16 U.S.C. § 3141 (1982).

28. *Id.* at § 3141(c).

29. *Id.* at § 3143.

30. *Id.* at § 3142(a).

31. *Id.* at § 3142(c).

32. *Id.*

33. *Id.* at § 3142(a).

34. *Id.* at § 3142(h).

35. *Id.*

36. *Id.*

recommendation must be all other legal steps he deems necessary to preserve the other resources within the refuge.³⁷

The United States Fish and Wildlife Service (USFWS), the managing agency of national wildlife refuges,³⁸ conducted studies and compiled the relevant data for the Secretary.³⁹ Under a memorandum of understanding the Bureau of Land Management and the U.S. Geological Survey assisted the USFWS in this task.⁴⁰ Fifteen companies were also allowed to explore the area in the years 1983 through 1985 to assist in the assessment of oil and gas potential.⁴¹ During the winters of these years, when adverse effects on wildlife are the least, the companies conducted seismic tests.⁴² The USFWS allowed helicopter travel only, and all the companies activities were monitored closely.⁴³ Upon completion of their studies, the USFWS compiled, and made available for comment, a draft 1002 Report and environmental impact statement.⁴⁴

Included in the final 1002 Report is an analysis of alternative courses of action and their environmental consequences.⁴⁵ The National Environmental Policy Act (NEPA) requires an analysis of alternative courses of action before deciding on whether to allow certain developments, constituting major federal actions, on public lands.⁴⁶ The report discusses the

37. *Id.*

38. The 1976 amendment to the National Wildlife Refuge System Administration Act at Pub. L. 94-223, 90 Stat. 199 (1976), specifically gives the USFWS the administrative powers over refuge lands. *See also* *Trustees for Alaska v. Watt*, 524 F.Supp. 1303 (D.Alaska 1981), *aff'd*, 690 F.2d 1279 (9th Cir. 1982). In *Trustees for Alaska*, the court held that the Secretary of the Interior's attempts to transfer the management of the guidelines of the 1002 study (16 U.S.C. § 3142(d)), the writing of the 1002 Report itself (16 U.S.C. § 3142(h)), and the responsibility of approving exploration plans (16 U.S.C. § 3142(e)), from the USFWS to the United States Geological Service were beyond his statutory authority.

39. 1002 REPORT, *supra* note 23, at 3.

40. *Id.* The interagency memorandum of understanding was dated June 1983.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 5. *See infra* text accompanying notes 127-131.

45. *Id.* at 97-176.

46. 42 U.S.C. § 4332(2)(c)(iii) (1982). Specifically § 4332(c) of NEPA states:

[I]n every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement [is required to be made] by the responsible official on — (i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

A major federal action defined in *Chelsea Neighborhood Assn. v. United States Postal Service*, 516

following five alternatives:

- (A) authorize full leasing of entire 1002 area;
- (B) authorize leasing limited to a part of the 1002 area;
- (C) authorize further exploration, including exploratory drilling;
- (D) continue current refuge status with no further oil and gas activity

allowed; or

- (E) designate the entire area as wilderness.⁴⁷

Secretary Hodel recommends full leasing, alternative A, calling it the "preferred alternative".⁴⁸ "The State of Alaska recommends alternative B, asking Congress to immediately open the 1002 area to oil and gas leasing, with the exception of the area described by the U.S. Fish and Wildlife Service as the "core" caribou calving area."⁴⁹ Canada⁵⁰, many environmental groups⁵¹, Delaware's Republican Senator Bill Roth, and House Interior Committee Chairman Morris Udall, favor the implementation of alternative E, wilderness designation.

Senator Roth, the chief Republican sponsor of ANILCA, which left ANWR's fate open, has submitted S. 1804 to the Senate which declares the entire refuge wilderness.⁵² Roth's bill faces the strong opposition of Alaska's Republican Senators Frank Murkowski and Pat Stevens, who have introduced a pro-development bill, S.1217.⁵³ In the House, Interior Committee Chairman Morris K. Udall D-AZ introduced H.R. 39 to designate the entire Refuge a wilderness area, while Representative Don Young R-AK introduced H.R. 1082 to open the coastal plain to oil and gas

F.2d 378, 382 (2nd Cir. 1975) includes "every form of significant federal activity." See *Foundation for N. American Sheep v. U.S.*, 681 F.2d 1172 (9th Cir. 1982)(reconstruction of one road that might disturb bighorn sheep habitat); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983)(oil and gas lease issuance); *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988)(issuance of oil and gas lease without "no surface occupancy" stipulations). But see *Park County Resource Council v. U.S. Dept. of Agriculture*, 817 F.2d 609 (10th Cir. 1987)(where issuance of lease itself was not "major federal action significantly affecting quality of human environment.")

47. 1002 REPORT, *supra* note 23, at 4, 97-104.

48. *Id.* at 189.

49. *Id.* at Appendix — Public Comments and Responses at S-1.

50. *Id.* at Appendix — Comments and Responses at F-1 through F-5.

51. Some groups whose comments are published in the report's appendix favoring wilderness designation include: Alaska Center for the Environment, Friends of the Earth, The Alaska Wildlife Alliance, American Wilderness Alliance, Animal Protection Institute of America, National Audubon Society, Canadian Wildlife Federation, Defenders of Wildlife, Greenpeace, The Wilderness Society, Trustees for Alaska, Sierra Club, National Resources Defense Council, Northern Alaska Environmental Center.

52. *Measure would bar ANWR development*, Anchorage Daily News, October 22, 1987. Notably, the original draft of ANILCA did designate the entire refuge wilderness. The House favored the original draft, while a majority of the Senate opposed it; hence the middle ground; only a third of the Refuge is designated wilderness. S. REP. NO. 413, *supra* note 1, 1980 U.S. CONG. & ADMIN. NEWS at 5074. See also Sagalkin and Panitch, *supra* note 26, at 117 n. 10, 129 ns. 52-55.

53. *Measure would bar ANWR development*, Anchorage Daily News, October 22, 1987.

development.⁵⁴ Thus, Congress is currently faced with opposing bills in both the House and the Senate.⁵⁵

On February 25, 1988, the Senate Energy and Natural Resources Committee recommended passage of S. 2214 by a slim 11 to 8 vote.⁵⁶ This bill allows for limited leasing using a phase in plan of leasing 300,000 acres within 18 months after the final regulations are submitted by the Secretary. The second lease sale must be at least 3 years later, and sales may be conducted every other year thereafter.⁵⁷ Additionally, S. 2214 requires the Secretary of Energy to complete a comprehensive national energy plan, not later than fifteen months after the date of bill's enactment.⁵⁸ Indeed, although the Senate Energy and Natural Resources Committee has finally passed a bill, the congressional act needed to open ANWR to oil and gas development will not be passed quickly. Strong conflicting views ensure heavy fighting from all sides.⁵⁹

V. THE 1002 AREA

The 1002 area contains 1.55 million acres of coastal plain consisting largely of pristine, extremely fragile tundra and wetlands.⁶⁰ It is located in the northernmost part of the Arctic Refuge between the Brooks Range and the Beaufort Sea, more than 250 miles above the Arctic Circle.⁶¹ The climate is arctic marine, extremely cold in the winters, and cool in the short summers, with persistent winds throughout the year.⁶² Ten percent of the area is glaciated, and all but a small area is believed to be underlain

54. Martin & Coie, *The Arctic National Wildlife Refuge: A Case Study in Reconciling Nationally Significant Wildlife Protection, Wilderness and Mineral Potential*, Nat. Resources L. Center, U. of Colo. School of Law (June 9, 1987).

55. To complicate matters further, currently more than 36 Federal and 5 Alaska State laws, and 111 separate regulations found in six separate titles of the *Code of Federal Regulations* apply to oil and gas activities in Alaska. 1002 REPORT, *supra* note 23, at 4.

56. S. REP. No. 308, 100th Cong., 2d Sess. 29 (1988).

57. S. 2214, 100th Cong., 2d Sess. § 304(c) (1988).

58. *Id.* at § 901. At the time of publication a new Jones bill to replace the original H.R. 3601 was in the making. H.R. 3601 called for an exploratory drilling phase followed by development. H.R. 4343 introduced March 31 by Representative Mike Lowry (D-Wash) would required the preparation of a national energy policy before Congress acted on leasing. Public Land Law News, April 14, 1988, at 2.

59. "The Department of the Interior's recommendation to allow oil and gas development in the refuge on Alaska's North Slope has become the most contentious environmental issue of the 100th Congress, which must decide the refuge's fate." *EPA Staffers Cry Foul on Arctic Wildlife Refuge Report*, Great Falls Tribune, December 15, 1987, at 9A. In this article it was uncovered by EPA staff members that proper procedure was not followed in that the EPA's recommendation was drafted largely by members in the Alaska office. As a result, three EPA regional employees, two in the Seattle office, and one in Anchorage, who objected to the way the recommendation came together, either left the agency later or were transferred to other jobs.

60. 1002 REPORT, *supra* note 23, at 7-8.

61. *Id.*

62. *Id.* at 9.

completely by permafrost.⁶³

The 1002 area is the most biologically productive part of the Arctic Refuge for wildlife and is the center of wildlife activity on the refuge. Caribou migrating to and from the 1002 area and the post-calving caribou aggregation offer an unparalleled spectacle.⁶⁴

Unfortunately, of the 1002 area's fish and wildlife resources, the animal which faces the greatest danger if development proceeds, is the Porcupine caribou. Section 306(a) of ANILCA states, "Congress finds that the barren-ground caribou are a migratory species deserving study and *special protection*, and that the Western Arctic and the Porcupine herds of such caribou are of national and international significance."⁶⁵ The Porcupine caribou herd, an international resource, was estimated in 1986 by the Alaska Department of Fish and Game to include 180,000 animals.⁶⁶ Despite Alaska's total caribou population drop from 600,000 in 1971 to only 216,000 in 1977⁶⁷, the Porcupine herd is now increasing, and is currently the sixth largest caribou herd in North America.⁶⁸ The Porcupine caribou herd ranges over 96,100 square miles of northeast Alaska and northwest Canada and constitutes the largest population of large mammals shared by two nations.⁶⁹

Because the 1002 area is an important calving ground, the herd will face great danger if development proceeds. Studies undeniably show substantial portions of the herd consistently calve in the 1002 area every year.⁷⁰ "Two years ago, 80% of the caribou herd calved in the 1002 area."⁷¹ A U.S. Fish and Wildlife biologist at ANWR stated, "[t]here is no question in my mind that development would destroy their calving area."⁷²

The report does indicate that the herd will likely experience "major"

63. Ferrians, Kachadoorian, and Greene, *Permafrost and related engineering problems in Alaska*, U.S. GEOLOGICAL SURVEY PROFESSIONAL PAPER 678 (1969).

64. DRAFT ENVIRONMENTAL ASSESSMENT REPORT, at 46. The 1002 draft report was submitted to the public for comment. Then the 1002 final report was prepared. The final report is that which is frequently cited in this comment.

65. ANILCA, Pub. L. No. 96-487, § 306(a), 94 Stat 2371, 2396 (1980) (emphasis added).

66. 1002 REPORT, *supra* note 23, at 21.

67. S.REP. No. 413, 96th Cong., 2d Sess. 183, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5127.

68. Whitten, *Population status and trend of the Porcupine caribou herd*, 1982-1985 update report in 1002 REPORT, *supra* note 23, at 21.

69. 1002 REPORT, *supra* note 23, at 21.

70. *Id.* at 22-23. Slight deviations in calving concentration in the area have occurred. These slight deviations may be due to advanced emergence of new vegetation, scarcity of predators, early snowmelt, topography, and/or proximity to insect relief habitat. Cameron, *Issue—Caribou and petroleum development in Arctic Alaska*, 36 ARCTIC 227-231 (1983).

71. Waterman, *Give us Jobs ! Leave us Alone !*, BACKPACKER 49 (March 1988).

72. *Id.*

effects if development proceeds.⁷³ Major effects in the biological environment are defined as "widespread, long-term change in habitat availability or quality which would likely modify natural abundance or distribution of species."⁷⁴ The 1002 Report states that a change in distribution of the Porcupine herd could reasonably be expected. However, admitting the population decline cannot be predicted, the report claims an appreciable population decline is not expected.⁷⁵ An obvious difficulty surfaces in reconciling no appreciable decline expectations with a finding of "major" effects.

Both Alaskans and Canadians rely on the Porcupine caribou herd for subsistence. Studies conclude that 3,000 to 5,000 animals are killed each year as a subsistence food source for various villages in and around the herd's migration area.⁷⁶ Recent annual harvests of the caribou by Kaktovik, the village adjacent to the 1002 area, have ranged from 25 to 75 animals.⁷⁷ Approximately 68 % of Kaktovik's present subsistence use area is within the Arctic Refuge and 95 % of the Village's households depend on the herd for their main source of meat.⁷⁸ Thus, any change in the migration pattern, or decrease in the numbers of the herd could spell disaster for Kaktovik.

The 1002 Report clearly states that an unavoidable impact includes the "loss of subsistence hunting opportunities throughout approximately one-half the 1002 area and possible reduction in subsistence opportunities to communities outside the 1002 area that are dependent on harvest of migratory fish and wildlife populations that spend part of their time on the 1002 area."⁷⁹ Thus, the village of Kaktovik, along with surrounding villages⁸⁰, will likely experience "major" effects in their subsistence and

73. 1002 REPORT, *supra* note 23, at 166.

74. *Id.* at 107.

75. *Id.* at 124.

76. Leblond, *Porcupine caribou herd*, Canadian Arctic Research Commission Research Monograph 3, Yukon Series (1979).

77. Pederson, and Coffing, *Caribou hunting—Land use dimensions and recent harvest patterns in Kaktovik, Northeast Alaska*, Fairbanks, Alaska Department of Fish and Game, Division of Subsistence (1984).

78. Pederson, Coffing, and Thompson, *Subsistence land use and place names maps for Kaktovik, Alaska*, Fairbanks, Alaska Department of Fish and Game Technical Paper 109 (1985).

79. 1002 REPORT, *supra* note 23, at 145.

80. The 1002 Report does not specifically address the effects development will have on the surrounding villages presumably because they are not located within, or adjacent to, the 1002 area. Effected villages may include the following: Arctic Village and Chalkyitsik, Alaska, Old Crow and Venetie, Yukon Territory, and Arctic Red River and Tuktoyaktuk, Northwest Territories.

1002 REPORT, *supra* note 23, at 40. *See also Id.* at Appendix — Public Comments and Responses at F-21. In their letter to the Secretary, the Government of Yukon states, "fully four-fifths of the subsistence use of the herd is estimated to occur in Canada and there is no treatment of the consequence of a major decline in herd size of such use."

sociocultural way of life.⁸¹ Major effects in the human environment "require substantial changes in governmental policies, planning, or budgeting, or [are] likely to affect the economic or social well-being of residents."⁸²

Nevertheless, Mayor Loren Ahlers, speaking for the people of Kaktovik, recommended limited leasing.⁸³ However, when deciding which areas should not be leased, he wants the Secretary, at a minimum, to encourage public comment and involvement of all subsistence users of the Porcupine herd.⁸⁴

On the other hand, the Government of Canada, concluding that the risk of oil and gas development far outweighs the benefits, "firmly believes and urges that the 1002 lands should be given wilderness designation."⁸⁵ Also urged is an agreement between the U.S. and Canada to mark the regional importance of the area by considering a twinning of protected areas on both sides of the border.⁸⁶

As stated, the Fish and Wildlife Service estimates that if alternative A, full leasing occurs, major effects on the Porcupine caribou herd would probably result.⁸⁷ In turn, major effects will occur in the village of Kaktovik.⁸⁸ Surely, these major effects point to the conclusion that oil and gas development is not compatible with at least two of the most significant resources in the refuge; the people, and the Porcupine caribou, an internationally prized species of wildlife.⁸⁹

Furthermore, three of the area's species are on the threatened and endangered list; the bowhead and gray whales are listed as endangered, and the arctic peregrine falcon is listed as threatened. In *TVA v. Hill*,⁹⁰ the United States Supreme Court ruled that an absolute duty exists under the Endangered Species Act⁹¹ "to ensure that actions authorized, funded or carried out by [federal agencies] do not jeopardize the continued existence

81. 1002 REPORT, *supra* note 23, at 166.

82. *Id.* at 107.

83. *Id.* at Appendix - Public Comments and Responses at S-19.

84. *Id.*

85. *Id.* at F-2.

86. *Id.* Canada has implemented her own protection mechanism, to compliment the United State's ANWR, by creating a 3 million acre National Park in North Yukon.

87. 1002 REPORT, *supra* note 23, at 166.

88. *Id.*

89. Other species studied include the following: the reintroduced muskoxen, moose, Dall sheep, wolves, arctic foxes, wolverines, brown bears, arctic ground squirrels, other rodents, polar bears, seals, whales, swans, geese, ducks, seabirds, shorebirds, raptors, ptarmigan, passerines, and fish. Notably, development could cause major changes in the muskoxen's habitat and livelihood also. *Id.* at 26-35, 166.

90. 437 U.S. 153 (1978). In *TVA* the Supreme Court enjoined construction on a dam worth over \$100 million, because the dam would destroy the snail darter's habitat, an endangered species.

91. 16 U.S.C. §§ 1531-1543 (1982).

of an endangered species, or result in the destruction or modification of habitat of such species."⁹² Additionally, there is an affirmative duty on federal agencies to take all steps necessary to recover threatened and endangered wildlife population to the point where they no longer need the Act.⁹³ If the 1002 area is fully leased, the 1002 Report states that whales will experience a minor effect, defined as "short-term local change of species abundance, distribution, habitat availability, or habitat quality."⁹⁴ Certainly, even if only minor effects occur, the result is a violation of the Endangered Species Act. Full leasing violates the USFWS' duty to take all steps necessary to recover the whale. Moreover, reduction of availability, quality, or modification of habitat, will likely jeopardize the whale's existence.

VI. OIL AND GAS POTENTIAL

The 1002 Report reveals there is a 19% chance that there is economically recoverable oil in ANWR.⁹⁵ The 1002 Report concludes that a 19% chance for discovery of an economically feasible oil field is very high when taking into account the small size of the exploration area, 1.55 million acres, and the high cost of operations in the Arctic.⁹⁶ For example, there is a 27% chance for discovery of an economically feasible field in the 37 million acre Navarin Basin, and a 22% chance for the 70 million St. George Basin.⁹⁷ Consequently, the report concludes there "is an exceptionally high potential for oil and gas."⁹⁸

Experts estimate there is a 95% chance for more than 0.6 billion barrels of oil (BBO) and a 5% chance for more than 9.2 BBO economically recoverable in the area as a whole.⁹⁹ The average of all the estimates of the conditional economically recoverable resources is 3.2 BBO.¹⁰⁰ In the year 2000, which is when production would occur if ANWR were opened to oil

92. *TVA*, 437 U.S. at 173 (citing 16 U.S.C. § 1536(a)(2) (1982)).

93. 16 U.S.C. § 1536(a)(1) (1982); *See Sierra Club v. Clark*, 577 F. Supp. 783, 789 (D. Minn. 1984), *aff'd in part, rev'd in part*, 755 F.2d 608 (8th Cir. 1985) In *Sierra Club*, the State of Minnesota and the Department of Interior proposed a sport trapping season on the Eastern Timber Wolf, a threatened species in northern Minnesota. The season was challenged and struck down. In striking the season the court stated "the Secretary clearly has an affirmative duty to bring the wolf population to the point where the protections of the Act are no longer needed." *See generally* France and Tuholske, *Stay the Hand: New Directions for the Endangered Species Act*, 7 PUB. LAND L. REV. 1 (1986).

94. 1002 REPORT, *supra* note 23, at 107.

95. *Id.* at 56. Economically recoverable oil in ANWR is defined as fields of more than 440 million barrels of oil.

96. *Id.*

97. *Id.* Both the Navarin and St. George Basins are located in Alaska.

98. *Id.*

99. *Id.*

100. *Id.*

and gas development today, it is estimated the U.S. will use 16.4 million barrels of oil per day.¹⁰¹ In short, the average estimate of oil reserves in the 1002 area would serve this country's needs for only 195 days. Thus, although a 19% potential may be high in the oil and gas industry, a volume of 3.2 BBO does not seem significant.¹⁰²

VII. NATIONAL NEED

In accordance with Section 1002(h)(5) of ANILCA, a discussion of the Nation's need for domestic sources of oil and gas is included in the 1002 Report. If the area were opened and leased in a timely manner, as stated, production would not be expected until about the year 2000.¹⁰³ To determine the demand and supply of oil and gas in the year 2000 is difficult.¹⁰⁴ The report relies on the U.S. Department of Energy's (DOE) long-term reference case projections and several private forecasts.¹⁰⁵ Based on the required studies under ANILCA, the 1002 Report concluded that the 1002 area "is the petroleum exploration target in the onshore U.S. having the greatest potential."¹⁰⁶ Alaska North slope crude oil, especially that from Prudhoe Bay, now contributes almost 20% of domestic production.¹⁰⁷ However, production in these areas is expected to decline, and thus oil from the 1002 area could help moderate these declines in supply and substantially reduce the need for increased imports.¹⁰⁸

101. *Id.* at 186.

102.

There is a 19% chance that there is at least one economically viable field in the area (This may seem like bad odds to us, but it is good among oil company risks.) Given this 1 in 5 chance that there is any oil we can get economically, there is a very high chance (95%) that we'd recover 600 million barrels. . . to a very low probability (5%) that we'd recover a Prudhoe-sized find: 9.2 BBO. So chances that it is Prudhoe size are 1 in 5, and then 5% after that. Given there is any at all, the mean we would recover is 3.2BB. Thus, the recommendation for total leasing and development is inconsistent with the data and the text of the report. (This is why people are charging that whoever wrote the Executive Summary did not read the report.)

This quote comes from a compilation of frequently heard arguments regarding ANWR included at the end of the Secretary's report. The response is in reaction to the allegation that ANWR's oil and gas potential is enormous.

REPORT OF THE SECRETARY OF THE INTERIOR TO THE CONGRESS REGARDING OIL AND GAS LEASING ON THE COASTAL PLAIN OF THE ARCTIC NATIONAL WILDLIFE REFUGE, ALASKA: HEARING BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE, 100th Cong., 1st Sess. 969 (1987).

103. 1002 REPORT, *supra* note 23, at 177.

104. *Id.*

105. *Id.* The DOE's long-term reference case projections are contained in their 1985 National Energy Policy Plan. Later data for 1986 and 1987 have been compiled also. The private forecasts relied on include reports from Chevron in 1986, Conoco in 1986, and Nehring in 1981.

106. *Id.*

107. *Id.*

108. Riva, J.P., Jr., *Domestic oil production projected to year 2000 on the basis of resource*

Furthermore, the 1002 Report states that:

Exploration and development well drilling have decreased to less than half of 1985 levels and reserves are not being adequately replaced. This situation has very serious long-term consequences. Oil is being consumed faster than it is being discovered, and the Nation is reducing its oil inventory. Further, almost all the onshore basins in the United States that hold the greatest potential for very large discoveries have already been explored.¹⁰⁹

While oil consumption in the U.S. rose 300,000 barrels per day from May 1986 to May 1987, domestic oil production dropped by 400,000 barrels a day.¹¹⁰ Additionally, "our dependence on foreign oil in 1973, the year of the Arab oil embargo, was 34.8 %. Today it's in excess of 40 %."¹¹¹

Therefore, the report concludes that possible oil and gas reserves in the 1002 area could contribute much to various National objectives. For instance the 1002 Report states new domestic oil and gas reserves may: (1) foster adequate energy supplies at reasonable costs; (2) reduce dependence on imported oil; (3) enhance National security; (4) help achieve a more favorable balance on international trade; (5) provide economic benefits to the Nation; and (6) provide Federal, State and local revenues.¹¹² Yet by the year 2000 many of the above National objectives may be satisfied. Furthermore, whether 3.2 BBO, the mean estimate, could significantly affect any of the stated objectives is doubtful. Estimates suggest that production could provide net national economic benefits of \$79.4 billion¹¹³, based on \$33 per barrel. Currently oil is priced at \$12.96 per barrel.¹¹⁴ Thus, because oil prices are notably down since the completion of the 1002 Report, a conclusion may be drawn that the need for domestic production of oil and gas, coupled with the economic benefit of developing ANWR have disappeared.

capability, Washington, D.C., The Library of Congress Congressional Research Service Report 84-129 SPR (1986). See also Riva, J.P., Jr., *Future domestic oil production projected under conditions of continued low drilling activity*, Washington, D.C., The Library of Congress Congressional Research Service (February 18, 1987).

109. 1002 REPORT, *supra* note 23, at 179.

110. Murkowski, *Gulf war puts focus on Alaska*, Anchorage Times, October 16, 1987. Frank Murkowski is an Alaskan Senator and member of the Senate Committee on Energy and Natural Resources.

111. *Id.*

112. 1002 REPORT, *supra* note 23, at 180-182.

113. *Id.* at 189.

114. *Oil prices fall to snuffrally*, Anchorage Daily News, Sept. 16, 1988. This figure constitutes the price of North Slope crude at the Gulf of Mexico refineries on September 16, 1988.

VIII. HODEL'S RECOMMENDATION

The Secretary for the Department of the Interior, Donald Hodel, recommends opening the entire 1002 area for oil and gas exploration and development.¹¹⁵ Hodel allegedly based his recommendation on the analysis conducted, public comment, the Nation's need for domestic sources of oil and gas, and the "Nation's ability to develop such resources in an environmentally sensitive manner as demonstrated by two decades of success at Prudhoe Bay and elsewhere."¹¹⁶ The following four sections discuss the flaws and inconsistencies in the Secretary's conclusions.

A. *Analysis Conducted*

As evidenced by some of his conclusions, Secretary Hodel did not read the 1002 Report carefully. Perhaps his gravest problems occur in his discussion of the Porcupine caribou herd. He states that "the Porcupine caribou herd has shown some preference for calving on the Arctic Refuge coastal plain."¹¹⁷ Yet, in every year for which there are records, the Porcupine herd has calved in the coastal plain. With no explanation, the Secretary is quick to point out that major effects are not synonymous with adverse.¹¹⁸ But a major decline in caribou population is adverse, and a major change in distribution results in major adverse effects on the subsistence user's life. As stated, 95 % of the Kaktovik village depends on the Porcupine herd for their main source of food. With loss of subsistence hunting over one-half of the area, 47.5 % of the Village will lose their main food source.

Moreover, the Secretary then attempts to compare the Central Arctic caribou herd, the predominant herd in the Prudhoe Bay area, which has actually increased in size since oil development, with the Porcupine herd in ANWR.¹¹⁹ This attempt at comparison refutes the 1002 Report's biological data. "Biologists suspect [the increase in the Central Arctic herd is] attributed to illegal hunting of the caribou's predators in the area."¹²⁰ More importantly, the calving area of the Central Arctic herd and the Porcupine herd differ. Concentrated calving of the Central Arctic herd has

115. 1002 REPORT, *supra* note 23, at iii.

116. *Id.*

117. *Id.* at 187.

118. *Id.*

119. *Id.*

120. Kelder, *Core Calf area in Refuge not an Issue, Report Says*, Fairbanks Daily Times, December 27, 1987. This article questions the finding of Mike Fraker who stated, "the available data show that the majority of caribou calve outside the so-called 'core area'." Notably, Fraker is the sole wildlife biologist, out of the other 14 wildlife biologists attending the largest conference on the Porcupine herd's core calving area, who drew this conclusion. Mike Fraker is employed by Standard Alaska Production Co..

never been documented in the Prudhoe Bay area, and little or no calving has been observed in there since about 1973¹²¹. In contrast, concentrated calving has occurred in the 1002 area every year for which there are records.

Additionally, because of the Porcupine herd's greater density, 24 caribou per square kilometer, versus the Central Arctic herd's 5 caribou per square kilometer, a greater percentage of the Porcupine herd would encounter oil development throughout its summer range than the Central Arctic herd does in the Prudhoe Bay area.¹²² Also, wolves, brown bears, and other predators are more abundant adjacent to the Porcupine herd's concentrated calving areas; predator densities are relatively low near the Central Arctic herd's.¹²³ In sum, important distinctions are found when comparing the Central Arctic herd in Prudhoe Bay with the Porcupine herd in the 1002 area. Thus, comparison of the Central Arctic caribou herd's ability to handle oil and gas development in Prudhoe Bay, with the Porcupine herd's ability in ANWR is groundless.

The Secretary states, "the fish and wildlife species that might be affected by oil and gas activities in the 1002 area are very important but are neither threatened or endangered."¹²⁴ But the report plainly states that development could have minor effects on the bowhead and gray whales, both endangered species, and the peregrine falcon, a threatened species.¹²⁵ As noted previously, full leasing invites a clear violation of the Endangered Species Act.

Additionally, Secretary Hodel's recommendation completely ignores Canada's subsistence and conservation interests of the "largest shared mammal", and Section 306(a) of ANILCA which mandates special protection for the herd. The Secretary ends his discussion of the Porcupine caribou stating, "the long period of time required to bring commercial fields into production would provide ample opportunity to develop any additional mitigation measures as may be needed to address unexpected impacts."¹²⁶ These measures must be taken before Congress passes an act allowing development to ensure compatibility with the uses for which the refuge was created.

121. Whitten and Cameron, *Distribution of caribou calving in relation to the Prudhoe Bay oilfield*, 35-39 (1985), in *CARIBOU AND HUMAN ACTIVITY*, OTTAWA, PROCEEDING OF THE FIRST NORTHERN CARIBOU WORKSHOP, WHITEHORSE, SEPT. 28-29, 1983, CANADIAN WILDLIFE SERVICE SPECIAL PUBLICATION (Martell and Russell, eds.).

122. *Id.*

123. *Id.*

124. 1002 REPORT, *supra* note 23, at 190.

125. *Id.* at 166. See text accompanying *supra* notes 90-94.

126. *Id.* at 188.

B. Public Comment

Remarkably, the Secretary relied on the public's comments in his recommendation to lease fully ANWR. Hodel initially attempted to exclude the public in helping make this decision which substantially effects our prized resources. During preparation of the preliminary draft report and detailed legislative environmental impact statement (LEIS) for departmental review, Trustees for Alaska and other environmental groups¹²⁷ sued Secretary Hodel for failing to comply fully with NEPA.¹²⁸ Specifically, they alleged that the Secretary did not provide an opportunity for public participation in advance of the report's submittal to Congress.¹²⁹ The District Court and the Ninth Circuit Court of Appeals held that the Department of the Interior did indeed violate NEPA by submitting the 1002 Report to Congress without an opportunity for public comment.¹³⁰ Consequently, the report was submitted for review and public comment from November 24, 1986 to February 6, 1987.¹³¹

More than eleven thousand letters were received during the comment period¹³². Of these letters, over two-thirds favored at least some form of oil and gas activity, while less than one-third favored wilderness designation.¹³³ Thus, upon receiving these responses, Hodel obviously changed his attitude toward the public's importance in commenting on the issue. Some of the comments could change however, if Mr. Hodel's assistant, William Horn, gets his way.¹³⁴

William P. Horn, Assistant Secretary for Fish, Wildlife and Parks for the Department of Interior, and Senator J. Bennett Johnston, Chairman of the Senate Energy and Natural Resources Committee are seeking to repeal the section of the Alaska Statehood Act which entitles Alaska to receive 90% of all oil and gas royalties on public lands.¹³⁵ Because more

127. These groups included: American Wilderness Alliance, Defenders of Wildlife, Northern Alaskan Environmental Center, and the Wilderness Society.

128. *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986).

129. *Id.*

130. *Id.* at 1383-1384. By Executive Order the CEQ issued regulations to federal agencies for implementation of NEPA. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977). 40 CFR 1506.8(b)(2)(ii) provides that proposals resulting from a "study process required by statute" must follow a draft/final EIS procedure permitting public comments on the draft.

131. 1002 REPORT, *supra* note 23, at 193.

132. *Id.* at 193.

133. *Id.* Many of the comments and letters are publicized in the appendix of the assessment report. They are split into the following categories; Federal governments and agencies, State and local governments, organizations, industry, private individuals, and general comment letters.

134. As of this publication Mr. Horn has left the Department of the Interior.

135. Johnston has introduced legislation that would mandate a 50-50 split on oil revenue generated from the Arctic National Wildlife Refuge with the federal government. Horn states that "the Statehood Act is not binding." *State shouldn't get 90/10 ANWR split official says*, Anchorage Times, October 14, 1987. See also S. 2214 at *supra* text accompanying notes 56-59 in which under

than 85% of Alaska's revenue comes from the 90% royalties,¹³⁶ a reduction in the royalty percentage would have serious effects on Alaska's economy. Moreover, perhaps the main reason Alaskans favor limited leasing of ANWR is because of the need for state funds. A decreased royalty would likely change some minds as to whether they favor any development at all in ANWR. Over 10% of the comments came from Alaskan entities.¹³⁷ The state with the second largest number of public comments was Texas, the homebase of many oil and gas companies.

Yet another example avoiding public opinion is evidenced by the fact the Secretary negotiated in secret in July of 1987 with several Alaska Native Corporations.¹³⁸ Secretary Hodel proposed to exchange 166,000 acres in the Arctic Refuge, representing 10.8% of the 1002 area, for 891,000 acres held by Native Corporations in other Alaska Refuges.¹³⁹ However, "implementation of a land exchange is contingent upon Congress opening the 1002 area to oil and gas exploration, development and production, and upon congressional approval of any exchange agreement."¹⁴⁰ Secretary Hodel sought to skirt this provision, by secretly negotiating a swap with Native Corporations, who have in turn already entered into contracts with 8 oil and gas companies.¹⁴¹ This time, not the court, but top Reagan officials ordered Hodel to reverse his planned course of action stating it was "inconsistent with presidential policy."¹⁴²

If at a later date an exchange under the Alaska Native Claims Settlement Act (ANCSA)¹⁴³ becomes reality, the report states that, only subsurface oil and gas interests in the Arctic Refuge would be exchanged. Surface ownership and control would remain vested in the Federal Government. Any exchange agreement

Section 601 Alaska receives only 50% of the revenues received from competitive bids, sales, bonuses, royalties, rents, fees, interest charges, or any other income derived from leasing ANWR.

136. *Juneau Report: The 1988 elections, For the victors tough policy decisions lie ahead*, Peninsula Clarion, August 16, 1988, at 13, col.3.

137. 1002 REPORT, *supra* note 25, at 193.

138. Peterson, *A Choice in the Wilderness*, The Washington Post Weekly Edition, November 30, 1987, at 34, col. 1. The Alaska Native Claims Settlement Act of 1971 is found at 43 U.S.C. §§ 1601-1628 (1982).

139. Peterson, *supra* note 138.

140. *Id.*

141. *Mobile calls Land Swap Illegal*, Anchorage Daily News, January 30, 1988.

142. *ANWR Land Swap Hits Snag*, The Anchorage Times, January 22, 1988. The order to reverse the exchange plan was contained in a memorandum from the Office of Management and Budget to the Department of Interior on January 21, 1988.

143. ANCSA provided land grants and cash payments to Alaskan natives to extinguish their aboriginal rights. The Act organized Alaskan's native population into twelve regional corporations and then gave each the right to select and receive title to federal land. The size of the entitlement was proportionate to the population of the village corporation. *See generally* Comment, *The Alaska Lands Act: A Delicate Balance between Conservation and Development*, 8 PUB. LAND L. REV. 143, 144 (1987).

would contain such surface use provisions as are necessary to ensure protection of refuge resources and maintain the integrity of the area.¹⁴⁴

With the exception of NEPA, exploration and development of State or private oil and gas interests within the 1002 area would be subject to the same regulations and environmental controls as Federal lands in the area.¹⁴⁵ Section 910 of ANILCA exempts Native Corporations compliance with NEPA.¹⁴⁶

In sum, Secretary Hodel's reliance on public comment in his recommendation is questionable at best. He refused to allow public comment without a court order. His assistant is trying to change Alaskan's statutory right to 90 % of oil and gas royalties, while he sought to exchange ANWR land through the ANCSA. Either action could change many Alaskan's comments. Hodel's attempt polarized both Alaskans and industry. If the swap had been completed Alaskans would have lost their 90 % royalties to the Native corporations, and oil and gas companies left out of the negotiations would surely have sued, testing the legality of such a move. Even the Reagan administration had to order him to stop his secretly negotiated exchange plans.

C. *The Nation's Need*

There is no question that our Nation requires energy resources. However, the 19 % possibility that oil sufficient to run this country for 195 days may be present in the 1002 area simply does not warrant the destruction of our Nation's last pristine arctic wildlife sanctuary.

The 1002 Report lists the following alternative sources of energy: energy conservation, coal (this country's most abundant resource), nuclear power, oil shale, tar sands (which Canada uses to a great extent), hydroelectric power, solar energy, geothermal energy, tidal power and wind power.¹⁴⁷ Secretary Hodel concludes oil and gas development is preferred over the environmental impact of these alternative sources of energy, stating, "each involves a large measure of environmental harm."¹⁴⁸ Yet, considering the current administration's failure to invest in researching alternative courses of energy, it is doubtful whether Secretary Hodel seriously considered the environmental effects of any of the listed alternatives. In the opening statement to Congress, beginning the debate of ANWR's future, Colorado Senator Timothy E. Wirth stated:

144. 1002 REPORT, *supra* note 23, Appendix at 13.

145. *Id.*

146. *Id.*

147. *Id.* at 155-160.

148. *Id.* at 189.

This is the same Administration that has rolled back the Corporate Average Fuel Economy Standards, and has recommended repeal of the law setting CAFE standards.¹⁴⁹ This Administration has slashed funding for research on conservation, solar and other renewable energy sources, and even for fossil fuels.¹⁵⁰ And our efforts to impose a fee on imported crude or to somehow control the volatility of oil prices consistently have been opposed by the Administration. This Administration even proposed that we defer addition of crude oil to the Strategic Petroleum Reserve.¹⁵¹

Increasing the fuel efficiency of the U.S. car fleet from an average of 13.3 mpg in 1973 to 18.3 mpg in 1986 resulted in savings of 3.23 billion barrels of oil for every five years, the equivalent of which there is a 19% chance of recovering in ANWR.¹⁵² The development of oil and gas reserves in ANWR is clearly not part of a "comprehensive, all-fronts energy plan for the safety of this country, but a short-sighted, band-aid approach which amounts to a preferential treatment for one industry at the risk of" ¹⁵³ losing a priceless wildlife sanctuary.

D. *The Nation's Ability to Develop Oil and Gas in Alaska in an Environmentally Sound Manner*

The 1002 draft report stated that 23,000 spills have already occurred in Alaska.¹⁵⁴ The Alaska Oil and Gas Association challenged this statistic. As a result, allegedly because the statistic could not be verified without extensive record reviews, it was left out of the final report submitted to

149. After CAFE took effect in 1978, the national fleet efficiency increased from 14 mpg to 18 mpg in 1985. In the long-term, as older cars are retired, national efficiency will continue to increase, approaching the CAFE level. Thus, the Secretary of Transportation's decision to rollback the CAFE standard from 27.5 mpg to 26.0 mpg could have a significant impact on fuel use and oil import spending in the long-term. This impact can be estimated from either the amount of gasoline consumed or from the number of miles traveled. The combined impact of the rollback of the 55 mph speed limit and CAFE could increase oil use by as much as 0.5 million barrels per day. Similarly, the combined impact on oil import spending could reach as high as \$3 billion to \$4 billion per year. Letter from Fred J. Sissine to the Senate Committee on Energy and Natural Resources (May 18, 1987). Fred J. Sissine is an analyst in Science and Technology of the Science Policy Research Division.

150. During the first 4 years, the Reagan Administration emphasized an energy supply-side policy in conventional fuel development and as a result proposed significant reduction in the Federal role for conservation and solar energy. With the decontrol of oil, it was felt that many Federal conservation and solar programs were unnecessary; higher energy prices would be sufficient incentive to promote conservation and solar energy commercialization. Total projected reductions in the conservation budget were to total \$2.5 billion by the end of FY86. This represented program outlay reduction of about 30% in FY81, 80% in FY82, and over 90% in FY83. Letter from Fred J. Sissine to the Senate Committee on Energy and Natural Resources (May 18, 1987).

151. REPORT, *supra* note 102, at 8 (statement of Colorado Senator Timothy E. Wirth).

152. S.REP. NO. 308, 100th Cong., 2d Sess. at 79 (statement of Senator Evans).

153. REPORT, *supra* note 102, at 8 (statement of Colorado Senator Timothy Wirth).

154. 1002 REPORT, *supra* note 23, at 200.

Congress.¹⁵⁵ Just one known spill, discovered on the Kenai National Wildlife Refuge by the Fish and Wildlife Service, will cost \$10 million to clean up.¹⁵⁶ Over fourteen tons of soil contaminated with PCB must be excavated.¹⁵⁷ The Fish and Wildlife Service discovered the spill while conducting a study on the impact of oil development on the refuge.

A study conducted by Trustees for Alaska, the Natural Resources Defense Council, and the National Wildlife Federation concluded that:

The conduct of oil and gas industries on the North Slope ranges from environmentally responsible to irresponsible - including instances of serious disregard for the environment. Hundreds of violations of state and federal regulatory controls to protect air, water and land have occurred, from minor infractions to at least one conviction on multiple criminal counts.

Existing environmental laws and regulations as currently implemented and enforced fail to prevent significant environmental deterioration caused by oil and gas activities.

Restoring large industrialized areas in the Arctic has not been shown to be economically or technically feasible over the long term, and industry predicts extremely high costs to restore developed sites on the North Slope.

A systematic failure by resource agencies to adequately monitor compliance and environmental impacts and to pursue enforcement actions aggressively on the North Slope has left serious voids in data. This information gap will persist unless monitoring and enforcement are substantially improved.¹⁵⁸

As seen, contrary to Hodel's conclusion, we have not developed our resources in Alaska in an environmentally sensitive manner. Leasing should not occur until we demonstrate that we can.

In sum, Secretary Hodel's recommendation, allegedly based on the analysis conducted, public comment, the Nation's need for domestic sources of oil and gas, and the Nation's ability to develop oil and gas in a sensitive manner, is hock-full of flaws and inconsistencies. A realistic recommendation based on the available data could not conclude that full leasing of oil and gas reserves in the 1002 area is compatible with the purposes for which the Arctic National Wildlife Refuge was created.

155. *Id.*

156. *Refuge cleaners estimate \$10 million bill*, Anchorage Daily News, September 13, 1987.

157. *Id.*

158. Speer and Libenson, *Oil in the Arctic: The Environmental Record of Oil Development on Alaska's North Slope*, Trustees for Alaska, at i (January 1988). The area studied included the Prudhoe Bay region of Alaska, between the Colvill and Canning Rivers. Information was collected from the years 1980 to 1987, through a review of published material, state and federal regulatory agency files and interviews with agency personnel.

IX. CONCLUSION

Congress is now facing an extremely important decision. Secretary Hodel's recommendation, based on flaws and inconsistencies, should not be used to assist Congress in resolving the Arctic National Wildlife Refuge's fate. As noted, the Senate Energy and Natural Resources Committee's bill allows phased in leasing and requires a National energy program. A National energy program should be developed and implemented before any leasing occurs on the Arctic National Wildlife Refuge. Short-term oil and gas resources should not be awarded industry at the price of the loss of some of the most prized long-term resources for which the Arctic National Wildlife Refuge was created. A 19 % chance of discovering 195 days worth of oil simply does not warrant the destruction accompanying development. Unfortunately, our bureaucratic system often creates inherent conflicts in accessing the importance of the Nation's resources. If full leasing occurs in the Arctic National Wildlife Refuge, in a short time not only will the oil and gas resources be removed, but also the pristine, wild and fragile ecosystem.