CHAPTER 27 FEDERAL OIL AND GAS LEASING IN ALASKA

James D. Linxwiler
Updated by James D. Linxwiler and Nicholas Ostrovsky

SYNOPSIS

§ 27.01 Introduction

Chapter 27 represents a departure for this treatise by outlining the law of federal oil and gas leases applicable only to one state. Alaska is unique in the area of federal oil and gas leasing; so unique that almost nothing else discussed in this text unqualifiedly applies to federal oil and gas leasing in that state.

Alaska possesses approximately 375 million acres onshore and over one-half of the United States's total Outer Continental Shelf. According to the most recent report by the Energy Information Administration, Alaska also possesses approximately 3.566 billion barrels of the total U.S. proven domestic crude oil reserves of 20.6 billion barrels, about 17%, and 210 million barrels of the total annual domestic crude oil production of 1.751 billion barrels, about 12%.[1] The Arctic region, including Alaska, is estimated to contain a sizeable percentage of the world's remaining undiscovered, technically recoverable oil and natural gas resources, ensuring that Alaska will be prominent in oil and gas exploration well into the future.[2] As a result of its size

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[1] Energy Information Administration, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Proved Reserves, 2009* at 18 (Nov. 2010), http://www.eia.gov.

[2] *See* http://www.usgs.gov/newsroom/article.asp?ID=1980 and http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf. According to the U.S. Geological Survey, these undiscovered Arctic resources account for 13% of the world's undiscovered oil, 30% of its undiscovered natural gas, and 20% of its undiscovered natural gas liquids. Of the 33 geologically defined Arctic sub-regions, over one-half of the undiscovered oil

and rich oil resources, Alaska has become the cornerstone of a national energy policy. But Alaska also possesses such unparalleled environmental resources—whole ecosystems virtually untouched by civilization, half of the US. National Park System acreage, and over 100 million acres of federal lands in special classifications—that the state has also become a cornerstone of the country's national conservation policy. Moreover, because of its unique history, Alaska has developed a singular body of federal land law.

The interplay of these factors—large oil and gas resource potential, unparalleled environmental riches, and unique federal land law—produced, in December 1980, three oil and gas programs applicable only to federal lands in Alaska.

This chapter outlines these three programs: the "Non-North Slope" federal oil and gas exploration and leasing program created by the Secretary of the Interior under sections 1008 and 1009[3] of the Alaska National Interest Lands Conservation Act (ANILCA)[4] applicable to many of the federal lands (including most National Wildlife Refuges) in Alaska; the exploration and leasing program applicable to the National Petroleum Reserve in Alaska on the North Slope under authority of 42 U.S.C. § 6506a;[5] and the exploration (and potential leasing) program applicable to the Arctic National Wildlife Refuge on the North Slope under ANILCA §§ 1002 and 1003.[6]

In order to place the discussion of these programs in proper context, this chapter also briefly discusses the history and land status of Alaska's federal lands.

Finally, this chapter discusses certain federal laws uniquely applicable to oil and gas activities on federal lands in Alaska.

§ 27.02 Historical Summary of Federal Land Status and Legislation in Alaska Affecting Federal Oil and Gas Leasing

[1] Introduction

From the time of its acquisition by the United States, Alaska has generated many unique public land laws.[1] It is not the intent of this section to catalog all of the various peculiarities of Alaska land law, because such information is available elsewhere.[2] Rather, this section simply

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resources are estimated to occur in only three distinct sub-regions: Arctic Alaska, the Amerasia Basin, and the East Greenland Rift Basins. Additionally, over 70% of the undiscovered natural gas resources in the Arctic are estimated to occur in the sub-regions of West Siberian Basin, the East Barents Basins, and Arctic Alaska.

[3] 16 U.S.C. §§ 3148, 3149.

[4] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 and 43 U.S.C.).

[5] The Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1981, § 100, Pub. L. No. 96-514, 94 Stat. 2957, 2964, 42 U.S.C. § 6508 (1982), *now at* 42 U.S.C. § 6506a.

[6] 16 U.S.C. §§ 3142, 3143.

[1] See, e.g., the Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322, which allowed federal mineral leasing of submerged lands beneath inland navigable waters in the Territory of Alaska.

[2] This chapter can offer only the briefest outline of these matters. For a fuller discussion of Alaska history, land law, and land status, the reader is referred to other publications, in particular, to Joseph Rudd, whose

discusses in general terms those provisions of federal law that may affect the interests of applicants for, or holders of, federal oil and gas leases in Alaska.

Virtually all federal public lands in Alaska have been the subject of formal or informal withdrawals since 1966. Thousands of federal oil and gas lease offers were held in limbo since then, and many of these were rejected. The unique provisions of the Alaska Statehood Act[3] and the Alaska Native Claims Settlement Act (ANCSA)[4] have also affected the interests of federal oil and gas lessees and lease applicants because much of the land and minerals in Alaska owned by the federal government and subject to land grants contained in these enactments is in the process of being transferred to state and Native ownership. The long delay in completing land conveyances under ANCSA and the Alaska Statehood Act has disrupted land status in Alaska for more than 40 years. In an attempt to speed the process of land conveyances under ANCSA and the Alaska Statehood Act, and resolve the uncertainties such delays have caused, in 2004 Congress enacted the Alaska Land Transfer Acceleration Act,[5] which was intended to complete most such conveyances during 2009. While that ambitious goal was not entirely met, significant progress was made. Once these transfers are complete, the oil and gas underlying these conveyed lands will not be subject to new leases under the federal law discussed in this chapter, although prior federally issued leases may remain valid. Furthermore, the Alaska National Interest Lands Conservation Act (ANILCA)[6] contains provisions creating or extending federal withdrawals in Alaska in a manner that affects federal oil and gas lessees and lease applicants.

This section summarizes how these matters affect federal oil and gas leasing in Alaska.[7]

[2] Pre-Statehood Federal Lands Legislation Affecting Federal Oil and Gas Leasing[8]

All important recent federal lands legislation relating to Alaska has, in one form or

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article "Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership," 20 *Rocky Mt. Min. L. Inst.* 109 (1975), establishes an historical overview necessary to understand Alaska's complex federal land status; to Sanford Sagalkin & Mark Panitch, whose article "Mineral Development Under the Alaska Lands Act," 10 *UCLA-Alaska L. Rev.* 117 (1981), presents a brief overview to the problems posed by ANILCA; to two RMMLF papers presented by the author of this chapter, entitled "The Alaska Native Claims Settlement Act: The First 20 Years," 38 *Rocky Mt. Min. L. Inst.* 2-1 (1992); and "The Alaska Native Claims Settlement Act at 35: Delivering On The Promise," 53 *Rocky Mt. Min. L. Inst.* 12 1 (2007); and to 3 *Am. L. of Mining* Title VI (2d ed. 2011), which represents an encyclopedic approach to Alaska land law.

[3] Pub. L. No. 85-508, 72 Stat. 339 (1958) (48 U.S.C. note prec. § 21).

[4] 43 U.S.C. §§ 1601–1629h.

[5] Pub. L. No. 108-452, 118 Stat. 3575 (2004) (codified at 43 U.S.C. §§ 1611, 1613, 1617, 1621, 1629g, 1635).

[6] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 and 43 U.S.C.).

[7] Land status and federal lands legislation establishing the sections 1008 and 1009 leasing program on federal public lands and game refuges are addressed in § 27.03, *infra*. Information on land status and federal lands legislation relating only to the National Petroleum Reserve in Alaska is discussed in § 27.04, *infra*, and similar information relating to the Arctic National Wildlife Refuge is discussed in § 27.05, *infra*. Finally, information concerning certain federal land use regulations is discussed in § 27.06, *infra*.

[8] For a more complete treatment of this subject, see 3 *Am. L. of Mining* Title VI (2d ed. 2011).

another, preserved prior valid existing rights. As a result, the effect of this body of legislation has been cumulative, i.e., the rights of federal oil and gas lessees created under recent legislation may be subject to rights created under earlier enactments. This effect can be traced to Alaska's originating legislation.

In 1867, the United States purchased Alaska from Russia pursuant to the Treaty of Cession.[9] The Organic Act of 1884[10] created a land district for Alaska, provided for a minimal civil government, and extended the United States' mining laws to Alaska. The Alaska Townsite Act[11] authorized establishment of townsites and conveyances of town lots to individual, non-Native occupants[12] and the grant of trade and manufacturing sites. Coal, oil, and gas underlying trade and manufacturing sites were reserved to the United States and may be leased pursuant to the authorities discussed in this chapter, subject to a finding that such lands may be valuable for these minerals.[13] However, the question of ownership of minerals within townsites is more complex and must be determined with reference to the specific lands at issue.[14]

In 1906, pursuant to the Alaska Native Allotment Act,[15] Alaska Natives were first allowed to obtain legal title to the land they occupied. The coal, oil, and gas underlying Native allotments were reserved to the United States at the time of the patent, and are subject to leasing, if it is found that such lands may be valuable for these minerals.[16] Most Natives, however, were not aware of the provisions of the Allotment Act or the methods of applying for the lands under that Act[17] until its provisions became known during the public debate surrounding Native rights in the late 1960s. Consequently, thousands of allotment applications were filed immediately before the passage of the Alaska Native Claims Settlement Act, which, *inter alia*, repealed the Alaska Native Allotment Act.[18] These applications languished for years in the administrative review process of the Department of the Interior, and were finally statutorily granted, with certain important exceptions, by ANILCA.[19]

In contrast to a general practice in mainland areas, no treaties were made between the

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[9] Treaty of Mar. 30, 1867, 15 Stat. 539.

[10] Act of May 17, 1884, ch. 53, 23 Stat. 24.

[11] Act of Mar. 3, 1891, ch. 561, § 11, 26 Stat. 1099 (repealed 1976, formerly codified at 43 U.S.C. § 732).

[12] In 1926, the townsite laws were extended to Alaska Natives by the Alaskan Native Townsite Act of 1926, ch. 379, 44 Stat. 629 (formerly codified at 43 U.S.C. §§ 733–736, repealed in 1976 by the Federal Land Policy and Management Act (FLPMA)), thus providing for the patenting of lots within Native townsites to the occupants. Additional authority for Alaska townsites is found in 43 U.S.C. § 975b (repealed by FLPMA) and 43 C.F.R. subpt. 2566.

[13] 43 U.S.C. §§ 270-11, -13 (repealed by FLPMA).

[14] *See Lindley on Mines* (3d ed. 1914); David S. Case, *The Special Relationship of Alaska Natives to the Federal Government* 59–63 (Alaska Native Foundation 1978); 43 C.F.R. subpts. 2564, 2565, 2566.

[15] Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971, formerly codified at 43 U.S.C. §§ 270-1 to -3).

[16] 43 U.S.C. §§ 270-11, -13 (repealed by FLPMA).

[17] S. Rep. No. 92-405 (1971).

[18] 43 U.S.C. § 1617.

[19] 43 U.S.C. § 1634.

United States and the Alaska Natives to settle aboriginal land claims or to designate lands for exclusive Native occupancy. Only one reservation was created by Congress in Alaska, for the Metlakahtla Indians.[20] Land was withdrawn for the benefit of the Natives between 1914 and 1917 by Executive Orders of the President.[21] In 1936, the Secretary of the Interior was authorized to create certain reservations in Alaska by an amendment to the Indian Reorganization Act.[22] However, both Natives and non-Natives in Alaska opposed the creation of reservations, and thus only six reservations were designated, and none were on the North Slope.[23] Oil and gas leasing of reservation lands was, as in the "lower 48 states," within the control of the Secretary of the Interior.[24] Only a few federal oil and gas leases were issued on such reservations, and their continuing validity is in doubt.[25] As discussed further at section 27.02[4], unlike every other state, essentially no aboriginal rights of Alaska Natives to the lands were extinguished during the territorial phase of Alaska's history,[26] a fact that has impacted federal oil and gas leasing in Alaska.

During the territorial phase, federal oil and gas leasing proceeded in Alaska under the Mineral Leasing Act.[27] The first major discoveries of oil and gas in Alaska occurred on the Kenai Peninsula. To facilitate federal oil and gas leasing in this area, a special statute was enacted[28] to allow for federal leasing of lands underlying navigable waters in the Territory of Alaska.

[3] Effects of the Statehood Act on Federal Oil and Gas Leasing

In 1958, Congress enacted the Alaska Statehood Act (Statehood Act).[29] In order to provide the state with a solid economic foundation,[30] section 6(b) of the Statehood Act authorized the state to select 102.5 million acres from the public lands that were "vacant, unappropriated, and unreserved at the time of their selection. …"[31] The state was also authorized to execute

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[20] Act of Mar 3, 1891, ch. 561, § 15, 26 Stat. 1101, 25 U.S.C. § 495.

[21] *E.g.*, Ft. Yukon, Exec. Order No. 1896 (Feb. 24, 1914); Klukwan, Exec. Order No. 2227 (Aug. 2, 1915); Yendistucky, Exec. Order No. 2388 (May 25, 1916); Norton Bay, Exec. Order No. 2508 (Jan. 3, 1917).

[22] Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250 (repealed by FLPMA, formerly codified at 25 U.S.C. § 496).

[23] Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* ch. V (1968).

[24] *See* chapter 26, *supra*.

[25] With reference to the powers of a tribal government to grant option rights that bind a Native corporation subsequently created under ANCSA, see *Cook Inlet Region, Inc. v. D.J. Moore Corp.*, No. 3AN-76-4171 CI, Alaska Superior Court, Third Judicial District of Anchorage (unpublished). *See also* 43 U.S.C. § 1613(g) (protecting prior valid existing rights when reservation lands are subsequently conveyed to Native corporations).

[26] United States v. Atl. Richfield Co., 612 F.2d 1132 (9th Cir. 1980).

[27] 30 U.S.C. §§ 181–263.

[28] Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322 (formerly codified at 48 U.S.C. §§ 455–456h).

[29] Pub. L. No. 85-508, 72 Stat. 339 (1958) (48 U.S.C. note prec. § 21).

[30] United States v. Atl. Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980). *See also* Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968).

[31] 48 U.S.C. note prec. § 21 at § 6(b).

conditional leases and make conditional sales of the selected lands after its selections were tentatively approved.[32]

Selections under section 6(b) of the Statehood Act were made "subject to any valid existing right," including any valid federal oil and gas lease.[33] Under section 6(h) of the Statehood Act,[34] lands selected by the state that contained a federal oil and gas lease were conveyed to the state, vesting in it all the right, title, and interest of the federal government in and to that lease. If only a portion of the land subject to the lease was selected and patented to the state, the United States reserved the minerals subject to that lease until termination of the lease, at which time title to the minerals so reserved passed to the state.

Unlike an existing lease, an application for a noncompetitive oil and gas lease filed under the Mineral Leasing Act of 1920 does not constitute a protected valid existing right for purposes of the Statehood Act.[35] In fact, once the state has made an application for selection of federal land, all applications and offers for mineral leases under the Mineral Leasing Act filed prior to, simultaneously with, or after the filing of such a selection must be rejected by the Secretary.[36]

The state does not have a powerful incentive to select lands leased under the Mineral Leasing Act: 90% of all rentals, bonuses, and royalties received by the federal government from oil and gas leases in Alaska under the Mineral Leasing Act are already given to the Alaska State Legislature for use as it sees fit.[37]

[4] Native Claims and the Alaska Native Claims Settlement Act

[a] Native Claims

As mentioned above, aboriginal rights of Alaska Natives to most of Alaska were not extinguished prior to statehood. Section 4 of the Statehood Act provides that the state disclaims any right or title to "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts … or is held by the United States in trust for said natives. …"[38] Section 4 of the Statehood Act therefore set the stage for an historic conflict, the reverberations of which still affect land status and federal oil and gas leasing in Alaska.

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[32] 48 U.S.C. note prec. § 21 at § 6(g).

[33] 48 U.S.C. note prec. § 21 at § 6(g).

[34] 48 U.S.C. note prec. § 21 at § 6(h).

[35] James W. Canon, 84 Interior Dec. 176 (1977); Richard W. Rowe, 20 IBLA 59, GFS(O&G) 51 (1975), *cf.* Rowe v. United States, 464 F. Supp. 1060 (D. Alaska 1979), *aff'd in part*, 633 F.2d 799 (9th Cir. 1980).

[36] 43 C.F.R. § 2627.3(b)(2).

[37] 30 U.S.C. § 191. *See* Act of July 7, 1958, Pub. L. No. 85-508, §§ 6(k), 28(a)(1), 72 Stat. 339, 351 (codified as amended at 48 U.S.C. note prec. § 21); FLPMA § 317(a), Pub. L. No. 94-579, § 317(a), 90 Stat. 2770 (codified at 30 U.S.C. § 191); *see also* Act of July 10, 1957, Pub. L. No. 85-88, § 2, 71 Stat. 282.

[38] Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (codified as amended at 48 U.S.C. note prec. § 21).

There had been oil discoveries in the mid-1950s on the Kenai Peninsula; there were also well-known agricultural, recreational, and mineral lands elsewhere around the state. The state first used its selection rights to obtain these lands. In doing so, the state selected and obtained title to lands near villages that Alaska Natives had occupied and claimed since time immemorial. These selections created conflict between the state and the Natives.

In 1964 and 1965, the state selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of federal land on the North Slope, an area in which large oil deposits were suspected.[39] In 1967, oil was discovered at Prudhoe Bay; in 1969, the Kuparuk River oil field was discovered. Also in 1969, the state held a sale of oil and gas leases for tentatively approved North Slope lands; the state obtained nearly $1 billion from the sale. These events also created conflict between the state and the Natives.

In 1966, the Alaska Federation of Natives and other regional Native associations were organized throughout Alaska. Protests and claims against state selections and conveyances were filed with the Bureau of Land Management by these Native groups. By 1968, 40 claims covering approximately 80% of the state had been filed,[40] with the North Slope Native Association filing a claim to almost the entire North Slope.[41] These claims threw doubt upon all land titles in the state, including titles to federal oil and gas leases.

In response to these claims and protests, Secretary of the Interior Stewart Udall instituted an informal departmental policy, known as the "Alaska land freeze,"[42] under which federal patenting, approval of state selections, and approval of other applications for public lands, including applications for leases, were suspended until the controversy with the Natives was settled. While offers for noncompetitive oil and gas leases could be filed, the Department of the Interior would only process such applications to the point of issuing a lease. Hundreds of leases were thus held in limbo.[43]

On December 12, 1968, the Bureau of Indian Affairs (BIA) took the first concrete steps to remedy the Native lands claim issue by filing an application under the Pickett Act[44] for withdrawal of all lands in the State of Alaska not otherwise withdrawn.[45] This application segregated lands from leasing under the mineral leasing laws, and thus required suspension of all

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[39] Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 456–57 (1968).

[40] Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 442 (1968).

[41] Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 456 (1968).

[42] Joseph Rudd, "Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership," 20 *Rocky Mt. Min. L. Inst.* 109, 118 (1975); *see also* Block, "Alaska Native Claims," 4 *Nat. Resources Law* 223, 224 (1971).

[43] *See* Joseph Rudd, "Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership," 20 *Rocky Mt. Min. L. Inst.* 109 (1975).

[44] Chapter 421, 36 Stat. 847 (1910) (codified as amended at 43 U.S.C. §§ 141–143, repealed in part 1960 & 1976).

[45] 33 Fed. Reg. 18,591 (Dec. 14, 1968).

action on pending and subsequent mineral lease applications.[46]

On January 17, 1969, Secretary of the Interior Udall responded to the BIA application by promulgating Public Land Order No. 4582,[47] which withdrew from disposal all unreserved public lands in Alaska and prevented the initiation of application for noncompetitive oil and gas leases. This formal withdrawal has been referred to as the "super-freeze."[48]

In *Alaska v. Udall*,[49] the state attempted to obtain a summary judgment requiring the Secretary of the Interior to approve pending state selections and patent others that were subject to Native claims and the super-freeze. The Ninth Circuit held that material questions of fact existed as to whether or not the lands selected by the state were actually occupied by the Natives. The court suggested that the suit be stayed pending anticipated legislative action that would resolve the question.[50]

[b] Settlement of Claims in ANCSA

In settlement of these claims and conflicts, Congress enacted the ANCSA on December 18, 1971.[51] ANCSA extinguished aboriginal rights to lands held by Natives,[52] established Native village corporations,[53] allowed these villages to select lands surrounding the villages,[54] established 13 regional Native corporations,[55] transferred subsurface rights in village-selected land and certain other land rights to the 12 Alaska-based regional corporations,[56] and provided additional authority to the Secretary of the Interior to withdraw unreserved public lands.[57]

One purpose of ANCSA was to protect the rights of those who had previously entered the North Slope in reliance on federal or state authorization.[58] Furthermore, ANCSA required the dismissal of Native claims to land that was tentatively approved for transfer to the state, or upon which entries had been made pursuant to valid federal leases or conveyances.[59]

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[46] 43 C.F.R. § 2013.2-7 (1968).
[47] 34 Fed. Reg. 1025 (Jan. 23, 1969).
[48] Joseph Rudd, "Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership," 20 *Rocky Mt. Min. L. Inst.* 109, 119 (1975).
[49] Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969).
[50] Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969).
[51] Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629h).
[52] 43 U.S.C. § 1603.
[53] 43 U.S.C. § 1607.
[54] 43 U.S.C. § 1611.
[55] 43 U.S.C. § 1606.
[56] 43 U.S.C. § 1613.
[57] 43 U.S.C. § 1616.
[58] United States v. Atl. Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).
[59] United States v. Atl. Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

[c] Native Selection Rights and Withdrawal Authority Under ANCSA

Under ANCSA, the Natives were granted the right to acquire approximately 44 million acres of land.[60] Village corporations are entitled to obtain the surface estates to approximately 22 million acres of land.[61] The subsurface estates to the land selected by the village corporations are acquired by the regional corporation for the region in which the village is situated.[62] However, oil and gas activities on regional subsurface underlying lands "within the boundaries of any Native village" are subject to the consent of the village corporation.[63] The precise nature of this consent power is not clearly established.[64] The regional corporations are, in addition, entitled to select approximately 16 million acres of land independent of the village corporations.[65] Such selections may include either or both the surface and subsurface estates.[66] The remaining lands are distributed to a variety of parties.[67]

To make it possible for the Native Corporations to select the public lands around the villages to which they were entitled, certain lands were withdrawn by ANCSA § 11(a)(1) through (3) from all forms of appropriation under the public land laws, including the mineral leasing laws, and from selection under the Statehood Act.[68]

ANCSA § 17[69] also contained Congress's first effort at federal land planning in Alaska. Part of this effort consisted of additional withdrawal authority to the Secretary of the Interior. The withdrawal authority granted to the Secretary by ANCSA § 17(d)(1) (d-1) and (2) (d-2)[70] was exceptionally broad. Under d-1, all unreserved public lands in Alaska were withdrawn for a

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[60] Pursuant to 43 U.S.C. §§ 1611, 1613, & 1615, Native corporations are entitled to select approximately 40 million acres. 43 U.S.C. § 1618(b) allowed village corporations to acquire approximately 4 million acres of land within former Native reserves. *See* James D. Linxwiler, "The Alaska Native Claims Settlement Act: The First 20 Years," 38 *Rocky Mt. Min. L. Inst.* 2-1, 2-5 (1992).

[61] 43 U.S.C. §§ 1611(a), (b), 1615(b), (d).

[62] 43 U.S.C. § 1613(a), (b), (f). However, note that in certain limited circumstances involving village selections in the National Petroleum Reserve in Alaska and in National Wildlife Refuges, regional corporation subsurface lands are granted elsewhere.

[63] 43 U.S.C. § 1613(f).

[64] It is not clearly established whether this consent right applies outside the physical boundaries of a village, or applies to unselected or unpatented lands. The language of section 1613(f) is patently ambiguous, and the courts have not decided the matter. *See* Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978). Moreover, it is unclear if 43 U.S.C. § 1613(g) (which protects prior valid existing rights, including leases, when lands are conveyed to them) modifies 43 U.S.C. § 1613(f) to apply legal principles under the Mineral Leasing Act to protect the access rights of federal lessees. *See e.g.*, Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878 (10th Cir. 1974); Ventura Cnty. v. Gulf Oil Co., 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980). In any event, the Native corporations are private entities organized under the laws of Alaska and can be dealt with on access issues as any other private corporation.

[65] 43 U.S.C. § 1611(c).

[66] 43 U.S.C. § 1613(e).

[67] 43 U.S.C. §§ 1613(c), (h), 1615.

[68] 43 U.S.C. §§ 1610(a)(1)–(3), 1615(a).

[69] 43 U.S.C. § 1616.

[70] 43 U.S.C. § 1616(d)(1), (2).

period of 90 days and the Secretary was authorized to extend the d-1 withdrawals.[71] Acting under this authority, the Secretary initially withdrew d-1 lands to create buffer zones around d-2 withdrawals, but eventually exercised the authority to include all unreserved public lands in Alaska in the d-1 withdrawals.[72] This d-1 withdrawal of all unreserved public lands in Alaska is significant because d-1 withdrawals continue to the present. Any action with respect to such lands, such as leasing, requires the modification of such withdrawals.[73]

The d-2 withdrawals were made on 80 million acres of unreserved public land to preserve them for possible addition to the national park, forest, wildlife refuge, and wild and scenic river systems.[74]

Any lease applications made on lands withdrawn under ANCSA are governed by the terms of the withdrawal order. Those withdrawal orders are in a somewhat standard form, which generally includes a statement that any offer for noncompetitive oil and gas leases made subsequent to the withdrawal will be automatically rejected.[75]

After selection, but prior to issuance of a conveyance, these lands remain under the authority of the Secretary of the Interior (or Secretary of Agriculture) and are governed by interim management regulations that allow, *inter alia*, the issuance of leases after consultation with the future Native corporation land owner.[76] The regulations and cases interpreting the statute make it clear that Congress did not intend the withdrawals to impair the authority of the federal government to contract, grant leases, permits, rights-of-way, or easements.[77]

All of the withdrawals[78] and conveyances made under ANCSA are subject to prior valid existing rights.[79] Section 14(g)[80] of ANCSA expressly provides that any patent to land or minerals under the Act will contain provisions making it subject to any prior lease (including those issued pursuant to section 6(g) of the Statehood Act), contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the rights, privileges, and benefits granted to him. Once a patent is issued, the Native corporation patentee succeeds and becomes entitled to the interests held by the state or the United States. However, the state or the

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[71] 43 U.S.C. § 1616(d)(1). The d-1 withdrawals as extended by the Secretary were for an indefinite time, because the time limitations upon ANCSA withdrawals did not apply to such d-1 extensions. *See* 43 U.S.C. § 1621(h)(3).

[72] Pub. Land Order No. 5180, 37 Fed. Reg. 5583 (Mar. 16, 1972), *as amended by* Pub. Land Order No. 5418, 39 Fed. Reg. 11,547 (Mar. 29, 1974).

[73] *See, e.g.*, Pub. Land Order No. 6329, § 1, 47 Fed. Reg. 39,495 (Sept. 8, 1982) and Pub. Land Order No. 6098, § 1, 46 Fed. Reg. 61,472 (Dec. 17, 1981).

[74] 43 U.S.C. § 1616(d)(2)(A).

[75] *See, e.g.*, Pub. Land Orders Nos. 5169–5188, 37 Fed. Reg. 5572 (Mar. 16, 1972).

[76] 43 C.F.R. § 2650.1.

[77] Richard W. Rowe, 20 IBLA 59, GFS(O&G) 51 (1975), *cf.* Rowe v. United States, 464 F. Supp. 1060 (D. Alaska 1979), *aff'd in part*, 633 F.2d 799 (9th Cir. 1980).

[78] 43 U.S.C. §§ 1610(a)(1), (2), (3), 1616(d)(1), (2).

[79] 43 U.S.C. § 1613(g).

[80] 43 U.S.C. § 1613(g).

United States continues to administer any valid existing leases, contracts, rights-of-way, permits, or easements on the patented estate unless such rights to administer are waived.[81]

It is important to note that lease applications that were pending on the date of Native selection were held not to be "valid existing rights" protected by the savings clause in ANCSA,[82] which has been interpreted as being notably more restrictive than that of the Statehood Act.[83] Moreover, noncompetitive oil and gas lease applications made prior to the withdrawals are held in suspense pending Native selection and conveyance.[84] If the land is selected and conveyed to the village, the lease offer is generally rejected.[85] If withdrawn land is not conveyed to the village, the application may still be suspended, pending approval and grant or rejection of a lease.

Pursuant to ANCSA, the Secretary of the Interior was to issue a patent to a Native corporation "immediately" after it selected its lands.[86] However, "immediately" has stretched for some length of time. Many lands have not yet been conveyed, leaving land status in Alaska in a highly unsettled state, which impedes oil and gas leasing.

Moreover, even when conveyances to Native corporations occur, they often are not final. Since much of the land selected was not surveyed, the Native corporation receives an "interim conveyance," which amounts to a grant of legal title to the unsurveyed lands, subject to confirmation of the boundaries after survey.[87] Upon survey of these lands, the Native corporation finally receives a patent to the lands.[88]

[5] Federal Lands Withdrawals and the Alaska National Interest Lands Conservation Act

Perhaps the single greatest public controversy with the federal government, in a state accustomed to such controversies, occurred over the passage of ANILCA.[89] The U.S. Supreme Court has stated: "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."[90] Needless to say, this was a huge task, and there was not a substantial consensus on its completion. ANILCA significantly altered the face of Alaska for all time by designating various special status for up to 100 million acres. The terms of ANILCA and its withdrawals are

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[81] 43 U.S.C. § 1613(g).

[82] 43 U.S.C. § 1613(g).

[83] Richard W. Rowe, 20 IBLA 59, GFS(O&G) 51 (1975), *cf.* Rowe v. United States, 464 F. Supp. 1060 (D. Alaska 1979), *aff'd in part*, 633 F.2d 799 (9th Cir. 1980).

[84] 43 U.S.C. § 1610(a)(1), (3).

[85] James W. Canon, 84 Interior Dec. 176 (1977).

[86] 43 U.S.C. § 1613(a), (b), (e), (f).

[87] 43 U.S.C. § 1621(j). The interim conveyance is similar to the tentative approval of a state selection under section 6(g) of the Statehood Act. Basically, the Native Corporation may deal with the lands as it wishes, subject to modification of the boundaries after the survey.

[88] 43 U.S.C. § 1621(j).

[89] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 and 43 U.S.C.).

[90] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 549 (1987).

far beyond the scope of this chapter.[91] The purpose of this section is to provide the practitioner with a description of certain events leading to the adoption of ANILCA that relate to land status and are of relevance to federal oil and gas leasing.

[a] The Effect of D-2 FLPMA and Antiquities Act Withdrawals

When the ANCSA d-2 withdrawals were ready to expire, the Secretary of the Interior exercised further withdrawal authority allegedly granted by section 204 of the Federal Land Policy and Management Act (FLPMA)[92] to place an additional layer of withdrawal upon these lands. Eventually, many of these lands were further withdrawn by an Executive Order issued by President Carter under authority of the Antiquities Act of 1906.[93]

The d-1 and d-2 withdrawals expanded and continued the effects of earlier withdrawals, and prevented or halted a great variety of public uses of federal public lands, including federal oil and gas leasing. These withdrawals therefore were the subject of bitter political controversy and litigation, and played a central role in forcing the passage of ANILCA.

[b] The Effect of ANILCA on Federal Lands Withdrawals and Federal Leasing

When Congress enacted ANILCA in 1980,[94] the act appeared to offer a more coherent resolution of land status than the procession of land freezes, d-2 withdrawals, FLPMA withdrawals, and Antiquities Act withdrawals that preceded it. However, ANILCA locked in place a new system of federal withdrawals. Furthermore, ANILCA also left in place the Secretary's statewide ANCSA d-1 withdrawals. Therefore, virtually all lands in Alaska are presently withdrawn, and federal oil and gas leases cannot be obtained in Alaska except under the provisions of the programs further discussed in this chapter.

Since the passage of ANCSA, the Secretary has taken action to deny applications for leases under the Mineral Leasing Act in those areas not expressly subject to leasing under ANILCA or other authority. During 1982, 950 applications located within Favorable Petroleum Geologic Provinces[95] were rejected, and approximately 500 applications located in National Parks and Monuments were rejected. Subsequently, the Secretary rejected offers in National Game Refuges.

ANILCA rejuvenated oil and gas leasing on certain federal public lands in Alaska. The Secretary was directed to create a leasing program for certain public domain lands and wildlife

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[91] For a general discussion of ANILCA, see Sanford Sagalkin & Mark Panitch, "Mineral Development under the Alaska Lands Act," 10 *UCLA-Alaska L. Rev.* 117 (1981), and 3 *Am. L. of Mining* Title VI (2d ed. 2011).

[92] 43 U.S.C. § 1714. *See, e.g.*, Pub. Land Order No. 5654, 43 Fed. Reg. 59,756 (Nov. 17, 1978); *but see* Pub. Land Order Nos. 5696–5711, 45 Fed. Reg. 9562 (Feb. 12, 1980) (giving the Secretary discretion to reinstitute oil and gas leasing on certain section 204 withdrawals).

[93] 16 U.S.C. § 431.

[94] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 and 43 U.S.C.).

[95] *See* § 27.03[5], *infra*.

refuges that would be opened at appropriate times for leasing.[96] The Secretary was also directed to allow exploration of the Arctic National Wildlife Refuge, and to report to Congress on possible future leasing.[97] In 1980, almost simultaneously with the passage of ANILCA, and possibly as a result of a complex legislative strategy to avoid leasing in the nearby Arctic National Wildlife Refuge, Congress also provided for competitive leasing in the National Petroleum Reserve in Alaska.[98]

§ 27.03 The "Non-North Slope" Federal Oil and Gas Leasing Program Under ANILCA §§ 1008 and 1009

[1] Introduction

The Alaska National Interest Lands Conservation Act (ANILCA) §§ 1008 and 1009[1] oil and gas leasing program in Alaska utilizes the same basic statutory authority as onshore leasing in the "lower 48"—the Mineral Leasing Act of 1920.[2] Moreover, the two programs use the same basic set of regulations[3] and therefore most of the basic concepts and procedures used for leasing under the Mineral Leasing Act and under ANILCA §§ 1008 and 1009 are similar or identical.

Prior to the enactment of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Reform Act),[4] certain significant differences existed in the leasing structure of the ANILCA §§ 1008 and 1009 program from that of the Mineral Leasing Act in general. However, those major programmatic differences are largely removed,[5] and the ANILCA §§ 1008 and 1009 program is understandable mainly as an extension of the Mineral Leasing Act program with certain special provisions of an environmental nature. However, lease applications under the previous system have been "grandfathered," and leases issued pursuant to such applications will continue to be issued and continue to be valid.[6] Thus, discussion of previous law has been preserved in this text for historical reasons and to provide an accurate basis for title examination. For instance, most leasing in Alaska uses competitive oil and gas lease sales in a manner identical to the "lower 48,"[7] and acreage limitations,[8] while different, are similar in intent.

However, the similarities may in some cases be more apparent than real, because the ANILCA §§ 1008 and 1009 program is a response to uniquely Alaskan problems. For instance, in response to the several-decade-long phenomenon of Alaska lands generally being closed to

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[96] *See* § 27.03, *infra*.
[97] *See* § 27.05, *infra*.
[98] *See* § 27.04, *infra*.
[1] 16 U.S.C. §§ 3148, 3149.
[2] 30 U.S.C. §§ 181–263.
[3] 43 C.F.R. pts. 3000–3140.
[4] 30 U.S.C. §§ 195, 226-3.
[5] *See* § 27.03[5], *infra*.
[6] 30 U.S.C. § 226 note.
[7] 43 C.F.R. subpt. 3120.
[8] *See* § 27.03[6][a], *infra*.

leasing, sections 1008 and 1009 oil and gas leases are offered only in discrete areas at specified times.[9] Moreover, similar to leases issued under the Outer Continental Shelf Lands Act,[10] leases issued under the ANILCA §§ 1008 and 1009 program may be cancelled for environmental reasons. Likewise, lease operations, including exploration and development, surface and subsurface activities alike, may be conducted by a lessee only pursuant to an exploration or development plan and/or permit.[11]

The discussion that follows is intended only as a general introduction to federal oil and gas leasing in Alaska under ANILCA §§ 1008 and 1009, in order to describe some of the unique aspects of this program.

[2] Lands Available for Sections 1008 and 1009 Oil and Gas Leasing

In general, because of the complex land withdrawals and "freezes,"[12] only lands included by the Secretary in the leasing program established under ANILCA §§ 1008 and 1009 are available for leasing. Lands that may be considered for eventual leasing under sections 1008 and 1009 are: (1) federal lands west of the National Petroleum Reserve in Alaska (NPRA), lying north of 68º north latitude,[13] and (2) federal lands south of 68º north latitude other than those lying within the NPRA.[14] These lands are hereinafter identified as "Non-North Slope lands." Lands are expressly excluded from leasing under sections 1008 and 1009: (1) where applicable law prohibits leasing, or (2) where, with respect to units of the National Wildlife Refuge System, the Secretary determines that exploration for, and development of, oil and gas would be incompatible with the purpose for which the unit was established, after having considered the national interest in producing such oil and gas.[15] Lands that lie north of 68º north latitude, and east of the western boundary of NPRA, are also subject to leasing and/or exploration, but under different authorities.[16]

[3] Establishment of the "Non-North Slope" Program by the Secretary

The Secretary was directed by ANILCA § 1008 to establish, pursuant to the Mineral Leasing Act of 1920,[17] a leasing program for "Non-North Slope" lands.[18] The Secretary's primary responsibilities in establishing the program are to conduct certain studies before making certain lands available for leasing.

If the Secretary deems an area to be favorable for the discovery of oil or gas, he is to

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[9] *See* § 27.03[2], *infra*.

[10] 43 U.S.C. §§ 1331–1356a.

[11] *See* § 27.03[6][d], [e], *infra*.

[12] *See* § 27.02[4], [5], *supra*.

[13] 68º north latitude crosses Alaska approximately 150 miles south of Prudhoe Bay.

[14] 16 U.S.C. § 3148(a).

[15] 16 U.S.C. § 3148(a).

[16] With reference to leasing NPRA lands, see § 27.04, *infra*. With reference to Arctic National Wildlife Refuge exploration, see § 27.05, *infra*.

[17] 30 U.S.C. §§ 181–263.

[18] 16 U.S.C. § 3148(a). *See* § 27.05, *infra*.

conduct studies or collect and analyze information obtained by permittees[19] authorized by the Secretary to conduct exploration.[20] The Secretary's studies are to determine the oil and gas potential of the areas and the effects of oil and gas exploration or development on environmental characteristics and wildlife resources.[21]

Prior to allowing exploration or leasing of Non-North Slope lands, the Secretary must seek the views of the Governor of Alaska, the Secretary of Energy, Alaskan local governments, the Alaska Land Use Council,[22] Native regional and village corporations, conservation groups, oil and gas industry representatives, and other interested groups and individuals.[23]

ANILCA provides that the Secretary is to encourage the State of Alaska to conduct studies of its land so that both governments can cooperate in managing energy and other natural resources, including fish and wildlife.[24]

The U.S. Fish and Wildlife Service has completed comprehensive conservation plans and compatibility assessments for 16 wildlife refuges in Alaska (*see* § 27.03[7]). As discussed below, section 1009 of ANILCA provides that leasing in National Wildlife Refuges may occur only pursuant to findings by the Secretary that oil and gas leasing is compatible with the purposes for which the refuge was created (*see* § 27.03[7]).[25]

There has been very little leasing activity with regard to Non-North Slope federal lands since 1984. The BLM manages leasing of Non-North Slope lands pursuant to land use plans and resource management plans.[26] Similarly, the Forest Service has developed best management practices for natural resource development[27] and the U.S. Fish and Wildlife Service has developed polices and procedures for natural resource development on Service lands.[28] Any future leasing of Non-North Slope federal lands for oil or gas development will likely be pursuant to the specific policies of the federal landowner at issue, as well as evaluation under the National Environmental Policy Act of 1969 (NEPA) and other applicable environmental laws.

[4] Alaska Noncompetitive Leasing Procedures

Prior to the enactment of the Reform Act, the basic concepts of over-the-counter and simultaneous filing oil and gas leasing procedures[29] described in chapters 5 and 6 of this treatise

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[19] *See* § 27.03[6][d], *infra*.
[20] 16 U.S.C. § 3148(b)(1)(A).
[21] 16 U.S.C. § 3148(b)(1)(A).
[22] *See* 16 U.S.C. § 3181.
[23] 16 U.S.C. § 3148(b)(2).
[24] 16 U.S.C. § 3148(b)(3).
[25] 16 U.S.C. § 3148(a).
[26] *See* http://www.blm.gov/ak/st/en/prog/energy/oil_gas/planning_docs.html and http://www.blm.gov/ak/st/en/prog/energy/oil_gas/leasing.html.
[27] *See* http://www.fs.fed.us/r10/ro/policy-reports/bmp/index.shtml.
[28] *See* http://www.fws.gov/policy/612fw2.html.
[29] *See* former 43 C.F.R. subpts. 3111 & 3112 (1983) (removed 1988).

generally applied to sections 1008 and 1009 lands in Alaska with the specific qualification that certain lands were mandated to be offered only over-the-counter.

As a general rule, the regulations provided that lands were available over-the-counter unless: (1) the lands were covered by cancelled, terminated, relinquished, or expired leases; or (2) the Director of BLM designated the use of simultaneous filing procedures.[30]

However, Alaskan lands were required to be offered over-the-counter when they became available for leasing if such lands: (1) were not included in a pending noncompetitive lease offer or simultaneous oil or gas lease application; and (2) were available for posting for simultaneous oil or gas leasing on August 22, 1983.[31]

Alaskan lands are now offered for noncompetitive leasing in a manner identical to the "lower 48," since the Reform Act of 1987 makes no distinction between Alaskan and non-Alaskan lands.[32] The one exception is that a lease offer for Alaskan lands must be for at least 2,560 acres or 4 full contiguous sections, whichever is larger, except where there are no contiguous lands available for lease.[33] Lease offers outside Alaska must be for at least 640 acres or 1 full section, with the same exception as for Alaskan lands.[34]

Briefly, the Reform Act provides that if lands are not leased competitively or are not special tar sands lands, a noncompetitive lease shall issue to the first qualified applicant, as determined by the Secretary, upon payment of at least a $75.00 administrative fee.[35]

Lands previously offered for competitive lease may subsequently be leased noncompetitively only if (1) no bids were received or the highest bid was less than the national minimum acceptable bid, and (2) less than two years has elapsed since the lands were offered for competitive lease.[36]

Noncompetitive lease applications pending on December 22, 1987, will be processed and leases will be issued under the provisions of the Mineral Leasing Act of 1920 in effect before enactment of the Reform Act.[37]

[5] Alaska Competitive Leasing Procedures

Outside the State of Alaska, prior to enactment of the Reform Act, competitive leasing was required for issuing leases in a "Known Geological Structure" (KGS).[38] In Alaska,

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[30] *See* former 43 C.F.R. § 3112.1-1(a) (1983) (removed 1988).
[31] *See* former 43 C.F.R. § 3112.1-1(b) (1983) (removed 1988).
[32] 30 U.S.C. § 226(c)(1).
[33] 43 C.F.R. § 3110.3-3(a).
[34] 43 C.F.R. § 3110.3-3(a).
[35] 30 U.S.C. § 226(c)(1).
[36] 30 U.S.C. § 226(c)(2)(A).
[37] 30 U.S.C. § 226 note.
[38] *See* § 27.03[7], *infra*.

competitive leasing was required for lands included in a "Favorable Petroleum Geological Province" (FPGP).[39]

The regulations defined an FPGP as "an area in Alaska as delineated by the authorized officer, within which oil or gas has been discovered, or within which available data indicate that there is a high probability that oil and gas will be discovered."[40]

The regulations described a KGS as the geologic trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, with the limits including all acreage "presumptively productive."[41]

The U.S. Geological Survey (USGS) further distinguished a KGS from an FPGP as follows:

> The KGS classification applies to the immediate structure of a known producing or producible oil and gas field. The FPGP classification applies to a total province encompassing many possible specific structures or traps, and does not necessarily require the past or present existence of a producing or producible well.[42]

In 1981, the USGS divided Alaska's onshore sedimentary basins into 14 provinces for purposes of determining Favorable Petroleum Geological Provinces. The USGS designated three provinces as FPGPs.[43] The three identified FPGPs were: (1) the Cape Lisburne Province,[44] (2) the Cook Inlet Onshore Tertiary Province, and (3) the Gulf of Alaska Onshore Tertiary Province.[45]

FPGP classification under most circumstances yielded the same result as if those lands were classified as a KGS. Lands determined to be within an FPGP in Alaska could not be offered for simultaneous oil and gas leasing.[46]

If paying quantities of oil or gas were discovered under a noncompetitive lease, the Secretary was directed to suspend all further noncompetitive leasing in the area and determine the FPGP in proximity to such discovery.[47] Any further leasing within the limits of the FPGP was

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[39] *See* former 16 U.S.C. § 3148(d) (1982).

[40] 43 C.F.R. § 3100.0-5(k) (1983) (removed 1988).

[41] 43 C.F.R. § 3100.0-5 (1983) (removed 1988).

[42] *See* 46 Fed. Reg. 59,317 (Dec. 4, 1981).

[43] *See* 46 Fed. Reg. 59,317 (Dec. 4, 1981).

[44] The Cape Lisburne Province FPGP classification was unsuccessfully challenged in *Asamera Oil, Inc.*, 77 IBLA 181 (1983), GFS(O&G) 32 (1984). The appellants raised questions concerning the criteria for designating an FPGP and the application of those criteria to that area. Resolution of this case did not refine the distinction between a KGS and an FPGP. 77 IBLA at 193.

[45] *See* 46 Fed. Reg. 59,317 (Dec. 4, 1981).

[46] 43 C.F.R. § 3112.1-1(a) (1983) (removed 1988).

[47] *See* former 16 U.S.C. § 3148(d) (1982).

required to be via competitive bidding.[48] Applications for noncompetitive leases that were submitted but not approved prior to determination of an FPGP encompassing such lands were rejected in whole or part, as appropriate.[49]

Rentals for noncompetitive leases determined subsequent to leasing to be within an FPGP were subject to increase.[50] This increase is analogous to the provision that rentals be similarly increased for lands found to be within a KGS.[51]

The maximum lease size applicable to an FPGP was different than that applicable to a KGS. The maximum lease tract or block size for lands within a KGS was 640 acres.[52] The maximum lease block size for FPGP lands was 2,560 acres.[53]

Except as noted above with reference to the identification of an FPGP instead of a KGS, competitive leasing procedures under the sections 1008 and 1009 program were pursued under the regulations in a manner identical to "lower 48" practice.

The Reform Act of 1987 eliminated both the KGS and the FPGP.[54] As a result, Alaska oil and gas leasing is subject to the same statutory framework as the "lower 48," with one exception: in Alaska, lands may be leased in units of not more than 5,760 acres,[55] while leases for lands outside of Alaska are limited to 2,560 acres.[56]

Briefly, the Reform Act provides that all lands not subject to leasing as special tar sands lands are to be leased to the highest responsible bidder by oral, competitive bidding.[57] A national minimum acceptable bid of $2.00 per acre was established for the two years following enactment of the Reform Act;[58] thereafter, the Secretary could set a higher national minimum acceptable bid.[59] If no bids are received, or if the highest bid is less than the national minimum acceptable bid, the lands are to be offered for noncompetitive leasing within 30 days, and remain available for noncompetitive leasing for two years after the competitive lease sale.[60]

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[48] *See* former 16 U.S.C. § 3148(d) (1982); 43 C.F.R. § 3110.3(a) (1983) (removed 1988).
[49] 43 C.F.R. § 3110.3(a) (1983) (removed 1988).
[50] 43 C.F.R. § 3111.3-4(b) (1983) (removed 1988).
[51] 43 C.F.R. § 3111.3-4(b) (1983) (removed 1988).
[52] 43 C.F.R. § 3120.2-3(a) (1983) (removed 1988).
[53] 43 C.F.R. § 3120.2-3(b) (1983) (removed 1988). *See also* Solicitor's Opinion, "Application of the Lease Size Restriction in Section 17(b) of the Mineral Leasing Act to Leasing Under Section 1008 of the Alaska Lands Act" (Jan. 21, 1982).
[54] 30 U.S.C. § 226(b)(1)(A).
[55] 30 U.S.C. § 226(b)(1)(A).
[56] 30 U.S.C. § 226(b)(1)(A).
[57] 30 U.S.C. § 226(b)(1)(A).
[58] 30 U.S.C. § 226(b)(1)(B).
[59] 30 U.S.C. § 226(b)(1)(B).
[60] 30 U.S.C. § 226(b)(1)(A).

A royalty of not less than 12.5% applies to all competitive leases.[61]

Regulations provide[62] the process by which lands may be nominated for competitive leasing. All nominations must be accompanied by a remittance sufficient to cover the national minimum acceptable bid, the first year's rental, and a per-parcel administrative fee.[63]

Competitive oil and gas bids pending on December 22, 1987, will be processed and leases will be issued under the provisions of the Mineral Leasing Act of 1920 in effect before the enactment of the Reform Act.[64]

[6] Oil and Gas Lease Administration Under Section 1008

[a] Acreage Limitations

Outside Alaska, no person or entity may hold or control more than 246,080 acres of federal oil and gas leases in any one state at any one time.[65] No more than 200,000 of such acres may be held under option.[66] The State of Alaska, however, is divided into a northern leasing district and a southern leasing district. The boundary between the northern and the southern leasing districts is the left limit of the Tanana River from the United States-Canadian border to the confluence of the Tanana River with the Yukon River and the left limit of the Yukon River from this point to its principal southern mouth.[67] For Alaska, acreage that can be taken, held, owned, or controlled by a person or entity is limited to 300,000 acres in the northern leasing district and 300,000 in the southern leasing district, of which no more than 200,000 acres may be held under option in each of the two leasing districts.[68]

The Reform Act of 1987 provides that the Secretary shall disapprove assignment or sublease of an oil or gas lease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond; except that the Secretary has discretion to disapprove assignment of any of the following, unless assignment constitutes the entire lease, or is demonstrated to further development of oil and gas: (1) a separate zone or deposit in any lease; (2) a part of a legal subdivision; and/or (3) less than 640 acres outside Alaska, or less than 2,560 acres within Alaska.[69]

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[61] 30 U.S.C. § 226(b)(1)(A).
[62] 43 C.F.R. § 3120.2.
[63] 43 C.F.R. § 3120.5-2.
[64] 30 U.S.C. § 226 note.
[65] 30 U.S.C. § 184(d)(1). See general discussion of acreage limitations in § 27.03[4], *supra*.
[66] 30 U.S.C. § 184(d)(2).
[67] 30 U.S.C. § 184(d)(1).
[68] 30 U.S.C. § 184(d)(2).
[69] 30 U.S.C. § 187a.

[b] Environmental Stipulations and Suspension or Cancellation of the Lease

The Secretary is obligated to monitor the performance of a lessee with regard to the exploration and development of a lease.[70] He may require a revised exploration or development plan should he determine that modifications are needed to address significant changes in circumstances regarding development and production, including environmental or economic changes.[71]

The Secretary is to suspend lease operations for a period of up to five years if he determines that: (1) immediate and irreparable damage will result from continuation of the lease; (2) the threat of harm will not disappear; and (3) the advantages of cancellation outweigh the advantages of lease continuation.[72] If the threat persists beyond a five-year suspension period, the Secretary shall cancel the lease and provide compensation under the terms the Secretary establishes, by regulation, to be appropriate.[73]

Leases may not be cancelled by the Secretary for failure to comply with the terms of the lease if the leased lands contain a well capable of production of oil or gas in paying quantities, or if the lease is committed to an approved unit plan or communitization agreement that contains a well capable of production of unitized substances in paying quantities.[74]

[c] Exploration Plans

Exploration activities are not allowed on a lease granted on Non-North Slope Alaskan lands pursuant to sections 1008 and 1009 until an exploration plan is approved.[75] The exploration plan must describe the proposed activities, and the Secretary must approve the plan if the described activities can be conducted consistent with the requirements that the Secretary has imposed for the protection and use of the land.[76]

[d] Conduct of Exploration Activities

Congress authorized the Secretary to grant permits for studies including geological, geophysical, and other assessment activities, provided the proposed activity can be conducted consistent with the purposes for which each affected area is managed under applicable law.[77] Regulations governing these activities have been published by the Secretary.[78]

Regulations provide that a geophysical oil and gas permit is required prior to conducting

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[70] 16 U.S.C. § 3148(h).
[71] 16 U.S.C. § 3148(h).
[72] 16 U.S.C. § 3148(i).
[73] 16 U.S.C. § 3148(i).
[74] 30 U.S.C. § 188(b).
[75] 16 U.S.C. § 3148(f).
[76] 16 U.S.C. § 3148(f).
[77] 16 U.S.C. § 3148(b)(1)(B).
[78] 43 C.F.R. subpt. 3152.

oil and gas exploration operations on public lands in Alaska.[79] Under previous regulations, a geophysical exploration permit was required on or off leased lands in Alaska, and was required for both casual use and exploration operations conducted by a lessee on leased lands in Alaska.[80]

The permittee must submit to BLM all data and information obtained in carrying out the exploration plan. Geological and geophysical information and data, including maps, concerning wells are exempted from statutory disclosure requirements.[81]

The regulations contain further requirements governing the conduct of such exploration.[82]

[e] Development and Production Plans

After discovery of oil or gas in paying quantities, and prior to development or production of the oil or gas, a lessee must submit a development and production plan.[83] The plan shall be approved if the proposed activities may be conducted consistent with requirements promulgated by the Secretary for the protection and use of the land for its legally mandated purpose.[84]

The Reform Act of 1987 grants the Secretary authority to regulate all surface-disturbing activities conducted under a lease and to determine reclamation and other actions as required by conservation of surface resources.[85] A plan of operations covering proposed surface disturbance activities must be submitted for approval by the Secretary prior to the issuance of a permit to drill.[86] The Secretary has established by regulation[87] the bonding procedures applicable to surface-disturbing activities.

No lease may be issued and no assignment may be approved to a person or entity during

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[79] 43 C.F.R. § 3152.1.

[80] 43 C.F.R. § 3045.0-1 (1988) (removed).

[81] *See* 43 C.F.R. §§ 2.13(c), 3100.4, 3152.6(b).

[82] Parties wishing to conduct oil and gas exploration operations in Alaska on public lands shall complete an application for an oil and gas geophysical exploration permit, which includes the applicant's, operator's, and contractor's names and addresses, a description of the lands involved, the time operations will be conducted, and a plan for conducting exploration operations. The application shall be submitted with a nonrefundable filing fee (43 C.F.R. § 3152.1) and be accompanied by a bond (43 C.F.R. § 3154.1). An application shall be approved or denied within 90 calendar days, unless compliance with statutory requirements, such as the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321–4347), delays this action (43 C.F.R. § 3152.2(a)), and shall expire one year thereafter (43 C.F.R. § 3152.2(c)). The permit shall contain terms and conditions necessary to protect the values, mineral resources, and non-mineral resources (43 C.F.R. § 3152.2(b)). An exploration permit may be renewed for a period not to exceed one year, upon application by the permittee (43 C.F.R. § 3152.3). The permittee may request modification of the terms of an exploration permit, and the Secretary may require such modifications if he determines it necessary (43 C.F.R. § 3152.5). The permittee shall submit a completion report within 30 days of the completion of operations under the permit (43 C.F.R. § 3152.7).

[83] 16 U.S.C. § 3148(g).

[84] 16 U.S.C. § 3148(g).

[85] 30 U.S.C. § 226(g).

[86] 30 U.S.C. § 226(g).

[87] 43 C.F.R. subpt. 3104.

any period in which there has been a failure or refusal to comply with reclamation requirements.[88] In addition, no lease can be issued or assignment approved to an entity or person who has failed or refused to comply with reclamation requirements applicable to any prior lease.[89] The person or entity is entitled to notice and an opportunity to comply with reclamation requirements, and the Secretary is required to consider whether an administrative or judicial appeal is pending prior to making a determination of failure or refusal to comply with reclamation or other requirements.[90]

[7] Leasing on National Wildlife Refuge System Lands Under Section 1009

ANILCA § 1009 provides procedures additional to those for the Non-North Slope Leasing Program that are applicable to oil and gas leasing on National Wildlife Refuge System lands in Alaska. The Secretary is directed to follow specific procedures, notwithstanding any other provision of law or regulation, for processing lease applications for lands within the National Wildlife Refuge System that are not a part of the National Wilderness Preservation System.[91]

In addition to all other applicable requirements of law, any decision to issue or deny a lease covering National Wildlife Refuge System lands in Alaska must be accompanied by a statement by the Secretary setting forth the reasons for that decision, including the reasons that oil and gas leasing is or is not compatible with the purposes of the refuge.[92]

Because the requirements of section 1009 are in addition to other applicable provisions of law, and because the program has not yet been implemented, two major questions remain unanswered.

First, the regulations[93] presently provide that no offer to lease will be accepted on any refuge except to prevent drainage.[94] There is no exemption stated to this provision for Alaska, although it is thereafter stated that no leasing may occur on lands in a refuge in Alaska until "compatibility determinations" are concluded.[95] It is unclear if this provision is intended to supplement or to supersede the provision barring acceptance of lease offers in game refuges contained in the regulations. Section 1009 itself could be argued to be a general congressional authorization and mandate to lease in Alaska game refuges. Similarly, ANILCA § 304(c)[96] contains a general withdrawal of Alaska game refuges from entry, but, auspiciously, allows oil and gas leasing therein. The meaning of these provisions of the regulations and statutes therefore

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[88] 30 U.S.C. § 226(g).
[89] 30 U.S.C. § 226(g).
[90] 30 U.S.C. § 226(g).
[91] 16 U.S.C. § 3149.
[92] 16 U.S.C. § 3149; 43 C.F.R. §§ 3101.5-1 to -3. Further requirements of findings of compatibility prior to allowing any use, including oil and gas leasing, are found in ANILCA § 304(b) and the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd.
[93] 43 C.F.R. § 3101.5-1(b).
[94] 43 C.F.R. § 3101.5-1(b).
[95] 43 C.F.R. § 3101.5-3.
[96] Act of Dec. 2, 1980, § 304(c), Pub. L. No. 96-487, 94 Stat. 2371, 2391.

must await further departmental action.

Second, ANILCA § 304(g)[97] requires the Secretary to prepare a comprehensive conservation plan for each refuge. It is unclear if compatibility findings under section 1009 will be affected by the conservation plan requirements of section 304(g).

Sixteen National Wildlife Refuge comprehensive conservation plans and compatibility assessments for wildlife refuges in Alaska have been completed (and in some cases revised) by the U.S. Fish and Wildlife Service: Kenai, Alaska Peninsula, Becharof, Izembek, Togiak, Tetlin, Yukon Flats, Kodiak, Kanuti, Arctic,[98] Yukon Delta, Nowitna, Koyukuk, Alaska Maritime, Selawik, and Innoko.[99]

No decision respecting leasing in National Wildlife Refuges in Alaska has yet been reached. However, when such decisions are made, should the Secretary determine that the requirements of section 1002(2)(C) of the National Environmental Policy Act of 1969 (NEPA)[100] do not apply to this decision, the Secretary must make his decision on the application to lease within six months after receipt.[101] If the requirements of NEPA § 1002(2)(C) do apply, the Secretary is to render his decision within three months after publication of the final environmental impact statement.[102]

§ 27.04 Federal Oil and Gas Leasing in the National Petroleum Reserve in Alaska

[1] Introduction

"Established in 1923, the NPR–A on Alaska's North Slope is the largest single unit of public land in the United States and covers 23.6 million acres. It is also an important habitat for vegetation, fish, and wildlife."[1]

The NPRA was originally created to secure a future supply of fuel for the United States Navy.[1.1] In 1976, congress passed the Naval Petroleum Reserves Production Act, redesignating the land as the National Petroleum Reserve—Alaska (NPRA) and transferring jurisdiction from the Navy to the Secretary of the Interior.[1.2] This redesignation was the first step toward opening the NPRA up to exploration, development, and production. Subsequently, in 1981, Congress

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[97] Act of Dec. 2, 1980, § 304(g), Pub. L. No. 96-487, 94 Stat. 2371, 2391.

[98] See also § 27.05, *infra*, regarding the Arctic National Wildlife Refuge.

[99] Telephone interview with Karen Murphy, U.S. Fish and Wildlife Service, Anchorage, Alaska (Feb. 14, 2001).

[100] 42 U.S.C. § 4332.

[101] 16 U.S.C. § 3149(c).

[102] 16 U.S.C. § 3149(c).

[1] Kunaknana v. U.S. Army Corps of Engineers, 23 F.Supp.3d 1063, 1071 (D. Alaska 2014).

[1.1] Exec. Order No. 3797-A (Feb. 27, 1923). The Naval Petroleum Reserves were identified in section 201(1) of the Act of Apr. 5, 1976, Pub. L. No. 94-258, 90 Stat. 307, 10 U.S.C. § 7420(2).

[1.2] 42 U.S.C. § 6502.

opened NPRA to competitive oil and gas leasing,[1.3] and since that time, oil and gas lease sales have been held and exploration, development and production activities have occurred.

[2] Lands in the National Petroleum Reserve in Alaska

Naval Petroleum Reserve No. 4, Alaska (Pet 4) was created by President Harding in 1923.[1] This action withdrew from oil and gas leasing approximately 37,000 square miles of the public lands lying between the Brooks Range and the Arctic Ocean on the North Slope of Alaska that were not then covered by valid entry, lease, or application.[2] The courts have determined that the beds of inland navigable waters within the reserve were included within this withdrawal, and thus continue to be a part of the reserve, and continue to be owned by the United States, notwithstanding Alaska's subsequent admission to the Union.[3]

In 1926, Congress vested control over the Naval Petroleum Reserves in the Secretary of the Navy.[4] The Secretary of the Navy was authorized to lease or otherwise explore and develop the Naval Petroleum Reserves.[5] The Secretary, with the approval of the President and authorization by a joint resolution of Congress, was empowered to produce petroleum where he found that such production was needed for national defense.[6] The Secretary was also required to adjust production to meet national defense needs.[7]

The Department of the Navy conducted substantial petroleum exploration in Pet 4. Between 1923 and 1926, the U.S. Geological Survey began geological mapping.[8] From 1944 to 1953 the Navy conducted its first program of extensive geological and geophysical surveys.[9] The program resulted in 45 shallow core-test wells and 36 test wells, including four near Barrow.[10] A small oil field and several gas fields were discovered within the reserve,[11] one of which still

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[1.3] 42 U.S.C. § 6506a

[1] Exec. Order No. 3797-A (Feb. 27, 1923). The Naval Petroleum Reserves were identified in section 201(1) of the Act of Apr. 5, 1976, Pub. L. No. 94-258, 90 Stat. 307, 10 U.S.C. § 7420(2).

[2] *See* Bureau of Land Management, "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska," at 1 (Feb. 1983).

[3] United States v. Alaska, 521 U.S. 1 (1997); United States v. Alaska, 530 U.S. 1021 (2000) (decree); Alaska v. United States, 213 F.3d 1092 (9th Cir. 2000).

[4] 10 U.S.C. § 7421.

[5] 10 U.S.C. § 7422(a).

[6] 10 U.S.C. § 7422(b).

[7] 10 U.S.C. § 7423.

[8] *See* Bureau of Land Management, "NPRA Environmental Assessment, Federal Oil and Gas Lease Sale," at 1 (Sept. 1981).

[9] *See* Bureau of Land Management, "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska," at 3 (Feb. 1983).

[10] *See* Bureau of Land Management, "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska," at 3 (Feb. 1983).

[11] *See* Bureau of Land Management, "NPRA Environmental Assessment, Federal Oil and Gas Lease Sale," at 1 (Sept. 1981).

supplies the Village of Barrow. The program was abandoned in 1953.[12] The Department of the Navy's second exploration effort began in 1972. Between 1974 and June 1977, seven test wells were completed outside the Barrow area.[13]

On April 5, 1976, Pet 4 was redesignated as the National Petroleum Reserve—Alaska (NPRA) pursuant to the Naval Petroleum Reserves Production Act of 1976.[14]

In the act, Congress reserved and withdrew all lands within NPRA from entry and disposition under the public land laws, including mining and mineral leasing laws, and from all other acts, subject to valid existing rights.[15] The Secretary of the Interior was authorized to make certain dispositions of mineral materials for the benefit of Alaska Natives. He was also authorized to convey surface lands properly selected under the Alaska Native Claims Settlement Act[16] by December 18, 1975,[17] to Native village corporations.

In addition to redesignating Pet 4 to NPRA and accomplishing a congressional withdrawal of the area, the Naval Petroleum Reserves Production Act of 1976 transferred jurisdiction over NPRA lands to the Secretary of the Interior,[18] effective June 1, 1977.[19]

Section 104 of the Act[20] generally prohibited the development and production of oil and gas on Pet 4. An exception was made, however, for natural gas production necessary to supply the Village of Barrow.[21]

Although petroleum development and production activities were generally prohibited, the Secretary of the Navy was directed to continue the ongoing petroleum exploration program within NPRA until June 1, 1977,[22] at which time the Secretary of the Interior was to initiate further petroleum exploration activities.[23]

A series of studies on production and transportation alternatives was completed by the

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[12] *See, e.g.*, 42 U.S.C. § 6504. The Barrow Gas Field Transfer Act of 1984, Pub. L. No. 98-366, removed section 504(e) in 1984, which authorized the Secretary of the Navy to operate the South Barrow gas field.
[13] *See* Bureau of Land Management, "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska," at 3 (Feb. 1983).
[14] 42 U.S.C. §§ 6501–6507.
[15] 42 U.S.C. § 6502.
[16] 43 U.S.C. §§ 1601–1629h.
[17] 42 U.S.C. § 6502. *See* 43 U.S.C. § 1613(a), (g).
[18] 42 U.S.C. § 6502.
[19] 42 U.S.C. § 6503; *see also* 43 C.F.R. subpt. 3130.
[20] 42 U.S.C. § 6504.
[21] *See* 42 U.S.C. § 6504(e). However, subsection (e) was removed in 1984 pursuant to Pub. L. No. 98-366, § 4(b), 98 Stat. 468 (1984).
[22] 42 U.S.C. § 6504(b).
[23] 42 U.S.C. § 6504(c).

President and submitted to Congress on January 1, 1980.[24] Certain other environmental studies were completed by the Secretary of the Interior and representatives of the State of Alaska, Arctic Slope Native community, and others, and were submitted to Congress on April 5, 1979.[25]

[3] Authority to Conduct Competitive Oil and Gas Leasing in NPRA

The status of oil and gas exploration in NPRA was significantly altered in 1980, when Congress enacted legislation as a part of the 1981 Interior Appropriations Act,[26] which authorized competitive oil and gas leasing in NPRA. In this legislation, Congress chose to provide completely new legal authority for NPRA leasing rather than simply extending existing Mineral Leasing Act authorities to NPRA lands. This has created many new problems for the practitioner.

The 1981 Interior Appropriations Act requires "an expeditious program of competitive leasing of oil and gas" in the NPRA, subject to restrictions promulgated by the Secretary of the Interior necessary to mitigate foreseeable adverse effects on the surface resources of the NPRA.[27] To promote leasing, Congress directed that the first lease sale would be conducted within 20 months of December 12, 1980,[28] waived environmental impact statement requirements on the first two sales,[29] and rescinded the withdrawals established by 42 U.S.C. § 6502.[30] It has been held[31] that this strong congressional directive significantly narrowed the available realm of Secretarial discretion over leasing in NPRA: "the statute did not give the Secretary the discretion not to lease; instead, the Secretary was given the discretion to provide rules and regulations under which leasing would be conducted and was to develop restrictions necessary to mitigate adverse impact on the NPRA."[32] "This leaves to the agency's discretion [only] the particular details concerning when, where and how leasing within the NPRA shall occur."[33] Congress also directed[34] that the bidding systems utilized in NPRA be based on those novel approaches enunciated in the Outer Continental Shelf Lands Act.[35] It provided that lease tracts could

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[24] 42 U.S.C. §§ 6505(a), 6244 (1994). Section 6244 was subsequently repealed by Pub. L. No. 106-649, Title I, § 103(16), 114 Stat. 2032 (2000).

[25] 42 U.S.C. § 6505(b).

[26] Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1981, § 100, Pub. L. No. 96-514, 94 Stat. 2957, 2964, 42 U.S.C. § 6508. 42 U.S.C. § 6508 was recodified with amendments as 42 U.S.C. § 6506a by the Energy Policy Act of 2005, Pub. L. No. 109-58, Title III, § 347, 119 Stat. 594, 704.

[27] 42 U.S.C. § 6506a(a), (b).

[28] 42 U.S.C. § 6506a(d).

[29] 42 U.S.C. § 6508(4) (1994 & Supp. IV 1998). The statute was subsequently amended to require an environmental impact statement before the first lease sale. 42 U.S.C. § 6506a(d).

[30] 42 U.S.C. § 6506a(e). See discussion of NPRA withdrawals in § 27.04[1], *supra*.

[31] Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984).

[32] Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984).

[33] Kunaknana v. Clark, 742 F.2d 1145, 1151 (9th Cir. 1984).

[34] 42 U.S.C. § 6506a(f).

[35] 43 U.S.C. § 1337(a)(1)(A)–(I). These bidding systems may use various combinations of royalties, net profits, work commitments, and bonuses as the bid variables. While Congress continued to encourage the use of these novel approaches in the 1981 Interior Appropriations Act, the courts have not required the Secretary to apply them in the Outer Continental Shelf. Watt v. Energy Action Educ. Found., 454 U.S. 151

encompass identified geological structures,[36] that leases may be as large as 60,000 acres,[37] and that leases be issued for an initial period of up to 10 years.[38] In an apparent oversight, Congress only provided for extensions of that term for so long as production, drilling, or reworking operations are conducted. Congress did not expressly provide for extensions of the initial term for shut-in production or for leases committed to a unit (or provide for unitization at all). Fifty percent of all compensation the Secretary of the Interior receives for leases in NPRA is paid to the State of Alaska.[39]

Congress subsequently enacted the Energy Policy Act of 2005,[40] which significantly altered the oil and gas leasing in NPRA. First, the act moved the competitive lease provisions from section 6508 to section 6506a. Significantly, the amendments authorized lease extensions where oil or gas are not capable of production in paying quantities but are discovered in such quantities that a prudent operator would hold the lease for potential future development, the lessee has diligently pursued exploration that warrants continuation, or the lease is part of a unit agreement and has not been contracted out of the unit.[41] The new term provisions apply only to leases in effect on or after August 8, 2005.[42] The 2005 amendments also authorize unitization[43] and exploration incentives, including waiver, suspension, or reduction of rental fees and royalties, suspension of operations and production, and suspension of payments.[44] The amendments also require the Secretary of the Interior to waive administration of any oil and gas lease in NPRA to the extent the lease covers land in which the subsurface estate is owned by the Arctic Slope Regional Corporation.[45]

Another significant change provided by the 2005 amendments is the inclusion of a provision addressing environmental impact statements. Judicial review of environmental impact statements concerning oil and gas leasing in NPRA is barred unless brought in the appropriate district court within 60 days after notice of the availability of the environmental impact statements is published in the *Federal Register*.[46] Congress also declared that the detailed environmental impact studies and assessments conducted on the exploration program and other land use studies fulfilled the requirements of NEPA with regard to the first two lease sales in NPRA.

(1981).
[36] 42 U.S.C. § 6506a(g).
[37] 42 U.S.C. § 6506a(h).
[38] 42 U.S.C. § 6506a(i)(1).
[39] 42 U.S.C. § 6506a(l).
[40] Pub. L. No. 109-58, 119 Stat. 594 (2005).
[41] 42 U.S.C. § 6506a(i)(1)–(3).
[42] 42 U.S.C. § 6505a(i)(4).
[43] 42 U.S.C. § 6506a(j).
[44] 42 U.S.C. § 6505a(k).
[45] 42 U.S.C. § 6506a(p).
[46] 42 U.S.C. § 6506a(n).

[4] Competitive Oil and Gas Leasing, Exploration and Development Procedures Applicable to NPRA

The regulations[47] establish the general procedures under which the Secretary of the Interior administers a competitive oil and gas leasing program within NPRA.

The 1981 Interior Appropriations Act mandated that no more than a total of 2 million acres should be offered at the first two sales, which were held in 1981. No statutory acreage limitation was imposed on later sales,[48] although the Department has attempted to continue to offer 2 million acres per year.

However, oil and gas leasing in NPRA has continued to encounter legal and practical challenges in spite of this apparently clear congressional mandate. Most of these legal challenges have attacked the NEPA documents accompanying leasing activities.

Following congressional authorization of an expeditious program of competitive leasing of oil and gas in the NPRA in 1980,[49] BLM leased tracts in the NPRA in 1982 and 1983 (all of which leases have now expired), but received no acceptable bids in a lease sale in 1984.[50]

In 1997, President Clinton directed Secretary of the Interior Babbitt to initiate a planning process for the northeast corner of NPRA.[51] Following extensive research and public comment, the final draft of the Northeast NPRA Final Integrated Activity Plan/Environmental Impact Statement (IAP/EIS) was printed in August 1998.[52]

The plan fulfills Congress's mandate in the Naval Petroleum Reserves Production Act to conduct "an expeditious program of competitive leasing of oil and gas," and at the same time mitigates "reasonably foreseeable and significantly adverse effects on the surface resources," consistent with the requirements of the act for the exploration of the NPRA.[53] Under the plan, oil and gas leases, including those that lie near the Alpine Field, near Nuiqsut and the Colville River, were made available for purchase subject to extensive mitigating measures.[54]

With the IAP/EIS complete, BLM held an oil and gas lease sale for portions of the northeast corner of the NPRA on May 5, 1999.[55] In all, a total of 425 tracts on approximately 3.9 million acres were offered by BLM in the lease sale, the first such sale for the reserve since 1984.

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[47] 43 C.F.R. pt. 3130.
[48] 42 U.S.C. § 6506a.
[49] *See* § 27.04[2], *supra*.
[50] 63 Fed. Reg. 42,431 (Aug. 7, 1998).
[51] Press Release, U.S. Dep't of the Interior, "Clinton Administration to Initiate Comprehensive Planning Within Northeastern Area of Alaska Petroleum Reserve" (Jan. 14, 1997).
[52] 63 Fed. Reg. 42,431 (Aug. 7, 1998).
[53] 42 U.S.C. § 6506a(b).
[54] Northeast NPRA Final Integrated Activity Plan/Environmental Impact Statement (IAP/EIS), Record of Decision, Summary (1998), http://www.blm.gov/ak/st/en/prog/planning/npra_general/ne_npra.html.
[55] "BLM Schedules NPR-A lease sale for May 5," *BLM-Alaska Frontiers Newsletter*, Mar./Apr. 1999 at 1.

Six oil companies (British Petroleum, Anadarko Petroleum, Chevron, Phillips Petroleum, ARCO Alaska, and R3 Exploration Corp.) submitted 174 bids on 133 tracts. The highest bid for Tract 991-H-051 (5,756 acres) was for $3,655,100 by ARCO Alaska and Anadarko Petroleum. All bids received totaled $124,951,166.

In the end, "this sale resulted in the issuance of 133 leases for approximately $104.6 million in rentals and lease bonus bids." Following an extensive environmental assessment, BP Exploration Alaska (BPXA) proposed drilling up to 24 wells during a five-year program. Phillips Petroleum proposed drilling one to two wells at any of 10 potential drill sites during a five-year exploration program, and began exploration in winter 2000.

The BLM subsequently issued a Northwest NPRA Final IAP/EIS in November 2003 and Record of Decision on January 22, 2004,[56] which drew NEPA challenges to the adequacy of the IAP/EIS. The U.S. District Court for Alaska rejected the NEPA challenges to the Northwest NPRA IAP/EIS in *Northern Alaska Environmental Center v. Norton*.[57] The Ninth Circuit agreed with the district court.[58]

However, at the time the Northwest NPRA IAP/EIS was being litigated, BLM was also considering amending the Northeast NPRA IAP/EIS. The court, in considering the Northwest NPRA IAP/EIS, held that BLM did not have to delay issuing the Northwest NPRA IAP/EIS until it issued the Northeast NPRA IAP/EIS, and that BLM simply had to address the cumulative impacts of development in the Northwest NPRA in the Northeast NPRA IAP/EIS.[59] The BLM issued a Northeast NPRA Amended IAP/EIS in January 2005.[60] Shortly thereafter, the National Audubon Society filed a NEPA action challenging the sufficiency of the IAP/EIS.[61] The court found that BLM abused its discretion in failing to consider the cumulative impacts of oil and gas leasing activities in the Northeast NPRA in light of the other leasing activities in NPRA.[62] In response, BLM issued a Draft Supplemental IAP/EIS in 2007 and a Final Supplemental IAP/EIS in 2008.[63] A Record of Decision was issued on July 16, 2008.[64] Subsequently, BLM issued leases in January 2009.[65] In March 2009, a federal court rejected challenges to the sufficiency of the environmental impact statement for Northeast NPRA.[66]

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[56] Northwest NPR-A Final IAP/EIS (2003) and Record of Decision (2004), http://www.blm.gov/ak/st/en/prog/planning/npra_general/nw_npra.html.

[57] N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069 (D. Alaska 2005).

[58] N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).

[59] N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1082 (D. Alaska 2005).

[60] Northeast NPRA Amended IAP/EIS (2005).

[61] Nat'l Audubon Soc'y v. Kempthorne, Memorandum Decision No. 1:05-cv-00008-JKS (Sept. 25, 2006).

[62] Nat'l Audubon Soc'y v. Kempthorne, Memorandum Decision No. 1:05-cv-00008-JKS (Sept. 25, 2006).

[63] Northeast NPRA Draft IAP/EIS (2007); Northeast NPR-A Final Supplemental IAP/EIS (2008).

[64] Northeast NPRA Record of Decision for Supplemental IAP (2008).

[65] News Release, Bureau of Land Management, "BLM Issues NPR-A Leases" (Jan. 7, 2009) (BLM News Release), http://www.blm.gov/ak/st/en/info/newsroom.html.

[66] Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52 (D.D.C. 2009).

The January 2009 leases were the result of a September 2008 lease sale.[67] Six lessees bid on 78 lease tracts totaling 834,423 acres.[68] ConocoPhillips had the highest overall bid per acre of $7,024,727 for 33 tracts covering 314,670 acres.[69] Petro-Hunt L.L.C. was also a bidder but relinquished its bids in light of falling oil prices.[70] Petro-Hunt was the high bidder on 72 lease tracts totaling 822,151 acres for $13,730,603.[71] Since the 2008 lease sale, the BLM has conducted lease sales in the NPRA in 2010, 2011 and 2012.[71.1]

BLM amended the NPRA oil and gas regulations following the 2005 amendments to 42 U.S.C. § 6506a to add provisions governing unitization, suspension, and subsurface-storage agreements relating to oil and gas activities in the NPRA.[72] Additionally, the BLM Northern Field Office has developed a multiple-use activity plan for the Colville River special area.[73] Development of the special management plan was concurrent with an Environmental Assessment based on the records of decisions for the Northwest NPRA IAP/EIS and Northeast NPRA Supplemental IAP/EIS that identify the Colville River special area.[74] BLM also issued a Record of Decision and Final Environmental Impact Statement for the Alpine Satellite Development Plant in 2004 clearing the way for Conoco Phillips Alaska, Inc. to develop satellite oil accumulations in the Northeast NPRA and Colville River area.[75]

In December 2012, the BLM completed a Final Integrated Activity Plan/Environmental Impact Statement for the entire NPR-A. [75.1] A Record of Decision was signed by the Secretary of the Interior in February 2013.[75.2] This decision made approximately 11.8 million acres of subsurface managed by BLM in the NPR-A available for oil and gas leasing.[75.3] A lease sale

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[67] BLM News Release.
[68] BLM News Release.
[69] BLM News Release.
[70] BLM News Release.
[71] BLM News Release.
[71.1] Bureau of Land Management, "NPR-A Lease Sale Documentation and Maps - 1999 to Current," http://www.blm.gov/ak/st/en/prog/energy/oil_gas/npra/npr-a_lease_sales-maps.html
[72] *See* 43 C.F.R. subpts. 3135, 3137, 3138, and pt. 3160.
[73] Bureau of Land Management, "Colville River Special Area Management Plan" (2008), http://www.blm.gov/ak/st/en/prog/planning/colville_plan.html.
[74] Bureau of Land Management, "Colville River Special Area Management Plan Environmental Assessment" (2008), http://www.blm.gov/ak/st/en/prog/planning/colville_plan.html. For the most current and updated information on the NPRA, visit the official NPRA web page at http://www.blm.gov/ak/st/en/prog/planning/npra_general.html.
[75] Alpine Satellite Development Plan Record of Decision (2004) and Alpine Satellite Development Plan Final Environmental Impact Statement (2004), http://www.blm.gov/ak/st/en/prog/planning/npra_general/alpine_plan.html.
[75.1] NPRA Final IAP/EIS (2012), https://www.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=14702
[75.2] Federal Register, "Notice of Availability of Record of Decision for the National Petroleum Reserve-Alaska Final Integrated Activity Plan" (2013), https://federalregister.gov/a/2013-04406
[75.3] NPRA Record of Decision for NPRA Final IAP/EIS (2013).

conducted under the Final IAP/EIS occurred in November 2014.[75.4]

Legal challenges to oil and gas development activities continue to be brought challenging NPRA EISs and the issuance of various development permits issued under the NPRA EISs. As part of the expanded development of the Alpine Oil Field in the Colville River Unit (most of which lies outside NPRA, on lands leased by the State of Alaska and Arctic Slope Regional Corporation), ConocoPhillips Alaska, Inc. proposed to construct a 6 mile road and a 1,400 foot bridge across the Nigliq Channel of the Colville River to connect existing oil field facilities with CD-5, a drillsite within the external boundaries of NPRA. In connection with this proposed construction, ConocoPhillips applied for a Clean Water Act Section 404[2] dredge and fill permit from the Army Corps of Engineers (USACE). The USACE adopted an earlier 2004 EIS on Alpine Field satellite development, and further concluded that no Supplemental EIS ws required. The Section 404 permit and the USACE's NEPA actions accompanying it were challenged in litigation brought by the Center for Biological Diversity (CBD) and residents of Nuiqsut, an Alaska Native village located near the NPRA. In a May 2014 decision, the United States District Court, D. Alaska dismissed CBD for lacking standing, and granted summary judgment in favor of the residents of Nuiqsut. The court held that USACE's determination was arbitrary and capricious because it failed to provide a reasoned explanation for why a Supplemental Environmental Impact Statement was unnecessary for the project. In its holding, the court expressed no opinion whether USACE is required to prepare a Supplemental Environmental Impact Statement and the court declined to issue an injunction to stop development.[75.6]

[a] Tract Offering

The current regulations provide that the public, state, and local governments may comment upon and nominate[76] tracts for sale in NPRA. After environmental analysis, tracts will be offered for sale.[77]

Tracts selected for leasing in NPRA must consist of a compact area of not more than 60,000 acres[78] and shall be described according to section, township, and range in accordance with the official survey or protraction diagrams.[79]

The Alaska State Director, BLM, is directed to develop measures to mitigate adverse impacts of leasing in NPRA, including lease stipulations and information to lessees; these mitigating measures must be made public in the notice of sale.[80]

[75.4] Bureau of Land Management, "NPR-A Lease Sale Documentation and Maps - 1999 to Current" (2014), http://www.blm.gov/ak/st/en/prog/energy/oil_gas/npra/npr-a_lease_sales-maps.html.
[75.5] 33 USC §1344.
[75.6] Kunaknana v. U.S. Army Corps of Engineers, 23 F.Supp.3d 1063 (D. Alaska 2014)..
[76] 43 C.F.R. § 3131.1.
[77] 43 C.F.R. § 3131.2(b).
[78] 43 C.F.R. § 3130.4-1.
[79] 43 C.F.R. § 3130.6-2(b).
[80] 43 C.F.R. § 3131.2(b).

Additional stipulations needed to protect surface resources and special areas that were not published in the notice of sale may be imposed at the time the surface use plan and permit to drill are approved.[81]

The notice of an NPRA lease sale is to be published in the *Federal Register* by the Alaska State Director, BLM, at least 30 days prior to the sale.[82]

[b] Form of Competitive Bidding

NPRA lease tracts are offered for lease by competitive sealed bid.[83] Bidding systems used in NPRA sales are to be based on those set forth in the Outer Continental Shelf Lands Act Amendments of 1978.[85] These systems may include cash bonus bidding, net profits share bidding, work commitment bidding, or some combination of these, either in conjunction with a sliding scale royalty or not, as the Secretary may determine.[86]

Prior to the issuance of any NPRA lease, contract, or operating agreement, the Secretary must notify the Attorney General of the proposed issuance, the name of the successful bidder, the terms of the proposed lease, contract, or operating agreement, and any other information required by the Attorney General to conduct an antitrust review of the proposed action.[87]

[c] Effective Date of Leases

All NPRA leases become effective as of the first day of the month following the date they are signed on behalf of the United States. When prior written request is made, a lease may become effective as of the first day of the month in which it is signed on behalf of the United States.[88]

[d] Payment of Bonus

Bonus payments including deferred bonuses, first year's rental, other payments due upon lease issuance, filing charges, and fees must be made to the Alaska State Office, Bureau of Land Management. All other payments required by a lease or the regulations shall be payable to the Minerals Management Service, Department of the Interior.[89]

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[81] 43 C.F.R. § 3131.3.

[82] 43 C.F.R. § 3131.4-1(a). The Director may also publish notice in other publications.

[83] 43 C.F.R. § 3132.2.

[85] 43 C.F.R. § 3131.4-1(b).

[86] With reference to the allowable scope of the Secretary's discretion to select bidding systems under this authority, see *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981).

[87] 43 C.F.R. § 3130.1(a). Information for such review may need to be provided by the successful bidder, and, if possible, may be submitted together with the bond.

[88] 43 C.F.R. § 3132.5-2.

[89] 43 C.F.R. § 3132.3. Though this regulation still requires that "[a]ll other" payments be made to the Minerals Management Service (MMS), the MMS was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) after the Deepwater Horizon disaster in 2010, and in 2011, BOEMRE was split into the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR).

[e] Term of Lease; Extension of Term of Lease

Each NPRA lease shall be issued for a primary term of 10 years, unless a shorter term is provided in the notice of sale. A lease may be extended beyond its primary term so long as oil or gas is produced from the lease in paying quantities or so long as drilling or reworking operations, actual or constructive, as approved by the Secretary, are conducted thereon.[90] 42 U.S.C. § 6506a(i) now authorizes lease renewals in certain circumstances where oil or gas are not being produced in paying quantities.[91] Leases expire on the thirtieth anniversary of their issue date unless oil or gas is being produced in paying quantities.[92] If a well is capable of production but the operator fails to produce for reasons beyond its control, it may apply for a suspension.[93] Unitization is authorized by the statute and the implementing regulations.[94]

An NPRA lease may be maintained in force by directional wells drilled under the leased area from surface locations on adjacent or adjoining lands not covered by the lease. In this case, drilling is considered to have commenced on the lease area when drilling is commenced on the adjacent or adjoining lands for the purpose of directional drilling. Production, drilling, or reworking of any directional well is considered production or drilling or reworking operations on the lease area for all purposes of the lease.[95]

[f] Term of Segregated Leases

Each segregated NPRA lease will continue in full force and effect for the primary term of the original lease and so long thereafter as oil or gas is produced in paying quantities from that segregated portion of the lease area or so long as drilling or well reworking operations, either actual or constructive, as approved by the Secretary, are conducted thereon.[96]

[g] Qualification to Hold Leases

The regulations provide that NPRA leases may be held by citizens and nationals of the United States; aliens lawfully admitted for permanent residence in the United States;[97] private, public, or municipal corporations; or associations of such citizens, nationals, resident aliens, or private, public, or municipal corporations.[98]

There is no express reciprocity provision in the regulations respecting holdings of alien stockholders similar to the provision[99] applicable to Mineral Leasing Act[100] leases.

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[90] 43 C.F.R. § 3135.1-5(a).
[91] 42 U.S.C. § 6506a(i).
[92] 43 C.F.R. § 3135.1-5(b).
[93] 43 C.F.R. § 3135.1-5(b).
[94] *See* 42 U.S.C. § 6506a(j); 43 C.F.R. subpt. 3137.
[95] 43 C.F.R. § 3135.1-5(c).
[96] 43 C.F.R. § 3135.1-4(b).
[97] As defined in 8 U.S.C. § 1101(a)(20).
[98] 43 C.F.R. § 3132.1.
[99] 43 C.F.R. § 3102.2.
[100] 30 U.S.C. §§ 181–287.

[h] Rentals

An annual rental is due and payable on or prior to the first day of each lease year prior to discovery at the rate prescribed in the notice of sale and the lease, but in no event less than $3 per acre or fraction thereof.[101]

If there is no actual or allocated production on the portion of a lease that has been segregated from a producing lease, the owner of such segregated lease shall pay an annual rental for such segregated portion at the rate per acre specified in the original lease. Such payment is to be made each lease year following the year in which the segregation became effective and prior to discovery of oil or gas on such segregated portion.[102]

Annual rental paid in any year is in addition to, and may not be credited against, any royalties due from production.[103]

[i] Royalties

Royalties on oil and gas will be at the rate specified in the notice of sale as to the tracts, if appropriate, and in the lease. However, the Secretary may reduce or eliminate the royalty required by the lease, in order to promote increased production on the leased area through direct, secondary, or tertiary recovery means.[104] For leases that provide for minimum royalty payments, each lessee must pay the minimum royalty specified in the lease at the end of each lease year beginning with the first lease year following a discovery on the lease.[105]

[j] Assignments, Transfers, and Extensions

Subject to approval of the authorized officer, a lessee may assign a lease, any undivided interest therein, or any legal subdivision thereof to anyone qualified to hold an NPRA lease.[106] Carried working interests, overriding royalty interests, payments out of production, or other interests may be created or transferred without approval.[107]

When an assignment is made of all the record title to a portion of the acreage in an NPRA lease, the assigned and retained portions are segregated into separates leases, each of which must constitute at least 640 acres.[108]

[k] Termination of Leases

Any lease on which there is no well capable of producing oil or gas in paying quantities will terminate if the lessee fails to pay the annual rental in full on or before the anniversary date

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[101] 43 C.F.R. § 3133.1(a).
[102] 43 C.F.R. § 3133.1(b).
[103] 43 C.F.R. § 3133.1(c).
[104] 43 C.F.R. § 3133.2.
[105] 43 C.F.R. § 3133.2-1.
[106] 43 C.F.R. § 3135.1-1.
[107] 43 C.F.R. § 3135.1-2.
[108] 43 C.F.R. § 3135.1-4.

of such lease and if such failure continues for more than 30 days after the notice of delinquent rental has been delivered by registered or certified mail to the lease owner's record post office address.[109]

[l] Cancellation of Leases

Any nonproducing lease may be cancelled by the Department of the Interior through administrative action whenever the lessee fails to comply with any provisions of certain statutes,[110] of the regulations issued thereunder, or of the lease, if such failure to comply continues for 30 days after a notice thereof has been delivered by registered or certified mail to the lease owner's record post office address. Producing leases or leases of lands known to contain valuable deposits of oil or gas may be cancelled only by court order.[111]

[m] Rights of Bona Fide Purchasers

In a section entitled "Bona Fide Purchasers,"[112] the NPRA regulations state as follows: "The provisions of § 3108.4 of this title shall apply to bona fide purchasers of leases within NPR-A." Section 3108.4 presently protects bona fide purchasers of leases from cancellation for acts of predecessors in interest, subject to the purchaser's constructive notice of pertinent regulations and records. However, this provision has been subject to a confused history. Originally, this section referred to the protective provisions of 43 C.F.R. § 3102.1-2.[113] However, no such section existed at that time, nor did such a section exist in 1981 when the NPRA regulations were first promulgated.[114] A section of 43 C.F.R. numbered 3102.1-2 and entitled "Bona Fide Purchasers"[115] did exist until May 23, 1980, when it was substantially altered in form and renumbered as 43 C.F.R. § 3108.3.[116] This provision has since been substantially altered in form and renumbered again.[117] All versions of this regulation excuse, in varying degrees, bona fide purchasers from the effects of violations of regulations by their predecessors in interest. The primary differences between the formerly applicable regulation cited in 43 C.F.R. § 3130.5 and the presently effective form of 43 C.F.R. § 3108.4 are: (1) the inclusion of the sentence: "[a]ll purchasers shall be charged with constructive notice as to all pertinent regulations and all Bureau records pertaining to the lease and the lands covered by the lease"; and (2) the change from protecting bona fide purchasers, when leases "may have been cancelled or forfeited," to that of protecting the bona fide purchaser when the interest "may have been subject to cancellation."

In view of this discussion, it is unclear what, if any, protections were extended by the

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[109] 43 C.F.R. § 3136.2.

[110] Department of the Interior Appropriations Act, Fiscal Year 1981, 42 U.S.C. § 6506a(b); Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. §§ 6501–6508; Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787.

[111] 43 C.F.R. § 3136.3.

[112] 43 C.F.R. § 3130.5.

[113] 43 C.F.R § 3130.5 (1982).

[114] 46 Fed. Reg. 55,494 (Nov. 9, 1981).

[115] 35 Fed. Reg. 9502, 9679 (June 13, 1970).

[116] 45 Fed. Reg. 35,156, 35,163 (May 23, 1980).

[117] 43 C.F.R. § 3108.4.

regulations to bona fide purchasers of interests in NPRA leases under the former versions of these regulations.

[n] Conduct of Exploration Activities

[i] Access for Purposes of Exploration

Access across NPRA is guaranteed for purposes of survey, geophysical, exploratory, or other temporary uses by the Alaska National Interest Lands Conservation Act.[118] Effective October 6, 1986, the Department of the Interior published regulations governing temporary access by state and private landowners.[119]

[ii] Exploration Permits

Oil and gas exploration activities may not be conducted on NPRA without the issuance of a geophysical exploration permit.[120] An application for an exploration permit must be approved or denied within 90 calendar days[121] and shall expire one year thereafter.[122] The permit must contain terms and conditions necessary to protect the values, mineral resources, and non-mineral resources[123] including conditions necessary to satisfy section 104(b) of the Naval Petroleum Reserves Production Act of 1976.[124] An exploration permit may be renewed for a period not to exceed one year, upon application by the permittee.[125] The permittee may request modification of the terms of an exploration permit, and the authorized officer may require modifications if he determines it necessary.[126] The permittee must submit a completion report within 30 days of the completion of operations under the permit.[127]

[iii] Data Submission

The permittee must submit to BLM all data and information obtained in carrying out the exploration plan. Geological and geophysical information and data, including maps, concerning wells are exempted from statutory disclosure requirements.[128]

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[118] 16 U.S.C. §§ 3171–3233.
[119] 51 Fed. Reg. 31,619 (Sept. 4, 1986) (codified at 43 C.F.R. pt. 36).
[120] 43 C.F.R. subpt. 3152.
[121] 43 C.F.R. § 3152.2(a).
[122] 43 C.F.R. § 3152.2(c).
[123] 43 C.F.R. § 3152.2(b).
[124] 42 U.S.C. § 6504.
[125] 43 C.F.R. § 3152.3.
[126] 43 C.F.R. § 3152.5.
[127] 43 C.F.R. § 3152.7.
[128] 43 C.F.R. §§ 2.13(c), 3100.4, 3152.6.

§ 27.05 Federal Oil and Gas Exploration and Leasing in the Arctic National Wildlife Refuge

[1] Introduction

There is no federal oil and gas leasing program in the Arctic National Wildlife Refuge (ANWR). Under sections 1002 and 1003 of the Alaska National Interest Lands Conservation Act (ANILCA),[1] Congress has only authorized an exploration program, and held out the possibility of leasing at some point in the future. But ANWR has occupied the imagination and talents of the oil industry because of its remarkable potential. In 1998, using new data and modern technology, the U.S. Geological Survey (USGS) completed a study of the ANWR 1002 area. A group of scientists, coordinating with other federal agencies, Alaska state agencies, and several universities, examined the geology of the area with new data and prepared a new resource assessment. The "Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998" estimated "[t]he total quantity of technically recoverable oil within the entire assessment area to be between 5.7 and 16.0 billion barrels (95-percent and 5-percent probability range), with a mean value of 10.4 billion barrels."[2] The exploration program foreseen for ANWR is intended to be minimal in scale. This has caused problems with potential duplication of efforts (*see* § 27.05[5]). The ANWR program is also intended to be quasi-public in nature, which has caused difficulties with data submission and confidentiality (*see* § 27.05[6]).

[2] Land Status in ANWR

On December 6, 1960, Secretary of the Interior Fred Seaton withdrew approximately 8.9 million acres of land in the extreme northeast corner of Alaska to create the Arctic National Wildlife Range (Arctic Range).[3] Secretary Seaton declared that the Arctic Range was established in order to preserve unique wildlife, wilderness, and recreational values and was to be administered by the U.S. Fish and Wildlife Service.[4] Secretary Seaton's action withdrew Arctic Range lands from appropriation under certain federal public land laws, including the mining laws, but not the mineral leasing laws or the laws governing disposals of certain materials.[5] While not expressly prohibited by the withdrawal, no significant mineral leasing or materials sales occurred in the Arctic Range during the 1960s or 1970s.

Secretary Seaton's withdrawal of the Arctic Range occurred after the State of Alaska was admitted to the Union.[6] Moreover, the area encompassed within the Seaton withdrawal included areas encompassing tidelands and offshore submerged lands,[7] as well as potentially navigable inland waters. The general rule is that submerged lands underlying navigable waters pass to the

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[1] 16 U.S.C. §§ 3142–3143.

[2] U.S. Geological Survey, "Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998, Including Economic Analysis" at 4 (2001), http://pubs.usgs.gov/fs/fs-0028-01.

[3] Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960).

[4] Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960).

[5] *See* 30 U.S.C. §§ 601–604.

[6] *See* Alaska Statehood Act, Act of July 7, 1958, 48 U.S.C. note prec. § 21; Presidential Proclamation of January 3, 1959.

[7] Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960).

state at the time of statehood unless expressly reserved by the federal government.[8] Taken together, these facts suggest that the Seaton withdrawal did not prevent passage of title to submerged lands in the Arctic Range to the State of Alaska at the time of statehood. However, a 1978 Interior Solicitor's Opinion[9] held that the Seaton withdrawal was issued pursuant to a pre-statehood application by the Bureau of Sport Fisheries,[10] that the application was intended to encompass all navigable waters in the Arctic Range, and that the application acted to segregate navigable waters in the Arctic Range, thereby precluding their transfer to the state under the Submerged Lands Act.[11]

With the passage of ANILCA[12] in 1980, five significant changes were made to the legal and land status of the Arctic Range. First, and probably least significant, a congressional withdrawal was made and the name of the Arctic Range was changed to the Arctic National Wildlife Refuge (ANWR).[13]

Second, ANILCA more than doubled ANWR's size by enlarging the refuge by approximately 9,160,000 acres,[14] to a total of approximately 18 million acres.

Third, ANILCA designated approximately eight million acres of ANWR as a part of the National Wilderness Preservation System.[15] The area of ANWR designated as wilderness is reflected on an official Department of the Interior map entitled "Arctic National Wildlife Refuge, August, 1980." ANWR's wilderness is generally that area of ANWR south of the "Coastal Plain,"[16] which was also not conveyed to Alaska Native Village and Regional Corporations under the Alaska Native Claims Settlement Act.[17]

Fourth, ANILCA closed all of ANWR to oil and gas leasing, to oil and gas production, and to any development leading to the production of oil and gas (*see* § 27.05[3]).[18] Therefore, no

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[8] *See* Montana v. United States, 450 U.S. 544 (1981); 43 U.S.C. § 1311(a); section 6(m) of the Alaska Statehood Act, Act of July 7, 1958, 48 U.S.C. note prec. § 21, at § 6(m); Presidential Proclamation of January 3, 1959.

[9] The Effect of Pub. Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska, M-36911, 86 Interior Dec. 151 (1978), GFS(OCS) 67 (1979).

[10] Application for Withdrawal of December 11, 1957, BLM Serial No. 017050, 23 Fed. Reg. 364 (Jan. 21, 1958).

[11] 43 U.S.C. §§ 1311–1315; Alaska Statehood Act, § 6(m), Act of July 7, 1958, 48 U.S.C. note prec. § 21, at § 6(m); Presidential Proclamation of January 3, 1959. With respect to the segregative effect of such application, see, e.g., 43 C.F.R. § 296.11 (1959). *See* United States v. Alaska, 521 U.S. 1, 50–55 (1997).

[12] Act of Dec. 2, 1980, Pub. L. No. 96-487, 94 Stat. 2371 (codified in scattered sections of 16 and 43 U.S.C.).

[13] 16 U.S.C. § 668dd note. The "Refuge" had previously been known as the "Range," and for a short time during the Carter Administration as the "William O. Douglas Arctic Wildlife Refuge."

[14] 16 U.S.C. § 668dd note.

[15] 16 U.S.C. § 1132 note.

[16] *See* 50 C.F.R. § 37.2(d) and App. I.

[17] 43 U.S.C. §§ 1601–1629h.

[18] 16 U.S.C. § 3143.

oil and gas leasing or production may occur in ANWR without express congressional authorization.

Fifth, as discussed below, ANILCA designated a "Coastal Plain" upon which certain oil exploration activities could be conducted (*see* § 27.05[3]).[19] The precise extent of the Coastal Plain may be in doubt because ANILCA defined the Coastal Plain as an area shown upon a map entitled "Arctic National Wildlife Refuge, August, 1980."[20] However, while the publicly available edition of this map distinguishes ANWR wilderness and non-wilderness areas, it does not contain an express designation of the Coastal Plain for purposes of ANILCA. In an apparent effort to rectify this ambiguity, the Department of the Interior has published a metes and bounds description of the Coastal Plain.[21]

With reference to land status in the Coastal Plain, ANILCA withdrew the ANWR Coastal Plain from all forms of entry or appropriation under the federal mining laws and from operation of the federal mineral leasing laws.[22] The ANWR Coastal Plain withdrawal will remain in effect until Congress acts to the contrary.[23]

Notwithstanding the ANWR Coastal Plain withdrawal[24] and the prohibition on oil or gas production, leasing, or other development leading to production,[25] ANILCA directed[26] the Secretary to promulgate regulations allowing geological and geophysical exploration of the ANWR Coastal Plain in a manner avoiding significant adverse effects on the fish and wildlife and other resources.[27]

[3] Summary of the Provisions of ANILCA §§ 1002 and 1003

ANILCA § 1003 prohibits oil and gas leasing, oil and gas production, or development leading to oil and gas production in ANWR until authorized by an act of Congress.[28]

However, ANILCA § 1002 establishes a comprehensive scheme to allow oil and gas exploratory activity in the ANWR Coastal Plain[29] subject to careful environmental controls, provided that significant adverse effects on the fish and wildlife and other resources of the Coastal Plain are minimized or avoided.[30] ANILCA defines "exploratory activity" to mean "surface geological exploration or seismic exploration, or both, for oil and gas within the coastal

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[19] 16 U.S.C. § 3142.
[20] 16 U.S.C. § 3142.
[21] 50 C.F.R. pt. 37 App. I.
[22] 16 U.S.C. § 3142(i).
[23] 16 U.S.C. § 3142(i). *See* 43 U.S.C. § 1714(j).
[24] 16 U.S.C. § 3142(i).
[25] 16 U.S.C. § 3143.
[26] 16 U.S.C. § 3142.
[27] See § 27.05[3], *infra*, for a discussion of oil and gas exploration allowed within the Coastal Plain.
[28] 16 U.S.C. § 3143.
[29] See § 27.05[2], *supra*, for a description and discussion of the ANWR Coastal Plain.
[30] 16 U.S.C. § 3142(a).

plain."[31] ANILCA's definition of "exploratory activity" does not include exploratory drilling, although ANILCA does not contain an express prohibition against drilling. Exploratory drilling is prohibited, however, by the relevant regulations.[32]

The Secretary was directed under section 1002 to conduct a baseline study of the fish and wildlife resources of the ANWR Coastal Plain, and to analyze the potential impacts of oil and gas exploration, development, and production on these resources.[33] The Secretary was directed to consult with the Alaska Governor, Native village and regional corporations, the North Slope Borough within the study area, and interested persons.[34]

ANILCA directed the Secretary to consider certain specific matters relating to wildlife impacts,[35] and within 18 months of December 2, 1980, to publish the results of the baseline study and thereafter to publish revisions thereto as new information is obtained by him.[36] The Secretary's findings were published in a report entitled: "Arctic National Wildlife Refuge Coastal Plain Resource Assessment, Initial Report, Baseline Study of the Fish, Wildlife, and the Habitats, Section 1002(c), ANILCA."[37]

The Secretary was also directed to promulgate regulations establishing initial guidelines governing the conduct of exploratory activities.[38] ANILCA requires such exploratory activities to be conducted pursuant to exploration plans, provides minimum guidelines for secretarial approval of exploration plans,[39] and directs the Secretary to suspend or modify exploration plans even after approval where such action is necessary to prevent significant adverse effects on fish or wildlife, their habitat, or the environment.[40] ANILCA provides civil penalties for failure to comply with terms or conditions of approved exploration plans.[41] Finally, ANILCA required the Secretary of the Interior to submit a report to Congress by September 1986 summarizing the prospects for oil and gas in ANWR, and determining whether further oil and gas exploration or development within the Coastal Plain would adversely affect fish and wildlife, their habitats, or other Coastal Plain resources.[42]

[4] Regulations Promulgated Pursuant to ANILCA § 1002(d)

A pivotal role is foreseen in the section 1002 scheme for secretarial regulations, which are

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[31] 16 U.S.C. § 3142(b)(2).
[32] 50 C.F.R. § 37.11(d).
[33] 16 U.S.C. § 3142(a). Special emphasis is given to protect caribou, wolves, wolverines, grizzly bears, migratory waterfowl, musk oxen, and polar bears. 16 U.S.C. § 3142(c).
[34] 16 U.S.C. § 3142(c).
[35] 16 U.S.C. § 3142(c)(A)–(E).
[36] 16 U.S.C. § 3142(c).
[37] U.S. Dep't of the Interior, U.S. Fish & Wildlife Service, Region 7, Anchorage, Alaska, April 1982.
[38] 16 U.S.C. § 3142(d)(1).
[39] 16 U.S.C. § 3142(e).
[40] 16 U.S.C. § 3142(f).
[41] 16 U.S.C. § 3142(g).
[42] 16 U.S.C. § 3142(h). This report was issued in April 1987. *See* § 27.05[9], *infra*.

to provide adequate environmental controls and a mechanism for exploration of ANWR. ANILCA requires the Secretary to promulgate regulations[43] governing exploratory activities[44] in the ANWR Coastal Plain. The Act directs the Secretary to include in these regulations the prohibitions, restrictions, and conditions regarding exploratory activities that the Secretary deems necessary or appropriate to ensure that exploratory activities do not significantly adversely affect the fish and wildlife, their habitats, or the environment.[45]

ANILCA requires the regulations to be accompanied by an environmental impact statement promulgated pursuant to NEPA[46] on exploratory activities.[47] The regulations are subject to continuous revision to reflect further information from continuing departmental studies or from appropriate information otherwise made available to the Secretary of the Interior.[48] This provision may have a significant impact on the explorer, since it appears to allow the provisions of any authorization to explore ANWR to be altered, perhaps substantially.

On March 12, 1981, Secretary of the Interior James Watt attempted to transfer primary responsibility for promulgation of the ANWR exploration regulations[49] and the congressional report[50] from the U.S. Fish & Wildlife Service to the USGS.[51] The Fish & Wildlife Service retained jurisdiction over the baseline study[52] while giving the USGS responsibility for approving exploration plans[53] with Fish & Wildlife Service concurrence.[54]

In *Trustees for Alaska v. Watt*,[55] the U.S. District Court for Alaska found this secretarial directive invalid. The court held that the Secretary's actions exceeded his authority under

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[43] ANILCA refers to these regulations as "guidelines." For purposes of clarity and precision, this discussion instead uses the term "regulations."

[44] The term *exploratory activities* is defined in 16 U.S.C. § 3142(b)(2) to mean: "surface geological exploration or seismic exploration, or both, for oil and gas within the coastal plain."

[45] 16 U.S.C. § 3142(d).

[46] 42 U.S.C. § 4332.

[47] 16 U.S.C. § 3142(e)(2). *See* "Final Environmental Impact Statement and Preliminary Final Regulations, Proposed Oil and Gas Exploration Within the Coastal Plain of the Arctic National Wildlife Refuge, Alaska" (Feb. 1983). Final 50 C.F.R. Part 37 regulations governing the conduct of exploratory activities in ANWR were published at 48 Fed. Reg. 16,838 (Apr. 19, 1983).

[48] 16 U.S.C. § 3142(f).

[49] 16 U.S.C. § 3142(d).

[50] 16 U.S.C. § 3142(h).

[51] Memorandum from Secretary James Watt to Director, Geological Survey, and Director, Fish and Wildlife Service, "Transfer of Lead Agency Responsibility for the Arctic National Wildlife Refuge Report and Exploration Regulations" (Mar. 12, 1981).

[52] 16 U.S.C. § 3142(c).

[53] 16 U.S.C. § 3142(e).

[54] Memorandum from Secretary James Watt to Director, Geological Survey, and Director, Fish and Wildlife Service, "Transfer of Lead Agency Responsibility for the Arctic National Wildlife Refuge Report and Exploration Regulations" (Mar. 12, 1981).

[55] 524 F. Supp. 1303, 1310 (D. Alaska 1981), *aff'd*, 690 F.2d 1279 (9th Cir. 1982).

ANILCA and the National Wildlife Refuge System Administration Act.[56] The Secretary was directed to delegate to the Fish & Wildlife Service full responsibility for all requirements under ANILCA § 1002.[57] Because of this litigation, the USGS regulations were never published.

As a result of the decision in *Trustees for Alaska v. Watt*, on April 19, 1983, the Fish & Wildlife Service published completely new regulations on geological and geophysical exploration of the ANWR Coastal Plain pursuant to ANILCA § 1002(d).[58] The regulations provide detailed application procedures and requirements,[59] and careful limitations on exploratory activities, which are intended to minimize environmental damage.[60] For instance, operation of ground vehicles in the summer is prohibited[61] and exploratory wells are prohibited.[62]

[5] Conduct of Surface Geological and Geophysical Exploration in ANWR

The regulations require that a special use permit (which is not mentioned in section 1002) be granted prior to the conduct of any exploratory activity in ANWR.[63] The Regional Director[64] is authorized[65] to determine whether a special use permit will be granted upon application by a prospective permittee.[66] An application for a special use permit consists of the exploration plan referred to in section 1002.[67] The regulations provide that exploration plans covering the initial period of the program were to be received by May 20, 1983; and exploration plans for the period from October 1, 1984 through May 31, 1986, or any portions thereof, must have been received by the Regional Director by March 1, 1984.[68]

ANILCA requires the submission of exploration plans for all exploratory activity to be conducted in ANWR. The exploration plans must contain a description and schedule of the proposed exploratory activity; a description of the equipment, facilities, and related manpower to be used in the proposed exploration; a description of the area to be explored; and a statement of the anticipated effects on fish and wildlife, their habitats, and the environment.[69]

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[56] 16 U.S.C. § 668dd.

[57] Trustees for Alaska v. Watt, 524 F. Supp. 1303, 1310 (D. Alaska 1981), *aff'd*, 690 F.2d 1279 (9th Cir. 1982).

[58] 48 Fed. Reg. 16,838 (Apr. 19, 1983) (codified at 50 C.F.R. pt. 37).

[59] 50 C.F.R. § 37.21.

[60] 50 C.F.R. §§ 37.31, .32.

[61] 50 C.F.R. § 37.31(b)(2).

[62] 50 C.F.R. § 37.11(d).

[63] 50 C.F.R. §§ 37.11(a), .23.

[64] *Regional Director* means the Regional Director, Region 7 of the U.S. Fish & Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503. 50 C.F.R. §§ 37.2(r), .21(b).

[65] 50 C.F.R. § 37.41.

[66] 50 C.F.R. § 37.22.

[67] 50 C.F.R. § 37.21(b).

[68] Applications received on May 20, 1983 appear at 48 Fed. Reg. 27,896 (June 17, 1983). The Regional Director approved eight of nine applications requesting expedited review on July 20, 1983.

[69] 16 U.S.C. § 3142(e)(1).

ANILCA and the regulations require the Regional Director to publish notice of an application for approval of an exploration plan, to hold public hearings, and to determine within 120 days after a plan is submitted for approval whether the plan complies with the regulations. If the plan is consistent with the regulations, ANILCA and the regulations require the Regional Director to approve it.[70] Without the Director's approval, granted only after public notice and comment, no revisions to operations approved in the exploration plan are allowed.[71] Extensive additional requirements for exploration plans are contained in the regulations.[72]

ANILCA expressly requires the Secretary to condition the approval of any plan on the permittee's agreement to undertake modifications to conform the plan to changed regulations.[73]

In the event that exploratory activity pursuant to an approved exploration plan would significantly adversely affect fish or wildlife, their habitat, or the environment if continued, the Secretary may suspend the activity.[74] In the alternative, he may modify the plan or the terms and conditions of the permit and/or suspend exploratory activity as he determines necessary and appropriate.[75]

Finally, once a special use permit and an exploration permit are approved, a plan of operations must be submitted annually covering specific field operations to be conducted in that year.[76]

One area of detail in the regulations given intense scrutiny by potential explorers in ANWR is the question of whether private or proprietary seismic operations may be conducted in ANWR. The regulations deal with this issue indirectly, by regulating duplication of seismic programs and group seismic efforts.

The regulations require exploratory activities to be conducted so as not to duplicate unnecessarily other exploratory activities of the permittee, or those of another permittee.[77] It is not entirely clear from the regulations what constitutes unnecessary duplication. The regulations allow a reexamination of an area if necessary to correct data deficiencies or to refine or improve data or information already gathered.[78] It is also unclear when reexamination of an area would be necessary to correct data deficiencies or to refine or improve data or information already gathered. The Regional Director possesses the authority to compel a permittee to afford all

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[70] 16 U.S.C. § 3142(e)(2). *See also* 50 C.F.R. §§ 37.21, .22, .23. Initial applications were received on May 20, 1983, pursuant to 50 C.F.R. Part 37. 48 Fed. Reg. 27,896 (June 17, 1983).
[71] 50 C.F.R. § 37.25.
[72] *See* 50 C.F.R. §§ 37.21, .22.
[73] 16 U.S.C. § 3142(e)(2); 50 C.F.R. § 37.23(a).
[74] 16 U.S.C. § 3142(f).
[75] 16 U.S.C. § 3142(f).
[76] 50 C.F.R. § 37.24.
[77] 50 C.F.R. § 37.11(b)(2).
[78] 50 C.F.R. § 37.11(c).

interested persons the opportunity to participate jointly in its exploratory activities.[79]

[6] Submission of Raw and Processed Data

The requirements of data submission have been the subject of substantial controversy and have become an area of continuing legislation and rulemaking. ANILCA requires that the Secretary obtain the submission of all geological and geophysical data and information, including processed, analyzed, and interpreted information, that a permittee acquires under an exploration plan.[80] The Secretary is directed by ANILCA § 1002(h) to make this data and information available to the public upon submission of his report to Congress; however, processed, analyzed, and interpreted data or information must be held confidential by the Secretary for a period of not less than two years following a lease sale including the area from which the information was obtained.[81]

As a result of a substantial outcry from industry, Congress amended the information disclosure provisions of ANILCA in 1982.[82] The amendment directed the Secretary, by regulation, to bar any person who obtains access to such data and information from the Secretary or from any person other than a permittee, from participating in any lease sale including the area from which the information was obtained, and from any commercial use of the information. The Secretary must require that any permittee make available such data to any person at a "fair cost."[83]

ANILCA's data submission provisions[84] are implemented by the regulations.[85] The regulations require that all data and information, including processed, analyzed, and interpreted information, obtained as a result of completing the exploration plan, be submitted to the Regional Director of the U.S. Fish & Wildlife Service.[86]

ANILCA states that the Secretary shall make raw data and information available to the public, but does not specify when such raw data and information should be made available.[87] The regulations state that submitted raw data and information[88] will be available to the public upon

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[79] 50 C.F.R. § 37.13.

[80] 16 U.S.C. § 3142(e)(2)(B).

[81] 16 U.S.C. § 3142(e)(2)(C).

[82] 1983 Interior and Related Agencies Appropriations Act, § 110, Pub. L. No. 97-394, 96 Stat. 1966, 1982 (1982).

[83] 16 U.S.C. § 3142(e)(2)(C). *See also* 50 C.F.R. § 37.22(d)(3). The meaning of the term "fair cost" is unclear; it suggests, on the one hand, "fair market value," which in the context of a group seismic shoot would probably be a participant's cost. It also suggests "reasonable cost," which might be construed as a lesser sum. The author has informally been advised by parties present during the congressional markup session of this provision that the term was intended to mean "fair market value," and that its present ambiguous form was the result of inadvertence.

[84] 16 U.S.C. § 3142(e)(2)(B).

[85] 50 C.F.R. §§ 37.22, .54.

[86] 50 C.F.R. § 37.22(d)(1).

[87] 16 U.S.C. § 3142(e)(2)(C).

[88] Raw data and information means all original observations and recordings in written or electronic form

the Secretary's submission to Congress of the report required under ANILCA § 1002(h).[89]

Notwithstanding the general limitation on public disclosure of raw data, the Regional Director is required to approve exploration plans only on the condition that all raw data and information obtained through the exploratory activities be made available by the permittee to any person at "fair cost."[90]

Processed, analyzed, and interpreted data or information (processed data)[91] must also be submitted to the Regional Director under the regulations.[92] ANILCA requires that processed data be held confidential by the Secretary for a period of not less than two years following any lease sale including the area from which the information was obtained.[93] Under the regulations, processed data will not be available to the public until two years after a lease sale including the area from which such data or information was obtained, or 10 years after submission of the data to the Regional Director, whichever period is longer.[94] The regulations may therefore provide a greater period of nondisclosure to the public of processed data than that strictly required by ANILCA. Some question may exist as to whether this additional period of nondisclosure is enforceable in the face of the Freedom of Information Act.[95]

[7] Commercial Use of Data and Disqualification from Bidding

In order to provide some measure of control in an area otherwise subject to abuse, commercial use of raw or processed data or information obtained pursuant to departmental disclosure is prohibited.[96] In addition, no person shall obtain access to data until he certifies that he is aware of both the prohibition on commercial use of such information and, further, that he is disqualified from obtaining or participating in any lease of the oil or gas to which such data or information pertain.[97] Any person obtaining access to data or information other than from the permittee is disqualified from obtaining or participating in any lease of the oil or gas to which such data and information pertain.[98] The meaning of the term "pertain" in this context is unclear.

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and samples obtained during field operations. 50 C.F.R. § 37.2(p).

[89] 50 C.F.R. § 37.54(a). ANILCA § 1002(h) required that the congressional report be submitted not earlier than December 2, 1985, and no later than September 2, 1986. 16 U.S.C. § 3142(h). The final report was actually submitted on April 21, 1987. *See* § 27.05[9], *infra*.

[90] 50 C.F.R. § 37.22(d)(3).

[91] Processed, analyzed, and interpreted data or information means any data or information which results from any subsequent modification, processing, analysis, or interpretation of raw data and information by human or electronic means, on or off the refuge, 50 C.F.R. § 37.2(o), and includes but is not limited to: (1) seismic record sections and their interpretations; (2) geologic maps and cross-sections and their interpretations; (3) maps of gravitational and magnetic fields and their interpretations; and (4) chemical or other analyses or rock samples collected on the refuge and interpretations thereof. 50 C.F.R. § 37.53(d).

[92] 50 C.F.R. § 37.22(d)(1).

[93] 16 U.S.C. § 3142(e)(2)(C).

[94] 50 C.F.R. § 37.54(a).

[95] 5 U.S.C. § 552.

[96] 50 C.F.R. § 37.54(d).

[97] 50 C.F.R. §§ 37.54(d), .4(b).

[98] 50 C.F.R. § 37.4(b).

Because of the regional significance of seismic data, it could be given a broad geographic interpretation. Also, the phrase "participating in any lease" could be construed perpetually to bar obtaining any participation interest in a lease so affected.

The regulations allow disclosure of processed information to the State of Alaska, to Congress, to any committee or subcommittee of Congress having jurisdiction over ANWR or the section 1002 exploration program,[99] and to the executive and judicial branches of the federal government for official use.[100] The recipient of such data is responsible for maintaining the confidentiality of the information.[101] Given the potentially wide distribution of confidential data to these governmental units (which, in the case of Congress and its committees, have substantial public constituencies and a reputation for free distribution of data), there remains a serious question whether confidentiality will in fact be maintained.

[8] Enforcement of Terms of Exploration Plans

The permittee who violates any provision of an exploration plan approved under ANILCA § 1002(e),[102] or a revised term or condition pursuant to section 1002(f),[103] or is found to have committed any act prohibited by regulation shall be liable to the United States for a civil penalty.[104] The Secretary determines whether there has in fact been a violation, and further, sets the penalty not to exceed $10,000 per violation.[105] Each day of a continuing violation constitutes a separate offense.[106]

A question may exist as to whether the enforcement provisions discussed herein apply to violations of the data use and submission provision of ANILCA and the regulations.

[9] Report to Congress Pursuant to Section 1002(h); Possible Future Leasing

The Secretary was directed to prepare and submit to Congress, not earlier than December 2, 1985, nor later than September 2, 1986, a report containing:

1. the identification of areas within the Coastal Plain having oil and gas potential, and estimates of volume concerned, but such identification shall be accomplished without drilling exploratory wells;

2. the description of fish and wildlife, their habitats, and other resources within the areas of oil and gas potential;

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[99] *See* § 27.05[5], *supra*.
[100] 50 C.F.R. § 37.54(c).
[101] 50 C.F.R. § 37.54(c).
[102] 16 U.S.C. § 3142(e).
[103] 16 U.S.C. § 3142(f).
[104] 16 U.S.C. § 3142(g).
[105] 16 U.S.C. § 3142(g).
[106] 16 U.S.C. § 3142(g).

3. an evaluation of the adverse effects that further exploration, development, or production of oil and gas would have on the resources described in paragraph 2;

4. a description of how such oil and gas, if produced within the area, may be transported to processing facilities;

5. an evaluation of how such oil and gas relates to the national need for additional domestic sources of oil and gas; and

6. the recommendations of the Secretary with regard to whether further exploration, development, or production of oil and gas should be permitted and, if so, the additional legal authority needed to ensure that adverse effects on fish and wildlife, their habitats, and other resources would be avoided or minimized.[107]

The Ninth Circuit Court of Appeals required the Secretary of the Interior to complete an Environmental Impact Statement (EIS) on his recommendations and to submit it to public comment before submission to Congress.[108] On November 24, 1986, the Secretary completed for public comment a draft EIS recommending full leasing.[109] On April 20, 1987, the Secretary submitted to Congress the Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment and Final Legislative Environmental Impact Statement, more commonly known as the "1002 Report."[110] The report reviewed the geology and resource potential of the ANWR Coastal Plain, and concluded that "the 1002 area is one of the most outstanding prospective oil and gas areas remaining in the United States."[111] The Secretary followed his conclusion with the statement: "Although the entire area should be considered for leasing, only a percentage would actually be leased, an even smaller percentage would be explored, and—if oil is discovered—a still smaller percentage would be developed."[112]

However, ANWR has also become the focus of protective efforts by wildlife and wilderness interests. Since well before enactment of ANILCA, governmental efforts relative to ANWR, whether directed to allowing or prohibiting development, have been intensely politicized. In response to the 1002 Report, over the ensuing years, Congress has conducted numerous hearings on the issue, but Congress has never developed a consensus to open

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[107] 16 U.S.C. § 3142(h).

[108] Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986).

[109] 51 Fed. Reg. 42,307 (Nov. 24, 1986).

[110] 52 Fed. Reg. 12,980 (Apr. 20, 1987).

[111] 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* 57 (Apr. 1987).

[112] Letter dated April 21, 1987 from Donald Paul Hodel, Secretary of the Interior, addressed "Dear Reader," at p. 1, enclosed as part of the *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* (Apr. 1987). *See also* Alaska v. United States, 35 Fed. Cl. 685, 697 (1996).

ANWR.[113]

§ 27.06 Unique Federal Land Use Regulations Applicable to Federal Oil and Gas Leasing in Alaska

[1] ANILCA § 810 Subsistence Findings

[a] Introduction

Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA)[1] provides for a formal analysis of the effects of many decisions relating to public lands in Alaska to determine effects upon subsistence hunting, fishing, and gathering activities pursued by rural Alaskans. The purpose of section 810 is to protect Alaskan subsistence resources from unnecessary destruction:[2]

> Section 810 does not prohibit all federal land use actions which would adversely affect subsistence resources but sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized.[3]

Section 810 applies broadly with respect to administrative decisions relative to federal lands in Alaska including, *inter alia*, oil and gas leasing and certain related permitting decisions; it provides for a preliminary finding as to whether the contemplated action "would significantly restrict" subsistence uses. If this threshold is crossed, then additional hearings and findings are required by the full section 810 process. Like many environmental statutes, section 810's legal mechanism is primarily procedural, but is intended to lead to a significant substantive effect—the laborious procedures of the full section 810 process provide an obvious incentive to avoid actions that "would significantly restrict" subsistence activities. However, subsistence is not thereby granted primacy. The U.S. Supreme Court has held that section 810 enunciates but one of several important policies governing federal lands, all of which are to be balanced in the decision-making process:

> Congress clearly did not state in ANILCA that subsistence uses are always more important than development of energy resources, or other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is *a* public interest, and established a framework for reconciliation, where possible, of competing public interests.[4]

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[113] Alaska v. United States, 35 Fed. Cl. 685, 697 (1996) (citing 138 Cong. Rec. S822-06 (Feb. 3, 1992)).

[1] 16 U.S.C. § 3120.

[2] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987).

[3] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 544 (1987).

[4] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545–46 (1987) (emphasis in original).

Because section 810 applies so broadly (it may, for instance, apply to federal oil and gas exploration or production permits as well as to oil and gas leasing), and because the "would significantly restrict" standard involves the exercise of substantial discretion to determine whether (and under what terms) the proposed lease or use of federal lands should be allowed, this provision has been subject to extensive litigation and subsequent judicial interpretation[5] in a manner similar to the "significantly affect" standard of the National Environmental Policy Act (NEPA)[6] and the "jeopardize" standard of section 7 of the Endangered Species Act.[7]

Notwithstanding the extensive litigation to date, more litigation will ensue before section 810 has been fully explicated by the courts and its requirements can be said to be fully mature and predictable. At this time, it is fair to say section 810 is somewhat unpredictable. Although some section 810 cases related to U.S. Forest Service timber sales and BLM mining claim permitting, the major Ninth Circuit interpretations of section 810 were made with respect to the application of section 810 to the Outer Continental Shelf (OCS) of Alaska, and strictly construed its procedural requirements based on the Ninth Circuit's perception that the federal policy of protecting subsistence uses under section 810 was dominant over the federal policy of allowing energy development of these same federal lands.[8] In an important 1987 ruling,[9] the U.S. Supreme Court overruled one of these cases[10] insofar as it applied section 810 to the OCS. The Supreme Court further overruled the Ninth Circuit's holdings with respect to the dominance of subsistence uses over energy development uses, holding that ANILCA provided for subsistence uses to be balanced with other uses of the federal public lands.[11] This latter holding might be said not to be strictly necessary because the Supreme Court's holding respecting the application of section 810 to the OCS was sufficient to dispose of the case.[12] However, it seems clear that the majority of the Supreme Court wanted to correct what it viewed as a basic error in the way the Ninth Circuit interpreted section 810 (and further correct the unusual standards the Ninth Circuit had recently applied to the issuance of injunctions in environmental cases in general).[13] As of early 2012, there

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[5] *See, e.g.*, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987); Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223 (9th Cir. 1999); Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988); City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986); Vill. of Akutan v. Hodel, 792 F.2d 1376 (9th Cir. 1986); Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*); Vill. of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*); Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984).

[6] 42 U.S.C. § 4332(2)(c).

[7] 16 U.S.C. § 1536(a)(2).

[8] Vill. of Akutan v. Hodel, 792 F.2d 1376 (9th Cir. 1986); Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*); Vill. of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*).

[9] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987).

[10] Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).

[11] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987); *see also* Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1227 (9th Cir. 1999).

[12] See concurrence of Justice Stevens in *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987).

[13] The Supreme Court's ruling in *Amoco* overturned the Ninth Circuit's emerging "alternative" doctrine of granting an injunction almost automatically in cases where the violation of an environmental statute is demonstrated on the grounds that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." Vill. of Gambell v. Hodel, 774 F.2d 1414, 1423 (9th Cir. 1985) (*Gambell II*). This "alternative" standard was based on the Ninth Circuit's mistaken

were no new significant cases interpreting section 810 that would directly impact federal oil and gas leasing.[14]

[b] Application of Section 810 to Federal Lands Decisions in Alaska

Section 810 applies to specific decisions made with respect to certain lands in Alaska.[15] In spite of the statute's apparent clarity, there remain significant, unresolved disputes concerning the lands and the decisions to which section 810 applies. Careful analysis of the lands and the decisions subject to section 810 clarifies the multitude of issues that can arise.

[i] Application of Section 810 to Categories of Lands in Alaska

With respect to the application of section 810 to various categories of federal lands in Alaska, section 810 uses the phrase "public lands,"[16] which is defined in ANILCA § 102(3)[17] as "land situated in Alaska which, after December 2, 1980, are (sic) federal lands (sic), except [state and native selections]." In turn, "federal land" is defined in ANILCA § 102(2)[18] as "lands the title to which is in the United States after December 2, 1980." As discussed above, it has been held that OCS lands are not "in Alaska" and thus not subject to the purview of section 810.[19] It has also been held[20] that section 810 does not apply to decisions to issue permits with respect to private lands, even where it was alleged that the "spillover effects" of the proposed use may impact subsistence activities pursued on adjacent public lands. This same case also held that section 810 does not apply to federal environmental permits issued in navigable waters that affect

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perception that the public interests "served by federal environmental statutes, such as ANILCA, supersede all other interests that might be at stake." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). As a result of its "alternative" doctrine, the Ninth Circuit had granted injunctions in environmental cases without engaging in a traditional balancing of the hardships. *See, e.g.*, Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*). The Ninth Circuit abandoned this approach after the decision in *Amoco*. *See* Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1227 (9th Cir. 1999).

[14] *Cf.* Akiak Native Cmty. v. U.S. Envtl. Protection Agency, 625 F.3d 1162 (9th Cir. 2010) (holding that the Environmental Protection Agency's transfer of the National Pollutant Discharge Elimination System (NPDES) program to the State of Alaska did not trigger a section 810 subsistence evaluation).

[15] Section 810 states in part as follows:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect … on subsistence uses and needs. …

16 U.S.C. § 3120(a).

[16] 16 U.S.C. § 3120(a).

[17] 16 U.S.C. § 3102(3).

[18] 16 U.S.C. § 3102(2).

[19] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987).

[20] City of Angoon v. Hodel, 803 F.2d 1016, 1028 (9th Cir. 1986).

the navigational servitude because such a servitude is not itself "public land."[21]

[ii] Application of Section 810 to Categories of Decisions

With respect to the application of section 810 to various exercises of federal administrative discretion, the statute applies by its terms to any determination to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands,"[22] when the determination is made by the agency having primary jurisdiction over the lands.

However, the statute does not apply by its terms to conveyances to the state or Native corporations. Section 810 findings do not prohibit or impair the rights of the state or any Native corporation to make selections or receive conveyances of lands under the Statehood Act[23] or the Alaska Native Claims Settlement Act.[24]

The Ninth Circuit Court of Appeals allowed an abbreviated section 810 review in a case[25] where, because of a strong congressional mandate to lease lands in the National Petroleum Reserve—Alaska (NPRA),[26] the agency's discretion over leasing was held to be very limited—"[t]he statute did not give the Secretary the discretion not to lease."[27]

At least one case held that section 810 does not apply to federal environmental permits in general, but rather only to decisions to permit the use of lands made by the agency having primary jurisdiction over the lands.[28]

The courts have also wrestled with the application of section 810 to agency *inaction*. One case has held that section 810 does not apply if the agency having primary jurisdiction has taken no action.[29] A second Ninth Circuit decision[30] reached a similar conclusion in a case posing difficult issues where certain mining activities are authorized by regulations[31] enacted prior to ANILCA. These mining activities, occurring on five acres or less, were authorized by the filing of

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[21] City of Angoon v. Hodel, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986).

[22] 16 U.S.C. § 3120(a).

[23] 48 U.S.C. note prec. § 21.

[24] 43 U.S.C. §§ 1601–1629h.

[25] Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984).

[26] For further discussion of the congressionally mandated leasing program and NPRA, see § 27.04[2], [3], *supra*.

[27] Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984). Similar facts relating to a congressionally mandated conveyance by the Secretary of the Interior were discussed in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986).

[28] City of Angoon v. Hodel, 803 F.2d 1016, 1028 (9th Cir. 1986); *see also* Akiak Native Cmty. v. U.S. Envtl. Protection Agency, 625 F.3d 1162 (9th Cir. 2010) (holding, in part, that the Environmental Protection Agency's transfer of the NPDES program to the State of Alaska did not trigger a section 810 subsistence evaluation because the EPA does not have primary jurisdiction over public lands in Alaska).

[29] City of Angoon v. Hodel, 803 F.2d 1016, 1028 (9th Cir. 1986).

[30] Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988).

[31] 43 C.F.R. § 3809.1-3 (2000). New regulations were adopted in November 2000. *See* 65 Fed. Reg. 69,998 (Nov. 21, 2000).

a notice with BLM, and thus the federal government made no active decision to approve or to disapprove these mining activities on federal lands. The plaintiffs claimed that such mining activities remained subject to section 810's requirements. The Ninth Circuit subsumed the discussion of section 810 within its discussion of NEPA and concluded that "[n]either BLM's approval process nor regulatory involvement is sufficient to trigger NEPA or ANILCA."[32] This decision also held that a challenge to BLM's section 810 findings on mining claims larger than five acres was moot.[33] BLM did not appeal the lower court's holding that the cumulative impacts requirements of NEPA also applied to section 810, and the Ninth Circuit upheld the lower court's retention of jurisdiction for purposes of evaluating the adequacy of the cumulative study.[34]

[c] Procedures Under Section 810

The heart of section 810 is a two-stage process—a preliminary analysis, and (if a threshold of subsistence impacts is found) a further, more detailed "full" process.

[i] Preliminary Analysis

Under section 810(a),[35] prior to withdrawing, reserving, leasing, or otherwise permitting the use, occupancy, or disposition of public lands in Alaska, including leasing of federal lands for oil and gas exploration, development, or production, the head of the federal agency having primary jurisdiction over the lands is required to evaluate: (1) the effect of the proposed lease or other use on subsistence uses and needs; (2) the availability of other lands for the purpose sought to be achieved; and (3) other alternatives that would reduce or eliminate from the proposal the use, occupancy, or disposition of lands needed for subsistence purposes.

This procedure has generally become formalized in the decision-making process and has generally resulted in separate section 810 "findings" becoming a part of the decision record in decisions subject to the section 810 requirement.

Section 810 findings must be included in an environmental impact statement, if one is required.[36] However, while conducted as part of the general environmental assessment process, review under section 810 has been held to be a separate requirement from NEPA, and the NEPA process further has been held not to be a substitute for a section 810 review.[37] However, while this specific holding was reversed on appeal,[38] closer interrelationship with the NEPA process probably will not result, and separate findings probably will continue.

[ii] Across the Threshold—Triggering the Full Process

If the preliminary analysis under section 810 shows that the proposed reservation, lease, permit, or other use "would significantly restrict" subsistence uses, then section 810 requires that

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[32] Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988).
[33] Sierra Club v. Penfold, 857 F.2d 1307, 1319 (9th Cir. 1988).
[34] Sierra Club v. Penfold, 857 F.2d 1307, 1321–22 (9th Cir. 1988).
[35] 16 U.S.C. § 3120.
[36] 16 U.S.C. § 3120(b).
[37] Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).
[38] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987).

the proposed action shall not be put into effect until the head of the agency: (1) gives notice to the appropriate state agency, local committees, and regional councils established under section 805 of ANILCA;[39] (2) holds a hearing in the vicinity of the area involved; (3) determines that the "significant restriction" is necessary and consistent with sound management practices for public land; (4) determines that the proposal utilizes the minimum amount of public land necessary to accomplish the purpose; and (5) ensures that reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources.[40]

The "would significantly restrict" threshold of section 810(a) seems to have been intentionally designed by Congress to require at least some certainty that negative impacts on subsistence would occur before the full section 810 process is triggered. This seems to be a calculated result because the full process is difficult and would disrupt the orderly administration of the federal lands in Alaska if applied to each federal lands decision. Accordingly, in several cases the Secretary of the Interior did not trigger the full 810 process where he concluded that subsistence impacts were unlikely.[41] However, a substantial judicial gloss has turned this statutory presumption on its head: Now, a federal agency must be *certain* that effects on subsistence will *not* occur before the remainder of the process can be avoided—if the agency finds its proposed action "may significantly impact" subsistence resources, then the full 810 process is triggered.[42]

[2] Access to Federal Oil and Gas Leases in Alaska

[a] Introduction—Land Status and Access to Federal Oil and Gas Leases

The status of land ownership and federal withdrawals in Alaska creates severe problems of access for federal oil and gas lessees in Alaska. Consequently, careful attention should be paid to access issues.

In addition to the laws applicable generally to public lands in the entire United States, many specialized statutes govern access to public lands in Alaska. Any question of access to a specific tract of land will involve examination of the status of both the land upon which oil and gas activities will take place, and any lands to be crossed to reach the site of the proposed activity. The subject of access in Alaska is exceptionally complex and has been extensively dealt with elsewhere.[43] For this reason, only a brief summary of the access provisions relative to federal,

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[39] 16 U.S.C. § 3115.

[40] 16 U.S.C. § 3120(a)(1)–(3).

[41] Vill. of Akutan v. Hodel, 792 F.2d 1376 (9th Cir. 1986); Vill. of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).

[42] *See* Vill. of Akutan v. Hodel, 792 F.2d 1376, 1378–79 (9th Cir. 1986); Vill. of Gambell v. Hodel, 774 F.2d 1414, 1427 (9th Cir. 1985) (*Gambell II*); Kunaknana v. Clark, 742 F.2d 1145, 1151 (9th Cir. 1984). This significant judicial gloss reversing an apparently clear statutory mechanism was created by the Ninth Circuit in *Gambell II* and supported by the *Gambell II* court's citation of an apparently inadvertent mistaken paraphrase of the words of the statute in dicta in *Kunaknana*.

[43] For a thorough exposition of issues relating to access across public lands in Alaska, see 3 *Am. L. of*

state, and private lands in Alaska is set forth here.

[b] Access Across Federal Lands Under ANILCA Title XI

The Alaska National Interest Lands Conservation Act[44] withdrew massive amounts of federal land. These withdrawals can hinder or prevent access to oil and gas leases.

Title XI of ANILCA[45] sets forth the general procedure for obtaining access across a national conservation system unit and other lands withdrawn by that statute.[46] In addition, ANILCA provides rights of access to inholdings that are within or surrounded by conservation system lands established by ANILCA,[47] and contains several provisions that relate to particular

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Mining Title VI (2d ed. 2011), and Sanford Sagalkin & Mark Panitch, "Mineral Development Under the Alaska Lands Act," 10 *UCLA-Alaska L. Rev.* 117 (1981). *See also* chapter 22, *supra*.

[44] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 and 43 U.S.C.).

[45] 16 U.S.C. §§ 3161–3173. *See especially* 16 U.S.C. §§ 3162–3167. ANILCA § 1106(c), 16 U.S.C. § 3166(c) provides for approval or access permits in wilderness areas by joint resolution of Congress; this procedure may constitute an unconstitutional legislative veto under *INS v. Chadha*, 462 U.S. 919 (1983).

[46] ANILCA § 102(4), 16 U.S.C. § 3102(4) defines "conservation system unit" to include "any unit in Alaska of the National Parks System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument. …"

[47] ANILCA § 1110(b), 16 U.S.C. § 3170(b); *see* 43 C.F.R. § 36.10; 73 Fed. Reg. 3181 (Jan. 17, 2008). ANILCA § 1110(b) provides:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land … is within or is effectively surrounded by one or more conservation system units, … the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

Thus, under ANILCA § 1110(b), notwithstanding other laws, inholders are "given" and "assured" "adequate and feasible access" to their lands. The term *adequate and feasible access* is defined in the regulations governing the Alaska National Wildlife Refuges as: "A reasonable method and route of pedestrian or vehicular transportation which is economically practicable for achieving the use or development desired by the applicant on his/her non-federal land or occupancy interest, but does not necessarily mean the least costly alternative." 50 C.F.R. § 36.2.

Senate Report, S. Rep. No. 96-413 (1979) (Senate Report), that accompanied ANILCA discussed section 1110 in two different places. The first is the "Committee Amendments" of the Senate Committee on Energy and Natural Resources; section 1110 is discussed on

conservation areas.[48]

Of special significance to the oil and gas lessee is the provision authorizing the Secretary to grant "landowners" temporary access for survey, geophysical, exploratory, or other temporary uses that will not result in permanent harm to the land, so long as such temporary access is for a period of less than one year and does not require permanent facilities.[49]

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pages 247–49. The second is the "Section by Section Analysis"; section 1110 is discussed on page 299.

The Senate Report provides that "The Committee amendment *guarantees* access subject to reasonable regulation. …" Senate Report at 247. Further, the Senate Report explains that "[w]here a … private interest in land is surrounded … the Secretary shall grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes." Senate Report at 248.

Perhaps most importantly, the Committee Amendments section, at 249, takes the view that section 1110 grants a right to the inholder:

> The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. *This provision is intended to be an independent grant supplementary to all other rights of access*, and shall not be construed to limit or be limited by any other right of access granted by the common law, other statutory provisions, or the Constitution.

(emphasis added). The legislative history also appears to demonstrate that the Secretary's discretion is limited to protection of the CSU resources. As the Committee explained, "[t]he Committee expects the Secretary to regulate such access in order to protect the natural and other values for which the units were established." Senate Report at 249.

[48] *See, e.g.*, 16 U.S.C. § 1274(a)(25)–(50).

[49] ANILCA § 1111, 16 U.S.C. § 3171. Section 1111 provides:

(a)

In general

Notwithstanding any other provision of this Act or other law the Secretary shall authorize and permit temporary access by the State or a private landowner to or across any conservation system unit, … in order to permit the State or private landowner access to its land for purposes of survey geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.

(b)

Access to non-federally owned lands that are totally surrounded by National Forest System lands or BLM lands is also guaranteed by ANILCA.[50] However, since the term "non-federally owned land" is not defined, access across forest or BLM land to federal lands covered by federal oil and gas leases may not be guaranteed under this provision.

Effective October 6, 1986, the Department of the Interior published final regulations governing the provisions of title XI of ANILCA.[51] The regulations set forth the application procedure for access.[52] The lead federal agency having management jurisdiction over the requested access must comply with the provisions of NEPA and the Council on Environmental Quality Regulations[53] in determining whether an environmental assessment or an environmental impact statement is required, or that a categorical exclusion applies.[54] Compliance with section 810 of ANILCA is also required.[55] The regulations further provide for administrative appeal of the disapproval of an application under certain circumstances.[56]

[c] Access Across State Lands

The Alaska Constitution guarantees access to navigable or public waters for all citizens and residents of the state,[57] and the Alaska Statehood Act confirmed prior valid existing access rights held at the time of statehood.[58] In addition, specific statutes governing the disposal of non-mineral interests in state lands include broad access rights for the purpose of developing state reserved minerals in those lands.[59]

Alaska has also attempted to guarantee access to lands within the state by accepting by

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Stipulations and conditions

In providing temporary access pursuant to subsection (a) of this section, the Secretary may include such stipulations and conditions he deems necessary to insure that the private use of public lands is accomplished in a manner that is not inconsistent with the purposes for which the public lands are reserved and which insures that no permanent harm will result to the resources of the unit, area, Reserve or lands.

[50] 16 U.S.C. § 3210(a), (b). *See also* Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951 (9th Cir. 1981) (holding that the "access to inholdings" provision in ANILCA is applicable to all National Forest System lands and is not solely limited to National Forest System units in Alaska).

[51] 36 C.F.R. pt. 13, 43 C.F.R. pt. 36, and 50 C.F.R. pt. 36, 51 Fed. Reg. 31,619 (Sept. 4, 1986). These regulations have been subsequently amended. *See, e.g.*, 71 Fed. Reg. 69,328 (Nov. 30, 2006) (revising 36 C.F.R. pt. 13); 73 Fed. Reg. 3181 (Jan. 17, 2008).

[52] 43 C.F.R. §§ 36.3–.7.

[53] 40 C.F.R. pts. 1500–1518.

[54] 43 C.F.R. § 36.6.

[55] 43 C.F.R. § 36.6. See discussion of section 810 at § 27.06[1], *supra*.

[56] 43 C.F.R. § 36.8.

[57] Alaska Const. art. VIII, § 14.

[58] Pub. L. No. 85-508, 72 Stat. 339 (1958).

[59] Alaska Stat. § 38.05.125. *See also* Alaska Const. art. VIII, § 9 and 48 U.S.C. note prec. § 21, at § 36(i).

statute, on a statewide basis, the federal section line easement right-of-way grant made by Alaska Stat. § 19.10.010.[60] Under the authority of this statute, the legislature has dedicated for use as public highways a 100-foot wide section line easement between each section of land owned by the state or acquired from the state, and a similar strip four rods wide between all other sections in the state.[61]

[d] Access Across Private Lands

Obtaining access across private lands in Alaska is not different, in most instances, from obtaining access across private lands in other states. However, the Alaska Constitution establishes a right of eminent domain for private ways of necessity across private lands to permit access for extraction or utilization of natural resources.[62] Additionally, a statutory reservation included in most conveyances of state land to private parties reserves broad access rights for the purpose of developing mineral resources.[63]

[e] Access Across Native Lands

While, in theory, access across Native-owned lands would be achieved in a fashion similar to any other privately owned lands, several provisions of the Alaska Native Claims Settlement Act[64] will impact such access. Prior valid existing access rights across lands granted to the Native corporations are protected.[65] As part of its interim management authority over Native selected lands prior to conveyance to Native corporations, the federal government may grant access rights across lands even if such lands may in the future be conveyed to a Native corporation.[66] ANCSA contained a broad provision for the reservation of public easements across Native lands, to preserve access uses in existence as of the date of enactment of ANCSA in 1971.[3] This provision is further clarified and defined in ANCSA's implementing regulations.[4] These provisions resulted in a significant administrative effort to identify and properly reserve such easements, and in litigation.[5] Thus, easements for public use that provide access to oil and gas leases may be reserved across lands selected by the Native corporations.

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[60] Former 43 U.S.C. § 932 (repealed 1976).
[61] Alaska Stat. § 19.10.010.
[62] Alaska Const. art. VIII, § 16.
[63] Alaska Stat. § 38.05.125.
[64] 43 U.S.C. §§ 1601–1629h.
[65] 43 U.S.C. § 1613(g).
[66] 43 U.S.C. § 1621(i).
[66.1] 43 U.S.C. § 1616(b)
[66.2] 43 CFR § 2650.4-7
[66.3] Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977).