

Golden Gate University Law Review

Volume 33

Issue 3 *Environmental Law Journal: Wild Ideas:*
George W. Bush on Wilderness & Wildlife


Article 7

January 2003

To Drill or Not to Drill: The Arctic National Wildlife Refuge v. the "Need" for U.S. Energy Independence

Sara N. Pasquinelli

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Sara N. Pasquinelli, *To Drill or Not to Drill: The Arctic National Wildlife Refuge v. the "Need" for U.S. Energy Independence*, 33 Golden Gate U. L. Rev. (2003).
<http://digitalcommons.law.ggu.edu/ggulrev/vol33/iss3/7>

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

COMMENT

TO DRILL OR NOT TO DRILL: THE ARCTIC NATIONAL WILDLIFE REFUGE v. THE “NEED” FOR U.S. ENERGY INDEPENDENCE

INTRODUCTION

Implementing new energy legislation is one of the Bush Administration's main goals. As such, the Department of the Interior (“DOI”), charged with carrying out the President's management plan, joins the President in support of oil drilling in the Arctic National Wildlife Refuge (“ANWR”). The debate has been extensive. In August, 2001, the House of Representatives adopted H.R. 4, Securing America's Future Energy Act of 2001 (“SAFE Act”), which included drilling in ANWR.¹ Then in April, 2002, the Senate passed S.517 and S.2917 in lieu of H.R. 4, also known as the Energy Policy Act of 2002, which did not include a measure for oil drilling in ANWR.² The debate reconvened at the end of the 107th Congress within the joint House-Senate conferences.³ In March 2003, the debate resurfaced in the 108th Congress as a provision in a federal budget resolution for 2004, but in a close vote of 52-48, the Senate struck down the rider to open ANWR to oil exploration, drilling and leasing.⁴

¹ H.R. 4, 107th Cong. (2002). Final version of the bill passed through the House, August 2, 2001 and the Senate on April 25, 2002. *See also* Bill Summary & Status for the 107th Congress, available at http://thomas.loc.gov/dgi-bon/bdquery/z?d107:HR000_04 (last visited October 1, 2002).

² *Id.* *See also* Senator Bingaman's website, available at www.senate.gov/mediafiles/s.am.2917.pdf. This link is extremely slow but contains the full text of Amendment 2917 (in pdf or word perfect format) that was incorporated in to S517 that replaced the text of H.R. 4 approved by the House and became the as the final Senate Energy Bill H.R. 4 on April 25, 2002. *See also* 65 Cong. Rec. S3688-3788 (2002).

³ *Id.*

⁴ *Oil Allies Sense Arctic Refuge Victory: Drilling Advocates See 'Best Opportunity' ever in Congress* by Miguel Llanos (Jan. 17, 2003), available at www.msnbc.com/modules/exports/ct

504 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

This Comment discusses the complexity of the issues surrounding the ANWR debate, from agency positions on drilling to alternative energy sources. Additionally, this Comment proposes the formation of an ANWR Consulting Group to specifically address the uniqueness of ANWR as an amazing wilderness area that should be preserved even though it happens to have oil beneath its surface.

Section II of this Comment discusses the history of Alaska's North Slope and how oil exploration transformed the North Slope from pristine wilderness to one of the largest oil production regions in the world. It also addresses the political measures taken to extend ANWR's surface area for designation as a wilderness refuge. Additionally, this section focuses on the adverse effects of oil exploration activities on wildlife, their habitat and the overall health of the environment. Section III analyzes the legislative history of the 107th Congress' energy bill as well as the bill's modification from the House to the Senate. Moreover, this section looks at the role that the DOI and other interest groups, such as environmentalists and the oil industry lobbyists, play within the ANWR debate.

Section IV examines the difficulties that the House-Senate conferees experienced during the ANWR discussions given looming political and economic pressures. This section also addresses the conflicting role that the Secretary of the DOI plays when considering whether to allow oil drilling on the same land the DOI is charged with managing and preserving. Section V proposes reformation of the Alaska National Interests Land Conservation Act's ("ANILCA") statutory language and a new committee to assist in the debate over ANWR. Further, this Section advances the notion that a diverse and unbiased ANWR Consulting Group would assist Congress in making a

_email.asp?/news/856994.asp (last visited Feb. 18, 2003). See also Environmental News Network-Reuters: *U.S. Senate defeats Bush's Arctic drilling plan* by Tom Doggett, (March 20, 2003), available at www.enn.com/news/2003-03-20/s_3463.asp (last visited March 23, 2003). Congressional proponents of drilling in ANWR added the rider to budget legislation to avoid a likely filibuster by drilling opponents. *Id.* "Eight Republicans crossed party lines to vote against giving oil companies access to the refuge. Five Democrats defied their party's leadership and cast votes in favor of drilling." *Id.* "Alaska Republican Ted Stevens, the leading proponent of the drilling plan said that the issue was not dead." *Id.* California Senator Barbara Boxer, who led the fight against drilling, criticized Stevens for making a threatening remark aimed at lawmakers that want to keep the refuge closed. *Id.* Stevens said, "People who vote against this today are voting against me and I will not forget it." Stevens is chairman of the Senate Appropriations Committee, where he can influence funding for projects proposed by individual Senators. *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 505

well-educated decision regarding whether oil drilling in ANWR would be prudent.

I. BACKGROUND

A. HISTORY OF THE ANWR AND OIL EXPLORATION IN ALASKA

The ANWR lies on the North Slope of Alaska along the Arctic coastline.⁵ Interest in the oil resources of northern Alaska arose in the early 1900's with reports of surface oil seepage along the arctic coast east of Point Barrow.⁶ In 1923, the United States ("U.S.") Navy established the twenty-three million-acre Naval Petroleum Reserve No. 4 in northwestern Alaska to ensure a supply of oil for future national security needs.⁷ During World War II, the entire North Slope of Alaska was withdrawn from entry under the public land laws, prohibiting commercial oil, gas, or mineral leasing and securing the exclusive control of the land for military purposes.⁸ That area was later renamed the National Petroleum Reserve-Alaska ("NPR-A"), the area underwent extensive government-sponsored exploration for oil and gas during the 1940-1950's.⁹

During post-war construction and increasing resource development in Alaska, scientists became concerned about the potential adverse effects on that region's biodiversity and inherent natural value.¹⁰ In 1952, government scientists conducted a detailed survey of potential conservation areas in Alaska.¹¹ Their report identified that the undisturbed northeast corner of Alaska as the ideal place to begin conservation efforts.¹² Two significant actions followed. First, in 1957, Secretary of the DOI, Fred Seaton of the Eisenhower Administration, revoked the oil and gas leasing rights awarded to the U.S.

⁵ U.S. Fish & Wildlife Service, *Arctic National Wildlife Refuge: Oil and Gas Issues*, available at <http://alaska.fws.gov/nwr/arctic/issues1.html> pg. 1-2 (last visited Nov. 24, 2002).

⁶ *Id.*

⁷ *Id.* See also Planet Ark News Search Results — World Environment News *UPDATE: New Study adds fodder to ANWR drilling debate* by Chris Baltimore (May 20, 2002), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=16029 (last visited October 25, 2002).

⁸ See *supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² *Id.*

506 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

Military on twenty million acres of North Slope land.¹³ Second, Secretary Seaton designated ANWR's 8.9 million acres of coastal plain and mountains in the northeast of Alaska to protect its "unique wildlife, wilderness and recreation values."¹⁴ These two political actions fostered the creation of a general land use pattern for northern Alaska by reserving approximately forty-three million acres for multiple land uses including oil and gas development, while establishing wildlife and wilderness preservation for the northeastern corner.¹⁵

In 1968, British Petroleum ("BP") discovered the Prudhoe Bay oil field, the vastest North American oil field, on state land that it had leased from the U.S. government in 1959.¹⁶ Since that discovery, successful exploratory activities have made Alaska's North Slope famous for its rich oil resources.¹⁷ Once extracted from Prudhoe Bay, the oil is transported to the south-central Alaskan city of Valdez by the 800-mile Trans-Alaska Pipeline System where it is transferred to oil tankers.¹⁸ As the nation's dependence on fossil fuel energy steadily increased, the U.S. government believed that oil reserves also existed in ANWR.¹⁹

Congress has extensively debated the fate of the Range's alleged oil reserves for decades.²⁰ The U.S. House of Representatives passed legislation in 1978 and 1979 designating the entire original Range, including the now contested Arctic coastal tundra, as Wilderness.²¹ The Senate's version, however, required studies of wildlife and petroleum resources, and the potential impacts of oil and gas development within the northern part of the Range.²² Accordingly, the Senate postponed its decision to authorize oil and gas development or establish a Wil-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* See also Newswatch, *News Q & A*, St. Louis Dispatch, July 29, 2001, at B5 (statements made by John Femy, Chief Economist of American Petroleum Institute). The 48-inch wide Trans-Alaska pipeline, opened in 1977, has a capacity of transporting 2 million barrels a day, but as of July, 2001 was only carrying about 1 million barrels a day. Most of the oil is carried by tanker to refineries on the West Coast. The predominant motivation to move Alaskan oil to the West Coast refineries is the decreased shipping costs and time as opposed to diverting it to Asia. *Id.*

¹⁸ See *supra* note 5.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 507

derness designation.²³ The differences between the Houses of Congress were not resolved until the election of President Jimmy Carter in 1980.²⁴ Following that election, the House accepted the Senate amendments to the bill, H.R. 39, and President Carter signed ANILCA into law.²⁵ ANILCA doubled the size of the Range to a total of nineteen million acres, renamed it the ANWR, and designated most of the original Range as Wilderness.²⁶

Section 1002 of ANILCA addressed the portion of the original Range that was not designated Wilderness. This portion of the original Range is now referred to as the "1002 Area" and encompasses 1.5 million acres.²⁷ Section 1002 of ANILCA outlines additional information that would be necessary before Congress could designate the area as Wilderness, or permit oil development. Section 1002(a) and (i) specify that:

The main goal is to provide for a comprehensive and continuing inventory and assessment of the fish and wildlife resources of the coastal plain of the [ANWR]; an analysis of the impacts of oil and gas exploration, development and production, and to authorize exploratory activity within the coastal plain in a manner that avoids significant adverse effects on the fish and wildlife and other resources Until otherwise provided for in law enacted after the enactment date of this Act, all public lands within the coastal plain are withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws of the United States.²⁸

Consequently, Section 1002 prohibited the practice of mineral leasing until such time as the Secretary of the Interior could make a recommendation to Congress, based on comprehensive studies, that oil exploration in the area will not pose

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* See also H.R. Res. 39, 96th Cong. (1979) (enacted).

²⁶ See *supra* note 5 at 3. See also USGS maps of the area, available at www.geology.cr.usgs.gov/pub/fact-sheets/fs-0028-01/fs0028-01.htm (last visited Nov. 24, 2002).

²⁷ See *supra* note 5 at 3. See also Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1002 (codified as 16 U.S.C. § 3142) (1980). See also USGS maps of the area, available at www.geology.cr.usgs.gov/pub/fact-sheets/fs-0028-01/fs0028-01.htm (last visited Nov. 24, 2002).

²⁸ See *supra* note 5 at 5.

508 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

significant adverse effects to wildlife.²⁹ At such time, Congress could choose to follow the Secretary's recommendation and enact law to permit drilling in the 1002 Area, or it could choose to uphold the restrictions on oil and mineral exploration.³⁰

Beginning in 1981, the U.S. Fish and Wildlife Service ("USFW") conducted fish and wildlife baseline studies, as well as geological studies of the 1002 Area.³¹ Additionally, a private exploration firm, funded by a group of oil companies, conducted seismic studies exploration along 1,400 miles of survey lines in the area.³² Several oil companies also independently conducted geological studies in the area, including surface rock sampling, mapping and geochemical testing.³³ Follow-up studies by the United States Geological Survey ("USGS") traced the impact of the winter exploration program on fish and wildlife and their habitats.³⁴ Information gathered from the biological, seismic and geological studies resulted in the compilation of the Legislative Environmental Impact Statement ("LEIS"), which described the potential impact of oil and gas development in the 1002 Area.³⁵

In 1987, Department of the Interior submitted the LEIS to Congress.³⁶ The report concluded that oil development and production in the 1002 Area would have major effects on the Porcupine Caribou herd and muskoxen, such as "widespread, long-term change in habitat availability or quality which would likely modify natural abundance or distribution of species."³⁷ Moreover, additional study results performed by the USGS anticipated moderate adverse effects for wolves, wolverine, polar bears, snow geese, seabirds and shorebirds, arctic grayling and coastal fish.³⁸ Along with the LEIS, Congress also received the Secretary of the DOI's recommendation that seemingly ignored the results of the LEIS and authorized oil and gas leasing "that

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 509

would avoid unnecessary adverse effects on the environment in the 1002 Area of the Refuge.³⁹

Following the Exxon Valdez oil spill in 1989, Congress decided not to act on the Secretary of the Interior's recommendation to open the Refuge to oil and gas leasing.⁴⁰ Once again, in 1991, Congress opted to strike a provision to open the Arctic Refuge to exploration from the National Energy Policy Act.⁴¹ Only four years later, Congress passed budget legislation that included a provision to allow drilling in the Refuge, but President Clinton vetoed the bill hoping to protect biological and wilderness values.⁴²

In sum, ANWR and its 1002 Area have spurred contentious debates for decades given that they are unique regions for many reasons. Most noteworthy, the entire Refuge is the only area on Alaska's North Slope where Congress has specifically prohibited petroleum development.⁴³ The remaining portions of the region are available for oil and gas development through administrative decisions made by various agencies' personnel.⁴⁴ The Secretary of the Interior is responsible for decisions related to the NPR-A and the Beaufort Sea, whereas the Commissioner of the Alaska Department of Natural Resources is responsible for state lands and waters.⁴⁵ Furthermore, the 1002 Area accounts for only ten percent of the total Refuge acreage, but includes most of the Refuge's coastal plain and arctic foothill ecological zones.⁴⁶ Consequently, this area is critically important to the ecological integrity of the entire Arctic Refuge, providing essential habitats for numerous internationally important species such as the Porcupine Caribou herd and polar bears.⁴⁷ The compactness and proximity of a number of arctic and subarctic ecological zones in ANWR provides for greater plant and animal diversity than in other similarly sized land on Alaska's North Slope.⁴⁸ Finally, the Refuge, as a whole, is an

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

510 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

important part of a larger international network of protected arctic and subarctic areas.⁴⁹ In Canada's Yukon Territory, the government and First Nations people protected the coastal tundra and adjacent mountains by establishing Ivvavik and Vuntut National Parks where oil exploration and production are strictly prohibited.⁵⁰

B. HOW MUCH RECOVERABLE OIL IS THERE IN ANWR?

The amount of recoverable oil in ANWR is in dispute. There have been numerous studies conducted; yet all differ when it comes to the amount of oil that is technically recoverable from beneath the Refuge. Additionally, the studies vary in regards to the degree of harm that oil exploration poses to the wildlife and the natural environment of the area. This section addresses the differing perspectives of the United States Government, drilling supporters and anti-drilling proponents.

1. *The U.S. Government*

In 1998, USGS updated its estimates of potential petroleum resources in the Refuge by re-analyzing the original seismic data from 1984-1985 and combining it with more recent data from seismic surveys and drilling in adjacent areas.⁵¹ The USGS, relying on the revised report and recent oil prices, and estimated that in 2000, assuming a price of twenty-four dollars per barrel, there is a ninety-five percent chance of finding 1.9 billion barrels ("BBO") of economically recoverable oil in the 1002 Area, a fifty percent chance of finding 5.3 BBO and a five percent chance of finding 9.4 BBO, with a mean value of 7.7 BBO.⁵² At prices less than sixteen dollars per barrel, there is

⁴⁹ *Id.*

⁵⁰ *Id.* See also The First Nations homepage, available at <http://www.first-nations.com> (last visited Sep. 20, 2002). The First Nations of British Columbia refer to those people that can trace their ancestry to the aboriginal people that inhabited the land that is now British Columbia prior to the arrival of Europeans and Americans in the late 18th century. These groups are commonly referred to by other names, including Aboriginals, Natives, Indians, Indigenous Peoples, and Indian Bands. The term First Nations is now more commonly used to remove the misnomer of 'Indians', which arose from the misconception by Columbus that he had landed in India. *Id.*

⁵¹ See *supra* note 5 at 5. See also USGS: USGS Study, *Arctic National Wildlife Refuge, 1002 Area Petroleum Assessment, 1998*, available at <http://geology.cr.usgs.gov/pub/fact-sheets/fs-0028-01.fs-002801.htm>. See also at <http://usgs.gov/anwr/memo.html>, pg. 2 (last visited Nov. 24, 2002).

⁵² See *supra* note 5 at 5. See also USGS: USGS Study, *Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998*, available at <http://geology.cr.usgs.gov/pub/fact-sheets/fs-0028->

2003] *THE ANWR DRILLING DEBATE CONTINUES* 511

reportedly no economically recoverable oil in the 1002 Area.⁵³ The USGS attributed the increase in the amount of estimated oil within the 1002 Area in part to improved resolution of reprocessed seismic data and geologic analogs provided by more recent nearby oil discoveries.⁵⁴ Furthermore, the USGS projected that quantities of technically recoverable oil are not uniformly distributed throughout the 1002 Area.⁵⁵ They estimated that most of the oil would exist in a series of accumulations that exceed 100 million barrels.⁵⁶ At the mean, nearly eighty percent of the oil is thought to exist in the western part of the ANWR 1002 Area, which is closest to existing infrastructure (pipelines).⁵⁷

Although close to established oil production infrastructure, the region of the 1002 Area, containing the highest estimated amount of recoverable oil, is still thirty miles from the end of the nearest pipeline and more than fifty miles from the nearest gravel road and oil support facilities.⁵⁸ Thus, development in 1002 Area would require a large number of small production sites spread across the Refuge landscape, connected by an infrastructure of roads, pipelines, power plants, processing facilities, loading docks, dormitories, airstrips, gravel pits, utility lines, and landfills.⁵⁹ Moreover, the commercial viability of a discovery in 1002 Area depends upon the oil price, accumulation size, recovery technology, and proximity to existing infrastructure.⁶⁰

The availability of water is also a consideration for commercial viability.⁶¹ Water is an essential ingredient to oil drill-

01.htm (last visited Nov. 24, 2002). See also *USGS 2000 updates and memo*, available at <http://usgs.gov/anwr/memo.html>, pg. 2, 6 (last visited Nov. 24, 2002).

⁵³ See *supra* note 5 at 5.

⁵⁴ USGS: *USGS Study, Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998*, available at <http://geology.cr.usgs.gov/pub/fact-sheets/fs-0028-01.fs-002801.htm>. See also at <http://usgs.gov/anwr/memo.html>, pg. 2 (last visited Nov. 24, 2002). See also *USGS: Additional Potential Development Scenarios for 1002 Area of ANWR and Supplemental Information Regarding our Report Arctic Wildlife Coastal Plain Terrestrial Wildlife Summaries* (April 4, 2002), available at <http://usgs.gov/anwr/memo.html>, pg. 6 (last visited Nov. 24, 2002).

⁵⁵ USGS: *USGS Study, Arctic National Wildlife Refuge, 1002 Area, Petroleum Assessment, 1998* at 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *supra* note 5 at 9.

⁵⁹ *Id.*

⁶⁰ See *supra* note 54 at 6.

⁶¹ See *supra* note 5 at 9.

512 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

ing; for the actual drilling as well as the development and construction of ice roads.⁶² According to the Bureau of Land Management ("BLM"), a typical oil development range requires between eight and fifteen million gallons of water over a five-month period.⁶³ If sufficient water is not available to build ice roads, gravel is generally used.⁶⁴ As is the case with 1002 Area, water resources are sparse during the winter months.⁶⁵ Within the entire 1002 Area, there is only close to nine million gallons of liquid available for oil development.⁶⁶ Such an amount of water is sufficient for only the development and maintenance of ten miles of ice roads.⁶⁷ Thus, full development of the 1002 Area will likely require a series of permanent gravel pads and roads.⁶⁸

Economic analysis establishes the predicted cost of transforming technically recoverable resources into producible proved resources; that is, the minimum market price required to find, develop, produce and transport oil to markets within the lower forty-eight states, particularly West Coast markets.⁶⁹ In sum, based on these estimates and current market information there are nearly one million barrels of oil a day produced from existing oil fields in the areas west of the Arctic Refuge and new wells are brought on line each year.⁷⁰ Moreover, given that present oil prices range between twenty to twenty-five dollars per barrel and the U.S. imports about sixty percent of the approximately nineteen million barrels of oil it consumes each day, or seven billion barrels of oil per year, there is a fifty percent chance of finding a nine-month supply of oil in the 1002 Area, at twenty-four dollars per barrel.⁷¹

During the spring of 2002, DOI Secretary Gale Norton ordered federal officials to expand leasing within the 9.6 million acres of the NPR-A.⁷² Just a few months later, the USGS an-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *supra* note 5 at 5.

⁷¹ *Id.*

⁷² See E&E Publishing — Greenwire: *Drilling turns to NPR-A* (April 22, 2002), available at www.eenews.net/Greenwire last visited (Nov. 24, 2002).

nounced that there were higher oil estimates in the NPR-A reserve than once previously concluded.⁷³ The USGS increased its estimate of crude oil lying beneath the NPR-A to 9.3 BBO from 2.1 BBO in 1980, when it conducted its last survey.⁷⁴ The agency also noted that at current oil prices, more oil could be pumped from ANWR than the NPR-A.⁷⁵ This assumes, however, that market prices are below thirty-five dollars per barrel, and at prices above thirty-five dollars per barrel, the two areas would have roughly the same amount of recoverable oil.⁷⁶ Moreover, this new estimate does not mention the technical difficulties that were previously discussed (including scarce water resources, small pockets of oil, sensitive habitat, etc.) present in ANWR and absent in the NPR-A. Consequently, environmental groups complained that the new government report relied on economics, not technology, to emphasize ANWR's exploration attractiveness.⁷⁷ These groups pointed out that by using the alternative standard of "available drilling technology" as a measure, the NPR-A would come out ahead of ANWR by about 1.6 BBO.⁷⁸ Moreover, the USGS Survey measured the ANWR oil value in 1996 dollars, while using 2001 dollars to measure the NPR-A oil value.⁷⁹

2. *Drilling Supporters*

Support for drilling within ANWR stems primarily from oil and gas lobbying groups, oil companies, and privately funded research groups. Examples of advocates of drilling in ANWR include the Oil Industry, the American Petroleum Institute ("API"), The Teamsters, the Department of Energy ("DOE") and Arctic Power. Many of the supporters of drilling in ANWR have conducted studies or have cited figures that yield much higher estimates of recoverable oil in the 1002 Area. For example, API's study projected that there was a baseline of about ten million barrels of oil under ANWR's coastal plain, equal to about 1.4 million barrels per day over a twenty-year period

⁷³ See *supra* note 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

514 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

(with a two million barrels per day peak).⁸⁰ In addition, API estimated that opening the Refuge to oil exploration would create 750,000 U.S. jobs.⁸¹

Another pro-drilling advocacy group, the Teamsters, although not vehemently involved in the numbers game, appear to agree with API's figures regarding the amount of recoverable oil in the 1002 Area. However, the Teamster's leader in the campaign to open ANWR, Jerry Hood, provided job estimates different from those provided by API. Hood stated that job creation studies provided by the DOI during the Clinton Administration, as well as University of Pennsylvania's Wharton School of Business, predicted the creation of 250,000 and 735,000 jobs respectively.⁸² Hood explained that by averaging the two estimates, opening the 1002 Area would likely result in close to 500,000 U.S. jobs.⁸³ The Teamsters stand to directly gain 25,000 jobs nationwide if ANWR is opened to oil drilling because of Project Labor Agreements ("PLA") inserted into the House-passed Energy Bill (H.R. 4) by Hood himself.⁸⁴

Some Democrats have complained that the PLAs directly violate the Bush Administration's decision in 2001 to do away with such labor agreements.⁸⁵ Hood maintains, however, that the Bush Administration's policy to rescind such labor agreements only applies to federally funded projects, not privately funded projects, such as ANWR commercialization.⁸⁶ Furthermore, Arctic Power stated that there was up to sixteen BBO of recoverable oil in the 1002 Area of ANWR.⁸⁷ Similarly, it projected that sixteen BBO would equal thirty years of Saudi Arabian oil imports to the U.S.⁸⁸ This figure has been relied upon

⁸⁰ See E&E Publishing - Greenwire: *Energy Policy: Oil Industry, Enviro Clash on ANWR Job Projections* (Aug. 10, 2001), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Arctic Power: *Worried about Fuel Prices? ANWR equals 30 years of Saudi Oil* (April 1, 2001), available at www.anwr.org/features/ctoohy.htm (last visited Oct. 5, 2002).

⁸⁸ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 515

by other advocates of ANWR drilling such as U.S. Senator Zell Miller (D-Georgia).⁸⁹

These conflicting studies conducted by the USFW, USGS and API, exemplify the complicated nature of the debate surrounding the Bush Administration's proposed Energy Legislation (H.R. 4) and the specific provision to open the 1002 Area of ANWR to oil exploration. The debate rages on, and given that each interested party is fixed in their position, it has been difficult to reach an agreement that satisfies a vast range of competing interests. Interested parties include the pro-drilling Bush Administration, members of the House and Senate, the DOI, the oil industry, API, the Teamsters, the Inupiat Eskimos the anti-drilling contingency lead by USWF, Environmental Groups, the Gwich'in Indians members of the House and Senate, and the Canadian government.

II. DISCUSSION

A. LEGISLATIVE HISTORY OF THE ENERGY BILL AND THE CONGRESSIONAL DEBATE OVER OIL DRILLING IN ANWR

The most apparent goals of the Bush Administration include creating a comprehensive energy bill, ensuring that Iraq complies with the United Nations weapons inspectors and does not harbor weapons of mass destruction, and endorsing a long-term war to end terrorism once and for all. These three goals collide when addressing the issue of oil drilling in ANWR. For drilling proponents, a comprehensive energy bill must include oil exploration in the 1002 Area of ANWR, especially in light of the September 11th terrorist attacks.⁹⁰

Proponents allege that drilling in the area will finally wean the U.S. off of Middle Eastern oil.⁹¹ For anti-drilling advocates,

⁸⁹ *Id.* See also Arctic Power: Zell Miller rips Washington "bribery" (Jan. 15, 2002), available at www.anwr.org/features/ctoohey.htm (last visited Oct. 15, 2002).

⁹⁰ See Arctic Power: Stevens States that Iraq is using Oil as a Weapon against the U.S. (April 8, 2002), available at www.anwr.org/features/stevens-iraq.htm (last visited October 15, 2002). See also *supra* note 74. See also Speech of Honorable Roger Wicker, Representative of Mississippi (Aug. 1, 2001), available at www.thomas.loc.gov/cgi-bin/query/D?r107:3./temp/~r107vjkBv3 (last visited Nov. 1, 2002). See also Verbatim Transcript of Committee Hearing of the House of Representatives Resources subcommittee on Energy and Mineral Resources, Feb. 14, 2002, 2002 WL 235331 (F.D.C.H.), pgs. 4-7.

⁹¹ See *supra* note 87.

516 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

however, a comprehensive energy bill must oppose drilling in ANWR because it is inherently valuable as one of the last pristine areas in the United States.⁹² The anti-drilling contingency proposes an energy legislation package that mandates alternative and renewable energy sources to fundamentally decrease the U.S.'s dependence on foreign, especially Middle Eastern, oil.⁹³ This dichotomy created a split between the House of Representatives and the Senate during the 107th Congress regarding energy legislation that is discussed herein.⁹⁴

1. *The House of Representatives Stance on H.R. 4 and the Key Players*

H.R. 4, also known as Securing America's Future Energy Act of 2001 (SAFE Act), is "[a]n act to enhance energy conservation, research and development and to provide for security and diversity in the energy supply for the American people, and for other purposes."⁹⁵ Representative W. J. (Billy) Tauzin (R-LA) and co-sponsors Representative James Hansen retired Chairman of the House Resources Committee (R-UT) and Michael Oxley (R-OH) introduced H.R. 4 on July 27, 2001.⁹⁶

The original version of H.R. 4 included provisions to allow oil drilling in ANWR.⁹⁷ Throughout H.R. 4's legislative history in the House, some representatives proposed Amendments to lessen the potential significant adverse effects that oil exploration poses to the wildlife and the environment.⁹⁸ Most notable are Amendment 296 and 297, sponsored by Rep. John Sununu (R-NH).⁹⁹ Amendments 296 called for the federal share of ANWR royalties from oil and gas leasing and operations to be used for the Renewable Energy Technology Investment Fund

⁹²See Speech of Honorable Patsy T Mink, Representative of Hawaii, (Aug. 1, 2001), available at www.thomas.loc.gov/cgi-bin/query/D?r107:1./temp/~r107vjkBv3 (last visited Nov., 2002). See also E&E Publishing — Greenwire: *Enviros Ask Congress to investigate Interior over withheld info* (Oct. 31, 2001). See also Senator Liberman's comments about ANWR's ecological value of ANWR.

⁹³ *Id.*

⁹⁴ See E&E Publishing — Greenwire: *Enviro Policy: ANWR drilling, energy exploration, legal changes back in play* (Nov. 18, 2002), available at www.eenews.net/ Greenwire (last visited Nov. 24, 2002).

⁹⁵ See *supra* note 1.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 517

and Royalties Conservation Fund.¹⁰⁰ Amendment 297 proposed a 2,000-acre limitation on the total surface area available for oil and gas production operations on ANWR's Coastal Plain.¹⁰¹ The House approved both amendments and added them to the final House bill that passed by 240 votes to 189 votes on August 2, 2001.¹⁰²

With the House in support of drilling in ANWR, the Senate represented the final hurdle. Passage of the SAFE Act, which would lead to oil exploration activities in the 1002 Area, required Senatorial approval.¹⁰³ The Senate received H.R. 4 for consideration the same day it passed through the House.¹⁰⁴

2. Senatorial Key Players

Because of the influx of legislation resulting from the terrorist attacks of September 11, 2001, the Senate was unable to address the SAFE Act on the floor.¹⁰⁵ Instead, House Resources

¹⁰⁰ *Id.* See also Department of Energy homepage, available at www.fe.doe.gov/program_reserves.htm. Royalties in general: The DOI usually collects royalties from oil and gas companies drilling on federal lands in the form of money. However, the DOI began a pilot program a few years ago, to take payment in the form of actual oil and gas instead of money, also known as royalty in kind (RIK) (Royalty oil is owed to the U.S. government by operators who acquire leases on the federally-owned Outer Continental Shelf. Under current law, federal ownership ranges from 12.5 percent to 16.7 percent of the oil produced or sold from federal leases. The MMS is responsible for collecting royalties. MMS has traditionally collected royalties from federal oil and gas leases in cash, but, in 1998, it started testing the effectiveness of collecting royalties "in kind" - or in other words, acquiring the crude oil itself; See also 30 U.S.C. §226: Minerals Land and Mining, Lease of Oil and Gas Lands. The House bill encouraged the RIK practice, while the Senate bill directs the President to use the royalties in kind to fill the Strategic Petroleum Reserve (The Strategic Petroleum Reserve is a U.S. Government complex of four sites created in deep underground salt caverns along the Texas and Louisiana Gulf Coast that hold emergency supplies of almost 600 million barrels of crude oil. This is America's "first line of defense" against a cutoff in oil supplies. Emergency reserves of home heating oil are also maintained in commercial tank farms in the Northeast. The RIK program did not generate as much revenue as anticipated, because once the government receives RIK, it has to transport the oil or gas, refine it and either store it or bring it to market. *Id.* See also E&E Publishing — Greenwire: *Energy Policy: ANWR debate dwarfs other production incentives in energy* (Feb. 15, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

¹⁰¹ See *supra* note 1.

¹⁰² *Id.*

¹⁰³ See News from Congressman James V. Hansen: *New Concern over Levels of U.S. Oil Reserves Underscores Need for Increased Domestic Production, Hansen Calls on Senate to Swiftly Pass Energy Bill that Includes ANWR* (September, 2001), available at www.house.gov/resources/press/2001/2001_1001oil.htm (last visited Nov. 1, 2002).

¹⁰⁴ See *supra* note 1.

¹⁰⁵ *Id.* See also News from Congressman James V. Hansen: *New Concern over Levels of U.S. Oil Reserves Underscores Need for Increased Domestic Production, Hansen Calls on Senate to Swiftly Pass Energy Bill that Includes ANWR* (September, 2001), available at www.house.gov/resources/press/2001/2001_1001oil.htm (last visited Nov. 1, 2002). See also, News from Congressman James V. Hansen: *Resource Chairman James V. Hansen Calls on Senate to Promptly*

518 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

Committee Chairman and co-sponsor of H.R. 4, Representative James Hansen, urged the Senate to act quickly to decrease America's dependence on oil from countries whose governments are unstable and unreliable.¹⁰⁶ Representative Hansen pointed out:

The oil we could get from ANWR would replace what we are getting from unfriendly governments. It's time to stop demagoging. It's time to stop pushing political agenda and posing for cameras. It's time to come together — Republican and Democrat — for the sake of our national security. I say to my friends in the Senate [a]ct now to give us an energy bill that ensures this nation will be prepared and self-reliant as it can be in its long war against terrorism . . . I can't envision a set of circumstances that more clearly underscores America's need to produce more of her own oil supply.¹⁰⁷

Despite Rep. Hansen's plea to accelerate the energy debates, it was not until April 2002 that the Senate discussed H.R. 4 on the Floor.¹⁰⁸ Even then, H.R. 4 discussion was amidst other Senatorial bills proposed as amendments to the House energy legislation.¹⁰⁹ One such proposed amendment is Senate bill S.517, the National Laboratories Partnership Improvement Act of 2001 that is also known as the Energy Security Policy Act.¹¹⁰ Senate Energy and Natural Resources Committee Chairman, Jeff Bingaman (D-NM) and co-sponsors Senators Mike Crapo (R-ID), Pete Domenici (R-NM) and Patty Murray (D-WA) proposed Senate bill S.517.¹¹¹ The bill authorizes funding for the Department of Energy to enhance its mission areas through technology transfer and partnerships for fiscal years 2002 through 2006.¹¹² The number of proposed amendments to S.517 alone is astounding and the majority of

Pass an Energy Bill for Sake of National Security (Sep.25, 2001), available at http://www.house.gov/resources/press/2001/2001_0925hansenenergy.htm (last visited Nov. 1, 2002).

¹⁰⁶ *Id.* Iraq was one of the governments that Representative Hansen was referring to since Iraq is suspected of supporting the Aug.11, 2001 terrorists and the U.S. is dependent upon Iraq for a significant amount of oil. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See supra* note 1. The Senate, however, discussed S.517 on the Senate Floor in February 2002. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* *See also supra* note 2.

¹¹¹ *Id.*

¹¹² *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 519

them are not relevant to this discussion. Consequently, after almost three months of debates on the Senate Floor, the Senate passed H.R. 4 in lieu of S.517 on April 25, 2002. In other words, S.517 and amendment 2917 replaced all text of the House version of H.R. 4 except for the enacting clause.¹¹³ The revisions incorporated into the House version of H.R. 4, were the final adaptations of the Senate Energy Bill, otherwise known as the Energy Policy Act of 2002.¹¹⁴

The final bill did not explicitly address oil drilling in ANWR because the issue was not fully resolved, although the majority of Senators during 107th Congress opposed the proposition of oil drilling in ANWR.¹¹⁵ Moreover, despite the absence of ANWR oil drilling and exploration provisions in the final version of the energy legislation, in effect, the Senate bill codifies the prohibition of oil exploration in ANWR in accord with ANILCA.¹¹⁶ Under ANILCA, unless another law was enacted after 1980, all public lands within the coastal plain of ANWR are to remain withdrawn from all forms of entry or appropriation under the mining laws and from operation of the mineral leasing laws of the United States.¹¹⁷

A number of Alaskan Representatives and Senators adamantly pushed to open the 1002 Area of ANWR to oil drilling, namely Senators Frank Murkowski (R-AK) and Ted Stevens (R-AK) and Representative Don Young (AK).¹¹⁸ These Congressmen's vehement advocacy for oil drilling in the 1002 Area of ANWR stems from the fact that their political future, "is directly linked to their ability to promote legislation that meets the economic needs of the state they represent."¹¹⁹ As such, the intimate connection between Alaska's revenue and oil extraction activities ensures that the Congressmen's decisions re-

¹¹³ *Id.*

¹¹⁴ *Id.* See also 65 Cong. Rec. S885-888 (2002). Amendment 2917 was proposed by Senators Tom Dachle (D-SD) and Jeff Bingaman (D-NM), available at www.senate.gov/~bingaman/mediafiles/s.am.2917.wpd (or pdf format) (last visited Nov. 1, 2002). *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *supra* note 27 at § 1003.

¹¹⁷ *Id.* at § 1002 (6)(i).

¹¹⁸ See University of Connecticut: *Arctic National Wildlife Refuge Special Report, White House, Congress and the State of Alaska* Section pg. 1, available at www.arcticcircle.uconn.edu/ANWR/anwrgov.html (last visited October 5, 2002).

¹¹⁹ *Id.*

520 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

garding oil drilling in the 1002 Area of ANWR are significantly influenced.¹²⁰

One example of this intimate connection between revenue and oil extraction is Prudhoe Bay.¹²¹ The Prudhoe Bay oil field is located on lands owned by the state. In the first twenty-five years following its discovery, the proportion of the state budget that utilized petroleum reserves rose from an average of twelve percent to over ninety percent.¹²² Presently, the figure has stabilized at approximately eighty-five percent.¹²³ Moreover, Alaskans do not pay income tax or statewide sales tax, due to a twenty-five billion dollar permanent fund established with new oil wealth in 1977 that has also allowed Alaskans to collect yearly payouts of up to \$1,900 per year as residents of the state.¹²⁴ With oil production down and budgetary shortfalls, Alaskans face severe cutbacks of these benefits.¹²⁵

Alaskans will ensure continued retention of their financial benefits if oil leasing, development, and production occur in ANWR.¹²⁶ Revenues from bonuses, rents and royalties, as well as from sales of gravel and water, could generate billions of dollars for the federal and native landowners.¹²⁷ Peak annual royalties alone might range from \$200 million to \$2.5 billion, followed by declining revenues for thirty-fifty years.¹²⁸ The allocation of these revenues between the state and the federal government could be one of the most contentious issues if development legislation passes.¹²⁹

Although ninety percent of the federal share of revenues would pass to Alaska under the Mineral Leasing Act, H.R. 4 and S.388 specify an alternative disposition of revenues; a fifty/fifty split between the federal and state government.¹³⁰

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *supra* note 72.

¹²⁵ *Id.*

¹²⁶ See M. Lynne Bernhard A. Gelb, and Pamela Baldwin, *IB10073 The Arctic National Wildlife Refuge, The Next Chapter*, American Law Division, National Council for Science and the Environment, Resources, Science and Industry Division (updated Aug. 1, 2001), available at www.arcticcircle.uconn.edu/ANWR/anwrdebate.html (last visited Jan. 10, 2003). This is a link from University of Connecticut website.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

2003] THE ANWR DRILLING DEBATE CONTINUES 521

Alaska has indicated that they will dispute any revenue distribution scheme that deviates from the ninety/ten split that Alaska is entitled to under the Minerals Leasing Act.¹³¹ It has been argued, however, that the ninety/ten split was intended to put Alaska on par with other states' shares under the Minerals Leasing Act, and that Congress has at times prescribed other disposition of revenues specifically for the NPR-A.¹³² A federal claim's court held that Congress has the authority to alter the ninety/ten revenue distributions in *Alaska v. United States*.¹³³

Given Alaska's reliance on revenue from state owned petroleum-producing property and the jobs generated from the industry as a whole, Congressmen Young, Murkowski and Stevens have worked closely with oil companies and lobbyists, such as Arctic Power, to gain public support for oil exploration in the Arctic Refuge.¹³⁴ These efforts led to bills proposed in Congress, the support of Alaskan businesses, and even a 1995 Alaska Federation of Natives ("AFN") vote of nineteen to nine in favor of opening the Arctic Refuge to oil exploration.¹³⁵ The Gwich'in strongly opposed Arctic Refuge oil exploration because they depend on the caribou herd for subsistence and believe, along with anti-drilling advocates, that the caribou's habitat will be adversely affected by oil exploration activities.¹³⁶

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* See also *Alaska v. United States*, 35 Fed. Cl. 685, 701 (1996).

¹³⁴ *Id.*

¹³⁵ *Id.* See also Alaska Federation of Natives home page, available at www.nativefederation.org/frames/background.html (last visited Sept. 15, 2002). "The Alaska Federation of Natives was formed in October 1966, when more than 400 Alaska Natives representing 17 Native organizations gathered for a three-day conference to address Alaska Native aboriginal land rights. From 1966 to 1971, AFN worked primarily to achieve passage of a just and fair land settlement. On December 18, 1971 the Alaska Native Claims Settlement Act (ANCSA) was signed into law. In the early and mid 1970's, AFN provided technical assistance to help Alaska Natives implement ANCSA and set up the corporations mandated by the act. Since then, AFN has evolved to meet the changing needs of Alaska Natives and respond to new challenges as they emerge, working to address and protect Native interests at the state and federal levels. AFN was instrumental in the development and passage of federal laws including the Alaska National Interest Lands Conservation Act of 1980, and the 1987 Amendments to ANCSA (the "1991 legislation"). At the state level, AFN plays an active role in the legislative process, promoting laws, policies and programs in areas such as health, education, resource development, labor and government. In the late 1980's, AFN turned its attention to social, tribal and economic issues." *Id.*

¹³⁶ See *supra* note 126. See also Old Crow's Official website, available at www.oldcrow.yk.net (last visited Jan. 24, 2003). The Gwich'in First Nation extends throughout the Yukon Territory and the Arctic Slope area of Alaska. For thousands of years, their ancestors have used and continue to use the land and its natural resources. The Gwich'in rely heavily on the land and the Porcupine Caribou Herd for food, shelter, and medicines. *Id.*

522 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

With such strong advocacy efforts put forth by the pro-drilling contingency, the Joint House-Senate Conferences, which commenced in September 2002, were created to help address the unresolved prospect of oil drilling in ANWR.¹³⁷ The Conferees appointed from the Senate were: Senators Baucus (D-MT), Bingaman (D-NM), Breaux (D-LA), Campbell (R-CO), Craig (R-ID), Domenici (R-NM), Grassley (R-IA), Hollings (D-SC), Jeffords (R-VT), Kerry (D-MA), Lieberman (D-CT), Lott (R-MS), Murkowski (R-AK), Nickles (R-OK), Reid (D-NV), Rockefeller (D-WV), and Thomas (R-WY).¹³⁸ Of the seventeen Senators appointed as negotiators, Senator Jeffords and all Democratic Senators, except John Breaux, voted against drilling in ANWR.¹³⁹ Thus, nine of the negotiators voted in favor of drilling in ANWR and only eight against the drilling.¹⁴⁰ As for representation by the House, there are over forty-five House Conferees.¹⁴¹ There are a greater number of House Conferees because many are appointed only for consideration of particular sections of H.R. 4.¹⁴²

In sum, the negotiations that have taken place between members of the House and Senate, although relatively ineffective to date, will ultimately be critical in determining the fate of the controversial H.R. 4 Bill and its ultimate impacts on ANWR.¹⁴³ Although at this juncture we do not know how Congress will rule, it is important to address the various factors that have influenced them thus far in order to better understand the possible outcomes.

¹³⁷ See *supra* note 1. Interview with Kira Finkler, Aide, Senate Energy & Natural Resources Committee, Washington D.C (Aug. 24, 2002). She explained that the majority of the 107th Senate was anti-drilling in ANWR. She also mentioned that the House-Senate Conferees would resume discussion around Aug.2002 through the conferees on both sides of the issue. See, e.g., www.senate.gov/~energy/.

¹³⁸ See *supra* note 1. See also www.energy.senate.gov/legislation&docs/pdf/107-2/energy_bill/conferees.htm (last visited Nov. 1, 2002).

¹³⁹ See Planet Ark News Results — World Environment News: *Arctic Drilling may get a Second Chance in Congress* by Tom Doggett (May 6, 2002), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=15807 (last visited October 25, 2002).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ H.R. 39, 108th Cong. (2003). See also *supra* note 94. In essence, H.R. 4 died in the Conference Committees at the end of the 107th Congress. This said, analysis of the previous Congress' actions is instructive given the multi-decade long debate surrounding ANWR. Currently, in the 108th Congress, Representative Don Young (AK) introduced H.R. 39, The Arctic Coastal Plain Domestic Energy Security Act of 2003 that proposes drilling in the Coastal Plain of ANWR.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 523

B. THE DOI'S POSITION REGARDING OIL DRILLING IN ANWR

The DOI is comprised of eight bureaus: the USFW, National Park Service, Minerals Management Service ("MMS"), Bureau of Land Reclamation ("BLR"), Bureau of Indian Affairs, Office of Surface Mining, BLM and USGS.¹⁴⁴ The primary bureaus within the DOI pertinent to this discussion are the USGS, USFWS, BLM and MMS. The DOI is considered the nation's principle conservation agency.¹⁴⁵

The DOI's mission is "to protect and provide access to our Nation's natural and cultural heritage."¹⁴⁶ The DOI commits itself to facilitating appropriate commercial use and development of federally managed natural resources in an environmentally sound manner.¹⁴⁷ To accomplish this goal, the DOI encourages the preservation of diverse plant and animal species and protection of the habitats critical to their survival.¹⁴⁸ However, in order to continue activities for the preservation and protection of natural resources, the DOI uses revenues generated from commercial use of natural resources.¹⁴⁹ For example, the DOI raises more than six billion dollars in revenues annually from energy leasing (including oil, gas and coal), mineral leasing, grazing, timber, recreation, and land sales of federally owned land.¹⁵⁰ Therefore, DOI is in a difficult position regarding the ANWR debate because it is charged with conflicting responsibilities. The DOI has the duty to promote the conservation of the natural resources owned by the federal government, but it also has the responsibility of managing commercial use and development on the very same lands.¹⁵¹

1. Traditional Role of The Secretary of the DOI and the Regional Director of the USFWS in the ANWR Oil and Gas Exploration Permit Process

The purpose of Title 50 of the Code of Federal Regulations, Section 37.1, et seq., is to ensure that the Secretary of the DOI,

¹⁴⁴ See generally DOI webpage, available at <http://www.doi.gov> (last visited Nov. 15, 2002).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

524 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

or his/her authorized representative, implements the requirements of Section 1002(d) of ANILCA.¹⁵² In accordance with Section 1002(d), the Secretary must establish guidelines governing surface geological and geophysical exploration for oil and gas within the coastal plain of the 1002 Area of ANWR.¹⁵³ For the purposes of this statute, “exploratory activities” includes surface geological exploration or seismic exploration conducted on the coastal plain.¹⁵⁴ Accordingly, “exploratory activities” also encompass all related activities, such as surface use of refuge lands and any logistics employed in furtherance of oil and gas exploration.¹⁵⁵

As aforementioned, Section 1002 of the ANILCA, “mandates an oil and gas exploration program for the refuge’s coastal plain.”¹⁵⁶ The program culminates via a report to Congress.¹⁵⁷ The report must contain, among other things, the identification of those areas within the coastal plain that have oil and gas production potential and an estimate of the volume of oil and gas concerned.¹⁵⁸ Regarding interaction with natural resources, the report must also contain the description of the wildlife, its habitat, and other resources that are within the areas identified, as well as an evaluation of the adverse effects that the exploration will have on the Refuge’s resources.¹⁵⁹ The objective of this program is to ascertain the best possible data and information concerning the probable existence, location, volume, and potential for further exploration, development, and production of oil and gas within the coastal plain without significantly adversely affecting the wildlife, its habitat, or the environment and without unnecessary duplication of exploratory activities.¹⁶⁰ In sum, these regulations set forth the requirements and procedures for obtaining authorization for conducting exploratory activities.¹⁶¹ Additionally, the regulations

¹⁵² See 50 CFR § 37 *et. seq.* (2002).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at § 37.2(g).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at § 37.1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See also 50 CFR § 37.45. “The USGS may at any time apply for a special use permit to conduct exploratory activities, by submitting an exploration plan pursuant to the same requirements as other applicants. No plan submitted will be approved unless: 1. No other person has sub-

2003] *THE ANWR DRILLING DEBATE CONTINUES* 525

outline the procedures for submitting the resulting data and information to the DOI for evaluation.¹⁶²

As written, Title 50 awards the Secretary of the DOI and the Regional Director of the USFW, or his/her authorized representative, a great deal of discretion in approving oil and gas exploration activities in the 1002 Area.¹⁶³ As aforementioned, the primary duty of the Secretary is to ensure that exploratory activities do not, "significantly adversely affect the refuge's wildlife habitat, or the environment; unnecessarily duplicate exploratory activities if the permittee or another permittee; and unreasonably or significantly interfere with another permittee's activities."¹⁶⁴ Sections 37.21 and 37.22 describe the application requirements and the role of the Regional Director in approving exploratory plans for the 1002 Area.¹⁶⁵

The Regional Director shall approve an exploratory plan if it satisfies the requirements of Section 37.21(c) and (d) and is otherwise consistent with the Act, Section 1002 of ANILCA, and regulations of this part.¹⁶⁶ Section 37.21(c) and (d) insist that the applicant describe an integrated program for exploratory activities such that it satisfies the overarching purpose of the program, which is to ensure refuge resource preservation and avoidance of duplicative exploratory activities.¹⁶⁷ In addition, the proposal must contain evidence of the applicant's technical and financial ability to conduct integrated and well designed exploratory activities in the arctic and subarctic environment and a general description of the type of exploratory activities planned.¹⁶⁸ The applicant must also include alternate methods and techniques, a schedule for the exploratory activities proposed, a description of the type of equipment that will be utilized, a hazardous substances control and contingency plan within the proposal.¹⁶⁹ Furthermore, the proposal

mitted a plan for the area involved which satisfies the regulations of this part and 2. The information that would be obtained from the Survey is needed to make an adequate report to Congress pursuant to the Act (section 1002 of ANILCA). All USGS contractors and subcontractors are subject to the same regulations under Title 50." *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at § 37.11.

¹⁶⁵ *Id.* at §§ 37.21 and § 37.22.

¹⁶⁶ *Id.* § 37.22.

¹⁶⁷ *Id.* at § 37.21(c) & (d).

¹⁶⁸ *Id.* at § 37.21(d)(3) & (15).

¹⁶⁹ *Id.* at § 37.21(d)(5), (7), (9) & (10).

526 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

must also include a general description of the anticipated impacts that the proposed activities may have on the refuge's wildlife, a description of the proposed procedures for monitoring the environmental impacts of the operation and its compliance with all regulatory and permit requirements and such other pertinent information as the Regional Director may reasonably require.¹⁷⁰

As part of the authority granted under Section 37.21(c) and (d), the Regional Director may approve or disapprove any exploration plan in whole or in part or may require, as a condition of approval, that an applicant conduct its exploratory activities in an assigned area or jointly with other applicants to make such modification in its exploration plan as he considers necessary or appropriate.¹⁷¹ Within forty-five days or less of approval of the exploratory plan, the Regional Director will issue a special use permit that authorizes the permittee to proceed with the exploratory activities.¹⁷² If the exploration is planned for an area within the allotted lands under the Alaska Natives Claims Settlement Act, the Regional Director shall seek the views of the native holders of the land for the purpose of developing permit conditions designed to mitigate the effects of such exploration on their interests.¹⁷³ If, on the other hand, a request does not meet the approval of the Regional Director, in whole or in part, the applicant can insist upon an informal hearing in front of the Director of USFW.¹⁷⁴ The Director's decision on the matter constitutes the final administrative decision of the Secretary of the DOI.¹⁷⁵

These regulations, although thorough in the detailed requirements necessary to acquire a special use permit for the oil

¹⁷⁰ *Id.* at § 37.21(d)(11), (12), & (15).

¹⁷¹ *Id.* at § 37.22(a).

¹⁷² *Id.* at § 37.23(a).

¹⁷³ *Id.* at § 37.23(b). See also Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611 and 1613 (1971). The Act calls for, "the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations" §1606. "During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title." *Id.*

¹⁷⁴ See *supra* note 152 at § 37.22(c).

¹⁷⁵ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 527

and gas exploration in the 1002 Area, still allow for a great deal of discretion on the part of the Secretary of the DOI and the Regional Director of USFW.¹⁷⁶ Political and economic pressures inevitably influence administrative decisions to issue special use permits for oil exploration in the 1002 Area. The next subsection addresses these political and economic pressures plaguing the administrative agencies.

2. *The DOI's stance on drilling in ANWR*

As previously discussed, the Secretary of the DOI is charged with carrying out the competing duties of preserving the nation's wildlife areas while managing commercial use and development of such areas. As a result of political influences, economic interests and environmental concerns, the Secretary's role can often become confused when an issue such as ANWR arises.¹⁷⁷ This confusion is further exacerbated by the DOI's implementation of the Bush Administration's Management Agenda for the nation's lands.¹⁷⁸ It is evident from President Bush's speeches and comments that he endorses an energy package that includes fossil fuel exploration in ANWR.¹⁷⁹ President Bush touts that ANWR exploration will create a vast number of jobs for Americans while fostering American energy independence.¹⁸⁰ During a speech made in Alaska, President Bush commented, "Listen, we need to be exploring for oil and gas in ANWR . . . there is no doubt in my mind . . . that we can find energy for America's people and at the same time preserve the beauty of Alaska."¹⁸¹

Bush's avid support for oil drilling is partially attributable to the White House's tight relationship with the energy industry.¹⁸² White House Chief of Staff, Andrew Card, former president of the American Automobile Manufacturers Association,

¹⁷⁶ *Id.*

¹⁷⁷ See generally *supra* note 144.

¹⁷⁸ *Id.*

¹⁷⁹ See, Planet Ark News Search Results — World Environment News: *Bush touts Alaska Refuge as a viable Energy Source* (Feb. 15, 2002), available at www.planetark.com/avantgo/dailynewstory.cfm?newsid=14599 (last visited October 25, 2002). See also *supra* note 140.

¹⁸⁰ *Id.*

¹⁸¹ See *supra* note 164.

¹⁸² See E&E Publishing — Greenwire: *Energy Policy II: Oil and gas interests are prevalent in Bush's White House* (April 22, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

528 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

lobbied against improving fuel efficiency and emission standards.¹⁸³ Additionally, Secretary of Commerce, Don Evans worked for Tom Brown Inc., a Denver oil and gas company, for twenty-five years.¹⁸⁴ Links to the energy industry are evident in the outer ranks of the administration as well.¹⁸⁵ The DOI and other agencies responsible for drafting environmental policy, like the Council on Environmental Quality, also have members who previously worked with the energy industry.¹⁸⁶ This said, it is apparent that the DOI as a whole, backs Bush's Energy Plan that calls for "environmentally sound" oil exploration in ANWR.¹⁸⁷

The DOI's support for drilling in ANWR is apparent from comments made by Secretary Norton alluding that she will ask President Bush to veto the energy bill that was in conference committee during the months of September and October 2002 if it does not ultimately call for opening ANWR to oil drilling.¹⁸⁸ Norton said that she would recommend the veto because she feels that without ANWR drilling, the bill "does almost nothing" to help the country's energy policy.¹⁸⁹ Moreover, she commented that, "[a]t this point, we really don't see a lot is going to significantly enhance the energy picture unless we take some steps like ANWR."¹⁹⁰

In addition, the DOI's support for ANWR drilling resonates through the testimony of Deputy Secretary of the Department, J. Steven Griles, given during a DOI fiscal year 2003 budgetary meeting of the Senate Energy and Natural Resources Committee on February 12, 2002.¹⁹¹ Deputy Griles commended the Administration's efforts to restore natural areas by proposing the largest DOI budget in history.¹⁹² Further, Deputy Griles

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* notes 144, 179.

¹⁸⁸ See E&E Publishing — Greenwire: *Energy Policy: Without ANWR drilling, Norton seeks Presidential veto* (Sep.19, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Senate Energy and Natural Resources Committee Meeting, (Feb. 12, 2002), Testimony of Deputy Secretary of the Department of the Interior, J. Steven Griles, and Assistant Secretary for Policy, Management and Budget, Lynn Scarlett, 2002 WL 222792 (F.D.C.H.).

¹⁹² *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 529

mentioned the \$10.2 million budgetary increase for BLM energy-related activities, which encompasses an increase in the number of oil and gas lease sales in the Alaska North Slope outside of ANWR.¹⁹³ The Deputy Secretary then recited a slew of figures proclaiming that the U.S. is in dire need of domestic energy to wean the country from the oil exports the country depends upon.¹⁹⁴ This was a prelude to his recitation of the DOI's commitment to carrying out the President's directives to work with Congress on legislation authorizing the leasing of oil and gas in the 1002 Area of ANWR.¹⁹⁵ Mr. Griles emphasized that, "only the best available technology will be used and that energy production activities have no significant adverse impact to the environment in the 1002 area."¹⁹⁶ Finally, Deputy Griles stressed that the DOI is dually committed to energy development and environmental conservation by stating "because of advances in technology and in our enhanced understanding of the ecology, we [DOI] believe we can develop ANWR's resources with very little long-term effect on its environment."¹⁹⁷

The DOI's support of oil drilling in ANWR is further evidenced by numerous complaints by anti-drillers that Secretary Norton has withheld information, used pro-drilling produced videos and misstated facts to the Senate Committee on Energy and Natural Resources to bolster the argument in favor of oil exploration.¹⁹⁸ Most notable at this juncture is the accusation by Representative Ed Markey (D-MA) that Secretary Norton illegally used an industry-supported video to promote drilling in ANWR.¹⁹⁹ Representative Markey said that the law bans the use of government funds "for publicity or propaganda purposes, and for the . . . distribution or use of any . . . film presentation

¹⁹³ *Id.*

¹⁹⁴ See *supra* note 179.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See E&E Publishing — Greenwire: *ANWR: Enviro ask Congress to investigate Interior over Withheld Info* (October 31, 2001), available at www.eenews.net/ Greenwire (last visited Nov. 24, 2002). See also E&E Publishing — Greenwire: *ANWR: Democrat accuses Norton of illegally using video to promote drilling* (April 12, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

¹⁹⁹ See E&E Publishing — Greenwire: *ANWR: Democrat accuses Norton of illegally using video to promote drilling* (April 12, 2002), available at www.eenews.net/ Greenwire (last visited Nov. 24, 2002).

530 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

designed to support or defeat legislation pending before Congress.²⁰⁰

DOI spokesman, Mark Pfeifle, said that one of the agency's senior attorneys approved the video's distribution to news outlets as well as its posting on the agency's website.²⁰¹ He further mentioned that although industry-backed lobbyist group Arctic Power produced the video, the state of Alaska provided more than sixty percent of the video's funding.²⁰² The video depicts the frozen, deserted tundra of ANWR in the winter months in an effort to bolster pending legislation that would allow oil exploration only during the winter.²⁰³ This is a sharp contrast to videos produced by environmentalists that feature ANWR's vibrant wildlife during the spring and summer months.²⁰⁴ Secretary Norton herself expressed that the environmentalist's videos do not accurately reflect the situation in ANWR.²⁰⁵ She argues that it is on the barren coastal plain that oil drilling will occur, not on the lush areas where caribou and other wildlife thrive.²⁰⁶ Representative Markey voiced his main concern stating, "[t]he [DOI] shouldn't be spreading oil company propaganda any more than the Department of Energy should be promoting Enron stock."²⁰⁷

Although the DOI denies the accusations portraying the agency as a pro-drilling sympathizer, it seems inevitable given their conflicting responsibilities.²⁰⁸ Moreover, the DOI must ensure that its policies coincide with President Bush's desires for U.S. energy independence at all costs.²⁰⁹ Accordingly, the analogy most fitting for the DOI in the ANWR debate is that of the two-headed giant. Both heads have reared themselves and they must fight until the death to reach a conclusion. Unfortunately, for ANWR's sake it seems that the DOI did not have to fight itself for very long to recognize its allegiance to the Bush

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See generally *supra* note 179.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 531

Administration's support for oil exploration activities in ANWR.

C. ENVIRONMENTALIST'S PAST EFFORTS TO CLEAN UP THE NORTH SLOPE OF ALASKA AND THEIR CURRENT EFFORTS TO PREVENT DRILLING IN ANWR

Environmental groups have played a huge role in the ANWR debate and they are responsible for exposing the downside of the oil industry in the Prudhoe Bay.²¹⁰ The oil industry has destroyed thousand of acres of habitat, caused declines in local wildlife populations, left hundreds of open pits containing industrial wastes, spilled gallons of crude oil, diesel and toxic chemicals into the water and pumped thousands of tons of air pollutants into the fragile arctic environment.²¹¹

1. Environmental Advocacy Groups Pressure Industry

Partly in response to criticism by environmental groups, the oil companies on the North Slope invested in improving their operation methods to minimize adverse environmental impacts.²¹² Still, innovations in the techniques and research studies promoted by the oil companies to reduce damage to the tundra and to foster restoration efforts have only been minimally successful.²¹³ Environmental groups point to Chevron as a prime example of limited success.²¹⁴ In 1986, Chevron drilled an exploratory well on Kaktovik Inupiat Corporation lands within ANWR, utilizing new techniques to reduce the impact of the drill pad on vegetation.²¹⁵ Yet, four years later, the USFWS discovered during a reconnaissance visit, that only six percent of the drill pad had any vegetation on it.²¹⁶ As stated in a 1991 report done by the Natural Resources Defense Council ("NRDC"), "there are almost 1,500 miles of roads and pipelines as well as thousands of acres of gravel pads on the North Slope" and "[e]ven if successful techniques are developed for

²¹⁰ See *supra* note 118 at *Environmentalists and the Oil Companies*.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

532 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

restoring these facilities, the economic feasibility of doing so will remain a major issue."²¹⁷

Chevron's 1986 results are an example of the oil industry's "dirty" legacy that environmentalists are desperately trying to prevent from recurring in ANWR. Despite the numerous studies generated by API, Arctic Power and those endorsed by the DOI that espouse figure upon figure that oil drilling and nature can coincide, environmental groups know only too well that they are half-truths at best.²¹⁸ Environmental organizations believe that even the most noble intentions by the oil industry and other pro-drilling advocates cannot prevent an environmental holocaust from occurring in ANWR if another spill like the Exxon Valdez should occur.²¹⁹ For this reason and many others, environmental groups have been waging a litigation war upon the pro-drilling advocates, challenging every move they make towards opening up ANWR to oil exploration activities.²²⁰

2. *Environmental Groups Expose Political Leaders' Biases*

Most notably, the NRDC filed a lawsuit against Vice President Dick Cheney's energy task force for the Energy Department's alleged failure to disclose, under the Freedom of Information Act ("FOIA"), its participation in the formulation of the Bush Administration's energy plan.²²¹ The DOE lawsuit is a way to investigate how immersed energy industry insiders are in the formation of H.R. 4, the House-passed energy bill.²²² NRDC attorney, Sharon Buccino insists that the public needs to know who participated in developing the Administration's pro-industry energy plan.²²³ Furthermore, the FOIA request seeks information to substantiate environmental groups' suspicions that senior DOI officials imposed a "gag order" on USFWS employees to prevent them from giving information

²¹⁷ *Id.*

²¹⁸ *See generally id.*

²¹⁹ *Id.*

²²⁰ *See generally* E&E Publishing — Greenwire: *Energy Policy: DOE sued over Cheney energy task force FOIA request* (Dec. 12, 2001), available at www.eenews.net/ Greenwire (last visited Nov. 24, 2002). *See also supra* note 198.

²²¹ *See supra* note 220.

²²² *Id.*

²²³ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 533

directly to the public about ANWR.²²⁴ Inside DOI employees deny such allegations and claim that they sent documents to their external affairs office because it is such a controversial debate, they wanted to keep track of who was asking for what.²²⁵

In addition to this litigation, several environmental groups sent a letter to the Senate Governmental Affairs Committee to ask the panel to exercise its oversight rights and investigate whether the Interior Department was withholding information on ANWR to enhance the pro-drilling argument.²²⁶ The letter tracks reports that the USFW withheld two 1995 internal reports that found drilling in the 1002 Area of ANWR could violate the International Agreement for the Conservation of Polar Bears from Congress.²²⁷ Public Employees for Environmental Responsibility also claim that DOI Secretary Norton withheld information from the Senate Energy and Natural Resources Committee when asked to answer questions about caribou activity in the 1002 Area.²²⁸ Allegedly, Secretary Norton changed one of her answers from what USFW had informed her and therefore misled the Committee.²²⁹ On her behalf, Secretary Norton claims that it was a mistake and that she immediately changed her answer upon discovery.²³⁰

Environmental groups are not backing down without an extended fight. These groups fully understand the difficulty nature has repairing itself once environmental damage occurs. Consequently, environmental organizations refute the proposal that oil drilling in ANWR and wildlife conservation "go hand-in-hand."²³¹ In order to end the U.S. dependence on foreign oil, these anti-drilling proponents endorse mandatory increased fuel-efficiency standards and increased investments into renewable sources of energy such as wind, solar and wave technology.²³²

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *supra* note 198. These groups included Defenders of Wildlife, Earthjustice Legal Defense Fund, National Audubon Society, Natural Resources Defense Council, Sierra Club, U.S. Public Interest Research Group and The Wilderness Society. *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See generally *supra* note 118.

²³² *Id.*

534 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

According to environmental organizations, drilling in ANWR is not the answer to permanently reducing the U.S.'s reliance on foreign oil supplies.²³³ They contend that a gradual change in Corporate Average Fuel Economy ("CAFÉ") from the present 27.5 miles per gallon ("mpg") to forty mpg will reduce demand for oil by two million barrels a day by the year 2005.²³⁴ This conservation measure will yield far more in oil savings than can be produced in ANWR within the same time frame.²³⁵ Additionally, anti-drilling advocates argue that imposing higher prices on gasoline will reduce consumption of fossil fuels in the U.S.²³⁶ "There is a clear correlation between Europeans buying gas-stingy cars and the fact that they pay three times more than Americans do for fuel."²³⁷ It appears that Americans' interest in fuel economy waxes and wanes in direct proportion to the cost of gas.²³⁸ During times such as the present, where gasoline is available at low prices, conservation thoughts seem to be nonexistent.²³⁹ At best, the environmental organizations contend drilling in ANWR is a short-term and short-sighted approach in an attempt to reach energy independence and efficiency because other sustainable policies have not been given priority such as solar and wind power.²⁴⁰

III. CRITIQUE

Having introduced some of the key players in the ANWR debate and their conflicting roles, it is crucial to analyze whether the political and economic pressures that exist are likely to impede a congressional resolution regarding oil drilling in ANWR.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ See Arctic Power: *How to Reduce Oil Imports* (Jan. 8, 2002), available at www.arcticpower.org/features/chicagotrib.htm (last visited Oct. 15, 2002).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See generally *supra* note 114.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 535

A. INFLUENCING THE JOINT HOUSE-SENATE CONFEREES: MILITARY ACTION IN IRAQ AND THE INCLUSION OF A GLOBAL CLIMATE PACKAGE

Since the ANWR issue was not fully resolved in April 2002, when the Senate passed H.R.4 in lieu of S.517, joint House-Senate conferees were appointed to debate the issue.²⁴¹ These conferees included key players in the ANWR debate to date, including proponent of H.R. 4, Representative Billy Tauzin (R-LA), proponent of S.517, Senator Jeff Bingaman (D-NM), pro-drilling advocate Senator Frank Murkowski (R-AK), and anti-drilling voice Senator Joseph Lieberman (D-CT).²⁴² Among the appointed conferees there was a blend of pro-drillers and anti-drillers.²⁴³ Of the Senate conferees, however, nine of the seventeen voted to open ANWR to oil drilling even though the Senate ultimately adopted H.R. 4 without ANWR.²⁴⁴

Conferee support favoring drilling is troublesome in light of the recent Congressional vote condoning, and actual occurrence of, U.S. military strikes in Iraq. As a result, Congress is under enormous pressure to resolve the ANWR issue so that the oil that can be produced there can offset the two billion barrels of oil Iraq exports each day.²⁴⁵ Pro-drilling conferees have tried to compromise by making the refuge's eastern coastal plain near the U.S.-Canada border, where caribou give birth, off limits to drilling in exchange for drilling in the other areas of ANWR.²⁴⁶ The eastern coastal plain, under the pro-drilling conferee's compromise, would also receive protected wilderness designation, as well as an additional 10.2 million acres in other areas of Alaska.²⁴⁷ Anti-drilling advocates, such

²⁴¹ See *supra* note 1.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* See also *supra* note 139. See also Senate Energy & Natural Resources Committee homepage, available at www.energy.senate.gov/legislation&docs/pdf/107-2/energy_bill/conferees.htm. The nine conferees who voted to open ANWR to drilling included Republican Senators Frank Murkowski (AK), Don Nickles (OK), Larry Craig (ID), Pete Domenici (NM), Ben Nighthorse Campbell (CO), Craig Thomas (WY), Charles Grassley (IA), Trent Lott (MS) and Democrat John Breaux (LA). The eight who voted against ANWR's opening included Democratic Senators Jeff Bingaman (NM), Fritz Hollings (SC), John Kerry (MA), Joseph Lieberman (CT), Harry Reid (NV), Max Baucus (MT), John Rockefeller (WV), and Independent James Jeffords (VT). *Id.*

²⁴⁵ See Planet Ark News Results — World Environment News: *Republicans seek Arctic oil drilling compromise* by Tom Doggett (Sep.27, 2002), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=17932 (last visited October 25, 2002).

²⁴⁶ *Id.*

²⁴⁷ See *supra* note 245. See also 148 Cong. Rec. S9808-02, Comments by Senator Murkowski, Wednesday, October 2, 2002. The designation of wilderness land in ANWR's eastern

536 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

as Senators Bingaman and Lieberman, however, have said that there would be "strong opposition" to such an ANWR drilling compromise in the Senate.²⁴⁸

The Iraqi conflict is not the only international issue pressuring lawmakers to consider opening ANWR to drilling. For instance, in response to the growing concern over global climate change, Republican House lawmakers have proposed accepting a climate change package to reduce global warming emissions from industrial facilities like power plants if Senate Democrats would agree to drilling in ANWR.²⁴⁹ Representative Tauzin, member of the House Resources Committee, hinted that, "[t]he Senate very clearly wants to have climate change in the bill. We very clearly on the House side want to see ANWR (in the bill)."²⁵⁰ Additionally, Tauzin hinted that "horsetrading" among lawmakers is an important step to settle major difference between the Senate and House on how to overhaul U.S. energy policy.²⁵¹ This said, the Senate members opposed to drilling are outnumbered and it may only be a matter of time before they are coerced into supporting an energy bill that contains some form of drilling in ANWR because they want to adopt some measures to address global climate change.²⁵²

Overall, the accomplishments of the joint House-Senate conferees were severely limited and biased.²⁵³ At the end of September 2002, Congressional conferees adopted a modified version of the CAFE language, passed last year in the House over vocal objections from some House Democrats and environmentalists who favor a more stringent increase.²⁵⁴ The

costal plain and around the state of Alaska is an effort by the House to demonstrate that they are committed to conservation and to passing a comprehensive energy bill that includes ANWR. The total designation of land in Alaska would equal 72 million acres. *Id.*

²⁴⁸ See *supra* note 245. Anti-drilling Senators are strongly opposed to the House compromise because they do not want to negotiate to open any portion of ANWR to drilling. Additionally, in response to the compromise, Senator Lieberman said that the Senate would, "reject any efforts" to drill in the refuge. *Id.*

²⁴⁹ See Planet Ark News Search Results — World Environment News: *U.S. lawmakers may deal on drilling, climate change* by (Sep.23, 2002), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=1786 (last visited October 25, 2002).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See generally *id.*

²⁵³ See E&E Publishing — Greenwire: *Energy Policy: Conference accepts House CAFE language* (Sep.20, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

²⁵⁴ *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 537

compromise, presented as a Senate counter offer to the House CAFE proposal, would enact a modest fuel economy boost of at least five billion gallons of oil between 2006 and 2012, a slight change to the original H.R. 4 language that would have conserved the same amount between 2004 and 2010.²⁵⁵ Intense criticism of this compromise came from Representatives Ed Markey (D-Mass.) and Henry Waxman (D-Calif.) because in practice the new version will only amount to an increase of less than one mile per gallon.²⁵⁶ Markey commented that, "[t]his compromise does virtually nothing."²⁵⁷

Additionally, an environmental lobbyist present at the conference said that, "five billion gallons of oil savings amounts to about two weeks worth" of U.S. gasoline consumption.²⁵⁸ Moreover, throughout the coming decade, U.S. oil consumption could increase by up to four billion gallons because automakers will be able to avoid tight fuel economy standards by manufacturing dual-fuel ethanol/gasoline vehicles.²⁵⁹ One would expect that the remainder of the House and Senate Democrats would agree with Representatives Markey and Waxman, however, Senator John Kerry (D-MA) seemed complacent when he said that he was not completely happy with the wording of the compromise, but that he decided to accept it to move the broader bill forward.²⁶⁰ With the passage of such watered-down CAFE standards, it is probable that ANWR could suffer the same fate because the vast majority of the conferees and congress people, in general, wish to conclude the energy legislation debate as soon as possible.²⁶¹

B. DOI'S ADAMANT SUPPORT OF AN ENERGY BILL THAT INCLUDES ANWR

An additional pressure looming over the joint House-Senate conferees as they discussed the critical issue of ANWR,

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See generally *id.* Environmental groups support ethanol because it is added to gasoline to ensure cleaner burning. A down side to ethanol is that automakers will get credit (relaxed CAFE standards) for incorporating these dual-fuel engines into their new fleets. *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* See also *supra* note 245.

538 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

was the prospect of a presidential veto of energy legislation that does not include oil drilling in ANWR.²⁶² DOI Secretary Norton will urge President Bush to veto the energy bill if it does not ultimately call for opening ANWR to oil drilling.²⁶³ Norton's political stance on the energy bill is indicative of the conflicting position she holds at the DOI; Norton is charged with raising revenues from the same land she is employed to conserve and protect.²⁶⁴ Norton's contention that there is no hope to enhance the U.S.'s energy picture without ANWR is misguided and unsupported by the available evidence.²⁶⁵ There are alternative oil supplies.²⁶⁶ For example, in the spring of 2002, despite the ANWR stalemate, Secretary Norton ordered federal officials to expand leasing within the 9.6 million acres of the National Petroleum Reserve of Alaska (NPR-A).²⁶⁷ Shortly thereafter, the USGS announced that there are higher oil estimates in the NPR-A reserve than those previously released.²⁶⁸ The agency also noted that at current oil prices, more oil could be pumped from ANWR than in the NPR-A.²⁶⁹

Environmental groups refuted this most recent report because the USGS allegedly relied on economics, not technology in order to emphasize the attractiveness of ANWR exploration.²⁷⁰ These environmental organizations noted that by using an alternative standard of "available drilling technology" (instead of solely using economics), the NPR-A would come out ahead of ANWR by about 1.6 billion barrels of oil.²⁷¹ Furthermore, the USGS study measured ANWR oil value in 1996 dollars, while using 2001 dollars to measure the NPR-A oil value.²⁷² Consequently, Jim Waltman of the Wilderness Society, argues that, "It looks like a switching of vocabulary to try to prove a point . . . (the study) [o]verstates ANWRs' oil value relative to the National Petroleum Reserves' oil value."²⁷³

²⁶² See generally *supra* note 188.

²⁶³ *Id.*

²⁶⁴ See generally *supra* note 144.

²⁶⁵ See generally *supra* note 188.

²⁶⁶ See *supra* note 72.

²⁶⁷ *Id.*

²⁶⁸ See *supra* note 7.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

2003] THE ANWR DRILLING DEBATE CONTINUES 539

On the other hand, Pamela Miller, an Anchorage environmental consultant, commented that the new study could be used as additional evidence for the campaign against ANWR drilling.²⁷⁴ Ms. Miller stated that, "It's one more study by the Interior Department focusing on oil, showing there's a lot more oil outside ANWR, in the ninety-five percent of the North Slope that's available to the oil and gas industry."²⁷⁵ Accordingly, oil exploration potential in the NPR-A appears to exceed that of ANWR.²⁷⁶ NPR-A's superior oil exploration stems from the USGS's skewed study results, available technology, and an existing infrastructure from which to extract oil.²⁷⁷

Moreover, Secretary Norton's notion that the U.S. energy policy hinges upon ANWR to generate enough fossil fuel resources to wean the U.S. from the Middle East exports is flawed because according to BP's Chief Executive Officer (CEO), Lord John Browne, "there are plentiful resources of oil and gas in the world . . . [t]hose resources are concentrated in a number of areas, but by no means exclusively in the Middle East."²⁷⁸ Consequently, Lord Browne stressed that BP is also exploring diverse sources of oil in regions such as, the Caspian Sea, Western Africa and the deep waters of the Gulf of Mexico.²⁷⁹ Additionally, Lord Browne noted that these regions would surely be able to accommodate ever-increasing U.S. oil needs.²⁸⁰ Commenting with great economic foresight, Lord Browne said that, ". . . having domestic (U.S.) production of energy enhances security . . . but I don't believe it is realistic to expect domestic production to be supported regardless of the costs; [t]hus Alaskan resources have to be able to compete at the point of consumption in the global market."²⁸¹

Presently, BP's operating costs per barrel of Alaskan oil are twenty percent higher than their worldwide average.²⁸²

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *See generally id.*

²⁷⁷ *See generally supra* notes 7, 72.

²⁷⁸ *See* Speech by Lord John Browne, CEO British Petroleum, Resource Development Council for Alaska, Alaska Support Industry Alliance, Anchorage Chamber of Commerce, Anchorage, Alaska (June 28, 2002), available at British Petroleum Website, www.alaska.bp.com/alaska/moreinfo/speeches/spch062802.htm (last visited Nov. 5, 2002).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

540 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

There are a number of reasons for this inflated cost.²⁸³ First, there is an added cost because the resources are being produced a long way from the markets in which they are being consumed.²⁸⁴ Second, Alaska is a mature, small oil province.²⁸⁵ The operating systems and infrastructure were designed for much higher volumes of throughput.²⁸⁶ As production declines, unit costs inflate.²⁸⁷ Lord Browne emphasized that in order to minimize these disadvantages to oil production in Alaska, they must discontinue frontier exploration (in areas like ANWR), focusing instead in and around existing fields, looking for smaller accumulations near available infrastructure.²⁸⁸ Thus, it appears that BP, who is the primary petroleum producer in Alaska, is reluctant to push oil exploration activities in ANWR due to the economic and technical challenges it presents.²⁸⁹ Instead, BP would prefer to focus on their oil production activities in the Caspian Sea, West Africa and the deep waters of the Gulf of Mexico because the operating costs are much lower.²⁹⁰

C. CRITICIZING THE PROPOSED ENERGY BILL: ENVIRONMENTAL ORGANIZATIONS AND PRO-ETHANOL FARM LOBBYISTS

The Public Interest Research Group ("PIRG") published a report that showed of the industry subsidies included in the House version of H.R. 4, approximately sixty-one percent goes to oil, natural gas, coal, electric utility and nuclear power industries.²⁹¹ PIRG doubts that the energy bill including oil drill-

²⁸³ See generally *id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* See also Planet Ark News Search Results — World Environment News: *BP Executive vows continued Alaska Commitment* by Yereth Rosen (Sep. 11, 2002), available at www.planetark.com/avantgodailynewsstory.cfm?newsid=17704 (statements by BP President Steve Marshall).

Last year BP closed its Alaska frontier exploration office and laid off 120 of its 600 Anchorage based employees. "The company can no longer afford to chase new barrels regardless of the cost." "If and when ANWR opens, as with any other emerging province, we'll evaluate it, look at the commercial terms, consider all of the business, technical, economic, social and environmental challenges a decision to enter ANWR would face, and make a determination as to whether it would be prudent to invest." *Id.*

²⁸⁹ See generally *supra* note 278.

²⁹⁰ *Id.*

²⁹¹ See Planet Ark News Search Results — World Environment News: *Group says U.S. energy bill won't benefit consumers* by Chris Baltimore (Jan. 9, 2001), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=13206 (last visited October 25, 2002).

2003] *THE ANWR DRILLING DEBATE CONTINUES* 541

ing in ANWR will bestow much benefit upon consumers.²⁹² In fact, PIRG reports that only about thirteen percent of the sixty-two billion dollar price tag of the energy bill passed by the House, will go to programs to benefit consumers.²⁹³ Specifically, the bill includes twenty-one billion dollars for oil and gas subsidies, including \$7.4 billion in lost revenue from royalty relief awards for offshore drilling in the Gulf of Mexico, \$5.8 billion for coal and electric utilities' subsidies and tax credits to develop technology for cleaner-burning coal plants, and \$2.7 billion for nuclear plant owners to support uranium mining, nuclear energy research and tax exemptions for nuclear plant decommissioning costs.²⁹⁴ In addition to the environmental groups that are upset about H.R. 4's favoritism of the fossil fuel industry, farm lobbyists who support energy legislation with a strong ethanol mandate are also disgruntled.²⁹⁵

The farm groups are politically powerful and are much larger than the ANWR lobby, so Congress will have a hard time turning down the energy legislation that includes ethanol.²⁹⁶ Ethanol, made mostly from corn, is added to gasoline to make fuel burn cleaner.²⁹⁷ Under the Senate energy bill, ethanol use would triple from its current 1.5 gallons a year to five billion gallons annually by 2012.²⁹⁸ Other supporters of ethanol are environmentalists, large oil companies and President Bush.²⁹⁹ Hurst Groves, director of Columbia's Center for Energy Policy, commented, "farmers and ethanol supporters are strong constituencies that both parties respond to. . . [a]rctic drilling may have to be dropped to please them."³⁰⁰ Further, Groves noted that the Senate negotiators are certain to reject the House bill's language to allow drilling in ANWR, thus he postulates that an energy bill passed will not include ANWR.³⁰¹ While President Bush has said that ANWR drilling is a critical

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ See Planet Ark News Search Results — World Environment News: *Ethanol may kill Arctic drilling in U.S. energy bill* by Tom Doggett (June 28, 2002), available at www.planetark.com/avantgo/dailynewsstory.cfm?newsid=15695 (last visited October 25, 2002).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

542 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

part of his energy policy, Groves noted that he does not believe that the president would veto an energy bill because of it.³⁰²

Finally, environmental groups have criticized H.R. 4 from the beginning because it does not offer sufficient incentives for the energy industry to incorporate renewable energy sources such as solar and wind.³⁰³ Instead, the bill includes exorbitant subsidies for industry to continue to deal in non-renewable fossil fuel energy.³⁰⁴ Moreover, the bill does not set forth strict guidelines for increased CAFE standards to reduce oil consumption nor does it propose a gradual increase in federal taxes on gasoline to encourage fuel conservation in the U.S.³⁰⁵ As a result, the bill perpetuates the domestic fossil fuel industry and demonstrates that certain factions of the government are incapable of setting aside biases and fashioning innovative policies that address long-term energy needs for the nation.

Moreover, the bill's shortfalls may lead to oil drilling in one of the last pristine wilderness areas in the world. The resulting damages will be apparent through the physical scars left on the land, decreases in the polar bear, caribou and musk oxen populations, and decreased standard of living for the Gwich'in tribe who are dependent upon the caribou herd as subsistence.³⁰⁶ In addition, if Congress allows drilling in ANWR to be used as a political negotiating tool, they will create a dangerous precedent, where the inherent value of nature can be surpassed by inflated projections of recoverable oil and biased political maneuvers throughout the White House, Congress and stemming to the DOI and its various branches.

³⁰² *Id.*

³⁰³ *See generally supra* note 118.

³⁰⁴ *See supra* note 291.

³⁰⁵ *Id.* *See also supra* note 1.

³⁰⁶ *See generally supra* note 118.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 543

IV. PROPOSAL

A. INCREASED CONGRESSIONAL GUIDANCE REQUIRED TO DETERMINE WHETHER TO OPEN ANWR TO OIL DRILLING

When considering whether to open ANWR to oil drilling, Congress has little if any guidance.³⁰⁷ Specifically, Section 1002 of ANILCA is silent on the procedures necessary to place ANWR within the minerals leasing program and allow oil drilling.³⁰⁸ The statute was promulgated in order to provide a comprehensive, continuing inventory and assessment of the fish and wildlife resources of the 1002 Area of ANWR.³⁰⁹ In addition, ANILCA provides an analysis of the impacts of oil and gas exploration, development and production within the 1002 Area.³¹⁰ Finally, ANILCA's purpose is to "authorize exploratory activity within the Coastal Plain in a manner that avoids significant adverse effects on the fish and wildlife and other resources."³¹¹

ANILCA charges the Secretary of the DOI with the duty of formulating guidelines, including prohibitions, restrictions and conditions on carrying out exploratory activities, such that activities do not significantly adversely affect the environment and wildlife of the 1002 Area.³¹² Once complete, the Secretary will make a recommendation to Congress with respect to further exploration in the 1002 Area and the effects of such activities on fish and wildlife.³¹³ ANILCA itself, however, fails to provide any guidance for Congress to determine whether to allow oil exploration in the 1002 Area.³¹⁴

³⁰⁷ While Congress has the power to make a decision regarding ANWR without significant input from the other branches of the government, they must have clear guidelines so that they can make an informed final decision. My proposition is that ANILCA is lacking for it does not explicitly set standards for determining when, why, and how to open ANWR for drilling. Congress needs to be better educated on the specific issues that make ANWR such an amazing place that is home to such diversity of plants, wildlife and native peoples before they decide to alter it irreparably. In addition, the 108th Congress doesn't need to adhere to the recommendations made by the 107th Congress regarding opening ANWR to drilling. However, Congress may find that analysis and consideration of the past may be beneficial in resolving the drilling dispute.

³⁰⁸ See generally *supra* note 27.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at §1002(d) & (h).

³¹³ *Id.*

³¹⁴ See generally *id.*

544 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

It appears that the only information afforded Congress under ANILCA to instruct them on how to make a decision regarding oil exploration within ANWR consists of an environmental analysis report and a DOI recommendation.³¹⁵ The environmental analysis report is prepared by the DOI and considers the adverse affects that oil exploration activities will have on the wildlife and environment of the 1002 Area.³¹⁶ The Secretary provides the DOI recommendation regarding future exploratory activities.³¹⁷ The lack of clear procedural steps to facilitate Congressional decision-making regarding oil drilling in ANWR is problematic because it leaves Congress members susceptible to biased information. Moreover, without clear guidelines, any potential for concluding the contentious debate surrounding drilling in ANWR becomes extremely difficult for Congress. Instead of reaching an environmentally responsible and economically viable solution regarding drilling in ANWR, Congress has wasted valuable time and energy debating in conference meetings that do little to effectively resolve the issue.

1. The Standard of "Significant Adverse Effects" Set Forth in Section 1002 of ANILCA is Ambiguous and Leaves Room for Gross Misinterpretation

The purpose of Section 1002 of ANILCA is to, "...authorize exploratory activity within the coastal plain in a manner that avoids significant adverse effects on the fish and wildlife and other resources."³¹⁸ The statutory language never expressly defines the term "significant adverse effects."³¹⁹ On its face, the phrase is ambiguous, but if one were to make a reasonable inference, the term "significant adverse effects" implies that the statute would only permit insignificant adverse effects on wildlife caused by exploration activities.³²⁰ The fact that a reasonable person is left to speculate as to the meaning of this phrase stands as proof that the statute is vague and ambiguous.

³¹⁵ See generally *id.*

³¹⁶ See generally *id.*

³¹⁷ See generally *id.*

³¹⁸ *Id.* at §1002(a).

³¹⁹ See generally *id.*

³²⁰ See generally *id.* ANILCA mentions that oil exploration during caribou calving or post calving may pose significant adverse effects. *Id.*

2003] THE ANWR DRILLING DEBATE CONTINUES 545

The lack of a comprehensible definition of such a crucial phrase as "significant adverse affects" seems deliberate on the part of the lawmakers as the remainder of the statute clearly defines the guidelines to be utilized by the Secretary of the DOI in the form of prohibitions, restrictions and conditions on carrying out exploratory activities.³²¹ The only express example of activities that would inflict significant adverse effects on the fish, wildlife and the environment would be if, exploratory activities were commenced during caribou or post-calving seasons, or if there was permitting that creates unnecessary duplication.³²² Although this list is not by way of limitation, it is still vague because for example, it does not delineate what "significant adverse effects" would be on the muskoxen or polar bear populations and how the Secretary should successfully avoid such effects when issuing exploration permits.³²³

In order to effectively implement this statute, Congress must establish a working definition for this critical phrase. Otherwise, Congress may choose to open ANWR to oil exploration without a complete understanding of ANILCA's key terms.³²⁴ Additionally, the lack of a comprehensible definition implies that Congress meant to leave a great amount of discretion in the hands of the administering agency, namely the DOI.³²⁵ As explained earlier, relegating the final interpretation

³²¹ *Id.*

³²² *Id.* at § 1002(A) & (D).

³²³ *Id.*

³²⁴ *See generally id.*

³²⁵ *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984). The Supreme Court held that the Environmental Protection Agency's construction of a statutory term was a permissible construction within the Clean Air Act because it was consistent with Congressional intent. When a court reviews an agency's construction of the statute that it administers, it is confronted with two questions. First, the court asks whether Congress has directly spoken to the precise question at issue. If Congress has directly spoken, then that ends the court's job. If Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842.

Additionally, the Supreme Court in *Chevron* noted that, "[i]f Congress left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 844. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* Often times the delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for reasonable interpretation made by the administrator of an agency. *Id.* The present state of affairs with ANWR is unlike the situation that existed when the Supreme Court decided *Chevron*. In *Chevron*, the statutory provision under debate was defined generally although it was not clearly defined when dealing with a specific permitting system. Unlike *Chevron*, where the debated term was defined by Congress, the phrase

546 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

of "significant adverse effects" to the Secretary of the DOI is risky because the agency is charged with generating revenue from oil, gas and mineral leasing within public lands.³²⁶ Moreover, although the USGS and USFW bureaus within the DOI generate assessment plans and environmental impact statements, the main focus of the DOI is not conservation, but environmentally sound exploitation of federally owned lands.

2. Augmenting the Existing Congressional Scheme: Needed Assistance to Determine the Fate of ANWR

To effectively aid both houses of Congress in deciding the ANWR issue, a new ANWR Consulting Group comprised of neutral scientists, economists and engineers would be a valuable addition. Although there are both House and Senate Committees on Natural Resources, an advisory group to specifically address the unique features of ANWR would ultimately facilitate a balanced resolution of the debate. In forming the ANWR Consulting Group, it is important to include experts that have specialized knowledge in the areas of resource and land management, wildlife conservation, economics, the intricacies of oil exploration, and who have the least to gain by opening ANWR to oil drilling.³²⁷ Consequently, each of the

"significant adverse effects" is not clearly described by Congress in ANICLA. Therefore, it appears that in dealing with the ANWR scenario, the courts would have to give deference to the apparent Congressional delegation to the DOI. Thus, the DOI would be able to interpret and implement regulations governing oil exploration in ANWR according to their understanding of the "significant adverse effects" standard. See also Proposed Rules for the Department of Commerce, National Oceanic and Atmospheric Administration, Deep Seabed Mining, July 25, 1986, 51 FR 26794-01 (examples of insignificant adverse effects), "... the regulations do not define, "significant adverse effects" ... this determination will be made on a case-by-case basis." *Id.* at 26800. However, the regulations narrow the scope of the inquiry by indicating those activities that are not considered to have significant adverse effect, and those activities with potential for "significant adverse effects." *Id.* Even if adverse environmental effects are attributable to seabed mining, but are of short duration and local scale, with no apparent food chain effects, NOAA probably would not consider these to be "significant adverse effects" e.g. temporary decrease in phytoplankton productivity as observed during test mining. *Id.*

³²⁶ See *supra* notes 27, 144.

³²⁷ An example of a person who has heavy biases and is not fit for such an ANWR Consulting Group is DOI Secretary Norton because she has enormous pressure upon her from the White House and Republicans in support of drilling, to ensure that ANWR is included in the final energy legislation. The members of the ANWR Consulting Group must be funded using money generated from all interested parties. Equal amounts would be collected from the oil industry, lobbyists, the federal government, environmentalists, indigenous peoples, and Alaskans so as not to promote biases. See generally *supra* note 126.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 547

interested parties will have the chance to nominate someone to sit on the ANWR Consulting Group.³²⁸

Appropriate selections for the ANWR Consulting Group are: scientists, wildlife managers, oil exploration technicians, and engineers from government agencies such as the DOI (specifically the USGS, USFW, BLM, MMS). In addition, members of the ANWR Consulting Group could come from universities such as, the Massachusetts Institute of Technology as well as other domestic and international universities, private consulting firms, and think tanks.³²⁹ Thus, instead of vesting the sole responsibility of informing Congress of the effects of oil exploration on the environment and wildlife in the Secretary of the DOI, the ANWR Consulting Group will present their expertise to Congress and be available to consult them during Committee Hearings and important decision-making sessions.

With the combined knowledge of the members of the ANWR Consulting Group, they will be able to address all of the pertinent issues so that the members of Congress can make well-educated decisions regarding oil exploration in ANWR. This is not to say that Congress would not have an opportunity to hear testimony from other interest groups and community activists, but this way the ANWR Consulting Group can serve as neutral advisors regarding the multitude of issues created by the prospect of drilling. Moreover, the ANWR Consulting Group can serve as a check and balance for the Congressional Committees and the DOI recommendations. In addition, the

³²⁸ The parties that should participate in the nomination of members of the ANWR Consulting Group are: American Petroleum Institute, Arctic Power, Environmental Groups (they will have to come together and select one scientist and one engineer in the interest of keeping the ANWR Committee small and cohesive), Gwich'in Indians, Inupiat Eskimos, DOI (one member from the USFW, one from the USGS, one from the BLM and one from the MMS), British Petroleum and the Teamsters. In order for the ANWR Consulting Group to coalesce and develop a good rapport with one another, there should be no more than 10-15 members. This composition of the ANWR Consulting Group ensures an equal balance of interests when the Group presents information to Congress or assists them in better understanding the issues.

³²⁹ The ANWR Consulting Group should be modeled after liberal (World Resources Institute (WRI) and The Rand Corporation (Rand)), conservative (The Cato Institute and The Heritage Foundation) and moderate think tanks (The Progressive Policy Institute). The members of the Board of Directors of these groups come from extremely diverse backgrounds. See, e.g., WRI webpage, available at www.staff.wri.org/board.cfm (last visited Dec. 3, 2002). See, e.g., Rand webpage, available at <http://www.rand.org/> (last visited Dec. 3, 2002). See, e.g., Progressive Policy Institute webpage, available at <http://www.ppionline.org> (last visited Dec. 3, 2002). See, e.g., The Cato Institute webpage, available at www.cato.org/about/about.html (last visited Dec. 3, 2002). See, e.g., The Heritage Foundation webpage, available at www.heritage.org/about/staff/experts.cfm (last visited Dec. 3, 2002).

548 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

Group will facilitate a Congressional resolution that will provide for long-term resource and wildlife conservation as well as sustainable domestic energy production.

B. ANWR SHOULD NOT BE OPENED TO OIL DRILLING

Based on all of the available evidence, it is clear that oil exploration activities, no matter how scientifically sophisticated will be extremely disruptive to the wildlife, habitat, indigenous peoples, and overall environmental quality of ANWR.³³⁰ As such, given the wide range of alternatives, oil drilling in ANWR should be prohibited and new regulations should be promulgated to ensure that drilling in ANWR will not be allowed in the future.³³¹ As previously mentioned, ANILCA's function is to ensure that exploration activities in ANWR do not significantly adversely affect the wildlife, their habitats and the environment.³³² ANILCA does not expressly prohibit oil exploration activities.³³³ Therefore, this debate over the 1002 Area of ANWR can arise again in the future, if Congress were to allow oil exploration and place ANWR back on the mineral leasing program.³³⁴ In order to truly protect ANWR, regulations that place ANWR off limits to oil exploration must be passed.

1. ANILCA Omissions: Consideration of Additional Factors Clearly Indicates that ANWR Should Not be Opened to Oil Drilling

In addition to the requisite environmental assessments, wildlife inventories, and the overall impact of oil exploration on ANWR provided for in ANILCA, it is essential that Congress set forth specific guidelines to use in considering when, and under what circumstances, ANWR could be opened to drilling. One such factor that Congress should pay particular attention

³³⁰ See generally *supra* notes 5, 27.

³³¹ See generally *supra* notes 87, excerpt from The Chicago Tribune (Jan. 8, 2002) available at www.anwr.org/features/chicagotrib.htm (last visited Nov. 1, 2002), 278, 288, 291.

³³² See *supra* note 118.

³³³ *Id.*

³³⁴ *Id.* ANILCA expressly says under section (i) that, "Until otherwise provided for in law enacted after [December 2, 1980], all public lands within the coastal plain are withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws, of the United States." In other words, Area 1002 is off limits to minerals leasing until such time as Congress deems otherwise. *Id.*

to is the impact of oil exploration in similarly situated areas, like the Prudhoe Bay area of Alaska.³³⁵ The environmental impacts in that areas have been astounding.³³⁶ As the most extensive oil production area on the North Slope, Prudhoe Bay has been transformed into a large industrial complex.³³⁷ There are thousands of miles of roads and pipelines, and thousands of acres of industrial facilities covering hundreds of square miles.³³⁸

Moreover, as a result of oil development, the area has suffered immeasurable destruction of wildlife habitat, a decline in local wildlife populations, hundreds of open pits containing millions of gallons of industrial waste, gallons of crude oil and toxic chemical spills and, finally, thousands of tons of air pollutants now exist in the fragile Arctic atmosphere.³³⁹ This evidence is highly persuasive since Prudhoe Bay is similarly situated to ANWR, thus this sort of pillage should be prohibited.³⁴⁰ Given that the oil accumulations under ANWR are small as opposed to the large pools of Prudhoe Bay, it is likely that the environmental and wildlife impacts would be even greater than those in the Prudhoe Bay because greater infrastructure is required to extract the oil in ANWR.³⁴¹ Thus, it is important for Congress to be aware of, and take into consideration, information regarding the degradation of Prudhoe Bay before it decides to condemn ANWR to a similar destiny.

Another vital consideration for Congress is the availability of alternative domestic oil supplies that pose less significant environmental impacts because of preexisting infrastructure.³⁴² For example, off-shore drilling within the Gulf of Mexico may provide companies, such as, BP, with the opportunity to remove a larger quantity of oil at a reduced cost with less significant environmental impact.³⁴³ There are a number of advantages to extracting oil from the Gulf as opposed to opening ANWR. First, the operating costs for the oil companies are

³³⁵ See generally *supra* note 27.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ See generally *id.*

³⁴¹ See generally *id.*

³⁴² See generally *supra* notes 278, 288.

³⁴³ *Id.*

550 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

much lower.³⁴⁴ Second, given existing infrastructure in the Gulf of Mexico, there is less additional environmental degradation that would occur as opposed to starting anew in ANWR's coastal plain.³⁴⁵ Moreover, the U.S. Energy Information Administration ("EIA") recently issued its final oil and natural gas analysis for 2001.³⁴⁶

The EIA reported that additional proved reserves (new gas and oil found in the ground that is yet to be developed), exceeded domestic production by twenty-one percent for oil and thirty-one percent for natural gas.³⁴⁷ "New deepwater Gulf of Mexico finds account for much of the new oil."³⁴⁸ The Thunder Horse Field, 125 miles southeast of New Orleans, is expected to be the largest oil field in the Gulf, once fully developed.³⁴⁹ The report concluded that U.S. oil reserves increased by two percent in 2001, continuing a recent upward trend after years of declines from 1977 to 1996.³⁵⁰ "Oil reserves have climbed in four out of the last five years, with the discoveries in the deep-water Gulf and Alaska leading the gains; [t]otal crude discoveries were 2,565 million barrels in 2001, almost twice the amount discovered in 2000."³⁵¹ Thus, given these figures it appears that U.S. oil supplies are not in grave danger of running dry.³⁵² In fact, if the EIA figures are accurate, it seems that there are robust and growing reserves of crude oil available domestically and the need to drill in ANWR is premature or fabricated by those who stand the most to gain from the profits.³⁵³

There are other areas within the U.S. that have recently been given greater attention due to increased extractable oil estimates. For example, the DOI increased mineral leases in the NPR-A in Alaska as a result of the USGS study that predicted that there is more recoverable oil in the NPR-A.³⁵⁴ This area, like the Gulf of Mexico, already has extensive oil produc-

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ See E&E Publishing — Greenwire: *Oil and Gas: Reserves were up in 2001-EIA* (Sep.30, 2002), available at www.eenews.net/Greenwire (last visited Nov. 24, 2002).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² See generally *id.*

³⁵³ *Id.*

³⁵⁴ See *supra* notes 7, 72.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 551

ing infrastructure, as it was opened to extensive exploration and extraction of oil in the 1940's and 1950's.³⁵⁵ Therefore, these alternative domestic oil-producing regions seem like more viable options than ANWR in terms of operating costs, availability of infrastructure and limiting environmental impacts.

Finally, the most indispensable criteria for Congress to consider is the extent to which alternative forms of energy have been utilized prior to opening ANWR to oil drilling. These forms of alternative energy include renewable solar energy, wind energy, and tidal energy. Although many pro-drillers emphasize the invasiveness of wind towers or photovoltaic cells used to produce solar energy, they are the most efficient forms of energy that can be employed presently, with virtually no threat of irreparable environmental degradation.³⁵⁶

Before voting to subject an amazing wilderness to environmental damage that may be irreversible, Congress must look at whether it has used its influence and strength as the lawmaking body of the U.S. to exhaust all other forms of energy before resorting to ANWR. It is apparent that Congress has not taken proactive measures to support alternative energy before entering into the ANWR debates. It is time that Congress stops the wheeling and dealing and starts attacking the issue at its root cause.

2. Extraordinary Circumstances: The Only Condition Under Which ANWR Should be Opened to Oil Drilling

Given the increase in crude oil discoveries in the past year, and the amplified oil leasing in the NPR-A, drilling in ANWR is not necessary.³⁵⁷ The risk of catastrophic environmental degradation of ANWR far outweighs the need for a few extra months of crude oil.³⁵⁸ The issues surrounding the ANWR debate are complex and it is not as simple as saying, "go drill for oil elsewhere." There are competing interests involved. At one end, environmental groups, the Gwich'in, Canadians, and certain members of Congress do not support drilling in ANWR at all. At the other extreme, there are oil lobbyists, the DOI, the ma-

³⁵⁵ See *supra* note 5 at 1.

³⁵⁶ See *supra* note 87.

³⁵⁷ See generally *supra* note 346.

³⁵⁸ See *supra* note 5 at 5.

552 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

jority of the House, various Senators, the Executive branch, Inupiat Indians, and local Alaskans who favor drilling in ANWR. These groups are adamantly trying to boost the local economy that is largely dependant on the oil industry. In the face of attempting to boost the economy by the production of a mere few months supply of domestic oil at the expense of catastrophic environmental impact, oil drilling in ANWR is inappropriate.

In the alternative, if ANWR were opened to drilling, it should only be under extraordinary circumstances that are not currently present. Such circumstances would occur only if there were no other alternative fossil fuel resources located within the U.S.. Based on the available evidence, there is no merit to the argument that the U.S. needs ANWR oil to subsist and to wean itself from Middle Eastern oil supplies.³⁵⁹ While it is true that the U.S. is dependent on oil imports, there are alternatives to relying on the unstable governments of the Middle East.³⁶⁰ Therefore, despite the threat of imminent military strikes on Iraq if they do not comply with United Nations weapons inspectors and increasing fossil fuel demands in the U.S., the country has not reached such a desperate state that would merit opening ANWR to oil drilling.

V. CONCLUSION

The ANWR debate has drastically changed gears to favor the pro-drilling advocates ever since the 108th Congress came into session.³⁶¹ Proponents of drilling boast that 2003 offers, "the best opportunity we've ever had" to open part of the refuge to drilling.³⁶² Drilling sponsors attribute their likelihood of success to two key reasons: 1) The prospect of war in the Persian Gulf and the political instability in Venezuela, another key U.S. supplier of oil, will encourage the need for development of domestic sources of oil, and 2) Republicans now control the

³⁵⁹ See generally *supra* note 346.

³⁶⁰ See generally *supra* notes 278, 288. Oil from the Caspian Sea and Western Africa are examples of more stable governments from which the U.S. can import). *Id.*

³⁶¹ See MSNBC News-Environment: *Oil Allies Sense Arctic Refuge Victory: Drilling Advocates See 'Best Opportunity' ever in Congress* by Miguel Llanos, available at www.msnbc.com/modules/exports/ct_email.asp?news/856994.asp (last visited Jan. 17, 2003).

³⁶² *Id.*

2003] *THE ANWR DRILLING DEBATE CONTINUES* 553

Senate, where the ANWR legislation died last year, and Republicans still run the House, that approved the H.R. 4 measure calling for oil drilling.³⁶³ In addition, Republican Senator Pete Domenici (R-NM), who is an advocate of ANWR oil drilling, is the new leader of the Senate Energy and Natural Resources Committee.³⁶⁴ Moreover, Representative Don Young (R-AK) introduced H.R. 39, The Arctic Coastal Plain Energy Security Act of 2003, that proposes implementation of "a competitive oil and gas leasing program that will result in an environmentally sound and job creating program for the exploration, development, and production of the oil and gas resources of the Coastal Plain, and for other purposes."

Consequently, supporters of ANWR oil drilling gained two critical Senate votes with the November 5, 2002 elections, but Republicans still do not have the 60 votes necessary to block a filibuster against the proposal to drill for oil in ANWR.³⁶⁵ However, Republicans may be able to circumvent a filibuster by including the ANWR provision in a reconciliation bill.³⁶⁶ In so doing, Republicans would prohibit a filibuster and allow passage by a simple majority vote in the Senate.³⁶⁷

Essentially the 108th Congress perceives that it has three options. First, Congress could include the drilling provision in a new energy bill (such as H.R. 39).³⁶⁸ Second, Congress could offer ANWR as stand-alone legislation.³⁶⁹ Lastly, Congress could attach ANWR to a budget reconciliation bill, which lawmakers use to fine tune revenue and spending.³⁷⁰ Senator Rick Santorum (R-PA), the Republican Senate Conference chairman, said "passing an energy bill was among his top five priorities for 2003 and that a provision for drilling in the Alaskan refuge would "absolutely" be in it."³⁷¹ Senator Pete Domenici, said "he expects to see a drilling provision in the budget reconciliation bill because it can be argued that royalties from drilling leases

³⁶³ *Id.* See also www.energy.senate.gov (last visited Feb. 19, 2003).

³⁶⁴ See generally *supra* note 1.

³⁶⁵ See *supra* note 361.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

554 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

would help the budget.³⁷² Domenici also said that, "the Senate Energy Committee, which he now chairs, will propose raising \$1.6 billion in lease royalties."³⁷³ The reconciliation bill could reach the Senate floor for a vote by late February, but more likely in March or April. The budget reconciliation approach also has Republican support in the House.³⁷⁴

The 108th Congress should not allow a provision for oil drilling in ANWR to pass regardless of the form of legislation.³⁷⁵ Given the increase in oil reserves and new discoveries in the deep water off the Gulf of Mexico, the U.S. does not need the oil from ANWR to ensure its continued domestic supply of crude oil. Moreover, there is oil available for importation from more stable and friendly governments in West Africa and in the Caspian Sea region. Additionally, further development and implementation of alternative energy sources will increase available domestic energy with limited adverse environmental impacts.

Furthermore, the potential for extreme environmental degradation in ANWR, like the spoliation that has occurred in Prudhoe Bay, should discourage Congress from passing legislation that would expose ANWR to such harm. Instead, lawmakers should promote legislation that permanently closes ANWR to oil drilling and allows the area to remain pristine and unfettered by human contact. If the evidence of degradation in Prudhoe Bay does not convince Congress, they should hear from experts on ANWR via the ANWR Consulting Group before making this irreversible decision. Amendments to ANILCA or new legislation drafted with the assistance of the proposed ANWR Consulting Group, will serve to better inform Congress of the specific circumstances that should be considered in the decision whether to open ANWR to drilling. If such criteria are not properly evaluated, then drilling must be prohibited so that

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* Despite widespread Republican support for a rider in the proposed 2004 legislation to open ANWR, in late March 2003 the Senate voted to strike that provision. *See supra* note 4. Eight Republicans crossed party lines voting against drilling and five Democrats cast votes in favor of drilling. *Id.*

³⁷⁵ *See generally id.* In late March 2003, the Senate voted to strike down budget legislation that sought to open ANWR to drilling. *See supra* note 4.

2003] *THE ANWR DRILLING DEBATE CONTINUES* 555

ANWR's unique wilderness is not jeopardized due to political and corporate greed.

*Sara N. Pasquinelli**

* J.D. Candidate; Environmental Law Certificate Candidate, 2004, Golden Gate University School of Law, San Francisco, California; B.A., Environmental Studies with an emphasis in Latin American Studies, 2000, University of California Santa Cruz, Santa Cruz, California. I cannot begin to express my gratitude to my Journal Editor, Denee DiLuigi, for all of her support, insight, knowledge, patience and unending friendship throughout this process. My sincere thanks go to Maryanne Gerber for her amazing ability to assist students in finding just about anything imaginable and for her confidence in my abilities. In addition, I would like to thank all of the faculty advisors, outside editors, and student editors for their guidance and suggestions. Moreover, I want to acknowledge Dominique Etchegoyhen for assisting me with his incredible knowledge of the congressional system, and his meticulous cite checking. Lastly, I want to express my deep appreciation for my family, my boyfriend Seth, and all my friends and colleagues. It means so much to me that you all are a part of my life and that each and every one of you has helped me achieve what I have only dreamed of in the past.