Notes

Drill Here Not There: Petroleum Leasing and Conservation in Alaska's National Petroleum Reserve

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This Note analyzes the Department of the Interior's recent decision to close off several million acres of the National Petroleum Reserve-Alaska ("NPR-A" or "Reserve") from oil and gas leasing while allowing petroleum development on discrete areas of the Reserve. After discussing the Reserve's history, this Note examines the Alaska National Interest Land Conservation Act of 1980 and its relevance to the NPR-A, and analyzes the petroleum industry's potential legal arguments against the Interior's decision. This Note also argues that the Department of the Interior's decision is in accordance with its administrative powers because the Secretary's decision should not be considered a formal public land "withdrawal," but rather, a discretionary decision to deny lease issuances within certain areas of the Reserve.

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INTRODUCTION

In December 2012, former Secretary of the Interior Ken Salazar announced the Department of the Interior's ("DOI" or the "Interior") final proposal to allow for increased oil and gas development in the National Petroleum Reserve-Alaska ("NPR-A" or "the Reserve").[1] The Interior's blueprint for the NPR-A, which the DOI finalized in February 2013 through the issuance of a Record of Decision,[2] will open up millions of Reserve acres to oil and gas drilling. The proposal also seeks to

1. Press Release, Dep't of Interior, Secretary Salazar Announces Plan for Additional Development, Wildlife Protection in 23 Million Acre National Petroleum Reserve-Alaska (Dec. 19, 2012), *available at* doi.gov/news/pressreleases/secretary-salazar-announces-plan-for-additional-development-wildlife-protection-in-23-million-acre-national-petroleum-reserve-alaska.cfm [hereinafter Salazar Announces Plan].

2. DEP'T OF THE INTERIOR, RECORD OF DECISION, NATIONAL PETROLEUM RESERVE-ALASKA INTEGRATED ACTIVITY PLAN (Feb. 21, 2013).

protect wildlife populations such as caribou herds, migratory bird habitats, and coastal resources that are significant to the Alaska Natives and "our nation's conservation heritage."[3] This decision, also known as the "preferred alternative," will allow for oil and gas leasing on 11.8 million acres of NPR-A land and designate 13.38 million acres in the NPR-A for protection from development.[4]

The Secretary's decision came after lengthy consideration of five potential plans and the Interior's receipt of over 400,000 public comments.[5] The four rejected alternatives varied in their balancing of potential development and environmental protection: one option sought to offer roughly half of NPR-A land to leases; another would have opened 57% of the Reserve; a third proposed 76%; and yet another advocated that 100% of NPR-A land be subject to oil and gas development.[6] The preferred alternative will offer 52% of NPR-A subsurface land to oil and gas leases—an area with an estimated 549 million barrels of discovered and undiscovered oil (72% of the entire Reserve's estimated oil holdings),[7] and 8.738 trillion cubic feet of discovered and undiscovered gas (50% of the entire Reserve's estimated gas).[8] The plan will also classify the remaining land as "special areas" closed to development.[9]

Perhaps unsurprisingly, the NPR-A land use decision has created controversy. In protest, Alaska Governor Sean Parnell sent a letter to Secretary Salazar in September 2012 withdrawing the state as a "cooperating agency" from the planning agreement for the NPR-A.[10] Before the preferred alternative was finalized, Alaska Senator Lisa Murkowski decried the plan for "den[ying] U.S. taxpayers both revenue and jobs at a time when our nation faces record debt and

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3. Salazar Announces Plan, *supra* note 1.

4. DEP'T OF THE INTERIOR, NPR-A IAP/EIS ALTERNATIVES, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/npr-a_iap_eis.Par.77255.File.dat/NPR-A_IAPEIS_Alternative_comparison_table.pdf. A copy of this table is reproduced in Appendix A, *infra*.

5. Salazar Announces Plan, *supra* note 1.

6. *See infra* Appendix A.

7. As a point of comparison, the United States "consumed a total of 6.87 billion barrels [of oil] (18.83 million barrels per day) in 2011." *Frequently Asked Questions, How Much Oil Does the United States Consume Per Day*, U.S. ENERGY INFO. ADMIN. (Nov. 15, 2012), http://www.eia.gov/tools/faqs/faq.cfm?id=33&t=6. According to these statistics, if all the estimated oil contained in lands opened to leasing under the preferred alternative were to be fully exploited, the resulting production would supply the United States with enough oil to meet its consumption needs for about twenty-nine days.

8. The United States consumed approximately 25.46 trillion cubic feet of natural gas in 2012. *Frequently Asked Questions, How Much Natural Gas Is Consumed (Used) in the U.S.?*, U.S. ENERGY INFO. ADMIN. (Apr. 30, 2013), http://www.eia.gov/tools/faqs/faq.cfm?id=50&t=8. Thus, the if all the natural gas on allowable preferred alternative land was fully exploited, the resulting yields would supply the United States with enough natural gas to meet its consumption needs for about four to five months.

9. *See infra* Appendix A.

10. Letter from Gov. Sean Parnell to Sec'y of the Interior Ken Salazar (Sept. 12, 2012), *available at* http://gov.alaska.gov/parnell_media/resources_files/09122012_npra_salazar_copy2.pdf.

unemployment."[11] The oil and gas industry will also likely attack the Interior's plan in court.

This Note analyzes the potential arguments that the oil and gas industry will mount in opposition to the "preferred alternative" and argues that the plan is entirely in accordance with the statutes governing the Reserve and Alaska's public lands in general. First, this Note examines the historical context of the NPR-A and its originating statute. Next, this Note discusses the Alaska National Interest Land Conservation Act of 1980 ("ANILCA")[12] and its relevance to the NPR-A, specifically with regard to section 1326 of ANILCA—the so-called "no more" clause. Next, this Note examines the oil and gas industry's potential legal arguments against the Interior's decision, including the assertion that the Secretary is exercising a "withdrawal" power to protect special areas of NPR-A land from petroleum development, an action that is prohibited in certain circumstances under ANILCA. This Note contends that the Interior's preferred alternative is not barred by ANILCA section 1326 because the Secretary's action should not be considered a formal withdrawal. Instead, the preferred alternative should be viewed merely as a discretionary decision not to issue leases within certain areas of the Reserve.

I. Background

A. The National Petroleum Reserve-Alaska

In 1923, President Warren Harding issued Executive Order 3797-A, which established Naval Petroleum Reserve Number 4 in northern Alaska to serve as an oil reserve for national defense purposes.[13] At the time, "Harding noted that the future supply of oil for the Navy is at all times a matter of national concern."[14] By the 1970s, America's energy needs had changed dramatically, and the oil embargo by the Organization of Petroleum Exporting Countries "established that the Nation had a need for oil that exceeded the needs of the Navy."[15] In order to accommodate the increased demand for American petroleum, President Gerald Ford and Congress passed the National Petroleum Reserve Production Act of 1976 ("Production Act"), which gave the

11. Tim Bradner, *Murkowski Slams NPR-A Plan, Conservation Groups Pleased*, Alaska J. Commerce (Aug. 13, 2012, 1:47 PM), www.alaskajournal.com/Alaska-Journal-of-Commerce/August-Issue-2-2012/Murkowski-slams-NPR-A-plan-conservation-groups-pleased.

12. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16, 42, and 43 U.S.C.).

13. N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005).

14. *Id.* (internal quotation marks omitted).

15. *Id.*

Reserve its current name and transferred authority over it from the Navy to the Interior.[16]

The NPR-A is the largest single unit of public land in the United States, covering 23.6 million acres (or nearly 37,000 square miles) on the Alaska North Slope, stretching from the Chuckchi Sea in the West to Colville River delta in the East, and from the Arctic Ocean in the North to the Brooks Range in the South.[17] The NPR-A and the Western Arctic region it inhabits boast some of the highest wilderness and wildlife values in North America, and the region sustains many species of fish and wildlife that are still utilized today for subsistence hunting by the Inupiat Natives.[18] Indeed, four villages inhabited primarily by Alaska Natives exist within the Reserve's boundaries, and the majority of these villagers practice subsistence lifestyles that depend on the natural resources of the NPR-A.[19] Some of these indigenous populations oppose oil and gas drilling in the Reserve, largely because the presence of heavy industry frightens away the animals they hunt.[20] Moreover, tribes have begun to experience their first cases of asthma-related illnesses.[21] Because of the sensitive ecosystems and local populations present in the Reserve, the Interior's plan arguably sought to balance the interests of wildlife and native peoples with those of the oil and gas industry.

B. The Interior's "Preferred Alternative"

Under the Secretary's selected plan—known as "B2" or the "preferred alternative"—four special areas are designated as either unavailable to oil and gas leasing or unavailable to both leasing and the construction of new "non-subsistence" infrastructure—that is, infrastructure used to support petroleum production.[22] NPR-A land not within these special areas will be open for petroleum leasing.[23]

The special areas designated by the Interior contain a rich abundance of wildlife and sensitive ecosystems. Perhaps the most well known of these areas is the Teshekpuk Lake Special Area in the Reserve's Northeast region, which the preferred alternative has marked

16. 42 U.S.C. § 6502 (2012) (transferring authority over the NPR-A to the Interior and renaming the plan).

17. Brief for Appellant at 4, N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069 (2005) (No. 05-35085), 2005 WL 1912173, at *4.

18. *Background of the National Petroleum Reserve-Alaska*, Audubon Alaska, http://ak.audubon.org/background-national-petroleum-reserve-alaska (last visited Apr. 24, 2014).

19. *Kempthorne*, 457 F.3d at 973.

20. Karin McDougal, Nat'l Audubon Soc'y, et al. v. Kempthorne*: A Win for the Environment or an Example of NEPA's Shortcomings?*, 13 Drake J. Agric. L. 437, 439 (2008).

21. *Id.*

22. *See infra* Appendix A; *see also* Map of Proposed Alternative, *infra* Appendix B.

23. *Id.*

as unavailable both to leasing and new non-subsistence construction.[24] In addition to housing the area's dominant lake feature, the area also "includes important nesting, staging and molting habitat for a large number of waterfowl and shorebirds."[25] As much as thirty percent of the population of Brant goose on the Pacific flyway may be present in the Teshekpuk Lake Special Area during molting season.[26] Additionally, the expanse near Teshekpuk Lake is a major calving area for the approximately 55,000-strong Teshekpuk Caribou Herd.[27]

To the South of the Teshekpuk Lake Special Area lies the Colville River corridor, a 2.44 million acre region[28] that the Interior has deemed a special area but nonetheless has not designated as off-limits to oil and gas leasing.[29] The Colville River Special Area contains a high density of nesting raptors and "has been recognized since the 1950s as one of the most significant regional habitats for raptors in North America."[30]

West of the Colville River, the Utukok Uplands Special Area is the primary calving ground for the Western Arctic Caribou Herd, which, at a population estimated at 325,000, ranks as Alaska's largest caribou herd.[31] Moreover, the Utukok Uplands provide crucial habitat for numerous wolverines and grizzly bears.[32] Unlike the Colville River Special Area, the vast majority of the Utukok Uplands Special Area has been placed off limits to petroleum development and new non-subsistence infrastructure.[33]

Two other special areas—the Kasegaluk Lagoon and Peard Bay regions in the Reserve's northwest—have also been designated as unavailable to leasing.[34] Offshore regions bordering these areas provide significant habitats for beluga whales, walruses, and numerous varieties of ice seals.[35] Further, the Reserve's northwest coast serves as a denning site for polar bears, which were listed as "threatened" under the Endangered Species Act in 2008.[36]

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24. *See infra* Appendix A.

25. 1 DEP'T OF THE INTERIOR, FINAL INTEGRATED ACTIVITY PLAN/ENVIRONMENTAL IMPACT STATEMENT 355 (2012) [hereinafter FINAL IAP/EIS VOL. 1].

26. *Id.* at 251.

27. *Id.* at 283.

28. *Id.* at 355.

29. *See infra* Appendix A.

30. FINAL IAP/EIS VOL. 1, *supra* note 25.

31. *Id.* at 287.

32. *Id.* at 298, 302.

33. *See infra* Appendix A.

34. *Id.*

35. *Background of the National Petroleum Reserve-Alaska*, *supra* note 18.

36. *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus Maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,212 (May 15, 2008) (codified as amended at 50 C.F.R. pt. 17).

C. The National Petroleum Reserve Production Act of 1976

In addition to transferring NPR-A land to the DOI, the Production Act required the Secretary to "commence further petroleum exploration of the reserve"[37] and "conduct an expeditious program of competitive leasing of oil and gas in the [NPR-A]."[38] The statute granted the Secretary discretion to promulgate rules and regulations for "the protection of environmental, fish and wildlife, and historical or scenic values" of the Reserve.[39] It also provided that "[a]ny exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection" of these values to the extent consistent with the Production Act.[40] In 1977, the Secretary relied on this authority to impose "maximum protective measures" to protect the migratory waterfowl and shorebirds of the Teshekpuk Lake Special Area.[41] The Secretary also placed restrictions on low-level aircraft flights in order to protect the then-endangered Arctic Peregrine Falcon residing in the Colville River Special Area and caribou herds roaming in the Utukok River Uplands Special Area.[42]

Additionally, the Production Act ordered the DOI to conduct a study to determine "the best uses" for NPR-A land; to this end, the Act mandated that the study examine the Reserve's mineral potential, indigenous populations, and its "scenic, historical, recreational, fish and wildlife, and wilderness values."[43] This directive permitted the DOI to designate environmentally sensitive areas, making vast swaths of the NPR-A off limits to oil development.[44] As one observer noted, "Congress has recognized the Reserve as a potential source for oil and gas exploration and production," but Congress's inclusion of numerous provisions in the Production Act regarding the environmental values of the Reserve "assur[ed] that environmental concerns would not be overlooked."[45]

In other words, the plain language of the Production Act appears to balance the desire for petroleum exploration with the recognition of the

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37. 42 U.S.C. § 6504(d) (2012)
38. *Id.* § 6506a(a).
39. *Id.* § 6503(b).
40. *Id.* § 6504(a).
41. National Petroleum Reserve in Alaska Designation of Special Areas, 42 Fed. Reg. 28,723, 28,723 (June 2, 1977).
42. *Id.*
43. 42 U.S.C. § 6505(c)(1).
44. McDougal, *supra* note 20.
45. N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005).

Reserve's abundant flora and fauna. Although the NPR-A's name may suggest otherwise, it is clear from the statute's language that the Production Act sought to ensure that the Reserve would not be subjected to petroleum exploitation without due consideration of its impact on the region's natural resources.

D. Alaska's Interest in Oil Development

Predictably, Alaska is eager to expand the state's oil and gas development because income from petroleum leases accounts for ninety percent of the state's tax revenues.[46] Alaska received $7 billion from oil companies in 2011, an increase from $6.2 billion the previous year, and nearly $8.9 billion in 2012.[47] Largely because of the state's oil revenue, Alaska now holds the largest cash reserves of any state, at $12.1 billion.[48]

State residents also stand to benefit from increased petroleum development because of annual dividends paid by a special state investment fund known as the Alaska Permanent Fund. The Fund, created by amendment to the Alaska state constitution in 1976, provides that "at least 25 percent of all mineral lease rentals" and other sources of mineral royalties be set aside for Alaska's residents.[49] From 1982 through 2009, the Fund paid about $17.5 billion in dividends to Alaskans through the annual distribution of dividend checks.[50] These dividends are an important source of income for many Alaskans, especially those living in rural areas.[51]

Alaska is also interested in opening up the NPR-A because the Production Act mandates that fifty percent of all mineral leasing revenue on NPR-A land be paid to the state and spent at Alaska's discretion, rather than remaining in the U.S. Treasury's reserves.[52] Furthermore, production from the Prudhoe Bay field, situated east of the Reserve, is declining due to the depletion of the massive oil field's initial discoveries, and active development on the periphery of Prudhoe Bay has been too small to fully offset the main field's decline.[53] Directly to the East of

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46. Maureen Farrell, *Alaska's Oil Windfall*, CNN Money (Feb. 29, 2012, 5:57 AM), http://money.cnn.com/2012/02/29/markets/alaska_oil/index.htm.

47. *Id.*; *Alaska's Oil & Gas Industry*, Alaska Resource Development Council, http://www.akrdc.org/issues/oilgas/overview.html (last visited Apr. 24, 2014).

48. *Id.*

49. *What Is the Alaska Permanent Fund?*, Alaska Permanent Fund Corp., http://www.apfc.org/home/Content/aboutFund/aboutPermFund.cfm (last visited Apr. 24, 2014).

50. *The Permanent Fund Dividend*, Alaska Permanent Fund Corp., http://www.apfc.org/home/Content/dividend/dividend.cfm (last visited Apr. 24, 2014).

51. *Id.*

52. 42 U.S.C. § 6506a(l) (2012).

53. *History of Northern Alaska Petroleum Development*, Am. Petroleum Inst., http://www.api.org/oil-and-natural-gas-overview/exploration-and-production/alaska/northern-alaska-petroleum-development.aspx (last visited Apr. 24, 2014).

Prudhoe Bay lies the Arctic National Wildlife Refuge, which is closed to oil development. Thus, the oil industry has set its sights West, to the NPR-A.

II. Legislative History of the Production Act

Section 104 of the Production Act directs the Interior Secretary to incorporate environmental considerations into her determinations regarding the extent to which Reserve land is to be subjected to oil exploration. Specifically, the provision seeks to assure the maximum protection of wildlife and scenic values for the exploration of the Reserve within the Utukok River area, the Teshekpuk Lake area, and any other regions that the Secretary deems environmentally significant.[54] Notably, in language unusual among public land statutes, Congress mandated that oil exploration within these ecologically significant areas be "conducted in a manner which will assure the *maximum protection* of . . . surface values."[55] Here, as explained more below, it is significant that Congress used the words "assure the maximum protection," rather than the "withdrawal" language typical of similar statutes because this language indicates that the preferred alternative is fully consistent with the power bestowed upon the Interior by the Production Act.[56]

The Production Act's legislative history contains numerous indications of Congress's intent not to make the entire swath of NPR-A land open to oil and gas drilling. Congress chose to allow for managed oversight of the Reserve, one that considers wildlife and scenic values alongside those of the petroleum industry. The Production Act Conference Committee's Joint Statement ("Statement"), which describes the reconciled version of the House and Senate forms of the Production Act, stated the Committee's intent to vest in the Interior the responsibility to consider environmental values "so that any activities which are or might be detrimental to such values will be carefully controlled."[57]

The Statement noted that, "[w]hile 'maximum protection of such surface values' is not a prohibition of exploration-related activities within [sensitive NPR-A] areas, it is intended that such exploration operations

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54. 42 U.S.C. § 6504(a).

55. *Id.* (emphasis added).

56. For detailed analysis of the Alaska National Interest Land Conservation Act's ("ANILCA") use of the term "withdrawal" and its applicability to the Reserve's management prescriptions, see *infra* Part IV

57. H.R. Rep. No. 94-942, at 20 (1976) (Conf. Rep.) [hereinafter Conference Report]. Joint conference committee reports are highly influential pieces of legislative histories; indeed, former Chief Justice William Rehnquist once observed that "some types of legislative history are substantially more reliable than others," and cited the report of a joint conference committee as an example of a superior form of legislative history. Simpson v. United States, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting).

will be conducted in a manner which will minimize the adverse impact on the environment."[58] The Statement noted explicitly that the Interior Secretary "may designate certain areas—including specifically the Utukok River area and the Teshekpuk Lake area—where special precautions may be necessary to control activities which would disrupt the surface values" of the region.[59] Further, it was "expected that the Secretary [would] take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the [R]eserve."[60]

In discussions about the Statement on the floor of the House of Representatives, Rep. John Melcher, the House sponsor of the Act, stated the Conference Committee's intent that oil and gas exploration on NPR-A land "be designed to minimize disturbance to fish and wildlife habitat and [that] exploration activities be planned so that interference with fish and wildlife populations during critical use seasons is curtailed."[61] Melcher further elucidated the intent of the Production Act, which was "to carefully explore and determine the petroleum potential of the [R]eserve *while simultaneously* identifying and protecting other important resources[,] values[,] and uses."[62]

The House Committee on Interior and Insular Affairs, which was closely involved in considering drafts of the House version of the Production Act, affirmed the importance of considering the wildlife and many other values of the vast Reserve land.[63] The Committee determined that the Secretary was "best qualified" to determine how to appropriately protect these values.[64]

Thus, the details provided by the Statement make it clear that the Production Act's purpose was not to cede all of the NPR-A to oil and gas leasing. To the contrary, the committee's statements highlighted above depict the Secretary's discretionary power to carefully control the surface values of the area.[65] The use of the phrase "may designate" in the Conference Report[66] further indicates the discretionary latitude bestowed upon the Secretary to preserve the Reserve's wildlife and scenic values. Thus, the Interior's preferred alternative is fully aligned with the Production Act's language and its stated intent as outlined in the Conference Report and other forms of legislative history. This is

58. Conference Report, *supra* note 57, at 21.
59. *Id.*
60. *Id.*
61. 122 CONG. REC. 8886, 8887 (daily ed. Mar. 31, 1976) (statement of Rep. John Melcher).
62. *Id.* (emphasis added).
63. H.R. REP. No. 94-81, pt. I, at 8 (1975).
64. *Id.*
65. Conference Report, *supra* note 57, at 20.
66. *See* Letter from Gov. Sean Parnell, *supra* note 10.

especially true with regard to the Interior's decision to ban petroleum leasing in the Utukok River and Teshekpuk Lake areas,[67] two particularly important and ecologically sensitive regions that were singled out by Congress as warranting additional protections.

III. ANILCA AND THE "NO MORE" CLAUSE

A. BACKGROUND OF ANILCA

In 1980, President Jimmy Carter signed the Alaska National Interest Land Conservation Act, which "created numerous new federal properties in Alaska in order to maintain a 'proper balance between the reservation of' land for conservation and the disposition of 'those public lands necessary and appropriate for more intensive use.'"[68] The Act, designed in part as a major land conservation statute, sought to preserve, among other things, wildlife habitat: Alaska's tundra, forest, and coastal rainforest ecosystems; the natural resources utilized by subsistence hunters; the recreational and scientific opportunities of the region; and the "unrivaled scenic and geological values associated with natural landscapes."[69]

To this end, the Act provided for the creation of fifteen National Park Service properties, set aside roughly 97.5 million acres in new and expanded "conservation system units," and created 56.4 million acres of wilderness.[70] ANILCA also provided for various studies regarding the efficacy of oil and gas exploration and the implementation of an oil and gas leasing program on certain Alaskan federal lands.[71] Additionally, the law's passage was fueled in part by strong opposition to numerous National Monument proclamations issued by President Carter and, as a result, ANILCA revoked many of these designations.[72]

B. ANILCA'S "NO MORE" CLAUSE

Because Congress believed that ANILCA properly balanced environmental and economic interests, it determined that the statute obviated the need for subsequent legislation to conserve Alaska's public

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67. *See infra* Appendix A.

68. Se. Conference v. Vilsack, 684 F. Supp. 2d 135, 138 (D.D.C. 2010) (quoting 16 U.S.C. § 3101(d) (2012)).

69. 16 U.S.C. § 3101(d).

70. ANILCA defines "conservation system unit" as "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." *Id.* § 3102(4).

71. *See, e.g.*, *id.* § 3141 (outlining an overall study program for affected lands); *id.* § 3147 (providing for an Arctic research study).

72. *See id.* § 3209(a).

land.[73] Consequently, Congress inserted section 1326 into ANILCA, which has come to be known as the "no more" clause. Section 1326 states:

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.
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> No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.[74]

Thus, the "no more" clause essentially sought to prevent the Executive from further conserving significant portions of Alaska's public lands. By prohibiting the Executive from formally "withdrawing" (a term that is described further below)[75] Alaska's public lands, the "no more" clause was an attempt to halt the tide of conservation on such lands.

The "no more" clause will likely be invoked in the fight against the implementation of the preferred alternative. The oil and gas industry will likely argue that section 1326(a) clearly prohibits Executive withdrawals of more than 5000 acres of Alaskan federal land absent congressional approval. In all probability, Congress will not grant the Interior the necessary approval within one year of its decision. As a result, this 13.38 million acre "withdrawal" of NPR-A land must terminate within a year of the preferred alternative's issuance, and the Interior should then open the remaining area of the land to oil and gas development.

As argued below, the Interior should respond that it is not exercising its withdrawal powers within the meaning of section 1326(a), but is merely operating under its statutorily prescribed discretionary power to designate some lands as unavailable to oil and gas leasing. Put another way, if the Interior is not exercising its withdrawal powers, it is not acting within the realm of the "no more" clause's proscription on Executive withdrawals and, thus, it cannot be prevented from conserving more of Alaska's public lands.

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73. *Id.* § 3101(d).
74. *Id.* § 3213(a)–(b).
75. For a description of the meaning of "withdrawal," see *infra* notes 76–82 and accompanying text.

C. Meaning of "Withdrawal" Under ANILCA Section 1326

ANILCA does not define the term "withdrawal." Thus, "[i]n the absence of a definition of the term in ANILCA, [courts] must look to how other, related statutes define withdrawal, as well as to the context in which the term is used in the statute at issue."[76] One such statute is the Federal Land Policy Management Act of 1976 ("FLPMA"), for which the term "withdrawal"means:

> [W]ithholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.[77]

In other words, a withdrawal removes a portion of federal land from sale, lease, or use "in order to preserve a public value in the area or for a public purpose."[78]

Because numerous other ANILCA provisions mirror the FLPMA definition of withdrawal, it is reasonable and in accordance with the canons of statutory interpretation to apply the FLPMA definition to ANILCA's use of the term.[79] For instance, ANILCA section 1322, which relates to the statute's effect on withdrawals of land made prior to its enactment, states that withdrawn lands "shall not be deemed available for selection, appropriation, or disposition."[80] As the United States District Court for the District of Columbia has held, use of the phrase "selection, appropriation, and disposition" in section 1322 reflects the phrase "settlement, sale, location or entry" used in the FLPMA definition of withdrawal.[81]

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76. Se. Conference v. Vilsack, 684 F. Supp. 2d 135, 143 (D.D.C. 2010) (citing Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300–03 (2006); Pierce v. Underwood, 487 U.S. 552, 564–65 (1988)).

77. 43 U.S.C. § 1702(j) (2012). Recent designations under the Antiquities Act, 16 U.S.C. §§ 431–33 (2012), have also utilized similar withdrawal language. *See, e.g.*, Proclamation No. 8750, 76 Fed. Reg. 68,625 (Nov. 7, 2012) (establishing Fort Monroe National Monument); Proclamation No. 8884, 77 Fed. Reg. 62,413 (Oct. 12, 2012) (establishing César E. Chávez National Monument); Proclamation No. 8868, 77 Fed. Reg. 59,275 (Sept. 27, 2012) (establishing Chimney Rock National Monument); Proclamation No. 8803, 77 Fed. Reg. 24,579 (Apr. 25, 2012) (establishing Ford Ord National Monument).

78. *See* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 761 n.1 (9th Cir. 1986); *see also* New Mexico v. Watkins, 969 F.2d 1122, 1124 (D.C. Cir. 1992) ("A withdrawal exempts the covered land from the operation of public land laws."); *Vilsack*, 684 F. Supp. 2d at 143 ("[A] withdrawal exempts covered land from the operation of laws that otherwise authorize the transfer of federal lands to the private domain for private use.").

79. *See, e.g.*, Sorenson v. Sec. of Treasury, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.").

80. 16 U.S.C. § 3209(a).

81. *Se. Conference*, 684 F. Supp. 2d at 143.

Another ANILCA provision regarding a management plan for Alaska's Bristol Bay mandated that specified lands "be withdrawn from all forms of appropriation under the public land laws."[82] This wording mirrors the FLPMA definition that a withdrawal serves to withhold land from disposal "under some or all of the general land laws."[83]

Lastly, it is also reasonable to presume that Congress intended to import the FLPMA definition of withdrawal into ANILCA because FLPMA was passed in 1976, a mere four years before ANLICA. When ANILCA's framers enacted the statute, they likely had FLPMA's withdrawal definition in mind because the two laws were enacted within only a few years of each other and during a time of increased debate surrounding federal land use policy.

D. Unique Wording of the "No More" Clause

ANILCA's "no more" clause proscribes "executive branch actions *which withdraw*,"[84] as opposed to "executive withdrawals" or "withdrawals," as the term is commonly used.[85] Consequently, advocates for a broad interpretation of the "no more" clause could argue that the clause's unique wording prohibits both traditional withdrawals and Executive actions that are *similar* to withdrawals, even if those actions do not rise to the level of a formal FLPMA "withdrawal." Such a fine parsing of the "no more" clause would aid the oil and gas industry's efforts to halt conservation in the Reserve, as a broad reading of the "no more" clause means that actions that are similar to, but technically distinct from, withdrawals would also fall under the clause's ambit and further prohibit conservation attempts by the Executive branch.

Such an interpretation of Congress's wording construes the "no more" clause as a shield against Executive actions that use traditional withdrawal mechanisms—such as the Antiquities Act, which authorizes traditional Executive withdrawals to preserve historical and natural landmarks[86]—as well as those Executive actions that have the purpose

82. 16 U.S.C. § 3183(f).

83. 43 U.S.C. § 1702(j) (2012). For other ANILCA provisions reflecting the Federal Land Policy Management Act definition of withdrawal, see, e.g., 16 U.S.C. § 3200(a) (mandating that certain Alaskan lands be "withdrawn from all forms of entry or appropriation" under the mining and mineral leasing laws); 16 U.S.C. § 3142(i) (same); *id.* § 410hh-5 (directing that specified lands be "withdrawn from all forms of appropriation or disposal under the public land laws").

84. *Id.* § 3213(a) (emphasis added).

85. *See, e.g.*, 43 U.S.C. § 1702(j) (defining "withdrawal" under FLMPA).

86. *Id.* §§ 431–33. The Antiquities Act authorizes the President to protect "historic landmarks, historical and prehistoric structures, and other objects of historic or scientific interest" by declaring them national monuments. *Id.* § 431. Since the statute's enactment, "large areas such as Grand Canyon, Death Valley, and Glacier Bay National Parks were first protected by Presidential proclamation under this statute. President Clinton revived the statute from nearly two decades of disuse, and employed it to

and effect of withdrawing land but are not named as such (in other words, de facto withdrawals). This argument, however, belies the plain language of the "no more" clause and advances a misguided interpretation of congressional intent.

First, the canons of statutory interpretation support giving effect to the plain meaning of the "no more" clause, which on its face prohibits Executive branch withdrawals only in the traditional sense. Although the "no more" clause uses atypical phrasing, it still discusses Executive withdrawals and does not facially indicate that its purpose is to expand the meaning of a commonly understood term. It is a longstanding canon of statutory interpretation that Congress intends to use ordinary words in their ordinary senses, as "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[87] If Congress wanted ANILCA to use a different definition of "withdrawal" than is customary, it stands to reason that it would have included a definition of the term in the statute or at least provided a rationale for phrasing the "no more" clause in the manner that it did. Because this is not the case, courts should remain faithful to the plain meaning of the statute, which proscribes formal withdrawals in the traditional sense of the term.

Alternatively, even if opposition to the preferred alternative succeeded in convincing a court that the "no more" clause is facially ambiguous, the Interior could also rely on the statutory canon of *in pari materia* to argue that the scope of the "no more" clause is limited to traditional withdrawals. Under this interpretation, an ambiguous statute's meaning may be determined in light of other statutes on the same subject matter.[88] Here, then, the Interior would point to the definitions of "withdrawal" in FLPMA—and as used in the Antiquities Act—in order to strengthen their argument that these definitions should be read into the "no more" clause.

ANILCA's legislative history further suggests reading the "no more" clause as a limitation only on Executive withdrawal powers as traditionally understood. The bill that eventually became ANILCA, House Report ("H.R.") 39,[89] did not include section 1326 and similarly, "section 1326 was not included in the version of H.R. 39 reported to the full Senate by the Senate Committee on Energy and Natural Resources

protect more acres of federal land than any chief executive other than Jimmy Carter." GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 24 (6th ed. 2007).

87. Caminetti v. United States, 242 U.S. 470, 485 (1917).

88. BLACK'S LAW DICTIONARY 862 (9th ed. 2009) (defining *in pari materia*).

89. 126 CONG. REC. S11,183–210 (daily ed. Aug. 19, 1980).

('Senate Energy Committee'), which initially considered" H.R. 39.[90] Instead, advocates included the "no more" clause in a floor amendment as a substitute for the reported bill out of the Senate Energy Committee.[91] As a result, there is little direct legislative history related to section 1326,[92] but what does exist makes no indication that Congress intended to distinguish between "executive branch action *which withdraws*"[93] and the traditional definition of "withdrawal."

When former Alaska Senator Ted Stevens officially introduced the "no more" clause on the Senate floor, his statements suggested that Congress did not consider the "no more" clause to encompass anything more than traditional, formal withdrawals. Stevens stated that the purpose of the "no more" clause was "to provide congressional oversight for major modifications of areas established or expanded by [ANILCA] and to require congressional approval for future major executive withdrawals of certain public lands in Alaska."[94] Stevens then read the amendment containing the "no more" clause, and in its original form the clause contained the potentially disputable language proscribing "executive branch action which withdraws" rather than simply "withdrawals." In his remarks, however, Stevens did not make any explicit distinction between the two iterations, and in fact, his stated purpose for the amendment speaks of "executive withdrawals"[95] rather than "executive branch action which withdraw[]."[96]

Along with the numerous references to other types of traditional withdrawals outlined in ANILCA,[97] Stevens's interchangeable use of the two types of phrasing is strong evidence for reading the "no more" clause as an attempt to curtail the Executive withdrawal power in its traditional, statutorily defined sense.

Furthermore, much of the congressional support for ANILCA came from opposition to President Carter's use of the Antiquities Act to withdraw seventeen tracts of Alaskan land between 1978 and 1980.[98] In addition to revoking these withdrawals,[99] proponents of ANILCA's "no

90. PATTON BOGGS LLP, THE IMPACT OF ANILCA ON THE POTENTIAL DESIGNATION OF THE COASTAL PLAIN OF ANWR AS A NATIONAL MONUMENT 7 (2000) [hereinafter PATTON BOGGS BRIEF].

91. H.R. 39, 96th Cong. (as amended by Sen. Paul Tsongas, Amendment no. 1961, Apr. 17, 1980); 126 CONG. REC. S11,063 (daily ed. Aug. 18, 1980) (reporting Senator Tsongas calling up the modified amendment).

92. PATTON BOGGS BRIEF, *supra* note 90, at 10.

93. 16 U.S.C. § 3213(a) (2012) (emphasis added).

94. 126 CONG. REC. at S11,054.

95. *Id.* at S11,052.

96. *Id.* at S11,054.

97. *See infra* Part IV.C.

98. *See, e.g.*, Eric. C. Rusnak, *The Straw That Broke the Camel's Back? Grand Staircase—Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 686–89 (2003).

99. 16 U.S.C. § 3209(a) (2012).

more" clause viewed the clause as a defense against future Executive withdrawals in Alaska pursuant to the Antiquities Act, under which Executive actions are always considered withdrawals in the traditional sense of the term.[100]

Former Alaska Senator Mike Gravel confirmed the Act's intent to shield the state from future Antiquities Act pronouncements when he praised the "no more" clause for protecting his state against a future "President who will exercise against Alaska the injustice that took place at the hands of [President Carter] in his use of the Antiquities Act and at the hands of the [Interior] Secretary in his use of" FLPMA.[101] Additionally, before the "no more" clause was inserted into ANILCA, Gravel sent a letter to the Senate Energy Committee expressing his desire for the insertion of "a provision barring further conservation system designations through administration action such as the Antiquities Act."[102] Gravel also praised section 1326(b) because it exempted Alaska "from the wilderness study provisions of FLPMA in the just belief that with passage of this bill enough is enough."[103] Because the Antiquities Act[104] and FLPMA are both classic withdrawal mechanisms, Gravel's explicit mention of the need for protection against these statutes further indicates that Congress intended the "no more" clause to proscribe only formalistic withdrawals.

Consequently, it is clear from the canons of construction and ANILCA's legislative history that the unique phrasing of section 1326 does not permit it to proscribe actions other than withdrawals in the traditional sense of the word. Any argument suggesting otherwise would likely be dismissed as mere semantic quibbling.

IV. The Preferred Alternative Does Not Propose a "Withdrawal"

A. Implied Statutory Repeals Are Not Favored

The Interior is fulfilling its statutory obligations under the Production Act by balancing the energy resources of the Reserve with environmental considerations. To interpret ANILCA's "no more" clause as a restriction on that obligation would be akin to allowing ANILCA to implicitly repeal the Production Act. The Supreme Court has acknowledged that, while a statute can operate to amend or even repeal a previous statutory provision, "repeals by implication are not favored" and the "intention of the legislature to repeal must be clear and

100. Coggins, *supra* note 86, at 24.
101. 126 Cong. Rec. S11,183, S11,188 (daily ed. Aug. 19, 1980).
102. S. Rep. No. 96-413, at 446 (1979).
103. *Id.* (internal quotation marks omitted).
104. For a list of recent withdrawals effectuated pursuant to the Antiquities Act, see *supra* note 77.

manifest."[105] A court should not infer a statutory repeal "unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order" for a provision to retain meaning.[106]

The Court should not abandon its requirement for an explicit directive authorizing a statutory repeal. There is nothing in ANILCA—neither in the "no more" clause nor anywhere else—that expressly manifests an intention to repeal the environmental provisions of the Production Act. Repeals by implication should be avoided,[107] and the Production Act would retain its original intent if the "no more" clause was interpreted to find that the Interior's discretionary actions pursuant to the Production Act do not constitute withdrawals. In other words, a court reviewing the Interior's preferred alternative should hold that the flexible nature of the Interior's leasing program is consistent with the "no more" clause.

The fact that Congress passed significant amendments to the Production Act just weeks after ANILCA's enactment[108] further suggests that Congress did not intend for the Production Act's management prescriptions to conflict with the "no more" clause. One such Production Act reform required activities to consider "such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources" of the Reserve.[109] This provision reauthorized the Secretary's discretionary power to protect the Reserve's abundant ecological treasures; indeed, the subsection's use of the term "prohibitions" is especially applicable with regard to the Interior's recent decision to prohibit oil and gas leasing on some of the Reserve's land.

Various other Production Act reforms passed shortly after ANILCA's enactment also speak of the Secretary's ability to consider natural resource conservation in NPR-A management decisions,[110]

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105. Watt v. Alaska, 451 U.S. 259, 267 (1981) (internal quotation marks omitted) (citation omitted).

106. Traynor v. Turnage, 485 U.S. 535, 548 (1988) (internal quotation marks omitted).

107. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 549 (1974) ("[T]he cardinal rule . . . that repeals by implication are not favored.").

108. Kunaknana v. Clark, 742 F.2d 1145, 1147 (9th Cir. 1984) (describing the plaintiff's assertion that a primary objective of ANILCA, "enacted just weeks before the [Production Act] was amended, was to provide the opportunity for rural residents engaged in a subsistence way of life [the opportunity] to do so" (internal quotation marks omitted)).

109. 42 U.S.C. § 6506a(b) (2012).

110. *See id.* § 6506a(j)(1) (permitting NPR-A oil and gas lessees to unite with each other to operate under a single agreement "for the purpose of conservation of the natural resources" and "if the Secretary determines the [lessee unification] action to be necessary or advisable in the public interest," with "public interest" defined to include considerations of the "impact to surface resources of the leases"); *id.* § 6506a(k)(1)(A) (authorizing the Secretary to "waive, suspend, or reduce the rental fees or minimum royalty" on leaseholds in order to encourage increased oil and gas recovery *or* "in the

further signaling Congress' intent for the Reserve to be managed with attention to both industry and environmental interests. Perhaps most importantly, the 1980 Production Act reforms explicitly continued the protections outlined in the Act's original section 104(a), which maintains that oil exploration near the Utukok River and Teshekpuk Lake areas, along with any other NPR-A areas the Secretary deems ecologically significant, shall be subject to maximum protections.[111]

Especially when viewed in light of its chronological proximity to ANILCA's enactment, the increased environmental safeguards provided for in the Production Act amendments indicate that Congress did not intend decisions such as the Interior's preferred alternative to be subject to the constraints of ANILCA section 1326. If Congress had intended such discretionary management decisions to be withdrawals for the purposes of ANILCA, it would not have promoted conservation and ecological planning in the Production Act just a few weeks after ANILCA's passage. If it had wanted this result, it is reasonable to assume that Congress would have explicitly pulled the new Production Act provisions under the guise of the "no more" clause at the time of their enactment or, at the very least, omitted much of the conservation language from the Production Act reforms. The cases described in the following two sections serve as additional evidence that the preferred alternative does not constitute a "withdrawal" under ANILCA.

B. *Southeast Conference v. Vilsack*

Courts have properly concluded that the Executive's conservation efforts in Alaska do not rise to the level of formal "withdrawals." For example, a court hearing an allegation that the preferred alternative's refusal to issue leases constitutes a prohibited withdrawal under the "no more" clause should look to the reasoning of the D.C. District Court in *Southeast Conference v. Vilsack*[112] for guidance.

In *Southeast Conference*, several cities and nonprofit corporations in Alaska brought suit against the U.S. Forest Service, alleging that the Forest Service's plan to reduce the amount of available land in the Tongass National Forest for timber harvesting violated the "no more" clause.[113] Similar to the preferred alternative, the plan at issue in *Southeast Conference* sought to promote "the ecological, social, and economic values derived from" the 16.8 million acre Tongass National

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interest of conservation"); *id.* § 6506a(k)(3) (articulating the procedures involving a lessee's suspension of payments "[i]f the Secretary, in the interest of conservation," suspends a lessee's petroleum production).

111. *Id.* § 6506a(n)(2) ("[A]ny exploration or production undertaken pursuant to this section shall be in accordance with section 6504(a) of this title.").

112. Se. Conference v. Vilsack, 684 F. Supp. 2d 135, 143 (D.D.C. 2010).

113. *Id.*

Forest in Southeast Alaska.[114] To this end, the Forest Service allowed timber harvesting on vast swaths of Tongass Forest land, but also designated 1.22 million acres as "old growth reserves" and prohibited timber harvesting on these lands.[115]

The plaintiffs in *Southeast Conference* contended that the "old growth reserves" designation "withdr[ew] more than 5,000 acres from the timber harvest" and thereby violated the "no more" clause.[116] The *Southeast Conference* court, however, rejected this argument. After extensive explanation showing that the FLPMA definition of "withdrawal" should also be used in the context of ANILCA's "no more" clause, the court concluded that the Forest Service's action did not constitute a withdrawal because there was no evidence "that the [old growth reserve] designations here have the effect of suspending any public land laws," an essential element of a formal "withdrawal."[117] Instead, the designation was simply an example of the Forest Service's legislatively mandated responsibility to plan for multiple uses of federal land.[118]

Much like the plan for the Tongass National Forest, the preferred alternative represents adherence to the Interior's statutory responsibility under the Production Act to "assure the maximum protection of" the land's significant ecological and scenic values.[119] Additionally, the Interior's refusal to issue leases on certain Reserve lands should not be considered a withdrawal because, much like the designation of "old growth reserves" at issue in *Southeast Conference*, the preferred alternative "neither exempt[s] lands from the operation of public land laws nor suspend[s] the operation of those laws on certain lands."[120] A land-use designation such as the one outlined in the preferred alternative simply has "no effect on laws that authorize the transfer of federal lands to the private domain."[121] In fact, the only court to consider the contention that "land use designations are withdrawals summarily rejected it."[122]

The Interior's defense of the preferred alternative may actually be stronger than its defense of the old growth reserves in *Southeast Conference*. Under the National Forest Management Act ("NFMA"), the Forest Service was obliged to outline a detailed "plan" for Tongass

114. *Id.*
115. *Id.* at 139.
116. *Id.* at 141.
117. *Id.* at 144.
118. *Id.*
119. 42 U.S.C. § 6504 (2012).
120. *Vilsack*, 684 F. Supp. 2d at 144.
121. *Id.*
122. *Id.* (citing Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1315 (W.D. Wash. 1994)).

management,[123] whereas the Production Act mandates no such action. NFMA's formalistic management plan requirements are more in line with FLPMA's procedural withdrawal requirements, which stand in contrast to the discretionary authority that the Production Act provides to the Secretary. Put another way, because the Production Act does not explicitly mandate that the Interior promulgate a "plan" for management of the Reserve, the Production Act does not rise to the same level of procedural formality outlined in NFMA or FLPMA. As a result, the preferred alternative presents an even stronger case than *Southeast Conference* for withstanding a "no more" clause attack because the Production Act's lack of formalistic planning requirements could be viewed as a substantial discretionary allowance to the Interior rather than a blueprint for rigid withdrawal proceedings. *Bob Marshall Alliance v. Hodel* also bolsters the argument that the preferred alternative does not advocate a formal Executive withdrawal.

C. *Bob Marshall Alliance v. Hodel*

In *Bob Marshall Alliance v. Hodel*,[124] the Ninth Circuit interpreted FLPMA's definition of "withdrawal," to institute the rule that a "'[w]ithdrawal' of public lands requires a formal procedure which, for parcels exceeding 5000 acres, includes congressional approval; the land is effectively segregated from the operation of public land laws for a period of up to 20 years."[125] In *Bob Marshall*, wilderness groups brought suit against the Interior, other federal agencies, and private lessees to challenge the issuance of oil and gas leases in Montana's Lewis and Clark National Forest.[126] One of *Bob Marshall*'s defendant lessees, in an argument similar to one the oil and gas industry could mount against the preferred alternative, asserted "that if the agencies had either denied or deferred action on . . . lease applications, their action would have constituted an illegal administrative 'withdrawal' of [the region] from mineral leasing."[127]

In support of this assertion, the defendant lessee cited *Mountain States Legal Foundation v. Andrus*,[128] in which the plaintiff alleged that the inaction of the Forest Service and Bureau of Land Management on applications for oil and gas leases in national forests constituted a "withdrawal" under FLPMA.[129] The *Mountain States* court agreed, stating that the agencies effectively placed large areas of federal land off

123. *See* 16 U.S.C. § 1604(a) (2012).
124. 852 F.2d 1223 (9th Cir. 1988).
125. *Id.* at 1229.
126. *Id.* at 1224–25.
127. *Id.* at 1229.
128. 499 F. Supp. 383 (D. Wyo. 1980).
129. *Id.* at 386.

limits from oil and gas leasing in order to protect wildlife.[130] The U.S. District Court in Wyoming then declared that "[w]e cannot allow the [d]efendants to accomplish by inaction what they could not do by formal administrative order."[131]

But *Bob Marshall* rejected this analysis, declaring that "*Mountain States* is not binding on us and we do not find its reasoning persuasive."[132] The Ninth Circuit elaborated:

> We fail to see how a decision not to issue oil and gas leases . . . would be equivalent to a formal withdrawal. [Defendant] cites only one case, *Mountain States Legal Foundation v. Andrus*, as authority for the proposition that deferring action on oil and gas lease applications can constitute an unlawful administrative withdrawal. . . . In that case, the court concluded that the Interior and Agriculture Departments had illegally withdrawn over a million acres of land because they had failed to act on oil and gas lease applications and had thereby removed the land from the operation of the Mineral Leasing Act of 1920. Yet as the court acknowledged, the Mineral Leasing Act gives the Interior Secretary discretion to determine which land are to be leased under the statute. We have held that the Mineral Leasing Act allows the Secretary to lease such lands, but does not require him to do so. . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract.[133]

Just as with the mineral leases in *Bob Marshall*, the Interior has authorization to use its discretion to determine the specific NPR-A areas to be subjected to oil and gas leases. As noted in Part II, the Production Act contains provisions detailing the Reserve's importance as a source of domestic petroleum and a significant ecological resource. Thus, similar to the *Bob Marshall* court's conclusion that the Mineral Leasing Act grants the Secretary discretion to issue oil and gas leases, ANILCA's attempt to strike a balance between petroleum exploration and environmental considerations leaves the Secretary discretion to refuse issuing leases on given tracts of the Reserve.[134]

In fact, some provisions of ANILCA explicitly exempt leasing programs on the Reserve from immediate exploration.[135] Thus, the statutory scheme established by the Production Act and ANILCA governing petroleum development and environmental management on NPR-A land is analogous to the mineral leasing at issue in *Bob Marshall*. A court considering the Interior's decision not to issue leases on various

130. *Id.* at 391, 397.

131. *Id.*

132. *Bob Marshall*, 852 F.2d at 1230.

133. *Id.* at 1229–30 (internal quotation marks omitted) (citations omitted).

134. *See, e.g.*, 16 U.S.C. § 3148 (2012) (outlining the oil and gas leasing program for Alaskan lands and granting leeway to the Secretary to approve or deny leases).

135. *Id.* § 3148(a).

tracts of Reserve land should afford the agency the same discretionary freedom as it was granted in *Bob Marshall*.

Accordingly, *Southeast Conference* and *Bob Marshall* strongly support the assertion that the protection of land under the preferred alternative does not constitute a "withdrawal" under ANICLA. Thus, the preferred alternative does not contravene the "no more" clause and should be upheld by any court that reviews it.

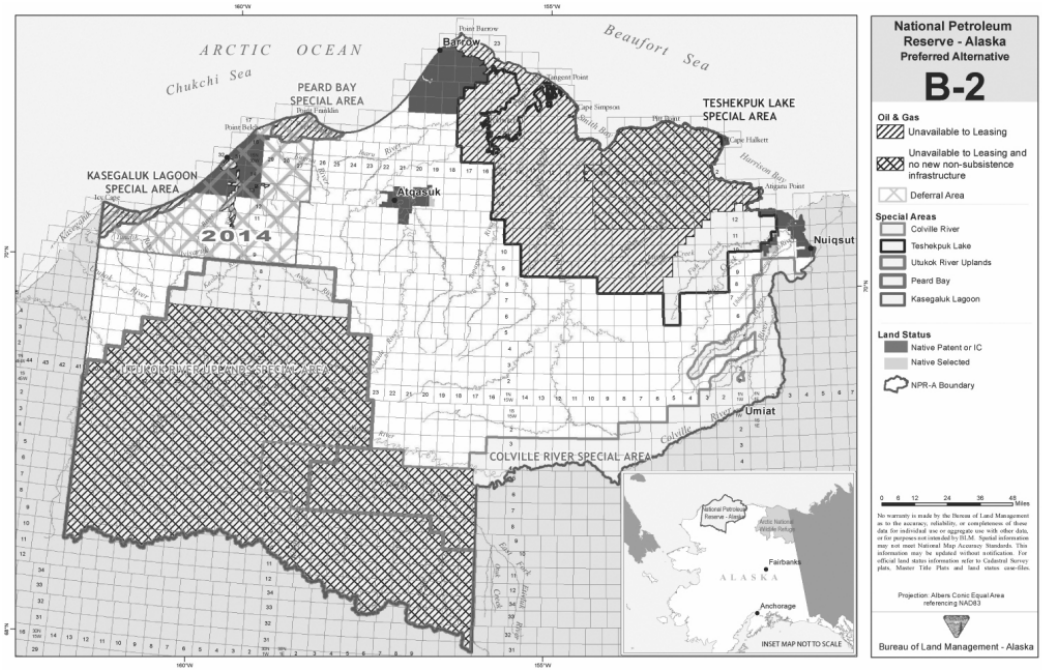
CONCLUSION

The Interior's recent decision to open roughly half of NPR-A land to petroleum leasing while placing the rest of the Reserve off limits to such leases represents a measured approach to federal land-use planning. The preferred alternative balances multiple interests through its protections for much of the area's abundant ecological resources and allows for the development of nearly three-quarters of the Reserve's estimated petroleum holdings. The execution of the preferred alternative neither contravenes the "no more" clause nor any other statutory provisions. In fact, the preferred alternative is in full compliance with the Interior's responsibilities the Production Act and ANILCA. As a result, any future court reviewing a challenge to the preferred alternative should respect the Interior's decision and allow the various stakeholders to proceed under the preferred alternative as it stands.

Appendix A: NPR-A IAP/EIS Alternatives: Major Land Allocations & Estimates of Economically Recoverable Oil & Gas

Land Allocation	Alternative A	Alternative B-1	Alternative B2 ("Preferred Alternative")	Alternative C	Alternative D
Lands that could be offered for O&G leasing	13 million acres (57% of NPR-A subsurface available; 1.57 million deferred until 2014; 425,000 deferred until 2018)	11 million acres (48% of NPR-A subsurface; current deferrals honored until expiration)	11.8 million acres (52% of NPR-A subsurface; current deferrals honored until expiration)	17.9 million acres (76% of NPR-A subsurface; current deferrals honored until expiration)	22.8 million acres (100% of NPR-A subsurface; current deferrals honored until expiration)
Special Areas	4 (8.3 million acres) TLSA: 1.75 million acres CRSA: 2.44 million acres URUSA: 3.97 million acres KLSA: 97,000 acres	5 (15.5 million acres) TLSA: 3.76 million acres CRSA: 2.44 million acres URUSA: 7.06 million acres KLSA: 364,000 acres PBSA: 1.6 million acres	5 (13.35 million acres) TLSA: 3.65 million acres CRSA: 2.44 million acres URUSA: 7.06 million acres KLSA: 97,000 acres PBSA: 107,000 acres	5 (9.0 million acres) TLSA: 1.87 million acres CRSA: 2.44 million acres URUSA: 4.44 million acres KLSA: 97,000 acres PBSA: 107,000 acres	4 (8.3 million acres) TLSA: 1.75 million acres CRSA: 2.44 million acres URUSA: 3.97 million acres KLSA: 97,000 acres
Wild and Scenic River recommen-dations	0	12 Wild River designation: Colville (where the BLM manages the bed and both banks), Nigu, Etivluk, Ipnavik, Kuna, Kiligwa, Nuka, Awuna, Kokolik, and Utukok Rivers and Driftwater and Carbon Creeks within the NPR-A	0	3 Scenic River designation: Colville (where the BLM manages the bed and both banks), Kiligwa, and Utukok Rivers within the NPR-A	0
Oil (millions of barrels discovered and undiscovered)	723 95%	50 66%	549 72%	707 93%	761 100%
Gas (trillion cubic feet discovered and undiscovered)	10.099 58%	8.41 48%	8.738 50%	15.388 88%	17.391 100%

Appendix B: Map of the Preferred Alternative



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