

# ARCTIC WILDLIFE NATIONAL MONUMENT

Legal analysis - August 2000

The Arctic National Wildlife Refuge in northeast Alaska is the only place in the circumpolar North where you can find such a rich assemblage of Arctic and sub-Arctic landscapes, wildlife and habitats. Within this intact but fragile Arctic ecosystem exists a uniquely diverse ecology unmatched anywhere else on earth. This area and the surrounding region also contain historic and prehistoric evidence of human activities reaching back thousands of years; to the ice age and earliest peopling of the Americas. Today it remains the resource base for the cultural and nutritional needs of the Gwich'in and Inupiat people who live in the region.

The lands of the Arctic National Wildlife Refuge are worthy of this nation's highest commitment to protection of their scientific and historical values, its imperiled ecological and wildlife communities, its multifaceted landscapes and waterscapes, and its living Native cultures. The President of the United States has the power and the opportunity under the Antiquities Act of 1906 to make this commitment by creating the Arctic Wildlife National Monument encompassing the "1002" and Wilderness areas of the Arctic Refuge; leaving a historic and unique legacy of Arctic and sub-Arctic wildlife, wild lands, and living cultures for all future generations of Americans.

The attached legal analysis explains how the President may create the Arctic Wildlife National Monument and why the "no more" provision of the Alaska National Interest Lands Conservation Act is not a bar to Presidential action. The key points are:

- The "no more" clause places restrictions only on executive branch "withdrawals" of public lands from operation of the public land laws.
- The "1002" and Wilderness areas of the Arctic National Wildlife Refuge are already fully withdrawn from operation of the public land laws, including the mining and mineral leasing laws; therefore, designating all or portions of these areas as the Arctic Wildlife National Monument will not be a withdrawal.
- The Arctic Wildlife National Monument must remain under the management of the U.S. Fish & Wildlife Service and available for all congressionally authorized uses and activities. However, the Monument may be given additional purposes consistent with the purposes of the Arctic Refuge, such as the protection of the Athabascan and Inupiat cultures that rely on the Monument and its resources.
- Creation of the Arctic Wildlife National Monument will commit the future of those federal lands, including the coastal plain ("1002" area) that is not now designated wilderness, to protective purposes. The future of the "1002" area was the major piece of unfinished business 20 years ago when ANILCA became law. Monument designation will resolve this question in favor of conservation; and ultimately reinforce the public's desire for Wilderness protection there. Although Congress may undo the designation, or authorize oil and gas development within the Monument, Congress has rarely taken such actions with respect to national monuments.

## QUESTION PRESENTED

The Gwich'in Steering Committee, national and state conservation organizations are advocating the creation of the Arctic Wildlife National Monument, to be composed of the "1002" coastal plain and Wilderness areas of the Arctic National Wildlife Refuge. Does ANILCA's "no more" clause preclude the President from taking this action under the Antiquities Act?

## SHORT ANSWER

No. The "no more" clause requires congressional notice and ratification for executive branch "withdrawals" of more than 5,000 acres in the aggregate of public lands in Alaska. The "1002" and wilderness portions of the Arctic Refuge are already fully withdrawn from operation of all the public land laws. Therefore, Presidential designation of the Arctic Wildlife National Monument would not be a withdrawal and would be effective without adherence to the congressional notice and ratification requirements of the "no more" clause. The Arctic Wildlife National Monument would continue to be managed by the U.S. Fish & Wildlife Service and to be available for all congressionally authorized uses and activities. The Monument may be given additional purposes consistent with the purposes of the Arctic Refuge; the most critical of these is the protection of the Athabascan and Inupiat cultures that are so deeply intertwined with the resources of this land.

## BRIEF ANALYSIS

### A. *ANILCA and the "No More" Provision*

With passage of the Alaska National Interest Lands Conservation Act ("ANILCA," or "Alaska Lands Act") in 1980, Congress purported to "provide sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." ANILCA § 10 1 (d), 16 U.S.C. § 3 101 (d). Among other provisions, the Act set aside about 97.5 million acres in new and expanded "conservation system units" and created 56.4 million acres of wilderness.

In the "Purposes" title of the Alaska Lands Act, Congress stated its view that the Act struck the proper balance between lands set aside for conservation and lands left available for other uses, and that future, legislation creating new conservation system units in Alaska would be unnecessary.<sup>1</sup> In the "no more" provision, section 1326, Congress put action to these words by placing limitations on future actions by the executive branch to establish or expand conservation

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<sup>1</sup> This clause of the "Purposes" title, ANILCA § 10 1 (d), is sometimes referred to as the "no more" clause, but the provision more commonly called the "no more" clause is ANILCA section 1326.

system units in Alaska. The provision renders ineffective any executive branch "withdrawal" of more than 5,000 acres in the aggregate absent public and congressional notice, and it automatically terminates such withdrawal after one year unless Congress ratifies it by joint resolution.

### ***B. Meaning of "Withdrawal"***

ANILCA does not provide a definition of the term "withdrawal." In the general context of the public land laws, however, "withdrawal" is understood as

a generic term referring to a statute, an executive order, or an administrative order that changes the designation of a described parcel from "available" to "unavailable" for homesteading or resource exploitation... (A withdrawal] can remove the parcel from some or all of the remaining disposition or use laws, including the mining and mineral leasing laws.

George C. Coggins, Charles F. Wilkinson & John Leahy, Public Natural Resources Law 285 (3d ed. 1992). Under this definition, a "withdrawal" of public land means a removal of that land from operation of some or all of the public land laws under which the land would ordinarily be made available for settlement, mineral location, or other forms of disposition or private use.

This definition is echoed in the keystone statute of modern public land law, the Federal Land Policy & Management Act (FLPMA) of 1976. See 43 U.S.C. § 17020). It is also echoed in the use of the term in several of ANILCA's substantive provisions. See ANILCA §§ 206, 304(c), 402(b), 502, 503(f)(1), 9066), 131 l(a). Finally, this definition is reflected in numerous Supreme Court decisions and Interior Department decisions. See, e.g., *Alaska v. United States* ("*Dinkum Sands* '), 521 U.S. 1, 44 (1997); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 203 (1987); *Andrus v. Utah*, 446 U.S. 500, 513 (1980); *United States v. Midwest Oil Co.*, 236 U.S. 459, 467 (1915); see also 60 I.D. 402 (1950); 28 L.D. 25 (1899).

Because the "1002" and wilderness portions of the Arctic Refuge are already fully withdrawn from operation of the public land laws, designating all or a portion of these areas as a National Monument would not remove them from operation of those laws and would not amount to a withdrawal.

### ***C. Legislative History of the "No More" Clause***

The legislative history of ANILCA and its "no more" provision indicates that the intent of Congress was in conformance with this general understanding of the term "Withdrawal": Congress intended to prevent the executive branch from removing additional lands from operation of the public land laws. This action reflected two primary motivations. One was the State's desire to proceed with its land selections. State land selections were authorized by the Alaska Statehood Act in 1959 but they were impeded first by Native land claims, then by the federal conservation withdrawals authorized by the Alaska Native Claims Settlement Act (ANCSA) of 1971 and not finalized until ANILCA was passed in 1980. The second was the desire of many members of Congress that the Executive not alter the hard-fought allocations

made in ANILCA between conservation lands and lands left available for state selection and private appropriation.

Congress intended to preclude future Executive action changing that fundamental allocation—removing additional lands from operation of the public land laws for purposes of conservation—without congressional approval. There is no indication that Congress intended to prohibit the executive branch from changing the designation of, or adding new designations to, lands already withdrawn from selection and private appropriation and included within the conservation system lands.

***D. Designation of National Monuments Under the Antiquities Act***

Under the Antiquities Act of 1906, the President is authorized to "declare by public proclamation" national monuments on sites of historic and scientific interest, and "may reserve" federal lands to protect those sites. In the general context of public land law, the term "reserve" means "a dedication of withdrawn land to a specified purpose, more or less permanently." Public Natural Resources Law at 285. A reservation differs from a withdrawal in that a withdrawal is a removal of lands from operation of the general laws allowing use and disposition of public lands, whereas a reservation is a dedication of the withdrawn lands to specified uses. However, the term "reserve" is sometimes used to include the initial removal of lands from the public domain. The Antiquities Act itself uses the term "reserve" in this sense, as its legislative history and the history of Executive practice in designating national monuments demonstrates. Despite the malleable definition of the term "reserve," the term "withdraw" is consistently used to mean the removal of lands from operation of the public land laws.

Because designation of the Arctic Wildlife National Monument would not effect any additional removal of the area from operation of the public land laws, the action would not amount to a withdrawal.

***E. Current Status of the "1002" and Wilderness Portions of the Arctic National Wildlife Refuge***

The Arctic Refuge has been reserved for wildlife purposes since it was first set aside in 1957. With passage of ANILCA in 1980, Congress doubled the size of the Arctic Refuge and withdrew all Alaska wildlife refuges from operation of all the public land laws except mineral leasing. Congress also withdrew the coastal plain (the "1002 area") of the Arctic Refuge from operation of the mineral leasing laws and designated the remainder of the original Arctic Range as wilderness, which automatically withdraws the area from operation of the mining and mineral leasing laws. Thus, the "1002" and wilderness areas are fully reserved and withdrawn from all private appropriation and use under the public land laws. Congress also prohibited oil and gas development anywhere in the Arctic Refuge without further congressional action and has not, since then, approved oil and gas exploration or development in the Arctic Refuge.

***F. Management of the Proposed Arctic Wildlife National Monument***

The Arctic National Wildlife Refuge is currently managed by the U.S. Fish & Wildlife Service as part of the National Wildlife Refuge System. The laws governing the National Wildlife Refuge System require an act of Congress to remove an existing refuge from the refuge system, and thus from the jurisdiction of the Fish & Wildlife Service; therefore, the President should leave management of the proposed Arctic Wildlife, National Monument with the Fish & Wildlife Service. This management regime is appropriate given that the unique wildlife and pristine wildlife habitat of the proposed Monument are foremost among its notable assets.

The President has the authority to designate national monuments under the management of agencies other than the National Park Service. Neither the Antiquities Act nor the National Park Service Organic Act requires that all monuments be under the aegis of the Park Service, and Presidents have created national monuments under the management of the U.S. Forest Service, the Fish & Wildlife Service, and the Bureau of Land Management.

The Arctic Wildlife National Monument may be given additional purposes, and may be managed to achieve those purposes, so long as they are consistent with those of the Arctic Refuge. The Arctic Refuge was established to protect fish and wildlife and their habitat, fulfill international treaty obligations concerning fish and wildlife, continue to provide opportunities for subsistence uses by local residents, and protect the water quality and quantity of the Arctic Refuge. One critical purpose of the proposed Monument, which is consistent with the existing purposes of the Arctic Refuge, should be to protect the cultures and subsistence resources of the region's Athabascan and Inupiat peoples.

**CONCLUSION:  
ARCTIC WILDLIFE NATIONAL MONUMENT**

Because the “1002” and wilderness portions of the Arctic Refuge are reserved for a public purpose and fully withdrawn from operation of the public land laws, Presidential creation of the Arctic Wildlife National Monument would not effect any removal of the area from selection, settlement, sale, location, or entry under the land laws and would therefore not be a withdrawal. The Monument would continue to be managed by the U.S. Fish & Wildlife Service and would continue to be available for all congressionally authorized uses and activities. The purposes of the Monument designation, in particular the protection of the region's Native Athabascan and Inupiat cultures, must be consistent with the purposes of the Arctic Refuge.