ALASKA LEGISLATURE COMMITTEE FILES 1987 - 1988 8672
4885 HRES ANWR: PROXY STATEMENTS, LEGAL (MOBILE/TFA), PRESS

457

Only if the specific elements of the political question doctrine are met can this Court withhold review of the legality of the Defendants' actions. The Supreme Court set six grounds for deciding whether a case involved a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination reserved for judicial discretion; (4) the impossibility of deciding without expressing lack of respect for the coordinate branches of government; (5) unusual need for adherence to a political decision already made; and (6) the potential for embarrassment from multifarious pronouncements by various departments. Northrop Corp., supra, 705 F.2d at 1046, citing Baker v. Carr, supra, 82 S.Ct at 710. This test is extremely narrow. Quinn v. Robinson, supra, 783 F.2d at 788.

None of these factors are even remotely implicated here. The legal questions presented, whether the actions of the Interior Department are lawful under specific statutes and regulations, are squarely within the province of the judiciary. Clear judicial standards are set forth for the legal issues presented. See Pl. Response at 27-32. The legal issues do not require the Court to decide whether a land exchange would be good or bad public policy -- the entire point is that Congress reserved this basic policy decision to itself. Pl. P.I. Brief at 32-39. Deciding that Interior is acting outside of its legal authority will not express any lack of respect for coordinate branch of

government any more than in any case in which the court rules that an agency has violated the law. There is no "political" decision already made, since Defendants admit that they have not yet passed on the wisdom of any proposed land exchange. This case involves whether Interior has the legal authority to make such a decision at all. Finally, there is no potential that a judicial ruling on the issues of law in this case will result in embarrassment due to "multifarious pronouncements of various departments."

The intervenors try in two ways to render this case nonjusticiable as a political question. First, Koniag argues that the case turns on Interior's motive in engaging in these negotiations. Koniag Response at 25. See Citizens for Management of Alaska Lands v. Dept. of Agriculture, 447 F. Supp. 753 (D. Alaska 1978). But unlike the Citizens case, motive is irrelevant here. NEPA and the CEQ regulations prohibit agency resource commitments that have a prejudicial effect on the decisionmaking process, regardless of motive. Similarly, ANILCA, ANCSA, and the Wilderness Act simply prohibit the Defendants' actions. Motive is again irrelevant. The Court need only pass on the legality of Defendants' actions, not Interior's motives.

Citizens and two other cases relied on by Defendants, Chamber of Commerce v. Department of Interior, 439 F. Supp. 762 (D.D.C. 1977) and Wingfield v. OMB, 7 ELR 20,362 (D.D.C. 1977), are unpersuasive for two additional reasons. These cases preceded another district court case in the same court, Atchison, supra, and two D.C. Circuit cases, Realty, supra, and Izaak

Walton League v. Marsh, 655 F.2d 346 (D.C. Cir. 1981), all of which disagreed with the reasoning in the earlier cases. More importantly, these cases simply affirm our position that if a final proposal is submitted to Congress, the political question doctrine may well preclude meaningful relief since the court cannot order Congress not to consider the proposal. The cases in which political question factors do not preclude relief are those in which relief is sought before such problems are encountered. Trustees for Alaska v. Hodel, supra; Atchison, supra.

D. The First Amendment Does Not Affect Jurisdiction Here

NLG claims that this action infringes a constitutional right to "talk to Interior." While NLG undoubtedly has a constitutional right to petition the government, this does not include a right to have Interior respond through detailed negotiations, particularly if prohibited by statute or regulation. NLG cites no cases demonstrating that the First Amendment guarantees two-way communications, for no such cases exist.

Plaintiffs do not seek to enjoin NLG or any other group's right to petition Interior. Indeed, we do not seek to enjoin the intervenors from doing anything, and did not even name them as defendants in the case. We seek to enjoin only Interior's ongoing illegal pursuit of the negotiations.8/

8/ The cases cited by NLG involve largely the use of "long-arm" statutes to find personal jurisdiction against parties based on their contacts with the Department of the Interior regarding proposed land exchanges. These cases are completely inapposite.

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Negotiations Violate NEPA

The Defendants mischaracterize Count 1, which asserts that NEPA and the CEQ regulations prohibit agencies from taking actions or committing agency resources that prejudice a NEPA decision by increasing the government's stake in the controversy, by creating institutional inertia, or by foreclosing options. Pl. P.I. Brief at 11-23. Interior prepared an LEIS on the 1002 Report, but a final decision has not been made by Congress . Thus, Count 1 in no way relates to the separate LEIS that would have to be prepared if land exchange negotiations are allowed to proceed. Due to this basic misunderstanding, most of Defendants' arguments are irrelevant to Count 1.9/

The purpose of NEPA is to ensure that environmental factors are taken into account in decisions that may have a substantial effect on the environment, and that a full range of alternatives

---

9/ Interior and NLG also make the absurd argument that because the Supreme Court has overturned various lower courts in specific NEPA cases, this Court obviously would be incorrect in enforcing NEPA here. While the cases cited did overturn lower courts in NEPA cases, not a single one is on point. United States v. SCRAP involved a provision of the Interstate Commerce Act that expressly overrode NEPA. 412 U.S. 669, 690-91 (1972). Aberdeen and Rockfish v. SCRAP, like Kleppe, involved the timing of an initial EIS. 422 U.S. 289 (1975). Flint Ridge Development Corp. v. Scenic Rivers Assn. involved an express statutory conflict. 426 U.S. 776, 788 (1976). Vermont Yankee v. NRDC addressed the agency's right to decide what procedures should be used in evaluating a given issue. 435 U.S. 519 (1978). Andrus v. Sierra Club ruled simply that NEPA's LEIS requirement did not apply to appropriation requests. 442 U.S. 347, 349 (1979). In sharp contrast to these cases finding that courts erred on specific aspects of NEPA, New York v. Kleppe, quoted above, sets forth the general rule that lower courts should vigorously enforce NEPA's procedural requirements. 97 S.Ct. at 6-7.

are considered before an "irreversible and irretrievable commitment of resources" is made. Pl. P.I. Brief at 13-15; 42 U.S.C. 4332(C)(v). If an agency begins to implement one possible alternative identified in an EIS before a decision is reached based on the EIS analysis, the process is meaningless. Unless the ultimate decisionmaker is left with the "widest freedom of choice," Realty, supra, 564 F.2d at 456-57, NEPA's goal of "informed decisionmaking" is not met. Thus, in New York v. Kleppe, the Supreme Court said:

> It is axiomatic that if the government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources" . . . a citizen's right to have environmental factors taken into account by the decisionmaker would be irreparably impaired. For this reason, the lower courts have enjoined the government from such resource commitments without first preparing impact statements.

97 S.Ct. 4, 6-7 (1976).

In the nonlegislative EIS context, the final EIS and the agency record of decision is the critical point before which resources that prejudice the final result should not be committed. In this case, and in all cases involving an LEIS, it is axiomatic that resources should not be committed to one alternative before the actual decisionmaker, Congress, has acted. Such actions create momentum behind the alternative that has begun, increase the government's stake in that particular option, and foreclose other viable options. In this case, plaintiffs also proved that the exchanges will be used intentionally to bias Congress. Pl. P.I. Brief, at 16-23.

In fact, the intervenors use this very argument to show irrepa-

rable harm. They have devoted time and effort to the proposed exchange, they have spent a lot of miney, and it would be "unfair" not to allow the exchanges to go forward. Sagesar affidavit, Gross affidavit, Eluska affidavit. This is precisely the argument that will be used in Congress.

The ongoing negotiations also foreclose other options for dividing the coastal plain. In fact, the State has set forth a viable alternative proposal for land exchanges after Congress reaches its basic decision. Pl. Exh. 25, attached hereto. But once the specific details of Interior's proposal are worked out, after the parties to the negotiations have spent so much time, effort, and money on these proposals, the State alternative is less likely to receive serious attention.

Only Koniag appears to understand this fundamental point. However, they argue that NEPA only prohibits prejudicial agency actions before the agency makes its decision, and when Congress is the final decisionmaker, no such prohibition applies. Koniag cites no case law to support this point. In fact, the proposed distinction makes little sense, and would frustrate the purposes of NEPA in cases where agencies prepare the EIS but Congress makes the final decision. Either the premature commitment of resources will influence Congress to pursue the option initiated by the agency, in violation of NEPA's goals, or the agency is wasting public resources. Moreover, cases dealing with NEPA in the legislative context have found no distinction between the role of NEPA in protecting administrative and legislative decisions. Atchison, supra, 431 F. Supp. at 727; Realty, supra, 564 F.2d at 454; Izaak Walton

League, supra, 655 F.2d at 365. See also Trustees for Alaska v. Hodel, supra.10/

Because of their persistent relation of Count 1 to any EIS that would be prepared on a land exchange itself, rather than the 1002 EIS, all of the Defendants improperly base their defense on Kleppe v. Sierra Club, 427 U.S. 390 (1976) and progeny. The reasoning behind Kleppe is that agencies should be free to determine at what point in the process an EIS should be prepared, to determine that a proposal has formulated, that the agency has a sound basis for the EIS, and to prevent unnecessary EISs if the agency abandons the proposal. 427 U.S. at 402-09. Since Count 1 relates to actions that may be taken after the EIS is completed, none of these arguments apply. The 1002 EIS is in Congress' hands. To preserve the objectivity of the Congressional decisionmaking process, and plaintiffs' right to a fair legislative decision, it is necessary to halt defendants' prejudicial actions. No "unnecessary" EIS will result; in fact, waiting for a Congressional decision may prevent an unnecessary EIS on the proposed land exchange if Congress decides against development of the coastal plain or that some form of leasing other than land exchanges

---

10/ The CEQ regulations generally refer to actions taken by agencies. 40 CFR 1502.2(f); 40 CFR 1506.1. However, there is no logical reason to treat the matter differently when Congress, rather than the agency itself, is the final decisionmaker. The CEQ regulations are to be given controlling weight in interpreting NEPA itself. Andrus v. Sierra Club, 99 S.Ct. 2335, 2341 (1979). Since CEQ interpreted NEPA as precluding prejudicial resource commitments before an agency makes a NEPA decision, the same result should apply when Congress is the final decisionmaker. This result is also required by the prevailing NEPA case law cited above and in our earlier briefs.

is appropriate.

Due to the irrelevance of Kleppe to count 1, the vast majority of NEPA cases cited by intervenors need not be refuted individually. With one exception, these cases all involve a single EIS situation where plaintiffs sought to enjoin agency actions leading to the preparation of the project EIS.11/

The only case relied on by the defendants that deals with a 2-stage process is Rapid Transit Associates v. Southern California Rapid Transit District, 752 F.2d 373 (9th Cir. 1985), and this case squarely supports plaintiffs' position. The administrative process in that case specifically called for a first-round EIS to select the basic project from a range of alternatives, and a second-round EIS to address the site-specific impacts of the preferred alternative. If the agency had initiated design on one project alternative before a decision was reached on the first EIS, the case would be analagous to the instant situation. They did not. Only after the primary decision was made on the selection of alternatives, after the completion of a full EIS and public notice and comment, did the agency commit any resources to the specific project.

This is precisely what should occur here. The 1002 EIS has been prepared, but no decision has been made on whether to allow oil development, and if so, how and where. In the interim, Inte-

---

11/ For example, in B.R.S. Land Investors v. United States, 596 F.2d 353 (9th Cir. 1979), the project had not proceeded to the point where an EIS was appropriate. But there was no decision pending on an existing EIS which could have been biased by the ongoing discussions, as there is here.

rior is committing resources to a project that presumes not only that development will occur, but how (Native land exchanges) and where (by allowing tract selection).

Finally, Defendant NLG argues that section 910 of ANILCA exempts Interior from all compliance with NEPA, rather than just the requirement to prepare an EIS. This argument flies in the face of the plain language of section 910, which, even if applicable to the land exchanges, only exempts the agency from the obligation to prepare an EIS. Given the requirement that agencies comply with NEPA to the "maximum extent feasible," the Supreme Court has ruled that NEPA compliance can be avoided only when there is a "clear and unavoidable statutory conflict." Flint Ridge, supra, 426 U.S. at 788. In fact, the Supreme Court found in Flint Ridge that the agency had a duty to comply with all other NEPA duties, despite a specific statutory exemption from the EIS requirement. Id.

Interior's agreement to prepare an EIS renders the section 910 issue in this case largely moot. However, in light of NLG's argument that section 910 exempts Interior from any NEPA compliance, we address briefly why section 910 does not apply to land exchanges. On its face, section 910 applies to Native conveyances under ANCSA and ANILCA, and not to land exchanges that happen to involve Native Corporation lands that were previously conveyed pursuant to ANCSA or ANILCA. Moreover, there is no support in the legislative history for the proposition that section 910 applies to land exchanges under section 1302 of ANILCA. Instead, the legislative history makes clear that this provision was in-

tended to ensure that Native Corporations promptly received their initial land entitlements.

Section 910 was first passed by the House Interior Committee in 1978, as section 810 of H.R. 39. H.R. Rep. 95-1045, Pt. I, at 42. It exempted from the EIS requirement only conveyances pursuant to the expedited procedures established in sections 801 and 802 of the bill. In October 1978, the Senate adopted broader language to cover conveyances under ANCSA as well. S. Rep. 95-1300, at 32-26. This formulation was passed by both houses in the 96th Congress. H.R. Rep. 96-97, at 81; S. Rep. 96-413, at 54. Since both provisions applied only to conveyances made pursuant to ANCSA and "this title" of ANILCA, land exchanges under section 1302 of ANILCA could not possibly have been covered by the section 910 exemption as then drafted.

In the final months of congressional deliberations, the expedited conveyance provisions that were formerly contained in what became Title IX, were moved to Title XIV, as section 1437. Hence, "this title" in section 910 was changed to "this Act." There is absolutely no evidence of any intent to broaden the exception to include, in addition to Native land conveyances, section 1302 land exchanges that involve Native lands.

B. Defendants' Actions Violate ANILCA

Intervenors argue that all of the substantive prohibitions against Interior's actions involving the coastal plain, which are based on Congress' crystal clear instructions to leave the coastal plain decision to Congress, are overridden by the perfunctory "notwithstanding any other provision of law" preface

to section 1302(h) of ANILCA.

First, this argument ignores entirely the canon of statutory construction that specific statutory provisions govern over general language. Markair, Inc. v. C.A.B., 744 F.2d 1383, 1385 (9th Cir, 1984); Monte Vista Lodge v. Guardian Life Ins. Co., 384 F.2d 126, 129 (9th Cir. 1967), cert. den. 390 U.S. 950 (1968). Congress was extremely precise in its instructions regarding the controversial 1002 area. It stretches credibility to assert that despite the clear instructions in sections 1002-1004, and the admonition in the legislative history that Congress intended to make the coastal plain decision itself, P.I. Brief at 32, the general land exchange authority in section 1302(h) controls.

Moreover, section 1302(h) itself only authorizes land exchanges "for the purposes of" ANILCA. Given the stated purposes of the Arctic National Wildlife Refuge in section 303(2), the detailed study program set forth in section 1002, and the absolute prohibition against oil and gas development or activities leading thereto in sections 1003 and 1004, it once again is incredible to assert that such a proposed land exchange is "for the purposes of ANILCA." Congress will decide what uses are appropriate for the coastal plain, and until that time, Interior is divested of discretion to make such fundamental management decisions. Congress did "not expect that [section 1302's] flexibility will be used to undermine the essential integrity of any conservation system unit or to frustrate the purpose of any such unit." H.R. Rep. 95-1045, Pt. I, at 212.

IV. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

The Defendants would have the Court believe that the Plaintiffs rely exclusively on potentially questionable Ninth Circuit injunction standards in light of the Supreme Court's ruling in Amoco Production Co. v. Gambell, supra. These characterizations are highly misleading. In light of Amoco, Plaintiffs were careful to demonstrate that they are entitled to injunctive relief even under the most stringent reading of that case. Pl. P.I. Brief at 39-50.

Intervenors argue irreparable harm in three major areas, none of which are persuasive. First, they argue that a preliminary injunction will eliminate forever their opportunity to exchange inholdings for subsurface tracts within the Arctic National Wildlife Refuge. This argument is absurd. A preliminary injunction will prevent the land exchange negotiations from proceeding only until the Court rules on the merits of whether the negotiations are lawful. If the Defendants prevail, the negotiations will simply begin where they left off. If the Plaintiffs prevail, Defendants are not entitled to their desired result in any event.

Even if a permanent injunction is issued against the land exchange negotiations, this will not preclude forever the possibility of these land exchanges, so long as Congress ultimately authorizes them. Since the Defendants themselves have established Congressional approval as a prerequisite for final land exchanges, requiring Congressional approval before rather than after the fact cannot constitute irreparable harm.

The intervenors argue that preventing the land exchange negotiations denies them any profitable economic uses of their lands. This claim is completely inconsistent with their almost simultaneous claim that if negotiations are stopped now, they will lose all opportunities for an exchange since they will be forced to put these lands to other economic uses. In addition to being inconsistent, this argument makes no sense. The lands in question are being offered for trade because they are perceived to be less valuable than oil and gas rights in the coastal plain. Requiring the corporations to wait for Congress to decide whether development will be allowed in the region before they can negotiate such trades again does not constitute irreparable harm. It is particularly ironic for Koniag to use this argument, when they have been trying to exchange the lands in question since 1981, and they themselves withdrew from a past land exchange.

Third, the intervenors argue that enjoining the negotiations will cause them to have wasted precious time and money. A Court in equity cannot consider this factor, however, when the waste of time and money resulted from the Defendants' illegal conduct. Moreover, as NLG itself admits, loss of money alone is insufficient to constitute irreparable harm. NLG Response at 43. Similarly, delay alone cannot constitute irreparable harm, U.S. v. Jefferson County, 720 F.2d 1511, 1520 (11th Cir. 1983), citing Sampson v. Murray, 445 U.S. 61, 90 (1974), particularly when the Defendants' hoped-for result must await Congressional action whether an injunction issues or not.

Finally, the Defendants argue that the public interest de-

mands that an injunction be rejected, based on the potential benefits of the proposed land exchange. But the policy decision on the appropriate use and management of the coastal plain will be made by Congress. The public interest is best protected by preventing the Defendants from engaging in unlawful activities that prejudice Congress' decision on these important issues. Defendants are correct that they may "influence" Congress, but only through the normal legislative process. They cannot be permitted to do so by exceeding their statutory authority.

CONCLUSION

For the above reasons, Plaintiffs' request for a preliminary injunction should be granted.

DATED this 6th day of June, 1987.

Respectfully submitted,

Robert W. Adler

Robert W. Adler
Attorney for Plaintiffs

LAW OFFICES OF

WINTHROP, STIMSON, PUTNAM & ROBERTS

1155 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20036
TELEPHONE: 202-457-9500
TELEX WINSTIM DC 316229
TELECOPIER 202-833-8491

MAIN OFFICE
40 WALL STREET, NEW YORK, N. Y. 10005
TELEPHONE: 212-943-0700 · CABLE: WINSTIM, N. Y.
TELEX: 62854

GERALD D. MORGAN, JR.
RAYMOND S. CALAMARO
PETER F. GOLD*
KENNETH BERLIN
RESIDENT PARTNERS

ROBERT REED GRAY
LOUIS H. KURRELMEYER
JOHN E. GILLICK
RESIDENT COUNSEL

*FEDERAL PRACTICE ONLY

CONNECTICUT OFFICE
460 SUMMER STREET
STAMFORD, CONN. 06901
TELEPHONE: 203-348-2300

FLORIDA OFFICE
125 WORTH AVENUE
PALM BEACH, FLA. 33480
TELEPHONE: 305-655-7297

EUROPEAN OFFICE
SALISBURY HOUSE
FINSBURY CIRCUS
LONDON, EC2M 5RO, ENGLAND
TELEPHONE: 011-441-628-4931

February 10, 1988

Mr. Ned Farquhar
House Resources Committee
P.O. Box V
Juneau, Alaska 99810

Dear Ned:

As we discussed, enclosed is a copy of the memorandum on the antitrust considerations of the proposed land exchanges. Give me a call if you have any questions or if I can be of any further help.

Hope to meet you sometime in Alaska!

Best regards.

Sincerely,

Chuca

Aileen Meyer

LAW OFFICES OF
WINTHROP, STIMSON, PUTNAM & ROBERTS
1155 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20036
TELEPHONE: 202-467-9600
TELEX: WINSTIM DC 318229
TELECOPIER 202-833-8491

MAIN OFFICE
40 WALL STREET, NEW YORK, N. Y. 10005
TELEPHONE: 212-943-0700 . CABLE: WINSTIM, N. Y.
TELEX: 62854

GERALD D. MORGAN, JR.
RAYMOND S. CALAMARO
PETER F. GOLD*
KENNETH BERLIN
RESIDENT PARTNERS

ROBERT REED GRAY
LOUIS H. KURRELMEYER
JOHN E. GILLICK
RESIDENT COUNSEL

*FEDERAL PRACTICE ONLY

CONNECTICUT OFFICE
460 SUMMER STREET
STAMFORD, CONN. 06901
TELEPHONE: 203-348-2300

FLORIDA OFFICE
125 WORTH AVENUE
PALM BEACH, FLA. 33480
TELEPHONE: 305-655-7297

EUROPEAN OFFICE
SALISBURY HOUSE
FINSBURY CIRCUS
LONDON, EC2M 5RO, ENGLAND
TELEPHONE: 011-441-628-4931

Department of Interior
Proposed ANWR Land Exchanges

Antitrust Considerations

The land exchanges in the coastal plain of the Artic Natural Wildlife Refuge ("ANWR") violate the policies set forth in the U.S. antitrust laws and were conducted in a manner that resulted in inadequate consideration to the federal government.

Facts

When Congress passed the Mineral Leasing Act of 1920 ("MLA"), it made the requirement of competitive bidding the cornerstone of the federal government's oil and gas leasing program on federal lands that are determined to be within favorable geological provinces. Congress specifically reiterated the requirement of competitive bidding for oil and gas leases in non-ANWR lands in Alaska in Section 1008 of the Alaska National Interests Land Conservation Act ("ANILCA")

and Section 100 of the Interior Appropriations Act of 1981. Congress has required competitive bids because they maximize income to the federal government and give all persons interested in leasing land a fair chance to obtain a lease. This policy has not lessened over the years. In fact, Congress is currently considering legislation to require competitive leasing of all federal oil and gas lands.

Despite these articulated policies, the competitive bidding process was ignored during the ANWR tract selections. The Department of Interior ("Interior") went to great lengths to ensure that the ANWR coastal plain tracts would be allocated to the native corporations at the cheapest price possible. Prior to the tract selection sessions, Interior set a minimum acceptable price for each tract, as it normally does before competitive bidding, and the participating native corporations made 15 primary tract nominations. The selection sessions proceeded in rounds. In the first round, each participant identified its first priority tract, and if only one participant nominated a tract and there were no constraint problems, that participant received the nominated tract at the minimum price. If two or more participants nominated a tract, they were given an opportunity to leave the room to resolve the conflict among themselves. Suggested resolution mechanisms included agreements to take the tract together or relinquish a

selection for payment.*/ If the conflict was not resolved in this way, Interior would allocate the tract either by random drawing or competitive bidding. The selection session continued with each native corporation nominating its first priority tract from the remaining available tracts until the native corporations had used up substantially all of thevalue of their exchange lands. This process resulted in seriously inadequate consideration to the federal government since such lands normally are leased at far more than the minimum price.

The Exchanges Were Anticompetitive.

The exchanges violate the policies set forth in two doctrines of the antitrust laws. First, the antitrust laws forbid companies from agreeing on the price of bids which they submit to the federal government.*/ Secondly, they prohibit companies from controlling access to a market unless such companies make access available to competitors on fair and reasonable terms.

---

*/In other words, the native corporations that nominated the same tract, incredibly, were encouraged to resolve the conflict by having one corporation pay another corporation, rather than the federal government, for the right to the tract.

*/United States v. Fishbach and Moore, Inc., 750 F.2d 1184 (3rd Cir. 1984), cert. denied 105 S. Ct. 1397 (1985); United States v. Azzarelli Construction Co., 612 F.2d 292, 294 (7th Cir. 1979). cert. denied, 447 U.S. 920 (1980); Otter Tail Power Co. v. United States , 410 U.S. 366 (1973).

In the absence of involvement by Interior, the actions of the private companies here would have fit squarely within bid rigging prohibitions since competitors left the room in which the bids were being taken to allocate the tracts among themselves at the minimum price set by Interior. The competitors were encouraged to work things out among themselves by, under one alternative, agreeing to pay each other to withdraw from contested bids. In addition, we believe it is likely (although we do not have supporting documentary evidence) that the native corporations agreed among themselves, in advance of their negotiations with Interior to insist that Interior structure the tract selection process so that tracts would be allocated at Interior's minimum price. Although the native corporations and Interior presumably would argue that Interior's involvement technically exempts the native corporations from antitrust liability since they were following procedures and policies established by a governmental entity,*/ those procedures violate the bid rigging prohibitions of antitrust policy and should be condemned by Congress.

The antitrust laws also require any company that controls an "essential facility" or a "strategic bottleneck"

---

*/Note, however, that the native corporations might have insisted on these procedures during the negotiations and that it is not clear under what legal authority Interior set up this allocation procedure.

in a market to make access to that facility available to its competitors on fair and reasonable terms. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). The exchanges violate the policies underlying this doctrine since they will create a strategic bottleneck that will effectively prevent all oil companies that do not have native corporation partners from bidding on all leases in ANWR, not just on leases involved in the exchanges. This bottleneck will occur because the oil companies involved in the exchanges will be able to begin exploration activities as soon as ANWR is open to development, while oil companies not involved in the exchanges will have to wait to begin oil exploration until the federal oil leasing regime begins -- a time consuming process. By the time the ANWR tracts not involved in the exchanges are open to public bidding, the companies involved in the exchanges will have received such a competitive advantage from knowing the results of their earlier oil exploration that other oil companies will in all likelihood choose to withdraw from the bidding process.*/ Thus, a strategic bottleneck will be created unless the exchange participants agree to make their exploration data available to their competitors. Despite this bottleneck problem, the

---

*/Whether the essential facilities or the strategic bottleneck doctrine is technically violated will depend principally on (i) the definition of the relevant market and (ii) whether the exchanges will give the participants monopoly power against companies that did not take part in the exchanges.

exchange agreements currently provide that the exploration data which the native corporations are required to submit to Interior will be withheld from the public to the maximum extent possible under the Freedom of Information Act. Instead, Congress should require, at a minimum, release of all exploration data gathered as a result of the exchanges.

The Value Received by the Government

Bid rigging is prohibited because it prevents the government from receiving the fair market value of the asset which is or should be subject to bids. As expected, the procedures used in the exchanges resulted in serious undercompensation for the ANWR tracts involved in the exchanges.

First, as described above, the "tract identification" process eliminated competitive bidding. It ensured, as a result, that native corporations paid only the minimum price for each tract as established by Interior.

Second, because the exchanges transfer the subsurface rights in ANWR from the federal government to private corporations, the federal government will receive no royalties in oil and gas produced in the tracts. In contrast, if the land exchanges do not take place and the ANWR coastal plain lands are leased competitively in accordance with federal leasing law, the federal and Alaska state governments (which share royalty payments pursuant to the Alaska Statehood Act) will receive at least the 12.5 percent minimum royalty imposed by the MLA. Thus, they are

receiving less value for coastal plain tracts than they would have received if such tracts were leased competitively.

Interior asserts that the present value of these lost royalties was included in the minimum tract prices which it established prior to awarding the tracts. This assertion is undermined by the fact that the oil companies appear to be willing to pay a significant royalty in addition to the minimum tract price established by Interior. For example, under the Old Harbor-Texaco agreement, Old Harbor will receive payment from Texaco (after the exchanges are approved by Congress) in an amount approximately equal to the total consideration Old Harbor paid to Interior plus a 14 per cent royalty on production on Old Harbor's ANWR tracts plus a 1.5 percent royalty on all other production from tracts subsequently acquired by Texaco in the ANWR coastal plain. Texaco thus thought that the tracts were worth a great deal more than the value Old Harbor provided to the federal government in the form of exchanged inholdings. Texaco's willingness to pay a substantially greater price than the price received by Interior establishes that Interior significantly undervalued the tracts.

Conclusion

The exchanges violate important antitrust policies and will result in significant losses of revenue to the federal government and the State of Alaska.

LAW OFFICES OF

WINTHROP, STIMSON, PUTNAM & ROBERTS

1133 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20036
TELEPHONE: 202-467-5500
TELEX: WINSTIM DC 248229
TELECOPIER: 202-833-8491

MAIN OFFICE
40 WALL STREET, NEW YORK, N. Y. 10005
TELEPHONE: 212-943-0700 . CABLE: WINSTIM, N. Y.
TELEX: 62854

CONNECTICUT OFFICE
460 SUMMER STREET
STAMFORD, CONN. 06901
TELEPHONE: 203-348-2300

FLORIDA OFFICE
125 WORTH AVENUE
PALM BEACH, FLA. 33480
TELEPHONE: 305-655-7207

EUROPEAN OFFICE
SALISBURY HOUSE
FINSBURY CIRCUS
LONDON, EC2M 5RO, ENGLAND
TELEPHONE: 011-441-628-4931

GERALD D. MORGAN, JR.
RAYMOND S. CALAMARO
PETER F. GOLD*
KENNETH BERLIN
RESIDENT PARTNERS

ROBERT REED GRAY
LOUIS H. KUPPELMEYER
JOHN E. GILLICK
RESIDENT COUNSEL

*FEDERAL PRACTICE ONLY

November 24, 1987

OPINION ON THE LEGALITY OF THE PROPOSED LAND EXCHANGES IN THE ARCTIC NATIONAL WILDLIFE REFUGE

You have asked us to prepare an opinion concerning the legality of the proposed ANWR land exchange agreements that have been negotiated by the Secretary of the Interior. As is set forth in detail below, it is our opinion, based on the exchange documents that we have reviewed to date, that:

(a) Interior has severely undervalued the subsurface rights of the tracts in ANWR it is exchanging with the native corporations by (i) failing to require competitive bidding, (ii) grossly undervaluing the present value of royalties that the federal government will lose as a result of the exchange, and (iii) permitting rescission of four of the exchange agreements for up to 15 years;

(b) Interior has overvalued the inholdings it will receive from native corporations by (i) failing to recognize that 45 percent of the inholdings are as well protected from development now by section 22(g) of ANCSA as they would be if the exchange is completed, and (ii) inflating the appraised fair market value of the inholdings by a factor of three by employing an inappropriate valuation method;

(c) Interior failed to comply with competitive bidding policies that have been followed for almost 70 years in oil and gas leasing, failed in its valuation of the exchanged properties, failed to consider alternatives that would protect the public interest and failed to consider the effects on competition;

(d) As a result, the exchanges are not in the public interest, are not for the purposes of ANILCA and are not being made for equal value. The exchanges are therefore invalid under section 1302(h) of ANILCA, the section relied upon by Interior.

I. Factual Background

A. The Arctic National Wildlife Refuge

The tracts of land at issue lie within the coastal plain of the Arctic National Wildlife Refuge ("ANWR"). The present size and status of ANWR was established by Congress in 1980 in the Alaska National Interests Lands Conservation Act ("ANILCA"), 94 Stat. 2371. The coastal plain of ANWR is the only section of the North Slope of Alaska that is still closed to oil and gas development and has long been regarded as a potential source of significant oil and gas reserves. Oil industry spokespeople have stated that the coastal plain of ANWR "provides the world's best chances of finding super giant oil fields" and have speculated that it may produce as much oil as Prudhoe Bay. See Oil Daily August 25, 1986 and November 19, 1986.

The coastal plain also has been regarded as an area of significant environmental value. Congress' attempt to strike a balance between its desire to preserve this rich environment and the need to explore potential oil and gas reserves is reflected in section 1002 of ANILCA in which

Congress ordered that a report and recommendation concerning development be made to Congress by the Secretary of the Interior within five years (the "1002 Report"). A study was conducted by the Fish and Wildlife Service ("FWS"), a report was made by the Assistant Secretary of the Interior for Fish, Wildlife and Parks, William Horn, to the Secretary of the Interior in November 1986, and the final 1002 Report was submitted to Congress by Secretary Hodel on June 1, 1987. Assistant Secretary Horn and Secretary Hodel recommended that Congress enact legislation that would open the coastal plain of ANWR for oil and gas exploration and development. There are presently a number of bills pending in Congress to implement the Secretary's recommendation as well as a number of bills that would declare the coastal plain a wilderness area, thereby barring development.

B. The Negotiations with the Native Corporations

Over two years before the 1002 Report was submitted to Congress, representatives of the Department of the Interior ("Interior") began holding secret discussions with several Alaskan native corporations concerning possible exchanges of subsurface rights in the ANWR coastal plain for inholdings in other national wildlife refuges in Alaska that would be conveyed to the FWS by the native corporations. Interior's negotiations have taken place with six native entities, representing 18 separate native corporations. Each of the six entities has an oil company partner or partners.

The entities and their partners are: Old Harbor Corporation and Texaco; Doyon, Ltd. and Atlantic Richfield; Gana-A'Yoo, Ltd. and Atlantic Richfield; Koniag Inc. and Chevron, BP and Phillips Petroleum; Ahkiok-Kaguyak, Inc. and Shell; and Native Lands Group, L.P. and Conoco and Exxon.

During the months prior to July 1987, the native corporations and Interior reached agreement concerning which lands would be conveyed by each native group and agreed upon the value of those lands. They also agreed on the terms of the basic exchange agreements and the procedure that would be used to allocate tracts within ANWR. Prior to receipt of any selections from the native corporations, Interior divided the coastal plain into 576 tracts, with each tract containing approximately 2,560 acres. Interior then determined a minimum value for each tract. Interior claims to have calculated the value of the tracts "in the same manner as [it] would use in contemporaneous competitive federal lease sales of such tracts, plus the royalty value for such tracts discounted to net present value." See Model ANWR Tract Identification Agreement, p. 6.

From July 9 through July 11, 1987, Interior held closed-door "tract identification" meetings with the native corporations in a hotel in Arlington, Virginia to determine which tracts would be allocated to each participant. Three weeks prior to those meetings, each native corporation participant was given a map of the coastal plain with an overlay that designated the tracts. A week later, each

participant submitted lists of its tract nominations to Interior. Interior then prepared an aggregate overlay that reflected all of the primary nominations, without identifying the nominator of the individual tracts. Three days prior to the tract identification meetings, each participant was given a copy of the map and noted any errors in the representation of its selection.

The tract allocation procedure was carried out in rounds. In the first round each participant submitted a sealed bid which noted its first priority selection. The sealed bids were then opened by Interior and examined to determine which tracts were selected by only one participant and were not in violation of Interior's established "constraint provisions."* Such tracts were automatically awarded to that participant at the minimum value established by Interior. Selections that violated the constraint provisions or that were made by more than one participant were "negotiated." The participants were given an opportunity to leave the room and negotiate among themselves to try to allocate tracts so that they could still be awarded at the minimum price. Interior's specified mechanisms for resolving tract selection conflicts included having one participant pay cash to another participant to relinquish a

---

* In the selection process, Interior imposed constraint levels. The plain was divided into six constraint regions. Each region contained a number of tracts, with each tract contained solely in a single region. The constraint provisions required that within each constraint region one-third of the acreage or value of that region be reserved for future leasing.

tract selection. If, after 90 minutes of negotiations, there was still no agreement on allocation, the native corporations could mutually agree to competitive bidding, or if they did not agree, Interior could employ competitive bidding or a random drawing to allocate disputed tracts. Each bidding round continued until all of the participants had been awarded a tract.

The tract identification session continued until each participant had used up all or substantially all of its exchange value. Thus, at the end of the tract identification session, Interior's values for the ANWR tracts and the inholdings to be conveyed had been "matched" so that supposedly equal value was given for equal value.

Only three representatives of each participating native corporation (which included officers, employees or independent consultants) were allowed in the room during the selection process. Those representatives, however, apparently were able to seek advice from their oil company partners by telephone and clearly had been aided by their partners in making their initial selections. By the end of the process, the subsurface rights in 65 whole tracts and 8 partial tracts in the coastal plain of ANWR had been allocated to the native corporations.

The 166,000 acres allocated represents 10.8 percent of the coastal plain and is valued at $538.7 million. Interior maintains that the remaining 503 tracts will be

available for a federal leasing program and represent approximately $3.5 billion in revenue. However, the State of Alaska has performed an analysis that shows that Interior's focus on acreage is misleading. In a critique released by the Alaska Division of Oil and Gas, the proposed exchanges are criticized as including all of the most highly prospective coastal plain lands. According to that critique, all of the tracts selected are on structural traps mapped by Alaska and all of the mappable four-way closures (the best target areas on the structural traps) are located in the selected tracts. Thus, these subsurface rights may have far greater value than indicated by the amount of acreage involved in the exchange.

II. Interior's Valuation Procedures

A. The ANWR Tracts Were Significantly Undervalued

As described above, the "tract identification" process essentially eliminated competitive bidding. It ensured, as a result, that native corporations paid only the minimum price for each tract as established by Interior. In addition, two other aspects of the valuation process for the ANWR tracts minimized costs to the native corporations and resulted in considerable undervaluation of the ANWR tracts.

First, no royalties will be paid to the federal government. While the model exchange agreement provided that the federal government would receive a royalty of 1.75 percent on the coastal plain tracts, it appears, from the

draft agreements (dated 6/12/87*) between the native corporations and Interior, that this royalty has been eliminated. Considering that the MLA prescribes a 12.5 percent minimum royalty for oil and gas leases on federal lands, it appears that both the federal and Alaska state governments (which share royalty payments pursuant to the Alaska Statehood Act) are receiving less value for coastal plain tracts than they would have received if such tracts were leased competitively.

Interior asserts that the present value of these lost royalties was included in minimum tract prices which it established prior to awarding the tracts. This assertion is undermined by the fact that the oil companies appear to be willing to pay a significant royalty in addition to the minimum tract price established by Interior. For example, under the Old Harbor-Texaco agreement, Old Harbor will receive an up-front payment from Texaco (as soon as the exchanges are approved by Congress and Texaco accepts the leases) in an amount approximately equal to the total consideration Old Harbor paid to Interior plus a 14 percent royalty on production on the Old Harbor coastal plain tracts and a 1.5 percent royalty on all other production by Texaco in subsequently acquired ANWR coastal plain leases.** Texaco

---

* It is our understanding that these are the most recent drafts of the exchange agreements.

** We have learned of some of the provisions of the Old Harbor-Texaco agreement from an Old Harbor Proxy Statement urging adoption of that agreement. However, we have not been able to obtain any of the native corporation-oil company agreements.

thus thought the tracts were worth a great deal more than the value Old Harbor provided to the federal government in the form of exchanged inholdings. Texaco's willingness to pay a substantially greater price than the price received by Interior establishes that Interior significantly undervalued the tracts. The federal government, moreover, by exchanging the coastal plain tracts for less valuable native corporation inholdings, ensured that the state government would lose substantial royalties as well.

Second, four of the six draft exchange agreements give the native corporations the right to rescind "the exchange in its entirety" for "failure of consideration." Quite simply, the native corporations have the right to rescind the exchanges if no "Significant Quantities" (as defined) of oil or gas are discovered within 10 to 15 years.* If the native corporations' rescission rights are

---

* If the native corporation retains this right in its final agreement, the native corporation will have the right to rescind the agreement at any time prior to the earlier of (1) 10 years after completion of the drilling of a test well, (2) 15 years from the date of conveyance of the rights to the ANWR lands and the inholdings, or (3) discovery of Significant Quantities. Under this provision, therefore, full consideration does not pass until after the native corporation has found large reserves of oil or gas. If Significant Quantities are not found, the rights conveyed are revoked subject to a provision which permits Interior to retain inholdings that equal in value any revenues received by the native corporation by reason of its participation in the exchange.

exercised, the native corporations will receive back a portion of the lands they exchanged as consideration for the ANWR tracts.

The values allocated by Interior to the ANWR tracts prior to the tract identification meeting presumably take into account the possibility that significant quantities of oil and gas may not be discovered in a given tract. However, the native corporations have received a right to have their "money" returned if significant quantities of oil and gas are not found. As a result, the tracts should have been valued as if significant oil or gas reserves had already been found, thus making the land many times more valuable than the minimum values assigned by Interior and used in matching with the inholding values.

B. The Lands Received by Interior Were Significantly Overvalued

The inholdings that Interior will receive under the exchange agreements total approximately 791,000 acres, including: 87,000 acres in the Alaska Maritime Refuge; 125,000 acres in the Innoko Refuge; 75,000 acres in the Kanuti Refuge; 33,000 acres in the Kenai Refuge; 260,000 acres in the Kodiak Refuge; 78,000 acres in the Nowitna Refuge; and 233,000 acres in the Yukon Delta Refuge. The Secretary takes the position that the acquisition of these inholdings will consolidate Interior's holdings in other

refuges and that these inholdings "collectively represent some of the highest priority acquisition needs within the National Wildlife System in Alaska. Their uniqueness is reflected in world class habitats for migratory birds, anadromous fish, and brown bears, coupled with unsurpassed recreational opportunities." See Interior's briefing sheet on ANWR Land Exchange. Interior further alleges that the exchanges are "designed to protect the integrity, resources and purposes" of ANWR.

Neither Interior's claims about the environmental value of the inholdings received nor its valuation process, however, withstands even minimal scrutiny.

1. The Environmental Value of the Inholdings

Receipt of inholdings by Interior is valuable environmentally only if Interior can demonstrate that its receipt of the acreage will result in better protection of the fish and wildlife resources on the land. Interior can make only a de minimis showing of such benefits.

The inholdings to be conveyed fall into two categories. First, approximately 45 percent of the inholdings are already protected from development by section 22(g) of ANCSA (the "section 22(g) inholdings"). This section permits development on inholdings only if such development is permitted by the laws and regulations governing the national wildlife refuge system. The most important national wildlife refuge protection applicable to

the section 22(g) inholdings is the requirement that any development be "compatible" with the purposes of the surrounding refuge. 43 U.S.C. § 1621(g); ANILCA § 304(b); 43 C.F.R. §§ 2653.11, 2650.4-6. The National Wildlife Refuge Administration Act applies the same standards to development on lands that are actually included in a national wildlife refuge. 16 U.S.C. § 668dd(d)(1)(A). Since development of the section 22(g) inholdings is already governed by the same standard as development of actual refuge lands, acquisition of the inholdings will not provide them with any additional environmental protection since the public interest in these lands would have been equally protected even if the inholdings remained in the hands of the native corporations.

Second, with regard to the remaining 55 percent of the lands involved in the trade, the potential environmental benefits which Interior uses to justify the exchange were minimized, if not completely lost, as a result of Interior's decision to seek only the surface rights to these lands. Under the exchange agreements, the native corporations retain subsurface rights on all non-section 22(g) lands. If there is a threat to these lands it will, in all probability, arise from proposed subsurface development. In fact, the draft Doyon, Ltd. exchange agreement specifically provides that Doyon retains the same rights with respect to its refuge subsurface as it had before the exchange and that Doyon will advise the Secretary prior to the commencement of subsurface

activities. It is manifestly unlikely that the inholdings received by Interior are threatened by housing developments or other developments on the surface of the land. By excluding subsurface rights, Interior gave up its right to provide environmental protection for what may be the only portion of the exchanged lands which requires such protection. 22(g)

Ironically, Interior implies that acquisition of the inholdings will reduce the checkerboard pattern on the refuges in Alaska, thereby aiding protection and regulation of the refuges. Yet a checkerboard pattern is precisely what will be created on the coastal plain by the exchange agreements. Native ownership of the coastal plain tracts will make regulation of development activities more difficult than if the United States retained ownership and leased the land for oil and gas exploration and development. In addition, while removing checkerboard land patterns on the inholdings is attractive in principle, it is doubtful that the FWS has the manpower resources to take advantage of refuge consolidation. On the Yukon Delta Refuge, for example, which totals approximately 19 million acres, the FWS has only three supervisory biologists.

2. Interior's Valuation Method

Interior's valuation scheme also cannot withstand scrutiny. As best we can determine, Interior asked the FWS realty office to appraise the fair market value of each of

the inholdings involved in the exchange.* The mean fair market value assigned to the inholding acreage by FWS is $75 per acre and 75 percent of the inholding acreage was valued at less than $165 per acre. Bearing these numbers in mind it is difficult, if not impossible, to understand how Interior arrived at an average value of $602 per acre for the inholdings (more than three times the FWS determined average fair market value). Interior's futile attempt to justify these valuations demonstrates that Interior had no basis for its decision.

Interior claims the value of the inholdings are increased by what it calls their "public interest attributes," including their fish, wildlife and recreational values. In arriving at this "public interest attributes" factor, Interior may have relied on a theory advanced in an appraisal of the Old Harbor inholdings by a private real estate appraisal company (paid for by the Old Harbor Corporation). Apparently, this appraisal company determined that an extra $1,000 of public interest value, corresponding to the rare and scenic value of the land, needed to be added to the fair market value of each and every acre. Often the land to which this $1,000 was added was valued at less than

---

* See attached letter from FWS to Kenneth Berlin, which summarizes FWS's appraisal values.

$100 per acre. Since definitionally fair market value reflects the price a willing buyer would pay for the land, it would seem that if this rare and scenic premium were real it would be reflected in the FWS fair market value. The fact that it was not included seems to demonstrate that it is simply an imaginative means to inflate the inholding values.

Interior further seeks to justify the excessive values which it assigned to the native corporation inholdings by pointing out that ANILCA prohibits condemnation of such inholdings. See Assistant Secretary Horn's Memorandum to ANWR Negotiation Team, 2/20/87. Interior states that this lack of condemnation authority, therefore, limits it to "willing seller inholding acquisitions," see Assistant Secretary Horn's letter to Senator J. Bennett Johnston, 3/31/87, and that these inholdings never again may be available for purchase by Interior. The fact that Interior is unable to condemn the inholdings is no justification for its valuation procedure, and there is certainly no evidence in the record to show that this may be the only opportunity to acquire the inholdings. The willingness of the native corporations to enter into the proposed exchanges in fact demonstrates that they would be willing sellers of the inholdings for satisfactory consideration.

We believe the record will show that the value assigned to the native corporation inholdings simply reflects Interior's desire to come up with sufficient value to justify

its giveaway of the subsurface rights on ANWR. In a case such as this, in which Interior appears to have been primarily concerned with justifying its allocation of the ANWR coastal plain tracts, Interior and the native corporations all benefitted by inflated inholding valuations and real negotiations were not possible.

III. Legal Analysis

A. Purported Authority for the Exchange Agreements

Interior takes the position that the Secretary has the authority to consummate the proposed exchanges under section 1302(h) of ANILCA,* although Secretary Hodel has assured Congress that, despite this purported authority, he will seek Congressional approval of the exchange agreements. Section 1302(h) authorizes the Secretary to exchange lands

---

* Section 1302(h) of ANILCA provides: "Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands ... or interests therein ... with the [native] corporations . . . and other municipalities and corporations or individuals, the State ... or any Federal agency. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value." Interior also relies on section 22(f) of ANCSA which contains language similar to section 1302h.

with the native corporations to further the purposes of ANILCA. This limited exchange authority requires that any proposed exchange be made on the "basis of equal value." The only exception to the equal value requirement is a situation in which the parties agree to an exchange and the Secretary makes an affirmative determination that the proposed exchange is in the public interest.

The proposed ANWR exchanges fail to meet any of the requirements of section 1302 and are therefore unauthorized.

B. The Exchanges Will Not Be Made for Equal Value

As set forth in part II above, the valuation procedures employed by Interior significantly undervalued the ANWR tracts and at the same time vastly overvalued the inholdings to be exchanged for the ANWR tracts. The native corporations were able to select coastal plain tracts for the minimum value established by Interior since the selections were made pursuant to an elaborate, cooperative procedure which was kept secret from the public rather than through competitive bidding subsequent to public notice in the Federal Register. Leases of federal lands are seldom based on the minimum value established by Interior, since that is simply the least Interior will accept and is therefore merely a beginning point in a competitive bidding situation. The fact that the oil company partners of the native corporations were willing to pay the native corporations virtually the

same amount as the native corporations paid Interior plus, in the case of Texaco, royalties of 14 percent on the exchange tracts and 1.5 percent on other ANWR tracts is further evidence that Interior's values were drastically understated.

C. The Exchanges Are Not In Furtherance of the Purposes of ANILCA and Are Not in the Public Interest

In order to fulfill the requirement that the exchanges be for equal value, Interior developed an elaborate procedure to value the inholdings and the ANWR tracts and then "matched" those values during the tract identification meetings. Obviously concerned with the weakness of its equal value argument, Interior attempts to argue, alternatively, that the exchanges will further the purposes of ANILCA (see pages 63-65 of the model exchange agreement) and claims that the Secretary is able to "confirm his findings as contained in the records of the Department that the exchange is in the public interest and, therefore, does not require equalization of values." (id. page 65). Not only is Interior wrong in claiming that equal value was exchanged, Interior is also incorrect in claiming that the exchanges further the purposes of ANILCA and are in the public interest.

1. The Exchanges Do Not Further the Purposes of ANILCA

Section 1302(h) gives Interior the authority to exchange lands only when it is acquiring lands in a manner consistent with the purposes of ANILCA. Although Interior

could argue that it has acted consistent with the purposes of ANILCA in acquiring inholdings in national wildlife refuges other than ANWR, the legislative history of section 1302(h) indicates that in deciding whether an exchange is for the purposes of ANILCA, Interior has to consider the entire transaction, including the effect of the exchange on the lands being given up by Interior, and not just the benefit of the land that Interior acquires.

The House Committee emphasized that while the statute gave the Secretary flexibility, "of course, the committee does not expect that this flexibility will be used to undermine the essential integrity of any conservation system unit or to frustrate the purpose of any such unit." H.R. Rep. No. 95-1045, Pt. I (p.212). As the Senate Committee explained: "the federal government will still own a large amount of land, and that land base, exclusive of lands located within conservation system units . . . should provide ample opportunity to exchange." S. Rep. 96-413 (p. 304) (emphasis added). Thus, it is clear that Congress did not intend that Section 1302 would be used to disrupt one refuge for the benefit of another refuge.

The ANWR exchanges violate the "for the purposes of the Act" requirement because: (i) contrary to the intent of Congress, they will significantly reduce native landholding in Alaska; (ii) they will undermine ANWR; (iii) Interior probably did not consider whether it could have acquired the

lands it sought by a trade using lands not in a national wildlife refuge; and (iv) the evidence probably will show that the motivating purpose of the exchange was to give up the ANWR lands, not to acquire lands on other refuges.

First, the land exchanges require the native corporations to trade almost five acres of land for every acre of subsurface rights they receive in ANWR. Congress, however, never intended that Section 1302(h) be used by Interior to reduce the amount of land owned by native Alaskans or that it be used to give up all surface rights in land for subsurface mineral rights. Instead, Congress included Section 1302(h) in ANILCA so that "federal condemnation not be used to unnecessarily diminish the private land base in Alaska." S. Rep. No. 96-413, 96th Cong., 1st Session (1979) at 304. Congress stated that the exchange authority enables Interior to "make a good faith effort to find other lands within the state of Alaska (as near to existing lands as possible) for which he can exchange the land desired to be acquired." Id. Congress' desire to avoid condemnation - i.e., the taking of private lands that reduces the amount of land in private ownership--is inconsistent with a trade that requires native corporations to give up 866,000 acres of land and receive no surface lands and only subsurface rights to 166,000 acres in return.

Second, even if Congress opens ANWR to oil exploration and development, the exchanges will undermine the integrity of the refuge by creating a checkerboard pattern of private and public ownership within the refuge. Generally, Interior regards such a pattern as unacceptable and it justifies its acquisition of inholdings in other refuges as necessary to ensure adequate management on the refuges. But if Interior believes that acquiring inholdings on refuges is necessary for effective management, it acted arbitrarily if it concluded that it could manage ANWR effectively after it created a massive set of inholdings on the coastal plain.

The need for consolidated management is particularly important in ANWR. The refuge has a unique combination of environmental values and potential for oil development and in section 1302 of ANILCA, Congress made it clear that if development took place, it would do so only after a careful study of environmental issues. Presumably, if ANWR is opened to development, a carefully thought-through federal regulatory regime will be devised to protect the environment. The exchanges, however, will remove the lands involved from ANWR and from that federal regime (even if environmental stipulations are built into the exchange agreements, they are very unlikely to be as stringent or as carefully thought-through as the requirements that will be placed on federal lands). Thus, the exchange is not only contrary to Interior's policy of acquiring inholdings, but it will have a particularly strong impact on ANWR.

The land exchanges also violate Congress' instructions to Interior that it establish a systematic program designed to ensure that inholdings in national wildlife refuges be acquired without disrupting other refuges. Congressman Udall explained: "We expect that the Secretary shall inventory the lands in Alaska for the purpose of locating suitable tracts for trade . . ." 146 Cong. Rec. H10548 (Nov. 12, 1983). Congress also expected the Secretary to ensure that agencies such as the Fish and Wildlife Service have full authority to identify lands managed by the Bureau of Land Management for trade to acquire the inholdings. Indeed, to ensure that lands outside national wildlife refuges and other conservation units were available for exchanges, Congressman Udall emphasized that:

> "If BLM resists yielding prime lands under its jurisdiction, thus frustrating the land acquisition policy of another agency such as the Park Service, we intend that the Secretary step in. The Secretary shall give each agency managing conservation unit lands authority to identify areas for trade on BLM lands." 146 Cong. Rec. H10548 (Nov. 12, 1980)

DOI does NOT acquire NPS lands as may be vulnerable to development

There is no evidence that Interior considered alternative lands to give in exchange for the lands it will receive in the exchanges.

Finally, we expect that when the record of the exchanges is reviewed, it will become apparent that the purpose of the exchanges is to remove lands from ANWR so that they can be open to immediate development by private parties

without waiting for Interior to establish a full management and leasing regime for all ANWR. The record probably will show that Interior acquired lands via the exchanges to justify giving up ANWR lands and not vice versa. Nothing in the legislative history of ANILCA supports an argument that section 1302(h) can or should be used to open national wildlife refuges to mineral development or to transfer national wildlife refuge lands to native groups and their industry partners for development. Such an approach is not consistent with the purposes of ANILCA.

2. The Exchanges Are Not in the Public Interest

Interior's "public interest" determination under section 1302 of ANILCA is subject to review in a federal court under the arbitrary and capricious standard. Keating v. FAA, 610 F.2d 611, 612 (9th Cir. 1979); National Audubon Society v. Hodel, 606 F. Supp.825 (D. Alaska 1984). Agency actions are arbitrary and capricious if they are not based on "a consideration of the relevant factors" and "there was a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Village of False Pass v. Watt, 565 F. Supp. 1123, 1138 (D. Alaska 1983). Interior's public interest analysis fails both of these tests.

a. Competitive bidding

First, Interior acted arbitrarily and capriciously when it found that it was in the public interest and in furtherance of ANILCA to provide a means for development of

the coastal plain without competitive bidding. Competitive bidding for oil and gas leases of federal lands has been and remains the cornerstone of federal oil and gas leasing policy. Competitive bidding promotes the orderly development of petroleum resources on publicly-owned lands by private industry and assures that the U.S. receives the best price for the leasing of public resources.

Congress has repeatedly recognized the central role of competitive bidding in lease or sale programs for public land. For example, in 1909, Congress enacted a criminal statute (currently found at 18 U.S.C. § 1860 and entitled "bids at land sales") making it a crime to agree not to bid or to hinder anyone from participating in a competitive bid for public lands. The statute states:

> Whoever bargains, contracts, or agrees, or attempts to bargain, contract, or agree with another that such other shall not bid upon or purchase any parcel of lands of the United States offered at public sale; or
>
> Whoever, by intimidation, combination, or unfair management, hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract or land so offered for sale--
>
> Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

By making collusion or interference in bids for public lands a crime, Congress emphasized its commitment to a fair and orderly process for development of public lands.

Oil and gas lease sales in the lower 48 states are controlled by section 17 of the Mineral Leasing Act of 1920, as amended ("MLA") (30 U.S.C.§§ 181-263), which requires competitive bidding for all oil and gas leases in "known geological structures." While the law applicable to oil and gas lease sales on federal lands in Alaska differs somewhat from that applicable to oil and gas lease sales in the lower 48, such differences are primarily directed at accommodating environmental concerns. Competitive bidding remains the touchstone of the Alaska federal oil and gas leasing programs.

Oil and gas lease sales covering federal lands in Alaska are subject to three different programs: Section 100 of the Interior Appropriations Act of 1981 (P.L. 96-514) ("IAA"); section 1008(d) of ANILCA; or, section 1002(i) of ANILCA. These programs apply, respectively, to the National Petroleum Reserve - Alaska ("NPRA"), non-ANWR federal lands exclusive of the NPRA, and ANWR lands. The first two programs, which permit oil and gas leasing, each adopt a central policy of competitive bidding.

Section 100 of IAA provides for competitive leasing of all oil and gas lands in the NPRA in accordance with the bidding system employed in the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629). Section 1008(d) of ANILCA establishes a leasing program for the non-North Slope lands in Alaska pursuant to the MLA. This program differs from the MLA program applicable to the lower 48 in that

competitive bidding for oil and gas leases under section 1008(d) of ANILCA is triggered more easily than under the known geologic structure standard of the MLA. Section 1008(d) requires competitive bidding for both those federal lands on which oil and gas have been discovered and those lands within which there is a high probability that oil and gas will be discovered (designated as favorable petroleum geological provinces ("FPGP") by the Bureau of Land Management). Thus, ANILCA provides for competitive bidding in instances in which there is merely high probability that oil and gas will be discovered, rather than the higher standard applicable to the lower 48, namely that oil and gas deposits have been discovered by drilling and that such deposits have been determined to be productive.

Section 1002(i) of ANILCA withdrew the coastal plain of ANWR from all form of entry under the mineral leasing laws. Thus, Section 1008(d) of ANILCA does not currently apply to the coastal plain of ANWR. If, however, the coastal plain of ANWR were made available for oil and gas leasing by Congress, it is clear the coastal plain should be designated as an FPGP based on the extremely high probability that oil and gas will be discovered there. The coastal plain is adjacent to the giant Prudhoe Bay field, which currently supplies almost 20 percent of the total U.S. oil production. Available data indicates that the coastal plain reserves should equal and may well be even greater than Prudhoe.

Based on the foregoing, it is clear that in enacting ANILCA, Congress did not intend to ease the standards under which competitive bidding for oil and gas leases on federal lands would be required. In fact, the contrary is true: at a minimum, competitive leasing is required when there is only a probability that oil and gas will be discovered. The Secretary's action in exchanging the withdrawn ANWR lands in order to facilitate oil and gas leasing without competitive bidding subverts 67 years of mineral leasing policy and thwarts the clear intent of sections 1002(i) and 1008(d) of ANILCA.

b. Valuation of ANWR Tracts and Inholdings

Second, as discussed above, Interior made a clear error of judgement and failed to consider relevant factors in its valuations of the ANWR tracts and the inholdings. Moreover, if the predictions concerning potential oil and gas reserves in the ANWR coastal plain are correct, the public interest has not been served by giving those tracts away to the native corporations at bargain prices. Additionally, without realizing what it was doing (because it had not seen any contracts between the native corporations and their oil company partners), Interior transferred the royalty payments in ANWR from the federal and state governments to Alaskan native corporations.

c. Alternatives Are Available that Protect the Public Interest

Interior also made a clear error of judgment and failed to consider relevant factors in concluding that the exchanges are necessary to further the purposes of ANILCA and protect the public interest. Interior's identified purposes for the exchanges -- consolidation of refuge lands and acquisition of priority lands -- can be accomplished by other, more rational and more equitable means.

(i) Environmental Value

The inholdings are part of a conservation system designed by Congress to protect the lands from or during development. A large percentage of the inholdings to be acquired are section 22(g) lands and as such are statutorily protected from development. Moreover, Interior will receive only the surface rights to the non-section 22(g) inholdings, and it is unlikely that any of the inholdings are threatened by housing development or other surface development. The only likely threat to those lands is from possible subsurface development. Thus, Interior had no rational basis to conclude that the exchange has the environmental benefits which Interior claims.

(ii) Acquisition of Inholdings

The land exchanges are not the only available means for Interior to acquire these "priority" lands. Revenues derived from leasing the coastal plain

tracts, for example, could be used to purchase them or Interior and Congress could devise a procedure that let native corporations bid the value of inholdings during normal competitive biddings on ANWR tracts. Such a procedure could well cost Interior much less than the exchanges, given the overvaluation of the exchanged inholdings and the undervaluation of the ANWR tracts.

(iii) Protection of the Native Corporations

If there is a fear that the native corporations will not benefit from any future development of the ANWR coastal plain, a far simpler and more equitable procedure would be to ensure their participation at the point that Congress votes to open the plain for development. There is no reason to rush into these exchanges, particularly since they do not offer the claimed benefits to all the native corporations and do not allow participation by all interested parties. If, as Interior believes, the exchanges are not subject to section 7(i) of ANCSA,* only those native corporations which have entered into exchange agreements will share in the revenues derived from the development of the coastal plain. The state treasury, moreover, will be deprived of substantial revenues that would inure to the benefit of all residents of Alaska. Any number of alternatives would be available to ensure participation by the native corporations when and if Congress votes to open

the plain. For example, the native corporations could be authorized to participate in the bidding process by bidding land rather than money.

d. Interior Ignored the Effects on Competition

Finally, Interior made an error of judgment and failed to consider relevant factors when it ignored the anticompetitive effect of the exchanges. As discussed above, competitive bidding has been the cornerstone of federal oil and gas leasing policy for almost 70 years. Notwithstanding that policy, Interior entered into secret negotiations with select native corporations linked to select oil company partners. The oil companies that did not participate in these exchanges have been excluded not only from participation in the first potential development of the coastal plain, but may well be excluded effectively from any participation in development of the coastal plain. Such exclusion would result from the competitive advantage gained as a result of the head start period which the participating oil companies will have. During this period the participating oil companies will have an opportunity to determine where it is most probable that oil and gas reserves

---

* Section 7(i) of ANCSA (43 U.S.C. § 1606(i)) provides that 70 percent of the timber and subsurface revenues from lands conveyed to a regional corporation pursuant to ANSCA shall be divided among the twelve regional corporations.

are located. When the remaining ANWR lands are finally made publicly available through a competitive leasing program, they will be able to use this information to guide their bidding.

IV. Conclusion

Interior's proposed land exchanges violate important public policies set forth in ANILCA and the MLA and are in violation of section 1302(h) of ANILCA.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1011 E. TUDOR RD.
ANCHORAGE, ALASKA 99503

IN REPLY REFER TO:

ARD

SEP 15 1987

Mr. Kenneth Berlin
Winthrop, Stimson, Putnam, and Roberts
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Berlin:

As you requested in our telephone conversation of September 10, 1987, I am enclosing a summary of appraisal values for Native corporation inholdings located in national wildlife refuges in Alaska.

Please keep in mind that the properties described by the enclosure will not cross-walk directly to the properties included in the current exchange proposal. This reflects differences both in the size and configuration of appraisal tracts versus exchange proposal tracts. Also most of the appraisal figures were generated in 1985 and would require updating and appropriate revision in order to be current.

I hope the enclosure is responsive to your needs. Please let me know if we may be of further assistance.

Sincerely,

John H. Doebel
Associate Regional Director

Enclosure

cc: Sharon Allender

NATIVE CORPORATION APPRAISED VALUES

Refuge	Corporation	Acres	Total $	$/Acre
Nowitna	Doyon	139,393	9,554,910	69
	Dineega	12,124	1,278,795	105
	Doyon/Dineega	2,529	132,950	53
Kanuti	Doyon	244,835	16,570,090	68
	Evansville	15,562	984,050	63
	K'oyitl'ots'ina	68,186	4,910,050	72
	K'oyitl'ots'ina/ Doyon	1,440	108,000	75
Innoko	Doyon	387,823	22,386,580	58
	Gana-a 'Yoo	53,774	3,803,055	71
	Hee-yea-lingde	54,186	3,171,620	59
	Zho-Tse	18,100	1,181,250	65
	Doyon/Gana-a 'Yoo	7,971	629,890	79
	Doyon/Hee-yea-lingde	1,774	88,700	50
	Doyon/Zho-Tse	4,181	274,625	66
Kodiak	Larsen Bay	81,714	13,103,000	160
	Karluk	78,025	12,248,000	157
	Cemetery/Historic	4,880	1,412,000	289
	Koniag	164,619	26,763,000	163
	Akiok	103,487	21,843,000	211
	Kaguyak	87,242	19,193,000	220
	Old Harbor	35,099	7,422,000	211
Alaska Maritime	Old Harbor	61,991	2,460,940	40
	Aleut	32,850	1,360,000	41
Yukon Delta	Bethel Native Corp	58,101	3,196,000	55
	Nima	53,197	3,724,000	70
	Calista	712	46,000	65
	Nunakauiak-Yupik	27,172	2,113,000	78
	Tununrmiut-Rinit	58,135	4,770,000	82
	Chevak Company	32,165	2,370,000	74
	Sea Lion	33,870	2,989,000	88
	Paimiut	24,385	1,707,000	70
	Askinuk	32,185	2,560,000	80
Kenai	Point Possession	4,433	2,231,000	503
	Tyonek	32,938	14,000,000	425
	Cook Inlet Region	8,203	10,620,000	1,295
	Kenai Native Assoc.	18,775	13,985,000	745
	Salamatof	3,030	2,205,000	728

Alaska, U.S. May Lose In Oil Land Transfer

Study Cites 'Billions' in Potential Royalties

By Cass Peterson
Washington Post Staff Writer

An Interior Department proposal would result in a transfer of virtually all the best tracts in a prospective Alaska oil field to native groups backed by major oil companies, according to an analysis by Alaska mineral officials.

The analysis, prepared by the Alaska Division of Oil and Gas, concludes that the proposed land exchange in the Arctic National Wildlife Refuge could cost state and federal treasuries "billions of dollars" in foregone royalties if significant discoveries are made.

The document is likely to stoke a controversy over oil development in the arctic refuge, on the Beaufort Sea in extreme northeast Alaska. The analysis was provided to The Washington Post in advance of a hearing on the issue Tuesday by House Interior and Merchant Marine subcommittees.

The Interior Department recommended earlier this year that the arctic refuge be opened to oil development, contending that it is the best prospect for major new domestic supplies. Conservation groups are strongly opposed, arguing that development would irreparably damage the coastal refuge and its population of caribou, musk oxen and other arctic wildlife.

Congress has yet to determine whether the refuge should be leased or left untouched.

Nonetheless, the Interior Department proposed last summer to exchange 166,000 acres in the arctic refuge for 891,000 acres held by native corporations in other Alaska refuges. The native corporations, in turn, have arranged leasing contracts with major oil firms. The exchange was negotiated in secret last July, and it was put on hold after public disclosure raised an outcry.

Department officials maintain, however, that the proposed trade is fair. The department values the oil and gas tracts at $543.8 million, about the same as the wildlife refuge lands it would receive in exchange.

According to the department, the native groups selected 73 tracts, only 34 of them on potential oil and gas structures as defined by Interior Department geologists. More than 80 percent of the 1.53 million-acre refuge would still be available for competitive bidding, department officials said.

Alaska officials, analyzing the same data, said every one of the 73 tracts lies over a high-potential area. "The selection pattern and our independent mapping indicate that . . . *all* the best structures . . . have been selected already by the exchange participants," their assessment said. "To focus on the relative number of acres conveyed through exchanges, as DOI does, is very misleading."

The distribution of oil rights in the arctic refuge, should drilling be permitted, is of critical importance to Alaska. If the land is leased competitively under federal law, the state receives 90 percent of bonus bids and rental and royalty revenues. If the oil rights are transferred to native groups, the state gets nothing.

"The value of the royalty interest alone, should significant discoveries occur, potentially may be measured in the billions of dollars," the assessment said.

State officials said the contract arrangements between native groups and oil firms strongly suggest that the Interior Department has undervalued the tracts it is seeking to trade.

In its proposed contract with Texaco Inc., for example, the Old Harbor Native Corp. would receive $45.7 million in cash, exactly the value of its traded land. However, Old Harbor also would receive royalties of 14 percent on any oil production from its 58,000 acres of arctic refuge tracts and 1.5 percent on any other oil Texaco produces in the refuge, whether on Old Harbor tracts or not.

The Interior Department is seeking to limit royalties on federal leases in the arctic refuge to 12.5 percent.

The agreement between the Chevron and Phillips Petroleum companies and the Koniag Native Corp. provides for royalties of 20 percent, with provisions to convert that into as much as 40 percent of net profit. The Koniag group essentially selected one tract in the arctic refuge, about 3,200 acres, which Chevron/Phillips would lease for a payment up front of $58.3 million.

REP. GEORGE MILLER
. . . calls analysis "deeply troubling"

The hefty price is considered significant because Chevron is the only oil firm with any concrete clue of what may lie beneath the tundra in the arctic refuge. It drilled a 15,000-foot exploratory well there two years ago, on land held by two native corporations, but has kept the results tightly under wraps.

Assistant Interior Secretary William P. Horn said he has not looked at the native corporations' contracts, but is confident that the department fairly estimated values in the arctic refuge.

"The models were set up to err on the upside, not on the downside," he said. "We feel pretty solid that the numbers are good."

But Rep. George Miller (D-Calif.), chairman of the House Interior subcommittee on water and power resources, said the state's analysis is "deeply troubling."

"At the same time we're being told that we need cutbacks of millions of dollars in programs for children and the elderly and the poor, we see the Department of the Interior engaged in the disposal of valuable resources in a manner that could cost the Treasury billions of dollars," he said.

The department has defended the proposed exchange as an "unequaled opportunity" to add high-quality wildlife habitat to the national refuge system. The native lands include brown bear habitat on Kodiak Island and waterfowl nesting areas in the Yukon Delta.

But critics contend that the refuges would still be vulnerable to development because native corporations would continue to hold mineral rights.

GAO

United States
General Accounting Office

Seattle Regional Office

Room 1992, Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

February 1, 1988

Honorable Sam Cotten
Co-Chairman, House Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811-0101

Dear Mr. Cotten:

As discussed with your staff by phone today, since October, 1987, the General Accounting Office (GAO) has had an on-going review of the proposed ANWR land exchange.

The review was requested on July 23, 1987, by Representative George Milller, Chairman, House Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs, and on August 7, 1987, by Senator James McClure, Ranking Minority Member, Senate Committee on Energy and Natural Resources. GAO's objectives are to address the questions asked in the two congressional requests. They include:

--Determine the legality of the currently proposed land exchanges.

--Assess the appropriateness of the factors the Department of Interior considered and the methodology it employed in the proposed land exchanges.

--Evaluate the baseline data used by the Department of Interior and the resulting computations to determine if the government's interests were adequately protected in arriving at the land values involved in the exchanges.

We anticipate completing our review and issuing a report about June 30, 1988. Thank you for your interest in GAO's current efforts and if I can be of any further assistance please contact me in Anchorage at 786-3306 or in Seattle, Washington at 206-442-5356.

Sincerely,

Steven N. Calvo

Steven N. Calvo
Evaluator-In-Charge
U.S. General Accounting Office

THE PROPOSED LAND TRADES

In Congress:

- The trades have met with little approval. Key congressmen and senators have announced opposition to the trades, including the Chairman of the Senate Energy Committee and the House Water and Power Resources Subcommittee. Congressional opposition was first noticed in August 1986 when eleven key senators wrote the Interior Department asking that the trades be ended.

- The trades have distracted Congress. The General Accounting Office and Congressional Research Service are conducting investigations of the trades. The trades have caused controversy and prevented focusing on the main issue of opening the coastal plain.

- The trades are being actively lobbied by support groups. Soon after the trade agreements were concluded last fall, ANCSA corporations and oil companies began strong lobbying efforts on Capitol Hill. The State of Alaska has tried to oppose the trade proposals but has focused most of its concern on opening the coastal plain.

- The trades must be dropped entirely for Congress to act on coastal plain legislation. The House of Representatives will use the existence of the trade proposals to avoid addressing the main issue of opening the coastal plain. Unless the trades are dropped or postponed until after Congress acts on coastal plain legislation, proponents will continue to preoccupy Congress with the trade issue.

State interests:

- The trades promote private interests at public expense. The trades are a noncompetitive disposal of potentially valuable public assets. By avoiding the usual lease sale process, the Interior Department deprives the United States Treasury and the State of Alaska of hundreds of millions or billions of dollars.

- The trades could virtually eliminate any return to the State of Alaska from ANWR oil and gas activity. If the trades occur, select oil companies and ANCSA corporations will gain a preview of the subsurface before federal leasing of adjacent lands. If the trade tracts prove dry, there will be substantially less competition at ensuing lease sales on adjacent acreage.

- The State is in an ideal situation without the trades. Under existing law the State should receive 90% of the proceeds from federal oil and gas leasing, including lease sale bonuses. (This might be reduced to 50% by Congress.) Thus the State will receive at least 50% of the federal revenue on all lease tracts in the coastal plain. To endorse the trades it would have to agree that this entitlement should be reduced to zero on trade tracts.

- The trades affect excellent acreage. The State and industry representatives indicate that the trade lands encompass at least 45-50% of the oil and gas potential of the coastal plain. The tracts are scattered across numerous structures throughout the coastal plain. Several major oil companies (not participating in the trades) oppose the trades because they affect such good acreage and may prevent full and free leasing competition on the coastal plain.

- Alaskans have a basic economic interest in averting the trades. The trades threaten hundreds of millions or billions of dollars of state revenue. Half of the bonus and royalty revenue would go to the Permanent Fund. If the trades occur, permanent fund dividend checks will be hundreds or thousands of dollars lower (1).

- The State withdrew from the trades for three reasons: 1) they made the ANWR issue more complex; 2) the trades do not protect Alaska's interests; and 3) the trade proposal was premature, before Congress acts on coastal plain legislation.

- The State should not become involved in the trades now. None of the state's concerns have been resolved. Other interests (some having better subsurface information) have gained control of the best coastal plain trade acreage. The State should continue to fight to retain the existing 50-90% entitlement in all tracts, rather than foresake interest in many tracts for control over a few.

Legal issues:

- The trades have been challenged in federal court for subverting the intent of the Alaska Lands Act and the National Environmental Policy Act.

---

1 - The Interior Department released and then withdrew a "state revenue analysis" purported to show how the State actually would benefit from the trades. This "state revenue analysis" has only recently become available and has not yet been fully analyzed, but shows serious deficiencies.

- An opinion prepared for Mobil Oil states that the trades contradict the Alaska Lands Act and seventy years of federal oil leasing law and policy.

- The State of Alaska clearly has sovereign and revenue interests that are not protected in the trades. There may be grounds for the State to oppose the trades in court.

Other issues:

- The refuges can be protected in other ways. Key senators and congressmen have proposed buying refuge inholdings with some portion of the federal receipts from coastal plain oil and gas leasing.

- The trade process has been secretive and exclusive. The newspapers, state documents, and the response in Congress reflect the secretiveness and exclusiveness of the trade process, which seems to have been preconceived to benefit some interest groups at the expense of others.

- The pressure for State involvement is intended to reduce opposition to the trades. If the State returns to the bargaining table, the Interior Department trade process will gain new credibility.

January 27, 1988

- excludes KIC.
- divides into the prospective structure
- does not include bonuses.

Estimated Reserves Anticipated from ANWR
Acreage Involved With The Native Corporations
Land Swaps

A conservative estimate indicates that the reserves likely to be recovered from the ANWR acreage involved in the current land swaps between the Department of Interior and the Native Corporations range from 500 million to 1.5 billion barrels.* Anticipated total revenue from the production and sale of these reserves, beginning in the late 1990's, would likely be 15 billion to 45 billion dollars, assuming a conservative crude price of approximately $30 dollars per barrel. An assumed royalty of 1/6 of the revenues would produce royalty amounts ranging from 2 1/2 billion to as high as 7 1/2 billion dollars.

Under current law the State of Alaska is entitled to 90% of these amounts. This would produce a total [illegible] ranging from 2.2 billion dollars to in excess of 6.5 billion dollars.

The proposed land swaps will [illegible] share of 42% of the anticipated royalty. The Native corporations prospects in ANWR because of [illegible] interests by the DOI under the proposals [illegible] approximately 42 1/2% of the [illegible]

This represents, assuming a royalty [illegible] a loss of direct revenue per [illegible] $18,250 which would otherwise [illegible]

* DOI has estimated that the reserves could range from 1.5 to 9 billion barrels with an outside high of 20 billion. Should any of these estimates prove correct, the [illegible] will increase in direct relation to the increase in recoverable reserves.

→ Mobil's analyses of data - projections of risk/production - what Mobil can reasonably expect. -

TESTIMONY OF REP. SAM COTTEN
Co-Chair, Resources Committee
Alaska State House

Before the House Committees
on Interior and Insular Affairs and
Merchant Marine and Fisheries

November 17, 1987

Mr. Chairman, and members of both committees, I appreciate this opportunity to address you on the issue of oil and gas exploration and development in the coastal plain of the Arctic National Wildlife Refuge.

This issue is important to Alaska. In my lifetime our economy has never seen such hard times and we are interested in every sensible economic opportunity that comes along.

On the other hand, we are proud of our environment and our heritage, and we recognize the national importance of the Arctic Refuge. We might have the chance to bolster national security, reduce our dependence on foreign oil, and bring in some important jobs and revenue for the State of Alaska and the nation, but we must take care in doing so.

Today, while oil seems to be in plentiful supply, we can take a measured approach to oil and gas leasing in the coastal plain.

Last spring my state legislative committee heard many hours of testimony on issues in the coastal plain debate. I will cover those issues in my written testimony, which I would ask permission to submit for the record, and will summarize them for you today.

Environmental Protection

With due respect for Chairman Udall, whose strong interest in the management of federal lands in Alaska I respect, I do not believe that the Congress should designate the coastal plain into the National Wilderness Preservation System. The oil and gas resource potential of the area is so high that it should, in the national interest, be tested.

Like Chairman Udall, I recognize the national importance of the environmental resources of the coastal plain. The air and water are clean and should be protected. The habitat value of the coastal plain is very high, especially for some Arctic species that need broad ranges for survival -- polar bear, caribou, wolf, and musk ox in particular.

The industry and its state and federal regulators have learned a lot at Prudhoe Bay and other North Slope fields. The record at Prudhoe is not spotless, but it is generally

very good. And it serves as a valuable predicate for oil and gas exploration and development on the coastal plain.

I believe that there should be high standards for environmental protection in the Arctic Refuge, based on North Slope experience to date. Roads and facilities should be kept to a minimum and carefully planned and located. Wastes should be managed to prevent long-term degradation of the Refuge. Rehabilitation and reclamation standards should be high. Monitoring and enforcement should be provided for from the beginning, in ways that assure full cooperation among the state, local, and federal governments and the industry.

Some might object to the imposition of these standards by Congress. But if the coastal plain is rich in oil and gas, as many experts believe could be the case, we will be able to afford to protect its other important resources in the event of oil and gas development.

Revenue Entitlements

The State of Alaska, like other western states, receives the benefit of 90% of federal receipts from oil and gas activity on federal lands. Congress is considering reducing the State of Alaska's share to 50% on the coastal plain.

Obviously, as an Alaskan, I must object to such treatment. The 90% entitlement was agreed to at Statehood and is part of our compact with the union of states. We want to be treated equitably.

All the same, if Congress chooses to adjust the entitlement unilaterally, I support proposals by some members of Congress to dedicate a portion of the federal revenue stream to conservation purposes. Our national parks and refuges could be improved by the acquisition of inholdings, facility construction, and new access.

Resident hire

Because our economy is in the doldrums and because Congress is considering a reduction in the State's revenue allotment, I don't feel bad asking the committees to consider special treatment for us in one respect: resident hire.

There's a history in our state of drawing transient labor for our major projects. While the residents provide services and facilities for tens of thousands of workers, many of the payroll dollars are spent in other states. The boom and bust cycle that has so characterized our history could be somewhat dampened if the Congress were to require

resident hire on oil and gas exploration and development in the coastal plain.

My understanding, gained from constitutional scholars, is that Congress alone has the authority to impose such conditions, in the form of federal legislation. I hope that the committees will do so.

Land trades

I am pleased that the committees have chosen not to address the proposed land trades at this time. If the Congress decides to make the coastal plain available for oil and gas leasing, the land trade issue deserves thorough review, subsequent to the larger decision. Suffice it to say for now that the trades have stirred a lot of controversy and might not serve the state and national interests at all.

Exploration only?

I have heard about proposals that would allow only exploration -- perhaps just a few exploratory wells -- in the coastal plain.

State, industry, and federal geologists agree that the area's subsurface is so complicated, and the potential is so

high, that such limited exploration could be entirely inadequate. We might not learn very much from just a few wells.

Also, by separating the exploration and development phases, the federal government might forsake large amounts of bonus and royalty revenue. I don't know of a leasing scenario which could provide for both exploration-only and rights to develop. Both are necessary to provide for full and free competition when the rights are offered. In this case full and free competition is likely to increase the landowner's receipts.

Summary

Mr. Chairman, and committee members, thank you again for listening to some of our concerns as Alaskans. In most cases you'll find that our interests coincide with yours: we want to assure the nation's energy security; we want to see that any coastal plain oil and gas activity is carefully conducted; and we want benefits to accrue equitably to the nation and the sovereign state of Alaska. I look forward to answering any questions from the committee.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

November 4, 1987

The Hon. Sam Cotten
Co-Chairman, Resources Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Mr. Cotten:

On November 17, 1987, the Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs, together with the Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, will hold a joint oversight hearing on the Arctic National Wildlife Refuge (ANWR).

The focus of this hearing will be Alaskan perspectives on the Secretary of the Interior's report and recommendations for oil and gas development of the coastal plain of ANWR.

On behalf of Chairman Gerry E. Studds and myself, we extend you the invitation to provide testimony at this special hearing.

The hearing will begin at 2:00 p.m. and will be held in 1334 Longworth House Office Building. Please delivery 100 copies of your written statement to 1522 Longworth no later than 24 hours prior to the hearing.

We look forward to exploring this important subject with you on November 17. In the meantime, if you have any questions, please contact Jeff Petrich at 202-225-6042.

Sincerely yours,

George Miller

GEORGE MILLER, Chairman
Subcommittee on Water and
Power Resources

Alaska State Legislature

Senate Resources Committee

Sen. John B. (Jack) Coghill, Chairman
Sen. Paul Fischer, Vice-Chairman
Sen. Lloyd Jones
Sen. Arliss Sturgulewski
Sen. Jim Duncan
Sen. Fred Zharoff
Sen. Dick Eliason

Box V
Juneau, Alaska 99811
(907) 465-4907

Coghill → Cotten 11/87

November 19, 1987

The Honorable Sam Cotten
Alaska House of Representatives
P.O. Box 296
Eagle River, AK 99577

Dear Representative Cotten:

I have recently received your memorandum to Senator Faiks regarding "ANWR land trades." It's very interesting reading, especially the attached information from the Division of Oil and Gas. The information just goes to show you the State should have been in there knocking out a land trade also. Perhaps all the parties interested in ANWR could have come out as happy as the parties in the recent Eklutna exchange.

I don't want to belabor the apparent misunderstandings your memo seems to indicate, but perhaps it was the House that failed to take action on ANWR. It's my understanding that your Resource Committee held numerous ANWR hearings. Just because the Senate was able to pass an ANWR resolution to the House, is not a reason to conclude there was no legislative action.

As far as I know, SJR 7 had no magic restrictions preventing the House from exercising its independent process. If your committee had of been able to move any ANWR resolution through the House to the Senate, then the ball would have been in our court to concur or not. If that had taken place and we still had no joint action, then I think the accusations in your memo regarding Senate leadership might have held a little water. My understanding is that you wouldn't hear SJR 7 in your committee.

Regarding the land trades language in SJR 7, I must remind you that the Senate only endorsed the "principle" of the exchanges. You have to agree that section 1302 of ANILCA gives the Secretary of Interior the authority to do exactly what has occurred. I still find it disturbing that the State has not been involved in this exchange process. In my opinion, the Senate took action on "a strong ANWR resolution"; I hope you'll be able to take action as well.

Sincerely,

Senator John B.(Jack) Coghill

cc: Members of the Alaska Legislature

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Chairman, Senate Community and Regional Affairs Committee
Vice-Chairman, Senate Judiciary Committee
Member, Senate Resources Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

TO: Senator Jack Coghill
Chairman, Senate Resources Committee

January 25, 1988

FROM: Senator Arliss Sturgulewski

RE: Arctic National Wildlife Refuge Report

As you are aware, I am strongly supportive of opening ANWR to environmentally responsible oil development and I am the prime sponsor of SJR 7 which urges Congress to do so.

As such, I thank you for the opportunity to comment on your proposed report on the Arctic National Wildlife Refuge. Though I have a number of minor concerns, I will limit my comments to one substantive area.

The report gives an unqualified endorsement to the ANWR land trades as they are currently proposed. The final conclusion in the Land Exchange section of your report says, "After all the oil and gas in Alaska has been pursued developed and consumed, this value-for-value exchange effort could stand as a lasting testimony to our commitment, wisdom and foresight on behalf of future generations."

I am not an opponent of the concept of land trades, particularly if the state is involved in the trades. The exchanges as now proposed, however, raise far too many serious questions for me to be able to endorse the report without qualification unless it addresses all major issues. This is particulary true in light of new information presented by the Department of Natural Resources and the Federal Office of Management and Budget since the Senate Resource Committee hearings.

In particular, the report consistently refers to the exchanges as "value-for-value" exchanges and exchanging "land titles of equal value". The report lists negotiated values for native lands, however, it omits the D.O.I. appraised values for these same lands. The appraised values are less than one quarter of the negotiated values ($118.9 million vs. $538.7 million).

The report also lists values for Native corporation nominated ANWR tracts. These values exactly match the negotiated values of offered native lands, but based on what is known of existing contracts between the participating Native corporations and oil companies, the values appear substantially low.

The values provided in the report combine to present a picture that is less than complete. This problem is compounded by the inclusion of a map that shows tract nominations and D.O.I. identified deep prospects, but does not show more promising shallow structures identified in later information and which correspond closely to Native tract nominations.

The report quotes a spokesperson of the Native Lands Group saying, "Native involvement will broaden the supportive constituencies within the Democratic Congress." I believe this is true <u>if</u> there is a perception that the trades are fair and serve a legitimate public purpose.

Because there is a growing perception, however, that the land trades are not in the state's or the nation's best interest, many people are reevaluating their commitment to the trades. In fact, in the text of the report, contrary to its conclusions or executive summary, there is an admission that, "...any tactical or real advantage to these exchanges has been negated."

I am concerned that if the Senate Resources Committee goes on the record strongly in support of the land trades, without fully considering and including all the facts, we may actually hurt the effort to open ANWR by this report.

Opening ANWR remains my overriding goal. For this reason I hope you will carefully review all the information that has become available since our subcommittee hearings and include the new information in your report as well as correcting other drafting problems.

Alaska State Legislature

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811

November 27, 1987

MEMORANDUM

TO: Representative Sam Cotten, Co-Chairman
House Resources Committee

FROM: Senator Jan Faiks
President of the Senate

SUBJECT: Senate Joint Resolution 7

Thank you for the opportunity to again state the Senate's full support for oil and gas exploration, development, and production in the Coastal Plain of the Arctic National Wildlife Refuge (ANWR). Please be assured that I share your disappointment at the Alaska House of Representatives' failure to pass any form of a resolution supporting oil and gas leasing in the Coastal Plain of ANWR during the five months the Legislature was in session this year.

In your November 13 memorandum you stated that SJR 7 endorses the proposed land trades, and that this was the reason for the failure of the House to act on the resolution. In fact, SJR 7 does not address any of the proposed land exchanges, it only "supports the principle of value-for-value exchange."

You also stated that the proposed land trades have stalled discussion on ANWR in the U.S. Congress. Yet almost everyone I have spoken with who has been working in support of leasing in the Coastal Plain feels that Congress has entered into serious discussions on ANWR sooner than predicted.

You have requested that the Senate reconsider the language in SJR 7 so that a strong ANWR resolution can be passed early next session. At this point, I believe that the best approach would be for the House Resources Committee to pass what it considers to be an acceptable version of SJR 7. Then, assuming that the resolution passes the full House of

Representatives, the Senate would have the opportunity to concur with any House amendments. Should the Senate not concur with any House amendments SJR 7 would then go before a conference committee.

Your interest in expediting the passage of a strong ANWR resolution as early as possible next session is certainly encouraging. The Senate stands willing to work with the House of Representatives through the conference committee process to resolve differences in the wording of SJR 7.

cc: All legislators

Enclosure

REPRESENTATIVE
SAM COTTEN
DISTRICT 15

P.O. BOX 296, EAGLE RIVER, AK 99577
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

M E M O R A N D U M

TO: The Hon. Jan Faiks
President, Alaska State Senate
FROM: Rep. Sam Cotten
DATE: November 13, 1987
SUBJECT: ANWR land trades

Last session the Legislature failed to pass a resolution supporting oil and gas leasing in the coastal plain of the Arctic Refuge for one reason: the leadership of the State Senate insisted that the resolution include language endorsing coastal plain land trades proposed by the Interior Department and several ANCSA corporations. When the Senate passed SJR 7 ten days before the end of the legislative session, it intended to force acceptance of the land trades as part of the legislative resolution. Senate leaders told me that they would not accept a resolution lacking the Senate's land trade language.

I believed then, and believe even more strongly now, that the proposed land trades could do enormous violence to the general interests of the people of the State of Alaska, even though they might benefit oil companies and the involved ANCSA corporations. I also believe, despite the arguments to the contrary last session, that the proposed trades have diverted and stalled discussion of the larger issue before the U.S. Congress. They certainly have not smoothed the progress of coastal plain legislation on Capitol Hill. In fact influential U.S. representatives and senators have told the Interior Department to hold off on further trade actions and have requested an investigation of the trades by the General Accounting Office. Fortunately the trades are inactive at present, despite expensive lobbying activity by some ANCSA corporations in Washington. (Notably the Anchorage Public Policy Forum was not able to come up with a proponent of the trades for a public meeting last week. I understand from APPF that state senators who had included the pro-trade language in SJR 7 were not willing to speak on the issue, and ANCSA corporations were unwilling to have a representative defend the trades at the meeting.)

In addition to their effects in Washington, there are numerous substantive arguments against the trades, especially if the concerns of Alaska's public are considered. The trades could eliminate hundreds of millions of dollars of bonus and royalty revenue for the people of Alaska, including the Alaska Permanent Fund. They have been conducted secretly and without market tests that might assure that the federal government is receiving a fair return on the disposal of public assets. They could threaten future leasing on nearby state and federal acreage. State geologists believe that the trades include the best oil and gas land in the coastal plain, perhaps worth more than the remaining land. At this point the benefits of the trades are restricted to a few oil companies and ANCSA corporations; they include no provisions for any revenue return to the State from royalties or bonuses, and I understand that there are no revenue-sharing provisions for ANCSA corporations not directly participating. The enclosed critique of the trades by the State of Alaska gives more detail on some of the problems posed by the trades. My staff has also prepared an analysis of them that I would be pleased to share with you and other members of the Senate.

I know that the Senate majority endorsed the trades last year in SJR 7. Yet it seems incomprehensible that any Alaska public policymaker would continue to hold this position in light of the many revelations this summer. I hope that you and other senators will reconsider the language in SJR 7, as passed last year, so that we may pass a strong ANWR resolution early in the coming session.

cc: All senators
All representatives

Enclosure

ALASKA DIVISION OF OIL AND GAS
CRITIQUE OF THE PROPOSED ANWR LAND EXCHANGES

The Department of the Interior (DOI) has tentatively agreed to exchange the subsurface rights to certain tracts within the Coastal Plain of the Arctic National Wildlife Refuge (ANWR) for the surface estate of certain Native Corporation inholdings from other federal refuges within Alaska. The methodology which DOI apparently employed in estimating the value of the oil and gas estate within ANWR is inadequate for that purpose, and its application under the circumstances is technically unsound. As a result, the individual tract values which DOI assigned to the ANWR lands are unlikely to approximate those that would result from a competitive auction. In fact, the actual value of those resources is currently unknown, and it could only be estimated with reasonable accuracy after the drilling, testing and production of numerous wells within ANWR.

In order to understand the inadequacies of DOI's appraisals, one must first recognize the distinction between oil and gas reserves analysis and oil and gas resource analysis. This distinction is crucial because DOI apparently has used a hybrid, poorly documented resource analysis procedure ostensibly to generate estimated values which, in fact, could only be estimated from a more sophisticated reserves analysis.

This review focuses primarily on the deficiencies of DOI's assessment of the potential amount and value of oil and gas underlying the proposed exchange lands. However, in addition to the uncertainties as to the actual volume of oil and gas which may be discovered in ANWR, there are equally critical uncertainties surrounding future price and cost estimates to develop those discoveries. The interplay of each of these factors--all of which are now highly speculative--will significantly influence the estimated values of the proposed exchange tracts.

Reserves evaluation is conducted only after the discovery and delineation of oil and gas deposits within a field. Reserve evaluation relies upon objective data gathered from the completion and testing of wells, its results are highly reliable and they are reproducible by independent analysts. On the other hand, oil and gas resource evaluation of prospective areas such as the Coastal Plain of ANWR usually is conducted before any wells are drilled. It is an iterative, probabalistic computer-assisted modelling procedure which relies upon numerous subjective estimates of potential reservoir characteristics. These subjective estimates generate a probability distribution of potential "outcomes" from hypothetical drilling. These "outcomes" are expressed as anticipated amounts of hydrocarbons associated with corresponding probabilities of occurrence.

These resource estimates are based on subjective assertions about possible geophysical and geological characteristics (parameters) of a particular region such as ANWR. The computer model specifies a method of sampling from pre-specified probability distributions of these characteristics. This sampling generates a joint probability distribution of reservoir characteristics. The correct combination of characteristics results in a

simulated hydrocarbon discovery. Other combinations generate a simulated dry hole. Thousands of passes through the probability distributions for each parameter result in the probability distribution of potential resource values. But note, the range of potential outcomes is dependent upon the subjectively determined range of values for each individual reservoir characteristic. Thus, resource estimates represent the "best guess" of both men and model as to the likely distribution and value of oil and gas resources. The accuracy of the "best guess" will be strongly influenced by the quality and quantity of available data. In the final analysis, only drilling will verify the estimates.

Both reserves analysis and resource analysis have particular applications, and each has its own unique limitations. Obviously, the purposes for which each is used are determined, among other things, by both the relative availability of objective geological, engineering and economic data and the degree of certainty which the analyst (usually an investor in the case of reserves analysis and a bidder in the case of resource analysis) is trying to achieve. Investors routinely rely upon detailed reserves analysis of a delineated oil and gas field to loan money to develop the field's reserves. The same reliance should never be placed on resource estimates.

Resource analyses typically are used by petroleum exploration companies as a management decision tool to compare the relative prospectiveness of frontier areas to assist in directing the companies' future exploration efforts. A much more sophisticated but similar modelling approach is used to estimate tract values for bidding purposes. The Minerals Management Service, the State of Alaska and the Bureau of Land Management also conduct independent resource analyses before competitive oil and gas lease sales on lands which they manage. These analyses serve two important functions. First, they provide some indication of the relative prospectiveness of each potential subsurface trap identified within an area proposed for leasing. Secondly, and of greater utility, they provide ranges of estimated tract values which are used to set bidding terms and establish minimum acceptable bonus bids.

The calculated minimum bid for each tract is used as a benchmark after the sale for determining whether to accept or reject the highest bonus bid submitted for each lease. The calculation of each tract's minimum bonus bid before a sale is a modelling exercise which relies upon the manipulation of many highly subjective values. In recognition of this fact, the numbers are not treated by government agencies as absolutes in deciding whether or not to accept the apparent high bids.

Although one can speculate about the range of values which a lease may have, the actual value of a given lease cannot be accurately estimated until the lease area has been thoroughly explored by the drilling and testing of exploratory wells. For each productive lease, the number of wells required to delineate adequately the underlying reserves and to accurately estimate their value is dependent upon the geological and economic characteristics unique to that lease. It is for this reason that the minimum bid for each competitively offered lease is not considered to represent the actual value of the resources

beneath the lease. It is simply one estimate based upon the then available information. In competitive leasing, the failure of a particular lease to attract the precalculated minimum bid simply means that additional considerations will be evaluated before a decision is made whether to award the lease or to reoffer it at a later date.

The determination that "fair market value" is being received in any competitive leasing program which relies upon resource analysis presumes that public value is measured by more than the bonus bids offered. In fact, resource analysis presumes that value received by the lessor may consist of future rentals, royalties and taxes in addition to the advance bonuses received from lessees for the right to explore and develop a lease. In many cases, high bonus bids are received for tracts which subsequently are found to be nonproductive; in others, relatively low bids may win leases which ultimately prove to be highly productive, and thus extremely valuable. This fact in itself illustrates the highly speculative nature of any analysis prior to drilling. To reiterate a point made earlier, "best guesses" are just that.

Under real world competitive circumstances, bonus bids represent a percentage of the firm's estimate of the net economic value of the lease (or economic rent). The percentage that the bonus represents will vary according to the firm's perception of the geological and economic risks attendant to the lease, as well as its assessment of the potential competition for the lease. This net economic value is a residual after all costs (including taxes and royalties) have been deducted from potential revenues and the net revenue has been discounted by a "risk adjusted" discount rate representing a normal rate of profit. The firm's potential net revenues are estimated by a procedure analagous to resource analysis.

Given the subjective nature of the resource evaluation process, either too much or too little is paid for a particular lease but, on average, the competitive process transfers the net economic value to the lessor. In the long-run, negative and positive windfalls should tend to offset one another.

In theory, the net result when numerous competitive sales are conducted over time is that fair market value is received for the leasing of the public resource. Competitive leasing can thus proceed in the face of the relative uncertainty surrounding resource estimates because, on average, the future royalty and tax "windfall" revenues from unanticipated exploration successes or from discoveries which far exceed pre-leasing expectations will tend to compensate for the anticipated royalties and taxes which never materialize from estimated highly prospective leases that turn out to be dry.

There is only one certainty with subsurface resource analysis--it can never accurately estimate before leasing and drilling the present value of the combined future bonuses, rentals, royalties and taxes which may be produced from a discovery on a lease tract. The wide variance in bids for a particular tract in a lease sale offers further evidence of this estimating problem. Yet, using methodology designed for resource analysis and relying upon data insufficient for the task, DOI claims to have calculated a value of each ANWR

tract which it proposes to exchange, and that this value is an accurate estimate of that tract's value. As the previous discussion indicates, this is highly unlikely. In fact, its evaluation is inadequate as an accurate present value estimate. However, just as important for the reasons described below, its utility as a responsible resource analysis also is largely discredited.

The geophysical data used to map the structures described in DOI's 1002 report constitute a reconnaissance grid which averages approximately three miles by six miles. Such a large grid size, when combined with the lack of well data control and the extremely complex geologic characteristics of ANWR, virtually guarantees that many potential oil and gas traps of significant size may not be recognized, while others will be so poorly defined that their dimensions and geometry will be misinterpreted. Far more detailed data would be required to define accurately the potential subsurface traps within the Coastal Plain of ANWR.

Amauligak, Gulf Canada's recently announced discovery in the Canadian Beaufort Sea, is approximately twenty-one square miles in area. That discovery, which contains an estimated 850 million barrels of recoverable oil, provides an excellent example of the problems associated with relying on a regional seismic reconnaissance grid and inadequate geological data to predict the value of ANWR tracts. Were that field located in the Coastal Plain of ANWR, it would be entirely fortuitous to recognize its existence, much less to define its limits accurately with the existing data. If a deposit this size--a giant oil field by world standards--cannot be detected or accurately mapped, it should be obvious that the tracts overlying it cannot be appraised accurately.

DOI undoubtedly failed to accurately estimate the value of those tracts where subsurface traps exist but cannot be identified from the existing data. However, in addition, it clearly failed to map numerous structures which can be identified from the reconnaissance data available. According to DOI's press release describing the July 1987 exchange selections, "...Of the 73 tracts identified, 34 were on potential oil and gas structures mapped for the 1002 study and report to Congress." However, based upon our independent mapping of the same geophysical data, every one of the 73 tracts selected for exchange lies above a structural trap. Further, all of the mappable four-way closures (representing the highest potential targets) have either been exchanged or selected for exchange.

It is clear from the selection pattern and our independent mapping of the geophysical data that the tops (structurally highest and most prospective portions) of all the best structures, including the very large prospects numbers 18 and 19 (from the 1002 study), as well as the numerous prospects aligned along the Marsh Creek trend, have been selected as a result of the ASRC and latest exchanges. This is precisely the same result that would be expected to occur if the Coastal Plain acreage were made available for competitive bidding and exploration by well-informed bidders.

Many of the structures which we have identified involve the relatively shallow Tertiary sediments, which apparently either were not mapped in detail or

completely analyzed by DOI. These structures involve sedimentary rocks which are the same age as those which produce the oil-stained outcrops along the flanks of the famous Marsh Creek anticline, the prominent surface structure which first attracted petroleum explorationists to ANWR. The selection of the overlying tracts by the Native Corporations and their industry partners indicates that they have recognized and mapped the underlying structures, and that they must have high regards for their oil and gas potential.

DOI concluded further that "...503 (85.5%) tracts not identified remain available for a federal leasing program and include 87.7% of the tracts over mapped structures." For the reasons described in the preceding paragraph, this is simply not the case. The fact that DOI apparently failed to identify the potential traps beneath many of the tracts which they propose to exchange does not alter the fact that they exist. The Tertiary structures obviously have some real value even though DOI has failed to map them in detail and to attribute proper value to them.

DOI dramatically downplays the potential detrimental effects of proceeding with the proposed exchanges in the absence of objective and independently reproducible determinations of the actual value for each tract. For DOI to claim, as it does in its press release, that "...these latest selections only represent a small (10.8%) percentage of the entire 1002 area." is disingenuous in the extreme. In fact, based upon our subsurface mapping, these selections, when considered in combination with the 1983 ASRC land exchange, would result in the noncompetitive conveyance of more than 250,000 of the most prospective acres within the Coastal Plain of ANWR. This amount represents approximately 18 percent of the entire Coastal Plain of ANWR.

To focus on the relative number of acres conveyed through exchanges as DOI does, however, is very misleading. It is the location of that acreage relative to the most prospective subsurface structures which is relevant, not the absolute number of acres exchanged. Relatively small but well-informed selections could effectively result in the exchange of all of the area's potential oil and gas reserves. The potential effect of a fortuitous selection involving a relatively small area is demonstrated by the Prudhoe Bay Field.

Although the entire area surrounding the Prudhoe Bay structure was recognized to be highly prospective before the first exploratory well was drilled, we now know that the vast majority of the prolific oil and gas reserves in that region are confined to a surprisingly small area. In fact, the surface area above the main producing reservoir of the giant Prudhoe Bay Field encompasses only about 150,000 acres. Fifty-nine percent of the reservoir's recoverable oil (5.9 billion barrels) lies beneath just 40,000 acres in that field, and fully 94% of the recoverable oil (9.4 billion barrels) lies beneath the best 100,000 acres of the field.

Among the millions of acres of state-owned lands between the Canning and the Colville Rivers, this particular 150,000 acres is uniquely valuable. DOI cannot assure the public that it has not already exchanged the subsurface rights to equally valuable lands within ANWR to the Arctic Slope Regional Corporation. Similarly, DOI can offer no guarantees that the proposed

exchanges will not potentially transfer billions of dollars in oil and gas reserves to other Native Corporations and their industry partners in return for 891,000 acres of surface estate with an estimated value of $538.7 million (not based upon fair market value appraisals).

The details of one particular exchange contract, that between Old Harbor and its industry partner, Texaco, illustrate quite clearly that the corporations will receive substantially more from the exploration of the tracts which they selected than DOI has claimed those lands to be worth. In this example, the total value of the corporation's exchange lands, and thus the value of the ANWR tracts it selected, was placed at $45.7 million by DOI. Yet, if ANWR is opened, the corporation's industry partner is committed to pay $45.7 million plus a 14 percent royalty on any oil and gas produced from those lands.

The DOI exchange procedures apparently neither estimate nor acknowledge the value of that 14 percent royalty interest. Whatever the amount may ultimately be, it would accrue directly to the corporation shareholders instead of to the federal (and/or state) treasury, as would be the case if the tracts were leased competitively. Furthermore, Texaco has agreed to pay Old Harbor a 1 1/2 percent royalty on any leased lands in the Coastal Plain not owned by Old Harbor.

In relative terms, the proposed land exchanges provide almost absolute economic protection for the Native Corporations with no parallel protection for the federal government. In fact, the exchange contract provisions virtually assure that any loss for DOI (and the public) will be a windfall for the corporations and their industry partners. In the final analysis, the exchanges are a no-loss proposition for the corporations, and a no-win situation for the public. Economic and geological risk has been transferred to the taxpaying public and a few select oil companies.

For example, one of the exchange contracts currently contains a rescission clause which enables the corporation to relinquish title to its subsurface estate in ANWR in exchange for the reconveyance of a portion--rumored to be as high as 65 percent of the surface estate which it has traded for the ANWR lands. In light of the total uncertainty surrounding whether the ANWR lands have oil and gas reserves, this provision was created to enable the corporations to regain title to a portion of their former surface inholdings should exploration by their industry partners prove unsuccessful.

However, if as has been reported, each of the corporations has already received advance cash payments from its respective industry partner for the future right to explore and develop the lands which it has selected, the corporations bear little or no risk in the exchanges. Their risk is offset effectively by the cash advances from industry. Moreover, this protection is further enhanced for any corporation that insists upon a rescission clause if its ANWR selections are nonproductive.

Under the same circumstances, however, the public interest will not fare so well. In exchange for an indeterminate number of abandoned exploratory well locations on the Coastal Plain for which it will regain title, DOI will have to reconvey title to some of the valuable refuge inholdings which it has temporarily received from one or more of the corporations. The stated basis for its proposed exchange literally will disappear. Meanwhile, DOI will have

foregone the undoubtedly high bonus bids, rentals and royalties which it could have received had it competitively leased the ANWR lands instead of exchanging them under noncompetitive procedures.

Of equal importance, should exploration prove unsuccessful, DOI will have assured the early condemnation of adjacent unleased acreage by allowing expedited drilling of the exchanged lands, all of which overlie portions of prospective subsurface structures. The absolute revenue loss from the premature condemnation of surrounding unleased acreage cannot be calculated should one or more of the exchange tracts prove to be dry. However, given ANWR's perceived hydrocarbon potential, the foregone bonus revenues, alone, could amount to hundreds of millions of dollars. Whatever that loss ultimately might be, it would not be industry's loss, and it would not be the Native Corporations' loss--it would be the public's loss. There is no effective way to limit the potential public revenue loss from the early condemnation of unleased tracts by drilling on adjacent exchange lands short of prohibiting the drilling of any additional exploratory wells in ANWR before competitive leasing occurs.

To assure that the corporations receive the full value of their inholdings, but that neither they nor their industry partners benefit from windfalls at public expense, would necessitate limiting total revenues to the full appraised value of those surface inholdings. From a public perspective it would make sense to limit the corporation's future revenues from its ANWR subsurface rights to the appraised value of its exchanged inholdings (plus interest) minus the cash advance it has received from its industry partner. Once the full appraised value (plus interest) of its surface lands is recouped, the corporation's interest in the subsurface estate would revert to the federal government, and the corporation's former percentage revenue share would subsequently accrue to DOI as a royalty on the continuing production.

A combined strategy of prohibiting additional drilling until after competitive leasing has occurred and limiting the Native Corporations' future revenues from exchanges to the appraised value of their surface inholdings would minimize the loss of public revenue. However, it would not remedy the worst flaw of the proposed exchanges, the fact that they simply are bad public policy. Proceeding with the exchanges would ratify DOI's precedent of substituting noncompetitive, negotiated exchanges which favor only a few companies and Native Corporations for open competitive leasing procedures which would treat all participants equally, and which assure the federal government's receipt of fair market value for the leasing of public resources.

In summary, DOI's resource analysis is no substitute for competitive sales as a means to estimate the value of the potential oil and gas resources which are proposed for exchange. However, that evaluation, which relies upon regional geophysical and geological mapping is adequate to establish a competitive leasing program in ANWR. The federal government's receipt of fair market value for ANWR's oil and gas resources can only be assured through a fully open and competitive leasing program which retains a significant royalty interest in any oil and gas reserves which are discovered and produced there. Both the Prudhoe Bay and the Amauligak fields provide graphic examples of why DOI's proposed exchanges entail unacceptable risks for prudent managers of the public resources.

1080E 09/18/87

EXECUTIVE SUMMARY
OF THE ALASKA DIVISION OF OIL AND GAS CRITIQUE
OF THE PROPOSED ANWR LAND EXCHANGES

When combined with the 1983 ASRC exchange, the Department of the Interior's (DOI) most recent proposed ANWR land exchanges result in the non-competitive conveyance of more than a quarter of a million acres of the most prospective lands within the Coastal Plain of ANWR for a TOTAL VALUE OF ONLY $543.8 MILLION (the appraised value of the exchange lands tendered to DOI). In the ASRC exchange, DOI received surface estate appraised at $5.6 million in exchange for subsurface rights to approximately 92,000 acres of highly prospective mineral estate beneath lands owned by the Kaktovik Inupiat Corporation in the Coastal Plain of ANWR. The currently proposed exchange would convey the subsurface rights to an additional 166,278 acres of the remaining most highly prospective lands to six Native Corporation groups and their industry partners in exchange for 891,000 acres of surface estate with an estimated value of $538.7 million.

Although impossible to calculate, it is almost certain that a competitive lease sale of this same coastal plain acreage would generate substantially higher revenues than those resulting from the ASRC exchange and the latest proposed exchange. The value of the royalty interest alone, should significant discoveries occur, potentially may be measured in the billions of dollars. Bonus revenues are likely to be higher than the exchange values because the open competition in a competitive lease sale necessitates higher bids to "win" the most prospective tracts.

The details of one particular exchange contract, that between Old Harbor and its industry partner, Texaco, illustrate quite clearly that the corporations will receive substantially more from the exploration of the tracts which they selected than DOI has claimed those lands to be worth. In this example, the total value of the corporation's exchange lands, and thus the value of the ANWR tracts it selected, was placed at $45.7 million by DOI. Yet, if ANWR is opened, the corporation's industry partner is committed to pay to them $45.7 million plus a 14 percent royalty on any oil and gas produced from those lands.

The DOI exchange procedures apparently neither estimate nor acknowledge the value of that 14 percent royalty interest. Whatever the amount may ultimately be, it would accrue directly to the corporation shareholders instead of to the federal (and/or state) treasury, as would be the case if the tracts were leased competitively. In addition, the agreement provides that Texaco will also pay Old Harbor a 1 1/2 percent royalty from production by Texaco on any leased land in ANWR not owned by Old Harbor.

The uniquely high hydrocarbon potential of ANWR presents DOI with a one-time-only opportunity both to reduce the national dependence on foreign oil imports and to receive significant public revenues in the process. In acknowledging the extremely high upside resource potential and realizing the uncertainties attached to DOI's assigned value for individual ANWR tracts, a prudent approach, at the very least, would require that the federal government retain a significant royalty interest in future petroleum production from all the ANWR tracts.

The methodology which DOI apparently employed in estimating the value of the oil and gas estate in ANWR is inadequate for that purpose, and as a result, the individual tract values which DOI assigned to the ANWR lands are unlikely to approximate those that would result from a competitive lease sale. A reserves analysis, which relies upon objective data from the completion and testing of wells, would be necessary to establish a reliable value for the subsurface resources beneath the ANWR tracts. DOI has employed a resource analysis procedure which relies on probabilistic computer-assisted modelling of subjective geologic variables to assign values to the individual tracts. Subsurface resource analysis can never accurately estimate, prior to leasing, drilling, and testing, the present value of the combined future bonuses, rentals, royalties and taxes which may be realized from a discovery on a lease tract.

In addition to the limitations of resource analysis methodology, the utility of DOI's evaluation is further constrained by the inadequacy of data available in ANWR. The geophysical data used to map structures in ANWR constitute a reconnaissance grid which averages three miles by six miles. Such a large grid size, when combined with the lack of well data control and the extremely complex geology, virtually guarantees that many potential oil and gas traps of significant size may not be recognized.

Amauligak, a recent discovery in the Canadian Beaufort Sea with an estimated 850 million barrels of recoverable oil, is approximately twenty-one square miles in area. Were that field located in the Coastal Plain of ANWR, it would be entirely fortuitous to recognize its existence, much less to define its limits accurately with the existing data. If a deposit this size--a giant oil field by world standards--cannot be detected or accurately mapped, it should be obvious that the tracts overlying it cannot be appraised accurately.

According to DOI's press release describing the latest exchange selections, "...of the 73 tracts identified, 34 were on potential oil and gas structures mapped for the 1002 study and report to Congress." However, based upon the state's independent mapping of the same geophysical data, every one of the 73 tracts selected for exchange lies above a structural trap.

Further, all of the mappable four-way closures (representing the best potential target areas on the structures) have either been exchanged or selected for exchange. The fact that most of the industry selections do not overlie structures mapped by DOI in the final 1002 study indicates that DOI's mapping is incomplete. The actual exchange selection pattern reveals that the native corporations and their industry partners have recognized and mapped these underlying structures and that they apparently have high regards for their oil and gas potential.

The selection pattern and our independent mapping indicate that not only the mappable closures, but the tops (structurally highest and most prospective portions) of all the best structures, including the very large prospects #18 and #19 (from the 1002 study), and numerous prospects aligned along the Marsh Creek trend, have been selected already by the exchange participants, just as

would be expected to occur if the acreage were offered for competitive leasing and exploration by informed bidders. Based upon our current knowledge, the acreage remaining for any future competitive sales is situated over the structurally lower (and therefore less prospective) portions of the subsurface structures on which selections were made or on other less prospective unselected structures.

Together, the ASRC and latest proposed exchanges would transfer over 250,000 acres of the 1.53 million acre Coastal Plain (approximately 18 percent) into private ownership. However, to focus on the relative number of acres conveyed through exchanges, as DOI does, is very misleading. It is the location of that acreage relative to the most prospective subsurface structures which is relevant, not the absolute number of acres exchanged. Relatively small but well-informed or simply fortuitous selections could effectively result in the exchange of all of the area's potential oil and gas reserves.

It is the uniquely high upside potential of the ANWR acreage which is attracting the wide-spread exploration interest in the Coastal Plain. However, unsuccessful exploration on the exchanged lands, prior to leasing, is one possible outcome. The less prospective tracts in ANWR, those remaining after the exchange selections, could very well be condemned through early drilling of the exchange tracts, with a resultant loss in public revenues.

The incorporation of a rescission clause in any of the exchange contracts would enable a corporation to relinquish title to its subsurface estate in ANWR in exchange for the reconveyance of a portion--rumored to be as high as 65 percent--of the surface estate which it has traded for the ANWR lands. The effect of this particular stipulation, when combined with the advance cash payments the corporations are reported to have received from their respective industry partners, places the corporations in a very enviable low or no-risk position. The public interest does not enjoy parallel protection, however. In exchange for an indeterminate number of abandoned exploratory well locations on the Coastal Plain for which it will regain title, DOI will have to reconvey title to some of the valuable refuge inholdings which it has temporarily received from one or more of the corporations. Under these circumstances, the stated basis for the proposed exchange literally will disappear.

The federal government's receipt of fair market value for ANWR's oil and gas resources can be assured only through a fully open and competitive leasing program which retains a significant royalty interest in any oil and gas reserves which ultimately may be discovered and produced there. The fairness and equity offered by competitive leasing procedures are in marked contrast to the terms of DOI's proposed exchanges. Those exchanges are not equal value exchanges. In fact, the actual value of the ANWR lands proposed for exchange cannot be determined prior to the drilling and testing of numerous exploratory wells on the tracts.

1078E 09/18/87

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

October 27, 1987

Cowper → Cotten 10/87

The Honorable Sam Cotten
Alaska State Representative
P.O. Box 296
Eagle River, AK 99577

Dear Sam,

Thank you for again sharing your concerns over the proposed ANWR land exchanges. Your reaction to this proposal to dispose of public resources without adequate compensation is the same as mine. Furthermore, the trades divert congressional attention away from our primary objective of opening the ANWR coastal plain to responsible oil and gas development and adversely impact potential state and federal royalty revenue from subsequent leasing.

As you know, my administration continues to closely monitor the progress of the proposed trades. At the present time, Secretary Hodel has placed the trades on hold, pending further congressional consideration of the entire ANWR opening issue. In addition, the state is cooperating with the General Accounting Office in an investigation of the process used by the United States Fish and Wildlife Service (USFWS) and Bureau of Land Management to value the ANWR subsurface and the Native corporation inholdings. I am confident that my office in Washington, D.C., is well able to observe and deal with the trade proposals. John Katz continues to believe that the proposed trades enjoy very little support and have generated considerable opposition from key congressmen. Both the Senate and the House are now considering bills to require ANWR trade proposals to receive full congressional review and authorization.

Assistant Secretary Bill Horn has indicated that the next step in the land trade process will be the preparation of a Legislative Environmental Impact Statement (LEIS) by the USFWS. The LEIS process, however, has not yet been initiated. When it is, the state will provide all information necessary to ensure that state interests are addressed and protected. The LEIS process will include opportunities for public involvement.

We are now in possession of all relevant materials related to the proposed trades, including the final exchange contract, land used stipulations and related appendices. At the appropriate time in the LEIS review process, we will formally articulate state concerns and vigorously defend state interests. In the meantime, we will continue informal efforts to convince congressional leaders that the trades are adverse to state and national interests. Part of our effort will include promotion of the state's alternative proposal, whereby the Native corporations could be assigned bid credits (of equal value to their refuge inholdings) which would then be used to bid in any competitive federal oil and gas lease sale.

I am not convinced that it is necessary for the state to join the Trustees for Alaska in their suit against the Department of the Interior regarding the administrative process used to develop the trade proposal. It seems clear that the Trustees have raised the relevant legal issues, and I see no advantage to direct state participation in this matter. I'd rather focus our energies directly on Capitol Hill.

As we forge ahead with our primary objective, the opening of ANWR, we do not intend to allow the proposed trades to sandbag the congressional review process. In this regard, I believe a well-publicized frontal attack on the trades may be counterproductive. Instead we should continue to release factual data to support our position that the trades compromise important public interest considerations. I intend to personally communicate this to key congressmen, as well as the Secretary of Interior, during my November visit to Washington, D.C.

Your continued support in this matter is much appreciated.

Sincerely,

Steve Cowper
Governor

cc/enc: Commissioner Brady
DNR

REPRESENTATIVE
SAM COTTEN
DISTRICT 15

P.O. BOX 296, EAGLE RIVER, AK 99577
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

Cotten → Cowper 9/87

The Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, AK 99810

September 18, 1987

Dear Governor Cowper:

The Department of the Interior recently finalized land exchange agreements with ANCSA corporations that could place the oil and gas rights to 166,000 acres of the ANWR coastal plain in private ownership. The acreage included in the trades is thought to be the best in ANWR, lying atop known geological structures hoped to contain large amounts of oil and gas.

The proposed trades could have enormous revenue impacts affecting both the U.S. Treasury and the State of Alaska. The federal government appears to be forsaking potentially huge bonus and royalty revenues, and may be acting in a manner that will reduce leasing revenue from adjacent acreage remaining in federal ownership.

As you stated in February, the State of Alaska is in the uncomfortable position of wanting to see the ANWR coastal plain opened to environmentally responsible oil and gas development, but at the same time opposing the proposed land trades because they could eliminate the State's revenue share. To my knowledge, the potential revenue impact on the state has not been estimated, but the trades could take billions of dollars from the people of the state.

The Interior Department and the involved ANCSA corporations have begun to lobby in favor of the exchanges on Capitol Hill. Without the State's steady and noticeable opposition to the trades as presented, it seems likely that the trades will be part of the final ANWR resolution.

It is very important to Alaska -- perhaps as important as any issue in Congress right now -- for the State to oppose the proposed land trades vigorously and offer better alternatives. Congress needs to know the possible impact on

the national treasury and deserves to see the State's alternative leasing/land exchange proposal (put forward by Commissioner Brady in April). This proposal could return more inholdings to the federal government, restore openness to a closed process, and assure equitability now missing from the trades.

Additionally, there has been some question about the legal process underlying the exchanges. Trustees for Alaska has filed suit against the Interior Department to stop the land exchanges. Given the magnitude of the State's interest in the potential development, I hope that the State will consider joining or supporting this suit in some fashion. Whether or not the case would be winnable, it might be important for the State to indicate its concern in the courts as well as on Capitol Hill.

It is also important for the State to review the proposed exchange agreements thoroughly to be certain that we know their potential effects on other state interests than revenue. Included among possible concerns would be submerged lands, environmental regulation, oil and gas conservation, and continued surface access.

I recognize that opposing the land trades is not easy, especially in the face of our congressional delegation's support for them. But your leadership on this issue is very much needed. As you said last February, we are talking about actions that could affect Alaskans for generations to come.

Sincerely,

Sam Cotten
Rep. Sam Cotten
Co-Chair, House Resources Ct.

cc: Commissioner Judy Brady
Commissioner Don Collinsworth
Hon. John Katz
Commissioner Denny Kelso
Attorney General Grace Berg Schaible

REPRESENTATIVE
SAM COTTEN
DISTRICT 15

P.O. BOX 296, EAGLE RIVER, AK 99577
P.O. BOX V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

February 16, 1987

The Honorable Frank Murkowski
United States Senate
317 Hart Building
Washington, D. C. 20510

Dear Senator Murkowski:

I am writing with regard to the proposed land exchanges in the Arctic National Wildlife Refuge. As you may know, the House Resources Committee of the Alaska State Legislature has been investigating the proposed land exchanges and last week heard about them from the Interior Department, ANCSA Corporations, and the State of Alaska.

As you stated in your annual address to the Legislature on February 13th, the protection of the state's interest is vital in any ANWR land exchange. I agree with you that one way of protecting the state's interests would be to provide that the state's entitlement to revenues from the traded ANWR acreage will not be reduced by the exchange.

However, in our hearing last week, we heard from Bob Gilmore of the U.S. Fish and Wildlife Service (who stated that he has the "responsibility for making the exchanges happen") that the exchanges are "a long way down the road," and that inclusion of a provision to retain the state's revenue entitlement would require renegotiation of the proposed land exchange contract. To my understanding there would also need to be an adjustment of the subsurface appraisals of ANWR acreage to reflect the lower revenue potential for holders of the limited subsurface interests after the trades occur.

Senator Murkowski, it is my belief that the time has come for our congressional delegation to work as closely and immediately as possible with the Interior Department to assure that the state's revenue entitlement is protected in any land exchange agreement. Obviously, we cannot afford for the agreements to proceed to finalization without this protection.

I hope that you will be able to help out on this issue which needs your personal attention right now.

Sincerely,

Sam Cotten

Sam Cotten, Co-Chairman
House Resources Standing Committee

cc: The Honorable Steve Cowper
Governor, State of Alaska

Mr. John Katz, Special Assistant
Office of the Governor, Washington D. C.

Mr. Robert Gilmore, Regional Director
United States Fish and Wildlife Service