Arctic National Wildlife Refuge Oil: Canadian and Gwich'in Indian Legal Responses to 1002 Area Development

TABLE OF CONTENTS

INTRODUCTION........................................................................................................... 790
I. BACKGROUND ON THE ANWR AND THE PARTIES INVOLVED........792
   A. LEGISLATIVE HISTORY OF THE ARCTIC NATIONAL WILDLIFE REFUGE.................................................................................... 792
   B. WILDLIFE OF THE ANWR AND THE 1002 AREA............................................ 794
   C. INTERESTS IN OIL DEVELOPMENT IN THE 1002 AREA.................. 796
      1. Proponents of Development.............................................................. 796
      2. Opponents of Development............................................................ 800
II. CANADIAN AND GWICH’IN LEGAL RESPONSES TO OIL DEVELOPMENT.............................................................. 803
    A. CANADIAN RESPONSES........................................................................ 804
    B. GWICH’IN RESPONSES................................................................... 810
    CONCLUSION.......................................................................................... 816
INTRODUCTION

Strangely enough, one of the fiercest environmental and political battles of the past twenty-plus years is being waged over land where the sun, literally, does not shine for many months a year. This land is a section of the north shore of the Arctic National Wildlife Refuge [hereinafter ANWR] in Alaska, commonly referred to as the 1002 area, which is currently closed to oil drilling but subject to opening per an act of Congress. Depending on who is asked, this land has either a tremendous potential for oil or, conversely, merely a small and problematic chance for oil production. An unusual alliance is pushing for development of the 1002 area. The state of Alaska, oil companies such as British Petroleum, the Teamsters union, some native Alaskan Indians, and the Bush administration are in support of oil development in the 1002 area. On the other side of the debate are the standard environmental groups, the Canadian government, and a different group of native Alaskan Indians, all of whom would like the 1002 area declared off-limits to oil exploration forever.

3. Id. at 77.
6. E.M. Swift, Pipeline Dreams; The Last True American Wilderness is Up for Grabs, and the Stakes are Higher Than Either the Environmentalists or the Oil Interests are Telling You, SPORTS ILLUSTRATED, May 13, 2002, at 70.
8. Stanke, supra note 5, at 927.
11. Swift, supra note 6, at 77.
Rarely has a predominantly environmental issue stirred so much public and political interest. The strong interest is in part due to the fact that oil development in the ANWR has been debated since before Ronald Reagan was president of the United States. Additionally, both the proponents and opponents to drilling are making every effort in order to prevail. Drilling proponents tie oil development in the 1002 area to terrorism and the incidents of September 11th and the record electrical blackout that affected much of the Midwest and Northeast United States and Canada in 2003. Opponents to drilling have countered by pointing to potential environmental damage and potential harm to wildlife in the area. Opponents even allege that drilling in the 1002 area threatens an entire culture’s way of life.

There have been a number of scholarly and opinion-editorial articles arguing for or against drilling. This comment, however, will focus not on arguing for one side of the issue. Instead, it will consider some of the likely legal ramifications to result if Congress passes a bill allowing oil production in the ANWR, and the impact that these potential lawsuits could and should have on the decision whether or not to drill. Part I of this comment is divided into three parts. Part I-A outlines the legislative history of the ANWR, and how the issue currently stands. Part I-B describes some of the many animals that call the refuge generally, and the 1002 area specifically, home. Part I-C discusses the interests various groups have in oil development, and is divided into two parts. Part I-C-1 discusses some of the parties supporting oil development, while part I-C-2 discusses some of the parties opposed to development, and their interests. This discussion of interests will serve as background for the analysis of the legal claims some of the opponents to drilling could bring. The discussion will also demonstrate what is at stake in this issue. The Gwich’in Indians (a group of Native Alaskans) will be discussed specifically, including some of their history, as well as their current status.

13. Stanke, supra note 5, at 911.
16. Weigert, supra note 9, at 179.
17. Anthony Lathrop, People of the Caribou in the Land of the Oil: Climate Change, the Venetie Decision, and Oil Development in the Arctic National Wildlife Refuge, 8 WIS. ENVTL. L.J. 169, 182 (2002).
Part II of this paper is divided into two subsections. Part II-A deals with Canadian legal responses to American oil development in the 1002 area and, more specifically, legal responses to the results from the development. One possibility is a suit against the oil developers and the United States for any actual environmental damages that occur in Canada as a result of the drilling.\textsuperscript{18} Canada's second potential suit would be against the United States government for damages stemming from America's violation of an existing bilateral agreement by permitting/authorizing drilling.\textsuperscript{19} Part II-B explores the Gwich'in Indian challenges that could arise. First, the Gwich'in could potentially sue in tort against the oil companies for any environmental damages that resulted from the drilling.\textsuperscript{20} Second, they could also sue the oil companies for environmental damages, if the Gwich'in are recognized as a sovereign nation.\textsuperscript{21}

Part III argues that the total potential costs, in more than just dollars, from these lawsuits by Canada and the Gwich'in should be considered by the United States government as well as oil developers when deciding whether to open and drill in the 1002 area.

I. BACKGROUND ON THE ANWR AND THE PARTIES INVOLVED

A. LEGISLATIVE HISTORY OF THE ARCTIC NATIONAL WILDLIFE REFUGE

The Franklin Roosevelt Administration reserved approximately 67,440,000 acres of land in northeast Alaska during World War II.\textsuperscript{22} The Administration set this land aside because it believed that the land contained oil that may have been needed to aid in the war effort.\textsuperscript{23} Nothing was developed, however. In 1960, President Eisenhower created the Arctic National Wildlife Range through Public Land Order 2214, with a stated goal of "preserving unique wildlife, wilderness and recreational values"
therein.\footnote{24} Out of the original 67,440,000 acres a total of 8,900,000 acres were reserved under this Order.\footnote{25}

This area remained untouched until 1980, when President Carter signed the Alaska National Interest Lands Conservation Act [hereinafter ANILCA].\footnote{26} ANILCA added “an addition of approximately nine million one hundred and sixty thousand acres of public lands” to the existing 8,900,000 acres from Public Land Order 2214, and changed its name to Arctic National Wildlife Refuge.\footnote{27} ANILCA was, in general, designed to preserve and protect this “nationally significant” land.\footnote{28} Specifically, ANILCA stated among its goals the conservation of the Porcupine Caribou herd,\footnote{29} and the desire “to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats.”\footnote{30} Perhaps even more significantly, ANILCA attempted to “provide . . . the opportunity for continued subsistence uses by local residents.”\footnote{31}

ANILCA also designated much of the reserved land as wilderness consistent with the Wilderness Act.\footnote{32} The Wilderness Act allows Congress to designate land as “wilderness,” thus giving the land strong protection from human development by preserving it in its natural state.\footnote{33} Commentators have asserted that one of the main goals of the Wilderness Act is to save the land “for the enjoyment of future generations.”\footnote{34} The Wilderness Act defines “wilderness” as an area untouched by man that keeps “its primeval character and influence, without permanent improvements or human habitation.”\footnote{35} The wilderness designation prohibits any “commercial enterprise” or “permanent road within any wilderness area.”\footnote{36} This naturally raises the question as to how there can
be any potential for oil exploration in an area specifically cut off from just such an endeavor? The answer is the controversial section 1002 of ANILCA.

Even though ANILCA created millions of acres of wilderness, section 1002 of the Act left open the potential for oil development on approximately 1,500,000 acres of the northern coastal plain.37 This area is now referred to simply as the 1002 area.38 Although actual oil and gas development were still off limits in this section of the coastal plain, Congress retained the authority to allow development, per its approval.39 ANILCA called for a study of the coastal plain area and its wildlife, the effects of natural resource development on the wildlife and native people in the area, and the publication of an Environmental Impact Statement prior to opening the area.40 Congress knew of the potential for a large oil field in the 1002 area, so it did not want to designate the entire coastal plain as wilderness and thus preclude all future development.41 However, Congress was also concerned with possible negative environmental impacts associated with oil exploration and development, so it did not want to allow for immediate development, either.42 Hence the compromise of keeping the area open, but only allowing development by an act of Congress once it knew (via the Environmental Impact Statement and other studies) that the environment would not be adversely affected in any significant manner.

This is where the land and the debate stand today. Since ANILCA was signed, there have been numerous attempts to pass legislation opening the 1002 area for development, but to date none have succeeded.43 Part of the reason for this lack of success is the great number and diversity of wildlife species that call the northern coastal plain generally, and the 1002 area specifically, home.

B. WILDLIFE OF THE ANWR AND THE 1002 AREA

According to the United States Fish and Wildlife Service, the "[r]efuge contains the greatest wildlife diversity of any protected area in the circumpolar north."44 There are almost 180 species of birds (some

37. ANILCA § 1002, 94 Stat. at 2449.  
38. See Docherty, supra note 2.  
39. ANILCA § 1003, 94 Stat. at 2452.  
40. ANILCA § 1002, 94 Stat. at 2449.  
41. Sherman, supra note 1, at 215.  
42. Id.  
43. Docherty, supra note 2, at 78.  
44. U.S. Fish & Wildlife Service, Description of the Refuge: Refuge Brochure Text,
migratory birds), 36 species of fish, and 45 species of mammals including musk oxen, polar bears, foxes and the Porcupine Caribou herd, just to name a few. Of these, the Porcupine Caribou are arguably the most important animals in the ANWR regarding the oil debate.

The Porcupine Caribou are a unique herd of animals that annually migrate "more than 800 miles" between Canada and the United States. This is the longest mammal migration in the world, and one that tourists travel to Alaska specifically to view. The herd's destination is the very area that is at issue here—the coastal plain and the 1002 area. The Porcupine Caribou use the coastal plain and the 1002 area as their calving ground, and have been doing so for "thousands of years." Scientists believe this migration is done for a number of reasons. First, the caribou enjoy relative safety on the coastal plain during calving because there are not as many of the herd's natural predators on the plain as elsewhere in the Refuge. This includes important relief from mosquitoes, which farther inland are so numerous that they can drain up to a quart of blood per week from each caribou. Avoiding predators and mosquitoes increases the chances for first week survival of the calves, after which the young caribou are stronger and faster and therefore better able to survive in less protected areas. Second, the coastal plain and the 1002 area contain the best and most nutritious food for the mothers and, in turn, their still nursing calves.

The Porcupine Caribou are generally not as successful as other caribou at reproduction, but their "calf survival rate rises when they are able to give birth on the traditional calving ground." The herd then winters south of the coastal plain, where the Gwich'in Indians rely on the herd for almost their entire subsistence-based livelihood.


45. Id.
46. Id.
47. Docherty, supra note 2, at 73.
49. Id.
50. Id.
51. Stanke, supra note 5, at 915 n.91.
53. Docherty, supra note 2, at 88.
55. Id.
56. Stanke, supra note 5, at 915.
57. Id.
Many of the animals that call the ANWR and, more importantly, the coastal plain home, currently enjoy some protection under United States treaties. For example, the United States, Norway, Denmark, Canada and the former Union of Soviet Socialist Republics signed a treaty to protect the habitat of the polar bear.58 "The United States is [also] party to four bilateral migratory bird treaties which protect more than a hundred species that nest in the Arctic Refuge."59 Perhaps most importantly of all, the United States and Canada have an agreement regarding the Porcupine Caribou herd.60 This agreement recognizes the Porcupine Caribou herd as a valuable natural resource relied upon by various groups for many needs.61 It states as its objectives the conservation of "the Porcupine Caribou Herd and its habitat through international co-operation" and ensuring that "opportunities for customary and traditional uses of the Porcupine Caribou herd" continue, which includes subsistence use by natives.62

C. INTERESTS IN OIL DEVELOPMENT IN THE 1002 AREA

1. Proponents of Development

The vigor of the debate over oil development in the 1002 area can be traced in part to the many groups that have a pecuniary interest in development. For example, the State of Alaska itself is a strong proponent for oil development.63 This might seem a little counterintuitive, as one normally considers a state's interests as lying in preserving its parks and other areas of wilderness. However, the state of Alaska is heavily dependent on tax revenue from its oil fields. In fact, some have argued that Alaska has been relying more and more on oil revenue.64 Alaska receives most of its revenue directly from the current oil drilling in the state. Oil money "will account for close to [eighty percent] of the 2002-2003 fiscal year unrestricted general-purpose revenue."65 Consequently, the state's budget goes as the oil money goes: if oil money drops off (from declining

58. Docherty, supra note 2, at 90.
59. Id.
61. Id. at 2.
62. Id. at 3.
63. Corbisier, supra note 4, at 405.
64. Id. at 404.
65. Id.
production, which has begun), the state will be forced to find alternative means of income. The dependence the State of Alaska has on oil money is illustrated by the fact that the residents of Alaska do not pay an income tax or a sales tax. In fact, the state set up a “Permanent Fund” from oil revenue that disburse a varying amount to each citizen every year (in 2001 each resident of Alaska received $1,850 from the fund). Due to this reliance on oil taxes and fees, Alaska has a vested interest in seeing further oil development.

Naturally, oil companies have many financial incentives to develop the 1002 area. Specifically, British Petroleum [hereinafter BP] has a strong interest in seeing development in the 1002 area. BP has been called the “highest profile proponent of opening the ANWR Coastal Plain [the 1002 area] to oil and gas development.” BP will substantially profit if it is allowed to develop the 1002 area for oil, considering that estimates put the total value of oil in the 1002 area near $80 billion. Commentators assert that BP will probably be an early bidder for a lease to develop in the 1002 area. This is in part because BP already has a strong foothold in the region.

Similarly, the Teamsters Union supports oil development for the number of American jobs that it would create. The Teamsters has been persistently lobbying Congress in support of opening the 1002 area for oil development. The Teamsters estimates that approximately one-half million American jobs would be created if the 1002 area were opened for development. The Teamsters would get 25,000 of those jobs. The Teamsters Union, like the State of Alaska, stands to gain substantial financial benefits from the jobs that the new oil fields would create.

However, it is not just the proverbial “big business” that wants the 1002 area opened for oil development. Another group that has a strong
interest in seeing development is the Inupiat Indians,\textsuperscript{79} a group of Native Alaskans who live on Kaktovik, a small island just north of the 1002 area.\textsuperscript{80} The Inupiat stand at the opposite side of the debate from other native Alaskans because the Inupiat potentially stand to gain financially from any oil development that occurs in the 1002 area.\textsuperscript{81}

When oil was discovered in Prudhoe Bay (just east of the 1002 area), various oil companies began to lobby Congress to clear up all titles to that land (so there would be no impediment to continued production), and as a result the Alaska Native Claims Settlement Act [ANCSA] was passed in 1971.\textsuperscript{82} This act "extinguished native aboriginal rights to land in Alaska in exchange for a cash settlement of $963 million and fee title to 44 million acres of land,"\textsuperscript{83} effectively barring any native claims to the subsurface rights to any oil rich land. ANCSA "created a system of about 200 village corporations, each of which held surface rights to its land, allocated under the Act."\textsuperscript{84} The Inupiat were one of the groups who took part in this settlement, and they have reaped the financial benefits ever since. The settlement, managed by the Alaska Native Fund, supports community projects and annual $600 payments to members of each tribe.\textsuperscript{85}

In addition, many of the Inupiat are employed at various oil fields and rigs in the area, especially those at Prudhoe Bay.\textsuperscript{86} The Inupiat are aware, however, that those supplies of oil are not infinite, so they are interested in securing employment for the future as well.\textsuperscript{87} Hence they support development of the 1002 area so they can work at the future fields.\textsuperscript{88} The Inupiat will likely be hired preferentially because they formed the Arctic Slope Regional Corporation, which does the hiring at most of the oil fields in the area and would presumably do the same for any 1002 area fields as well.\textsuperscript{89} Additionally, there is a small chance that the Inupiat, through the North Slope Borough they formed, can tax any oil companies that drill in the ANWR.\textsuperscript{90} Thus, the Inupiat are in favor of development in the 1002

\textsuperscript{79} Pasquale, \textit{supra} note 7, at 253.
\textsuperscript{80} Swift, \textit{supra} note 6, at 78.
\textsuperscript{81} \textit{Id.} at 79.
\textsuperscript{84} Lathrop, \textit{supra} note 17, at 171.
\textsuperscript{85} Pasquale, \textit{supra} note 7, at 256.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{See} Swift, \textit{supra} note 6, at 78-79.
\textsuperscript{88} Pasquale, \textit{supra} note 7, at 258.
\textsuperscript{89} \textit{Id.} at 259.
\textsuperscript{90} \textit{Id.} at 260.
area at least in part because it will translate directly into money and/or jobs for them. Although they have a large stake in the outcome of the 1002 area, the Inupiat are not the most powerful voice advocating for development of the 1002 area.

The current Bush Administration strongly supports development in the 1002 area. The Administration’s energy policy promotes an increase in domestic production of natural resources. This position is exemplified “in the central and most controversial aspect of the plan—drilling for oil in the Arctic National Wildlife Refuge.” In fact, a provision to open the ANWR was included in the original Securing America’s Future Energy Act [SAFE] in 2001. Although passed by the House of Representatives, the Senate had promised to stop that very provision. However, the terrorist attacks of September 11th occurred shortly thereafter, stalling this debate.

The events of September 11th changed the Administration’s approach to the ANWR issue. The Administration began promoting opening the refuge by tying the issue to the resulting national security concerns from the attacks. The argument is that increasing the domestic production of oil would in turn lower United States dependence on foreign (i.e. Middle Eastern) oil. The United States would then presumably be able to distance itself from the Middle East and its associated problems, such as terrorism. Any drilling provision was still unable to pass, however, and the issue stalled. As a result, the Bush administration renewed its efforts to open the 1002 area to drilling by linking the record blackout in the northeast United States in August of 2003 with development of domestic natural resources. Nevertheless, as of the writing of this paper no drilling provision has been passed by the Congress either alone or in conjunction with any energy policy bill.

91. Stanke, supra note 5, at 927.
93. Id. at 96-7.
94. Id. at 98.
95. Id.
96. Id.
97. Id. at 100.
98. Clements, supra note 92, at 106. See also Stanke, supra note 5, at 924.
2. Opponents of Development

On the other side of the issue are the groups who oppose oil development in the 1002 area. As one would imagine, environmental groups are against any drilling or any oil exploration in the 1002 area. Groups such as Defenders of Wildlife,100 the Sierra Club,101 and the Natural Resources Defense Council102 all oppose opening the 1002 area for drilling. The Sierra Club, for example, is concerned about potential harm to wildlife in the area, as well as damage to the environment due to spills, pollutants and the like.103 Environmental groups are not the only concerned parties, however.

The Canadian government generally promotes responsible development of natural resources by the United States.104 Nonetheless, the Deputy Minister of Environment for Canada has stated that the Canadian government is “strongly” opposed to opening up the 1002 area for oil development.105 In fact, the Canadian government even lobbied the United States Congress to reject the recommendation of the Interior Secretary of the United States, which was to develop the 1002 area for oil.106 Canada believes development will harm the Porcupine Caribou herd, and in turn the approximately 10,000 Natives who live in Canada and subsist on the Porcupine Caribou.107 Canada feels the most pressure due to its obligations to its own Native Indian population.108 This is in great part because Canada’s obligations to its Natives are “constitutional in nature, if not greater.”109 Canada cannot diminish “Native use of lands,” which “includes the right of subsistence hunting,” without the natives first having

100. Defenders of Wildlife, Save the Arctic Refuge from Big Oil, at http://www.defenders.org/wildlife/arctic/overview.html (last visited Apr. 4, 2004).
104. Swift, supra note 6, at 76 (quoting Rodney Moore, spokesman for Canada’s Department of Foreign Affairs).
105. Nymark, supra note 10, at 35.
107. See Swift, supra note 6, at 74-76.
109. Id.
"ceded their aboriginal rights to the government." In other words, Canada has a very strong duty to protect the subsistence lifestyle of these natives who rely on the Porcupine Caribou herd, and cannot take any action to reduce subsistence hunting without a treaty allowing it to do so. It should be kept in mind that harm to the Porcupine Caribou herd can in turn threaten the very livelihood of the native subsistence hunters in Canada.

Canada desires to protect the Porcupine Caribou herd not just to guard the interests of the Native Indians in Canada, but also because the Canadian Government views the Porcupine Caribou as a valuable natural resource that migrates between Canada and the United States. Canada, like the other groups opposed to development, feels the presence of oil fields and the associated structures and roads could harm the Porcupine Caribou in a variety of ways. The presence of roads and pipelines across the migration route could "deflect caribou movements, and reduce their chances for survival." In general, "caribou are most sensitive at calving time, and studies have shown that caribou are displaced from their traditional calving grounds when oil development occurs there." Hence, oil development on the coastal plain could drive the caribou from their traditional calving grounds, leaving them more susceptible to the predators and the problems they avoid by calving in the 1002 area. This could result in a reduction in the total number of caribou, which currently number only approximately 120,000. These potential problems appeared in the Final Legislative Environmental Impact Statement (FLEIS).

Canada has demonstrated its commitment to protecting the Porcupine Caribou herd and its habitat in a variety of ways. The Canadian Government, for example, entered into the bilateral Agreement on the Conservation of the Porcupine Caribou Herd with the United States. To further support these goals, Canada created the "Vuntut and Ivvavik [110] Id. at 46.
[111] Id. at 46-47.
[114] Id.
[115] Weigert, supra note 9, at 180.
[116] Stanke, supra note 5, at 915.
[118] See Agreement, supra note 60.
National Parks, in 1984 and 1993, respectively, despite evidence of substantial oil and gas reserves in those areas."\textsuperscript{119}

Perhaps the group most opposed to the drilling, and certainly the group with the most to lose, is the Gwich'in Indian tribe.\textsuperscript{120} The name Gwich'in means "people of the caribou."\textsuperscript{121} The Gwich'in are a small Indian Nation who are scattered across northeastern Alaska and northwestern Canada.\textsuperscript{122} Approximately "7,000 Gwich'in people . . . live on or near the migratory route of the Porcupine Caribou Herd."\textsuperscript{123} The Gwich'in strongly oppose any development of the 1002 area because they fear that it could harm the caribou's traditional calving ground which could, in turn, harm the caribou herd as a whole.\textsuperscript{124} The Gwich'in call the 1002 area the "Vadzaih googii vi dehk'it gwaniili," or "The Sacred Place Where Life Begins."\textsuperscript{125} The Gwich'in consider the calving ground "so hallowed that they do not even walk upon that sacred ground."\textsuperscript{126}

The Gwich'in have good reason to be concerned with the plight of the caribou—they are a subsistence tribe who rely almost exclusively on the herd.\textsuperscript{127} In the words of the Gwich'in themselves, they rely on the Porcupine Caribou herd for their "clothing, tools, weapons, shelter, medicines and nutritional needs."\textsuperscript{128} The Gwich'in receive approximately three-quarters of their caloric intake from caribou.\textsuperscript{129} The caribou support the "physical, cultural, social, economic and spiritual needs" of the Gwich'in people.\textsuperscript{130} The Gwich'in have been relying on the Porcupine Caribou for generation after generation; literally thousands of years,\textsuperscript{131} and by some accounts 10,000 years.\textsuperscript{132} They see their fate as being intertwined
with that of the Porcupine herd. This comes from the Gwich’in creation story, which says that the “Gwich’in came from the caribou,” so “[w]hat befalls the caribou befalls the Gwich’in.”

The Gwich’in argue that developing the 1002 area for oil will hurt the caribou either directly or indirectly. They are concerned because the oil companies in Alaska allegedly carry an abysmal record regarding the environment. The Gwich’in raise the same concerns regarding the caribou that are in the LEIS: that the development of oil fields in the 1002 area will likely drive the caribou away from their traditional calving ground either through direct environmental damage to the coastal plain or the caribou not wanting to calve amidst a web of pipelines, roads, oil pads and the like. If the herd is displaced from its traditional calving ground, it could drop significantly in numbers, which could hurt all of the Gwich’in who rely on the herd for all of their cultural and physical needs. Additionally, the Gwich’in do not want to see the 1002 area which they regard as a sacred place physically damaged through oil spills or other pollution. It becomes clear then why the Gwich’in feel it is in their best interest to speak with “one voice” and vigorously oppose any oil drilling on the Alaskan coastal plain.

II. CANADIAN AND GWICH’IN LEGAL RESPONSES TO OIL DEVELOPMENT

If Congress were to open the 1002 area for oil development, the United States and the oil companies would likely be flooded with lawsuits attempting to enjoin the drilling, or seeking damages. Were development to be allowed, two of the most concerned parties would be the Canadian government and the Gwich’in Indians. Each would most likely bring suit against the United States or the oil companies.

136. LEIS, supra note 117, at 119.
137. Id.
A. CANADIAN RESPONSES

It appears that the Canadian government is so strongly opposed to oil drilling in the 1002 area that if Congress were to open the area, Canada would take legal action of some sort. This could happen in one of two ways. The first action Canada could take is one for compensation for environmental damages that might occur within their borders as a direct result of the oil drilling on the coastal plain. This would need to be based on actual and identifiable physical environmental harm within Canada’s territory.  

If environmental damage did occur within Canada’s borders, the United States would probably assert that it has a recognized right, based on a United Nations resolution, to pursue its natural resources however it sees fit. The United Nations indeed recognizes that each state has an inalienable right to dispose of its natural resources as it wishes. The United Nations declared that “[t]he right of nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the people of the state concerned.” It is not an absolute right, however; there are limitations. It has been asserted that sovereignty over resources “is not an absolute concept but is limited by the duty to respect the interests of other states.” This limitation would apply “in situations where energy production caused substantial harm in a neighboring state’s territory.” This idea is embodied in the Trail Smelter arbitration, which Canada could attempt to use as legal precedent in a suit for damages.

142. Id.
143. Id. at 15, art. 1.
145. Id.
146. Hickey, supra note 140, at 211.
The Trail Smelter arbitration involved a hearing between the United States and Canada in 1941. The Consolidated Mining and Smelting Company of Canada, Ltd. had been operating a factory to smelt zinc and lead in Trail, British Columbia. In the mid 1920s, the smelter’s output was increased to the point that its large stacks emitted approximately 10,000 tons of sulfur per month. Just a few miles down the river from the factory, the pollutants released by the smelter damaged some farms in Washington State. The Arbitration tribunal was faced with the task of determining whether actual damage to the farms in Washington occurred, if that damage resulted from the pollutants from the smelter in Trail, and if so, what damages and/or remedies should be applied. The tribunal held that there had indeed been damage to the farms in Washington, that it was a result of the smelter’s sulfur, and that Canada needed to pay the United States on behalf of the farmers in Washington for the damages. In addition, and perhaps just as importantly, the tribunal held that the noxious output from the Trail smelter had to be regulated continuously so as to not cause further harm to the farms. This was to be maintained unless and until the tribunal held otherwise.

Observers have argued that the decision’s most important sentence is “[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another, when the case is of serious consequence and the injury is established by clear and convincing evidence.” This means that “[u]nder the Trail Smelter standard, a state is responsible for the environmental consequences of energy production and use but only for direct, provable, substantial, and actual injury caused in a neighboring state’s territory.” The implications from the arbitration’s holding are clear. Canada could use this as precedent to bring suit against the oil companies (via the United States government) to recover damages for direct environmental harm.

148. ld.
149. ld. at 692.
150. ld. at 693.
151. ld.
152. ld. at 686.
153. Arbitration, supra note 147, at 687.
154. ld. at 717.
155. ld.
156. Hickey, supra note 140, at 211 (quoting Arbitration, supra note 147).
157. ld.
158. See Docherty, supra note 2, at 111 (stating that the Trail Smelter decision “could offer protection for ANWR’s coastal plain”).
The potential for direct environmental harm does exist. First would be an oil spill large enough to pass into Canadian waters or reach the Canadian shore. This is possible because the 1002 area is less than 50 miles from the Canadian border. Hence, a large enough oil spill in the water could, theoretically, drift to Canadian shores. This would almost certainly meet the Trail Smelter requirements of actual and physical environmental harm, as the release of oil would be directly linked to the oil drilling, and the harms from oil spills are well documented. For example, the world witnessed the destruction the oil spilled from the Exxon Valdez wreaked on the Alaskan coast. The chances of an oil spill are also relatively high, although it is unclear what the chances are that a spill would reach Canadian water or land.

Oil drilling on the coastal plain that in turn damages the Porcupine Caribou herd could also satisfy the Trail Smelter requirement of environmental harm since the herd migrates between the United States and Canada. Such a definition would require a slight expansion in the meaning of damage to the environment under the Trail Smelter Arbitration. It has been argued that “[i]nternational environmental law should also expand this rule’s definition of harm so that it covers more than material damage to other states.” If this were to occur, damage to the caribou would then certainly be considered environmental damage. Additionally, the Agreement on the Conservation of the Porcupine Caribou Herd recognizes the herd as “a unique and irreplaceable natural resource of great value” which would support Canada’s argument that damage to the herd should be considered damage to the environment.

If Canada failed in its claim under the Trail Smelter precedent for damage to the Porcupine Caribou, it could nonetheless attempt to recover damages for violation of the Agreement on the Conservation of the Porcupine Caribou Herd. Agreements and treaties “represent the most concrete obligations under international law and legally bind state parties as soon as they enter into force.” Usually if an agreement does not enumerate remedies for a breach, the damaged party turns to customary law, defined as “common state practice which binds all nations regardless

---

160. Arbitration, supra note 147, at 684.
161. Stanke, supra note 5, at 938. BP’s spills at their Prudhoe Bay facilities are referred to as frequent and copious. Id.
162. Docherty, supra note 2, at 111.
163. Id.
164. Agreement, supra note 60, at 2.
165. Docherty, supra note 2, at 85.
of specific legal commitments," 166 for its remedies. 167 These remedies can include a cessation of the cause of the harm, as well as reparations, which can entail restitution, compensation, or a guarantee that it will not happen again. 168

The Porcupine Caribou agreement lists among its goals the conservation of "the Porcupine Caribou Herd and its habitat through international co-operation" and "to ensure opportunities for customary and traditional uses of the Porcupine Caribou herd." 169 There is little doubt that opening up the 1002 area to oil development would violate this agreement. 170 For example, the agreement requires that if one of the parties to the agreement is going to undertake "an activity . . . determined to be likely to cause significant long-term adverse impact on the Porcupine Caribou Herd or its habitat, the other Party will be notified and given an opportunity to consult prior to final decision." 171 The LEIS affirmed that it is likely that oil development on the coastal plain will drive the herd from their traditional calving ground, which in and of itself could be very detrimental to the herd. 172 Oil development then falls within the aforementioned section of the agreement. However, the United States has not given the slightest indication that it is interested in consulting with Canada prior to making a final decision, and has shown little to no interest in hearing from the Canadian government on the issue of opening the coastal plain for oil development. 173 If this trend continues and the United States does not consult Canada prior to opening the 1002 area for development, it would violate the agreement.

Additionally, the development of the 1002 area would, on its face, violate the section of the agreement that requires the parties to "take appropriate action to conserve the Porcupine Caribou Herd and its habitat." 174 Since, according to the LEIS, oil development in the 1002 area is likely to be harmful to the herd, development cannot be considered appropriate action to conserve the herd or its habitat. 175

166. Id.
167. Id.
168. Id. at 85-86.
169. Agreement, supra note 60, at 3.
170. Docherty, supra note 2, at 87.
171. Agreement, supra note 60, at 4.
172. LEIS, supra note 117, at 119.
173. Docherty, supra note 2, at 88-89.
174. Agreement, supra note 60, at 4.
175. LEIS, supra note 117, at 119.
176. See Agreement, supra note 60, at 4.
The agreement also created an advisory board\textsuperscript{177} that is "authorized to make recommendations on matters affecting the [Porcupine Caribou herd] and its habitat . . . .\textsuperscript{178} It does not appear that the board has made any recommendations yet.\textsuperscript{179} However, the board did state that if the herd were forced out of its traditional calving ground because of drilling, the effects could be permanently detrimental to the herd.\textsuperscript{180} However, the agreement does not contain a provision for damages should the agreement be violated.\textsuperscript{181} It only discusses the consultation and recommendation by the board.\textsuperscript{182} This is problematic to Canada's potential claim for two reasons. First, even if the United States complied with the consultation requirement and the advisory board recommended against development of the area, it would be moot.\textsuperscript{183} An executive agreement is only the law as long as it does "not conflict with an act of Congress."\textsuperscript{184} Since the coastal plain can only be opened up for development by an act of Congress, and because an act of Congress opening the 1002 area would trump the Porcupine herd agreement (due to the conflict), any recommendation against development by the board would be of negligible assistance to Canada.\textsuperscript{185}

Additionally, any recommendation by the board against oil development has already been preempted. The Agreement states that the parties must "provide written reasons for the rejection in whole or in part of conservation recommendations made by the board."\textsuperscript{186} The United States Secretary of the Interior "has already provided a written explanation why he rejected all alternatives limiting oil development in the coastal plain."\textsuperscript{187} Thus the Agreement's requirement for a written explanation has been satisfied even before the board has made a contrary recommendation. The agreement does not require any more than this\textsuperscript{188} because the Secretary's recommendation occurred after consultation with Canada.\textsuperscript{189}

However, Canada still has one card to play if this agreement were broken by oil development despite the agreement not enumerating damages

\begin{itemize}
\item[177.] \textit{Id.} at 6.
\item[178.] Agreement, supra note 60, at 6.
\item[179.] Walker, supra note 108, at 39.
\item[180.] Docherty, supra note 2, at 89.
\item[181.] See id.
\item[182.] Id.
\item[183.] Walker, supra note 108, at 39.
\item[184.] Id. (quoting Restatement (Third), The Foreign Relations Law of the United States § 102 and accompanying comment b (1986)).
\item[185.] Id. at 40.
\item[186.] Agreement, supra note 60, at 6.
\item[187.] Walker, supra note 108, at 40.
\item[188.] See Agreement, supra note 60, at 6.
\item[189.] Walker, supra note 108, at 40.
\end{itemize}
for breach: traditional/customary international law. This relates to the right of a country to develop its natural resources as it wishes, with the recognized limitation on harming another country.\(^{190}\) In general, "[c]ustomary international law becomes binding upon nations when they follow 'a general and consistent practice' in determining legal rights based upon a rule of law generally accepted within the international community."\(^{191}\) The Agreement on the Conservation of the Porcupine Caribou Herd states that the herd is a valuable natural resource,\(^{192}\) and it is the tradition of international law to negotiate regarding disputes over shared natural resources, as the Porcupine caribou are.\(^{193}\) The United States and Canada have traditionally resolved similar disputes via negotiation, occasionally resorting to arbitration.\(^{194}\) Additionally, one observer pointed out that based on both the Boundary Water Treaty and the "historic practice of negotiation" between the United States and Canada, the two countries are in fact required to negotiate regarding shared natural resources.\(^{195}\) Hence the customary international law of negotiation and/or arbitration regarding this shared natural resource, the Porcupine Caribou herd, should be binding on the United States and Canada.

It has been pointed out that the traditional requirement to negotiate is usually triggered only after harm has occurred.\(^{196}\) In this case, however, such an action creating liability without first determining the extent of that liability would be irresponsible, meaning the parties should negotiate prior to any oil development in the 1002 area.\(^{197}\) In sum, Canada likely does not have a direct remedy under the Porcupine Caribou Agreement, but should still be able to entertain negotiations about the fate of the 1002 area, and perhaps even arbitrate with the United States regarding its fate before any action is taken to the contrary. At a minimum Canada should be able to receive reparations for any environmental damage to its land, or damage to the Porcupine Caribou herd based on the Trail Smelter arbitration precedent.


\(^{191}\) Walker, supra note 108, at 42 (quoting Restatement (Third), The Foreign Relations Law of the United States § 102 and accompanying comment b (1986)).

\(^{192}\) Agreement, supra note 60, at 2.

\(^{193}\) Walker, supra note 108, at 42.

\(^{194}\) Id. at 41.

\(^{195}\) Id. at 42.

\(^{196}\) Id. at 44.

\(^{197}\) Id.
B. GWICH’IN RESPONSES

While the Gwich’in Indians have a few actions they could take in response to oil development in the 1002 area, none are certain. Even though United States environmental law has been called “complex, messy and disorganized,” the Gwich’in's first option would be to sue oil companies under United States law for environmental damage to the 1002 area and its resulting damage to the Porcupine Caribou herd under traditional environmental tort law.

The Gwich’in would sue under the theory that the oil companies, by drilling in the 1002 area, harmed the Porcupine Caribou in some way which, in turn, harmed the Gwich’in themselves. For example, if the drilling were to drive the herd out of their calving ground it could cause a decrease in the number of the caribou and, in turn, problems for the Gwich’in in maintaining their caribou-based subsistence lifestyle. In order to prevail on this claim, however, the Gwich’in must first demonstrate that they have standing to sue under Article III of the United States Constitution. This is often a large hurdle in environmental suits.

The seminal case on Article III standing in an environmental suit is *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* This case reaffirmed the three parts to the standing requirement by holding that to satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

The Court explained that the first prong, an “injury in fact,” means an injury to the plaintiff and not an injury to the environment. This is helpful for the Gwich’in because, as the Court points out, requiring a

198. Westbrook, supra note 20, at 621.
199. See generally id. (discussing environmental tort suits generally).
201. *Id.* at 180-81 (quoting Lujan, v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)).
202. *Id.* at 181.
showing of environmental damage would make it too difficult for plaintiffs to succeed in these types of cases.\textsuperscript{203} The Gwich’in then need to show that they as a group, or individuals among them, were injured in some way. The Court stated that simply not being able to see the animals anymore would be sufficient,\textsuperscript{204} so if the Gwich’in were having trouble subsisting because of the oil development’s affect on the caribou they would almost certainly meet the injury in fact requirement.

An earlier case, \textit{Sierra Club v. Morton}, also explained the injury in fact requirement.\textsuperscript{205} In order for the plaintiff to meet this requirement, he or she must show that the injury involves a “cognizable interest”\textsuperscript{206} and that the plaintiff himself/herself is “among the injured.”\textsuperscript{207} Although in \textit{Sierra Club} “[t]he Court did not define cognizable interests,”\textsuperscript{208} it did state that “an interest need not be economic in order to be cognizable.”\textsuperscript{209} It has been argued both that the Court “[i]mplicitly ... defined cognizable interest as a private interest” and that, generally, the plaintiff makes a proper case when he or she loses some part of the environment that, were it not for the action of the defendant, the plaintiff had previously enjoyed.\textsuperscript{210} Arguably the Gwich’in will be able to meet these requirements with damage to the Porcupine Caribou herd.

To meet the injury in fact prong, the Gwich’in would first have to prove that there was some actual harm to the Porcupine herd. Merely asserting that the herd was displaced from calving in the 1002 area and that the herd was harmed as a result would be insufficient. They would need to demonstrate that the drilling in the 1002 area caused the harm to the herd. The Gwich’in would then have to show that they were harmed as a result of the damage to the caribou herd. If the herd were reduced by, for example, 10,000, but the Gwich’in could not show that they were in any way affected by this drop then they would not meet the requirements from \textit{Friends of the Earth} or \textit{Sierra Club}. This is because the Gwich’in would not be able to demonstrate that they suffered a sufficient “injury in fact,”

\begin{itemize}
  \item \textsuperscript{203} \textit{Id.}
  \item \textsuperscript{204} \textit{Id.} at 183 (quoting \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 562-563 (1992)).
  \item \textsuperscript{205} \textit{Sierra Club v. Morton}, 405 U.S. 727, 734 (1972).
  \item \textsuperscript{206} \textit{Id.} at 734-735.
  \item \textsuperscript{207} \textit{Id.} at 735.
  \item \textsuperscript{208} Westbrook, supra note 20, at 636.
  \item \textsuperscript{209} \textit{Id.} The Court in \textit{Sierra Club v. Morton} stated that the impairment of “the enjoyment of the park for future generations” certainly “amount[ed] to an ‘injury in fact’ sufficient to lay the basis for standing” under the Administrative Procedure Act. 405 U.S. at 734.
  \item \textsuperscript{210} Westbrook, supra note 20, at 636.
\end{itemize}
which the Court requires.\textsuperscript{211} If the Gwich’in could show, however, that this drop significantly impacted their ability to kill enough caribou to meet their subsistence needs, they will have demonstrated an injury in fact. They have a “private interest” and will be (as a group) personally affected because they cannot enjoy an aspect of the environment (the Porcupine herd) as they did before, thereby meeting the Court’s “injury in fact” requirement.\textsuperscript{212} The fact that the Gwich’in rely on the Porcupine Caribou herd for their very survival makes this argument even stronger.

Oil companies would likely contend that the Gwich’in cannot sue for environmental damage if the only alleged damage is to animals, not the environment (i.e. the physical, natural environment; the land, sea, air, etc). The Gwich’in response could argue that the Porcupine herd has been recognized by the governments of both the United States and Canada as a natural resource,\textsuperscript{213} and as such should be considered part of the environment and in turn valid as the subject of an environmental damage suit. This would not be the most difficult aspect of their claim, as the Supreme Court has recognized that “the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing.”\textsuperscript{214} The Gwich’in’s subsistence on the caribou would undoubtedly meet the “use” requirement the Court laid out.\textsuperscript{215} Additionally, the oil company’s argument would probably fail because the Court requires harm to the plaintiff, not harm to the environment.\textsuperscript{216}

Practically speaking, however, this type of claim is not the best option for the Gwich’in. Although plaintiffs in environmental damage suits can request civil penalty judgments, declaratory or injunctive relief,\textsuperscript{217} the problem in this particular situation is that if the oil drilling harmed the Porcupine herd to the point that the Gwich’in cannot subsist on them any longer, there is probably not much of a remedy that will be truly appropriate for the Gwich’in. For example, an injunction could stop any further drilling, but it seems unlikely that any damage to the herd would quickly mend itself once the drilling is stopped. Additionally, the Gwich’in would not be very interested in receiving a monetary payment or settlement

\textsuperscript{212} Laidlaw, 528 U.S. at 180.
\textsuperscript{213} Agreement, supra note 60 at 2.
\textsuperscript{215} Id.
\textsuperscript{216} Laidlaw, 528 U.S. at 180.
\textsuperscript{217} Westbrook, supra note 20, at 640.
because their culture is based on subsistence and hence they have no need or desire for money.

A potentially superior, but much more tenuous, solution exists for the Gwich'in. This would involve the Gwich'in negotiating or going to arbitration with the United States government under the Trail Smelter arbitration precedent. This is dependent, however, on the Gwich'in Nation being recognized as a sovereign nation, which is not in and of itself a completely settled matter.

The issue of Gwich'in sovereignty relates directly to ANCSA. ANCSA was designed to quash any claims to oil rich lands that native Alaskans may have brought. Upon its passage the Act immediately eliminated the Gwich'in's Venetie Reservation. However, the Gwich'in desired to maintain their subsistence way of life and decided not to participate in ANCSA. There was a section of ANCSA which allowed the Gwich'in to regain title to their Venetie Reservation they had initially lost upon the passage of ANCSA. As opposed to the Inupiat, for example, who participated in ANCSA and thus received financial benefits, the Gwich'in did not receive any land or money under ANCSA since they opted out of the settlement. ANCSA formed two Gwich'in corporations, but the Gwich'in voted to dissolve them and, in 1981, the State of Alaska did just that. It was unclear after this series of events whether the Gwich'in would be recognized as sovereign.

In the recent case of Alaska v. Native Village of Venetie Tribal Government, the Supreme Court answered whether the Gwich'in land at issue was Indian country or not, and in so doing helped shed some light on the issue of Gwich'in sovereignty. The Native Village of Venetie Tribal Government attempted to tax the State of Alaska and the contractor for building a school on the Gwich'in's land. Alaska did not want to pay the tax, so it sued the tribe in federal district court to stop collection. The district court decided that Venetie no longer existed as a dependent Indian community since ANCSA was passed, and hence they had no power to tax. This decision was reversed by the Ninth Circuit Court of Appeals.

219. Lathrop, supra note 17, at 172.
220. Id. at 172-173.
221. Id. at 173. See also ANILCA, supra note 25.
222. Lathrop, supra note 17, at 173.
223. Id.
225. Id. at 525.
226. Id.
227. Lathrop, supra note 17, at 187.
The Ninth Circuit held that the land was validly set apart as Indian country, and because the Gwich'in who lived there were under federal government superintendence, the land qualified as Indian country. Upon appeal, however, the Supreme Court overruled the Ninth Circuit.

The Supreme Court defined Indian country using the federal criminal code, explaining that this definition is often used in civil settings such as this one. 18 U.S.C. § 1151 provides, and the Court quoted:

The term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependant Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The Court agreed with the Ninth Circuit's holding regarding the two main factors being the appropriate test, but held that they had not been satisfied. The problem this raises for the Gwich'in is that the Court held the Gwich'in are not on Indian country, so they will be limited if not completely restricted in their otherwise inherent sovereignty.

The Trail Smelter Arbitration decision stands as precedent for two governments working out environmental damage claims through negotiation and/or arbitration. If the Gwich'in are not recognized as a sovereign nation, as the Venetie decision strongly suggests, the Gwich'in will have difficulty using the Trail Smelter decision as precedent. However, there are still options for the tribe through other means. The Trail Smelter decision itself does leave some maneuverability for the Gwich'in, as well.

228. Id.
231. Id. at 526-27.
233. Id. at 532.
234. Lathrop, supra note 17, at 193.
235. See Arbitration, supra note 147.
One potential route to recognition of sovereignty for the Gwich’in could be Administrative Order 186, which was passed by Alaska to "recognize[] tribal sovereignty" and to foster "a government-to-government [working] relationship between Alaska and tribal governments." Although this appears to be exactly what the Gwich’in would need, it is problematic because it would be the United States Congress, not the state of Alaska, which would open up the 1002 area for drilling. Hence, Alaska enumerating its plans to work with the natives on a government-to-government basis would not be of much assistance to the Gwich’in in this situation. Additionally, the order has been criticized as falling short of what it proposes.

The Gwich’in could also point out that in certain areas of environmental regulation Congress treats Native Alaskans like states or sovereign governments. This means that "a tribe would have Congressionally granted express jurisdiction over its territory without needing jurisdiction derived from Indian country status." The Comprehensive Environmental Response, Compensation and Liability Act, for example, "treats Alaska Native villages as states with respect to hazardous waste cleanup." However, the Venetie decision did not extend that far, so if the Gwich’in were attempting to regulate something other than hazardous waste on their land they probably would not be treated as a sovereign state.

The Trail Smelter arbitration itself, however, potentially allows the Gwich’in living in Canada to use the decision as precedent even if the Gwich’in in the United States are not considered a sovereign nation. The arbitration tribunal stated that it was not deciding a claim between individuals, but that "individuals may come within the meaning of 'parties concerned,' in Article IV and of 'interested parties,' in Article VIII of the Convention," meaning that the Canadian Gwich’in, as individuals and not as a government, may qualify to use the Trail Smelter Arbitration as

236. Lathrop, supra note 17, at 195.
237. Carl L. Johnson, A Comity of Errors: Why John v. Baker is Only a Tentative First Step in the Right Direction, 18 Alaska L. Rev. 1, 53-54 (2001). The Order has been criticized because it "seems to envision the role of tribes in Alaska as municipal or borough governments, not as independent self-governing entities." Id. Additionally, the Order "falls short because it fails to respect all jurisdictional issues, particularly exclusive jurisdiction over matters involving internal affairs." Id. at 54.
238. Lathrop, supra note 17, at 195.
239. Id.
241. Lathrop, supra note 17 at 195.
precedent to bring their own action for arbitration.\textsuperscript{243} This would be a good argument for the Gwich’in to make, as they could receive reparations for any damages and potentially a cessation of the activities causing the damage.\textsuperscript{244} However, it should be noted that this would probably only be a remedy to Gwich’in living in Canada. The Trail Smelter arbitration does not stand for the individuals of one country taking that same government to arbitration, but for two different countries going to arbitration.\textsuperscript{245} Nevertheless, if the Gwich’in in Canada are able to use this and prevail, the Gwich’in in the United States would reap the same benefits because the harm to the Porcupine Caribou would be stopped.

CONCLUSION

Opening the 1002 area to oil development is such a hotly contested political and environmental topic because there is so much riding on the outcome for many different groups. The state of Alaska,\textsuperscript{246} BP,\textsuperscript{247} the Teamsters Union,\textsuperscript{248} the Inupiat Indians,\textsuperscript{249} and the Bush administration\textsuperscript{250} are all pushing for the 1002 area to be opened to development. On the other side of the debate are environmental groups such as Defenders of Wildlife,\textsuperscript{251} the Sierra Club\textsuperscript{252} and the National Resources Defense Council,\textsuperscript{253} the Canadian government,\textsuperscript{254} and the Gwich’in Indians,\textsuperscript{255} all of whom are against oil development.

The Canadian government has a few options if the 1002 area is opened to drilling. First, it can recover for any environmental damage from the drilling that occurs within Canadian borders under the Trail Smelter

\textsuperscript{243} Arbitration, supra note 147, at 685 (emphasis added).
\textsuperscript{244} See id. at 1934 (requiring a cessation of harm).
\textsuperscript{245} See generally Arbitration, supra note 147.
\textsuperscript{246} Corbisier, supra note 4, at 405.
\textsuperscript{247} Stanke, supra note 5, at 937.
\textsuperscript{248} Swift, supra note 6, at 73.
\textsuperscript{249} Pasquale, supra note 7, at 253.
\textsuperscript{250} Stanke, supra note 5, at 927.
\textsuperscript{251} Defenders of Wildlife, Save the Arctic Refuge from Big Oil, at http://www.defenders.org/wildlife/arctic/overview.html (last visited Apr. 4, 2004).
\textsuperscript{253} Natural Resources Defense Council, Oil and the Arctic National Wildlife Refuge, at http://www.nrdc.org/land/wilderness/arctic.asp (last revised Mar. 25, 2004).
\textsuperscript{255} See Swift, supra note 6.
Arbitration. Damages to the Porcupine Caribou herd could be included under this. Second, Canada can attempt to recover for the violation of treaties with the United States. Specifically, oil development in the 1002 area will break the Porcupine Caribou herd agreement between Canada and the United States which is designed to protect the herd and its habitat, and customary international law holds that Canada and the United States should negotiate or arbitrate over the fate of the 1002 area prior to any drilling because the Porcupine Caribou herd is a shared natural resource.

The Gwich'in Indians also have some potential remedies to drilling. First, the Gwich'in can bring a traditional tort environmental damage suit for damage to the Porcupine Caribou herd, assuming that they can assert proper standing under Article III of the United States Constitution. Specifically the Gwich'in must show that they have suffered an injury in fact. Second, the Gwich'in could attempt arbitration with the United States government as a sovereign nation using the Trail Smelter arbitration as precedent, just like Canada could do, as long as the Gwich'in are considered a sovereign nation. However, it appears likely that the Gwich'in in the United States would not be recognized as a sovereign nation. The Canadian Gwich'in could bring the claim instead, which, if successful, would potentially have the same effect on the Gwich'in in the United States as if they had brought it themselves.

In sum, there is much at stake regarding Congress's decision whether to open the 1002 area for oil development. Proponents point at the enormous amount of money that will be gained by almost all involved if the area is opened for development, as well as the potential for energy independence from the Middle East and the possible resulting reduction in terrorism against the United States. However, opponents claim that perhaps even more important things stand to be lost if the 1002 area is

256. See Docherty, supra note 2, at 111.
257. Id. at 85.
258. See Docherty, supra note 2.
260. See generally Westbrook, supra note 20, at 621 (discussing environmental tort suits generally).
263. Lathrop, supra note 17, at 193.
264. See Arbitration, supra note 147.
265. Swift, supra note 6, at 76.
266. Clements, supra note 92, at 106.
opened for oil development. The Gwich’in Nation’s subsistence culture is based on the Porcupine Caribou herd, which traditionally uses the 1002 area and coastal plain as its calving ground. Drilling in the 1002 area could damage the herd by driving them away from the plain, which in turn could, literally, threaten the Gwich’in Indian’s 10,000 year old way of life. The damages that would be awarded to the Gwich’in for the loss of their culture may well be enormous, and in fact “could be large enough to significantly affect the net public benefit that could be derived from opening the coastal plain” to oil development. To demonstrate just how much this could be, the “predicted net public economic benefit” of opening the ANWR for development is $79,400,000,000. The Porcupine Caribou herd is a significant and important resource in its own right, as demonstrated by the agreement between the United States and Canada designed to protect it. The amount of the damages from breaking this and other agreements/treaties were not factored into the estimates of the net gain from the 1002 area.

Opponents to development point out that the Arctic National Wildlife Refuge as a whole and specifically the 1002 area is not the barren wasteland oil proponents paint it to be; it is a vibrant, beautiful area that has been called the “American Serengeti.” Because this area is so far north, it is more fragile and hence more susceptible to damage from drilling and the associated construction. Opponents contend that oil development could leave a permanent scar on the previously untrammeled landscape. Proponents to drilling counter that new drilling technology will reduce any potential negative impact on the environment.

It is also worth noting that exactly how much oil there is in the 1002 area is not a settled matter. The difficulty with determining how much oil is economically recoverable is twofold. First, it depends on the price of oil at that time. Second, both sides have a proclivity to bump the numbers

268. See Lathrop, supra note 17, at 182.
270. Id. at 49-50.
271. See Agreement, supra note 60.
273. Clements, supra note 92, at 102.
275. Clements, supra note 92, at 112.
276. Swift, supra note 6, at 70.
277. Clements, supra note 92, at 118.
up or down, depending on whether they are for or against drilling, respectively.278

For example, pro-drilling sources claim that there are anywhere from a low of 5.7 to a high of 16 billion barrels of oil in the 1002 area.279 More reasonable estimates put the figure at approximately 7.7 billion barrels.280 However, these figures do not take into account all costs associated with oil recovery in Alaska.281 In fact, "Alaska oil is so expensive to produce that even the oil companies already doing business on the North Slope have reservations about the financial wisdom of drilling in the refuge."282 After costs and price are taken into account, most estimates put the amount of economically recoverable oil at approximately 3.2 billion barrels.283 Opponents to production are quick to point out that 3.2 billion barrels is only approximately a six-month supply for the United States.284 However, the opponents fail to mention that this oil would only last six months if it were used alone, without any imported oil.285 The tactics used by both sides in the debate as to how much oil there is in the area is a microcosm of the larger debate: both sides manipulate the facts to their side.

In making the determination as to whether opening the 1002 area for oil development is worth the potential costs, Congress and individuals should weigh all of the aforementioned arguments and facts. The potential legal actions discussed in this comment are only a handful of the actions that could be taken if the refuge were opened for development. These lawsuits might end up costing the oil companies and perhaps the United States government millions or even billions of dollars, thereby reducing the net gain from the 1002 area. It is impossible to know for sure what the environmental effects of development will be ahead of time. To that end, this comment suggests that the total cost from all potential lawsuits, as well as all non-legal arguments, pro and con, be examined in making the final determination as to the fate of the 1002 area.

MICHAEL T. DELCOMYN

278. Id.
279. Swift, supra note 6, at 76.
280. Clements, supra note 92, at 118.
281. Swift, supra note 6, at 76.
282. Id.
283. Id.
285. Clements, supra note 92, at 118.