GAO

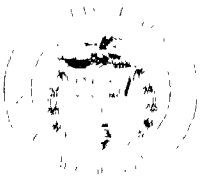
United States General Accounting Office

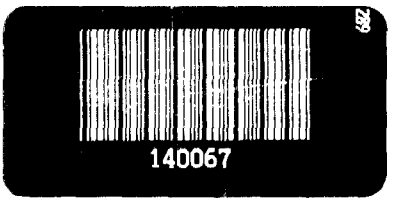
Report to the Chairman, Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs, House of Representatives

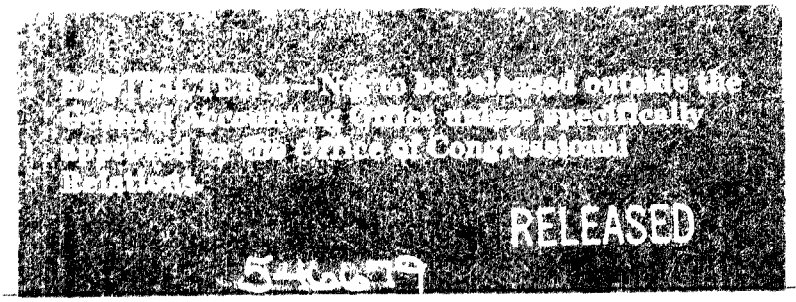
October 1989

# FEDERAL LAND MANAGEMENT

# Chandler Lake Land Exchange Not in the Government's Best Interest






GAO/RCED-90-5

GAO
**United States**
**General Accounting Office**
**Washington, D.C. 20548**

**Resources, Community, and**
**Economic Development Division**

B-229232

October 6, 1989

The Honorable George Miller
Chairman, Subcommittee on Water
and Power Resources
Committee on Interior and Insular Affairs
House of Representatives

Dear Mr. Chairman:

This report responds to your request that we review the Chandler Lake land exchange conducted by the Department of the Interior in 1983 in which 92,000 acres of Arctic National Wildlife Refuge subsurface estate was exchanged for 101,000 acres of land within the Gates of the Arctic National Park. In summary, we believe that the Chandler Lake land exchange was not in the government's best interest, and that the shortcomings of the exchange are linked to an absence of procedural requirements for land exchanges Interior conducts in Alaska under the Alaska Native Claims Settlement Act of 1971 and the Alaska National Interest Lands Conservation Act of 1980. Because Interior disagreed with the need for procedures to guide such exchanges, the report now recommends that the Congress require the Secretary of the Interior to develop such procedures.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to interested parties and make copies available to others upon request.

This report was performed under the direction of James Duffus III, Director, Natural Resources Management Issues, (202) 275-7756. Other major contributors are listed in appendix VI.

Sincerely yours,

J. Dexter Peach
Assistant Comptroller General

# Executive Summary

## Purpose

The Chairman of the Subcommittee on Water and Power Resources, House Committee on Interior and Insular Affairs, asked GAO to review a number of Department of the Interior land exchanges involving the Arctic National Wildlife Refuge (ANWR) in Alaska. GAO reviewed seven such exchanges, six of which were in the proposal stage and one that had been completed in 1983. All of the exchanges (both proposed and completed) involve the coastal plain of ANWR—an area rated as the most outstanding petroleum exploration target in the onshore United States. However, no production of oil and gas can occur in ANWR until specifically authorized by the Congress. GAO reported on the six proposed exchanges in September 1988 in a report entitled Federal Land Management: Consideration of Proposed Alaska Land Exchange Should Be Discontinued (GAO/RCED-88-179). This report deals with the land exchange (referred to as the Chandler Lake land exchange) that was completed in 1983.

## Background

As part of a 1971 settlement of their aboriginal land claims, 12 Alaskan Native Corporations received the right to select 44 million acres of federally owned land in Alaska. About 3.7 million acres of land the Natives selected are in national parks in Alaska. Park Service officials believe that acquiring Native-owned lands within the parks (called inholdings) helps to protect important wildlife habitat, improve park management, and keep the land in its natural state. In the Chandler Lake exchange, Interior acquired surface rights to 101,272 acres of inholdings from the Arctic Slope Regional Corporation (Arctic Slope) within Gates of the Arctic National Park. In exchange for this land, Arctic Slope received subsurface rights to 92,160 acres within ANWR. In acquiring the surface rights to these lands, the Park Service hoped that, in addition to consolidating federal land within the park, it would also be able to limit damage to the tundra caused by the eight-wheel all-terrain vehicles the Natives use in their hunting and fishing activities.

The 1971 law that allowed the Alaskan Natives to select lands in Alaska precluded Arctic Slope from selecting any subsurface estate in wildlife refuges such as ANWR. A later law, enacted in 1980, specifically provided that Arctic Slope could modify its previous land selections by exchanging up to 92,160 acres of subsurface it had earlier selected outside of ANWR for an equal amount of subsurface in ANWR, if ANWR were subsequently opened to oil and gas development. Interior reasoned that if ANWR were opened, Arctic Slope would exchange its least valuable subsurface outside of ANWR for highly prospective subsurface within ANWR. By executing the exchange before ANWR was opened, Interior obtained

inholdings in a national park rather than potentially valueless lands in other areas of Alaska. Interior valued the 101,272 acres of inholdings acquired by the government at $5.1 million. Interior initially valued the mineral estate of the 92,160 acres that Arctic Slope acquired at about $395.5 million, but through a number of adjustments, Interior estimated that the government's interest in these lands was only $5.9 million. For example, the largest single adjustment was that under current law, 90 percent of the mineral revenues generated from such land would be given to the state of Alaska.

## Results in Brief

The Chandler Lake exchange did accomplish Interior's objectives of consolidating federal lands and obtaining access to parklands in Gates of the Arctic National Park. However, other aspects of the exchange led GAO to conclude that, overall, the exchange was not in the best interest of the government. Specifically, the exchange (1) has not mitigated the imminent threat to the lands that the Park Service was seeking to control—scarring of the land by eight-wheel all-terrain vehicles, (2) allowed Arctic Slope to drill the only test well within ANWR and to retain exclusive rights to the test well data, (3) removed Interior's discretion to disapprove the specific location of 23,040 acres of land the Natives had not yet selected, and (4) was structured to make inapplicable the 1971 law that calls for the sharing of 70 percent of revenues derived from subsurface estates with other Alaska regional corporations.

GAO believes that these problems are linked to an absence of procedural requirements for land exchanges Interior conducts in Alaska under the Alaska Native Claims Settlement Act of 1971 and the Alaska National Interest Lands Conservation Act of 1980.

## Principal Findings

### Acquisition of Inholdings Has Not Protected Park Resources

Although Interior acquired surface ownership of 101,272 acres of inholdings in Gates of the Arctic National Park, the imminent threat to the lands—scarring of the tundra by eight-wheel all-terrain vehicles—is now worse. Before the exchange, the Natives used such vehicles throughout the Chandler Lake lands for subsistence hunting and fishing. The exchange provided for limiting the Natives' use of these vehicles to easements along riverbeds, but the Natives continued to use the vehicles

throughout the Chandler Lake lands as they had previously done. Recognizing the vehicle use limitations were troublesome, the Park Service started a study of such use in 1986 and began negotiating a new exchange with the Natives to resolve the problems. During the study period, which is expected to be completed in 1989, the Natives' use of the vehicles has also increased in park wilderness areas.

## ANWR Test-Well Data Not Available

The exchange gave Arctic Slope the right to drill the only exploratory test-well within ANWR and to retain exclusive rights to the test-well data. As a result, Arctic Slope and its oil company partners are now in a superior position to all other potentially interested parties, including the federal government, in assessing the oil and gas potential of ANWR. Without the test-well data, the federal government is at a distinct disadvantage in estimating the oil and gas value of the ANWR subsurface, and setting sale terms for oil and gas leases, if ANWR is opened to oil and gas development in the future.

## Interior Gave Up Discretion on Placement of Subsurface Land in ANWR

The exchange gave Arctic Slope subsurface rights to 92,160 acres of land—69,120 specific acres beneath existing Native village lands in ANWR, and 23,040 acres that were to be specified later. The exchange allowed the Natives to select the unspecified 23,040 acres without requiring Interior's approval of the specific acreage. If the exchange had not been completed or did not contain this provision, the location of the 23,040 acres would have been subject to Interior's approval. The uncontestable selection right was exercised in late 1985 and 1986, after seismic and test-well data had been obtained. The lands selected are in an area now considered by Interior to hold the highest oil and gas potential within ANWR. Recent Interior estimates of the tracts selected in 1985 and 1986 were over $250 million compared with Interior's 1983 estimated fair market value for the entire 92,160 acres of $395.5 million.

## Other Alaskan Natives Did Not Share Benefits of Exchange

The 1971 law that settled the claims of Alaskan Natives provided that each Alaskan Native regional corporation would share 70 percent of the revenues it derives from its subsurface estate with 11 other regional corporations in the state. The exchange was structured in a way that the revenue-sharing provisions of the law did not apply. If Arctic Slope had obtained ANWR subsurface lands under the 1980 law, rather than the Chandler Lake exchange, it would have been required to share any revenues derived from these lands with 11 other Alaskan regional corporations.

## Land Exchange Problems Linked to Absence of Procedures

Under the Alaska Native Claims Settlement Act of 1971 and the Alaska National Interest Lands Conservation Act of 1980, Interior has unique land exchange authority applicable only in Alaska. Under these authorities, Interior need not follow usual land exchange procedures. GAO found that in the Chandler Lake exchange, Interior used its broad authority to avoid procedural requirements that would have been otherwise applicable and that these procedural deficiencies can be directly linked to many of the problems identified with the exchange. For example, Interior did not provide for a full public review and assessment of the exchange. Federal, state, and Alaskan Native representatives told GAO that if they had had the opportunity to do so, they would have objected to many of the exchange provisions.

GAO believes that the lessons learned from the Chandler Lake exchange are applicable in the future because about 20 million acres of inholdings remain in national parks, wildlife refuges, and other federal lands in Alaska that may give rise to additional land exchanges. Consequently, GAO believes there is a need for procedural requirements for conducting such land exchanges.

## Recommendation to the Congress

In a draft of its report, GAO proposed that Interior develop written procedures to execute land exchanges. Because Interior disagreed with the need for formal procedures, GAO recommends that the Congress direct the Secretary of the Interior to develop and issue written procedures to guide Interior's conduct of land exchanges in Alaska under the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. (See ch. 3.)

## Agency Comments

Both Interior and Arctic Slope provided lengthy comments that disagreed with this report. After considering their comments, GAO continues to believe that the report is accurate and fairly presents the results of its review. This report includes a discussion of Interior's and Arctic Slope's comments and GAO's responses to them at the ends of chapters 2 and 3. In addition, the entire text of Interior's and Arctic Slope's comments are included as appendixes III and IV of this report, and GAO responses to their comments are included as appendix V.

# Contents

## Figures



### Abbreviations

| | |
|---|---|
| ANCSA | Alaska Native Claims Settlement Act |
| ANILCA | Alaska National Interest Lands Conservation Act |
| ANWR | Arctic National Wildlife Refuge |
| ASRC | Arctic Slope Regional Corporation |
| ATV | all-terrain vehicle |
| FLPMA | Federal Land Policy Management Act |
| GAO | General Accounting Office |
| NEPA | National Environmental Policy Act |

# Introduction

In 1983, the Department of the Interior entered into a land exchange agreement with the Arctic Slope Regional Corporation (ASRC), a corporation representing Alaskan Natives who live in the northernmost region of the state. Under the provisions of Section 1302(h) of the Alaska National Interest Lands Conservation Act of 1980, the Secretary of the Interior had the authority to make the exchange without congressional approval, and notwithstanding any other provision of law. In the exchange—commonly referred to as the "Chandler Lake exchange"—Interior acquired surface rights to 101,272 acres of land the Natives owned within the Gates of the Arctic National Park. In return, ASRC received the subsurface rights to 92,160 acres of land within the Arctic National Wildlife Refuge (ANWR), an area with high potential for large amounts of oil and gas.

Since this exchange, Interior has proposed a number of other exchanges involving federal land within ANWR. In 1988, we reported on a recent Interior proposal to exchange land with six native entities, and concluded that they were not in the government's interest and that further consideration of them should be discontinued.[1] To provide additional information to the Congress about Interior's land exchanges in Alaska, the Chairman of the Subcommittee on Water and Power Resources, House Committee on Interior and Insular Affairs, asked us to review the Chandler Lake exchange. This report presents our findings with regard to that exchange. It also contains conclusions and recommendations that stem from our analysis of the entire set of exchanges we have reviewed to date.

## Native-Owned Lands Within National Parklands and Wildlife Refuges in Alaska

For more than a century after the United States acquired Alaska from Russia, the land ownership claims of Alaska's Natives remained unsettled. The Alaska Native Claims Settlement Act of 1971 (ANCSA) (P.L. 92-203, Dec. 18, 1971) was enacted to settle these claims. The act authorized the establishment of 13 regional corporations and more than 200 Native village corporations. Under ANCSA, the corporations received $962.5 million from the federal government and the right to select 44 million acres of federally owned land in Alaska.[2]

[1] Federal Land Management: Consideration of Proposed Alaska Land Exchanges Should Be Discontinued (GAO/RCED-88-179, Sept. 29, 1988).

[2] One of the 13 regional corporations represents Natives who live outside Alaska. This corporation participated in the allocation of the $962.5 million but was excluded from participating in selecting the 44 million acres of land.

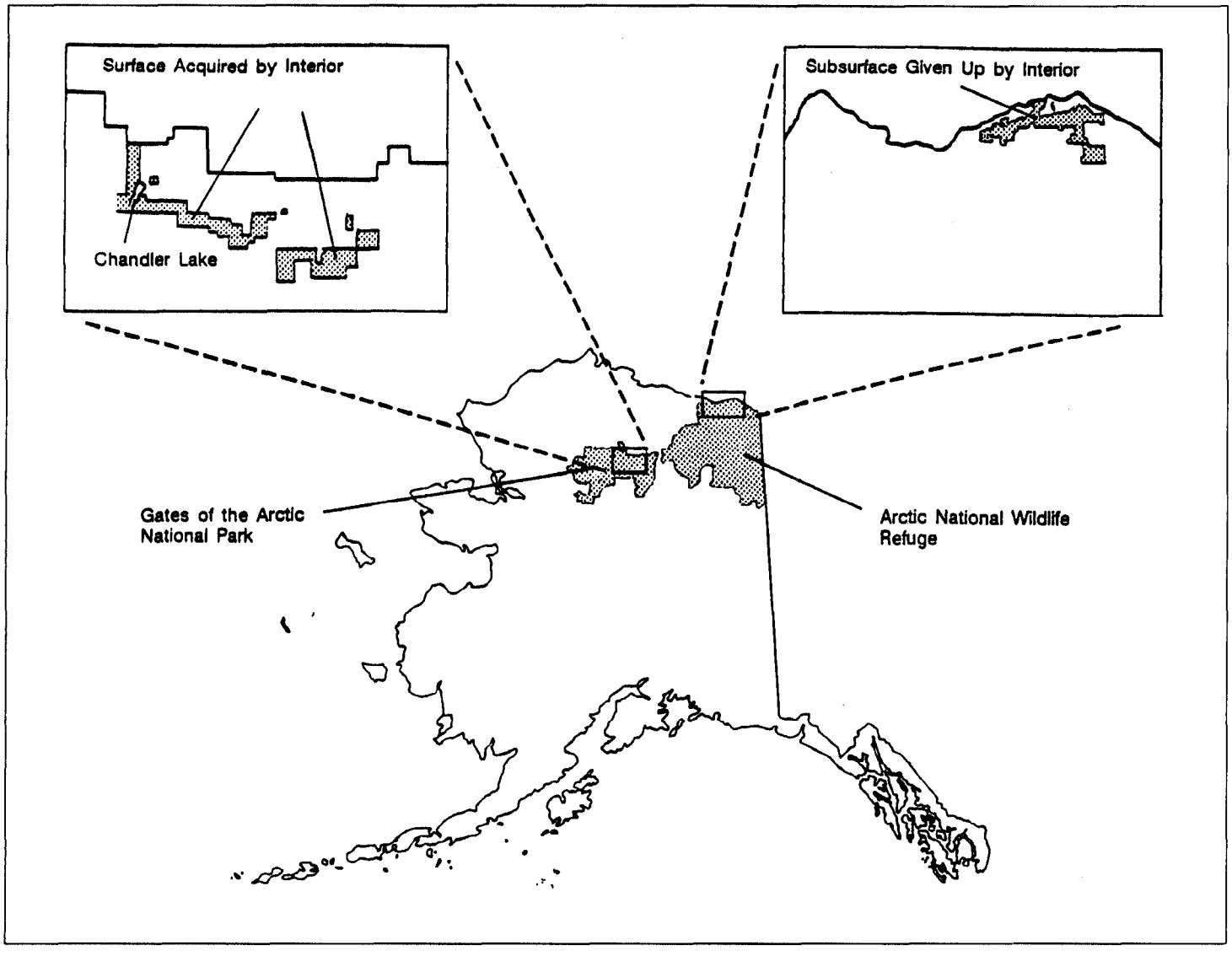
Some of the land claims the Natives made under ANCSA were affected by another major piece of land legislation passed by the Congress in 1980. This legislation, the Alaska National Interest Lands Conservation Act (ANILCA) (P.L. 96-487, Dec. 2, 1980) created a number of new parks and wildlife refuges in Alaska and added land to existing parks and refuges. When ANILCA expanded the boundaries of the then-existing parks and refuges and created new ones, some of those lands previously selected by the Natives under ANCSA now fell within the park and refuge boundaries. These lands are called "inholdings."

Alaska's national parklands comprise about 54.7 million acres, an area about the size of Idaho. According to Interior's National Park Service, as of August 1988, Alaska Native corporations' inholdings totaled about 3.7 million acres of land, or about 7 percent of the total land area in the Alaska park system. According to Alaska regional officials of the Park Service, the number and size of inholdings can make it difficult to manage the parklands. They said that increased use and development of the inholdings could threaten park resources over a period of time. Given this concern, Park Service officials said they consider it wise for Interior to acquire high-priority inholdings when the opportunity arises.

## Objectives of the Exchange

The Department of the Interior's stated objectives in the Chandler Lake exchange included protecting nationally significant resources, consolidating federal lands within the Gates of the Arctic National Park, and obtaining access to other parklands. This park, which lies north of the Arctic Circle, was created in 1980 and comprises 8.4 million acres of land. (See fig. 1.1.)

**Figure 1.1: Lands Exchanged in the Chandler Lake Land Exchange**




The Park Service representative on the team negotiating the exchange, told us that although the primary reason for the exchange was to acquire inholdings within the park, another significant benefit of the exchange would be to restrict the use of eight-wheel all-terrain vehicles (ATVs) used by the Natives for subsistence hunting activities on the Chandler Lake lands. The design of these ATVs allows them to cross the land without using a road. These vehicles weigh a maximum of 1,200 pounds empty or 2,000 pounds fully loaded. According to Park Service

officials, these vehicles break the surface of the tundra and cause damage that may take many years for nature to repair. Park Service officials involved with the exchange said that by acquiring the Chandler Lake lands, they intended to control ATV use and thereby reduce damage to the parklands.

According to ASRC officials and representatives, the Corporation was interested in the exchange to improve the economic well-being of all ASRC shareholders (approximately 3,700 members) and the eight village corporations within the region. At the time of the exchange, Interior reported that the limited geological data available indicated that ANWR held a high potential for oil and gas resources. Since that time, it has been rated by geologists as the most outstanding petroleum exploration target in the onshore United States. ASRC officials said the Corporation had two objectives in carrying out the Chandler Lake land exchange: obtaining the right to develop the natural resource potential of the lands being acquired and consolidating ASRC's scattered land holdings.

From Interior's perspective, an additional factor leading to the exchange was that ASRC had the potential to acquire subsurface lands within ANWR by other means. Specifically, under the provisions of ANILCA, if the Congress opened ANWR to oil and gas leasing before December 2, 2020, ASRC could exercise an option to acquire the subsurface beneath village corporation lands in ANWR in exchange for other subsurface lands ASRC owned in Alaska. In Interior's view, if ASRC exercised this option, the government would not receive lands as valuable as those that ASRC was offering within Gates of the Arctic National Park, and that Interior would receive ASRC's least valuable subsurface elsewhere in Alaska.

## Lands and Interests Involved in the Chandler Lake Exchange

Under the exchange agreement, Interior received surface rights to 101,272 acres of ASRC's inholdings in Gates of the Arctic National Park. Interior acquired only the surface estate of these inholdings; the subsurface estate remained in ASRC's ownership. (In 1984, under the Barrow Gas Field Transfer Act, Interior subsequently acquired the subsurface estate as well.) Under the exchange agreement, the Natives' use of ATVs was to be greatly restricted.

In return for the surface rights to 101,272 acres, ASRC received:

- Subsurface rights to 69,120 acres of land within ANWR.
- Subsurface rights to an additional 23,040 acres within ANWR, which were to be identified at a later time.

- The right to drill exploratory test wells on the 69,120 acres specified in the exchange agreement and to retain exclusive ownership of the data obtained from the test wells. Shortly after the exchange was completed, ASRC entered into a contract with a number of oil companies to drill the exploratory test wells.
- An option under which ASRC could acquire additional subsurface in ANWR beneath additional surface lands that the village of Kaktovik may be entitled to under ANCSA and ANILCA. If, as a result of this option, ASRC's total subsurface acreage in ANWR exceeds 92,160 acres, ASRC would be required to give Interior additional surface acreage (of ASRC's choosing) in Gates of the Arctic National Park in an amount equal to the number of subsurface acres conveyed to ASRC in ANWR in excess of 92,160 acres.

Under ANILCA, however, no production of oil and gas could occur anywhere within ANWR—including the subsurface ASRC received—unless the activity was specifically authorized by an act of Congress.

Interior determined that the values of the lands were comparable ($5.1 million for the parklands Interior received, and $5.9 million for the lands and interests traded to ASRC). Under the provisions of ANCSA and ANILCA, the Secretary of the Interior can conduct an exchange of unequal value if it is in the public interest to do so. The Secretary determined that the exchange was in the public interest and it was carried out on August 9, 1983.

## Objectives, Scope, and Methodology

The Chairman, Subcommittee on Water and Power Resources, House Committee on Interior and Insular Affairs, asked us to review the Chandler Lake exchange. He specifically asked us to assess whether the Chandler Lake land exchange was in the government's best interest.

We performed work primarily in Washington, D.C., and in various locations in Alaska. We reviewed the laws, regulations, and policies that guide the exchange process and interviewed officials of the agencies and groups involved. These agencies and groups included Interior's National Park Service, Bureau of Land Management (Bureau), Solicitor's Office, and Fish and Wildlife Service; three regional corporations (ASRC because it is directly involved in the exchange, and Bristol Bay and Aleut, because they filed for arbitration on the revenue-sharing aspects of the exchange); one village corporation (Nunamiut, because of its use of the Chandler Lake lands for subsistence activities); and the Alaska Department of Natural Resources. Our work was divided into several main parts, as follows:

- To evaluate Interior's legal authority to conduct the exchange, we reviewed statutes, regulations, court decisions, and other related documents, and we held discussions with officials of Interior's Solicitor's Office.
- To evaluate the inholdings that were acquired in the exchange, we first examined records and interviewed personnel at the Regional Director's Office and Lands Division in the Park Service's Alaska region. We visited Gates of the Arctic National Park, and we interviewed the current Park Superintendent, the Park Superintendent at the time of the exchange, and the Chief Ranger to obtain information on the inholdings acquired. We also discussed the acquisition with officials of ASRC and Anaktuvuk Pass Village (because their subsistence uses of the lands acquired by Interior were affected by the exchange) and reviewed documents they provided. We also discussed the exchange with management-level officials at the Park Service's Alaska region, and Park Service and Interior headquarters officials in Washington, D.C., including the former Deputy Under Secretary of the Interior at the time the exchange was completed.
- To evaluate the prices established for the parklands, we compared the Uniform Appraisal Standards followed by the Park Service in acquiring or exchanging land and the applicable laws and procedures for land acquisition with the procedures used in the exchange. Our analysis was based on a review of files at the Park Service's Alaska region and on interviews with Park Service headquarters officials, officials and representatives of ASRC, and other Park Service personnel.
- To evaluate the Bureau's geologic analysis of the oil and gas lands transferred to ASRC, we conducted an extensive literature search and interviewed officials of the Bureau, Interior's Minerals Management Service, and U.S. Geological Survey, the state of Alaska, and the petroleum industry. We reviewed and analyzed ANWR geological and geophysical data bases, geological interpretations and derivative maps, and supporting documentation on delineation of prospects in ANWR as it existed in 1983 and 1987. To analyze the Bureau's geologic inputs to the 1983 economic evaluation, we reviewed the Bureau's documentation of risk methodology, tracts identified for comparable sales analysis, geologic/engineering assumptions, and derived tract dollar values. We also examined oil company geological and geophysical data and interpretations provided to the Department of the Interior from 1984-87, after the exchange took place. In addition, we compared some aspects and derived dollar values of the 1983 exchange evaluation with the evaluations the Bureau conducted in 1987 for Interior's proposed land exchanges. We did not evaluate the potential benefits to ASRC of

obtaining more than 92,160 subsurface acres in ANWR because at the time of our review, this option had not been exercised.

- To describe the Bureau's valuation process for the lands traded to ASRC, we reviewed documentation the Bureau provided us.

We performed our review between July 1988 and March 1989 in accordance with generally accepted government auditing standards.

# The Chandler Lake Exchange Was Not in the Best Interests of the Government

We disagree with Interior's conclusion that the Chandler Lake exchange was in the best interests of the government. The Chandler Lake exchange partially accomplished Interior's stated objectives of consolidating federal lands and gaining access to parklands by acquiring the surface rights to 101,272 acres of inholdings in Gates of the Arctic National Park. However, the exchange did not mitigate the imminent threat to these lands which involved surface damage by eight-wheel ATVs. Subsequent to the exchange, damage to the Chandler Lake lands by eight-wheel ATVs is now worse. In addition, the concessions Interior gave for these lands appear to be too high a price to pay for the lands Interior received. Specifically:

- The exchange allowed ASRC to drill exploratory test-wells within ANWR and to retain exclusive rights to the test-well data. With this information, ASRC and its oil company partners are now in a superior position to all others, including the government, in assessing the oil and gas potential of ANWR. Conversely, without this information, the federal government is at a distinct disadvantage in estimating the oil and gas value of the remaining land it owns in ANWR, setting sale terms for oil and gas lease sales, and establishing minimum bids for tracts within ANWR.
- The exchange removed Interior's right to disapprove the specific location of 23,040 acres of ANWR lands that had yet to be selected by the Natives. The Natives exercised their uncontestable selection right in late 1985 and 1986, after seismic and test-well data had been developed. The lands selected are in an area now considered by Interior to hold the highest potential for oil and gas within ANWR. In 1987, Interior estimates of the value of these selections were over $250 million.

In addition, the exchange was structured in a way that a provision of ANCSA calling for the sharing of oil and gas revenues with other Native regional corporations did not apply. Two other Native corporations filed for arbitration on this matter, contending that ASRC had failed to abide by the provisions of ANCSA. On March 28, 1989, the American Arbitration Association ruled that the revenues generated from the exchange are not subject to sharing.

## Acquisition of Chandler Lake Lands Has Not Protected Park Resources

The Chandler Lake exchange accomplished Interior's stated objectives of consolidating federal lands and gaining access to parklands, but did not mitigate the imminent threat to the lands acquired—use of eight-wheel ATVs on the lands.

Interior stated that the exchange would "assure sound use of natural resource lands and protect critical natural values." However, the exchange has had much the opposite effect. It has created a land management problem for the Park Service and has harmed the wild and undeveloped character of the park.

Natives who live in the area have used the Chandler Lake lands for subsistence use.[1] For at least the past 2 decades, Natives have used ATVs for transportation throughout these lands—eight-wheeled ATVs are the most common type in use today. (See fig. 2.1.) According to Park Service officials, one pass of an ATV on wet tundra or two or three passes on dry tundra leave visual scars on the land that can last many years. According to the Assistant Regional Director for the Park Service's Alaska Region and the Park Service representative on the Chandler Lake negotiating team, scarring by ATVs was the imminent threat the Park Service was seeking to control.

The exchange has complicated rather than solved the problem of ATV use. Under the exchange agreement, the Natives' use of ATVs was to be limited to "linear easements" along banks of rivers and creeks and other lands in the exchange. The villagers were dissatisfied with these linear easements because the easements limited access to hunting grounds. As a result, according to Park Service officials, they continued to use ATVs throughout the Chandler Lake lands as they had when they owned the lands. Park officials did not enforce the restrictions, choosing instead to study the Natives' use of ATVs prior to reaching a decision on how to implement restrictions on ATV usage. According to Park officials, the study began in June 1986 and is expected to be completed in the summer of 1989. Also, since the exchange, the Park Service has reported that the Natives' use of ATVs—and the consequent scarring of the land—has since increased in park wilderness areas that were not part of the exchange. A park official at Gates of the Arctic National Park told us that this has occurred because when the Natives noticed that the Park

[1] "Subsistence use" means the customary and traditional use by rural Alaska residents of wild, renewable resources for direct personal or family consumption such as food, shelter, fuel, clothing, or transportation.

Service was not enforcing the linear easement restrictions, they expanded their usage of the ATVs in park wilderness areas.

**Figure 2.1: Eight-Wheel ATV Used on Chandler Lake Lands**

**Figure 2.2: Damage That ATVs Are Causing**

The provision for linear easements has been so troublesome for the Park Service and the Natives that in July 1986, they began negotiating a new agreement to resolve the problem. At the end of our review in March 1989, these negotiations had been completed, and the Park Service expects an agreement to be submitted to the Congress for its consideration in the fall of 1989. The agreement would require congressional approval because it would involve deauthorization of existing wilderness areas in Gates of the Arctic National Park where the Natives use ATVs.

## Exchange Placed the Federal Government and Others at a Disadvantage in Estimating the Oil and Gas Potential of ANWR

Industry and government geologists have concluded that ANWR's coastal plain provides the nation's best single opportunity to increase domestic oil production over the next 40 years. However, only limited data are available for making assessments about oil and gas resources in the coastal plain. In such a situation, data from an exploratory well can be of great significance.

The exchange placed ASRC and its oil company partners in a unique position of being the only entity able to obtain onshore well data about the geology underlying the coastal plain. To date, ASRC's exploratory well is the only one to have been drilled on the coastal plain of ANWR. During the exchange negotiations, Interior and ASRC negotiated whether the government would have access to the well data. Our discussions with ASRC and government representatives on the negotiating team indicated that ASRC might have discontinued negotiations unless it was able to retain exclusive rights to the well data. The Deputy Under Secretary of the Interior relented on the point, agreeing that ASRC and its oil company partners would retain exclusive access to this information.[2] To date, the government has not seen nor does it have access to these data.

The decision not to obtain access to the data had a number of significant consequences for the government. First, it restricted the amount of information available to the government for a study it conducted of the oil and gas potential of ANWR. Officials involved in conducting the government study told us that information from the well would have been very valuable.

[2]In compliance with Alaska state law, the consortium also filed the well data with the Alaska Oil and Gas Conservation Commission. The Commission keeps filings confidential and does not make them available to government agencies or any other parties if the information relates to the valuation of unleased land in the same vicinity.

A second consequence of not obtaining the well data was that it placed the federal government at a competitive disadvantage to ASRC and its oil company partners. If the Congress opens ANWR to commercial oil and gas development, such data would prove useful to the government in estimating the oil and gas value of the remaining land it owns in ANWR and setting terms for oil and gas lease sales for the remaining tracts within ANWR. Because only ASRC and its oil company partners have these data, they are more knowledgeable than the government and other oil companies regarding any future leasing of tracts within ANWR.

## Chandler Lake Exchange Gave ASRC Greater Discretion in Choosing Subsurface Lands Than Under Existing Law

Under ANCSA, a village corporation was required to make its land selections on and around its traditional village site. The village obtained title to only the surface estate of these lands, and the regional corporation for that area was required to select the subsurface beneath the village lands.[3] An exception to this requirement was that if the lands the Natives were entitled to receive were within a then-existing (1971) national wildlife refuge (such as ANWR), the village corporation was not allowed to select more than 69,120 acres of its lands within the refuge, and the regional corporation was precluded from selecting any subsurface beneath the village lands within a refuge. The corporations had to select other lands outside the refuge when this exception applied.

Specifically, as it applies to the lands involved in the Chandler Lake exchange, only one village (Kaktovik) is located inside the refuge. The village corporation was allowed to select a total of 92,160 acres—69,120 acres within ANWR, and 23,040 acres outside ANWR's boundaries. ASRC (the regional corporation) was precluded from selecting any of the subsurface beneath the village lands inside ANWR and had to select all 92,160 subsurface acres outside the refuge. However, ANILCA modified this requirement by allowing the village corporation to exchange its 23,040 surface acres outside ANWR for an equal amount of surface acreage inside the refuge. ANILCA also provided that ASRC could acquire the subsurface beneath all village lands—the 69,120 acres of lands already selected, and the 23,040 acres in ANWR that the village had yet to identify—if ANWR was opened for oil and gas development.

The section of ANILCA that allowed the village corporation to exchange its 23,040 acres outside the refuge for 23,040 acres inside ANWR also required the concurrence of the Secretary of the Interior in the selection

[3]For a further discussion of the relationship between regional and village corporations, see appendix II.

of the specific lands identified by the village corporation. In the Chandler Lake exchange, Interior waived its right to disapprove the specific location of these 23,040 acres. The Chandler Lake exchange agreement requires that the land to be selected be compact and contiguous with lands previously conveyed, but beyond this, it contains no provisions for Interior approval of the specific location of the lands selected. The former Deputy Under Secretary told us that although Interior may have surrendered some discretion on the selection of these 23,040 acres, the purposes of ANCSA and ANILCA were to benefit the Natives, and that wherever possible, he believed Interior should give the Natives the benefit of any doubt.

The village corporation made its other selections in ANWR in late 1985 and 1986, after substantial information concerning the land's oil and gas potential had been developed, including seismic and exploratory test-well data. With this information, the village corporation selected lands in an area now considered by Interior to hold the highest potential for oil and gas within ANWR. In 1987, based on our review of government estimates, the value of the tracts comprising these selections was over $250 million.[4] The village's and regional corporation's ability to select this acreage without requiring Interior's approval may significantly increase the dollar value of the rights given to ASRC in the exchange. The former Deputy Under Secretary told us that because ASRC would be able under ANILCA to obtain 92,160 acres of subsurface within ANWR (if ANWR was opened for oil and gas development), the value of these ANWR lands to the government was minimal. We agree with the former Deputy Under Secretary's assessment for the 69,120 acres beneath existing village corporation lands, but based on the foregoing discussion, we disagree with his assessment regarding the 23,040 acres that at the time of the exchange had yet to be specifically identified. In its analysis of the dollar value of the interests to be exchanged, Interior reduced the value of the 92,160 acres of oil and gas interests from about $395.5 million to $5.9 million. (See app. I.) We recognize that the actual oil and gas value of the selections made subsequent to the exchange has yet to be determined and that it will be of little consequence unless ANWR is opened to oil and gas development. Nevertheless, the village and regional corporations' ability to select land with such high oil and gas potential increases the likelihood that Interior's $5.9 million valuation of the rights

[4]It should be noted, however, that as we reported previously (GAO/RCED-87-179, Sept. 29, 1988) the geological data used to generate these tract values was limited, and as a result, the values are highly uncertain.

exchanged may substantially understate the financial interests the government gave up.

## Other Regional Native Corporations Did Not Participate in Financial Benefits of Oil and Gas Resources

The Chandler Lake exchange was structured in a way that the other Alaskan Native regional corporations did not participate in its financial benefits. Since 1984, ASRC has received about $30 million from its oil company partners for the exclusive right to conduct exploratory activities and to acquire oil and gas leases on the lands. However, a provision of ANCSA calling for the sharing of oil and gas revenues with 11 other regional corporations was not applicable to the exchange.

When the Congress enacted ANCSA to settle land claims made by the various Alaskan Native groups, it provided for a sharing of income from mineral and timber resources among 12 Native regional corporations. Specifically, Section 7(i) of ANCSA provided that,

> "Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region . . . ."

If ASRC had acquired the subsurface rights in ANWR under the provisions of ANILCA discussed earlier in this chapter, it would have had to share 70 percent of the revenue it would receive with 11 other regional corporations. However, the Chandler Lake exchange was structured in a way that the revenue-sharing provision of ANCSA did not apply. This occurred because ASRC exchanged surface interests in the Chandler Lake lands for the subsurface estate in ANWR. According to a 1982 section 7(i) settlement agreement, approved by 12 Alaska regional corporations, the revenue-sharing provisions of ANCSA would apply in this case if subsurface interests had been exchanged for subsurface interests. Thus, because ASRC exchanged surface interests for subsurface interests, none of the other regional corporations have shared in any of the revenue that ASRC has already received from its oil company partners, and they may not share in any of the revenue ASRC will receive in the future for leases, royalties, and other payments involved in this exchange, if ANWR is opened to oil and gas development.

We asked ASRC and Interior officials why the exchange had been structured in this way. ASRC's attorney said the corporation acted to protect its own interests and retained the subsurface rights of the Chandler

Lake lands because they wanted to minimize the revenue-sharing effects of the ANCSA provision. The former Deputy Under Secretary told us that he was willing to accommodate ASRC on this point.

Two other regional corporations (Aleut and Bristol Bay) demanded arbitration on the provisions of the exchange in 1986. The corporations alleged that any revenues attributable to the subsurface acquired in the exchange are subject to the ANCSA requirements. On March 28, 1989, the American Arbitration Association found that the revenues generated from the exchange are not subject to sharing.

## Conclusions

We believe that, on an overall basis, the Chandler Lake exchange was not in the best interests of the government. The exchange has not solved, and has actually worsened, the use of ATVs on the lands Interior acquired. Further, we believe the concessions Interior gave ASRC in the exchange were excessive because they (1) gave ASRC and its oil company partners a decided advantage compared with all others, including the government, in assessing the oil and gas potential of ANWR, as well as a competitive advantage in future lease sales in ANWR and (2) allowed ASRC to incontestably select 23,040 acres of subsurface estate in the potentially most valuable area of ANWR, which may ultimately be worth hundreds of millions of dollars. In addition, the Chandler Lake exchange was structured in a way to make inapplicable the revenue-sharing provision of ANCSA, which provides for dividing the natural resource development revenues among 12 Alaska regional corporations.

We believe that these shortcomings can be linked to an absence of procedures governing land exchanges in Alaska conducted under the broad authority granted to Interior under ANCSA and ANILCA. Chapter 3 discusses this concern in detail and recommends actions we believe are needed to reduce the potential for similar problems occurring in future land exchanges in Alaska.

## Agency Comments and Our Evaluation

Both Interior and ASRC strongly disagreed with a draft of this report, describing it as misleading, inaccurate, unfair, and unfounded. After carefully considering both Interior's and ASRC's comments, we believe that the factual information in the report is accurate and complete, and fairly presents the results of our review. More significantly, we continue to believe that the Chandler Lake exchange was not in the government's best interest. Following is a discussion of their comments on the principal points made in this chapter and our responses to their comments.

The entire text of Interior's and ASRC's comments are included in appendixes III and IV, and the full text of our responses to their comments is included as appendix V.

Both Interior and ASRC said that control of all terrain vehicles on the land acquired by the government was not a stated exchange objective. Interior also stated that the parties to the exchange did not foresee the dissatisfaction that subsequently arose over the limitations in the access easements that were negotiated as a part of the exchange. While control of ATVs was not a stated objective of the exchange, both the Assistant Director for the Park Service's Alaska region and the Park Service representative on the team negotiating the exchange told us that control of the vehicles on the lands was the imminent threat to the resources of the Chandler Lake lands. Six years have passed since the exchange was consummated, and the use of ATVs on Chandler Lake lands continues to be a problem; so much so that their use is the subject of a proposed agreement between Interior and the Natives to seek resolution. We believe Interior was remiss in having not fully addressed and resolved the ATV issue prior to consummating the exchange, particularly in light of the substantial benefits conferred on ASRC in the exchange. We have, however, made revisions to the report to clarify that the stated objectives of the exchange were to consolidate land holdings and obtain access to parklands.

Interior and ASRC took the position that allowing ASRC to drill a test-well on the coastal plain of ANWR and to retain exclusive rights to the well data simply allowed ASRC to enjoy the benefits of landownership available to other private land owners. We disagree with this view. By allowing ASRC early entry into ANWR, and further to drill the only test-well geographically located on the coastal plain of ANWR, Interior was in a strong negotiating position to demand access to the well data. This was because ASRC did not own any subsurface in ANWR at the time of the exchange and, under existing law, would continue to be precluded from such ownership unless and until ANWR was opened to commercial oil and gas development. Without the exchange, ASRC would not currently own any subsurface in ANWR, and would not have been able to negotiate agreements with oil companies that have already yielded over five times Interior's claimed value of the entire exchange to ASRC. Failure to recognize the special significance of the test-well information (and the strength of Interior's negotiating position) raises serious questions about Interior's negotiations on the exchange. In our view, Interior was plainly outnegotiated by ASRC, on this point.

The importance of the test-well data should not be underestimated. For example, a newspaper of the American Association of Petroleum Geologists named this well as the most important well completed in the world in 1986. In our opinion, this aspect of the exchange placed ASRC and its oil company partners in a superior position to other potential bidders if and when ANWR is opened to oil and gas development. Just as significantly, and perhaps more so, a private party has better data than the government to estimate the oil and gas potential of ANWR's coastal plain, most of which is still owned by the United States.

Interior and ASRC disagreed with our observation that the Chandler Lake exchange gave the Natives greater discretion in choosing subsurface lands than they had under Sections 1431(g)(3) and 1431(o) of ANILCA. Interior's disagreement is based on its belief that there is an ambiguity as to whether Interior could disapprove the selection of lands identified by the village corporation if the lands were within the boundary established by Section 11(a)(1) of ANCSA.

ASRC stated that in its view, the Congress has recognized that the identification of the lands in question was to be treated like any other land entitlements under ANCSA. However, Section 1431(g)(3) of ANILCA specifically requires the Secretary of the Interior's concurrence in the selection of the lands identified by the village corporation. Our research into this issue revealed that in 1982, Interior, in a letter to ASRC, specifically cited section 1431(g)(3) as the basis for not agreeing to a land identification that the Natives had made. The letter further stated that the requirement that the Secretary agree to the lands to be conveyed is a distinct departure from the concepts of land selection as authorized by ANCSA. Thus, Interior has already utilized the authority that it states it is unsure it has. We continue to believe that the Chandler Lake exchange gave the Natives greater discretion in selecting lands in ANWR than they had under Section 1431(g)(3) of ANILCA, and that the Natives used this greater discretion to select lands that are in an area now considered to hold the highest potential for oil and gas development within ANWR.

Both Interior and ASRC took issue with our discussion of revenue sharing issues of the exchange on the basis that our presentation infers impropriety in Interior's and ASRC's handling of the section 7(i) negotiations portion of the exchange. Our report did not state that Interior's and ASRC's structuring of the exchange to make inapplicable the revenue-sharing provisions of section 7(i) was illegal. In fact, we have updated the final report to recognize that the American Arbitration Association found on March 28, 1989, that the revenues generated from the

exchange are not subject to sharing under the terms of the section 7(i) settlement agreement. Notwithstanding this, however, the exchange was structured in a way that the revenue sharing provisions of Section 7(i) of ANCSA did not apply. Had ASRC obtained the ANWR subsurface received in the Chandler Lake exchange under the provisions of Section 1431(o) of ANILCA (if ANWR were opened to oil and gas development), the other Alaska regional corporations would have shared in the revenues to be derived from these lands. We included a discussion of this issue in the report because it was a significant element of the exchange and had financially adverse effects on other Alaskan Natives.

Finally, Interior stated that the Chandler Lake exchange should only be viewed as a gain for the United States because regardless of whether or not ANWR is opened for leasing, the value of the Kaktovik subsurface to the federal government would be zero or nearly zero; and ASRC stated that it may suffer a loss as a result of the exchange and that the exchange was not unfair from either party's perspective. We disagree with these assessments and continue to believe that the exchange was not in the government's best interest.

Notwithstanding whether ANWR is opened, the potential value of the ANWR lands has been and remains substantial. For example, ASRC has already received $30 million (or over 5 times Interior's calculated value of the exchange to ASRC) for the right to conduct exploratory activities and to acquire oil and gas leases in ANWR. Interior did not, but in our opinion could have, capitalized on this potential value in the exchange negotiations process. With regard to the Chandler Lake lands the government received in the exchange, the Alaskan Natives are continuing to use these lands much as they did when they owned the lands before the exchange, and Interior continues to have problems in resolving the imminent threat to those lands, the use of ATV vehicles. When viewed in this context, it is not clear that the exchange was substantially beneficial to the government even if ANWR is never opened. On the other hand, if ANWR is opened to oil and gas development, we believe that the benefits of the exchange would be skewed heavily in favor of ASRC. For example, the exchange removed Interior's discretion in the location of one-fourth of subsurface traded to ASRC that the Natives had yet to select in 1983. These lands may have a value of hundreds of millions of dollars, and the potentially most valuable of the tracts may have been retained in government ownership had Interior not given up its discretion on the location of the lands selected. Additionally, we believe that it was not in the government's best interest to have allowed a private

party (ASRC and its oil company partners) to achieve a superior informational position about the oil and gas potential of ANWR than the federal government, which continues to own the vast majority of the lands in ANWR. We believe that for Interior and ASRC to continue stating that this land exchange was in the best interests of government is clearly not substantiated by the facts.

# Improvements Needed in the Administration of ANCSA/ANILCA Land Exchanges in Alaska

Under ANCSA and ANILCA, Interior has unique land exchange authority applicable only in Alaska. Under these authorities, Interior need not follow usual land exchange procedures. In the Chandler Lake exchange, for example, Interior used its broad authority to avoid the requirement that provides for full review of proposed land exchanges by all interested parties. As a result, shortcomings of the exchange were not surfaced until after the exchange was completed. Federal, state, and Alaskan Native representatives told us that if they had had the opportunity to do so, they would have objected to many of the exchange provisions. By contrast, in two other Alaska land exchanges, Interior voluntarily provided for full public review. As a result, problems were identified before the exchanges were completed, and ultimately, neither exchange was carried out.

The potential for additional ANCSA/ANILCA exchanges in Alaska remains great, given the approximately 20 million acres of Native inholdings within the boundaries of national parks, wildlife refuges, and other federal land. In light of this potential, we believe Interior needs to develop and issue written procedures that will, if followed, ensure a comprehensive review of future land exchanges in Alaska.

## Most Land Exchanges Follow Established Procedures

The two largest federal land management agencies are the Bureau of Land Management in the Department of the Interior, and the Forest Service in the Department of Agriculture. These two agencies make considerable use of land exchanges in the management of their holdings of federal land.[1] Although the specific procedures may vary somewhat from agency to agency, the basic steps required for conducting these exchanges can be summarized as follows:

- Establishing the fair market values in the exchange on the basis of the methodology presented in the Uniform Appraisal Standards for Federal Land Acquisitions.[2] This ensures that the government recognizes the monetary values involved in each side of the exchange.
- Preparing an Environmental Assessment and, if necessary, an Environmental Impact Statement. These documents examine all the possible or probable consequences of an exchange and consider alternative actions

[1]From October 1, 1981, through March 31, 1985, the Bureau acquired about 842,000 acres of nonfederal land in the exchange process. During the same period, the Forest Service acquired about 326,000 acres.

[2]This document was prepared by the Federal Interagency Land Acquisition Conference in 1973 and provides the methodology for federal agencies to use in appraising land values.

and mitigating measures that the United States might take. An Environmental Assessment is the shorter of the two; in preparing it, an agency determines if the preparation of a more comprehensive Environmental Impact Statement is necessary.

- Providing for an extensive public review and an assessment of the exchange's impact. This allows all interested and affected parties to comment on an exchange and can provide the government with new information regarding the impact of an exchange.

In a report issued in 1987,[3] we stated that the processes of the Bureau and Forest Service are designed to protect the public interest by ensuring that exchange proposals conform to federal land-use plans, address environmental as well as state and local governments and other interested parties concerns and set land values that ensure the government obtains equal value in the exchange.

## Interior Has Not Established Written ANCSA/ANILCA Land Exchange Procedures

Land exchanges involving federal and Native-owned lands in Alaska are unique in that they can be carried out under broad authorizing provisions of ANCSA and ANILCA and not under the more specific requirements of the Federal Land Policy and Management Act (FLPMA), as amended. Under this broad authority, Interior has substantial discretion in selecting the exchange process it will follow. In practice, Interior has not developed or issued written procedures for conducting exchanges under ANCSA and ANILCA and has instead administered land exchanges on a case-by-case basis. In the case of the Chandler Lake exchange, the Deputy Under Secretary established and directed the process used to develop and carry out the exchange. He instructed the Bureau, the Fish and Wildlife Service, and the Park Service to prepare several administrative documents to support the exchange.

In addition to the administrative documents, Interior conducted a limited public review of the exchange by informing various groups, including the Alaska Land Use Council,[4] the state of Alaska, and various members of Congress that an exchange was planned. ASRC and Interior also held a public meeting in the village of Anaktuvuk Pass after the village petitioned Interior for a meeting. The information provided to these groups for review was limited to the acreage involved in the

[3]Federal Land Acquisition: Land Exchange Process Working but Can Be Improved (GAO/RCED-87-9, Feb. 5, 1987).

[4]The Alaska Land Use Council is a federal/state council established under ANILCA to conduct a number of land-use functions, including review of land exchanges.

exchange and the environmental stipulations that would apply to drilling in ANWR.

## Procedures Used in the Chandler Lake Exchange Did Not Provide for a Thorough Review

Interior's procedures used for the Chandler Lake exchange did not provide for a thorough administrative or public review of the exchange. We believe that if Interior had been required to use procedures similar to those used in FLPMA exchanges, the review would have been more thorough and the ramifications and effects of the exchange would have been known by all affected parties and the public.

### Documents Did Not Disclose Major Ramifications of the Exchange

The National Environmental Policy Act (NEPA) (42 U.S.C. 4332), applies to exchanges conducted under FLPMA. Thus, for FLPMA exchanges, a written analysis of all the relevant data concerning an exchange is required. The written analysis begins with an Environmental Assessment, and, if necessary, includes an Environmental Impact Statement. Either document must disclose all aspects and ramifications of an exchange and weigh all alternatives, such as conducting the exchange as proposed, modifying its conditions, or not conducting it at all.

In the Chandler Lake exchange, instead of writing an Environmental Assessment or an Environmental Impact Statement, Interior wrote a report that disclosed only the positive aspects of the exchange and did not discuss or analyze any of the factors that led to subsequent problems with the exchange. According to a Park Service official involved in the exchange, the documents used in the exchange were prepared to support the exchange, not to analyze it. As such, the exchange report did not disclose that (1) continued Native use of ATVs for subsistence purposes would be limited to designated easements, (2) ASRC and its oil company partners would retain exclusive rights to the well-drilling data, (3) the Secretary was waiving the right to concur in the specific lands to be selected for the remaining 23,040 acres within ANWR's coastal plain, and (4) that the exchange agreement would make inapplicable the provision of ANCSA for sharing oil and gas revenues with other Native corporations.

## Process Did Not Provide Sufficient Review of the Exchange's Consequences

FLPMA exchanges incorporate extensive procedures for ensuring that the exchange is announced publicly and that government agencies and other interested parties are allowed to review and comment on it. By contrast, the Chandler Lake exchange procedures did not allow for such a thorough review. In some instances, the problem involved the amount of time given to prepare or review exchange documents; in others, it involved the amount of information divulged about the exchange. For example:

- The final exchange report was prepared by a headquarters official unfamiliar with the exchange. According to the official, she received the task because of her writing skills and because of her involvement in work on a report analyzing ANWR's oil and gas potential. She said she included only the information provided to her and had no idea if the information was adequate. By contrast, for FLPMA exchanges, staff familiar with the details prepare the Environmental Assessment or Environmental Impact Statement.
- The Alaska region of the Fish and Wildlife Service, which has administrative responsibility for ANWR, was given only 1-1/2 days to review the exchange report and its impact on wildlife in ANWR. Officials of the Fish and Wildlife Service's Alaska region told us they protested to the Park Service that the time was totally inadequate to bring together appropriate staff to properly assess the impact of the exchange on wildlife in ANWR.
- Documents provided by Interior and ASRC on the proposed exchange to groups in Alaska and congressional members and staffs included information only on the acreage involved in the exchange and on the environmental stipulations that would be placed on ASRC's oil exploration.

A thorough administrative and public review of the exchange would likely have raised a number of the problems we have described about the exchange. Most of these problems were known or could have been perceived by various officials, but no opportunity was provided for bringing these various views into the review process. In a more thorough review, the following would, in all likelihood, have taken place:

- Park Service field personnel and Natives of Anaktuvuk Pass told us they would have alerted Interior to the fact that the designated easements for ATV use provided in the exchange were unworkable.
- Officials from Alaska's Oil and Gas Division told us they would have raised concerns about the lack of a requirement for ASRC to provide the United States with data from the exploratory well.

- Personnel with the Alaska region of the Fish and Wildlife Service told us that if they had been a part of the review process, they would have raised concerns over the Secretary's waiver of Interior's right to concur in the placement of the remaining 23,040 acres of land to be selected.
- Officials of other Native corporations told us they would have raised concerns over ASRC's retention of all oil and gas revenues.

## More Extensive Procedures Used in Two Other ANCSA/ANILCA Land Exchanges

In two Alaska land exchanges proposed about the time of the Chandler Lake exchange, Interior elected to use procedures that were more extensive than those for the Chandler Lake exchange. In both cases, use of the procedures allowed concerns about the exchanges to surface during the exchange process rather than afterwards. As a result, neither exchange was carried out.

### Cascade Lake Exchange

In 1983, Interior and ASRC proposed an exchange in which ASRC would give up 2,960 acres of inholdings inside Gates of the Arctic National Park for certain lands within the National Petroleum Reserve-Alaska. In this exchange, Interior involved regional and field-level personnel in the preparation of documents and conducted an extensive public review of the proposal. A number of parties voiced concerns about the proposed exchange. Those who commented included the states of California and Washington, Sierra Club, Alaska Department of Fish and Game, Pacific Flyway Brant Subcommittee of the Pacific Flyway Coastal States, and California Black Brant Association. In particular, they noted that some of the land ASRC would receive has valuable wildlife habitat that may be harmed through the exchange. Their comments led Interior to decide not to execute the exchange, according to the Assistant Regional Director for the Park Service's Alaska Region.

### St. Matthew Exchange

In 1983, Interior agreed to exchange a portion of St. Matthew Island, a wilderness area in the Alaska Maritime National Wildlife Refuge, for various interests owned by three Native corporations on land in two other national wildlife refuges. Under the exchange, the Native corporations would have leased the St. Matthew Island parcel to private companies as a support facility for oil exploration and potential development of oil in the Bering Sea. As part of the process for executing this exchange, the Fish and Wildlife Service prepared an environmental ascertainment report, similar to an Environmental Impact Statement.

That document disclosed, among other things, that a provision in ANCSA already protected some of the inholdings the government would acquire in the exchange against development inconsistent with wildlife refuge purposes. When the advisability of this exchange was challenged in U.S. District Court, the judge ruled that the exchange was not in the public interest and overturned the agreement. Specifically, the court found that the exchange would have threatened the wildlife values of St. Matthew Island and that most of the inholdings that would be acquired were already protected from development.

## Procedures Needed for Future ANCSA and ANILCA Land Exchanges

Land ownership patterns on federal land in Alaska suggest a potential for additional ANCSA/ANILCA land exchanges. The 224.6 million acres of land in Alaska administered by the Bureau, the Park Service, and the Fish and Wildlife Service contain about 20 million acres of inholdings. Officials of the Park Service and Fish and Wildlife Service told us they consider it wise for Interior to attempt acquisition of high-priority inholdings when opportunities arise. Given this potential, we believe the need exists for greater consistency, thoroughness, and openness in the administration of land exchanges in Alaska. At a minimum, procedures that ensure consistent compliance with the principles established in such legislation as NEPA and FLPMA and their implementing regulations appear appropriate and include:

- Coordinating with state and local governments to ensure that any inconsistencies between federal, state, and local land-use plans are considered and, to the extent possible, are resolved.
- Determining that proposed exchanges are in the public interest. Such determinations should consider federal land management needs as well as the needs of state and local people. It should also address the values and the objectives which federal lands or interest to be conveyed may serve if retained in federal ownership and whether these values and objectives are greater than the values of the nonfederal lands or interests to be acquired.
- Preparing and reviewing Environmental Assessments or Environmental Impact Statements—to ensure that all the substantive and controversial aspects of an exchange are examined including consideration of alternative actions and mitigating measures that the United States might take. The assessments or statements should be prepared by knowledgeable personnel, and when drafts are complete, notifications should be placed in the Federal Register and/or local newspapers to provide for comment and review by affected parties and the public.

- Establishing fair market value—including the use of the Uniform Appraisal Standards for Federal Land Acquisitions to help ensure that the government recognizes the values in the exchange. Though Interior has the authority to carry out exchanges in Alaska in which the land values of the two sides are unequal, determining fair market land values would help in the assessment of the public interest of such exchanges. Public interest considerations that warrant exchanging lands with substantially different fair market values would then have to be justified.

Interior's Alaska regional officials also believe that formalized procedures are needed for land exchanges in Alaska. The officials responsible for land exchanges at Alaska regional headquarters of the Park Service and the Fish and Wildlife Service told us they believe it is necessary to establish regulations and procedures. The Chief of the Lands Division for the Park Service's Alaska region said that it was important for the Park Service to establish procedures for exchanges in Alaska so that it will not be criticized for inappropriately defining an exchange to be in the public interest. He also said that from an efficiency standpoint, it is necessary to have written procedures so that the Park Service does not have to invent a new process every time it does an exchange. Both he and the Chief of the Division of Realty for the Alaska region of the Fish and Wildlife Service said that Interior needs procedures for ANCSA and ANILCA exchanges to reduce the discretion that has resulted in problems in Alaska land exchanges.

## Conclusions

Although the procedures discussed above might reasonably be expected to be complied with as a matter of prudent governmental administration, none were fully complied with in the Chandler Lake exchange. These shortcomings were possible because (1) the land exchange authority available to Interior under ANCSA and ANILCA does not contain such requirements, (2) Interior has not developed or issued written procedures implementing these broad authorities, and (3) Interior did not choose to voluntarily comply with requirements and procedures otherwise applicable to land exchanges.

We believe the problems resulting from the Chandler Lake land exchange (discussed in ch. 2) point to the need for Interior to develop and issue written procedures for conducting ANCSA/ANILCA land exchanges in Alaska. In two cases where more extensive procedures have been used in other Alaska land exchanges, concerns about the exchanges have surfaced during the process rather than afterwards and ultimately resulted in neither exchange being carried out. We believe the

need for such procedures is great, given the 20 million acres of inholdings in national parks, wildlife refuges, and other federal lands in Alaska.

## Recommendation to the Congress

We recommend that the Congress direct the Secretary of the Interior to develop and issue written procedures to execute land exchanges under ANCSA and ANILCA. At a minimum, the procedures should require (1) the preparation of Environmental Assessments or Environmental Impact Statements, when appropriate, (2) full review by the public, state, and local governments, and other affected parties, of all aspects of a proposed exchange, (3) justification for determining whether a proposed exchange is in the public interest, and (4) establishment and disclosure of the fair market value of the lands and interests to be exchanged.

## Agency Comments and Our Evaluation

A draft of this report proposed that Interior develop written procedures to execute land exchanges under ANCSA and ANILCA. In commenting on our proposal, Interior said it was in general disagreement and that it will (as it did in the case of Chandler Lake) take a well planned, administratively documented course of action in any future Alaska land exchanges. As the report shows, the process used in the Chandler Lake exchange was far from adequate or complete. Specifically, in this exchange, Interior did not:

- Disclose major ramifications of the exchange including that (1) linear easements for ATVs would be unworkable, (2) ASRC would obtain exclusive rights to well data, (3) Interior waived the right to concur in lands to be selected by the Natives, and (4) the exchange made inapplicable the sharing of revenues with other Alaskan Native Regional Corporations.
- Provide for sufficient review of the exchange's consequences stated above by interested and affected parties.

The shortcomings of the exchange that continue to adversely affect the federal government and others should have been surfaced and addressed before the exchange was completed. For Interior to continue to claim that the exchange was in the government's interest, and that the processes followed were adequate, we believe, clearly points to the need for some formal procedures under which Interior conducts land exchanges in Alaska.

As discussed in this report, Interior officials in Alaska who are responsible for land exchanges told us that Interior needs procedures for ANCSA and ANILCA land exchanges to reduce the discretion that has resulted in problems in Alaska land exchanges. Because the 20 million acres of nonfederally owned lands in national parks, wildlife refuges, and other federal lands in Alaska create the potential for many future land exchanges, we believe that procedural requirements are necessary to ensure that future exchanges are fully discussed in an open public forum, with all interested and affected parties having access to all relevant information. Because Interior has disagreed with the need for such formal procedures, and because we strongly believe that procedures are needed for decisions affecting future land exchanges in Alaska, we have redirected our recommendation to the Congress.

The entire text of Interior's comments are included as appendix III, and ASRC's comments (which also disagreed with the need for our recommendation) are included as appendix IV. Our responses to both sets of comments are included as appendix V.

# Interior's Valuation of Mineral Interest Traded to the Arctic Slope Regional Corporation

As part of our work, we were asked to look into Interior's methods of valuation for the subsurface interests exchanged to the Arctic Slope Regional Corporation (ASRC) in the Chandler Lake exchange. Interior's former Deputy Under Secretary told us that the Bureau of Land Management's (Bureau) valuation of the subsurface exchanged to ASRC was not an important factor in deciding whether to proceed with the exchange. He said that, in his view, Interior was unable to retain ownership of 92,160 acres of Arctic National Wildlife Refuge (ANWR) subsurface because of ASRC's right under ANILCA to exchange minimally valuable subsurface it owned elsewhere in Alaska for the ANWR subsurface on an acre-for-acre basis if and when ANWR was opened.

We agree with the former Deputy Under Secretary's reasoning for 69,120 acres of subsurface beneath village corporation lands. However, with regard to the 23,040 acres of the subsurface in ANWR that had yet to be selected, the discretion Interior gave up may have been excessive. Not withstanding the former Deputy Under Secretary's position, the following is the valuation process used by Interior in arriving at the value of the subsurface exchanged to ASRC. Interior initially estimated the fair market value of the mineral estate of the 92,160 acres that ASRC would acquire in the exchange at about $395.5 million, but through a number of adjustments estimated the government's interest in these lands to be $5.9 million.

## Estimate of Mineral Estate Was Based on Limited Geologic Information

When Interior began assessing the value of the subsurface that ASRC would acquire in the exchange, its knowledge was limited in several important respects.

- Little geologic information about the area's oil and gas potential was available. At the time of the exchange, no wells had been drilled on the coastal plain, and seismic data for ANWR had not yet been collected. Data from exploratory wells and seismic testing provide the most reliable information in estimating the oil-bearing potential of unexploited oil and gas lands.
- Because the area had not been opened to oil and gas activity, no sales of oil and gas leases had been conducted within ANWR. Indications of the amounts that companies might be willing to pay for the right to produce oil and gas were thus not available.

On July 6, 1983, the Director of the Bureau's Alaska state office, the federal agency responsible for determining the value of mineral

resources on these federal lands, directed his staff to develop an estimate of the fair market values of the mineral subsurface for lands that were to be traded to ASRC. In an internal memorandum dated July 12, 1983, the geologist assigned to the task wrote:

"Any valuation placed on the 92,160 acres proposed for exchange prior to the acquisition of subsurface data would be highly presumptive and subject to challenge . . . . Detailed evaluation of the oil and gas potential of the area cannot be made because of the absence of subsurface data . . . . We suggest that consummation of this exchange be delayed until after seismic data for the Arctic National Wildlife Refuge is available to this office for interpretation."

Nevertheless, Interior carried out an economic evaluation, despite the data limitations.

## Methodology Used in Valuing the Subsurface

The main steps used by the Bureau in estimating how much the mineral resources were worth were as follows:

- The geologist provided an evaluation of potentially recoverable undiscovered oil resources that could be present in the area of the lands selected. This evaluation was based on the Bureau's interpretation of a 1980 U.S. Geological Survey report. The geologist estimated that 92,160 acres of land in the area would yield about 177 million barrels of recoverable oil.
- A staff mineral economist developed estimates of the amount that oil companies might pay in bonus bids for oil and gas leases. Because no lease sales had been held in ANWR, this estimate was based on lease sales held primarily in state and federal waters northwest of the refuge. Using the data from these sales, the economist estimated that these lands would yield $111.8 million in bonus bids.
- In addition to the determination for bonus bids, Bureau staff computed the amount of royalties that could be expected for the estimated 177 million barrels of oil to be $276.7 million. The combined bonus and royalty estimates totaled $388.5 million. Adding other mineral estate values of $7 million for sand and gravel brought the total estimated value of the exchange lands to $395.5 million.

Although the Bureau's documentation supporting its methodology was limited, we did identify some areas of concern. For example, the Bureau's analysis of bonus bids was based predominantly on offshore lease sales, but the tracts in the exchange were onshore. Because drilling and recovery are generally less expensive for onshore tracts than for

offshore tracts, companies can reasonably be expected to make higher bids for onshore tracts, given comparable resource estimates.

Another concern is that the Bureau's approach appears to inappropriately combine estimates of bonus bids based on actual sales with estimate of royalties based on oil resources and royalty rates. The relationship between royalties and bonus bids is complex. That is, royalties cannot be evaluated independently from bonus bids and vice versa. Because of the lack of documentation, we were not able to discern whether the Bureau's analysis recognized and adjusted for this bonus/royalty relationship. In fact, it is not clear to us why both royalties and bonus were not estimated on the basis of available resource estimates used to calculate royalties.

## Value of Mineral Resources Reduced to $5.9 Million

In the exchange documents, Interior stated that subsurface under the 92,160 acres proposed for exchange had a value to the federal government of $5.9 million even though the mineral resources were originally valued at $395.5 million. The $5.9 million was close to the appraised value of $5.1 million for the Chandler Lake lands to be received by the government, and the exchange documents referred to the "comparable value" of the two sides of the exchange.

The method used by the Bureau to arrive at the value of $5.9 million was based on the following factors.

- Under federal law, the state of Alaska, not the federal government, would receive most of the proceeds from bonuses and royalties on federal lands.[1] However, the Bureau's staff were not sure if current law, which gives 90 percent of such revenues to the state, or some change in the law giving the state only 50 percent, would be in place when ANWR would be open for leasing. The Bureau assumed that there was an 85 percent chance that the current (90/10) revenue split would be in place at that time. They then multiplied the federal share of oil revenues under this assumption ($38.8 million or 10 percent of the $388.5 million combined bonus and royalty estimates for oil) by 85 percent, which equaled $33 million. They then assumed that there was a 15-percent chance that the federal government would receive one-half of the oil revenues. One-half of the oil revenues ($194.3 million) multiplied by the

[1]The allocation of the proceeds of the sale of federal mineral resources is not an appropriate consideration in determining the fair market value of these resources. Nevertheless, this allocation was used by the Bureau as a factor in its valuation.

15 percent equaled $29.1 million. Adding the revenue from the two different assumptions yielded $62.1 million. Gravel value of $7 million was then added to the oil estimate to yield a grand total of $69.1 million.

- The Bureau estimated that there was a 50-percent chance that ANWR would be opened for development. On this basis, the Bureau reduced the estimated value from $69.1 million to about $34.5 million.
- ASRC's ability under ANILCA to acquire 92,160 acres of subsurface within ANWR by exchanging it for subsurface it had selected outside the refuge. For this factor, the Bureau then reduced the remaining $34.5 million estimate to $5.5 million on the assumption that there was only a 16-percent chance that the government could retain its ownership interests in the 92,160 acres, if ANWR was opened to oil and gas development. The Bureau made a final adjustment, adding about $0.4 million to the $5.5 million figure. This adjustment recognized the value of the 92,160 acres of land the government would have received from ASRC elsewhere in Alaska if ASRC exercised its option to acquire 92,160 acres of ANWR subsurface, if ANWR was open for oil and gas development.

This $5.9 million figure, however, is no more reliable than the original figure of about $395 million from which it was derived. Because of the data limitations, and the methodology used, neither figure provided Interior with a sound basis for determining the value of the lands traded to ASRC.

# Relationship Between Alaskan Native Regional and Village Corporations

On December 18, 1971, the Alaska Native Claims Settlement Act (ANCSA) was enacted to settle the claim of Alaska's Native Indian, Aleut, and Eskimo population to aboriginal title to the land on which they had lived for generations. The act provided both monetary awards and property titles to the Natives to settle their aboriginal claims. These Native groups, 13 regional corporations and more than 200 village corporations established under ANCSA, received $962.5 million. In addition, the village corporations and 12 regional corporations within Alaska have the right to choose 44 million acres of land, both surface and subsurface rights. The remaining 13th regional corporation was established to enable Native nonresidents of Alaska to share in part of the monetary settlement. ANCSA provided a framework to establish the basic ownership pattern (regional and village corporations) through which Alaska Natives may fully participate in the social and economic life of the state and nation.

The regional and village corporations are organized as for-profit organizations under Alaska state laws and under the authority of ANCSA's terms. The act sets requirements on such matters as the distribution of funds received by the regional corporations to stockholders and village corporations, approval by the Secretary of the Interior of the original articles of incorporation, and stockholders' rights. The regional corporations can expend and invest funds consistent with the authority granted by the corporate bylaws, articles of incorporation, and Alaska laws not otherwise inconsistent with the act.

Each eligible Native is entitled to membership in both the corporation established for his or her village and in the corporation for the region in which the village is located. As shareholders, the Natives are entitled to a voice in the management of and share in the lands, assets, and income which are owned and managed by the corporations. Although the Natives have ownership and control over their lands, the act provides that they cannot sell their shares of corporation stock until 20 years after December 18, 1971.

Under ANCSA, village corporations were required to select lands in and around the villages. The village corporations were to receive title to the surface rights to about 22 million acres. The subsurface rights in these lands were to be patented to regional corporations. The act also required that title to a portion of each village corporation's land entitlement be conveyed to certain residents, businesses, occupants, and municipal corporations which had already been using the land.

The act required that 12 regional corporations be incorporated under the laws of Alaska to

- conduct business for profit;
- receive title to the subsurface rights in the land patented to village corporations;
- receive title to both surface and subsurface rights to nearly 16 million additional acres of land divided among the regional corporations; and
- receive, administer, and distribute part of the monetary settlement to village corporations and to individual shareholders.

The act also provided that 70 percent of all revenues received by any of the 12 regional corporations from timber and subsurface resources are to be distributed among them on the basis of Native enrollment.

The 13 regional corporations were also given certain responsibilities in distribution of the monetary settlement. Funds were to be distributed to regional corporations on the basis of their Native enrollment. The original 12 regional corporations were then required to distribute part of the funds received to village corporations and to enrolled Natives (shareholders) within its boundaries. The 13th regional corporation is responsible for distributing their shares of the monetary settlement to nonresident Natives.

# Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear in appendix V.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN [illegible] 1989

Mr. James Duffus III
Associate Director
Resources, Community, and Economic
Development Division
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Duffus:

Thank you for affording us this opportunity to comment on the draft report of the General Accounting Office (GAO) entitled Federal Land Management: Chandler Lake Land Exchange Not in the Government's Best Interest (GAO/RCED-89-133). After reading our comments, we hope that GAO will substantially revise its report to reflect an accurate portrayal of our administrative record and the reasons for the Secretary's determination that the exchange was in the public interest. In criticizing the Department of the Interior's (the "Department") handling of the Chandler Lake exchange, we also suggest that GAO recognize the administrative steps that the Department took voluntarily as a matter of sound agency practice and acknowledge the judgmental nature of its disagreement with the merits of the exchange. In any case, we request that GAO include a verbatim copy of this response in its final report on the Chandler Lake exchange.

See comment 1.

The findings, conclusions, and recommendations of the draft report are based on an analysis which is incomplete and misleading. Such an analysis does real harm to a fair understanding of the events leading to and the merits of the Chandler Lake exchange. The draft report fails to appreciate the administrative procedures that were followed in processing the Chandler Lake exchange and the histories of the other exchanges which were recited in the report for comparative purposes. The Department did, as a matter of prudent governmental administration, voluntarily incorporate procedures beyond those legally required in exercising its exchange authorities so as to ensure that the public interest would be met in its consideration and execution of the Chandler Lake exchange. However, there are significant differences in Federal acquisition in Alaska and the lower forty-eight states which make it essential that the adoption of further procedural measures not undermine the utility of the Secretary's discretionary exchange authority as an effective land acquisition tool.

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The draft report is also fundamentally remiss in not attributing appropriate weight to the existence of section 1431(o) of the Alaska National Interest Lands Conservation Act (ANILCA) in the Department's decisionmaking process. Without section 1431(o), there would have been no Chandler Lake exchange. It was the existence of section 1431(o) which led, justifiably, to the conclusion that the public interest could be enhanced by proceeding with the Chandler Lake exchange.

Conflicts between public use of parks and refuges and resource protection are not uncommon. GAO unfairly faults the exchange for park management problems. Had the Department not acquired the native-owned inholdings in Gates of the Arctic National Park, the National Park Service (NPS) would have no role in protecting their nationally significant resource values.

In asserting that the Department made excessive concessions in negotiating the terms of the Chandler Lake exchange agreement, GAO is improperly seeking to substitute its judgment for that of the Secretary. Moreover, in making this assertion, GAO does not address certain relevant facts and statutory provisions. In addition, GAO's criticism of the exchange's effect on the private revenue-sharing arrangements of the twelve regional corporations in Alaska cannot be maintained in light of a recent arbitration decision on this issue.

By its recommendations, GAO seeks to have the Department adopt criteria and procedures for exercising its public interest exchange authorities in Alaska which would make its public interest determinations less assailable by its critics. While there is obvious merit in making the Department's public interest determinations less assailable, the adoption of criteria and procedures to do so will necessarily impact on agency responsiveness, innovation, efficiency and funding. In contemplating the use of his discretionary exchange authorities, the Secretary must balance these competing pressures so as to preserve their continued utility.

The Department is in general disagreement with the GAO recommendation to develop more extensive, restrictive procedures than are currently in place or being followed. We agree with GAO to the extent that our public outreach efforts may be improved. The Department should continue sound planning and documented decisionmaking without limiting Secretarial flexibility and discretion to the detriment of effecting Alaska land exchanges in the public interest.

We believe the enclosed comments provide a more accurate, complete picture of the Chandler Lake land exchange and should be incorporated into the final report. Please let us know if we may be of further assistance.

Sincerely,

Susan Recce Lamson

Assistant Secretary for Fish and Wildlife and Parks

Enclosure

Enclosure

COMMENTS ON GAO DRAFT REPORT

FEDERAL LAND MANAGEMENT: CHANDLER LAKE LAND EXCHANGE NOT IN THE GOVERNMENT'S BEST INTEREST

General Comments

The draft GAO report may be divided into two basic parts. It contains specific findings relating to the Chandler Lake exchange, as well as recommendations for the exercise in the future of the Secretary's discretionary exchange authority in Alaska. GAO makes three major criticisms of the Chandler Lake exchange which lead it to reach the overall conclusion that that particular exchange was not in the best interests of the Government. In criticizing the Department of the Interior (the "Department") for executing the Chandler Lake exchange agreement, GAO finds that (1) the exchange did not accomplish one of the Department's primary objectives for entering into the exchange, (2) the Department made unwise concessions to Arctic Slope Regional Corporation (ASRC), the native corporation with which it was dealing, and (3) the exchange circumvented a requirement for revenue-sharing with other Alaska native corporations. GAO concludes that these alleged shortcomings are due to the failure of the Department to follow established procedures relating to valuation, environmental analysis, intergovernmental coordination and public review, and recommends that certain administrative procedures be established for future exchanges in Alaska.

See comment 1.

We believe GAO's analysis, as presented in the draft report, does not present a complete picture of the issues and actions taken, and, therefore, its findings, conclusions, and recommendations are incorrect and/or unwarranted. For example, the report focuses considerable attention upon this exchange and three others that are cited, arguably, as examples of the process not working. This leaves the impression that all such agreements have been faulty or unsuccessful. Yet no mention or consideration is made of the other exchanges that have worked successfully in Alaska. Earlier exchanges with Arctic Slope, Cook Inlet, NANA, and Doyon are examples of the process working well. Thus, when characterizing exchanges in general, the GAO report takes issues out of context.

The report is critical, stating that sufficient information was not considered in the exchange. Yet in the history of the exchanges completed in Alaska since ANCSA, more information was

gathered on this one than most. Previous exchanges which included as much or more land and, in at least one instance, a value several times that of this exchange, were completed with little to no documentation. Yet those exchanges were endorsed by the Congress. We mention this to place the issue in its proper perspective.

See comment 2.

The Department had a rational and fully defensible basis for entering into the Chandler Lake exchange. It did, as a matter of prudent governmental administration, voluntarily incorporate procedures beyond those legally required in exercising its exchange authorities in Alaska in order to ensure that the public interest would be met in its consideration and execution of the exchange. While the Department recognizes the importance and proper role of such procedures, at the same time it recognizes, as has the Congress repeatedly, the vital importance of the Secretary's discretionary authority to acquire lands in Alaska by exchange. Although they have much in common, Federal land acquisition in Alaska is nonetheless different than land acquisition in the lower forty-eight states. These differences arise from such factors as:

(1) the statutory prohibition on condemnation of native-owned lands;
(2) the shortage of acquisition funding for Alaska inholdings;
(3) the national significance of local habitats for migratory species enjoyed in the lower forty-eight states;
(4) the ongoing need to resolve native and state selection rights and the resulting ownership patterns;
(5) the vast acreages involved;
(6) the limited knowledge of baseline resource data;
(7) the remoteness of most of Alaska from the general public;
(8) the unfinished status of the rectangular survey system in Alaska;
(9) the undeveloped nature of most Alaska communities;
(10) the dependence of the State's economy on certain limited industries which tends to narrow the field of economic opportunities;
(11) the lack of comparable remote, large-tract sales; and
(12) prior congressional precedents approving exchanges in Alaska on the basis of acreage rather than the monetary values to be traded.

See comment 3.

While looking for ways to improve the exchange process, the Department must also be careful not to undermine the utility of the Secretary's discretionary exchange authority as an effective land acquisition tool in this context.

GAO also does not appear to have attributed appropriate weight to the existence of section 1431(o) of ANILCA in the Department's decisionmaking process. Had there been no section 1431(o), undoubtedly there would have been no Chandler Lake exchange. Section 1431(o) was included in ANILCA with the tacit approval or acquiescence of the Department, the State of Alaska, the Alaska Federation of Natives, and the Alaska Coalition, all of which participated in the formulation of ANILCA. Section 1431(o) gives ASRC the right to acquire the subsurface underlying the village corporation's lands within the Arctic National Wildlife Refuge, if and when nearby public lands are made available for oil and gas development, by forcing the Department to accept subsurface acreage of ASRC's choosing in exchange on an acre-for-acre basis. The administrative record is clear that it was the existence of section 1431(o) that made the Department willing to proceed with the Chandler Lake exchange. The Department saw the exchange as a unique opportunity to acquire valuable park inholding under its exchange authorities that it would not be eligible to receive were ASRC to exercise its rights under section 1431(o). It was the existence of section 1431(o) which colored the Department's perceptions and led the Department justifiably to believe that it could enhance the public interest by proceeding with the Chandler Lake exchange. GAO does not convey the salience of section 1431(o) to the Department's decisionmaking.

See comment 4.

In passing on the Chandler Lake exchange, the draft report reiterates GAO's conclusions concerning six proposed exchanges that were the subject of a separate GAO report in 1988. Those exchanges are not relevant to a fair analysis of the Chandler Lake exchange because the differences between them are so fundamental. The only feature that these public interest exchanges share in common is the intended use of interests in lands within the Arctic Refuge to acquire native-owned inholdings elsewhere in Alaska. The Chandler Lake exchange was carried out administratively, whereas the other Arctic Refuge exchanges were always intended to be carried out only upon the express approval of Congress. Consequently, the Department prepared a Legislative Environmental Impact Statement (LEIS) on the proposed exchanges and circulated the draft LEIS for public comment. Moreover, in the Chandler Lake exchange, the existence of ASRC's future contingent option under section 1431(o) of ANILCA created the incentive for the Department to utilize its discretionary exchange authority as an opportunity to enhance its position and the public interest. There was no similar statutory provision acting as a backdrop to the other proposed exchanges. Consequently, valuation of the interests to be traded in those exchanges played a more centrol role in the analysis and formulation of the exchange proposals. Therefore, GAO's apparent attempt to link the various Arctic Refuge exchanges warrants

See comment 5.

See comment 6.



further scrutiny before any meaningful conclusions about the exercise of the Secretary's public interest exchange authority can be drawn.

GAO also suggests that, if the negotiations had taken longer and been subject to broader review and consultation, these concessions would have been avoided. The fact is that these issues were recognized and debated internally and with ASRC during the course of the exchange negotiations, and that departmental decisionmakers had sound reasons for making the decisions that were reached. GAO now, with the benefit of hindsight, improperly seeks to substitute its judgment on these matters.

GAO's Principal Findings

GAO Finding #1: Acquisition of Chandler Lake Lands Has Not Protected Park Resources

The draft report suggests that a primary reason for entering the exchange was to protect park resources by gaining control of all-terrain vehicle (ATV) use by residents of the Village of Anaktuvuk Pass. GAO finds instead that the exchange has exacerbated management problems and ATV impacts to parklands. GAO then uses this finding to undermine the merits of entering into the exchange. GAO's understanding of the reasons why the NPS wished to acquire the lands in the vicinity of Chandler Lake is erroneous, and, to the extent that it relies on the representations of NPS personnel not directly involved in the exchange negotiations, its reliance is misplaced. While better regulation of ATV use may have been a consideration, these lands were acquired because as major inholdings in Gates of the Arctic National Park they possessed the scenic and natural attributes and other intrinsic values which made them suitable for national park designation and they provided greater accessibility for park visitors to adjacent parklands. They were lands that NPS management had sought to acquire for more than a decade. In so doing, this acquisition satisfied the fundamental purpose of the national park system which is "to conserve the scenery and the natural ... objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1.

These purposes were very clearly spelled out in the exchange's administrative record. It is inappropriate for GAO now to attempt to rewrite that record by its overemphasis of the ATV issue. The desirability of and reasons for this land acquisition are readily apparent in the following Public Interest

Determination for the Proposed Land Acquisition of Chandler Lake by Land Exchange Between the Department of the Interior and Arctic Slope Regional Corporation, signed by Secretary James G. Watt, dated August 9, 1983.

> The acquisition of the Chandler Lake inholdings and their management as part of Gates of the Arctic National Park represents a significant addition to the National Park System. Chandler Lake is a spectacular mountain-rimmed lake. It is a major nationally significant resource whose geologic, cultural, scenic, recreation, wildlife and wilderness resources make a major contribution to furthering the purposes for which Gates of the Arctic National Park was established.
>
> Chandler Lake is one of only eight major glacially formed lakes located in the northern foothills of the Brooks Range. The lake and related valleys to be conveyed to the United States provide an essential access corridor for park visitors, including hikers, campers, and fishermen, to the north central and northwestern reaches of the Park, which has few access points. At five miles in length, the lake is one of the largest lakes in the northern Brooks Range, and provides critical float plane access to this region of the Park. The scenic beauty of the lake and its surroundings provide a major contribution to the wilderness values of an area regarded by the Congress in the legislative history of ANILCA as the greatest remaining wilderness in North America.
>
> The Anaktuvuk River and Kollutarak Creek are major hiking valleys through the Park which provide access not only for visitors but wildlife. Consistent with the purposes of section 201(4)(a) of ANILCA, the acquisition of the Chandler Lake and Kollutarak valleys will protect critical wildlife populations as these areas serve as major migration routes for the Arctic caribou herd on its spring and fall movements through the Brooks Range. Chandler Lake is home for lake trout, Arctic char, whitefish, burbot and grayling. The mountainous areas to be acquired contain Dall sheep.
>
> The lands also encompass mountainous terrain, which in addition to great scenic beauty provide critical watershed protection for three major park rivers, the Chandler, John and Anaktuvuk Rivers. A small segment of the John River, which is

designated a wild river in the National Wild and Scenic River System, is also included in the Park.

The Chandler Lake and Kollutarak Creek drainages fall within a significant cultural resources zone which offers very high potential for archeological site discovery. Of major consideration are the benefits obtained through improved management of the Park with the implementation of the exchange. Federal land holdings will be consolidated with the elimination of isolated tracts of federal holdings. Land ownership patterns will be improved, facilitating the protection of Park resources, thus improving the ability to fulfill the purposes of the Park as defined in ANILCA.

The importance of Chandler Lake and related mountains and valleys has long been recognized. In 1972, the area was proposed by the National Park Service for withdrawal under section 17(d)(2) of ANCSA the Alaska Native Claims Settlement Act . While subsequent negotiations between the Department and ASRC resulted in the eventual withdrawal of these lands under section 11(a)(3) of ANCSA for ASRC, these lands have remained a major concern to the Department. Both the legislative recommendations of Secretary Morton in 1973 and Secretary Andrus in 1977 included these lands within a proposed national park. Congress responded to this continued recognition of the area's values through the establishment of the Gates of the Arctic National Park in 1980, including these lands within exterior boundaries of the Park. Now the goal of four Administrations and the Congress will be achieved as the Chandler Lake lands become federally owned as part of the Park.

Gaining control of ATV use is nowhere mentioned in the administrative record as a primary reason for the Chandler Lake acquisition.

GAO unfairly faults the exchange for problems created for park management by ATV use in and around the Anaktuvuk Pass area. Such use has been a somewhat intractable problem that predated the Chandler Lake agreement. The associated adverse impacts on park resources are the natural function of changing attitudes in the Village of Anaktuvuk Pass towards the use of ATVs in the pursuit of summertime subsistence activities. In other words, these impacts most likely would have occurred regardless of the Chandler Lake exchange, as villagers have increasingly opted to travel by ATV rather than by foot or pack animal. The Department and ASRC first tried to deal with this problem in 1979, with the agreement that they would use their best efforts to reach a

binding agreement for the establishment of floating access easements, including the right of overnight camping, on both federal and native-owned lands in the Anaktuvuk Pass area, giving due consideration to the cultural and other concerns of the Anaktuvuk people. It was also stipulated at that time that, if the parties did not reach an agreement on such floating easements within 18 months, then linear access easements would be established. This understanding was ratified by Congress in section 1431(a) of ANILCA. Since the parties did not reach an agreement on such floating access easements, linear easements for the benefit of the residents of Anaktuvuk Pass were negotiated as a part of the Chandler Lake exchange agreement. Despite the fact that the NPS held a hearing on the proposed Chandler Lake exchange agreement in the Village of Anaktuvuk Pass on July 19, 1983, the parties did not foresee the dissatisfaction that subsequently arose over the limitations in the access easements that were negotiated as a part of the Chandler Lake exchange. Rather than exacerbate local opinion further by strict enforcement of the easements, the NPS has opted to seek an amicable resolution of this problem. The NPS feels that it is on the verge of doing so, by negotiating a new agreement which would, subject to congressional approval, exchange access and other easements based on actual land-use patterns. Ultimately, it will be for the Congress to decide whether it considers the new agreement to be a workable and acceptable solution to this problem. Moreover, the national interest attributes of the Chandler Lake lands will continue to be conserved as part of the national park system in perpetuity.

It should also be recognized that, had the Department not acquired these private lands, the residents of Anaktuvuk Pass would have continued to have free use of them without any regulation of their ATV use by the NPS, and the NPS would have no role in protecting their resource values. Acquisition, even though subject to the easements negotiated by ASRC on the villagers' behalf, was the only practical way for the NPS to gain some measure of control and protection. The fact that the management of these lands and adjacent park areas has continued to present some problems for the NPS, notwithstanding their acquisition, is not all that unusual. There are many examples of management problems arising in parks in the lower forty-eight states due to conflicts between public use and natural resource preservation. The fact is that it often takes a long time to find an acceptable solution to such problems. The Fish and Wildlife Service (FWS) also frequently acquires important fish and wildlife habitat even though the habitat has traditionally had inappropriate public uses. Land acquisition alone does not solve such public use problems, nor does the existence of such conflicts abrogate the merit of acquisition. The important point is that the parties have continued to search for a workable resolution to the ATV problem and believe that they at last have found a way to resolve it.

See comment 7.

GAO Finding #2: Exchange Placed the Federal Government and Others at a Disadvantage in Estimating the Oil and Gas Potential of ANWR

In GAO's view, the failure of the Department to require data sharing from the exploratory wells that ASRC has the right to drill on its lands within the Arctic Refuge (but outside of the coastal plain study area established by section 1002 of ANILCA) gives ASRC and its oil company partners an undue advantage in assessing the oil and gas potential of the coastal plain.

Pursuant to the terms and conditions of the Chandler Lake exchange agreement, ASRC has received title to the subsurface estate in lands within the Arctic Refuge in which the surface estate is owned by Kaktovik Inupiat Corporation (KIC), the village corporation for the village of Kaktovik, Alaska. Kaktovik is located on Barter Island, which is situated in the Beaufort Sea on the northern side of the refuge. ASRC's lands are now privately owned lands within the refuge, although by virtue of section 22(g) of ANCSA and the terms of the Chandler Lake agreement they remain subject to laws and regulations governing use and development of the refuge. Frequently, conveyance of a subsurface estate carries with it the right to explore for any minerals that might be found therein and the right to exclusively use and control any resulting exploratory data and information that are gathered. Here, however, limitations were imposed on ASRC's rights to the use and enjoyment of its subsurface interests because of section 22(g). Because section 1002 of ANILCA requires the exploration of the coastal plain, a legislatively defined area which is actually smaller than the refuge's geographic coastal plain, by means other than exploratory wells, ASRC is not permitted to drill any wells on its lands within the 1002 area until Congress passes new legislation allowing additional oil and gas activities to occur within the coastal plain. Because section 22(g) of ANCSA also extends the limitations of section 1003 of ANILCA to ASRC's lands, ASRC cannot develop or produce oil and gas from any of its lands within the refuge without a further act of Congress. These limitations make ASRC's full enjoyment and use of its lands within the refuge for oil and gas purposes highly uncertain. However, they do not preclude ASRC from exercising the type of exclusive control over mineral data that a subsurface owner normally enjoys with respect to the wells drilled by ASRC on its non-1002 lands within the refuge.

It is true that geologists within the Department would like to have access to ASRC's existing well data. The importance of these data to the Department's 1002 program was recognized and vigorously sought by the Department's representatives during the exchange negotiations. However, in fairness to ASRC, it should also be recognized by GAO that ASRC has legitimate interests in

protecting the speculative value of its lands within the refuge and that it has sought to do so by maintaining the exclusivity and confidentiality of such data. In fact, the only real benefits to ASRC resulting from the Chandler Lake exchange were the opportunity to explore its lands early and the opportunity to control the use of the resulting data. The fact that recently ASRC successfully sued to prevent the Alaska Oil and Gas Conservation Commission from sharing these data with the Alaska Department of Natural Resources underscores the importance of exclusivity and confidentiality of such data to ASRC as a landowner. During the negotiations, departmental decisionmakers reasonably determined that a continued insistence that ASRC share with the Department the exploratory well data, which it would have the right to gather and for which right it was giving valuable consideration, would cause the negotiations to fall through and, therefore, deprive the NPS of its acquisition objectives. Accordingly, a compromise was reached in which ASRC was required to share its seismic data but not its well data from any exploratory wells drilled outside of the coastal plain. This compromise was not inconsistent with the statutory scheme designed for the exploration of the 1002 area, in that Congress mandated that the Secretary should estimate the oil and gas production potential of the statutory coastal plain by means other than the drilling of exploratory wells.

GAO criticizes this compromise on the grounds that it will place the United States at a disadvantage in holding lease sales, should Congress decide to open the coastal plain to leasing. Obviously, there can be no such disadvantage if Congress does not open the area. If it does, any such disadvantage is likely to be substantially offset by the requirement for a competitive leasing program. Furthermore, any competitive disadvantage that oil companies which do not have exploration agreements with ASRC might assert should be mitigated substantially by continuing the ban on the drilling of exploratory wells on ASRC's lands within the coastal plain until after the first Federal lease sale is held. It appears likely that if leasing legislation is passed by the Congress such features will be included. Elimination of ASRC's section 1431(o) claim to refuge lands by virtue of the Chandler Lake exchange also allows a leasing program, should one be authorized, to proceed unencumbered. This is to the Government's benefit as there is still much acreage within the section 11(a)(1) boundary (discussed below) which will be available for leasing.

GAO Finding #3: Chandler Lake Exchange Gave ASRC Greater Discretion in Choosing Subsurface Lands Than Under Existing Law

GAO asserts that the Chandler Lake agreement waives the

Secretary's right to approve the location of additional native selections within the refuge with the possible result of significant financial gain to ASRC.

The draft report's assertion that the Chandler Lake agreement yielded too much discretion to ASRC in the selection of its lands within the coastal plain rests upon a construction of section 1431(g)(3) of ANILCA with which the Department disagrees. Section 1431(g)(3) reads:

> Kaktovik Inupiat Corporation shall identify additional lands it desires to acquire pursuant to this exchange from within the following described lands, and to the extent necessary to acquire the surface estate of an aggregate total of twenty-three thousand and forty acres, including the lands conveyed by the Secretary to Kaktovik Inupiat Corporation pursuant to subsection (g)(2) hereof:
>
> Umiat Meridian
>
> Township 7 north, ranges 32 through 36 east;
> Township 8 north, ranges 32 through 36 east; and
> Township 9 north, ranges 33 through 34 east;
>
> or such other adjacent lands as the Secretary and Kaktovik Inupiat Corporation may mutually agree upon. Upon the concurrence of the Secretary in the lands identified, he shall convey to Kaktovik Inupiat Corporation all right, title and interest of the United States in the surface estate of the lands so identified: Provided, That such lands shall be contiguous to lands previously conveyed to Kaktovik Inupiat Corporation pursuant to section 14(a) of the Alaska Native Claims Settlement Act: Provided further, That such lands when conveyed to Kaktovik Inupiat Corporation shall be subject to the provisions of the Alaska Native Claims Settlement Act, including section 22(g) of said Act, except that the acreage limitation for Village Corporation selection of lands within the National Wildlife Refuge System shall not apply;...

When ANCSA was enacted in 1971, KIC was granted the right to select 92,160 acres (four townships) of surface estate by sections 12(a)(1) and 14(a) of the act. This acreage entitlement was based upon Kaktovik's population according to the 1970 census. KIC's selections were required by section 12(a)(1) to be made from the public lands withdrawn by section 11(a)(1) of ANCSA for this purpose in the two concentric rings of townships surrounding the township in which Kaktovik is located. The townships referred to in section 1431(g)(3) are within the area

withdrawn by section 11(a)(1). Section 14(a) of ANCSA required the Secretary to convey the surface estate of whichever lands KIC validly selected within the 11(a)(1) area to KIC. However, section 12(a)(1) barred a village corporation from selecting more than 69,120 acres (three townships) within the national wildlife refuge system. Thus, because the lands withdrawn for KIC's selection by section 11(a)(1) were within the Arctic National Wildlife Range (as it was established on December 6, 1960), KIC was required to select its remaining ANCSA entitlement, 23,040 acres (one township), from public lands withdrawn by the Secretary for this purpose outside of the range.

As the regional corporation for the native residents of Alaska's North Slope, ASRC was granted by sections 12 and 14 of ANCSA approximately 5 million acres of surface and subsurface estate. Pursuant to the provisions of sections 12(a)(1) and 14(f) of ANCSA, a regional corporation is normally conveyed the subsurface estate beneath its village corporations' surface lands, unless those lands are located within the national wildlife refuge system or the Naval Petroleum Reserve Numbered 4 (later renamed as the National Petroleum Reserve-Alaska). In that event, the regional corporation is required to select its subsurface estate from other lands, commonly referred to as "in lieu" subsurface estate. As a consequence of these provisions, ASRC was precluded from making selections within the range and the petroleum reserve. So, in 1972 Secretary Morton withdrew lands for purposes of ASRC's selections, which withdrawal included lands surrounding Chandler Lake in the central Brooks Range over the NPS's objections.

In early 1974, KIC selected its 69,120 acres of surface entitlement in Kaktovik on Barter Island and nearby on the mainland, all of which were within the range. By late 1974, KIC selected its remaining entitlement of one township from lands outside of the range, about 85 miles southwest of Kaktovik. That same year, ASRC made a portion of its ANCSA selections, including those in the Chandler Lake area. Title to the Chandler Lake lands was conveyed to ASRC in 1976. KIC received conveyance of its surface interests within and outside of the range in 1977 and 1978.

On June 29, 1979 Secretary Andrus and ASRC signed a land exchange agreement, which had as one of its purposes the consolidation of the land holdings for the mutual benefit of the United States and the native corporations within ASRC's region. The 1979 agreement included provisions which, if approved by Congress, would (1) enable KIC to exchange its township of selected surface lands outside of the Range for an equal amount of surface acreage to be selected from lands contiguous to the 69,120 acres of surface estate already conveyed to KIC within the range, and (2) grant ASRC the option of exchanging its "in lieu" subsurface lands selected outside the range for the subsurface estate beneath

KIC's lands within the range if and when refuge lands near Kaktovik were made available by Congress for commercial oil and gas development.

Section 1431 of ANILCA incorporates and ratifies the 1979 agreement as a matter of federal law. Section 1431(g) allows KIC to exchange its fourth township, the one outside of the Arctic Refuge, for lands selected by KIC within the refuge. Section 1431(o) gives ASRC a five-year option to consolidate its lands by exchanging the "in lieu" subsurface lands that it selected pursuant to section 12(a)(1) of ANCSA for an equal acreage of subsurface estate identified by ASRC under KIC's lands, if at any time within forty years of the enactment of ANILCA public lands within the Arctic Refuge are opened by Congress for commercial oil and gas development. In 1986, KIC exercised its rights under section 1431(g) to exchange its lands outside of the refuge for lands that it identified within the refuge. In doing so, KIC used some of its section 1431(g) entitlement to acquire lands on Barter Island that had been recently released from a military withdrawal. The remainder of its selections were made south of its existing holdings on the mainland. During 1986, ASRC received conveyance to the subsurface estate underlying the surface lands conveyed to KIC earlier that year.

GAO apparently construes section 1431(g)(3), specifically the phrase "upon the concurrence of the Secretary in the lands identified", to give the Secretary a right of approval over any of the lands that might be selected by KIC in exchanging its township outside of the refuge for acreage within the refuge. Although an ambiguity concerning the extent of the Secretary's legal authority to approve or disapprove KIC's selection under section 1431(g)(3) was recognized during Chandler lake exchange negotiations, departmental representatives who had been involved in the previous negotiations with ASRC and the passage of ANILCA advised that the Secretary's right of concurrence was only intended to reach lands identified by KIC that were adjacent to the lands expressly described in section 1431(g)(3), that is lands located outside of the boundary established by section 11(a)(1) of ANCSA. This interpretation of section 1431(g)(3) is supported by the preceding phrase in section 1431(g)(3), "or such other adjacent lands as the Secretary and Kaktovik Inupiat Corporation may mutually agree upon", which is separated from the townships specifically described in section 1431(g)(3) by a semicolon. A semicolon is a form of punctuation that is usually used to indicate a major division in a sentence where a more distinct separation is intended between clauses than is normally indicated by a comma. This interpretation is also consistent with ANCSA which entitles a village corporation to any lands that it validly selects within its section 11(a)(1) withdrawal.

Paragraph 8 of the Chandler Lake exchange agreement is an attempt to clarify this ambiguity. By its terms, the Secretary concurred

in any identification of lands that KIC was to make pursuant to section 1431(g)(3) in the section 11(a)(1) area, as it is more particularly described in section 1431(g)(3), provided that the lands selected were compact and contiguous. At the same time, paragraph 8 preserved the Secretary's discretion to approve or disapprove lands identified by KIC outside of the section 11(a)(1) boundary.

As noted earlier, following the conveyance of KIC's fourth township to it in 1986, ASRC received the subsurface estate underlying those lands pursuant to paragraph 3(c) of the Chandler Lake agreement. The principle of conterminousness of native-owned estates, which is reflected in the Chandler Lake agreement, is derived from section 14(f) of ANCSA and is consistent with the scheme envisioned by section 1431(o) of ANILCA had ASRC obtained its rights through that provision. Furthermore, Federal management is enhanced where subsequent mineral development is envisioned and the avoidance of split estates is possible. Thus, contrary to suggestions in the draft report that the lands conveyed to ASRC in the three townships outside of the 1002 area were conveyed to ASRC for distinct reasons, the conveyances of subsurface estate to ASRC merely followed the land selection patterns of KIC, the surface owner.

In criticizing the Department's handling of KIC's rights under section 1431(g)(3), GAO does not address several other relevant facts. KIC initially expressed an interest in 1982 in obtaining additional lands along the rivers south of and along coastline east and west of its holdings. The FWS discouraged this effort by expressing concerns over refuge access and other uses. When KIC again approached the Department to exercise its section 1431(g)(3) rights in 1986, it first sought the Department's concurrence in the selection of lands lying outside of the section 11(a)(1) line. The Department disallowed this selection because of advice by the Bureau of Land Management (BLM) that the lands being sought were considered to be more prospective for oil and gas than the alternative lands identified by KIC within the section 11(a)(1) boundary. Accordingly, the draft report's conclusion that by this means ASRC was allowed to select lands in an area now considered by the Department to hold the highest potential for oil and gas within the refuge is misleading. Finally, in making its 1986 identification, KIC satisfied the criteria established by the Department for this purpose in order to protect refuge interests. Historically, in adjudicating native selections, BLM has focused on contiguity rather than compactness. In this respect, KIC's selection is also consistent with the Department's administrative practice. It should be stressed that GAO's use of 1987 data to attribute values to a transaction that was agreed upon in 1983 and carried out in 1986 is misleading. Fair evaluation of the process and decisions made during the Chandler Lake exchange dictates that GAO use data on

See comment 9.



which to base its analysis that were available to the Department at the times when the relevant decisions were being made.

GAO Finding #4: Exchange Denied Participation of Other Regional Native Corporations in Financial Benefits of Oil and Gas Resources

The draft report suggests that the Department improperly permitted ASRC to structure the Chandler Lake exchange in such a way as to avoid the requirement to share its financial benefits with other native corporations. We recommend that this entire portion of the report be deleted as an inappropriate area for comment. The Department was aware of the section 7(i) implications of the Chandler Lake exchange at the time of its negotiation. We do not believe either the Department or GAO should interpose itself in the private arrangements worked out between the regional corporations in applying the revenue-sharing provisions of ANCSA. Moreover, the Department, in transacting business with a regional corporation, has no duty to ensure that other regional corporations share in any financial benefits that might be derived as a result of such transaction. Section 7(i) of ANCSA states:

> Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 5. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

The application of this provision has been settled in litigation over its meaning among the regional corporations. The 1982 settlement agreement reached among the twelve regional corporations provides that if surface is traded for subsurface (as was the case in the Chandler Lake exchange) revenues from the property received in the trade shall not be subject to sharing under the agreement or section 7(i). Despite this language, two other regional corporations asserted a claim for revenue-sharing against ASRC. The arbitrators assigned to resolve this dispute have fully vindicated ASRC's position, and, by implication, the Department's policy of treating section 7(i) revenue-sharing as a private matter. Preliminary Opinion, dated March 28, 1989, in The Aleut Corporation, et al. v. Arctic Slope Regional Corporation, AA No. 75 113 0309 86, states at page 18:

> The Section 7(i) Settlement Agreement was negotiated by all of the Regional Corporations some two years after the passage of ANILCA which contained Section 1431(o). The Settlement Agreement in the clearest of language provides that a trade of surface-for-subsurface causes the revenues derived from the subsurface to be nonshareable. ASRC openly and candidly admitted that they structured the trade for the Kaktovik subsurface so as to qualify that trade under Section 6(g) of Article II of the Settlement Agreement . ASRC was not deceitful, was not in bad faith and was not unfair in structuring a trade that was specifically invited by language in the (Kaktovik Land Exchange Agreement) (sic) agreed to by all of the Regional Corporations. There is no breach of an implied covenant of good faith and fair dealing.

See comment 10.

Given this finding on the part of the arbitration panel, it is hard to see how GAO can persist in its criticism of this issue.

GAO's Conclusions and Recommendations

In Chapter 3 of the draft report, GAO asserts that the alleged shortcomings of the Chandler Lake exchange are due to the failure of the Department to follow established procedures for conducting exchanges under its Alaska exchange authorities, and further asserts that where such procedures have been used in two instances in Alaska, problems have been identified and as a result neither exchange was carried out. In making these charges, GAO fails to appreciate both the procedures that were voluntarily followed in the Chandler Lake exchange and the histories of the Cascade Lake and St. Matthew Island exchanges. The result is that the draft report grossly misrepresents the actual facts and events.

The Chandler Lake and St. Matthew Island exchanges were processed administratively within the Department at about the same time. The Chandler Lake exchange agreement was signed by the Secretary on August 9, 1983, and the St. Matthew Island exchange agreement

was signed by the Secretary on August 10, 1983. However, because the St. Matthew Island exchange negotiations were initiated first, the administrative process being followed in that exchange served as a model for the administrative steps followed in the Chandler Lake exchange. Conceptually, there was no substantive difference in how these two exchanges were handled administratively. An Environmental Impact Statement (EIS) was not prepared in either case because section 910 of ANILCA states that the National Environmental Policy Act (NEPA) shall not be construed in whole or in part as requiring the preparation of an EIS for conveyances or other actions which lead to the issuance of conveyances to native corporations pursuant to ANCSA or ANILCA. Since these exchanges were done pursuant to one or both of these statutes, they were statutorily exempt from NEPA compliance. Notwithstanding this exemption, the Department voluntarily opted to prepare ascertainment reports so that decisionmakers could consider the possible environmental impacts of and alternatives to the proposed exchanges. In both cases, these ascertainment reports were intended to be the functional equivalents of EIS's. Both documents described the purpose and need for the proposed action, alternatives to the action, the affected environment, and the environmental consequences of the action and its alternatives, just as though they had been prepared pursuant to the Council on Environmental Quality's NEPA guidelines.

The draft GAO report's statement that the Chandler Lake ascertainment report was prepared by a headquarters official unfamiliar with the exchange is factually inaccurate and misleading. The ascertainment report was initially prepared under the direction of the NPS's regional office. It was referred to the FWS's Division of Refuge Management for review, where it was appropriately assigned to a staff biologist with experience in preparing NEPA documents. While she may not have been familiar with the details of the proposed exchange, her review was valued for her expertise in the proper format of NEPA documents. Consequently, she made organizational and editorial changes in the report. The draft GAO report also states that the FWS's regional office only had one and a half days to review the "exchange report" and thereby suggests that the regional office had virtually no role in assessing the Chandler Lake exchange. This portrayal too is misleading. Although the FWS representatives on the Department's negotiating team were from the Washington offices of the FWS, they and the Department's attorneys consulted frequently with the regional staff during the course of the negotiations, particularly about the land-use stipulations to govern ASRC's oil and gas activities.

Contrary to GAO's assessment of the St. Matthew Island exchange, it was not the preparation of an ascertainment report and its disclosure that some of the lands for which the Department would obtain a conservation easement were already subject to section 22(g) of ANCSA that were the undoing of that exchange. It was, instead, litigation brought by the National Audubon Society and other groups after the exchange was consummated. In that litigation, the judge used the ascertainment report and a draft EIS prepared by another part of the Department for the Navarin Basin lease offering to conclude that the Department's administrative record did not support the Secretary's determination that the St. Matthew Island exchange was in the public interest.

See comment 11.

It should be noted that determining "the public interest" is the appropriate legal standard when exercising the Secretary's exchange authorities in ANCSA and ANILCA on a basis other than equal value, not "the government's best interest". The public's interest is often broader than the government's. The judge in the St. Matthew Island exchange litigation declined to substitute his judgment for the Secretary's in determining what factors should be considered in analyzing the public interest and concluded that the Secretary could reasonably take non-monetary benefits into account in determining whether the public interest would be furthered by an exchange.

The Cascade Lake exchange was also negotiated with ASRC in 1983. The draft report asserts that comments received from several states and groups led the Department not to execute the exchange. This is a completely erroneous assumption on GAO's part, which makes its comparative analysis of the Cascade exchange totally irrelevant. The correspondence to which the report alludes was received during June and July of 1983. Notwithstanding that correspondence, negotiations with ASRC over the Cascade Lake exchange continued into October and November. The parties had in mind exchanging properties of approximately comparable values. However, there was difficulty in valuing the remote and unique properties that were involved and ASRC in particular disputed the higher value that the Department attributed to Camp Lonely. On November 1, 1983, counsel for ASRC informed the Deputy Under Secretary that the Department was asking too much for the property it was to trade to ASRC, and, therefore, ASRC preferred not to pursue the negotiations further. This account of the negotiations is documented in a memorandum in the files on the Cascade Lake exchange. It is for this reason, not public review, that the Cascade Lake exchange negotiations were discontinued.

See comment 12.

As stated earlier, the draft report fails to note the administrative steps that the Department did take in processing

the Chandler Lake exchange. In addition to the ascertainment report and public interest determination already mentioned, these steps included separate correspondence and consultation with the State of Alaska pursuant to section 106 of the National Historic Preservation Act (by letter of July 22, 1983), Office of Management and Budget Circular A-95 (by letter of June 17, 1983), section 307 of the Coastal Zone Management Act (by letter of June 16, 1983), and section 1201 of ANILCA, which established the Alaska Land Use Council (by letter of June 15, 1983 to the Governor who was the State Co-Chairman of the Council).

The Alaska State Historic Preservation Officer, as well as the Advisory Council on Historic Preservation, agreed with the Department's conclusion that the exchange would have no adverse effect on properties on, or eligible for inclusion on, the National Register of Historic Places. No reply was addressed to the Department from the State through the Cir. A-95 process.

Although the federal lands to be conveyed to ASRC were outside of the coastal zone and the exchange would not directly affect it, the Department nonetheless provided a comprehensive consistency determination to the State's Division of Governmental Coordination (DGC), within the Governor's Office of Management and Budget, as a matter of comity. The DGC serves as staff to the State's Coastal Policy Council, which is comprised of seven State agency commissioners and nine local elected officials. The Department of Natural Resources, in which Alaska's Oil and Gas Division (OGD) is located, was copied in all the correspondence that the Department received from the DGC on the Chandler Lake exchange. And, indeed, the Department and ASRC made changes in the land-use stipulations attached to the agreement on the basis of DGC's comments. The analysis that was provided by the Department to the State as a part of the coastal zone consistency process conforms to the federal and state guidelines for such determinations. Providing the consistency determination to the State performed another important function for the Department, because the State's consistency review procedures incorporate the opportunity for public review and comment.

In addition to the Governor, four other state representatives, as well as two native representatives, sit on the Alaska Land Use Council (ALUC). The other state representatives are the Commissioners of the Alaska Departments of Natural Resources, Fish and Game, Environmental Conservation, and Transportation. ALUC had the proposed exchange under advisement for the usual 30-day waiting period. The Governor's Office was notified of the pending exchange as early as June 15, 1983, in a letter from ASRC to Governor Sheffield and June 16, 1983 in a letter from then Deputy Under Secretary William Horn, asking for review

and comment. The Governor was present and chaired a meeting of the ALUC on August 31, 1983, at which the exchange was on the agenda. The State of Alaska and, specifically, the Governor and his immediate office were well informed and knowledgeable about the proposed land exchange. As early as April 26, 1983, the Governor's senior staff person at the ALUC informed the Governor's Office of the proposed trade. Subsequently, the Governor's Office and the Department and various other entities engaged in an exchange of correspondence that numbers in excess of 12 separate and distinct items between June 15, 1983, and August 31, 1983. Several of these items are either from Governor Sheffield himself or addressed to Governor Sheffield. These include a June 20, 1983, distribution from the Governor's Office of Intergovernmental Coordination to the Departments of Environmental Conservation, Transportation, Community and Regional Affairs, Natural Resources, and Commerce and Economic Development, of the Coastal Zone Management Consistency Determination documents. Thus, the State had three distinct opportunities to review and comment on the exchange. No formal comments were received from the Council. Only the Fish and Game Commissioner submitted comments and they were generally supportive of the exchange. The Department's files on the exchange also contain a July 14, 1983 letter signed by Senators Henry M. Jackson and J. Bennett Johnston, both members of the Senate Energy and Natural Resources Committee, concluding that the exchange would not be inconsistent with ANILCA, and a June 29, 1983 letter from Senators Ted Stevens, a member of the Senate Appropriations Committee, and Frank H. Murkowski, also a member of the Senate Energy and Natural Resources Committee, concluding that the exchange would provide substantial benefits to the nation and the natives of northern Alaska. Thus, from the Department's standpoint, the procedures followed in this instance afforded plenty of opportunities for interested parties to express their opinions and concerns about the exchange. Any disgruntlement that any state officials now express must be viewed in light of these facts and the fact that lands owned by ASRC (whether by virtue of the Department's exchange authorities or section 1431(o) of ANILCA) are not subject to sharing of federal leasing revenues by the State of Alaska.

See comment 13.

In addition to taking these steps, the Department also engaged in endangered species consultation, subsistence use analysis, and valuation of the interests to be traded. These steps, too, were done to assist the decisionmakers in making sound decisions. Valuation was another step that was done by the Department even though it was not required by law because in Alaska the Secretary has the authority to enter into an exchange if he determines it to be in the public interest. It is ironic that GAO criticizes

the Department for doing something that it was not required to do and for doing it in a way which is basically consistent with GAO's recommendation that values be established by using the uniform appraisal standards for federal land acquisition. Recognizing that the precise determination of the market value of interests in lands in Alaska is difficult, both the NPS and BLM nevertheless attempted to do so. In his appraisal of ASRC's property, the chief appraiser for the NPS's Pacific Northwest Region wrote that accepted appraisal methodology was employed and that his appraisal met the uniform appraisal standards for federal acquisition to the maximum extent possible for this type of property. The value of the subsurface underlying the Kaktovik lands was also determined by analyzing a set of comparable sales, in that instance to determine the expected bonuses and royalties. Then, because of the uniqueness of ASRC's future contingent option and the probability of some form of revenue-sharing with the State of Alaska should the Arctic Refuge be opened for oil and gas leasing, the BLM went a step further and attempted to estimate the actual value to the federal government of the lands to be disposed of by the Department. These valuations were done, not because the trade was ever intended to be structured on the basis of value, but so that departmental decisionmakers would have some idea of what each party was giving up in the exchange. Accordingly, the Department did recognize the monetary values involved in each side of the Chandler Lake exchange. But, while this information was considered relevant, it was by no means considered material because of ASRC's future option under section 1431(o). In other words, whether or not Congress ever decides to open the Arctic Refuge to oil and gas development, the Department saw the exchange as enhancing the government's interest by securing the acquisition of the Chandler Lake lands. On the other side of the transaction, if the Congress does not open the coastal plain to oil and gas leasing, the value of the subsurface underlying the Kaktovik lands to the United States for oil and gas will be zero. If the Chandler Lake exchange had not been carried out and the Congress does open it to leasing by the year 2020, the value of this subsurface will be nearly zero (the equivalent of ASRC's most worthless in lieu subsurface) because ASRC will surely exercise its option under section 1431(o). When viewed in this light, the Chandler Lake exchange can only be seen as a gain for the United States.

See comment 14.

Finally, the Department prepared and the Secretary signed a formal public interest determination. It did address federal management needs--its focus was on acquiring points of access for the general public to parklands, as well as areas administered by BLM, and on eliminating isolated federal tracts and major park inholdings. It did address the needs of the local people in Gates of the Arctic National Park and the Arctic Refuge. It did summarize the results of intergovernmental consultation with the State of Alaska. It did discuss the values of the lands to be

traded, both in monetary and non-monetary terms. It did discuss the value of the Arctic Refuge lands for refuge purposes and leasing purposes, as well as the prospect that ASRC could eventually obtain these lands under another provision of law far less favorable to the government. In criticizing the Department's handling of the Chandler Lake exchange, GAO should be more explicit in recognizing the administrative efforts that the Department did make and in acknowledging the judgmental nature of its disagreement with the results.

GAO's Recommendation: The Secretary of the Interior Should Develop and Issue Written Procedures to Execute Land Exchanges Under ANCSA and ANILCA. At a Minimum, the Procedures Should Require (1) the Preparation of Environmental Assessments or Environmental Impact Statements, when Appropriate; (2) Full Review by the Public, State and Local Governments, and Other Affected Parties, of All Aspects of a Proposed Exchange; (3) Justification for Determining Whether a Proposed Exchange is in the Public Interest; and, (4) Establishment and Disclosure of the Fair Market Value of the Lands and Interests to be Exchanged

The GAO report did not provide sufficient understanding of the ANCSA, its intent and purpose, and place the history and role of such lands transactions in proper context. In some of the major land exchanges approved by the Congress, for example, dollar value was never a consideration. To that end, more consideration of value and documentation was given to the Chandler Lake deal than most other similar transactions completed since ANCSA. In light of the GAO report placing considerable weight on the questions of value, a major omission in the report is a discussion of the real problem of even doing appraisals in Alaska. This is a major problem that the GAO staff acknowledged in discussions with departmental staff, but did not raise in the report. First, there is very little track record of parcels of land being bought and sold in remote areas of Alaska. Second, there is no track record of 100,000 to 1,000,000 acre tracts of land being bought and sold. Thus, the very job of the appraiser is stretched to the limit of the profession, which leaves the potential for disagreement and error about values. Any appraisal of large blocks of land in the interior of Alaska must heavily rely on the professional judgment of the appraiser, since there is no data base and track record to draw upon, and thus, it is easy to criticize the end product. This is a major reason in support of the continued need of the Secretary to be able to use his judgment to determine that an exchange is in the public interest.

Because GAO foresees the continued use of the Secretary's exchange authorities to acquire inholdings in the Department's parks and refuges in Alaska, GAO recommends that the Secretary develop written guidelines for executing his ANCSA and ANILCA exchange authorities which incorporate procedures similar to those followed under NEPA and the Federal Land Policy and Management Act (FLPMA). In making this recommendation, GAO fails to acknowledge the steps that the Department has already taken in this direction, including: (1) the numerous administrative steps described above, which were followed in both the Chandler Lake and St. Matthew Island exchanges and will continue to be followed in the future; and (2) an exchange workshop in 1984 in Alaska in which the knowledge gained from processing the Chandler Lake and St. Matthew Island exchanges was shared with regional NPS, FWS, BLM and Forest Service personnel. In addition to these steps, a departmental task force on improving large land exchanges in the lower forty-eight states recommended in October of 1986 the adoption of certain selection guidelines and procedures for processing significant exchanges. While this work, by definition, did not relate to exchanges in Alaska, the did not relate to exchanges in Alaska, the general principles articulated by the task force are consistent with departmental practices followed in the Alaska exchanges.

In making its procedural recommendations, GAO also fails to note that Congress itself has recently recognized the cumbersome burdens and unduly narrow limitations that FLPMA imposes on the Secretary by enactment of the Federal Land Exchange Facilitation Act of 1988, 102 Stat. 1086. The 1988 act amends section 206 of FLPMA to require appraisals to be done for properties to be exchanged, but allows disputes over appraised values to be resolved through arbitration or negotiation. The most telling point about that legislation is, for the purposes of this discussion, that Congress expressly exempts the Secretary's exchange authorities in ANCSA and ANILCA from the 1988 act. This was done because Congress recognizes, as does the Department, the necessity of continuing to acquire lands in Alaska by public interest exchanges on a willing buyer/willing seller basis rather than on the basis of appraisals to establish equal values. Maintaining the Secretary's discretion and administrative flexibility in processing such exchanges is essential if the Secretary's public interest exchange authority, i.e., the authority to exchange lands on a basis other than equal value, is to continue as a useful acquisition tool. While we appreciate the merit of adopting procedures which will improve the unassailability of the Department's public interest determinations, we must also balance that appreciation with the recognition that an increase in procedural measures never comes without a price in terms of agency responsiveness, innovation, efficiency, and funding.

At such time as the Department contemplates or processes any major land exchanges in Alaska, we will continue to draw on our past experiences and guidelines, will take GAO's recommendations under advisement, and will look for means of improving our public outreach in handling such exchanges.

In summary, the Department is in general disagreement with the GAO recommendation to develop more extensive, restrictive procedures than are currently in place or being followed. We agree with GAO, however, to the extent that our public outreach efforts can be improved. Otherwise, the Department will, as it has in the past (including the Chandler Lake exchange), take a well planned, administratively documented course of action in any future Alaska land exchanges. Congress has deemed flexibility necessary when enacting related Alaska laws and we believe it is essential that the Secretay's discretion and administrative flexibility be maintained in processing each unique Alaska land exchange.

See comment 15.

# Comments From the Arctic Slope Regional Corporation

Note: GAO comments supplementing those in the report text appear in appendix V.

arctic slope regional corp.

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June 12, 1989

Mr. James Duffus, III
Director, Natural Resources
Management Issues
United States General Accounting Office
Room 4901
441 G Street, N.W.
Washington, D.C. 20548

HAND-DELIVERED

Dear Mr. Duffus:

Thank you for your letter of May 11, 1989, that transmitted to Arctic Slope Regional Corporation the draft report, Federal Land Management: Chandler Lake Land Exchange Not in the Government's Best Interest (GAO/RCED-89-133). We have reviewed the draft report as requested and provide you with our comments.

We very much appreciate the opportunity to comment on the factual information contained in the draft report that relates directly to our corporation and to express our concerns with respect to such information and the inferences that may be drawn from it. We urge you to amend the report to reflect these concerns.

We respectfully request that our views be included as an appendix to the final report. We believe that, as a party to the Chandler Lake exchange, ASRC should have the opportunity to explain its position on the exchange and have its comments included as a part of the final report on this matter.

Sincerely,

Jacob Adams
President

cc: Congressman George Miller

COMMENTS OF ARCTIC SLOPE REGIONAL CORPORATION

ON

THE DRAFT REPORT OF THE GENERAL ACCOUNTING OFFICE

ENTITLED

"FEDERAL LAND MANAGEMENT: CHANDLER LAKE LAND EXCHANGE

NOT IN THE GOVERNMENT'S BEST INTEREST"

(GAO/RCED-89-133)

June 12, 1989

See comment 1.

## I. INTRODUCTION

This document constitutes the response of Arctic Slope Regional Corporation ("ASRC") to the undated draft report of the General Accounting Office ("GAO") to the Chairman, Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs, House of Representatives, tentatively titled "Chandler Lake Land Exchange Not in the Government's Best Interest" and hereinafter referred to as the "draft report." The draft report criticizes four elements of the 1983 land exchange in which ASRC traded 101,272 acres of surface estate in the vicinity of Chandler Lake within Gates of the Arctic National Park (hereinafter sometimes referred to as the "Chandler Lake lands") for four townships (approximately 92,000 acres) of subsurface estate underlying surface estate owned or to be selected by Kaktovik Inupiat Corporation ("KIC"), the Village Corporation established pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA") by the Native residents of the Village of Kaktovik. The subsurface estate acquired by ASRC in the 1983 exchange (hereinafter referred to as the "Kaktovik subsurface") is located within the Arctic National Wildlife Refuge ("ANWR"). For the reasons set forth in this response, ASRC believes that the criticisms of the draft report are inaccurate, unfair and unfounded.

One of the criticisms in the draft report -- that the exchange worsened problems associated with all-terrain vehicle ("ATV") usage by the Native people of Anaktuvuk Pass -- ignores the historical origins of the problem, misstates the intent of the United States and ASRC in addressing the problem in the context of the land exchange and vastly overstates the extent of the problem, which by Park Service estimates affects only a little more than 1 percent of the lands received in the land exchange by the United States, leaving the remaining 99 percent in condition suitable for wilderness designation.

The criticisms in the draft report that the United States' negotiators should have demanded access to well data and should not have acquiesced in ASRC's legal position that KIC had the right to designate which additional lands it would receive within its original ANCSA selection area are flawed attempts to isolate and criticize a few of the many elements of consideration exchanged by the parties in a complex, arms length agreement. These provisions were agreed to as part of the give and take of the six-month negotiating process and simply cannot be divorced for analytical purposes from the merits of the exchange as a whole. To suggest, as the draft report does, that the United States should have insisted on some provisions not found in the agreement or should have rejected other provisions ignores the fact that the United States gave no more -- and no less -- than was necessary to make the deal.

The criticism that ASRC structured its exchange proposal to the Interior Department so as to circumvent its revenue sharing obligations to other Native Regional Corporations has been mooted by a unanimous decision of a three-member panel of arbitrators. That decision, issued after the completion of the draft report, held that ASRC acted in good faith and complied with all of the requirements of both Section 7(i) of ANCSA and a federal court approved Section 7(i) Settlement Agreement signed by all twelve Native Regional Corporations entitled to participate in revenue sharing.

Moreover, the assumption in the draft report that the Congress in Section 1431(o) of ANILCA had provided an available alternative exchange mechanism that would have required Section 7(i) sharing of revenues derived from the Kaktovik subsurface estate is incorrect. The Chandler Lake lands would not have been available to the United States in an exchange under Section 1431(o) of ANILCA, even if that exchange authority were operative in 1983 (which it was not). Under that authority, ASRC could acquire the Kaktovik subsurface only after Congressional action to open the Coastal Plain of ANWR to commercial oil and gas development and only by exchanging other subsurface of its choosing on an acre-for-acre basis. Section 1302(b) of ANILCA prohibited the acquisition of the Chandler Lake lands through eminent domain. In short, the only way the United States could acquire ASRC's critical and long sought after inholdings in Gates of the Arctic National Park was by negotiating an exchange through some mechanism other than Section 1431(o) of ANILCA. The draft report acknowledges that Section 22(f) of ANCSA and Section 1302(h) of ANILCA provided the necessary authority.

Finally, the draft report unfairly suggests that the procedures used in negotiating the Chandler Lake exchange were deficient. While acknowledging the Secretary of the Interior's unique land exchange authority in Alaska under provisions of both the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") and the Alaska Native Claims Settlement Act of 1971 -- authority conferred on him by Congress in enacting these historic pieces of legislation -- the draft report mistakenly tests the 1983 land exchange by the more exacting and legally inapplicable procedural requirements of the Federal Land Policy and Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA"). Congress directed that ANILCA Section 1302(h) exchanges were to be carried out "notwithstanding any other provision of law." The simple fact of the matter is that the Secretary complied with each and every statutory and regulatory requirement other than those that Congress itself had previously exempted from application to Alaska land exchanges and, in many instances, as a matter of sound administrative practice, went beyond what Congress required.

As a result of the exchange -- the largest inholding acquisition in the history of the National Park Service -- the United States was able to obtain lands that the National Park Service had long regarded as critical to the management of Gates of the Arctic National Park. In recommending that the Secretary proceed with the proposed exchange, the Director of the National Park Service justly described the Chandler Lake lands to be acquired by the United States in the exchange as "spectacular," "a major nationally significant resource" and an integral part of "the greatest remaining wilderness in North America."

Given the highly contingent nature of any future production from the Kaktovik subsurface estate, it can hardly be said that the exchange was an unfair one from either party's perspective. ASRC has received, or will receive, guaranteed payments with respect to the Kaktovik subsurface equal to roughly half of what it believes to be a fair appraised value of the lands it gave up in the exchange. If Congress fails to open ANWR, or if ANWR is opened and no oil is discovered on ASRC's lands, ASRC will suffer a loss as a result of the exchange.

## II. BACKGROUND OF THE LAND EXCHANGE

In 1983, the Department of the Interior negotiated and executed a land exchange agreement with Arctic Slope Regional Corporation, the regional corporation established pursuant to the provisions of the Alaska Native Claims Settlement Act by the Inupiat Eskimo people residing on Alaska's North Slope. Under the terms of the land exchange agreement, ASRC conveyed to the United States 101,272 acres of surface estate that it owned within Gates of the Arctic National Park for approximately 92,000 acres of subsurface estate within the Arctic National Wildlife Refuge. ASRC also provided to the United States access and recreation easements on the Killik River, Lake Udrivik, Imiaknikpak Lake, and Shainin Lake for the benefit of the general public. In the exchange, ASRC received the subsurface estate beneath the surface estate that had been or would be conveyed to Kaktovik Inupiat Corporation, the ANCSA Village Corporation for the Village of Kaktovik. In taking title to the Kaktovik subsurface estate, ASRC accepted a detailed set of environmental stipulations to ensure that any developmental activities undertaken by ASRC on this subsurface estate would be conducted in a manner that would not significantly adversely affect the surface estate of those lands or adjacent lands within ANWR.

The 1983 land exchange (referred to as the "Chandler Lake land exchange" because of the acquisition of lands owned by ASRC in the vicinity of Chandler Lake) was executed under the authority provided to the Secretary of the Interior in Section 22(f) of ANCSA and Section 1302(h) of ANILCA. These statutory provisions grant to the Secretary of the Interior the

authority to negotiate and execute land exchanges in Alaska without Congressional approval. In addition, these statutory provisions permit the Secretary to enter into land exchanges on the basis of equal value or, upon a determination that the exchange is in the public interest, on an other than equal value basis.

Prior to executing the Chandler Lake exchange agreement, the Secretary of the Interior carefully reviewed the public benefits to be achieved in the exchange. The Secretary found that, under Section 1431(o) of ANILCA, ASRC had an option to obtain, for minimal consideration, the Kaktovik subsurface in the event of Congressional enactment of legislation opening the coastal plain of ANWR to commercial development of oil or gas. The Secretary determined that, by entering into the proposed exchange agreement, the United States would receive the valuable ASRC inholdings in Gates of the Arctic National Park rather than the virtually valueless consideration that the United States would receive if ASRC ever were in a position to exercise its option under Section 1431(o). In view of the many public benefits that the Secretary determined would be derived from the proposed exchange, the Secretary concluded that the consummation of the exchange would be in the public interest and, on August 9, 1983, the Secretary and ASRC executed the exchange agreement and proceeded with the exchange of lands and interests therein.

See comment 16.

III. RESPONSES TO SPECIFIC MATTERS RAISED IN THE DRAFT REPORT

A. Protection of Park Resources by the Acquisition of ASRC Inholdings.

The draft report asserts that one of the principal problems that the Chandler Lake land exchange was intended to resolve -- the scarring of tundra by all-terrain vehicles used by the Native people of the Village of Anaktuvuk Pass -- has become worse since the acquisition of the ASRC inholdings through the 1983 land exchange. The draft report asserts that the exchange has complicated rather than solved the ATV problem. To support the contention that the Chandler Lake exchange was not in the best interests of the government, the draft report points to the failure of the land exchange to accomplish the "objective of providing increased protection to park resources that were being damaged by the [ATVs]."

The draft report overlooks the origins and the scope of the ATV problem, as well as the relative significance of the issue in the exchange negotiations. There is absolutely nothing in the exchange agreement or the administrative record of the exchange to support the assertion in the draft report that control of ATV use was a principal, or even an important, objective of the National Park Service in entering into the exchange. The

exchange did not, as the draft report asserts, "create" any land management problems with respect to ATV usage in the Park. The extensive ATV trail system in the Anaktuvuk Pass area pre-dates the creation in 1980 of Gates of the Arctic National Park. The draft report offers neither logic nor facts to support its assertion that the exchange aggravated this pre-existing situation. Moreover, the draft report distorts the extent of the ATV problem beyond recognition.

Contrary to the suggestion of the draft report, the matter of ATV use by the Native people of Anaktuvuk Pass was not a major consideration in the development of the proposal to acquire ASRC's Chandler Lake inholdings, nor was the 1983 land exchange designed to resolve this problem. A careful review of the administrative record underlying the 1983 Chandler Lake exchange provides a clear explanation of the objectives of the National Park Service in acquiring the 101,000 acres of ASRC inholdings within Gates of the Arctic National Park. Nowhere in the administrative record is there any suggestion that these inholdings were being acquired to protect Park resources from damage by ATV use by the people of Anaktuvuk Pass.

As one example from the administrative record, the Director of the National Park Service, in his recommendation to the Secretary of the Interior that the Secretary proceed with the proposed land exchange, set forth his view of the public benefits to be achieved through the proposed acquisition:

> Of major consideration are the benefits obtained through improved management of the Park with the implementation of the exchange. Federal land holdings will be consolidated with the elimination of isolated tracts of Federal land. Land ownership patterns will be improved, facilitating the protection of Park resources, thus improving the ability to fulfill the purposes of the Park as defined in ANILCA.

The National Park Service Director also recognized the geologic, cultural, scenic, recreation, and wilderness resources that could be brought into federal ownership through the acquisition of these significant National Park System inholdings, and further found that public access to many areas of the Park could be improved by this acquisition and protection could be provided to critical wildlife populations. In his determination that the proposed land exchange was in the public interest, the Secretary reiterated these findings and determined that the exchange should be executed to achieve these public benefits.

The use of all-terrain vehicles by the people of Anaktuvuk Pass presents a conflict between the mission of the National Park Service to protect park resources from degradation and the Secretary's obligation under Title VIII of ANILCA to protect the historical and traditional subsistence activities on these lands by the Native people of Anaktuvuk Pass. This conflict exists not only on the lands acquired by the United States in the 1983 land exchange but also on other Park lands. It should be recognized, however, that neither the National Park Service nor ASRC viewed the Chandler Lake exchange as the mechanism for resolving this conflict. Indeed, this issue was raised by the people of Anaktuvuk Pass, not by the National Park Service, and became the subject of collateral negotiations in which the people of Anaktuvuk Pass were represented by independent legal counsel.

The Anaktuvuk people's use of these all-terrain vehicles predated the establishment of Gates of the Arctic National Park in 1980. ATV use has historically occurred and continues to occur on both lands traded by ASRC to the United States in the Chandler Lake exchange and on other, nearby non-Native lands that are now part of the Park and have been designated as wilderness. Thus, the ATV problem upon which the draft report places its greatest emphasis is a much broader problem that should be addressed on its own merits. The parties to the land exchange did not intend to resolve this problem in the context of the land exchange.

The issue of ATVs came up quite late in the exchange negotiations between ASRC and the Interior Department. In his August 9, 1983 memorandum to the Secretary recommending the proposed Chandler Lake land exchange, the Director of the National Park Service described the meeting at which the ATV issue was first raised:

> On July 19, 1983, the National Park Service, Arctic Slope Regional Corporation, and the North Slope Borough attended a town meeting in the Village of Anaktuvuk Pass. The proposed exchange was explained to the local people, who expressed several concerns about the exchange and how it would effect [sic] subsistence uses and access to Chandler Lake and other traditional hunting areas. Based upon input from this meeting, clarifications and changes were made in the agreement to address those issues.

Prior to July 1983, neither the National Park Service nor ASRC had recognized ATV use as an issue to be addressed in the context of the proposed land exchange.

As the result of the concerns that the Anaktuvuk Pass people expressed to ASRC and National Park Service representatives at the July 19, 1983 general meeting in the Village, ASRC and the Interior Department negotiated and agreed upon specific linear easements to be reserved on the lands that ASRC conveyed to the United States. The suggestion made in the draft report that field personnel of the National Park Service and Natives of Anaktuvuk Pass, if provided notice of the proposed ATV use easements during the negotiation of the proposed exchange, would have alerted the Department that the designated easements were unworkable cannot be sustained. The National Park Service field personnel and the Native residents of Anaktuvuk Pass were engaged, directly and through independent legal counsel, in the development of the proposed easements, and all parties believed at the time that a workable system of easements had been developed.

The ATV access easements reserved pursuant to the 1983 exchange agreement placed restrictions on both the size and weight of ATVs that would be allowed on the easements as well as designating the specific routes to be used. Additionally, ATV use was limited to Natives and their invitees. The exchange thus provided a mechanism for protecting the lands conveyed by ASRC to the United States. As the draft report points out, however, the National Park Service has not enforced the restrictions in these easements. The National Park Service has, instead, chosen to "study the Natives' use of ATVs prior to reaching a decision on how to implement restrictions on ATV usage."

To the casual reader of the draft report, it would appear that ATV use prior to the exchange was concentrated exclusively on the lands ASRC traded to the United States in August 1983 and that only after the Natives expressed dissatisfaction with the linear easements reserved to them in the exchange on the former ASRC lands did their use of ATVs expand to adjacent Park lands. For instance, at page 20, the draft report notes:

Now page 16.

> Also, since the exchange, the Park Service has reported that the Natives' use of ATVs -- and the consequent scarring of the land -- has since spread to park wilderness areas that were not part of the exchange.

Blaming the land exchange for the continuing problem, the draft report goes on to state that "[t]he provision for linear easements has been so troublesome for the Park Service and the Natives that in July 1986, they began negotiating a new agreement to resolve the problem."

The facts are contrary to the draft report's treatment of the ATV issue. From the first introduction of these vehicles in

the 1970's, the Anaktuvuk people's use of ATVs has not been confined to the lands that ASRC conveyed to the United States in the Chandler Lake exchange. Several Anaktuvuk villagers have used ATVs for access to subsistence resources in river and creek drainages outside the ASRC lands included in the 1983 exchange, lands that prior to late 1980 were not in Gates of the Arctic National Park. These areas include Masu Creek, Ekokpuk Creek, Kongumavik Creek, upper Contact Creek, Akmagolik Creek and the upper Anaktuvuk River to Ernie Pass.

This pre-exchange use is well documented in the only published study of the Anaktuvuk people's ATV use, In the National Interest: A Geographically Based Study of Anaktuvuk Pass Inupiat Subsistence Through Time, North Slope Borough (1985). Attached to these comments as Exhibit A is a summary of the ATV use of 17 village residents on lands that were wilderness park lands prior to the 1983 exchange. A composite map from this study that depicts the extent of ATV use prior to the exchange is also attached as Exhibit B.

See comment 19.

See comment 19.

It is important to place in perspective the magnitude of ATV use as it relates to the total acreage conveyed to the United States in the 1983 land exchange. The National Park Service itself has recognized that the linear easements reserved to ASRC in 1983 -- and since transferred to Nunamiut Corporation -- and ATV use of the people of Anaktuvuk Pass have not impacted the wilderness values of most of the lands that ASRC transferred to the United States in the Chandler Lake exchange. In the November 7, 1986 General Management Plan, Land Protection Plan and Wilderness Suitability Review for Gates of the Arctic National Park, the National Park Service reviewed the suitability for wilderness designation of the lands conveyed to the United States by ASRC in the Chandler Lake exchange. The National Park Service concluded that, as of late 1986, nearly 99 percent of the lands that ASRC traded to the United States were considered to be suitable for wilderness.

The easements reserved by ASRC for ATV use in the 1983 land exchange agreement were based on recommendations of the National Park Service and the Native people of Anaktuvuk Pass. It was thought at the time that these easements would satisfactorily address the concerns of both the National Park Service and the people of Anaktuvuk Pass with respect to ATV use on those lands conveyed by ASRC to the United States under the terms of the exchange agreement. However, neither ASRC nor the National Park Service attempted in the development of these easements to address the broader questions raised by ATV use by the residents of Anaktuvuk Pass, particularly on lands on which ATVs were used that were not involved in the Chandler Lake exchange.

See comment 7.



The draft report's attempt to make the 1983 Chandler Lake exchange primarily accountable for the existing ATV problem in the Anaktuvuk Pass area is plainly in error. This factual error should not be allowed to detract from the substantial benefits that the United States has received by placing 101,272 acres of private lands into the National Park System -- the largest single acquisition of an inholding in the history of the National Park Service.

B. Government Access to ANWR Test Well Data.

The draft report finds that the Chandler Lake exchange gave ASRC the right to drill the only exploratory well drilled to date in ANWR and to retain exclusive rights to the test well data. As a result, the draft report concludes that ASRC and its oil company partners are in a superior position to all other potentially interested parties, including the federal government. Without access to the test well data, in the draft report's estimation, the federal government is placed at a disadvantage in determining the oil and gas potential of ANWR's coastal plain. The draft report also concludes that, if Congress were to open the ANWR coastal plain to oil and gas leasing in the future, the federal government's ability to set lease sale terms would be enhanced if it had access to this well data.

The consummation of the Chandler Lake land exchange, however, did not place the United States in any worse position with regard to geologic information than it would have been in had the exchange not occurred, and in fact gave the United States access to seismic information that it could not have acquired through the ANILCA Section 1002 process. The right to exclusive use of geologic information is a normal, and valuable, incident of private property. ASRC made it clear to the Interior Department negotiators that the right was sufficiently valuable that it was unwilling to go through with the exchange if it had to share this information with the public. Even if the United States had insisted and ASRC had agreed upon a disclosure provision, the presence of such a clause would have diminished the value of the Kaktovik subsurface estate to ASRC, requiring ASRC to reduce the amount of Chandler Lake surface estate that it was willing to exchange to obtain the less valuable Kaktovik property. In short, the failure of the Interior Department negotiators to reserve the right of access to well data cannot be isolated and criticized without regard to the impact of such a provision on the entire negotiated exchange package.

Even in the absence of the Chandler Lake land exchange, the federal government could not necessarily have obtained exploratory well data from the Kaktovik subsurface estate. The fact that the federal government owned the Kaktovik subsurface estate prior to August 1983 does not mean that it could have

drilled an exploratory well on the lands. Between December 2, 1980, when ANILCA was enacted, and some future date when Congress might act to authorize oil and gas leasing in ANWR, no such drilling could have occurred by the federal government in the absence of specific Congressional authorization. Normally, the drilling of onshore exploratory and development wells on federal lands occurs only pursuant to an oil and gas lease issued by the Interior Department. Since oil and gas development on these lands was prohibited by federal law, no lease could be issued and private exploratory drilling could not have proceeded.

After examining the various ANCSA, ANILCA and other legal authorities, ASRC officials concluded that ASRC would not be prohibited from drilling exploratory wells on three of the four townships of the Kaktovik subsurface estate if it acquired that subsurface prior to the opening of ANWR. ASRC believed that the exclusive nature of its access to this information could have significant economic value, for which it was prepared to exchange to the United States lands of considerable value. ASRC realized that, to generate the federal government's interest in such a land exchange prior to the opening of ANWR, it would have to offer to exchange to the United States some of its most valuable land. The only tract of land that ASRC believed would generate this level of interest was Chandler Lake, an inholding in Gates of the Arctic National Park that because of its scenic grandeur, location and other attributes the National Park Service had sought for years.

Although the Interior Department negotiators pressed extremely hard for access to exploratory well data, ASRC believed that the exchange was not worth pursuing if it meant that one of the most valuable rights it would obtain could possibly be compromised. To break the impasse in the negotiations, however, a compromise was reached. Although ASRC was willing to grant the Interior Department limited access to seismic data from the Kaktovik lands, ASRC held firm on the proprietary nature of the exploratory well data. As a result of this agreement and the federal government's access to seismic data from the Kaktovik subsurface estate, the United States actually had access to more, not less, information on this subsurface estate than it would otherwise have had in completing its ANILCA Section 1002 study.

In pursuing the Chandler Lake land exchange, the ability to obtain seismic and exploratory well data on an exclusive and proprietary basis was a significant consideration to ASRC. ASRC was concerned that, if it agreed to share these data with the United States, the United States could not guarantee the confidentiality of this data and the economic return of the land exchange to ASRC would be significantly reduced. Finally, ASRC believed that, in exchange for its valuable 101,000 acres of Chandler Lake surface estate, it should receive the full benefits

of the Kaktovik subsurface. As the private land owner of the Kaktovik subsurface following the land exchange, ASRC has received the rights normally associated with private ownership of property just as any Native corporation that has received lands pursuant to ANCSA has exclusive rights to any information developed on those lands and the United States retains no interest therein. ASRC bargained in good faith for the Kaktovik subsurface and the property rights attendant thereto, and the United States received full and fair consideration in exchange for that subsurface. Before executing the proposed exchange, the Secretary of the Interior found that the public interest benefits from the proposed exchange far outweighed the consideration to be transferred to ASRC in the exchange, including the loss of the ability to develop information about the Kaktovik subsurface.

In conclusion, the right to drill exploratory wells and to have exclusive rights to the data and information developed on the Kaktovik lands were essential elements of the land exchange from ASRC's point of view. Had the Federal government failed to grant these rights -- which are common and incidental rights of private property ownership -- the exchange would not have been concluded by ASRC. From ASRC's perspective, much of the value of the Kaktovik lands lay in the early and exclusive access to geophysical data and information on these lands.

See comment 8.

C. Discretion in Determination of the Location of the Fourth Township of Subsurface Lands in ANWR.

The draft report contends that a provision in the exchange agreement allowed the Natives to select 23,040 acres of subsurface estate (to be identified after the exchange) that the Interior Department now values at over $250 million. Had the exchange not occurred or had the agreement not contained this provision, the draft report reasons that the location of the 23,040 acres would have been subject to the discretionary approval of the Secretary of the Interior.

In reaching this conclusion, the draft report overlooks the fact that whether the Secretary had discretion to refuse to convey lands identified by KIC pursuant to Section 1431(g) of ANILCA within KIC's original withdrawal area under Section 11(a)(1) of ANCSA was a contested issue. ASRC believed then, as it believes today, that Congress intended KIC to have the same right normally accorded under ANCSA to village corporations to obtain lands of its own choosing within its original Section 11(a)(1) withdrawal. To the extent that the Secretary's acquiescence to ASRC's position on this disputed issue had value, it was part of the give and take of the negotiating process and cannot be analyzed in isolation. Under the provisions of ANCSA, KIC's selections within the Arctic National Wildlife Range as it existed in 1971 when ANCSA was

enacted had been limited to three townships (i.e., 69,120 acres), and the Village Corporation was therefore required to fulfill its remaining one township (i.e., 23,040 acres) of land entitlement from the nearest available federal land outside of the Range. This fourth township was therefore selected from land west of the Canning River and nearly 90 miles from the Village, land that was of no historical, cultural or economic interest or value to the people of Kaktovik.

In enacting Section 1431(g) of ANILCA, the Congress recognized the historical injustices that had been perpetrated against the Native people of Kaktovik. In the mid-1950's, when a DEW-Line site was constructed on Barter Island, where the Native Village of Kaktovik is located, government contractors relocated the Village to avoid the proposed DEW-Line site. Again a few years later, the Village was forced to relocate to allow for a proposed expansion of the DEW-Line airstrip. Incredibly, the Native residents of Kaktovik were not consulted prior to either of these government-sponsored actions.

In order to partially rectify this historic injustice, and in recognition of the fact that the fourth township of land conveyed to KIC under ANCSA was far removed from the Village and of no practical or historical significance to its shareholders, numerous discussions were held between Interior Department officials and representatives of ASRC and KIC between 1972 and 1978. At the end of this consultative process, the participants agreed that the most equitable solution was to allow KIC to relocate the one township it owned outside of ANWR -- nearly 90 miles from the Village's location on Barter Island -- to be joined with the other three townships KIC owned near the Village.

In 1978, however, the Interior Department lacked the administrative authority to consummate the relocation of the fourth township. Nevertheless, as a part of a comprehensive agreement intended to resolve a number of land selection and conveyancing issues in the Arctic Slope region, which agreement was entitled the "Terms and Conditions," and executed on June 29, 1979, the Department and ASRC agreed that, if Congress enacted new legislative authority, an exchange would be authorized to allow KIC to transfer the single township of surface estate it owned west of the Canning River in return for the right to select a corresponding township of surface estate near the Village. The principal limitation on the ability of KIC to select this township was that it had to be contiguous to the existing three townships surrounding the Village and to be in a reasonably compact tract -- consistent with all Native Village Corporation selections under ANCSA.

As there was some interest on KIC's part in having the flexibility to select tracts along the coast of the Beaufort Sea

both east and west of the former withdrawal under Section 11(a)(1) of ANCSA -- the block of continguous and cornering townships from which Native Village Corporation selections under ANCSA were required to be made -- the parties agreed that KIC could select its one township from within the original Section 11(a)(1) withdrawal or "such other adjacent lands as the Secretary and [KIC] may mutually agree upon." This exchange was ultimately authorized by the Congress in Section 1431(g) of ANILCA.

Several provisions of the Terms and Conditions required legislative approval in order to become effective. Section 1431(a) of ANILCA approved and ratified the entire Terms and Conditions as a matter of federal law. Upon enactment of Section 1431(a) and (g), KIC was authorized to proceed with the land exchange that had first been negotiated in Paragraph VII of the Terms and Conditions under which KIC could exchange its one township of surface estate outside ANWR for a township of land in the vicinity of the Village of Kaktovik.

Although Paragraph VII of the Terms and Conditions and Section 1431(g) both required the Secretary's "concurrence" in the identification of lands near the Village to be made by KIC, Congress recognized that the selection and conveyance of the one township of land was to be treated just like other land entitlements under ANCSA. If KIC accepted the government's offer to enter into the exchange by conveying to the United States its one township of surface estate west of the Canning River, the conveyances by the Secretary to KIC pursuant to Section 1431(g)(2) and (3) are to be treated under Section 1431(p) of ANILCA "as though the lands were originally conveyed to such corporation under the provisions of [ANCSA]." Under the provisions of ANCSA, the Secretary exercised no discretion over selections of lands by a village corporation within its Section 11(a)(1) withdrawal area.

In mid-1982, KIC initiated discussions with the Alaska office of the United States Fish and Wildlife Service about identifying lands in the vicinity of the Village to be obtained through the land exchange authorized by Section 1431(g) of ANILCA. At that time, KIC was interested in selecting a portion of this township of land along the coast of the Beaufort Sea both east and west of the original ANCSA Section 11(a)(1) withdrawal as well as a portion inside the withdrawal. All of the lands tentatively identified were compact and contiguous with the existing three townships of land owned by KIC. These discussions broke down, however, when a local official of the United States Fish and Wildlife Service demanded that KIC drop its proposed selections along the Jago River (inside the Section 11(a)(1) withdrawal) in exchange for concurrence by the United States Fish and Wildlife Service in the proposed selections along

the seacoast outside the withdrawal. KIC regarded these demands as both unfair and inconsistent with the intent of ANCSA as amplified in Section 1431(p) of ANILCA.

During the negotiations concerning the Chandler Lake exchange, ASRC was concerned that KIC's unsatisfactory experience in 1982 might be repeated in the future. Accordingly, as one of its demands for which it paid valuable consideration in the form of conveying to the United States its highly valuable Chandler Lake inholdings in Gates of the Arctic National Park, ASRC insisted that the question of Secretarial "concurrence" -- at least with respect to the area within the original ANCSA Section 11(a)(1) withdrawal -- be resolved in the exchange agreement. As a consequence, the parties agreed to Paragraph 8 of the 1983 exchange agreement in order to resolve any ambiguity with respect to the Secretary's authority to concur in KIC's identification of lands within the original Section 11(a)(1) withdrawal and in order to clarify what ASRC viewed to be the intent of Congress at least with respect to identifications by KIC of lands inside the original ANCSA Section 11(a)(1) withdrawal area. The parties agreed, therefore, that, within those townships described in Section 1431(g)(3) of ANILCA, KIC's selection rights would be treated just like an ANCSA selection. As long as KIC's selection within the original Section 11(a)(1) withdrawal area was "compact and contiguous" with the previously conveyed three townships, the Secretary agreed not to object to the selection.

The draft report -- with the benefit of hindsight -- contends that as a result of the later acquisition of well and seismic data from its Kaktovik subsurface, ASRC was able to acquire property that today is valued by the Interior Department at "over $250 million." Aside from the value question, which the GAO itself has argued in another context is highly uncertain (see Federal Land Management: Consideration of Proposed Alaska Land Exchanges Should be Discontinued, GAO, September 1988, Ch. 4, pp. 38-56), it is difficult to see how the Interior Department can be faulted for its agreement in the 1983 negotiations to a provision that assured KIC that its selections of lands to complete the land exchange authorized in Section 1431(g) of ANILCA would be considered under the same standards as were applied to all other village corporation selections under ANCSA.

See comment 9.

D. Denial of Participation of Other Native Regional Corporations in Financial Benefits of the Land Exchange.

The draft report criticizes the Chandler Lake land exchange because, in its view, the exchange was structured so as to "circumvent" the revenue-sharing provisions of Section 7(i) of the Alaska Native Claims Settlement Act. Limiting its brief analysis of this issue to the statutory language of Section 7(i)

and a discussion of a hypothetical exchange in which ASRC might have traded subsurface for subsurface, the draft report fails to address the single provision of the comprehensive 1982 Section 7(i) Settlement Agreement that governs whether ASRC was obligated to share the revenues it has received -- and may receive in the future -- from its Kaktovik subsurface estate.

The draft report was apparently prepared prior to the unanimous arbitration panel decision holding that ASRC was entitled to structure the exchange as surface-for-subsurface without revenue sharing consequences under both Section 7(i) of ANCSA and the Section 7(i) Settlement Agreement signed by all Alaska Native Regional Corporations entitled to participate in Section 7(i) sharing. To the extent the draft report suggests that ASRC violated Section 7(i) of ANCSA or acted improperly in structuring the exchange so as to "avoid" Section 7(i) sharing consequences, the issue is moot.

Containing just two sentences in one of the most complex pieces of public land legislation enacted in this century, Section 7(i) of ANCSA provides:

> Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 5. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

The express language of Section 7(i), as enacted and never amended, makes it clear that in order for a Section 7(i) revenue-sharing obligation to arise, two conditions must be satisfied. First, a Regional Corporation must receive revenues derived from lands conveyed to it pursuant to ANCSA. Second, these revenues must relate to disposition of the subsurface resources, or the disposition of timber, from these ANCSA-conveyed lands. Revenues derived from the disposition of the surface estate of ANCSA-conveyed lands (other than timber sales) are, by definition, not governed by Section 7(i) and are not subject to sharing. Revenues from the disposition of subsurface resources on lands acquired by a Regional Corporation through means other than an ANCSA conveyance likewise fall outside the Section 7(i) sharing requirement.

Beyond the basic principle that only revenues from ANCSA-conveyed subsurface (or timber) are subject to sharing, Section 7(i) is a model of legislative imprecision. After nearly seven years of protracted litigation among all twelve Regional Corporations over the proper interpretation to be given Section 7(i), in June 1982 all twelve Regional Corporations signed a comprehensive, court approved Settlement Agreement that took the one operative sentence of Section 7(i) and transformed it into a 121 page governing document. One of the significant issues singled out for treatment in the Section 7(i) Settlement Agreement was whether Section 7(i) revenue sharing obligations resulted from land exchanges in which a Regional Corporation traded its ANCSA conveyed lands to a third party, such as the federal government or the State of Alaska. Section 7(i) itself was silent on this question.

Article II, Section 6 of the Section 7(i) Settlement Agreement devotes six pages to answering this question and provides a separate rule for every conceivable type of exchange, including 11 different combinations of surface, subsurface or "boot" on each side of an exchange transaction. The complexity of Article II, Section 6 reflects an attempt to reconcile the right of the other Regional Corporations to receive their Section 7(i) revenue attributable to the subsurface estate or timber resources exchanged, while, at the same time, protecting the exchanging Regional Corporation's right to retain the full value of its surface estate, which is not subject to Section 7(i) sharing.

Consistent with the principle that the Section 7(i) sharing obligation attaches only to ANCSA conveyed subsurface, Article II, Section 6(g) of the Settlement Agreement provides:

> If surface is traded for surface, or for subsurface, or for surface and subsurface, revenues from the property received in trade shall not be subject to sharing under this Agreement or Section 7(i). (Emphasis added.)

Again, this result is required by the fact that the Section 7(i) sharing obligation attaches only to the subsurface conveyed to a Regional Corporation under ANCSA. Revenues derived from disposition of surface estate -- no matter how valuable -- are simply not subject to Section 7(i) sharing. Lands or interests in lands obtained in trade for surface estate -- even though the subsurface estate may be of great value -- are legally and logically exempt from the "sharing" requirement.

In reliance upon this provision of the Section 7(i) Settlement Agreement, ASRC proposed to the Interior Department in early 1983 to exchange its highly valuable surface estate in

Gates of the Arctic National Park for the Kaktovik subsurface estate. Consistent with the provisions of the Section 7(i) Settlement Agreement, any revenues derived from ASRC's Kaktovik subsurface estate are therefore not shareable with the other Regional Corporations.

Despite the Settlement Agreement's unambiguous provision on how revenues in a surface-for-subsurface exchange would be treated under Section 7(i), three Regional Corporations initiated an arbitration proceeding against ASRC in late 1986 challenging ASRC's position that its revenues derived from the Kaktovik subsurface estate are not subject to Section 7(i) sharing. It should be noted that, under the Section 7(i) Settlement Agreement, arbitration is the exclusive means of resolving Section 7(i)-related disputes.

A three member arbitration panel composed of one arbitrator appointed by each of the opposing parties and a neutral third arbitrator considered extensive evidence and testimony from numerous witnesses last winter. On March 26, 1989, the three-member panel unanimously ruled that:

> Income derived through use of the Kaktovik subsurface by ASRC are not to be shared under the terms of the Section 7(i) Settlement Agreement. Such lands were acquired by ASRC pursuant to a surface-for-subsurface exchange in accordance with Article II, Section 6(g) of such agreement. For such reasons, Claimants are not entitled to participate in the signature bonus, the rental or any other revenues derived from that subsurface in fiscal year 1984 [i.e., the fiscal year for which claims were made in the arbitration proceeding]."

In addition to concluding that the revenues received by ASRC from the Kaktovik subsurface estate are not subject to sharing under the provisions of Section 7(i) and the terms of the Section 7(i) Settlement Agreement, the arbitration panel also answered several additional allegations advanced by the claimants in the arbitration proceeding. In the proceeding, the claimants alleged that ASRC had violated an obligation to act in good faith and to deal fairly with the other parties to the Section 7(i) Settlement Agreement. In response, the arbitration panel unanimously found that:

> The Section 7(i) Settlement Agreement was negotiated by all of the Regional Corporations some two years after the passage of ANILCA which contains Section 1431(o).

> The Settlement Agreement in the clearest of language provides that a trade of surface-for-subsurface causes the revenues derived from the subsurface to be nonsharable. ASRC openly and candidly admitted that they structured the trade for the Kaktovik subsurface so as to qualify that trade under Section 6(g). ASRC was not deceitful, was not in bad faith and was not unfair in structuring a trade that was specifically invited by language in the [Section 7(i) Settlement Agreement] agreed to by all of the Regional Corporations. There is no breach of an implied covenant of good faith and fair dealing.

Thus, the arbitration panel determined that ASRC acted properly and well within the terms of the Section 7(i) Settlement Agreement in structuring the Chandler Lake land exchange as a surface-for-subsurface exchange, and, as a result, has taken title to the Kaktovik subsurface estate without a requirement to share revenues therefrom under Section 7(i) or the Section 7(i) Settlement Agreement.

Although the ruling of the arbitration panel appears in a document captioned "Preliminary Opinion," it represents a final ruling by the panel on the merits of the dispute. A copy of the Preliminary Opinion is attached to these comments as Exhibit C. All that remains under the arbitration procedures established by the Section 7(i) Settlement Agreement is the determination of attorney fees and costs to be awarded to the prevailing party.

See comment 19.

Section 7(i) of ANCSA was adopted by the Congress in 1971 to assure that revenues from subsurface estate and timber resources conveyed under ANCSA to Native Regional Corporations would be fairly and equitably distributed among all twelve Regional Corporations. However, Section 7(i) did not extend in its application to any subsurface estate or timber resources acquired over time by a Regional Corporation. The Congress did not intend to limit the business activities of the Regional Corporations to prevent them from pursuing opportunities beyond the original scope of ANCSA, or to impose upon the Regional Corporations additional burdens on business opportunities that the corporations might develop over time. Since the Kaktovik subsurface was obtained solely in exchange for surface holdings of ASRC within Gates of the Arctic National Park, the arbitration panel correctly ruled that the sharing requirements of Section 7(i) and the Section 7(i) Settlement Agreement did not apply to revenues received from that subsurface estate.

See comment 10.

E. Procedural Steps in the Development of the Chandler Lake Exchange Proposal.

The draft report criticizes the Department of the Interior for its failure to follow procedures intended to assure public review and input on the proposed exchange prior to its execution on August 9, 1983, and recommends that the Department develop and issue written procedures to govern the development of land exchanges under ANCSA and ANILCA. ASRC recognizes the need to assure adequate public notice and participation prior to the execution of a land exchange such as the Chandler Lake exchange. A considered review of the administrative record on the Chandler Lake exchange, however, demonstrates that, in developing the exchange proposal, the Department followed the procedures recommended by the draft report, ensuring a review of the exchange proposal by the public, state and local governments, and other affected parties.

Prior to the execution of the Chandler Lake exchange agreement by the Secretary of the Interior on August 9, 1983, the Department examined every aspect of the proposed exchange, and complied with each and every applicable statutory and regulatory requirement and, in many instances, went beyond these requirements as a matter of sound administrative practice. Through this compliance, the Department developed a complete analysis of the exchange and its impacts, and provided an opportunity for third parties, including affected state and local governments, to consider and comment upon the proposed exchange. Only after completion of these steps did the Secretary conclude that the proposed exchange was in the public interest and should be completed. A brief review of the steps taken by the Department to analyze the proposed exchange and to encourage public review of and public comment on the proposed exchange may help to demonstrate the analytical approach taken by the Department in developing the Chandler Lake exchange proposal.

See comments 3 and 6.

1. Analysis of the Impacts of the Proposed Exchange

Prior to the execution of the Chandler Lake exchange agreement, the National Park Service and the United States Fish and Wildlife Service prepared an "ascertainment evaluation", a 60-page document in which the environmental impacts of the proposed exchange were carefully analyzed. Although the Department concluded that section 910 of ANILCA exempted this type of land exchange from the requirements of the National Environmental Policy Act of 1969 ("NEPA"), the Department determined that, as a matter of sound administrative practice, an ascertainment evaluation should be prepared to analyze the environmental impacts associated with the proposed exchange and to consider possible alternatives thereto. The Department noted that the ascertainment evaluation was the functional equivalent

to NEPA compliance. After considering the environmental impacts of the proposed exchange, the Department concluded that the proposed exchange would have significant environmental benefits through the acquisition of more than 101,000 acres of ASRC land within Gates of the Arctic National Park, and that the conveyance of subsurface estate to ASRC in the vicinity of the Village of Kaktovik, when coupled with strict environmental stipulations limiting exploratory and developmental activities on this subsurface estate, assured that no significant adverse environmental impacts would result from the conveyance of this subsurface estate.

Section 810(a) of ANILCA requires that, prior to any disposition of public lands, the head of the federal agency having primary jurisdiction over such lands must evaluate the effect of such disposition on subsistence uses and needs. Pursuant to this statutory directive, the Secretary of the Interior, the Director of the United States Fish and Wildlife Service, and the Director of the National Park Service evaluated the effects on subsistence uses of the proposed Chandler Lake exchange. Based upon a 65-page report that considered in great detail the effects of the proposed exchange on subsistence uses in the vicinity of both Anaktuvuk Pass and Kaktovik, these three officials concluded that the proposed exchange would not significantly restrict subsistence uses.

See comment 7.

Section 7 of the Endangered Species Act requires a federal agency to ensure that its action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the habitat of such species. To fulfill this requirement during the consideration of the proposed Chandler Lake exchange, the Department initiated formal consultation with the Alaska Regional Office of the United States Fish and Wildlife Service.

In his biological opinion, the Regional Director concluded that the proposed exchange would not likely jeopardize the continued existence of the Arctic peregrine falcon, the only endangered species on or near the proposed exchange area. In addition, after informal consultation with the National Marine Fisheries Service, the United States Fish and Wildlife Service also concluded that the exchange would not affect the endangered Bowhead and Gray whales using the Beaufort Sea offshore from the subsurface estate to be conveyed to ASRC.

In order to ensure that the proposed exchange and the activities resulting therefrom would not adversely affect properties on or eligible for inclusion on the National Register of Historic Places, the National Park Service initiated, in compliance with Section 106 of the National Historic Preservation Act, consultation with the Alaska State Historic Preservation

Officer ("SHPO") and the Advisory Council on Historic Preservation. Based upon suggestions of the SHPO, significant restrictions were added to the environmental stipulations included in the exchange agreement to preclude damage to cultural sites. As a result of this consultation and the adoption of the SHPO's suggestions, the SHPO and the Advisory Council on Historic Preservation concluded that the proposed exchange would have no adverse effect.

At the time of the negotiation of the proposed Chandler Lake exchange, the Department of the Interior was subject to the directives of two Executive Orders requiring specific attention to the environmental impact of proposed administrative actions. Executive Order 11988, entitled "Floodplain Management," and Executive Order 11990, entitled "Protection of Wetlands," required federal agencies to take actions to preserve and enhance the natural and beneficial values of floodplains and wetlands. In the development of the proposed environmental stiputlations under which ASRC might engage in exploratory or developmental activities on the Kaktovik subsurface, the Department included a series of stipulations to ensure the protection of floodplains and wetlands on the Kaktovik lands.

See comment 13.

2. Consultation with State and Local Governments

The Coastal Zone Management Act requires that the United States, when conducting or supporting activities that directly affect the coastal zone of a state, determine whether the proposed action is consistent with the coastal management program of the affected state. In considering the proposed land exchange, the Department of the Interior examined the effects of the proposed exchange on the coastal zone of Alaska and the consistency of the proposal with the Alaska Coastal Management Plan. In a 43-page analysis, the Department found that the exchange would not involve the United States in conducting or supporting any activity that would have a direct effect on Alaska's coastal zone.

Notwithstanding its finding of no direct effect, the Department, as a matter of comity, evaluated the possible impacts of the proposed exchange and concluded that the exchange was consistent to the maximum extent practicable with the Alaska Coastal Management Plan. In June 1983, the Assistant Secretary for Fish and Wildlife and Parks notified the Office of Management and Budget of the Office of the Governor of the State of Alaska of this conclusion and solicited any comments or concerns that the State might have about the proposed exchange or the Department's consistency determination. Copies of this letter and determination were forwarded to the Mayor of the North Slope Borough and the Mayor of the Village of Kaktovik.

In response to the Department's request, the State of Alaska raised several specific concerns with the proposed exchange agreement and land use stipulations. Although the State did not agree with the conclusion that the proposed exchange was consistent with its coastal management program, it indicated that, if certain additional provisions were included in the exchange agreement, the proposed exchange would be consistent with the State program. These recommended changes were adopted and included in the exchange.

The North Slope Borough, the county government that encompasses the Villages of Kaktovik and Anaktuvuk Pass, received a copy of the Department's consistency determination. In commenting to the State on this matter, the North Slope Borough expressed its general support for the land exchange proposal. In addition, the Village of Kaktovik and Kaktovik Inupiat Corporation, the local Native Village Corporation, each wrote to the Secretary to indicate the strong support of the people of Kaktovik for the proposed exchange.

On June 17, 1983, the Regional Director of the National Park Service provided an additional notice to the State of Alaska about the proposed exchange. This notice described the proposed exchange in considerable detail, and solicited any comments that the State of Alaska might have on the proposed exchange in accordance with the requirements of Office of Management and Budget Circular A-95. Other than its comments through the coastal zone management consistency process, the State of Alaska provided no further comments on the proposed exchange.

See comment 13.

3. Consultation with Other Interested Parties

In an attempt to provide for public participation in the development of the proposed land exchange, in June 1983, both ASRC and the Department of the Interior notified the Alaska Land Use Council of the proposed land exchange. In addition to providing the Alaska Land Use Council with detailed summaries of the proposed exchange, ASRC and the National Park Service participated in a public meeting of the Alaska Land Use Council to answer the questions of Council members and members of the public.

ASRC and the Department of the Interior also held a public meeting on the proposed land exchange in the Village of Anaktuvuk Pass in July 1983. After this meeting, numerous changes were made to the proposed exchange agreement to address concerns raised by the people of Anaktuvuk Pass.

Prior to the execution of the land exchange agreement, ASRC representatives also met with various interested parties to ensure widespread input on the proposed land exchange.

Specifically, ASRC briefed the Alaska Federation of Natives ("AFN") and many representatives of national and Alaska environmental organizations to explain the details of the proposed land exchange and to solicit their input. In the meeting with AFN, the representatives of ASRC specifically advised the Native community that the exchange was being structured as a surface-for-subsurface exchange in which the consideration received by ASRC would not be subject to Section 7(i) revenue sharing requirements, and this fact was reported in the Alaska press the very next day and again two months later when the exchange agreement was executed in August 1983. The suggestion in the draft report that Native leaders did not learn of the Section 7(i) consequences until after the exchange was executed is absolutely false.

Finally, ASRC met with interested members of Congress and their staffs to brief them on the proposed land exchange. Letters of support for the proposed land exchange were received from both Alaska Senators, Senators Jackson and Johnston of the Senate Energy and Natural Resources Committee and Congressman Young of Alaska.

See comment 17.

4. Public Interest Determination

Having completed the extensive negotiations with ASRC and having complied with the exhaustive procedures described above, the Department of the Interior then determined whether to proceed with the proposed land exchange. In a 21-page public interest determination, the Secretary concluded that the proposed land exchange was in the public interest under the standard set forth in Section 22(f) of ANCSA and Section 1302(h) of ANILCA and should be executed. He based this determination upon a recognition that only through the proposed exchange could the United States acquire the valuable ASRC inholdings within Gates of the Arctic National Park, and that, in the absence of the proposed land exchange, the lands to be conveyed by the United States to ASRC in the proposed exchange could be acquired for minimal consideration by ASRC under the authority set forth in Section 1431(o) in the event that the Congress enacts legislation that opens the Coastal Plain of the Arctic National Wildlife Refuge to oil and gas exploration and development. The Secretary specifically found that:

> The Department, by acting now, is able to obtain valuable inholdings within the National Park System, rather than obtaining virtually valueless lands later. Thus, the goals of four Administrations to protect and manage the valuable Chandler Lake lands as part of the Gates of the Arctic National Park and to provide public use and enjoyment of

the Killik River will be realized through the implementation of this exchange.

The Secretary further found that the proposed restrictive covenants and land use stipulations imposed by the exchange agreement on ASRC's development and use of the Kaktovik subsurface estate provided permanent protections to assure that the use of this subsurface would not significantly adversely affect the surface values of these lands or adjacent lands in the Arctic National Wildlife Refuge. On the basis of this public interest determination, the Secretary executed the exchange agreement.

It should be noted that, although the Secretary executed the exchange agreement on the basis of his determination that the exchange was in the public interest, the Department of the Interior nevertheless had appraised the parcels of land to be exchanged. Although recognizing the difficulties of determining the values of over 100,000 acres of lands in the remote Gates of the Arctic National Park and the speculative nature of any determination of the value of the Kaktovik subsurface, the Department engaged in appraisals of both sets of properties. Even though the values determined through these appraisals were of the same magnitude, the Secretary proceeded with the exchange on a public interest basis, finding that the exchange would achieve broad public benefits that more than justified the proposed action.

See comment 18.

5. Adequacy of the Procedural Steps Undertaken by the Department

The draft report recommends that, in pursuing possible land exchanges in the future, the Department of the Interior should follow procedures that ensure public notice and review of the proposed exchange and provide an opportunity for public input prior to execution of the exchange agreement. ASRC agrees with this recommendation, but believes that, in contrast to the finding of the draft report, such procedures were in fact followed in the development of the 1983 Chandler Lake land exchange. As briefly described above, and as documented in the hundreds of pages of the administrative record compiled prior to the execution of the Chandler Lake exchange agreement, the Department of the Interior thoroughly considered the environmental and economic impacts of the proposed exchange and solicited and received public input on the proposed exchange prior to its execution.

In reaching its conclusions, the draft report cites two other land exchanges considered by the Department of the Interior contemporaneous with the Chandler Lake land exchange. The draft report suggests that the procedures used by the Department of the

Interior in these land exchanges were more appropriate and more extensive than the procedures used in pursuing the Chandler Lake exchange. However, a careful review of the administrative record in each of these cited land exchange proposals clearly demonstrates that the Department of the Interior utilized the identical procedures in developing these other land exchanges as were used in the development of the Chandler Lake land exchange. In utilizing the same procedures, the Department, in developing the Chandler Lake land exchange, did not find the kinds of shortcomings that the draft report cites as ultimately leading to the abandonment of the Cascade Lake exchange or the overturning by a federal court of the St. Matthew land exchange, and the Secretary therefore proceeded forward with, and no third parties ultimately challenged, the Chandler Lake land exchange.

See comments 11 and 12.

The draft report recommends that particular procedures should be followed by the Secretary of the Interior in pursuing land exchanges under ANCSA and ANILCA. Specifically, the draft report recommends that procedures should be developed that require:

(1) the preparation of environmental assessments or environmental impact statements;

(2) full review by the public, state and local governments and other affected parties of all aspects of a proposed exchange;

(3) justification for determining whether a proposed exchange is in the public interest; and

(4) establishment and disclosure of the fair market value of the lands and interests in land to be exchanged.

However, the draft report apparently fails to recognize that the Department of the Interior complied with these suggested procedures in considering the Chandler Lake exchange. As discussed above, the Department prepared an extensive biological ascertainment report identical in form to the "comprehensive review document similar to an Environmental Impact Statement" that the draft report finds to have been sufficient in the context of the St. Matthew exchange. During consideration of the proposed exchange, the Department of the Interior and ASRC assured thorough review of the proposal by the State of Alaska and affected local governments, as well as members of Congress and their staffs, other Native organizations, the Alaska Land Use Council, and the national and local environmental organizations. Through this public review, numerous improvements to the proposed land exchange agreement were adopted.

In pursuing the proposed land exchange, the Department of the Interior determined and disclosed the appraised value of the

lands and interests to be exchanged. However, the Department concluded that, because of the remoteness of the lands involved and the speculative nature of any determination of land values, the exchange should not be consummated on the basis of equal value. Instead, the Secretary thoroughly examined the public benefits to be achieved by the proposed land exchange and concluded that the proposed exchange was in the public interest. The justification for this determination that the exchange was in the public interest is thoroughly set forth in the administrative record and remains as compelling now as it was at the time the determination was made and the exchange executed.

See comment 18.

IV. CONCLUSION

Section 22(f) of ANCSA and Section 1302(h) of ANILCA provide broad statutory authorization to the Secretary of the Interior to engage in land exchanges in Alaska. The Congress provided these broad exchange authorities to the Secretary in recognition of the unique circumstances of land ownership in Alaska, including vast federal land holdings and many significant inholdings within conservation system units. To allow the Secretary broad discretion in rationalizing land ownership patterns, the Congress specifically recognized that the Secretary should proceed with land exchanges not only on an equal value basis, but also on a basis other than equal value when he determines that such exchanges are in the public interest.

In negotiating and executing the Chandler Lake exchange agreement, the Secretary of the Interior sought to achieve a broad array of public benefits and ultimately concluded that the proposed land exchange would be in the public interest. In making this determination, the Secretary found that the acquisition of the ASRC inholdings and their management as part of Gates of the Arctic National Park would represent a significant addition to the National Park System, and that these inholdings represented "a major nationally significant resource whose geologic, cultural, scenic, recreation, wildlife and wilderness resources make a major contribution to furthering the purposes for which Gates of the Arctic National Park was established." As described in greater detail earlier in these comments, the Secretary also found that the acquisition of these lands would improve management of the Park, eliminating isolated tracts of federal holdings and improving land ownership patterns. Finally, the exchange provided a mechanism to obtain from ASRC access easements to several significant rivers and lakes in and around Gates of the Arctic National Park.

In addition to the public benefits to be achieved by the acquisition of the Chandler Lake inholdings, the Secretary also found that the proposed land exchange would provide protection for the public's interest in the Kaktovik subsurface to be

conveyed to ASRC. The Secretary noted that the land exchange agreement included negotiated stipulations and covenants to assure that the conveyance of this subsurface estate to ASRC would not undermine the essential integrity of ANWR or frustrate its purposes. These environmental stipulations, to be incorporated into the deed of conveyance of this subsurface estate to ASRC, established a general environmental standard assuring that ASRC's exploration and developmental activities would not significantly adversely affect fish and wildlife resources, their habitats, and the environment of the lands to be conveyed to ASRC or adjacent lands in ANWR. The Secretary concluded that these environmental stipulations enhanced the protection of the lands to be conveyed to ASRC and adjacent Refuge lands.

In contrast to the thorough analysis undertaken by the Secretary of the Interior prior to executing the Chandler Lake land exchange, the draft report gives scant attention to the many public benefits achieved by the 1983 land exchange. Rather than considering the broad array of public benefits determined by the Secretary of the Interior to be achieved by the land exchange, the draft report proceeds to consider only specific, relatively minor aspects of the land exchange without ever addressing the broader context in which the land exchange was negotiated and concluded. The narrow focus of the draft report is, in itself, a serious drawback and leads to an incomplete and misleading analysis of the public benefits achieved by the Chandler Lake exchange.

Even if the many public benefits of the Chandler Lake land exchange are ignored, the draft report provides no basis for a finding that the 1983 land exchange was not in the public interest. In reaching its conclusion, the draft report focuses on several specific aspects of the land exchange. As discussed in great detail in these comments, the criticisms in the draft report are not well founded. In the broader context in which the exchange was negotiated, each of these concerns was specifically resolved by arms length negotiations between the parties.

Finally, the draft report suggests that, in negotiating and developing the proposed land exchange, the Department failed to follow procedures designed to ensure adequate public review and comment on the proposal and adequate analysis of the proposal prior to its execution. As detailed in these comments and in the extensive administrative record developed prior to the execution of the exchange agreement by the Secretary of the Interior, the Department of the Interior followed procedures designed to assure compliance with all applicable statutory and regulatory requirements, detailed analysis of the proposal and the public benefits derived therefrom, and full and complete public review and input on the proposal.

See comments 3 and 6.

# GAO's Response to the Comments of Interior and the Arctic Slope Regional Corporation

The following are GAO's comments on the Department of the Interior's letter dated June 12, 1989, and the Arctic Slope Regional Corporation's letter also dated June 12, 1989.

1. Both Interior and ASRC strongly disagreed with our report, describing it as misleading, inaccurate, unfair, and unfounded and stated that its findings, conclusions, and recommendations are incorrect and/or unwarranted. After carefully considering both Interior's and ASRC's comments, we believe that the factual information in the report is accurate and complete, and fairly presents the results of our review. More significantly, we continue to believe that the Chandler Lake exchange was not in the government's best interest, and that procedural requirements are needed for future land exchanges in Alaska.

2. We do not believe our discussion of other land exchanges in the report takes issues out of context. Our presentation on this issue was not to infer that all Alaska land exchanges were faulty or unsuccessful. Rather, our point is that in some other Alaska land exchanges, issues and problems with these exchanges were disclosed and debated in a public forum. We believe that Interior's statement that other Alaska land exchanges were completed with little to no documentation reinforces the need for procedural requirements for future Alaska land exchanges.

3. Because of the uniqueness of Alaska land situations, we do not dispute the utility of the Secretary's discretionary land exchange authority. Our point is that in exercising such authority, Interior should have and follow established procedural requirements, and that the absence of a requirement to do so creates the potential for shortcomings. We believe that the Chandler Lake exchange illustrates that in absence of such requirements these potential shortcomings can become a reality. Interior states that in the Chandler Lake exchange, it voluntarily incorporated procedures beyond those legally required. The important issue here is not what Interior did voluntarily, but rather what it did not do. For example, Interior did not disclose all relevant aspects of the exchange in the exchange documents, nor did it provide for obtaining comments on the exchange by all interested and affected parties. If in each of its Alaska land exchanges, Interior voluntarily followed prudent administrative procedures, the requirements we are recommending would place no additional burden or constraint on Interior, nor would they restrict the Secretary's discretionary authority. On the other hand, if for a particular exchange, Interior chose not to voluntarily follow prudent administrative procedures, as was the case in the Chandler Lake

exchange, a requirement to do so would preclude shortcomings that could otherwise occur.

4. We disagree with Interior's statement that we did not give appropriate weight to Section 1431(o) of ANILCA. The significance of that section is discussed in the executive summary, chapter 1, chapter 2, and appendix I, in which we point out that under ANILCA, ASRC could exercise an option to acquire subsurface land in ANWR in exchange for other subsurface lands ASRC owned in Alaska, and that under this scenario, the lands the government would receive might be of minimal value.

5. Contrary to Interior's reading of our draft report, we made no attempt to link the Chandler Lake exchange with the other proposed exchanges. Rather, our prior report on proposed Alaska land exchanges is mentioned in three places in this report. In the first two instances, we are simply noting that the Chandler Lake exchange was one in a series of completed or proposed exchanges involving ANWR and was provided as background information. In the third instance, we cited the prior report in a footnote as a reader reference since the prior report goes into greater detail on data limitations that cause ANWR tract values to be highly uncertain.

6. As stated in chapter 3, if all interested and affected parties had been provided complete information and had been given an opportunity to comment on the Chandler Lake exchange, a number of negative comments on the exchange would likely have been sent to Interior, and may have affected the concessions Interior made to ASRC. Interior notes that these issues were recognized and debated internally and with ASRC, and that Interior's decision makers had sound reasons for making their decisions. We believe that had Interior's decisions been subjected to broader review in a public forum, the soundness of Interior's reasons for making the exchange would have likely been challenged. If the decisions were sound as Interior maintains, they would have been able to withstand such a test. Interior's election not to subject the exchange to the test of public scrutiny seems to reinforce the need for such procedures.

7. Both Interior and ASRC said that control of all terrain vehicles on the land acquired by the government was not a stated exchange objective. Interior also stated that the parties to the exchange did not foresee the dissatisfaction that subsequently arose over the limitations in the access easements that were negotiated as a part of the exchange. While control of ATVs was not a stated objective of the exchange, both the Assistant

Director for the Park Service's Alaska Region and the Park Service representative on the team negotiating the exchange told us that scarring by ATV vehicles was the imminent threat to the resources of the Chandler Lake lands. In fact, control of ATVs was so important that it became an issue to the Park Service during the exchange negotiations. Knowing that the ATV linear easements provided for in the exchange agreement would likely be unworkable, a Park Service official told us that the Park Service would have negotiated harder and longer on this point to resolve this problem in 1983 if the former Deputy Under Secretary had not set a deadline of August 1983 to consummate the exchange. Six years have passed since the exchange was consummated, and the use of ATVs on Chandler Lake lands continues to be a problem; so much so that their use is the subject of a proposed agreement between Interior and the Natives to seek resolution. The proposed solution will involve yet another land exchange that will now require Congressional approval, because it would involve deauthorization of existing wilderness areas within Gates of the Arctic National Park. We further believe Interior was remiss in having not fully addressed and resolved the ATV issue prior to consummating the exchange, particularly in light of the substantial benefits conferred on ASRC in the exchange. We have, however, made revisions to the report to clarify that the stated objectives of the exchange were to consolidate land holdings and obtain access to parklands.

ASRC also stated in its comments that ATVs had been used prior to the Chandler Lake land exchange in park wilderness areas and the exchange did not make the situation worse. Park Service officials at Gates of the Arctic National Park told us that prior to the Chandler Lake exchange, there was some use of ATVs on Park wilderness lands. However, after the exchange, there was confusion as to whether the Park Service was going to enforce ATV restrictions. As a result of the confusion and because the Natives did not think the Park Service was going to enforce the restrictions, there was a significant increase in ATV use on the wilderness lands according to Park Service officials.

8. Interior and ASRC took the position that allowing ASRC to drill a test-well on the coastal plain of ANWR and to retain exclusive rights to the well data simply allowed ASRC to enjoy the benefits of landownership available to other private land owners. We disagree with this view. By allowing ASRC early entry into ANWR, and further to drill the only test-well geographically located on the coastal plain of ANWR, Interior was in a strong negotiating position to demand access to the well data. This was because ASRC did not own any subsurface in ANWR at the time of the

exchange and, under existing law, would continue to be precluded from such ownership unless and until ANWR was opened to commercial oil and gas development. Without the exchange, ASRC would not currently own any subsurface in ANWR, and would not have been able to negotiate agreements with oil companies that have already yielded over five times Interior's claimed value of the entire exchange to ASRC. Failure to recognize the special significance of the test-well information (and the strength of Interior's negotiating position) raises serious questions about Interior's negotiations on the exchange. In our view, Interior was plainly outnegotiated by ASRC on this point. In our opinion, this is yet another reason to require Interior to subject its Alaska land exchanges to public scrutiny.

The importance of the test-well data should not be underestimated. For example, a newspaper of the American Association of Petroleum Geologists named this well as the most important well completed in the world in 1986. In our opinion, this aspect of the exchange placed ASRC and its oil company partners in a superior position to other potential bidders if and when ANWR is opened to oil and gas development. Just as significantly, and perhaps more so, a private party has better data than the government to estimate the oil and gas potential of ANWR's coastal plain, most of which is still owned by the United States.

Interior stated that while it did not obtain well data, it did obtain access to ASRC seismic data. Seismic data, while useful in evaluating unexplored oil and gas lands, cannot take the place of exploratory drilling. The ability to determine the actual age, types of rocks, and presence of petroleum is best determined through well data. Furthermore, the stipulations on the use of the seismic data available to Interior were so restrictive that Interior did not use these data in the government's assessment of ANWR's oil and gas potential.

9. Interior and ASRC disagreed with our observation that the Chandler Lake exchange gave the Natives greater discretion in choosing subsurface lands than they had under Sections 1431(g)(3) and 1431(o) of ANILCA. Interior's disagreement is based on its belief that there is an ambiguity as to whether Interior could disapprove the selection of lands identified by the village corporation if the lands were within the boundary established by Section 11(a)(1) of ANCSA. Interior's view that the Secretary's discretion applied only to lands outside the section 11(a)(1) boundary is based on the placement of a semicolon in Section 1431(g)(3) of ANILCA between a description of lands which the Natives could identify for selection that were either within or outside the section 11(a)(1)

boundary. We believe that the placement of the semicolon is not significant. We believe that the controlling element of section 1431(g)(3) is that this section only allows the village corporation to "identify" additional lands it desired to obtain and not to "select" as under Section 1431(o) of ANILCA and other provisions of ANCSA and ANILCA. Thus, identification of lands by the corporation was subject to the Secretary's concurrence before conveyance of the identified lands to the Natives.

ASRC also disagreed with our analysis of the effect of section 1431(g)(3) on the Secretary's discretion to concur in lands identified by the village corporation. ASRC stated that in its view, the Congress had recognized that the identification of the lands in question was to be treated like any other land entitlements under ANCSA. However, section 1431(g)(3) specifically requires the Secretary of the Interior's concurrence in the selection of the lands identified by the village corporation. It should be noted that in 1982, Interior, under section 1431(g)(3), denied the conveyance of lands identified by the village corporation. We continue to believe that the Chandler Lake exchange gave the Natives greater discretion in selecting lands in ANWR than they had under Section 1431(g)(3) of ANILCA, and that the Natives used this greater discretion to select lands that are in an area now considered to hold the highest potential for oil and gas development within ANWR.

Interior also stated that our use of Interior's own 1987 data to discuss the value of subsurface rights obtained in 1986 as part of the exchange is misleading. We disagree with Interior's position. When the exchange was made in 1983, Interior's staff made its evaluation with less than adequate geological information, and the exact location of one-fourth of the acreage to be exchanged (the acreage at issue in this comment) was not known. The theme of our point in this section of the report is that Interior gave up its discretion on the location of this acreage, and the dollar figure (over $250 million) while only an estimate, provides the reader a context for understanding the possible value of this concession.

10. Neither Interior nor ASRC disputed the factual information contained in this section of the report. However, both Interior and ASRC took issue with our presentation on the basis of their belief that the presentation infers impropriety in Interior's and ASRC's handling of the section 7(i) negotiations portion of the exchange. Our report did not state that Interior's and ASRC's structuring of the exchange to make inapplicable the revenue-sharing provisions of section 7(i) was illegal. In fact, we have updated the final report to recognize that the American Arbitration Association found on March 28, 1989, that the revenues generated from

the exchange are not subject to sharing under the terms of the section 7(i) settlement agreement.

Notwithstanding this, however, the exchange was structured in a way that the revenue sharing provisions of Section 7(i) of ANCSA did not apply. Had ASRC obtained the ANWR subsurface received in the Chandler Lake exchange under the provisions of Section 1431(o) of ANILCA (if ANWR were opened to oil and gas development), the other Alaska regional corporations would have shared in the revenues to be derived from these lands. We included a discussion of this issue in the report because it was a significant element of the exchange and had financially adverse effects on other Alaskan Natives who did not have an opportunity to comment on this element of the exchange before the exchange was executed. We believe that contrary to Interior's comments, the section 7(i) revenue-sharing issue is not a "private matter" since one of the parties to the agreement (Interior) is a public agency, and because Interior knowingly accommodated ASRC's wishes by structuring the exchange, however legally, in a manner that denied other Alaskan Natives from participating in the benefits of the exchange.

11. We disagree with Interior that there was no substantive difference in the process followed in the St. Matthew Island exchange and the Chandler Lake exchange. The environmental ascertainment report for the St. Matthew Island exchange disclosed information that was both positive and negative on the need for the exchange, while the ascertainment report for the Chandler Lake exchange included only information favorable to the exchange.

In addition, the ascertainment report for the St. Matthew Island exchange was prepared by field personnel familiar with the details of the proposed exchange. In contrast, the report for the Chandler Lake exchange was not prepared by Park Service field personnel, but rather by a Fish and Wildlife official unfamiliar with the exchange. Contrary to Interior's statement that the report was prepared under the direction of the region, the Assistant Director for the Park Service's Alaska Region told us that the ascertainment report was not prepared in or under the direction of the region. The person who prepared the report told us that she included only the information she was provided on the exchange and had no idea whether the information was adequate. While there is no assurance that the report would have been more detailed had it been prepared in Alaska, it is important to note that the report did not include information on several questionable aspects of the exchange that were known to Park Service, Fish and Wildlife Service, and the

Bureau of Land Management officials in Alaska. Most notable among these were that the ATV easements would likely be unworkable, that ASRC would retain exclusive rights to well data, that Interior was waiving its right in the location of 23,040 acres that had not yet been selected by the Natives, and that the exchange would make inapplicable the sharing requirements of Section 7(i) of ANCSA.

12. Interior stated that it was ASRC's unwillingness to proceed with the exchange that caused the exchange not to be completed instead of the comments on the Cascade Lake exchange. Although Interior and ASRC continued negotiations on the exchange after receiving comments, the extensive negative comments received raise questions as to whether the exchange should have or would have been consummated even if Interior and ASRC had agreed to do so. For example, the U.S. Fish and Wildlife Service wrote on June 9, 1983, "While these exchanges, when viewed individually, may not cause extensive damage to existing wildlife resources, the cumulative effect is insidious and may have long-range serious implications on those resources." Then on July 7, 1983, the Park Service Alaska Regional Director noted that "This exchange is not supported by either the U.S. Fish and Wildlife Service or the Alaska Department of Fish and Game because of concerns over wildlife and habitat."

The State of California Department of Fish and Game wrote on July 12, 1983: "The California Department of Fish and Game would like to encourage reconsideration of the proposed land exchange involving the Camp Lonely Tract in the Cascade Lake Exchange . . . . Only through a concerted management effort on the wintering grounds and conscientious stewardship by the Federal Government of important molting and staging areas in Alaska can we hope to maintain internationally important waterfowl resources." The State of Alaska Department of Fish and Game said on June 14, 1983, "As the Department has repeatedly stated in communications to BLM, the Teshekpuk Lake areas must be protected because it comprises one of the most productive, diverse, and sensitive ecosystems in arctic Alaska including the calving grounds and most of the year-round range of the Teshekpuk Lake caribou herd; breeding, molting, and staging habitats for large numbers of white-fronted geese, Canada geese, swans, shorebirds, and other waterfowl; and documented polar bear denning habitat."

13. Interior and ASRC enumerated the coordination that was performed in the Chandler Lake exchange. Conversely, our report focuses on the information and aspects of the exchange that were not disclosed to interested and affected parties. For example, during our work, we

reviewed the files of the Division of Governmental Coordination, Office of Management and Budget, State of Alaska. We found that the information available to this office disclosed only the positive aspects of the exchange, and did not disclose negative and/or controversial aspects of the exchange involving the nonworkability of the ATV easements, that ASRC would retain exclusive rights to well data, that Interior was waiving its rights on the location of 23,040 acres that had yet to be selected by the Natives, and that the exchange would make inapplicable the sharing requirements of Section 7(i) of ANCSA. As another example, ASRC said that the Village of Kaktovik wrote to the Secretary endorsing the exchange. However, in a letter dated July 29, 1983 (about 12 days before the exchange was executed), the Vice-Mayor of the City of Kaktovik wrote a letter to the State of Alaska's Office of the Governor that raises questions about ASRC's statements. The letter states as follows:

"We have recently become aware of a proposed land exchange between the USDI and ASRC which would involve lands near Anaktuvuk Pass and Kaktovik. Despite the fact that neither the USDI nor the ASRC have at any time met with us to discuss this matter in depth and given us full information about it to consider, it has come to our attention that it has been alleged that Kaktovik has given its 'unqualified support' to the proposal. Such is not the case. Most of the people in Kaktovik are either unaware of the proposal or have no understanding of its implications and the City Council has neither considered it nor taken a position regarding it."

The procedures we recommend would ensure that Interior regularly provides all pertinent, relevant, and material information to all interested and affected parties for all future Alaska land exchanges, as Interior implies it has done and infers it intends to do in the future.

14. Interior stated that the Chandler Lake exchange should only be viewed as a gain for the United States because regardless of whether or not ANWR is opened for leasing, the value of the Kaktovik subsurface to the federal government would be zero or nearly zero. Clearly, if ANWR is never opened to oil and gas development, the value of the Kaktovik subsurface to the government would be zero. However, there is no way of knowing whether or when the Congress may choose to open ANWR. Notwithstanding whether ANWR is opened, the potential value of the ANWR lands, even given this uncertainty, has been and remains substantial. For example, ASRC has already received $30 million (or over 5 times Interior's calculated value of the exchange to ASRC) for the right to conduct exploratory activities and to acquire oil and gas leases in ANWR.

Interior did not, but in our opinion could have, capitalized on this potential value in the exchange negotiations process. With regard to the Chandler Lake lands the government received in the exchange, the Alaskan Natives are continuing to use these lands much as they did when they owned the lands before the exchange, and Interior continues to have problems in resolving the imminent threat to those lands, the use of ATV vehicles. When viewed in this context, it is not clear that the exchange was substantially beneficial to the government even if ANWR is never opened. On the other hand, if ANWR is opened to oil and gas development, we believe that the benefits of the exchange would be skewed heavily in favor of ASRC, and would be contrary to the best interests of the government. For example, the exchange removed Interior's discretion in the location of one-fourth of subsurface traded to ASRC that the Natives had yet to select in 1983. These lands may have a value of hundreds of millions of dollars, and the potentially most valuable of the tracts may have been retained in government ownership had Interior not given up its discretion on the location of the lands selected. Additionally, we believe that it was not in the government's best interest to have allowed a private party (ASRC and its oil company partners) to achieve a superior informational position about the oil and gas potential of ANWR than the federal government, which continues to own the vast majority of the lands in ANWR. For Interior to continue believing that this land exchange was in the best interests of the government, we believe, clearly points to the need for procedures to govern future land exchanges in Alaska.

15. We continue to believe that there is a need for procedures to govern the conduct of Interior's ANCSA and ANILCA land exchanges in Alaska. We have, however, redirected our recommendation to the Congress since Interior's disagreement with the recommendation leaves little room for optimism that Interior would unilaterally implement our recommendation. A more detailed analysis of Interior's comments on our recommendation is presented at the end of chapter 3. With regard to the effects of the Federal Land Exchange Facilitation Act of 1988 (P.L. 100-409), we do not dispute that the Secretary's authority to conduct land exchange on a public interest rather than equal value basis is a valuable tool. However, we believe that the Chandler Lake exchange illustrates the need for established procedural requirements for ANCSA and ANILCA land exchanges, and that these procedures should include the identification of the fair market value of the interests exchanged. We are not advocating that all exchanges be made on an equal value basis, but rather that the fair market values be considered and disclosed in every case.

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