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SECTIONAL ANALYSIS: Title II of H.R. 1 – FY 2018 Reconciliation Legislation

The Senate passed H.R. 1, its FY 2018 budget reconciliation legislation, with provisions opening the Coastal Plain of the Arctic National Wildlife Refuge to oil and gas development. Title II of the **proposed legislation will eviscerate the Arctic National Wildlife Refuge by stripping existing protections for fish, wildlife, and subsistence uses on the Coastal Plain — the Refuge’s biological heart.** Further, the legislation **opens the entire 1.5-million-acre Coastal Plain to oil and gas development and would functionally turn it into an industrial zone.** Specifically, the proposed legislation:

- Adds oil and gas development on the Coastal Plain as a purpose of the Refuge, undercutting the existing purposes to protect fish, wildlife, subsistence use, and other values;
- Mandates an extensive oil and gas leasing program that prioritizes leasing of high oil and gas potential areas over the protection of sensitive areas;
- Directs the Bureau of Land Management to administer an oil and gas program on the Coastal Plain, undercutting U.S. Fish and Wildlife Service’s (“FWS”) role and ability to protect fish and wildlife resources;
- Confuses and potentially undercuts the standards for the protection of wildlife and the wilderness character of the Arctic Refuge by requiring that the Bureau of Land Management manage the oil and gas program in a manner similar to how it manages the National Petroleum Reserve–Alaska;
- Contains a meaningless and misleading 2,000-acre provision that purports to limit development, but in reality would allow industrialization of the entire Coastal Plain;
- Mandates that the Secretary grant rights-of-way and easements across the Coastal Plain for oil and gas activities and infrastructure, regardless of impacts;
- Fails to mandate any specific environmental protections for the Coastal Plain, while removing existing environmental protections; and
- Opens over 92,000 acres of non-federal land interests in the Refuge to oil and gas development.

As history has shown, time and time again, oil drilling necessarily involves a trade-off between environmental values and industrialization; oil drilling will compromise the biological values of the Coastal Plain, including the birthing grounds of the Porcupine Caribou Herd. **Any drilling program on the Coastal Plain would irreparably damage the unparalleled wilderness character and wildlife values of the Refuge. This legislation effectively negates the Coastal Plain’s role as a wildlife refuge in favor of turning it into a petroleum zone. Under this bill, the Coastal Plain of the Arctic National Wildlife Refuge would have fewer environmental protections than other refuges.** If the heart of the Arctic Refuge can be turned into an oil field, no place is safe.

SECTION-BY-SECTION ANALYSIS OF TITLE II OF H.R. 1

Section 20001. Oil and Gas Program

Subsection (a): Definitions

(1): The Coastal Plain is defined as the area identified as the 1002 area on two maps prepared by the U.S. Geological Survey (“USGS”) entitled “ANWR Map – Plate 1” and “ANWR Map – Plate 2,” dated October 24, 2017. The inclusion of this subsection and the two maps creates confusion about the definition of “Coastal Plain” and exactly what lands are impacted by the bill. As the Congressional Research Service (“CRS”) has noted, “a change in the map specified in the definition can have substantial effects on many sections” of a bill.¹ The USGS maps also state that they are “not intended to prejudice ongoing boundary litigation between the State of Alaska and the U.S. Department of the Interior.” That litigation concerns a State of Alaska assertion of ownership over land in the northwest corner of the Coastal Plain.

(2): This subsection defines “Secretary” as the “Secretary of the Interior, acting through the Bureau of Land Management.” This definition places the Bureau of Land Management (“BLM”) in charge of administering the oil and gas leasing program on the Coastal Plain, which, combined with other aspects of this bill, effectively removes the FWS as the lead manager of the Coastal Plain. FWS is the manager of land in the Wildlife Refuge System, and historically, FWS has had “considerable authority” over the administration of oil and gas leasing programs on refuge lands.² As the CRS has noted, which agency administers the leasing program is a “critical element” of any leasing program in or near the Arctic Refuge.³ According to CRS, BLM authority over the leasing program could “divorce the mineral development aspects from the biological/wildlife purposes and the expertise of the FWS personnel.”⁴

Subsection (b): Oil and Gas Program

(1): This subsection states that Section 1003 of the Alaska National Interest Lands Conservation Act does not apply to the Coastal Plain of the Arctic Refuge. Section 1003 of ANILCA contains the congressional prohibition on oil and gas leasing, development, and production for the entire Arctic Refuge.

The repeal of Section 1003 as to the Coastal Plain would also potentially open the Arctic Slope Regional Corporation’s (“ASRC”) 92,160-acre, qualified subsurface estate, which lies within the boundary of the Coastal Plain, to full surface development activities and infrastructure. ASRC acquired the rights to the subsurface estate in a controversial Watt-era land exchange, where it

¹ M. Lynne Corn and Pamela Baldwin, *Legislative Maps of ANWR*, CRS Report RS22326 at 1–2 (Nov. 18, 2005). Prior to the 109th Congress, proposed drilling legislation generally referred to a 1980 map from ANILCA of the Arctic Refuge, which was apparently lost. See Felicity Barringer, *Arctic Map Vanished, and Oil Area Expands*, N.Y. TIMES (Oct. 21, 2005) (noting that photographs of the 1980 map exist); Pamela Baldwin, *Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge*, CRS Report RL31115, at 15 (May 4, 2005) [hereinafter RL31115].

² RL31115, *supra*, at 5.

³ RL31115, *supra*, at 4.

⁴ *Id.* at 7.

traded its surface rights in Gates of the Arctic National Park for qualified subsurface rights to 92,160 acres under the Arctic Refuge. This transfer specifically prohibited leasing and development of these lands for oil and gas unless the Federal government authorizes leasing or development in the Coastal Plain, on these lands, or both.⁵

This land trade occurred behind closed doors and flew in the face of the Alaska Native Claims Settlement Act's intent to prohibit subsurface selection within National Wildlife Refuges.⁶ In 1989, after the fact, the General Accounting Office found that this land exchange was not in the interest of the United States. Further, when ASRC entered into this agreement with former Secretary Watt, ASRC did so with full knowledge that commercial oil and gas development was prohibited in the Arctic Refuge and on its selected lands. Accordingly, ASRC does not now and never has had either oil and gas development rights or a reasonable expectation of such rights with respect to its subsurface lands in the Arctic Refuge.⁷

This subsection potentially allows leasing and expansive development of federal lands within the Coastal Plain, and expands what are highly qualified, non-federal property rights within the Coastal Plain to allow for the leasing and development of nearly 100,000 acres of previously and legitimately closed lands within the Coastal Plain.⁸

(2)(A): This subsection requires BLM to establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain of the Arctic Refuge. An oil and gas program in the Arctic Refuge is antithetical to the purposes Congress sought to protect when it established the Arctic Refuge in ANILCA.⁹ Oil and gas activities are also at odds with the reasons that the area was first protected in 1960: to “preserve the unique wildlife, wilderness, and recreational values” of the area.¹⁰ By placing the administration of the oil and gas program in the hands of the Bureau of Land Management, this and other provisions of the bill *undercut U.S. Fish & Wildlife Service's role and ability to protect fish and wildlife resources in the Coastal Plain.*

(2)(B): This subsection modifies ANILCA and the purposes of the Arctic Refuge to include “an oil and gas program on the Coastal Plain.” *This provision undercuts the purposes for which the Refuge was established.* The Arctic National Wildlife Refuge, including the Coastal Plain, was originally set aside in 1960 by President Eisenhower's Interior Secretary Fred Seaton as the Arctic National Wildlife Range to preserve “the unique wildlife, wilderness and recreational values” of the area.¹¹ In ANILCA, Congress changed the name of the Range to the Arctic

⁵ Agreement between ASRC and the United States of America (Aug. 9, 1983), Appendix 2: Land Use Stipulations ASRC Lands, Kaktovik, Alaska at 6.

⁶ See CRS Report RL31115 at 16–17.

⁷ Despite the prohibition on oil and gas development, ASRC has made over \$30 million as a result of the land trade. See U.S. Gen. Accounting Office, *Federal Land Management: Chandler Lake Land Exchange Not in the Government's Best Interest* 21 (1989). For more information about ASRC lands with the Arctic Refuge, see Pamela Baldwin, CRS Memorandum re: Arctic Slope Regional Corporation Lands and Interests within the Arctic National Wildlife Refuge (Apr. 22, 2002).

⁸ Chevron Texaco and BP currently hold lease agreements for these lands. See Arctic Slope Reg'l Corp., Oil, <http://www.asrc.com/Lands/Pages/Oil.aspx> (last visited Nov. 9, 2017).

⁹ ANILCA § 303(2)(B), P.L. 96-487, 94 Stat. 2371 (1980).

¹⁰ Public Land Order 2214, Establishing the Arctic National Wildlife Range at 1 (Dec. 6, 1960).

¹¹ *Id.*

Refuge, and added specific conservation-focused purposes to the area, including the conservation of fish and wildlife populations and habitats in their natural diversity, the fulfillment of international treaty obligations related to the protection of fish and wildlife, continued opportunities for subsistence uses by local residents, and the protection of water quality and quantity.¹² An oil and gas program in the Arctic Refuge is completely inconsistent with the purposes Congress sought to protect when it established the Arctic Refuge. As far as we know, this would be the first time a wildlife refuge would have oil and gas listed as an express purpose for the refuge — undercutting the integrity of the refuge system as a whole.

This subsection effectively predetermines the outcome of any Refuge Administration Act compatibility determination for oil and gas activities.¹³ The fundamental “compatibility” requirement mandates that “the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use.”¹⁴ By making the oil and gas program on the Coastal Plain one of the purposes of the Refuge, and then mandating that it occur, the bill impacts FWS’s ability to balance protection of the fish, wildlife, and other values of the Refuge against the impacts of oil and gas development. In other words, this provision could elevate oil and gas development over the protection of other values on the Coastal Plain.

(3): This subsection indicates that the Secretary, via BLM, is required to manage the oil and gas program on the Coastal Plain in a manner similar to how it administers lease sales under the Naval Petroleum Reserves Production Act of 1976 (NPRPA) and the related regulations, which govern the National Petroleum Reserve–Alaska. This provision imposes a petroleum-focused statutory scheme on the Coastal Plain of the Arctic Refuge. Coupled with other provisions, ***this subsection will turn the Coastal Plain into a petroleum zone where oil and gas development could be prioritized over other uses, including the protection of fish, wildlife, and subsistence.***

(4): This subsection sets a royalty rate for leases issued on the Coastal Plain at 16.67%. This modifies the standard 12.5% onshore oil and gas royalty rate on federal land.

(5): Under the MLA and the Alaska Statehood Act, Alaska normally receives 90 percent of the revenue generated by oil and gas leases and royalties on federal lands within the boundaries of the State.¹⁵ This subsection seeks to override these provisions and provide Alaska with 50 percent of the bonus, rental, and royalty revenues from oil and gas leasing and operations on the Coastal Plain, with the balance going to the federal treasury.¹⁶

Subsection (c): Lease Sales

(1)(A): This subsection requires that the Secretary conduct at least two area-wide lease sales within ten years. Coupled with subsection (b)(2)(B) above, this subsection prioritizes oil and gas

¹² ANILCA § 303(2)(B), P.L. 96-487, 94 Stat. 2371 (1980).

¹³ See, e.g., RL31115, *supra*, at 7.

¹⁴ 16 U.S.C. § 668dd(d)(3)(A)(i).

¹⁵ 30 U.S.C. § 191(a); Alaska Statehood Act of 1958, PL 85-508.

¹⁶ In the past, Alaska has argued that Congress cannot change this revenue distribution scheme without Alaska’s formal approval, which has not occurred. It is entirely possible that Alaska will sue to enforce its view of the law, and if successful this would further undercut any projected federal revenue from drilling the Arctic Refuge.

over other purposes of the Refuge as applied to the Coastal Plain.

(1)(B): This subsection establishes a minimum lease sale size of no less than 400,000 acres in each lease sale. This subsection also requires the Secretary to offer for lease “those areas that have the highest potential for the discovery of hydrocarbons.” This provision requires leasing on areas with the highest oil and gas potential, with no explicit consideration of whether there are significant biological, subsistence, or other important resources in the area.

This subsection also requires that the Secretary conduct an initial lease sale no later than four years after passage of the legislation and a second lease sale no later than seven years after passage of the legislation. Setting a minimum number of acres to be leased, and doing so under strict timeframes, is inconsistent with a precautionary approach to oil development in sensitive areas.

(2) Rights-of-Way: This subsection exempts rights-of-way and easements on the Coastal Plain from the environmentally protective provisions of Title XI of ANILCA, declaring that the Secretary is required to issue “any rights-of-way or easements across the Coastal Plain for the exploration, development, production, or transportation necessary to carry out the [legislation].” This effectively places oil and gas activities above other purposes of the Arctic Refuge and ignores Title XI’s procedural and substantive standards, which are intended to provide reasonable access across conservation system units while protecting the values of the affected lands. Additionally, there is no standard in this subsection that enables the Secretary to prevent environmental damage to the Coastal Plain.

Coupled with the mandatory nature of this oil and gas program and the lack of meaningful limits on surface infrastructure, this bill could severely limit access to and the health of subsistence resources on the Coastal Plain. This subsection, combined with other provisions, also undercuts bedrock environmental laws like the National Environmental Policy Act by essentially predetermining the outcome of any environmental analysis in favor of oil and gas development.

(3) Surface Development: This subsection contains a misleading 2,000-acre development limitation that *will actually allow industrialization of the entire Coastal Plain*. This legislation would open the entire 1.5-million-acre Coastal Plain of the Arctic Refuge to oil and gas leasing and seismic exploration, and exploration and production wells could be drilled anywhere on the entire 1.5-million-acre Coastal Plain. The misleading 2,000-acre “limitation” only addresses “surface acres covered . . . by production and support facilities (including airstrips and any area covered by gravel berms or piers for support of pipelines).” There is no requirement to plan for contiguous or consolidated operations in a way that is protective or avoids duplicative infrastructure. It also does not cover gravel mines, roads, the many miles of pipelines crisscrossing the tundra, or the tundra permafrost excavated for buried pipelines. Pipelines can extend for hundreds of miles and have a significant ecological footprint, yet this provision at most covers just the locations where the vertical posts that support the pipelines literally touch the ground. For example, the U.S. Army Corps of Engineers authorized 11.7 miles of pipeline

and the placement of 1,400 vertical supports for the pipeline at the Greater Mooses Tooth 1 project, but that would only count as 0.1 acres of fill for purposes of this 2,000-acre limitation.¹⁷

The “limitation” also does not require that the 2,000 acres of production and support facilities be in one contiguous or even one limited area. Thus, as with the oil fields to the west of the Arctic Refuge, development could and would spread out over a very large area. Indeed, according to the USGS, oil under the Coastal Plain — to the extent there is any — is not concentrated in one large reservoir but would be distributed under the Coastal Plain in numerous small deposits.¹⁸ To produce oil from this vast area, supporting infrastructure would stretch across the entire 1.5-million-acre Coastal Plain.

It also does not cover seismic or other exploration activities, which have significant impacts on the Arctic environment.¹⁹ Seismic activities are conducted with convoys of bulldozers and “thumper trucks” over extensive areas of the tundra, and exploratory oil drilling involves large drill rigs, convoys, and aircraft. Newer 3-D seismic surveys on the North Slope deploy more vehicles than older 2-D seismic surveys, including heavy vehicles used for “cat-train” camp hauling, and make a grid profile with line spacing of only a few hundred yards — much closer together than 2-D. Not only are these activities intrusive, but surface exploration activities — which are employed year after year throughout the life of the oil field — can cause severe and long-lasting damage to wilderness and the Arctic Refuge ecosystem.²⁰

Finally, winter exploratory drilling activities require significant quantities of fresh water for the construction of ice roads and ice pads. Fresh water resources are far more plentiful to the west of the Coastal Plain. Indeed, preservation of water is one of the statutory purposes of the Refuge because its relative lack of abundance on the Coastal Plain.²¹

Section 20002. Limitations on Amount of Distributed Qualified Outer Continental Shelf Revenues

This section amends the Gulf of Mexico Energy Security Act of 2006 to increase the total amount of Outer Continental Shelf revenues available for distribution to Gulf producing States from \$500,000,000 up to \$650,000,000 in fiscal years 2020 and 2021.²²

Section 20003. Strategic Petroleum Reserve Drawdown and Sale

This section authorizes the Secretary of Energy to generate up to \$600,000,000 in revenues by

¹⁷ See U.S. ARMY CORPS OF ENG'RS, RECORD OF DECISION: CONOCOPHILLIPS ALASKA, INC., GREATER MOOSE TOOTH 1 (POA-2013-461), at 3 (2015).

¹⁸ See U.S. GEOLOGICAL SURVEY, ARCTIC NATIONAL WILDLIFE REFUGE, 1002 AREA, PETROLEUM ASSESSMENT, 1998, INCLUDING ECONOMIC ANALYSIS 4 (2001) (USGS Fact Sheet FS-028-01).

¹⁹ See Janet C. Jorgenson et al., *Long-Term Recovery Patterns of Arctic Tundra After Winter Seismic Exploration*, ECOLOGICAL APPLICATIONS 20(1) (2010) (discussing the still evident impacts from exploration activities that occurred in the Arctic Refuge the mid 1980's).

²⁰ See Janet C. Jorgenson et al., *Long-Term Recovery Patterns of Arctic Tundra After Winter Seismic Exploration*, ECOLOGICAL APPLICATIONS 20(1) (2010) (discussing the still evident impacts from exploration activities that occurred in the Arctic Refuge in the mid-1980's).

²¹ ANILCA § 303(2)(B), P.L. 96-487, 94 Stat. 2371 (1980).

²² P.L. 109-432 § 105(f)(1) (Dec. 20, 2006).

selling up to 7,000,000 barrels of crude oil from the Strategic Petroleum Reserve during fiscal years 2026 through 2027.

The Senate included this provision selling off portions of the Strategic Petroleum Reserve to raise additional funds and make up for the lack of revenues from drilling in the pristine Arctic Refuge. The Congressional Budget Office originally estimated the Arctic Refuge provisions would raise \$2.2 billion between 2018 and 2027, but later reduced this estimate in light of changes to the proposed legislation.²³ The revised estimate, which is still unrealistic, indicated the Arctic Refuge provisions would fall \$366 million short of the \$1 billion target in the FY18 budget resolution.²⁴ To make up for this shortfall, the majority further increased the number of barrels that would be sold from the Strategic Petroleum Reserve — from 5,000,000 barrels of oil, as proposed by the Senate Energy Committee, to 7,000,000 barrels. Just a few years ago, Senator Murkowski herself warned, “The Strategic Petroleum Reserve is not an ATM. It is certainly not the petty cash drawer for Congress.”²⁵ Senator Murkowski and Congress are now proposing to use the Strategic Petroleum Reserve for exactly that — by selling oil in order to justify drilling for new oil in the Arctic Refuge, which leadership in turn claims is necessary for national security and energy independence. This provision only further underscores the fact that drilling in the Arctic Refuge is not a budget issue and should not be included as part of legislation aimed at tax reform.

²³ The revenue projections for the provisions are speculative and out of touch with reality. To reach the original \$2.2 billion revenue target — half of which would go to the State of Alaska under the terms of the bill — companies would need to bid an average of \$1,467 for every single one of the 1.5 million acres on the Coastal Plain. The average North Slope onshore bid since 2000 has been just \$34/acre, nowhere close to the levels necessary to meet the \$2.2 billion estimate. For a more detailed analysis of this issue, see D. Murphy, *Oil Production in the Arctic National Wildlife Refuge: Impacts on Deficit and National Security* (Oct. 2017).

²⁴ Josh Siegel, *Senate Republicans Approve Plan to Allow Drilling in Arctic Refuge With Tax Legislation*, WASHINGTON EXAMINER, Dec. 2, 2017, <http://www.washingtonexaminer.com/senate-republicans-approve-plan-to-allow-drilling-in-arctic-refuge-with-tax-legislation/article/2642365>.

²⁵ John Kemp, *U.S. SPR Oil Sale Before Strategic Review Would Be a Mistake*, REUTERS, July 27, 2015, <https://www.reuters.com/article/us-usa-spr-review-kemp/u-s-spr-oil-sale-before-strategic-review-would-be-a-mistake-kemp-idUSKCN0PY25C20150727>.