The Alaskan National Monuments of 1978: Another Chapter in the Great Alaskan Land War

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THE ALASKAN NATIONAL MONUMENTS OF 1978: ANOTHER CHAPTER IN THE GREAT ALASKAN LAND WAR

Regina Marie Hopkins*

I. INTRODUCTION

The most difficult thing to comprehend about Alaska is its size. The State of Alaska is 375 million acres; over one-fifth the size of the remaining forty-nine states.¹ In contrast, the population of Alaska is small, only 407,000 people.² This amounts to one person per 833.33 acres.³ This tremendous extreme in population and size makes Alaska unique among the states.⁴ While most of the people live in either Fairbanks or Anchorage,⁵ most Alaskan towns evoke comparisons with the Old West. With its vast tracts of virgin land and small isolated towns, the state is the last remnant of 19th Century frontier America.⁶ In small outposts, “pioneers” live in small, handmade log cabins heated by a fireplace or a wood burning stove and lighted by kerosene lamps.⁷ The people have no electricity, no

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² Id. This figure is an estimate for the 1977 population.
³ Id. This translates to 0.7 persons per square mile.
⁴ Id. Alaska ranks last among the states in population density. The 49th state, Wyoming, has 4.1 persons per square mile. Id. at 457. Alaska’s sparse population is in sharp contrast to its large size. The second largest state in area, California, has 40.4 persons per square mile. Id. at 361.
⁵ Judge, Alaska: Rising Northern Star, 147 NATIONAL GEOGRAPHIC 760 (1975). The combined population of Fairbanks and Anchorage is approximately 250,000 people.
⁶ J. McFee, COMING INTO THE COUNTRY 175-417 (1977). This book contains an excellent description of life in the town of Eagle, Alaska (population 100) and the problems that the inhabitants encounter trying to exist in the Alaskan wilderness. See also, Robinson, Alaskan Family Robinson, 143 NATIONAL GEOGRAPHIC 55 (1973).
⁷ J. McFee, supra note 6, at 198-202.
telephones or television. They live by hunting, trapping, and in some places, by prospecting. Since there are no roads in most of the state, the only connection with the outside world is by the airborne pony express. And while such modern innovations as the snowmobile are found, much of life in the state harkens back to an earlier existence.

Because of these conditions and the climate, most Americans are under the impression that the state is a frozen wasteland, inhabited only by polar bears and Eskimos. This is not an accurate picture. In almost all areas of Alaska, the summer temperature often reaches seventy degrees, and are almost invariably over fifty degrees in the summer months. In addition, the state is rich in oil, minerals, timber, game and fish. Most surprisingly, Alaska has potential as an agricultural state, with an estimated two to three million acres of arable land. Because of the large amount of land, and its potential riches, it is thus amazing that such a vast and sparsely populated land should be the subject of a bitter land dispute.

On December 1, 1978 President Jimmy Carter created fifteen new national monuments in Alaska, as well as enlarging two existing ones, for a total land withdrawal of 56 million acres. The land was selected chiefly because of its value as a wilderness area, including unspoiled habitats for endangered species.

President Carter acted under the authority of the American Antiquities Preservation Act of 1906 (hereinafter the Antiquities Act), which authorizes the President to create national monuments in order to preserve "historic landmarks, historic or prehistoric struc-

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8 Id.
9 Id. at 259-276.
10 Id. at 17-18.
11 Id. at 102.
12 HAMMOND ALMANAC, INC., supra note 1, at 355.
tures and other objects of historic or scientific interest.”

The President issued seventeen proclamations which proscribed all development of the land in question. The land withdrawal was necessary because congressional protection of the Alaskan wilderness lands was due to expire shortly thereafter on December 18, 1978. Secretary of the Interior Cecil Andrus issued regulations governing the use of the monuments on December 26, 1978.

The presidential proclamations were the latest links in a chain of governmental actions concerning Alaskan land. Since the acquisition of the Alaskan territory, the federal government’s attitude has often been one of indifference, but the pressure of recent events commanded the attention of Congress and the Executive Branch. The creation of the national monuments was another step in the long, and often tortuous, process of accommodating the conflicting interests of the various parties in Alaska, among which are the Natives, the state and the federal government. The state and Natives have brought suit in response to the presidential proclamations. In particular, the Bristol Bay Native Corporation has challenged the validity of Becharof and Katmai National Monuments.


The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

(emphasis added.)


See note 57, infra. Congress froze 80 million acres of land in Alaska in order to protect it from development. Congress then gave itself until December 18, 1978 to decide whether to include any or all of the 80 million acres of land in the national parks system.


For purposes of this article the term “Natives” includes all Aleuts, Eskimos and Indians living in the State of Alaska. This use of the term parallels its use in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 (1976). See text at notes 54-71, infra.


Bristol Bay, supra note 19.
This article will discuss the legality of the President's actions in creating the national monuments, focusing, in particular, on *Bristol Bay Native Corporation v. Carter.* The President's actions will be analyzed to see if they conform with the Antiquities Act. In addition, other legislation such as the Alaskan Statehood Act (hereinafter the Statehood Act) and the Alaska Native Claims Settlement Act (hereinafter the Settlement Act) will be examined to see if there has been an implied revocation of the President's authority under the Antiquities Act.

II. LEGISLATIVE HISTORY OF ALASKA

The United States purchased the Territory of Alaska from Russia on March 20, 1867. The price for the 375 million acres was $7.2 million and amounted to less than two cents an acre. The treaty with Russia conveyed to the United States title to all vacant lands, public lands and all lands used by the aboriginal tribes. Unlike land owned by the white population, which remained in private ownership, the land used by the Natives was not regarded as individually owned property, and the United States thus took dominion over the land. Since the United States held title to the land, it retained the right to adopt any laws and regulations with respect to the Natives' land.

A. Organic Act of 1884

After the treaty with Russia was signed in 1867, the Territory of Alaska was ignored by the rest of the country. Sarcastically referred to as "Seward's folly" and "Seward's icebox," after Secretary of State Seward who engineered the purchase, Americans regarded Alaska a frozen wasteland with little or no value. In fact, it was not until seventeen years after Alaska was purchased that a territorial government was established. Prior to that time, there was no civil government in Alaska, no courts, no law. Only gradually did Con-
gress realize that legislation would be needed to facilitate the settlement of Alaska. The first issue to resolve was necessarily the question of Native rights. Instead of creating reservations — the favored solution in the rest of the country — Congress passed the Organic Act of 1884.\textsuperscript{29} Under the provisions of the Act, the Natives were given a qualified right to possession of their aboriginal lands. Their rights to the land took precedence over all except the federal government. However, Congress reserved until a later date the question of how the Natives could acquire actual title to the land.\textsuperscript{30} As a result, the Natives had no conveyable interest in their lands and were completely dependent on the United States for their right to continuing use and occupation. They had a right to possess the land, subject to total dispossession by the federal government.\textsuperscript{31} They were, in effect, tenants at will.\textsuperscript{32} As a result, the United States could use the land as it wished.

The Natives' status was confirmed by the Supreme Court in 1955.\textsuperscript{33} In the early 1950's, the Tee-Hit-Ton Indians, an Alaskan tribe, sued the United States for the value of lumber which the government had taken from their lands without compensation. They claimed that the government's actions violated the just compensation clause of the Fifth Amendment.\textsuperscript{34} However, the Supreme Court rejected the Tee-Hit-Ton's claim.\textsuperscript{35} The Court reasoned that, under the Organic Act, the Indians only had a possessory interest in the land which the Congress could divest at any time. The Organic Act only protected the Indians against claims from third par-

\begin{itemize}
\item During [the territorial] period in Alaska no hopeful settler could acquire a title to land; no pioneer could clear a bit of the forested wilderness and count on the fruits of his toil, or build a log cabin with the assurance that it was his; no prospector could stake a mining claim with security for his enterprise; property could not be deeded or transferred; no will was valid; marriage could not be celebrated; no injured party could secure redress for grievances except through his own acts; crime could not be punished.

\textit{Id.}\textsuperscript{36}

\textsuperscript{29} Organic Act of 1884, ch. 53, 23 Stat. 24 (1884).

\textsuperscript{30} Id. at 24.

\textsuperscript{31} This status was subsequently confirmed by the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). See also note 33, infra.

\textsuperscript{32} A "tenant at will" has the right to occupy which may be terminated by either the owner or the tenant at his discretion. See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 83 (1962).

\textsuperscript{33} Tee-Hit-Ton Indians, 348 U.S. 272, 277 (1955).

\textsuperscript{34} U.S. CONST. Amend. V. The Fifth Amendment reads in part: "nor shall private property be taken for public use without just compensation."

\textsuperscript{35} Tee-Hit-Ton Indians, 348 U.S. 272, 277 (1955).
\end{itemize}
ties but not against the sovereign.35

Moreover, while the Organic Act alleviated many administrative and legal problems, it did nothing to help non-native settlers obtain title to land in Alaska. It was not until 1898 that Congress extended the Homestead Act37 to Alaska, which allowed settlers to acquire title to their land, and which in turn fostered immigration to the state. Gold was discovered in 1899, and soon other resources such as timber and fish were being exploited.38 As the great wealth of the land was discovered, there resulted a growing interest in Alaska.39

Consequently, there was an increase in the population. Yet long after Alaska was no longer regarded as "Seward's folly," Congress continued in its policy of inaction.40 In every congressional session from 1945 to 1957, statehood bills for Alaska were introduced and

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35 It is well settled that in all the States of the Union, the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty" as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligations to compensate the Indians.

Id. at 279.

37 Alaskan Homestead Act, ch. 299, 30 Stat. 409 (1898).


39 Id.

40 E. GRUENING, supra note 28, at 137. In 1912 Congress finally designated Alaska an organized territory and allowed it to send a delegate to Congress. Second Organic Act, Pub. L. No. 62-334, 37 Stat. 512 (1912). Congress waited 45 years to designate Alaska an organized territory even though the territory's population warranted a much earlier designation. The following table illustrates why (see table on following page):
defeated. When Alaska was finally admitted to the Union in 1958, the federal government still owned 99 percent of the land.

B. Alaskan Statehood Act

Under the Alaskan Statehood Act of 1958, the state was given a land grant of about 103 million acres. The Act gave the state twenty-five years to make its land selections out of any unoccupied federal lands in Alaska. However, any land held by Native groups was excluded from available lands in the selection pool. The land grant was the largest ever given to any state government entering the Union. The total of 103 million acres given to the state was larger than the total acreage of the State of California.

<table>
<thead>
<tr>
<th>State</th>
<th>Date of Organization</th>
<th>Census</th>
<th>White</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Feb. 24, 1863</td>
<td>1870</td>
<td>9,581</td>
<td>9,658</td>
</tr>
<tr>
<td>Dakota, N. &amp; S.</td>
<td>Mar. 2, 1861</td>
<td>1860</td>
<td>2,576</td>
<td>4,837</td>
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<tr>
<td>Idaho</td>
<td>Mar. 3, 1863</td>
<td>1870</td>
<td>10,618</td>
<td>14,999</td>
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<tr>
<td>Illinois</td>
<td>Feb. 3, 1809</td>
<td>1810</td>
<td>11,501</td>
<td>12,282</td>
</tr>
<tr>
<td>Indiana</td>
<td>May 7, 1800</td>
<td>1800</td>
<td>2,402</td>
<td>2,517</td>
</tr>
<tr>
<td>Michigan</td>
<td>Jan. 11, 1805</td>
<td>1810</td>
<td>4,618</td>
<td>4,762</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Mar. 2, 1849</td>
<td>1850</td>
<td>6,938</td>
<td>6,977</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Apr. 7, 1798</td>
<td>1800</td>
<td>4,446</td>
<td>7,600</td>
</tr>
<tr>
<td>Montana</td>
<td>May 26, 1864</td>
<td>1870</td>
<td>18,306</td>
<td>20,595</td>
</tr>
<tr>
<td>Nevada</td>
<td>Mar. 2, 1863</td>
<td>1860</td>
<td>6,812</td>
<td>6,857</td>
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<tr>
<td>Utah</td>
<td>Sept. 9, 1850</td>
<td>1850</td>
<td>11,330</td>
<td>11,380</td>
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<tr>
<td>Washington</td>
<td>Mar. 2, 1853</td>
<td>1860</td>
<td>11,138</td>
<td>11,594</td>
</tr>
<tr>
<td>Wyoming</td>
<td>July 18, 1868</td>
<td>1870</td>
<td>8,726</td>
<td>9,118</td>
</tr>
<tr>
<td>Alaska</td>
<td></td>
<td>1896*</td>
<td>4,298</td>
<td>32,052</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>10,000</td>
<td>37,000</td>
</tr>
</tbody>
</table>

Source: H.R. REP. No. 1318, 54th Cong., 1st Sess. 751 (1896), reprinted in E. Gruneng, supra note 28, at 137. The House Committee on Territories used this table as evidence that Alaska was long-overdue for organized territory status. For further evidence of the federal government’s failure to respond to Alaska’s problems, see generally, E. Grunning, supra note 28.


**Id. § 6(b). The state was also given land in and around the city of Anchorage.

**Id. The time period was extended to fifty years in 1966. Act of November 2, 1966, Pub. L. No. 89-702, 80 Stat. 1098.


However, the Act did not address the basic problem of unclear ownership of Native lands. Under the Act, the status of the Native claims remained unchanged. The Natives still enjoyed the right to possess aboriginal lands. As a result, they could claim possession to literally tens of millions of acres. Unfortunately, this issue was particularly acute since any selections made by the state were subject to the possessory claims of the Natives. Similarly any lands leased from the United States government were subject to the same restrictions. Only Congress had the power to abolish the Native claims and any act by the other branches of the federal government which diminished these rights would violate the Organic Act of 1884 as well as the Statehood Act. At first this did not pose a serious problem, but as Indians everywhere were becoming more conscious and assertive of their rights, Alaskan Natives started bringing lawsuits, challenging the federal government's leasing of Native land and approval of state selections under the Statehood Act.

C. Alaska Native Claims Settlement Act.

To address the problems of conflicting Native and state claims to...
the land, Congress enacted the Alaska Native Claims Settlement Act in 1971.\textsuperscript{54} The legislation had two main objectives. First, the Act attempted to provide "a fair and just settlement of claims by Natives and Native groups."\textsuperscript{55} Second, Congress wanted to clear the cloud on the title of all Alaskan lands by extinguishing Native claims based on aboriginal title.\textsuperscript{56}

Under the terms of the Act, the State of Alaska was divided into twelve geographic regions, each designed to include Native groups with a common heritage and interests.\textsuperscript{57} Regional corporations were established to administer the Native holdings in each of the regions.\textsuperscript{58} The specific by-laws of the corporations were left to the Natives themselves, subject to the approval of the Secretary of the Interior.\textsuperscript{59} Each regional corporation was subdivided into village corporations which were business organizations established in each village in order to manage the village assets.\textsuperscript{60} Congress mandated that both corporations be governed by a board of directors, elected by the shareholders.\textsuperscript{61} The Act also provided that all Natives over age eighteen be shareholders and only they were to be eligible for board membership.\textsuperscript{62}

In return for relinquishing their claims, the federal government gave the Natives 40 million acres of land.\textsuperscript{63} The land was allocated between the regional and village corporations. The title to the surface estate\textsuperscript{64} of 22 million acres in the immediate vicinity of the villages was given to the village corporations,\textsuperscript{65} while the regional corporations took title to the subsurface estate.\textsuperscript{66} The remaining 18 million acres were conveyed in fee simple absolute\textsuperscript{67} to the regional

\textsuperscript{55} Id. § 1601(a).
\textsuperscript{56} This concern was evidenced in the House debates. See note 48, supra.
\textsuperscript{57} 43 U.S.C. § 1606(a) (1976).
\textsuperscript{58} Id.
\textsuperscript{59} Id. § 1606(a).
\textsuperscript{60} Id. § 1607.
\textsuperscript{61} Id. § 1606(f).
\textsuperscript{62} Id.
\textsuperscript{63} Id. § 1611.
\textsuperscript{64} Title to the surface estate indicates that the owner is entitled to the use and enjoyment of the top soil of the land while mineral rights below the land are held by another owner. BLACK'S LAW DICTIONARY 1611 (4th ed. 1968).
\textsuperscript{66} Id. § 1611(b).
\textsuperscript{67} "Fee simple absolute" means that the owner of the property has total and unconditional
In addition to the 40 million acres, Congress authorized the payment of $462 million by the federal government over a period of eleven years as well as $500 million by the state from royalty fees paid to it by the oil companies.8 Under the Act, the funds were to be divided almost equally between the regional corporations and their village corporations for investments.7 The village corporations were to invest the money according to plans approved by their respective regional corporation.71 However, the regional corporation was to distribute at least 10 percent of its payments directly to the shareholders.72

The Settlement Act also made provision for the Alaskan wilderness lands. In the Act, Congress mandated a ninety day freeze on all appropriations of federal land beginning December 18, 1971 whether by the state, the federal government or the regional corporations.73 Following the freeze, the Secretary of the Interior was authorized to withdraw within nine months up to eighty million acres to be added to the national parks system.74 All other lands were open to appropriation. The Secretary then had one year to recommend the precise plans for the withdrawn lands.75 Congress then gave itself five years to act on the Secretary's recommendations,76 which period ended on December 18, 1978.

To assist the Secretary in his selections, Congress established a Joint Federal-State Land Use Planning Commission77 consisting of ten members: five appointed by the Governor of Alaska, at least one of whom had to be a Native;78 four members appointed by the Secretary of the Interior; and one by the President with the advice and consent of the Senate.79

ownership of both the surface and subsurface estates. BLACK'S LAW DICTIONARY 742 (4th ed. 1968).

81 Id. § 1605.
81 Id. § 1606(j).
81 Id.
82 Id.
83 Id. § 1616(d).
84 Id. § 1616(d)(2)(B).
85 Id. § 1616(d)(2)(C).
86 Id. § 1616(d)(2)(D).
87 Id. § 1616(a).
88 Id.
89 Id.
The Planning Commission assisted the Secretary in his selections, and also assisted the state and Native groups in theirs. By establishing a single advisory committee to balance federal, state and Native interests, Congress hoped to achieve a coherent and comprehensive land development plan for the State of Alaska.

Once the recommendations were made to the Secretary, he reviewed them and then made his final recommendations to the Congress for its consideration. Realizing that the existence of national parks, forests and refuges might create problems for the implementation of the Settlement Act because many Native villages were contained in the remaining unspoiled areas of Alaska, Congress provided for alternative selections by the regional corporations if the subsurface estates in which they were interested were withdrawn by the Secretary.

Such restrictions did not apply to the village corporations. Congress was especially concerned that the Native villager's life-style should remain intact. For example, if a village corporation chose land in a wildlife refuge, the Secretary was instructed to deed the surface estate to the village corporation and replace the land taken from the refuge. Similar provisions were made for land taken from parks and forests. The only proviso was that the village corpora-
tion's use of the land be consistent with the rules and regulations of a refuge.66

Acting pursuant to the Settlement Act, Secretary of the Interior Rogers Morton withdrew 86 million acres with recommendations to create various parks, forests and refuges.67 However, despite repeated attempts, a final bill failed to pass Congress by the December 18, 1978 deadline. Congressional protection of the withdrawn land was due to expire, and the land would have been open to full exploitation. President Carter stepped in to prevent this from happening, creating the national monuments on December 1, before the lands were available for selection.

D. The American Antiquities Preservation Act of 1906

When President Carter created the national monuments in Alaska, he was acting under the authority given him by the American Antiquities Preservation Act.68 This legislation allows the president to withdraw areas of land anywhere in the United States from development if he considers them of historic or scientific interest.69

Typically, national monuments have been created to preserve special objects of environmental value.70 Thus, in each of the Alaskan proclamations, the President was careful to list several reasons why these particular lands were being set aside.71 For example, Becharof National Monument72 was created because, first, it contains "one of Alaska's most recent volcanically active areas."73 Second, the park contains a salmon spawning area, Becharof Lake, which attracts large groups of the Alaskan brown bear.74 Finally, the area contains the "unique subsistence culture of the local residents"

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66 Id. § 1621(g).
69 See note 2, supra.
70 Id. For example, recently created monuments include Congaree Swamp National Monument in South Carolina, Pub. L. No. 94-545, 90 Stat. 2517 (1976), and John Day Fossil Beds National Monument in Oregon, Pub. L. No. 93-486, 88 Stat. 1461 (1974). (Even though the monuments were created by presidential proclamations, the legislation was necessary for Congress to provide appropriations for the monuments).
71 See note 89, supra.
72 This would help the new monuments withstand judicial scrutiny if they were challenged in court.
75 Id.
whose continued existence "depends on subsistence hunting."

Similarly, Katmai National Monument has been set aside because of large brown bear and red salmon populations and for the preservation of the local subsistence culture. The new Alaskan monuments are in many ways typical of recently created monuments.

III. PENDING LITIGATION: Bristol Bay Native Corp. v. Carter

President Carter's decision to create the new national monuments has caused an uproar in Alaska. Angry at the federal government's intrusion into "their state," Alaskan residents have responded with a flood of criticism and a flurry of lawsuits. The outpouring of opposition is symptomatic of a long series of confrontations between the state and the federal government.

Conflict was unavoidable. For most of Alaska's history, the federal government has ignored the state. Congress has enacted legislation to meet the needs of the people only after problems have become totally unmanageable. Only with the discovery of oil on the North Slope and the emergence of the environmental movement has

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95 Id.
97 See note 89, supra.
98 "[S]ome Alaskans opposed to President Carter's national monuments proclamation in the state have held demonstrations, undertaken civil disobedience protests in the newly created national monuments, and burned the President in effigy. They are gathering signatures on petitions requesting Alaska's secession from the U.S., and are continuing the fight in the courts to halt the President's national monuments proclamation." 9 ENVIR. REP. 1744 (BNA) (1979).
99 Anticipating the creation of the national monuments, the State of Alaska filed suit in late October, 1978 seeking preliminary and permanent injunctions preventing President Carter from creating the national monuments. Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978). The complaint alleged, inter alia, that a supplemental environmental impact statement issued on October 25, 1978 by the Department of the Interior, prior to the President's actions, violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976). Whenever a federal agency undertakes any major action, it must publish a statement explaining the impact, if any, of the action on the environment. The public typically has ninety days to respond to the statement. The statement filed by the Department of the Interior when the monuments were proposed was a supplement to the original impact statement filed by Secretary of the Interior Rogers Morton on December 17, 1973, when he recommended to Congress which national parks should be created. In particular, the state alleged that President Carter violated NEPA by closing the comment period on the impact statement 45 days after October 30, 1978 instead of the usual ninety days. Alaska v. Carter, supra. The court denied a preliminary injunction on the grounds that NEPA does not apply to the President because he is not an "agency" within the meaning of the Act. Id.
100 See text at notes 24-42.
Washington focused its attention on the area.\textsuperscript{101} As a result, many Alaskans resent the intrusion of the federal government into their lives at this late date.\textsuperscript{102} The recent change of attitudes on the part of the federal government is particularly irritating to newcomers to Alaska who have immigrated to the state in order to escape "civilization" and the accompanying big government.\textsuperscript{103} To them, Alaska is a vast frontier where a man's fortune is there for the making. Such a dream is shattered by government regulations which prevent or restrict logging, mining, oil exploration, prospecting or hunting.\textsuperscript{104} As a result, they have no patience with environmentalists or environmental concerns.\textsuperscript{105} Starting with the struggle over the Alaskan pipeline,\textsuperscript{106} the Alaskans have engaged in an angry struggle with environmental groups and the federal government.\textsuperscript{107} So fierce has been the struggle that a small but growing number of Alaskans have been arguing for secession from the Union.\textsuperscript{108} Furthermore, the Alaskan legislature has taken steps to restrict the further

\textsuperscript{101} J. McFee, \emph{supra} note 6, at 233.

\textsuperscript{102} Id. at 279. McFee states this frustration best when describing the reaction of an Alaskan-born man to recent federal actions in Alaska:

With his infant son, Jimmy, and his wife, Andrea, ... Stanley lives in a new cabin on his parents' property. He would have liked to build somewhere else, off in the hills or out near the Yukon, in an unneighbored place he could call his own, but, in the vastness of all the surrounding country, land was not available. That, for Stanley, has been a bewildering disappointment. When he was born, in 1950, the country was open and free. Expectations were that when he grew up he could live where he pleased. Then Alaska became a state. Oil was discovered. Homesteading ended. In the great reapportionment of Alaskan land, the squares seemed to be moving as well as the checkers. Stanley, who had always been at ease with all aspects of this place and latitude, now found himself feeling more than uneasy. A government many thousands of miles away had "frozen" the land with printed words.

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 294-296.

\textsuperscript{105} Id.

\textsuperscript{106} See note 91, \emph{supra}, and J. McFee, \emph{supra} note 6, at 306:

The Alaskan Independence Party's candidate ... for governor was Joe Vogler, and his name appeared on the ballot with those of William Egan, the Democratic incumbent, and Jay Hammond, a Republican. In implication and influence, the results of Vogler's campaign were more sizeable than anyone might have guessed. All told, just under a hundred thousand votes were cast. The number by which Hammond defeated Egan was only two hundred and eighty-seven. Almost five thousand people voted for Joe Vogler and his declarations of independence.

\textsuperscript{107} Id.
immigration of outsiders to the state. With this “leave us alone” attitude, President Carter’s actions are viewed as another unwarranted intrusion into the internal affairs of the state.

Because of the federal government’s late-date intrusion, the new monuments have been attacked in the courts. The chief lawsuit involves the Bristol Bay Native Corporation, one of the regional corporations established by the Settlement Act. The complaint challenges the creation of two national monuments, Katmai and Becharof, on the ground that their creation has decreased the value of the Native’s adjoining land, rich in mineral deposits. The Natives contend that this diminution of value is in violation of the Alaska Native Claims Settlement Act. Furthermore, the proclamations are claimed to violate the Alaskan Statehood Act because of a similar diminution in value of state land, inasmuch as oil and gas production will be curtailed. Thus, the state’s ability to meet its royalty payments to the Natives will be in doubt. Finally, the plaintiff contends that the proclamations violate the Antiquities Act because the subject land areas of the proclamations do not contain objects of scientific or historic importance, nor are they confined to the smallest area necessary to preserve proper care and management as required by the Act. This suit is currently pending.

A. Claims Under the Antiquities Act

The Bristol Bay Native Corporation’s complaint alleges that Becharof and Katmai monuments violate the Antiquities Act. The Corporation maintains that when Congress passed the Antiquities Act, its intent was to empower the President to protect specific

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109 In 1978, the United States Supreme Court struck down an Alaskan statute that required all persons granted oil and gas leases, easements or right of way permits for oil and gas pipelines from the state to give hiring preference to Alaskan residents. Hicklin v. Orbeck, 437 U.S. 518 (1978). The law was prompted by anger at all the outsiders who were coming to Alaska to obtain high-paying work on the pipeline. Id.
110 See note 99, supra.
111 Bristol Bay Native Corp. v. Carter, No. 79-0355 (D.D.C., filed Feb. 6, 1978).
112 See text at notes 56-63, supra.
113 Bristol Bay, supra note 111, at 10.
115 Telephone conversation with George Miron, plaintiff’s attorney (March, 1979).
116 The venue of the litigation has been changed to the District Court of Alaska. Interview with Donald Barry, Attorney, Department of the Interior, in Boston (October 14, 1979).
objects of historic value, such as Indian burial grounds or prehistoric Indian caves but not to authorize creation of vast national parks. The Corporation asserts that neither Becharof nor Katmai National Monuments contain objects of antiquity such as Indian remains and that, if they do, the monuments are not limited to the smallest area necessary for proper management.117

The Corporation bases its assertions of illegality on the legislative history of the Antiquities Act. Plaintiff contends that it was not the intention of the Congress to allow the president to set aside vast tracts of wilderness as national monuments. In support, the Corporation relies upon the House Report of the Committee of Public Lands which recommended passage of the bill, stating:

There are scattered throughout the Southwest [United States] quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.118

The Committee report contained a list of possible monuments,119 including cliff dwellings, prehistoric towers, communal houses, shrines and burial grounds. While the list is not all-inclusive,120 it does show that Congress was interested in preserving small, discrete objects of historic value, rather than large tracts of land whose primary value is to preserve wilderness areas.

The same concern to limit the scope of the Antiquities Act to small areas of specific historic importance was echoed in the Senate Report.121 Again, the emphasis of the report was on prehistoric ruins:

[I]n view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums and colleges, etc., your committee are [sic] of the opinion that their preservation is of great importance.122

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117 See note 115, supra.
119 Id.
120 A rule of statutory construction is that when the legislature lists possible applications of the law, the list is not exclusive unless the legislature explicitly states so. 2A C. Sands, Statutes and Statutory Construction § 47.18 (4th ed. 1972).
122 Id.
Ambiguity regarding the intent of the bill was clarified during debate in the House of Representatives. During the debate, Representative Stephens of Texas wanted to ensure that the effect of the bill would be limited:

Mr. Stephens: I think the bill would be preferable if it covered a particular spot and did not cover the entire public domain.

Mr. Lucy: There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to preserve them.

Mr. Stephens: Would [the amount of land] be anything like the forest reserve bill, by which seventy or eighty millions of acres of land in the United States have been tied up?

Mr. Lucy: Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserved the forest and the water courses.\textsuperscript{123}

Based on the House debate and the committee reports, the Corporation is able to allege that the type of withdrawals made by President Carter are not within the intended scope of the Act.

\textbf{B. Claims Under the Statehood Act}

Even if the monuments comply with the provisions of the Antiquities Act, the Corporation believes that they are still illegal. The Natives contend that the new monuments frustrate the workings of the Statehood and Settlement Acts.\textsuperscript{124} Since these laws were recently enacted and are specific Alaskan legislation, while the Antiquities Act is an older statute which is applicable to the entire nation, the claim is made that the Alaskan Acts should control as they more nearly reflect the desires of Congress in the area.

Specifically, the Bristol Bay Native Corporation alleges that the President has violated the Statehood Act\textsuperscript{125} by reducing the amount of land available to the state for its land selections. Under the Act, the state was given twenty-five years\textsuperscript{126} to select 103 million acres as a land grant.\textsuperscript{127} By reducing the selection pool by millions of acres,

\textsuperscript{123} Mr. Lacy was chairman of the Public Lands Committee which reported the bill to the full House. 40 CONG. REC. 7888 (1906).

\textsuperscript{124} Bristol Bay, supra note 111, at 12.


\textsuperscript{126} Id. § 6(b). The period has been extended to fifty years.

\textsuperscript{127} Id.
the President has diminished the value of the state land grant. As a result, the state's royalty payments to the Natives under the Settlement Act will suffer. If the President's actions impermissibly interfere with the Statehood Act then, plaintiff argues, the general statute must give way to specific legislative authority, namely the Statehood Act.

C. Claims Under the Native Claims Settlement Act

The Bristol Bay Native Corporation also alleges that the new national monuments violate the Settlement Act, in that they have made the Corporation's land selection worthless. As part of the Corporation's settlement grant the Native group selected land north of Becharof and Katmai Monuments because of its rich mineral deposits. However, the only way to transport the ore out of the mines is through Becharof and Katmai, to the southeast, since the area is surrounded by mountains to the north and west. The only alternative to sending the ore south through the monuments is to ship it west to ports on Bristol Bay which are frozen most of the year. Therefore, plaintiff alleges that the President has deprived it of its just settlement under the Act.

128 Bristol Bay, supra note 111, at 12. The Natives may have standing to raise the state's interest, because if the state is deprived of valuable land, it would be unable to pay the $500 million royalty fee. However, there is no evidence that the state would default because of the creation of the national monuments, or even that the state was interested in the same lands. Therefore, it is doubtful that the Corporation has third party standing to raise the state's claims. See, e.g., Simon v. Eastern Ky. Welfare Rights Organ., 426 U.S. 26 (1976).

129 For a similar case where the Supreme Court held that a general statute must give way to a more specific one, see Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976).

130 Id. The Natives' claim is not without threshold problems. In particular, the Bristol Bay Native Corporation is vulnerable to a 12(b)(6) motion under Federal Rules of Civil Procedure for failure to state a cause of action for which relief can be granted. By alleging that the national monuments violate the substantive provisions of the Settlement Act, the Natives must show that there is a legal obligation on the part of President Carter not to diminish the value of the Natives' land selections. Generally, absent zoning laws or restrictive covenants, there is no legal obligation on the part of an adjoining property owner to develop his property in a way most advantageous to his neighbor's interests. E. YOKLEY, ZONING LAW AND PRACTICE § 1-4 (4th ed. 1978). The Natives must show that there is a legal obligation for President Carter to act in the best interest of the Natives. Generally, the federal government stands in a trust relationship with Native people. In 1790, Congress passed the Indian Nonintercourse Act, 25 U.S.C. § 177 (1976), which required the federal government to protect Indian tribes from third parties. Similarly, the United States government has brought suit on behalf of Alaskan Natives against third parties. See, e.g., United States v. Atlantic Richfield Co., supra note 53. The suit was based on the obligations imposed on the federal government by the
The question, then, is whether the President’s actions unlawfully hamper the operation of the Settlement Act. In order to deal with the conflicting land claims of the state, Natives and federal government, Congress established an elaborate procedure to balance each faction’s demands. By unilaterally setting aside millions of acres of land, President Carter has threatened the balancing of interests which the legislation was meant to achieve.

Viewing the plaintiff’s claim in its most favorable light, one of the strongest arguments for overturning the proclamations is that, by acting before the expiration of the December 18 deadline Congress had set for itself, President Carter impermissibly interfered with the workings of the Settlement Act. By substituting his judgment for that of the Congress, President Carter has encroached upon the authority Congress had reserved for itself in this area and deprived the various factions in the state of their input in the decision-making process.

As stated, the Settlement Act, by means of the Joint Land Use Planning Commission, provided all parties to the Alaskan dispute (the state, the Natives, the Executive and the Congress) with a voice in the decision as to what lands were to be withdrawn. After this process was completed, Congress was to make the final determination. This fact was evidenced in the congressional debate in the Senate. Senator Bible, the drafter of the wilderness provisions of the Act, stated unequivocally that if land were to be withdrawn in Alaska, it was to be done by the Congress.

Therefore, if the president intervened during the effective life of

Organic Act of 1884; see text at note 29. However, this Act only applies to third parties and not the government itself. Tee-Hit-Ton, supra note 33. The Settlement Act specifies that the Act does not create a trust relationship between the federal government and the Natives. H.R. REP. No. 523, 92d Cong., 1st Sess. 7, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2192, 2199. See also, CONF. REP. No. 746, 92d Cong., 1st Sess. 6, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2247, 2253. The intent of the Congress was to abolish any trust relationship, with regard to land, which was created by the Organic Act, and put the Natives on their own footing. But see Rosenblatt, The Federal Trust Responsibility and Eskimo Whaling, 7 B.C. ENV. AFF. L. Rev. 505, 522 (1979) for a discussion of federal trust responsibilities to Alaskan Natives in other areas.

See text at note 72, supra.

See text at note 72, supra.

In the debate, Senator Stevens of Alaska asked whether “this amendment provides that if there is to be any additional land added to these [national parks] . . . it will be done by an act of Congress under this amendment.” Senator Bible responded: “The Senator is correct.” 117 CONG. REC. 38453 (1971).
the Settlement Act, that is, before December 18, 1978, his action would be contrary to the scheme of the Act. Congress had exclusive jurisdiction over the area. The Executive's power was to be limited to the Secretary's recommendations and the president's power to veto any bill from Congress. A presidential proclamation would thwart the congressional plan to ensure participation from all groups.

Since Congress reserved to itself exclusive power to deal with the Alaskan wilderness, there necessarily was a limitation of the President's power under the Antiquities Act. Since President Carter created the national monuments on December 1, 1978, he would be in violation of the Settlement Act because he acted before the December 18 deadline.

IV. ANALYSIS

Essentially, the Corporation contends that the President had no statutory authority to create the national monuments. In the first place, he acted outside the intended scope of the Antiquities Act. Secondly, if he had the requisite authority under the Antiquities Act, that power was withdrawn when Congress passed the Statehood and Settlement Acts.

A. The Antiquities Act

To support its contention that the monuments do not satisfy the provisions of the Antiquities Act, the plaintiff relies heavily on the congressional history of the Act. The Corporation points to House and Senate reports which, by their language, would seem to limit the scope of the Act to preserving small tracts of land which contain Indian relics and other prehistoric remains. Clearly, the reports and the debates indicate that the type of wilderness withdrawals made by President Carter are not within the intended scope of the Act. If these records were the only aid for construing the statute,

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135 See text at notes 72-83, supra.
136 See text at notes 117-123, supra.
137 See text at notes 117-123, supra.
138 In fact, the congressional history is in contradiction with the plain language of the Act which allows the president to withdraw land which contains "historic landmarks, historic or prehistoric structures, and other objects of historic or scientific value." 16 U.S.C. § 431 (1976) (emphasis added). The language itself indicates that the Act was not limited to prehistoric Indian structures.
a reviewing court might well declare that the President's actions are illegal since the Alaskan monuments do not contain objects of antiquity. Since legislative history is not binding on the courts, however, courts have not taken such a restrictive view while construing the Antiquities Act. 140

The Supreme Court has consistently given great deference to the president's power to issue presidential proclamations generally. 141 The Court has stated that when Congress has given the president discretion to act or not act in an area, any abuse of that discretion is a dispute between the executive and the legislature; and as such should not be reviewed by the Court. 142 When the president is exercising his discretionary power, such as whether to create a national monument, any challenge to the merits of his decision is notjusticiable. 143 As long as the president complies procedurally with the statute, the courts cannot review the underlying factual determination which prompted the President to issue the proclamations. 144

While the trend in the law has been to expand judicial review of executive actions, 145 in an area such as this, where the Bristol Bay Native Corporation is challenging the factual determination made by the President when he created the monuments, the plaintiff has to show that there is no factual basis whatsoever for the proclamations. Alternatively, the Corporation must show that the President's actions are not within the outer limits of his statutory authority. 146 In the case of the Antiquities Act, this has proven to be a very difficult burden for a plaintiff to meet. The Supreme Court has

139 2A C. SANDS, supra note 120, at § 48.02.
142 It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review . . . . As stated by Mr. Justice Story "whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."
143 Id.
144 Id.
145 See, e. g., Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971).
twice reviewed the validity of a national monument designation, and has upheld it on both occasions. Both cases centered around ecological sites rather than archeological objects. In *Cameron v. United States*, the plaintiff was challenging the validity of the Grand Canyon National Monument. Similarly, in a recent case, *Cappaert v. United States*, the subject of the lawsuit was Devil's Hole National Monument, a waterpool which is a remnant of the prehistoric Death Valley Lake System.

In *Cappaert*, the plaintiffs, relying on the legislative history of the Antiquities Act, argued that the Antiquities Act only applied to archeological or historic sites, and not to environmental ones. Since Devil's Hole was not an archeological site, the president had no authority to reserve the pool. However, as in *Cameron*, the Court did not take such a limited view of the Act. Chief Justice Burger, speaking for a unanimous Court, rejected this argument, stating that the monument had scientific value, and therefore came within the ambit of the Act. The Court concluded that a monument need only have scientific value, and need not contain historic or prehistoric structures as well.

The justification implicit in the Court's decision is that to adopt the restrictions on the president urged by the petitioner would run counter to the plain meaning of the statute. The language of the statute reads: "[t]he President [may] declare by public proclamation historic landmarks, historic or prehistoric structures, and other objects of historic or scientific interest ... [as] national monuments." If the purpose of the Act was only to protect objects of antiquity, then there would be no reason to add the words "of historic or scientific interest." The Act would convey the same meaning if it only reserved objects of historic or prehistoric interest, adding the words "scientific interest" would create a redundancy.

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148 *Cameron*, supra note 147, at 451.
149 *Cappaert*, supra note 147, at 129.
150 *Id.* at 141-142.
151 *Cameron*, supra note 147, at 456.
152 *Cappaert*, supra note 147, at 141-42.
153 *Id.*
154 The Supreme Court has stated, in the past, that when the meaning of the words in a statute is clear and unambiguous, the Court has no discretion but must give those words full effect. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
These words can add nothing to the meaning of "historic" or "prehistoric" which are not inherent in them already. Examining the Act, it is more logical to assume that the words "scientific interest" were intended to give an additional grant of authority from what was given with the words "historic or prehistoric."

Just as important as the liberal construction of the scope of the Act is the mode of analysis which the Court has adopted to determine whether the particular subject matter of the monument is an object of scientific interest. In Cameron, the Court in effect took judicial notice that the Grand Canyon was an object of scientific value and did not engage in any weighing of conflicting evidence. Indeed, the Court did not even consider the possibility that the Grand Canyon was not an object of scientific interest. In response, it can be said that with the Grand Canyon, there is no question but that it is of great scientific importance. Yet, in a considerably closer case, where the object of the monument was not of such extraordinary value as the Grand Canyon, the Supreme Court again engaged in very perfunctory analysis. Again, in Cappaert, the Court merely assumed that Devil's Hole was an object of scientific interest. Its discussion on the point was limited to one sentence: "The pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"

Applying this standard of review, it clearly would not be difficult for presidential actions to withstand judicial scrutiny. One is hard pressed to imagine anything in the environment which is not of scientific interest. Furthermore, since the Court is willing to assume that something is of scientific interest, the burden on the government is negligible. At most, to defend particular actions would require a showing that a significant body of the scientific community considers that the subject matter of the monument has some value. The monument need not even contain objects of scientific importance, only of interest.

However, Cameron and Cappaert can be distinguished from the Bristol Bay litigation. In the case of the Becharof and Katmai Monuments, there is nothing of peculiar scientific interest. Neither

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154 Cameron, supra note 147, at 456.
155 Id.
156 Cappaert, supra note 147, at 142.
place contains the only natural habitat of the salmon or brown bear, whereas the Grand Canyon is unique and Devil's Hole contains a fish found nowhere else in the world.\textsuperscript{181} The present case is also distinguishable because of the massive size of Katmai and Becharof; the reserves contain 1.37\textsuperscript{182} and 1.2\textsuperscript{183} million acres respectively. Indeed, some of the Alaskan monuments are as much as 8 million acres in size.\textsuperscript{184} In contrast, Devil's Hole Monument is comprised of forty acres.\textsuperscript{185} Therefore, it may be possible to demonstrate that the objects of importance could be preserved with smaller withdrawals.

However, while Becharof and Katmai are different from \textit{Cappaert} and \textit{Cameron} in degree, they are not different in kind. When dealing with the Grand Canyon, it is much easier to find the requisite scientific interest. However, the Antiquities Act speaks only of objects of scientific interest and is not limited to protecting objects of extraordinary value. The language in the Act is more far-reaching. While it is true that the Alaskan brown bear is found in several areas of the state\textsuperscript{188} and in several of the new monuments, withdrawing more than one of these habitats and designating it a national monument does not threaten the legality of all the monuments. If there could be only one such monument, how would a court determine which one to keep? Either the natural habitat of the brown bear is of scientific interest or it is not. The fact that there are other areas of equal value should be irrelevant.

However, the Supreme Court's analysis is not without problems. Because of the very broad definition that can be given to the words "scientific interest," Times Square could be considered of scientific interest. Almost anything in our modern-day society could come within the range of the Act. The Court could hold that designating Times Square a national monument was within the scope of the Act. Yet, it cannot completely ignore the congressional history. Moreover, if the Court wishes to adopt the plain-meaning rule, it must also

\textsuperscript{181} \textit{Cappaert}, supra note 147, at 132.
\textsuperscript{185} \textit{Cappaert}, supra note 147, at 129.
\textsuperscript{186} In fact, the animal is quite common throughout southern Alaska. J. McFEE, \textit{supra} note 6, at 57-59.
realize that the meaning of the word "scientific" has changed between 1906 and 1978 and that, perhaps, the 1906 meaning should define the limits of the Act. One possible definition for "scientific" might be that the word refers to objects of ecological value. This would closely parallel the meaning of "scientific" in 1906, before psychology and social sciences became part of the general consciousness. Thus any object of interest in nature or the physical world would be subject to the Act. This definition is also appropriate, since the typical national monument is concerned with preserving wilderness areas. Therefore, the President would have the authority, under this definition, to preserve historic structures and ecological areas. As a result, the Alaskan monuments would be legal since they contain objects of environmental value.

B. The Statehood Act

In addition to the claims involving the Antiquities Act, the Corporation alleges that the President has violated the Statehood Act as well. The Corporation fears that royalty payments which the state owes will not be paid because the land available for the state's land selections will not be valuable.

However, the presidential proclamations do not violate the Act. First, the Act allows the state to choose from all federal lands "which are vacant, unappropriated, and unreserved at the time of their selection." The very language of the statute contemplates a fluctuating, ever-changing selection pool. To limit the federal government's authority to manage its own land until the fifty years had elapsed would be unreasonable. By handcuffing the federal government in such a way, a court would be unfairly limiting the federal rights of ownership in disregard of clear statutory language to the contrary. The more reasonable interpretation would give the federal government the right to dispose of its land as it sees fit, up to the time that the land is selected by the State of Alaska. Otherwise, millions of acres of land would be held in a state of limbo, with the federal government unable to respond to any problems of the

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\(^{167}\) See note 89, supra. For a list of recently created national monuments, see 16 U.S.C.A. § 431 (1976).


\(^{169}\) See text at notes 125-129.

\(^{170}\) See note 45, supra.
land for fear of prejudicing the state's rights. Moreover, the proclamations themselves are careful not to prejudice any existing state rights. The national monuments are subject to prior valid selections by the Native corporations and the state.\footnote{See, e.g., Exec. Order No. 4611, 43 Fed. Reg. 57009 (1978).}

Nor is such a limitation of the president's power to reserve national monuments consistent with the intent of the Statehood Act. The legislation was not designed to permanently solve the problem of ownership of the Alaskan land.\footnote{H.R. REP. No. 624, 85th Cong., 2d Sess. 18, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 2933, 2951.} Instead, the Act was designed to give the state a land grant, with Congress reserving other questions regarding Alaskan land until a later date. For example, the Act maintained the status quo regarding Native rights to their land.\footnote{Id.} The Act also reserved a large tract of land for defense purposes.\footnote{Alaskan Statehood Act, § 10, Pub. L. No. 85-508, 72 Stat. 339 (1958).} Congress authorized the president to approve state selections in the area, after deciding how much land would be needed to satisfy defense needs.\footnote{Id.} Likewise, the creation of the national monuments, although not dealt with expressly in the Act, remained in the background, an ever-present limitation of the state's right to choose its land for its grant.

Therefore, the right of the president to operate under the Antiquities Act should not be so easily restricted.\footnote{C. SANDS, supra note 120, § 23.09. An implied revocation of a statute, here the Antiquities Act, is strongly disfavored. See text at note 185, infra.} To infer a repeal of the Antiquities Act, when there is nothing in the Statehood Act to suggest such a revocation, would be tantamount to judicial lawmaking. Such a limitation of the president's power should only be inferred when the president's exercise of this power would prevent the effective implementation of the Statehood Act.\footnote{See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).} However, there is no such conflict in the present situation. The withdrawal of 56 million acres does not reduce the selection pool so much that there is not enough land to satisfy the state's land grant, nor does it leave the state with only worthless land from which to select. Included in the selections already made by the state is the oil-rich North Slope of Alaska.\footnote{Judge, supra note 5, at 734. "What is not so clear is the value of the state-owned Prudhoe
any substantive rights guaranteed by the Statehood Act.

C. The Settlement Act

The Bristol Bay Native Corporation also alleges that the new national monuments violate the Settlement Act, in that they have made the Corporation's land selection worthless. The strongest argument plaintiff can make is that, by setting a December 18 deadline for itself and by establishing the Joint Land Use Planning Commission, Congress reserved exclusive jurisdiction for itself in the area. By acting before the December 18 deadline, President Carter illegally interfered with congressional jurisdiction and so violated the Settlement Act. Because Congress retained exclusive jurisdiction, there was an implied revocation of the President's power under the Antiquities Act.

However, it is difficult to prove that there has been an implied revocation. The Supreme Court has often stated that there is a "cardinal rule . . . that repeals by implication are not favored." Plaintiff must show either that the congressional intention to repeal was clear and manifest, or that there is a "clear repugnancy between the old and new [law]."

There is nothing in the legislative history of the Settlement Act which manifests a clear intent to repeal the Antiquities Act. Thus, plaintiff must show that there is a clear repugnance between the Settlement Act and the Antiquities Act; that President Carter's actions frustrate the scheme and spirit of the Settlement Act.

Viewing the Settlement Act as a whole, however, it is clear that President Carter's actions did not thwart the intent of the Act, but have instead actually fulfilled it. By creating the national monu-

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Bay field. When fully developed, each of its 150 wells will be capable of producing an average of 10,000 barrels a day, compared to the average production of a well in the Lower Forty-Eight of 11 barrels a day. The net profit to the oil companies is variously estimated at between three and eight million dollars a day." Id.

180 Bristol Bay, supra note 111, at 12.

181 See text at notes 130-135.


185 Id. (citing with approval Wood v. United States, 41 U.S. 343, 363 (1842)).

ments, the President has filled the void Congress created when it failed to enact a bill before the December 18, 1978 deadline. If Congress had acted, the result would have been no different. Because the Settlement Act contemplates a withdrawal of 80 million acres, a withdrawal of 56 million acres of land, in and of itself, does not frustrate the operation of the Act, particularly since President Carter acted within the time allotted in the Settlement Act for congressional action.187 Moreover, President Carter's selections are identical to those originally recommended by the Secretary of the Interior Rogers Morton, which were incorporated into the aborted H.R. 39.188

Even if Congress intended to reserve exclusive jurisdiction for itself in Alaska, there are mitigating factors in this case. The President’s actions came within seventeen days of the expiration of the Act and almost two months after Congress had adjourned for the year.189 Therefore, there was no chance that Congress would enact a law unless there was a special session of Congress. As a result, the President’s violation of the Settlement Act is a matter of form rather than substance. The President may have technically violated the Act, but in no significant way did he pre-empt congressional authority in the area.190

It is difficult to say whether a court would insist on the letter of the law, or would instead excuse any violation because of the mitigating circumstances surrounding the President's decision. Perhaps the wisest course would be to sustain the proclamation, even if there is an arguable violation of the Settlement Act, since there was no violation of the central purpose of the Settlement Act. In any event, Congress can revoke the creation of a national monument.191

188 In 1978 the House of Representatives passed a bill setting aside 95 million acres for national parks, refuges and forests, which included all the land set aside by President Carter. A similar provision was favorably reported out of committee in the Senate. However, the bill died in the conference committee.
189 9 ENVIR. REP. 1403 (BNA) (1979).
190 There is a question of whether the Natives can raise the December 1 issue. Arguably, the abrogation of congressional authority is a dispute between the legislature and the executive. As such, if the issue is to be raised, it must be done by Congress. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). Even then, the Court may refuse to adjudicate the dispute, as it may be a non-justiciable political question. Baker v. Carr, 369 U.S. 186 (1962). As such, the Natives would have no standing to raise the interest of Congress, even though they might be effected by the President's actions.
V. Conclusion

The history of Alaska has been one of federal neglect. The inhabitants of the state resent the intrusion of the federal government at this late date. Therefore, they have been quick to challenge the legality of President Carter's recent proclamations which set aside 56 million acres of land for environmental purposes.

In particular, the Bristol Bay Native Corporation has challenged the legality of two national monuments, Becharof and Katmai. First, they allege that President Carter acted outside the scope of the Antiquities Act when he created the monuments. However, the proclamations should be able to withstand the attack. Given the liberal view the Supreme Court has taken towards the president's power under the Antiquities Act in the past, the national monuments should be upheld.

In addition, the Natives contend that the monuments are illegal in that they violate the Statehood Act. It is clear, however, from the terms of the Act, that Congress wanted to maintain the president's flexibility to create monuments in Alaska.

More problematic is the question of whether the Settlement Act pre-empted the President's authority to create these monuments. By acting before the December 18, 1978 deadline, the President has infringed upon congressional authority. Yet since Congress had adjourned for the year, the violation is more technical than substantive. Therefore, the proclamations should not be overturned.

In late 1979, Congress tried to resolve the conflict. A resurrected version of H.R. 39 passed the House of Representatives on May 16, 1979.\(^2\) However, the bill has subsequently encountered difficulty in the Senate, where Senator Gravel of Alaska has attempted to block passage of the bill.\(^3\) The ultimate resolution of the conflict is uncertain.