HB

484

(7)

HOUSE COMMITTEE REPORT

Date Referred: February 18, 1992 FURTHER REFERRAL Finance

Date of Committee Action: 4-3-92

The JUDICIARY Committee considered: HB 484

HOUSE BILL NO. 484 EXXON TRUST EXPENDITURE LIMITATIONS

"An Act relating to the Exxon Valdez Oil Spill Trust and to natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state in settlement of the parties' claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill; to the approval of expenditures by the state officers acting as trustees of the trust established for natural resource damage recoveries under that Memorandum of Agreement and Consent Decree; and placing the state trustees of the Exxon Valdez settlement and certain persons to whom trust duties are delegated in the Alaska Executive Branch Ethics Act; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS HB 484 (JUD)

[ ] the same title

[✓] a new title

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[ ] no recommendations

[✓] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[✓] zero fiscal note Legislature (Budget & Audit)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Kevin (Pat) Pamell	✓	Mike Miller		✓	
H. Ebin	✓	Terry Martin		✓	
Mark Hanley	✓	Mark Hanley		X	

Mark Hanley

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 484

Revision Date: _____
Title: "An Act relating to the Exxon Valdez Oil Spill Trust..."
Sponsor: House Judiciary by Request
Requestor: House Judiciary Committee

Department Affected: Department of Law
BRU: Exxon Valdez Litigation
Component: Exxon Valdez Litigation

COMPONENT SERIAL 1175

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

The Attorney General's comments will be forthcoming after an opportunity to review the bill.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services
Phone: 465-3672
Date: March 5, 1992

Richard I. Pegues/FOR

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: March 5, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 484

Revision Date: _____ Department Affected: Legislature

Title: Exxon Valdez Oil Spill Trust BRU: Budget & Audit Committee

Component: Committee Expense

Sponsor: House Judiciary

Requestor: _____ COMPONENT SERIAL NO. [ ][ ][ ][ ]

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Randy S. Walker Phone: 465-3830

Division: Legislative Audit Date: 3-4-92

Approved by Commissioner: _____

Agency: _____ Date: _____

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

M E M O R A N D U M

DATE: March 4, 1992

TO: Memembers of the House Judiciary Committee

FROM: Representative Max F. Gruenberg Jr. MAX

RE: HB 484, "The Exxon Valdez Oil Spill Trust Bill"

I would very much appreciate your support for HB 484. As you recall, HB 484 introduced by the Judiciary Committee at the request of the Settlement Subcommittee.

HB 484 creates the Exxon Valdez Oil Spill Trust in statute. It requires state trustees and their designees to conform to the Alaska Open Meetings Act and the Alaska Executive Branch Ethics Act. It requires that state trustees ensure: (1) that all trust expenditures are submitted to the legislature for appropriation (2) that trust records are treated as public records, and (3) that trust expenditures that are not paid to state or federal agencies are disbursed pursuant to our state procurement code. It also contains findings of fact partially approving, and partially disapproving the final settlement.

The State Trustees should be bound by the state statutory ethical and procedural constraints applicable to executive branch officers establishing state policy and managing state assets.

The advice of legal counsel to the subcommittee was that the legislature should appropriate the state's interest in the settlement money to the trust when that money is paid by Exxon. This will place the state in the best position to defend itself against a state constitutional challenge to the structure of the Exxon spill settlement. The legislature should also require appropriation of all trust expenditures.

The U.S. Congress has already asserted its right to control the expenditure of the settlement money. Section 207 of Public Law 102-229, enacted December 12, 1991, requires that all proposed expenditures of the Exxon Valdez oil spill settlement money for FY'93 and thereafter must be submitted to Congress in the President's budget. Proposed expenditures of settlement funds prior to FY'93 must be submitted to the Appropriation Committees of the House and Senate at least 30 days before the money is to be spent.

Unless the Alaska State Legislature asserts its constitutional authority through the passage of HB 484, the legislature will have little or no control over how the Exxon Valdez oil spill settlement money is spent.

If you have any questions please call me or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB484.SUP

State of Alaska

House Majority Leader
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MEMORANDUM

Date: March 4, 1992

To: Representative Max Gruenberg
Chair, Settlement Subcommittee

From: Mark Handley MCH

Re: Sectional Analysis of HB 484, "The Exxon Valdez Oil Spill Trust Bill"

Section 1

This section sets out legislative findings regarding the Exxon Valdez oil spill settlement, and the settlement process. These findings also establish the need for the legislation recommended by the Settlement Subcommittee.

Section 2

AS 37.14.400 establishes the Exxon Valdez Oil Spill Trust and provides that it will be managed in accordance with the terms of the M.O.A.

AS 37.14.405 prohibits state trustees from approving trust expenditures unless the state has appropriated the states interest in the settlement money to the trust and the legislature has made an appropriation for that specific trust expenditure.

AS 37.14.410 provides that reimbursements for state spill-related-expenses incurred before 9/30/92 will be deposited in the general fund. This clarifies an ambiguity as to the disposition of these funds in the M.O.A.

AS 37.14.415 requires that the state trustees annually submit a proposed budget for the next fiscal year and an accounting of funds actually spent out of the preceding years budget.

AS 37.14.420 prohibits the state trustees from approving trust expenditures, unless those expenditures are paid to government agencies, or are made pursuant to our state procurement code.

AS 37.14.425 places records that are subject to the control of a state trustee under the jurisdiction of the state public records act.

AS 37.14.450 defines "state trustee" and "trust" for the purposes of section one of this bill.

Section 3

AS 24.20.206 amends the existing statutes that list the duties of L.B.& A. by adding the duty provide the trustees with assistance in preparing their budget reports.

Section 4

AS 37.05.147(5) adds income of the trust to the definition of "program receipts". This will provide for special accounting of these funds.

Section 5

AS 39.52.960(21)(C) subjects state trustees and their designees to the requirements of the Alaska Executive Branch Ethic Act.

Section 6
AS 44.62.310(g) subjects state trustees and their designees to the requirements of the Open Meetings Act.

Section 7
Provides for an immediate effective date.

HB484.SEC\MTH

State of Alaska

House Majority Leader
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HOUSE JUDICIARY
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HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
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(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

MEMORANDUM

DATE: February 17, 1992

TO: Dave Donley
Chair, House Judiciary Committee

FROM: Representative Max Gruenberg MAX

RE: HB 484, "The Exxon Valdez Oil Spill Trust Bill"

I would very much appreciate it if you would schedule HB 484 for a hearing as soon as it is possible.

HB 484 creates the Exxon Valdez Oil Spill Trust in statute. It requires state trustees and their designees to conform to the requirements of the Alaska Open Meetings Act and the Alaska Executive Branch Ethics Act. It requires that state trustees ensure that all trust expenditures are submitted to the legislature for appropriation, ensure that trust records are treated as public records, and that trust expenditures, not paid to state or federal agencies, are disbursed pursuant to our state procurement code.

HB 484 was introduced at the request of the House Judiciary Committee Settlement Subcommittee.

The subcommittee asked legislative legal counsel to review the settlement for potential conflicts with our state statutes and the Alaska State Constitution. The subcommittee also asked for suggestions regarding legislation that would help make the trust work within our existing constitutional framework and improve the state's position in the event of a legal challenge to the settlement.

The advice of legal counsel to the subcommittee was that in order to place the state in the best position to defend itself against a state constitutional challenge to the structure of the Exxon spill settlement, the legislature must appropriate the state's interest in the settlement money to the trust, when that money is paid by Exxon. The legislature should also require appropriation of all trust expenditures.

If you have any questions please call me or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB484.TXT

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
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MEMORANDUM

February 17, 1992

To: Representative Max Gruenberg
Chair, Settlement Subcommittee

From: Mark Handley

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Section 6
AS 44.62.310(g) subjects state trustees and their designees to the requirements of the Open Meetings Act.

Section 7
Provides for an immediate effective date.

7-LS1563\M
Chenoweth
2/8/92

HB 484

Draft

~~HOUSE~~ BILL NO. 1

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE GRUENBERG

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Exxon Valdez Oil Spill Trust and to natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state in settlement of the parties' claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill; to the approval of expenditures by the state officers acting as trustees of the trust established for natural resource damage recoveries under that Memorandum of Agreement and Consent Decree; and placing the state trustees of the Exxon Valdez settlement and certain persons to whom trust duties are delegated in the Alaska Executive Branch Ethics Act; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE DISPOSITION AND FINDINGS. The legislature

(1) approves the administration's efforts to avoid protracted court battles and escalating

attorney costs through settlement of the Exxon Valdez Oil Spill litigation;

(2) disapproves the process by which the second settlement proposal was accepted; specifically, the legislature disapproves of the failure of the governor to abide by the governor's commitment to submit the proposal to the legislature for approval, and the refusal of the parties to allow for public comment before the public's claims were irrevocably compromised;

(3) approves the acceptance of the second criminal plea agreement that resulted in an additional $50,000,000 in restitution for restoration of Prince William Sound;

(4) disapproves the governor's acceptance of the second civil settlement because, under the terms of the second settlement, there is delay in the payment schedule that reduced the value of that settlement; the second civil settlement is worth approximately $7,300,000 less than the civil settlement rejected by the House of Representatives;

(5) finds that there is a need for statutory change to eliminate the causes of the failure of process that occurred in the final settlement of the Exxon Valdez oil spill litigation, to incorporate the spirit of the recommendations of the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement that are encompassed in House Concurrent Resolution 29, and to cure the constitutional infirmities of this settlement.

* Sec. 2. AS 37.14 is amended by adding new sections to read:

ARTICLE 5. EXXON VALDEZ OIL SPILL TRUST.

Sec. 37.14.400. TRUST ESTABLISHED. The Exxon Valdez Oil Spill Trust is established. Subject to law, the trust shall be managed under the Memorandum of Agreement and Consent Decree entered into by the United States and the state on August 27, 1991, in settlement of claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill.

Sec. 37.14.405. APPROPRIATIONS REQUIRED. (a) The state trustee may not approve an expenditure from the trust unless

(1) trust money available for the proposed expenditure has been appropriated by the legislature to the trust; and

(2) the legislature has appropriated money from the trust for the proposed expenditure.

(b) The provisions of (a) of this section do not apply to amounts paid as reimbursements to the United States or the state as authorized by the Memorandum of Agreement and Consent

Decree for expenses that are

(1) related to the Exxon Valdez oil spill; and

(2) incurred by either government before September 30, 1991.

Sec. 37.14.410. REIMBURSED EXPENDITURES. Amounts received by the state as reimbursement for expenses related to the Exxon Valdez oil spill incurred by the state before September 30, 1991, shall be deposited in the general fund.

Sec. 37.14.415. BUDGET AND REPORTS. The state trustees shall

(1) submit to the governor and the legislature by February 1 each year a report that sets out, for each object or purpose of expenditure, the amounts approved for expenditure from the trust during the preceding fiscal year and the amounts actually expended during the preceding fiscal year; and

(2) prepare and submit, under AS 37.07, a budget for the next fiscal year setting out the trustees' determination of the amount required for that fiscal year for appropriation for

(A) the operating expenses of the trust; and

(B) the probable objects or purposes of expenditure and the anticipated amounts of expenditure of the trust as authorized by the Memorandum of Agreement and Consent Decree.

Sec. 37.14.420. PAYMENTS TO PERSONS OTHER THAN GOVERNMENTS. The state trustees may not approve the payment of an expenditure from the trust to a person other than the state or federal government unless the expenditure complies with the procurement procedures established by AS 36.30.

Sec. 37.14.425. PUBLIC RECORDS. For purposes of AS 09.25.120, records of the trust in the custody or subject to the control of state officers and agencies are public records.

Sec. 37.14.450. DEFINITIONS. In AS 37.14.400 - 37.14.450,

(1) "state trustee" means a state officer designated by the governor to serve as a co-trustee of the trust;

(2) "trust" means the trust established for natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state on August 27, 1991, in settlement of claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill.

* Sec. 3. AS 24.20.206 is amended to read:

Sec. 24.20.206. DUTIES. The Legislative Budget and Audit Committee shall

(1) report to the legislature its recommendations relating to the confirmation of appointees to the Board of Trustees of the Alaska Permanent Fund Corporation;

(2) annually review the long-range operating plans of all agencies of the state which perform lending or investment functions;

(3) review periodic reports from all agencies of the state which perform lending or investment functions;

(4) present a complete report of investment programs, plans, performance, and policies of all agencies of the state which perform lending or investment functions to the legislature within 30 days after the convening of each regular session;

(5) present to the legislature within 30 days after the convening of each regular session a review of the report of the governor under AS 37.07.020(d) with recommendations for needed legislation;

(6) in conjunction with the finance committee of each house recommend annually to the legislature the investment policy for the general fund surplus and for the income from the permanent fund;

(7) provide for an annual post audit and annual operational and performance evaluation of the Alaska Permanent Fund Corporation investments and investment programs;

(8) provide for an annual operational and performance evaluation of the Alaska Housing Finance Corporation and the Alaska Industrial Development and Export Authority; the performance evaluation shall include, but is not limited to, a comparison of the effect on various sectors of the economy by public and private lending, the effect on resident and nonresident employment, the effect on real wages, and the effect on state and local operating and capital budgets of the programs of the Alaska Housing Finance Corporation and the Alaska Industrial Development and Export Authority;

(9) provide assistance to the trustees of the trust established in AS 37.14.400 - 37.14.450 in carrying out their duties under AS 37.14.415.

* Sec. 4. AS 37.05.146 is amended to read:

Sec. 37.05.146. DEFINITION OF PROGRAM RECEIPTS. In AS 37.05.142 - 37.05.146 and AS 37.07.080, "program receipts" means fees, charges, income earned on assets, and other state money received by a state agency in connection with the performance of its functions; all

program receipts except the following are general fund program receipts:

(1) federal receipts;

(2) University of Alaska receipts (AS 14.40.491);

(3) individual, foundation, or corporation gifts, grants, or bequests that by their terms are restricted to a specific purpose;

(4) receipts of the following funds:

(A) highway working capital fund (AS 44.68.210);

(B) correctional industries fund (AS 33.32.020);

(C) loan funds;

(D) international airports revenue fund (AS 37.15.430);

(E) funds managed by the Alaska Aerospace Development Corporation (AS 14.40.821), the Alaska State Housing Authority (AS 18.55.020), the Alaska Housing Finance Corporation (AS 18.56.020), the Alaska Railroad Corporation (AS 42.40.010), the Municipal Bond Bank Authority (AS 44.85.020), or the Alaska Industrial Development and Export Authority (AS 44.88.020);

(F) fish and game fund (AS 16.05.100);

(G) school fund (AS 43.50.140);

(H) training and building fund (AS 23.20.130);

(I) retirement funds (AS 14.25, AS 22.25, AS 26.05.222, AS 39.35, and former AS 39.37);

(J) permanent fund (art. IX, sec. 15, Alaska Constitution);

(K) public school trust fund (AS 37.14.110);

(L) second injury fund (AS 23.30.040);

(M) fishermen's fund (AS 23.35.060);

(N) FICA administration fund (AS 39.30.050);

(O) mental health trust fund (AS 37.14.031);

(5) receipts of the trust established by AS 37.14.400 - 37.14.450.

* Sec. 5. AS 39.52.960(21) is amended to read:

(21) "public officer" or "officer" means

(A) a public employee; [AND]

(B) a member of a board or commission; **and**

(C) a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties; in this paragraph, "trust" has the meaning given in AS 37.14.450;

* Sec. 6. AS 44.62.310 is amended by adding a new subsection to read:

(g) Unless an exception is authorized by federal law, the provisions of this section and AS 44.62.312 apply to meetings of the state officers designated by the governor to act as trustees of the trust established by AS 37.14.400 - 37.14.450, and to meetings of persons to whom they have delegated any of their authority, if the meetings involve

(1) two or more of the state officers or persons for purposes of establishing a common state position for purposes of administration of the trust; or

(2) one or more of the state officers or persons and one or more of the individuals appointed as trustees by the President of the United States, or individuals to whom those trustees have delegated any of their authority, for purposes of exercising authority over the trust.

* Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

March 3, 1992

Rep. Dave Donley, Chair
House Judiciary Committee
P.O. Box V
Juneau, AK 99811

RE: ACE Support for HB 483, HB 484, and HB 486

Dear Rep. Donley:

The Alaska Center for the Environment (ACE) appreciates this opportunity to express our support for the above referenced legislation. It is essential that the legislature exert its full authority under the constitution to appropriate monies, and also to ensure that adequate public oversight occur in regards to how spill settlement funds are expended.

Therefore, **ACE supports HB 484 and HB 486.** These bills will help ensure that the legislature will retain its full constitutional authority to appropriate money from the Exxon Valdez oil spill settlement. There is widespread concern among Alaskans regarding the manner in which the Trustee Council will spend the settlement monies. For instance, despite overwhelming support from throughout the spill-impacted region for investing most of the settlement money in an aggressive program of habitat acquisition, the Trustee Council is dragging its feet while publicly expressing support for programs other than habitat acquisition. It is therefore important for the legislature to protect the public interest through full review and approval of restoration expenditures. In support of this oversight authority, we recommend that the legislature establish a citizen advisory committee to advise the legislature on questions regarding proposed expenditures.

ACE also supports HB 483, which would require court approval of, and opportunity for public review and comment on, future proposed settlements of public interest litigation. The inadequate Exxon Valdez settlement was finalized without the benefit of public review and comment, and this mistake should not be allowed to happen again. As can be seen from the high level of public interest and extensive testimony occurring in the Trustee Council proceedings, there is much to be gained by public involvement.

We appreciate the opportunity to comment on these bills.

Sincerely,

Alan Phipps

Alan Phipps
State Lands Specialist

Alaska State Legislature

House of Representatives
House Judiciary Committee
Settlement Subcommittee

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

SEVENTEENTH STATE LEGISLATURE

SECOND SESSION

FINAL REPORT

OF THE

SETTLEMENT SUBCOMMITTEE

FROM THE OFFICE
OF
THE HOUSE MAJORITY LEADER

FEBRUARY 1992

HOUSE JUDICIARY COMMITTEE
SETTLEMENT SUBCOMMITTEE

FINAL REPORT

FEBRUARY 1992

FROM THE OFFICE
OF
THE HOUSE MAJORITY LEADER
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
PHONE NUMBER: (907) 465-4986

SETTLEMENT SUBCOMMITTEE MEMBERS

REPRESENTATIVE MAX GRUENBERG, CHAIR
REPRESENTATIVE CLIFF DAVIDSON
REPRESENTATIVE DAVE DONLEY
REPRESENTATIVE GENE KUBINA
REPRESENTATIVE MIKE NAVARRE
REPRESENTATIVE GAIL PHILLIPS

SUBCOMMITTEE STAFF

MARK HANDLEY, STAFF ATTORNEY
PAT WILLIAMS, SUBCOMMITTEE SECRETARY

C O N T E N T S

Final Report of the Settlement Subcommittee

I

The Settlement Subcommittee heard testimony from Legislative Legal Counsel and an economist from Legislative Research. These witnesses had reviewed the settlement documents at the request of the subcommittee. They had prepared written comparisons of the proposed Exxon Valdez oil spill settlement that the Alaska House of Representatives rejected last session and the final settlement that Governor Hickel signed four months later.

The major points of their testimony were as follows:

1. The final criminal settlement provided an additional $50 million for restoration areas affected by the spill in Alaska.[1]

2. Although the final criminal settlement requires Exxon to pay an additional $25 million in nominal dollars,[2] Exxon realized substantial tax advantages because the final settlement was structured so that an additional $50 million is deductible from Exxon's state and federal tax liability.[3]

3. The final civil settlement was essentially the same as the proposal that the House rejected with the passage of HCR 29, except that it did not provide for legislative approval or public comment,[4] and the payment schedule was moved back,[5] resulting in a reduction in the present value of the civil settlement by about $7.3 million.[6]

4. The total value of the final civil and criminal settlements to the state and federal government is approximately $722.5 million in present value, after-tax-loss dollars. This is $ 5.9 million less than the value of the rejected settlement.[7]

5. The total cost to Exxon of final civil and criminal settlements is approximately $434.3 million in present value, after-tax dollars. This is $4 million less than the cost of the rejected settlement.[8]

6. The State of Alaska did better under the final settlement because more of it will be spent on restoration in Alaska.[9]

7. The federal government did worse under the final settlement because more of it was deductible, less of it goes to the federal treasury, and its present value is less.[10]

8. Exxon did better under the final settlement because more of it was deductible, and they have will more time to pay it off.[11]

II

The subcommittee asked legislative legal counsel to review the settlement for potential conflicts with our state statutes and the Alaska State Constitution. The subcommittee also asked for suggestions regarding legislation that would help make the trust work within our existing constitutional framework and improve the state's position in the event of a legal challenge to the settlement. A summary of the advice of legal counsel follows:

1. Allowing the trust to receive and hold settlement money, without a legislative appropriation of the State's interest in that settlement money to the trust, probably violates Article II, section 1, and Article IX, section 13 of the Alaska State Constitution. The case law in this area strongly indicates that the courts would find this to be an invalid circumvention of the legislature's powers of appropriation.[12]

2. The settlement provides for Exxon to make payments over a period of many fiscal years. A single continuing appropriation of the state's entire interest in the settlement would probably be held to violate our state constitutional prohibition against the dedication of funds under Article IX, section 7.[13]

3. State constitutional considerations require that all trust expenditures be submitted to the legislature for appropriation. State statutes and the state constitution require appropriations for trust expenditures that are to be spent by state agencies.[14]

4. In order to place the state in the best position to defend itself against a state constitutional challenge to the structure of the Exxon spill settlement, the legislature must appropriate the state's interest in the settlement money to the trust, when that money is paid by Exxon.[15] The legislature should also require appropriation of all trust expenditures.[16]

III

The Settlement Subcommittee solicited suggestions for settlement-related legislation and reviewed proposed and existing legislation. As a result of these deliberations the subcommittee recommends that the House Judiciary Committee introduce the following bills:

Draft #1 (7-LS1563\M) Sets out legislative findings regarding the Exxon Valdez settlement, and settlement process. It creates the Exxon Valdez Oil Spill Trust in statute. It requires state trustees and their designees to conform to the requirements of the Alaska Open Meetings Act and the Alaska Executive Branch Ethics Act. It requires that state trustees ensure that all trust expenditures are submitted to the legislature for appropriation, ensure that trust records are treated as public records, and that trust expenditures, not paid to state or federal agencies, are disbursed pursuant to our state procurement code.

Draft #2 (7-LS1675\A) appropriates the state's interest in the Exxon civil settlement money paid by Exxon in FY '92 and FY '93 to the Exxon Oil Spill Trust. This appropriation is contingent on the enactment of legislation containing the major substantive provisions of Draft #1.

Draft #3 (7-LS1605\M), "Settlement in the Sunshine", prohibits out-of-court settlements of public interest litigation, without court approval after a public comment period and a finding that the settlements are in the public interest Public interest litigation is defined as lawsuits brought by the state for damages to natural resources, if the value of each proposed settlement is over $10 million.

IV

The Settlement Subcommittee also recommends passage of the following bills:

CSHB 144(FIN)am, " An Act providing for legislative appropriation of the terms of certain proposed settlements of claims; prohibiting the payment of those terms without an express appropriation; and the requiring reports of settlements." (by Representative Ulmer)

This bill seeks to clarify the legislature's role in approving state settlements by providing when legislative appropriations are required. Testimony before the subcommittee has made it clear that the legislature needs to assert itself in this area. CSHB 144(FIN)am is presently in the Senate Judiciary Committee.

CSHB 287(FIN), " An Act disallowing under the Alaska Net Income Tax a portion of the deduction authorized by the Internal Revenue Code for certain oil and hazardous substance discharge related expenditures; and providing for a effective date." (by Representative Ellis)

This bill limits the deductibility under state tax law for certain expenses incurred as the result of the taxpayer's illegal discharge of oil or hazardous substances. Testimony and reports and legal opinions ordered by the subcommittee show that a large portion of Exxon's cleanup costs and settlement payments will be subsidized by state and federal taxpayers. CSHB 287(FIN) is presently in the House Rules Committee.

HB 411, " An Act making appropriations for restoration projects relating to the Exxon Valdez oil spill; and providing for an effective date." (by Representative Davidson)

This bill appropriates the $50 million that the state received as a result of Exxon's criminal plea for various restoration-related purposes. HB 411 is presently in the House Resources Committee.

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FOOTNOTES

1. See Committee Documents: #2 (page 2) #4 (page 1); and #8 (tape count 055)

2. See Committee Documents: #2 (page 2) and #8 (tape count 055)

3. See Committee Documents: #2 (page 2), #3 (pages 1, 2) and #10 (pages 1, 2)

4. See Committee Documents: #5 (page 1) and #8 (tape count 000)

5. See Committee Document #5 (page 2)

6. See Committee Document #2 (page 5). [Note: The $7.3 million figure was calculated by Milt Barker in response to a question by committee staff]

7. See Commiteee Documents: #1 (page 1, #2 (page 5) and #8 (tape count 055)

8. See Committee Documents: #2 (page 3, Table II) and #8 (tape count 055)

9. See Committee Documents: #2 (page 2), and #8 (tape count 055)

10. See Committee Documents: #1 (page 1), #2 (pages 3, 5), #8 (tape counts 000 and 055), and #10 (page 2)

11. See Committee Documents: #1 (page 1), #2 (page 3), #3 (pages 1, 2) #8 (tape count 055), and #10

12. See Committee Documents: #7 (pages 1 - 8) and #8 (tape count 000)

13. See Committee Documents: #7 (page 9), and #8 (tape count 000)

14. See Committee Document #7 (pages 8, 9)

15. See Committee Documents: #7 (page 9) and #8 (tape count 000)

16. See Committee Document #7 (pages 1 - 8) [Note: The issue of whether or not the State Consitution required legislative appropriation of all trust expenditures was put to Pamela Finley, Legislative Legal Counsel. She answered in the affirmative, indicating that non-appropriated trust expenditures are constitutionally problematic because these funds came in part from the federal government and in part from income from the state's interest in the trust.

A P P E N D I C E S

COMMITTEE DOCUMENTS

Committee Document #1: Executive Summary dated October 10, 1991

Committee Document #2: Memorandum to Max Gruenberg from Milt Barker dated October 10, 1991 re Valuation of Exxon Settlement

Committee Document #3: Memorandum to Milt Barker from John B. Gagaine dated October 9, 1991 re Deductibility of fines and restitution in Exxon Valdez criminal case

Committee Document #4: Memorandum to Max Gruenberg from Tamara Cook dated October 3, 1991 re Exxon Litigation; Plea Agreement Dated September 26, 1991 (Work Order No. 7-LS1044)

Committee Document #5: Memorandum to Max Gruenberg from Tamara Cook dated October 7, 1991 re Exxon Litigation; Agreement and Consent Decree signed September 24 and 25, 1991 (Work Order No. 7-LS1044)

Committee Document #6: Memorandum to Max Gruenberg from Pamela Finley dated August 29, 1991 re Exxon Litigation; Memorandum of Agreement dated 9/27/91 (Work Order No. 17-LS1044)

Committee Document #7: Memorandum to Senator Curt Menard from Pamela Finley dated January 8, 1992 re Appropriation Power and the Exxon-Valdez Trust Fund; Work Order No. 7-LS1749

Committee Document #8: Minutes of House Judiciary Exxon Settlement Subcommittee meeting dated October 21, 1991

Committee Document #9: Minutes of House Judiciary Exxon Settlement Subcommittee meeting dated December 9, 1991

Committee Document #10: Memorandum to Max Gruenberg from Jack Chenoweth dated December 10, 1991 re Deductibility of certain expenses from state income tax (Work Order No. 7-LS1650A)

Alaska State Legislature

Committee Document #1

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
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October 10, 1991

Valuation of Exxon Settlement

EXECUTIVE SUMMARY

This analysis compares the estimated cost to Exxon, and the value to the State of Alaska and the U.S. government, of the Exxon settlement approved October 8, 1991 (the "New Settlement") with the settlement rejected in March, 1991 (the "Old Settlement").

Taking into account inflation, the time value of money, and the effects of federal and state income taxes, the analysis found under the New Settlement, compared with the Old:

- the cost to Exxon is less in present value, even though Exxon pays more out-of-pocket
- the combined value to the state and federal governments is less in present value, although greater in actual dollars received
- the value to the State of Alaska is greater both in present value and actual dollars received
- the value to the federal government is less both in present value and actual dollars received

The lesser cost of the New Settlement is due to:

- its close similarity to the Old Settlement in dollar terms
- structuring a greater portion of the payments for purposes that are likely to be tax-deductible
- an approximate seven month delay in the payment of $340 million

Alaska State Legislature

Committee Document #2

Legislative Research Agency

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Juneau, AK 99811-3100
Phone: (907) 465-3991
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October 10, 1991

MEMORANDUM

TO: Representative Max Gruenberg

FROM: Milt Barker MB
Consultant

RE: **Valuation of Exxon Settlement**
Research Request 92.067

You requested a comparison of the estimated cost to Exxon, and the value to the State of Alaska and U.S. government, of the Exxon settlement rejected in March (the "Old Settlement" which would have been effective March 12, 1991) with the settlement approved October 8, 1991 (the "New Settlement").

This analysis takes into account inflation, the time value of money, and the effects of federal and state income taxes on the cost to Exxon and the value to the State and U.S.

The analysis does not reflect certain payments under the settlements that are not yet known. The exact dates of some payments are also uncertain.

Summary

In both nominal (actual out-of-pocket dollars) and present value terms, the State gains and the federal government loses under the New Settlement compared to the old. The combined value to the state and federal governments of the New Settlement is greater than the Old Settlement by $6.5 million in nominal terms, but $5.5 million to $5.9 million less than the Old Settlement in present value. The combined values include the loss of federal and state income tax revenue in both nominal and present value terms.

The combined government results is mirrored in the fact that Exxon pays more in nominal dollars under the New Settlement, but the actual cost to Exxon is less in present value.

One's view of the overall financial terms of the New Settlement relative to the Old Settlement might be shaped by the relative weights one gives as decision criteria to Exxon's burden under the settlement, to benefits received by the State, and to the combined benefits to the federal and all state governments.

Assumptions

The analysis uses discount rates of 11.28 percent and 8.16 percent per annum to determine respectively the present value of costs to Exxon and benefits to the governments. The effective marginal combined federal and state income tax rate is assumed to be 37 percent. These are assumptions contained in a March 19, 1991 Congressional Research Service memorandum which has been provided to you.

In this analysis, the 11.28 percent rate is used to calculate the present value of Exxon's costs because it represents the average pre-tax return on private capital. The 8.16 percent rate is used to calculate the present value of the governments' benefits because it is closer to the average return on short or medium-term investments of public funds like the State general fund. In these respects, these two discount rates represent the respective opportunity costs of Exxon and the governments.[1]

Based on an October 9, 1991 memorandum from the Division of Legal Services, which has been provided to you, it is assumed that the criminal fines are not deductible for purposes of federal and state income taxes, but that the restitution and civil payments are deductible.

Nominal Amounts

Under the New Settlement, the total out-of-pocket amount to be paid by Exxon, and received by the State and federal governments, has increased to $1,025 million from $1,000 million under the Old Settlement.

The amount that can be considered of benefit to the State has increased to $1,000 million from $950 million as the result of an increase of $50 million in restitution payments under the plea agreement (criminal settlement).[2] The amount of benefit solely to the federal government, namely, the criminal fine, is decreased from $50 million to $25 million.

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[1]Even if the lesser 8.16 percent discount rate is used for Exxon, the present value of the company's after-tax cost remains less under the New Settlement.

[2]It should be noted that this increased $50 million in restitution is technically paid to the U.S. government, though actually deposited in the trust. Under the New Settlement, a $50 million restitution payment to the State contained in the Old Settlement is maintained, but is placed in the trust also, rather than being paid to the State general fund.

TABLE I Exxon Settlements ($ Millions)			
	Fine	Restitution & Civil Payments	Total Exxon Payments
Old Settlement	$50	$950	$1,000
New Settlement	$25	$1,000	$1,025

Cost to Exxon

Table II displays the present value of the *after-tax* costs of the Old and New Settlements to Exxon. The present values are given for two different points in time--March 12, 1991, the date the Old Settlement was signed, and October 8, 1991, the date the New Settlement was approved by the court. To accurately compare the two settlements, their present values should be stated as of the same point in time to take account of the time value of money.

TABLE II Present Value of After-Tax Cost of Settlements to Exxon ($ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	$439.3	$434.3
10-8-91	$467.7	$462.9

If the present values are stated as of March 12, 1991, the cost to Exxon of the Old Settlement is $439.3 million and the cost of the New Settlement is $434.3 million. If the present values are stated as of October 8, 1991, the cost to Exxon of the Old Settlement is $467.7 million and the cost of the New Settlement is $462.9 million. No matter which date is chosen, the cost of the New Settlement to Exxon is less than the cost of the Old Settlement.

The lesser cost of the New Settlement arises from the following:

- the New Settlement is very close to the Old Settlement in dollar terms;
- a greater portion of Exxon's payments under the New Settlement are assumed to be tax-deductible; and,

- $340 million of payments occur approximately 7 months later under the New Settlement.

The real financial burden to Exxon of the New Settlement is less than the Old Settlement because the company pays approximately the same sum of money but pays it seven months later. Most people would prefer to pay a bill later rather than sooner, especially a $340 million one. It would allow them to earn interest on the amount if they had the money, or avoid paying interest if they had to borrow it. This factor is taken into account through the present value analysis.

Value to the State and Federal Governments

Tables III-V present, in a manner similar to Table II, the present value of Exxon's payments (before-tax) to the State and the federal governments.[3]

TABLE III
Present Value of
Settlements to State
($ Millions)

Value as of	Old Settlement	New Settlement
3-12-91	$678.4	$716.4
10-8-91	713.7	754.0

TABLE IV
Present Value of
Settlements to Federal Government
($ Millions)

Value as of	Old Settlement	New Settlement
3-12-91	$50.0	$6.1
10-8-91	52.3	6.5

[3]In Tables III-V, the criminal restitution payments and all civil payments are considered to be of benefit to the State. The criminal fine is considered to be of benefit only to the federal government.

TABLE V Present Value of Settlements to State and Federal Governments ($ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	$728.4	$722.5
10-8-91	766.0	760.5

As indicated in these tables, the State comes out ahead and the federal government loses ground under the New Settlement, in all cases. However, the combined value to the two governments is less under the New Settlement, as long as one values the two settlements at the same point in time.[4] This is the other side of the coin, i.e., the other side of Exxon's lesser cost for the New Settlement. Basically, the same factors are at work to produce lesser value to the combined governments as produced the lesser cost for Exxon--namely, only a slight increase in payments, deferral of payments, and greater tax deductions.

I hope this information is useful to you. If you have any questions or would like additional information, please contact this agency.

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[4] If the loss of $18.5 million of federal (and state) income tax revenue due to Exxon's deduction of $50 million of additional restitution payments were to be ignored, the combined value of the New Settlement to the governments would be greater than the Old Settlement.

DIVISION OF LEGAL SERVICES

Committee Document #3

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM October 9, 1991

SUBJECT: Deductibility of fines and restitution in Exxon Valdez criminal case

TO: Milt Barker

FROM: John B. Gaguine JBG
Legislative Counsel

You have asked about the deductibility, under federal income tax law, of the fine and restitution that Exxon will pay under the recently approved plea agreement. The fine is clearly not deductible under 26 U.S.C. 162(f), which precludes a deduction for "any fine or similar penalty paid to a government for violation of any law." The restitution probably is deductible, but this is not entirely clear.

The IRS regulations (attached) on fines and penalties, and the case law on the issue, make it clear that any fine imposed in connection with a criminal conviction is not deductible, because of 162(f). Indeed, even if the fine here were a civil fine under the Clean Water Act, it would probably not be deductible. True v. United States, 894 F.2d 1197 (10th Cir. 1990); Colt Industries, Inc. v. United States, 880 F.2d 1311 (Fed. Cir. 1989).

The restitution probably is deductible as a business expense under section 162, with subsection (f) not applicable. See the last sentence of regulation 1.162-21(b)(2) ("Compensatory damages . . . paid to a government do not constitute a fine or penalty"). However, at least one case has held that restitution was not deductible. In Waldman v. Commissioner, 88 T.C. 1384 (U.S. Tax Ct. 1987), affirmed on basis of Tax Court opinion, 850 F.2d 611 (9th Cir. 1988), the taxpayer, convicted of grand theft in a California court in connection with business fraud, was ordered to pay restitution as a condition of probation. The court found that the order was intended at least in part as a penalty, and that the "compensatory damages" clause of the regulation did not apply. The court also found that the restitution should be seen as paid to the government, even though it would be distributed to the taxpayer's victims.

My guess, however, would be that the restitution order in the Exxon case will be treated by the Internal Revenue Service as in the nature of compensatory damages,

rather than as an additional penalty. (Indeed, there may already be some tacit agreement between the federal government and Exxon about the tax consequences of the plea agreement.) The fact that the restitution moneys are specifically directed to go to restoration of the environment certainly seems to qualify them as compensatory damages. Moreover, the nature of Exxon's offenses (not involving fraud or dishonesty, unlike the Waldman case) would in my opinion make the IRS and the courts less likely to find that something labelled restitution is in fact an additional, nondeductible penalty.[1/] However, in light of Waldman, there is certainly the possibility that the restitution order might be found to be nondeductible, too.

Please feel free to contact me if I can be of further assistance.

JBG:lmb
91-273.lmb

cc: Pam Finley

Enclosure

[1/] See, Mason and Dixon Lines, Inc. v. United States, 708 F.2d 1043 (6th Cir. 1983), holding deductible "liquidated damages" that motor carrier was required by Virginia law to pay for operating overweight trucks (in addition to nondeductible fines).

activity does not constitute an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. If an organization pays or incurs expenses allocable to legislative activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph (appearances or communications with respect to legislation or proposed legislation of direct interest to the organization), on behalf of its members, the dues paid by a taxpayer are deductible to the extent used for such activities. Dues paid by a taxpayer will be considered to be used for such an activity, and thus deductible, although the legislation or proposed legislation involved is not of direct interest to the taxpayer, if, pursuant to the provisions of subparagraph (2)(ii)(b)(1) of this paragraph, the legislation or proposed legislation is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162–15.

(4) Limitations No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

[T.D. 6819, 30 FR 5581, April 20, 1965, as amended by T.D. 6996, 34 FR 835, Jan. 18, 1969]

§ 1.162–21 Fines and penalties.

(a) In general. No deduction shall be allowed under section 162(a) for any fine or similar penalty paid to—

(1) The government of the United States, a State, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico;

(2) The government of a foreign country; or

(3) A political subdivision of, or corporation or other entity serving as an agency or instrumentality of, any of the above.

(b) Definition. (1) For purposes of this section a fine or similar penalty includes an amount—

(i) Paid pursuant to conviction or a plea of guilty or *nolo contendere* for a crime (felony or misdemeanor) in a criminal proceeding;

(ii) Paid as a civil penalty imposed by Federal, State, or local law, including additions to tax and additional amounts and assessable penalties imposed by chapter 68 of the Internal Revenue Code of 1954;

(iii) Paid in settlement of the taxpayer's actual or potential liability for a fine or penalty (civil or criminal); or

(iv) Forfeited as collateral posted in connection with a proceeding which could result in imposition of such a fine or penalty.

(2) The amount of a fine or penalty does not include legal fees and related expenses paid or incurred in the defense of a prosecution or civil action arising from a violation of the law imposing the fine or civil penalty, nor court costs assessed against the taxpayer, or stenographic and printing charges. Compensatory damages (including damages under section 4A of the Clayton Act (15 U.S.C. 15a), as amended) paid to a government do not constitute a fine or penalty.

(c) Examples. The application of this section may be illustrated by the following examples:

Example (1). M Corp. was indicted under section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) for fixing and maintaining prices of certain electrical products. M Corp. was convicted and was fined $50,000. The United States sued M Corp. under section 4A of the Clayton Act (15 U.S.C. 15a) for $100,000, the amount of the actual damages resulting from the price fixing of which M Corp. was convicted. Pursuant to a final judgment entered in the civil action M Corp. paid the United States $100,000 in damages. Section 162(f) precludes M Corp. from deducting the fine of $50,000 as a trade or business expense. Section 162(f) does not preclude it from deducting the $100,000 paid to the United States as actual damages.

Example (2). N Corp. was found to have violated 33 U.S.C. 1321(b)(3) when a vessel it operated discharged oil in harmful quantities into the navigable waters of the United States. A civil penalty under 33 U.S.C. 1321(b)(6) of $5,000 was assessed against N Corp. with respect to the discharge. N Corp. paid $5,000 to the Coast Guard in payment of the civil penalty. Section 162(f) precludes N Corp. from deducting the $5,000 penalty.

Example (3). O Corp., a manufacturer of motor vehicles, was found to have violated 42 U.S.C. 1857f–2(a)(1) by selling a new motor vehicle which was not covered by the required certificate of conformity. Pursuant to 42 U.S.C. 1857f–4, O Corp. was required to pay, and did pay, a civil penalty of $10,000. In addition, pursuant to 42 U.S.C. 1857f–5a(c)(1), O Corp. was required to expend, and did expend, $500 in order to remedy the nonconformity of that motor vehicle. Section 162(f) precludes O Corp. from deducting the $10,000 penalty as a trade or business expense, but does not preclude it from deducting the $500 which it expended to remedy the nonconformity.

Example (4). P Corp. was the operator of a coal mine in ıich occurred a violation of a mandatory safety standard escribed by the Federal Coal Mine Health and Safety Act of 69 (30 U.S.C. 801 et seq.). Pursuant to 30 U.S.C. 819(a), a ·il penalty of $10,000 was assessed against P Corp., and P ırp. paid the penalty. Section 162(f) precludes P Corp. from ducting the $10,000 penalty.

Example (5). Q Corp., a common carrier engaged in inter- ıte commerce by railroad, hauled a railroad car which was t equipped with efficient hand brakes, in violation of 45 S.C. 11. Q Corp. was found to be liable for a penalty of 50 pursuant to 45 U.S.C. 13. Q Corp. paid that penalty. ction 162(f) precludes Q Corp. from deducting the $250 nalty.

Example (6). R Corp. owned and operated on the highways State X a truck weighing in excess of the amount permitted der the law of State X. R Corp. was found to have violated e law and was assessed a fine of $85 which it paid to State X. ction 162(f) precludes R Corp. from deducting the amount so id.

Example (7). S Corp. was found to have violated a law of ate Y which prohibited the emission into the air of particu- e matter in excess of a limit set forth in a regulation ɔmulgated under that law. The Environmental Quality ıarring Board of State Y assessed a fine of $500 against S ırp. The fine was payable to State Y, and S Corp. paid it. ction 162(f) precludes S Corp. from deducting the $500 fine.

Example (8). T Corp. was found by a magistrate of City Z ɔe operating in such city an apartment building which did t conform to a provision of the city housing code requiring erable fire escapes on apartment buildings of that type. ɔon the basis of th. magistrate's finding, T Corp. was re- ıired to pay, and did pay, a fine of $200 to City Z. Section 2(f) precludes T Corp. from deducting the $200 fine.

[T.D. 7345, 40 FR 7437, Feb. 20, 1975; 40 FR 8948, March 4, 1975, as amended by T.D. 7366, 40 FR 29290, July 11, 1975]

1.162–22 Treble damage payments under the antitrust laws.

(a) **In general.** In the case of a taxpayer who ter December 31, 1969, either is convicted in a ·minal action of a violation of the Federal anti- ıst laws or enters a plea of guilty or *nolo contendere* to an indictment or information charging ch a violation, and whose conviction or plea ɔes not occur in a new trial following an appeal a conviction on or before such date, no deduc- ɔn shall be allowed under section 162(a) for vo-thirds of any amount paid or incurred after)ecember 31, 1969, with respect to—

(1) Any judgment for damages entered against ıe taxpayer under section 4 of the Clayton Act 5 U.S.C. 15), as amended, on account of such ɔlation or any related violation of the Federal ntitrust laws, provided such related violation oc- ırred prior to the date of the final judgment of ɔch conviction, or

(2) Settlement of any action brought under such ɛction 4 on account of such violation or related ıolation.

For the purposes of this section, where a civil judgment has been entered or a settlement made with respect to a violation of the antitrust laws and a criminal proceeding is based upon the same violation, the criminal proceeding need not have been brought prior to the civil judgment or settlement. If, in his return for any taxable year, a taxpayer claims a deduction for an amount paid or incurred with respect to a judgment or settlement described in the first sentence of this paragraph and is subsequently convicted of a violation of the antitrust laws which makes a portion of such amount unallowable, then the taxpayer shall file an amended return for such taxable year on which the amount of the deduction is appropriately reduced. Attorney's fees, court costs, and other amounts paid or incurred in connection with a controversy under such section 4 which meet the requirements of section 162 are deductible under that section. For purposes of subparagraph (2) of this paragraph, the amount paid or incurred in settlement shall not include amounts attributable to the plaintiff's costs of suit and attorney's fees, to the extent that such costs or fees have actually been paid.

(b) **Conviction.** For purposes of paragraph (a) of this section, a taxpayer is convicted of a violation of the antitrust laws if a judgment of conviction (whether or not a final judgment) with respect to such violation has been entered against him, provided a subsequent final judgment of acquittal has not been entered or criminal prosecution with respect to such violation terminated without a final judgment of conviction. During the pendency of an appeal or other action directly contesting a judgment of conviction, the taxpayer should file a protective claim for credit or refund to avoid being barred by the period of limitations on credit or refund under section 6511.

(c) **Related violation.** For purposes of this section, a violation of the Federal antitrust laws is related to a subsequent violation if (1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction against the taxpayer, and (2) the taxpayer's actions which constituted the prior violation would have contravened such injunction if such injunction were applicable at the time of the prior violation.

(d) **Settlement following a dismissal of an action or amendment of the complaint.** For purposes of paragraph (a)(2) of this section, an amount may be considered as paid in settlement of an action even though the action is dismissed or otherwise dis-

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

Committee Document #4

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM October 3, 1991

SUBJECT: Exxon Litigation; Plea Agreement Dated September 26, 1991 (Work Order No. 7-LS1044)

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director TBC

You have asked me to identify the differences between the plea agreement in the Exxon litigation filed with the United States District Court on March 13, 1991 and rejected by the court and the new plea agreement dated September 26, 1991. The major differences between the two documents appear to be the following:

(1) the new plea agreement does not deal with Alyeska Pipeline Service Company at all whereas under the old agreement the United States agreed not to seek additional criminal, civil or administrative penalties against Alyeska;

(2) the total amount of the fine imposed and not remitted under the new plea agreement is $25 million, whereas under the old agreement that amount was $50 million;

(3) a new provision has been added to the effect that $12 million of the fine is imposed for violation of the Migratory Bird Treaty Act and this amount is to be deposited into a special fund and used by the United States to carry out approved wetlands conservation projects in the United States, Canada and Mexico;

(4) an additional restitution payment of $50 million is to be paid to the United States to be used for restoration projects within Alaska relating to the oil spill.

These are the specific differences between the two documents organized according to the numbering contained in the new plea agreement:

II. The name "E. Edward Bruce, Esq." is deleted from the list of attorneys representing Exxon Shipping;

II.C.2. This provision is entirely new and states, "The defendants, EXXON SHIPPING and EXXON, agree solely for the purpose of this plea agreement and for

no other purpose that there is a legal basis for the court to impose the payment agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes by the State of Alaska." The paragraph referred to deals with the restitutionary payments.

III.A. References contained in the old plea agreement to Alyeska Pipeline Service Company are deleted.

III.B. The reference contained in the old plea agreement to Alyeska Pipeline Service Company is deleted.

III.C. The total amount of fines imposed is changed from $100 million to $150 million;

l. with respect to EXXON SHIPPING, the fine is changed from $75 million to $125 million;

3. with respect to EXXON SHIPPING, the amount remitted is changed from $37.5 million to $105 million; with respect to EXXON, the amount remitted is changed from $12.5 million to $20 million; .

(b) the amount defendants have expended for clean up is designated to be $2.1 billion, rather than $2 billion;

(e)-(l) these are new facts added to the list of facts set out in the plea agreement as justification for the partial remission of the fines.

III.D. The amount required to discharge the criminal sanctions is reduced from $37.5 million to $20 million for EXXON SHIPPING and from $12.5 million to $5 million for EXXON.

III.E. This entirely new provision states: "The parties agree that $7 million of Exxon Shipping's fine and all of Exxon's $5 million fine be imposed for violation of the Migratory Bird Treaty Act. By operations of law, Title 16, United States Code, Section 4406(b), this fine is to be deposited into the North American Wetlands Conservation Fund to be used solely by the U.S. Department of the Interior to carry out approved wetlands conservation projects in the United States, Canada and Mexico."

IV.A. The amount of restitutionary payments is increased from $50 million to $100 million with the additional $50 million to be paid to the United States. The state still receives the original $50 million payment. Like the state, the United States must use this money for restoration projects within the State of Alaska relating to the oil spill.

IV.B. The restitutionary payments are to be under the control of each recipient. Originally the paragraph dealt only with the state, since only the state was to receive a restitutionary payment. (Note that under the new Memorandum and Consent Decree between the state and the federal government "all natural resource damage recoveries shall be placed in a joint trust." (VI.A.) The phrase is defined to include criminal restitution recoveries, which may be separately managed only upon agreement of the parties (Alaska and the U.S.) (II.G.). So, despite this plea agreement it appears the state and federal government will each place its $50 million restitutionary payment into the trust fund and not separately manage the money. Remember, Alaska is not a party to this plea agreement, so this provision in the plea agreement itself cannot serve as an agreement between the U.S. and Alaska to separately manage the recovery.)

IV.C. This entirely new provision states: "The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis for the Court to impose the payments agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes."

IV.D. An additional phrase is inserted to the effect that the parties agree that the restitutionary payments represent compensation for harm to the state.

TBC:lmb:gc
91-268.lmb

Enclosure

Committee Document #5

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM October 7, 1991

SUBJECT: Exxon Litigation; Agreement and Consent Decree signed September 24 and 25, 1991 (Work Order No. 7-LS1044)

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director TBC

You have asked me to identify differences between the Agreement and Consent Decree in the Exxon litigation under the new settlement and the Agreement and Consent Decree under the former proposed settlement. The major differences between the two documents result from the deletion from the new Agreement of the following provisions that were in paragraph 37 of the original Agreement:

(1) the Agreement was published in the Federal Register and a public comment period of 30 days after publication was provided for;

(2) the Agreement was submitted to the Alaska State Legislature for approval;

(3) the United States and the state were both granted authority to withdraw from the Agreement within 15 days after close of the public comment period if the comments disclosed facts making the Agreement inappropriate, improper or inadequate or if the legislature did not approve the Agreement.

These are the specific differences between the two documents organized according to the new Agreement and Consent Decree:

Introduction, 3rd paragraph. The dates the United States (March 13) and the state (March 15) each filed a complaint in United States District Court asserting civil claims have been inserted into the new Agreement. The old Agreement was drafted before those claims had been asserted. The following sentence from the old Agreement is omitted: "Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S.

Coast Guard, Coast Guard Maintenance and Logistics Command-Pacific at Alamenda, California under date of September 21, 1990."

5th paragraph. The original Agreement read: "Exxon represents that, during the period from the Oil Spill through the end of 1992, it expended in excess of $2 billion for clean-up activities. . ." The new Agreement is modified to read: "Exxon represents that, during the period from the oil spill through August, 1991, it expended in excess of $2.1 billion for clean-up activities. . ."

Definitions, 6(c) The reference to natural resources controlled by the United States "and/or" the State is modified to reflect control by the United States, the State, "or both the United States and the State."

(f) The Commissioner of Environmental Conservation and the Commissioner of Fish and Game is added to the other listed state trustee, the Attorney General. This change is probably not significant, since the original MOA included these three as state trustees.

(i) Two events are deleted from the list of events that must occur under the definition of "Final Approval" which originally read: "(1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired;" These events are no longer applicable, since all of the original paragraph 37 has been deleted.

Payment Terms, 8(b) The date for payment is changed from September 1, 1992 to December 1, 1992. The amount of the payment up to the $4,000,000 maximum, is reduced by Exxon's clean-up expenditures from January 1, 1991 through March 12, 1991 rather than from January 1, 1991 to the effective date of the agreement, and by expenditures after March 12, 1991 rather than after the effective date. A new provision reads: "provided that all such Expenditures shall be subject to audit by the Governments." (Note: March 12, 1991 was the date the original Agreement was signed.)

9. Reference to the events under the original paragraph 37 are deleted.

10. Items dealing with reimbursement to the governments for costs incurred prior to the effective date have been altered to refer to costs incurred prior to March 12, 1991. Under clause 5 after March 12, 1991, rather than after the effective date, the governments are permitted to receive reimbursement for costs to assess certain injuries. Injuries to "archaeological sites and artifacts" is added to the list. Item 6 is added and reads: "to reimburse the State for reasonable Litigation Costs incurred by it after March 12, 1991." The aggregate amount allocated for United States reimbursement under items 1 and 2 shall not exceed $67, rather than $62, and the

amount allocated to the state for reimbursement under items 1-3 shall not exceed $75 million, rather than $72. The amount allocated for state litigation costs incurred after March 12, 1991 (new item 6) shall not exceed $1 million per month. Reference to the MOA that "the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another. . ." is changed to a reference to the MOA "this court entered on August 28, 1991. . ."

Releases and Covenants Not to Sue by the Governments, (c) and (d) These are entirely new and replace the following material in the original Agreement: "nothing in this Agreement shall affect or impair. . . (b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purpose of asserting and compromising claims for injury to destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such village; (c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;"

16(b) and (c) are added. (b) requires dismissal of the claims asserted by the governments against Exxon or Exxon Pipeline in federal court and dismissal of counterclaims within 15 days of final approval of the Agreement. (c) required claims asserted by Exxon in Exxon Shipping Company, et al., v. Lujan, et al., against the governments to be dismissed not later than 5 days after court approval of any agreements between the governments and the non-government defendants in Lujan under which all of the non-Government defendants disclaim any right to recover natural resource damages.

Third Party Litigation, 26(a) An exception is added identifying (b), which is new.

(b) This is a new indemnification provision under which Exxon agrees to indemnify the governments from liability to a third party (other than the TAPL Fund or Alyeska) (1) only to the extent of the value received by Exxon or Exxon Pipeline from the third party; and (2) only if the governments assert all defenses they have to the claim.

Election to Terminate. Paragraph 37 of the original Agreement is deleted as previously mentioned in this memorandum and all the remaining paragraphs in the Agreement are renumbered.

TBC:gc
91-363.glc

Committee Document #6

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM August 29, 1991

SUBJECT: Exxon Litigation; Memorandum of Agreement dated 9/27/91 (Work Order No. 17-LS1044)

TO: Representative Max Gruenberg

FROM: Pamela Finley
Assistant Revisor of Statutes

You asked for a summary of the major differences between the memorandum of agreement (MOA) between the State of Alaska and the U.S. dated March 12, 1991 and the one dated August 27, 1991 in Civ. Action No. A91-081 Civ., filed in federal District Court in Anchorage. The two MOAs are very similar; the major differences are as follows.

1. Public Participation. A public advisory group to advise the trustees is required in the new MOA. In the first MOA it was allowed, but not required. (Compare IVA4 at p. 11 of original MOA with VA4 at p.11 of new MOA.)

2. Cooperation Agreement. The new MOA contains a cooperation agreement between the governments that did not appear in the first MOA. (Since the first MOA was tied to a settlement with Exxon, provisions for cooperation in litigation and settlement would have been superfluous.) The cooperation agreement appears at paragraph VII of the new MOA on pages 15-16. It (1) requires the governments to cooperate in civil litigation and in the settlement of restitution claims connected with criminal proceedings; and (2) allows the governments to share information with each other or third parties, although the government receiving the information is required to do its best to maintain the information as privileged and may not share it with a third party without the consent of the government producing the information.

3. Termination of the Trust. Under the old MOA the trust terminated in 16 years or upon termination of the consent decree with Exxon. In the new MOA, the trust terminates when the governments certify to the court, or the court finds, that all activities contemplated under the MOA have been completed. (Compare XI at p. 17 of the old MOA with XIII at page 20 of the new MOA.)

4. Trust Money vs. General Revenues. This is the biggest change in the MOA. The differences can be seen by comparing the definitions of "allowed expenses" and "natural resource damage recovery" at pages 6 and 7 of the old MOA and paragraph VB at pages 12-13 of the old MOA with the definitions of "base allowed expenses" and "natural resource damage recovery" at pages 5 and 6-7 of the new MOA and paragraph VIB at pages 13-14 of the new MOA.

Under the old MOA (and the related criminal plea agreement):

(1) the state general fund was to be reimbursed $72 million for damage assessment, restoration, and litigation expenses incurred on or before March 12, 1991, and for unreimbursed response and cleanup costs incurred on or before December 31, 1991;

(2) the federal government was to be reimbursed $62 million for damage assessment and restoration expenses incurred on or before March 12, 1991, and for response and cleanup costs incurred on or before December 31, 1990;

(3) both governments were to be reimbursed for response and cleanup costs they incurred after December 31, 1990;

(4) the above reimbursements were to be made within five years; and

(5) the state general fund was to receive $50 million in restitution as part of the criminal plea bargain, to be paid within 30 days, and to be used for restoration or replacement of equivalent resources.

Under the new MOA:

(1) recovery for response and cleanup costs will go directly to the government recovering it (see p.7 of new MOA);

(2) the state and federal governments will be reimbursed for assessment and restoration costs incurred on or before 3/12/91, and the state will be reimbursed for litigation costs incurred on or before 3/12/91 (see pp.5 and 13 of new MOA) ;

(3) the state and federal governments will be reimbursed for jointly agreed upon assessment and restoration costs incurred after 3/12/91 (see p. 13 of new MOA);

(4) money recovered by the federal government for its litigation costs and attorney fees will go directly to the federal government (see p.7 of new MOA); the state general fund will be reimbursed for its litigation costs and attorney fees incurred on or before March 12, 1991 (pp. 5 and 13 of new MOA); the state will be

reimbursed for its litigation costs and attorneys fees incurred after March 12, 1991 only up to $40 million and not more than $1 million for any one month;

(5) if money is received in settlement, $67 million shall be reimbursed to the federal government for assessment and restoration incurred on or before 3/12/91 and for response and cleanup costs incurred before 1/1/91; and $75 million shall be reimbursed to the state general fund for assessment, restoration, and litigation and attorney fees incurred on or before 3/12/91 and for response and cleanup costs incurred before 1/1/91 (pages 5 and 13 of new MOA);

(6) money received as restitution in a criminal case (e.g., the $50 million in the rejected criminal plea agreement) will go to the trust, rather than the state general fund unless the state and federal governments agree otherwise (page 7 of new MOA);

(7) money received for lost royalty, taxes, licenses, fees, punitive damages, and criminal fines or penalties (which are different from restitution) go directly to the government recovering them (page 7 of new MOA); this appears to have been true in the old MOA and related agreements as well;

(8) the reimbursements are to be paid before the trust fund is paid (page 14 of new MOA); under the old MOA the reimbursements were to be paid in 5 years.

In my view, the major financial provisions are (1) the placing of any criminal restitution money that might be due the state in the trust rather than the general fund; (2) the direct recovery of each government of response and cleanup costs; (3) the preference given reimbursement over the trust fund; and (4) the $40 million limitation on the post-March 12, 1991 litigation costs and attorney fees incurred by the state, without any similar limitation on the federal government's recovery for litigation costs and attorney fees.

I will be preparing a more detailed analysis, which I will send to you next week.

PF:gc:mi
91-303.glc

Committee Document #7

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
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304

MEMORANDUM January 8, 1992

SUBJECT: Appropriation Power and the Exxon-Valdez Trust Fund; Work Order No. 7-LS1749

TO: Senator Curt Menard

FROM: Pamela Finley PF
Assistant Revisor

I. QUESTIONS PRESENTED. You have asked the following questions about the trust fund (established by a Memorandum of Agreement (MOA)) consisting of proceeds from the state and federal governments' settlement of claims against Exxon and managed by three federal and three state trustees:

1. What authority does the legislature have to appropriate money paid by Exxon into the trust fund?

2. What authority does the legislature have over trust money given by the trustees to state agencies or entities?

3. What specific actions can the legislature take to exercise control over expenditure of the trust fund?

II. ANSWERS.

1. While the question has not been directly answered by Alaska's Supreme Court, and while the Attorney General disagrees, in my opinion the trustees may not expend money from the trust fund unless it is appropriated by the state legislature. The MOA does not require (or provide for) appropriation by the state legislature, but I believe that (1) at least some of the trust fund represents state money; (2) the state constitution requires an appropriation before state money can be expended; (3) an appropriation requirement must be read into the trust agreement or else it will have been beyond the power of the Attorney General to agree to it.

2. This question has also not been definitely answered by the Alaska's Supreme Court, but in my opinion the state constitution prohibits a state agency from

spending money received by the state from the trust unless the legislature has appropriated the money to the agency.

3. (a). There are many ways that the legislature can exercise control over the expenditure of trust money because the state trustees must agree to any expenditure and the state trustees are state officials subject to legislative control. The main legal limitation on the legislature's power over appropriations in this case is the federal Supremacy Clause, which requires that legislative measures not conflict with federal law. In addition, the trust agreement allows the federal district court judge to authorize expenditures if the state and federal trustees cannot agree; this provision, if valid, might allow the federal judge to act in a way that is beyond the control of the legislature.

(b). If the legislature wants to satisfy the constitutional appropriation requirement, but exercise very little control over how the trustees expend the money, it could simply appropriate the state's interest in money received from Exxon to the trust for the purposes outlined in the MOA. This might be considered an unconstitutionally excessive delegation of legislative power, but I suspect (though am not sure) that the purposes set out in the MOA (while somewhat vague) would be sufficient and that our courts would uphold such an appropriation. However, appropriations to the trust may have to be made each year that money is received from Exxon; a one time appropriation of money to be received in the future may be unconstitutional.

(c). On the other hand, if the legislature wants to exercise maximum power over the trust expenditures,

(1) an appropriation to the trust of the state's interest in money received from Exxon should be conditioned on the passage of legislation requiring the state trustees not to agree to any expenditures from the trust unless the legislature has appropriated the money from the trust for those projects;

(2) the legislature could require the state trustees to submit proposed expenditures from the trust as part of the budget process, and then specifically appropriate the state's interest in the trust fund money to those projects that the legislature and the trustees (state and federal) could agree on;

(3) the legislature should review the general "program receipts" appropriations (see e.g., SLA 1991, ch. 73, sec. 2) and decide whether it wants to allow money to flow from the trust to state agencies under such a general appropriation, with review by LB&A under AS 37.07.080(h), or whether it wants to draft these general "program receipts" appropriations in such a way that they do not inadvertently allow the money to flow from the trust to state agencies unless there is a specific appropriation to a specific project;

(4) the legislature could enact legislation that in some way limited the state trustees' power to agree to expenditures (e.g., to agree only to those projects for which there is a legislative appropriation.)

III. DISCUSSION.

A. The State's Interest in Trust Money is Subject to Appropriation. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were conditioned on appropriations by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting

appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset); Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over $32 million in exchange for $1 is appropriation prohibited by initiative); McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Former Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

In his April 2, 1991 opinion (a copy of which is enclosed), the attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act (which was one basis for the state's claim against Exxon), because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for

the damage to its natural resources: the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.[1/]

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree with Exxon clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA also recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), clearly indicates that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

Different jurisdictions have taken divergent positions on what money is subject to appropriation. E.g., Kittredge v. Boyd, 18 P.2d 563 (Kan. 1933)(Taxes paid under protest are not subject to appropriation); Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952)(Taxes paid under protest are subject to appropriation.) Some states hold that money coming from a non-state source (usually the federal government) that the source designates for a particular purpose, is not subject to the appropriation process. Opinion of the Justices, 378 N.E.2d 433 (Mass 1978)(federal trust fund money); Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Ariz. 1974)(funds from a purely federal source to be disbursed to Indian Tribe and two cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(Federal and private funds given to state university are not subject to appropriation.)

[1/] Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.

The resolution of this issue in Colorado has changed somewhat over time. In MacManus v. Love, 499 P.2d 609 (Colo. 1972), the court held that federal funds that are not connected to state appropriations are not subject to appropriation. In Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985), the court held that money received by the state from a settlement between a federal agency and a private entity (without participation by the state) was not subject to appropriation. However, in Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the court held that federal funds that required state matching money, or that could be transferred among block grants, were subject to appropriation.

At least two states with provisions similar to art. IX, sec. 13 of Alaska's constitution have held that all federal funds must be appropriated before they can be spent. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the court held that federal funds must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability in government. In Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630 (1979), the court came to the same conclusion. The court noted that the Advisory Commission on Intergovernmental Relations, established by Congress, had urged state legislatures to assume greater control over federal funds coming to state governments.

Given the divergent decisions on this issue in other jurisdictions, it is impossible to state with certainty what Alaska's Supreme Court would decide. However, in my opinion, allowing the trustees to spend money recovered from Exxon without an appropriation would violate art. II, sec. 1, or art. IX, sec. 13, of the state constitution. This conclusion is based on five considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to limit the appropriation power to cover only money. Finally, it applied the principle in the Public Employees Local 71 case even though that case involved a contract already negotiated by the governor with public employees. In addition, a highly respected Superior Court judge has found that custodial and trust funds are subject to appropriation in Alaska. Kelley v. Hammond, 1st Jud. Dist. at Juneau, case No. 77-4 (May 30, 1978). There seems little reason for the court to depart from the principle when the state is recovering money for damage to natural resources of the state.

Second, the possibility that other parts of the state budget would be affected by spending the money—the consideration behind the shift in the Colorado cases—may well apply here. If trust fund money is to be spent on certain environmental or fish

and game programs, that fact may affect other programs of the state departments of environmental conservation and fish and game. If trust fund money is spent on programs that use state employees, that may also affect the state budget. While the attorney general has taken the position that no part of the recovery is "state" money, the restoration plan clearly anticipates that the trustees will use state employees in some of the trust's projects. See 56 Fed. Reg. No. 41, p. 8898 (1991). The use of these employees, and liability for their acts will certainly affect the state budget. Time taken by the state trustees for their duties in administering the trust may also affect staffing decisions in the state budget. Finally if the trustees acquire property to be owned, or partially owned, by the state, that may also affect the long-term fiscal obligations of the state.

Third, the cases in this area have primarily dealt with funds received from the federal government, and the practice in Alaska has been to appropriate federal funds. AS 37.20.020 states that all federal grants of money are to be deposited in a special account in the general fund (which would then be subject to appropriation.) In addition, AS 46.08.020(a)(2) authorizes the legislature to appropriate to the oil and hazardous release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site." Since the money will be received from an entity (Exxon) that matches the statutory description, the statute indicates the legislature's intent that such money be deposited in the general fund for appropriation. While these statutes do not settle the constitutional issue, they do reflect the legislature's longstanding interpretation of its powers.

Fourth, some of the cases holding that money is not subject to appropriation are based on the fact that the money was being held by the state in trust for another political entity authorized to spend it. E.g., Navajo Tribe v. Arizona Dept. of Admin., 528 P.2d 623 (Ariz. 1974)(Tribe and cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(University.) The money received for natural resource damages from Exxon, however, is not being "passed through" to another entity that can spend it. Rather, the state trustees recover the money "on behalf of the public as trustee of the natural resources." 33 U.S.C. 1321(f)(5). The natural resources cannot spend the money, nor can the public. Therefore the "pass through" rationale underlying these cases does not seem to apply to the money recovered from Exxon. The state is doing more than "holding" the money for another; it is, through its trustees, deciding how to allocate the money, which is primarily a legislative function.

Finally, in all the cases discussed above in which money was held not to be subject to appropriation, the money was coming to the state as a gift or grant from either the federal government or a third party. (This is true even of the money received from a settlement between the federal government and Chevron in Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) because it does not appear that the state was a litigant or released any of its claims in the settlement.) No one could

seriously maintain that money paid by Exxon under the consent decree is a "gift" from Exxon to the state. As is clearly evident from the terms of the consent decree, Exxon is to pay the money in exchange for the state and federal governments extinguishing their claims for damages. This fact distinguishes this situation from those in which the court viewed money as outside the appropriation process because it was "non-state funds." E.g., State ex rel Sego v.Kirkpatrick, 524 P.2d 975 (N.M. 1974). Money received in exchange for a state damage claim can hardly be "non-state funds."

For all of the reasons discussed above, I believe that the state constitution requires legislative appropriation before the trust money can be spent.

B. A State Agency Cannot Spend Funds Unless They are Appropriated to It.

If, as maintained in the previous section, state money cannot be expended unless it is appropriated, then a state agency could not take money from the trust and spend it unless the legislature appropriated it to that agency.

AS 37.07.080(h) does allow the increase of an appropriation item based on federal or other program receipts "not specifically appropriated by the full legislature" after review by Legislative Budget and Audit Committee. Since AS 37.05.146 defines "program receipts" to include "state money received by a state agency in connection with the performance of its functions," money from the trust fund given to a state agency to do work that is within its statutory power would probably be a program receipt. Nevertheless, I doubt that AS 37.07.080(h) alone would allow money to flow from the trust to the agency without some sort of an appropriation. In Kelley v. Hammond, I-JU-77-4 (Superior Ct., 1st Jud. Dist. at Juneau; May 30, 1979), Judge Stewart held that LB&A could not, despite AS 37.07.080, approve or veto the expenditure of trust or custodial monies received by the executive or judicial branches from federal or other sources for specific functions or purposes. However, what recent legislatures have done is to appropriate federal and other program receipts generally, conditioned on program review under AS 37.07.080(h). See e.g., SLA 1991, ch. 73, sec.2. This general type of appropriation has not been upheld by the state Supreme Court, and could reasonably be challenged as an excessive delegation of the legislature's appropriation power, but we also believe that it could reasonably be defended since the legislature is indicating that the money, once received, is to be used for the purpose for which it is received.

If the legislature wanted, it could probably appropriate all money flowing from the trust to state agencies by using a general appropriation which simply says that any of the trust fund money given by the trustees to state agencies is appropriated to the designated agencies for the purposes designated by the trustees. On the other hand, if the legislature wanted to retain control over the specific trust-funded projects of the agencies, the legislature should make sure that the general appropriations in the front pages of the budget bill exclude receipts from the Exxon trust, and instead appropriate any proposed Exxon trust expenditures in specific appropriations.

C. Comments on Methods of Legislative Control. There are a number of legal issues that affect, or may affect, legislative control over appropriations. The discussion below is not intended to be exhaustive, but simply to give you a general idea of the relevant legal principles.

1. Continuing Appropriations. I suggested that, in order to satisfy the appropriation requirement, the legislature may need to appropriate the money to the trust each year, as it is received from Exxon. A one time appropriation of the entire settlement proceeds (including amounts to be received in the future) may not be valid. In Trustees of Alaska v. State, Superior Ct., 3rd Jud. Dist at Anchorage, C.A. No. 3-AN-84-12053 (Aug. 30, 1985), the Superior Court held that an appropriation of money to be received in future fiscal years was invalid as a dedication of funds in violation of art. IX, sec. 7 of the state constitution. The case was not appealed, and might not be followed by the Supreme Court, but it does cast doubt on the validity of a one time appropriation of all the money to be received from Exxon in future fiscal years.

2. Form of Appropriations. The form of appropriations to the trust will inevitably be strange because all the legislature can appropriate is the state's interest in the trust money, and the amount of that interest is unknown. Appropriations usually require a determinable amount designated for a particular purpose, so the lack of a definite amount makes the appropriation somewhat questionable. However, since the purpose of appropriations is to give the legislature ultimate control over the expenditure of state assets, the court may accept the validity of such an appropriation as the best possible expression of the appropriation power.

3. The Legislature's Authority to Control the State Trustees and The Supremacy Clause. The trust agreement between the state and federal governments cites the Clean Water Act (33 U.S.C. 1321) as the basis for the trustees' authority. Trustees appointed by a state governor under the Clean Water Act must be "state officials." 42 U.S.C. 9607(f)(2)(B). Because they are state officials, their powers and duties may be limited or defined by the legislature. However, because federal law is supreme over state law in the event of a conflict between the two, provisions in state law could not conflict with the trustees' duties under federal law. (For instance, because federal law requires that money received under the Clean Water Act be used only for certain purposes, state law could not require the trustees to spend the money on other things.) Federal regulations do require the trustees to develop and implement a rehabilitation plan, 40 CFR 300.615(c)(4) and 43 CFR 11.92(c) and 11.93, but this does not appear to require that the development or implementation be accomplished without appropriation or other legislative involvement. On the contrary, because federal regulations contemplate that recoveries may be put in a special account in the state treasury, 43 CFR 11.92(a)(2), federal law appears to anticipate that legislative appropriations may be needed. Finally, if the Clean Water

Act and related regulations were interpreted to require the expenditure of the trust money without legislative appropriation, it may have been beyond the power of the Attorney General to agree to a settlement under the Clean Water Act. See McDowell v. State, 785 P.2d 1, 10, n.20 (Alaska 1989)(Because state was not required to manage federal land, the fact that federal law required a subsistence preference did not justify such a preference when such a preference was prohibited by the state constitution); White Construction Co., Inc. v Commonwealth, 418 N.E. 2d 357 (Mass Ct. App. 1981), aff'd., 432 N.E. 2d 104 (1982) (State officials have authority to bind the state only to the extent allowed by state law.)

4. Delegation of Appropriation Powers. I mentioned that, if the legislature wanted to give the trustees maximum discretion in deciding how the money should be spent, it might be able simply to appropriate the state's interest in the money to the trust fund to be spent in accordance with the terms of the MOA, without making any specific appropriations from the trust fund. The question is whether this would be an excessive delegation of the appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), Alaska's Supreme Court held that AS 37.07.080(g)(2), which allows the governor to reduce or withhold appropriations in the event of a budget shortfall, was unconstitutional because it delegated the appropriation power to the governor and because it lacked standards to guide the exercise of administrative discretion. However, in Walker v. Alaska State Mtg. Ass'n., 416 P.2d 245 (Alaska 1966), the court upheld statutes creating the Alaska State Mortgage Association, despite the fact that its powers were broadly stated. Given these cases, I suspect, although am not sure, that an appropriation to the trust to be spent for the purposes in the trust agreement, would constitute a sufficient appropriation. However, if the legislature wants to ensure that expenditures from the trust are valid under the state constitution, it would also be wise to appropriate the money from the trust to whatever projects the trustees specify. On the other hand, if the legislature wants to retain maximum control over trust expenditures, it should condition any appropriations to the trust on legislation that prohibits the state trustees from agreeing to any expenditures from the trust that are not appropriated by the legislature.

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92-007.plm

Enclosures

Committee Document #8

HOUSE JUDICIARY SETTLEMENT SUBCOMMITTEE
October 21, 1991
10:00 a.m.

MEMBERS PRESENT

Subcommittee Chairman Max F. Gruenberg, Jr.
Representative Dave Donley, via teleconference
Representative Mike Navarre, via teleconference
Representative Cliff Davidson
Representative Gene Kubina
Representative Gail Phillips

OTHER LEGISLATORS PRESENT

Representative David Finkelstein
Senator Pat Pourchot, arriving later
Representative Pat Parnell, via teleconference
Representative Terry Martin, arriving later

SUBCOMMITTEE CALENDAR

Economic and legal analysis of the differences between the New and Old Exxon Valdez Settlements.

Goals and objectives of the settlement subcommittee.

WITNESS REGISTER

Milt Barker, Legislative Analyst
Legislative Research Agency
P.O. Box Y
Juneau, Alaska 99811
465-3991

POSITION STATEMENT: Fiscal analysis of the differences between the two settlements.

Pam Finley, Assistant Revisor
Legislative Legal Counsel
P.O. Box Y
Juneau, Alaska 99811
465-2450

POSITION STATEMENT: Legal analysis of the differences between the two settlements.

Mark Handley, Staff Attorney for House Majority
3111 C Street, Suite 440
Anchorage, Alaska 99503
561-7621

POSITION STATEMENT: Staff to Representative Gruenberg

PREVIOUS ACTION OF THIS SUBCOMMITTEE: NONE

ACTION NARRATIVE

TAPE JUD SETTLEMENT SUBCOMMITTEE 91-1, SIDE A

Number 000

Subcommittee Chairman Max F. Gruenberg, Jr. called the meeting to order at 10:08 a.m. on October 11, 1991 and announced the agenda (attachment #1). He noted the members present in person and via teleconference. He added that he would like to discuss the constitutional issues related to the administration of the settlement and possible needed legislation. The legislature's role in large settlements such as this, its relationship with the executive branch and HB 144 by Representative Ulmer will also be discussed.

Number 055

MILT BARKER, Consultant for the Legislative Research Agency stated his qualifications as a financial analyst. He began discussion of his prepared analysis of the Old and New settlements dated October 10, 1991 (attachment #2). It takes into account inflation, the time value of money and the federal and state income taxes effects. His procedure was to determine the value of all the payments at a particular point in time. These payments must be discounted to reflect the effects of inflation and the time value of money (its ability to earn interest). Bringing all these values to one point in time is called present value. Nominal or actual dollars means out of pocket costs. The benefits to the state are considered to be the civil payments as well restitution under the criminal plea agreement. Some of the restitution will be paid to the federal government but will go through the trust. The criminal fine will solely benefit the federal government.

The results of the analysis indicate that the cost to Exxon is less in present value in the New Settlement even though Exxon pays more dollars out of pocket. The value received by the state and federal governments combined is greater in actual dollars received. The value to the state alone is greater under the new settlement in present and actual dollars. The federal government is getting less in the New Settlement.

Representative Gruenberg asked Mr. Barker to summarize the three reasons why the New Settlement is actually of lesser value. This information may be found in the Executive Summary by Mr. Barker dated October 10, 1991 (attachment #3).

Mr. Barker indicated that the differences in the two settlements are the result of three factors. The two settlements are very close in value, the almost seven month delay in payments has eroded the value of the money and a

greater portion of the payments will in all likelihood be tax deductible. An additional deduction of $50 million will cost the federal government an estimated $18.5 in lost tax revenue.

Representative Kubina asked Mr. Barker if the actual volume of dollars to the state is greater and if there is more assurance that the dollars will be spent in the affected areas of the state.

Mr. Barker replied that the state would receive more dollars in the New Settlement and deferred to Ms. Finley on the question of how it would be spent.

Mr. Barker presented overhead transparencies based on the table in his October 10, 1991 memo. Table I indicates that in the Old Settlement $50 million would have been a fine and $950 million would constitute restitution and civil payments for a total of $1 billion. In the new settlement the fine is reduced to $25 million and restitution and civil payments total $1.025 billion.

Table II indicates that the present value of the after tax costs to Exxon in the New Settlement is $434.3 million and the Old Settlement was worth $439.3 million, when the March 12, 1991 date is used. Using the October 8, 1991, the Old Settlement is worth $467.7 and the New Settlement is worth $462.9. The New Settlement is worth approximately $5 million dollars less in each case. The difference is the result of the value of tax deductions and the delay of payments which has affected the value of the increased payment.

Table III contrasts the present value of settlements to the state. Using the March 12, 1991 date, the Old Settlement is valued at $678.4 million and the new at $716.4 million, with the state receiving $38 million more. Using the October 8, 1991 date, the Old Settlement is worth $713.7 million and the New Settlement $754.0 million, a difference of $40.3 million more to the state. The state is getting $50 million more for restitution but the delay has reduced the value of this amount somewhat.

Table IV indicates the present value to the Federal Government of the criminal settlement. Using the March 12, 1991 date, the Federal government would get $50 million in the Old Settlement and $6.1 million in the New Settlement. Using the October 8, 1991 date, the Federal Government will get $52.3 million in the Old Settlement and $6.5 million in the New Settlement. The reduction of the fine, tax deductibility and time value of money were taken into account.

Representative Gail Phillips asked if clean up costs incurred during the summer of 1991 were taken into consideration in the federal money calculations.

Mr. Barker replied that he did not address the clean up costs in this table.

Representative Finkelstein asked if clean up costs would reduce the amount of the settlement.

Mr. Barker replied that these clean up costs are not known at this time and he cannot take them into account. Ms. Finley will address this question.

Table V displays the present value of settlements to state and federal governments combined. Using the March 12, 1991 date, the Old Settlement is worth $728.4 million and the New Settlement $722.5 million, a reduction of $5.9 million. Using the October 8, 1991 date, the Old Settlement is worth $766 million and the new $760.5 million, a reduction of $5.5 million.

Representative Donley asked if these figures reflected the tax deductibility factor.

Mr. Barker replied yes. He added that the total to the state and federal governments is slightly less because the of the loss of $18.5 million in federal and state income tax revenue. This is due to Exxon's tax deductibility of the $50 million in additional restitution payments. The federal receipts from Exxon are reduced $25 million because of the fine, the State's receipts are increased $50 million because of the restitution and the net result is an additional $25 million coming from Exxon. $18.5 million in state and federal income tax revenue will be lost.

Representative Gruenberg summarized that the federal government is losing money, Exxon is having to pay slightly less, the State appears to be the big winner and there is a net loss on the entire settlement.

Mr. Barker characterized the financial burden in present value. The cost to Exxon and the benefits to the governments combined is less under the New Settlement than under the Old Settlement. No matter how the New Settlement is viewed it is of lesser value. The state is the party that benefits at the federal government's expense but Exxon is still paying less.

Representative Gail Phillips asked that if the New Settlement had been presented in March, would the reverse be true?

Mr. Barker answered that a slight increase in cost to Exxon would have been realized if the New Settlement had been effective in March. In March the Old Settlement would have cost $439.3 and the New Settlement $443.7. This differs from the $434.3 in Table II because this is a hypothetical situation. He questioned if this is a proper comparison. It

should correctly be between the dates that the two settlements would have actually taken effect.

Representative Navarre commented that in trying to analyze what the cost is, you would also have to subtract the cost to the state of the third party litigant suits. These would cost the state a considerable amount of dollars to defend against. Also some of the provisions of the criminal plea that have been changed are exactly what some members of the previous committee also pointed to as large questions marks in the settlement offer.

Mr. Barker reiterated that his analysis did not look at some of these other unknown costs. While this is a shortcoming, it is the only possible avenue at this point.

Representative Navarre is of the opinion that the settlements are very close and that individuals are not likely to change their minds about whether it is enough or not.

Representative Martin commented on the high costs of litigation and long time involved before monies are received.

Representative Finkelstein remarked that the state is getting more money in the New Settlement and the proper question is the amount of the overall penalty.

Representative Martin asked Mr. Barker how many cases had been filed against the state and federal government and how many of those would now be null and void.

Mr. Barker does not know the answer to this question. Ms. Finley will address this.

TAPE JUD SETTLEMENT SUBCOMMITTEE 91-1, SIDE B

Number 000

PAMELA FINLEY, Legislative Legal Counsel, began her testimony by describing her qualifications, and answering some of the previous questions from the committee.

In regards to the question regarding clean ups costs to Exxon, they will be deducted from the payments under both the Old and New settlement. In the New Settlement these costs are subject to audit by the governments.

In regards to the number of cases filed against the state and federal governments, Ms. Finley is not sure of the exact number but it is in the hundreds. The attorney general's office may be able to answer this question. Exxon has filed two interpleaders actions.

Ms. Finley began discussion on the new plea agreement. In the New Settlement the provision concerning Alyeska Pipeline being criminally prosecuted has been left up to the Department of Justice. The Old Settlement had protected Alyeska from prosecution.

In regards to money issues, the bottom line is that Exxon and Exxon Shipping are paying $25 million more. The state government will actually be receiving the same amount in restitution ($50 million). The federal government will get an additional $25 million however the allocation has changed. In the Old Settlement, $50 million, rather than $25 million, was going to a fine. This fine would have gone into the federal general fund not necessarily to be spent in Alaska. It was not tax deductible. In the New Settlement an additional $50 million will go into restitution for the oiled areas of Alaska. It is tax deductible.

Representative Gail Phillips asked how the $50 million restitution money will be administered.

Ms. Finley notes that there is confusion as to where the restitution money will go. In the MOA (Memorandum of Agreement and Consent Decree-attachment # 8) between the state and federal governments the money received as criminal restitution will go to the trust unless otherwise agreed by the parties. She feels that there is a side agreement that the $50 million will go to a special account within the general fund. The legislature will appropriate that money subject to the the "laundry list" of restrictions regarding the spending of the restitution monies. The federal court will retain jurisdiction to ensure the money is spent as agreed. She does not know how the federal restitution money will be spent. It will not go into the trust but must be spent on restoration in Alaska.

MARK HANDLEY, legislative staff to Representative Gruenberg, indicated that at the acceptance of the criminal plea before Judge Holland, Attorney General Charlie Cole indicated that the state's $50 million would go into a special account in the general fund to be used for restoration.

Ms. Finley continued that of the $25 million fine, $12 million will go to wetlands, not necessarily, but likely to benefit Alaskan birds. $13 million will go to the federal general fund.

Representative Martin asked if it has been clarified where the monies will go and wondered if the legislature may have problems with appropriations.

Ms. Finley replied that the restitution money will go into the general fund and the legislature will decide how to spend it. There are restrictions on how to spend the money but they are

not clearly defined. Appropriation problems in the consent decree are seen in both the New and Old settlements.

Representative Gruenberg asked Ms. Finley for comments about the language in Ms. Cook's memo of October 30, 1991 memo found at II.C.2 and IV.C (attachment #4) with regard to John Gaugine's memo on tax deductibility dated October 9. 1991 (attachment #5). The language reads "the defendants agree solely for the purpose of this plea agreement and for no other purpose that there is a legal basis..." He notes that it is unusual for this language to appear twice.

Ms. Finley agrees with Representative Gruenberg in concluding that this language would indicate that this is restitutionary and not criminal in nature and would therefore be tax deductible. She notes that on page nine of the new plea agreement (attachment #6) it states "the parties agree that all payments made under paragraph IVA are exclusively remedial, compensatory and non-punitive and are separate and distinct from the fines described in paragraph IIIC ....." This language was in the old plea agreement as well. Fines are not tax deductible, however restitution is.

Representative Gruenberg asked what the binding effect of this language would be on the state Department of Revenue. Is it likely they would come to a different conclusion and is it legally permissible for them to come to a different conclusion?

Ms. Finley is unsure if it would be legally permissible. It is unlikely that the state could successfully challenge these allocations.

Ms. Finley moved her discussion to the consent decree. A major change is dropping the provision for legislative approval or public comment. The second payment is now due December 1, 1992 rather than September 1, 1992. The amount that Exxon can deduct from the $150 million payment for clean up costs is now subject to audit by the government. She feels this is an improvement. There are new provisions concerning the preservation third party rights. These specifically deal with the rights of Alaskan Natives, Native Villages and Native Corporations. Their rights to sue are preserved for personal injuries, damages to their culture or subsistence but not for natural resource damages. The old consent decree dealt with the rights of Native villages to act as "trustees" for natural resources and also preserved the rights of other third parties. She does not know why this language was dropped.

There are two side agreements in addition to the agreement with Exxon. One involves the Chenega Bay case and the other involves private plaintiffs such as the fisherman, tour boat operators, municipalities, etc. The native law suit is a mandatory class action suit. The basic purpose of the two

side agreements is to have the suits against the governments dropped in exchange for the sharing of scientific data and data concerning liability. These settlements are not set in stone but are good indications of what the government is trying to do.

Representative Gruenberg notes that the side agreements are in the subcommittee's notebooks.

Representative Martin asked what possible negative effects the side agreements may have for the state.

Ms. Finley does not feel there are problems for the state with the side agreements. She asked the subcommittee to look at the new language regarding indemnification on page twenty-three, paragraph twenty-six (b) of the consent decree (attachment #7). She recounted a hypothetical situation. Suppose that Exxon believes that a defective part of the ship was responsible for the spill and sues the manufacturer of that part and recovers damages. The manufacturer then sues the governments and also recovers damages. Exxon would have to pay back what it got from the manufacturer to the governments.

Representative Gruenberg feels there must be other reasons for this language.

Ms. Finley explained that this information was given to her by the attorney general's office. She feels this is a good change.

Representative Gruenberg referred to page three of Tam Cook's October 7, 1991 memo (attachment #8) regarding "releases and covenants not to sue by the governments."

Ms. Finley notes that Exxon has not been released from claims for fish tax. This is not a change. Sections (c) and (d) on page fifteen of the consent decree are new. What is missing in the new MOA is the language "the rights and obligations, if any, of Alaska Native Villages to act as trustees for the purpose of asserting and compromising claims for injury to destruction of, or loss of natural resources....." The native entities are no longer "trustees" for natural resources. She maintains that two parties cannot make an agreement to take away the rights of another.

Representative Gruenberg called the members attention to the language on page three, paragraph two of the October 17, 1991 Cook memo that reads "the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;" He is concerned about the omission of this language and what it's

legal effect may be. He fears this may adversely affect third party rights.

Ms. Finley referred to page twenty-six, paragraph thirty-two of new consent decree which reads "nothing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this agreement." She still maintains that these two governments still cannot take away the legal rights of these third parties.

Representative Gruenberg asked permission of the subcommittee to draft a letter to the attorney general asking why this was omitted and its legal effect. There were no objections.

Representative Martin feels the language was redundant.

Ms. Finley talked about the reimbursement provisions in the paragraph ten of the consent decree. Now included are reimbursements for expenses incurred after March 12, 1991. The reimbursement to the federal government was raised from $62 million to $67 million. The state's was raised from $72 million to $75 million. Limitations have been put on reimbursements for the state's litigation costs. They cannot exceed $1 million per month. In the MOA, the $67 million for the United States and the $75 million for Alaska applied to expenses before January 1, 1991. In the consent decree it applies to expenses before March 12, 1991. The consent decree will most likely be the governing document. Both limit the state's reimbursement for post March 12th litigation expenses to $1 million per month. The MOA limits the total reimbursements after March 12th to $40 million. In the new MOA, priority is given to reimbursements and the governments may get their money back sooner. In the new MOA the government must "elect" to be reimbursed.

TAPE JUDICIARY SETTLEMENT SUBCOMMITTEE 91-2, SIDE A

Number 000

Ms. Finley discussed the definition of allowed expenses for reimbursements. The response and clean up costs incurred before 1991 have been deleted from allowed expenses. Now that Exxon has settled this change is most likely irrelevant.

The definition of natural resource damage recovery has changed. This is a major change. It used to be that the natural resource damage recovery was just the settlement money from Exxon. Now it covers money received from "anyone." This could be a problem for Alyeska and the trust is potentially bigger. It also includes recoveries that are not under the Clean Water Act. This would make the dedicated funds problem in the new MOA worse in her opinion.

Another major change is the definition of oil spill litigation. It was litigation with Exxon but now it is oil spill litigation with everyone. The main effect of this is in connection with attorney fees. If the state should be awarded attorney fees for oil spill litigation this would go into the trust. She assumes this change is intentional.

Representative Gruenberg hypothesized that if there are one hundred lawsuits out there by third parties most would be settled out of court but some may not. If they should go to trial and attorney fees are awarded, that money would go into the trust, however, the money spent for the attorneys came out of the general fund.

Ms. Finley commented that the monies would be considered natural resource damage recoveries and will flow back into the general fund through the trust as long as they do not exceed $1 million per month or $40 million total for expenses incurred after March 12, 1991.

Representative Gruenberg asked Ms. Finley to assume the attorney fees are within limits and asked if the general fund would be reimbursed?

Ms. Finley answered yes and added that if the attorney fee limits were exceeded then the general fund would be subsidizing the trust.

Representative Martin commented that there would seem to be no end to the lawsuits.

Ms. Finley replied that there should not be any more cases due to the statute of limitations. There could conceivably be cases involving poisoned fish, disagreements on how the money is spent or on undiscovered damages.

Ms. Finley noted another change in MOA. The public interest group is now mandatory. The MOA provides that the two governments cooperate in the litigation strategy. There is a new provision concerning reservation of rights which allows each government to assert a claim against each other in order to obtain an allocation of liability. This may have been included to settle who was liable for what. The provision concerning the invalidity of the MOA has been dropped. The old MOA would have been in effect for sixteen years, the new MOA has no termination date.

Representative Davidson asked Ms. Finley if this agreement would tend to enhance or assist the third party claimants.

Ms. Finley believes their fate is similar in both cases, however the side agreements to share information enhance their position. They must agree not to sue the state in order to get this information.

Representative Gail Phillips asked about language on page twenty, paragraph thirteen of the new MOA regarding termination. When the duties of the trust are completed, will this terminate? She also asked if the MOA can be changed?

Ms. Finley assumes that termination will occur when the monies are gone. The MOA is a court order and an agreement and can be amended.

Representative Gruenberg brought up the constitutionality of the board of trustees being set up under court decree without legislative involvement. He feels this could be a runaway situation where money is spent for an indefinite time. He asked if this is constitutional.

Ms. Finley feels the constitutional problem arises by virtue of state money being spent without appropriation.

Representative Gruenberg asked what could be done to correct this.

Ms. Finley feels the legislature must appropriate money each year from the trust to the purposes that the trustees have determined. The trustees should be required to report on what they intend to do with money each year. Interest may even have to be appropriated.

Representative Gruenberg suggested legislation prohibiting the spending of this money unless the legislature has appropriated the expenditure. This could bind the executive branch.

Ms. Finley will research the matter and reply in writing. She notes that this raises the question on how the legislature can influence the activities of the trustees. The trustees are state officials and their offices and powers have been created by the legislature.

Representative Martin presented a resolution approving the New Settlement (attachment #10).

Representative Gail Phillips asked if there is anything in the constitution or trust agreement that prevents the legislature from receiving money from trust and appropriating it yearly.

Ms. Finley does not see a problem with the constitution or with federal law.

Representative Gruenberg concluded with a discussion of the goals and objectives of the subcommittee. He proposed that another meeting be planned in mid November to look at Representative Martin's resolution, review the answers to the legal questions from the attorney general and Ms. Finley, to look at potential legislation that would require the legislature to approve appropriations, to look at the general

workings of the trustees and its involvement with the legislature and to discuss HB 144. It is his intention to formulate a written report to be given to the House Judiciary Committee and the entire legislature.

The subcommittee members agreed.

Representative Gruenberg suggested that all members of the House Judiciary Committee be given the handouts from today's meeting and be invited to participate in the next meeting.

TAPE JUD SETTLEMENT SUBCOMMITTEE, 91-2, SIDE B

Number 000

Representative Gruenberg invited all members of the legislature to participate in crafting the proposed legislation and adjourned the meeting at 12:23 p.m.

Committee Document #9

HOUSE JUDICIARY COMMITTEE
EXXON SETTLEMENT SUBCOMMITTEE
DECEMBER 9, 1991
1:00 P.M.

MEMBERS PRESENT

Rep. Max Gruenberg, Chairman
Rep. Cliff Davidson (via teleconference)
Rep. Dave Donley
Rep. Gene Kubina (via teleconference)

MEMBERS ABSENT

Rep. Mike Navarre
Rep. Gail Phillips

OTHER LEGISLATORS PRESENT

Rep. Mark Hanley
Rep. Terry Martin
Rep. Pat Parnell (via teleconference)

SUBCOMMITTEE AGENDA

1. Review of the Task Force on Urgent Fiscal Matters Spill Settlement Hearing in Washington D.C.

2. Update on Spill Settlement Trustees Activities

3. Review of Settlement Related Legislation

WITNESS REGISTER

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Tape 1, Side A
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Chairman Gruenberg called the meeting to order at 1:15 p.m. in the first floor Legislative Information Office Conference Room in Anchorage.

The Chairman stated that they would hear a report by Mr. Jay Nelson of the House Resources Committee on the Spill Settlement Trustees' activities of the last week. In addition, the committee would go through the packet of bills and resolutions and discuss their form and content. He said it is his intent to have a final subcommittee meeting when we have a quorum of the subcommittee, probably the first or second day of the legislative session, to approve the final packet of bills and a report of the subcommittee that would cover bills that are elsewhere in the legislative process.

The Chairman then gave a brief synopsis of the congressional subcommittee hearing. He said it was a task force or a subcommittee of the House Budget Committee, chaired by Congressman Frank Guarini. It concerned the tax deductibility of the oil spill settlement. Assistant Attorney General Barry Hartman from the Justice Department testified, as did Alaska's Attorney General, Charlie Cole, Rep. Max Gruenberg, and a panel of people from the resources and environmental community.

The Chairman stated that Congressman Guarini introduced legislation to prohibit Exxon and all other oil spillers from deducting the costs of out-of-court settlements from their federal taxes. That bill is presently in the Congressional Ways and Means Committee. The Chairman noted that copies of his Washington D.C. comments are included in the members' packets. He asked if members had any questions.

Rep. Terry Martin asked if anyone had ever brought up the question of what is deductible and not deductible. He said it seemed to him that we were trying to change the law after the fact.

The Chairman requested that question be directed to Mr. Chenoweth. He restated the question: If we pass HB 287 or something similar that disallows the tax deductibility for the clear up costs and the settlement cost, is that an unconstitutional ex post facto law?

Mr. Chenoweth did not have an answer off the top of his head. He said ex post facto typically applies to a criminal proceeding. He said the legislature has latitude to make changes in tax laws after the fact for a reasonable period -- not a number of years, but certainly within a calendar year.

The Chairman asked Mr. Chenoweth to provide the subcommittee and the full House Judiciary Committee a short written opinion on whether that is in fact ex post facto or denial or due process.

The Chairman then welcomed Mr. Jay Nelson, legislative staff to Rep. Cliff Davidson, Chairman of the House Resources Committee.

Mr. Nelson said he attended the Exxon Valdez Oil Spill Settlement Trustee Council meeting last Thursday evening on behalf of Rep. Davidson. He then proceeded to summarize what went on in that meeting. He said the meeting lasted about two hours. State of Alaska trustees are the Commissioners of Fish and Game and Natural Resources and the Attorney General. Federal government trustee included Curt McVee, a Special Assistant to the Secretary for the Department of Interior, Steve Penoyer, with NOAA, and Michael Barton, a regional forester for the Department of Agriculture. Mr. Barton's designee attended in his place.

This was the first time the Trustee Council met together as a group, so they had to create the organization; so they sort of adopted themselves into existence. The council is a group that is below the trustees which were set up under the Clean Water Act (CWA). The trustees are the same three state representatives and the three secretaries of the departments on the federal side: Secretary of the Department of Commerce, Department of Interior, and Department of Agriculture. As far as he knows the trustees have never met; but the Trustee Council will probably be handling most of the issues related to the Exxon Valdez settlement.

Mr. Nelson referred to a handout the members had that shows an organizational chart. He said this chart was presented by the federal trustees. He said the state trustees said they had not seen the chart until about 30 minutes before the meeting.

The Chairman noted that Rep. Davidson and Kubina did not have this. He asked Mark Handley to make sure that material was faxed to them immediately.

The Chairman said what Mr. Nelson is referring to is contained in a packet of material that were given out at the Trustee Council meeting last week. (Attached to minutes).

Continuing, Mr. Nelson said the Trustees essentially adopted that (organizational chart) as their guiding organization over the Trustee Council. They then voted the Trustee Council into existence. The Trustee Council includes the same three state

representatives who are Trustees, but three designees of the federal Trustees.

Mr. Nelson reported that the six trustees discussed setting up the next layer of organization. He said they understand that there's not a likelihood that they'll have the time to deal with the Exxon Valdez funding, so they needed some organization to actually deal with the day-to-day management of the Exxon Valdez funds. So, they established what is shown on this sheet as the Resource Restoration Coordination Group (RRCG). All this was done with very little discussion. There was pretty much consensus.

Mr. Nelson said the main discussion about the Resource Restoration Group was whether or not they should have a designee on this group. They eventually decided they would have a designee; and whether or not the designees they would each have would be one individual or several individuals who would rotate according to different issues. He said he was not sure they resolved that issue, but he thought the general feeling was that each of them would appoint one primary person. He said the RRCG will also have some sort of an executive director who will oversee day-to-day operations. It is not clear at this point whether or not they will be physically located in one location. The federal side favored one location for all, but the state people preferred to work out of their own offices and meet from time to time.

Initially they decided the group would be based in Juneau. The primary public comment during this meeting was that people felt that Juneau was not an appropriate site for this group -- that it should be located closer to the affected area. Most people were saying that Anchorage would be most the appropriate place. Charlie Cole, the chairman of the trustee council, said that Juneau was a temporary location, and would not necessarily be the permanent location. It was to be a subject of later discussions.

Mr. Nelson said the council also discussed public participation and who to give the authority to set it up. They didn't really want to get into public participation themselves, so they asked Curt McVee, the Department of Interior representative, and John Sandor, the Commissioner of the Alaska Department of Environmental Conservation (DEC) to have somebody designated from each of their groups to look into how to set up a public participation process. They wanted to have some initial meetings in mid to early January for the public.

Mr. Nelson said the members of the Resource Restoration group would be appointed by December 13. The next trustee council meeting will be on December 19, 6:30 p.m. in Anchorage.

Mr. Nelson said public comment was pretty informal. At different points they allowed the audience -- from 80 to 100 people -- to comment pretty much as they wished. Most of the comments related

to whether the group would be located, with most people preferring Anchorage. The other comments were sort of supportive of the group getting moving to try to spend some money and do some things that needed to be done. There were very few specific recommendations offered.

That concluded Mr. Nelson's initial report.

The Chairman welcomed Rep. Mark Hanley, a member of the House Judiciary Committee.

Rep. Martin commented that he felt the public was a little bit impatient in demanding answers before the committee had even started. He asked if anyone came up with suggestions as to how the money we have already received should be spent.

Mr. Nelson replied that there were no specifics discussed. He said the newspaper account, in his opinion, was fair, but a bit "more testy" than what actually occurred. He said people wanted to get some comments in, but he didn't feel that people felt there were any major problems. Their interest was that the process start -- not that they had any specific suggestions.

Rep. Martin suggested that we offer people an open door to begin making suggestions. Rep. Gruenberg agreed and he would like to make that official: Anybody who has any suggestions on the subject of the settlement or the implementation of the settlement may bring them before the subcommittee. He said it was his intent to have one more meeting of the subcommittee, at which they will finalize their report and deal with the packet of legislation.

Mark Handley, staff to the Chairman, said they sent out a memo last month to all legislators soliciting any settlement-related legislation they had. The only response received was from Senator Menard's office, and his staff is here to discuss their legislation.

The Chairman requested that staff do a press statement requesting that the information be transmitted to the subcommittee.

Mr. Nelson called attention to a letter from Rep. Davidson in the packet. The letter is to the three state commissioners and requests that they consider fairly aggressive public involvement in the restoration process. The public participacion aspects of the restoration are still being discussed by the trustees.

The Chairman asked Mr. Nelson to provide the subcommittee with a copy of the trustee council's response to Rep. Davidson's letter, and also a copy of Rep. Davidson's letter.

<u>Proposed Legislation</u>

The next part of the meeting was to discuss potential legislation. The packets contain drafts of a number of bills.

Mark Handley reported that Rep. Gruenberg requested that legislation for about nine different issues be drafted. He said some of them probably can be merged, but they ordered them as individual bills so they can deal with the issues one at a time. The first two bills deal with future ~settlements in the sunshine," trying to make sure the legislature and the public get input.

Draft #1

Mr. Handley said the first draft prohibits out-of-court statement of public interest litigation. Page 2, lines 22 - 27 defines public interest litigation under this bill. Public interest litigation, where the value is over $10 million, under this bill would not be able to be settled out of court without court approval. Court approval is conditioned on a hearing, which is to be opened and noticed to the public. The court must make a finding based on that record -- that the settlement is in the public interest.

Rep. Martin questioned whether the legislation was retroactive. Mr. Handley replied that it does not have a retroactive effect; however, some of the outstanding litigation has not been settled. The way it is drafted, it would not bring cases like the Amarada Hess case into it. One of the questions to be considered is whether to broaden the definition of 'public interest litigation.' It would deal mostly with situations like the Exxon Valdez where there was damage to a natural resources. It would not apply to people who have already settled; however, if there was a settlement after the effective date, it would come under the sweep of this bill. The definition of public interest litigation is narrow enough, so that it would only include damages to natural resources. He said he is not aware of any cases right now that are outstanding.

Rep. Hanley asked why we wanted judicial approval. He said the court system does not necessarily look out for the public interest. If we want a public process, it seems like we could do that without requiring court approval. Is the only reason for judicial approval to guarantee a public process?

Mr. Handley replied that we based this on a class action model in place in the federal and state system. The policy behind it is to have a broad class of people represented by one or two people. In order to make sure that any kind of settlement really is in the best interest of the parties, the court must review it. In this case, we have natural resource damages and we are represented by the Attorney General. It was the sponsor's feeling that there are other interests besides the state's sovereign involvement -- you

have huge natural resource damages. Or, people in the affected area, for instance Native groups, also have an interest that may or may not coincide with the interest of the sovereign. It was felt there should be some point in the judicial system where those interests have a right to be heard and the court is made aware of them before it accepts the settlement in the public interest.

Chairman Gruenberg said it was his thinking that if a party to litigation enters into a settlement, often there is a pride of authorship and a desire to see the deal go. In cases where there's a real public interest involved, there should be a neutral third person -- in this case a judge, who is set up to adjudicate and determine things like this, whether it is in the public interest. There are two reasons to have the judge involved: (1) to make a conclusion of that the process set forth in the bill has been followed and (2) that it is in the public interest.

Rep. Hanley agreed that there should be public input. His concern is that the court would take the role of public officials in determining what is in the public interest. He does not disagree with the court determining whether the process was followed. He also felt we should be careful not to put so many restrictions on that we have no settlements, and that everything will be litigated to the end.

Chairman Gruenberg stated that it was not his intent that a judge should become a legislator. The concept of judges approving settlements as being in the best interest is a very old concept. For example, there's a civil rule now that requires the judges to approve settlements involving minors. As far as stopping settlements, it is not the intent to put any impediment in the way of settlement, but, in fact, to increase the public confidence to make it then more likely that the legislature may find that an independent body has approved it. Hopefully, this would increase the public confidence and make the system work better.

Chairman Gruenberg welcomed Rep. Dave Donley, Chairman of the House Judiciary Committee, to the meeting.

Rep. Martin said he was very concerned about this delegation of powers to the judiciary. He thought we should look into the constitutionality of it. He did not feel the court system should be telling the legislature how to appropriate money.

Rep. Davidson (via teleconference) said he concurred with Rep. Martin's remarks in many respects. However, he would also like to know if there was a disproportionate share of authority that underlies appropriation issues of the legislature. How does it work currently?

The Chairman asked Mr. Chenoweth to reply. Mr. Chenoweth explained the state procedure in accepting settlements involving sums of

money. The Department of Law would sign the settlement agreement, and the money would then be made available and put in the general fund for legislative use. As a general matter, there is no restriction on the settlement authority of the Attorney General's office; and the legislature has access to what is available to it in the general fund for purposes of appropriation.

Rep. Davidson asked if the legislation might get too many people involved in negotiating settlements. Mr. Chenoweth stated that there is no legislative role in the draft we are talking about. The legislative role would not be any different if this particular piece of legislation passed or did not pass.

Mr. Handley stated that this first bill basically does not interfere with the negotiation process. What happens is that the parties come together in negotiation and they bring that settlement to the court. It is similar to the process that Judge Holland went through where he required notification to the public about the settlement, and a subsequent hearing. As Rep. Gruenberg said, there would probably be a fairly broad standard applied by the court that he would not reject a settlement unless it was obviously not in the public interest, based on the hearing he had. This draft does not affect the legislature's role -- that matter is dealt with in the next draft.

In answer to Rep. Davidson, Mr. Handley said the legislature could pass a resolution or something that would be made a part of the record under the first draft, and that would increase the legislature's participation in the settlement. Basically, we don't have a role at this point in negotiated settlements. The purpose of the first bill is to provide for a public hearing and a judicial finding that the settlement is in the public interest.

Tape 1, Side B
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Rep. Martin again requested that Mr. Chenoweth look into the constitutionality question -- especially since the Attorney General's office has pointed out that revenues equal appropriations, which he (Martin) disagrees with. He believed they were two different things.

Mr. Handley stated that at some point we may want to look at the definition of public interest to determine whether it is too narrow or too broad. He then moved on to Draft #2.

<u>Draft #2</u>

Mr. Handley explained this draft looks at future settlements that would basically require a legislative appropriation for any claim for or against the state. It also will require legislative appropriations for claims made by the state if there's a

restriction on the use of the settlement as there was in the present case or if there is a transfer of state assets involved, i.e., a trade of mining rights for some other kind of settlement, or if the value of the settlement is over $10 million. So, basically, by statute the legislature is trying to assert its role and its constitutional role in the appropriation process, to make sure the legislature is not circumvented through the settlement process by the creation of some kind of a trust.

Chairman Gruenberg wanted to know the differences and similarities between this draft bill #2 and the bill we passed last year, HB 144, involving settlements over $10 million and also the differences and similarities between this bill and the statute in the Little Tort Claims Act (AS 09.50) that talks about settlements and appropriations when the state is a defendant and requires that vouchers be submitted to the Department of Administration. And if current appropriations to that department are insufficient, that the legislature be asked to appropriate additional funds to pay the judgement against the state with respect to tort claims.

Mr. Chenoweth said he would outline those similarities and differences in writing in the near future.

Chairman Gruenberg stated that he is not aware that there is any provision of this type in the Little Miller Act. If there is not, was it an oversight or is there a reason? He said it seems to him that there should be one statute that generally covers these kind of claims.

Mr. Chenoweth said his immediate reaction is that there ought to be one statute that generally covers these two areas, but he does not know that off the top of his head.

Rep. Martin said he would like to have some backup information to justify whether $10 million is a fair reference mark. Another question is: When will we make decisions? We are in session only four months of the year. Are we going to put that on the Judiciary Committee to settle on behalf of the body?

Chairman Gruenberg replied that his thought was that there should be another branch of government involved in oversight. It seemed to him that the Court is the best equipped to be the involved branch, where you would be dealing with just one judge. You're not getting the 60 people involved. The Court is in session all the time and it is something that courts often do in class actions and when the deal with other cases involving minors and legal incompetents, etc.

Regarding the appropriation process, he said right now we simply add the money into the appropriation bill. It basically involves just one subcommittee taking at it, and it is not a major issue. The Exxon Valdez case may be the exception since it has been a

different case than almost anything else.

Rep. Hanley asked if there were cases now that are settled without specific appropriations, aside from the Exxon settlement. Mr. Handley replied that they asked the Department of Law for an accounting of past settlements over the last few years and Law said it was impossible for them to do that because of present policy. Many times individual departments will settle cases out of their departmental operating budgets; and very rarely does the Department of Law get involved from a budget aspect. Mr. Handley said, besides the constitutional implications, we felt that this bill might provide a vehicle for the administration to set up some sort of an accounting system so somewhere in the budget the legislature would actually see what kind of settlements are being made.

Rep. Parnell (via teleconference) commented that it seemed to him that settlements would need to come to us in some form for legislative approval prior to the dispensing of funds.

The Chairman said we also had a question sort of along these lines from a member of the audience: Doesn't this ensure that the Governor has the authority to settle? How do we know that the legislature doesn't already have the powers? He then read from two statutes in the Little Tort Claims Act (AS 09.50.300 and AS 09.50.270) relating to the state's authority to settle.

Mr. Chenoweth (via teleconference) said there is a general provision in federal law covering claims against all state governments. Perhaps the thinking behind AS 09.50 was intended to cover other types of claims. He said there is a chapter in Title 44, Chapter 77, Claims Against the State, that might accommodate the kind of extended handling we are discussing.

The Chairman asked if any of the subcommittee members agreed that we should take a look at this against the background of existing law and see what we can do to consolidate and update the law to meet our needs.

Rep. Davidson remarked that in the past the state litigation team had problems because they did not have sufficient resources to do the job. He wondered if this is the place to consider something, or would that be an entirely different matter and have no place in this kind of litigation package?

Rep. Davidson also remarked that in the future we should make sure we have the resources to pursue litigation or the public interest certainly will not be served. We have had that amply demonstrated to us in Alaska.

Chairman Gruenberg asked the staff to meet with Rep. Davidson to see specifically what he had in mind.

Rep. Martin remarked that in the past he believed the Attorney General made periodic reports to the legislature on the status of litigation the state is involved in. Mr. Handley said the Attorney General's office said the only cases they would have any accounting for were those that came out of the Department of Law's budget, rather than out of the individual departments' budgets. They also said that those cases were generally rare -- that the bulk of settlements were taken care of either out of program operating expenses, or, in the case of a capital project, out of the money appropriated for that particular project.

Chairman Gruenberg asked Mr. Chenoweth to see if he could find an answer to Rep. Martin's question and respond to him directly.

Chairman Gruenberg then asked the following legal question: Looking at two cases, the first being the Mike Beirne Homestead case that went to the Supreme Court about ten years ago, and the second is a case in family law, Schover. The first case said that an appropriation could be an appropriation of something other than money. In that case, it was an appropriation of land. The analysis was that if you give away or transfer state land, it is an appropriation. The initiative provision of the Constitution prohibits an appropriation by initiative. Therefore, the Beirne initiative was unconstitutional because it gave away state land. The second case dealt with whether vacation time provided by an employer, that can be converted into cash - a marital asset, which is a type of property. The court said it was, because it is a legal claim or a legal cause of action, it is a type of marital property, subject to division by the family court.

Continuing, the Chairman said if you put both of those cases together, it seems to him an argument can be made that if you transfer or give away a valuable state cause of action, that's a type of appropriation. The question in his mind is; If the state compromises a valuable state claim for less than the potential value of it, is that the type of appropriation that would have to be approved by the legislature?

Mr. Chenoweth said he followed that reasoning. His concern is that the Courts would be inclined to limit the application of the term "appropriation" to things that are readily recognizable as state assets -- things that the state has in hand. He said he would want to look at the use of the term "appropriations" in our courts' opinions and elsewhere.

Chairman Gruenberg said he wants to move ahead on the agenda, and would speak to Mr. Chenoweth about this matter later.

Draft #3

Mr. Handley stated that the rest of our drafts are not dealing with future settlements. They deal with the Exxon Valdez

settlement -- getting the legislature involved in making sure that the state trustees are subject to same requirements that the head of any state agency using state money would be bound by. The first draft requires that all trust expenditures pass through at least a state or federal agency. It does not apply to expenses of the trust or money that under the MOA (Memorandum of Agreement) is supposed to be reimbursed to the federal and state governments for money they have expended in the clean up and litigation costs.

Mr. Handley said he had asked Mr. Chenoweth whether or not this was a constitutional requirement or just another check. In other words, whether we need this in addition to the next draft, where we require a legislative appropriation for all trust expenditures.

Chairman Gruenberg interrupted to say he saw Johanna Munson of Senator Menard's office. He asked Mr. Chenoweth if SB 200, 201, 202 are alternatives to the subcommittee's drafts. What is the inter-relationship between drafts 3 and 4 with each other and with Senator Menard's bills?

Mr. Chenoweth replied that he does not have any of the drafts numbered as Rep. Gruenberg does, so he can only pick up on the descriptions given him.

Chairman Gruenberg furnished the following work order numbers: Draft #3 is 7LS1562/A, Chenoweth, 10/29/91. Draft #4 is 7LS1563/A.

Responding to the question, Mr. Mark Handley, stated that Senator Menard's bill (SB 202 appropriates all the trust settlement money in to these two other trusts. Basically, their bills would be an alternative to our bill. It would basically take all the state money out of the hands of the present trustees and put it into a new trust that would go to specific things outlined in the bill.

Ms. Munson said she thought Senator Menard's drafts were intended to appropriate that money that comes exclusively to the state -- the $50 million plus whatever other sums may be appropriated to the fund.

Chairman Gruenberg asked if it was a different portion of the settlement money. Ms. Munson replied "that is correct."

Mr. Chenoweth said he understood Drafts 3 and 4 to be complimentary to each other. Draft #3 sets limitations on what the trustees, acting on behalf of the state, can do. Draft #4 establishes the process by which the legislature has a role in the process by which trusts are to be made available to the state agencies.

Rep. Martin listed two concerns: (1) The Governor signed the settlement on December 30, 1991. Would that not be a better reference point instead of when the agreement was agreed to?

Mr. Handley said he believed that date was tied in to the Memorandum of Agreement which says expenses, attorneys fees, etc., will not become part of the trust. That money will be reimbursed to the state. That date is referencing language within the MOA.

Rep. Gruenberg asked both Mr. Handley and Mr. Chenoweth to check on the correctness of the date.

Rep. Martin had a concern about legislative oversight. He suggested making the Legislative Budget and Audit Committee (LB&AC) be the vehicle by which we help the trustees in their ongoing decision-making.

Mr. Chenoweth asked what kind of help Rep. Martin contemplated LB&AC providing to the trustees on an ongoing basis. Chairman Gruenberg said he believes we would have to include this money as a line item in an appropriation bill, and we really can't delegate that to the LB&AC. This would just be rolled into an appropriation bill.

Rep. Martin clarified his remarks, saying that as long as we know they had been given the authority to accept and disburse on behalf of the legislature. . . .

Rep. Hanley said he definitely felt we should combine all the drafts. Drafts 3, 4, and 6 all new sections to AS 37.14.400.

There were no further comments on Drafts 3 or 4. The Chairman directed the members to Draft #6, saying we will come back to Draft #5.

Draft #6 - Work Order 1565

Mr. Handley stated that this draft requires that the state Exxon trustees submit reports to the legislature and the Governor accounting for their expenditures for the preceding year; and that they project and submit their budget for the next fiscal year, like a department would.

There were no comments or questions on this draft.

Draft #5

Mr. Handley said this draft subjects the trustees to requirements that other state officers would be in expending state money. It also subjects them to the Open Meetings Act. He said since they (the trustees) seem to be delegating some of their authority to sub-groups, we might want to look at putting some of these sub-groups under the same restrictions.

Chairman Gruenberg asked Mr. Handley to have the bill redrafted along those lines.

Rep. Hanley said he believed it was important to check with the federal people before we draft anything. By imposing some of these things on our own people, we may effectively conflict with federal regulations. For instance, we may require ten days notice, while they may require five days notice, etc.

Chairman Gruenberg asked Mr. Chenoweth to make sure there are no conflicts along those lines.

Draft #7

Mr. Handley said this draft subjects the trustees to the Executive Branch Ethics Act, which prohibits such things as nepotism and requires conflict of interest reporting.

Draft #8

Mr. Handley said this draft subjects the trustees to the requirements of tne state's Procurement Code. We wanted to make sure that the money is disbursed fairly.

Note: The members did not have a copy of Draft #8 before them, but the draft had been ordered from Legislative Affairs.

Rep. Martin feared that because the money is a mix of state and federal, we will get involved in a problem of whose procurement code we're going to follow.

Mr. Handley said they had thought of that possibility, which could be resolved by having the trustees choose to follow one government code or the other.

Draft #9

Mr. Handley said this bill is an appropriation bill to deal with the potential civil litigation against the trust, challenging their expenditure or use of state money without going through the legislature. We would appropriate the state's interest in the settlement to the trust. In order to protect the legislature's interest, because, arguably, if we do make that appropriation, the Executive could make the argument that once we have appropriated funds into the trust, we have given carte blanc to expend money as they see fit. We have added a contingent effective date that provides that the appropriation only becomes effective on the date of enactment of legislation requiring legislative appropriation of trust expenditures.

Note: Draft #9 was not available to the subcommittee at this time.

Tape 2, Side A
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Mr. Chenoweth asked if Rep. Martin contemplated a one time appropriation by the legislature and then further allocations by the Legislative Budget and Audit Committee when they meet monthly. Or, does he contemplate some sort of targeted appropriation and reserving the authority to Budget and Audit to allow the executive branch to move money between those appropriations?

Rep. Martin said he preferred the second alternative.

The Chairman asked Mr. Chenoweth to include such a provision in the draft legislation.

There were no further questions or comments concerning Draft #8.

Senator Menard's Bills (SB's 200, 201, 202)

Johanna Munson, staff to Senator Menard testified on Senator Menard's three bills.

She said one of the bills is an appropriation bill. The other two create two trust funds -- SB 200 establishes the Prince William Sound (PWS) Science Center Trust Fund, and the other the Exxon Valdez Environmental Restoration Trust Fund.

She briefly went through the bills for the subcommittee.

SB 200 is a separate endowment trust fund. The legislature would make appropriations to the fund. It would also be available for gifts, bequests or any other source of funding. An important limitation on expenditures is that only net income is available to be awarded in the form of grants. This is intended to be a long-term endowment process. Sec. 410 outlines the powers and duties of the Commissioner of Revenue, who administers the fund. Sec. 420 outlines how the funds can be utilized. Under the CERCLA process, the Commissioner of Fish and Game is the trustee for the state for the damage assessment program. The bill establishes that the Department of Fish and Game is the functional body to disburse and award the Science Center trust awards. Section 430 outlines the Fish and Game Commissioner's responsibilities. Sec. 440 outlines the grants themselves. The bill also limits the amount of money that can be spent on administration.

Rep. Martin said he would prefer that the administrative expenses be limited cumulatively rather than per grant. Also, he felt that Sec. 2 effective date, which is tied to the Exxon Valdez settlement date, should be deleted.

Ms. Munson said she thought Rep. Martin's comments on the effective date were appropriate. The language was prospective -- prior to the spill settlement, and that is why it was deemed to be important at that time.

SB 201

Ms. Munson said SB 201 establishes the Exxon Valdez Environmental Restoration Trust Fund. They will be administered by the Department of Revenue. Sec. 310 establishes a nine member board of trustees for the fund. The bill also requires the board to report to the Governor and the Legislature by February 1, of each year on its activities and programs. They also must provide an estimate of the annual income and expenses of the fund.

Under this bill, the legislature appropriates the money to the fund and then the legislature appropriates money from the fund to the board for specific projects. The effective date of the bill also ties itself to the Exxon Valdez settlement, which Rep. Martin mentioned in SB 200. SB 202 is an appropriation bill. The intent was to appropriate those funds that came exclusively to the state to these two trust funds.

Rep. Hanley believed the appropriation bill needs work, since there should be some relationship between the money that's coming in. He said they talk about specifics here for purchasing timber rights. That's more appropriately up to the trustees. That may be something that's covered already under the normal trustees process. So, there's no sense us using money that we've had appropriated to us as direct state appropriations to purchase things that are probably going to be purchased anyway under the joint federal/state money.

Ms. Munson replied that their intent in the bills was to try to be as broad and general as possible to allow the full gamut of potential restoration activities to occur. It was also their intent to encourage cooperative restoration efforts with the trustees.

Mr. Handley had a question about Sec. 1. He said he was not sure exactly what money that initial appropriation would sweep in. It seems like it would potentially sweep in the money we received under the criminal plea and the money we will get for reimbursement for expenditures the state's already made. It seems like it could potentially do this, but that it was not Senator Menard's intent. What was their intent?

Ms. Munson replied that Mark is correct. They did intend it to be limited, but perhaps they did not convey that to the drafters. She said they could work on that language in conjunction with the other bills that have been drafted. She said they were amenable to working with others to put together a legislative package.

Rep. Martin wanted to know if the three bills could be combined.

The Chairman replied that the appropriation bill had to stand

alone.

Mr. Chenoweth said SB's 200 and 201 could be combined.

There were no further questions for Ms. Munson, and so the Chairman continued with the last item on the agenda, which is Rep. Martin's resolution.

HCR Bill Draft by Rep. Terry Martin

Rep. Martin's draft resolves that the Alaska Legislature approve the proposed new settlement with Exxon (those documents signed on September 30, 1991). He felt we should approve the Exxon settlement and move forward.

Rep. Davidson (via teleconference) thought perhaps we should include an additional resolve that the legislature would like to see an increased role for itself in the dispensation of those funds. Would Rep. Martin agree with that?

Rep. Martin replied that although the other bills being considered deal with that issue, he had no problem with including such a provision in his resolution.

Rep. Davidson commented that the reason he says that is that a resolution usually has no problem going forward, whereas these bills obviously are going to have much more scrutiny and involve a longer process. In the event some of the bills do not pass, he would like the resolution to reflect that these people should be aware that we expect to have a role in future settlements.

Chairman Gruenberg asked Mr. Handley to work with Mr. Chenoweth to see that Rep. Davidson's suggestions are incorporated into a new draft of the Martin resolution.

Rep. Pat Parnell agreed with Rep. Davidson. He said Rep. Martin earlier indicated the legislature had to maintain its constitutional role. It seems to him that it is within the purview of the constitution, and it is our responsibility to uphold it, that we agree with the agreement and consent decree -- that we still maintain our rightful role in the disbursement of those funds.

Chairman Gruenberg asked staff to ensure that that kind of language was included also.

Adjournment

There being no further comments or questions, the Chairman adjourned the meeting at 3:45 p.m.

Committee Document #10

DIVISION OF LEGAL SERVICES

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MEMORANDUM December 10, 1991

SUBJECT: Deductibility of certain expenses from state income tax (Work Order No 7-LS1650A)

TO: Representative Max F. Gruenberg, Jr.

FROM: Jack Chenoweth
Legislative Counsel

Your recent opinion request asks about Exxon's ability, as a taxpayer to deduct under the state's income tax (the Alaska Net Income Tax Act) amounts that it pays or incurs under the recently concluded settlement.

This office recently considered the question of the deductibility, under federal income tax law, of amounts to be paid by Exxon as fines and restitution in conjunction with the settlement of criminal charges arising out of the March, 1989, Exxon Valdez grounding. That opinion determined that the fines were clearly not deductible, but that the restitution payment probably was a deductible expense. The opinion said:

> You have asked about the deductibility, under federal income tax law, of the fine and restitution that Exxon will pay under the recently approved plea agreement. The fine is clearly not deductible under 26 U.S.C. 162(f), which precludes a deduction for "any fine or similar penalty paid to a government for violation of any law." The restitution probably is deductible, but this is not entirely clear.
>
> The IRS regulations (attached) on fines and penalties, and the case law on the issue, make it clear that any fine imposed in connection with a criminal conviction is not deductible, because of 162(f). Indeed, even if the fine here were a civil fine under the Clean Water Act. it would probably not be deductible. True v. United States, 894 F.2d 1197 (10th Cir. 1990); Colt Industries, Inc. v. United States, 880 F.2d 1311 (Fed. Cir. 1989).
>
> The restitution probably is deductible as a business expense under section 162, with subsection (f) not applicable. See the last sentence

of regulation 1.162-21(b)(2) ("Compensatory damages . . . paid to a government do not constitute a fine or penalty"). However, at least one case has held that restitution was not deductible. In Waldman v. Commissioner, 88 T.C. 1384 (U.S. Tax Ct. 1987), affirmed on basis of Tax Court opinion, 850 F.2d 611 (9th Cir. 1988), the taxpayer, convicted of grand theft in a California court in connection with business fraud, was ordered to pay restitution as a condition of probation. The court found that the order was intended at least in part as a penalty, and that the "compensatory damages" clause of the regulation did not apply. The court also found that the restitution should be seen as paid to the government, even though it would be distributed to the taxpayer's victims.

My guess, however, would be that the restitution order in the Exxon case will be treated by the Internal Revenue Service as in the nature of compensatory damages, rather than as an additional penalty. (Indeed, there may already be some tacit agreement between the federal government and Exxon about the tax consequences of the plea agreement.) The fact that the restitution moneys are specifically directed to go to restoration of the environment certainly seems to qualify them as compensatory damages. Moreover, the nature of Exxon's offenses (not involving fraud or dishonesty, unlike the Waldman case) would in my opinion make the IRS and the courts less likely to find that something labelled restitution is in fact an additional, nondeductible penalty.[1/] However, in light of Waldman, there is certainly the possibility that the restitution order might be found to be nondeductible, too.

Since the state's income tax provisions are tied to the federal tax code, AS 43.20.021, and the section of the federal tax code relied upon to reach the conclusions set out in the earlier opinion has not been changed or amended by the state tax law, the conclusions reached as regards deductibility for purposes of the federal income tax should also attach as to taxation under the Alaska Net Income Tax Act: the company may not deduct the amount of the fine, but is likely to claim the restitution payable as a deductible business expense and, for reasons discussed in the earlier opinion, would seem to have a reasonable chance to prevail if that deduction is challenged by the Department of Revenue.

JBC:lmb
91-299.lmb

1/ See, Mason and Dixon Lines, Inc. v. United States, 708 F.2d 1043 (6th Cir. 1983), holding deductible "liquidated damages" that motor carrier was required by Virginia law to pay for operating overweight trucks (in addition to nondeductible fines).

BILLS

Draft #1: "An Act relating to the Exxon Valdez Oil Spill Trust and to natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state in settlement of the parties' claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill; to the approval of expenditures by the state officers acting as trustees of the trust established for natural resource damage recoveries under that Memorandum of Agreement and Consent Decree; and placing the state trustees of the Exxon Valdez settlement and certain persons to whom trust duties are delegated in the Alaska Executive Branch Ethics Act; and providing for an effective date."

Draft #2: "An Act making a contingent appropriation to the Exxon Valdez Oil Spill Trust; and providing for an effective date."

Draft #3: "An Act requiring judicial approval of proposed settlements entered into by the state in public interest litigation; setting forth procedures for judicial review of these proposed settlements; defining public interest litigation; and amending Rule 41, Alaska Rules of Civil Procedure, and Rules 202 and 216, Alaska Rules of Appellate Procedure."

CSHB 144 (FIN) am: "An Act providing for legislative appropriation of the terms of certain proposed settlements of claims; prohibiting the payment of those terms without an express appropriation; and the requiring reports of settlements." (By Rep. Ulmer)

CSHB 287 (FIN): "An Act disallowing under the Alaska Net Income Tax a portion of the deduction authorized by the Internal Revenue Code for certain oil and hazardous substance discharge related expenditures; and providing for an effective date." (By Rep. Ellis)

HB 411: "An Act making appropriations for restoration projects relating to the Exxon Valdez oil spill; and providing for an effective date." (By Rep. Davidson)

State of Alaska

House Majority Leader
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HOUSE RULES
HOUSE STATE AFFAIRS
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MEMORANDUM

February 7, 1992

To: Representative Max Gruenberg
Chair, Settlement Subcommittee

From: Mark Handley

Re: Sectional Analysis of Draft #1(7-LS1563\M), The Exxon Valdez Oil Spill Trust Bill

Section 1

This section sets out legislative findings regarding the Exxon Valdez oil spill settlement, and the settlement process. These findings also establish the need for the legislation recommended by the Settlement Subcommittee.

Section 2

AS 37.14.400 establishes the Exxon Valdez Oil Spill Trust and provides that it will be managed in accordance with the terms of the M.O.A.

AS 37.14.405 prohibits state trustees from approving trust expenditures unless the state has appropriated the states interest in the settlement money to the trust and the legislature has made an appropriation for that specific trust expenditure.

AS 37.14.410 provides that reimbursements for state spill-related-expenses incurred before 9/30/92 will be deposited in the general fund. This clarifies an ambiguity as to the disposition of these funds in the M.O.A.

AS 37.14.415 requires that the state trustees annually submit a proposed budget for the next fiscal year and an accounting of funds actually spent out of the preceding years budget.

AS 37.14.420 prohibits the state trustees from approving trust expenditures, unless those expenditures are paid to government agencies, or are made pursuant to our state procurement code.

AS 37.14.425 places records that are subject to the control of a state trustee under the jurisdiction of the state public records act.

AS 37.14.450 defines "state trustee" and "trust" for the purposes of section one of this bill.

Section 3

AS 24.20.206 amends the existing statutes that list the duties of L.B.& A. by adding the duty provide the trustees with assistance in preparing their budget reports.

Section 4

AS 37.05.147(5) adds income of the trust to the definition of "program receipts". This will provide for special accounting of these funds.

Section 5

AS 39.52.960(21)(C) subjects state trustees and their designees to the requirements of the Alaska Executive Branch Ethic Act.

Section 6
AS 44.62.310(g) subjects state trustees and their designees to the requirements of the Open Meetings Act.

Section 7
Provides for an immediate effective date.

7-LS1563\M
Chenoweth
2/8/92

Draft
~~HOUSE~~ BILL NO. 1

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Exxon Valdez Oil Spill Trust and to natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state in settlement of the parties' claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill; to the approval of expenditures by the state officers acting as trustees of the trust established for natural resource damage recoveries under that Memorandum of Agreement and Consent Decree; and placing the state trustees of the Exxon Valdez settlement and certain persons to whom trust duties are delegated in the Alaska Executive Branch Ethics Act; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** LEGISLATIVE DISPOSITION AND FINDINGS. The legislature

(1) approves the administration's efforts to avoid protracted court battles and escalating

attorney costs through settlement of the Exxon Valdez Oil Spill litigation;

(2) disapproves the process by which the second settlement proposal was accepted; specifically, the legislature disapproves of the failure of the governor to abide by the governor's commitment to submit the proposal to the legislature for approval, and the refusal of the parties to allow for public comment before the public's claims were irrevocably compromised;

(3) approves the acceptance of the second criminal plea agreement that resulted in an additional $50,000,000 in restitution for restoration of Prince William Sound;

(4) disapproves the governor's acceptance of the second civil settlement because, under the terms of the second settlement, there is delay in the payment schedule that reduced the value of that settlement; the second civil settlement is worth approximately $7,300,000 less than the civil settlement rejected by the House of Representatives;

(5) finds that there is a need for statutory change to eliminate the causes of the failure of process that occurred in the final settlement of the Exxon Valdez oil spill litigation, to incorporate the spirit of the recommendations of the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement that are encompassed in House Concurrent Resolution 29, and to cure the constitutional infirmities of this settlement.

* **Sec. 2.** AS 37.14 is amended by adding new sections to read:

ARTICLE 5. EXXON VALDEZ OIL SPILL TRUST.

Sec. 37.14.400. TRUST ESTABLISHED. The Exxon Valdez Oil Spill Trust is established. Subject to law, the trust shall be managed under the Memorandum of Agreement and Consent Decree entered into by the United States and the state on August 27, 1991, in settlement of claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill.

Sec. 37.14.405. APPROPRIATIONS REQUIRED. (a) The state trustee may not approve an expenditure from the trust unless

(1) trust money available for the proposed expenditure has been appropriated by the legislature to the trust; and

(2) the legislature has appropriated money from the trust for the proposed expenditure.

(b) The provisions of (a) of this section do not apply to amounts paid as reimbursements to the United States or the state as authorized by the Memorandum of Agreement and Consent

Decree for expenses that are

(1) related to the Exxon Valdez oil spill; and

(2) incurred by either government before September 30, 1991.

Sec. 37.14.410. REIMBURSED EXPENDITURES. Amounts received by the state as reimbursement for expenses related to the Exxon Valdez oil spill incurred by the state before September 30, 1991, shall be deposited in the general fund.

Sec. 37.14.415. BUDGET AND REPORTS. The state trustees shall

(1) submit to the governor and the legislature by February 1 each year a report that sets out, for each object or purpose of expenditure, the amounts approved for expenditure from the trust during the preceding fiscal year and the amounts actually expended during the preceding fiscal year; and

(2) prepare and submit, under AS 37.07, a budget for the next fiscal year setting out the trustees' determination of the amount required for that fiscal year for appropriation for

(A) the operating expenses of the trust; and

(B) the probable objects or purposes of expenditure and the anticipated amounts of expenditure of the trust as authorized by the Memorandum of Agreement and Consent Decree.

Sec. 37.14.420. PAYMENTS TO PERSONS OTHER THAN GOVERNMENTS. The state trustees may not approve the payment of an expenditure from the trust to a person other than the state or federal government unless the expenditure complies with the procurement procedures established by AS 36.30.

Sec. 37.14.425. PUBLIC RECORDS. For purposes of AS 09.25.120, records of the trust in the custody or subject to the control of state officers and agencies are public records.

Sec. 37.14.450. DEFINITIONS. In AS 37.14.400 - 37.14.450,

(1) "state trustee" means a state officer designated by the governor to serve as a co-trustee of the trust;

(2) "trust" means the trust established for natural resource damage recoveries under the Memorandum of Agreement and Consent Decree entered into by the United States and the state on August 27, 1991, in settlement of claims for damages for injury, loss, or destruction to the natural resources affected by the March 24, 1989, Exxon Valdez oil spill.

* **Sec. 3.** AS 24.20.206 is amended to read:

Sec. 24.20.206. DUTIES. The Legislative Budget and Audit Committee shall

(1) report to the legislature its recommendations relating to the confirmation of appointees to the Board of Trustees of the Alaska Permanent Fund Corporation;

(2) annually review the long-range operating plans of all agencies of the state which perform lending or investment functions;

(3) review periodic reports from all agencies of the state which perform lending or investment functions;

(4) present a complete report of investment programs, plans, performance, and policies of all agencies of the state which perform lending or investment functions to the legislature within 30 days after the convening of each regular session;

(5) present to the legislature within 30 days after the convening of each regular session a review of the report of the governor under AS 37.07.020(d) with recommendations for needed legislation;

(6) in conjunction with the finance committee of each house recommend annually to the legislature the investment policy for the general fund surplus and for the income from the permanent fund;

(7) provide for an annual post audit and annual operational and performance evaluation of the Alaska Permanent Fund Corporation investments and investment programs;

(8) provide for an annual operational and performance evaluation of the Alaska Housing Finance Corporation and the Alaska Industrial Development and Export Authority; the performance evaluation shall include, but is not limited to, a comparison of the effect on various sectors of the economy by public and private lending, the effect on resident and nonresident employment, the effect on real wages, and the effect on state and local operating and capital budgets of the programs of the Alaska Housing Finance Corporation and the Alaska Industrial Development and Export Authority;

(9) provide assistance to the trustees of the trust established in AS 37.14.400 - 37.14.450 in carrying out their duties under AS 37.14.415.

* Sec. 4. AS 37.05.146 is amended to read:

Sec. 37.05.146. DEFINITION OF PROGRAM RECEIPTS. In AS 37.05.142 - 37.05.146 and AS 37.07.080, "program receipts" means fees, charges, income earned on assets, and other state money received by a state agency in connection with the performance of its functions; all

program receipts except the following are general fund program receipts:

(1) federal receipts;

(2) University of Alaska receipts (AS 14.40.491);

(3) individual, foundation, or corporation gifts, grants, or bequests that by their terms are restricted to a specific purpose;

(4) receipts of the following funds:

(A) highway working capital fund (AS 44.68.210);

(B) correctional industries fund (AS 33.32.020);

(C) loan funds;

(D) international airports revenue fund (AS 37.15.430);

(E) funds managed by the Alaska Aerospace Development Corporation (AS 14.40.821), the Alaska State Housing Authority (AS 18.55.020), the Alaska Housing Finance Corporation (AS 18.56.020), the Alaska Railroad Corporation (AS 42.40.010), the Municipal Bond Bank Authority (AS 44.85.020), or the Alaska Industrial Development and Export Authority (AS 44.88.020);

(F) fish and game fund (AS 16.05.100);

(G) school fund (AS 43.50.140);

(H) training and building fund (AS 23.20.130);

(I) retirement funds (AS 14.25, AS 22.25, AS 26.05 222, AS 39.35, and former AS 39.37);

(J) permanent fund (art. IX, sec. 15, Alaska Constitution);

(K) public school trust fund (AS 37.14.110);

(L) second injury fund (AS 23.30.040);

(M) fishermen's fund (AS 23.35.060);

(N) FICA administration fund (AS 39.30.050);

(O) mental health trust fund (AS 37.14.031)**;**

(5) receipts of the trust established by AS 37.14.400 - 37.14.450.

*** Sec. 5.** AS 39.52.960(21) is amended to read:

(21) "public officer" or "officer" means

(A) a public employee; [AND]

(B) a member of a board or commission; **and**

(C) a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties; in this paragraph, "trust" has the meaning given in AS 37.14.450;

* **Sec. 6.** AS 44.62.310 is amended by adding a new subsection to read:

(g) Unless an exception is authorized by federal law, the provisions of this section and AS 44.62.312 apply to meetings of the state officers designated by the governor to act as trustees of the trust established by AS 37.14.400 - 37.14.450, and to meetings of persons to whom they have delegated any of their authority, if the meetings involve

(1) two or more of the state officers or persons for purposes of establishing a common state position for purposes of administration of the trust; or

(2) one or more of the state officers or persons and one or more of the individuals appointed as trustees by the President of the United States, or individuals to whom those trustees have delegated any of their authority, for purposes of exercising authority over the trust.

* **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

State of Alaska

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MEMORANDUM

January 27, 1992

To: Representative Max Gruenberg
Chair, Settlement Subcommittee

From: Mark Handley

Re: Sectional Analysis of Draft #2(7-LS1675\A), The Exxon Valdez Oil Spill Trust Appropriation Bill

Section 1

Appropriates the states interest in the the Exxon Valdez oil spill settlement money paid by Exxon in FY '92 and FY '93 to the Exxon Valdez Oil Spill Trust. This appropriation is contingent on the taking effect of legislation creating Exxon Valdez Oil Spill Trust, requiring the state trustees to submit trust expenditures to the legislature for appropriation, comply with the state procurement code, the Alaska Executive Branch Ethics Act, and the Alaska Open Meetings Act.

Section 2

Provides for an immediate effective date.

7-LS1675\A
Utermohle
1/16/92

Draft
~~HOUSE~~ BILL NO. 2

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act making a contingent appropriation to the Exxon Valdez Oil Spill Trust; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** (a) Contingent upon (b) of this section, the interest of the State of Alaska in the money paid during fiscal years 1992 and 1993 by Exxon Corporation, Exxon Shipping Company, or Exxon Pipeline Company, under the Agreement and Consent Decree in United States v. Exxon et al., and State of Alaska v. Exxon, et al., United States District Court, District of Alaska, cases No. A91-082 Civ. and A91-083 Civ., and not paid to the state or federal governments as reimbursements for expenses related to the Exxon Valdez oil spill and incurred by either government before September 25, 1991, is appropriated to the Exxon Valdez Oil Spill Trust.

(b) The appropriation made by (a) of this section is contingent upon the taking effect of a bill or bills passed by the Seventeenth Alaska State Legislature that

(1) establish the Exxon Valdez Oil Spill Trust;

(2) prohibit state officers designated as trustees of the Exxon Valdez Oil Spill Trust from

approving an expenditure from the trust unless the legislature has appropriated trust money available for the proposed expenditure to the trust and the legislature has appropriated money from the trust for the proposed expenditure; and

(3) require state officers designated as trustees of the Exxon Valdez Oil Spill Trust to comply with AS 36.30 (State Procurement Code), AS 39.52, and AS 44.62.310 - 44.62.312.

* **Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

State of Alaska

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MEMORANDUM

January 29, 1992

To: Representative Max Gruenberg
Chair, Settlement Subcommittee

From: Mark Handley 1/29/92

Re: Sectional Analysis of Draft #3(7-LS1605\M), The "Settlement in the Sunshine" Bill

Section 1

AS 44.23.070 prohibits the Attorney General from binding the state to a settlement of "public interest litigation" unless the court finds that the proposed settlement is in the public interest.

AS 44.23.075 sets out the procedure for court review of a proposed settlement of "public interest litigation". This procedure provides for notification to the public and a public comment period.

AS 44.23.080 defines "public interest litigation" for the purposes of this bill as state claims for natural resource damages if the value of the proposed settlement exceeds $10 million.

Section 2

This section provides notice that the bill has the effect of amending Court Rule A.R.C.P. 41.

7-LS1005\M
Chenoweth
1/29/92

Draft
~~HOUSE BILL~~ NO. 3

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act requiring judicial approval of proposed settlements entered into by the state in public interest litigation; defining public interest litigation; and amending Rule 41, Alaska Rules of Civil Procedure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 44.23 is amended by adding new sections to read:

Sec. 44.23.070. JUDICIAL APPROVAL REQUIRED FOR PROPOSED SETTLEMENTS OF PUBLIC INTEREST LITIGATION. The attorney general may not bind the state to a proposed settlement of public interest litigation unless the proposed settlement is submitted to the court for review and the court finds that the proposed settlement is in the public interest.

Sec. 44.23.075. PROCEDURES FOR JUDICIAL APPROVAL OF PROPOSED SETTLEMENTS OF PUBLIC INTEREST LITIGATION. (a) If the state reaches a proposed settlement of public interest litigation, the attorney general shall within 15 days of reaching the proposed settlement reduce it to writing and submit the writing to the court for review under this section.

(b) Upon receipt of a writing from the attorney general under (a) of this section, the court shall require the parties to provide reasonable notice to the public of the terms of the proposed settlement and of the public's opportunity to submit written testimony about the terms. The court shall provide a public comment period on the settlement terms of at least 30 days. During the public comment period, the court may hold a public hearing on the proposed settlement.

(c) Within 30 days of the end of the public comment period, the court shall enter written findings as to whether

(1) the procedures of (b) of this section have been complied with; and

(2) the settlement is in the public interest.

Sec. 44.23.080. DEFINITION OF "PUBLIC INTEREST LITIGATION." In AS 44.23.070 - 44.23.080, "public interest litigation" means litigation in which the state asserts claims for damage to natural resources where the proposed settlement would result in the state receiving money, property, or services, or a combination of money, property, or services, having a value of $10,000,000 or more, exclusive of interest, costs, and attorneys' fees.

* Sec. 2. AS 44.23.075, added by sec. 1 of this Act, has the effect of amending Rule 41, Alaska Rules of Civil Procedure, by establishing procedures that the court must follow before granting a voluntary dismissal in certain litigation where the state is a party.

CS FOR HOUSE BILL NO. 144 (FINANCE) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Amended: 4/5/91
Offered: 3/21/91
Referred: Rules

Sponsor(s): HOUSE FINANCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act providing for legislative appropriation of the terms of certain proposed settlements of claims; prohibiting the payment of those terms without an express appropriation; and requiring reports of settlements."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. It is the purpose of this Act

(1) to place all persons with claims against the state or against whom the state has claims on notice that settlements of those claims requiring large appropriations are subject to legislative action;

(2) to require the governor to submit to the legislature all settlements of claims by or against the state that require large appropriations, and to allow the legislature to give informal approval or disapproval of those settlements; and

(3) to prohibit the state from paying large claim settlements out of funds other than those expressly appropriated for that purpose.

* Sec. 2. AS 09.50.300 is amended to read:

Sec. 09.50.300. COMPROMISE BY ATTORNEY GENERAL. Subject to the

requirements of AS 44.23.070. the [THE] attorney general may, with the approval of the court, arbitrate, compromise, or settle any action filed under AS 09.50.250 - 09.50.300.

* Sec. 3. AS 36.30 is amended by adding a new section to read:

Sec. 36.30.631. LEGISLATIVE REVIEW. AS 44.23.070 applies to claims brought under AS 36.30.620.

* Sec. 4. AS 37.05.170 is amended by adding a new subsection to read:

(b) The Department of Administration may not make the certification required under (a) of this section for the payment of part or all of a claim settlement covered by AS 44.23.070 unless the legislature has made an express appropriation or expenditure authorization for that part of the settlement for which payment is requested. The Department of Administration may not make a certification for payment of a settlement covered by AS 44.23.070 based on a general appropriation to pay judgments against the state or a general appropriation to the division of risk management.

* Sec. 5. AS 44.23 is amended by adding new sections to read:

Sec. 44.23.070. LEGISLATIVE APPROVAL REQUIRED FOR CERTAIN PROPOSED SETTLEMENTS OF CLAIMS. (a) If a settlement of a claim by or against the state would require legislative appropriation of goods, services, or money, or a combination of them, worth a total of $10,000,000 or more, whether in one or more than one fiscal year, the terms of the settlement requiring appropriation may not take effect until the legislature has made a specific appropriation to carry out those terms.

(b) A settlement of a claim described in (a) of this section shall be reduced to a written agreement. The written agreement must contain a provision stating the requirements for legislative appropriation set out in (a) of this section. The governor shall submit the written agreement to the speaker of the house of representatives and the president of the senate within 15 days of the date that the written agreement is executed. The legislature may advise the governor by concurrent resolution if it approves or disapproves of the terms of the settlement. The approval of the terms of a settlement requiring appropriation under this subsection is a nonbinding, advisory expression of legislative intent. If the legislature disapproves the terms of the settlement under this subsection, the state and the adverse party may resume settlement negotiations.

(c) If the settlement provides for payments by the state in more than one fiscal year, the

legislature may enact an appropriation carrying out the entire terms of the settlement or may enact an appropriation carrying out only the terms that require appropriation in the next fiscal year. An appropriation for part of the terms of an agreement does not bind the legislature to appropriate for the remaining terms. An appropriation for part or all of the terms of a settlement is subject to repeal of the unexpended portion of the appropriation.

(d) This section applies to settlements where money is to be paid to the state but is designated for specific purposes and where a legislative appropriation of $10,000,000 or more, whether in one or more than one fiscal year, would be necessary to effectuate those purposes. This section applies whether the claim is settled before or after litigation is commenced.

(e) If a settlement would require the state to pay costs, attorney fees, or interest, the amount of costs, attorney fees, and interest that the state would be required to pay is included in calculating the $10,000,000 figure.

Sec. 44.23.080. REPORTS ON SETTLEMENT OF CLAIMS. (a) An agency in the executive branch that during a calendar year has settled a claim by or against the agency without the involvement of the attorney general shall report in writing to the attorney general, no later than January 15 of the year following the year in which the claim was settled, on the claim settled and the terms of the settlement.

(b) No later than February 1 of each year, the attorney general shall report in writing to the legislature regarding claims by or against the state that were settled during the previous year

(1) by the attorney general as a result of litigation;

(2) by the attorney general without litigation;

(3) by an executive branch agency with the involvement of the attorney general; or

(4) by an executive branch agency without the involvement of the attorney general.

(c) The report to the legislature under (b) of this section must set out the nature of the claims settled and the terms of the settlements.

Sec. 44.23.090. DEFINITIONS. In sections 44.23.070 - 44.23.080 "claim" means a demand for payment of money, goods or services based on a legal cause of action.

* Sec. 6. AS 44.77 is amended by adding a new section to read:

Sec. 44.77.080. LEGISLATIVE REVIEW. AS 44.23.070 applies to claims brought under

this chapter.

CS FOR HOUSE BILL NO. 287 (FINANCE)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered: 5/8/91
Referred: Today's Calendar

Sponsor(s): REPRESENTATIVES ELLIS, Brown, Gruenberg, Navarre

A BILL

FOR AN ACT ENTITLED

"An Act disallowing under the Alaska Net Income Tax Act a portion of the deduction authorized by the Internal Revenue Code for certain oil and hazardous substance discharge related expenditures; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 43.20.036 is amended by adding a new subsection to read:

(k) For purposes of determining the tax payable under this chapter, a taxpayer who owns or who has control over oil or a hazardous substance may deduct expenses not to exceed $1,000,000 incurred during the tax year to contain, clean up, and mitigate the effects of the discharge of that oil or hazardous substance. The limitation of this subsection also applies to payments, whether compensatory or remedial in nature or otherwise, if made to the state or the federal government or to a trust to which the state is a party when required by a court order entered under 33 U.S.C. 1251 - 1376 (Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, as amended) or 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended) or in settlement

of litigation by the state against the taxpayer made under one of those Acts or other law. The limitations of this subsection do not apply to a hazardous substance response action contractor, as that term is defined by AS 46.03.823, unless the oil discharge or the discharge of the hazardous substance is caused by an act or omission of the contractor that under AS 46.03.823(a) is negligent or grossly negligent or that constitutes intentional misconduct.

* Sec. 2. This Act is retroactive to January 1, 1991, and applies to taxes payable under the Alaska Net Income Tax Act (AS 43.20) after December 31, 1990.

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

HOUSE BILL NO. 411

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES DAVIDSON, Navarre, Gruenberg

Introduced: 1/21/92
Referred: Resources, Finance
Funding Information: General Fund $ -0-
Other Funds 50,000,000
$50,000,000

A BILL

FOR AN ACT ENTITLED

"An Act making appropriations for restoration projects relating to the Exxon Valdez oil spill; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** FINDINGS. The Seventeenth Alaska State Legislature finds that:

(1) Under the recently approved criminal plea agreement between the United States and Exxon Shipping Company and Exxon Corporation (United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR.), the State of Alaska received $50,000,000 as "remedial and compensatory payments." The payments received by the state "are to be used by the State of Alaska . . . exclusively for restoration projects, within the State of Alaska, relating to the 'Exxon Valdez' oil spill. Restoration includes restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills."

(2) The health of damaged coastal and near-shore habitats is substantially related to activities

on adjacent uplands. Economically important fish species, including herring and halibut, utilize near-shore areas and anadromous species, including five species of salmon, rely on continued access to both clean streams and unpolluted estuaries for spawning and rearing.

(3) Populations of aquatic birds, including the tree-nesting marbled murrelet and fresh water nesting species such as harlequin ducks, were severely damaged by the Exxon Valdez oil spill.

(4) The quality of fresh water entering the estuarine environment is critical to satisfactory restoration and recovery of the physical and biotic environment in the region affected by the Exxon Valdez oil spill.

(5) Restoration of the coastal estuaries affected by the Exxon Valdez oil spill is placed at risk by further environmental stress resulting from timber harvesting and other industrial activities that involve substantial environmental disturbance. In order to minimize the potential for further environmental stress and to encourage and enhance the natural recovery and restoration of the affected region, acquisition of coastal related uplands in the affected region, including Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, the south side of the Alaska Peninsula, and adjacent biologically related areas, is an important use of "remedial and compensatory payments" received by the state under the criminal plea agreement.

(6) Continued citizen involvement and education are essential in order to identify damage to material resources caused by the Exxon Valdez oil spill, to restore areas affected by the Exxon Valdez oil spill, and to prevent future oil spills in the area.

* Sec. 2. In order to restore, replace, and enhance resources affected by the Exxon Valdez oil spill, to acquire resources and services equivalent to those affected by the Exxon Valdez oil spill, and to conduct long-term environmental monitoring and research programs directed to the containment, cleanup, and amelioration of the Exxon Valdez oil spill, the sum of $34,000,000 is appropriated from the remedial and compensatory payments received by the state under the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR., to the Department of Natural Resources for the acquisition of land and development rights in land, including timber rights, from willing sellers in the Prince William Sound region including the coastal region between Icy Cape and Gore Point, and the southern Kenai Peninsula.

* Sec. 3. In order to restore, replace, and enhance resources affected by the Exxon Valdez oil spill, to acquire resources and services equivalent to those affected by the Exxon Valdez oil spill, and to conduct long-term environmental monitoring and research programs directed to the containment, cleanup,

and amelioration of the Exxon Valdez oil spill, the sum of $7,000,000 is appropriated from the remedial and compensatory payments received by the state under the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR., to the Department of Natural Resources for the acquisition from willing sellers of land surrounding Pauls Lake and Malina Lake on Afognak Island. Not more than one-half of the land to be acquired through this appropriation shall be from Township 20 South Range 18 West, Township 20 South Range 19 West, and Township 21 South Range 19 West, Seward Meridian; the balance of the land to be acquired shall be from Township 23 South Range 23 West, Township 23 South Range 24 West, Township 24 South Range 23 West, and Township 24 South Range 24 West, Seward Meridian.

* **Sec. 4.** In order to restore, replace, and enhance resources affected by the Exxon Valdez oil spill, to acquire resources and services equivalent to those affected by the Exxon Valdez oil spill, and to conduct long-term environmental monitoring and research programs directed to the containment, cleanup, and amelioration of the Exxon Valdez oil spill, the sum of $3,000,000 is appropriated from the remedial and compensatory payments received by the state under the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR., to the Department of Fish and Game for environmental monitoring and research to determine the long-term effects of the Exxon Valdez oil spill on the biota of Prince William Sound and the Alaskan coast adjacent to the Gulf of Alaska.

* **Sec. 5.** In order to restore, replace, and enhance resources affected by the Exxon Valdez oil spill, to acquire resources and services equivalent to those affected by the Exxon Valdez oil spill, and to conduct long-term environmental monitoring and research programs directed to the prevention, containment, cleanup, and amelioration of the Exxon Valdez oil spill, the sum of $3,000,000 is appropriated from the remedial and compensatory payments received by the state under the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR., to the Department of Environmental Conservation for long-term research programs directed to the prevention, containment, cleanup, and amelioration of the Exxon Valdez oil spill.

* **Sec. 6.** In order to restore, replace, and enhance resources affected by the Exxon Valdez oil spill, to acquire resources and services equivalent to those affected by the Exxon Valdez oil spill, and to conduct long-term environmental monitoring and research programs directed to the containment, cleanup, and amelioration of the Exxon Valdez oil spill, the sum of $3,000,000 is appropriated from the remedial

and compensatory payments received by the state under the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, United States District Court, District of Alaska, case No. A90-015 CR., to the Department of Education for grants for environmental education projects related to the Exxon Valdez oil spill and coastal studies.

* **Sec. 7.** The appropriations made by this Act are for capital projects and lapse under AS 37.25.020.

* **Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).