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MEMORANDUM March 21, 1991

SUBJECT: Sectional Analysis of Consent Decree - Paragraph 13 to end. (Work Order 17LS-1053)

TO: Senator Dick Eliason

FROM: Pamela Finley
Assistant Revisor of Statutes

SECTIONAL ANALYSIS OF CONSENT DECREE
PARAGRAPH 13 TO END.

RELEASE OF CLAIMS BY GOVERNMENTS;PARAGRAPH 13 (Pages 14-15) .
The state and federal governments give up all civil and administrative claims they have against Exxon arising out of the oil spill. This includes all the claims the State has made in state court under state law, except for #4 below. This paragraph explicitly states that the consent decree does not impair:

(1) the right of the state or federal government to enforce the consent decree, including the reopener clause;

(2) the rights of Alaska Native villages to act as trustees for the purposes of asserting or compromising their claims for damage to natural resources belonging to, managed by, controlled by, or appertaining to the villages;

(3) the rights of other parties who own or have an interest in property affected by the oil spill; or

(4) claims by the State for tax revenues that would have been, or would be collected under existing AS 43.75.

However, if the state recovers a judgment for lost AS 43.75 taxes, the state agrees to enforce that judgment only to the amount that would have been refunded to local governments. (See AS 43.75.130). In other words, the state can go ahead and sue for the full amount of lost taxes under AS 43.75, but if Exxon decides not to pay the full

amount, the state can only force payment of the amount (roughly one-half) that is given to local governments.

Questions.

1. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful?

2. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement?

3. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims?

RELEASE OF CLAIMS BY GOVERNMENTS; PARAGRAPHS 14-15 (Pages 15-17). In paragraph 14, the governments give up civil and administrative claims against Exxon Pipeline (except to the extent that Exxon Pipeline is liable because of its interest in Alyeska) to the same extent they gave up claims against Exxon in paragraph 13.

In paragraph 15, the governments agree not to make civil claims against Exxon's or Exxon Pipeline's employees, directors, and officers that relate to the oil spill. However, this provision is void if the employee, director, or officer brings an action against the governments, or either of them, relating to the oil spill.

If the state or federal government obtains a judgment against an officer, employee, or director of Exxon or Exxon Pipeline for liability relating to the oil spill, the government will collect on the judgment only to the extent the judgment is covered by insurance policies purchased by the individuals.

Question.

1. From the way paragraph 15 is structured, it appears that there may be a civil case pending against an employee, director, or officer of Exxon or Exxon Pipeline. Is this true?

REOPENER FOR UNKNOWN INJURY (Pages 17-18). In addition to other payments required by the consent decree, Exxon shall pay amounts, up to $100 million, needed for restoration projects to restore one or more populations, habitats, or species which, as a result of the oil spill, have suffered a substantial loss or substantial decline in the oil spill areas if

(1) the cost of the restoration project is not grossly disproportionate to the magnitude of the benefits; and

(2) the injury to the population, habitat, or species could not reasonably have been known, nor could it have been anticipated by any trustee from any information in the possession of or reasonably available to any trustee on the effective date.

Ninety days before demanding payment, the governments must file plans for the projects, statement of claimed costs, and information relied upon in preparing the plan and cost estimate.

Question.

1. How likely is it that the state or federal government will be able to take advantage of this provision, given the requirement that the injury can not have been anticipated by any trustee?

RELEASES AND COVENANTS NOT TO SUE BY EXXON AND EXXON PIPELINE (Pages 18-19). Exxon and Exxon Pipeline give up all civil and administrative claims they may have against the state and federal governments, and their employees, relating to the oil spill. Exxon and Exxon Pipeline reserve the right to enforce the consent decree. This does not affect any claims Alyeska may have against the governments.

Question.

1. What claims have Exxon or Exxon Pipeline asserted against the state or federal government?

TRANS-ALASKA PIPELINE LIABILITY FUND. The TAPL Fund is established by 43 U.S.C. 1653 (c), and consists of a nickel-per-barrel fee on the shipment of oil through the Valdez facility. The fee is not paid once the fund balance reaches $100 million, and is imposed when the balance falls below that amount. The owner or operator of a vessel and the fund are strictly liable, jointly and severally, for damages sustained as a result of discharges of oil from the vessel if the oil was transported through the trans-Alaska pipeline and placed aboard the vessel at the Valdez loading facility. Strict liability of the fund may not exceed $100 million per incident and the owner or operator of the vessel is responsible for the first $14 million, and the fund

is liable for the rest up to $100 million. The fund may proceed against the owner and operator of the vessel and third parties if the negligence of any of these caused the damage.

The consent decree provides that Exxon's release of the governments does not bar a claim Exxon may have against the TAPL fund. It also provides that if the TAPL fund asserts claims against the governments based on money the fund pays to Exxon or Exxon Pipeline, Exxon will repay the governments for any liability they may have to the TAPL fund. Also, if the TAPL fund asserts claims against the governments based on money the fund pays to Alyeska, Exxon will repay 20.34% of the government's liability. (Exxon Pipeline owns 20.34% interest in Alyeska.)

Questions.

1. Has the TAPL fund paid any money to Exxon or Exxon Pipeline? Is it likely to do so?

2. Has the TAPL fund paid any money to Alyeska, or is it likely to do so?

3. How likely is it that the TAPL fund will assert claims against the state for money (if any) the fund pays to Alyeska?

PROVISIONS PERTAINING TO ALYESKA (Pages 20-21). In paragraph 22, the governments give up all claims they may have against Alyeska related to the oil spill for "Natural Resource Damages" and "damages for injury to Natural Resources." In addition, if Alyeska pays Exxon for claims relating to the oil spill, and Alyeska then recovers from the state or federal governments all or part of what Alyeska paid Exxon, Exxon will repay the governments that amount.

In paragraph 23, the governments agree that if either recovers any amount from Alyeska related to the oil spill, it will instruct Alyeska to pay 20.34% of that amount to Exxon.

In paragraph 24 Exxon and Exxon Pipeline agree to repay the governments 20.34% of any amount Alyeska recovers from the governments related to the oil spill (except for recoveries described in paragraphs 22 or 25).

Paragraph 25 covers situations where Alyeska sues the state or federal governments for its own damages related to the oil spill, or because of Alyeska's liability to third parties (other than Exxon) related to the oil spill. In this situation, Exxon will pay the governments the amounts the governments paid Alyeska, if the government asserts in good faith all defenses it has and doesn't refuse a good faith proposal for settlement with Alyeska.

Questions.

1. Are any lawsuits of the types described in paragraphs 22-25 currently pending, or likely?

2. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska (e.g., economic loss)?

THIRD PARTY LITIGATION (Pages 21-23). Paragraph 26 governs cases where a third party sues Exxon or Exxon Pipeline and one or both of the governments for damages related to the oil spill. In this case, each party is to pay the amount allocated to it in the judgment recovered by the third party, and will not try to recover against the other sued party. If necessary to obtain an allocation of the liability, the sued parties may assert claims against each other, but will not enforce a judgment against each other.

Under paragraph 27 , if Exxon or Exxon Pipeline is sued by a third party for damages related to the oil spill, but neither government is a party, then Exxon will not seek to hold the governments liable for any amount it has to pay. If one or both of the governments is sued for damages related to the oil spill, but neither Exxon nor Exxon Pipeline is a party, the governments will not seek to hold Exxon liable for any amount the government has to pay (except for indemnification under paragraphs 21, 22 and 25).

Paragraph 28 provides that any amount Exxon has to pay a third party will not reduce the payments required by paragraph 8 ($900 million) or paragraph 17 ($100 million reopener).

Paragraph 29 provides that the parties will not tender each other as defendants under Rule 14(c) of the Federal Rules of Civil Procedure. Essentially this means that the parties will not pull each other in as a defendant in a maritime or admiralty case started by a third party. Note that this paragraph is not explicitly limited to lawsuits related to the oil spill.

Paragraph 30 covers situations where a third party settles with Exxon and sues one or both of the governments. In such cases, the governments have to try to apportion fault without joining Exxon as a defendant. If the court does not allow that, the governments may join Exxon for the purpose of allocation of fault, but may not enforce any action against Exxon as a result of that allocation. Here again, this paragraph is not explicitly limited to lawsuits related to the oil spill.

Questions.

1. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.)

2. Are there third party suits against the state, or are there likely to be such, in which Exxon or Exxon Pipeline is not a defendant? (Under paragraph 27, the state could not recover against Exxon for its losses in such cases.)

3. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. I suspect this was an oversight. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits?

4. Can the state and federal governments recover against each other for judgments they have to pay to third parties?

INTEREST FOR LATE PAYMENTS (Pages 23-24). If Exxon fails to make a payment when due under paragraph 8 (($900 million) or paragraph 9 (the escrow account), Exxon must pay interest on the overdue amount. The interest rate is the amount the federal government charges on amounts owed it. It is tied to the investment rate for the Treasury tax and loan accounts. 31 U.S.C. 3717 (a)(1) and (2).

RESERVATION OF RIGHTS (Pages 24-25). Paragraphs 32-35 contain fairly standard provisions. Paragraph 32 states that the agreement does not constitute an admission of fact, law, or liability. Paragraph 33 states that the agreement does not create any rights in a person who is not a party to it. Paragraph 34 states that the agreement does not prevent the governments from providing assistance or funding to those who are not a party to the agreement. Paragraph 35 states that the agreement does not impair an existing contract between Exxon or Exxon Pipeline and any entity of either Government, including a bioremediation studies agreement between Exxon and the EPA.

NOTICES AND SUBMITTALS (Pages 25-26). This section gives the addresses of the parties for the purposes of any written notices required by the agreement.

ENTRY OF AGREEMENT; WITHDRAWAL OF CONSENT (Page 26). Notice of the consent decree is to be published in the Federal Register, and public comments received for 30 days. At the end of the 30-day period, either the state or the federal government can withdraw from the agreement if comments show that it is inappropriate, improper, or inadequate, or if , before the end of the 15-day period the state legislature has not approved the agreement "as written". If either

government withdraws, the agreement terminates as of the date of notice of withdrawal.

Question.

1. It appears that the governments could keep the agreement in effect even if the state legislature does not approve it. If the legislature does not approve it and the state or federal government does not withdraw, could the legislature intervene in the federal case to prevent approval by the court? Could it intervene in the state court to prevent dismissal of claims?

TERMINATION OF AGREEMENT. Any party, including Exxon and Exxon Pipeline, can terminate the agreement if

(1) a court of competent jurisdiction disapproves or overturns a plea agreement in the federal criminal case against Exxon;

(2) a court of competent jurisdiction makes a final decision that the agreement will not be approved and entered by the court without modification; or

(3) a court of competent jurisdiction modifies the agreement in a manner materially adverse to any party, or interprets a material provision in a manner inconsistent with the parties' intentions, before or at the time of approving the agreement.

To terminate the agreement, the party must give written notice to the other parties within 10 days after the event occurs that justifies termination. If one party terminates, the agreement terminates as to all parties. The provisions for termination do not appear to involve approval of the termination by the court, although the court may get involved if the parties disagree about whether a modification was "material".

After termination under this paragraph (or termination after withdrawal under the previous paragraph), the agreement ceases to be valid, except that (1) Exxon may recover its money from the escrow account, and (2) the provisions of paragraphs 11 and 12, relating to cleanup, continue notwithstanding the termination.

Paragraph 12 gives Exxon a setoff under certain circumstances (the circumstances being different depending on whether the setoff amount exceeds $35 million or not) for its future cleanup work against any amount that it may owe either government for the oil spill. It appears that this setoff is now cast in stone, whether the agreement is terminated or not.

Paragraph 11's relationship to termination is a bit more complex because it states that Exxon has no further obligations with respect to cleanup (except as set forth in

the agreement) after "final approval". Given the definition of "final ap... pages 6-7, the agreement will not extinguish Exxon's cleanup duty if e... governments withdraws from it, or if any of the parties terminates it for ... except the rejection of the plea agreement in the criminal case. The difficu... arise if the governments do not withdraw, the court approves the agreement without changing it or indicating that it interprets it differently from the parties, the court's decision becomes final without an appeal (at which point "final approval" occurs and Exxon's cleanup duty ends under paragraph 11) and thereafter, a court rejects the plea agreement, thereby allowing Exxon to terminate the agreement, but still arguably to claim the benefit of paragraph 11(b). This may not be very likely, but it is theoretically possible.

Questions.

1. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated?

2. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC?

RETENTION OF JURISDICTION (Page 28). The court retains jurisdiction to enforce the consent decree.

MODIFICATION AND ASSERTION OF AUTHORITY (Page 28). Any modifications of the agreement can be made only with the written consent of all the parties and the approval of the court.

Also, the representatives of the parties certify that they have authority to enter into the agreement and legally bind the parties to the agreement.

Question.

1. Does the assertion by the Governor and the A.G. that they have authority to enter into the agreement and bind the state, prevent the legislature or a private party from challenging the agreement as beyond the power of the executive (e.g., if one of its provisions violates the state constitution)?

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