

SCOMM

77:13

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

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

MEMORANDUM

March 19, 1991

SUBJECT: Sectional Analysis of Consent Decree (W.O. 17LS-1053)

TO: Senator Dick Eliason

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

SECTIONAL ANALYSIS OF CONSENT DECREE THROUGH PARAGRAPH 12

INTRODUCTION. Pages 2-3. This sets out the background of the federal case. The important points are (1) an assertion that only the trustees are entitled to act on behalf of the public as trustees to recover damages to the natural resources arising from the oil spill; (2) the payments by Exxon are in addition to the \$2 billion that Exxon alleges it has spent for past cleanup and reimbursements to the federal, state, and local governments; and (3) the payments are made in response to "pending or potential civil claims for damages or other civil relief."

Questions.

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so?
2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it?

JURISDICTION. (Page 4). This sets out the basis of the federal district court's jurisdiction---federal question; maritime and admiralty; U.S. as a plaintiff; and the Clean Water Act.

Question.

1. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce agreement? Other?)

PARTIES.(Page 4). This sets out the parties to the agreement. Note that "Exxon" includes the T/V EXXON VALDEZ, but does not include Exxon Pipeline.

DEFINITIONS.(Pages 5-7). This section defines terms used in the consent decree. "Governments" is defined earlier (page 1) to mean the U.S. and the State of Alaska.

Note that "natural resources" includes those belonging to the federal government, the state, or both.

For the purposes of the consent decree, the only state trustee is the attorney general.

The "effective date" is the date all parties have signed the agreement, while "final approval" does not occur until 45 days after the agreement has been published in the Federal Register, and the court has approved the agreement and the time for appeal from that decision has elapsed without appeal, or the decision has been upheld on appeal.

Special attention should be paid to the definition of "natural resource damages." It includes damages to natural resources arising under state as well as federal law. It also includes "economic rent".

Questions.

1. Why are the natural resource damages of the state not separated from the natural resource damages of the federal government?
2. If the court signs the consent decree, when does the time for appealing that decision expire?
3. Does the reference to claims under state law mean that this recovery is not entirely under the CWA?
4. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state e.g. lost taxes?
5. When was the last date that all parties signed? (My copy does not show Exxon's signature.)

EFFECT OF ENTRY OF DECREE (Page 7). Once the decree is signed and entered by the court, it is a final judgment between the state and federal governments and Exxon and Exxon Pipeline.

PAYMENT TERMS; PARAGRAPH 8 (Pages 7-8). Exxon is to pay, to both governments jointly, a total of \$900 million. The first payment of \$90 million is due

10 days after the effective date. The second payment is due September 1, 1992. The amount of the second payment is \$150 million, less (1) Exxon's cleanup costs from January 1, 1991 to the effective date (up to \$4 million); and (2) Exxon's cleanup costs from the effective date to the date of final approval. On September 1, 1993, Exxon is to pay \$100 million. On September 1 of each year from 1994 through 2001, Exxon is to pay \$70 million. The payments shall be made as directed jointly in writing by the state attorney general and the federal assistant attorney general in charge of environment and natural resources.

Questions.

1. What is the present value of the amounts to be paid by Exxon?
2. Has Exxon paid the first \$90 million?
3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?
4. Are the amounts Exxon will pay deductible under federal tax law? Under state tax laws?

ESCROW; PARAGRAPH 9 (Pages 8-10). If final approval of the consent decree has not occurred when a payment is due (which will almost certainly be the case with the first payment), Exxon is to deposit the payment in an escrow account and notify the state and federal governments. The escrow agent must submit to the court's jurisdiction. After final approval, and 5 days after notification by the state and federal attorneys general, the money shall be paid to the "governments", plus interest. The interest is based on the average daily yield on three-month treasury bills. If the amount in the escrow account is not sufficient to pay that amount of interest and the escrow expenses, Exxon must make up the difference. If either government withdraws its consent under paragraph 37, or any party terminates the agreement under paragraph 38, the money in the escrow account shall be returned to Exxon.

USE OF MONEY; PARAGRAPH 10 (Pages 10-11). In this paragraph the governments agree between themselves how the money is to be spent. The consent decree states that neither Exxon, Exxon Pipeline, Alyeska, nor anyone except the governments obtains a right or obligation as a result of this paragraph.

The U.S. and the State "agree" that the money will be spent only as follows:

- (1) to reimburse the state and federal governments for response and cleanup costs incurred before January 1, 1991;

(2) to reimburse the state and federal governments for damage assessment costs incurred before the effective date;

(3) to reimburse the state for litigation costs incurred before the effective date;

(4) to reimburse the state and federal governments for cleanup and response costs incurred by either of them after December 31, 1990; and

(5) to assess injury and plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources (or natural resource services) injured, lost, or destroyed as a result of the oil spill, or acquire the equivalent of those resources or services.

The maximum amount that the state can receive as reimbursement for past response, cleanup, assessment, and litigation expenses is \$72 million. The maximum amount that the federal government can receive as reimbursement for past response, cleanup, and assessment is \$62 million. The federal and state governments also "represent" that the amount recovered from Exxon will be spent in accordance with the MOA.

Questions.

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

2. Alaska's constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's constitution, and if so, does the attorney general have the power to enter into an agreement under the CWA?

3. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree?

4. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

5. This paragraph refers to "natural resource services." What is a "natural resource service"?

6. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true?

7. Despite the statement to the contrary, will a private party have a right to enforce the restrictions in use set forth in this paragraph?

EXXON'S CONTINUED CLEANUP: PARAGRAPH 11 (Page 11). Paragraph 11(a) requires Exxon to continue cleanup work after the effective date, as directed by the federal on-scene coordinator (FOSC), subject to prior approval of costs by the FOSC. In addition Exxon shall perform cleanup work as directed by the state on-scene coordinator, to the extent it does not conflict with the directions of the FOSC or federal law, subject to prior approval of costs. This paragraph also states that "Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC for the State OSC." Under paragraph 11(b), Exxon's obligation for cleanup ends upon final approval of the settlement "except as set forth in this Agreement". In addition, Exxon gets a credit for its expenditures for cleanup under this paragraph. "Expenditures" includes salaries, wages, benefits, expenses for Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

Questions.

1. If the State OSC or the FOSC disagree with Exxon's proposed costs, does Exxon still have to do the work? (What does "subject to prior approval" mean?) In the event of a dispute about the costs, who makes the final decision?

2. The first sentence of 11(b) provides that Exxon has no cleanup obligations after final approval of the consent decree "except as set forth in this Agreement." Does another paragraph of the agreement impose cleanup obligations after final approval?

3. What does the last sentence of 11(a)---concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or State OSC--- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under direction of the FOSC or State OSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims?

EXXON'S CONTINUED CLEANUP: PARAGRAPH 12 (Pages 13-14). If the agreement is terminated, or the court does not approve it, Exxon can setoff expenditures made by Exxon under paragraph 11 against any liability Exxon may have to either government as follows:

(1) If the post-effective date expenditures are \$35 million or less, the setoff does not apply unless Exxon shows both

(a) that based on information available to the FOSC or State OSC the anticipated cost was grossly disproportionate to the net environmental benefits anticipated, or the work could not reasonably have been expected to result in a net environmental benefit; and

(b) that Exxon submitted a written objection to the work a reasonable time before beginning it, explaining its objections.

(2) If the post-effective date expenditures are above \$35 million, Exxon gets the setoff unless the government or governments show that based on the information available to the FOSC or State OSC, the work was reasonably expected to result in a net environmental benefit and the anticipated cost was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Question.

1. Can Exxon setoff amounts approved by the FOSC against amounts owed the State? Can Exxon setoff amounts approved by the State OSC against amounts owed the federal government?

PF:lmb:pl
91-187.plm