

SCOMM

77:32

**TESTIMONY OF
MAYOR BOBBY VAN BROCKLIN,
CITY OF CORDOVA,
BEFORE THE ALASKA HOUSE SELECT COMMITTEE
ON EXXON VALDEZ SETTLEMENT
APRIL 14, 1991**

Committee Members, Attorney General Cole, Commissioner Rosier and Commissioner Sandor:

I would like to start my testimony with Cordova's point of view based on a little history.

The people of Cordova have expressed concern about the Trans-Alaska Pipeline System from the time of its conception. After a hard-fought battle, the System was approved by a margin of one vote by the U.S. Senate. During the time of operation until the Exxon Valdez spill, Cordova continued to express its concerns and always were assured that "the best equipment, material and expertise will make operations at Port Valdez and in Prince William sound the safest in the world."

On March 23, 1989, all our concerns plus some we hadn't thought of started to become a reality. Even under good weather conditions, for the first three days, Alyeska or Exxon couldn't live up to their promises. Not even close. Less than 3,000 of the 260,000 barrels were recovered. And, with a weather change, the Exxon Valdez spill would eventually soil over 1,000 miles of Alaska's coastline, inflicting one of the worst wildlife disasters in our nation's history, and disrupting the lives of thousands of Alaskans who depend on the natural resources of this region.

We all know that the Trans-Alaska Pipeline provides 25% of the nation's oil and 80% of the State of Alaska's revenue. Everyone enjoys the benefits of the oil. However, only a few coastal communities share the risk posed by the transportation of this oil along our coast. The risks and benefits are not shared proportionately. Cordova's economy is based almost entirely on Prince William Sound's resources, especially commercial fishing. Through years of efforts, we have tried to enhance these resources through the Prince William Sound Aquaculture Corporation and 1989 was the first year the plan was to be in full production. I remember a conversation I had with a local fisherman a week or two before the spill. The conversation went like this. I was asked, well what do you think the season's going to be like this year? My reply was last year we had great fish prices, but only 10,000,000 fish; this year the price will probably drop some, but the prediction is 40,000,000 fish. Even if half the fish don't return for some crazy reason, it will be better than last year, which wasn't bad. Cordova's expectations were of a good to great fishing season which would mean our economy would be thriving. On March 23, we went from being optimists to pessimists because our world as we knew it started to fall apart. Next started a time of more promises and harsh reality. The mighty resources of Alyeska and Exxon, the State of Alaska and the federal government couldn't put Humpty Dumpty back together. The community tried rage, cooperation, begging and blind faith and again we got more promises. Don Cornett from Exxon made his famous quote in Cordova: "Trust us. We will make you whole." I think Mr. Cornett's definition of "whole" is a little different than the folks of Cordova or the folks from other oil affected areas.

The Vice President, the Governor, and countless Senators, Congressmen, Admirals, cabinet members, State Senators and House members, environmentalists, reporters and lawyers came. Some made promises. Some made statements. Others just listened. But little was ever done to address the impacted people. By law, it's my understanding that

people don't qualify as a resource, so their needs haven't been addressed. If the testimony you hear today seems a little harsh, you will know why. Our mistrust in government and the oil industry is based on the fact that promises are not kept. So please don't ask us to trust you. We would prefer it in writing, backed up by a letter of credit. So much for the history lesson. Let's get to specifics on the proposed settlement.

Since we are to fend for ourselves in recovery of people damages and city governments are closer to the people than the State, I have some statements and questions that the people of Cordova and the municipality would like answers to.

The State is the trustee of all the studies and legal preparation for Exxon Valdez damages, but now the people are being put in the position to sue just to get the information. This doesn't set well when you come to us now and say the federal and state governments will fix or restore the damage if we go along with the settlement. Mr. Attorney General, tell me why I should trust the state or federal government to repair my environment and natural resources? Please give me examples of what the trustees would do and give me a equal number of examples of the trustees will not do?

What about full study of the spill? Will this be completed or curtailed because of settlement?

Why has the State, especially at paragraph 13(c), on page 15 of the agreement and consent decree, not adopted the language that it represented it would to Judge Sporkin? The State in its settlement agreement purports to reserve only 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." What does the word "present" mean in that case? Is the State trying to support Exxon's view that the only recovery available to fishermen and others dependent on natural resources is what they would have recovered in 1989, but that otherwise, the recovery belonged to the State, and that has been compromised by the settlement?

Much the same case is made by paragraph 13(b) which purports to preserve certain aspects of Alaska Native claims. Why not just preserve whatever Alaska Native claims which are available? Why did the State tried to give the benefit of certain language to Exxon, to the detriment of certain private plaintiffs?

Why is the State sacrificing some of the availability of the Trans-Alaska Pipeline Liability Fund, by explicitly allowing Exxon to try to recover some of its losses from that fund, to the detriment of the various private plaintiffs, who may have no other source of recovery if Judge Holland is right about Robins Dry Dock?

What do the provisions at paragraphs 24-30 mean? It looks as if Exxon is free to have the governments be responsible for a portion of the fault, but that the governments are not free to bring in Exxon. Paragraph 30.

Did the State have any responsibility to its municipalities and to its citizens (be they fishermen, landowners, kayakers, businessmen, or Alaska Natives) when they are facing a litigant of Exxon's size not to settle its claims alone, but to make more of an attempt to try to get Exxon to the settlement table and compensate the individuals who were really hurt most by the spill?

The State says its settlement does not affect any other parties' rights, but this ignores the realities of litigation. With the State in the case, Exxon recognizes that it is facing a

group of plaintiffs with formidable assets and resources, not otherwise available to private plaintiffs.

Why does the State seem to go out of its way to help support Exxon's legal positions, e.g. (a) representing that only the "Governments" may recover natural resource damages under the Clean Water Act [Par. 4 of the introduction]; (b) defining Natural Resources or Natural Resource Damages broadly to appear to cut off other parties' rights [Par. 6(c),(d)]; or (c) suggesting that the agreement settles "all consequences" of the spill (paragraph 6(g))?

The municipalities were able to get a State grant for an impact analysis to look at effects of the spill on municipal finance and other "people issues." The State should continue to fund this effort both to assist municipalities with their damage case, and to help the State and municipalities plan for future catastrophic disasters. This study was the Oiled Mayors' Study. Mr. Attorney General, have you examined the Oiled Mayors' Study? Do you know why the recommendations in the study funded by a million dollars by the State of Alaska haven't been acted upon?

Can we trust the State or Federal government to be adequate trustees of the environmental claims when they are not just pursuing those claims as trustees, but also alleged to have been a party which has violated the trust through its malfeasance? It is inconceivable that a trustee would be allowed to settle a claim for a beneficiary when it is implicated in the wrongdoing. Mr. Attorney General, last session the oiled communities tried to have the legislature advance raw fish tax claims to municipalities. This was shot down in Senate Finance--Exxon told them they would fix us up. That hasn't happened. Without State studies, can you tell me if Exxon were to agree to settle with us tomorrow, what would be a fair number without knowing the study information?

Can you clarify how municipalities will be asked to prosecute their raw fish tax claims against the defendants for maximum recovery?

Why is the State allowing Alyeska peace on certain issues, when Alyeska is still free to both sue the State (paragraph 20, last sentence), and argue that the State is responsible for most of the damages to private plaintiffs? [Paragraph 22 makes it obvious that this alternative will be open to Alyeska.]

**ISSUES OF PARTICULAR CONCERN TO LEGISLATURES
LOOKING AT THE SETTLEMENT FROM THE VIEW OF ALL
CITIZENS OF THE STATE**

1. Don't the people of the State need a much better understanding of the real effect of the money package?
 - (a) The real value of the money being given to the State by Exxon -- this is the whole "present value" idea. Exxon agrees to pay money over time. It is basically paying back a loan of the "Present value" of the money. What interest rate should be used in the real calculation?
 - (b) The real costs which the State and feds have accumulated so far --
 - (1) We need not just the total cleanup cost to the State and feds, but when those costs accumulated, because to the extent the State and feds don't get interest on the amount due, they are being underpaid.
 - (2) We need the same for attorneys fees',
 - (3) We need the same for the trustee and other science costs;
 - (4) We need a realistic estimate of what the rest of the cleanup costs will be for which a commitment has been made to pay Exxon when they do the work from their own money in the form of a credit; do we have any data on what was spent last year for cleanup to use as a guide ?
 - (5) The caps that the State and federal government put on the amount of the trust money which will be allocated to State and federal costs (in Par. 10 of the agreement) are not necessarily the actual value of those costs. To the extent they are not, a subsidy is being given by the people to Exxon.
 - (6) The federal government is not apparently seeking any money for litigation costs. Is that not just a subsidy to Exxon, or is the federal government being reimbursed from some other source?
 - (c) We need to really understand the tax value of this settlement to Exxon, because that affects the federal public fiscally as well. Exxon appears to have gone out of its way to force the State and federal government to spend the "leftover" money for certain projects only. How much of a tax break will that mean for Exxon? Otherwise wouldn't they have to pay taxes on this money since it would be earnings?
 - (d) We need to decide what is really going to be done with what, if any, money is left:
 - (1) Is it going to be used for projects, such as timber purchases, which might hurt local communities, e.g., Seward, more than help them?
 - (2) In what areas is it going to be used? Is there any understanding now of how it should be spent?
 - (3) Who will have control over the trust fund? It appears to be 3 federal and 3 State people, whose choice is left completely to the Governor;

- (4) What controls will there be on the trustees? There appear to be none now.
2. Can a responsible citizen or legislator now assess the appropriateness of the settlement since neither knows:
- (a) The liability case against Exxon, and Alyeska (this is to be found largely in the work product of Preston and the AG);
 - (b) The damages case against Exxon, and Alyeska [this is to be found largely in the science from the trustees, a summary of part of which was first made available a few days ago, but the bulk of which has not been made available];
 - (c) The downside of continuing with the litigation
 - costs for attorneys? Has any serious analysis been done of the Preston and costs: have they been cost effective; what would it cost if a "tight ship" set up from here on out? Is there any foundation for the representations the Governor that it would take 10 more years to litigate the case? Is the that complicated? What would be the real costs that are being forgone through settlement?
 - (2) The impact of not settling on other State projects (e.g., ANWR and other development projects). The assumption is that the State wants to put Exxon, and certain other tax litigation behind it so that development can occur. How valid is this position? Do the people of the State really want that development? Has this issue been really looked at?
 - (d) The case against the State for its own negligence (which for the most part may remain open as a result of the settlement given that there is a significant risk that the State will be exposed to a damage verdict).
 - (e) The effect of a settlement of some of the State claims on those that remain--is the State worse off now in terms of its potential liability to private plaintiffs than it was before? Is there a bigger chance it will have to pay than if it was in the case at a trial against Exxon?
 - (f) Can we trust the State or the Federal government to be adequate trustees of the environmental claims when they are not just pursuing those claims as trustees, but also alleged to have been a party which has violated the trust through its malfeasance? It is inconceivable that a trustee would be allowed to settle a claim for a beneficiary when it is implicated in the wrongdoing.
3. The reopener clause appears to have severe problems:
- (a) The reopener may be used in very limited circumstances, and only if "the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the effective date" of the agreement. Is there any reasonable possibility that this clause is of any value to the State. Why was it even bargained for?
 - (b) The reopener clause invites litigation again. If the State asserts its validity, nothing stops Exxon from fighting its application, and again, "settling" differences with the State. It lacks any objective standards.

(c) There is no scientific evidence presented from which one can make a judgment about the usefulness of the reopener clause.

4. The indemnity provisions seem to put the State in a worse position than it was prior to the settlement with respect to liability and with respect to exposure for attorneys' fees. Whereas the State had not been sued prior to the settlement and probably would not have been sued had it secured the agreement of Exxon that it would not assert that the State was responsible, or had it obtained Exxon's agreement to indemnify the State, it now has been sued by hundreds of parties who did not want to sue the State. The cost of defending the case may well exceed the cost of prosecuting the case. The State is now looking at serious potential exposure for damages, or, alternatively, with the ridiculous notion of fighting its own citizens in a liability battle, and trying to belittle their injuries suffered from the spill.

5. How does the State control billing by Exxon for post agreement spill costs? The language in paragraph 11(b) seems to cover everything in the world; including Exxon's attorneys' expenses [i.e., "other professional expenses."] Is there no control in the agreement for Exxon's accountability to the fund it itself created through a settlement with the State?

6. Why is there the tension between paragraphs 12(a) and (b)? Which is the paragraph which more probably will apply because of what we expect Exxon to actually expend, and what does that paragraph mean?

7. Why is the State allowing Alyeska peace on certain issues, when Alyeska is still free to both sue the State (paragraph 20, last sentence), and argue that the State is responsible for most of the damages to the private plaintiffs? (Paragraph 22 makes it obvious that this alternative will be open to Alyeska)

8. Is there any serious attempt at deterrence through the amount of penalty involved, especially when Chairman Rawls telling the media that the settlement and criminal penalty will have no noticeable effect on Exxon's bottom line? The \$421 million present value which Exxon is paying is just 4/10 of 1% of Exxon's annual revenues of \$95 billion.

9. What deterrent effect is there for Alyeska which avoids any liability for its part in the damage to the environment through this settlement?

10. Should the legislature be concerned with what has appeared to be an intentional withholding of information from the legislature and the citizens of the State by Exxon and the State of the information necessary to make an informed judgment about the settlement?

11. Do the recent revelations of Alyeska's conscious indifference to the need for a realistic contingency plan to deal with large spills make any difference in assessing the settlement?

12. Have the people of the State, who are just now getting an idea of what the settlement document says, and its economic ramifications had enough time to make a Judgment, or to provide you with political input into what should be done?

13. Is it constitutional for the State to enter into a plan committing to trustees, without legislative scrutiny, the discretion to spend what may be large amounts of money?

14. What is the joint conduct agreement described in paragraph 35?

WHAT SHOULD THE LEGISLATURE DO AT THIS JUNCTURE?

The legislature should postpone any approval of the settlement until:

- a. It has sufficient information, and time, to assess whether the settlement provides enough money to fix the long-term damage to the Alaskan environment;
- b. provisions are added to give the oil affected areas, a voice in how the money is spent;
- c. Exxon and Alyeska settle the compensatory and punitive damages claims of the people and entities injured by the spill, or if that cannot be accomplished within 30 days, Exxon and Alyeska agree that they will not put the State on trial in absentia when those damage claims go on trial.