Exxon

Settlement

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. Exxon Corporation, Exxon Shipping Company, Alyeska Pipeline Service Company, Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, BP Alaska Pipelines, Inc., Unocal Alaska Pipeline Company, and the T/V EXXON VALDEZ), in rem, Defendants.	CIVIL ACTION NO. A91-082

NOTICE OF LODGING OF UNITED STATES' SUMMARY OF EFFECTS OF EXXON VALDEZ OIL SPILL ON NATURAL RESOURCES

PLEASE TAKE NOTICE that the United States is lodging

with the Court the attached Summary of Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources (the "Summary"). The United States is lodging the Summary to assist the Court in evaluating the proposed Consent Decree lodged with the Court on March 13, 1991. The Summary is based on scientific studies conducted by the Departments of Agriculture and the Interior, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency to assess the injury to natural resources resulting from the oil spill.

The Summary is being lodged in advance of a motion to enter the proposed Consent Decree in order to give the Court additional time to consider the nature of injury to natural resources resulting from the oil spill.

Dated: April 8, 1991

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SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL ON NATURAL RESOURCES AND ARCHAEOLOGICAL RESOURCES

March 1991

INTRODUCTION

The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the night of March 23-24, 1989, spilling approximately 11 million gallons of North Slope crude oil, making this the largest oil spill in United States history. The oil spread through Prince William Sound, the Gulf of Alaska, and lower Cook Inlet. More than 1,200 miles of coastline were oiled, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, and Alaska Peninsula/Becharof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Oil from the T/V Exxon Valdez impacted shorelines nearly 600 miles from Bligh Reef.

The magnitude of efforts of the state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill is unprecedented. Among those efforts are the state/federal natural resource damage assessment studies designed to measure injuries to natural resources including birds, mammals, fish and other wildlife, and marine and terrestrial habitats. These studies are intended to provide the information necessary for the Trustee agencies to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties. This summary briefly describes the area affected by the spill, the chronology of the spill, and the process developed to implement and manage the injury assessment studies. It focuses, however, on what has been learned over the past two years about the effects of this oil spill on natural resources.

DESCRIPTION OF THE AREA AFFECTED BY THE SPILL

Prince William Sound lies near the top of the Gulf of Alaska (see map), an 850 mile arc extending from the Aleutian Islands on the west to the islands of southeast Alaska. The gulf coast is remote, rugged, and scenic. Its maritime climate nourishes a lush, green landscape in the summer. The area is snow covered in the winter. Bears, whales, bald eagles, puffins, seals, sea lions, and sea otters are among the abundant wildlife of the area. Storms that cross the Gulf drop as much as 300 inches of rain and snow annually in the high coastal mountains. Glaciers descend from permanent ice fields capping these coastal mountain ranges, continuing to carve intricate fjords and send icebergs floating out to sea. These are the largest glaciers outside Antarctica and Greenland.

Prince William Sound is one of the largest relatively undeveloped marine ecosystems in the United States. It has one of the continent's largest tidal estuary systems. Prince William Sound has rich commercial herring and salmon fisheries. The open water of the Sound is about the size of Chesapeake Bay. Its many islands, bays, and fjords give it

more than 2,000 miles of shoreline. Prince William Sound is surrounded by land, most of which is part of Chugach National Forest.

To the southwest of Prince William Sound is the Kenai Peninsula, home of the Kenai Fjords National Park, various units of the Alaska Maritime National Wildlife Refuge, and, among others, the cities of Homer and Seward. Numerous seabird colonies are located along the coast of the Kenai Peninsula, including those most frequently visited by tourists in Alaska. Both Prince William Sound and the Kenai Peninsula are accessible by air, boat, and on a limited basis, by automobile from nearby Anchorage, Alaska's major population center. State ferries that run among the larger communities and many charter boats make it easy for people to visit the heart of the Gulf coast. In recent years, there has been a steady increase in the number of wilderness seekers, kayakers, cruise ship passengers, and other tourists visiting the area.

The Kenai Peninsula points southwest to Shelikof Strait and Kodiak Island. Shelikof Strait lies between Kodiak Island, on the south and the Alaska Peninsula on the north. Shelikof Strait is the source of a very productive commercial pollock fishery. The Kodiak National Wildlife Refuge is located on the Kodiak Archipelago and Katmai National Park and Preserve, Alaska Peninsula/Becharof National Wildlife Refuge, and Aniakchak National Monument and Preserve are located along the coast of the Alaska Peninsula. The Alaska Peninsula tapers, then scatters into the islands of the Aleutian chain.

CHRONOLOGY OF THE EXXON VALDEZ OIL SPILL

For the first three days of the spill, the weather was calm and the slick lengthened and widened amoeba-like and generally stayed in the vicinity of the grounded tanker and off the beaches. Even with these seemingly ideal circumstances for oil recovery, the amount of oil in the water completely overwhelmed efforts to contain and recover the oil. A major windstorm on March 27, 1989, pushed the oil in a southwesterly direction and oiled beaches on Little Smith, Naked, and Knight Islands. The oil continued to spread, contaminating islands, beaches, and bays in Prince William Sound. Four days into the spill, oil began to enter the Gulf of Alaska. The leading edge of the slick reached the Chiswell Islands off the coast of the Kenai Peninsula on April 2, 1989, and the major seabird nesting colonies on the Barren Islands on April 11, 1989, nineteen days into the spill. By May 18, 1989, oil had moved some 470 miles and had fouled shorelines of Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, and the Alaska Peninsula. Oil subsequently reached shorelines on the Alaska Peninsula nearly 600 miles from Bligh Reef.

During 1989, the response to contain and cleanup the spill and rescue oiled wildlife involved a massive effort. Skimmer ships were sent throughout the spill zone to vacuum oil from the water surface. Booms were positioned to keep oil from reaching important commercial salmon hatcheries in Prince William Sound. A fleet of fishing vessels, known as the "Mosquito Fleet," played an important role in protecting these hatcheries, in corralling oil to assist the skimmer ships, and in capturing oiled wildlife and

transporting these animals to rehabilitation centers. After oil contaminated shorelines, a beach cleanup program was activated. Various local committees, with community and government agency participation, provided recommendations to the U.S. Coast Guard about areas that should receive priority for cleanup. An army of workers cleaned shorelines, using techniques ranging from cleaning rocks by hand to high pressure hot water washing. Fertilizers, sometimes in a chemical base, were applied to some oiled shorelines to increase the activity of oil-metabolizing bacteria, in an experimental procedure known as bioremediation. When deteriorating weather brought an end to cleanup work in the fall of 1989, a great amount of oil remained on the shorelines. Although winter storms proved extremely effective in cleaning many beaches, spring shoreline surveys indicated that much work remained to be done in 1990. Crews operating from boats and helicopters cleaned oiled shorelines in Prince William Sound, along the Kenai and Alaska Peninsulas, and on the Kodiak Archipelago. Manual pick up of remaining oil was the principal method used during 1990, but bioremediation and relocation of oiled berms to the active surf zone were also used in some areas.[1] Another shoreline survey will be conducted during May 1991, to determine the need for additional cleanup work.

INJURY ASSESSMENT PROCESS

The Exxon Valdez oil spill occurred just prior to the most biologically active season of the year in southcentral Alaska. During the two month period after the spill, seaward migrations of salmon fry, major migrations of birds, and the primary reproductive period for most species of birds, mammals, fish, and marine invertebrate species took place. The organisms involved in these critical periods of their life cycles encountered the most concentrated, volatile, and potentially damaging forms of the spilled oil. As will be discussed in this summary, the oil affected different species differently. Whereas, for example, it directly killed large numbers of birds and sea otters that encountered oil on the water surface, it did not prohibit in and out migration and spawning of large schools of salmon and herring.

The state and federal Trustee agencies were forced to mobilize field studies rapidly with little time for planning. Through intensive efforts, studies were designed, administrative processes were accelerated, and 58 field studies were carried out. Additionally, technical services programs were organized to provide hydrocarbon analysis, histopathology, and mapping support for the field studies. Initial decisions on the types and scope of studies conducted were made by agency experts familiar with the resources and the environment. Even with the rapid deployment of studies, however, some opportunities to gather injury data were irretrievably lost during the early weeks of the spill.

A legal framework was subsequently established and studies were reviewed and modified according to their likelihood to document resource injury. Expert peer reviewers were retained and study plans used during 1989 underwent scientific review for possible

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[1]Exxon has represented that it has paid over $2.0 billion to conduct cleanup activities during 1989 and 1990.

modification in 1990. Some studies were discontinued or modified if they were unable to further document resource injury, and some new studies were initiated to fill identified information needs. Status reports prepared in January 1990, were used to guide the development of plans for the second year of studies. Thirty-nine studies and three technical services programs were continued in 1990. Scientific review was again used to plan for the upcoming 1991 field season, during which 29 studies and two technical services programs will be conducted.

This summary of the effects of the Exxon Valdez oil spill on natural resources is preliminary, as studies are still underway and available data are not fully analyzed and interpreted. However, the injuries to natural resources that have been documented to date are summarized herein. This summary also addresses studies that were discontinued. It should be noted that studies were discontinued for a variety of reasons, such as the determination that field work had been completed, that there was no practicable way to measure injury, or that no injury was documented. Even though some studies failed to identify injury and were discontinued, this does not necessarily mean that the resources were not affected by the spill. Certain injuries (if present), such as possible latent or sublethal effects on reproductive or other systems in animals, might not become fully evident for a number of years after the spill. At present there is no significant indication of long-term injury to resources other than those specifically noted below. Although studies indicate that there are continuing injuries to certain resources, natural recovery may also have begun. As petroleum hydrocarbons are broken down in the ecosystem, plant and animal communities begin to reestablish themselves. This recolonization has already been observed in some of the more lightly oiled areas. In the more heavily oiled areas, this natural recovery process is expected to take longer. As this natural recovery occurs, many of the birds and mammals that feed in these areas are expected to begin recovering.

MARINE MAMMALS

Following the spill, studies of humpback whales, Stellers sea lions, sea otters, harbor seals, and killer whales were started. The humpback whale and Stellers sea lion studies were discontinued following the 1990 field season. Humpback whale investigations were limited to photo identification of whales, estimations of reproductive success, and possible relocations of whales. It was not possible to take tissue samples for petroleum hydrocarbon analysis to document exposure. The study did not show direct oil spill mortalities or reproductive failures.

The sea lion study is being completed following the 1990 pup counts. Some tissue samples were analyzed for petroleum hydrocarbon concentrations, and although there was some indication of exposure to oil, it was difficult to determine what populations were affected because of the sea lions' active seasonal movements. Because of an ongoing pre-spill population decline and premature pupping of sea lions, it was not possible to distinguish post- from pre-spill population effects clearly.

Studies of killer whales, based on observations only (because tissue sampling was not an

option), have indicated that killer whales are missing from at least one and possibly two pods in Prince William Sound. Injuries to harbor seals and sea otters have been clearly indicated and studies of these species are continuing.

Sea Otters: The population of sea otters in Prince William Sound before the spill was estimated to have been as high as 10,000. The total sea otter population of the Gulf of Alaska was estimated to be at least 20,000. Statewide, the sea otter population is estimated at 150,000. Sea otters were particularly vulnerable to the spill. As the oil moved through Prince William Sound and the Gulf of Alaska, it covered areas used by large numbers of otters. When sea otters become contaminated by oil, their fur losses its insulating capabilities, leading to death from hypothermia. Sea otters also died as a result of ingestion of oil and perhaps inhalation of toxic aromatic compounds that evaporated from the slick shortly after the spill. The effects of oil were documented by surveys of wild populations; analysis of tissues for petroleum hydrocarbons and indicators of reduced health; by tracking sea otters outfitted with radio transmitters (including those released from rehabilitation centers); and estimating total mortality from the number of sea otters found on beaches. These studies concentrated on developing an estimate of sea otter mortality in Prince William Sound and along the Kenai Peninsula, the population most affected by the spill. During 1989, a total of 1,011 sea otter carcasses were recovered in the spill area, cataloged, and stored in evidence trailers. Of these, 876 were recovered dead from the field and 135 died in rehabilitation centers or other facilities. The total number of sea otters estimated to have been killed directly by the spill ranges from 3,500 to 5,500 animals throughout the spill area.

Initial results indicate significant differences in hematology and blood chemistry parameters between sea otters in oiled and unoiled areas. Greater variation was observed in DNA content of blood lymphocytes of sea otters from oiled areas, but sperm and testicular cells showed no indication of DNA damage resulting from oil exposure. It cannot yet be determined whether these differences affect sea otter health or survival. There are indications that sea otters continue to be exposed to petroleum hydrocarbons in oiled areas. Analysis of blood and fat samples collected from animals during 1990 found elevated concentrations of certain aromatic compounds in sea otters from heavily oiled areas and elevated concentrations of petroleum hydrocarbons continue to be documented in food items eaten by sea otters in oiled areas. Additionally, other damage assessment studies have documented a decreased abundance of mussels in oiled areas, a key prey species for sea otters.

Studies have documented continuing injury to sea otters. Normally, very few prime age sea otters (animals between 2 and 8 years old) die each year and most mortality occurs among very young and old age classes. The high number of prime age sea otter carcasses found during 1990 indicates that the pattern of sea otter mortality in heavily oiled areas continues to be abnormal. Results of boat surveys indicated continued declines in sea otter abundance within oiled habitats in Prince William Sound. Preliminary results indicate that pupping rates in oiled and unoiled areas are not significantly different. However, the first information available for the spring of 1991 shows higher yearling mortality rates in oiled areas than in unoiled areas. Studies of the survival and reproductive success of sea otters released from rehabilitation

centers indicate a high level of mortality of adult animals and significantly lower pupping rates than the pre-spill mortality and pupping rates in Prince William Sound. Of the 193 sea otters released from rehabilitation centers, 45 were fitted with radio transmitters. Sixteen of these animals are still alive, 13 are known to be dead, and 15 are missing. One radio transmitter is known to have failed.

Harbor Seals: There has been no census of harbor seals in Prince William Sound since the mid-1970s when the population was estimated at 3,000 to 5,000 animals. Since that time, the harbor seal population in Prince William Sound and the Gulf of Alaska has declined substantially. A population census of Prince William Sound is planned for the summer of 1991.

Two hundred harbor seals are estimated to have been killed by the spill. Only 19 seal carcasses were recovered following the spill, since seals sink when they die. Population changes were documented by summer and fall aerial surveys of known haulout areas. Toxicological and histopathological analyses were conducted to assess petroleum hydrocarbon accumulation and persistence and to determine toxic injuries to tissues.

Population surveys, which are reliable indicators of population trends, conducted in 1984 and 1988 indicated that harbor seal populations in Prince William Sound had declined prior to the spill, with similar declines in what were subsequently oiled and unoiled areas. From 1988 to 1990, however, the decline at oiled sites (35 percent) was significantly greater than at unoiled sites (13 percent).

Severe debilitating lesions were found in the thalamus of the brain of a heavily oiled seal collected in Herring Bay 36 days after the spill. Similar but milder lesions were found in five other seals collected three or more months after the spill. During 1989, oiled harbor seals behaved abnormally, being lethargic or unwary. Petroleum hydrocarbon concentrations in bile were 5 to 6 times higher in seals from oiled areas one year after the spill. This indicates that seals were still encountering oil in the environment, were metabolizing stored fat reserves that had elevated levels of petroleum hydrocarbons, or both.[2]

Killer Whales: Approximately 182 killer whales forming nine distinct family units or "pods" resided in Prince William Sound before the spill. This count is based on pre-spill documentation. These whales were studied intensively before the spill and their group composition and dynamics are well known. Damage assessment studies of killer whales involved extensive boat-based surveys in Prince William Sound and adjacent waters. Whales were photographed and the photographs were compared to the Alaskan

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[2]Harbor seals are taken in some Alaska villages for subsistence. The State of Alaska conducted a program, separate from the damage assessment program, to test subsistence foods potentially affected by the spill to insure that they were safe for human consumption. The State of Alaska determined that harbor seals in the affected area were safe for people to eat (Oil Spill Health Task Force, July-August 1990 Report and September-October 1990 Report. Alaska Department of Fish and Game, Division of Subsistence).

killer whale photographic database for the years 1977 to 1989 to determine changes in whale abundance, seasonal distribution, pod integrity, and mortality and natality rates.

The AB pod of 36 individual whales was sighted intact in September of 1988. When sighted on March 31, 1989, seven days after the spill, seven individuals were missing. These whales remain absent and six additional whales were missing from the AB pod in 1990. Several of the missing whales are females who left behind calves. It is unprecedented for females to abandon calves, therefore their prolonged absence implies that these adult females are dead. In addition, nine individuals from AT pod were missing in 1990. Explanations for the possible causes of death of these missing whales, including explanations apart from the effects of the spill, are being explored. Killer whale surveys will continue in 1991.

TERRESTRIAL MAMMALS

Studies were conducted on terrestrial mammals that may have been exposed to oil through foraging in intertidal habitats. These species included brown bear, mink, black bear, Sitka black-tailed deer, and river otters.

Brown bears are long-lived animals and forage seasonally in the intertidal and supratidal areas of the Alaska Peninsula and the Kodiak Archipelago. Preliminary analysis of brown bear fecal samples and some tissues show that some brown bears were exposed to petroleum hydrocarbons, but no conclusive injury has been documented. Radio-collared brown bears along the Katmai coast and at a control site on the Alaska Peninsula will continue to be monitored while the transmitters remain active.

Mink and other small mammals that are known to feed and spend part or all of their time in the intertidal zone are difficult to study. They are known to crawl off into burrows or the brush if sick or injured and carcasses are unlikely to be found. Also, information on pre-spill populations of these animals is minimal. Scientists developed a laboratory study to test reproductive effects of oil on ranch-bred mink, in which they were fed food mixed with small, non-lethal amounts of weathered oil. Although changes in reproductive rates or success were not documented, it was found that oil-contaminated food moved through the intestines of the animals at a more rapid rate than did clean food, possibly providing less nutrition to the animals.
No field studies were carried out for black bear due to the difficulty of finding, collaring, or otherwise investigating these animals in the dense underbrush in which they reside. However, a literature search confirmed that these animals do forage in the intertidal zone in the spill area.

The deer study found no evidence of injury based on intensive searches of beaches that revealed no mortality attributable to the spill. However, deer taken for purposes of testing for safety for human consumption (not part of the damage assessment process) found slightly elevated petroleum hydrocarbons in some tissues in deer (which feed on kelp in intertidal areas) but it was determined that the deer were safe to eat.

River Otters: A few river otter carcasses were found by cleanup workers. River otters forage in streams and shallow coastal habitats that were contaminated by the spill. Analysis of river otter bile indicated that petroleum hydrocarbons are being accumulated by this species. Studies of radio tagged animals in Prince William Sound showed that home ranges are larger, movements more erratic, and body weights are lower in oiled habitat. Field work is continuing in 1991 to further assess the status of this species, including analysis of blood samples to measure the health of these animals.

BIRDS

Among the most conspicuous effects of the Exxon Valdez oil spill was the injury to birds. Seabirds are particularly vulnerable to oil as they spend much of their time on the sea surface while foraging. Oiled plumage insulates poorly and loses buoyancy and birds die from hypothermia or drowning. Birds surviving initial acute exposure may then ingest oil by preening. Approximately 36,000 dead birds were recovered after the spill; at least 31,000 of these deaths were attributed to the effects of oil. In addition to the large number of murres, sea ducks, and bald eagles, carcasses of loons, cormorants, pigeon guillemots, grebes, murrelets, and other species were also recovered (see attached comprehensive list of bird carcasses logged into evidence trailers by September 25, 1989). Only a small proportion of the total number of birds estimated to have been killed were recovered, as many undoubtedly floated out to sea, sank, were scavenged, were trapped and hidden in masses of oil and were not visible, were buried under sand and gravel by wave actions, decomposed, or simply beached in an area where they were not found. Additionally, it is known that, in a number of cases, carcasses found shortly after the spill were not turned in to receiving stations. Preliminary analyses provided by computer models that account for some of these variables estimate that the total number of birds killed by the spill ranges from 260,000 to 580,000 with the best approximation that between 350,000 and 390,000 birds died. Following peer review, the model will be run again to provide a more refined estimate of total mortality.

Common and Thick-billed Murres: Murres are the third most abundant seabird in Alaska (after tufted puffins and black-legged kittiwakes). A total of approximately 1,400,000 murres reside in the Gulf of Alaska (Unimak Pass to the Canadian border in southeastern Alaska). The total population of murres in Alaska is approximately 12,000,000. The murre colonies on the Chiswell Islands are the most visited by tourists in Alaska. In 1989 and 1990 murres were the most heavily affected bird species. Murre colonies impacted by the spill lost 60 to 70 percent of breeding birds. Oil in Prince William Sound affected major wintering areas of murres and other species. As oil moved out of Prince William Sound and along the Kenai Peninsula and the Alaska Peninsula, it hit major seabird nesting areas such as the Chiswell and Barren Islands, as well as numerous smaller colonies. The oil hit these areas outside Prince William Sound at the same time that adult murres were congregating on the water near colonies in anticipation of the nesting season. Approximately 22,000 murre carcasses were recovered following the spill. Colony surveys indicate that an estimated minimum of 120,000 to 140,000 breeding adult murres in the major colonies that were surveyed were killed by the spill. Extrapolating this information to other known murre colonies hit by

the spill (but not specifically studied), the mortality of breeding adult murres is estimated to have been 172,000 to 198,000. However, area-wide, including wintering and non-breeding birds, the total mortality of murres is estimated to be about 300,000. Murres exhibit strong fidelity to traditional breeding sites and infrequently immigrate to new colonies.

Normally, murres breed in densely packed colonies on cliff faces. Each murre colony initiates egg laying almost simultaneously. This synchronized breeding behavior helps the birds repel predators such as gulls and ravens. In oiled areas, murre colonies have exhibited a much lower populations than before the spill, breeding is later than normal, and breeding synchrony has been disrupted. These structural and behavioral changes in colonies have caused complete reproductive failure during 1989 and 1990, and thus lost production of at least 215,000 chicks. Murre colonies in unoiled areas displayed none of these injuries and had normal productivity. Monitoring of reproductive success of the colonies will continue in 1991.

Bald Eagles: Of the estimated Alaskan bald eagle population of 30,000 birds (20,000 adults and 10,000 fledglings), an estimated 2,200 reside in Prince William Sound. One hundred forty-four (144) dead bald eagles were found following the spill. Although there is considerable uncertainty regarding the total mortality of bald eagles, it is estimated that several times this amount may have been killed by the initial spill. Approximately 90 percent of radio-tagged bald eagles that died during subsequent studies were not found on the beach but in the brush back from the beachfront. This suggests that most of the eagles that died in the spill would not have been found by surveys typically restricted to beach areas. To assess injuries to bald eagles, helicopter and fixed-wing surveys were flown to estimate populations and productivity. Radio transmitters were attached to bald eagles to estimate survival, distribution, and exposure to oiled areas. Bald eagles in Prince William Sound were most intensively studied. Productivity surveys in 1989 indicate a failure rate of approximately 85 percent for nests on moderately or heavily oiled beaches compared to 55 percent on unoiled or lightly oiled beaches. Bald eagles have a delayed sexual maturity and have a relatively long life span under normal circumstances. Consequently, although reproduction apparently rebounded to more normal levels in 1990, population impacts as a result of poor productivity of nestlings and the death of hundreds of adult eagles in 1989 may not be readily apparent for several years. Fewer bald eagles were sighted in 1990 than in 1989, however this change was within the expected error of the survey method. An additional survey will be conducted in 1991 to see if there is a downward population trend.

Sea Ducks: More than 2,000 sea duck carcasses were recovered after the spill, including more than 200 harlequin ducks. Studies concentrated on harlequins, goldeneyes, and scoters, species that use the intertidal and shallow subtidal habitats most heavily affected by the spill. Harlequins were most affected, consistent with the fact that they feed in the shallow water area of the intertidal zone. This is the only species of sea duck studied that both nests in the spill area and feeds in the shallow intertidal zone. All of these species feed on invertebrates such as mussels and are likely to continue to be exposed to petroleum hydrocarbons through their food. About 33 percent of the harlequins collected in the spill area had poor body condition and about 40 percent had

tissues contaminated with petroleum hydrocarbons. Preliminary surveys also indicate harlequins may have failed to reproduce in the spill zone in Prince William Sound during 1990. These injuries will be investigated further during 1991.

Other Birds: Surveys and studies indicate reduced numbers of black oystercatchers, pigeon guillemots, and marbled murrelets in oiled areas. Black oystercatchers and pigeon guillemots use inshore and intertidal areas for feeding and nesting. Reduced breeding success of black oystercatchers was documented in oiled areas, largely as a result of loss of chicks along oiled beaches. It is estimated that between 1,500 and 3,000 pigeon guillemots were killed by the spill, representing as much as 10 percent of the catalogued population in the Gulf of Alaska. This species is susceptible to continued exposure to petroleum hydrocarbons because it uses intertidal rocks and waters within 200 meters of shore. Petroleum hydrocarbons were found in eggs and tissue in 1989.

Marbled and Kittlitz's murrelets represented a high proportion of the dead birds recovered in oiled areas of Prince William Sound. The reduction in the number of murrelets observed in oiled areas during cleanup in 1989 and the return of many of these birds in 1990 suggest disturbance associated with cleanup activities affected these birds. The extent of injury to certain species, including loons, cormorants, and gulls will probably never be known because pre-spill information on numbers of these birds in the spill area are not available. Data on bird distribution and abundance data gathered during aerial and boat surveys remain to be fully analyzed and interpreted. Boat surveys will continue during 1991. Studies did not document injury to certain bird species such as Peale's peregrine falcons or songbirds.

FISH/SHELLFISH

No massive die-offs of adult fish were found following the spill, and adult salmon, for example, were evidently able to migrate to spawning areas after the spill. However, fish are most vulnerable to oil contamination during the early stages of their life cycles. Accordingly, most fish studies initially focused on this phase of fish life history. During 1991, scientists will begin to be able to assess affects on adult fish such as salmon that would have been exposed to oil as eggs or larvae. Species most often affected by the spill were those that inhabit and spawn in the intertidal zone (salmon) or in the shallow areas next to shore (herring and Dolly Varden).[3] Less than ten dead rockfish were found during the spill and their deaths were attributed to oil. Several species of coastal and offshore fish (pollock, halibut, sablefish, cod, yellowfin and flathead sole, and rockfish) show evidence over a large geographic area of continuing exposure to petroleum hydrocarbons in areas affected by the spill, but significant injury has not yet been documented. Exposure to petroleum hydrocarbons does not necessarily lead to

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[3]The State of Alaska imposed the highest possible standards for commercial fishery openings and for processing plant inspections to insure that all commercially harvested salmon were free from contamination. Salmon subject to commercial harvest in the spill area were rigorously tested to insure that the catch was safe for human consumption.

injury, since many animals have the capability to physiologically "manage" the exposure with no resulting harm. In particular, salmon and other fish can metabolize petroleum hydrocarbons so that these contaminants are unlikely to be found in edible fish tissues. Indicators of exposure among fish include bile metabolites and mixed function oxidases. Since injuries from chronic exposure to oil may not manifest themselves for a number of years, it is premature to conclude that coastal and offshore species were not injured; therefore certain studies are continuing.

Pink Salmon: The full extent of short term injury to pink salmon cannot be assessed until after the 1991 run returns to spawn in the summer. Although the overall catch of pink salmon in Prince William Sound during 1990 was an all-time record (as predicted before the spill), this was primarily due to strong runs of hatchery-produced salmon. Salmon survival associated with the Armin F. Koerning hatchery, located in the middle of a heavily oiled area of the spill zone, was half that of Ester Hatchery, located outside the area of the spill. Wild production of pink salmon did not mirror the record production of hatchery fish.

Seventy-five percent of wild pink salmon spawn in the intertidal portion of streams in Prince William Sound. Wild stock salmon did not shift spawning habitat following the spill and deposited eggs in intertidal areas of oiled streams. Preliminary analyses indicate a 70 percent greater mortality of pink salmon eggs laid in the summer of 1989 and a 50 percent greater mortality in the summer of 1990 in oiled streams as compared to control streams. Larvae from heavily oiled streams showed gross morphological abnormalities, including club fins and curved spines. The pink salmon that returned to Prince William Sound in the summer of 1990 were exposed to oil as larvae as they swam under the slick, but not as eggs which were more directly exposed to oil than the larvae. Fish returning in 1991 will be the first that were exposed to oil as eggs. Eggs and larvae of wild populations continue to be exposed to oil in intertidal gravel in oiled areas.

Sockeye Salmon: Commercial harvest of sockeye salmon was curtailed in portions of Cook Inlet, Chignik, and Kodiak in 1989 because of the spill, resulting in an unusually high number of adults migrating to spawn in certain lake spawning systems (returning adults that arrive at the spawning areas are referred to as the "escapement"). Overly large spawning escapements may result in poor returns in future years by producing more juvenile salmon than can be supported by the nursery lake's productivity. Preliminary data indicate that overescapement degraded rearing habitat in lakes and that sockeye salmon survival and growth rates are lower than usual. Further study is needed before the extent of these injuries can be determined.

Dolly Varden and Cutthroat Trout: Prince William Sound is the northern extreme of the range of cutthroat trout. Both cutthroat trout and Dolly Varden use nearshore and estuarine habitat for feeding throughout their lives (in contrast to salmon which migrate out to sea). The highest concentrations of bile petroleum hydrocarbon metabolites in all fish sampled were found in Dolly Varden. Tagging studies have demonstrated that the annual mortality of adult Dolly Varden was 32 percent greater in oiled areas than in unoiled areas. The larger cutthroat trout showed similar levels of mortality in oiled and unoiled areas. Additionally, cutthroat trout growth rates were reduced in oiled areas.

Studies are continuing to measure impacts on populations of these popular sport fish species.

Pacific Herring: Populations of Pacific herring were spawning in shallow eelgrass and algal beds at the time of the spill. The effects of oil on egg survival, hatching success, larval development, and recruitment to the spawning population were studied. Study results show a large increase in the percentage of abnormal embryos and larvae in oiled areas of Prince William Sound during the 1989 reproductive season. Larvae in oiled areas also had a greater incidence of eye tumors. These effects continued but at somewhat lower rates in 1990. Results also showed greater egg mortality in oiled areas as compared to unoiled areas. Whether the adult population has been affected by these larval injuries will not be determined until the 1989 and 1990 cohorts return to spawn in 1992 and 1993.

COASTAL HABITAT

The coastal tidal zone, commonly known as the "intertidal zone," was the most severely contaminated habitat. Intertidal habitats are highly productive and biologically rich. They are particularly vulnerable to the grounding of oil, its persistence, and effects of associated clean-up activities. An interdisciplinary team with expertise in plant and systems ecology, marine biology, and statistical analysis, was established to conduct field studies to assess the effects of oil on intertidal ecosystems.

Supratidal: Results of studies in the Kodiak/Alaska Peninsula area suggest that oil in the supratidal habitat and beach cleanup disturbance decreased the productivity of grasses and other vegetation including beach rye grass, that help stabilize beach berms. In one instance, cleanup activities completely removed the vegetation. Increased production of supratidal vegetation was found in Prince William Sound in 1989. This finding corresponds with information from other oil spills. It is not known whether this increased production was a result of decreased browsing by terrestrial mammals or a fertilizer effect of the oil.

Intertidal: Natural populations of intertidal organisms were significantly reduced along heavily oiled shorelines such as Herring Bay. Densities of intertidal algae (Fucus), barnacles, limpets, amphipods, isopods, and marine worms were decreased. Although there were increased densities of mussels in oiled areas, they were significantly smaller than mussels in the unoiled areas and the total biomass of mussels was significantly lower. Intertidal organisms continue to be exposed to hydrocarbons from the more heavily oiled sediments. Petroleum hydrocarbon accumulation in filter feeding mussels experimentally placed in oiled areas indicate that oil remains available for uptake by other organisms. Initial findings also indicate that oiled surfaces retarded settlement by juvenile barnacles when compared to unoiled sites. In addition to direct mortality, the reproductive cycle of mussels at oiled sites in the lower Cook Inlet/Kenai Peninsula and Kodiak/Alaska Peninsula regions was delayed by several months.

Intertidal fishes were less abundant in oiled areas than in unoiled areas. In addition, gill

parasitism and respiration rates were significantly higher in fish from oiled sites compared to unoiled sites.

Fucus, the dominant intertidal plant, was severely affected by the oil and subsequent cleanup activities. The percentage of intertidal areas covered by Fucus was reduced following the spill and opportunistic plant species which characteristically flourish in disturbed areas were increased. The average size of Fucus was reduced, the number of reproductive sized plants greatly decreased, and the remaining plants of reproductive size decreased in reproductive potential due to fewer fertile receptacles per plant. There was also reduced recruitment of Fucus at oiled sites.

SUBTIDAL HABITATS

Spilled oil in some areas has migrated to and contaminated the seafloor at depths of up to 100 meters as contaminated sediments moved off beaches during winter storms and cleanup activities. There is evidence that petroleum hydrocarbons have been taken up by animals feeding on the ocean bottom. Petroleum hydrocarbon metabolites have been found in the bile of yellowfin sole, rock sole, rockfish, and pollock. Concentrations of petroleum hydrocarbon metabolites in the bile of yellowfin sole have not declined from 1989 to 1990. This contrasts with Dolly Varden which feed close to shore and where petroleum hydrocarbon metabolites in bile decreased in the same period. The effects of this exposure are still being studied. Many subtidal and intertidal species, particularly fish, have the capability of metabolizing and eliminating petroleum hydrocarbons from their bodies. Clams metabolize hydrocarbons very slowly and consequently accumulated them in high concentrations.

Contaminated clams and other invertebrates are a potential continuing source of petroleum hydrocarbons for sea otters and otherspecies that forage in the shallow subtidal zone. Samples from pollock, which feed in the water column, taken as far away as 500 mile from the wreck site on Bligh Reef, showed elevated petroleum hydrocarbon metabolite concentrations in their bile. This indicates that the water column or food supply was affected at great distances from the spill. Initial 1990 study results show a significant effect on benthic organisms associated with eelgrass beds. These are known to be highly productive habitats. The composition of benthic animal communities on soft-bottom habitats as deep as 40 meters were also significantly altered in oiled areas.

ARCHAEOLOGICAL AND SUBSISTENCE RESOURCES

The spill directly impacted archaeological sites and subsistence resources. Cleanup activities and the associated significant increases in human activity throughout the spill zone resulted in additional injuries to these resources.

Archaeological Resources: Archaeological sites along the shoreline were injured by the

spill. Review of spill response data revealed injuries from oil to a minimum of 26 archaeological sites. Among these are burial sites and home sites. Twenty-one (21) of these sites are on federally-owned land, with the remaining five on State of Alaska and private lands. Of the 21 sites on federal land, 10 are on national parks, six on national wildlife refuges, four within Chugach National Forest, and one on Bureau of Land Management land. While injury to these 26 sites was documented during cleanup, a spill-wide assessment of injuries to archaeological resources has yet to be completed. In addition to oil contamination, increased knowledge of the location of archaeological sites may put them at risk from looting. Loss of rye grass cover may threaten some sites. A comprehensive survey of injuries to archaeological resources on public lands throughout the spill zone will be conducted during 1991.

A study was conducted to determine impacts caused by oil contamination on radiocarbon dating of archaeological resources and to investigate the potential for cleaning artifacts and materials to allow such dating. Preliminary results indicate significant injury to the ability to contextually date artifacts and materials by Carbon 14 analysis. It also appears that these materials cannot be successfully "cleaned" to allow accurate dating.

Subsistence Resources: Surveys undertaken by state researchers before the spill and in 1990 indicated that subsistence harvesters in the area affected by the oil spill significantly reduced their use of subsistence resources after the spill, primarily because of their concerns about possible contamination of these resources. The oil spill disrupted the subsistence lifestyle of some communities that have historically relied upon these resources. Some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter. The attached report (Subsistence Use of Fish and Wildlife in 15 Alutiiq Villages after the Exxon Valdez Oil Spill) details these studies. Warnings were issued by the state in 1989 for people to avoid consumption of intertidal invertebrates (such as mussels and clams, which bioaccumulate petroleum hydrocarbons) found along shorelines contaminated by oil. After the spill, an oil spill health task force was formed, including the state and federal governments, subsistence users, and Exxon. This group helped oversee studies conducted by the state and others in conjunction with FDA and NOAA in 1989 and 1990, on subsistence food resources such as seals, deer, salmon, ducks, clams, and bottomfish. Based upon the test results these resources, with the exception of clams and mussels in certain oiled areas such as Windy Bay, were determined to be safe for human consumption.

CONCLUSION

The federal and state Trustee agencies have now concluded two field seasons of study and are currently preparing to begin a third year of studies to assess injuries to natural resources resulting from the Exxon Valdez oil spill. The information contained in this

summary is based upon the field work and data analysis conducted to date, and is preliminary. Many studies will likely need to continue for additional years before a full understanding of injuries is developed. For example, long-lived species such as bald eagles, murres, and sea otters, may not manifest some effects until a number of years have passed. For other species, such as herring and salmon that return to spawn years after hatching, it is necessary to wait for these key life history events to occur before one can determine the extent to which or if they have been injured. At present there is no indication of long-term injury for species other than those noted in this summary. Although two field seasons of study are complete, only a portion of the data gathered has been fully analyzed and interpreted. As studies and data analysis are completed, some of the information contained in this summary may need to be modified.

For the reasons given above, injury assessment studies will continue in 1991, and thereafter until the process is complete. The need to continue to understand the long-term effects of the spill will be accomplished through monitoring projects that will measure the natural recovery of resources injured by the spill as well as the effectiveness of restoration measures implemented by the Trustee agencies. The information gathered by the injury assessment studies, the restoration monitoring studies, and other studies will be used to develop and implement a restoration program that will accelerate the recovery of injured resources.

Restoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated. Wherever possible, restoration will focus on those projects that will provide ecosystem-wide benefits, thereby benefitting a variety of species. These projects may include various initiatives to protect habitat; in other cases it may be necessary to conduct restoration programs that will primarily benefit a particular resource injured by the spill.

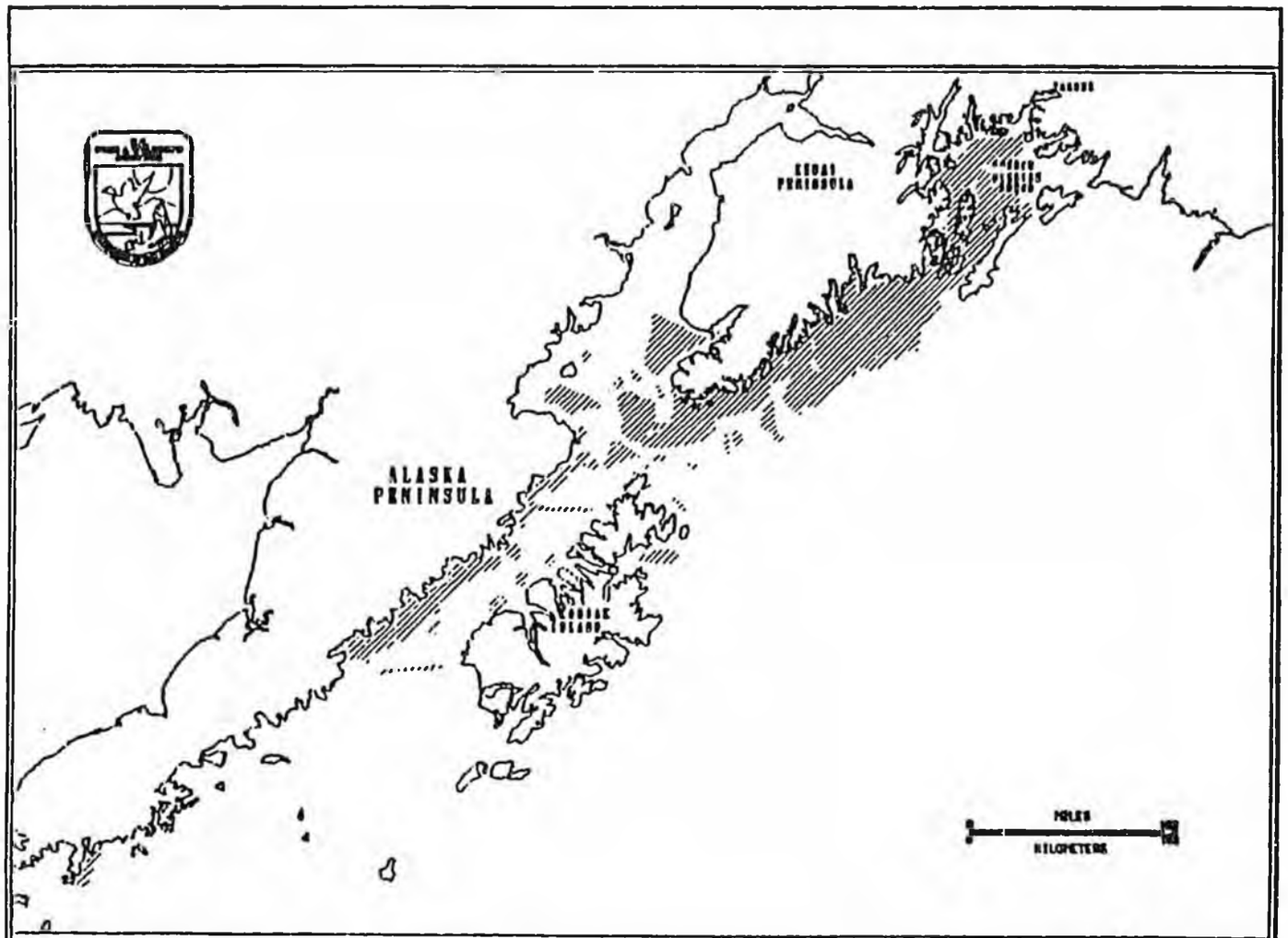

Figure 1. Maximum extent of T/V EXXON VALDEZ oil spill through September 15, 1989, as interpreted by USFWS from ADEC.

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

Species	Total	Valdez	Seward	Homer	Kodiak
Total	35,279	3,360	3,503	5,778	22,638
Unidentified bird	2,927	476	414	916	1,121
Unidentified loon	69	27	6	25	11
Common Loon	216	142	23	32	19
Yellow-billed Loon	87	72	5	3	7
Pacific Loon	18	8	5	0	5
Red-throated Loon	5	3	1	1	0
Unidentified grebe	65	27	8	11	19
Red-necked Grebe	120	79	22	12	7
Horned Grebe	277	233	15	22	7
Northern Fulmar	426	0	22	12	115
Unidentified shearwater	579	5	22	14	538
Sooty Shearwater	360	4	80	34	242
Short-tailed Shearwater	2,460	1	84	4	2,371
Unidentified petrel	69	2	24	14	29
Fork-tailed Storm-petrel	363	1	50	19	293
Leach's Storm-petrel	12	0	9	0	3
Unidentified cormorant	219	76	27	56	60
Double-crested Cormorant	38	19	10	0	9
Pelagic Cormorant	418	277	65	29	47
Red-faced Cormorant	161	90	29	9	33
Great Blue Heron	1	1	0	0	0
Unidentified swan	3	0	2	1	0
Emperor Goose	2	0	0	0	2
Canada Goose	1	0	0	1	0
Brant	3	0	1	2	0
Unidentified duck	30	4	6	20	0
Unidentified seaduck	112	63	2	11	36
Mallard	11	2	4	1	4
Northern Pintail	4	0	3	1	0
Green-winged Teal	5	0	5	0	0
Unidentified Scaup	4	1	3	0	0
Greater Scaup	27	2	21	4	0
Lesser Scaup	2	0	2	0	0
Unidentified Goldeneye	25	8	2	14	1
Common Goldeneye	6	3	0	2	1
Barrow's Goldeneye	33	19	9	4	1
Bufflehead	21	17	1	0	3
Oldsquaw	185	131	43	6	5

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Unidentified alcid	173	24	0	15	134
Unidentified murre	8,851	21	775	2,101	5,954
Common Murre	10,428	399	523	1,353	8,153
Thick-billed Murre	669	16	142	73	438
Pigeon Guillemot	614	136	109	155	214
Unidentified murrelet	413	21	37	121	234
Marbled Murrelet	612	289	97	82	144
Kittlitz's Murrelet	67	23	19	21	4
Ancient Murrelet	311	3	40	73	195
Cassin's Auklet	48	0	36	2	10
Least Auklet	5	0	0	1	4
Parakeet Auklet	31	1	2	1	27
Rhinoceros Auklet	141	0	31	31	79
Unidentified puffin	46	0	7	4	35
Horned Puffin	139	0	32	13	94
Tufted Puffin	361	0	29	15	317
Bald Eagle	125	31	20	15	59
Unidentified raptor	7	1	3	2	1
Peregrine Falcon	2	0	0	0	2
Willow Ptarmigan	1	0	0	0	1
Unidentified owl	1	0	0	1	0
Great-horned Owl	3	0	0	3	0
Unidentified woodpecker	1	0	0	1	0
Cliff Swallow	3	0	3	0	0
Violet-green Swallow	1	0	1	0	0
Unidentified passerine	9	1	7	1	0
Stellar's Jay	1	1	0	0	0
Magpie	7	1	0	0	6
Common Raven	18	1	4	0	13
Northwestern Crow	34	6	3	3	22
American Robin	2	0	2	0	0
Varied Thrush	1	0	0	0	1
Hermit Thrush	1	0	1	0	0
Unidentified warbler	1	0	0	0	1
Yellow Warbler	3	0	3	0	0
Pine Grosbeak	1	0	0	0	1
Unidentified sparrow	15	0	10	2	3
Savannah Sparrow	1	0	1	0	0
Golden-crowned Sparrow	4	0	3	0	1
White-winged Crossbill	8	0	0	6	2

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Harlequin Duck	213	148	10	35	20
Unidentified Eider	3	0	0	3	0
Stellar's Eider	4	4	0	0	0
Common Eider	17	5	0	2	10
King Eider	9	0	0	0	9
Unidentified Scoter	162	23	17	51	71
White-winged Scoter	342	164	13	137	28
Surf Scoter	175	45	28	9	6
Black Scoter	132	112	4	8	8
Ruddy Duck	1	0	1	0	0
Unidentified merganser	3	1	0	0	2
Common Merganser	2	2	0	0	0
Red-breasted Merganser	33	30	1	1	1
Sandhill Crane	2	1	1	0	0
Black Oystercatcher	9	2	2	0	5
Golden Plover	1	0	0	1	0
Unidentified sandpiper	11	1	5	1	4
Unidentified turnstone	1	0	0	0	1
Common Snipe	1	0	0	1	0
Semipalmated Sandpiper	1	0	1	0	0
Lesser Yellowlegs	2	0	0	2	0
Western Sandpiper	5	0	0	5	0
Baird's Sandpiper	1	0	0	0	1
Least Sandpiper	4	0	2	0	2
Surfbird	3	3	0	0	0
Short-billed Dowitcher	1	0	0	0	1
Red Phalarope	2	0	0	2	0
Red-necked Phalarope	7	1	3	0	3
Long-tailed Jaeger	1	0	0	0	1
Unidentified gull	99	6	34	39	20
Glaucous-winged Gull	555	33	188	28	213
Herring Gull	8	3	5	0	0
Mew Gull	33	0	3	3	27
Black-legged Kittiwake	1,225	8	214	74	929
Arctic Tern	3	1	1	0	1
Aleutian Tern	1	0	0	0	1

CERTIFICATE OF SERVICE

I certify that I caused to be served by mail the attached Notice of Lodging of United States' Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and attached Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources on

Douglas Serdahely
Bogle & Gates
1031 W. Fourth Ave.
Anchorage, Alaska 99501

John F. Clough, III
Clough & Associates
431 N. Franklin St.
Suite 202
Juneau, Alaska 99801

Randall J. Weddle
Faulkner, Banfield, Doogan & Holmes
550 West Seventh Ave.
Suite 1000
Anchorage, Alaska 99501

Charles P. Flynn
Burr, Pease & Kurtz
810 N. Street
Anchorage, Alaska 99501

on April 8, 1991.

James L. Nicoll, Jr.

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 April 8, 1991

SUBJECT: State Constitutional Issues Related to the Exxon Valdez Settlement

TO: Representative Max Gruenberg, Chair
House Special Committee on the Exxon Valdez Oil Spill Settlement

FROM: Pamela Finley Pam Finley
Assistant Revisor of Statutes

QUESTION PRESENTED. You have asked if there are any state constitutional issues raised by the Exxon Valdez settlement.

SHORT ANSWER. There are certainly constitutional issues raised by the settlement documents. Unfortunately, there are no cases in Alaska clearly deciding these issues, and therefore I cannot state for certain that the settlement does or does not violate the state constitution. With that warning, what follows is my opinion on the issues raised.

1. The requirement in the consent decree and the MOA that a certain part of the recovery from Exxon be used for certain purposes may violate the prohibition against dedication of funds, art. IX, sec. 7, Constitution of the State of Alaska. However, there is a reasonable argument to be made that the dedication falls within the "federal program" exception of art. IX, sec. 7.

2. While there is case law from other jurisdictions on both sides of the issue, in my opinion the provision of the MOA under which the three federal and three state trustees are to spend roughly $700 million without appropriation by the legislature violates art. II, sec. 1, or art. IX, sec. 13.

3. There is a remote possibility that the dedication in the plea agreement would preclude the state from accepting the money, but I believe that the chances of a court making such a decision are extremely slim.

4. The legislature could cure the appropriation problem by a yearly appropriation. A one-time appropriation of the proceeds to be received in the future might violate the dedicated funds provision. While an appropriation for the required purposes would allow the money appropriated to be spent for those purposes, it would not cure any dedication problem in the agreement.

DISCUSSION.

I. The Settlement Documents. There are two documents related to the Exxon Valdez settlement---the consent decree (which settles the case between the state and Exxon and the federal government and Exxon)[1/] and the memorandum of agreement and consent decree, hereinafter "MOA" (which settles the case between the state and federal governments concerning the proceeds to be received by both governments from Exxon.)[2/] In addition, the plea agreement in a criminal case brought by the U.S. against Exxon[3/] requires Exxon to pay money as restitution to the state, and therefore is also discussed here.

A. The Consent Decree. Under paragraph 8 of the consent decree, Exxon is to pay to the governments $900 million (less certain cleanup costs incurred by Exxon) over a period of eleven years. In paragraph 10 of the consent decree the two governments agree (without participation by Exxon) that the $900 million (less certain of Exxon's cleanup costs) will be paid as follows:

(1) up to $72 million will be paid to the state to reimburse it for its past cleanup, response, assessment, and litigation costs;

(2) up to $62 million will be paid to the U.S. to reimburse it for its past cleanup, response, and assessment costs;

(3) the state and federal governments will be reimbursed for cleanup costs incurred by either of them after December 31, 1990; and

(4) the remainder (referred to herein as "the trust fund money" or "natural resource damage recovery"), which will probably be in the neighborhood of $700 million depending on future cleanup costs, will be spent for future assessment, rehabilitation, restoration, or replacement of the natural resources or services injured by the oil spill, or the acquisition of equivalent resources or services.

[1/] This is filed in federal district court in Anchorage, case no. A-91-083 Civ.

[2/] This is filed in federal district court in Anchorage, case no. A-91-081 Civ.

[3/] This is filed in federal district court in Anchorage, case no. A-90-015-1 Cr. and A-90-015-2 Cr.

Finally, in paragraph 10, the governments "represent" that the money received under the consent decree will be held, allocated, and spent in accordance with the MOA.

The money that the state will receive under (1) and (3) above does not raise any issues under the state constitution if, as appears to be the case, that money will go to the state treasury and be available for appropriation without any restrictions on its use.[4/] However, because the money received under (4) above must be spent for certain purposes, that provision may violate the prohibition on dedicated funds found in art. IX, sec. 7 of the state constitution.[5/] In addition, to the extent that the representation concerning the MOA incorporates the MOA in the consent decree,[6/] the consent decree may violate those sections of the constitution relating to the legislature's appropriation power, which are discussed below in relation to the MOA.

B. The MOA. Paragraph IVA2 of the MOA requires the two governments to establish a trust fund into which trust fund money will be deposited. The trust fund will be in the court registry unless the parties and the court agree otherwise. The money will be spent by 3 federal trustees (designated by the President) and 3 state trustees (designated by the Governor) acting jointly. It is to be spent for the purposes of restoring, replacing, enhancing, rehabilitating, or otherwise acquiring the equivalent of the natural resources injured as a result of the oil spill, and the lost services provided by those resources. In addition to the dedication of funds problem mentioned above, the MOA raises the question of whether the agreement to let the trustees establish a trust fund and spend the money without requiring an appropriation violates art. II, sec. 1 of the state constitution (vesting the legislative power, including the appropriation power, in the legislature), or art. IX, sec. 13 of the state constitution (requiring an appropriation before money can be withdrawn from the state treasury and requiring authorization for any obligation for the payment of money.)

C. The Plea Agreement. Under the plea agreement entered into by Exxon and the federal government, Exxon is to pay the state $50 million in restitution. According to the plea agreement this money can be spent only for restoration, replacement, and

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[4/] The attorney general has taken the position that reimbursement money will be unrestricted, and I agree.

[5/] In addition, AS 46.08.020(a)(2) states that the legislature may appropriate to the oil and hazardous substance release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance." In his April 2, 1991 opinion, at pages 26-27 the Attorney General states that this statute is limited to money reimbursed for cleanup expenses. However, the literal terms of AS 46.08.020(a)(2), unlike those of AS 46.04.010, suggest that all money recovered from a responsible party is to be general fund money subject to appropriation. It is possible therefore that the agreement may violate AS 46.08.020.

[6/] A "representation" may not necessarily be the same as an agreement.

enhancement of resources affected by the oil spill, 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. The requirement also raises the question of whether the legislature can accept the money, with restrictions on its use, given the prohibition on the dedication of funds in art. IX, sec. 7 of the state constitution.

II. The Prohibition Against the Dedication of Funds.

Art. IX, sec. 7, Constitution of the State of Alaska, reads as follows:

> The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

A. Dedication in the Consent Decree and MOA. Despite the fact that this section appears to restrict the dedication[7] of the proceeds of a "state tax or license," Alaska's Supreme Court has held that it applies to "the sources of any public revenues." State v. Alex, 646 P.2d 203, 210 (Alaska 1982). In Alex, the state Supreme Court relied on the history of the state constitutional convention, as discussed in an opinion of the Alaska Attorney General, which opinion concluded that revenues from the lease or sale of state natural resources could not be dedicated. 1975 Alaska Op. Atty. Gen. No. 9 (May 2). It seems highly likely that "revenues" would include money due the state under either a judgment for, or settlement of, the state's claims for damages to its natural resources. A settlement is, after all, very much an exchange of one state asset (the state's legal claims) for another (money). If the state had continued to pursue its state claims in state court, any recovery would certainly be "revenue" of the state. Even under the Clean Water Act, the trustee must be an authorized "representative" of the state. 33 U.S.C. 1321(f)(5). See 42 U.S.C. 9607(f)(2)(B) (state trustee must be "state official.") State recoveries under the Clean Water Act may be deposited in a special account in the state treasury. 43 CFR 11.92(a)(2). It seems likely that money exchanged for the extinguishment of the state's legal claim would be state revenue for the purposes of art IX, sec. 7 of the state constitution. Therefore, the question is whether the recovery from Exxon is subject to an exception to the dedicated funds provision.

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[7] Although in the normal course of events this section will have the greatest effect on the legislative branch, by its terms it appears to apply to all state officials.

Based on the history of the state constitutional convention, the Attorney General has suggested that there may be certain "implied exceptions" to this provision, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, certain contributions from local governments, and tax receipts collected by the state on behalf of local governments. 1982 Op. Atty. Gen. No. 13, p. 11 (November 30). None of these include recoveries from a third party for damages to state natural resources. Moreover, to "imply" an exception for dedications that the attorney general establishes in a settlement, would give the attorney general unfettered discretion to circumvent this section of the state constitution by including in any settlement a "trust" requirement that the money be spent for a particular purpose. It may be that the court would imply an exception for money offered to the state as a gift, with conditions imposed by the donor, because in that case (1) no state official has participated in the dedication, and (2) the money is not being exchanged for a state asset. In the Exxon settlement however, the dedication applies (1) because of the Attorney General's decision to sue and settle under the Clean Water Act, and (2) to money exchanged for the state's legal claims against Exxon.

However, section 7 itself has several explicit exceptions, namely the Permanent Fund in art. IX, sec. 15, dedicated funds that existed at the time the sec. 7 was ratified, and those dedications "required by the federal government for participation in federal programs." Only the latter seems relevant.

To qualify under the "federal program" exception, (1) the dedication must be required; and (2) the state must be attempting to "participate in a federal program." The applicable provision of the federal Clean Water Act, 33 U.S.C. 1321(f)(5), requires that any damages received by the state under that section be used " to restore, rehabilitate, or acquire the equivalent of" the injured natural resources. Clearly, a recovery under the applicable provision of the Clean Water Act must be dedicated. However, it is not entirely clear that the full amount that will be dedicated to the trust fund is in fact required to be dedicated under the Clean Water Act. 33 U.S.C. 1321(f)(1)-(3) contain dollars per barrel limitations on recovery, except in cases of willful negligence or willful misconduct, and it is not clear whether the state's recovery under 33 U.S.C. 1321(f)(4) and (5) is similarly limited.[8/] If it is so limited, and there was no evidence to support willful negligence or willful misconduct then the vast majority of the money that will be deposited in the trust could not be received under the terms of the Clean Water Act because it would exceed those dollar limitations. Therefore, it should not be subject to the dedication requirements of the Clean Water Act, and is not "required" to be dedicated under federal law.

[8/] At the end of the April 3, 1991 hearing of the House Special Committee on the Exxon Valdez Settlement, the Attorney General indicated that he thought the dollars per barrel limitation would apply to the state's recovery, but that Exxon had waived the limitation.

Assuming that federal law does require the dedication of all of the roughly $700 million, it is also not clear that suing under the Clean Water Act is "participation in a federal program" within the meaning of the dedicated funds provision. The delegates to the state constitutional convention adopted the "federal program" exception because they realized that without dedication, the state could not receive federal funding for certain programs e.g., fish and wildlife programs. 1975 Op. Atty. Gen. No.9 pp. 3-4 (May 2). If Alaska's Supreme Court were to take a strict view of the "federal program" exception, it could hold that the exception applies only to programs under which a dedication is required in order for the state to receive money from the federal government since that was the type of program envisioned by the drafters of the state constitution.

Even taking a slightly less restrictive view, the state Supreme Court could nevertheless hold that the exception did not apply where the state has the choice of receiving money under federal law with a required dedication of funds or of receiving it under state law without a dedication. The rationale for this interpretation would be that Alaska's Constitution establishes a strong policy against dedicated funds, and exceptions to it should be construed to allow dedication only when it is truly necessary for the state to receive some benefit. This less restrictive view would still bar the attorney general from settling under the Clean Water Act because that Act does not preempt state law, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), and therefore the state could simply pursue the claims under state law that it has already filed in state court. Under either of these two interpretations of the "federal program" exception, the court would essentially be saying that the attorney general could not take advantage of a federal law (that did not preempt state law) if the provisions of that federal law required a violation of the dedicated funds provision of state constitution. See McDowell v. State, 785 P.2d 1, 10 n. 3 (Alaska 1989) (Despite federal law that allowed state to manage federal land only if state recognized rural preference, state could not grant rural preference in violation of state constitution.)[9/]

However, the Alaska Supreme Court might well interpret the "federal program" exception to include litigation under federal law, even though state remedies were

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[9/] The Attorney General has suggested in his April 2, 1991 opinion, at page 28, that state law that would effectively prohibit the state from suing under the Clean Water Act would be preempted, and therefore unenforceable, because it would serve as an obstacle to the Clean Water Act's purposes. However, since the Clean Water Act does not prevent a state from enacting its own remedies for spills covered by the Clean Water Act, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), this seems unlikely. In addition, the Clean Water Act expressly states that it does not preempt a state from imposing liability for oil spills, and that it does not affect any state law not in conflict with the section. 33 U.S.C. 1321(o)(2) and (3). Since the Clean Water Act contemplates that the state may establish its own remedies, it obviously does not require the state to sue under the Clean Water Act.

available. The rationale would be that the attorney general should not be limited in choosing available remedies because there may be tactical advantages to suing under federal law that are not available under state law. See Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975) (Dicta; the exercise, within constitutional limits, of the Attorney General's discretion in disposing of state litigation is not subject to review.) If the attorney general chooses to litigate under federal law, and federal law requires dedication of recoveries, then the basic purpose of the exception (to allow the state to take advantage of federal law despite a federal dedication requirement) has been met. Given the lack of case law on the "federal program" exception, it is difficult to predict how the state Supreme Court would interpret this provision. Either of the three possible approaches outlined above is plausible and reasonable.

B. Dedication in the Plea Agreement. Generally, the discussion above concerning dedication of funds in the consent decree and MOA would apply to the plea agreement. I am considerably more confident that the state may accept the $50 million from the plea agreement than I am about the constitutionality of the dedication in the consent decree and MOA. The reason for this is that the money to come to the state in the plea agreement is not being exchanged for the state's claims for civil damages, nor has the state participated in the dedication. Rather the money will come to the state as a result of the federal government's agreement with Exxon.

First, the state Supreme Court may determine that money received by the state as a gift, to which the state has no legal claim, is not "revenue" subject to the dedicated funds provision. This would allow the state to accept gifts given with restrictions on their use. (Note that if the state accepts a gift with restrictions on its use, the state is bound by those restrictions. Patrick v. Blake, 19 N.W.2d 220 (S.D. 1945).) This interpretation would also appear not to violate the policy underlying the dedicated funds provision, since the dedication was not created by any action of a state official, but rather entirely by the donor. Since the dedicated funds provision is a limit on the state's taking action that creates a dedicated fund, it should not be applicable at all where the dedication is imposed by a donor without any action by the state government.

Even if the dedicated funds provision applies, the "federal program" exception appears applicable to the $50 million, even if it is not applicable to money received in settlement of the state's claims. Assuming the court took a strict view of the "federal program" exception, it is likely that this would be viewed as money received from the federal government (like federal money for fish and wildlife programs or highways.) It is true that Exxon will be paying the money, but only because the federal government required it to do so as part of the plea agreement. At any rate, it is money that the federal government could have kept for itself, as part of a fine,

but chose to have paid to the state in restitution. It is not money that the state is exchanging for its own civil claims.

If the court took the "middle" position concerning the federal program exception, the state should also be allowed to accept the money, with restrictions on its use. The state does not have the opportunity to receive this money without restrictions, because it is available only as part of an agreement between the federal government and Exxon. The state has no right to prosecute Exxon for violations of federal criminal laws.

Therefore, while there is some possibility that the state Supreme Court might hold that the state cannot accept the $50 million in restitution, because its use is restricted, that possibility is very remote. The dedication in the plea agreement is not created by the choice or agreement of a state official, and the state is not giving up anything of value in exchange for the restitutionary payment.

III. Encroachment on Legislative Power.

A. The Consent Decree. Except for the reference to the MOA in paragraph 10 of the consent decree, the consent decree does not address the mechanism by which the settlement proceeds are to be spent. Therefore its terms (with the possible exception of the reference to the MOA) do not raise the separation of powers problems inherent in the MOA. However, because the consent decree is based on the Clean Water Act, there is a latent question as to whether the Clean Water Act itself requires a spending mechanism that may violate art. II, sec. 1 or art. IX, sec. 13 of Alaska's constitution.

The answer appears to be "no". 33 U.S.C. 1321(f)(5) requires money recovered by the state to be used for certain purposes, but does not establish a mechanism for spending that money. 40 CFR 300.605 requires the state trustee to act on behalf of the public as trustee for state resources, but does not address the mechanism for spending a recovery. 40 CFR 300.615(a) directs the trustees to coordinate their efforts and cooperate, but does not require a joint trusteeship, let alone the spending of money without legislative authorization. 40 CFR 300.615(c)(4) requires the state trustee to devise and implement the restoration plan, but again this procedure does not appear to require that the trustee do so without legislative participation.

Regulations enacted pursuant to 42 U.S.C. 9651(c) also may affect the state trustee's power. These regulations were remanded in Ohio v. U.S., 880 F.2d 432 (D.C. Cir. 1989), so it is possible that they do not apply. However, even if they do apply, they appear to allow for the legislature's appropriation role, and may even mitigate against the joint trusteeship proposed in the MOA. 43 CFR 11.92(a) requires the federal

recovery to be placed in the federal treasury,[10/] and the state recovery to be placed in either a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee. The state trustee is required to prepare a restoration plan (which may be modified) and the money must be spent for actions described in the restoration plan. 43 CFR 11.92(c) and 11.93. These provisions do not explicitly prevent the legislature from appropriating the money to projects described in the restoration plan, and there seems no practical need to engraft such a restriction on to the regulations. Typically the executive branch devises specific plans (within statutory law) and the legislature appropriates money for them. There seems no reason why the legislature could not participate in the process here by establishing statutory authority necessary for state agencies to participate in the restoration plan if that authority did not already exist, and appropriating the money for the programs proposed by the trustee. Moreover, the fact that 43 CFR 11.92(a)(2) allows the state recovery to be deposited in an account in the state treasury suggests that under the Clean Water Act the legislature is to be allowed to exercise the appropriation power over money that the trustee uses to implement the plan. However, if the Clean Water Act itself, or regulations adopted under it, were to be interpreted to prevent the legislature from appropriating money recovered under that Act, then the same constitutional questions that are discussed under the MOA would apply.

B. The MOA.

The MOA requires the state and federal natural resource damage recovery to be deposited in a joint trust account, either in the court registry or in another account agreed to by the parties and approved by the court. Six trustees, three federal and three state, are then to spend the money. This procedure raises two questions: (1) Does the legislature need to establish the fund into which the recovery is deposited; and (2) Does the power of the six trustees to spend the money violate the state legislature's appropriation power?

1. The Establishment of the Trust Fund. So long as the money remains in the court registry, there may be no constitutional requirement that the legislature authorize the deposit of the proceeds, though it would do no harm to do so. It is standard judicial procedure to deposit funds into the court registry when there are two litigants who claim a right to all or part of those funds, pending the court's decision on ownership. However, it is clear from the MOA that the deposit is not made pending judicial decision, but rather that the money will remain in the fund until it is spent by the trustee. Because of this "wrinkle," it may be necessary for the

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[10/] 33 U.S.C. 1321(k) also requires any money recovered by the federal government under that section to be placed in a fund in the U.S. treasury. Since the federal recovery is being placed in the court registry, there is a question as to whether the MOA complies with 33 U.S.C. 1321(k).

legislature to authorize the creation of the fund and the deposit of money into it. If the parties attempt to set up a separate fund, it becomes somewhat more likely that legislative authorization is needed because the state could no longer shelter under the notion that the fund is a normal deposit into the court registry.

Generally, special funds for state money must be established by law, i.e., by the legislature. Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E. 2d 176 (Mass. 1980). (Trial court ordered fine to be paid for project enhancing natural resources; Supreme Court holds money is subject to appropriation and that it cannot be considered a trust fund because only the legislature can establish a trust fund); State v. West, 145 P. 15 (Wash. 1914). The possible argument against the need for legislative authorization is that the court itself has the power to establish a trust fund. It is not clear, however, that this power can be exercised in derogation of a state's constitutional requirement that money in the fund be appropriated. Moreover, because the fund would be established by the court under the state's attorney general's agreement, it is not really the court's power to establish a trust fund that is at issue, but rather the authority of the executive branch to establish a trust fund by agreement.

2. The Appropriation Power. 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 subject to approval 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). 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.

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, 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.[11/]

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA 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), is a clear indication 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.

[11/] 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.

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, are 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.)

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. Finally, 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 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 land 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 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 is being held by the state in trust for another 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 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 asset can hardly be "non-state funds."

IV. Effect of Unconstitutionality; Cure; Continuing Appropriations.

A. Effect of Unconstitutionality. In general, of course, the attorney general has absolute discretion in settling lawsuits, including the power to dismiss cases without recovery by the state. Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (1975). But courts have indicated that this discretion is not absolute. Public Defender Agency v. Superior Court, Third Judicial District, supra, 534 P.2d at 950 (discretion only within constitutional bounds; dicta); Smith v. Meese, 821 F. 2d 1484 (11th Cir. 1987)(Dept. of Justice's policy on prosecution of voting rights cases subject to judicial review); NAACP v. Levi, 418 F. Supp. 1109 (D.C. Cir. 1976) (Dept. of Justice's policy of deferring to state investigation of civil rights violations is subject to judicial review);Boyd v. U.S., 345 F. Supp. 790 (E.D.N.Y. 1972) (Prosecutorial discretion does not protect attorney general's conduct from review on charge of bad faith, fraud, or illegality; dicta). As the court stated in Nader v. Saxbe, 497 F.2d 676, 679-80, n. 19 (D.C. Cir 1974):

> The Executive's constitutional duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3, applies to all laws, not merely to criminal statutes. (Citations omitted). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. (Citations omitted). The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits of that authority. (Citations omitted.) Judicial review

> of the latter sort is normally available unless Congress has expressly withdrawn it. (Citations omitted). The decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. (Citations omitted).

If the attorney general has agreed to provisions that violate the state constitution, those provisions are invalid. See 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.) This true even if those unconstitutional provisions are authorized by the federal Clean Water Act. Federal law does not require the state to sue under the Clean Water Act. Therefore the situation is similar to that in McDowell v. State, 785 P.2d 1, 10, n. 20 (Alaska 1989), wherein the court held that the state could not grant a subsistence preference to rural residents, even though federal law allowed the state to manage federal land only if it granted a rural subsistence preference on federal land. The issue then is whether the Exxon settlement documents do violate the state constitution.

Because several documents and legal issues are raised, I will try to summarize the possibilities:

1. If the dedication required by the Clean Water Act is not allowed under art. IX, sec. 7 of the state constitution, the trust fund provisions in both the consent decree and the MOA are invalid, since they both contain that dedication.

2. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, and the Clean Water Act is interpreted to require that procedure, then both the MOA and the consent decree would be invalid because the attorney general would not be authorized to sue or settle under the Clean Water Act.

3. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, but those provisions are not required under the Clean Water Act (nor incorporated by implication into the consent decree), then the MOA would be invalid, but the consent decree would not violate the appropriations provisions of the state constitution.

4. If the money due the state under the plea agreement violates the dedicated funds provision (which seems unlikely), then the state cannot accept the money.

B. Cure. If the plea agreement, MOA, or consent decree violate the dedicated funds prohibition, then the dedication is invalid. The legislature cannot "cure" a dedication problem because the prohibition on dedicated funds applies to the legislature as well as the executive branch. However, for those years in which the legislature actually

appropriated the money for the required purposes, the money could be spent for those purposes pursuant to the appropriation (not pursuant to the dedication.)

The appropriation problem could be cured in several ways, assuming of course that the Clean Water Act does not require trust money to be spent without appropriation. First, the court or the parties could amend the MOA to require annual appropriation of that portion of Exxon's payment that is a state asset. The court may, in fact, imply an appropriation requirement. Alternately, the legislature could take it upon itself to authorize the trust and the deposit of money into it, and to appropriate each year the state's interest in Exxon's payment to the fund.

It might be possible for the current legislature to appropriate to the trust fund all of the natural resource damage recovery to be received from Exxon under the consent decree over the years. However such a "continuing appropriation" may itself violate the dedication of funds prohibition. A state superior court has held that a continuing appropriation violates the dedicated funds provision. Trustees of Alaska v. State, Super. Ct., 3rd Jud. Dist., at Anchorage, case No. 3-AN-84-12053 (Aug. 30, 1985.) Apparently the theory was that the legislature making the continuing appropriation is attempting to tie the hands of future legislatures who would, in order to negate the continuing appropriation, have to repeal it. The Trustees case was not appealed, so it is not clear whether continuing appropriations do violate the dedicated funds provision. However, in Public Employees' Local 71 v. State, 775 P.2d 1062, 1064 (Alaska 1989), the State Supreme Court did state that the monetary terms of a collective bargaining agreement are subject to independent legislative approval by appropriation "each year" that the contract is in effect. Even if continuing appropriations do violate the dedicated funds provision as a general matter, it still might be possible to defend a continuing appropriation as required for participation in a federal program, although such an argument would be subject to the objections discussed above in connection with the dedication in the MOA and consent decree, and the additional argument that a continuing appropriation was not required by the Clean Water Act, the consent decree, or the MOA. Finally, of course, as a practical matter subsequent legislatures could repeal the continuing appropriation at any time.

V. Summary.

The Attorney General stated in his April 2, 1991 memo at p. 10 that the "real" issue is whether he and the Governor had the power to settle the Exxon Valdez litigation. Unfortunately, I cannot agree. There is no doubt that the Attorney General has the authority to settle the state's litigation in good faith. However, his authority, like the authority of any state official acting in his or her official capacity, is limited by the Constitution of the State of Alaska.

Therefore the first question is whether the Attorney General can release the state's claim in exchange for money that must be used for certain purposes under the Clean

Water Act, 33 U.S.C. 1321(f)(5). If the court were to interpret art. IX, sec. 7, Constitution of the State of Alaska, strictly, the dedication might well be invalid. However, if the court interpreted the "federal program" exception less strictly (which in my view it could reasonably do), and if in fact all the money dedicated to the trust were actually recoverable under the Clean Water Act, then the agreement would not violate art. IX, sec. 7 of the state constitution.

The second question is whether the Attorney General, having recovered money as the authorized representative of the state, has the constitutional authority to allow the state and federal trustees to spend that money without appropriation by the state legislature. (It should be noted that the Clean Water Act and regulations adopted pursuant to it do not expressly prohibit the legislature from appropriating the state's recovery nor require or expressly authorize a joint trust.) Essentially the Attorney General has decided that, rather than litigate with the federal government over who owns how much of the trust money, he will agree that the state and federal trustees may spend the money. However well-intentioned that decision may be, I believe the agreement violates art. II, sec. 1 or art. IX, sec. 13, Constitution of the State of Alaska. The Attorney General certainly has the authority to determine the value of the state's claim by a good faith settlement, but only the state legislature has the power to authorize its expenditure. While it is possible that I am wrong, I doubt that a court will agree with the position that the state never received anything because the trustees spent the money without deciding who owned how much of it.

PLF:pl
91-237.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM March 19, 1991

SUBJECT: Exxon Settlement; Overview and Preliminary Questions; Federal Criminal Case (Work Order No. (7LS1053)

TO: Senator Dick Eliason

FROM: Pamela Finley Pam Finley
Assistant Revisor of Statutes

OVERVIEW: CRIMINAL CASE

The U.S. has filed a criminal case against Exxon in federal district court in Alaska (A-90-015-1 Cr. and A-90-015-2 Cr.) There is a proposed plea agreement between the U.S. and Exxon. If it is rejected, Exxon can withdraw from the consent decree.

Legal Basis. The case against Exxon is based on violations of the Clean Water Act, (33 U.S.C. 1311(a) and 1319(c)(1)(A)), the Refuse Act (33 U.S.C. 407 and 411), and the Migratory Bird Treaty Act (16 U.S.C. 703 and 707(a).

Types of Damages. The Plea Agreement contemplates a fine payable to the U.S. and restitution payable to the state.

Amounts to be Paid. The proposed fine is $100 million, with $50 million remitted (not paid). Restitution to the state is in the amount of $50 million.

To Whom Paid. The fine is to be paid to the U.S. government. The $50 million in restitution will be paid to the state.

Restrictions on Use. The $50 million paid in restitution is to be "used by the State of Alaska exclusively for restoration projects relating to the "EXXON VALDEZ" oil spill." Plea Agreement p. 8. Restoration includes replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research projects directed to the prevention, containment, cleanup and amelioration of oil spills. Id.

Who Decides How Money Used. It appears that the restitution will be paid immediately to the state (general fund) and therefore the legislature will determine how it is spent, within the restrictions on use listed above.

PRELIMINARY QUESTIONS RELATED TO PLEA AGREEMENT

1. Has the state filed a criminal complaint against Exxon under state law? Could it? When does the statute of limitations run?

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91-185.plm

DIVISION OF LEGAL SERVICES

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MEMORANDUM March 19, 1991

SUBJECT: Exxon Settlement; Overview and Preliminary Questions; State Case (Work Order No. 7LS1053)

TO: Senator Dick Eliason

FROM: Pamela Finley
Assistant Revisor of Statutes

Pam Finley

OVERVIEW; STATE CASE

On August 15, 1989 the State filed a complaint against Exxon and others (including Alyeska) under state law in state superior court. (89-06852). References in this memo are to pages of the complaint. If the consent decree becomes effective, all but one of the state's claims against Exxon and Exxon Pipeline in the state case will be dismissed. The one exception is for the local governments' share of fisheries business taxes lost due to the oil spill. CD 20 pp. 18-19. The consent decree also provides for the release of claims "for natural resource damages" against Alyeska. It is not clear what will happen to the state claims against other defendants: Exxon Shipping Co Amerada Hess Pipeline Corp.; Arco Pipe Line Co.; BP Alaska Pipelines; Mob Alaska Pipeline Co.; Phillips Alaska Pipeline Corp.; and Unocal Pipeline Co.

Legal Basis. The state's claims are based on state statutory and common law. The claims include: negligent or intentional failure to contain and clean up the spill (p.23); negligence in piloting the Exxon Valdez (p. 25); negligent or intentional misrepresentation as to prevention and cleanup capabilities (p. 27); negligence per se (negligence proved by violation of statutes and regulations)(p. 28); common law strict liability (p.29); maritime tort (p.30); breach of right-of-way lease (p. 31); public nuisance (p.32); private nuisance (p.33); trespass (p. 34); strict liability under AS 46.03.822 (p. 35); liability for restoration under AS 46.03.780 (p. 36); civil damages under AS 46.03.760(e) (p.37); civil penalties under AS 46.03.758(b)(1) and (2) (p.37); civil assessments under AS 46.03.760(a); and infliction of emotional distress.

Types of Damages. The state seeks to recover civil penalties and assessments, response costs, cleanup costs, damage assessment costs, damage to the natural

resources of the state, direct and indirect costs of providing governmental services to people adversely affected by the oil spill, losses due to ordinary government services curtailed or impaired as a result of the oil spill, loss of revenue from fish processing tax, salmon enhancement tax, oil and gas production tax, corporate income tax, and oil production royalties. (See pp 6-8 and 22).

Amount Paid. No settlement has been proposed. If the case were taken to trial, damages recovered would depend on the strength of the evidence presented at trial to prove the loss, and the amount that the fact-finder would attach to intangible losses (e.g., the value of natural resources damaged.)

To Whom Paid. If a judgment were recovered, Exxon would either pay the state or the state would execute on its judgment against Exxon's property.

Restrictions on Use. There are no restrictions on the use of damages recovered under state law. AS 46.08.020 encourages the legislature to appropriate recoveries and penalties to the oil and hazardous substance release response fund, but does not require such an appropriation.

Who Decides How Money Used. The legislature decides how the money will be used.

PRELIMINARY QUESTIONS RELATED TO STATE CLAIMS

1. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska?

2. State law allows recovery of certain damages that the CWA does not, e.g., economic losses, civil penalties. What does the state gain in the consent decree that compensates for the loss of these claims?

PLF:pl
91-184.plm

To: House & Senate Members

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

MEMORANDUM March 14, 1991

SUBJECT: Disclosure of Exxon Valdez litigation documents (W.O. 7LS0985)

TO: Representative Kay Brown

FROM: John B. Gaguine
Legislative Counsel

You have asked whether the governor may agree, as part of an Exxon Valdez settlement, to keep certain documents confidential that would otherwise be public under state law, especially resource damage assessments. I believe that a recent Alaska Supreme Court decision would prohibit the governor from doing this.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes (AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer quite clear:

> The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.
>
> Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the

> record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.
>
> We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

I do not think that the "work product" exception to discovery has any relevance here, at least not after a settlement. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While it probably overrides the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

> Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not apply after a settlement.

It also seems clear that the resource damage assessments would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

> (6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I do not see how resource damages assessments would not fall under this definition.

I understand that the attorney general is concerned that some of the litigation-related material, if released, might be used in subsequent litigation against the state. I do not think that this matters. There is nothing in the public records law that provides an exception for records that might be detrimental to the state's interests.[1/] If the state is already in litigation as a defendant, it might be able to withhold information from a plaintiff under AS 09.25.122 (assuming that the court decided that the "work product" was prepared for all litigation, and not just that where the state was a plaintiff). But if no litigation has yet been brought, I do not think that the state can avail itself of this protection. (Of course, since it is almost two years since the Exxon Valdez grounding, the statute of limitations for tort suits against the state arising from the grounding will likely run soon.)

If I may be of further assistance, please advise.

JBG:pl
91-155.plm

[1/] In Anchorage School District the court rejected an argument that the settlement could be sealed because the Open Meetings Act, AS 44.62.310 - 44.62.312, allowed executive session for matters which would clearly have an adverse effect upon a government unit's finances. 779 P.2d at 1193 n.5. The court observed, "The people have not delegated to their representatives the power to decide what the public may or may not know."

ANALYSIS OF INDEMNIFICATION PROVISIONS OF PROPOSED EXXON SETTLEMENT AGREEMENT

The proposed settlement agreement recognizes that even if it is approved there will still be litigation among Exxon, Alyeska, the Alyeska owner companies, and the Trans Alaska Pipeline Liability Fund, over who will end up paying how much of the bill for the oil spill. It also recognizes that the state and federal governments will be drawn into that litigation by Exxon and Alyeska, who blame the governments for part of the damage. It contains a series of complicated provisions dealing with Exxon's and Alyeska's right to blame the state and federal governments for whatever liability is imposed on them in the ongoing litigation by commercial fishermen, natives, municipalities, and others injured by the Exxon Valdez oil spill.

This memorandum attempts to show the practical consequences of these tangled provisions.

1. Exxon agrees to indemnify the state against claims by Alyeska that the state is partly at fault for the damages owed to commercial fishermen, natives, area businesses and others injured by the spill. However, the agreement requires the state to fight any such claims; otherwise Exxon does not have to pay. Alyeska has filed suit against the state in Superior Court; the agreement permits Alyeska to continue to litigate that claim against the state. The settlement agreement does not free the state from the need to defend itself against Alyeska's suit.

2. In response to Congressman Miller's recent criticism that the settlement lets Alyeska off scot free, Attorney General Cole has said that the agreement permits the state to continue its suit against Alyeska to recover the state's expenses in responding to the spill, and that the state intends to press those claims in court. The continued litigation by Alyeska against the state, and by the state against Alyeska, destroys one of Governor Hickel's public justifications for the deal -- namely, ending the state's legal expenses by getting the state out of the oil spill litigation. (It should be noted that for every dollar the state recovers on its claims against Alyeska, the settlement agreement entitles Exxon to a rebate of $20.34 - its share of Alyeska's obligations, as a 20.34% owner of Alyeska.[1])

3. Exxon does <u>not</u> agree to indemnify the state against claims by injured citizens that the state's negligence was partly at fault for the spill and the botched cleanup.[2]

4. Exxon agrees not to make claims against the state for "Contribution" or "indemnity," in the suits brought against Exxon by victims of the spill. However Exxon retains the right to blame the state for part or all of the damages, and to ask the jury to allocate a share of the responsibility to the state. Under Alaska law, the victims cannot collect from Exxon for the state's share

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1 Agreement and Consent Decree, ¶ 23.

2 <u>Id.</u>, ¶ 26.

of the damages. Unless Exxon and Alyeska agree in the settlement not to try to shift the blame onto the state, the victims are forced to sue in state in order to protect their ability to collect full compensation for their losses. Once again, the settlement agreement fails to extricate the state from the litigation, as Governor Hickel claimed it would.

5. The agreement explicitly preserves Exxon's right to sue the Trans Alaska Pipeline Liability Fund, to recover the money Exxon paid out to spill victims through its "claims program" in 1989 and 1990 on behalf of the Fund (more than $225 million).[3] If the Fund tries to bring the state into the case, Exxon will indemnify the state against claims by the Fund.[4]

6. Exxon also has the right to sue Alyeska to recover whatever Exxon pays to the governments or to the private plaintiffs. If Alyeska tries to bring the state into that case, Exxon will indemnify the state against these kinds of claims by Alyeska.[5]

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3 Id., ¶ 21.

4 Id. ¶ 22.

5 Id, ¶ 22.

ANALYSIS OF FINANCIAL TERMS OF PROPOSED EXXON SETTLEMENT

The settlement agreement has been publicized as a billion dollar payment for restoration of Alaska's damaged natural resources. In fact, considerably less will be available for restoration of the environmental damage caused by the Exxon Valdez oil spill. As shown below, no money at all will be available for restoration projects until September, 1993.

1. The agreement only requires Exxon to pay a total of $900 million, in installments over 10 years. The other $100 million is only payable if the State can prove (in 2002) that there has been additional natural resource damage of a kind that was not anticipated or known in 1991. The likelihood of Exxon ever paying that $100 million (without a fight) is nil.

2. Exxon is required to pay only $90 million in 1991, and $150 million in September, 1992. Under the agreement, all of those first two payments will be spent to

(a) reimburse Exxon for its clean-up expenses from January 1, 1991 forward;

(b) reimburse the federal and state governments for their past clean-up costs, damage assessment costs, and litigation expenses (approximately $62 million and $72 million, respectively);

(c) reimburse the state and federal governments for clean-up costs incurred after December 31, 1990.

3. The first money that will be available to fund restoration projects will be the September 1993 payment of $100 million. Thereafter, Exxon will make 8 annual payments of $70 million each, in September of each year until 2001. (That is less than the interest the government would be earning annually on the "$900 million settlement" if Exxon had been required to pay that amount in a lump sum.

FAX COVER SHEET

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
H2-543

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SENDER: ~~[illegible]~~ Bill Woodward

DATE: 4/12/91

TO: Doug Bailey

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MINORITY STAFF
DIRECTOR/CHIEF COUNSEL
GEORGE D. PENCE

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

April 12, 1991

Dear Judge Holland:

We are writing to express our views regarding certain aspects of the proposed settlement of Federal and state civil claims arising from the EXXON VALDEZ oil spill.

These views are based on the ongoing effort of our Subcommittees to monitor the response to the oil spill, particularly by Federal agencies, including the assessment of injury to natural resources and plans for restoring the environment of Prince William Sound. In this capacity, our Subcommittees conducted an oversight hearing on the proposed settlement on March 20, 1991. Prior to that hearing, we asked the Department of Justice to prepare and make public a summary describing and quantifying the scope and severity of injuries caused by the EXXON VALDEZ spill to natural resources. That summary was prepared and submitted to Congress and the Court on April 8th.

Following the hearing, we asked the Justice Department to provide "all documents summarizing or estimating the dollar value of injuries done to natural resources by the spill and the costs of restoring those damages", while offering, if requested, to maintain the confidentiality of those documents. That request was denied in a letter to us on April 9th. A copy of the correspondence is enclosed.

We believe there is a strong general argument to be made in favor of settling the pending Federal and state claims now, thereby avoiding prolonged litigation and making funds immediately available for restoration purposes. But we also believe that no settlement should be accepted unless it serves the public interest and meets the requirements of Federal law. We are unable at this time to determine if the proposed settlement satisfies these criteria. We therefore respectfully recommend that you not approve the proposal unless and until certain fundamental issues are clarified.

Specifically, we believe that the following three actions should be taken prior to approval of the settlement: 1) disclosure to the court of enough information to permit a fully informed judgment about the monetary sufficiency of the proposed settlement; 2) a commitment by the trustees to release all damage assessment and restoration studies and related documents to the public after the settlement is approved; and 3) clarifications by the trustees concerning the manner in which the recovered funds will be spent and the extent of public participation in the restoration planning and decisionmaking process. Each point is discussed below.

1. THE TRUSTEES HAVE FAILED TO PROVIDE THE INFORMATION NEEDED TO ASSESS THE MERITS OF THE PROPOSED SETTLEMENT.

a. How much will restoration cost?

Section 311 of the Clean Water Act requires the United States to recover from Exxon sufficient funds to cover the costs of replacing or restoring the natural resources under its trusteeship that were damaged or destroyed by the oil spill. At this point, only the trustees--and perhaps not even they--are in a position to judge whether or not the amount of the settlement is sufficient to meet this statutory obligation. This is true because the trustees have not disclosed to the court, and have refused to disclose to Congress and the public, the detailed information necessary to assess the severity of damage and the anticipated costs of restoration or replacement.

Although we do not know how large the settlement should be, we do know that it is not as large as some of its proponents have encouraged the public to believe. Last month, we asked the Congressional Research Service to review the proposed agreement to determine its net value to the Federal and state governments in real terms, taking into account the effects of inflation and Exxon's ability to deduct civil payments from its taxes. That study, a copy of which is enclosed, placed the estimated net value of the settlement at between $421 million and $524 million.

The difficulty of judging the adequacy of the settlement is further complicated by the facts that the damage assessment process is, according to the Administration's April 8th summary, still in a "preliminary" stage; the degree of injury to some important species, including salmon, will not be known for years; injuries to several other species are continuing; and specific restoration plans have not been made, nor costs estimated.

b. Should restoration funds be used to pay cleanup costs?

Today, more than two years after the spill, oil remains trapped in sediments and gravel. More cleanup may occur this summer. Under the proposed agreement, any future cleanup activities (and certain past cleanup costs) will be paid for by the Fund established to finance restoration activities. This will create a direct tension between cleanup funding and restoration funding -- an "either-or" scenario even though the Clean Water Act requires both.

The adequacy of this arrangement depends upon the sufficiency of funds to cover both obligations. Once again, no good conclusion can be made about this aspect of the agreement without better information on projected cleanup costs and restoration costs.

We, like the public, are not able to make a good judgment about the monetary adequacy of the proposed settlement. That is important, but it is far more important that the court have access to all the documents it needs to make that judgment. Those documents must include more than a summary of the injuries to natural resources that have occurred, but also an expert evaluation of the cost of restoring those injuries, acquiring equivalent resources, if necessary, and providing compensation for lost use and other values pending restoration. We urge you to withhold approval of the settlement unless and until that information has been provided to the court.

2. THE PUBLIC'S NEED TO KNOW.

As mentioned above, the trustees have refused to release their evaluations of the scope and severity of the injury to natural resources resulting from the spill. This refusal is based on the claim that disclosure would jeopardize the proposed settlement and is covered by a loosely construed attorney-client privilege.

We agree that the trustees are entitled to maintain the confidentiality of a limited amount of detailed information gathered or prepared specifically to assist the prosecution of a pending case and that would, if publicly revealed, seriously undermine their legal position. That entitlement is an extremely narrow one in our judgment, however, and should never again be interpreted as broadly as it has been by the trustees in the present case.

The fact is that the trustees in this instance developed a virtual obsession about secrecy. That obsession undermined the effectiveness and coordination of oil spill response and damage assessment efforts and unnecessarily limited public access to information on matters as important as public health. The sharing of scientific data and the dissemination of expert opinions is vital to maintain public confidence and ensure the effectiveness of response actions. In this case, the trustees operated with a degree of secrecy for which there was no practical or legal justification.

It is important to remember that the information available to the Executive branch concerning natural resource injuries in the EXXON VALDEZ case was gathered pursuant to public law, by public personnel and at public expense. The information pertains to resources that are publicly managed, publicly owned and subject to public trusteeship under federal law. Accordingly, we believe that citizens deserve access to the information whether they desire simply to assess the merits of the deal worked out by the trustees or to make a more informed judgment about their own legal options.

Consequently, we urge you to solicit an enforceable commitment from the Federal Government that all information available to it concerning the scope and nature of injuries done to natural resources as a result of the oil spill, including documents that place an estimated dollar value on those injuries and the costs of restoration, will be made public promptly subsequent to approval of any proposed settlement.

3. THE TRUSTEES MUST CLARIFY VAGUE COMMITMENTS ABOUT HOW THE FUNDS WILL BE SPENT.

The proposed settlement and Memorandum of Agreement between the Federal and state trustees provide only a vague and inadequate description of the purposes for which the recovered monies will be spent and the manner in which decisions about spending priorities will be made. We therefore recommend to the court that it seek substantial further clarifications from the trustees on these matters.

The effect of the consensus decisionmaking approach proposed for the Trustee Council will be to allow each Federal and state representative to veto any proposal by any participant. In the event that the obligations of the Federal and state trustees under Federal and state law are not identical, the Trustee Council may be operating under a set of dual and potentially conflicting obligations. Under section 311 of the Clean Water Act, recovered funds must be used to solely to restore,

rehabilitate or acquire the equivalent of the damaged natural resources. We encourage the Court to make it clear that this limitation must be strictly adhered to by the trustees. The restoration fund is not to be viewed as a general fund to finance favorite projects or to conduct assessments in perpetuity.

We also urge you to solicit a clearer commitment from the Federal and state trustees for public participation in the natural resource damage restoration process. As you know, the proposed Memorandum of Agreement and Consent Decree provides that the Trustees shall ensure "meaningful public participation", including the "possible" establishment of a public advisory group. We believe a more detailed commitment should be made before the agreement becomes final.

CONCLUSION

We appreciate the opportunity to provide the court with our recommendations on the proposed settlement. While we value and applaud the attempt by the litigants to settle their differences, we believe that certain clarifications are necessary before the proposed settlement is approved. We respectfully urge the court to seek those clarifications prior to taking final action on the agreement.

Respectfully Submitted,

Dennis M. Hertel, Chairman
Subcommittee on Oceanography, Great Lakes and the Outer Continental Shelf
Committee on Merchant Marine and Fisheries

Gerry E. Studds, Chairman
Subcommittee on Fisheries and Wildlife Conservation and the Environment
Committee on Merchant Marine and Fisheries

William J. Hughes, Chairman
Subcommittee on Intellectual Property and Judicial Administration
Committee on the Judiciary

The Honorable H. Russel Holland
U.S. District Judge
U.S. District Court
222 West 7th Avenue
Anchorage, Alaska 99513

Enclosures

U.S. House of Representatives
Committee on
Interior and Insular Affairs
Washington, DC 20515-6230

April 8, 1991

Honorable H. Russel Holland
United States District Judge
U.S. District Court
222 West 7th Avenue No.4
Anchorage, Alaska 99513

Honorable Stanley Sporkin
United States District Judge
U.S. Court House
3rd and Constitution, N.W.
Washington, D.C. 20001

In Re:

United States of America v. Exxon Shipping Company and Exxon Corporation (No. A90-015 CR.) [Criminal Plea Agreement]

United States of America v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem (A91082 Civil) [Agreement and Consent Decree]

State of Alaska v. Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem (A91083 Civil) [Agreement and Consent Decree]

United States of America v. State of Alaska, and The State of Alaska v. United States of America (A91081 Civil) [Memorandum of Agreement and Consent Decree]

State of Alaska v. Exxon Corporation, et al., (3AN-89-6852 Civil)

The Native Village of Chenega Bay, et al., v. Manuel Lujan, Jr., et al. (91-483 SS Civil) and Chenega Corporation, et al., v. Manuel Lujan, Jr., et al. (91-484 SS Civil)

Gentlemen:

For purposes of your review of the pending cases cited above and other claims arising from the Exxon Valdez oil spill of March 24, 1989, I want to bring to your attention some significant evidence concerning Exxon Corporation's and the Alyeska Pipeline Service Company's culpability.[1]

[1]The owner companies of Alyeska Pipeline Service Company ("Alyeska") are B.P. Pipelines Alaska, Inc. (50.01 percent); Exxon Pipeline Company (20.34 percent); Arco

As Chairman of the Subcommittee on Water, Power and Offshore Energy Resources, I have conducted an investigation of matters related to the Exxon Valdez oil spill, including the cleanup response, damage to natural resources, and operation of the Trans-Alaska Pipeline System.[2] The Committee on Interior and Insular Affairs was a principal author of the Trans-Alaska Pipeline Authorization Act (P.L. 93-153) and has broad jurisdiction concerning public lands and natural resources in Alaska and a special interest in issues affecting Alaska Natives.

In the course of this investigation, Alyeska has provided me with documents which indicate that Exxon and the other owner companies which control Alyeska: (1) knew that Alyeska could not effectively respond to an oil spill in Prince William Sound; (2) failed to make necessary improvements in Alyeska's oil spill response capabilities; and, (3) secretly decided that Alyeska would not respond to an oil spill in Prince William Sound in the manner prescribed by Alyeska's Oil Spill Contingency Plan.

Alyeska's Promises

Before the Pipeline Was Approved

In 1971, during the consideration of the trans-Alaska pipeline project, Alyeska's pollution control specialist R.L. Benyon promised the public in testimony before the Department of the Interior that:

> "The contingency plan which will be drawn up will detail methods for dealing promptly and effectively with any spill which may occur, so that its effect on the environment will be minimal. We have adequate knowledge for dealing with oil spills and improvements in techniques and equipment are continuing to become available through world-wide research. The best equipment, materials and expertise which will be made available as part of

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Pipe Line Co. (20.34 percent); Mobil Alaska Pipeline Co. (4.08 percent); Amerada Hess Pipeline Corp. (1.5 percent); Unocal Pipeline Co. (1.36 percent); and Phillips Alaska Pipeline Corp. (1.36 percent).

[2]"Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska," Oversight Hearings before the Subcommittee on Water, Power and Offshore Energy Resources of the Committee on Interior and Insular Affairs (Serial No. 101-5, Parts I to V) (hereinafter "Investigation of the Exxon Valdez Oil Spill").

> the oil spill contingency plan, will make operations at Port Valdez and in Prince William Sound the safest in the world. [Emphasis added.]"

On April 10, 1973, the President of Alyeska, E.L. Patten, in testimony urging approval of the pipeline project, promised Congress that the very best technology would be in place:

> "In safety [sic] superior American tankers the light traffic between Valdez, Alaska, and the west coast involves hazards of less magnitude than any other tanker run of which I have knowledge. The most modern loading equipment and proposed vessel designs will reduce even these modest risks before pipeline authorization begins."[3]

In the Right-of-Way Agreements

In exchange for the right to build the Trans-Alaska Pipeline System on public lands, Alyeska signed right-of-way agreements with both the United States and the State of Alaska.

In the section on oil spill contingency plans in the right-of-way contract with the United States, Alyeska promised to control and clean up any oil spill:

> "It is the policy of the Department of the Interior that there should be no discharge of Oil or other pollutant into or upon lands or waters. Permittees must therefore recognize their prime responsibility for the protection of the public and environment from effects of spillage.... Permittees shall demonstrate their capability and readiness to execute the [contingency] plans....If during any phase of the construction, operation, maintenance or termination of the Pipeline, any Oil or other pollutant should be discharged from the Pipeline System, the control and total removal, disposal and cleaning up of such Oil or other pollutant, wherever found, shall be the responsibility of Permittees, regardless of fault. [Emphasis added.]"[4]

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[3] "Oil and Natural Gas Pipeline Rights-of-Way," Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs (Serial 93-12) at p.526.

[4] Stipulation 2.14 to Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline, January 23, 1974, between United States of America and Alyeska owners. As used in Stipulation 2.14, Oil Spill Control is defined as: (1) detection of the spill; (2) location of the spill; (3) confinement of the spill; and (4) cleanup of the spill.

At the time of the Exxon Valdez spill

According to the "purpose" section of Alyeska's Oil Spill Contingency Plan (the "contingency plan") which was in effect on March 23, 1989, Alyeska promised rapid and effective response to any oil spill using state-of-the-art technology:

> "The objective of the Alyeska Oil Spill Contingency Plan is to minimize damage to the environment...in the event of an oil spill...the resources of [Alyeska] are organized in a preplanned manner to assure rapid and effective response to any oil spill emergency. This manual outlines the techniques which will be in accordance with state-of-the-art oil spill cleanup technology. [Emphasis added.]"[5]

In section 102 of the contingency plan, Alyeska promised that it is the policy of the owner companies to fully comply with the laws and to take "every reasonable action" to minimize environmental damage from oil spills:

> "It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and, if they occur, to minimize environmental damage. Alyeska will comply with the relevant pollution laws for the protection and conservation of environmental resources. [Emphasis added.]"[6]

Alyeska also promised in section 102 of the contingency plan that it will be fully prepared to implement the contingency plan even in the event of a major oil spill:

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[5] Section 101, Alyeska Pipeline Service Company Oil Spill Contingency Plan General Provisions (January, 1987).

[6] The "relevant pollution laws" according to Alyeska are: "Alaska Statute Title 46, and 18 AAC75, and the National Oil and Hazardous Substances Pollution Contingency Plan, and any revisions thereof, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act [sic], as amended (Public Law 92-500). Alyeska Policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way lease with the United States of America and the State of Alaska, respectfully. Alyeska Pipeline Service Company will ensure that the National Contingency Plan is followed during any spill event." p.1-1

> "Regularly scheduled training programs will be conducted...The objectives of this training program are:....To maintain the Plans as fully operable working documents [and] To update the Plans to reflect state-of-the-art capability....Full scale, company-wide field exercises will be held at least once per year to insure overall readiness for response to large scale oil spills.... [Emphasis added."

Alyeska further promised in section 102 of the contingency plan that, as agent for the owner companies, it will effectively direct and conduct cleanup operations, including those related to any spill in Prince William Sound:

> "[C]leanup operations within the areas of liability and responsibility [imposed by law] will be conducted by Alyeska as Agent for the Owner companies and will be conducted in a manner as not to require assumption of control of such cleanup operations by federal or state officials....Alyeska will direct cleanup operations of spills resulting from...[O]peration, involving tankers carrying or destined to carry crude oil transported though the Trans-Alaska Pipeline System, occurring at Valdez terminal, in Port Valdez, Valdez arm or Prince William Sound. [Emphasis added.]"

Promises Versus Performance

In an addendum to its Oil Spill Contingency Plan in 1982, Alyeska informed the Alaska Department of Environmental Conservation that, in the event of a spill in Prince William Sound, the "[e]stimated time of completion of spill cleanup of a 100,000 barrel spill would be less than 48 hours."[7]

At the urging of the State of Alaska's Department of Environmental Conservation, Alyeska reluctantly included a response scenario for a 200,000 barrel spill in the 1987 Oil Spill Contingency Plan for Prince William Sound. "Alyeska believes it is highly unlikely a spill of this magnitude would occur."[8]

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[7]Letter from B.L. Hilliker, manager, environmental protection and government reports, to Alaska Department of Environmental Conservation, dated June 22, 1982, reprinted in "Investigation of the Exxon Valdez Oil Spill," Part I at p. 894.

[8] Oil Spill Contingency Plan Prince William Sound (January 1987), p.3-54. By letter to the Alaska Department of Environmental Conservation dated October 23, 1986, Alyeska predicted that the probability of a 200,000 barrel spill occurring in Prince

This Prince William Sound response scenario assumed that the spill would occur 30 miles from the Valdez terminal and that weather conditions would be conducive to oil spill cleanup. The contingency plan called for equipment, including a barge, to be in place within 5 hours after the spill.

Alyeska's Prince William Sound contingency plan predicted that 35 percent of the oil would be recovered from the water (70,000 barrels), 30 percent recovered from shoreline cleanup, 30 percent to disperse naturally or evaporate, and only 5 percent to remain in the environment.[9]

Yet when the Exxon Valdez spilled some 260,000 barrels on March 23, 1989 the cumulative total of oil recovered within the first 72 hours was less than 3,000 barrels. As one example of the response failure, the equipment barge which the contingency plan relied upon was damaged and unloaded at the time of the spill. The barge did not reach the spill site for more than 14 hours, even though the contingency plan called for it to be on the scene within five hours. Based on my investigation, there were clearly not sufficient quantities of dispersants or application equipment available to make up for the utter failure of the mechanical recovery effort.[10]

Even under extraordinarily good weather conditions for the first three days, Alyeska did not have equipment or resources to contain and collect even a fraction of the amount specified in the contingency plan. The failure of Alyeska's cleanup response in the first 72 hours significantly contributed to the ultimate environmental impacts of the spill, since winds of over 70 miles per hour spread the slick completely out of control (more than 40 miles from Bligh Reef) by the fourth day.

The Exxon Valdez spill would eventually soil over 1,000 miles of Alaska's coastline, inflict one of the worst wildlife disasters in our nation's history, and disrupt the lives of thousands of Alaskans who depend on the natural resources of this region.

William Sound would be once in 241 years. "Investigation of the Exxon Valdez Oil Spill," Part I at p. 834.

[9]Oil Spill Contingency Plan Prince William Sound (January 1987) at p. 3-56.

[10]"Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska", Part I at p. 303.

As the Alaska Oil Spill Commission concluded, "[p]ublic pronouncements by Alyeska and its owners that the company employed the best available technology and committed adequate resources to safety purposes turned out to be false."[11]

Exxon and the Alyeska Owner Companies Knew That Alyeska Was Not Equipped to Effectively Respond To An Oil Spill in Prince William Sound.

My investigation revealed that Alyeska was on notice in 1984 that its own personnel believed they were incapable of effectively responding to an oil spill in Prince William Sound. James K. Woodle, former commander of the U.S. Coast Guard's Marine Safety Office in Valdez, and marine superintendent at the Valdez terminal, informed Alyeska's President George M. Nelson that:

> "Serious doubt exists that Alyeska would be able to contain and clean-up effectively a medium or large size oil spill....Response to any spill beyond the limits of Valdez narrows should not be attempted with present equipment and personnel. [Emphasis added.]"[12]

A series of documents, which I have enclosed, reveal that Alyeska by 1988 -- one year prior to the Exxon Valdez oil spill -- had reached the same conclusion as James K. Woodle: it was seriously unprepared for an oil spill in Prince William Sound.

On April 18, 1988, W.D. Howitt, then Alyeska's Valdez Marine Terminal Superintendent, wrote to the Marine Services Subcommittee -- comprised of representatives of the owner companies, including Harvey Borgan of Exxon Shipping -- to inform them of a meeting in Bellingham, Washington on May 18, 1988. "Oil Spill Response Equipment" was listed on the agenda [Exhibit A].

On April 28, 1988, Howitt wrote to the Marine Services Sub-committee members with additional information for the May 18 meeting [Exhibit B]:

> "The first part of the information package contains the T.L. Polasek briefing that was presented to the Operations Subcommittee on April 6-7, 1988, at the quarterly meeting. The briefing is the result of an action item from January's meeting during which a concern was raised by ARCO on

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[11]Final Report of the Alaska Oil Spill Commission (February 1990) at p.135.

[12]Letter from James K. Woodle dated April 15, 1984 concerning operations of the Marine Department, Alyeska Marine Terminal, Valdez, Alaska, reprinted in "Investigation of the Exxon Valdez Oil Spill," Part I at p. 179 and 890.

> Alyeska's capability to respond to oil spills at midpoint of Prince William Sound. [Emphasis added.]"[13]

Theo L. Polasek's (Alyeska's Vice President of Operations) briefing on April 6-7 for the Operations Subcommittee was entitled "Oil Spill Issues -- Status of Action Items from January Owners Meeting." [Exhibit C] The topic of "Alyeska's Response Capability to Spills at midpoint of Prince William Sound" is included under the heading "ARCO/Alyeska Response Equipment Discussions." What follows is a comparison of the equipment available to the "Clean Sound" Cooperative in Puget Sound, Washington. According to the document, Clean Sound's spill cleanup methodology is "immediate, fast response to spill, at any location, with boom to contain, exclude, and/or divert oil."

By contrast to the equipment available to Clean Sound, Polasek's briefing on "Present Alyeska Prince William Sound Capability" notes that "no new skimming vessels purchased since 1977." The list of Alyeska equipment is clearly deficient by comparison to Clean Sound.

Polasek's briefing on Alyeska's Prince William Sound cleanup response equipment includes the following indictment of Alyeska's capability to meet its obligations under its own Oil Spill Contingency Plan:

> "Immediate, fast response to mid-point of Prince William Sound not possible with present equipment complement." (emphasis added)

Exxon and the Alyeska Owner Companies Failed to Improve Alyeska's Oil Spill Response Capabilities Before the Exxon Valdez Spill on March 23, 1989.

Theo Polasek's briefings to the owner company representatives in April and May 1988 outlined the deficiencies in Alyeska's equipment including the fact that "no new skimming vessels had been purchased since 1977."

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[13]Howitt's letter also states that purchases of clean-up equipment for Alyeska, as recommended by Jeff Shaw of Arco, would be discussed at the May 18th meeting. In a document with the heading "Alyeska Equipment Project (for oil spill cleanup)" dated March 22, 1988, Jeff Shaw recommends: 1) a large oceangoing skimmer; 2) a 10,000 barrel barge; 3) an adds pack; 4) fast spill response vessels; 5) a destroil skimmer with power pack; and 6) an additional 5,000 feet of sea quality boom. [Exhibit D] In addition, a separate document indicates that the marine subcommittee members discussed an advanced skimmer recovery system which could operate in open waters, the "Dynamic Inclined Plan Oil Vessel." [Exhibit E]

When Polasek testified, under oath, at a hearing I chaired in Valdez on May 7, 1989, he acknowledged that: "the equipment in this plan was similar to the plan in 1977. We increased the amount of boom and take [sic] other actions, but essentially that was the same equipment decided upon."[14]

Polasek's briefing includes a reference to the planned acquisition of a 10,000 barrel tank barge by late 1988. In fact, this oil spill barge -- the "Betty-K" -- was stored in Washington state for the winter of 1989 and was not available in the Exxon Valdez cleanup.

Moreover, Polasek's briefing refers to a "mobile contingency com mand center with communications repeaters" which would be installed by "mid 1988." In fact, such a system was not in place at the time of the Exxon Valdez spill.

Exxon and the Alyeska Owner Companies Secretly Decided that Alyeska Would Not Respond to an Oil Spill In Prince William Sound in the Manner Prescribed in the Contingency Plan.

According to a June 30, 1988 telex from Roger A. Gale, Manager, Marine Operations, Sohio Oil (now BP) to Polasek of Alyeska, the Marine Services Subcommittee decided to make five recommendations to the Owners Committee as part of an "acceptable compromise" [Exhibit F]:

First, the "current stockpile of clean up equipment is adequate" for spills at the terminal, but "should be maintained to the highest state of readiness."

Second, for spills in Prince William Sound, additional equipment should be purchased of the "type best suited for near shore and beach operations."

Third, a large barge (50-100,000 barrel capacity) equipped with ocean boom and skimmers was needed.

Fourth, a "study of the best and quickest methods of moving the barge around" including predeployment in Prince William Sound.

Fifth, that Alyeska and the owners "press" state and federal officials for "preapproval to use chemicals on a widespread basis."

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[14]"Investigation of the Exxon Valdez Oil Spill, Prince William Sound," Part I at p. 155.

However, on July 6, 1988, Stanley Factor, Vice President, Chartering and Evaluations, Arco Marine, Inc., objected to Roger Gale's recommendations because the owners had already decided that Alyeska would not respond to spills in Prince William Sound in the manner required by the Oil Spill Contingency Plan [Exhibit G]:

> "Arco Marine Inc. does not agree with this telex nor do we concur that this represents the thoughts of the subcommittee.
>
> "At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller. [Emphasis added.]"[15]

Conclusion

At my subcommittee's hearing on May 7, 1989 in Valdez, Theo Polasek testified under oath on Alyeska's behalf that "[w]e fulfilled our promises in that [oil spill contingency] plan. We have not broken our promises to the people of this State."[16]

But the evidence I have set forth indicates that Alyeska broke the law as well as its promises to the State of Alaska and the Congress.

For example, section 309(c)(4) of the Clean Water Act (33 U.S.C. section 1319(c)(4) provides that substantial criminal penalties may be imposed upon any corporation or responsible corporate official that files information with Federal authorities with knowledge that the documents contain material misstatements.[17] In addition, criminal penalties may be imposed on any person who knowingly submits false information to any agency of the United States under 18 U.S.C. section 1001.[18]

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[15]The Chairman of the Owners Committee at the time was Darrell Warner, President of Exxon Pipeline Company.

[16]"Investigation of the Exxon Valdez Oil Spill," Part I at p. 169.

[17] A fine of up to $10,000, or a prison term of up to two years or both may be imposed under this section.

[18]A fine of up to $10,000. or a prison term of up to five years, or both, may be imposed under this section.

Thus, since Alyeska knew that it could not and would not respond to an oil spill in Prince William Sound as required by its oil spill contingency plans, Alyeska and any responsible officer could be exposed to substantial criminal penalties.

However, the Department of Justice has not even filed any criminal charges against Alyeska or its owner companies other than Exxon. Furthermore, in the proposed Criminal Plea Agreement, the United States would waive its rights not only to pursue any criminal charges against Alyeska and its owner companies, but also waive its rights to pursue civil or administrative penalties against Alyeska and its owner companies.[19]

The proposed Agreement and Consent Decree also provides generous protection for Alyeska. The United States and the State of Alaska both waive their rights to raise claims against Alyeska for natural resource damages in Paragraph 20. In addition, should either government recover any amount from Alyeska for claims of any kind, Exxon is entitled to be reimbursed for 20.34 percent of the governments' recovery (this figure represents the percentage ownership by Exxon of Alyeska). Yet Alyeska, including its shareholders and owner companies other than Exxon Pipeline, expressly reserves their rights to sue the United States or the State of Alaska in Paragraph 19 of the proposed settlement agreement.

In my view, the inclusion of Alyeska in the proposed Criminal Plea Agreement and in the proposed settlement Agreement and Consent Decree is contrary to the public interest. Based on the evidence, it is inconceivable that the Department of Justice would waive its rights to pursue criminal claims, and virtually all civil claims, against Alyeska.

In sum, the proposed Exxon settlement fails to hold Alyeska accountable to the public for its wrongdoing and fails to serve as a deterrent for similar conduct in the future.[20]

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[19] Section III.A. of the Plea Agreement states that "[t]he United States agrees not to seek additional criminal charges or any civil or administrative penalties.... against Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives, for any violation of federal law arising out of the grounding of the 'EXXON VALDEZ,' the resulting oil spill, the containment or cleanup of that spill, or its or their conduct in connection with the preparation or submission of oil spill contingency plans or related, by Alyeska Pipeline Service Company to the federal or state government...." p.5.

[20] Under Alaska law, punitive damages are awarded for the public policy reasons of punishment and deterrent when the defendant's conduct was outrageous, reckless, or malicious. In this instance, there is clear and convincing evidence that Alyeska's conduct merits the award of punitive damages.

After extensive debate about the environmental risks, the Trans-Alaska Pipeline System was approved in 1973 by only a one-vote margin in the U.S. Senate. In exchange for access to environmentally sensitive public lands, the Congress was assured by Alyeska and the owner companies that the pipeline system would be operated in a safe and environmentally sound manner, using state-of-the-art technology.

The oil industry betrayed its own promises and deceived the Congress with respect to operations of Alyeska and the Exxon Valdez oil spill. Without a commitment by the Department of Justice to prosecute this intentional deception, how is it that Congress and the people of the State of Alaska can rely on such assurances in the future?

Sincerely yours,

George Miller

GEORGE MILLER
Vice Chairman

cc:

The Honorable Walter J. Hickel, Governor, State of Alaska
The Honorable Ben Grussendorf, Speaker, Alaska House of Representatives
The Honorable Richard Eliason, President, Alaska Senate
The Honorable Senator Ted Stevens
The Honorable Senator Frank Murkowksi
The Honorable Representative Don Young
The Honorable Richard L. Thornburgh, Attorney General, U.S. Department of Justice
The Honorable Manuel Lujan Jr., Secretary, U.S. Department of the Interior
The Honorable Samuel K. Skinner, Secretary, U.S. Department of Transportation
The Honorable Edward R. Madigan, Secretary, U.S. Department of Agriculture
The Honorable William K. Reilly, Administrator, U.S. Environmental Protection Agency
The Honorable John A. Knauss, Undersecretary for Oceans and Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce
Members, Committee on Interior and Insular Affairs

DRAFT

Honorable Dave Donley, Chairman
House Judiciary Committee
House of Representatives
Alaska State Legislature

February 27, 1991

663-91-0339

465-3600

Deposit and accounting for
Exxon Valdez oil spill
settlement proceeds

James L. Baldwin
Assistant Attorney General
Governmental Affairs

This responds to your letter of February 19, 1991 in which you asked two questions concerning a possible settlement of claims arising out of the oil spill caused by the grounding of the Exxon Valdez. You also requested our comments on a draft bill that purports to require review and approval of an out-of-court settlement of the state's claim against the parties responsible for the oil spill.

Both of your questions concern the attorney general's power to settle a lawsuit. State law authorizes the attorney general to perform duties "which usually pertain to the office of attorney general in a state." AS 44.23.020(b)(7). The attorney general's settlement powers are a necessary element of his recognized common law power to control the disposition of cases. In Public Defender Agency v. Superior Court, 534 P.2d 947 the Alaska Supreme Court stated:

> Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he

thinks best.

534 P.2d at 950 (citation omitted)(emphasis added);accord Island-Gentry Joint Venture v. State, 554 P2d 761 (Haw. 1976).

The questions you asked appear to express a concern that AS 46.08.020 may abrogate, or limit, the attorney general's common law powers to settle oil spill claims. We believe that AS 46.08.020 does not limit the attorney general's settlement powers. The attorney general has the discretion to settle state claims using remedies available under the Federal Clean Water Act (33 U.S.C. 1321). His actions are reviewable by a court but would be subject to a deferential standard of review.

To briefly answer your questions, federal law requires recoveries to be dedicated for restoration and replacement of natural resources. We believe that a settlement agreement dedicating settlement proceeds can be made consistent with the dedicated fund prohibition contained in the Alaska Constitution. This can occur because the constitution allows federally required dedications to be implemented. Alaska Const. art. IX, sec. 7.

Our reasoning is set out in the following answers to your questions. We will respond to your questions in the order in which they were asked.

1) May the governor settle the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill under terms that require the defendant's to give the state money dedicated to a particular purpose, or to provide specified services or property?

The state's claim was asserted to recover for natural resource damages, including the cost of the restoration and replacement of natural resources harmed by the Exxon Valdez oil spill. The federal government also asserts that it is the steward of resources harmed by the spill and is also entitled to a recovery. Depending on the damage theory asserted, the state and federal government each have an undivided interest in harmed resources. Federal law provides that the state and federal governments should act jointly in administering damages recovered by either sovereign for such resources. 40 CFR 300.615. Any recovery under this damage theory is being considered, for the purposes of this case, as money belonging jointly to the federal and state governments. As a consequence, the governments acting together intend to establish a joint trust under the Clean Water Act (33 U.S.C.1321) to prosecute and, if determined to be in the public interest, serve as a device for settlement of the claims.

The Clean Water Act provides for disposition by state and

federal natural resource trustees of the proceeds of any settlement. The Act expressly provides:

> "Sums recovered [by the trustees] shall be used . . . [for restoration and resource acquisition] by the appropriate agencies of the federal government, or the state government."

33 U.S.C. 1321(f)(5). The Act is further implemented by federal regulations. These regulations authorize the deposit of recoveries in separate accounts within the state treasury or in interest bearing accounts established outside the state treasury. 43 C.F.R. 11.92. Based on this statutory and regulatory framework, we conclude, that the Clean Water Act requires the dedication of settlement proceeds as a condition of participation in a joint enforcement effort. We consider a joint enforcement effort effective and proper in this case.

The federal restrictions either take the form of a dedication imposed by federal law as a condition of exercising joint enforcement powers under the Clean Water Act or a public trust authorized under that Act. In both cases, the money may be received and expended under an exception to the dedicated fund restriction imposed by art. IX, sec. 7 of the Alaska Constitution. Section 7 provides in relevant part:

> The proceeds of any [state revenue] shall not be

> dedicated to any special purpose, except . . . when required by the federal government for state participation in federal programs.

After a thorough analysis of the history of the dedicated fund prohibition, this office opined that trust receipts are exempt from the dedication fund prohibition by implication. 1982 Op. Att'y Gen. No. 13 (November 30; A.G. file No. 366-649-80). A reading of the constitutional history also makes it quite likely that the framers did not intend to prohibit the dedication of certain non-tax or license related revenues, such as litigation proceeds.

Strong legal arguments can be made in support of the validity of a settlement agreement that purports to require the dedication of joint trust receipts for restoration and replacement of natural resources harmed by an oil spill.

2) May the governor settle the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill under terms that do not involve deposit of the money in the state general fund, and would such terms violate AS 46.08.020.?

In our opinion, the provisions of AS 46.08.020 do not impair the governor's ability to settle claims under the Clean Water Act. As discussed above, the Clean Water Act requires that the proceeds be dedicated for the purpose of restoration. The

custodian holds them in trust. These federally imposed restrictions on use appear to conflict with AS 46.08.020(b) which provides:

> Money received by the state . . . shall be deposited in the general fund and credited to a special account called the "oil and hazardous substance release mitigation account." The legislature may annually appropriate to the fund from this account a sum equal to the amount received . . . during the calendar year preceding the legislative session in which the appropriations are to be made.

(Emphasis added). The foregoing provision is a part of a chapter of statutes that provide for financing "the expenses incurred by the Department of Environmental Conservation in the protection of the environment of the state from the release of oil or hazardous substances." AS 46.08.005. The text of AS 46.08.020 plainly does not dedicate amounts for the purpose of restoration and replacement of natural resources. To the contrary, the legislature has the discretion whether to appropriate money for a federally required purpose. The implication is plainly present that the legislature could appropriate the settlement proceeds for another purpose. In the case of a true dedication, the legislature has no discretion concerning the assignment of purpose for an expenditure. The nature and effect of a dedicated fund is analyzed in a 1982 formal opinion of the attorney general. 1982 Op Att'y Gen No. 13 (November 30; A.G. file No. 366-649-80).

There is additional evidence to explain why AS 46.08.020 does not apply to settlement proceeds under the Clean Water Act. The regulations implementing the Clean Water Act require the trustee to either deposit the proceeds in a separate account within the state treasury or in an interest bearing account if maintained outside the state treasury. 43 C.F.R. 11.92(a)(2). In both instances, the regulations contemplate a segregation and dedication for a specific purpose. Section 020(b) would require the governor to deposit the proceeds in the state general fund.

The general fund is not the equivalent of the state treasury. All public money and revenue coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose, constitute the general fund of the state. Navajo Tribe v. Arizona Dept. of Admin. 528 P2d 623 (Ariz. 1975). State v. Bates, 18 S.E. 2d 346, 351 (S.C. 1941) Bd of Ed of Wyoming County v. Bd of Public Works, 109 S.E. 2d 551 (W. Va. 1959). However, a requirement to deposit dedicated receipts in the general fund does not cause them to lose their restricted status. Municipality of Metropolitan Seattle v. O'Brien, 544 P.2d 729 (Wash.1976).

We believe that it is reasonable to interpret section 020

so it does not conflict with federal law. In construing this section, we must presume that the legislature was aware of the remedies afforded by the Clean Water Act. Wik v. Wik, 681 P.2d 336 (Alaska 1984). The statutory directive to deposit recoveries set out in AS 46.08.020(b) can be interpreted to exclude proceeds that are dedicated or encumbered by trust obligations imposed by federal law.

By express reference, the deposit and accounting requirements apply only to amounts received under AS 46.08.020(a)(2) and (3). Section 020(a)(2) covers

> money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site.

It refers only to money that is received directly from a responsible party, not from a joint trust entity.

Section 020(a)(3) covers "fines, penalties, or damages recovered under AS 46.08.005 - 46.08.080 or other law." Taken out of context, it appears to cover a broad spectrum of damages. However, a careful reading of AS 46.08 discloses that only recoveries to reimburse the state for previous expenditures are addressed. The right to claim established in AS 46.08.070 is described as the power to seek "reimbursement". We presume that

damages recovered under "other law" refers to reimbursement type damages as well. Such recoveries should be deposited in the general fund.

Amounts allocated by the joint trustees for state restoration projects would be from a source described in AS 46.08.020(a)(1). Section 020(a)(1) covers "money received from federal, state, other sources, or from a private donor." That provision describes money received from a source other than a responsible party and appears to include federal or other trust receipts that do not represent a reimbursement for past expenditures. The joint trust could be considered a grant of money to a state agency for restoration purposes. Amounts from this nonstate source are not expressly directed by section 020(b) to the general fund of the state for possible appropriation to the hazardous substance release response fund, nor are "joint" as opposed to "state" recoveries. This treatment is consistent with the status of trust receipts and dedicated funds discussed earlier in this memorandum.

In summary, we conclude that settlement recoveries are not required to be deposited in the general fund of the state. The provisions of AS 46.08.020 can be interpreted to allow for the receipt and expenditure of settlement proceeds held in trust under

the Clean Water Act.

We next turn to the validity of a separate trust fund that may be established to implement a settlement under the Clean Water Act. As mentioned above, the state and federal governments may agree to proceed under the Clean Water Act to create a joint trust to administer the proceeds of a settlement. The settlement agreement may prescribe the elements of this trust or there may be a separate trust agreement that describes in detail the powers and duties of the trustees. The joint trustees would be a federal natural resources management agency (43 C.F.R. 11.14 (rr)) and state officials designated by the governor (42 U.S.C. 9607(f)(2)(B)).

A difficult question concerns whether there is sufficient authority for the attorney general to take a part in the creation of a joint trust fund. Generally it is held that special funds must be established by law. State v. West, 145 P. 15 (Wash. 1914). However, we believe that the joint trust could be formed under authority expressly granted by the Alaska Constitution. Article XII, sec. 2 provides:

> The state . . . may cooperate with the United States . . . on matters of common interest.

The attorney general could agree to form an intergovernmental trust

entity to solve the common dilemma presented by the Exxon Valdez oil spill. Some may argue that the joint cooperation provision of the state constitution may only be implemented by law. However, it must be remembered that the constitution is to be construed as self-executing "whenever possible." Alaska Const. art. XII, sec. 9.

If the relationship between the state and federal government is to be truly "cooperative," it is reasonable to assume that neither the state legislature nor the Congress has absolute veto power over deposit in the joint trust or expenditure of settlement proceeds from the joint trust. The joint trust would hold the settlement proceeds as an asset of the trust. As jointly recovered trust receipts, the state or federal treasuries could not claim absolute title to them. Beyond these basic legal concepts it would be difficult to foretell the exact nature and effect of a joint trust created under the Clean Water Act. It is possible that private trust law will be used to construe the rights and obligations of the joint trustees and the beneficiaries. In Weiss v. State, 706 P.2d 681 (Alaska 1985), the Alaska Supreme court applied private trust law principles to resolve legal disputes concerning the operation of a public land trust.

In a memorandum attached to your February 19 letter,

legislative counsel argues that a state agency cannot expend trust receipts without a valid appropriation. There are numerous cases from other states holding that no appropriation is needed to expend trust receipts. See, e.g. Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 508); See also Navajo Tribe v.Ariz. Dept. of Administration 528 P2d 623 (Ariz. 1975); but see Sharpp V. Sloan, 391 A2d (Pa. 1978) (custodial funds must be appropriated or returned). The practice in Alaska for the past 14 years has been to appropriate the majority of federal, trust and other custodial funds.

However, there are notable exceptions to this practice. For example, refunds of overpayments of state income tax were not appropriated before disbursed. The Alaska Supreme Court has not interpreted art. IX, sec. 13 of the Alaska Constitution to determine how the appropriation requirement imposed there applies to expenditure of trust or custodial receipts. We believe that the result of a supreme court decision on this issue would be too close to predict. However, we believe that the legislature could not appropriate the settlement proceeds for a purpose other than restoration or replacement of natural resources damaged by the Exxon Valdez Oil Spill. Nor may the money be expended in a manner that is contrary to a restoration plan prepared by or at the direction of the joint trustees. 43 C.F.R. 11.92(c).

3. **Comments concerning draft legislation purporting to regulate the attorney general's settlement powers.**

We have reviewed a work draft for a bill relating to agreements, compromises, and settlements entered into by the state in the Exxon Valdez oil spill litigation. This bill would require the administration to submit to the legislature for review a settlement that arose out of the March 1989 grounding of the Exxon Valdez. The bill purports to give the legislature the power to prohibit the settlement before it takes effect.

We believe that this bill contains serious legal defects. Under our constitutional system there must be a separation of powers between the branches of government. The Alaska Supreme Court has held that the separation of powers doctrine, though not expressly set out in the Alaska Constitution, is clearly implied. Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975). If the legislature has the power to prohibit a specific settlement, it may be improperly attempting to obtain executive or quasi-judicial power. The legislature would be supervising the decision making of executive officers. The ability to prohibit a settlement amounts to a veto power.

There are several ways to illustrate that such a retained

veto power constitutes the exercise of an executive power. No one doubts that it would be unconstitutional for the legislature to require the governor to appoint a legislator to negotiate a settlement agreement. See, Stockman v. Leddy, 129 P. 220 (Colo. 1912)(legislative committee improperly given executive duties in the enforcement of statute). There is little difference between being the party doing the negotiating and having the power to cancel the resulting agreement. The attorney general becomes as much a agent of the legislature as does the legislator who is appointed to negotiate.

Assumption of the power to review and prohibit a settlement agreement frustrates the constitutional objective of making the executive branch accountable to the people for the execution of the law. Under the draft bill, accountability would be spread among the various legislators who vote one way or another on the question of prohibition of a settlement.

The draft bill would cause a serious blow to the ability of the attorney general to settle the case in point. The legislature must abide by its delegation of authority until that delegation is altered or revoked. INS v. Chadha, 462 U.S. 919, 955 (1983). The legislature may, as a general proposition, prescribe the standards under which the attorney general may settle cases.

However, by failing to adopt real criteria for the settlement of this case, there can be no certainty that a negotiated settlement will remain binding on the parties. Essentially, the only real criteria remaining is whether a motion to enact a prohibition of the settlement can command a majority vote in each house of the legislature. The legislature cannot delegate a power, while retaining significant control over how the power is exercised. That type of control is executive in nature and is inappropriate.

Another serious defect of this bill is the notion that the legislature could pass a bill prohibiting a specific settlement. We do not know what form a bill prohibiting a settlement will take. Certainly, it must focus on only a single settlement. By doing this, it becomes special legislation. The legislature cannot as a general rule enact a special act "if a general act can be made applicable." Alaska Const. art. II, sec. 19; Section 1 of the draft bill contains little more than conclusions to justify special treatment for the Exxon Valdez spill settlement. Persuasive justification for special treatment must be provided by the legislature. Abrams v. State, 534 P.2d 91 (Alaska 1975). (Enactment creating Eagle River Chugiak Borough invalidated because other communities were similarly situated). Settlement of the mental health land trust dispute is no less important for having "far reaching effects on the welfare of the people of the

state, on disposition of state funds, and on the status of large areas of state land." Other equally important oil and gas taxation cases also come to mind.

A question involving a possible violation of the special legislation prohibition must be analyzed using the rational basis test applicable to nonsuspect classifications challenged under the equal protection doctrine. State v. Lewis, 559 P.2d 630 (Alaska 1977). It is presumed that the same nondeferential, ends versus means test applied in Isakson v. Rickey, 550 P2d 359 (1976); will also apply in resolving a special legislation claim. To satisfy this test, the legislature must rigorously develop a detailed legislative history supporting the reasons why the Exxon Valdez settlement warrants special legislation. The findings and purpose clauses of the work draft do not contain sufficient material to satisfy the heightened scrutiny of the state equal protection test for validity. Further, we doubt that it is possible to make a convincing case for such special treatment.

We hope that the foregoing memorandum adequately responds to your questions and will assist the House Judiciary Committee in its deliberations concerning the work draft bill.

JLB:jr

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Our Fax Number: (907) 278-7022

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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☐ *P.O. BOX K— STATE CAPITOL*
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FAX TRANSMITTAL LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Doug Baily

LOCATION: Juneau

FAX NUMBER: 465-3805

TOTAL NUMBER OF PAGES 2 INCLUDING COVER LETTER.

COMMENTS: _____

DATE SENT: 3/20/91 TIME: 1:30

FROM: Barbara Herman
Assistant Attorney General - Anchorage

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL:

bonita nipper or Mary Deaver at (907) 269-5274.

03.C5LH

MEMORANDUM

State of Alaska
Department of Law

TO: Douglas Baily

DATE: March 20, 1991

FILE NO.:

TEL. NO.: 269-5274

SUBJECT: Dismissal of Case Against the State

FROM:
Barbara Herman
Assistant Attorney General
Oil Spill Litigation Section - Anchorage

VIA FACSIMILE
(465-3805)

You requested information concerning the lawsuits filed against the state and the circumstances under which those cases were ultimately dismissed. John Hanson and Chuck Ray sued the state on behalf of Whittier Seafood, Inc., F/V Debra Lee, Inc. and F/V Dew Drop Inc. on April 4, 1989. The State was dismissed as a defendant on June 23, 1989. Hansen also sued the State on behalf of Martin and James Goreson on March 28, 1989 and that suit was dismissed on June 23, 1989.

Threats, not promises, forced the dismissals. We simply told Hanson and Ray, as well as all other plaintiffs' counsel, that the state was not willing to share work product and otherwise cooperate with private plaintiffs in prosecuting the case as long as those same plaintiffs were suing the state. Although Hanson made a number of outrageous demands (i.e., finance and scientific consulting firm of his choice, and provide unlimited, direct access to state employees) in exchange for dismissing the lawsuits, we refused to negotiate. Ultimately, members of the plaintiffs' court appointed executive committee were successful in persuading Hanson and Ray to dismiss the cases.

BH:bkn

cc: Charlie Cole, Attorney General

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

March 26, 1991

Mr. Dick Thornburgh
Attorney General of the United States
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20520

Dear Mr. Thornburgh:

We are writing to re-state our interest in obtaining information concerning the recently negotiated proposed settlement of certain civil and criminal liabilities resulting from the EXXON VALDEZ oil spill.

We understand that your Department is currently preparing a summary of information describing and quantifying the scope and severity of injuries to natural resources caused by the spill and that this summary will soon be available to the Committee and the public.

We also request that documents, studies and memoranda be made available to us for the purpose of allowing us to make an informed judgment about the reasonableness of the settlement that has been reached. These materials need not include raw scientific data, but they should include all documents summarizing or estimating the dollar value of injuries done to natural resources by the spill and the costs of restoring those damages. If requested, we will agree to maintain the confidentiality of these materials. We ask that the materials be provided no later than the close of business on Thursday, March 28.

If you have any questions about these requests, please let me know or ask a member of your staff to contact Bill Woodward or Will Stelle of the Subcommittee staff at 226-3533.

We look forward to your continued help and cooperation.

With kind regards.

Sincerely,

Dennis E. Hertel, Chairman
Subcommittee on Oceanography and Great Lakes and the Continental Shelf

Gerry E. Studds, Chairman
Subcommittee on Fisheries and Wildlife Conservation and the Environment

cc: Mr. John Knauss, Administrator
National Oceanic and Atmospheric Administration

Daily

Charles Hamel
101 QUAY STREET
ALEXANDRIA, VIRGINIA 22314
TEL. [illegible]

February 12, 1991

The Honorable William K. Reilly
Administrator
United States Environmental Protection Agency
Washington, D.C. 20460

The Honorable Richard L. Thornburgh
The Attorney General
United States Department of Justice
Washington, D.C. 20530

RE: EXXON TANKERS CONTINUED VIOLATIONS OF THE CLEAN WATER ACT, AND POLLUTION OF PRINCE WILLIAM SOUND

Gentlemen:

Valdez community leaders, Cordova fishermen, and Region Ten EPA officials have urged me to present new evidence that EXXON is illegally dumping toxic wastes in Valdez Harbor, Prince William Sound.

I had intended to present the new evidence at my upcoming Evidentiary Hearing. Administrative Law Judge Thomas B. Yost has been designated to preside at the Hearing granted me by EPA Regional Administrator Dana Rasmussen.

We believe it is important to bring these violations of the Clean Water Act to your attention immediately in view of the increasing toxic impairment of the Harbor and Prince William Sound from these illegal practices.

And we also believe that these EXXON violations must be reviewed in conjunction with your ongoing EXXON VALDEZ Spill settlement negotiations.

The evidence comes directly from the Tanker Wheel House Logs, the Chief Mate's Oil Record Books, the Engine Room Logs, the Engine Room Oil Record Books, the Mate's Relief Note Files, the Engineer's Relief Note files regarding these "pollutants" and the Cable/Fax traffic instructions, from EXXON Shipping Operations Department.

It is the practice of EXXON Shipping to transfer toxic wastes originating in California, via EXXON lightering tankers/barges, to Valdez bound EXXON vessels. These liquid wastes, are diluted and disguised in the ballast water

of EXXON's Alaska bound tankers. Much of the water soluble concentrations of chemicals, corrosive solvents, heavy metals, and toxic aromatic hydro-carbons (carcinogens) are ultimately disposed of, undetected, into Prince [illegible] Sound through ALYESKA (and EXXON's) Ballast Water Treatment [illegible] faci

On August 4, 1988, EXXON ordered the transfer of 8,000 tons of toxic wastes, in San Francisco Bay, from the EXXON GALVESTON tanker to the EXXON VALDEZ, diluted as part of her 21,203 tons of sea water ballast. The illegal disposal occurred at Valdez, Alaska, on August 14, 1988.

The EXXON GALVESTON sails between the Benicia Terminal and San Francisco Bay area as a lightering tanker. It is EXXON's practice to store wastes, originating in California, in the EXXON GALVESTON for transhipment to Alaska. Indeed, the EXXON GALVESTON herself, prior to dry-docking in 1987 and again after the "Spill," was cleaned and vapor-freed by the use of tons of highly corrosive chemicals (because she lacks the usual hot water and Butter-Worth cleaning systems). The resultant tons of toxic chemical sludge were disposed of by dilution in the ballast water of Alaska bound EXXON tankers and dumped in Valdez, disguised as sea water.

In addition, EXXON BAYTOWN, EXXON VALDEZ, and her sister ship, EXXON LONG BEACH continually and illegally dump their peculiar on-board created toxic waste at Valdez. These three, the only EXXON diesel powered vessels, generate tons of highly toxic sludge from their diesel fuel filters during each voyage. These vessels are provided with special sludge storage tanks connected to dedicated piping to the deck for shore transfer and legal disposal. But EXXON had the piping reconfigured to allow pumping into the ballast water to evade costly Federal and California toxic waste disposal statutes.

For submission at the Hearing, we have computerized the records (date and point of original ballast, date of discharge to the BWT, the Master, the Chief Mate, etc) of all voyages, for the past three years, of the EXXON BAYTOWN, EXXON BENICIA, EXXON BOSTON, EXXON HOUSTON, EXXON JAMESTOWN, EXXON LONG BEACH, EXXON NEW ORLEANS, EXXON NORTH SLOPE, EXXON PHILADELPHIA, EXXON SAN FRANCISCO and EXXON VALDEZ.

On March 27, 1985, my attorneys served on your predecessors, Administrator Lee M. Thomas and Attorney General Edwin Meese, III, "60 Day Notice of Intent" to commence action in a District Court of the United States regarding

violations of the EPA NPDES Permit issued to the Owners/Permittees ** of the Valdez BWT Facility. The Cordova District Fishermen United joined in this action identifying improper operation, violations of the Clean Water Act, and the serious pollution of Prince William Sound.

Separately, my attorneys notified Messrs. Thomas and Meese of former ALYESKA technicians and officials' testimony that the contaminants, chemicals, and toxic wastes were diluted and concealed in tanker ballast water for ultimate illegal disposal into the receiving waters of the "Sound".

Our evidence caused EPA to issue numerous Compliance Orders to correct the violations.

These Orders were personally implemented by EXXON's Mr. Craig Rassinier, on loan to Alyeska in Valdez (but continuing on EXXON Payroll). Later that same year, Mr. Rassinier returned to Houston as Assistant to EXXON Shipping President Frank Iarossi for Tanker Operations including responsibility for Valdez BWT liaison and environmental compliances.

Coincidentally, EXXON USA's Mr. Darrell Warner was also deeply involved as Vice-Chairman and Chairman of the Owner Committee ** through 1989. He over saw the protracted legal controversies with EPA regarding these compliance orders.

Through these compliance orders, EPA was misled by EXXON, et al, into believing that extraneous pollutants were no longer being concealed in ballast water. EPA specifically defined tanker ballast and bilge water, in its Compliance Orders and the NPDES Permit, as:

"Ballast water means harbor, river, and seawater added to tankers' cargo tanks to maintain proper ship stability when not loaded with cargo."

"Bilge water means water which collects in the lower internal parts of a tanker's machinery spaces and which may be contaminated with oil, grease, and/or cleaning agents."

** EXXON, ARCO, BP, SOHIO/BP, MOBIL, PHILLIPS, UNION, AMERADA HESS, AND ALYESKA PIPELINE SERVICE COMPANY

NOTE: Additional language provides for oil contaminated slop tank water (repeat water) and rainwater/deck drainage from the tanker's deck which is routed to the slop tanks only while in port, (decanted to ballast water).

Gentlemen, ANY OTHER SUBSTANCES, CONTAMINANTS, WASTES MIXED WITH BALLAST WATER ARE NOT AUTHORIZED. INTRODUCTION OF ANY UNAUTHORIZED POLLUTANTS INTO ...ER BALLAST IS NOT PERMISSIBLE UNDER THE CLEAN WATER ACT AND/OR THE TOXIC SUBSTANCES CONTROL ACT (TOSCA).

EXXON has never provided the few paragraphs of its Permit, with regard to ballast water restrictions, to the EXXON tanker Masters, Mates, Engineers, and Pumpmen. Nor were these Mariners apprised of the EWT Facilities' limitations and resultant environmental harm. The Mariners believed that it was permissible to move EXXON's California wastes on EXXON's tankers to EXXON's partially owned and operated EWT Facility. Should a Federal inquiry become necessary, I hope that all cooperating Mariners will be assured immunity.

The Alyeska Technical Advisory Group (of scientists) was recently ap...inted by Federal/Alaska State agencies. Their intimate familiarity with this ...cility can readily assess for your agencies the additional harm to the waters and marine creatures of this already "Toxic Impaired" Port Valdez (as designated by the State of Alaska under the Clean Water Act).

There is no basis for concluding that the operating practices of EXXON Shipping, giving rise to these violations, have been abandoned.

Certainly, before any "Restoration" negotiations are completed, EXXON should show its "good faith" by terminating the operating practices of EXXON Shipping which are increasing the "Toxic Impairment" of Prince William Sound.

Sincerely yours,

Charles Hamel

Charles Hamel

cc: Restoration Fund Trustees for Natural Resources Damaged by the EXXON-Alyeska Oil Spill:

The Honorable Manuel Lujan, Secretary of Interior

The Honorable Clayton Yeutter, Secretary of Agriculture

The Honorable John Knauff, Under Secretary of Commerce

The Honorable George Miller, Vice Chairman, House Interior Committee

The Honorable Walter J. Hickel, Governor, State of Alaska

The Honorable Charles Cole, Attorney General, State of Alaska

Mr. Lawrence G. Rawl, Chairman, EXXON Corporation

EXXON Board of Directors Investigation Committee
c/o EXXON Corporate Secretary:

Mr. Jeff Hay, Committee Chairman

Sir Hector Laing

Dr. John Steele

Mr. Phillip E. Lippincott

Ms. Dana Rasmussen, Administrator, E.P.A. Region Ten, Seattle

The Honorable Robert S. Mueller, Assistant Attorney General, Criminal Division

The Honorable Dick Stewart, Assistant Attorney General, Environment and Natural Resources Division

The Honorable Jay Kertula, State Senator, State of Alaska (Prince William Sound)

The Honorable Curt Menard, State Senator, State of Alaska (Prince William Sound)

Mr. Eric Olsen, National Wildlife Federation

Alaska Center for the Environment

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

April 24, 1991

Senator Rick Halford
Alaska State Legislature
P.O. Box V
Juneau, AK 99801

Dear Senator Halford:

The following comments are submitted on behalf of the Alaska Center for the Environment (ACE) regarding the proposed Exxon Valdez criminal and civil settlement agreements. ACE greatly appreciates the work done by the House and Senate Special Committees on the Exxon Valdez Settlement to provide opportunities to the public to testify before the Legislature regarding the settlement. As stated in verbal testimony, ACE considers the settlement presented to the people of Alaska by Exxon, the Governor, and the federal government to be flawed irreconcilably as currently proposed.

Release of Economic and Scientific Spill Data

ACE finds it ludicrous to be asked to evaluate the adequacy of the settlement without first being given the opportunity to review the biologic and economic study data measuring natural resource damages to Prince William Sound. Public monies paid for that data, and the public has a right to it. Attorney General Cole's argument that the spill data should not be released because it could potentially be used against the state in a lawsuit is horrifying in terms of public policy. If indeed the state was party to events leading to or causing improper response to the Prince William Sound spill (e.g. approval of a faulty spill contingency plan, failure to inspect response equipment, etc.), then the public has a right to know where the flaws were in order to evaluate how to correct them before a future spill occurs.

Review of the spill data is needed not only to evaluate the settlement, but also to help direct efforts towards restoration of Prince William Sound and prevention of future spills. How can we know where restoration is needed most, or what ongoing studies are needed without review of the spill data? Equally as important, little is currently known in "dollar for dollar" terms about the value of preventative measures compared to the costs of spill response and natural resource damages. The data from the Exxon Valdez spill could help provide answers to some of these questions. It would truly be a tragedy if another spill like the Exxon Valdez occurred in Alaska tomorrow because, for example, the arguments for prevention were outweighed by industry resistance to expending the upfront capital needed for a double-hulled tanker, or because the state did not want to pay the costs of maintaining adequate staffing of the Oil Spill Response Office in the Department of Environmental Conservation.

The summary of federal spill data recently released is not enough. Economic analysis is not included in the summary, and the report plainly states that it is "preliminary" and "available data are not fully analyzed and interpreted." The rest of the federal scientific and economic data, in addition to the state studies, must be released in order to be of value.

Public Participation

The public has been given no opportunity to participate in decisions about how settlement monies would be spent, were the settlement approved. The Trustees Council thus far has met behind closed doors, and has made no move towards soliciting public input on this matter. ACE would like to see the money spent on 1) purchase of timber rights along spill-affected coastlines to prevent further damage to these areas, 2) other restoration activities, and 3) ongoing studies of spill impacts in Prince William Sound.

ACE is disturbed to hear the Trustees Council part from the state administration's long stated intention to use the settlement monies to purchase timber tract lands. The statements against purchase of timber rights by members of the Trustees Council came forth despite the clear public support for timber buy-backs expressed in the legislative hearings on the settlement, and is further evidence of the Council's oblivion to public concerns.

Deterrent Value of Settlement

ACE is extremely pleased with Judge Holland's ruling that the $100 million fine required of Exxon in the proposed criminal settlement is inadequate. A criminal penalty should both reflect the enormity of the crime committed by Exxon and should act to deter further crimes of this sort. The settlement fashioned by Exxon and the state and federal administrations accomplishes neither of these goals.

The entire settlement package clearly fails to send a message to polluters that egregious environmental crimes are unacceptable and will not be tolerated. The message it does send, however, is that polluters can make deals behind closed doors and buy their way out of messy pollution problems-- including the largest oil spill in North America.

Alyeska's Release from Culpability

ACE objects to the release of Alyeska Pipeline Service Company and its owner companies from any criminal charges, civil penalties or administrative penalties in the criminal plea, and release from natural resource damages in the civil settlement.
Alyeska's failure to comply with the oil spill contingency plan in effect on March 24, 1989 significantly compounded the environmental damage that eventually occurred. According to material presented by Rep. George Miller, U.S. House of Representatives, in his letter to Judge Holland and Judge Sporkin dated April 8, 1991, Alyeska and its owners had advance knowledge of the company's inability to respond to an oil spill in Prince William Sound, and failed to take action to correct that situation. It is clearly not in the public interest for the state and the federal government to waive their rights to pursue charges against Alyeska for the Exxon Valdez oil spill.

Because of the major flaws inherent in the Exxon Valdez settlement agreement, the Alaska Center for the Environment strongly urges you to reject the settlement. We encourage you to consider these concerns and work to avoid the reemergence of the same problems in any potential future settlement proposals. Thank you for considering these comments.

Sincerely,

Sue Libenson
Executive Director

April 12, 1991

Alaska State Legislators
Pouch V
Juneau, Alaska 99801

Dear Legislator,

Attached is my submitted testimony to U.S. District Judge Holland on the proposed settlement of the federal and state charges against the Exxon Corporation, Exxon Shipping, and Alyeska Services Corporation. I hope you take the opportunity to review these comments and consider either new settlement terms or the pursuit of original and new charges through the court system, both federal and state. These are extremely important issues which, if allowed to be settled in present form, will only reinforce the understanding in Congress and the nation as a whole that Alaskans are willing to sacrifice the environment and the trust of many state residents for a very small monetary deposit in the treasury. Thank you for your time and consideration.

Sincerely,

Chip Thoma

TO: Honorable H. Russel Holland

United States District Judge
U.S. District Court
222 W.Seventh Avenue, No.4
Anchorage, Alaska 99513

April 10, 1991

RE: A 90 - 015 CR

FR: Theodore P. Thoma
#2 Marine Way
Juneau, Alaska 99801

RE: CRIMINAL PLEA BARGAIN PROCEEDINGS
concerning EXXON CORPORATION, EXXON SHIPPING, ALYESKA SERVICES

For the record, I am a self-employed environmental lobbyist and have been closely involved in Alaska resource issues for over 20 years. As such I was a chief proponent for the re-design of the Alyeska pipeline, for an all land route through Canada, and for full environmental safeguards to protect state and national/international waters connected with the eventual marine terminal and tanker route emanating from Valdez. As you are aware, the pipeline and marine route escaped full NEPA court review as a result of Congressional action instigated by the Alaska delegation in 1973. I still believe that NEPA review would have addressed the basic environmental safety and compliance responsibilities that were the root cause of the EXXON VALDEZ disaster, and subsequent inadequate response. My direct comments follow:

1) I oppose the agreement to drop the FELONY criminal charges against Exxon Corporation and Exxon Shipping Company (A90-015). I strongly believe that the pursuit of these grand jury charges and probable convictions are the only way to reform the inadequate staffing and competency levels aboard U.S. tankers that service Valdez and the West Coast to Panama. From the week-long live broadcast of the National Transportation Safety Board (NTSB) hearings in the summer of 1989, it was obvious that:

A) Mr. Frank Iarossi, former chairman of Exxon Shipping, knowingly cut back the number of crew members aboard the EXXON VALDEZ, compromising safety, stretching the physical ability of crew to competently man this carrier of dangerous, toxic material;

B) That Mr. Iarossi, Exxon Shipping, and Mr. Hazelwood, the ship's master, allowed Mr. KAGAN, a known incompetent, to serve aboard the EXXON VALDEZ, against the wishes and counsel of competent crew members who knew of his mental and physical problems, and caused KAGAN to steer the vessel through dangerous, ice-choked waters, resulting in the crash of the EXXON VALDEZ and resultant spillage of 11 million gallons of oil;

C) That Mr. Iarossi, Exxon Shipping, and Exxon Corporation knowingly allowed Mr. Hazelwood to operate the EXXON VALDEZ without monitoring his acute alcoholism, and in fact fabricated the small amounts of paperwork in Exxon files relative to Hazelwood's condition. These two reports were without dates or signatures, yet purported to show that monitoring of Hazelwood did occur;

Consequently, I believe that counts IV & V (A90-015)should be reinstated and litigated, and actively pursued by the federal government, as these circumstances were the BASIS of state testimony before the NTSB. The agreement to bring these charges for litigation by the federal government was done in lieu of applicable state laws covering crew safety and competence.

2) Additionally, I strongly believe that the MISDEMEANOR criminal charges against Exxon Corporation and Exxon Shipping Company are being settled far too cheaply for the great, extensive damages to wildlife over a 700 mile region. It is my understanding that the ALLIED CHEMICAL case was the largest, previous U.S. settlement for environmental damages, at $13 million. However, this was also 10% of Allied's earnings for that year. EXXON's yearly SALES are over $100 BILLION; their reported net, yearly earnings are $5 BILLION; and their NYSE traded stock has gone up 13 points in the last two years, at a estimated value of $1 BILLION per point. This huge corporation is in effect being given a pittance fine by the plea-bargain, and it in no way should be viewed as a properly negotiated fine for either the extent of damages or the worth of the corporation. Also, as you may be aware, Mr. Lawrence Rawl of Exxon has repeatedly stated to the press that the fines and settlement will in no way impair or harm his company, and that all costs will be immediately passed on the consumer in pump prices. Finally, the overall terms of the settlement, payments over ten years, are an affront to Alaskans and the nation as a whole; once Mr. Rawl 'passes on the costs', consumers will in effect be paying over and over for Exxon's corporate liabilities, while the corporation makes token payments for it's environmental assault on the nation's common resources.

3) Finally, I strongly believe that civil and criminal charges, both felony and misdemeanor, against Exxon, Exxon Shipping and ALYESKA should be reinstituted and pursued by the federal and state governments, based on the complicity, culpability and liability of Exxon and the owner companies of Alyeska to secretly plan non-compliance with terms of agreements struck with the federal and state governments to immediately respond and clean up ANY spill in Prince William Sound. The documents obtained and verified by U.S. Congressman George Miller amply demonstrate that collusion on the part of Exxon and Alyeska to ignore the existing contingency plan was commonplace, and an active topic of discussion among the owner companies in 1987-88, even to the point of written, internal memos that materials, personell and marine transport were not on-hand to address but the most minor spills in Port Valdez and Valdez Arm. The June, 1988 owners meeting of Alyeska in Phoenix, Arizona, as referenced by Stanley Factor, Vice-President of Arco Marine, Inc., states clearly the Alyeska HAD NO INTENTION of responding to a spill in Prince William Sound, except with dispersents that were not on hand, with no properly fitted aircraft to utilize them. On March 24, 1989, in the early am hours, one of the first calls made by Mr. Iarossi, upon hearing of the spill in Houston, was to Southern Air Transport of Miami, for a C-5 aircraft, specially fitted for dispesent application, to be airborn, fly to New Mexico to pick up the dispersent ("ADDS PACK") and proceed to Anchorage. As the record shows, dispersent was not on-hand in Alaska, the plane was in Miami. The Valdez personell were not trained or available, the barge was empty, and whatever small booms and skimmers on-hand were buried in snow. I term these circumstances as criminal acts on the part of Alyeska and owner companies who were far more interested in tanker turn-around times and under manning than taking any responsibility for the consequences.

In summary, I trust you take these points into consideration, and I do appreciate the opportunity to comment. The Alaska Legislature is holding daily hearings on these vitally important issues, and I hope you are able to see the wisdom in recommending rejection of these present settlement terms, as a judicial officer responsible for determining the fairness of the settlement for immediate and long-term damage to national resources.

Sincerely,

Theodore P. Thoma

Theodore P. Thoma

Sandra Tavanis Cesarini
6621 Fairweather Drive
Anchorage, Alaska 99518
907-344-0519
fax 349-7261

April 17, 1991

Re: PROPOSED EXXON SETTLEMENT

Allow me to introduce myself. My name is Sandra Cesarini. I am co-founder of a large seafood processing company in this state. I am not now, nor have I ever been, "anti-business". I have been an active member in virtually every local and statewide pro-development organization in Alaska. However, as a legitimate victim of the oil spill, I cannot allow the settlement now under consideration to be accepted without voicing my heartfelt opposition.

I believe that Governor Hickel and Attorney General Cole worked diligently and sincerely in what they perceived to be the best interest of the State. I have personally been in negotiations with Exxon and know full well the difficulties involved. I understand the pressures of closed door negotiations. Considering the additional complication of Federal involvement (and agendas) in the negotiations, the Governor and Attorney General should be commended for their good faith efforts.

None-the-less, in reviewing the new information on Alyeska's culpability, as well as the repercussions that the proposed Exxon settlement has on third party (private) plaintiffs, I believe you will agree with me that serious reconsideration of the terms of this settlement is necessary.

The State of Alaska, until now, has stood squarely on the side of its injured citizens, proclaiming the need for responsible development yet seeking to insure the negligent parties bore full responsibility for their actions, Now, in the midst of bitter litigation and in light of the most recent revelations, the settlement proposal seems to put the State of Alaska in bed with the guilty parties. In the eyes of the third party plaintiffs and Congressional leaders who will determine the fate of ANWR, this settlement transforms Alaska from a leading plaintiff into just another defendant.

Over the past two years the State has acted in concert (for the most) with other victims of the spill. The proposed settlement as it presently stands is a radical departure from this policy and leaves the remaining plaintiffs to face not only a corporate giant, but the full force of the State government as well. As a plaintiff, I would alert you to several specific concerns:

A. THE PROPOSED SETTLEMENT UNDERMINES THE LEGITIMATE CLAIMS OF HUNDREDS OF ALASKANS STILL SEEKING REDRESS FROM EXXON.

United, the plaintiffs as a whole were in a much better negotiating position. With the State settling the government's interest, the remaining plaintiffs, businesses and individual citizens, are much weakened. We feel abandoned by the State in our hour of greatest need. It seems the power and leadership of the State is now backing the party responsible for the disaster, and we are left alone to deal with an organization that describes itself as "wealthy and powerful beyond your wildest dreams".It is difficult not to feel betrayed.

B. THE PROPOSED SETTLEMENT ALLOWS EXXON TO SHARE THE BLAME AND LEGAL LIABILITY FOR THE SPILL WITH THE STATE GOVERNMENT.

It has been Exxon's position at every juncture since the day of the grounding of the Exxon Valdez to spread the blame as widely as possible. Fundamental to this policy is the ongoing attempt by Exxon to establish the legal grounds necessary to include the State of Alaska as a responsible party, sharing proportionately in any future financial damage awards. The most recent evidence of this effort to shift the blame comes from the extensive deposition taken last week from fellow Bruce Suzumoto, President of the Prince William Sound Aquaculture Corporation (PWSAC). Exxon, in court, intends to attribute as much blame and accordingly, financial damage liability, to the State of Alaska as it can. The more the blame and damage is attributed to the State, the less will be attributed to Exxon. During this action between Exxon and the third party plaintiffs, the State will be powerless to affect the jury's determination of proportion, or amount of blame that will fall to Alaska. This percentage of blame will set the State's set the State's percentage of direct financial liability in any damage award made to the plaintiffs.

In order to insure the ability of the third parties to collect whatever portion of any such future award the court may decide will be the State's responsibility, the third party plaintiffs have no option but to sue the State as well as Exxon and Alyeska. Legal fees will be astronomical given the fact there will be many lawsuits and the State will be required to defend itself many times.

By settling now, and forcing the third parties to sue the State as well as Exxon, I feel the administration is opening itself to even more enormous court costs. When the settlement's potential for massively increasing the actual direct liability is added to the potential of ongoing legal fees incurred defending against some 300 litigants, it would seem clear that the Governor"s goal of saving legal fees is not met with the proposed settlement.

C. THE PROPOSED SETTLEMENT ESTABLISHES THE STATE AS AN ADVERSARY TO THE OTHER PLAINTIFFS.

Where the State has been seen as an ally, the terms of the proposed settlement clearly moves the government into an adversarial position (politically as well as legally) against the hundreds of citizens who need access to the information denied them by the settlement terms. Extensive case law, Alaska's Freedom of Information Statutes and, indeed, the State Constitution all suggest that efforts to hide research done by State officials, State contractors or paid for by State warrants are doomed to fail. Rather than freely transferring information between joint plaintiffs, the parties must now anticipate another round of legal battles to gather the data needed to establish our case against Exxon.

We feel Exxon is well able to hire its own attorneys and fight its own battles if it wants to deny us access to information which chronicles the damage done by Exxon's negligence. Why should the State assist Exxon in this endeavor?

These issues are those of most concern to third party plaintiffs in the Exxon case. However, there are other primarily political and moral concerns that bear consideration as well. I simply cannot believe that the State's acceptance of the proposed settlement, especially in light of the recent revelations regarding Alyeska and its owner companies (including Exxon), is good public policy. From a practical standpoint, Alaska's development would appear to be hindered by the State's seeming compliance in relieving Alyeska of its liability.

Opposition to the settlement is growing within Alaska. Rather than take an increasingly unpopular position siding with the guilty parties, it would seem the Legislature has an opportunity to seize the leadership of a move to revisit the terms of this dubious arrangement. The new light shed on the behind-the-scenes dealings with Alyeska and the owner companies allows ample excuse to re-evaluate the State's position without loss of face. We have been negotiating in good faith.

I can assure you that the last thing I or any of the other third party plaintiffs want to do is drag the State of Alaska into court on our way to seeking redress from Exxon and Alyeska. To prevent this I urge the following actions be considered:

1.THE STATE SHOULD SEEK IMMEDIATE AND SUBSTANTIVE RENEGOTIATION OF THE PROPOSED SETTLEMENT.

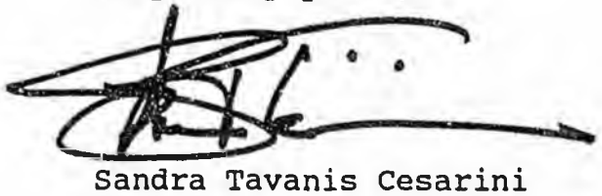
2. THE STATE SHOULD WITHHOLD ANY SETTLEMENT AGREEMENT UNTIL AND UNLESS EXXON HAS SATISFIED ALL THIRD PARTY PLAINTIFFS.

3. THE STATE SHOULD REQUIRE ANY SETTLEMENT AGREEMENT TO INCLUDE PROVISIONS HOLDING THE STATE BLAMELESS FOR ANY LOSS OR DAMAGE SUFFERED AS A CONSEQUENCE OF THE SPILL AND RELATED ACTIVITIES.

Thank you for your serious consideration of this matter.

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

Very truly yours,



Sandra Tavanis Cesarini

Congressional Research Service • The Library of Congress • Washington, D.C. 20540

March 19, 1991

TO : House Committee on Merchant Marine and Fisheries
Attention: Will Stell

FROM : Bernard A. Gelb
Specialist in Industry Economics
Economics Division
and
Jane G. Gravelle
Senior Specialist in Economic Policy

SUBJECT : Net Present Values of the Exxon Valdez Settlement

This memorandum is in response to your request for a calculation of the present value of the recent settlement of the Exxon Valdez case to the U.S. Government and to Exxon Corporation. (Such a "value" would be negative in the case of Exxon.) The gross amount received (or paid) can differ from the net cost to the firm depending on tax liabilities, and values could differ with choice of discount rate. Because of uncertainties we have prepared several alternative scenarios.

One uncertainty is the ultimate amount to be paid. The agreement provides for a $100 million criminal penalty, which we assume will be paid May 1, 1991, and for a series of civil payments tentatively payable on September 1 of this and the following ten years. These payments are set at $90 million in 1991, $150 million in 1992, $100 million in 1993 and $70 million for the next eight years. These amounts total to $1 billion. There also is, however, the possibility of up to $100 million more being payable after the year 2001, if additional environmental damage is discovered. In this alternative, we assume the $100 million will be paid in two installments in the two years following.

Undiscounted, the payments will sum to $1 billion and $1.1 billion in the two payment scenarios. The net cost to Exxon will be smaller, however, because the civil payments can be deducted from income for purposes of both State and Federal taxes. The Federal tax rate is set at 34 percent; and we add three percentage points to account for State income taxes net of the

deductibility against Federal taxes.[1] Thus, the combined tax rate is set at 37 percent. As a result, the net cost to Exxon (net receipts to the Government) will be $655 and $716 million, respectively, without discounting.

A second major uncertainty is the discount rate. The present value of both net and gross costs depend on the discount rate used, and the proper discount rate is not entirely clear.

We consider several. The Forestry Service uses a 4 percent real return, while the Office of Management and Budget (OMB) suggests a 10 percent real return. (The regulations on evaluating natural resource damages, 43 CFR 11, direct the use of the OMB rate). The General Accounting Office (GAO) suggests using a nominal rate of return similar to a Treasury security for the same maturity. The 4 percent rate of return is closer to a riskless rate; it is also quite similar to the Government bond yield for three to ten year maturities assuming an inflation rate of around 4 percent. The 10 percent rate seems quite high, and would be associated with a relatively risky investment. Our understanding is that this rate was based on an attempt to estimate the pre-tax real return on physical capital investment. We would estimate that the average pre-tax return on private capital investment is lower than these numbers, at around 7 percent.[2]

Since the payments are in nominal dollars, these real returns should be converted to nominal returns. Assuming an inflation rate of 4 percent, the nominal rates would be 8.16 percent for the Forestry Service number (and consistent with the GAO approach), 11.28 percent to correspond to the average pre-tax return on private capital, and 14.4 percent to correspond to suggested OMB rates.

Using the three discount rates with the two payment scenarios, we obtain the following results:

(1) For the 8.16 percent rate, the present value to the Government ranges between $734 million and $773 million. The cost net of taxes to Exxon would be $499 to $524.

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[1] This adjustment was suggested to us by Andy Yood of the American Petroleum Institute, who indicated that an add on of two to three percentage points was a typical rule of thumb to obtain a combined Federal and State income tax rate.

[2] To estimate the pre-tax return requires a measure of yields on debt and equity and an estimate of the effective tax rate. See June G. Gravelle, Differential Taxation of Capital Income: Another Look at the 1986 Tax Reform Act, National Tax Journal, December 1989, pp. 441-464 for a discussion of the methods used to derive this number.

(2) For the 11.28 percent rate, the present value to the Government ranges from $666 million to $694 million. Exxon's cost net of taxes would be $456 million to $474 million.

(3) For the 14.4 percent rate, the present value ranges from $611 million to $631 million. The cost net of taxes would be $421 million to $434 million.

While we would consider the discount rate in (3) as probably too high, the choice between (1) and (2) is less clear. Since the stream of payments is fixed, there is some justification for using a relatively riskless rate of return. On the other hand, the present value using the estimated pre-tax return rate represents the quantity of actual physical capital that would be necessary to generate the stream of future payments.

Please contact us (at 7-7300) if you have further questions on this matter.

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

MEMORANDUM

TO: The Cabinet
All Administrative
Services Directors

Special Staff Assistants
Regional Offices
Office of the Governor

DATE: April 20, 1989

PHONE: 465-3616

FROM: Mike Nizich
Director, Division of
Administrative Services
Office of the Governor

SUBJECT: Valdez Oil
Spill Expense
Reimbursement
Agreement

Attached is a copy of the Expense Reimbursement Agreement reached by Exxon Shipping Company and the State of Alaska during the April 18 meeting in Juneau. All agencies are to follow the expense submission procedures outlined in my April 3 memo. All agencies reimbursement and direct payment claims are to be submitted through the Office of the Governor, Division of Administrative Services. The only agency exception to this routing process is the Department of Environmental Conservation.

Again, claims to be submitted are for those expenses directly related to mitigating the effects of the oil spill. As stated in paragraph one of the agreement, consequential damage claims will be addressed at a future date.

Any equipment that is purchased for oil spill clean-up and reimbursed for or paid by Exxon is the property of Exxon. All agencies must be able to identify such equipment for future return to Exxon. In order to avoid possible repayment to Exxon for lost equipment, please ensure that detailed property inventories are maintained.

ACE 153800

As paragraph three of the Expense Reimbursement Agreement specifies, Exxon has agreed to process claims within 10 days of their receipt of the documentation. Any claims that are rejected by Exxon will be scrutinized by DEC for payment from their Oil and Hazardous Substance Release Response Fund. Exxon rejected claims that do not meet the criteria for payment from DEC's fund will be returned to the originating agency. Agencies are responsible for maintaining complete records of their rejected claims. The Department of Law will request those records at a later date for litigation purposes.

Please call me if you have any questions or need assistance.

cc: Garrey Peska

Attachments

STATE OF ALASKA - EXXON SHIPPING COMPANY
EXPENSE REIMBURSEMENT AGREEMENT

The State of Alaska and Exxon Company U.S.A. (a division of Exxon Corporation) as contractor for Exxon Shipping Company, agree to the following:

1. The State of Alaska ("State") may submit invoices to Exxon Shipping Company ("Exxon") as the State incurs expenses, debts, or obligations of any type, except damage assessment expenses (collectively "invoices") due to the oil spill from the M/V EXXON VALDEZ.

2. The State may submit invoices to Exxon for direct payment to the vendor, or the State may pay the vendor or use operating funds and seek reimbursement from Exxon by filing an invoice with Exxon. "Vendor" as used here includes, without limitation, any administrative agency of the State as well as any political subdivision of the State. Subject to the terms of this agreement, overhead will be payable on an incremental cost basis as described in paragraph 8 of the "Procedures For Payments/Accounting" which is attached as Exhibit A.

3. Exxon agrees that it will, within ten (10) days from the date Exxon receives an invoice from the State, either: a) pay the invoice directly to the vendor identified by the State, if the State has not paid the invoice; b) reimburse the State, if the State has already paid the invoice; or c) notify the State that Exxon will not pay the invoice. Exxon agrees that it will process all invoices pursuant to the "Procedures For Payments/Accounting" which is attached as Exhibit A.

4. By entering into this agreement, the State does not waive, release or acknowledge satisfaction of any claim or cause of action it may have against Exxon or any other party for penalties, civil assessments, damages or costs attributable to the oil spill from the M/V EXXON VALDEZ. The State specifically reserves the right to bring any action, civil or criminal, it may have against Exxon or any other party. The State agrees that it will not include any invoice paid by Exxon under this agreement as part of any future claim or demand on Exxon.

5. By entering into this agreement, Exxon does not admit any violation of law nor does it admit liability for any penalties, civil assessments, damages or costs attributable to the M/V EXXON VALDEZ oil spill or obligate itself to pay any invoices submitted by the State. However, Exxon is obligating itself to process all such invoices submitted by the State hereunder in accordance with this agreement.

6. The State agrees that Exxon may audit the State's contracts, records and other documentation (including the State's vendors' records and documentation) associated with any expense or invoice which Exxon pays directly or for which Exxon reimburses the State. In the event that such an audit determines that Exxon has overpaid a third party vendor, the State will assist Exxon's efforts to seek recovery from the vendor, including assigning or subrogating its contractual

rights against third party vendors to Exxon to allow Exxon to identify and recover any overpayment; provided, however, that the State is not obligated to bring suit in its own name against any third party vendor. In light of the State's agreement to assist, Exxon agrees that it will not seek reimbursement from the State for any third party vendor overpayment. Exxon and the State agree to expend their best efforts to resolve by mutual agreement any overpayments made to reimburse the State's own expenses that may be revealed by audits conducted pursuant to this paragraph.

7. In the event that a court or other judicial or administrative body should determine that Exxon was not liable for any penalties, civil assessments, damages, or costs attributable to the M/V EXXON VALDEZ oil spill, Exxon's right to recover from the State or its vendors funds paid pursuant to this agreement shall be limited to that specified in paragraph six above.

8. This agreement shall be executed in two counterparts, each of which shall be an original, but both of which when taken together shall constitute one and the same instrument.

Dated:_____

EXXON COMPANY U.S.A. (A DIVISION OF EXXON CORPORATION) AS A CONTRACTOR FOR EXXON SHIPPING COMPANY

By:_____

ACE 153804

Dated: April 21 1989

STATE OF ALASKA

By: Douglas B. Baily

Douglas B. Baily
Attorney General

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State Exxon Shipping Co Expense Reimbursement Agreement

ACE 153805

Exhibit A to Expense Reimbursement Agreement

PROCEDURES FOR PAYMENTS/ACCOUNTING FOR THE STATE OF ALASKA'S RESPONSE EXPENSES FOR THE M/V EXXON VALDEZ OIL SPILL

Expenses incurred by the State of Alaska as a result of the M/V EXXON VALDEZ oil spill will be processed by Exxon pursuant to the terms of the Expense Reimbursement Agreement. Exxon and the State agree to devise an accounting and payment process which promptly pays or reimburses State expenditures and which is consistent with the accounting processes of both Exxon and the State. Therefore, a Joint Financial Response Coordination Group is formed to ensure expeditious processing of invoices for State and vendors' expenditures (as defined in the Expense Reimbursement Agreement) incurred as a result of the M/V EXXON VALDEZ oil spill.

The Financial Response Coordination Group will consist of State and Exxon personnel organized to account for, process, and pay these expenditures. Participation of personnel from both organizations will: (1) facilitate prompt payments; (2) eliminate duplicate processing of documents, to the extent possible; and (3) minimize disputed costs. Further, the coordination during document processing will provide easy access, for both parties, to the appropriate decision level for items in question.

The Financial Response Coordination Group ("FRCG") will

conduct operations to account for, process, and pay for invoices for State and vendors oil spill expenditures as follows:

1. The State and Exxon will be responsible for supervising the FRCG. The FRCG will consist of Exxon's Accounting and Control Manager in Valdez and the State's representatives.
2. Exxon will provide the staff necessary to account for and process the invoices submitted by the State, as well as all materials, equipment and supplies needed to perform this accounting, review and payment process.
3. All State requests for payment will be submitted by the State's representative to the FRCG for review and processing.
4. Processing will include supporting payment or reimbursement requests by appropriate documentation such as invoices, contracts, purchase authorizations, personnel documentation, appropriate State approval for the expenditure being reviewed, or other substantiation linking the expenditure to the State oil spill response.
5. Because of the unusual nature and magnitude of the emergency that precipitated State expenditures, it has not always been possible to follow normal procurement procedures for all expenditures and obligations.

Therefore, documentation of approval by an appropriate State official, along with an invoice, will serve as adequate support for submission of items procured by means other than normal procedures. Additional State approvals may be obtained during this review and processing period. However, nothing in this paragraph shall preclude Exxon from conducting audits pursuant to paragraph six of the Expense Reimbursement Agreement.

6. Exxon may request additional justification from the State during this review and processing period. If, after appropriate decision levels have been contacted, Exxon still has objections regarding an expenditure, the amount in question will be placed in an "Adjust and Hold" status. Under these circumstances, the State may pay the expenditure and the State reserves the right to assert the expense as a claim against Exxon or any other party at a later date, pursuant to the terms of the Expense Reimbursement Agreement. Nothing in this paragraph shall preclude Exxon from making partial payment on an invoice and reserving the balance for the Adjust and Hold status.

7. Exxon and the State will develop a spreadsheet to track expenditure review information. This spreadsheet will address all payment and cost

information data specified by both Exxon and the State. The spreadsheet shall include, but is not limited to, the following:

A. Invoice information
    1. Log-in date
    2. Invoice date
    3. Vendor
    4. Payee
        a. Vendor
        b. State
    5. Invoice number
    6. Review responsibility
    7. Invoice amount

B. Review results
    1. Review date
    2. Adjust and hold
    3. Amount payable

C. Payment information
    1. Exception amount
    2. Total paid
    3. Exxon check number
    4. Check date

It is recognized that the FRCG may change the specific format of the spreadsheet from time to time, but the spreadsheet shall as a minimum contain the above information.

8. Pursuant to the terms of the Expense Reimbursement Agreement, the State may submit for reimbursement invoices for reasonable overhead costs incurred as a result of the M/V EXXON VALDEZ oil spill. For the purposes of this agreement, "overhead costs" are defined as those costs incremental to normal State operations such as overtime, temporary personnel, office equipment and supplies, travel expenses, or other out of pocket expenditures which were directly related to the oil spill.

9. Exxon shall promptly review and process payment for invoices submitted by the State in no more than 10 days from the day the invoice is received by Exxon.

10. Exxon will make expeditious payment upon State invoices, as requested by the State, by either direct payment to the vendor or the State, or by wire transfer to the First Pennsylvania Bank, Philadelphia, Pennsylvania, ABA # 031000024 (attention: Catherine Jacobs) for credit to the State of Alaska account # 881-462-6.

11. Exxon will, on a daily basis, print a hard copy of the spreadsheet described in paragraph 7 above. Exxon will on a daily basis: provide two copies of the spreadsheet to the Department of Environmental

Conservation, Valdez, Alaska; and maintain one copy at Exxon's Valdez office.

Acknowledged:

By: _____ Date: April 21 1989

By: _____ Date: _____

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Exhibit "A" to State of Alaska/Exxon Shipping Co.
Expense Reimbursement Agreement

ACE 153811

The Wall Street Journal

Date:

Exxon Confirms Waste Water Charges; Move May Impede a Valdez Settlement

By Allanna Sullivan
Staff Reporter of The Wall Street Journal

Exxon Corp. acknowledged that it has shipped tanker waste water to Alaska.

While the company said the shipments and subsequent tanker-to-tanker transfers of so-called tank washings were within federal guidelines, such a disclosure could further entangle attempts to settle litigation stemming from the Exxon Valdez oil spill two years ago. Exxon, Alaska and the federal government have been engaged in talks for several weeks in efforts that could settle the state's civil case and possibly the federal government's criminal case. The allegations, which have drawn Environmental Protection Agency scrutiny, raise "the possibility of further complicating the settlement," said Jay Kerttula, chairman of Alaska's Senate Finance Committee.

The parties were on the verge of settlement late last week, but pressure from some state officials and environmentalists unhappy with the terms of the possible settlement may be slowing the process. Indeed, some Alaskan lawmakers are considering legislation that would preclude a settlement until state legislators scrutinize the agreement. Gov. Walter J. Hickel had proposed that Exxon pay $1.2 billion to settle; it appears the company has asked to provide payments over a period of years that would devalue the amount.

Allegations regarding waste water specifically focus on the transfer of so-called tank washings from the Exxon Galveston, a lightering tanker, to the supertanker Exxon Valdez on Aug. 4, 1988. The washings were then transported up to Valdez, Alaska, where they were treated in the ballast water-treatment plant owned by Alyeska Pipeline Services Co.

The charges were contained in a letter sent last week by former oil-tanker broker Charles Hamel to EPA head William Reilly and U.S. Attorney General Richard Thornburgh. In the letter, Mr. Hamel says that before any settlement is concluded, Exxon should be asked to stop such shipping practices. Mr. Hamel, who is engaged in a dispute over mutual business arrangements he has with Exxon and other oil companies, claims that Exxon insiders told him of the wrongdoing.

Beyond hearsay, however, a document turned up by Alaskan attorneys in preparation for the state's civil case against Exxon makes reference to the transfer. The handwritten document is a set of instructions from the second mate to another second mate who was boarding the vessel to relieve him. It says specifically that the Exxon Valdez will unload its crude oil to the Exxon Galveston but not until "after we take 50,000 barrels of tank washings from [the Exxon Galveston]."

Pressed for a response to the charges, Jim Pitts, a spokesman for Exxon, said that "yes, there was a transfer ... all wash water returned to the Exxon Valdez as ballast and returned for treatment to the ballast water treatment plant in Alaska were in compliance with permits from EPA."

Exxon declined to identify what type of cleaning agent was being used to clean the oil storage tanks of the vessels other than to say that the tanks were cleaned with hot water and a very small amount of detergent. The oil company also declined to say what materials were contained in the tank washings following the cleaning.

But the company did say that the practice of transfering tank washings to tankers en route to Alaska "wasn't uncommon" and that all such transfers involved washings of ships handling Alaskan crude oil. Indeed, individuals familiar with the transport of crude oil said that other oil companies engage in the same practice and that it's still continuing.

But EPA officials said such moves are violations of federal law.

The EPA permit that authorizes operation of Alyeska's ballast water treatment plant in Valdez allows small amounts of cleaning agents to be present in the ballast water injected into the plant by arriving supertankers. But EPA officials presumed that such tank washings would be the result of cleanings of the supertankers themselves, which en route to Alaska aren't permitted to eject the waste water.

"But deliberately stopping a supertanker and putting the washings into its ballast; there's no way the permit authorizes that kind of discharge," says Harold Geren, chief of water permits for EPA in Seattle, which has jurisdiction over the Alyeska plant.

Mr. Geren says that EPA has already started to look into what is contained in those cleaning wastes. Mr. Geren says that Alyeska has volunteered to scan the ballast water at the treatment plant for toxic pollutants. "We need to know what is in the waste water," he said, adding that tank washings can contain toxic wastes, such as heavy metals.

Experts say that any damage to the port of Valdez depends on the amount and constituency of the chemicals going into the water. The ballast water treatment plant was designed to separate oil from water and then eject the treated water back into Valdez Harbor. Individuals familiar with the design of the plant say that any unanticipated substances, such as certain heavy metals, could travel through the plant and into Valdez Harbor undetected.

Riki Ott, a sediment toxicologist who is also heading up a coalition of Alaskans seeking reform of oil industry practices, said that the Port of Valdez was recently declared environmentally "impaired." Its degeneration is from long-term abuse unrelated to the Exxon Valdez spill that never fouled the harbor's waters, she says. To be sure, Valdez is in better shape than many commercial harbors in the U.S., but "we've had the first warning sign that something has gone wrong," she says.

In Exxon Deal, Transportation Chief Wins Another One for the President

By KEITH SCHNEIDER
Special to The New York Times

WASHINGTON, March 20 — A week ago Tuesday, Lawrence G. Rawl, the chairman of Exxon, flew to Washington. In an informal ceremony at the Justice Department just before midnight he signed a $1.1 billion settlement that he hoped would put the nation's worst oil spill, and the two years of civil and criminal cases that followed, behind him and his company.

Standing with Mr. Rawl, Gov. Walter J. Hickel of Alaska and the lawyers for the Department of Justice was Transportation Secretary Samuel K. Skinner.

Once again Mr. Skinner had pulled it out for the White House, bringing to a successful conclusion talks that by all accounts could easily have tipped the other way.

"I viewed my job as a facilitator," said Mr. Skinner, a former United States Attorney from Chicago. "You had a huge amount of egos and interests that had to be blended together.

"In my experience I've found that if the principals don't want to settle they look for an opportunity to get out. In this case everybody wanted a deal because they knew the alternatives didn't make sense."

A 52-year-old lawyer and protégé of James R. Thompson, the former Governor of Illinois who at one time was considered as a potential national Republican figure himself, Mr. Skinner has made his career in the capital handling domestic political issues without embarrassing the President. His background as a litigator has helped. So has his instinct for the spotlight and his good feel for the Washington social circuit.

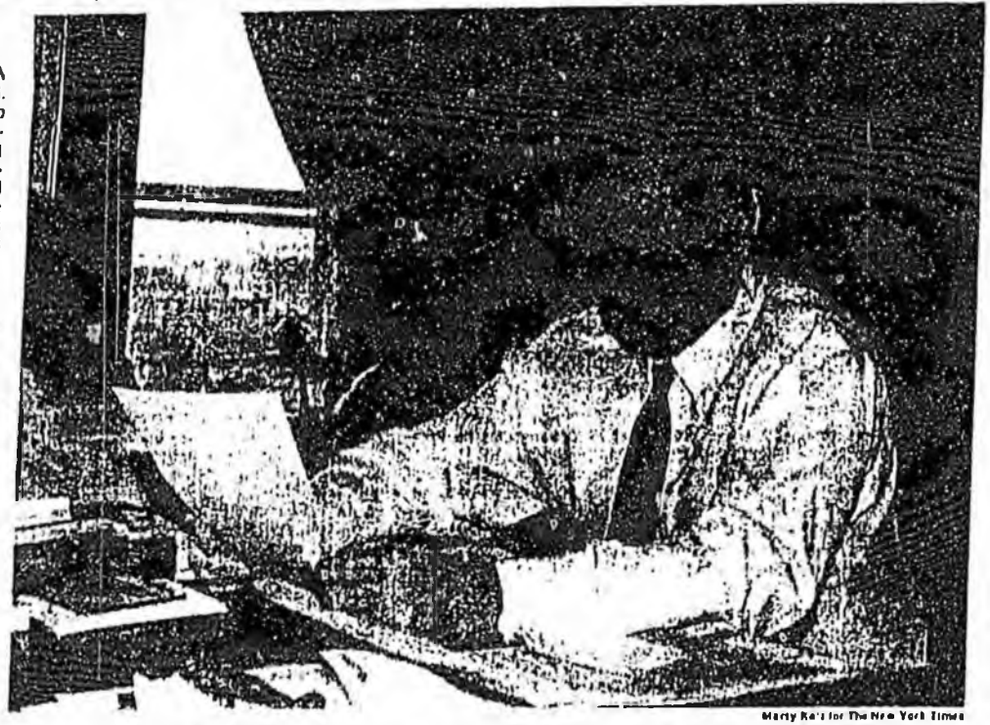
In Response to Disasters

When the tanker Exxon Valdez struck a reef in Prince William Sound in Alaska on March 24, 1989, spilling 11 million gallons of Alaska crude into the sound and turning beaches into a chaos of oil-soaked birds and dying otters, it was Mr. Skinner who was dispatched to supervise the Government's response.

Earlier that month, when machinists at Eastern Airlines went on strike, President Bush tapped Mr. Skinner instead of Elizabeth Dole, then Secretary of Labor, to handle the strike. Mr. Skinner's advice to the President: stay out of the struggle.

In September 1989 Hurricane Hugo swept through the Caribbean and struck the mainland in South Carolina, killing 24 Americans and causing immense property damage. A month later a powerful earthquake hit the San Francisco Bay area, killing 59 people. In both disasters Mr. Skinner was called in.

Now there is the Exxon deal. With his company facing a criminal trial in April and civil litigation afterwards being prepared by the Justice Department, Mr. Rawl had been ready for months to talk. "It's been a burden to us," the Exxon chairman said in a news conference on March 13 in Irving, Tex.



Marty Katz for The New York Times

"I viewed my job as a facilitator," said Transportation Secretary Samuel K. Skinner of Exxon's Justice Department settlement. "You had a huge amount of egos and interests that had to be blended together."

Eager for a Settlement

Governor Hickel, an independent, wanted a consistent source of money to continue recovery work in Prince William Sound, the source of a prosperous fishing and tourism industry.

The Federal Government was eager to settle, too. The civil case against Exxon was expected to take at least five years to litigate, and in the criminal case, scheduled to begin April 10, the Justice Department was going to be testing new applications of environmental law. Nobody knew how a jury would respond.

"The cleanup efforts Exxon had made in the sound made a significant difference," Mr. Skinner said. "Nature had also done a tremendous job there. Scientists were telling everybody this was not a multibillion-dollar damage suit."

Mr. Rawl and Lee R. Raymond, Exxon's president, flew to Juneau, Alaska, on Jan. 15 at Governor Hickel's invitation. The state and the Federal Government had agreed three weeks earlier to work together, he told them. Mr. Raymond called Mr. Skinner and told him that the Governor was seeking an agreement.

Mr. Skinner said he believed that a successful negotiation was possible, but only if it was conducted at the Cabinet level. "I said this case will not be settled by lawyers," Mr. Skinner said. "First of all, they don't know how to settle it. Second, they have a built-in conflict of interest. This could go on for years."

> An experienced litigator finds a way to satisfy everybody.

The Chairman Cools His Heels

On Feb. 5 Mr. Rawl and Mr. Raymond were asked to come to Washington for a meeting at the Commerce Department with the Federal and state negotiators: Mr. Skinner, Manuel Lujan Jr., Secretary of the Interior; William K. Reilly, Administrator of the Environmental Protection Agency; John Knauss, Administrator of the National Oceanic and Atmospheric Administration; Governor Hickel and Charles E. Cole, the Alaska Attorney General.

Mr. Rawl, a combative executive whose four-year tenure as Exxon's chairman had been marred by the oil spill, was in a dour mood, several negotiators recalled. After being asked to wait outside a conference room for 30 minutes while the government officials finished a meeting, Mr. Rawl became furious.

"I went out twice and asked them to please be patient," said Thomas A. Campbell, general counsel of the National Oceanic and Atmospheric Administration, who organized the meeting. "Rawl said: 'Just tell them they don't need to take much time. What I'm going to say is short and sweet.' He was going to tell them he's had it, he'll see them in court."

Mr. Skinner said that when the Exxon chairman entered the room he lashed out at the negotiators, saying he was sick and tired of how the company had been treated by the Government, the news media and the people of Alaska. Exxon had spent $2 billion to help clean up Prince William Sound, Mr. Rawl said, more than had ever been spent by any company for an environmental restoration project, and had received no credit.

Nobody responded until Mr. Skinner disarmed Mr. Rawl, according to participants.

"Look, Larry," said Mr. Skinner, whose department includes the Coast Guard and who has developed a personal relationship with Mr. Rawl in the two years since the spill. "Let's not relive it. If we do, we'll never get past it."

'Reopener Clause' Is a Snag

Over the next 90 minutes, participants say, the broad outline of a settlement of the civil claims was established. Following Mr. Hickel's lead, the state and the Federal Government said they were looking for at least $1 billion. Mr. Reilly insisted that the settlement include $300 million more to be put into a special fund if more damage was found, a provision that came to be known as the "reopener clause."

Mr. Rawl and Mr. Raymond said that they wanted the settlement to make Exxon immune to any more state and Federal claims, that they did not want to pay the money in a lump sum and that they hated the reopener clause.

Three more meetings were held in Washington in February and early March before lawyers were dispatched on March 3 to put the agreement into legal language. With Washington gripped by the Persian Gulf war, the group was able to work undistracted by reporters or environmental groups or other interests.

"This had to be handled by the principals only, and it had to be handled in a short period," Mr. Skinner said.

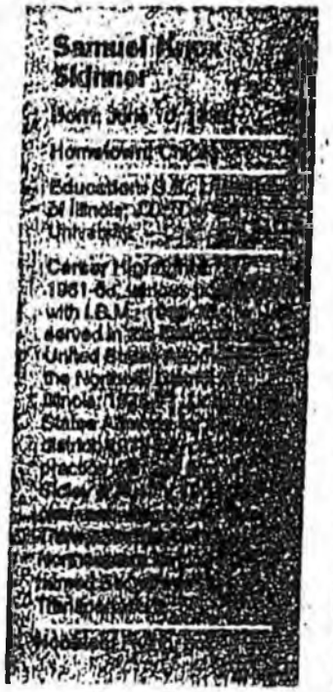
Through February, the talks were never far from collapse. "We knew the longer the discussions went on the harder it would be to put it together," the Secretary said.

Justice Department lawyers and other participants credit Mr. Skinner with keeping Exxon and government officials at the table.

When Mr. Rawl and Mr. Raymond almost walked out because of Mr. Reilly's insistence that the agreement should have a reopener clause, Mr. Skinner told them the E.P.A. administrator's signature on the agreement was vital politically. Without it, the Secretary said, the Bush Administration and Exxon would have a hard time justifying the settlement to environmental groups.

And when Exxon insisted that Mr. Reilly be barred from attending a meeting on Feb. 24, Mr. Skinner assured Mr. Reilly that the Government would not negotiate something the E.P.A. administrator was unable to accept. In the end, Exxon and Mr. Reilly accepted a provision that called for the company to spend up to $100 million after the year 2001 if more work in the sound was needed.

Mr. Skinner also kept the White House informed. During a meeting at the White House, John H. Sununu, the President's chief of staff, remarked that the $1.1 billion deal sounded "like an awful lot of money," Mr. Skinner said. But he assured Mr. Sununu that the agreement between the Government, Alaska and Exxon would be a good deal for everybody.



Exxon and its shipping subsidiary pleaded guilty to four criminal misdemeanor violations of environmental law and agreed to pay a $100 million fine. It was the largest penalty ever assessed in a pollution case, more than three times higher than the $29.7 million that the Government collected in 1990 for all environmental crimes. Even more, from the White House point of view, it makes good on Mr. Bush's campaign promise to penalize polluters.

From the state's point of view, the cost of the settlement, $1.1 billion, will keep Exxon involved in the restoration of Prince William Sound for at least a decade.

Exxon, like any corporation (or person, for that matter), would have preferred not to spend any money. But Mr. Rawl said last week that he thought the settlement was good for the company. Paid out annually over 10 years, the payments reach a maximum of $190 million this year, and then drop to $70 million each year from 1994 to 2001.

To a corporation with an annual revenue of $100 billion, the cost of the settlement each year is roughly the same as drilling two difficult offshore wells. "It will not curtail any of our plans," Mr. Rawl said.