

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
1952 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL... 1991-92

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Richard J. Wysong
P.O. Box 992
Girdwood, Alaska
99587



APR 12 1991

OIL SPILL LITIGATION
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SUITE 200
ANCH, AK. 99501

ACE 417343

DAVID P. JANKA
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VALDEZ, ALASKA 99686

4-16-91

LETTERS,

I AM A 15 YEAR RESIDENT OF PRINCE WILLIAM SOUND, ALASKA. I HAVE KAYAKED, SAILED, POWER BOATED, FLOWN, RESEARCHED, HIKED, WORKED, ENJOYED AND AM RAISING A FAMILY HERE.

I HAVE BEEN INVOLVED AT TIMES WITH OIL SPILL RESPONSE AND HAVE FOLLOWED ALASKA LEGISLATIVE HEARINGS RELATED TO THE EXXON VALDEZ SETTLEMENT.

I DO NOT FEEL THIS SETTLEMENT IS IN THE PUBLIC INTEREST OR DOES IT EVEN MEET THE NON-PUBLIC INTERESTS. IT IS CLOSE TO BEING A GOOD SETTLEMENT THOUGH! THE CONCERNS RAISED OVER THESE PAST WEEKS COULD BE SATISFIED WITHIN A SHORT PERIOD OF TIME (< 1 YEAR I BELIEVE) WITH A REWORKED SETTLEMENT.

PLEASE WITHDRAW FROM/OPOSE THIS SETTLEMENT AND COME BACK TOGETHER WITH A COMMITMENT TO WORK OUT A GOOD, WELL REPRESENTED SETTLEMENT BASED IN REALITY WITH PUBLIC AND LEGISLATIVE PARTICIPATION THROUGHOUT THE PROCESS.

THANK YOU FOR ALLOWING US TO COMMENT. I ONLY WISH WE WERE BROUGHT INTO THE PROCESS EARLIER.

D.P.J.

CC: BARBARA HERMAN - ST. OF ALASKA
THOMAS A. CAMPBELL - NOAA WASH. D.C.
H. RUSSEL HOLLAND - US DIST. COURT AK.
EUGENE KUBINA - AK. LEGISLATURE
KURT MENARD - AK. LEGISLATURE
JIM KERTUJILA - AK. LEGISLATURE
CHARLES COLE - ATTORNEY GENERAL, ALASKA
WAITER HICKEL - GOVERNOR, ALASKA

ACE 417357

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BARBARA HERMAN
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SAMUEL J. FORTIER
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TELEPHONE (907) 277-4222
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April 11, 1991

Mr. Thomas Campbell
General Counsel
National Oceanic and Atmospheric Administration
Department of Commerce
14th and Constitution Avenue N.W.
Washington D.C. 20230

Dear Mr. Campbell:

We have been directed to you by the Department of Interior to consider and obtain the views of Chenega Corporation, Port Graham Corporation and English Bay Corporation, with regard to the settlement agreement between the governments and Exxon Corporation. This settlement agreement is stated at 56 Fed. Reg. 11636 - 11642, and the MOA is stated at 56 Fed. Reg. 11642 - 11646.

First, we object to the United States Department of Interior delegating its duty to consult with the village corporations, and consider their views to the NOAA. We also object to the federal government, through the Department of the Interior, entering into the settlement agreement before it has considered our clients' views. Further, the Department of the Interior's failure to involve the village corporations in settlement discussions concerning lands within interim jurisdiction as well as natural resources damaged by Exxon is violative of the following federal laws, particularly 45 CFR 2650.1 and Public Law 94-204, as amended by Public Law 96-47, Public Law 99-396, Sec. 22 and Public Law 100-581. We object to the State of Alaska's involvement in the allocation of the limited resources recovered in the settlement. We also object to the State of Alaska's involvement in the settlement process, where our clients

requested to be kept advised as to the progress of the settlement as early as February 1991, and we were ignored until the settlement was completed.

Second, our clients are unable to determine whether the sums recovered are sufficient to deal with the compensatory and remedial relief necessary to compensate for loss, injury, impairment, damage, or destruction of the natural resources, whether or not said loss is temporary or permanent, and whether the ecosystems polluted by the Exxon Valdez oil spill are able to recover, and if so, over what period of time. The consultation is inadequate because it did not include any scientific studies or assessments concerning these issues.

Third, it is our clients' view that the Attorney General for the State of Alaska has a conflict of interest, in that he has an ongoing business relationship with one or more defendants in the settlement and may stand to gain monetarily as a result of the settlement. In short, it is our clients' view that the appearance of impropriety on the part of Mr. Cole is so great as to cast grave doubt on the adequacy of the settlement, and the ability of the State of Alaska to act fairly and impartially, as a trustee in the allocation of resources, which impact lands conveyed to our clients or are within the interim jurisdiction of the United States, by and through its Secretary of Interior, and its Secretary of Agriculture.

Fourth, it is our clients' view that the agreement and consent decree at paragraph 13(c) does in fact compromise the rights and claims of the village corporations in effect, by ignoring the obligations of the federal government to our clients. We believe, at a minimum, that paragraph 13(c) must be amended to read:

(c) rights, obligations, and claims, if any, of legal entities, include village corporations created pursuant to the Alaska Native Claims Settlement Act (ANCSA) or persons other than the governments who are holders of any present right, including lands, or resources of lands, selected but not yet conveyed to ANCSA corporations by the United States Government, or title or interest in land or other property interests, including Natural Resources, and ecosystems affected by the oil spill.

Fifth, the limitations stated at paragraph 13(b), (56 Fed. Reg. 11639) are too narrowly defined. In this regard, the village corporations which we represent are holders of the

surface estate, and are concerned with preserving the use of the lands in accordance with traditional local lifestyles and subsistence economies. See 4.R. Rep. No. 729, 94th Cong., 1st Sess. 26-27 (1979) reprinted in 1975 United States Code, Congressional and Administrative News 2376, 2393. See also Ahtna, Inc. 107 IBLA. 266, 269, 270 (1989):

[Section 14(f) of ANCSA] provides protection to villages from a precipitant decision by Regional Corporations to develop the subsurface estate. This provision seeks to avoid potential conflicts between villages which are holders of the surface estate and which may be concerned with preserving the use of the land in accordance with the traditional local lifestyle and subsistence economy. . . .

It is their traditional lifestyle and subsistence economy which our clients are undertaking to protect, in this case, not against the regional corporation's potential development of mining activities, but rather, with regard to devastation on account of the Exxon Valdez and its aftermath. For more information, please see Exhibit 1, a report by the State of Alaska specifically discussing Chenega, Port Graham and English Bay.

It is our position that ANCSA Section 14(f), with the 1976 amendment must be construed to place in the village corporation, as a holder of the surface estate, the right to preserve the use of the land and its resources for traditional lifestyles and subsistence economy. See also 16 U.S.C. Sec. 3111(4), which demonstrates Congress' overriding concern to protect Native cultures. Congress expressed its intent to protect Natives "physical, economic, traditional and cultural existence. . . ." Pursuant to ANCSA and ANILCA, the authority to preserve subsistence activities and the traditional local lifestyle was vested in the village corporations, as owners of the surface estate of once public, and now private or selected but not yet conveyed lands. Alaskan IRAs and Traditional Councils possess authority concurrently with the village corporations. See 25 U.S.C. Sec. 461-495, wherein the Indian Reorganization Act of 1934 was amended and applied by Congress in 1936 to Alaskan Native villages.

The goal of tribal cultural autonomy that Congress expressed in the Indian Civil Rights Act is also expressed in ANCSA and ANILCA, with the duty of the village corporations to protect Native subsistence lifestyles. Cf. McCurdy v. Steele, 353 F. Supp. 629, 633 (1973). Pursuant to the 1976 amendment to ANCSA Sec. 14(f), Congress has voiced the concern for tribal cultural economies by expressly granting

the right to shape cultural development or preserve cultural economy to village corporations concerned with preserving lands uses and the resources thereon, based upon their special standards and obligations to protect traditional lifestyles and the subsistence economy. This right or power is a concurrent power shared with the I.R.A. or Traditional Councils.

Here, the village corporations of Chenega, Port Graham and English Bay, have suffered enormous losses. 70% of Chenega Corporation's coastline is oiled, and highly toxic oiling occurred on Port Graham and English Bay conveyed lands. Moreover, the purpose of ANCSA was to resolve aboriginal land claims by providing a land resource base. Although Congress did not expressly address Native subsistence, it was and continues to be a Congressional expectation that the Secretary of Interior would protect subsistence users under their existing authority. See Note, The Alaska National Interest Lands Conservation Act: Striking the Balance in favor of customary and traditional subsistence use by Alaska Natives, 27 Natural Resources Journal 421, 425 (1987). Thus, In People of Gambell v. Clark, 746 F.2d 572, 575, (9th Cir. 1984), the 9th Circuit noted:

The needs of the Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives, See e.g. H.R. Rep. No. 523, 92nd Cong. 1st Sess. 5, Reprinted in 1971 U.S. Code Congressional and Administrative News, 2192, 2195; the land was granted, in part, in lieu of subsistence hunting and fishing rights. . . . 117 Cong. Records 36864 (1971) (Rep. McClure).

Based upon the foregoing, we believe that paragraph 13(b) of the Settlement Agreement, in order to conform with ANCSA and ANILCA, must be amended to read as follows:

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees, and Alaska village corporations to exercise their legal rights and obligations, both for the purposes of asserting and compromising claims for injury to, destruction of, or loss of Natural Resources, and affected ecosystems if any, belonging to, managed by, controlled, selected by, or appertaining to such villages and village corporations.

Sixth, it is our clients' view that the inclusion of Exxon

Pipeline Company, and in the agreement's apparent exclusion of Alyeska, which is owned in part by Exxon Pipeline Company, is not clear and must be amplified before we can offer you a view as to this portion of the agreement.

Seventh, we believe the definitions concerning Natural Resources and Natural Resource Damages (Agreement paragraph 6(c) and (d), page 5; MOA paragraph II (F) and (G) pages 6 through 7) specifically include lands and resources held by the United States in interim jurisdiction, the same constitute selected lands under ANCSA.

"Natural Resources", within its definition also includes resources which are appurtenant to lands selected by the village corporations, which resources the village corporations have a direct interest under ANILCA. See, for example, AMOCO Production Company v. Village of Gambell, 107 Sup. Ct. 1396, 1397 (1987) (applicability of ANILCA includes coastal waters to a point 3 miles from the coastline). The village corporations' restoration claims based upon subsistence use under ANILCA extends to 3 miles from the coastline. Scientific studies and assessments are essential to ascertain the extent of those damages, because village corporations have an obligation under ANCSA and ANILCA to protect the subsistence lifestyle, which extends to the use of marine resources.

The scientific studies and assessments which the Governments undertook earlier are coming to an end, according to news reports. As mentioned earlier, those studies and assessments have not heretofore been made available to the village corporations, either with regard to conveyed lands or selected but not yet conveyed lands. However, the State of Alaska has informed the village corporations that it will not be undertaking any further oil removal work after this season, which means that resource restoration must depend upon species hardy enough to withstand the effects of oil pollution. It is our clients' common view that said substitute resources are unacceptable. That the damaged or destroyed ecosystems appurtenant to the village corporations' property interests render their ability to safeguard subsistence lifestyles and economies and the cultural values thereto unperformable.

Thus, even if the settlement pays lip service not to compromising, the village corporations' claim and rights, as well as these obligations, it is clear that the practical application results in prohibition against the performance and enjoyment of legal obligations and rights.

Eighth, the agreement fails to address the federal government's obligation with regard to escrow of damages money, and does not provide any methodology for restoration with regard to lands and resources in its interim

jurisdiction, except in conjunction with the State, which has become increasingly adverse to oil reclamation and preservation of Native lifestyles.

Ninth, there is no meaningful participation on the part of the village corporations with regard to either their present or future rights and legal obligations.

Tenth, the State of Alaska cannot act as a trustee with regard to resources on lands selected but not conveyed to the village corporations.

Eleventh, both the settlement agreement and the MOA ignore the clear requirements pursuant to CERCLA at 42 U.S.C. Sec. 9651 as it relates to the Clean Water Act, recovering compensation for loss, injury, impairment, and damage or destruction or the ability of polluted ecosystems to recover. . . ." Page 5 of the agreement and consent decree, at paragraph 6(c) and paragraph II (F) of the MOA should be corrected to include this important provision.

Similarly, the MOA, at page 7, paragraph G, fails to address the duties of the federal and state trustees to settle claims for "impacted ecosystems".

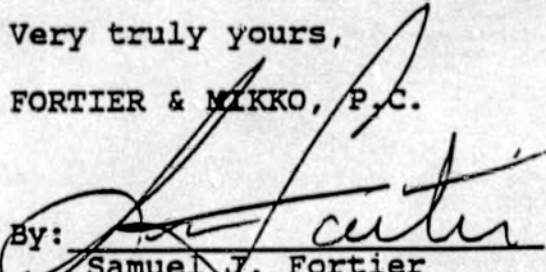
See also MOA at paragraph II (J), (definition of restore or restoration) but fails to address the damage to the ecosystems.

Based upon the foregoing, it is our clients' common view that the Department of the Interior should not enter into the settlement agreement until adequate consultation has occurred. It is Chenega's view that the Department of Agriculture in its capacity as a holder of interim

jurisdiction lands and resources selected by Chenega Corporation has failed to even so much as acknowledge Chenega's letter, and has not sought Chenega's views nor consulted with Chenega Corporation.

Very truly yours,

FORTIER & MIKKO, P.C.

By: 

Samuel J. Fortier

SJF:jmb (ltr-488/204.210.288)

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COPY WITH ORIGINAL SIGNATURE

16 APRIL 91

Dear Mr. Campbell and Ms. Herman: re: Exxon VALDEZ Settlement

Following are my comments on the proposed settlement.

Credentials and Disclaimer:

I earned an M.A. and Ph.D in Government at Claremont Graduate School and a J.D. (cum laude) at Georgetown. I passed bar exams in Alaska, Massachusetts, Hawaii, and New York and hold membership in the bars of Alaska and Massachusetts [only paperwork pending in the other states]. I came to Alaska to live in 1971.

However, I am representing only myself and, hopefully, the public interest here and am representing no other client. I am a pro se plaintiff in public interest litigation against the State of Alaska on a Marine Highways case involving the dedicated funds question.

I have been working as a reporter for five small Alaskan weekly newspapers, which is how and why I happen to have attended many of the Exxon VALDEZ settlement events. I am not representing any newspaper in this letter or in prior testimony.

I am a member of the Juneau Democratic Precinct Committee and chair a Democratic luncheon speakers' club, the Bill Egan Forum, but represent neither the Precinct nor the Forum here. In fact, I discussed and sought approval for my letter and testimony with no one else. So I am representing no one else, other than myself and the public interest, in these comments.

Not in Public Interest: One Branch of Government Intent

The settlement is not in the public interest because it intentionally creates or tends to create a one-branch form of government in which only the Executive has power, even though both State and Federal governments have a tripartite form of government.

The settlement in fact creates a one-branch form of government because only Trustees, who are appointed Executive branch officials, will control the spending of the bulk of the money recovered under

the settlement, because both Legislative branches--Congress and the Legislature--are removed from the appropriation, allocation function despite constitutional and court requirements that all money bills originate with the Legislative branch only, and because the settlement avoids the Judicial branch decision, except as a rubber stamp upon the Executive branch settlement itself and not upon the merits of the case.

This emphasis upon and factual creation of one-branch government is intentional and not accidental, as shown by the following direct and circumstantial evidence.

1. In late January or early February, Governor Hickel, responding to my report to him of a common legislative saying about all governors, that "a governor can cut, but he cannot add" [meaning that Alaska's governor has a line-item veto but only the Legislature can put items into the budget], said that he would try to find a way "to multiply." He made this comment in his offices in Juneau during a 'meet the press' session, but no one other than I heard the Governor's remark. Still, I did hear it.

The settlement, by creating a \$1 billion money pot administered by Executive branch officials not subject to Legislative branch oversight and direction, does 'multiply' Hickel's powers as Governor.

2. Attorney General [AG] Charles Cole, testifying to the Alaska House Judiciary Committee March 7,

a. when asked if his repeated failure to answer Committee questions about the settlement, on deadlines he chose, was an attempt to stall the Committee until after he had completed the settlement negotiations, said, "What difference would that make?"

b. said that legislative involvement in the negotiation process or in settlement approval would be "highly ill-advised public policy."

3. AG Cole also told the House Judiciary Committee that there were negotiators who did not want the Legislature to have the ability to make appropriations for any purpose. [Alaska's Constitution prohibits "dedicated funds" in order to let the Legislature make unrestricted judgment calls about each year's budget.]

4. AG Cole told the House Settlement Review Committee on April 5 that some settlement negotiators "who shall remain nameless" did not want Congress to control settlement funds.

5. AG Cole told Rep. Hudson and the House Settlement Review Committee April 5 that the Legislature could not have "advise and consent" powers over Trustee spending, but could be advisory only.

6. AG Cole admitted to the House Settlement Review Committee

that he had had no discussion with U.S. Assistant Attorney General [?title?] Richard Stewart over the possible division of natural resource damage claims between the State and the Federal government. [Remember this one; we come back to it later].

This is significant, because, if the governments had reached agreement on this division, then the State could have pursued its own claims in State court and any damages it won there clearly would have been General Fund monies clearly subject to the plenary power of the Legislature to appropriate as it saw fit. By failing even to have such a discussion, AG Cole acted consistently with an intent to withhold from the Legislature even the chance that it could exercise its constitutional power over appropriations.

7. AG Cole admitted to the Senate Settlement Review Committee that, even though regulations promulgated under the Clean Water Act required the deposit into the Federal Treasury of all damages recovered under the Act, "the Governor and I were unwilling to permit that deposit into the Federal Treasury," in part, because "it takes an Act of Congress to get money out of the Federal Treasury."

This is significant, because it shows both a willingness to violate Federal regulations, agreed to by both State and Federal negotiators, and an intentional effort to avoid Congressional control of settlement monies Exxon paid.

8. Alaska Representative Niilo Koponen said that the Hickel Administration "was relying on the settlement as a way of keeping payments out of the Legislature's hands." April 6-9 period.

While Koponen's saying so does not make it so, the fact that he said so means that I am not the only person to think it so.

9. On April 12, at a press conference that I did not attend but an uncut videotape of which I watched later, another reporter asked Governor Hickel a question I had not 'planted', namely, was it Hickel's intent to shift the balance of power from the Legislature to the Executive. Governor Hickel answered that he did have such an intent, that he was doing his accustomed role of giving increased Executive direction, that it was a counter to Legislative control during the late '70's, and that he expected to be at least partly successful at encouraging that shift that was trying to happen.

This is significant because now the Governor's intent to increase Executive branch control was made public--not just confided in me--and not at my instigation or suggestion.

So, therefore, the settlement is not in the public interest because Governor Hickel and others actively intended to--and did act to accomplish their intention to--create a large sum of money subject only to Executive branch control, taking acts both of commission and omission to accomplish this improper end.

Illusory Benefits of Settlement

The settlement is not in the public interest because it does not end litigation the way a properly-structured settlement would do. Because ending litigation is the primary advantage of a settlement, the continued existence of outstanding litigation means that the proposed settlement does not achieve the ends for which it was created. That is, the benefits of settlement are illusory.

1. Settlement benefits are illusory, according to former AG Doug Baily, because now individuals who sued Exxon will also have to sue the State of Alaska. Thus, said both Baily and Assistant Revisor of Statutes Pamela Findley to the Juneau Bar Association luncheon April 12, Alaskans will be suing Alaska, leading in Baily's words to "legal civil war." Findley and Baily foresaw difficult political decisions for legislators who would be asked to fund litigation against their own constituents.

2. Settlement benefits are also illusory, because public interest litigants [who need not pay their governmental opponents' costs, because under Alaska law it is in the public interest to get public answers to public interest questions] have, under Alaska's Constitution, a right to a legislature which itself exercises its sole right to make appropriations.. See Kenai Lumber.

3. Settlement benefits are also illusory, because under Alaskan law, citizens can intervene in a government case merely by showing that possible non-feasance occurred. see McCormick v. Smith, a 1989 Alaskan case in two parts [see both].

NOW go back to the AG's failure even to ask Richard Stewart about the division of natural resource damage claims between the two governments. Because Cole failed even to ask that question, the legislature was excluded even from the chance of getting the appropriation power due it under Alaska's constitution.

And that "possible non-feasance" is enough to permit intervention of right by a public interest litigant(s) who want to enforce their constitutional right to a Legislature that makes appropriations.

Alyeska Received Too Great a Release from Liability

1. AG Cole for the first time testified April 13 in Kodiak that Exxon had insisted that Alyeska be released from liability, because, Cole said, Exxon did not want to settle ITS claim only later to become liable for Alyeska, which it partly owns.

2. But, said Cole, that release was so broad that Alyeska was also released from liability to Alaska for natural resource damages even if Alyeska had either acted independently from Exxon or acted on behalf of another 3rd party, most likely another owner.

3. And, given Congressman Miller's letter showing that Alyeska and its owner companies most likely in fact intentionally violated promises to Congress, there would be reasons for someone to bring suit against Alyeska.

So, for these three reasons good and true, I urge you to "just say 'no'" to the settlement.

Violating State Right to Appropriate Funds Without Restriction

Once again, however, let me explain, adopting Rep. Ramona Barnes' analysis, the argument for State control of some portion of Exxon payments.

1. Although it may be difficult to draw the line exactly which separates Federal from State natural resources damaged, nevertheless it is a virtual certainty that there are some damaged natural resources that would belong to the State; i.e., that are State assets.

2. If there are even any State assets, then the part of the recovery which applies to those State assets is itself in reality a State asset, albeit in financial rather than in natural resource form, and however differently denominated. But, thought the form may differ, nevertheless the recovery from Exxon is to that degree a State asset.

3. Alaska's constitution and court cases here give ONLY to the Legislature the right to make appropriations of State assets.

4. The Alaska Constitution further prohibits "dedicated funds," i.e., funds spent for a special purpose. Therefore, funds in the General Fund are subject to the general appropriation power of the Hickel Administration.

5. So, therefore, the Legislature is intended by the constitution specifically to consider all possible State needs, not just natural resource damage restoration needs. Alaska has an abysmal infant mortality rate and some of the nation's worst per-capita rates for alcoholism, drug abuse, homicide, suicide, accidental death. The U.S. may differ; still, that is Alaska's view: the legislature should be able to balance needs for one more deer along the north slope against needs for a clean water drinking system in a rural area.

I hope this all makes sense. I am including a fact sheet and calendar or diary of Settlement talk events.

Sincerely & cordially

Joseph A. Sonneman

ACE 417363

GOVERNOR MEETS PRESS, Jan-Feb. ?

Responding to 2nd floor saying that "a governor can cut, but he can't add," Gov. Hickel says perhaps he can find a way to "multiply."

HOUSE JUDICIARY, February dates

AG repeatedly refuses to answer Committee questions about settlement progress and clauses, alleging incomplete answer-preparation process.

HOUSE JUDICIARY, 3/7

Asked if his repeated failure to answer Committee questions, on deadlines he chose, was an effort to stall the Committee until after the settlement was complete, the AG says "What difference would that make?"

AG says legislative involvement in negotiation process or settlement approval would be "highly ill-advised public policy."

HOUSE JUDICIARY, Feb-March??

AG says some settlement negotiators do not want Legislature to be able to appropriate to any purpose.

HOUSE SETTLEMENT REVIEW COMM., ??

AG says negotiators had "no substantive discussion" of Legislature's power to appropriate.

AG does not answer Rep. Gruenberg question re: any discussion of dividing the damaged resources between Alaska and U.S. governments. Gruenberg asks again if "any discussion." AG then says he did not discuss that with U.S. Asst. AG Stewart.

AG says Hickel got idea for \$1.2 billion figure from "intuition."

SENATE SETTLEMENT REVIEW COMM. ??

AG says Hickel got idea for \$1.2 billion figure from analysis.

HOUSE SETTLEMENT REVIEW COMM, 4/5

AG says some settlement negotiators "who shall remain nameless" do not want Congress to control funds.

AG tells Rep. Hudson that the Legislature can not have "advise and consent" power over Trustee spending, but may have advisory-only role.

Rep. Barnes says that some damaged natural resources were State assets, that money recovery for that damage must thus also be a State asset even if not so called, and that only the Legislature can appropriate State assets. "So I have a constitu-

by Joe Sonneman

tional problem" with the proposed settlement's Executive branch trustee control of most settlement money.

SENATE SETTLEMENT REVIEW COMM., 4/6

AG says he considered alternative, that Legislature might want to fund restoration, would need half of Exxon money and Legislature might want to spend it on education.

Private lawyer questions settlement amount as inadequate, especially upset that no trial means no chance of punitive damages.

AG says he would consider releasing data if Legislature asked him to do so by a joint resolution. Sen. Eliason asks why the Legislature would want to take Cole off the hook and put themselves on it.

CONG. MILLER LETTER, 4/8

U.S. Rep. George Miller writes Judges Holland & Sporkin 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."

Cong. Miller includes photocopy telex evidence as proof, asks the judges not to accept plea bargain.

SENATE MEMORANDUM, 4/8

Findley writes that possible constitutional issues exist, both as to dedicated funds--because settlement receipts mostly for special purposes, though "federal programs" exception may apply--and as to the power only of the Legislature to appropriate--because Trustees, not Legislature, disburse Exxon settlement payments.

FEDS RELEASE STUDY SUMMARY, 4/9

U.S. Govt. releases summary of scientific studies, showing spill damage as reportedly twice the level previously known.

LEGISLATOR COMMENTS, 4/6-9

Rep. Sharp observes that if State & Federal trustees are not unanimous, a single Federal judge

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FROM:

Mr. CONNOR
324 Willow St
Juneau, AK 99801

ADDRESSEE'S COPY

TO: Telephone Number: _____

BARBARA ALERBY
ATTORNEY GENERAL OFFICE
STATE OF ALASKA RT. 200
1031 WEST 4TH AVENUE
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ACE 417366

29

Ley Schleich
P. O. Box 874216
Wasilla, AK 99687

RECEIVED
DEPARTMENT OF LAW

'91 APR 18 P1:03

April 17, 1991

Barbara Herman
Office of the Attny. General
State of Alaska
1031 W. 4th Ave. #200
Anchorage, AK 99501

ATTORNEY GENERAL'S OFFICE
ANCHORAGE, ALASKA

Dear Ms. Herman,

As a thoughtful citizen, I would like to take this opportunity to express my deep concern over the Exxon Valdez Oil Spill Settlement plans. I urge you to immediately request Judge Holland to suspend a determination on the settlement due to lack of adequate opportunity for public study and input. Secondly, I urge you to work toward bringing about the release of all the state's economic and scientific data related to the spill and establishing better methods for public participation in decision-making related to how the settlement money will be spent.

My reasons for this request have to do with my perception that the current settlement plan is not in the best interest of all Alaskans. First, the monetary amount does not appear to be large enough to cover public costs already spent on the spill clean-up and litigation activities, plus further clean-up and research costs, plus compensation costs, plus an adequate penalty on the corporation. While Exxon is not the sole culprit in the tragedy and should not bear the full burden of paying for it, the terms of the \$900 million settlement seem far from a fair and just payment.

Second, I am uncomfortable with the settlement plan's process for deciding on how the money will be spent. The Trustees Council, as designed, excludes adequate public participation, especially by the communities most affected by the spill and by environmentalists. It allows too much power to be placed in the hands of political appointees who in all likelihood will be more sympathetic to corporate / oil / development interests than to the public at large.

I was in Seward, Cordova, Chenega Bay and Tatitlek three weeks after the spill, and observed directly the impact of the spill on the environment and the local residents. I believe that we all share a part of the responsibility for the spill to the extent that we all are consumers of energy and petroleum products and therefore perpetuate dependence on oil and, perhaps indirectly, lenient environmental protection laws. However, I feel that we can learn from our past mistakes and try to establish mechanisms to avoid

ACE 459981

another disaster. I do not believe that the current settlement plan does this, and urge you to influence the process in such a way as to build in greater environmental protection and true democratic input.

Thank you for your consideration of this matter.

Sincerely,

Ley Schleich
Ley Schleich

Lay Schleich
P.O. Box 874218
Wasilla, AK 99687-4218

ACE 459983



Barbara Herman
Office of the Attny General
State of Alaska
1031 W. 4th Ave. #200
Anchorage, AK 99501

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Department of Law

APR 18 1991

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

April 16, 1991



Dear Ms. Herman,

As a concerned Alaskan citizen, I am shocked over the proposed oil spill settlement. Is it true that ~~translates~~ to relative amounts, it's the same as fining a person earning 40,000 a year \$39 a year (max.) for 10 years? That's the statistic we hear.

I don't agree that there has been meaningful public participation in the assessment of injuries, and discussion of restoration. The meetings have been private, and the scientific data has not been released by the state. I care - I want to be able to access and study this information. I want to be informed of what our state is

and economic data released. I want an opportunity to participate in the use of the settlement money. This spill has been a part of my life since its occurrence, and like so many other Alaskans - both old and young - I need and deserve to know what is the outcome. I feel personally cheated by such a puny settlement. What message is that for our oil companies? We must become more serious about protecting our environment - it's urgent in the 1990's.

Please do what you can, in your position of power, to represent us in demanding release of the information, public access, and also some opportunities for public input on spending the money environmentally.

Thank you -

Dr. Tara Walker, ELI
Alaska Pacific University
4101 University Drive



Alaska Pacific University
4101 University Drive • Anchorage, Alaska 99508-4672



Barbara Herman
Office of the Atty General
State of AK.
1031 W. 4th Ave, #208
Anch AK 99501

ACE 459986

A New Universe New World

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Department of Law

APR 18 1991

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

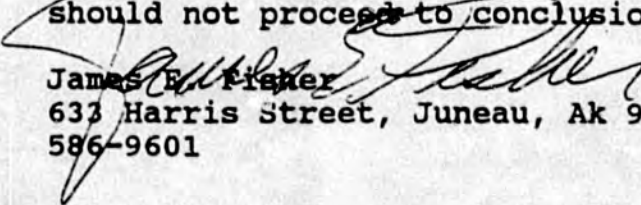
4/14/91

Alaska Attorney General
1031 West 4th Ave., Suite 200
Anchorage, AK 99501Attn: AAG Barbara Herman
RE: EXXON VALDEZ proposed settlement

The proposed settlement of the EXXON VALDEZ case appears to have deficiencies harmful to Alaska and Alaskans, as follows:

1. The settlement doesn't seem to provide enough money in a timely fashion.
2. Since the settlement is not global in scope, it appears Alaska could be sued much more than it has been to date, therefore being unable to "put the matter behind us". In this event wouldn't legal expenses be as much or more than litigating the case to a judicial conclusion?
3. Is the case to be actually settled, or will Alaska be converted from a plaintiff to a defendant?
4. Would a proceeding under Alaska law permit attorney's fees, full costs and prejudgment interest so a sum closer to actual damages be secured rather than under the Clean Water Act in the Federal Court?
5. Isn't there some hazard of releasing Alyeska from its liability for resource damage?
6. The settlement appears to be poor public policy in so far as it would leave individually damaged Alaskan communities and people to fend for themselves against the enormous resources of Exxon.
7. In view of the continuing control over the settlement proceeds, it would seem the Federal agencies are much more advantageously treated than the State? Another aspect is the constitutional problems with the proceeds going to a trust fund, and not being subject to the appropriation process of the Legislature.

From the foregoing very brief summary, it seems the settlement should not proceed to conclusion.


James E. Fisher
633 Harris Street, Juneau, Ak 99801
586-9601

ACE 459987

633 Harris Street
Juneau, AK 99801

ACE 459988



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P.O. Box 794
Kasilof, Ak. 99610
April 15, 1991

Barbara Herman
Office of Atty. General
State of Alaska
1031 W. 4th Av. #200
Anchorage, Ak. 99501

RECEIVED
Department of Law

APR 18 1991

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

Dear Ms. Herman,

I am aghast & appalled at the \$1 billion settlement Gov. Hickel + Mr. Cole made with Exxon. Why didn't our state officials make public first the results of economic studies that were made to establish, to some degree, the financial damages done to Prince William Sound?

Of course the damages are priceless. Of course no one has or will be able to clean up the Sound. Of course the Sound cannot be "restored" by money or by ANYTHING people can do.

ACE 459989

What is important is that this NEVER HAPPENS AGAIN. I believe this spill could have been avoided if Exxon and the Alyeska Pipeline Service Co. had not become complacent with costs and been negligent.

Exxon needs a whopping fine to give them and other oil companies the incentive to be responsible.

\$1 billion to Exxon is peanuts to them.
\$1 billion out of \$117 billion?!!?!

Proportionally, I get fined more for speeding!

The fine needs to hurt Exxon, not us. We have been hurting enough.

- To give you another smaller scale example: Commercial fishermen (I know - I am one) have learned that if they fish outside the law just a "little bit" that they can make

sometimes thousands of dollars in a relatively short time. Many have learned that the fines are only a few hundred dollars - if they get caught at all. So, of course, they are out there next opening fishing illegally again. The few hundred dollars are nothing - no incentive whatever - to encourage compliance with the law.

So, I believe it's the same with this proposed settlement. The unlawful fishermen laugh and so is Exxon.

Please think this over again

Thanks for listening,
Kathleen Holt

Kathleen & Bill Holt
P. O. Box 794
Kasilof, AK 99610

ACE 459992



Barbara Herman
Office of the Atty General
State of Alaska
1031 W. 4th Ave, #200
Anchorage, Ak. -
99501

Clare Pavia
Box 2251
Valdez Ak 99686

34

April 18, 1991

Barbara Herman
Assistant Attorney General
State of Alaska
1031 W 4 th
Anchorage, Ak 99501

Dear Ms. Herman,

I am writing in response to the Exxon Valdez Settlement. The settlement is not in the best interests of Prince William Sound and the communities of this region. One of my major concerns is that the amount of money may not be sufficient to pay for the necessary cleanup, restoration and continued studies of the impacts caused by the spill.

Without the availability of data from the economical and scientific studies performed it is impossible to judge what amount is sufficient. The knowledge that can be had from these studies will also be beneficial to the people and resources of Prince William Sound as well as industry, government, and researchers.

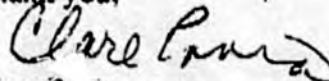
People living in and near Prince William Sound should not have to doubt the quality of the food they gather from this region now and in the future. Data from studies performed could help people make informed judgements about the quality of the food. Alaska needs to learn from this disaster in order to protect the land, water, and air from future harm. Industry, government and researchers need this information to restore the sound and to clean up future spills in Alaska and the world.

The ecological balance in areas touched by the oil has been greatly disrupted. I have been on many beaches in Prince William Sound, Homer, Kodiak, and Seward effected by this spill. The damage caused by the oil and clean up is substantial. Many beaches were sterilized by cleaning, leaving no sign of life. Organisms are returning and regenerating but the disruption to the natural cycle could leave an effect for years to come. It may take years to realize all the problems associated with the spill and clean up. For this reason the data collected thus far needs to be available to evaluate and studies need to continue to monitor the health of the sound.

Violators of Federal and State laws are to be held accountable. We are sending the wrong message if corporations are able to cause damage to the environment, economy, and people's mental health without being fully penalized. Industry in Alaska needs to be aware that government and the public want them to be fully responsible for the prevention and clean up of all spills, big or small.

The public needs to have data available in order to judge if this settlement is reasonable. Public participation is essential, meetings related to this case should not be behind closed doors. A public advisory group should be formed in order to advise the trustees how to structure the decision making tree and the budget. Money received should be spent on restoration, land acquisitions, buying development rights, and to support on going studies. Money should not be spent on clean up or government expenses incurred. Exxon should continue to pay those expenses out right.

Thank you,



Clare Pavia

Thomas A Campbell, NOAA
Gene Kubina, State Legislature
Kurt Menard, State Legislature
H. Russell Holland, Court Clerk

ACE 460001

ATTN: Barbara
Herman
1031 with RM-200
Anch. AK. 99501

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Barbara,

I regret that I started this petition ~~for~~
too late and had no time to commit to it. For the
past 2 weekends I have been out in Prince William
sound digging around in oil. Lots of oil remain in
our beaches. I urge all involved not to be too hasty to
settle this thing.

Best wishes,

Ted Raynor.

Ted Raynor



See Spill Action
hand. delivered
llw

ACE 417506

To whom it may concern:

We oppose the proposed settlement between EXXON and the State of Alaska regarding the EXXON Valdez oil spill for the following reasons:

- o The amount of the settlement is not a deterrent to polluters. EXXON and their stockholders have indicated that the amount and terms of the settlement will not have any noticable impact on them. A sliding scale needs to be established whereby fines are based on a corporation's ability to pay as well as on the amount of damage.
- o The state studies should be released. Alaskans paid for the studies and they need the information to make informed decisions on the settlement.
- o The recently released summary of the federal study indicates that damage is far worse than previously believed. For example, hundreds of thousands more birds were killed than most Alaskans had been led to believe. It is too soon to know what the long term impact will be. EXXON should be required to cover these damages as they become known.
- o EXXON profited during the spill, they didn't finish cleaning up the spill, and now it appears that they will not be prosecuted for their crimes.
- o Future cleanup costs should not come out of the settlement money.
- o New revelations about Alyeska Pipeline confirm the suspicions of many that neither Alyeska nor the owners. (including EXXON) planned to clean up a large spill beyond the Valdez area.
- o Attorney General Charles Cole has a conflict of interest and should not have negotiated the settlement.

We feel that \$1 billion is probably not enough to cover the long term damage to Prince William Sound, let alone Kenai Fjords, the Katmai coastline, Shuyak, Afognak, Kodiak, Barren Islands Maritime NWR, the Kachamak Bay State Park and hundreds of miles of once pristine coastline. Moreover, how can you put any dollar value on the wildlife and natural beauty of that area?

It is our opinion that the Hickel Administration is so bent on gaining access to the Arctic National Wildlife Refuge they are willing to mislead the public into thinking that Prince William Sound and the Gulf of Alaska have recovered, while in fact, there is extensive and continuing damage.

Name	Signature	Address
PATRICE POIROT	Patrice Poirot	Box 770 GIRDWOOD AK 99587
Ted Raynor	Ted Raynor	13801 Schubert Circle Anchorage, Ak. 99516
Steve Poirot	Steve Poirot	P.O.B. 770 Girdwood AK 99587
Tom Rausett	Tom Rausett	HCO2 7669 Palmer 99664

ACE 417507

DAN FARKWEST	<i>Dan Farkwest</i>	1425 GARDEN ST. 99508
JONATHAN K. ROME	Jonathan K. Rome	1977 1/2 Hillcrest Rd., L.A., Cal. 90065
VERENA DAY	<i>VT Day</i>	8212 Seaclyff. Anch. AK 99502
Robert A. Day	<i>Robert A. Day</i>	8212 Seaclyff Anch AK 9950.
Sue Libenson	<i>Sue Libenson</i>	1306 W 6th #10 Anch AK 99501
Karen Wood	<i>Karen Wood</i>	1237 W. 11th Ave Anch AK 9950
Cliff Eames	<i>Cliff Eames</i>	2613 W. 33rd, #2, Anch, AK 995
Ruth Wood	<i>Ruth Wood</i>	540 C St, #307, Anch, AK 995
Peter Montesano	<i>Peter Montesano</i>	1808 Arctic Anch. 9950
KAREN JETTNER	<i>Karen Jettner</i>	618 W. 14th Ave Anchorage AK 99501
CAROLE LAWSON	<i>Carole Lawson</i>	2400 FORAKER, ANCHORAGE AK 99517
Bob Childers	<i>Bob Childers</i>	1231 W. 7th Ave Anchorage AK 99501
HAROLD HENRY	<i>Harold Henry</i>	1401 W. 25th #2 Anch 99503
SHER CANADY	<i>Sher Canady</i>	430 W. 7th Ave Anch AK 9950
SHERYL DEAN	<i>Sheryl Dean</i>	430 W 7th Ave Anch AK 99501
Deane Raynor	<i>Diane Raynor</i>	5132 W. 72nd Anch AK 9950
MONTY SARGENT	<i>Monty Sargent</i>	2007 ARCTIC BLVD #13 ANCH AK. 99503

ADLER, JAMESON & CLARAVAL

Attorneys at Law

38

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April 18, 1991

Thomas A. Campbell, Esq.
General Counsel, NOAA
U.S. Department of Commerce,
Room 5818
14th & Constitution Avenue, N.W.
Washington D.C., 20230

VIA FACSIMILE

Barbara Herman, Esq.
Office of the Attorney General
State of Alaska
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

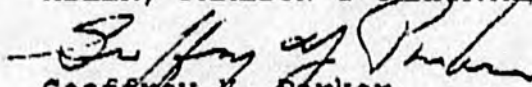
Dear Mr. Campbell and Ms. Herman:

Enclosed are my comments to Judge Holland regarding the Exxon Valdez criminal plea and civil settlement. Our clients are opposed to this settlement for numerous reasons. These reasons are explained in the enclosure, but several are worth summarizing.

First, both the criminal plea and the civil damage settlement are grossly insufficient. Second, the settlement fails to make clear its relationship to or protect third-party claims, particularly claims for loss of non-market use value asserted by private litigants under theories other than the Clean Water Act. Third, because the injuries resulting from the spill are greatest to the public, the governments should have provided an opportunity for public interest litigants to participate in this settlement. By not doing so, the Trustees have greatly eroded the public trust in this settlement, as is evident from the overwhelming opposition to it. Fourth, by seeking to maintain a lid of silence on the damage calculation and injury studies, the government provides no mechanism for either assisting private plaintiffs or restoring the public confidence that is needed.

Sincerely,

ADLER, JAMESON & CLARAVAL


Geoffrey N. Parker

GYP/myg/1266#7

Enclosure - My comments to Judge Holland regarding the Exxon Valdez criminal plea and civil settlement

ACE 417512

ADLER, JAMESON & CLARAVAL

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April 11, 1991

Honorable H. Russell Holland
United States District Judge
U.S. Courthouse
Anchorage, Alaska 99501

Re: Comments on Criminal Plea Agreement in United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR

Dear Judge Holland:

These comments in opposition to the proposed criminal plea and settlement are submitted in behalf of our clients, the Alaska Sport Fishing Association and named individuals who are recreational plaintiffs, the Area Business Class, and approximately 500 other claimants in the civil litigation arising from the Exxon Valdez oil spill. Those plaintiffs represent a variety of recreational, commercial, subsistence and other pursuits involving consumptive and nonconsumptive use of the fish, wildlife, lands and waters affected by the spill. The Association is the largest fishery conservation organization in Alaska and has through political, legislative, administrative, and litigatory efforts achieved conservation of more than a dozen areas, totalling nearly 7 million acres of fish and wildlife habitat in Alaska since the enactment of ANILCA in 1980.

Because the Association and these class and individual plaintiffs are concerned for the conservation of fish and wildlife habitat, and because the monies from this plea and settlement may be used for such purposes, the criminal plea and settlement are of particular concern. The proposed fine is inordinately low, particularly when combined with the inordinately low settlement of civil damages. The manner with which they were reached erodes confidence.

A. This Court Should Not Allow the Governments to Settle Without Encouraging the Governments to Provide an Opportunity for Public Interest Litigants, and Probably Also Private Class Litigants, to Participate in Settlement of Negotiations.

Fundamentally, this is a political case that goes to the heart of how our judicial, executive, and legislative branches of government, as well as our corporate institutions, deal with environmental injuries of great magnitude that affect natural resources and the public in innumerable and complex ways. Here, the executive branch has chosen to operate and settle in isolation, without any opportunity for public interest litigants and private interest litigants to participate.

In a case of this nature, where the science, injuries and damages involve complex relationships between public and private claims, that should not be encouraged. It erodes confidence in the settlement, our corporate institutions and government in general. The importance of such confidence reaches far beyond this spill. By allowing public comment, this court has commendably sought to allow the public to be heard. But informed comment has been thwarted by the long silence on science and the continued silence on damage calculations. That history of silence, isolation and the need for confidence warrants rejection of this settlement. That is essentially the point reached by Congressman George Miller, when he concludes that without

confidence in the Department of Justice, "how is it that Congress and the people . . . can rely on (governmental or corporate) assurances in the future?"

B. This Court Should Apply the Alternative Fines Act, 18 USC Section 3571(d).

In imposing sentence, this court should apply the Alternative Fines Act for purposes of determining the appropriate criminal penalty. The Act provides that the court may impose up to twice the pecuniary loss resulting from the offense. In this case, the defendants have already paid out approximately \$300 million in damages for pecuniary losses occurring in just 1989 and for the most part to just the commercial fishing industry. There are as yet outstanding in excess of \$56 billion in claims filed against the TAPS Fund, much of which is for pecuniary loss. This court should not hesitate to conclude that the pecuniary losses resulting from this spill vastly exceed the \$300 million already paid out.

Therefore, this court is faced with the problem determining an appropriate fine based on only partially determined pecuniary losses. These plaintiffs urge this court to impose a fine as follows: \$600 million (for twice the pecuniary losses already determined) plus \$400 million (not twice, but to address pecuniary losses yet to be determined) with a remittance of any portion of the latter that is not determined.

C. The Court Should Not Accept the Plea Agreement Until the Court Has Received a Summary of the Damage Calculation Studies, and Acceptance of the Plea Agreement Should Be Contingent Upon Scientific and Economic Studies Being Made Public and Being Continued.

It has been impractical for the public, this court, or state and federal officials and legislators to evaluate this settlement or the criminal plea without scientific and economic data being available. While the recent federal release of scientific information shows the injuries to be long lasting and worse than Exxon claims, more importantly, the release shows that the entire ecosystem has been attacked from the lowest to the highest trophic levels.

The signs of this are: (1) the decline in species diversity, abundance and recruitment of benthic organisms that are important to predator-prey relationships and the food chain, (2) the widespread loss of kelp, which has been conservatively documented in similar Alaskan ecosystems to provide 58.3 percent of the organic carbon load into the environment (see Attachment A), and (3) the widespread incidence across many higher trophic species of continuing lethal and sublethal effects such as lost reproductivity, debilitating lesions, mutagenic effects, MFO induction (multi-function oxidases which attack testosterone and estrogen), behavioral and territorial disruptions, low body weight, and decreased growth rates. In general, these are the types of (post-initial mortality) injuries to be expected at higher trophic levels when the lower trophic levels are severely disrupted by oil spill contaminants. Furthermore, these injuries are most prevalent among organisms that more often than not have non-market (and often nonconsumptive) use and intrinsic value, such as marine birds, harlequin ducks, eagles, sea otters, dolly varden, killer whales, harbor seals, and intertidal benthic life, as well as among marketed and non-marketed harvested species such as salmon and shellfish.

Of greater importance are the damage calculation studies. Neither the state or federal governments has released the studies that measure the value of market and non-market losses, including commercial, subsistence, recreational, and intrinsic losses. Various reports in the press, based on interviews with economic experts, have placed the natural resources damages at multiple billions of dollars. A range of \$3 - 10 billion has been mentioned in several recent reports as

coming from economic studies conducted by the State of Alaska that were designed to measure the non-use and intrinsic values associated with the injured natural resources.

To reach a reasonable decision on this settlement, this court needs those studies, particularly the intrinsic value study, every bit as much as it needs the scientific summary. To obtain a summary of the intrinsic value damage study, this court should subpoena the testimony and any summaries prepared by the following experts who, by information and belief, were retained as expert witnesses by the Alaska Department of Law and performed the intrinsic value study: Dr. Richard Carson, Associate Professor of Economics, University of California, San Diego; Dr. Robert Mitchell, Professor of Sociology, Clark University, Worcester MA; Dr. Michael Hanemann, Associate Professor of Agricultural & Resource Economics, University of California, Berkeley; and Dr. Raymond Kopp, Director, Quality of the Environment Division, Resources for the Future, Inc. Washington, D.C. In addition, this court should subpoena Dr. Norman Meade, Chief Economist in the NOAA Damage Assessment Branch, Rockville, MD, who managed the federal studies of recreation damages and intrinsic values, and the following experts who, by information and belief, were retained as expert witnesses by the U.S. Department of Justice to perform those studies: Dr. Alan Randall, Professor of Agricultural Economics, The Ohio State University, Columbus; Dr. John Hoehn, Assistant Professor of Agricultural Economics, Michigan State University, East Lansing; and Drs. Nancy Bockstael, Kenneth McConnell and Ivar Strand, Professors of Agricultural & Resource Economics at the University of Maryland, College Park.

The federal and state studies of intrinsic value employed the contingent valuation approach that was recently upheld by the U.S. Court of Appeals for the District of Columbia Circuit. By information and belief, these studies had been under way for a period of about eighteen months at the time the settlement was submitted to this court and they had reached preliminary conclusions indicating a range of \$3 - 10 billion for the non-use component of the natural resources damages. The range arises from the fact that, by design, the studies sought only a lower bound on the damages and reflects differences due to the use of willingness to pay versus willingness to accept, differences in the payment vehicle and the period of time over which payments would be made, and -- most importantly -- differences in the extent and duration of the natural resources injuries. In the light of the scientific information concerning these injuries that has just been released by the federal government, it is more than likely that a final analysis of the contingent valuation data will place the value of the non-use damages near the high end of the \$3 - 10 billion range.

We urge this court not to accept this settlement and plea agreement until such information is before it and that any acceptance be contingent on release and continued assessment of damages for loss of commercial, subsistence and recreational use of natural resources, as required by 43 C.F.R. 11.83. By information and belief, including statements of Attorney General Cole at the April 6 legislative hearing, we believe those studies are not complete and that the governments have effectively turned their backs on their citizens.

D. The Settlement Represents a Gross Violation of the State and Federal Governments' Fiduciary Obligations as Trustees for the Natural Resources Injured by the Oil Spill.

From numerous press accounts of the settlement, it is abundantly clear that it was a political decision on the part of a few key players in the state and federal governments who bypassed the entire natural resource damage assessment process. By information and belief, the amount of the settlement was in no way grounded in the information developed by the scientists and economists working on the damage assessment. The idea of settling for around one billion dollars originated with Governor Hickel a few weeks after the election, if not earlier -- well before he had taken office or had obtained access to the information developed by the damage assessment.

At the federal level, the settlement was promoted by Secretary of Transportation Skinner, who is not a trustee and who, by his own account, was not conversant with the findings of the damage assessment.

The final agreement calls for payment of \$900 million for natural resource damages over a period of more than 10 years without interest. The trustees' decision to forego interest on the natural resource damages violates the decision of the DC Circuit Court of Appeals upholding payment of interest at a rate of 10%, and reduces the costs of conducting the damage assessment and the costs of restoration, which would be fully recoverable with interest accruing from the time that they were incurred. When these costs are subtracted from the amount of the settlement and the remainder is converted to present value terms, recognizing the time value of money, the settlement for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent and related natural resource values amounts, at best, to about \$450 million.

By information and belief, this trifling sum is grotesquely out of proportion to any reasonable estimate of these damages and bears no relation whatsoever to the information developed by the state and federal damage assessment teams. Indeed, the trustees would have reached a figure considerably larger than \$450 million if they had merely taken the estimated kill of fish and wildlife immediately after the spill and multiplied this by replacement cost figures that have been used in earlier cases to value a very limited set of natural resources damages.

For example, in the case of the T/V Puerto Rican oil spill off the coast of San Francisco in 1984, NOAA published a damage assessment report in 1986 valuing the birds killed in the incident at from \$575,000 to \$1,528,000 using the replacement cost method, based on estimates from zoological institutions and supply houses of what it would cost to obtain replacement specimens of the birds affected. (See Attachment B.) This case was subsequently settled for about \$750,000. The Exxon Valdez spill involves many of the same species of birds. NOAA's estimate of the replacement cost for these birds was from \$200 to \$500 per bird at 1986 prices. When these replacement costs are applied to the estimates of bird losses just released by the federal government for the Exxon Valdez spill, and when similar replacement costs are applied to the many other wildlife and fish losses and the injuries to land, it is evident that a damage estimate of well over \$1 billion would be obtained for just initial effects.

It is widely recognized, including by the NOAA Attachment, that estimates of replacement cost from supply houses significantly understate the true cost of replacing of wildlife, quite possibly by an order of magnitude because it is impossible to buy a half million wild birds, let alone other wildlife. Furthermore, because of delays before restoration can be effected, there are additional, interim, losses to the fish and wildlife populations that would have to be added to this \$1 billion of damages. One would also have to add the loss of recreation and other use values. The resulting total damage would be compounded at 10% interest from the time the damage occurred until the time that payment was received by the trustees. All of this is added to the state and federal governments' other expenses for damage assessments, cleanup and restoration that are fully recoverable under existing law.

By settling for an amount that is so much lower in present value terms, and by failing to provide a credible explanation of the settlement or to relate it in a meaningful way to any theory of damage valuation, the trustees have cast aside their fiduciary obligations to determine the magnitude of natural resources damages and account for them to the general public. If this court does not intervene, it will send a signal that such wanton misconduct by trustees can become the norm in all future natural resource damages cases.

Furthermore, the gross imbalance between the actual settlement of \$450 million for natural resource damages and any reasonable accounting of such damages makes a mockery of the re-opener clause. Under this clause, an amount no more than \$100 million is payable in 2002 for injuries that could not reasonably have been known at the present time. According to press reports, William Reilly, the Administrator of the EPA had recommended that \$300 million be set aside for this purpose. When viewed as a proportion of the likely natural resource damages that already are known to the trustees --if they choose to consult their damage assessment -- even this amount seems small. By failing to provide any rationale for capping the re-opener at \$100 million, the trustees have violated their fiduciary obligations and set a bad precedent for future natural resource damages cases.

E. This Court Should Strike the Prohibition on Judicial and Administrative Review in Paragraph IV B.

Paragraph IV B provides that the State of Alaska may spend monies from the criminal plea without public objection, challenge, or judicial or administrative review. This prohibition is unconscionable. It allows the State of Alaska to spend in any manner whatsoever and should be stricken from the agreement.

F. Alyeska Should Not be Excused From Criminal Liability.

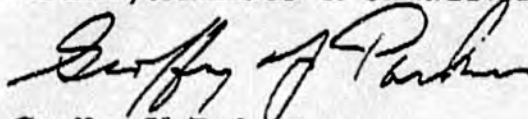
Congressman Miller has described Alyeska's broken promises regarding its ability to prevent or respond to a spill of this magnitude. The merits of any criminal case or civil penalties against Alyeska cannot be determined without court proceedings, but to foreclose that possibility erodes confidence that government diligently prosecutes major corporate perpetrators of environmental crimes. The exculpation of Alyeska should be stricken.

CONCLUSION

The political nature of this highly public case demands that the court scrutinize carefully the secretive process and evidence behind this settlement. Private litigants, particularly public interest litigants, should not have been foreclosed from that process. This court can redress that process by rejecting this criminal settlement and effectively urging the governments to pursue a more open settlement of civil aspects of this case brought by both governments and numerous public interest and class litigants. By so doing, this court will be sensitive to its own vital role in sustaining public confidence in public institutions.

Respectfully submitted,

ADLER, JAMESON & CLARAVAL


Geoffrey Y. Parker

to 32%. K_2O = 8 to 9%, and CO_2 = 27 to 32% (3-5, 15). Analyses of fresh samples, which were sealed before complete cooling, indicate that the 1988 lavas were almost water-free. The volatile contents of F (2.5 to 4.5%), Cl (3.5 to 5%), and SO_2 (4 to 5.5%) are higher than reported previously for the 1960 lavas (15). Such high volatile concentrations no doubt contributed to the lower solidus temperature of the lava of Oldoinyo Lengai compared with that of the synthetic system studied by Cooper et al. (13).

The temperature measurements on natural lava flows are in good agreement with experimental melting-temperature determinations carried out on samples from the same flows. The rock powder of the natural lava melted easily at temperatures of 500° to 550°C. The melting temperature at 1 atm was determined by differential thermal analysis (DTA) and differential thermal gravimetry (DTG). A pronounced DTA endotherm, representing the onset of melting, began at 490°C ($\pm 5^\circ$) and had its maximum at 510° to 520°C. This range (490° to 520°C) is similar to the range of the temperature measurements of the lava flows. Dissociation of CO_2 from the carbonate melt began at 660°C.

The observed temperatures are several hundred degrees lower than the lowest 1-atm temperatures of silicate lavas. Significant cooling must have occurred from temperatures of possible partial melting in the mantle (6). Concomitant crystallization can account for the distinctly fractionated composition of nanocarbonates (5, 6, 15).

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17. The DTA and DTG analyses were carried out at the

Knobloch-Geothermometer, University of Burgin V. Kramer is thanked for his help. We thank the members of the expedition, K. Kruth, C. H. Wenz, C. Hug-Fock, and A. Dommers for assistance. We also thank the Peterson family, Anshu, and our local porters for their help in the field.

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Magnification of Secondary Production by Kelp Detritus in Coastal Marine Ecosystems

D. O. DUGGINS, C. A. SIMENSTAD, J. A. ESTES

Kelps are highly productive seaweeds found along most temperate latitude coastlines but the fate and importance of kelp production to nearshore ecosystems are largely unknown. The trophic role of kelp-derived carbon in a wide range of marine organisms was assessed by a natural experiment. Growth rates of benthic suspension feeders were greatly increased in the presence of organic detritus (particulate and dissolved) originating from large benthic seaweeds (kelps). Stable carbon isotope analysis confirmed that kelp-derived carbon is found throughout the nearshore food web.

ALTHOUGH PHYTOPLANKTON is undoubtedly the primary source of organic carbon in much of the world's oceans, benthic plants are thought to be important contributors to food webs in estuarine and coral reef habitats (1). In the early 1970s, Mann and others (2-4) showed exceptionally high productivity in benthic macrophytes belonging to the order Lamnariales (kelps) and inferred that kelp-derived organic carbon could play a significant role in temperate coastal (nearshore) secondary production. We assessed the significance of kelp-derived organic carbon to secondary production by a natural experiment involving islands in the Aleutian archipelago (Alaska) with and without sea otters, and thus with and without extensive kelp forests (5). We show that growth rates of benthic suspension feeders are two to five times as high at kelp-dominated islands as at those without kelp beds. Stable carbon isotope ($\delta^{13}C$) analyses show that kelp-derived carbon contributes significantly to the carbon assimilated by secondary consumers at these islands.

Kelps are a dominant feature of many exposed and semiclosed temperate coastlines, where they frequently form dense stands from the low intertidal zone to depths approaching 40 m. Individual kelps can achieve large biomass and rapid growth even at high density, thus forming one of the world's most productive habitats (3, 6). Benthic marine herbivores such as sea urchins (Echinoidae) can retard the growth of kelp populations and occasionally decimate extant populations, but most kelp biomass is not consumed directly (7). This has led to

speculation that kelp biomass enters the nearshore food web through indirect (detrital) routes. By releasing particulate as well as dissolved organic matter (POM and DOM respectively) as they grow and senesce, kelps could provide a significant organic carbon source for the diverse and abundant assemblages of nearshore suspension feeders, pelagic as well as benthic. Even the considerable quantity of kelp biomass deposited on beaches adjacent to kelp stands ultimately may reenter the nearshore food web as POM and DOM after decomposition.

The reestablishment of sea otters in the Aleutians after their near extinction in the 19th century and the subsequent resurgence of otter predation upon sea urchins allow us to compare secondary production between areas that differ greatly in kelp biomass but are otherwise similar. Oceanographic data indicate that the pervasive influence of the westward-flowing Alaskan Stream accounts for relatively uniform physical conditions among the central and western Aleutian Islands (8). Neither the few prior studies nor our surveys provide evidence for significant differences in species composition (including phytoplankton) along this segment of the archipelago (9).

The mid- and low-intertidal zones throughout the Aleutian Islands are dominated by kelps belonging to the genera

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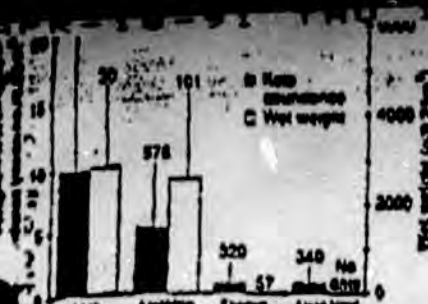


Fig. 1. Kelp abundance and wet weight (means and 1 SD of quadrat counts and sample weights) of four islands with sea urchins (Adak and Amchitka) and without urchins (Shemya and Alaid-Nizki). Wet weight at Shemya = 0. Sample size is given above each error bar.

Laminaria and *Alaria*, which exist in a refuge above the foraging range of sea urchins. Rocky subtidal habitats at islands with sea urchins are characterized by low urchin biomass and large stands of both understory and surface canopy kelps; however, islands where sea urchins have not become reestablished are characterized by large urchin biomass and few kelps (5). This nearshore community variation allowed us to assess (by comparison) the importance of kelp production to the production of nearshore consumers. Between 1985 and 1987 we conducted benthic surveys, experiments, and analyses at Adak and Amchitka Islands (urchins abundant) and at Shemya and Alaid-Nizki Islands (no sea urchins) to determine whether growth (as an indicator of production) and $\delta^{13}\text{C}$ of consumer organisms were related positively to kelp bio-

production. Benthic surveys verified differences in kelp abundance and biomass between islands. At each island, transects were established at 16 to 80 randomly selected sites along the 6-m contour. All sites were on the Bering Sea side of each island and were judged subjectively to be of similar exposure. Along each transect, 20 randomly selected 0.25-m² quadrats were centered by divers for kelp abundance. The resulting data (Fig. 1) show orders of magnitude differences in subtidal kelp abundance and biomass between islands with and without sea urchins. Although abundance and biomass are not synonymous with production, research on similar kelp assemblages suggests that benthic production should be very different among these islands (2, 10). If kelp-derived organic carbon is available to nearshore suspension feeders, detritivores, and (indirectly) their predators, and if phytoplankton alone is a limiting resource, then secondary production should be significantly different between island types. We used two analyses to determine

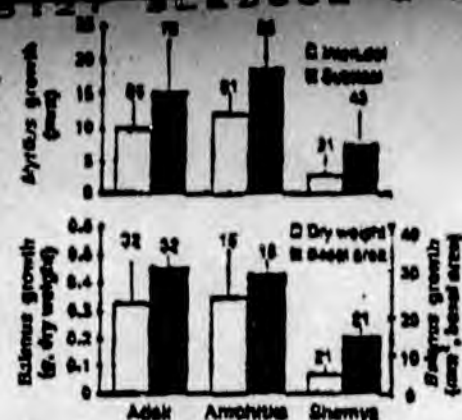


Fig. 2. Results of translocation experiments: means and 1 SD of growth in length (mussels, *Mytilus*) or dry weight and basal area (barnacles, *Balanus*). Sample size is given above each error bar.

grow faster in kelp-dominated than in urchin-dominated environments. First, we translocated two species of suspension feeders (the mussel *Mytilus edulis* and the barnacle *Balanus glandula*) from a common source (Puger Sound, Washington) into cages at six intertidal and six subtidal sites at Adak, Amchitka, and Shemya islands. Mussels were translocated in 1985 and 1986 and barnacles in 1986. Mussels were individually tagged and measured (maximum valve length) (12); barnacles were allowed to settle on fiberglass plates, thinned to minimize competition, and measured in four dimensions (length and width of operculum and base). Barnacle locations were mapped for individual identification and the plates were placed in the same cages with the mussels. All animals were remeasured after 1 year. Mussel valve elongation, barnacle final dry weight (13), and change in barnacle basal plate area were the parameters used to compare growth among islands.

Growth rates were significantly different (14) among islands. Mussels in kelp-dominated habitats (Adak and Amchitka) grew approximately two (subtidal) to four (intertidal) times as fast as mussels in urchin-dominated habitats (Fig. 2). Likewise, barnacles (intertidal) grew up to five times as

fast in kelp-dominated environments (Fig. 2) (barnacles from subtidal cages did not survive).

As a second, independent verification of the translocation data, age-size relations were analyzed for intertidal mussels collected from six sites at each of four islands (15). Mussel valves were sectioned and age determined by the methods of Lutz (16). For year classes 2 to 5, mussels were significantly larger at islands with substantial subtidal kelp forests (Fig. 3) (17).

Our results do not exclude the possibility that a carbon source other than that derived from kelps accounted for differences in mussel and barnacle growth among islands. We employed $\delta^{13}\text{C}$ analyses to determine the extent to which consumers were using kelp-derived organic carbon and if such use differed among islands as predicted (18). The Aleutian nearshore food web lends itself well to such analyses for several reasons. Unlike other habitats such as estuaries where diverse autotrophs (phytoplankton, benthic algae, and marine and terrestrial angiosperms), each with a distinctive $\delta^{13}\text{C}$ signature, contribute POM and DOM to nearshore waters, the Aleutians have only two principal sources of organic carbon: benthic algae and phytoplankton (19). Furthermore, at high latitudes, phytoplankton is more depleted in ^{13}C than at low latitudes (20) and thus the difference in signatures between kelps and phytoplankton is large, leading to less ambiguous interpretation of the origins of organic carbon in nearshore consumers. In addition, because islands differ greatly in the potential input of kelp carbon, we could incorporate the measured consumer $\delta^{13}\text{C}$ enrichment at kelp-dominated islands in a simple mixing model to assess quantitatively the magnitude of kelp carbon input to the nearshore food web.

To characterize predominant carbon sources, $\delta^{13}\text{C}$ was determined from samples of the dominant kelps (*Laminaria groenlandica*, *L. longipes*, and *Alaria fistulosa*) collected at Adak and Amchitka islands. Six suspension feeders, two detritivores, and three

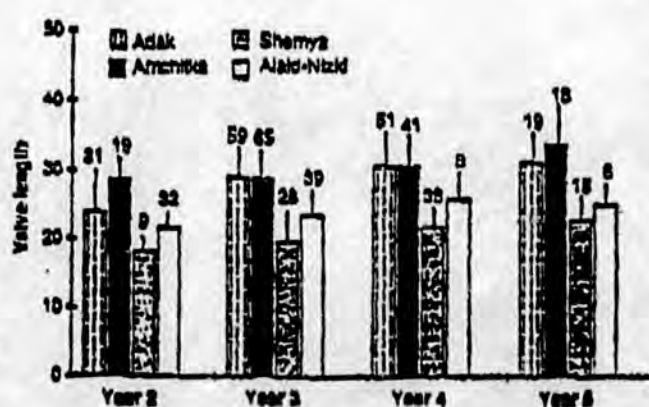


Fig. 3. Age-size relations for *Mytilus edulis* at four Aleutian Islands; means and 1 SD of valve length. Sample size is given above each error bar.

predator taxa were collected at each island as indicators of the islands' nearshore consumers (21). Phytoplankton isotopic values were derived from cultures incubated on board the R.V. *Alpha Helix*. Cultures inoculated from ambient seawater were used rather than net tow samples because of the inevitable problem of contamination by non-phytoplankton carbon in plankton net tows. These cultures were made up primarily of *Chaetoceros* and *Thalassiosira*, which were the dominant genera in net tows at all islands as well as the most common genera reported for the region (9). The mean phytoplankton isotopic value (-24.0 per mil ± 1.0 SD, $n = 5$) corresponds with published values (-22.9 to -24.4 per mil) for this region and surface water temperatures. Kelps were considerably enriched in ^{13}C relative to phytoplankton, and values were relatively consistent among taxa and islands (overall mean of -17.7 per mil ± 2.3 SD, $n = 162$).

Differences in consumer $\delta^{13}\text{C}$ between kelp-dominated islands and urchin-dominated islands support the hypothesis that carbon fixed by kelp is found throughout the nearshore food web and may even be consequential at islands with comparatively low kelp abundance. For each of 11 consumers tested, with the single exception of *Mytilus edulis* (22), mean $\delta^{13}\text{C}$ values for animals from kelp-dominated islands (Adak and Amchitka pooled) were more enriched than mean values for animals from islands without kelps (Shemya and Alaid-Nizki pooled)

(25). On the basis of a simple mixing model (24), primary consumers at kelp-dominated islands average, conservatively, 58.3% kelp-derived carbon (Fig. 4), whereas at urchin-dominated islands they average only 32.0%. This was the case despite all consumers being collected in midsummer during periods of peak phytoplankton abundance, when $\delta^{13}\text{C}$ values should be indicative of maximum phytoplankton influence. The moderate percentage of kelp-derived carbon in consumers at urchin-dominated islands is probably the result of input from intertidal kelps and kelps existing in subtidal refuges from urchin grazing. The relatively consistent enrichment of consumers at Adak and Amchitka, regardless of feeding type or trophic level, argues for the pervasive occurrence throughout the nearshore food web of organic carbon originally derived from kelp photosynthesis.

Both the transplant translocation experiments and age-size analysis show that suspension feeders grew at a significantly higher rate at islands with extensive subtidal kelp forests than at those without. The $\delta^{13}\text{C}$ data indicate that this difference in growth rate most likely results from the use of organic carbon photosynthesized by kelps, rather than from differences among islands in phytoplankton production or some other variable. Isotopically enriched signatures of organisms such as mysids, rock greenling, and pelagic cormorants at kelp-dominated islands further indicate that use of kelp-de-

rived organic carbon is not restricted to benthic organisms.

The ecological role of kelps in the nearshore region is multifaceted. Strong evidence exists that they provide habitat (stratum and canopy) for a wide range of benthic, epibenthic, and pelagic organisms and alter the hydrodynamic environment of the nearshore region (25). Here we report a strong trophic link between kelps and a wide range of organisms of varied feeding strategies and trophic levels, extending beyond the obvious kelp-grazer-predator chain. The common occurrence of extensive highly productive kelp forests along temperate to subpolar coastlines suggests that our results are not specific to the Aleutian Islands. The relative trophic contributions of kelp detritus and phytoplankton may vary with latitude, habitat, or season, particularly given the punctuated nature of phytoplankton production. The role of kelp production may actually be greatest in winter, when phytoplankton production is at a minimum, and kelp standing stock is either senescing (annual species) or being physically degraded during storms (annual and perennial species).

Our data support quantitatively the suggestions of Mann (2, 5) and others that kelps contribute significantly to coastal secondary production, perhaps ultimately establishing limits to the abundances of food-limited populations. Factors affecting kelp occurrence and production such as the recolonization or extinction of sea otters, sea urchin disease, catastrophic storms, nutrient depletion during El Niño events, or oil spills and other pollution are thus likely to have wide-ranging and often long-lasting influences on the productivity of coastal ecosystems.

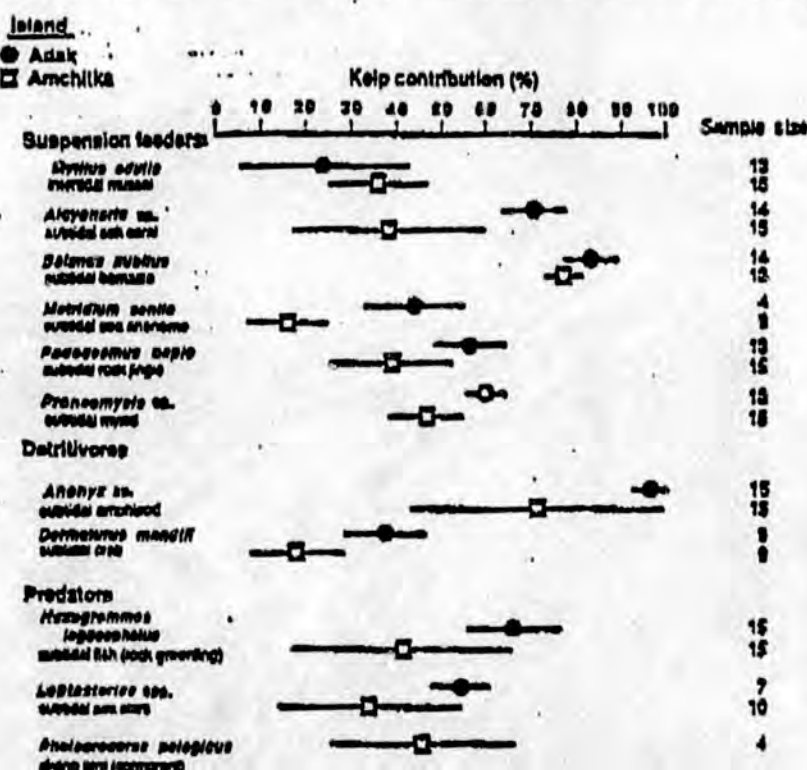


Fig. 4. Percentage of carbon photosynthesized by kelps found in tissues of consumers at islands with extensive subtidal kelp beds. Values are means and 1 SD. Three to five samples were collected and analyzed from each of three sites at each island.

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Phytosynthesis production in the Aleutians is extremely low (38 to 243 mg of carbon per square meter per day) concentrated during a relatively short growing season and probably restricted to herbaceous plants (the exposed coast) with vertical water availability (9).

Islands were usually of equal size and were assigned to cages randomly. We could not replicate the "no kelp" treatment of this experiment because we were unable to visit Adak-Nakhi Island until the summer of 1987.

All barnacles remained in the settling plates within a span of several weeks and were of similar size. Barnacle physical dimensions were measured within 48 hours of placement in cages; at that time there was no statistically significant difference in mean basal plate area among islands ($n = 4$) for those individuals that survived to the experiment's conclusion (Kruskal-Wallis, $P > 0.1$). Final dry weight was measured on animals removed from the plates and dried at 50°C for 24 hours.

Kruskal-Wallis ANOVA on mean growth of individuals at a site (cage) were mixed intertidal, $\chi^2(2) = 19.3$, $P < 0.0001$; mixed subtidal, $\chi^2(2) = 17.2$, $P < 0.0002$; barnacle dry weight, $\chi^2(2) = 6.4$, $P < 0.05$; barnacle basal plate area, $\chi^2(2) = 6.2$, $P < 0.05$.

Islands were collected from equivalent tidal heights at pairs of equivalent wave exposure. Spatially isolated islands were chosen to reduce the possible confounding consequences of intraspecific competition.

E. A. Lutz, *J. Mar. Biol. Assoc. U.K.* 56, 723 (1976).

Complex random block ANOVA for age-size analysis with age (2 to 6 years) as the blocking factor ($F(1,11) = 202$, $P < 0.001$). Such a random block analysis allows us to examine island effects (kelp-assisted compared to unmanipulated) for all age-size classes simultaneously.

W. B. Fry and E. B. Sbrer (*Canad. Mar. Sci.* 27, 15 (1970)) for comprehensive discussion and critique of the application of $\delta^{13}\text{C}$ techniques to ecological studies. The ratio of ^{13}C to ^{12}C is fixed at the time (and according to the pathway) of photosynthesis. With minor modification (± 0.5 to ± 1.5 per mil per trophic level), this ratio is maintained through consumer trophic levels. Thus consumer signatures reflect those of key primary producers.

Isotopic input of organic matter to consumers coastal waters was presumed to be insignificant primarily because most terrestrial vegetation is marine kinds of grasses and lichens, which degrade in time; there is no woody vegetation that would produce large amounts of exposable detrital matter.

L. McCormick and C. P. McRae, *Mar. Biol.* 53, 267 (1979); M. L. Fortgens and J. C. Dupuy, *Canad. J. Fish. Aquat. Sci.* 4, 85 (1981); G. H. Rau et al., *Deep Sea Res.* 29, 1035 (1982).

Five whole (above holdfast) kelp specimens per species were collected at each of three randomly selected sites at each island and subsampled systematically by taking a number of plugs uniformly along the length of the blade. Three to five specimens of each consumer species were collected at the same sites as the kelps and were used whole (mytilid, amphipod, etc.) or subsampled (mussel tissue of other).

The single exception to the pattern of greater consumer enrichment at islands with kelp was *Mytilus* adults, which was the only consumer we collected from the intertidal zone, where kelps are abundant at all four islands. *Mytilus* $\delta^{13}\text{C}$ values showed no pattern between kelp and no kelp islands.

Differences between kelp and no kelp islands were significant in a random-block ANOVA (with species as blocks, thus allowing analysis of all species simultaneously) considering all subtidal consumers pooled ($F(1,27) = 7.96$, $P < 0.0001$) or only suspension feeders ($F(1,14) = 11.64$, $P < 0.005$). A simple mixing model based upon that of T.

263 (1979)) was possible because of the two-source source known. Percentage contribution from kelp is calculated as $(\delta^{13}\text{C}_{\text{sample}} - \delta^{13}\text{C}_{\text{phytoplankton}}) / (\delta^{13}\text{C}_{\text{kelp}} - \delta^{13}\text{C}_{\text{phytoplankton}}) \times 100$, where 1 represents a pure-photosynthetic source fractionation and was essentially derived for each species by calculating the difference in $\delta^{13}\text{C}$ between the most depleted sample of that species ("pure" phytoplankton diet) and the mean phytoplankton value (-24.0). In cases where the most $\delta^{13}\text{C}$ depleted value for a species was less than our phytoplankton value, the mean of our measured phytoplankton values (2.5 per mil per trophic level) was used. This method makes our model conservative in favor of phytoplankton (reducing the percentage of carbon from kelp) in that our calculations indicate that even the most isotopically depleted consumers incorporate

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29. Supported by NSF grant DTT-8421342. We are grateful to the participants and organizers of our symposium M. Dethier, S. Fry, T. Michener, and G. VanBlaricom, and the assistance provided by a small army of divers plus the U.S. Coast Guard (17th District), the U.S. Navy (Admiral Naval Station), the U.S. Air Force (Naval Air Force Base), and the U.S. Fish and Wildlife Service (Alaska Marine Refuge), during our surveys, collections, and experiments in the Aleutians. We thank P. Hansen, L. Johnson, A. Sewell, and J. Watson who were particularly helpful in the field or laboratory.

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A 48-Million-Year-Old Aphid-Host Plant Association and Complex Life Cycle: Biogeographic Evidence

NANCY A. MORAN

Biogeographical and paleobotanical evidence suggests that the aphid subtribe Melaphidina has been associated with its sumac host plant since the early Eocene when these plants were continuously distributed across the Bering land bridge. Transfer experiments indicate that the American species, *Melaphis rhois*, shows an unusual complex life cycle, similar to that known in Chinese melaphidines, with some generations feeding on mosses as alternate host plants. As with the association with sumac, this complex life cycle may have been established in the melaphidine lineage before the southward retreat of sumac from Alaska 48 million years ago. This example suggests that the interactions and life histories shown by modern populations may be determined, in large part, by evolutionary commitments made in the distant past.

DESPITE THE LARGE AMOUNT OF attention paid to possible coevolutionary interactions between herbivorous insects and their host plants, the ages of interactions between specific insect and plant lineages have been estimated in only a few cases (1, 2). These ages are difficult to obtain from fossils of damaged plant tissues since the damage must be distinctive enough to be definitely associated with a modern insect group. The ages of life cycle phenomena observed in modern animal species are even more difficult to establish, because these are rarely documented by any fossil evidence. I have used biogeographic evidence to establish the antiquity of an association between an aphid and a plant lineage and of a peculiar complex life cycle.

The aphid subtribe Melaphidina (Homoptera: Aphididae: Pemphiginae: Fordini) consists of four Asian genera and a monospecific American genus (3, 4). All known species form galls on sumac species [Anacardiaceae, *Rhus* L., subgenus *Rhus* (3, 4)]. These galls are induced by aphid feeding and are inhabited by three generations of parthenogenetic females. Galls are closed, sac-like structures with a structure and composition very different from leaves from

which they are derived (5). Eclosion of the final winged emigrant generation is synchronized with opening of gall exit slits. Although this level of intricacy suggests that a sumac-Melaphidina association is ancient, more definite evidence concerning the age of the interaction is provided by biogeographic considerations.

The current distribution of the Melaphidina implies that use of sumac was established before the geographic separation of the ancestors of modern hosts in Asia and America. The occurrence of the subgenus *Rhus* in both the Old and New Worlds is attributed to dispersal across the Bering land bridge during or before the early Eocene, an explanation strongly supported by fossil evidence (6) (Fig. 1). The vicariance between Asian and American plant lineages resulted when climatic changes pushed plant distributions southward during the Tertiary (7). For sumac, this occurred about 48 million years ago, as judged by the distribution of leaf fossils in Alaskan Tertiary floras (6, 8). The sumac-Melaphidina association must be

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commercial fishery of the area depends. Thus, not only would many of the larvae have been valuable in themselves if they had lived to become adults, but the entire commercial fishery would have been more productive. Unfortunately, current ecological theory will not support an estimate of the total injury done to the commercial fishery as a result of the destruction of a part of the food chain upon which it depends.

Replacement Costs

222 A replacement cost approach can avoid many of the problems involved in attempting to estimate the use value of biological resources. Under the replacement cost approach the resource is valued at what it would cost to replace it. If the resource is replaced, the problems of identifying all its uses, the monetary value of these uses, and the users affected by the resource loss are eliminated, except for the period between the initial loss and the replacement.

223 Twenty-three institutions were asked to estimate the cost of obtaining specimens of the birds killed in the Puerto Rican oil spill, or the price at which they would be willing to sell members of each species (Sterling Hobe Corporation 1985; and California Department of Fish and Game 1985). Nine institutions responded and their estimates are shown in Figure 23.

224 One problem with most of these estimates is that they are not true replacement costs, but rather the cost of collecting already existing specimens from the wild and redistributing them to the Gulf of the Farallones area. This does not represent true replacement, since true replacement requires a complete recovery of the species population. This can be most clearly assured by using only captive breeding programs for replacement.

FIGURE 25

ESTIMATES OF SEABIRD SPECIES VALUE/PRICE FROM VARIOUS SOURCES

(in dollars per one specimen)

SPECIES	SOURCE								
	Seattle Aquarium	Sea World	Los Angeles Zoo	Myrtle Marine Life Aquarium	New York Zoological Park	Brook Gardens	International Zoological Distributors	International Animal Exchange	Boston Zoological Gardens
Common Loon		200	300		1500		200	800	250
Arctic Loon		200	500		1500		500	800	250
Red-throated Loon		200	500		1500		500	800	250
Loon spp.		200			1500			800	250
Western Grebe	75	200	250		1000		25	800	250
Red-necked Grebe	75	200	300		1000		25	800	250
Horned Grebe	75	200	300		1000		25	800	250
Eared Grebe	75	200	250		1000			800	250
Grebe spp.					1000			800	250
Northern Fulmar					500			800	250
Sooty Shearwater		100	200		500			800	250
Brandt's Cormorant			75	200		500			800
Pelagic Cormorant		75	200		500			800	250
Cormorant spp.		75	200		500			800	
Northern Pintail	20			50	200	35	15	800	50
Ruddy Duck	150	75		90	300	75	90	800	200
Greater Scaup		37	150		100	50	15	800	50
Scaup spp.			150		100			800	
Black Scoter					500		150	800	250
Surf Scoter	228	1000	700		500		150	800	250
White-winged Scoter	228	1000	100		500		150	350	800
Scoter spp.					500			800	
American Coot			30		300		10	800	50
Red Phalarope		50	100		150			800	150
Western Gull			50		50			800	50
Common Murre	228	100	200		500			800	250
Pigeon Guillemot	228	100	250		500			800	250
Cassin's Auklet	228	100	250		500			800	250
Mottled Murrelet	228	100	250		500			800	250
Rhinoceros Auklet	228	100	200		500			250	800
Ancient Murrelet									
Auklet spp.		100	200		500			800	
Red-tailed Hawk	50				500		150	800	100

Source: Sterling Hobe Corporation 1985

ACE 417523

APR-18-91 THU 15:32 BLEDSON & KUTSON

However, most of the species in this list are not and probably cannot be bred in captivity (Briggs, pers. comm.). Therefore, true replacement from captive breeding is probably impossible. It is absurd to value them at 0 since they cannot be replaced. Therefore, this section presents some calculations on the assumption that they could be redistributed or replaced.

225

Figure 24 presents a range of calculations, multiplying the number of dead birds times the second lowest and the second highest replacement costs given in Figure 23. The second lowest and highest costs were selected in order to eliminate extreme values. Using this approach, the total replacement costs for the birds estimated to have been killed in the Puerto Rican incident amount from \$574,692 to \$1,528,050.

226

An alternative approach to estimating replacement costs is to estimate the cost of creating new habitat or enhancing existing habitat to support enough nesting pairs of each species to replenish the population. Again, to represent true replacement costs, this should be new or enhanced habitat, not just the cost of acquiring already existing habitat. Research on estimating replacement costs based on this alternative approach is currently being conducted and will be concluded within the next several months. Upon completion of this research, the estimates of habitat replacement or enhancement will be included in a supplement to this report.

227

If replacement of the birds were attempted, it would take several years to accomplish. In the interim, there would be a loss of use which would have to be included to derive the total cost of a replacement strategy. Most of the birds destroyed in the Puerto Rican incident require three to twelve years to mature. Assuming no natural regeneration and that the replacement effort began immediately after the spill and all the replacement birds were released three years later, there would be three years lost use in addition to the

FIGURE 24

REPLACEMENT COST FOR MARINE BIRDS

SPECIES	TOTAL DEAD BIRDS *	LOW ESTIMATE		HIGH ESTIMATE	
		Cost/Bird	Total Cost	Cost/Bird	Total Cost
Common Loon	19	200	3,800	800	15,200
Arctic Loon	178	250	44,000	800	140,800
Red-throated Loon	6	250	1,500	800	4,800
Loon spp.	-	-	-	-	-
Western Grebe	109	75	8,175	800	87,200
Red-necked Grebe	2	75	150	800	1,600
Horned Grebe	7	75	525	800	5,600
Eared Grebe	25	200	5,000	800	20,000
Grebe spp.	1	75	75	800	800
Northern Fulmar	-	500	-	500	-
Sooty Shearwater	3	200	600	500	1,500
Brandt's Cormorant	2	200	400	500	1,000
Pelagic Cormorant	3	150	450	500	1,500
Cormorant spp.	2	150	300	500	1,000
Northern Pintail	1	20	20	200	200
Ruddy Duck	5	75	375	300	1,500
Greater Scaup	2	37	74	150	300
Scaup spp.	-	-	-	-	-
Black Scoter	-	250	-	500	-
Surf Scoter	25	228	5,700	800	20,000
White-winged Scoter	10	228	2,280	800	8,000
Scoter spp.	-	-	-	-	-
American Coot	13	30	390	300	3,900
Red Phalarope	10	100	1,000	150	1,500
Western Gull	33	50	1,650	50	1,650
Common Murre	1856	200	371,200	500	928,000
Pigeon Guillemot	2	228	456	500	1,000
Cassin's Auklet	548	228	124,944	500	274,000
Marbled Murrelet	1	228	228	500	500
Rhinoceros Auklet	4	200	800	500	2,000
Ancient Murrelet	1	200	200	500	500
Alcid spp.	7	200	1,400	500	3,500
Red-tailed Hawk	1	100	100	500	500
TOTALS	2874		\$575,792		1,528,050

* November 20, 1984 to May 30, 1985

ADLER, JAMESON & CLARAVAL

Attorneys at Law

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Facsimile (907) 424-7454

FACSIMILE COVER SHEET

DATE: 4/18/91

FILE NO.: 1266.1

TO: Barbara Herman

COMPANY: _____

PHONE NUMBER: _____

FACSIMILE NUMBER: 278-7022

RE: Exxon Settlement

FROM: Gloff Parker

NUMBER OF PAGES (INCLUDING COVER SHEET): 15

COMMENTS: _____

OPERATOR: [Signature]

IF YOU DO NOT RECEIVE ALL OF THE ABOVE STATED PAGES,
PLEASE CALL (907) 272-5200 IMMEDIATELY.

39

Samuel J. Fortier, Esq.
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2550 Denali Street, Suite 604
Anchorage, AK 99503
907-277-4222

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APR 13 1991

Office of the Attorney General
Anchorage branch
Anchorage, Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EXXON CORPORATION, EXXON SHIPPING COMPANY,
EXXON PIPELINE COMPANY, In personam,

Plaintiffs,

v.

T/V EXXON VALDEZ, In rem,

Defendants.

Civil Action No.

THE STATE OF ALASKA,

Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING COMPANY,
and EXXON PIPELINE COMPANY, In personam,
and the T/V EXXON VALDEZ, In rem,

Defendants.

Civil Action No.

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant

Civil Action No.

204/210/288 (4/15.4:CC4)
NOTICE OF SUBMITTAL PAGE 1

ACE 417434

STATE OF ALASKA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

IN RE: EXXON VALDEZ LITIGATION
UNITED STATES DISTRICT COURT
CASE NO.

Civil Action No.

COMMENTS OF THE
CHENEGA CORPORATION,
PORT GRAHAM
CORPORATION, AND
ENGLISH BAY
CORPORATION

56 Fed. Reg. 11636

COMES NOW Chenega Corporation and its subsidiary, CHN, Inc., Port Graham Corporation and its subsidiary Port Graham Development Corporation, and English Bay Corporation, by and through counsel and hereby submit comments pursuant to 56 Fed. Reg. 11636 (March 19, 1991) and 56 Fed. Reg. 11642 (March 19, 1991) and hereby submit comments to the proposed consent decree and settlement agreement and memorandum of understanding, respectively, as follows:

1. NOAA and The State are improper parties to receive comments concerning interim jurisdiction lands. The National Oceanic and Atmospheric Administration, by and through the Secretary of Commerce, and the State of Alaska, by and through its Attorney General's office, are not proper parties to consider comments from affected Village Corporations with regard to land and resources within interim jurisdiction. See 43 CFR 2650.1.

See also Pub. L. 94-204, as amended by Pub. L. 96-487; Pub. L. 99-396, Sec. 22 and Pub. L. 100-581. See Exhibit 1 hereto, letter from commenting Village Corporations to Secretary Lujan and Secretary Yeutter. See Exhibit 2, letter dated March 4, 1991 from attorneys for commenting Village Corporation. See Exhibit 3, letter from attorneys for commenting Village Corporations. See also Exhibit 4, letter from Fortier & Mikko, P.C. to Thomas Campbell, General Counsel, N.O.A.A.

Both the Consent Decree and MOA affect the rights and obligations of the Village Corporations, in direct contravention to the order of Judge Stanley Sporkin entered March 12, 1990 in Washington D.C., in a case captioned Chenega Corporation v. Lujan; case No. 91-484 SS. See Exhibit 5 (order of Judge Sporkin; an original is on file with the court). See also Exhibit 4, supra. The balance of the comments herein will describe how plaintiffs' rights are being compromised.

2. Paragraph 13(C) of the Consent Decree and MOA, III (C) must be reworded as follows:

(C) rights, obligations, and claims, ~~if any~~, of legal entities including Villages Corporations created pursuant to the Alaska Native Claims Settlement Act (ANCSA) or persons other than the government who are holders of any ~~present~~ right, including lands, or resources of lands selected but not yet conveyed to

ANCSA Corporations by the United States Government or title or interests in land or other property interests, including Natural Resources, and ecosystems affected by the oil spill.

The limitations stated in paragraph 13(B) are too narrowly defined. See Consent Decree at 13(B). See also MOA at paragraph III C, paragraphs 1-3. There is no reason to use the "if any" language with regard to rights and obligations of the entities discussed. The literal effect is to reduce rights and obligations to a matter of proof from a matter of law, and shift the burden to the Villages.

3. Paragraph 13(B): The Consent Decree at paragraph 13(B) and the MOA at paragraph IIIC1 should be restated by striking the "if any" where it appears and in addition by inserting the following rewrite:

The rights and obligations of Alaskan Native Villages to act as trustees and Alaska Village Corporations to exercise their legal rights and obligations, both for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, and affected ecosystems belonging to, managed by, controlled, selected by or appurtenant to such Villages and Village Corporations.

See discussion at Exhibit 4, pages 2 - 4.

Alyeska

4. Why is Alyeska Pipeline Service Company receiving such preferential treatment and Exxon Pipeline Company receiving such

benefits as are stated at Consent Decree, Paragraphs 14, 15, 16, 20 and Paragraphs 22 - 24?

Natural Resources

5. Definitions concerning "Natural Resources" and "Natural Resource Damage" (Consent Decree at Para. 6(C) and 6(D); MOA at Para. II F and G), take into the sweep of those definitions rights and interests belonging to the Village Corporations. See Exhibit 4, at pages 4 - 5.

Escrow

6. The Consent Decree and MOA are silent on the Federal Government's obligation with regard to escrow of damages proceeds. See Exhibit 4, pages 5 - 6.

There is no meaningful participation on the part of Village Corporations with regard to either the present or future rights and the legal obligations owed them by the United States Government.

The State of Alaska cannot act as Trustee with regard to resources or lands selected but not yet conveyed to the Village Corporations.

The Consent Decree and MOA ignore the statutory requirements pursuant to CERCLA, 42 USC 9651, and the Clean Water Act, regarding the ability of polluted ecosystems to recover. The Consent Decree at Para. 6(C) and the MOA at Paragraph II F must be corrected to include this provision. See also MOA, page 7, Paragraph G and Paragraph 2(J).

General Comments

A. Both the Consent Decree and MOA permit concealment of science and assessments necessary for private litigants to adequately prosecute their cases;

B. The Settlement Agreement, while paying lip service to "present rights", fails to address future rights and interests as well as damages which will occur and reoccur in the future, and therefore compromises the rights of the responding Village Corporations;

C. The Agreements fail to provide for the continuation of scientific and assessment studies, and fail to require the release of studies and assessments already completed, or data acquired and withheld.

D. The Agreement shifts the burden to user groups to establish that the Settlement Agreement did not dispose of their claims, and provides a powerful weapon for delay purposes by Exxon et. al. against private litigants, including the Village Corporations.

E. The Settlement Agreement fails to provide for a common settlement fund.

F. The Settlement Agreement fails to provide any objective methods for determining a reopener.

G. Without the Science and Assessment work already completed, the Village Corporations, as well as other litigants, lack sufficient information to determine whether the funds recovered are fair and reasonable, adequate, or, the net proceeds, after deductions for this year's operations, will be sufficient.

H. We are attaching the following written Testimonies to the Alaska Legislature:

1. Exhibit 6, Port Graham Corporation

- a. Testimony of Patrick Norman, President, 4/13/91.
- b. Testimony of Mary Malchoff, Chairperson, 4/13/91.

2. Exhibit 7, Chenega Corporation

- a. Testimony of Charles W. Totemoff, President, Seward 4/12/91.
- b. Testimony of Philip Totemoff, Secretary/Treasurer, Seward 4/12/91.
- c. Testimony of Paul Kompkoff, Director, Seward 4/12/91.
- d. Testimony of Charles W. Totemoff, President, Juneau 4/15/91.
- e. Testimony of Paul Kompkoff, Director, Juneau 4/15/91.
- f. Testimony of Gail Evanoff, Vice President Operations, Juneau 4/15/91.
- g. Chenega Resolution #91-09

3. Exhibit 8, English Bay Corporation and its
Shareholders, 12 pages of comments provided by:

Pauline Dunces
Kathy Brewster
Tessie Moonin
John Kvasnikoff
Vincent Kvasnikoff, Director
Helen Ukatish
Gus Ukatish
Alma Kvasnikoff
Robert Kvasnikoff, Director
Roberta Kvasnikoff
James Kvasnikoff
Virginia Moonin
Ephim Moonin, Sr.
Mack and Rose Ukutish
Herman Tamape
Anne Tamape
Frank Hetrick
Martha Hetrick
Becky Kvasnikoff
Seraphim Ukatish, Sr.
Irene Ukatish
Dan Anahanok, Jr.

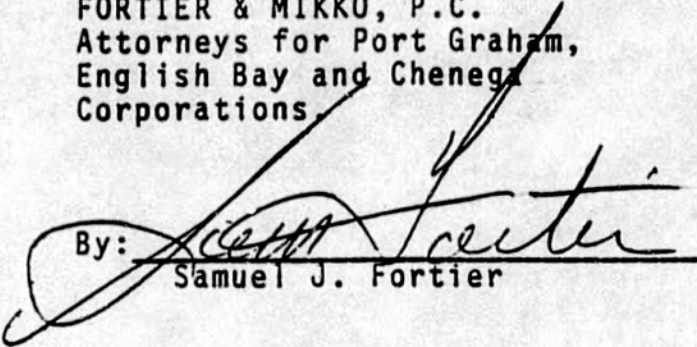
Anita Evans
Sperry Ash
Nancy Yeaton
Roy Evans, Jr.
Carol Mattsan
Nick Tanape
Susan Tanape
Eloise Meganick
Kathy Evans
Leo Ash
Dale Pease
Wally Kvasnikoff, Director
Nina Kvasnikoff
Sarjus Kvasnikoff
Mack Kvasnifoff

I. We join in the Comments presented on behalf of the Regional and Village Corporations, a copy of which is attached as Exhibit 9.

Based upon all of the foregoing, you are requested to withdraw from the Agreement within the fifteen (15) day period following the close of public comments until we renegotiate the Agreement so as not to compromise in any fashion the rights and claims of the commenting Village Corporations.

Respectfully submitted this 16th day of April, 1991.

FORTIER & MIKKO, P.C.
Attorneys for Port Graham,
English Bay and Chenega
Corporations

By: 

Samuel J. Fortier

Samuel J. Fortier, Esq.
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Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EXXON CORPORATION, EXXON SHIPPING COMPANY,
EXXON PIPELINE COMPANY, In personam,

Plaintiffs,

v.

T/V EXXON VALDEZ, In rem,

Defendants.

Civil Action No.

THE STATE OF ALASKA,

Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING COMPANY,
and EXXON PIPELINE COMPANY, In personam,
and the T/V EXXON VALDEZ, In rem,

Defendants.

Civil Action No.

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant

Civil Action No.

AFFIDAVIT OF MAILING
PAGE 1 (4/16.2)(cc4)

ACE 417445

STATE OF ALASKA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

IN RE: EXXON VALDEZ LITIGATION
UNITED STATES DISTRICT COURT
CASE NO.

Civil Action No.

COMMENTS OF THE
CHENEGA CORPORATION,
PORT GRAHAM
CORPORATION, AND
ENGLISH BAY
CORPORATION

56 Fed. Reg. 11636

AFFIDAVIT OF MAILING

STATE OF ALASKA

THIRD JUDICIAL DISTRICT

}
} ss

I, Cynthia Barnett-Stephens, being first duly sworn, upon oath, depose and say:

That I am employed in the law office of FORTIER & MIKKO, A Professional Corporation; that on April 16, 1991, I served a copy of COMMENTS OF THE CHENEGA CORPORATION, PORT GRAHAM CORPORATION, AND ENGLISH BAY CORPORATION, to the following as listed below:

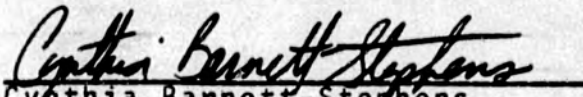
Thomas A. Campbell, General Counsel NOAA, U.S. Department of Commerce Room 5816, 14th Street and Constitution Ave. N.W., Washington, D.C. 20230; on behalf of the Administrator of NOAA, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the

AFFIDAVIT OF MAILING
PAGE 2 (4/16.2)(cc4)

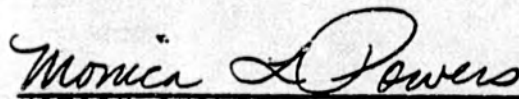
ACE 417446

Environmental Protection Agency and the United States Attorney General; by DHL Carrier.

And Barbara Herman, Attorney Generals Office, State of Alaska, 1031 W. 4th Avenue, Suite 200, Anchorage, Alaska 99501; by the U.S. Postal Department.


Cynthia Barnett-Stephens

SUBSCRIBED AND SWORN to before me this 16th day of April, 1991.


NOTARY PUBLIC in and for Alaska
My Commission Expires: 10-10-94

CHENEGA CORP.
P.O. BOX 60
CHENEGA BAY, AK
99574

PORT GRAHAM CORP.
P.O. BOX PGM
PORT GRAHAM, AK
99601-8998

ENGLISH BAY CORP.
1637 STANTON AVE.
ANCHORAGE, AK
99508

February 18, 1991

Honorable Manuel Lujan,
Secretary of Interior
1800 C Street, Suite N.W.
Washington, D.C. 20240

Honorable Clayton Yeutter
Secretary of Agriculture
14th Street and Independence Avenue S.W.
Old Executive Office Building
Washington, D.C. 20501

RE: Settlement of Claims on Native Lands Arising from
EXXON VALDEZ oil spill.

Dear Secretaries Lujan and Yeutter:

We understand that you are currently participating in discussions with the State of Alaska and Exxon Company U.S.A. to settle claims arising from the Exxon Valdez oil spill.

The undersigned village corporations are writing to express their concerns that none of their rights be compromised in your negotiations. Port Graham Corporation and English Bay Corporation have selected many thousands of acres in the Kenai Fjords National Park under the Alaska Native Claims Settlement Act ("ANCSA"). Those lands remain withdrawn pending final conveyance by your Department in satisfaction of our entitlements under that Act.

Chenega Corporation has selected but not yet received conveyance to approximately 3000 acres in the Chugach National Forest. The lands selected but not yet conveyed include lands at Jack Pot Lake and Jack Pot Bay in Prince William Sound. Those lands were also selected under ANCSA.

ACE 417448

Honorable Manuel Lujan
Honorable Clayton Yeutter
Page 2

By law, we understand you may continue to administer the lands withdrawn for our selections. However, by law, you are also required to obtain and consider our views prior to making any contract affecting these lands. See 43 CFR 2650.1.

This is, therefore, our formal request that you advise us of the terms of the proposed settlement with Exxon as it affects lands withdrawn for our selection so that we may, in turn, provide you with our informed advice as required by law.

Very truly yours,

CHENEGA CORPORATION

By: Charles W. Totamoff
Charles W. Totamoff, President

PORT GRAHAM CORPORATION

By: Patrick Norman
Patrick Norman, President

ENGLISH BAY CORPORATION

By: Donald Emmal
Donald Emmal, President

CT:dea:500ltr

cc: Honorable Wally Hickel, Governor
Honorable Charles Cole, Attorney General

ACE 417449

FORTIER & MIKKO
A PROFESSIONAL CORPORATION
Attorneys at Law

DENALI TOWERS NORTH
2550 DENALI STREET
SUITE 604
ANCHORAGE, ALASKA 99503

SAMUEL J. FORTIER
DAGMAR C. MIKKO
CARLENE M. FAITHFUL
TELEPHONE (907) 277-4222
FAX LINE (907) 277-4221

March 4, 1991

Honorable Manuel Lujan
Secretary of Interior
1800 C Street, Suite N.W.
Washington D.C. 20240

Honorable Clayton Yeutter
Secretary of Agriculture
14th Street and Independence Avenue S.W.
Old Executive Office Building
Washington D.C. 20501

RE: In re Exxon Valdez Litigation

Dear Secretaries Lujan and Yeutter:

Several weeks ago, the village corporations of Chenega, Port Graham and English Bay sent you a letter bringing to your attention your responsibilities to obtain their views and consider those views prior to entering into a settlement agreement with the State of Alaska and Exxon, concerning damages arising from the 1989 Exxon Valdez oil spill. A copy of that letter is attached. We understand that you have not yet responded to our clients' common concerns.

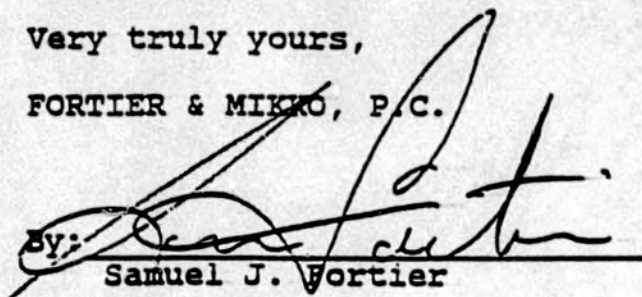
This letter is to inform you that the village corporations of Chenega, Port Graham and English Bay are now considering pursuing injunctive relief to prevent you from concluding the settlement agreement without obtaining their views and considering those views.

ACE 417450

You are respectfully requested to respond, preferably directly through us, with regard to the village corporations' letter dated February 18. Please assure us that you will not enter into a settlement without first complying with the requirements stated at 43 CFR 2650.1.

Very truly yours,

FORTIER & MIKHO, P.C.

By: 
Samuel J. Fortier

SJF:jmb (Ltr-449.doc)

cc: Chenega Corporation
Port Graham Corporation
English Bay Corporation
Honorable Charles Cole, Esq.
James Stevens, Esq.

ACE 417451

FORTIER & MIKKO
A PROFESSIONAL CORPORATION
Attorneys at Law

DENALI TOWERS NORTH
2550 DENALI STREET
SUITE 804
ANCHORAGE, ALASKA 99503

SAMUEL J. FORTIER
DAGMAR C. MIKKO
CARLENE M. FAITHFUL
TELEPHONE (907) 277-4222
FAX LINE (907) 277-4231

April 11, 1991

Mr. Martin J. Suuberg
Deputy Solicitor
United States Department of the Interior
Offices of the Solicitor
Washington, D.C. 20240

Dear Mr. Suuberg:

We represent Chenega Corporation and Port Graham Corporation as general counsel, and we also represent those corporations and English Bay Corporation as special counsel in the Exxon Valdez litigation. We have been requested to respond to your letter dated March 29, 1991, and received April 2, 1991, which was in response to the letters from Chenega Corporation and Port Graham Corporation dated February 18, 1991.

We are concerned that your department has entered into the settlement agreement before considering our clients' view on this agreement. In addition, we are concerned that there is no provision for escrow, and that your department is acting as a co-trustee with the State of Alaska concerning interim jurisdiction land over which the State of Alaska has no interest; our clients have vested interests. Our clients have not been involved in key decision-making, nor is there an escrow to protect their interests, although the agreement clearly affects each village corporation's rights.

We do not believe that your department can delegate its statutory duties to the National Oceanic and Atmospheric Administration (NOAA), nor for that matter, its Indian trust duties, which are separate and independent from your public trust duties. Without waiving any rights to demand that you obtain and consider the views of the affected village corporations before entering into the agreement, we are proceeding as you requested, and addressing our comments to Mr. Campbell of NOAA with a copy to Ms. Herman. We are also attaching a copy of our response to this letter.

ACE 417452

In summary, because your department has not adequately responded to and advised our clients, they lack sufficient information upon which to form an opinion as to whether or not the settlement agreement contains sufficient monetary remuneration with regard to costs of damage assessment: compensation for losses, injury, impairment, damage or destruction of the natural resources, including lands in interim jurisdiction affected by this settlement and damages from trespass pertaining to the lands or resources of the lands, and also the ability of the polluted ecosystems to recover are essential items to consider of damages sustained by our clients.

Further, because the Native corporations are not directly involved in determining the allocation of the compensation recovered, the village corporations object to decisions being made which appear to impact directly their interests in the diminution of natural resources still within interim jurisdiction, as well as natural resources appurtenant or those natural resources, including lands, already conveyed to the village corporations.

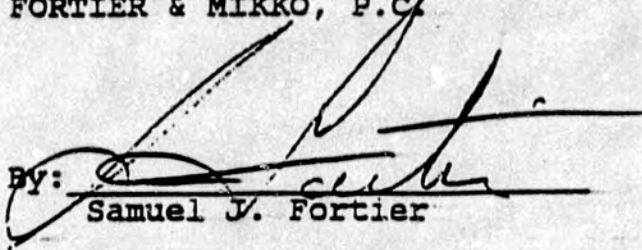
We do not believe that you have complied with the requirements under 43 CFR 2650.1, which require your department to obtain the views of our clients, to consider our clients' views and to not delegate that regulatory duty to another department. Your department is required to perform by law these duties in good faith, including providing our clients with sufficient information to make informed decisions.

In short, your department has failed to comply with its legal duties. We suggest that the government seek an additional 120 days, so that the Department of the Interior can adequately consult with the affected villages, including supplying the villages with scientific studies and

assessments sufficient to enable them to determine whether the natural resources and the damaged ecosystem are likely to recover, and when.

Very truly yours,

FORTIER & MIKKO, P.C.

By: 
Samuel J. Fortier

SJF:jmb (ltr-488/204.210.288)

cc: Chenega Corporation
Port Graham Corporation
English Bay Corporation
Ken McCallion, Esq.
Timothy Petumenos, Esq.
Bill Horn, Esq.
Terance Gargan, Esq.
Christopher Kende, Esq.

ACE 417454

FORTIER & MIKKO
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RECEIVED
Department of Law

April 11, 1991

APR 13 1991

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

Mr. Thomas Campbell
General Counsel
National Oceanic and Atmospheric Administration
Department of Commerce
14th and Constitution Avenue N.W.
Washington D.C. 20230

Dear Mr. Campbell:

We have been directed to you by the Department of Interior to consider and obtain the views of Chenega Corporation, Port Graham Corporation and English Bay Corporation, with regard to the settlement agreement between the governments and Exxon Corporation. This settlement agreement is stated at 56 Fed. Reg. 11636 - 11642, and the MOA is stated at 56 Fed. Reg. 11642 - 11646.

First, we object to the United States Department of Interior delegating its duty to consult with the village corporations, and consider their views to the NOAA. We also object to the federal government, through the Department of the Interior, entering into the settlement agreement before it has considered our clients' views. Further, the Department of the Interior's failure to involve the village corporations in settlement discussions concerning lands within interim jurisdiction as well as natural resources damaged by Exxon is violative of the following federal laws, particularly 45 CFR 2650.1 and Public Law 94-204, as amended by Public Law 96-47, Public Law 99-396, Sec. 22 and Public Law 100-581. We object to the State of Alaska's involvement in the allocation of the limited resources recovered in the settlement. We also object to the State of Alaska's involvement in the settlement process, where our clients

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requested to be kept advised as to the progress of the settlement as early as February 1991, and we were ignored until the settlement was completed.

Second, our clients are unable to determine whether the sums recovered are sufficient to deal with the compensatory and remedial relief necessary to compensate for loss, injury, impairment, damage, or destruction of the natural resources, whether or not said loss is temporary or permanent, and whether the ecosystems polluted by the Exxon Valdez oil spill are able to recover, and if so, over what period of time. The consultation is inadequate because it did not include any scientific studies or assessments concerning these issues.

Third, it is our clients' view that the Attorney General for the State of Alaska has a conflict of interest, in that he has an ongoing business relationship with one or more defendants in the settlement and may stand to gain monetarily as a result of the settlement. In short, it is our clients' view that the appearance of impropriety on the part of Mr. Cole is so great as to cast grave doubt on the adequacy of the settlement, and the ability of the State of Alaska to act fairly and impartially, as a trustee in the allocation of resources, which impact lands conveyed to our clients or are within the interim jurisdiction of the United States, by and through its Secretary of Interior, and its Secretary of Agriculture.

Fourth, it is our clients' view that the agreement and consent decree at paragraph 13(c) does in fact compromise the rights and claims of the village corporations in effect, by ignoring the obligations of the federal government to our clients. We believe, at a minimum, that paragraph 13(c) must be amended to read:

(c) rights, obligations, and claims, if any, of legal entities, include village corporations created pursuant to the Alaska Native Claims Settlement Act (ANCSA) or persons other than the governments who are holders of any present right, including lands, or resources of lands, selected but not yet conveyed to ANCSA corporations by the United States Government, or title or interest in land or other property interests, including Natural Resources, and ecosystems affected by the oil spill.

Fifth, the limitations stated at paragraph 13(b), (56 Fed. Reg. 11639) are too narrowly defined. In this regard, the village corporations which we represent are holders of the

surface estate, and are concerned with preserving the use of the lands in accordance with traditional local lifestyles and subsistence economies. See H.R. Rep. No. 729, 94th Cong., 1st Sess. 26-27 (1979) reprinted in 1975 United States Code, Congressional and Administrative News 2376, 2393. See also Ahtna, Inc. 107 IBLA. 266, 269, 270 (1989):

[Section 14(f) of ANCSA] provides protection to villages from a precipitant decision by Regional Corporations to develop the subsurface estate. This provision seeks to avoid potential conflicts between villages which are holders of the surface estate and which may be concerned with preserving the use of the land in accordance with the traditional local lifestyle and subsistence economy. . . .

It is their traditional lifestyle and subsistence economy which our clients are undertaking to protect, in this case, not against the regional corporation's potential development of mining activities, but rather, with regard to devastation on account of the Exxon Valdez and its aftermath. For more information, please see Exhibit 1, a report by the State of Alaska specifically discussing Chenega, Port Graham and English Bay.

It is our position that ANCSA Section 14(f), with the 1976 amendment must be construed to place in the village corporation, as a holder of the surface estate, the right to preserve the use of the land and its resources for traditional lifestyles and subsistence economy. See also 16 U.S.C. Sec. 3111(4), which demonstrates Congress' overriding concern to protect Native cultures. Congress expressed its intent to protect Natives "physical, economic, traditional and cultural existence. . . ." Pursuant to ANCSA and ANILCA, the authority to preserve subsistence activities and the traditional local lifestyle was vested in the village corporations, as owners of the surface estate of once public, and now private or selected but not yet conveyed lands. Alaskan IRAs and Traditional Councils possess authority concurrently with the village corporations. See 25 U.S.C. Sec. 461-495, wherein the Indian Reorganization Act of 1934 was amended and applied by Congress in 1936 to Alaskan Native villages.

The goal of tribal cultural autonomy that Congress expressed in the Indian Civil Rights Act is also expressed in ANCSA and ANILCA, with the duty of the village corporations to protect Native subsistence lifestyles. Cf. McCurdy v. Steele, 353 F. Supp. 629, 633 (1973). Pursuant to the 1976 amendment to ANCSA Sec. 14(f), Congress has voiced the concern for tribal cultural economies by expressly granting

the right to shape cultural development or preserve cultural economy to village corporations concerned with preserving lands uses and the resources thereon, based upon their special standards and obligations to protect traditional lifestyles and the subsistence economy. This right or power is a concurrent power shared with the I.R.A. or Traditional Councils.

Here, the village corporations of Chenega, Port Graham and English Bay, have suffered enormous losses. 70% of Chenega Corporation's coastline is oiled, and highly toxic oiling occurred on Port Graham and English Bay conveyed lands. Moreover, the purpose of ANCSA was to resolve aboriginal land claims by providing a land resource base. Although Congress did not expressly address Native subsistence, it was and continues to be a Congressional expectation that the Secretary of Interior would protect subsistence users under their existing authority. See Note, The Alaska National Interest Lands Conservation Act: Striking the Balance in favor of customary and traditional subsistence use by Alaska Natives, 27 Natural Resources Journal 421, 425 (1987). Thus, In People of Gambell v. Clark, 746 F.2d 572, 575, (9th Cir. 1984), the 9th Circuit noted:

The needs of the Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives, See e.g. H.R. Rep. No. 523, 92nd Cong. 1st Sess. 5, Reprinted in 1971 U.S. Code Congressional and Administrative News, 2192, 2195; the land was granted, in part, in lieu of subsistence hunting and fishing rights.
117 Cong. Records 36864
(1971) (Rep. McClure).

Based upon the foregoing, we believe that paragraph 13(b) of the Settlement Agreement, in order to conform with ANCSA and ANILCA, must be amended to read as follows:

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees, and Alaska village corporations to exercise their legal rights and obligations, both for the purposes of asserting and compromising claims for injury to, destruction of, or loss of Natural Resources, and affected ecosystems if any, belonging to, managed by, controlled, selected by, or appertaining to such villages and village corporations.

Sixth, it is our clients' view that the inclusion of Exxon

Pipeline Company, and in the agreement's apparent exclusion of Alyeska, which is owned in part by Exxon Pipeline Company, is not clear and must be amplified before we can offer you a view as to this portion of the agreement.

Seventh, we believe the definitions concerning Natural Resources and Natural Resource Damages (Agreement paragraph 6(c) and (d), page 5; MOA paragraph II (F) and (G) pages 6 through 7) specifically include lands and resources held by the United States in interim jurisdiction, the same constitute selected lands under ANCSA.

"Natural Resources", within its definition also includes resources which are appurtenant to lands selected by the village corporations, which resources the village corporations have a direct interest under ANILCA. See, for example, AMOCO Production Company v. Village of Gambell, 107 Sup. Ct. 1396, 1397 (1987) (applicability of ANILCA includes coastal waters to a point 3 miles from the coastline). The village corporations' restoration claims based upon subsistence use under ANILCA extends to 3 miles from the coastline. Scientific studies and assessments are essential to ascertain the extent of those damages, because village corporations have an obligation under ANCSA and ANILCA to protect the subsistence lifestyle, which extends to the use of marine resources.

The scientific studies and assessments which the Governments undertook earlier are coming to an end, according to news reports. As mentioned earlier, those studies and assessments have not heretofore been made available to the village corporations, either with regard to conveyed lands or selected but not yet conveyed lands. However, the State of Alaska has informed the village corporations that it will not be undertaking any further oil removal work after this season, which means that resource restoration must depend upon species hardy enough to withstand the effects of oil pollution. It is our clients' common view that said substitute resources are unacceptable. That the damaged or destroyed ecosystems appurtenant to the village corporations' property interests render their ability to safeguard subsistence lifestyles and economies and the cultural values thereto unperformable.

Thus, even if the settlement pays lip service not to compromising, the village corporations' claim and rights, as well as these obligations, it is clear that the practical application results in prohibition against the performance and enjoyment of legal obligations and rights.

Eighth, the agreement fails to address the federal government's obligation with regard to escrow of damages money, and does not provide any methodology for restoration with regard to lands and resources in its interim

jurisdiction, except in conjunction with the State, which has become increasingly adverse to oil reclamation and preservation of Native lifestyles.

Ninth, there is no meaningful participation on the part of the village corporations with regard to either their present or future rights and legal obligations.

Tenth, the State of Alaska cannot act as a trustee with regard to resources on lands selected but not conveyed to the village corporations.

Eleventh, both the settlement agreement and the MOA ignore the clear requirements pursuant to CERCLA at 42 U.S.C. Sec. 9651 as it relates to the Clean Water Act, recovering compensation for loss, injury, impairment, and damage or destruction or the ability of polluted ecosystems to recover. . . ." Page 5 of the agreement and consent decree, at paragraph 6(c) and paragraph II (F) of the MOA should be corrected to include this important provision.

Similarly, the MOA, at page 7, paragraph G, fails to address the duties of the federal and state trustees to settle claims for "impacted ecosystems".

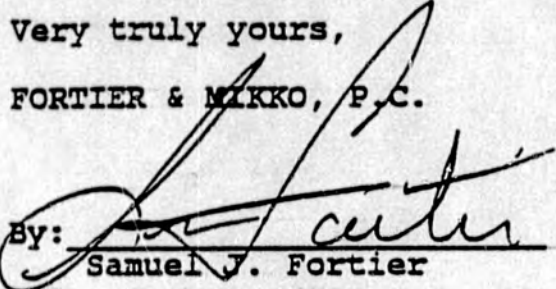
See also MOA at paragraph II (J), (definition of restore or restoration) but fails to address the damage to the ecosystems.

Based upon the foregoing, it is our clients' common view that the Department of the Interior should not enter into the settlement agreement until adequate consultation has occurred. It is Chenega's view that the Department of Agriculture in its capacity as a holder of interim

jurisdiction lands and resources selected by Chenega Corporation has failed to even so much as acknowledge Chenega's letter, and has not sought Chenega's views nor consulted with Chenega Corporation.

Very truly yours,

FORTIER & MIKKO, P.C.

By: 

Samuel J. Fortier

SJF:jmb (ltr-488/204.210.288)

cc: Chenega Corporation
Port Graham Corporation
English Bay Corporation
Kenneth McCallion, Esq.
Christopher Kende, Esq.
Timothy Petumenos, Esq.
Terance Gargan, Esq.
Martin Suuberg, Esq.
Barbara Herman, Esq.

ACE 417461

RECEIVED

Department of Law

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APR 13 1991

THE NATIVE VILLAGE OF
CHENEGA BAY, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

Civil Action No. 91-483 SS

CHENEGA CORPORATION, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

Civil Action No. 91-484 SS

MEMORANDUM OPINION AND ORDER

These cases¹ are before the Court on a continuation of the hearing commenced on March 7, 1991, on plaintiffs' motions for a temporary restraining order, and on the plaintiffs' motions for a preliminary injunction. The plaintiffs are Native Alaskan villages, the some 5,000 residents of these villages, and Native Village Corporations owned by these villagers. The defendants are officials of the United States Government and of the State of Alaska. Plaintiffs seek to enjoin the defendants from consummating

¹ The captioned cases have not been consolidated for all purposes. Plaintiffs in both cases have moved for issuance of a preliminary injunction. Because the plaintiffs in both cases seek identical relief, and because the issues raised in the plaintiffs' motions are similar, the Court has treated the motions jointly.

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settlement negotiations with Exxon Corporation, Exxon Shipping Co., [collectively, "Exxon"] and Alyeska Pipeline Service Co., relating to the discharge of oil by the M/V EXXON VALDEZ. The Court on March 7, 1991, issued a ten-day temporary restraining order restraining a settlement. Plaintiffs now seek issuance of a preliminary injunction.

Plaintiffs contend that the defendants plan to enter into an agreement with Exxon and Alyeska settling civil claims against Exxon and Alyeska that the defendants may have as a result of the Valdez oil spill. The plaintiffs' claim, in essence, is that this planned agreement will compromise the plaintiffs' rights to seek relief themselves against Exxon and Alyeska. The plaintiffs' claims for damages against Exxon and Alyeska are currently being prosecuted in federal and state court in Alaska.

In response to plaintiffs' motions, the defendants have represented to the Court that the planned settlement agreement will not in any way compromise the plaintiffs' rights, except to the extent the plaintiffs agree to be bound by the settlement agreement. The Court understands this representation to mean that after the settlement agreement has been executed, the plaintiffs will be able to prosecute fully the suits they have initiated against Exxon and Alyeska just as if no settlement agreement existed. The Court further understands the defendants' representation to mean that Exxon and Alyeska may be liable to the plaintiffs for damages to natural resources with respect to lands they have an interest in even if it is claimed the same natural

resources are covered by the settlement agreement among the defendants and Exxon and Alyeska.

The Court accepts the defendants' good-faith representations. On the basis of these representations, the Court believes that the plaintiffs' rights are not affected by the planned settlement agreement. Accordingly, it is this _____ day of March 1991 hereby

ORDERED that the temporary restraining order issued by this Court on March 7, 1991, is DISSOLVED; and it is further

ORDERED that plaintiffs' motions for a preliminary injunction are DENIED; and it is further

ORDERED that the Court shall retain jurisdiction over this matter to ensure that plaintiffs' rights are protected. The Court shall maintain this case on its docket so that the plaintiffs may on a motion request such additional relief as they may be entitled to, and so that the defendants may make an appropriate motion to have this case transferred to the United States District Court for the District of Alaska, as the defendants have indicated in court they may desire to do.

Stanley Sporkin
United States District Court

PORT
GRAHAM

April 12, 1991

Alaska State Legislature
Oil Spill Settlement Committee
P.O. Box V
Juneau, AK 99811

Dear Committee Members:

I am President of Port Graham Corporation, an Alaska Village Corporation which owns or has selected lands around lower Cook Inlet, the Gulf of Alaska and the Kenai Fjords area. Port Graham Corporation has approximately 190 shareholders, the majority of whom live in Port Graham and other communities on the Kenai Peninsula.

The oil spill has had a devastating effect upon our local economy. All seasonal jobs have been lost because the cannery has not operated in several years. We lost our leasee on account of the oil spill. We have not been able to attract a new lessee, because of concerns over oil contamination.

Our shareholders are, for the most part, traditional and subsistence oriented. Port Graham Corporation, in order to fulfill its obligations as a village corporation, has not developed its lands, so that we can guarantee a subsistence base for our shareholders.

We have been involved in the oil spill litigation for two years. When Exxon settled with the processors, it would not settle with us. We have received no reimbursement from Exxon for the closure of our cannery, the resulting loss of jobs and pressure on the corporation's scarce resources to take care of its shareholders, the tremendous costs the corporation incurred over the first summer of the oil spill in attempting to protect our land, or for any of the other extraordinary costs on account of the oil spill.

We have worked closely with the state, our people have answered innumerable questionnaires, thrown open their doors

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to the state scientist studying the effects of the oil spill, and we have coordinated with state and federal cleanup efforts to the point where that becomes virtually our sole occupation during the summer months. We are, of only two communities in the oil spill area which did not receive local response project funds. We did not receive those funds because the Kenai Peninsula Borough had its own plans for oil spill response, which did not include our lands within the Borough. Thus, even while other communities were able to provide some employment for their residents displaced by the oil spill, we were unable to do so, and at the same time we incurred enormous expenses.

The Rocky Bay, Windy Bay area in the Gulf, which we own, continues to be highly toxic, according to state and federal studies. Yet, even though Port Graham and its shareholders contributed to the study assessments, we have not been permitted any information as to the likelihood of recovery of the polluted ecosystems, ecosystems upon which we depend. The attorney general has said that the studies would not be released because of litigation. The only reason we can figure for not releasing the studies is that the damages assessments would indicate the state is settling for an amount which would mean that the ecosystem recovery and resource damages are not being adequately compensated, and he does not want either you or us to know this.

As citizens of the State of Alaska, we have a direct interest in the state's success in resource and ecosystem restoration. Yet, the State's settlement has not been shown to be adequate to compensate for those damages and restoration expenses into the future. It does not make sense to accept such a situation. Just as I must advise my board of directors by the use of the corporation's professionals, it seems to me that you, the Alaska Legislature, also have a duty on behalf of all of us to make adequate inquiry before agreeing to this proposed settlement. There are too many unanswered questions. My board would not let me get away with something like this. I encourage you not to let the Chief Executive Officer of the so called owner state not get away with it either.

Please make your inquiries. Please take the time you need, and if its another 120 days, try to get it. While you are performing your diligent inquiry, I also hope that you will remember the little people, the displaced residents of Port

Graham, the fishermen, the cannery workers, area businesses, and the entire state which has been impacted negatively by this oil spill. Even if the state settles, that will not put the matter behind those of us who have suffered the most, but may push us into a closet with no escape.

Thank you.

Very truly yours,

FORTIER & MIKKO, P.C.

By: Patrick Norman, President

PN:dea:573ltr

ACE 417467

CHENEGA CORPORATION

General Delivery
Chenega Bay, Alaska 99574-9999
(907) 573-5118

April 12, 1991

The Oil Spill Litigation Committee
of the Alaska Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Ladies & Gentlemen:

I am President of Chenega Corporation, the village corporation for Chenega, located in Prince William Sound. We have 72 shareholders, most of whom live in Chenega Bay and other communities in Prince William Sound. For the past two years, we have been dealing with the impact of the oil spill, and the evidence that the oil spill still pollutes our beaches.

We have read the Exxon settlement papers. We are concerned, if the State does settle with Exxon, that that settlement will mean that Exxon has no reason to settle with the little people, including Chenega Corporation and its shareholders, for many years. The State of Alaska and the Federal governments have the most significant resources to bring against Exxon. We are a very small village corporation, our resources are devoted to insure the continuation of Chenega's unique culture and lifestyles. We do not have the resources to fight a giant like Exxon alone. In this case, because the State's Attorney General is insisting upon concealing the studies and assessments which would otherwise establish resource damage and estimates of recovery on the ecosystem, we have no idea how long or when the seals, otters, and other marine life, as well as land animal populations will recover.

Chenega and its lands are located in the southwestern part of Prince William Sound, and received the full impact of the 11 million gallons of oil spilled from the Exxon Valdez. 70% of our shorelines were oiled, and areas of our shoreline show no recovery whatsoever from 1989. We have devoted

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