

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

1980 SCOMM 77: SENATE SPEC. COMM. EXXON VALDEZ OIL SPILL. 1991

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The trustees agree to establish procedures for meaningful public participation, which may include a public advisory group.

The trustees shall agree to an organizational structure for decisionmaking under the MOA within 90 days after the consent decree (in the U.S. and State v. Exxon case) has been approved and entered as a judgment of the court.

Questions.

1. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government?

2. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as "the 311(k) fund," which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the federal Treasury?

3. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply (see below)?

4. Is the commingling of trust assets a violation of the trustees' common law trust responsibilities?

5. Will a trust fund in the court registry bear interest?

6. What standards would a court use in deciding disputes among the trustees?

7. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money?

RETENTION OF RIGHTS RE INJURY ASSESSMENT AND RESTORATION:
PARAGRAPHS IVB and C (Pages 11-12). This states that the MOA does not prevent either government from undertaking injury assessment or restoration activity in addition to that paid for by the trust fund.

It also allows each government to change the trustees, without objection by the other, so long as neither government designates more than three trustees. (It appears that a government could designate fewer than three trustees if it wanted to.)

It also acknowledges that the President has given the EPA the task of coordinating, on behalf of the federal government, the restoration of the injured natural resources.

Finally, it provides that the MOA does not constitute an election on the part of either government to be bound by the Natural Resource Damage Assessment Regulations codified at 43 CFR 11. This is an interesting provision, especially given the parties' reference of 43 CFR 11.32 in the introduction. Although Part 11 is entitled "Natural Resource Damage Assessments," and the vast majority of 43 CFR 11 deals with methods of damage assessments, 43 CFR 11.92 and 11.93 address the establishment of a restoration account and a restoration plan. 43 CFR 11.10 states that the "assessment procedures set forth in this part are not mandatory," but 43 CFR 11.14(aa) defines "assessment" to mean the process of determining damages for injuries to natural resources. Therefore it is not clear whether the parties to the MOA are saying that they are not bound by any part of 43 CFR 11, or whether they are saying they are not bound by that part of 43 CFR 11 that relates to damage assessments.

Question.

1. Do 43 CFR 11.92 and 11.93 apply to all recoveries under the CWA, or are they optional? Did the parties believe those regulations apply.

USE OF NATURAL RESOURCE DAMAGE RECOVERIES; PARAGRAPH VA (Page 12). The trustees jointly use the trust fund money to restore, replace, enhance, rehabilitate or otherwise acquire the equivalent of natural resources injured as a result of the oil spill and the reduced or lost services provided by such resources. The CWA, 33 U.S.C. 1321(a)(8) defines "removal" to include actions necessary to minimize or mitigate damage, but does not otherwise provide guidance as to the meaning of these terms. It is likely, although not certain, that the trustees will use the definitions at 43 CFR 11.14. 43 CFR 11.14(a) defines "acquisition of the equivalent" or "replacement" to mean the substitution for an injured resource with a resource that provides the same or substantially similar services (this is in addition to substitutions as part of response actions). "Services" under 43 CFR 11.14(nn) means the physical and biological functions performed by the resource, including the human uses of those functions; I interpret it as including use of natural resources for food or water, and perhaps such things as recreation. "Restoration" or "rehabilitation" means actions undertaken to return the injured resource to its baseline condition. 43 CFR 11.14(ll).

Under this paragraph the governments are also to establish standards and procedures for administering the trust fund money.

Finally, this paragraph requires that all natural resource damage recoveries be placed in the joint trust fund.

Questions.

1. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
2. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds?
3. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?)
4. Will the trust pay its own administrative expenses?
5. Who, if anyone, will perform audits of the trustees' expenditures?
6. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed?

REIMBURSEMENT TO GOVERNMENTS; PARAGRAPH VB. (Pages 12-13).
Up to \$72 million shall be available to the state for reimbursement of its past expenses. Up to \$62 million shall be available to the federal government to reimburse its past expenses. This reimbursement money shall be paid directly to the governments by Exxon over five years. The agreement does not state which five years, or whether the installments must be equal.

Also, all of the governments' unreimbursed response and cleanup costs incurred after December 31, 1990, and certified by either the FOSC or the SOSC, shall be reimbursed to the appropriate government. (The trust fund will get whatever is left when these items are deducted from the settlement proceeds.)

For questions relevant to this paragraph, see the sectional of the consent decree.

OUT-OF-STATE EXPENDITURES; PARAGRAPH VC. (Page 13). "Except as otherwise provided" in the MOA, the trustees agree that the trust money will be expended on the restoration of natural resources in Alaska unless the trustees agree that "spending funds outside of Alaska is necessary for the effective restoration, replacement, or acquisition of equivalent natural resources injured in Alaska and services provided by such resources."

Questions.

1. Is there some other provision that allows the trustees to spend the money on projects outside Alaska? (Why is the "except as otherwise provided" language there?)

2. Could the trustees create a recreational site in another state to compensate for the loss of a recreational site in Alaska? Could fish hatcheries be built in Washington and paid for out of the trust funds under this provision? Could scientific studies be done out of state and paid for with trust fund money?

NO STATE OBLIGATION TO SPEND MONEY; PARAGRAPH VD (Page 13).
The MOA states that it does not obligate the governments to expend money except to the extent funds are appropriated or are otherwise lawfully available.

Question.

1. Is this an indication that trust money that the trustees decide to use to pay for work of state agencies will have to be appropriated by the legislature? Or it is just a "safety" clause to assure the state that it does not have to pay money under the MOA?

SCIENCE STUDIES (Page 13). The state and federal governments are to continue to cooperate in appropriate scientific studies relating to the oil spill, including those approved for the 1991 field season.

COVENANTS NOT TO SUE; PARAGRAPHS VIIA A,E, and F (Pages 14-16).
The governments agree not to sue each other with respect to:

(1) the authority of either government to enter into and comply with the MOA;

(2) the right of either government to engage in cleanup, damage assessment, or restoration activities under the MOA;

(3) all civil claims one government may have against another arising out of acts or omissions that occurred before the execution of the MOA and related to the oil spill.

In "E" on page 15, the governments agree that if they are both sued by a third party for a claim arising out of the oil spill, the governments will cooperate in their defense and not assert claims against each other. In "F" the parties agree that they will cooperate in each other's defense if one, but not the other, is sued by a third party for a claim relating to the oil spill. In both cases, the governments agree to pay their liability as determined in final judgment, and not to assert claims against each other.

Questions.

1. If the trustees disagree, can the state trustees take the issue to court if the issue is whether a federal agency should be involved in a particular project, or does #2 above preclude that?

2. Does this put the state in the position of cooperating with the federal government against an Alaskan resident who asserts an oil spill claim against the federal government?

CO-TRUSTEESHIP AS TO NATURAL RESOURCES; PARAGRAPHS VIIIB AND C (Pages 14-15). For the purposes of oil spill litigation related to Exxon and other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the oil spill, each government is entitled to assert that it is a co-trustee of all of the natural resources injured, lost, or destroyed as a result of the oil spill.

Each government also agrees not to sue the other one to determine the share of either government's ownership or rights or management authority over natural resources injured, lost, or destroyed as a result of the oil spill.

Question.

1. Does the last clause preclude, at least for the next 16 years, the U.S. and the State from suing each other to determine ownership of resources, or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill?

EFFECTIVENESS OF MOA; PARAGRAPH VIID (Page 15). If the governments become adverse to each other in the oil spill litigation (with Exxon), the MOA shall remain in effect.

Question.

1. How does this provision interact with the termination provision on page 17 that says the MOA terminates if the consent decree terminates, unless otherwise agreed by the parties?

ENFORCEMENT, VENUE, AND INVALIDITY (Page 16). The MOA is enforceable in federal district court in Alaska, which retains jurisdiction.

If the MOA is determined to be invalid, the use of the remaining money will be determined by further agreement of the governments or by an allocation of the recoveries by the federal district court in Alaska, subject to appellate review.

Question.

1. The heading of this paragraph includes "governing law," but the text doesn't mention it. Did the agreement have a governing law provision at one time?

EFFECTIVE DATE (Page 17). The MOA is effective on the date the consent decree is signed and entered by the court, except for the provision covering continuation of joint science studies, which is effective on the date all parties sign the MOA.

INTEGRATION AND MERGER (Page 17). The MOA and the consent decree constitute the entire agreement between the state and federal governments as to matters mentioned in them. The parties note that the agreement reached among the trustees as to disbursements of the \$15 million paid by Exxon in April 1989 remains in effect.

Question.

1. What was the agreement of April, 1989?

TERMINATION (Page 17). The MOA terminates 16 years from the effective date, or upon termination of the consent decree, unless otherwise agreed by the parties.

Question.

1. How does this relate to paragraph VIID on p.15?

JUDICIAL REVIEW (Page 18). The MOA creates no rights in a person who is not a party to it. It is not subject to judicial review except as provided in article VII.

Question.

1. Since this is a court decree, do the parties have the power to prevent judicial review?

2. What does the reference to article VII refer to?

3. Does this prevent a third party from challenging a decision of the trustees on the grounds that the decision is inconsistent with the MOA or applicable law?

MODIFICATION AND REPRESENTATION (Page 18). This MOA can only be modified with the written consent of the parties and the approval of the court. The representatives certify that they are authorized to enter into the MOA and bind the governments.

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DIVISION OF LEGAL SERVICES

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MEMORANDUM

March 25, 1991

SUBJECT: Exxon Settlement; Sectional Analysis of Plea Agreement
(Work Order No. 7LS-1053)

TO: Senator Dick Eliason

FROM: Pamela Finley
Assistant Revisor of Statutes

SECTIONAL ANALYSIS OF PLEA AGREEMENT

I. INTRODUCTION. This section sets out the crimes in the indictment against Exxon and Exxon Shipping that Exxon and Exxon Shipping will be pleading guilty to.

Exxon Shipping is pleading guilty to

- (1) negligent discharge of pollutants (oil) into Prince William Sound without a permit (a violation of the Clean Water Act, carrying a fine of \$2500-\$25,000 per day);
- (2) discharge of refuse (oil) into Prince William Sound (a violation of the Refuse Act carrying a fine of \$500-2500), and
- (3) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.)

Exxon is pleading guilty to

- (1) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.) The basis for Exxon's liability is that Exxon owned the oil that Exxon Shipping discharged that killed migratory birds.

II. DEFENDANTS' AGREEMENT AND UNDERSTANDING. This lists the attorneys representing the defendants and sets forth the facts that the government would have to prove for conviction of the counts to which the defendants are pleading guilty. It also sets forth the defendant's agreements that there is a legal basis for the fines and restitution. This statement is made for the purpose of the plea

agreement only. The defendants also recognize that by pleading guilty they are admitting the essential elements of the charges in the counts (i.e., the essential facts.)

Finally, the U.S. agrees to ask the court to dismiss (once the court has accepted the plea agreement) other counts against Exxon Shipping and Exxon, namely the ones to which they are not pleading guilty.

Question.

1. What counts will be dismissed?

III. AGREEMENTS REGARDING IMPOSITION OF SENTENCE. First, the U.S. agrees not to make additional criminal charges or seek civil or administrative penalties for various acts relating to the oil spill against

- (1) Exxon, its present or former officers, directors, or employees;
- (2) any of Exxon's wholly-owned subsidiaries or their present or former officers, directors or employees; or
- (3) Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives.

The government reserves the right to take civil or administrative action (other than for penalties or under criminal laws) against the above persons and entities. (This reserves the federal government's rights to take action relating to suspension, debarment, or listing.)

This section also lists the fines. Exxon Shipping is to pay \$75 million, half of which is remitted (not paid). Exxon agrees to pay \$25 million, half of which is remitted (not paid). The remission is based on the defendants' recognizing their responsibility, cooperating with the federal government, and making past payments for cleanup (\$2 billion) and for injuries to claimants (in excess of \$300 million.)

Question.

1. Who are Exxon's wholly owned subsidiaries?
2. Why is Alyeska Pipeline Service Company included in the entities against whom criminal charges will not be brought and from whom civil or administrative penalties will not be sought?

IV. AGREEMENTS REGARDING RESTITUTION. Exxon and Exxon Shipping agree to pay the State of Alaska \$50 million in restitution within 30 days after the court accepts the plea agreement. The payments are to be used by the State

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exclusively for restoration projects relating to the oil spill. The state is to control the use of the money, and upon payment the money shall be available for use by the state for restoration projects without objection, challenge, or judicial or administrative review.

Restoration (for which the money may be spent), includes (1) restoration, replacement, and enhancement of resources affected by the oil spill; (2) acquisition of equivalent resources and services; and (3) long-term environmental monitoring and research programs directed to prevention, containment, cleanup, and amelioration of oil spills.

V. GENERAL PROVISIONS. Exxon guarantees the payments Exxon Shipping is to make.

If the court rejects the plea agreement or does not dismiss the charges the U.S. has said it will move to dismiss, each defendant will be permitted to withdraw its guilty plea.

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MEMORANDUM

March 21, 1991

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

TO: Senator Dick Eliason

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

SECTIONAL ANALYSIS OF CONSENT DECREE
PARAGRAPH 13 TO END.

RELEASE OF CLAIMS BY GOVERNMENTS; PARAGRAPH 13 (Pages 14-15).

The state and federal governments give up all civil and administrative claims they have against Exxon arising out of the oil spill. This includes all the claims the State has made in state court under state law, except for #4 below. This paragraph explicitly states that the consent decree does not impair:

- (1) the right of the state or federal government to enforce the consent decree, including the reopener clause;
- (2) the rights of Alaska Native villages to act as trustees for the purposes of asserting or compromising their claims for damage to natural resources belonging to, managed by, controlled by, or appertaining to the villages;
- (3) the rights of other parties who own or have an interest in property affected by the oil spill; or
- (4) claims by the State for tax revenues that would have been, or would be collected under existing AS 43.75.

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

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

Questions.

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

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

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

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

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

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

Question.

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

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

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

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

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

Question.

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

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

Question.

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

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

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

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

Questions.

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

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

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

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

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

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

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

Questions.

1. Are any lawsuits of the types described in paragraphs 22-25 currently pending, or likely?
2. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska (e.g., economic loss)?

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

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

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

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

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

Questions.

1. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.)
2. Are there third party suits against the state, or are there likely to be such, in which Exxon or Exxon Pipeline is not a defendant? (Under paragraph 27, the state could not recover against Exxon for its losses in such cases.)
3. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. I suspect this was an oversight. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits?
4. Can the state and federal governments recover against each other for judgments they have to pay to third parties?

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

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

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

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

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

Question.

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

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

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

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

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

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

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

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

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

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

Questions.

1. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated?
2. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC?

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

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

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

Question.

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

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ALASKA STATE LEGISLATURE SENATE

SENATOR RICHARD I. ELIASON

PRESIDENT OF THE SENATE
LABOR & COMMERCE COMMITTEE
RESOURCES COMMITTEE
RULES COMMITTEE
CHAIRMAN, SPECIAL COMMITTEE ON
DOMESTIC & INTERNATIONAL
COMMERCIAL FISHERIES



P.O. BOX 143
SITKA, ALASKA 99835

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4916

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March 27, 1991

Honorable Charles Cole
P.O. Box K
Juneau, AK 99811

Dear Attorney General Cole:

The Senate Special Committee on the Exxon Settlement appreciates your acceptance of our invitation to meet with us tomorrow morning at eight o'clock in the Butrovich Room. At this initial meeting with you regarding the Exxon settlement, the committee would particularly like to discuss a number of the policy-type decisions that went into the negotiations and ultimate settlement agreement. A list of the questions we would like you to be prepared to discuss tomorrow is attached. The committee is likely to bring up questions beyond this list, but I plan to try to keep this first discussion to primarily addressing the basic premises and approaches used in creation of the settlement, rather than getting into the details.

We hope to meet with you again within the next week or so to begin discussing the many technical and legal questions which have arisen. My office will be providing you with a list of specific questions in advance of that next meeting with you.

We look forward to meeting with you in the morning.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dick", written over the word "Sincerely,".

Senator Dick Eliason, Chairman
Senate Special Committee on the Exxon Settlement

Used as basis of discussion
with Attorney General at
3-28-91 Committee meeting.

SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

QUESTIONS FOR ATTORNEY GENERAL CHARLES COLE

The following questions regarding the Exxon settlement relate mainly to the basic thinking, premises, policy calls and general approach used in the negotiations and outcome of the settlement. A separate list of more technical and legal questions about the settlement is being compiled.

1. Why did the state choose to settle under the Clean Water Act?

2. If under CWA the combining of the state and federal funds was not required, why did the MOA require it?
Whose idea was it to commingle the funds?
How difficult would it have been to make a determination or agreement regarding what percentage of the loss was state and federal?

3. The Clean Water Act (33 USC 1321(k)) specifically requires that money recovered by the federal government under the Act is to be deposited in the federal treasury. Regulations (43CFR 11.92) require state recovery to be deposited in the state treasury or in an account payable to the state treasury or in an account payable to the state trustee. During negotiations was there discussion about whether this agreement would be valid under federal law if the funds were never deposited into the treasuries?

4. In negotiations, did the parties discuss each of their preferences regarding involvement (or lack of it) of the Legislature in the appropriations process and future decisions regarding how the money is to be spent? Did the question of constitutionality come up during negotiations?

5. Why was it determined that decisions of the Trustees have to be unanimous rather than simply a majority on each side (state and federal)?

6. Why does the decision power go to a federal judge when consensus can't be reached? How do you see this as working?

7. Has the complaint under the Clean Water Act been filed yet?

8. Why did you choose to not bring state criminal charges against Exxon?

9. Do you plan to pursue the state's case in state court against the remaining defendants?

10. Why was all the language regarding Alyeska included when they were not a party?

11. Why is there no language asking that the trustees confer with advisory groups already established to deal with all aspects of the spill to avoid having to establish new ones?

12. Please describe the approach taken to third party litigants. What were the objectives?

13. Please describe the approach taken to the issue of indemnification of parties in the settlement. Does non- indemnification language put Exxon and the state together defending themselves against the Alaskan citizens?

14. Why was the section deducting future cleanup costs allowed to stand alone even if the Decree is disapproved?

15. What is the purpose of the provision in the MOA allowing Trust Fund money to be spent outside of Alaska?

16. Why is the payment of the \$72 million to the state spread out over a five year period, and why does the settlement not specify which five year period?

17. What is a "natural resource service," which is listed in the settlement as something that the settlement money can be used for?

...

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INTEREST

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SCOMM

77:21



Alaska State Legislature

SENATOR RICHARD I. ELIASON

President of the Senate

P.O. Box V
Juneau, Alaska 99811
(907) 465-3755

MEMORANDUM

TO: MEMBERS OF THE SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

FROM: SENATOR DICK ELIASON, CHAIRMAN

DATE: MARCH 29, 1991

RE: SECOND SET OF QUESTIONS FOR THE ATTORNEY GENERAL

ATTACHED IS A COPY OF THE COVER LETTER AND LIST OF QUESTIONS WHICH I HAVE SUBMITTED TO ATTORNEY GENERAL CHARLIE COLE ON BEHALF OF THE SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT TODAY.

PLEASE REVIEW THESE QUESTIONS AND BE PREPARED TO DISCUSS THESE, AND ANY OTHERS THAT YOU WOULD LIKE TO BRING UP, AT OUR NEXT MEETING ON THURSDAY, MARCH 4, AT 8 A.M. IN THE BUTROVICH ROOM.

PLEASE ADD THIS LIST OF QUESTIONS TO YOUR COMMITTEE BINDER AND BRING IT WITH YOU TO THURSDAY'S MEETING.



Alaska State Legislature

SENATOR RICHARD I. ELIASON

President of the Senate

P.O. Box V
Juneau, Alaska 99811
(907) 465-3755

March 29, 1991

Honorable Charles Cole
P.O. Box K
Juneau, AK 99811

Dear Attorney General Cole:

Thank you for meeting with the Senate Special Committee on the Exxon Settlement yesterday. We appreciate the time you are spending with the Committee to explain the settlement and answer questions.

Enclosed is a second list of questions which the Committee would like to have you answer, beginning at the meeting we have scheduled with you next Thursday morning, April 4, at 8:00 in the Butrovich Room.

As you go through the questions, please identify any that you feel should not be answered in a full public hearing. The Committee may want to go into executive session to give you the opportunity to respond to those. Perhaps we can set aside all of the questions which you believe require executive session and take them up all at once.

I hope that your legal analysis of the constitutionality of the settlement will be completed and available to the Committee by Thursday's meeting as well.

We look forward to meeting with you again on Thursday.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dick", written over the word "Sincerely,".

Senator Dick Eliason, Chairman
Senate Special Committee on the Exxon Settlement

SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

SECOND LIST OF QUESTIONS FOR THE ATTORNEY GENERAL

(Submitted March 29, 1991)

General Settlement Questions:

1. What were dollar amounts of settlement based on? Please provide the figures you used for the State expenditures for which the \$72 million is reimbursement. How was the value of the natural resource damages figured? Was actual present day value figured in when it was decided to spread it over 10 years? 3/24/91
2/2/91
2/3/91
2. The \$50 million to the State under the plea agreement must be spent on restoration. Does the \$50 million which comes to the federal government under the plea agreement have to be spent on restoration ~~too?~~ NO
Also.
3. Does approval of the Decree constitute approval of the MOA? What would happen if the Legislature approved of the Decree but not the MOA? Could approval of the Decree be made contingent upon changes in the MOA? YES
-NOT likely-
4. Can the State exercise appropriation power over joint funds? Does the State "own" other property jointly (e.g., AHFC jointly-owned mortgages)? Does an agreement that the recovery will be joint necessarily require that the funds be expended without legislative authority? -The
Theory
5. Could the legislature, within the framework of the MOA, require that the State's interest in the joint funds be annually appropriated after the trust has submitted a proposed budget to the legislature and that budget has been approved? NO
6. If the court does not accept the agreement, can it go forward anyway as an "agreement" rather than as a decree? NO
7. The State gives up its right in the settlement to ever go after Exxon for the State's lost revenue from lost oil and gas taxes and royalties, corporate taxes, State's portion of salmon enhancement taxes, etc. How much did the State figure those to be worth (as it had already sued for all of those under the State suit it now gives up), and what were our chances of proving and recovering those? Will these particular claims be pursued against Alyeska? YES
8. What was the State's potential recovery/claim under the "dollars per gallon" state law (AS 46.03.758-759)? Please provide a copy of the letter from the State to Exxon, dated approximately April of 1989, requesting early settlement of that claim. Copy

9. Please provide a copy of the reimbursement contract signed by Exxon with the State after the spill.

10. What will the Department of Law be seeking in appropriations to defend against third party lawsuits for FY 92 through FY 95? Please estimate and compare legal fees that will have to be paid by the State with and without the settlement.

11. What are specific examples of types of things that might be eligible for funding under the re-opener clause? How likely is it that anything would ever trigger the receipt of that money?

12. You have stated that you plan to keep scientific data regarding the spill confidential due to the pending claims against the State. If and when those claims are resolved, will you release all data to the public? Do you believe that it is legal to keep that information confidential? Is it likely that this data will be made public anyway through the normal "discovery" process during the third parties' litigation proceedings, making the question of the legality of keeping the information confidential moot.

Hold Over

→ Questions regarding third party lawsuits:

13. What third party suits have been filed? (Please provide list of them). What is the total estimated dollar amount of the third party claims against the State resulting from the oil spill and clean-up? Are any of the plaintiffs seeking punitive damages?

14. Since the \$72 million is recovered under the CWA it can only be reimbursement for funds already expended, and the \$50 million must be spent for restoration. With the remainder of the settlement money going to the Trust, there is no money to help the State pay for any third party liability or legal fees. Won't there ultimately be a net loss of millions of dollars to the State treasury?

15. Paragraphs 29 and 30 on page 23 of the Decree, do not appear to be specifically limited to lawsuits related to the oil spill. Was this a drafting error? If not changed, how likely is a court to interpret these paragraphs as applying only to lawsuits related to this spill?

16. How are third party suits affected by this settlement? Does the State have a responsibility to protect interests of groups of Alaskan citizens? If third parties need the State's help wouldn't they be affected by the Decree, even though the Decree says it does not affect third parties?

Comment
12-15 M.
Annually

YES

Possible

✓

17. The MOA also prevents any of the three parties involved from ever challenging the authority of the others to enter into this agreement. If the Legislature disapproved of the Decree, and the Governor chose to go ahead with it anyway, would the Legislature as a part of "the State" be precluded from ever challenging the authority of the parties to enter into the agreement? Are the claims of municipalities, which are political subdivisions of the State, barred by the State's release of its claims?

Questions regarding Clean Water Act:

18. Since CWA requires money to go into state or federal treasuries, do we know for sure whether this settlement is even legal under the CWA? *YES!!*
19. Is filing under the CWA an "election of remedies?" Does it necessarily preclude the State from pursuing the case in State court if the settlement is terminated? *NO*

Questions about the Trustees and Joint funds:

20. The Trustees named in the settlement were evidently already designated as trustees before this settlement. *YES*
When was this particular group of Trustees established and under what authority? *PRES- FED, STATE & GOV.*
21. If there is a lack of consensus among the trustees and the court is left to make decisions about expenditures from the Trust Fund, what would the court use for standards to make its decisions? *SOUND DECISION*

Indemnification questions:

22. The non-indemnification language evidently puts Exxon and the federal government and the State together defending themselves against the Alaskan citizens and other groups of third party litigants. Under the terms of the settlement is there a way the State can avoid being put in that position? *NO*
23. Section VII. B. on page 14 of the MOA states that the governments will not sue each other or take other legal action with respect to determining the scope or proportionate share of either government's ownership, rights, etc. over natural resources. It appears that this falls under the language of the opening phrase, "Solely for purposes of the Oil Spill Litigation... and related proceedings." Please confirm whether the opening phrase binds the whole paragraph, so that the agreement to not argue over state and federal land and resource ownership does not go beyond the scope of this settlement. *YES*

Questions about how money can be spent:

TRUST FUND PORTION:

24. Please provide a list of specific examples of the kinds of expenditures that would be possible and likely with the use of the Trust Fund.
25. Could federal employees already working in Alaska (or elsewhere) and currently being paid out of the regular federal budget, end up being paid instead out of this fund?
26. What are "natural resource services"? (one of the things that fund money can be spent on). Please give specific examples of things that would qualify.
27. If assets are purchased or built with trust fund money, who will own them? How would those properties or facilities be administered, etc.?
28. Will all operating costs, travel, staff, per diem, etc. of the Trustees and the Trust come out of the Trust?
29. What mechanism will ensure public accountability? There appears to be no required budget review, annual oversight by elected officials, appropriation process, or audits of the trustees' expenditures.
30. Is there a limit on how much can be spent to reimburse Exxon for whatever clean-up work they do between the effective date of the Consent Decree and the date of final approval of the Consent Decree?

\$72 MILLION PORTION:

31. If the \$72 million to be paid to the State is over a five-year period, when does that start? Will the five payments be of equal amounts? Any interest charged on payments to bring the total up to a real level of \$72 million in today's dollars? Is there any requirement that the 470 Fund specifically be reimbursed?

(This revised version of the March 29 list has been prepared for the committee's April 11 meeting with the Attorney General. In this version, the questions to which the AG responded at the previous meeting have simply been deleted).

SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

SECOND LIST OF QUESTIONS FOR THE ATTORNEY GENERAL
(Submitted March 29, 1991)

General Settlement Questions:

7. The State gives up its right in the settlement to ever go after Exxon for the State's lost revenue from lost oil and gas taxes and royalties, corporate taxes, State's portion of salmon enhancement taxes, etc. How much did the State figure those to be worth (as it had already sued for all of those under the State suit it now gives up), and what were our chances of proving and recovering those? Will these particular claims be pursued against Alyeska?
8. What was the State's potential recovery/claim under the "dollars per gallon" state law (AS 46.03.758-759)? Please provide a copy of the letter from the State to Exxon, dated approximately April of 1989, requesting early settlement of that claim.
9. Please provide a copy of the reimbursement contract signed by Exxon with the State after the spill.
10. What will the Department of Law be seeking in appropriations to defend against third party lawsuits for FY 92 through FY 95? Please estimate and compare legal fees that will have to be paid by the State with and without the settlement.
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SCOMM

77:22

MEMORANDUM

State of Alaska

Department of Law

TO: Sen. Richard I. Eliason, Chair
Senate Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

DATE: April 2, 1991

FILE NO:

TEL NO: 465-3600

Rep. Max F. Gruenberg, Jr., Chair
House Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

SUBJECT: Authority of the Governor
and Attorney General to
Enter into the EXXON VALDEZ
Settlement Agreement

FROM: Charles E. Cole
Attorney General

As you know, the Agreement and Consent Decree (hereinafter "Settlement Agreement") in the EXXON VALDEZ litigation was reached between Exxon,^{1/} the State and the Federal governments after several weeks of discussion about the pending and potential litigation between them. The terms of the Settlement Agreement reflect many hours of hard bargaining among the parties, an effort to resolve on mutually acceptable terms their respective claims related to the EXXON VALDEZ oil spill ("Oil Spill") without additional expensive, potentially interminable, and uncertain litigation.

This memorandum will discuss the reasons why the Governor and the Attorney General have the authority to negotiate and agree to the Settlement Agreement on behalf of the State of Alaska.

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

The basic economic terms related to the Settlement Agreement are the provisions pertinent to this memorandum's discussion and, therefore, merit summary at the outset.

A. The Federal Criminal Plea Agreement

The State played no role in the negotiations between Exxon and the Federal government with respect to the Plea Agreement in the Federal government's criminal case against Exxon (Case No. A-90-015 CR., United States District Court for the District of Alaska). However, under that Plea Agreement, the State is to receive half of the fine to be paid by Exxon.

^{1/} The Exxon entities involved in the Settlement Agreement are Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, the supertanker that caused the Prince William Sound oil spill. Those entities will be referred to in this memorandum collectively as "Exxon."

Under the Plea Agreement, Exxon Shipping pleads guilty to violations of the Clean Water Act, 33 U.S.C. §§1311(a) and 1319(c)(1)(A), the Refuse Act, 33 U.S.C. §§407 and 411, and the Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a); Exxon Corporation pleads guilty to Migratory Bird Treaty Act violations, 16 U.S.C. §§703 and 707(a). Exxon will pay \$100 million as a criminal fine under the Plea Agreement.

The Plea Agreement provides that \$50 million of that fine is to be paid as restitution to the State of Alaska within 30 days of the Court's acceptance of the Plea Agreement. It further provides that those monies "are to be used by the State of Alaska exclusively for restoration projects" relating to the Oil Spill. Restoration is defined to include "restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills." Plea Agreement ¶4(A). Those monies will be entirely under the control of the State and will thus be subject to the legislative appropriations process, though with that restriction on their use. Plea Agreement ¶4(B).

B. The Agreement And Consent Decree

The Settlement Agreement requires Exxon to make a total of \$900 million in payments.^{2/} After the first installment of \$90 million is paid within ten days after the effective date of the Settlement Agreement, payments are to be made annually on September 1st, over a ten year period beginning in 1992, in amounts set out in the payment schedule in paragraphs 9(b) and (c) of the Settlement Agreement.

The Settlement Agreement includes two basic types of recoveries from Exxon related to the settlement of the State's civil claims. The first type, in a amount of up to \$72 million, is in settlement to reimburse the State 1) for response and clean-up costs incurred prior to January 1, 1991, 2) for its natural resource damages assessment costs, and 3) for its litigation costs, including attorneys' fees, experts' fees and other costs. Settlement Agreement ¶10.

^{2/} The Settlement Agreement also includes a "reopener" provision that provides for Exxon to pay up to \$100 million dollars for additional restoration projects in areas affected by the Oil Spill, if the projects meet a cost/benefit criterion and the injury being redressed was not reasonably known or anticipated based on information available at the time of the Settlement Agreement's effective date. Settlement Agreement ¶¶17-19.

The second type governs the balance of the \$900 million to be paid, after deductions are made for the State reimbursement payments, for the similar federal reimbursement payments of up to \$62 million, and for expenditures made by Exxon with respect to continuing Oil Spill clean-up, as defined in paragraph 11 of the Settlement Agreement. In addition, the related Memorandum of Agreement ("MOA") provides for reimbursements to the State and Federal government for "all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990," as certified by their spill response coordinators, "shall be paid directly to the Governments by Exxon over a period of 5 years." MOA ¶V(B). These reimbursements will thus be paid to the State and subject to the Legislature's appropriations power, like the \$72 million in reimbursements to the State for pre-1991 costs and the \$50 million in restitution to be received under the Plea Agreement.

The remaining balance of Exxon's settlement payments will be held in and administered through a joint trust fund ("Trust Fund"). Those monies must be used by the Trust Fund's trustees "to assess injury resulting from the Oil Spill, and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the oil spill, or the acquisition of equivalent resources or services." The Settlement Agreement provides that the Trust Fund monies are to "be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska." ¶10.

Pursuant to the MOA, the Trust Fund will be administered by the State and Federal governments as "co-trustees." MOA ¶III(A). A group of six Trustees designated by the President and the Governor, three each from the State and Federal governments, are to act as co-trustees: the Administrator Of the National Oceanic and Atmospheric Administration, the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney General. The MOA requires that the Trustees act jointly in the collection and use of all damage recoveries. Decisions on use of the monies in the Trust Fund for restoration are to be made by unanimous agreement of the Trustees, though provisions are made in the MOA for methods to resolve any disputes. MOA ¶IV(A)(3). The MOA provides that the Trustees "shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group" MOA ¶IV(A)(3). The funds are to be held subject to this co-trusteeship in a joint Trust Fund under the supervision of the United States District Court for the District of Alaska. MOA ¶IV(A)(2).

II. DEFINING THE REAL ISSUE

The only real issue presented by the joint Trust Fund aspect of the settlement is whether the executive branch of the State government has authority to negotiate and agree to such a settlement mechanism.

In framing that issue, it is critical to understand that the Trust Fund monies are not monies to be received by or belong to either the State or the Federal governments. While the State's position is that it owns and is the trustee for most of the resources impacted by the Oil Spill, the Federal government contends otherwise. As a compromise of both governments' claims to exclusive control of monies recovered, the governments agreed that the monies would instead be placed in the joint Trust Fund established by Consent Decree under the Clean Water Act.

Thus, under the Settlement Agreement, those monies comprise a trust res, as to which neither government has sole ownership or control, held jointly for the benefit of certain damaged natural resources.^{3/} Consistent with well-established trust law, the governments, as co-trustees, have joint ownership control over the Trust Fund monies and must exercise that control jointly and consistently with the terms of the Settlement Agreement. See generally Restatement (Second) of Trusts §§2, 34, 185, 194 (1959) (two or more co-trustees hold trust property as joint tenants; unless terms of trust provide otherwise, co-trustees share duties and powers, which can properly be exercised only by all trustees).^{4/}

^{3/} The rights and obligations of the governments with respect to the Trust Fund are governed by the terms of the Settlement Agreement, construed in light of common law trust principles. See Restatement (Second) of Trusts §4 (1959) (terms of trust are defined by instrument creating trust). See also State v. Weiss, 706 P.2d 681, 683-83 & n.3 (Alaska 1985) (applying common law trust principles to State's obligations with respect to public lands; state legislature had no power to alter status of Mental Health Lands granted by United States, because doing so effectively terminated trust in violation of the State's duties as trustee); State v. University of Alaska, 624 P.2d 807, 814 (Alaska 1981) (private trust law principles applied to evaluation of State's obligation with respect to University lands).

^{4/} See also Mitchell v. Mitchell, 655 P.2d 748, 752 (Alaska 1982) (person seeking recovery as representative for surviving family members is "a nominal party only and holds the recovery in trust"); Thomson v. Wheeler Construction Company, 385 P.2d 111, 114 (Alaska 1963) ("A trust is a fiduciary relationship with respect to
(continued...)

A. The Trust Fund Does Not Violate
The Legislature's Appropriations Authority

While there has been concern expressed about whether the Trust Fund violates the Legislature's appropriation power, that power simply does not extend to monies that are not public revenues or assets of the State and can not be placed in the State Treasury.^{5/}

The Alaska Supreme Court has discussed the definition of "appropriations" in delineating the scope of the governor's line item veto power:

'An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'

For our purpose, the operative phrase "public revenue" is critical since it is the basis of the general fund and special funds from which the legislature may allocate money. Thus, any time the legislature allocates monies from the general fund or special funds, the governor's line item veto would be appropriate. However, the sale of general obligation bonds is the commitment of the state to a debtor relationship with those who purchase the bonds, and is therefore distinguishable from such allocations.

Thomas v. Rosen, 569 P.2d 793, 796-97 (Alaska 1977) (citations omitted) (governor lacks constitutional power to line item veto general obligation bonds authorizations, since they "do not qualify as appropriations").

^{4/}(...continued)

property, subjecting the person who holds ... the property to equitable duties to deal with it for the benefit of another person.") Cf., In re Cornelius, 520 P.2d 76, 85 (Alaska 1974) (one who receives money on behalf of another is a fiduciary; "the funds are impressed with a trust and conversion by the [person to his or her own uses] is a breach of that trust").

^{5/} The provision of the Alaska Constitution concerning appropriations provides, in relevant part:

No money shall be withdrawn from the Treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

Alaska Const., Art. IX, §13 (emphasis added).

Most broadly interpreted, the Legislature's appropriations power extends both to "public revenues" and to all "state assets," all property owned by the State. Thomas v. Bailey, 595 P.2d 1, 4-9 (Alaska 1979) (Beirne initiative to transfer State lands to private persons based on residency violated constitutional prohibition against making "appropriations" by initiative). As the Supreme Court later explained, invalidating initiative provisions requiring the University of Alaska to transfer real and personal property to Community College System:

The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

McAlpine v. University of Alaska, 762 P.2d 81, 87-88 (Alaska 1988) (emphasis added). See also Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (initiative seeking to require sale of municipally owned utility to private, nonprofit cooperative for \$1 would unconstitutionally make "appropriation," where utility had \$32.7 million in equity; "prohibition against appropriations by initiative applies to all state and municipal assets") (emphasis added).

However, that power obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control.^{6/}

^{6/} Courts in other jurisdictions have ruled that funds received by a state for specific purposes are trust funds and are not subject to the legislative appropriations power, even where they are received and held solely by the state and not in a joint trust fund subject to co-trusteeship obligations. The Massachusetts Supreme Court well stated the rationale for that conclusion:

(continued...)

⁶/(...continued)

If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by Federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the Legislature. The recipient of such funds has no choice but to comply with the requirements imposed by Federal law.

Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws.

Opinion of the Justices to the Senate, 378 N.E.2d 433, 436 (Mass. 1978) (citations omitted). See, e.g., Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987) (expenditure of federal block grant funds, not subject to state matching requirement or other legislative decisionmaking, was within governor's executive power to make resource allocation decisions, since funds were essentially custodial in nature); Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) (oil company's payment to state pursuant to consent order resolving administrative proceeding alleging that company violated regulations in marketing petroleum and natural gas products was not subject to General Assembly's appropriation power, and governor's exercise of authority over fund was not an impermissible invasion of Assembly's right to appropriate public funds); Opinion of the Justices to the House of Representatives, 471 N.E.2d 1266 (Mass. 1984) (even if revenues received pursuant to bill establishing Development Bank constituted "money received on account of the Commonwealth" within meaning of State Constitution's article establishing process by which revenues are to be received and disbursed, revenues would not be subject to those requirements, since funds were impressed with a trust established to secure debt obligations of Bank, which could disburse those funds pursuant to specific conditions and limitations). See also Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Arizona 1974); MacManus v. Love, 499 P.2d 609, 610 (Colo. 1972); State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974); Application of State ex. rel. Dept. of Transportation, 646 P.2d 605, 609-10 (Okla. 1982). Contra, Shapp v. Sloan, 391 A.2d 595, 604-07 (Pa. 1978), appeal dismissed sub nom., Thornburgh v. Casey, 440 U.S. 942 (1979) (custodial Federal funds must be appropriated by the legislature or returned to the Federal government).

(continued...)

B. The Trust Fund Does Not Violate The Constitution's
Prohibition Against Dedicated Funds

For similar reasons, the Alaska Constitution's prohibition concerning dedicated funds is not violated by the Trust Fund. The relevant sentence in the Constitution states:

Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 [the Constitution's Permanent Fund provisions] of this article or when required by the federal government for state participation in federal programs. ...

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. State v. Alex, 646 P.2d 203 (Alaska 1983). In Alex, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. Id. at 208-210. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply not "revenues" of the State.^{6/}

^{6/}((...continued))

The Alaska Supreme Court has not decided the issue whether the Legislature can or must exercise its appropriations power in order to authorize the State to expend trust monies or custodial funds held by the State, though a Superior Court decision has ruled (without elaboration) that the governor could not expend custodial funds without a legislative appropriation. Kelly v. Hammond, Case No. 77-4 Civ. (Juneau, 4/19/78).

^{7/} There is obviously a strong link between the Alaska Constitution's appropriations language and the dedicated funds prohibition. That prohibition is aimed at restraining the Legislature's creation of dedicated funds from certain State revenues through its appropriations power. See Alaska Constitutional Convention Proceedings 2364 (dedications of funds had the undesirable effect of preventing the "legislature" from "decid[ing] each case on its merits," causing it to "lose[] [the] control that it should have over the workings over state government"; appropriations should be made only after legislature (continued...))

Furthermore, even if the Trust Fund monies were State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: 1) the monies would be received by the State subject to co-trusteeship obligations; and 2) the monies would be received by the State subject to a federal statutory requirement as to their use.^{8/}

^{7/}(...continued)

"decide[s] each case on its merits"); id. at 2367-70 ("eventually you get so many funds earmarked that the legislature just does not have the money to work with for current operating expenses").

^{8/} In a thorough analysis of the dedicated funds prohibition after the Alex decision, the Attorney General concluded that even under the strictest conceivable interpretation, monies received in trust would not be subject to that prohibition. 1982 Op. Att'y Gen. No. 13, File No. 366-649-80 (Nov. 30, 1982) ("[E]ven under the strict view, there would be some kinds of monies received by the state which it could not, for independent legal reasons, deposit into the general fund. These monies would include trust funds, restricted gifts, and funds subject to restrictions by contract"). That opinion also concluded that the fact that some State revenue was subject to federal statutory requirements that it be spent in a particular way did not violate the prohibition. Id. ("The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. See 16 U.S.C. §669."). See also Op. Att'y Gen., File No. 366-403-85 (Aug. 13, 1985) (trust obligation exists with respect to public school fund; dedication of revenues to public school fund would not violate dedicated fund prohibition because "the legislature has removed the lands from a federally-created trust and substituted a monetary fund. We believe the exceptions to the prohibition on dedicated funds contained in article IX, section 7, of the Alaska Constitution--i.e., for dedicated funds 'required by the federal government' or 'existing upon the date of ratification of this section by the people of Alaska'--authorize the dedication of revenues to the public school fund, since the dedication of revenues is an alternate form to the pre-statehood federal dedication of lands."); Op. Att'y Gen., File No. 388-140-82 (June 22, 1982) (federal statute specifying use to which State could put its share of receipts from oil and gas leasing in National Petroleum Reserve; "federal legislation directing payment of the money to the state attaches conditions to the state's receipt of that money" and thus "impose[s] a requirement which is exempt from the dedicated fund prohibition").

(continued...)

C. The Real Issue

The Trust Fund monies are not "State assets" or "public revenues," subject to the Legislature's appropriations power or the constitutional prohibition against dedicated funds.

The issue then, purely and simply, is whether the Governor and the Attorney General of the State of Alaska have the power and authority to agree to a settlement of the Exxon litigation in which a portion of Exxon's settlement payments are made into a Trust Fund, supervised by the United States District Court and administered by the State and Federal governments as co-trustees, or whether they are legally constrained to settle the Exxon litigation only on terms that require all monies to be paid directly to the State.

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.^{8/}

^{8/}(...continued)

A common sense reading of the exemption where a dedication of funds is "required by the federal government for state participation in federal programs" would allow funds to be taken under the restrictions embodied in the Settlement Agreement, even were those funds considered "public revenues." The purpose of this exemption is to ensure that the State may receive monies available under federal law subject to restrictions. Though recoveries under the Clean Water Act might not be received literally from a federal "program," it is likely that the dedicated funds prohibition would be interpreted by the courts to allow the State to benefit from such recoveries with the statutory restrictions as to their use.

^{9/} The historical and intellectual origins of the separation of powers doctrine have been extensively reviewed and analyzed by scholars. See, e.g., W. Gwyn, *The Meaning of the Separation of Powers* (1965); M. Vile, *Constitutionalism and the Separation of Powers* (1967); Sharp, "The Classical American Doctrine of 'the Separation of Powers'," 2 U.Ch.L.Rev. 385 (1935). The doctrine is generally considered to have been derived primarily from the writings of John Locke concerning the delineation of functions in the English government, and the writings of Montesquieu, who strongly "argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions." The doctrine was incorporated into the state constitutions that predated the American Constitution and has been embodied in subsequent state constitutions. J. Nowak, R.

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The Alaska Supreme Court has long and consistently recognized that although "the Alaska Constitution does not expressly address itself to the doctrine of separation of powers," that principle is clearly "implied" from the Constitution's separate articles creating the executive, legislative and judicial branches of the Alaska government. Rust v. State, 582 P.2d 134, 138, n.11 (Alaska 1978).^{10/} "Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, the executive power in the governor, and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature." Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976) (footnotes omitted).

There is no doubt that the countervailing principle of "checks and balances" allows each branch of the State government to directly and indirectly affect the other.^{11/} Thus, the legislature may enact laws that are to be executed by the executive and interpreted by the judiciary in accordance with legislative intent;^{12/} the executive may enforce those laws in accordance with its discretionary view of the public interest and governmental priorities; and the judiciary may review the actions of both the

^{9/} (...continued)

Rotunda, and J. Young, Constitutional Law (1983), citing, J. Locke, Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government); Montesquieu, The Spirit of Laws (Nugent trans. 1949)

^{10/} See also Alaska State-Operated School System v. Mueller, 536 P.2d 99, 103 (Alaska 1975) ("Those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial.").

^{11/} See, e.g., Bradner v. Hammond, 553 P.2d at 5:

A problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.

^{12/} For purposes of the analysis presented below in this memorandum, it is important to bear firmly in mind that the legislature can restrict the executive's constitutional discretion to execute the law only by means of a lawfully enacted statute. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

other branches in light of applicable constitutional and other legal constraints.^{13/}

However, the Alaska Supreme Court has embraced a strict view of the autonomy of the State's governmental branches, which precludes each branch from improperly interfering with the autonomy and discretion of the others with respect to their core constitutional powers. See, e.g., Bradner v. Hammond, 553 P.2d at 6-8 ("the separation of powers doctrine requires that the blending of governmental powers [between the branches] will not be inferred in the absence of an express constitutional provision").

IV. THE GOVERNOR'S CONSTITUTIONAL AUTHORITY TO EXECUTE AND ENFORCE THE LAWS

"There is no dispute that our constitution was designed with a strong executive in mind." Bradner v. Hammond, 553 P.2d 1, 3 n.3 (Alaska 1976). See Alaska Constitutional Convention Proceedings 1102, 1741, 1986-88, 2038, 3103. Article III, Section 1 of the Constitution provides that "[t]he executive power of the State is vested in the governor."

Principal among the governor's express constitutional powers is his or her responsibility for executing and enforcing the laws. The constitutional provision concerning that power makes clear the governor's plenary authority to initiate and control litigation brought for that purpose:

Governor's Authority. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. ...

^{13/} See also, e.g., State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984) (doctrine of separation of powers avoids dangerous concentration of power through checks and balances each branch of government has against other by assigning each branch powers and functions appropriate to it; generally, "legislative power" is power to make, amend or repeal laws, whereas "executive power" is power to enforce laws, and "judicial power" is power to interpret and apply laws in actual controversies).

Alaska Const., Art. III, §16.^{14/}

The Constitutional Convention considered the discretion of the executive branch to enforce the law to be an essential element of the strong executive intended under the Alaska Constitution:

In order to enforce the strong executive and to bulwark his power we have given him power by appropriate actions or proceedings in the court, brought in the name of the state, to enforce compliance with any constitution [sic] or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive.

Alaska Constitutional Convention Proceedings 1986. Thus, the governor has the constitutional mandate to use his or her judgment in enforcing the law to best protect the public's interest. See State v. Lewis, 559 P.2d 630, 635 (Alaska), cert. denied, 432 U.S. 901 (1977).

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law.^{15/} In that respect, the Attorney General

^{14/} See, e.g., Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983) ("Executive power" is the power to administer and enforce the laws; "execution" is at the core of executive power).

^{15/} The Alaska Constitutional Convention strongly rejected proposals offered by a minority of its Judiciary Committee members either to create an elected Attorney General's position in the Constitution (defeated by a 40-12 vote) or to have the Governor appoint the Attorney General, by a process similar to that adopted for judicial appointments, from candidates determined to be qualified by the Judicial Council (defeated by a 36-18 vote). In doing so, the Convention expressly reaffirmed the Constitution's intention to have a "strong executive" and made it clear that the Governor should have full authority to appoint his or her Attorney General, in order to assure that the Attorney General could work effectively in the executive department and would be compatible with the Governor and the Governor's programs. Alaska Constitutional Convention Proceedings 2193-2202, 2215-23 (Delegate McLaughlin stating that an elected Attorney General would put "a diverse and possibly a discordant element into the executive (continued...)

has broad common law powers and responsibilities. For the historically inclined, the common law roots of the attorney general's powers were recently, tersely summarized by the Alabama Supreme Court:

The office of attorney general had its nascence in the attornatus regis of the thirteenth and fourteenth century England. The attornatus regis served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute. ...

The most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, 'the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest.... [H]e may abandon, discontinue, dismiss or compromise it.' In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a

¹⁵/(...continued)

branch" undercutting the Attorney General's "attorney-client relationship" with the Governor, which "has to be based on faith and personal selection"; instead, Attorney General should be an "executive appointee" and "an attorney largely for the executive department"; Delegate Stewart stating that rather than giving independent advice to both the executive and the legislature, "the attorney general [should be] purely and simply the adviser for the executive"; Delegate Rivers, a territorial attorney general, agreeing that the Attorney General should not be expected to counsel both the governor and the legislature, and that an elected attorney general would undercut the constitutional intention to have a strong executive, because an elected attorney general might be of an "opposite political faith," otherwise not "see eye-to eye" with the governor, or be "inadequate or hostile to [the governor]"; Delegate Buckalew opposing the Judicial Council proposal as inconsistent with the commitment to a strong executive). See also id. 2284 (Delegate Taylor explaining that by not making the attorney general a constitutional office, the Convention was recognizing that "it was a legal department of the executive branch and ... the governor would have the right ... to appoint the attorney general who sets up the legal department of the executive department").

suit when he determines that continued litigation would be adverse to the public interest.

Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (footnotes omitted) (attorney general had authority to dismiss state insurance department's proceedings in appeals court despite objection of commissioner of insurance).^{16/}

Alaska takes a similarly expansive view of the Attorney General's common law powers. Because the nature and extent of those powers is fundamental to the issue addressed in this memorandum, the Alaska Supreme Court's seminal discussion of the subject deserves extended quotation:

Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020 indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law:

- (b) The attorney general shall . . .
- (7) perform all other duties required by law or which usually pertain to the office of the attorney general in a state.

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.

When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers. Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive

^{16/} See also 6 W. Holdsworth, A History of English Law 467-68 (1924); National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 9-17 (1980); Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am.J. of Legal History 304 (1958).

branch, it can fairly be implied that this state does recognize the separation of powers doctrine.

Both federal and state courts have consistently and carefully observed the line which divides their branch of government from that of the executive. They have held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding.

"In that field, the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state."

The order to prosecute by the Superior Court overstepped this line and was an infringement upon the discretionary powers residing in the executive branch. Such an order is not within the province of the court.

We conclude that, although we have jurisdiction to entertain this case and to find, as we have, the existence of legal authority, we do not have power to control the exercise of the Attorney General's discretion as to whether he will take action in any particular cases of contempt for non-support.

Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975) (footnotes and citations omitted) (emphasis added).^{17/}

It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation.^{18/}

^{17/} In addition to AS 44.23.020, which codifies certain of the Attorney General's inherent powers and provides other duties for him or her, other statutes, far too numerous for citation, expressly provide for the Attorney General to initiate or defend administrative and judicial proceedings. However, "[t]he duties of the office are so numerous and varied that it has not been the policy of state legislatures to attempt specifically to enumerate them." State ex rel. Olsen v. Public Service Commission, 283 P.2d 594, 598-99 (Mont. 1955).

^{18/} See also State of Oklahoma ex. rel. Wilson v. Blankenship, 308 F. Supp. 870, 875 (W.D. Ok. 1969), rev'd. on jurisdictional grounds, 447 F.2d 687 (10th Cir. 1971), cert. denied, 405 U.S. 918 (1972) ("Ordinarily, the Attorney General both under the common law (continued...)

A. The Attorney General Has The Authority To Agree To
A Settlement That Includes A Joint Trust Fund

The Trust Fund settlement device agreed to by the Attorney General in the Exxon litigation is appropriate under both common law and state and federal statutes.

First, as part of the Attorney General's common law authority to initiate, participate in and settle litigation, the Attorney General may seek any available legal or equitable remedy, even if a particular remedy is not expressly provided by statute.^{19/}

^{18/}(...continued)

and by statutes, may control and manage all litigations in behalf of the state and is empowered to make any disposition of the state's litigation, which he deems for its best interest"); Island-Gentry Joint Venture v. State Through State Board of Land and Natural Resources, 554 P.2d 761 (Haw. 1976) (attorney general has exclusive authority to control and manage for state all phases of civil litigation in which state has an interest, and such authority necessarily includes control of settlement of actions); Sarkeys v. Independent School District, 592 P.2d 529, 536 (Okla. 1979) ("The authority of the Attorney General to settle or compromise the litigation in question, in the absence of fraud or collusion is exclusive."); State ex rel. Derryberry v. Kerr-McGee, 516 P.2d 813 (Okla. 1973) (attorney general had authority to settle and compromise asphalt price-fixing case; absent "fraud or collusion," court will presume that case settled for valid reasons, based on Attorney General's judgment as to the state's best interests); State v. Jones, 41 So.2d 280 (Ala. 1949) (attorney general had power to enter into good faith settlement, despite constitutional provision forbidding compromise or release of obligations owed the state).

^{19/} Attorneys general have been recognized to have numerous common law litigation powers, including: to institute and intervene in civil suits to protect the public interest, in their discretion; to challenge the constitutionality of legislative or administrative actions; to bring suits under federal law to protect members of the public; to intervene in regulatory rate cases; to litigate parens patriae (for the benefit of the state's citizens) in cases involving a wide range of matters; to bring proceedings against public officers; to sue for abatement of nuisances; to enforce charitable trusts; to intervene in will contests; to seek revocation of corporate charters; to represent state agencies; and to initiate criminal prosecutions, even where local prosecutors have not done so. See National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 36-71 (1980).

Thus, in State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982), the Alaska Supreme Court held that the State's Consumer Protection Act did not regulate real property sales and that the State's Uniform Land Sales Practices Act would not apply retroactively to certain land purchases. However, the Court held that neither statute restricted "the court's traditional equity powers" to award restitution "at the instance of the State," as a remedy to benefit defrauded land purchasers. 660 P.2d at 416.²⁰/

Furthermore, the Court held that the Attorney General, on behalf of the State, had the authority to pursue the common law fraud claims of land purchasers and to seek restitution for them based on those claims. Quoting and reaffirming its recognition of the Attorney General's broad common law powers in the Public Defender case, discussed previously, the Court concluded:

We believe that the above language [from the Public Defender decision] forecloses any argument that the State is without authority to bring suit in the absence of express statutory authority. This view finds ample support in the decisions of other jurisdictions where the attorney general's common law powers are recognized. ... This authority has been held to confer standing on the attorney general to seek redress for common law fraud.

We therefore hold that the State has the authority to bring suit in the public interest on the basis of common law fraud to obtain restitution for defrauded land purchasers. ... [I]t is not the court's function to pass upon the Attorney General's determination of what is or is not in the "public interest"

660 P.2d at 420-21.

²⁰/ In reaching this conclusion, the Court found "persuasive" the California Supreme Court's reasoning in a case involving a substantially similar issue. In that case, People v. Superior Court, 507 P.2d 1400 (Cal. 1973), the Court ruled that while a California statute only expressly authorized the California Attorney General to sue to enjoin misleading advertizing, that statute "did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference'" Therefore, the California Court held that courts retained their "inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the consumers found to have been defrauded." 507 P.2d at 1402 (citations omitted and emphasis added). The Alaska Supreme Court's First National Bank opinion noted that "a number of analogous federal cases ... had reached the same conclusion." 660 P.2d at 416.

The trust, used as the vehicle for the Exxon settlement, is an ancient equitable creature. Litigants have long asked courts to infer or create trusts as a way to remedy legal or equitable wrongs. See, e.g., Klondike Industries Corp. v. Gibson, 741 P.2d 1161, 1171 (Alaska 1987) (court may impose constructive trust where it concludes that holders of legal title to property should be considered to have duty to act consistently with the equitable interests of other persons in property); Ayers v. Jackson Township, 525 A.2d 287, 314 (N.J. 1987) (citing authorities in support of creation of equitable fund so that 1) damages from toxic discharge would not have to be estimated in advance; 2) recovery could be used for medical monitoring; and 3) trustees could make decisions on disbursements on equitable grounds). See also Milliken v. Bradley, 433 U.S. 267, 281 (1976) (courts have "broad" "equitable powers to remedy past wrongs").^{21/}

For almost 40 years, environmental trusts have been created, by settlements and court orders, as a method to use monies paid by a polluter to benefit the resource damaged by the polluter's activities. See For Land's Sake 1 (New Jersey Conservation Foundation, Morristown, N.J., 1990). Such trusts have been established with both private plaintiffs and governmental trustees making the decisions about expenditures of trust monies.^{22/}

^{21/} The creation of common or trust funds for recoveries in class action litigation is one notable and well-established example of the courts' willingness to create such funds as a remedy. See generally 2 H. Newberg, Newberg on Class Actions §§10.01 et seq., 11.15 - .21, 12.01 et seq. (2d ed. 1985) (classwide damage awards and lump sum fund settlements).

^{22/} Some examples gleaned from research done by the National Wildlife Federation as a result of the Exxon litigation:

The Chesapeake Bay Foundation and Natural Resources Defense Council sued Bethlehem Steel for polluting the Chesapeake Bay in violation of its clean water permit. The resulting consent decree gave them extensive oversight powers in administering a \$1.1 million trust fund, with monies to be spent on projects which "further the goals of the Clean Water Act by contributing to the restoration and protection of the Chesapeake Bay and its resources," consistent with the "mitigation project criteria" set forth in the EPA's Clean Water Act settlement policies. Chesapeake Bay Foundation v. Bethlehem Steel Corp., Civ. No. Y-84-1620 (D.Md., July 14, 1987).

The Hudson River Foundation was the result of a protracted case brought by environmental organizations and Hudson River fishermen opposed to the construction of the Storm King power plant. The settlement established a \$12 million endowment for scientific research on the ecology of the Hudson River.

(continued...)

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Representatives from the state and federal government, from the different plaintiff groups, and from New York utilities sit on a panel which recommends projects for a trustee panel. Final authority for administration of funds rests with the trustee panel, comprised of ten distinguished persons independent of government. See generally R. Sandler and D. Schoenbrod, The Hudson River Plant Settlement (New York University, 1981).

The Virginia Environmental Endowment began with a \$13.2 million deposit from Allied Chemical Corporation which had been found guilty of polluting the James River with the toxic chemical kepone. The presiding federal judge approved Allied's suggestion that instead of paying a fine, it would create an environmental trust. The judge appointed independent, prominent citizens to administer the Endowment. Projects undertaken range from educating citizens to tackling pollution problems in the Virginia area. See Virginia Environmental Endowment, Annual Report (1987).

The Ohio Fund was established pursuant to a consent decree between the EPA and parties responsible for the administration of the Hamilton County municipal sewer system, the Metropolitan Sewer District of Greater Cincinnati, which failed to comply with its NPDES permit. The purpose of the trust is to fund "environmentally beneficial project(s)" for enumerated purposes in accordance with certain criteria. The project(s) are required 1) to further the statutory goals of the Clean Water Act, 2) to address the kinds of environmental problems caused by the defendants' noncompliance, 3) to supplement any existing legal requirements, and 4) to benefit the general public rather than any of the defendants or any governmental unit. U.S. v. Bd. of County Commissioners of Hamilton County, Ohio, et al., C-1-89-0693 (S.D. Ohio, March 11, 1985).

The Whooping Crane Trust is a \$7.5 million "trust in perpetuity" created in a consent decree between an electric power company and plaintiffs, the State of Nebraska and the National Wildlife Federation. Each of the three parties to the agreement (the power company, the governor of Nebraska, and the National Wildlife Federation), appoint one trustee who may be replaced at the pleasure of the party who appointed him. The purpose of the trust is "to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska;" the trustees may choose to fund "programs, activities, and acquisitions ... formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life support system for the whooping crane and other migratory species which utilize it." Platte River Whooping Crane Maintenance Trust, Trust Declaration. See also U.S. v. Metropolitan District Commission, No. 85-0489-MA (D.Mass. 1988) (establishing Boston Harbor Massachusetts Bay (continued...))

Trust funds have often been created by consent decrees entered in Clean Water Act actions for injunctive relief and other remedies.^{23/} See, e.g., PIRG v. Powell Dufiryn, 913 F.2d 64, 82 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991) ("in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy"; district court can create trust fund as part of equitable relief, but civil penalties must be paid into U.S. Treasury).

The environmental trust fund most analogous to that created under the Exxon Settlement Agreement was established as a result of litigation relating to the Shell Oil Company's discharge of oil from its Martinez, California complex. That discharge affected lands and waters, including wetlands around the Shell Marsh and Peyton Slough, and entered into the Carquinez Strait and Suisun Bay, near San Francisco.

^{22/} (...continued)

Trust). Cf., United States v. Browning-Ferris Industries Chemical Services, Inc., 704 F.Supp. 1355 (M.D. La. 1988) (attorney general had defendant pay a portion of recovery to university to endow environmental research program).

^{23/} The remedies expressly available under the CWA also arguably exist at common law. The courts have long recognized common law "public trust" and "parens patriae" doctrines, under which a government is entitled to seek damages and injunctive relief in order to protect land or water resources in which it has a "public trust" interest. See, e.g., Maine v. M/V Tamano, 357 F.Supp 1097, 1101 (D.Me. 1973) (state can seek both injunctive relief and damages for oil discharge under public trust and parens patriae theories); Aerojet-General Corp. v. San Mateo County Superior Court, 257 Cal.Rptr. 621 (Cal.App. 1989) (State's public trust interest in navigable portions of river was sufficient for standing to claim damages caused by environmental pollution). See generally 1 V. Yannacone, B. Cohen, S. Davison, Environmental Rights and Remedies §2.1 et seq. (1972) (discussing development of trust doctrine). Under common law theory then, the State might seek as an equitable remedy, and a court might order created, a fund to benefit damaged resources. See, e.g., Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 495-96 (1971) (fund sought for restoration of waters polluted by mercury); State v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986) (settlement fund for class members created in parens patriae consumer action brought by Attorney General). See also 1 W. Rodgers, Environmental Law §2.13D (1986) (range of equitable remedies possible in environmental cases is "virtually unlimited").

The Consent Decree in that case, a copy of which is available to the Legislature, resolved the claims of the United States Government, as well as those of numerous California state and local governmental entities and agencies that were also plaintiffs. U.S., et al. v. Shell Oil Company, Civ. No. C- 89-4220 (N.D. Cal., Nov. 29, 1989). Like the present case, the Consent Decree used a Clean Water Act trust as the mechanism for collectively resolving claims for natural resources and other damages sought under various state and federal statutes, as well as common law theories. See Shell-Martinez Consent Decree ¶¶I(D)-(J), V.

Prominent among its settlement payment provisions, the Consent Decree provides for approximately \$11 million to be placed in a joint trust fund.^{24/} A Memorandum of Agreement incorporated into the Consent Decree provides for decisions concerning disbursement and management of the trust fund to be made by a Committee comprised of representatives of federal, California and local governmental entities. See Shell-Martinez MOA ¶I. While the Shell-Martinez MOA enumerates various uses to which the fund monies may be devoted, the Committee is to "be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill." See Shell-Martinez MOA ¶II.

Cooperation with the Federal government and the creation of a joint trust fund is clearly appropriate under the circumstances of the Exxon litigation, as it was in the Shell-Martinez case.

B. The Clean Water Act Trust Remedy

The Clean Water Act ("CWA") provides that the State and Federal governments are to act as "trustees" in seeking recovery for natural resource damages and that all recoveries by the trustees are to be used for restoration and resource acquisition purposes. See 33 U.S.C. §1321(f)(5) ("The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.").

^{24/} Like the Exxon Settlement Agreement, the Shell-Martinez Consent Decree, though dedicating the majority of the recovery to an environmental trust fund, also provided for significant monies to be paid directly to the numerous governmental parties as reimbursement for their costs and clean-up efforts, as well as penalties. See Shell-Martinez Consent Decree ¶IV(A).

Consistent with the trustee status under which the governments may recover natural resource damages, the statute is interpreted to require that such recoveries be held in trust for the damaged resources. See Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 675 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) (requirement that recoveries be used to benefit damaged resource is "[i]n accordance with the trust analogy"). See also W. Fratcher, Scott on Trusts §§170, 192 (4th ed. 1987) (trustee's duty is to act with respect to trust property in the interests of the trust's beneficiaries).

The regulations promulgated under the CWA concerning such trusts expressly address only the situation where a single sovereign recovers money. "All sums recovered ... by the Federal government acting as trustee shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." 43 C.F.R. §11.92(a)(1). "All sums ... recovered ... by a State government acting as trustee shall either: (i) be placed in a separate account in the state Treasury; or (ii) be placed by the responsible parties in an interest bearing account payable in trust to the state agency acting as trustee." 43 C.F.R. §11.92(a)(2). These sums must be spent "out of the account ... only for those actions described in the Restoration Plan" 43 C.F.R. §11.92(c). The regulations further provide the State trustee responsible for the Restoration Plan and spending trust proceeds in accordance with that Plan is to be an "agency designated by the governor". 43 C.F.R. §11.14(rr).

However, relevant to the joint Trust Fund created by the Exxon Settlement Agreement, the regulations also provide that the state and federal trustees should cooperate to "[d]evise and carry out a plan" for restoration and resource acquisition where the affected resources are "contiguous," or under joint trusteeship. 40 C.F.R. §§300.615(a), (b)(4).^{25/} The CWA and its accompanying regulations therefore strongly support the conclusion that joint recoveries should be placed in a joint trust fund and administered cooperatively. See also Alaska Const., Art. XII, §2 ("The state ... may cooperate with the United States ... on matters of common interest.").

Based on these statutory and regulatory provisions, a joint trusteeship was considered the appropriate basis for the Consent Decree in the Shell-Martinez oil spill litigation,

^{25/} See also 43 C.F.R. §§11.32(a)(1)(ii), (a)(1)(iii) (trustees encouraged to cooperate in assessing inseparable damages and required to cooperate in pursuing such damages); 40 C.F.R. §§300.73-.74 (requiring trustee coordination and cooperation in fulfilling duties which, under 33 U.S.C. §1321 (f)(5), include pursuing damage claims and implementing restoration plan).

discussed previously in this memorandum. A joint trusteeship will almost certainly be upheld by the courts as an appropriate settlement mechanism, authorized by federal law, in the Exxon case as well.

C. No Statutory Provision Expressly Precludes
The Trust Fund Settlement

The Attorney General's authority to enter into the joint Trust Fund settlement with Exxon and the Federal government is certainly subsumed within the Attorney General's broad, inherent settlement powers. Because of the inherent nature of those powers, "[i]t is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law," the Attorney General retains all his or her common law powers "in the absence of express restrictions" imposed by constitution or statute. Hansen v. Barlow, 456 P.2d 177, 178 (Utah 1969) (emphasis added).^{26/}

No Alaska statutory provision expressly precludes the Attorney General from settling litigation like the EXXON VALDEZ case by means of a settlement which includes a joint Trust Fund.^{27/}

^{26/} Accord, Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 684 (Ala. 1990); Olsen v. Public Service Commission, 283 P.2d 594 (Mont. 1955); Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973) (attorney general "may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights"); Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987) ("[i]n the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity ..., and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers"); State ex rel. Derryberry v. Kerr-McGee Corporation, 516 P.2d 813 (Okla. 1973). See also National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 24 (1980) ("In states which recognize common law powers, codification does not affect such powers unless the statutes expressly state so.")

^{27/} Given the absence of any such express prohibition, it is unnecessary to speculate concerning the issue whether and to what extent the Legislature might prohibit the Attorney General from so settling the litigation. However, it is clear that the separation
(continued...)

²⁷/ (...continued)

of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest. See Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) (appointment of executive officers clearly an executive function, and legislature could not require legislative confirmation of lesser executive officers in addition to those made subject to confirmation by the Alaska Constitution); In re Mackay, 416 P.2d 823 (Alaska 1965), cert. denied, 382 U.S. 803 (1965) (inherent power of Supreme Court over suspension and disbarment of attorneys cannot be defeated by legislative branch of government). Cf., Granato v. Occhipinti, 602 P.2d 442 (Alaska 1979) (superior court could not constitutionally require State executive agency to perform home-study in private child custody dispute); Rust v. State, 582 P.2d 134 (Alaska 1978) (sentencing court could recommend that defendant be incarcerated in particular facility, but ultimate responsibility for classification and placement of defendant was vested in Division of Corrections, and court lacked authority to order defendant incarcerated in a designated facility); State Carlson, 555 P.2d 269 (Alaska 1976) (separation of powers principles precluded trial court from accepting guilty plea to lesser charge of manslaughter over the opposition of the prosecution). See also Bowsher v. Synar, 478 U.S. 714 (1986) (powers vested in the Comptroller General under "reporting provisions" of Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws); State Board of Ethics for Elected Officials v. Green, 545 So.2d 1031 (La. 1989) (to extent statute authorized Supervisory Committee on Campaign Finance Disclosure to file civil proceedings to collect penalties for violation of Campaign Finance Disclosure Act, it unconstitutionally violated separation of powers; Committee members were legislatively appointed, and thus could not constitutionally be authorized to enforce the law); In re Opinion of the Justices, 532 A.2d 195 (N.H. 1987) (once legislature has made appropriation for executive branch, requirement of fiscal committee approval of contracts made pursuant thereto is unconstitutional intrusion into executive branch of government); State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (constitutional provision that duties of state executive "shall be prescribed by law" does not allow the legislature to transfer inherent or core functions of executive officers); General Assembly of State of New Jersey v. Byrne, 448 A.2d 438 (N.J. 1982) (any legislative action which excessively interferes with executive's ability to faithfully execute the laws passed by Legislature violates separation of powers); Aiken County Bd. of Ed. v. Knotts, 262 S.E.2d 14 (S.C. 1980) (legislature may not, consistent with separation of powers, undertake to both pass laws and execute them by its own members); State ex rel. Guste v.
(continued...)

The only statutes that have been suggested to have potential impact on that settlement authority are the Alaska statutes concerned with oil and hazardous substance release remedies. However, those statutes can not be fairly said to preclude expressly the Settlement Agreement or its joint Trust Fund mechanism, for several reasons.

First, AS 46.08.020 and AS 46.08.010 require "[m]oney received by the state" to be "deposited in the general fund and credited to the special account called the 'oil and hazardous substance release account'." As discussed earlier in this memorandum in the context of the appropriations and dedicated fund issues, the joint Trust Fund monies are not monies "received by the state." Therefore, the statutory requirement to deposit such monies in the general fund, as a matter of plain statutory language, simply does not apply.

Furthermore, the most plausible reading of these statutes is that they deal only with monies recovered by the State as reimbursement for costs, as the February 15, 1991, memorandum to Senator Cotten from the Assistant Revisor of Statutes stated at page 4, ¶II(C). AS 46.08.070(a) empowers the Attorney General to seek compensation for State cleanup related expenditures. That section states:

The commissioner shall seek reimbursement promptly under this section, AS 46.03.760(e), or federal law for the cost incurred in the cleanup or containment of oil or a hazardous substance that has been released.

(emphasis added).

AS 46.08.020 similarly makes clear the cost reimbursement nature of the recoveries subject to the statutory chapter, in outlining potential appropriations of these proceeds:

²⁷/(...continued)

Legislative Budget Committee, 347 So.2d 160 (La. 1977) (legislature may not appoint officers to enforce its laws because that would invade the exclusive realm of the executive).

Some courts have held that the legislature may not restrict the attorney general's common law powers. See, e.g., Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority, 456 N.E.2d 50, 55 (Ill. 1983) (Attorney General's duties are prescribed by law and include those powers traditionally held by Attorney General at common law; while legislature may add to his powers, it cannot reduce his common-law authority in directing legal affairs of state); Murphy v. Yates, 348 A.2d 837 (Md. 1975) (legislature may not abrogate common-law powers of Attorney General).

(a) The legislature may appropriate from the following sources to the ["Oil and Hazardous Substance Release Response] fund:

(2) money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific cite [sic]...; [and]

(3) fines, penalties, or damages recovered under this chapter or other law for costs incurred by the state as a result of the release or threatened release of oil or a hazardous substance.

(b) Money received by the state under (a)(2) and (a)(3) of this section shall be deposited in the general fund and credited to the special account called the "oil and hazardous substance release mitigation account."

The relevant sections thus require on their faces that only those damages, penalties or fines recovered for "costs incurred by the State" for "clean up and containment" be placed in the special account in the general fund.^{28/}

Additionally, it is important to recognize that if any Alaska statute were interpreted to preclude the Attorney General from pursuing or agreeing to Clean Water Act trust fund remedies,

^{28/} The Legislature's concern was that the general fund be reimbursed for outlays of money. The legislative Fiscal Note to HB 205, the source of AS 46.04.010 as it presently reads, states, "This procedure is designed to reimburse the general fund and thus hold down overall state cleanup costs. It is intended that about 20% of all cleanup costs can be recovered." 1980 House Journal Supp. No. 43, Apr. 8, 1980. Similarly, in introducing this legislation, Representative Miles stated that "it provides for prompt clean up of oil spills and for prompt reimbursement of those spills." House Floor debates, Apr. 15, 1980.

With respect to AS 46.08, Representative Navarre noted in support of the new fund that "it appeals to me because although it offers the opportunity to charge back to the responsible party, if we can identify them, the cost of cleaning up these areas as we discover them." House Resources Comm., Jan. 29, 1986. Former DEC Commissioner Ross similarly told the House Finance Committee on Feb. 17, 1986, that "we would anticipate operating this fund in exactly the same manner, of looking for liability, and assigning it accordingly when we found it, and reimbursing the state." (emphasis added). See also Statement by Representative Pourchot before House Finance Committee, Mar. 10, 1986; statement by Representative Davis on House Floor, Mar. 19, 1986.

serious federal supremacy and preemption issues would be raised.^{29/} While the State may in many contexts provide remedies more liberal or protective than those provided by federal law,^{30/} the courts might well rule invalid an attempt by the Legislature effectively to eliminate a remedy clearly provided under federal law.

In brief, were a State statute interpreted to preclude the State from participating in trust fund recoveries under the Clean Water Act, that statute would likely be held preempted, because it would frustrate and serve as an obstacle to the Clean Water Act's purposes. See International Paper Company v. Ouellette, 479 U.S. 481, 491 (1987) ("[i]n addition to express or implied preemption, a state law also is invalid to the extent that it 'actually conflicts with a ... federal statute'"; Clean Water Act preempts private water pollution suit based upon the common law of nuisance of the state in which the alleged injury occurred, when the source of the alleged injury is located in another state).

Finally, it would make little sense for the legislature expressly to constrain the Attorney General's discretion by prohibiting him or her from agreeing to a settlement, based on federal laws, that establishes a joint State-federal environmental restoration trust fund, even when that settlement mechanism would provide the best overall outcome for the State. The Legislature clearly, and wisely, has not done so.

VI. THE SETTLEMENT STRUCTURE WAS NEGOTIATED AND AGREED TO REASONABLY AND IN GOOD FAITH

It was thus certainly within the Attorney General's authority and discretion to decide to settle the State's Oil Spill litigation with Exxon, in part by agreeing to the creation of a resource restoration Trust Fund jointly administered by State and federal Trustees. As quoted previously in this memorandum, the

^{29/} The Supremacy Clause provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U. S. Const., Art. VI.

^{30/} See, e.g., Webster v. Bechtel, 621 P.2d 890 (Alaska 1980) (federal Fair Labor Standards Act did not preempt State from providing greater protection and more expansive remedies under the Alaska Wage and Hour Act).

Alaska Supreme Court has strongly declared that where the Attorney General has the "legal authority" to make a particular decisions with respect to the State's litigation, Alaska's courts "do not have power to control the exercise of the Attorney General's discretion" To attempt to do so would be "an infringement upon the discretionary powers residing in the executive branch" "not within the province of the court." Public Defender Agency, 534 P.2d at 951.

Even if the Supreme Court's clear statement in that regard were disregarded, at most an Attorney General's decision concerning the conduct and disposition of State litigation can be legally challenged only if that decision was made in bad faith or, perhaps, for entirely arbitrary and capricious reasons. See Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (courts have either "refused to interfere with the attorney general's use of his discretionary power" or "left undisturbed the use of the power to control litigation as long as the attorney general's actions are not arbitrary, capricious, or in bad faith").^{31/}

The Governor and the Attorney General must be allowed to exercise discretion to settle cases in good faith and on whatever lawful basis they think to be in the State's best interests. They are not required to doggedly pursue in every case all potential State positions and claims. In some cases, they might decide for a variety of reasons, including litigation strategy or problems of proof, simply to abandon potential claims, without seeking any recovery for them. In other cases, they might determine that injunctive relief would provide the best settlement consideration (for instance, an agreement by Exxon itself to undertake certain cleanup or restoration work at the direction of State and federal agencies), rather than seek any monetary recovery under any State or federal law.^{32/}

^{31/} See also Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980) (Supreme Court will not interfere with performance of attorney general's discretionary duties, absent bad faith); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977) (attorney general's discretionary power not to be used in arbitrary or capricious manner); State ex rel. Carmichael v. Jones, 41 So.2d 280 (Ala. 1949) (consent agreement between attorney general and taxpayer settling unliquidated claim for taxes was lawful because made in good faith and within power of Attorney General); Cooley v. South Carolina Tax Commission, 28 S.E.2d 445 (S.C. 1943) (attorney general acted in good faith in compromising estate tax).

^{32/} See also Rubin v. Board of Environmental Protection, 577 A.2d 1189, 1192 (Me. 1990) ("Attorney General is entitled under the common law to seek injunctive relief against violations" of law).

There is no sense in which the Exxon Settlement Agreement was negotiated and agreed to in bad faith or arbitrarily and capriciously. Instead, for the reasons discussed in this memorandum and which will be discussed further with the Legislature during the public comment and legislative approval process, the conclusion was reached that it was in the best interests of the State of Alaska to settle the Oil Spill litigation in large part through the mechanism of a joint Trust Fund, rather than pursue separately the State's various claims for damages. For present purposes, this memorandum will merely summarize the basic reasons why the joint Trust Fund was a reasonable, even essential, component of a settlement.

As a fundamental matter, it was important for the State and Federal governments to act in concert in seeking a settlement. By acting and settling together with the Federal government, the State was able to achieve a better overall settlement for the people of Alaska, both in terms of receiving reasonable reimbursement damages (as to which the Legislature will have appropriations authority), and obtaining the greatest benefit for Alaska's damaged natural resources.

A joint Trust Fund recovery for natural resource damages and restoration was reasonably necessary to such a joint settlement because of potential disputes concerning which sovereign is trustee for which resources. It was desirable to avoid such disputes for several reasons, including: 1) the expense and considerable time unquestionably required for litigating -- undoubtedly including through the available appeals processes -- the numerous resource trusteeship issues presented; 2) the uncertain outcome, always attendant to litigation even in more clearly charted legal waters, of such disputes because of numerous unsettled questions of law concerning trusteeships of various resources; 3) the arguable prospect that some resources or restoration efforts might ultimately be held by the courts to be subject to joint trusteeship by the State and Federal governments; 4) the practical fact that even with respect to resources that might be identified with some confidence as subject to the trusteeship of a single sovereign (e.g., state tidelands and federal uplands), both the damage to those resources and restoration efforts affecting them are very much intertwined; and, finally, 5) as a tactical matter, resource trusteeship disputes could certainly have been used by Exxon to complicate hugely the litigation by interjecting at various stages issues as to which sovereign could recover and bore the burden of proving damages with respect to which resources, thereby both dividing the State and Federal governments and likely prolonging further Exxon's day of reckoning and payment.

The State believes that it has a stronger claim to many of the fish, wildlife and other natural resources impacted by the spill than does the Federal government and might well have

prevailed to that effect after lengthy and costly litigation. However, in light of the considerations mentioned above, it was more appropriate and in the best interests of the State to agree instead to a settlement that in part employed a joint State-federal resource restoration Trust Fund. Such a Trust Fund was a necessary ingredient of a settlement designed to produce the greatest benefit to the people of Alaska.

CONCLUSION

This memorandum has discussed the clear authority of the Attorney General to agree to the settlement of the EXXON VALDEZ litigation on the terms contained in the Settlement Agreement.

However, despite that authority, the settlement is obviously politically sensitive, not only because of the magnitude of the resource and economic issues addressed by the Settlement Agreement, but also because of the profound impact of the EXXON VALDEZ Oil Spill on both Alaska's political culture and -- very directly -- on the lives of many Alaskans.

Therefore, in recognition of the public's interest in the settlement and the Legislature's perceived desire to review the Settlement Agreement, the Settlement Agreement was made subject both to a public comment period and review by the Alaska Legislature. As paragraph 37 of the Agreement provides, if the Legislature does not approve the Settlement Agreement within a prescribed time period, the Agreement may be terminated by the State merely by giving notice to Exxon and the United States government.

77:23

SCOMM

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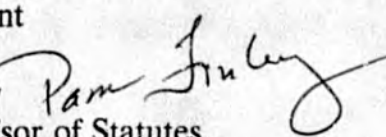
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MEMORANDUM

April 8, 1991

SUBJECT: State Constitutional Issues Related to the Exxon Valdez Settlement

TO: Senator Dick Eliason, Chair
Senate Special Committee on the Exxon Valdez Oil Spill Settlement

FROM: Pamela Finley 
Assistant Revisor of Statutes

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

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

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

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

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

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

DISCUSSION.

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

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

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

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

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

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

^{1/} This is filed in federal district court in Anchorage, case no. A-91-083 Civ.

^{2/} This is filed in federal district court in Anchorage, case no. A-91-081 Civ.

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

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

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

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

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

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

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

^{6/} A "representation" may not necessarily be the same as an agreement.

enhancement of resources affected by the oil spill, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup, and amelioration of oil spills. The requirement also raises the question of whether the legislature can accept the money, with restrictions on its use, given the prohibition on the dedication of funds in art. IX, sec. 7 of the state constitution.

II. The Prohibition Against the Dedication of Funds.

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

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

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

^{2/} Although in the normal course of events this section will have the greatest effect on the legislative branch, by its terms it appears to apply to all state officials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Encroachment on Legislative Power.

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

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

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

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

B. The MOA.

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

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

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

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

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

2. The Appropriation Power. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were subject to approval by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset). Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over \$32 million in exchange for \$1 is appropriation prohibited by initiative). McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

The attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act, because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court

were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for the damage to its natural resources; the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.^{11/}

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), is a clear indication that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

^{11/} Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.