

SCOMM

77:2

SENATE SPECIAL COMMITTEE ON THE EXXON-VALDEZ SETTLEMENT

March 21, 1991

8:10 A.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Jay Kerttula
Senator Lloyd Jones
Senator Pat Rodey
Senator Rick Halford
Senator Sam Cotten
Senator Drue Pearce

MEMBERS ABSENT

None

OTHER MEMBERS PRESENT

Senator Arliss Sturgulewski
Senator Rick Uehling
Senator Pat Pourchot
Senator Lyman Hoffman

COMMITTEE CALENDAR

Overview of the Exxon-Valdez Settlement

WITNESS REGISTER

Pamela Finley, Assistant Revisor
Legislative Legal Counsel
Legislative Affairs Agency
P.O. Box Y
Juneau, Alaska 99811

Doug Bailey, Legislative Aide
c/o Senator Rick Halford
P.O. Box V
Juneau, Alaska 99811

Tamara Cook, Director
Division of Legal Services
Legislative Affairs Agency
P.O. Box Y
Juneau, Alaska 99811

ACTION NARRATIVE

Senate Sp. Com. on the
Exxon Valdez Settlement

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon-Valdez Settlement to order at 8:10 a.m. He said the intent of this meeting was to totally inform as many people as possible regarding the settlement. He invited Pamela Finley to review the settlement for the Committee.

In response to Senator Cotten's comments on the time frame the legislature had to work with, Ms. Finley clarified that the time starts to run from the date of publication in the federal register and that was the 19th of March.

MS. FINLEY said that there are four different cases: the case between the U.S. and Alaska v. Exxon, and out of that case came the consent decree. It deals with how the money is received from Exxon and is based on federal law, in particular, the Clean Water Act. The second case is the U.S. v. Alaska and out of that case comes the Memorandum of Agreement (MOA). This has to do with how the money is split up when it comes to the two governments and is also based on federal law. The third case is the State v. Exxon and a host of other people which is based on state law. The fourth case is the U.S. v. Exxon, a criminal case filed in federal court in Alaska in the early 1990s under the Clean Water Act and the Migratory Bird Act. Alaska is not involved in this litigation, but may receive money from it.

MS. FINLEY emphasized that the Clean Water Act is limited to damage done to the environment. The State cannot recover economic damages under this Act. The money received must be spent on restoration of the environment and the money must be used by a trustee who will develop a plan for using the money and will then implement that plan. She explained that this procedure is good to use for a small spill, but not necessarily for one of this size.

Number 200

SENATOR RODEY asked if filing under the Clean Water Act constituted an election of remedies. She said that wasn't clear.

SENATOR STURGULEWSKI asked if the settlement had happened under the case we have in court, Alaska v. Exxon, would we have those limitations? Ms. Finley replied that under a state settlement, we would not have those limitations, the money could come to the state to be appropriated by the legislature. She added that it may still be possible to go back and settle under the state remedies, if the settlement

is ultimately not approved.

SENATOR RODEY explained that when you choose an election of remedies, you choose one approach and exclude all others. He wanted to know if using the Clean Water Act constituted an election of remedies and further stops us from litigating in other fields as part of the contract. He asked if the discussion was based on the Clean Water Act only, or on all other state claims, as well? Ms. Finley said she couldn't answer that question.

Number 225

SENATOR ELIASON questioned if we went back to a state case, would we be in court with the federal government to ascertain who owns the natural resources. Ms. Finley said in state court, Exxon would probably raise that issue, since the federal government is not involved in the state suite. She said certain problems would be raised in proving ownership of the natural resource.

SENATOR RODEY commented that using state law, it would be a question of negligence and damages and he explained that state law has broad guidelines for determining those issues. He thought that under the Clean Water Act, the federal government could use the ownership argument effectively.

SENATOR HALFORD commented that Alaska gives up the cases currently pending in state court if we settle. She agreed and added that there are third party cases pending and the state would still keep the fisheries business tax case.

Senator Rodey commented that from his perspective the other defendants in the case were there because their naming was compulsory in nature and they would probably go away with the settlement, except for the fish business tax claim.

Ms. Finley reviewed the amount to be paid under the consent decree which is explained in her memo to Senator Eliason, dated March 19, 1991. She explained that if there are appeals, which could take as long as a couple of years, Exxon would be able to deduct its cleaning costs from the settlement amount during that time.

Number 321

SENATOR COTTEN asked who decides if Exxon should spend money to clean up now. She said that this was covered in a section of the consent decree which stated the state and federal on-scene coordinators have to approve the expenditures. There is no cap on this money, but it would be deducted from their

payment. She explained that in federal court, it is possible for natives, environmental groups, etc. to object to the consent decree and appeal to the 9th Circuit Court of Appeals.

MS. FINLEY emphasized that the total amount of the settlement is owed to both the state and federal government and does not say how much goes to which government. Under the consent decree, a portion of the settlement money is paid to the federal and state Attorneys General.

SENATOR RODEY asked if \$687 million, as reported by the Anchorage Daily News, was a correct figure for the net present value of the settlement. She said she couldn't answer that.

Money recovered under the Clean Water Act, Ms. Finley said, can be used 1. To reimburse the U.S. and the State for response and cleanup costs incurred by them before 1/1/91. 2. To reimburse the U.S. and the State for damage assessments done before the date the consent decree is signed. 3. To reimburse the State for litigation costs incurred before the date the consent decree is signed. 4. To reimburse the U.S. or the State or both for cleanup costs incurred by either of them after 12/31/90 and to plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources or natural services injured, lost or destroyed by the oil spill, or to acquire equivalent natural resources or natural resource services. The amount that can be returned to the state for past response and cleanup costs, past damage assessments, and litigation fees, is limited to \$72 million and to the federal government, \$62 million.

Number 400

SENATOR KERTTULA asked DOUG BAILEY, former state Attorney General, if \$72 million is what the state spent. He replied that he just didn't know, the figures were difficult to quantify.

Senator Kerttula asked what was the maximum amount Exxon could pay under this agreement. Ms. Finley replied \$900 million and a possible extra \$100 million. Under the criminal case, Exxon could pay another \$100 million.

Number 419

SENATOR PEARCE asked if the trustees could use the money for damages outside of the state? Ms. Finley said the MOA states that the money shall be spent in Alaska, unless the six trustees find a better use somewhere else.

SENATOR RODEY asked if resolution of the criminal charges

would reduce incentive for Exxon to settle. Ms. Finley said there would be less incentive, but couldn't judge how much. She explained that Exxon cannot withdraw from the agreement within the 45 day period, just because it changes its mind, but the governments can. Exxon can withdraw if the plea is not accepted, if the court does not accept the consent decree, or if the court materially changes the consent decree. So she thought what you would really be losing would be the ability to renegotiate the terms.

SENATOR ELIASON said that the legislatures' involvement is not a requirement, that the Governor chose to let them be involved. He commented that probably the only way the legislature would become involved with expenditures of the funds is through resolutions to the people who are dealing with those decisions. He asked if there were other ways for them to be involved. Ms. Finley answered that when the \$72 million comes back to the state, the legislature can spend it any way it wants. The \$50 million that would come to the state under the federal plea agreement has to be spent to restore the environment as the legislature sees fit, not the trustees. The other money is in a federal court registry for the next 16 years and the legislature can only suggest ways to the trustees to spend it.

Senator Eliason asked who designates the trustees. Ms. Finley replied that the Governor has appointed the trustees and noted that he could change them, also. The only requirement is that they have to be state officials. She said that the decisions the trustees make have to be unanimous.

Number 525

SENATOR PEARCE asked if there was any definition or guidelines as to what equivalent resources are and asked who owns the trust?

TAPE 1, SIDE 2
Number 001

MS. FINLEY answered that she didn't know of any guidelines and she didn't know who owned the trust.

SENATOR STURGULEWSKI asked how the state would be recompensed for actual expenditures. Ms. Finley said that wasn't clear, either. She said it looks like the state and federal Attorneys General would decide how the money flows. Senator Sturgulewski noted that she wanted to get a figure of accounts receivable to the state from the administration and to ask the Attorney General how the payments would be made. She commented that being reimbursed for direct expenses over a

period of five years was rather odd.

There was a discussion of when the funds would be paid. SENATOR PEARCE questioned how the money would be divided once it has been paid.

Number 390

MS. FINLEY explained that the MOA deals primarily with who decides how the money is used in the trust fund. The consent decree references the MOA, but she didn't know if approval of the consent decree meant approval of the MOA, as well.

MS. FINLEY explained that the extra \$100 million (the future re-opener clause) we might get is a cap figure. It can be spent on a species or habitat that the trustees had no reason to anticipate was damaged by the spill. She said it requires a very high burden of proof.

One of the questions regarding the consent decree is whether there are dedicated funds involved and does the Attorney General have the authority to sue under the Clean Water Act.

Another issue is, since the Alaskan constitution vests the appropriation power in the legislature alone, is the scheme devised under the Clean Water Act consistent with it.

A third question is, will Exxon pay the required amounts and is this debt dischargeable in bankruptcy?

A fourth question is, are the amounts Exxon will pay deductible under federal and state tax laws.

Question number five is if the legislature does not approve the settlement, can the state still agree to it? (It appears the answer is yes).

Number six is how much has the state spent for response, cleanup, damage assessment, and litigation costs?

Number seven is does legislative approval of the consent decree constitute an approval of the MOA?

The last question was what is meant by "natural resource service"?

Number 490

SENATOR JONES asked if timberlands and the animals that came from them were included in the claim. Ms. Finley said that that was another unclear area.

SENATOR UEHLING commented that he thought the staff would be funded out of the federal money. Ms. Finley said that there is a provision in the MOA that says nothing in the MOA shall require the government to spend money.

SENATOR STURGULEWSKI mentioned that the \$72 paid out over five years was considerably less than getting it right now. Ms. Finley agreed and added that she didn't know if that amount included "prejudgment interest" which is normal procedure under Alaska state law.

Ms. Finley said that the MOA covers future response costs and would have to be certified by the coordinators. A question she raised was regarding the bulk of the payment and if it would receive interest when it was placed in a court registry. She explained that regulations for the Clean Water Act provided that the state's money is put in an interest bearing account payable to the trustee or in a special account in the state treasury. The MOA differs because it combines the money and puts it in the court registry.

SENATOR STURGULEWSKI asked if there is an opportunity for the money to come to the state for management. Ms. Finley said if the state sued under the Clean Water Act on behalf of itself, it could have managed the money.

Number 720

SENATOR ELIASON said he wanted to ask the Attorney General why he decided to join the funds in with the federal government's.

MS. FINLEY said that the decisions on allocation and what are the damages to the state's resources are left up to the trustees and not the legislature. She raised the questions of who will perform audits of the trustees expenditures and what rules apply to deposits in the court registry.

SENATOR STURGULEWSKI asked if the money has to be spent in a specific geographical area, for instance, just Prince William Sound? Ms. Finley replied that it is a fairly broad qualification and the limits were unclear.

SENATOR JONES noted that the MOA didn't settle many of the questions and asked if this would end up in court. Ms. Finley answered that there were many things that needed to be cleared up, probably in court. Senator Jones asked if there were any time limitations on the federal side. She answered that there were limitations, but since they weren't the same ones as the state's, she didn't know what they were.

SENATOR RODEY asked who's idea was the joint trustees? She said they needed to ask the Attorney General.

SENATOR JONES asked why we didn't pursue the State v. Exxon to recover the most money? Ms. Finley said that they needed to ask the Attorney General, but she couldn't see any obvious problem with the case.

SENATOR PEARCE asked if there was language in the MOA that might direct the trustees to confer with certain groups that were set up to deal with all aspects of the spill so they would not have to set up new advisory groups. Ms. Finley replied that there wasn't any language to that affect.

Senator Pearce asked who the trustees are. Ms. Finley said for the state, it's the Attorney General, the Commissioners of the Departments of Fish and Game and Environmental Conservation. An unidentified person said it was the Secretaries of Interior, Commerce, and Agriculture on the federal side.

Number 1061

MS. FINLEY said that the proposed fine for the criminal case is \$100 million, \$50 million of that is remitted; and another \$50 million is restitution to the State of Alaska which would be paid soon and would have to be spent directly for restoration.

SENATOR COTTEN asked her if the administration needed to submit an appropriations bill to the legislature that moves the money to the trust fund. Ms. Finley said that is one of the constitutional questions. She suspects that this is a state asset that needs to be appropriated.

Ms. Finley also explained that the \$50 million restitution is under criminal provisions of the Clean Water Act and would come to the state directly without going through the trustees.

TAPE 2, SIDE 1
Number 001

Ms. Finley said that the dedication of funds issue came up because a revenue stream will be dedicated over some years under the proposed settlement. She said there is an exception for dedications required in order for the state to participate in a federal program. Another question she raised is, if you can get around the legislature's power to appropriate by suing and recovering under a federal law, does the Attorney General have any authority to recover under a law when the result of

that is a violation of the constitution - almost like the McDowell case.

SENATOR COTTEN asked if the legislature can appropriate the money expected to be received over the next nine years. Ms. Finley answered that there is a supreme court case, Trustees of Alaska v. State, with a continuing appropriation which the supreme court said was a violation of the dedication of funds provision.

TAMARA COOK, Director of Legal Services, agreed that there was a significant question on that issue.

SENATOR STURGULEWSKI asked what was the responsibility of the legislature to protect other interests of groups of state citizens and what is the state's exposure to suits from other parties once the settlement is made. Ms. Finley said the consent decree doesn't affect third parties. In practical terms, it would affect them if they needed the state's help. She said the Attorney General should be able to answer that question.

Number 136

SENATOR HALFORD commented that if the net settlement is \$670 million and if the state is precluded from further recovery from Exxon and the state loses in third party lawsuits more than half of the \$670 million, then the settlement is a net loss. In response, Ms. Finley pointed out the indemnification section of the MOA starting on page 21 where the parties agree to pay proportional amounts, but will not indemnify each other. SENATOR ELIASON commented that this might put Exxon and the state together defending themselves against Alaskan citizens.

SENATOR STURGULEWSKI asked if the state's claims were adequate to cover the state's needs if the state decided to back out of the settlement. Ms. Finley said that the state's claims are very broad.

SENATOR ELIASON said they would have further meetings and adjourned the meeting at 10:05 a.m.

SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ
OIL SPILL CLAIMS SETTLEMENT
March 26, 1991
2:43 P.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Pat Rodey
Senator Drue Pearce
Senator Rick Halford
Senator Lloyd Jones
Senator Sam Cotten

MEMBERS ABSENT

Senator Jay Kerttula

OTHER SENATORS PRESENT

Senator Rick Uehling

COMMITTEE CALENDAR

Exxon Valdez Oil Spill Claims Settlement

WITNESS REGISTER

Pamela Finley, Assistant Revisor
Division of Legal Services
P.O. Box Y
Juneau, Alaska 99811

Doug Baily, Legislative Aide
c/o Senator Rick Halford
P.O. Box V
Juneau, Alaska 99811

ACTION NARRATIVE

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement to order at 2:43 p.m. and invited Pamela Finley, Assistant Revisor, to join the Committee for further review of the Settlement.

MS. FINLEY began with the consent decree and said that the

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effective date and the date of final approval are not the same. The effective date is when the parties signed the agreement and the date of final approval is when the court approves it.

SENATOR COTTEN asked how many days the legislature has to review the settlement. Ms. Finley answered that the governments have 45 days from March 19 when it was signed to withdraw from the settlement. She explained that there is a 30 day comment period and then a 15 day period during which the governments can withdraw. If the governments do not withdraw, then the settlement goes to court for approval and then it would become a consent decree.

SENATOR PEARCE asked what the court would base their decision on. Ms. Finley replied that they would probably look at whether or not it's in compliance with federal law.

SENATOR RODEY asked if either House could approve the settlement contingent on certain modifications without triggering the ability of either government to withdraw. She answered that the settlement would have to be approved without modifications or the ability to withdrawal by either government is triggered. Another thing that would trigger it is if the legislature does not approve the settlement as written during the comment period (paragraph 37).

Senator Rodey asked if either party did not want to withdraw from the agreement and the legislature wanted to modify the agreement what would the impact be. Ms. Finley replied that it would have no impact on the governments, but if the agreement is modified that action would impact the provisions regarding Exxon's ability to terminate the agreement. Senator Rodey noted that there is no requirement that the Governor honor any suggested changes from the legislature. Ms. Finley agreed. Senator Rodey commented that anything the federal government construes as being inappropriate could trigger their withdrawal from the agreement. Ms. Finley agreed. Senator Rodey summarized that the legislature's role is advisory and a negative vote would not compel anyone to do anything, but it might allow someone to do something if they wish.

MS. FINLEY noted that a possible exception to that might be paragraph 10 in the consent decree which deals essentially with how the money is spent. If that is changed, it is possible it wouldn't be material to Exxon and, therefore, they wouldn't be allowed to depart from the agreement.

Number 227

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SENATOR ELIASON asked what could Exxon do, if the governments decided to put \$100 million into each of their treasuries. Ms. Finley looked at the termination provision of the consent decree and read that "a party may terminate the agreement if the court modifies this agreement in a manner materially adverse to that party." She questioned if this paragraph applied to Exxon as well as the governments, because paragraph 10 said that Exxon was not included materially as part of their obligations.

SENATOR UEHLING said that Exxon would probably argue that the change would have a material affect upon the remediation in Prince William Sound and, therefore, have an affect on Exxon. Ms. Finley agreed that they could use that argument.

SENATOR HALFORD asked if the legislature could intervene with the court, should it decide to do something. Ms. Finley said that would be good to ask the Attorney General. She said it would be more difficult since it would be in federal court. However, there would be a 30 day public comment period while it was in court. SENATOR RODEY asked if the legislature would qualify as amicus curiae (official advisor of the court). Ms. Finley thought not, because the legislature has too much interest of its own.

SENATOR ELIASON said he was not looking to make changes, but to see if the settlement was fair or not.

Number 290

SENATOR HALFORD asked if the agreement is rejected, what, as a matter of law, would change with regard to any potential court case. Ms. Finley answered that there is a provision about Exxon's cleanup that would take effect if the settlement was not approved. Also the Attorney General would have to decide which claim to pursue.

MS. FINLEY cautioned the Committee if the settlement does fall through, there shouldn't be a lot of public information from the Attorney General on the strength of his case, etc. SENATOR ELIASON said he thought we should know as much as the Attorney General about the case.

MS. FINLEY reviewed the payments in the settlement. She started with the \$900 million. From that is deducted up to \$4 million for Exxon's cleanup costs for the first 3 1/2 months and mid-March until the final approval date. What is left over is the proceeds. \$72 million goes to the state and \$62 million goes to the federal government plus any future

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cleanup costs done by the state or the federal government. What is left over goes to the trust fund. She said the payments are to be made as directed jointly by the state Attorney General and the federal Assistant Attorney General in charge of Natural Resources. She noted that they will also decide when the \$72 million goes to the state.

SENATOR HALFORD asked if our Attorney General can restrict the appropriation process of our constitution. Ms. Finley rephrased it saying if this consent decree requires state money to be spent without appropriation and if the Clean Water Act requires that, could he sue under the Clean Water Act. She said that would be a question for the Attorney General. She commented that she thought there was a problem with taking state assets and having the Attorney General put them in a place and have people spend them without the legislature having any say in it. She asked when that question would come up. After the case has been dismissed, perhaps?

Number 387

Senator Halford asked if some other cases turn around the basic tenets of the settlement, do they also turn around our agreement not to sue Exxon, or are we left with a severable provision that says that we have no recourse, but everyone else does? Ms. Finley said that paragraph 10 is an agreement among all parties. Senator Halford said he was thinking of 2 years from now when it's in supreme court. Senator Eliason said they were having that issue researched thoroughly. Ms. Finley said if the appropriation was the issue, a possible resolution might be for the legislature to appropriate the proceeds.

Ms. Finley reviewed the restrictions of the Clean Water Act. She said that the MOA changes these conditions somewhat by putting the state and federal money together and appoints six trustees to spend it.

Number 473

SENATOR HALFORD asked Ms. Finley to review what happens to the money when the six trustees fail to agree. She answered that the parties can agree to mediation or agree to other methods of conflict resolution (which may include something like binding arbitration). One option is go to the 9th Circuit Court of Appeals in Alaska, and have the court figure it out. She emphasized that there weren't any standards for a judge to base a ruling on.

Number 502

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Exxon's continued cleanup, paragraph 11, regarding the non-liability clause, causes her some concern. She said that the Attorney General had explained that the intent was to say Exxon has no liability for the decision to undertake cleanup, but once they start, if they are negligent, they could then be liable.

Paragraph 12 says if the consent decree falls apart, Exxon still gets credit for its cleanup after mid-March of this year against any recovery any government would get in the future. She said this is set solidly because everyone agreed to it. She said the Attorney General should be asked what consideration the state received in return for this allowance.

Paragraph 13 covers the release of claims against Exxon by the governments with one exception. It does not impair the ability of the parties to enforce the consent decree, which is a standard provision, or the rights of Alaska native villages to act as trustees, a right they have under the Clean Water Act. It does not compromise the right of third parties. Another interesting question, Ms. Finley pointed out, is by giving up the state's rights, are you giving up the rights of political subdivisions of the state. She said this issue pertains to the state's continuing claims for fish tax revenues.

TAPE 1, SIDE 2
Number 001

MS. FINLEY said that the state court case is against a lot of people and she didn't know if the Attorney General was going to pursue them or not.

SENATOR ELIASON asked if the state will pursue the fish tax for communities. Ms. Finley replied that we were. She added that the government also released claims against Exxon Pipeline and Alyeska. There is the reopener for unknown injury up to \$100 million.

Ms. Finley said that pages 18 and 19 covered the releases and covenants not to sue by Exxon. The Transalaska Liability Fund is there and Exxon may want to make a claim from that fund. She explained that this is the federal version of the state's 470 fund. She said it is conceivable that the fund could make a claim against the state as a negligent party. But Exxon agrees if the fund makes a claim against the state based on payments the fund has made to Exxon, that Exxon would reimburse the state. The same is true of any claims Alyeska makes against the fund. If the fund comes back against the

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state, Exxon will reimburse it for 20.34% of whatever the state has to pay the fund. The 20.34% is the amount of ownership that Exxon Pipeline has in Alyeska.

Ms. Finley explained that we give up all claims the state has against Alyeska related to the oil spill for natural resource damages and damages for injury to natural resources. She said it would be good to ask the Attorney General what claims we are keeping.

There are several paragraphs dealing with claims payments between Alyeska, Exxon, and Alaska state.

Number 482

SENATOR JONES asked what was the basis for all the third party suits. Ms. Finley supposed that it was allegations that the state did not act quickly enough or did not allow the cleanup to go forward as it should have.

SENATOR PEARCE asked how the state would sue because of Exxon's negligence. Ms. Finley said that we couldn't recover on the damages to the natural resources, but we might recover on something else.

DOUG BAILY, Legislative Aide for Senator Halford and former Alaska State Attorney General, said that we could sue possibly for the dollar per gallon claim that provides a penalty of a fixed amount of dollars based on a formula for any oil spill - about \$47 million.

Paragraphs 24 and 25 covers situations where Alyeska sues the state or federal government for its own damages related to the oil spill or because of Alyeska's liability to a third party.

The third party litigation provisions are all non-indemnification agreements for the state, Ms. Finley said.

SENATOR PEARCE asked what was the deadline for filing claims. Ms. Finley said the statute of limitations for tort claims is two years after the incident which had just passed that weekend.

Paragraph 30 covers situations where a third party settles with Exxon and then sues the state. The state cannot make any claims against Exxon for indemnification.

MS. FINLEY said that there is interest on late payments and it is tied to the investment rate for treasury tax and loan accounts. Senator Cotten noted that it was compound interest.

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SENATOR HALFORD asked if the legislature passed a law regarding the settlement and the Governor vetoed it, would that constitute the absolute position of the state of Alaska? Ms. Finley said she could not answer for sure.

SENATOR RODEY questioned what would happen if the Alaska supreme court ruled the settlement was unconstitutional after it had been entered into by all parties. Ms. Finley said she just couldn't answer that, but if there was concern, one of the things to do would be to intervene in the state case before the claims get dismissed.

The provisions for termination of the settlement are if the court does not accept the plea agreement in the criminal case or if the court decides the consent decree is not approved. In this later case the consent decree could just become an out of court settlement. The other possibility is if the court modifies the agreement in some material way. To terminate, the party must give written notice to the other parties within 10 days after the event that triggers it.

MS. FINLEY discussed the MOA which sets forth the federal trustees to be the Secretaries of Interior, Agriculture, and the Administrator of NOAA. The state trustees are Commissioners of Fish and Game and Environmental Conservation and the State Attorney General.

Ms. Finley had questions about the establishment of a joint trust fund and whether that is valid under federal law, because the Clean Water Act states that recovered money is to be deposited into the federal treasury.

SENATOR PEARCE asked if Exxon had to agree to any ancillary decision between the state and the federal government or would adding something like that throw the whole thing off. Ms. Finley said we can try to change things in the MOA, but the question is to what degree is the consent decree tied to the MOA.

SENATOR ELIASON said that his concern is not how to spend the money, but if it is constitutional to spend it in the manner of the settlement. Ms. Finley said that would be a good reason for the federal government to go along with any changes we suggest aimed at making it constitutional.

TAPE 2, SIDE 1
Number 001

SENATOR COTTEN asked what form the legislature's approval is

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supposed to take. Ms. Finley answered that she didn't know. She thought that approval of the consent decree could be done by resolution. If there is a constitutional issue, you would need a bill authorizing the Attorney General to set up the fund and to appropriate the money to it.

MS. FINLEY explained the termination provision in the MOA. If the MOA is determined to be invalid, the use of the remaining money will be by further agreement between the governments or by allocation of the recoveries by the federal district court. She said the way the money in the trust fund is to be used is not very specific.

SENATOR COTTEN asked if the federal government has filed civil charges under the Clean Water Act? Ms. Finley said they were going to, but didn't know if they had.

One of the important things in the MOA is that the two governments agree not to sue each other. She said the provisions for third party law suits is if the federal government gets sued by a fisherman, the state has to cooperate with the federal government's defense.

SENATOR ELIASON asked why they put that provision in. Ms. Finley said that it looked like it was intended to end the lawsuits between the parties.

She pointed out on pages 14 and 15, that for the purposes of oil spill litigation each government is entitled to assert that it is a co-trustee of all the natural resources. Each government also agreed to not sue the other one to determine the share of either government's ownership or management authority over natural resources that were lost or destroyed as a result of the oil spill. She thought this was an important point to ask the Attorney General to comment on.

Another interesting point about the MOA is that it says it creates no rights in a person who is not a party to it and is not subject to judicial review, except as provided in Article 7.

Number 135

Exxon Shipping is pleading guilty to violations of the Clean Water Act and the Migratory Bird Act according to the agreement. Exxon is pleading guilty only to violations of the Migratory Bird Act. The basis of that is that Exxon owned the oil.

SENATOR HALFORD asked if the money coming to the state could

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be appropriated by buy Kachemak Bay timber which is native land that was oiled. She thought it was a possibility.

SENATOR ELIASON asked when the \$72 million would become available. She thought that the federal and state Attorneys General might have a say in that.

SENATOR HALFORD said that one of the reasons to settle a case is to avoid the ongoing cost of litigation, but there are pieces of this case that aren't settled. He wanted to know what we have saved in legal costs by settling. Ms. Finley said that is a valid question, but in this case would be hard to answer. She suggested asking the Attorney General.

SENATOR ELIASON adjourned the meeting at 4:39 p.m.

SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ
OIL SPILL CLAIMS SETTLEMENT

March 28 ,1991

8:20 A.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Drue Pearce
Senator Jay Kerttula
Senator Rick Halford
Senator Sam Cotten

MEMBERS ABSENT

Senator Pat Rodey
Senator Lloyd Jones

OTHER MEMBERS PRESENT

Senator Rick Uehling
Senator Curt Menard

COMMITTEE CALENDAR

Exxon Valdez Oil Spill Claims Settlement

WITNESS REGISTER

Charles Cole, Attorney General
Department of Law
P.O. Box K
Juneau, Alaska 99811

ACTION NARRATIVE

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement to order at 8:20 a.m. He welcomed Attorney General Charles Cole to the meeting to answer the questions the Committee had prepared from previous meetings on the settlement.

ATTORNEY GENERAL COLE said that he welcomed the opportunity to appear before the Committee and respond to its questions about the agreement. He said the provision in the settlement providing for approval by the legislature was inserted at the

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insistence of Governor Hickel and himself, although his office has the power of negotiating the settlement without legislative approval. They thought that a settlement of this magnitude required input from the public through the legislature. He stated that he and the Governor expect and want the legislature to thoroughly review the agreement and ask all the questions necessary to discharge their responsibilities to the public.

SENATOR ELIASON asked if the Governor could sign the agreement without the legislature's approval? Attorney General Cole answered that he doubted that he would if there were legislative disapproval.

SENATOR ELIASON began at question #1 from a list of 17 questions the Committee had prepared and handed out to the members. "Why did the state choose to settle under the Clean Water Act?" Attorney General Cole answered that he and the Governor thought it was the most effective mechanism for the resolution of the plethora of issues surrounding the litigation. It provided a method for the state and federal governments to proceed in a unified fashion and avoid irresolvable questions as to which government held the rights to recover for various aspects of the natural resource damages.

Number 200

The second question was, "If under the Clean Water Act (CWA) the combining of the state and federal funds was not required, why did the MOA require it?" Attorney General Cole explained that issues would arise regarding the right to recover damage to the eagle population, for example, where both governments would claim the right. He noted the Dinkum v. Sands litigation which had been going on for years over which resources belong to which government.

Number 240

SENATOR UEHLING questioned the commingling of the funds. Attorney General Cole responded that if you don't commingle the funds, you have to separate the funds and then you are back at the Dinkum v. Sands issue where the state and federal governments couldn't agree over rights.

Senator Uehling questioned how the money can be spent. Attorney General Cole said that the six trustees have constraints on spending the funds under the CWA. The funds must be spent on restoration and related work. SENATOR ELIASON asked if we could establish a 50/50 split to avoid

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deciding that at a later date in court. He replied that would have required more than a 50/50 split and the CWA has provisions as to how the funds are used, and regulations which provide that the federal and state governments should cooperate with the natural resource recoveries.

Number 289

Question number three states that, "The CWA specifically requires that money recovered by the federal government under the Act is to be deposited in the federal treasury. Regulations require state recovery to be deposited in 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?" Attorney General Cole explained that it takes an act of Congress to get money out of the federal treasury and the money does not bear interest. He said that regulations do say that funds can be deposited into a special account in the state treasury. Since there was a unified recovery, the funds were deposited into the federal court registry, invested with special provisions which enabled the surplus funds to draw treasury bill interest. The money would essentially be in an Alaskan court and would be withdrawn by order of the U.S. District Court in Alaska. He said there was unanimous agreement on that issue.

Attorney General Cole explained that the Department of Justice said that the present mechanism (federal court registry) which has been used for hundreds of millions of dollars of settlements was a proper and legal vehicle.

Number 352

SENATOR UEHLING asked if the money would actually be deposited in Alaska and would the court have to have authorization to withdraw it even with agreement from the six trustees. Attorney General Cole answered that the trustees were authorized to withdraw it and the money will not be deposited into Alaskan banks, but into a carefully regulated mechanism for the control of those funds.

ATTORNEY GENERAL COLE read question number four: "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?" He asked if that referred to the Alaska legislature, as opposed to Congress. Several members of the Committee indicated that it

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did.

SENATOR COTTEN asked what form he expected the legislature to use to take action on the settlement. Mr. Cole answered that the legislative bodies are the ones to best make that decision. He said it was his view that a legislative appropriation was not required.

Senator Cotten asked what would happen if the legislature took no action. Mr. Cole replied that the settlement agreement would be canceled, in that case. He welcomed appropriation legislation if that is what they wished.

Number 403

SENATOR KERTTULA questioned expenditure of the \$72 million. Attorney General Cole said it was his and the Governor's view to recover expenditures made by the state for response costs and legal fees.

SENATOR UEHLING asked if Exxon hadn't been paying on expenses to the state already, anyway? Didn't the agreement delay that, and how long will it take to realize the \$72 million. Attorney General Cole said the money would be paid over a period of five years, and the reason for that is that there wouldn't be sufficient funds available under the terms of the settlement to enable the repayment of those monies immediately. As to why which five year period the money is to be paid is not mentioned in the agreement, he thought that it was clear under the terms of the agreement that it was the first five years after the effective date on the installment payment date. He added that the schedule of repayment is front end loaded with \$67 million being paid out during the first three years and the last two years it would be approximately \$2.5 million.

ATTORNEY GENERAL COLE stated that this settlement was never keyed to the opening of ANWR. That was never mentioned in any discussions or negotiations with Governor Hickel or anyone else.

SENATOR ELIASON said they respected the integrity of the Attorney General, but that the process demanded they inform themselves so they could answer questions.

Number 500

ATTORNEY GENERAL COLE read question number five which is, "Why was it determined that decisions of the Trustees have to be unanimous rather than simply a majority on each side?" He

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answered that it gave the state equal say in the disbursement of those funds, which he thought was a singular achievement.

SENATOR ELIASON noted that if the state and federal government can't agree, the decision will be made in a federal court. Attorney General Cole said that federal judges don't want to hear cases that people with good will ought to be able to resolve themselves.

TAPE 1, SIDE 2
Number 001

Attorney General Cole explained that the reason it would be resolved in federal court is that the proceedings are under the Clean Water Act. He answered yes to the question of whether a complaint had been filed under the Clean Water Act.

Attorney General Cole said he didn't bring criminal charges against Exxon, because the state had already brought charges against Captain Hazelwood and had not contemporaneously brought charges against Exxon when the spill happened. He had relied on the judgement of Attorney General Baily who had not brought criminal charges then. He also didn't think it would have been in the spirit of a settlement to bring charges against Exxon at this time. He reminded the Committee that it was improper to use criminal proceedings to gain advantage in a civil dispute. He also noted that the state was going to receive \$50 million from the settlement of the criminal case.

SENATOR COTTEN said that everyone was pretending that the criminal charges weren't a part of the settlement and everyone knows that's not true. He asked if we weren't kidding ourselves when we said there was no connection.

Number 539

SENATOR ELIASON asked if it would be more difficult to reach the same agreement with Exxon after criminal charges have been settled? Mr. Cole answered that that would be pure speculation.

SENATOR KERTTULA asked for a two minute recess.

SENATOR ELIASON called the meeting back to order and Attorney General Cole addressed question number nine, "Do you plan to pursue the state's case in state court against the remaining defendants?" He explained that the single remaining defendant is Alyeska Pipeline Service Company and the answer is yes,

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with vigor. He explained that the reason Alyeska was included in the settlement language was to indemnify Exxon who wanted to settle all of its liability for natural resource damage with this agreement.

SENATOR KERTTULA asked how far out into the Sound does Alyeska Pipeline have a responsibility. Attorney General Cole couldn't answer that question.

Number 433

SENATOR COTTEN asked what are the remaining charges against Alyeska. Attorney General Cole answered that they were civil charges based on misrepresentation and things of that nature. He said they were continuing to prosecute those claims.

ATTORNEY GENERAL COLE addressed question eleven which asked "Why there is no language asking the trustees to confer with established advisory groups to avoid having to establish new ones?" He said that a new set of advisory groups would be better calculated to advise the trustees. They would be composed of individuals chosen from a broad base within the state. The groups were not enumerated for fear of leaving someone out.

Attorney General Cole said one of his objectives was to preserve unfettered the claims of third parties. SENATOR KERTTULA was concerned with the state letting third parties down as a result of the settlement. Attorney General Cole urged those third parties to follow the advice of their lawyers. He said he had seen no written claims that the state was to carry any third party burdens. He felt that if the state misrepresented its position to anyone, they should write to him and he would address the situation or they could pursue legal redress.

SENATOR HALFORD asked if we could get a value for the third party claims. Attorney General Cole said that would be a time consuming process.

SENATOR COTTEN raised the issue of the state releasing data to third party claimants. Attorney General Cole said that no one had offered to release their claims against the state in return for release of the information.

SENATOR ELIASON asked if the state was going to continue its claims against Exxon for the fish business tax. Attorney General Cole answered that they were, but they hadn't worked out the precise mechanism for it.

SENATOR HALFORD asked if there were any other claims against Exxon besides the natural resource damages held by the state. Attorney General Cole answered no.

Senator Halford asked if the fish tax claims would require extra effort in court. Attorney General Cole answered that they were proceeding normally. He said he had tried to settle the claims, but was unsuccessful.

ATTORNEY GENERAL COLE explained that Exxon was allowed to deduct future cleanup costs if the decree is disapproved, because there needed to be some way to start over if negotiations fell apart.

Number fifteen, "What is the purpose of the provision in the MOA allowing Trust Fund money to be spent outside of Alaska?"

TAPE 2, SIDE 1
Number 001

Attorney General Cole said he didn't think there would be any problem in dissuading the federal trustees from spending any money outside of Alaska.

SENATOR UEHLING asked why the \$72 million was being made in installments. Attorney General Cole replied that there wasn't enough money available to make the installment payments, to pay the reimbursement funds, to do the necessary planning, and to do all the other activities that are required. SENATOR ELIASON asked if \$72 million was sufficient? Attorney General Cole answered that it was. He said it was his intention that the legislature play a part in expenditure of those funds.

Number 144

SENATOR HALFORD asked regarding the \$50 million restitution, if there was some way to get an analysis of the volume of the spill and get a projection of what recovery there would have been under the state dollars per gallon spill law. Attorney General Cole said he would get those figures to him confidentially. Senator Halford asked if there were any monies Exxon had already paid that would be offset on the forthcoming \$72 million. Attorney General Cole replied that there weren't.

Attorney General Cole said that a "natural resource service" is in the federal regulations. He noted that the terms under which the \$50 million restitution to the state could be spent were broadened in the MOA, compared to what the \$900 million in the trust fund could be spent for.

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SENATOR ELIASON noted that Attorney General Cole called him numerous times during the settlement negotiations and he asked him to comment on them. Attorney General Cole said that the federal government had much difficulty because of all the federal agencies that were involved in the negotiating process. It was not easy for them all to agree on a federal government position. He said it was relatively simple for the state, because it was only him and the Governor and they didn't spend a lot of time conferring about their position. He noted that the Exxon negotiators were forthright and professional.

SENATOR ELIASON asked what would happen down the road if we didn't settle. Attorney General Cole answered we would have interminable expensive litigation, and he figured that it would be hard for anyone to want to settle with the state again. He said that it is a terrible moment if you lose an opportunity like this to settle.

Number 360

SENATOR HALFORD asked what we could do to help third party litigants. Attorney General Cole answered resolve the claims against the state. He said he did not think the legislature would want to expend the funds to aid in the prosecution of those claims. He said that people needed to drop claims against the state in exchange for release of information.

SENATOR ELIASON thanked the Attorney General and adjourned the meeting at 10:35 a.m.

SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ
OIL SPILL CLAIMS SETTLEMENT

April 4, 1991

8:17 A.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Pat Rodey
Senator Jay Kerttula
Senator Rick Halford
Senator Lloyd Jones
Senator Sam Cotten

MEMBERS ABSENT

Senator Drue Pearce

OTHER SENATORS PRESENT

Senator Lyman Hoffman
Senator Arliss Sturgulewski
Senator Rick Uehling

COMMITTEE CALENDAR

Exxon Valdez Oil Spill Claims Settlement

WITNESS REGISTER

Charles Cole, Attorney General
Department of Law
P.O. Box K
Juneau, Alaska 99811

ACTION NARRATIVE

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement to order at 8:10 a.m. and welcomed Attorney General Cole. Senator Eliason noted that they had a list of questions for him to respond to and that they could have an executive session at a later time for discussion of the ones requiring confidential disclosure. He also noted the Attorney General's written opinion on the constitutional question.

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Settlement

Attorney General Cole apologized for the lateness of the opinion. He addressed question number one: "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?" He answered that the dollar amount of the settlement consisted of the \$72 million reimbursement to the State and the other is the \$900 million to the Trust Fund. The \$900 million was a figure arrived at by intense bargaining with Exxon. Initially, he had presented Exxon with a request for a settlement of \$1.2 billion in cash. This was the figure that had been discussed among the oil spill attorneys for months. He said that Exxon refused to pay \$1.2 billion in cash and negotiations proceeded from that point. Exxon submitted a counter offer which was substantially less than \$900 million paid over a period of years; the State rejected that.

Attorney General Cole couldn't say that a finite figure for the natural resource damage was ever calculated. He explained that figuring natural resource damage from the spill is a very complex exercise. First one must make at least a subjective analysis of what the damage was. They have data on the number of dead birds and mammals, but they had to figure how long that damage would continue in the Sound. It was not like assessing an automobile collision. Secondly, he said figuring the damage to salmon would be the subject of interminable dispute and expert testimony. The same comments could be made about the damage to deer, bear, eagles, etc.

Laying aside the problem of whether damages were done to state or federal resources, he asked how does one measure damage to the eagle population? And how long does the damage continue? How do you measure the damage of the loss of one eagle? Studies were made by economists in an effort to figure out what expert testimony would be. They included the cost of transplanting eagles, the cost of raising them from eggs, for instance. Analysis was made of the "use value" of the resource and the "existence value" of the resource. The "existence value" is a new method of evaluation called "contingency valuation," and is open to a lot of criticism. Attorney General Cole emphasized that the state and federal representatives did not just "pluck a figure out of the air." He is satisfied that the \$900 million figure reduced to present worth is reasonable under all the circumstances. He added that you have to also evaluate if you went to trial how much more likely would it be that more than \$900 million would be recovered as placed against the fact that less than \$900 million could be recovered. Under that type of analysis, \$900 million is a well balanced figure.

Number 307

SENATOR UEHLING asked if he had taken present day value into consideration. Attorney General Cole answered that he had taken that into consideration and using an 8% rate the actual present day value is about \$713 million.

SENATOR RODEY asked if it was simple or compound interest. Attorney General Cole said it was simple interest.

SENATOR COTTEN asked if that was a discount rate? Attorney General Cole answered that it was a discount rate.

SENATOR RODEY asked again, if we did go to trial, how much more likely would it be that we would receive \$900 million? Attorney General Cole said he was the one who decided what to accept, because he had experience in things of this nature that the other attorneys didn't have, with due deference to their abilities. He explained that in a court situation every time the state would present an economist or a damage witness testimony, sooner or later in the course of the trial there would be some of the world's greatest expert witnesses testifying largely to the contrary. Then it would become an analysts' battle of experts. People who have faced that quality of testimony know more about how to evaluate the case.

Another consideration he had was that he has found Alaskan jurors to be very responsible and listen carefully to the evidence and discharge their duties and responsibilities with great care and he was not prepared to accept the argument that the jury would come back with a huge award.

SENATOR RODEY commented as the only attorney on the Committee and in the Senate that as an attorney Mr. Cole is known as a very tough and capable adversary who knows his business well. He added that looking at the history of these kinds of trials tends to inject realism into what ultimately results from a trial versus what is alleged in it.

ATTORNEY GENERAL COLE stated that the state is spending approximately \$500,000 per month just on document production in this case. Those are orders of the court, the state has no control over it. He continued that he would provide figures on the \$72 million. He had insisted that the state recover for its spill response costs and attorney fees. He explained that there was a widespread view that the state should forego those fees for restoration of the Sound. He said that the estimated unreimbursed response costs through 12/31/90 is about \$35 million. Unreimbursed damage assessment costs through that date is about \$17.5 million. Litigation

costs are about \$20 million.

Attorney General Cole read question number two: "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?" He answered no. The uses for the \$50 million which comes to the state as part of the criminal fine for the federal criminal proceeding are slightly broader than was used for the federal funds and include the possibility of establishing a scientific center for study of oil spills generally, not simply cold water oil spills or oil spills in Prince William Sound. The legislature would be party to the process of how those funds are spent. SENATOR KERTTULA asked if the plea agreement funds could be used for enhancing the fishery? He answered yes. SENATOR ELIASON asked who makes that determination? The implication was that the legislature would.

Number 489

Question number three: "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?" Attorney General Cole said that substantively the answer to the first question was yes; he didn't think it possible for them to be dealt with separately. The answer to the last question is substantively no. He explained that the concept of the joint trust fund had been discussed for months and months before the agreement was ever arrived at.

SENATOR ELIASON asked what would happen if they want to comply with the agreement, but couldn't do it legally. He asked how they could follow the agreement and stay out of court in the future over the constitutional issue. Would that be a concept they would discuss? Attorney General Cole answered that you appropriate state's interest in the recovery to the joint trust fund and that would be the most simple expeditious way to accomplish that. Senator Eliason asked on a yearly basis? Attorney General Cole answered that that wouldn't be satisfactory, but he would need to study that subject.

Attorney General Cole said his opinion is that the agreement does not run afoul of the constitution for several reasons. SENATOR ELIASON asked what would happen if a group sued the state and were lucky enough to win in court, would Exxon be out of the loop? Would we be stuck? Attorney General Cole answered that he didn't know.

TAPE 1, SIDE 2

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Number 001

Attorney General Cole said he didn't think that Exxon could get out of it, and he said that furthermore this settlement would be approved by a federal court under a federal decree and would be enforced as such. He felt very strongly on this issue.

SENATOR ELIASON asked why wouldn't it work if the legislature had to make an appropriation every year? Attorney General Cole answered with the question, suppose the legislature didn't make the appropriation three years from now? He didn't think the federal law and the Clean Water Act would enable the legislature to do that. Senator Eliason said that this legislature would be more comfortable knowing that when they took action, it could not be changed by a future legislature.

Number 563

SENATOR COTTEN asked if the problem was with a future legislature repealing an appropriation. Attorney General Cole answered that that is a concern, but that is why the CWA is set up the way it is. He didn't think the money would ever come into the state treasury which would in turn enable or permit the legislature to appropriate those funds.

Number 501

Question number four is, "Can the State exercise appropriation power over joint funds?" Attorney General Cole answered no. "Does the State 'own' other property jointly (e.g., AHFC jointly-owned mortgages)? He answered that he really didn't know, but imagined that it does. "Does an agreement that the recovery will be joint necessarily require that the funds be expended without legislative authority?" He answered yes.

SENATOR COTTEN asked if the agreement said the legislature could not be involved? Attorney General Cole answered that the whole theory of the agreement is that if the legislature wants to appropriate those funds to a joint trust, there is nothing to prevent them from doing that.

Question number five is, "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?" Attorney General Cole answered no.

Question number five is, "If the court does not accept the agreement, can it go forward anyway as an 'agreement' rather than as a decree?" Attorney General Cole said he thought the

answer is no.

SENATOR COTTEN asked if one party was more concerned about the payment being amortized over time? Attorney General Cole answered that he didn't know. SENATOR RODEY said he presumed that since Exxon would be paying the same amount of money, it would be immaterial to them and his presumption would be that the federal government would have a greater interest in the structure of the settlement.

There was discussion of the constitutional issue.

Attorney General Cole read question number seven, "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?" Attorney General Cole answered that it's correct that the state gave up its claims against Exxon for lost oil and gas taxes, royalties, etc. He said the claims had been evaluated and that he thought it was a good trade. He also felt that corporate taxes to the state under the settlement that were given up were insignificant or nothing. The state will continue to pursue all claims it presently has against Alyeska.

Question number eight is, "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." He said he would provide the letter to them as well as the answer to the first part of the question.

Attorney General Cole read question number nine, "Please provide a copy of the reimbursement contract signed by Exxon with the State after the spill." He said he would furnish the Committee with that.

Number 390

Number ten is, "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." He said that he was unable to say at this time the amount of the appropriations required to defend against the third party lawsuits for each of those fiscal years. If

Exxon Valdez
Settlement

there is a settlement, there will be no legal fees required to prosecute or defend against Exxon. He said the state has been spending a little less than \$1 million a month on that lawsuit. He said these costs included not only attorney fees, but for expert witnesses and studies. Without the settlement the state would have to expend for the next five to six years \$12 - \$15 million annually. He had grave doubts that that period of time would be enough. He said that the state will have spent \$75 - \$100 million before the trial phase. In his view it would not be prudent for the state to continue its claim against Exxon without the federal government, because when the state endeavors to produce testimony, for example, on sea otters, the Exxon lawyers could always object that that was a claim by the federal government. The state would have to face the issues of which government do salmon, marine mammals, eagles, submerged lands, habitat, etc. belong to. The settlement neatly avoided all those problems by saying that we each have an equal voice. He said that the state is ready to argue that it is entitled to the recoveries for the natural resource damages, but certainly it's a long process that would not be resolved until the U.S. Supreme Court came down with an opinion. He questioned what would happen to the natural resource damage in the Sound during the gargantuan litigation? He said that the monies saved could be used for other things that are needed.

"How much will it cost to defend against the seventeen recently filed lawsuits." He said that would have to be analyzed more closely.

Question number eleven is, "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?" Attorney General Cole answered the same type of restoration projects that are eligible for funding at this time would be eligible - most likely undiscovered new damages. How likely is a matter of pure speculation.

Number 246

On the third party issue, Attorney General Cole said that there are capable lawyers making the decisions of who to prosecute and it is not the state's position to necessarily be working with them. The state really has no control over the third party cases.

The next question, number twelve, "You have stated that you plan to keep scientific data regarding the spill confidential due to the pending claims against the State." Attorney General Cole said, "True." "If and when those claims are

resolved, will you release all data to the public?" Attorney General Cole responded that the answer is yes."

Do you believe that it is legal to keep that information confidential?" Attorney General Cole answered, "Yes." "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." Attorney General Cole said he didn't believe the data would be made public through the normal discovery process during third party litigation. Attorney General Cole said that the State ought to protect itself from legal liability by legal means available. He thought he should "be sacked summarily" if he didn't do that. He did not have the office of Attorney General to open the treasuries.

Number 141

SENATOR COTTEN asked if the time had passed for other parties to sue the state? Attorney General Cole answered he believed so. Senator Cotten asked if this agreement somehow obligated us to defend Exxon. Attorney General Cole answered no, that we're defending claims against the state of Alaska. We are defendants in the same lawsuit. Senator Cotten asked if those suits against the state are dropped, is there any prohibition against the state assisting third parties. Attorney General Cole answered, "clearly no."

TAPE 2, SIDE 1
Number 001

Attorney General Cole reiterated that the lawyers for the third party suits are responsible for the prosecution of their own claims.

SENATOR JONES asked about new damages to third parties that might occur. Attorney General Cole answered that there are certain exceptions to the law dealing with the statute of limitations and he did not want to give an opinion now on whether those exceptions might become applicable based on a wide variety of circumstances. All in all the statute of limitations does give a lot of protection to the state.

The Committee went on with the question number eighteen, "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?" Attorney General Cole answered that he is satisfied that the settlement is legal under the Clean Water Act.

Number 134

Exxon Valdez
Settlement

To question number nineteen, "Is filing under the CWA an "election of remedies?" Attorney General Cole answered, "No." To the question, "Does it necessarily preclude the State from pursuing the case in State court if the settlement is terminated?" he answered "No."

Question number twenty, "The Trustees named in the settlement were evidently already designated as trustees before this settlement." Attorney General Cole answered "Correct." The next question is, "When was this particular group of Trustees established and under what authority?" Attorney General Cole replied that the state trustees were designated by Governor Hickel and the President of the United States under the authority of the Clean Water Act in December or January 1990/91.

Number 175

Question number twenty one is, "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?" Attorney General Cole answered he thought the court would use sound discretion - likely based on the testimony of expert witnesses.

Question number twenty two is, "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." Attorney General Cole answered that he would quarrel with that statement. He explained that complaints are filed in court against the state of Alaska and Exxon. The lawsuits are what join them. To the next question, "Under the terms of the settlement is there a way the State can avoid being put in that position?" He answered that it isn't the settlement that puts them in that position, it's the complaints filed against the state that puts the state in that position.

Number 200

Question number twenty three is, "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 of 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." Attorney General Cole said he thought this section was a stunning success on the part of the state negotiators. They weren't endeavoring to resolve issues of ownership unrelated to the oil spill.

SENATOR COTTEN raised a question about the cooperative language between governments if they are sued by third parties. Attorney General Cole explained that if the state was sued by a third party plaintiff, it would want the Department of Justice to cooperate in the defense of that action to the extent of agreeing to be impleaded. He said the seventeen claims against the state may be won by the TAPA Fund against the United States. The state hasn't answered those seventeen complaints yet, but there is the language which the state will focus on when it comes to defending against those claims.

Number 232

Senator Eliason asked Attorney General Cole to be present at the meeting Saturday, and adjourned the meeting at 10:13 a.m.

SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ
OIL SPILL CLAIMS SETTLEMENT

April 9, 1991
8:20 A.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Jay Kerttula
Senator Lloyd Jones
Senator Sam Cotten

MEMBERS ABSENT

Senator Pat Rodey
Senator Drue Pearce
Senator Rick Halford

COMMITTEE CALENDAR

Exxon Valdez Oil Spill Claims Settlement

WITNESS REGISTER

Pam Finley, Assistant Revisor
Legislative Legal Council
P.O. Box Y
Juneau, Alaska 99811

ACTION NARRATIVE

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon Valdez Oil Committee meeting to order at 8:20 a.m. He said that they would discuss two legal opinions regarding the constitutionality of the Exxon settlement, one by the Attorney General and one by Pam Finley.

MS. FINLEY said that in her memo she hoped to explain the State Attorney General's opinion. She said that his position is that the recovery from the natural resource damages from Exxon never really becomes state money, therefore we don't have to worry about the dedication of funds issue or the appropriation issue. This is because the money is put into a special account and will not be separated into state and federal funds. She did not accept that view. It's possible that none of it is state's money, because essentially it's not labeled as such, but she thought that the reasoning of, "It's a pot of money and I don't know if it's ours, so we'll agree

with the people who are disputing our ownership that we will jointly spend it, " was questionable also. It would set a very bad precedence.

Number 100

SENATOR KERTTULA asked her to speculate about why that decision was made to provide for a committee and a joint expenditure of those funds.

SENATOR COTTEN said it appears that it was decided to go to a joint fund, because of the ownership issue, and now later they are trying to figure out whether it's constitutional and lots of issues are arising from that question.

MS. FINLEY said there have been joint trusts before, for example the Shell Oil case in California, which does not have a dedicated funds problem. The federal government probably assumed that this would work in Alaska because it works in other places which have different state constitutions.

Number 190

Ms. Finley said that another concern is that the money belongs to the Alaskan trustees and not the state which is not consistent with the Clean Water Act which says that a representative of the state should sue on behalf of the public.

She thought it possible that the settlement might pass the dedicated funds provision for other reasons. She was worried that the court might say you can't sue under the CWA, because of the dedication.

Number 220

SENATOR JONES asked whether the state constitution would take precedence over federal law? Ms. Finley replied that there was a supremacy clause issue here and she was analyzing it like our Supreme Court might. However, she thought they would not want to tie the Attorney General's hands over this issue. She explained that the dedicated funds provision has an exception, that you can dedicate money to the extent necessary for state participation in a federal program.

SENATOR ELIASON asked how the legislature is to participate in the joint effort. Ms. Finley said if there is a problem with dedication of funds, there is no way to get around that. As for the appropriation issue, the legislature can appropriate the money.

Number 260

SENATOR KERTTULA asked if they could take the set of facts before them and authorize that set of facts without ever having it in the treasury or out of the treasury? Ms. Finley thought that you could do that.

Number 282

SENATOR COTTEN asked her to explain again how this might violate dedication of funds. Ms. Finley explained that by choosing to go with the CWA, the Attorney General may be choosing to dedicate the use of the funds to those things allowed under the CWA.

The agreement dismisses the seventeen state charges against Exxon, and if the agreement failed a constitutional challenge after that, she questioned what would be left to pursue.

Senator Cotten questioned whether a continuing appropriation would also be a dedication of funds. Ms. Finley said that might be answered with the fact that it's under a federal program.

SENATOR ELIASON asked if the state is sued some time in the future and Exxon continued to pay into the fund, would it be a problem to get back into the fund so we could use it? Ms. Finley answered that it was possible to go either way. Senator Eliason asked if we could go back to court if the whole thing falls apart. Ms. Finley answered that that bothered her, because the claims are being released with prejudice. Probably you would have to say that the dismissal was based on a contract that was held void, therefore Alaska courts might find a way to undue the dismissal.

MS. FINLEY stated that the appropriations problem with the constitution should not affect Exxon as the dedication of funds issue might. She said that there was only one case, the Alex case which dealt with Aquaculture, out of the Supreme Court that could provide any precedent.

Number 406

SENATOR JONES asked about the constitutionality of the CWA. Ms. Finley said that an argument that was alluded to was if the state's constitution limits the state's ability to sue under the CWA, that may be a violation of the supremacy clause.

MS. FINLEY said there was a decision by Judge Stewart saying that custodial funds and all federal funds have to be run through the appropriations process. This would require the legislature to participate in order to validate the funding.

Senator Jones asked if you have to do the appropriation every year? She said the way it is drafted, you have to do it every year. Senator Cotten mentioned that there were other funds that needed appropriations every year, like the appropriation from the earnings of the permanent fund to the dividend fund. Then he said the easiest way to deal with that would be to just get the money in a lump sum.

SENATOR ELIASON said that this agreement, if it is workable, is a guarantee that this money will be spent in reclaiming Prince William Sound and other areas that were touched by the oil spill, but if we go back to court it is uncertain what would happen at the end of the road. Would Exxon owe us a certain amount of money that would go into the general fund for the legislature to spend any way they want or would they be dedicated funds? Ms. Finley said one of the things it depends on is whether the State Attorney General decides to stay in state court or to go back into federal court and litigate under the CWA and whether or not they would try for a joint recovery with the federal government...She said that the Attorney General said that recoveries under state law might be required to be spent for restoration because of the application of the public trust doctrine.

MS. FINELY explained that the public trust doctrine says the state does not own the public resources the way it owns the capitol building. It owns the natural resources as a trustee for the public forever. There are no strict guidelines for the public trust doctrine.

TAPE 1, SIDE 2
Number 001

There was further discussion of the public trust doctrine. The Committee discussed options regarding introduction of legislation aimed at making the settlement more legal.

SENATOR COTTEN asked why the non-appropriation bill was necessary. Ms. Finley said she was concerned about the Attorney General's ability to set up a trust fund, because normally only the legislature can set up a trust fund. She said they did not need that bill and a resolution, too.

There was general discussion of what the House Committee on the Exxon Valdez Settlement was doing and of some general directions the Committee could take.

Number 443

Senator Eliason adjourned the meeting at 9:20 a.m.

SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ
OIL SPILL CLAIMS SETTLEMENT
April 11, 1991
8:10 A.M.

MEMBERS PRESENT

Senator Dick Eliason, Chairman
Senator Drue Pearce
Senator Rick Halford
Senator Lloyd Jones
Senator Sam Cotten

MEMBERS ABSENT

Senator Pat Rodey
Senator Jay Kerttula

OTHER LEGISLATORS PRESENT

Senator Rick Uehling
Representative Bill Hudson
Representative Loren Leman
Representative Cliff Davidson
Representative Max Gruenberg

COMMITTEE CALENDAR

Exxon Valdez Oil Spill Claims Settlement

WITNESS REGISTER

Charles Cole, Attorney General
Department of Law
P.O. Box K
Juneau, Alaska 99811

ACTION NARRATIVE

TAPE 1, SIDE 1
Number 001

SENATOR ELIASON called the Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement to order at 8:10 a.m. He said they would continue with the list of questions presented to Attorney General Cole on March 29, 1991.

Attorney General Cole said he had already answered "yes" to question number seven: "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?

To questions number eight and nine regarding copies of the reimbursement contract signed by Exxon with the state and the letter from the State to Exxon, dated approximately April of 1989, requesting early settlement of that claim, Attorney General Cole said he would provide the Committee with those.

Number 100

ATTORNEY GENERAL COLE answered \$12 - \$15 million annually to question number ten: "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."

Question number eleven: "What are specific examples of types of things that might be eligible for funding under the re-opener clause?" Attorney General Cole answered the same types of things which are eligible for funding for the basic settlement agreement. "How likely is it that anything would ever trigger the receipt of that money?" Attorney General Cole said they would have to wait for ten or twelve years to see what develops. He hoped that the scientists have a solid understanding of the damage to the resource at this time.

SENATOR ELIASON asked him how the State would present that type of claim to Exxon? Attorney General Cole noted that the clause they are dealing with is on page 17 of the agreement and is entitled Number 17. It says essentially that "Exxon shall pay to the government such additional sums that are required for the performance of the restoration projects in Prince William Sound and other areas affected by the oil spill 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 areas affected by the spill. Provided, however, that for a restoration project to qualify for repayment under this paragraph the project must meet the following requirements: a. Cost of the restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation, and b. The injury affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any trustee from any information in the possession of or reasonably available to the trustee on the affective date."

Attorney General Cole said that it is clear what the money has

to be spent on and there are the limitations that the cost must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation. That language, as well as the language from b, comes from a federal court case that essentially laid down those requirements. He explained the process for a claim of that nature is outlined in paragraph 19 demanding payment.

Number 225

REPRESENTATIVE HUDSON asked if Prince William Sound could be construed to mean other affected areas, like the back side of Shebekof Straits or Swiss Island. Attorney General Cole answered "yes," and that is because of the language saying that Exxon shall pay to the government such additional sums that are required for the performance of restoration projects in Prince William Sound and other areas affected by the oil spill.

Number 280

To question number thirteen, "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?" Attorney General Cole replied that he would bring down the catalogue of lawsuits at the next recess. He also said that by rough calculation the claims against the state exceed \$1 billion.

REPRESENTATIVE DAVIDSON asked if he knew how many people filed suits just to protect themselves because the statute of limitation was about to expire. Attorney General Cole said that no one had discussed with him dismissing any lawsuits against the state and he had no idea of the number. He said that the state intends to very vigorously defend against those claims. Representative Davidson asked what kind of claims were filed against the state. Attorney General Cole said the state would defend itself against all claims and complaints and he said the state would not confess judgement on these lawsuits.

Representative Davidson said it was a big hurdle in the public's mind that the state would be on the same side as Exxon against them. Attorney General Cole said without the settlement the state would be in the same place with these claims. He explained again that it is the State that is being sued, not the other way around.

Representative Davidson asked on what grounds the state can withhold information. Attorney General Cole answered that Alaska statutes give the state the right to withhold that

information along with discovery provisions of the Alaska Rules of Civil Procedure contained in Civil Rule 26. They give the state the right to protect its work product and trial preparation - here, first, against Exxon and secondly in the prosecution of its claims against Alyeska. Attorney General Cole asked what would happen if the settlement was not approved and the State has \$70 million worth of work product that they just gave to Exxon? He said we still have claims against Alyeska Pipeline Service, Co. and he intends to prosecute those claims. Is he to give Alyeska all the State's information - statements they've taken, damages the State can prove, legal research, etc.? He does not intend to do that and will not flinch on that issue.

Number 420

REPRESENTATIVE HUDSON stated that he could clearly see now why any release of data would not be in the state's best interest.

SENATOR ELIASON asked Attorney General Cole if he thought the attorneys asking for the information seriously thought they would get it? Attorney General Cole replied, "Look what they've already done to get it."

Number 440

REPRESENTATIVE LOREN LEMAN said Attorney General Cole had been quoted to say that he would release the information if the legislature asked him to. He asked what form he would need to release the information. Attorney General Cole replied that it was a misquote. He said if the legislature acts in that fashion, he would give it careful consideration. Representative Lemman asked if a letter of intent attached to a bill would be sufficient? Attorney General Cole replied that he would regard it as ineffective. Representative Lemman said he had argued the same thing on the House floor.

Number 469

REPRESENTATIVE DAVIDSON asked what was meant by the "State of Alaska?" He said that the people are the ones that had been damaged. He said it is very uncomfortable to stand up against the people who had been damaged, and asked how they could be helped. Attorney General Cole answered that they could dismiss the lawsuits against the state so they could effectively aid them in the prosecution of their suits against Exxon. They take that help away when they sue the state. He added that he would not spend state money to prosecute their claims against Exxon, because that would be a breach of responsibility, too.

REPRESENTATIVE HUDSON and ATTORNEY GENERAL COLE discussed

Senate Exxon Valdez

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April 11, 1991

keeping the information until the claims against Alyeska and Exxon are done. Attorney General Cole said the information was needed also to defend against third party claims against the State. He said some people had elected to sue the state and they have very fine lawyers and the state must resist those claims by all legal means.

Number 510

SENATOR UEHLING asked what happens to the third party claims if the settlement is not approved. Attorney General Cole said that the claims would remain. Senator Uehling commented that they would not be that much farther ahead by disapproving the settlement.

Number 530

SENATOR ELIASON asked if there was any effort in the negotiations to deal with the third party suits? Attorney General Cole said he supposed the foremost way to have done that would be to say to Exxon, "Why don't you defend against all these claims against the State as a part of the settlement?" It may not have been politically palatable to have Exxon defending claims against the state. Certainly Exxon would not have said we'll pay for your liability, too. He noted that what they did is in paragraph 32, "Nothing in this agreement shall affect..."

Senator Eliason asked what would happen if Exxon was being sued and not the State and the determination was made that the State was partially responsible? Attorney General Cole answered he didn't think that Exxon lawyers and third party lawyers would want to venture into that legal thicket.

Number 564

SENATOR COTTEN pointed out in a letter from U.S. Congressman George Miller that his conclusion was that Alyeska broke the law as well as promises. Attorney General Cole said he agreed on behalf of the state to not bring criminal charges against Exxon, but there is no agreement like that relating to Alyeska. Senator Cotten asked in what form he made the agreement with Exxon? Attorney General Cole replied that he gave them a letter separate from the rest of the agreement. Senator Cotten asked if that was binding on the state. Attorney General Cole said he regarded it as such, but he was not sure it was legally binding. He thought it was ethically binding and would stand behind it.

TAPE 1, SIDE 2
Number 001

ATTORNEY GENERAL COLE continued that the decision whether or not to sue Exxon for criminal charges was made nearly two years ago when the decision was made to prosecute Captain Hazelwood. At that time no criminal charges were filed against Exxon. That was the time to file those charges. He said the decision was made for sound reasons and didn't see anything to be gained by rising up now to file criminal charges against Exxon.

SENATOR PEARCE asked what was the statute of limitations on criminal charges? Attorney General Cole replied that he didn't know. Attorney General Cole said he knew that no criminal charges were filed against Alyeska or any officer or employee or agent of Alyeska back then. That distinguishes the case somewhat from the Exxon situation. Criminal charges were filed against Exxon by the United States and one suspects that there were sound reasons for filing against Exxon and not the state, he said.

He noted that under the federal statutory procedure there's legislation called the Alternative Fines Act which is a powerful piece of legislation.

Number 544

REPRESENTATIVE DAVIDSON asked what options are open for the state to go against Alyeska, if it's determined by someone that Alyeska did, in fact, break the law. He withdrew his question.

REPRESENTATIVE HUDSON asked if it would be possible for the State and the third party litigants to combine forces against Alyeska to recover for common damages? Attorney General Cole said that this could happen and depends on the lawyers for the third party plaintiffs. He elaborated that litigation doesn't always contain nice little compartments.

SENATOR ELIASON asked what would happen if charges against the state were dropped and the state joined forces with the third party litigants suing Exxon and we gave the information to those attorneys, would Exxon have that same information? Attorney General Cole answered that he didn't think that would happen unless someone gave it to them. Senator Eliason asked him if he would be comfortable if one of the attorneys dropped suit against the state and received the information? Attorney General Cole said that plaintiffs' attorneys quite properly share information.

Number 462

Question number fourteen is: "Since the \$72 million is recovered under the CWA, it can only be reimbursement for

funds already expended,..." Attorney General Cole said it's true at least that the \$72 million goes into the state treasury. "And the \$50 million must be spent for restoration." He said that was essentially correct. "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." He said that was true. "Won't there ultimately be a net loss of millions of dollars to the state treasury?" He responded that if the suits against the state are dismissed, there will be essentially no net loss, and whether or not there is a settlement makes no difference as to the necessity for the state to defend against third party claims.

REPRESENTATIVE HUDSON clarified the point that the \$72 million is going to the general fund and need not be used for restoration. Attorney General Cole said that was true, but the \$50 million is going to a special fund, because its purpose is somewhat limited to some broad purposes.

Number 407

SENATOR UEHLING commented that there is no way to recover, but to sue Alyeska, for the cost of the third party lawsuits. He asked if we would ever recover any of that money. Attorney General Cole said under the Civil Rule 82 of the Alaska Court Rules of Civil Procedure the prevailing party in litigation is entitled to recover a reasonable attorney fee.

Number 303

SENATOR ELIASON asked what other avenues were open to obtain money that is dedicated to restoration rather than the general fund? Attorney General Cole answered legislative appropriations. Senator Eliason said if they do sign off on the settlement, there is at least \$900 million earmarked for restoration of the area. He asked if they don't sign off, can they go to court under different conditions and reach a conclusion that this money will be used for that purpose or would that money go back into the general fund and not be earmarked for restoration. Attorney General Cole answered if the State went to trial and recovered monies under the public trustee theory, he thought that the state acting as trustee would be required to expend the money on the beneficiaries of the trust.

Senator Eliason asked why we would go for a trust rather than fine or reimbursement to the general fund. It is his sense that real damages in this case are limited to the natural resource and not the loss of fish tax or the diminution of oil going through the pipeline. He thought those recoveries would be required to be expended for the benefit of the

beneficiaries of the trust.

SENATOR UEHLING asked what else can be done to restore the environment that hasn't already been done? How specific are the trustees going to be on how the money can be spent. Attorney General Cole replied enhancement of the salmon fisheries and things along those lines.

REPRESENTATIVE DAVIDSON asked if port and harbor infrastructure could be included? He explained that some of the areas that were hit were dependent on both commercial and subsistence uses. Attorney General Cole said he would have to confer with his fellow trustees on that.

REPRESENTATIVE HUDSON said he thought there was a great deal of leeway for use of the recovery money, for example ocean sciences. Attorney General Cole agreed.

Number 260

ATTORNEY GENERAL COLE read question number fifteen: "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?" He read paragraph 29: "The parties agree that they will not tender each other to any third parties as direct defendants in any action pursuant to Rule 14c of the Federal Rules of Civil Procedure." He commented that although it sounds confusing, this language was not a drafting error.

REPRESENTATIVE GRUENBERG asked if it would allow tendering under other rules? Attorney General Cole said he thought it only related to oil spill litigation. Representative Gruenberg said the only thing that is precluded tender under 14c and f in Admiralty law, they can implead or take them in as a third party defendant.

Attorney General Cole read paragraph 30 which he noted is a very arcane provision. "If a third party which has previously reached or thereafter reaches a settlement with Exxon brings an action against governments or either of them, the sued government shall undertake to apportion liability, if any, according to the principles of comparative fault without the joinder of Exxon and shall assert the joinder of Exxon is unnecessary to obtain the benefits of allocation of fault." He said that it means exactly what it says. As far as the state is concerned, one of the critical provisions is contained in the memorandum of understanding. Historically the law of contributory negligence on the part of the claimant was a total bar to recovery from a negligent party which means

that if a plaintiff sues a defendant for negligence in an automobile accident, and the plaintiff shows that the defendant was negligent, and the defendant then shows some measure of negligence was also committed by the plaintiff, the plaintiff can recover nothing. Alaska law states that there is comparative apportionment where each party is assigned a percentage of the responsibility.

Number 115

REPRESENTATIVE DAVIDSON asked when the third parties come after the state, a settlement would be reached only after application of a basic proportion of fault. Attorney General Cole said that paragraph 30 deals with a specific situation where a third party which previously or thereafter settles with Exxon. The critical language is on page 15 of the Memorandum of Understanding, VII, Subsection F which would be operative in the existing circumstances.

REPRESENTATIVE DAVIDSON asked if this applies to third parties that have settled with Exxon and then sued the State? Attorney General Cole answered he did not know whether any of the third party suits against the state have been brought by parties which have reached a settlement with Exxon. He doubted it.

SENATOR UEHLING asked what is the responsibility of the federal government after the settlement or are they being sued by the third parties also? Attorney General Cole answered that the federal government is being sued and that the state has no proportional fault.

TAPE 2, SIDE 1
Number 001

REPRESENTATIVE GRUENBERG said this is to insure that Exxon doesn't have to pay twice for the same damage. Attorney General Cole said, "yes."

ATTORNEY GENERAL COLE read the second sentence of question number 17: "If the legislature disapproved the Decree and the Governor chose to go ahead with it anyway, would the legislature, as part of the "the State" be precluded from ever challenging the authority of the parties to enter into the agreement?" He answered that the Governor has said if the legislature disapproves the settlement, they would continue with the litigation. "Are the claims of municipalities, which are political subdivisions of the State, barred by the State's release of its claims?" He said that all the claims held by the municipalities before the settlement are retained.

REPRESENTATIVE HUDSON asked about the fish tax. Attorney

General Cole said that that is taken up on pages 14 and 15 of the agreement which reads, "provided, however, that nothing in this agreement shall affect or impair the following: b. claims by the State for tax revenues which would have been or would be collected under existing AS 43.75, fisheries business tax, but for the oil spill..." He said that the ability of municipalities to seek compensation for their portion of the fish tax has been preserved.

REPRESENTATIVE DAVIDSON said there was a question of whether the Department of Revenue had been accurately accounting for where the raw fish taxes were due. Therefore, there is some question as to what that amount should be. How would that affect how much the municipalities would be owed? Attorney General Cole answered they should get what they agreed with Exxon to settle for or what they can prove in court. Attorney General Cole said the state had done a lot of work to quantify the fish taxes and they are prepared to litigate that claim.

Representative Davidson asked why the state agreed to the economic exclusion of the fish tax? Attorney General Cole said the state wanted to protect the financial interest of the municipalities under the statute. Representative Davidson asked why the state gave up its share of the fish tax? Attorney General Cole said it gave up these and other damages in the spirit of negotiations and did not feel it should give the rights for the municipalities. Representative Davidson asked him again why he gave up the state's share of the fish taxes? Attorney General Cole explained that he gave it up, as well as other interests of the state, to affect a settlement.

SENATOR ELIASON asked if the state's fish tax was somehow a part of the \$72 million. Attorney General Cole answered that a lot of things were tied up in the \$72 million.

Number 232

REPRESENTATIVE HUDSON said that the Attorney General said the state had not given up its opportunity to claim the lost fish taxes from Alyeska.

ATTORNEY GENERAL COLE reiterated that the answer to the last question in number seventeen was no. SENATOR ELIASON asked if any municipalities had sued Exxon since negotiating the settlement. He thought no, but they had filed claims previously.

Number 250

To question number twenty four, "Please provide a list of

specific examples of the kinds of expenditure that would be possible and likely with the use of the Trust Fund." Attorney General Cole answered there was no definitive list. They want to get public input from everybody.

Number 260

Question number twenty nine states, "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." Attorney General Cole answered that he was sure there would be audits of the trustee's expenditures. He believed that the budget review would be public. He was satisfied that there will be public accountability.

Number 292

ATTORNEY GENERAL COLE said he had data on question number twenty-six, "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." He said that term was defined in the Federal regulations dealing with oil spills 43CFR11214. The term "services" is defined as the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical or biological quality of the resource.

Number 320

SENATOR ELIASON adjourned the meeting at 10:10 a.m.