

SCOMM

79:5

Ports & Waterways Safety Act.

LTR to Federal Justice - Handing over criminal proceedings

Criminal -

Civil -

CERCLA - CWA - Tort -

Criminal Div. Dept of Justice

2 Conclusions

1. little public policy advantage
2. Feds best to proceed

Civil Litigation

Civil Litigation
State Damage - Nat. Resource Assessment.

An argument between State - Kelso &
Adm. Nelson

⑧ ~~Wasn't~~ Wasn't we still be a target - perhaps
one of three.

2 of Frans -

Booby trapped -

* IF we pass a resol. Asking the courts
to deny the agreement - what force that is to
the settlement - Sink it.

* won't the interests of the people be best
served by proceeding with the civil damages
claims. - no - gave up resource damages -
still have: • dollars per gallon
• Punitive damages
• Lost Revenue & live shutouts
• Fish taxes

6/21/89 - LTR Bailey

3/12/91 - LTR Cole -

Richard Stewart - / Thomas Campbell -

Co-equal stewardship

13 years - \$105 mill - recovered! AMOCO-CADIZ

stewards of Resources

new
memo of agreement
not an amendment - but another one.

Memo. of agreement with Fed. Govt on program
content - leg - Public involvement

* Release scientific data

* Release ex. session

what's the concern
AS to STATE & Fed.

Range of Values - Held by Fed & AG

Expenditure Criteria - CWA
Process

\$50 mill.

Restoration -
Enhancement

P Alaska different

Replace with comparable or compatible resources!

* INDEMNIFY ALASKA



avenue still open
ongoing litigation against Alaska — what's our objectives
• what's still out there.

Plea = \$50M to STATE FOR RESTORATION

⊗ A New memo of Agreement that defined Process —
terms + responsibilities!

⊗ ? ISSUE — STATE gets the door open — !
FEDS will follow. ?

⊗ Replacement values

ON PROCESS — STATE most
impacted — it's here
+ there will be the necessity
of COOPERATION —
ASSOCIATED economic
values — Accrue to the
STATE! —

1. ⊗ spending outside the region —
? → Entire region in the pot — just PWS.
Per Campbell oiled Bird — but served by enhancing repro. elsewhere!

⊗ Precedent of accepting the \$50 mil / 50 mil
to deter future spills

"Note"

\$1 Billion Precedent — Not in Present Value
only HALF that in 91 dollars!!

Kubinka's

X Any harm noted to the public's food
chain — advise them.
Anyone

X WAS THE DETERMINATION TO NOT sue under Criminal
Terror Criminal Injuries + Prosecution over ~~to~~ fees

Alternative to Accept
Time
Costs
Expectations

Parties - STATE UNDERSTANDING -

settlement w/ STATE - FEES - way not 3rd party?

— Period of Pay — Reopeners amt.

Unusual to reveal goals in Anticip'd
Negotiations — Harm

executive briefing re: scientific research.

(1) U.S. Govt - 18 ms.'s spend = \$20. mill
① FED Claims -
8-12 YEARS possible - ^{cont.} superior - Supreme -
Dinkum Santos - 13 yrs - open
Amoco Cadiz - 13 yrs - coming closer

(2) Antic. Costs - \$90-100 mill?

would going back to the table afford
better chance - less

Are we inadvertently harming future litigation
by this process, -

Hudson

Criminal charges against Exxon
was not chosen by former Atty
Gen. Bartley.

Bartley chose to proceed against
Hazelwood instead -

Atty Cole - felt criminal pro. against
Exxon would not be successful.

Exxon req'd a ltr or commitment that
State would not proceed against them.
LTR was drafted.

what was to be achieved by moving against
Hazelwood

MAR 24-89 - Spill

{ FED Filed Criminal Charges
{ STATE Filed Crim. charges against Hazelwood
LOST
Cole Filed civil charges against Exxon
Formally Filed LTR

Add - 1 - Sen.
1 - Rep -

EX OFFICIO.

1 - US Sen
1 - US Cong.

Trustees -

1. Alaska stays in - do not release
2. Exxon should comply indemnify state

Claims

STATE - Exxon - Alaska, FED

FED - " " STATE

Exxon - STATE - FED

PRIV. - Exxon - Alaska, STATE - (FEDS)

MUNYS - EXXON - Alaska - (STATE - FEDS)

* Alaska should not be released from Res. Damages

ALASKA + PRIVATE - Partnership - Documents
↓
EXXON - ALASKA ← Discovery - statements

Release - of scientific info - AFTER Court. -
Judgement - go for Exxon -
settle & go for

Public input - Accountability - Open Meetings
Regulatory Review -

OIL SPILL LITIGATION CHRONOLOGY
(April 2, 1991)

March 13, 1991

State, federal and Exxon representatives sign "Agreement and Consent Decree" and "Memorandum of Agreement and Consent Decree" in civil litigation; federal and Exxon representatives sign "Plea Agreement" in federal criminal case.

March 19, 1991

Settlement documents published in the federal register.

March 24, 1991

Statute of limitations expires on common law tort claims under state law.

April 8-9, 1991

Hearings scheduled before US House Interior subcommittee.

April 11, 1991

Deadline established by Judge Holland for public comments on the Plea Agreement.

April 18, 1991

Deadline for comments to federal and state government on Consent Decree and MOA.

April 24, 1991

Judge Holland has scheduled a hearing at 8:30 a.m. to announce his decision on the Plea Agreement.

May 3, 1991

Last day on which federal or state government may withdraw from the settlement if: (1) legislature has not approved the Consent Decree; or (2) comments show Consent Decree is inappropriate, improper or inadequate.

May 4, 1991

Last day on which any Party may terminate the Consent Decree if Judge Holland rejects the Plea Agreement on April 24 (Parties may terminate within 10 days of rejection).

10 Days After (1) Final Judicial Rejection of Consent Decree or (2) Final Judicial Approval With (a) Misinterpretation or (b) Materially Adverse Modification

Last day on which any Party may terminate the Consent Decree. This period would apparently expire at the end of the time for appealing from Judge Holland's decision, or when an appeal has been finally decided.

SETTLEMENT

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 18, 1991

SUBJECT: Exxon Settlement; Overview and Preliminary Questions; Federal Criminal Case (Work Order No. (7LS1044))

TO: Representative Max Gruenberg

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

OVERVIEW: CRIMINAL CASE

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

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

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

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

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

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

Representative Max Gruenberg
March 18, 1991
Page 2

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

PRELIMINARY QUESTIONS RELATED TO PLEA AGREEMENT

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

PLF:pl
91-177.plm

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TO: Representative Max Gruenberg

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Assistant Revisor of Statutes

OVERVIEW; STATE CASE

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

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

Types of Damages. The state seeks to recover civil penalties and assessments, response costs, cleanup costs, damage assessment costs, damage to the natural resources of the state, direct and indirect costs of providing governmental services to people adversely affected by the oil spill, losses due to ordinary government services curtailed or impaired as a result of the oil spill, loss of revenue from fish processing tax, salmon enhancement tax, oil and gas production tax, corporate income tax, and oil production royalties. (See pp 6-8 and 22).

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

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

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

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

PRELIMINARY QUESTIONS RELATED TO STATE CLAIMS.

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

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

PLF:pl
91-178.plm

FACT SHEET

FACT SHEET

Agreement has been reached between the United States, the State of Alaska, and Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company for settlement of claims arising from the Exxon Valdez oil spill in Prince William Sound on March 24, 1989.

The settlement, totalling \$1 billion, represents the largest environmental damage settlement in history. Exxon has previously spent more than an estimated \$2.2 billion on cleanup and damage payments.

Highlights

- o Exxon will pay \$190 million immediately. Of this amount, \$100 million consists of a criminal fine payable to the United States and restitution to the State of Alaska. Remaining funds will be used to continue the science program, and for restoration planning and to initiate restoration pilot projects. The balance will be used to begin to reimburse a portion of the past expenses of the trustees and the Coast Guard (the remainder of these past expenses to be reimbursed from the later payments).
- o Exxon will pay \$150 million on September 1, 1992 (less certain cleanup costs), but this amount will be usable by the governments beginning in October 1991. These funds will be used in restoration efforts aimed at returning Prince William Sound to its pre-spill condition.
- o Exxon will pay \$100 million on September 1, 1993.
- o Exxon will pay \$560 million over a period of years beginning in FY 1993.

If significant new injury arises after the 10-year restoration period, which is based on previously unknown information, the trustees may assert additional Exxon liability up to a cap of an additional \$100 million.

Trust Fund Administration

The agreement and the joint trust fund established will be administered by a group of six trustees comprising the Administrator of the National Oceanic and Atmospheric Administration (NOAA), the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, and the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney-General. The Environmental Protection Agency (EPA) has been

designated by the President to coordinate restoration activities for the U.S. The Coast Guard will continue to oversee cleanup activities for the United States.

Pursuant to a Memorandum of Agreement (MOA), the trustees will act jointly in the collection and joint use of all damage recoveries. Decisions on use of recovered funds for restoration will be made by unanimous agreement; the funds are to be held in a joint trust fund under the supervision of the U.S. District Court for Alaska.

Cooperative Restoration Efforts

The governments will continue to work cooperatively conducting scientific studies and restoration efforts approved by the trustees for the 1991 field season. Among those presently under consideration are:

- o Restoration of the Beach Wildrye Community, to stabilize sites where natural or cultural resources are at risk,
- o A public information and education program, to lessen the potential for further human disturbances,
- o Habitat restoration for pink and chum salmon, using proven fisheries enhancement techniques,
- o Protection of strategic fish and wildlife habitats and recreation sites.

Public Participation and Third Party Rights Protected

The Memorandum of Agreement (MOA) between Alaska and the U.S., and the settlement agreement between the governments and Exxon, will each be published separately in the Federal Register, and public comment will be sought on each of them for a period of 30 days. Broadly based public participation will be an integral part of the program. Both the MOA and the settlement with Exxon will be subject to judicial approval.

Both agreements will be filed with the U.S. District Court for Alaska. The public will have the right to comment on the agreements and the agreements must be approved by the court before becoming effective.

The agreement with Exxon states that it is not intended to affect rights and obligations of third parties with oil spill claims. Among the third parties whose rights are protected by these provisions are Alaska natives and their villages, and other private plaintiffs.

Each government has the right to withdraw its consent to the settlement agreement within 15 days after the close of the public comment period if the comments disclose facts indicating the agreement is not in the public interest or if the Alaska legislature does not approve the agreement.

Exxon-Valdez Settlement Largest Ever

Shell-Martinez

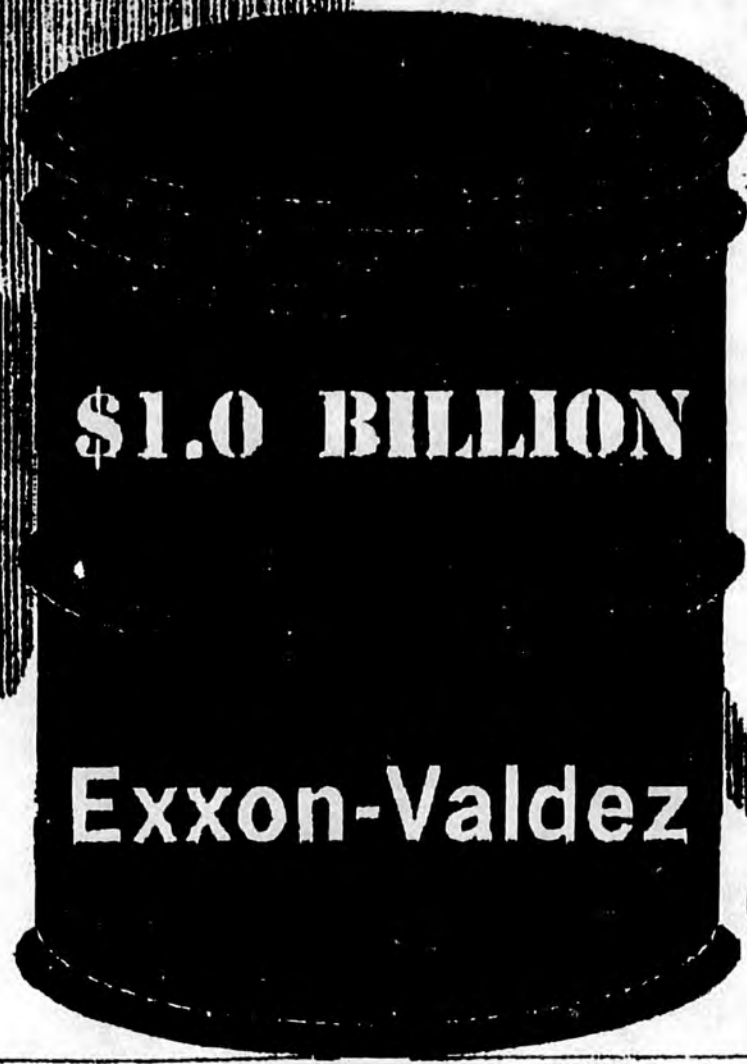
San Francisco Bay - 1988

\$19.7 MILLION



\$1.0 BILLION

Exxon-Valdez



MAR 13 '91 11:54 03/12/91 11:54 0202 234 8901
ID:HY ADAMS HOTEL WDC TEL: 444 600 4110
SEN. BUDWISER

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Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, MARCH 13, 1991

AG
202-514-2007
TDD 202-514-1888

**EXXON TO PAY RECORD ONE BILLION DOLLARS IN CRIMINAL FINES AND
CIVIL DAMAGES IN CONNECTION WITH ALASKAN OIL SPILL**

WASHINGTON, D.C. -- Attorney General Dick Thornburgh and Alaska Governor Walter Hickel today announced that Exxon Corporation and Exxon Shipping Company have agreed to settle all federal and state civil claims resulting from the Exxon Valdez oil spill on March 24, 1989, by the payment of \$900 million in damages. The settlement also has a reopener clause stating that Exxon may incur an additional \$100 million for natural resource damages not currently foreseen.

The Attorney General also announced that the two corporate defendants have agreed to plead guilty to federal environmental criminal charges and to pay a criminal fine of \$100 million, of which \$50 million will be remitted; the State of Alaska will receive \$50 million of the \$100 million as restitution for restoration of the damaged natural resources. This is, by far, the largest single environmental criminal recovery ever exacted.

According to the plea agreement, which will be filed in the District of Alaska, Exxon Shipping Co. will plead guilty to violating the Clean Water Act, the Refuse Act, and the Migratory

(MORE)

- 2 -

Bird Treaty Act. Exxon Corporation will plead guilty to violating the Migratory Bird Treaty Act.

"The aggregate of one billion dollars in civil damages and criminal restitution is by far the largest single amount ever paid as a result of environmental violations. Through tough negotiations by the Department of Justice, the Environmental Protection Agency, the Department of Agriculture, the Department of Interior, the Department of Transportation, the National Oceanic and Atmospheric Administration (NOAA), the State of Alaska, and federal prosecutors, the federal and state interests surrounding the legal responsibilities of Exxon Shipping and Exxon Corporation have been vindicated," said Thornburgh.

Filed in the District of Alaska today is a civil complaint and accompanying consent decree alleging violations of the Clean Water Act. The decree states that Exxon Shipping and Exxon Corp. will pay a total of \$900 million in civil damages over the next ten years to federal and state trustees. The money will be used for additional cleanup and both short and long term restoration projects in Prince William Sound and the Gulf of Alaska, the areas damaged by the spill. Of the total, \$135 million is committed for past expenses such as cleanup and scientific research.

Both the Plea Agreement and the Consent Order will require court review and approval.

(MORE)

- 3 -

Governor Hickel, who initially proposed settlement in a personal one-on-one meeting in Juneau with Exxon's Chairman Lawrence Rawl on January 15, 1991, commends the outcome. Said Hickel, "When Mr. Rawl and I first met in Juneau, we made it clear that negotiations could only be successful if we kept the talks at the highest level. Today, we have a settlement which is the result of eight weeks of intensive negotiations. It's a good settlement and its use will benefit the environment directly.

"On behalf of the State of Alaska, I want to commend Attorney General Thornburgh for his legal leadership, Alaska Attorney General Charlie Cole for his aggressive yet patient commitment, Secretary of Interior Manuel Lujan for his tenacity, Secretary of Transportation Samuel Skinner, NOAA Administrator Dr. Knauss, and Environmental Protection Agency (EPA) Administrator Reilly. We have a winner -- environmentally, psychologically, and financially."

Reilly said, "I am pleased with the settlement being announced today. The one billion dollar settlement with Exxon -- plus a \$100 million reopener for damages currently unanticipated -- is the largest environmental assessment ever and the funds will be available years earlier than any recovery that could have been secured through full litigation.

"These funds assure that necessary activities will be carried out and monitored to restore Prince William Sound. It

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also should send a clear signal to ship owners that they share responsibility for protecting waters and coastlines. The settlement closes a chapter on the nation's largest oil spill ever, and it allows us to turn our attention finally now to the tasks of restoration," said Reilly.

John Knauss, NOAA Administrator and Commerce Undersecretary, called the settlement, "a good deal for the nation and one that resolves all of the governments' outstanding claims against Exxon. It will permit us to complete the critical cleanup and begin restoration of Prince William Sound now, while avoiding years of lengthy and costly litigation."

Interior Secretary Manuel Lujan said of the agreement, "This settlement serves notice to all that carelessness in transporting oil can have costly consequences. It also ensures adequate funding to complete the cleanup, continue appropriate studies and restore the fish, wildlife and other natural resources of Prince William Sound."

Secretary of Agriculture Edward Madigan said of today's settlement, "The funds from the settlement will enable the Department of Agriculture to restore the natural beauty of the portion of the Chugach National Forest that was impaired by the spill."

The Department of Justice and Alaska signed an agreement outlining how and under what authority money obtained in a

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settlement with Exxon would be spent. Following the law, there are six trustee agencies which will administer the funds from the civil settlement: NOAA, the Department of Agriculture, the Department of Interior, the Alaska Department of Fish and Game, the Alaska Department of Environmental Conservation, and the Alaska Attorney General's Office.

Under this agreement, the trustees will collectively decide how the approximately \$750 million paid by Exxon in satisfaction of civil claims and remaining after past expenses such as those for scientific research and cleanup will be spent to restore Prince William Sound and the Gulf of Alaska.

Thornburgh praised Governor Hickel; Alaska Attorney General Charlie Cole; Administrator Reilly; Secretary Lujan; Secretary Skinner; NOAA Administrator Knauss and General Counsel Tom Campbell; General Counsel of the Department of Agriculture Alan Raul; Assistant Attorney General for the Environment and Natural Resources Division Richard B. Stewart; and Assistant Attorney General for the Civil Division Stuart Gerson, for their dedication and cooperative spirit throughout the thousands of hours of negotiations needed to reach this settlement.

Thornburgh pointed out that the United States and Alaska have asked the U.S. District Court in Alaska to allow a 30-day public comment period regarding the civil consent order. This public comment period is not required by law but is being

(MORE)

- 6 -

requested to allow any interested parties not a part of this settlement to express publicly their opinion regarding today's settlement.

More than 700 miles of Alaska shoreline were covered with crude oil spilling from the Exxon Valdez when it ran aground on Bligh Reef in Prince William Sound on March 24, 1989. Approximately 11 million gallons of crude oil spilled from the Valdez fouling the waters and shorelines of both National Wildlife Refuges and National Parks. As a result, more than 36,000 migratory birds, including at least 100 bald eagles along with numerous other varieties of wildlife, were killed.

Since the date of the spill, Exxon has spent approximately \$2.2 billion to clean up Prince William Sound and the Gulf of Alaska. Cleanup has included the containment of oil using booms, skinning oil from the surface of the water, mobilizing thousands of workers to conduct excavation of contaminated beaches, high pressure water washing of beaches, and rescuing and rehabilitating wildlife fouled by oil.

On February 27, 1990, Exxon Shipping Co. and Exxon Corp. were each indicted by a federal Grand Jury in Alaska. Both were charged with one misdemeanor violation of the Clean Water Act, one misdemeanor violation of the Refuse Act, one misdemeanor violation of the Migratory Bird Treaty Act, one felony violation of the Ports and Waterways Act, and one felony violation of the

(MORE)

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Dangerous Cargo Act. According to the plea agreement, Exxon Shipping will plead guilty to three misdemeanors and Exxon Corporation will plead guilty to one misdemeanor.

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91-101

DOJ
FACT
SHEET



Department of Justice

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CONSENT
DECREE

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

COPY

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MEMORANDUM

March 19, 1991

SUBJECT: Sectional Analysis of Consent Decree (W.O. 17LS-1044)
TO: Representative Max Gruenberg
FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

**SECTIONAL ANALYSIS OF CONSENT DECREE
THROUGH PARAGRAPH 12**

INTRODUCTION. Pages 2-3. This sets out the background of the federal case. The important points are (1) an assertion that only the trustees are entitled to act on behalf of the public as trustees to recover damages to the natural resources arising from the oil spill; (2) the payments by Exxon are in addition to the \$2 billion that Exxon alleges it has spent for past cleanup and reimbursements to the federal, state, and local governments; and (3) the payments are made in response to " pending or potential civil claims for damages or other civil relief."

Questions.

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so?
2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it?

JURISDICTION. (Page 4). This sets out the basis of the federal district court's jurisdiction---federal question; maritime and admiralty; U.S. as a plaintiff; and the Clean Water Act.

Question.

1. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce agreement? Other?)

PARTIES.(Page 4). This sets out the parties to the agreement. Note that "Exxon" includes the T/V EXXON VALDEZ, but does not include Exxon Pipeline.

DEFINITIONS.(Pages 5-7). This section defines terms used in the consent decree. "Governments" is defined earlier (page 1) to mean the U.S. and the State of Alaska.

Note that "natural resources" includes those belonging to the federal government, the state, or both.

For the purposes of the consent decree, the only state trustee is the attorney general.

The "effective date" is the date all parties have signed the agreement, while "final approval" does not occur until 45 days after the agreement has been published in the Federal Register, and the court has approved the agreement and the time for appeal from that decision has elapsed without appeal, or the decision has been upheld on appeal.

Special attention should be paid to the definition of "natural resource damages." It includes damages to natural resources arising under state as well as federal law. It also includes "economic rent".

Questions.

1. Why are the natural resource damages of the state not separated from the natural resource damages of the federal government?
2. If the court signs the consent decree, when does the time for appealing that decision expire?
3. Does the reference to claims under state law mean that this recovery is not entirely under the CWA?
4. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state e.g., lost taxes?
5. When was the last date that all parties signed? (My copy does not show Exxon's signature.)

EFFECT OF ENTRY OF DECREE (Page 7). Once the decree is signed and entered by the court, it is a final judgment between the state and federal governments and Exxon and Exxon Pipeline.

PAYMENT TERMS: PARAGRAPH 8 (Pages 7-8). Exxon is to pay, to both governments jointly, a total of \$900 million. The first payment of \$90 million is due

10 days after the effective date. The second payment is due September 1, 1992. The amount of the second payment is \$150 million, less (1) Exxon's cleanup costs from January 1, 1991 to the effective date (up to \$4 million); and (2) Exxon's cleanup costs from the effective date to the date of final approval. On September 1, 1993, Exxon is to pay \$100 million. On September 1 of each year from 1994 through 2001, Exxon is to pay \$70 million. The payments shall be made as directed jointly in writing by the state attorney general and the federal assistant attorney general in charge of environment and natural resources.

Questions.

1. What is the present value of the amounts to be paid by Exxon?
2. Has Exxon paid the first \$90 million?
3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?
4. Are the amounts Exxon will pay deductible under federal tax law? Under state tax laws?

ESCROW; PARAGRAPH 9 (Pages 8-10). If final approval of the consent decree has not occurred when a payment is due (which will almost certainly be the case with the first payment), Exxon is to deposit the payment in an escrow account and notify the state and federal governments. The escrow agent must submit to the court's jurisdiction. After final approval, and 5 days after notification by the state and federal attorneys general, the money shall be paid to the "governments", plus interest. The interest is based on the average daily yield on three-month treasury bills. If the amount in the escrow account is not sufficient to pay that amount of interest and the escrow expenses, Exxon must make up the difference. If either government withdraws its consent under paragraph 37, or any party terminates the agreement under paragraph 38, the money in the escrow account shall be returned to Exxon.

USE OF MONEY; PARAGRAPH 10 (Pages 10-11). In this paragraph the governments agree between themselves how the money is to be spent. The consent decree states that neither Exxon, Exxon Pipeline, Alyeska, nor anyone except the governments obtains a right or obligation as a result of this paragraph.

The U.S. and the State "agree" that the money will be spent only as follows:

- (1) to reimburse the state and federal governments for response and cleanup costs incurred before January 1, 1991;

(2) to reimburse the state and federal governments for damage assessment costs incurred before the effective date;

(3) to reimburse the state for litigation costs incurred before the effective date;

(4) to reimburse the state and federal governments for cleanup and response costs incurred by either of them after December 31, 1990; and

(5) to assess injury and plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources (or natural resource services) injured, lost, or destroyed as a result of the oil spill, or acquire the equivalent of those resources or services.

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The maximum amount that the state can receive as reimbursement for past response, cleanup, assessment, and litigation expenses is \$72 million. The maximum amount that the federal government can receive as reimbursement for past response, cleanup, and assessment is \$62 million. The federal and state governments also "represent" that the amount recovered from Exxon will be spent in accordance with the MOA.

Questions.

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

2. Alaska's constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's constitution, and if so, does the attorney general have the power to enter into an agreement under the CWA?

3. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree?

Major question

4. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

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5. This paragraph refers to "natural resource services." What is a "natural resource service"?

6. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true?

7. Despite the statement to the contrary, will a private party have a right to enforce the restrictions in use set forth in this paragraph?

EXXON'S CONTINUED CLEANUP; PARAGRAPH 11 (Page 11). Paragraph 11(a) requires Exxon to continue cleanup work after the effective date, as directed by the federal on-scene coordinator (FOSC), subject to prior approval of costs by the FOSC. In addition Exxon shall perform cleanup work as directed by the state on-scene coordinator, to the extent it does not conflict with the directions of the FOSC or federal law, subject to prior approval of costs. This paragraph also states that "Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC for the State OSC." Under paragraph 11(b), Exxon's obligation for cleanup ends upon final approval of the settlement "except as set forth in this Agreement". In addition, Exxon gets a credit for its expenditures for cleanup under this paragraph. "Expenditures" includes salaries, wages, benefits, expenses for Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

Questions.

1. If the State OSC or the FOSC disagree with Exxon's proposed costs, does Exxon still have to do the work? (What does "subject to prior approval" mean?) In the event of a dispute about the costs, who makes the final decision?

2. The first sentence of 11(b) provides that Exxon has no cleanup obligations after final approval of the consent decree "except as set forth in this Agreement." Does another paragraph of the agreement impose cleanup obligations after final approval?

3. What does the last sentence of 11(a)---concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or State OSC--- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under direction of the FOSC or State OSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims?

Representative Max Gruenberg
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EXXON'S CONTINUED CLEANUP; PARAGRAPH 12 (Pages 13-14). If the agreement is terminated, or the court does not approve it, Exxon can setoff expenditures made by Exxon under paragraph 11 against any liability Exxon may have to either government as follows:

(1) If the post-effective date expenditures are \$35 million or less, the setoff does not apply unless Exxon shows both

(a) that based on information available to the FOSC or State OSC the anticipated cost was grossly disproportionate to the net environmental benefits anticipated, or the work could not reasonably have been expected to result in a net environmental benefit; and

(b) that Exxon submitted a written objection to the work a reasonable time before beginning it, explaining its objections.

(2) If the post-effective date expenditures are above \$35 million, Exxon gets the setoff unless the government or governments show that based on the information available to the FOSC or State OSC, the work was reasonably expected to result in a net environmental benefit and the anticipated cost was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Question.

1. Can Exxon setoff amounts approved by the FOSC against amounts owed the State? Can Exxon setoff amounts approved by the State OSC against amounts owed the federal government?

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MEMORANDUM

March 21, 1991

SUBJECT: Sectional Analysis of Consent Decree - Paragraph 13 to end.
(Work Order 17LS-1044)

TO: Representative Max Gruenberg

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

SECTIONAL ANALYSIS OF CONSENT DECREE
PARAGRAPH 13 TO END.

RELEASE OF CLAIMS BY GOVERNMENTS; PARAGRAPH 13 (Pages 14-15).
The state and federal governments give up all civil and administrative claims they have against Exxon arising out of the oil spill. This includes all the claims the State has made in state court under state law, except for #4 below. This paragraph explicitly states that the consent decree does not impair:

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

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

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

Questions.

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

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

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

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

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

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

Question.

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

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

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

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

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

Question.

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

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

Question.

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

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

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

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

Questions.

1. Has the TAPL fund paid any money to Exxon or Exxon Pipeline? Is it likely to do so?
2. Has the TAPL fund paid any money to Alyeska, or is it likely to do so?
3. How likely is it that the TAPL fund will assert claims against the state for money (if any) the fund pays to Alyeska?

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

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

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

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

Questions.

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

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

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

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

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

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

Questions.

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

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

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

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

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

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

Question.

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

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

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

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

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

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

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

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

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

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

Questions.

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

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

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

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

Question.

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

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MEMORANDUM

March 18, 1991

SUBJECT: Overview of Consent Decree and Preliminary Questions related to it

TO: Representative Max Gruenberg

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

OVERVIEW; CONSENT DECREE.

This settles the case between the State and Exxon and the U.S. and Exxon for civil damages against Exxon arising out of the Exxon Valdez oil spill. The case has recently been, or will soon be, filed in federal District Court in Alaska. It is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state has the choice of suing in state court under state law, or federal court under the Clean Water Act. In re Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979). If it chooses to pursue its federal remedies (by agreeing to the consent decree), it will give up all but one of its state claims. (The one involves fisheries business taxes.) It will also be bound by certain restrictions in the CWA and related regulations.

Legal Basis. Jurisdiction is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state and the federal government each have the right to recover for their own damages under the CWA. In re Allied Towing Corp., *supra*. There does not appear to be any requirement that the damages to the state and the damages to the federal government be combined, although the consent decree does combine them. However, if the state chooses to sue under the CWA, it must abide by the limitations of that Act as to (1) the types of damages that can be recovered, (2) the things for which money recovered can be spent, and (3) the use of a trustee in developing a plan for spending the money recovered. The state's damages under the CWA are recovered through a trustee appointed by the Governor. 42 U.S.C. 9607(f)(2)(B).

Types of Damages. Under the CWA, the state can recover for the costs of "replacing or restoring" the damaged natural resources.

Amount to be Paid. The consent decree requires Exxon to pay \$900 million less (1) Exxon's clean up costs from 1/1/91 to the date the consent decree is signed (up to \$4 million), and (2) Exxon's clean up costs from the date the consent decree is signed through the date the consent decree is approved (including any appeals from it). See CD 8(a), p.7 and CD 11, pp. 11-12. The rest is to be paid in installments from 1991 through 2001. CD 8, pp.7-8. There is no interest accruing on the unpaid amounts before they are due, but interest does accrue on overdue payments. CD31, p. 23. The \$900 million (less Exxon's clean up costs from 1/1/91) is the total that is owed to both the state and federal governments. The consent decree does not say how much of this is the federal government's money and how much is the state's money.

To Whom Paid. The trustees (three federal appointed by the President and three state officials appointed by the Governor) tell Exxon to whom the money is to be paid. CD8(d), p. 8.

Restrictions on Use. In the consent decree the U.S. and the State agree that the money will be used as follows:

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 resource 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. The amount that can be returned to the federal government for past response, cleanup, and assessment is \$62 million. The remainder is to be used by the trustees for things in #4.

Who Decides How the Money is Used. The MOA, rather than the consent decree, is the document that primarily deals with the use of the money. However, in the consent decree the governments "represent" that the money will be disbursed in accordance with the MOA. CD10, p.11. Also, the consent decree does contain the restrictions discussed above as to how the money can be used. Moreover, even if there were no MOA, the CWA restricts the use of the money to restoring, rehabilitating, or acquiring the equivalent of the natural resources that were damaged. 33 U.S.C. 1321(f)(5) The regulations under the CWA also require the state trustee

to adopt a plan, and the money to be spent in accordance with that plan. 43 C.F.R. 11.92 and 11.93. However, the "up to \$72 million" that is to be reimbursed to the state for past cleanup, response, assessment, and litigation costs, and any money reimbursed to the state for future clean up should go into the general fund and be available for any use. (The consent decree and MOA are not clear on this, but it would make sense since, with the possible exception of litigation costs, this is "reimbursement" for money already spent for the required uses.)

Other. The consent decree also addresses releases, reopener for damage that could not have been anticipated at the time of the settlement, provisions covering the TAPL fund, Alyeska, and third parties. Note that if the court approves the settlement, the state gives up all its civil claims relating to the oil spill, including those currently pending in state court, except the amount that would have been refunded to local governments under AS 43.75.130 (fisheries business tax). CD 13, pp. 14-15.

The consent decree also allows the State or the U.S. to withdraw from it within 45 days after the publication of the proposed consent decree in the Federal Register if comments received on it show it is inappropriate, improper, or inadequate, or if Alaska's legislature does not approve it by that time. CD 37, p. 26 Any of the parties may withdraw for certain other reasons as well, including failure of the court to accept the plea agreement in the criminal case. See CD 38, p. 27.

PRELIMINARY QUESTIONS RELATED TO THE CONSENT DECREE

1. Art.IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA, must be dedicated. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

2. Alaska's constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's constitution, and if so, does the A.G. have the power to enter into an agreement under the CWA?

3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?

4. Are the amounts Exxon will pay deductible under federal tax laws? Under state tax laws?

Representative Max Gruenberg

March 18, 1991

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5. If the legislature does not approve the settlement, can the state still agree to it? (It appears the answer is yes). Should/can the legislature intervene in the federal case if it does not approve the settlement, but the Governor decides to go ahead with the settlement?

6. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree?

7. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

8. At the bottom of page 10 and top of page 11, the consent decree refers to "natural resources or natural resource services" that were injured, lost, or destroyed and the acquisition of equivalent "resources or services". What is a "natural resource service"?

PF:lmb

91-081.lmb

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

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

Defendants.

Civil Action No.

The STATE OF ALASKA,
Plaintiff,

v.

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

Defendants.

Civil Action No.

AGREEMENT AND
CONSENT DECREE

This Agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V EXXON VALDEZ, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V EXXON VALDEZ, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as State of Alaska v. Exxon Corporation, et al., Civil No. JAN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints.

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Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command-Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

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Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V EXXON VALDEZ, Official Number 692966 (now the T/V EXXON MEDITERRANEAN).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

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Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) "Alyeska" means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) The "TAPL Fund" means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.), and/or the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. §§ 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, et seq., or any federal or state statute or maritime or common law relating to the environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or

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permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) "Party" or "Parties" means Exxon, Exxon Pipeline, the United States, and the State, or any of them.

(f) "Trustees" means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General

(g) The "Oil Spill" means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) "Effective Date" shall mean the earliest date on which all Parties have signed this Agreement.

(i) "Final Approval" shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the

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time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where
"X" equals Exxon's expenditures for work done from
January 1, 1991 to the Effective Date, in
preparation for and conduct of clean-up of the Oil
Spill in accordance with directions of the Federal
On-Scene Coordinator, up to a maximum of \$4,000,000,
plus Expenditures made by Exxon for clean-up work

after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent)". The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions

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as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) the United States or the State

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withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or

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services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed

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by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and

warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) if total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both --

(1) that based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) that a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

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(b) if total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided,

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however, that nothing in this Agreement shall affect or impair the following:

(a) claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) 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, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility

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for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or

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arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of 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 Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

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- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Releases and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based on

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or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

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Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to sue Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take

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other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the

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Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party. However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the Governments for interest on the

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overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. § 3717(a)(1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated

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December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attn. DOJ #90-5-1-1-3343

Chief, Admiralty and Aviation Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

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

As to the State of Alaska:

Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Supervising Attorney
Oil Spill Litigation Section
Department of Law
1031 W. Fourth Street, Suite 200
Anchorage, Alaska 99501

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As to Exxon:

Office of the Secretary
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

General Counsel
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

Mr. A. Elmer, President
Exxon Shipping Company
P.O. Box 1512
Houston, Texas 77251-1512

As to Exxon Pipeline:

Mr. D. G. Warner
President
Exxon Pipeline Company
P.O. Box 2220
Houston, Texas 77252-2220

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the Federal Register, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

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38. Any Party may elect to terminate this Agreement if:

(1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in United States v. Exxon Shipping Co., No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

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Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

THE FOREGOING Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby APPROVED AND ENTERED THIS ____ DAY OF _____, 1991.

Honorable H. Russel Holland
United States District Judge
District of Alaska

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

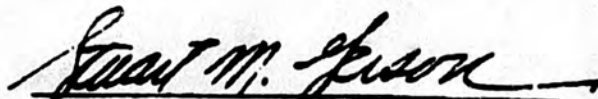
FOR THE UNITED STATES OF AMERICA

Date: 3.12.91



RICHARD B. STEWART
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Date: March 12, 1991



STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

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[Agreement and Consent Decree in United States v. Exxon Corporation et al. (D. Alaska)]

Date: 3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: 12 March 91

Alan Charles Raul
ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: March 12, 1991

John A. Knauss
JOHN A. KNAUSS, Undersecretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: _____

William K. Reilly
WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date: 3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: _____

ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: _____

JOHN A. KNAUSS, UnderSecretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: March 12, 1991

William K. Reilly
WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR THE STATE OF ALASKA

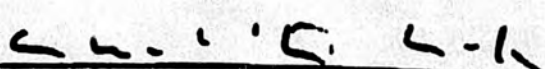
Date:

3-12-91


WALTER J. HICKEL
Governor
State of Alaska

Date:

3-12-91


CHARLES E. COLE
Attorney General and Lead State
Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR EXXON CORPORATION

Date: Mar. 12, 1991


L. G. RAWL, Chairman
Exxon Corporation

FOR EXXON PIPELINE COMPANY

Date: Mar 12, 1991


D. G. WARNER, President
Exxon Pipeline Company

FOR EXXON SHIPPING COMPANY and T/V EXXON VALDEZ

Date: Mar 12, 1991


A. ELMER, President
Exxon Shipping Company

MOA

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 18, 1991

SUBJECT: Exxon Settlement; Overview of Memorandum of Agreement and Consent Decree (MOA) and Preliminary Questions Related to It (Work Order No. 7LS1044)

TO: Representative Max Gruenberg

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

OVERVIEW: MOA

The "Memorandum of Agreement and Consent Decree" (MOA) settles a lawsuit that has recently been filed, or will soon be filed, in federal District Court in Alaska. In this lawsuit the federal and state governments are suing each other. The MOA concerns how the money recovered jointly by the U.S. and the State in the Exxon case is to be spent. Exxon is not a party to this lawsuit or the MOA.

Legal Basis. The Clean Water Act (CWA) says that the state is to recover for injuries to natural resources "on behalf of the public as trustee," 33 U.S.C. 1321(f)(5), but does not address the mechanics of the "trust". However, federal regulations adopted under the CWA (or under CERCLA, but applicable to the CWA, 42 U.S.C. 9651(c)), do address the mechanics of spending money recovered under the CWA. The state trustee is appointed by the Governor, 42 U.S.C. 9607(f)(2)(B), and recovers on behalf of the public for damage to state resources. 40 CFR 300.605. The trustee then devises a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 CFR 300.615(c)(4); and 43 CFR 11.93. The money is then to be spent in accordance with this plan. 43 CFR 11.92(c).

Types of Damages. The MOA deals with three types of damages. First there are "allowed expenses". These are the unreimbursed past expenses incurred by the state or federal governments for assessment and restoration (response and cleanup) and the state's litigation expenses. Second there are unreimbursed costs of future response and cleanup incurred by the state or federal government. Finally, there is "natural resource damage recovery," which is intended to compensate for the damage done state and federal natural resources. MOA IIA and G, pp.6-7.

Allowed Expenses. The state can recover up to \$72 million for its "allowed expenses". This money would be paid directly by Exxon to the state treasury "over a period of five years." MOA VB. The MOA does not say what 5 years, or whether the installments are to be equal. Although the MOA is not entirely clear on this point, it appears that this money would have no restrictions on its use since it simply replaces money the state has already spent on items allowed under the CWA. If this is so, the legislature could then appropriate the money for any purpose.

The federal government would also be reimbursed, directly by Exxon, for its past restoration and assessment expenses, up to \$62 million.

Future Response Costs. If the state or federal governments perform response work after December 31, 1990, and the work is certified by the federal on-scene coordinator (FOSC) or the state on-scene coordinator (SOSC), reimbursement for those expenses shall also be paid by Exxon directly to the appropriate government. MOA VB, p.13. It appears that any such reimbursements to the state would go to the state treasury and be available for appropriation without limitation as to any specific purpose.

Natural Resource Damage Recovery. Whatever is left of the \$900 million after Exxon's cleanup costs after December 31, 1990 have been deducted, allowed expenses have been paid to the state (up to \$72 million) and federal (up to \$62 million) governments, and future response costs have been paid, will be deposited in a trust fund in the court registry. Interestingly enough, the federal regulations require that money recovered by the state trustee under the CWA be deposited either in a special account in the state treasury, or in an interest bearing account payable to the state agency acting as trustee. 43 CFR 11.92(a)(2). However, the MOA does not allocate this money between the federal and state governments nor does it appear to require that such an allocation be made in the future. While the regulations encourage trustees to cooperate, they do not explicitly authorize such a joint trust. 40 CFR 300.615.

Under the MOA, six trustees (3 federal officials and 3 state officials) will decide how to spend the money in the trust fund. MOA IVA 1 and 2, pp 9-10. If all six trustees cannot agree as to how the money shall be spent, the federal district court judge will decide; the trustees may also submit a dispute to non-binding mediation or "other means of conflict resolution." MOA IVA 3. The MOA requires the trustees to establish procedures for "meaningful public participation" (including an advisory group) in formulating an injury assessment and restoration plan. MOA IVA 4. Once the plan is established, it appears that the trustees would spend the money to implement it. MOA IVA 1, pp. 9-10. I have found nothing in the MOA that requires the trustees to use federal or state agencies in spending the money, nor anything that would prevent them from doing so. However, if some of the money is

to be used by a state agency, it would probably have to be appropriated. See MOA VD, p. 13.

Other. The MOA terminates 16 years from its effective date. The MOA does not require legislative approval, or even provide for it, but the MOA is referenced in the consent decree.

PRELIMINARY QUESTIONS RELATED TO THE MOA

1. Since some of the natural resource recovery is received in exchange for damages done to state resources, does the money have to be appropriated in order to comply with the state constitution vesting the appropriation power in the legislature? If so, how would that appropriation be accomplished, especially if the money is to be spent (out of the court registry) on something other than activities of a state agency?
2. Is the dedication of funds to a specific purpose contrary to the state constitution prohibiting such dedication. (See question #1 re consent decree.)
3. Would expenditures from the trust be subject to AS 36.30, the state procurement code?
4. Who, if anyone, will perform audits of the trustees' expenditures?
5. What rules apply to deposits in the court registry? Are deposits in the court registry interest bearing? May they be invested?
6. The MOA (as well as the consent decree) refers to "natural resource services" MOA p. 8 (top) and paragraph 13C's last sentence. What are these?
7. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
8. Will the federal government be able to pay for some of its existing regular staff out of the trust fund on the theory that the federal employees are working on assessment and restoration related to the oil spill? In short, can this money simply be substituted as the funding source for services the federal government would provide anyway out of other federal funding?
9. Is the existence of the trust fund in the court registry and the commingling of state and federal damages allowed under applicable federal regulations?

10. The MOA, paragraph VC on p. 13, states that the money will be spent on restoration of natural resources in Alaska unless the trustees decide that spending funds outside of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources (or services) injured in Alaska. What does this mean? Would it allow the money to be used to establish parks, institutes, centers, etc. in other states?

11. The MOA notes that the A.G. and the commissioners of fish and game and environmental conservation are the state trustees. (The trustees can be changed, MOA IIL, p.8.) Will the commissioners have the time to establish the restoration plan and implement it, in addition to their other duties? Will additional staff be required in the state budget to allow them to do so? Who will pay for administrative expenses of the trust? The trust? Will this eat up the trust?

12. For the purposes of the oil spill litigation and use of money recovered, the federal government will be able to assert that it is a co-trustee over all natural resources injured by the oil spill. The state can assert the same as to federal resources. MOA VII B, p. 14. What are the implications of this paragraph?

13. If the legislature approves the consent decree, will it be prevented from challenging the MOA?

14. Could the legislature, by enacting legislation, retain greater control over the trust proceeds than allowed by the MOA (but still be within the limits of the CWA and applicable regulations)?

15. Will reimbursements for past allowed expenses and future clean up costs go to the general fund without any restrictions on its use?

16. Does the A.G. believe it is bound by 43 CFR 11.92 and 11.93 (the way money must be spent)?

17. If the trustees buy and develop real estate, who will own it? Who will be responsible for it when the MOA terminates?

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 22, 1991

SUBJECT: Exxon Settlement; Sectional Analysis of Memorandum of Agreement (MOA) (Work Order No. 7LS1044)

TO: Representative Max Gruenberg

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

SECTIONAL ANALYSIS OF MOA.

INTRODUCTION (Pages 2-5). This contains background and certain information. The Clean Water Act (CWA) is referenced. The current federal trustees are identified as the secretaries of the interior and agriculture and the administrator of NOAA, and the state trustees are identified as the commissioners of fish and game and environmental conservation and the state Attorney General. The U.S. Coast Guard is identified as the federal on-scene coordinator (FOSC) and the state DEC is identified as the state on-scene coordinator (SOSC). "Exxon" in the MOA includes Exxon Corp., Exxon Shipping Co., and Exxon Pipeline Co.

The introduction also identifies laws on which the parties rely in setting up the joint trusteeship, i.e., 42 U.S.C. 9607 (that section of CERCLA authorizing the regulations at 43 CFR 11), 40 CFR 300.615(a), and 43 CFR 11.32(a)(1)(ii). The committee should note that while 40 CFR 300.615(a) encourages cooperation among trustees, it does not specifically authorize a co-trusteeship nor the commingling of funds. 43 CFR 11.32(a)(1)(ii) concerns damage assessments, not disposition of recovered funds. 43 CFR 11.92 and 11.93, which do concern disposition of recovered funds are not referenced. The introduction also states that the state and federal entities have determined that the procedures in the MOA "will best enable them to fulfill their duties as trustees...."

JURISDICTION (Page 5). The jurisdiction of the court is the same here as it is in the consent decree, including jurisdiction under the CWA.

DEFINITIONS (Pages 6-8). The definitions should be read, but certain points can be summarized here.

First, "allowed expenses" are the past unreimbursed expenses of the state and federal government for response, assessment, and cleanup, as well as the past litigation expenses of the state. These parallel the provisions in the consent decree.

"Natural resource damage recovery" is the amount to be paid under the consent decree, less the "allowed expenses" and less unreimbursed cleanup and response costs of the state or federal government incurred after December 31, 1990; the "natural resource damage recovery" is the amount to be managed by the six trustees. In this memo, I will refer to this as "the trust fund money."

The "trustees" under this agreement are the current trustees, or any replacements designated by the President or the Governor hereafter.

"Restore" or "restoration" are important terms because the definition is about the only limit on what the trustees may use the trust fund money for. It means any action which endeavors to restore a natural resource (or services provided by that resource) that was injured, lost, or destroyed by the oil spill to its pre-spill condition. It also includes actions which replace or substitute something for those resources or services. It also includes acquisition of "equivalent resources and services." It is a very broadly defined term, especially when it includes "services provided by the resource." This is discussed more fully under paragraph V below.

CO-TRUSTEESHIP (Pages 8-9). This states that the trustees shall act as co-trustees in collecting and using the natural resource damage recoveries from Exxon. To avoid the claim that this "co-trusteeship" gives one government ownership of or authority over natural resources of the other government, the parties state that nothing in the MOA shall be deemed an admission of law or fact by either government concerning that ownership or authority. Neither government may use the MOA against the other except in matters concerning the enforcement of the MOA or the settlement of the oil spill litigation. This section also states that the MOA does not affect rights or obligations of third parties (including Alaska Native villages and persons with an interest in property injured by the oil spill) or the rights and obligations of the U.S. or the State to the Native villages or private parties.

ORGANIZATION; Paragraph IVA (Pages 9-11). First, all decisions relating to the use of the trust fund money shall be made by unanimous agreement of the six trustees. In addition, the federal trustees must consult with the EPA. If the trustees cannot agree, either government may resort to federal district court in Alaska to settle the dispute. The trustees may also submit the matter to non-binding mediation or "other means of conflict resolution."

The trustees agree to cooperate in establishing a joint trust fund in the registry of the federal district court in Alaska, or as otherwise determined by agreement of the governments and order of the court.

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

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

Questions.

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

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

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

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

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

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

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

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

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

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

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

Question.

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

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

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

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

Questions.

1. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?

2. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds?

3. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?)

4. Will the trust pay its own administrative expenses?

5. Who, if anyone, will perform audits of the trustees' expenditures?

6. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed?

REIMBURSEMENT TO GOVERNMENTS; PARAGRAPH VB. (Pages 12-13).

Up to \$72 million shall be available to the state for reimbursement of its past expenses. Up to \$62 million shall be available to the federal government to reimburse its past expenses. This reimbursement money shall be paid directly to the governments by Exxon over five years. The agreement does not state which five years, or whether the installments must be equal.

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

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

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

Questions.

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

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

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

Question.

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

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

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

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

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

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

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

Questions.

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

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

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

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

Question.

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

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

Question.

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

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

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

Question.

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

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

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

Question.

1. What was the agreement of April, 1989?

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

Question.

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

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

Question.

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

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

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

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

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Division

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Attorney for Plaintiff State of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Civil Action No.

The STATE OF ALASKA,

Plaintiff,

v.

Civil Action No.

UNITED STATES OF AMERICA

Defendant,

MEMORANDUM OF
AGREEMENT
AND
CONSENT DECREE

This Memorandum of Agreement and Consent Decree (MOA) is made and entered into by the United States of America (United States) and the State of Alaska (State) (collectively referred to as the "Governments").

INTRODUCTION

WHEREAS, Section 311 of the Clean Water Act, 33 U.S.C. § 1321, establishes liability to the United States and to States for injury, loss or destruction to natural resources resulting from the discharge of oil or the release of hazardous substances or both;

WHEREAS, the United States and the State are trustees and/or co-trustees for natural resources injured, lost or destroyed as a result of the EXXON VALDEZ Oil Spill;

WHEREAS, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, the National Contingency Plan, 40 C.F.R. § 300.615(a), and the Natural Resource Damage Assessment Regulations, 43 C.F.R. § 11.32(a)(1)(ii), provide a framework for and encourage the state and federal trustees to cooperate with each other in carrying out their responsibilities for natural resources;

WHEREAS, the Secretaries of the United States Departments of the Interior and Agriculture and the Administrator of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated

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trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities related to the natural resources injured, lost or destroyed as a result of the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

WHEREAS, the Commissioners of the State Departments of Fish and Game and Environmental Conservation and the Attorney General of the State of Alaska have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities relating to the natural resources injured, lost or destroyed as a result of the Oil Spill;

WHEREAS, the United States Coast Guard, an agency of the United States Department of Transportation, is the predesignated Federal On-Scene Coordinator (FOSC) to direct response efforts and to coordinate all other efforts at the scene of the Oil Spill, pursuant to the Clean Water Act, 33 U.S.C. § 1321, and the National Contingency Plan, 40 C.F.R. § 300, and is coordinating its efforts with the Federal Trustees in accordance with the National Contingency Plan;

WHEREAS, the State Department of Environmental Conservation is the State On-Scene Coordinator (SOSC) to direct containment and cleanup of discharged oil pursuant to AS 46.04.020;

WHEREAS, the United States Department of Justice (Justice) and the Department of Law for the State of Alaska (Law) have constitutional and statutory responsibility for litigation management and specifically for prosecuting claims for damages for injury, loss or destruction to the natural resources affected by the Oil Spill;

WHEREAS, all of the above state and federal entities have determined that it is in furtherance of their statutory and trust responsibilities to assure that all injuries, loss or destruction to state and federal natural resources are fully compensated and to assure that such compensation is used in accordance with law;

WHEREAS, the United States and the State have entered into an Agreement and Consent Decree ("Agreement and Consent Decree") with Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company (collectively referred to as Exxon) which provides for the recovery of compensation for damages resulting from the Oil Spill, including natural resource damages;

WHEREAS, the United States and the State have claims against one another with respect to their respective shares in recoveries from Exxon for compensation for damages resulting from the Oil Spill, including natural resource damages, and have determined that entering into this MOA is the most effective means of resolving those claims and will best allow them to fulfill their duties as Trustees;

WHEREAS, on or before the lodging of this MOA with the Court, the United States and the State will each have filed a complaint

in this Court against the other Government asserting civil claims relating to their respective shares in recoveries from Exxon for compensation for damages arising from the Oil Spill (Governments' Complaints);

WHEREAS, all of these state and federal entities have determined that the procedures set forth in this Memorandum of Agreement (MOA) will best enable them to fulfill their duties as trustees to assess injuries and to restore, replace, rehabilitate, enhance or otherwise acquire the equivalent of the natural resources injured, lost or destroyed as a result of the Oil Spill;

NOW THEREFORE, in consideration of their mutual promises, the United States, acting through the United States Departments of the Interior, Agriculture, Transportation, and Justice, NOAA, and EPA, and the State of Alaska, acting through the State Departments of Fish and Game, Environmental Conservation, and Law (together "the Governments") have agreed to the following terms and conditions, which shall be binding on both Governments, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

The Court has jurisdiction over the subject matter of the claims set forth in the Governments' Complaints and over the parties to this MOA pursuant to, among other authorities, 28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

II.

DEFINITIONS

For purposes of this MOA,

A. "Allowed Expenses" means reasonable, unreimbursed costs obligated on or before the effective date of the Agreement and Consent Decree for the planning, conduct, evaluation and coordination of natural resource damage assessment and restoration pursued by the Governments with respect to the Oil Spill or by the State for experts and counsel in connection with the preparation of the Oil Spill Litigation and the unreimbursed response and cleanup costs incurred by the Governments on or before December 31, 1990.

B. "CERCLA" means the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. as amended.

C. "Clean Water Act" means Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, as amended.

D. "Joint use" means use of natural resource damage recoveries by the Governments in such a manner as is agreed upon by the Governments in accordance with Article V of this MOA.

E. "National Contingency Plan" means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

F. "Natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such

resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976) and/or the State.

G. "Natural resource damage recovery" means those monies paid to the Governments by Exxon which are received in settlement of natural resource damage claims arising from the Oil Spill and consists of the settlement monies not reimbursed to the Governments either as 1) allowed expenses or 2) in the case of response and cleanup costs, those unreimbursed costs incurred by either Government after December 31, 1990 and certified by the FOSC with respect to the FOSC directed costs and by the SOSC with respect to SOSC directed costs. The term includes all interest accrued on any such recoveries.

H. "Oil Spill" means the grounding of the T/V EXXON VALDEZ on Bligh Reef in Prince William Sound, Alaska on the night of March 23-24, 1989 and the resulting oil spill.

I. "Oil Spill Litigation" means any past, present or future civil judicial or administrative proceeding by the Governments against Exxon or by Exxon against the Governments relating to or arising out of the Oil Spill.

J. "Restore" or "Restoration" means any action, in addition to response and cleanup activities required or authorized by state or federal law, which endeavors to restore to their pre-spill condition any natural resource injured, lost, or destroyed

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as a result of the Oil Spill and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services. Restoration includes, injury assessment, restoration, replacement and enhancement of resources and acquisition of equivalent resources and services.

K. "Settlement monies" means all monies received from Exxon under the Agreement and Consent Decree between the Governments and Exxon in settlement of the Oil Spill Litigation, exclusive of amounts credited to Exxon for cleanup costs incurred after December 31, 1990.

L. "Trustees" means the officials now or hereafter designated by the President of the United States and the Governor of the State of Alaska to act as trustees, for purposes of CERCLA and the Clean Water Act, of natural resources injured, lost or destroyed as a result of the Oil Spill

III.

CO-TRUSTEESHIP

A. The Governments shall act as co-trustees in the collection and joint use of all natural resource damage recoveries from Exxon for the benefit of natural resources injured, lost or destroyed as a result of the Oil Spill.

B. Nothing in this MOA shall be deemed an admission of law or fact by either Government concerning ownership, right, title, or interest in or management or control authority over natural resources or the right to recover for injury to such resources.

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Except in matters concerning or relating to enforcement of this MOA and the settlement of the Oil Spill Litigation, the Governments agree that this MOA may not be used by one Government against the other for any reason.

C. Nothing in this MOA shall be construed to affect or impair in any manner the rights and obligations, if any, of any entities or persons not parties to this MOA, including without limitation:

1. The rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources affected by the Oil Spill and expending any proceeds derived therefrom;

2. The rights and obligations, if any, of legal entities or persons other than the United States and the State who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

3. The rights and obligations, if any, of the United States or the State or both relating to such Alaska Native villages and the entities or persons referred to in subparagraph 2 above.

IV.

ORGANIZATION

A. General Provisions

1. All decisions relating to injury assessment, restoration activities, or other use of the natural resource

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damage recoveries obtained by the Governments, including all decisions regarding the planning, evaluation, and allocation of available funds, the planning, evaluation, and conduct of injury assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the unanimous agreement of the Trustees. Such decisions, on the part of the Federal Trustees, shall be made in consultation with EPA.

2. The Governments shall cooperate in good faith to establish a joint trust fund for purposes of receiving, depositing, holding, disbursing and managing all natural resource damage recoveries obtained or received by the Governments in connection with settlement of the Oil Spill Litigation in accordance with paragraph V.A. The joint trust fund shall be established in the Registry of the United States District Court for the District of Alaska or as otherwise determined by stipulation of the Governments and order of the court.

3. If the Trustees cannot reach unanimous agreement on a decision pursuant to paragraph A.1. of this Article, and either Government so certifies, either Government may resort to litigation in the United States District Court for the District of Alaska with respect to any such matter or dispute. At any time, the Governments may, by mutual agreement, submit any such matter or dispute to non-binding mediation or other means of conflict resolution.

4. The Trustees shall establish procedures providing for meaningful public participation in the injury assessment and

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restoration process, which may include establishment of a public advisory group to advise the Trustees with respect to the matters described in paragraph IV.A.1.

5. The Trustees shall agree to an organizational structure for decisionmaking under this MOA within 90 days from the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

B. Injury Assessment and Restoration Process

1. Nothing in this MOA limits or affects the right of each Government unilaterally to perform any natural resource injury assessment or restoration activity, in addition to the cooperative injury assessment and restoration process contemplated in this MOA, from funds other than natural resource damage recoveries as defined in paragraph G of Article II.

2. Nothing in this MOA constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 C.F.R. Part 11.

3. Nothing in this MOA shall prevent the President of the United States or the Governor of the State of Alaska from designating, pursuant to applicable law, an official or officials to exercise any or all rights or obligations of their respective Governments under this MOA. Neither Government shall object to any designation of such officials, or to any transfer of Trustee status from one official to another, by the other Government; provided that, in no event shall either Government designate more

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than three Trustees for the purposes of carrying out the provisions of this MOA. The designation of such officials or of successor Trustees by either Government shall not affect the enforceability of this MOA.

C. Role of the Environmental Protection Agency

The Governments acknowledge that the President has assigned to EPA the role of advising the Federal Trustees and coordinating, on behalf of the Federal Government, the long-term restoration of natural resources injured, lost or destroyed as a result of the Oil Spill.

V.

DISTRIBUTION OF SETTLEMENT MONIES

A. Joint Use of Natural Resource Damage Recoveries

The Governments shall jointly use all natural resource damage recoveries for purposes of restoring, replacing, enhancing, rehabilitating or otherwise acquiring the equivalent of natural resources injured as a result of the Oil Spill and the reduced or lost services provided by such resources. The Governments shall establish standards and procedures governing the joint use and administration of all such natural resource damage recoveries. All natural resource damage recoveries shall be placed in the joint trust fund for use in accordance with the terms and conditions of this MOA.

B. Reimbursement of Allowed Expenses and Response Costs

Up to 72 million dollars for the State and up to 62 million dollars for the United States shall be available from the

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settlement monies, at the election of each Government, for reimbursement of allowed expenses. In addition, all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990 and certified by either the FOSC or SOSC shall be reimbursed out of the settlement monies. Reimbursements of allowed expenses described in this paragraph shall be paid directly to the Governments by Exxon over a period of 5 years.

C. Except as otherwise provided in this MOA, the Governments agree that all natural resource damage recoveries will be expended on restoration of natural resources in Alaska unless the Trustees determine, in accordance with Article IV, paragraph A.1. hereof, that spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured in Alaska and services provided by such resources.

D. Nothing in this MOA shall be construed as obligating the Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

VI.

SCIENCE STUDIES

The Governments shall continue to work cooperatively to conduct all appropriate scientific studies relating to the Oil Spill, including specifically the scientific studies approved by the Trustees for the 1991 field season.

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VII.

COVENANTS NOT TO SUE

A. Each Government covenants not to sue or to take other legal action against the other Government with respect to the following matters:

1. The authority of either Government to enter into and comply with the terms of this MOA.
2. The respective rights of either Government to engage in cleanup, damage assessment or restoration activities with respect to the Oil Spill in accordance with this MOA.
3. Any and all civil claims (including, but not limited to, cross-claims, counter-claims, and third party-claims) it may have against the other Government arising from any activities, actions, or omissions by that other Government relating to or in response to the Oil Spill which occurred prior to the execution of this MOA, other than claims to enforce this MOA.

B. Solely for purposes of the Oil Spill Litigation and any other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the Oil Spill, each Government shall be entitled to assert in any such proceeding, without contradiction by the other Government, that it is a co-Trustee with the other Government over any or all of the natural resources injured, lost or destroyed as a result of the Oil Spill, and each Government covenants not to sue the other with respect to, or to take any other legal action to determine, the

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scope or proportionate share of either Government's ownership, rights, title or interest in or management, control, or trusteeship authority over any of the natural resources injured, lost or destroyed as a result of the Oil Spill.

C. Notwithstanding anything in this Article, each Government reserves the right to intervene or otherwise to participate in any legal proceeding concerning the claims of a third party with respect to the scope of either Government's Trusteeship and waives any objection to such intervention or participation by the other Government.

D. If the Governments become adverse to each other in the course of the Oil Spill Litigation, this MOA shall remain in effect.

E. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if both Governments are sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree to cooperate fully in the defense of such action, and to not assert cross-claims against each other or take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

F. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if one of the Governments is sued by a Third Party on a claim relating to or

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arising out of the Oil Spill, the Governments agree the non-sued Government shall cooperate fully in the defense of the sued Government, including intervening as a party defendant or consenting to its being impleaded, if necessary. If the non-sued Government thereby becomes a party to the action, the Governments agree not to assert cross-claims against each other, to cooperate fully in the defense of such action, and not to take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

VIII.

ENFORCEMENT OF AGREEMENT
AND
GOVERNING LAW AND VENUE

A. This MOA shall be enforceable by the United States District Court for the District of Alaska, which Court shall retain jurisdiction of this matter for the purpose of entering such further orders, directions, or relief as may be appropriate for the construction, implementation, or enforcement of this MOA.

B. If this MOA is subsequently and finally determined to be invalid, this MOA shall terminate and the disposition to the Governments of any remaining natural resource damage recoveries shall be determined by further agreement of the Governments or by an allocation of such recoveries by the United States District Court for the District of Alaska, subject to appellate review in accordance with applicable law.

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IX.

MULTIPLE COPIES AND EFFECTIVE DATE

This MOA may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. Except for the provisions contained in Article VI, which shall be effective as of the date this MOA is signed by all the signatories hereto, this MOA shall be effective as of the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

X.

INTEGRATION AND MERGER

A. This MOA and the Agreement and Consent Decree between the Governments and Exxon constitute the entire agreement between the United States and the State as to the matters addressed herein, and there exists no other agreement of any kind which is inconsistent with this MOA with respect to the subjects addressed in this MOA; provided, that the agreement reached among the Trustees as to disbursements of the original \$15 million paid by Exxon in April, 1989 shall remain in full force and effect.

XI.

TERMINATION

The obligations of the parties under this MOA shall terminate sixteen years from the effective date of this MOA, or upon termination of the Agreement and Consent Decree, unless otherwise agreed by the Parties.

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XII.**JUDICIAL REVIEW**

This MOA creates no rights of action on the part of any persons not signatory to this MOA and shall not, except as provided in Article VII, be subject to judicial review.

This MOA is executed at the time and on the dates set forth below.

XIII.**MISCELLANEOUS**

A. This MOA can be modified only with the express written consent of the Parties to the MOA and the approval of the Court.

B. Each undersigned representative of the Parties to this MOA certifies that he or she is fully authorized to enter into the terms and conditions of this MOA and to execute and legally bind such Party to this MOA.

THE FOREGOING Memorandum of Agreement and Consent Decree among the United States of America and the State of Alaska is hereby APPROVED AND ENTERED THIS ____ DAY OF _____, 1991.

Honorable H. Russel Holland
United States District Judge
District of Alaska

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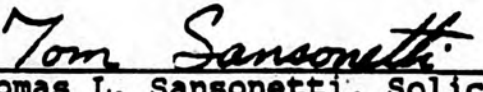
[Memorandum of Agreement and Consent Decree in United States v. State of Alaska. (D. Alaska)]

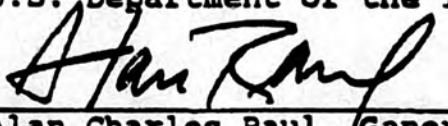
FOR THE UNITED STATES OF AMERICA

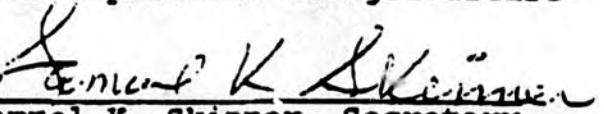
Date: 3.12.91


Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

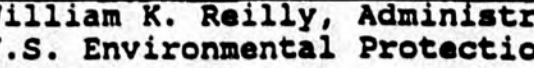

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Washington, D.C. 20530


Thomas L. Sansonetti, Solicitor
U.S. Department of the Interior


Alan Charles Raul, General Counsel
U.S. Department of Agriculture


Samuel K. Skinner, Secretary
U.S. Department of Transportation


Thomas A. Campbell, General Counsel
National Oceanic and Atmospheric
Administration
United States Department of Commerce


William K. Reilly, Administrator
U.S. Environmental Protection
Agency

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[Memorandum of Agreement and Consent Decree in United States v. State of Alaska. (D. Alaska)]

FOR THE UNITED STATES OF AMERICA

Date: _____

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Samuel K. Skinner
Samuel K. Skinner, Secretary
U.S. Department of Transportation

John A. Knauss, Under Secretary for Oceans
and Administrator, National Oceanic
and Atmospheric Administration,
United States Department of Commerce

William K. Reilly
William K. Reilly, Administrator
U.S. Environmental Protection
Agency

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Date: 3-17-91 FOR THE STATE OF ALASKA
Walter J. Hickel, Governor
State of Alaska
Charles E. Cole
Attorney General and
Lead State Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

PLEA
AGREEMENT

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 25, 1991

SUBJECT: Exxon Settlement; Sectional Analysis of Plea Agreement
(Work Order No. 7LS-1044)

TO: Representative Max F. Gruenberg, Jr.

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

SECTIONAL ANALYSIS OF PLEA AGREEMENT

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

Exxon Shipping is pleading guilty to

(1) negligent discharge of pollutants (oil) into Prince William Sound without a permit (a violation of the Clean Water Act, carrying a fine of \$2500-\$25,000 per day);

(2) discharge of refuse (oil) into Prince William Sound (a violation of the Refuse Act carrying a fine of \$500-2500), and

(3) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.)

Exxon is pleading guilty to

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

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

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

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

Question.

1. What counts will be dismissed?

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

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

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

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

Question.

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

IV. AGREEMENTS REGARDING RESTITUTION. Exxon and Exxon Shipping agree to pay the State of Alaska \$50 million in restitution within 30 days after the

Representative Max F. Gruenberg, Jr.

March 25, 1991

Page 3

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

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

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

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

PF:gc:mi
91-166.glc

MAR 13 '91 08:10 U.S. ATTORNEY'S OFC.

P.2/16

CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Environment and Natural Resources
 Division
 U.S. Department of Justice
 P.O. Box 23985
 Washington, D.C. 20026-3985
 (202) 272-9879

FILED**MAR 13 1991**

UNITED STATES DISTRICT COURT
 DISTRICT OF ALASKA

By _____ Deputy

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-1CR
	)	No. A90-015-2CR
Plaintiff,	)	
	)	MOTION TO PERMIT FILING
v.	)	OF DOCUMENTS TRANSMITTED
	)	VIA FACSIMILE MACHINE
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

Comes Now, the United States of America, plaintiff in the above-captioned case, by and through its attorneys, to move this Court to permit the filing of an original ~~Plea Agreement~~ and a Notice of Intent to Change Plea containing faxed signature pages for the reasons set forth in the attached affidavit of counsel.

Respectfully submitted this 13th day of March, 1991, at Anchorage, Alaska.



CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Department of Justice

ERIC NAGLE
 Trial Attorney
 Environmental Crimes U.S.
 Section

MARK B. HARMON
 Trial Attorney
 Environmental Crimes Section -

MARK R. DAVIS
 Special Assistant U.S.
 Attorney

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
(202) 272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-1CR
	)	No. A90-015-2CR
Plaintiff,	)	
	)	AFFIDAVIT OF MARK R. DAVIS
v.	)	IN SUPPORT OF MOTION TO
	)	PERMIT FILING OF DOCUMENTS
EXXON CORPORATION AND	)	TRANSMITTED VIA FACSIMILE
EXXON SHIPPING COMPANY,	)	MACHINE
	)	
Defendants.	)	

Mark R. Davis, being duly sworn, deposes and states as follows:

1. I am a Special Assistant U.S. Attorney assigned to represent the United States in the above-captioned matter.
2. The United States has agreed to execute a plea agreement with both defendants in the above-captioned case.
3. Counsel for both the government and defendants are located at present in three different cities: Washington, D.C., Tucson, AZ, and Anchorage, AK.
4. To permit all necessary counsel to sign the Notice of Intent to Change Plea and the Plea Agreement, they contain separate signature pages. These signature pages will

- 2 -

first be executed in Washington, D.C., then will be transmitted by facsimile machine to Tucson and then faxed to Anchorage.

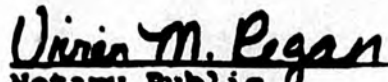
5. Facsimile transmission is the fastest manner available which will permit all counsel to sign the signature page so that the plea agreement can be filed on March 13, 1991.

6. Only the signature pages will be transmitted by facsimile machine. The body of the Notice of Intent to Change Plea and the Plea Agreement are original documents.

Further more, affiant sayeth not.


MARK R. DAVIS

Subscribed and sworn before me on this the 13th day of March, 1991.


Notary Public

My commission expires on 1/21/92.

FILED

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
(202) 272-9879

MAR 13 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Attorney for the United States of America

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
EXXON CORPORATION)
)
and)
)
EXXON SHIPPING COMPANY,)
)
Defendants.)

No. 190-015 CR.

PLEA AGREEMENT

I. INTRODUCTION

This document contains the complete plea agreement between the United States of America, plaintiff in the above-captioned action, and the defendants, EXXON SHIPPING COMPANY ("EXXON SHIPPING") and EXXON CORPORATION ("EXXON").

A. The defendant, EXXON SHIPPING, is charged in Counts One, Two and Three of an indictment filed in the District of Alaska with violations of the Clean Water Act, Title 33, United States Code, Sections 1311(a) and 1319(c)(1)(A); the Refuse

Act, Title 33, United States Code, Sections 407 and 411; and the Migratory Bird Treaty Act, Title 16, United States Code, Sections 703 and 707(a).

B. The defendant, EXXON, is charged in Count Three of an indictment filed in the District of Alaska with a violation of the Migratory Bird Treaty Act, Title 16, United States Code, Sections 703 and 707(a).

C. The defendant, EXXON SHIPPING, agrees to enter a plea of guilty to the Counts in paragraph IA.

D. The defendant EXXON agrees to enter a plea of guilty to the Count in paragraph IB, subject to the factual basis for the plea being that it was oil owned by EXXON, and transported under contract with EXXON SHIPPING, that killed migratory birds, for which EXXON had no permit.

II. DEFENDANTS' AGREEMENT AND UNDERSTANDING

The defendant, EXXON SHIPPING, is represented by James F. Neal, Esq., James F. Sanders, Esq., E. Edward Bruce, Esq., and Robert C. Bundy, Esq. The defendant EXXON, is represented by Patrick Lynch, Esq., Edward J. Lynch, Esq., and John F. Clough, III, Esq. The defendants acknowledge that their attorneys have explained all of the elements of each offense charged against them.

A. If EXXON SHIPPING pled not guilty, the United States would have to prove beyond a reasonable doubt each and every one of the following charges to the unanimous satisfaction of a jury:

MAR 13 '91 08:13 U.S. ATTORNEY'S OFC.

P.9/16

1. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant, EXXON SHIPPING, did negligently cause the discharge of pollutants, namely more than ten million gallons of crude oil, from a point source, namely the tank vessel "EXXON VALDEZ," into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1)(A).

2. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant EXXON SHIPPING unlawfully did throw, discharge and deposit, and did cause, suffer, and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the "EXXON VALDEZ," into Prince William Sound, a navigable water of the United States, without a permit, all in violation of and contrary to Title 33, United States Code, Sections 407 and 411.

3. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant, EXXON SHIPPING, without being permitted to do so by regulation as required by law, did kill migratory birds in violation of Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

B. If EXXON pled not guilty, the United States would have to prove the following charge to the unanimous satisfaction of a jury beyond a reasonable doubt:

That on or about March 24, 1989, in the District of Alaska, the defendant EXXON, without being permitted to do so by regulation as required by law, did kill migratory birds in violation of Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

C. Legal Basis for the Fines and Restitution Payment

1. The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis with respect to the offenses charged in the indictment for the Court to impose the fines agreed to in paragraph IIIC.

2. The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis for the Court to impose the payment agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes by the State of Alaska.

D. Consequences of the Plea

1. EXXON SHIPPING understands that by pleading guilty to the Counts under paragraph IC, it is admitting the essential elements of the charges in those Counts.

2. EXXON understands that by pleading guilty to the Count under paragraph ID, it is admitting the essential elements of the charge in that Count on the factual basis set forth in paragraph ID.

3. Each defendant understands that by pleading guilty, it gives up the following rights:

- a. The right to be tried by jury;
- b. The right to challenge and object to the composition or procedures of the grand jury; and
- c. The right to confront and cross-examine witnesses.

E. Upon acceptance of the pleas and imposition of sentence by the Court, the United States will immediately move to dismiss Counts 4 and 5 as to EXXON SHIPPING and Counts 1, 2, 4, and 5 as to EXXON.

III. AGREEMENT OF THE PARTIES REGARDING IMPOSITION OF SENTENCE

A. The United States agrees not to seek additional criminal charges or any civil or administrative penalties, except as provided in paragraph IIIB below, against the defendant EXXON, or any of its present or former officers, directors or employees, or any of its wholly-owned subsidiaries, their present or former officers, directors or employees, or against Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives, for any violation of federal law arising out of the grounding of the "EXXON VALDEZ," the resulting oil spill, the containment or cleanup of that spill, or its or their conduct in connection with the preparation or submission of oil spill contingency plans or related documents,

by Alyeska Pipeline Service Company to the federal or state government.

B. The parties agree that nothing in this plea agreement limits the right of any agency of the United States, other than the Department of Justice, to seek and take civil or administrative action against EXXON SHIPPING, EXXON, or any other EXXON subsidiaries, or their employees, or against Alyeska Pipeline Service Company, or any of its shareholders or owner companies or present or former shareholder representatives, including any such action relating to suspension or debarment or listing, but not including the civil or administrative penalties referred to in paragraph IIIA.

C. The parties agree, following the entry of pleas by EXXON SHIPPING and EXXON, and the acceptance by the Court thereof, that the defendants shall be sentenced in accordance with the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., and that under that procedure the appropriate disposition at the time of sentence is the imposition of fines which total \$100 million, as follows:

1. With respect to EXXON SHIPPING, the fine shall be \$75 million.
2. With respect to EXXON, the fine shall be \$25 million.
3. With respect to EXXON SHIPPING, \$37.5 million shall be remitted, and with respect to EXXON, \$12.5 million

shall be remitted. The remission of these amounts is appropriate in view of the following facts:

(a) The defendants recognized their responsibilities with respect to the grounding of the "EXXON VALDEZ" and the resulting oil spill;

(b) The defendants have expended in excess of \$2 billion in response to and clean up of the oil spill in Prince William Sound and its environs;

(c) The defendants have paid in excess of \$300 million to claimants allegedly injured by the oil spill; and

(d) The defendants cooperated in the federal criminal investigation of the grounding of the "EXXON VALDEZ" and the resulting oil spill.

D. The parties agree that the fines described in paragraph IIIC represent the full extent of the criminal sanctions to be imposed upon the defendants pursuant to this agreement, and are in full satisfaction of the criminal charges referred to in the indictment and all criminal charges or claims for civil or administrative penalties referred to in Paragraph IIIA. The payment of \$37.5 million by EXXON SHIPPING and \$12.5 million by EXXON shall fully discharge the criminal sanctions to be imposed pursuant to this agreement.

IV. AGREEMENT OF THE PARTIES REGARDING RESTITUTIONARY PAYMENTS

A. The defendants, EXXON SHIPPING and EXXON, agree to make payments to the State of Alaska which total \$50 million

50 mtl-
30 days

within 30 days of the acceptance of this plea agreement by the Court. All monies paid by EXXON SHIPPING and EXXON under this paragraph IVA are remedial and compensatory payments. Such monies are to be used by the State of Alaska exclusively for restoration projects relating to the "EXXON VALDEZ" oil spill. Restoration includes restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.

B. The parties agree that the administration of the monies to be paid under paragraph IVA shall be under the control of the State of Alaska and that upon payment, such monies and any interest which accrues thereon shall be available for use by the State of Alaska for the purposes described in paragraph IVA without objection, challenge, or judicial or administrative review.

C. The parties agree that all payments made under paragraph IVA represent compensation for harm or injury to the State of Alaska. Such payments are intended by the parties to be exclusively remedial, compensatory, and non-punitive and are intended to be separate and distinct from the fines described in paragraph IIIC and from any other criminal, civil, or administrative penalties that could have been imposed upon the defendants.

V. GENERAL PROVISIONS

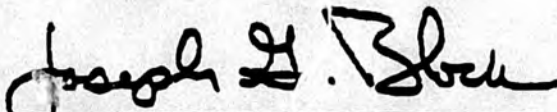
A. EXXON guarantees payment of the fine imposed on EXXON SHIPPING under this plea agreement. In the event that defendant EXXON SHIPPING fails to make timely payment of the fine, EXXON shall, within thirty (30) days of the date of demand, make payment in EXXON SHIPPING's stead.

B. The defendants, EXXON SHIPPING and EXXON, understand that the Court has discretion to accept or reject this plea agreement, and that if the Court rejects the plea agreement or does not dismiss the charges referred to in paragraph IIE, each defendant will be permitted to withdraw its plea of guilty.

C. The parties agree, subject to the decision of the Court, that there is in the record information sufficient to enable the meaningful exercise of sentencing authority, pursuant to Rule 32(c) F.R. Cr. P., and agree that waiver of a presentence investigation and report would be appropriate.

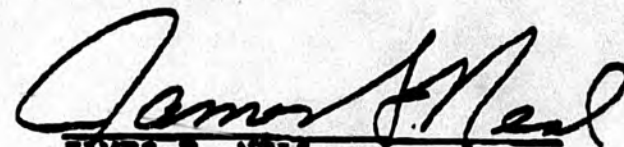
The above-stated terms and conditions comprise the entire plea agreement between the United States of America, defendant EXXON SHIPPING and defendant EXXON, and there are no other terms or conditions, express or implied.

FOR THE UNITED STATES
OF AMERICA:

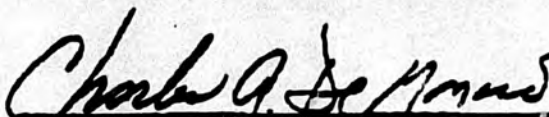


JOSEPH G. BLOCH
Chief
Environmental Crimes Section
Environment and Natural
Resources Division
U.S. Department of Justice

FOR THE DEFENDANTS:



JAMES F. NEAL
Counsel for Exxon Shipping



CHARLES A. De MONACO
Assistant Chief

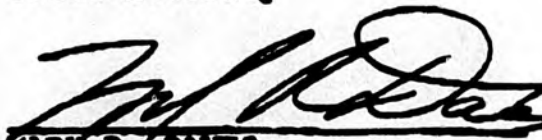


E. EDWARD BRUCE
Counsel for Exxon Shipping



ERIC W. NAGLE
Trial Attorney

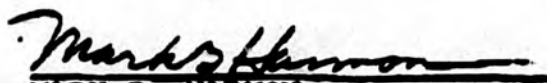
ROBERT C. BUNDY
Counsel for Exxon Shipping



MARK R. DAVIS
Special Assistant U.S.
Attorney



EDWARD J. LYNCH
Counsel for Exxon
Corporation



MARK B. HARMON
Trial Attorney



JOHN F. CLOUGH III
Counsel for Exxon
Corporation

DATED THIS 13th day of March, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIATHE NATIVE VILLAGE OF
CHENEGA BAY, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

Civil Action No. 91-483 SS

FILED

MAR 12 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIACHENEGA CORPORATION, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

Civil Action No. 91-484 SS

MEMORANDUM OPINION AND ORDER

(N) These cases are before the Court on a continuation of the hearing commenced on March 7, 1991, on plaintiffs' motions for a temporary restraining order, and on the plaintiffs' motions for a preliminary injunction. The plaintiffs are Native Alaskan villages, the some 5,000 residents of these villages, and Native Village Corporations owned by these villagers. The defendants are officials of the United States Government and of the State of Alaska. Plaintiffs seek to enjoin the defendants from consummating settlement negotiations with Exxon Corporation, Exxon Shipping Co., [collectively, "Exxon"] and Alyeska Pipeline Service Co., relating to the discharge of oil by the M/V EXXON VALDEZ. The Court on March 7, 1991, issued a ten-day temporary restraining order

restraining a settlement. Plaintiffs now seek issuance of a preliminary injunction. Defendants seek dissolution of the temporary restraining order.

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

In response to plaintiffs' motions, the defendants have represented to the Court that "resolution of [the United States'] natural resource damages should not impair rights or claims of third parties." Declaration of George W. Van Cleve at ¶ 4. The Court believes this representation to mean that after the settlement agreement has been executed, the plaintiffs will be able to prosecute fully the suits they have initiated against Exxon and Alyeska just as if no settlement agreement existed. The Court will further take the defendants' representation to mean that Exxon and Alyeska may be liable to the plaintiffs for damages to natural resources and/or lands they have an interest in, even if it is claimed the same natural resources and/or lands are covered by the settlement agreement among the defendants and Exxon and Alyeska.

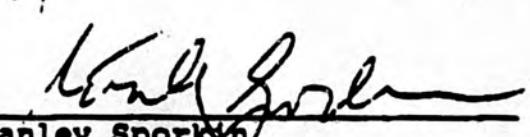
The Court accepts the defendants' good-faith representations. On the basis of these representations, the Court believes that the

plaintiffs' rights are not affected by the planned settlement agreement. Accordingly, it is this 12 day of March 1991 hereby

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

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

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


Stanley Sporkin
United States District Court

HB 213

State of Alaska

Committees

CO-CHAIR, HOUSE JUDICIARY
CO-CHAIR, HOUSE LABOR AND COMMERCE
HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES



P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4712
465-4968/4986
(SESSION)
914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

MEMORANDUM

TO: Members of the House of Representatives
FROM: Representative Max Gruenberg *MMX*
DATE: March 26, 1991
RE: Support of HB 213 (FIN), the Exxon Valdez oil spill
claims settlement oversight bill

I would very much appreciate your support of HB 213 (FIN).

This bill provides for legislative review and approval of any settlement of the Exxon Valdez oil spill litigation between the state and Exxon by:

1. requiring the governor to submit any settlement to the legislature, and
2. allowing time for the legislature to review and,
3. requiring legislative approval of any settlement before the state can bind itself.

The administration has submitted a settlement to the legislature for review. This bill sets up the procedure for the review process. Hopefully, its passage will provide the public assurance that the process will be open for public input and legislative review.

If you have any questions, please call me or Mark Handley, my Legislative Assistant, at ext. 4968.

Thank you very much.

7-LS0949D

Gaguine

3/22/91

CS FOR HOUSE BILL NO. 213 (FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Koponen, Moyer, MacLean, Ulmer, Brown, B.Davis, Bruckman,
Lincoln

A BILL

FOR AN ACT ENTITLED

1 "An Act providing for legislative review and approval of current and future proposed
2 settlements of the state's claims against the Exxon Corporation and its subsidiaries arising
3 out of the Exxon Valdez oil spill; requiring the governor to notify the legislature about
4 ongoing settlement negotiations; relating to the confidentiality of information relevant to
5 proposed settlements; and providing for an effective date."

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

7 * Section 1. FINDINGS. The legislature finds that

8 (1) the possible settlement of the state's actual and potential claims against the Exxon
9 Corporation and its subsidiaries arising from the Exxon Valdez oil spill would have far-reaching effects
10 on the welfare of the people of the state, the disposition of state funds, and the status of large areas of
11 state land;

12 (2) it is of paramount importance to the state's interests that any settlement proposal
13 regarding these claims be submitted to the legislature for review, that the state not bind itself with regard

1 to any settlement until the legislature has had an opportunity to review the proposal, and that the
2 legislature be given the opportunity to prevent any settlement that is not in the public interest; and
3 (3) the present administration has submitted a proposed settlement to the legislature for
4 public review and approval.

5 * Sec. 2. The state may not bind itself with regard to the proposed settlement described in sec. 1(3)
6 of this Act unless the legislature gives its assent to that settlement. The state may bind itself with regard
7 to that settlement if both houses of the legislature pass a concurrent resolution giving assent.

8 * Sec. 3. The governor or the governor's designee shall keep the legislature, through the president
9 of the senate and the speaker of the house or their designees, informed, on a daily basis if possible, of
10 any ongoing settlement negotiations of the actual or potential claims described in sec. 1(1) of this Act,
11 including settlement negotiations that occur while the legislature is reviewing a proposed settlement
12 under this Act.

13 * Sec. 4. (a) Before the state binds itself with regard to any proposed settlement to resolve the actual
14 or potential claims described in sec. 1(1) of this Act, the governor shall submit the settlement to the
15 president of the senate and the speaker of the house.

16 (b) If a proposed settlement of claims described in (a) of this section is submitted to the
17 legislature, the state may not bind itself with regard to that settlement unless the legislature by concurrent
18 resolution either waives its right to review the settlement or assents to it.

19 * Sec. 5. (a) Information relevant to any proposed settlement submitted to the legislature under sec. 2
20 or 4 of this Act, including the terms of the settlement, is not confidential, except as required by law.

21 (b) The Department of Law shall maintain for public review full documentation of each proposed
22 settlement submitted to the legislature, as well as the final settlement.

23 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

HR 4

HOUSE RESOLUTION NO. 4**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE HOUSE RULES COMMITTEE**

Introduced: 3/18/91

Referred: Today's Calendar

A RESOLUTION**1 Establishing a House Special Committee on the Exxon Valdez Oil Spill Claims Settlement.****2 BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:**

3 WHEREAS justice requires that Alaska be adequately compensated for the damage done to it
4 as a result of the oil spilled from the T/V Exxon Valdez in March of 1989; and

5 WHEREAS the Agreement and Consent Decree in United States v. Exxon, et al., and State of
6 Alaska v. Exxon, et al., signed by the parties on March 12, 1991, allows the United States or the State
7 of Alaska to withdraw its consent to the Agreement if the Alaska State Legislature fails to approve the
8 Agreement within 45 days from the date that notice of the Agreement is published in the Federal
9 Register;

10 BE IT RESOLVED by the House of Representatives that a House Special Committee on the
11 Exxon Valdez Oil Spill Claims Settlement is established to study the proposed Agreement and related
12 documents; and be it

13 FURTHER RESOLVED that the Speaker of the House of Representatives shall determine the
14 number of representatives to be members of the committee, shall appoint the members, and shall
15 designate a member to chair the committee; and be it

16 FURTHER RESOLVED that the House Special Committee on the Exxon Valdez Oil Spill
17 Claims Settlement shall hold, in addition to its own meetings, joint meetings with a like Senate

1 committee for the purpose of receiving public testimony on the proposed Agreement; and be it

2 **FURTHER RESOLVED** that the House Special Committee on the Exxon Valdez Oil Spill

3 Claims Settlement shall report to the House of Representatives by the 35th day after the Agreement is

4 published in the Federal Register the committee's recommendation that the House approve or disapprove

5 the proposed Agreement, and that the committee is terminated on the 46th day after the Agreement is

6 published in the Federal Register.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 1Bill Version: HR 4(H) Publish Date: 3/18/91

Revision Date: _____

Title: Establishing a House Special Comm.
on the Exxon Valdez Oil Spill claims settlement.

Sponsor: House RulesRequestor: House RulesDepartment Affected: Legislative Affairs AgencyBRU: Legislative CouncilLegislative Operating BudgetComponent: Session ExpensesLegislative Operating Budget

COMPONENT SERIAL NO:

782 & 796

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact. Expenditures for this special committee will be absorbed within the existing Session Expenses and House Operating Budget.

Prepared By: Pamela A. Stoops, DirectorDivision: Administrative ServicesPhone: 465-3850Date: 3/15/91Approved By: Warren W. Endicott, Executive DirectorAgency: Legislative Affairs AgencyDate: 3/15/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

HCR 19

HOUSE CONCURRENT RESOLUTION NO. 19
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE

Introduced: 3/21/91

Referred: Today's Calendar

A RESOLUTION

1 Relating to the United States v. Exxon plea agreement.

2 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **WHEREAS** the T/V Exxon Valdez oil spill of March 1989 and the actions taken by the United
4 States, the State of Alaska, and Exxon Corporation as a result of that spill have had a tremendous effect
5 on the people, land, and natural resources of Alaska; and

6 **WHEREAS** certain agreements relating to the T/V Exxon Valdez oil spill have been entered into
7 by or between the United States, the State of Alaska, and Exxon Corporation and certain of its
8 subsidiaries; and

9 **WHEREAS** these agreements provide for the settlement of various civil claims and criminal
10 charges brought by the United States and the State of Alaska against Exxon Corporation and certain of
11 its subsidiaries; and

12 **WHEREAS** the Alaska State Legislature is presently reviewing these agreements in order to
13 determine, among other things, whether the agreements are in the best interest of Alaska; and

14 **WHEREAS** the review being conducted by the Alaska State Legislature is not expected to be
15 completed until May 3, 1991; and

16 **WHEREAS** one of the agreements under review by the Alaska State Legislature is the plea
17 agreement entered into by the parties in United States of America v. Exxon Corporation and Exxon

1 Shipping Company, No. A90-015 CR; and

2 **WHEREAS** a hearing on that plea agreement is scheduled for Friday, March 22, 1991, before
3 the United States District Court for the District of Alaska; and

4 **WHEREAS** the Alaska State Legislature is concerned that approval of the plea agreement by
5 the United States District Court prior to the time the Legislature completes its review of all the
6 settlement agreements will not be in the best interest of Alaska;

7 **BE IT RESOLVED** that the Alaska State Legislature respectfully requests the parties to the plea
8 agreement in United States of America v. Exxon Corporation and Exxon Shipping Company to request
9 the United States District Court to take no final action on the plea agreement prior to May 3, 1991; and
10 be it

11 **FURTHER RESOLVED** that if the parties refuse to accede to this request, the Alaska State
12 Legislature respectfully requests the United States District Court for the District of Alaska to take
13 judicial notice of this official act of the Alaska State Legislature and on its own motion delay final
14 approval of the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping
15 Company until May 3, 1991.

16 **COPIES** of this resolution shall be sent to Joseph G. Block, Chief, Environmental Crimes
17 Section, Environment and Natural Resources Division, United States Department of Justice; Charles A.
18 De Monaco, Assistant Chief, Environmental Crimes Section, Environment and Natural Resources
19 Division, United States Department of Justice; Eric W. Nagle, Trial Attorney, United States Department
20 of Justice; Mark R. Davis, Special Assistant United States Attorney; Mark B. Harmon, Trial Attorney,
21 United States Department of Justice; James F. Neal, Counsel for Exxon Shipping; E. Edward Bruce,
22 Counsel for Exxon Shipping; Robert C. Bundy, Counsel for Exxon Shipping; Edward J. Lynch, Counsel
23 for Exxon Corporation; John F. Clough III, Counsel for Exxon Corporation; and to the Honorable H.
24 Russel Holland, Chief Judge, United States District Court for the District of Alaska.

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill Version HCR 19
(H) Publish Date: 3/21/91

Revision Date: _____ Department Affected: _____
Title: Exxon Valdez Oil Spill BRU: _____
Litigation Component: _____
Sponsor: House Rules Committee
Requestor: _____ COMPONENT SERIAL NO.

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Rep. Johnny Ellis, Chair Phone: _____
Division: House Rules Committee Date: 3/21/91

Approved by Commissioner: _____
Agency: _____ Date: _____

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

LEGISLATURES
DENIAL

Alaska State Legislature

House of Representatives



Official Business

P.O. Box V
State Capitol, Rm. 216
Juneau, Alaska 99811
(907) 465-3718

House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

April 23, 1991

Honorable H. Russel Holland
United States District Court
222 West 7th Avenue No. 54
Anchorage, Alaska 99513-7545

Re: United States v. Exxon Corporation
Case No. A90-015 Crim.

Dear Judge Holland:

The Committee appreciates the opportunity you have provided for legislative comment on the plea agreement. We particularly appreciate the courtesy of your April 12 letter.

We recognize the responsibility of all counsel not to make any threat of criminal prosecution to gain advantage in a pending civil case and your concern that the court not be a party to any such conduct.

However the legislature has its own responsibility, and that is to give thorough and thoughtful consideration to the civil agreement as well as to the plea agreement. That responsibility arises directly from, not only the civil agreement itself, but also the legislature's role as elected representatives of the people of Alaska.

In considering these agreements, it has become apparent that the civil agreement and the criminal plea agreement are in fact expressly and inextricably linked. Exxon can withdraw from the civil settlement if the criminal plea is not accepted. See item 38 on page 27 of the Agreement and Consent Decree. It was impossible (and probably inadvisable) for the parties, the public and this committee to consider them separately, without acknowledging their interrelationship. Except as set forth below, it has therefore not been possible for this committee to comment on the plea agreement alone, as if our judgment as to the public interest in that case had no relation to the civil agreement.

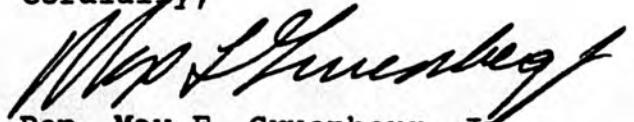
At this time, we have not reached a final decision regarding either the plea agreement or the civil agreement. We intend to present our report to the House of Representatives later this week. We are therefore unable to make conclusive comments on the plea agreement at this time. As we have previously stated in House Concurrent Resolution 19, copy enclosed, it is our view that, because these two matters are clearly linked, we request that the court defer action on the plea agreement until May 3, when the legislature will have reached a final decision regarding the civil agreement.

The Committee has several concerns about the proposed plea agreement, however:

- (1) Should Alyeska be relieved of all criminal liability without specifying the conduct or charges at issue?
- (2) Should Count IV of the indictment with respect to Exxon Shipping Company be dismissed, when the National Transportation Safety Board found that Exxon Shipping's "failure...to provide a fit master and a rested crew" was a probable cause of the grounding?
- (3) Is the criminal fine sufficient to deter other large corporations from engaging in similar criminal conduct in the future?

This letter is being sent by motion of the Committee. Individual members who are so inclined may also submit separate comments.

Cordially,


Rep. Max F. Gruenberg, Jr.
Chairman

Encl.: HCR 19

Alaska State Legislature

House of Representatives



Official Business

P.O. Box V
State Capitol, Rm. 216
Juneau, Alaska 99811
(907) 463-3718

House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

April 10, 1991

Honorable H. Russel Holland
United States District Judge
District of Alaska
222 West 7th Avenue #4
Anchorage, Alaska 99513

Dear Judge Holland:

The House Special Committee on the Exxon Valdez Oil Spill Settlement has received and reviewed a copy of Congressman George Miller's letter to you dated April 8.

The matters raised in the letter present significant new issues regarding the propriety of the Plea Agreement pending in your court. The allegation by Congressman Miller that Alyeska knowingly disregarded the requirements of its own contingency plan indicates a level of culpability on the part of both Exxon and Alyeska that could go well beyond the criminally negligent conduct previously alleged against Exxon.

The Committee believes that the Plea Agreement must be considered, not solely in light of its impact on Exxon and Alyeska, but also with respect to its impact on the State of Alaska. Our report to the House, scheduled to be issued prior to April 24, will reflect that aspect of the case.

We respectfully renew our request, embodied in HCR 19, that you delay final action on the Plea Agreement until after May 3, when the legislature will have considered this issue and the remainder of this committee's report.

Sincerely,

Rep. Max F. Gruenberg, Jr.
Chairman

cc: John F. Clough III, Counsel for Exxon Corporation
Charles A. DeMonaco, United States Department of Justice

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CHIEF COUNSEL
FORWARD S. WELSHCHIEF CLERK
BARBARA L. CAVASMINORITY STAFF
DIRECTOR/CHIEF COUNSEL
GEORGE D. PENCE

U.S. House of Representatives Committee on

Merchant Marine and Fisheries

Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

April 12, 1991

Dear Judge Holland:

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

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

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

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

April 12, 1991
Page Two

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

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

a. How much will restoration cost?

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

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

The difficulty of judging the adequacy of the settlement is further complicated by the facts that the damage assessment process is, according to the Administration's April 3th summary, still in a "preliminary" stage; the degree of injury to some important species, including salmon, will not be known for years; injuries to several other species are continuing; and specific restoration plans have not been made, nor costs estimated.

April 12, 1991

Page Three

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

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

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

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

2. THE PUBLIC'S NEED TO KNOW.

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

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

April 12, 1991
Page Four

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

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

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

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

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

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

April 12, 1991
Page Five

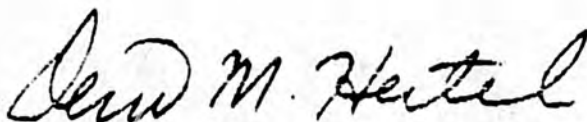
rehabilitate or acquire the equivalent of the damaged natural resources. We encourage the Court to make it clear that this limitation must be strictly adhered to by the trustees. The restoration fund is not to be viewed as a general fund to finance favorite projects or to conduct assessments in perpetuity.

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

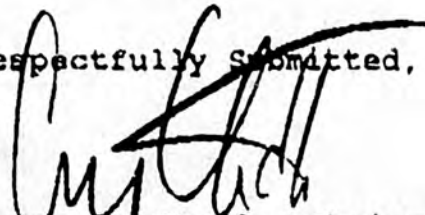
CONCLUSION

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

Respectfully Submitted,



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



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



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

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

Enclosures

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

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 JOHN T. DOOLITTLE, CALIFORNIA
 WAYNE ALLARD, COLORADO

April 8, 1991

DANIEL P. BEARD
 STAFF DIRECTOR
 RICHARD MELTZER
 GENERAL COUNSEL
 DANIEL VAL KISH
 REPUBLICAN STAFF DIRECTOR

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

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

In Re:

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

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

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

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

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

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

Gentlemen:

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

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

Honorable H. Russel Holland
Honorable Stanley Sporkin
April 8, 1991
Page 2

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

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

Alyeska's Promises

Before the Pipeline Was Approved

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

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

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

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

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

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

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

In the Right-of-Way Agreements

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

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

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

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

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

At the time of the Exxon Valdez spill

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

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

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

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

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

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

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

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

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

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

Promises Versus Performance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Arco Marine Inc. does not agree with this telex nor do we concur that this represents the thoughts of the subcommittee.

"At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller. [Emphasis added.]"¹⁵

Conclusion

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

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

For example, section 309(c)(4) of the Clean Water Act (33 U.S.C. section 1319(c)(4)) provides that substantial criminal penalties may be imposed upon any corporation or responsible corporate official that files information with Federal authorities with knowledge that the documents contain material misstatements.¹⁷ In addition, criminal penalties may be imposed on any person who knowingly submits false information to any agency of the United States under 18 U.S.C. section 1001.¹⁸

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

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

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

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

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

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

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

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

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

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

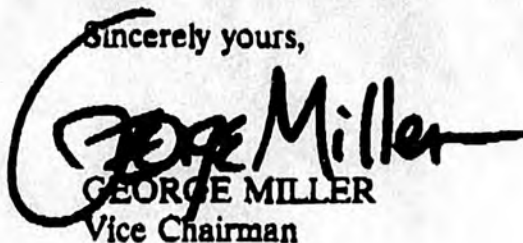
²⁰ Under Alaska law, punitive damages are awarded for the public policy reasons of punishment and deterrent when the defendant's conduct was outrageous, reckless, or malicious. In this instance, there is clear and convincing evidence that Alyeska's conduct merits the award of punitive damages.

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

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

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc:

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

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April 17, 1991

DANIEL P. BEARD
 STAFF DIRECTOR
 RICHARD MELTZER
 GENERAL COUNSEL
 DANIEL VAL KISH
 REPUBLICAN STAFF DIRECTOR

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

Dear Judge Holland:

I have reviewed the U.S. Department of Justice's memorandum supporting the government's criminal plea agreement in United States v. Exxon Corporation and Exxon Shipping Company (No. A90-015-CR) which was filed in your court yesterday (April 16, 1991).

In my view, the Department of Justice's memorandum fails to satisfactorily explain why it is in the public interest to agree not to bring criminal charges or any civil or administrative penalties against Alyeska Pipeline Service Company ("Alyeska") or its owner companies, including British Petroleum and Arco, for their conduct related to the Exxon Valdez oil spill.

In my April 8, 1991, letter, I set forth compelling evidence from company documents that Alyeska and its owner companies were aware long before the Exxon Valdez spill that Alyeska could not effectively respond to an oil spill in Prince William Sound, failed to make recommended improvements in Alyeska oil spill response capabilities, and secretly decided that Alyeska would not respond to an oil spill in the manner prescribed by Alyeska's Oil Spill Contingency Plan.

Despite this evidence, the Department of Justice failed to file any criminal charges or pursue any civil litigation against Alyeska or its owner companies other than Exxon. Yet Alyeska and its owner companies and shareholder representatives are immunized in both the proposed criminal plea agreement and civil settlement with Exxon.

The Department of Justice's memorandum acknowledges that criminal charges could have been brought against Alyeska for false statements in violation of 18 U.S.C. section 1001 (p.21). However, Justice asserts that "it was in the best interests of the public" to

The Honorable H. Russel Holland

April 17, 1991

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let Alyeska and its owner companies off the hook by including them in the proposed plea agreement with Exxon. However, Justice failed to explain how they weighed the evidence against Alyeska to arrive at this conclusion.

How can it be "in the best interests of the public" when the Department of Justice is not even attempting to recover a single penny in compensation from Alyeska or its owner companies other than Exxon?

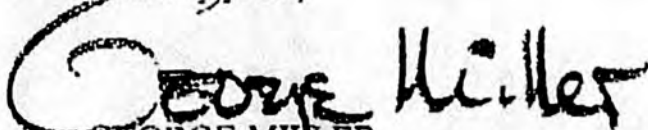
As Justice's memorandum points out, factors to be considered by the court pursuant to 18 U.S.C. section 3553 in reviewing the proposed plea agreement include the need of the sentence to: reflect the seriousness of the offense; promote respect for the law; provide just punishment; afford adequate deterrence; and provide restitution for victims.

It is difficult to understand how granting Alyeska and its owner companies immunity from criminal prosecution can conceivably "promote respect for the law" or meet any of the other sentencing criteria.

In defending the non-prosecution of Alyeska, Justice's memorandum states that the plea agreement "preserves the federal government's right to prosecute any employee of Alyeska for any criminal conduct that may have been associated with the spill plan." Yet this obfuscates the reality that it was the Alyeska owner companies and their representatives on Alyeska's Owners Committee who are most culpable since they decided not to commit the resources necessary for the Alyeska employees to respond effectively to an oil spill in Prince William Sound.

The Department of Justice has failed to meet its burden of proof that providing immunity for Alyeska, its owner companies, and their shareholder representatives, is in the public interest. I urge you to reject the plea agreement as currently written.

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc: The Honorable Richard L. Thornburgh
Attorney General, U.S. Department of Justice

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

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Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
EXXON CORPORATION AND)
EXXON SHIPPING COMPANY,)
)
Defendants.)

No. A90-015-CR

GOVERNMENT'S MEMORANDUM
IN AID OF SENTENCING

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

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consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

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respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. First, the plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

The government conducted a thorough investigation of possible criminal conduct associated with Alyeska's submission of spill plans. The evidence would not support a prosecution for false statements under the Clean Water Act, 33 U.S.C. § 1319(c)(4), because that section applies only to documents required to be filed under the Clean Water Act. Alyeska's spill plans were not required to be filed under that Act. After carefully weighing the evidence, the relevant law and attendant litigation risks, the possible

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sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

C. Objections to Lack of Data on Spill Damage

In order to assist the Court in reviewing the plea agreement, the government filed a summary of preliminary results of a number of extensive oil spill damage assessment studies. That summary does not purport to offer a definitive tally of the tremendous damage done by the spill to the waters, wildlife and people of Alaska. It does, however, provide the government's present best estimate of these damages, based on all the information they have collected over the two years since the spill. This assessment of the harm caused by the spill was available to responsible government officials who negotiated the plea agreement and consent decree. While the full scope of that harm may not be known for several years, there are no present indications of significant long term injury to resources other than those specifically identified in the summary.

⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to 18 U.S.C. § 3571(c).

Alyeska Group Is Subpoenaed By Grand Jury

Inquiry Involves the Oil Spill
By Tanker Exxon Valdez
In Prince William Sound

By CHARLES MCCOY

Staff Reporter of THE WALL STREET JOURNAL

A federal grand jury has issued subpoenas to Alyeska Pipeline Service Co. and at least one of its owners as part of an investigation into possible criminal wrongdoing in connection with the disastrous Valdez oil spill.

The grand jury investigation, long rumored, was confirmed in documents filed with the Securities and Exchange Commission by Atlantic Richfield Co. Arco's Arco Pipeline Co. unit owns 21% of Alyeska, the consortium set up by several big oil companies to operate the Trans-Alaska Pipeline. A separate but related Federal Bureau of Investigation investigation has been under way since shortly after the March 24 spill, caused when the Exxon Valdez super-tanker crashed into a reef and dumped 11 million gallons of crude oil into Alaska's Prince William Sound.

Alyeska is responsible for mounting the first efforts to contain damage from spills in the sound and had long assured state regulatory bodies that it was capable of responding speedily to any major spill. It has been bitterly criticized for a slow, stumbling response in the hours immediately after the Exxon Valdez ran aground. Although Alyeska has defended its efforts, environmentalists and many state officials maintain that Alyeska's failure to corral more of the oil before it drifted away from the ship greatly increased the environmental damage done as the oil roamed the sound and washed up on its rocky shoreline.

Late yesterday, Alyeska confirmed that it had been subpoenaed but said that the Justice Department had informed it that it was "not a target" of the probe. An Alyeska spokesman declined to specify the target. Neither the Justice Department nor the FBI had any immediate comment on the grand jury probe.

In its filings, Arco said Arco Pipeline had been subpoenaed by a federal grand jury in Anchorage for records of its "review and evaluation of Alyeska's oil spill equipment, personnel, capabilities and contingency plans."

To operate the pipeline, Alyeska is required by state law to submit contingency plans spelling out how it will respond to spills or other disasters. In the Valdez spill, Alyeska failed to do many of the things it had said it could do in its plan. For example, the plan called for Alyeska to respond in less than five hours to spills in the area where the Exxon Valdez crashed. Significant emergency equipment didn't begin arriving at the site until

A6 THE WALL STREET JOURNAL THURSDAY, AUGUST 31, 1989

1989

so what happened to
this grand jury?

nearly 14 hours after the tanker went aground. In addition, some of Alyeska's spill-fighting equipment was in disarray or quickly broke down.

Lawyers familiar with the numerous investigations and lawsuits surrounding the spill also said it was likely that, in addition to Arco, the other owners of Alyeska had been or will be subpoenaed, too. Those companies are Exxon Corp. (which owns the Exxon Valdez), British Petroleum Co., Mobil Corp., Amerada Hess Corp., Unocal Corp. and Phillips Petroleum Co.

Arco wouldn't elaborate on precisely what the grand jury is looking into. A spokesman would say only that "we have been asked for records, and we are in the process of compiling those records." None of the other owners could be reached to comment.

However, the probe most likely focuses on whether any of the companies may have been guilty of negligence that would constitute violations of federal anti-pollution laws such as the Clean Water Act. The laws authorize sizable fines and—in certain circumstances—prison sentences of as many as 15 years. Last month, Alaska dropped a criminal probe of Alyeska, saying that federal laws have stiffer penalties and tougher provisions than state laws and thus were better suited to the case.

Alyeska has already been named a co-defendant in many of the suits filed in connection with the spill, including the massive civil lawsuit filed by the state earlier

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(907) 561-7628

WHILE IN SESSION
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3704

ALASKA STATE HOUSE



CHAIR
RULES COMMITTEE

JUDICIARY

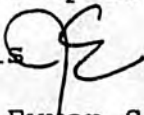
SPECIAL COMMITTEE ON INTERNATIONAL
TRADE & TOURISM

LEGISLATIVE COUNCIL

REPRESENTATIVE JOHNNY ELLIS

MEMORANDUM

TO: Rep. Max Gruenberg, Chair,
and Members of the House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

FROM: Rep. Johnny Ellis 

RE: Comments on the Exxon Settlement

DATE: April 26, 1991

In the aftermath of Judge Holland's decision regarding the criminal plea in the suit between Exxon and the federal government, I understand the Committee will proceed as planned with deliberation on the civil suit, at least until any of the parties give notice that they are withdrawing. Although I am not a member of the Special Committee, I would like to offer my comments regarding the proposed civil settlement.

You may have noted in a recent Anchorage Times article that I was one of two legislators who has decided to vote against the proposed settlement. The article was correct if the the choice for legislators is to simply take it or leave it. However, I see no reason why the legislature can not set its own list of conditions for acceptance of the settlement. **I encourage the Committee to adopt the position that the settlement be rejected unless certain changes are made.**

I would be willing to vote for the settlement if it included the following changes:

1) PAYMENT UP FRONT OR WITH INTEREST OVER TIME

If we accept \$900 million as the settlement figure (which is much lower than the preliminary damage assessment figures), then the state should receive it in one lump sum or with interest if paid over time. The expectation created by the Governor is that the settlement figure would be around \$1 billion and not \$500 million, which is the approximate present value amount.

2) DAMAGE ASSESSMENT INFORMATION SHOULD BE MADE PUBLIC

The settlement should be written to ensure that all damage assessment information is released to the public. While the Attorney General has a legitimate need to protect the government's interest by withholding this information, the legislature has a broader interest in representing the people of Alaska who have a right and a need for the information.

3) PUBLIC/LEGISLATIVE APPROVAL OF TRUST FUND EXPENDITURE

The settlement needs to provide for an ironclad guarantee that the Alaskan public is allowed to participate in decisions regarding the restoration process and use of the settlement monies. Perhaps the legislature's approval should be required which has the advantage of helping to avert constitutional (dedicated fund) challenges.

4) RECOVERY OF LOST TAX REVENUES

The state should receive immediate payment for lost tax revenues related to the oil spill in addition to the restoration monies. This includes \$19-33 million in lost petroleum tax and \$5-6 million in lost fish tax revenues, as estimated by the Legislative Research Agency.

cc. all House members

7-LS1330A

Cook

5/1/91

HOUSE CONCURRENT RESOLUTION NO. 29**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

Introduced:

Referred:

A RESOLUTION

1 Disapproving the proposed Exxon Valdez settlement and suggesting amendments.

2 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **WHEREAS** the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 **WHEREAS** under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 **WHEREAS** the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement has
8 carefully reviewed the proposed settlement, and has concluded that it should be disapproved unless
9 certain changes are made;

10 **BE IT RESOLVED** by the Alaska State Legislature that the proposed settlement is disapproved
11 as written; and be it

12 **FURTHER RESOLVED** that the parties to the proposed settlement are requested to amend the
13 proposed settlement in the following respects:

14 (1) to provide for the payment of at least \$700,000,000 within one year of the date the
15 settlement is approved;

16 (2) to provide for a plea agreement establishing a criminal fine of at least \$500,000,000,
17 with at least \$100,000,000 of the fine to be remitted on payment of that amount to the State of Alaska

1 as restitution for economic losses incurred by the state as a result of the oil spill, and with at least
2 \$300,000,000 of the fine to be remitted on payment of that amount into the trust fund established in the
3 civil settlement, as restitution for damages to natural resources;

4 (3) to provide that there shall be no deduction from state taxes of any amounts payable
5 under the settlement;

6 (4) to provide for membership of two members of the legislature as ex officio nonvoting
7 members of the trustee board governing the operation of the trust fund established in the civil settlement;

8 (5) to provide that the state's share of the funds recovered in the civil settlement shall
9 be subject to appropriation into the trust fund, and expenditures from the trust fund of the state's share
10 shall be subject to appropriation by the Alaska State Legislature;

11 (6) to provide that if the trust fund is found to be an unconstitutional dedicated fund, the
12 civil settlement shall in all other respects be maintained;

13 (7) to provide that the funding decisions of the trustees of the trust fund shall be made
14 with input from a broad-based citizens' advisory board, and that the trustees shall comply with Alaska
15 law regarding open meetings, public records, and adoption of regulations;

16 (8) to provide that scientific and economic data obtained by the state shall be released
17 unless the state demonstrates that the data is privileged, and that release of the information would
18 materially and substantially harm the state's case in pending litigation;

19 (9) to clarify the status of third-party claims and claims for damages to archaeological
20 resources;

21 (10) to require the parties to enter good faith negotiations to resolve the claims of third
22 parties; and

23 (11) to delete the "reopener" clause.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HCR 29

Revision Date: _____ **Department Affected:** None

Title: Disapproving the proposed Exxon Valdez Oil Spill Settlement and suggesting
Amendments. Spec. Cmte. Exxon Valdez

Sponsor: _____ **BRU:** _____

Requestor: _____ **Component:** _____

COMPONENT SERIAL NO.

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS: N/A

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Max Gruenberg, Jr.
Prepared By: Rep. Max Gruenberg, Jr.
Division: Chair, Spec. Cmte. Exxon Valdez

Phone: 465-3718

Date: 5/1/91

Approved by Commissioner: _____
Agency: _____ **Date:** _____

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

7-LS1323A
Cook
5/1/91

A

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:

Referred:

A RESOLUTION

1 Approving the proposed Exxon Valdez oil spill claims settlement.

2 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **WHEREAS** the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 **WHEREAS** under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 **WHEREAS** the Attorney General has stated in a public meeting that if the legislature fails to
8 approve the proposed settlement the state will take action to terminate the proposal;

9 **BE IT RESOLVED** by the Alaska State Legislature that it approves the Agreement and Consent
10 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
11 States District Court, District of Alaska, Civil Action No. A91-083; and be it

12 **FURTHER RESOLVED** that the Governor is respectfully requested to inform the United States
13 Department of Justice that the legislature has approved the proposed settlement.

7-LS1330A

Cook

5/1/91

B

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:

Referred:

A RESOLUTION

1 Relating to the Exxon Valdez oil spill settlement.

2 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **WHEREAS** the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 **WHEREAS** under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 **WHEREAS** the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement has
8 carefully reviewed the proposed settlement, and has concluded that it should be disapproved unless
9 certain changes are made;

10 **BE IT RESOLVED** by the Alaska State Legislature that the proposed settlement is disapproved
11 as written; and be it

12 **FURTHER RESOLVED** that the parties to the proposed settlement are requested to amend the
13 proposed settlement in the following respects:

14 (1) to provide for the payment of at least \$700,000,000 within one year of the date the
15 settlement is approved;

16 (2) to provide for a plea agreement establishing a criminal fine of at least \$500,000,000,
17 with at least \$100,000,000 of the fine to be remitted on payment of that amount to the State of Alaska

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19 (9) to clarify the status of third-party claims and claims for damages to archaeological
20 resources;

21 (10) to require the parties to enter good faith negotiations to resolve the claims of third
22 parties; and

23 (11) to delete the "reopener" clause.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

April 25, 1991

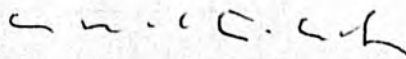
Hon. Max Gruenberg, Chairman
House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement
House of Representatives
P. O. Box V
Juneau, AK 99811

Dear Mr. Chairman:

This will confirm my remarks to you earlier this afternoon that Governor Hickel's position continues to be that the State will terminate the Agreement among the United States, the State of Alaska and Exxon Corporation, et al. if the Alaska Legislature does not approve the Agreement as written.

It will also confirm my view that action by the Legislature to approve the Agreement is inappropriate until Exxon decides whether to terminate it because of Judge Holland's rejection yesterday of the criminal plea agreement.

Very truly yours,



Charles E. Cole
Attorney General

CEC:pml

cc: Hon. Richard I. Eliason, President, Alaska State Senate
Assistant Attorney General Richard Stewart, U.S.
Department of Justice
J. G. Clarke, Senior Vice President, Exxon Corporation

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

April 25, 1991

Hon. Max Gruenberg, Chairman
House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement
House of Representatives
P. O. Box V
Juneau, AK 99811

Dear Mr. Chairman:

The State of Alaska does not intend at this time to withdraw from the Agreement and Consent Decree entered into among the United States of America, State of Alaska, and Exxon Corporation, et al. on March 12, 1991.

If the State of Alaska later decides to withdraw from the Agreement, it will notify you promptly.

Very truly yours,

Charles E. Cole

Charles E. Cole
Attorney General

CEC:pml

EXXON

J. G. CLARKE
Director and Senior Vice-President

April 25, 1991

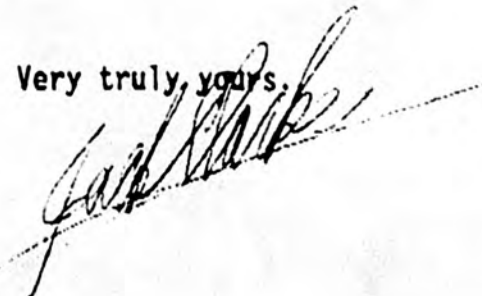
VIA FACSIMILE

The Honorable Max F. Gruenberg, Jr.
Chairman, Special Committee on the
Exxon Valdez Settlement
House of Representatives
Alaska State Legislature
P. O. Box V
State Capital, Room 216
Juneau, Alaska 99811

Dear Mr. Gruenberg:

With reference to your letter of April 24 to Charles Cole, Richard Stewart and me, this will confirm that if we decide to withdraw from the March 12, 1991 Civil Agreement and Consent Decree, we will inform you in a timely manner of that decision after we have informed the other parties to that agreement.

Very truly yours,



JGC:nc

c: The Honorable Charles E. Cole
The Honorable Richard Stewart



STATE OF ALASKA
House of Representatives
District 27

Representative Cliff Davidson
Chairman
House Resources Committee



Box V, Juneau, AK 99811
(907) 465-2487
Box 746, Kodiak, AK 99615
(907) 486-8250

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

FROM: Representative Cliff Davidson

DATE: 23 April 1991

SUBJECT: Disapproval of Settlement Unless Modified

Below are some conditions that I believe the Committee should support as we take up consideration of disapproval without these conditions in the settlement:

1) All factual information accumulated during the course of the Exxon Valdez oil spill scientific studies, whether done by Exxon or the governments of Alaska or the United States must be made available immediately upon the final approval of this settlement.

This may be the most important element in the restoration of the faith of our citizens in government. That should be one of the primary public policy goals in resolving this tragedy. It is clear that the current settlement does just the opposite and this provision is essential to the restoration of a measure of justice and openness in this process.

2) The payment of the full amount of the settlement should occur over 3 years, not 10 years.

If Exxon wants to resolve this situation as soon as possible, this will do it quicker. As a sweetener, I propose that we eliminate the reopener clause. Its effectiveness was limited and it only served to artificially inflate the apparent value of the settlement.

3) Delete those provisions which provide that Exxon can set off cleanup expenses against the settlement.

Settlement for the damages caused by Exxon's mistakes should not relieve Exxon of the responsibility of continuing the cleanup to the satisfaction of both the state and federal governments.

4) Prior to final agreement, there should be a better definition of how the Trustees will be selected, under what rules of procedure

they will operate, how the public process will operate and what kinds of projects will qualify for funding.

These are very important provisions that should not matter to Exxon, thus they will not affect the overall settlement. I am unclear as to how they should be worked into our disapproval of the settlement, but feel strongly that they should be.

5) Alyeska should not be mentioned in the settlement.

Alyeska was not a party to the negotiations and they should not be absolved from culpability.

Alaska State Legislature

House of Representatives



Official Business

P.O. Box V
State Capitol, Rm. 216
Juneau, Alaska 99811
(907) 463-3718

House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

M E M O R A N D U M

TO: Rep. Max F. Gruenberg, Jr., Chairman

FROM: Andy Hemenway, Counsel to the Special Committee

DATE: April 21, 1991

SUBJECT: Alternatives to Acceptance or Rejection

At your request, I have reviewed the Committee minutes, my notes, and the comments submitted to this Committee and to the federal district court with the intent of focussing discussion on possible alternatives to outright rejection or unconditional acceptance of the proposed settlement.

In considering whether specific changes in the proposed settlement are desirable and achievable, the Committee should keep in mind that there is no assurance that any requested changes would be acceptable, or that appropriate legal mechanisms can be devised within the framework of the proposed settlement. Furthermore, the effort to condition approval on specific changes could result in the collapse of the settlement altogether.

With that caveat, this document briefly describes a variety of approaches that might be considered, should the Committee wish to seek a middle ground between acceptance and rejection of the current proposal. The suggestions included are intended to address the major areas of public and legislative concern raised in the course of the Committee's hearings, and in comments submitted to the legislature and to the federal district court.

I
AVAILABILITY OF SCIENTIFIC AND ECONOMIC DATA

The Committee could condition its approval of the settlement on a specific agreement by the parties regarding the release of information gathered since the spill. Such an agreement would have to address a number of issues, including:

- (1) Which information should be released -- solely scientific data, or also economic data?
- (2) Who should be required to release their information -- the State? the United States? Exxon? all the parties?
- (3) When should the information be released -- should time be allowed to encourage settlement of private suits against the State prior to the release?
- (4) Should additional assistance in interpreting or documenting the information be required?

II
AMOUNT AND STRUCTURE OF SETTLEMENT

Clearly, the negotiators for the State and federal governments believe that the amount of the proposed settlement is the best that could have been done. If the Committee is nonetheless persuaded that the amount is insufficient, or that the payment structure is inappropriate, it could condition its approval of the proposal on changes in either the amount or the structure of payments.

Without speculating on what amount the Committee might deem appropriate, there are a number of changes in the structure of payments that might be considered, including:

- (1) Conditioning approval on payment of the the present value of the settlement in a lump sum.
- ✓ (2) Conditioning approval on immediate payment in full of the State's past expenditures.
- (3) Conditioning approval on a specific schedule for reimbursement of the State's past expenditures.

(4) That such payment not be tax deductible.

III PUBLIC PARTICIPATION IN THE RESTORATION PROCESS

The proposed settlement requires "meaningful public participation" in the restoration process. However, the manner of public participation is entirely up to the Trustees. There are a wide variety of steps that could be taken to clarify the manner of public participation in the Memorandum of Agreement between the State and federal governments, including:

- (1) Providing for a public or legislative role in the designation of State Trustees. Under federal law, the Governor must designate the State Trustees for purposes of any recovery under the Clean Water Act. It is unclear, however, that the State's recovery in this case is under the Clean Water Act. Furthermore, the administration has not pointed to any provision in federal or state law which prevents the legislature from establishing the process by which the Governor may make his designations. Even if there is such a limitation, the Governor could choose to waive it, in order to obtain legislative approval of the settlement agreement.
- (2) Making a Citizens Advisory Board mandatory, rather than optional.
- (3) Legislatively establishing the makeup of a Citizens Advisory Board, e.g., by requiring the membership of certain elective officials, or representatives of named interest groups. If such a group is designated by the legislature, a provision for funding its operations through the trust fund should be devised.
- (4) Requiring the Trustees to submit specific plans for public participation to the legislature for approval, prior to final acceptance of the settlement. This would require gaining the approval of all parties to an extension of time.
- (5) Requiring State representatives to abide by Alaska law governing Open Meetings and Public Records, and requiring that the Trustees promulgate policies of general application substantially in accordance the requirements for issuing regulations under Alaska law.
- (6) Clarifying the nature of projects qualifying for funding by: (a) specifically designating certain categories of projects as eligible or ineligible; (b) enacting legislation establishing funding priorities or criteria; or (c) requiring the Trustees to submit priorities/criteria to either the Citizens Advisory Board or the legislature.

IV LEGISLATIVE OVERSIGHT

The issue of legislative oversight has been discussed primarily in terms of its appropriation power. While the Attorney General and legislative counsel have both addressed the constitutional issues raised in this case, the only sure way of determining whether the proposed settlement is constitutional would be to obtain a ruling by the Alaska Supreme Court. Alaska rules of court provide that the United States District Court may certify directly to the Alaska Supreme Court questions of state law which "may be determinative of the cause then pending". The Committee may wish to consider making its approval of this settlement conditional on that procedure being followed.

In addition to seeking clarification of the constitutional issues, the Committee may wish to seek clarification of the precise funding mechanisms envisaged by the parties. Testimony before the Committee indicates that the Trustees will grant monies to State and federal agencies to perform much of the scientific work associated with the restoration process. If that is the case, the money spent by the State agencies will presumably flow through the general fund, with the specific conditions for spending the money attached. If this is the plan, then the legislature will in effect have a veto power over any such expenditures, since it will not be obligated to appropriate any such grants.

Other issues that might be clarified include the relationship between Trust funding and the Section 470 Fund, ensuring that any changes to the Consent Decree or the Memorandum of Agreement are submitted to the legislature for approval, and whether the Legislative Budget and Audit Committee will have full access to Trust records for auditing purposes.

V OTHER ISSUES

A variety of issues have been raised that do not fall into the broad categories above, but which the Committee may wish to see addressed in the settlement documents before recommending approval. Among the more significant issues are these:

- (1) Exxon's payment of Fish Enhancement Taxes.
- (2) Clarification of the legal claims preserved, e.g., damages to archaeological resources.
- (3) Completion of damage assessment.
- (4) Tax deductibility of payments under State law.
- (5) Assurance that adequate public health studies will be done.

I
Consent Decree

NOON
FRIDAY

A. Monetary Terms

(i) Terms of Payment

RECOMMENDATION: The Committee recommends that the proposed settlement be disapproved unless all payments due under the consent decree are paid in a single lump sum within 90 days of the effective date of the consent decree.

COMMENT: The Committee believes that the current structure of delayed payments leave the state vulnerable to the vicissitudes of inflation, uncertain payment dates, and problematic offsets which Exxon may or may not be able to apply to reduce future payments.

(ii) Amount of Payment

RECOMMENDATION: The Committee recommends that the proposed settlement be disapproved unless the lump-sum payment for the joint natural resource damage and the other claims extinguished under the proposed consent decree is at least \$713 million. This is the amount that the attorney general testified would fairly represent the present value of the

payments he states will occur in the future under the proposed settlement.

III 1991 Clean-up Expenses

RECOMMENDATION: The Committee recommends that the proposed settlement be disapproved unless it is amended to provide that Exxon shall be responsible for clean-up expenses incurred in 1991.

COMMENT: The Committee believes that the clean-up is a legal obligation of the spiller, and that it is inappropriate for the state to give up the established principal that the responsibility for these costs should be directly and strictly charged to the responsible party.

IV Reimbursement of Government Costs

RECOMMENDATION: The Committee recommends that funds recovered under the revised settlement for reimbursement of state and federal costs be allocated substantially as contemplated in the proposed settlement, i.e. \$72 million to the state and \$62 million to the federal government, to be paid out of the lump sum.

COMMENT: While it is possible that other reimbursement claims might be advanced by either government, nothing in the

testimony received by the Committee suggested that the amounts or their allocation as between the two governments was inappropriate.

V Allocation of Funds Recovered

RECOMMENDATION: The Committee recommends that all funds recovered in excess of the reimbursements of government costs described above be devoted exclusively to the restoration, replacement or acquisition of equivalent resources.

(B) Public Access to Science Information

Release of Scientific Information

RECOMMENDATION: The Committee recommends that the settlement be rejected unless provision is made for the prompt public release of all raw scientific damage assessment information gathered by the state, the federal government, and Exxon, unless a clear showing of privilege is made.

COMMENTS: The committee believes that the burden of proof regarding any attorney-client or other privilege that may apply to scientific information should be borne by the party requesting that the information be withheld. The committee suggests that the scheme embodied in HB 117 for determining

privilege, involving an ex parte review by the court of requests to withhold, be considered by the parties.

II

Decision Making Structure

The Committee is concerned that the MOA as presently written makes no specific provision for "meaningful public participation" in the restoration process. In particular, it does not require that a Citizens Advisory Board be created, and it provides that all funding decisions will be in the hands of the Trustees alone.

The Committee has reviewed the memoranda providing for the disbursement of funds received in settlement of other similar actions, and has concluded, based on a review of those documents, the Consent Decree, and the applicable law, that the parties have the authority to provide in the MOA for a direct public role in the disbursement of funds received in this settlement.

It is therefore the Committee's recommendation that the settlement agreement be rejected unless the MOA is amended to provide for direct participation by representatives of the public, to be determined subject to the approval of this legislature, on a committee with full authority to make fund projects under the MOA.

The Committee also recommends that the settlement agreement be rejected unless it the MOA is amended to provide that: (1) all

- 1 -

meetings of the trustees, the funding committee, and the Citizens Advisory Board will be conducted in accordance with Alaska law; (2) the Legislative Budget and Audit Committee shall be provided full access to Trust Fund records pursuant to Alaska law; and (3) rules and regulations adopted by the trustees, the funding committee, and the Citizens Advisory Board, shall be promulgated pursuant to Alaska law.

III

Constitutional Issues

Under the Alaska Constitution, a state asset cannot be disposed of without legislative action. State assets include not only tangible things, like money and land, but intangible things, such as the legal right to collect damages in a lawsuit. The Alaska Constitution also forbids the creation of dedicated funds of state money.

The proposed settlement agreement raises substantial questions with respect to both of these constitutional prohibitions. The Attorney General has issued an opinion that the funds received in exchange for the release of the State's claims are not State assets, because they go into a Trust Fund that is under joint federal and state control. According to the Attorney General, the legislature's appropriation power "obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control." Inf. Op. of Att'y Gen., April 2, 1991, at 6 [emphasis in original; hereinafter cited as Op. Att'y. Gen.] The Attorney General concludes that "for similar reasons, the Alaska Constitution's prohibition concerning dedicated funds is not violated by the Trust Fund."

①

In the opinion of legislative counsel and this Committee, the Attorney General's opinion does not satisfactorily resolve the constitutional issues. The key issue is whether the money in the Trust Fund is in fact an asset of the state, and the Attorney General's opinion simply does not address that issue, except to assert -- without making any reasoned legal argument -- that it is not. As is pointed out by legislative counsel, there is in fact a substantial legal question as to that issue. See Mem. of Leg. Counsel, April 8, 1991, at pages 9-12.

Because the settlement agreement raises these substantial legal questions with respect to matters that lie at the heart of the relationship between the executive branch and the legislative branch of the government of the State of Alaska, this Committee is compelled to recommend to the full body that the proposed settlement not be approved unless the constitutional issues are fully resolved.

A satisfactory resolution of the constitutional issues raised by the proposed settlement requires at least three elements:

(1) Funds paid by Exxon in exchange for the release of the State's claims must be appropriated into the Trust Fund.

(2) The State's interest in funds expended by the Trust Fund must be appropriated out of the Trust Fund.

(3) Funds in the Trust Fund may not be dedicated to a specific purpose, except insofar as is "required by the federal government for state participation in federal programs."

In the opinion of legislative counsel and this Committee, the primary aspect of the dedicated funds dispute which must be resolved at this time is whether Exxon would be able to avoid payments if the dedication of funds in the consent decree were later found unconstitutional. To eliminate that possibility, the Committee recommends that the settlement agreement be rejected unless Exxon specifically waives any right it may have to avoid making payments as required by the consent decree even if the dedicated use of the payments is found to be unconstitutional.

The issue of appropriation of funds into the Trust Fund can be resolved by passing legislation on an annual basis appropriating into the Trust Fund the State's interest in funds received pursuant to the Settlement (other than funds which under the terms of the settlement agreement are not part of the trust corpus).

The Committee therefore recommends that the settlement agreement be rejected, unless legislation is enacted appropriating the State's interest in the settlement funds into the Trust Fund or the general fund, as may be proper.

The issue of appropriation of funds out of the Trust Fund can be resolved by amending the MOA to require that all Trust Fund expenditures (other than administrative costs) must be made to state or federal agencies, for purposes within the authority of the agency receiving the funds. Funds received by State agencies in this manner would be available for direct expenditures by the agency, or through contracts with third parties, to the extent permitted under state law. All such funds would be subject to appropriation by the legislature.

The Committee therefore recommends that the settlement agreement be rejected unless the MOA is amended to establish a process for expenditures of Trust Funds as set forth above, including a specific acknowledgment that the state appropriation process will apply to all expenditures by state agencies.

IV

Third Party Claims

The Committee received written comments and public testimony requesting clarification of the impact of the proposed settlement agreement on certain claims held by third parties. The Committee believes that it is in the public interest to avoid litigation over this aspect of the agreement to the maximum extent possible. We therefore recommend that the settlement be rejected unless provisions are added to clarify that:

(1) Notwithstanding any language in Paragraph 13(b) and (c), this agreement does not in any way limit, alter, bar, create or otherwise affect any right, claim, title or interest in recoveries for damages to natural resources or to uses of those resources which any third party could have asserted in the absence of the settlement agreement.

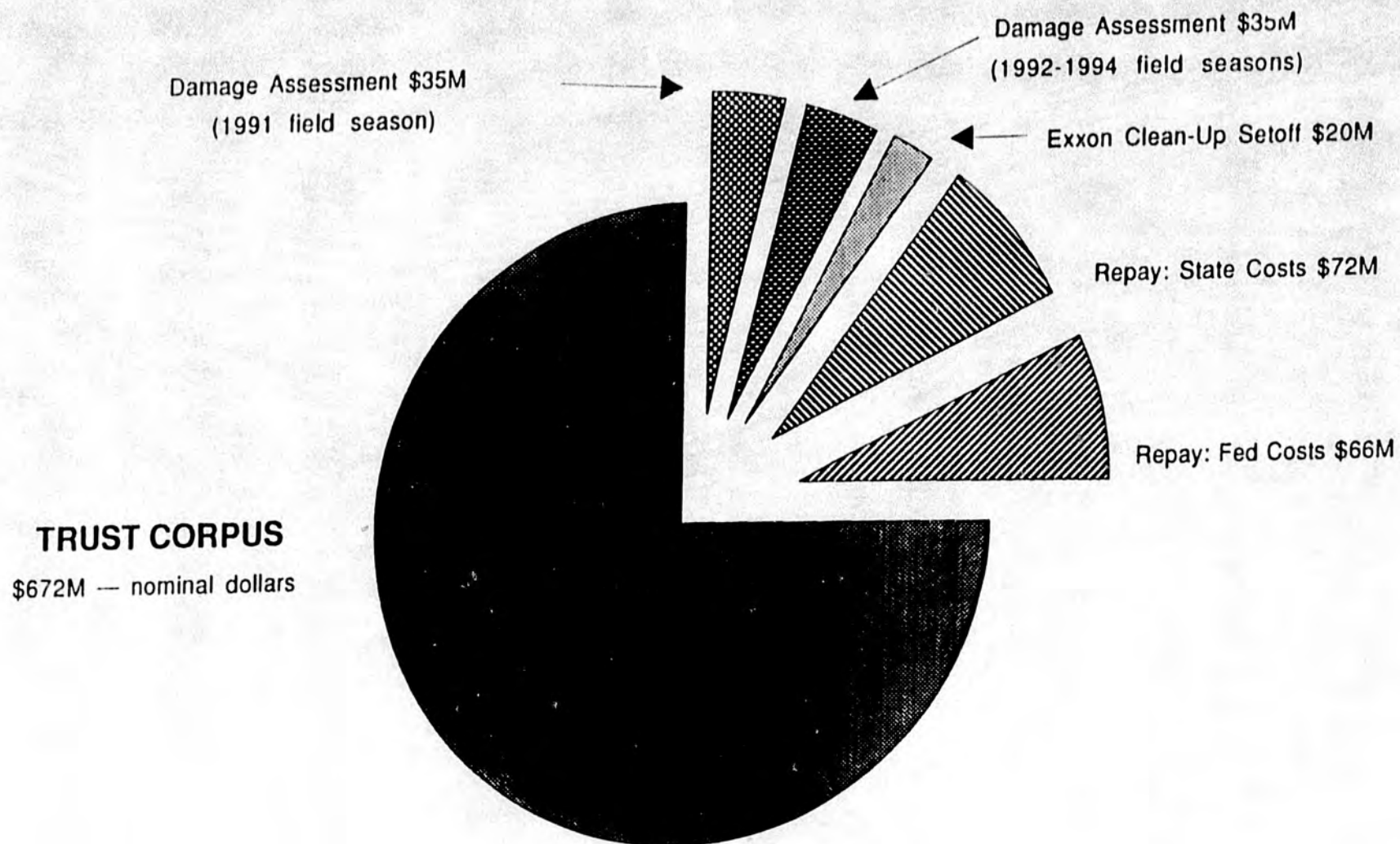
(2) Any and all claims for damages to archaeological resources which would have been asserted by either the State or third Parties are similarly preserved. (Alternatively, the MOA should be amended to specifically provide that Trust Funds may be expended to restore, preserve, or otherwise provide compensation for damages to such resources.)

①

(3) Exxon must pay in full to the appropriate Regional Aquaculture Association the 2% of the amount it has paid, or pays in the future, to third party fishermen as compensation for loss of fishing opportunities.

COST OF SPILL

PROPOSED EXXON CIVIL SETTLEMENT
ESTIMATED COSTS



NOTE: Not shown is \$100M in criminal restitution.

STATE OF ALASKA
EXXON VALDEZ OIL SPILL
(ESTIMATED ALLOWED COSTS - \$ IN MILLIONS)

RECORDED RESPONSE COSTS THROUGH 2/28/91 (1)	\$56.0
ESTIMATED OVERHEAD THROUGH 12/31/90	4.5
ESTIMATED FINANCING COSTS THROUGH 12/31/90	3.9
SUBTOTAL	\$64.5
LESS: EXXON REIMBURSEMENTS	(\$30.0)
NET ESTIMATED UNREIMBURSED RESPONSE COSTS (RECORDED AND INCURRED THROUGH 12/31/90)	\$34.5
RECORDED DAMAGE ASSESSMENT COSTS THROUGH 2/28/91 (2)	\$20.1
RECORDED DAMAGE ASSESSMENT OBLIGATIONS THROUGH 2/28/91	3.1
SUBTOTAL	\$23.2
LESS: CERCLA REIMBURSEMENTS	(5.7)
NET ESTIMATED UNREIMBURSED DAMAGE ASSESSMENT COSTS (RECORDED COSTS AND OBLIGATIONS THROUGH 2/28/91)	\$17.5
RECORDED LITIGATION COSTS THROUGH 2/28/91 (2)	\$17.3
RECORDED LITIGATION OBLIGATIONS THROUGH 2/28/91	2.5
NET ESTIMATED UNREIMBURSED LITIGATION COSTS (RECORDED COSTS AND OBLIGATIONS THROUGH 2/28/91)	\$19.8
TOTAL ESTIMATED UNREIMBURSED RESPONSE, DAMAGE ASSESSMENT, AND LITIGATION COSTS	\$71.8

NOTES:

- (1) ALLOWS TWO MONTH LAG TO RECOGNIZE ESTIMATED INCURRED BUT UNRECORDED COSTS PRIOR TO 12/31/90. EXCLUDES ALL RECORDED RESPONSE OBLIGATIONS AT 12/31/90.
- (2) DAMAGE ASSESSMENT AND LITIGATION RECORDED COSTS AND OBLIGATIONS AS OF 2/28/91. AMOUNTS AT 3/12/91 WERE NOT AVAILABLE.

CONFIDENTIAL
TENTATIVE & PRELIMINARY
PREPARED AT THE DIRECTION OF
ATTORNEY - COUNSEL

PRELIMINARY
&
DRAFT

ACE 1744212



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

TO: Mike Greeny, Director
Legislative Finance Division

Randy Welker, Legislative Auditor
Legislative Audit Division

FROM: Representative Max Gruenberg, Chair *Max Gruenberg*
House Special Committee on the Exxon Valdez Settlement

Representative Kay Brown, Chair *Kay Brown*
House DEC Budget Subcommittee

DATE: March 25, 1991

SUBJ: Accounting of Exxon Valdez Spill Related Expenditures

As you are perhaps aware, during recent meetings of the House Special Committee on the Exxon Valdez Oil Spill Settlement questions have been raised about the quantity and type of the total expenses incurred by the state in responding to the Exxon Valdez oil spill. These same questions have also been raised during the operating budget deliberations of the House Finance Committee.

In the proposed Exxon settlement, it is proposed that the state can recover up to \$72 million for reimbursement of the state's past spill expenses. At this point, however, we are not aware of any definitive accounting of the state's spill-related expenditures incurred to date. The purpose of this memorandum is to ask for your assistance in providing both the House Special Committee on the Exxon Valdez Oil Spill Settlement and the House Finance Committee with an accounting of state expenditures on the Exxon Valdez spill response, clean up and related activities such as legal costs.

Specific questions we would like addressed include the following:

1. What is the total amount of state expenditures in response to the Exxon Valdez oil spill, including response, clean up, damage assessment, restoration and litigation, accounted for by agency, by Fiscal Year, and by funding source (ie., general fund, Oil and Hazardous Substance Release Response Fund/470 Fund, program receipts, other)?

2. Which of these expenditures have been billed to Exxon or other parties? Which of these expenditures have been reimbursed by Exxon or other parties? Which of these expenditures, if any, are still potentially eligible for reimbursement from Exxon or other parties, apart from reimbursement as part of the proposed settlement (ie., is Exxon still in the process of reviewing expenditures for possible reimbursement apart from the proposed settlement)?

It is our understanding that the former Oil Spill Coordinating Office had been tracking the state's spill-related expenditures but we do not know what became of the materials or analysis developed by that office, or whether that information is still current. We also understand that Peterson and Associates, under subcontract to the Department of Law's contractor, Preston Thorgrimson in Seattle also prepared an analysis of these accounts under the direction of a Mr. Bob Grey. We would also note that Commissioner John Sandor indicated to the House Finance DEC Budget Subcommittee that the DEC had initiated an internal audit of the Oil and Hazardous Substance Release Response Fund (470 Fund). The status of this audit is not known, although it could presumably provide information relevant to the effort of accounting for total state spill related expenditures.

In order to expedite the work of the House Special Committee on the *Exxon Valdez* Oil Spill Settlement, we would appreciate a response to this request by April 18. We appreciate your assistance with this request. If you have questions concerning this matter, please let us know or contact our offices (Eric Myers in Representative Brown's office at 465-4998 or Andy Hemenway in Representative Gruenberg's office at 465-4968).

cc: Commissioner John Sandor
Attorney General Charlie Cole
Dick Pegues/Department of Law

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

MEMORANDUM

AUDIT DIVISION
P.O. BOX W
JUNEAU, ALASKA 99811-3300

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

Representative Kay Brown, Chair
House DEC Budget Subcommittee

FROM: Randy S. Welker *Randy*
Legislative Auditor

DATE: April 18, 1991

SUBJECT: Information Regarding Expenditures Covered by the Memorandum of Agreement between the State, the Federal Government, and Exxon.

This memorandum has been prepared in response to your request regarding information on state expenditures involved in responding to the *Exxon Valdez* oil spill. In order to respond to your questions, we reviewed the Memorandum of Agreement (MOA) between Exxon and the State and federal governments.

We were able to obtain expenditure information compiled by Peterson and Associates that appears to have been the basis for the \$72 million cost recovery amount included in the MOA. Due primarily to time constraints, we are not able to provide you with total assurance regarding the reasonableness of the MOA's cost recovery provisions.

The expenditure information used in the development of the MOA's \$72 million ceiling is comprehensive. From our cursory review of the Peterson and Associates information, and discussions with a Peterson and Associates representative and agency staff of the significantly involved departments, we believe that the \$72 million amount in the MOA appears to reasonably represent the oil spill response, assessment, and litigation costs incurred by the State through December 31, 1990.

Using the Peterson and Associates information, compiled from the State's accounting system, we have developed the following information. We also offer some observations and concerns that we have regarding cost recovery under the terms of the MOA.

COST REIMBURSEMENT

Section V. B of the MOA allows the State to receive up to \$72 million for "reimbursement of allowed expenses," incurred through December 31, 1990. The section further allows the State to receive reimbursement of "response and cleanup costs incurred after December 31, 1990."

From the detailed listing of expenditures prepared by Peterson and Associates, we developed the following table summarizing expenditures by agency through December 31, 1990.

DEPARTMENT	Estimated Recorded Expenditures (thousands)	Reimbursements from Exxon or CERCLA (thousands)	Remaining Expenditures or Costs (thousands)
Administration	3,591.0	488.0	3,103.0
Commerce and Economic Development	627.0	499.0	128.0
Community and Regional Affairs	1,429.0	40.0	1,389.0
Environmental Conservation	38,652.0	24,621.0	14,031.0
Fish and Game	23,467.0	6,440.0	17,027.0
Governor's Office	1,345.0	730.0	615.0
Health and Social Services	827.0	7.0	820.0
Labor	895.0	273.0	622.0
Law	17,342.0	0.0	17,342.0
Military and Veterans' Affairs	949.0	653.0	296.0
Natural Resources	2,989.0	1,341.0	1,648.0
Public Safety	334.0	18.0	316.0
Transportation and Public Facilities	1,131.0	1,013.0	118.0
University of Alaska	439.0	53.0	386.0
TOTALS	94,017.0	36,176.0	57,841.0
NON-CASH EXPENDITURE ADDED IN MOA TOTALS:			
Overhead (4,600.0)/Financing (3,900.0) Estimates			8,500.0
Damage Assessment Obligations (costs incurred but not paid by 12/31/90)			3,100.0
Litigation Obligations (costs incurred but not paid by 12/31/90)			2,500.0
Total Expenditures used to set MOA Cost Recovery Cap			71,941.0

The table on the following pages highlights the major, but not all, components of each department's costs and includes our observations.

DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
ADMINISTRATION (3,591.0): Valdez Oil Spill Commission Telecommunications	952.0 2,200.0	The Telecommunication costs may be understated. We reviewed information as of 8/15/90 that showed expenditures of 3,300.0 primarily for two projects: Prince William Sound microwave system (2,091.0) and a non-microwave system for the South Kenai/Kodiak link (1,206.0).
COMMERCE AND ECONOMIC DEVELOPMENT (627.0): Alaska Seafood Marketing Institute (ASMI) Weigh Stations	475.0 130.0	ASMI received 800.0 directly from Exxon. Actual expenditures were somewhat greater than reflected here, however it is immaterial as any costs are paid from funds already received, with a net zero effect on nonreimbursed costs.
COMMUNITY AND REGIONAL AFFAIRS (1,429.0): Community Assistance Grants	1,173.0	Grants were awarded on a competitive/needs based evaluation. Eighteen grants were awarded ranging from 2.3 to Port Lions for equipment repair to 684.0 to Kodiak for a Social/Economic Study.
ENVIRONMENTAL CONSERVATION (38,652.0): Personal Services Travel Contractual Equipment	14,000.0 2,218.0 20,000.0 1,000.0	The oil spill drastically impacted DEC. Personal services included significant overtime, project new hires, and back-fills for employees assigned to the spill. We are more confident in the accounting section at DEC than most of the impacted departments. However, we will verify that further with a detailed financial review for FY 90.
FISH AND GAME (23,476.0): Personal Services Travel Contractual	10,350.0 1,000.0 8,455.0	The majority of the department's work dealt with impact assessment studies on a wide variety of fish and wildlife species. The department fiscal staff believes the total recorded expenditures adequately cover costs incurred.
GOVERNOR'S OFFICE (1,345.0): Oil Spill Coordination Office	995.0	
HEALTH AND SOCIAL SERVICES (827.0): Substance Abuse Grants Mental Health and DD Grants	522.0 231.0	
Labor (895.0): OSHA/Inspections/Job Service Training Spill Workers in Safety Compliance	325.0 174.0	
LAW (17,342.0): Legal Expenses Experts and Consultants	11,400.0 4,682.0	According to the department, the total amount recorded plus the 2,500.0 litigation obligation will cover costs through 12/31/90. It is estimated an additional 4,000.0 will be needed for 1991 costs.
Continued on Next Page.		

(Continued) DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
MILITARY AND VETERANS' AFFAIRS (949.0):		Significant initial response effort from the Division of Emergency Services.
NATURAL RESOURCES (2,989.0): Personal Services Equipment	2,000.0 600.0	Most personal services costs were for temporary project hires for oil spill response. Fiscal staff is confident total covers costs incurred.
PUBLIC SAFETY (334.0): Increased Enforcement Two Enforcement Vessels	100.0 142.0	Personal services costs for overtime/sea pay for troopers and Fish and Wildlife vessel crew for increased enforcement. Little, if any, regular compensation for permanent employees is included.
TRANSPORTATION AND PUBLIC FACILITIES (1,131.0): MV Aurora MV Bartlett	488.0 46.0	MV Aurora provided floating lodging for oil spill workers.

Almost half of the State expenditures were made with 470 funds

Of the \$94 million in expenditures, it has been estimated that more than \$46.7 million has been spent out of the Oil and Hazardous Substance Response Fund (OHSRF), also known as "470 Funds." According to a draft of an internal audit report prepared by the Department of Environmental Conservation, the expenditures from the fund, broken down by agency, are:

EXPENDITURES BY DEPARTMENT FROM THE OIL AND HAZARDOUS SUBSTANCE RESPONSE FUND	Estimated Recorded Expenditures (thousands)
Administration	2,281.0
Environmental Conservation	32,889.0
Fish and Game	7,095.0
Governor's Office	275.0
Labor	272.0
Law	92.0
Military and Veterans' Affairs	60.0
Natural Resources	1,529.0
Transportation and Public Facilities	786.0
University of Alaska	59.0
Other	1,400.0
Total	46,738.0

According to the information compiled by Peterson and Associates, the Department of Fish and Game has received \$5.7 million in reimbursements from the Federal CERCLA process. As of December 31, 1990, Exxon had reimbursed \$30 million to the State's Oil and Hazardous Substance Response Fund (OHSRF). Given these reimbursements, total "out-of-pocket expenditures," broken down by "funding source," are as follows.

Expenditures by "Funding Source"	Expenditures (thousands)
General Fund	41,100.0
CERCLA Reimbursement to General Fund	5,700.0
EXXON Reimbursement to the Oil and Hazardous Substance Response Fund	30,000.0
EXXON Reimbursement to Alaska Seafood Marketing Institute	500.0
Unreimbursed Oil and Hazardous Substance Response Fund Expenditures	16,700.0
Total "Out-of-Pocket" Expenditures by State	94,000.0

OBSERVATIONS AND QUESTIONS

1. What requirements, if any, must the State meet to receive recovery? - It is our understanding that the cost recovery totals listed in the MOA are to settle all expenditure claims still pending before Exxon, in addition to reimbursing the State for expenditures not yet submitted. According to a January 4, 1991 summary, \$49.7 million in state expenditures had been submitted to Exxon. Of this amount Exxon had paid just over \$30 million, was still considering \$4.4 million, and had rejected \$14.8 million in submitted claims. As suggested by the summary of expenditures submitted to Exxon already, a significant part of the \$72 million recovery amount contemplated in the MOA has previously been rejected for reimbursement. Does the cost recovery amount allowed for in the MOA supersede earlier decisions by Exxon officials not to reimburse the State for some of the costs claimed? Does the use of the phrase "allowed expenses" in the MOA imply that the State's expenditures must meet some specific criteria or requirement prior to being eligible for reimbursement?

We have been informally advised by Legal Services Director Tam Cook that the agreement is silent about any specific criteria for "allowed" expenditures. She commented that this possibly could be an issue subject to further discussion and negotiation between the State and Exxon. However, Ms. Cook also reported that Attorney General Cole testified before the Committee that the reimbursement would be paid without further audit or scrutiny by Exxon. We suggest that the Committee get a clear understanding of any further review and approvals to which these expenditures may be subjected.

2. Ownership of assets and other personal property - From the outset of the cost reimbursement process, Exxon had told the State that any durable goods and equipment purchased by the State and reimbursed by Exxon belonged to the company after the oil spill activity was finished. The summary of expenditures that make up the MOA's \$72 million recovery cap, lists over \$4 million in equipment bought by the State. Additionally, more than \$11 million was paid by Exxon directly to vendors. This amount may also include payment for equipment used by the State.

Is Exxon going to continue to insist on the return of the numerous computers, filing cabinets, boats, and telecommunications equipment paid for by the company? If so, a significant effort will be required to inventory, centralize, and value this property, which may require future appropriations from the legislature. It may be in the State's best interest to compensate Exxon for the current diminished value of the equipment.

3. Audit Access to Restoration Funding - In a March 18, 1991 overview memorandum, the Division of Legal Services raised the issue of audit access to the expenditures of the trustees. The memorandum rhetorically asks who, if anyone, will perform audits of the trustees' expenditures? We concur that audit access should be clarified. Due to the unique relationship between the state and federal governments in administering these funds, some provision should be made that clearly gives the Legislative Auditor access, on behalf of the State, to expenditures of the trustees.

In summary, we believe that the \$72 million amount appears reasonable. Additionally, the overhead and financing amount of \$8.5 million is not based on identified expenditures, but on estimates. Therefore, we believe there may be some "cushion" in this number to cover costs not identified as of December 31, 1990.

We hope this memorandum provides some insight into the make-up of the \$72 million ceiling in the MOA. If you need further clarification or detail please contact me at 465-3830.

cc: Representative Ron Larson, Chairman
Legislative Budget and Audit Committee

Members of the Legislative Budget
and Audit Committee

Members of the Senate Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

ISSUES

TO

RESOLVE

CONSENT DECREE, MOA AND PLEA AGREEMENT

QUESTIONS FOR FEDERAL REPRESENTATIVES
(revised 4/16)

1. To what extent can the state recover damages under federal law for species under federal management? Under the common law, could the state recover for losses to those species?
2. Does the federal government object in principle to a division of natural resource damages between the state and federal governments? What percentage of the total recovery would you expect to receive under such a division?
3. Will money spent by federal agencies from trust proceeds be made available to the agencies through the federal appropriation process?
4. Do the Consent Decree and the MOA as written provide for a natural resources damages recovery under the Clean Water Act? How? What specific provisions in either document make the CWA the governing law?
5. What is "enhancement" of natural resources, within the meaning of the Consent Decree and the MOA?
6. Were the state Trustees consulted when the federal government called for public comment on the method of public participation in the restoration process under the MOA, in the March 19 Federal Register? Do you view that notice as sufficient to provide for "meaningful public participation" from the local Alaskans most impacted by the spill? What steps will the federal Trustees take to ensure that in the future, there is meaningful public participation in the restoration process?
7. Would the federal Trustees object to conditioning implementation of the settlement agreement on a final decision by the Alaska Supreme Court on the constitutionality of the settlement agreement under Alaska law? Would the federal government be prepared to request certification of this issue from the federal district court to the Alaska Supreme Court, if requested by the legislature?
8. What are the projected costs of damage assessment over the next three years? Is it the policy of the federal Trustees to continue damage assessment until the full extent of long term damages has been ascertained?

9. The legislature may be unwilling to accept the settlement agreement on the present terms. Does the federal government object in principle to the revision of the MOA in any respect?

10. Have the federal trustees, to this point, acted to ensure that the federal government will be able to take advantage of the rebuttable presumption regarding damages under CERCLA?

11. When, and under what conditions, will information generated by the federal government regarding damages (biological and economic) be released if this settlement is approved?

12. Why was Alyeska relieved of all civil liability for natural resources damages under the settlement agreement? Was the decision to release Alyeska from all criminal liability in any way linked to the civil settlement? Did Exxon refuse to settle its civil case unless Alyeska was relieved of criminal liability? Was the federal government aware of the information contained in Rep. Miller's letter when it agreed to drop criminal charges against Alyeska?

13. Do the subsistence rights of Native villages give rise to a claim for damages to natural resources "appertaining to" Native villages, within the meaning of Paragraph 13(b) of the Consent Decree?

14. Are the rights of fishermen to commercially fish post-1989 fish resources a "present property interest", within the meaning of Paragraph 13(c) of the Consent Decree?

15. How do the federal Trustees intend to provide for public participation in the restoration process?

16. What specific ideas do the federal Trustees have at this point regarding the types of projects that would qualify for funding under the settlement agreement?

17. Will the Trust pay its own administrative expenses? Will the Trust reimburse the state for the costs of state oversight of its activities?

18. Under what conditions would it be appropriate to spend Trust money on projects outside Alaska? What sorts of projects might be funded in this way? In particular, could Trust money be spent to acquire habitat outside the state for species damaged by the spill, or for other species?

19. If the State were to reject a settlement, would the federal government continue to prosecute its civil claims with full vigor?

20. Would the federal government accept designation of a state official as a special master to the federal judge, in its capacity as tie-breaker?

21. What are specific examples of uses to which the restitutionary funds could be put? Are there any limitations on the use of these funds in federal law, or is the Plea Agreement the sole limitation?

22. If the Trust is sued, will Trust funds bear the cost of litigation?

23. Have any of the federal damage assessment studies, or the economic damage surveys, been shared with the Exxon Corporation? Have the federal economic damages studies been shared with either Exxon or the State?

24. Has the federal government insisted on using the Clean Water Act as the model for settlements in other similar cases?

CONSENT DECREE

MASTER LIST OF ISSUES
(revised 3/29)

[I]
Introduction
(pages 2-3)

- 1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so? [PF]
- 2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it? [PF]
- 3. The parties represent that the payments called for are in addition to "those described above". Does this mean that for purposes of the Consent Decree, the amounts recovered are not subject to CWA limitations?

[II]
Jurisdiction
(paragraph 1; page 4)

- 4. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce the agreement? Other?) [PF]

[III]
Parties
(paragraphs 2-5; page 4)

[IV]
Definitions
(paragraph 6 [a-i]; pages 5-7)

- 5. Why are the natural resources damages of the state not separated from the natural resource damages of the federal government? [PF]

6. If the court signs the consent decree, when does the time for appealing that decision expire? [PF]

7. Does the reference to claims under state law mean that this recovery is not entirely under the CWA? [PF]

8. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state, e.g. lost taxes [PF]

8.1 When was the last date that all parties signed? [PF]

[V]

Effect of Entry of Decree by Court
(paragraph 7, page 7)

9. What impact does the agreement have on the state's rights/legal position prior to "final approval" but after the "effective date", i.e., right now?

[VI]

Payment Terms
(paragraphs 8 [a-d], 9-10; pages 9-11)

Payment Schedule (paragraph 8)

10. What is the present value of the amounts to be paid by Exxon? [PF]

11. Has Exxon paid the first \$90 million? [PF]

12. What guarantee is there that Exxon will pay the required amount? Is this a debt dischargeable in bankruptcy? [PF]

13. Are the amounts Exxon will pay deductible under federal tax law? Under state tax law? [PF]

Escrow (paragraph 9)

Use of Money (paragraph 10)

14. Art. IX, Sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. choose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply? [PF; Rep. Barnes, 3/19]

15. Does any state statute require that money received in this settlement be deposited in the General Fund?

16. Is legislative authorization needed to accept funding from the trustees? [Rep. Ulmer, 3/21, p. 10]

17. Alaska's Constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's Constitution, and if so, does the A.G. have the power to enter into an agreement under the CWA? [PF]

18. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree? [PF]

19. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA? [PF]

20. This paragraph refers to "natural resource services." What is a "natural resource service?" [PF] Could it include economic loss? [Rep. Hudson, 3/27]

NB: This term is also used, and undefined, in the MOA (page 8 [paragraph IIIA]).

21. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true? [PF; Rep. Hudson, 3/20, p.12]

22. Despite the statement to the contrary, will a private party have a right to enforce the restrictions in use set forth in this paragraph? [PF]

23. Does the settlement provide for federal or state funding for continued damage assessment studies?

24. By "representing" to the court that money will be spent pursuant to the MOA, are the governments barred from changing the MOA without court approval? Do they in effect approve the MOA? [3/19, p. 6]

25. Could the trustees, or the court if breaking an impasse, act through a private party (e.g. the Nature Conservancy or a Native corporation) to preserve or utilize natural resources under the settlement? [Rep. Phillips, 3/19, p.11]

26. Does the Alaska Constitution bar the state from bypassing the appropriation process in disposing of state assets, i.e., the litigation proceeds? [Rep. Barnes, 3/19, p. 11]

— 27. How was the \$950 million amount for compensation calculated?

28. To what extent can the losses of third parties, for which the state is found liable, be paid out of these funds? [Rep. Phillips, 3/20, p.10]

29. Will any of these funds go into the Sec. 470 fund? [Rep. Brown, 3/20, p.12] Which funds get used first -- the trust funds, or Sec. 470 funds? [Rep. Hudson, 3/25]

[VII]

Commitment by Exxon to Continue Cleanup
(paragraphs 11[a-b], 12[a-b]; pages 11-14)

Cleanup Duties (paragraph 11)

30. If the SOSC or the FOSC disagree with Exxon's proposed costs, does Exxon still have to do the work? (What does "subject to prior approval" mean?) In the event of a dispute about the costs, who makes the final decision? [PF]

31. The first sentence of 11(b) provides that Exxon has no cleanup obligations after final approval of the consent decree "except as set forth in this Agreement." Does another paragraph of the agreement impose cleanup obligations after final approval? [PF]

32. What does the last sentence of 11(a) -- concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or SOSC -- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under the direction of the FOSC or SOSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims? [PF; Rep. Navarre, 3/19, p.16]

33. To what extent is Exxon's current liability for cleanup limited by the settlement? Why are we reimbursing Exxon for future cleanup even if the settlement is rejected? [Rep. Davidson, 3/20, p.11]

Set Off for Cleanup Expenses (paragraph 12)

34. Can Exxon setoff amounts approved by the FOSC against amounts owed the state? Can Exxon setoff amounts approved by the SOSOC against amounts owed the federal government? [PF]

[IX]

Releases and Covenants Not to Sue by the Governments
(paragraphs 13 [a-d], 14-16; pages 14-17)

Release of Exxon (paragraph 13; pages 14-15)

35. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful? What has it gained in the consent decree to compensate for the loss of those claims? [PF]
36. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska? [PF/State Claims]
37. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement? [PF]
38. Do political subdivisions of the state retain their claims against Exxon under this settlement? [Rep. Kubina 3/19; Rep. Leman 3/21, p.2]
39. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims (e.g. is there any effect on confidentiality of scientific and economic data)? [PF]

Release of Exxon Pipeline (paragraph 14; pages 15-16)

Release of Claims Against Employees, etc.
(paragraph 15; pages 16-17)

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

Dismissal of Actions (paragraph 16; page 17)

[IX]
Reopener for Unknown Injury
(paragraphs 17-19; pages 17-18)

Qualified Restoration Projects (paragraph 17;
pages 17-18)

41. How likely is it that the state or federal government will be able to take advantage of this provision, given the requirement that the injury can not have been anticipated by any trustee? [PF; Reps. Leman, Davidson, 3/21, p.3]

42. How will "benefits" be quantified under this clause? [Reps. Gruenberg, Leman, 3/21, p.3]

\$100 Million Limitation (paragraph 18; page 18)

Filing of Plans (paragraph 19; page 18)

[X]
Releases and Covenants Not to Sue by Exxon and Exxon Pipeline
(paragraph 20; pages 18-19)

43. What claims have Exxon or Exxon Pipeline asserted against the state or federal government? [PF]

[XI]
Trans-Alaska Pipeline Liability Fund
(paragraph 21; page 19)

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

[XII]
Provisions Pertaining to Alyeska
(paragraphs 22-25; pages 20-21)

Release of Alyeska (paragraph 22; page 20)

45. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska e.g., economic loss)? [PF]

Partial Payment to Exxon (paragraph 23; page 20)

Partial Payment to Governments (paragraph 24; page 21)

Indemnification of Governments by Exxon (paragraph 25; page 21)

[XIII]
Third Party Litigation
(paragraphs 26-30; pages 21-23)

No Contribution or Indemnity; Allocation of Liability
(paragraph 26; page 21)

46. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.) [PF] What will the cost of litigating third party suits be to the state? [Rep. Barnes, 3/19]

47. Can scientific and economic information acquired by the state in connection with the claims being released in this case be kept confidential under state law once the claims are dismissed? [Rep. Navarre, 3/19]

Suits Against Exxon or A Government Only (paragraph 27; page 22)

48. Are there third party suits against the state, or are there likely to be such, in which Exxon is not a defendant? (Under paragraph 27 the state could not recover against Exxon for its losses in such cases.) [PF] What value do the claims have? What portion of the claim could we collect from Exxon? What will the litigation cost? [Rep. Navarre, 3/19]

No Reduction in Payments (paragraph 28; page 23)

No Tender as Defendants (paragraph 29; page 23)

49. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits? [PF]

Settlement With Exxon and Suit Against A Government
(paragraph 30; page 23)

50. Can the state and federal governments recover against each other for judgments they have to pay to third parties? [PF]

[XIV]

Interest for Late Payments
(paragraph 31; pages 23-24)

[XV]

Reservation of Rights
(paragraphs 32-35; pages 24-25)

No Admission (paragraph 32)

No Claims Created (paragraph 33)

Government Programs Not Impaired (paragraph 34)

Existing Contracts Not Impaired (paragraph 35)

[XVI]

Notices and Submittals
(paragraph 36; pages 25-26)

[XVII]

Process for Entry of Agreement
(paragraphs 37-38; pages 26-27)

Notice, Legislative Approval, Withdrawl (paragraph 37)

51. It appears that the governments could keep the agreement in effect even if the state legislature does not approve it. If the legislature does not approve it and the state or federal government does not with draw, could the legislature

intervene in the federal case to prevent approval by the court? Could it intervene in the state court to prevent a dismissal of claims? [PF]

52. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA? [PF/Overview; Rep. Barnes, 3/19, p.6]

53. Is the federal court bound to wait the full 45 days before ruling?

54. Can the legislature approve the settlement conditionally, with stipulations? [Rep. Hudson, 3/19, p.12]

55. If the consent decree is not approved, does the plea agreement terminate? [Rep. Ulmer, 3/20, p.20]

Termination of Agreement (paragraph 38)

56. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated? [PF]

57. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC? [PF]

58. If the court rejects the Plea Agreement, can the U.S. or Alaska terminate the settlement?

59. Does legislative approval of the settlement estop the state or third parties from making constitutional challenges to the authority of the administration to enter into it, or to the funding mechanisms? [Rep. Barnes, 3/19, p.12]

[XVIII]

Retention of Jurisdiction (paragraph 39; page 28)

60. Who drafted which parts of the documents, and will they be interpreted against the drafter? [Rep. Gruenberg, 3/21, p.4] Is there any record of the settlement negotiations?

61. Is the Consent Decree to be interpreted under federal law, or under Alaska law? [Rep. Gruenberg, 3/21, p.6]

62. Is the agreement in violation of the law of any other jurisdiction? [Rep. Gruenberg, 3/21, p.6]

63. Why is there no provision for judicial review in the Consent Decree, as there is in the MOA? [Rep. Gruenberg, 3/27]

[XIX]
Miscellaneous
(paragraphs 40-41; page 28)

Modification (paragraph 40)

Assertion of Authority (paragraph 41)

64. Does this Article estop the legislature or a third party from litigating the issue of authority? [PF, 3/21 p.9]

MEMORANDUM OF AGREEMENT

MASTER LIST OF ISSUES (revised 3/29)

Introduction

I Jurisdiction (page 5)

II Definitions (pages 6-8)

1. Can the legislature by statute designate trustees or a procedure for their appointment by the governor? [Rep. Donley, 3/19, p.6] ✓

III Co-Trusteeship (pages 8-9; paragraphs A-C)

NB: These articles raise constitutional and other questions addressed in the context of the Consent Decree.

IV Organization (pages 9-12; sections A[1-5], B[1-3] and C)

A. General Provisions

2. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government? [PF]
3. Could the state and federal governments agree on a formula or process to divide the litigation proceeds between them which would limit the trustees' discretion in funding projects? [Rep. Leman, 3/19, p.8]

4. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as the "311(k) fund", which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the U.S. Treasury? [PF]
5. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply? [PF]
6. Will a trust fund in the court registry bear interest? [PF]
7. What standards would a court use in deciding disputes among the trustees? [PF]
8. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money? [PF]
9. If an appropriation is necessary in order for expenditures to comply with the Alaska Constitution, how could this be done? [PF/Overview]
10. Who, if anyone, will perform audits of the trustees' expenditures? [PF/Overview]
11. Could the legislature, by enacting legislation, retain greater control over the trust proceeds that allowed by the MOA (but still be within the limits of the CWA and applicable regulations)? [PF/Overview]
12. What alternative mechanisms for funding and distributing the litigation proceeds are there (i.e., does the CWA impose too many restrictions on use, and is a co-trusteeship the best approach)? [Rep. Hudson, 3/19, p.9; Rep. Phillips, 3/21, p.6]
13. What mechanisms does the agreement provide for input by the legislature, local governments, Native groups, injured third parties, and the general public in the formulation of policies and governing the co-trusteeship, and in their funding decisions? [Rep. Hudson, 3/19, p.10]
14. To what extent will the MOA restrict state resource management decisions affecting resources affected by the spill?

NB: This Article raises the same issues under the Alaska Constitution raised in connection with the Consent Decree, regarding the appropriation requirement and the prohibition against dedicated funds.

B. Injury Assessment and Restoration Process (pages 11-12)

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

16. What is the meaning and effect of the "nonelection" of 43 CFR? [PF, 3/25]

C. Role of the Environmental Protection Agency (page 12)

[V]

Distribution of Settlement Monies
(paragraph A-D; pages 12-13)

A. Joint Use of Natural Resource Damage Recoveries
(paragraph A; page 12)

17. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much on damage to federal resources? [PF]

18. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds? [PF]

19. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?) [PF]

20. Will the trust pay its own administrative expenses? [PF]
If state staff are used in support of the state trustees' activities, will the state budget bear the cost? Will additional state staff be needed to carry out trustee duties and oversee the trust's activities? [PF/Overview]

21. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed? [PF]

22. To what extent can the trustees provide relief to municipalities, Native groups, or private plaintiffs who were damaged as a result of injuries to natural resources? [Rep. Hudson, 3/19, p.10]

B. Reimbursement of Allowed Expenses and Response Costs
(paragraphs B-D; pages 12-13)

B. Federal and State Limitations (page 12)

23. Will reimbursements for past allowed expenses and future cleanup costs go to the general fund without any restrictions on its use? [PF/Overview]

24. When does the 5 year repayment period begin? Is there a payment schedule, and will interest accumulate on the unpaid balance? [PF, 3/19, p.5]

C. Out of State Expenditures (page 13)

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

26. Is there any limitation on the use of funds for projects outside the state? Could the money be used to establish parks, institutes, etc. in other states? [PF/Overview]

D. No Obligation To Spend Except As Authorized
(page 13)

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

VI
Science Studies
(page 13)

VII
Covenants Not to Sue
(paragraphs A[1-3], B-F; pages 14-16)

A. Suits by Government Against Government

28. If the trustees disagree whether a federal agency should be involved in a particular project, can the state trustees take the issue to court? [PF]

29. Does the ability of either government to participate in third party litigation over the scope of the trusteeship vitiate the covenant not to sue?

B. Assertions of Co-Trusteeship

30. Does the last clause preclude, at least for the next 16 years, the U.S. and the state from suing each other to determine ownership of resources (e.g. submerged lands or marine mammals) or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill? [PF] In general, what are the implications of this paragraph? [PF/Overview]

C. Intervention in Third Party Suits

D. MOA Effective Notwithstanding Adversarial Status

31. How does this provision interact with the termination provision on page 17 that says the MOA terminates in the Consent Decree terminates, unless otherwise agreed by the parties? [PF]

E. Third Party Suits Against Both Governments

F. Third Party Suits Against One Government

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

33. Does the requirement to cooperate in the defense of these suits obligate either government to participate in the litigation costs of the sued government?

VIII
Enforcement of Agreement
and Governing Law and Venue
(paragraphs A-B; page 16)

A. Enforcement by Alaska Federal Court

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

35. Why was the federal court selected to enforce the agreement instead of state court?

B. Disposition if MOA Found Invalid

IX

Multiple Copies and Effective Date
(page 17)

X

Integration and Merger
(page 17)

36. What was the agreement of April, 1989? Are there any other prior agreements? [PF]

XI

Termination
(page 17)

37. How does this relate to paragraph VII (D) on page 15 (providing that the MOA remains in effect if the Governments are adverse in litigation)? [PF]

38. Why is the MOA limited to a 16 year term? What happens to funds in the trusteeship after that time?

XII

Judicial Review
(page 18)

39. Since this is a consent decree, do the parties have the power to prevent judicial review? [PF]

40. To what in Article VII does this refer? [PF]

41. Does this prevent a third party from challenging a decision of the trustees or the court as a tiebreaker) on the ground that the decision is inconsistent with the MOA or applicable law? [PF; Reps. Kubina, Navarre, 3/25]

PLEA AGREEMENT

MASTER LIST OF ISSUES
(revised 3/29)

I

Introduction
(paragraphs A-D; pages 1-2)

II

Defendants' Agreement and Understanding

- A. Charges Against Exxon Shipping
(paragraphs 1-3; pages 2-3)
- B. Charges Against Exxon
(page 3-4)
- C. Legal Basis for the Fines and Restitution Payment
(paragraphs 1-2; page 4)
- D. Consequences of the Plea
(paragraphs 1-3; pages 4-5)
- E. Dismissal of Remaining Charges
(page 5)
 - 1. What criminal charges are being dismissed?

III

Agreement of the Parties Regarding Imposition of Sentence
(paragraphs A-D; pages 5-7)

- A. No New Criminal Charges or Civil or Admin. Penalties
(pages 5-6)
- 2. Who are Exxon's wholly-owned subsidiaries?

3. Why is Alyeska Pipeline Service Company included in the entities against whom criminal charges will not be brought and from whom civil or administrative penalties will not be sought?

4. Is it ethical/legal for Defendant A to enter into a plea agreement contingent on disposition of charges or potential charges against Defendant B? [Rep. Gruenberg, 3/27]

5. What criminal charges could have been brought under Alaska law? Why weren't they? Could they now? [Reps. Gruenberg, Hudson, 3/27]

6. What oil spill contingency plans is Alyeska required to submit to the state under Federal law?

B. Other Civil or Administrative Action Allowed
(page 6)

7. What kinds of civil or administrative action could be taken against the defendants? Would the payments currently included in the civil settlement be allowed if the plea is accepted and the settlement is rejected? [Rep. Gruenberg, 3/27]

C. Sentencing Agreement
(pages 6-7)

D. No Other Sanctions

8. Do any federal or state "victims' rights" statutes apply? [Rep. Gruenberg, 3/27]

IV

Agreement of the Parties Regarding Restitutionary Payments
(paragraphs A-C; pages 7-8)

A. \$50 Million Payment to State

B. Administration by State; No Judicial or Admin. Review

9. What are some examples of what the restitutionary payments could be used for: oil spill response groups? a skimmer? timber buyouts in Kachemak Bay State Park? [Reps. Phillips, Hudson, Ulmer, 3/27]

10. Is the "no review" provision effective to bar the United States and third parties from challenging specific expenditures? [Rep. Ulmer, 3/27]

11. Does Alaska waive any challenge to the limitations on these payments by accepting them? [Rep. Gruenberg, 3/27]

12. Are there any limitations in Alaska or federal law restricting our use of these payments, or is it strictly as a result of the consent decree? [Rep. Ulmer, 3/19 p.14; Hudson, 3/27]

C. Payments are Compensatory, Not Punitive

V

General Provisions
(paragraphs A-C; page 9)

A. Guarantee by Exxon

B. Rejection of Plea Agreement

13. Are there any time limits, or other constraints, forcing the judge to act on the plea agreement before May 3? [Rep. Davidson, 3/27]

C. Waiver of Presentence Report

CONSENT DECREE

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so? [PF]

Attorney General Baily wrote to the Department of Justice on June 21, 1989, saying that because the maximum fine available under Alaska law against Exxon was only \$100,000, the State would not be pursuing criminal charges against the corporation. (Alaska law has subsequently been amended to provide for fines of up to twice the damage caused by the offense.)

In connection with settlement negotiations, Attorney General Cole wrote to Exxon on March 12, 1991, agreeing not to bring any criminal charges against Exxon or any of its employees. The letter reserves the right to seek criminal charges against Alyeska or Exxon Pipeline Company for any violation of state law "based on an allegation of false statements to any agency of the State" in connection with the preparation or submission of oil spill contingency plans and related documents.

5. Why are the natural resources damages of the state not separated from the natural resource damages of the federal government? [PF]

The AG testified [4/3] that there are substantial legal and factual issues with respect to who owns which resources, and the extent of the damage to each government. He stated these issues would result in years of litigation. He testified to the Senate [3/28] that the CWA encourages cooperation by the state and federal governments. (The AG does not appear to be saying that we could not legally have negotiated such a split.)

In response to a question, the AG stated [4/5] that he had not attempted to negotiate a division of the proceeds with the federal government, because he did not believe an agreement on dividing the money could have been reached.

Mr. Erickson's memo [4/5] supports the idea that sorting out the respective governments' claims to the damaged resources would be expensive, time consuming, and analytically difficult: "Most of the natural resource damages...arise from injuries to

biological resources to which the notion of ownership can be related only with difficulty...From an economic perspective, the notion of a joint trusteeship, whatever its deficiencies, must be measured against the expenditure of human talent and public funds that efforts by the governments to 'divide the baby' would entail."

7. To what extent is the recovery under the Consent Decree "under" the Clean Water Act? To what extent is the MOA limited by the CWA? [PF]

The AG testified [4/3, p.9] that the entire recovery in the Consent Decree is "under" the CWA, although a different form of recovery could have been made. He testified that it was preferable to settle "under" the CWA because it enabled the state and federal governments to put the recovery into a joint trust fund, without allocating their losses.

He testified to the Senate [3/28] that the state chose to settle solely under the CWA because it provides an "effective mechanism for the resolution of the plethora of issues surrounding the litigation [and] a method for the state and federal governments to proceed in a unified fashion."

Mr. Campbell testified [4/16] that a settlement "under" the CWA was the best approach, using the natural resource damage assessment regulations applicable to the CWA as a pattern.

Mr. Stewart testified [4/16] that the federal government was bound to the CWA as a source of authority to enter a joint trust with the state; Mr. Campbell added that the CWA settlement was needed in order to get funds into the trust without an appropriation.

Mr. Stewart testified to the Senate [4/17] that using the aegis of the CWA was the only way to get federal and state cooperation to the desired degree. He noted that for purposes of the federal government, the CWA clearly provides a means of avoiding the appropriation process. He questioned whether state legislation requiring an appropriation of funds would be constitutional under the federal Constitution.

Nothing in the Consent Decree states that the recovery from Exxon is limited by the CWA, and

nothing in the MOA states that the trust fund is subject to the CWA. The CD references the CWA in only two places: (1) on page 3, the parties state that only CWA trustees can recover damages under the CWA; and (2) in Paragraph 1, the parties assert that the court has jurisdiction under the CWA, "among other authorities". However, the amount recovered in the CD is specifically defined in Paragraph 6(d) of the CD as including to amounts not recoverable under the CWA. The state's lawsuit in state court, which is settled in the CD, did not even assert a claim under the CWA.

The preliminary clauses of the MOA note that the CWA establishes liability and that federal law and regulations promulgated under CERCLA and the CWA "provide a framework for and encourage state and federal trustees to cooperate with each other". Pages 2-3. They add that various state and federal agencies and trustees with jurisdiction over natural resources "have determined that the procedures set forth in [the MOA] will best enable them to fulfill their duties as trustees." Page 5. Except for a reference to the CWA, "among other authorities", as a source of jurisdiction, none of the operative provisions of the MOA make any reference whatsoever to either the CWA or CERCLA.

In view of the limited manner in which the CD and MOA reference the CWA, and since a number of its provisions are contrary to the federal regulations the normally govern CWA actions, it is unclear on what basis the federal government and the AG assert that the settlement agreement is "under" the CWA. Mr. Stewart acknowledged (4/16) that the agreement is "unclear" in this regard.

10. What is the present value of the amounts to be paid by Exxon? [PF]

The AG testified to the Senate [4/4] that he estimated the present value of the payments at \$713 million, using an 8% discount value.

Other sources include: Ak. Perm. Fund, \$689 million (6% inflation, 9% compound interest); Cong. Research Service, \$734-773 million (8.16% discount rate; cost net of taxes to Exxon of \$499-524 million), \$666-694 million (11.28% discount rate, net cost \$456-474 million), or \$611-631 million (less likely estimate, 14.4% discount rate, net cost \$421-434 million); and Leg. Research Agency, \$710-722 million ("real" discount rate of 3-4.5%).

DRAFT

Apart from uncertainty as to the appropriate discount rate, evaluation of the settlement is made problematic by the fact that it can be deducted from both state and federal taxes; the resulting loss in revenues reduces the value further to both governments. The estimated loss to state taxes, over the life of the agreement has been estimated at no more than \$5 million. The loss to the federal treasury, according to the Congressional Research Service, will be in the neighborhood of \$200 million, in constant dollars.

In evaluating how well the governments did in recovering this amount, it is also appropriate to consider the real cost to Exxon, since that is one way of gauging their willingness to pay. The net cost to Exxon, given the tax benefits, has been estimated by the CRS at \$421-524 million. Assuming that Exxon's internal rates of return are substantially greater than the discount rate, the likely real cost to Exxon is considerably lower.

14. Art. IX, Sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. choose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply? [PF; Rep. Barnes, 3/19]

The AG has provided a legal opinion on the constitutional issues. The thrust of the opinion is that because the funds never enter the state treasury, the constitutional restrictions do not apply.

Legislative counsel has issued a contrary opinion. The thrust of that opinion is that because the money is being exchanged for the extinguishment of a legal claim, the portion recovered for the state's claims is a state asset, whether or not it is put into the general fund, and that therefore both the "dedicated fund" issue and the "appropriation" issue are unresolved.

The AG has also testified [4/5, p.6-7] that because the recovery is "under" the CWA, it is equivalent to federal program receipts, and therefore exempt from the prohibition against dedicated funds. He also stated that it could be seen as dedicated under common law "public trust" principles. [4/5, p.10]

16. Can state agencies expend trust funds without legislative authorization? [Rep. Ulmer, 3/21, p. 10]

The AG testified to the Senate [3/28] that in his view no legislative appropriation of the settlement funds was needed.

He testified [4/5, p.17] that this raised "technically a very difficult legal question".

The AG has indicated he has not thought this problem through. Members of the House Finance Committee have indicated they know of no method by which state agencies can spend money that has not been appropriated to them out of the general fund.

17.1 Will the federal government utilize the appropriation process for Trust funds spent by federal agencies?

Mr. Stewart testified [4/16] that the federal Trustees had insisted that funds not flow through the appropriation process, despite pressure from OMB to have the money flow through that process.

In a conversation with staff, Mr. Stewart indicated he was unaware that funds expended by state agencies might have to be appropriated as federal program receipts under the Alaska Constitution. He stated he was opposed to such a process, because it would give the legislature a veto power over Trustee funding decisions.

Federal regulations applicable to recoveries under the CWA specifically authorize the expenditure of the funds recovered by the federal government without appropriation. 43 CFR 11.92(a)(1). Amounts recovered by state governments, under the same regulations, are to be either deposited in the state treasury, or in an account payable to a state agency. 43 CFR 11.92(a)(2).

17.2 Does anything in the CWA require that the appropriation process not be used?

Federal regulations require that sums recovered by the Federal trustees "shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." Funds recovered by State Trustees "shall either: (i) Be placed in a separate account in the State treasury; or (ii) Be placed...in an interest bearing account payable to the State agency acting as trustee." 43 CFR 11.92. This language does not appear to

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foreclose an appropriation process for the State funds.

21. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true? [PF; Rep. Hudson, 3/20, p.12]

The AG affirmed [4/5, p.17] that these funds are unrestricted.

The issue is governed by Article V, Sec. B of the MOA (pages 12-13): at the election of the "Government" (defined as the State acting through DF&G, DEC and the AG), up to \$72 million is "available...for reimbursement of allowed expenses". These amounts are to be paid "directly to the Governments", which means they will flow into the General Fund. At that point, insofar as the MOA is concerned, the money apparently will be available for use without restriction for any purpose. It does not appear they must in fact be appropriated for the reimbursement of expenses incurred, even though that is why they are being paid.

The Consent Decree states that these amounts "shall be applied...to reimburse...the State for [allowed expenses]. Par.10, pg.10. Arguably this language would limit the uses to which that money is put. However, the CD also states that the "monies paid...will be allocated..and used in accordance with the [MOA]"; thus unless the MOA restricts the use of these funds, they may spent as the State wishes.

23. Does the settlement provide for federal or state funding for continued damage assessment studies?

Yes, but only as part of the total settlement amount; there is no separate funding for damage assessment.

23.1 What are the estimated costs of continuing litigation expenses and damages assessment, which will be compensated out of the total recovery and will therefore not be available for restoration?

The settlement agreement includes payment for litigation expenses incurred or obligated through March 13, 1991, as well as federal and state response, damage assessment and cleanup costs

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through the 1990 field season. A total of \$138 million will be deducted for these unreimbursed expenses. Any additional litigation costs, and all damage assessment and cleanup costs beginning with the 1991 field season, will come out of the remainder of the settlement.

If the settlement is adopted, there will be minimal additional litigation expenses in the Exxon case, but there may be substantial costs associated with lawsuits brought by third parties. The cost of those lawsuits will be charged to the General Fund, however; settlement monies will not be available for the costs of defending against those claims.

The 1991 budget for damages assessment is approximately \$26,524,000. Mr. Erickson has estimated continuing damage assessment costs of \$35,000,000 in 1992-94.

The 1991 cost of cleanup has been estimated by Ernie Piper (personal communication with staff, 4/25) at approximately \$35 million (Mr. Piper said that Exxon had estimated the cost at \$20-50 million, and the federal government had estimated it at \$25-35 million). Mr. Piper added that he would suggest that \$10-15 million be set aside as a contingency fund for post-1991 cleanup expenses. He had previously estimated total future cleanup costs, in testimony to the House (4/8), at \$20-30 million.

The total amount to be deducted from the settlement funds to cover these non-restoration costs is thus approximately \$249,524,000, in nominal dollars, leaving a balance to go to the Trust Fund and be used for restoration of approximately \$650,476,000. Because the deductions will occur during the first five years of the agreement, the present value of the Trust Fund, that is, the amount actually available for restoration and acquisition of equivalent resources, is approximately \$400,000,000.

24. By "representing" to the court that money will be spent pursuant to the MOA, are the governments barred from changing the MOA without court approval? Do they in effect approve the MOA? [3/19, p. 6]

The AG testified [4/5] that this was his view. He declined to commit the administration to bringing any changes to the MOA back before the legislature, if any were negotiated between the two governments.

27. How was the \$900 million amount for compensation calculated?

The AG testified to the House [4/3] that the Governor had suggested the figure of \$1.2 billion based on his own personal assessment of the federal and State damages; he does not believe the Governor had input from the bureaucracy in reaching that figure, and that he doubts if the Governor intended to include the "reopener" amount in that figure. The AG stated that it was his own firm opinion, based on 40 years experience as a litigator, and mindful of his role as a trustee for the public resources, that the settlement amount is fair.

The AG told the Senate [4/4] that Exxon had rejected the initial demand of \$1.2 billion in cash, and that the Settlement of \$900 million was the result of hard bargaining after that. He added that the State had been internally discussing potential settlement amounts for months prior to Governor Hickle's initiative. He stated that he'd had calculated the present value of the settlement at \$713 million, using an 8% discount rate. He noted that it is impossible to come up with precise valuations for natural resource damages, for which there is no market. He described the methods used by economists to assess these values. He stated he was willing to discuss the strengths and weaknesses of the State's case more fully in an executive session. He testified that in his opinion the probability of a recovery of less than \$900 million was greater than the probability of a recovery in excess of \$900 million.

Mr. Erickson prepared a memorandum for the Committee addressing the evaluation of the settlement. [4/21] In it he notes that the governments have performed studies aimed at calculating the economic value of the damaged resources in terms of their "use" value (i.e., the value for recreationists, subsistence users, fishermen, etc.) as well as their "non-use" value. The primary focus of these studies has been the non-use values.

Two methods are used to measure non-use values: (1) direct measures, which calculates the value based on the value of the individual species affected; and (2) contingent valuation, which measures the willingness of consumers to pay money to keep the resources undamaged.

Direct measures, which are according to Mr. Erickson a fairly standard method, yield non-use values in

the range of several hundred million dollars. According to numerous newspaper reports, the contingent valuation studies, using a conservative methodology, have yielded a value of \$3-8 billion.

Mr. Erickson reports that a federal study has shown that federal natural resource damages cases have generally been settled for from 25-40% of the estimated damages. Applying this figure to the calculations in this case yields a settlement value of \$750 million to \$3.2 billion. Reimbursement of State and federal expenditures would be added to that amount.

33. To what extent is Exxon's current liability for cleanup limited by the settlement? Why are we reimbursing Exxon for future cleanup even if the settlement is rejected? [Rep. Davidson, 3/20, p.11] How much do we anticipate Exxon will be able to deduct under this provision?

The AG testified to the Senate [3/28] that the deduction was there "because there needed to be some way to start over if the [Consent Decree] fell apart." He testified to the House [4/12] that Exxon argued that since the Consent Decree obligates it to do the work, the corporation should be reimbursed if the settlement falls through.

Exxon would be liable for the cleanup costs under federal law regardless of the Consent Decree. However, the amount that it would have to pay would be subject to dispute -- as, in the past, Exxon has disputed its responsibility for a significant portion of the State and federal claims for cleanup and response.

Ernie Piper testified [4/8] that the total future cleanup costs would be \$20-30 million. He stated that because the cleanup would be publicly funded, there would be a special effort to justify costs, and to use local cleanup personnel when they are cheaper than Exxon's subcontractors.

Mr. Piper added [4/8] that the settlement simplifies cleanup, because it places Exxon under the direct control of the SOSC and the FOSC, whereas Exxon is currently itself in the decision making loop.

35. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue,

and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful? What has it gained in the consent decree to compensate for the loss of those claims? [PF]

The AG testified to the Senate [4/4] that the value of these claims did not exceed the \$50 million received under the Plea Agreement, and that, given the fact that this amount was coming to the state in another fashion, through the criminal plea agreement, he gave it up in the civil agreement. He stated these claims could still be pursued against Alyeska. He gave similar testimony to the House [4/11].

The Legislative Research Agency has estimated that the State lost \$24-39 million in oil and other taxes as a result of the spill.

35.1 What was the settlement value of the state common law claims against Exxon, such as claims for social costs and punitive damages, and how has the State been compensated for these losses? [Rep. Davidson, 4/3]

The value of the State's other claims has not been discussed in any public session of either committee. (Regarding claims for lost revenues, see Question 1# 35.)

From a review of the State's complaint, however, it appears that the only significant recovery to the State that could have been made that is not included in the Exxon settlement is for punitive damages. If punitive damages were awarded, the amount recovered could be several times the actual loss suffered. The Attorney General testified to the Senate (4/6) that it is not clear that such a claim would even get to the jury, and it is of course unknown whether a jury would award such damages if given the opportunity.

36. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska? [PF/State Claims]

Under the Consent Decree, the State has released all its claims for natural resource damages against Alyeska. The only other claims the State has the

are unsatisfied are claims for lost tax revenues and for increased social costs arising from the spill. These value of these claims is almost certainly less than \$100 million.

The AG testified to the Senate [3/28] that the "single remaining defendant is Alyeska", and the claims against Alyeska will be pursued with vigor. He stated that Alyeska was included in the settlement language simply to totally resolve Exxon's liability for natural resource damages, including its liability as an Alyeska owner. He described the claims remaining against Alyeska as common law claims based on misrepresentation "and things of that nature".

The AG testified to the Senate (3/28) that the State will pursue its fish business tax claim against Exxon, and that these claims were proceeding in normal fashion.

38. Do political subdivisions of the state retain their claims against Exxon under this settlement? [Rep. Kubina 3/19; Rep. Leman 3/21, p.2]

Yes. [AG, 4/12]

39. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims (e.g. is there any effect on confidentiality of scientific and economic data)? Does the release of the State's claims for damages to natural resources materially affect the legal claims of third parties who use those resources and suffered economic damages as a result of the injury to the resources?

The AG testified to the Senate [4/4] that nothing in the agreement prevents the State from assisting third party plaintiffs against Exxon after their suits against the State are resolved. (With respect to the confidentiality of economic and scientific data, see Question #47.)

Attorneys representing third party plaintiffs have identified six major concerns regarding the settlement, not all of which pertain to their ability to litigate against Exxon:

(a) Third party plaintiffs do not have the economic resources to battle Exxon on an equal footing.

(b) The settlement amount is inadequate to ensure that Exxon (or others) will not cause damage to the third parties in the future.

(c) The settlement amount may be inadequate to restore the resources damaged in the spill, and on which the third party plaintiffs depend.

(d) At any trial, Exxon will assert that the negligence of the state and federal governments in the conduct of containment and cleanup operations was responsible for much of the third party plaintiffs' damages; the third party plaintiffs must therefore sue the governments so that Exxon cannot "try the empty chair". This places the third party plaintiffs in an adversarial role with the governments that neither the governments nor the third parties desire.

(e) The third party plaintiffs not only need access to the underlying scientific and economic data (See #47), but they also need the assistance of the governments experts' in interpreting and analyzing this data. The cooperation of the governments in the third party litigation would be of great value.

(f) Exxon has indicated that it will argue that the reference to reserving the rights of third parties to sue for damages for injuries arising from a "present" property interest to mean that economic losses arising from future fish runs are not preserved. The AG and the Federal Trustees have asserted that Paragraph 32, which generally preserves all third party rights, precludes such an interpretation.

39.2 Could the State have insisted on the settlement of all third party claims before settling its own suit?

Attorney General Baily testified that it was the policy of the Cowper administration to attempt this, but there is no assurance that it could have been done, or that it could be in the future if this settlement is rejected or delayed.

Attorney General Cole stated [4/12] that he had not attempted to negotiate on behalf of third parties.

47. Can scientific and economic information acquired by the state in connection with the claims being released in this

case be kept confidential under state law once the claims are dismissed? [Rep. Navarre, 3/19]

LAA has provided an opinion on this subject. The opinion states that the "the attorney general is probably acting within his authority. The law, although, is not completely clear..." The opinion notes that to the extent the materials were produced in anticipation of litigation, and not in the ordinary course of business, it would be protected from discovery by litigants by Civil Rule 26(b). "AS 09.25.122 suggests that [non-litigants] would be entitled to inspect the data [notwithstanding the court rule].... But such an interpretation would effectively remove the work product protections for public litigants. I am inclined to think that a court would not support such a reading of the statutes."

Attorney Matt Jamin testified [4/16, p.48] that in his opinion "the basic core scientific data", including economic studies, would ultimately be discovered in the course of litigation, and that the key issue is the timing of disclosure. He stated that information obtained from experts for consultation, rather than for trial testimony, might not be discovered, however.

Mr. Stewart testified [4/16] that much of the information being sought would not be discoverable.

The AG testified to the Senate [4/4] that he would vigorously resist discovery of this information in third party litigation, because it could be harmful to the State. He has stressed that the information could be used by Exxon if the settlement is not approved, and after that by Alyeska, as well as third parties who are suing the state. [Senate, 4/10; 4/14; House, 4/16]

The AG also testified to the Senate [4/6] that he would give "due consideration" to a joint legislative resolution requesting the release of that information. He stated that he would not give such consideration to a letter of intent. He told the House he would give a resolution "weighty consideration." [4/12]

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

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court? Could it intervene in the state court to prevent a dismissal of claims? [PF]

The AG reaffirmed [4/3] that if the legislature does not approve the settlement, the Governor will withdraw. He provided a letter to that effect on April 25. He testified to the Senate [3/28] that if the legislature took no action, the settlement would be cancelled.

52. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

[PF/Overview; Rep. Barnes, 3/19, p.6]

The AG testified [4/5, p.17] that the CD and MOA are "irretrievable linked", in that approval of the CD activates the MOA.

54. Can the legislature approve the settlement conditionally, with stipulations? [Rep. Hudson, 3/19, p.12]

The AG testified [4/5, p.11] that he believed that Exxon would not accept any such stipulations. Specifically, he stated that he did not believe that Exxon would accept payment up front.

The AG testified to the Senate [4/6] that if so instructed by the Legislature, he would convey any to Exxon and the federal government any such requested modifications.

Mr. Campbell stated [4/16] he would resist changes to the MOA, because of the difficulty in getting the various federal agencies and the Congress to accept them.

55.1 What are the consequences to the State if we choose not to settle at this time?

Mark Broderson testified [4/8] that restoration work would probably not proceed at the rate it will under an agreement, because of concerns over reimbursement.

The AG had suggested [4/3] that restoration work would be delayed until a settlement is reached or the litigation is concluded.

The major concerns that have been expressed regarding a failure to settle at this time are:

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(1) Funding for ongoing litigation would be a continuing drain on the general fund.

(2) The cost of restoration is too high to be funded out of the general fund, and this work would be delayed.

On the other hand, Section 470 funds may be used to pay for the cost of litigation against Exxon, as well as for cleanup and restoration costs. The fund currently generates about \$28 million per year. With litigation costs estimated at \$12-15 million per year, Section 470 funding of up to \$16 million would be available for cleanup, damage assessment, and restoration.

answers1.amh 4/29/91

MEMORANDUM OF AGREEMENT

1. Can the legislature by statute designate trustees or a procedure for their appointment by the governor? [Rep. Donley, 3/19, p.6]

In the Consent Decree, the State and federal governments "represent that it is their legal position that only...state officials designated by the Governor..." can act as Trustees "to recover damages...under...the Clean Water Act." Translation: to the extent the State is recovering "under...the Clean Water Act", the Governor must designate the Trustees, because that is what the federal law requires. See 42 U.S.C. 9607(f)(2)(B); 33 U.S.C. 1321(f)(5).

However, it is far from clear that the State's recovery under the settlement is "under the Clean Water Act." Nothing in the Consent Decree or the MOA says that the sole source of recovery is the Clean Water Act, and in fact the State's lawsuit in superior court does not allege a Clean Water Act cause of action. [See CD Question #7]

Arguably, therefore, the State can select Trustees by whatever mechanism it wants, simply by asserting that the basis for its recovery is something other than the Clean Water Act.

Even if the State's recovery is under the Clean Water Act, there is nothing in federal law that prohibits the legislature from specifying the process to be followed in making the designations, or from nominating candidates for final designation by the Governor. There are serious Alaska constitutional barriers to such an approach, however. See *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).]

3. Could the state and federal governments agree on a formula or process to divide the litigation proceeds between them which would limit the trustees' discretion in funding projects? [Rep. Leman, 3/19, p.8]

The fact that both the State and federal Trustees will have a veto power on the Trust's expenditures suggests that a working relationship will arise in which each party gets control over 50% of the total available.

None of the witnesses before the Committee pointed to any legal barriers to a formula or other process for expressly dividing the recovery, but the practical impediments would be substantial.

12. What alternative mechanisms for funding and distributing the litigation proceeds are there (i.e., does the CWA impose too many restrictions on use, and is a co-trusteeship the best approach)? [Rep. Hudson, 3/19, p.9; Rep. Phillips, 3/21, p.6]

From a review of the Consent Decree, the applicable statutes and regulations, and the practice in other cases, it does not appear that the parties in this case were legally restricted to the method they have selected.

It is an open question whether the MOA, which governs the expenditure of money recovered in the CD, is in any way restricted by the CWA. In fact, the MOA is apparently in some respects contrary to the CWA.

Alternative mechanisms have been used in other similar cases recently settled in New York and California. In the San Francisco Bay case, the MOA establishes a Committee composed of the state and federal trustees, plus representatives of regional park and conservation entities, established under state law. The Committee, not the trustees, has "final authority to disburse money contained in the Trustee Fund...and to make all necessary decisions for the management and administration of the projects for which the money has been disbursed." The Committee is authorized to carry out its work through either public or private groups as subcontractors. The MOA establishes Natural Resource Objectives that are to guide the Committee's decisions, including the specific designation of several projects.

In the Arthur Kill (New York) case, the MOA also establishes a Committee with "the authority to make all decisions relating to the use of any sums recovered pursuant to the Consent Order." The Committee includes representatives of the state and federal trustees, plus representatives of the local governments impacted by the spill in that case. The Arthur Kill MOA also describes the Natural Resource Objectives that apply, and mentions specific projects to be carried out.

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13. What mechanisms does the agreement provide for input by the legislature, local governments, Native groups, injured third parties, and the general public in the formulation of policies and governing the co-trusteeship, and in their funding decisions? [Rep. Hudson, 3/19, p.10]

Paragraph IVA(4) of the MOA requires the trustees to provide for "meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group to advise the Trustees" regarding restoration. The details of public participation are up to the trustees, under the MOA.

The AG testified to the Senate [4/17] that there is an "absolute commitment" on the part of both the federal and state trustees to form an advisory group; Mr. Campbell and Mr. Stewart confirmed this. The AG testified [4/13] that he would have no objection to altering the Agreement to making such an advisory council mandatory, and to making meetings of the trustees subject to the Alaska Open Meetings Act [4/12], although he could not speak for the federal trustees. He stated [4/12] that public input would be obtained before spending decisions were reached.

There is no indication that meetings of the Trustee Management Team, or of the Trustee Council, have been open to the public, or announced pursuant to Alaska law, up to this time.

14.1 What alternatives arrangements for public participation could be included in the MOA?

Among the proposals that have been suggested are:
(1) public membership on the group authorized to make funding decisions (see MOA Question #12);
(2) application of the Alaska Open Meetings Act to trustee and subsidiary body meetings; (3)
legislative appropriation of funds.

19. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?) [PF]

Mr. Heinz testified [4/10] that in his opinion, a "road to Cordova" would be outside the scope of the allowable expenditures. Mr. Rosier indicated [4/14] that in his view it would take considerable work to link a road to Cordova with "restoration".

The AG testified [4/12] that as yet there has been no discussion by the trustees of timber buyouts, although habitat acquisition along streams had been discussed.

Mr. Stewart stated to the Senate [4/17] that the CWA language on restoration is "quite broad". A fish hatchery or a research facility could be funded under the CWA language, he said.

"Restoration" or "rehabilitation" are defined in 43 CFR 11.14(11) as "actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it preciously provided."

"Replacement" or "acquisition of the equivalent" is defined in 43 CFR 11.14(ii) as "the substitution for an injured resource with a resource that provides the same or substantially similar services."

19.1 The CWA does not provide for spending money to "enhance" injured resources. What does this term mean? How does the Trustees' authority, given this term, differ from what they could do under the CWA?

The term "enhancement", which is an authorized use of trust funds under the Consent Decree and the MOA, does not appear in the CWA and is undefined. Mr. Stewart testified to the Senate [4/17] that in his view "enhancement" was allowed under the CWA. He did not elaborate on whether it adds anything to the existing CWA language.

19.2 What are some specific examples of how the trust funds might be spent?

Comm'r. Heinz testified [4/10] that many ideas had been advanced regarding how trust funds might be spent, but no specific decisions have been reached. He indicated that in his view the Trustees would reach the limit of what could be spent on biological restoration projects relatively soon. In that case, he suggested, it might be advisable to widen the scope of the allowable expenditures, if that was what local people wanted. He stated that he would not at some point be adverse to dividing up the remaining Trust funds with the federal government. He stated that it was possible that not all the money could be responsibly be spent within the CWA limitations.

Some specific ideas that have been suggested, he said, include: where a natural beach biological habitat has been irretrievably destroyed, a dock, picnic tables, or cabin for recreational use might be appropriate; a Seward Marine Mammal Science Study Center, which would be at once a scientific, educational, and tourism resource; hatcheries for fish or shellfish; purchase of timber rights. He also mentioned the idea of a Prince William Sound Conservation Area, to enhance (1) recreational uses; (2) traditional uses, such as subsistence and fishing; and (3) education and science.

Mr. Rosier testified [4/14] that he "would have trouble" with "huge set asides". He stated that he would like to see money spent as much as possible on actual restoration, rather than just on studies.

24. When does the 5 year repayment period for reimbursement of prior state expenses begin? Is there a payment schedule, and will interest accumulate on the unpaid balance? [PF, 3/19, p.5]

The AG testified [4/17] that the trustees have informally agreed to direct Exxon to make these payments over the first five years of the trust. He stated that the repayment of the state's share would be in the area of \$20-\$20-\$27-\$2.5-\$2.5 million. He noted that the federal agencies had not determined whether they would ask for reimbursement.

Under the terms of the Consent Decree, there is no interest on these payments.

26. Is there any limitation on the use of funds for projects outside the state? Could the money be used to establish parks, institutes, etc. in other states? [PF/Overview]

The AG testified to the Senate [4/17] that under no circumstances would the state trustees consider spending any of the money for projects outside Alaska.

43. Is there any mechanism by which the authority of the governments to enter into these agreements could be determined in advance? [Rep. Phillips, 3/27]

Alaska Appellate Rule 407 provides that a federal district court judge may certify to the Alaska Supreme Court questions of state law "which may be

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determinative of the cause" pending in the federal court. This procedure might be available to test the constitutionality of the Consent Decree and MOA. However, the Alaska Supreme Court is not obligated to respond to such questions.

- Timing - extension, of time -
- NO CHANGES AUTH'D -
- SCIENTIFIC DATA -
- Hse & Senate

3 party Agreement
 complicated by the
 turf issues of the
 trustee agencies -

don't disapprove for emotional Reasons
 nor political reasons -

think about the clean up of the environment -
 weakened their authority now - not
 in 10 years. -

Cole = reluctant
 litigant

IF we dep 57X!

* IF we are really interested in
 restoring the environment - think -

Questions for Doug Baily b/4 House Committee

1. did your settlement efforts include 3d party plaintiffs?
2. did you ever address the question of the need for legislative appropriation as part of the first settlement?
3. how did you contemplate release of the scientific evidence if you settled?
4. did your settlement contemplate using just CERCLA and CWA or did you contemplate settling in part under various state statutes which did not require a joint state-federal trust?
5. do you have concerns about a settlement exclusively under the CWA?
6. several persons have testified that the state and federal government have a conflict in settling this case because they are alleged to have been responsible in part for the spill damage? Do you agree, and if so, how should that impact what we are doing here?
7. several persons have testified that the effect of this settlement is to put the state on the same side as Exxon, against Alaska citizen-litigants? Do you agree, and if so, can you explain why to us?
8. several persons have testified that the real litigation costs to the state will not be diminished to the state through this settlement? Do you agree, and if so, explain why?
9. Do you see increased liability exposure to the state through this settlement? Why?
10. Is it fair to characterize this settlement as putting a very limited amount of money into essentially federal control, while exposing the state to a position much worse than it was in before?
11. Attorney General Cole has told us there is no relation between this settlement and ANWR? Do you think there really is, and if so, why?
12. Should this settlement be accepted by us as trustees for the people of the State of Alaska?

EXXON VALDEZ OIL SPILL SETTLEMENT CLAIM
IDENTIFIED ISSUES

1. Is there a formal mechanism or should the Legislature intervene so the court cannot approve the settlement without Legislature?
2. Should the Federal government be notified of the House Special Committee's meetings? Which is the lead agency? Should Attorney General's Office also be notified?
3. Federal government testimony must be obtained. Attorney General should attend.
4. What are bankruptcy implications? What are the net costs to the state, in terms of taxes?
5. What is the present value of the settlement monies?
6. What are the implications to settling with Alyeska Pipeline Service?
7. Why isn't the rest of the settlement "restitution as part of the fine?" Is restitution, as part of the fine, deductible?
8. Why not enforced settlement by state superior court?
9. Is this issue a "lock-up" of state lands?
10. Can we disapprove one of the two agreements?
11. What if trustees don't agree? Will that spawn an increase of litigation?
12. Is district bound to grant 45 days waiting period? Should Legislature intervene to protect interest?
13. Why is there no guilty plea to felony charges? Is misdemeanor and felony punishable?
14. Why not charge Exxon to state law? When is statute of limitation of state law? Are we precluded or prohibited from pursuing state law?
15. Should we publish statute of limitation for third parties?
16. Estoppel and subpoena Attorney General
17. How will third party lawsuit against State be funded? How will costs of defense be paid in the third party suits

18. Constitution: power of appropriation of state revenues
19. Confidentiality of scientific and economic data. Is it a conflict of state law?
20. How will lawsuits against the state be funded (should the state lose its case)? How much to defend the state against these claims?
21. Effect on affected communities
22. Value of settlement
23. Are there other mechanisms that can accept the settlement?
24. Are these state assets?
25. What are other realistic options? Analysis of options.
26. Legislature's power to appoint trustees. Can the trustees act completely independently without state or federal approval?
27. Can Legislature agree to agreement with stipulations?
28. How is liability exclusion related to state law?
29. How much has state already spent in litigation costs?
30. Timeline required by court and this committee
31. How to identify state and federal monies?

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MEMORANDUM

March 20, 1991

SUBJECT: Telephone Conversation with Attorney General Cole re Exxon Valdez Settlement; March 20, 1991

TO: Representative Max Gruenberg

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

On March 20, 1991 I talked on the telephone to Attorney General Cole, who was very cordial and cooperative. I asked him three questions and received the following answers.

1. Question: Can the "up to \$72 million" to be given to the state for reimbursement of past expenses be appropriated for any purpose once it is deposited in the state treasury?

Answer: Mr. Cole believed that it could. He also stated that "up to \$72 million" really meant "\$72 million".

2. Question: If the six trustees decide to spend money from the trust fund for work to be done by state employees, will that money flow into the state treasury (with restrictions on its use set by the trustees) and be subject to appropriation for the specified purposes?

Answer: Mr. Cole said that this issue had not been considered in the negotiations. He said he suspects that the money would not need to be appropriated, but would be like a gift to the affected agency. I pointed out that if these were state employees, they would expect to be paid by the state. I think he could see my point and we left this as an unresolved question that would need more thought.

3. Question: I asked him generally about the immunity of Exxon that appears at the end of paragraph 11(a) in the middle of page 12 of the consent decree.

Representative Max Gruenberg
March 20, 1991
Page 2

Answer: He stated that this was intended to immunize Exxon from liability for undertaking the cleanup, but not for its negligence in performing the cleanup.

PLF:pl
91-195.plm

cc: Charles Cole, Attorney General
Senator Dick Eliason

SETTLEMENT
VALUE

EXXON VALDEZ OIL SPILL SETTLEMENT

DOCUMENT/CASE	LEGAL BASIS	TYPES OF DAMAGES	AMOUNT PAID	TO WHOM PAID	RESTRICTIONS ON USE	WHO DECIDES HOW USED
U.S. and Alaska v. Exxon (Federal Court Alaska) Consent Decree	Federal Clean Water Act (CWA) 33 USC 1321(f)	Past and future cleanups, response and assessment (state and federal) Damage to state and federal natural resources	\$900 million less Exxon's cleanup cost from 1/1/91 to final approval of consent decree This is <u>joint</u> recovery for U.S. and Alaska	Federal and state trustees jointly AS Directed by STATE + FEDERAL Attorney General	CWA requires use for restoring, rehabili- tating or acquiring equivalent of damaged natural resources	Trustees in accordance with MOA
U.S. v. Alaska (Federal Court Alaska) Memorandum of Agreement (MOA)	CWA regulations 43 CFR 11.92 and 11.93 40 CFR 300.600- 300.615	1) State cleanup, response and litigation costs through 12/31/90 2) Federal cleanup, response costs through 12/31/90 3) Federal and state cleanup costs after 12/31/90 4) Restoration, rehabilitation, acquisition	1) Up to \$72 million 2) Up to \$62 million 3) No limit 4) Remainder of settle- ment	1) State government 2) Federal government 3) State or federal government 4) Trustees: 3 state 3 federal	1) None 2) None 3) None 4) Restoration, rehabilitation, acquisition of natural resources	1) State Legislature 2) Federal Government 3) State Legislature and Federal Government 4) Unanimous agreement of trustees Failing that, federal judge

DOCUMENT/CASE	LEGAL BASIS	TYPES OF DAMAGES	AMOUNT PAID	TO WHOM PAID	RESTRICTIONS ON USE	WHO DECIDES HOW USED
Alaska v. Exxon (State Superior Court) 89-06852	State law (Statutory and Common Law)	Cleanup, response, assessment, damage to natural resources, lost state revenue (taxes), litigation costs, prejudgment interest	? (No settlement proposal)	To state government	None	State Legislature
U.S. v. Exxon (Federal Court Alaska) Criminal Case	Federal law	1) Fine 2) Restitution	1) \$50 million 2) \$50 million	1) U.S. Government 2) State Government	1) None 2) Only for restoration projects related to spill	1) Federal Government 2) State Legislature

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Memorandum

5 April 1991

To: Max Gruenberg

From: Gregg Erickson *Gregg Erickson*

Subject: Economic Issues in Proposed Exxon Settlement

During the Special Committee's meeting on March 27, you requested that I work with your staff to follow-up on several issues. Some initial comments are given below. An additional memorandum addressing the more general issue of valuing natural resources injuries is in preparation.

Natural Resources Damages

What is meant by "natural resources damages"?

If Mr. A. smashes Mr. B's car, justice requires that Mr. A repair the car to its condition before the crash, or provide an equivalent replacement vehicle, or sufficient money to make Mr B indifferent to the injury inflicted on his car. The money that Mr. B gets is his "damages," not the injury to his car.

Natural resource damages are, like the money paid to Mr. B, "compensatory and remedial" (see the definition on p. 5 of the consent decree), but from an economist's standpoint they differ from ordinary damages in two ways: (1) the injured property must in some sense be held in common ownership; and (2) the injury must be so broadly inflicted that private parties have an insufficient economic incentive to recover all the damages.

The injured resource need not be a part of nature's endowment; for example, injury to cultured fish in an artificial lake would almost certainly give rise to natural resources damages, provided the lake and fish were public resources. Commercial fishermen who lose income because of an oil spill are usually not thought to have a claim to natural resources

Memorandum
Rep. Max Gruenberg
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damages, as long as they have sufficient economic incentive to pursue private litigation.

What are natural resources services?

Natural resource services are a flow, distinct from the natural resources themselves, which are the stock of assets that provide the flow. If Mr. A destroys Mr. B's House, Mr A is not only liable for replacing the house (the stock), but also liable for providing Mr. B a place to live (maintaining the flow of housing services) while the new house is being built. The robins that arrive in Juneau each April are a valuable natural resource stock, providing insect control, bird-song, pleasure to bird-watchers, food to certain predators, and other valuable natural resources services .

Do natural resources damages include economic losses as from lost tax revenue? If not, is the state then giving up these claims?

It is unlikely that lost tax revenue would be considered natural resources damages.

Excepting the municipal portion of the fish taxes, the settlement explicitly extinguishes the state's tax-loss claims. There is no provision in the consent decree for making good the loss to the general fund. This contrasts to the cleanup and damage assessment claims, for which general fund reimbursement is explicitly provided. The state's negotiators may have decided that the tax loss claims had little merit, or that reimbursement was bargained away for things they judged to be of greater importance. The restitution to be paid under the criminal plea agreement may have figured in the negotiator's thinking. The attorney general denies any role in that agreement, however, and in any event, the restitution monies may only be appropriated for specific purposes, and thus do not directly compensate for the unrestricted revenue the lost taxes would have provided.

Memorandum
Rep. Max Gruenberg
5 April 1991

Why are the state's natural resources damages being treated as if they are inseparable from those of the federal government?

In principle, "ownership" can be determined for tidelands, submerged lands and a few other resources injured by the oil spill. Most of the natural resources damages, however, arise from injuries to biological resources to which the notion of ownership can be related only with difficulty. Who owns the sea otter, or the salt water she swims in? Who owns the clams she eats or the plankton that feed the clam? And if the sea otter dies because the clams die because the plankton die because of the oil, how is the injury and damages to be divided among the various "owners"? From an economic perspective, the notion of a joint trusteeship, whatever its deficiencies, must be measured against the expenditure of human talent and public funds that efforts by the governments to "divide the baby" would entail.

What limits are there to the "acquisition of equivalent resources"?

The federal Clean Water Act defines "restoration" as including "replacement and acquisition of equivalent resources." The question of how far one can stretch the notion of equivalent resources has been the object of considerable legal and bureaucratic discussion within the trustee agencies and among them and their legal advisers. Good economic arguments have been advanced to support the "equivalence" of a wide range of alternative resource acquisitions. For example, boat launching facilities near Talkeetna might be an economically and cost effective way to compensate sport fishermen for lost opportunities in Prince William Sound. "Equivalent resources" is an elastic concept, but restoration planners were advised that the further they chose to stretch it, the greater the risk of doing something that would be ruled non-reimbursable. Absent a compelling policy reason to push the limits, and anticipating vigorous challenges from Exxon, the attorneys counseled caution.

The Dept. of Law has addressed restoration questions in a number of contexts, including a 1990 memorandum responding to concerns among staff at the Department of Natural Resources that the purchase of upland habitat scheduled for logging might be going beyond the definition. The committee may wish to request a copy of this and other memoranda addressing the definitions of restoration in federal law.

Restitution

On what sorts of things might the state properly spend the \$50 million that may come to the state as restitution under the criminal plea agreement?

The plea agreement provides that within 30 days of the agreement's acceptance Exxon will pay the state \$50 million in "remedial and compensatory payments...to be used by the State of Alaska exclusively for restoration projects related to the EXXON VALDEZ oil spill." Restoration includes "restoration, replacement *and enhancement of affected resources*, acquisition of equivalent resources and services, and long-term environmental monitoring and *research programs directed at the prevention, containment, cleanup and amelioration of oil spills.*" (emphasis added)

In contrast to the rest of the definition, the italicized words are not found in federal statutes. The statutory language probably allows for a wide range of alternative resource acquisitions and restoration strategies. The addition of "enhancement" and "research programs directed at...oil spills" further widens the range of options available for spending the restitution money. The committee may wish to inquire concerning the origins of this new language.

Re-Opener Clause

The proposed consent decree allows the governments to collect up to \$100 million from Exxon after the year 2002 for additional restoration projects, but only if the governments can prove that "the injury [requiring restoration] could not reasonably have been known nor ... anticipated by any Trustee from any information in the possession of or reasonably

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5 April 1991

available to any Trustee on the Effective Date." Is there any basis for determining the likelihood of this condition being met?

Speaking from the damage assessment perspective, it is a difficult though probably not impossible standard to meet.

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April 21, 1991

MEMORANDUM ON EXXON VALUATION ISSUES

This memorandum addresses several economic issues in consideration of the proposed settlement of government claims from the Exxon Valdez oil spill. These issues include the valuation of the settlement, the valuation of the natural resources damage, some comparisons of this settlement with other natural resource damage cases, and related matters.

VALUATION OF THIS SETTLEMENT

Various sources have estimated of value of the proposed settlement at amounts ranging from a low of \$421 million (under one of six scenarios used by the Congressional Research Service, Library of Congress) to a high of \$757 million (memorandum from Jim Kelly, research and liaison officer for the Permanent Fund Corp., to staff for Rep. Barnes). The majority of the estimates cluster in the \$500-600 million range. Several uncertainties account for the range.

- Inflation will erode the real value of the large bulk of the settlement that will be received in the future, but no one can know future inflation rates with certainty.
- A similar discount is usually appropriate to reflect the real earnings that could be collected if the funds were available to use or invest now, instead of in the future. The real earnings rate varies independently of inflation.
- The dates on which payments will be made under the settlement are not in all cases certain, i.e., the date for payment of the \$72 million reimbursement of state out-of-pocket costs.
- Some payments result from calculations involving amounts that are not yet known, i.e., Exxon's clean-up costs between January 1, 1991 to the date of final approval.
- An unknown portion of the settlement covers a part of future state clean-up costs that have a high probability of being recoverable from Exxon without litigation.

MEMORANDUM ON EXXON VALUATION ISSUES, page 2

- Tax effects will lower the cost of the settlement to Exxon and reduce its value to the governments by a significant but unknown amount. Whether to include the tax effects is itself a judgement.
- The final installment payment is contingent on unknown future events.
- Additional but unknown liabilities for legal expenses and possible damages may arise as a result of entering the settlement, a factor not accounted for in any of the estimates.

There is no single correct way to deal with these uncertainties. Most economists familiar with the settlement seem to be comfortable in casual calculation and discussion with rounding its present cash value to a half-billion dollars.

NON-USE VALUES

Although the governments have attempted to keep confidential their economic valuations of the Exxon damage, the major results of those studies have been widely discussed in economic circles and with the press. Some of the economic studies attempted to evaluate losses of use values to recreationists, sports fishermen, hunters, subsistence users, and losses associated with commercial fishing. The major thrust of the economic studies, however, and the major part of the several million dollars spent by the governments on economic valuations has been devoted to determining non-use values.

Direct Measures of Non-use Values

Non-use values reflect the worth people give to things like eagles, sea otters, and pristine ecosystems that individuals don't directly use, and which are rarely bought and sold at market prices. These values may reflect a desire to preserve options for future recreational use (option value), to preserve options for future generations (bequest value), or simply because the very existence of the resource (existence value) is something an individual is willing to pay to preserve.

The concept of non-use values is widely accepted in economics. Some methods of measuring the values of non-market goods such as eagles sea otters are also well established. If people are willing to pay \$50,000 to preserve the life of an injured sea otter, as they apparently were in the case of the rescue program after the Exxon spill, it is inferred that the value of the otter to people must be at least that amount. Thus, one approach to determining the values of Exxon oil spill losses calculates known, inferred, and projected losses and multiplies those numbers by values for individual animals. In addition to looking at rescue efforts, values can be imputed from information such as the costs zoos incur to acquire animals. For example, zoos are

estimated to be paying \$200-500 per bird for murre. The costs of transplant programs, and spending on management and protection can also be used. These relatively accepted approaches to non-use valuation have received little publicity, but studies employing the techniques, together with the emerging picture of the biological injury, reliably support claims of several hundreds of millions of dollars. Mortality to sea otters, murre, other sea birds, eagles, whales, and seals would likely account for the bulk of these values.

Contingent Valuation Measures

The biggest part of the governments' economic effort on the Exxon case has been directed toward determining non-use values using a survey technique called contingent valuation (CV). Respondents are asked how much they would pay to preserve a natural resource, assuming such a transaction were possible; the hypothetical transaction is thus *contingent* on the situation posed by the questioner. The technique is controversial within the economic profession, but has won acceptance in various applications. Although the technique has never been tested directly in a trial, it was approved in theory by a 1989 U.S. Court of Appeals decision in the Ohio case, a proceeding involving challenges to natural resource valuation regulations issued by the Dept. of the Interior. The breadth of that decision was expanded later that same year in the related Colorado case.

Non-use values are not limited to those who live in proximity to the resource; the governments' Exxon contingent valuation surveys were designed to determine the values lost by the entire population of the U.S. The state's national survey was conducted early this year, but it was preceded by extensive focus group studies used to evaluate the proposed questionnaire, and pilot studies to verify survey validity. The federal work had not reached the survey stage when it was suspended.

The state's survey essentially asked the 1000 or more respondents questions to elicit the amount they would be willing to pay in higher taxes and gasoline costs to prevent another accident like the Exxon oil spill. The total amount all U.S. residents would pay was estimate by multiplying the average among the respondents by an figure representing the entire population.

The state's approach to its CV survey has been conservative. For example, respondents were asked questions to elicit the amount they would pay this year to protect against damage over the next ten years. A more accurate (and likely higher) value would have been returned had the questions been designed to elicit the value that the respondents would have been willing to pay if they could have spread the payments over the entire ten year period.

MEMORANDUM ON EXXON VALUATION ISSUES, page 4

Economists working on the federal economic studies criticized the state's approach for being too conservative. Concern was expressed that the state's economic consultants had been pressured on this point. The attorneys, it was suggested, were stunned by the real values of the damage being returned by the focus groups and pilot surveys, and were fearful that these "too large" values would be more vulnerable to methodological challenge in court. One result of this conservative approach was that the wording of the survey questions provided little or no information to respondents on the issue of long-term injury to the environment. This silence may have left the survey vulnerable to an Exxon counter strategy using a major advertising campaign to influence respondent perceptions of the severity of the natural resources damage. One of the major reasons for keeping the CV survey dates secret was to make it difficult for Exxon to employ this strategy. Nevertheless, in October 1990, the company launched a multi-million dollar television campaign designed to reach half of U.S. households in that month with video pictures of a "now almost recovered" Prince William Sound. An extensive print campaign followed.

The state's economists do not believe the Exxon strategy was successful. Comparing data from pilot surveys conducted before October with the results of the final survey suggest that the Exxon strategy had little effect on the final survey values. In any event, the state's C.V. studies nevertheless yielded significant values for the damage done by the spill to Alaska's natural resources. The CV results have been variously reported as \$2.5 billion to \$5 billion (*N.Y. Times*, March 13, 1991), \$3 billion (*Washington Post*, March 20), \$3 to \$5 billion (Tom Campbell, general counsel of the National Oceanic and Atmospheric Administration in March testimony to Congress), and \$3 billion to \$8 billion (*Anchorage Daily News*, March 31). Economists working on the studies have independently confirmed the \$3 to \$8 billion range, and suggest that because of the state's conservative approach, the actual value is likely to be in the higher end of that range.

Evaluating the Economic Studies

The academic economists and other experts who served on the two governments' litigation teams are largely, perhaps unanimously, opposed to the settlement. Experts, of course are not the final arbiters of these issues. Attorneys usually make the decisions that finally set the values in these cases. Dr. Norman Meade, a U.S. government economist who has studied the historical data, found that natural resource damage issues have generally been settled by U.S. attorneys for 25 to 40 percent of the present values of the economic damage estimated by expert economists. Applying those percentages to the values reported above suggests that the present value of the Exxon natural resources damage settlement should be between \$750

MEMORANDUM ON EXXON VALUATION ISSUES, page 5

million (25 percent of \$3 billion) and \$3.2 billion (40 percent of \$8 billion). Reimbursements of government expenses, and other damage claims would have to be added to these amounts.

RECOVERIES IN OTHER CASES

Another approach to evaluating this settlement is to compare it directly to the values recovered in other oil spill cases. In terms of present value of the recovery per gallon of spilled oil, this approach tends to confirm the relative severity of the damages and penalties assessed against Exxon in the proposed settlement. On the other hand all of the spills described below differ in many respects from the Exxon Alaska spill, and none extended over as large a geographic area. The listing below is selective, but typical of recent oil spill settlements.

Shell Oil San Francisco Bay Spill

In 1988, the Shell Oil Co. spilled 400,000 gallons of crude oil from its Martinez refinery into San Francisco Bay. In December 1989, the federal and California governments announced the settlement of all state, local, and federal claims arising out of the spill for \$19.75 million, or just under \$50 per gallon. Payments were not extended. At \$50 per gallon, the comparable recovery for the 11 million gallons spilled in the Exxon case would be a present value of \$550 million, well within the range estimated to have been achieved under the Exxon settlement.

The Shell spill affected waters that are among the most polluted on the Pacific Coast. It could be argued that the relatively undamaged nature of the environment affected by the Exxon spill makes it more valuable. On the other hand, the Shell spill affected an area that humans use far more intensively and directly than the Alaska environments hit by the Exxon spill, factors that could increase the likely damages in the more populous area.

Amoco Cadiz Spill

The tanker Amoco Cadiz struck the French Atlantic coast and eventually broke up, spilling an estimated 66 million gallons. The case is still on appeal, but it seems unlikely that the plaintiffs will receive much more than the equivalent of \$61 million, or 92¢ per gallon. While the trial was in the United States, it was conducted under French recovery theories, and did not include any natural resources damages.

U.S. laws and attitudes have evolved considerably since 1978. Most would argue that the precedent is not controlling. Nevertheless, the

MEMORANDUM ON EXXON VALUATION ISSUES, page 6

fact that a major oil company could be assessed such a small liability for such a large oil spill on the coast of a Western democracy is a fact that cannot be wholly dismissed in considering the vicissitudes of potential litigation.

Exxon Arthur Kill Spill

In 1990, an underwater pipeline rupture in Arthur Kill, a waterway between New York City and New Jersey, resulted in a 567,000 gallon spill of heating oil. State, federal and local government claims arising out of the spill were recently settled for \$15 million, or \$26 per gallon. At that rate the Exxon spill in Alaska would be worth only \$290 million. Comparability with Exxon's Alaska spill is clouded by the already polluted nature of the Kill, that the New York/New Jersey waterway was not heavily used or appropriate for recreation, the relatively high percentage of the oil recovered (26 percent), and the difference in the kind of oil spilled.

Glacier Bay Cook Inlet Spill

The 1987 spill from the tanker Glacier Bay into Cook Inlet resulted in a recent damage recovery by the state of \$700,000. The volume spilled was never accurately determined; based on estimates, the recovery amounted to \$14 to \$28 per gallon.

Arco Anchorage Port Angeles Spill

This was a spill of 240,000 gallons of North Slope crude oil from the Arco tanker *Anchorage* in 1985. The total state recovery was \$348,000, or \$1.45 per gallon. A relatively high percentage of the spilled oil was recovered, and relatively little biological damage resulted.

ORGANIZATION OF THE TRUSTEESHIP

Concern has been expressed regarding the organizational structure of the trusteeship proposed under the settlement. The negotiators could have chosen other models for trust organization that might have provided the public with greater confidence that the recovered funds will be put to good use. In several recent environmental pollution cases funds recovered as damages have been dedicated much more strictly and directly to environmental purposes.

- In a 1981 settlement of a federal pollution case against the Occidental Chemical Company, the defendants provided a \$1.5 million contribution to California Universities for environmental research.

MEMORANDUM ON EXXON VALUATION ISSUES, page 7

- In 1988, as part of a settlement of a case against General Electric for pollution of a Massachusetts river, the company paid the Fund for New England, a private non-profit philanthropic organization, \$100,000 to undertake projects to enhance river water quality.
- In the largest environmental criminal case up to that date, the Allied Chemical Company agreed in 1977 to put \$8 million into a Virginia Environmental Endowment, an independent grantmaking foundation whose purpose is to improve the environment in Virginia.
- In 1987, the endowment established in the Allied case received an additional \$1 million in settlement of claims against Bethlehem Steel Corp. for pollution of Chesapeake Bay, also under a federal consent decree.

ADEQUACY OF EXXON'S PUNISHMENT

The less tangible effects of the civil and criminal settlements are legitimate matters of legislative interest. Even if the civil settlement was considered the best outcome likely, it might still be rejected on the grounds that accepting it would send the wrong message to future negotiators, or would set an undesirable precedent. Certain economic factors may bear on this judgement, one of which relates to the severity of the punishment.

Exxon officers have stated that the settlement will have no significant future effect on the company's earnings. This is in part because it is largely covered by already established reserves. Had the present cost of the settlement been absorbed last year it would have lowered the corporation's 1990 profits of \$5 billion by about 10-12 percent.

In the Justice Department's 1987 Browning Ferris environmental pollution case the consent decree included a provision that barred the defendant from claiming deductibility for federal tax purposes. Had this provision been included in the settlement it would have likely increased the share of 1990 earnings taken by about three percentage points.

Total expenditures by the company as a result of the spill are likely to be about \$3 billion, all told. An estimated \$450 million of this was covered by insurance, and an estimated \$850 million was offset by tax savings, leaving a net cost to the company of about \$1.7 billion. This figure is about one-third of Exxon's 1990 net earnings, and about 7 percent of Exxon's value to its stockholders.

ABILITY TO CARRY THE CASE FORWARD

The Committee has taken testimony bearing on the state's ability to go forward with this case should the proposed settlement be rejected, including testimony on the extent to which the federal government would assist in pursuing the two government's joint civil claims. The likely future costs of litigation are a factor to be considered. Further work on the natural resources damage assessment, including economic studies would likely require several tens of millions of dollars over the next several years.

Alaska State Legislature

Legislative Research Agency



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March 20, 1991

MEMORANDUM

TO: Representative Cliff Davidson
FROM: Tom Chester *TC*
Legislative Analyst
RE: Present Value of Proposed Exxon Settlement

You asked for a calculation of the present value of the proposed Exxon oil spill settlement.

The present value of a series of future payments depends upon the inflation rate and the discount rate used in the calculation. We have used two sets of assumptions in the calculations shown in the attached table: an inflation rate of 6 percent and a real discount rate of 3 percent, and an inflation rate of 5 percent and a real discount rate of 4.5 percent. Under the first set of assumptions the present value of the negotiated settlement is \$722,321,863; under the second set of assumptions it is \$710,849,765.

Present Value

A payment received in the future has less value than a payment of the same amount received at the present time. This is because the money received now will generate interest; and because the money received now will have more purchasing power than the money received later due to inflation that occurs during the intervening period. Therefore, to convert future payments to their present value, one must make an assumption about the rate of inflation that will prevail during the future period, and the real rate of interest that the money could earn (i.e., the interest rate without an inflationary component). The real rate of interest is referred to as the real discount rate.

The higher the inflation and discount rates, the lower the present value of a future payment; the lower these rates, the greater the present value. The more distant the payment, the less its present value; the sooner the payment, the greater its present value.

A person is theoretically indifferent to receiving the present value of a future payment or the future payment. Thus, in the case of the proposed settlement of the Exxon Valdez oil spill, Alaskans should be indifferent

Representative Davidson
March 19, 1991
Page 2

between receiving the proposed stream of payments and a one-time lump sum payment now of \$722,321,863 (or whatever the number is, depending on the inflation and discount rates used in the calculation).

Calculation of Present Value

The calculation of the present values of the Exxon settlement shown in the accompanying table uses two sets of assumptions, as discussed above. Column 2 in each case is the schedule of payments in nominal dollars. Column 3 converts the payments to constant (1991) dollars. Column 4 computes the present value of the modified payment schedule from column 3 with a real discount rate. The present value of the entire series of payments is the last entry in column 4.

We hope this information has been of value. Please call if we can provide you with further information.

Attachments

Proposed Exxon Settlement Payments in Present Value

Case a

Year[1]	Settlement Amount[2] (Nominal Dollars)	1991 Dollars[3]	Present Value (1991 Dollars) [4]	Cumulative Payment (Nominal Dollars)
1991	\$190,000,000	\$190,000,000	\$190,000,000	\$190,000,000
1992	\$150,000,000	\$139,462,976	\$134,404,063	\$340,000,000
1993	\$100,000,000	\$87,712,563	\$82,068,793	\$440,000,000
1994	\$70,000,000	\$57,923,391	\$52,617,838	\$510,000,000
1995	\$70,000,000	\$54,644,708	\$48,193,660	\$580,000,000
1996	\$70,000,000	\$51,551,612	\$44,141,473	\$650,000,000
1997	\$70,000,000	\$48,633,596	\$40,429,999	\$720,000,000
1998	\$70,000,000	\$45,880,751	\$37,030,591	\$790,000,000
1999	\$70,000,000	\$43,283,727	\$33,917,009	\$860,000,000
2000	\$70,000,000	\$40,833,705	\$31,065,222	\$930,000,000
2001	\$70,000,000	\$38,522,363	\$28,453,216	\$1,000,000,000
Cumulative Sum	\$1,000,000,000	\$798,449,392	\$722,321,863	

Assumptions

6.00% Inflation Rate

3.00% Real Discount Rate

Case b

Year[1]	Settlement Amount[2] (Nominal Dollars)	1991 Dollars[3]	Present Value (1991 Dollars) [4]	Cumulative Payment (Nominal Dollars)
1991	\$190,000,000	\$190,000,000	\$190,000,000	\$190,000,000
1992	\$150,000,000	\$141,125,221	\$133,570,106	\$340,000,000
1993	\$100,000,000	\$89,603,315	\$81,154,466	\$440,000,000
1994	\$70,000,000	\$59,735,543	\$51,773,184	\$510,000,000
1995	\$70,000,000	\$56,890,994	\$47,184,492	\$580,000,000
1996	\$70,000,000	\$54,181,899	\$43,002,499	\$650,000,000
1997	\$70,000,000	\$51,601,808	\$39,191,159	\$720,000,000
1998	\$70,000,000	\$49,144,579	\$35,717,620	\$790,000,000
1999	\$70,000,000	\$46,804,361	\$32,551,944	\$860,000,000
2000	\$70,000,000	\$44,575,582	\$29,666,843	\$930,000,000
2001	\$70,000,000	\$42,452,935	\$27,037,451	\$1,000,000,000
Cumulative Sum	\$1,000,000,000	\$826,116,238	\$710,849,765	

Assumptions

5.00% Inflation Rate

4.50% Real Discount Rate

Notes:

[1] 1991 payment made in June 1991. All other payments occur on September 1 of specified year.

[2] Proposed Payment Schedule, United States of America v. Exxon Corp., Exxon Shipping, and Exxon Pipeline Co.

[3] Payments adjusted for inflation.

[4] Payments adjusted for inflation are discounted back to 1991 using real discount rate.

Source: Legislative Research Agency, March 1991 (Exxon.xls)



Alaska Permanent Fund Corporation

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(907) 465-2047

MEMORANDUM

DATE: March 18, 1991

TO: Mel Krogseng
c/o Representative Barnes

FROM: Jim Kelly 
Research & Liaison Officer

SUBJECT: Present Value of the Proposed Exxon Settlement

Per your request, attached is a table which provides a rough approximation of the present value to the State of Alaska of the proposed Exxon settlement. These numbers are not exact because this analysis assumes the payments are received on December 31 of each year, not September 1. Notwithstanding this difference, the numbers as attached are in the ball park — if the assumptions made here about future inflation rates and the future value of money turn out to be correct.

This analysis assumes a 6 percent per year rate of inflation for each of the next 10 years, and the opportunity during that same period of time to earn a compound rate of return on dollars invested of 9 percent. For the long term, the Alaska Permanent Fund Corporation makes the same inflation and rate of return assumptions.

There are undoubtedly a number of other issues involved in analyzing the financial aspects of the settlement, such as whether or not the State will actually control disbursement or investment of all of the settlement monies, etc. I would suggest that you contact Tom Chester of the Legislative Research Agency for a more detailed analysis.

cc: Tom Chester, Legislative Research Agency

Amts of Exxon Payments	Real 1991 \$ (Inflation @ 6%)	Present Value (Return @ 9%)	FV of Payments In 2001 @ 9% Return
1991	140,000,000	140,000,000	331,380,000
1992	150,000,000	141,510,000	325,650,000
1993	100,000,000	89,000,000	199,200,000
1994	70,000,000	58,772,000	127,960,000
1995	70,000,000	55,447,000	117,390,000
1996	70,000,000	52,311,000	107,660,000
1997	70,000,000	49,350,000	98,770,000
1998	70,000,000	46,557,000	90,650,000
1999	70,000,000	43,918,000	83,160,000
2000	70,000,000	41,433,000	76,300,000
2001	70,000,000	39,088,000	70,000,000
\$950,000,000	\$757,386,000	\$687,875,000	\$1,628,120,000



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March 19, 1991

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

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

SUBJECT : Net Present Values of the Exxon Valdez Settlement

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

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

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

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

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

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

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

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

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

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

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

CRS-3

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

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

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

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

Gov's

AUTHORITY

DRAFT

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

February 27, 1991

663-91-0339

465-3600

Deposit and accounting for
Exxon Valdez oil spill
settlement proceeds

James L. Baldwin
Assistant Attorney General
Governmental Affairs

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

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

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

Honorable Dave Donley, Chairman
House Judiciary Committee, House of Rep.
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thinks best.

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

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

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

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

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

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

The Clean Water Act provides for disposition by state and

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

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

33 U.S.C. 1321(f)(5). The Act is further implemented by federal regulations. These regulations authorize the deposit of recoveries in separate accounts within the state treasury or in interest bearing accounts established outside the state treasury.

43 C.F.R. 11.92. Based on this statutory and regulatory framework, we conclude, that the Clean Water Act requires the dedication of settlement proceeds as a condition of participation in a joint enforcement effort. We consider a joint enforcement effort effective and proper in this case.

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

The proceeds of any [state revenue] shall not be

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

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

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

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

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

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

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

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

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

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

We believe that it is reasonable to interpret section 020

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

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

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

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

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

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

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

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

the Clean Water Act.

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

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

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

The attorney general could agree to form an intergovernmental trust

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

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

In a memorandum attached to your February 19 letter,

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

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

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

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

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

There are several ways to illustrate that such a retained

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

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

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

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

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

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

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

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

JLB:jr

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

*Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101*

MEMORANDUM

February 20, 1991

SUBJECT: Legal Services memo to Senator Cotten regarding settlement of claims related to the Exxon Valdez oil spill

TO: All Legislators

FROM: Lynn M. Barnes *LMB*
Special Assistant

Senator Cotten has asked Tam Cook that the Division of Legal Services release copies of Pam Finley's memo to Senator Cotten regarding the ~~Exxon Valdez oil spill~~ settlement to all members of the legislature.

Attached is a copy for your information.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

COPY

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

February 15, 1991

SUBJECT: Settlement of claims related to the Exxon Valdez Oil Spill
(Work Order 7-LS0777)

TO: Senator Sam Cotten

FROM: Pamela Finley
Assistant Revisor of Statutes

QUESTIONS PRESENTED. In light of an impending settlement of the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill, you have asked two questions:

(1) May the governor settle those claims with terms that require the defendants to give the state money dedicated to a particular purpose, or to provide services or property; and

(2) If the settlement contains such terms, what oversight authority does the legislature have?

SHORT ANSWER. Because the terms of a settlement have not been released, we cannot offer an opinion on the validity of particular provisions; this memo is confined to the general questions presented above. There are valid legal arguments to be made for and against the validity of a settlement with the terms described above. However, in my opinion a settlement that required money to be spent for a particular purpose or required the state to accept money or services would be beyond the constitutional power of the governor, although the legislature could ratify it by making an appropriation that carried out those terms. In addition, failure to deposit money recovered or received from Exxon in the general fund would violate AS 46.08.020(b). Your second question is difficult to answer until the specifics of the settlement are known, but I suspect that the discussion of the first question may address the real issue being raised by the second (i.e., the legislature's role). If you have more specific questions, or questions about a settlement once it is made public, please let me know.

DISCUSSION.

I. Attorney General's Authority. The attorney general has the power to dispose of the state's litigation as he thinks best, and "the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts." Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975)(dicta; emphasis added.) See Boyd v. U.S., 345 F. Supp. 790 (E.D. N.Y., 1972)(Attorney General's discretion does not prevent review based on allegations of bad faith, fraud, or illegality); People v. Santa Clara Lumber Co., 106 N.E. 927 (N.Y. Ct. App. 1914)(Settlement violating constitutional provision prohibiting cutting of timber on state land was void). The question then is whether a settlement of the type described above violates the constitution or statutory law.

II. Settlement Requiring Money to be Spent in Specified Way. A settlement that requires the money to be spent in a particular way would probably violate art. II, sec. 1 and art. IX, sec. 13 of the state constitution (vesting the legislative power in the legislature and requiring appropriations before money can be removed from the state treasury) and art. IX, sec. 7 of the state constitution (prohibiting dedicated funds).

A. The Power of Appropriation. Article II, sec. 1, Constitution of the State of Alaska, vests the legislative power in the legislature, and the power to appropriate is indisputably a legislative power. Article IX, sec. 13, Constitution of the State of Alaska, states that no money shall be withdrawn from the treasury except by appropriation. The Governor may argue that the latter section does not apply to a settlement if the money is not deposited in the state treasury, but that argument begs the real question, i.e., what money is subject to appropriation?

In Colorado General Assembly v. Lamm, 700 P.2d 508, 524 (Colo. 1985), the court held that the proceeds of a settlement between Chevron and the federal Department of Energy, which according to the settlement had to be used for specified purposes, were not subject to appropriation by the Colorado legislature. The court reasoned that the money was not subject to appropriation either because it was in trust from a private source, or because it was from a federal source, with restrictions placed on its use. While the Governor will no doubt advance the same arguments used by the court in Colorado General Assembly, there are some significant differences between that case and the situation at hand.

First, in the Colorado case there is no indication that the state was a party to the litigation. Therefore the state had no power to control the terms of the settlement, nor was the state trading the money for a legal claim the state had. Colorado really did have to accept the money, if at all, on the terms given, a fact that makes the money much more like a "gift" from a private party.

Second, under Colorado law the legislature does not have the power to appropriate most federal funds. Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987)(Except for federal funds subject to state match and portions that can be transferred to other block grants, executive has power to allocate money received from federal government); MacManus v. Love, 499 P.2d 609 (Colo. 1972)(Federal funds need not be appropriated). While Colorado is not the only state that does not require appropriation of federal trust funds, Opinion of the Justices to the Senate, 378 N.E.2d 433(Mass 1978), other states do require the legislature to appropriate federal funds, even though the federal funds are subject to restrictions on their use. Anderson v. Regan, 425 N.E.2d 792 (N.Y. Ct. App. 1981); Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630(1979). The Anderson case is especially important because the court's decision was based on a constitutional provision similar to art. IX, sec. 13 of Alaska's constitution.

Third, in Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E.2d 176 (Mass. 1980), the court rejected the "constructive trust" theory. In this case the state had sued a municipality for violation of laws involving sanitary landfills. The parties agreed to the entry of an order, but the town failed to comply with it and the court assessed a \$30,000 fine and ordered that it be paid for a project that enhanced a natural resource, the specific project to be chosen from proposals submitted by political subdivisions and charitable organizations. The department argued that the money was not subject to deposit in the state treasury and to appropriation because the money was held by the state in trust, subject to certain conditions. The court recognized that money held by the state in trust was not subject to appropriation under Massachusetts law, but noted that this exception only applied when the money was held and to be disbursed "under legislatively prescribed conditions". Because the legislature had not established a program for the deposit and expenditure of such money, it had to be deposited in the state treasury and appropriated by the legislature.

Finally, Alaska's Supreme Court has held that the term "appropriation" as used in art. XI, sec. 7 (governing initiatives), involves "committing certain public assets to a particular purpose." McAlpine v. Univ. of Alaska, 762 P.2d 81,88 (Alaska 1988)(the transfer of property was an "appropriation" that could not be accomplished by initiative). While the court in McAlpine was construing a provision governing initiatives rather than the legislative power or removal of money from the state treasury, the court explained that the purpose of the initiative provision was "to ensure that the legislature and only the legislature, retains control of the allocation of state assets among competing needs." McAlpine, 762 P.2d 81 at 88 (emphasis in original). It is worth noting that a broad reading of the term "asset" includes a claim for damages. McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983)(divorce action). Therefore, while the executive branch has the authority to determine

whether litigation will settle, and how much will be received in settlement, it is up to the legislature to determine how the proceeds of that settlement will be allocated.

B. Dedicated Funds. Article IX, sec. 7, Constitution of the State of Alaska states that the "proceeds of any state tax or license shall not be dedicated to a special purpose," and excepts from this prohibition dedicated funds existing at the time the state constitution was ratified, the permanent fund, and dedications required by the federal government for state participation in federal programs. Alaska's Supreme Court has, based on the history of the constitutional convention, interpreted the prohibition to apply to "the dedication of any source of revenue". State v. Alex, 646 P.2d 203, 210 (Alaska 1982). The Governor may claim that the settlement proceeds are required to be dedicated for state participation in federal programs. If the state were suing under the Clean Water Act, this might be a legitimate argument since sums recovered under that Act must be used to restore, rehabilitate, or acquire the equivalent of the nature resources damaged. 33 U.S.C. 1321(f)(5). Even if that were the case, however, it should be the legislature that decides exactly what programs will fulfill those purposes and how the money is to be allocated among those purposes. However, it is our understanding that the state is not making claims under the Clean Water Act. It does not appear that the "federal program" exception applies here.

C. Statutory Provisions Under state law, money received for cleanup reimbursement must be deposited in the general fund and credited to the oil and hazardous substance release mitigation account. AS 46.04.010. It would then be subject to legislative appropriation. AS 46.08.020(a)(2) and (b) require that money recovered "or otherwise received" from persons responsible for the containment and cleanup of oil from a specific site shall be deposited in the general fund and credited to the oil and hazardous substance release mitigation account." The legislature may then appropriate the money to the release response fund. Failure to place money received from Exxon in the general fund would violate AS 46.08.020(b).

III. Settlement Providing for Services or Property.

Because McAlpine construes the appropriation power to apply broadly to all "assets" of the state, and because the prohibition against dedicated funds applies to any "source of revenue," the above discussion should apply to services and property that might be given to the state in the settlement. Any property received would be the result of exchanging one state asset (the claim against Exxon) for another (the property). However, in applying the doctrine that the legislature alone has the power to allocate state assets, the question arises as to whether this means (1) the governor can agree to accept 10 bulldozers and the legislature has to allocate them to a particular program, or (2) the governor cannot agree to accept services or property in settling a state claim because that involves the allocation of resources. I have not been able to find any case law on this subject, but believe that interpretation (2) is more consistent with the separation of powers doctrine because the first

interpretation would allow the executive, without authority from the legislature, to determine how state resources are to be allocated.

It is possible that the court might uphold the donation of services or property to a department and for a specified purpose if the legislature has already authorized the department to accept services or property for that particular purpose. In this situation, the legislature would at least have authorized both the receipt of the property from private parties and its use for particular purposes. However, even this approach does not give the legislature the power to allocate a state asset (namely the proceeds of a legal claim) to competing programs and might therefore be unconstitutional. Examples of statutes authorizing the receipt of property from private persons are AS 16.05.050(2) (fish and game); AS 19.22.020(roads); AS 41.21.020(3) (recreation and park lands); and AS 42.40.250(7)(railroad).

If the settlement purports to accept property on behalf of the state and there is no statutory authority for the acceptance of that property for that purpose, the purported acceptance would be invalid because the state's power over its property is vested in the legislature. Wolverine Sign Works v. State Hwy. Com'n, 218 N.W.2d 863 (Mich. Ct. App. 1974) (Because statute did not authorize commission to acquire restrictive covenants, the covenants acquired were void); 81A C.J.S. States, sec. 145. AS 38.05.035(a)(12) makes the director of the division of lands the "certifying agent" for securing land available to the state, but I do not read this as granting the director the authority to accept all land for whatever purposes; rather it appears to give the director the authority to handle the mechanics of the transaction when the state's acceptance of land is otherwise provided for. See State v. Thomson, 449 P.2d 656 (N.M.1969) (Failure of governor to obtain deed did not nullify transfer of land to the state because the title vested by act of the legislature, and the governor's role was just to formalize the record of title).

Finally, even if a settlement purporting to give the state property or services to be used for a particular project were found to be constitutional (which I doubt), the state project would have to be authorized by the legislature and a project (state or private) would still be subject to regulatory restrictions (labor and environmental laws for instance). See South Carolina State Hwy. v. Butterfield, 58 S.E.2d 737 (S. Car. 1950) (Attorney General's statement that highway department would "take care" of septic tank in right of way did not bind highway department's actions.)

Aside from the considerations discussed above, if the settlement entered into is manifestly unfair to the interests of the state, the Governor may be found to have failed in his constitutional duty under Art. III, sec. 16 to "be responsible for the faithful execution of the laws."

MEMORANDUM

State of Alaska
Department of Law

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

DATE: April 2, 1991

FILE NO.

TEL NO: 465-3600

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

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

FROM: Charles E. Cole
Attorney General

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

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

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

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

A. The Federal Criminal Plea Agreement

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

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

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

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

B. The Agreement And Consent Decree

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

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

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

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

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

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

II. DEFINING THE REAL ISSUE

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

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

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

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

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

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

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

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

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

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

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

^{4/}((...continued)

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

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

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

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

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

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

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

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

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

(continued...)

6/ (...continued)

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

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

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

(continued...)

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

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

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

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. State v. Alex, 646 P.2d 203 (Alaska 1983). In Alex, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. Id. at 208-210. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply not "revenues" of the State.^{7/}

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

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

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

Furthermore, even if the Trust Fund monies were State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: 1) the monies would be received by the State subject to co-trusteeship obligations; and 2) the monies would be received by the State subject to a federal statutory requirement as to their use.^{6/}

^{7/}(...continued)

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

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

(continued...)

C. The Real Issue

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

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

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.^{9/}

^{8/}((...continued))

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

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

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

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

^{9/} (...continued)

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

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

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

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

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

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

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

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

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

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

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

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

Alaska Const., Art. III, §16.^{14/}

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

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

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

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

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

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

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

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

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

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

¹⁵/(...continued)

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

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

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

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

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

(b) The attorney general shall . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^{18/} (...continued)

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

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

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

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

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

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

660 P.2d at 420-21.

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

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

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

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

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

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

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

²²/ (...continued)

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

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

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

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

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

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

^{22/} (...continued)

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

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

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

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

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

B. The Clean Water Act Trust Remedy

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

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

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

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

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

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

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

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

C. No Statutory Provision Expressly Precludes
The Trust Fund Settlement

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

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

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

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

²⁷/ (...continued)

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

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

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

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

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

(emphasis added).

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

²⁷/ (...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^{29/} The Supremacy Clause provides:

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

U. S. Const., Art. VI.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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