

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2110 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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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

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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)]

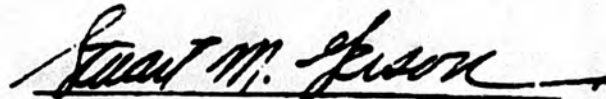
FOR THE UNITED STATES OF AMERICA

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

- 30a -

[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

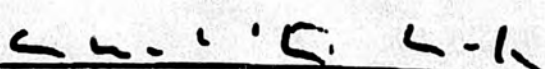
Date:

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

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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?

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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.

RICHARD B. STEWART
Assistant Attorney General
Environment & Natural Resources
Division

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

Attorneys for Plaintiff United States of America

CHARLES E. COLE
Attorney General
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Juneau, Alaska 99811

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

- 3 -

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

- 8 -

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

- 11 -

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

- 12 -

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

- 13 -

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

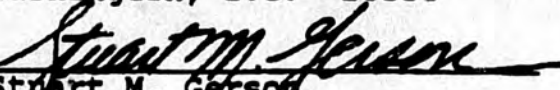
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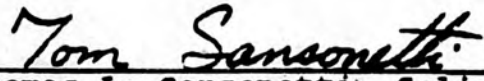
[Memorandum of Agreement and Consent Decree in United States v. State of Alaska. (D. Alaska)]

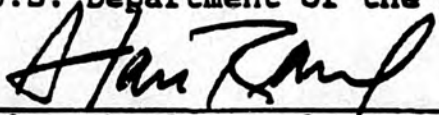
FOR THE UNITED STATES OF AMERICA

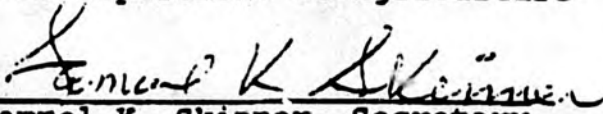
Date: 3.12.91


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

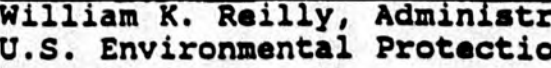

Stuart M. Gerson
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530


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: _____

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

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

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

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

- 20 -

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.

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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

MARK B. HARMON
 Trial Attorney
 Environmental Crimes Section -

ERIC NAGLE
 Trial Attorney
 Environmental Crimes U.S.
 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

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

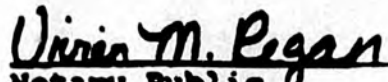
5. Facsimile transmission is the fastest manner available which will permit all counsel to sign the signature page so that the plea agreement can be filed on March 13, 1991.

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:

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 addition
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

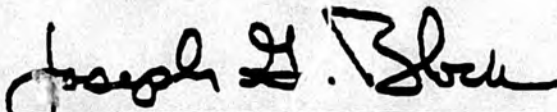
A. EXXON guarantees payment of the fine imposed on EXXON SHIPPING under this plea agreement. In the event that defendant EXXON SHIPPING fails to make timely payment of the fine, EXXON shall, within thirty (30) days of the date of demand, make payment in EXXON SHIPPING's stead.

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.

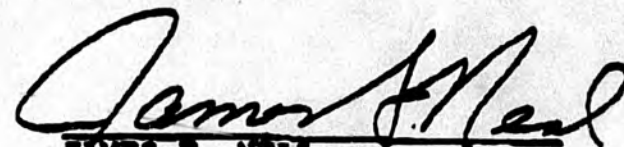
The above-stated terms and conditions comprise the entire plea agreement between the United States of America, defendant EXXON SHIPPING and defendant EXXON, and there are no other terms or conditions, express or implied.

FOR THE UNITED STATES
OF AMERICA:

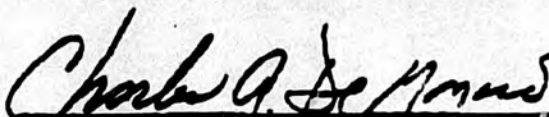


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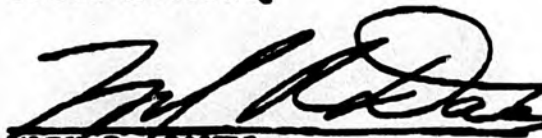


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DATED THIS 13th day of March, 1991

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.

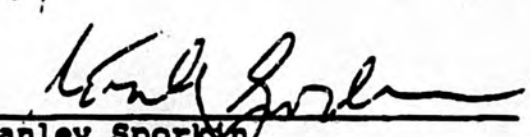
The Court accepts the defendants' good-faith representations. On the basis of these representations, the Court believes that the

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