

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2112 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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15. Does any state statute require that money received in this settlement be deposited in the General Fund?

16. Is legislative authorization needed to accept funding from the trustees? [Rep. Ulmer, 3/21, p. 10]

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

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

19. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA? [PF]

20. This paragraph refers to "natural resource services." What is a "natural resource service?" [PF] Could it include economic loss? [Rep. Hudson, 3/27]

NB: This term is also used, and undefined, in the MOA (page 8 [paragraph IIIA]).

21. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true? [PF; Rep. Hudson, 3/20, p.12]

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

23. Does the settlement provide for federal or state funding for continued damage assessment studies?

24. By "representing" to the court that money will be spent pursuant to the MOA, are the governments barred from changing the MOA without court approval? Do they in effect approve the MOA? [3/19, p. 6]

25. Could the trustees, or the court if breaking an impasse, act through a private party (e.g. the Nature Conservancy or a Native corporation) to preserve or utilize natural resources under the settlement? [Rep. Phillips, 3/19, p.11]

26. Does the Alaska Constitution bar the state from bypassing the appropriation process in disposing of state assets, i.e., the litigation proceeds? [Rep. Barnes, 3/19, p. 11]

— 27. How was the \$950 million amount for compensation calculated?

28. To what extent can the losses of third parties, for which the state is found liable, be paid out of these funds? [Rep. Phillips, 3/20, p.10]

29. Will any of these funds go into the Sec. 470 fund? [Rep. Brown, 3/20, p.12] Which funds get used first -- the trust funds, or Sec. 470 funds? [Rep. Hudson, 3/25]

[VII]

Commitment by Exxon to Continue Cleanup
(paragraphs 11[a-b], 12[a-b]; pages 11-14)

Cleanup Duties (paragraph 11)

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

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

32. What does the last sentence of 11(a) -- concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or SOSC -- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under the direction of the FOSC or SOSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims? [PF; Rep. Navarre, 3/19, p.16]

33. To what extent is Exxon's current liability for cleanup limited by the settlement? Why are we reimbursing Exxon for future cleanup even if the settlement is rejected? [Rep. Davidson, 3/20, p.11]

Set Off for Cleanup Expenses (paragraph 12)

34. Can Exxon setoff amounts approved by the FOSC against amounts owed the state? Can Exxon setoff amounts approved by the SOSC against amounts owed the federal government? [PF]

[IX]

Releases and Covenants Not to Sue by the Governments
(paragraphs 13 [a-d], 14-16; pages 14-17)

Release of Exxon (paragraph 13; pages 14-15)

- ~35. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful? What has it gained in the consent decree to compensate for the loss of those claims? [PF]
- ~36. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska? [PF/State Claims]
37. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement? [PF]
- ~38. Do political subdivisions of the state retain their claims against Exxon under this settlement? [Rep. Kubina 3/19; Rep. Leman 3/21, p.2]
- ~39. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims (e.g. is there any effect on confidentiality of scientific and economic data)? [PF]

Release of Exxon Pipeline (paragraph 14; pages 15-16)

Release of Claims Against Employees, etc.
(paragraph 15; pages 16-17)

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

Dismissal of Actions (paragraph 16; page 17)

[IX]
Reopener for Unknown Injury
(paragraphs 17-19; pages 17-18)

Qualified Restoration Projects (paragraph 17;
pages 17-18)

41. How likely is it that the state or federal government will be able to take advantage of this provision, given the requirement that the injury can not have been anticipated by any trustee? [PF; Reps. Leman, Davidson, 3/21, p.3]

42. How will "benefits" be quantified under this clause? [Reps. Gruenberg, Leman, 3/21, p.3]

\$100 Million Limitation (paragraph 18; page 18)

Filing of Plans (paragraph 19; page 18)

[X]
Releases and Covenants Not to Sue by Exxon and Exxon Pipeline
(paragraph 20; pages 18-19)

43. What claims have Exxon or Exxon Pipeline asserted against the state or federal government? [PF]

[XI]
Trans-Alaska Pipeline Liability Fund
(paragraph 21; page 19)

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

[XII]
Provisions Pertaining to Alyeska
(paragraphs 22-25; pages 20-21)

Release of Alyeska (paragraph 22; page 20)

45. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska e.g., economic loss)? [PF]

Partial Payment to Exxon (paragraph 23; page 20)

Partial Payment to Governments (paragraph 24; page 21)

Indemnification of Governments by Exxon (paragraph 25; page 21)

[XIII]
Third Party Litigation
(paragraphs 26-30; pages 21-23)

No Contribution or Indemnity; Allocation of Liability
(paragraph 26; page 21)

46. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.) [PF] What will the cost of litigating third party suits be to the state? [Rep. Barnes, 3/19]

47. Can scientific and economic information acquired by the state in connection with the claims being released in this case be kept confidential under state law once the claims are dismissed? [Rep. Navarre, 3/19]

Suits Against Exxon or A Government Only (paragraph 27; page 22)

48. Are there third party suits against the state, or are there likely to be such, in which Exxon is not a defendant? (Under paragraph 27 the state could not recover against Exxon for its losses in such cases.) [PF] What value do the claims have? What portion of the claim could we collect from Exxon? What will the litigation cost? [Rep. Navarre, 3/19]

No Reduction in Payments (paragraph 28; page 23)

No Tender as Defendants (paragraph 29; page 23)

49. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits? [PF]

Settlement With Exxon and Suit Against A Government
(paragraph 30; page 23)

50. Can the state and federal governments recover against each other for judgments they have to pay to third parties? [PF]

[XIV]

Interest for Late Payments
(paragraph 31; pages 23-24)

[XV]

Reservation of Rights
(paragraphs 32-35; pages 24-25)

No Admission (paragraph 32)

No Claims Created (paragraph 33)

Government Programs Not Impaired (paragraph 34)

Existing Contracts Not Impaired (paragraph 35)

[XVI]

Notices and Submittals
(paragraph 36; pages 25-26)

[XVII]

Process for Entry of Agreement
(paragraphs 37-38; pages 26-27)

Notice, Legislative Approval, Withdrawl (paragraph 37)

51. It appears that the governments could keep the agreement in effect even if the state legislature does not approve it. If the legislature does not approve it and the state or federal government does not with draw, could the legislature

intervene in the federal case to prevent approval by the court? Could it intervene in the state court to prevent a dismissal of claims? [PF]

52. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA? [PF/Overview; Rep. Barnes, 3/19, p.6]

53. Is the federal court bound to wait the full 45 days before ruling?

54. Can the legislature approve the settlement conditionally, with stipulations? [Rep. Hudson, 3/19, p.12]

55. If the consent decree is not approved, does the plea agreement terminate? [Rep. Ulmer, 3/20, p.20]

Termination of Agreement (paragraph 38)

56. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated? [PF]

57. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC? [PF]

58. If the court rejects the Plea Agreement, can the U.S. or Alaska terminate the settlement?

59. Does legislative approval of the settlement estop the state or third parties from making constitutional challenges to the authority of the administration to enter into it, or to the funding mechanisms? [Rep. Barnes, 3/19, p.12]

[XVIII]

Retention of Jurisdiction (paragraph 39; page 28)

60. Who drafted which parts of the documents, and will they be interpreted against the drafter? [Rep. Gruenberg, 3/21, p.4] Is there any record of the settlement negotiations?

61. Is the Consent Decree to be interpreted under federal law, or under Alaska law? [Rep. Gruenberg, 3/21, p.6]

62. Is the agreement in violation of the law of any other jurisdiction? [Rep. Gruenberg, 3/21, p.6]

63. Why is there no provision for judicial review in the Consent Decree, as there is in the MOA? [Rep. Gruenberg, 3/27]

[XIX]
Miscellaneous
(paragraphs 40-41; page 28)

Modification (paragraph 40)

Assertion of Authority (paragraph 41)

64. Does this Article estop the legislature or a third party from litigating the issue of authority? [PF, 3/21 p.9]

MEMORANDUM OF AGREEMENT

MASTER LIST OF ISSUES (revised 3/29)

Introduction

I Jurisdiction (page 5)

II Definitions (pages 6-8)

1. Can the legislature by statute designate trustees or a procedure for their appointment by the governor? [Rep. Donley, 3/19, p.6] ✓

III Co-Trusteeship (pages 8-9; paragraphs A-C)

NB: These articles raise constitutional and other questions addressed in the context of the Consent Decree.

IV Organization (pages 9-12; sections A[1-5], B[1-3] and C)

A. General Provisions

2. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government? [PF]
3. Could the state and federal governments agree on a formula or process to divide the litigation proceeds between them which would limit the trustees' discretion in funding projects? [Rep. Leman, 3/19, p.8]

4. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as the "311(k) fund", which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the U.S. Treasury? [PF]
5. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply? [PF]
6. Will a trust fund in the court registry bear interest? [PF]
7. What standards would a court use in deciding disputes among the trustees? [PF]
8. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money? [PF]
9. If an appropriation is necessary in order for expenditures to comply with the Alaska Constitution, how could this be done? [PF/Overview]
10. Who, if anyone, will perform audits of the trustees' expenditures? [PF/Overview]
11. Could the legislature, by enacting legislation, retain greater control over the trust proceeds that allowed by the MOA (but still be within the limits of the CWA and applicable regulations)? [PF/Overview]
12. What alternative mechanisms for funding and distributing the litigation proceeds are there (i.e., does the CWA impose too many restrictions on use, and is a co-trusteeship the best approach)? [Rep. Hudson, 3/19, p.9; Rep. Phillips, 3/21, p.6]
13. What mechanisms does the agreement provide for input by the legislature, local governments, Native groups, injured third parties, and the general public in the formulation of policies and governing the co-trusteeship, and in their funding decisions? [Rep. Hudson, 3/19, p.10]
14. To what extent will the MOA restrict state resource management decisions affecting resources affected by the spill?

NB: This Article raises the same issues under the Alaska Constitution raised in connection with the Consent Decree, regarding the appropriation requirement and the prohibition against dedicated funds.

B. Injury Assessment and Restoration Process (pages 11-12)

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

16. What is the meaning and effect of the "nonelection" of 43 CFR? [PF, 3/25]

C. Role of the Environmental Protection Agency (page 12)

[V]

Distribution of Settlement Monies
(paragraph A-D; pages 12-13)

A. Joint Use of Natural Resource Damage Recoveries
(paragraph A; page 12)

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

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

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

20. Will the trust pay its own administrative expenses? [PF]
If state staff are used in support of the state trustees' activities, will the state budget bear the cost? Will additional state staff be needed to carry out trustee duties and oversee the trust's activities? [PF/Overview]

21. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed? [PF]

22. To what extent can the trustees provide relief to municipalities, Native groups, or private plaintiffs who were damaged as a result of injuries to natural resources? [Rep. Hudson, 3/19, p.10]

B. Reimbursement of Allowed Expenses and Response Costs
(paragraphs B-D; pages 12-13)

B. Federal and State Limitations (page 12)

23. Will reimbursements for past allowed expenses and future cleanup costs go to the general fund without any restrictions on its use? [PF/Overview]

24. When does the 5 year repayment period begin? Is there a payment schedule, and will interest accumulate on the unpaid balance? [PF, 3/19, p.5]

C. Out of State Expenditures (page 13)

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

26. Is there any limitation on the use of funds for projects outside the state? Could the money be used to establish parks, institutes, etc. in other states? [PF/Overview]

D. No Obligation To Spend Except As Authorized
(page 13)

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

VI
Science Studies
(page 13)

VII
Covenants Not to Sue
(paragraphs A[1-3], B-F; pages 14-16)

A. Suits by Government Against Government

28. If the trustees disagree whether a federal agency should be involved in a particular project, can the state trustees take the issue to court? [PF]

29. Does the ability of either government to participate in third party litigation over the scope of the trusteeship vitiate the covenant not to sue?

B. Assertions of Co-Trusteeship

30. Does the last clause preclude, at least for the next 16 years, the U.S. and the state from suing each other to determine ownership of resources (e.g. submerged lands or marine mammals) or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill? [PF] In general, what are the implications of this paragraph? [PF/Overview]

C. Intervention in Third Party Suits

D. MOA Effective Notwithstanding Adversarial Status

31. How does this provision interact with the termination provision on page 17 that says the MOA terminates in the Consent Decree terminates, unless otherwise agreed by the parties? [PF]

E. Third Party Suits Against Both Governments

F. Third Party Suits Against One Government

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

33. Does the requirement to cooperate in the defense of these suits obligate either government to participate in the litigation costs of the sued government?

VIII
Enforcement of Agreement
and Governing Law and Venue
(paragraphs A-B; page 16)

A. Enforcement by Alaska Federal Court

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

35. Why was the federal court selected to enforce the agreement instead of state court?

B. Disposition if MOA Found Invalid

IX

Multiple Copies and Effective Date
(page 17)

X

Integration and Merger
(page 17)

36. What was the agreement of April, 1989? Are there any other prior agreements? [PF]

XI

Termination
(page 17)

37. How does this relate to paragraph VII (D) on page 15 (providing that the MOA remains in effect if the Governments are adverse in litigation)? [PF]

38. Why is the MOA limited to a 16 year term? What happens to funds in the trusteeship after that time?

XII

Judicial Review
(page 18)

39. Since this is a consent decree, do the parties have the power to prevent judicial review? [PF]

40. To what in Article VII does this refer? [PF]

41. Does this prevent a third party from challenging a decision of the trustees or the court as a tiebreaker) on the ground that the decision is inconsistent with the MOA or applicable law? [PF; Reps. Kubina, Navarre, 3/25]

PLEA AGREEMENT

MASTER LIST OF ISSUES
(revised 3/29)

I

Introduction
(paragraphs A-D; pages 1-2)

II

Defendants' Agreement and Understanding

- A. Charges Against Exxon Shipping
(paragraphs 1-3; pages 2-3)
- B. Charges Against Exxon
(page 3-4)
- C. Legal Basis for the Fines and Restitution Payment
(paragraphs 1-2; page 4)
- D. Consequences of the Plea
(paragraphs 1-3; pages 4-5)
- E. Dismissal of Remaining Charges
(page 5)
 - 1. What criminal charges are being dismissed?

III

Agreement of the Parties Regarding Imposition of Sentence
(paragraphs A-D; pages 5-7)

- A. No New Criminal Charges or Civil or Admin. Penalties
(pages 5-6)
- 2. Who are Exxon's wholly-owned subsidiaries?

3. Why is Alyeska Pipeline Service Company included in the entities against whom criminal charges will not be brought and from whom civil or administrative penalties will not be sought?

4. Is it ethical/legal for Defendant A to enter into a plea agreement contingent on disposition of charges or potential charges against Defendant B? [Rep. Gruenberg, 3/27]

5. What criminal charges could have been brought under Alaska law? Why weren't they? Could they now? [Reps. Gruenberg, Hudson, 3/27]

6. What oil spill contingency plans is Alyeska required to submit to the state under Federal law?

B. Other Civil or Administrative Action Allowed
(page 6)

7. What kinds of civil or administrative action could be taken against the defendants? Would the payments currently included in the civil settlement be allowed if the plea is accepted and the settlement is rejected? [Rep. Gruenberg, 3/27]

C. Sentencing Agreement
(pages 6-7)

D. No Other Sanctions

8. Do any federal or state "victims' rights" statutes apply? [Rep. Gruenberg, 3/27]

IV

Agreement of the Parties Regarding Restitutionary Payments
(paragraphs A-C; pages 7-8)

A. \$50 Million Payment to State

B. Administration by State; No Judicial or Admin. Review

9. What are some examples of what the restitutionary payments could be used for: oil spill response groups? a skimmer? timber buyouts in Kachemak Bay State Park? [Reps. Phillips, Hudson, Ulmer, 3/27]

10. Is the "no review" provision effective to bar the United States and third parties from challenging specific expenditures? [Rep. Ulmer, 3/27]

11. Does Alaska waive any challenge to the limitations on these payments by accepting them? [Rep. Gruenberg, 3/27]

12. Are there any limitations in Alaska or federal law restricting our use of these payments, or is it strictly as a result of the consent decree? [Rep. Ulmer, 3/19 p.14; Hudson, 3/27]

C. Payments are Compensatory, Not Punitive

V

General Provisions
(paragraphs A-C; page 9)

A. Guarantee by Exxon

B. Rejection of Plea Agreement

13. Are there any time limits, or other constraints, forcing the judge to act on the plea agreement before May 3? [Rep. Davidson, 3/27]

C. Waiver of Presentence Report

CONSENT DECREE

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so? [PF]

Attorney General Baily wrote to the Department of Justice on June 21, 1989, saying that because the maximum fine available under Alaska law against Exxon was only \$100,000, the State would not be pursuing criminal charges against the corporation. (Alaska law has subsequently been amended to provide for fines of up to twice the damage caused by the offense.)

In connection with settlement negotiations, Attorney General Cole wrote to Exxon on March 12, 1991, agreeing not to bring any criminal charges against Exxon or any of its employees. The letter reserves the right to seek criminal charges against Alyeska or Exxon Pipeline Company for any violation of state law "based on an allegation of false statements to any agency of the State" in connection with the preparation or submission of oil spill contingency plans and related documents.

5. Why are the natural resources damages of the state not separated from the natural resource damages of the federal government? [PF]

The AG testified [4/3] that there are substantial legal and factual issues with respect to who owns which resources, and the extent of the damage to each government. He stated these issues would result in years of litigation. He testified to the Senate [3/28] that the CWA encourages cooperation by the state and federal governments. (The AG does not appear to be saying that we could not legally have negotiated such a split.)

In response to a question, the AG stated [4/5] that he had not attempted to negotiate a division of the proceeds with the federal government, because he did not believe an agreement on dividing the money could have been reached.

Mr. Erickson's memo [4/5] supports the idea that sorting out the respective governments' claims to the damaged resources would be expensive, time consuming, and analytically difficult: "Most of the natural resource damages...arise from injuries to

biological resources to which the notion of ownership can be related only with difficulty...From an economic perspective, the notion of a joint trusteeship, whatever its deficiencies, must be measured against the expenditure of human talent and public funds that efforts by the governments to 'divide the baby' would entail."

7. To what extent is the recovery under the Consent Decree "under" the Clean Water Act? To what extent is the MOA limited by the CWA? [PF]

The AG testified [4/3, p.9] that the entire recovery in the Consent Decree is "under" the CWA, although a different form of recovery could have been made. He testified that it was preferable to settle "under" the CWA because it enabled the state and federal governments to put the recovery into a joint trust fund, without allocating their losses.

He testified to the Senate [3/28] that the state chose to settle solely under the CWA because it provides an "effective mechanism for the resolution of the plethora of issues surrounding the litigation [and] a method for the state and federal governments to proceed in a unified fashion."

Mr. Campbell testified [4/16] that a settlement "under" the CWA was the best approach, using the natural resource damage assessment regulations applicable to the CWA as a pattern.

Mr. Stewart testified [4/16] that the federal government was bound to the CWA as a source of authority to enter a joint trust with the state; Mr. Campbell added that the CWA settlement was needed in order to get funds into the trust without an appropriation.

Mr. Stewart testified to the Senate [4/17] that using the aegis of the CWA was the only way to get federal and state cooperation to the desired degree. He noted that for purposes of the federal government, the CWA clearly provides a means of avoiding the appropriation process. He questioned whether state legislation requiring an appropriation of funds would be constitutional under the federal Constitution.

Nothing in the Consent Decree states that the recovery from Exxon is limited by the CWA, and

nothing in the MOA states that the trust fund is subject to the CWA. The CD references the CWA in only two places: (1) on page 3, the parties state that only CWA trustees can recover damages under the CWA; and (2) in Paragraph 1, the parties assert that the court has jurisdiction under the CWA, "among other authorities". However, the amount recovered in the CD is specifically defined in Paragraph 6(d) of the CD as including to amounts not recoverable under the CWA. The state's lawsuit in state court, which is settled in the CD, did not even assert a claim under the CWA.

The preliminary clauses of the MOA note that the CWA establishes liability and that federal law and regulations promulgated under CERCLA and the CWA "provide a framework for and encourage state and federal trustees to cooperate with each other". Pages 2-3. They add that various state and federal agencies and trustees with jurisdiction over natural resources "have determined that the procedures set forth in [the MOA] will best enable them to fulfill their duties as trustees." Page 5. Except for a reference to the CWA, "among other authorities", as a source of jurisdiction, none of the operative provisions of the MOA make any reference whatsoever to either the CWA or CERCLA.

In view of the limited manner in which the CD and MOA reference the CWA, and since a number of its provisions are contrary to the federal regulations the normally govern CWA actions, it is unclear on what basis the federal government and the AG assert that the settlement agreement is "under" the CWA. Mr. Stewart acknowledged (4/16) that the agreement is "unclear" in this regard.

10. What is the present value of the amounts to be paid by Exxon? [PF]

The AG testified to the Senate [4/4] that he estimated the present value of the payments at \$713 million, using an 8% discount value.

Other sources include: Ak. Perm. Fund, \$689 million (6% inflation, 9% compound interest); Cong. Research Service, \$734-773 million (8.16% discount rate; cost net of taxes to Exxon of \$499-524 million), \$666-694 million (11.28% discount rate, net cost \$456-474 million), or \$611-631 million (less likely estimate, 14.4% discount rate, net cost \$421-434 million); and Leg. Research Agency, \$710-722 million ("real" discount rate of 3-4.5%).

DRAFT

Apart from uncertainty as to the appropriate discount rate, evaluation of the settlement is made problematic by the fact that it can be deducted from both state and federal taxes; the resulting loss in revenues reduces the value further to both governments. The estimated loss to state taxes, over the life of the agreement has been estimated at no more than \$5 million. The loss to the federal treasury, according to the Congressional Research Service, will be in the neighborhood of \$200 million, in constant dollars.

In evaluating how well the governments did in recovering this amount, it is also appropriate to consider the real cost to Exxon, since that is one way of gauging their willingness to pay. The net cost to Exxon, given the tax benefits, has been estimated by the CRS at \$421-524 million. Assuming that Exxon's internal rates of return are substantially greater than the discount rate, the likely real cost to Exxon is considerably lower.

14. Art. IX, Sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. choose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply? [PF; Rep. Barnes, 3/19]

The AG has provided a legal opinion on the constitutional issues. The thrust of the opinion is that because the funds never enter the state treasury, the constitutional restrictions do not apply.

Legislative counsel has issued a contrary opinion. The thrust of that opinion is that because the money is being exchanged for the extinguishment of a legal claim, the portion recovered for the state's claims is a state asset, whether or not it is put into the general fund, and that therefore both the "dedicated fund" issue and the "appropriation" issue are unresolved.

The AG has also testified [4/5, p.6-7] that because the recovery is "under" the CWA, it is equivalent to federal program receipts, and therefore exempt from the prohibition against dedicated funds. He also stated that it could be seen as dedicated under common law "public trust" principles. [4/5, p.10]

16. Can state agencies expend trust funds without legislative authorization? [Rep. Ulmer, 3/21, p. 10]

The AG testified to the Senate [3/28] that in his view no legislative appropriation of the settlement funds was needed.

He testified [4/5, p.17] that this raised "technically a very difficult legal question".

The AG has indicated he has not thought this problem through. Members of the House Finance Committee have indicated they know of no method by which state agencies can spend money that has not been appropriated to them out of the general fund.

17.1 Will the federal government utilize the appropriation process for Trust funds spent by federal agencies?

Mr. Stewart testified [4/16] that the federal Trustees had insisted that funds not flow through the appropriation process, despite pressure from OMB to have the money flow through that process.

In a conversation with staff, Mr. Stewart indicated he was unaware that funds expended by state agencies might have to be appropriated as federal program receipts under the Alaska Constitution. He stated he was opposed to such a process, because it would give the legislature a veto power over Trustee funding decisions.

Federal regulations applicable to recoveries under the CWA specifically authorize the expenditure of the funds recovered by the federal government without appropriation. 43 CFR 11.92(a)(1). Amounts recovered by state governments, under the same regulations, are to be either deposited in the state treasury, or in an account payable to a state agency. 43 CFR 11.92(a)(2).

17.2 Does anything in the CWA require that the appropriation process not be used?

Federal regulations require that sums recovered by the Federal trustees "shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." Funds recovered by State Trustees "shall either: (i) Be placed in a separate account in the State treasury; or (ii) Be placed...in an interest bearing account payable to the State agency acting as trustee." 43 CFR 11.92. This language does not appear to

foreclose an appropriation process for the State funds.

21. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true? [PF; Rep. Hudson, 3/20, p.12]

The AG affirmed [4/5, p.17] that these funds are unrestricted.

The issue is governed by Article V, Sec. B of the MOA (pages 12-13): at the election of the "Government" (defined as the State acting through DF&G, DEC and the AG), up to \$72 million is "available...for reimbursement of allowed expenses". These amounts are to be paid "directly to the Governments", which means they will flow into the General Fund. At that point, insofar as the MOA is concerned, the money apparently will be available for use without restriction for any purpose. It does not appear they must in fact be appropriated for the reimbursement of expenses incurred, even though that is why they are being paid.

The Consent Decree states that these amounts "shall be applied...to reimburse...the State for [allowed expenses]. Par.10, pg.10. Arguably this language would limit the uses to which that money is put. However, the CD also states that the "monies paid...will be allocated..and used in accordance with the [MOA]"; thus unless the MOA restricts the use of these funds, they may spent as the State wishes.

23. Does the settlement provide for federal or state funding for continued damage assessment studies?

Yes, but only as part of the total settlement amount; there is no separate funding for damage assessment.

- 23.1 What are the estimated costs of continuing litigation expenses and damages assessment, which will be compensated out of the total recovery and will therefore not be available for restoration?

The settlement agreement includes payment for litigation expenses incurred or obligated through March 13, 1991, as well as federal and state response, damage assessment and cleanup costs

through the 1990 field season. A total of \$138 million will be deducted for these unreimbursed expenses. Any additional litigation costs, and all damage assessment and cleanup costs beginning with the 1991 field season, will come out of the remainder of the settlement.

If the settlement is adopted, there will be minimal additional litigation expenses in the Exxon case, but there may be substantial costs associated with lawsuits brought by third parties. The cost of those lawsuits will be charged to the General Fund, however; settlement monies will not be available for the costs of defending against those claims.

The 1991 budget for damages assessment is approximately \$26,524,000. Mr. Erickson has estimated continuing damage assessment costs of \$35,000,000 in 1992-94.

The 1991 cost of cleanup has been estimated by Ernie Piper (personal communication with staff, 4/25) at approximately \$35 million (Mr. Piper said that Exxon had estimated the cost at \$20-50 million, and the federal government had estimated it at \$25-35 million). Mr. Piper added that he would suggest that \$10-15 million be set aside as a contingency fund for post-1991 cleanup expenses. He had previously estimated total future cleanup costs, in testimony to the House (4/8), at \$20-30 million.

The total amount to be deducted from the settlement funds to cover these non-restoration costs is thus approximately \$249,524,000, in nominal dollars, leaving a balance to go to the Trust Fund and be used for restoration of approximately \$650,476,000. Because the deductions will occur during the first five years of the agreement, the present value of the Trust Fund, that is, the amount actually available for restoration and acquisition of equivalent resources, is approximately \$400,000,000.

24. By "representing" to the court that money will be spent pursuant to the MOA, are the governments barred from changing the MOA without court approval? Do they in effect approve the MOA? [3/19, p. 6]

The AG testified [4/5] that this was his view. He declined to commit the administration to bringing any changes to the MOA back before the legislature, if any were negotiated between the two governments.

27. How was the \$900 million amount for compensation calculated?

The AG testified to the House [4/3] that the Governor had suggested the figure of \$1.2 billion based on his own personal assessment of the federal and State damages; he does not believe the Governor had input from the bureaucracy in reaching that figure, and that he doubts if the Governor intended to include the "reopener" amount in that figure. The AG stated that it was his own firm opinion, based on 40 years experience as a litigator, and mindful of his role as a trustee for the public resources, that the settlement amount is fair.

The AG told the Senate [4/4] that Exxon had rejected the initial demand of \$1.2 billion in cash, and that the Settlement of \$900 million was the result of hard bargaining after that. He added that the State had been internally discussing potential settlement amounts for months prior to Governor Hickle's initiative. He stated that he'd had calculated the present value of the settlement at \$713 million, using an 8% discount rate. He noted that it is impossible to come up with precise valuations for natural resource damages, for which there is no market. He described the methods used by economists to assess these values. He stated he was willing to discuss the strengths and weaknesses of the State's case more fully in an executive session. He testified that in his opinion the probability of a recovery of less than \$900 million was greater than the probability of a recovery in excess of \$900 million.

Mr. Erickson prepared a memorandum for the Committee addressing the evaluation of the settlement. [4/21] In it he notes that the governments have performed studies aimed at calculating the economic value of the damaged resources in terms of their "use" value (i.e., the value for recreationists, subsistence users, fishermen, etc.) as well as their "non-use" value. The primary focus of these studies has been the non-use values.

Two methods are used to measure non-use values: (1) direct measures, which calculates the value based on the value of the individual species affected; and (2) contingent valuation, which measures the willingness of consumers to pay money to keep the resources undamaged.

Direct measures, which are according to Mr. Erickson a fairly standard method, yield non-use values in

the range of several hundred million dollars. According to numerous newspaper reports, the contingent valuation studies, using a conservative methodology, have yielded a value of \$3-8 billion.

Mr. Erickson reports that a federal study has shown that federal natural resource damages cases have generally been settled for from 25-40% of the estimated damages. Applying this figure to the calculations in this case yields a settlement value of \$750 million to \$3.2 billion. Reimbursement of State and federal expenditures would be added to that amount.

33. To what extent is Exxon's current liability for cleanup limited by the settlement? Why are we reimbursing Exxon for future cleanup even if the settlement is rejected? [Rep. Davidson, 3/20, p.11] How much do we anticipate Exxon will be able to deduct under this provision?

The AG testified to the Senate [3/28] that the deduction was there "because there needed to be some way to start over if the [Consent Decree] fell apart." He testified to the House [4/12] that Exxon argued that since the Consent Decree obligates it to do the work, the corporation should be reimbursed if the settlement falls through.

Exxon would be liable for the cleanup costs under federal law regardless of the Consent Decree. However, the amount that it would have to pay would be subject to dispute -- as, in the past, Exxon has disputed its responsibility for a significant portion of the State and federal claims for cleanup and response.

Ernie Piper testified [4/8] that the total future cleanup costs would be \$20-30 million. He stated that because the cleanup would be publicly funded, there would be a special effort to justify costs, and to use local cleanup personnel when they are cheaper than Exxon's subcontractors.

Mr. Piper added [4/8] that the settlement simplifies cleanup, because it places Exxon under the direct control of the SOSC and the FOSC, whereas Exxon is currently itself in the decision making loop.

35. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue,

and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful? What has it gained in the consent decree to compensate for the loss of those claims? [PF]

The AG testified to the Senate [4/4] that the value of these claims did not exceed the \$50 million received under the Plea Agreement, and that, given the fact that this amount was coming to the state in another fashion, through the criminal plea agreement, he gave it up in the civil agreement. He stated these claims could still be pursued against Alyeska. He gave similar testimony to the House [4/11].

The Legislative Research Agency has estimated that the State lost \$24-39 million in oil and other taxes as a result of the spill.

35.1 What was the settlement value of the state common law claims against Exxon, such as claims for social costs and punitive damages, and how has the State been compensated for these losses? [Rep. Davidson, 4/3]

The value of the State's other claims has not been discussed in any public session of either committee. (Regarding claims for lost revenues, see Question 1# 35.)

From a review of the State's complaint, however, it appears that the only significant recovery to the State that could have been made that is not included in the Exxon settlement is for punitive damages. If punitive damages were awarded, the amount recovered could be several times the actual loss suffered. The Attorney General testified to the Senate (4/6) that it is not clear that such a claim would even get to the jury, and it is of course unknown whether a jury would award such damages if given the opportunity.

36. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska? [PF/State Claims]

Under the Consent Decree, the State has released all its claims for natural resource damages against Alyeska. The only other claims the State has the

are unsatisfied are claims for lost tax revenues and for increased social costs arising from the spill. These value of these claims is almost certainly less than \$100 million.

The AG testified to the Senate [3/28] that the "single remaining defendant is Alyeska", and the claims against Alyeska will be pursued with vigor. He stated that Alyeska was included in the settlement language simply to totally resolve Exxon's liability for natural resource damages, including its liability as an Alyeska owner. He described the claims remaining against Alyeska as common law claims based on misrepresentation "and things of that nature".

The AG testified to the Senate (3/28) that the State will pursue its fish business tax claim against Exxon, and that these claims were proceeding in normal fashion.

38. Do political subdivisions of the state retain their claims against Exxon under this settlement? [Rep. Kubina 3/19; Rep. Leman 3/21, p.2]

Yes. [AG, 4/12]

39. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims (e.g. is there any effect on confidentiality of scientific and economic data)? Does the release of the State's claims for damages to natural resources materially affect the legal claims of third parties who use those resources and suffered economic damages as a result of the injury to the resources?

The AG testified to the Senate [4/4] that nothing in the agreement prevents the State from assisting third party plaintiffs against Exxon after their suits against the State are resolved. (With respect to the confidentiality of economic and scientific data, see Question #47.)

Attorneys representing third party plaintiffs have identified six major concerns regarding the settlement, not all of which pertain to their ability to litigate against Exxon:

(a) Third party plaintiffs do not have the economic resources to battle Exxon on an equal footing.

(b) The settlement amount is inadequate to ensure that Exxon (or others) will not cause damage to the third parties in the future.

(c) The settlement amount may be inadequate to restore the resources damaged in the spill, and on which the third party plaintiffs depend.

(d) At any trial, Exxon will assert that the negligence of the state and federal governments in the conduct of containment and cleanup operations was responsible for much of the third party plaintiffs' damages; the third party plaintiffs must therefore sue the governments so that Exxon cannot "try the empty chair". This places the third party plaintiffs in an adversarial role with the governments that neither the governments nor the third parties desire.

(e) The third party plaintiffs not only need access to the underlying scientific and economic data (See #47), but they also need the assistance of the governments experts' in interpreting and analyzing this data. The cooperation of the governments in the third party litigation would be of great value.

(f) Exxon has indicated that it will argue that the reference to reserving the rights of third parties to sue for damages for injuries arising from a "present" property interest to mean that economic losses arising from future fish runs are not preserved. The AG and the Federal Trustees have asserted that Paragraph 32, which generally preserves all third party rights, precludes such an interpretation.

39.2 Could the State have insisted on the settlement of all third party claims before settling its own suit?

Attorney General Baily testified that it was the policy of the Cowper administration to attempt this, but there is no assurance that it could have been done, or that it could be in the future if this settlement is rejected or delayed.

Attorney General Cole stated [4/12] that he had not attempted to negotiate on behalf of third parties.

47. Can scientific and economic information acquired by the state in connection with the claims being released in this

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case be kept confidential under state law once the claims are dismissed? [Rep. Navarre, 3/19]

LAA has provided an opinion on this subject. The opinion states that the "the attorney general is probably acting within his authority. The law, although, is not completely clear..." The opinion notes that to the extent the materials were produced in anticipation of litigation, and not in the ordinary course of business, it would be protected from discovery by litigants by Civil Rule 26(b). "AS 09.25.122 suggests that [non-litigants] would be entitled to inspect the data [notwithstanding the court rule].... But such an interpretation would effectively remove the work product protections for public litigants. I am inclined to think that a court would not support such a reading of the statutes."

Attorney Matt Jamin testified [4/16, p.48] that in his opinion "the basic core scientific data", including economic studies, would ultimately be discovered in the course of litigation, and that the key issue is the timing of disclosure. He stated that information obtained from experts for consultation, rather than for trial testimony, might not be discovered, however.

Mr. Stewart testified [4/16] that much of the information being sought would not be discoverable.

The AG testified to the Senate [4/4] that he would vigorously resist discovery of this information in third party litigation, because it could be harmful to the State. He has stressed that the information could be used by Exxon if the settlement is not approved, and after that by Alyeska, as well as third parties who are suing the state. [Senate, 4/10; 4/14; House, 4/16]

The AG also testified to the Senate [4/6] that he would give "due consideration" to a joint legislative resolution requesting the release of that information. He stated that he would not give such consideration to a letter of intent. He told the House he would give a resolution "weighty consideration." [4/12]

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

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court? Could it intervene in the state court to prevent a dismissal of claims? [PF]

The AG reaffirmed [4/3] that if the legislature does not approve the settlement, the Governor will withdraw. He provided a letter to that effect on April 25. He testified to the Senate [3/28] that if the legislature took no action, the settlement would be cancelled.

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

[PF/Overview; Rep. Barnes, 3/19, p.6]

The AG testified [4/5, p.17] that the CD and MOA are "irretrievable linked", in that approval of the CD activates the MOA.

54. Can the legislature approve the settlement conditionally, with stipulations? [Rep. Hudson, 3/19, p.12]

The AG testified [4/5, p.11] that he believed that Exxon would not accept any such stipulations. Specifically, he stated that he did not believe that Exxon would accept payment up front.

The AG testified to the Senate [4/6] that if so instructed by the Legislature, he would convey any to Exxon and the federal government any such requested modifications.

Mr. Campbell stated [4/16] he would resist changes to the MOA, because of the difficulty in getting the various federal agencies and the Congress to accept them.

55.1 What are the consequences to the State if we choose not to settle at this time?

Mark Broderson testified [4/8] that restoration work would probably not proceed at the rate it will under an agreement, because of concerns over reimbursement.

The AG had suggested [4/3] that restoration work would be delayed until a settlement is reached or the litigation is concluded.

The major concerns that have been expressed regarding a failure to settle at this time are:

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(1) Funding for ongoing litigation would be a continuing drain on the general fund.

(2) The cost of restoration is too high to be funded out of the general fund, and this work would be delayed.

On the other hand, Section 470 funds may be used to pay for the cost of litigation against Exxon, as well as for cleanup and restoration costs. The fund currently generates about \$28 million per year. With litigation costs estimated at \$12-15 million per year, Section 470 funding of up to \$16 million would be available for cleanup, damage assessment, and restoration.

answers1.amh 4/29/91

MEMORANDUM OF AGREEMENT

1. Can the legislature by statute designate trustees or a procedure for their appointment by the governor? [Rep. Donley, 3/19, p.6]

In the Consent Decree, the State and federal governments "represent that it is their legal position that only...state officials designated by the Governor..." can act as Trustees "to recover damages...under...the Clean Water Act." Translation: to the extent the State is recovering "under...the Clean Water Act", the Governor must designate the Trustees, because that is what the federal law requires. See 42 U.S.C. 9607(f)(2)(B); 33 U.S.C. 1321(f)(5).

However, it is far from clear that the State's recovery under the settlement is "under the Clean Water Act." Nothing in the Consent Decree or the MOA says that the sole source of recovery is the Clean Water Act, and in fact the State's lawsuit in superior court does not allege a Clean Water Act cause of action. [See CD Question #7]

Arguably, therefore, the State can select Trustees by whatever mechanism it wants, simply by asserting that the basis for its recovery is something other than the Clean Water Act.

Even if the State's recovery is under the Clean Water Act, there is nothing in federal law that prohibits the legislature from specifying the process to be followed in making the designations, or from nominating candidates for final designation by the Governor. There are serious Alaska constitutional barriers to such an approach, however. See *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).]

3. Could the state and federal governments agree on a formula or process to divide the litigation proceeds between them which would limit the trustees' discretion in funding projects? [Rep. Leman, 3/19, p.8]

The fact that both the State and federal Trustees will have a veto power on the Trust's expenditures suggests that a working relationship will arise in which each party gets control over 50% of the total available.

None of the witnesses before the Committee pointed to any legal barriers to a formula or other process for expressly dividing the recovery, but the practical impediments would be substantial.

12. What alternative mechanisms for funding and distributing the litigation proceeds are there (i.e., does the CWA impose too many restrictions on use, and is a co-trusteeship the best approach)? [Rep. Hudson, 3/19, p.9; Rep. Phillips, 3/21, p.6]

From a review of the Consent Decree, the applicable statutes and regulations, and the practice in other cases, it does not appear that the parties in this case were legally restricted to the method they have selected.

It is an open question whether the MOA, which governs the expenditure of money recovered in the CD, is in any way restricted by the CWA. In fact, the MOA is apparently in some respects contrary to the CWA.

Alternative mechanisms have been used in other similar cases recently settled in New York and California. In the San Francisco Bay case, the MOA establishes a Committee composed of the state and federal trustees, plus representatives of regional park and conservation entities, established under state law. The Committee, not the trustees, has "final authority to disburse money contained in the Trustee Fund...and to make all necessary decisions for the management and administration of the projects for which the money has been disbursed." The Committee is authorized to carry out its work through either public or private groups as subcontractors. The MOA establishes Natural Resource Objectives that are to guide the Committee's decisions, including the specific designation of several projects.

In the Arthur Kill (New York) case, the MOA also establishes a Committee with "the authority to make all decisions relating to the use of any sums recovered pursuant to the Consent Order." The Committee includes representatives of the state and federal trustees, plus representatives of the local governments impacted by the spill in that case. The Arthur Kill MOA also describes the Natural Resource Objectives that apply, and mentions specific projects to be carried out.

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13. What mechanisms does the agreement provide for input by the legislature, local governments, Native groups, injured third parties, and the general public in the formulation of policies and governing the co-trusteeship, and in their funding decisions? [Rep. Hudson, 3/19, p.10]

Paragraph IVA(4) of the MOA requires the trustees to provide for "meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group to advise the Trustees" regarding restoration. The details of public participation are up to the trustees, under the MOA.

The AG testified to the Senate [4/17] that there is an "absolute commitment" on the part of both the federal and state trustees to form an advisory group; Mr. Campbell and Mr. Stewart confirmed this. The AG testified [4/13] that he would have no objection to altering the Agreement to making such an advisory council mandatory, and to making meetings of the trustees subject to the Alaska Open Meetings Act [4/12], although he could not speak for the federal trustees. He stated [4/12] that public input would be obtained before spending decisions were reached.

There is no indication that meetings of the Trustee Management Team, or of the Trustee Council, have been open to the public, or announced pursuant to Alaska law, up to this time.

14.1 What alternatives arrangements for public participation could be included in the MOA?

Among the proposals that have been suggested are:
(1) public membership on the group authorized to make funding decisions (see MOA Question #12);
(2) application of the Alaska Open Meetings Act to trustee and subsidiary body meetings; (3)
legislative appropriation of funds.

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

Mr. Heinz testified [4/10] that in his opinion, a "road to Cordova" would be outside the scope of the allowable expenditures. Mr. Rosier indicated [4/14] that in his view it would take considerable work to link a road to Cordova with "restoration".

The AG testified [4/12] that as yet there has been no discussion by the trustees of timber buyouts, although habitat acquisition along streams had been discussed.

Mr. Stewart stated to the Senate [4/17] that the CWA language on restoration is "quite broad". A fish hatchery or a research facility could be funded under the CWA language, he said.

"Restoration" or "rehabilitation" are defined in 43 CFR 11.14(11) as "actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it preciously provided."

"Replacement" or "acquisition of the equivalent" is defined in 43 CFR 11.14(ii) as "the substitution for an injured resource with a resource that provides the same or substantially similar services."

19.1 The CWA does not provide for spending money to "enhance" injured resources. What does this term mean? How does the Trustees' authority, given this term, differ from what they could do under the CWA?

The term "enhancement", which is an authorized use of trust funds under the Consent Decree and the MOA, does not appear in the CWA and is undefined. Mr. Stewart testified to the Senate [4/17] that in his view "enhancement" was allowed under the CWA. He did not elaborate on whether it adds anything to the existing CWA language.

19.2 What are some specific examples of how the trust funds might be spent?

Comm'r. Heinz testified [4/10] that many ideas had been advanced regarding how trust funds might be spent, but no specific decisions have been reached. He indicated that in his view the Trustees would reach the limit of what could be spent on biological restoration projects relatively soon. In that case, he suggested, it might be advisable to widen the scope of the allowable expenditures, if that was what local people wanted. He stated that he would not at some point be adverse to dividing up the remaining Trust funds with the federal government. He stated that it was possible that not all the money could be responsibly be spent within the CWA limitations.

Some specific ideas that have been suggested, he said, include: where a natural beach biological habitat has been irretrievably destroyed, a dock, picnic tables, or cabin for recreational use might be appropriate; a Seward Marine Mammal Science Study Center, which would be at once a scientific, educational, and tourism resource; hatcheries for fish or shellfish; purchase of timber rights. He also mentioned the idea of a Prince William Sound Conservation Area, to enhance (1) recreational uses; (2) traditional uses, such as subsistence and fishing; and (3) education and science.

Mr. Rosier testified [4/14] that he "would have trouble" with "huge set asides". He stated that he would like to see money spent as much as possible on actual restoration, rather than just on studies.

24. When does the 5 year repayment period for reimbursement of prior state expenses begin? Is there a payment schedule, and will interest accumulate on the unpaid balance? [PF, 3/19, p.5]

The AG testified [4/17] that the trustees have informally agreed to direct Exxon to make these payments over the first five years of the trust. He stated that the repayment of the state's share would be in the area of \$20-\$20-\$27-\$2.5-\$2.5 million. He noted that the federal agencies had not determined whether they would ask for reimbursement.

Under the terms of the Consent Decree, there is no interest on these payments.

26. Is there any limitation on the use of funds for projects outside the state? Could the money be used to establish parks, institutes, etc. in other states? [PF/Overview]

The AG testified to the Senate [4/17] that under no circumstances would the state trustees consider spending any of the money for projects outside Alaska.

43. Is there any mechanism by which the authority of the governments to enter into these agreements could be determined in advance? [Rep. Phillips, 3/27]

Alaska Appellate Rule 407 provides that a federal district court judge may certify to the Alaska Supreme Court questions of state law "which may be

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determinative of the cause" pending in the federal court. This procedure might be available to test the constitutionality of the Consent Decree and MOA. However, the Alaska Supreme Court is not obligated to respond to such questions.

- Timing - extension, of time -
- NO CHANGES AUTH'D -
- SCIENTIFIC DATA -
- Hse & Senate

3 party Agreement
 complicated by the
 turf issues of the
 trustee agencies -

don't disapprove for emotional Reasons
 nor political reasons -

think about the clean up of the environment -
 weakened their authority now - not
 in 10 years. -

CBE = reluctant
 litigant

IF we dep 57X!

* IF we are really interested in
 restoring the environment - think -

Questions for Doug Baily b/4 House Committee

1. did your settlement efforts include 3d party plaintiffs?
2. did you ever address the question of the need for legislative appropriation as part of the first settlement?
3. how did you contemplate release of the scientific evidence if you settled?
4. did your settlement contemplate using just CERCLA and CWA or did you contemplate settling in part under various state statutes which did not require a joint state-federal trust?
5. do you have concerns about a settlement exclusively under the CWA?
6. several persons have testified that the state and federal government have a conflict in settling this case because they are alleged to have been responsible in part for the spill damage? Do you agree, and if so, how should that impact what we are doing here?
7. several persons have testified that the effect of this settlement is to put the state on the same side as Exxon, against Alaska citizen-litigants? Do you agree, and if so, can you explain why to us?
8. several persons have testified that the real litigation costs to the state will not be diminished to the state through this settlement? Do you agree, and if so, explain why?
9. Do you see increased liability exposure to the state through this settlement? Why?
10. Is it fair to characterize this settlement as putting a very limited amount of money into essentially federal control, while exposing the state to a position much worse than it was in before?
11. Attorney General Cole has told us there is no relation between this settlement and ANWR? Do you think there really is, and if so, why?
12. Should this settlement be accepted by us as trustees for the people of the State of Alaska?

EXXON VALDEZ OIL SPILL SETTLEMENT CLAIM
IDENTIFIED ISSUES

1. Is there a formal mechanism or should the Legislature intervene so the court cannot approve the settlement without Legislature?
2. Should the Federal government be notified of the House Special Committee's meetings? Which is the lead agency? Should Attorney General's Office also be notified?
3. Federal government testimony must be obtained. Attorney General should attend.
4. What are bankruptcy implications? What are the net costs to the state, in terms of taxes?
5. What is the present value of the settlement monies?
6. What are the implications to settling with Alyeska Pipeline Service?
7. Why isn't the rest of the settlement "restitution as part of the fine?" Is restitution, as part of the fine, deductible?
8. Why not enforced settlement by state superior court?
9. Is this issue a "lock-up" of state lands?
10. Can we disapprove one of the two agreements?
11. What if trustees don't agree? Will that spawn an increase of litigation?
12. Is district bound to grant 45 days waiting period? Should Legislature intervene to protect interest?
13. Why is there no guilty plea to felony charges? Is misdemeanor and felony punishable?
14. Why not charge Exxon to state law? When is statute of limitation of state law? Are we precluded or prohibited from pursuing state law?
15. Should we publish statute of limitation for third parties?
16. Estoppel and subpoena Attorney General
17. How will third party lawsuit against State be funded? How will costs of defense be paid in the third party suits

18. Constitution: power of appropriation of state revenues
19. Confidentiality of scientific and economic data. Is it a conflict of state law?
20. How will lawsuits against the state be funded (should the state lose its case)? How much to defend the state against these claims?
21. Effect on affected communities
22. Value of settlement
23. Are there other mechanisms that can accept the settlement?
24. Are these state assets?
25. What are other realistic options? Analysis of options.
26. Legislature's power to appoint trustees. Can the trustees act completely independently without state or federal approval?
27. Can Legislature agree to agreement with stipulations?
28. How is liability exclusion related to state law?
29. How much has state already spent in litigation costs?
30. Timeline required by court and this committee
31. How to identify state and federal monies?

DIVISION OF LEGAL SERVICES

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MEMORANDUM

March 20, 1991

SUBJECT: Telephone Conversation with Attorney General Cole re Exxon Valdez Settlement; March 20, 1991

TO: Representative Max Gruenberg

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

On March 20, 1991 I talked on the telephone to Attorney General Cole, who was very cordial and cooperative. I asked him three questions and received the following answers.

1. Question: Can the "up to \$72 million" to be given to the state for reimbursement of past expenses be appropriated for any purpose once it is deposited in the state treasury?

Answer: Mr. Cole believed that it could. He also stated that "up to \$72 million" really meant "\$72 million".

2. Question: If the six trustees decide to spend money from the trust fund for work to be done by state employees, will that money flow into the state treasury (with restrictions on its use set by the trustees) and be subject to appropriation for the specified purposes?

Answer: Mr. Cole said that this issue had not been considered in the negotiations. He said he suspects that the money would not need to be appropriated, but would be like a gift to the affected agency. I pointed out that if these were state employees, they would expect to be paid by the state. I think he could see my point and we left this as an unresolved question that would need more thought.

3. Question: I asked him generally about the immunity of Exxon that appears at the end of paragraph 11(a) in the middle of page 12 of the consent decree.

Representative Max Gruenberg
March 20, 1991
Page 2

Answer: He stated that this was intended to immunize Exxon from liability for undertaking the cleanup, but not for its negligence in performing the cleanup.

PLF:pl
91-195.plm

cc: Charles Cole, Attorney General
Senator Dick Eliason

SETTLEMENT
VALUE

EXXON VALDEZ OIL SPILL SETTLEMENT

DOCUMENT/CASE	LEGAL BASIS	TYPES OF DAMAGES	AMOUNT PAID	TO WHOM PAID	RESTRICTIONS ON USE	WHO DECIDES HOW USED
U.S. and Alaska v. Exxon (Federal Court Alaska) Consent Decree	Federal Clean Water Act (CWA) 33 USC 1321(f)	Past and future cleanups, response and assessment (state and federal) Damage to state and federal natural resources	\$900 million less Exxon's cleanup cost from 1/1/91 to final approval of consent decree This is <u>joint</u> recovery for U.S. and Alaska	Federal and state trustees jointly AS Directed by STATE + FEDERAL Attorney General	CWA requires use for restoring, rehabili- tating or acquiring equivalent of damaged natural resources	Trustees in accordance with MOA
U.S. v. Alaska (Federal Court Alaska) Memorandum of Agreement (MOA)	CWA regulations 43 CFR 11.92 and 11.93 40 CFR 300.600- 300.615	1) State cleanup, response and litigation costs through 12/31/90 2) Federal cleanup, response costs through 12/31/90 3) Federal and state cleanup costs after 12/31/90 4) Restoration, rehabilitation, acquisition	1) Up to \$72 million 2) Up to \$62 million 3) No limit 4) Remainder of settle- ment	1) State government 2) Federal government 3) State or federal government 4) Trustees: 3 state 3 federal	1) None 2) None 3) None 4) Restoration, rehabilitation, acquisition of natural resources	1) State Legislature 2) Federal Government 3) State Legislature and Federal Government 4) Unanimous agreement of trustees Failing that, federal judge

DOCUMENT/CASE	LEGAL BASIS	TYPES OF DAMAGES	AMOUNT PAID	TO WHOM PAID	RESTRICTIONS ON USE	WHO DECIDES HOW USED
Alaska v. Exxon (State Superior Court) 89-06852	State law (Statutory and Common Law)	Cleanup, response, assessment, damage to natural resources, lost state revenue (taxes), litigation costs, prejudgment interest	? (No settlement proposal)	To state government	None	State Legislature
U.S. v. Exxon (Federal Court Alaska) Criminal Case	Federal law	1) Fine 2) Restitution	1) \$50 million 2) \$50 million	1) U.S. Government 2) State Government	1) None 2) Only for restoration projects related to spill	1) Federal Government 2) State Legislature

ERICKSON & ASSOCIATES

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Telephone (907) 586-1290

Memorandum

5 April 1991

To: Max Gruenberg

From: Gregg Erickson *Gregg Erickson*

Subject: Economic Issues in Proposed Exxon Settlement

During the Special Committee's meeting on March 27, you requested that I work with your staff to follow-up on several issues. Some initial comments are given below. An additional memorandum addressing the more general issue of valuing natural resources injuries is in preparation.

Natural Resources Damages

What is meant by "natural resources damages"?

If Mr. A. smashes Mr. B's car, justice requires that Mr. A repair the car to its condition before the crash, or provide an equivalent replacement vehicle, or sufficient money to make Mr B indifferent to the injury inflicted on his car. The money that Mr. B gets is his "damages," not the injury to his car.

Natural resource damages are, like the money paid to Mr. B, "compensatory and remedial" (see the definition on p. 5 of the consent decree), but from an economist's standpoint they differ from ordinary damages in two ways: (1) the injured property must in some sense be held in common ownership; and (2) the injury must be so broadly inflicted that private parties have an insufficient economic incentive to recover all the damages.

The injured resource need not be a part of nature's endowment; for example, injury to cultured fish in an artificial lake would almost certainly give rise to natural resources damages, provided the lake and fish were public resources. Commercial fishermen who lose income because of an oil spill are usually not thought to have a claim to natural resources

Memorandum
Rep. Max Gruenberg
5 April 1991

damages, as long as they have sufficient economic incentive to pursue private litigation.

What are natural resources services?

Natural resource services are a flow, distinct from the natural resources themselves, which are the stock of assets that provide the flow. If Mr. A destroys Mr. B's House, Mr A is not only liable for replacing the house (the stock), but also liable for providing Mr. B a place to live (maintaining the flow of housing services) while the new house is being built. The robins that arrive in Juneau each April are a valuable natural resource stock, providing insect control, bird-song, pleasure to bird-watchers, food to certain predators, and other valuable natural resources services .

Do natural resources damages include economic losses as from lost tax revenue? If not, is the state then giving up these claims?

It is unlikely that lost tax revenue would be considered natural resources damages.

Excepting the municipal portion of the fish taxes, the settlement explicitly extinguishes the state's tax-loss claims. There is no provision in the consent decree for making good the loss to the general fund. This contrasts to the cleanup and damage assessment claims, for which general fund reimbursement is explicitly provided. The state's negotiators may have decided that the tax loss claims had little merit, or that reimbursement was bargained away for things they judged to be of greater importance. The restitution to be paid under the criminal plea agreement may have figured in the negotiator's thinking. The attorney general denies any role in that agreement, however, and in any event, the restitution monies may only be appropriated for specific purposes, and thus do not directly compensate for the unrestricted revenue the lost taxes would have provided.

Memorandum
Rep. Max Gruenberg
5 April 1991

Why are the state's natural resources damages being treated as if they are inseparable from those of the federal government?

In principle, "ownership" can be determined for tidelands, submerged lands and a few other resources injured by the oil spill. Most of the natural resources damages, however, arise from injuries to biological resources to which the notion of ownership can be related only with difficulty. Who owns the sea otter, or the salt water she swims in? Who owns the clams she eats or the plankton that feed the clam? And if the sea otter dies because the clams die because the plankton die because of the oil, how is the injury and damages to be divided among the various "owners"? From an economic perspective, the notion of a joint trusteeship, whatever its deficiencies, must be measured against the expenditure of human talent and public funds that efforts by the governments to "divide the baby" would entail.

What limits are there to the "acquisition of equivalent resources"?

The federal Clean Water Act defines "restoration" as including "replacement and acquisition of equivalent resources." The question of how far one can stretch the notion of equivalent resources has been the object of considerable legal and bureaucratic discussion within the trustee agencies and among them and their legal advisers. Good economic arguments have been advanced to support the "equivalence" of a wide range of alternative resource acquisitions. For example, boat launching facilities near Talkeetna might be an economically and cost effective way to compensate sport fishermen for lost opportunities in Prince William Sound. "Equivalent resources" is an elastic concept, but restoration planners were advised that the further they chose to stretch it, the greater the risk of doing something that would be ruled non-reimbursable. Absent a compelling policy reason to push the limits, and anticipating vigorous challenges from Exxon, the attorneys counseled caution.

The Dept. of Law has addressed restoration questions in a number of contexts, including a 1990 memorandum responding to concerns among staff at the Department of Natural Resources that the purchase of upland habitat scheduled for logging might be going beyond the definition. The committee may wish to request a copy of this and other memoranda addressing the definitions of restoration in federal law.

Restitution

On what sorts of things might the state properly spend the \$50 million that may come to the state as restitution under the criminal plea agreement?

The plea agreement provides that within 30 days of the agreement's acceptance Exxon will pay the state \$50 million in "remedial and compensatory payments...to be used by the State of Alaska exclusively for restoration projects related to the EXXON VALDEZ oil spill." Restoration includes "restoration, replacement *and enhancement of affected resources*, acquisition of equivalent resources and services, and long-term environmental monitoring and *research programs directed at the prevention, containment, cleanup and amelioration of oil spills.*" (emphasis added)

In contrast to the rest of the definition, the italicized words are not found in federal statutes. The statutory language probably allows for a wide range of alternative resource acquisitions and restoration strategies. The addition of "enhancement" and "research programs directed at...oil spills" further widens the range of options available for spending the restitution money. The committee may wish to inquire concerning the origins of this new language.

Re-Opener Clause

The proposed consent decree allows the governments to collect up to \$100 million from Exxon after the year 2002 for additional restoration projects, but only if the governments can prove that "the injury [requiring restoration] could not reasonably have been known nor ... anticipated by any Trustee from any information in the possession of or reasonably

Memorandum
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5 April 1991

available to any Trustee on the Effective Date." Is there any basis for determining the likelihood of this condition being met?

Speaking from the damage assessment perspective, it is a difficult though probably not impossible standard to meet.

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April 21, 1991

MEMORANDUM ON EXXON VALUATION ISSUES

This memorandum addresses several economic issues in consideration of the proposed settlement of government claims from the Exxon Valdez oil spill. These issues include the valuation of the settlement, the valuation of the natural resources damage, some comparisons of this settlement with other natural resource damage cases, and related matters.

VALUATION OF THIS SETTLEMENT

Various sources have estimated of value of the proposed settlement at amounts ranging from a low of \$421 million (under one of six scenarios used by the Congressional Research Service, Library of Congress) to a high of \$757 million (memorandum from Jim Kelly, research and liaison officer for the Permanent Fund Corp., to staff for Rep. Barnes). The majority of the estimates cluster in the \$500-600 million range. Several uncertainties account for the range.

- Inflation will erode the real value of the large bulk of the settlement that will be received in the future, but no one can know future inflation rates with certainty.
- A similar discount is usually appropriate to reflect the real earnings that could be collected if the funds were available to use or invest now, instead of in the future. The real earnings rate varies independently of inflation.
- The dates on which payments will be made under the settlement are not in all cases certain, i.e., the date for payment of the \$72 million reimbursement of state out-of-pocket costs.
- Some payments result from calculations involving amounts that are not yet known, i.e., Exxon's clean-up costs between January 1, 1991 to the date of final approval.
- An unknown portion of the settlement covers a part of future state clean-up costs that have a high probability of being recoverable from Exxon without litigation.

MEMORANDUM ON EXXON VALUATION ISSUES, page 2

- Tax effects will lower the cost of the settlement to Exxon and reduce its value to the governments by a significant but unknown amount. Whether to include the tax effects is itself a judgement.
- The final installment payment is contingent on unknown future events.
- Additional but unknown liabilities for legal expenses and possible damages may arise as a result of entering the settlement, a factor not accounted for in any of the estimates.

There is no single correct way to deal with these uncertainties. Most economists familiar with the settlement seem to be comfortable in casual calculation and discussion with rounding its present cash value to a half-billion dollars.

NON-USE VALUES

Although the governments have attempted to keep confidential their economic valuations of the Exxon damage, the major results of those studies have been widely discussed in economic circles and with the press. Some of the economic studies attempted to evaluate losses of use values to recreationists, sports fishermen, hunters, subsistence users, and losses associated with commercial fishing. The major thrust of the economic studies, however, and the major part of the several million dollars spent by the governments on economic valuations has been devoted to determining non-use values.

Direct Measures of Non-use Values

Non-use values reflect the worth people give to things like eagles, sea otters, and pristine ecosystems that individuals don't directly use, and which are rarely bought and sold at market prices. These values may reflect a desire to preserve options for future recreational use (option value), to preserve options for future generations (bequest value), or simply because the very existence of the resource (existence value) is something an individual is willing to pay to preserve.

The concept of non-use values is widely accepted in economics. Some methods of measuring the values of non-market goods such as eagles sea otters are also well established. If people are willing to pay \$50,000 to preserve the life of an injured sea otter, as they apparently were in the case of the rescue program after the Exxon spill, it is inferred that the value of the otter to people must be at least that amount. Thus, one approach to determining the values of Exxon oil spill losses calculates known, inferred, and projected losses and multiplies those numbers by values for individual animals. In addition to looking at rescue efforts, values can be imputed from information such as the costs zoos incur to acquire animals. For example, zoos are

estimated to be paying \$200-500 per bird for murre. The costs of transplant programs, and spending on management and protection can also be used. These relatively accepted approaches to non-use valuation have received little publicity, but studies employing the techniques, together with the emerging picture of the biological injury, reliably support claims of several hundreds of millions of dollars. Mortality to sea otters, murre, other sea birds, eagles, whales, and seals would likely account for the bulk of these values.

Contingent Valuation Measures

The biggest part of the governments' economic effort on the Exxon case has been directed toward determining non-use values using a survey technique called contingent valuation (CV). Respondents are asked how much they would pay to preserve a natural resource, assuming such a transaction were possible; the hypothetical transaction is thus *contingent* on the situation posed by the questioner. The technique is controversial within the economic profession, but has won acceptance in various applications. Although the technique has never been tested directly in a trial, it was approved in theory by a 1989 U.S. Court of Appeals decision in the Ohio case, a proceeding involving challenges to natural resource valuation regulations issued by the Dept. of the Interior. The breadth of that decision was expanded later that same year in the related Colorado case.

Non-use values are not limited to those who live in proximity to the resource; the governments' Exxon contingent valuation surveys were designed to determine the values lost by the entire population of the U.S. The state's national survey was conducted early this year, but it was preceded by extensive focus group studies used to evaluate the proposed questionnaire, and pilot studies to verify survey validity. The federal work had not reached the survey stage when it was suspended.

The state's survey essentially asked the 1000 or more respondents questions to elicit the amount they would be willing to pay in higher taxes and gasoline costs to prevent another accident like the Exxon oil spill. The total amount all U.S. residents would pay was estimate by multiplying the average among the respondents by an figure representing the entire population.

The state's approach to its CV survey has been conservative. For example, respondents were asked questions to elicit the amount they would pay this year to protect against damage over the next ten years. A more accurate (and likely higher) value would have been returned had the questions been designed to elicit the value that the respondents would have been willing to pay if they could have spread the payments over the entire ten year period.

MEMORANDUM ON EXXON VALUATION ISSUES, page 4

Economists working on the federal economic studies criticized the state's approach for being too conservative. Concern was expressed that the state's economic consultants had been pressured on this point. The attorneys, it was suggested, were stunned by the real values of the damage being returned by the focus groups and pilot surveys, and were fearful that these "too large" values would be more vulnerable to methodological challenge in court. One result of this conservative approach was that the wording of the survey questions provided little or no information to respondents on the issue of long-term injury to the environment. This silence may have left the survey vulnerable to an Exxon counter strategy using a major advertising campaign to influence respondent perceptions of the severity of the natural resources damage. One of the major reasons for keeping the CV survey dates secret was to make it difficult for Exxon to employ this strategy. Nevertheless, in October 1990, the company launched a multi-million dollar television campaign designed to reach half of U.S. households in that month with video pictures of a "now almost recovered" Prince William Sound. An extensive print campaign followed.

The state's economists do not believe the Exxon strategy was successful. Comparing data from pilot surveys conducted before October with the results of the final survey suggest that the Exxon strategy had little effect on the final survey values. In any event, the state's C.V. studies nevertheless yielded significant values for the damage done by the spill to Alaska's natural resources. The CV results have been variously reported as \$2.5 billion to \$5 billion (*N.Y. Times*, March 13, 1991), \$3 billion (*Washington Post*, March 20), \$3 to \$5 billion (Tom Campbell, general counsel of the National Oceanic and Atmospheric Administration in March testimony to Congress), and \$3 billion to \$8 billion (*Anchorage Daily News*, March 31). Economists working on the studies have independently confirmed the \$3 to \$8 billion range, and suggest that because of the state's conservative approach, the actual value is likely to be in the higher end of that range.

Evaluating the Economic Studies

The academic economists and other experts who served on the two governments' litigation teams are largely, perhaps unanimously, opposed to the settlement. Experts, of course are not the final arbiters of these issues. Attorneys usually make the decisions that finally set the values in these cases. Dr. Norman Meade, a U.S. government economist who has studied the historical data, found that natural resource damage issues have generally been settled by U.S. attorneys for 25 to 40 percent of the present values of the economic damage estimated by expert economists. Applying those percentages to the values reported above suggests that the present value of the Exxon natural resources damage settlement should be between \$750

MEMORANDUM ON EXXON VALUATION ISSUES, page 5

million (25 percent of \$3 billion) and \$3.2 billion (40 percent of \$8 billion). Reimbursements of government expenses, and other damage claims would have to be added to these amounts.

RECOVERIES IN OTHER CASES

Another approach to evaluating this settlement is to compare it directly to the values recovered in other oil spill cases. In terms of present value of the recovery per gallon of spilled oil, this approach tends to confirm the relative severity of the damages and penalties assessed against Exxon in the proposed settlement. On the other hand all of the spills described below differ in many respects from the Exxon Alaska spill, and none extended over as large a geographic area. The listing below is selective, but typical of recent oil spill settlements.

Shell Oil San Francisco Bay Spill

In 1988, the Shell Oil Co. spilled 400,000 gallons of crude oil from its Martinez refinery into San Francisco Bay. In December 1989, the federal and California governments announced the settlement of all state, local, and federal claims arising out of the spill for \$19.75 million, or just under \$50 per gallon. Payments were not extended. At \$50 per gallon, the comparable recovery for the 11 million gallons spilled in the Exxon case would be a present value of \$550 million, well within the range estimated to have been achieved under the Exxon settlement.

The Shell spill affected waters that are among the most polluted on the Pacific Coast. It could be argued that the relatively undamaged nature of the environment affected by the Exxon spill makes it more valuable. On the other hand, the Shell spill affected an area that humans use far more intensively and directly than the Alaska environments hit by the Exxon spill, factors that could increase the likely damages in the more populous area.

Amoco Cadiz Spill

The tanker Amoco Cadiz struck the French Atlantic coast and eventually broke up, spilling an estimated 66 million gallons. The case is still on appeal, but it seems unlikely that the plaintiffs will receive much more than the equivalent of \$61 million, or 92¢ per gallon. While the trial was in the United States, it was conducted under French recovery theories, and did not include any natural resources damages.

U.S. laws and attitudes have evolved considerably since 1978. Most would argue that the precedent is not controlling. Nevertheless, the

MEMORANDUM ON EXXON VALUATION ISSUES, page 6

fact that a major oil company could be assessed such a small liability for such a large oil spill on the coast of a Western democracy is a fact that cannot be wholly dismissed in considering the vicissitudes of potential litigation.

Exxon Arthur Kill Spill

In 1990, an underwater pipeline rupture in Arthur Kill, a waterway between New York City and New Jersey, resulted in a 567,000 gallon spill of heating oil. State, federal and local government claims arising out of the spill were recently settled for \$15 million, or \$26 per gallon. At that rate the Exxon spill in Alaska would be worth only \$290 million. Comparability with Exxon's Alaska spill is clouded by the already polluted nature of the Kill, that the New York/New Jersey waterway was not heavily used or appropriate for recreation, the relatively high percentage of the oil recovered (26 percent), and the difference in the kind of oil spilled.

Glacier Bay Cook Inlet Spill

The 1987 spill from the tanker Glacier Bay into Cook Inlet resulted in a recent damage recovery by the state of \$700,000. The volume spilled was never accurately determined; based on estimates, the recovery amounted to \$14 to \$28 per gallon.

Arco Anchorage Port Angeles Spill

This was a spill of 240,000 gallons of North Slope crude oil from the Arco tanker *Anchorage* in 1985. The total state recovery was \$348,000, or \$1.45 per gallon. A relatively high percentage of the spilled oil was recovered, and relatively little biological damage resulted.

ORGANIZATION OF THE TRUSTEESHIP

Concern has been expressed regarding the organizational structure of the trusteeship proposed under the settlement. The negotiators could have chosen other models for trust organization that might have provided the public with greater confidence that the recovered funds will be put to good use. In several recent environmental pollution cases funds recovered as damages have been dedicated much more strictly and directly to environmental purposes.

- In a 1981 settlement of a federal pollution case against the Occidental Chemical Company, the defendants provided a \$1.5 million contribution to California Universities for environmental research.

MEMORANDUM ON EXXON VALUATION ISSUES, page 7

- In 1988, as part of a settlement of a case against General Electric for pollution of a Massachusetts river, the company paid the Fund for New England, a private non-profit philanthropic organization, \$100,000 to undertake projects to enhance river water quality.
- In the largest environmental criminal case up to that date, the Allied Chemical Company agreed in 1977 to put \$8 million into a Virginia Environmental Endowment, an independent grantmaking foundation whose purpose is to improve the environment in Virginia.
- In 1987, the endowment established in the Allied case received an additional \$1 million in settlement of claims against Bethlehem Steel Corp. for pollution of Chesapeake Bay, also under a federal consent decree.

ADEQUACY OF EXXON'S PUNISHMENT

The less tangible effects of the civil and criminal settlements are legitimate matters of legislative interest. Even if the civil settlement was considered the best outcome likely, it might still be rejected on the grounds that accepting it would send the wrong message to future negotiators, or would set an undesirable precedent. Certain economic factors may bear on this judgement, one of which relates to the severity of the punishment.

Exxon officers have stated that the settlement will have no significant future effect on the company's earnings. This is in part because it is largely covered by already established reserves. Had the present cost of the settlement been absorbed last year it would have lowered the corporation's 1990 profits of \$5 billion by about 10-12 percent.

In the Justice Department's 1987 Browning Ferris environmental pollution case the consent decree included a provision that barred the defendant from claiming deductibility for federal tax purposes. Had this provision been included in the settlement it would have likely increased the share of 1990 earnings taken by about three percentage points.

Total expenditures by the company as a result of the spill are likely to be about \$3 billion, all told. An estimated \$450 million of this was covered by insurance, and an estimated \$850 million was offset by tax savings, leaving a net cost to the company of about \$1.7 billion. This figure is about one-third of Exxon's 1990 net earnings, and about 7 percent of Exxon's value to its stockholders.

ABILITY TO CARRY THE CASE FORWARD

The Committee has taken testimony bearing on the state's ability to go forward with this case should the proposed settlement be rejected, including testimony on the extent to which the federal government would assist in pursuing the two government's joint civil claims. The likely future costs of litigation are a factor to be considered. Further work on the natural resources damage assessment, including economic studies would likely require several tens of millions of dollars over the next several years.

Alaska State Legislature

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March 20, 1991

MEMORANDUM

TO: Representative Cliff Davidson
FROM: Tom Chester *TC*
Legislative Analyst
RE: Present Value of Proposed Exxon Settlement

You asked for a calculation of the present value of the proposed Exxon oil spill settlement.

The present value of a series of future payments depends upon the inflation rate and the discount rate used in the calculation. We have used two sets of assumptions in the calculations shown in the attached table: an inflation rate of 6 percent and a real discount rate of 3 percent, and an inflation rate of 5 percent and a real discount rate of 4.5 percent. Under the first set of assumptions the present value of the negotiated settlement is \$722,321,863; under the second set of assumptions it is \$710,849,765.

Present Value

A payment received in the future has less value than a payment of the same amount received at the present time. This is because the money received now will generate interest; and because the money received now will have more purchasing power than the money received later due to inflation that occurs during the intervening period. Therefore, to convert future payments to their present value, one must make an assumption about the rate of inflation that will prevail during the future period, and the real rate of interest that the money could earn (i.e., the interest rate without an inflationary component). The real rate of interest is referred to as the real discount rate.

The higher the inflation and discount rates, the lower the present value of a future payment; the lower these rates, the greater the present value. The more distant the payment, the less its present value; the sooner the payment, the greater its present value.

A person is theoretically indifferent to receiving the present value of a future payment or the future payment. Thus, in the case of the proposed settlement of the Exxon Valdez oil spill, Alaskans should be indifferent

Representative Davidson
March 19, 1991
Page 2

between receiving the proposed stream of payments and a one-time lump sum payment now of \$722,321,863 (or whatever the number is, depending on the inflation and discount rates used in the calculation).

Calculation of Present Value

The calculation of the present values of the Exxon settlement shown in the accompanying table uses two sets of assumptions, as discussed above. Column 2 in each case is the schedule of payments in nominal dollars. Column 3 converts the payments to constant (1991) dollars. Column 4 computes the present value of the modified payment schedule from column 3 with a real discount rate. The present value of the entire series of payments is the last entry in column 4.

We hope this information has been of value. Please call if we can provide you with further information.

Attachments

Proposed Exxon Settlement Payments in Present Value

Case a

Year[1]	Settlement Amount[2] (Nominal Dollars)	1991 Dollars[3]	Present Value (1991 Dollars) [4]	Cumulative Payment (Nominal Dollars)
1991	\$190,000,000	\$190,000,000	\$190,000,000	\$190,000,000
1992	\$150,000,000	\$139,462,976	\$134,404,063	\$340,000,000
1993	\$100,000,000	\$87,712,563	\$82,068,793	\$440,000,000
1994	\$70,000,000	\$57,923,391	\$52,617,838	\$510,000,000
1995	\$70,000,000	\$54,644,708	\$48,193,660	\$580,000,000
1996	\$70,000,000	\$51,551,612	\$44,141,473	\$650,000,000
1997	\$70,000,000	\$48,633,596	\$40,429,999	\$720,000,000
1998	\$70,000,000	\$45,880,751	\$37,030,591	\$790,000,000
1999	\$70,000,000	\$43,283,727	\$33,917,009	\$860,000,000
2000	\$70,000,000	\$40,833,705	\$31,065,222	\$930,000,000
2001	\$70,000,000	\$38,522,363	\$28,453,216	\$1,000,000,000
Cumulative Sum	\$1,000,000,000	\$798,449,392	\$722,321,863	

Assumptions

6.00% Inflation Rate

3.00% Real Discount Rate

Case b

Year[1]	Settlement Amount[2] (Nominal Dollars)	1991 Dollars[3]	Present Value (1991 Dollars) [4]	Cumulative Payment (Nominal Dollars)
1991	\$190,000,000	\$190,000,000	\$190,000,000	\$190,000,000
1992	\$150,000,000	\$141,125,221	\$133,570,106	\$340,000,000
1993	\$100,000,000	\$89,603,315	\$81,154,466	\$440,000,000
1994	\$70,000,000	\$59,735,543	\$51,773,184	\$510,000,000
1995	\$70,000,000	\$56,890,994	\$47,184,492	\$580,000,000
1996	\$70,000,000	\$54,181,899	\$43,002,499	\$650,000,000
1997	\$70,000,000	\$51,601,808	\$39,191,159	\$720,000,000
1998	\$70,000,000	\$49,144,579	\$35,717,620	\$790,000,000
1999	\$70,000,000	\$46,804,361	\$32,551,944	\$860,000,000
2000	\$70,000,000	\$44,575,582	\$29,666,843	\$930,000,000
2001	\$70,000,000	\$42,452,935	\$27,037,451	\$1,000,000,000
Cumulative Sum	\$1,000,000,000	\$826,116,238	\$710,849,765	

Assumptions

5.00% Inflation Rate

4.50% Real Discount Rate

Notes:

[1] 1991 payment made in June 1991. All other payments occur on September 1 of specified year.

[2] Proposed Payment Schedule, United States of America v. Exxon Corp., Exxon Shipping, and Exxon Pipeline Co.

[3] Payments adjusted for inflation.

[4] Payments adjusted for inflation are discounted back to 1991 using real discount rate.

Source: Legislative Research Agency, March 1991 (Exxon.xls)



Alaska Permanent Fund Corporation

P.O. Box 4-1000 Juneau, Alaska 99802-4100

(907) 465-2047

MEMORANDUM

DATE: March 18, 1991

TO: Mel Krogseng
c/o Representative Barnes

FROM: Jim Kelly 
Research & Liaison Officer

SUBJECT: Present Value of the Proposed Exxon Settlement

Per your request, attached is a table which provides a rough approximation of the present value to the State of Alaska of the proposed Exxon settlement. These numbers are not exact because this analysis assumes the payments are received on December 31 of each year, not September 1. Notwithstanding this difference, the numbers as attached are in the ball park — if the assumptions made here about future inflation rates and the future value of money turn out to be correct.

This analysis assumes a 6 percent per year rate of inflation for each of the next 10 years, and the opportunity during that same period of time to earn a compound rate of return on dollars invested of 9 percent. For the long term, the Alaska Permanent Fund Corporation makes the same inflation and rate of return assumptions.

There are undoubtedly a number of other issues involved in analyzing the financial aspects of the settlement, such as whether or not the State will actually control disbursement or investment of all of the settlement monies, etc. I would suggest that you contact Tom Chester of the Legislative Research Agency for a more detailed analysis.

cc: Tom Chester, Legislative Research Agency

Amts of Exxon Payments	Real 1991 \$ (Inflation @ 6%)	Present Value (Return @ 9%)	FV of Payments In 2001 @ 9% Return
1991	140,000,000	140,000,000	331,380,000
1992	150,000,000	141,510,000	325,650,000
1993	100,000,000	89,000,000	199,200,000
1994	70,000,000	58,772,000	127,960,000
1995	70,000,000	55,447,000	117,390,000
1996	70,000,000	52,311,000	107,660,000
1997	70,000,000	49,350,000	98,770,000
1998	70,000,000	46,557,000	90,650,000
1999	70,000,000	43,918,000	83,160,000
2000	70,000,000	41,433,000	76,300,000
2001	70,000,000	39,088,000	70,000,000
\$950,000,000	\$757,386,000	\$687,875,000	\$1,628,120,000



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March 19, 1991

TO : House Committee on Merchant Marine and Fisheries
Attention: Will Stell

FROM : Bernard A. Gelb
Specialist in Industry Economics
Economics Division
and
Jane G. Gravelle
Senior Specialist in Economic Policy

SUBJECT : Net Present Values of the Exxon Valdez Settlement

This memorandum is in response to your request for a calculation of the present value of the recent settlement of the Exxon Valdez case to the U.S. Government and to Exxon Corporation. (Such a "value" would be negative in the case of Exxon.) The gross amount received (or paid) can differ from the net cost to the firm depending on tax liabilities, and values could differ with choice of discount rate. Because of uncertainties we have prepared several alternative scenarios.

One uncertainty is the ultimate amount to be paid. The agreement provides for a \$100 million criminal penalty, which we assume will be paid May 1, 1991, and for a series of civil payments tentatively payable on September 1 of this and the following ten years. These payments are set at \$90 million in 1991, \$150 million in 1992, \$100 million in 1993 and \$70 million for the next eight years. These amounts total to \$1 billion. There also is, however, the possibility of up to \$100 million more being payable after the year 2001, if additional environmental damage is discovered. In this alternative, we assume the \$100 million will be paid in two installments in the two years following.

Undiscounted, the payments will sum to \$1 billion and \$1.1 billion in the two payment scenarios. The net cost to Exxon will be smaller, however, because the civil payments can be deducted from income for purposes of both State and Federal taxes. The Federal tax rate is set at 34 percent; and we add three percentage points to account for State income taxes net of the

deductibility against Federal taxes.¹ Thus, the combined tax rate is set at 37 percent. As a result, the net cost to Exxon (net receipts to the Government) will be \$655 and \$716 million, respectively, without discounting.

A second major uncertainty is the discount rate. The present value of both net and gross costs depend on the discount rate used, and the proper discount rate is not entirely clear.

We consider several. The Forestry Service uses a 4 percent real return, while the Office of Management and Budget (OMB) suggests a 10 percent real return. (The regulations on evaluating natural resource damages, 43 CFR 11, direct the use of the OMB rate). The General Accounting Office (GAO) suggests using a nominal rate of return similar to a Treasury security for the same maturity. The 4 percent rate of return is closer to a riskless rate; it is also quite similar to the Government bond yield for three to ten year maturities assuming an inflation rate of around 4 percent. The 10 percent rate seems quite high, and would be associated with a relatively risky investment. Our understanding is that this rate was based on an attempt to estimate the pre-tax real return on physical capital investment. We would estimate that the average pre-tax return on private capital investment is lower than these numbers, at around 7 percent.²

Since the payments are in nominal dollars, these real returns should be converted to nominal returns. Assuming an inflation rate of 4 percent, the nominal rates would be 8.16 percent for the Forestry Service number (and consistent with the GAO approach), 11.28 percent to correspond to the average pre-tax return on private capital, and 14.4 percent to correspond to suggested OMB rates.

Using the three discount rates with the two payment scenarios, we obtain the following results:

(1) For the 8.16 percent rate, the present value to the Government ranges between \$734 million and \$773 million. The cost net of taxes to Exxon would be \$499 to \$524.

¹ This adjustment was suggested to us by Andy Yood of the American Petroleum Institute, who indicated that an add on of two to three percentage points was a typical rule of thumb to obtain a combined Federal and State income tax rate.

² To estimate the pre-tax return requires a measure of yields on debt and equity and an estimate of the effective tax rate. See Jane G. Gravelle, Differential Taxation of Capital Income: Another Look at the 1986 Tax Reform Act, National Tax Journal, December 1989, pp. 441-464 for a discussion of the methods used to derive this number.

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(2) For the 11.28 percent rate, the present value to the Government ranges from \$666 million to \$694 million. Exxon's cost net of taxes would be \$456 million to \$474 million.

(3) For the 14.4 percent rate, the present value ranges from \$611 million to \$631 million. The cost net of taxes would be \$421 million to \$434 million.

While we would consider the discount rate in (3) as probably too high, the choice between (1) and (2) is less clear. Since the stream of payments is fixed, there is some justification for using a relatively riskless rate of return. On the other hand, the present value using the estimated pre-tax return rate represents the quantity of actual physical capital that would be necessary to generate the stream of future payments.

Please contact us (at 7-7300) if you have further questions on this matter.

Gov's

AUTHORITY

DRAFT

Honorable Dave Donley, Chairman
House Judiciary Committee
House of Representatives
Alaska State Legislature

February 27, 1991

663-91-0339

465-3600

Deposit and accounting for
Exxon Valdez oil spill
settlement proceeds

James L. Baldwin
Assistant Attorney General
Governmental Affairs

This responds to your letter of February 19, 1991 in which you asked two questions concerning a possible settlement of claims arising out of the oil spill caused by the grounding of the Exxon Valdez. You also requested our comments on a draft bill that purports to require review and approval of an out-of-court settlement of the state's claim against the parties responsible for the oil spill.

Both of your questions concern the attorney general's power to settle a lawsuit. State law authorizes the attorney general to perform duties "which usually pertain to the office of attorney general in a state." AS 44.23.020(b)(7). The attorney general's settlement powers are a necessary element of his recognized common law power to control the disposition of cases. In Public Defender Agency v. Superior Court, 534 P.2d 947 the Alaska Supreme Court stated:

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he

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House Judiciary Committee, House of Rep.
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thinks best.

534 P.2d at 950 (citation omitted) (emphasis added); accord Island-Gentry Joint Venture v. State, 554 P2d 761 (Haw. 1976).

The questions you asked appear to express a concern that AS 46.08.020 may abrogate, or limit, the attorney general's common law powers to settle oil spill claims. We believe that AS 46.08.020 does not limit the attorney general's settlement powers. The attorney general has the discretion to settle state claims using remedies available under the Federal Clean Water Act (33 U.S.C. 1321). His actions are reviewable by a court but would be subject to a deferential standard of review.

To briefly answer your questions, federal law requires recoveries to be dedicated for restoration and replacement of natural resources. We believe that a settlement agreement dedicating settlement proceeds can be made consistent with the dedicated fund prohibition contained in the Alaska Constitution. This can occur because the constitution allows federally required dedications to be implemented. Alaska Const. art. IX, sec. 7.

Our reasoning is set out in the following answers to your questions. We will respond to your questions in the order in which they were asked.

1) May the governor settle the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill under terms that require the defendant's to give the state money dedicated to a particular purpose, or to provide specified services or property?

The state's claim was asserted to recover for natural resource damages, including the cost of the restoration and replacement of natural resources harmed by the Exxon Valdez oil spill. The federal government also asserts that it is the steward of resources harmed by the spill and is also entitled to a recovery. Depending on the damage theory asserted, the state and federal government each have an undivided interest in harmed resources. Federal law provides that the state and federal governments should act jointly in administering damages recovered by either sovereign for such resources. 40 CFR 300.615. Any recovery under this damage theory is being considered, for the purposes of this case, as money belonging jointly to the federal and state governments. As a consequence, the governments acting together intend to establish a joint trust under the Clean Water Act (33 U.S.C.1321) to prosecute and, if determined to be in the public interest, serve as a device for settlement of the claims.

The Clean Water Act provides for disposition by state and

federal natural resource trustees of the proceeds of any settlement. The Act expressly provides:

"Sums recovered [by the trustees] shall be used .
. . . [for restoration and resource acquisition] by
the appropriate agencies of the federal government,
or the state government."

33 U.S.C. 1321(f)(5). The Act is further implemented by federal regulations. These regulations authorize the deposit of recoveries in separate accounts within the state treasury or in interest bearing accounts established outside the state treasury.

43 C.F.R. 11.92. Based on this statutory and regulatory framework, we conclude, that the Clean Water Act requires the dedication of settlement proceeds as a condition of participation in a joint enforcement effort. We consider a joint enforcement effort effective and proper in this case.

The federal restrictions either take the form of a dedication imposed by federal law as a condition of exercising joint enforcement powers under the Clean Water Act or a public trust authorized under that Act. In both cases, the money may be received and expended under an exception to the dedicated fund restriction imposed by art. IX, sec. 7 of the Alaska Constitution. Section 7 provides in relevant part:

The proceeds of any [state revenue] shall not be

dedicated to any special purpose, except . . . when required by the federal government for state participation in federal programs.

After a thorough analysis of the history of the dedicated fund prohibition, this office opined that trust receipts are exempt from the dedication fund prohibition by implication. 1982 Op. Att'y Gen. No. 13 (November 30; A.G. file No. 366-649-80). A reading of the constitutional history also makes it quite likely that the framers did not intend to prohibit the dedication of certain non-tax or license related revenues, such as litigation proceeds.

Strong legal arguments can be made in support of the validity of a settlement agreement that purports to require the dedication of joint trust receipts for restoration and replacement of natural resources harmed by an oil spill.

2) May the governor settle the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill under terms that do not involve deposit of the money in the state general fund, and would such terms violate AS 46.08.020.?

In our opinion, the provisions of AS 46.08.020 do not impair the governor's ability to settle claims under the Clean Water Act. As discussed above, the Clean Water Act requires that the proceeds be dedicated for the purpose of restoration. The

custodian holds them in trust. These federally imposed restrictions on use appear to conflict with AS 46.08.020(b) which provides:

Money received by the state . . . shall be deposited in the general fund and credited to a special account called the "oil and hazardous substance release mitigation account." The legislature may annually appropriate to the fund from this account a sum equal to the amount received . . . during the calendar year preceding the legislative session in which the appropriations are to be made.

(Emphasis added). The foregoing provision is a part of a chapter of statutes that provide for financing "the expenses incurred by the Department of Environmental Conservation in the protection of the environment of the state from the release of oil or hazardous substances." AS 46.08.005. The text of AS 46.08.020 plainly does not dedicate amounts for the purpose of restoration and replacement of natural resources. To the contrary, the legislature has the discretion whether to appropriate money for a federally required purpose. The implication is plainly present that the legislature could appropriate the settlement proceeds for another purpose. In the case of a true dedication, the legislature has no discretion concerning the assignment of purpose for an expenditure. The nature and effect of a dedicated fund is analyzed in a 1982 formal opinion of the attorney general. 1982 Op Att'y Gen No. 13 (November 30; A.G. file No. 366-649-80).

There is additional evidence to explain why AS 46.08.020 does not apply to settlement proceeds under the Clean Water Act. The regulations implementing the Clean Water Act require the trustee to either deposit the proceeds in a separate account within the state treasury or in an interest bearing account if maintained outside the state treasury. 43 C.F.R. 11.92(a)(2). In both instances, the regulations contemplate a segregation and dedication for a specific purpose. Section 020(b) would require the governor to deposit the proceeds in the state general fund.

The general fund is not the equivalent of the state treasury. All public money and revenue coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose, constitute the general fund of the state. Navajo Tribe v. Arizona Dept. of Admin. 528 P.2d 623 (Ariz. 1975). State v. Bates, 18 S.E. 2d 346, 351 (S.C. 1941) Bd of Ed of Wyoming County v. Bd of Public Works, 109 S.E. 2d 551 (W. Va. 1959). However, a requirement to deposit dedicated receipts in the general fund does not cause them to lose their restricted status. Municipality of Metropolitan Seattle v. O'Brien, 544 P.2d 729 (Wash.1976).

We believe that it is reasonable to interpret section 020

so it does not conflict with federal law. In construing this section, we must presume that the legislature was aware of the remedies afforded by the Clean Water Act. Wik v. Wik, 681 P.2d 336 (Alaska 1984). The statutory directive to deposit recoveries set out in AS 46.08.020(b) can be interpreted to exclude proceeds that are dedicated or encumbered by trust obligations imposed by federal law.

By express reference, the deposit and accounting requirements apply only to amounts received under AS 46.08.020(a)(2) and (3). Section 020(a)(2) covers

money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site.

It refers only to money that is received directly from a responsible party, not from a joint trust entity.

Section 020(a)(3) covers "fines, penalties, or damages recovered under AS 46.08.005 - 46.08.080 or other law." Taken out of context, it appears to cover a broad spectrum of damages. However, a careful reading of AS 46.08 discloses that only recoveries to reimburse the state for previous expenditures are addressed. The right to claim established in AS 46.08.070 is described as the power to seek "reimbursement". We presume that

damages recovered under "other law" refers to reimbursement type damages as well. Such recoveries should be deposited in the general fund.

Amounts allocated by the joint trustees for state restoration projects would be from a source described in AS 46.08.020(a)(1). Section 020(a)(1) covers "money received from federal, state, other sources, or from a private donor." That provision describes money received from a source other than a responsible party and appears to include federal or other trust receipts that do not represent a reimbursement for past expenditures. The joint trust could be considered a grant of money to a state agency for restoration purposes. Amounts from this nonstate source are not expressly directed by section 020(b) to the general fund of the state for possible appropriation to the hazardous substance release response fund, nor are "joint" as opposed to "state" recoveries. This treatment is consistent with the status of trust receipts and dedicated funds discussed earlier in this memorandum.

In summary, we conclude that settlement recoveries are not required to be deposited in the general fund of the state. The provisions of AS 46.08.020 can be interpreted to allow for the receipt and expenditure of settlement proceeds held in trust under

the Clean Water Act.

We next turn to the validity of a separate trust fund that may be established to implement a settlement under the Clean Water Act. As mentioned above, the state and federal governments may agree to proceed under the Clean Water Act to create a joint trust to administer the proceeds of a settlement. The settlement agreement may prescribe the elements of this trust or there may be a separate trust agreement that describes in detail the powers and duties of the trustees. The joint trustees would be a federal natural resources management agency (43 C.F.R. 11.14 (rr)) and state officials designated by the governor (42 U.S.C. 9607(f)(2)(B)).

A difficult question concerns whether there is sufficient authority for the attorney general to take a part in the creation of a joint trust fund. Generally it is held that special funds must be established by law. State v. West, 145 P. 15 (Wash. 1914). However, we believe that the joint trust could be formed under authority expressly granted by the Alaska Constitution. Article XII, sec. 2 provides:

The state . . . may cooperate with the United States . . . on matters of common interest.

The attorney general could agree to form an intergovernmental trust

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entity to solve the common dilemma presented by the Exxon Valdez oil spill. Some may argue that the joint cooperation provision of the state constitution may only be implemented by law. However, it must be remembered that the constitution is to be construed as self-executing "whenever possible." Alaska Const. art. XII, sec. 9.

If the relationship between the state and federal government is to be truly "cooperative," it is reasonable to assume that neither the state legislature nor the Congress has absolute veto power over deposit in the joint trust or expenditure of settlement proceeds from the joint trust. The joint trust would hold the settlement proceeds as an asset of the trust. As jointly recovered trust receipts, the state or federal treasuries could not claim absolute title to them. Beyond these basic legal concepts it would be difficult to foretell the exact nature and effect of a joint trust created under the Clean Water Act. It is possible that private trust law will be used to construe the rights and obligations of the joint trustees and the beneficiaries. In Weiss v. State, 706 P.2d 681 (Alaska 1985), the Alaska Supreme court applied private trust law principles to resolve legal disputes concerning the operation of a public land trust.

In a memorandum attached to your February 19 letter,

legislative counsel argues that a state agency cannot expend trust receipts without a valid appropriation. There are numerous cases from other states holding that no appropriation is needed to expend trust receipts. See, e.g. Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 508); See also Navajo Tribe v. Ariz. Dept. of Administration 528 P2d 623 (Ariz. 1975); but see Sharpp V. Sloan, 391 A2d (Pa. 1978) (custodial funds must be appropriated or returned). The practice in Alaska for the past 14 years has been to appropriate the majority of federal, trust and other custodial funds.

However, there are notable exceptions to this practice. For example, refunds of overpayments of state income tax were not appropriated before disbursed. The Alaska Supreme Court has not interpreted art. IX, sec. 13 of the Alaska Constitution to determine how the appropriation requirement imposed there applies to expenditure of trust or custodial receipts. We believe that the result of a supreme court decision on this issue would be too close to predict. However, we believe that the legislature could not appropriate the settlement proceeds for a purpose other than restoration or replacement of natural resources damaged by the Exxon Valdez Oil Spill. Nor may the money be expended in a manner that is contrary to a restoration plan prepared by or at the direction of the joint trustees. 43 C.F.R. 11.92(c).

3. Comments concerning draft legislation purporting to regulate the attorney general's settlement powers.

We have reviewed a work draft for a bill relating to agreements, compromises, and settlements entered into by the state in the Exxon Valdez oil spill litigation. This bill would require the administration to submit to the legislature for review a settlement that arose out of the March 1989 grounding of the Exxon Valdez. The bill purports to give the legislature the power to prohibit the settlement before it takes effect.

We believe that this bill contains serious legal defects. Under our constitutional system there must be a separation of powers between the branches of government. The Alaska Supreme Court has held that the separation of powers doctrine, though not expressly set out in the Alaska Constitution, is clearly implied. Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975). If the legislature has the power to prohibit a specific settlement, it may be improperly attempting to obtain executive or quasi-judicial power. The legislature would be supervising the decision making of executive officers. The ability to prohibit a settlement amounts to a veto power.

There are several ways to illustrate that such a retained

veto power constitutes the exercise of an executive power. No one doubts that it would be unconstitutional for the legislature to require the governor to appoint a legislator to negotiate a settlement agreement. See, Stockman v. Leddy, 129 P. 220 (Colo. 1912) (legislative committee improperly given executive duties in the enforcement of statute). There is little difference between being the party doing the negotiating and having the power to cancel the resulting agreement. The attorney general becomes as much an agent of the legislature as does the legislator who is appointed to negotiate.

Assumption of the power to review and prohibit a settlement agreement frustrates the constitutional objective of making the executive branch accountable to the people for the execution of the law. Under the draft bill, accountability would be spread among the various legislators who vote one way or another on the question of prohibition of a settlement.

The draft bill would cause a serious blow to the ability of the attorney general to settle the case in point. The legislature must abide by its delegation of authority until that delegation is altered or revoked. INS v. Chadha, 462 U.S. 919, 955 (1983). The legislature may, as a general proposition, prescribe the standards under which the attorney general may settle cases.