

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2113 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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However, by failing to adopt real criteria for the settlement of this case, there can be no certainty that a negotiated settlement will remain binding on the parties. Essentially, the only real criteria remaining is whether a motion to enact a prohibition of the settlement can command a majority vote in each house of the legislature. The legislature cannot delegate a power, while retaining significant control over how the power is exercised. That type of control is executive in nature and is inappropriate.

Another serious defect of this bill is the notion that the legislature could pass a bill prohibiting a specific settlement. We do not know what form a bill prohibiting a settlement will take. Certainly, it must focus on only a single settlement. By doing this, it becomes special legislation. The legislature cannot as a general rule enact a special act "if a general act can be made applicable." Alaska Const. art. II, sec. 19; Section 1 of the draft bill contains little more than conclusions to justify special treatment for the Exxon Valdez spill settlement. Persuasive justification for special treatment must be provided by the legislature. Abrams v. State, 534 P.2d 91 (Alaska 1975). (Enactment creating Eagle River Chugiak Borough invalidated because other communities were similarly situated). Settlement of the mental health land trust dispute is no less important for having "far reaching effects on the welfare of the people of the

Honorable Dave Donley, Chairman
House Judiciary Committee, House of Rep.
AG file: 663-91-0339

February 27, 1991
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state, on disposition of state funds, and on the status of large areas of state land." Other equally important oil and gas taxation cases also come to mind.

A question involving a possible violation of the special legislation prohibition must be analyzed using the rational basis test applicable to nonsuspect classifications challenged under the equal protection doctrine. State v. Lewis, 559 P.2d 630 (Alaska 1977). It is presumed that the same nondeferential, ends versus means test applied in Isakson v. Rickey, 550 P2d 359 (1976); will also apply in resolving a special legislation claim. To satisfy this test, the legislature must rigorously develop a detailed legislative history supporting the reasons why the Exxon Valdez settlement warrants special legislation. The findings and purpose clauses of the work draft do not contain sufficient material to satisfy the heightened scrutiny of the state equal protection test for validity. Further, we doubt that it is possible to make a convincing case for such special treatment.

We hope that the foregoing memorandum adequately responds to your questions and will assist the House Judiciary Committee in its deliberations concerning the work draft bill.

JLB:jr

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
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*Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101*

MEMORANDUM

February 20, 1991

SUBJECT: Legal Services memo to Senator Cotten regarding settlement of claims related to the Exxon Valdez oil spill

TO: All Legislators

FROM: Lynn M. Barnes *LMB*
Special Assistant

Senator Cotten has asked Tam Cook that the Division of Legal Services release copies of Pam Finley's memo to Senator Cotten regarding the ~~Exxon Valdez oil spill~~ settlement to all members of the legislature.

Attached is a copy for your information.

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

COPY

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

MEMORANDUM

February 15, 1991

SUBJECT: Settlement of claims related to the Exxon Valdez Oil Spill
(Work Order 7-LS0777)

TO: Senator Sam Cotten

FROM: Pamela Finley
Assistant Revisor of Statutes

QUESTIONS PRESENTED. In light of an impending settlement of the state's claims against Exxon and its subsidiaries arising from the Exxon Valdez oil spill, you have asked two questions:

(1) May the governor settle those claims with terms that require the defendants to give the state money dedicated to a particular purpose, or to provide services or property; and

(2) If the settlement contains such terms, what oversight authority does the legislature have?

SHORT ANSWER. Because the terms of a settlement have not been released, we cannot offer an opinion on the validity of particular provisions; this memo is confined to the general questions presented above. There are valid legal arguments to be made for and against the validity of a settlement with the terms described above. However, in my opinion a settlement that required money to be spent for a particular purpose or required the state to accept money or services would be beyond the constitutional power of the governor, although the legislature could ratify it by making an appropriation that carried out those terms. In addition, failure to deposit money recovered or received from Exxon in the general fund would violate AS 46.08.020(b). Your second question is difficult to answer until the specifics of the settlement are known, but I suspect that the discussion of the first question may address the real issue being raised by the second (i.e., the legislature's role). If you have more specific questions, or questions about a settlement once it is made public, please let me know.

DISCUSSION.

I. Attorney General's Authority. The attorney general has the power to dispose of the state's litigation as he thinks best, and "the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts." Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975)(dicta; emphasis added.) See Boyd v. U.S., 345 F. Supp. 790 (E.D. N.Y., 1972)(Attorney General's discretion does not prevent review based on allegations of bad faith, fraud, or illegality); People v. Santa Clara Lumber Co., 106 N.E. 927 (N.Y. Ct. App. 1914)(Settlement violating constitutional provision prohibiting cutting of timber on state land was void). The question then is whether a settlement of the type described above violates the constitution or statutory law.

II. Settlement Requiring Money to be Spent in Specified Way. A settlement that requires the money to be spent in a particular way would probably violate art. II, sec. 1 and art. IX, sec. 13 of the state constitution (vesting the legislative power in the legislature and requiring appropriations before money can be removed from the state treasury) and art. IX, sec. 7 of the state constitution (prohibiting dedicated funds).

A. The Power of Appropriation. Article II, sec. 1, Constitution of the State of Alaska, vests the legislative power in the legislature, and the power to appropriate is indisputably a legislative power. Article IX, sec. 13, Constitution of the State of Alaska, states that no money shall be withdrawn from the treasury except by appropriation. The Governor may argue that the latter section does not apply to a settlement if the money is not deposited in the state treasury, but that argument begs the real question, i.e., what money is subject to appropriation?

In Colorado General Assembly v. Lamm, 700 P.2d 508, 524 (Colo. 1985), the court held that the proceeds of a settlement between Chevron and the federal Department of Energy, which according to the settlement had to be used for specified purposes, were not subject to appropriation by the Colorado legislature. The court reasoned that the money was not subject to appropriation either because it was in trust from a private source, or because it was from a federal source, with restrictions placed on its use. While the Governor will no doubt advance the same arguments used by the court in Colorado General Assembly, there are some significant differences between that case and the situation at hand.

First, in the Colorado case there is no indication that the state was a party to the litigation. Therefore the state had no power to control the terms of the settlement, nor was the state trading the money for a legal claim the state had. Colorado really did have to accept the money, if at all, on the terms given, a fact that makes the money much more like a "gift" from a private party.

Second, under Colorado law the legislature does not have the power to appropriate most federal funds. Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987)(Except for federal funds subject to state match and portions that can be transferred to other block grants, executive has power to allocate money received from federal government); MacManus v. Love, 499 P.2d 609 (Colo. 1972)(Federal funds need not be appropriated). While Colorado is not the only state that does not require appropriation of federal trust funds, Opinion of the Justices to the Senate, 378 N.E.2d 433(Mass 1978), other states do require the legislature to appropriate federal funds, even though the federal funds are subject to restrictions on their use. Anderson v. Regan, 425 N.E.2d 792 (N.Y. Ct. App. 1981); Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630(1979). The Anderson case is especially important because the court's decision was based on a constitutional provision similar to art. IX, sec. 13 of Alaska's constitution.

Third, in Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E.2d 176 (Mass. 1980), the court rejected the "constructive trust" theory. In this case the state had sued a municipality for violation of laws involving sanitary landfills. The parties agreed to the entry of an order, but the town failed to comply with it and the court assessed a \$30,000 fine and ordered that it be paid for a project that enhanced a natural resource, the specific project to be chosen from proposals submitted by political subdivisions and charitable organizations. The department argued that the money was not subject to deposit in the state treasury and to appropriation because the money was held by the state in trust, subject to certain conditions. The court recognized that money held by the state in trust was not subject to appropriation under Massachusetts law, but noted that this exception only applied when the money was held and to be disbursed "under legislatively prescribed conditions". Because the legislature had not established a program for the deposit and expenditure of such money, it had to be deposited in the state treasury and appropriated by the legislature.

Finally, Alaska's Supreme Court has held that the term "appropriation" as used in art. XI, sec. 7 (governing initiatives), involves "committing certain public assets to a particular purpose." McAlpine v. Univ. of Alaska, 762 P.2d 81,88 (Alaska 1988)(the transfer of property was an "appropriation" that could not be accomplished by initiative). While the court in McAlpine was construing a provision governing initiatives rather than the legislative power or removal of money from the state treasury, the court explained that the purpose of the initiative provision was "to ensure that the legislature and only the legislature, retains control of the allocation of state assets among competing needs." McAlpine, 762 P.2d 81 at 88 (emphasis in original). It is worth noting that a broad reading of the term "asset" includes a claim for damages. McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983)(divorce action). Therefore, while the executive branch has the authority to determine

whether litigation will settle, and how much will be received in settlement, it is up to the legislature to determine how the proceeds of that settlement will be allocated.

B. Dedicated Funds. Article IX, sec. 7, Constitution of the State of Alaska states that the "proceeds of any state tax or license shall not be dedicated to a special purpose," and excepts from this prohibition dedicated funds existing at the time the state constitution was ratified, the permanent fund, and dedications required by the federal government for state participation in federal programs. Alaska's Supreme Court has, based on the history of the constitutional convention, interpreted the prohibition to apply to "the dedication of any source of revenue". State v. Alex, 646 P.2d 203, 210 (Alaska 1982). The Governor may claim that the settlement proceeds are required to be dedicated for state participation in federal programs. If the state were suing under the Clean Water Act, this might be a legitimate argument since sums recovered under that Act must be used to restore, rehabilitate, or acquire the equivalent of the nature resources damaged. 33 U.S.C. 1321(f)(5). Even if that were the case, however, it should be the legislature that decides exactly what programs will fulfill those purposes and how the money is to be allocated among those purposes. However, it is our understanding that the state is not making claims under the Clean Water Act. It does not appear that the "federal program" exception applies here.

C. Statutory Provisions Under state law, money received for cleanup reimbursement must be deposited in the general fund and credited to the oil and hazardous substance release mitigation account. AS 46.04.010. It would then be subject to legislative appropriation. AS 46.08.020(a)(2) and (b) require that money recovered "or otherwise received" from persons responsible for the containment and cleanup of oil from a specific site shall be deposited in the general fund and credited to the oil and hazardous substance release mitigation account." The legislature may then appropriate the money to the release response fund. Failure to place money received from Exxon in the general fund would violate AS 46.08.020(b).

III. Settlement Providing for Services or Property.

Because McAlpine construes the appropriation power to apply broadly to all "assets" of the state, and because the prohibition against dedicated funds applies to any "source of revenue," the above discussion should apply to services and property that might be given to the state in the settlement. Any property received would be the result of exchanging one state asset (the claim against Exxon) for another (the property). However, in applying the doctrine that the legislature alone has the power to allocate state assets, the question arises as to whether this means (1) the governor can agree to accept 10 bulldozers and the legislature has to allocate them to a particular program, or (2) the governor cannot agree to accept services or property in settling a state claim because that involves the allocation of resources. I have not been able to find any case law on this subject, but believe that interpretation (2) is more consistent with the separation of powers doctrine because the first

interpretation would allow the executive, without authority from the legislature, to determine how state resources are to be allocated.

It is possible that the court might uphold the donation of services or property to a department and for a specified purpose if the legislature has already authorized the department to accept services or property for that particular purpose. In this situation, the legislature would at least have authorized both the receipt of the property from private parties and its use for particular purposes. However, even this approach does not give the legislature the power to allocate a state asset (namely the proceeds of a legal claim) to competing programs and might therefore be unconstitutional. Examples of statutes authorizing the receipt of property from private persons are AS 16.05.050(2) (fish and game); AS 19.22.020(roads); AS 41.21.020(3) (recreation and park lands); and AS 42.40.250(7)(railroad).

If the settlement purports to accept property on behalf of the state and there is no statutory authority for the acceptance of that property for that purpose, the purported acceptance would be invalid because the state's power over its property is vested in the legislature. Wolverine Sign Works v. State Hwy. Com'n, 218 N.W.2d 863 (Mich. Ct. App. 1974) (Because statute did not authorize commission to acquire restrictive covenants, the covenants acquired were void); 81A C.J.S. States, sec. 145. AS 38.05.035(a)(12) makes the director of the division of lands the "certifying agent" for securing land available to the state, but I do not read this as granting the director the authority to accept all land for whatever purposes; rather it appears to give the director the authority to handle the mechanics of the transaction when the state's acceptance of land is otherwise provided for. See State v. Thomson, 449 P.2d 656 (N.M.1969) (Failure of governor to obtain deed did not nullify transfer of land to the state because the title vested by act of the legislature, and the governor's role was just to formalize the record of title).

Finally, even if a settlement purporting to give the state property or services to be used for a particular project were found to be constitutional (which I doubt), the state project would have to be authorized by the legislature and a project (state or private) would still be subject to regulatory restrictions (labor and environmental laws for instance). See South Carolina State Hwy. v. Butterfield, 58 S.E.2d 737 (S. Car. 1950) (Attorney General's statement that highway department would "take care" of septic tank in right of way did not bind highway department's actions.)

Aside from the considerations discussed above, if the settlement entered into is manifestly unfair to the interests of the state, the Governor may be found to have failed in his constitutional duty under Art. III, sec. 16 to "be responsible for the faithful execution of the laws."

MEMORANDUM

State of Alaska
Department of Law

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

DATE: April 2, 1991

FILE NO.

TEL NO: 465-3600

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

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

FROM: Charles E. Cole
Attorney General

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

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

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

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

A. The Federal Criminal Plea Agreement

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

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

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

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

B. The Agreement And Consent Decree

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

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

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

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

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

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

II. DEFINING THE REAL ISSUE

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

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

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

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

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

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

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

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

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

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

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

^{4/}((...continued)

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

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

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

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

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

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

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

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

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

(continued...)

6/ (...continued)

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

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

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

(continued...)

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

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

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

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. State v. Alex, 646 P.2d 203 (Alaska 1983). In Alex, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. Id. at 208-210. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply not "revenues" of the State.^{7/}

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

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

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

Furthermore, even if the Trust Fund monies were State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: 1) the monies would be received by the State subject to co-trusteeship obligations; and 2) the monies would be received by the State subject to a federal statutory requirement as to their use.^{6/}

^{7/}(...continued)

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

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

(continued...)

C. The Real Issue

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

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

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.^{9/}

^{8/}((...continued))

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

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

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

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

^{9/} (...continued)

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

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

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

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

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

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

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

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

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

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

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

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

Alaska Const., Art. III, §16.^{14/}

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

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

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

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

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

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

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

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

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

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

¹⁵/(...continued)

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

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

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

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

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

(b) The attorney general shall . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^{18/} (...continued)

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

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

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

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

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

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

660 P.2d at 420-21.

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

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

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

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

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

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

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

²²/ (...continued)

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

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

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

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

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

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

^{22/} (...continued)

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

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

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

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

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

B. The Clean Water Act Trust Remedy

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

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

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

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

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

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

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

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

C. No Statutory Provision Expressly Precludes
The Trust Fund Settlement

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

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

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

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

²⁷/ (...continued)

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

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

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

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

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

(emphasis added).

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

²⁷/ (...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^{29/} The Supremacy Clause provides:

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

U. S. Const., Art. VI.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

SCOMM

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JUSTICE
DEPT.



U. S. Department of Justice

Washington, DC 20530

TESTIMONY

OF

RICHARD B. STEWART
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT & NATURAL RESOURCES DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

OF

HOUSE OF REPRESENTATIVES
STATE OF ALASKA

CONCERNING

PROPOSED SETTLEMENT OF CIVIL AND CRIMINAL LIABILITY
ARISING FROM THE EXXON VALDEZ OIL SPILL

APRIL 17, 1991

Mr. Chairman and Members of the Subcommittees:

Good afternoon. I am Richard B. Stewart, the Assistant Attorney General in charge of the Justice Department's Environment and Natural Resources Division. I am pleased to have this opportunity to appear on behalf of the Department to discuss the proposed settlement of the federal government's claims of civil and criminal liability arising from the Exxon Valdez oil spill.

Background to the Litigation

Mr. Chairman, I am sure that it is unnecessary before this body to recite the events that gave rise to the claims against the Exxon Corporation and the settlement that now is pending. As you know, the tanker vessel Exxon Valdez was outbound from Port Valdez, Alaska on the night of March 23-24, 1989, carrying 50 million gallons of Alaska North Slope crude oil. The tanker, which was owned by an Exxon subsidiary and commanded by Joseph Hazelwood, left the sound's designated shipping lanes and went hard aground on Bligh Reef, a well-known and well-marked navigational hazard.

The grounding pierced the ship's hull, and best estimates are that 11 million gallons of oil spilled into the pristine waters of Prince William Sound and the Gulf of Alaska. The oil fouled those waters and much of the 1100 miles of adjacent shoreline. In the weeks and months following the spill, Exxon began an extensive campaign to clean up the oiled beaches,

which continued through the fall of 1989. In response to public pressure, Exxon resumed cleanup work in the Spring of 1990, and is expected to undertake further cleanup this spring. Exxon reports that so far it has spent more than \$2 billion in cleanup activities.

Both the federal government and the State of Alaska have asserted claims against Exxon. Initially, the Justice Department successfully sought the criminal indictment both of Exxon Shipping, the owner of the Exxon Valdez, and the parent Exxon Corporation. We regard the spill as a classic example of culpable corporate management failure. A ten-count indictment was returned in February 1990, including felony charges for knowing violations of the Ports and Waterways Safety Act and the Dangerous Cargoes Act, and misdemeanor counts under the Clean Water Act, the Refuse Act and the Migratory Bird Treaty Act. The criminal charges were scheduled for trial this month.

The federal government also has a number of civil claims, particularly on behalf of those federal agencies that serve as trustees for natural resource damages under the Clean Water Act and other federal statutes and common law. These claims have been asserted in a complaint that was filed along with the proposed settlement documents last month. The State of Alaska has had civil claims pending since August 1989, when the state filed a complaint in Alaska Superior Court seeking damages under state law.

In support of both the civil and criminal claims, the federal and state governments together have undertaken extensive scientific studies to assess the impact of the spill and the probable damage to natural resources. By June, the two governments will have spent a total of more than \$80 million in such studies. This investigation was necessary because the damage issues lie at the frontiers of scientific knowledge concerning the effect of oil spills on marine and coastal resources.

While the spill presents factual issues that lie on the scientific frontier, the case also presents many issues on what can only be described as a legal frontier. Many if not most of the legal issues that would be litigated against Exxon are issues of first impression in the federal courts. By way of example, the Exxon defendants' exposure to criminal fines could range from \$600 million to a meager \$3 million, depending on whether and how the court were to apply the Alternative Fines Act in this case.

Settlement Objectives

Because of these daunting uncertainties, both the Justice Department and the State of Alaska recognized the desirability of resolving their respective claims that would eliminate the uncertainty and expense of protracted litigation and permit early funding of restoration work for the Sound, but only if Exxon would come to the table ready to recognize its

responsibility for the spill and the magnitude of the damage to natural resources in and around Prince William Sound.

Accordingly, the Justice Department and the federal trustees, together with EPA, concluded from the outset that no settlement would be acceptable without three elements: first, there would have to be sufficient recovery of damages for the trustees to undertake a prompt and thorough restoration program for the Sound; second, any settlement would have to be made public and include an appropriate opportunity for public comment; and third, Exxon would have to acknowledge its criminal conduct and pay a substantial criminal penalty that reflects the seriousness of the offenses that led to the spill.

I am happy to report to the committee that all three of these elements have been met by the proposed civil settlement and the criminal plea. A vital impetus for this favorable settlement was the Justice Department's aggressive prosecution of the criminal charges, and early favorable rulings by the court in the criminal case. These established the seriousness with which the government has regarded Exxon's criminal responsibility for the spill as a binding principle for settlement.

On the civil side of the case, considerable credit must go to Alaska Governor Hickel's initiative, this past January, for talks between the corporation and the state and federal governments. These talks began with direct bargaining among the principals, involving Exxon Chairman Lawrence Rawl, Governor Hickel and Alaska Attorney General Cole, and the heads of the

federal agencies concerned -- the Departments of Agriculture, Interior, and Transportation, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration. NOAA General Counsel Tom Campbell, on behalf of the natural resource trustees, provided crucial leadership in ensuring that these early negotiations forged a suitable framework for an agreement in principle.

Eight weeks of hard bargaining with Exxon resulted, finally, in the settlement proposed last month. Those negotiations were marked by extraordinary cooperation among Governor Hickel and Attorney General Cole of Alaska, Interior Secretary Lujan, NOAA Administrator Knauss and General Counsel Campbell, EPA Administrator Reilly, Transportation Secretary Skinner, and Agriculture General Counsel Raul. Their collective leadership helped shape a settlement that should be regarded as an unprecedented win for the environment.

Settlement Terms

Under the settlement, Exxon will pay \$900 million over ten years to satisfy the state and federal governments' civil damage claims. Exxon also may be liable for an additional \$100 million if the future discloses currently unforeseen damage that was not discovered by the extensive damage survey the two governments have undertaken to date. These amounts will be used both to reimburse the state and the federal government for past expenses and restoration costs, and to fund a thorough program to

restore Prince William Sound's natural resources. These funds also may be used to fund additional cleanup work by Exxon in 1991. The schedule of payments under the settlement agreement is expected generally to coincide with the future funding needs for restoration work now being planned by the federal trustees.

The settlement also includes a number of releases and covenants by the parties not to bring certain claims. Exxon has agreed not to sue the United States for any claims arising from the spill. The United States and Alaska have agreed not to sue Alyeska Pipeline Service Company for natural resource damages, because the settlement satisfies all of those claims and because Alyeska could seek to recover any liability to the United States for such damage from Exxon. This covenant reasonably protects Exxon from having to pay twice, in effect, for the same claims. In turn, Exxon has agreed to indemnify Alaska and the United States for any claims Alyeska might assert against the two governments. The United States has preserved all other claims against Alyeska, including potential claims for civil penalties, that do not involve natural resource damages.

Apart from the civil settlement, the two corporate defendants -- and here I mean Exxon Corporation and Exxon Shipping -- have agreed to plead guilty to four serious criminal charges arising from the spill. Exxon shipping will plead guilty to three counts under the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, and Exxon Corporation will plead guilty to one count under the Migratory Bird Treaty Act. Exxon

will pay a \$100 million fine, half of which will be remitted, and Exxon will pay of \$50 million as restitution to the State of Alaska for restoration of damaged natural resources.

These sums -- totalling a billion dollars -- represent the largest environmental liability settlements in history. Based on the survey of damage to natural resources undertaken by the natural resource trustees, this recovery should provide sufficient funds to undertake and complete the needed restoration program for the Sound. And Exxon will have to pay up to \$100 million more if future exposure discloses additional damage that cannot be discovered now. More importantly, these funds will be available to the trustees far sooner than would have been possible through protracted and complex litigation that would have taken years. More than seven years of intensive litigation have been necessary to recover for natural resource damage to New Bedford Harbor from PCB contamination. Restoration there is only now getting substantially underway; this case exemplifies the protected nature of litigating large natural resource damage cases.

Standing alone, the criminal fine against Exxon will be the largest ever paid for an environmental crime. This meets our objective of securing a fine that is commensurate with the seriousness of the underlying offenses. When Exxon's past cleanup costs are taken into account, the spill will have cost Exxon considerably more than \$3 billion.

Finally, the committee should know that the agreement with Exxon fully meets our objective of having this be a public settlement, one that affords an opportunity for public comment and participation. For the federal government, public participation has been a paramount concern throughout the process of litigation and restoration planning. The civil settlement is conditioned on court approval following a public comment period. Let me emphasize that this step was not required by law; the concerned federal agencies and the State of Alaska have insisted that the settlement be incorporated into a consent decree that will be subject to a thirty day public comment period in federal court. Judge Holland, who oversees our criminal case against Exxon, is following a similar procedure with respect to the plea agreement. The court has set April 24th as the date it will render its judgment on whether to accept the plea agreement. If the court accepts the plea, sentencing will proceed on the 24th.

The United States and the State will have the right to withdraw from the agreement if the public comment period shows that the settlement is inappropriate or inadequate. The State of Alaska also may withdraw if the Alaska legislature disapproves of the agreement. Exxon does not have a comparable right of withdrawal based on public comment or other information, but may withdraw if the court modifies the agreement.

We have provided the court, the legislature, and the Congressional Subcommittees overseeing the settlement with information concerning natural resource damage and restoration

costs that should remove any doubt that the settlement meets the objectives that I previously set forth. But there remains the possibility that both the state and federal governments might return to full-scale criminal and civil prosecution of their claims against Exxon if the settlement ultimately is rejected by the court or one of the parties. Both the Justice Department and the trustees, therefore, are constrained not to present any information that might tip the government's hand concerning specific evidence it has against Exxon. After the decree is finalized and scientific studies have undergone peer review, disclosure of most of the resulting information will, of course, be possible.

Finally, I think it important for the committee to understand that despite the federal and state governments' success in meeting the federal government's objectives in this settlement, that success has not been achieved at the expense of any of the many other parties who may have lawsuits pending against Exxon. As the committee is aware, the spill has spawned an immense amount of litigation. Private plaintiffs ranging from environmental and Native American groups to commercial fishermen and cannery workers have filed suits for damages and/or injunctive relief.

To ensure that the settlement would not prejudice those claims, the settlement specifically provides that it is not intended to affect legally the claims of third parties against Exxon. Paragraph 13 of the proposed consent decree has even more

explicit protection for Alaska Native villages to recover natural resource damages, as well as protection for those who hold any property interest affected by the spill.

Administering Settlement Monies

The objectives of thorough natural resource restoration and public participation have been protected not only by the Agreement with Exxon but also in the Agreement between the federal government and the State of Alaska that will govern use of the settlement monies. Under the Agreement, expenditures for restoration must be approved unanimously, and must be for natural resource restoration and enhancement. The Agreement specifically provides that its governance structure, which will be further developed by the trustees, must incorporate procedures for meaningful public participation. Of course the trustees already have been true to this spirit of public involvement by submitting their initial restoration plan for public comment; the plan was published in the Federal Register on March 1, 1991. The trustees remain committed to sustaining public participation in the restoration planning process.

I would be happy to answer any questions you may have.

HOUSE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

EXCERPT FROM APRIL 16, 1991 TESTIMONY OF RICHARD STEWART, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Gruenberg: Any comment about Congressman Miller's letter?

Stewart: First of all, it contains a fundamental legal error asserting that there would be a prosecution available under the CWA. These reports on the contingency plans were not required to be filed under the CWA. In fact, there is a very substantial legal question whether any jurisdiction to assert a false reporting claim under the general false reporting claims of title 18 of the code with respect to the spill here because the report was to be filed under the lease agreement with the BLM and the contingency plan went with respect to spills out of the sound, not the spills on federal land. So, there is a real legal issue of whether there is a proper basis for federal prosecution under law and there are other substantial litigation risks in the case about whether any falsehood was knowing....(indecipherable).

I would say that the evidence before Congressman Miller did not really address those problems and I find it rather surprising that a responsible official felt this was important information material to the criminal case -- why this wasn't disclosed to us before. We never heard this information.

Gruenberg: Before passing on to this second letter, is it your testimony that you are not certain that there was, assuming the allegations made in that letter were true -- is it your testimony that there is significant question in your mind whether there is federal law that would make that criminal?

Stewart: yes.

Gruenberg: Have you brought that to the attention of Congress and sought curative legislation?

Stewart: No

Gruenberg: Is it your intent to do so.

Stewart: I want to investigate the facts more closely.

Gruenberg: From a legislative point of view, it's less important whether these particular facts were true than that if the hypothetical -- which certainly could occur -- not in Alaska in 1989, then in other places at other points in time. If that is in fact not criminal, ought it not to be?

Stewart: I think it is a substantial question we will pursue.

NOAA

**TESTIMONY
OF
MR. THOMAS A. CAMPBELL
GENERAL COUNSEL
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE
HOUSE COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

APRIL 16, 1991

Mr. Chairman and Members of the Subcommittees:

I appreciate the opportunity to participate in this oversight hearing concerning the Exxon VALDEZ settlement. My name is Tom Campbell, and I am the General Counsel of the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. NOAA is the lead Federal trustee for the Exxon VALDEZ damage assessment, and I am here today on behalf of the other Federal trustees - the Department of the Interior and the Department of Agriculture and on behalf of the EPA who is coordinating the federal side of the restoration effort.

Under the Clean Water Act, NOAA, the Department of the Interior and the Department of Agriculture act as stewards for the Nation's natural resources. An equal grant of authority was granted Alaska for state resources. The spill of 11 million gallons of oil into the pristine environment of the Prince William Sound on a dark night in March 1989, brought our respective trust responsibilities into sharp focus. For the past year and 11 months, Federal and State trustees have done everything in their power to assess injuries to natural resources and determine the economic damage done to the Sound and other areas of Alaska, and to

prepare to present our claim in court.

NOAA first became involved in assessing injuries to marine resources and their habitats with the grounding of the Amoco CADIZ which occurred in 1978. In that case the vessel split in two, spilling 68 million gallons of crude oil on the coast of Brittany, France. Claims arising from this environmental disaster have been in litigation for 13 years. On July 24, 1990, a Federal judge in Chicago order Amoco to pay \$105 million in damages to the French Government. Amoco has appealed, and the litigation process continues.

Litigation is wasteful and protracted. Litigation is like war and litigation like war should be avoided if reasonably possible. Litigation also represents failure -- failure of one party to properly assess his position in a conflict.

In the fall of 1990, NOAA was made the lead Federal trustee on the Exxon VALDEZ spill. Under the leadership of Administrator Knauss we have tried to act as the "honest broker." Our first responsibility was to fully assess the natural resource injuries and prepare for possible litigation. Our second responsibility was to explore the possibility of an equitable out of court settlement.

It is the Federal trustees' belief that the settlement achieved with Exxon represents a fulfillment of our stewardship responsibility. It provides us with money this year to do necessary restoration instead of 5 to 10 years from now.

As the trustees weighed the benefits of settling with Exxon and grappled with the proper range of negotiating values, we

considered a myriad of factors such as the extent of the injury demonstrated thus far, the likelihood of translating those injuries into provable damages, the value of beginning restoration now rather than 5 - 10 years later, and the estimated cost of restoration. The settlement that was announced last month falls well within the range of values estimated by the trustees.

Finally, let us not lose sight of the fact that this represents the largest environmental settlement in the world -- one billion dollars -- ten times that recovered in Amoco CADIZ, a spill that was six times larger. It is a very good deal for Prince William Sound, and it is an outstanding deal for the United States and Alaska. The State of Alaska and the Federal trustees have exercised their trusteeship responsibly and with considerable imagination in bringing these complicated negotiations to fruition.

Mr. Chairman, this concludes my testimony. I would be pleased to answer any questions concerning the settlement.

DEPT.
OF
LAW

CHARLES E. COLE
ATTORNEY GENERAL
STATE OF ALASKA

March 12, 1991

Mr. Lee Raymond
President
Exxon Corporation
225 East Carpenter Freeway
Irving, Texas 75062-2298

Dear Mr. Raymond:

As a part of the settlement of certain issues covered by the Plea Agreement, the State of Alaska agrees that it will not bring criminal charges or seek any civil or criminal or administrative penalties, except as provided below, against Exxon Corporation, or any of its officers, directors or employees, past or present, or against any of its wholly-owned subsidiaries, their offices, directors or employees, past or present, for any violations of Alaska law arising out of or relating to the grounding of the "EXXON VALDEZ," the resulting oil spill, the containment or cleanup of that spill, the oil spill contingency plans or related documents of Alyeska Pipeline Service Company, including their preparation or submission to the State of Alaska.

Nothing in the foregoing paragraph shall prevent the State of Alaska from seeking criminal charges against Exxon Pipeline Company or Alyeska Pipeline Service Company, or any of their officers, directors, or employees, for any violation of Alaska law based on an allegation of false statements made to any agency of the State of Alaska arising out of its or their conduct in connection with the preparation or submission of oil spill contingency plans and related documents by Alyeska Pipeline Service Company to the State of Alaska.

You may advise Exxon Shipping Company of the contents of this letter and provide each of them with a copy.

Sincerely,

4-16-91 5:41

Charles Cole
Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

June 21, 1989

Charles DiMonaco, Chief
Lands Division
Environmental Crime Section
Department of Justice
Washington D.C. 20038

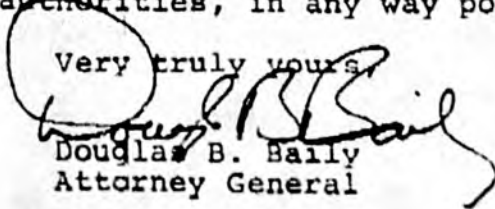
Dear Mr. DiMonaco:

We would like to inform you that the State of Alaska is no longer pursuing a criminal investigation of either Alyeska Pipeline Company or Exxon Shipping Company with respect to the Exxon Valdez oil spill. Based on our initial investigation, we believe that our remedies against these corporations are limited to B misdemeanors. For corporations, the maximum penalty for a B misdemeanor is a fine of \$100,000. In light of the state penalty structure, and the broader range of remedies available under federal law, we would defer any further investigation of the corporations involved in this matter to the Department of Justice.

Of course, if new evidence is developed that indicates additional criminal acts under state law have been committed by either defendant, we would be willing to resume our investigation. However, given our limited resources and limited remedies, we believe the best course of action at this time is to turn primary responsibility for any criminal prosecution of Alyeska and Exxon over to you. Part of the reason for our decision is the excellent cooperation we received from the Department of Justice during the course of our investigation.

As you continue your inquiry, please keep in mind that we will make available to you the information and materials we have developed to date. We will make every effort to cooperate with you, and the other federal authorities, in any way possible.

Very truly yours,


Douglas B. Bailly
Attorney General

cc: Mark Davis, Acting U.S. Attorney

PUBLIC
TESTIMONY

The New York Times

Founded in 1851

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Now, Save Prince William Sound

Exxon's \$1 billion settlement of state and Federal claims stemming from the calamitous Exxon Valdez oil spill is clearly preferable to a long and chancy trial that might have yielded a smaller penalty. But the real test will be whether the money is spent wisely.

The six Federal and state agencies controlling the funds will inevitably lodge competing claims. These claims must not be allowed to shortchange the main victim of one of the worst environmental disasters in American history: Prince William Sound.

Under the settlement, Exxon and a shipping subsidiary will plead guilty to four Federal criminal charges, pay an immediate criminal fine of \$100 million and an additional \$900 million over 10 years to settle civil claims brought by the Federal Government and the state of Alaska.

The agreement wisely includes a "reopener" clause, obligating Exxon to pay an extra \$100 million if damages turn out to be greater than presently anticipated. And while the settlement relieves Exxon of Federal and state liabilities, the company still faces 300 smaller suits brought by fishermen, food processors and other individuals and businesses.

The settlement isn't perfect. The Justice Department might also have pressured Exxon to fork over the entire \$1 billion immediately. True, Exxon has already paid a stiff price for its carelessness — \$2 billion so far in cleanup costs. It's also true, as Justice argues, that the additional \$1 billion can't be spent right away. But that's disingenuous. A one-time payment would begin earning interest immediately; the same amount spread over 10 years will lose value through inflation.

A further question is why Justice chose not to

sue Alyeska, the pipeline consortium composed of Exxon and other companies with drilling interests on the North Slope. Alyeska, which had piously assured the public that it could handle any emergency, thoroughly bungled the Valdez spill. One theory is that the Justice Department feared that Alyeska would countersue the Coast Guard, which also performed miserably. As one Congressman put it: "For Alyeska and the Coast Guard, this agreement may be more shield than sword."

The agreement is unlikely to be changed, so the task now is to make sure it does the most good. Six different agencies — three Federal, three Alaskan — will collaborate in administering the funds. The agreement calls vaguely for the "restoration, rehabilitation or replacement of natural resources" or the acquisition of "equivalent resources." Those words could mean almost anything, from cleaning beaches to land acquisition for wildlife refuges to building recreational parks to encourage tourism.

There will be many good ideas and hard choices. But the first beneficiary of the money should be the sound itself. Eleven million gallons of oil did not, as some feared, turn Prince William into a dead sea. The beaches are now much cleaner and there have been predictions, challenged by some environmentalists, that salmon runs will reach record proportions this year.

But coastal wetlands have suffered grievously, as have colonies of sea birds and the bald eagles, shellfish and other species vital to the food chain and the local economy. Despite the sound's hardy resilience, there's no guarantee that the ecosystem will recover on its own. Exxon devastated that ecosystem; Exxon's money ought to be targeted first and foremost at speeding its renewal.

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Anger greets reported pact on spill fund

Critics: Plan easy on Exxon

By BRIAN S. AKRE
The Associated Press

JUNEAU — Environmentalists, fishermen, lawmakers and other Alaskans reacted with outrage Thursday to published reports that the state may let Exxon Corp. take 10 years to pay a proposed \$1 billion settlement of the Exxon Valdez oil-spill litigation.

The Boston Globe, quoting unnamed sources, said the oil giant's settlement would be tax-deductible. Exxon initially would pay the state \$200 million, followed by payments of \$160 million the second year and \$80 million a year for eight years.

The money would go into a fund that would be used to restore Prince William Sound, the waterway polluted in the nation's largest oil spill.

Harry Gamble, a spokesman for Gov. Walter Hickel, declined to comment on the reports. Exxon and federal officials also declined to comment.

Critics say the installment plan, because of inflation, would net the state far less money in real terms than the \$1 billion reportedly being sought by Hickel.

The installment plan to-



■ **NO DEAL:** Cook Inlet oil companies and a local citizens council failed Thursday to meet a congressional deadline for an agreement on oil-spill planning. E-2

tally shortchanges Alaskans," said Riki Ott, a commercial fisherman and leader of the Oil Reform Alliance, a group formed after the spill to lobby for changes in oil industry practices.

"In real terms it's about half of Hickel's proposed \$1 billion settlement. And we don't even know what we're settling on."

State Rep. Cliff Davidson, D-Kodiak, agreed.

"If you look at the bottom line for that company over this past year, it seems like they could afford a little more," he said.

The proposed tax deduction for Exxon was equally unpopular.

"Exxon was the polluter.

Please see Page E-3, SPILL.

UW has been watched over and analyzed by special-edu- down towns on the sea with him. But the second day, he

SPILL: Anger greets pact

Continued from Page E-1

If they're allowed to deduct their expenses from their immense profits, it doesn't really come out of their hide," said Mike Wenig, an attorney for Trustees for Alaska, an environmental law firm.

Alaska Attorney General Charlie Cole left Washington on Thursday after negotiating with Exxon and federal officials. He was to arrive today in Juneau to brief Hickel and state lawmakers.

Hickel said Wednesday that he expected a settlement within a week. He said details will not be released until he signs the pact.

The governor last month proposed settling the lawsuits and the criminal case for about \$1.2 billion. Much of the money would be used to buy private timberlands that would be part of a marine conservation area in the sound.

The tanker Exxon Valdez spilled nearly 11 million gallons of North Slope crude oil into the sound when it ran aground on March 24, 1989.

The state sued Exxon for unspecified civil damages resulting from the spill. The federal government is prosecuting Exxon on criminal charges, with trial set for April 10 in Anchorage.

Most of the criticism of the settlement talks in Alas-

ka has focused on Hickel.

Ott accused Hickel of rushing to get the litigation settled so he can focus Alaska's attention on several major development projects, including proposed oil drilling in the Arctic National Wildlife Refuge and construction of an \$11 billion natural gas pipeline across the state.

State legislators complained that they were being kept in the dark about the negotiations.

Davidson said he is learning more about the talks from Eastern newspapers than he is from the governor's office.

"I just wonder, are we doing everything we can do to protect the people's interests here?"

Rep. Max Gruenberg, D-Anchorage and vice-chairman of the House Judiciary Committee, unveiled a bill Thursday that would require legislative approval of any spill settlement.

A group of Native leaders who represent villages affected by the spill issued a news release condemning the closed-door talks.

Robert Kvasnikoff, chairman of English Bay Corp., a Native village corporation, said the villages "were victims of Exxon's oil. We won't be victims of Exxon's secret deal. We won't be sold out by the government."

en get class-action voice in court

3 of 6

Exxon reportedly gets years to pay damages

By William P. Coughlin
GLOBE STAFF

The \$1 billion Exxon Valdez oil spill settlement being completed by Exxon Corp., the federal government and Alaska calls for payment over a period of years and the payments will be tax deductible, sources said yesterday.

Because the payments to a Prince William Sound Restoration Fund will be spread out, the present dollar value of the \$1 billion is only \$550 million, the sources said.

The settlement reportedly will also let the oil company deduct costs of all future cleanup from the fund.

Some \$160 million will be deducted from the fund to reimburse federal and state agencies for cleanup costs already incurred.

It also was revealed that the agreement gives Exxon a voice on any panel set up to decide how and where its restoration funds will be spent in Prince William Sound.

In Congress, US Rep. George Miller, a California Democrat and vice chairman of the Interior Affairs Committee, has demanded a "full briefing" from Attorney General Dick Thornburgh, one of the negotiators, before any settlement is made public.

In Alaska, critics condemned the reported settlement, focusing on Gov. Walter Hickel.

Rick Ott, a toxicologist who heads Alaska's Oil Reform Alliance, said: "It's apparent this state did not elect a governor. We elected instead another lobbyist for the oil industry... People are not with him. A settlement like this sells Alaska short."

Michael Wenig of Trustees for Alaska, an environmental law firm, said: "If it is true that they can write this off, it is a total outrage. If the amount of money is such that after you pay for existing bills for damage assessment up to now, and whatever cleanup still needs to be done, and after all that, there is nothing left for restoration, then it is a total tragedy."

Wally Hickel deserves a lot of blame for this."

A spokesman for Hickel said the governor would not comment on the reported deal.

The Exxon payments to the fund would be made in installments: \$200 million the first year, \$160 million the second and \$80 million for the last eight years.

Because it will pay in installments, "Exxon gets to keep most of its money, on which it will accrue interest," one source said. "It's like a company paying a worker only \$10,000 of a \$30,000 salary, then promising X amount-per-year after that."

At Exxon USA headquarters in Texas, spokesman Les Rogers, speaking for vice president C.M. Harrison who has been involved in negotiations, said: "Our instruction is we have no comment to anyone about anything."

In Washington, a Justice Department spokeswoman, Amy Casner, said: "Nothing has changed... We are pressing for an April 10 trial." Exxon was indicted on five criminal charges last winter. The trial is scheduled for April.

Asked if Attorney General Charles Cole of Alaska met yesterday with Thornburgh, Casner said: "I've no response to that."

Neither Cole nor Harrison returned telephone calls yesterday.

Rep. Miller said he is concerned that the Alaskan fishing industry and mayors "may have been excluded" from negotiations, and "the settlement may prejudice their ability to get fair compensation."

He also said his committee will probe charges that Exxon is dumping hazardous waste into the ballast water of ships.

These allegations were made in a letter delivered Tuesday to Thornburgh and William Reilly, administrator of the Environmental Protection Agency, by a shipping broker based in Alexandria, Va., Charles Hamel.

*Boston
Globe
2/14/91*

Lawmakers fault Hickel's negotiating

Exxon deal worth only half
of sum sought, report claims

- Fishermen, coastal towns grow wary as bigger players near settlements in Exxon oil spill fight A9
- Coastal Native villages condemn Hickel spill negotiations, threaten to block deal A9

By DAVID FUTCH

TIMES WRITER

JUNEAU — Legislators, left out of negotiations to settle Exxon oil spill lawsuits, are heating up their criticism of the governor for not telling them the details of settlement talks.

The Boston Globe and Wall Street Journal quoted unnamed sources citing details of settlement terms this week that legislators have been unable to pry from Gov. Walter J. Hickel and state Attorney General Charles Cole.

Both officials have refused to discuss details of the talks.

"Frankly it makes me angry to see that we learn far more information from the Boston Globe and the Wall Street Journal than we have been able to learn in Alaska," said Sen. Arliss Sturgulewski, R-Anchorage.

Hickel originally proposed that Exxon pay \$1.2 billion to settle state and federal government lawsuits stemming from the March 1989 spill from the Exxon Valdez tanker in Prince William Sound.

But the Journal report published Thursday placed the value of the settlement at less than \$1 billion because Exxon would pay out the money over a period of time rather than in one lump sum.

The newspapers reported payments would span a decade with a \$500 million payment up front to set up a fund to restore the Sound.

The Globe said the payments would be tax deductible, with the initial payment followed by \$180 million the second year and \$80 million a year for eight years.

The \$180 million would cover costs incurred by the state and federal government because of the spill, the Journal story said.

Money would be allocated by three federal trustees and one state trustee, the Journal said. Exxon and federal officials would not comment on the reports.

Critics say the installment plan, because of inflation, would net the state far less money in real terms than the \$1 billion reportedly being sought by Hickel.

"In real terms it's about half of Hickel's proposed \$1 billion settlement. And we don't even know what we're settling on," said Rikl Ott, a com-

See Reports, page A9



Hickel



Sturgulewski

Reports

Continued from page A1

mercial fisherman and leader of the Oil Reform Alliance, a group formed after the spill to lobby for changes in oil industry practices.

Hickel would not discuss specifics of the settlement Thursday, but denied legislators were being left out of talks taking place in Washington, D.C., where Cole is meeting with federal officials.

"They (legislators) are not being left in the dark," Hickel said. "We're doing the best thing we can. We're trying to solve a very difficult problem."

Hickel has proposed settling state civil and federal criminal lawsuits against Exxon for \$1.2 billion. Much of the money would buy private timber area in Prince William Sound and establish a conservation area and marine park there.

At least one lawmaker, Rep. Cliff Davidson, D-Kodiak, said he felt like "a legislative mushroom," in the dark without a clue about the latest direction of settlement talks.

"Nobody knows what's going on. None of us," Davidson said. "If the governor is feeling good about this settlement, I wish he would tell us why because we (legislators) have spent the last two years on this thing and here's a lot of pain."

"I've had my eyes open all along and I haven't seen a piece of information that I can go to the bank of my constituency and say we're being taken care of."

Rep. Max Gruenberg, D-Anchorage, made a move Thursday to bring the process into the pen.

At a House Judiciary Committee meeting Thursday, Gruenberg offered a bill requiring any settlement proposal be given to

the Legislature for review.

The bill would allow lawmakers to prevent a settlement if they decide it is not in the public's best interest.

The bill gives the Legislature opportunity to review a proposed settlement for 60 days.

If necessary, a special session could be called to further study a settlement proposal. Details of a settlement would become public, the bill says.

"I don't want to comment on the settlement until I've seen it," Gruenberg said. "My mind is open."

Gruenberg and the House Judiciary Committee are scheduled to hold a meeting with the attorney general today to discuss the settlement.

Sen. Sturgulewski said Thursday that besides legislators, the people most affected by the spill, including residents and fishermen who live and work near the Sound, have been left out of negotiations.

Sen. Pat Pourchot, D-Anchorage, said there is an inherent danger involved with having only three or four people involved in the negotiations.

The result could be someone forgetting certain aspects that should be included in the final deal, Pourchot said.

"They are not going to bring a full range of views in and structure a deal trying to accommodate all these people," Pourchot said.

Hickel's acting press secretary Harry Gamble said the governor has offered to talk with key legislators at their convenience.

There is a caveat. Gamble said he has no idea how much detail Hickel can give to legislators.

"If we negotiate this in the press or bring in other groups we're likely to be in court for eight or 10 years," Gamble said.

This report includes material from the Associated Press.

informed in the future.

LAWSUITS: Natives, fishermen get class-action voice in court

Continued from Page E-1

fore filing suits in federal court.

Holland has ruled that only people who can show actual physical damage from the 11 million-gallon spill by the tanker Exxon Valdez can sue the oil company. Shortell's decision allows anyone owning a business or proper-

ty affected by the March 1989 spill to sue.

The different approaches taken by the judges suggests that much of the spill litigation may be concentrated in state court.

Attorney Lloyd Miller, who represents the class of Alaska Natives hurt by the spill as well as serving as liaison counsel for all the

plaintiffs, said Shortell's decision also may promote settlement talks.

"It means Exxon and Alyeska and the other defendants must face the full impact of the oil spill by meeting in court all the injured parties, all the Alaska Natives, all the fishermen, not merely those who hire a lawyer and file a lawsuit,"

Miller said. "It's a tremendous victory and should be a sobering decision (for Exxon)," he said. "It should encourage, by all logic, settlement negotiations between the parties, because the defendants can be sure they are negotiating with everybody who was injured by the spill."

DENALI NATIONAL PARK AND PRESERVE

A task force of top National Park Service managers will hold meetings next month to gather public opinion concerning access into the Kantishna area of Denali National Park and Preserve. The meetings will focus on three topics:

- The safety and adequacy of the existing park road.
- The current law regarding access rights along the road.
- The feasibility and desirability of alternative access to Kantishna, a large area of privately held mining claims at the west end of the park road.

Members of the task force include Jim Parham, NPS executive assistant to the director; Bob Barbee, superintendent, Yellowstone National Park; Don Castleberry, NPS Midwest regional director; Boyd Eison, NPS Alaska regional director; Paul Heertel, NPS Alaska associate regional director for resource services; Jim Straughen, transportation engineer for the NPS Denver Service Center; and Russ Berry, superintendent of Denali.

The task force is an outgrowth of a fall, 1990, meeting between NPS Director James Fidenour and members of the Alaska Congressional delegation. The group will visit the park again this summer to see the operation of the road and review alternative access routes. By fall, the task force will report their findings to the director of the National Park Service.

After meeting with state of Alaska officials on February 19 in Juneau, the task force will hold the following public meetings:

February 20	Anchorage	6 p.m.	Anchorage Museum of History and Art
February 21	Fairbanks	6 p.m.	Noel Wien Library auditorium
February 22	Healy	5 p.m.	Tri-Valley Community Center



ATTENTION:

Important Public Meeting!

Public Input Needed on Education Questionnaire

A public meeting will be held for the WISE Project "Winning With Stronger Education", on:

Friday, February 15th - 6:30 to 8:30 p.m.
at UAA Consortium Library Building, Room 118

The purpose of the meeting is to solicit public input on a questionnaire that will be mailed this month to 1,000 Anchorage families asking their opinion on a wide-range of education issues. Anyone interested in education is encouraged to attend and express their ideas about what kind of questions should be included in the questionnaire.

This is your chance to have a say on the education of your children. For further information please call Cracum & Associates at 278-3882. For information on the WISE Project, please call Robert Galtstein at 278-3557.

**We're getting smart
about Education!**



Alaskans fear 'sellout' in oil spill settlement

By William P. Coughlin
GLOBE STAFF

Opposition to Alaska's reported settlement with the Exxon Corp. for the Exxon Valdez oil spill continued yesterday, with a growing number of lawmakers and native Alaskans expressing fears that the deal may be what some called a "sellout."

Meanwhile, there were signs that the negotiations were not going entirely smoothly.

Gov. Walter Hickel is scheduled to join the state's key negotiator, Attorney General Charles Cole, tomorrow in Washington to sign the settlement, sources said. But, "things may have started to go sideways. Cole has been recalled to brief the governor ... everyone is surprised Cole's being called back," a source said.

"The meeting where things started to go sour was with NOAA," the source said, referring to the National Oceanic and Atmospheric Administration. He indicated that the federal agency had unresolved environmental concerns about the deal.

Alaska has been completing what is reported to be a \$1 billion settlement to be paid by Exxon in installments over 11 years, and from which the company can deduct millions in cleanup costs already spent. Sources say that the \$1 billion deal amounts to about \$550 million in real dollars over the years.

Hickel, a former Interior secretary, told The Alaska Daily News this week that "it's a

good settlement." However, he declined to reveal details "until after the signing."

The secrecy is worrying Alaskans, whose shores were fouled by the largest spill in American waters. It also has stirred the Legislature, whose members are angered by Hickel's lack of consultation with them.

Rep. Cliff Davidson of Kodiak, chairman of the House Resources Committee, whose native island 1,000 miles from the Valdez spill was damaged, said, "This is going down without the Legislature knowing anything."

"There was total cancellation of livelihoods on my island, and while some have been compensated, a lot of people have fallen through the cracks," he said.

Davidson also said that Alaskans "have not yet completed assessment of damages. ... I wouldn't say the governor is selling us short, but is he getting enough for those hurt and to restore the damage?"

Leaders at the Chenega, English Bay and Point Graham native villages said they will try to block the pact "if we are sold out."

Some village shores are still covered by oil "up to 8 feet thick," said Charles Totemoff of Chenega Corp. "This deal involves our lives and lands, but no one has talked to us. They can't do this deal without us."

Robert Kvassnoff, chairman of English Bay Corp. at Koon Fjord National Park, said, "We were victims of Exxon's oil; we won't be victims of Exxon's secret deal; we won't be sold out by the government."

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The New York Times

DATE: 3/13/91

PAGE: A1

\$1.1 Billion Settlement by Exxon Is Said to Include Criminal Fine

Payments Would End Big Claims in Valdez Spill

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, March 12 — The Exxon Corporation is prepared to pay a \$100 million criminal penalty as part of a \$1.1 billion payment over the next 10 years to settle civil and criminal cases arising from North America's largest oil spill, Alaskan and Federal authorities said today.

Federal and state officials have agreed to the arrangement. Although a Federal District Court judge at first seemed to raise another hurdle today when he said he would review the settlement to insure that the rights of 5,000 Alaskan villagers were protected, a state official said early this evening that the final obstacles to a settlement appeared to have been overcome.

Effects Would be Studied

Under the proposed agreement, Exxon would pay \$100 million immediately to settle criminal charges brought by the Department of Justice. That would be one of the largest, if not the largest, criminal fine ever paid for pollution. A trial on the charges had been scheduled for April 10 in District Court in Alaska.

The villagers had filed suit last week, asserting that they had been locked out of negotiations between Exxon, the State of Alaska and the Federal Government. The villagers said they feared that a settlement would prevent them from recovering financial damages caused by the Exxon Valdez oil spill on March 24, 1989.

The proposed settlement, which has

been under negotiations for months, would not end Exxon's legal troubles in Alaska. At last count, 330 separate suits were pending against the company. But the settlement would end the major suits, brought by the State of Alaska and the United States.

In addition, the company would pay \$80 million this year into a fund administered by three Federal agencies and three state agencies. The money would be used for scientific studies of the Prince William Sound region, which suffered great damage, and for projects to continue scrubbing the shoreline of oil left when nearly 11 million gallons spilled from the hull of the

Exxon Valdez after the tanker ran aground in the sound. The tanker's skipper, Capt. Joseph J. Hazelwood, was convicted in April 1990 of the relatively minor charge of negligently discharging oil but acquitted of piloting the vessel while drunk and other charges.

The agreement also called for payments into the fund of \$150 million in September 1992, \$100 million in September 1993, and \$70 million annually from 1994 until 2001. The proposed settlement also calls for Exxon to contribute \$100 million more to the fund if additional damage from the oil spill is discovered.

Economists noted that Exxon would be able to claim tax deductions for every payment except for the \$100 million criminal penalty, to be paid this year.

The agreement would not affect some 300 other lawsuits filed by environmentalists, fishermen and Aleuts asking Exxon to pay for damages these groups say they suffered after the spill.

The proposed settlement was applauded by Gov. Walter J. Hickel of Alaska but strongly criticized by environmental groups and some state officials who said, essentially, that Exxon would be paying too cheap a price in settling the case.

Bottom of the Pockets?

"It seems like a good deal for Exxon," said Eric Jorgenson, a lawyer for the Sierra Club Legal Defense Fund in Juneau, which has a separate suit pending against the company in the aftermath of the spill.

But Governor Hickel said: "I am very happy with the settlement. It allows us to get to the bottom of Exxon's pockets."

Lance Lambertson, a spokesman for Exxon in Irving, Tex., declined today to say whether Exxon would sign the agreement and said the company would make no comment about the situation for the time being.

"If and when things break and we have come together for a proposal to be signed, there will be extensive notification," said Mr. Lambertson.

The settlement contains provisions to make public a wealth of scientific studies conducted after the spill by the Department of the Interior, the Environmental Protection Agency and other Federal agencies. But studies sponsored by the State of Alaska and the United States Coast Guard are to remain private pending the outcome of court cases brought against the state and the Coast Guard.

"Keeping the data secret is a major problem," said Mr. Jorgenson. "All of the data available from the spill should be released. The public paid for it. It's public information."

Although the terms would make the settlement the most expensive ever for damages caused by an environmental disaster, the pact is certain to raise a stir in Alaska and in Washington. The negotiators will open the pact to public comment for 30 days after it is signed. Officials with the state and two Federal agencies said the pact could be altered as a result.

Economists who have studied the spill for the state and Federal governments said today that the \$1.1 billion settlement represents only a portion of the actual value of the damage to fisheries, water, wildlife and land. The economists said the Exxon Valdez disaster will have caused \$2.5 billion to \$5 billion in damages from the time of the



The New York Times
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"I think this agreement, if it is resolved, is going to have to stand the light of day by the Legislature, the Governor and Exxon shareholders," said Senator Murkowski. "The alternative is litigation. I certainly am inclined to think a bird in the hand is worth two in the bush. The cost of litigation would be very substantial."

The settlement also calls for an advisory group made up of members of the public to help oversee how money from the settlement is spent. The Department of Justice scheduled a news conference for Wednesday to explain provisions in the settlement.

The last obstacles to the settlement were crossed this afternoon when Judge Stanley Sporkin lifted an order here that prevented the pact from being signed, and a District Judge from Alaska, H. Russell Holland, approved the agreement. Judge Holland was to have presided over the criminal trial next month.

Last week, Judge Sporkin blocked the settlement from being signed until the state and Federal Government assured more than 5,000 Alaskan native villagers that their right to gain financial damages from Exxon would not be harmed by the pact.

Today, Judge Sporkin said he was satisfied that the rights of the native villagers to fully prosecute their suits had not been harmed by any settlement between Exxon, Alaska and the Federal Government and lifted his injunction. But in an order he signed this afternoon, Judge Sporkin said he would review the settlement after it is signed to make sure the rights of the villages are ensured.

"The court shall retain jurisdiction over this matter to ensure that the defendants' representations are carried out so the plaintiffs' rights are protected," Judge Sporkin wrote in the order.

The Washington Post

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Exxon Settles Spill For \$1.1 Billion

\$100 Million in Pact for Criminal Fine

By Michael Weiskopf
Washington Post Staff Writer

Exxon Corp. agreed early today to acknowledge criminal responsibility and pay a \$100 million fine as part of a \$1.1 billion agreement with the federal and Alaskan governments to settle civil and criminal charges stemming from the nation's worst oil tanker spill, according to informed sources.

The settlement, by far the largest for environmental damage in the United States, apparently dealt with one of five federal criminal charges filed against the company and its shipping subsidiary, the sources said. Exxon faced two felony and three misdemeanor charges related to the spill.

Trial on the criminal charges was to begin April 10 in U.S. District Court in Anchorage.

Half of the criminal fine and most of the \$1 billion in civil damages to be paid over 10 years would be used to restore the fragile Alaskan shoreline after the ecological havoc caused when the tanker Exxon Valdez ran aground on a marked reef March 24, 1989. Nearly 11 million gallons of crude oil gushed into Prince William Sound, eventually spreading for miles.

Under the settlement signed here, Exxon is obligated to pay another \$100 million if significant environmental problems can be traced to the spill after the 10-year payment period.

Negotiators reached basic terms of the settlement days ago, but U.S. District Court Judge Stanley Sporkin barred final agreement until he heard arguments here Monday by five native Alaskan villages seeking to protect their rights to pursue damages separate from the government agreement.

Yesterday, Sporkin lifted his ban after warning government lawyers not to trample on the villagers' legal rights.

The settlement was signed shortly after midnight at the Justice Department, and details of the agreement are expected to be released at a news conference here today. Spokesmen for the Justice Department and Exxon declined to comment.

Walter J. Hickel (D), who took office as Alaska's governor last December and has been representing the state in negotiations here, said the settlement terms are "in the best interests" of Alaskans.

But environmentalists and some Alaskans criticized the agreement for failing to provide enough money and specifically target its use for environmental restoration. Actual distribution of Exxon's payment would be decided by a board of trustees that is to include representatives of the federal and state governments.

"The worry is that the state of Alaska is going to stretch the definition of restoration and spend the money for marinas and roads," said Doug Wolf, counsel for Alaskan issues at the National Wildlife Federation.

Michael Hausfeld, an attorney who represented the native Alaskan villages in the hearing before Sporkin, said the two governments should have held out for an "open-ended" settlement in which Exxon agreed to pay whatever is necessary to restore ecological damage related to the spill.

Exxon has spent \$2 billion on the cleanup, leaving shorelines almost free of oil. The huge Alaskan fishing industry, badly dislocated by the spill, gradually is returning to normal.

But authorities have barely begun to calculate damage to wildlife as scientific studies continue to find new evidence of long-term damage to certain varieties of sea birds, salmon, trout and other marine life.

According to confidential documents, federal scientists have concluded that some colonies of diving birds have suffered "total failure" to reproduce as result of the spill, while some species of marine life were so affected that they "may not respond" to revival efforts for decades.

Known as the greatest man-made wildlife disaster in the nation's history, the spill resulted in the deaths of more than 36,000 waterfowl, at least 1,016 sea otters and 144 bald eagles along with many other animals.

A federal grand jury in Anchorage indicted Exxon and its subsidiary, Exxon Shipping Co., a year ago after the corporation rejected a plea bargain proposed by the Justice Department. The two felony counts accused Exxon of failing to man its ships with a competent captain and physically and mentally capable crew members.

Joseph J. Hazelwood, the Exxon Valdez captain who witnesses said was drinking ashore before the early morning grounding, left the ship's bridge shortly before it hit the reef and left in command a third mate who lacked Coast Guard certification.

Hazelwood was acquitted last March on state charges of criminal

misconduct, reckless endangerment and piloting a vessel while intoxicated. He was convicted of negligent discharge of oil and sentenced to perform 1,000 hours of community service and pay \$50,000 in partial restitution for spill damage.

Under terms of the agreement, Exxon is to pay \$190 million, including the fine, immediately. Of the first installment, \$40 million is slated for continued evaluation of environmental damage and planning for restoration.

And, \$150 million to be released by October is intended to be used to return Prince William Sound to its pristine state before the spill.

Exxon also agreed to pay \$100 million in fiscal 1993 and \$660 million over the next eight years. It was not immediately known if that is earmarked for a specific purpose.

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Although the agreement frees Exxon of further obligations to the state and federal governments, the company faces more than 300 lawsuits by Alaskan residents and business executives claiming large losses caused by the spill.

The Alaskan villages that filed suit here said they feared that the government was bartering away their right to pursue spill-related claims later.

But Sporkin assured lawyers for the villages that "the government, I think, understands that they cannot play fast and loose with your rights." If the settlement later compromises those rights, he said, "Hell hath no fury like a judge scorned. . . . It's not fair, it's not right and it's not American."

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Government Ready to Sign Settlement Over Exxon Valdez Spill

Eds: UPDATES with settlement near; edits to conform throughout

By LAURIE ASSEO=

Associated Press Writers

WASHINGTON (AP) — The government and Exxon Corp. are poised to sign a \$1.1 billion settlement of claims over the Exxon Valdez oil spill that likely would include a guilty plea to at least one criminal charge, sources said Tuesday.

A source close to the talks said the settlement amount would be \$1.1 billion. However, the source also said Exxon was having some second thoughts about the settlement after a federal judge issued an order Tuesday intended to protect the rights of five Alaska Native villages.

A law enforcement source said Exxon had tentatively agreed to plead guilty to at least one criminal charge as part of the deal.

Exxon initially had refused, but Attorney General Dick Thornburgh insisted that any settlement include such a plea, the law enforcement source said. It was not clear whether the company would plead to a misdemeanor or a felony.

Justice Department sources said a settlement could be announced as early as Wednesday.

U.S. District Judge Stanley Sporkin on Tuesday lifted an order that had barred the federal and Alaska governments from signing a settlement with Exxon. In place of that order, the judge issued one intended to protect the rights of five Native villages to pursue their own damages against Exxon.

Alaska Gov. Walter J. Hickel's spokesman, Eric Rehmann, said, "The governor is extremely happy with the terms that have been reached at this point. The terms are in the best interests of the people of Alaska.

"The judge has given a green light," Rehmann added. "If the two parties agree based on the judge's order, it's a done deal."

State Attorney General Charles Cole said last week the proposed settlement would be for about \$1.2 billion.

The villages said they feared the government was negotiating away their right to seek damages from Exxon without allowing them to participate.

"The government, I think, understands that they cannot play fast and loose with your rights," Sporkin told the villages' attorneys during a hearing. "This may well be a settlement that is outstanding. ... This is not a situation where anybody's going to get out on the cheap."

"I feel much better. I had a sleepless night last night," said Elenore McMullen, chief of the village of Port Graham, one of the plaintiffs. Asked whether she felt confident the villages' rights now would be protected, she said, "I feel pretty sure they will be."

Sporkin issued a stern warning to government attorneys, saying that if a settlement between the government and Exxon did wind up harming the villages' right to sue Exxon, "Hell hath no fury like a judge scorned. ... It's not fair; it's not right, and it's not American."

The judge said he would not require the government and Exxon to enter in court any settlement they reach, but he said he was keeping jurisdiction of the villages' lawsuit.

The villages' attorney, Michael D. Hausfeld, said he was pleased with Sporkin's decision. Hausfeld said it indicates that if any settlement does damage the villages' rights, "I think the federal government and the state of Alaska will have one angry judge on their hands."

Sporkin had ordered the federal and state governments last week not to sign any agreement with Exxon until he determined whether it might harm the Alaska Natives' rights.

Federal law gives the villages the right to "subsist off the natural resources of their ancestral lands," which the lawsuit said includes Prince William Sound, which was fouled by the oil spill.

Nearly 11 million gallons of oil gushed from the tanker Exxon Valdez when it ran aground March 24, 1989. The spill killed countless birds, mammals and fish and disrupted Alaska's lucrative fisheries.

The government said federal law does not give the villages any right to join negotiations for settlement of a government claim. Sporkin agreed, saying, "You cannot negotiate with the world."

The villages — Chenega, Port Graham, English Bay, Larsen Bay and Karluk — have about 3,000 to 5,000 Native residents.

A similar lawsuit was filed by three Alaska Native corporations that will control thousands of acres of land to be turned over to the villages by the government under an unrelated agreement.

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THE WASHINGTON POST

Oil Officials Ignored Cleanup Deficiencies, Hill Probe Finds

By John Lancaster
Washington Post Staff Writer

A year before the Exxon Valdez oil spill, oil industry officials—who had long pledged to make their shipping operations “the safest in the world”—knew that their spill-fighting capabilities were inadequate but chose not to invest in recommended improvements, a congressional investigation has found.

Aleyeska Pipeline Service Co., the oil-industry consortium that oversees the shipping of Alaskan oil, concluded in 1988 that “immediate, fast response” to a spill in the center of Prince William Sound was “not possible with present equipment,” according to internal documents obtained by the staff of Rep. George Miller (D-Calif.).

Miller said the documents suggest that approval of last month’s settlement in which Exxon Corp., the tanker operator, agreed to pay \$1.1 billion should be held up because the terms also call for charges against Aleyeska to be dropped.

Contrary to Aleyeska’s safety pledge, consortium operators rejected their staff’s recommendations that they purchase additional spill-fighting equipment, such as a large-capacity oil storage barge, the documents show.

An Aleyeska spokeswoman acknowledged yesterday that the consortium had not been adequately prepared to cope with the Exxon Valdez spill but said Alaska officials

were well aware of the deficiencies and denied any attempt to deceive the public. “The industry and the state did not plan for [a spill of that] magnitude,” said the spokeswoman, Marale Isaacs.

In a related development, a new assessment by state and federal scientists revealed far greater devastation to some species of marine life and wildlife than previously reported. The latest estimate of deaths to sea otters ranged from 3,500 to 5,500 and seabirds from 250,000 to 500,000.

Last month, the federal government and state of Alaska agreed to drop all criminal claims against Aleyeska as part of a proposed settlement agreement with Exxon, a member of the consortium. The settlement must still be approved by the Alaska legislature and a federal judge in Anchorage, H. Russell Holland.

But in a letter yesterday to Holland, Miller, vice chairman of the House Interior and Insular Affairs Committee, said the settlement “fails to hold Aleyeska accountable to the public for its wrongdoing” and should be reconsidered.

“This was like the Challenger disaster—the system failed,” Miller said in an interview. “These people would tell the state legislature, the government of Alaska, the Alaskan people anything they could to get their way . . . and as a result we had a national tragedy.”

A Justice Department spokeswoman said yesterday that government attorneys were “studying”

Miller’s findings but declined further comment.

Until now, attention has focused largely on Exxon’s role in the March 1989 tanker grounding, which dumped nearly 11 million gallons of crude oil into one of the world’s richest commercial fisheries. But under agreement with state and federal agencies, Aleyeska was to have been the first line of defense against oil spilled by tankers operating out of the port of Valdez. The consortium of seven major oil companies oversees the operation of the trans-Alaska pipeline, which transports oil from Alaska’s North Slope to the pipeline terminus in Valdez.

Aleyeska officials offered repent- ed assurances that oil shipping operations would not endanger the environment. In 1971, for example, an Aleyeska pollution specialist said in testimony before an Interior Department panel that the consortium would use “the best equipment, materials and expertise” to “make operations at Port Valdez and in Prince William Sound the safest in the world.”

Aleyeska’s oil spill “contingency plan,” which was in effect at the time of the spill, promised a “rapid and effective response to any oil spill emergency” using “state-of-the-art spill cleanup technology.” The plan applied to the Port of Valdez and Prince William Sound.

But in April 1988, according to documents obtained by the Interior subcommittee staff, Theo L. Polasek, Aleyeska’s vice president of op-

erations, offered this warning to consortium operators: “Immediate, fast response to mid-point of Prince William Sound not possible with present equipment complement.”

Several months later, another consortium official recommended a series of improvements, including purchase of new equipment “for near shore and beach operations” and an oil-skimming barge with a capacity of 50,000 to 100,000 barrels. But Aleyeska owners apparently rejected the suggestions, deciding instead to scale back Aleyeska’s responsibility for cleaning up spills.

“At the owners committee meeting in Phoenix, it was decided that Aleyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only,” said a document attributed to Stanley Factor, an executive of Arco Marine Inc., one of the owners. “Further efforts in the Prince William Sound would be limited to the use of [chemical] dispersants and any additional effort would be the responsibility of the spiller.”

Isaacs, the Aleyeska spokeswoman, said the spill contingency plan acknowledged the shortcomings in Aleyeska’s cleanup capabilities and that the Alaska Department of Environmental Conservation had approved it anyway. Moreover, she denied Miller’s suggestion that the consortium “secretly” reneged on commitments, asserting that statements attributed to consortium officials were nothing more than proposals to modify the contingency plan when it came up for renewal in

1990. “It’s absolutely incorrect to characterize these discussions as modifying the [existing] plan,” she said.

Larger Environmental Toll Revealed in U.S. Report

In the most comprehensive assessment yet of environmental fallout from the Exxon Valdez spill, the Justice Department filed a report in federal district court in Anchorage that revealed injury to species of wildlife not previously known to have suffered and much higher death rates of better known victims, such as otters and seabirds.

The report also said the pollution was causing lasting effects on such newly identified victims as the river otter, which are said to be accumulating petroleum byproducts in their tissues, losing body weight and moving in more erratic patterns.

Of the hardest-hit seabirds, murres colonies lost up to 70 percent of their breeding birds, with at least 120,000 dead. Bald eagles in Prince William Sound failed nearly twice as often to produce offspring in oily areas than in clean ones, according to the report compiled by several state and federal agencies.

Pacific herring populations spawning in shallow waters at the time of the spill recorded abnormally high numbers of abnormal embryos with a high incidence of eye tumors in larvae found in oily areas, the report said.

—Michael Weiskopf

BUSINESS

April 10, 1990
Los Angeles Times

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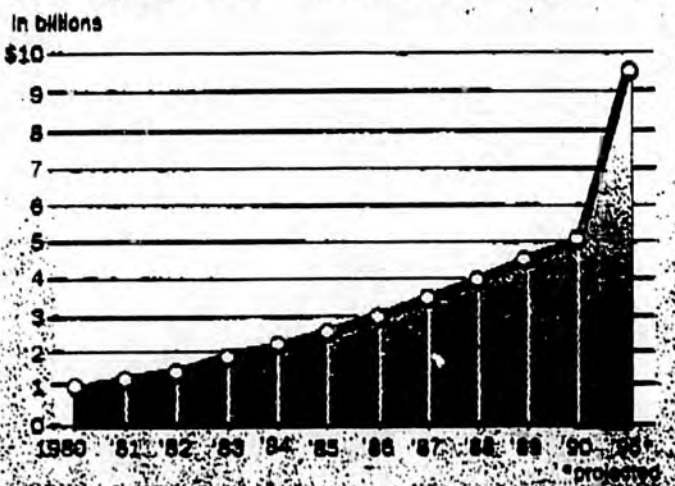
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TV SYNDICATION MARKET SOARS

The TV program syndication market, one of the fastest-growing and most lucrative areas of the television business, is projected to reach \$9.5 billion in 1995—roughly the size of the combined advertising revenues of ABC, CBS and NBC. The syndication market includes everything from the sale of reruns of old network shows (the most profitable segment) and the sale of so-called first-run shows such as "Wheel of Fortune" and "Oprah Winfrey" to local TV stations. In addition, the market now encompasses the sale of programs to cable TV networks and overseas broadcasters.



Note: Figures include combined revenues from program licenses, first-run sale of commercial time retained by distributors, and foreign syndication revenues.

Los Angeles Times

FCC'S NEW FIN/SYN RULES

- **Limitation:** The financial interest and syndication rules are eliminated for all parts of the networks' schedule except prime-time entertainment programming.
- **Outside productions:** A network may acquire a financial interest and rerun syndication rights, both domestic and foreign, in any TV show airing in prime time—provided that the rights are not acquired until 30 days after the network has agreed to a program license fee.
- **In-house productions:** A network may not fill more than 40% of its schedule with "in-house productions," defined as any program that is produced solely by the network, co-produced with a foreign entity or with an outside producer that initiates the deal.
- **Off-network syndication:** A network may earn profits in the syndication market from any outside-produced shows, but those shows must be sold through an independent distributor. A network itself, however, can syndicate its in-house productions internationally and, subject to certain safeguards, domestically.
- **Foreign syndication:** A network may syndicate

Alaska Oil Co-op Accused of Plan to Ignore Spills

■ **Energy:** Rep. George Miller contends that before the Exxon Valdez disaster, the Alyeska pipeline consortium decided against cleaning up slicks. The group denies the charge.

By PATRICK LEE
TIMES STAFF WRITER

A year before the disastrous Exxon Valdez oil spill, a consortium of oil companies secretly decided that it would not respond to spills in Alaska's Prince William Sound as required by a government-approved cleanup plan, according to documents released Tuesday by a leading congressional critic of the oil industry.

Based on an investigation by his subcommittee, Rep. George Miller (D-Martinez) also charged that the consortium—the Alyeska Pipeline Service Co.—knew that it could not respond effectively to such a spill despite previous assurances to the contrary, and that it made little effort to improve its readiness.

"The oil industry betrayed its own promises and deceived the Congress with respect to operations of Alyeska and the Exxon Valdez," Miller wrote in a 12-page letter to federal judges reviewing challenges to the Justice Department's proposed \$1.1-billion agreement with Exxon Corp. to settle litigation arising from the spill.

At Anchorage-based Alyeska, spokeswoman Marnie Isaacs vehemently denied Miller's charges, insisting that Alyeska never intended to evade its responsibility.

Please see SPILL, D3

Greenspan Yields in Spat With Fed

SPILL: Exxon Settlement Being Reviewed

Continued from D1

clean up spills, to mislead regulators or to break the law.

"Congressman Miller's attention is fairly selective," she said. "He is not acknowledging the present. . . . The standards [for spill response] have escalated enormously, and Alyeska has kept up with the heightened responsibility."

Miller, who opposes the proposed settlement with Exxon, objects to any agreement that would preclude further criminal or civil action against the consortium, which operates the trans-Alaska pipeline and the marine terminal at Valdez, Alaska.

"If after making agreements with the state of Alaska and the United States with respect to their ability to clean up an oil spill, . . . the Alyeska Co. then unilaterally and secretly changed its operations . . . that's a major misrepresentation," Miller, chairman of the House Subcommittee on Water, Power and Offshore Energy Resources, said in an interview.

Justice Department officials declined to comment on Miller's charges.

Alyeska is owned by seven oil companies, including Exxon, British Petroleum and Atlantic Richfield Co. Miller based his allegations on internal Alyeska documents obtained during congressional hearings.

The Exxon Valdez spill, the nation's worst, dumped 11 million gallons of crude oil into Alaskan waters on March 24, 1989. It fouled about 700 miles of Alaska coastline in Prince William Sound, killed as many as 580,000 birds and 5,500 sea otters and polluted tidal zones up to depths of 300 feet, according to a summary of 58 federal and state environmental studies filed late Monday in U.S. District Court. Those estimates are worse than previously believed.

Alyeska came under heavy criticism for its handling of the spill. The U.S. Coast Guard eventually assumed control of cleanup operations, for which Exxon paid \$2.2 billion.

On Tuesday, Miller's sharpest accusation concerned an apparently secret 1988 decision by Alyeska's owners not to clean up an oil spill in Prince William Sound, despite their promises to do so in a so-called Oil Spill Contingency

plan, which was approved by regulators as a condition of the permit to operate the 800-mile trans-Alaska pipeline. Alyeska promised that it would assume responsibility for cleaning up spills from tankers operating in Prince William Sound and other areas.

But in a July 6, 1988, telex, Stanley Factor, a vice president at Arco's marine subsidiary, wrote: "At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants, and any additional effort would be the responsibility of the spiller."

Alyeska's Isaacs said the telex referred to ongoing discussions about changes in future oil spill contingency plans, not to the existing one. She denied any intent to evade the law.

"That's absolutely false," she said. "[Miller] is basing that conclusion on conversations between Alyeska and our owner companies . . . [that are] a slice of a very long-term give-and-take between Alyeska and the owners on how to craft, design and manage oil spill responsibilities for the 1990 contingency plan," not the plan in effect at the time.

Daniel Weiss, a spokesman for Miller, said, however, that it was clear from the subcommittee's review of Alyeska documents that Factor's comments were part of a discussion about equipment purchases to satisfy the existing contingency plan. None of the documents refers to an update of that plan, he added.

Miller also alleged that Alyeska knew it was ill-prepared to deal with an oil spill—despite assurances otherwise—and that it did little in the years before the Valdez spill to improve its preparedness.

In a 1984 letter obtained by Miller's subcommittee, former Coast Guard Commander James K. Woodie, then Alyeska's marine superintendent at its Valdez terminal, issued a warning to Alyeska President George M. Nelson: "Serious doubt exists that Alyeska would be able to contain and clean up effectively a medium- or large-size oil spill. . . . Response to any spill beyond the limits of Valdez narrows should not be attempted with present equipment and personnel."

Theo Polasek, Alyeska's vice president of operations, said in a 1988 company briefing document, also obtained by the subcommittee: "Immediate, fast response to [the] midpoint of Prince William Sound [is] not possible with [the] present equipment complement."

Yet Alyeska's Oil Spill Contingency Plan assured regulators that the "estimated time of completion of spill cleanup of a 100,000-barrel spill [in Prince William Sound] would be less than 48 hours."

Among other items, Alyeska said equipment, including a barge, would be in place within five hours of a spill.

In fact, Miller's subcommittee found, when the Exxon Valdez ran aground, fewer than 3,000 barrels were recovered in the first 72 hours. And an equipment barge failed to reach the site for more than 14 hours.

Isaacs said she couldn't comment on the documents, other than to say that some equipment was purchased in the years before the Valdez spill.

Tight budgets contributed to the situation, Woodie said in an interview Tuesday.

"It was a cut, cut, cut operation," said Woodie, who left Alyeska in 1984 in a disagreement over the company's spill preparedness. "The bottom line: It was impossible to maintain readiness."

Woodie said Alyeska asked him to sign letters assuring the state of Alaska that the consortium had sufficient manpower, equipment and readiness to comply with the Oil Spill Contingency Plan. He refused. "When I left, I don't know who signed them," Woodie added.

Isaacs said she did not know whether anyone else at Alyeska signed such letters.

It is unclear what effect Miller's allegations will have on the proposed settlement with Exxon. The settlement, which would require Exxon to pay \$100 million in criminal fines and up to \$1 billion in damages, has drawn criticism from environmentalists and some Alaskans on grounds that it is too easy on the oil company.

Alaska Atty. Gen. Charles Cole said Tuesday that he doubted Miller's concerns would torpedo the settlement.

Cole added that the settlement would preclude further state action against Alyeska only for natural resource damages, not for other damage claims. "And we intend to vigorously continue the prosecution of those claims," he said.

Boeing Parts Center

SEATAC, Wash.—Faced with rising demand for spare parts and highway congestion that is hampering efforts to deliver those parts, Boeing Commercial Airplane Group has broken ground for a \$100-million parts distribution center adjacent to SeaTac International Airport.

When completed, the facility will allow BCAG to consolidate spare parts storage and distribution in one building.

COMPUTER

Continued from D4

it as just another confusing to a crowded alphabet soup.

"A lot of people would like a lifesaver tossed from the ship," said Spencer Leyton, vice president for business development at software development International. "This is either foam or lead, and it landed yet."

Microsoft's new operating system, OS/2 3.0, is its answer to gradual encroachment of Unix the PC turf dominated by software's far less powerful DOS operating system. The new would be able to run all software written for DOS or the Windows enhancement and feature much better networking capabilities and the ability to perform several tasks at once.

By developing a version of Mips chip, which is based on speedy new design concept as reduced instruction set computing (RISC), Microsoft is ending exclusive allegiance to Intel and giving a potentially long-term boost to the Mips, Sun, IBM and Hewlett-Packard have powerful RISC-based systems that run versions of Unix are considered by Microsoft Compaq to be long-term competitive threats.

The new ACE-compatible hardware and software is supposed to be ready for shipment to system developers by the end of the year with commercial products coming sometime next year. Other analysts, however, are skeptical that the Microsoft operating system would be ready soon.

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Congressman Urges Revision Of Exxon Pact

Miller Says Oil Firms Agreed
Not to Do Full Cleanup;
Damage Estimate Raised

By ALLANNA SULLIVAN

Staff Reporter of THE WALL STREET JOURNAL
Allegations that oil companies had agreed before the 1969 Valdez spill not to attempt a complete cleanup of spills in Prince William Sound could force revisions in—or even scuttle—Exxon Corp.'s proposed settlement of damages stemming from the giant Alaskan oil spill.

The allegations were contained in a letter to U.S. Judge Russel Holland of Anchorage, Alaska, by Rep. George Miller (D., Calif.), who attacked the settlement in part because it would grant indemnification against natural resource damage claims to Alyeska Pipeline Service Co. Alyeska, which is responsible for cleaning up oil spills in Alaskan waters, is owned by a consortium of oil companies, including Exxon. Mr. Miller heads the House Water, Power and Offshore Energy Resources subcommittee, which has broad jurisdiction over Alaska's natural resources.

In addition, a 19-page report filed by the Justice Department in the Anchorage court Monday indicates that damage caused by the Valdez spill may be more extensive than initially believed. The report is a compilation of 570 million of federal and state studies done in preparation for litigation with Exxon. The filing reflects the first time the federal government has attempted to summarize the past two years' worth of studies.

Although the report doesn't assign a dollar amount to the damage done, it does suggest that the damage is continuing. Crude oil from the spill has contaminated the sediment far below the sound's surface and is continuing to affect marine life, the report says.

In light of the new information regarding Alyeska and damages, Mr. Miller is hoping that the settlement process will be slowed down. "We need an independent review of what the Justice Department did or did not know about Alyeska," he said. "And if damages are greater than we thought, then is \$1 billion sufficient to rectify those damages?"

The settlement is in a public-comment phase, and Judge Holland is to decide by early next month whether to approve it in its present form. The National Wildlife Federation also yesterday urged Judge Holland to strike the Alyeska indemnification clause from the settlement.

Business and Finance

What's News—

World-Wide

Exxon's proposed Valdez settlement is being opposed. Mean-while, a federal report indicates that damage caused by the spill may be more extensive than first believed.

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According to a document Mr. Miller subpoenaed from Alyeska, the consortium's owners decided at a regular quarterly meeting in 1988 to scrap plans to aggressively fight oil spills in Prince William Sound. The document is a June 30, 1988, telex from Stanley Factor, vice president of chartering and evaluations for Atlantic Richfield Co., a member of the Alyeska consortium.

The telex says in part: "At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only (fjordlike bodies of water which extend about 35 miles out of Valdez Harbor). Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller."

An Alyeska spokeswoman contested Mr. Miller's assertions that officials of Alyeska and its member companies were fully aware of Alyeska's lack of readiness. She said that the documents obtained by Mr. Miller were internal memos issued as part of the planning process for updating the oil-spill contingency plan and didn't pertain to how Alyeska would actually handle a spill. An Arco spokesman said company officials couldn't comment until they examined Mr. Miller's letter.

EASTMAN KODAK

WEDNESDAY, APRIL 10, 1991

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THE WALL STREET JOURNAL

Harm to Nature From Valdez Spill Is Now Seen as Far Worse by U.S.

NYT 1-4

By KESTH SCHNEIDER

4/10/91

WASHINGTON, April 9 — In the most comprehensive account yet made public about the damage caused when oil spilled from the Exxon Valdez two years ago, the Government said today that more wildlife had been killed and the environmental damage in Alaska's Prince William Sound would persist much longer than scientists had originally thought.

The Government said that populations of sea otters, harbor seals, bald eagles, murres, sea ducks, cormorants and seals plummeted after the Exxon Valdez ran aground and spilled nearly 11

million gallons of oil into the Sound. And it said it did not expect the animal populations to recover for years.

The Government said that the Sound, catalogued in an 18-page summary of 50 scientific studies, also includes losses of killer whales, extensive reproductive defects in salmon and herring fry, and widespread and lingering damage to sea grasses and other plants in tidal zones along 1,300 miles of the eastern boundary of the Sound and down the coast in the Gulf of Alaska, which were coated by oil for months.

Seal Left Alone

Government scientists also said today that efforts to clean 400 hundreds of miles of the Sound's shoreline with pressurized and heated sea water caused more damage to shellfish, sea grasses and other organisms in the tidal zones than if the shorelines had been left alone.

Thomas A. Campbell, general counsel at the National Oceanic and Atmospheric Administration, said the studies were used as the basis for negotiating the deal the Government and the State of Alaska reached last month with the Exxon Corporation. The \$1.1 billion agreement would settle civil and criminal claims from the spill, which occurred after midnight on March 24, 1989.

Two Federal judges are reviewing the settlement and their rulings are expected next month. Although Government officials said they were releasing

Continued on Page A18, Column 4

the studies to bolster their assertions that the settlement with Exxon was fair, critics say the same information could be used as evidence that the settlement is not adequate.

Government officials said the assessment of the environmental disaster in the Alaskan Sound reached and, in some cases, exceeded what scientists predicted from the earliest days of the Exxon Valdez disaster. Officials said that the detailed report indeed confirmed that the disaster had taken a heavy toll on wildlife and would produce environmental damage that, in some cases, would be permanent.

"Exxon has not had time to study the problem in detail," said Karsten P. Rodvik, a spokesman for Exxon in Anchorage. "We will withhold comment on it until we have had time to do so."

"However," he went on, "we can say that on the basis of our own and published studies and reports that Prince William Sound is in an advanced state of recovery. Little oil remains on the shoreline. The water is clean. Fish are abundant and safe to eat and wildlife is thriving. Everything we are seeing supports the biological community is healthy and thriving."

Shoreline Was Hard Hit

The Government's study said that 300,000 to 500,000 sea birds died after the spill, and that colonies of one of the most abundant species, the common and thick-billed murres, lost 60 to 70 percent of breeding birds. Because the murres colonies live on islands where hydrocarbons and chemicals lingering from the spill are still killing them, and because murres instinctively return to their same breeding sites, scientists fear these colonies could be entirely wiped out.

The habitat most heavily damaged by the oil spill, the study showed, was the shoreline and shallow areas along the western boundaries of Prince William Sound that are affected by the tides. For weeks, tides washed oil in and out of bays and up and down the rocky shore, killing sea grasses, cormorants, collecting bay bottoms and playing havoc with almost all the living creatures in the region.

The spill occurred just weeks before spring, when birds, mammals and fish species are giving birth. Scientists found that Pacific herring, which were spawning in the shallow coasts and along bays at the time of the spill, showed large increases in the number of abnormal embryos and larvae. Larvae collected in oil-coated areas had unusual numbers of eye tumors, said one study.

Mammals found in oiled areas were smaller than mammals in unaffected bays, a study said. Scientists also found cormorants and other shellfish absorbed hydrocarbons from the oil and passed a continuing source of poison to sea otters and other species that forage in the tidal zones. A study also found that pollock, caught 60 miles from Bligh Reef, had elevated levels of hydrocarbons in their bile, evidence that the sea and food supply was affected at great distances from the spill.

Perhaps the most surprising finding was made by the National Oceanic and

Atmospheric Administration, which concluded that spraying beaches with highly pressurized hot sea water, which was widely used in the spill, proved to be more destructive than the blanket of oil. Scientists said the hot water sterilized beaches, killed marine life and changed the character of beaches by washing sand and rocks down the beaches into city sediments in shallow waters.

Scientists with the oceanic administration said today that Exxon came up with the idea of washing beaches with hot sea water and they approved. And the beach washing began within weeks of the spill. In November 1989, the

The damage to Prince William Sound will last many years.

agency received preliminary evidence from an scientist about the damage caused by the practice and three weeks ago notified the Coast Guard that the washings should be discontinued on nearly all beaches.

"At the time it made sense," said Dr. Sylvia Earle, the chief scientist at the oceanic administration. "You had a great desire to do something. People were running around with towels wiping rocks."

Dr. Earle added: "Sometimes the best and ironically the most difficult thing to do in the face of an ecological disaster is to do nothing. As far as Alaska's shoreline is concerned, the environment would have been better off if there had been less aggressive but water treatment and we had let nature take its course."

Mr. Campbell of the oceanic administration, who helped to negotiate the settlement with Exxon, said it was in the Government's interest to allow the public to gain a partial insight at the scientific studies so that they would feel more comfortable about the \$1.1 billion settlement. "We put it out because we wanted the public to know what lay beneath the claims of loss," Mr. Campbell said. "If we felt the settlement was not strong, we wouldn't have put our cards on the table."

May Stir New Concerns

But the new information also could stir new concerns among critics of the settlement, among them Representative George Miller, a California Democrat who is sitting chairman of the House Interior Committee.

Mr. Miller today questioned the terms of the settlement, especially in a letter to Federal District Court judges in Washington and Alaska that the Justice Department had acted improperly in attempting the Alyeska Pipeline Service Company from prosecution and Federal or state damage claims. The protection for Alyeska, which is owned by Exxon and seven other oil companies, was part of the criminal plea agreement that the Justice Department reached with Exxon on March 12.

Mr. Miller said in his letter that his staff had found that 11 months before the Exxon Valdez ran aground, Alyeska's owners met in Bellingham, Wash., and determined that the company was not ready to respond effectively to an oil spill.

But, Mr. Miller told the judges, Alyeska had told the State of Alaska in its oil spill contingency plan that it was ready to respond to any spill with state-of-the-art equipment and techniques. The Coast Guard and other agencies have previously criticized Alyeska's performance.

The Washington Post

DATE: 5/13/91

PAGE: A1

Exxon Settles Spill For \$1.1 Billion

\$100 Million in Pact for Criminal Fine

By Michael Weiskopf
Washington Post Staff Writer

Exxon Corp. agreed early today to acknowledge criminal responsibility and pay a \$100 million fine as part of a \$1.1 billion agreement with the federal and Alaskan governments to settle civil and criminal charges stemming from the nation's worst oil tanker spill, according to informed sources.

The settlement, by far the largest for environmental damage in the United States, apparently dealt with one of five federal criminal charges filed against the company and its shipping subsidiary, the sources said. Exxon faced two felony and three misdemeanor charges related to the spill.

Trial on the criminal charges was to begin April 10 in U.S. District Court in Anchorage.

Half of the criminal fine and most of the \$1 billion in civil damages to be paid over 10 years would be used to restore the fragile Alaskan shoreline after the ecological havoc caused when the tanker Exxon Valdez ran aground on a marked reef March 24, 1989. Nearly 11 million gallons of crude oil gushed into Prince William Sound, eventually spreading for miles.

Under the settlement signed here, Exxon is obligated to pay another \$100 million if significant environmental problems can be traced to the spill after the 10-year payment period.

Negotiators reached basic terms of the settlement days ago, but U.S. District Court Judge Stanley Sporkin barred final agreement until he heard arguments here Monday by five native Alaskan villages seeking to protect their rights to pursue damages separate from the government agreement.

Yesterday, Sporkin lifted his ban after warning government lawyers not to trample on the villagers' legal rights.

The settlement was signed shortly after midnight at the Justice Department, and details of the agreement are expected to be released at a news conference here today. Spokesmen for the Justice Department and Exxon declined to comment.

Walter J. Hickel (D), who took office as Alaska's governor last December and has been representing the state in negotiations here, said the settlement terms are "in the best interests" of Alaskans.

But environmentalists and some Alaskans criticized the agreement for failing to provide enough money and specifically target its use for environmental restoration. Actual distribution of Exxon's payment would be decided by a board of trustees that is to include representatives of the federal and state governments.

"The worry is that the state of Alaska is going to stretch the definition of restoration and spend the money for marinas and roads," said Doug Wolf, counsel for Alaskan issues at the National Wildlife Federation.

Michael Hausfeld, an attorney who represented the native Alaskan villages in the hearing before Sporkin, said the two governments should have held out for an "open-ended" settlement in which Exxon agreed to pay whatever is necessary to restore ecological damage related to the spill.

Exxon has spent \$2 billion on the cleanup, leaving shorelines almost free of oil. The huge Alaskan fishing industry, badly dislocated by the spill, gradually is returning to normal.

But authorities have barely begun to calculate damage to wildlife as scientific studies continue to find new evidence of long-term damage to certain varieties of sea birds, salmon, trout and other marine life.

According to confidential documents, federal scientists have concluded that some colonies of diving birds have suffered "total failure" to reproduce as result of the spill, while some species of marine life were so affected that they "may not respond" to revival efforts for decades.

Known as the greatest man-made wildlife disaster in the nation's history, the spill resulted in the deaths of more than 36,000 waterfowl, at least 1,016 sea otters and 144 bald eagles along with many other animals.

A federal grand jury in Anchorage indicted Exxon and its subsidiary, Exxon Shipping Co., a year ago after the corporation rejected a plea bargain proposed by the Justice Department. The two felony counts accused Exxon of failing to man its ships with a competent captain and physically and mentally capable crew members.

Joseph J. Hazelwood, the Exxon Valdez captain who witnesses said was drinking ashore before the early morning grounding, left the ship's bridge shortly before it hit the reef and left in command a third mate who lacked Coast Guard certification.

Hazelwood was acquitted last March on state charges of criminal

misconduct, reckless endangerment and piloting a vessel while intoxicated. He was convicted of negligent discharge of oil and sentenced to perform 1,000 hours of community service and pay \$50,000 in partial restitution for spill damage.

Under terms of the agreement, Exxon is to pay \$190 million, including the fine, immediately. Of the first installment, \$40 million is slated for continued evaluation of environmental damage and planning for restoration.

And, \$150 million to be released by October is intended to be used to return Prince William Sound to its pristine state before the spill.

Exxon also agreed to pay \$100 million in fiscal 1993 and \$660 million over the next eight years. It was not immediately known if that is earmarked for a specific purpose.

Cont'd