

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672

2116 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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parasitism and respiration rates were significantly higher in fish from oiled sites compared to unoiled sites.

Fucus, the dominant intertidal plant, was severely affected by the oil and subsequent cleanup activities. The percentage of intertidal areas covered by Fucus was reduced following the spill and opportunistic plant species which characteristically flourish in disturbed areas were increased. The average size of Fucus was reduced, the number of reproductive sized plants greatly decreased, and the remaining plants of reproductive size decreased in reproductive potential due to fewer fertile receptacles per plant. There was also reduced recruitment of Fucus at oiled sites.

SUBTIDAL HABITATS

Spilled oil in some areas has migrated to and contaminated the seafloor at depths of up to 100 meters as contaminated sediments moved off beaches during winter storms and cleanup activities. There is evidence that petroleum hydrocarbons have been taken up by animals feeding on the ocean bottom. Petroleum hydrocarbon metabolites have been found in the bile of yellowfin sole, rock sole, rockfish, and pollock. Concentrations of petroleum hydrocarbon metabolites in the bile of yellowfin sole have not declined from 1989 to 1990. This contrasts with Dolly Varden which feed close to shore and where petroleum hydrocarbon metabolites in bile decreased in the same period. The effects of this exposure are still being studied. Many subtidal and intertidal species, particularly fish, have the capability of metabolizing and eliminating petroleum hydrocarbons from their bodies. Clams metabolize hydrocarbons very slowly and consequently accumulated them in high concentrations.

Contaminated clams and other invertebrates are a potential continuing source of petroleum hydrocarbons for sea otters and otherspecies that forage in the shallow subtidal zone. Samples from pollock, which feed in the water column, taken as far away as 500 mile from the wreck site on Bligh Reef, showed elevated petroleum hydrocarbon metabolite concentrations in their bile. This indicates that the water column or food supply was affected at great distances from the spill. Initial 1990 study results show a significant effect on benthic organisms associated with eelgrass beds. These are known to be highly productive habitats. The composition of benthic animal communities on soft-bottom habitats as deep as 40 meters were also significantly altered in oiled areas.

ARCHAEOLOGICAL AND SUBSISTENCE RESOURCES

The spill directly impacted archaeological sites and subsistence resources. Cleanup activities and the associated significant increases in human activity throughout the spill zone resulted in additional injuries to these resources.

Archaeological Resources: Archaeological sites along the shoreline were injured by the

spill. Review of spill response data revealed injuries from oil to a minimum of 26 archaeological sites. Among these are burial sites and home sites. Twenty-one (21) of these sites are on federally-owned land, with the remaining five on State of Alaska and private lands. Of the 21 sites on federal land, 10 are on national parks, six on national wildlife refuges, four within Chugach National Forest, and one on Bureau of Land Management land. While injury to these 26 sites was documented during cleanup, a spill-wide assessment of injuries to archaeological resources has yet to be completed. In addition to oil contamination, increased knowledge of the location of archaeological sites may put them at risk from looting. Loss of rye grass cover may threaten some sites. A comprehensive survey of injuries to archaeological resources on public lands throughout the spill zone will be conducted during 1991.

A study was conducted to determine impacts caused by oil contamination on radiocarbon dating of archaeological resources and to investigate the potential for cleaning artifacts and materials to allow such dating. Preliminary results indicate significant injury to the ability to contextually date artifacts and materials by Carbon 14 analysis. It also appears that these materials cannot be successfully "cleaned" to allow accurate dating.

Subsistence Resources: Surveys undertaken by state researchers before the spill and in 1990 indicated that subsistence harvesters in the area affected by the oil spill significantly reduced their use of subsistence resources after the spill, primarily because of their concerns about possible contamination of these resources. The oil spill disrupted the subsistence lifestyle of some communities that have historically relied upon these resources. Some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter. The attached report (Subsistence Use of Fish and Wildlife in 15 Alutiiq Villages after the Exxon Valdez Oil Spill) details these studies. Warnings were issued by the state in 1989 for people to avoid consumption of intertidal invertebrates (such as mussels and clams, which bioaccumulate petroleum hydrocarbons) found along shorelines contaminated by oil. After the spill, an oil spill health task force was formed, including the state and federal governments, subsistence users, and Exxon. This group helped oversee studies conducted by the state and others in conjunction with FDA and NOAA in 1989 and 1990, on subsistence food resources such as seals, deer, salmon, ducks, clams, and bottomfish. Based upon the test results these resources, with the exception of clams and mussels in certain oiled areas such as Windy Bay, were determined to be safe for human consumption.

CONCLUSION

The federal and state Trustee agencies have now concluded two field seasons of study and are currently preparing to begin a third year of studies to assess injuries to natural resources resulting from the Exxon Valdez oil spill. The information contained in this

summary is based upon the field work and data analysis conducted to date, and is preliminary. Many studies will likely need to continue for additional years before a full understanding of injuries is developed. For example, long-lived species such as bald eagles, murres, and sea otters, may not manifest some effects until a number of years have passed. For other species, such as herring and salmon that return to spawn years after hatching, it is necessary to wait for these key life history events to occur before one can determine the extent to which or if they have been injured. At present there is no indication of long-term injury for species other than those noted in this summary. Although two field seasons of study are complete, only a portion of the data gathered has been fully analyzed and interpreted. As studies and data analysis are completed, some of the information contained in this summary may need to be modified.

For the reasons given above, injury assessment studies will continue in 1991, and thereafter until the process is complete. The need to continue to understand the long-term effects of the spill will be accomplished through monitoring projects that will measure the natural recovery of resources injured by the spill as well as the effectiveness of restoration measures implemented by the Trustee agencies. The information gathered by the injury assessment studies, the restoration monitoring studies, and other studies will be used to develop and implement a restoration program that will accelerate the recovery of injured resources.

Restoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated. Wherever possible, restoration will focus on those projects that will provide ecosystem-wide benefits, thereby benefitting a variety of species. These projects may include various initiatives to protect habitat; in other cases it may be necessary to conduct restoration programs that will primarily benefit a particular resource injured by the spill.

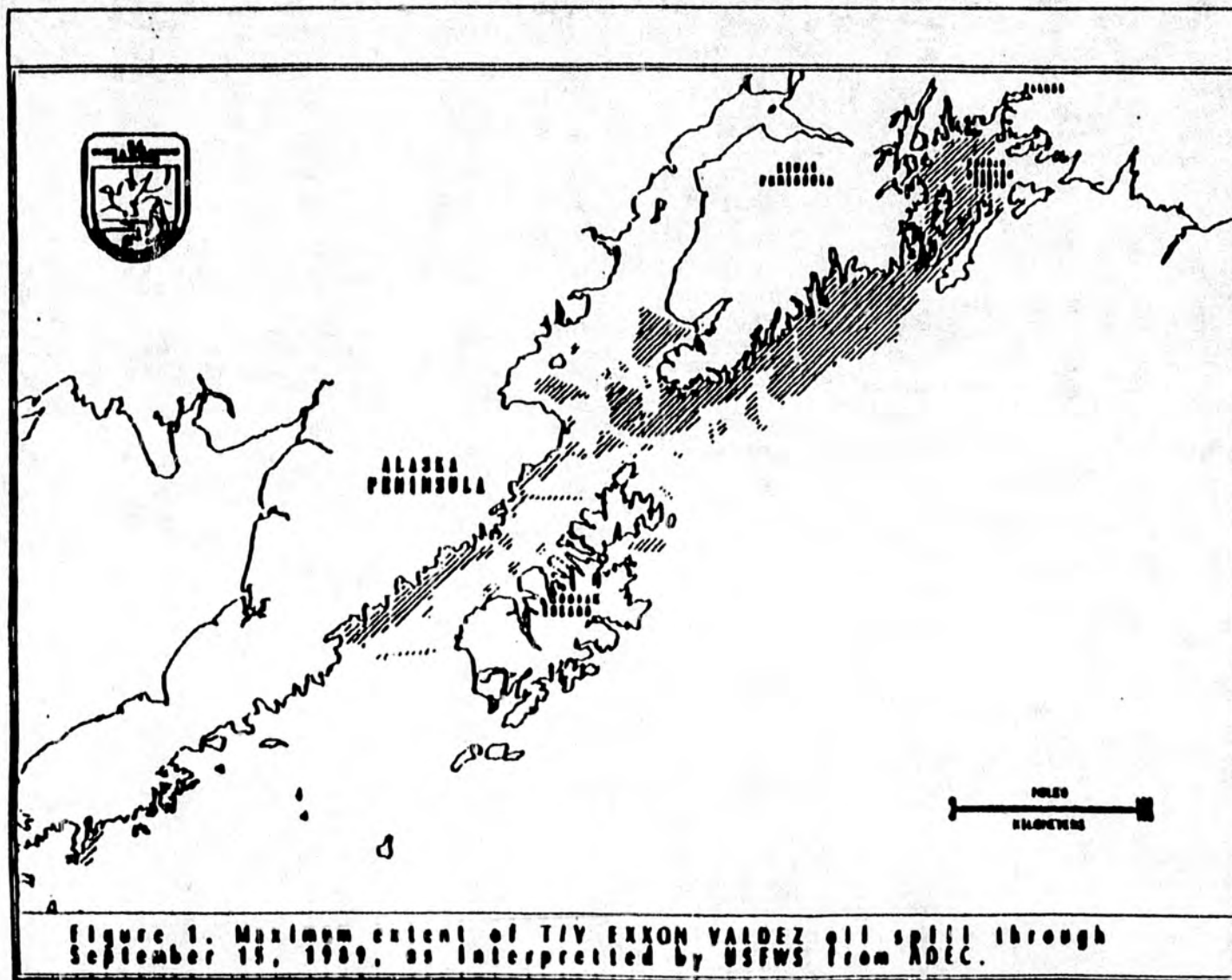


Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

Species	Total	Valdez	Seward	Homer	Kodiak
Total	35,279	3,360	3,503	5,778	22,638
Unidentified bird	2,927	476	414	916	1,121
Unidentified loon	69	27	6	25	11
Common Loon	216	142	23	32	19
Yellow-billed Loon	87	72	5	3	7
Pacific Loon	18	8	5	0	5
Red-throated Loon	5	3	1	1	0
Unidentified grabe	65	27	8	11	19
Red-necked Grabe	120	79	22	12	7
Horned Grabe	277	233	15	22	7
Northern Fulmar	426	0	22	12	115
Unidentified shearwater	579	5	22	14	538
Sooty Shearwater	360	4	80	34	242
Short-tailed Shearwater	2,460	1	84	4	2,371
Unidentified petrel	69	2	24	14	29
Fork-tailed Storm-petrel	363	1	50	19	293
Leach's Storm-petrel	12	0	9	0	3
Unidentified cormorant	219	76	27	56	60
Double-crested Cormorant	38	19	10	0	9
Pelagic Cormorant	418	277	63	29	47
Red-faced Cormorant	161	90	29	9	33
Great Blue Heron	1	1	0	0	0
Unidentified swan	3	0	2	1	0
Emperor Goose	2	0	0	0	2
Canada Goose	1	0	0	1	0
Brant	3	0	1	2	0
Unidentified duck	30	4	6	20	0
Unidentified seaduck	112	63	2	11	36
Mallard	11	2	4	1	4
Northern Pintail	4	0	3	1	0
Green-winged Teal	5	0	5	0	0
Unidentified Scaup	4	1	3	0	0
Greater Scaup	27	2	21	4	0
Lesser Scaup	2	0	2	0	0
Unidentified Goldeneye	25	8	2	14	1
Common Goldeneye	6	3	0	2	1
Barrow's Goldeneye	33	19	9	4	1
Bufflehead	21	17	1	0	3
Oldsquaw	185	131	43	6	5

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Unidentified alcid	173	24	0	15	134
Unidentified murre	8,851	21	775	2,101	5,954
Common Murres	10,428	399	523	1,353	8,153
Thick-billed Murres	669	16	142	73	438
Pigeon Guillemot	614	136	109	155	214
Unidentified murrelet	413	21	37	121	234
Marbled Murrelet	612	289	97	82	144
Kittlitz's Murrelet	67	23	19	21	4
Ancient Murrelet	311	3	40	73	195
Cassin's Auklet	48	0	36	2	10
Least Auklet	5	0	0	1	4
Parakeet Auklet	31	1	2	1	27
Rhinoceros Auklet	141	0	31	31	79
Unidentified puffin	46	0	7	4	35
Horned Puffin	139	0	32	13	94
Tufted Puffin	361	0	29	15	317
Bald Eagle	125	31	20	15	59
Unidentified raptor	7	1	3	2	1
Peregrine Falcon	2	0	0	0	2
Willow Ptarmigan	1	0	0	0	1
Unidentified owl	1	0	0	1	0
Great-horned Owl	3	0	0	3	0
Unidentified woodpecker	1	0	0	1	0
Cliff Swallow	3	0	3	0	0
Violet-green Swallow	1	0	1	0	0
Unidentified passerine	9	1	7	1	0
Stellar's Jay	1	1	0	0	0
Magpie	7	1	0	0	6
Common Raven	18	1	4	0	13
Northwestern Crow	34	6	3	3	22
American Robin	2	0	2	0	0
Varied Thrush	1	0	0	0	1
Hermit Thrush	1	0	1	0	0
Unidentified warbler	1	0	0	0	1
Yellow Warbler	3	0	3	0	0
Pine Grosbeak	1	0	0	0	1
Unidentified sparrow	15	0	10	2	3
Savannah Sparrow	1	0	1	0	0
Golden-crowned Sparrow	4	0	3	0	1
White-winged Crossbill	8	0	0	6	2

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Harlequin Duck	213	148	10	35	20
Unidentified Eider	3	0	0	3	0
Stellar's Eider	4	4	0	0	0
Common Eider	17	5	0	2	10
King Eider	9	0	0	0	9
Unidentified Scoter	162	23	17	51	71
White-winged Scoter	342	164	13	137	23
Surf Scoter	175	45	28	9	6
Black Scoter	132	112	4	8	8
Ruddy Duck	1	0	1	0	0
Unidentified merganser	3	1	0	0	2
Common Merganser	2	2	0	0	0
Red-breasted Merganser	33	30	1	1	1
Sandhill Crane	2	1	1	0	0
Black Oystercatcher	9	2	2	0	5
Golden Plover	1	0	0	1	0
Unidentified sandpiper	11	1	5	1	4
Unidentified turnstone	1	0	0	0	1
Common Snipe	1	0	0	1	0
Semipalmated Sandpiper	1	0	1	0	0
Lesser Yellowlegs	2	0	0	2	0
Western Sandpiper	5	0	0	5	0
Baird's Sandpiper	1	0	0	0	1
Least Sandpiper	4	0	2	0	2
Surfbird	3	3	0	0	0
Short-billed Dowitcher	1	0	0	0	1
Red Phalarope	2	0	0	2	0
Red-necked Phalarope	7	1	3	0	3
Long-tailed Jaeger	1	0	0	0	1
Unidentified gull	99	6	34	39	20
Glaucous-winged Gull	555	33	188	28	213
Herring Gull	8	3	5	0	0
Mew Gull	33	0	3	3	27
Black-legged Kittiwake	1,225	8	214	74	929
Arctic Tern	3	1	1	0	1
Aleutian Tern	1	0	0	0	1

CACI FILMED

CERTIFICATE OF SERVICE

I certify that I caused to be served by mail the attached Notice of Lodging of United States' Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and attached Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources on

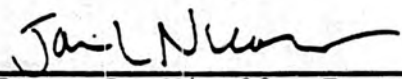
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on April 8, 1991.


James L. Nicoll, Jr.



Congressional Research Service • The Library of Congress • Washington, D.C. 20540

March 19, 1991

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

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

SUBJECT : Net Present Values of the Exxon Valdez Settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Billion-dollar deal may cost Exxon only half that much

By MICHAEL J. SNIFFEN

ASSOCIATED PRESS

WASHINGTON — Exxon's agreement to pay \$1 billion to settle government claims and charges for the nation's largest oil spill could actually cost the company less than half that amount, an Associated Press analysis shows.

The company's cost would be reduced if it chose to purchase an annuity that would guarantee the 10 future annual payments called for under the settlement in the Exxon Valdez case—a growing business practice. Exxon's cost would be cut further because most of the payments are tax deductible.

The AP calculations, based on actual market quotation for an annuity, show it could cost

Exxon as little as \$486.3 million to meet its obligations to repair the damage caused when the supertanker ran aground and spilled 11 million gallons of crude oil in Prince William Sound in March 1989.

In Houston, Exxon spokesman Bill Smith had no comment on the calculations or the current value of the settlement.

Last week, Attorney General Dick Thornburgh proudly announced a \$1 billion settlement by Exxon that included record criminal fines and civil damages.

But the settlement drew skepticism at a congressional hearing Wednesday. "In essence, a lot of taxpayers' money is going back into this to pay Exxon's share," Rep. George J. Hochbrueckner, D-N.Y., said at a House mer-

chant marine committee session.

The Congressional Research Service, using three different estimates of how much investments might earn over the next 10 years, calculated Exxon's costs at between \$421 million and \$524 million in material prepared for the hearing.

At the request of The Associated Press, JMW Settlements Inc., of Washington, a national company that specializes in writing deferred payment settlements of law suits, calculated that it would charge Exxon \$527.3 million for an annuity that would make \$785 million in deferred payments. These payments begin next year and continue through 2001.

"I would be authorized to place that contract today," said

James P. Klappes, vice president of JMW. Klappes said the figure includes a profit for his company and two large insurance company underwriters.

An annuity, most often sold by insurance companies, is used to set deferred payments. It costs less to buy than the payments it provides, because the underwriter invests the original amount and uses the interest to meet the payments and make a profit.

In fact, Exxon could essentially save the amount of that profit by financing its own annuity internally.

Klappes said his industry has seen growing use of annuities in environmental cases to protect plaintiffs against the bankruptcy of a polluting company, but those

cases have involved much smaller companies than Exxon.

In addition to the \$527.3 million for the annuity, Exxon this year would have to spend \$50 million to pay a federal criminal fine, \$50 million in restitution to Alaska, and an estimated \$115 million on the first installment.

The settlement provides that next year's \$150 million payment will be reduced by whatever Exxon spends this year and next. For the calculation, the AP assumed the \$25 million estimated by the government source would all be spent this year. This assumption might overstate Exxon's actual outlay by about \$2 million if the company spread \$25 million in cleanup over the full two years.

The payments would bring

Exxon's outlay to \$742.3 million, but that figure could be reduced by tax deductions of up to \$256 million, for a net outlay of \$486.3 million. The AP calculated that by applying Exxon's federal and state deduction rate of 37 percent to all but \$50 million of \$742.3 million payment.

Internal Revenue Service spokesman Don Roberts said the \$50 million criminal fine is not tax deductible but damages generally are. Roberts said there is a chance the \$50 million restitution to Alaska may be tax deductible as well, because language in the settlement distinguishes it from any criminal, civil or administrative penalty.

Exxon chairman Lawrence G. Rawl has said the damage payments are tax deductible.

Anchorage Daily News
4/17/91

State backs off timber buyout

By DAVID POSTMAN

Daily News reporter

JUNEAU — State officials who will decide how to spend Exxon Valdez settlement money, said Tuesday they do not support buying large tracts of timber land around Prince William Sound — a plan Gov. Wally Hickel pushed for months while trying to win support for the settlement.

"That was in the beginning. Things change," said Attorney General Charlie Cole, the state's chief negotiator on the settlement and one of three state officials who, along with an equal number of federal officials, will choose the projects to be funded from the proposed \$1 billion settlement.

But a spokesman for Hickel said the governor hasn't changed his mind.

"The governor is neither no more or no less committed to buying that timber," said James Rockwell, Hickel's special assistant for special projects. "He envisioned



■ **BACK IN COURT:** Native villagers seek to modify a \$1 billion spill-cleanup settlement they say undermines their claims for compensation. C-4

■ **FITTING PUNISHMENT:** Federal prosecutors and Exxon attorneys countered criticism of a proposed plea bargain of criminal charges. C-4

insuring that those trees wouldn't be logged, but he didn't say that was exactly what he was going to do."

Also Tuesday, Rep. Gene Kubina, D-Valdez, suggested the settlement be postponed so Exxon could try to settle some of the hundreds of private suits filed against it. But top federal officials told

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TIMBER: State backs off

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lawmakers that any delay or change in the agreement would likely kill it.

Environmentalists and Cordova residents say the administration used the timber buyout as a ploy to ease local opposition to dropping the state suit against Exxon.

"I feel betrayed," said environmentalist and fisheries biologist Rick Steiner, one of the earliest supporters of Hickel's proposed settlement. "I was operating under the premise that these people were honorable individuals with noble intentions and that they meant what they were saying."

"I hope I wasn't being used."

Steiner liked the timber buyout idea because it would protect lands around the Sound that have been marked for commercial harvest. He and other environmentalists say large-scale timber operations could hurt the Sound.

Word that the administration was backing off the plan first came Sunday at a legislative hearing on the proposed settlement in Cordova. In response to a question from Cordova Mayor Bob Van Brocklin on what the settlement money would be spent on, Cole said he would not "go out and buy wholesale tracts of timber."

Fish and Game Commissioner Carl Rosier also said he didn't think that was a good idea. "At this point I'm not willing to commit to any course of action," he said Tuesday.

Environmental Conservation Commissioner John Sandor said Tuesday that settlement money would be better spent on restoring land directly damaged by the spill. He said he supports designating the federal land around the Sound a recreation area, which would allow timber cutting "and protect as many jobs as possible" while still offering some protection.

Rockwell said the state

trustees are not disputing what Hickel said earlier. Instead, they are just trying to move slowly.

"There has been so much pounding on these guys they are weary and a little gun-shy about what they say they are going to do and what they are not going to do," Rockwell said. "What they are going to do is enhance and restore Prince William Sound."

Van Brocklin said Tuesday his constituents are unhappy with the administration's shift. But he was not surprised.

"I know from previous experience not to trust what they tell me," he said. "I prefer it in writing with a letter of credit."

Steiner, who had urged the legislature to approve the settlement, said Tuesday he now thinks it should be rejected.

"The only urgency was taking care of the victim, the environment," he said. "Now the money is going to go to agencies to balloon the bureaucracy, it is going to go to studies. Studying the situation does nothing for restoration."

Also Tuesday:

• An attorney representing cities suing Exxon over the spill said the state should release confidential scientific and economic damage studies. Matt Jamin disputed Cole's argument that the state needs to keep the information secret because it could be used against the state in court.

Jamin said Cole and other state officials have a responsibility to see that the Sound is restored and should not be so concerned about the state's financial position. He accused state officials of "self-dealing to cover the backside a little bit."

• The House special committee asked Cole to formally invite Exxon executives to testify on the settlement. So far, lawmakers have heard from state and federal officials and Alaskan residents.



*Natural Resources
Defense Council*

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MEMORANDUM
via facsimile

To: Dick Stewart, Charles Cole

From: John Adams, Executive Director, Natural Resources Defense Council

Date: February 28, 1991

Re: Creation of Independent Foundation as Part of Potential Exxon Settlement

As part of any settlement, the environmental community has sought the creation of an independent not-for-profit foundation with a board of eminent and respected individuals to oversee the expenditure of funds received from Exxon. See, for example, February 8, 1991 letter to Thornburgh, et. al. from Adams, Hair and Sutherland. We have pressed this idea in the belief that such a foundation would ensure that decisions about how the Exxon money was spent would be made by individuals with the best credentials and expertise, in an atmosphere insulated from political pressures and divisive turf battles. The foundation would be established and run as an endowed permanent fund. As such, it would provide a lasting and permanent legacy for Prince William Sound and Alaska.

From our understanding of the settlement discussions with Exxon, it appears that much of the civil settlement money would be controlled by government trustees based on recommendations from an Advisory Council. Even if this is the case, we still believe that there is a place for an independent foundation into which a substantial portion of the civil settlement money could go.

1. Because the foundation would be a permanent fund, it could provide benefits extending far into the future, beyond the time when the government-administered fund is used up. Its purpose would be to assure that over the long term, the highest calibre research, restoration and acquisition work was performed to benefit Prince William Sound.

2. Mr. Nicholas Peter

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2. The foundation would have serving on its board eminent and respected scientists, named representatives of conservation groups, community leaders, Alaskan Natives and others. Individuals of the calibre of former Alaska Governor Jay Hammond, former Interior Secretary Stewart Udall, and former EPA Administrator Russell Train would be considered for Board membership. The integrity, expertise and credentials of these individuals would be of the highest order.

3. We strongly believe that the civil settlement money should be spent for restoration or replacement of damaged resources and for acquisition of equivalent resources. Thus, the principal purposes of the foundation should be consistent with these goals. However, to the extent that these goals can be met and there is additional money available, the purpose of the foundation could include the broader goals outlined in the attached document describing the Alaska Forever Conservation Trust Fund. (This document was provided to you last fall as you may recall.) These purposes further the objectives of the Clean Water Act and Alaska statutes upon which the government claims are based and in no way violate such statutes. See Sierra Club v. Electronic Controls Design, 909 F. 2nd 1350, 1355 (9th Circuit 1990).

4. The endowment for such a foundation should be sizable so as to ensure a lasting and meaningful contribution to Prince William Sound and Alaska. We suggest that a minimum of ten percent, or \$100 million, of the settlement be placed in such a foundation. This amount could be placed into the foundation at the rate of ten percent of the annual installments received from Exxon.

The model of an independent ongoing foundation, created as part of a settlement of a case against polluters, has worked very well in other contexts: the Virginia Environmental Endowment which was created when the Kepone case in the James River, Virginia was settled; and the Hudson River Foundation created as a part of the settlement of a series of power plant cases on the Hudson River. Both foundations are making important ongoing contributions to the Chesapeake Bay and the Hudson River.

Prince William Sound specifically and Alaska generally can benefit from the creation of a similar permanent entity as the result of this settlement.

Attachment

SETTLEMENT DOCUMENT
PROPOSAL FOR CREATION OF TRUST FUND
IN SETTLEMENT OF NATURAL RESOURCE DAMAGE CLAIMS
IN EXXON VALDEZ CASE

Work Product of: NATIONAL WILDLIFE FEDERATION, NATURAL
RESOURCES DEFENSE COUNCIL, WILDLIFE
FEDERATION OF ALASKA and their attorneys, TRIAL
LAWYERS FOR PUBLIC JUSTICE

This document proposes a framework for the settlement of the Exxon Valdez natural resource damage case through the creation of a trust fund funded by the defendants. What follows is a proposed statement of purposes and a review of potential uses of the trust fund.

Purposes of Alaska Forever Conservation Trust Fund.

The Alaska Forever Conservation Trust will be created to protect in perpetuity the integrity and vitality of the ecosystems and species of Alaska for the benefit of current generations and those yet to be born. The trust is created for public rather than private benefit and shall protect resources that spend all or part of their life cycle in the state.

The first priority for the trust shall be to study the short and long-term impacts of the Exxon Valdez spill, and to pay for the restoration, replacement, and acquisition of natural resources equivalent to resources injured or destroyed as a result of the spill. The trust also shall promote the protection of Alaska's ecosystems and natural resources from future anthropogenic environmental insults that may destabilize or interfere with the full and rapid recovery or health of Alaskan species and ecosystems, with special emphasis placed on those affected by the Exxon Valdez spill.

The trust shall promote environmental protection in Alaska by encouraging: the adoption of measures to avert pollution or other forms of ecological destruction of Alaskan ecosystems; research on the Alaskan ecosystems; environmental education in Alaska; and citizen-based environmental protection institution building in the state. Finally, the trust will, to the extent deemed feasible by the trustees, seek to mitigate the impacts of its acquisition of timber rights on native or other communities by providing and promoting environmentally sound alternatives to such timber harvesting.

PROJECTS TO BE FUNDED

The Alaska Forever trust instrument will specifically name certain high-priority projects to be funded, and then will establish categories of authorized expenditures for the remaining funds. It will be made clear in the instrument what the funding priorities are after the named projects are

Purposes of Conservation Trust

1/31/91

Page 2

funded. Among the categories of projects the trust will consider funding are:

A. ACQUISITION OF EQUIVALENT RESOURCES

1. Timber rights acquisition;
2. Outright purchase of pupping areas, staging areas, and other habitat, with emphasis placed upon those areas threatened by potential development;
3. Conservation easements for habitat and for areas whose development or degradation may destabilize or harm the affected ecosystems;
4. Fishing rights acquisition--both near shore and drift net or other far offshore;
5. Other harvesting rights acquisition;
6. Acquisition of land or easements distant from the spill but in areas used by migratory populations of wildlife affected by the spill (e.g. threatened over-wintering or staging areas in the lower 48 for Pacific flyway migratory waterfowl).

B. RESTORATION AND REPLACEMENT

The instrument will provide that restoration and replacement are top priority projects, although there will only be a limited number of possible effective restoration projects, such as planting certain sea grasses in some affected areas, and the reintroduction of certain species (e.g. otters) into the cleaned-up environment.

C. RESEARCH AND OBSERVATION.

Research on the short and long-term impacts of the spill should also be funded. This research should be driven by ecological principles rather than by litigation strategy. Of somewhat lesser priority but still important is more basic research on the overall health and nature of the affected ecosystems, and of Alaskan ecosystems not affected by the spill.

D. EDUCATION

The trust also will fund environmental education projects in Alaska to promote long-term ecological concern and protection among and by Alaskans.

E. VISION FOR ALASKA

Alaska Forever will fund projects that would encourage the eventual transition of the state's economy from oil and extraction of non-renewable resources to more sustained and environmentally sound economic development.

F. DEVELOPMENT OF BETTER ENVIRONMENTAL INSTITUTIONS

Alaska Forever will assist in the development of strong community and local citizen environmental protection organizations, regional natural resource centers, information and educational centers, and natural resources law centers.

For example, the trust will fund citizen efforts to assure that special measures are taken and implemented to prevent another ecological disaster like the Exxon Valdez. Thus, Alaska Forever might fund citizen efforts to advocate and to assure the implementation of special protections such as expert tanker loading crews, and vessel and navigation requirements for Prince William Sound and Valdez. Other funding possibilities might include grants to citizen watchdogs to assure that the Trans-Alaska Pipeline System and North Slope Development are carefully overseen, and that the industry and the government deploy and have readily accessible the best available oil spill containment and cleanup equipment and experts, and that these experts conduct regular test drills.

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

This memorandum proposes a structure and membership for an advisory committee that could be formed as part of the proposed Exxon Valdez settlement.

Members

We feel it is important to list categories of interests, not specific groups.

The categories we suggest¹:

- Environmental groups
 - national
 - Alaska
 - Prince William Sound
- Fishing groups
 - commercial
 - sport
- Recreational interests
 - low impact (kayaking, hiking, etc.)
 - tourism
- Natives
 - [non-profit (subsistence) only]
 - Chugach/PWS
 - Kodiak/Kenai
- Elected representatives of oiled communities
- Archeological/cultural/historical
 - [professional representation]
- Scientific
 - [outside scientists only, i.e., not permanent government employees; also should have no contracts, etc. with Exxon, Alyeska, and Alyeska owner companies]
 - Alaska scientist(s) with PWS focus
 - scientist(s) who studies Alaska environment
 - scientist(s) with relevant experience

¹ Where more than one subcategory is listed, we are suggesting that there be at least one representative for each subcategory.

Mechanics of Advisory Committee

Our goal is to devise a process which will allow the advisory committee meaningful participation in the work of the trust. As part of this, we feel it is important to make the committee as independent and as well-supported as possible.

We suggest that:

-- the committee have a small, paid staff and these staff members will not be employees of the trustees' respective agencies;

-- the committee members will have their expenses paid and will have a per diem;

-- the committee will meet bi-monthly and in consultation with their staff and with government agency professionals² will propose an annual workplan/spending plan for the trust; this plan will include a reasonable list of options from which the trustees would choose (trustees would have to choose options only from this list, however);

-- the staff should include a public participation expert and a scheme of adequate public participation should be guaranteed;

-- the committee would be chaired by a distinguished public citizen (for example, Jay Hammond or Russell Train) and members of the committee would be chosen by the groups/organizations/individuals that make up the specific categories of interests listed above³; private mediators/facilitators could be used to aid in this selection process.

² This would include the following agencies' professional staffs: Alaska: F&G, DEC, DNR; US: EPA, NOAA (NMFS), USFS, USF&WS, NPS.

³ The parties involved in the Exxon Valdez oil spill litigation who are included in these suggested categories could be consulted as part of this selection process.

Wall Street Journal 2/19/91

Exxon Confirms Waste Water Charges; Move May Impede a Valdez Settlement

By ALLANNA SULLIVAN

Staff Reporter of THE WALL STREET JOURNAL

Exxon Corp. acknowledged that it has shipped tanker waste water to Alaska.

While the company said the shipments and subsequent tanker-to-tanker transfers of so-called tank washings were within federal guidelines, such a disclosure could further entangle attempts to settle litigation stemming from the Exxon Valdez oil spill two years ago. Exxon, Alaska and the federal government have been engaged in talks for several weeks in efforts that could settle the state's civil case and possibly the federal government's criminal case. The allegations, which have drawn Environmental Protection Agency scrutiny, raise "the possibility of further complicating the settlement," said Jay Kertula, chairman of Alaska's Senate Finance Committee.

The parties were on the verge of settlement late last week, but pressure from some state officials and environmentalists unhappy with the terms of the possible settlement may be slowing the process. Indeed, some Alaskan lawmakers are considering legislation that would preclude a settlement until state legislators scrutinize the agreement. Gov. Walter J. Hickel had proposed that Exxon pay \$1.2 billion to settle; it appears the company has asked to provide payments over a period of years that would devalue the amount.

Allegations regarding waste water specifically focus on the transfer of so-called tank washings from the Exxon Galveston, a lightering tanker, to the supertanker Exxon Valdez on Aug. 4, 1988. The washings were then transported up to Valdez, Alaska, where they were treated in the ballast water-treatment plant owned by Alyeska Pipeline Services Co.

The charges were contained in a letter sent last week by former oil-tanker broker Charles Hamel to EPA head William Reilly and U.S. Attorney General Richard Thornburgh. In the letter, Mr. Hamel says that before any settlement is concluded, Exxon should be asked to stop such shipping practices. Mr. Hamel, who is engaged in a dispute over mutual business arrangements he has with Exxon and other oil companies, claims that Exxon insiders told

him of the wrongdoing.

Beyond hearsay, however, a document turned up by Alaskan attorneys in preparation for the state's civil case against Exxon makes reference to the transfer. The handwritten document is a set of instructions from the second mate to another second mate who was boarding the vessel to relieve him. It says specifically that the Exxon Valdez will unload its crude oil to the Exxon Galveston but not until "after we take 50,000 barrels of tank washings from the Exxon Galveston."

Pressed for a response to the charges, Jim Pitts, a spokesman for Exxon, said that "yes, there was a transfer ... all wash water returned to the Exxon Valdez as ballast and returned for treatment to the ballast water treatment plant in Alaska were in compliance with permits from EPA."

Exxon declined to identify what type of cleaning agent was being used to clean the oil storage tanks of the vessels other than to say that the tanks were cleaned with hot water and a very small amount of detergent. The oil company also declined to say what materials were contained in the tank washings following the cleaning.

But the company did say that the practice of transferring tank washings to tankers en route to Alaska "wasn't uncommon" and that all such transfers involved washings of ships handling Alaskan crude oil. Indeed, individuals familiar with the transport of crude oil said that other oil companies engage in the same practice and that it's still continuing.

But EPA officials said such moves are violations of federal law.

The EPA permit that authorizes operation of Alyeska's ballast water treatment plant in Valdez allows small amounts of cleaning agents to be present in the ballast water injected into the plant by arriving supertankers. But EPA officials presumed that such tank washings would be the result of cleanings of the supertankers themselves, which en route to Alaska aren't permitted to eject the waste water.

"But deliberately stopping a supertanker and putting the washings into its ballast; there's no way the permit authorizes that kind of discharge," says Harold Geren, chief of water permits for EPA in Seattle, which has jurisdiction over the Alyeska plant.

Mr. Geren says that EPA has already started to look into what is contained in those cleaning wastes. Mr. Geren says that Alyeska has volunteered to scan the ballast water at the treatment plant for toxic pollutants. "We need to know what is in the waste water," he said, adding that tank washings can contain toxic wastes, such as heavy metals.

Experts say that any damage to the port of Valdez depends on the amount and constituency of the chemicals going into the water. The ballast water treatment plant was designed to separate oil from water and then eject the treated water back into Valdez Harbor. Individuals familiar with the design of the plant say that any unanticipated substances, such as certain heavy metals, could travel through the plant and into Valdez Harbor undetected.

Riki Ott, a sediment toxicologist who is also heading up a coalition of Alaskans seeking reform of oil industry practices, said that the Port of Valdez was recently declared environmentally "impaired." Its degeneration is from long-term abuse unrelated to the Exxon Valdez spill that never fouled the harbor's waters, she says. To be sure, Valdez is in better shape than many commercial harbors in the U.S., but "we've had the first warning sign that something has gone wrong," she says.

SENATE
COMMITTEE

REPORT OF THE SENATE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT
TO THE ALASKA STATE SENATE

April 23, 1991

The Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement met 12 times during the last month to review the proposed settlement. The Special Committee met with Legislative Affairs Agency attorneys, the State Attorney General, two State Assistant Attorneys General, the Commissioners of the Alaska Departments of Fish and Game and Environmental Conservation, top-level attorneys for the U.S. Department of Justice and National Oceanographic and Atmospheric Administration, and members of the public. Two of the meetings were statewide teleconferences which provided a forum for members of the public to express their views on the settlement and to ask questions of the Special Committee and the State Attorney General. During those two hearings, the Special Committee heard over eight hours of teleconferenced public testimony. The Special Committee has reviewed the Consent Decree and Memorandum of Agreement, numerous analyses of those documents, and written comments submitted to the Committee. All documents reviewed by the Committee have been distributed to the full Senate.

The decision before the Legislature, of whether or not to approve the proposed settlement, is not a simple one. No one seems to be completely satisfied with this settlement. The Legislature must try to determine which is the "lesser of two evils" -- to sign off on an agreement which raises serious concerns, or to face years of expensive litigation with an unknown outcome.

The Senate Special Committee has decided to introduce a resolution approving the settlement, to be voted up or down by the Senate. The Committee plans to introduce the approval resolution in two forms: a concurrent resolution and a simple resolution. Regardless of whether the concurrent resolution is acted upon by both the House and Senate, a vote on the Senate's simple resolution can express the approval or disapproval of the Senate.

To aid the Senate in its deliberations, the Special Committee submits the following summary of the main issues that were raised during the committee hearing process, and expressed in public comment, regarding the settlement.

ADVANTAGES OF THE SETTLEMENT:

1. The settlement would bring finality to the State and federal claims for natural resource damages.
2. The State would avoid some of the future litigation arising from the oil spill and would probably save millions of dollars in legal fees and on damage assessment studies each year for several years.
3. The settlement would provide a definite monetary amount and thus preclude the possibility of recovering less. Damages in this case may be very difficult to quantify.
4. Most of the money recovered would be required to be used to restore, replace, enhance, rehabilitate, or otherwise acquire the equivalent of natural resources or natural resource services injured as a result of the oil spill. Testimony indicated that the amount of money recovered would be sufficient to complete whatever restoration work would be reasonable and feasible.
5. A portion of the money would be available for restoration work immediately, rather than after lengthy litigation.
6. The settlement would not preclude suits by, or affect the legal rights of, third party litigants.

CONCERNS:

1. Since the settlement money would be paid over a ten-year period, the actual value is estimated at approximately \$500 - \$700 million.
2. While the settlement would recover for damages to natural resources, the State in turn would dismiss, without compensation, its claims against Exxon for economic damages (except for the municipal portion of the raw fish tax), and its claims against Alyeska for natural resource damages. The dismissed claims are worth an undetermined, and potentially substantial, amount. (However, the State's claims for economic losses against Alyeska would not be affected. Therefore, the State may be able to recover from Alyeska a portion of the amount it could have recovered from Exxon had the economic loss claims been pursued against Exxon).
3. Without access to damage assessment studies and time to have a thorough independent analysis conducted, the Legislature cannot know whether the dollar amount of the settlement is adequate compensation for the natural resource damage claims being settled and the other claims being dismissed in this settlement. The Attorney General has refused to release the economic studies. Even if the studies had been

released, there was not time to conduct the necessary analysis between the time the settlement was referred to the Legislature and the deadline for approval. Furthermore, even with complete data and analysis of it, it would be difficult to judge the many contingencies and determine the adequacy of the settlement.

4. Under the settlement, the State would not be indemnified by Exxon against claims by third parties and would give up its right to seek indemnification from Exxon. As a result, (1) the State would have to continue to litigate with third parties and pay for that litigation; (2) the State would be exposed to an unknown amount of liability to third parties; and (3) the State would find itself more aligned as a co-defendant with Exxon than as a co-plaintiff with injured Alaskans.

5. The State's influence with regard to the use of most of the money would be in the hands of the three Trustees appointed by the Governor. This raises several concerns:

- a) No provision is made for the Legislature to participate in determining who those Trustees will be, how the money will be spent, or how meetings will be conducted. Nor are there provisions to ensure public accountability. These concerns are magnified by the fact that the Trust will continue for at least 16 years.
- (b) Because the settlement would recover under the Clean Water Act, use of the money would be restricted to restoration. However, definitions under the Act are so vague that we have little idea of the types of things on which the money will be spent. Since it is possible that only time and nature can do much of the actual restoration, the question remains whether the money can or will be put to its best use if bound by the restrictions imposed by the Clean Water Act and the interpretation and judgment of the Trustees.
- (c) There is concern that spending decisions by the three federal and three State Trustees must be unanimous. Without unanimity, decisions will be made by a federal judge. Criteria upon which a judge would base spending decisions are no more defined than they are for the Trustees.

6. The language of the settlement's "re-opener clause" is so restrictive that it is unlikely that Exxon would have to pay any of that \$100 million.

7. The State Constitution makes the Legislature responsible for appropriation of State funds. This raises several concerns with the settlement:

- (a) Money recovered through settlement is in exchange for the money the State would have recovered through the lawsuits which we now give up. Those claims are a "state asset." Therefore, the recovery under the settlement, even though it technically never enters the state general fund, and it is jointly owned by the Federal Government, is a state asset too. The question then arises as to whether the Legislature must make an appropriation of that asset in order for it to be legally spent on anything, including deposit into the Trust Fund. (The Special Committee believes that legislation could be passed to address this aspect of the problem).
- (b) As the Memorandum of Agreement is written, the Trustees, rather than the Legislature, will decide how the Trust money will be spent, again raising constitutional questions.
(Note, however, that if the settlement were approved and a court later found that the Memorandum of Agreement violated the appropriations provisions of the State Constitution (1) the Memorandum of Agreement would terminate and the disposition of the money could be renegotiated; and (2) it is unlikely that the agreement with Exxon would be affected).
- (c) The settlement may also raise constitutional "dedicated funds" questions, both because allowed uses of the money are predetermined by the parameters of the Clean Water Act, and because even if the Legislature officially appropriated the money to the Trust Fund this year, it may not be able to commit future legislatures to appropriating the annual payments that are to go into the Trust over the next nine years.

7-LS1211A
Cook
4/12/91

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

BY THE SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:
Referred:

A RESOLUTION

1 Approving the proposed Exxon Valdez oil spill claims settlement.

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

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the legislature's failure to approve the proposed settlement or disapproval of it will
8 not automatically terminate the proposal, but is, essentially, advisory to the executive branch of state
9 government and to the United States Department of Justice; and

10 WHEREAS the provisions of the proposed settlement do not appear to be negotiable; and

11 WHEREAS settlement of this major case is more desirable than years of litigation; and

12 WHEREAS if the case is settled, money that would otherwise be tied up in protracted litigation
13 will be immediately available to begin restoration of areas damaged by the oil spill; and

14 WHEREAS because of these considerations the legislature believes it is in the best interest of
15 the state to approve the proposed settlement despite the fact that members of the legislature do not
16 wholeheartedly support all of the provisions of the proposal;

WORK DRAFT

WORK DRAFT

WORK DRAFT

- 1 **BE IT RESOLVED** by the Alaska State Legislature that it approves the Agreement and Consent
- 2 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
- 3 States District Court, District of Alaska, Civil Action No. A91-083; and be it
- 4 **FURTHER RESOLVED** that the Governor is respectfully requested to inform the United States
- 5 Department of Justice that the legislature has approved the proposed settlement.

7-LS1211ND

Cook

4/15/91

SENATE CONCURRENT RESOLUTION NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

Introduced:

Referred:

A RESOLUTION**1 Approving the proposed Exxon Valdez oil spill claims settlement.****2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the Attorney General has stated in a public meeting that if the legislature fails to
8 approve the proposed settlement the state will take action to terminate the proposal;

9 BE IT RESOLVED by the Alaska State Legislature that it approves the Agreement and Consent
10 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
11 States District Court, District of Alaska, Civil Action No. A91-083; and be it

12 FURTHER RESOLVED that the Governor is respectfully requested to inform the United States
13 Department of Justice that the legislature has approved the proposed settlement.

7-LS1136A

Cook

3/29/91

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act making special appropriations to a joint trust fund of proceeds from the
2 settlement of certain claims arising from the Exxon Valdez oil spill; and providing for an
3 effective date."

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

5 * Section 1. State interests in money paid by defendants during fiscal years 1991 and 1992 under the
6 Agreement and Consent Decree that settles State v. Exxon Corporation, et al., United States District
7 Court, District of Alaska, Civil Action No. A91-083 that is to be deposited into a joint trust fund under
8 the Memorandum of Agreement and Consent Decree filed in United States v. State, United States
9 District Court, District of Alaska, Civil Action No. A91-081, is appropriated to the joint trust fund
10 established under the Memorandum of Agreement and Consent Decree to be used in accordance with
11 the Memorandum of Agreement and Consent Decree.

12 * Sec. 2. State interests in money paid by defendants after fiscal year 1992 under the Agreement and
13 Consent Decree that settles State v. Exxon Corporation, et al., United States District Court, District of
14 Alaska, Civil Action No. A91-083 that is to be deposited into a joint trust fund under the Memorandum

WORK DRAFT

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1 of Agreement and Consent Decree filed in United States v. State, United States District Court, District
2 of Alaska, Civil Action No. A91-081, is appropriated to the joint trust fund established under the
3 Memorandum of Agreement and Consent Decree to be used in accordance with the Memorandum of
4 Agreement and Consent Decree.
5 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

7-LS1135A

Cook

3/29/91

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act granting authority to the attorney general to dispose of certain claims arising
2 from the Exxon Valdez oil spill, approving an agreement and consent decree involving
3 claims arising from the oil spill; and providing for an effective date."

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

5 * Section 1. The attorney general is authorized to enter into an agreement and consent decree to settle
6 State v. Exxon Corporation, et al., United States District Court, District of Alaska, Civil Action No. A91-
7 083. Under the settlement the attorney general is authorized to

8 (1) establish a joint trust fund with the federal government for the collection and joint
9 use by the state and federal governments of money received under the settlement agreement;

10 (2) dismiss or otherwise terminate State v. Exxon Corporation, et al., Superior Court for
11 the State of Alaska, Third Judicial District, Civil No. 3AN-89-6852 and other Civil claims of the state
12 arising from the Exxon Valdez oil spill.

13 * Sec. 2. The legislature approves the Agreement and Consent Decree signed March 12, 1991,
14 relating to the settlement of State v. Exxon Corporation, et al., United States District Court, District of

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1 Alaska, Civil Action No. A91-083.

2 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

(This revised version of the March 29 list has been prepared for the committee's April 11 meeting with the Attorney General. In this version, the questions to which the AG responded at the previous meeting have simply been deleted).

SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

SECOND LIST OF QUESTIONS FOR THE ATTORNEY GENERAL
(Submitted March 29, 1991)

General Settlement Questions:

7. The State gives up its right in the settlement to ever go after Exxon for the State's lost revenue from lost oil and gas taxes and royalties, corporate taxes, State's portion of salmon enhancement taxes, etc. How much did the State figure those to be worth (as it had already sued for all of those under the State suit it now gives up), and what were our chances of proving and recovering those? Will these particular claims be pursued against Alyeska? *yes*
8. What was the State's potential recovery/claim under the "dollars per gallon" state law (AS 46.03.758-759)? Please provide a copy of the letter from the State to Exxon, dated approximately April of 1989, requesting early settlement of that claim. *coming*
9. Please provide a copy of the reimbursement contract signed by Exxon with the State after the spill.
10. What will the Department of Law be seeking in appropriations to defend against third party lawsuits for FY 92 through FY 95? Please estimate and compare legal fees that will have to be paid by the State with and without the settlement. *\$12-15 mil/YR*
11. What are specific examples of types of things that might be eligible for funding under the re-opener clause? How likely is it that anything would ever trigger the receipt of that money? *- same AS BASIC Restor. of damage
?? UNKNOWN*

Questions regarding third party lawsuits:

13. What third party suits have been filed? (Please provide list of them). What is the total estimated dollar amount of the third party claims against the State resulting from the oil spill and clean-up? Are any of the plaintiffs seeking punitive damages?
14. Since the \$72 million is recovered under the CWA it can

only be reimbursement for funds already expended, and the \$50 million must be spent for restoration. With the remainder of the settlement money going to the Trust, there is no money to help the State pay for any third party liability or legal fees. Won't there ultimately be a net loss of millions of dollars to the State treasury?

15. Paragraphs 29 and 30 on page 23 of the Decree, do not appear to be specifically limited to lawsuits related to the oil spill. Was this a drafting error? If not changed, how likely is a court to interpret these paragraphs as applying only to lawsuits related to this spill?
16. How are third party suits affected by this settlement? Does the State have a responsibility to protect interests of groups of Alaskan citizens? If third parties need the State's help wouldn't they be affected by the Decree, even though the Decree says it does not affect third parties?
17. The MOA also prevents any of the three parties involved from ever challenging the authority of the others to enter into this agreement. If the Legislature disapproved of the Decree, and the Governor chose to go ahead with it anyway, would the Legislature as a part of "the State" be precluded from ever challenging the authority of the parties to enter into the agreement? Are the claims of municipalities, which are political subdivisions of the State, barred by the State's release of its claims?

Questions about how money can be spent:

TRUST FUND PORTION:

24. Please provide a list of specific examples of the kinds of expenditures that would be possible and likely with the use of the Trust Fund.
25. Could federal employees already working in Alaska (or elsewhere) and currently being paid out of the regular federal budget, end up being paid instead out of this fund?
26. What are "natural resource services"? (one of the things that fund money can be spent on). Please give specific examples of things that would qualify.
27. If assets are purchased or built with trust fund money, who will own them? How would those properties or facilities be administered, etc.?
28. Will all operating costs, travel, staff, per diem, etc. of the Trustees and the Trust come out of the Trust?

29. What mechanism will ensure public accountability? There appears to be no required budget review, annual oversight by elected officials, appropriation process, or audits of the trustees' expenditures.
30. Is there a limit on how much can be spent to reimburse Exxon for whatever clean-up work they do between the effective date of the Consent Decree and the date of final approval of the Consent Decree?

\$72 MILLION PORTION:

31. If the \$72 million to be paid to the State is over a five-year period, when does that start? Will the five payments be of equal amounts? Any interest charged on payments to bring the total up to a real level of \$72 million in today's dollars? Is there any requirement that the 470 Fund specifically be reimbursed?



Alaska State Legislature

SENATOR RICHARD I. ELIASON

President of the Senate

P.O. Box V
Juneau, Alaska 99811
(907) 465-3755

QUESTIONS FOR ATTORNEY GENERAL CHARLES COLE
FROM THE SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

APRIL 10, 1991

1. There has been some concern expressed over the State's filing of a claim against the oil spill liability fund established under the Trans-Alaska Pipeline Authorization Act, as our claim will reduce the amount that other claimants will be able to receive under this fund. Evidently Judge Holland had asked that the state and federal governments not file TAPL fund claims since they had other recourse. The press reported that the federal government has agreed to withdraw its claim if the proposed Exxon settlement is approved and if the fund promises to drop its claims against the government.

Why did you choose to file this claim on behalf of the state, and would you withdraw the state's claim if the settlement is approved or under any other conditions?

2. You mentioned in a House hearing that if the settlement is not approved and the state litigates under state law, the expenditure of money recovered might be dedicated to restoration work under the "public trust doctrine."

Would you please elaborate on that?

3. What affect, if any, do you believe the release of the scientific report by the federal government to the federal court will have? Does the release of that report make any difference in your willingness to release any of the state's data?

4. What is your response to the letter from Congressman George Miller to the federal court which states that Alyeska is being "let off the hook" by the settlement? Governor Hickel has issued a press release which states that the State will still pursue civil charges against Alyeska, but Miller's letter speaks to the criminal charges that he feels should be pursued. Please explain why criminal charges will not be pursued against Alyeska.

CONSTITUTIONALITY

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MEMORANDUM

April 8, 1991

SUBJECT: State Constitutional Issues Related to the Exxon Valdez Settlement

TO: Representative Max Gruenberg, Chair
House Special Committee on the Exxon Valdez Oil Spill Settlement

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

QUESTION PRESENTED. You have asked if there are any state constitutional issues raised by the Exxon Valdez settlement.

SHORT ANSWER. There are certainly constitutional issues raised by the settlement documents. Unfortunately, there are no cases in Alaska clearly deciding these issues, and therefore I cannot state for certain that the settlement does or does not violate the state constitution. With that warning, what follows is my opinion on the issues raised.

1. The requirement in the consent decree and the MOA that a certain part of the recovery from Exxon be used for certain purposes may violate the prohibition against dedication of funds, art. IX, sec. 7, Constitution of the State of Alaska. However, there is a reasonable argument to be made that the dedication falls within the "federal program" exception of art. IX, sec. 7.

2. While there is case law from other jurisdictions on both sides of the issue, in my opinion the provision of the MOA under which the three federal and three state trustees are to spend roughly \$700 million without appropriation by the legislature violates art. II, sec. 1, or art. IX, sec. 13.

3. There is a remote possibility that the dedication in the plea agreement would preclude the state from accepting the money, but I believe that the chances of a court making such a decision are extremely slim.

4. The legislature could cure the appropriation problem by a yearly appropriation. A one-time appropriation of the proceeds to be received in the future might violate the dedicated funds provision. While an appropriation for the required purposes would allow the money appropriated to be spent for those purposes, it would not cure any dedication problem in the agreement.

DISCUSSION.

I. The Settlement Documents. There are two documents related to the Exxon Valdez settlement---the consent decree (which settles the case between the state and Exxon and the federal government and Exxon)^{1/} and the memorandum of agreement and consent decree, hereinafter "MOA" (which settles the case between the state and federal governments concerning the proceeds to be received by both governments from Exxon.)^{2/} In addition, the plea agreement in a criminal case brought by the U.S. against Exxon^{3/} requires Exxon to pay money as restitution to the state, and therefore is also discussed here.

A. The Consent Decree. Under paragraph 8 of the consent decree, Exxon is to pay to the governments \$900 million (less certain cleanup costs incurred by Exxon) over a period of eleven years. In paragraph 10 of the consent decree the two governments agree (without participation by Exxon) that the \$900 million (less certain of Exxon's cleanup costs) will be paid as follows:

(1) up to \$72 million will be paid to the state to reimburse it for its past cleanup, response, assessment, and litigation costs;

(2) up to \$62 million will be paid to the U.S. to reimburse it for its past cleanup, response, and assessment costs;

(3) the state and federal governments will be reimbursed for cleanup costs incurred by either of them after December 31, 1990; and

(4) the remainder (referred to herein as "the trust fund money" or "natural resource damage recovery"), which will probably be in the neighborhood of \$700 million depending on future cleanup costs, will be spent for future assessment, rehabilitation, restoration, or replacement of the natural resources or services injured by the oil spill, or the acquisition of equivalent resources or services.

^{1/} This is filed in federal district court in Anchorage, case no. A-91-083 Civ.

^{2/} This is filed in federal district court in Anchorage, case no. A-91-081 Civ.

^{3/} This is filed in federal district court in Anchorage, case no. A-90-015-1 Cr. and A-90-015-2 Cr.

Finally, in paragraph 10, the governments "represent" that the money received under the consent decree will be held, allocated, and spent in accordance with the MOA.

The money that the state will receive under (1) and (3) above does not raise any issues under the state constitution if, as appears to be the case, that money will go to the state treasury and be available for appropriation without any restrictions on its use.^{4/} However, because the money received under (4) above must be spent for certain purposes, that provision may violate the prohibition on dedicated funds found in art. IX, sec. 7 of the state constitution.^{5/} In addition, to the extent that the representation concerning the MOA incorporates the MOA in the consent decree,^{6/} the consent decree may violate those sections of the constitution relating to the legislature's appropriation power, which are discussed below in relation to the MOA.

B. The MOA. Paragraph IVA2 of the MOA requires the two governments to establish a trust fund into which trust fund money will be deposited. The trust fund will be in the court registry unless the parties and the court agree otherwise. The money will be spent by 3 federal trustees (designated by the President) and 3 state trustees (designated by the Governor) acting jointly. It is to be spent for the purposes of restoring, replacing, enhancing, rehabilitating, or otherwise acquiring the equivalent of the natural resources injured as a result of the oil spill, and the lost services provided by those resources. In addition to the dedication of funds problem mentioned above, the MOA raises the question of whether the agreement to let the trustees establish a trust fund and spend the money without requiring an appropriation violates art. II, sec. 1 of the state constitution (vesting the legislative power, including the appropriation power, in the legislature), or art. IX, sec. 13 of the state constitution (requiring an appropriation before money can be withdrawn from the state treasury and requiring authorization for any obligation for the payment of money.)

C. The Plea Agreement. Under the plea agreement entered into by Exxon and the federal government, Exxon is to pay the state \$50 million in restitution. According to the plea agreement this money can be spent only for restoration, replacement, and

^{4/} The attorney general has taken the position that reimbursement money will be unrestricted, and I agree.

^{5/} In addition, AS 46.08.020(a)(2) states that the legislature may appropriate to the oil and hazardous substance release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance." In his April 2, 1991 opinion, at pages 26-27 the Attorney General states that this statute is limited to money reimbursed for cleanup expenses. However, the literal terms of AS 46.08.020(a)(2), unlike those of AS 46.04.010, suggest that all money recovered from a responsible party is to be general fund money subject to appropriation. It is possible therefore that the agreement may violate AS 46.08.020.

^{6/} A "representation" may not necessarily be the same as an agreement.

enhancement of resources affected by the oil spill, 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. The requirement also raises the question of whether the legislature can accept the money, with restrictions on its use, given the prohibition on the dedication of funds in art. IX, sec. 7 of the state constitution.

II. The Prohibition Against the Dedication of Funds.

Art. IX, sec. 7, Constitution of the State of Alaska, reads as follows:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

A. Dedication in the Consent Decree and MOA. Despite the fact that this section appears to restrict the dedication^{7/} of the proceeds of a "state tax or license," Alaska's Supreme Court has held that it applies to "the sources of any public revenues." State v. Alex, 646 P.2d 203, 210 (Alaska 1982). In Alex, the state Supreme Court relied on the history of the state constitutional convention, as discussed in an opinion of the Alaska Attorney General, which opinion concluded that revenues from the lease or sale of state natural resources could not be dedicated. 1975 Alaska Op. Atty. Gen. No. 9 (May 2). It seems highly likely that "revenues" would include money due the state under either a judgment for, or settlement of, the state's claims for damages to its natural resources. A settlement is, after all, very much an exchange of one state asset (the state's legal claims) for another (money). If the state had continued to pursue its state claims in state court, any recovery would certainly be "revenue" of the state. Even under the Clean Water Act, the trustee must be an authorized "representative" of the state. 33 U.S.C. 1321(f)(5). See 42 U.S.C. 9607(f)(2)(B) (state trustee must be "state official.") State recoveries under the Clean Water Act may be deposited in a special account in the state treasury. 43 CFR 11.92(a)(2). It seems likely that money exchanged for the extinguishment of the state's legal claim would be state revenue for the purposes of art IX, sec. 7 of the state constitution. Therefore, the question is whether the recovery from Exxon is subject to an exception to the dedicated funds provision.

^{7/} Although in the normal course of events this section will have the greatest effect on the legislative branch, by its terms it appears to apply to all state officials.

Based on the history of the state constitutional convention, the Attorney General has suggested that there may be certain "implied exceptions" to this provision, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, certain contributions from local governments, and tax receipts collected by the state on behalf of local governments. 1982 Op. Atty. Gen. No. 13, p. 11 (November 30). None of these include recoveries from a third party for damages to state natural resources. Moreover, to "imply" an exception for dedications that the attorney general establishes in a settlement, would give the attorney general unfettered discretion to circumvent this section of the state constitution by including in any settlement a "trust" requirement that the money be spent for a particular purpose. It may be that the court would imply an exception for money offered to the state as a gift, with conditions imposed by the donor, because in that case (1) no state official has participated in the dedication, and (2) the money is not being exchanged for a state asset. In the Exxon settlement however, the dedication applies (1) because of the Attorney General's decision to sue and settle under the Clean Water Act, and (2) to money exchanged for the state's legal claims against Exxon.

However, section 7 itself has several explicit exceptions, namely the Permanent Fund in art. IX, sec. 15, dedicated funds that existed at the time the sec. 7 was ratified, and those dedications "required by the federal government for participation in federal programs." Only the latter seems relevant.

To qualify under the "federal program" exception, (1) the dedication must be required; and (2) the state must be attempting to "participate in a federal program." The applicable provision of the federal Clean Water Act, 33 U.S.C. 1321(f)(5), requires that any damages received by the state under that section be used "to restore, rehabilitate, or acquire the equivalent of" the injured natural resources. Clearly, a recovery under the applicable provision of the Clean Water Act must be dedicated. However, it is not entirely clear that the full amount that will be dedicated to the trust fund is in fact required to be dedicated under the Clean Water Act. 33 U.S.C. 1321(f)(1)-(3) contain dollars per barrel limitations on recovery, except in cases of willful negligence or willful misconduct, and it is not clear whether the state's recovery under 33 U.S.C. 1321(f)(4) and (5) is similarly limited.^{8/} If it is so limited, and there was no evidence to support willful negligence or willful misconduct then the vast majority of the money that will be deposited in the trust could not be received under the terms of the Clean Water Act because it would exceed those dollar limitations. Therefore, it should not be subject to the dedication requirements of the Clean Water Act, and is not "required" to be dedicated under federal law.

^{8/} At the end of the April 3, 1991 hearing of the House Special Committee on the Exxon Valdez Settlement, the Attorney General indicated that he thought the dollars per barrel limitation would apply to the state's recovery, but that Exxon had waived the limitation.

Assuming that federal law does require the dedication of all of the roughly \$700 million, it is also not clear that suing under the Clean Water Act is "participation in a federal program" within the meaning of the dedicated funds provision. The delegates to the state constitutional convention adopted the "federal program" exception because they realized that without dedication, the state could not receive federal funding for certain programs e.g., fish and wildlife programs. 1975 Op. Atty. Gen. No.9 pp. 3-4 (May 2). If Alaska's Supreme Court were to take a strict view of the "federal program" exception, it could hold that the exception applies only to programs under which a dedication is required in order for the state to receive money from the federal government since that was the type of program envisioned by the drafters of the state constitution.

Even taking a slightly less restrictive view, the state Supreme Court could nevertheless hold that the exception did not apply where the state has the choice of receiving money under federal law with a required dedication of funds or of receiving it under state law without a dedication. The rationale for this interpretation would be that Alaska's Constitution establishes a strong policy against dedicated funds, and exceptions to it should be construed to allow dedication only when it is truly necessary for the state to receive some benefit. This less restrictive view would still bar the attorney general from settling under the Clean Water Act because that Act does not preempt state law, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), and therefore the state could simply pursue the claims under state law that it has already filed in state court. Under either of these two interpretations of the "federal program" exception, the court would essentially be saying that the attorney general could not take advantage of a federal law (that did not preempt state law) if the provisions of that federal law required a violation of the dedicated funds provision of state constitution. See McDowell v. State, 785 P.2d 1, 10 n. 3 (Alaska 1989) (Despite federal law that allowed state to manage federal land only if state recognized rural preference, state could not grant rural preference in violation of state constitution.)^{9/}

However, the Alaska Supreme Court might well interpret the "federal program" exception to include litigation under federal law, even though state remedies were

^{9/} The Attorney General has suggested in his April 2, 1991 opinion, at page 28, that state law that would effectively prohibit the state from suing under the Clean Water Act would be preempted, and therefore unenforceable, because it would serve as an obstacle to the Clean Water Act's purposes. However, since the Clean Water Act does not prevent a state from enacting its own remedies for spills covered by the Clean Water Act, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), this seems unlikely. In addition, the Clean Water Act expressly states that it does not preempt a state from imposing liability for oil spills, and that it does not affect any state law not in conflict with the section. 33 U.S.C. 1321(o)(2) and (3). Since the Clean Water Act contemplates that the state may establish its own remedies, it obviously does not require the state to sue under the Clean Water Act.

available. The rationale would be that the attorney general should not be limited in choosing available remedies because there may be tactical advantages to suing under federal law that are not available under state law. See Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975) (Dicta; the exercise, within constitutional limits, of the Attorney General's discretion in disposing of state litigation is not subject to review.) If the attorney general chooses to litigate under federal law, and federal law requires dedication of recoveries, then the basic purpose of the exception (to allow the state to take advantage of federal law despite a federal dedication requirement) has been met. Given the lack of case law on the "federal program" exception, it is difficult to predict how the state Supreme Court would interpret this provision. Either of the three possible approaches outlined above is plausible and reasonable.

B. Dedication in the Plea Agreement. Generally, the discussion above concerning dedication of funds in the consent decree and MOA would apply to the plea agreement. I am considerably more confident that the state may accept the \$50 million from the plea agreement than I am about the constitutionality of the dedication in the consent decree and MOA. The reason for this is that the money to come to the state in the plea agreement is not being exchanged for the state's claims for civil damages, nor has the state participated in the dedication. Rather the money will come to the state as a result of the federal government's agreement with Exxon.

First, the state Supreme Court may determine that money received by the state as a gift, to which the state has no legal claim, is not "revenue" subject to the dedicated funds provision. This would allow the state to accept gifts given with restrictions on their use. (Note that if the state accepts a gift with restrictions on its use, the state is bound by those restrictions. Patrick v. Blake, 19 N.W.2d 220 (S.D. 1945).) This interpretation would also appear not to violate the policy underlying the dedicated funds provision, since the dedication was not created by any action of a state official, but rather entirely by the donor. Since the dedicated funds provision is a limit on the state's taking action that creates a dedicated fund, it should not be applicable at all where the dedication is imposed by a donor without any action by the state government.

Even if the dedicated funds provision applies, the "federal program" exception appears applicable to the \$50 million, even if it is not applicable to money received in settlement of the state's claims. Assuming the court took a strict view of the "federal program" exception, it is likely that this would be viewed as money received from the federal government (like federal money for fish and wildlife programs or highways.) It is true that Exxon will be paying the money, but only because the federal government required it to do so as part of the plea agreement. At any rate, it is money that the federal government could have kept for itself, as part of a fine,

but chose to have paid to the state in restitution. It is not money that the state is exchanging for its own civil claims.

If the court took the "middle" position concerning the federal program exception, the state should also be allowed to accept the money, with restrictions on its use. The state does not have the opportunity to receive this money without restrictions, because it is available only as part of an agreement between the federal government and Exxon. The state has no right to prosecute Exxon for violations of federal criminal laws.

Therefore, while there is some possibility that the state Supreme Court might hold that the state cannot accept the \$50 million in restitution, because its use is restricted, that possibility is very remote. The dedication in the plea agreement is not created by the choice or agreement of a state official, and the state is not giving up anything of value in exchange for the restitutionary payment.

III. Encroachment on Legislative Power.

A. The Consent Decree. Except for the reference to the MOA in paragraph 10 of the consent decree, the consent decree does not address the mechanism by which the settlement proceeds are to be spent. Therefore its terms (with the possible exception of the reference to the MOA) do not raise the separation of powers problems inherent in the MOA. However, because the consent decree is based on the Clean Water Act, there is a latent question as to whether the Clean Water Act itself requires a spending mechanism that may violate art. II, sec. 1 or art. IX, sec. 13 of Alaska's constitution.

The answer appears to be "no". 33 U.S.C. 1321(f)(5) requires money recovered by the state to be used for certain purposes, but does not establish a mechanism for spending that money. 40 CFR 300.605 requires the state trustee to act on behalf of the public as trustee for state resources, but does not address the mechanism for spending a recovery. 40 CFR 300.615(a) directs the trustees to coordinate their efforts and cooperate, but does not require a joint trusteeship, let alone the spending of money without legislative authorization. 40 CFR 300.615(c)(4) requires the state trustee to devise and implement the restoration plan, but again this procedure does not appear to require that the trustee do so without legislative participation.

Regulations enacted pursuant to 42 U.S.C. 9651(c) also may affect the state trustee's power. These regulations were remanded in Ohio v. U.S., 880 F.2d 432 (D.C. Cir. 1989), so it is possible that they do not apply. However, even if they do apply, they appear to allow for the legislature's appropriation role, and may even mitigate against the joint trusteeship proposed in the MOA. 43 CFR 11.92(a) requires the federal

recovery to be placed in the federal treasury,^{10/} and the state recovery to be placed in either a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee. The state trustee is required to prepare a restoration plan (which may be modified) and the money must be spent for actions described in the restoration plan. 43 CFR 11.92(c) and 11.93. These provisions do not explicitly prevent the legislature from appropriating the money to projects described in the restoration plan, and there seems no practical need to engraft such a restriction on to the regulations. Typically the executive branch devises specific plans (within statutory law) and the legislature appropriates money for them. There seems no reason why the legislature could not participate in the process here by establishing statutory authority necessary for state agencies to participate in the restoration plan if that authority did not already exist, and appropriating the money for the programs proposed by the trustee. Moreover, the fact that 43 CFR 11.92(a)(2) allows the state recovery to be deposited in an account in the state treasury suggests that under the Clean Water Act the legislature is to be allowed to exercise the appropriation power over money that the trustee uses to implement the plan. However, if the Clean Water Act itself, or regulations adopted under it, were to be interpreted to prevent the legislature from appropriating money recovered under that Act, then the same constitutional questions that are discussed under the MOA would apply.

B. The MOA.

The MOA requires the state and federal natural resource damage recovery to be deposited in a joint trust account, either in the court registry or in another account agreed to by the parties and approved by the court. Six trustees, three federal and three state, are then to spend the money. This procedure raises two questions: (1) Does the legislature need to establish the fund into which the recovery is deposited; and (2) Does the power of the six trustees to spend the money violate the state legislature's appropriation power?

1. The Establishment of the Trust Fund. So long as the money remains in the court registry, there may be no constitutional requirement that the legislature authorize the deposit of the proceeds, though it would do no harm to do so. It is standard judicial procedure to deposit funds into the court registry when there are two litigants who claim a right to all or part of those funds, pending the court's decision on ownership. However, it is clear from the MOA that the deposit is not made pending judicial decision, but rather that the money will remain in the fund until it is spent by the trustee. Because of this "wrinkle," it may be necessary for the

^{10/} 33 U.S.C. 1321(k) also requires any money recovered by the federal government under that section to be placed in a fund in the U.S. treasury. Since the federal recovery is being placed in the court registry, there is a question as to whether the MOA complies with 33 U.S.C. 1321(k).

legislature to authorize the creation of the fund and the deposit of money into it. If the parties attempt to set up a separate fund, it becomes somewhat more likely that legislative authorization is needed because the state could no longer shelter under the notion that the fund is a normal deposit into the court registry.

Generally, special funds for state money must be established by law, *i.e.*, by the legislature. Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E. 2d 176 (Mass. 1980). (Trial court ordered fine to be paid for project enhancing natural resources; Supreme Court holds money is subject to appropriation and that it cannot be considered a trust fund because only the legislature can establish a trust fund); State v. West, 145 P. 15 (Wash. 1914). The possible argument against the need for legislative authorization is that the court itself has the power to establish a trust fund. It is not clear, however, that this power can be exercised in derogation of a state's constitutional requirement that money in the fund be appropriated. Moreover, because the fund would be established by the court under the state's attorney general's agreement, it is not really the court's power to establish a trust fund that is at issue, but rather the authority of the executive branch to establish a trust fund by agreement.

2. The Appropriation Power. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

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. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were subject to approval by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset). Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over \$32 million in exchange for \$1 is appropriation prohibited by initiative). McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

The attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act, because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court

were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for the damage to its natural resources; the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.^{11/}

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), is a clear indication that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

^{11/} Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.

Different jurisdictions have taken divergent positions on what money is subject to appropriation. E.g., Kittredge v. Boyd, 18 P.2d 563 (Kan. 1933)(Taxes paid under protest are not subject to appropriation); Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952)(Taxes paid under protest are subject to appropriation.) Some states hold that money coming from a non-state source (usually the federal government) that the source designates for a particular purpose, are not subject to the appropriation process. Opinion of the Justices, 378 N.E.2d 433 (Mass 1978)(federal trust fund money); Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Ariz. 1974)(funds from a purely federal source to be disbursed to Indian Tribe and two cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(Federal and private funds given to state university are not subject to appropriation.)

The resolution of this issue in Colorado has changed somewhat over time. In MacManus v. Love, 499 P.2d 609 (Colo. 1972), the court held that federal funds that are not connected to state appropriations are not subject to appropriation. In Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985), the court held that money received by the state from a settlement between a federal agency and a private entity (without participation by the state) was not subject to appropriation. However, in Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the court held that federal funds that required state matching money, or that could be transferred among block grants, were subject to appropriation.

At least two states with provisions similar to art. IX, sec. 13 of Alaska's constitution have held that all federal funds must be appropriated before they can be spent. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the court held that federal funds must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability in government. In 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 court came to the same conclusion. The court noted that the Advisory Commission on Intergovernmental Relations, established by Congress, had urged state legislatures to assume greater control over federal funds coming to state governments.

Given the divergent decisions on this issue in other jurisdictions, it is impossible to state with certainty what Alaska's Supreme Court would decide. However, in my opinion, allowing the trustees to spend money recovered from Exxon without an appropriation would violate art. II, sec. 1, or art. IX, sec. 13, of the state constitution. This conclusion is based on five considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to

limit the appropriation power to cover only money. Finally, it applied the principle in the Public Employees Local 71 case even though that case involved a contract already negotiated by the governor with public employees. Finally, a highly respected Superior Court judge has found that custodial and trust funds are subject to appropriation in Alaska. Kelley v. Hammond, 1st Jud. Dist. at Juneau, case No. 77-4 (May 30, 1978). There seems little reason for the court to depart from the principle when the state is recovering money for damage to natural resources of the state.

Second, the possibility that other parts of the state budget would be affected by spending the money---the consideration behind the shift in the Colorado cases---may well apply here. If trust fund money is to be spent on certain environmental or fish and game programs, that fact may affect other programs of the state departments of environmental conservation and fish and game. If trust fund money is spent on programs that use state employees, that may also affect the state budget. While the attorney general has taken the position that no part of the recovery is "state" money, the restoration plan clearly anticipates that the trustees will use state employees in the trust's projects. See 56 Fed. Reg. No. 41, p. 8898 (1991). The use of these employees, and liability for their acts will certainly affect the state budget. Time taken by the state trustees for their duties in administering the trust may also affect staffing decisions in the state budget. Finally if the trustees acquire land to be owned, or partially owned, by the state, that may also affect the long-term fiscal obligations of the state.

Third, the cases in this area have primarily dealt with funds received from the federal government, and the practice in Alaska has been to appropriate federal funds. AS 37.20.020 states that all federal grants of money are to be deposited in a special account in the general fund (which would then be subject to appropriation.) In addition, AS 46.08.020(a)(2) authorizes the legislature to appropriate to the oil and hazardous release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site." Since the money will be received from an entity (Exxon) that matches the statutory description, the statute indicates the legislature's intent that such money be deposited in the general fund for appropriation. While these statutes do not settle the constitutional issue, they do reflect the legislature's interpretation of its powers.

Fourth, some of the cases holding that money is not subject to appropriation are based on the fact that the money is being held by the state in trust for another entity authorized to spend it. E.g., Navajo Tribe v. Arizona Dept. of Admin., 528 P.2d 623 (Ariz. 1974)(Tribe and cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(University.) The money received for natural resource damages from Exxon, however, is not being "passed through" to another entity that can spend it. Rather, the state trustees recover the money "on behalf of the public as trustee of the natural resources." 33 U.S.C. 1321(f)(5). The natural resources cannot spend the money,

nor can the public. Therefore the "pass through" rationale underlying these cases does not seem to apply to the money recovered from Exxon. The state is doing more than "holding" the money for another; it is, through its trustees, deciding how to allocate the money, which is primarily a legislative function.

Finally, in all the cases discussed above in which money was held not subject to appropriation, the money was coming to the state as a gift or grant from either the federal government or a third party. (This is true even of the money received from a settlement between the federal government and Chevron in Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo 1985) because it does not appear that the state was a litigant or released any of its claims in the settlement.) No one could seriously maintain that money paid by Exxon under the consent decree is a "gift" from Exxon to the state. As is clearly evident from the terms of the consent decree, Exxon is to pay the money in exchange for the state and federal governments extinguishing their claims for damages. This fact distinguishes this situation from those in which the court viewed money as outside the appropriation process because it was "non-state funds." E.g., State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974). Money received in exchange for a state asset can hardly be "non-state funds."

IV. Effect of Unconstitutionality; Cure; Continuing Appropriations.

A. Effect of Unconstitutionality. In general, of course, the attorney general has absolute discretion in settling lawsuits, including the power to dismiss cases without recovery by the state. Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (1975). But courts have indicated that this discretion is not absolute. Public Defender Agency v. Superior Court, Third Judicial District, supra, 534 P.2d at 950 (discretion only within constitutional bounds; dicta); Smith v. Meese, 821 F. 2d 1484 (11th Cir. 1987) (Dept. of Justice's policy on prosecution of voting rights cases subject to judicial review); NAACP v. Levi, 418 F. Supp. 1109 (D.C. Cir. 1976) (Dept. of Justice's policy of deferring to state investigation of civil rights violations is subject to judicial review); Boyd v. U.S., 345 F. Supp. 790 (E.D.N.Y. 1972) (Prosecutorial discretion does not protect attorney general's conduct from review on charge of bad faith, fraud, or illegality; dicta). As the court stated in Nader v. Saxbe, 497 F.2d 676, 679-80, n. 19 (D.C. Cir 1974):

The Executive's constitutional duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3, applies to all laws, not merely to criminal statutes. (Citations omitted). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. (Citations omitted). The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits of that authority. (Citations omitted.) Judicial review

of the latter sort is normally available unless Congress has expressly withdrawn it. (Citations omitted). The decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. (Citations omitted).

If the attorney general has agreed to provisions that violate the state constitution, those provisions are invalid. See White Construction Co., Inc. v. Commonwealth, 418 N.E. 2d 357 (Mass. Ct. App. 1981), aff'd, 432 N.E. 2d 104 (1982) (State officials have authority to bind the state only to the extent allowed by state law.) This true even if those unconstitutional provisions are authorized by the federal Clean Water Act. Federal law does not require the state to sue under the Clean Water Act. Therefore the situation is similar to that in McDowell v. State, 785 P.2d 1, 10, n. 20 (Alaska 1989), wherein the court held that the state could not grant a subsistence preference to rural residents, even though federal law allowed the state to manage federal land only if it granted a rural subsistence preference on federal land. The issue then is whether the Exxon settlement documents do violate the state constitution.

Because several documents and legal issues are raised, I will try to summarize the possibilities:

1. If the dedication required by the Clean Water Act is not allowed under art. IX, sec. 7 of the state constitution, the trust fund provisions in both the consent decree and the MOA are invalid, since they both contain that dedication.
2. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, and the Clean Water Act is interpreted to require that procedure, then both the MOA and the consent decree would be invalid because the attorney general would not be authorized to sue or settle under the Clean Water Act.
3. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, but those provisions are not required under the Clean Water Act (nor incorporated by implication into the consent decree), then the MOA would be invalid, but the consent decree would not violate the appropriations provisions of the state constitution.
4. If the money due the state under the plea agreement violates the dedicated funds provision (which seems unlikely), then the state cannot accept the money.

B. Cure. If the plea agreement, MOA, or consent decree violate the dedicated funds prohibition, then the dedication is invalid. The legislature cannot "cure" a dedication problem because the prohibition on dedicated funds applies to the legislature as well as the executive branch. However, for those years in which the legislature actually

appropriated the money for the required purposes, the money could be spent for those purposes pursuant to the appropriation (not pursuant to the dedication.)

The appropriation problem could be cured in several ways, assuming of course that the Clean Water Act does not require trust money to be spent without appropriation. First, the court or the parties could amend the MOA to require annual appropriation of that portion of Exxon's payment that is a state asset. The court may, in fact, imply an appropriation requirement. Alternately, the legislature could take it upon itself to authorize the trust and the deposit of money into it, and to appropriate each year the state's interest in Exxon's payment to the fund.

It might be possible for the current legislature to appropriate to the trust fund all of the natural resource damage recovery to be received from Exxon under the consent decree over the years. However such a "continuing appropriation" may itself violate the dedication of funds prohibition. A state superior court has held that a continuing appropriation violates the dedicated funds provision. Trustees of Alaska v. State, Super. Ct., 3rd Jud. Dist., at Anchorage, case No. 3-AN-84-12053 (Aug. 30, 1985.) Apparently the theory was that the legislature making the continuing appropriation is attempting to tie the hands of future legislatures who would, in order to negate the continuing appropriation, have to repeal it. The Trustees case was not appealed, so it is not clear whether continuing appropriations do violate the dedicated funds provision. However, in Public Employees' Local 71 v. State, 775 P.2d 1062, 1064 (Alaska 1989), the State Supreme Court did state that the monetary terms of a collective bargaining agreement are subject to independent legislative approval by appropriation "each year" that the contract is in effect. Even if continuing appropriations do violate the dedicated funds provision as a general matter, it still might be possible to defend a continuing appropriation as required for participation in a federal program, although such an argument would be subject to the objections discussed above in connection with the dedication in the MOA and consent decree, and the additional argument that a continuing appropriation was not required by the Clean Water Act, the consent decree, or the MOA. Finally, of course, as a practical matter subsequent legislatures could repeal the continuing appropriation at any time.

V. Summary.

The Attorney General stated in his April 2, 1991 memo at p. 10 that the "real" issue is whether he and the Governor had the power to settle the Exxon Valdez litigation. Unfortunately, I cannot agree. There is no doubt that the Attorney General has the authority to settle the state's litigation in good faith. However, his authority, like the authority of any state official acting in his or her official capacity, is limited by the Constitution of the State of Alaska.

Therefore the first question is whether the Attorney General can release the state's claim in exchange for money that must be used for certain purposes under the Clean

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Water Act, 33 U.S.C. 1321(f)(5). If the court were to interpret art. IX, sec. 7, Constitution of the State of Alaska, strictly, the dedication might well be invalid. However, if the court interpreted the "federal program" exception less strictly (which in my view it could reasonably do), and if in fact all the money dedicated to the trust were actually recoverable under the Clean Water Act, then the agreement would not violate art. IX, sec. 7 of the state constitution.

The second question is whether the Attorney General, having recovered money as the authorized representative of the state, has the constitutional authority to allow the state and federal trustees to spend that money without appropriation by the state legislature. (It should be noted that the Clean Water Act and regulations adopted pursuant to it do not expressly prohibit the legislature from appropriating the state's recovery nor require or expressly authorize a joint trust.) Essentially the Attorney General has decided that, rather than litigate with the federal government over who owns how much of the trust money, he will agree that the state and federal trustees may spend the money. However well-intentioned that decision may be, I believe the agreement violates art. II, sec. 1 or art. IX, sec. 13, Constitution of the State of Alaska. The Attorney General certainly has the authority to determine the value of the state's claim by a good faith settlement, but only the state legislature has the power to authorize its expenditure. While it is possible that I am wrong, I doubt that a court will agree with the position that the state never received anything because the trustees spent the money without deciding who owned how much of it.

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MEMORANDUM

March 11, 1991

SUBJECT: Trust Fund for Proceeds of Exxon Valdez Settlement
(W.O. 7LS0912)

TO: Representative Niilo Koponen

FROM: Pam Finley *Pam Finley*
Assistant Revisor

QUESTION PRESENTED: You have asked whether the governor could put money received from a settlement with Exxon for the Exxon Valdez oil spill into a fund such that the legislature would have no power over the use of the money.

SHORT ANSWER: If such a settlement requires money recovered by the state under the federal Clean Water Act to be spent without appropriation by the state legislature, it is probably a violation of the state constitution and therefore it would be beyond the power of the attorney general to agree to such a settlement.

DISCUSSION: The Attorney General has suggested in hearings that a trust fund for the proceeds of an Exxon settlement would be based on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. In general, CERCLA does not apply to spills of crude oil. The act contains many provisions governing "hazardous substances," but the definition of this term explicitly excludes crude oil. 42 U.S.C. 9601(14). However, a section of CERCLA, 42 U.S.C. 9651(c), authorizes the promulgation of regulations for the assessment of damages "resulting from a release of oil or a hazardous substance for the purposes of this Act (CERCLA) and section 311(f)(4) and (5) of the Federal Water Pollution Control Act..."

The water control act referred to, commonly known as the Clean Water Act (CWA), does cover releases of crude oil. 33 U.S.C. 1321(f)(4) and (5) allow a state to recover, as "trustee of the natural resources" damaged by an oil spill, the costs of replacing or restoring those natural resources. The Clean Water Act does not appear to cover economic losses. See, *Piccolini v Simon's Wrecking*, 686 F. Supp. 1063 (M.D. Pa. 1988) (Damage recoverable for response and remedial actions under

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CERCLA did not include lost income.) The actual costs incurred by the state for the restoration or replacement of its resources, as distinguished from similar costs incurred by the federal government on the state's behalf, may be recovered only by the state. In re Allied Towing Corp., 478 F. Supp. 398,402 (E.D. Va. 1979). Any damages recovered by the state under 33 U.S.C. 1321(f)(5) must be used to "restore, rehabilitate, or acquire the equivalent of such natural resources." The state's remedy under the Clean Water Act is not exclusive; it does not preempt state laws that provide for recovery of damages caused by oil spills. Allied Towing, supra.

The state trustee who can recover these damages under federal law is appointed by the governor. 42 U.S.C. 9607(f)(2)(B). I do not know if the Governor of Alaska has appointed such a person, or if so, who he or she may be. The trustee so appointed has various powers, including devising and carrying out a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 C.F.R. 300.615(c)(4). Under regulations adopted under CERCLA, but applicable to the Clean Water Act, the money recovered by the state may be placed either in a separate account in the state treasury, or in an interest bearing account payable in trust to the state agency acting as the trustee. 43 C.F.R. 11.92(a)(2). The trustee is required to prepare an authorization plan describing how money recovered under the Clean Water Act will be used and to address what restoration, replacement, or acquisition of the equivalent resources will occur. 43 C.F.R. 11.93(a). This regulation has been upheld against a challenge that it exceeds the authority granted in the federal statute, and that it usurps the state sovereign powers by "micromanaging" state accounting and planning procedures. State of Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 473-474 (D.C. Cir. 1989).

However, while the regulation does require the state trustee to establish the plan, it does not on its face say that the plan, or expenditures under it, shall be accomplished without legislation or appropriation by the state legislature. In fact, the regulation allowing deposit of the money in a special account in the state treasury suggests legislative action would be allowed. If the regulation were interpreted to do away with a requirement of state legislative action, it would probably be beyond the executive's power to enter into an agreement under the regulation.

In my memo to Senator Cotten, which was distributed to all legislators at his request, I discussed both the appropriation power and the dedicated funds provision in Alaska's constitution; please refer to that memo for a fuller discussion of relevant cases. The gist of the memo was that (1) a state asset (money received in settlement of the state's claims) must be appropriated by the legislature before it can be spent, and (2) neither the executive nor the legislature can "dedicate" a revenue stream to a particular purpose. The latter is especially important if money is to be received over several years since this legislature, even if it "appropriated" whatever was received from the settlement to a trust fund, could not bind the actions of a future legislature with regard to money received in the future.

The existence of the federal regulations, however, requires a bit more elaboration. First, because the state is not required to sue under the Clean Water Act (and in fact, Alaska has sued in state court asserting claims based on state law), this is not a case of federal law (the regulation) being supreme over Alaska's constitutional provision vesting the law-making power (including the appropriation power) in the legislature. In this respect, the situation would be similar to the subsistence issue. Although federal law required a preference for rural residents on federal land and allowed the state to manage federal land only if that preference were honored, Alaska was not allowed to violate its constitutional provisions that prohibited a preference for rural residents. McDowell v. State, 785 P.2d 1 (Alaska 1989). As the court pointed out, the federal law did not require the state to manage federal land. McDowell, supra, 785 P.2d at 10, n. 20. Similarly, if federal law requires the proceeds of a lawsuit or settlement under federal law to be spent without legislation or appropriation in violation of the state constitution, then the state cannot sue or settle under federal law. There is certainly no requirement that it do so, and in fact the state has chosen to sue under state law. A settlement under the CWA/CERCLA regulations that allowed for the expenditure of state money without appropriation by the legislature, or established programs that were not authorized by state law would be unconstitutional. Therefore the governor would not have the authority to agree to it.

The second issue raised by the existence of the federal regulations is whether the federal regulations would allow the state to avoid the dedicated funds prohibition of art. IX, sec. 7, Constitution of the State of Alaska. That provision allows a dedicated fund "when required by the federal government for state participation in federal programs." Federal highway money is one example of this exception. The provisions vesting the law-making and appropriation power in the legislature, of course, have no such exception, and so this second issue is most important if the settlement provides for legislative appropriation and action and this legislature makes the necessary appropriations and law, and those appropriations purport to bind how money received in future years can be spent. Quite frankly, I do not know whether the court would find the trust fund to be a "federal program" since it consists of money paid by Exxon in settlement of claims by the state. It gets even harder to justify the trust fund as a "federal program" when one realizes that the money could have been recovered under state law (or settlement of claims under state law) without a required dedication. However, it is conceivable that the court would find the exception applicable.

Since we do not have a draft settlement or even a complaint based on federal claims before us, it is difficult to predict exactly what statute or regulation the Attorney General will assert is the basis for the settlement and the trust fund. Lacking the settlement and the Attorney General's explanation of why he believes it is constitutional, I can only guess about the applicable statute and regulations. Until I see a copy of the settlement itself, and hear the Attorney General's opinion as to why he

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believes it is constitutional, I cannot give an opinion on its constitutionality. However, as a general matter a settlement of the state's CWA claims under the regulations at 43 C.F.R. 11.92 and 11.93 would violate the state constitution if it purported to divest the legislature of the power to appropriate the proceeds.

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SCIENTIFIC DATA

RECEIVED

Department of Law

APR 15 1991

5:30, 10:11, 12:12, 2:23, 3:30



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

NATIONAL OCEAN SERVICE
OFFICE OF OCEANOGRAPHY AND MARINE ASSESSMENT
OCEAN ASSESSMENTS DIVISION
ROCKVILLE, MARYLAND 20852

8 April 1991

MEMORANDUM FOR: NOAA/GC Thomas A. Campbell
Washington Policy Group
Trustee Council

FROM:

Douglas A. Wolfe
Robert B. Spies
Donald C. Malins

SUBJECT:

**RECOMMENDATIONS RELATED TO REVIEW AND
RELEASE OF NRDA DATA AND TO PUBLICATION OF
EXXON VALDEZ ASSESSMENT RESULTS**

We want to share with you our collective concerns about recent efforts and activities to place for public access all available, quality-assured NRDA data into the Oil Spill Public Information Center in Anchorage as soon as possible. Our view is that the release of "data" (whether quality-assured or not) without accompanying interpretive reports will raise a series of conflicting interpretations and claims from various interested parties. The controversy ensuing from such claims and counterclaims would be regrettable and could erode public support for the NRDA process. In addition, we believe that the first publicly available interpretations and analyses of the NRDA data should be performed by the NRDA Project Managers, and that the resulting reports and manuscripts should undergo peer review prior to formal publication.

The release of the NRDA planning documents (detailed study plans and interim project reports) should not, in most cases, be a problem as long as they are clearly identified as interim planning documents that: a) are based on incomplete data; b) have not undergone peer review; and c) contain interpretations subject to revision. The raw data that were available to the Project Managers and taken into consideration at the time they drafted those reports could also be appended and made available with the same caveats. Additional data generated more recently, however, should NOT be archived in the repository for public access until such time as the Project Managers have had the opportunity to review, analyze and interpret those data. This concern applies very strongly to the hydrocarbon analytical data collected under project Technical Services No. 2. Large amounts of these data have become available only after the last



interim reports were written, and in many cases, the Project Managers have not yet had an opportunity to review the data, much less develop interpretive reports. In most cases, the Project Managers are still waiting for additional data before they can reasonably undertake their detailed data analyses and interpretations.

We are also concerned that without coordinated direction, the very large base of information (both scientific and economic) developed about the EXXON VALDEZ spill (easily the best-studied spill in human history to date) might be released and published in a haphazard and diffuse manner, resulting in a product not easily accessible either to the scientific community or to the interested public. The current push for release of available data to the Public Information Center could stimulate Project Managers to rush incomplete results towards publication in the most accessible publication outlets. While our principal investigators should definitely be encouraged to publish their results as early as possible in peer-reviewed scientific journals, this process should be driven by the maturation and analysis of logical units of data and the development of significant interpretations and conclusions.

An attractive mechanism for public release of information would be for the Trustees (perhaps in cooperation with Exxon) to sponsor a major symposium for the presentation of EVOS results, and to publish, in one place, a comprehensive collection of scientific papers related to the spill. The sponsors could install an acceptable mechanism for peer review of all papers. The proceedings could be published through an existing scientific journal, or could take the form of a separate, high quality volume (such as that published by the French *Centre National pour l'Exploitation des Oceans* for the *Amoco Cadiz* spill). This approach would motivate the investigators to analyze and publish their results on a rigorous schedule, ensure that a large block of EVOS information (from all possible sources) becomes accessible in one place, and provide a uniform standard for quality control on the publication. A logical and practical time frame for this symposium would be during spring of 1992 (providing ample time for analysis of Oil-Year 3 results). The team of Wolfe, Spies, and Malins possesses considerable experience in the organization and conduct of such symposia and the publication of high quality proceedings. With NOAA's support, we could undertake this activity, working through the existing structure of the Management Team to notify the Project Managers and request their participation. Planning must start very soon, however, if this approach and schedule are to be implemented.

cc: C.N. Ehler

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MEMORANDUM

April 9, 1991

SUBJECT: Disclosure of scientific data relating to Exxon Valdez litigation
(Work Order No. 7LS1171)

TO: Representative Max Gruenberg, Jr.
Attn: Andy Hemenway

FROM: John B. Gaguine *JBG*
Legislative Counsel

You have asked whether the attorney general may keep confidential scientific data relating to the Exxon Valdez oil spill, or whether the information is public under AS 09.25.110-09.25.125. If the recent proposed settlement terminated all Exxon Valdez litigation, then I would say that the information probably could not be kept confidential, based on a recent Alaska Supreme Court decision. However, since there is litigation ongoing naming the state as a defendant, I think that the attorney general is probably acting within his authority. The law, though, is not completely clear on either of these points.

First, it seems that the scientific data, absent litigation considerations, clearly would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

(6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I think that the data plainly falls under this definition.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes

(AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer clear:

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

If all Exxon Valdez litigation was concluded, I do not think that the "work product" exception to discovery would have any relevance to post-settlement disclosure of the

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Page 3

data. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While, as discussed below, it may override the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not seem to apply after a settlement.

A recent Florida case, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985), supports my conclusion. In that case the court held that communications between the members of a city council and the city's attorney relating to litigation were not exempt from disclosure under the broad Florida public records law. The court held that the law did not incorporate such non-statutory exceptions as attorney-client privilege and attorney work product.^{1/} However, the language of the Florida public records law is different from the Alaska law, so that North Miami might not be persuasive to an Alaska court.

It is clear that under federal law the Exxon Valdez scientific data would not be disclosable to the public, even after all litigation is settled. The federal Freedom of Information Act, 5 U.S.C. 552, contains a provision, subsection (b)(5), that exempts from FOIA disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." In Federal

^{1/} The court did note, however, that a specific Florida statute authorized the city to withhold disclosure while the litigation was ongoing.

Trade Commission v. Grolier Incorporated, 462 U.S. 19, 76 L.Ed.2d 387 (1983) (copy attached), the U.S. Supreme Court ruled that the (b)(5) exemption applied even when the litigation for which the requested documents had been generated was over.

I think that an Alaska court would not be likely to follow Grolier, both because of the strong presumption of public access to public records (expressed in Anchorage School District, *supra*), and because of the absence of any language in AS 09.25.110 - 09.25.125 similar to (b)(5).^{2/} I think that this absence is especially significant because, as noted, the Alaska public records statutes were overhauled in 1990, and a special section, AS 09.25.122 (quoted above), dealt specifically with litigation, without including (b)(5)-type language. Thus, as noted, I believe that an Alaska court would be more inclined to follow North Miami than Grolier. However, both the majority and the concurring opinions in Grolier set out strong policy arguments for exempting "work product" from FOIA disclosure, and an Alaska court might thus choose to follow Grolier notwithstanding the presumption of public access and the absence of (b)(5)-type language in the Alaska statutes.

At any rate, there is litigation ongoing, and so the question of whether an exemption to disclosure applies in the absence of litigation is premature. I believe that the existence of this litigation in my opinion would support the attorney general's non-disclosure decision.

First, I believe that the scientific data constitutes "work product" that is generally not available for discovery under Civil Rule 26(b)(3) - it is my understanding that the data was produced "in anticipation of litigation or for trial", and that the production was coordinated by the attorney general's office.^{3/} Although the state was primarily producing the data for its litigation against Exxon, it seems obvious that the state was also anticipating use of the data in the suits naming it as a defendant, if those suits were not settled or dismissed. Even if the suits were not filed at the time that the data was produced (and I believe some were; I recall that some suits were filed against Exxon, the state and the federal government almost immediately), it seems that the "work product" exception to discovery would still apply, especially in light of the "anticipation of litigation" language of Rule 26(b)(3). I think it would be impossible to dispute an assertion by the state that it was gathering data not only for

^{2/} Some states, such as Maryland and Rhode Island, have adopted language in their public records statutes essentially identical to that in (b)(5). Others have included language that the courts have read as incorporating the (b)(5) principle. See, e.g., Denver Post Corp. v. University of Colorado, 739 P.2d 874, 880 (Colo. App. 1987) (use of term "privileged information" in Colorado public records statute authorizes non-disclosure of attorney litigation work product).

^{3/} If I am wrong, and the data was produced by the agencies in their normal course of business not specifically for use in litigation, then AS 09.25.122 would clearly make the data public.

Representative Max Gruenberg, Jr.

April 9, 1991

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litigation then pending, but also for litigation that might be subsequently brought against it.

In Grolier, the Court, interpreting Fed.R.Civ.P. 26(b)(3) (from which the Alaska rule derives), held that the language of the rule "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." 76 L.Ed.2d at 393 (emphasis in original). I see no reason why an Alaska court would not follow Grolier in interpreting Alaska Rule 26(b)(3).

Thus it seems clear that the state may refuse to disclose the data to litigants against it. But what about those plaintiffs who have sued only Exxon, and not the state, or those members of the public who have no interest in any litigation? The answer here is not entirely clear. AS 09.25.122 suggests that such persons would be entitled to inspect the data, as only litigants are bound by the court rules.^{4/} But such an interpretation would effectively remove the work product protections for public litigants. I am inclined to think that a court would not support such a reading of the statutes.

As noted, the Florida Supreme Court in North Miami, supra, held, based on a specific statute, that there is no right of public access to a public litigant's work product during the pendency of the litigation.^{5/} I am inclined to think that an Alaska court would, as a matter of policy, read the same limitation of access into Alaska law even though no specific statutory limitation exists. However, it is certainly possible that an Alaska court would read the absence of a specific limitation in statute as precluding a court from creating such a limitation, notwithstanding the powerful policy arguments in favor of it. At any rate, it seems clear that, no matter how the courts might finally rule on this question, the attorney general can assert reasonable justifications for his policy; he is not acting in contravention of clearly stated law.

I hope that this memorandum has been of assistance to you. Please feel free to let me know if I can be of further assistance.

JBG:pl:mi
91-239.plm

^{4/} However, if such a person were seeking to obtain the data so that he or she could transfer it to a litigant, then the person would be "involved in litigation" within the meaning of AS 09.25.122.

^{5/} Note that North Miami, unlike many public access/work product cases (such as Grolier), involved a request by a news organization, rather than by a former litigant.

[462 US 19]
FEDERAL TRADE COMMISSION, et al., Petitioners

v

GROLIER INCORPORATED

462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

[No. 82-372]

Argued March 29, 1983. Decided June 6, 1983.

Decision: Agency attorney work product held exempt from mandatory FOIA disclosure without regard to status of litigation for which it was prepared.

SUMMARY

A corporation filed a request with the Federal Trade Commission for disclosure of documents concerning the investigation of a subsidiary corporation. The Commission had investigated the subsidiary in connection with a civil penalty action but the suit had been dismissed with prejudice. The Commission refused to release some documents on the basis that they were exempt from mandatory disclosure under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency. The United States District Court for the District of Columbia held that all the requested documents were exempt from disclosure under Exemption 5. The United States Court of Appeals for the District of Columbia Circuit held that four documents could not be withheld unless the Commission could show that litigation related to the terminated action existed or potentially existed (671 F2d 553).

On certiorari, the United States Supreme Court reversed. In an opinion by WHITE, J., joined by BURGER, Ch. J., and MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., it was held that attorney work product is exempt under Exemption 5 of the Freedom of Information Act from mandatory disclosure without regard to the status of the litigation for which it was prepared.

BRENNAN, J., joined by BLACKMUN, J., concurring in part and concurring

Briefs of Counsel, p 865, *infra*.

in the judgment, expressed the view that the holding should rest exclusively on a construction of Rule 26(b)(3) of the Federal Rules of Civil Procedure.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Administrative Law § 64 — FOIA — attorney work product exemption
1a-1d. Under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

2 Am Jur 2d, Administrative Law § 232; 66 Am Jur 2d, Records and Recording Laws § 39

15 Federal Procedure, L Ed, Freedom of Information §§ 38:90 et seq.

1 Federal Procedural Forms, L Ed, Administrative Procedure §§ 2:53.3, 2:175, 2:175.5, 2:192

1 Am Jur Pl & Pr Forms (Rev), Administrative Law, Form 54.1

2 Am Jur Trials 409, Locating Public Records

5 USCS § 552

US L Ed Digest, Administrative Law § 64

L Ed Index to Aunos, Freedom of Information Act

ALR Quick Index, Freedom of Information Acts

Federal Quick Index, Freedom of Information Act; Work Product Doctrine

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Freedom of Information Act exemption (5 USCS § 552(b)(5)) for interagency and intraagency memorandums or letters as applicable to communications to or from attorneys for the government. 54 ALR Fed 280.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation. 41 ALR Fed 123.

What are interagency or intraagency memorandums or letters exempt from disclosure under the Freedom of Information Act (5 USCS § 552(b)(5)). 7 ALR Fed 855.

Development, since *Hickman v Taylor*, of attorney's "work product" doctrine. 35 ALR3d 412.

FTC v GROlier INC.

462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

**Depositions and Discovery § 36 —
work product — immunity**

2. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation.

**Administrative Law § 64 — FOIA —
attorney work product exemption**

3. The test under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, is whether the docu-

ments would be routinely or normally disclosed upon a showing of relevance.

**Administrative Law § 64; Depositions
and Discovery § 36 — FOIA —
attorney work product exemption**

4. Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context.

SYLLABUS BY REPORTER OF DECISIONS

Exemption 5 of the Freedom of Information Act (FOIA) exempts from disclosure under the Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Petitioner Federal Trade Commission (FTC) conducted an investigation of a subsidiary of respondent in connection with a civil penalty action against the subsidiary in Federal District Court filed by the Department of Justice. The action was later dismissed with prejudice when the Government declined to comply with a discovery order. Thereafter, respondent filed a request with the FTC for disclosure of certain documents concerning the investigation of the subsidiary, but the FTC denied the request on the ground that the documents were exempt from disclosure under Exemption 5. Respondent then brought suit in Federal District Court to compel release of the documents. The District Court held that the documents were exempt from disclosure under Exemption 5 as, inter alia, attorney work product. The Court of Appeals held that the documents generated during the action against the subsidiary could not be withheld on the basis of the work-product rule unless the FTC could show that "litigation related to the terminated action exists or potentially exists." The court reasoned that the work-product rule encompassed by Exemption 5 was coextensive with the

work-product privilege under the Federal Rules of Civil Procedure, and that a requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation best comported with the fact that the work-product privilege is a qualified one.

Held: Under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation with the agency. Under a literal reading of Federal Rule of Civil Procedure 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and thus would fall within the scope of Exemption 5. But regardless of how Rule 26(b)(3) is construed, the Court of Appeals erred in construing Exemption 5 to protect work-product material only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. The Court of Appeals' determination that its rule concerning related litigation best comported with the qualified nature of the work-product rule is irrelevant in the FOIA context. Whether its

immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure. Work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt

information, implements the FOIA's purpose to provide "workable" rules.

217 US App DC 47, 671 F2d 553, reversed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Marshall, Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Brennan, J., filed an opinion concurring in part and concurring in the judgment, in which Blackmun, J., joined.

APPEARANCES OF COUNSEL

Kenneth S. Geller argued the cause for petitioners.

Daniel S. Mason argued the cause for respondent.

Briefs of Counsel, p 865, *infra*.

OPINION OF THE COURT

[462 US 20]

Justice White delivered the opinion of the Court.

[1a] The Freedom of Information Act (FOIA), 5 USC § 552 [5 USCS § 552], mandates that the Government make its records available to the public. Section 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It is well established that this exemption was intended to encompass the attorney work-product rule. The question presented in this case is the extent, if any, to which the work-product component of Exemption 5 applies when the litigation for which the requested docu-

ments were generated has been terminated.

[462 US 21]

In 1972, the Federal Trade Commission undertook an investigation of Americana Corp., a subsidiary of respondent Grolier Inc. The investigation was conducted in connection with a civil penalty action filed by the Department of Justice.¹ In 1976, the suit against Americana was dismissed with prejudice when the Government declined to comply with a District Court discovery order. In 1978, respondent filed a request with the Commission for disclosure of documents concerning the investigation of Americana.² The Commission initially denied the entire request, stat-

1. United States v Americana Corp., Civ No. 388-72 (NJ). Americana was charged with violation of a 1948 cease-and-desist order in making misrepresentations regarding its encyclopedia advertisements and door-to-door sales.

2. By letter to the Commission, respondent requested the following:

"1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

"2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies: [listing 14 companies, including respondent and Americana Corporation].

"3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity." App 15-16.

"Covert investigation" was defined by respondent to be "any investigation of which the subject entity was not notified in advance and

ing that it did not have any information responsive to some of the items and that the remaining portion of the request was not specific enough to permit the Commission to locate the information without searching millions of documents contained in investigatory files. The Commission refused to release the few items that were responsive to the request on the basis

[462 US 22]

that they were exempt from mandatory disclosure under § 552(b)(5).³

Pursuant to the Commission's Rules, respondent appealed to the agency's General Counsel. Following review of respondent's request, and after a considerable process of give and take, the dispute finally centered on seven documents.⁴ Following in camera inspection, the District Court determined that all the requested documents were exempt from disclosure under § 552(b)(5), either as attorney work product, as confidential attorney-client communications, or as internal predecisional agency material. On appeal, the Court of Appeals held that four documents generated during the Americana litigation could not be withheld on the basis of the work-

product rule unless the Commission could show that "litigation related to the terminated action exists or potentially exists."⁵ 217 US App DC 47, 50, 671 F2d 553, 556 (1982).

The Court of Appeals reasoned that the work-product rule encompassed by § 552(b)(5) was coextensive with the work-product privilege under the Federal Rules of Civil Procedure.

[462 US 23]

A requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation, in the Court of Appeals' view, best comported with the fact that the work-product privilege is a qualified one. We granted the Commission's petition for certiorari, 459 US 986, 74 L Ed 2d 381, 103 S Ct 339 (1982). Because we find that the Court of Appeals erred in its construction of Exemption 5, we reverse.

Section 552(b) lists nine exemptions from the mandatory disclosure requirements that "represent[t] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." EPA v Mink, 410 US 73, 80, 35 L Ed 2d 119, 93 S Ct 827 (1973).

prior to acts taken pursuant to such investigation." Id., at 16. Respondent later abandoned its requests for any documents other than those related to the Americana investigation, defined in the first category of its request.

3. The requested documents are subject to mandatory disclosure as "identifiable records" under § 552(a)(3), unless covered by a specific exemption. In this case, the Commission claims exemption only under § 552(b)(5), which provides:

"This section does not apply to matters that are—

"(5) inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency"

4. The Commission released a number of documents after respondent filed this suit. Respondent abandoned its claim for many others. See n 2, supra.

5. Respondent withdrew its claim for disclosure of one of the seven documents. The Court of Appeals affirmed the District Court's judgment that another was exempt as an attorney-client communication, 217 US App DC, at 48, n 3, 671 F2d, at 554, n 3, and held that still another was clearly a predecisional document not subject to disclosure under Exemption 5, id., at 51, 671 F2d, at 557. These rulings are not at issue here.

The primary purpose of one of these, Exemption 5, was to enable the Government to benefit from "frank discussion of legal or policy matters." S Rep No. 813, 89th Cong, 1st Sess, 9 (1965). See HR Rep No. 1497, 89th Cong, 2d Sess, 10 (1966). In keeping with the Act's policy of "the fullest responsible disclosure," S Rep No. 813, at 3, Congress intended Exemption 5 to be "as narrow as [is] consistent with efficient Government operation." *Id.*, at 9. See HR Rep No. 1497, at 10.

Both the District Court and the Court of Appeals found that the documents at issue were properly classified as "work product" materials, and there is no serious argument about the correctness of this classification.⁶ "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5," the privilege being that enjoyed in the context of discovery in civil litigation. *NLRB v Sears, Roebuck & Co.*, 421 US 132, 154-155, 44 L Ed 2d 29, 95 S Ct 1504 (1975); HR Rep No. 1497, at 10; S Rep No. 813, at 2.

[462 US 24]

In *Hickman v Taylor*, 329 US 495, 510, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947), the Court recognized a qualified immunity from discovery for the "work product of

the lawyer"; such material could only be discovered upon a substantial showing of "necessity or justification." An exemption from discovery was necessary because, as the *Hickman* Court stated:

"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

The attorney's work-product immunity is a basic rule in the litigation context, but like many other rules, it is not self-defining and has been the subject of extensive litigation.

Prior to 1970, few District Courts had addressed the question whether the work-product immunity extended beyond the litigation for which the documents at issue were prepared. Those courts considering the issue reached varying results.⁷ By 1970, only one Court of Appeals had addressed the issue. In *Republic*

6. Respondent makes some assertions concerning the ethical conduct of the Commission in continuing its investigations after the *Americana* suit had been instituted and claims that the work-product rule would not apply to documents containing evidence of unethical conduct. Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

7. See *Honeywell, Inc. v Piper Aircraft Corp.*, 50 FRD 117 (MD Pa 1970); *Bourget v Government Employees Ins. Co.*, 48 FRD 29 (Conn 1969); *Stix Products, Inc. v United*

Merchants & Mfrs., Inc., 47 FRD 334 (SDNY 1969); *LaRocca v State Farm Mutual Automobile Ins. Co.*, 47 FRD 278 (WD Pa 1969); *Kirkland v Morton Salt Co.*, 46 FRD 28 (ND Ga 1968); *Chitty v State Farm Mutual Automobile Ins. Co.*, 36 FRD 37 (EDSC 1964); *Insurance Co. of North America v Union Carbide Corp.*, 35 FRD 520 (Colo 1964); *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 207 F Supp 407 (MD Pa 1962); *Thompson v Hoitama*, 19 FRD 112 (NJ 1956); *Tobacco and Allied Stocks, Inc. v Transamerica Corp.*, 16 FRD 534 (Del 1954).

Gear Co. v Borg-Warner Corp., 381 F2d 551, 557 (CA2 1967), the Court of Appeals held that documents prepared in connection with litigation that was on

[462 US 25]

appeal were not subject to discovery in a related case. The court also noted that there was potential for further related litigation. Thus, at the time FOIA was enacted in 1966, other than the general understanding that work-product materials were subject to discovery only upon a showing of need, no consensus one way or the other had developed with respect to the temporal scope of the work-product privilege.

[1b, 2] In 1970, the Federal Rules of Civil Procedure were amended to clarify the extent to which trial preparation materials are discoverable in federal courts. Rule 26(b)(3) provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Rule 26(b)(3) does not in so many

words address the temporal scope of the work-product immunity and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 USC App, pp 441-442. But the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, p 201 (1970). Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, see *id.*, at 201-202, it provides a satisfactory resolution to the question whether

[462 US 28]

work-product documents are exempt under the FOIA. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*. Under a literal reading of Rule 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5.

[3, 4] We need not rely exclusively on any particular construction of Rule 26(b)(3), however, because we find independently that the Court of Appeals erred in construing Exemption 5 to protect work-product materials only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. *NLRB v Sears, Roebuck & Co.* 421 US, at 148-149, 44 L Ed 2d 29, 95 S Ct 1504. At the time this case came to the Court of Appeals, all of the courts of appeals that

had decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated.⁸ In addition, an overwhelming majority of the Federal District Courts reporting decisions on the issue under Rule 26(b)(3) were in accord with that view.⁹ "Exemption 5 incorporates

[462 US 27]

the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v Grumman Aircraft Engineering Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975) (emphasis added). Under this state of the work-product rule it cannot fairly be said that work-product materials are "routinely" available in subsequent litigation.

The Court of Appeals' determination that a related-litigation test best comported with the qualified nature of the work-product rule in civil discovery—a proposition with which we do not necessarily agree—is irrelevant in the FOIA context. It makes little difference whether a

privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.

[1c] Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the congressional intent to provide "workable" rules. See S Rep No. 813, at 5; HR Rep No. 1497, at 2.

Respondent urges that the meaning of the statutory language is "plain" and that, at least in this case, the requested

[462 US 28]

documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an

8. See *In re Murphy*, 560 F2d 326, 334 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655 (CA6 1976) cert denied, 430 US 945, 51 L Ed 2d 792 97 S Ct 1579 (1977); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 487 F2d 480, 483-384 (CA4 1973). See also *In re Grand Jury Proceedings*, 604 F2d 798, 803 (CA3 1979) (work-product privilege continues at least when subsequent litigation is related). Cf. *Kent Corp. v NLRB*, 530 F2d 612 (CA5) (work-product privilege does not turn on whether litigation actually ensued), cert denied, 429 US 920, 50 L Ed 2d 287, 97 S Ct 316 (1976).

9. See *In re Federal Copper of Tennessee, Inc.*, 19 BR 177 (Bkrtcy MD Tenn 1982); *In re International Systems & Controls Corp. Secu-*

rities Litigation, 91 FRD 552 (SD Tex 1981); *United States v Capitol Service, Inc.* 89 FRD 578 (ED Wis 1981); *In re LTV Securities Litigation*, 89 FRD 595 (ND Tex 1981); *First Wisconsin Mortgage Trust v First Wisconsin Corp.*, 86 FRD 160 (ED Wis 1980); *Panter v Marshall Field & Co.* 80 FRD 718 (ND Ill 1978); *United States v O. K. Tire & Rubber Co.* 71 FRD 465 (Idaho 1976); *SCM Corp. v Xerox Corp.* 70 FRD 508 (Conn), appeal dismissed, 534 F2d 1031 (1976); *Burlington Industries v Exxon Corp.* 65 FRD 26 (Md 1974). See also *Hercules, Inc. v Exxon Corp.* 434 F Supp 136 (Del 1977) (protected when cases are closely related in parties or subject matter); *Ohio-Sealy Mattress Mfg. Co. v Sealy, Inc.*, 90 FRD 45 (ND Ill 1981) (protected in later related litigation).

ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. In *NLRB v Sears, Roebuck & Co.*, supra, we construed Exemption 5 to "exempt those documents, and only those documents, normally privileged in the civil discovery context." 421 US, at 149, 44 L Ed 2d 29, 95 S Ct 1504. (Emphasis added.) It is not difficult to imagine litigation in which one party's need for otherwise privileged

documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged. See id., at 149, n 16, 44 L Ed 2d 29, 95 S Ct 1504.

[1d] Accordingly, we hold that under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered. The judgment of the Court of Appeals is reversed.

It is so ordered.

SEPARATE OPINION

Justice Brennan, with whom Justice Blackmun joins, concurring in part and concurring in the judgment.

The Court rests its judgment on two alternative holdings: one a construction of Federal Rule of Civil Procedure 26(b)(3), ante, at 26, 76 L Ed 2d, at 393; the other a more limited holding under Exemption 5 of the Freedom of Information Act (FOIA), 5 USC § 552(b)(5) [5 USCS § 552(b)(5)], ante, at 26, 76 L Ed 2d, at 393. I find the latter holding unpersuasive and accordingly would rest exclusively on the former.

[462 US 29]

I

I agree wholeheartedly with the Court that Rule 26(b)(3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, "the

literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." Ante, at 25, 76 L Ed 2d, at 393. A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect. We described the reasons for protecting work product from discovery in *Hickman v Taylor*, 329 US 495, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947):

"In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless

interference This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 510-511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

[482 US 30]

The Court of Appeals is doubtless correct in its view that the need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related" litigation) is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. More concretely, disclosure of work product connected to

prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be "related" to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present recurring, parallel factual settings and identical legal and policy considerations.¹ It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the adversary."

[482 US 31]

Id., at 516, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (Jackson, J., concurring). Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled. Nor is the problem limited to Government agencies. Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer

1. It is possible, I suppose, that such suits might be considered "related" in a very broad reading of the Court of Appeals' "related litigation" test; the courts adopting the test have not had occasion to explore its outer boundaries. But this possibility merely reveals a dilemma: If the test is read so broadly as to classify similar but factually unrelated suits as "related," it is virtually no limitation on

the work-product doctrine at all, since almost any work-product document otherwise discoverable under Rule 26(b)(1) will have originated in "related" litigation. But to the extent that the "related" test is read any more narrowly than that, it threatens to cause the harm discussed in text. Hence, the test is either harmful or toothless.

products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an “unrelated” opponent against him and his client. Counsel for less litigious clients as well might have cause for concern in particular cases; fear of even one future “unrelated” but similar suit might instill an undesirable caution, and neither client nor counsel can always be entirely sure what might lie over the horizon. This is precisely the danger of “[i]nefficiency, unfairness[,] . . . sharp practices” and demoralization that Hickman warned against.²

[462 US 32]

I do not understand the Court's holding on this point to be limited to

2. See generally, e. g., *In re Murphy*, 560 F2d 326, 333-335 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655, 659-660 (CA6 1976); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 509 F2d 730 (CA4 1974); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 487 F2d 480 (CA4 1973).

The Court of Appeals reasoned that “[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute.” 217 US App DC 47, 50, 671 F2d, 553, 556 (1982) (footnote omitted). In my view, this mistakes by 180 degrees the significance of the qualified nature of the privilege. As another Court of Appeals has explained:

“Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery. . . .” *Leggett & Platt*, *supra*, at 660.

the FOIA context. The Court itself quite accurately characterizes its first holding as a “particular construction of Rule 26(b)(3).” *Ante*, at 26, 76 L Ed 2d, at 393. Indeed, it could hardly do otherwise, since the plain meaning of Exemption 5 is that the scope of the Exemption is coextensive with the scope of the discovery privileges it incorporates. “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v Sears, Roebuck & Co.*, 421 US 132, 149, 44 L Ed 2d 29, 95 S Ct 1504 (1975) (footnote omitted). See also *id.*, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504; *Federal Open Market Committee v Merrill*, 443 US 340, 353, 61 L Ed 2d 587, 99 S Ct 2800 (1979); *Renegotiation Board v Grumman Aircraft Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975); *EPA v Mink*, 410 US 73, 85-86, 91, 35 L Ed 2d 119, 93 S Ct 827 (1973).³ Thus, nothing in either FOIA or our decisions construing it authorizes us to

Indeed, to the extent that the need for protection of work product does decrease after the end of a suit, that fact might in some cases lower the threshold for overcoming the work-product barrier. A party seeking discovery of work product must show that “he is unable without undue hardship to obtain the substantial equivalent of the materials by other means,” Rule 26(b)(3). What hardship is “undue” depends on both the alternative means available and the need for continuing protection from discovery. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, p 202 (1970).

3. But see *Federal Open Market Committee v Merrill*, 443 US, at 354, 61 L Ed 2d 587, 99 S Ct 2800: “[I]t is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery.” Of course, it is settled that the Exemption does incorporate the work-product doctrine. *NLRB v Sears, Roebuck & Co.*, 421 US, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504.

define the coverage of the work-product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3) in an ordinary lawsuit. If a document is work product under the Rule, and if it is an "inter-agency or intra-agency memorandum or letter" under the Exemption, it is absolutely exempt.⁴

[462 US 33]

II

Since the Court rejects the "related litigation" test under Rule 26(b)(3), and since that holding necessarily governs the application of the work-product doctrine under Exemption 5, it need go no further. The Court proceeds, however, to put forward a second holding directly under FOIA. It reasons that work product generated in connection with a prior, unrelated litigation would not be "routinely" available in subsequent litigation," ante, at 27, 76 L Ed 2d, at 394, because at the time of the Court of Appeals' decision in this case a majority of federal courts that had decided the

issue had rejected the "related litigation" test. Ante, at 26-27, 76 L Ed 2d, at 393-394. This holding apparently would preclude disclosure under FOIA even in a district or circuit where the precedents under Rule 26(b)(3) do incorporate the "related litigation" test, since the "majority view" does not depend on the location of the library in which one reads the cases.⁵ I grant that uniformity of statutory interpretation is a good thing as a general matter, but I cannot see taking it this far.

I confess that the source from which the Court draws its reasoning is a mystery to me. I know of no other statutory context in which the test of discoverability (or anything else) is not what the *correct* view of the law is, but what the *current* [462 US 34]

majority view is.⁶ Certainly the plain language of the statute is to the contrary; it directs a court to exempt material "which would not be available by law to a party . . . in litigation with the agency." 5 USC § 552(b)(5) [5 USCS § 552(b)(5)] (emphasis added). "By law" presumably means "by the law as correctly con-

4. We held in *Sears* that Exemption-5 does not apply to "final opinions" explaining agency actions already taken or agency decisions already made. *Id.*, at 150-154, 44 L Ed 2d 29, 95 S Ct 1504. The gist of our holding was that such documents are not within any privilege incorporated into Exemption 5—specifically, that they are not covered by the Government's executive privilege. *Ibid.* The same would be true of the work-product doctrine; it is difficult to imagine how a final decision could be "prepared in anticipation of litigation or for trial," Rule 26(b)(3). It is also questionable whether such decisions would constitute "inter-agency or intra-agency memorandums or letters," 5 USC § 552(b)(5) [5 USCS § 552(b)(5)].

5. Presumably, this principle would work in reverse as well. That is, if the settled law of a particular district under Rule 26(b)(3) were that a particular type of document (some sort

of investigative report, say) is within the work-product doctrine, but a majority of other courts disagreed, the district court entertaining a FOIA suit would be obliged to follow the majority view and grant disclosure, even though the same document would not be "routinely" disclosed in an ordinary lawsuit in that district.

6. One might posit a different sort of incorporation of case law—one in which the relevant law was that in existence in 1966, when FOIA was enacted. The Court wisely declines to adopt this reading. There is nothing in FOIA that indicates that it intended to "freeze" the law that existed in 1966; the phrase "available by law" certainly seems to refer to the law at any given time. Indeed, this reading would preclude recognition of subsequent changes in statutory law, such as the adoption of Rule 26(b)(3) in 1970.

strued by the court deciding the case at hand," not "by the law as construed (whether correctly or incorrectly) by a majority of other federal courts." The Court draws the words "routinely" and "normally" from *Sears*, supra, at 149, and n 16, 44 L Ed 2d 29, 95 S Ct 1504. But as a quick perusal of that case reveals, all we were saying there was that once a privilege is held to apply under Exemption 5, it applies absolutely, without regard to whether a party in ordinary discovery might be able to overcome the privilege by some showing of need (an understanding the Court itself embraces, ante, at 28, 76 L Ed 2d, at 395). Alternatively, the Court cites our statement in *Grumman Aircraft*, supra, at 184, 44 L Ed 2d 57, 95 S Ct 1491, that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Ante, at 26-27, 76 L Ed 2d, at 394 (emphasis by the Court). Again, however, the context of the quoted passage makes clear that it refers simply to the extent to which the correct state of the law with regard to a privilege may be embodied in cases interpreting a statute or erecting a nonstatu-

tory privilege. The scope of the work-product doctrine on a particular disputed point, for example, may be laid out in some binding precedent of the district court entertaining a given FOIA suit, of the court of appeals for that circuit, or of this Court. Absent a controlling [462 US 35]

precedent, of course, the district court would ordinarily look to the decisions of other courts to inform its own construction of Rule 26(b)(3). But nothing in Exemption 5, *Sears*, *Grumman Aircraft*, or anything else of which I am aware authorizes or directs that district court to do anything other than to determine what the legally correct interpretation of the doctrine is, and then to apply it—even if the interpretation it reaches is contrary to that of a majority of other courts. Under the Court's reading of the word "routinely," however, it appears that the district court would be obliged to adhere to the majority view even if there were unmistakable precedent in its circuit construing Rule 26(b)(3) to the contrary. I see no warrant for this astonishing principle. Hence, although I agree with the Court's construction of Rule 26(b)(3), I join only its judgment.

To: House + Senate members

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MEMORANDUM

March 14, 1991

SUBJECT: Disclosure of Exxon Valdez litigation documents
(W.O. 7LS0985)

TO: Representative Kay Brown

FROM: John B. Gaguine *JB*
Legislative Counsel

You have asked whether the governor may agree, as part of an Exxon Valdez settlement, to keep certain documents confidential that would otherwise be public under state law, especially resource damage assessments. I believe that a recent Alaska Supreme Court decision would prohibit the governor from doing this.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes (AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer quite clear:

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the

record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

I do not think that the "work product" exception to discovery has any relevance here, at least not after a settlement. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While it probably overrides the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

Representative Kay Brown
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I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not apply after a settlement.

It also seems clear that the resource damage assessments would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

(6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I do not see how resource damages assessments would not fall under this definition.

I understand that the attorney general is concerned that some of the litigation-related material, if released, might be used in subsequent litigation against the state. I do not think that this matters. There is nothing in the public records law that provides an exception for records that might be detrimental to the state's interests.^{1/} If the state is already in litigation as a defendant, it might be able to withhold information from a plaintiff under AS 09.25.122 (assuming that the court decided that the "work product" was prepared for all litigation, and not just that where the state was a plaintiff). But if no litigation has yet been brought, I do not think that the state can avail itself of this protection. (Of course, since it is almost two years since the Exxon Valdez grounding, the statute of limitations for tort suits against the state arising from the grounding will likely run soon.)

If I may be of further assistance, please advise.

JBG:pl
91-155.plm

^{1/} In Anchorage School District the court rejected an argument that the settlement could be sealed because the Open Meetings Act, AS 44.62.310 - 44.62.312, allowed executive session for matters which would clearly have an adverse effect upon a government unit's finances. 779 P.2d at 1193 n.5. The court observed, "The people have not delegated to their representatives the power to decide what the public may or may not know."