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Anchorage. Velez became acquainted with G.J. because he was a regular lunchtime customer at the bar where she danced. Velez visited G.J. and her boyfriend at G.J.'s trailer on several occasions and helped G.J.'s boyfriend work on his truck. On November 14, 1985, G.J. went to Velez's body shop to pick up a coat. Velez drove G.J. nome, stopping on the way to purchase blackberry brandy and beer. When they arrived at G.J.'s trailer, she invited Velez in for a drink.

Velez told G.J. about an incident involving his former girlfriend in which he had hit her and forced himself upon her because "he wanted her and he knew that she wanted him." He told G.J. that his former girlfriend had accused him of rape and had obtained a restraining order against him.

After drinking the brandy and beer, Velez asked G.J. to dance for him. She refused. Velez got up and put his arms around G.J., saying that he had not been with a woman for a while. G.J. kissed Velez on the cheek and told him to calm down, reminding him that she had a boyfriend. Velez became more aggressive and held G.J. against himself. G.J. again told Velez to calm down or leave. She moved away from Velez and sat down on the couch. Velez approached G.J. again, saying, "come on, ... I want it and you want it too." G.J. started to get up, but Velez pushed her back down on the couch. He lay on top of G.J. and attempted to separate her legs with his knees, telling her, "come on, you know you want it." G.J. screamed and told Velez to get out. Velez struck her in the face, and they continued to struggle. Eventually, G.J. managed to get away for long enough to pick up the telephone. She threatened to call the police. Velez left the trailer.

G.J. reported the incident to the police. After an initial investigation, a misdemeanor citation was issued against Velez for assault and battery, and the case was apparently referred to the Anchorage Police Department for further investigation of more serious charges.

On November 19, 1985, Velez met S.F. at another Anchorage bar. Velez and S.F. talked and danced. Velez invited S.F. to l[illegible]g her car to his body shop to get an estimate on some work S.F. needed to have done. On November 23, 1985, S.F. went to the body shop to have a headlight repaired. Velez was at the shop with several other people. While Velez was installing the headlight, he suggested that S.F. and the shop owner's girlfriend buy some blackberry brandy and beer. When they returned, everyone drank the brandy and beer and smoked marijuana. During this time, Velez mentioned to S.F. that he had charges pending against him in another state for assault and battery and that he had come to Alaska to get away from them.

After the others left the shop, S.F. asked Velez what she owed him for fixing her headlight. Velez replied, "A hug." S.F. gave Velez a hug and he pushed her down on the couch. S.F. said, "No," and began to struggle. Velez grabbed her by the throat and tried to remove her clothing. S.F. tried to knee Velez in the groin; he said menacingly, "Don't you ever do that again." After removing S.F.'s pants and underwear, Velez had sexual intercourse with her. He got up and placed a blanket on the floor, dragged S.F. off the couch, and had sexual intercourse with her again. Velez subsequently permitted S.F. to leave. S.F. reported the rape to the police later that evening.

Velez testified in his own behalf at trial. Concerning the November 14 attempted rape, he admitted hugging and kissing G.J. but claimed that she started screaming for no apparent reason, so he let go of her and she fell down. According to Velez, he left G.J.'s apartment soon thereafter when efforts to calm her down proved unavailing. Velez did not deny making the statements to G.J. concerning his assault on a former girlfriend. He testified, however, that he had not been charged with rape as a result of the incident and that his former girlfriend's efforts to obtain a restraining order had been dismissed because she failed to appear for a hearing. On cross-examination, Velez denied forcing his former girlfriend to have sexual intercourse with him.

Concerning the November 23 sexual assault on S.F., Velez admitted having sexual intercourse but claimed that the episode was entirely consensual.

On rebuttal, the trial court permitted the state to call Velez's former girlfriend, C.S., as a witness. C.S. testified that she met Velez in September 1985 and went out with him several times. On October 24, 1985, she and Velez spent the evening drinking with several other people at the body shop; Velez was drinking blackberry brandy and beer. Later that evening, Velez invited her to his apartment for a drink. According to C.S., Velez became aggressive and tried to kiss her. She told him that she did not want to have sex with him. They struggled and C.S. began to cry. Velez pulled her down on the floor and forced her to have sexual intercourse. C.S. subsequently attempted to obtain a restraining order, but she did not follow through or file formal charges of assault against Velez because she was afraid of him.

The jury convicted Velez of the attempted sexual assault on G.J. and of the sexual assault on S.F. He thereafter appealed. On appeal, Velez claims that, had separate trials been held on each of the two charges, evidence of his other two acts of sexual misconduct would have been inadmissible.

The proper starting point for analysis of Velez's claim is Alaska Rule of Evidence 404(b):

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident.

The plain language of Rule 404(b) bars the use of evidence of other misconduct only when it is admitted to prove the defendant's character, and only when the purpose of proving character is to establish the defendant's conduct in committing the offense charged. The rule does not operate to forbid evidence of other misconduct when it is relevant to show the defendant's culpable mental state—or *mens rea*—as opposed to the defendant's conduct—or *actus reus*:

> Where the proof of other acts is offered to show that the person engaged in the disputed conduct, the weak probative value of the evidence of other crimes, wrongs, or acts is swamped by the countervailing considerations of fairness and efficiency. Therefore, the general rule is, as stated in Rule 404(b), that other acts may not be used to prove the conduct of the actor. But once it has been shown by other evidence that the act was done and the issue is who did the act and with what mental state, the balance shifts. The probative worth of the evidence when offered for some other purpose may be higher, the need to prove the requisite mental state may be greater, and the prejudice to the defendant may be less. Hence, the balance cannot automatically be struck against admissibility.

22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5239 at 438–39 (1978) (hereinafter Wright & Graham).

When evidence of other misconduct is shown to have relevance to some issue other than the defendant's propensity for conduct similar to the conduct charged, admission of the evidence "is left to the application of the normal rules of relevance...." *Id. See also Huddleston v. United States*, — U.S. —, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Primary among the "normal rules of relevance," of course, is Alaska Rule of Evidence 403,[2] which permits the trial court, as a matter of discretion, to exclude relevant evidence when its probative value is outweighed by its potential for prejudicial impact. Wright & Graham, § 5239 at 439. *See also Ler-*

2. A.R.E. 403 provides:

> *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.* Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*chenstein v. State*, 697 P.2d 312, 315–16 (Alaska App.1985), *aff'd*, 706 P.2d 546 (Alaska 1986).

The issue of admissibility in the present case thus turns initially on the question whether, in relation to each of the two charges against Velez, the evidence of his other misconduct was relevant to prove something besides his propensity to commit the type of conduct charged. If some other legitimate relevance is established, A.R.E. 404(b) is inapplicable; the issue of admissibility shifts to the balancing formula articulated in A.R.E. 403.

One of the purposes for which evidence of other misconduct is expressly allowed under A.R.E. 404(b) is to show intent. "The theory upon which evidence of other crimes is admissible on [the issue of intent] under Rule 404(b) is that its use on the mental element of the offense does not require an inference as to the character of the accused or as to his conduct." Wright & Graham, § 5242 at 487–88. This exception to A.R.E. 404(b) is broadly recognized and as broadly applied. *See, e.g., Huddleston*, 108 S.Ct. 1496. Intent is one of the exceptions expressly listed in A.R.E. 404(b) and is thus clearly recognized under Alaska law, even though the rule has been characterized as one of exclusion rather than inclusion. *See Oksoktaruk v. State*, 611 P.2d 521, 524 (Alaska 1980).

Because the exception for intent might threaten to swallow the rule if too broadly applied, however, two limitations are commonly imposed. First, "[t]he issue of intent must be seriously disputed." Wright & Graham, § 5242 at 489. *See also Freeman v. State*, 486 P.2d 967, 977 (Alaska 1971). And, second, the evidence of other misconduct must be similar to the act of misconduct with which the accused is charged. Wright & Graham, § 5242 at 490–92; *Adkinson v. State*, 611 P.2d 528, 532 (Alaska 1980); *Oksoktaruk*, 611 P.2d at 524.

In the specific context of sexual assault cases where the defendant claims consent, there is abundant case law in other jurisdictions allowing the admission of evidence showing similar sexual acts in order to prove the defendant's intent. *See, e.g., Oglen v. State*, 440 So.2d 1172, 1176 (Ala. Cr.App.1983); *People v. Salazar*, 144 Cal. App.3d 799, 193 Cal.Rptr. 1, 7 (1983); *People v. Jackson*, 110 Cal.App.3d 560, 167 Cal.Rptr. 915, 918–19 (1980); *O'Neal v. State*, 170 Ga.App. 637, 318 S.E.2d 66, 67 (1984); *Baker v. State*, 449 N.E.2d 1085, 1088–89 (Ind.1983); *State v. Gonzales*, 217 Kan. 159, 535 P.2d 988, 989–90 (1975); *Williams v. State*, 95 Nev. 830, 603 P.2d 694, 697 (1979); *State v. Fears*, 69 Or.App. 606, 688 P.2d 88, 89–90 (1984); *State v. Willis*, 370 N.W.2d 193, 198 (S.D.1985); *Rodriguez v. State*, 646 S.W.2d 539, 542 (Tex.App.1982); *State v. York*, 50 Wash. App. 446, 749 P.2d 683, 688–90 (1987). *See generally*, Annotation, *Admissibility, in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other than Prosecutrix*, 2 A.L.R. 4th 330, 345–49 (1980).

In Alaska, the issue is squarely controlled by *Davis v. State*, 635 P.2d 481 (Alaska App.1981), a case that is virtually indistinguishable from Velez's case. In *Davis*, we expressly approved the use of similar crimes evidence to prove the intent of the defendant, who was charged with sexual assault and kidnapping, and who affirmatively asserted the defense of consent:

> In the present case, when Davis took the stand and testified that he had engaged in sexual intercourse with M.M., but that the intercourse was consensual, he affirmatively and specifically placed in issue his intent. Given this testimony, the highly probative nature of the evidence concerning recent similar assaults by Davis is manifest, and the trial court's decision allowing the evidence to be heard by the jury is not an abuse of discretion.

*Id.* at 485 (citations omitted).

The majority of the court in this case is unable to decide whether to distinguish *Davis* or overrule it, so they attempt to do a little of both. The attempt to distinguish *Davis* is wholly unconvincing. While it is true that Davis was charged with kidnapping, a specific intent crime, as well as with

sexual assault, the passage from *Davis* quoted above makes it clear that our holding addressed the relevance of Davis' prior misconduct on the issue of his intent in committing the sexual assault, not on the issue of his intent in committing the kidnapping. We found the evidence to be "highly probative" on the issue of intent, and we found its relevance for that purpose to be "manifest." *Id.*

Moreover, our holding in *Davis* addressed the admissibility of the challenged evidence on the issue of intent, not, as the majority of the court implies, on the issue of common scheme or plan. Indeed, if common scheme or plan had been at issue in *Davis*, it would have been wholly unnecessary for this court to rely on the fact that Davis had expressly raised the defense of consent and thereby placed his intent in issue, because the common scheme or plan exception to A.R.E. 404(b) allows the use of other crimes evidence to prove either conduct or intent. *See* Wright & Graham, § 5244 at 502 ("evidence of a plan may also be admissible to show the doing of the criminal act").

Judge Coats' concurrence suggests that it was necessary to explain Davis' intent toward his victim. Yet, the need to explain Davis' intent with respect to his victim was hardly greater than the need to explain Velez's intent with respect to G.J. and S.F. Other bases for distinguishing *Davis* suggested by Judge Coats are no more persuasive. To the extent that the actions of Smith, Davis' accomplice, needed explanation, that explanation could certainly have been provided without specific reference to the prior sexual assaults. As in *Davis*, the evidence of Velez's prior misconduct in this case placed his actions "in a context." Just as was the case in *Davis*, the issue of guilt here came down to a contest of credibility between the victims and the defense. And there is little reason to suspect that the evidence of prior sexual assault was any less prejudicial in *Davis*—where it was presented through the testimony of an accomplice who was an eyewitness—than it was in the present case—where it was presented through the testimony of the victims themselves.

The reasons advanced in support of overruling *Davis* are equally unconvincing. In opposition to *Davis* and the numerous authorities from other jurisdictions reaching like conclusions on similar facts, Judge Singleton's opinion cites two decisions: *People v. Key*, 153 Cal.App.3d 888, 203 Cal.Rptr. 144, 147–50 (1984), and *State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697, 699–701 (1982) (*en banc*).

These decisions are poorly reasoned. They begin with the premise that rape is a general intent crime, and they point out that a defendant who claims consent admits knowingly engaging in an act of sexual intercourse. From this, the cases prematurely conclude that the defendant, by claiming consent, has admitted both the *actus reus* and the culpable mental state for the offense. They reason that the only fact remaining in dispute is the victim's lack of consent—an issue which they assume to be unrelated to the defendant's mental state. *See Key*, 203 Cal.Rptr. at 148; *Saltarelli*, 655 P.2d at 701. *See also State v. Houghton*, 272 N.W.2d 788, 791–92 (S.D.1978) (overruled by *State v. Willis*, 370 N.W.2d 193, 197–98 (S.D.1985)).

Atop this analytical foundation, *Key*, *Saltarelli*, and similar cases build the conclusion that defendants in rape cases who claim consent do not place their intent in issue. This conclusion is as shaky as its logical underpinnings are flawed. These cases are mistaken in two respects: first, in their understanding of the scope of the intent exception to Rule 404(b), and, second, in their understanding of the elements of the crime of rape—more particularly, the requirement that the state prove the victim's lack of consent.[3]

3. In addition, *Key* seems to place significance on the conclusion that, because the state bears the burden of proving the lack of consent to begin with, the fact that the defendant expressly raises a consent defense adds no new element to the state's burden and therefore cannot be relied on as a basis for justifying the admission of evidence that would not otherwise be permitted. *See Key*, 203 Cal.Rptr. at 148. This reasoning, however, simply misinterprets the common restriction that limits reliance on the intent exception to Rule 404(b) to cases in which intent is

The starting point of analysis in *Key* and *Saltarelli* is that rape is a general intent crime. The underlying premise seems to be that the intent exception to Rule 404(b) has no application—or is at least of less significance—in cases involving only knowing or reckless conduct; the cases seem to assume that for the intent exception to apply, specific intent must somehow be at issue. This is simply incorrect. Rule 404(b) uses the word "intent" as a convenient form of shorthand to denote any aspect of the accused's culpable mental state that is included as an element of the prosecution's case:

> The 'intent' exception should be read broadly so as to cover any required mental element of the crime whether malice or knowledge or the absence of mistake, accident, or duress or intoxication.

Wright & Graham, § 5242 at 487.

The second mistake made by *Key* and *Saltarelli* lies in their characterizing the state's duty to prove lack of consent as one that deals only with the conduct of the victim and that has nothing to do with the culpable mental state of the accused. Even Judge Singleton's opinion in the present case expressly disavows this view and acknowledges that it amounts to a significant oversimplification.

Under Alaska law, the crime of rape—sexual assault in the first degree—is defined to include any act of "sexual penetration with another person without consent of that person." AS 11.41.410(a)(1). We construed this provision in *Reynolds v. State*, 664 P.2d 621, 625 (Alaska App.1983). Under the interpretation we adopted in *Reynolds*, in order to prove the crime, the state must first show an act of sexual penetration by the defendant. This is the prohibited conduct, or *actus reus*, of the offense. The prosecution must next show that the victim did not consent. Lack of consent, a surrounding circumstance, comprises the second element of the state's case. As to each of these two elements, the state is required to prove the defendant's culpable mental state. With respect to the prohibited conduct—the act of sexual penetration—the state must show that the defendant acted knowingly. With respect to the surrounding circumstance—the victim's lack of consent—the state must prove that the defendant acted recklessly.[4]

The state's duty to prove lack of consent thus actually encompasses a two-fold obligation: the first portion of the duty deals with establishing the victim's state of mind and conduct; the second portion addresses the defendant's awareness of the victim's conduct and state of mind, and the defendant's own subjective response to that awareness. These two aspects of lack of consent are inextricably interwoven, and, contrary to the conclusions reached in *Key* and *Saltarelli*, the second aspect plainly involves the defendant's intent—his culpa-

actually disputed. *See Freeman v. State*, 486 P.2d 967, 977–78 (Alaska 1971); Wright & Graham, § 5242 at 489. The significance of the defendant's reliance on a consent defense is not that it imposes on the state the duty to prove a new element, but rather that it places into actual and serious dispute an element that, while there from the outset, might otherwise not have been actively contested.

4. Our interpretation in *Reynolds* was based on our previous ruling in *Neitzel v. State*, 655 P.2d 325, 329 (Alaska App.1982), where we construed the provisions of the Alaska Revised Criminal Code governing general principles of criminal responsibility. Under AS 11.81.600(a), the minimal requirement for criminal liability is "conduct" involving a voluntary act or omission. In all but rare instances, the prohibited conduct must be accompanied by a culpable mental state. AS 11.81.600(b). Under AS 11.81.610, the elements of any crime may be separated into four categories: conduct, surrounding circumstance, result, and culpable mental state. Where no specific provision for a culpable mental state is made in the definition of an offense, AS 11.81.610 makes the following mental states applicable: for conduct, the prosecution must show that the accused acted knowingly; for a result or a circumstance, the prosecution must show that the defendant acted recklessly. The definition of first-degree sexual assault, as set out in AS 11.41.410(a)(1), does not specify a culpable mental state. In *Reynolds*, relying on *Neitzel's* interpretation of AS 11.81.600 and AS 11.81.610, we concluded that, as to the prohibited conduct—sexual penetration—the applicable mental state is "knowingly"; as to the surrounding circumstance—lack of consent—the applicable mental state is "recklessly."

ble mental state.[5]

It is precisely because the notion of consent intertwines the victim's willingness to consent and the defendant's awareness of that willingness that a defendant cannot affirmatively invoke the former without also invoking the latter. Both are integral parts of the same fabric, and when a defendant asserts that he committed an act of sexual penetration with the victim's consent, he also necessarily asserts his own good faith—that he acted with benign intent, neither knowing of nor disregarding the victim's lack of consent.

It follows that, when a defendant affirmatively claims consent, the issue of culpable mental state becomes actually and seriously disputed: the state will not prevail by convincing the jury merely of the victim's subjective unwillingness to engage in sexual penetration with the defendant, but it must also convince the jury that the defendant knew of or recklessly disregarded the victim's wishes. In these circumstances, evidence of other similar misconduct by the defendant should legitimately be available to the state—subject of course to the balancing process of A.R.E. 403—to shed light on the defendant's intent.

Although actually acknowledging that the notion of lack of consent incorporates the defendant's intent, and although actually conceding—albeit reluctantly—that evidence of similar misconduct may have relevance on this issue, Judge Singleton's opinion in this case inexplicably adheres to cases like *Key* and *Saltarelli*, which wrongly reach exactly the opposite conclusion. And in the same breath as Judge Singleton's opinion acknowledges the theoretical relevance of evidence of other misconduct on the issue of intent, it summarily dismisses the relevance as insignificant. In the process, the opinion overlooks the limited reach of A.R.E. 404(b). The point made at the outset of this dissent bears repetition: Rule 404(b) operates to categorically exclude evidence of other misconduct only when the sole relevance of that evidence is to establish the defendant's conduct by proving a propensity to engage in like conduct; once any relevance apart from propensity is established, Rule 404(b) ceases to operate as a prohibition, shifting the question of admissibility to the balancing process established in Rule 403.

The balancing test set out in A.R.E. 403, however, is one that is primarily for the trial court to apply. *Alaska Northern Development, Inc. v. Alyeska Pipeline Service Company*, 666 P.2d 33, 42 (Alaska 1983); *Hawley v. State*, 614 P.2d 1349, 1361 (Alaska 1980); *Dyer v. State*, 666 P.2d 438, 451 (Alaska App.1983). The opinions written by the majority of the court in this case give no meaningful deference to that court's superior command over factual issues. Neither opinion advances a satisfactory explanation for the conclusion that the trial court abused its discretion in applying the balancing test.[6]

5. It might be argued that *Key* and *Saltarelli* are distinguishable because Alaska construes its sexual assault statute differently from California and Washington by requiring proof of recklessness as the culpable mental state the defendant must possess with regard to the victim's lack of consent. No comparable *mens rea* requirement is explicitly recognized in many jurisdictions. This distinction, however, does not restore the validity of the analysis in *Key* and *Saltarelli*. Although Alaska may be unique in affirmatively requiring proof of recklessness with respect to the victim's lack of consent, virtually all jurisdictions recognize, at the very least, a reasonable mistake of fact defense as to the victim's lack of consent. In effect, then, virtually all jurisdictions recognize that the defendant must be shown to have acted at least negligently with respect to the victim's lack of consent. According to Wright & Graham, absence of mistake is among the aspects of culpable mental state included in the intent exception to Rule 404(b). *See* Wright & Graham, § 5242 at 487. Thus, even taking into account the potential differences between Alaska law and the substantive provisions governing sexual assault in California and Washington, *Key* and *Saltarelli* are incorrect in concluding that a consent defense does not place the defendant's intent in issue.

6. Judge Singleton's opinion also somewhat clouds the issue with a discussion of Alaska cases considering other exceptions to A.R.E. 404(b). It discusses the "lewd disposition" rule articulated in *Burke v. State*, 624 P.2d 1240, 1248–50 (Alaska 1980), and subsequently applied by this court in *Moor v. State*, 709 P.2d 498, 505–07 (Alaska App.1985), *Bolden v. State*, 720 P.2d 957, 960–61 (Alaska App.1986), and *Soper v. State*, 731 P.2d 587, 590–91 (Alaska App.1987). All of these cases address a *sui*

In summarily concluding that, for purposes of proving the November 23 sexual assault of S.F., the probative value of Velez's November 14 attempted assault on G.J. was "more than outweighed by the potential for prejudice," Judge Singleton's opinion seems to assume that the only conceivable relevance of Velez's attempted assault on G.J. lies in its tendency to show Velez's recklessness by establishing that he had prior notice that his conduct was offensive to G.J. and that he was therefore aware of a substantial and unjustifiable risk that similar conduct might be offensive to S.F. This is certainly one point of relevance. Although I am far less willing than the majority of this court to dismiss out of hand the probative value of the evidence under this theory, the point is not determinative. For there is a separate theory under which Velez's attempted assault on G.J. is more directly relevant to prove his culpable mental state in assaulting S.F.

It is important to note preliminarily that the mere fact that the state was required to prove that Velez acted at least recklessly with regard to S.F.'s lack of consent could not preclude the presentation of evidence showing that he acted knowingly or intentionally. Obviously, it would be irrational to argue that a man who deliberately raped a woman should thereafter be able to preclude the state from proving his culpable mental state because the evidence established that he acted intentionally rather than recklessly with regard to lack of consent. Such situations are foreseen and dealt with in the Alaska Revised Criminal Code, which expressly provides that recklessness may be established not only by evidence of reckless conduct but also by evidence showing one of the higher levels of culpable mental state. Alaska Statute 11.81.610(c) states, in relevant part: "If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly."

Because Velez placed his culpable mental state in issue by claiming S.F.'s consent, the state was entitled, under this provision, to establish that he acted with knowledge of S.F.'s lack of consent. The evidence of Velez's recent assault on G.J. did just that. Quite apart from its more tenuous tendency to show that Velez's earlier attack on G.J. placed him on notice of the risk that S.F. might find his advances offensive, the attack on G.J. tended to directly and forcefully establish the probability that Velez was fully aware of S.F.'s state of mind and that he knowingly disregarded it.

This theory of relevance, commonly referred to as the theory of probabilities, has long been recognized as legitimate. Wright & Graham ascribe the theory of probabilities to Wigmore and make a point of noting that it is distinguishable from the use of evidence of other misconduct to show propensity:

> The "intent" exception should be read broadly so as to cover any required mental element of the crime whether malice or knowledge or the absence of mistake, accident, duress or intoxication. The the-

*generis* exception that is akin to the "motive" exception expressly provided for in A.R.E. 404(b); the exception permits use of evidence showing prior sexual contact between the defendant and the victim, or a person closely related to the victim, in order to establish the existence of a particular affinity between the defendant and the victim. This exception obviously has nothing to do with the issues of admissibility presented here, and our decisions dealing with this exception are inapposite. Somewhat more pertinent is our decision in *Pletnikoff v. State*, 719 P.2d 1039 (Alaska App. 1986), also discussed by Judge Singleton's opinion and relied on almost exclusively by Velez on appeal. *Pletnikoff* involved a sexual assault prosecution in which the defendant claimed consent. The trial court allowed evidence of a prior episode of sexual contact between the defendant and another woman; it was undisputed, however, that the prior sexual contact was consensual. In reversing as violative of A.R.E. 404(b) the trial court's admission of evidence dealing with the prior episode, our decision in *Pletnikoff* considered and rejected various of the listed exceptions to the rule, including common scheme and plan, *modus operandi*, and motive. The intent exception, however, was not argued or considered as a theory of relevance; the reason for this seems apparent: because the prior incident of sexual contact in *Pletnikoff* was acknowledged to have been consensual, it could have had no conceivable relevance on the issue of intent. To the extent that *Pletnikoff* contains any discussion of the intent exception to Rule 404(b), the discussion is clearly *dicta*, addressing an issue that was not only unnecessary but also not raised.

> ory upon which evidence of other crimes is admissible on these issues under Rule 404(b) is that its use on the mental element of the offense does not require an inference as to the character of the accused or as to his conduct.... As Wigmore explains, the evidence of intent can be offered on the theory of probabilities. We can accept the defense that an accused car thief had a good faith belief that he had permission to take an automobile on one occasion but when the evidence shows that he made similar "mistakes" before, our doubts grow. It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief in guilt.

Wright & Graham, § 5242 at 487–88 (footnotes omitted). It seems to me that this is the precise theory upon which we have previously found comparable proof to have manifest relevance as evidence of intent. *See Davis*, 635 P.2d at 485.

Wright & Graham go on to observe that "[s]imilarity of offenses is an important consideration when the evidence of other crimes is offered to prove intent on Wigmore's theory of improbability [sic]." Wright & Graham, § 5242 at 491. In the present case Judge Johnstone correctly noted numerous points of factual similarity between Velez's assault on S.F. and his earlier assault on G.J. Judge Johnstone also properly considered that the two crimes were closely related in time, occurring within approximately two weeks of each other. Given the circumstantial and temporal similarity between the two offenses, I see utterly no basis for concluding that Judge Johnstone abused his discretion in finding that the probative value of Velez's prior attempted assault on G.J. was substantially outweighed by its potential for prejudicial impact.

In reaching a contrary conclusion and finding that the evidence of Velez's other assaults was more prejudicial than probative, the majority of the court appears to misunderstand the relevance of the disputed testimony under the theory of probabilities. Ironically, it is perhaps because the disputed testimony has such forceful weight as evidence of probability that the majority of the court confuses it with impermissible evidence of propensity.

Certainly, the evidence of Velez's other sexual misconduct in this case must have had compelling impact, and in all likelihood it made the jury's task a relatively simple one. Yet, the chief convincing force of the disputed testimony lay not in its indirect tendency to establish Velez's guilt by showing that he was the type of person who committed sexual assaults and that he must therefore have acted in conformity with his character in committing the sexual assaults charged. Rather, the evidence had more obvious and immediate impact because it directly refuted Velez's claim that he acted with innocent intent. That Velez might falsely be accused of rape after engaging in consensual sexual intercourse with one woman would not, in the abstract, be implausible. But the evidence here showed that in a one-month period Velez engaged or attempted to engage in sexual intercourse with three separate women, all of whom claimed rape.

In light of this evidence, the probability that Velez acted out of a reasonable and good faith belief that he was engaging in consensual sexual intercourse seems staggeringly low. Crucially, the conclusion that Velez's consent defense is improbable is one that derives exclusively from the sheer improbability of three false accusations arising under similar circumstances in such a short period of time. This conclusion is distinct from and entirely independent of any tendency of the disputed evidence to show propensity; it does not entail the intermediate, and impermissible, inference that Velez is the type of person who commits rape and that he must therefore have committed the rapes with which he was charged: "It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief in guilt." *Id.*

The force of the disputed testimony as evidence of probability is, in my view, far more compelling than its impact as evidence of propensity. The mere fact that

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mmitting the sexual
ther, the evidence
immediate impact
futed Velez's claim
ocent intent. That
e accused of rape
ensual sexual inter-
n would not, in the
. But the evidence
one-month period
npted to engage in
th three separate
laimed rape.

nce, the probability
f a reasonable and
e was engaging in
course seems stag-
ly, the conclusion
ense is improbable
clusively from the
three false accusa-
ar circumstances in
time. This conclu-
d entirely indepen-
f the disputed evi-
y; it does not entail
npermissible, infer-
ype of person who
he must therefore
pes with which he
e improbability of
han any inference
the accused that
uilt." *Id.*

uted testimony as
is, in my view, far
its impact as evi-
he mere fact that

the evidence is compelling evidence of Velez's guilt should hardly serve as a basis for its exclusion.

Under the theory of probabilities, moreover, the evidence of Velez's sexual assault on S.F. is at least as relevant to establish his intent in committing the attempted assault on G.J. as the evidence of the attempt on G.J. is to show his intent in the assault on S.F. The chronological order of the two assaults is unimportant to probative value under the theory of probabilities, because the issue of whether Velez had "prior notice" that his conduct was offensive simply is not germane. It is the fact of the two occurrences that renders the existence of the culpable mental state significantly more probable in each case, regardless of the order in which the offenses occurred. To the extent that there may be any distinction in probative value, the subsequent sexual assault would seem to have greater relevance as evidence of intent in the earlier case, because the earlier assault on G.J. was charged as an attempt, an offense involving specific intent.

The admissibility of the evidence relating to Velez's uncharged October assault on his former girlfriend, C.S., remains to be considered. While the circumstantial similarities of the October assault are perhaps not as great as the similarities between the assaults on G.J. and S.F., they are nonetheless significant. The October assault was also closely related in time to the two charged offenses. Even more significantly, the evidence of the October assault on C.S. was admitted on rebuttal, in direct response to testimony by Velez that inaccurately explained his prior differences with C.S. In this context, admission of C.S.'s testimony concerning the prior offense was not an abuse of discretion.

Given the cross-admissibility of the challenged evidence of other misconduct, I would conclude that the trial court's failure to grant a severance was, at most, harmless error.[7] Accordingly, I would affirm Velez's conviction.


7. Velez also argues that the trial court erred in denying a motion for continuance made by his trial counsel. In requesting the continuance, however, Velez's trial counsel asserted only a generalized need for additional time to prepare, without specifying any particular matter that remained to be done. On appeal, Velez has failed to point out any specific deficiency or omission as having resulted from inadequate preparation by trial counsel or from the denial of the requested continuance. Velez does not claim that his trial counsel afforded him ineffective assistance. The time given to Velez's trial counsel for preparation prior to trial—a period of approximately five weeks—is certainly not in and of itself so short as to give rise to an inference that effective assistance could not be provided. Absent a more specific showing of prejudice, I would find no abuse of discretion in the trial court's denial of Velez's motion for a continuance. *Patterson v. State*, 689 P.2d 146, 148 (Alaska App.1984).

FBX News Miner 2/14/91

# Defense witnesses rebut girl's testimony in trial

By ANNA FARNESKI
*Staff Writer*

A man charged with raping a 12-year-old girl in 1988 didn't live at the apartment where the girl claims the rape occurred until 1989, defense witnesses testified Wednesday in the trial of Christopher Paschall.

According to Paschall's mother and university housing records, Paschall was living in Nerland Hall on the University of Alaska Fairbanks campus in the fall of 1988.

Patricia Paschall and her son's former roommate testified Wednesday as the defense began presenting its case to the jury. This trial is the first of eight the 21-year-old Paschall faces in connection with the alleged rape and sexual abuse of 11 teen-age girls between 1988 and 1990.

According to the state, Paschall lured the girl to his Judd Street apartment and raped her. In a series of tape-recorded interviews Paschall at first denied having any contact with the girl. He later said the girl performed oral sex on him and he could not recall if he used force.

Paschall is charged with two counts of first-degree sexual assault and two counts of first-degree sexual abuse of a minor in connection with the incident.

However, according to defense attorney James Hackett, Paschall never had sex with the girl. Hackett said the girl, who is now 15, was told what to say by police. If the assault occurred in 1989, the girl would have been 13, and the jury could not convict Paschall of sexual abuse of a minor. A victim must be 12 years old or younger under that law.

The girl testified earlier this week that the assault occurred in the fall of 1988. Her mother testified the teen-ager told her about the assault in the spring of 1989 and she reported it to police.

In one tape-recorded conversation with Fairbanks police detectives, Paschall said he and and the girl were intimate at the Flintstone Apartments on Judd Street. Paschall changed his recollection about the incident more than once, including how long his "fling" with the girl lasted, what they did and when it happened.

But, according to Wednesday's testimony, Paschall didn't live at the apartment complex off South Cushman Street until a year later. Paschall did not testify Wednesday.

According to Paschall's mother, her son moved into the Flintstone Apartments in the fall of 1989 and lived with a boyhood friend for approximately two weeks at the end of September and beginning of October. Patricia Paschall said her son's friend, Joey Robertson, leased the apartment and Christopher Paschall paid him rent.

She told the jury that her son moved around town between various apartments and home during the past three years.

Robertson testified that he didn't move into the apartment until September 1989 and moved out in late October. He said he had never lived there before, and produced copies of rent receipts.

Patricia Paschall also testified about the blue car her son drove. Earlier this week, the victim said Paschall drove her from The Center in a blue car. Patricia Paschall said she and her husband gave their son a blue Dodge for Christmas in 1988, but that it was the only car Christopher Paschall owned and that he didn't get to drive it until after Dec. 27.

Following conviction, the second trial is moved ...

Anch Times 2/24/91

# Rape trial moved to Anchorage

ASSOCIATED PRESS

FAIRBANKS — Extensive newspaper coverage of Christopher Paschall's first trial on rape and sex abuse charges here has forced the second one to be held in Anchorage, a Superior Court Judge has ruled.

Judge Jay Hodges ordered that the trial be moved to Anchorage next month because he said an impartial jury could not be found in Fairbanks. Forty-nine of 54 prospective jurors said on Wednesday that they had heard about Paschall's first trial.

Paschall has been charged with raping and sexually abusing 11 girls between 1988 and 1990. A total of eight trials is planned.

Earlier this week, a jury found him guilty of all charges in the first trial.

Jury selection for the second trial began on Wednesday. Paschall is accused of luring a 13-year-old girl into his car in 1989 and assaulting her.

Hodges said he and attorneys would return to Fairbanks for the third trial and try to select a jury there again. The first trial lasted one week.

Defense attorney James Hackett had requested that the trial be moved to another city because of pretrial publicity. Jury selection in the first trial was not difficult, but an article on the jury's verdict was published on the front page of the Fairbanks Daily News-Miner Tuesday, and many of Wednesday's jurors told the judge they saw it.

HB

106

# Alaska Association Chiefs of Police

February 2, 1991

Representative Dave Donley
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

Dear Representative Donley,

I am writing this letter to express the support of the Alaska Association of Chiefs of Police for House Bill 106. Existing law only allows for imposition of five years of probation. We support extending this to ten years as proposed in your bill.

Probation can be an excellent tool in protecting the public. We submit, however, that judges under current law are too limited and should be given the ability to require persons convicted of serious crimes to be monitored and supervised for longer periods of time when necessary.

If we can be any assistance in the passage of your bill, please contact me.

Sincerely,

Duane S. Udland
President

BILL NO: HB 106

DATE: 2/8/91

TITLE: An Act Extending the Maximum Period of Probation

CONTACT: Gayle A. Horetski
Deputy Commissioner

DEPARTMENT OF PUBLIC SAFETY

HB 106 extends, from five to ten years, the maximum period of probation to which a convicted criminal defendant can be sentenced. There may be situations in which the court wishes to continue probation supervision of an offender for longer than the five-year period now allowed by law. This bill would allow the courts the flexibility to fashion a sentence which best fits a particular offense or defendant.

The Department of Public Safety supports this bill.

Richard L. Burton
Commissioner

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 106

Revision Date: _____
Title: An Act Extending the Maximum Period of Probation
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments

COMPONENT SERIAL NO. | | 7 | 9 | 9 |

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not Included)

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

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER/PROG RCPT | | | | | | |
| **TOTAL** | -0- | -0- | -0- | -0- | -0- | -0- |

POSITIONS:

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

Estimate of current year impact None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated

Prepared by: Gayle A. Horetski
Phone: 465-4322
Division: Commissioner's Office
Date: 2/7/91

Approved by Commissioner: Gayle A. Horetski for Richard L. Burton
Agency: Department of Public Safety
Date: 2/8/91

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

Rev 10/90

BILL NO: HB 106

DATE: February 15, 1991

TITLE: An Act extending the maximum period of probation after conviction.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence
and Sexual Assault



The Council on Domestic Violence and Sexual Assault supports HB 106. This bill changes the maximum allowable period of probation from 5 years to 10 years.

The Council supports this legislation primarily because of its effect on sex offenders who have extremely high rates of recidivism. In order to prevent re-offending, sex offenders should be monitored closely and for a substantial amount of time. Monitoring is particularly necessary for offenders who do not participate in or complete treatment while incarcerated. However, offenders who do engage in treatment while incarcerated also need continuing treatment and parole supervision after their release to monitor their life-style and behavior. Monitoring the behavior of sex offenders for a longer period of time will help protect victims of crime.

Respectfully submitted, Andy Klamser

Andy Klamser, Chair
Council on Domestic Violence
and Sexual Assault

# FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. H.B. 106

Revision Date: _____ Department Affected: Corrections

Title: An act relating to the maximum period of probation... BRU: _____

Component: _____

Sponsor: House Judiciary Committee

Requestor: _____ COMPONENT SERIAL NO. | | | | |

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| **TOTAL** | | | | | | |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
The number of individuals receiving 10 year probation periods is not quantifiable, the impact may be on how many instances would represent serving suspended sentences as part of the probation stipulations.

Prepared By: Tom Sutton, Director Tom Sutton Phone: 465-3376

Division: Administrative Services Date: 2-10-91

Approved by Commissioner: Lloyd Hoses

Agency: Department of Corrections Date: _____

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

Rev 10/90

# FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 106

Revision Date: _____ Department Affected: Department of Law

Title: "An Act extending the maximum period of probation..." BRU: Prosecution

Component: Criminal Justice Litigation

Sponsor: House Judiciary Committee

Requestor: House Judiciary Committee COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
This bill amends AS 12.55.090(c) to extend the maximum period of probation after conviction to ten years from five years. This is a sentencing provision that may have some impact on Probation and Parole, but it will not have an impact on the Department of Law.

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: February 11, 1991

Approved by Commissioner: Richard I. Pegues/FOR Charles E. Cole, Attorney General

Agency: Department of Law Date: February 11, 1991

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

# FISCAL NOTE

**STATE OF ALASKA**
**1992 LEGISLATIVE SESSION**

**BILL NO.** HB 106

**Revision Date:** December 19, 1991 **Department Affected:** Department of Law
**Title:** "An Act extending the maximum period of probation..." **BRU:** Prosecution
**Component:** Criminal Justice Litigation
**Sponsor:** House Judiciary Committee
**Requestor:** Governor's Office **COMPONENT SERIAL NO.** 9 3

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

| OPERATING | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL | | | | | | |
| REVENUE FUND SOURCE: | | | | | | |

**FUNDING: (Thousands of Dollars)**

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER FUND SOURCE: | | | | | | |
| TOTAL | | | | | | |

**POSITIONS:**

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

**Estimate of current year impact:**

**ANALYSIS: (Attach a separate page if necessary.)**
This bill amends AS 12.55.090(c) to extend the maximum period of probation after conviction to ten years from five years. This is a sentencing provision that may have some impact on Probation and Parole, but it will not have an impact on the Department of Law.

**Prepared By:** Richard L. Pegues, Director **Phone:** 465-3672
**Division:** Administrative Services **Date:** December 19, 1991
**Approved by Commissioner:** Richard L. Pegues for Charles E. Cole, Attorney General
**Agency:** Department of Law **Date:** December 19, 1991

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).
Rev 10/7/91

# FISCAL NOTE

**STATE OF ALASKA**
**1991 LEGISLATIVE SESSION**

**Bill No.** HB 106

Revision Date:
Title: An Act extending the maximum period of probation after conviction
Sponsor: Judiciary Committee
Requestor: Judiciary Committee

Department Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 92 | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS & CLAIMS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUNDS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8228
Division: Alaska Court System Date: 02/08/91

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System Date: 02/08/91

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

Rev 10/90

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 4, 1991 FURTHER REFERRALS: Finance

Date of Committee Action: 2-11-91

The JUDICIARY Committee considered: HB 106

HOUSE BILL NO. 106 EXTEND MAXIMUM PERIOD OF PROBATION

"An Act extending the maximum period of probation after conviction."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

H yes [X] zero fiscal note LAW, Pub. Saf., Corrections, Court [ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

| | Check appropriate column: | Do Not Pass | No Rec | Amend |
|---|---|---|---|---|
| Dave Donley | | | | |
| [illegible] | | | | |
| Mark [illegible] | | | | |
| Terry Martin | | | | X needs true fiscal no |
| Kevin Pat Parnell | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Dave Donley
Chairman's Signature

# HOUSE BILL NO. 106

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/4/91
Referred: Judiciary, Finance

## A BILL

## FOR AN ACT ENTITLED

"An Act extending the maximum period of probation after conviction."

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

* **Section 1.** AS 12.55.090(c) is amended to read:

(c) The period of probation, together with any extension, **may** [SHALL] not exceed **10** [FIVE] years.

* **Sec. 2.** AS 12.55.090(c), as amended by sec. 1 of this Act, does not apply in the case of a conviction for a criminal act committed before the effective date of this Act. unless appl.

MG - allow - Rule 35.1 motion

Cmpt. Amend



New Text Underlined [DELETED TEXT BRACKETED]

**Cited** in Fermoyle v. State, 638 P.2d 1320 (Alaska Ct. App. 1982); Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982); State v. Price, 715 P.2d 1183 (Alaska Ct. App. 1986).

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**Collateral references.** — Power of state court, during same term, to increase severity of lawful sentence — modern cases. 26 ALR4th 906.

**Sec. 12.55.090. Granting of probation.** (a) Probation may be granted whether the crime is punishable by fine or imprisonment or both. If a crime is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

(b) The court may revoke or modify any condition of probation, or may change the period of probation.

(c) The period of probation, together with any extension, shall not exceed five years.

(d) *[Repealed, § 11 ch 68 SLA 1965.]*

(e) *[Repealed, § 11 ch 68 SLA 1965.]* (§ 8.09 ch 34 SLA 1962; am § 25 ch 43 SLA 1964; am § 11 ch 68 SLA 1965)

NOTES TO DECISIONS



I. GENERAL CONSIDERATION.

**Parallels 18 U.S.C. § 3651.** — Alaska's probation statutes, this section, AS 12.55.080, and 12.55.100 closely parallel the federal statute, 18 U.S.C. § 3651, which empowers federal district courts to grant probation. Brown v. State, 559 P.2d 107 (Alaska 1977).

The Alaska probation statutes, this section and AS 12.55.080 and 12.55.100, use much of the same language as 18 U.S.C. § 3651 (1976), and were apparently derived from the federal law. Gonzales v. State, 608 P.2d 32 (Alaska 1980).

Alaska Statutes 12.55.080 and this section appear to have been modeled after the federal statute, 18 U.S.C. § 3651. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

**This section and AS 12.55.080 construed in pari materia.** — Since both essentially identical sections were enacted together in § 1, ch. 195, SLA 1955, AS 12.55.080 and this section must be construed with reference to each other as in pari materia. Jackson v. State, 541 P.2d 23 (Alaska 1975).

**Second sentence of subsection (a) construed.** — An appropriate construction of the segment of this statute which provides "if a crime is punishable by both fine and imprisonment the court may impose a fine and place the defendant on probation as to imprisonment" is that it authorizes the trial court to impose a fine as a separate punishment in addition to probation where the penalty provision of the violated criminal statute provides for both fine and imprisonment. Any fine meted out as a sanction by the trial court in such circumstances would be subject to the fine limitation prescribed under the penalty section of the statute involved. Brown v. State, 559 P.2d 107 (Alaska 1977).

**Fine as condition of probation.** — Sentencing court may impose a fine as condition of probation upon a defendant's conviction of a crime which is not directly

HB

1099

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 5, 1991 FURTHER REFERRALS: Finance

Date of Committee Action: 3-7-91

The JUDICIARY Committee considered: HB 109

HOUSE BILL NO. 109 APPROP: OIL SPILL LITIGATION

"An Act making an appropriation to the Department of Law to pursue litigation resulting from the Exxon Valdez oil spill losses; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

| | Check appropriate column: | Do Not Pass | No Rec | Amend |
|---|---|---|---|---|
| Drue Dudley | | | | |
| | | | | |
| | Mark Boyle | | X | |
| | Terry Martin | | X | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Drue Dudley
Chairman's Signature

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY**
**STATE OF ALASKA**

COPY

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

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

**MEMORANDUM** February 15, 1991

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

**TO:** Senator Sam Cotten

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

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

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

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

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

DISCUSSION.

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

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

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

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

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

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

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

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

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

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

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

III. Settlement Providing for Services or Property.

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

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

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

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

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

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

PF:lmb
91-046.lmb

# Alaska State Legislature


## House of Representatives

House Judiciary Committee
**Chairman Dave Donley**

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712


February 19, 1991

The Honorable Charles E. Cole
Attorney General
P.O. Box K
Juneau, Alaska 99811

Dear Attorney General Cole:

I am writing to confirm your appearance before the House Judiciary Committee on February 22, 1991 at 1:30 p.m., and at that time will provide the committee with a written opinion addressing the following questions:

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

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

In addition, the committee would appreciate your comments on the attached work draft of legislation proposed by Representative Gruenberg. For your information, a copy of the draft legislation and a copy of a relevant legal opinion from our legislative counsel are attached.

Thank you very much for your cooperation.

Very truly yours,

Dave Donley

Dave Donley, Chair

DD:lho

# Alaska State Legislature


## House of Representatives

House Judiciary Committee

**Chairman Dave Donley**

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712


February 21, 1991

The Honorable Charles E. Cole
Attorney General
P.O. Box K
Juneau, Alaska 99811

Dear Attorney General Cole:

At your request, and as a courtesy to you, the House Judiciary Committee has agreed to put off your appearance before the committee that was previously scheduled for February 22, 1991. Your appearance has been rescheduled to 1:30 p.m. on February 27, 1991. At that time, we look forward to receiving the information requested in my letter to you of February 19, 1991 (copy attached).

Thank you very much for your continuing cooperation.

Very truly yours,

Dave Donley

Dave Donley, Chair

DD:lho

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

February 20, 1991

The Honorable Walter Hickel
Governor of the State of Alaska
State Capitol
P.O. Box A
Juneau, Alaska 99811-0101

Dear Governor Hickel:

Last year Congress passed landmark oil spill legislation. With the President's signature on August 18, 1990, a 15-year deadlock over the issue of state law preemption was resolved, and comprehensive, badly needed reforms were enacted into law ("Oil Pollution Act of 1990," P.L. 101-380).

The catalyst for the oil spill legislation was the Exxon Valdez disaster in Alaska. Compounded by a woefully inadequate cleanup response by Alyeska, the Exxon Valdez spill cast serious doubt on the reliability of the Trans-Alaska Pipeline System ("TAPS") for transporting oil in a safe and environmentally sound manner.

In the Oil Pollution Act, Congress sought to assure increased government oversight and operational improvements in the delivery system for Alaska oil by establishing a Presidential Task Force on the Trans-Alaska Pipeline System. As set forth in Title VIII, the Task Force is to conduct a comprehensive audit and report to Congress on what structural and operational improvements are necessary to TAPS in order to prevent oil spills and other damage to the environment and public health.

In recognition of the important State role in regulating TAPS, the Presidential Task Force includes three members nominated by the Governor of Alaska.

As the principal congressional author of the Presidential Task Force on TAPS, I am dismayed that the Bush Administration and the State of Alaska have failed to carry out the mandate of the law.

The need for the Presidential Task Force on TAPS is clear. For example, in March 1990, the General Accounting Office testified at a hearing that I chaired on TAPS that:

> "The pipeline has not received the systematic, comprehensive oversight needed to ensure compliance with operational safety, emergency response, and environmental problems."

At that same hearing, the State of Alaska cited serious pipeline corrosion problems and inadequate technology to control air (vapor recovery system) and water (ballast water treatment system) pollution. The Department of Environmental Conservation's testimony pointed out Alyeska's habit of spending money on lawyers to fight environmental enforcement rather than installing pollution control technology:

> "Alyeska promised in the lease covenants to stay abreast of technology developments and to continually upgrade equipment. In our view, however, the difference between what was promised and what was delivered was substantial."

The most timely example of why a comprehensive audit of TAPS is critical is the acknowledgement by Exxon that wastes from its California operations have been transferred in tanker

ballast water for disposal at the TAPS terminal facilities in Valdez. This practice raises serious concerns both about the extent of pollution in Prince William Sound caused by TAPS operations and about the oil industry's commitment to protect the Alaskan environment.

The oil industry assured Congress that the Trans-Alaska Pipeline System would be state-of-the-art and that the environmental impacts would be minimal when pipeline construction was authorized in 1973. Repeatedly, I have heard similar promises about the oil industry's plans for developing the coastal plain of the Arctic National Wildlife Refuge.

The State of Alaska has a vital role in assuring that the oil industry lives up to its promises. I led the fight in Congress to protect the rights of states to enact tougher oil spill laws than the Federal government. Yet recent reports that your Administration canceled oil spill regulations intended to implement state laws passed after Exxon Valdez--after giving Alyeska a "sneak preview"--are deeply troubling to me.

Governor, the integrity of the Trans-Alaska Pipeline System, and the State of Alaska's commitment to environmental protection, will be an important part of the congressional deliberations on ANWR and the other Alaska oil and gas development issues.

Sincerely yours,

GEORGE MILLER
Vice Chairman

cc: The Honorable Ben Grussendorf
Speaker of the House

The Honorable Richard Eliason
President of the Senate

For Dave Donaldson
FR: Johanna

463-3944

For immediate release:

March 7, 1991

Contact: Sam Fortier (907) 277-4222

Alan Charney (212) 505-5566

**NATIVE PEOPLES DERAIL EXXON-GOVERNMENT SETTLEMENT TALKS**

**-FEDERAL JUDGE GRANTS 10 DAY TEMPORARY RESTRAINING ORDER-**

Washington, DC -- Judge Stanley Sporkin of Federal District Court in Washington, DC today granted a 10 day Temporary Restraining Order blocking the completion of any settlement between Exxon, The State of Alaska and the Federal Government on claims arising from the 1989 spill of the Exxon Valdez.

This 10 day TRO is effective immediately pending the results of a hearing before Judge Sporkin to be held on Monday, March 11th at 10:00 am.

On Wednesday, March 6th, three Native Corporations and other parties from Prince William Sound and Lower Cook Inlet filed an injunction against state and federal officials involved in the Exxon settlement talks. The Native Corporations are seeking a permanent injunction that would halt further negotiations on or implementation of the settlement agreement.

--MORE--

**NATIVES STOP SETTLEMENT**

"Today, we have taken the first step in assuring that Native interests will be protected in any settlement," said Charles Totemoff, President of Chenega Corporation. "Our intention is to be fully involved in these settlement talks because any settlement concerns the future of our land and livelihood." /

The Native Corporations are seeking three remedies through their legal action:

(1) to restrain officials from signing or implementing a settlement agreement with respect to their "selected" lands and any proceeds from this land;

(2) to segregate any payments for damages to these "selected" lands in an interest-bearing account;

(3) to halt further negotiations until the Native Corporations are fully involved.

The Chenega, Port Graham and English Bay Corporations claim that the proposed settlement could weaken the Native claims for damages. This would violate federal laws and regulations because thousands of acres of federal lands, particularly in the Kenai Fjords and Chugach National Forest, has been "selected" for ownership by Native Corporations under the Alaska Native Claims Settlement Act (ANSCA).

--MORE--

**NATIVES STOP SETTLEMENT**

Under ANSCA, the federal government is required to obtain and consider the views of Native Corporations prior to making any contractual agreements on "selected" lands. "Selection" is the first step in taking ownership of lands by the Native Corporations.

Gail Evanoff, another Chenega leader, said that " the 10 day TRO is a real victory for our people. It puts Exxon and the government on notice that there can be no settlement without Native participation. Some of our land is still covered with oil two years after the spill. There are no seal; no otter. We can't hunt or fish as we used to. Exxon must treat us fairly. They can't hide behind a deal with the government.

* * * * *

file:ua\al-pr.16

FEB 15 '91 15:53 LEG. AFFAIRS - WASILLA

FAX TRANSMITTAL MEMO

TO: House Judiciary

DEPT: FAX #:

FROM: Mat-Su LIO PHONE: 376-3704

CO: FAX #: 376-6180

NO. OF PAGES 1

Post-it™ brand fax transmittal memo 7671

I make the following comments as a very concerned, troubled and angry Alaskan.

I wish to make my support known regarding funding for continued Oil Spill Litigation. I think it is imperative that we send a clear message to the Oil Companies that we are determined to do whatever we have to, and spend whatever we have to to secure a fair and just settlement for the damage they have done to our lands.

I must tell you however, my overriding concern at this point in time concerns the current negotiations for an out-of-court settlement being pursued by Mr. Hickle.

Make no mistake about it, the people of Alaska have a certifiable ego maniac governor who is playing a fast and loose game of monopoly with Exxon on a settlement. If he is not stopped now all Alaskans concerned with a fair and just settlement are going to find themselves not able t o pass go or collect 200 dollars, and Exxon is going to own Boardwalk and Park Place. What we have here is another Haul Road fiasco in the making. I am convinced this governor is prepared to sell the state short for his own ego gratification at reaching a settlement. The legislature should act immediately to pass legislation that will require any out of court settlement be approved by the legislature. The Governors attitude of "I alone will make the determination of what is a fair settlement, and the people of Alaska and their legislative representatives will hear about it when it is a done deal" is insulting beyond belief.

In closing I would say this to you, and the rest of the legislature, you as a body are the only ones that can put a stop to this exercise in ego mania and secret agendas by our governor. You not only have the right, you have the duty and responsibility to protect the interests of Alaska and its people. I urge you to pass this legislation swiftly and decisively, because as you know, this secret deal is being made as we speak. Act and you will gain the respect and appreciation of the people of Alaska. Vacillate until it is too late and you will gain their contempt.

Laura M. Schafer

LAURA M. SCHAFER
P.O. Box 877569
WASILLA, AK 99687
373-3195 Hm 376-2414 WK

DRAFT

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

February 27, 1991

663-91-0339

465-3600

Deposit and accounting for
Exxon Valdez oil spill
settlement proceeds

James L. Baldwin
Assistant Attorney General
Governmental Affairs

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

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

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

thinks best.

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

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

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

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

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

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

The Clean Water Act provides for disposition by state and

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

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

33 U.S.C. 1321(f)(5). The Act is further implemented by federal regulations. These regulations authorize the deposit of recoveries in separate accounts within the state treasury or in interest bearing accounts established outside the state treasury. 43 C.F.R. 11.92. Based on this statutory and regulatory framework, we conclude, that the Clean Water Act requires the dedication of settlement proceeds as a condition of participation in a joint enforcement effort. We consider a joint enforcement effort effective and proper in this case.

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

> The proceeds of any [state revenue] shall not be

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

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

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

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

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

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

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

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

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

The general fund is not the equivalent of the state treasury. All public money and revenue coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose, constitute the general fund of the state. Navajo Tribe v. Arizona Dept. of Admin. 528 P2d 623 (Ariz. 1975). State v. Bates, 18 S.E. 2d 346, 351 (S.C. 1941) Bd of Ed of Wyoming County v. Bd of Public Works, 109 S.E. 2d 551 (W. Va. 1959). However, a requirement to deposit dedicated receipts in the general fund does not cause them to lose their restricted status. Municipality of Metropolitan Seattle v. O'Brien, 544 P.2d 729 (Wash.1976).

We believe that it is reasonable to interpret section 020

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

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

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

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

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

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

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

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

the Clean Water Act.

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

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

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

The attorney general could agree to form an intergovernmental trust

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

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

In a memorandum attached to your February 19 letter,

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

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

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

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

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

There are several ways to illustrate that such a retained

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

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

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

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

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

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

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

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

JLB:jr

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

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|---|---|
| THE STATE OF ALASKA, on its own behalf, and as public trustee and as parens patriae for the citizens of the State,<br><br>Plaintiff,<br><br>vs.<br><br>EXXON CORPORATION, a New Jersey corporation; EXXON PIPELINE COMPANY, a Delaware corporation; EXXON SHIPPING COMPANY, a Delaware corporation; ALYESKA PIPELINE SERVICE COMPANY, a Delaware corporation; AMERADA HESS PIPELINE CORPORATION, a Delaware corporation; ARCO PIPE LINE COMPANY, a Delaware corporation; BP ALASKA PIPELINES, INC., a Delaware corporation; MOBIL ALASKA PIPELINE COMPANY, a Delaware corporation; PHILLIPS ALASKA PIPELINE CORPORATION, a Delaware Corporation; UNOCAL PIPELINE COMPANY, a California corporation,<br><br>Defendants. | Case No. 89-06852<br><br>COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES, CIVIL PENALTIES AND INJUNCTIVE RELIEF |



The plaintiff, by and through its attorneys, State of Alaska Department of Law and Preston, Thorgrimson, Ellis & Holman, on behalf of itself and as public trustee and as parens patriae on behalf of all natural persons residing within the State of Alaska, brings this action and complains and alleges as follows:

## JURISDICTION AND VENUE

1. This is a civil action for compensatory and punitive damages, civil penalties and injunctive relief for

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losses sustained by plaintiff arising out of, and resulting from, the unlawful and negligent discharges of crude oil and other hazardous substances into Prince William Sound by the T/V EXXON VALDEZ ("EXXON VALDEZ"), and from the intentional and negligent acts of defendants before or after the crude oil and other hazardous substances were discharged into Prince William Sound.

2. Subject matter jurisdiction is proper pursuant to Alaska statutory and common law including AS 22.10.020(a) and AS 09.05.015 and general maritime law.

3. Personal jurisdiction is proper because each defendant either transacts business in or has sufficient contacts with the State for purposes of personal jurisdiction.

4. Venue is properly laid in the Third Judicial District pursuant to AS 22.10.030 and Alaska Civil Rule 3(c) because the claims herein arose in the Third Judicial District and because defendants are present and doing business in this judicial district.

**THE PARTIES**

5. Plaintiff State of Alaska, (the "State") is a sovereign state of the United States. The State appears on its own behalf as the owner of lands, waters and resources of the State, on behalf of all administrative departments and agencies of the State, and as parens patriae and public trustee for the citizens of the State of all lands, waters and resources within the jurisdictional boundaries of the State. Under the common law and the common use clause of the Alaska

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Constitution, Article VIII, Section 3, plaintiff is the public trustee of and possesses sovereign interests in State lands, waters and resources. Plaintiff may maintain an action as parens patriae on behalf of its citizens and to protect and defend its sovereign interests. The public trust includes, but is not limited to, State navigable waters, submerged lands, tidelands and beaches. The interests protected by the public trust include, but are not limited to, providing scenic beauty, open space, air quality, food and habitat for birds and marine life, recreational experiences, scientific studies, functioning ecological systems and the various activities and management options enabled thereby. Unless otherwise expressly indicated herein, the term "State" means the State of Alaska in all its above-described capacities.

6. Defendant Exxon Corporation is a corporation organized under the laws of the State of New Jersey, that maintains its principal place of business in New York, New York. Through its subsidiaries and divisions, Exxon Corporation engages, among other things, in all phases and aspects of petroleum exploration, development, transportation, refining and marketing. On information and belief, it is an owner and/or operator of the EXXON VALDEZ, and it owned or controlled the crude oil cargo carried on the EXXON VALDEZ at the time the vessel discharged a substantial volume of its crude oil cargo into Prince William Sound.

7. Defendant Exxon Pipeline Company, a Delaware corporation, is a wholly-owned subsidiary of Exxon

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Corporation. It maintains its principal place of business at Houston, Texas. Defendant Exxon Pipeline Company is a party to the Right-of-Way Lease for the Trans-Alaska Pipeline System granted by the State on May 3, 1974 (the "State Right-of-Way Lease").

8. Defendant Exxon Shipping Company, a Delaware corporation, is a wholly-owned subsidiary of defendant Exxon Corporation. It maintains its principal place of business in Houston, Texas. Exxon Shipping Company is an owner and/or operator of the EXXON VALDEZ, and it owned or controlled the crude oil cargo carried on the EXXON VALDEZ at the time the vessel discharged a substantial volume of its crude oil cargo into Prince William Sound.

9. Upon information and belief, at all material times defendant Exxon Corporation so dominated Exxon Shipping Company and Exxon Pipeline Company as to render Exxon Corporation liable for the conduct of Exxon Shipping Company and Exxon Pipeline Company, more fully described below.

10. Defendant Alyeska Pipeline Service Company ("Alyeska") is a Delaware corporation and maintains its principal place of business in Alaska. Alyeska operates the Trans-Alaska Pipeline System ("TAPS") as an agent of the owners or assignees of the TAPS right-of-way lease granted by the State Right-of-Way Lease -- the Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Petroleum

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Corporation, BP Alaska Pipelines, Inc. and Unocal Alaska Pipeline Company (collectively the "Owner Companies").

11. Defendant Amerada Hess Pipeline Corporation, a Delaware corporation, is a subsidiary of Amerada Hess Corporation. It maintains its principal place of business in New York, New York. Defendant Amerada Hess Pipeline Corporation is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

12. Defendant ARCO Pipe Line Company, a Delaware corporation, is a wholly-owned subsidiary of Atlantic Richfield Company. It maintains its principal place of business at Independence, Kansas. Defendant ARCO Pipe Line Company is a party to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

13. Defendant Mobil Alaska Pipeline Company, a Delaware corporation, is a wholly-owned subsidiary of Mobil Corporation. It maintains its principal place of business at Dallas, Texas. Defendant Mobil Alaska Pipeline Company is a party to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

14. Defendant Phillips Alaska Pipeline Corporation, a Delaware corporation, is a subsidiary of Phillips Petroleum Corporation. It maintains its principal place of business at Bartlesville, Oklahoma. Defendant Phillips Alaska Pipeline Corporation is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

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15. Defendant BP Alaska Pipelines, Inc., a Delaware corporation, is a subsidiary of British Petroleum Company, PLC. Defendant BP Alaska Pipelines, Inc. is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

16. Defendant Unocal Pipeline Company, a California corporation, is a wholly-owned subsidiary of Union Oil Company of California. It maintains its principal place of business at Los Angeles, California. Defendant Unocal Pipeline Company is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

**DEFINITIONS**

17. "ANS" means crude oil produced on Alaska's North Slope and transported through the Trans-Alaska Pipeline System pipeline to the marine terminal facilities at Valdez, Alaska.

18. A "barrel" of crude oil means 42 United States gallons of crude oil at 60° Fahrenheit.

19. "Economic damages" includes, but is not limited to, one or more of the following:

a. Injury to the public or private economy of the State, including goodwill, whether or not said injury occurs within the boundaries of the State;

b. Injury to private businesses, individuals, trade organizations, or any other commercial, scientific, educational,

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charitable, cultural, subsistence, or other institution or activity generating direct or indirect economic benefits in the State.

c. Loss or uncertainty of government revenues, including, but not limited to, revenues from licenses, taxes, royalties, fees or other direct or indirect sources;

d. Increases or uncertainty in government expenses, including, but not limited to, internal operating, maintenance, overhead and capital costs, and external costs in the provision of services to other public or private individuals or entities.

20. "Environmental damages" includes, but is not limited to, one or more types of damages to use and enjoyment values derived from State lands, waters and resources:

(1) Use values, including consumptive and nonconsumptive uses;

(2) Nonuse values, including existence, intrinsic, option, bequest, temporal and quasi-option values;

(3) Values derived from the existence of management options and the expertise and data to exercise and support same;

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(4) Values associated with the necessity or desirability of restoration, replacement, assessment or monitoring;

(5) Other ecosystem existence values.

21. The terms "Exxon," "defendant Exxon" and "Exxon defendants" refer collectively to defendants Exxon Corporation, Exxon Pipeline Company and Exxon Shipping Company.

22. The terms "grounding," "spill," and "accident" refer to the grounding and consequent rupture of the hull and oil tanks of the EXXON VALDEZ on March 24, 1989, the second rupture of the hull and the cumulative release of approximately 11 million gallons of crude oil into Prince William Sound. As more fully set forth below, plaintiff alleges that there were at least two separate incidents which caused the discharge of oil into Prince William Sound. Unless stated otherwise, both incidents are included within the meaning of the word "spill" or "accident."

23. "Owner Companies" means the Lessees of the State Right-of-Way Lease or the Assignees of a Lessee's interest in the State Right-Of-Way Lease.

24. The term "pipeline" refers to any pipeline in the Trans-Alaska Pipeline System.

25. The "State lands, waters, and resources" include, but are not limited to, any and all of the interests set forth in (a) below, controlled or influenced by the State

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acting pursuant to law in one or more of the capacities set forth in (b) below.

(a) All real and personal property, together with fixtures and improvements thereon, and any other rights, uses, profits, values, authorities, or other interests or duties respecting any of the following land, resource and environmental components:

(1) Coastal and inland waters and wetlands;

(2) Tide and submerged lands;

(3) Plants and animals, and their habitat, including artificially enhanced habitat;

(4) The surface and subsurface of lands, including minerals and materials;

(5) Air;

(6) Aesthetics, scenic quality, and open space;

(7) Historic, archaeological, cultural, scientific and recreational resources;

(8) Ecological systems, together with the expertise and data necessary or desirable to control or influence same; or

(9) Activities dependent upon or connected to any of (1) through (8).

(b) Capacities include any of the following exercised on behalf of public or private parties, whether or not residents of the State:

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(1) Sovereign;

(2) Proprietor;

(3) Trustee, including trustee for the public trust;

(4) Representative, including parens patriae representative; or

(5) Administrator.

26. "State Right-of-Way Lease" means the lease between the State of Alaska and the Owner Companies dated May 3, 1974, including all stipulations, amendments and other agreements incorporated into or made a part of the lease.

27. The term "terminal facilities" refers to those facilities of the Trans-Alaska Pipeline System, including specifically Port Valdez, at which oil is transferred from the pipeline to vessels or stored for future loading onto vessels.

28. The terms "Trans-Alaska Pipeline System" or "TAPS" refer to the pipeline and terminal facilities used to effect the transfer of ANS crude oil to markets and includes those facilities described in the State Right-Of-Way Lease between the Owner Companies and the State.

29. The term "vessel" or "tanker" refers specifically to the vessel known as the EXXON VALDEZ, which was being used to transport ANS crude oil from the terminal facility at Valdez, Alaska to Long Beach, California, and to other ports in the United States.

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**BACKGROUND**

30. In 1968, the Prudhoe Bay oil field was discovered by Atlantic Richfield Company. It is the largest commercially developed oil field in North America. It is located on State lands and has been developed pursuant to oil and gas leases issued by the State.

31. In the early 1970s, the initial attempts to develop the Prudhoe Bay oil field were delayed, in part, because concerns were expressed about the potential adverse impact of this development on the sensitive terrestrial and marine environments that would be disturbed and through which the crude oil would be transported. The areas through which ANS oil is transported are considered to be among the last true wilderness areas in the United States, and are renowned for their beauty and natural resources. The defendants knew then and know now that many Alaskans, including commercial fishermen, subsistence users, tour operators, hunting and fishing guides, hoteliers, and many others, depend on these areas for their livelihood. Other Alaskans use, and have used, these areas for recreational activities including, among others, boating, sport fishing and sport hunting. Additionally, many Alaskans have long valued these areas for their scenic and pristine qualities and wilderness environments.

32. In order to persuade state and federal agencies to grant the permits, leases and other authorizations the Owner Companies needed to build and operate the TAPS, the

Owner Companies and Exxon defendants represented that they would take all action necessary to ensure that a major oil spill would not occur. They further represented that they would utilize the best available oil spill containment and clean up technology and that, if an oil spill did occur, they would be able to contain and clean up the oil spill.

33. Eventually, pursuant to federal and state legislation, implementing regulations and agreements between the United States, the State, and the Owner Companies, which agreements were entered into in reliance upon the representations of Owner Companies and one or more of the Exxon defendants, the construction and operation of TAPS was authorized.

34. TAPS was completed in 1977, and commercial crude oil production began from Prudhoe Bay in June of 1977.

35. Even after the commencement of TAPS operations, Alaska residents, including state officials and legislators, and others remained concerned about the potential adverse impact of an oil spill on the sensitive land, air and marine environments through which ANS crude oil was being transported. The oil industry (including the Exxon defendants, Alyeska and the Owner Companies) repeatedly assured the State and others that the Owner Companies and Alyeska would take all actions that would ensure an oil spill would not occur and, if it did, that they could and would promptly and completely contain and clean up all spilled oil.

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36. Pursuant to state law, administrative regulations and the state and federal Right-of-Way Leases, Alyeska, the Exxon defendants (other than Exxon Shipping Company) and other Owner Companies were required to, and did, prepare and submit an oil spill contingency plan (the "Plan") to the State and federal officials. The Plan was periodically updated.

37. In the Plan, the defendants represented that they had developed, assembled and organized in advance the procedures, protocols, equipment, supplies, and personnel to respond immediately to a major oil spill. The Plan represented that the defendants' oil spill techniques and equipment were "state-of-the-art" and that they were prepared to and could initiate a rapid response to "contain" a spill and to "exclude" a spill from particularly sensitive areas such as hatcheries and spawning grounds. The Plan further represented that Alyeska had a 24-hour task force in Valdez, Alaska, that was fully trained to respond to an oil spill, and that Alyeska could have equipment and personnel on-scene adequate to respond to a major spill in the vicinity of Bligh Island within five hours.

38. Contrary to the representations made by defendants, defendants did not have the best available technology to contain and clean up the oil spill, did not have adequately trained personnel, equipment or supplies available to respond to an oil spill and could not and did not respond adequately to the oil spilled by the EXXON VALDEZ. Defendants

inability to respond to the oil spill was due in large part to defendants' conscious, deliberate, negligent and reckless decision to save money by reducing manpower, training, equipment and maintenance of equipment below those levels which defendants knew, or should have known, were necessary to respond to a major oil spill.

THE GROUNDING

39. On Thursday evening, March 23, 1989, the EXXON VALDEZ, a very large crude oil carrier ("VLCC") and one of Exxon's two largest oil tanker vessels, left the Port of Valdez, Alaska, bound for Long Beach, California.

40. On information and belief, Third Mate Gregory Cousins and other crew members did not have the amount of rest required by statute prior to the EXXON VALDEZ's departure from Port Valdez on the evening of March 23, 1989.

41. Prior to boarding the EXXON VALDEZ on March 23, 1989, Captain Joseph Hazelwood had been drinking alcoholic beverages in Valdez. On information and belief, at the time Captain Hazelwood boarded the vessel, he was intoxicated and in violation of United States Coast Guard ("Coast Guard") regulations and prudent practices concerning the use of alcohol and the physical and mental condition required of captains operating this type of vessel.

42. Under the command of a harbor pilot, the EXXON VALDEZ left the Valdez terminal at approximately 9:15 p.m., March 23, 1989, and passed through the Valdez Narrows. Except for a brief period at the start of the voyage, Captain

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Hazelwood, who at all times relevant hereto was acting within the scope of his employment and as an agent and/or representative of defendant Exxon, was not present on the bridge of the EXXON VALDEZ when the harbor pilot was conning the vessel. In preparation for his departure, the harbor pilot requested, however, that Captain Hazelwood return to the bridge, which Captain Hazelwood did.

43. After the departure of the harbor pilot, Captain Hazelwood informed the Coast Guard that he was changing the vessel's course from the deep-water, normal outbound shipping lane. Captain Hazelwood also informed the Coast Guard that he would notify it when the vessel crossed the traffic separation zone. Captain Hazelwood did not inform the Coast Guard when the vessel crossed the traffic separation zone.

44. Captain Hazelwood directed Helmsman Harry Claar to come to a heading of 200°. Captain Hazelwood then told Helmsman Claar to come to a heading of 180° and put on the autopilot. Helmsman Claar carried out these instructions. In violation of Coast Guard regulations, the Coast Guard was not informed of the second course change, which took the EXXON VALDEZ entirely out of the traffic separation system.

45. Captain Hazelwood directed Third Mate Gregory Cousins to bring the vessel back into the shipping lanes by executing a turn at a point which he identified to Cousins on the navigational chart as a certain "38" (fathoms) notation on the chart. After giving this order, Captain Hazelwood

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departed the bridge, leaving Mr. Cousins in control of the navigation of the vessel. Mr. Cousins did not have the pilotage endorsement required to pilot a VLCC through Prince William Sound. Cousins was unaware that the autopilot was on when he was left in control of the navigation of the vessel.

46. Following Captain Hazelwood's departure from the bridge, Helmsman Claar was relieved by Helmsman Robert Kagan. At all relevant times, Messrs. Cousins, Claar and Kagan were acting within the scope of their employment, and as agents and/or representatives of defendants Exxon.

47. The EXXON VALDEZ continued past the clearly-marked vessel traffic lanes into an area dangerous to vessels due to reefs and other obstructions, including the well-marked Bligh Reef. After traveling approximately three miles east of the inbound shipping lane, and ignoring until too late the buoy and flashing red light at Bligh Reef, the EXXON VALDEZ struck Bligh Reef shortly after midnight on Friday, March 24, 1989. The grounding punctured the single-hulled vessel and resulted in the rupture of several of the vessel's crude oil cargo tanks. When the EXXON VALDEZ went aground, Captain Hazelwood was not on the bridge of the vessel.

48. After the grounding, Captain Hazelwood and Exxon increased the quantity of the oil spilled into Prince William Sound by their attempts to extricate the vessel from Bligh Reef.

49. Exxon defendants have systematically reduced the crew size of tankers in the Valdez trade for the purpose

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of saving money. The crew size of the EXXON VALDEZ was too small for the work responsibilities assigned to the crew. On information and belief, as a result, the crew of the EXXON VALDEZ was overworked, fatigued and not alert on the evening of March 23, 1989.

50. At the time the EXXON VALDEZ struck Bligh Reef, the vessel was incompetently manned within the privity and knowledge of the Exxon defendants, who knew, or had reason to know, that Captain Hazelwood would become intoxicated prior to the vessel's departure. The Exxon defendants had failed to institute adequate and prudent measures to preclude impairment of its officers and crews serving on VLCCs. On information and belief, the vessel was also incompetently manned within the privity and knowledge of the Exxon defendants, who knew, or had reason to know, that Third Mate Cousins would be left in charge of the vessel when he lacked the pilotage endorsement to operate the vessel in Prince William Sound. The Exxon defendants failed to take steps to insure that the EXXON VALDEZ complied with all applicable state and federal laws and regulations relating to the manning of VLCCs in Prince William Sound. On information and belief, the Exxon defendants intentionally or negligently authorized or permitted Captain Hazelwood and the crew of the EXXON VALDEZ to frequently and systematically violate Coast Guard regulations and Exxon policies concerning the manning or operation of the EXXON VALDEZ.

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51. Eleven of the EXXON VALDEZ's tanks were ruptured by either the initial grounding or the subsequent efforts to dislodge the vessel from Bligh Reef, causing the largest oil spill in United States history. Approximately 11 million gallons of crude oil spilled into Prince William Sound from the EXXON VALDEZ.

RESPONSE OF DEFENDANTS TO THE OIL SPILL

52. All defendants are responsible for containment and cleanup of the oil spill from the EXXON VALDEZ. By statute, regulation, the provisions of the State Right-of-Way Lease and ordinary prudence, the defendants were required to be prepared to contain and clean up oil spilled by them and to implement the Plan in the event of an oil spill in Prince William Sound. Nonetheless, and contrary to the representations of the defendants, both in their Plan as updated and in other representations to the State and third parties, the defendants both failed to make, and delayed making, an appropriate response to the oil spill from the EXXON VALDEZ. The defendants failed to take prompt and adequate measures to contain the oil spill and to recover oil spilled from the EXXON VALDEZ.

53. Although the Plan does not disclose that Alyeska might surrender its responsibilities for containing and cleaning up an oil spill in Prince William Sound, Alyeska nonetheless withdrew from containing and cleaning up the spill. This withdrawal commenced as early as Friday evening (March 24, 1989) and withdrawal caused delay, uncertainty,

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confusion and ineffective and inefficient use of containment and clean up equipment and manpower and contributed to the failure of defendants promptly to protect sensitive areas by booming as required by the Plan.

54. During the crucial first 48 hours after the oil spill, the weather conditions were well-suited to containing and recovering the spilled crude oil. Nonetheless, as a result of the inadequate equipment, insufficient and inadequately trained personnel, confusion over which defendants were responsible for what actions, virtually no oil was recovered in the first 48 hours. The ultimate assignment of containment and clean up responsibility went to Exxon Shipping Company, an entity which, on information and belief, had no substantial knowledge of the Plan.

55. When the spill occurred, the defendants did not provide the personnel, equipment or response they committed to in the Plan. The defendants did not have present at the oil spill site a trained task force capable of an adequate, sustained, state-of-the-art response. The dock and office workers who were part of the Alyeska oil spill response team had no substantial experience or training with oil spills of substantial size, and a full-time oil spill coordinator was no longer stationed in Valdez, Alaska.

56. During the first 24 hours after the oil spill, none of the defendants had the aircraft, spray equipment, fire booms, other equipment and personnel on-site to commence burning of the oil or full scale application of dispersants.

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During this crucial time period, defendants only action was to start transporting equipment, supplies and personnel from locations as far as 2,000 miles from the oil spill site.

57. At the time of the oil spill, defendants' equipment and materials were not adequate, not state-of-the-art, not operational, not properly maintained and were not effective. The defendants lacked immediate access to adequate containment booms. Alyeska's containment boom deployment barge which was to be used for such emergencies was unloaded or not fully loaded and out of service. Modern self-inflating containment booms designed to contain oil slicks immediately after an oil spill were unavailable for prompt deployment.

58. The skimmer boats used by the defendants for the oil spill clean up were in poor condition and incapable of recovering the amount of oil represented in the Plan to be recoverable by skimming. A 218,000-gallon capacity tanker barge, designed to carry oil from spill sites, had been replaced by a much smaller, second-hand barge.

59. At the time of the spill, the defendants also lacked available or immediate access to equipment needed to exclude spilled oil from environmentally sensitive areas, as committed to in the Plan. Further, the defendants had no communications equipment capable of permitting effective and prompt deployment and coordination of spill response personnel and equipment.

60. Defendants Alyeska and Exxon's response effort to clean up the oil after the first 48 hours was, and

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continues to be, even to the present, insufficient and inadequate. Among other things, defendants have deployed equipment and manpower ineffectively and wastefully. Defendants have failed to clean up and remove all the oil from State lands, waters and resources as required by law.

DAMAGES TO PLAINTIFF

61. As a result of the oil spill from the EXXON VALDEZ, over a thousand square miles of State lands, waters and resources have suffered severe environmental damage. A growing number of coastal and inland sounds and bays, beaches, tidelands, tidal pools, wetlands, estuaries and other sensitive elements of the ecosystems have been devastated; thousands of mammals, fowl and fish have been killed or injured; anadromous streams, near shore environments and other fish and wildlife critical habitats have been contaminated; aesthetics and scenic quality have been destroyed or impaired, together with attendant opportunities for recreational experiences; air quality has deteriorated through the escape of evaporating pollutants; commercial fisheries have been sharply curtailed, with adverse biological and economic consequences; the greater ecosystem in the spill area has been deprived of its pristine condition with attendant damage to the condition of, and interrelationship among, living creatures comprising the system; and the management opportunities available through the knowledge and data base generated from prior experience with the ecosystem have been compromised.

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62. The State has incurred, and will continue to incur, economic damages in the form of extraordinary expenses directly related to the spill including, without limitation: (i) costs of response to the oil spill, investigation and monitoring of the oil spill; (ii) costs of clean up and removal; (iii) costs of damage assessment studies; (iv) increased direct and indirect costs of providing governmental services to persons or entities adversely effected by the oil spill; and (v) the losses due to ordinary government services curtailed or impaired as a result of diversion of State resources caused by State activities related to the spill.

63. The State has suffered, and will continue to suffer, economic damages in the form of extraordinary losses of revenue relating to the spill, including, without limitation: (i) loss of fish processing tax revenue; (ii) loss of salmon enhancement tax revenue; (iii) loss of oil and gas production tax revenue; (iv) loss of corporate income tax revenue; and (v) loss of oil production royalties.

64. On information and belief, the environmental and economic damages caused by the oil spill to property, trades and business, State revenues, fisheries, marine life, various categories of State lands, waters and resources and the enjoyment thereof within, among others, Prince William Sound, Cook Inlet, Kodiak Island and the Gulf of Alaska, will continue for many years.

65. On information and belief, defendants may curtail or abandon their efforts at cleaning up the beaches

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and restoring them to their pre-spill condition. Such curtailment and/or abandonment of the clean up will cause plaintiff irreparable harm because money will not prevent the environmental and other damages which will occur to State lands, waters and resources as a result of defendants' termination of clean up work. On information and belief, defendants have not yet commenced restoration work and the State will incur costs of restoration and replacement of impacted State lands, waters and resources.

COUNT I

NEGLIGENT OR INTENTIONAL FAILURE TO CONTAIN AND CLEAN UP THE OIL SPILL ALL DEFENDANTS

66. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

67. The containment and removal of the discharged oil which damaged and threatens to further damage State lands, waters and resources and private property was the responsibility of all defendants. Defendants had a duty to plaintiff to have adequate resources available to contain and clean up immediately and effectively the oil spill.

68. Prior to the EXXON VALDEZ oil spill, the defendants had repeatedly represented to the State and others that they had the resources, technology and a plan by which major oil spills could be contained and excluded from environmentally sensitive areas within hours of the occurrence. In the period immediately after the grounding of the EXXON VALDEZ, nothing was done to promptly contain the oil

spill. Nearly an entire day passed after the oil spill before Alyeska and Exxon representatives even started to place booms or clean up the oil spill. More days would pass before defendants took any effective action to implement exclusionary booming of sensitive areas.

69. The delays in responding to the EXXON VALDEZ oil spill were due to the defendants' lack of preparedness in personnel, equipment and materials to engage in an effective clean up of the EXXON VALDEZ oil spill.

70. Defendants knew, or should have known, that they lacked adequate equipment and materials and trained personnel to contain effectively and to clean up a spill of the magnitude of the EXXON VALDEZ oil spill.

71. The defendants either intentionally or negligently failed to control, contain and clean up the oil spill by, among other things, (i) failing to provide adequately for the containment and clean up of any discharge of oil; (ii) inadequately planning the clean up effort stemming from the EXXON VALDEZ oil spill; (iii) possessing inadequate equipment, supplies and personnel for deployment in the ensuing clean up effort; (iv) unreasonably delaying the ensuing clean up effort; (v) failing to adequately carry out the ensuing clean up effort; and (vi) choosing inadequate tactics in the ensuing clean up effort. All these actions and omissions of defendants served to aggravate and compound the environmental and economic damages to plaintiff.

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72. As a direct and proximate result of the foregoing and other failures by the defendants to exercise that degree of care expected of a reasonably prudent person acting under the same or similar circumstances, the defendants in their own right, as well as by and through their agents, servants and employees, caused plaintiff to suffer substantial and continuing environmental, economic and other damages to State lands, waters and resources, and other interests in amounts to be proven at trial.

COUNT II

NEGLIGENCE
EXXON DEFENDANTS

73. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

74. Captain Hazelwood was not in control of the navigation of the EXXON VALDEZ when the vessel hit the well-marked Bligh Reef. Instead, Third Mate Cousins was in control of the navigation when the vessel ran aground, even though Third Mate Cousins lacked the proper pilotage endorsement and experience to pilot vessels such as the EXXON VALDEZ through the waters of the Prince William Sound.

75. The Exxon defendants and Captain Hazelwood and Third Mate Cousins knew, or should have known, that Cousins did not possess either the required pilotage endorsement or the requisite degree of competence to command the EXXON VALDEZ with reasonable prudence, skill or care. Acting within the scope of their employment, Captain Hazelwood and Third Mate

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