

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672  
7448 SENATE JUDICIARY

larly serious injury, is closely related to the medical nature of the intervention. A momentary lapse that delays the diagnosis of a skin rash is usually of little consequence, for example, whereas a similar lapse during a brain operation can have disastrous effects. It is unlikely that neurosurgeons are more prone to error than dermatologists, but the conditions under which they work are far less forgiving. As we have seen, certain specialties, such as thoracic surgery, obstetrics, and neurosurgery, had more adverse events than other specialties, but the events were not more likely to have been caused by negligence.<sup>1</sup>

#### Limitations of the Study

Our observations and conclusions must be interpreted within the limitations of a retrospective review of records. Several features of the study could have biased the results. First, we relied exclusively on data from hospital records. Although we have shown that adverse events can be identified accurately from information in hospital records,<sup>12</sup> such records may not provide evidence or insight into the specific causes of an adverse event. For example, in some of our study patients, the adverse event was caused by failure to diagnose an ectopic pregnancy. From the information in most hospital records, it would not be possible to tell whether such failures occurred because the physician (1) did not think of the diagnosis, (2) considered the diagnosis unlikely and therefore did no further follow-up examinations or testing, or (3) considered the diagnosis possible and recommended further testing, but the patient did not come for the test (in which case the outcome would not have been considered an adverse event). Nor can we tell whether (4) both the physician and the patient sought the test, but the equipment was broken (or overbooked, unavailable on weekends, or the like), (5) the examination was performed but the results were not reported, or (6) any one of many other possible problems arose that can be imagined.

Second, we relied on implicit, not explicit, review. Because we studied the entire range of medical services, it was not possible to set up explicit criteria for every conceivable type of adverse event. Accordingly, we relied on the judgments of physicians. To minimize variability therein, we structured the record-review process by means of an Adverse Event Analysis Form, which required the reviewers to conduct their analysis in a standardized way and to address specific questions about causation.

Third, we used general internists and surgeons as physician-reviewers, not specialists. For a study of this scope and magnitude, it would have been both difficult and expensive to do otherwise, since the reviewers were required to identify adverse events of all types. In our pilot study, we found that internists and surgeons could identify adverse events with a high degree of accuracy.<sup>13</sup> As they had been instructed to do, the reviewers consulted with a panel of specialists when they needed to determine whether the care that had resulted in a possible adverse event met accepted standards.

Finally, our information on the follow-up of the patients was limited to data about care in the hospital (including the outpatient department). Although the reviewers had available the record of care provided at the same hospital after the index hospitalization, they had no access to the information in physicians' private offices. However, except for those that are rapidly fatal, adverse events not requiring hospital care are unlikely to result in serious disability.

#### Prevention of Adverse Events

As knowledge increases, in theory more adverse events will become preventable. Indeed, the safety and effectiveness of many current medical treatments result from the earlier reduction or elimination of complications similar or identical to those we have identified as adverse events here: high rates of heart block, bleeding, and mortality in the early years of heart surgery, problems associated with the initial attempts at organ transplantation, side effects of many drugs, and so forth. These were the adverse events of an earlier day, and they were greatly reduced in frequency after research led to an understanding of their causes.

Future reductions in the occurrence of adverse events also depend in part on research into causes. In the case of adverse events that are currently unpreventable, progress will come from scientific advances, such as the development of less hazardous chemotherapeutic agents. In the case of events due to error, control will require scientific advances in some instances, but we believe that progress will also depend heavily on systems analysis, education, and the development and dissemination of guidelines and standards for practice. Automatic "fail-safe" systems — such as a computerized system that makes it impossible to order or dispense a drug to a patient with a known sensitivity — are likely to have an increasing role.

The reduction of adverse events involving negligence will also require an increased emphasis on education. To the extent that failure to meet the standard of practice is due to ignorance, improved dissemination and enforcement of practice guidelines might be effective. The development of better mechanisms of identifying negligent behavior and instituting appropriate corrective or disciplinary action is equally important.

Preventing medical injury will require attention to the systemic causes and consequences of errors, an effort that goes well beyond identifying culpable persons.<sup>7</sup> Such approaches have paid off handsomely in other highly technical and complicated enterprises, such as aviation.<sup>5,14</sup> A similar strategy may work in medicine as well.<sup>5,15-17</sup>

In this context, our description of adverse events represents an agenda for research on quality of care. Adverse events result from the interaction of the patient, the patient's disease, and a complicated, highly technical system of medical care provided not only by a diverse group of doctors, other care givers, and support personnel, but also by a medical-industrial sys-

tem that supplies drugs and equipment. Reducing the risk of adverse events requires an examination of all these factors as well as of their relation with each other.

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### DRUG THERAPY

JOHN A. OATES, M.D., *Editor*  
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### FLUOROQUINOLONE ANTIMICROBIAL AGENTS

DAVID C. HOOPER, M.D.,  
AND JOHN S. WOLFSON, M.D., PH.D.

THE introduction of fluoroquinolone antimicrobial agents (Fig. 1) into clinical use is an important recent advance.<sup>1-3</sup> These drugs, also called quinolones, include norfloxacin, ciprofloxacin, ofloxacin, enoxacin, and pefloxacin. Of these, norfloxacin, ciprofloxacin, and ofloxacin have been approved for use in the United States. Quinolones are orally absorbed, are potent in vitro against a broad spectrum of bacterial species, and have favorable pharmacokinetic properties. We shall evaluate here the current status of the quinolones, considering mechanisms of action and resistance, activity in vitro, pharmacokinetics, clinical efficacy, adverse effects, and clinical uses. A discussion of the structure-activity relations of the quinolones is beyond the scope of this article, and this topic has recently been reviewed elsewhere.<sup>4,5</sup>

#### MECHANISMS OF ACTION AND RESISTANCE

Uniquely among antimicrobial agents in clinical use, the primary bacterial target of quinolones is DNA

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gyrase (bacterial topoisomerase II),<sup>6,9</sup> an enzyme that introduces negative supertwists into DNA and separates interlocked DNA molecules. Quinolones antagonize these enzymatic activities, interfering with DNA replication, segregation of bacterial chromosomes, transcription, and other cellular processes and damaging DNA. Recently, binding to gyrase-DNA complexes has been reported.<sup>10</sup>

Spontaneous single-step mutation to quinolone resistance tends to be infrequent ( $1 < 10^9$ ), and when it occurs the resistance is of a low level for many bacterial species. High-level resistance can be selected by serial exposure of bacteria to increasing drug concentrations. Mechanisms of bacterial resistance to quinolones include chromosomal mutations that either alter DNA gyrase (resistance to quinolones alone) or reduce drug accumulation in association with changes in bacterial outer-membrane proteins (pleiotropic resistance). Destruction or modification of the drug by bacteria has not yet been described, and plasmid-mediated resistance to fluoroquinolones has not yet been found in clinical isolates.

#### ACTIVITY IN VITRO

In general, quinolones have excellent potency in vitro<sup>3,11</sup> against most Enterobacteriaceae, fastidious gram-negative bacilli including species of haemophilus, and gram-negative cocci, such as *Neisseria gonorrhoeae*, *N. meningitidis*, and *Moraxella (Branhamella) catarrhalis* (Table 1). Among the drugs listed in Table 1, ciprofloxacin is the most potent. Quinolones are active against *Pseudomonas aeruginosa* but are less active against other species of pseudomonas. They also have good activity against *Staphylococcus aureus* and other staphylococci but are less active against species of streptococcus and enterococcus. They have minimal activity against anaerobes and none against *Candida albicans*. Quinolones are active against gram-negative

Exxon

Settlement

1 of 2

Bill Woodward

House Fish & Wildlife -

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# Alaska State Legislature

SENATOR RICHARD I. ELIASON

*President of the Senate*

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## M E M O R A N D U M

TO: All Senators

FROM: Senator Dick Eliason, Chairman  
Senate Special Committee on the Exxon Settlement

DATE: March 25, 1991

RE: Distribution of further information regarding the  
Exxon settlement

Attached for your information are several more documents regarding the Exxon settlement.

A reminder to those of you who are members of the special committee, please make sure this information is added to your committee folder, and please bring that folder with you to our next meeting which is scheduled for Tuesday, March 26 at 2:30 in the Butrovich Room.

# DIVISION OF LEGAL SERVICES

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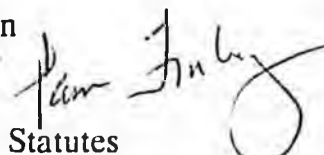
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### MEMORANDUM

March 25, 1991

**SUBJECT:** Exxon Settlement; Sectional Analysis of Plea Agreement  
(Work Order No. 7LS-1053)

**TO:** Senator Dick Eliason

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

### SECTIONAL ANALYSIS OF PLEA AGREEMENT

I. INTRODUCTION. This section sets out the crimes in the indictment against Exxon and Exxon Shipping that Exxon and Exxon Shipping will be pleading guilty to.

Exxon Shipping is pleading guilty to

(1) negligent discharge of pollutants (oil) into Prince William Sound without a permit (a violation of the Clean Water Act, carrying a fine of \$2500-\$25,000 per day);

(2) discharge of refuse (oil) into Prince William Sound (a violation of the Refuse Act carrying a fine of \$500-2500), and

(3) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.)

Exxon is pleading guilty to

(1) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.) The basis for Exxon's liability is that Exxon owned the oil that Exxon Shipping discharged that killed migratory birds.

II. DEFENDANTS' AGREEMENT AND UNDERSTANDING. This lists the attorneys representing the defendants and sets forth the facts that the government would have to prove for conviction of the counts to which the defendants are pleading guilty. It also sets forth the defendant's agreements that there is a legal basis for the fines and restitution. This statement is made for the purpose of the plea

agreement only. The defendants also recognize that by pleading guilty they are admitting the essential elements of the charges in the counts (i.e., the essential facts.)

Finally, the U.S. agrees to ask the court to dismiss (once the court has accepted the plea agreement) other counts against Exxon Shipping and Exxon, namely the ones to which they are not pleading guilty.

Question.

1. What counts will be dismissed?

III. AGREEMENTS REGARDING IMPOSITION OF SENTENCE. First, the U.S. agrees not to make additional criminal charges or seek civil or administrative penalties for various acts relating to the oil spill against

- (1) Exxon, its present or former officers, directors, or employees;
- (2) any of Exxon's wholly-owned subsidiaries or their present or former officers, directors or employees; or
- (3) Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives.

The government reserves the right to take civil or administrative action (other than for penalties or under criminal laws) against the above persons and entities. (This reserves the federal government's rights to take action relating to suspension, debarment, or listing.)

This section also lists the fines. Exxon Shipping is to pay \$75 million, half of which is remitted (not paid). Exxon agrees to pay \$25 million, half of which is remitted (not paid). The remission is based on the defendants' recognizing their responsibility, cooperating with the federal government, and making past payments for cleanup (\$2 billion) and for injuries to claimants (in excess of \$300 million.)

Question.

1. Who are Exxon's wholly owned subsidiaries?
2. Why is Alyeska Pipeline Service Company included in the entities against whom criminal charges will not be brought and from whom civil or administrative penalties will not be sought?

IV. AGREEMENTS REGARDING RESTITUTION. Exxon and Exxon Shipping agree to pay the State of Alaska \$50 million in restitution within 30 days after the court accepts the plea agreement. The payments are to be used by the State

Senator Dick Eliason

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exclusively for restoration projects relating to the oil spill. The state is to control the use of the money, and upon payment the money shall be available for use by the state for restoration projects without objection, challenge, or judicial or administrative review.

Restoration (for which the money may be spent), includes (1) restoration, replacement, and enhancement of resources affected by the oil spill; (2) acquisition of equivalent resources and services; and (3) long-term environmental monitoring and research programs directed to prevention, containment, cleanup, and amelioration of oil spills.

V. GENERAL PROVISIONS. Exxon guarantees the payments Exxon Shipping is to make.

If the court rejects the plea agreement or does not dismiss the charges the U.S. has said it will move to dismiss, each defendant will be permitted to withdraw its guilty plea.

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### MEMORANDUM

March 22, 1991

**SUBJECT:** Exxon Settlement; Sectional Analysis of Memorandum of Agreement (MOA) (Work Order No. 7LS1053)

**TO:** Senator Dick Eliason

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

### SECTIONAL ANALYSIS OF MOA.

INTRODUCTION (Pages 2-5). This contains background and certain information. The Clean Water Act (CWA) is referenced. The current federal trustees are identified as the secretaries of the interior and agriculture and the administrator of NOAA, and the state trustees are identified as the commissioners of fish and game and environmental conservation and the state Attorney General. The U.S. Coast Guard is identified as the federal on-scene coordinator (FOOSC) and the state DEC is identified as the state on-scene coordinator (SOSC). "Exxon" in the MOA includes Exxon Corp., Exxon Shipping Co., and Exxon Pipeline Co.

The introduction also identifies laws on which the parties rely in setting up the joint trusteeship, i.e., 42 U.S.C. 9607 (that section of CERCLA authorizing the regulations at 43 CFR 11), 40 CFR 300.615(a), and 43 CFR 11.32(a)(1)(ii). The committee should note that while 40 CFR 300.615(a) encourages cooperation among trustees, it does not specifically authorize a co-trusteeship nor the commingling of funds. 43 CFR 11.32(a)(1)(ii) concerns damage assessments, not disposition of recovered funds. 43 CFR 11.92 and 11.93, which do concern disposition of recovered funds are not referenced. The introduction also states that the state and federal entities have determined that the procedures in the MOA "will best enable them to fulfill their duties as trustees...."

JURISDICTION (Page 5). The jurisdiction of the court is the same here as it is in the consent decree, including jurisdiction under the CWA.

DEFINITIONS (Pages 6-8). The definitions should be read, but certain points can be summarized here.

First, "allowed expenses" are the past unreimbursed expenses of the state and federal government for response, assessment, and cleanup, as well as the past litigation expenses of the state. These parallel the provisions in the consent decree.

"Natural resource damage recovery" is the amount to be paid under the consent decree, less the "allowed expenses" and less unreimbursed cleanup and response costs of the state or federal government incurred after December 31, 1990; the "natural resource damage recovery" is the amount to be managed by the six trustees. In this memo, I will refer to this as "the trust fund money."

The "trustees" under this agreement are the current trustees, or any replacements designated by the President or the Governor hereafter.

"Restore" or "restoration" are important terms because the definition is about the only limit on what the trustees may use the trust fund money for. It means any action which endeavors to restore a natural resource (or services provided by that resource) that was injured, lost, or destroyed by the oil spill to its pre-spill condition. It also includes actions which replace or substitute something for those resources or services. It also includes acquisition of "equivalent resources and services." It is a very broadly defined term, especially when it includes "services provided by the resource." This is discussed more fully under paragraph V below.

CO-TRUSTEESHIP (Pages 8-9). This states that the trustees shall act as co-trustees in collecting and using the natural resource damage recoveries from Exxon. To avoid the claim that this "co-trusteeship" gives one government ownership of or authority over natural resources of the other government, the parties state that nothing in the MOA shall be deemed an admission of law or fact by either government concerning that ownership or authority. Neither government may use the MOA against the other except in matters concerning the enforcement of the MOA or the settlement of the oil spill litigation. This section also states that the MOA does not affect rights or obligations of third parties (including Alaska Native villages and persons with an interest in property injured by the oil spill) or the rights and obligations of the U.S. or the State to the Native villages or private parties.

ORGANIZATION; Paragraph IVA (Pages 9-11). First, all decisions relating to the use of the trust fund money shall be made by unanimous agreement of the six trustees. In addition, the federal trustees must consult with the EPA. If the trustees cannot agree, either government may resort to federal district court in Alaska to settle the dispute. The trustees may also submit the matter to non-binding mediation or "other means of conflict resolution."

The trustees agree to cooperate in establishing a joint trust fund in the registry of the federal district court in Alaska, or as otherwise determined by agreement of the governments and order of the court.

The trustees agree to establish procedures for meaningful public participation, which may include a public advisory group.

The trustees shall agree to an organizational structure for decisionmaking under the MOA within 90 days after the consent decree (in the U.S. and State v. Exxon case) has been approved and entered as a judgment of the court.

Questions.

1. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government?

2. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as "the 311(k) fund," which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the federal Treasury?

3. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply (see below)?

4. Is the commingling of trust assets a violation of the trustees' common law trust responsibilities?

5. Will a trust fund in the court registry bear interest?

6. What standards would a court use in deciding disputes among the trustees?

7. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money?

RETENTION OF RIGHTS RE INJURY ASSESSMENT AND RESTORATION:  
PARAGRAPHS IVB and C (Pages 11-12). This states that the MOA does not prevent either government from undertaking injury assessment or restoration activity in addition to that paid for by the trust fund.

It also allows each government to change the trustees, without objection by the other, so long as neither government designates more than three trustees. (It appears that a government could designate fewer than three trustees if it wanted to.)

It also acknowledges that the President has given the EPA the task of coordinating, on behalf of the federal government, the restoration of the injured natural resources.

Finally, it provides that the MOA does not constitute an election on the part of either government to be bound by the Natural Resource Damage Assessment Regulations codified at 43 CFR 11. This is an interesting provision, especially given the parties' reference of 43 CFR 11.32 in the introduction. Although Part 11 is entitled "Natural Resource Damage Assessments," and the vast majority of 43 CFR 11 deals with methods of damage assessments, 43 CFR 11.92 and 11.93 address the establishment of a restoration account and a restoration plan. 43 CFR 11.10 states that the "assessment procedures set forth in this part are not mandatory," but 43 CFR 11.14(aa) defines "assessment" to mean the process of determining damages for injuries to natural resources. Therefore it is not clear whether the parties to the MOA are saying that they are not bound by any part of 43 CFR 11, or whether they are saying they are not bound by that part of 43 CFR 11 that relates to damage assessments.

Question.

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

USE OF NATURAL RESOURCE DAMAGE RECOVERIES: PARAGRAPH VA (Page 12). The trustees jointly use the trust fund money to restore, replace, enhance, rehabilitate or otherwise acquire the equivalent of natural resources injured as a result of the oil spill and the reduced or lost services provided by such resources. The CWA, 33 U.S.C. 1321(a)(8) defines "removal" to include actions necessary to minimize or mitigate damage, but does not otherwise provide guidance as to the meaning of these terms. It is likely, although not certain, that the trustees will use the definitions at 43 CFR 11.14. 43 CFR 11.14(a) defines "acquisition of the equivalent" or "replacement" to mean the substitution for an injured resource with a resource that provides the same or substantially similar services (this is in addition to substitutions as part of response actions). "Services" under 43 CFR 11.14(nn) means the physical and biological functions performed by the resource, including the human uses of those functions; I interpret it as including use of natural resources for food or water, and perhaps such things as recreation. "Restoration" or "rehabilitation" means actions undertaken to return the injured resource to its baseline condition. 43 CFR 11.14(ll).

Under this paragraph the governments are also to establish standards and procedures for administering the trust fund money.

Finally, this paragraph requires that all natural resource damage recoveries be placed in the joint trust fund.

Questions.

1. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
2. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds?
3. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?)
4. Will the trust pay its own administrative expenses?
5. Who, if anyone, will perform audits of the trustees' expenditures?
6. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed?

REIMBURSEMENT TO GOVERNMENTS: PARAGRAPH VB. (Pages 12-13).  
Up to \$72 million shall be available to the state for reimbursement of its past expenses. Up to \$62 million shall be available to the federal government to reimburse its past expenses. This reimbursement money shall be paid directly to the governments by Exxon over five years. The agreement does not state which five years, or whether the installments must be equal.

Also, all of the governments' unreimbursed response and cleanup costs incurred after December 31, 1990, and certified by either the FOOSC or the SOOSC, shall be reimbursed to the appropriate government. (The trust fund will get whatever is left when these items are deducted from the settlement proceeds.)

For questions relevant to this paragraph, see the sectional of the consent decree.

OUT-OF-STATE EXPENDITURES: PARAGRAPH VC. (Page 13). "Except as otherwise provided" in the MOA, the trustees agree that the trust money will be expended on the restoration of natural resources in Alaska unless the trustees agree that "spending funds outside of Alaska is necessary for the effective restoration, replacement, or acquisition of equivalent natural resources injured in Alaska and services provided by such resources."

Questions.

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

2. Could the trustees create a recreational site in another state to compensate for the loss of a recreational site in Alaska? Could fish hatcheries be built in Washington and paid for out of the trust funds under this provision? Could scientific studies be done out of state and paid for with trust fund money?

NO STATE OBLIGATION TO SPEND MONEY: PARAGRAPH VD (Page 13).  
The MOA states that it does not obligate the governments to expend money except to the extent funds are appropriated or are otherwise lawfully available.

Question.

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

SCIENCE STUDIES (Page 13). The state and federal governments are to continue to cooperate in appropriate scientific studies relating to the oil spill, including those approved for the 1991 field season.

COVENANTS NOT TO SUE: PARAGRAPHS VIIA A,E. and F (Pages 14-16).  
The governments agree not to sue each other with respect to:

(1) the authority of either government to enter into and comply with the MOA;

(2) the right of either government to engage in cleanup, damage assessment, or restoration activities under the MOA;

(3) all civil claims one government may have against another arising out of acts or omissions that occurred before the execution of the MOA and related to the oil spill.

In "E" on page 15, the governments agree that if they are both sued by a third party for a claim arising out of the oil spill, the governments will cooperate in their defense and not assert claims against each other. In "F" the parties agree that they will cooperate in each other's defense if one, but not the other, is sued by a third party for a claim relating to the oil spill. In both cases, the governments agree to pay their liability as determined in final judgment, and not to assert claims against each other.

Questions.

1. If the trustees disagree, can the state trustees take the issue to court if the issue is whether a federal agency should be involved in a particular project, or does #2 above preclude that?

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

CO-TRUSTEESHIP AS TO NATURAL RESOURCES: PARAGRAPHS VIIB AND C (Pages 14-15). For the purposes of oil spill litigation related to Exxon and other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the oil spill, each government is entitled to assert that it is a co-trustee of all of the natural resources injured, lost, or destroyed as a result of the oil spill.

Each government also agrees not to sue the other one to determine the share of either government's ownership or rights or management authority over natural resources injured, lost, or destroyed as a result of the oil spill.

Question.

1. Does the last clause preclude, at least for the next 16 years, the U.S. and the State from suing each other to determine ownership of resources, or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill?

EFFECTIVENESS OF MOA: PARAGRAPH VIID (Page 15). If the governments become adverse to each other in the oil spill litigation (with Exxon), the MOA shall remain in effect.

Question.

1. How does this provision interact with the termination provision on page 17 that says the MOA terminates if the consent decree terminates, unless otherwise agreed by the parties?

ENFORCEMENT, VENUE, AND INVALIDITY (Page 16). The MOA is enforceable in federal district court in Alaska, which retains jurisdiction.

If the MOA is determined to be invalid, the use of the remaining money will be determined by further agreement of the governments or by an allocation of the recoveries by the federal district court in Alaska, subject to appellate review.

Question.

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

EFFECTIVE DATE (Page 17). The MOA is effective on the date the consent decree is signed and entered by the court, except for the provision covering continuation of joint science studies, which is effective on the date all parties sign the MOA.

INTEGRATION AND MERGER (Page 17). The MOA and the consent decree constitute the entire agreement between the state and federal governments as to matters mentioned in them. The parties note that the agreement reached among the trustees as to disbursements of the \$15 million paid by Exxon in April 1989 remains in effect.

Question.

1. What was the agreement of April, 1989?

TERMINATION (Page 17). The MOA terminates 16 years from the effective date, or upon termination of the consent decree, unless otherwise agreed by the parties.

Question.

1. How does this relate to paragraph VIID on p.15?

JUDICIAL REVIEW (Page 18). The MOA creates no rights in a person who is not a party to it. It is not subject to judicial review except as provided in article VII.

Question.

1. Since this is a court decree, do the parties have the power to prevent judicial review?

2. What does the reference to article VII refer to?

3. Does this prevent a third party from challenging a decision of the trustees on the grounds that the decision is inconsistent with the MOA or applicable law?

MODIFICATION AND REPRESENTATION (Page 18). This MOA can only be modified with the written consent of the parties and the approval of the court. The representatives certify that they are authorized to enter into the MOA and bind the governments.

Question.

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

EFFECTIVE DATE (Page 17). The MOA is effective on the date the consent decree is signed and entered by the court, except for the provision covering continuation of joint science studies, which is effective on the date all parties sign the MOA.

INTEGRATION AND MERGER (Page 17). The MOA and the consent decree constitute the entire agreement between the state and federal governments as to matters mentioned in them. The parties note that the agreement reached among the trustees as to disbursements of the \$15 million paid by Exxon in April 1989 remains in effect.

Question.

1. What was the agreement of April, 1989?

TERMINATION (Page 17). The MOA terminates 16 years from the effective date, or upon termination of the consent decree, unless otherwise agreed by the parties.

Question.

1. How does this relate to paragraph VIID on p.15?

JUDICIAL REVIEW (Page 18). The MOA creates no rights in a person who is not a party to it. It is not subject to judicial review except as provided in article VII.

Question.

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**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

March 21, 1991

**SUBJECT:** Sectional Analysis of Consent Decree - Paragraph 13 to end.  
(Work Order 17LS-1053)

**TO:** Senator Dick Eliason

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

SECTIONAL ANALYSIS OF CONSENT DECREE  
PARAGRAPH 13 TO END.

RELEASE OF CLAIMS BY GOVERNMENTS: PARAGRAPH 13 (Pages 14-15).

The state and federal governments give up all civil and administrative claims they have against Exxon arising out of the oil spill. This includes all the claims the State has made in state court under state law, except for #4 below. This paragraph explicitly states that the consent decree does not impair:

(1) the right of the state or federal government to enforce the consent decree, including the reopener clause;

(2) the rights of Alaska Native villages to act as trustees for the purposes of asserting or compromising their claims for damage to natural resources belonging to, managed by, controlled by, or appertaining to the villages;

(3) the rights of other parties who own or have an interest in property affected by the oil spill; or

(4) claims by the State for tax revenues that would have been, or would be collected under existing AS 43.75. *Raw Fish -*

However, if the state recovers a judgment for lost AS 43.75 taxes, the state agrees to enforce that judgment only to the amount that would have been refunded to local governments. (See AS 43.75.130). In other words, the state can go ahead and sue for the full amount of lost taxes under AS 43.75, but if Exxon decides not to pay the full

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# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
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Senator Dick Eliason  
March 21, 1991  
Page 2

amount, the state can only force payment of the amount (roughly one-half) that is given to local governments.

Questions.

1. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful?

2. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement?

3. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims?

RELEASE OF CLAIMS BY GOVERNMENTS: PARAGRAPHS 14-15 (Pages 15-17). In paragraph 14, the governments give up civil and administrative claims against Exxon Pipeline (except to the extent that Exxon Pipeline is liable because of its interest in Alyeska) to the same extent they gave up claims against Exxon in paragraph 13.

In paragraph 15, the governments agree not to make civil claims against Exxon's or Exxon Pipeline's employees, directors, and officers that relate to the oil spill. However, this provision is void if the employee, director, or officer brings an action against the governments, or either of them, relating to the oil spill.

If the state or federal government obtains a judgment against an officer, employee, or director of Exxon or Exxon Pipeline for liability relating to the oil spill, the government will collect on the judgment only to the extent the judgment is covered by insurance policies purchased by the individuals.

Question.

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



is liable for the rest up to \$100 million. The fund may proceed against the owner and operator of the vessel and third parties if the negligence of any of these caused the damage.

The consent decree provides that Exxon's release of the governments does not bar a claim Exxon may have against the TAPL fund. It also provides that if the TAPL fund asserts claims against the governments based on money the fund pays to Exxon or Exxon Pipeline, Exxon will repay the governments for any liability they may have to the TAPL fund. Also, if the TAPL fund asserts claims against the governments based on money the fund pays to Alyeska, Exxon will repay 20.34% of the government's liability. (Exxon Pipeline owns 20.34% interest in Alyeska.)

Questions.

1. Has the TAPL fund paid any money to Exxon or Exxon Pipeline? Is it likely to do so?
2. Has the TAPL fund paid any money to Alyeska, or is it likely to do so?
3. How likely is it that the TAPL fund will assert claims against the state for money (if any) the fund pays to Alyeska?

PROVISIONS PERTAINING TO ALYESKA (Pages 20-21). In paragraph 22, the governments give up all claims they may have against Alyeska related to the oil spill for "~~Natural Resource Damages~~" and "~~damages for injury to Natural Resources~~". In addition, if Alyeska pays Exxon for claims relating to the oil spill, and Alyeska then recovers from the state or federal governments all or part of what Alyeska paid Exxon, Exxon will repay the governments that amount.

In paragraph 23, the governments agree that if either recovers any amount from Alyeska related to the oil spill, it will instruct Alyeska to pay 20.34% of that amount to Exxon.

In paragraph 24 Exxon and Exxon Pipeline agree to repay the governments 20.34% of any amount Alyeska recovers from the governments related to the oil spill (except for recoveries described in paragraphs 22 or 25).

Paragraph 25 covers situations where Alyeska sues the state or federal governments for its own damages related to the oil spill or because of Alyeska's liability to third parties (other than Exxon) related to the oil spill. In this situation, Exxon will pay the governments the amounts the governments paid Alyeska, if the government asserts in good faith all defenses it has and doesn't refuse a good faith proposal for settlement with Alyeska.



Questions.

1. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.)

2. Are there third party suits against the state, or are there likely to be such, in which Exxon or Exxon Pipeline is not a defendant? (Under paragraph 27, the state could not recover against Exxon for its losses in such cases.)

3. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. I suspect this was an oversight. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits?

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

INTEREST FOR LATE PAYMENTS (Pages 23-24). If Exxon fails to make a payment when due under paragraph 8 ((\$900 million) or paragraph 9 (the escrow account), Exxon must pay interest on the overdue amount. The interest rate is the amount the federal government charges on amounts owed it. It is tied to the investment rate for the Treasury tax and loan accounts. 31 U.S.C. 3717 (a)(1) and (2).

RESERVATION OF RIGHTS (Pages 24-25). Paragraphs 32-35 contain fairly standard provisions. Paragraph 32 states that the agreement does not constitute an admission of fact, law, or liability. Paragraph 33 states that the agreement does not create any rights in a person who is not a party to it. Paragraph 34 states that the agreement does not prevent the governments from providing assistance or funding to those who are not a party to the agreement. Paragraph 35 states that the agreement does not impair an existing contract between Exxon or Exxon Pipeline and any entity of either Government, including a bioremediation studies agreement between Exxon and the EPA.

NOTICES AND SUBMITTALS (Pages 25-26). This section gives the addresses of the parties for the purposes of any written notices required by the agreement.

ENTRY OF AGREEMENT: WITHDRAWAL OF CONSENT (Page 26). Notice of the consent decree is to be published in the Federal Register, and public comments received for 30 days. At the end of the 30-day period, either the state or the federal government can withdraw from the agreement if comments show that it is inappropriate, improper, or inadequate, or if, before the end of the 15-day period the state legislature has not approved the agreement "as written". If either

government withdraws, the agreement terminates as of the date of notice of withdrawal.

Question.

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

TERMINATION OF AGREEMENT. Any party, including Exxon and Exxon Pipeline, can terminate the agreement if

(1) a court of competent jurisdiction disapproves or overturns a plea agreement in the federal criminal case against Exxon;

(2) a court of competent jurisdiction makes a final decision that the agreement will not be approved and entered by the court without modification; or

(3) a court of competent jurisdiction modifies the agreement in a manner materially adverse to any party, or interprets a material provision in a manner inconsistent with the parties' intentions, before or at the time of approving the agreement.

To terminate the agreement, the party must give written notice to the other parties within 10 days after the event occurs that justifies termination. If one party terminates, the agreement terminates as to all parties. The provisions for termination do not appear to involve approval of the termination by the court, although the court may get involved if the parties disagree about whether a modification was "material".

After termination under this paragraph (or termination after withdrawal under the previous paragraph), the agreement ceases to be valid, except that (1) Exxon may recover its money from the escrow account, and (2) the provisions of paragraphs 11 and 12, relating to cleanup, continue notwithstanding the termination.

Paragraph 12 gives Exxon a setoff under certain circumstances (the circumstances being different depending on whether the setoff amount exceeds \$35 million or not) for its future cleanup work against any amount that it may owe either government for the oil spill. It appears that this setoff is now cast in stone, whether the agreement is terminated or not.

Paragraph 11's relationship to termination is a bit more complex because it states that Exxon has no further obligations with respect to cleanup (except as set forth in

① under  
① plan  
② if doesn't approve  
③ Exxon  
④

② 10 days  
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Exxon  
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1997  
plus other  
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1997

the agreement) after "final approval". Given the definition of "final approval" on pages 6-7, the agreement will not extinguish Exxon's cleanup duty if either of the governments withdraws from it, or if any of the parties terminates it for any reason except the rejection of the plea agreement in the criminal case. The difficulty would arise if the governments do not withdraw, the court approves the agreement without changing it or indicating that it interprets it differently from the parties, the court's decision becomes final without an appeal (at which point "final approval" occurs and Exxon's cleanup duty ends under paragraph 11) and thereafter, a court rejects the plea agreement, thereby allowing Exxon to terminate the agreement, but still arguably to claim the benefit of paragraph 11(b). This may not be very likely, but it is theoretically possible.

Questions.

1. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated?
2. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC?

RETENTION OF JURISDICTION (Page 28). The court retains jurisdiction to enforce the consent decree.

MODIFICATION AND ASSERTION OF AUTHORITY (Page 28). Any modifications of the agreement can be made only with the written consent of all the parties and the approval of the court.

Also, the representatives of the parties certify that they have authority to enter into the agreement and legally bind the parties to the agreement.

Question.

1. Does the assertion by the Governor and the A.G. that they have authority to enter into the agreement and bind the state, prevent the legislature or a private party from challenging the agreement as beyond the power of the executive (e.g., if one of its provisions violates the state constitution)?

# Alaska State Legislature

Legislative Research Agency




P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 165-3991  
Fax: (907) 163-3351

March 20, 1991

## MEMORANDUM

TO: Senator Dick Eliason

FROM: Tom Chester   
Legislative Analyst

RE: Present Value of Proposed Exxon Settlement

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

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

### Present Value

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

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

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

Senator Eliason  
March 20, 1991  
Page 2

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

The analysis presented in the attached table assumes the payments presented in the column labeled "Settlement Amount" occur. This may not be so; however, determination of exactly what the payments will be is beyond the scope of this request.

#### Calculation of Present Value

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

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

Attachments

## Proposed Exxon Settlement Payments in Present Value

### Case a

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

#### Assumptions

- 6.00% Inflation Rate
- 3.00% Real Discount Rate

### Case b

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

#### Assumptions

- 5.00% Inflation Rate
- 4.50% Real Discount Rate

#### Notes:

- [1] 1991 payment made in June 1991. All other payments occur on September 1 of specified year.
- [2] Proposed Payment Schedule, United States of America v. Exxon Corp., Exxon Shipping, and Exxon Pipeline Co.
- [3] Payments adjusted for inflation.
- [4] Payments adjusted for inflation are discounted back to 1991 using real discount rate.

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

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

Attorneys for Plaintiff United States of America

CHARLES E. COLE  
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State of Alaska  
Pouch K  
Juneau, Alaska 99811

Attorney for Plaintiff State of Alaska

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

---

The STATE OF ALASKA,

Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

AGREEMENT AND  
CONSENT DECREE

time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where  
"X" equals Exxon's expenditures for work done from  
January 1, 1991 to the Effective Date, in  
preparation for and conduct of clean-up of the Oil  
Spill in accordance with directions of the Federal  
On-Scene Coordinator, up to a maximum of \$4,000,000,  
plus Expenditures made by Exxon for clean-up work

after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent"). The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions

as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) the United States or the State

withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or

services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed



**Alaska Permanent Fund Corporation**

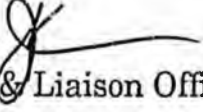
P.O. Box 4-1000 Juneau, Alaska 99802-4100

(907) 465-2047

**MEMORANDUM**

**DATE:** March 19, 1991

**TO:** Senate Special Committee on the Exxon Settlement

**FROM:** Jim Kelly   
Research & Liaison Officer

**SUBJECT:** **Present Value of the Proposed Exxon Settlement**

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

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

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

cc: Tom Chester, Legislative Research Agency

	<b>Amts of Exxon Payments</b>	<b>Real 1991 \$ (Inflation @ 6%)</b>	<b>Present Value (Return @ 9%)</b>	<b>FV of Payments In 2001 @ 9% Return</b>
1991	140,000,000	140,000,000	140,000,000	331,380,000
1992	150,000,000	141,510,000	137,610,000	325,650,000
1993	100,000,000	89,000,000	84,170,000	199,200,000
1994	70,000,000	58,772,000	54,054,000	127,960,000
1995	70,000,000	55,447,000	49,588,000	117,390,000
1996	70,000,000	52,311,000	45,493,000	107,660,000
1997	70,000,000	49,350,000	41,741,000	98,770,000
1998	70,000,000	46,557,000	38,290,000	90,650,000
1999	70,000,000	43,918,000	35,133,000	83,160,000
2000	70,000,000	41,433,000	32,228,000	76,300,000
2001	70,000,000	39,088,000	29,568,000	70,000,000
	<b>\$950,000,000</b>	<b>\$757,386,000</b>	<b>\$687,875,000</b>	<b>\$1,628,120,000</b>

# DIVISION OF LEGAL SERVICES

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### MEMORANDUM

March 19, 1991

**SUBJECT:** Exxon Settlement; Overview of Memorandum of Agreement and Consent Decree (MOA) and Preliminary Questions Related to It (Work Order No. 7LS1053)

**TO:** Senator Dick Eliason

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

### OVERVIEW: MOA

The "Memorandum of Agreement and Consent Decree" (MOA) settles a lawsuit that has recently been filed, or will soon be filed, in federal District Court in Alaska. In this lawsuit the federal and state governments are suing each other. The MOA concerns how the money recovered jointly by the U.S. and the State in the Exxon case is to be spent. Exxon is not a party to this lawsuit or the MOA.

Legal Basis. The Clean Water Act (CWA) says that the state is to recover for injuries to natural resources "on behalf of the public as trustee," 33 U.S.C. 1321(f)(5), but does not address the mechanics of the "trust". However, federal regulations adopted under the CWA (or under CERCLA, but applicable to the CWA, 42 U.S.C. 9651(c)), do address the mechanics of spending money recovered under the CWA. The state trustee is appointed by the Governor, 42 U.S.C. 9607(f)(2)(B), and recovers on behalf of the public for damage to state resources. 40 CFR 300.605. The trustee then devises a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 CFR 300.615(c)(4); and 43 CFR 11.93. The money is then to be spent in accordance with this plan. 43 CFR 11.92(c).

Types of Damages. The MOA deals with three types of damages. First there are "allowed expenses". These are the unreimbursed past expenses incurred by the state or federal governments for assessment and restoration (response and cleanup) and the state's litigation expenses. Second there are unreimbursed costs of future response and cleanup incurred by the state or federal government. Finally, there is "natural resource damage recovery," which is intended to compensate for the damage done state and federal natural resources. MOA IIA and G, pp.6-7.

Senator Dick Eliason  
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Allowed Expenses. The state can recover up to \$72 million for its "allowed expenses". This money would be paid directly by Exxon to the state treasury "over a period of five years." MOA VB. The MOA does not say what 5 years, or whether the installments are to be equal. Although the MOA is not entirely clear on this point, it appears that this money would have no restrictions on its use since it simply replaces money the state has already spent on items allowed under the CWA. If this is so, the legislature could then appropriate the money for any purpose.

The federal government would also be reimbursed, directly by Exxon, for its past restoration and assessment expenses, up to \$62 million.

Future Response Costs. If the state or federal governments perform response work after December 31, 1990, and the work is certified by the federal on-scene coordinator (FOSC) or the state on-scene coordinator (SOSC), reimbursement for those expenses shall also be paid by Exxon directly to the appropriate government. MOA VB, p.13. It appears that any such reimbursements to the state would go to the state treasury and be available for appropriation without limitation as to any specific purpose.

Natural Resource Damage Recovery. Whatever is left of the \$900 million after Exxon's cleanup costs after December 31, 1990 have been deducted, allowed expenses have been paid to the state (up to \$72 million) and federal (up to \$62 million) governments, and future response costs have been paid, will be deposited in a trust fund in the court registry. Interestingly enough, the federal regulations require that money recovered by the state trustee under the CWA be deposited either in a special account in the state treasury, or in an interest bearing account payable to the state agency acting as trustee. 43 CFR 11.92(a)(2). However, the MOA does not allocate this money between the federal and state governments nor does it appear to require that such an allocation be made in the future. While the regulations encourage trustees to cooperate, they do not explicitly authorize such a joint trust. 40 CFR 300.615.

Under the MOA, six trustees (3 federal officials and 3 state officials) will decide how to spend the money in the trust fund. MOA IVA 1 and 2, pp 9-10. If all six trustees cannot agree as to how the money shall be spent, the federal district court judge will decide; the trustees may also submit a dispute to non-binding mediation or "other means of conflict resolution." MOA IVA 3. The MOA requires the trustees to establish procedures for "meaningful public participation" (including an advisory group) in formulating an injury assessment and restoration plan. MOA IVA 4. Once the plan is established, it appears that the trustees would spend the money to implement it. MOA IVA 1, pp. 9-10. I have found nothing in the MOA that requires the trustees to use federal or state agencies in spending the money, nor anything that would prevent them from doing so. However, if some of the money is

to be used by a state agency, it would probably have to be appropriated. See MOA VD, p. 13.

Other. The MOA terminates 16 years from its effective date. The MOA does not require legislative approval, or even provide for it, but the MOA is referenced in the consent decree.

#### PRELIMINARY QUESTIONS RELATED TO THE MOA

1. Since some of the natural resource recovery is received in exchange for damages done to state resources, does the money have to be appropriated in order to comply with the state constitution vesting the appropriation power in the legislature? If so, how would that appropriation be accomplished, especially if the money is to be spent (out of the court registry) on something other than activities of a state agency?
2. Is the dedication of funds to a specific purpose contrary to the state constitution prohibiting such dedication. (See question #1 re consent decree.)
3. Would expenditures from the trust be subject to AS 36.30, the state procurement code?
4. Who, if anyone, will perform audits of the trustees' expenditures?
5. What rules apply to deposits in the court registry? Are deposits in the court registry interest bearing? May they be invested?
6. The MOA (as well as the consent decree) refers to "natural resource services" MOA p. 8 (top) and paragraph 13C's last sentence. What are these?
7. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
8. Will the federal government be able to pay for some of its existing regular staff out of the trust fund on the theory that the federal employees are working on assessment and restoration related to the oil spill? In short, can this money simply be substituted as the funding source for services the federal government would provide anyway out of other federal funding?
9. Is the existence of the trust fund in the court registry and the commingling of state and federal damages allowed under applicable federal regulations?

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10. The MOA, paragraph VC on p. 13, states that the money will be spent on restoration of natural resources in Alaska unless the trustees decide that spending funds outside of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources (or services) injured in Alaska. What does this mean? Would it allow the money to be used to establish parks, institutes, centers, etc. in other states?

11. The MOA notes that the A.G. and the commissioners of fish and game and environmental conservation are the state trustees. (The trustees can be changed, MOA IIL, p.8.) Will the commissioners have the time to establish the restoration plan and implement it, in addition to their other duties? Will additional staff be required in the state budget to allow them to do so? Who will pay for administrative expenses of the trust? The trust? Will this eat up the trust?

12. For the purposes of the oil spill litigation and use of money recovered, the federal government will be able to assert that it is a co-trustee over all natural resources injured by the oil spill. The state can assert the same as to federal resources. MOA VII B, p. 14. What are the implications of this paragraph?

13. If the legislature approves the consent decree, will it be prevented from challenging the MOA?

14. Could the legislature, by enacting legislation, retain greater control over the trust proceeds than allowed by the MOA (but still be within the limits of the CWA and applicable regulations)?

15. Will reimbursements for past allowed expenses and future clean up costs go to the general fund without any restrictions on its use?

16. Does the A.G. believe it is bound by 43 CFR 11.92 and 11.93 (the way money must be spent)?

17. If the trustees buy and develop real estate, who will own it? Who will be responsible for it when the MOA terminates?

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# DIVISION OF LEGAL SERVICES

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#### MEMORANDUM

March 19, 1991

**SUBJECT:** Overview of Consent Decree and Preliminary Questions related to it (Work Order No. 7LS1053)

**TO:** Senator Dick Eliason

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

#### OVERVIEW: CONSENT DECREE.

This settles the case between the State and Exxon and the U.S. and Exxon for civil damages against Exxon arising out of the Exxon Valdez oil spill. The case has recently been, or will soon be, filed in federal District Court in Alaska. It is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state has the choice of suing in state court under state law, or federal court under the Clean Water Act. In re Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979). If it chooses to pursue its federal remedies (by agreeing to the consent decree), it will give up all but one of its state claims. (The one involves fisheries business taxes.) It will also be bound by certain restrictions in the CWA and related regulations.

Legal Basis. Jurisdiction is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state and the federal government each have the right to recover for their own damages under the CWA. In re Allied Towing Corp., supra. There does not appear to be any requirement that the damages to the state and the damages to the federal government be combined, although the consent decree does combine them. However, if the state chooses to sue under the CWA, it must abide by the limitations of that Act as to (1) the types of damages that can be recovered, (2) the things for which money recovered can be spent, and (3) the use of a trustee in developing a plan for spending the money recovered. The state's damages under the CWA are recovered through a trustee appointed by the Governor. 42 U.S.C. 9607(f)(2)(B).

Types of Damages. Under the CWA, the state can recover for the costs of "replacing or restoring" the damaged natural resources.

Amount to be Paid. The consent decree requires Exxon to pay \$900 million less (1) Exxon's clean up costs from 1/1/91 to the date the consent decree is signed (up to \$4 million), and (2) Exxon's clean up costs from the date the consent decree is signed through the date the consent decree is approved (including any appeals from it). See CD 8(a), p.7 and CD 11, pp. 11-12. The rest is to be paid in installments from 1991 through 2001. CD 8, pp.7-8. There is no interest accruing on the unpaid amounts before they are due, but interest does accrue on overdue payments. CD31, p. 23. The \$900 million (less Exxon's clean up costs from 1/1/91) is the total that is owed to both the state and federal governments. The consent decree does not say how much of this is the federal government's money and how much is the state's money.

To Whom Paid. The trustees (three federal appointed by the President and three state officials appointed by the Governor) tell Exxon to whom the money is to be paid. CD8(d), p. 8.

Restrictions on Use. In the consent decree the U.S. and the State agree that the money will be used as follows:

1. To reimburse the U.S. and the State for response and cleanup costs incurred by them before 1/1/91.
2. To reimburse the U.S. and the State for damage assessments done before the date the consent decree is signed.
3. To reimburse the State for litigation costs incurred before the date the consent decree is signed.
4. To reimburse the U.S. or the State or both for cleanup costs incurred by either of them after 12/31/90 and to plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources or natural resource services injured, lost or destroyed by the oil spill, or to acquire equivalent natural resources or natural resource services.

The amount that can be returned to the state for past response and cleanup costs, past damage assessments, and litigation fees, is limited to \$72 million. The amount that can be returned to the federal government for past response, cleanup, and assessment is \$62 million. The remainder is to be used by the trustees for things in #4.

Who Decides How the Money is Used. The MOA, rather than the consent decree, is the document that primarily deals with the use of the money. However, in the consent decree the governments "represent" that the money will be disbursed in accordance with the MOA. CD10, p.11. Also, the consent decree does contain the restrictions discussed above as to how the money can be used. Moreover, even if there were no MOA, the CWA restricts the use of the money to restoring, rehabilitating, or acquiring the equivalent of the natural resources that were damaged. 33 U.S.C. 1321(f)(5) The regulations under the CWA also require the state trustee

to adopt a plan, and the money to be spent in accordance with that plan. 43 C.F.R. 11.92 and 11.93. However, the "up to \$72 million" that is to be reimbursed to the state for past cleanup, response, assessment, and litigation costs, and any money reimbursed to the state for future clean up should go into the general fund and be available for any use. (The consent decree and MOA are not clear on this, but it would make sense since, with the possible exception of litigation costs, this is "reimbursement" for money already spent for the required uses.)

?  
Other. The consent decree also addresses releases, reopener for damage that could not have been anticipated at the time of the settlement, provisions covering the TAPL fund, Alyeska, and third parties. Note that if the court approves the settlement, the state gives up all its civil claims relating to the oil spill, including those currently pending in state court, except the amount that would have been refunded to local governments under AS 43.75.130 (fisheries business tax). CD 13, pp. 14-15.

The consent decree also allows the State or the U.S. to withdraw from it within 45 days after the publication of the proposed consent decree in the Federal Register if comments received on it show it is inappropriate, improper, or inadequate, or if Alaska's legislature does not approve it by that time. CD 37, p. 26 Any of the parties may withdraw for certain other reasons as well, including failure of the court to accept the plea agreement in the criminal case. See CD 38, p. 27.

#### PRELIMINARY QUESTIONS RELATED TO THE CONSENT DECREE

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA, must be dedicated. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

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

3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?

4. Are the amounts Exxon will pay deductible under federal tax laws? Under state tax laws?

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5. If the legislature does not approve the settlement, can the state still agree to it? (It appears the answer is yes). Should/can the legislature intervene in the federal case if it does not approve the settlement, but the Governor decides to go ahead with the settlement?

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

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

8. At the bottom of page 10 and top of page 11, the consent decree refers to "natural resources or natural resource services" that were injured, lost, or destroyed and the acquisition of equivalent "resources or services". What is a "natural resource service"?

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#### MEMORANDUM

March 19, 1991

**SUBJECT:** Sectional Analysis of Consent Decree (W.O. 17LS-1053)

**TO:** Senator Dick Eliason

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

#### SECTIONAL ANALYSIS OF CONSENT DECREE THROUGH PARAGRAPH 12

INTRODUCTION. Pages 2-3. This sets out the background of the federal case. The important points are (1) an assertion that only the trustees are entitled to act on behalf of the public as trustees to recover damages to the natural resources arising from the oil spill; (2) the payments by Exxon are in addition to the \$2 billion that Exxon alleges it has spent for past cleanup and reimbursements to the federal, state, and local governments; and (3) the payments are made in response to "pending or potential civil claims for damages or other civil relief."

#### Questions.

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so?
2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it?

JURISDICTION. (Page 4). This sets out the basis of the federal district court's jurisdiction---federal question; maritime and admiralty; U.S. as a plaintiff; and the Clean Water Act.

#### Question.

1. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce agreement? Other?)

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PARTIES.(Page 4). This sets out the parties to the agreement. Note that "Exxon" includes the T/V EXXON VALDEZ, but does not include Exxon Pipeline.

DEFINITIONS.(Pages 5-7). This section defines terms used in the consent decree. "Governments" is defined earlier (page 1) to mean the U.S. and the State of Alaska.

Note that "natural resources" includes those belonging to the federal government, the state, or both.

For the purposes of the consent decree, the only state trustee is the attorney general.

The "effective date" is the date all parties have signed the agreement, while "final approval" does not occur until 45 days after the agreement has been published in the Federal Register, and the court has approved the agreement and the time for appeal from that decision has elapsed without appeal, or the decision has been upheld on appeal.

Special attention should be paid to the definition of "natural resource damages." It includes damages to natural resources arising under state as well as federal law. It also includes "economic rent".

Questions.

1. Why are the natural resource damages of the state not separated from the natural resource damages of the federal government?
2. If the court signs the consent decree, when does the time for appealing that decision expire?
3. Does the reference to claims under state law mean that this recovery is not entirely under the CWA?
4. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state e.g. lost taxes?
5. When was the last date that all parties signed? (My copy does not show Exxon's signature.)

EFFECT OF ENTRY OF DECREE (Page 7). Once the decree is signed and entered by the court, it is a final judgment between the state and federal governments and Exxon and Exxon Pipeline.

PAYMENT TERMS; PARAGRAPH 8 (Pages 7-8). Exxon is to pay to both governments jointly, a total of \$900 million. The first payment of \$90 million is due

10 days after the effective date. The second payment is due September 1, 1992. The amount of the second payment is \$150 million, less (1) Exxon's cleanup costs from January 1, 1991 to the effective date (up to \$4 million); and (2) Exxon's cleanup costs from the effective date to the date of final approval. On September 1, 1993, Exxon is to pay \$100 million. On September 1 of each year from 1994 through 2001, Exxon is to pay \$70 million. The payments shall be made as directed jointly in writing by the state attorney general and the federal assistant attorney general in charge of environment and natural resources.

Questions.

1. What is the present value of the amounts to be paid by Exxon?
2. Has Exxon paid the first \$90 million?
3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?
4. Are the amounts Exxon will pay deductible under federal tax law? Under state tax laws?

ESCROW; PARAGRAPH 9 (Pages 8-10). If final approval of the consent decree has not occurred when a payment is due (which will almost certainly be the case with the first payment), Exxon is to deposit the payment in an escrow account and notify the state and federal governments. The escrow agent must submit to the court's jurisdiction. After final approval, and 5 days after notification by the state and federal attorneys general, the money shall be paid to the "governments", plus interest. The interest is based on the average daily yield on three-month treasury bills. If the amount in the escrow account is not sufficient to pay that amount of interest and the escrow expenses, Exxon must make up the difference. If either government withdraws its consent under paragraph 37, or any party terminates the agreement under paragraph 38, the money in the escrow account shall be returned to Exxon.

USE OF MONEY; PARAGRAPH 10 (Pages 10-11). In this paragraph the governments agree between themselves how the money is to be spent. The consent decree states that neither Exxon, Exxon Pipeline, Alyeska, nor anyone except the governments obtains a right or obligation as a result of this paragraph.

The U.S. and the State "agree" that the money will be spent only as follows:

- (1) to reimburse the state and federal governments for response and cleanup costs incurred before January 1, 1991;

(2) to reimburse the state and federal governments for damage assessment costs incurred before the effective date;

(3) to reimburse the state for litigation costs incurred before the effective date;

(4) to reimburse the state and federal governments for cleanup and response costs incurred by either of them after December 31, 1990; and

(5) to assess injury and plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources (or natural resource services) injured, lost, or destroyed as a result of the oil spill, or acquire the equivalent of those resources or services.

The maximum amount that the state can receive as reimbursement for past response, cleanup, assessment, and litigation expenses is \$72 million. The maximum amount that the federal government can receive as reimbursement for past response, cleanup, and assessment is \$62 million. The federal and state governments also "represent" that the amount recovered from Exxon will be spent in accordance with the MOA.

#### Questions.

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

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

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

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

5. This paragraph refers to "natural resource services." What is a "natural resource service"?

6. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true?

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

EXXON'S CONTINUED CLEANUP: PARAGRAPH 11 (Page 11). Paragraph 11(a) requires Exxon to continue cleanup work after the effective date, as directed by the federal on-scene coordinator (FOSC), subject to prior approval of costs by the FOSC. In addition Exxon shall perform cleanup work as directed by the state on-scene coordinator, to the extent it does not conflict with the directions of the FOSC or federal law, subject to prior approval of costs. This paragraph also states that "Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC for the State OSC." Under paragraph 11(b), Exxon's obligation for cleanup ends upon final approval of the settlement "except as set forth in this Agreement". In addition, Exxon gets a credit for its expenditures for cleanup under this paragraph. "Expenditures" includes salaries, wages, benefits, expenses for Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

Questions.

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

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

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

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EXXON'S CONTINUED CLEANUP: PARAGRAPH 12 (Pages 13-14). If the agreement is terminated, or the court does not approve it, Exxon can setoff expenditures made by Exxon under paragraph 11 against any liability Exxon may have to either government as follows:

(1) If the post-effective date expenditures are \$35 million or less, the setoff does not apply unless Exxon shows both

(a) that based on information available to the FOSC or State OSC the anticipated cost was grossly disproportionate to the net environmental benefits anticipated, or the work could not reasonably have been expected to result in a net environmental benefit; and

(b) that Exxon submitted a written objection to the work a reasonable time before beginning it, explaining its objections.

(2) If the post-effective date expenditures are above \$35 million, Exxon gets the setoff unless the government or governments show that based on the information available to the FOSC or State OSC, the work was reasonably expected to result in a net environmental benefit and the anticipated cost was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Question.

1. Can Exxon setoff amounts approved by the FOSC against amounts owed the State? Can Exxon setoff amounts approved by the State OSC against amounts owed the federal government?

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Attorney for Plaintiff State of Alaska

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,  
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem.

Defendants.

Civil Action No.

The STATE OF ALASKA,  
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem.

Defendants.

Civil Action No.

AGREEMENT AND  
CONSENT DECREE

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Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command-Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

RICHARD B. STEWART  
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Division

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Civil Division  
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Washington, D.C. 20530

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Attorney General  
State of Alaska  
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Juneau, Alaska 99811

Attorney for Plaintiff State of Alaska

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,  
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

The STATE OF ALASKA,  
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

AGREEMENT AND  
CONSENT DECREE

This Agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V EXXON VALDEZ, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

#### Introduction

On the night of March 23-24, 1989, the T/V EXXON VALDEZ, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as State of Alaska v. Exxon Corporation, et al., Civil No. JAN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints.

Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command-Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

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### Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

### Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V EXXON VALDEZ, Official Number 692966 (now the T/V EXXON MEDITERRANEAN).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

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Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) "Alyeska" means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) The "TAPL Fund" means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.), and/or the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. §§ 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, et seq., or any federal or state statute or maritime or common law relating to the environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or

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permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) "Party" or "Parties" means Exxon, Exxon Pipeline, the United States, and the State, or any of them.

(f) "Trustees" means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General

(g) The "Oil Spill" means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) "Effective Date" shall mean the earliest date on which all Parties have signed this Agreement.

(i) "Final Approval" shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the

time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where  
"X" equals Exxon's expenditures for work done from  
January 1, 1991 to the Effective Date, in  
preparation for and conduct of clean-up of the Oil  
Spill in accordance with directions of the Federal  
On-Scene Coordinator, up to a maximum of \$4,000,000,  
plus Expenditures made by Exxon for clean-up work

after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent)". The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions

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as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (319) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) the United States or the State

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withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or

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services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed

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by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and

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warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) if total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both --

(1) that based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) that a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above;  
or

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(b) if total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided,

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however, that nothing in this Agreement shall affect or impair the following:

(a) claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility

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for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or

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arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

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- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Releases and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based on

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or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

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Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to sue Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take

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other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

#### Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the

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Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party. However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

#### Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the Governments for interest on the

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overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. § 3717(a)(1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated

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December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
10th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
Attn. DOJ #90-5-1-1-3343

Chief, Admiralty and Aviation Branch  
Civil Division  
U.S. Department of Justice  
601 D Street, N.W.  
Washington, D.C. 20530

General Counsel  
National Oceanic and Atmospheric Administration  
Department of Commerce  
14th & Constitution Avenue, N.W.  
Washington, D.C. 20230

As to the State of Alaska:

Attorney General  
State of Alaska  
Pouch K  
Juneau, Alaska 99811

Supervising Attorney  
Oil Spill Litigation Section  
Department of Law  
1031 W. Fourth Street, Suite 200  
Anchorage, Alaska 99501

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As to Exxon:

Office of the Secretary  
Exxon Corporation  
225 E. John W. Carpenter Fwy.  
Irving, Texas 75062-2298

General Counsel  
Exxon Corporation  
225 E. John W. Carpenter Fwy.  
Irving, Texas 75062-2298

Mr. A. Elmer, President  
Exxon Shipping Company  
P.O. Box 1512  
Houston, Texas 77251-1512

As to Exxon Pipeline:

Mr. D. G. Warner  
President  
Exxon Pipeline Company  
P.O. Box 2220  
Houston, Texas 77252-2220

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the Federal Register, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

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38. Any Party may elect to terminate this Agreement if:

(1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in United States v. Exxon Shipping Co., No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

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Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

THE FOREGOING Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby APPROVED AND ENTERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 1991.

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Honorable H. Russel Holland  
United States District Judge  
District of Alaska