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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION, et al., in personam, and the T/V EXXON VALDEZ, in rem, Defendants.	Civil Action No. A91-082 CIV GOVERNMENTS' MEMORANDUM IN SUPPORT OF AGREEMENT AND CONSENT DECREE

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STATE OF ALASKA, Plaintiff, v. EXXON CORPORATION, et al., Defendants,	Civil Action No. A91-083 CIV GOVERNMENTS' MEMORANDUM IN SUPPORT OF AGREEMENT AND CONSENT DECREE

INTRODUCTION

The United States and the State of Alaska (collectively "the Governments") have requested entry of the Agreement and Consent Decree (the "Decree") lodged with the Court on September 30, 1991. If approved, the Decree would represent the largest civil settlement ever in an environmental case. The Decree would resolve the United States' claims against Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ (collectively "Exxon") in Civil Action No. A91-082, and all other pending or potential civil claims between the Governments and Exxon arising out of the March 23-24, 1989 oil spill from the T/V EXXON VALDEZ (the "Spill"). Most importantly, the Decree would settle the Governments' claims for natural resource damages resulting from the Spill.

The United States has separately filed a plea agreement in United States v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR (D. Alaska), which if accepted by the Court would resolve the federal criminal charges against Exxon Corporation and

Exxon Shipping for their part in the Spill. Among other things, the plea agreement would require Exxon to make restitution payments totalling $100 million to the Governments -- $50 million to the United States and $50 million to Alaska -- for use in restoring natural resources injured by the Spill. The payments required by the instant civil Decree would be in addition to those restitution payments. The United States suggests that the Court consider entry of the Decree at the same time it considers acceptance of the criminal plea agreement, because the full amount of judicially ordered compensation to the Governments for the consequences of the Spill -- more than $1 billion -- results from the two agreements together.

The United States brought this civil action primarily to ensure that the oil released into Prince William Sound and the Gulf of Alaska is cleaned up insofar as is practicable and to recover monies sufficient to restore or otherwise compensate the public for any harm to natural resources that remains after the cleanup is done. Due in part to Exxon's cooperation and its voluntary expenditure of over $2.5 billion to address the consequences of the spill, and in particular for cleanup activities, the first of these objectives has largely been achieved. Although there is continuing harm to some natural resources, much of the affected environment is on the road to recovery. The settlement presented to the Court in this Decree would allow the Governments immediately to begin the actions necessary to restore those resources that are not already fully recovering without the delays and risks inherent in continued

litigation.

As described in more detail below, the proposed Decree would provide an unprecedented recovery of at least $900 million to reimburse the Governments' costs and to restore, replace, or acquire the equivalent of the natural resources affected by the Spill. This amount will be paid over ten years, reflecting the Governments' expectation that understanding and repairing the remaining resource injuries will require many years of effort. The Decree also contains a "reopener" requiring Exxon to pay up to an additional $100 million to the Governments for restoration of presently-unknown and unanticipated injury to populations, species or habitats. The Decree further requires Exxon to perform any oil cleanup work remaining to be done in accordance with the Governments' directions.

The $900 million base settlement amount in the Decree is by far the largest recovery ever obtained in an environmental enforcement case. It is more than 80 times the size of the largest previous natural resource damages recovery by the United States or any state government.[1] Although the EXXON VALDEZ spill was one-sixth the size of the world's largest, involving the AMOCO CADIZ, Exxon is paying over six times the amount awarded to the French

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[1] See United States v. Shell Oil Company, No. C-89-4220-CAL (N.D. Cal. Mar. 26, 1990)(entry of consent decree), arising out of the San Francisco Bay oil spill. The Shell natural resource damages settlement may soon be surpassed by a currently pending settlement for $24 million, which the City of Seattle agreed to pay to restore contaminated areas of Elliott Bay under a consent decree lodged on September 9, 1991, in United States v. City of Seattle, No. C90-395WD (W.D. Wash.).

plaintiffs, after 12 years of litigation, for the environmental harm caused by the AMOCO CADIZ oil spill -- and payment of the AMOCO CADIZ award is still being held up by appeals.[2] The proposed settlement is thus advantageous not only because of its size, but also because it has been achieved promptly, avoids litigation risks that the Governments believe are substantial, and provides adequate funding for restoration of the environment at the time it is needed.

The Governments believe that the Decree is fair, reasonable, and adequate, that it is fully in accord with the Clean Water Act and State law, and that it is the most appropriate and most expeditious way to achieve the Governments' objective of restoring the natural resources of Prince William Sound and the Gulf of Alaska that were injured by the Spill. Accordingly, the Governments request the Court to enter the Decree.

BACKGROUND

On March 13, 1991, the United States filed this action in admiralty and maritime jurisdiction for cleanup costs and natural resource damages resulting from the Spill, and for injunctive relief, against Exxon Corporation, Exxon Shipping Company, Exxon

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[2] The AMOCO CADIZ spilled approximately 68 million gallons of crude oil -- more than six times the amount of oil spilled from the EXXON VALDEZ -- off the north coast of France on March 16, 1978. In July 1990, the U.S. District Court for the Northern District of Illinois entered a final order awarding the French government and several local government plaintiffs approximately $125 million from Amoco Oil Co. for damages caused by the AMOCO CADIZ spill. The parties filed cross-appeals from this judgment, and the matter is pending before the U.S. Court of Appeals for the Seventh Circuit.

Pipeline Company, and Alyeska Pipeline Service Company ("Alyeska") and its owner-companies, in personam, and the T/V EXXON VALDEZ, in rem. This action arises under a number of federal environmental statutes, including Section 311 of the Clean Water Act, 33 U.S.C. § 1321. Complaint, ¶ 6. Section 311 authorizes the United States and the State to recover their costs for removal of oil discharged from the T/V EXXON VALDEZ. Section 311 further authorizes the United States and the State, acting on behalf of the public, to recover natural resource damages resulting from the Spill, including the costs of restoration, replacement and acquisition of the equivalent of injured natural resources and the costs of assessing damages to natural resources. 33 U.S.C. § 1321(f)(1), (4) and (5). The Exxon Defendants have asserted counterclaims against the United States, seeking damages, contribution and indemnity.

The State has also brought natural resource damage claims under Section 311 before this Court in Alaska v. Exxon Corp., No. A91-083 CIV (D. Alaska). As in the United States' action, defendants Exxon Corporation and Exxon Shipping Company have counterclaimed against the State for damages, contribution and indemnity. In addition, the State previously asserted state statutory and common law claims for damages, including natural resource damages, against Exxon and Alyeska in the Superior Court for the State of Alaska. Alaska v. Exxon Corporation, Civil No. 3AN-89-6852 (Super. Ct. Alaska filed Aug. 16, 1989). Exxon has counterclaimed in this case as well.

These Government actions are in the context of a multitude of interlocking lawsuits in federal and state courts and related proceedings before the Trans Alaska Pipeline Liability Fund ("TAPL Fund"). Thousands of fishermen, fish processors, Native groups, and other private parties ("private plaintiffs") and several local governments and local and national environmental groups have asserted claims against Exxon relating to the Spill. Many of the private plaintiffs have sued the State, alleging that it bears some responsibility for the inadequacy of initial efforts to contain the Spill. The United States also sued the State in this Court, alleging that the it has primary trusteeship over the natural resources injured by the Spill, and the State counterclaimed alleging that its trusteeship of those resources should have precedence over that of the United States. United States v. State of Alaska, No. A91-081 CIV (D. Alaska).

Several Alaska Native Villages and Native Corporations sued both the State and the United States, asserting among other things that by settling their natural resource damages claims with Exxon, the Governments would compromise claims belonging to Alaska Natives. See Native Village of Chenega Bay v. Lujan, No. 91-CV-483 (D.D.C. filed Mar. 5, 1991) and Chenega Corporation v. Lujan, No. 91-CV-484 (D.D.C. filed Mar. 6, 1991) (consolidated). These multiple claims for natural resource damages led Exxon to file a Complaint in Interpleader in this Court, naming as defendants the heads of the six federal and state natural resource trustee agencies, five Native Villages and three Native Corporations ("the

Native Interests"). Exxon Shipping Company v. Lujan, No. A91-219 CIV (D. Alaska filed May 16, 1991).

The proposed Decree is the culmination of a series of final and pending settlements that, if they are all approved, will favorably resolve the most complex and novel claims among all those in the Spill-related litigation -- the claims for natural resource damages. It also resolves, or contributes to the resolution of, other pieces of this litigation, as discussed below. As the Court is well aware, the Governments and Exxon attempted to resolve those claims among themselves in March of this year, only to see that proposed settlement collapse after the Court rejected the first proposed criminal plea agreement. During the five months since the March 1991 Agreement was terminated, the Governments have negotiated a series of agreements which resolve many of the collateral disputes that motivated objections to their previous proposed settlement of natural resource damage claims.

First, the Governments have resolved any potential competition between their respective natural resource damage claims, by agreeing, in the MOA approved by the Court on August 28, 1991 in Civil Action No. A91-081, to act as co-trustees of all of the resources affected by the Spill and to jointly use any recoveries for natural resource damages obtained from defendants. Second, the Governments and the Alaska Native groups have entered into a proposed Consent Decree and Stipulation of Dismissal, lodged with the Court on September 25, 1991 in newly-filed Native Village of Chenega Bay v. United States, No. A91-454 CIV ("Chenega Bay"),

which among other things stipulates that the Governments have the right, to the exclusion of the Native groups, to assert natural resource damages claims arising from the Spill.

Third, the Governments recently reached an agreement with many of the private plaintiffs, soon to be filed in Alaska Superior Court, under which the private plaintiffs will release the State and the United States for all claims arising from the Oil Spill in return for commitments by the Governments to give the private plaintiffs access to the scientific information gathered by the Governments in their ongoing natural resource damage assessment.[3] The agreement between the Governments and the private plaintiffs will substantially decrease the possibility of lengthy discovery battles over release of the scientific data. Approval of that agreement, the proposed Chenega Bay Consent Decree and Stipulation of Dismissal, and the instant Decree would remove the Governments as parties in virtually all Spill-related cases filed in federal and state court and would clear the way for more expeditious resolution of the remaining claims in the Oil Spill litigation.

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[3] The preliminary results of the Governments' damage assessment were outlined in the Summary of Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archeological Resources (March 1991), which the United States lodged with the Court in this case on April 8, 1991. After the March 1991 Agreement was lodged, many of the private plaintiffs and others commented that the results of the Governments' resource injury assessment should be made available to the public and to other litigants. The information collected in the damage assessment has been kept confidential for sound litigation reasons, but will be made available to those private claimants who have entered into this recent agreement.

SUMMARY OF TERMS OF THE DECREE

The most significant terms of the proposed Decree are as follows.

1. Payments by Exxon

Exxon is required to pay a total of $900 million to the Governments over a ten-year period. Decree ¶ 8. The first payment of $90 million became payable 10 days after the parties signed the decree and will be disbursed to the Governments upon "final approval" of the Decree, i.e., as soon as the Decree has been entered as a judgment and the time for appeal from that judgment has expired.[4] The remaining payments are to be made on the following schedule:

December 1, 1992	$150,000,000[5]
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

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[4] In accordance with Paragraph 9 of the Decree, Exxon has already deposited this first payment in an interest-bearing escrow account. The payment will be disbursed to the Governments, with the accrued interest, within five days after final approval of the Decree. See Decree ¶ 9. If the escrow account earns less interest than the Treasury bond rate calculated as described in the Decree, Exxon must pay the difference to the Governments. Id.

[5] As set forth in subparagraph 8(b) of the Decree, Exxon will receive a credit against this payment equal to its costs for cleanup work performed in accordance with directions of the Federal On-Scene Coordinator ("FOSC") from January 1, 1991 through March 12, 1991, up to a cap of $4 million, plus its costs of cleanup in accordance with directions of the FOSC or the State On-Scene Coordinator after March 12, 1991.

The monies paid by Exxon under the Decree will be allocated and used in accordance with the Memorandum of Agreement and Consent Decree ("MOA") between the Governments, which this Court approved on August 28, 1991 in United States v. State of Alaska, No. A91-081 CIV (D. Alaska). See Decree ¶ 10. As provided in the MOA, the United States will receive $67 million and the State will receive $75 million in reimbursement for their cleanup costs before January 1, 1991, their natural resource damages assessment costs through March 13, 1991, and the State's litigation costs through the latter date. The Governments will also be reimbursed for the cleanup and damages assessment costs that they have incurred since those dates. The State will be reimbursed for its litigation costs after March 13, 1991, at a rate not to exceed $1 million per month. All of the remaining monies paid by Exxon under the Decree will be deposited in the Registry of the Court and will be used by the Governments jointly (1) to complete the ongoing assessment of environmental damage and planning for restoration or replacement of injured resources; and (2) to implement the plans developed in the assessment process to restore or replace injured natural or archaeological resources and, if certain resources cannot be restored, to acquire equivalent resources.[6]

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[6] After entry of the Decree, the Governments will submit to the Court a proposed order, pursuant to Fed. R. Civ. P. 67, establishing the Registry account. Subject to the Court's approval, the Governments intend that these monies be deposited in the Court Registry Investment System (CRIS) operated by the Clerk's Office of the U.S. District Court for the Northern District of Texas. The CRIS is designed to hold and invest securely large sums of money under judicial supervision.

The Decree also contains a novel provision requiring Exxon to pay to the Governments, between September 1, 2002 and September 1, 2006, up to an additional $100 million for restoration of population(s), habitat(s) or species which have suffered a substantial loss or substantial decline in Spill-affected areas, where the loss or decline was unknown to and could not reasonably have been anticipated by the federal and state natural resource trustees when they entered into the Decree. Decree ¶¶ 17-19. This provision differs from the "reopeners" or reservations of rights that the United States has often required in consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The reservations in CERCLA consent decrees typically allow the United States to reopen litigation if new information or previously unknown conditions are discovered, but the United States must then establish liability of the defendant for such conditions. Under the Instant Decree, Exxon commits to pay up to $100 million for restoration of unanticipated environmental harm, without any need for the Governments to establish Exxon's liability.

2. Obligation to Continue Cleanup

In addition to its monetary terms, Exxon must continue its Oil Spill cleanup work in accordance with the directions of the Federal On-Scene Coordinator (FOSC) and subject to the FOSC's prior approval of the costs of such work. Decree ¶ 11. Exxon is also required to perform any additional cleanup work directed by the State On-Scene Coordinator, so long as that work does not interfere

or affirmatively conflict with the directions of the FOSC or federal law. Id. Expenditures made by Exxon for this additional cleanup work will be credited against the next payment owed to the Governments.[7]

3. Mutual Releases and Covenants Not to Sue

The proposed Decree resolves all civil claims between the Governments and Exxon arising from the Spill and resolves all of the Governments' claims for natural resource damages resulting from the Spill, without in any way impairing or impeding the Spill-related claims of third parties.

Under Paragraph 20 of the Decree, Exxon Corporation, Exxon Shipping, and Exxon Pipeline release and covenant not to sue both Governments for any and all civil claims arising from the Spill. In addition, the Decree requires Exxon to indemnify and hold harmless the Governments for any liability they may have to the TAPL Fund or other third parties based on contribution or any other theory of recovery arising from any payments by those entities to Exxon. Decree ¶¶ 21, 26(b). These provisions ensure that the Governments will not be exposed to any risk of loss if Exxon recovers on an affirmative Spill-related claim against the TAPL Fund or another third party and the Fund or other third party sues

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[7] Even if the Decree were not approved by the Court, Exxon would be bound by the requirement in paragraph 11 of the Decree that it continue cleanup work as directed by the Federal or State On-Scene Coordinators. See Decree ¶ 12. In that circumstance, however, Exxon may be entitled to set off certain post-Decree cleanup costs against its liability to the Governments. Id. The parties presently anticipate only minor additional cleanup work, if any.

the Governments for contribution, indemnity, subrogation rights, or under any other theory of recovery over.

Paragraph 13 of the Decree states that, effective upon final approval, the Governments release and covenant not to sue Exxon Corporation and Exxon Shipping Company for any and all civil claims arising from the Oil Spill. The Governments similarly release and covenant not to sue Exxon Pipeline Company, except insofar as it may be liable as a part owner of Alyeska Pipeline Service Company. Decree ¶ 14. The Governments also agree not to sue any present or former officer, director, or employee of Exxon Corporation, Exxon Shipping, or Exxon Pipeline in connection with the Spill, unless such an individual brings suit against the Governments. Id. ¶ 15. Notwithstanding these broad covenants, Paragraph 13 expressly states that nothing in the Decree affects or impairs (a) claims for enforcement of the Decree; (b) claims by the State of Alaska for tax revenues which it would have collected or would collect in the future under state statute AS 43.75 but for the Oil Spill; (c) private claims of Alaska Native Villages and individual Natives; and (d) private claims by Native Corporations.

Paragraph 16 of the Decree requires the parties to enter into stipulations for dismissal, with prejudice, of each of the pending claims by the Governments against Exxon or by Exxon against either of the Governments in these federal court actions or in the state court litigation, with the exception of claims by the State of Alaska for tax revenues that it would have collected or would collect in the future under state statute AS 43.75 but for the Oil

Spill.

The payments required by the Decree and the additional $100 million to be paid for restitution under the criminal plea agreement are intended as full compensation to the Governments for the injury to natural resources caused by the Spill. Accordingly, the Decree includes a covenant by the Governments not to sue Alyeska and its seven owner companies for natural resource damages resulting from the Spill once the Decree has become effective. Decree ¶ 22. The Governments' claims against Alyeska in this civil action for relief other than natural resource damages would remain pending and would not be affected by the Decree. In view of the fact that Exxon Pipeline Company owns a 20.34 percent share of Alyeska, the Decree contains several provisions designed to ensure that no recovery by Alyeska would inure to Exxon's benefit, that no recovery by the Governments against Alyeska would have any financial impact on Exxon, and that no recovery by Exxon against Alyeska could be passed on to the Governments. Id. ¶¶ 21 (last sentence), 22-25.

4. Changes from March 13, 1991 Agreement

As previously noted, the Decree is quite similar to the Agreement and Consent Decree lodged with this Court on March 13, 1991, and subsequently terminated. The material differences between the prior Agreement and the current Decree are as follows:

(1) Subparagraphs 13(c) and (d) of the current Decree contain new language confirming that the Decree does not affect or impair any private claims of Alaska Native Villages,

individual Alaska Natives, or Alaska Native Corporations. This language is consistent with Paragraphs 7 and 8 of the proposed Consent Decree and Stipulation of Dismissal lodged with this Court on September 25, 1991, in the new Chenega Bay case, Civil Action No. A91-454.

(2) The current Decree expressly states that the payments by Exxon may to be used for restoration or replacement of "archaeological sites and artifacts" damaged by the Spill. Decree ¶ 10(5). The March 1991 Agreement did not address archaeological resources.

(3) The current Decree (consistent with the MOA) permits the State to be reimbursed out of Exxon's payments for the costs it incurred for the Spill-related litigation after March 13, 1991, up to a cap of $1 million per month. Decree ¶ 10(6).

(4) The date of Exxon's second payment has been changed from September 1, 1992 under the Agreement to December 1, 1992 under the Decree. Decree ¶ 8(b). All other payment dates are unchanged.

(5) The current Decree expressly provides the Governments the right to audit any cleanup costs after March 13, 1991 which Exxon seeks to use as an offset against the December 1992 payment. Id. The March 1991 Agreement was silent on this subject.

(6) Subparagraphs (b) and (c) have been added to Paragraph 16 of the current Decree to require dismissal of the

actions between the Governments and Exxon that have been filed since the March 1991 Agreement was executed.

(7) Subparagraph 26(b) was added to the current Decree to ensure that the Governments are protected from any loss in the situation where Exxon sues a third party for damages arising from the Spill and the third party seeks contribution from one or both of the Governments.

(8) The references in the March 1991 Agreement to public notice and comment have been deleted from the Decree.[8]

DISCUSSION

A. Standard of Review

The standard of review to be applied by a district court in reviewing a settlement is whether it is "reasonable, fair, and consistent with the purposes of the statute under which the action is brought". United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990); United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990); Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied sub nom. Byrd v. Civil Service Comm'n, 459 U.S. 1217 (1983) ("Officers for Justice"). The questions to be resolved in reviewing the settlement and the degree of scrutiny afforded them are distinct from the merits of the underlying action. The Court's inquiry should be directed not to

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[8] There is no legal requirement for public notice and comment on this settlement. See footnote 11, infra. Nonetheless, since this settlement is substantially similar in all major respects to the March 1991 Agreement for which public comment was submitted, the United States is responding to those comments in this memorandum.

whether the court itself would have reached the particular settlement terms but, rather, to whether the proposed settlement is a reasonable compromise and otherwise in the public interest. Officers for Justice, 688 F.2d at 625; Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, 467 U.S. 1219 (1984). See Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980) (court should not substitute its judgment for that of the parties and their counsel in reviewing a settlement).

In instances where the federal government is the plaintiff, as is the case here, a legal presumption of validity attaches to the settlement agreement. Officers for Justice, supra, 688 F.2d at 625; Securities & Exchange Comm'n v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984); United States v. Rohm & Haas Co., 721 F. Supp. 666, 681 (D.N.J. 1989). Moreover, the Court should be mindful of the fact that there is a strong policy in the law favoring settlements. See United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985) (trial judge should exercise discretion to further strong public policy of voluntary settlement of litigation); accord Securities & Exchange Comm'n v. Randolph, supra, 736 F.2d at 528; Citizens for a Better Environment v. Gorsuch, supra, 718 F.2d at 1126; Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862 (1976); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). The consent decree, in particular, is a "highly useful tool for

government agencies," for it "maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975). See Securities & Exchange Comm'n v. Randolph, supra, 736 F.2d at 528 ("use of consent decree encourages informal resolution of disputes, thereby lessening the risks and costs of litigation").

Further, in cases where the public interest is represented by the Department of Justice and its client agencies, the courts should give "proper deference to the judgement and expertise of those empowered and entrusted by the Congress to prosecute the litigation as to the appropriateness of the settlement." United States v. Monterey Investments, No. C 88-422-RFP, slip op. at 6 (N.D. Cal. Jul. 31, 1990)(citing Rybachek v. United States Environmental Protection Agency, 904 F.2d 1276 (9th Cir. 1990)). See Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 689 (1961)("[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."); United States v. Assoc. Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied sub nom. Nat'l Farmers' Org., Inc. v. United States, 429 U.S. 940 (1976) (Attorney General must retain discretion in "controlling government litigation and determining what is in the public interest."); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454

U.S. 1083 (1981) (the balance to be struck among competing interests in the formulation of an agreement resides initially in the Attorney General's discretion).

B. The Decree is Reasonable, Fair, Adequate, and Consistent With the Clean Water Act

The central purpose of section 311 of the Clean Water Act, 33 U.S.C. § 1321, and the other federal laws that give rise to this action, is the cleanup and restoration of resources injured by oil spills. As noted above, the proposed Decree provides an unprecedented recovery for achieving that objective in this case. The settlement proceeds will allow the Governments to conduct restoration measures to enhance recovery of the environment affected by the Spill without the long delay and uncertainty as to outcome that would inevitably occur in continued litigation; the settlement also requires Exxon to complete any remaining cleanup that the Governments believe to be needed. Accordingly, the Decree is clearly reasonable, fair and consistent with the Clean Water Act, and should be entered by the Court.

The reasonableness of the Decree should also be considered in light of the inevitable and serious risks of continued litigation, which is the alternative to settlement. Obviously, the parties to this case believe that the settlement is reasonable in light of their respective litigation risks. For example, from the viewpoint of the United States, it should be emphasized that one of the primary federal statutes upon which the United States is relying in this case contains a conditional limitation of liability far lower

than the amount of the settlement. See Section 311(f)(1) of the Clean Water Act, 33 U.S.C. § 1321(f)(1).[9] Surmounting that limitation on recovery would require substantial litigation effort and is not a certainty. Moreover, given the novelty and extraordinary legal and technical complexity of natural resource damage litigation, the risks, expense and the inherent uncertainty of recovery make voluntary settlement especially attractive, particularly where the settlement terms provide for a substantial recovery fairly comparable to that which is probable after litigation. See In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1030 (D. Mass. 1989).

Continued litigation would, of course, create serious burdens on public resources. The needs of litigation are already requiring the attention of government scientists whose time is better spent on restoring the environment. The need to begin active restoration measures is another factor in favor of settlement. The earlier the Governments can begin restoration, the more effective it will be in enhancing the recovery of the environment. Even if further litigation led to greater recovery, "any benefits above those provided by the decree would likely be substantially diluted by the delay inherent in acquiring them." Officers for Justice, supra,

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[9] Applicable provisions of Section 311 of the Clean Water Act limit Exxon's liability under that statute to $150 per gross ton of the EXXON VALDEZ. This limitation under the Clean Water Act may only be broken if the United States proves that the discharge of oil "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner . . . ." 33 U.S.C. § 1321(f)(1). Thus, unless the Clean Water Act limitation is broken, liability under the statute is limited to $16,624,650.

688 F.2d at 629.

The reasonableness of the Decree should also be evaluated in light of the environmental problem to be addressed. The results of the Governments' damage assessment, as outlined in the Summary of Effects lodged with the Court on April 8, 1991, show significant injury to the environment, manifested in several important resources.[10] At the same time, many resources appear to be recovering either naturally or as a result of ongoing efforts. The critical need at the present time is to undertake those restoration measures that will best enhance natural recovery of the resources that have suffered continuing injury.

The Decree will provide the funding needed by the Governments to undertake the necessary restoration measures. Based on the results of the damage assessment, the Governments believe that the settlement provides adequate money to conduct effective restoration. The Court should allow the Governments the discretion to make that determination because the negotiations were conducted with the participation of, and on behalf of, administrative agencies "specially equipped, trained and oriented in the field . . . ." United States v. Nat'l Broadcasting Co., Inc., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978).

The fairness of the Decree is further illustrated by the

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[10] Exxon has stated strongly differing views regarding the effects of the Spill, thus underlining the risks of the litigation. See Attachment A of the Joint Sentencing Memorandum of Exxon Corporation and Exxon Shipping Company filed in United States v. Exxon Corp., No. A90-015 CR (D. Alaska) on September 30, 1991.

process through which it was developed. The Governments have conducted a two-year, multi-million dollar effort to assess the effects of the Spill. Based on this information, they have engaged in months of hard fought, arm's length negotiations with Exxon to reach the present Decree.

In the light of the scope of the injury, the risks of trial and the burdens of further litigation, it is clear that the Decree is reasonable, fair, consistent with the Clean Water Act, and provides the Governments with an outstanding, unprecedented, and immediate opportunity to address the environmental problems caused by the Spill. The Decree is plainly in the public interest and should be entered without delay.

C. Responses to Public Comments

There is no legal requirement for public notice and comment on the proposed Decree.[11] Nonetheless, because of the unusual nature of this case, when the Governments lodged the March 1991 Agreement with the Court, they published a notice containing the full text of the Agreement in the Federal Register and solicited public comments

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[11] Neither the Clean Water Act nor any of the other statutes relied upon by the United States or the State in these actions requires public notice and comment on consent decrees. Department of Justice policy, codified at 28 C.F.R. § 50.7, requires notice and an opportunity for comment on consent decrees in actions to enjoin the discharge of a pollutant. However, the instant actions do not seek such an injunction, and that policy is therefore inapplicable. Some commenters have incorrectly stated that the public notice and comment requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., apply to this case. CERCLA does not apply here because it imposes liability for releases of hazardous substances, and petroleum is explicitly excluded from the definition of "hazardous substance." See 42 U.S.C. § 9601(14).

even though they were not required to do so. See 56 Fed. Reg. 11636-42 (March 19, 1991). Written comments were accepted for a period of 30 days after publication.

The Governments carefully reviewed and considered the comments on the March 1991 Agreement before entering into the instant Decree.[12] Because of the close similarity of the Decree with that Agreement, a summary of the Governments' responses to the most significant of those comments may be helpful to the Court.

While there was a large volume of material submitted, the most significant issues fall into seven headings: (1) the extent of damage assessment information available to the public; (2) the adequacy of the amount of the settlement; (3) the absence of civil penalties; (4) the lack of provision for archaeological and cultural resources; (5) the effect of the settlement on Alyeska; (6) alleged conflicts of interest of the Governments as a result of the counterclaims that Exxon asserted against each of them; and (7) the effect of the Decree on third parties.

1. Availability of Scientific Data

A number of commenters expressed concern that the publicly available data on the injuries to the resources affected by the Spill was insufficient to support an informed decision on the

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[12] The following agencies of the Governments participated in the review of public comments: the U.S. Departments of Agriculture and the Interior, the National Oceanic and Atmospheric Administration ("NOAA"), the Environmental Protection Agency ("EPA"), and the U.S. Department of Justice; and, for the State, the Departments of Fish and Game ("ADF&G"), Environmental Conservation ("DEC"), and Natural Resources ("DNR"), as well as the Department of Law.

adequacy of the March 1991 Agreement. The Governments believe that there is sufficient information to evaluate the overall adequacy of the Decree. First and most importantly, the United States lodged with this Court on April 8, 1991 the report, Summary of the Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources ("Summary of Effects"), which summarized the results of two years of damage assessment studies. This report provides a reasonably detailed description of the injuries caused by the Spill. In addition, in March 1991, NOAA published its "Review of the Status of Prince William Sound Shorelines Following Two Years of Treatment By Exxon", which summarizes some of the available data on the state of shoreline areas that were directly affected by the Spill.

Second, the intense public and scientific interest in the Spill has resulted in a significant and growing body of literature -- both technical and non-technical -- concerning the Spill's environmental effects. The Governments have collected much of this literature and have made it readily available to all parties and to the public in the Oil Spill Public Information Center (OSPIC) in Anchorage, as part of OSPIC's repository for information relating to oil spills in general and the EXXON VALDEZ oil spill in particular.

Third, the Governments are making scientific data available to the groups most directly interested in the damage assessment. Recent agreements with Alaska Native organizations and certain private plaintiffs will ensure that these groups have access to the

results of the damage assessment. (See discussion at pp. 8-9, infra.)

The Governments support eventual disclosure of all scientific data collected during the damage assessment. To unilaterally disclose the data and reports that form the basis of its case would, however, seriously handicap the Governments in litigation, and would be contrary to Governments' primary duty of obtaining an award that will protect and restore the environment. Settlement of this case, in conjunction with agreements recently reached with private plaintiffs and Alaska Natives, should expedite eventual release of scientific data.

2. The Amount of the Settlement

A number of commenters questioned the amount of the settlement in light of uncertainty regarding the full extent of damages.[13] The Governments believe that there is adequate information available to enter into this settlement, and that the recovery is adequate to allow the Governments to restore the environment. Moreover, it is worth reemphasizing that the recovery afforded by this settlement is worth far more to the public because it comes relatively soon after the Oil Spill, instead of after many years of litigation, and because it will make substantial sums available for restoration work immediately, with the remaining payments scheduled to correspond to the Governments' expectation of when they will be

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[13] Some commenters suggested that the amount of the settlement was simply too low -- i.e., that the actual damages exceeded one billion dollars. However, none provided any concrete information supporting this contention.

needed.[14]

The Governments have spent over two years and tens of millions of dollars in an effort to assess the damages resulting from the Spill. While not all of the results of the damage assessment are final, the Governments believe that the results to date, as reported in the Summary of Effects, provide an adequate basis for evaluating the overall damage to the environment at a level of generality sufficient to evaluate the settlement. In light of what the Governments now know about the extent of injury to the environment, the settlement is clearly sufficient to allow the Governments to achieve their primary objective of restoring the resources injured by the Spill.

The benefits of a settlement now far outweigh the marginal improvement in scientific information that might occur in the next several years. Most significantly, the settlement provides money to begin restoration activities now, which will speed recovery of the environment. Moreover, the burden and expense of further litigation is considerable, and distracts government scientists from the more important job of restoring the environment. Furthermore, the serious litigation risks that this case presents counsels against unnecessarily prolonging litigation.

As additional insurance against uncertainty in the scope of

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[14] It is not unusual for consent decrees in environmental cases to impose financial obligations regarding environmental cleanup which extend for years into the future. This is particularly true where it is not possible or wise to spend the entire amount immediately.

injury, the Decree provides a "reopener" clause that provides an additional $100 million in restoration funds for injuries that are unknown and could not reasonably be foreseen at this time.[15] See Decree at ¶¶ 17-19. Based on the results of the damage assessment, the Governments do not believe that they will ever need to invoke this clause. Nonetheless, if currently unknown injuries are discovered in the future, the reopener provides additional insurance that the environment can be fully restored.

In sum, based on two years' worth of study, the Governments believe that they have sufficient information to evaluate the amount of the settlement in light of the extent of injury to the environment. The Governments believe that the settlement will allow them to achieve their objective of restoring the environment. Accordingly, they believe that the settlement is in the public interest.

3. Absence of Civil Penalties

A number of commenters questioned the absence of civil penalties in the settlement.[16] The need for civil penalties is obviated by the large criminal fine imposed as part of the plea agreement settling the United States' criminal case against Exxon

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[15] The reopener also requires a finding that the cost of a proposed restoration project is not "grossly disproportionate" to the benefits of restoration. Decree at ¶ 17. This factor would likely be considered by the Court in any event under existing case law. See Ohio v. United States Dep't of the Interior, 880 F.2d 432, 443 n.7, 456, 459 (D.C. Cir. 1989).

[16] The $900 million which Exxon will pay under this Decree is 28 times more than all civil penalties imposed by federal courts for civil violations of environmental laws in 1990.

Corp. and Exxon Shipping, United States v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR (D. Alaska). The Governments believe that the criminal fine is sufficient to achieve the punitive and deterrence objectives of civil penalties, and that it was preferable to direct the civil settlement towards restoration of the environment.

4. Treatment of Archaeological and Cultural Resources

Several commenters expressed concern that the definition of "natural resources" in ¶ 6(c) of the March 1991 Agreement did not include archaeological and cultural resources. The Governments based the definition of "natural resources" on the definition in DOI's natural resource damages assessment regulations, 43 C.F.R. § 11.14(z). The Governments nevertheless believe that restoration of injured archaeological and cultural resources on public lands is a valid use of settlement proceeds. Accordingly, the Decree now presented to the Court provides explicitly that the money recovered under the Decree may be used for "restoration, replacement, or rehabilitation of . . . archaeological sites and artifacts injured, lost, or destroyed as a result of the Oil Spill." Decree ¶ 10(5).

5. Treatment of Alyeska

There is apparently some confusion regarding treatment of Alyeska under the Decree. Some commenters interpret the Decree as releasing all claims by the Governments against Alyeska. This is incorrect. The Decree provides a covenant not to sue Alyeska for natural resource damages to protect Exxon from having to pay contribution claims with respect to damage claims settled under the

Decree. See Decree at ¶¶ 22-25. The Governments believe that this is appropriate, because the settlement provides an adequate recovery for restoration of those natural resources that are not already recovered. The Governments have retained their other pending civil claims against Alyeska.

6. Potential Conflicts of Interest as a Result of Claims Against the Government

One commenter suggested that the United States may have a conflict of interest in pursuing claims for natural resource damages because of potential claims against the U.S. Coast Guard. The United States does not believe that there is any conflict of interest, either legally or practically.

First, as a legal matter, it is the obligation of the United States to take into consideration all aspects of a potential claim in settlement negotiations. The Supreme Court has recognized that it is simply "unrealistic" for the United States to follow "the fastidious standards of a private fiduciary . . . ." Nevada v. United States, 463 U.S. 110, 128 (1983). The United States' many and varied interests "reflect[] the nature of a democratic government that is charged with more than one responsibility; it does not describe conduct that would deprive the United States of the authority to conduct litigation on behalf of diverse interests." Nevada v. United States, 463 U.S. at 135-38 n.15. Accordingly, the Supreme Court has stated:

> the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such duties it does not by that

> reason alone compromise its obligation to any of the interests involved.

Nevada v. United States, 463 U.S. at 128. See also White Mountain Apache Tribe v. Hodel, 784 F.2d 921 (9th Cir. 1986), cert. denied, 479 U.S. 1006 (1986). Thus, in United States v. Olin Corp., 606 F. Supp. 1301, 1306-07 (N.D. Ala. 1985), the Court rejected the argument that the United States faced a conflict of interest in negotiating claims for cleanup and restoration of a hazardous waste site because of claims against the U.S. Army.

In the case of oil spills, Congress explicitly designated the state and federal governments as trustees for natural resources, 33 U.S.C. § 1321(f)(4) and (5), notwithstanding its recognition that the United States might itself face claims for damages, see, e.g., 33 U.S.C. § 1321(i). Accordingly, as a matter of law, the United States does not face any conflict of interest in acting as a natural resource trustee while defending the Coast Guard from claims arising out of the spill.

Second, as a practical matter, there are institutional safeguards that minimize any potential for the concerns of defensive litigation to color the United States' evaluation of the scope of natural resource damages. The natural resource damage assessment has been conducted by federal and state natural resource trustees, not the Coast Guard. The trustees have independently evaluated and approved the settlement in light of their assessment of damages.

7. Effect of the Decree on Third Parties

Some commenters expressed the opinion that the settlement should be a "global" settlement involving resolution of third party claims against Exxon as well as the Governments' claims. A number of commenters expressed concern over the effects of the Decree on the claims of third parties.

Many third parties have brought private claims against Exxon. The Governments have done their utmost to protect third party interests. First, the Decree explicitly provides that it is not intended to affect third party claims against Exxon. See Decree at ¶ 32. Second, the Decree provides that it does not limit the Governments' ability to provide funding or other assistance to parties affected by the Spill. See Decree at ¶ 34. As discussed above, the Governments have entered into an agreement with many of the private plaintiffs in the EXXON VALDEZ litigation that will make available to them the results of the Governments' damage assessment scientific studies.

The concerns expressed by Alaska Natives with respect to the previous consent decree in this case will be entirely mooted by the language in the instant Decree essentially incorporating key provisions of the proposed Chenega Bay settlement. See Decree ¶ 13(c) and (d). In the Chenega Bay consent decree, currently pending before the Court in Civil Action No. A91-454, Alaska Natives and the Governments agreed to a division of rights with respect to pursuing damage claims against Exxon. The provisions of that proposed agreement are reflected in the provisions of the

current Decree. Thus, the Decree preserves the ability of Alaska Natives to bring claims for injury to Native subsistence well being, community, culture, tradition or way of life, as well as private claims for injury to Alaska Native villages and individuals resulting from the impairment, loss or destruction of natural resources caused by the Spill, and any other exclusively private claims by Native villages and individuals. See Decree at ¶ 13(c).

In addition, the Decree preserves the right of Alaska Native corporations to bring claims for lost or diminished land values, protection of archaeological or cultural sites or resources, as well as other private claims for injuries caused by the Spill on lands in which Native corporations have a present right, title or interest. See Decree at ¶ 13(d). The concerns expressed by Alaska Natives are further addressed by the United States' commitment in the proposed agreement between the Governments and the Natives to conduct a joint study with the Natives on the effect of the spill on natural resources relied upon by Alaska Natives for subsistence.

The Governments believe that a global settlement resolving these private claims is impractical at this time. To delay or lose an advantageous settlement of the Governments' claims solely to accommodate the private interests of third parties would be inconsistent with the Governments' responsibility to secure restoration of the environment with the least burden and expense on public resources.

Thus, the concerns raised by the public comments have already been considered and addressed by the Governments in the settlement

and/or are now or will soon be mooted by the various agreements reached between the Governments and third parties during the five months since the March 1991 Agreement was terminated. In light of the extent of the environmental injury and the burdens and risks of further litigation if there is no settlement, it is clear that the Decree is reasonable, fair, and furthers the purposes of the Clean Water Act.

CONCLUSION

For the reasons set forth above, the Court should approve and enter the Decree as a reasonable, fair and lawful settlement of the Governments' civil claims against Exxon arising from the EXXON VALDEZ oil spill.

Respectfully submitted this 8th day of October, 1991 at Anchorage, Alaska.

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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. A91-082 CIV
STATE OF ALASKA, Plaintiff, v. EXXON CORPORATION, and EXXON SHIPPING COMPANY, Defendants.	Civil Action No. A91-083 CIV AGREEMENT AND CONSENT DECREE

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. 3AN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On March 13, 1991 and March 15, 1991, respectively, the United States and the State each 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 counterclaims against the

United States and the State in their responses to the Federal Court Complaints.

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 August, 1991, it expended in excess of $2.1 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:

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.

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.), the State, or both the United States and the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources on behalf of the public 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 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 the Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, the Alaska Attorney General, and the Commissioners of the Alaska Departments of Environmental Conservation and Fish and Game.

(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 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 (2) 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 December 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 through March 12, 1991, 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 March 12, 1991 in accordance with Paragraph 11; provided that all such Expenditures shall be subject to audit by the Governments.

(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 any Party terminates the Agreement pursuant to Paragraph 37. If the Agreement is terminated, 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 on or before March 12, 1991 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 on or before March 12, 1991 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) to reimburse or pay costs incurred by the United States or the State or both after March 12, 1991 to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources, natural resource services, or archaeological sites and artifacts injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or services; and (6) to reimburse the State for reasonable Litigation Costs incurred by it after March 12, 1991. 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 $67

million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs incurred on or before March 12, 1991 (under items 1-3 above) shall not exceed $75 million. The amounts allocated for State Litigation Costs incurred after March 12, 1991 (under item 6 above) shall not exceed $1 million per month. 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 this Court entered on August 28, 1991, in United States v. State of Alaska, Civil Action No. A91-081 CV. 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 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 warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraph 37 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

(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, 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) 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;

(c) exclusively private claims, if any, by Alaska Native Villages and individual Alaska Natives, other than claims for Natural Resource Damages, seeking damages for private harms to Native subsistence well being, community, culture, tradition and way of life resulting from the Oil Spill, including private claims for private harms to Alaska Native Villages and individual Alaska Natives resulting from the impairment, destruction, injury or loss of Natural Resources caused by the Oil Spill and any other exclusively private claims that are available to Alaska Native Villages and individual Alaska Natives; and

(d) exclusively private claims, if any, by Alaska Native Corporations, other than claims for Natural Resource Damages, seeking damages for private harms resulting from injuries caused by the Oil Spill to lands in which a Native Corporation holds any present right, title, or interest, including private claims for

lost or diminished land values, for preservation, protection and restoration of archaeological or cultural resources and archaeological sites found on the lands described in this subparagraph, for private harms resulting from injuries to Natural Resources found on lands described in this subparagraph, for impairment of riparian or littoral rights, if any, and any other claims that are available to Alaska Native Corporations as private landowners; provided, however, that such claims shall not include any claims based upon injuries to tidelands or submerged lands.

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 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 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. (a) 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 subparagraph.

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

(c) Each of the claims asserted by Exxon against the Governments or their officials in Exxon Shipping Company, et al. v. Lujan, et al., Civil Action No. A91-219 CIV (D. Alaska) ("Lujan") shall be dismissed with prejudice, and without an award of attorneys fees or costs to any Party, not later than 5 days after United States District Court approval of any agreement(s) between the Governments and the non-Government defendants in Lujan under which all of the non-Government defendants disclaim any right to recover Natural Resource Damages.

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:

(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 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 liability that either Government has to the TAPL Fund based on such claims.

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 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. (a) Except as provided in subparagraph (b) of this paragraph, if any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the 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.

(b) If any person or entity, other than the TAPL Fund or Alyeska, asserts claims against the Governments, or either of

them, that are based upon contribution or indemnity or any other theory of recovery over against the Governments arising from any liability of or payment by said person or entity to Exxon or Exxon Pipeline relating to or arising from the Oil Spill, or based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to such person or entity based on such claims. The foregoing indemnity (i) shall not be enforceable with respect to any amount in excess of value actually received by Exxon or Exxon Pipeline, and (ii) shall be enforceable only if the Governments assert in good faith all defenses they may have to such claims.

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 hereafter 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 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 entitities 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 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

As to Exxon Corporation:

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

As to Exxon Shipping Company:

Office of the President
Exxon Shipping Company
P.O. Box 1512
Houston, Texas 77251-1512

As to Exxon Pipeline:

Office of the President
Exxon Pipeline Company
P.O. Box 2220
Houston, Texas 77252-2220

Election to Terminate

37. 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, "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.

Retention of Jurisdiction

38. 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

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

40. Each undersigned representative of a Party 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.

_____

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

FOR THE UNITED STATES OF AMERICA

Date: Sept. 25, 1991

Barry M. Hartman

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: Sept. 24, 1991

Stuart M. Gerson

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

FOR THE STATE OF ALASKA

Date: Sept 25, 1991

CHARLES E. COLE
Attorney General and Lead State Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

FOR EXXON CORPORATION

Dated: Sept 25, 1991

EDWARD J. LYNCH
Associate General Counsel
Exxon Corporation
225 E. John W. Carpenter Freeway
Irving, Texas 75062-2298

Dated: Sept. 25, 1991

PATRICK LYNCH
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071

Dated: _____

JOHN F. CLOUGH III
Clough & Associates
431 North Franklin Street, Suite 202
Juneau, Alaska 99801

FOR EXXON SHIPPING COMPANY and T/V EXXON VALDEZ

Dated: 9/25/91

JAMES F. NEAL
Neal & Harwell
2000 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Dated: _____

ROBERT C. BUNDY
Bogle & Gates
1031 West 4th Avenue, Suite 600
Anchorage, Alaska 99501

FOR EXXON PIPELINE COMPANY

Dated: 9-25-91

JOHN R. REBMAN
Attorney for Exxon Pipeline Company
P.O. Box 2180
Houston, Texas 77252-2180

Dated: _____

RANDALL J. WEDDLE
Faulkner, Banfield, Doogan & Holmes
550 West 7th Avenue, Suite 1000
Anchorage, Alaska 99501

Date: _____

WALTER J. HICKEL
Governor
State of Alaska

Date: _____

THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: _____

ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: _____

SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: _____

THOMAS A. CAMPBELL, General Counsel
National Oceanic and Atmospheric Administration
U.S. Department of Commerce

Date: _____

WILLIAM K. REILLY, Administrator
U.S. Environmental Protection Agency

3.1.B

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment & Natural Resources
Division

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

JOSEPH W. BOTTINI
Assistant United States Attorney
222 W. Seventh Street
Anchorage, Alaska 99513
(907) 271-5071

Attorneys for the United States of America

CHARLES E. COLE
Attorney General
State of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Attorney for the State of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF ALASKA, Defendant and Counterclaimant.	Civil Action No. A91-081 CV

MEMORANDUM OF AGREEMENT AND CONSENT DECREE

This Memorandum of Agreement and Consent Decree (MOA) is made and entered into by the United States of America (United States)

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and the State of Alaska (State) (collectively referred to as the Governments).

INTRODUCTION

WHEREAS, Section 311 of the Clean Water Act, 33 U.S.C. § 1321, establishes liability to the United States and to States for injury, loss, or destruction of natural resources resulting from the discharge of oil or the release of hazardous substances or both and provides for the appointment of State and Federal Trustees;

WHEREAS, the United States and the State are trustees and/or co-trustees for natural resources injured, lost or destroyed as a result of the EXXON VALDEZ Oil Spill (Oil Spill);

WHEREAS, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, the National Contingency Plan, 40 C.F.R. § 300.615(a), and the Natural Resource Damage Assessment Regulations, 43 C.F.R. § 11.32(a)(1)(ii), provide a framework for and encourage the state and federal trustees to cooperate with each other in carrying out their responsibilities for natural resources;

WHEREAS, the Secretaries of the United States Departments of the Interior and Agriculture and the Administrator of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated trustees (the Federal Trustees) for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities related to the natural

resources injured, lost or destroyed as a result of the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

WHEREAS, the Commissioners of the State Departments of Environmental Conservation and Fish and Game and the Attorney General of the State of Alaska have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities relating to the natural resources injured, lost or destroyed as a result of the Oil Spill;

WHEREAS, the United States Coast Guard, an agency of the United States Department of Transportation, is the predesignated Federal On-Scene Coordinator (FOSC) to direct response efforts and to coordinate all other efforts at the scene of the Oil Spill, pursuant to the Clean Water Act, 33 U.S.C § 1321, and the National Contingency Plan, 40 C.F.R. § 300, and is coordinating its efforts with the Federal Trustees in accordance with the National Contingency Plan;

WHEREAS, the State Department of Environmental Conservation is the State On-Scene Coordinator (SOSC) to direct containment and cleanup of discharged oil pursuant to AS 46.04.020;

WHEREAS, the United States Department of Justice (Justice) and the Department of Law for the State of Alaska (Law) have constitutional and statutory responsibility for litigation

management and specifically for prosecuting claims for damages for injury, loss or destruction to the natural resources affected by the Oil Spill;

WHEREAS, all of the above state and federal entities have determined that it is in furtherance of their statutory and trust responsibilities to ensure that all injuries, loss or destruction to state and federal natural resources are fully compensated and to ensure that such compensation is used in accordance with law;

WHEREAS, the United States has brought this action against the State, and the State has asserted counterclaims in this action against the United States, with respect to their respective shares in any recoveries for compensation for natural resource damages resulting from the Oil Spill;

WHEREAS, recognizing their mutual desire to maximize the funds available for restoration of natural resources, the United States and the State have determined that entering into this MOA is the most appropriate way to resolve their claims against one another in this action, and that the terms of this MOA are in the public interest and will best enable them to fulfill their duties as trustees to assess injuries and to restore, replace, rehabilitate, enhance, or acquire the equivalent of the natural resources injured, lost, or destroyed as a result of the Oil Spill;

NOW THEREFORE, in consideration of their mutual promises, the United States, acting through the United States Departments of the Interior, Agriculture, Transportation, and Justice, NOAA, and

EPA, and the State of Alaska, acting through the State Departments of Fish and Game, Environmental Conservation, and Law (together "the Governments") have agreed to the following terms and conditions, which shall be binding on both Governments, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

The Court has jurisdiction over the subject matter of the claims set forth in the United States' Complaint and in the State's Counterclaim and over the parties to this MOA 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).

II.

DEFINITIONS

For purposes of this MOA, the following terms shall have the meanings specified in this paragraph:

A. "Base Allowed Expenses" means (1) reasonable, unreimbursed costs obligated or incurred by either the United States or the State on or before March 12, 1991, for the planning, conduct, evaluation, and coordination, and oversight of natural resource damage assessment and restoration pursued by the Governments with respect to the Oil Spill, and (2) reasonable, unreimbursed costs obligated or incurred by the State on or before March 12, 1991, for experts and counsel in connection with the preparation of the Oil Spill Litigation.

B. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. as amended.

C. "Clean Water Act" means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, as amended.

D. "Joint use" means use of natural resource damage recoveries by the Governments in such a manner as is agreed upon by the Governments in accordance with Article IV of this MOA.

E. "National Contingency Plan" means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

F. "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) and/or the State.

G. "Natural resource damage recovery" means any award, judgment, settlement or other payment to either Government which is received as a result of a claim or demand for Base Allowed Expenses or for damages for injury, destruction, or loss of natural resources arising from the Oil Spill and for costs incurred by the State for experts and counsel in connection with the Oil Spill Litigation. The term includes, without limitation, all recoveries upon claims for natural resource damages under the Clean Water Act, the Trans-Alaska Pipeline Authorization Act,

state and federal common law, state statutes, admiralty law, state and federal right-of-way lease covenants and any recoveries for natural resource damages obtained from or in connection with a civil proceeding or criminal restitution, unless the parties otherwise agree that criminal restitution recoveries can be separately managed by either government consistent with this MOA. The term also includes all interest accrued on any such recoveries. Natural resource damage recovery excludes any reimbursement or other recovery by either Government for response and cleanup costs, lost royalty, tax, license, or fee revenues, punitive damages, federal or state civil or criminal penalties, federal litigation costs and attorney fees.

H. "Oil Spill" means the grounding of the T/V EXXON VALDEZ on Bligh Reef in Prince William Sound, Alaska on the night of March 23-24, 1989, and the resulting oil spill.

I. "Oil Spill Litigation" means any past, present, or future civil judicial or administrative proceeding relating to or arising out of the Oil Spill.

J. "Response and cleanup costs" means actual, unreimbursed response and/or cleanup costs incurred by either Government in connection with the Oil Spill, as certified for payment by the Federal On-Scene Coordinator or the State On-Scene Coordinator.

K. "Restore" or "Restoration" means any action, in addition to response and cleanup activities required or authorized by state or federal law, which endeavors to restore to their pre-spill condition any natural resource injured, lost, or destroyed

as a result of the Oil Spill and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services. Restoration includes all phases of injury assessment, restoration, replacement, and enhancement of natural resources, and acquisition of equivalent resources and services.

L. "Trustees" means the officials now or hereafter designated by the President of the United States and the Governor of the State of Alaska to act as trustees, for purposes of CERCLA and the Clean Water Act, of natural resources injured, lost or destroyed as a result of the Oil Spill.

III.

EFFECT OF ENTRY OF MOA

Upon approval and entry of this MOA by the Court, this MOA shall constitute a final judgment between the United States and Alaska in accordance with its terms. The MOA is entered for the sole and exclusive benefit of the Governments and does not create any rights or privileges in any other parties.

IV.

CO-TRUSTEESHIP

A. The Governments shall act as co-trustees in the collection and joint use of all natural resource damage recoveries for the benefit of natural resources injured, lost or destroyed as a result of the Oil Spill.

B. Nothing in this MOA shall be deemed an admission of law or fact by either Government concerning ownership, right, title,

or interest in or management or control authority over natural resources or the right to recover for injury to such resources. Except in matters concerning or relating to enforcement of this MOA, the Oil Spill Litigation, or the settlement of claims relating to the Oil Spill, the Governments agree that this MOA may not be used by one Government against the other for any reason.

C. Nothing in this MOA shall be construed to affect or impair in any manner the rights and obligations, if any, of any entities or persons not parties to this MOA, including without limitation:

1. 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 affected by the Oil Spill and expending any proceeds derived therefrom;

2. The rights and obligations, if any, of legal entities or persons other than the United States and the State who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

3. The rights and obligations, if any, of the United States relating to such Alaska Native villages and the entities or persons referred to in subparagraph 2 above.

V.

ORGANIZATION

A. General Provisions

1. All decisions relating to injury assessment, restoration activities, or other use of the natural resource damage recoveries obtained by the Governments, including all decisions regarding the planning, evaluation, and allocation of available funds, the planning, evaluation, and conduct of injury assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the unanimous agreement of the Trustees. Such decisions, on the part of the Federal Trustees, shall be made in consultation with EPA.

2. The Governments shall cooperate in good faith to establish a joint trust fund for purposes of receiving, depositing, holding, disbursing and managing all natural resource damage recoveries obtained or received by the Governments. The joint trust fund shall be established in the Registry of the United States District Court for the District of Alaska or as otherwise determined by stipulation of the Governments and order of the court.

3. If the Trustees cannot reach unanimous agreement on a decision pursuant to paragraph A.1. of this Article, and either Government so certifies, either Government may resort to litigation in the United States District Court for the District of Alaska with respect to any such matter or dispute. At any time, the Governments may, by mutual agreement, submit any such

matter or dispute to non-binding mediation or other means of conflict resolution.

4. Within 90 days after their receipt of any natural resource damage recovery, the Trustees shall agree to an organizational structure for decision making under this MOA and shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which shall include establishment of a public advisory group to advise the Trustees with respect to the matters described in paragraph V.A.1.

B. Injury Assessment and Restoration Process

1. Nothing in this MOA limits or affects the right of each Government unilaterally to perform any natural resource injury assessment or restoration activity, in addition to the cooperative injury assessment and restoration process contemplated in this MOA, from funds other than natural resource damage recoveries as defined in paragraph G of Article II.

2. Nothing in this MOA constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 C.F.R. Part 11.

3. Nothing in this MOA shall prevent the President of the United States or the Governor of the State of Alaska from transferring, pursuant to applicable law, trustee status from one official to another official of their respective Governments; provided that, in no event shall either Government designate more

than three Trustees for the purposes of carrying out the provisions of this MOA. The designation of such substitute or successor Trustees by either Government shall not affect the enforceability of this MOA.

C. Role of the Environmental Protection Agency

The Governments acknowledge that the President has assigned to EPA the role of advising the Federal Trustees and coordinating, on behalf of the Federal Government, the long-term restoration of natural resources injured, lost or destroyed as a result of the Oil Spill.

VI.

DISTRIBUTION OF MONIES

A. Joint Use of Natural Resource Damage Recoveries

The Governments shall jointly use all natural resource damage recoveries for purposes of restoring, replacing, enhancing, rehabilitating or acquiring the equivalent of natural resources injured as a result of the Oil Spill and the reduced or lost services provided by such resources, except as provided in paragraph B of this Article. The Governments shall establish standards and procedures governing the joint use and administration of all such natural resource damage recoveries. Except as provided in paragraph B of this Article, all natural resource damage recoveries shall be placed in the joint trust fund for use in accordance with the terms and conditions of this MOA. Nothing in this MOA creates a right in or entitlement of

any person not a party to th[illegible] resource damage recoveries.

B. Reimbursement of Cer[illegible]

1. The Governmen[illegible] be advanced or reimburse[illegible] out of any natural resource da[illegible] Spill and shall not be place[illegible] in paragraph A: (1) Base Allo[illegible] of Expe[illegible]; (2) reasonable unreimbursed costs jointly agreed upon by the Governments and incurred by either or both of t[illegible] planning, conduct, coordination, or ov[illegible] damage assessment and restoratio[illegible] Oil Spill or for restoration ac[illegible] and (3) other reasonable unrei[illegible] after March 12, 1991 for exp[illegible] the Oil Spill Litigation provide[illegible] aggregate, deducted for such purpo[illegible] per month and a total of $40,000,0[illegible] no such costs shall be deducted f[illegible] recovered as restitution in a cri[illegible]

2. Solely for the pu[illegible] received by either or both of the Governments pursuant to any settlement(s) of the Governm[illegible] Spill, $67 million shall be rei[illegible] Base Allowed Expenses and for response and cleanup costs incurred by it before January 1, 1991, and $75[illegible]

to the State for Base Allowed Expenses and for response and cleanup costs incurred by it before January 1, 1991; provided that this subparagraph shall not affect or impair in any way the rights of either Government to recover any costs, damages, fees, or expenses through litigation.

3. The Governments further agree that any monies received by either or both of them pursuant to a settlement of claims arising from the Oil Spill that remain after the costs referred to in subparagraphs 1 & 2 have been reimbursed shall be allocated as follows: (1) first, to reimburse the Governments for their respective response and cleanup costs incurred after December 31, 1990, and for their respective costs of natural resource damages assessment (including restoration planning) obligated or incurred after March 12, 1991 and; (2) second, to the joint trust fund for natural resource damage recoveries referred to in paragraph A of this Article.

C. Except as otherwise provided in this MOA, the Governments agree that all natural resource damage recoveries will be expended on restoration of natural resources in Alaska unless the Trustees determine, in accordance with Article V, paragraph A.1. hereof, that spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured in Alaska and services provided by such resources.

D. Nothing in this MOA shall be construed as obligating the

Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

VII.

LITIGATION AND SETTLEMENT OF CLAIMS RELATING TO THE OIL SPILL

A. Agreement to Consult and Cooperate. The Governments, through the Departments of Law and Justice, agree to act in good faith to consult and cooperate with each other to develop a common approach to the Oil Spill Litigation, to the settlement of civil claims and restitution claims in connection with criminal proceedings: provided, however, that this MOA shall not in any way limit or otherwise affect the prosecutorial discretion of the State of Alaska or the United States.

B. Legal Work Product and Privileged Information. The Governments, through the Departments of Law and Justice, agree that, except as may otherwise be provided by separate agreement of the parties, they may in their discretion share with each other or with private and/or other public plaintiff litigants scientific data and analyses relating to the injury to natural resources resulting from the Oil Spill, the products of economic studies, legal work product, and other confidential or privileged information, subject to the following terms and conditions:

1. Each Government will take all reasonable steps necessary to maintain work product and other applicable privileges and exemptions available under the Freedom of Information Act, 5 U.S.C. § 552 et seq., the Rules of Civil Procedure, and AS 09.25.110 et seq.

2. No Government may voluntarily share with another party information jointly prepared or prepared by the other Government without the prior express written consent of the other Government's legal counsel.

VIII.

SCIENCE STUDIES

The Governments shall continue to work cooperatively to conduct all appropriate scientific studies relating to the Oil Spill.

IX.

COVENANTS NOT TO SUE

A. Each Government covenants not to sue or to take other legal action against the other Government with respect to the following matters:

1. The authority of either Government to enter into and comply with the terms of this MOA.

2. The respective rights of either Government to engage in cleanup, damage assessment or restoration activities with respect to the Oil Spill in accordance with this MOA.

3. Any and all civil claims (including, but not limited to, cross-claims, counter-claims, and third party-claims) it may have against the other Government arising from any activities, actions, or omissions by that other Government relating to or in response to the Oil Spill

which occurred prior to the execution of this MOA, other than claims to enforce this MOA.

B. Solely for purposes of the Oil Spill Litigation and any other proceedings relating to the ascertainment, recovery, or use of natural resource damages resulting from the Oil Spill, each Government shall be entitled to assert in any such proceeding, without contradiction by the other Government, that it is a co-Trustee with the other Government over any or all of the natural resources injured, lost or destroyed as a result of the Oil Spill; and each Government covenants not to sue the other with respect to, or to take any other legal action to determine, the scope or proportionate share of either Government's ownership, rights, title or interest in or management, control, or trusteeship authority over any of the natural resources injured, lost or destroyed as a result of the Oil Spill.

C. Notwithstanding anything in this Article, each Government reserves the right to intervene or otherwise to participate in any legal proceeding concerning the claims of a third party with respect to the scope of either Government's Trusteeship and waives any objection to such intervention or participation by the other Government; provided that, in any such proceeding, neither Government may dispute that it is a co-Trustee with the other over the natural resources injured, lost, or destroyed as a result of the Oil Spill.

D. If the Governments become adverse to each other in the

course of the Oil Spill Litigation, this MOA shall nevertheless remain in effect.

E. Notwithstanding the covenants contained in this Article, if both Governments are sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree to cooperate fully in the defense of such action, and to not assert cross-claims against each other or take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

F. Notwithstanding the covenants contained in this Article, if one of the Governments is sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree that the non-sued Government shall cooperate fully in the defense of the sued Government, including intervening as a party defendant or consenting to its being impleaded, if necessary. If the non-sued Government thereby becomes a party to the action, the Governments agree not to assert cross-claims against each other, to cooperate fully in the defense of such action, and not to take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

G. Notwithstanding Paragraphs E and F above, the Governments may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability between the Governments. Any such actions shall be solely for the purpose of allocation of liability, if any, and neither Government shall

enforce any judgment obtained against the other Government pursuant to this paragraph.

X.

RETENTION OF JURISDICTION

This MOA shall be enforceable by the United States District Court for the District of Alaska, which Court shall retain jurisdiction of this matter for the purpose of entering such further orders, directions, or relief as may be appropriate for the construction, implementation, or enforcement of this MOA.

XI.

MULTIPLE COPIES AND EFFECTIVE DATE

This MOA may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. This MOA shall be effective as of the date it is signed by all the parties hereto.

XII.

INTEGRATION AND MERGER

A. This MOA constitutes the entire agreement between the United States and the State as to the matters addressed herein, and there exists no other agreement of any kind which is inconsistent with this MOA with respect to the subjects addressed in this MOA; provided, that the agreement reached among the Trustees as to disbursements of the original $15 million paid by Exxon in April, 1989 shall remain in full force and effect.

XIII.

TERMINATION

This MOA shall terminate when the Governments certify to the Court, or when the Court determines on application by either Government, that all activities contemplated under the MOA have been completed.

XIV.

JUDICIAL REVIEW

This MOA creates no rights on the part of any persons not signatory to this MOA and shall not, except as provided in Article X, be subject to judicial review.

XV.

MISCELLANEOUS

A. This MOA can be modified only with the express written consent of the Parties to the MOA and the approval of the Court, except that the Parties may correct any clerical or typographic errors in writing without court approval.

B. Each undersigned representative of a Party to this MOA certifies that he or she is fully authorized to enter into this MOA and to execute and legally bind such Party to this MOA.

THE FOREGOING Memorandum of Agreement and Consent Decree among the United States of America and the State of Alaska is hereby APPROVED AND ENTERED THIS 28 DAY OF August, 1991.

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

cc: J. Bottini (AUSA)
B. Herman (AAG-K)

FOR THE UNITED STATES OF AMERICA

Date: Aug. 27, 1991

Barry M. Hartman
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Stuart M. Gerson
Stuart M. Gerson S.C.B.
Assistant Attorney General
Civil Division
U.S. Department of Justice

FOR THE STATE OF ALASKA

Date: Aug 27, 1991

Charles E. Cole
Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

3.1.1A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUL 25 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By ____ Deputy

In re	)	
	)	Case No. A89-095-Civil (Consolidated)
the EXXON VALDEZ	)	

RE: ALL CASES

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

EXXON VALDEZ OIL SPILL LITIGATION	)	3AN-89-2533 Civil (Consolidated)
	)	
This Document Relates to ALL CASES	)	

MEMORANDUM DECISION RE ALL PLAINTIFFS EXCEPT STATE OF ALASKA'S MOTION FOR RULE CHANGE

This Memorandum Decision is in response to plaintiffs' Motion for Rule Change.[1] The motion seeks to amend the Discovery Plan on the grounds that it "is inadequate to meet the right and need of plaintiffs and the public to discover the scientific information in the possession of other parties". (Pl. Memorandum, p. 5). The motion was accompanied by affidavits to the effect that the data and information gathered in the Prince William Sound scientific studies conducted by government trustees and Exxon should be made available not only to the parties participating in this lawsuit, but to legislators, the scientific community, and the general public. According to plaintiffs, the massive ecological damages sustained, the enormous sums expended by Exxon collecting scientific data, the public's interest and right to know, and the

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1 The moving parties are all plaintiffs except the State of Alaska and will be referred to as plaintiffs in this Decision.

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inability of plaintiffs to otherwise obtain this information create "exceptional circumstances" justifying production under Rule 26(b)(4)(B). Plaintiffs seek through this motion to require defendants to collect and deposit all scientific studies in a public repository and further seek to compel defendants to fund the operation of the repository.

Private defendants oppose the motion on a variety of grounds. Defendants contend that the Discovery Plan does not require production of scientific studies at this stage of the litigation, that the plaintiffs desire the information for public consumption and not trial preparation, that much of the material is privileged and that plaintiffs have not made the requisite showing of substantial need under Rule 26(b). Defendants further contend that a significant amount of scientific data has been produced during the discovery process and scientific data is available from various state and federal agencies including NOAA, USCG, USFS, FWS, EPA, ADEC, ADF&G, ADNR and the Alaska Oil Spill Health Task Force. This data is now available to the public at the Federal Trustee's Oil Spill Information Center in Anchorage. Moreover, in addition to the government studies, defendants state that they are prepared to release their own oil movement studies, shoreline assessment studies, site monitoring studies, subsistence studies, etc. but plaintiffs have elected to give top discovery priority to the production of other matters.

Private defendants and the State of Alaska assert that not only has scientific information been made available to plaintiffs and continues to be made available in accordance with the priorities established by plaintiffs, but that plaintiffs have reviewed only a small portion of the data and copied even less. Defendants further assert that the motion conflicts with the existing Discovery Plan. The entire Case Management Plan is presently being reviewed by Judge Holland and Judge Shortell in light of the federal government having recently been named a party in this litigation. According to defendants, the granting of this Order will subvert the overall discovery scheme.

Plaintiffs acknowledge their disinterest in much of the scientific data that has been made available to date, and complain that the material is without value to them. According to counsel for environmental plaintiffs, "Most of the documents have been absolutely irrelevant". (Hearing, 6/21/91; Tr. 94) Plaintiffs accuse Exxon of burying meaningful scientific data in millions of production documents, and selectively releasing scientific data benefiting only Exxon. (Pl. Memorandum, pp. 6, 31). From the positions taken at the hearing held in this matter on June 21, 1991, and from the reply brief filed by plaintiffs, it would appear that plaintiffs are mainly, but not exclusively, interested in the production of Natural Resources Data Assessment (NRDA) (Tr. 115; Reply Brief, p. 14-16). Plaintiffs contend that under the circumstances they have met their burden under Rule 26(b) because the NRDA studies are not protected by any privilege and to the

extent that plaintiffs have not articulated the exact, specific need for particular documents, it is because defendants have not articulated precisely what documents they have. (Tr. 41). The plaintiffs' position is that "We are simply asking to get a handle on the studies to know what is there so that we can make our argument". (Tr. 85). Private defendants do not object at this time to identifying these studies and the privileges claimed regarding these studies. (Tr. 109).

From the briefing on the motion and the statements made on the record at the hearing held on June 21, 1991, the Discovery Master finds as follows:

1. Public Repository. The record establishes that defendants and public agencies have made and are in the process of making available numerous scientific studies. This data is presently available for review at the Oil Spill Information Center in Anchorage and over $2.9 million of public funds have been funded to maintain this Center. It appears that various agencies will continue to deposit scientific studies and other related data in the Oil Spill Recovery Center. Although the selection and priority of the transfer of various scientific studies may not be satisfactory to the plaintiffs, it does appear that all non-privileged scientific data will eventually be deposited at the Center and preserved for review by the scientific community and the general public. At present, there is little or no justification for establishing a parallel repository. If the Oil Spill Information Center presently does not serve the objective of the

plaintiffs' Motion for Rule Change for complete public access all scientific data, there is every indication that the Center will eventually accomplish this goal. If at some later date there is a showing that bona fide, non-privileged scientific data is not available in a public repository, this finding may be reconsidered. To the extent the Motion for Rule Change requests a central repository to be funded by defendants, the motion is DENIED.

2. Identification of Documents. The record is unclear as to precisely which studies plaintiffs are seeking, and which privileges, if any, apply to each study. The motion is directed to all scientific studies but the emphasis is obviously on the NRDA studies. In view of recent events (i.e., the collapse of certain tentative settlement arrangements, the federal government's present involvement in the litigation, contemplated changes in the proposed Case Management Plans), it is difficult to ascertain what effect, if any, a ruling on the expedited production of certain scientific studies would have on this litigation.

The Discovery Master is unwilling to rule on a modification of the Discovery Plan phases regarding the production of documents without a clear understanding of which scientific studies are requested, the burdens that would be imposed on the defendants and the State of Alaska in producing this data, the impact of "out of sequence" production on other aspects of the Discovery Plan, and what, if any, privileges exist relating to this data. The record is silent on these matters.

To resolve this the plaintiffs propose that defendants be required to identify each study and the privilege, if any, claimed in respect to each study. At the conclusion of the June 21, 1991 hearing, the Discovery Master requested the parties to submit a proposed order listing and briefly describing the scientific studies in their possession and to identify any privileges claimed with regard to those studies. The principal difference between the proposed order submitted by the plaintiffs and defendants is that the plaintiffs' order applies to all scientific studies (NRDA and non-NRDA) whereas the defendants' proposed order limits the application to damage assessment (NRDA) studies. There is no compelling reason to list non-NRDA matters. First, the briefing and the discussion at the hearing centered on the NRDA studies.[2] Secondly, some of the non-NRDA studies have already been produced and plaintiffs have expressed disdain as to the relevance and utility of these studies. It seems pointless to place the onerous burden on the defendants of listing and summarizing all these studies in the absence of any need or even interest in the non-NRDA matters. The order issued in conjunction with this decision will be limited to NRDA studies.

3. Disclosure of Studies. In addition to the identification procedure discussed above, plaintiffs' proposed order incorporates a time limit in which "any party opposing either

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2 MR. MILLER: The only reason I made the comment is I wanted the record to be clear that what we're talking about today, what this entire proceeding involves, is natural resource damage science and not science that you have on the economic impact in the fisheries or science that we may have on the economic impact of the fisheries or a whole variety of other issues. (Tr. 115-116).

a claim of privilege or the timing of disclosure" may submit a responsive pleading addressing why privilege status should be denied or why the disclosure should occur earlier than the time sequence set forth in the Discovery Plan. The defendants object to this provision and argue that it is inconsistent with the schedules and procedures proposed in the parties' Case Management submissions and would improperly interfere with the Case Management Plan to be issued by the courts. Defendants contend that any compulsory discovery of NRDA studies should be deferred until the later phases of the litigation dealing with the NRDA studies, and following such time as the courts have decided the dispositive motions challenging the standings of private plaintiffs to claim NRDA damages.

Defendants' objections may very well have merit, however, it is not practical to rule on these objections at the present time. The defendants themselves argue the Case Management Plan is presently under review and is in a state of flux and may be altered. The plaintiffs may revise their Case Management submissions in response to Judge Holland's Order dated July 19, 1991. The sequence of triable issues (i.e., punitive damages, compensatory damages, size of fish runs) has not yet been established and it cannot be ruled out that NRDA studies may be assigned a higher discovery priority than exists at present. It is also possible that the revised Case Management Plan will not conflict with the deadlines established in plaintiff's proposed order.

In any event, it will be the plaintiffs (or other moving party's) burden and responsibility to articulate reasons for accelerated production of the NRDA studies. This order does contemplate that disclosure of some or all of the NRDA studies may be on an accelerated basis upon the proper showing. However, defendants (or non-moving parties) are not merely passive observers in this determination. The order will provide that non-moving parties will have 20 days in which to submit a responsive brief defending any claims of privilege and to advance reasons why disclosure is out of sequence, overly burdensome or otherwise unfair.

An order regarding assessment of costs in connection with this motion for rule change will be issued within 30 days.

DATED at Anchorage, Alaska, this 24th day of July, 1991.

David B. Ruskin, Discovery Master

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on the 24th day of July, 1991, a true and correct copy of this document was served by fax + mail on: Landau, Reilly, Bybee, Samuelson & Hamilton
By Linda L. Vernon