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UNITED STATES DISTRICT COURT,
DISTRICT OF ALASKABy Yh DeputyRECEIVED
MAY 24 1995EXXON VALDEZ OIL SPILL
TRUSTEE COUNCIL
ADMINISTRATIVE RECORD

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF ALASKA,

Defendant and
Counterclaimant.

No. A91-0081 CV (HRH)

O R D E R

(Motion to Intervene)

The Coastal Coalition has filed motions to intervene in United States v. State of Alaska, Case No. A91-0081 CV, United States v. Exxon, et al, Case No. A91-0082 CV, and State of Alaska v. Exxon Corp., Case No. A91-0083 CV.¹ The United States and the State of Alaska oppose the motions.² The Coastal Coalition did not

¹ Clerk's Docket Nos. 10 (A91-0081 CV), 108 (A91-0082 CV), and 77 (A91-0083 CV).

² Clerk's Docket Nos. 11 and 12 (A91-0081), Clerk's Docket No. 113 (A91-0082), and Clerk's Docket No. 81 (A91-0083).

1 file reply briefs. Oral argument was not requested and is deemed
2 unnecessary.

3 The purpose of the motions to intervene is to file motions
4 to compel compliance of the United States and the State of Alaska
5 and their designated trustees with an agreement and consent decree
6 filed in each case. The motions to intervene, opposition, and
7 motions to compel are nearly identical and will be considered
8 together.

9 Background

10 Subsequent to the March 24, 1989, Exxon Valdez oil spill,
11 the United States and the State of Alaska filed separate lawsuits
12 against Exxon Corporation, et al. (Exxon). These lawsuits sought
13 compensation for damages to the environment caused by the oil spill.
14 The United States also filed an action against the State of Alaska
15 regarding the governments' respective shares in any recovery for
16 spill related damages.

17 On August 29, 1991, the United States and the State of
18 Alaska entered into an Agreement and Consent Decree resolving Case
19 No. A91-0081. The Consent Decree constituted final judgment in Case
20 No. A91-0081.³

21 On October 9, 1991, the United States the State of Alaska
22 and the Exxon defendants entered in to an Agreement and Consent
23 Decree in Case No. A91-0082 and Case No. A91-0083.⁴ On November 25,
24

25 ³ Case No. A91-0081, Clerk's Docket No. 8 at 8.

26 ⁴ Clerk's Docket Nos. 46 and 47, Case No. A91-0082, and
Clerk's Docket Nos. 26 and 27, Case No. A91-0083.

1 1991, the United States, the State of Alaska, and the Alyeska
2 defendants⁵ entered into an Agreement and Consent Decree in Case
3 No. A91-0082.⁶ The consent decrees constituted final judgments in
4 Case No. A91-0082 and Case No. A91-0083.

5 Pursuant to the terms of the Consent Decree in Case
6 No. A91-0081, the United States and the State of Alaska were to "act
7 as co-trustees in the collection and joint use of all natural
8 resource damage recoveries for the benefit of natural resources
9 injured, lost or destroyed as a result of the Oil Spill." Case
10 No. A91-0081, Clerk's Docket No. 8 at 8. The Consent Decree further
11 provided:

12 The Governments shall jointly use all nat-
13 ural resource damage recoveries for purposes of
14 restoring, replacing, enhancing, rehabili-
15 tating 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....

16 Id. at 12.

17 The Coastal Coalition moves to intervene "on behalf of the
18 injured Environment in this Agreement and Consent Decree because the
19 Government parties have failed to fulfill their obligations to act
20 on behalf of the injured Environment." Case No. A91-0083, Clerk's
21 Docket No. 77, at second unnumbered page. In the underlying motions
22 to compel, the Coastal Coalition request that the court establish
23 an "Exxon Valdez Oil Spill Restoration Review Commission to conduct
24

25 ⁵ The Alyeska defendants include the various oil companies
26 which own the Alyeska Pipeline Service Company.

⁶ Clerk's Docket No. 65, Case No. A91-0082.

1 an independent, comprehensive, detailed review of all Government
2 policies, expenditures, and activities since March 24, 1989, related
3 to the mitigation of injuries caused by this Oil Spill." Case
4 No. A91-0083, motion to compel at 4, Clerk's Docket No. 77. The
5 motions to compel contain detailed steps by which the proposed
6 Commission should conduct its review.

7 The Motion to Intervene

8 The Coastal Coalition's motions are filed pursuant to
9 Rule 24(b) of the Federal Rules of Civil Procedure. The applicable
10 portion of Rule 24(b) states that "[u]pon timely application anyone
11 may be permitted to intervene in an action ... when an applicant's
12 claim or defense and the main action have a question of law or fact
13 in common." Id. The decision to grant or deny a Rule 24(b) motion
14 is a matter for the court's discretion. "In exercising its
15 discretion the court shall consider whether the intervention will
16 unduly delay or prejudice the adjudication of the rights of the
17 original parties." Id. Additionally, the movant must show an
18 "independent ground for jurisdiction". Greene v. United States, 996
19 F.2d 973, 978 (9th Cir. 1993).⁷

21 ⁷ Rule 24(c) requires: "[a] person desiring to intervene
22 shall serve a motion to intervene upon the parties as provided in
23 Rule 5. The motion shall state the grounds therefor and shall be
24 accompanied by a pleading setting forth the claim or defense for
25 which intervention is sought." Fed. R. Civ. P. 24(c). The United
26 States and the State of Alaska argue that the motions for
intervention and underlying motions to compel do not comply with the
technical "pleading" requirements. The court finds that the motions
have described the basis for intervention with sufficient
specificity to satisfy Rule 24(c). Regarding Rule 24(c), the
"proper approach is to disregard non-prejudicial technical
(continued...)

1 The court will first consider whether the motion to
2 intervene was filed timely. As noted above, the consent decrees,
3 entered in August, October, and November of 1991, constituted final
4 judgments in the three cases at issue. The motions to intervene
5 were not filed until March 29 and 30, 1995, nearly three and a half
6 years after judgments were entered in the three cases.⁸

7 "The 'general rule [is] that a post-judgment motion to
8 intervene is timely if filed within the time allowed for the filing
9 of an appeal.'" United States ex rel McGough v. Covington
10 Technologies, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting Yniguez
11 v. Arizona, 939 F.2d 727, 734 (9th Cir. 1991) (alteration in
12 McGough). In addition to the general rule, the court may consider
13 three other factors to determine timeliness: "(1) the stage of the
14 proceeding at which an applicant seeks to intervene; (2) the
15 prejudice to other parties; and (3) the reason for and length of the
16 delay." County of Orange v. Air California, 799 F.2d 535, 537 (9th
17 Cir. 1986), cert. denied, 480 U.S. 946 (1987) (citation omitted).⁹

18
19
20 ⁷(...continued)
21 defects[.]" Beckman Indus., Inc. v. International Ins. Co., 966
22 F.2d 470, 475 (9th Cir. 1992), cert. denied, 113 S. Ct. 197 (1992)
(citation omitted).

23 ⁸ Case Nos. A91-0082 and A91-0083 remain active for the sole
24 administrative purpose of disbursing funds from the settlement
account.

25 ⁹ The timeliness considerations set out in County of Orange
26 were designed for motions for intervention as of right under
Rule 24(a). The standard "applies equally" to motions for
permissive intervention under Rule 24(b). County of Orange, 799
F.2d at 539.

1 The court finds that the motions were filed timely. Even
2 though the motions were filed more than three years after final
3 judgments were entered in the three cases, the manner in which the
4 trustees would fulfill their responsibilities under the consent
5 agreements was not immediately apparent. It is not untimely to seek
6 intervention at the time when the trustees have allegedly digressed
7 from their duties.

8 Regarding the potential for prejudice, neither the State
9 of Alaska nor the United States argue that prejudice would result
10 from intervention. The court finds that a review of the trustees'
11 activities would not unduly prejudice the parties in any of the
12 three cases.

13 The court also finds that a common question of law and
14 fact exists between the motions to intervene and the main action.
15 The main action concerns the "primacy of the United States'
16 trusteeship over the natural resources affected by the Spill."
17 Opposition at 6-7, Clerk's Docket No. 11, Case No. A91-0081. The
18 motion to intervene concerns the manner in which the trustees manage
19 the funds recovered from damage to natural resources. The two
20 actions are sufficiently similar to create a common question of law
21 and fact.

22 Having found that the motions are timely, non-prejudi-
23 cial, and present common questions of law and fact as compared with
24 the main action, the court must consider whether the motions state
25 an independent ground for jurisdiction. The motions to compel do
26 not discuss jurisdiction, but argue that the Oil Pollution Act of

1 1990 ("OPA"), 33 U.S.C. § 2701, et seq., provides authority for
2 persons seeking judicial review of federal officials who act as
3 natural resource trustees. OPA does not apply to the Exxon Valdez
4 litigation and does not create an independent ground for
5 jurisdiction. 33 U.S.C. § 2701 (Historical and Statutory Notes)
6 (1994).

7 An independent ground for jurisdiction may exist under
8 28 U.S.C. § 1367. This statute, which was not discussed by the
9 parties, states:

10 [I]n any civil action of which the district
11 courts have original jurisdiction, the district
12 courts shall have supplemental jurisdiction
13 over all other claims that are so related to
14 claims in the action within such original
15 jurisdiction that they form part of the same
16 case or controversy under Article III of the
17 United States Constitution. Such supplemental
18 jurisdiction shall include claims that involve
19 the joinder or intervention of additional
20 parties.

21 28 U.S.C. § 1367.

22 The court need not determine whether section 1367 dem-
23 onstrates an independent ground for federal jurisdiction, because
24 even if it did, the court would not have the jurisdiction to man-
25 date creation of Exxon Valdez Oil Spill Review Commission.¹⁰ In
26 asking the court to create the Commission, the Coastal Coalition is
requesting that the court perform a legislative function. Creation
of a commission to review the performance of the Exxon Valdez Oil

¹⁰ "Simply because the elements of permissive intervention are present does not automatically entitle an applicant to intervene...." MGM Grand Hotel, Inc. v. Smith-Hemion Prod. Inc., 158 F.R.D. 677, 680 (D. Nev. 1994).

1 Spill Trustees Council is beyond the court's Article III powers.¹¹
2 The court must therefore deny the motions to intervene.

3 The court is not unsympathetic with the Coastal Coali-
4 tion's concerns. Exxon has agreed to pay the United States and the
5 State of Alaska \$900 million through the year 2001.¹² The potential
6 for payment of an additional \$100 million exists. See Agreement and
7 Consent Decree at 7-19, Case No. A91-0083, Clerk's Docket No. 26.
8 Given that the Trustee Council could spend \$1 billion of the
9 public's money, their actions should be subject to scrutiny. The
10 Coastal Coalition's concerns should be addressed to the legislative,
11 not the judicial, branches of the state and federal governments.¹³
12
13
14

15 ¹¹ The court notes that the United States General Accounting
16 Office conducted a review of the Exxon Valdez Oil Spill Trustees
Council and published a report in 1993.

17 ¹² To date, Exxon has made four payments totaling \$410 mil-
18 lion. Exxon will pay an additional \$70 million per year through
2001. Depending upon the circumstances, Exxon could pay an addi-
19 tional \$100 million by 2006. See consent agreement at 7-19, Case
No. A91-0083, Clerk's Docket No. 26.

20 ¹³ In exercising its discretionary decision on the issue of
21 permissive intervention, the court may also consider other relevant
22 factors such as standing. Spangler v. Pasadena City Bd. of Ed., 552
23 F.2d 1326 (9th Cir. 1977). "An organization has standing to sue in
its own right if the associational ties of its members are injured."
24 E.E.O.C. v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986)
(citation omitted). "[T]he 'injury in fact' test requires more than
25 an injury to a cognizable interest. It requires that the party
seeking review be himself among the injured." Lujan v. Defenders
26 of Wildlife, 112 S. Ct. 2130, 2137 (1992) (citation omitted). Here,
the Coastal Coalition has not claimed injury to itself or to one of
its members. Rather, the motion was filed on behalf of the
environment. The Coastal Coalition has not demonstrated standing
to file the motion to intervene.

1 Conclusion

2 For the above stated reasons, the motions to intervene in
3 Case Nos. A91-0081, A91-0082, and A91-0083 are denied. The
4 underlying motions to compel will not be considered.

5 DATED at Anchorage, Alaska, this 17 day of May, 1985.

6
7 
8 United States District Judge
9

10 A91-0081--CV (HRH)

11 -----
12 B. HERMAN (AG-STE-200)

13 J. ROTTINI (US-ATTNY)

14 COASTALCOALITION
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FILED

APR 18 1995
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

A91-082 Civil (HRH)

OPPOSITION OF THE
UNITED STATES TO THE
COASTAL COALITION'S
MOTION TO INTERVENE

On March 31, 1995, nearly three and one-half years after the Court entered the Agreement and Consent Decree settling the claims between the United States and the Exxon Defendants in this action and the claims in the companion case between the State of Alaska and the Exxon Defendants (State of Alaska v. Exxon Corp., Civ. No. A91-083 (D. Alaska)), the Coastal Coalition has moved under Rule 24(b) of the Federal Rules of Civil Procedure for permissive

intervention in this case.¹

The Coastal Coalition's Motion to Intervene is devoted to a recitation of the facts purportedly demonstrating that organization's standing to participate in this case and the fact that the Governments have trust responsibilities to the environment affected by the EXXON VALDEZ Oil Spill. It does not contain any claims for relief. Motion to Intervene, pp. 2-4.

Lodged simultaneously with the Motion to Intervene was the Coastal Coalition's Motion to Compel Compliance. In this latter motion, the Coastal Coalition contends that the Governments have failed in their trust responsibilities to the Spill-impacted environment and asks the Court to establish an independent commission -- funded from the settlement -- to review the Governments' restoration activities to date. Motion to Compel Compliance, pp. 2-6. Despite its assertion that the trustees have failed to implement their trust responsibilities, the Coastal Coalition does not identify either: (1) restoration measures the Governments have taken that were in derogation of their trust responsibilities; or (2) restoration measures that the Governments were obligated, but failed, to take.

¹ The Coastal Coalition moved at the same time for permissive intervention in two other cases arising from the EXXON VALDEZ Oil Spill, namely State of Alaska v. Exxon Corp. and United States v. State of Alaska, Civil Nos. A91-083 and A91-081, respectively. Since the intervention motions in these three cases are virtually identical, the State of Alaska and the United States (collectively "the Governments") have combined their responses and filed virtually identical oppositions in each of these three cases.

The Coastal Coalition's demand to establish an independent commission to review the Governments' restoration activities has no legal basis whatsoever. Neither the Agreement and Consent Decree nor any of the statutes pursuant to which this case was brought contemplate such "independent" review. Nor is there any need for such review: The federal and state trustees' restoration activities have been implemented by the Trustee Council within the public eye. Meetings of the Trustee Council, with the exception of executive sessions, are public, and its documents, with the exception of those that are by law confidential, are available to the public. The Trustee Council solicits public input on proposed restoration actions, and there is a Public Advisory Group, representing a wide range of interests, including environmental and conservation interests, that makes recommendations to the Trustee Council. In fact, Coastal Coalition members Rick Steiner and David Grimes have availed themselves of this public process to obtain documents and participate in meetings of the Trustee Council. The motions brought by the Coastal Coalition are simply an unlawful attempt to usurp the Governments' trustee functions.

The United States opposes the Coastal Coalition's Motion to Intervene on the following grounds: (1) it is untimely, (2) the Coastal Coalition has not provided a pleading articulating its claims, as required by Rule 24(b), (3) nor has it provided an independent basis for jurisdiction, (4) the Coastal Coalition has no standing to intervene in this action, and (5) only the Governments can act as trustees. The Motion to Intervene should

therefore be denied.

I. THE COASTAL COALITION'S MOTION FOR INTERVENTION IS UNTIMELY.

Rule 24(b) of the Federal Rules of Civil Procedure provides:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

28 U.S.C. Federal Rules of Civil Procedure ("F.R.Civ.P."), Rule 24(b) (emphasis supplied).

The United States filed this action on March 13, 1991, and the State of Alaska filed its companion case two days later on March 15. According to the Motion to Intervene, the Coastal Coalition was formed in 1989 "to assist in expediting restoration of the Oil Spill region. The Coalition helped create a regional consensus for the concept of settling the Natural Resource Damage cases out-of-court and formally proposed such to the State of Alaska, the United States and Exxon on July 4, 1990." Motion to Intervene, p. 2. Thus, the Coalition was aware of the natural resource damage claims that were the subject of the United States' claims against the defendants well before this action was filed.

In April of 1991, the Court rejected a proposed settlement of the United States' criminal action against Exxon Corporation and Exxon Shipping Company (A90-015 CR), this action and the State's

companion case. The rejection of that settlement was widely publicized, yet it did not prompt the Coastal Coalition to intervene in this case.

In September of 1991, the United States lodged with the Court another proposed settlement of this action (and its criminal action against the Exxon defendants). Still the Coastal Coalition refrained from seeking to intervene. This proposed settlement -- the Agreement and Consent Decree -- was approved by the Court after hearing on October 8, 1991. *Clerk's Docket # 46*. Judgment was rendered the same day. *Clerk's Docket # 47*. The Coastal Coalition did not seek to intervene in this action at any time prior to final judgment or during the period for appeal. On January 16, 1992, the Court entered the parties' stipulated dismissal with prejudice of the claims between the United States and the Exxon defendants. *Clerk's Docket # 55*.²

After this partial dismissal, the Court found that a position that had been espoused by "trust class plaintiffs" in an October, 1991 reply brief in Oil Spill litigation against Exxon in state court was a collateral attack on the Agreement and Consent Decree

² The remaining claims in this action were settled in a separate Agreement and Consent Decree adopted by the United States, the State of Alaska, and Alyeska and its owner companies ("the Alyeska defendants"). That tripartite settlement established the Alyeska Settlement Fund, which the State is to use for certain oil spill response projects and the acquisition of land for Kachemak Bay State Park. The use of that Fund is not implicated in the Coastal Coalition's Motion to Intervene. The Agreement and Consent Decree between the Governments and the Alyeska defendant was entered as a final judgment in this action on November 25, 1992. *Clerk's Docket # 65*.

because it implied that the judgment in this case had been fraudulently obtained. In re the EXXON VALDEZ, Civ. No. A89-095 Consolidated (D. Alaska), *Clerk's Docket # 2391* (Notice of Oral Argument dated March 24, 1992). The "trust class plaintiffs'" reply brief was treated as a Rule 60(b)(3) motion for relief from judgment. As a result, this case was reopened and consolidated with the consolidated EXXON VALDEZ Oil Spill Litigation in federal court for the limited purposes of determining the Rule 60(b)(3) issue. Order No. 80, *Clerk's Docket # 58*. See also Eyak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir. 1994) (upholding Exxon's removal of the "trust class plaintiffs'" action to federal court). The "trust class plaintiffs'" purported attack on the judgment herein was ultimately rejected by the Court. Amended Order No. 125 (*Clerk's Docket # 68*); Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994). But even during those post-judgment proceedings there was no attempt by the Coastal Coalition to intervene in this case.

It is only now -- four years after this suit was commenced and three and one-half years after its conclusion by entry of judgment -- that intervention is sought. There must be a live case or controversy in which to intervene. See Yniquez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (continuation of a suit "in the absence of the party on whose side [post-judgment] intervention [is sought] is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III."), quoting Diamond v. Charles, 476 U.S. 54 (1986) (emphasis in original). The fact that

the Governments are implementing restoration does not make this case a "live" one. Therefore the Coastal Coalition's application for intervention is not timely. See Garza v. County of Los Angeles, 918 F.2d 763, 776-77 (9th Cir. 1990) (affirming district court's denial of motion to intervene in redistricting case during remedial phase of proceedings brought by candidate for County Board of Supervisors who knew of pendency of lawsuit when she elected to run for office).

II. THERE IS NO "PLEADING" IDENTIFYING THE COASTAL COALITION'S CLAIMS OR DEFENSES WITH ISSUES OF LAW OR FACT COMMON TO THE MAIN ACTION.

Even if post-dismissal intervention in this case were appropriate, the Coastal Coalition's motion fails for a second reason. As noted above, permissive intervention requires that the applicant's claim or defense and the main action have a question of law or fact in common. Rule 24(b), F.R.Civ.P. Hence the procedure for intervention calls for the motion to be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), F.R.Civ.P. See also Beckman Industries, Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir.), cert. denied, 113 S. Ct. 197 (1992). There is no such pleading here.

The Motion to Intervene, and the accompanying Motion to Compel Compliance, do not satisfy the "pleading" requirement of Rule 24(b). Those motions assert that the United States and the State have "failed to fulfill their obligation to act on behalf of the injured Environment", Motion to Intervene, p. 2, and that the Governments have failed to comply with the Agreement and Consent

Decree, Motion to Compel Compliance, p. 2.

Even if these motions could be regarded as "pleadings" within the meaning of Rules 7 and 8, F.R.Civ.P., the "claims" they make do not present questions of law or fact common to the United States' original claims against the defendants in this "civil action for clean up costs, natural resource damages, civil penalties, and injunctive relief, arising out of the grounding of the T/V EXXON VALDEZ" Complaint (*Clerk's Docket # 1*), ¶ 1, p. 2. Nor do they set forth a defense presenting issues of law or fact common to the defenses raised by the defendants.

The claims between the United States and the Exxon defendants, on the one hand, and the State of Alaska, on the other, concerned the amount of damages needed to compensate the public and restore the resources injured by the EXXON VALDEZ Oil Spill. The Coastal Coalition's motions do not appear to be directed in any way to that long-resolved set of issues. Rather, they address the Governments' use of the monies recovered from the Exxon defendants -- a matter separate from the claims that gave rise to these cases.

III. THERE IS NO INDEPENDENT BASIS FOR JURISDICTION OF THE COASTAL COALITION'S "CLAIMS".

Where, as here, a proposed intervenor seeks to litigate a claim on the merits, the motion for permissive intervention must not only be timely and accompanied by an appropriate pleading, it must include an independent ground for jurisdiction. Beckman Industries, Inc. v. Int'l Ins. Co., *supra*, 966 F.2d at 473; Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989), aff'd on other

grounds, 495 U.S. 82 (1990). There is no independent jurisdictional basis for the Coastal Coalition's proposed entry into this case.

The Coastal Coalition correctly notes that the Court has retained jurisdiction in this case to enter "such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement." Agreement and Consent Decree, p. 29, ¶ 38. But, as the Court itself has recognized, this jurisdiction does not provide the authority for reviewing or otherwise participating in the functions of the Executive Branch as it makes restoration decisions: "While the court has neither a review or approval function as regards the work of the Trustees, that work is a matter of great public interest and the court appreciates the parties keeping the court apprised of the Trustees' work." *Clerk's Docket # 72* (Order (Case Status) dated January 26, 1993).

The Motion to Compel Compliance refers to Section 1006 of the Oil Pollution Act of 1990 ("OPA") as authority for seeking judicial review of actions of the federal government in its natural resource trustee capacity. But, as that Motion itself states, Section 1006 review is available only "where there is alleged to be a failure of that official to perform a duty that is not discretionary with that official" Motion to Compel Compliance, p. 3.

We note initially that Section 1006 is inapplicable here because the EXXON VALDEZ Oil Spill predates OPA. See OPA Section 1020 ("This Act shall apply to an incident occurring after the date

of the enactment of this Act.")³ But even if Section 1006 were applicable, the Coastal Coalition has failed to identify any non-discretionary duty that the federal government has failed to perform.

Indeed, the relief it apparently seeks is not an order mandating the Governments to take particular restoration actions, but the establishment of a commission to review the Governments' restoration activities to date or, alternatively, representations by the Governments to the Court that "they have done everything possible to fulfill their obligations to the Court, the public, and the injured Environment." Motion to Compel Compliance, p. 6.

Thus, Section 1006 of OPA does not provide an independent jurisdictional basis for the Coastal Coalition's proposed intervention.

IV. THE COASTAL COALITION HAS NO STANDING TO INTERVENE IN THIS ACTION TO ENFORCE THE CONSENT DECREE.

The Coastal Coalition claims to have standing to intervene in this action. Motion to Intervene, pp. 2-3. We disagree.

The statements made in the Motion to Intervene and to Compel Compliance make clear the Coastal Coalition's intervention aims: to contest the Governments' compliance with the Agreement and Consent

³ To the extent that the Motion to Intervene and the Motion to Compel Compliance might be read as challenging otherwise unreviewable federal action, the Coastal Coalition has identified no "final agency action" for which sovereign immunity has been waived. See 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court [is] subject to judicial review").

Decree in this case -- and in the State's companion case against Exxon -- and with the Memorandum of Agreement ("MOA") and Consent Decree in United States v. State of Alaska vis-a-vis their expenditure of the settlement monies obtained from the Exxon defendants.

The Motion to Intervene asserts that the United States and the State have "failed to fulfill their obligation to act on behalf of the injured Environment". Motion to Intervene, p. 2. The Motion to Compel Compliance is more specific: it asserts that the Governments have failed to comply with the Agreement and Consent Decree because their implementation of restoration has: (1) not provided enough tangible benefits to the injured environment; (2) diverted settlement monies into non-essential expenditures; (3) been too slow in developing a restoration plan; and (4) failed to accomplish significant coastal habitat acquisition and protection, thereby allowing irreparable injury to further jeopardize the Spill-affected environment. Motion to Compel Compliance, pp. 2-4.

Only those deemed third-party beneficiaries have non-party rights to enforce the terms of a consent decree. Hook v. Arizona, 972 F.2d 1012, 1014 (9th Cir. 1992), citing Restatement (Second) of Contracts § 304 & comment a-b (1981). See also Rule 71, F.R.Civ.P. Incidental third-party beneficiaries do not have this right. Hook v. Arizona, *supra*, 972 F.2d at 1015 (interpreting the rule of Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) regarding the rights of third parties to enforce consent decrees directly or in collateral proceedings). It has long been the rule that where the

Government is a party to a consent decree, only the Government can seek enforcement of the contractual bargain it has made on behalf of the public. Id. (citing Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971)). The public does not assume third party beneficiary status unless the Government has manifested a different intent. Id. This, the United States and the State of Alaska have not done.

Paragraph 10 of the Agreement and Consent Decree in this case contains the Governments' agreements to apply the natural resource damage recoveries obtained from the Exxon defendants solely to: (1) reimburse or pay the Governments for past and future Spill response and clean-up costs, natural resources damage assessment costs, injury assessment costs and costs of planning, implementing and monitoring "the restoration, rehabilitation, or replacement of Natural Resources, natural resource services, or archaeological sites and artifacts injured as a result of the Oil Spill, or the acquisition of equivalent resources or services"; and (2) reimburse the State for its litigation costs. Agreement and Consent Decree, pp. 9-10, ¶ 10.

Paragraph 10 continues: "[t]his 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." Agreement and Consent Decree, p. 11, ¶ 10. Moreover, the Reservations of Rights provisions of the Agreement and Consent Decree state: "Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person not a

Party to this Agreement", id., p. 26, ¶ 32, and "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." Id., ¶ 33.

Similarly, the Memorandum of Agreement and Consent Decree in the case between the two Governments, provides: "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", MOA, p. 8, Section III., and "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 [(Retention of Jurisdiction)], be subject to judicial review." Id., p. 20, Section XIV.

Clearly, the Governments have not manifested an intent that the public have third party beneficiary rights for purposes of enforcing the Consent Decree in this case.

V. ONLY THE UNITED STATES AND THE STATE OF ALASKA CAN ACT AS TRUSTEES TO RESTORE THE SPILL-AFFECTED ENVIRONMENT.

The Coastal Coalition seeks to fund an oversight commission "to assess what has been accomplished by the Governments compared to what has not and could have been done to mitigate the damage caused by this Oil Spill, and (2) to provide a basis for doing a better job next time." Motion to Compel Compliance, pp. 4-6 (emphasis in original). Funding for this commission would come from the natural resource damage recovery obtained by the Governments under the Agreement and Consent Decree. Id., p. 5.

The Agreement and Consent Decree recites the legal positions of the Governments as to the ability of other persons to act as

trustees to recover natural resource damages as a result of the Spill: "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 from the Oil Spill" *Clerk's Docket # 46*, p. 3.

This position has been confirmed by the judiciary. Order No. 125 (Amended), *Clerk's Docket # 68*, and Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 772-73 (9th Cir. 1994) ("Alaska Sport Fishing"). In Alaska Sport Fishing, the Ninth Circuit affirmed this Court's dismissal of sportfishers' claims for damages for loss of use and enjoyment of natural resources stemming from the EXXON VALDEZ Oil Spill owing to the Governments' recovery on behalf of the public as a result of their settlement with the Exxon defendants:

The governments of Alaska and the United States have already recovered damages on behalf of the public for the public's loss of use and enjoyment of natural resources caused by the tragic *Exxon Valdez* oil spill in Prince William Sound. Because plaintiffs were in privity with these governments, as members of the public, and because plaintiffs seek to recover for the very same damages the governments have recovered for, plaintiffs' claims are barred by *res judicata*.

Id. at 774. Thus, *res judicata* precludes any member of the public, including the Coastal Coalition and its members Rick Steiner and David Grimes, from bringing claims to recover natural resource damages as a result of the EXXON VALDEZ Oil Spill.

The motions brought by the Coastal Coalition do not claim a right to recover natural resource damages *per se*. Instead, the Coastal Coalition seeks to appropriate the monies the Governments have already recovered to fund an oversight commission. The suggestion that although private parties cannot recover natural resource damages themselves they nevertheless can control the Governments' use of those recoveries is insupportable. Private parties cannot appropriate natural resource damages for the same reason that they cannot seek such damages in this first place: the Governments, not private parties, are the natural resource trustees.

Moreover, the source of the Governments' trusteeship in this instance is Section 311(f)(5) of the Clean Water Act, and that Section requires that the natural resource damage recoveries be used by the Governments for restoration purposes. See 33 U.S.C. § 1321(f)(5) ("Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State Government."). See also 42 U.S.C. § 9607(f)(1): "Sums recovered by the United States Government as [natural resources] trustee . . . shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources." Thus, the Clean Water Act makes it clear that once damages are recovered, the Governments, not private parties or independent commissions shall control the disposition of natural resource damages.

Further, the United States submits that there is no practical difference between claims the Coastal Coalition might have brought against the Exxon defendants for natural resource damages -- claims precluded by the natural resource trustees' recovery -- and the claim implicit in the Coastal Coalition's current request: that persons other than the natural resource trustees have a right to manage natural resource damages.

CONCLUSION

We do not contend that the trustees' decisions on projects to restore or replace natural resources are necessarily beyond review in all circumstances. While there might be a legal theory for review of a specific, final agency action, see footnote 3 *supra*, the Coalition has neither asserted such a theory nor identified any specific action that it would challenge. Instead, the Coalition has asked for a general grant of authority to review and oversee the trustees' exercise of their governmental responsibilities -- a form of relief for which there is simply no legal basis.

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For all of the foregoing reasons, the United States respectfully requests that the Court exercise its discretion under Rule 24(b) to deny the Coastal Coalition's Motion to Intervene.

RESPECTFULLY SUBMITTED this 18th day of April, 1995.

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FILED

APR 19 1995

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By _____ Deputy

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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,
et al., in personam, and the T/V
EXXON VALDEZ, in rem,

Defendants.

No. A91-082 Civil (HRH)

CERTIFICATE OF SERVICE

I, Regina R. Belt, hereby certify that I have served a true copy of documents entitled OPPOSITION OF THE UNITED STATES TO THE COASTAL COALITION'S MOTION TO INTERVENE on the following persons this 19th day of April, 1995 by deposit of same in United States first class mail, postage prepaid except as noted below:

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FILED

APR 18 1995

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
v.
STATE OF ALASKA,
Defendant.

A91-081 Civil (HRH)

OPPOSITION OF THE
UNITED STATES TO THE
COASTAL COALITION'S
MOTION TO INTERVENE

On March 31, 1995, more than three and one-half years after the Court entered the Memorandum of Agreement and Consent Decree settling the claims between the United States and the State of Alaska in this action, the Coastal Coalition has moved under Rule 24(b) of the Federal Rules of Civil Procedure for permissive intervention in this case.¹

¹ The Coastal Coalition moved at the same time for permissive intervention in two other cases arising from the EXXON VALDEZ Oil Spill, namely State of Alaska v. Exxon Corp. and United States v. Exxon Corp., Civil Nos. A91-083 and A91-082, respectively. Since the intervention motions in these three cases are virtually identical, the State of Alaska and the United States (collectively "the Governments") have combined their responses and filed

The Coastal Coalition's Motion to Intervene is devoted to a recitation of the facts purportedly demonstrating that organization's standing to participate in this case and the fact that the Governments have trust responsibilities to the environment affected by the EXXON VALDEZ Oil Spill. It does not contain any claims for relief. Motion to Intervene, pp. 2-4.

Lodged simultaneously with the Motion to Intervene was the Coastal Coalition's Motion to Compel Compliance. In this latter motion, the Coastal Coalition contends that the Governments have failed in their trust responsibilities to the Spill-impacted environment and asks the Court to establish an independent commission -- funded from the Governments' recovery from the Exxon defendants in United States v. Exxon Corp. and State of Alaska v. Exxon Corp. -- to review the Governments' restoration activities to date. Motion to Compel Compliance, pp. 2-6. Despite its assertion that the trustees have failed to implement their trust responsibilities, the Coastal Coalition does not identify either: (1) restoration measures the Governments have taken that were in derogation of their trust responsibilities; or (2) restoration measures that the Governments were obligated, but failed, to take.

The Coastal Coalition's demand to establish an independent commission to review the Governments' restoration activities has no legal basis whatsoever. Neither the Memorandum of Agreement and Consent Decree in this case nor any of the statutes pursuant to

virtually identical oppositions in each of these three cases.

which this case was brought contemplate such "independent" review. Nor is there any need for such review: The federal and state trustees' restoration activities have been implemented by the Trustee Council within the public eye. Meetings of the Trustee Council, with the exception of executive sessions, are public, and its documents, with the exception of those that are by law confidential, are available to the public. The Trustee Council solicits public input on proposed restoration actions, and there is a Public Advisory Group, representing a wide range of interests, including environmental and conservation interests, that makes recommendations to the Trustee Council. In fact, Coastal Coalition members Rick Steiner and David Grimes have availed themselves of this public process to obtain documents and participate in meetings of the Trustee Council. The motions brought by the Coastal Coalition are simply an unlawful attempt to usurp the Governments' trustee functions.

The United States opposes the Coastal Coalition's Motion to Intervene on the following grounds: (1) it is untimely, (2) the Coastal Coalition has not provided a pleading articulating its claims, as required by Rule 24(b), (3) nor has it provided an independent basis for jurisdiction, (4) the Coastal Coalition has no standing to intervene in this action, and (5) only the Governments can act as trustees. The Motion to Intervene should therefore be denied.

I. THE COASTAL COALITION'S MOTION FOR INTERVENTION IS UNTIMELY.

Rule 24(b) of the Federal Rules of Civil Procedure provides:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

28 U.S.C. Federal Rules of Civil Procedure ("F.R.Civ.P."), Rule 24(b) (emphasis supplied).

The United States filed this action on March 13, 1991. *Clerk's Docket # 1.* (United States v. Exxon Corp., Civ. No. A91-082, was filed the same day.) This civil action was brought "for declaratory and injunctive relief . . . to assert the United States' primary trusteeship and management authority over natural resources injured as a result of the [EXXON VALDEZ Oil Spill]." Complaint (*Clerk's Docket # 1*), p. 2.

According to the Motion to Intervene, the Coastal Coalition was formed in 1989 "to assist in expediting restoration of the Oil Spill region. The Coalition helped create a regional consensus for the concept of settling the Natural Resource Damage cases out-of-court and formally proposed such to the State of Alaska, the United States and Exxon on July 4, 1990." Motion to Intervene, p. 2. Thus, the Coalition was aware of the Governments' natural resource damage claims that were the subject of this lawsuit well before this action was filed.

On August 28, 1991, the Court approved a Memorandum of Agreement ("MOA") and Consent Decree between the United States and the State of Alaska resolving the claims between the Governments in this action. *Clerk's Docket # 8*. That MOA and Consent Decree establishes the means that "will best enable the Governments 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 result of the Oil Spill." MOA and Consent Decree, p. 4.

At no time before or after this case was settled did the Coastal Coalition seek to intervene. It is only now -- four years after this suit was commenced and more than three and one-half years after its conclusion -- that intervention is sought.

There must be a live case or controversy in which to intervene. See Yniquez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (continuation of a suit "in the absence of the party on whose side [post-judgment] intervention [is sought] is *contingent upon a showing by the intervenor that he fulfills the requirements of Article III.*"), quoting Diamond v. Charles, 476 U.S. 54 (1986) (emphasis in original). The fact that the Governments are implementing restoration under the Memorandum of Agreement and Consent Decree does not make this case a "live" one. Therefore the Coastal Coalition's application for intervention is not timely. See Garza v. County of Los Angeles, 918 F.2d 763, 776-77 (9th Cir. 1990) (affirming district court's denial of motion to intervene in redistricting case during remedial phase of proceedings brought by

candidate for County Board of Supervisors who knew of pendency of lawsuit when she elected to run for office).

II. THERE IS NO "PLEADING" IDENTIFYING THE COASTAL COALITION'S CLAIMS OR DEFENSES WITH ISSUES OF LAW OR FACT COMMON TO THE MAIN ACTION.

Even if post-settlement intervention in this case were appropriate, the Coastal Coalition's motion fails for a second reason. As noted above, permissive intervention requires that the applicant's claim or defense and the main action have a question of law or fact in common. Rule 24(b), F.R.Civ.P. Hence the procedure for intervention calls for the motion to be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), F.R.Civ.P. See also Beckman Industries, Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir.), cert. denied, 113 S. Ct. 197 (1992). There is no such pleading here.

The Motion to Intervene, and the accompanying Motion to Compel Compliance, do not satisfy the "pleading" requirement of Rule 24(b). Those motions assert that the United States and the State have "failed to fulfill their obligation to act on behalf of the injured Environment", Motion to Intervene, p. 2, and that the Governments have failed to comply with the Agreement and Consent Decree, Motion to Compel Compliance, p. 2.

Even if these motions could be regarded as "pleadings" within the meaning of Rules 7 and 8, F.R.Civ.P., the "claims" they make do not present questions of law or fact common to the United States' claims against the State of Alaska in this action, i.e., those concerning the primacy of the United States' trusteeship over the

natural resources affected by the Spill. Nor do they set forth a defense presenting issues of law or fact common to the defenses or counterclaims raised by the State. The Coastal Coalition's motions do not appear to be directed in any way to that long-resolved set of issues. Rather, they address the Governments' use of the monies recovered from the Exxon defendants -- a matter separate from the claims that gave rise to this case.

III. THERE IS NO INDEPENDENT BASIS FOR JURISDICTION OF THE COASTAL COALITION'S "CLAIMS".

Where, as here, a proposed intervenor seeks to litigate a claim on the merits, the motion for permissive intervention must not only be timely and accompanied by an appropriate pleading, it must include an independent ground for jurisdiction. Beckman Industries, Inc. v. Int'l Ins. Co., *supra*, 966 F.2d at 473; Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989), aff'd on other grounds, 495 U.S. 82 (1990). There is no independent jurisdictional basis for the Coastal Coalition's proposed entry into this case.

The Coastal Coalition correctly notes that the Court has retained jurisdiction in this case to enforce the MOA and Consent Decree. Agreement and Consent Decree, p. 19. But, as the Court itself has recognized, this jurisdiction does not provide the authority for reviewing or otherwise participating in the functions of the Executive Branch as it makes restoration decisions: "While the court has neither a review or approval function as regards the work of the Trustees, that work is a matter of great public

interest and the court appreciates the parties keeping the court apprised of the Trustees' work." United States v. Exxon Corp., Clerk's Docket # 72 (Order (Case Status) dated January 26, 1993).

The Motion to Compel Compliance refers to Section 1006 of the Oil Pollution Act of 1990 ("OPA") as authority for seeking judicial review of actions of the federal government in its natural resource trustee capacity. But, as that Motion itself states, Section 1006 review is available only "where there is alleged to be a failure of that official to perform a duty that is not discretionary with that official" Motion to Compel Compliance, p. 3.

We note initially that Section 1006 is inapplicable here because the EXXON VALDEZ Oil Spill predates OPA. See OPA Section 1020 ("This Act shall apply to an incident occurring after the date of the enactment of this Act.")² But even if Section 1006 were applicable, the Coastal Coalition has failed to identify any non-discretionary duty that the federal government has failed to perform.

Indeed, the relief it apparently seeks is not an order mandating the Governments to take particular restoration actions, but the establishment of a commission to review the Governments' restoration activities to date or, alternatively, representations

² To the extent that the Motion to Intervene and the Motion to Compel Compliance might be read as challenging otherwise unreviewable federal action, the Coastal Coalition has identified no "final agency action" for which sovereign immunity has been waived. See 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court [is] subject to judicial review").

by the Governments to the Court that "they have done everything possible to fulfill their obligations to the Court, the public, and the injured Environment." Motion to Compel Compliance, p. 6.

Thus, Section 1006 of OPA does not provide an independent jurisdictional basis for the Coastal Coalition's proposed intervention.

IV. THE COASTAL COALITION HAS NO STANDING TO INTERVENE IN THIS ACTION TO ENFORCE THE CONSENT DECREE.

The Coastal Coalition claims to have standing to intervene in this action. Motion to Intervene, pp. 2-3. We disagree.

The statements made in the Motion to Intervene and to Compel Compliance make clear the Coastal Coalition's intervention aims: to contest the Governments' compliance with the Agreement and Consent Decree in United States v. Exxon Corp. and State of Alaska v. Exxon Corp. -- and with the Memorandum of Agreement and Consent Decree in this case -- vis-a-vis their expenditure of the settlement monies obtained from the Exxon defendants.

The Motion to Intervene asserts that the United States and the State have "failed to fulfill their obligation to act on behalf of the injured Environment". Motion to Intervene, p. 2. The Motion to Compel Compliance is more specific: it asserts that the Governments have failed to comply with the Agreement and Consent Decree because their implementation of restoration has: (1) not provided enough tangible benefits to the injured environment; (2) diverted settlement monies into non-essential expenditures; (3) been too slow in developing a restoration plan; and (4) failed to

accomplish significant coastal habitat acquisition and protection, thereby allowing irreparable injury to further jeopardize the Spill-affected environment. Motion to Compel Compliance, pp. 2-4.

Only those deemed third-party beneficiaries have non-party rights to enforce the terms of a consent decree. Hook v. Arizona, 972 F.2d 1012, 1014 (9th Cir. 1992), citing Restatement (Second) of Contracts § 304 & comment a-b (1981). See also Rule 71, F.R.Civ.P. Incidental third-party beneficiaries do not have this right. Hook v. Arizona, *supra*, 972 F.2d at 1015 (interpreting the rule of Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) regarding the rights of third parties to enforce consent decrees directly or in collateral proceedings). It has long been the rule that where the Government is a party to a consent decree, only the Government can seek enforcement of the contractual bargain it has made on behalf of the public. Id. (citing Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971)). The public does not assume third party beneficiary status unless the Government has manifested a different intent. Id. This, the United States and the State of Alaska have not done.

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restoration, rehabilitation, or replacement of Natural Resources, natural resource services, or archaeological sites and artifacts injured as a result of the Oil Spill, or the acquisition of equivalent resources or services"; and (2) reimburse the State for its litigation costs. Agreement and Consent Decree, pp. 9-10, ¶ 10.

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Clearly, the Governments have not manifested an intent that the public have third party beneficiary rights for purposes of

enforcing the Consent Decree in this case.

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The Coastal Coalition seeks to fund an oversight commission "to assess what has been accomplished by the Governments compared to what has not and could have been done to mitigate the damage caused by this Oil Spill, and (2) to provide a basis for doing a better job next time." Motion to Compel Compliance, pp. 4-6 (emphasis in original). Funding for this commission would come from the natural resource damage recovery obtained by the Governments under the Agreement and Consent Decree. *Id.*, p. 5.

The Agreement and Consent Decree in United States v. Exxon Corp. and State of Alaska v. Exxon Corp. recites the legal positions of the Governments as to the ability of other persons to act as trustees to recover natural resource damages as a result of the Spill: "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 from the Oil Spill" *Clerk's Docket # 46*, p. 3.

This position has been confirmed by the judiciary. Order No. 125 (Amended), *Clerk's Docket # 68*, and Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 772-73 (9th Cir. 1994) ("Alaska Sport Fishing"). In Alaska Sport Fishing, the Ninth Circuit affirmed this Court's dismissal of sportfishers' claims for damages

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The governments of Alaska and the United States have already recovered damages on behalf of the public for the public's loss of use and enjoyment of natural resources caused by the tragic Exxon Valdez oil spill in Prince William Sound. Because plaintiffs were in privity with these governments, as members of the public, and because plaintiffs seek to recover for the very same damages the governments have recovered for, plaintiffs' claims are barred by *res judicata*.

Id. at 774. Thus, *res judicata* precludes any member of the public, including the Coastal Coalition and its members Rick Steiner and David Grimes, from bringing claims to recover natural resource damages as a result of the EXXON VALDEZ Oil Spill.

The motions brought by the Coastal Coalition do not claim a right to recover natural resource damages *per se*. Instead, the Coastal Coalition seeks to appropriate the monies the Governments have already recovered to fund an oversight commission. The suggestion that although private parties cannot recover natural resource damages themselves they nevertheless can control the Governments' use of those recoveries is insupportable. Private parties cannot appropriate natural resource damages for the same reason that they cannot seek such damages in this first place: the Governments, not private parties, are the natural resource trustees.

Moreover, the source of the Governments' trusteeship in this instance is Section 311(f)(5) of the Clean Water Act, and that Section requires that the natural resource damage recoveries be used by the Governments for restoration purposes. See 33 U.S.C. § 1321(f)(5) ("Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State Government."). See also 42 U.S.C. § 9607(f)(1): "Sums recovered by the United States Government as [natural resources] trustee . . . shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources." Thus, the Clean Water Act makes it clear that once damages are recovered, the Governments, not private parties or independent commissions shall control the disposition of natural resource damages.

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CONCLUSION

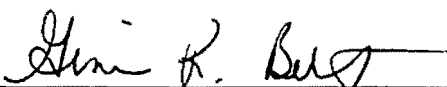
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For all of the foregoing reasons, the United States respectfully requests that the Court exercise its discretion under Rule 24(b) to deny the Coastal Coalition's Motion to Intervene.

RESPECTFULLY SUBMITTED this 18th day of April, 1995.

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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A91-081 Civil (HRH)

CERTIFICATE OF SERVICE

I, Regina R. Belt, hereby certify that I have served a true copy of documents entitled OPPOSITION OF THE UNITED STATES TO THE COASTAL COALITION'S MOTION TO INTERVENE on the following persons this 19th day of April, 1995 by deposit of same in United States first class mail, postage prepaid except as noted below:


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