

***Exxon Valdez* Oil Spill**

State Trial Transcript

Case Number 3AN-89-2533 civil

1994

Volume 37 - Volume 47

Includes State Court Hearing Excerpts

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- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Tuesday August 16 1994
) 8 37 a m
 (6))
 (8) VOLUME 37 Pages 5734 through 5938
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
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- (1) PROCEEDINGS
 (2) (Jury in at 8 37 a m)
 (3) THE CLERK Please rise
 (4) (Call to Order of the Court)
 (5) THE COURT Good morning everybody Go ahead
 (6) counsel
 (7) MR. PETUMENOS Thank you Judge
 (8) CROSS EXAMINATION OF ANDREW R. TEAL (Resumed)
 (9) BY MR. PETUMENOS
 (10) Q Mr. Teal good morning
 (11) A Good morning
 (12) Q How are you feeling this morning?
 (13) A Oh a little tired but not too bad
 (14) Q Not as hot as the end of the day yesterday?
 (15) A Yeah I was getting a little weary yes
 (16) Q If you need to take off that coat I'll stipulate to stop
 (17) my questioning but it's the room causing the heat.
 (18) Yesterday we were going back and forth about how many
 (19) maritime spills you were involved in I think what confused me
 (20) is we asked you a question about that in your deposition -
 (21) MR. PETUMENOS I've given counsel the references
 (22) already Judge
 (23) BY MR. PETUMENOS
 (24) Q - and we asked you So how many spills have you been
 (25) involved in prior to the Exxon Valdez oil spill involving 300

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- (1) barrels or more?
 (2) Answer Several
 (3) Question How many is several?
 (4) I'd have to go back through the records to determine the
 (5) specifics but I would say between 8 and 12 somewhere in that
 (6) range of spills that were in the order of that magnitude at
 (7) least
 (8) Question And can you tell me whether or not any of these
 (9) spills have occurred in a maritime environment?
 (10) There was - and your answer There was one spill of that
 (11) size in the maritime environment yes
 (12) And where was that spill?
 (13) That was in the Beaufort Sea
 (14) And how large was that spill? It was 2 500 barrels
 (15) Now no big deal Mr. Teal You were involved in the
 (16) Nestucca spill as well?
 (17) A Yeah if you'd read further on actually in the deposition
 (18) I then referred to the Nestucca spill which was not our
 (19) incident therefore we were not the key player in that
 (20) response but I was involved in an advisory capacity
 (21) Q So you weren't intending to restrict your answer to those
 (22) when you were in an advisory capacity but where you were
 (23) involved with your company is that the distinction you're
 (24) making?
 (25) A You mean as far as my deposition

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- (1) Q Yeah
- (2) A Yeah My deposition that was the one that stuck in my
- (3) mind as far as our company's actual response
- (4) Q Okay I have it on pretty good authority that the Nestucca
- (5) spill was a total of 227 304 gallons of bunker C Does that
- (6) sound about right?
- (7) A I'd have to have a calculator to figure out how many
- (8) barrels that is
- (9) Q How about 5 412?
- (10) A That's about what I thought it was
- (11) Q About 2 1 percent of the Exxon Valdez?
- (12) A I'll believe your calculation yeah It sounds about
- (13) right
- (14) Q So The other one you had in the Beaufort Sea that was
- (15) about one percent of the size of the Exxon Valdez?
- (16) A That's about right yeah If the original calculation's
- (17) correct then that would be correct as well
- (18) Q You have spent really your whole career since college with
- (19) Imperial?
- (20) A That's correct yes
- (21) Q And you must like your company or you wouldn't stay there
- (22) A I do In fact Imperial Oil has very high environmental
- (23) ethics and that's one of the reasons I'm still with them
- (24) Q And they probably think a lot of you as well?
- (25) A I would hope so

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- (1) Q Because you were one of the people they selected to be one
- (2) of the first on the scene at the Exxon Valdez
- (3) A That's true I was a containment and recovery advisor for
- (4) our national emergency team at that time and Imperial Oil
- (5) provides the support role in an Exxon incident such as -
- (6) something such as the Exxon Valdez So what happened was
- (7) that
- (8) you know we were basically on standby We were there as a
- (9) resource in the event that we would be needed to support the
- (10) Exxon response then we could be called upon
- (11) Q You were one of the first on the scene?
- (12) A For Imperial Oil yes
- (13) Q And when you got to Alaska can you remember who the
- (14) other
- (15) executives were from Exxon that were first on the scene?
- (16) MR CLOUGH Objection Your Honor Basis of
- (17) relevance
- (18) THE COURT Overruled I'll let him explore it a
- (19) little bit counsel
- (20) A When I first arrived in Alaska Don Cornett there was
- (21) Frank Iarossi Craig Rassinier Those were the three key
- (22) players I met with very early
- (23) Q Three key players were Cornett and Iarossi and -
- (24) A And Craig Rassinier
- (25) Q What's Mr Cornett's position?
- (26) A Mr Cornett's position was manager of the Alaska Interest
- (27) Organization which is Exxon's arm in Alaska

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- (1) Q When you got here in Valdez was he a co equal of yours or
- (2) a supervisor of yours or was that not even figured out yet?
- (3) A When I arrived in Valdez?
- (4) Q Yeah when you first got to Alaska on this day after the
- (5) spill
- (6) A Well when I first arrived in Alaska she was the first
- (7) contact point From there I moved to Valdez and met with Craig
- (8) Rassinier He was one of the first persons I met with from
- (9) Exxon in Valdez
- (10) Q Now we talked about the fact yesterday a little bit that
- (11) the media was hot on the spill right?
- (12) A Yes In fact they were tying up all our phone lines It
- (13) was difficult to be able to communicate outside of Valdez
- (14) Q And prior to coming to Alaska you had had some experience
- (15) working with the media in connection with a spill in Canada
- (16) right?
- (17) A There were a number of times that I was interfacing with
- (18) the media prior to arriving in Alaska yes
- (19) Q There was a spill from a refinery or something in the 80s
- (20) that you were involved in in Canada in Calgary?
- (21) A That's correct yes
- (22) Q And you had worked with the local and national news media
- (23) in Calgary?
- (24) A That's true
- (25) Q Canadian Broadcasting Company?

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- (1) A Yes
- (2) Q Local radio and newspapers?
- (3) A That's a fair statement yeah
- (4) Q Gave lots of interviews and interfaced with them as you
- (5) say?
- (6) A That was one of my roles yes
- (7) Q And that was one of your roles in the Exxon Valdez too
- (8) wasn't it Mr Teal? We did a search of the United Press
- (9) International and there were a number of times you gave
- (10) statements to the media about the Exxon Valdez spill?
- (11) A That's true In fact as a technical advisor and an
- (12) environmental background obviously I had the knowledge and
- (13) also capability to - to discuss those issues and try and
- (14) position appropriately with the media
- (15) Q Trying to position appropriately with the media?
- (16) A Yes as far as educating basically the media as to what the
- (17) issues were how we were responding what the priorities were
- (18) and how best to respond to an incident such as this
- (19) Q And before you ever arrived in Alaska you held the opinion
- (20) that the media usually overdramatizes and focuses on the
- (21) emotional aspects rather than the facts and technical issues
- (22) around the case of contamination is that right?
- (23) MR CLOUGH Objection beyond the scope of direct
- (24) and also relevance
- (25) MR PETUMENOS I can tie it in Judge give me a

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- (1) moment
 (2) THE COURT All right counsel better tie it up
 (3) pretty quick
 (4) MR PETUMENOS I m getting there
 (5) A Well that s true That s one of the things that the media
 (6) tried to do That s how they sell newspapers is trying to put
 (7) a dramatic flare to incidents and issues and one of the things
 (8) I try to do is make sure that we focus on the facts the
 (9) reality of the issue and the science behind it
 (10) BY MR PETUMENOS
 (11) Q The fact is Mr Teal that there were times when the Exxon
 (12) Response Team attempted to put a dramatic flare before the
 (13) media and there were times at the very beginning of this spill
 (14) when response was directed for the purpose of public relations
 (15) is that so?
 (16) MR CLOUGH Objection Your Honor same objection
 (17) THE COURT Don t answer it Don t answer it What s
 (18) the - same objection?
 (19) MR CLOUGH Same objection
 (20) THE COURT Counsel I m finding it hard to find the
 (21) relevance of this
 (22) MR PETUMENOS Because we were told during direct
 (23) examination that the response was for the purpose of cleaning
 (24) up the beaches that it ran smoothly that it was a cooperative
 (25) effort and I m entitled I think at this point to establish

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- (1) that a lot of the response or some of the response was for the
 (2) purpose of -
 (3) MR CLOUGH Your Honor what happens - perhaps we
 (4) should -
 (5) MR PETUMENOS And the public relation
 (6) THE COURT I understand your position counsel The
 (7) objection s sustained
 (8) MR PETUMENOS For this next inquiry - I need to
 (9) approach the bench
 (10) THE COURT All right
 (11) (At side bar on the record)
 (12) MR PETUMENOS Couple of points I was going to -
 (13) MR CLOUGH Sorry Tim I can t hear you
 (14) MR PETUMENOS I have a tape recording of an Exxon
 (15) official Mr Cornett directing - attempting to direct
 (16) clean up operations as of the first day of the spill in which
 (17) he stated that he didn t care whether or not the oil picked up
 (18) was going to do anything or not that he wanted it to look
 (19) good and he wanted somebody out there that allowed as many
 (20) fishermen they could find going around in circles if
 (21) necessary to pick up oil because they were facing a public
 (22) relations disaster That was the lead into my questions and I
 (23) didn t know whether the Court was aware of it and that the
 (24) relevance is clearly that this witness has put into issue the
 (25) fact that the beaches were cleaned up cleaned up for the

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- (1) purposes of making things better that there were no other
 (2) influences that there was a cooperative arrangements with the
 (3) other parties I have information directly to the contrary
 (4) and I was laying the -
 (5) THE COURT You mean that tape?
 (6) MR PETUMENOS Right It is an Alyeska emergency
 (7) tape between Mr Cornett and the Alyeska Response Central at
 (8) Valdez and the tape is very clear on that subject there s no
 (9) doubt
 (10) THE COURT I m just trying to find out whether or not
 (11) that s the extent of the information
 (12) MR PETUMENOS I have a transcript if you d like to
 (13) see it
 (14) THE COURT So the question is whether that tape is
 (15) the only information you want to present on this issue?
 (16) MR PETUMENOS About whether the media influenced
 (17) the -
 (18) THE COURT What the motivation was that s what
 (19) you re trying to show isn t it?
 (20) MR PETUMENOS I m showing that that s an additional
 (21) motivation I m not saying it s the only one I m saying I m
 (22) entitled to bring it out
 (23) THE COURT Don t you understand what I m saying? You
 (24) came up here to make your record I m simply trying to find
 (25) out how extensive the record is It s this tape this witness

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- (1) and that tape
 (2) MR PETUMENOS At this point I want to play it in
 (3) view of the responses
 (4) THE COURT The objection is sustained just as it was
 (5) before
 (6) MR PETUMENOS The next issue I have is we have a
 (7) discussion of how all of the parties were cooperating well and
 (8) so forth I want to bring out the fact that the parties that
 (9) were on these various committees and so forth were in fact
 (10) suing each other at the time that these operations were going
 (11) on and that this - these shoreline surveys and the cleanup
 (12) decisions were being made in an environment in which the
 (13) parties that were involved the federal state - federal
 (14) government the state government the Native corporations the
 (15) fishermen from the CDFU all those people on the chart were in
 (16) fact in a litigation mode at the same time they were trying
 (17) to put on this program Again going to the same points there
 (18) were other influences affecting the SCAT surveys and were
 (19) affecting the motivations that were affecting the -
 (20) THE COURT You mean in other words the SCAT surveys
 (21) were the result of some motivation on the part of this
 (22) particular company to avoid litigation?
 (23) MR PETUMENOS That -
 (24) THE COURT Or to win litigation?
 (25) MR PETUMENOS That s right That was a motivation

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- (1) that was extant at the time for purposes of the bias of the
 (2) surveys the motivation of the company and how they
 conducted
 (3) them and I wanted to come to the Court because I want to do
 (4) this in a way that doesn't violate any orders and I want to
 (5) use it in terms of litigation and not criminal prosecution
 (6) because they were being criminally prosecuted at the time by
 (7) the federal government and I'm going to phrase it in terms of
 (8) litigation And while I'm here I have one more application
 (9) and that is - well let me take them one at a time so I don't
 (10) confuse the Court
 (11) MR CLOUGH Well we object to that as well First
 (12) of all it's the point in time issues here The program was
 (13) set up before any of those were filed
 (14) Second we're in a classic situation where plaintiffs have
 (15) been insistent upon no reference to litigation no reference to
 (16) result of litigation Now they wish to introduce litigation to
 (17) the courtroom so I would object One mischaracterizes the
 (18) nature of the situation and two I guess there would be any
 (19) relevances that way particularly given your other rulings
 (20) prohibiting us from introducing the results of that litigation
 (21) THE COURT You can question in that area I may stop
 (22) you though because I have a feeling it's going to go into an
 (23) area I'm not going the like I'll give you a fair chance
 (24) MR PETUMENOS That's why I came up All right
 (25) The final area is there is an order in limine that was -

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- (1) that was created in context of the punitive damages trial once
 (2) the punitive damages trial was out relating to the wealth of
 (3) the defendant and there is a paper that was presented in the
 (4) direct examination for the 1991 oil conference in which the
 (5) point was everybody was cooperating I have another paper
 that
 (6) was presented at the 1991 conference in which the issue of the
 (7) federal on scene coordinator's authority is addressed and
 which
 (8) the writer discusses the fact that -
 (9) THE COURT Who's the writer?
 (10) MR PETUMENOS A biologist named Riki Ott who
 (11) discusses the fact that the only remedy that the federal
 (12) on scene coordinator has in the event that the person doing the
 (13) cleanup didn't do it right has to take over the cleanup and
 (14) that -
 (15) THE COURT Have you? I don't -
 (16) MR PETUMENOS No I'm asking Judge
 (17) THE COURT No that was specifically said
 (18) MR PETUMENOS I haven't finished yet The writer
 (19) was - goes on to say that the federal on scene coordinator is
 (20) in an impossible spot because in the case of a wealthy
 (21) spiller the federal government is not in a position to take
 (22) over the cleanup
 (23) THE COURT Okay
 (24) MR PETUMENOS And not in a position to -
 (25) THE COURT I understand your point You can't go

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- (1) into that We will have a hearing out of the presence of the
 (2) jury I just don't want to keep you up here very long
 (3) MR PETUMENOS I just wanted to have a smooth cross
 (4) THE COURT Don't go into it and we'll go into it out
 (5) of the presence of the jury
 (6) MR PETUMENOS Now or -
 (7) THE COURT Well how long is your examination going
 (8) to take?
 (9) MR PETUMENOS I've lost a good portion with the
 (10) ruling I have to take a look at my notes
 (11) THE COURT Just let me know I'll let the jury out
 (12) They can go in here and we can discuss it
 (13) (Sidebar Concluded)
 (14) BY MR PETUMENOS
 (15) Q Now when you first got to Alaska do you recall there
 (16) being some concern about protecting Tatitlek?
 (17) A It was being discussed yes There was a lot of discussion
 (18) around spill movement what the trajectories were looking
 (19) like We were looking at weather conditions and issues
 (20) Exclusion booming was one of the issues that we were
 discussing
 (21) at that point yes
 (22) Q And the concern was that the spill was so close to Tatitlek
 (23) that Tatitlek ought to be boomed?
 (24) A No that wasn't the concern The concern was that there
 (25) was a village there in proximity However by looking at the

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- (1) oil movement the weather forecasts the wind directions we
 (2) did not believe that there would be a risk there However
 (3) there was some absorb boom was laid out stretched out in that
 (4) area as a contingency
 (5) Q Did you ever get any reports of people getting sick in
 (6) Tatitlek?
 (7) MR CLOUGH Objection Your Honor relevance and
 (8) beyond the scope of direct
 (9) THE COURT At what time counsel?
 (10) MR PETUMENOS Right at the beginning of the spill
 (11) during the same period of time from the spill
 (12) THE COURT All right I'll let you -
 (13) A Yeah I can't remember anything about anybody ever getting
 (14) sick in Tatitlek
 (15) BY MR PETUMENOS
 (16) Q From fumes or anything like that?
 (17) A I didn't hear anything like that no
 (18) Q You hired a fellow named Ed Owens?
 (19) A That's true yes
 (20) Q And he was a geomorphologist?
 (21) A Yes he's a international oil spill expert
 (22) Q And you went on R&R in about April 12th to April 15th of
 (23) 1989?
 (24) A Well I wouldn't call it R&R
 (25) Q You were on the phone a lot I understand from your house

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- (1) but you went back to Edmonton?
 (2) A I had to run back quickly to grab a few more things and
 (3) head back to Alaska yes
 (4) Q All right During this period of time the shoreline
 (5) cleanup plan was being put together?
 (6) A No In fact that was prior to that time We were laying
 (7) out the strategies the objectives the process the program
 (8) very early as I indicated yesterday I believe Dave Kennedy
 (9) with NOAA he and I got together would be on a Sunday or
 (10) Monday I guess immediately following the spill and we
 (11) started that whole planning process
 (12) Q When was the first time a clean up crew hit beach in
 (13) Western Prince William Sound?
 (14) A Well I can't remember the specific date
 (15) Q How about a week?
 (16) A It would probably be early in April I can't speculate as
 (17) to exactly when that occurred
 (18) Q We've heard testimony that the toxicity of oil is at its
 (19) highest at the very beginning of the spill You ever hear
 (20) that?
 (21) A Yes
 (22) Q Do you have any idea in your own mind how long the toxicity
 (23) of oil is high when it comes out of a tanker like the Exxon
 (24) Valdez?
 (25) A Well it depends on the circumstances the issues at the

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- (1) of toxicity is You can't just make a general statement as to
 (2) yes it was toxic for what period of time You have to
 (3) understand the conditions
 (4) Q I see But we're not talking about fresh water here are
 (5) we Mr Teal?
 (6) A No
 (7) Q No March 24th it began coming out of the tanker
 (8) A That's correct yes
 (9) Q And we had a period of two weeks before the beginning part
 (10) of April when you began to get clean up crews on the beach?
 (11) A As far as the shoreline clean up effort yes But as far
 (12) as the strategy and the understanding as to why we were
 (13) addressing the spill in the way we were I mean that was all
 (14) built in
 (15) Q My question is People on the beach - not planning
 (16) people on the beach - couple weeks after the spill before the
 (17) first people hit the beach to do cleaning up?
 (18) A I don't know if it was a couple weeks It would be the
 (19) early part of April so within a week to two weeks
 (20) Q How many people are on the beach a couple of weeks after
 (21) the spill? 50 100 200?
 (22) A There were probably 100 to 200 somewhere in that nature
 (23) Q The first time this - within two weeks you had 100 people
 (24) out there?
 (25) A That was my recollection about that time that's how many

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- (1) time climatic conditions sea state There's a number of
 (2) factors that would determine the longevity of the toxicity
 (3) issues
 (4) Q Give me a range if you can
 (5) A Well I can't right now no No it - it depends what
 (6) components you're referring to If you're talking about
 (7) aromatics released into the atmosphere are you talking about
 (8) water column issues? Those are things you have to consider
 (9) You can't just make a general statement about toxicity
 (10) Q As a general rule we can make this general statement
 (11) can't we the closer in time from the actual discharge of oil
 (12) from the Exxon Valdez tanker the higher in general terms the
 (13) toxicity is going to be because it begins to dissipate over
 (14) time?
 (15) A That's true And the first - the first few hours
 (16) obviously you're going to have a higher potential for
 (17) toxicity One of the things - one of the issues around
 (18) toxicity though you must remember everything's relevant - or
 (19) relative in that when you're looking at toxicity everything
 (20) can be toxic in various concentrations I mean even fresh
 (21) water is toxic if we inhale it
 (22) Q Even fresh water is toxic if you inhale it?
 (23) A That's just an example I mean there's a number of things
 (24) you could call toxic It depends - you have to know what the
 (25) conditions are what the situation is as to what the definition

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- (1) clean up workers were actually being mobilized
 (2) Q Were they wiping - I'm sorry were you done?
 (3) A I was just going to say that there was a lot of training
 (4) going on a lot of equipment commandeering putting things
 (5) together readying for shoreline cleanup
 (6) Q Were they wiping rocks?
 (7) A Were they wiping rocks?
 (8) Q Right
 (9) A There was one crew that was out doing at that time what
 (10) they could under a Type A type cleanup that's true
 (11) Q I don't mean to be critical here because this mobilization
 (12) effort Mr Teal was - was a massive undertaking wasn't it?
 (13) A It was a massive effort that's correct.
 (14) Q It was a massive effort By the time we were done we had
 (15) a Coast Guard cutter sitting in a bay serving as a control
 (16) tower for aircraft do you remember that?
 (17) A Yes I do
 (18) Q We had a military style operation where landing craft
 (19) were - in fact military had a role to play in this cleanup
 (20) didn't they?
 (21) A They were there assisting yes definitely
 (22) Q And so that the logistical gearing up in response to a
 (23) spill of this size naturally takes some time?
 (24) A Particularly in a remote location And that was one of the
 (25) key challenges with you know this whole spill It was very

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- (1) remote The location where the oil was contacting the
 (2) shorelines was 50 miles outside of Valdez and obviously as it
 (3) moved down through the Kenai and Kodiak areas very remote
 (4) locations very difficult for access weather conditions
 (5) Those were all the challenges that we had to address
 (6) Q Now there is a thing that's going on here with respect
 (7) to - big word would be nomenclature but another way to
 (8) describe it would be what words were used to describe things
 (9) and that became - sometimes it became important in the course
 (10) of this process didn't it what words were used to describe
 (11) things?
 (12) A If you give me a specific example I might be able to
 (13) respond to that
 (14) Q All right Exhibit 1886 please
 (15) MR CLOUGH Counsel if you're going to cross examine
 (16) the witness from something in the deposition testimony would
 (17) you permit him to have a copy of it?
 (18) MR PETUMENOS I was just going to show it to him
 (19) right here This is all I'm going to do okay?
 (20) THE COURT That's fine
 (21) BY MR PETUMENOS
 (22) Q Exhibit 1886 is Exxon's Shoreline Restoration Plan dated
 (23) May 1 1989 and then it was called the Shoreline Restoration
 (24) Plan am I right?
 (25) A I was involved with a lot of plans I'd have to look at

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- (1) the title Yes That's correct the May 1st plan that's the
 (2) title
 (3) Q Exhibit 1887 May 1st 1989 plan upgrade right?
 (4) A Yeah
 (5) Q The Shoreline Cleanup it's now called
 (6) A And the point is?
 (7) Q And then exhibit 1888 June 3rd 1989 we now call it the
 (8) Field Shoreline Treatment Manual?
 (9) A Well I'd like to have a look at that one again if I
 (10) could please
 (11) Q Sure
 (12) A That's actually the - the Coast Guard's manual that was
 (13) put together and this really isn't - this isn't an Exxon
 (14) document This was a package that was put together on behalf
 (15) of the Coast Guard to help orient people to the kinds of
 (16) conditions the program the ISCCs all those kinds of things
 (17) that were coming to the spill This is basically a training
 (18) manual
 (19) Q Okay So we have the term restoration we have the term
 (20) cleanup and we have the term treatment being used and
 (21) the last term I gave you was June 3rd 1989
 (22) You were here and - were you here in court when Dr Page
 (23) testified?
 (24) A Yes I was yes
 (25) Q I heard you say that in the course of your work in the

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- (1) summer you were involved in a program of Exxon's called the
 (2) fate and persistence do you remember that?
 (3) MR CLOUGH Your Honor if we could have a year
 (4) Mr Teal testified I believe working five different summers
 (5) MR PETUMENOS I meant yesterday
 (6) THE COURT He's talking about yesterday
 (7) MR CLOUGH I'm confusing the comments
 (8) THE COURT These are words some of us remember
 (9) because they've been repeated a number of times in this case
 (10) BY MR PETUMENOS
 (11) Q Fate and persistence is a word that's been repeated a
 (12) number of times in this Mr Teal?
 (13) A I'm sorry I didn't catch that
 (14) Q And fate and persistence was the name of the study that you
 (15) were involved in right?
 (16) A That was a program that we had initiated in the summer of
 (17) 89 if that's what you're referring to yes
 (18) Q An Exxon program?
 (19) A That's true
 (20) Q And there's lots of literature that talks about the fate
 (21) and persistence of oil isn't there?
 (22) A Sure there is
 (23) Q Lots of documents that call it that?
 (24) A Uh huh
 (25) Q And when Mr - when Dr Page came in he was qualified as

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- (1) an expert in the fate and effects of oil wasn't he?
 (2) A I can't remember -
 (3) Q Can't remember all right
 (4) A - the specific details there
 (5) Q Persistence is a different word than effect isn't it?
 (6) A Yes it is a different word
 (7) Q Yes Heavy medium and light is a word that was used in
 (8) the course of your work in 1989 right?
 (9) A That is true yes
 (10) Q And then Exxon wanted to change that nomenclature at
 (11) some point didn't they?
 (12) A No no
 (13) Q No?
 (14) A Perhaps I can explain this It might help - help clear up
 (15) the issue here and that is the definitions and what you're
 (16) referring to are the definitions that I was leading through
 (17) yesterday as far as what's classified as heavy in 89
 (18) moderate and light I believe that's what you're referring to
 (19) Now what we did is really we looked at that and said
 (20) well a better terminology is describe the band width because
 (21) that's really the definition is band width so that's why we
 (22) were looking at the nomenclature if you will around those
 (23) issues
 (24) Q And it changed to wide moderate narrow and very light?
 (25) A That's right

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- (1) Q Now when you go out to the beaches and you survey the
 (2) point of the change was what was being looked at was how
 (3) wide
 (4) the band was am I right?
 (5) A That's correct yes
 (6) Q And so a narrow band didn't tell you anything about how
 (7) deep into the ground necessarily the oil went?
 (8) A Again let's keep in mind that we jointly developed those
 (9) definitions ADEC et cetera and one of the reasons we did
 (10) define it that way is because the observations the early
 (11) observations in seeing the way the oil was laying down on the
 (12) shorelines there was a direct correlation to the volume of oil
 (13) that was being deposited on the shoreline that correlated to
 (14) the band width so we believed that that was a reasonable way
 (15) of representing the degree of oiling on the shoreline
 (16) Q But then we changed it?
 (17) A We didn't change the definitions no
 (18) Q Changed the words to be more accurate?
 (19) A Well that's right From a scientific perspective it was
 (20) more accurately representing those conditions
 (21) Q Now the way this worked I think was the first thing that
 (22) happened - and please I'm not being critical - we had a
 (23) huge logistical problem on our hands Some people have
 (24) described it as an emergency situation Does that fairly
 (25) describe the opening weeks of the spill?
 (26) A Oh I think you could say it was an emergency situation

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- (1) yes
 (2) Q I think we can say that And the first thing that happened
 (3) is we sent out helicopters aerial surveys reconnaissance?
 (4) A There was a number of helicopter flights yes to have a
 (5) look see what was happening see where the oil was moving
 (6) Q It's fair to say that from a helicopter what you see is
 (7) wide medium and narrow because you can't from a
 (8) helicopter
 (9) certainly determine how deep into the subsurface the oil is
 (10) That's not controversial is it Mr Teal?
 (11) A Well no it's not As far as those helicopters first
 (12) initial overflights though ADEC Alaska Department of
 (13) Environmental Conservation were the ones making those
 (14) overflights
 (15) Q I thought we saw a picture of a helicopter with three guys
 (16) coming out of it with Exxon employees
 (17) A That was a different survey We had a number of people out
 (18) there looking In fact that's why we had such an extensive
 (19) database as far as information to lead - lead us to where the
 (20) oil was
 (21) Q Now SCAT teams were comprised generally speaking - I
 (22) understand sometimes people went with them - but the SCAT
 (23) teams in 1989 consisted of folks that were independent
 (24) contractors but hired by Exxon in general terms is that
 (25) correct?
 (26) A They were independent contractors that's true consultants

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- (1) that were - that were hired by Exxon yes
 (2) Q Yes And in 1989 the people that were going and doing the
 (3) ground truthing if you will the work on the ground were
 (4) these independent contractors from Exxon and ADEC did not
 (5) routinely not every time not generally speaking accompany
 (6) them?
 (7) A That's true
 (8) Q So in the 1989 SCAT surveys generally speaking it's Exxon
 (9) contractors walking around on the shore for SCAT?
 (10) A Specific for those SCAT surveys I referred to yes But
 (11) also ADEC also had individuals oil spill consultants
 (12) contractors if you will that were also out looking for oiling
 (13) conditions
 (14) Q And you showed us a graph a moment ago relating to the
 (15) number of miles of beach surveyed the graph that's horizontal
 (16) with the little colors on it.
 (17) MR PETUMENOS You still have it? Can you pull it
 (18) up? Can you give me the number and pull it up?
 (19) MR CLOUGH I think it's 5170
 (20) MR PETUMENOS Thank you Mr Clough Appreciate
 (21) it
 (22) MR CLOUGH Now that's from memory
 (23) MR PETUMENOS You have a good memory 5170
 (24) Mr Teal
 (25) BY MR PETUMENOS

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- (1) Q I think you made the point that this survey here is the one
 (2) we're talking about This is the one we just described with
 (3) the independent contractors going out to the beaches?
 (4) A That's the summary of the results of the SCAT surveys the
 (5) shoreline cleanup assessment team surveys yes
 (6) Q And I think you told me on - told us on direct that there
 (7) are a number of miles of beaches
 (8) A Yes
 (9) Q That were never surveyed again?
 (10) A That were never surveyed again? Well as we can see here
 (11) in 1989 the 3400 miles that was surveyed there was -
 (12) actually the majority of them were either no oil or very very
 (13) light conditions
 (14) Q According to these independent contractors - I understand
 (15) but my question is this There were a number of miles of
 (16) coastline from 1989 to 1990 that were surveyed by the SCAT
 (17) team
 (18) and then never surveyed again?
 (19) A That's true yes Again there was no - there's no oil
 (20) there so there's no reason to resurvey those locations
 (21) Q Now the difference is that when we get to surveys that
 (22) take place after 1989 and there's a little more time and it's
 (23) not an emergency situation these surveys are being conducted
 (24) with other people present besides Exxon independent
 (25) contractors Is that so?
 (26) A That's true That's the joint surveys from 1990 onward

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- (1) Q The first joint survey as a matter of a programmatic thing
 (2) as opposed to the occasional person coming along to observe
 (3) was not until 1990?
 (4) A That's true. There were some surveys in the fall of 1989
 (5) but the joint survey, the systematic documentation of
 (6) shorelines for the SAP program occurred in the spring of 1990
 (7) that's true. I think also here you can see how in 1990 the
 (8) number of miles of shoreline that was surveyed in 1990 actually
 (9) closely correlates to the oiled miles in 1989.
 (10) Q Did you get pretty good at creating forms for the surveys?
 (11) A Did we get pretty good?
 (12) Q Yeah.
 (13) A I think you know each year we were able to fine tune the
 (14) forms to make sure we had the best information possible being
 (15) collected, yes.
 (16) Q Let's get to that in a second. I'm going to show you
 (17) I'm finished with this exhibit.
 (18) I'm going to show you defendants' exhibit 13165 which we
 (19) talked about. This is down in the Kodiak Borough area in the
 (20) land claim area of Ugak Bay and the document that I don't
 (21) think we talked about at the back of that -
 (22) I'm at page 6 of 6, counsel.
 (23) Now we're into these surveys where somebody else is around
 (24) besides Exxon contractors and right here there's a little
 (25) block, see it? It says Alaska Department of Environmental

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- (1) Conservation representative and he checks a box that says no
 (2) further treatment is necessary unless it's reoiled. See that?
 (3) A I see that on that form, yes. But that's not - that's not
 (4) one of our forms. I don't believe.
 (5) Q Okay. Not one of Exxon's forms. And the point is that
 (6) he's making here is that even down at Kodiak - what was the
 (7) date of this survey?
 (8) A I don't have the document.
 (9) MR CLOUGH: Objection, Your Honor, this is
 (10) speculation as to what the point somebody else who's not in the
 (11) courtroom has made.
 (12) THE COURT: We'll see, counsel.
 (13) MR PETUMENOS: I haven't asked the question yet.
 (14) Judge.
 (15) THE COURT: I'll take that one under advisement as
 (16) soon as I hear what the question is.
 (17) BY MR PETUMENOS:
 (18) Q Does that help?
 (19) A Does that help?
 (20) Q July 29, 89.
 (21) A Yeah, at the time of that report, yeah.
 (22) Q Now, the reason somebody might want to be concerned
 (23) based upon your experience about not necessary to do treatment
 (24) unless reoiled is that in 1989 there was reoiling going on on
 (25) beaches, wasn't there?

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- (1) A In the early part of 89 that's true, yes. And in fact
 (2) I mentioned that yesterday as far as the transient kinds of
 (3) conditions in the Kodiak Region.
 (4) Q Here's a fellow who gets on the beach and he says, well, I
 (5) don't want to do any treatment now, but we have to watch it
 (6) because it's going to be reoiled?
 (7) A I don't think he says that there.
 (8) Q Well, isn't that the import of it, not necessary unless
 (9) reoiled?
 (10) MR CLOUGH: Same objection, Your Honor.
 (11) MR PETUMENOS: I'll withdraw it, Judge.
 (12) THE COURT: Yeah.
 (13) BY MR PETUMENOS:
 (14) Q Let's take another one. Defendants exhibit 13161. There's
 (15) a little story I think about Spruce Island on Kodiak. You
 (16) pointed out this is an ADEC form and not one of yours?
 (17) A Well, I say it wasn't one of our SCAT forms as far as
 (18) documentation.
 (19) MR CLOUGH: Counsel, if we could see which form
 (20) you're showing the witness.
 (21) MR PETUMENOS: The same one, counsel. I was looking
 (22) at before, page 8 of 8 on the exhibit.
 (23) MR CLOUGH: If you're going to put that on the Elmo
 (24) and zoom in, if you could put the whole thing on the board
 (25) because there's substantial other information for the witness.

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- (1) to form his answer.
 (2) MR PETUMENOS: I'm going to try and do that on this
 (3) one, but if you take a look with me, counsel, it's hard to
 (4) read. I'm reading right there.
 (5) MR CLOUGH: All I'm asking is the witness have a copy of
 (6) the full form other than the part you zoom in on.
 (7) THE COURT: The witness can have - hold on, counsel.
 (8) Counsel can question the way counsel wants to. If in fact
 (9) there's something about the form that needs to be explored in
 (10) more detail, I'll make the decision whether or not it's to be
 (11) done at that time or you get to do it when you get to inspect
 (12) co-counsel.
 (13) MR CLOUGH: I understand, Your Honor. It's
 (14) permissible to give the witness -
 (15) THE COURT: Yes, that's what I said.
 (16) MR CLOUGH: Okay, thank you.
 (17) A Thank you, sir.
 (18) BY MR PETUMENOS:
 (19) Q In the comments section, the ADEC representative writes on
 (20) this September 2nd, 1989 form, set down on gravel bed that
 (21) collects a lot of driftwood and debris. No oil was observed
 (22) old or new. However, this is the type of beach that the oil
 (23) would churn into the high tide berm and continuously be
 (24) reoiled.
 (25) Do you see that comment?

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- (1) A I see the comment yes Are you going to ask me if I agree
 (2) with it or -
 (3) Q Well you weren't there were you?
 (4) A No I wasn't there no
 (5) Q Now I want to show you exhibit 12987
 (6) Now we're going to talk about a place called Chenega
 (7) Island owned by the Chenega Corporation
 (8) And counsel I'll be at page 11 of 11
 (9) And let's show you the whole form on the Elmo here This
 (10) is a MAYSAP field shoreline comments sheet right?
 (11) A Yes it is
 (12) Q And is it another one of these sheets all worked out
 (13) together with the joint surveys?
 (14) A That's true yes We wanted to make sure that we provided
 (15) the opportunity for all team members to - to provide their
 (16) input comments any issues they may have and
 (17) recommendations
 (18) Q Okay This is May 1991
 (19) A That's true it is yes
 (20) Q And there is a box for each and every person who is
 (21) responding to the survey that's printed on the form and it
 (22) says NTR and that's the preprinted form right?
 (23) A That's true yes it is
 (24) Q Now where is the preprinted form that says the treatment
 (25) is required on that form?

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- (1) A Well you didn't need one I was the one that made that
 (2) decision by the way because this is the reason we were
 (3) putting this comment sheet there is we asked them to give us
 (4) their input as to what their observations were and what their
 (5) suggestions were for any further effort and so we really were
 (6) just putting that box there in case everybody agreed that there
 (7) was really nothing left to do here they could just check it
 (8) and they wouldn't have to go into elaborate discussion But
 (9) you know that's the reason why we had this block for each
 (10) individual to put their comments down
 (11) Q Let's take a look This guy from ADEC he draws in a box
 (12) and he says treatment recommended right?
 (13) A But he doesn't check the box
 (14) Q Doesn't check it in this instance but we can find some
 (15) where they did can't we?
 (16) A I guess we probably could yes
 (17) Q Now we have a land manager down here and he writes in a
 (18) box that says treatment recommended right?
 (19) A Yes he does yeah
 (20) Q Now the Exxon fellow he doesn't seem to need to do that
 (21) in this particular instance?
 (22) A Well I guess he knew the protocol as far as not needing to
 (23) do that
 (24) Q He was pretty well trained in the protocol then for MAYSAP?
 (25) A We had fairly extensive training for all members of the

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- (1) survey teams two or three days we went through the forms the
 (2) process the objectives everybody was collectively pulled
 (3) together for that training program
 (4) Q The MAYSAP information was put into a database right?
 (5) A Yes it was in the same way we described before as far as
 (6) the QA/QC program through the GIS input through the map
 (7) representation
 (8) Q The database was put together by Exxon that you showed on
 (9) these maps for these - when you printed out the GIS maps that
 (10) you showed to the jury here on the direct that database was
 (11) created by Exxon?
 (12) A It was created from the data collected from the joint
 (13) survey We provided the function of pulling that information
 (14) together and representing it in the database on the maps
 (15) Everybody got a copy of that Everybody got a copy of the
 (16) original data so they could do their own QC if they wished
 (17) Q I understand But the point is you're not representing to
 (18) the jury that the MAYSAP maps or the 1991 oiling maps that the
 (19) database was jointly arrived at because what Exxon did was
 (20) take
 (21) the forms and input the material onto the database is that
 (22) right? And you did that by yourself you Exxon?
 (23) A We took the data and it was agreed that that's the way we
 (24) were outlining it within the TAG group was to go through take
 (25) the data from the OG forms and represent that on the database
 (26) In the GIS system that's true

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- (1) Q There were times when these four people who were writing
 (2) on this piece of paper disagreed right?
 (3) A Keep in mind what this form is for is for their input
 (4) This was not for data representation in GIS and mapping This
 (5) was their direct input to TAG We were asking them jointly
 (6) to give us their input So that's what this form is for is
 (7) for going into the decision process for making evaluations and
 (8) determinations as far as next steps
 (9) Q That's exactly my point This form had nothing to do with
 (10) the - well let me put it this way If there were
 (11) disagreements on this form where the different people wrote
 (12) down their comments you can't say that the land manager or
 (13) ADEC's comments necessarily got into the maps that you
 (14) showed
 (15) the jury can you?
 (16) A You must realize the process
 (17) Q I'll let you explain the process but would you answer my
 (18) question first?
 (19) A This information was not included in the database entry
 (20) that is correct However what we were doing was that the
 (21) survey teams were a team They went to a shoreline together
 (22) They made the observations together they made the
 (23) representation of what they saw on the OG form The OG
 (24) again
 (25) was an independent consultant Yes he was hired by Exxon
 (26) but
 (27) he was there to provide a role and a function for that survey
 (28) team His role was a scientific one was to take the data

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- (1) collected by all the team members and best represent that on
 (2) the OG form There were only a few occurrences that I can
 (3) remember where there was any question as to the
 (4) documentation
 (5) of the oiling conditions that were seen In fact we received
 (6) a lot of compliments regarding our OGs our senior scientists
 (7) that were out there making those observations and doing the
 (8) documentation I don't think there's an issue as far as how
 (9) the data was represented
 (10) Q Okay all done?
 (11) A Well I just felt like you needed that kind of explanation
 (12) to understand the process
 (13) Q Okay thank you
 (14) Let's talk about archaeology
 (15) MR PETUMENOS And then we'll take a break if that's
 (16) all right Judge
 (17) THE COURT Yes it is
 (18) BY MR PETUMENOS
 (19) Q As I understand - were you here in court - I know you
 (20) were here a lot of days but were you here in court when we had
 (21) an examination about confidentiality of archaeological sites
 (22) and we were waving library books around and talking about
 (23) whether sites were confidential or not? Were you here in court
 (24) for any of that?
 (25) A No I think I would have remembered that one No I wasn't
 (26) here

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- (1) Q You had an archaeologist involved in your program from the
 (2) very beginning?
 (3) A We had a number of archaeologists yes
 (4) Q One of the first things you did?
 (5) A That's true - well not one of the first things but
 (6) certainly early in the program we had an archaeologist
 (7) directly involved assisting us
 (8) Q And you discussed with - was Dr Mobley one of those
 (9) people?
 (10) A Dr Mobley was one of those people yes that's true
 (11) Q Dr Mobley was one of the head people that you had there?
 (12) A He was our field director for 1989
 (13) Q And you remember - before this trial before this
 (14) litigation before you were involved in any litigation expert
 (15) testimony work you remember talking with Dr Mobley about
 (16) the
 (17) need for confidentiality with regard to site protection of
 (18) archaeological and cultural resources don't you?
 (19) A We had a discussion regarding the - what we called the
 (20) need-to-know basis as far as archaeological information This
 (21) was following discussions I'd had very early with CAC
 (22) representatives for example And one of their concerns was
 (23) that we - we were to make sure that we addressed the issue of
 (24) identifying the resources and the sensitivities but also
 (25) trying to keep that data separate keep it - again on a
 (26) need to know basis We had that discussion yes

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- (1) Q And your understanding based upon these discussions was
 (2) that a key aspect of your program was not only to identify
 (3) sites but also to maintain confidentiality surrounding those
 (4) sites was a key aspect of the program?
 (5) A No I wouldn't -
 (6) MR CLOUGH Excuse me Mr Teal objection as beyond
 (7) the scope of direct
 (8) THE COURT Counsel -
 (9) MR PETUMENOS He discussed archaeology in his
 (10) examination
 (11) THE COURT I'm going to send the jury out It's time
 (12) for a break anyway You can take your normal break This may
 (13) take a little bit of time
 (14) (Jury out at 9 31 a m)
 (15) THE COURT Let's talk about the archaeology issue
 (16) first When did he discuss it?
 (17) MR PETUMENOS He discussed it on direct He
 (18) indicated that - I can pull the transcript up if you give the
 (19) computer just a second Judge
 (20) MR DIAMOND The only reference to archaeology was
 (21) his statement that the SCAT teams were composed of various
 (22) people and he identified them by profession He identified one
 (23) was an archaeologist We deliberately avoided having Mr Teal
 (24) talk about the archaeological program
 (25) THE COURT Are you talking about when he was

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- (1) testifying about evaluating sensitivities?
 (2) MR DIAMOND No that evaluating sensitivities
 (3) concerned I believe - it was a little bit before that
 (4) Evaluating sensitivities concerned environmental sensitivities
 (5) MR PETUMENOS Excuse me I'm sorry to interrupt
 (6) could we have the witness excused since we're in the middle of
 (7) cross?
 (8) A Thank you
 (9) THE COURT Very well There's a witness who knows
 (10) how to take advantage of an opportunity
 (11) MR PETUMENOS Do you have it David? Can we just
 (12) read it for the Court?
 (13) THE COURT Sure
 (14) MR PETUMENOS If I give you the line and page does
 (15) that help to bring it up?
 (16) MR DIAMOND We have the hard copy transcript
 (17) MR PETUMENOS Could I see it?
 (18) MR DIAMOND Yeah I'll share it with you What
 (19) page?
 (20) MR PETUMENOS I want to read it
 (21) MR DIAMOND I would like to see it
 (22) MR PETUMENOS 5632 lines 17 through 5634 line 8
 (23) Wonder how we did this in the old days
 (24) THE COURT You didn't have to it made trials go a
 (25) lot faster

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- (1) MR PETUMENOS It's like slow motion replay in a
 (2) football game Why don't I give it to the Judge? It's the
 (3) best thing to do
 (4) MR DIAMOND You're right it's in connection with
 (5) sensitivities
 (6) THE COURT That's what I thought
 (7) MR STOLL Don't tell me you have the old-fashioned
 (8) way of taking notes Judge
 (9) THE COURT So it's the testimony that says in
 (10) addition - he's describing all of the sensitivities that he
 (11) dealt with and then he says in addition to that we also had
 (12) the archaeological resource to make sure that we were
 (13) addressing adequately Where's the other archaeological
 (14) references?
 (15) MR PETUMENOS They're all in the transcript notes I
 (16) put in front of you Judge
 (17) MR PETUMENOS The court reporter tells me there's
 (18) also a word concordance in the back of the transcript that
 (19) tells you every time that it appeared
 (20) THE COURT Okay I've seen it So where are you
 (21) going?
 (22) MR PETUMENOS I have a deposition here Judge as
 (23) you might have guessed in which the witness discussed the
 (24) need
 (25) for confidentiality of the sites that it was a key aspect of
 (26) the Exxon program I insisted that I did not need to know the

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- (1) details of the various locations I only needed to know
 (2) archaeological information that was relevant to my role in
 (3) decision making We established that specifically for the
 (4) purpose of confidentiality So the archaeologists were the
 (5) only ones that dealt with the details of the program
 (6) What details did Dr Mobley - or you did not know as far
 (7) as the site notes the location of various cultural resources
 (8) on a site by site basis I did not need to know
 (9) It's been Exxon's position on this trial that there is no
 (10) confidentiality surrounding these archaeological sites that
 (11) the sites are widely known and there is not a need to protect
 (12) confidentiality It doesn't exist when in fact their own
 (13) cultural resources program was built upon the notion that
 (14) confidentiality was - in their words - the key aspect of
 (15) their program the thing that they were striving to obtain
 (16) And I think it directly rebuts the contention of Mr Diamond in
 (17) this trial earlier that confidentiality is a nonissue that
 (18) it's in the library that it's in the federal register that
 (19) it's in the legal notices of the paper and I think I'm
 (20) entitled to bring that out
 (21) MR DIAMOND Your Honor it may well be something
 (22) that Mr Petumenos wants to bring out but we assiduously
 (23) avoided reference of confidentiality worker education and a
 (24) number of other things in this witness testimony we could have
 (25) gone into and we could have gone into the reasons why they

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- (1) respected Native corporation's wishes with respect to
 (2) confidentiality We could have gone into whether they believed
 (3) that to be justified or not
 (4) This witness could go into discussions of whether sites are
 (5) confidential or not confidential We chose to steer - steer a
 (6) wide course around all of these subjects but I didn't want to
 (7) end up in that morass with this particular witness and the
 (8) only references he's made to confidentiality - to archaeology
 (9) have nothing whatsoever to do with issues of confidentiality
 (10) and that was quite deliberate Simply because this is
 (11) something Mr Petumenos wants to get into is not license to go
 (12) beyond the scope of direct particularly when the direct was
 (13) very carefully crafted to avoid these issues
 (14) MR PETUMENOS I guess I disagree that it was
 (15) carefully crafted I think it was carefully crafted all
 (16) right but it was carefully crafted to discuss with the jury
 (17) all of the planning and thought that went into the
 (18) sensitivities of the spill and at the same time they want to
 (19) keep from the jury what those sensitivities and planning was
 (20) and I'm entitled to go in to discuss exactly what they did
 (21) because the extent to which the sensitivity planning succeeded
 (22) or didn't succeed is in direct issue in this case
 (23) We contend and we're entitled to contend that it didn't
 (24) succeed so very well perhaps with the best of intentions and
 (25) that's a central issue in this case They can't come in here

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- (1) and say we planned for the sensitivities we looked at this
 (2) material we looked at archaeology we retained somebody
 (3) early
 (4) on we did a really good job without my getting into exactly
 (5) what job were you trying to do and how difficult was it to do
 (6) it
 (7) THE COURT The objection's beyond the scope?
 (8) MR DIAMOND That's the objection
 (9) THE COURT Okay the objection's overruled
 (10) MR PETUMENOS Could we handle a couple other
 (11) matters?
 (12) THE COURT That's what I wanted to do
 (13) MR PETUMENOS Could we have copies for counsel here
 (14) and I need my highlighted version if I can
 (15) Judge Exxon has made a central point in their case that
 (16) the federal on scene coordinator directed things that they
 (17) worked for him that he was a tough guy who sent out a memo
 (18) in
 (19) this very case we heard in the direct sent out a memo telling
 (20) everybody to toe the line he was the boss et cetera et
 (21) cetera There is a contrary point of view It was presented
 (22) and circulated on behalf of something called the oil reform
 (23) alliance at the same conference that he was permitted to put
 (24) his own paper in and discuss and I tender it to the Court
 (25) THE COURT I know what it is counsel It's a -
 (26) it's a statement by a biologist named Riki Ott right?
 (27) MR PETUMENOS Right And I'm trying to - I think

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- (1) the area itself there's no question I can go into because
 (2) it's opened on direct it's at issue in this trial
 (3) THE COURT Certainly you can go into the issue of who
 (4) was in control yes
 (5) MR PETUMENOS And rather than - if I ask this
 (6) witness obviously who was in control I'm going to get more of
 (7) the same the federal on-scene coordinator was in control but
 (8) under the principles of 803 I'm entitled to read to him other
 (9) papers that were presented at that conference other treatises
 (10) that were presented at the conference so that the jury gets a
 (11) balanced view
 (12) THE COURT This is a treatise it's your contention
 (13) that this is a treatise?
 (14) MR PETUMENOS Under Evidence Rule 803 it's no less a
 (15) treatise than his own which was read into the record which if
 (16) you take a look at that document it was people that got
 (17) together to discuss how good the program was how well the
 (18) cooperation was and how the federal on scene coordinator
 was
 (19) in charge if that document is relevant this is just as
 (20) relevant
 (21) THE COURT Relevance isn't the issue 803 is not a
 (22) relevance issue is it?
 (23) MR PETUMENOS No but the issue is is he aware of
 (24) does he disagree with this other paper that was written in the
 (25) symposium that went on that his paper was a part of and I can

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- (1) read - I think the Evidence Rule would permit me to read to
 (2) him and ask him whether he disagrees or agrees with the
 (3) following passages May I read to the Court what - some of
 (4) the ones - well the ones I want to use?
 (5) The laws are structured to have the spiller responsible for
 (6) cleanup while a predesignated on scene coordinator -
 (7) MR CLOUGH Which page are you at?
 (8) MR PETUMENOS I'm sorry Mr Clough Page 3 -
 (9) ensures operations are conducted properly if the OSC decides
 (10) the spiller is not conducting a proper response or the spiller
 (11) is not known the OSC is required under the Clean Water Act to
 (12) assume control of the response
 (13) Realistically however in a case like the Exxon Valdez in
 (14) which the responsible party has enormous financial resources
 (15) even if the response is not quote proper the OSC will be
 (16) under tremendous political pressure to leave the spiller in
 (17) charge of the cleanup Caught between company attorneys
 eager
 (18) to blame the poor response on another party and the
 (19) realization that resources available to the OSC may be less
 (20) than what is available to the spiller the OSC is likely to
 (21) stay in an advisory only capacity for the duration of the
 (22) response And we contend that that's exactly what was going
 (23) on and we put on some evidence to support it
 (24) Another passage The Cordova fact sheet on June 23rd 1989
 (25) reported that the ADEC team leader was informed by a Veco

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- (1) foreman that all Veco foremen had been directed by Exxon
 (2) officials not to speak to any ADEC representatives However a
 (3) Veco foreman at one work site informed an ADEC team member
 (4) that although they had recovered approximately one barrel of
 (5) oil and 20 bags of oiled fucus from the site they reported a
 (6) recovery of eight barrels of oil and 40 bags of oiled fucus
 (7) Realizing that recovered oil may contain 40 to 50 percent of
 (8) water would be helpful to have accurate figures for amount of
 (9) actual oil recovered for both natural resource damage
 (10) assessment and baseline information for the next major spill
 (11) Again this rebuts the notion of a cooperative arrangement
 (12) where there's a report in the papers that in fact Exxon
 (13) contractors were instructed not even to talk to the State
 (14) representatives on the spill
 (15) Because of political pressures local field staff who
 (16) served as first responders for ADEC and the Coast Guard
 during
 (17) the Exxon Valdez spill were relieved of their posts Dan
 (18) Lawn the State expert on contingency plans and Alyeska's
 (19) operations according to past commissioner Dennis Kelso has
 (20) been reassigned to state drinking water standards
 Commander
 (21) McCall was transferred out of state It goes on for another
 (22) paragraph relating to dismissals of officials
 (23) Now there's another passage here about the press access
 (24) During the Exxon Valdez spill response repeated attempts
 were
 (25) made by industry to limit press access in the field Initial

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- (1) contracts circulated to fishermen contained a clause stating
 (2) that contractors would not carry press or a camera on board the
 (3) vessel while working on the spill
 (4) Though this clause was removed in the final contracts
 (5) Exxon ordered that the entire central and southwestern regions
 (6) of Prince William Sound be placed in a high security zone
 (7) Persons transiting this zone including the air space above it
 (8) were required to obtain permission Press were not permitted
 (9) Locals were reluctant to ignore Exxon's orders for fear of
 (10) jeopardizing boat and plane charters The situation was
 (11) absurd
 (12) The picture being painted by the witness is that there was
 (13) a cooperative effort going on open and clear communication
 (14) between parties that media didn't play a role in the decisions
 (15) and in the - in the surveying and in the consequences of the
 (16) cleanup I believe that this document - although I understand
 (17) the need to approach the Court first I believe this document
 (18) is an appropriate cross-examination given the scope of the
 (19) direct and the issues in the case
 (20) THE COURT Can I see the document counsel?
 (21) MR PETUMENOS You may I will also state that the
 (22) document comes from Judge the back-up materials for
 (23) Mr Roddewig who conducted an extensive review of other oil
 (24) spills and on this oil spill and on the south central market
 (25) region and is one of the documents that he says he may or may

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- (1) not have read in the course of formulating his opinions so
- (2) it s not a document new to Exxon either
- (3) THE COURT Counsel are you contending this is a
- (4) public document?
- (5) MR PETUMENOS Yes it was circulated at the 1991 oil
- (6) spill conference
- (7) MR CLOUGH Your Honor I m prepared to respond
- (8) whenever you re ready
- (9) THE COURT I m not but I will be
- (10) What was the organization at this conference that ran this
- (11) conference?
- (12) MR PETUMENOS Ms Riki Ott was a biologist and a
- (13) resident of Cordova who was very active in the course of the
- (14) spill
- (15) THE COURT I know that that wasn t what I was asking
- (16) you
- (17) MR PETUMENOS I m not really sure what the Oil Spill
- (18) Alliance is exactly Maybe somebody here does
- (19) THE COURT Well what I m asking you is Was this
- (20) oil spill conference somehow a governmental function?
- (21) MR PETUMENOS No this oil spill conference was a -
- (22) a conference where people brought together papers and
- (23) discussed
- (24) how oil spills should run and what we should do in the future
- (25) and how we could do it better and there were all sorts of
- (26) scientific papers and other kinds of papers exchanged of which

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- (1) Mr Teal s was one and which this was distributed as another
- (2) THE COURT All right This was a private conference
- (3) as opposed to a governmental conference?
- (4) MR PETUMENOS It was the Coast Guard the American
- (5) Petroleum Institute and somebody else that was involved in the
- (6) conference
- (7) MR FORTIER The EPA Your Honor
- (8) THE COURT The what?
- (9) MR FORTIER EPA the Environmental Protection
- (10) Agency
- (11) THE COURT They ran it
- (12) MR FORTIER It was co-sponsored
- (13) THE COURT Counsel I don t believe this is a public
- (14) record You re going to have to show me that it is Beyond
- (15) that you re going to have other problems that it is Show me a
- (16) case that says this kind of information which is normally rank
- (17) hearsay can be used to cross examine a witness on specific
- (18) points of his testimony when it is not a governmental
- (19) document Can you do that?
- (20) MR PETUMENOS I will give you the rule that I think
- (21) applies
- (22) THE COURT I just read the rule counsel It s
- (23) not - the magic case is not in there So - but you may be
- (24) able to find it so I ll give you an opportunity
- (25) MR PETUMENOS So my record s clear -

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- (1) THE COURT Your record is not clear counsel You
- (2) have to give me some authority for your position and I m going
- (3) to give you an opportunity to do that and I m going to take a
- (4) break right now
- (5) MR PETUMENOS I have some other matters before the
- (6) jury comes back If you want to take a break that s fine
- (7) THE COURT How long are they going to take?
- (8) MR PETUMENOS Well one of the things I want to do
- (9) I have Exhibit 722A marked as the next court s exhibit in
- (10) order?
- (11) THE COURT Sure
- (12) MR PETUMENOS This is the tape that I made the offer
- (13) of proof on
- (14) MR CLOUGH I must admit I m forgetting again
- (15) MR PETUMENOS This is the offer of proof I made on
- (16) the instructions by Mr Cornett to the Alyeska emergency group
- (17) to - with respect to certain clean up activities that were
- (18) being done for the purpose of public relations and for the
- (19) media
- (20) THE COURT Oh oh all right Yes you can have it
- (21) marked
- (22) THE CLERK Court s exhibit 25
- (23) MR PETUMENOS 722A was
- (24) THE COURT You can put your position on the record
- (25) counsel we may not have caught it all in the bench conference

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- (1) MR PETUMENOS On 722A?
- (2) THE COURT On this tape and the material it
- (3) contains
- (4) MR PETUMENOS 722A is a tape recording of a
- (5) telephone conversation between Mr Cornett who was one of
- (6) the
- (7) highest authorities at Exxon Within a day of the spill among
- (8) other things on the tape he is talking to Alyeska and asking
- (9) that they get out fishing boats that they run around in a
- (10) circle if necessary He doesn t care how much oil is picked
- (11) up that he wants it essentially out there so that Exxon can
- (12) look good and so people will think that something is
- (13) happening
- (14) and that there is a response taking place because they are
- (15) taking a public relations hit And that is the thrust of the
- (16) tape with respect to the instructions that were being given on
- (17) the oil spill response at the time And he basically says he
- (18) didn t care whether or not it was going to be a successful or
- (19) fruitful or worthwhile endeavor but that it only needed to be
- (20) done so that people think that we re doing something
- (21) THE COURT All right And what did you propose to do
- (22) once you played that tape in front of the jury to this
- (23) witness?
- (24) MR PETUMENOS I believe I got - the objection was
- (25) sustained a little early but I wish to ask him whether or not
- (26) media and public relations ever was the source for direction of
- (27) the clean up activities and the choices made with respect to

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- (1) the kinds of cleanup and treatment to conduct and I believe
 (2) that his answer was or it hasn't been yet his answer will be
 (3) that that's not the case and I wish to complete the
 (4) impeachment by playing this tape and I think that that is an
 (5) event to which I'm entitled to impeach him on given the issues
 (6) in the case
 (7) THE COURT Counsel what's your position on that?
 (8) MR CLOUGH We object for a couple of reasons
 (9) First of all it's - the way Mr Petumenos has phrased
 (10) this - he keeps talking about the consensus process he's
 (11) trying to impeach on that That was developed and employed
 (12) starting in April 20th the memorandum we saw from the FOSC
 (13) It was on the shoreline cleanup This particular statement was
 (14) made on March 25th probably before this guy everyone got to
 (15) Valdez
 (16) THE COURT Before this person got -
 (17) MR CLOUGH Before Mr Teal Thank you Your Honor
 (18) for helping me correct the record It certainly is not
 (19) impeaching anything Mr Teal has testified about at all He
 (20) did not testify about the on the water cleanup that went on for
 (21) the first week to ten days or whatever it was before the
 (22) shoreline He testified about what he did planning the
 (23) shoreline cleanup setting up the shoreline cleanup the
 (24) shoreline cleanup that went on from there It's not impeaching
 (25) a single thing he said It's also beyond the scope of direct

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- (1) beyond that Obviously what they're trying to do to the
 (2) degree it has any relevance at all we argue 403 that the
 (3) potential prejudice of it far outweighs the relevance
 (4) THE COURT The objection's sustained counsel
 (5) MR PETUMENOS There's a misstatement in the record
 (6) about whether Mr Teal was present when this - when this
 (7) conversation took place number one And number two the
 (8) other thing that needs to be in the record is -
 (9) THE COURT What is the misstatement?
 (10) MR PETUMENOS I think the date of the tape is
 (11) March 24 1989 and my understanding is his arrival was
 (12) March 24 1989 And the other thing I want to point out is
 (13) this witness has been qualified as an expert witness They
 (14) were not content Exxon to have him come in and testify to
 (15) what he did They went through the process of qualifying him
 (16) as an expert in shoreline treatment and how it should be done
 (17) and how it should be organized and in view of that I think
 (18) the response of counsel is not well taken because I'm entitled
 (19) to play not just a prior statement of the witness but events
 (20) that took place in the course of the cleanup to ask him
 (21) whether he thinks this is good clean up technique
 (22) Maybe I failed you here because you asked me the question
 (23) earlier of what other questions would I ask him I think
 (24) questions that I could ask him would be Do you regard this as
 (25) the sort of thing that is proper clean up technique as what

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- (1) you were trained to do? Is it the kind of thing that should be
 (2) going on in a cleanup of this sort?
 (3) THE COURT That's what you propose to ask him?
 (4) MR PETUMENOS Yes
 (5) THE COURT All right When did he arrive?
 (6) MR CLOUGH March 25th in Valdez
 (7) MR PETUMENOS March 24th in Alaska
 (8) THE COURT You can clarify that if there's confusion
 (9) in the record And you I suppose you can do that with the
 (10) witness
 (11) MR DIAMOND I'll go back to the record I believe
 (12) the testimony was Anchorage March 25th
 (13) MR PETUMENOS I don't think that -
 (14) THE COURT Actually these old note taking techniques
 (15) sometimes do work I went to Valdez on March 25th 1989
 (16) MR PETUMENOS And Judge I think whether he was
 (17) present in Anchorage not for purposes of the expert nature of
 (18) his testimony is irrelevant
 (19) THE COURT Yeah that may be so counsel but to the
 (20) extent that you thought he was here at the time these
 (21) statements were made you were wrong
 (22) MR PETUMENOS Okay I was wrong If he - I think
 (23) he said he was on the phone on March 24th then talking about
 (24) the matters but that he was involved
 (25) THE COURT The objection is sustained -

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- (1) MR PETUMENOS Okay
 (2) THE COURT - on all of the grounds stated What's
 (3) next?
 (4) MR PETUMENOS Well I think what I ought to do is go
 (5) through this - I think that's it Judge
 (6) THE COURT We'll take a break
 (7) THE CLERK Please rise This court stands in
 (8) recess
 (9) (Recess from 9:57 a.m. to 10:12 a.m.)
 (10) THE CLERK Please rise This court now resumes its
 (11) session Please be seated
 (12) THE COURT Counsel you wanted to see me without the
 (13) jury
 (14) MR PETUMENOS Just for one minute Judge I do
 (15) appreciate it
 (16) Just to show you I make mistakes going in both directions
 (17) I'd like to mark next in order the transcript of the tape we're
 (18) talking about It does extend to March 25th in fact most of
 (19) it is March 25th The -
 (20) THE COURT What does?
 (21) MR PETUMENOS The tape we were talking about told
 (22) you was March 24th It is - in fact the conversations I'm
 (23) interested in getting in are March 25 and they may or may not
 (24) change your ruling I don't know but if I could get this
 (25) marked as next in order

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- (1) THE COURT Yes
- (2) MR PETUMENOS And finally I have a transcript of
- (3) the direct that I believe makes this fair cross
- (4) MR CLOUGH Could we have the page reference for
- (5) that Mr Petumenos?
- (6) MR PETUMENOS Let me see if it makes any difference
- (7) with the Judge first Maybe he can just tell me
- (8) THE COURT Page 5703 line 4 - not line 4 That s
- (9) where it starts I guess the - the relevant part is the
- (10) highly charged atmosphere part is that right?
- (11) MR PETUMENOS That s correct Judge talking about
- (12) the opening time of the spill and wanting to do things right
- (13) THE COURT This is the testimony about the paper
- (14) right that was prepared
- (15) MR CLOUGH Right The paper regarding the ISCC
- (16) process co authored
- (17) THE COURT When was that paper prepared?
- (18) MR CLOUGH 1991 described the ISCC process which
- (19) started in April of 1989 and continued through the remainder of
- (20) the time
- (21) THE COURT Okay
- (22) MR PETUMENOS The second page in particular is what
- (23) I think - I believe I m entitled to impeach the paper as well
- (24) as the witness
- (25) THE COURT Say that again

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- (1) MR PETUMENOS I believe I m entitled to impeach the
- (2) paper that he testified to on direct okay which was - the
- (3) import of the paper that he prepared with these other people
- (4) for the conference was to say that he got together with all
- (5) these people and wrote this article and the - everybody s
- (6) conclusion was that everything worked smoothly and they all
- (7) worked together to do the right thing and so forth in the
- (8) highly charged atmosphere of the Exxon Valdez
- (9) THE COURT Now what specific piece of evidence are
- (10) you talking about when you say you want to impeach the paper
- (11) or
- (12) the witness?
- (13) MR PETUMENOS I m talking once again about the tape
- (14) which I have a transcript of which I just filed and if you
- (15) look at the March 25th portions of it I believe that it fairly
- (16) states that that s not what was going on on March 25th in any
- (17) event when this phone call was made
- (18) THE COURT All right You want me to attach this to
- (19) the exhibit?
- (20) MR PETUMENOS I made the transcript if you re
- (21) interested in looking at it the earlier exhibit I guess this
- (22) would be the next in order That s the transcript of the
- (23) actual tape that I m seeking to introduce And portions of
- (24) March 25th I think are on the second page
- (25) Did I give you a copy of that yet that transcript?
- (1) MR CLOUGH No

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- (1) THE COURT Thank you counsel That s court s
- (2) exhibit 26 The ruling remains the same
- (3) MR PETUMENOS Thank you Judge for giving me the
- (4) time to make my record Appreciate it
- (5) THE COURT Yes That will be part of exhibit 26
- (6) too just for completeness
- (7) MR PETUMENOS Okay I m ready to go
- (8) MR STOLL Your Honor I just had it brought to my
- (9) attention - as long as the jury s not here - yesterday when I
- (10) referred to the Exxon tour book I inadvertently cited it -
- (11) called it Exhibit 734 which apparently was a federal court
- (12) exhibit number And it s 1519 A - should be the correct -
- (13) just so we have it And also Your Honor I - excuse me
- (14) forget the A part Your Honor It s just 1519
- (15) THE COURT Okay
- (16) MR STOLL The other thing is Your Honor I
- (17) submitted a brief that we delivered to your chambers this
- (18) morning and I gave to counsel for the defendants We said we
- (19) would we did it this morning
- (20) THE COURT Regarding what?
- (21) MR STOLL This is on the lay testimony expert lay
- (22) witnesses or lay expert witnesses whatever you want to call
- (23) them and -
- (24) THE COURT All right I ll pick it up I don t think
- (25) I ve gotten it yet

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- (1) MR CLOUGH We re getting a confused record on this
- (2) point Your Honor The plaintiffs designated one version of
- (3) the tour book but the tour book that was actually presented to
- (4) Mr Selby on the stand used in his cross-examination was
- (5) defendants exhibit 15488 We have a copy of it here
- (6) Plaintiffs had only given him a portion
- (7) THE COURT When I m required to do something as
- (8) opposed to when you re required to do something give me the
- (9) high sign counsel so I can make a ruling These discussions
- (10) are all interesting to me but it doesn t seem to me that I
- (11) have to do anything at this point right? I don t have that
- (12) yet Mr Stoll but I ll get it your pleading -
- (13) MR STOLL Our brief?
- (14) THE COURT Yes
- (15) MR STOLL It was delivered to Scarlet this morning
- (16) THE COURT Thank you
- (17) Are we ready for the jury? Okay let s bring them in
- (18) (Jury in at 10 19 a m)
- (19) THE COURT And the witness too
- (20) BY MR PETUMENOS
- (21) Q All set?
- (22) A Yeah ready whenever you are
- (23) Q Okay the subject was archaeology
- (24) A Okay
- (25) Q Your understanding of the issues surrounding - or a key

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(1) aspect of the program that you were conducting on archaeology
 (2) was to first identify sites as archaeological yes?
 (3) A That was the archaeologist role was to identify locations
 (4) that s true
 (5) Q But for the whole program you as the program
 (6) administrator to the extent that you were was a key aspect
 (7) was also to maintain confidentiality around those sites am I
 (8) right?
 (9) A Not specific to the sites We - again I met with CAC and
 (10) discussed the issue you know they did have a concern They
 (11) wanted to - to make sure we were doing as much as possible to
 (12) retain confidentiality of the data the files that we were
 (13) selecting and holding within our offices and that was a
 (14) discussion that I had with them and that s why we tried to
 (15) keep those files segregated and only on a need to-know basis
 (16) was that information - and need to know being archaeologists
 (17) involved with the program had access and direct involvement
 (18) with those files
 (19) Q And you insisted that you yourself didn t need to know
 (20) the details of the locations?
 (21) A That s true I did state that you know unless - unless
 (22) there were issues or something that I could add value to in the
 (23) discussions from a management perspective that I did not
 (24) need
 (25) to know the details of those sites and also the data I did not
 (26) need to see the field notes of the archaeologists for example

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(1) or the data they were collecting That was an archaeological
 (2) issue
 (3) Q A need to-know basis based upon the decision making that
 (4) you had to make all you wanted to know about
 (5) A I needed to know that the archaeologists were - were doing
 (6) an appropriate job in protecting the information that was being
 (7) collected and I consulted with the SHPO office for example
 (8) to make sure they were comfortable with the arrangements we
 (9) had
 (10) and the filing system we had and they agreed that yes that
 (11) was appropriate
 (12) Q You tried to be careful about that?
 (13) A Yes I did
 (14) Q The State was concerned about that confidentiality issue?
 (15) A They never identified that they were concerned about that
 (16) Again it was - CAC are the ones that identified it to me as a
 (17) concern of theirs
 (18) Q Really?
 (19) A Yeah
 (20) Q The State never did?
 (21) A Well the State now we had a SHPO representative in our
 (22) offices that in fact went through all the information that
 (23) was going to the ISCC to make sure that it was appropriate for
 (24) that discussion so they were there as an advisor basically
 (25) to deal with any - any issues in that regard
 (26) Q Did the State or any of its representatives ever express

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(1) concern to you that they wanted their sites maintained
 (2) confidential as well?
 (3) A I can t ever remember a discussion like that no
 (4) Q Do you remember the 1991 response plan?
 (5) A Again I was involved with a lot of plans I can t
 (6) remember specifics
 (7) Q The State response plan -
 (8) A State response plan
 (9) Q - for 1991 written by Ernie Piper?
 (10) A I remember there was a plan yes
 (11) Q Anything in there about archaeology?
 (12) A I can t remember specifics at this time I d have to see
 (13) the document
 (14) Q We already I think had that in this trial so we ll just
 (15) rest with the record move on
 (16) Words again talked about persistence and effects and wide
 (17) and medium Let s talk about unopened and unsurveyed Any
 (18) difference there?
 (19) A Well unsurveyed you know we asked SCAT teams to
 (20) identify
 (21) any particular locations where they could not access for
 (22) whatever reason or were unsurveyed and also those areas
 (23) outside of the segments of the survey area are designated as
 (24) unsurveyed So yes there is a difference between unsurveyed
 (25) and necessarily no oil
 (26) Q That s right And the issue is that sometimes there was

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(1) difficult access to beaches?
 (2) A There are very few locations yes where you just - it was
 (3) impossible to access
 (4) Q Sometimes the access depended on tides?
 (5) A That would have an influence yeah
 (6) Q Sometimes you can get on a beach at low tide and can t in
 (7) high tide?
 (8) A Well if you can get onto a shoreline at any particular
 (9) tide level there shouldn t be an issue Let s put it this
 (10) way From a vessel access you should be able to access those
 (11) kinds of shorelines if tide is the influencing factor
 (12) Q Are you telling me in all these miles and miles of
 (13) shoreline there was never a time because of logistics that a
 (14) SCAT team went to a beach when it was at high tide and where
 (15) they could have gotten on if it was low tide never happened?
 (16) A Oh I can t remember I guess it is possible it may have
 (17) been an outside occurrence something like that but keep in
 (18) mind our SCAT surveys were at lower tide levels so that
 (19) shouldn t be an issue
 (20) Q Do you have any figures that tell me for the SCAT surveys
 (21) how many miles of shoreline were physically walked as
 (22) opposed
 (23) to surveyed from a boat from an airplane from a helicopter?
 (24) A I don t have any physical miles showing how that would be
 (25) broken out but I think you know as we ve seen in the
 (26) photographs that we ve been showing that in fact there are a

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- (1) number of miles of shoreline that are rocky headlands that you
 (2) obviously cannot walk
 (3) Q Is the reason that you don't have those miles figures for
 (4) us today because the data doesn't exist or you haven't looked?
 (5) A A SCAT survey they would access a shoreline and walk as
 (6) much as possible of that shoreline. Now the actual footage of
 (7) that has not been documented in a GIS system that you could
 (8) pull up that data very readily, no.
 (9) Q Well, does the data exist? Could it have been put into a
 (10) GIS system?
 (11) A Not that I'm aware of.
 (12) Q These little forms that people filled out as they went on
 (13) the SCAT surveys, was there information in there as to how
 (14) much
 (15) was walked and how much wasn't walked?
 (16) A Not yard damages, no.
 (17) Q Not yardages, that wasn't put on the form?
 (18) A As to how much they physically walked?
 (19) Q Right.
 (20) A To the best of my knowledge, it's not on that form.
 (21) Q So now there's no way to tell, is there?
 (22) A No, other than the word of the teams that were physically
 (23) out there.
 (24) Q So when we hear these numbers of miles of shoreline that
 (25) were covered by SCAT, the numbers you're giving us include
 numbers of miles walked, numbers of miles from a skiff.

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- (1) whatever they said they covered, that's not broken out, is it?
 (2) A That's true, it's not broken out. But again, the SCAT
 (3) teams would access a particular segment of shoreline, put an
 (4) identifier at one end and at the other end and they would
 (5) access wherever humanly possible, on foot and other than
 (6) that, they would have to -- those rocky headlands, for example,
 (7) they would have to make the documentation or observation
 (8) from
 (9) the skiff.
 (10) Q All right. Let's see what can happen as a result of this
 (11) process. Mr. Teal, there is a gentleman named Matthew
 (12) Keplinger, and Matthew Keplinger testified in this trial, and
 (13) he said that he went to a place called Sitkinak Island, and he
 (14) said we did beach surveys along the spit, I guess. Of all the
 (15) areas that we went, this was the most heavily oiled area that
 (16) we saw in terms of the beach survey. There was oil on the
 (17) outside of the spit, there was oil on the inside of the spit.
 (18) Another time we beach surveyed it, here and there was high
 (19) concentration of oil on the beach in both of these areas. In
 (20) terms of what kind of oil, this is again what we saw, again, in
 (21) varying sizes. Let me show you where Sitkinak --
 (22) MR. PETUMENOS, could I have the SCAT map, counsel
 (23) for --
 (24) MR. STOLL, it's pulled out.
 (25) MR. PETUMENOS, No, I want their map.
 MR. STOLL, That's it, that's their map.

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- (1) MR. PETUMENOS, Okay, you're the first lawyer I've
 (2) asked to hold a chart.
 (3) MR. STOLL, Right here.
 (4) BY MR. PETUMENOS.
 (5) Q All right, looking at your chart, Mr. Teal --
 (6) A Do you want me to get up, come and look?
 (7) Q No, we'll just be a second.
 (8) Correct me if I'm wrong, on your SCAT2 oiling map, we've
 (9) got -- this is -- if I represent to you this is Sitkinak spit,
 (10) we have no oil on Sitkinak spit, right?
 (11) A That is correct, there's no indication of any oiling there.
 (12) Q I'm sorry, could you speak up just a bit?
 (13) A I said there's no indication on this map to show that
 (14) there's oiling conditions on that particular location.
 (15) Q No area on the next island over?
 (16) A That's correct.
 (17) Q No area of oiling on these two islands here nearby?
 (18) A That's true.
 (19) Q No area of oiling in this entire coastline going up the
 (20) Aliulik Peninsula?
 (21) A That's true. But keep in mind that these are K
 (22) designations, and that doesn't necessarily mean that SCAT
 (23) teams
 (24) were physically on those locations.
 (25) Q Right, they were unsurveyed, right?
 A That's correct. As far as the SCAT program, that's true.

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- (1) I'm not sure of the reference there, as far as the conditions
 (2) that were being discussed, I don't know this individual or his
 (3) position or --
 (4) Q That's okay, Mr. Teal, the jury does. They were here.
 (5) A Okay.
 (6) Q 822 miles of no oil on the SCAT survey is something that
 (7) we've heard in this courtroom. Does that sound about right?
 (8) A That would sound about right, yes.
 (9) Q Now, one of the things that we know is that 822 miles of no
 (10) oil does not include unsurveyed land, isn't that right?
 (11) A That's true, it does not include unsurveyed areas.
 (12) MR. PETUMENOS, I have no further questions.
 (13) MR. STOLL, Your Honor, I have a couple questions.
 (14) CROSS-EXAMINATION OF ANDREW R. TEAL.
 (15) BY MR. STOLL.
 (16) Q Mr. Teal, on your map here, did you get to yourself, did
 (17) you get to -- yourself, did you get to Kodiak in 1989?
 (18) A Not very often, I was there two or three times.
 (19) Q Did you know where Larsen Bay is, by any chance?
 (20) A I remember the name, I can't remember specifically.
 (21) Q This is Larsen Bay, right here?
 (22) A Okay, yeah.
 (23) Q Now, this -- this area here, and this entire area, all of
 (24) Larsen Bay shows on this map as not being oiled, isn't that
 (25) right?

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- (1) A It shows that it wasn't SCAT surveyed that's correct
 (2) Q It wasn't SCAT surveyed?
 (3) A Yeah that's what it shows
 (4) Q And not only -- not only not Larsen Bay but even the
 (5) adjoining areas around Larsen Bay?
 (6) A That's -- that's true However we must keep in mind the
 (7) Kodiak Region was really a different spill condition I
 (8) referred to that earlier where there in fact were a lot of
 (9) transient kinds of conditions We had two kinds of programs
 (10) for the Kodiak area One was a SCAT program surveying The
 (11) other was village clean up crews that were physically going to
 (12) those locations In fact those locations we just discussed
 (13) that was part of that program was to physically go identify
 (14) oiling conditions and clean it up as they were moving through
 (15) those areas
 (16) Q Could I have the Elmo please?
 (17) A That's how those -- those type conditions would have been
 (18) addressed
 (19) Q Now this is -- I want to show you an exhibit which is
 (20) marked 24544
 (21) THE COURT Whose exhibit counsel? Whose exhibit?
 (22) MR STOLL I'm sorry it's PX plaintiffs exhibit
 (23) BY MR STOLL
 (24) Q And this was a photograph taken by a woman named Natalie
 (25) Fobes in Larsen Bay of a clean up group Did you ever see or

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- (1) hear of any cleanup going on in Larsen Bay that was where this
 (2) SCAT map shows?
 (3) A Yeah that's true In fact that's what I was referring to
 (4) Is the village clean up crews that were out addressing those
 (5) kinds of conditions in proximity to those villages yes
 (6) Q Then I show PX24546 which is another photograph in that
 (7) same series I won't go through all of them This is in
 (8) Larsen Bay of some of the -- apparently some of the oil that
 (9) was cleaned up or attempted to be cleaned up there That
 (10) doesn't show on the SCAT map either does it?
 (11) A No Again those locations were addressed by village crews
 (12) and it was not required Also keep in mind the locations for
 (13) SCAT surveys out in the Kodiak Region and all the regions were
 (14) identified by the ISCC process as to where we should be doing
 (15) the SCAT surveys and where we didn't have to Priority was
 (16) established not by SCAT but by the joint process as to where
 (17) to go and look and these kinds of areas were already being
 (18) identified and addressed by the village clean up crews and
 (19) therefore the -- the ISCCs did not identify them as priorities
 (20) for going out and surveying so that's the reason why we don't
 (21) have SCAT surveys for those particular areas
 (22) Q The -- you showed -- there was some pictures yesterday that
 (23) you showed of some rocky shores where there was oil on the
 (24) shoreline and you said that the -- the waves would pound that
 (25) rocky shore and so you just -- you didn't clean it because it

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- (1) was going to wash off essentially or be rubbed off by the
 (2) wave action is that basically your testimony?
 (3) A In the beginning yes those were the kinds of conditions
 (4) where light oiling higher wave energy exposure will clean --
 (5) Q What happened to that oil?
 (6) A Would clean very naturally by themselves
 (7) Q Did the oil evaporate or go back down into the water?
 (8) A It would get eroded off and would be dispersed and broke
 (9) down into very minute particles droplets
 (10) Q And then if it broke off in Prince William Sound and then
 (11) it would come on down the current down towards Kodiak
 (12) wouldn't it a lot of it?
 (13) A Not those kinds of conditions What we were seeing there
 (14) was a light oiling band that -- that would be naturally
 (15) weathered it would be dispersed fairly quickly I wouldn't
 (16) expect those kinds of conditions could release oil back into
 (17) the water column or back in the surface of the water that would
 (18) move further
 (19) MR STOLL That's all I have Your Honor
 (20) Mr Petumenos --
 (21) MR PETUMENOS Judge I've been watching too many
 (22) Columbo movies I've got about five questions if I could have
 (23) your permission to reopen
 (24) THE COURT No counsel you had a thorough
 (25) examination counsel You can make a motion to reopen --

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- (1) MR PETUMENOS No that's fine I don't need to
 (2) reopen Judge
 (3) MR CLOUGH We have no redirect You can go
 (4) A Thank you
 (5) MR CLOUGH Your Honor we have our next witness
 (6) outside It will take a moment to get him and his exhibits in
 (7) here If we could have a short break
 (8) THE COURT Sure
 (9) MR CLOUGH Thank you
 (10) THE CLERK Please rise This court stands in
 (11) recess
 (12) (Jury out at 10 38 a m)
 (13) (Recess from 10 38 a m to 10 52 a m)
 (14) (Jury in at 10 52 a m)
 (15) THE CLERK This court now resumes its session
 (16) Please be seated
 (17) MR CLOUGH Your Honor for our next witness we'd
 (18) like to call Mr Wayne Purdom
 (19) THE COURT You can come to the witness stand
 (20) please
 (21) THE CLERK Can you attach the microphone to your tie
 (22) and remain standing for the oath Please raise your right
 (23) hand
 (24) (The Witness Is Sworn)
 (25) THE CLERK Please be seated

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- (1) Sir for the record could you please state your full name?
 (2) A Jerry Wayne Purdom P u r d o m
 (3) THE CLERK And your occupation?
 (4) A I m a manager in the Exxon Baton Rouge Refinery
 (5) THE CLERK Thank you
 (6) DIRECT EXAMINATION OF JERRY W PURDOM
 (7) BY MR CLOUGH
 (8) Q Good morning Mr Purdom
 (9) A Good morning
 (10) Q Could you tell the jury a little bit about yourself and
 (11) your background please sir?
 (12) A Yes Following attending college at the University of
 (13) Kentucky I graduated with a chemical engineering degree in
 (14) 1969 after which I joined the Baton Rouge Refinery and
 (15) following several assignments as an engineer and then a
 manager
 (16) in operations I went to headquarters in 1980 That s Houston
 (17) Texas
 (18) Following two assignments in the headquarters organization
 (19) then I returned to the Baton Rouge Refinery where I had a
 (20) department head job in the engineering support of operations
 (21) followed by an assignment in the - what s called the operating
 (22) services area where I had responsibility for feedstock
 (23) receipts product transfers dock operations et cetera
 (24) In 1989 I did respond to the Exxon Valdez oil spill and
 (25) then following the activities that I had during the oil spill

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- (1) I came back to Baton Rouge Since 1990 I have been the head
 (2) of the cracking and light ends department in the Baton Rouge
 (3) Refinery
 (4) Q And are you married?
 (5) A Yes I am married to Sandy We have two children both
 (6) boys ages 26 and 23
 (7) Q You mentioned - I believe you mentioned you worked - did
 (8) you work on the Valdez oil spill sir?
 (9) A Yes I worked on the Valdez oil spill from early June until
 (10) late September
 (11) Q That was what year?
 (12) A 1989
 (13) Q How did you come to work on the Valdez spill?
 (14) A I volunteered The operations manager and a number of
 (15) other people who were already associated with - involved with
 (16) the oil spill was home on vacation for - actually home for
 (17) about ten days I had grown up with him and told him that if
 (18) he needed for me to come that I would be willing to come
 (19) Q Now prior to going to work on the Valdez spill did you
 (20) have prior experience in oil spill response?
 (21) A I had no experience with spills of this magnitude As I
 (22) said I was responsible for dock operations in Baton Rouge
 (23) Refinery where we do have occasional oil spills mostly in
 (24) just a few gallons or one or two barrels
 (25) Q What type of experience were you bringing to the Valdez

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- (1) spill?
 (2) A Over half of my tenure with Exxon has been in the arena of
 (3) operations management running an oil refinery and so I
 (4) brought the experience of making things work and running
 (5) operations Additionally I had had responsibility for the
 (6) emergency response organizations of that particular refinery
 (7) and training in crisis management
 (8) Q Now when did you arrive in Alaska?
 (9) A In Alaska I arrived I think on June the 7th
 (10) Q And were you given an assignment?
 (11) A Yes I was I saw the operations manager in Valdez and was
 (12) assigned to Kodiak operations
 (13) Q What were your duties? What was your assignment sir?
 (14) A I was responsible for the safety of the operations
 (15) responders for execution of the clean up activities as directed
 (16) by the federal on scene coordinator and it was also my
 (17) responsibility to try to plan the growth of the response to
 (18) that which would be required hopefully to allow the salmon
 (19) season to occur in 1989 in the Kodiak area
 (20) Q And what was your title?
 (21) A I was called the operations coordinator
 (22) Q Now I have here - I had here - there we go - what had
 (23) been marked as defendants exhibit - and already admitted into
 (24) evidence as defendants Exhibit 7031AA - which is a map the
 (25) SCAT maps they re called of Kodiak Island for 1989

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- (1) Can you describe for the jury what portions of this map
 (2) fell within your area of responsibility as operations
 (3) coordinator?
 (4) A The entire area covered by this map was my area of
 (5) responsibility and those who worked with me as well as the
 (6) Alaska mainland from Douglas south
 (7) Q Now did the Alaska Peninsula essentially -
 (8) A Right across from Shuyak and then down
 (9) Q When did you arrive in Kodiak?
 (10) A I arrived in Kodiak on June the 8th
 (11) Q And when you arrived in Kodiak did you essentially
 (12) acquaint yourself with a situation of the oil spill as it was
 (13) occurring there at that time?
 (14) A Yes I met with the senior field representative Jack
 (15) Rickner who was going to be reporting to me I met with the
 (16) U S Coast Guard met with as many of the agencies as I could
 (17) and also met with the oil spill consultants that we had working
 (18) for us
 (19) Q You say oil spill consultants who were they and what was
 (20) their role?
 (21) A The - who they were was Fred Byars from the OOPS
 (22) Incorporated or OOPS Inc and Larry Safford and several of
 (23) the people who worked with the VRCA called VRCA
 organization
 (24) Fred had significant experience with major oil spills pretty
 (25) much around the world Larry and VRCA had significant oil

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- (1) spill experience in the arctic region kind of response
 (2) Q What did you observe about oiling conditions in Kodiak
 (3) generally when you took over duties as operations coordinator?
 (4) A My first observations were shortly after arriving and we
 (5) were - I was flying with Mr. Byars up to Shuyak Isles where we
 (6) had some clean up activities underway and it was difficult to
 (7) see any oiling from the helicopter. Later we - we
 (8) characterized that as light to very light oiling around the
 (9) general archipelago.
 (10) Q Now can you describe generally what you mean by light to
 (11) very light oil?
 (12) A This would be the occurrence of tar balls which I would
 (13) guess that by now you're familiar with and mousse patties that
 (14) may be very small or they may be out like cow pies that would
 (15) be resident sometimes clustered sometimes at very great
 (16) distances from one another.
 (17) Q Who was in charge of the spill response in Kodiak at the
 (18) time that you arrived in early June of 1989?
 (19) A The Coast Guard.
 (20) Q And what was their role?
 (21) A They were - well they had an office that operated in the
 (22) same command center that we operated out of and their role
 (23) was
 (24) to direct the activities associated with oil spill cleanup. In
 (25) other words they would tell us where we were to go and clean
 up oil and they also had reporting to them the Kodiak

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- (1) Interagency Spill Clean up Committee which was directed or
 (2) managed headed up by the NOAA representative at the time
 (3) The
 (4) KISCC had in its membership all of the agency - agencies
 (5) represented the landowners as well as the borough and city
 (6) mayors. I'm not sure that the city mayor was on that group.
 (7) Q Can we have defendants exhibit 5142 please?
 (8) Mr. Purdom this is a chart that was earlier showed to the
 (9) jury during Mr. Teal's testimony. Can you show us basically
 (10) how this process worked in Kodiak?
 (11) A May I get up?
 (12) THE COURT Yes you can get up.
 (13) MR. CLOUGH You can get up if that's more comfortable
 (14) for you. We had a pointer here somewhere and I'll be darn -
 (15) do the plaintiffs have their pointer available?
 (16) MR. PETUMENOS No.
 (17) MR. DIAMOND Here's one.
 (18) MR. CLOUGH There we go.
 (19) A I think this is - this treatment decision chart that shows
 (20) the federal on scene coordinator in this case it was the
 (21) person in charge in Kodiak which was through the summer
 (22) about five people were in that position. You see here the
 (23) Interagency Shoreline Cleanup Committee that was receiving
 (24) clean up recommendations from field surveys. These field
 (25) surveys would be completed by people like Alaska Department of
 Fish and Game U.S. Fish & Wildlife Service the clean up teams

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- (1) that were in the field of course and cleaning up had input
 (2) on where they had found oiling and basically the Interagency
 (3) Shoreline Cleanup Committee provided a prioritized list of
 (4) clean up sites to the federal on scene coordinator and we were
 (5) down here in the actual planning and execution of clean up
 (6) activities. We also facilitated final site review and
 (7) submitted for approval by the Coast Guard commander in that
 (8) area the executed cleanup evaluation forms.
 (9) Q Was there also something in existence in Kodiak called the
 (10) EMC or Emergency Management Council?
 (11) A Yes there - go back.
 (12) Q Whatever sure I will take that back thank you.
 (13) Could you tell the jury what the EMC was and what it did?
 (14) A The EMC was a group that also had agency representatives
 (15) the city and borough mayors were on this group that provided
 (16) to me a pretty useful form to gather information about oil
 (17) spill activities. It provided me with a form in which all of
 (18) those people would be present where we could share the
 (19) status
 (20) of what clean up activities were underway and as we
 (21) developed
 (22) more and more teams we would talk about the assignment of
 (23) those teams to other spill cleanup priority areas as shown by
 (24) the chart.
 (25) Q Now did Exxon and its contractors working under your
 direction in Kodiak did they perform the clean up work under
 the direction of the FOSC?

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- (1) A Yes.
 (2) Q And what type of cleanup was generally required throughout
 (3) the - your Kodiak area of responsibility the Kodiak Islands?
 (4) A The type of cleanup that we did was what you call low
 (5) intensity. A type manual cleanup involved a lot of hard work.
 (6) And what you would do is when you came into an area where
 (7) there
 (8) had been impact the beach cleanup people would locate the
 (9) material clean it up by either using a shovel a trowel or in
 (10) some cases their hands and a wipe pad to pick it up put it
 (11) in a plastic bag and then remove it from the shoreline for -
 (12) for its ultimate disposal.
 (13) Q Now you mentioned that one of the things you did as
 (14) operations coordinator was grow the response effort. What
 (15) type
 (16) of a - what were the logistics involved with the Type A with
 (17) supporting the Type A cleanup you're talking about?
 (18) A The logistics involved with that when we - when I arrived
 (19) in Kodiak we at that time had five of what we'll call the
 (20) Exxon/Veco teams. We had six villages which had clean up
 (21) activities within their areas of - well within their local
 (22) areas and they were being converted from protective-type
 (23) activities to active beach clean up teams. And we also had
 (24) about 50 of the people who were involved in setnet fisheries
 (25) who were under contract to clean up their setnet sites.
 Q Now was communications an important part of locating and
 directing the cleanup?

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- (1) A Yes it was If you look at the Kodiak Island area -
 (2) Q Could we have defendants Exhibit 711 (sic) please?
 (3) A If you look at the Kodiak Island area it is pretty far
 (4) flung in that the Kodiak Archipelago is about 40 miles wide and
 (5) about 120 miles long and we had clean up activities that would
 (6) go from place to place as the oil was identified and we would
 (7) have a small clean up crew come in pick up the oil and then
 (8) they would be dispatched to another site
 (9) For the purposes of receiving next assignment and for the
 (10) purpose of being able to communicate in case there was a
 (11) problem with operational safety then we wanted to be able to
 (12) communicate with all of our clean up teams all the time Not
 (13) to say that we maintained continuous contact but we wanted to
 (14) be able to contact them and we wanted them to be able to
 (15) contact us That meant that we had to have the kind of radio
 (16) communication systems that did not exist and what you see on
 (17) this exhibit are places typically mountaintops where we would
 (18) put in radio repeaters that were solar powered so that we could
 (19) reach down into the coves and the bays of the Kodiak Island
 (20) Archipelago and communicate with our - with our people
 (21) Q Now these remote teams how were they generally
 (22) transported around from site to site where you identified oil?
 (23) A They were - they were in - almost exclusively they were
 (24) boat transported and we would have perhaps one large boat
 and
 (25) two smaller boats boats being 20 to - small boats being 30 to

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- (1) 50 feet large boats being maybe 80 to 100 feet The clean up
 (2) crews would stay on those boats They lived on the boats
 (3) during the summer and they would go from place to place
 (4) Did I answer your question?
 (5) Q Yes sir
 (6) Now you said you were operations coordinator Were you
 (7) the only operations coordinator for the Kodiak area from when
 (8) you arrived in June through the rest of the season?
 (9) A No I was not I was the first operations coordinator and
 (10) then I was replaced and switched out with Arley McAdams who
 (11) was the - who was always there when I was not there
 (12) Q How did that process work?
 (13) A The way the process worked was Arley had been involved in
 (14) the Prince William Sound portion of the spill cleanup and came
 (15) down to Kodiak to switch off with me Since our operations
 (16) were quite a bit different than - than the operations that
 (17) occurred in the Sound we spent quite a bit of time the first
 (18) time Arley came down I believe the 26th of June and then I
 (19) left the first time on July the 3rd then I was back on the
 (20) 20th and then flopped over every 21 days
 (21) We did have a procedure where we would go through - I
 (22) would go through with him he would go through with me all of
 (23) the field notes that we had kept and we used that as a
 (24) transition guide and we would talk about current activities
 (25) and planned future activities say in the next few days

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- (1) Q Now during your tenure as operations coordinator down in
 (2) Kodiak were there many erroneous reports of oiling?
 (3) A Good many yes
 (4) Q Can you tell the jury how that occurred or what occurred in
 (5) that regard?
 (6) A Yes We would receive from citizens from our own clean up
 (7) teams from really any source reports that there was oiling in
 (8) this bay or that bay and our job - since we were pretty
 (9) dependent on moving around from place to place we needed
 that
 (10) information and yet we did not want to relocate a clean-up
 (11) team based on a single report Our spill clean up consultants
 (12) were very helpful in helping us check out all of these
 (13) reports We did need to know where the area was that we
 needed
 (14) to clean up but we needed verification prior to the relocation
 (15) of a spill clean up team
 (16) If we got that verification then we would channel that
 (17) information on in to the KISCC and then they would help us
 (18) with the priority of what it was that we were to do in terms of
 (19) moving a team around to the particular site that we had - had
 (20) identified
 (21) Q Now you mentioned that there were essentially a number of
 (22) different surveys going on that summer out there looking for
 (23) oil on shorelines?
 (24) A Yes
 (25) Q Could we have defendants Exhibit 8025 please?

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- (1) First of all before we get to the actual photograph can
 (2) you tell me sir - can you tell the jury actually what were
 (3) some of the surveys that were in place in Kodiak in 1989 out
 (4) there looking for oil on the shorelines?
 (5) A I think as you have discussed this or as you heard this
 (6) morning there was the SCAT activity that Mr Teal described
 (7) In addition to that we had a bird and mammal recovery fleet
 (8) that was directed by the U S Fish & Wildlife Service that had
 (9) about ten or so vessels that was continually on station during
 (10) the summer of 1989 and they would communicate back
 clean up
 (11) priorities and information about oil impact The ADF&G had
 (12) test fisheries vessels that were around the Kodiak Archipelago
 (13) primarily to see if it was - if we could have the salmon
 (14) harvest But those vessels were on station during the summer
 (15) and they provided information
 (16) We had reports from the Veco clean up teams from our
 (17) village clean up teams from NOAA from the National Park
 (18) Service all of the landowners who were on their properties
 (19) and fed back information either to the KISCC through their
 (20) parent agency to Exxon to the Coast Guard
 (21) Q Okay Now what is the photograph we have marked here as
 (22) DX8025? Can you tell us what this photograph is and what it
 (23) shows?
 (24) A Yes This photograph is a status board of the air
 (25) operations activities from I think probably a typical day

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- (1) During the spill cleanup we had - we employed up to 13
 (2) helicopters and five fixed wing aircraft In order to make the
 (3) best utilization of those aircraft we planned their activities
 (4) day by day and what you see here is a line by line description
 (5) of a type of aircraft its tail number the destination time
 (6) of departure time expected to arrive and its particular
 (7) mission
 (8) For example if you take the first line you will see that
 (9) tail number 82 - I can't read that It's going to Wide Bay
 (10) It was going to be there all day and it was going to be doing
 (11) SCAT activities The next one the Coast Guard and SCAT the
 (12) next one the Coast Guard and on and on down You see
 ADF&G
 (13) and then Veco
 (14) One of the activities we did with aircraft was change-out
 (15) crews on the clean up teams and since the crews stayed on
 (16) station or since the boat stayed on station we had to ferry
 (17) the people out and back from the various sites that could be up
 (18) to 115 or 120 miles away
 (19) Q Now all this information you said was fed into the KISCC?
 (20) A Yes
 (21) Q And they were the body that determined what needed to be
 (22) cleaned and how it should be cleaned?
 (23) A That's correct
 (24) Q Did you also receive additional reports of oiling from
 (25) private citizens?

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- (1) A Yes
 (2) Q Fishermen whoever?
 (3) A Yes
 (4) Q What was done about checking out those reports?
 (5) A Every report that we got we assigned follow up
 (6) responsibilities of fairly large part of Fred Byars activities
 (7) other than helping us with clean up techniques was to check
 out
 (8) reports
 (9) Q And was this sort of a verification process?
 (10) A Yes This was the verification process that would say
 (11) yes there is oil present here and if that was indicated then
 (12) we would report that information onto the KISCC
 (13) Q Now when the KISCC had this information did they then
 (14) make the determination of what areas needed to be SCAT'd and
 (15) what didn't?
 (16) A They could act - ask for SCAT activities If the type of
 (17) cleanup that was appropriate would be a Type A cleanup we
 did
 (18) not have to have SCAT If it was to be more mechanically
 (19) intensive then we would have to have a SCAT team go out and
 do
 (20) an evaluation of that particular site
 (21) MR STOLL Your Honor I have a matter for the Court
 (22) to take up
 (23) THE COURT Can you take it up at the bench or do you
 (24) need a break?
 (25) MR STOLL Yes the bench would be fine

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- (1) (At side bar on the Record)
 (2) MR STOLL I don't know where we're going - I don't
 (3) know where we're going but it sounds to me like we may be
 (4) going to a lot of hearsay about who said what in terms of
 (5) verification no verification
 (6) THE COURT Are we?
 (7) MR CLOUGH No not at all I'm just getting the
 (8) process down that it was on verification
 (9) MR STOLL The implication is hearsay The reports
 (10) they didn't do anything and the implication is is that the
 (11) reports - that they got reports that said that there was no
 (12) oil
 (13) THE COURT I don't know that that's the implication
 (14) at all counsel but we'll see When you hear hearsay please
 (15) let me know okay?
 (16) MR STOLL I will
 (17) (Sidebar Concluded)
 (18) BY MR CLOUGH
 (19) Q Now I don't want there to be - I want to follow up on
 (20) this point with the map again if I can which is 7031AA In the
 (21) SCAT mat for 1989 was all of this area formally SCAT'd during
 (22) 1989 when you were the operations coordinator?
 (23) A No it was not
 (24) Q Why not?
 (25) A Because as we just described we had many clean up teams

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- (1) that were doing Type A cleanup We had many other sources of
 (2) information that provided us with data which fed into the
 (3) KISCC for them to determine which areas needed to be cleaned
 (4) up A document I had seen come to Kodiak Island was the
 (5) cleanup plan and that plan stipulated that it was acceptable to
 (6) do Type A cleanup in the Kodiak Island area without SCAT
 (7) Q Now the Type A cleanup this is the manual cleanup you
 (8) were describing earlier to the jury?
 (9) A It's a low intensity cleanup where people physically remove
 (10) the oil debris from the beach
 (11) Q And was this the type of cleanup that was done in the great
 (12) majority of situations in Kodiak during the time you were
 (13) operations coordinator?
 (14) A Yes it was
 (15) Q Now were there any instances when a more intensive a
 (16) mechanical cleanup was required?
 (17) A Yes
 (18) Q And can you tell the jury about those?
 (19) A There were three areas of the island where we used the warm
 (20) water wash technique Chief Point which is down on the point
 (21) of Spiridon Bay
 (22) Q Let me bring the map up here In fact it might be easiest
 (23) for this map if you could come down and show the jury on this
 (24) And this map again referring to defendants Exhibit 7031AA
 (25) Are you all hooked up there?

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- (1) A I think so
 (2) Chief Point is the area right here and we had an area
 (3) about 150 100 by 150 here where we had to use warm water
 (4) washes of a very significant bouldered area where the oil had
 (5) impacted and melted and moved down into the area kind of
 down
 (6) In under the rocks
 (7) Shuyak Harbor which is the area right here and Perevalnie
 (8) Pass In Shuyak Harbor we had an area of shoreline that was
 (9) about 200 feet long a narrow shoreline only about 20 feet
 (10) wide In Perevalnie Pass we had a semi rectangular area
 (11) probably 50 feet by 70 feet of pea sized cobbles where the
 same
 (12) thing had occurred where the oil had impacted pretty
 (13) significantly and melted into the rocks
 (14) Q Couple things I want to clarify here while I've got the
 (15) map and we'll show a photo or two First of all you see the
 (16) gray area delineates the KIB parcels?
 (17) A Yes I do
 (18) Q Was Chief Point part of the KIB parcel?
 (19) A No
 (20) Q How about Perevalnie is that part of the KIB parcel?
 (21) A No
 (22) Q This one you're going to have to look close How about
 (23) that stretch of Shuyak Harbor?
 (24) A Shuyak Harbor it's my understanding that also was not on
 (25) the borough property

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- (1) Q Did you have an opportunity to go back and look through
 (2) some of the photos generated through the clean up process
 and
 (3) identify photographs of this mechanical cleanup which was
 (4) conducted -
 (5) A Yes
 (6) Q - in Perevalnie and Chief Point? If we could have
 (7) please defendants exhibit 14021
 (8) MR STOLL 14 what?
 (9) MR CLOUGH 14021
 (10) BY MR CLOUGH
 (11) Q Well did you ever get yourself personally out to
 (12) Perevalnie?
 (13) A Yes
 (14) Q You walked the area of the shoreline?
 (15) A Yes walked this area both before and during the warm water
 (16) wash operations
 (17) Q Is this the area that was later warm water washed in
 (18) Kodiak?
 (19) A Yes
 (20) Q Can you tell the jury - just come on down to the Barco or
 (21) however works for you - describe to the jury what they're
 (22) seeing there
 (23) A What you see here -
 (24) Q Did you want this again by the way?
 (25) A I could use it

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- (1) What you see here is the cobble and here is the
 (2) delineation of the northeast extent of the oiling You can see
 (3) there's some depth to this beach back to the intertidal the
 (4) top of the intertidal zone and then it goes out to probably
 (5) about right here if this was a three-dimensional picture and
 (6) that basically you can see pools of melted mousse that had
 (7) run into the crannies between the cobble
 (8) Q Now is this typical of the beaches that you saw throughout
 (9) Kodiak Island during the summer of 1989?
 (10) A Not at all This was one of those beaches where we would
 (11) say that the impact was moderate and that there was going to
 (12) have to do fairly extensive work to be able to recover the oil
 (13) from this area
 (14) Q And the type of work that you eventually did was warm water
 (15) flushing?
 (16) A Yeah What we did was we brought in small machines that
 (17) made water that was approximately 140 degrees wash it -
 (18) washed - or washed the rocks with that warm water That
 (19) heated up the mousse or mousse oil mixture and it ran down
 (20) toward an area where we had boomed with both Sorbent and
 (21) containment boom and we also had Sorbent material at
 (22) intermediate places to try to intercept and keep the oil from
 (23) going back into the water
 (24) Q Now was a similar procedure used down at Chief Point?
 (25) A Yes

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- (1) Q And were you able to find a picture of the operation that
 (2) was conducted there?
 (3) A Yes
 (4) Q Were you personally at Chief Point as well?
 (5) A Yeah I was at Chief Point only during the cleanup not
 (6) prior to
 (7) Q Could I have DX14021 please the other photograph in that
 (8) exhibit?
 (9) MR STOLL That's what we just saw
 (10) BY MR CLOUGH
 (11) Q Is this the photograph of the clean up operation conducted
 (12) at Chief Point?
 (13) A Yeah this is the cleanup as it was actually underway
 (14) Q About how large an area was treated with mechanical warm
 (15) water washing at Chief Point?
 (16) A It was an area that - this is the extent of the cleanup on
 (17) the western side and then this whole area was a pocket that
 (18) was kind of like ice cream scooped out of the bank of Spindon
 (19) Bay and it comes over and you can see that where the
 (20) photographer is is about the extent of the cleanup but it was
 (21) pretty vertical very hard to get around on the big boulders
 (22) You can see that the clean-up personnel are actually spraying
 (23) the hot water onto this material You can see the Sorbent
 (24) material that has been put in down here the backup Sorbent
 (25) boom and the containment boom that is preventing oil from

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- (1) getting away from us
- (2) Q Now was this oiling you saw at Chief Point was this
- (3) typical of the type of oiling that you saw throughout Kodiak
- (4) Islands during the summer of 1989?
- (5) A No Again we would say this was moderate oiling and it
- (6) was very uncommon in Kodiak
- (7) Q So to recap there were a total of three places throughout
- (8) the entire Kodiak Archipelago that received mechanical
- (9) treatment during the entirety of 1989?
- (10) A That's correct
- (11) Q They were Shuyak Harbor?
- (12) A Uh huh
- (13) Q How large an area there?
- (14) A Shuyak Harbor was about 20 feet wide and 200 feet running
- (15) along the coastline
- (16) Q And Chief Point which is what we see here and how large
- (17) an area there?
- (18) A Hundred by 150 roughly
- (19) Q And finally I guess we had up at Perevalnie?
- (20) A An area that's about 50 by 70
- (21) Q And for the rest of the beach -
- (22) A Those are all estimates
- (23) Q All the rest of the cleanup conducted in Kodiak that summer
- (24) was this Type A mechanical cleanup?
- (25) A Yes

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- (1) Q Did you also have an opportunity to go back through the
- (2) clean up files and the photographs there and select an example
- (3) of a more typical beach based on your observations and
- (4) experience showing Kodiak oiling in the summer of 1989?
- (5) A Yes I did
- (6) Q And did you select a stretch from Kiliuda Bay?
- (7) A I call it Kiliuda
- (8) Q Kiliuda okay Did you get up to Kiliuda yourself during
- (9) the summer?
- (10) A Yes
- (11) Q The photograph you selected of Kiliuda Bay does that
- (12) accurately depict the type of oiling and scenes you saw out
- (13) there that year?
- (14) A Not only Kiliuda Bay but most of the Archipelago
- (15) Q If we could have - what's the next - defendants exhibit
- (16) 13166 Thank you Ms Dowling
- (17) What does this show us?
- (18) A This shows the location of Kiliuda Bay on the southwest
- (19) side or southeast side of Kodiak Island
- (20) Q And the next page of this exhibit please
- (21) And what does this show the jury?
- (22) A This is a closeup of the area where we did oil spill
- (23) cleanup This would -
- (24) Q Go ahead
- (25) A This would be basically a segment that would be designated

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- (1) as KL 001 show you is some oil in the back
- (2) Q Finally the last page which is the third photograph in
- (3) the exhibit DX13166 is this the beach there at Kiliuda Bay?
- (4) A Yes it is
- (5) Q According to the SCAT data and the oiling data you've just
- (6) showed was this a beach that was lightly or very lightly
- (7) oiled?
- (8) A Lightly to very lightly
- (9) Q Can you describe for the jury what this picture shows what
- (10) type of oil is in there?
- (11) A Yes If you were to walk down this beach what you might
- (12) find occasionally would be a fleck or a mousse patty as I've
- (13) described or tar balls Sometimes you would find them in the
- (14) beach substrate itself Sometimes you would find them tied up
- (15) in the vegetative matter that was the high tide line and
- (16) basically the oiled area would be confined to the area between
- (17) the water and the high tide line
- (18) Q And the amount of these mousse patties would they be
- (19) consistent or did they vary from location to location?
- (20) A They varied Oftentimes you would find one every 100
- (21) yards Sometimes you would find them every two or three feet
- (22) but in light to very lightly oiled they would not be - there
- (23) would not be a significant amount of mousse patty or oil
- (24) material It was all in a clump
- (25) Q And how did they go about cleaning up a very lightly oiled

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- (1) beach like the jury's seeing right here?
- (2) A It's - it's a lot of hard work First thing you do is
- (3) you're walking the beach and you have with you implements
- (4) that
- (5) you're going to use
- (6) Q You say implements you mean a shovel?
- (7) A It could be a shovel it could be a rake it could be a
- (8) trowel Those were the implements that were generally
- (9) provided And if it was in the vegetative material here you
- (10) would typically separate the oiled material put it in a bag
- (11) and then go on down the way
- (12) Q And what would happen - this picture is dated I notice
- (13) on July 26th 1989
- (14) A I don't know
- (15) Q I think you can read it down in the lower right corner
- (16) there
- (17) A Yes
- (18) Q And after a beach had been treated what would happen?
- (19) Would there be some type of follow up procedure?
- (20) A Basically yes There would be at the - well about this
- (21) time and really from June - July the 15th on through the end
- (22) of September we went through an exercise with the federal
- (23) on scene coordinator to come back to these beaches to verify
- (24) that they had been cleaned
- (25) Q If we could have page 7 from that exhibit please from
- (26) defendants exhibit 13166 - oh it's an Elmo

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- (1) Is this - looking at page 7 from defendants exhibit
 (2) 13166 is this one of the types of sign off sheets?
 (3) A Yes this would be a segment inspection record where we
 (4) would verify that the cleanup had been completed and it was
 (5) completed on the 29th September - no this is July the 29th
 (6) Yeah July the 29th of 1989 And basically down at the bottom
 (7) there is a signoff that says that the FOSC s representative and
 (8) the FOSC in this case Dennis McGuire had signed off that this
 (9) segment had been cleaned
 (10) Q Now I d like to focus in on the comment by the ADEC
 (11) representative here because Mr Petumenos was using it for
 (12) Mr Teal I notice that under the area as to whether - do you
 (13) see where there s a thing there above ADEC rep where there s a
 (14) little checkmark says no not necessary unless reoiled?
 (15) A Right
 (16) Q Was reoiling an issue in Kodiak during the summer of 1989?
 (17) A Yeah reoiling or the occurrence of additional oiling
 (18) around the island What we saw was in areas where we
 (19) executed
 (20) cleanup that we might have to come back and clean up again
 (21) at
 (22) a later time period
 (23) Q Now all these surveys that you described did they go back
 (24) and check beaches over again?
 (25) MR STOLL Excuse me Your Honor I have a matter
 (26) (At side bar on the Record)
 (27) MR STOLL Your Honor I thought that this witness

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- (1) was going to be limited to testimony - this is the witness we
 (2) objected to yesterday - relative to the mapping of Mr Bush
 (3) This was the basis of upon which this witness was going to
 (4) testify And my recollection is is that you had ruled he
 (5) could testify about things that were contained that were
 (6) new - new matter that Mr Bush had put in the April 11th map
 (7) I don t see that this is - goes to any of that I don t know
 (8) where we re going
 (9) MR CLOUGH We re literally about three questions
 (10) away from showing him the questions on the map
 (11) THE COURT Showing him what map?
 (12) MR CLOUGH The ICF map we are talking about do all
 (13) the triangles represent continuous oiling as by the map it
 (14) would appear to a lay person looking at it the surveys were
 (15) conducted the cleanups the follow ups and the reoiling
 (16) That s what s the basis of his opinion here
 (17) THE COURT Okay go ahead
 (18) MR PETUMENOS I think he s using it to rehabilitate
 (19) Mr Teal
 (20) THE COURT Pardon me?
 (21) MR PETUMENOS He used it to rehabilitate Mr Teal
 (22) THE COURT What you think is not a valid objection
 (23) counsel If you have a valid objection give me the objection
 (24) but what you think is not important
 (25) MR PETUMENOS What I think Judge is that this is

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- (1) beyond the scope of the offer when he rehabilitates Mr Teal
 (2) MR CLOUGH This was designated last week
 (3) MR STOLL This was designated Friday night is when
 (4) it was designated
 (5) THE COURT I thought it was Thursday but I m not
 (6) going to make a finding
 (7) MR STOLL No Friday
 (8) THE COURT Go back to the table counsel
 (9) (Sidebar Concluded)
 (10) BY MR CLOUGH
 (11) Q I believe the question I had been asking you was surveys
 (12) you described - did they continue throughout the summer?
 (13) A Yes they did
 (14) Q Did they continue basically on all the shorelines?
 (15) A This particular sign off survey was directed at the
 (16) activities of the areas that had cleanup and we got around to
 (17) all of the areas where cleanup had occurred during the
 (18) summer
 (19) Q And did the FOSC sign off on all those areas throughout the
 (20) course of the summer of 1989?
 (21) A Yes
 (22) Q Now we can dump the Elmo here I was looking for your
 (23) map that was out here what I call your triangle map
 (24) Mr Purdom why don t you step up here And you can turn
 (25) off the Elmo
 (26) I m showing you what s been marked previously as

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- (1) plaintiffs exhibit 1354 which shows a whole bunch of
 (2) triangles and circles Let s talk first about the triangles
 (3) which represent according to data looked at by the plaintiffs
 (4) sites where Veco clean up crews working for you in your
 (5) operation picked up some oiled - some oil during the course of
 (6) the summer of 1989
 (7) A Uh huh
 (8) Q Now In some of these places you see these triangles look
 (9) pretty close together My question for you is Based on your
 (10) work as operations coordinator and your observations that
 (11) summer were these - all of these shorelines oiled out in
 (12) Kodiak?
 (13) A No they were not They were oiled lightly to very
 (14) lightly and I think that the triangle would indicate that we
 (15) had clean up activities but that might be and normally would
 (16) be confined to a very small space along this area As I said
 (17) we had a really good communications system that allowed us to
 (18) learn where oiling had occurred We followed the priority
 (19) listing that ISCC had developed and we would go to these
 (20) areas
 (21) and execute cleanup
 (22) Q So first you had to basically find the oil?
 (23) A Yeah
 (24) Q Then you had to get a team out there?
 (25) A Right
 (26) Q And then you had to pick it up and then you had to check

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- (1) back to make sure it didn't get reoiled is that correct?
 (2) A Yes
 (3) Q And that's what was done during the summer of 1989?
 (4) A All summer long
 (5) Q And there was only three places on this entire archipelago
 (6) where they needed any mechanical cleanup?
 (7) A That's correct
 (8) Q Those are the three areas you described for the jury?
 (9) A Right
 (10) Q A couple hundred feet or so each
 (11) Finally Mr. Purdom at some point in the summer was a
 (12) decision made to -- to close down the Kodiak clean up
 (13) operations?
 (14) A Yes
 (15) Q And did that occur sometime in September?
 (16) A The -- the shutdown of operations did occur in September
 (17) yes
 (18) Q Who made the decision to shut down those operations?
 (19) A That was the federal on scene coordinator I think we were
 (20) pretty comfortable with what we had learned about the weather
 (21) and the conditions as they deteriorated in Alaska
 (22) Q To your knowledge -- to your knowledge did Mayor Selby
 (23) protest that decision to shut down the operations?
 (24) A Yes
 (25) Q At approximately this time did the Coast Guard Commandant

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- (1) come out to Kodiak?
 (2) A Yeah
 (3) Q Who was that?
 (4) A It was Commandant Paul Yost
 (5) Q What happened when he got there?
 (6) A This was a --
 (7) MR. STOLL Your Honor I think we're a little beyond
 (8) what the offer is
 (9) THE COURT I agree counsel I believe this is not
 (10) within the scope of the ruling I made yesterday
 (11) MR. CLOUGH May we approach?
 (12) THE COURT Yes
 (13) MR. DIAMOND This is not one of the witnesses that we
 (14) talked about yesterday
 (15) MR. CLOUGH No it is
 (16) (At side bar on the Record)
 (17) MR. CLOUGH This is definitely one of the witnesses
 (18) we talked about there's no question Mr. Purdom is a witness
 (19) we talked about The only additional point is a point on
 (20) Mr. Selby where he was present at a situation where Mr. Selby
 (21) told the Commandant of the Coast Guard that he personally
 (22) could
 (23) not -- request to the Coast Guard on the termination issue
 (24) that the Coast Guard's Commandant said take me out there
 (25) show
 (26) me the problems Mr. Selby said I can't I can't point you to
 (27) any particular beach

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- (1) THE COURT Objections sustained
 (2) MR. STOLL Thank you
 (3) (Sidebar Concluded)
 (4) MR. CLOUGH No further -- I need a break -- no
 (5) further questions for this witness Your Honor
 (6) How did you do it for three in a row?
 (7) THE COURT Counsel?
 (8) CROSS EXAMINATION OF JERRY W. PURDOM
 (9) BY MR. STOLL
 (10) Q Good morning My name's Bob Stoll I happen to represent
 (11) Kodiak Island Borough
 (12) Now do you recall ever being -- ever being introduced to
 (13) the Mayor of Kodiak Island Borough as the chief person for
 (14) Exxon on Kodiak?
 (15) A Yes
 (16) Q Do you recall being introduced as working with Rickner as
 (17) opposed to being the chief person?
 (18) A I don't recall that no
 (19) Q Do you recall -- you attended some Emergency Management
 (20) Council meetings isn't that correct?
 (21) A Yes uh huh
 (22) Q Starting on June 9th does that sound about right?
 (23) A Sounds right
 (24) Q And you attended those meetings until about June 27th?
 (25) MR. CLOUGH Counsel if you're going to cross-examine

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- (1) from a document could we have a copy please for the record?
 (2) MR. STOLL You've got 89 emergency services --
 (3) MR. CLOUGH It was not designated for use with this
 (4) witness in cross examination Can we have a copy please?
 (5) THE COURT Do you have a copy?
 (6) MR. STOLL I've got my own
 (7) BY MR. STOLL
 (8) Q Didn't you -- you attended some of those meetings didn't
 (9) you?
 (10) A I tried to attend every -- the five o'clock meetings every
 (11) day
 (12) Q And according to -- those meetings occurred virtually every
 (13) day isn't that right?
 (14) A Every day early
 (15) Q I'm sorry what do you mean by early?
 (16) A Later in the summer it's my recollection that they were
 (17) reduced to two times a week
 (18) Q And they met at five o'clock?
 (19) A Uh huh
 (20) Q And you attended meetings from my review of the minutes --
 (21) there were minutes kept of those meetings weren't there?
 (22) A Yes there were
 (23) Q And those minutes -- did you review those minutes at the
 (24) end of the meeting?
 (25) A No

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- (1) Q Did you ever review them?
- (2) A I have no recollection of ever reviewing those minutes
- (3) Q Okay Would it surprise you if I told you that my review
- (4) of those minutes indicated that you had attended 16 of the
- (5) meetings out of 90-some - 97 meetings that were held that
- (6) summer?
- (7) A Yes it would surprise me
- (8) Q And you were not in attendance at the meetings from late
- (9) June to late July That was for about a month was that
- (10) because of your cycled out period?
- (11) A My recollection would be that that would be from early July
- (12) to about July the 21st
- (13) Q And did you - did you have a problem getting authority
- (14) from time to time from Valdez?
- (15) A From Valdez?
- (16) Q Yes Didn't you have to ask for material or crews and
- (17) other logistical material from crews in Valdez?
- (18) MR CLOUGH Objection beyond the scope
- (19) THE COURT Objection's overruled go ahead
- (20) A We had to work with Valdez in order to acquire materials
- (21) that we were going to be using both significant things like
- (22) large work boats helicopters I do not recall having what I
- (23) would call problems There were priorities to be addressed
- (24) and the things that we asked for that we were able to talk
- (25) about what we were going to do with them we got

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- (1) BY MR STOLL
- (2) Q Now could I - I don't have the Barco for these exhibits
- (3) You've got some you guys have 14021?
- (4) MR CLOUGH They're going to be used for the next
- (5) witness I don't know whether I have the Barco version or the
- (6) Elmo version
- (7) MR STOLL Okay could you pull up 14021 It's
- (8) defendants exhibit
- (9) MR STOLL And could you go back? This is 14021
- (10) could you go back to the preceding page? I don't know how
- (11) your exhibit works I've got a -
- (12) MR GROSS These are the Barcos I have
- (13) MR STOLL Oh okay perfect So I can just use it
- (14) with this? That would be great.
- (15) BY MR STOLL
- (16) Q Now this is one of these mousse patties or - is this a
- (17) mousse patty or tar ball?
- (18) A I would call this a mousse patty
- (19) Q Okay And -
- (20) A Now I'm not sure that that was associated with that
- (21) particular site
- (22) Q Oh I understand But I'm just trying to get some idea of
- (23) what these - what these looked like give the jury some idea
- (24) what these looked like This was a pile of bags that was -
- (25) A Yes these were plastic bags that you would fill to a

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- (1) weight of 30 or so pounds
- (2) Q Per bag?
- (3) A Per bag You see the shovels there You can see some
- (4) containment boom and these particular bags have been moved
- (5) above the high tide line which may mean that they're going to
- (6) stay overnight prior to being loaded on skiffs to be
- (7) transshipped and then disposed of
- (8) Q And tens of thousands of - maybe hundreds of thousands of
- (9) these bags were taken off of Kodiak Island isn't that
- (10) correct?
- (11) A There were a lot
- (12) Q Am I correct that even in early June there were tens of
- (13) thousands of bags being taken off isn't that correct?
- (14) A I would say that by the middle of June there were - yeah
- (15) in that magnitude
- (16) Q And in addition to that tar ball or mousse patty -
- (17) whatever you wanted to call it - this is an example of other
- (18) oil that you'd find on the beach in Kodiak this is part of
- (19) that same exhibit of defendants?
- (20) A We saw oil like this yeah
- (21) Q And this - this would be classified as a lightly oiled
- (22) beach also isn't that right?
- (23) A Light to very light
- (24) Q Light to very light?
- (25) A Depends how far it was between here and the next one

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- (1) Q Okay
- (2) MR STOLL And I'm sorry Your Honor -
- (3) A In fact this would be a very good exhibit of mousse that's
- (4) weathered down into a beach
- (5) BY MR CLOUGH
- (6) Q There could be oil underneath that also that soaked into
- (7) the sediment isn't that correct?
- (8) A It's possible
- (9) Q And could I have -
- (10) Joel could I have the 13167 Barco?
- (11) MR STOLL I'm sorry Your Honor I'm dealing with
- (12) their exhibits
- (13) THE COURT It's no problem We are going to take a
- (14) break soon counsel So you can pick a time
- (15) MR STOLL This will just take a minute I'll just
- (16) finish this one segment up I'm not going to be too long
- (17) There's some other pages to these I've got some more pages
- (18) to
- (19) the copy I've got that they gave me Some printed - maybe
- (20) that's not on the Barco
- (21) Now part of -
- (22) Why don't we take a break right now Your Honor?
- (23) THE COURT Okay
- (24) MR STOLL I'm sorry It would be faster
- (25) THE COURT Fair enough
- (26) THE CLERK Please rise This court stands in

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- (1) recess
- (2) (Jury out at 11 50 a m)
- (3) (Recess from 11 50 a m to 12 05 p m)
- (4) (Jury in at 12 05 p m)
- (5) THE CLERK This court now resumes its session
- (6) Please be seated
- (7) BY MR STOLL
- (8) Q Now I m fond of this
- (9) THE COURT It s lunchtime
- (10) BY MR STOLL
- (11) Q Does this look like - well I don t know each to his
- (12) own Does this look like a - some of it may be cleaned up
- (13) but does it look like what you saw on some of the beaches
- (14) there?
- (15) A This is - what we would normally see with a mousse patty
- (16) of this size would be that it would be maybe browner
- (17) Q With some debris in it?
- (18) A Also has kind of a funny characteristic smell
- (19) Q Okay But this -
- (20) A We had mousse patties that large yes
- (21) Q And you had them larger too didn t you?
- (22) A Yes
- (23) Q Now I d like to - could I have the Elmo please?
- (24) This is part of one of your exhibits 13167 Now I m
- (25) going to show you a part of a shoreline - what you call a

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- (1) shoreline evaluation oil evaluation and what I d like to ask
- (2) you first of all is this says mousse patty and oil splatter
- (3) generally one piece - this is my reading of it I want to see
- (4) if this is - you agree with this - one piece of mousse
- (5) splatter per 10-20 inches of beach Is that what that looks
- (6) like?
- (7) A It s either 10 to 20 feet or 10 to 20 inches It s not
- (8) clear what it is
- (9) Q It would be 10-20 then feet then in of beach or
- (10) what s that next word?
- (11) A It s I N as I read it The question is -
- (12) Q The question I ve got - the question I ve got how would
- (13) this go down in some report would that go down every 20 feet
- (14) or 20 inches a -
- (15) MR CLOUGH Objection Your Honor no foundation this
- (16) witness has written this report or seen this or would have any
- (17) idea -
- (18) THE COURT If you know Do you know?
- (19) A No
- (20) BY MR STOLL
- (21) Q Now according to this report this is designated as a very
- (22) light oiled beach Is that right? That s the box the square
- (23) box -
- (24) A Yes it is
- (25) Q And could you tell the jury what this report indicates is

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- (1) the length of this beach?
- (2) A 15 000 meters
- (3) Q 15 000 meters That s about eight miles long?
- (4) A Yes
- (5) Q And then it says something about burial depth there?
- (6) A Yes
- (7) Q And what is to 20 what does that mean?
- (8) A I don t know
- (9) Q Pardon me?
- (10) A I don t know
- (11) Q Oh there was n t any regular protocol how to fill out this
- (12) form?
- (13) A There was protocol on how to fill out this form That was
- (14) handled by the SCAT people and came to the KISCC
- (15) Q I see So you wouldn t know from reading it - if you got
- (16) this form you wouldn t know what that meant variable to
- (17) twenty?
- (18) A Well it s not specific in terms of what 20 is
- (19) Q I see and then down further here there s a section here
- (20) where it says - has some percentages oil morphology and it
- (21) says pancakes and balls 20 - 90 percent Did I read that
- (22) correct?
- (23) A Yes you - that s the way I read it as oil
- (24) Q And the same thing down here for oil weathering weathered
- (25) mousse 90 percent?

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- (1) MR CLOUGH Objection Your Honor there s been no
- (2) testimony that this witness participated in the SCAT program
- (3) out there at all He talked about setting up the operations
- (4) and logistics of the cleanup There s no foundation he was
- (5) presented with these forms or knows how they were prepared
- (6) much less this particular one which he already testified he
- (7) doesn t know anything about
- (8) THE COURT Counsel?
- (9) MR STOLL Yes Your Honor
- (10) THE COURT Do you have response?
- (11) MR STOLL Yes he s in charge - according to his
- (12) testimony he s in charge of the on scene operations I guess
- (13) the manager of operations for Exxon at - on Kodiak and I
- (14) would assume that he is - I think he s said that he is
- (15) familiar with SCAT teams going out there He s familiar with
- (16) his people going out there and doing surveys He s identified
- (17) this as a standard form and I think it s appropriate
- (18) cross examination
- (19) THE COURT Well he can tell us when he doesn t know
- (20) because of the - because he doesn t know the routine or what
- (21) certain symbols mean you can simply tell us that all right?
- (22) A I have seen these forms but these forms were prepared as
- (23) part of the evaluation program My responsibilities were in
- (24) the cleanup of the prioritized listing as supplied by the
- (25) federal on scene coordinator

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- (1) BY MR STOLL
 (2) Q I understand Mr Purdom in other words if somebody
 (3) didn't prioritize something for cleanup then you didn't come
 (4) into contact with it is that what you're saying?
 (5) MR CLOUGH Objection vague and ambiguous Is he
 (6) asking whether the witness personally went out there?
 (7) MR STOLL I don't mean personally
 (8) THE COURT Counsel he's asking the witness for the
 (9) definition which is acceptable
 (10) A We cleaned up all of the areas that were shown on the
 (11) prioritized work list In addition several of the teams
 (12) working in their own village areas cleaned up in areas where
 (13) they found oiling
 (14) BY MR STOLL
 (15) Q So the villages were doing cleanup in addition to what you
 (16) were doing?
 (17) A The villages were a part of the overall clean up program
 (18) yes
 (19) Q Okay
 (20) A So was the - so was a crew that was working in the Kodiak
 (21) Island road system
 (22) Q And there was with these - these EMC meetings Emergency
 (23) Management Council meetings that occurred daily at least for
 (24) most of the summer there were a large number of people at
 (25) those meetings wasn't there?

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- (1) A There were 15 to 20 people
 (2) Q Right And those are the daily meetings or whatever they
 (3) were?
 (4) A What I call the five o'clock meetings
 (5) Q Right And at those there was reports - there was an
 (6) exchange of information as to where there was oiling isn't
 (7) that correct?
 (8) A Yes that's true
 (9) Q And there was a lot of reports of oiling at these meetings
 (10) by various people isn't that correct?
 (11) A There were reports yes
 (12) Q And some of the people that attended these were the Coast
 (13) Guard?
 (14) A U S Coast Guard was there
 (15) Q And there were several people from Exxon there?
 (16) A Normally one to two
 (17) Q And there was people from ADF&G?
 (18) A Yes
 (19) Q The Alaska Department of Fish and Game?
 (20) A Uh huh
 (21) Q And people from NOAA?
 (22) A Yes
 (23) Q And people from the national parks?
 (24) A That's correct
 (25) Q And the - I think - was the presiding officer Mr Selby

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- (1) the Mayor of Kodiak -
 (2) A Yes
 (3) Q - Island Borough and generally he was there and the
 (4) Deputy Mayor was there is that right? Usually Mr Selby?
 (5) A Yeah most of the time
 (6) Q And sometimes the Mayor - the City of Kodiak was there
 (7) Mr Brodie?
 (8) A Uh huh
 (9) Q And then the Lieutenant Governor came at least one
 meeting
 (10) Mr McAlpine?
 (11) A I remember the Lieutenant Governor coming to Kodiak
 (12) Island I don't have a specific recollection of whether or not
 (13) he came to that meeting
 (14) Q And there were - from time to time there were discussions
 (15) about bottlenecks isn't that correct?
 (16) A Yes
 (17) Q And there was some logistical problems of getting all these
 (18) bags on occasion off the island or getting them - isn't
 (19) that right?
 (20) A That's correct
 (21) Q And for instance one time there was a time when you had
 (22) six barges loaded up with these bags of material that had been
 (23) removed from Kodiak and you couldn't - couldn't - you didn't
 (24) have anything to tow them away with isn't that - didn't that
 (25) happen?

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- (1) A That's not correct We had only three barges over the
 (2) entire summer Now those barges were part of the logistical
 (3) chain where we would have boats visiting the various work
 (4) teams They would then bring that back to a staging area we'd
 (5) use a crane to offload those boats so they could go on to the
 (6) next team and we would transship from those barges to other
 (7) larger boats that would make a haul either in to Seward or
 (8) Homer for transshipment to the eventual disposition in a
 (9) landfill in the Lower 48
 (10) Q Did you - in the Coast Guard report among others of
 (11) reoiling isn't that correct?
 (12) A Yes
 (13) Q They - occasions they'd say it just keeps coming back
 (14) isn't that right?
 (15) A It keeps occurring That was also information that we got
 (16) from pretty much all of the agencies and our own - and our
 (17) own teams We had some areas where we cleaned a number
 of
 (18) times the same stretch of beach
 (19) Q And there was a problem one time there was talk about
 (20) filming some of the clean up activities but unfortunately I
 (21) think you said actually at the meeting that you didn't have a
 (22) camera to film it?
 (23) MR CLOUGH Your Honor if I may object he's
 (24) questioning him from the document This is not the witness
 (25) and he's not even given us a page reference If I could first

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- (1) have a page reference myself so I can see if there s any
- (2) impeachment here
- (3) THE COURT Are you questioning from the document?
- (4) MR STOLL No I m referring to the document Your
- (5) Honor but I m also asking him to - he s agreeing with what is
- (6) indicated in here and I m just asking - I m not trying to
- (7) impeach him by it
- (8) THE COURT When you re referring to the document make
- (9) that clear so that counsel can have an opportunity to review
- (10) whatever you re referring to all right?
- (11) MR STOLL Fine
- (12) THE COURT When you re not look at the witness so we
- (13) all know you re not referring to the document all right? That
- (14) way counsel won t be confused
- (15) MR STOLL Okay
- (16) BY MR STOLL
- (17) Q If you look at the emergency - Kodiak Emergency Response
- (18) Council meeting of June 21 1989 page 1 - bates number is
- (19) 04039 -
- (20) MR CLOUGH Just a second
- (21) MR STOLL And on - the third person there is
- (22) Mr Purdom
- (23) BY MR STOLL
- (24) Q I m not trying to make a big thing out of this but at one
- (25) time you said we ve been instructed to make a video but

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- (1) the foundation objection it s just been sitting up there
- (2) THE COURT Sure
- (3) MR STOLL Sure
- (4) BY MR STOLL
- (5) Q Now you - you referred to erroneous reports of oil in
- (6) your direct testimony
- (7) A Yes
- (8) Q You personally didn t go out to see whether they were
- (9) erroneous or whether all these reports were erroneous or not
- (10) did you?
- (11) A It was not normal for me to go out However I - I had
- (12) one occasion where I went out It was a major report
- (13) Q Other than the one occasion your job was to run the
- (14) operations from the City of Kodiak essentially?
- (15) A Yes
- (16) Q And if a property owner - what you re saying is that a
- (17) property owner or somebody that wanted to use a beach or
- (18) something might get a report of it being oiled even though it
- (19) wasn t oiled is that basically what you re saying?
- (20) A Yes
- (21) Q And -
- (22) A Go back and say that again please?
- (23) Q Well if a person wanted to go out and use a beach -
- (24) A Uh huh
- (25) Q - say they wanted to go fishing or something of that

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- (1) unfortunately we don t have a video camera Do you recall
- (2) that?
- (3) A I don t recall
- (4) Q Okay that s fine I m just asking the question No big
- (5) deal
- (6) Now during the recess did you have an opportunity to talk
- (7) with Mr Clough in the witness room out here?
- (8) A Yes
- (9) Q And incidentally how did you know what Mr Teal testified
- (10) to this morning?
- (11) A How did I know what Mr Teal testified to this morning?
- (12) Q Yeah You made some reference to - that the jury had
- (13) heard something about the SCAT -
- (14) A We were both in the same office building as we were brought
- (15) up to be - to await our turn talking with you all
- (16) Q Oh you mean before you came to the Court today?
- (17) A Yes
- (18) Q I see preparation for testimony?
- (19) A Yeah We were all thinking we might be on yesterday
- (20) Hoping the same thing
- (21) Q Now the shoreline do you recall the shoreline of Kodiak
- (22) is actually about 2900 miles?
- (23) A Yes 3 000 2600 3200 something like that yes
- (24) MR CLOUGH Minor point Your Honor but could we
- (25) have this document removed from the screen? There was -
- after

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- (1) nature they might get a report it was oiled and you re saying
- (2) it might not be oiled?
- (3) MR CLOUGH Objection foundation have no
- (4) foundation -
- (5) THE COURT Rephrase the question counsel It s
- (6) confusing to me
- (7) MR STOLL I don t think it s that important Your
- (8) Honor
- (9) BY MR STOLL
- (10) Q Do you - you re not giving any opinion here Mr Purdom
- (11) about what oil - the oiling of property that is adjacent to a
- (12) particular parcel does to the property values of either parcel
- (13) do you?
- (14) A I have no way to comment on that That s not my area of
- (15) specialization
- (16) MR STOLL Thank you very much
- (17) MR CLOUGH Just one area should be very brief Your
- (18) Honor We will get you on your way today
- (19) REDIRECT EXAMINATION OF JERRY W PURDOM
- (20) BY MR CLOUGH
- (21) Q You testified in cross examination about the fact that
- (22) there were in fact thousands of bags picked up from some of
- (23) these beaches?
- (24) A Yes
- (25) Q First of all how many different crews were out there

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- (1) looking for oil and bagging stuff when they found it?
 (2) A Let's talk about different kinds of crews. We had 20
 (3) teams, small teams, that moved around from place to place that
 (4) we called the Exxon/Veco teams. These people lived on boats
 (5) for the summer and went from place to place.
 (6) There were six village teams, as I think I said earlier.
 (7) and then there were between 50 and 150 people up through
 (8) early August that were involved in the Setnet Recovery Program.
 (9) Is that responsive to your - oh, there was a Kodiak road
 (10) gang, too. There was about - each of these small teams would
 (11) be about 20 people who were actually on the beach cleaning up
 (12) oil.
 (13) Q Now Mr. Byars showed you - or excuse me Mr. Stoll
 (14) showed you a picture we were actually going to show Mr. Byars
 (15) in just a little bit of time here, remember the picture of the
 (16) shovels sticking in the sand and there's a bunch of bags beside
 (17) them?
 (18) A Yeah.
 (19) Q Did you have occasion to get out there at times when
 (20) clean up crews were out there actually picking up stuff?
 (21) A Yes.
 (22) Q What type of stuff did people put in the bags?
 (23) A Pretty much everything that was coming off the beach. It
 (24) could be - of course, the oiled waste would be put in the
 (25) bags, many times if a rock had oil on it and the entire rock

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- (1) went in the bag. If people were sitting in an area where they
 (2) had several mousse patties to pick up, they would sit down on a
 (3) three by three piece of white absorbent material and that would
 (4) go in the bag. If they used that Sorbent material to wipe off
 (5) a rock, that would go in the bag. If you were using pompom -
 (6) I don't know if you're familiar with the - it's just like a
 (7) pompom - to wipe off rocks, then that material would go in the
 (8) bag. It was all of the material that came off the beach.
 (9) Q Now these crews that would walk along the beach with their
 (10) shovels and their bags and stuff, from your observations did
 (11) they do a good job?
 (12) A They did a great job. It's hard work. Imagine if you
 (13) will, having an assignment to walk along a beach and then - if
 (14) you did get into an area where there were a number of mousse
 (15) patties - then you were bending over or kneeling over or
 (16) perhaps sitting down and loading those things into bags
 (17) transporting the bags, most of the time manually, to an
 (18) intermediate point, and hopefully most of the time being able
 (19) to load those directly into a boat with a human chain that
 (20) would pass bag to bag.
 (21) Q Literally walk the beach foot by foot, they see something
 (22) they find it, they pick it up?
 (23) A Scoop it up, pick it up.
 (24) Q And carry it away?
 (25) Lastly, is a splatter the same thing as a mousse patty?

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- (1) A A splatter would typically be something that you would see
 (2) on the face of a rock.
 (3) Q How big is a splatter as compared to a mousse patty?
 (4) A This is an opinion - a splatter would be -
 (5) Q From what you saw?
 (6) A Less than the width of a fingernail on a rock.
 (7) Q Thank you.
 (8) MR. CLOUGH: No further questions.
 (9) MR. STOLL: Your Honor, I just have two little
 (10) matters.
 (11) THE COURT: Go ahead.
 (12) RE-CROSS-EXAMINATION OF JERRY W. PURDOM.
 (13) BY MR. STOLL:
 (14) Q Generally speaking, these beach - this Type A cleanup, if
 (15) it was - if it had soaked more than half an inch into the soil,
 (16) and they couldn't see it, it didn't get removed, isn't that
 (17) right, if there was oil, subsurface oil?
 (18) A Anything that was visible from the surface was removed.
 (19) Q I understand, at least that was the goal.
 (20) A Anything that they saw, they removed.
 (21) Q Well, you didn't go out there yourself to know that, in
 (22) fact, that happened. That was what they were - the people
 (23) were instructed to do?
 (24) A And they were supervised, and we had representatives from
 (25) the Coast Guard and representatives from the Village -

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- (1) Q I understand?
 (2) A I have a pretty high level of confidence that that
 (3) happened.
 (4) MR. STOLL: Okay, Your Honor, I'd like to have this
 (5) document, this one page which I - was part of exhibit 13167,
 (6) I'd like to just have it designated as 13167A. This is the
 (7) shoreline oil evaluation which Mr. Purdom identified.
 (8) THE COURT: All right.
 (9) MR. CLOUGH: I don't have an objection to it being
 (10) designated. We would have an objection to it being introduced
 (11) into evidence because, as his testimony indicated, there's no
 (12) foundation for it.
 (13) MR. STOLL: We can talk about that later.
 (14) THE COURT: We can talk about that later. You can
 (15) certainly designate it.
 (16) MR. STOLL: Your Honor, the other one I'd like to have
 (17) designated as an A is exhibit 14021, there's a photograph of a
 (18) mousse patty, and I'd like to just - so that my record is -
 (19) we'll just call that A, if that's okay.
 (20) THE COURT: 14021A?
 (21) MR. STOLL: 14021A.
 (22) THE COURT: All right.
 (23) MR. STOLL: Thank you, Your Honor.
 (24) THE COURT: You want that admitted?
 (25) MR. STOLL: Yes, I'd like to have that admitted, but

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- (1) we can argue about that later
- (2) THE COURT I don't know if there's argument. All I
- (3) want to know is, is there argument?
- (4) MR. CLOUGH I have no argument to that.
- (5) THE COURT It's admitted.
- (6) (Exhibit 14021A received)
- (7) MR. CLOUGH We'd like to move into evidence
- (8) defendants Exhibit 711 (sic) the chart of the communication
- (9) sites. Defendants exhibit 5142 the treatment decision
- (10) chart.
- (11) (Exhibits DX7111 and DX5142 offered)
- (12) MR. STOLL No objection.
- (13) MR. CLOUGH Defendants Exhibit 8025 the photograph
- (14) of the helicopter operations.
- (15) (Exhibit 8025 offered)
- (16) MR. STOLL No objection.
- (17) MR. CLOUGH Defendants exhibit - and we'll
- (18) designate them here - 14021A photograph of the woman
- (19) standing
- (20) on Perevalnie beach.
- (21) THE COURT That sounds like the same number I just
- (22) heard.
- (23) MR. CLOUGH Better make this one B then.
- (24) (Exhibit 14021B offered)
- (25) THE COURT All right.
- (26) MR. CLOUGH Also like to move into evidence.

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- (1) defendants exhibit 14021C the pile of bags with the shovel
- (2) beside it.
- (3) (Exhibit 14021C offered)
- (4) MR. STOLL No objection.
- (5) MR. CLOUGH Defendants exhibit 14021D the clean up
- (6) operations conducted at Chief Point defendants exhibit
- (7) 13166A
- (8) and B the two maps of Kiliuda Bay defendants exhibit 13166C
- (9) the photograph at Kiliuda Bay defendants exhibit 13166D the
- (10) segment inspection record of Kiliuda Bay I believe and we'll
- (11) also put in here defendants exhibit 14021A a picture -
- (12) (Exhibits DX14021D DX13166A DX13166B DX13166C and
- (13) DX13166D offered)
- (14) MR. STOLL Not A this is the next letter of the
- (15) alphabet whatever it is.
- (16) MR. CLOUGH I don't believe we have another one.
- (17) THE COURT I think that you can step down.
- (18) A Thank you.
- (19) MR. STOLL That one we'll do later.
- (20) MR. CLOUGH That's the only one.
- (21) THE COURT Counsel doing it later has caused some
- (22) logistical problems. Mostly I want to get these things in if
- (23) they're going to come in let's not wait a day and I find
- (24) out -
- (25) MR. STOLL This is the next letter Your Honor I
- (26) think it's D - E 14021E is this photograph of the -

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- (1) (Exhibit 14021E offered)
- (2) THE COURT Okay And there's no objection to the -
- (3) MR. CLOUGH No objection to that.
- (4) THE COURT All of the documents that were just read
- (5) into the record are admitted except those to which there was
- (6) specific objection I think there was only one.
- (7) (Exhibits DX7111 DX5142 DX8025 DX14021B DX14021C
- (8) DX14021D DX14021E DX13155A DX13155B DX13166C and
- (9) DX13166D
- (10) received)
- (11) THE COURT Thank you.
- (12) Next witness please.
- (13) MR. CLOUGH Your Honor we're going to call Mr. Fred
- (14) Byars who's out in the hallway and we'll bring him on in.
- (15) THE COURT The exhibit is that 7111 or is it 711?
- (16) MR. CLOUGH 7111.
- (17) THE COURT Thanks.
- (18) THE CLERK Sir can you attach the microphone to your
- (19) tie and please stand up for the oath. Raise your right hand.
- (20) (The Witness Is Sworn)
- (21) THE CLERK Please be seated Sir for the record
- (22) can you please state your full name?
- (23) A My name is Frederick D. Byars.
- (24) THE CLERK And please spell your last name?
- (25) A B-y a r s.
- (26) THE CLERK And your occupation?

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- (1) A I work for Marine Spill Response Corporation in Lake
- (2) Charles Louisiana response supervisor.
- (3) MR. CLOUGH Thank you Your Honor.
- (4) DIRECT EXAMINATION OF FREDERICK D. BYARS
- (5) BY MR. CLOUGH
- (6) Q Good afternoon Mr. Byars I guess it's become the classic
- (7) opening question do it one more time Tell the jury a little
- (8) bit about yourself.
- (9) A My name is Fred Byars I'm married been married 30 years
- (10) this December I have two children son 23 years old second
- (11) year medical school student and a daughter that's a senior in
- (12) college.
- (13) Q And where do you live?
- (14) A I live in Lake Charles Louisiana I just moved there I
- (15) had been in New Orleans for the last 25 years.
- (16) Q What do you do down in Lake Charles sir?
- (17) A I work - as I stated a little while ago I work for the
- (18) Marine Spill Response Corporation which is a - it's a
- (19) nonprofit company that was formed to set up spill response
- (20) equipment and vessels around the perimeter of the United
- (21) States And my job is response supervisor for the Gulf of
- (22) Mexico and I would be responsible for offshore cleanup
- (23) operations in the event of a major spill offshore in the Gulf.
- (24) Q Fred one thing you and I have in common is we both have
- (25) been accused of speaking pretty quickly on occasion so for the

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- (1) sake of her fingers and our record and the jury I'm going to
 (2) ask you to be conscious of that and I will try and do the
 (3) same
 (4) Can you tell us a little bit about what the MSRC
 (5) organization does down there in the Gulf?
 (6) A Okay We have spill response equipment We have 210 foot
 (7) oil spill response vessels that are strategically placed in the
 (8) high volume ports along the Gulf of Mexico and also around
 (9) the perimeter of the United States and these vessels would be
 (10) used
 (11) to respond to any oil spills out in open waters They have
 (12) people available 24 hours a day that are full time working or
 (13) assigned to these vessels
 (14) Q For how long have you been employed in the field of oil
 (15) spill response?
 (16) A Dedicated the last 20 years of my career to strictly oil
 (17) spill cleanup and response around the United States and
 (18) different parts of the world
 (19) Q Aside from your work on the Exxon Valdez have you been
 (20) involved in the responses to any other famous oil spills?
 (21) A In 1979 I was in the Ikstok (phonetic) one well blowout
 (22) which occurred in the Bay of Campeche off of coast in Mexico
 (23) This particular one spilled about 30 000 barrels a day or
 (24) about 1 2 million gallons a day of oil for about seven months
 (25) and I was down there as a consultant to PNEC (phonetic) which
 (26) is the National Oil Company of Mexico advising them on

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- (1) offshore skimming and clean up operations
 (2) Q Any others? How many spills have you been involved in
 (3) overall in the span of your career?
 (4) A In 20 years I think we all know along the Gulf of Mexico
 (5) there's a lot of oil production and there's been - there have
 (6) been hundreds of oil spills some only a few gallons up to the
 (7) size I just stated
 (8) I was also - after the Exxon Valdez I was also in Saudi
 (9) Arabia on the Persian Gulf oil spill
 (10) Q Is that the one where Saddam Hussein blew up the lines?
 (11) A That's correct
 (12) Q And I understand you were involved with response to the
 (13) Exxon Valdez spill?
 (14) A That's correct
 (15) Q Mr. Byars tell the jury how you got involved with response
 (16) to the spill up here in Alaska?
 (17) A Well I was - when the spill occurred I was working on
 (18) another spill in New Orleans area a federal project two
 (19) abandoned waste barges and I had had a contractual
 (20) agreement
 (21) with Jim O'Brien who owns a company called OOPS
 (22) Incorporated
 (23) which stands for O'Brien's Oil Pollution Service to do
 (24) consulting work And he needed additional help and he was
 (25) called up I think the first day March 24th to come up to
 (26) Valdez and about a week later first week in April I finished
 (27) up the project that I was on and was called up by Jim to come

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- (1) up and get an assignment where they needed some help
 (2) Q And when did you arrive to - in Valdez?
 (3) A I arrived the first week in April of 89
 (4) Q And your status was as a contractor to Exxon?
 (5) A Yes I was employed by Jim O'Brien by OOPS
 (6) Incorporated
 (7) consulted or whatever capacity they deemed necessary for me
 (8) Q Have you ever been an employee of Exxon at any time?
 (9) A Not as an employee I've done contract work for them
 (10) Q Are you being paid for your testimony here?
 (11) A No I'm on administrative leave with pay through my
 (12) company My expenses were covered
 (13) Q Now what did Exxon - I should say really Mr. O'Brien call
 (14) you in to consult about?
 (15) A Excuse discussed the needs where my services could better
 (16) help and we discussed Jim and I and Don Carpenter I think it
 (17) was with Exxon decided I would be assigned to Kodiak to go
 (18) down and advise as operations - from an operations point of
 (19) view operational manager
 (20) Q And when did you get to Kodiak?
 (21) A I spent I think one night in Valdez and was immediately
 (22) dispatched to Kodiak
 (23) Q What did you do when you got there?
 (24) A We got in and went to the - I think it was the Kodiak
 (25) Island the borough chamber offices or the city chamber
 (26) offices where the initial command center was set up and got

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- (1) briefed by the Exxon people there was two Exxon personnel
 (2) that
 (3) were there Met with Mayor Selby and Brodie and attended
 (4) some
 (5) Emergency Management Council meetings and the first thing
 (6) that
 (7) I was asked to do was to fly with Larry Nicholson with the
 (8) Alaska Department of Fish and Game
 (9) There was concern about the salmon streams in the Kodiak
 (10) area and the sensitivities of them so I spent a lot of hours
 (11) in a supercub just kind of small for as big as I am looking at
 (12) different salmon streams in the area to see if there was a
 (13) possible way to protect some of these areas with boom So we
 (14) would go back in every day and report back to the EMC about
 (15) the
 (16) different areas we looked at and also there was concerns on
 (17) all these areas around Kodiak Island
 (18) Q When did -
 (19) A This was prior to impact
 (20) Q You say it was prior to impact When did the oil start to
 (21) arrive down in Kodiak?
 (22) A It was middle - middle of April little bit later than
 (23) that I think it was the latter part of April
 (24) Q When the oil started getting to the Kodiak area did you
 (25) have occasion to get out there and observe it?
 (26) A Yeah I was - I was assigned after I finished working or
 (27) flying with the ADF&G I was assigned a helicopter full time so
 (28) that we could - or I could monitor the areas and as the oil
 (29) kept coming started coming in we - I - my job was to

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- (1) consistently fly constantly fly every day looking at the area
 (2) called the beach areas around the Kodiak area monitoring the
 (3) impact area
 (4) Q You had your own chopper?
 (5) A Yeah it was dedicated to me full time so I could - could
 (6) respond to any reports of oiling or we had lots of reports
 (7) came - come in over a period of time about oiling and we
 (8) would go out verify that there was actually impact
 (9) Q And so you essentially performed this function of the
 (10) verifier or the investigator or whatever you want to call
 (11) yourself -
 (12) A Yeah
 (13) Q - throughout the spring and summer of 1989?
 (14) A Yeah Throughout the whole time In addition to my other
 (15) duties of working with the clean up teams as we formed them
 (16) working with the Exxon supervisors and helping them organize
 (17) their efforts and work with them on the beaches watching the
 (18) clean up operations
 (19) Q Now on all these trips you made out there can you - let
 (20) me put it this way On some of the trips you made out there
 (21) did you see oil?
 (22) A Sure
 (23) Q What type? Can you describe for the jury what were the
 (24) oiling conditions in the Kodiak - first of all let's get this
 (25) straight here I'm holding up a map here - for the last time

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- (1) I'll say this today I hope - DX7031AA the Kodiak Island
 (2) property data and SCAT2 oiling map And can you using this
 (3) map describe for the jury generally where you would go on all
 (4) these trips?
 (5) A Well initially because initial impacts as far as Kodiak
 (6) zone were concerned were up here in the Shuyak Island here
 (7) In fact Big Fort Island is where our first clean up efforts
 (8) were made so I spent a lot of time in this area assessing and
 (9) looking at the areas reporting back into the command center so
 (10) that information would be given to the KISCC so that they
 (11) could make determinations on cleanup But the better part
 (12) of - during the first impact I spent quite a bit of time
 (13) going around Shuyak Island and then as the oil moved
 (14) followed
 (15) it down the west side and then generally over the period of
 (16) the summer I covered about six to eight hours a day in a
 (17) helicopter I covered quite a bit of the whole area landed on
 (18) a lot of beaches When it wasn't very evident that there was
 (19) oil we landed and would walk quite a bit of the area to see
 (20) what kind of impact was was there
 (21) Q Describe for the jury if you will what type of oiling
 (22) there was in Kodiak
 (23) A In general the - obviously we had some areas where there
 (24) was some fairly heavy impacts but the general oiling around
 (25) the whole island was - was very light We had scattered tar
 (26) patties and mousse patties in a lot of the areas lot of the

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- (1) beaches Again in Perevalnie area there was heavy impact
 (2) There was a couple other spots that were deemed heavy by the
 (3) KISCC but in general it was scattered very scattered and
 (4) light
 (5) Q You say you got an awful lot of reports in for you to go
 (6) and check out and verify?
 (7) A Yeah We got reports in but there was a lot of people
 (8) out The village the village teams were out in their area
 (9) If you look at the Kodiak area if you take all six areas
 (10) there's quite a bit of geographic area for them to look at so
 (11) we would get reports back from them fishermen pilots reports
 (12) would come in there was oiling in different areas and these
 (13) would be logged in at the command center If I was out in the
 (14) area or out flying it would be radioed to me to go - go
 (15) check And I wasn't the only one that was actually checking
 (16) the Coast Guard would go out and look We had another oil
 (17) spill consultant there also who would go out and verify oil
 (18) and when we did find it we would call it back in to the
 (19) command center and it was sent to KISCC and they would log
 (20) it
 (21) In for their data
 (22) Q Now did you get many erroneous reports of oiling
 (23) throughout the course of the summer?
 (24) A Yes we did And that's kind of typical in oil spills you
 (25) see sometimes kelp will look like oil You get popweed
 (26) seaweed that will turn dark and people mistake it for oil

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- (1) which is fairly typical and it's not intentional it's just
 (2) that people are mistaken Sometime feeding fish it'll cause a
 (3) sheen and krill cause a sheen So there's mistaken - there's
 (4) a lot of mistake in oil spills but we did have numerous
 (5) reports of oiling
 (6) Q Did you do all this verification from up in the helicopter
 (7) or did you guys land on the beaches and walk around?
 (8) A We landed - when a report came in and it was a good
 (9) location on the report we knew pretty much exactly where it
 (10) was it was pretty easy to go to that particular spot we would
 (11) land and walk the beaches and report what we saw We did
 (12) follow generally around an area looking for sheen and/or
 (13) floating oil
 (14) Q Now did you have occasions to go back to the same areas
 (15) more than once?
 (16) A Sure did
 (17) Q How did that happen?
 (18) A Well it could have been that maybe some of the oil that
 (19) might have been one of the beaches that were reported and we
 (20) verified might have - might have moved off It might have -
 (21) some of the mousse patties were mobile and moved off and
 (22) maybe
 (23) another one came in so yeah we went - we went back to the
 (24) same spots a number of times It might have been additional
 (25) oil that came in to some areas
 (26) Q So if you'd been out to say place A on Tuesday and

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- (1) checked it and found there was no oil and got a report again on
 (2) Thursday that there was oil at place A what would you do?
 (3) A We d verify it We d go down to check it out
 (4) Q What if you got a report on the next Sunday that the same
 (5) place now there was oil there?
 (6) A Went back again because we wanted to know I mean it
 (7) was - we had to know where the oil was in order to keep track
 (8) of it We had to go look at it
 (9) Q Now I know you said that when you found oil you gave the
 (10) information to the KISCC?
 (11) A It was sent back to the command center and from there it
 (12) was logged in and given to the Interagency Shoreline Cleanup
 (13) Committee
 (14) Q And they were the group that essentially determined the
 (15) priorities for beach surveys and beach cleanups?
 (16) A They decided pretty much who what when and where you
 (17) know where we would go and what type of cleanup would be -
 (18) would be done on each area
 (19) Q Now in addition to the Exxon/Veco mobile clean up teams
 (20) were there also what were called village clean up teams in
 (21) place in the Kodiak Islands in the summer of 1989?
 (22) A There was six villages in the Kodiak Island area and they
 (23) were - they were trained Veco brought out some boom experts
 (24) and safety people and went to each village and worked with
 (25) them
 (25) on how to deploy some booms how to look for the oil what to

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- (1) look for safety - safety measures in dealing with it and
 (2) also from the administrative view - point of view paperwork
 (3) flow so that what was done was recorded properly
 (4) Q Try and slow down again just a little bit here
 (5) A Sorry
 (6) Q Probably meet my lead there Did you yourself get out to
 (7) the village clean up operations much?
 (8) A Yes I did I visited all of the villages and watched and
 (9) observed their operations
 (10) Q And did you also get out and personally observe the
 (11) operations of the Exxon/Veco crews?
 (12) A Yes I did That was - my job was to visit all of the -
 (13) the clean up operations
 (14) MR STOLL Your Honor I have a matter that is
 (15) consistent with the ruling of the order - ruling of the Court
 (16) yesterday afternoon
 (17) (At side bar on the record)
 (18) MR STOLL This relates to the witness the preceding
 (19) witness and this witness My understanding is that this was -
 (20) this was going to be new stuff and that was -
 (21) THE COURT This was the witness that was on -
 (22) MR STOLL This is on the original witness list
 (23) yeah but the - the representation was made that the other
 (24) witness was going to be different from this witness and that s
 (25) why - and this is all cumulative with what the -

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- (1) THE COURT There is a lot of cumulation here I d
 (2) like to stay away from that Some of the stuff isn't
 (3) necessary
 (4) MR STOLL The verification stuff we ve heard all -
 (5) MR CLOUGH I need to establish he was personally out
 (6) at those We re about to show pictures of the cruising
 (7) operations which are of the type of cruising operation
 (8) MR STOLL Same photos?
 (9) MR CLOUGH Not the same photos
 (10) THE COURT The objection s overruled On the other
 (11) hand I want you to stay away from accumulation If I hear a
 (12) lot of it I ll stop you
 (13) MR CLOUGH I understand I m trying
 (14) THE COURT Okay
 (15) (Sidebar Concluded)
 (16) BY MR CLOUGH
 (17) Q Now in your observations of both the village clean up
 (18) crews and the Exxon crew - try to move things along here -
 (19) what type of cleanup were they generally doing?
 (20) A Well the most of the cleanup down in the Kodiak zone was
 (21) called a Type A and Type A cleanup consisted of just removing
 (22) the surface - surface oil scooping it up by hand or with
 (23) trowels or shovels
 (24) Q And you testified that over the course of the summer you
 (25) had many opportunities to observe those types of Type A

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- (1) clean up activities going on in Kodiak yourself?
 (2) A Yes absolutely
 (3) Q I d like to show you first of all Mr Byars what s been
 (4) marked previously as plaintiffs exhibit 0245 star 042 which I
 (5) believe represents 042 And I will represent to you that this
 (6) is a photograph taken by Ms Natalie Fobes of the Larsen Bay
 (7) clean up worker one of the village crew workers in Kodiak in
 (8) the summer of 1989
 (9) And the question I d like to ask you is Looking at this
 (10) photograph was this typical of the type of - Type A clean-up
 (11) operations which you personally observed throughout Kodiak
 (12) In
 (12) the summer of 1989?
 (13) A For the most part this is not typical - this the Larsen
 (14) Bay folks encountered some significant oiling in their area
 (15) and this was not typical of what we - what we did throughout
 (16) most of the areas This was some hard work very difficult
 (17) work here
 (18) Q Now was it typical in your experience to see someone
 (19) with oil over most of their clothing in the course of the
 (20) clean up operations that you observed that summer?
 (21) A Well no because most of it was done in a - in a -
 (22) because most of the cleanup was done on beaches that were
 (23) lightly oiled Again the - these folks had some areas that
 (24) had quite a bit of oil and had to work a lot harder Again
 (25) most of it was done just picking up small mousse patties and

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- (1) stuff throughout the - the Kodiak zone But again this -
 (2) this is indicative of that particular area I do remember part
 (3) of that area
 (4) Q Okay Now did the Veco photographs taken photograph the
 (5) work that they did throughout Kodiak in the summer of 1989?
 (6) A The clean up teams all kept documentary photographs
 where
 (7) they went
 (8) Q Did you have an opportunity to review the Veco photographs
 (9) that have been maintained since the summer of 1989?
 (10) A Sure most of them looked through them
 (11) Q I m sorry?
 (12) A I did look through the Veco photographs yes
 (13) Q Did you have an opportunity to select a group of those
 (14) photographs that you felt was representative of the Type A
 (15) manual cleanup that you personally observed in Kodiak
 (16) throughout the summer of 1989?
 (17) A Yes I did
 (18) Q Are those the photographs that have been marked for the
 (19) purposes of this trial as defendants exhibit 1973A which you
 (20) would know as the photographs you brought with you here
 today?
 (21) A Yes
 (22) Q You can step down to the Barco if you feel more
 (23) comfortable Mr Byars What I d like you to do is to describe
 (24) for the jury what these pictures are how they re
 (25) representative of what you saw that summer and essentially

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- (1) what they show?
 (2) MR STOLL Excuse me counsel what is the exhibit
 (3) number please?
 (4) MR CLOUGH We have a pointer here
 (5) THE COURT Counsel could you stop for a moment?
 (6) We ve got a problem with the record so we re going off
 (7) MR STOLL Your Honor I m sorry but these weren t
 (8) designated -
 (9) THE COURT Hold on we re going off record
 (10) (Off record at 12 49 p m back on at 12 51 p m)
 (11) THE COURT All right we re on record again
 (12) BY MR CLOUGH
 (13) Q Mr Byars I was going to ask you to show the photographs
 (14) which have been marked DX1973A and describe to the jury the
 (15) types of operations that they re depicting please
 (16) A Typically in the Kodiak area this was the type of cleanup
 (17) we encountered It was scattered tar balls and mousse patties
 (18) scattered along a section of beach and generally the
 (19) methodology was to walk along find it pick it up put it in a
 (20) plastic bag It was very simple
 (21) Again the previous photo was not a typical one There
 (22) was - there was some very hard work done and very difficult
 (23) work done but in general this is the type of clean up
 (24) activity that occurred generally throughout the Kodiak Island
 (25) area Again these same - these people are finding tar balls

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- (1) and mousse patties scattered throughout an area again put
 (2) them in plastic bags and they would be handled
 (3) Q Did these people look very hard to find any traces of oil
 (4) in their work based upon your observations of the effort?
 (5) A Would you repeat that?
 (6) Q Sure Based on what you saw were these clean up crews
 (7) looking real hard to find any places of oil and to remove them
 (8) from the beaches?
 (9) A In some areas and obviously here they were - they had
 (10) to - looks like they had to hunt a little bit to find some oil
 (11) because it wasn t that evident Sometimes we had to walk
 (12) hundreds of yards of beach before you found anything so it
 was
 (13) really scattered In some areas you might find a little
 (14) concentration where you would tend to pick it up a little
 (15) easier
 (16) Next one And then there was some areas that were a lot
 (17) more difficult to find even though there was a lot of oil in
 (18) some of these areas but it was difficult to walk on the rocks
 (19) were - you had a lot of tripping hazards The mousse patties
 (20) and tar balls would fall down between the cracks of the rocks
 (21) and again one of the main concerns was safety and we made
 (22) sure that these guys took their time and didn t try to rush
 (23) through some of this area but again this is - this is some
 (24) of the tougher shorelines to work
 (25) Generally what we would do at the end of the day the bags

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- (1) would be accumulated near the - the upper tidal zone At the
 (2) end of the day they would form a human chain and they would
 (3) pass the bag down hand to hand down to the waiting boat and
 be
 (4) brought offshore to one of the bigger vessels where we had
 (5) waste containers for them
 (6) The bags generally we tried to keep them 20 to 30 pounds
 (7) no more You had the fatigue factor of handling these bags
 (8) many times In the bag obviously was rocks we had kelp
 (9) seaweed maybe some small debris but it generated a lot of
 (10) bags because we had to keep the weight down because they
 were
 (11) manhandled throughout the whole time and again worried
 about
 (12) safety and handling these bags over large rocks It generated
 (13) a tremendous amount of bags
 (14) This is typically one of the small vessels at the shoreline
 (15) that the bags were loaded on and brought out to a bigger
 vessel
 (16) where we had containers to put them in
 (17) Q The next photograph that I d like to show you is already
 (18) marked as defendants exhibit 14021 and we ll have to check
 (19) our alphabetical reference I believe it s A
 (20) Can you tell us what this shows?
 (21) A This shows kind of a typical mousse patty Some of them
 (22) maybe were a little bigger and this is the type of thing that
 (23) we found scattered throughout the Island these type of little
 (24) patties
 (25) Q Okay we can take that off

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- (1) Now was there an - were there aerial observation programs
- (2) being conducted in Kodiak in the summer of 1989?
- (3) A Yes there was filmed quite a bit of the Kodiak shoreline
- (4) Q This was a situation where helicopter crews would go out
- (5) with video cameras to photograph long stretches of shoreline?
- (6) A That's correct
- (7) Q Did you personally in your helicopter get to get out and
- (8) observe - similarly observe many sections of shoreline
- (9) throughout the Kodiak Island area?
- (10) A I did that constantly while I was in the -
- (11) Q Now earlier today and also a few weeks ago we've heard
- (12) some references to the testimony of a Mr. Keplinger who
- (13) testified during the plaintiffs case about some oiling in a
- (14) place called Sitkinak Lagoon. Can you show us where Sitkinak
- (15) Lagoon is? And why don't you step forward for the jury if you
- (16) could here
- (17) A Sitkinak Lagoon is here
- (18) Q Okay In your own observations did you have a chance to
- (19) fly over the Sitkinak area?
- (20) A Many times We had numerous reports of oiling in that
- (21) area and we went down to verify numerous times down in the
- (22) Sitkinak and Aiktaalik Island
- (23) Q And to your knowledge did the area overflight program also
- (24) go down to the Sitkinak area?
- (25) A Yes they did

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- (1) Q Under the aerial overflight area were they required to
- (2) keep documentation showing the date and location where the
- (3) overflight was being taken?
- (4) A All the videotapes had paper document backup showing
- (5) exactly where they were and the minutes of each segment. So it
- (6) was well documented
- (7) Q And did you have an opportunity while you were up here to
- (8) go through that documentation and identify some videos that
- (9) were actually taken of the Sitkinak Lagoon area during the
- (10) summer of 1984 - excuse me 1989?
- (11) A Yes I did 89
- (12) Q Did you then have an opportunity to basically edit some
- (13) segments out of those videos which you felt were representative
- (14) of the conditions you personally observed down there in 1989?
- (15) A That's correct that's what I found when I went down there
- (16) MR CLOUGH Okay Your Honor the first one we'd like
- (17) to show here is defendants exhibit 14024 and this is - is
- (18) this - is the first one going to be the one from the south
- (19) shore of Sitkinak?
- (20) A Yeah We were on the -
- (21) Q Can you show the jury where the south shore of Sitkinak is?
- (22) A The video was taken somewhere in this area here the south
- (23) shore by the video crew
- (24) MR CLOUGH If we could get the lights dimmed for the
- (25) videos

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- (1) MR DIAMOND I don't know where the switch is
- (2) THE COURT There's a diagram out there counsel
- (3) MR DIAMOND You should see me with my VCR
- (4) MR STOLL Excuse me what are the dates for these
- (5) videos?
- (6) MR CLOUGH See it on the screen here in just a
- (7) second
- (8) (Videotape Played)
- (9) VIDEO VOICE You can see a lot of the beach bluffs in
- (10) this area
- (11) MR CLOUGH Could we turn the audio down?
- (12) BY MR CLOUGH
- (13) Q Was one requirement of the program to your knowledge
- (14) that
- (15) the person making the video dictate a description of what he or
- (16) she was observing at the time the video was made?
- (17) A There was a geomorphologist on board that would dictate
- (18) MR STOLL If the witness wants to testify about what
- (19) the picture is showing but I don't know what - there's an
- (20) objection
- (21) THE COURT I agree Just run the video I don't want
- (22) to hear the narrative
- (23) MR CLOUGH Make sure the audio's off before you turn
- (24) it back on
- (25) BY MR CLOUGH
- (26) Q Why don't you just describe what's being shown here?

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- (1) A What I'm seeing here is the south side of Sitkinak Island
- (2) and typical beach for that portion of it. What the video crews
- (3) would do as they were flying along when they didn't see any
- (4) obvious oiling from the air they would land from time to time
- (5) and walk the beaches and here they had - they found a - this
- (6) is a small patty here. You can see reference point by this pen
- (7) right here the size of it. This is one that - this is kind
- (8) of - that size maybe a little larger and they were scattered
- (9) in this area quite a bit scattered
- (10) Q Could we rewind that for just a second and let me ask
- (11) Mr. Byars a question too just back to the pan shot
- (12) Now my question for you Mr. Byars is These dark areas
- (13) along the shoreline could you tell the jury what that is?
- (14) A Well that's wet - the tide's coming in. Now that's just
- (15) wet sand and stuff
- (16) Q That's not oil?
- (17) A No You've got - you may have some kelp some seaweed
- (18) stuff like that in here
- (19) Q Okay
- (20) A Again as you're flying along if you have significant
- (21) oiling it would be obvious from the area and again they would
- (22) land from time to time just to - to walk the beaches to see
- (23) what would be found and again typically you could find these
- (24) type of mousse patties got a little bit of kelp stuck in it
- (25) Again for reference point here's the pen

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- (1) Q I note this is July 26th 1989 Is that the date on this?
- (2) A That s correct
- (3) Q And to your knowledge isn t that the same day that
- (4) Mr Keplinger was in the Sitkinak area?
- (5) A I read the field notes yes it was the same day
- (6) Q Very same day You can probably fast forward this a little
- (7) bit if you can
- (8) A He s going to find a - what they call splash It s just a
- (9) small platter on a rock Used a Swiss Army knife for
- (10) reference Little bit on the driftwood couple of spots
- (11) splattered around Again on this beach these were scattered
- (12) Q You say that s a -
- (13) A You had to hunt for them to find them
- (14) Q That little black splotch there that s what you would call
- (15) a splatter?
- (16) A Yeah the terminology was a splat or splatter
- (17) Q You see a few other splatters there is that what we re
- (18) looking at there?
- (19) A Couple on these little rocks
- (20) Q And typically what would happen when a clean up crew
- (21) came
- (22) along a beach like this?
- (23) A Well if - if KISCC determined that this would need
- (24) cleanup then what would generally happen these rocks would
- (25) be
- (26) picked up put in a bag and the debris trash Just again
- (27) showing the type of beach and as they walked along they -

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- (1) there d be various and sundry ones scattered along here but
- (2) it s not obvious that this was oiled You had to hunt for them
- (3) to find it
- (4) Q Now if you could approach the jury here while that one
- (5) finishes up I think we re - you can fast forward through the
- (6) rest of that segment to move things along
- (7) MS SMITH John you want the lights on?
- (8) MR CLOUGH No we have another segment to show the
- (9) jury something
- (10) A Wait now this one here this is one of the patties mousse
- (11) patties picked up showing - it s full of sand kind of
- (12) starting to dry breaks apart
- (13) BY MR CLOUGH
- (14) Q Now that s typical of the type of mousse patties you saw in
- (15) many instances?
- (16) A Yeah quite a bit This one s not quite as dry but you
- (17) can see the size the Swiss Army knife there
- (18) Am I blocking you guys?
- (19) Q And a patty like this you just scoop it up?
- (20) A Scoop it up Again this is Type A cleanup and this is
- (21) the type of thing that we generally did around the island
- (22) Q Okay why don t we cut that one there We ll move to the
- (23) next one In just a second Joel
- (24) Did you also have an occasion - first of all looking down
- (25) in the gray area does the KIB own a parcel down in Sitkinak?

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- (1) A Yeah KIB owns within the Sitkinak Lagoon Kodiak Island
- (2) Borough
- (3) Q When you were reviewing the overflight were you able to
- (4) find a report of the same date of the actual Kodiak Island
- (5) Borough parcel that s at issue in this case?
- (6) A Yes
- (7) Q And did you review that aerial in its entirety and again
- (8) edit it down to what you thought was a representative section?
- (9) A Yeah the borough parcel
- (10) Q Did you bring that one here with you today?
- (11) A You have that next
- (12) Q This next one what is defendants exhibit - it s the next
- (13) part of defendants exhibit 14024
- (14) A This would be part of the borough parcel inside the
- (15) lagoon Again -
- (16) Q What are we seeing here?
- (17) A Seeing shoreline this type of shoreline here We re
- (18) seeing some wet sand seeing some kelp I know I ve been in
- (19) that area numerous times had walked this beach and from time
- (20) to time found the same type of oiling that we found on the
- (21) south shore of Sitkinak so generally was the same pattern
- (22) throughout this whole area Again you know obviously oiling
- (23) would be a spot from the air and on a sunny day some of the
- (24) mousse patties would glisten if they were big enough you
- (25) could see them pretty well again they would stop or I would

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- (1) stop on my travel throughout the area and generally walk the
- (2) areas to truth out reports that we may have had or in general
- (3) just to see if there was any oil
- (4) Q And this is also on July 26th 1989 the same day
- (5) Mr Keplinger was there?
- (6) A Yes it is
- (7) Q Now at another point in our trial we heard some testimony
- (8) from Mr Knault about oiling conditions up in Ugak Bay Did
- (9) you get up to Ugak Bay in your travels?
- (10) A Ugak Bay many times
- (11) Q And the area overflight program got up there as well
- (12) didn t it?
- (13) A Yes it did
- (14) Q Did you have an opportunity to review the files of the
- (15) aerial overflight program and locate video footage taken in the
- (16) summer of 1989 of the Kodiak Island Borough parcels that are
- (17) at
- (18) issue in this case in Ugak Bay?
- (19) A Yes I did
- (20) Q Were you able to view those and edit them down to what you
- (21) thought was a representative portion of what it looks like
- (22) during your trips during that summer?
- (23) A Yes I did
- (24) Q Did you bring it here with you today?
- (25) A Yes I did
- (26) Q Could we go to the next exhibit please? This is still

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- (1) part of the same exhibit Your Honor
- (2) A Ugak Bay Eagle Harbor area
- (3) Q We misspelled it there It's Ugak Bay isn't it?
- (4) A Ugak Bay It's a beautiful area gently sloping beach
- (5) very easy to - to fly over and a lot of these areas -
- (6) Q If we could stop it for just a second Why don't we show
- (7) the jury on the map just where we're talking about if you
- (8) could here Can you show where Ugak Bay and the Kodiak
- (9) parcels are here?
- (10) A This is Ugak Bay and we're going to visit fly over these
- (11) parcel areas each one of these as we go through the whole
- (12) bay
- (13) and just show you the different - the different areas
- (14) different type of shorelines In the whole of Ugak Bay area
- (15) there was - there was as you'll see on the video there was
- (16) some - there's some camps and some activity
- (17) Q What's that brown stuff there?
- (18) A Kelp There's quite a bit of kelp that was on the
- (19) shorelines here that we had checked out We had gotten a lot
- (20) of reports some reports of oiling in the area and because
- (21) there was - there was some boat activity there was some
- (22) camps
- (23) that you'll see along the way that had some boats and people
- (24) were in the area so we did get some oiling reports I did
- (25) land on a number of these shorelines flew it landed it
- (26) walked along the shorelines and found again what we typically
- (27) found in the Kodiak area was scattered mousse and tar balls

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- (1) very scattered
- (2) Q Did you run into many birds and wildlife while you were
- (3) down there?
- (4) A Lots of birds This area was really a pretty area I
- (5) didn't mind spending much time there It was a beautiful bay
- (6) Q This is the Eagle Harbor parcel we're looking at?
- (7) A Eagle Harbor parcel And again that's - nice pretty
- (8) beach
- (9) Q Is that oil sheen that we're looking at offshore there?
- (10) A I didn't - I don't remember - I don't recall seeing any
- (11) sheen in that area Again we had numerous reports of sheen in
- (12) some areas that turned out not to be Sometimes when there's
- (13) a
- (14) stream you have a fresh water lens that comes out on top that
- (15) does resemble sheen to the untrained eye
- (16) Q Next I believe we've got the Delta parcel?
- (17) A Delta We did get the spelling right on this one Okay
- (18) again same area just right - just right towards the head of
- (19) the bay from Eagle and the same type of shoreline again the
- (20) same type of observations When we did land typically there
- (21) would be some scattered tar balls and mousse in the area
- (22) Q There's a dark line right along the edge of the shore
- (23) what's that?
- (24) A That's wet the tide comes in that's your wet mark wet
- (25) sand wet rocks
- (26) Q In the course of your observations that summer did you see

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- (1) people out there doing recreational activities?
- (2) A Oh yeah In fact you'll see - this was in July but I
- (3) mean this was - you'll see some areas here where there's some
- (4) activity
- (5) Why don't you fast forward that a little bit Again you
- (6) notice the pretty beaches It's a beautiful beach along here
- (7) And the next segment south arm This one here's a camp
- (8) here and there's some activity here Hold this a minute We
- (9) think - we don't know whether this was setnet or some kind of
- (10) netting right here in the water here in the boat, but there
- (11) was activity throughout the summer in this area where there was
- (12) access to it
- (13) Q I think we're going the wrong way
- (14) MS SMITH Yeah we are going backwards
- (15) MR PETUMENOS Objection cumulative Your Honor
- (16) BY MR CLOUGH
- (17) Q And again we're seeing some brown material on the beach
- (18) there What's that?
- (19) A Kelp seaweed Again we did land quite a bit of times and
- (20) walk through here see if there was anything caught up in this
- (21) in the kelp
- (22) Q Did you manage to get out fishing at all during your summer
- (23) in Kodiak?
- (24) A Yes I did I got a segment coming up here show you where
- (25) I did quite a bit of fishing

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- (1) Q Was the sport fishing closed there?
- (2) A No it wasn't Kodiak was notorious for fog There were
- (3) days when the helicopter couldn't fly so we did get a little
- (4) bit of relaxation
- (5) Q Good fishing?
- (6) A Excellent
- (7) Again kelp beds all along the edge This is really one of
- (8) the prettiest bays in the Kodiak area Gorgeous water
- (9) Go ahead and fast forward get around to the next segment.
- (10) Q More kelp?
- (11) A More kelp Okay Hidden Basin
- (12) Q Did you get out to Hidden Basin yourself much in '89?
- (13) A This whole Ugak Bay area I covered quite a bit of
- (14) Q This again is one of the KIB parcels correct?
- (15) A Yes this is KIB Little different type of shoreline You
- (16) see the kelp piled up in these areas Another fish camp or
- (17) home boat there was usage throughout the summer here
- (18) Q And in your flights all around the island did you see
- (19) recreational personal usage going on all summer long?
- (20) A Sure In the different areas and bays there was boats in
- (21) there fishing relaxing
- (22) Q How many hours of helicopter time did you log in?
- (23) A Wish I'd kept track of it all but I did average in the
- (24) summer days that we flew six to eight hours It was pretty
- (25) extensive

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- (1) Q You flew every day the weather permitted?
- (2) A Every day the weather permitted I would venture to say
- (3) that I had - I want to say I hit almost every shoreline in the
- (4) whole area
- (5) Q Know anybody that got out to more shorelines than you that
- (6) summer?
- (7) A I don't see how they could have I was the only one with a
- (8) dedicated helicopter that didn't have to share it
- (9) Different type of shoreline here from the previous one
- (10) Again a lot of kelp along the shores
- (11) Go into Pasagshak I think is the next section Here's
- (12) some - there's some more activity Somebody in the water here
- (13) with a boat
- (14) Q There's actually somebody in the water there?
- (15) A Yeah might have been fishing or something
- (16) Q Pasagshak's not actually a parcel is it?
- (17) A No it's adjacent to right up around the corner from it
- (18) It's a heavily used area This one is accessible from the road
- (19) system This is one of the areas my favorite places to come
- (20) down and fish fishing stream but this beach again was -
- (21) typically had some small mousse patties and tar balls along as
- (22) we walked it Anyway this was actually a fishing stream here
- (23) and on the weekends there's a lot of activity down here
- (24) Q Based on your own personal observation as well as the
- (25) videotape did Kodiak residents still use this beach even

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- (1) though it had been lightly oiled?
- (2) A Oh yeah people walked along the beach Again it was
- (3) scattered quite a bit it wasn't like you - we had to really
- (4) hunt for them We did find some along here We did walk this
- (5) beach quite extensively Good salmon stream there We did
- (6) find a couple people running in the water here - don't know if
- (7) they were running from or to Water's cold to swim in
- (8) Q Did you that summer personally observe people swimming
- (9) in
- (10) the water?
- (11) A Yeah I don't know how they did it though It's very
- (12) cold
- (13) (Videotape concluded)
- (14) Q You were in Kodiak throughout the spring and summer of
- (15) 1989 isn't that right?
- (16) A Correct
- (17) Q And in the course of that time you worked with Mayor Selby
- (18) some didn't you?
- (19) A Sure did
- (20) Q What was your role in interacting with Mayor Selby?
- (21) A At the beginning when I got into Kodiak and the Emergency
- (22) Management Council was there I was pretty active in reporting
- (23) back to them some of the things that I saw and I got to know
- (24) Mayor Selby pretty well We discussed operational issues
- (25) stuff like that
- (26) Q At the end of the summer did Mayor Selby do anything to

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- (1) recognize your efforts on the cleanup?
- (2) A He did He awarded me the - a key to the borough I
- (3) guess he was appreciative of the contribution that I'd made
- (4) He knew the effort and amount of hours I spent out in the
- (5) Kodiak area so I was really appreciative of that
- (6) MR CLOUGH Thank you No further questions
- (7) CROSS EXAMINATION OF FREDERICK D BYARS
- (8) BY MR STOLL
- (9) Q Mr Byars my name's Bob Stoll I represent Kodiak Island
- (10) Borough
- (11) The parcels - you'd agree that the parcels on Kodiak that
- (12) are owned by Kodiak Island Borough are some really beautiful
- (13) recreational property wouldn't you?
- (14) A Yes they are
- (15) Q And the parcel that you showed at the end there Pasagshak
- (16) that's - those are - that's an area outside of the City of
- (17) Kodiak isn't that correct?
- (18) A Right
- (19) Q That's where people live isn't that right?
- (20) A Uh huh
- (21) Q I mean they live there - lot of them live there
- (22) year round?
- (23) A Pasagshak area yes
- (24) Q Yes It's on the road system?
- (25) A Right

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- (1) Q And you made reference to the problem one of the problems
- (2) we have on Kodiak is the fog and the weather and that is a -
- (3) and particularly during the summer of 1989 there was a lot of
- (4) that isn't that - lot of fog?
- (5) A There was quite a bit of fog yes sir
- (6) Q And would you agree with - you know Mr Teal
- (7) incidentally?
- (8) A I'm sorry?
- (9) Q Mr Teal Andy Teal?
- (10) A Oh Andy Teal sure
- (11) Q Yeah you know him?
- (12) A Yes
- (13) Q Would you agree with his statement that there was
- (14) limitation on aerial surveillance of light or very lightly
- (15) oiled beaches?
- (16) MR CLOUGH Counsel if you're going to question him
- (17) from the deposition could I have a page reference please?
- (18) MR STOLL I'm questioning from the transcript of
- (19) this trial
- (20) MR PETUMENOS No it's deposition counsel
- (21) MR STOLL Oh is it deposition?
- (22) THE COURT Why don't you ask him the question
- (23) directly and we can avoid this
- (24) MR STOLL That's what I tried to do
- (25) THE COURT No you didn't counsel Ask him

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- (1) directly
 (2) BY MR STOLL
 (3) Q Would you agree Mr Byars that there was a problem with
 (4) aerial surveillance of parcels that were not heavily or
 (5) moderately - in the definition as it was used - heavily or
 (6) moderately oiled beaches?
 (7) A Agree in terms of -
 (8) Q That it's hard to see - hard to see oil?
 (9) A Oh there's no doubt yeah it's hard to see oil a very
 (10) lightly oiled beach sure from the air
 (11) Q Now this is another map of Kodiak and the first film
 (12) segment when you were on the beach I believe at Sitkinak?
 (13) A Sitkinak yeah I wasn't but the videotape was
 (14) Q Oh you weren't actually there that wasn't actually your
 (15) photograph?
 (16) A Not that particular one no sir I thought that was
 (17) clear That was the video team that was there I have been to
 (18) Sitkinak
 (19) Q I may have misunderstood I'm sorry
 (20) Was the same true in the picture these other photographs
 (21) were these your photos or videotape?
 (22) A No these were taken from - the aerial shots of Ugak was
 (23) from the video team the aerial reconnaissance team that was
 (24) taking the aerial videos
 (25) Q So all these - all these helicopter flights at least I

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- (1) gather those were helicopter looks like helicopter flights
 (2) those weren't you filming out the window?
 (3) A No sir
 (4) Q You weren't actually on the plane when they were -
 (5) A Not that particular one no
 (6) Q Any of these segments were you on the plane?
 (7) A Not on those no The videos that you saw were taken by
 (8) the video reconnaissance team which I was not a part of
 (9) Q Okay Now the area that was where they took some
 (10) pictures on the beach in Sitkinak that's on the south side of
 (11) Sitkinak is that right?
 (12) A Yes
 (13) Q Do you know where on the south side?
 (14) A It was in this area right up in here
 (15) Q How do you know that?
 (16) A From the - from the SCAT - from the documentation that
 (17) goes with the video that they had -
 (18) Q I see
 (19) A - paper documentation
 (20) Q This area down here in the bottom?
 (21) A Yes sir
 (22) Q Not up here in the lagoon where the KIB property is?
 (23) A No that's correct
 (24) Q I understand
 (25) Now incidentally you were shown a photograph of some

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- (1) people that were cleaning a beach they were sitting on the
 (2) beach and they had oil on their coveralls and you identified
 (3) that as being Larsen Bay How did you happen to know that
 that
 (4) was Larsen Bay?
 (5) A Well it was - it was indicated that - John showed me the
 (6) first picture that it was indicated It was possibly Larsen
 (7) Bay the village clean up teams
 (8) Q I see So he told you that's where you got the
 (9) information? And that - that area you said was heavily or
 (10) heavily oiled area?
 (11) A Well we had the - the area there well Spirdon Bay that
 (12) Chief Point was on - and I'm thinking that a - and it looked
 (13) like the area that was around the Chief Point area the way the
 (14) beaches were and the Larsen Bay village team in fact that was
 (15) there and they spent considerable amount of time in that area
 (16) yes
 (17) Q And Larsen Bay - just so we know here again Larsen Bay is
 (18) this right in this area here?
 (19) A Correct right
 (20) Q And according to this map at least I'm referring to -
 (21) let me see - Exhibit 7031AA this entire area that is called
 (22) Larsen Bay here this indicates - here's the scale up here it
 (23) indicates no oiling on here?
 (24) A No no that's correct
 (25) Q Is that right?

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- (1) A They were in Spirdon Bay the Larsen Bay cleanup team
 (2) Q Well I think the testimony's been different than that but
 (3) that's okay
 (4) Did you cover the entire - how - how many miles did you
 (5) cover - did you cover all 3 000 miles of shoreline in -
 (6) A I would venture to say that I covered a good part of it
 (7) Bob You know that many hours in the air I flew the
 (8) perimeter of Shuyak Afognak and Kodiak
 (9) Q I'm not questioning that you at some point in time went
 (10) everywhere or most of - most areas Never mind
 (11) MR STOLL That's all I have Thank you
 (12) MR CLOUGH Nothing here Your Honor
 (13) THE COURT All right sir you can step down Thank
 (14) you very much
 (15) I'll let you go for today Please be back here at 8 30
 (16) tomorrow Don't talk about the case with anyone don't form or
 (17) express any opinion on it until it's submitted to you for
 (18) deliberation See you tomorrow at 8 30
 (19) (Jury out at 1 23 p m)
 (20) THE COURT The jury is not present counsel
 (21) MS SMITH Your Honor I have to admit that I made a
 (22) terrible mistake in not following my practice with David Page
 (23) and Jerry Neff of moving to admit my exhibits as I went along
 (24) which I would heartily advise everyone to do as you mentioned
 (25) earlier And I used 75 exhibits with Dr Gilfillan and I've

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- (1) been advised by the plaintiffs that they object to 66 of them
 (2) THE COURT Did they advise you what the specific
 (3) objections are?
 (4) MS SMITH Yes Your Honor and there s - for
 (5) 50 some of them - you can give this back to me in one
 (6) second - and here s the letter I got from them last night
 (7) And Your Honor if you recall Ed Gilfillan is the
 (8) intertidal ecologist and plaintiffs have agreed to the
 (9) admission of 11 exhibits out of the 75 and I hereby move to
 (10) admit them It s DX1018 DX9398 DX13205A 1 DX13205A 2
 The
 (11) three Crab Bay exhibits that they conducted voir dire on is
 (12) DX661AA DX662AA DX663AA DX8940 DX13250 and
 DX13207
 (13) The plaintiffs have objected to the other -
 (14) (Exhibits DX1018 DX9398 DX13205A 1 DX13205A 2
 DX661AA
 (15) DX662AA DX663AA DX8940 DX13250 and DX13207 offered)
 (16) THE COURT Wait a minute those are not objected to
 (17) MS SMITH Those are not objected to in the letter
 (18) THE COURT They re admitted
 (19) (Exhibits DX1018 DX9398 DX13205A 1 DX13205A 2
 DX661AA
 (20) DX662AA DX663AA DX8940 DX13250 and DX13207
 received)
 (21) MS SMITH The other 65 exhibits are objected to and
 (22) actually my best foundation for why they should be admitted is
 (23) the testimony itself and I spent some time last night you
 (24) know going through and highlighting it but we were all here
 (25) for it What I would like to say -

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- (1) THE COURT In varying degrees counsel
 (2) MS SMITH That 56 exhibits the objection is that
 (3) they were not - photos were not plaintiffs property
 (4) THE COURT That s the only objection correct?
 (5) MS SMITH Yes Although not stated I assume this
 (6) is a relevancy objection -
 (7) THE COURT Let s talk about that because that is the
 (8) bulk of them Mr McCallion are you the person that s making
 (9) the objection?
 (10) MR McCALLION Yes Your Honor
 (11) THE COURT Tell me what that objection means not
 (12) plaintiffs property
 (13) MR McCALLION We have objections on a number of
 (14) grounds yes I ll address that Your Honor
 (15) THE COURT Counsel tell me what the objection means
 (16) not plaintiffs property
 (17) MR McCALLION Your Honor with regard to that while
 (18) the counsel elicited testimony with regard to a number of
 (19) locations at various locations within Prince William Sound to
 (20) establish various points they do not relate to the subject
 (21) matter specific subject matter of the property damages in this
 (22) case
 (23) THE COURT So your objection is a relevance
 (24) objection?
 (25) MR McCALLION Yes relevance as well as possible

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- (1) confusion of issues under 403
 (2) THE COURT So it s a relevance and Rule 403
 (3) objection correct?
 (4) MR McCALLION Yes Your Honor I believe the
 (5) procedure which has been followed with certain witnesses
 while
 (6) testimony has been elicited with regard to various locations
 (7) for example Dr Lora Johnson was permitted by the Court after
 (8) a hearing to testify as to certain issues relating to sites
 (9) which were not on plaintiffs property the Court I suppose
 (10) cut the matter down the middle permitted testimony in that
 (11) regard which is in the record however the demonstrative
 (12) exhibits relating to that were excluded And by the same
 (13) token we would think that while a number of sites unrelated to
 (14) plaintiffs property that testimony was elicited and - and
 (15) permitted with regard to those sites at various locations
 (16) throughout Prince William Sound to make various and sundry
 (17) points by Dr Gilfillan that it would be inappropriate to
 (18) actually admit the photographs of those sites which are fairly
 (19) extensive because we feel that the case is sufficiently
 (20) complicated enough with regard to the sites in question and we
 (21) have no objection to those sites in question which are on
 (22) plaintiffs property and a fair amount of testimony was
 (23) elicited as to them
 (24) For example Sleepy Bay In - In the north part of
 (25) LaTouche Island There was extensive testimony on that

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- (1) That s been coming in throughout the case It s been one of
 (2) the focal points of various demonstrative exhibits
 (3) photographs and other things
 (4) What we would object to - and again it was the choice by
 (5) Exxon s counsel - but it seems like the bulk of the
 (6) photographs for example there were - I m trying to count
 (7) them well over a dozen photographs of Passage Point and
 well
 (8) over a dozen photographs where Your Honor might recall there
 (9) was a background photograph and then various segments were
 then
 (10) affixed to those particular photographs That was Northwest
 (11) Bay of Eleanor Island
 (12) Now presumably counsel has established the points that
 (13) were sought to be elicited with regard to those However the
 (14) introduction of the photographs themselves for example what
 (15) appear to be flourishing sea urchins sea stars and as Your
 (16) Honor might recall there were many specific creatures or
 (17) critters as they call them of which we have photographs
 (18) Those are simply not relating to sites on plaintiffs
 (19) property So while they may have been elicited to establish
 (20) some general points or even to establish that there are living
 (21) organisms at locations in Prince William Sound some of these
 (22) locations are substantially at a distance from the properties
 (23) here
 (24) Now we did not object to general inquiry as part of
 (25) Dr Gilfillan s tutorial of it much like with regard to

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- (1) certain plaintiffs witnesses Testimony was elicited in that
 (2) regard but at the time that we come to actually having
 (3) exhibits available to the jury we would think that it s
 (4) inappropriate
 (5) Now also just in that regard Your Honor with regard to
 (6) the - I'll call it compilation photographs which were
 (7) primarily -
 (8) THE COURT To what? To the what?
 (9) MR McCALLION Well compilation photographs where
 (10) there were perhaps a dozen admitted and then pieced together
 (11) THE COURT Are you talking about the photographs with
 (12) the little photographs all pasted?
 (13) MR McCALLION Right That was Passage Point and
 (14) Northwest LaTouche In addition to what was just mentioned
 (15) with regard to the photographs relating to Passage Point the
 (16) last photograph as Your Honor may recall affixed or posted
 (17) onto the board was a sign which stated overall recovery by
 (18) summer of 1990 Now we would object
 (19) THE COURT No I don't recall that
 (20) MR McCALLION Okay I think we have copies here
 (21) Your Honor We can get it The additional objection -
 (22) THE COURT Show it to me Show it to me counsel
 (23) You want that off?
 (24) MR McCALLION Your Honor we would object to that in
 (25) that each one of the photographs - well it was -

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- (1) THE COURT Counsel counsel don't you think I've
 (2) been patient enough? I've listened to you for some time I
 (3) understand what the objection was I'm asking you let's just
 (4) assume that - that I override some of your objections Do you
 (5) want that particular legend off the photograph?
 (6) MR McCALLION Yes Your Honor Each one of the
 (7) photographs to which it relates to is 1994
 (8) THE COURT Okay let me see it I just don't
 (9) remember I hate to say this Mr McCallion but would you get
 (10) near a microphone please?
 (11) MR McCALLION Yes Your Honor
 (12) THE COURT But the other court reporter I'm sure
 (13) caught every word
 (14) Would somebody please produce that one thing so that I can
 (15) get on with this?
 (16) MR McCALLION It's 13298 23
 (17) MS SMITH This is Byars I think I -
 (18) THE COURT This one yeah I buried it
 (19) MS SMITH What did you say it was Ken?
 (20) MR McCALLION 13298 23 I have a copy Your Honor
 (21) THE COURT Good
 (22) MR McCALLION Yes 13298 23
 (23) THE COURT I don't remember The visual presentation
 (24) was so stunning that I don't remember this in particular So
 (25) is this one of the things that was pasted up on the board along

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- (1) with the other photographs?
 (2) MR McCALLION Yes Your Honor related to Passage
 (3) Point And my recollection and the record reflects correctly
 (4) the photographs were in 1994 With the addition of this
 (5) particular notice we believe it gave a misleading - highly
 (6) misleading impression to the jury
 (7) THE COURT I understand thank you
 (8) I can rule on this objection without any further reply To
 (9) the extent that - I'm going to use this August 16 1994 letter
 (10) from Mr McCallion as a record of his objections The - in
 (11) shorthand form the objection just placed on the record is in
 (12) this letter and most of the objections say not plaintiffs
 (13) property As expanded upon by counsel that is a relevance
 (14) objection and Rule 403 objection
 (15) The objection is overruled as to all of those exhibits
 (16) The exhibits will be admitted with the exception of 13298 23
 (17) which is not a picture but it's verbal and it was - it's in
 (18) the testimony and certainly can be referred to as part of the
 (19) record I simply won't admit it as an exhibit
 (20) (Exhibits per August 15 letter received)
 (21) MR McCALLION Your Honor we have a -
 (22) THE COURT And I'm going to make a court's exhibit of
 (23) the August 15 letter and the - and the exhibit that I just
 (24) excluded also
 (25) MS SMITH Your Honor should I read into the record

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- (1) all the ones that are now offered and admitted or -
 (2) THE COURT No because the letter itself was
 (3) served served as record In fact I'm happy that there is
 (4) this letter It's the best record we could have and you don't
 (5) have to do a whole lot of discussion on it It's clear from
 (6) the record with the highlighting what the objection was
 (7) MR McCALLION Your Honor there are a few items of
 (8) which the objection is - is different One is the issue of
 (9) the elephant cartoon which is 5213
 (10) THE COURT The objection is sustained That will not
 (11) be admitted
 (12) MR McCALLION I believe there are two elephant
 (13) cartoons
 (14) MS SMITH You didn't object to one of them and the
 (15) Court just admitted it?
 (16) THE COURT I just admitted an elephant? I made a
 (17) terrible mistake
 (18) MS SMITH It's the one that shows the random
 (19) Shoreline Ecology Program sites Take that in the jury room
 (20) with you
 (21) MR McCALLION Your Honor we would object to both
 (22) elephants
 (23) MR PETUMENOS We want to kill the other elephant
 (24) too Judge
 (25) THE COURT I'm not understanding counsel Show me

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- (1) what it is that I admitted that I m now going the take out
 (2) maybe
 (3) MR McCALLION I believe the other one is defendants
 (4) exhibit 4814
 (5) THE COURT Oh that yeah Let me see it just to see
 (6) if it s -
 (7) MR STOLL It s a sort of elephant
 (8) THE COURT It looks like an elephant It could be a
 (9) number of other things including a mousse patty as far as I m
 (10) concerned It s not - I ll take it out What is the number
 (11) again?
 (12) MS SMITH 4814
 (13) MR STOLL We don t know if they re 20 inches apart
 (14) or 20 feet apart
 (15) THE COURT Go ahead
 (16) MS SMITH I don t - I mean are we done?
 (17) THE COURT No I don t think we are because there
 (18) are a number of individual objections Let s talk about -
 (19) MS SMITH Your Honor just for clanty in the
 (20) record where the only objection is not plaintiffs property or
 (21) Rule 403 you have admitted with the exception of 13298 23
 (22) which you say no and 4814 which we just took out that - he
 (23) hadn t objected to that that s why it -
 (24) THE COURT Right
 (25) MS SMITH All right Then 5213 is not admitted and

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- (1) then there are another handful of things where he had I guess
 (2) more to say
 (3) I would say Your Honor on the - on the first one which
 (4) is 3213AA 9 that s Ingot Island and it says no date or
 (5) specific location It s Ingot Island It says Ingot Island on
 (6) the exhibit and when he stood up and - Mr McCallion objected
 (7) when we showed it Mr - Dr Gilfillan gave him the date
 (8) The rest of the things on the front page are representative
 (9) of batterers that cause disturbance the rounded log the North
 (10) LaTouche Ice flows the sunflower the star the sea otter the
 (11) slide et cetera That s what those are right there and I can
 (12) point them out to you in the book and they are all - they are
 (13) all as he testified in the spill area and they were supposed
 (14) to be exemplars of the kinds of things that batter the shores
 (15) and cause disturbance
 (16) THE COURT What was the Ingot Island picture supposed
 (17) to prove?
 (18) MS SMITH That s the shoreline type that has the
 (19) nice neat bands of biota because it doesn t suffer much
 (20) disturbance and so it s banded and let me just show it to
 (21) you It s easier
 (22) THE COURT Yeah I ve lost it
 (23) MS SMITH He spent a while discussing this
 (24) THE COURT Oh yes I remember Okay
 (25) MS SMITH And it says Ingot Island

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- (1) THE COURT All right Mr McCallion now you know
 (2) the purpose for these exhibits What s your argument besides
 (3) what you put in the letter? And make it short please
 (4) MR McCALLION Yes Your Honor Simply on that one
 (5) unless I m missing something in the transcript I don t see a
 (6) reference to - to any date relating to that It presents a
 (7) nice neat clean presentation but we really don t know when
 (8) this was taken It was used I think usefully to show the
 (9) stratification however on this point it s neither on
 (10) plaintiffs property or more significantly it could lead to
 (11) confusion among the jurors that either A it could be on
 (12) plaintiffs property or B that it appears to be a nice neat
 (13) clean piece in Prince William Sound on some date
 (14) THE COURT Okay counsel let me explain something to
 (15) you I think this may be a legitimate objection The way I
 (16) generally deal with illustrative exhibits is I - is to the
 (17) extent they ve been described in the testimony and you know I
 (18) mean I agree that the idea of batterers is important to his
 (19) testimony It seems to me that the testimony itself is the
 (20) best proof He described it and gave these visual references
 (21) but the fact is that there s so many photographs in this case
 (22) that these few photographs are not going to be that important.
 (23) I would let you use these things as illustrative I just don t
 (24) particularly want them back in the jury room where they might
 (25) be confused with evidence relating to the cleanliness of the

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- (1) shoreline or the other issues that have been raised in this
 (2) case
 (3) Now if there are particular exhibits that have a better
 (4) purpose - a different purpose excuse me than just simple
 (5) illustration of what these - what characteristics there are
 (6) that make this a clean environment you can tell me about those
 (7) specifically but I ll be happy to hear you and perhaps admit
 (8) specifics
 (9) MS SMITH Your Honor I - I don t think so I
 (10) think these are - they were representational and the only
 (11) concern I have is the concern when I said oh you know it s
 (12) the one with the layers and you said you know I mean that
 (13) was Friday You didn t remember it and I - I think when they
 (14) read the transcript they may not - the may not remember it
 (15) THE COURT When they read the transcript?
 (16) MS SMITH Well when the jury looks at their notes
 (17) of DX3213AA 9 and he testified a while about it it would be
 (18) helpful to him to have a picture I know you re concerned
 (19) We ve got a lot of stuff in this case and I agree that they re
 (20) only used for the tutorial purpose of explaining his points on
 (21) intertidal zones and the issue of disturbance so I understand
 (22) your position I m just saying it s hard to remember any given
 (23) thing that happened in this case
 (24) THE COURT I agree with you but there are so many
 (25) different things to remember in this case and this one seems

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- (1) to be such a small one and -- and since I'm allowing you the
- (2) use of the photograph if it's really that important and it's
- (3) going to be mentioned in final argument then use it in final
- (4) argument
- (5) MS SMITH That would include the first six and I
- (6) just need to take one -- the only thing I think we have left to
- (7) talk about is 14003 1 and I just have to see whether it falls
- (8) within what we were just talking about or not I can't tell
- (9) from the letter
- (10) THE COURT The objection is simply it was taken in
- (11) 1994 right?
- (12) MS SMITH Oh is that --
- (13) THE COURT Is this another illustrative -- counsel
- (14) do you know?
- (15) MS SMITH What is the objection to that one
- (16) MR McCALLION I'm sorry the number again please?
- (17) THE COURT 14003 1
- (18) MS SMITH Yeah this is another example Your Honor
- (19) of -- it's the predator drills that drill into the mussels
- (20) THE COURT That's the same ruling with that I won't
- (21) let that in either But you can use these photographs just
- (22) as illustrative but you have to say in final argument if you
- (23) refer to any of them these were illustrations and you'll
- (24) recall the testimony of so and so about them and that's it
- (25) But they won't go into the jury room

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- (1) MS SMITH All right Your Honor So in the letter
- (2) starting on the Page 2 nothing's admitted on page one and the
- (3) first one on Page 2 is not admitted
- (4) THE COURT That's right And the elephant cartoon is
- (5) out
- (6) MS SMITH The elephant cartoon is out Starting
- (7) with 14342 which is the second exhibit on the second page
- (8) everything is in except the elephant cartoon which is 5213
- (9) and the overall recovery by summer of 1990 which is 13298 23
- (10) THE COURT And you did mention the elephant that I
- (11) took out
- (12) MS SMITH That's not in the letter
- (13) THE COURT Okay good
- (14) MR McCALLION Your Honor just on Page 2 the only
- (15) other objection we have is to the caption on 31 -- 3213AA 50
- (16) THE COURT I did deal with that counsel -- I mean I
- (17) did not deal with that What is the caption?
- (18) MS SMITH What is the objection?
- (19) MR McCALLION Which of these sites was heavily oiled
- (20) in 1989
- (21) THE COURT Isn't that -- wasn't -- wasn't that
- (22) caption on a number of these?
- (23) MR McCALLION Four of them Your Honor relating to
- (24) each beach type
- (25) MS SMITH And you've only objected to one?

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- (1) MR McCALLION No I was --
- (2) MS SMITH Your Honor I would --
- (3) MR McCALLION I was holding it up myself for
- (4) illustrative purposes
- (5) MS SMITH I would push to keep that in it's part
- (6) of the presentation
- (7) THE COURT I'll leave it in
- (8) MS SMITH Thank you
- (9) MR McCALLION Your Honor some of those related
- (10) to -- did not relate to plaintiffs property You've already
- (11) ruled on that
- (12) THE COURT Yes I have
- (13) MR DIAMOND The only thing worse than waiting too
- (14) many days after examination --
- (15) THE COURT All of these have been offered and the
- (16) rulings are as stated Go ahead The only thing worse than
- (17) waiting --
- (18) MR DIAMOND Yeah than waiting too many days before
- (19) you move the admission of exhibits is agreeing to move the
- (20) admission of exhibits for another lawyer who's waited too long
- (21) but I have agreed to move for the admission of certain exhibits
- (22) that were introduced during Mr Fall's cross examination by
- (23) Mr Shapira and fortunately there is consensus with one
- (24) exception
- (25) THE COURT Thank goodness that could be a

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- (1) nightmare
- (2) MR DIAMOND They are -- I move into admission
- (3) without objection DX2064 2083 2100 2115 2154 2188 2223
- (4) 2513 1 2513 2 2513 3 2513 4 4322 5925
- (5) (Exhibits DX2064 2083 2100 2115 2154 2188 2223
- (6) 2513 1 2513 2 2513 3 2513 4 4322 5925 offered)
- (7) In addition I've agreed with Mr Fortier that we have no
- (8) objection if he moves into admission -- moves for the admission
- (9) of the bear statistics but I don't have that DX number with
- (10) me
- (11) MR FORTIER The deer statistics
- (12) MR DIAMOND The deer statistics We will provide
- (13) that to you tomorrow
- (14) There is one videotape that is in dispute It was a
- (15) videotape that was played brief videotape played during
- (16) Dr Fall's cross-examination It was Dr Nighswander talking
- (17) about PSP and this was one of the videotapes that was
- (18) circulated by the Health Task Force to the villages informing
- (19) them of other risks of eating shellfish It came in during the
- (20) course of the examination Mr Fortier objects because he
- (21) doesn't think that Mr Shapira laid the proper foundation for
- (22) the admission of that videotape and I simply will present to
- (23) you the brief bit of transcript that refers to that I think
- (24) it is properly identified
- (25) THE COURT Please I'd like to read it

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- (1) MR FORTIER If I could inquire of Mr Diamond which
 (2) pages did you provide the Court?
 (3) THE COURT Volume 27 4226 through 4229
 (4) Now let me understand this - this correctly so we're all
 (5) on the same wavelength The videotape regarding the issue - I
 (6) mean the issue itself was generally discussed in the
 (7) testimony of the witness right?
 (8) MR DIAMOND Correct
 (9) THE COURT Then the witness was cross examined and
 (10) the videotape was played in court the jury saw and heard it
 (11) MR DIAMOND Correct
 (12) THE COURT And then the - the witness was asked
 (13) questions about it right?
 (14) MR DIAMOND Correct
 (15) THE COURT So it's in the record including the
 (16) videotape voice over the - the actual message of the
 (17) videotape right?
 (18) MR DIAMOND It is in the record
 (19) THE COURT So now you want to admit the videotape
 (20) itself?
 (21) MR DIAMOND Correct And the only objection -
 (22) THE COURT You can tell the way I'm going can't you
 (23) counsel?
 (24) MR DIAMOND I don't have a clue The only objection
 (25) is foundational The question is has it been properly

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- (1) authenticated
 (2) THE COURT It was that was the only objection
 (3) counsel
 (4) MR DIAMOND The only objection I've thus far heard
 (5) from counsel is foundation
 (6) MR FORTIER Mr Diamond has amended his objections
 (7) in the past based on discussion Your Honor
 (8) THE COURT So has everyone
 (9) MR DIAMOND You want to talk about whether it should
 (10) come in?
 (11) THE COURT I see no reason it should come in
 (12) MR DIAMOND Let me make the pitch I'm sure
 (13) Mr Shapira would make if he were here today
 (14) THE COURT So you can show him the transcript?
 (15) MR DIAMOND So I tried The issue of what - what
 (16) the folks in the villages was told is obviously at least in
 (17) the plaintiffs view a key issue They spent a fair amount of
 (18) time talking about uncertainty
 (19) With respect to mussels and clams which are one of the
 (20) principal nearshore resources that are alleged to have been
 (21) damaged we simply want to be in a position to argue
 (22) persuasively and have the jury review exactly what people were
 (23) told We think that all you have to do is look at
 (24) Dr Nighswander's videotape and there's no uncertainty in
 (25) anybody's mind it's not a good idea to eat mussels and clams

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- (1) that are not grown in protected places That's what he says
 (2) and our argument is that leaves no uncertainty in anyone's
 (3) mind and to the extent consumption declined it probably
 (4) declined because of that message that was being put out not
 (5) because of the oil spill
 (6) We got lots of exhibits in the record as to what people
 (7) were told lots of testimony We don't see that being any
 (8) different than any of the newsletters or any of the other
 (9) things that have already come into evidence
 (10) THE COURT Thank you counsel The ruling is that
 (11) the videotape will not come into evidence but this - it's
 (12) verbatim the message is verbatim in the record
 (13) THE CLERK What's the number of the videotape?
 (14) THE COURT Excuse me?
 (15) THE CLERK Exhibit Number?
 (16) MR DIAMOND That was DX6171
 (17) THE COURT All other exhibits unobjected to are
 (18) admitted
 (19) (Exhibits DX2064 2083 2100 2115 2154 2188 2223
 (20) 2513 1 2513 2 2513 3 2513 4 4322 5925 received)
 (21) MS SMITH Your Honor I forgot the lemming chart
 (22) It's DX15492 Can that be admitted?
 (23) THE COURT I've got to see it counsel
 (24) MS SMITH It's the one he - I don't have it
 (25) It's - but I can get it It's the one he drew of the simple

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- (1) ecosystem where there's only the owls the lemmings and
 (2) grasses
 (3) THE COURT Right right No I'm not going to admit
 (4) it There's no reason to do it no reason to
 (5) MR McCALLION Your Honor on Dr Gilfillan we had
 (6) offered two exhibits from the cross-examination One is
 (7) plaintiffs exhibit 1969 which was the 1990 meeting agenda
 (8) which Dr Gilfillan testified that he recalled the meeting he
 (9) recalled the agenda although he took some issue with the
 (10) contents or implications of the contents of the agenda
 (11) THE COURT Yes I remember
 (12) MS SMITH Why don't you say your other one too
 (13) THE COURT Are they both the same objection?
 (14) MS SMITH No no
 (15) THE COURT Let's go one at a time
 (16) MS SMITH Okay That's the 1990 Shoreline Ecology
 (17) Program agenda We object on the grounds that there's no
 (18) foundation with this witness He testified he didn't write it
 (19) and he didn't agree with the words of it It's an Exxon
 (20) document I assume but this -
 (21) THE COURT Well It is an Exxon document
 (22) MS SMITH Yes it is - I assume it was drafted by
 (23) someone at Exxon so it's an admission but this fellow
 (24) couldn't provide the foundation for it
 (25) THE COURT It's admitted Foundation is provided

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- (1) by - provided independently by what you just said Go ahead
- (2) I remember the testimony it's in
- (3) MR McCALLION The other item is plaintiffs exhibit
- (4) 1974 which is Dr Houghton's three year study of Recovery of
- (5) Prince William Sound Intertidal Epibiota from Exxon Valdez
- (6) Oiling and Shoreline Treatments 1989 through 1992
- (7) Dr Gilfillan testified that he was familiar with it with its
- (8) findings Although he referred to some later studies as well
- (9) he did concede that this was at least Dr Houghton's findings
- (10) as of the first three years after the Exxon Valdez oil spill
- (11) THE COURT All right
- (12) MS SMITH Your Honor it's perfect cross examination
- (13) material but I don't think it should be admitted It's
- (14) another expert who he examined our expert on to see whether
- (15) he agreed or disagreed
- (16) THE COURT And the expert was affiliated with whom?
- (17) MR McCALLION He was Exxon's expert fort 1989 -
- (18) MS SMITH Not when he wrote this report
- (19) MR McCALLION He was then replaced by Dr Gilfillan
- (20) and Dr Page He went to work for NOAA
- (21) THE COURT And after he was Exxon's expert he then
- (22) produced this report?
- (23) MR McCALLION Yes
- (24) MS SMITH Yes Your Honor
- (25) MR McCALLION He was with NOAA in 1983 (sic) when

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- (1) the three year study was produced - 93 covering the period
- (2) from 89 to 1992 As Your Honor may recall and we have no
- (3) objection to it Dr Houghton had been Dr Gilfillan's
- (4) predecessor with Exxon and indeed did not object to
- (5) photographs
- (6) taken in the ordinary course of business by Dr Houghton with
- (7) Exxon which Dr Gilfillan then later - later relied upon
- (8) MS SMITH Your Honor Houghton is not Gilfillan's
- (9) predecessor There's no testimony to that effect This does
- (10) not report on the results of any work he did for Exxon and
- (11) Houghton's pictures were the subject of video - of vigorous
- (12) voir dire by Mr McCallion and it was established that the Crab
- (13) Bay pictures were presented at the conference which
- (14) Dr Gilfillan attended and personally saw the pictures and was
- (15) able to testify about them Whether it comes in or not and I
- (16) don't think it should it's the kind of thing you cross-examine
- (17) on but it doesn't come in independently as an exhibit
- (18) I don't want there to be any mischaracterization on the
- (19) record of who Houghton is and Gilfillan's testimony was I've
- (20) read that report I don't agree and I also will tell you that
- (21) the next year his results were completely different I mean
- (22) it was the typical thing you'd see with an expert
- (23) THE COURT All right I don't think I can rule on
- (24) this until I see the portions of the transcript that relate to
- (25) this specific exhibit Sometimes these exhibits even though
- (26) they are - they have a lot of material in them that one

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- (1) probably does too that's simply at best tangentially - and I
- (2) said that word right right - relevant
- (3) MS SMITH Let's not start
- (4) THE COURT They don't get admitted for Rule 403
- (5) reasons for one thing and because they say a lot of things
- (6) that there's not been a fair opportunity to contest I'm - I'd
- (7) have to read the testimony of the witness to know what I was
- (8) going to rule on this So you provide me by tomorrow with the
- (9) transcript that relates specific - I'm talking about not the
- (10) whole transcript of his testimony but those portions that deal
- (11) specifically with this particular document and I'll tell you
- (12) whether or not I'll admit it
- (13) MR McCALLION Yes Your Honor I'll provide that to
- (14) chambers
- (15) MR CLOUGH I'm trying to move all mine in on the
- (16) same day
- (17) THE COURT Well you should It's clear to me that
- (18) that's the best way In fact I'm beginning to think and have
- (19) for some time it's better to move them in as you examine
- (20) MR CLOUGH Your Honor probably I'll start with
- (21) Mr Byars just because he's freshest in our mind and I'll jump
- (22) back to Mr Teal Also there's a few less for him
- (23) For Mr Byars I have the series of photos DX1973A and
- (24) since to save time we didn't show all of them I've got the
- (25) numbers for the ones we actually showed 1973A1 1973A2 3

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- (1) -4 5 -6 7 and these are the photographs of the cleanup
- (2) crew on the beach
- (3) (Exhibits DX1973A 1973A1 1973A2 1973A3 1973A4 1973A5
- (4) 1973A6 1973A7 offered)
- (5) MR STOLL No objection
- (6) THE COURT They're admitted
- (7) MR CLOUGH Then we have defendants exhibit -
- (8) THE COURT They're all admitted
- (9) (Exhibit DX1973A 1973A1 1973A2 1973A3 1973A4 1973A5
- (10) 1973A6 1973A7 received)
- (11) MR CLOUGH - for Mr Byars exhibit 14024 I'd like
- (12) to redesignate A There is one segment at the interest of
- (13) time I deleted on the fly We'll get it re-edited on the tape
- (14) so it's not on the one for the jury It's the videos shown
- (15) showing the Kodiak parcels he narrated
- (16) (Exhibit DX14024A offered)
- (17) MR STOLL I do object to those
- (18) THE COURT Let me see them so I know what you're
- (19) talking about
- (20) MR STOLL Just a minute are we talking about the
- (21) video?
- (22) MR CLOUGH We're talking about the videos that
- (23) Mr Byars - video Mr Byars narrated at the end of the
- (24) presentation showing the -
- (25) THE COURT What's the objection?

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- (1) MR STOLL Foundation He wasn't the photographer
 (2) He wasn't even on the plane when the - when the - when the
 (3) film was taken
 (4) THE COURT Okay I understand your objection The
 (5) objection's overruled The videos are admitted
 (6) (Exhibit DX14024A received)
 (7) MR CLOUGH That finishes Mr Byars For Mr Teal -
 (8) by the way I have no objection to yours I'll let you read
 (9) them or I can do them as part of this whichever you want
 (10) MR PETUMENOS Okay you can - let's do our own
 (11) because I have to tell the Judge which portions
 (12) MR STOLL Which - who you on now?
 (13) MR CLOUGH Teal
 (14) MR STOLL Hold it Can we go back for a moment
 (15) just because we're on the ones for today?
 (16) THE COURT Roll that videotape back counsel
 (17) MR STOLL I don't want to talk about video
 (18) THE COURT No we can't go back then Let Mr
 (19) Clough finish and I'll get to your point
 (20) MR STOLL Oh okay
 (21) MR CLOUGH From the Teal exhibits first of all
 (22) defendants Exhibit 2282 I'm going to redesignate it A because
 (23) we didn't show all the pages to the jury This would be the
 (24) three pages from it which were actually shown to the jury and
 (25) they would be the pages one two and - I'll have - on that

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- (1) one I'm going to have to confirm a page against the record
 (2) That won't come up with the others
 (3) MR PETUMENOS Judge I'm not going to have any
 (4) objections to any of the exhibits so long as the exhibit is
 (5) limited to the materials actually attached There were a
 (6) number of pages in each exhibit Some of them weren't
 (7) testified to
 (8) MR CLOUGH We're not seeking to introduce any pages
 (9) not testified to
 (10) THE COURT They'll all be designated with a small A
 (11) right?
 (12) MR CLOUGH They'll all be designated with a small A
 (13) THE COURT I appreciate that Go ahead
 (14) MR CLOUGH For verification the actual photographs
 (15) have a front and the back to them The back is the identifying
 (16) information for the photograph That back was never shown to
 (17) the jury but is part of the same document
 (18) MR PETUMENOS No problem no problem
 (19) THE COURT You want it in?
 (20) MR CLOUGH Yes I do want it in
 (21) THE COURT There's no problem?
 (22) MR PETUMENOS No objection
 (23) THE COURT Fine
 (24) MR CLOUGH Beyond that other than the photographs
 (25) we had - do you have objections to any of our photographs?

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- (1) There's a number of individual photographs as well
 (2) MR PETUMENOS None of them
 (3) MR CLOUGH Objections to any videos?
 (4) MR PETUMENOS No objection to your videos
 (5) MR CLOUGH And we are seeking to introduce the
 (6) Admiral Robbins memorandum defendants Exhibit 2293
 (7) MR PETUMENOS Could I just take a look at that?
 (8) MR CLOUGH You have a copy
 (9) MR PETUMENOS Oh Admiral Robbins is a tough guy
 (10) THE COURT Oh we need that in the record
 (11) MR PETUMENOS No objection
 (12) MR CLOUGH The maps have already been moved in I
 (13) think the only other thing out there is defendants exhibit
 (14) 14012 which is the article co-authored by Mr Teal and the
 (15) other members of the ISCC describing their effort
 (16) MR PETUMENOS I think that would be fundamentally
 (17) unfair in view of the rulings that we had on the Teal article
 (18) that the article we're talking about is the article that he
 (19) wrote at the conference if I recall saying that the matters
 (20) were all copacetic and everybody was cooperative and so forth
 (21) And I wasn't even allowed to bring to the attention of the
 (22) witness on cross that there was another article So I think
 (23) that at the minimum it should not be a separate exhibit
 (24) admitted to the jury I object I think it's consistent with
 (25) the rulings you made today on the other -

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- (1) MR CLOUGH I don't think - I think it's really
 (2) apples and oranges here We were prepared to show to the
 (3) jury
 (4) that other article what Ms Ott did She went down and passed
 (5) it out It was not formally presented to the presentation the
 (6) API conference It was not a part of the official record
 (7) This was a formal paper which -
 (8) THE COURT Which simply says what he said in his
 (9) testimony right?
 (10) MR CLOUGH To a large extent yes Your Honor
 (11) THE COURT So it's cumulative then The answer is I
 (12) will not admit it
 (13) MR CLOUGH I think that's it I'll review my notes
 (14) to make sure given Mr Petumenos cooperation I didn't miss
 (15) something I don't think we did
 (16) MR PETUMENOS Exhibits I have for Mr Teal are as
 (17) follows Judge I move in evidence plaintiffs exhibit 1886
 (18) the first page only There's no objection
 (19) (Exhibit 1886 (page 1) offered)
 (20) THE COURT It's admitted
 (21) (Exhibit 1886 (page 1) received)
 (22) MR PETUMENOS 1887 first page only There's no
 (23) objection 1888 the first page only
 (24) (Exhibits 1887 (page 1) and 1888 (page 1) offered)
 (25) THE COURT No objection? It's admitted All three
 of those are admitted

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- (1) (Exhibits 1887 (page 1) and 1888 (page 1) received)
- (2) MR PETUMENOS Defendants exhibit I move into
- (3) evidence 12987 pages 1 and 11 there s no objection
- (4) Defendants exhibit 13161 pages 1 and 8 there s no
- (5) objection And defendants exhibit 23165 pages 1 and 6
- (6) there s no objection and I think - 2293? Who wrote this
- (7) down you or me?
- (8) MR CLOUGH That wasn t me That wasn t either one
- (9) of us I think somebody else scribbled something
- (10) MR PETUMENOS I withdraw the scribble on the page
- (11) Nothing more
- (12) (Exhibits DX12987 (page 1 and 11) 13161 (pages 1 and 8)
- (13) and 23165 (pages 1 and 6) offered)
- (14) THE COURT Those that were named there s no objection
- (15) to they are admitted Is that it?
- (16) (Exhibits DX12987 (page 1 and 11) 13161 (pages 1 and 8)
- (17) and 23165 (pages 1 and 6) received)
- (18) MR STOLL Your Honor I have a - you said we could
- (19) take this up later this is - this is DX13167A which is the
- (20) sheet that Mr - what was the guy s name
- (21) MR PETUMENOS The guy in charge of the Kodiak -
- (22) MR STOLL Purdom Purdom Late in the day Your
- (23) Honor Mr Purdom testified about
- (24) THE COURT We ll call him that guy for the record
- (25) MR STOLL That guy Mr Purdom testified asked

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- (1) about - recognized the form Nobody questions this is the
- (2) SCAT form I think it is significant that this witness who was
- (3) supposed to know about the reliability of all these verifying
- (4) these reports and all this stuff did not know how to read this
- (5) form and that s - that is the relevance of - of this
- (6) document So we d offer that document
- (7) (Exhibit DX13167A offered)
- (8) THE COURT The relevance is that this is a form and
- (9) he couldn t interpret it properly?
- (10) MR STOLL Couldn t interpret - I don t know what
- (11) proper or improper It s a SCAT form
- (12) THE COURT He could read the amount of shoreline that
- (13) was in the -
- (14) MR STOLL That s the only thing - that was the only
- (15) thing he could get it was eight miles of shoreline Your
- (16) Honor
- (17) THE COURT There was some difficulty when he got that
- (18) question right It was your first question I m not going to
- (19) admit it counsel I see no reason to admit it You can talk
- (20) about his testimony and how he couldn t interpret the form
- (21) without - without the exhibit being in the record which would
- (22) only cause confusion At best it would cause confusion at
- (23) worst - I mean wait a minute At best it would cause no
- (24) confusion but it would have no probative value At worst it
- (25) might cause confusion It s not worth it It s not going in

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- (1) MR STOLL The next - the next item Your Honor is
- (2) the - the famous tape
- (3) THE COURT Which famous tape?
- (4) MR STOLL This is a guess guessing game
- (5) THE COURT I can t interpret your forms either
- (6) counsel
- (7) MR STOLL This is the - this is the tape of
- (8) Dr Suchanek and Dr Freitas
- (9) THE COURT Oh that tape okay Yes?
- (10) MR STOLL Exxon yesterday produced a group of
- (11) documents about that thick to the Court and -
- (12) THE COURT That s right You know counsel I
- (13) haven t actually looked at those Can I deal with that
- (14) tomorrow morning?
- (15) MR STOLL That s fine with me No problem
- (16) THE COURT I saw it They were on my desk this
- (17) morning
- (18) MR STOLL I have the transcript of the last hearing
- (19) and I don t think this changes anything from - from what you
- (20) indicated at the last hearing
- (21) THE COURT Well if you want me to review my own
- (22) words of wisdom so that I ll stick to them - sometimes I don t
- (23) do that you know counsel - but you can give them to me so
- (24) that I can read them
- (25) MR STOLL I wasn t suggesting it but if you d like

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- (1) a copy I ll be happy to give you it Would you like a copy?
- (2) THE COURT No that s all right If I need one I ll
- (3) certainly ask for one
- (4) MR DIAMOND If we give you the transcript of that
- (5) one we have to give you a transcript of the four other
- (6) hearings on this videotape
- (7) THE COURT We have had a number of hearings on this
- (8) MR DIAMOND Your Honor I hate to impose upon the
- (9) Court you said you were going to look at the documents and
- (10) make a ruling Tomorrow is fine except Mr Purdom and
- (11) Mr Byars get on a plane tonight
- (12) THE COURT Yeah you have a point
- (13) MR DIAMOND If you could just let us know -
- (14) THE COURT I kind of thought this might come up in
- (15) the examination of the witnesses and that s one of the reasons
- (16) why I wanted to hear them I thought it would be good to hear
- (17) them to determine what was being said about the extent of the
- (18) oiling but I didn t hear too much about that
- (19) MR DIAMOND If you could take a look at that -
- (20) THE COURT I could do it I have a child-related
- (21) matter which I m late for right now So what I ll tell you to
- (22) do is force you to come back here to the courtroom at 4 00
- (23) MR DIAMOND I don t know that we want to argue it
- (24) You said you d take a look -
- (25) THE COURT I ll tell you what it is you might as

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- (1) well be here That way we won't have any difficulty
 (2) understanding each other right? So I'll bring you back in and
 (3) we'll talk about it at 4:00
 (4) MR STOLL Fine Your Honor At that time we can
 (5) set up a schedule on this other matter
 (6) THE COURT Yeah fine
 (7) MR PETUMENOS At some point not now if the Court's
 (8) late I'd like to visit with the Court in chambers Maybe we
 (9) can do it around 4:00
 (10) THE COURT Well let's talk about in chambers all
 (11) right? Sometimes these in chambers conferences are
 (12) productive
 (13) and sometimes they aren't Sometimes one of you comes in
 (14) and
 (15) the other one comes in the next day and says gee I wasn't
 (16) there and somehow that's supposed to be important If you
 (17) want an in chambers conference I guess I have to let every one
 (18) of you in there or at least give you the opportunity so that I
 (19) can say the next morning hey if you weren't there tough
 (20) MR PETUMENOS This won't be - this won't have any
 (21) of those problems The subject matter will not have the
 (22) problems
 (23) MR STOLL I know what the matter is
 (24) MR PETUMENOS Will not have those problems
 (25) MR STOLL The only time I recall this happening was
 (26) one time and that was something where I didn't - it was a -
 (27) supposedly a scheduling meeting in chambers and then it
 (28) evolved

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- (1) into something else
 (2) THE COURT Well that -
 (3) MR PETUMENOS Trust me that will not happen
 (4) THE COURT That was the contention counsel but it
 (5) wasn't only one of them There's been some confusion about
 (6) those things I just want to make it clear prospectively I'm
 (7) not going to reach back and do something because I'm
 (8) annoyed
 (9) which I was
 (10) MR STOLL I know that
 (11) MR PETUMENOS We won't have those kinds of problems
 (12) with this matter Judge
 (13) MR DIAMOND Two other matters just to bring them to
 (14) your attention You asked us to take a look at the opposition
 (15) papers on the archaeology directed verdict motion tell you
 (16) whether we wanted to reply and if so we'd have 24 hours We
 (17) received those last night We would like to reply This is
 (18) not a good week for me I wonder if I could have to the end of
 (19) the week?
 (20) THE COURT Yeah I don't see any problem with that
 (21) You have until Friday
 (22) MR DIAMOND Yes We need to resolve before
 (23) Mr Roddewig testifies the issue that you left open yesterday
 (24) concerning post spill large parcel transactions in Prince
 (25) William Sound You recall the evidence will be there were no
 (26) such sales no market for large property large parcels in the

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- (1) Sound prior to the spill We have two after How we're going
 (2) to deal with that because we'd like to introduce the fact that
 (3) it was funded by settlement funds Can we deal with that at
 (4) four or -
 (5) THE COURT Well we can talk about it I'm not sure
 (6) whether we can deal with it That's a difficult issue too
 (7) MR DIAMOND Also we received and I'm sure you have
 (8) too a note from the jury concerning -
 (9) THE COURT Yes
 (10) MR DIAMOND We would certainly be inclined to accede
 (11) to their request but I imagine you want to set it for some
 (12) sort of conference
 (13) THE COURT Well yeah at the end of the case which
 (14) is what I said to you before I want to hear all the evidence
 (15) before I decide whether a view is necessary I'm sure they'd
 (16) love to have a view It's not necessarily that it will be an
 (17) end all decision
 (18) MR DIAMOND You're going to deal with that at the
 (19) end of the evidence?
 (20) THE COURT Yeah that's what I said before
 (21) MR DIAMOND Yeah I just wondered whether you
 (22) changed your mind in view of the note
 (23) THE COURT No
 (24) MR PETUMENOS Judge I have an observation about the
 (25) view which is concerning which is I fail to see how a jury

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- (1) can come together in a petition unanimously that they need a
 (2) jury view and be - be following the admonition of the Court
 (3) not to discuss the matter among themselves or with anyone
 (4) else
 (5) and I also am worried that this same note came from the federal
 (6) jury and perhaps it's coincidence
 (7) THE COURT It's not the same note
 (8) MR PETUMENOS Well the same request Perhaps it's
 (9) a coincidence pure speculation I know but I'm a little
 (10) concerned about the Court's instructions versus what we're
 (11) getting from the jury
 (12) THE COURT This is the old I'm concerned
 (13) counsel It's nice to be concerned but what do you want me to
 (14) do?
 (15) MR PETUMENOS Well perhaps what is happening is the
 (16) instructions sometime get a little numb after day in and
 (17) day out and perhaps there's an instruction that the Court could
 (18) give about - about that
 (19) THE COURT I tell you what you draft an instruction
 (20) I'll think about giving it It's not my inclination to scold
 (21) the jury at this point in the case
 (22) MR PETUMENOS No not my request
 (23) THE COURT I'll say I'm not going to do anything
 (24) without having an appropriate reason for it and perhaps
 (25) appropriate authority So if you think it's really a problem
 (26) you can research it

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- (1) MR PETUMENOS We ll think about it Judge
- (2) MR DIAMOND See you at four
- (3) THE COURT Okay thanks
- (4) THE CLERK Please rise This court stands in
- (5) recess
- (6) (Recess at 2 15 p m)

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- (1) EXHIBITS
- (2) DX7111 and DX5142 offered 5858
- (3) 8025 offered 5858
- (4) 14021B offered 5858
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- (13) DX1973A 1973A1 1973A2 1973A3 1973A4 1973A5 1973A6
- (14) 1973A7 offered 5921
- (15) DX14024A offered 5921
- (16) 1886 (page 1) offered 5925
- (17) 1887 (page 1) and 1888 (page 1) offered 5925
- (18) DX12987 (page 1 and 11) 13161 (pages 1 and 8) and 23165
- (19) (pages 1 and 6) offered 5926
- (20) DX13167A offered 5927
- (22) 14021A received 5858
- (23) DX7111 DX5142 DX8025 DX14021B DX14021C DX14021D
- (24) DX14021E DX13155A DX13155B DX13166C and DX13166D
- (25) received 5860

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- (1) DX1018 DX9398 DX13205A 1 DX13205A 2 DX661AA
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- (3) per August 15 letter received 5904
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- (1) STATE OF ALASKA)
 - (2) Reporter s Certificate
 - (3) DISTRICT OF ALASKA)
 - (6) I Joy S Brauer RPR a Registered Professional
 - (7) Reporter and Notary Public
 - (8) DO HERBY CERTIFY
 - (9) That the foregoing transcript contains a true and
 - (10) accurate transcription of my shorthand notes of all requested
 - (11) matters held in the foregoing captioned case
 - (12) Further that the transcript was prepared by me
 - (13) or under my direction
 - (14) DATED this day
 - (15) of 1994
 - (21) JOY S BRAUER RPR_{as} *
 - Notary Public for Alaska
 - (22) My Commission Expires 5-10 97
-

Look-See Concordance Report

UNIQUE WORDS 2,917
TOTAL OCCURRENCES 13,976
NOISE WORDS 385
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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AM 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Tuesday August 16 1994
) 4 05 p m
 (6))
 (8) Pages 1 through 69
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) HEARING
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
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(1) PROCEEDINGS
 (2) THE CLERK: Please rise. This court now resumes its
 (3) session. Please be seated.
 (4) THE COURT: I don't know why there aren't a whole lot
 (5) of spectators here. This is going to be one of the better
 (6) hearings that we have, but we're on the record and the jury is
 (7) not present.
 (8) Counsel, I think I have all the materials up here that you
 (9) submitted on these various issues. What do you want to take
 (10) up first?
 (11) MR. DIAMOND: I think we would invite the Court's
 (12) ruling on Mrs. Katzke's videotape.
 (13) THE COURT: Would you invite my ruling on - do you want
 (14) to argue it further?
 (15) MR. DIAMOND: No.
 (16) THE COURT: All right. I don't think it's - I do not
 (17) think it's admissible. Therefore, I will not let it in.
 (18) Now, do you want to argue it further?
 (19) MR. STOLL: Yes. May I inquire as to -
 (20) THE COURT: I think that you haven't shown that this
 (21) is the type of agent or representative of Exxon that is
 (22) authorized to speak as these witnesses spoke.
 (23) MR. STOLL: Your Honor, the section that we're
 (24) offering this exhibit under is the section that is not having
 (25) the agent authorized to - to be an authorized speaking agent.

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(1) but authorized - the agent is doing an act -
 (2) THE COURT: Within the scope -
 (3) MR. STOLL: - within the scope.
 (4) THE COURT: And I don't see that you've shown that
 (5) MR. STOLL: Well, the - the - Dr. Suchanek or
 (6) however you pronounce his name, says that he's the chief
 (7) biologist on the scene. He's doing an investigation of the
 (8) conditions as he sees them, and part of his scope of work is to
 (9) make an evaluation of the zooplankton and the other biota on
 (10) the scene, and that's what he's doing, and he's reporting -
 (11) and he's simply stating what he observed in his investigation.
 (12) I think that the - that the - what I took as a tentative
 (13) ruling of the Court the last time -
 (14) THE COURT: Very tentative counsel. That's the
 (15) problem with a tentative ruling.
 (16) MR. STOLL: I understand that. I understand that
 (17) You're not - obviously changed your ruling, but I'm not - I
 (18) thought that that analysis was, you know, correct. And I don't
 (19) see anything in the new - newly produced information
 (20) yesterday
 (21) that changes that, because in fact they affirm in the
 (22) affidavit that was filed yesterday that the scope of work was
 (23) what was defined in the - I think it was the March 27 letter
 (24) which was already offered, and -
 (25) THE COURT: March 27th or April 7th?
 (26) MR. STOLL: Maybe I'm wrong. Your Honor, could I just

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- (1) have a moment as to the date? April - no March 27 This is
 (2) the Dames & Moore -
 (3) THE COURT Oh the Dames and Moore letter yes To
 (4) assist Exxon in assessing the marine biological impacts of the
 (5) March 24th tanker oil spill
 (6) MR STOLL Right And I think that that is the -
 (7) that's the scope of this fellow's work and that's affirmed in
 (8) Mr Maki's affidavit that they filed yesterday and that's what
 (9) he's doing He's doing that biological analysis but I don't
 (10) see what -
 (11) THE COURT Well that's not - I don't know that that
 (12) is clear to me counsel The persuasive thing that the
 (13) defendants have said here is that we're not dealing here with
 (14) statements made in a report that Exxon commissioned Dr
 (15) Freitas
 (16) and Suchanek to make which arguably would constitute
 (17) admissions binding on Exxon Instead the proffered evidence
 (18) consists of extemporaneous comments apparently given with
 (19) no
 (20) advance information as to who she was why she was asking for
 (21) comment or how the statements would be used And more
 (22) over
 (23) there's no evidence that Exxon had any legal control
 (24) whatsoever
 (25) over verbal statements made by these scientists and no reason
 (26) to believe that Exxon had any practical means of controlling
 (27) their off-the-cuff comments
 (28) MR STOLL Well in the first place Your Honor I
 (29) don't think that there's a time when an agent that an agent

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- (1) has been authorized to make statements against the interest of
 (2) the principal The agent sometimes makes statements that are
 (3) admissions The agent sometimes makes admissions but they
 (4) are
 (5) never - if they're admissions if they're true admissions
 (6) I've never - I can't recall a time when the - the principal
 (7) authorized them to make an admission
 (8) The cases that we cited particularly that Brown & Root
 (9) case and the Material Research Corporation versus BOC
 (10) Group
 (11) THE COURT Right you know I don't have the copies
 (12) of those up here Do you have them with you?
 (13) MR STOLL Yes I do Your Honor
 (14) THE COURT Can I have them?
 (15) MR STOLL And the Hartford Insurance case where you
 (16) had a - there's BOC Research Brown & Root - excuse me
 (17) that's
 (18) Hartford Insurance I think the Material Research is the one
 (19) All of those cases - in the Material Research case Your
 (20) Honor the Court noted specifically the statements are
 (21) concerning the matter within the scope of his agency It
 (22) doesn't - it doesn't - none of these cases say that the
 (23) statement itself has to be authorized by the - by the
 (24) principal Not one of them
 (25) In fact in all these cases the person opposing the
 (26) admission had argued that
 (27) THE COURT Wait a minute counsel I'm not trying to
 (28) put you off I know that there were distinctions that I found

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- (1) in every one of these cases to try to make it plain to you what
 (2) they are so you'll understand
 (3) THE COURT Brown & Root is the case of a marine
 (4) surveyor who was actually hired by the - by the -
 (5) MR STOLL Defendant
 (6) THE COURT One of the parties right?
 (7) MR STOLL Right
 (8) THE COURT With a formal contract to report and -
 (9) and the thing that was admissible there was the formal report
 (10) that he - he submitted right?
 (11) MR STOLL His report yes I think - the point I
 (12) was making Your Honor was that in the case of the Material
 (13) Research and in the case of Hartford the Hartford case is the
 (14) one where there's the - the Stevedore Stevedore Company
 (15) There was no report involved whatsoever This was the one that
 (16) Your Honor referred to during the last hearing we had on this
 (17) And the same thing is true with the Material Research
 (18) THE COURT And in fact what they - I'll give you
 (19) the fact that this says you can - they can be an independent
 (20) contractor and still qualify But what this says is that
 (21) there's one document that's admissible as an admission and
 (22) that
 (23) was a document that the independent contractor specifically
 (24) was
 (25) authorized to execute right?
 (26) MR STOLL Yes
 (27) THE COURT In other words -

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- (1) MR STOLL But that - I don't think that changes the
 (2) issue though The issue is here in the section we're asking
 (3) for admission it is whether the statement is made in the
 (4) course of acting in the agency capacity and the agent here
 (5) you have - here you have a - this Dr Suchanek or whatever
 (6) his name he's out there he's performing his duties He's
 (7) supposed to make a report to someone at some point in time as
 (8) to what his findings are and he makes a statement
 (9) THE COURT To someone - no he's not supposed to
 (10) report to someone He's supposed to report -
 (11) MR STOLL Eventually to Exxon
 (12) THE COURT - to his employer His employer would
 (13) report to Exxon
 (14) MR STOLL Right
 (15) THE COURT Now suppose this independent contractor
 (16) or supposed agent had simply decided that the public needed
 (17) to
 (18) know some things and called a press conference Would that
 (19) be
 (20) an admission of Exxon whatever he said at the press
 (21) conference?
 (22) MR STOLL I think it could be if it was - if he
 (23) reported what his - what he had found in the course of his -
 (24) in the course of his work yes if he went out - if he went
 (25) out and he was hired to do an investigation after the
 (26) investigation he goes and makes a statement saying this is
 (27) what I found this is in the course of my employment I think

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- (1) that - I think that he's their agent
 (2) Your Honor I respectfully -
 (3) THE COURT Counsel I know that this is - to me
 (4) this is a tough question because it involves a lot of - what
 (5) the defendants have characterized as extemporaneous evidence
 (6) and extemporaneous comments by a person who is arguably -
 (7) arguably saying things he's qualified to say and that he was
 (8) hired to evaluate by - by what Exxon calls an independent
 (9) contractor
 (10) I don't think that the independent contractor status is the
 (11) be all and end all of the analysis I do think that the
 (12) relationship has to be described in enough detail so that I
 (13) know that this is the kind of admission that should be allowed
 (14) to get in This is a - it's a borderline yes That's why
 (15) I'm having so much trouble with it The cases are not - don't
 (16) shed blinding light on the subject and a number of them have
 (17) arguably distinguishable factors that might cause me to go one
 (18) way or another
 (19) MR STOLL Your Honor if I may I personally think
 (20) that the statements that you made at the last - I was just
 (21) reading - the reason I brought the transcript up the last time
 (22) was I thought that the statements that you made were probably
 (23) more articulate than anything I've said before as to why -
 (24) THE COURT I doubt that
 (25) MR STOLL Well no I'm serious as to why these are

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- (1) admissible And I also have to say Your Honor that I also
 (2) think that it's admissible as a present sense impression
 (3) THE COURT All right Is that all? I know that
 (4) that's a terrible thing to say to you now
 (5) MR STOLL I didn't hear what you said
 (6) THE COURT I said I know that's a terrible question
 (7) to ask you right now Is that all?
 (8) MR STOLL I guess it is Your Honor I think
 (9) that - I would just like to say that we also believe that it's
 (10) a present sense impression
 (11) THE COURT I know that I'd like to hear from you on
 (12) the present sense impression aspect of the evidence counsel
 (13) Since your brief is less than elucidating on that one
 (14) MR DIAMOND I thought we were coming to collect a
 (15) ruling and hear it in person and so I didn't even bring my -
 (16) THE COURT Counsel I get to be just as equivocal as
 (17) the parties have been at least as equivocal up until the time
 (18) of the final decision
 (19) MR DIAMOND Fine I came somewhat unprepared and
 (20) I've been sitting here refreshing my recollection as to all of
 (21) the cases dealing with the admission issue and I can recite
 (22) them from memory
 (23) THE COURT Why don't we just say I'll take this up
 (24) after I take up the other matters then
 (25) MR DIAMOND On present sense impression we laid out

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- (1) exactly what the statements were They were not present sense
 (2) THE COURT You said some of them were arguably
 (3) present sense
 (4) MR DIAMOND On the brief we filed most recently we
 (5) went back and laid out exactly what was alleged to be present
 (6) sense The statements are Suchanek pointing to a place on the
 (7) beach where he's talking about what happened sometime in the
 (8) past The only thing that's present sense impression that I
 (9) remember from this is Dr Freitas comments as to what she was
 (10) collecting in her jar when she was collecting it which really
 (11) proves nothing and I'm sure the plaintiffs don't want that in
 (12) for its own independent purpose Everything else was in the
 (13) nature of conclusions that each of the scientists have
 (14) formulated at some juncture in the past It was not as they
 (15) were doing it and that's the rule on present sense
 (16) impression
 (17) It has to be virtually instantaneous either at the time or
 (18) immediately thereafter There's no immediacy here these
 (19) people are being interviewed about conditions of beach oiling
 (20) that occurred in large measure before they even got there
 (21) Observations they have made sometime in the past that's not
 (22) present sense impression If that would be present sense
 (23) impression any kind of interview you would do of somebody
 (24) sort
 (25) of on the scene about what had happened at any time since they
 arrived would be present sense impression and wipe out the

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- (1) hearsay rule
 (2) But you know I think we did cover this
 (3) THE COURT Maybe my memory is faded on this counsel
 (4) but for instance with Suchanek didn't he just describe
 (5) what - in essence - he saw right then
 (6) MR DIAMOND No no If - I wish I had my brief in
 (7) front of me I'm sorry that I don't What he did was he
 (8) pointed over to a beach that had been oiled It had been
 (9) oiled He was not experiencing anything He was not
 (10) describing something he was experiencing He was saying
 over
 (11) there that's a place that had been oiled Well that's
 (12) plainly hearsay and it's not something he is presently
 (13) sensing He is describing something he had concluded when
 he
 (14) was over at that beach
 (15) THE COURT Do we have the tape?
 (16) MR STOLL I have the transcript Your Honor
 (17) THE COURT Well the transcript will do I suppose
 (18) I don't need the pictures I've seen those
 (19) MR OPPENHEIMER I hesitate to jump in May I jump
 (20) in with one observation Your Honor?
 (21) THE COURT Absolutely
 (22) MR OPPENHEIMER I think the essence of present sense
 (23) impression is spontaneity and the case I have in mind - we
 (24) may actually all remember from law school - one of the - one
 (25) of the teaching examples that's often used about hearsay is the

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- (1) lights in the back of the tractor Somebody says I saw that
 (2) there were no reflector lights on the back of the tractor
 (3) It s an important fact in a negligence case because the tractor
 (4) was hit at night from the rear And the question is was it -
 (5) was it properly set up to reflect the lights to reflect to
 (6) lights on the oncoming car and the whole point is anything you
 (7) happen to see at the time that you later report falls under
 (8) this exception Then I would - the exercise I d have to go
 (9) through is find a single situation where the observation of a
 (10) physical fact would ever be subject to the hearsay rule
 (11) THE COURT All right so what do you think makes the
 (12) distinction?
 (13) MR OPPENHEIMER If in fact and I - not having
 (14) been the author of the brief I can t speak to it specifically
 (15) but the example I would give is that if somebody were to see
 (16) you saying something about an event not in the context of
 (17) interview about what had happened or what you think about
 (18) something but if somebody had a tape of somebody saying
 there
 (19) goes a boat it s conceivable that would qualify as opposed to
 (20) an interview later did you see a boat go by or has a boat gone
 (21) by If we don t distinguish the two situations how could
 (22) there ever be a hearsay statement?
 (23) THE COURT Give me the transcript because I m sorry
 (24) about this but I haven t reviewed that lightly and it seemed
 (25) to me this was fairly spontaneous

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- (1) MR OPPENHEIMER I ve never seen the tape so -
 (2) MR PETUMENOS Judge I m just feeling bad I don t
 (3) remember this from law school I must have been in the back
 (4) THE COURT I don t remember the lights on the
 (5) tractor but I like it
 (6) MR STOLL I forget the tractor maybe it s too many
 (7) years but Your Honor I think we re getting confused here
 (8) maybe or counsel is by the difference between excited
 (9) utterance and the present sense impression
 (10) THE COURT Yeah which is - there is -
 (11) MR OPPENHEIMER I agree there s a separate
 (12) exception That s not my argument
 (13) MR STOLL At the hearing Your Honor that we had
 (14) one of the hearings we had on this you noted that the
 (15) statement of Dr Suchanek that most of the organisms appear to
 (16) be dying appear to be contemporaneous
 (17) THE COURT Right that s what I was -
 (18) MR STOLL Yeah
 (19) THE COURT Well I appreciate this This transcript
 (20) helps me I tell you what I m going to do counsel I don t
 (21) think I ve given it a fair shake This is one that I ve been
 (22) waffling back and forth on arguing myself on so I was
 (23) inclined to argue with you on the record to see if I could push
 (24) you a little bit further and by golly I did So let me go
 (25) back over the papers It s not fair to you for me to make a

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- (1) binding ruling right now
 (2) MR STOLL Thank you Your Honor
 (3) Your Honor the next matter we have is scheduling just
 (4) simply scheduling a hearing on a - our motion that we filed
 (5) You asked us to file yesterday - you asked us yesterday to
 (6) file this morning which we did
 (7) THE COURT Which motion now?
 (8) MR STOLL This is on the motion on the lay
 (9) witness - the so-called lay witnesses that were not designated
 (10) as experts
 (11) THE COURT Right And this is plaintiffs memorandum
 (12) regarding defendants third party real property witnesses
 (13) MR STOLL That s correct
 (14) THE COURT Yeah and that was filed -
 (15) MR STOLL We filed that this morning-
 (16) THE COURT Yeah got a copy of it this morning yeah
 (17) MR STOLL - pursuant to the Court s request
 (18) yesterday We don t care when we argue that, I just want to
 (19) set up a schedule because these witnesses are coming this
 week
 (20) THE COURT Counsel do you want to respond in
 (21) writing?
 (22) MR DIAMOND Is it your desire to hold a - another
 (23) in limine hearing on this before the witnesses testify or can
 (24) we deal with it during the course of the testimony
 (25) THE COURT That s a good question I mean I think

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- (1) that probably I have to - it would be wise for me to give you
 (2) some sort of guidance about the way I m going to rule when I m
 (3) first faced with the problem And I ll - let me tell you
 (4) this Frankly counsel I ve gone over the proposed testimony
 (5) of this witnesses and they appear to be experts Some of
 (6) their testimony is factual And may very well get in other of
 (7) their testimony is expert
 (8) MR DIAMOND What I intend to do is to confine this
 (9) to basically facts within the province of the witnesses If
 (10) we re dealing with brokers and what was their experience with
 (11) listings what was their experience with transactions what was
 (12) their experience with price I m not asking any ultimate
 (13) opinions although you know given the fact that Mr Carlson
 (14) was a lay witness testified here as to opinions as to price
 (15) and market effects Mr Tumeo who is a lay witness testified
 (16) as to numerous scientific conclusions I do think sort of
 (17) fairness on the scales really should enable us to have a fair
 (18) amount of leeway with these people
 (19) I also have found a case in which Judge Serdahely ruling
 (20) sitting by designation on Supreme Court upheld a ruling by
 (21) Shortell J
 (22) THE COURT Szmanski versus Congdon (phonetic) You
 (23) might notice it says reversed at the bottom but there s not a
 (24) single reversal in the opinion I ve held that against Judge
 (25) Serdahely for years

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- (1) MR PETUMENOS Pick another case
 (2) MR DIAMOND I thought that was affirmed I m
 (3) referring to the case in which you were affirmed
 (4) THE COURT I was affirmed on a number of aspects and
 (5) they write reversed at the end of their opinion
 (6) MR DIAMOND Well the holding that was affirmed that
 (7) was of interest to me was the fact that third parties can
 (8) testify as to opinions of values of property they don't own
 (9) I'll supply the Court with a copy of the decision I couldn't
 (10) remember it was a number of years ago
 (11) THE COURT You cited it and I thought that's not
 (12) exactly what I remember of the case but that was a long time
 (13) ago
 (14) MR DIAMOND I am going to try to confine this
 (15) confine the testimony to what these people know from - from
 (16) their own - their own daily businesses and professions
 (17) Because they are in the marketplace for real estate and I m
 (18) not going to put somebody on the stand and ask them the kind
 (19) of questions that you would ask an expert
 (20) We've given a description to counsel as to the subject
 (21) matter because in fact we are going to have a lawyer
 (22) testifying from Kodiak who's quite knowledgeable about the
 (23) Kodiak real estate market That's what he does
 (24) THE COURT Well he bought - he bought some property
 (25) after the spill

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- (1) MR DIAMOND He personally bought some property He
 (2) also is a real estate lawyer and he does most of the
 (3) conveyancing in Kodiak and he talks to most of the buyers and
 (4) sellers in Kodiak
 (5) THE COURT Why do you think he isn't an expert?
 (6) MR DIAMOND Why isn't he an expert?
 (7) THE COURT Yeah
 (8) MR DIAMOND This is percipient knowledge he has
 (9) THE COURT Well all experts - percipient knowledge
 (10) as to what? As to whether or not the oil spill reduced
 (11) property values you think that's percipient knowledge?
 (12) MR DIAMOND That's the generalization He's going
 (13) to talk about specific things I'm going to ask him specific
 (14) facts
 (15) THE COURT Give me an example
 (16) MR DIAMOND Did his business fall off after the oil
 (17) spill
 (18) THE COURT Did his business fall off -
 (19) MR DIAMOND Yeah did his real estate conveyancing
 (20) practice fall off were there fewer conveyances he had after
 (21) the oil spill It's a fact he has knowledge of that Was he
 (22) contacted less frequently to do real estate deals after the oil
 (23) spill than before Things within - basically within his -
 (24) his kin and things from which he could logically offer
 (25) opinioned testimony even of a lay type opinion based on facts

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- (1) that he - he assembles on a daily basis in his livelihood
 (2) THE COURT Okay Let me break in on you here What
 (3) you say is arguably factual testimony On the other hand to
 (4) go on to say well he could - he could provide lay opinion
 (5) because of his experience and because he's an expert in these
 (6) areas doesn't compute He's either a lay witness or he's an
 (7) expert witness If he can provide the opinions because of his
 (8) expertise in a way we classically think of as expert testimony
 (9) rather than lay testimony then he doesn't get to give lay
 (10) opinion when he couldn't give expert opinion
 (11) MR DIAMOND Except we do have a rule in this case
 (12) that Mr Petumenos would - will acknowledge exists which I
 (13) disputed at first and went back and did my homework and had
 (14) to concede that Mr Petumenos is right and that is that
 (15) percipient witnesses who are testifying are allowed to offer
 (16) their expert opinions if they have expertise on the matters to
 (17) which they are testifying percipiently and that was - that was
 (18) why Dr Tumeo was allowed to testify That's why I assume
 (19) Mr Carlson was allowed to testify the way he did We have
 (20) volumes of - volumes is an overstatement Pages of transcript
 (21) in which Mr Petumenos advocates that position quite forcefully
 (22) and ultimately that was the deal that he and Mr Lynch cut
 (23) before the other three of us at counsel table were ever
 (24) involved in this case
 (25) MR STOLL I'm sorry Your Honor I can't stand this

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- (1) any longer Here's the -
 (2) MR PETUMENOS Excuse me Bob I have never been able
 (3) to address this issue not once That was the hearing I missed
 (4) and - and perhaps as a consequence fairly was told to bide my
 (5) time
 (6) THE COURT Wait Carlson Tumeo where was the
 (7) objection that said this is expert testimony?
 (8) MR DIAMOND There was no objection
 (9) MR OPPENHEIMER That's not true There was an
 (10) objection
 (11) THE COURT What happened?
 (12) MR OPPENHEIMER It was overruled
 (13) MR STOLL That's not true That is absolutely not
 (14) true
 (15) THE COURT Show me
 (16) MR STOLL Your Honor I don't -
 (17) MR DIAMOND Once again this was - counsel has
 (18) asked to set this for hearing We don't come with transcript
 (19) in hand I didn't bring the case that was - in which you were
 (20) affirmed This is a little bit impromptu But we made certain
 (21) decisions and Tim will verify this I apologized to him after
 (22) a hearing in which I said I know of no such understanding
 (23) because I went back and I did my research and in fact what he
 (24) told the Court on the record about lay witnesses being able to
 (25) offer expert opinion was correct We've acted accordingly A

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- (1) lot has come in by folks -
 (2) THE COURT This is not that discussion This
 (3) essentially - the essentials of this particular discussion
 (4) what you re talking about right now are on the record already
 (5) Right and I have
 (6) MR PETUMENOS Judge they re not
 (7) THE COURT I have said many times people have blurred
 (8) the line between expert and lay testimony so badly that I m
 (9) having a tough time enforcing any rules strictly because it
 (10) just isn t fair to do that
 (11) MR DIAMOND That s why I thought you had us comply
 (12) with the expert disclosure requirements the expert discovery
 (13) requirements with respect to these witnesses I have a
 (14) distinct recollection of saying Judge I understand I m buying
 (15) myself some - an insurance policy by doing this We re going
 (16) to - if they re experts I m complying if they re not
 (17) experts then its s academic But I thought we had crossed
 (18) this bridge to some extent
 (19) THE COURT I don t think you ll find anywhere in the
 (20) transcript that I said oh if they re experts this will
 (21) qualify you and then you can present expert testimony I
 (22) don t think you ll find one single reference If you do
 (23) please bring it to my attention
 (24) MR STOLL Your Honor -
 (25) MR PETUMENOS Excuse me Judge -

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- (1) MR STOLL - could I just -
 (2) THE COURT Wait a minute counsel I m trying to
 (3) think how to do this rationally You all have different
 (4) recollections And I m not certain how - how much more I need
 (5) to know about your out of court deals I mean I think I know
 (6) enough to know that the line between expert and lay testimony
 (7) in this particular case has been blurred by the practices of
 (8) the parties
 (9) MR STOLL Your Honor I want to take exception with
 (10) that I d like to take these two examples
 (11) THE COURT Go ahead
 (12) MR STOLL Because I think they re very clear
 (13) examples Counsel has indicated that there s this blurring
 (14) some kind of side deal that s been made between plaintiffs and
 (15) defendants and we re taking some kind of advantage That is
 (16) absolutely not the case In the case of Dr Tumeo Dr Tumeo
 (17) testified and he put on - on the - we put on this tape or
 (18) part of the tape and then on two occasions Mr Oppenheimer
 (19) objected I ve got the transcript right here
 (20) THE COURT Let me see it
 (21) MR STOLL And you sustained the objections both
 (22) times that they were made It s underlined right here Goes
 (23) on to the next page
 (24) THE COURT Yeah Both times it was made?
 (25) MR STOLL Maybe there s just one time I think

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- (1) there was a second -
 (2) THE COURT Oh wait a minute
 (3) MR STOLL I thought there was a second place
 (4) THE COURT Second was a foundational objection which
 (5) I sustained
 (6) MR STOLL Okay
 (7) MR OPPENHEIMER Your Honor I don t have the
 (8) transcript so I don t know -
 (9) THE COURT I had to look at this myself today just
 (10) before I came in here and it was confusing to me because I
 (11) didn t recollect it
 (12) MR OPPENHEIMER I had thought again - I haven t
 (13) looked at this transcript ever but my recollection and Your
 (14) Honor has the transcript there was that what was said at
 (15) bench which I interpreted to mean the objection had been
 (16) denied was something to the effect of - and it s been a long
 (17) time since it was said but that he s - I m paraphrasing he s
 (18) going to describe what he saw something to that effect, and it
 (19) was my interpretation at the time that my objection was not
 (20) well taken I have another example where the same thing came
 (21) up
 (22) THE COURT I hate to sandbag you counsel but I ve
 (23) got the testimony You came up here I remember saying this to
 (24) you what s the name of the objection Do you remember that
 (25) question?

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- (1) MR OPPENHEIMER One of Your Honor s better
 (2) questions
 (3) THE COURT You said the name of this objection is
 (4) nondesignation of expert witness This is not a designated
 (5) expert I m going through it
 (6) MR OPPENHEIMER I recall that I do
 (7) THE COURT This is not a designated expert. There
 (8) are areas here you get into which are clearly going to
 (9) consume - do constitute expert testimony and we - he s not
 (10) designated We have the report from him He s never been
 (11) deposed and then we talked about whether or not that the
 (12) material was toxic And then I said the objection s
 (13) sustained judged on the basis he s not an expert witness and
 (14) I m not going to let him testify on what is essentially an
 (15) expert testimony of toxicity of this surfactant
 (16) MR OPPENHEIMER I stand corrected on that point. I
 (17) raised a second point on the transcript which is Mr Carlson s
 (18) observation about the two sales that reduced in value which he
 (19) said was indication of the drop in market value where he was
 (20) allowed - and I think Your Honor was correct in this
 (21) holding - he s allowed to testify as to his observation of the
 (22) sale prices dropping and it was a market observation but it s
 (23) that part of the market that he observed
 (24) THE COURT All right You mean - I can t remember
 (25) exactly how he testified

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- (1) MR OPPENHEIMER Maybe that's a part of the
 (2) transcript which I could find Of course I don't have it here
 (3) today but I guess the - I'm not sure what it is precisely
 (4) should be driving the discussion but clearly the rules
 (5) contemplate lay opinion irrespective of how the parties have
 (6) comported themselves And I think that -
 (7) THE COURT Oh there's no question about that no
 (8) question about that counsel but I'm having trouble when I look
 (9) at these witnesses and what you've said they're going to
 (10) testify to Some of it's factual I agree with you and some
 (11) of it's clearly expert opinion
 (12) MR STOLL Your Honor I don't - so we need to know
 (13) what the issue is we have no - we think that Mr Hancock
 (14) this lawyer in Kodiak can testify that he does a lot of
 (15) transactions if he testifies he did a hundred in 1988 and did a
 (16) hundred every year after that there's - there's not an issue
 (17) there
 (18) THE COURT He can testify that his business didn't
 (19) fall off
 (20) MR STOLL He can say his business didn't fall off
 (21) THE COURT But can he testify that the market value
 (22) was decreased
 (23) MR DIAMOND May I remind you of one other
 (24) illustration and this was - this was Mr Stoll's witness
 (25) Mr Carlson testified and put on on the Barco S-1 S-2 S-3 and

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- (1) S-4 These were sales that he had pulled from his records as
 (2) assessor
 (3) MR OPPENHEIMER Same type exhibits
 (4) MR DIAMOND And testified that they were in his
 (5) view comparable properties and they showed changing price
 (6) in
 (7) Kodiak after the spill declining price
 (8) Now if what I want to put on expert testimony isn't that
 (9) expert testimony?
 (10) THE COURT Yes but you - and then I go back to the
 (11) Judge's time-honored protection which is show me where the
 (12) objection was show me what I said
 (13) MR STOLL Your Honor I got to - but I want to make
 (14) another point on this on this Carlson thing I just was
 (15) responding to the Tumeo thing On - on Mr Carlson this was
 (16) a motion this was the subject of a motion for summary
 (17) judgment
 (18) because they said he was a lay person that couldn't give a -
 (19) give an appraisal and Your Honor correctly ruled that - that
 (20) an owner of property and here there was the assessor he's the
 (21) agent of the - of the county can express an opinion as to his
 (22) own - the value of his own property
 (23) MR OPPENHEIMER That wasn't - that was exactly -
 (24) this is actually helpful because the distinction I made and
 (25) the reason I stood up and I would like to get - I think I may
 (26) get 50 percent of the objections I made in my memory straight
 (27) If I lost Tumeo - or if I won Tumeo I'm quite sure I lost

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- (1) Mr Carlson I stood up at the point in time when Mr Carlson
 (2) went beyond appraising or assessing borough property and
 (3) making
 (4) a statement about land value and actually it might be useful
 (5) I think I can back at the office find that that exchange
 (6) because the fact is that at that point he was expressing a
 (7) view about the oil spill's impact on property values and S-1
 (8) S-2 and S-3 and S-4 weren't borough property at all They may
 (9) have been used in one of his appraisals They may have been
 (10) used in one of his appraisals He never did an appraisal post
 (11) spill anyway but more importantly the point he was making
 (12) about the comparables was there had been a lessening of
 (13) value
 (14) a conclusion he never drew on borough property because he
 (15) never
 (16) made a post spill assessment that was quite clear that was
 (17) left to Dr Shorett so his use of S-1 S-2 S-3 and S-4 was
 (18) actually to make a market observation
 (19) I'm a little gun shy after my recollection of Mr Tumeo
 (20) Your Honor ruled I believe appropriately he was going to
 (21) testify as to something within his knowledge and that that
 (22) is - that is the distinction I think that's at work here
 (23) If he were simply expressing a view of the value of his own
 (24) property that might be a little different but he was making a
 (25) market observation and that I believe is my objection
 (26) THE COURT I don't know what it was counsel and I'm
 (27) not going to resolve this question I - I draw a distinction
 (28) between Carlson and some of the other people here

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- (1) MR STOLL Your Honor one other final thing
 (2) THE COURT It's a distinction I think you draw too
 (3) counsel on some people who have worked for instance in the
 (4) Kenal office You're calling that a percipient witness and in
 (5) most areas I agree with you on that on that issue If it's
 (6) within - if it's simply describing the things they did as part
 (7) of their job then I think that you may very well avoid the
 (8) strict prohibition but each one of these witnesses is
 (9) different and Van Hancock he may be able to testify about how
 (10) his business was doing and how much - the volume of work he
 (11) did but he's - but unless you show me a real good reason for
 (12) it he's not going to be able to testify essentially an
 (13) opinion on the basis of everything I viewed in all my
 (14) experience I hereby find that the Kodiak land values didn't
 (15) decline That's probably the ruling for most of these
 (16) witnesses Now that's the problem I have to deal with these
 (17) witnesses each time they get up and each time the objection is
 (18) made but I'd certainly like to be a little bit consistent
 (19) MR DIAMOND And I'm - I'm going to avoid - I don't
 (20) want to walk into the locomotive I'm going to avoid asking
 (21) for grandiose opinions of that kind And I don't know that I
 (22) need to do that but I want these witnesses for the factual
 (23) opinions in any event but I do have an assessor who's going to
 (24) testify who's done studies I do have a guy from the Park
 (25) Service who - that's what his job was who made

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- (1) determinations part of his job I don't think they're
 (2) expert
 (3) But you know in response to one - one comment you made
 (4) there haven't been objections you're right there haven't been
 (5) a lot of objections But it - it's a little bit unfair to
 (6) stick us with that when there have been discussions on the
 (7) record as to what the ground rules are in the case and what the
 (8) ground rules had been before we got involved and what's fair
 (9) game and what's not fair game We bit our - bit our lips a
 (10) couple of times and we - Mr. Oppenheimer and I had many a
 (11) lengthy discussion about Professor Tumeo before he testified
 (12) Where can we intercede consistent with whatever agreements
 (13) have
 (14) been reached by our predecessors in interest and we did not
 (15) make certain objections that we - you were probably expecting
 (16) us to make but it's because this history has - I'm sorry
 (17) this litigation has a history that predates us and in fairness
 (18) to counsel on the other side we're not going to transgress
 (19) agreements that were made before but -
 (20) MR. STOLL No -
 (21) MR. DIAMOND - you know I understand Mr. Stoll
 (22) exudes anguish whenever this is discussed He was not party
 (23) to
 (24) these agreements either Mr. Petumenos was and I - if I'm
 (25) mischaracterizing it in any way I think Mr. Petumenos ought to
 (26) correct the record
 (27) THE COURT Can I tell you something? What you say

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- (1) right now is a classic example of memory revised by time and by
 (2) bias So to me neither one of you is going to give me the
 (3) definitive answer in this What you said prior to this time
 (4) though to the extent that it's inconsistent with what you say
 (5) today might very well influence me and you're on the record on
 (6) this issue both of you I believe are on the record on this
 (7) issue So am I You can show me all those things show me
 (8) that I should somehow relax a little bit with you which of
 (9) course I've been doing all the way through this trial because
 (10) I perceived that there was - there was unfairness in being -
 (11) in waiting for the plaintiffs case to be concluded and
 (12) running taking a strict analysis on this issue
 (13) But I still don't think it's unfair to you to let - to
 (14) limit you to only what you tell me you want to present which
 (15) is a fact witness and that's essentially the guideline that
 (16) I'm going to - I generally am going to provide for myself
 (17) unless you show me a good solid reason that I can say you've
 (18) made your point you've proved it I can't apply the rule
 (19) MR. DIAMOND I do have on my - posted to my wall
 (20) Mr. Petumenos words and I do have somewhere under my
 (21) computer Serdahely J's decision which I will bring to court
 (22) and I -
 (23) THE COURT I can look that one up counsel it's very
 (24) easy for me I read it every once in a while just to make sure
 (25) I didn't make any mistakes in that case

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- (1) MR. DIAMOND And I have - I have said what I want to
 (2) do is put these guys on the stand and have them testify to what
 (3) they know about the real estate markets in which they operate
 (4) and I recall when Mr. Stoll and I were discussing this I said
 (5) I don't care whether they're - you call them experts or
 (6) nonexperts If you want to call them experts that's what I
 (7) want to put on I want them to be able to talk about their
 (8) perception of the market in which they operate based on
 (9) information that they have Firsthand information that they
 (10) had
 (11) I have never said I don't want to present expert testimony
 (12) if you're going to call this expert testimony I think I've
 (13) been consistent in saying I don't think this is expert
 (14) testimony but if it is I ought to be able to put it on
 (15) anyway
 (16) MR. PETUMENOS May I address the Court?
 (17) THE COURT Yeah sure
 (18) MR. PETUMENOS As the one person who this didn't
 (19) predate as a person involved in the discussion in the first
 (20) instance - and this is really my first chance to address it
 (21) and it's my fault - what happened back then was the
 (22) following It became time for the parties to list expert
 (23) witnesses We were worried that there were witnesses like
 (24) archaeologists who were on the beaches that looked at things
 (25) and would be able to tell that it was an artifact or tell that

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- (1) there were artifacts around and when they would look at things
 (2) that they would get to - to understand whether they were on a
 (3) site for example We didn't end up calling anyone like that
 (4) because of the press of time and length of the trial so that
 (5) in an abundance of caution we put on the list in 1993 those
 (6) witnesses that were in that category so there would be no
 (7) surprise We were worried that there might be
 (8) Exxon then moved to strike the people from the list because
 (9) there was no report filed for them which was right because we
 (10) hadn't retained them as an expert All that happened Judge
 (11) Shortell is that when we went to the hearing to defend
 (12) ourselves against the motion to strike them from the list was
 (13) we explained what we were doing at which point Mr. Lynch
 (14) said
 (15) from Exxon oh well we're not putting any of our people on
 (16) the list that are like that so no problem That's all that
 (17) happened There was no side deal no agreement I simply
 (18) was
 (19) explaining to the Master who these people were on the list that
 (20) didn't have reports filed for them That's all that happened
 (21) So when it came to - that was the procedural context
 (22) within which this whole thing came up and I want to alert the
 (23) Court to another problem which I think is a more serious one
 (24) Mr. MacSwain who is one of the real estate experts for
 (25) Exxon I think is going to come into this court and do
 (26) something even worse than what we are asking the Court to
 (27) preclude with respect to the Rule 7 - the lay opinions which

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(1) is I think he is going to testify to a survey that he did in
 (2) which he called people up talked to them and they gave him
 (3) the opinion that there was no impact of the oil spill on the
 (4) market value So we re going to get people testifying to these
 (5) same opinions who talked to Mr MacSwain on the phone
 There

(6) is no survey documents there s no forms We have been
 (7) contacting some of these people to determine what it is they
 (8) actually said in the - some of the information diverges and I
 (9) would - I think we re going to have objections to that
 (10) testimony even more so -

(11) THE COURT I can handle those later counsel but
 (12) when you bring one of these things up at the tail end of a -
 (13) of a meeting like this it only confuses things Let s stick
 (14) to the issue

(15) MR PETUMENOS Well that s my presentation
 (16) MR DIAMOND That - his description is - of how the
 (17) present situation was reached is correct that s what he told
 (18) me when I asked him where did this come from And in fact
 (19) what he put on the record here which I took exception to the
 (20) first time which I believe came up in connection with
 (21) Professor Tumeo when he was first identified early on in
 (22) pretrial proceedings was as described when we re dealing with
 (23) a fact witness who has percipient information but also has
 (24) expertise through which to interpret that information the
 (25) individual would not be precluded from doing so simply
 because

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(1) he was not designated as an expert and that s the way we ve
 (2) dealt with real estate agents
 (3) They operate in the market they know what s listed they
 (4) know what the prices they re listed for they know what sells
 (5) If they formulate an opinion as to what s going on in the
 (6) market based on all those things it s no different than the
 (7) geomorphologist or the Professor Tumeo or the Mr Carlson or
 (8) anybody else who has factual information to present and then
 (9) uses his expertise to interpret it That s how we have been
 (10) operating

(11) MR PETUMENOS My only point is we did not make an
 (12) agreement to bend the Evidence Code or to make a contract
 that
 (13) anything other than Rule 701 and 702 applies in the normal
 (14) course We were trying to give disclosure as to who some of
 (15) the people were who that issue would be coming up with This
 (16) Court is free to apply the Evidence Code unfettered by any
 (17) agreement between the parties that I m aware of It was simply
 (18) a matter of disclosure in 1993 as to witnesses who we thought
 (19) had certain expertise who were out in the field looking at
 (20) things so that there would be no surprise There was no
 (21) attempt on our part to change the expert order or anything
 (22) else

(23) MR STOLL Your Honor there s one other point I d
 (24) like to make and that is the expert order that the Court
 (25) entered early on in the case Mr Homan who was the banker

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(1) who was designated as an expert by plaintiff - as opposed to
 (2) their banker - had his deposition taken ad nauseum He filed
 (3) a report His deposition was taken It wasn t a little
 (4) half page summary sheet of what happened It - Mr Carlson
 (5) issued a 60-page report His deposition was taken for I
 (6) believe seven days Every one of these people that we re
 (7) talking about here if they re permitted to come in - none of
 (8) their depositions have been taken they have not filed any
 (9) expert report at all I mean it s - it s a 701/702 issue
 (10) That s one issue But the second issue is the - the Court s
 (11) order on - on experts
 (12) MR OPPENHEIMER Just as a brief reply to that Your
 (13) Honor Mr Carlson s testimony on S-1 S-2 S-3 S-4 is not a
 (14) part of any of his reports That - that testimony - is not
 (15) MR STOLL Those are all comparables that he has -
 (16) MR OPPENHEIMER He never testified the - their
 (17) significance as an indicator of the market.
 (18) MR STOLL As part of the 60-page report.
 (19) THE COURT S-1 S-2 S-3 S-4 are in the report.
 (20) MR STOLL They re here in the report they re all -
 (21) excuse me they re all comparables He does a time - the way
 (22) this comes up is he has a time - time trend and so if the
 (23) transaction happened after March 23 1989 he has to - he does
 (24) an analysis to get it back to that time zone and he has the
 (25) same thing with sales that are preceding that. So he studies

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(1) all his comparables - and I put up those tables I don t know
 (2) if you recall that or not but at any rate he puts these - he
 (3) takes these comparables he takes them back Okay when
 he s
 (4) doing that two of those sales were pre-March 23 and two of
 (5) them were post March 23 and that s all in his - those are all
 (6) in his report and he -
 (7) MR OPPENHEIMER That is true S-1 S-2 S-3 S-4 -
 (8) MR STOLL They deposed him on the comparables
 (9) MR OPPENHEIMER He was asked if he had an opinion on
 (10) the oil spill effect on the market and in the courtroom
 (11) here - I m speaking without reviewing the transcript
 (12) recently - I believe the question he was asked very clearly
 (13) was to the effect that did he have an indication of affect of
 (14) value on the spill He pointed to S-1 S-2 S-3 S-4 an
 (15) opinion which I objected to I believe Now I m nervous Your
 (16) Honor I appear to have been off the mark on Tumeo my
 memory
 (17) was different than the actual ruling but I believe at that
 (18) point I approached the bench with this was an opinion that he
 (19) never expressed in his reports I called them reports They
 (20) weren t filed as reports in the case but - and I believe the
 (21) Court s response which was correct is that he s going to
 (22) observe the drop in the price he s going to observe what he
 (23) saw
 (24) And I believe two things about that One that that was
 (25) never disclosed as part of any report not in the sense that it

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(1) was attached to the oil spill which is the important part of
 (2) it And secondly I believe - again as I say I'm a little
 (3) hesitant - I believe that I did object to that and that the
 (4) Court's ruling was this is an observation that's within this
 (5) particular witness' factual - factual expertise to comment on
 (6) THE COURT Well and that sounds correct and it
 (7) doesn't sound inconsistent with what I've told you my
 (8) guidelines are
 (9) MR OPPENHEIMER It's not clear to me that it is I
 (10) was just responding - perhaps a response is unnecessary
 (11) THE COURT What I'm left with is what I said to you
 (12) 20 minutes ago which is if in fact we leave this hearing and
 (13) these one - one or more of these witnesses gets up and they
 (14) talk about factual matters and they are percipient witnesses
 (15) of course there's an objection to what they testify to is
 (16) going to be overruled If on the other hand they testify
 (17) what I consider to be clearly expert opinion then an objection
 (18) to what they say will be sustained
 (19) Now to the extent that that ham- - unduly hamstrings your
 (20) presentation I suppose the issue at that point is One did I
 (21) make a mistake and two do you want to argue it as to the
 (22) specific case and not the general proposition which you're
 (23) arguing here today? And the answer is of course you'll be
 (24) able to do that and I'll give you - I mean it's only fair I
 (25) think to - to determine whether or not I should relax in some

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(1) MR PETUMENOS Can I inquire of counsel through the
 (2) Court when Mr MacSwain - we're not going to get to him
 (3) tomorrow I don't believe
 (4) MR DIAMOND We hope to at least start him tomorrow
 (5) MR PETUMENOS The issue that the Judge says I'm
 (6) bringing up in the end of the afternoon late could -
 (7) THE COURT Could come up tomorrow afternoon
 (8) MR PETUMENOS Could come up tomorrow morning unless
 (9) you know that portion of it is not going to be addressed I
 (10) don't know Part of what was worrying me as I was sitting here
 (11) is we have in my view what I would consider to be a much
 (12) bigger issue than the one we've been discussing coming up
 (13) earlier It's very related
 (14) MR DIAMOND I'm surprised to hear this because my
 (15) witness Mr MacSwain talked to the same people that
 (16) Mr Petumenos' witness Dr Mundy talked to and was told in
 (17) many cases the same things and based his opinion on many of
 (18) those same things In many cases -
 (19) THE COURT There did seem to be a similarity of
 (20) presentation and objections in this side I mean it was sort
 (21) of bewildering to get motions to strike on one hearing from one
 (22) side and get motions to strike on the same theory from the
 (23) other side
 (24) MR DIAMOND Our predecessors at this table thought
 (25) symmetry was important and tit for tat was the guiding

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(1) Instances whether I should allow the line to be blurred or
 (2) whether I should allow expert testimony But what I'm telling
 (3) you now is it's unlikely I will allow flat out expert
 (4) testimony So they better be percipient witnesses
 (5) MR DIAMOND I think that that's fine and I
 (6) appreciate the guidance My head is swimming with
 (7) permutations
 (8) of where your distinction is going to begin to become difficult
 (9) in the application
 (10) THE COURT Probably when the witness takes the oath
 (11) MR DIAMOND But I - you know I appreciate the
 (12) guidance I'm going to endeavor to keep these factual to what
 (13) these people did what these people know from their own
 (14) personal experience You know I'll warn you that some of what
 (15) they did and some of what they know is in the nature of
 (16) inferences they draw from information that they deal with on a
 (17) daily basis or information that they collected for a - a
 (18) particular purpose as part of their job
 (19) THE COURT Well I'm not saying it's not going to be
 (20) difficult for me to deal with I can always give you
 (21) guidelines The problem is when I have to apply them it
 (22) becomes a little bit tougher but that's - but in one sense
 (23) it's tougher in another it's easier because at least I can
 (24) focus on the one witness Like for instance with Hancock I
 (25) mean I can - I can generally tell what part of his testimony
 (26) is expert and what part isn't So can you

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(1) principle
 (2) MR PETUMENOS I don't think I elicited Judge the
 (3) opinions of any survey respondents from Mr Mundy
 (4) MR DIAMOND I'm talking about Dr Mundy's
 (5) methodology What he based his opinion on was to a large
 (6) extent interviews
 (7) THE COURT Phone calls
 (8) MR DIAMOND And appraisers - and appraisers do
 (9) that
 (10) THE COURT Let's not talk about it anymore counsel
 (11) it's not going to be productive Could you relieve me of some
 (12) of this paper like for instance this transcript? In fact
 (13) Mr Oppenheimer you could probably -
 (14) MR OPPENHEIMER I could probably benefit from the
 (15) transcript
 (16) MR PETUMENOS We have one more issue that's not been
 (17) discussed at all
 (18) MR STOLL Your Honor on the cases the brief that
 (19) we wrote on the subject the last brief we wrote on this issue
 (20) was written by Mr Field I think it sort of summarizes it
 (21) pretty well
 (22) THE COURT That's - wait just a second Where am I
 (23) here? No this is - this is their supplemental right?
 (24) MR STOLL That's the defendants' right
 (25) THE COURT I've read the other one but I'll read

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- (1) this
 (2) MR STOLL Then we had a supplemental - we have one
 (3) that looks like this
 (4) THE COURT Yeah I have that one
 (5) MR STOLL You have that one?
 (6) THE COURT Back in the office
 (7) MR STOLL Okay I think the section Your Honor on
 (8) the present sense impression is - is -
 (9) THE COURT Yeah I remember that
 (10) MR OPPENHEIMER Your Honor I think we have one
 (11) other issue Mr Petumenos is correct to observe We have
 (12) Mr Roddewig coming up tomorrow and he has an exhibit in
 (13) connection with his testimony that I'd like to - maybe if I
 (14) show Your Honor this has to do with the market for these -
 (15) what has been characterized as natural lands Is this right?
 (16) This is the one you're - right?
 (17) MR PETUMENOS Uh huh
 (18) MR OPPENHEIMER And he's prepared an exhibit Your
 (19) Honor which we've identified as 10478A and I'll give you my
 (20) copy What this reflects are transactions before and after the
 (21) spill by public entities and if Your Honor will look at the
 (22) two huge bars after the spill those are respectfully Kachemak
 (23) and I believe it's Seal Bay in the Kodiak area
 (24) I went back to the transcript because I had - I guess I
 (25) earlier had - when this came up I had observed that I

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- (1) believed that there were two reasons why we wanted to get into
 (2) this and that the door had been opened on - on the direct
 (3) case
 (4) The two reasons again are that there is - there's evidence
 (5) there of large purchases subsequent to the spill of oiled
 (6) property But more importantly to the extent that there is
 (7) a - a market that the government actually participates in and
 (8) that that is a part of Mr Mundy's viewpoint that there is
 (9) a - that there is a special market a premium market for these
 (10) lands where they have a higher acreage value That the great
 (11) irony here is that that market doesn't really exist for the
 (12) decade surrounding the oil spill but for the - the infusion
 (13) of - of settlement funds
 (14) Those purchases were both settlement purchases And I had
 (15) observed that Mr Mundy had used these very purchases these
 (16) settlement purchases in his work to determine both that there
 (17) was this - this natural land premium and to calculate it And
 (18) this is - this will be rare this afternoon that I can actually
 (19) give you some transcript but if you'd like to I've identified
 (20) from Mr Mundy's July 18 testimony where he walks through
 (21) this
 (22) THE COURT Yeah let me see it
 (23) MR OPPENHEIMER Yes I would suggest starting at
 (24) the - on the other side of the arrow here at page - volume
 (25) 17 page 2714 Let's turn to the natural lands analysis

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- (1) THE COURT Okay Is this on direct?
 (2) MR OPPENHEIMER That's correct, Your Honor
 (3) THE COURT All right now tell me something
 (4) counsel The two settlement fund purchases one is Kachemak
 (5) Bay right?
 (6) MR OPPENHEIMER That's correct the 23 000 acreage
 (7) THE COURT And the other is Afognak Island Seal
 (8) Bay
 (9) MR OPPENHEIMER Correct that's the 42 000 figure
 (10) THE COURT And Dr Mundy testified that these were
 (11) acquisition that he used to do what?
 (12) MR OPPENHEIMER To do two things to establish the
 (13) market and to help him determine his price If you use the
 (14) natural lands approach you get closer to \$1 000 an acre If
 (15) you use a low amenity value which was his fallback you get
 (16) closer to \$500 an acre
 (17) THE COURT And Dr Mundy testified that the seller -
 (18) this is a quote the seller was the Seldovia Native
 (19) Corporation the buyer was the Trustee Council so it was the
 (20) State and the oil Trustees both jointly purchased this
 (21) property
 (22) MR OPPENHEIMER Right even if he hadn't said that I
 (23) would argue that the fact that he uses these two large sales as
 (24) comps and as evidence that there's this market for this type of
 (25) land creates this - this strange dilemma for us because we

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- (1) wish to - our expert believes that - that these sales are not
 (2) indicative of the market that preexisted the oil spill It is
 (3) ironic that it is the oil spill that created the capacity for
 (4) the purchases to be made now
 (5) Mr Petumenos yesterday made the observation that these are
 (6) political acts these purchases that - and that - that is
 (7) true actually That's a - that's an observation that could
 (8) be made about this government purchasing activity but it
 (9) doesn't change the fact that those two purchases were made
 (10) and
 (11) It doesn't change the fact I don't think that we ought to be
 (12) able to repute the notion either that the price for this type
 (13) of land or this existence of this type of market when it's
 (14) based on evidence including those two sales can't be
 (15) explained
 (16) for what it is
 (17) It clearly I think at least as I read it there is quite
 (18) an anomalous situation Those are huge purchases relative to
 (19) the prior history of land transactions in this area and from
 (20) an economist's and real estate market analyst's point of
 (21) view - I say economist only because that's my background -
 (22) those transactions beg for an explanation because they just -
 (23) they go off the chart And they're in and they're part of
 (24) Mr Mundy's analysis of his natural lands and a part of his
 (25) setting the price at the high end of the acreage value for the
 (26) natural lands
 (27) THE COURT All right counsel

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- (1) MR PETUMENOS Thank you Judge Could I see the
 (2) exhibit for just a minute the -
 (3) THE COURT You mean the transcript?
 (4) MR PETUMENOS No just the exhibit would be fine
 (5) thanks
 (6) THE COURT Sure
 (7) MR PETUMENOS There is an interesting thing going on
 (8) here Mr - Dr Mundy contended as do many other
 appraisers
 (9) that there is a market for natural land in terms of government
 (10) purchases for years and years before the spill before the last
 (11) two transactions ever took place
 (12) He wrote an article in the Appraisal Institute
 (13) Mr Roddewig wrote one back as we'll hear tomorrow in the
 (14) Appraisal Institute debating this issue of whether there is a
 (15) market whether the government's purchases of Native
 (16) corporation land and the Nature Conservancy and all these
 (17) things that have been going on for years constitute a market
 (18) That issue of whether there is a market for - for this land
 (19) has been going on in this case and in the reports for a long
 (20) time
 (21) These last two sales don't change that debate or that
 (22) issue They're just the next two occasions upon which the
 (23) government has bought land
 (24) THE COURT Well hang on just a minute The two
 (25) sales the subsequent sales are a fact right?

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- (1) MR PETUMENOS They are a fact
 (2) THE COURT And they're a fact that you say helps
 (3) establish the proposition that there is a market for natural
 (4) lands right?
 (5) MR PETUMENOS They are a fact that establishes there
 (6) is a market for natural lands because the government bought
 (7) them as they have been doing for ten years
 (8) THE COURT Right right
 (9) MR PETUMENOS And the other way in which the - the
 (10) sales have been used were just as essentially sales comps to
 (11) show how much the government pays for that land They pay
 you
 (12) know the government the fact that the money is coming from
 (13) Exxon doesn't make a difference in terms of what the negotiated
 (14) price is over time That is just the source of the money The
 (15) sales that were described by Dr Mundy - and there are more of
 (16) them here - I think that in this particular expert's theory
 (17) there are a number of them that he excludes from this graph
 (18) because he has a theory that certain of them should not be
 (19) considered He doesn't want to consider exchanges under
 ANCSA
 (20) for example He doesn't want to consider other things because
 (21) he has a particular theory that says they shouldn't be
 (22) considered or this graph might have a lot more bars on it
 (23) pre-spill - or pre Trustee In any event
 (24) Those prices that are obtained are the result of a
 (25) negotiated event between the governments and the Native

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- (1) corporations and it's no different than these last two
 (2) transactions than it ever is in terms of how those prices are
 (3) arrived at and the fact that they are arrived at and for what
 (4) amount
 (5) So the use that was made of these in the direct
 (6) examination which I think you will see was a fairly brief
 (7) exchange in the direct examination was for the purpose of
 (8) stating the government buys this land They continue to buy
 (9) land There is nothing in the Trustees Council that requires
 (10) them to use the land for that purpose
 (11) That was one of the many options that they had to restore
 (12) the area It was an idea someone had come up with and just
 (13) like there are congressional appropriations that have done the
 (14) same thing over a number of years that Mr Roddewig doesn't
 (15) want to concede exist and the debate that we're having here
 (16) Mr Roddewig doesn't believe that you get to use these And I
 (17) haven't presented a graph like this to show that there's these
 (18) two gigantic leaps in time I've simply indicated in the
 (19) direct that there were two additional purchases from the
 (20) government just as there were many purchases before from the
 (21) government and what Exxon's seeking to do here
 (22) THE COURT Well it was two out of five or six
 (23) right?
 (24) MR PETUMENOS Oh no it was more than that
 (25) MR OPPENHEIMER It was nine I believe the subject

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- (1) at that point in the testimony was about nine The 23 000-acre
 (2) figure for Kachemak was clearly the largest reference made in
 (3) the testimony
 (4) MR PETUMENOS There's a 42 000-acre figure here
 (5) MR OPPENHEIMER Yeah but that's the second
 (6) government sale which is mentioned but the figure isn't given
 (7) MR PETUMENOS Right that was my point
 (8) MR OPPENHEIMER I'm sorry I'll sit down
 (9) MR PETUMENOS And I've lost my train of thought
 (10) here
 (11) THE COURT I guess there were nine Were there nine
 (12) transactions total?
 (13) MR OPPENHEIMER I think it was nine
 (14) MR PETUMENOS In the course of the examination of
 (15) Mr Roddewig one would be able to establish that those are the
 (16) nine that Dr Mundy thought were important for sales comp
 (17) purposes for the appraisal but there are more than that in
 (18) terms of the amount of transactions between government and
 (19) private interests
 (20) THE COURT I'm a little confused counsel What are
 (21) you trying to get me to keep out?
 (22) MR PETUMENOS This and the reference to the fact
 (23) that the Exxon Valdez oil spill resulted in there being money
 (24) available I think the way this is going to be used in an
 (25) impermissible way is we have increased your land value
 because

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- (1) we have created a pot of money by spilling out and creating a
 (2) fine that has made your land more valuable because now
 there s
 (3) people running around trying to buy it I think that s -
 (4) THE COURT I get you I understand what you re
 (5) saying Is that true?
 (6) MR OPPENHEIMER That s part of it Your Honor
 (7) because you - it is not irrelevant to the analysis of this
 (8) essentially governmental market What - how much land is
 (9) already owned in The State how many - you know what kind of
 (10) funding is available and you know we - we might - we might
 (11) be having a different conversation here if Mr Mundy didn t so
 (12) clearly rely upon these transactions
 (13) I mean If - if the world ended for both sides at those -
 (14) before those last two bars you know I - there might be a way
 (15) to just artificially cut off the analysis for both sides But
 (16) both in his - I mean buried inherent in his method because
 (17) he prices the land using those comps and inherent in their
 (18) testimony that you know these transactions occurred some
 big
 (19) ones the biggest one they mentioned to the jury was
 Kachemak
 (20) I think we have a right to express a view that we held long
 (21) before the direct testimony that these - these purchases are
 (22) not characteristic of the market before the oil spill
 (23) THE COURT Okay I understand you
 (24) MR PETUMENOS My response to that is - and I
 (25) understand Mr Oppenheimer s point too My response to that

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- (1) is there are many occasions where evidence which can - which
 (2) is the subject of a motion in limine can be put to some use in
 (3) the course of a trial I faced one of them this morning which
 (4) I came to the bench about relating to the fact that
 (5) everybody s suing one another
 (6) Exxon put into evidence this morning through Mr Teal that
 (7) everything was hunky-dory between the government and
 Exxon
 (8) They all cooperated greatly I believe the facts to be that
 (9) attorneys were affecting that process tremendously that Exxon
 (10) was under criminal investigation at the time that was all going
 (11) on that the State of Alaska had prepared and did file a
 (12) lawsuit that the Chugach Alaska Corporation and the fishermen
 (13) did file a lawsuit against Exxon and there was a lot of
 (14) dancing and maneuvering and posturing that affected that
 whole
 (15) process
 (16) The Court told me that there was an order in limine that I
 (17) acted at my peril It worried me You didn t hear the cross
 (18) because whenever we have an order in limine it is going to be
 (19) the case that there s other proof that is foregone In this
 (20) instance Exxon put on evidence that everything was
 hunky dory
 (21) and there was some evidence that we could put on suggesting
 (22) that the Coast Guard Commandant for example or the Admiral
 (23) was in a position to either accept what Exxon was doing or face
 (24) the un - unattractive prospect of trying to take over a spill
 (25) with tremendous logistics himself and maybe his negotiating

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- (1) hand wasn t quite so - quite so great But that would have
 (2) put into evidence Exxon s wealth and anytime we have an order
 (3) in limine like this there s a prejudice probative issue that
 (4) has to be reached
 (5) If what I m hearing is that they want to prove that there
 (6) is a market now because we spilled oil on you and we paid a
 (7) criminal fine and you - in a civil settlement and you should
 (8) be happy that that occurred and we ve increased the value of
 (9) your land they do that at the expense of this jury hearing
 (10) that Exxon s paid enough that there s this huge pot of money
 (11) out there that there s no need to - to pay these Native
 (12) corporations because they ve been paid in other ways than the
 (13) land damage because the money s available for them to sell
 (14) their lands and that is what I think the orders in limine go
 (15) to
 (16) So there s a confusion of issues prejudice/probative
 (17) value I don t think there s much probative in telling the
 (18) jury what the source for the money was of these last two
 (19) purchases of many after the oil spill compare to the confusion
 (20) prejudice that will result when the jury says oh well it s
 (21) good for the Native corporations that Exxon spilled the oil and
 (22) gave them money
 (23) THE COURT The - tell me if I m right about this in
 (24) your view both of you counsel and Mr Oppenheimer first
 (25) Dr Mundy testified as to - that there s a market for

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- (1) natural lands which is selling for about 850 an acre to around
 (2) \$1300 an acre right? Is that right?
 (3) MR OPPENHEIMER I believe that s correct.
 (4) THE COURT And the reason he thought there was a
 (5) market at those levels was because of the sales before the oil
 (6) spill and the two sales after right? Am I right about that or
 (7) not?
 (8) MR OPPENHEIMER I believe so He may have had more
 (9) than two sales but I believe that s correct.
 (10) THE COURT Well I thought these two -
 (11) MR OPPENHEIMER They were included
 (12) THE COURT Including these two sales?
 (13) MR OPPENHEIMER Correct
 (14) THE COURT He said there was a market. He said these
 (15) sales were involved in the market and in fact he said these
 (16) sales had an influence on the market value right?
 (17) MR OPPENHEIMER I believe that s correct
 (18) THE COURT Isn t that right Mr Petumenos? I m
 (19) sorry lost you
 (20) MR PETUMENOS Again I think that s right. But I
 (21) think that it is one of a number of comparables I don t think
 (22) he mentioned Seal Bay at all as a comparable He didn t use it
 (23) as a sales comp I don t believe
 (24) MR OPPENHEIMER He mentioned it
 (25) MR PETUMENOS I understand he mentioned it but he

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(1) doesn't use it as a sales comp for determining value and the
 (2) reason for that is the transaction didn't close until after the
 (3) reports were written and it was therefore not used. The
 (4) question is the probative value of this one sale used as a
 (5) comparable and this mention of these sales as one of many
 (6) before and after the oil spill that they come from this Exxon
 (7) Trustee fund for which there was no guarantee that this money
 (8) was going to be used to buy property at the time that it came
 (9) in versus the prejudice that I've just described.
 (10) So as I said to the Court, I understand Mr. Oppenheimer's
 (11) point. It's not without merit. There's not without some
 (12) marginal proof that he could create but as always with a motion
 (13) and order in limine, there's a prejudice/probative balancing to
 (14) be undergone.
 (15) Pretty soon the plaintiffs are in a position of having had
 (16) the order so eroded from the way the trial is going on that it
 (17) begins to worry us as to whether you know it's out. We've
 (18) heard - I still wish to defend the order because I think it -
 (19) I think it's right but if the Court will recall we had the
 (20) issue of the scientists who compete for money and so forth
 (21) but we've always been careful about that.
 (22) This careful to limit it careful to how we presented it
 (23) to the jury and we were surgical in our attempts. This is
 (24) talking about stating that there's this - apparently this huge
 (25) fund of money out there even apparently beyond these two

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(1) sales but potentially others that haven't happened yet. Now
 (2) giving the jury the impression that there is some enormous pot
 (3) of money out there and now the confusion and the prejudice
 (4) which the order is designed to protect is becoming very much I
 (5) think to the forward.
 (6) MR. STOLL: Your Honor, my silence. I want to make it
 (7) clear that Kodiak joins in this position.
 (8) THE COURT: Okay.
 (9) MR. STOLL: And actually we feel even stronger about
 (10) it because we're sort of unwittingly in the middle of this
 (11) thing. I mean not in the middle, we're clearly on the side of
 (12) the Native corporations on this issue but we haven't offered
 (13) any evidence whatsoever dealing with any settlement or
 (14) settlement funds or anything and it suddenly is coming out
 (15) here that everybody should be thankful to Exxon because they
 (16) had to pay a fine and make a civil settlement with the State
 (17) and it's far - I think the probative value is - is nil.
 (18) There is some possibility that some of this money could be used
 (19) to acquire some property at some time in the future. We don't
 (20) know - you know I just think it's very - it's highly
 (21) prejudicial and very, very thin probative -
 (22) THE COURT: Okay, thank you, counsel. Is there
 (23) anything else?
 (24) MR. OPPENHEIMER: Unless the Court wishes, no. Your
 (25) Honor, I just obviously strongly disagree with the probative

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(1) issue. And if it would be useful, I'd be happy to go into more
 (2) detail but I think I've made the points -
 (3) THE COURT: I think that maybe it's - I hate to do
 (4) this because I do this frequently and I know we get lost but
 (5) the fact is I think I have to hear the testimony of the
 (6) witness so I - what I'm going to say to you is don't elicit
 (7) the testimony regarding these two sales or the witness
 (8) analysis until I have an opportunity to hear what he has to
 (9) say.
 (10) MR. OPPENHEIMER: Your Honor, the only - I'm trying
 (11) to figure out how I would actually do that with Mr. Roddewig.
 (12) His - my options with him are to instruct him not to discuss
 (13) anything past '92 which is when these sales pop up.
 (14) THE COURT: Well, I think the only question, counsel,
 (15) is: Are you going to go with him for an hour before you hit
 (16) that point?
 (17) MR. OPPENHEIMER: That's entirely possible.
 (18) THE COURT: Well, that's what I was thinking is at
 (19) the first break I could hear him out of the presence of the
 (20) jury and determine what I do. To me, this is a legitimate
 (21) issue. It's one of those factual decisions the jury will be
 (22) called upon to make. They have to know - I can't keep
 (23) evidence of the market or lack of it from them because it's -
 (24) it's a critical issue in the case. I may be able to say there
 (25) are certain aspects of this evidence that are unfairly

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(1) prejudicial because that's the - that's the real analysis
 (2) under Rule 403. Prejudice is not bad, prejudice is good.
 (3) Sometimes it simply means that a party is presenting highly
 (4) probative evidence.
 (5) But to the extent that it becomes unfairly prejudicial and
 (6) perhaps simply is a suggestion that Exxon is a wonderful
 (7) organization that simply showers money on people and
 (8) therefore it shouldn't have to pay compensatory damages as
 (9) opposed to punitive damages that may be - the evidence may
 (10) be
 (11) unfair in that particular aspect. And I'm not saying it is.
 (12) I'm only saying that's the argument. But I'd have to hear what
 (13) the evidence is. It might be relevant - when it comes out it
 (14) might be less prejudicial than the plaintiffs think it is and
 (15) less probative than the defendants think it is. But I'll hear
 (16) it and then I'll tell you what I'll do with it.
 (17) You know the easy way would be simply to say don't say
 (18) anything about Exxon, don't say anything about settlement
 (19) moneys but I don't think that's fair for me to do at this
 (20) point.
 (21) MR. OPPENHEIMER: Yes, and it would - it would make
 (22) it - it would transform these two events into something other
 (23) than what the expert thinks they are so it would be - it
 (24) would be hard for him - he wouldn't know what to say about
 (25) them.
 (26) THE COURT: Oh, I think he'd probably figure out

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- (1) something counsel Experts are pretty good at that
 (2) MR OPPENHEIMER Well except that he s currently -
 (3) he s currently instructed to say very clearly nothing one way
 (4) or the other or to intimate in the slightest anything about
 (5) that settlement fund So one thing he will not do coming from
 (6) both you and I is say anything about that Does Your Honor
 (7) wish he would testify up to the point before I would approach
 (8) the bench and see whether the testimony can go forward?
 (9) THE COURT I do if it s within the first hour If
 (10) it s not I d like to take it up at the first break We ll
 (11) just take it up
 (12) MR OPPENHEIMER We ll try to time it just that way
 (13) THE COURT If you don t do that that s fine we can
 (14) still take a break I ll hear it then and give you a ruling
 (15) okay?
 (16) MR OPPENHEIMER I understand
 (17) THE COURT Is there anything else we ve left undone
 (18) today except for the - the representative admission problem?
 (19) MR DIAMOND If you re going to bring that up bring
 (20) it up now
 (21) MR STOLL Your Honor there s -
 (22) THE COURT You mean there s something else? I should
 (23) never ask those questions should I?
 (24) MR STOLL This is not the first witness this is the
 (25) second witness tomorrow There s a video -

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- (1) THE CLERK Off the record a minute
 (2) THE COURT Just a second off the record
 (3) (Off the record to change tape)
 (4) THE CLERK On record
 (5) MR STOLL There is a videotape that Exxon wishes to
 (6) put on with Mr MacSwain who is the second witness I don t
 (7) know for sure that we re going to get to him tomorrow but
 (8) maybe And there is a voice-over on the videotape and we
 (9) object to the voice-over They can ask him maybe some of the
 (10) same questions that are on the - on the narrative
 (11) THE COURT Who s the voice? Him?
 (12) MR DIAMOND Him
 (13) THE COURT Okay
 (14) MR STOLL Anyhow that s the -
 (15) THE COURT What is it that s so objectionable about
 (16) the voice-over?
 (17) MR STOLL Well the objection is that the - you
 (18) can t separate one - you can t separate - there s no
 (19) question It s the problem that they asked - this is not a
 (20) narrative where he says I m looking at this piece of property
 (21) or that piece of property He s making a statement this
 (22) property was lightly oiled this property was clean this
 (23) property is fine you know - I mean making all kinds of
 (24) commentary and if that is - I don t think that there is -
 (25) there may be foundational objections to it I mean this

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- (1) witness to my knowledge had not gone to many of these sites
 (2) or any of these sites that I know of but whatever - you know
 (3) I don t know what the basis we re not in a position to know
 (4) what - we want one question at a time We can t do it when
 (5) we ve got a narrative film there
 (6) The second thing is is that the - the film if it s in
 (7) evidence they re going to offer this and put it in evidence
 (8) goes into the jury room we don t have an opportunity to
 (9) cross examine it and it s hearsay
 (10) THE COURT Okay thank you
 (11) MR DIAMOND Your Honor this is a very simple
 (12) introductory videotape dealing with their parcels of property
 (13) where they re located distance from place to place
 (14) population how many people live here how many people live
 (15) there This is a view of this this is a view of that.
 (16) The reason I did it and this is not a surprise to counsel
 (17) because this was discussed with you when I asked whether I
 had
 (18) an obligation to turn over to narrative track prior to trial
 (19) and was told I did I have managed to put in an hour of
 (20) testimony in 12 minutes It is very succinct. It s very
 (21) short With these witnesses when you put on a videotape and
 (22) you have them try to narrate it it s start stop start
 (23) stop This is a very good way to get a lot of information
 (24) just basic information which is noncontroversial over very
 (25) quickly very efficiently

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- (1) As to the objection which seems to be - it calls for a
 (2) narrative The reason people object to narratives is that they
 (3) can t object to what s coming Counsel has had this videotape
 (4) for over a month They know exactly what s coming They -
 (5) they have the script There s nothing objectionable in the
 (6) tape
 (7) The - if there was something objectionable I had invited
 (8) counsel to tell me so that we could - we could cut out
 (9) whatever was objectionable and make sure that this was simply
 (10) basic introductory material and - and although he s had it for
 (11) over a month this is the first - this morning was the first
 (12) word I ever had that there was any problem with it Yet I
 (13) still - I don t hear any problems as to what s wrong with what
 (14) the witness is saying
 (15) Beyond that they put in a videotape of Mr Costello from
 (16) Tatitlek narrating on the tape the videotape and there was no
 (17) objection raised to that We had it in advance We had
 (18) reviewed it We knew what Mr Costello said on the
 (19) videotape - I m at a loss with Mr Stoll on this point
 (20) because I just - I don t see any basis for this It is simply
 (21) an attempt to be efficient and that s all I have to say
 (22) THE COURT Thank you
 (23) MR STOLL Well Your Honor if the - if the witness
 (24) was simply saying on the tape this is this piece of property
 (25) this is that piece of property I d have no problem with that

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- (1) That s not all that the person is saying on the tape and
 (2) that s - that s the basis of it
 (3) As to the fact that we ve had this for a month we have had
 (4) a lot of videotapes for a month many many many hundreds of
 (5) hours of videotape We have had thousands literally
 thousands
 (6) of exhibits that they have produced and said that they are
 (7) marked as trial exhibits We have had 150 deposition
 (8) designations that they have told us they were going to use at
 (9) trial and now maybe they re going to use ten I don t know
 (10) what they re going to use I mean it is - the - the needle
 (11) in the haystack and we - we - we unfortunately have not had
 (12) the luxury of having an Army back somewhere here or Los
 Angeles
 (13) to review all this stuff and then figure out you know what of
 (14) all this stuff may be objectionable and what may not
 (15) I m sorry that we didn t focus in on this until we got on
 (16) Friday their designation and found out exactly what exhibits
 (17) they intended to use with this witness but the fact of the
 (18) matter is it s still objectionable
 (19) THE COURT Thank you counsel
 (20) Mr Diamond I m going to save you the emotion I m going
 (21) to tell you you can use this with the voice-over If I
 (22) could - one specific thing that - in this 12-minute narrative
 (23) from Mr Stoll that caused me to think that there was
 (24) inadmissible material on that tape It would be different but
 (25) it s all general commentary about what problems there might be

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- (1) with this evidence I m not going to refuse to let you use
 (2) it I m going to give you the - the - the benefit of the
 (3) doubt here because certainly I d like to reward efficiency in
 (4) this case of all cases
 (5) Now what is this about that voice over anything specific
 (6) counsel you can tell me that shouldn t come in?
 (7) MR STOLL Well about whether the property is oiled
 (8) or not oiled
 (9) THE COURT Suppose the witness got up and he said on
 (10) the tape he pointed to it with his pointer that Mr Diamond
 (11) gave him and said this property was lightly oiled what would
 (12) you do then?
 (13) MR STOLL I d subsequently have - find out what the
 (14) basis of his knowledge was on that and it may be
 (15) objectionable
 (16) THE COURT And you cross-examine him and you re going
 (17) to have every opportunity to do that Right? No matter
 (18) whether the narrative s played or whether he memorized it over
 (19) the evening and says exactly the same things in the tape
 (20) MR STOLL Your Honor I suppose it would be more
 (21) efficient for us to put our expert reports in and not have the
 (22) experts -
 (23) MR PETUMENOS Judge we ll live with this We ll
 (24) live with this
 (25) THE COURT Yes counsel I wouldn t get too far out

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- (1) on that limb because as far as I m concerned that would be
 (2) fine with me Put your expert reports in that s no threat to
 (3) me
 (4) MR PETUMENOS That s the way the British do it sir
 (5) THE COURT Probably wouldn t take 16 or 17 hours
 (6) MR STOLL I haven t put any witness on for 16 or 17
 (7) hours
 (8) THE COURT But as I recall counsel there was a
 (9) representation that cross-examinations would be - I ve been
 (10) waiting for this - would be 45 minutes long Name one
 (11) MR STOLL I can I can name two today Both the
 (12) ones I did
 (13) MR DIAMOND Your Honor we - we produced a set of
 (14) videotapes to be used for trial They re finite In fact,
 (15) they re quite - quite few in number There are some that will
 (16) be used with witnesses next week for the same reasons and
 (17) concerning the same kind of basic information we put voice
 (18) track on them I would ask Mr Stoll or Mr Petumenos one or
 (19) the other to look at those If there are - if they think
 (20) there s any objectionable material in the narrative please let
 (21) me know at least 72 hours in advance We will then - we will
 (22) undertake to reedit it
 (23) MR PETUMENOS We ll do it
 (24) MR DIAMOND Our problem is we can t do it the night
 (25) before if they raise problems

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- (1) MR PETUMENOS We ll do it We ll do it
 (2) THE COURT All right I appreciate that counsel
 (3) Tell me something how many more witnesses do we have?
 (4) MR DIAMOND How much more time do we have?
 (5) THE COURT About a week
 (6) MR DIAMOND Yeah we probably have two weeks worth
 (7) of witnesses This has not gone as fast as I anticipated
 (8) We re a day and a half behind our own internal schedule and
 (9) when we started we had slated this for -
 (10) MR OPPENHEIMER We thought we d be through with
 (11) Mr Roddewig today at least - or certainly we d started him
 (12) MR DIAMOND We initially tried to timeline this and
 (13) came up with I think 17 trial days when I gave you the three to
 (14) four week estimate We re going to try to cut back but I
 (15) think we re still two weeks away
 (16) THE COURT Two weeks doesn t bother me I was - I m
 (17) worried that it s going to be worse than that You think that
 (18) there s a relatively good chance you could finish in two
 (19) weeks?
 (20) MR DIAMOND We had - the balance of this week the
 (21) week after and I think through Wednesday of the following week
 (22) is what we plotted out
 (23) THE COURT Fine I can certainly live with that
 (24) MR DIAMOND But we are I think we re about a day
 (25) and a half behind schedule

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- (1) MR PETUMENOS Judge I need one additional late
 (2) filed exhibit for Mr. Roddewig tomorrow that I would normally
 (3) get the backup for - the exhibit that you ordered to be
 (4) produced yesterday was in fact served on me 10 00 this
 morning
 (5) in court and it's a computer printout with a lot of figures on
 (6) it I was - I am not able to designate my - my cross exhibit
 (7) for that document -
 (8) THE COURT What is that document?
 (9) MR PETUMENOS It was the - it was the rebuttal to
 (10) the Mundy exhibit and I had stated that it wasn't in the report
 (11) and I had moved to exclude it yesterday morning because it
 was
 (12) not reported on and you ruled that testimony and the deposition
 (13) that said he had disagreements with the Mundy report and so
 (14) forth and this had to do with what percentage of his
 (15) calculations are this and that that were in the exhibit I
 (16) moved to exclude it You denied that motion but ordered Exxon
 (17) to have the material to me by four - not by 4 30 you said
 (18) but sometime by the close of business yesterday
 (19) THE COURT Yes that's right
 (20) MR OPPENHEIMER No that was a different - I
 (21) believe that was a different document I believe that was a
 (22) conversation where -
 (23) MR PETUMENOS No no I've got the document It's
 (24) the backup for that -
 (25) MR OPPENHEIMER I understand what the document is

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- (1) Wasn't there another document that was delivered before the
 (2) close of business yesterday?
 (3) MR PETUMENOS No we got it 10 00 this morning
 (4) MR OPPENHEIMER I know and if I had - I've either
 (5) misunderstood what was said yesterday or thought it pertained
 (6) to another document I thought you were entitled to it We
 (7) got it to you as soon as we could but if I thought you were to
 (8) get it -
 (9) MR PETUMENOS I understand We were fortunate
 (10) Mr. Roddewig didn't testify today I would have been in real
 (11) trouble if they'd served it to me in the middle of the direct
 (12) But I can't create a document in time to serve on them I
 (13) haven't looked at it
 (14) THE COURT Create a document you mean a list of
 (15) those things you're going to use in connection with that
 (16) exhibit?
 (17) MR PETUMENOS To cross on yes Normally we'd
 (18) serve the cross exhibits the day before I can't do it I
 (19) haven't even seen it yet I went from court today - got it at
 (20) ten went from court today had lunch we had a meeting I
 came
 (21) here And so I haven't had a chance to look at it Normally
 (22) we get three documents which I've used up not to - and I just
 (23) want one more that's all for the late production That's my
 (24) request
 (25) THE COURT One more undisclosed document?

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- (1) MR PETUMENOS Right
 (2) MR DIAMOND Which is now disclosed
 (3) MR OPPENHEIMER No no you're both talking - as I
 (4) understand what Mr. Petumenos is saying -
 (5) THE COURT You got it From three to four is not a
 (6) major -
 (7) MR OPPENHEIMER I'm not arguing Your Honor but
 (8) just so the record is clear because I'm sensitive to these
 (9) sorts of deadlines the 4 30 or close of business deadline was
 (10) with respect to the scripts We did everything we could to get
 (11) you the data At ten this morning was as soon as we could
 (12) MR PETUMENOS Mr. Oppenheimer I'm not complaining
 (13) I understand I just need time to respond
 (14) THE COURT That's fine I find there's no sin been
 (15) committed here that I can see
 (16) MR PETUMENOS I need just three or four minutes on a
 (17) personal matter with the Court in chambers either tonight or
 (18) tomorrow
 (19) THE COURT I was wondering about that I thought you
 (20) were going to come earlier Three four minutes? I think you
 (21) better know something I can cause consternation I'm
 beginning
 (22) to enjoy these sessions which suggests there's something
 wrong
 (23) with me so we shouldn't have too many more of them because
 I'm
 (24) going to do something really wrong
 (25) THE CLERK Please rise This court stands in

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- (1) recess
 (2) (Recess at 5 45 p m)

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- (1) STATE OF ALASKA)
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5-10-97

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UNIQUE WORDS 1,502

TOTAL OCCURRENCES 4,797

NOISE WORDS 385

TOTAL WORDS IN FILE

15,420

SINGLE FILE CONCORDANCE

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OCCURRENCES

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No JAN 89 2333 Civil
) Anchorage Alaska
 (3) The EXXON VALDEZ) Wednesday August 17 1994
) 8 36 a m
 (6))
 (8) VOLUME 38 Pages 5939 through 6103
 (10) TRANSCRIPT Or PROCEEDINGS (Continued)
 (11) TRIAL BY JURY -
 (12) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
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(1) PROCEEDINGS
 (2) THE CLERK Please rise
 (3) (Call to Order of the Court)
 (4) THE CLERK Please be seated
 (5) MR. DIAMOND Your Honor perhaps I should move over
 (6) to this side and provide some balance because I don't think we
 (7) have plaintiffs counsel here yet
 (8) THE COURT Fair enough Move them in
 (9) MS. SMITH Your Honor thank you for coming out The
 (10) court reporter tells me that unless we put them on the record
 (11) one by one the letter doesn't work for them that's why we're
 (12) moving them in
 (13) THE COURT Oh all right
 (14) MS. SMITH The following exhibits have been admitted
 (15) by the Court from the Gilfillan direct DX13242 DX9398
 (16) DX13205A 1 DX13205A 2 DX3213AA 48 DX3213AA 49
 (17) DX3213AA 50 DX3213AA 51 DX3213AA 8 DX13298 22 Then
 the
 (18) 1994 Passage Point critter pictures which are all DX13298 so
 (19) it's DX13298 17 18 21 2 3 4 5 19 11 13 9 1
 (20) 15 14 7 12 10 16 DX13299 DX1074AA DX14003 3
 (21) DX14403 4 DX1077AA DX13300 1 And the 1994 Northwest
 Bay
 (22) critter pictures which are all DX13300 something So we have
 (23) 6 9 25 28 30 17 5 16 32 35 24 21 19
 (24) 20 33 34 22 23 7 3 15 27 26 11 DX0661AA
 (25) DX0662AA DX0663AA DX8940 DX13250 and DX13207

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(1) That's it Thank you very much
 (2) (Exhibit DX13242 DX9398 DX13205A 1 DX13205A 2
 (3) DX3213AA 48 DX3213AA 49 DX3213AA 50 DX3213AA 51
 DX3213AA 8
 (4) DX13298 22 DX13300 6 9 25 28 30 17 5 16 32
 (5) 35 24 21 19 20 33 34 22 23 7 3 15 27
 (6) 26 11 DX0661AA DX0662AA DX0663AA DX8940 DX13250
 and
 (7) DX13207 offered)
 (8) THE COURT Thank you they're all admitted
 (9) (Exhibit DX13242 DX9398 DX13205A 1 DX13205A 2
 (10) DX3213AA 48 DX3213AA 49 DX3213AA 50 DX3213AA 51
 DX3213AA 8
 (11) DX13298 22 DX13300 6 9 25 28 30 17 5 16 32
 (12) 35 24 21 19 20 33 34 22 23 7 3 15 27
 (13) 26 11 DX0661AA DX0662AA DX0663AA DX8940 DX13250
 and
 (14) DX13207 received)
 (15) MR. STOLL Your Honor I don't know if -
 (16) Mr. McCallion's not here and I don't know any of these
 (17) numbers so we'll just check the record later I didn't know
 (18) that this was going to come up this morning
 (19) THE COURT Okay the record's clear They're in so
 (20) if there's any reason they should be out someone's going to
 (21) have to tell me
 (22) MR. STOLL I'm sure that they're fine I just - do
 (23) we have to reread into the record then any of the plaintiffs
 (24) exhibits or is that all taken care of yesterday?
 (25) THE CLERK It was just for the transcript

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- (1) MS SMITH I think the only problem on this one was
 (2) that the Court quite sensibly thought that if we admitted the
 (3) letter we could get them all in without doing that and the
 (4) court reporter says it's not in the record unless I read it so
 (5) that was the only reason on these that they had to go in
 (6) MR STOLL Oh okay Fine I think everything's
 (7) fine then
 (8) THE COURT And you want me to recess?
 (9) THE CLERK Recess because they didn't get all the
 (10) exhibits into the courtroom
 (11) MR OPPENHEIMER Your Honor we had a slight exhibit
 (12) confusion this morning
 (13) THE COURT You mean exhibits for the next
 (14) examination
 (15) MR OPPENHEIMER I think if we have five minutes
 (16) THE COURT Sure I can give it to you By the way
 (17) I'm going to bring something up you probably anticipated
 (18) would come later Is Mr Stoll here by the way?
 (19) MR OPPENHEIMER He's right here
 (20) THE COURT Yes the Kodiak tape I must have been
 (21) suffering from information overload yesterday because when I
 (22) went back over the cases and I thought about the issue it's
 (23) very clear to me that those tapes were admissible I really
 (24) don't know what I was thinking I suppose it was simply that
 (25) the last - the last word is important and the last case I

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- (1) read favored the defendants point of view when I came in here
 (2) so I'm very sorry because I don't like to equivocate like this
 (3) and go back and forth but the fact is when I went back over
 (4) it and read the cases again and looked at the material and
 (5) looked at the type of relationship that these people had with
 (6) their - their immediate contractors and with Exxon it's very
 (7) clear to me that - that they were within the language of the
 (8) rule
 (9) Now I'll put that on direct in more detail but I wanted
 (10) to tell you now so that you could get ready If I understand
 (11) the record correctly this particular tape was taken at
 (12) Perevalnie is that right?
 (13) MR STOLL Correct Your Honor
 (14) THE COURT Which the last witness said was very
 (15) heavily oiled right?
 (16) MR DIAMOND Correct
 (17) THE COURT Right So in essence this material -
 (18) it appears to me that this material may not be that
 (19) inconsistent with the defendants position once the - if the
 (20) witness gets back on Are you going to get - put the
 (21) witnesses back on?
 (22) MR DIAMOND I think we'll discuss that internally
 (23) I don't know that we've reached a decision It would be our
 (24) preference to have the tape played now rather than wait
 (25) because I think we would like to be able to deal with that in

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- (1) our case in chief if we decide that we need to deal with it
 (2) rather than waiting for the end of our case to put it on We
 (3) would ask that the Court interrupt our presentation of proof
 (4) and allow the plaintiffs to augment the record with that tape
 (5) MR STOLL That's fine Your Honor I don't - it
 (6) can - you know I don't want to - I'll do whatever
 (7) THE COURT You want to put it on first thing
 (8) MR STOLL I don't care I don't know that I have
 (9) the tape here frankly I don't think I do have the tape here
 (10) THE COURT Why don't you find out and get it over
 (11) here and we'll put it on at the first opportunity when it
 (12) doesn't interrupt the flow of the proceedings any more than
 (13) we've already interrupted them
 (14) MR STOLL That's fine Your Honor
 (15) MR DIAMOND Just so our record - did you intend to
 (16) write something? You said you were going to -
 (17) THE COURT I have it written down and I do that when
 (18) I worry about whether or not I'm right and I was - I
 (19) convinced myself as I wrote it But I can - I can tell you in
 (20) more detail why I'm doing it and I'll do that later
 (21) MR DIAMOND I'm not looking for an invitation to
 (22) talk you out of it because of this case
 (23) THE COURT The decision's made
 (24) MR DIAMOND I prefer finality to victory
 (25) THE COURT You prefer what?

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- (1) MR DIAMOND I prefer finality to victory
 (2) THE COURT I've got to remember that yeah Okay I
 (3) guess we need about five minutes and then we'll get going with
 (4) the next witness
 (5) MR OPPENHEIMER Thank you Your Honor
 (6) THE CLERK Please rise This court stands in
 (7) recess
 (8) Recess from 8 44 a.m. to 9 02 a.m.)
 (9) (Jury in at 9 02 a.m.)
 (10) THE CLERK This court now resumes its session
 (11) Please be seated
 (12) THE COURT Counsel
 (13) MR OPPENHEIMER Good morning Your Honor For our
 (14) next witness Exxon calls Mr Richard Roddewig
 (15) THE CLERK Sir can you please attach the microphone
 (16) to your tie and remain standing for the oath? Please raise
 (17) your right hand
 (18) (The Witness Is Sworn)
 (19) THE CLERK Please be seated
 (20) Sir for the record can you please state your full name?
 (21) A Yes My name is Richard J Roddewig
 (22) THE CLERK Please spell your last name
 (23) A R o d d e w i g
 (24) THE CLERK And your occupation?
 (25) A I am a real estate appraiser and a real estate analyst

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- (1) THE CLERK. Thank you
 (2) DIRECT EXAMINATION OF RICHARD J RODDEWIG
 (3) BY MR OPPENHEIMER
 (4) Q We warn all of our witnesses Mr Roddewig about that
 (5) water pot so be careful
 (6) A I'll look in it first
 (7) Q Mr Roddewig good morning
 (8) A Good morning
 (9) Q With whom do you work?
 (10) A I work with Clarion Associates Inc
 (11) Q Would you tell the jury a little bit about Clarion
 (12) A Clarion is a real estate consulting and real estate
 (13) appraisal firm We have two offices one in Chicago and one in
 (14) Denver Colorado I am based in the Chicago office
 (15) Q What type of work does Clarion do?
 (16) A Clarion does a wide range of real estate consulting and
 (17) real estate appraisal work market analysis appraisals and
 (18) counseling studies of all kinds
 (19) Q Are you an appraiser?
 (20) A Yes I am
 (21) Q Do you have some professional designations?
 (22) A Yes I have the MAI designation from the Appraisal
 (23) Institute
 (24) Q The jury has heard a little bit both about the Appraisal
 (25) Institute and MAI designation but briefly tell us what the

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- (1) Appraisal Institute is and what is the MAI designation?
 (2) A The appraisal Institute is a national professional
 (3) organization of real estate appraisers It gives designations
 (4) to qualified appraisers who meet the education requirements
 and
 (5) meet the experience requirements publishes professional
 (6) standards of practice that the members comply with and it
 (7) offers various types of continuing appraisal education courses
 (8) Q How long have you been an MAI?
 (9) A I think it was 1987 that I received my MAI designation
 (10) Q Do you have any other professional designations?
 (11) A Yes I do
 (12) Q Tell the jury about that
 (13) A I also hold the CRE designation which stands for Counselor
 (14) in Real Estate and it's a designation that's given by the
 (15) American Society of Real Estate Counselors
 (16) Q What type of organizations does Clarion do work for? What
 (17) type of clients do you have?
 (18) A We have a wide variety of clients We work for private
 (19) sector clients as well as government sector clients private
 (20) sector We work for everything from major corporations to
 (21) small individual owners of property work for financial
 (22) institutions in the private sector On the government side we
 (23) work for every conceivable type of government unit big cities
 (24) small towns villages state government special agencies of
 (25) state government and local government

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- (1) Q Have you worked for some federal agencies?
 (2) A Yes
 (3) Q Would you identify just an example for the jury?
 (4) A Worked for the Bureau of Land Management and I've
 worked
 (5) for the Internal Revenue Service
 (6) Q What about environmental groups have you done any work
 (7) with environmental groups as clients?
 (8) A Yes I've done quite a bit of work with environmental
 (9) organizations
 (10) Q Again can you give the jury an example?
 (11) A Over the years I've done quite a bit of work with the
 (12) Conservation Foundation and the World Wildlife Funds I've
 (13) also done some work for the Trust for Public Lands which is a
 (14) national conservancy organization I've done quite a bit of
 (15) work for statewide and regional conservancy organizations and
 (16) even many historical societies and historic preservation
 (17) organizations all over the country
 (18) Q I hesitate to ask this and I don't mean it as a criticism
 (19) but you're also a lawyer right?
 (20) A That's right
 (21) Q How long have you been an appraiser?
 (22) A I've been an appraiser for I guess about 17 years now
 (23) Q And in how many geographic areas in the United States have
 (24) you done appraisal work?
 (25) A I've done appraisal or real estate counseling work in more

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- (1) than 40 states all over the country
 (2) Q Just very briefly where did you go to school?
 (3) A I went to college at the University of Notre Dame was a
 (4) history and government major there and got my Bachelor of
 Arts
 (5) degree from Notre Dame And I went to the University of
 (6) Chicago for graduate school got a Master's in political
 (7) science at the University of Chicago Then I switched over to
 (8) the law school and got my JD degree from the University of
 (9) Chicago Law School
 (10) Q Tell us about the experience you've had teaching other
 (11) people about appraisal matters
 (12) A I'm on the faculty at DePaul University in Chicago as an
 (13) adjunct lecturer I teach in the Department of Finance and I
 (14) teach real estate appraisal to undergraduate students in the
 (15) real estate program I've also taught real estate analysis at
 (16) the University of Illinois in Chicago to both graduate and
 (17) undergraduate students at the Planning Program in the
 (18) University of Illinois and I've also taught once or twice at
 (19) Governor State University in Chicago and Northeastern
 (20) University of Illinois as well
 (21) Q You mentioned the Appraisal Institute Do you do any
 (22) teaching work in connection with that body?
 (23) A Yes I do
 (24) Q Describe that for the jury
 (25) A I teach the Appraisal Institute's seminar titled

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- (1) Environmental Risk in Real Estate Appraisal Process I taught
 (2) it this year four or five different cities around the country
 (3) Q Is that the Appraisal Institute's primary course on
 (4) environmental risk matters?
 (5) A Yes it is
 (6) Q Did you develop the course materials for that course?
 (7) A Yes my partner Gary Papke and I developed the course
 (8) materials together
 (9) Q Would you tell the jury briefly what do you mean by
 (10) environmental risk?
 (11) A Environmental risk covers a wide range of topics related to
 (12) contaminated properties and other types of uses or activities
 (13) that can create an environmental impact on property For
 (14) example electromagnetic fields put out by power lines would
 (15) be
 (16) a type of environmental risk as would presence of
 (17) contamination on properties even noise from facilities like
 (18) airports or quarries or dust could be an environmental risk
 (19) that could affected some types of property
 (20) Q Those course materials include matters pertaining to oil as
 (21) an event in the environment?
 (22) A Yes they do
 (23) Q You mentioned at the beginning of your description of what
 (24) Clarion did that you do market studies Can you briefly
 (25) describe for the jury what that's all about?
 (26) A There's a lot of different kinds of market studies and we

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- (1) actually work on many of the different kinds For example you
 (2) can have market studies that relate to one particular piece of
 (3) property where you might be trying to determine what the
 (4) particular market would be for one piece of vacant property
 (5) what type of development should go on that site Is there a
 (6) market for one type of development versus another And there
 (7) are other types of market studies that we do that involve
 (8) neighborhood analysis or trend analysis in a particular region
 (9) of a state We've even worked on statewide market analyses for
 (10) particular types of agencies and activities
 (11) Q How many of these market studies do you think you've done
 (12) in your career?
 (13) A I wouldn't have a precise number I would - I think about
 (14) the best I can do on that one is say dozens and dozens of
 (15) market studies and market analyses
 (16) Q And have you testified in proceedings before today about
 (17) market studies of that type?
 (18) A Yes I have
 (19) Q Have those market studies ever involved the effects of
 (20) environmental factors and how they relate to real estate?
 (21) A Yes they have Many times
 (22) Q Can you give us an example of such a study?
 (23) A Yes For example I looked at some quarries in the east
 (24) in North Carolina and Maryland to determine what impact the
 (25) expansion of an existing quarry or proposal for construction of

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- (1) a new quarry would have on surrounding neighborhoods In
 (2) order
 (3) to do that I looked at existing quarries that were operating
 (4) elsewhere in order to try to determine what impacts they were
 (5) having on the neighborhoods near them and took the lessons
 (6) learned there to the quarry that I was being asked to analyze
 (7) I've done work on other types of situations involving
 (8) landfills and airports did a study for the City of Chicago of
 (9) the impact of O'Hare Airport on schools in the surrounding
 (10) suburbs Done a wide variety of those types of environmental
 (11) risk assignments involving market analysis that I've
 (12) undertaken
 (13) Q When you do environmental work Mr Roddewig do you
 (14) tend
 (15) to work primarily for the property owners?
 (16) A No we work on some assignments for property owners and
 (17) I've worked on other assignments for people who own property
 (18) adjacent to an activity or a use that's being analyzed for its
 (19) potential impact or actual impact
 (20) Q Have you had experience dealing with remote lands?
 (21) A Yes I have
 (22) Q As Mr Petumenos would say tell the jury
 (23) A Quite a bit of experience with forests and timberland
 (24) undertook a review appraisal in New Hampshire that involved a
 (25) market analysis as part of that work for an 11 000 acre forest
 (26) in New Hampshire
 (27) There was another forest in Pennsylvania that I've

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- (1) appraised I did some analysis work for the State of
 (2) California on the value of Headwaters Forest which is one of
 (3) the largest remaining stands of old growth redwood in the State
 (4) of California that's in private ownership still and that was a
 (5) remote property that I would probably call close to a
 (6) wilderness property
 (7) There was another forest in the upper peninsula of Michigan
 (8) I looked at as part of an appraisal assignment involved with
 (9) that piece of property up there about a 4 000 acre piece
 (10) There's been a number of assignments I've had involving
 (11) remote
 (12) property around the United States
 (13) Q Have you qualified previously as an expert in court on real
 (14) estate appraisal and consulting matters?
 (15) A Yes I have
 (16) Q How many times would you say you've testified as an expert
 (17) previously?
 (18) A I think I've testified as an expert in court about a dozen
 (19) times
 (20) Q Writings have you published some things?
 (21) A Yes I have
 (22) Q Briefly tell us what
 (23) A Well I've published approximately 30 or 40 articles in
 (24) professional journals and monographs published by various
 (25) professional organizations I've also authored or co authored
 (26) six books

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- (1) Q Did you and your colleague Mr Papke help to develop or
 (2) in fact develop the Appraisal Institute's environmental risk
 (3) seminar materials?
 (4) A Yes we did
 (5) Q Does Clarion do any work in connection with culturally
 (6) significant properties?
 (7) A Yes we do quite a bit of work in that area Historic
 (8) properties all around the country have been the subject of a
 (9) lot of our work probably valued or analyzed over 200 historic
 (10) properties And I've also personally been involved as a
 (11) Trustee of the Illinois Historic Preservation Agency and in
 (12) that capacity civic capacity I've had a lot of experience
 (13) with acquisition of cultural property and management of
 (14) cultural property
 (15) Q Have you had an opportunity to testify before Congress?
 (16) A Yes I have
 (17) Q And that was on real estate matters?
 (18) A Yes it was on real estate as it relates to historic
 (19) property
 (20) MR OPPENHEIMER Your Honor at this time we would
 (21) tender Mr Roddewig as an expert in real estate appraisal and
 (22) analysis including market studies
 (23) MR PETUMENOS Your Honor other than what is of
 (24) record I have no further objection and I will reserve my
 (25) questions on qualification for cross examination

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- (1) THE COURT All right he's qualified as an expert
 (2) BY MR OPPENHEIMER
 (3) Q Mr Roddewig we talked a lot about the past let's talk
 (4) about the present Have you worked for Exxon before this
 (5) case?
 (6) A No I have not
 (7) Q Briefly describe for us the assignment you undertook for
 (8) Exxon in connection with this case
 (9) A Clarion Associates was asked to form its professional
 (10) opinion concerning the impact of the Exxon Valdez oil spill on
 (11) the market for property in South Central Alaska
 (12) Q I'd like you - we're going to get into more detail as we
 (13) go but I'd like you to give the jury an overview of what
 (14) Clarion did in that regard
 (15) A We've undertaken a number of tasks One task that we did
 (16) was to actually analyze the market in South Central Alaska for
 (17) real estate and to collect information about that market
 (18) The second major task that we did was to actually go out
 (19) and look at other oil spills and determine in the markets where
 (20) these other oil spills have occurred what the impact of the
 (21) spill was on the marketplace And I've also reviewed the
 (22) reports of the plaintiffs' real estate experts as well
 (23) Q We'll get to it toward the end of your testimony but did
 (24) you also have occasion to look at governmental land purchase
 (25) practices?

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- (1) A Yes As part of our analysis of the market in South
 (2) Central Alaska we did study government acquisition since the
 (3) government is such an important player in that marketplace
 (4) Q In the course of your work have you had occasion to go out
 (5) and look at some of the land that's involved in this case?
 (6) A Yes I have
 (7) Q Where have you gone just in general areas?
 (8) A Been through Prince William Sound on a couple of
 occasions
 (9) and I've also done fly over inspections of the Kenai Peninsula
 (10) and of Kodiak and also been on the ground in the Kenai
 (11) Peninsula and Kodiak
 (12) Q And you're going to be talking to the jury about some case
 (13) studies you did in different geographic locations Did you or
 (14) others from Clarion visit many of those sites?
 (15) A Yes we did
 (16) Q I'd like to focus now on the task you described of these
 (17) case studies First of all why do case studies?
 (18) A Oh the concept of doing case studies is an accepted
 (19) technique in real estate analysis It's especially important
 (20) and relevant where you have a use or an activity that is
 (21) expected to have an impact in the future In order to try to
 (22) understand what that impact would be in the future you go out
 (23) and find a marketplace where that activity or use has already
 (24) occurred and you look to see what impact it's had there and
 (25) then you can come back and learn some lessons from that other

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- (1) location that you can apply to the place where you're trying to
 (2) understand what the impact of a similar use or activity might
 (3) be
 (4) Q Now I'm undoubtedly stating the obvious - I do that a lot
 (5) in court - but what event were you studying?
 (6) A The event we were studying was the Exxon Valdez oil spill
 (7) Q And the case studies you're talking about involve other oil
 (8) spills?
 (9) A Yes they do
 (10) Q We'll come back in more detail to this but tell the jury
 (11) your general conclusions as a result of your case study
 (12) A We arrived at a number of conclusions based on our case
 (13) study work First we found that there's very little evidence
 (14) of the impact of oil spills on the market for real estate The
 (15) evidence that we did find is that directly oiled properties -
 (16) I should say the little evidence we found is that directly
 (17) oiled properties can be affected We found however that
 (18) property that is upland or away from the shoreline related area
 (19) is never affected and we found that even with directly oiled
 (20) prompts the effects are very temporary of short duration
 (21) Q When you say temporary of short duration can you give
 (22) us a little more detail about that?
 (23) A Yes Generally what we found is that the impact lasts no
 (24) longer than the clean up period associated with the oil spill
 (25) event

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- (1) Q And you re talking about the directly impacted areas?
- (2) A That s correct
- (3) Q How did you go about figuring out what oil spills to
- (4) study?
- (5) A We collected a lot of information on oil spills from a
- (6) variety of sources and once we had enough information in
- hand
- (7) we looked for studies that compared oil spills We found five
- (8) studies that formed the basis for our first selection of
- (9) potential spills to study Two of these five studies were
- (10) publications of NOAA National Oceanic and Atmospheric
- (11) Administration One of the studies was a publication of the
- (12) National Research Council which is an independent technical
- (13) engineering organization The fourth study was a
- Congressional
- (14) Research Service study that compared oil spills following the
- (15) Exxon Valdez accident And the fifth study was an Exxon
- (16) Production Research Company report that looked at various oil
- (17) spills in light of the Exxon Valdez spill
- (18) Q Did that work give you a set of spills to consider as case
- (19) study samples?
- (20) A Yes I think there were 37 or 38 spills mentioned in those
- (21) various reports and that was our beginning set for analysis
- (22) Q I d like to put up on the -
- (23) MR PETUMENOS Give me time to locate the exhibit if
- (24) you would counsel
- (25) MR OPPENHEIMER Yes I will I just want to make

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- (1) sure we have the right one
- (2) Joel can you give me defendants - and before you put it
- (3) up give counsel a chance - this is counsel defendants
- (4) 10506 We may have a blowup of this too Can you bring it
- (5) up Joel? Okay
- (6) BY MR OPPENHEIMER
- (7) Q Can you see that on your screen Mr Roddewig?
- (8) A Yes I can
- (9) Q More than technology Tell us what we re looking at in
- (10) this exhibit
- (11) A This shows the location of the oil spills that we studied
- (12) in our report located around North America and one of the red
- (13) circles indicates the location of the Exxon Valdez spill
- (14) Q I notice two circles in the Alaska area here One you say
- (15) is the Exxon Valdez oil spill?
- (16) A That s correct
- (17) Q Is there another oil spill that was part of that original
- (18) set in Alaska?
- (19) A Yes There was a spill in Cook Inlet that we also gathered
- (20) information about
- (21) Q Is that the Glacier Bay spill?
- (22) A Yes it was
- (23) Q Now having reached the point where you had these possible
- (24) study locations did you do something after that to narrow the
- (25) field down even further?

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- (1) A Yes
- (2) Q Tell the jury what you did
- (3) A This - this is a set of - of oil spills that is narrower
- (4) than the 37 or 38 that we started with Once we got that set
- (5) of 37 or 38 we narrowed it down to a group of 21 based on the
- (6) need to eliminate spills from that first set that were in
- (7) foreign countries and narrowed it down to a smaller set And
- (8) then with this set of 21 we did - we gathered information
- (9) about them all and we selected a smaller set of four spills in
- (10) which we did very detailed case studies
- (11) Q Before you get down to that smaller set why did you take
- (12) out the foreign spills?
- (13) A Well it would be very difficult to go to a foreign country
- (14) and analyze the real estate market in a way that would provide
- (15) a truly meaningful understanding of exactly what happened
- over
- (16) there I don t speak any foreign languages I m not sure
- (17) anybody else at Clarion Associates does There are also legal
- (18) differences and cultural differences that we would have to
- (19) understand in order to be able to take what we learned in a
- (20) foreign country and apply it to the Exxon Valdez spill
- (21) Q Were there some expermental events that you also ruled
- (22) out?
- (23) A Yes In the initial group of 38 there were a number I
- (24) think nine or ten experimental spills that had been included
- (25) in the scientific studies for purposes of comparability and we

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- (1) didn t think it was appropriate to analyze a spill that was not
- (2) an accident
- (3) Q Now you mentioned the word comparability Were you
- (4) looking for spills that were identical to the Exxon Valdez oil
- (5) spill when you were doing this work?
- (6) A No we were not No two spills are precisely identical
- (7) There are similarities and differences between spills
- (8) Q Did you take into account any of these similarities and
- (9) differences when you chose your case studies?
- (10) A Yes we did
- (11) Q Can you tell the jury how you did that?
- (12) A Well first of all the five reports that we started with
- (13) had already done some of that for us They were reports that
- (14) looked at the technical distinctions between spills and
- (15) provided this initial list of 38 and then from that as I
- (16) said we eliminated some kinds of spills based on things like
- (17) the foreign country location And then for purposes of
- (18) selecting the final spills to do detailed case studies on we
- (19) went out and visited a number of these sites and were looking
- (20) for real estate markets that could be analyzed in a meaningful
- (21) way And the four case studies that we finally selected are
- (22) those that we believed were the best laboratories to test what
- (23) the impact of an oil spill is on a real estate market
- (24) Q Let me take an example of one factor The amount of oil
- (25) spilled was that the same in all the case studies that you

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- (1) did?
- (2) A No they were not the same
- (3) Q Did you take that into account in assessing the
- (4) significance for your case study work here?
- (5) A Yes we did
- (6) Q How many cases did you finally decide to use as a detailed
- (7) case study as a laboratory as you said for your work?
- (8) A We did four detailed case studies
- (9) Q We re going to get - we re going to go briefly through
- (10) each of those but before we do that tell the jury what your
- (11) approach was in each of those case studies
- (12) A First thing that we did for each case study was collect as
- (13) much information as we could ahead of time about the
- (14) particular
- (15) spill This included technical reports as well as any reports
- (16) about possible economic impacts that the spill had had
- (17) We then went out and visited the area in which the spill
- (18) occurred We talked to knowledgeable local real estate
- (19) professionals in the marketplace We gathered information
- (20) from
- (21) the county or the city in which the spill occurred We talked
- (22) to the local assessor Based on the information that we
- (23) gathered in that way and our drive around and inspection of
- (24) the - of the location of the spill we actually analyzed a
- (25) particular locale a neighborhood or a subdivision located in
- (26) close proximity to the spill collected sales information from
- (27) that neighborhood or subdivision and compared the sales

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- (1) information that we got there to general trends for the town or
- (2) for the county or for the region and analyzed the entire
- (3) marketplace
- (4) Q How many of the detailed case study sites were visited?
- (5) A We visited every one of the detailed case study sites In
- (6) fact we visited them on many occasions
- (7) MR OPPENHEIMER I m going to put up on the screen
- (8) Tim defendants 10243
- (9) MR PETUMENOS 10243?
- (10) MR OPPENHEIMER 10243 if I get this right Getting
- (11) better I ll wait until you pour and then I ll ask you to
- (12) tell us what s on the screen
- (13) A If I pour without looking at the glass I m afraid it will
- (14) go all over
- (15) BY MR OPPENHEIMER
- (16) Q What do we see here in this exhibit?
- (17) A This is a map that shows the location of one of the four
- (18) case studies that we did The case study involved a spill from
- (19) the Florida barge at Buzzard s Bay just off of Falmouth
- (20) Massachusetts And Falmouth Massachusetts is located on
- (21) Cape
- (22) Cod on the southern side of Cape Cod and if you look up
- (23) above
- (24) the yellow box above the word Florida above the F in
- (25) Florida you ll see that Boston is located north and a little
- (26) bit west of Falmouth And this particular location was at the
- (27) mainland side of the Cape Cod Peninsula

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- (1) Q The graph here says September 1969 that was the date of
- (2) the spill?
- (3) A That s correct
- (4) Q How much was spilled in this spill?
- (5) A This was a spill of 175 000 gallons of oil
- (6) Q How serious was the oiling?
- (7) A Well the oiling did come ashore There was about four
- (8) miles of shoreline that was oiled but there was one particular
- (9) part of that shoreline that was very heavily oiled and was hit
- (10) very hard There s a chart of that shoreline that was heavily
- (11) oiled was the Wild Harbor area
- (12) MR OPPENHEIMER Counsel we re going to be showing
- (13) defendants Exhibit 10621
- (14) MR PETUMENOS Should I get you an easel?
- (15) MR OPPENHEIMER That s okay I m getting it
- (16) BY MR OPPENHEIMER
- (17) Q Mr Roddewig I m going to ask you to come down off that
- (18) stand and be mindful of the cord
- (19) MR PETUMENOS Put it in your pocket
- (20) MR OPPENHEIMER You can hold it or whichever would
- (21) be easier
- (22) A Don t let me trip over it
- (23) MR OPPENHEIMER I won t.
- (24) A Hard to stand somewhere where everyone can see it
- (25) BY MR OPPENHEIMER

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- (1) Q We re going to get a pointer might be easier While we re
- (2) getting the pointer describe for the jury what we re seeing in
- (3) Exhibit 10621?
- (4) A This is the area in Falmouth that was heaviest hit by the
- (5) spill in September of 1969 The oil spill was offshore here
- (6) and the oil came in and hit the beaches in this area in here
- (7) and hit particularly hard in this salt marsh here and here
- (8) This is shown as Wild Harbor River but it s actually more like
- (9) an inlet of the ocean
- (10) Q By the way was there any cleanup in connection with the
- (11) spill?
- (12) A Yes there was
- (13) Q What type of area is this in green that we re looking at
- (14) here?
- (15) A Well this is what I would call a salt marsh There s a
- (16) lot of wetlands in here and it s got salt marsh grasses that
- (17) get very high in the season
- (18) Q Let us just get another easel here
- (19) MR PETUMENOS Judge might I inquire of counsel as
- (20) to one matter so we can get something clarified?
- (21) THE COURT Yes
- (22) MR PETUMENOS Mr Oppenheimer I don t know if I
- (23) understand what the date of this particular map was that we re
- (24) using here
- (25) BY MR OPPENHEIMER

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- (1) Q Mr Roddewig do you know the plat date?
- (2) A It's a subdivision map that postdates the date of the
- (3) spill I can look at it and see if there's a date on it
- (4) refresh my recollection It says January 19th but it doesn't
- (5) seem to have what year January 19th And I don't remember
- (6) Mr Petumenos the -
- (7) MR PETUMENOS We don't know whether it's the 60s or
- (8) 70s or 80s?
- (9) A Well it would definitely be the 70s because it's
- (10) following the spill
- (11) BY MR OPPENHEIMER
- (12) Q Is this map fairly illustrative of the plat data you did at
- (13) the time you did your study?
- (14) A Yes
- (15) Q Does it fairly represent the scene at the time you did your
- (16) analysis?
- (17) A Yes
- (18) Q And was it a fair depiction of the lot layout at the time
- (19) of the spill based on your research?
- (20) A Yes it is
- (21) Q Now I'd like to show you two exhibits defendants
- (22) 10625A 5 and defendants 10625A 1
- (23) A Three seems to be the limit that you can do
- (24) Q Oh no you have seen nothing yet
- (25) MR PETUMENOS You're new here Mr Roddewig

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- (1) A Yes they are
- (2) Q Tell us what did you do to look at the impact in this
- (3) spill in Falmouth?
- (4) A We did a number of things The first thing we did as I
- (5) said before is collect as much information as we could about
- (6) the actual spill We then got a complete record of the sales
- (7) activity in this subdivision that is the neighborhood located
- (8) closest to the area hardest hit by the spill and we analyzed
- (9) that sales activity This entire subdivision actually started
- (10) its development just before the spill occurred It was platted
- (11) and approved for development in 1968 and the first
- (12) transactions after the platting occurred a few months before
- (13) the spill in 1969
- (14) We gathered information and sales I believe all the way
- (15) up to 1980 in that subdivision and tracked the actual sales
- (16) prices and tracked the numbers of transactions over time
- (17) We also did what I call a tier analysis within the Wild
- (18) Harbor Estates area We located sales by location within the -
- (19) subdivision and tried to compare what was happening in the -
- (20) on the lots closest to the salt marsh and to the areas affected
- (21) by the spill to what was happening in terms of price and number
- (22) of transactions on the interior portions of the subdivision
- (23) Q We have some charts here that I think will help explain
- (24) that
- (25) Counsel this is going to be defendants 10402 A

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- (1) A Yes I haven't been here very much
- (2) BY MR OPPENHEIMER
- (3) Q I tell you what you can sneak around here in the front if
- (4) you would I'll watch the cord for you if you could stand
- (5) over here so you don't block the jury's view
- (6) Could you tell them what they're seeing in these two
- (7) photographs?
- (8) A These are two photos taken at Wild Harbor This one is a
- (9) photo taken looking across at Wild Harbor and I can point out
- (10) to you where it is
- (11) Q So the photographer would be standing here?
- (12) A Looking across at the Wild Harbor Estates Subdivision
- (13) This gives you an idea of the salt marsh on the Wild Harbor
- (14) River
- (15) The second photograph is taken on Alden Lane in the actual
- (16) subdivision itself looking out at the shoreline area across
- (17) and shows a portion of one of the houses that have been built
- (18) in the subdivision
- (19) Q Have you been to these locations?
- (20) A Yes I have
- (21) Q In fact are these your photographs?
- (22) A That one for sure is my photograph This one I believe
- (23) is Mr Papke's photograph
- (24) Q And they're both in your files at Clarion as part of this
- (25) research?

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- (1) What are we seeing here Mr Roddewig?
- (2) A This is the chart that shows the tiers that we classified
- (3) in the Wild Harbor Estates Subdivision There was a beach
- (4) front area a shore front area a river front area and then
- (5) two different types of interior areas in the subdivision And
- (6) we collected sales activity in each of the period 1969 to 1980
- (7) Q Did you undertake any other companions in connection with
- (8) this study?
- (9) A Yes we did I think we need to put back up the other one
- (10) that you just took down
- (11) Q And you said we couldn't do more than three
- (12) Okay tell us what you did
- (13) A We also looked at the number of transactions in two other
- (14) nearby neighborhoods the Nyes Neck area in here and the
- (15) Seascape area in here and tracked transactions in each of
- (16) those subdivisions as well
- (17) I should add that when I say "transactions" what we're
- (18) looking at were both sales of vacant lots in Wild Harbor
- (19) Estates as well as sales of houses as the houses were built
- (20) and sold and then we did an even broader analysis and that
- (21) was to compare what we were finding in Wild Harbor Estates to
- (22) information that we gathered about the town of Falmouth as a
- (23) whole and about the county Barnstable County in which the
- (24) subdivision and the town is located and also about the
- (25) northeast part of the United States

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- (1) Q The town is in Falmouth -
 (2) A The subdivision is in Falmouth
 (3) Q The subdivision is in Falmouth and the town is in
 (4) Barnstable?
 (5) A That s correct
 (6) Q Now we have some more charts defendants 10514 Tim
 and
 (7) defendants 10264 They re both Bs
 (8) MR PETUMENOS In that case it s all right
 (9) MR OPPENHEIMER Okay
 (10) BY MR OPPENHEIMER
 (11) Q Okay what are we seeing here? What do these tell us?
 (12) A These are two of the charts that compare -
 (13) Q I m sorry Mr Roddewig I spoke a little fast earlier I
 (14) think for the reporter Sorry to interrupt you You were
 (15) about to comment upon defendants 10514B and defendants
 (16) 10264B Now tell us what these are showing us
 (17) A These are charts that show housing starts by year in the
 (18) town of Falmouth and housing starts by year in the county of
 (19) Barnstable And what we re trying to do here is show the trend
 (20) in housing starts in Falmouth Housing starts dropped down in
 (21) the year 1968 increased dramatically in 1969 and continued to
 (22) go up the period 1970 through 73 There was a recession in
 (23) the United States and in this part of the United States as well
 (24) in 1974 and 1975 and then there was a rebound later on
 (25) Barnstable County tracks pretty much the same way General

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- (1) increase up to 1969 but then there was a slower increase in
 (2) housing starts in the county from 1969 to 70 than there was in
 (3) Falmouth itself The rate of increase in Falmouth was higher
 (4) than in the county
 (5) Q Let me stop you there Are you saying that one of the
 (6) things you noticed in the data is that Fa mouth the place
 (7) where Wild Harbor subdivision is located and where the spill
 (8) occurred actually went up faster than Barnstable County?
 (9) A In terms of housing starts it did yes
 (10) Q I m sorry?
 (11) A Generally if you look you see the housing trend tracks
 (12) pretty well against Barnstable County The second chart shows
 (13) the town of Falmouth should be the same chart as down there
 (14) and I think it is compared to the northeastern United States
 (15) as a whole And again this is housing starts and it shows
 (16) that the town of Falmouth generally goes up in keeping with the
 (17) trends in the northeastern United States and then goes down
 (18) during the recession but actually locally Falmouth was doing
 (19) better in terms of percentage increases in some of the years
 (20) following the spill than the northeastern United States as a
 (21) whole was doing in terms of numbers of housing starts and the
 (22) percentage increases
 (23) Q Why are you looking at this data?
 (24) A Remember that we were trying to determine the impact of
 (25) this oil spill on the market in Falmouth And if there had

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- (1) been a market wide impact from an oil spill like the Florida
 (2) barge spill you would expect to see that the town that was
 (3) most associated with the spill would show a decrease in
 housing
 (4) starts or an impact that would be different from the county as
 (5) a whole
 (6) Barnstable County covers about 395 square miles of area and
 (7) is substantially larger than Falmouth which I think only has
 (8) about 28 000 acres in it But that s not what we found when we
 (9) compared Falmouth statistics to county wide statistics
 (10) Q And why did you want to do what you described earlier as
 (11) your tiered analysis?
 (12) A Tier analysis we were trying to determine whether or not
 (13) there was a difference in the impact of the oil spill on
 (14) property located immediately adjacent to the salt marsh that
 (15) was oiled by comparison to property that was located a little
 (16) bit further away within the same shoreline related area of the
 (17) community
 (18) Q Now as part of your work did you also conduct interviews?
 (19) A Yes we did
 (20) Q Tell us a little bit about that?
 (21) A We conducted quite a few interviews in Falmouth in order to
 (22) try to understand what happened with this subdivision in the
 (23) years following the oil spill We interviewed representatives
 (24) of the development company to the extent we could find
 (25) representatives who were still around in the area that we could

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- (1) interview
 (2) MR PETUMENOS Your Honor I m ready to approach
 (3) (At side bar on the Record)
 (4) MR PETUMENOS I ll try to make the objection briefly
 (5) because I think the Court is more or less familiar with the
 (6) issue
 (7) THE COURT I can t hear you
 (8) MR PETUMENOS I m try to make the objection
 (9) abbreviated because I think the Court is more or less familiar
 (10) with the issue If this witness is going to be giving
 (11) testimony -
 (12) MR DIAMOND Tim I can t hear you
 (13) MR OPPENHEIMER I can
 (14) MR DIAMOND But it s got to come up for me too
 (15) MR PETUMENOS This witness is going to be giving
 (16) testimony of people that he talked to in the Falmouth area
 (17) giving their opinion that the oil spill did not affect the real
 (18) estate market 20-some years ago 24 years ago We have the
 (19) problem that we discussed yesterday afternoon the spade and
 I
 (20) would object to him being allowed to give the opinion
 (21) If he has interviewed people that have some personal
 (22) knowledge about something that they actually did or were
 (23) involved in some transaction which I don t think he does that
 (24) would be one thing but I think he may be getting ready to
 (25) testify that he talked to a real estate broker who gave him the

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- (1) opinion that the oil spill did not affect the real estate
 (2) market in Florida (sic) 25 years ago which is an expert
 (3) opinion on an expert opinion from a long time ago
 (4) MR OPPENHEIMER Your Honor I think the Court
 (5) already addressed this Research interviews are a standard
 (6) part of methodology
 (7) THE COURT What s he going to testify to? I ve heard
 (8) it in general terms but I need to know what he s going to
 (9) say
 (10) MR OPPENHEIMER He s going to say that he took these
 (11) into account that there was no impact on the oil spill
 (12) THE COURT That s all he s going to say?
 (13) MR OPPENHEIMER If you want to - I can ask it one
 (14) at a time so we don t take more time I can ask him which I
 (15) want to do did you take into account the interviews in
 (16) reaching the conclusions about the case
 (17) THE COURT And that s it?
 (18) MR OPPENHEIMER That s fine because I - all I m
 (19) anxious to do frankly is establish his method and he did
 (20) some interviews and to keep the testimony as short as
 (21) possible We don t intend to do this with every case study
 (22) this is going to be by way of example
 (23) THE COURT Okay
 (24) (Sidebar Concluded)
 (25) BY MR OPPENHEIMER

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- (1) Q Did the interviews that you conducted contribute to your
 (2) reaching your conclusions about this case study?
 (3) A Yes they did
 (4) Q Okay Now having done this work tell the jury what
 (5) conclusions did you draw as - as you looked at this case
 (6) study?
 (7) A Conclusions that we drew after we analyzed the sales
 (8) activity was that there was no impact from the oil spill on
 (9) either the sales or prices of property located close to the
 (10) salt marsh nor on the sales or number of transactions of
 (11) properties located in the interior portions of the
 (12) subdivision
 (13) The second conclusion that we drew was based on a
 (14) comparison of this information and the information from the
 (15) town of Falmouth as a whole and the Barnstable County
 (16) information and the northeastern U S information There was
 (17) no market wide impact from this oil spill on either the number
 (18) of transactions or on the - the velocity rate at which the
 (19) transactions occurred or there was no market wide stigma
 (20) impact from the spill in Falmouth
 (21) Q Mr Roddewig in simple terms how can that be? How can
 (22) you have an oil spill and have that result?
 (23) A Well I think markets are very perceptive and they re very
 (24) smart and they understand the implications of oil spills and
 (25) they react in a way that processes all the information that

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- (1) comes out of an oil spill
 (2) Q Does it take a long time for a market to do that in your
 (3) experience?
 (4) A Not necessarily Markets can process this information very
 (5) quickly and make up their minds as to what impact the spill is
 (6) having on either the marketability or use of property in that
 (7) market area
 (8) Q We keep using the word market Are we talking about a
 (9) group of buyers and sellers?
 (10) A Yes we are
 (11) Q Were there any sales of shore front property in the
 (12) immediate aftermath of the spill?
 (13) A Yes there were There were four transactions involving
 (14) shore front property in December of 1969 just two or three
 (15) months after the oil spill And there were two houses that
 (16) sold right across the street from the shore front in December
 (17) of 1969 as well
 (18) Q How did those prices compare with respect to the
 (19) subdivision overall?
 (20) A When you compare those prices to sales transactions that
 (21) occurred in the rest of the subdivision there was no
 (22) perceivable impact from the oil spill on those prices
 (23) Q Is the approach that you have generally described with
 (24) respect to the case study you did on Falmouth the type of thing
 (25) you did with respect to all of your detailed case studies?

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- (1) A Yes it is
 (2) Q Let s take a look at your second case study Let s move
 (3) all these down I m going to ask you to continue standing
 (4) because it will probably surprise you but we have some more
 (5) blowups here
 (6) A Not surprised
 (7) MR OPPENHEIMER Counsel the next up will be
 (8) defendants 10248A
 (9) MR PETUMENOS Are we still on Florida?
 (10) MR OPPENHEIMER No In fact this will help locate
 (11) the next one in just a second Now if I did this correctly
 (12) Mr Roddewig it will come up and it did
 (13) BY MR OPPENHEIMER
 (14) Q Tell the jury what are we seeing here
 (15) A This is the second of the four case studies we did
 (16) involves a spill on the northern shore of the Olympic
 (17) Peninsula which is located in the State of Washington west of
 (18) Seattle and involved a - the Arco Anchorage tanker that
 (19) spilled out into the strait between Vancouver Island and the
 (20) Olympic Peninsula in December of 1985
 (21) MR OPPENHEIMER Counsel defendants 10536
 (22) BY MR OPPENHEIMER
 (23) Q What is this?
 (24) A This is a chart that shows the spread of the oil from the
 (25) spill of December of 1985 This shows the location of the oil

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- (1) as of about eight days after the spill incident began Some of
 (2) the oil has gone almost all the way out to the far northwest
 (3) point of the Olympic Peninsula and to two areas in particular
 (4) I want to point out that the oil came ashore in what s called
 (5) Fresh Water Bay here The oil also came ashore on a point a
 (6) spit that sticks out called Dungeness Spit
 (7) Q Is that - you were pointing there to an area which says
 (8) Mains Farm is that the area you were referring to?
 (9) A Yes The Mains Farm area is a subdivision located next to
 (10) Dungeness Spit Observatory Point refers to a subdivision
 (11) located adjacent to Fresh Water Bay where some oil came
 (12) ashore
 (13) Q Did you look at both of those areas in your work?
 (14) A Yes we did
 (15) Q Okay Now I don t - I don t want to have you tell the
 (16) jury everything that you told previously about the other case
 (17) study but is what you told them about Falmouth the same
 (18) approach you took to studying these two areas?
 (19) A Yes we did
 (20) MR PETUMENOS Before you go to another exhibit may
 (21) I ask maybe two questions on this exhibit right here before so
 (22) the jury can understand it?
 (23) THE COURT Yes go ahead
 (24) VOIR DIRE EXAMINATION OF RICHARD J RODDEWIG
 (25) BY MR PETUMENOS

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- (1) Q I just want to ask understand one thing This red
 (2) represents the oil correct?
 (3) A That s correct
 (4) Q Now am I correct that you made an effort to show each
 (5) point that the oil touched shore and where we don t see the
 (6) oil touching the shore are we to take from that that it
 (7) didn t reach the land or not?
 (8) A Well there were a number of these oil maps for various
 (9) days that the spill was going on Mr Petumenos and this is
 (10) one of the maps The points out here it s my understanding
 (11) that no oil touched shore The areas where most of the oiling
 (12) occurred was between Fresh Water Bay and Dungeness Spit
 (13) There
 (14) was oiling that came ashore there
 (15) Q Where we see the blue in between the red in other words
 (16) and the green this map tends to point out it didn t touch
 (17) shore in here and here?
 (18) A Not on this particular date
 (19) MR OPPENHEIMER Since you are asking questions
 (20) Mr Petumenos can you put this up for me?
 (21) MR PETUMENOS Absolutely So long as I don t - if
 (22) I ask a whole lot of them will it be the heavy one that I -
 (23) MR OPPENHEIMER Yes yes you ll end up doing more
 (24) MR STOLL I haven t said anything
 (25) MR DIAMOND What a novelty
 (26) DIRECT EXAMINATION OF RICHARD J RODDEWIG
 (27) (Resumed)

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- (1) BY MR OPPENHEIMER
 (2) Q Mr Roddewig we put up on the easels here 10625A 6 and
 (3) defendants exhibit 10625A 23 and actually if it would help to
 (4) explain the photographs you can point out - I believe it s
 (5) hard for the jury but you can see the Barco in the background
 (6) as well
 (7) What are we seeing here in these photographs?
 (8) A This photo here is taken at Observatory Point out over the
 (9) strait This photo here - and you may have to strain your
 (10) eyes a little bit to see it but you can see Dungeness Spit
 (11) The beige line goes off from the mainland here and this is
 (12) taken up above Dungeness Spit in the vicinity of the Mains Farm
 (13) subdivision And again Mains Farm is - oops disappeared
 (14) from the screen Now the photo s on
 (15) Mains Farm is located here at the base of Dungeness Spit
 (16) Q Did you have occasion to do something called a matched
 (17) pairs analysis in these two areas?
 (18) A Yes we did
 (19) Q Describe for the jury briefly what is that?
 (20) A We looked for sales and resales of the same piece of
 (21) property looking for a sale before the oil spill occurred and
 (22) a resale of the same property after the oil spill occurred In
 (23) the case of Observatory Point we found six of those matched
 (24) pairs involving the same piece of vacant property and in the
 (25) Mains Farm area near Dungeness Spit we found 28 matched
 (26) pairs

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- (1) some of which were before and after the spill and a number of
 (2) which occurred both sale and resale before the spill and
 (3) then both sale and resale after the spill
 (4) Q Why do a matched pairs study?
 (5) A Matched pairs are an accepted technique for understanding
 (6) what happens in a particular real estate market We look to
 (7) see what the trend is between the first sale date and the
 (8) second sale date and then you can compare that trend to other
 (9) trends that you see in the marketplace to see if there s some
 (10) particular factor that might account for a change in sale price
 (11) or rate of change
 (12) Q I m going to show you defendants 10218B and defendants
 (13) 10265A and ask you to -
 (14) A You think you should match them up with the picture that
 (15) was underneath
 (16) Q Whoops Well since we can t see the pictures why don t
 (17) we leave it this way
 (18) MR PETUMENOS Objection Your Honor the witness is
 (19) leading the lawyer
 (20) MR OPPENHEIMER And getting better results I might
 (21) add
 (22) BY MR OPPENHEIMER
 (23) Q Tell us what we re seeing here
 (24) A These are two charts that show some of the results of our
 (25) matched pair analysis Why don t I start with the Observatory

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- (1) Point one
- (2) This shows the before sale price and an after sale price
- (3) for the same piece of property and in Observatory Point these
- (4) are actual vacant lots that are shown here For example
- (5) here s one that sold in June of 1983 at a price and then the
- (6) same lot resold in January of 1990 at a higher price These
- (7) were the six transactions in Observatory Point that we could
- (8) find where there was the same piece of property selling before
- (9) the spill and then reselling sometime after the spill
- (10) As I indicated at Mains Farm we had a larger group of
- (11) property and this is a depiction of some of those We ll come
- (12) back to that one after talking about that
- (13) Q What is the -
- (14) A Should I quit this?
- (15) Q I ll regain my seat and learn quite a bit
- (16) MR PETUMENOS He s a lawyer after all
- (17) BY MR OPPENHEIMER
- (18) Q Mr Roddewig what is the Observatory Point subdivision
- (19) comparison telling us?
- (20) A We analyzed the transactions that we found there and looked
- (21) at the rates of increases in price What we found was that the
- (22) rate of increase was not affected by the spill The rates were
- (23) very healthy Prices and values were going up in the period
- (24) from immediately before the spill to the period after the
- (25) spill and we could find no impact from the spill on that

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- (1) increase in the price for that property However we also
- (2) found a couple of sales where the price trend was different
- (3) from that
- (4) Here is a lot that sold in March of 1984 at a price that
- (5) was slightly higher than its resale price in October of 1987
- (6) after the spill Here s another set of transactions where
- (7) there was the same price before the spill as compared to after
- (8) the spill
- (9) One of the interesting things I found when I analyzed these
- (10) two lots is that these two properties are located further away
- (11) from the shoreline than these two pieces of property These
- (12) were in the third row and the fourth row away from the
- (13) shoreline These were in the 11th row and the 5th row away
- (14) from the shoreline
- (15) Q To put your data into perspective did you look at the
- (16) broader area - this is a community is it not in Clallam
- (17) County?
- (18) A Yes it is Clallam County Washington
- (19) Q Once again did you look at broader data here to put what
- (20) you were finding in perspective?
- (21) A Yes we did We compared the price trends we saw in
- (22) Observatory Point and in Mains Farm to general trends we saw
- (23) in
- (24) the county as a whole and even in the State of Washington in
- (25) order to try to understand what the overall condition of the
- (26) marketplace was

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- (1) particular subdivision from the six matched pairs transactions
- (2) that we had
- (3) I might also add that we had a few other additional sales
- (4) in Observatory Point that we looked at There was one other
- (5) matched pair a seventh one that started after the spill and
- (6) had the resale after the spill and we collected three or four
- (7) other sales in Observatory Point too in the period from 1983
- (8) to 1990
- (9) Q Mains Farm subdivision what is this telling us?
- (10) A Mains Farm results were a little bit different when we
- (11) analyzed it Here we had a larger number of sales to analyze
- (12) We had 28 matched pairs And what we found was that there
- (13) was
- (14) no - no impact from the spill on Mains Farm that could be
- (15) conclusively shown from all of the evidence that we found in
- (16) Mains Farm In particular these two transactions are
- (17) interesting
- (18) This is a transaction that occurred in July of 1985
- (19) Remember here the oil spill was in December of 1985 so this
- (20) was a few months before the spill same property resold in June
- (21) of 1987 at a higher price and the rate of increase was a fairly
- (22) substantial one I think in that case it was about 13 percent
- (23) premier
- (24) We found another transaction January of 1985 Remember
- (25) the spill was in December of 1985 and that piece of property
- (26) resold in January of 1990 and again there was a very healthy

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- (1) Q What conclusions did you draw from looking at these two
- (2) subdivisions?
- (3) A Case of Observatory Point our conclusion was that there
- (4) was no evidence that the oil spill affected values or prices or
- (5) even the numbers of transactions In the case of Mains Farm
- (6) when we looked at the - all of the matched pairs our
- (7) conclusion was that there was no provable impact of the spill
- (8) on Mains Farm However any evidence that we did find of a
- (9) possible impact from the spill there was that it was affecting
- (10) shoreline related area and not portions of the subdivision that
- (11) were further inland
- (12) The general conclusion that we drew from both studies was
- (13) once again there s no market wide stigma no market wide
- (14) impact Clallam County itself was not effected the
- (15) community of Sequim in which Mains Farm is located was not
- (16) affected by the oil spill
- (17) Q Did you find any evidence of sales being delayed as a
- (18) result of the spill?
- (19) A Yes we found some evidence of possible deferral of sales
- (20) activity Remember again that the spill occurred in December
- (21) of 1985 There s a typical trend in the east end of Clallam
- (22) County where sales activity goes up in January - for sales
- (23) activity in January of a year to be higher than in February of
- (24) a year And what we found in January and February of 1989 is
- (25) that January transactions sales volume was down by
- (26) comparison

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- (1) to February Which was some indication to us that maybe there
- (2) was a possible delay in transactions from January into
- (3) February
- (4) Q So we re talking a month s period of time perhaps?
- (5) A A month s period of time
- (6) Q Okay
- (7) A We looked at the quarterly evidence as well and there was
- (8) some evidence from the quarterly transactions that there may
- (9) have been a pickup in the second part of the quarter that
- (10) offset the delay from January to February
- (11) MR OPPENHEIMER Your Honor this might be a good
- (12) time for a break
- (13) THE COURT Yes okay
- (14) THE CLERK Please rise This court stands in
- (15) recess
- (16) (Jury out at 10 06 a m)
- (17) (Recess from 10 06 a m to 10 27 a m)
- (18) (Jury in at 10 27 a m)
- (19) THE CLERK This court now resumes its session
- (20) Please be seated
- (21) BY MR OPPENHEIMER
- (22) Q Mr Roddewig I m going to put up defendants 10376 This
- (23) is a - the area of your third case analysis is that correct?
- (24) A Yes it is
- (25) Q Tell the jury what we re seeing

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- (1) A This is a map that shows the location of a spill at Ocean
- (2) Shores Washington The previous spill that you heard about
- (3) was up here at Port Angeles Washington on the north shore of
- (4) the Olympic Peninsula This one is down here at the mouth to
- (5) Grays Harbor Washington and it was in December of 1988
- (6) Q By the way I think you and I misspoke at the end just
- (7) before the break When you were talking about the one month
- (8) delay at Mains Farm potentially in a sale I think you and I
- (9) mentioned that that occurred in 89 You in fact meant to
- (10) talk about the one month in the year of the spill is that
- (11) correct?
- (12) A That s correct it would have been in 1986 I sometimes
- (13) get the dates of these two confused in my mind when I talk
- (14) about them
- (15) Q This one December 1988 we don t have a picture of the
- (16) spill area Can you identify in the inset picture generally -
- (17) maybe if you stand to the - on the other side so you don t
- (18) block the view here Go ahead show where the oil spill
- (19) generally occurred
- (20) A The area heaviest hit was right here at Ocean Shores
- (21) MR PETUMENOS Excuse me just one second
- (22) MR OPPENHEIMER Go ahead
- (23) A Right here at Ocean Shores Washington but there was
- (24) some
- (25) scattered oiling along the entire west coast of the Olympic
- (26) Peninsula and there was even some scattered oiling on

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- (1) Vancouver Island I think the total length of shoreline that
- (2) had some oiling of one type or another was about 110 miles
- (3) Q 110 miles?
- (4) A That s correct
- (5) Q Was there a cleanup?
- (6) A Yes there was
- (7) Q And extensive?
- (8) A Yes there was extensive cleanup including mechanical
- (9) pickup of oil on the beaches
- (10) Q What time period after the spill in December 88 did the
- (11) oil spill cleanup continue?
- (12) A Cleanup continued for a number of months after the spill
- (13) Ocean Shores itself was generally cleaned up within a month
- (14) or so after the spill Cleanup continued up the - up the
- (15) coast for a couple of months two or three months to my
- (16) recollection
- (17) Q Now you ve described your method to us previously so
- (18) we re going to go through this a little - little bit more
- (19) quickly
- (20) A I think it was actually in June of 1989 that the end of the
- (21) cleanup was declared
- (22) Q I show you Mr Roddewig defendants 10627 and ask you to
- (23) describe this for the jury What are we seeing here?
- (24) A This is a subdivision map of the Ocean Shores community
- (25) Q Let me just - I m not sure everyone can - okay sorry

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- (1) Thank you
- (2) A To orient the jury north is pointing this way east is
- (3) that way south is that way Ocean Shores is a community of
- (4) 11 000 lots most of which are still undeveloped as of - as of
- (5) today There are only about 2 200 people who actually live in
- (6) the community Where you see the little black dots on some of
- (7) these lots that indicates houses that were in place as of the
- (8) date of this plat map
- (9) Q Let me show you exhibit - Doug can you read that? It s
- (10) too hard for my eyes
- (11) MR DAVIS DX10625A 16
- (12) BY MR OPPENHEIMER
- (13) Q Tell the jury what we re looking at here
- (14) A This is a photograph of Ocean Shores It s taken from
- (15) close to the beach shows some of the houses and the types of
- (16) houses that are built I think you can also get an idea for
- (17) how open a lot of the community is and there really are very
- (18) few trees on the community There are some forest areas on the
- (19) bay side of the community but virtually nothing along the
- (20) ocean side It s basically a sand spit that runs out of the
- (21) Olympic Peninsula
- (22) Q Did you conduct the same type of study that you described
- (23) earlier with respect to Ocean Shores here?
- (24) A Yes we did
- (25) Q And was one of the things you did a tiered study?

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- (1) A Yes we did This community was very well suited for a
 (2) tier analysis since it had so many lots and so many sales going
 (3) on We could do quite a bit of work looking at sales in
 (4) various tiers located close to the ocean and away from the
 (5) ocean
 (6) Q I'll show you defendants 10403A and ask you to describe
 (7) what we're looking at for the jury
 (8) A This is a depiction of a portion of the Ocean Shores area
 (9) This shows our tier segments running along the bay front This
 (10) would be the bay front area in here where we had a bay front
 (11) tier and then a second and third row of lots removed away from
 (12) the bay side We had a similar tier mapping that we did for
 (13) the ocean side
 (14) Q Could you read that number into the record Doug?
 (15) A Me?
 (16) Q Yes
 (17) A DX10518B And again this depicts the tier mapping that
 (18) we did on the ocean side of the community and then interior
 (19) areas were classified as interior areas for purposes of our
 (20) analysis
 (21) Q What conclusions did you draw from looking at Ocean
 (22) Shores?
 (23) A Here we literally had hundreds of transactions that we were
 (24) able to analyze Most of them involved vacant lots but we
 (25) also tracked improved sales as well And from this analysis

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- (1) we found very little evidence of any impact of the spill
 (2) although one of these charts will give you an idea of some of
 (3) the evidence we did find
 (4) Q I'm going to put up on the easel defendants 10521 and
 (5) Mr Roddewig what does that show?
 (6) A This is an exhibit that shows total sales of vacant lots in
 (7) Ocean Shores by quarter Each one of these is a quarter of the
 (8) year and it also has the vacant lots represented by tier as
 (9) well
 (10) Q Before you go on those are the tiers that are shown on
 (11) exhibits 10403A and 10518B?
 (12) A That's correct The colors - the colors are different
 (13) but the labels of the tiers are the same There's a first row
 (14) second row third row and then there's an inland area over
 (15) here which would be the area that has not been colored And I
 (16) think one of the things the jury should notice is the large
 (17) numbers of transactions that appeared in the quarter For
 (18) example in the third quarter of 1987 there were 50
 (19) transactions in that quarter alone involving vacant lots
 (20) There's a pattern you can see if you look at the pattern of
 (21) sales activity by quarter
 (22) This is a seasonal community in large part A number of
 (23) second homes are built out here and you see a dropoff in total
 (24) sales in the first quarter of virtually every year and a rise
 (25) in sales in the second and third quarter of every year which

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- (1) you would expect in an oceanside community that's seasonally
 (2) oriented for second home purchase and for retirees
 (3) I think one of the interesting things to note is the spill
 (4) occurred in fourth quarter of 1988 The first quarter sales
 (5) went down in keeping with the trend but the second quarter
 (6) sales went up sharply and continued up and the third quarter
 (7) into the second quarter of 1990 and the third quarter of 1990
 (8) there were very large number of sales in the community
 (9) Q Each of those quarters representing a three month period?
 (10) A That's correct
 (11) Q You asked us to make a different chart - I want you to
 (12) step back so they can see - regarding this part of your
 (13) graph
 (14) A Yes It's somewhat difficult to see what happens here with
 (15) the first tier sales because the number of first tier sales in
 (16) an absolute sense per quarter is smaller than some of the other
 (17) areas so this other chart just takes the first tier sales and
 (18) shows you by quarter what happens with them
 (19) I think again if you look back you'll see the seasonal
 (20) pattern Here's a drop in the first quarter of 1988 There's
 (21) a drop in the first quarter of 1989 There's a drop in the
 (22) first quarter of 1991 1990 is an exception but one of the
 (23) things that we found was that there was not an increase in
 (24) sales in the second quarter of 1989 just after the spill
 (25) Instead sales stayed relatively flat And if you look at some

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- (1) of the other second quarters you'll see an increase you'll
 (2) see an increase you'll see an increase This is some evidence
 (3) that the spill may have deferred sales transactions and slowed
 (4) them down in terms of the number of transactions in the second
 (5) quarter of 1989
 (6) Q And do you see -
 (7) A And at the end of the first - by the end of the third
 (8) quarter however it's clear that the numbers of sale
 (9) transactions in the first year closest to the ocean had been
 (10) rebounded dramatically
 (11) Q Now this area this colored area in here all of these are
 (12) sales is that correct?
 (13) A That's correct They represent the numbers of sales
 (14) Q Okay And what did you conclude from your analysis then
 (15) of Ocean Shores and was it consistent with what you were
 (16) finding in your other case studies?
 (17) A Again we looked at community wide information as well and
 (18) we could find no market wide stigma impact no impact of the
 (19) spill on the general real estate market We could find no
 (20) impact on Ocean Shores as a whole when you looked at the
 (21) total
 (22) numbers of transactions and you looked at price increases but
 (23) we did find this potential anomaly from the first to the second
 (24) quarter in 1989 for the lot sales closest to the beach which
 (25) may indicate some possible impact of the spill on the pace of
 transactions

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- (1) Q Followed by this rebound?
 (2) A Followed by the rebound
 (3) MS SMITH Randy that one s not in the record
 (4) MR OPPENHEIMER I m sorry the exhibit that you were
 (5) just referring to that shows the first tier near the water is
 (6) Exhibit 10524
 (7) BY MR OPPENHEIMER
 (8) Q All right let s shift to the fourth of the studies and
 (9) first tell the jury where was the fourth study located And
 (10) protect yourself from these flying pieces of paper
 (11) A The fourth study is located in Huntington Beach
 (12) California and it s a spill that occurred after the Exxon
 (13) Valdez spill It occurred in February of 1990 Huntington
 (14) Beach is shown on this inset map here It s south of
 (15) Los Angeles on the coastline It s in Orange County
 (16) California and this exhibit shows the oiling that occurred
 (17) on - on one of the dates that the spill was in process This
 (18) particular date is February 10th 1990 The tanker spill
 (19) actually occurred directly off Huntington Beach itself
 (20) Q Did this spill have an effect on those beaches?
 (21) A Yes There was shoreline oiling and there was scattered
 (22) oiling from Newport Beach north to Seal Beach which was the
 (23) first community north of Huntington Beach but the area that
 (24) was most directly hit on a number of occasions by the spill was
 (25) Huntington Beach itself

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- (1) Q And again did you conduct the type of study that you have
 (2) been describing to the jury in connection with these other
 (3) detailed case studies?
 (4) A Yes we did
 (5) Q Showing you defendants exhibit 10622 and I d like you to
 (6) tell the jury what this exhibit is?
 (7) A This is a map of Huntington Beach California Here s the
 (8) Pacific Ocean here beach area Huntington Beach is a very
 (9) well known surfing beach It s sometimes called Surf City
 (10) USA The map also shows a number of subdivision areas and
 (11) gated communities separate developed communities that we
 (12) studied in our effort to find out what impact if any the
 (13) spill had on the real estate market And one of the projects
 (14) is actually named the Huntington Pacific Condominiums which
 (15) is
 (16) the only actual development project on the beach itself in
 (17) Huntington Beach There is a road that separates the beach
 (18) from the rest of the developed area in Huntington Beach
 (19) Q What are these little numbers on the exhibit?
 (20) A The numbers are references to the neighborhoods and the
 (21) subdivisions and they match up with particular case studies
 (22) that we did of individual subdivisions in Huntington Beach
 (23) One other thing -
 (24) Q Yes I was going to say is there something about this
 (25) exhibit that helps us get a sense of distance?
 (26) A Yes this line here this dotted line is one mile

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- (1) approximately one mile from the beach The second line is
 (2) approximately 1 5 miles from the beach and that allowed us to
 (3) do some comparative analysis to see if we saw any differential
 (4) impact within the one-mile area from the beach compared to the
 (5) one and a half mile area
 (6) Q You mentioned doing a study on the Huntington Pacific
 (7) Condominiums is that correct?
 (8) A Yes I did
 (9) Q Tell the jury what you did there
 (10) A We did a number of things on Huntington Pacific
 (11) Condominiums It s about a hundred unit condominium
 (12) project
 (13) We found - we actually got multiple listing sheets on sales
 (14) transactions prior to the spill and following the spill and we
 (15) looked at the numbers of transactions and the pattern of
 (16) transactions and we actually found a - a matched pair
 (17) involving a sale before and after the spill And we also found
 (18) a sale that actually closed in the third week of February
 (19) while the cleanup was going on and just two weeks after the
 (20) spill event started and there were a number of transactions in
 (21) 1990 immediately following the spill in that building
 (22) Q I ll show you what we have marked as defendants 10234A
 (23) and as usually ask you to tell the jury what we re looking
 (24) at
 (25) A This is a chart that shows part of our analysis involving
 (26) the Huntington Pacific Condominium project. There were two

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- (1) matched pairs before and after the spill unit 319 and unit
 (2) 420 The green indicates the sale price in September of 1987
 (3) Again remember the spill was in February of 1990 That same
 (4) condominium unit resold in September of 1991 for a substantial
 (5) increase in value Unit 420 sold in April of 1988 and resold
 (6) in June of 1990 Again there was a substantial increase in
 (7) sale price following the spill
 (8) And this summarizes the average sale prices for all of the
 (9) two bedroom units in 1988 average price compared to 1990
 (10) average price And again two-bedroom units comparing 1989
 (11) transactions to 1990 transactions and in each case you see a
 (12) substantial increase in average value for those transactions
 (13) Q Could we get the right number of zeros on this table? I
 (14) guess that s the Los Angeles market okay Just so that we re
 (15) clear with the jury this look that you took of the Huntington
 (16) Pacific Condominiums was not the only thing you did in this
 (17) market is that correct?
 (18) A That s correct
 (19) Q All of the things you described previously including
 (20) interviews and other types of surveys you did in connection
 (21) with this work?
 (22) A That s correct and including detailed analysis of the
 (23) pattern of sales transactions in each of these 21 other
 (24) neighborhoods and some of the interviews that we did were
 (25) interesting we did find -

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- (1) Q Before you get into that did you look at area wide data
 (2) for example in the form of permits and that sort of thing?
 (3) A Yes we did We gathered information on construction
 (4) starts permit information and also assessed value trends and
 (5) compared what we were finding in each one of these
 (6) neighborhoods and subdivision projects to area wide
 community
 (7) trends
 (8) Q And what conclusion did you draw from looking at
 Huntington
 (9) Beach?
 (10) A As in the other case studies we found no general
 (11) market wide impact from the spill We could find no indication
 (12) that any of these 21 projects were being affected in any way by
 (13) the oil spill We did find some interview information that
 (14) indicated a couple of specific projects may have been affected
 (15) by the spill One broker that we talked with indicated that a
 (16) group of Japanese investors who had been out to buy a
 (17) condominium project directly across the street from the beach
 (18) were out during the spill cleanup and they notified the broker
 (19) after they left that they were not going to go ahead with the
 (20) transaction and the reason they gave was the oil spill
 (21) We also found in talking to a broker who was involved in a
 (22) project located within a quarter mile of the beach in
 (23) approximately this area here that she believed that the sales
 (24) pace at her project that she was working on had been slowed
 (25) during the course of the cleanup And the cleanup here in

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- (1) Huntington Beach itself went for I think from early February
 (2) into late March by the time the beaches were declared open
 (3) Q And how did you factor that information into your
 (4) conclusion here?
 (5) A Our conclusion again was that there s very little
 (6) evidence of any impact of the spill There s no evidence of
 (7) any market wide impact of the spill but there s some possible
 (8) evidence of an impact on marketability of properties located
 (9) within the beach front area
 (10) Q What do you mean by that? What was your conclusion about
 (11) that?
 (12) A There s some potential delay in transactions but it was no
 (13) longer than the clean up period
 (14) Q And in terms of area what do you have in mind?
 (15) A The shore front related area no more than a quarter mile
 (16) in from the beach
 (17) Q And the - again the Huntington Beach Condominium project
 (18) where you saw the sales picture you saw earlier that you would
 (19) describe as unaffected by the spill?
 (20) A That was right on the beach It was the project in closest
 (21) proximity to where the shoreline oiling was and cleanup was
 (22) and we could find no impact in the Huntington Pacific project
 (23) Q To your great relief I d like to have you take your seat
 (24) again
 (25) Mr. Roddewig have you shown the jury today all of the data

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- (1) that you collected in your case analysis?
 (2) A No I have not
 (3) Q And have you talked to them about all of the case studies
 (4) that you have done?
 (5) A No I ve not
 (6) Q Based on your overall research including the detailed case
 (7) studies that you ve talked to the jury about today what are
 (8) your overall conclusions about the effect of oil spill on real
 (9) estate markets?
 (10) A First of all there s very little evidence that oil spills
 (11) have any impact on real estate markets The evidence that we
 (12) found indicates that there s no market wide stigma no
 (13) market wide impact of an oil spill There s some limited
 (14) evidence of an impact on directly oiled property and property
 (15) within the - a quarter mile of the shoreline that is in the
 (16) shoreline related area of the community
 (17) The other conclusion is that any impact that there is is
 (18) only temporary It s related to the clean-up period and it
 (19) goes away once cleanup occurs
 (20) Q You say cleanup period are you talking period of time
 (21) when people are actually on the beach doing things?
 (22) A That s correct when the physical cleanup is going on
 (23) Q Did you conclude that there was a relationship between the
 (24) mere physical presence of oil on a beach and some adverse
 (25) effect on the real estate market?

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- (1) A No I did not Our conclusion was that there is no
 (2) relationship between the mere physical presence of oil on a
 (3) beach and the real estate market In fact in some of the case
 (4) studies that we did there was some oil on the beaches or in
 (5) the - in the area found in cleanup
 (6) Q I d like to change subjects now Are you familiar with
 (7) notions of land that s been called natural land and
 (8) environmental preservation lands?
 (9) A Yes I am
 (10) Q And tell us what you understand those to be?
 (11) A Natural land is a term that Bill Mundy uses to describe
 (12) land that the government purchases or that is sometimes
 (13) purchased by nonprofit organizations and that he believes
 (14) involves a premium in price that is paid over the market value
 (15) of the property I believe it s similar to the term that
 (16) Professor Green uses and he calls that same land
 environmental
 (17) preservation land And in Mr. Mundy s reports about 207 000
 (18) acres of the 582 000 acres involved in the corporate and
 (19) village claims he classifies as natural land
 (20) Q Do you believe that land should receive that type of
 (21) classification?
 (22) A No I do not
 (23) Q Tell the jury why
 (24) A Well I agree that the - the ultimate purchaser of much of
 (25) the land that he classifies as natural land would be state or

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- (1) federal government However I don't agree with his conclusion
 (2) that there is a premium in price over market value that is
 (3) typically paid for that kind of land and -
 (4) Q Do you also hold a view with respect to the likelihood of
 (5) large scale purchases by these agencies?
 (6) A Yes The amount of government purchases or nonprofit
 (7) purchases is very small very small by the comparison of
 amount
 (8) of land that has been a classified in this classification by
 (9) Dr Mundy
 (10) Q I apologize for having asked you to retake your seat but I
 (11) would like to have you come down one more time
 (12) Counsel this is exhibit defendants DX12082
 (13) Mr Roddewig what are we seeing in this exhibit?
 (14) A This is a map that shows federal lands owned by the federal
 (15) government in Alaska It shows various components of that
 (16) federal ownership including the national wildlife refuge
 (17) system in a beige color national park system in the darkest
 (18) color and national forest in the light green color and
 (19) various Bureau of Land Management pieces in other colors
 (20) Q About how much of Alaska is already owned by the state and
 (21) federal government?
 (22) A The federal government owns about 59 percent of the State
 (23) of Alaska and the state government owns approximately
 another
 (24) 28 or 29 percent for a total of about 87 or 88 percent of the
 (25) state in federal and state ownership

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- (1) Q Does that influence your conclusion about the likelihood of
 (2) their purchasing large tracts of land?
 (3) A Yes it does Because there is already so much land in the
 (4) state of Alaska owned by the federal government the federal
 (5) government currently doesn't make Alaska very high priority for
 (6) additional purchases There's a lot of competition among the
 (7) states for the federal dollars that are available for purchases
 (8) of land and there just isn't a great deal of acquisition
 (9) activity by the federal government in the state
 (10) Q Briefly describe for the jury how - the process by which
 (11) governments state and federal go through acquiring land
 (12) A Governments have rules for how property is acquired and
 how
 (13) it is appraised prior to acquisition and one of the
 (14) fundamental rules is that the property be appraised at fair
 (15) market value And the rules require that when the appraiser
 (16) looks to fair market value he looks to fair market value in
 (17) the private marketplace and he cannot value the property
 based
 (18) on some expected premium in value that a particular owner of
 (19) the land may believe is there Instead the appraiser has to
 (20) look to the marketplace to sales among willing buyers and
 (21) willing sellers and to the private marketplace
 (22) Q Are you saying the government's never paid premium for
 (23) land?
 (24) A No there are occasions where they will pay a premium for
 (25) land In fact the experience that I've had in appraising land

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- (1) for the Bureau of Land Management BLM they actually
 indicated
 (2) to me that they could pay a ten percent premium over fair
 (3) market value if they had to for purposes of negotiation in
 (4) order to complete a transaction I believe some of the other
 (5) agencies of the federal government when they're negotiating
 (6) transactions if they need to avoid potential litigation they
 (7) can pay a premium up to 35 percent over fair market value to
 (8) avoid litigation
 (9) Q And in your opinion are these the exceptions rather than
 (10) the rule?
 (11) A They are certainly the exceptions rather than the rule
 (12) MR OPPENHEIMER Counsel may we approach the bench?
 (13) (At side bar on the record)
 (14) MR OPPENHEIMER Your Honor I should have thought to
 (15) raise this at the break but I have a version of the exhibit
 (16) that we argued over yesterday which has the two bars I
 (17) thought that the examination was consistent with Your Honor's
 (18) directive yesterday would be for me to question him on that
 (19) data not showing the last two bars
 (20) THE COURT Just the first
 (21) MR OPPENHEIMER So you could hear it and see this
 (22) THE COURT Just the history
 (23) MR OPPENHEIMER Frankly I would request an
 (24) opportunity to ask the Court to allow him to discuss the chart
 (25) with the other two bars on which we also have here - this one

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- (1) does not have the other - and Your Honor would then have
 heard
 (2) what he had said up until that point And I'm sorry I didn't
 (3) raise that at the break
 (4) THE COURT Okay that's fine
 (5) (Sidebar concluded)
 (6) BY MR OPPENHEIMER
 (7) Q Mr Roddewig I'm going to show you defendants 10478A
 (8) which is a modified version of the predesignated exhibit and
 (9) if I haven't completely closed you off if you could explain to
 (10) the jury what does this table show us
 (11) A Well this is a table that shows state and federal park
 (12) acquisition in Alaska from the year 1980 to the year 1992 by
 (13) year and it's expressed in terms of the number of acres
 (14) purchased per year in the entire state
 (15) Q Does this reflect the activities of the major players in
 (16) the market you were describing?
 (17) A Yes The state and federal government entities that are
 (18) represented here are the major government purchasers and
 once
 (19) again this is for the entire state of Alaska
 (20) Q What type of conclusions does this help you draw in your
 (21) view of the activity in this market for so called natural lands
 (22) or environmental preservation lands?
 (23) A It indicates that the actual amount of land that's
 (24) purchased by the federal and state government every year is
 (25) very small In some years there are no purchases at all

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- (1) Most of the years shown on this graph on this chart the acres
 (2) purchased are under 320 acres per year When we re talking
 (3) about the market for 207 000 acres of land classified as
 (4) natural land it would take a very long time with this type of
 (5) activity for that - that land to be absorbed in the
 (6) marketplace
 (7) Q Is the data that we see reflected on the exhibit showing
 (8) state and federal park purchases consistent with Exhibit 12082
 (9) which shows the existing ownership?
 (10) A Yes it is
 (11) Q And again explain that
 (12) A Well this exhibit shows federal lands in Alaska It does
 (13) not show the state lands but included in the acreage that s
 (14) been bought here is federal acquisition of park lands and
 (15) those acquisitions would be reflected in that map
 (16) Q Give us an idea of the size of plaintiffs parcels in this
 (17) case
 (18) A Plaintiffs total acreage is about 582 000 acres and of
 (19) that about 207 000 has been classified as - as natural
 (20) lands It would be - the natural lands area would be a
 (21) hundred times more than - than what was bought in 1985 more
 (22) than a hundred times more
 (23) Q Does this data include exchanges?
 (24) A No it does not
 (25) Q Why is that?

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- (1) A Exchanges are not payments in cash for land They are a
 (2) situation in which the government will exchange one piece of
 (3) land for another piece of land There s no cash
 (4) consideration There are political considerations involved in
 (5) the exchanges and they take a very long time to get
 (6) consummated
 (7) Q Mr Roddewig have you had an opportunity to apply some of
 (8) the conclusions you ve been talking to us about today to the
 (9) damage analyses that have been done in this case by plaintiffs
 (10) experts?
 (11) A Yes I have
 (12) Q I m going to show you Mr Roddewig what has been marked
 (13) as defendants 13072C?
 (14) MR PETUMENOS I m sorry could I have the number
 (15) again counsel?
 (16) MR OPPENHEIMER Yes it is defendants 13072C
 (17) MR PETUMENOS And I m sorry I missed - 13072C
 (18) right
 (19) MR OPPENHEIMER 13072C
 (20) MR PETUMENOS I m sorry counsel if you could give
 (21) me the last one
 (22) THE COURT 10478A
 (23) MR PETUMENOS 10478A
 (24) MS SMITH Your Honor we have a computer that s gone
 (25) down for the court reporter can you stop for a second?

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- (1) THE COURT Sure Maybe this is a signal from a
 (2) higher authority we should take a break so I ll let you go
 (3) (Jury out at 11 07 a m)
 (4) (Recess from 11 07 a m to 11 12 a m)
 (5) (Jury no present)
 (6) THE COURT We re on the record again
 (7) Since this is break time counsel I think it s probably -
 (8) it s just about the time anyway I d like to hear the testimony
 (9) regarding the proposed spill purchases of Alaska land
 (10) MR OPPENHEIMER I m sorry Your Honor he s coming
 (11) right back in It s my fault
 (12) THE COURT While you re doing this you gave me the
 (13) transcript yesterday of Dr Mundy s testimony and it s on my
 (14) desk I just don t want to have to go get it Do you have an
 (15) extra copy
 (16) MR OPPENHEIMER I think I do although I may have
 (17) given you my only copy Afraid I did
 (18) THE COURT We can stay on the record just go get
 (19) it It s a two page excerpt of transcript It s right on my
 (20) desk in front of the chair
 (21) Okay I guess we re ready
 (22) VOIR DIRE EXAMINATION OF RICHARD J RODDEWIG
 (23) BY MR OPPENHEIMER
 (24) Q Mr Roddewig what are the sales or transactions in 93 and
 (25) 94 that are depicted on this table?

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- (1) A The 1993 transaction is the sale of 23 800 acres commonly
 (2) called the Kachemak Bay 3 transaction It was a sale by the
 (3) Seldovia Native Association to the State of Alaska
 (4) Q And the 42 000 acre transaction?
 (5) A The 42 000 acre transaction in 1994 is the sale of the Seal
 (6) Bay/Tonki Cape property on Afognak to the state and federal
 (7) government following the Exxon Valdez spill
 (8) Q Because we re before the Judge not a jury I m going to
 (9) ask you if you would to just describe for us the significance
 (10) of the 93 and 94 data on this table to your analysis of the
 (11) presence or absence in the market for natural or environmental
 (12) preservation lands
 (13) MR PETUMENOS Just so we re clear we re not before
 (14) the jury This is an offer of what would be before the jury if
 (15) you had -
 (16) THE COURT Yes
 (17) MR OPPENHEIMER That s correct I m not doing it
 (18) literally question for question Your Honor
 (19) THE COURT That s fine
 (20) A There are two implications of this The first is that the
 (21) Exxon Valdez settlement money is being used to acquire
 (22) property and that has created a larger market for land that
 (23) has been classified as natural land than existed previously
 (24) And second the land that has been purchased in both of these
 (25) transactions is land that was oiled by the Exxon Valdez spill

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- (1) BY MR OPPENHEIMER
 (2) Q Are either of the transactions used by Mr Mundy in his
 (3) calculations of damages?
 (4) A The Kachemak Bay 3 transaction is mentioned in his report
 (5) Q And is it used as a comparable?
 (6) A Yes it is
 (7) Q Do you believe it is appropriate to reason from the
 (8) transactions in '93 or '94 to a conclusion about whether or not
 (9) there is a market for these types of lands in the absence of
 (10) the money that resulted from the settlement fund of the oil
 (11) spill?
 (12) A No it is not appropriate to form that conclusion because
 (13) these transactions occurred only as a result of the settlement
 (14) in the wake of the Exxon Valdez oil spill and also they are
 (15) transactions involving oiled property So they don't show
 (16) any - any impact of the Exxon Valdez oil spill on the
 (17) marketplace because these properties were actually oiled and
 (18) were purchased by the state and federal government
 (19) MR OPPENHEIMER Your Honor that is the gist of our
 (20) testimony at this point
 (21) MR PETUMENOS Some questions Judge
 (22) THE COURT Go ahead
 (23) VOIR DIRE EXAMINATION OF RICHARD J RODDEWIG
 (24) BY MR PETUMENOS
 (25) Q Mr Roddewig you can actually take the stand You don't

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- (1) have to if you don't want to?
 (2) A Depends how long it's going to be
 (3) Q I don't want you to be uncomfortable The Kachemak Bay
 (4) transaction that you're talking about was the subject of
 (5) governmental interests substantial governmental interest
 (6) before the Exxon Valdez settlement is that right? Do you
 (7) know?
 (8) A Yeah the transaction was negotiated over a quite long
 (9) period of time
 (10) Q Well even before there was a settlement of the - Exxon
 (11) Valdez litigation with state and federal government there was
 (12) interest in purchasing these lands by the government am I
 (13) right?
 (14) A That's correct
 (15) Q And the other thing that I wanted to ask you is have you
 (16) studied the oiling data for the Seldovia Native Association
 (17) land?
 (18) A No I have not
 (19) Q Do you have any idea how oiled the Native - Seldovia
 (20) Native Association lands was?
 (21) A Lightly oiled
 (22) Q Lightly oiled And have you studied Dr Mundy's evaluation
 (23) of the persistence period of time for the Seldovia Native
 (24) Association?
 (25) A Yes I've seen it but I don't remember the specific

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- (1) persistence period
 (2) Q Do you know whether or not the subsistence - the
 (3) persistence period and the damages for the Seldovia Native
 (4) Association according to Dr Mundy was over before the
 (5) Trustees purchased the land?
 (6) A I don't recall
 (7) Q With respect to the Afognak Seal Bay transaction were
 (8) there negotiations between the federal and state government
 (9) prior to the settlement of the Exxon Valdez case over
 (10) purchasing that land?
 (11) A Yes I believe there were
 (12) Q So before there were these funds and pots of money from the
 (13) settlement there were discussions between these property -
 (14) the property owners and the governments about selling this
 (15) land right?
 (16) A There were some discussions
 (17) Q Okay Now your chart as we see it here as I think was
 (18) fairly pointed out in your direct excludes land exchanges
 (19) between the government and Native Corporations?
 (20) A Yes it does
 (21) Q There was a sale of the Pribilof Islands land between the
 (22) Native Corporation and the government in January of 1981 Is
 (23) that on your chart?
 (24) A Pribilof Islands was not an exchange but -
 (25) Q No I understand it was a purchase but is that on your -

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- (1) chart?
 (2) A No it's not
 (3) Q The Lake Clark National Park and Reserve transaction are
 (4) you familiar with that one?
 (5) A Yes I am
 (6) Q That was in 1976 and that's not on your chart?
 (7) A That's correct it predates 1980
 (8) Q The Attu Island transaction with the government in August
 (9) of 1988 is that on your chart?
 (10) A That one I don't know about
 (11) Q The Gold Belt transaction in 1980 is that on your chart?
 (12) A That is an exchange and it's not on the chart
 (13) Q The - there was a Kachemak Bay transaction in - well was
 (14) there more than one Kachemak Bay transaction?
 (15) A Yes there were two previous Kachemak Bay transactions
 (16) Q Those two previous Kachemak Bay transactions had nothing
 (17) to do with the oil spill Trustees or did they do you know?
 (18) A They predated the Exxon spill
 (19) Q And are they in the chart?
 (20) A I believe they are if Mr Mundy included them in his
 (21) tables
 (22) Q Explain that to me explain why that -
 (23) A This chart is derived from Mr Mundy's tables in his report
 (24) showing state and federal acquisition
 (25) Q Okay so these - these are the comparables that were used

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- (1) by Mr Mundy?
- (2) A They re -
- (3) Q For his -
- (4) A They are some of the comparables and the acquisition that he puts in his report to show the extent of the market
- (5) Q So this doesn't show all of the transactions between the government and private ownership that took place just those that were on Mundy's in Mundy's appraisal is that right?
- (6) A That's correct
- (7) Q Are you familiar with the backscatter sales in January of 1989?
- (8) A Yes I am
- (9) Q Are they on there?
- (10) A Those were purchased by the Department of Defense for other purposes so they were not included in state and federal park purchases
- (11) Q But they're still - they were Native Corporation land wilderness properties purchased by the federal government or by the Department of Defense?
- (12) MR OPPENHEIMER Argumentative and assumes facts not in evidence
- (13) THE COURT What was the last one?
- (14) MR OPPENHEIMER Assumes facts not in evidence I know how Professor Green has characterized the backscatter Tok sites but -

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- (1) THE COURT The objection's overruled Go ahead
- (2) A They were purchased by the Department of Defense so they're in the - in the chart These are purchases for park purposes
- (3) BY MR PETUMENOS
- (4) Q Cape Krusenstern do you know where that is?
- (5) A Yeah I know where it is
- (6) Q What was that transaction?
- (7) A That was an exchange
- (8) Q 1985?
- (9) A I don't remember the exact date but it was an exchange and exchanges are not in the chart
- (10) Q Gates of the Arctic is another exchange?
- (11) A The Chandler Lake Gates of the Arctic exchange is not in the chart because it's an exchange
- (12) Q Now you said in your direct the Exxon Valdez settlement You're talking about the settlement between the federal and state governments?
- (13) A That's correct
- (14) Q No settlement that you're aware of relates to this property with the Native Corporations?
- (15) A You mean in the present lawsuit?
- (16) Q Right
- (17) A This is not a settlement that comes out of the present lawsuit It was out of the federal litigation

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- (1) MR PETUMENOS That's all I have on voir dire
- (2) Judge
- (3) THE COURT All right counsel you want to argue your positions any further?
- (4) MR OPPENHEIMER Your Honor I think we've stated our position The - the one point I would make is that it is already the subject of testimony That's the one of our biggest problems
- (5) MR PETUMENOS I'd like to argue my position further
- (6) THE COURT Yes go ahead I guess you could step down for a while sure
- (7) MR PETUMENOS Are you now changing your mind and arguing?
- (8) MR DIAMOND Your Honor I made some statements to you while we were off the record and this is going to come up with another witness I simply would like to repeat the statements that I'd made when we were off the record with respect to this and I've reviewed Mr Mundy's testimony volume 17 page 2706 and would be happy to share my copy with you but it is quite clear that as part of the proof of the existence of a market for these large tracts of wilderness land Dr Mundy cites to the Kachemak Bay transaction and makes additional use of Kachemak Bay and Seal Bay in connection with establishing price
- (9) Whether the jury remembers specifically Kachemak or Seal

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- (1) Bay they undoubtedly have in their notes notions of the existence of such a market and they undoubtedly now have a conviction as to whether it exists or doesn't exist based on the power of the presentation made in the course of Dr Mundy's examination
- (2) It was no secret when Dr Mundy testified on July 18th that these transactions were funded as a result of moneys made available by the spill Dr Mundy knew it counsel proffering the testimony knew it and nonetheless put this in as existence proof of existence of a market
- (3) I think the door swings both ways on this one If they want to make use of the transaction to tell a story we should be entitled to make use of that transaction to tell the whole story
- (4) That's all I wanted to add
- (5) THE COURT Thank you
- (6) MR PETUMENOS Judge as I indicated yesterday I think this is a matter of probative value versus potential prejudice The prejudice I don't think I need to argue because we - that was what led us to the order in limine in the first place The probative value however I think there are a number of points to be made
- (7) First of all the fact that a transaction exists and is relevant to what the price that is paid for this kind of property and this kind of transaction does not require

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- (1) discussing where the money came from I think we can
- (2) distinguish or draw a line between the use of these
- (3) transactions for purposes of establishing price per acre than
- (4) establishing whether a market exists
- (5) As I understand the proffer of testimony it is because
- (6) there are so few orange bars here that the - the witness
- (7) states that there is no market for or no legitimate highest
- (8) and best use for natural land
- (9) The counter to that is that this chart is in fact a - an
- (10) expert's view There is a contrary view that there are many
- (11) more little orange bars that could be put on there if one were
- (12) to disagree with him that exchanges shouldn't be used If one
- (13) were to disagree with him that other government purchases of
- (14) certain land shouldn't be used there would be a
- (15) substantially - there would be a lot more transactions there
- (16) If I as I agreed at the bench do not cross-examine him on
- (17) these two blue transactions but instead cross-examine him in
- (18) the manner that I have with respect to the other transactions
- (19) that appear all in that time frame I think I am doing exactly
- (20) what - and the parties would be doing exactly what the Court
- (21) should do in this situation which is given the minimum amount
- (22) of probative value that these last two transactions lend to the
- (23) issue given the nature of the Mundy testimony on that side of
- (24) the line of the issue and I think it would be fair for me not
- (25) to argue in final either the last two transactions for purposes

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- (1) of the existence of the market that we have cut the line the
- (2) way we need to to preserve the unbelievable prejudice that
- (3) will occur if this testimony comes in
- (4) I heard him say in his proffer the Exxon Valdez
- (5) settlement What does that mean to the jury? Who settled?
- (6) How much money is out there?
- (7) And of course the issue for us is we don't need to be
- (8) paid for our damage to the land because oil spills are good for
- (9) you and you now have more of a chance to sell your land
- (10) because Exxon has spilled out and there's now this fund of
- (11) money when in fact no Native Corporation in this trial has
- (12) received dollar one from this fund And there's no - it's
- (13) sheer speculation that they ever would
- (14) So I think that we have suffered a - some limitation on
- (15) proof relating to other areas relating to the cleanup for
- (16) example relating to the fact that Exxon was under criminal
- (17) investigation at the same time that their statement that they
- (18) were acting cooperatively and openly with the federal
- (19) government during the - during the spill
- (20) Conversely I think that pales that restriction in our
- (21) view pales by comparison to what's going on here by virtue of
- (22) the fact we have to live with most orders in limine which are
- (23) designed to make sure the jury stay focused on what is their
- (24) task and doesn't get overwhelmed by highly prejudicial and
- (25) irrelevant evidence So that's our position

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- (1) MR STOLL Your Honor I feel on behalf of Kodiak
- (2) Island Borough even more unfairly prejudiced because there is
- (3) absolutely no probative value as far as KIB is concerned We
- (4) have not brought any of these transactions in The
- (5) transactions were being negotiated long before there was any -
- (6) as the witness testified long before there was any settlement
- (7) fund involved here I just don't see that there's - I don't
- (8) see the probative value and I certainly don't in any kind of
- (9) analysis with the interest of the parties because as
- (10) Mr Petumenos indicated we've been precluded from putting in
- (11) a lot of evidence that we may have otherwise wanted to put -
- (12) that we would have otherwise wanted to put - put in And if
- (13) we get into this and we get into - seems to me into issues
- (14) about the criminal prosecution by the federal government what
- (15) that money was for how the money - whether the money gets
- (16) into - is going to be used for land acquisition in the future
- (17) or not be involved in land acquisition in the future and we're
- (18) getting into very very collateral issues and I don't see
- (19) this - the probative value of this
- (20) I think that Mr Petumenos offer that plaintiffs not make
- (21) these comments is more than - frankly more than generous in
- (22) the circumstances but I don't see how we have been precluded
- (23) from putting on our case And in the case of KIB there's not
- (24) one reference to any of these transactions in any of our proof
- (25) or anything that we've done

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- (1) MR OPPENHEIMER Your Honor I think the - the
- (2) market impact of this infusion of funds is - is properly an
- (3) argument that we should be able to make and that the fact of
- (4) the matter is that when Mr Mundy told the jury that you know
- (5) 23 000 acre purchase of these natural lands he was referring
- (6) to a purchase that was facilitated by those funds
- (7) I don't - I don't see that this opens the door to any
- (8) aspect of any other criminal matters that were alluded to just
- (9) now I think that's a complete red herring
- (10) The issue as to whether there's an event which changes the
- (11) character of the capital in the market for land acquisition and
- (12) whether - if that is the case or whether those funds are a new
- (13) event within the market whether the opportunity to participate
- (14) in that new market is adversely presently affected by the
- (15) presence or absence of oil
- (16) So the facts go to the energy of the market and in fact
- (17) it's a - it's different from what it has been And it goes
- (18) to - it goes to the fact that the presence or absence of
- (19) oiling is not a - not a preinclusive factor in terms of
- (20) participating in that market And I think that Mr Mundy
- (21) suggested that the opposite of each of those two points was the
- (22) case that there's a robust market for these kinds of lands
- (23) these lands qualify and we've by spilling our oil stopped
- (24) intruded upon that market or at least the participation of
- (25) these landowners in that market and I would respectfully

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- (1) suggest that the data is exactly the opposite
 (2) THE COURT Okay the - the issue of other
 (3) settlements in a case like this and the words Exxon Valdez
 (4) settlement moneys certainly conjure up the possibility of
 (5) unfair prejudice The question is whether they do more than
 (6) simply conjure it up or make people speculate that there s
 (7) prejudice I mean I d really have to find that there was some
 (8) very real possibility of prejudice before I could weight that
 (9) possible prejudice highly enough to exclude otherwise relevant
 (10) evidence
 (11) This witness himself has an analysis that he s done that
 (12) encompasses the years 1980 to 1994 regarding this particular
 (13) theory of the plaintiffs damages He can t fully describe his
 (14) analysis to rebut Dr Mundy without the - I believe without
 (15) the - without the full analysis not just the
 (16) prior to-the spill sales but the 93 and 94 sales You can t
 (17) rebut Mundy adequately without the use of those sales
 (18) The Mundy testimony clearly raised this issue And that s
 (19) at volume 17 in the transcript page 1210 and subsequently up
 (20) until about 1217 It would - I think it would be unfair for
 (21) me to allow Dr Mundy and the plaintiffs to use the testimony
 (22) and then to limit what I consider to be valid rebuttal
 (23) evidence
 (24) I also believe that to the extent that the issue of a
 (25) possible settlement might raise the spectre of unfair

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- (1) prejudice I can do away with the possibility of that unfair
 (2) prejudice by - in one or two ways
 (3) One is that I could certainly instruct that the - after
 (4) you submit appropriate instruction that these - that
 (5) settlement is - this settlement is on an entirely separate
 (6) matter it s not - doesn t involve the claims that are
 (7) involved in this lawsuit
 (8) The other is I can allow cross-examination which could
 (9) clarify the issue well without the possibility of unfair
 (10) prejudice I don t think that does mean that the door opens
 (11) entirely to all - all evidence including possible criminal
 (12) prosecution but that s not the issue I m deciding right now
 (13) The issue I m deciding right now is do I allow the
 (14) defendants to use this evidence This witness to testify about
 (15) his analysis - analysis fully and to use those sales which
 (16) were specifically testified to by Doctor Mundy in his
 (17) presentation for the plaintiffs and as part of the plaintiffs
 (18) case
 (19) So the answer is right now no I will not exclude that
 (20) evidence The offer of proof appears to me to be - there s a
 (21) minimal danger of the kind of unfair prejudice that the
 (22) plaintiffs claim and that prejudice can be done away with
 (23) either by jury instruction or by - by appropriate
 (24) cross examination So I ll allow the testimony
 (25) MR STOLL Your Honor may I ask questions so my

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- (1) record s clear?
 (2) THE COURT Sure
 (3) MR STOLL In the case of Kodiak Island Borough we
 (4) are not making any claim for any damages that extend into 1993
 (5) or 1994 and I just - I think that this is as far as KIB is
 (6) concerned in particular but I think also for the Native
 (7) Corporations it is highly prejudicial and unfairly
 (8) prejudicial and the only transaction as I understand it that
 (9) Mr Mundy - even from Mr Mundy that he used was the one in
 (10) 1993 There was no reference at all I believe that s correct
 (11) to the - am I wrong?
 (12) MR PETUMENOS I m not sure There may have been
 (13) reference to Seal Bay but I m not sure
 (14) THE COURT Afognak Island Seal Bay page 1216
 (15) MR STOLL Okay but as far as Kodiak Island Borough
 (16) is concerned Your Honor we have made no reference
 (17) whatsoever
 (18) to this and we have not claimed any damages that extend into
 (19) 199 - 1992 1993 or 1994
 (20) THE COURT Yes I understand that counsel I
 (21) understood it when you argued the first time
 (22) So the question is If you think there s prejudice what
 (23) do you intend to do about it? If you want me to instruct this
 (24) jury in some way you have to give me an appropriate
 (25) instruction I ve already said I m going to allow the
 (26) testimony

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- (1) MR STOLL I understand I understand what your
 (2) ruling is
 (3) MR PETUMENOS Judge the only thing - only thing I
 (4) want to do is counsel I think at some point are going to need
 (5) to confer as to whether or not with the rulings of the Court -
 (6) whether or not this order in limine has been so eroded by
 (7) either the materials we put in or necessarily the proof that
 (8) has to be before the jury that it is now becoming a - a sword
 (9) in Exxon s hand as opposed to a shield for us and whether or
 (10) not the proof that we are foregoing that - to avail ourselves
 (11) of the protection of that order is now becoming more onerous
 (12) than the protection
 (13) In other words as I mentioned I think before yesterday
 (14) that as the Trustees material got in with the scientists
 (15) because of the probative inquiry that they might be skewed
 (16) because of their need for grant money As this comes in in
 (17) terms of the land being bought other factors like the way the
 (18) SCAT maps were formed and the way that the parties were
 (19) dealing with one another the fact that litigation was ongoing
 (20) which is a very critical proof for us and a very probative
 (21) proof for us which I forewent in the cross examination of
 (22) Teal but there are other witnesses coming up it is not - we
 (23) need to confer It is now becoming - getting to the point
 (24) where Exxon s getting all the advantage of this and we re
 (25) getting to the point where we re not able to use those same

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- (1) facts as they may be probative for our case
 (2) And so I think we ought to get back to the Court in a day
 (3) or two but I think our analysis has to be is there anything
 (4) left of this order in view of the other issues that had to
 (5) come forward so that we can take advantage of the existence of
 (6) this litigation in relationship to the parties and Exxon won't
 (7) be in a position of stating you can't talk about that because
 (8) of this order
 (9) THE COURT That's fine
 (10) MR DIAMOND Your Honor we're happy to confer with
 (11) Mr Petumenos however least the record be rewritten from
 (12) yesterday I would like to point out that with respect to
 (13) Mr Teal's cross examination the request that counsel be
 (14) allowed to go into the existence of litigation was objected to
 (15) by us and the objection was overruled and therefore what
 (16) counsel has done he has done voluntarily
 (17) THE COURT Counsel counsel frequently make
 (18) representations based on their analysis of what's in the
 (19) record and it turns out if you want a closer view of what
 (20) actually happened then they're wrong all right? And that
 (21) applies to all sides in litigation
 (22) MR DIAMOND I just didn't want our silence -
 (23) THE COURT I'm not - as I've said many times most
 (24) of what the lawyers say in this courtroom is interesting to me
 (25) but when they don't ask me for anything I don't do anything

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- (1) And they haven't asked me for anything
 (2) MR DIAMOND I'm going to make one additional
 (3) comment which is not a request but as one of our colleagues
 (4) would say procedural point the evidence concerning the
 (5) Kachemak and Seal Bay transactions and the existence of the
 (6) funds is the subject as I told you at the side bar two
 (7) witnesses Mr Roddewig who deals with this on a global basis
 (8) and Mr MacSwain who talks about the narrow Prince William
 (9) Sound Kenai markets
 (10) Mr Oppenheimer and I are going to confer during the
 (11) remainder of this break and decide whether we're going to
 (12) bring
 (13) that in through both of them or one of them or how best to deal
 (14) with that but I just wanted to let you know we may reserve
 (15) that evidence for the next witness rather than do it now
 (16) THE COURT You may reserve what evidence?
 (17) MR DIAMOND A discussion of the existence of the
 (18) funding of the Kachemak Bay and Seal Bay transactions
 (19) THE COURT You mean in essence you made me an offer
 (20) of proof and now the witness may not testify to it?
 (21) MR DIAMOND We have two witnesses who are prepared
 (22) to discuss it
 (23) THE COURT Counsel I okayed the offer of proof with
 (24) this witness I expected that you'd be presenting this
 (25) evidence with this witness That's all I've authorized
 (26) MR DIAMOND You'll hear it then

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- (1) MR STOLL Could we just have a slight break and then
 (2) tell your clerk whether we want to bring anything up because
 (3) it may affect our cross examination of Mr Roddewig
 (4) THE COURT Yes that's fine I think that's -
 (5) MR STOLL We may want to take that up before the
 (6) jury comes back
 (7) THE COURT Well if you do you let my clerk know
 (8) but I'm going to give you ten minutes
 (9) MR STOLL That's fine Thank you Your Honor
 (10) THE CLERK Please rise This court stands in
 (11) recess
 (12) (Recess from 11 42 a.m. to 11 57 a.m.)
 (13) (Jury in at 11 57 a.m.)
 (14) THE CLERK This court now resumes its session
 (15) Please be seated
 (16) MR OPPENHEIMER Mr Roddewig if you could just put
 (17) the microphone back on
 (18) Your Honor by stipulation of counsel we have designated
 (19) the state and federal park purchases in Alaska table previously
 (20) identified for the record as 10478A modified The unmodified
 (21) version is 10478A 1
 (22) THE COURT Okay thank you
 (23) MR OPPENHEIMER Decimals are always useful for
 (24) something
 (25) BY MR OPPENHEIMER

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- (1) Q Mr Roddewig we looked at this table previously We're
 (2) now showing you two additional transactions in 1993 and 1994
 (3) Would you tell the jury what those transactions are?
 (4) A Yes This transaction in 1993 involving 23 800 acres is a
 (5) sale by the Seldovia Native Association to the State of
 (6) Alaska It is commonly called the Kachemak Bay 3 transaction
 (7) It's located in the Kachemak Bay area state park across from
 (8) Homer
 (9) Q And the last bar the 42 000-acre bar?
 (10) A 1994 transaction here is the sale on Afognak Island in the
 (11) Kodiak group of 42 000 acres at Seal Bay and Tonki Cape to the
 (12) state and federal government following the Exxon Valdez spill
 (13) Q Did Mr Mundy use any of that information in connection
 (14) with his opinion?
 (15) A Yes he did He used both of these sales in his report
 (16) Q And for what purchase?
 (17) A He used them as comparable sales to analyze the purchases
 (18) of the natural land market
 (19) Q Do you believe that these sales indicate the presence of an
 (20) active market for the purchase of government land or natural
 (21) land or environmental preservation lands before the oil spill?
 (22) A No they do not Both of the transactions occurred after
 (23) the spill and the source of the funds for the purchase was
 (24) money that came from the settlement of some of the federal
 (25) litigation involving the Exxon Valdez spill and the State of

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- (1) Alaska and the federal government and Exxon
 (2) Q Do you believe that there s anything about these two large
 (3) transactions that suggests that the Exxon Valdez oil spill
 (4) interfered with a market for natural lands or environmental
 (5) preservation lands?
 (6) A No they do not And in fact they show just the
 (7) opposite -
 (8) MR PETUMENOS At this point I will object We re
 (9) beyond the offer These funds are not funds that are earmarked
 (10) for purchase of lands in particular
 (11) MS SMITH Tim you should approach
 (12) THE COURT I m sorry -
 (13) MR OPPENHEIMER Let s approach the bench
 (14) (At side bar on the record)
 (15) THE COURT What s the objection?
 (16) MR PETUMENOS The objection is now this goes too
 (17) far We re now not just talking about the inappropriateness of
 (18) using the land transactions for purposes of establishing
 (19) natural land market We re now going to say that these funds
 (20) benefit the property owners and will benefit them in the future
 (21) because of the existence of these funds I am scared to death
 (22) at least that that s what the witness is going to say and of
 (23) course this fund is for all kinds of purposes for restoration
 (24) could be for science there s no evidence in the record nor
 (25) can there be that it will be to the benefit of future property

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- (1) owners and that s what I m going with this objection
 (2) MR OPPENHEIMER Your Honor I do not wish to waive
 (3) my position with respect to that I believe it would be
 (4) appropriate for us to ask those questions so I m not intending
 (5) to with this witness it s premature if it ever comes up at
 (6) all All I m getting to with this question is the oiling
 (7) point I m not going to ask him about disposition of future
 (8) funds from that settlement account I m going to ask him
 (9) whether it s his understanding that those lands were oiled
 (10) That s where I m going with this not there
 (11) MR PETUMENOS Then I object to foundation because in
 (12) the voir dire it was clear
 (13) THE COURT I heard voir dire but that s for
 (14) cross examination
 (15) MR PETUMENOS All right
 (16) THE COURT So the objection s overruled
 (17) MR STOLL Just for the record Your Honor -
 (18) THE COURT Yes Kodiak Island Borough joins in the
 (19) objection
 (20) MR PETUMENOS You didn t miss anything
 (21) MR OPPENHEIMER I ll trust that you -
 (22) THE COURT It s with regard to Kodiak
 (23) (Sidebar concluded)
 (24) BY MR OPPENHEIMER
 (25) Q My question to you then Mr Roddewig do you believe that

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- (1) it is appropriate to draw the conclusion from those sales that
 (2) the Exxon Valdez oil spill has interfered with the market for
 (3) natural lands or environmental preservation lands?
 (4) A No it is not proper to draw that conclusion
 (5) Q Is there something about the condition of the property in
 (6) those two sales that influences your conclusion in that regard?
 (7) A Yes there is Both of these properties were oiled by the
 (8) Exxon Valdez oil spill
 (9) Q Do you have a conclusion as to the availability of funding
 (10) for purchases of this size as to this type of land prior to the
 (11) oil spill?
 (12) A Yes I think the - the chart shows what happened as a
 (13) result of the oil spill You had funds now available to
 (14) purchase this type of land for state and federal government
 (15) purchases and these transactions occurred involving very
 (16) large pieces of property as a result of that funding being available
 (17) Q My question to you is Prior to that period of time was
 (18) that type of funding available in this market?
 (19) A No it was not
 (20) Q Thank you Mr Roddewig Don t take your seat however
 (21) because we re going to - I m sorry - going to put back on the
 (22) easel defendants exhibit 13072C
 (23) Mr Roddewig what are we looking at here?
 (24) A This is an exhibit that shows the result of our market
 (25) analysis and our case study work as we applied it to the

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- (1) plaintiffs damage claims
 (2) Q This table or rather bar indicates the total claims at
 (3) 86 751 000 is that correct?
 (4) A Yes This is the total amount of the claims for damages by
 (5) the Native corporations in this case
 (6) Q And is that an approximation?
 (7) A Yes it is
 (8) MR PETUMENOS Excuse me could I just interrupt?
 (9) I m sorry Mr Oppenheimer A moment ago he said the
 (10) plaintiffs and the chart says the Native Corporation
 (11) MR OPPENHEIMER This does not - good point
 (12) BY MR OPPENHEIMER
 (13) Q This does not include Kodiak is that correct?
 (14) A That s correct does not include the Kodiak holdings
 (15) Q Describe for us if you would what you wish the jury to
 (16) understand from this section of the chart entitled Landlocked
 (17) Properties ?
 (18) A Our case studies involving other oil spills shows that
 (19) properties that are not located on a shoreline and are not
 (20) oiled are not affected by oil - oil spills This portion of
 (21) the damage claim involves properties that don t have any
 (22) shoreline and are interior landlocked parcels with no shoreline
 (23) whatsoever and that s an amount of \$6 552 000 in damages
 (24) that
 (25) are being claimed for those parcels
 (26) Q Doug I wonder if you could help me hold this up

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- (1) Could you point out an example to us which looks
 (2) remarkably like the legend there but point out to us what you
 (3) have in mind by way of example here
 (4) A There s two examples here
 (5) Q And for the record if you would state the name of the
 (6) parcel
 (7) A Yes This parcel is the Chugach Alaska Corporation Nellie
 (8) Juan parcel It contains no shoreline It is a landlocked
 (9) interior parcel and there s also another parcel that is
 (10) included as one of the claims the Snow River parcel of
 Chugach
 (11) Alaska Corporation
 (12) Q What is meant by the next portion of the graph?
 (13) A The next portion of the chart -
 (14) Q Careful you don't block everyone
 (15) A - shows the damage claim for property that was never oiled
 (16) but had shoreline area and it consists of a claim for
 (17) \$15 741 000
 (18) You want to hold these for me so we don t lose them?
 (19) Q Sure The next bar?
 (20) A The next bar is the claim for damage to underground
 (21) property interests Some of the underground property interest
 (22) would already have been included in the portions of the claim
 (23) that were related to those parcels but that too is a claim
 (24) for damages that involves was not oiled
 (25) MR PETUMENOS I m sorry excuse me the five million

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- (1) seven seventeen is only unoiled subsurface you said
 (2) A That s correct
 (3) BY MR OPPENHEIMER
 (4) Q And the part of the bar graph entitled unoiled upland
 (5) portions of oiled properties what are we talking about there?
 (6) A Based on the case study research that we ve done and our
 (7) conclusions it s clear that inland property property that is
 (8) not shoreline related property is not affected by oil spills
 (9) We ve calculated the area that would be more than one quarter
 (10) of a mile away from the shoreline on properties that do have
 (11) shoreline and where oiling occurred If we exclude those
 (12) upland areas farther inland than one quarter mile from the
 (13) shore another \$39 800 000 of damages would come off of the
 (14) claim
 (15) Q I want to ask just a few questions here On the upland
 (16) portions that you ve discussed you used a quarter of a mile
 (17) back from the water to calculate an area beyond that that you
 (18) took out to reduce the damages by that 39 8 million Are there
 (19) any other experts in this case who have taken a similar
 (20) approach to damages?
 (21) A Yes there are Professor Hayden Green in his reports on
 (22) damages for English Bay and Port Graham and Chenega in
 years
 (23) two and three did not find any damage to the area of - of
 (24) property more than a quarter of a mile inland He didn t do
 (25) that in year one and I would disagree with him on that I

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- (1) think even in year one areas more than a quarter of a mile
 (2) inland based on our research would not have been affected
 (3) Q Just to clarify one point on other unoiled properties which
 (4) resulted in that 15 7 million dollar adjustment I d like to
 (5) bring out a map of Prince William Sound - no that s not the
 (6) correct map If we could find one - but for the jury while
 (7) we re pulling that map out by way of example are you
 (8) referring to parcels here that have no oiled shoreline?
 (9) A That s correct Parcels that were never oiled in any way
 (10) by the Exxon Valdez oil spill
 (11) Q And show the jury where an example of that -
 (12) A These parcels this part of Prince William Sound owned by
 (13) Eyak and there are some CAC properties over here although
 (14) some of the CAC properties are also inland landlocked
 (15) properties and many of the Tattlet properties in this area
 (16) were never touched by any oil in fact virtually this entire
 (17) area the other side of Bligh Island is untouched by oil
 (18) Q Mr Roddewig whose oiling data did you use to do these
 (19) calculations?
 (20) A We used the oiling data put together by ICF for the
 (21) plaintiffs
 (22) Q You did not use Exxon s oiling data?
 (23) A No we did not
 (24) Q I d like to show you - now that brings the calculation of
 (25) damages if you did those things which you did down to 18 8

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- (1) million is that correct?
 (2) A That s correct
 (3) Q I m going to show you what has been marked as defendants
 (4) 13073B Have I left you room to get in?
 (5) Mr Roddewig what is exhibit 13073B and how does it
 (6) relate to exhibit 13072C?
 (7) A This exhibit begins with the remaining claims from the
 (8) first exhibit the \$18 8 million of remaining claims And then
 (9) it represents our analysis of other factors that come out of
 (10) our work both involving case studies as well as our work in
 (11) the South Central Alaska land market analyzing the way the
 (12) market works
 (13) Q Go ahead
 (14) A Okay The first additional factor that needs to be
 (15) considered in thinking about this remaining claim is that our
 (16) research into the land market in South Central Alaska and our
 (17) research into government acquisition indicates that the
 (18) government does not pay a premium for value over and above
 (19) market value for these types of properties that Dr Mundy calls
 (20) natural land and that Professor Green calls environmental
 (21) preservation lands
 (22) Q Let me stop you there Was that what you were referring to
 (23) earlier in your testimony when we were talking about
 (24) governmental purchases and the fact by regulation or policy
 (25) they don t pay premiums?

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- (1) A That's correct Dr Mundy in his testimony says that if
 (2) the property that he's classified as natural land was not
 (3) natural land he would call it low amenity land He has about
 (4) 207 000 acres that he calls natural land In our analysis we
 (5) do not believe that there is a premium that would be paid for
 (6) that and therefore we have put in the value that Dr Mundy
 (7) concludes for low amenity land \$500 per acre as a substitute
 (8) for the value that he claims for natural land of \$950 per
 (9) acre
 (10) Q And continuing land uses what does that provide?
 (11) A Part of the analysis by Dr Mundy is that there would be a
 (12) period of time between one and three years when there would
 (13) be no continuing use no use at all for various parcels We
 (14) don't see that in our investigation from other case studies
 (15) We see that uses continue when there are oil spills Our look
 (16) at this oil spill as well indicates that there were
 (17) continuing uses on some parts of some land parcels on many
 (18) parts of some land parcels during the oil spills Therefore
 (19) we don't think it's appropriate to say there was no use
 (20) whatsoever for the remaining parcels of land during a one to
 (21) three year period following the spill
 (22) Q In doing this calculation for the jury did you assume
 (23) then that all the uses were available?
 (24) A No we did not
 (25) Q What assumptions did you make then?

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- (1) A Certainly some use of some parcels were interfered with for
 (2) particular periods of time The cleanup varied from place to
 (3) place in terms of how long it lasted so there was some
 (4) interference with use but most uses continued on and many of
 (5) the parcels use was limited at the beginning
 (6) Q Long term effects what does that mean long term market
 (7) effects?
 (8) A Long term market effects is a summary of another portion of
 (9) the plaintiffs claim They relate the physical persistence in
 (10) the ICF analysis to a continuing impact on the land in
 (11) Dr Mundy's analysis Our studies of the case study
 (12) neighborhoods and communities shows that once cleanup is
 (13) finished there is no continuing impact on these types of oiled
 (14) properties And so therefore we have reduced the length of
 (15) the market effect down to no - no longer than four years and
 (16) on some parcels it would be much less than that because the
 (17) impact was much smaller
 (18) Q When you say cleanup you're - you're not saying when
 (19) the oil is all gone but when the clean up activities are over?
 (20) A That's correct When the physical cleanup is finished
 (21) Now in this case we've been very conservative The physical
 (22) cleanup was declared over in 1992 approximately three years
 (23) after the spill We've added a fourth year to be conservative
 (24) and again that doesn't mean that that should apply to every
 (25) piece of property but that's the maximum amount of impact that

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- (1) there would be on any - any possible piece of property
 (2) Q Now that just from a mathematical view is how you went
 (3) from 18 8 million to 5 9 million is that correct?
 (4) A That's correct
 (5) Q Were there any other adjustments that you think could be
 (6) made that would lower the number below 5 9?
 (7) A Yes there are There are a number of others The
 (8) discount rates and the interest rates that Dr Mundy uses I
 (9) don't think are appropriate and there should be some - some
 (10) reconsideration of those I mentioned some of the potential
 (11) additional deletions that would result if you analyzed each
 (12) individual property and how long the interference with the use
 (13) lasted Those are the other things that would come off here
 (14) but they're not within the type of research that we did in the
 (15) land market in South Central Alaska or in the case studies
 (16) Q Are you telling the jury that it's your conclusion that the
 (17) land has actually been damaged to the tune of \$5 951 000?
 (18) A No I'm telling them that there's even less damage than
 (19) that
 (20) MR PETUMENOS I'm relieved Mr Oppenheimer I
 (21) thought we had a few more exhibits
 (22) MR OPPENHEIMER Your Honor no further questions
 (23) MR PETUMENOS Could I have a few minutes to set
 (24) myself up Judge?
 (25) THE COURT Sure sure Okay give you ten minutes

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- (1) okay?
 (2) THE CLERK Please rise This court stands in
 (3) recess
 (4) (Jury out at 12 18 p m)
 (5) (Recess from 12 18 p m to 12 29 p m)
 (6) (Jury in at 12 29 p m)
 (7) THE CLERK This court now resumes its session
 (8) Please be seated
 (9) A Well I brought one too Mr Petumenos I appreciate it
 (10) MR PETUMENOS I made you a promise You want to
 (11) tell the jury what we just did there?
 (12) A Mr Petumenos knows that I need a Diet Pepsi every now and
 (13) then and he learned that at my deposition so he's brought me
 (14) a Diet Pepsi I hope I can drink that one
 (15) MR PETUMENOS As I recall you used to consume 12 or
 (16) 13 a day or so
 (17) A Close to that
 (18) MR PETUMENOS And Judge he would start at about
 (19) 8 30 in the morning on a winter Chicago morning and so I
 (20) wanted the jury to understand that right up front
 (21) CROSS EXAMINATION OF RICHARD J RODDEWIG
 (22) BY MR PETUMENOS
 (23) Q Dr Roddewig you are a Doctor right?
 (24) A I'm not a Doctor
 (25) Q You're a Juris Doctor like I am?

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- (1) A I have a law degree
 (2) Q And your highest degree that you have attained in
 (3) postgraduate education is that of a lawyer?
 (4) A That s correct
 (5) Q You also have a Master s in political science?
 (6) A Yes I do
 (7) Q And you still practice law from time to time?
 (8) A I don t practice full time but once every few years I do a
 (9) legal research assignment
 (10) Q And the legal training that you have is the general legal
 (11) training that we ve all had Dr Oppenheimer here and the rest
 (12) of us in the room?
 (13) A I ve had a general legal training but I -- more of my work
 (14) in land use and zoning than in any other area
 (15) Q Well in law school one of the things that we have to do is
 (16) we have to go through something called the socratic method
 (17) in the socratic method the law professor stands you up and he
 (18) asks you questions and he asks you to defend your position is
 (19) that right?
 (20) A Yes he does
 (21) Q And you have had a lot of training over the course of three
 (22) years doing that haven t you?
 (23) A Mr Petumenos I tried to sit in the back row as often as
 (24) possible so I wouldn t have to --
 (25) Q One of the things I notice about lawyers I ve talked to

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- (1) they all claim to sit in the back row and I can t figure out
 (2) who it was that was sitting in front of me in law school
 (3) MS SMITH I was
 (4) MR PETUMENOS I think I d remember you
 (5) BY MR PETUMENOS
 (6) Q Anyway you talk about your office being in Chicago and
 (7) you have lived in Chicago most of your life
 (8) A Most of my life
 (9) Q And prior to the Exxon -- well I asked you in deposition
 (10) to help me characterize the gist of Clarion s work and I asked
 (11) would you agree that the best characterization of Clarion s
 (12) work would be to describe it as doing any type evaluation or
 (13) consulting assignment involving major pieces of commercial
 (14) property improved or unimproved do you remember that?
 (15) A I remember the question I m not sure I answered quite
 (16) that way That would be the majority of our work
 (17) Q Make me get out the deposition Page 13 counsel
 (18) question Now you have -- how would you best characterize
 (19) Clarion s work? How would you hold Clarion out what kind of
 (20) work would you do?
 (21) We are real estate consultants and real estate appraisers
 (22) as well as land consultants
 (23) Involved in what kinds of property?
 (24) I m going to skip to line 20 excuse me
 (25) MR OPPENHEIMER I m sorry which line are you on?

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- (1) MR PETUMENOS Line 20
 (2) MR OPPENHEIMER Line 20
 (3) MR PETUMENOS Yes
 (4) BY MR PETUMENOS
 (5) Q Would you agree that the best characterization f Clarion s
 (6) work would be to describe it as any type of valuation or
 (7) consulting assignments involving major pieces of commercial
 (8) property improved or unimproved?
 (9) Answer Be an accurate summary
 (10) Now prior to being retained by Exxon in the Exxon Valdez
 (11) case here you had never done any work in the State of Alaska?
 (12) A That s correct
 (13) Q You had never done any work looking at or valuing Native
 (14) corporation land?
 (15) A That s correct
 (16) Q There is a set of standards that relate to what an
 (17) appraiser must do before he conducts an appraisal of property
 (18) and you re familiar with those standards right?
 (19) A Yes I am
 (20) Q And those are called the Uniform Standards of Professional
 (21) Appraisal Practice or USPAP?
 (22) A Yes they are
 (23) Q And not talking about any testimony you may have given
 (24) right now but in terms of a written USPAP authorized
 (25) appraisal you had never done a USPAP written appraisal on

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- (1) wilderness property before the Exxon Valdez oil spill?
 (2) A That s probably correct as to wilderness property
 (3) Q And in terms of oil spills themselves prior to the Exxon
 (4) Valdez oil spill you had never done a USPAP -- same
 (5) question -- written appraisal in connection with any oil spill
 (6) event?
 (7) A Not a written appraisal
 (8) Q Now you mentioned in your direct -- and I wrote it down --
 (9) that you excluded from your consideration property that was
 (10) outside of the United States because of legal differences and
 (11) cultural differences in the property that might exist outside
 (12) the United States Do you remember that your testimony on
 (13) direct?
 (14) A Yes I do
 (15) Q Now can you think of any other property that is held in
 (16) the legal way that Native corporation Alaska Native
 (17) Corporation property is held as a legal matter or is it
 (18) unique in the way it is held under the law?
 (19) A I don t know if it s unique Mr Petumenos
 (20) Q You don t?
 (21) A No I don t
 (22) Q Do you know whether or not there are any cultural
 (23) differences between the way Native Corporation land is used
 (24) and the way other kinds of land is used in the United States?
 (25) A I m not sure I understand the question There are some

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- (1) differences in the use of the land but the Natives use their
- (2) land in similar ways that land is used in other parts of the
- (3) United States
- (4) Q I m sorry your voice is beginning to get softer
- (5) A I m sorry I m hoping to conserve it I m getting a cold
- (6) but I will try to pipe up more
- (7) Q You ll probably get a break here in about a few -
- (8) A Okay
- (9) Q Now on this business about whether or not there is such a
- (10) thing as natural land you wrote an article for the Appraisers
- (11) Journal
- (12) Counsel PX8130
- (13) And the article that was written in the Appraisal Journal
- (14) was entitled Market Value and Public Value an Exploratory
- (15) Essay?
- (16) A Yes it was
- (17) Q Yes And there was an article that preceded yours and it
- (18) was called the Valuation of High Amenity Land High Amenity
- (19) Natural Land also in the Appraisal Journal am I right?
- (20) A Yes
- (21) Q And that was an article written by Mr Bill Mundy counsel
- (22) Exhibit 8113
- (23) I would like to show you first Exhibit 8113 and ask you if
- (24) that isn t the article written by Dr Mundy
- (25) A Yes

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- (1) A He has been here
- (2) Q So that before you published this article you sent it to
- (3) him for his comments?
- (4) A I sent -
- (5) MR OPPENHEIMER Your Honor may we approach the
- (6) bench?
- (7) THE COURT Yes
- (8) (At side bar on the record)
- (9) MR OPPENHEIMER Seems to me this contradicts the
- (10) order regarding conversations with counsel Mr Stephens is
- (11) Exxon counsel I don t see why this doesn t fall under the
- (12) order
- (13) THE COURT What are you going to ask him?
- (14) MR PETUMENOS This is not a draft report The order
- (15) is draft reports This is an article published in the journal
- (16) and for public circulation The witness has previously
- (17) testified that this was not part of his engagement with Exxon
- (18) and that he wasn t compensated for the writing of the article
- (19) so the order doesn t apply
- (20) MR OPPENHEIMER Well in that case I can t
- (21) understand the relevance of any of it
- (22) THE COURT What is the relevance?
- (23) MR PETUMENOS He attached the article and
- (24) incorporated it by reference to his final report on natural
- (25) land and that is very -

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- (1) Q And Exhibit 8130 is the article that was written by you?
- (2) A By me and my partner Mr Papke
- (3) Q The co author of this report that you just were describing
- (4) to the jury?
- (5) A That s correct Let me make sure it s all here
- (6) Q I d hate to leave out a page Now -
- (7) A It s a l there
- (8) Q Good Now some of the theses that we re talking about
- (9) here and some of the controversy between you and Dr Mundy
- (10) is
- (11) laid out in those two articles would you agree?
- (12) A Some of our points of disagreement are
- (13) Q That s correct Now the article that you wrote you wrote
- (14) after your retention as an expert for the Exxon Valdez oil
- (15) spill?
- (16) A That s correct
- (17) Q And you sent a draft of that article before it was
- (18) published to another Doctor a Mr Jim Stephens who is a
- (19) lawyer for Exxon who was in charge of supervising this
- (20) litigation?
- (21) A Yes and that s my custom whenever I write an article when
- (22) I m in the middle of a case
- (23) Q We ll get to your custom about doing that in just a minute
- (24) but Mr Stephens is a fellow that was in this courtroom much of
- (25) the time while you were in the courtroom observing the trial
- (26) am I right?

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- (1) THE COURT So what s your contention that Stephens
- (2) drafted it?
- (3) MR PETUMENOS My contention is that yes the
- (4) positions taken in the article are not his own or are
- (5) influenced by Exxon
- (6) THE COURT Do it
- (7) MR OPPENHEIMER Your Honor I - one other point to
- (8) make The order does not restrict communications with counsel
- (9) to draft reports It says there are Will not be testimony
- (10) with regard to communications between counsel
- (11) THE COURT I ve lost it I don t remember the exact
- (12) terms of it
- (13) MR PETUMENOS I have another problem too and that
- (14) is Mr Stephens has not retained counsel for litigation He
- (15) represents the client
- (16) MR OPPENHEIMER It s not restricted
- (17) THE COURT Can you get it?
- (18) MR OPPENHEIMER We ll get it
- (19) (Sidebar concluded)
- (20) THE COURT You ve left me counsel I need that
- (21) article
- (22) MR DIAMOND We re trying to find it at this moment
- (23) MR PETUMENOS Perhaps I could ask a few foundational
- (24) questions first
- (25) THE COURT That s fine dig out the order and come

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- (1) back up here You can ask a few questions
 (2) BY MR PETUMENOS
 (3) Q This article that you wrote you weren't - you didn't
 (4) charge Exxon for the time it took to write it am I right?
 (5) A No I did not
 (6) Q All right This article was a publication that you were
 (7) putting out to the world for them to read and debate and
 (8) discuss the issue everyone could read it?
 (9) A Yes in response to Mr Mundy's article
 (10) Q Right Can you show me in the article - for the reader -
 (11) where you disclose anywhere in the article to the reader that
 (12) you are on retention to Exxon at the time that you wrote the
 (13) article?
 (14) A I don't say anything in the article about being retained by
 (15) Exxon
 (16) Q The thesis that is contained in the article is the same
 (17) thesis that Exxon is putting forward to defend itself in this
 (18) case through your testimony?
 (19) A I'm not sure that's a fair characterization of the article
 (20) Mr Petumenos It covers a lot of things not related to this
 (21) case at all The major focus of the article is a response to
 (22) Mr Mundy's article and he's putting forth a thesis that is
 (23) involved in the case and part of our article responds to
 (24) that
 (25) Q Okay

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- (1) MR PETUMENOS I move the admission of Exhibit 8130
 (2) the Roddewig article
 (3) (Exhibit 8130 offered)
 (4) MR OPPENHEIMER No objection Your Honor
 (5) THE COURT It's admitted
 (6) (Exhibit 8130 received)
 (7) MR PETUMENOS I move the admission of Exhibit 8113
 (8) the Mundy article
 (9) (Exhibit 8113 offered)
 (10) MR OPPENHEIMER Your Honor that's hearsay I went
 (11) to law school too
 (12) THE COURT Which row were you in counsel?
 (13) MR OPPENHEIMER I don't remember
 (14) MR PETUMENOS The context of the Roddewig article is
 (15) clearly going to be missed if the Mundy article it rebuts is
 (16) not included
 (17) THE COURT It's admitted not to prove the truth of
 (18) the matter asserted but to show the debate between the two
 (19) experts
 (20) (Exhibit 8113 received)
 (21) BY MR PETUMENOS
 (22) Q And we talked about this business of there being just -
 (23) there being so few transactions regarding the government and
 (24) private owners of wilderness land in Alaska that testimony you
 (25) gave and showed us the bar chart with all the little bars going

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- (1) across the bottom there?
 (2) A Yes I do
 (3) Q What is that exhibit number counsel do you remember?
 (4) And I think you said in your direct examination that you
 (5) didn't include exchanges because they were political
 remember
 (6) that testimony?
 (7) A I said that was one of the reasons for not including
 (8) exchanges
 (9) Q Now the government when it does something does
 something
 (10) through the political process doesn't it?
 (11) A Yes
 (12) Q How does the Congress of the United States do anything at
 (13) all if they don't go through the political process?
 (14) A I sometimes wonder about that, myself Mr Petumenos
 They
 (15) do go through the political process
 (16) Q We can all joke about politicians and all that but the
 (17) fact of the matter is the governments are a big part of the
 (18) economy?
 (19) A That's correct
 (20) Q They're a huge part of the economy?
 (21) A They are a very large part of the economy
 (22) Q One of the things that is not on your chart I don't think -
 (23) are direct congressional appropriations for the purchase of
 (24) property in Alaska
 (25) A Pribilof is on the chart and it is a direct appropriation

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- (1) Q Really? Could we have the chart? Do you have that chart
 (2) with all the bar graphs on it?
 (3) MR OPPENHEIMER 10478A You helped me I'll help
 (4) you Here we go
 (5) MR PETUMENOS Cast your bread upon the water -
 (6) thanks It's also on the Barco Thank you very much Joel
 (7) BY MR PETUMENOS
 (8) Q The Pribilof transaction according to my records took
 (9) place in January of 1991 does that sound right?
 (10) A No the one I'm talking about is the one in 1984
 (11) Q Interesting Lake Clark National Park and Reserve took
 (12) place in 1976 didn't it?
 (13) A One of the Lake Clark transactions did yes
 (14) Q And 1976 isn't on your chart?
 (15) A That's correct This covers the period from 1980 to 1994
 (16) Q There was a transaction around the Attu Island?
 (17) A I think I indicated to you before I don't remember that
 (18) one Mr Petumenos
 (19) Q You don't remember something in 1988 about that?
 (20) A No I don't
 (21) Q But that's not on?
 (22) A I don't know anything about that transaction
 (23) Q The Gold Belt transaction in 1980?
 (24) A That was an exchange and it's not on the chart
 (25) Q Because you don't consider exchanges - by the way were

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- (1) you in the courtroom when Keith Gordaoff testified the first
 (2) witness in the case?
 (3) A No I was not
 (4) Q Did you ever review any of his transcript?
 (5) A I can't remember reviewing his transcript
 (6) Q You weren't there when he said that one of the reasons that
 (7) the Nellie Juan parcel that you pointed out to the jury as
 (8) being the landlocked one you weren't there when he said one
 (9) of the reasons that that parcel was in fact selected was it was
 (10) a good candidate for exchange?
 (11) A No I wasn't there for that
 (12) Q And an exchange so that we know is where a Native
 (13) Corporation takes - you all right?
 (14) A He was going to object I'm sorry
 (15) MR OPPENHEIMER My lawyer skill should be
 (16) scrutinized
 (17) MR STOLL Who's the lawyer who's the witness?
 (18) MR PETUMENOS Guess you're going to have to just
 (19) answer the question
 (20) BY MR PETUMENOS
 (21) Q The exchange process one of the things that happens in an
 (22) exchange is the Native Corporation takes one piece of property
 (23) often for - that has preservation value and exchanges it for
 (24) another piece of property that has commercial value isn't that
 (25) so?

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- (1) A Both pieces of property would have commercial value in the
 (2) real estate marketplace
 (3) Q But the reason that it's being exchanged from the
 (4) government's standpoint often is for preservation value would
 (5) you agree?
 (6) MR OPPENHEIMER No foundation Your Honor calls for
 (7) speculation
 (8) THE COURT Overruled
 (9) A I'm sorry the question is the reason is for natural - I
 (10) didn't -
 (11) BY MR PETUMENOS
 (12) Q That's because he's starting to listen to you
 (13) The reason often that the government gets involved in these
 (14) exchanges is because they want to acquire the land for
 (15) conservation purposes or preservation purposes That
 (16) happens a
 (17) lot in exchanges?
 (18) A Yes The land is typically an inholding that's purchased
 (19) to extend an existing park unit or conservation unit
 (20) Q And what the Native Corporation wants to get is something
 (21) that'll make them money often?
 (22) A Sometimes the exchanges I've seen are for that purpose
 (23) Q Kachemak Bay transaction April 1985 is that on your
 (24) chart?
 (25) A Kachemak the two Kachemak transactions preceding the
 third
 (26) one are not on the chart because they are exchanges

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- (1) Q Tazimina Lake October 1986 is that on your chart?
 (2) A Yes it is
 (3) Q There were three purchases by the Department of Defense of
 (4) wilderness land in January 1989 from Native Corporations is
 (5) that on your chart?
 (6) A No they are not because they were Defense Department
 (7) purchases for something other than park use
 (8) Q The Gates of the Arctic transaction in August of 1983 was
 (9) that in your chart?
 (10) A Is that the Chandler Lake one that was an exchange
 (11) 100 000 acres? No that's an exchange of 100 000 acres
 (12) Q That's not on your chart?
 (13) A No it's not
 (14) Q Cape Krusenstern is that on your chart?
 (15) A No that was an exchange
 (16) Q The PINGA exchange in October of 1986 no?
 (17) A That was an exchange
 (18) Q This unique nature of the Alaska Native Claims Settlement
 (19) Act the Alaska Native Claims Settlement Act is the law that
 (20) tells us how the Native Corporations own their land am I
 (21) right?
 (22) A Yes
 (23) Q May I have the Elmo please?
 (24) I'm going to show you a section of the Alaska Native Claims
 (25) Settlement Act and it says Exchanges of land shall be on the

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- (1) basis of equal value and either party to the exchange may pay
 (2) or accept cash in order to equalize the value of the property
 (3) exchanged provided that when the parties agree to an
 (4) exchange
 (5) and the appropriate secretary determines that it is in the
 (6) public interest such exchanges may be made for other than
 (7) equal value
 (8) Were you aware of that provision?
 (9) A Yes
 (10) Q Another section land acquisition authority - this is
 (11) from I think ANCSA as well - except that the parties agree
 (12) to - except that if the parties agree to an exchange and the
 (13) secretary determines that it is in the public interest such
 (14) exchanges may be made for other than equal value And that's
 (15) the law isn't it?
 (16) A I'm sorry were you paraphrasing this one?
 (17) Q I'm just reading the last sentence
 (18) A Yes
 (19) Q Because I want to make sure your voice hangs in there
 (20) A Yes I see Thank you
 (21) Q Now when we took your deposition in Chicago in December
 (22) I
 (23) think it was December you had some confusion about how the
 (24) Alaska Native Claim Settlement Act operated didn't you?
 (25) A Yes
 (26) Q We asked you a fairly fundamental question about the Alaska
 (27) Native Claim Settlement Act We asked you what the

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- (1) consideration for - was for the Alaska Native - in other
- (2) words what was the price paid by the Alaska Natives do you
- (3) remember those questions?
- (4) A Yes and I remember my response
- (5) Q And your response - I asked you whether or not Alaska
- (6) Natives had the aboriginal right to hunt and fish and you said
- (7) yes?
- (8) A Well no I think you've got two questions You asked me
- (9) what the consideration was and I said there was no
- (10) consideration in the typical way that consideration is
- (11) considered
- (12) MR PETUMENOS Counsel Mr Roddewig's deposition
- (13) page 75 line 15 through page 76 line 20
- (14) BY MR PETUMENOS
- (15) Q Deposition taken in Chicago with you and I and Diet Pepsi
- (16) A One of the six days
- (17) (Videotape Played)
- (18) VIDEO QUESTIONER
- (19) Q Do Alaska Natives have aboriginal rights to hunting and
- (20) fishing in Alaska?
- (21) A Yes
- (22) Q On what do you base that?
- (23) A Articles that I've reviewed conversations I've had with
- (24) people during the course of our work
- (25) Q What was the consideration?

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- (1) A My review of other experts' reports
- (2) Q What was the consideration that was given by the Natives -
- (3) UNIDENTIFIED SPEAKER I'm sorry were you finished?
- (4) VIDEO WITNESS Yes
- (5) VIDEO QUESTIONER
- (6) Q I'm sorry I didn't mean to interrupt What was the
- (7) consideration given by the Alaska Natives in return for the
- (8) benefit they received under ANCSA?
- (9) A Well it's my recollection that the political basis for the
- (10) Alaska Native Claims Settlement Act was the situation involving
- (11) approval of the Trans Alaska Pipeline and that Congress
- (12) considered it necessary to resolve Alaska Native claims in
- (13) order to obtain the support that was needed to complete the
- (14) pipeline project
- (15) Q Anything else?
- (16) A What was the question again?
- (17) Q What consideration did the Alaska Natives - what did the
- (18) Alaska Natives give up in return for the benefit they received
- (19) under ANCSA if anything that you know of?
- (20) A I don't know of any specific things they gave up for the
- (21) right to receive land
- (22) (Videotape concluded)
- (23) BY MR PETUMENOS
- (24) Q You now know that the Alaska Natives don't have aboriginal
- (25) rights to hunting and fishing because that was part of the

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- (1) deal in ANCSA
- (2) A Yes they gave up their aboriginal rights
- (3) Q And you testified in your deposition that you had talked to
- (4) people other experts had read reports had looked at other
- (5) materials that formed the basis for your statement remember
- (6) that?
- (7) A Yes
- (8) Q You just heard it?
- (9) A Yes And that's because I didn't understand the meaning of
- (10) the term aboriginal as you put it to me The technical
- (11) meaning of the term aboriginal in the context of ANCSA
- (12) Q The fact is you looked at no reports no experts - talked
- (13) to no experts you read no information that told you that the
- (14) Alaska Natives had the aboriginal right to hunt and fish in
- (15) Alaska isn't that correct?
- (16) A I was interpreting it as subsistence rights At that time
- (17) I didn't understand the technical legal meaning of aboriginal
- (18) as it is used in ANCSA
- (19) Q And it is important to know would you agree how ANCSA
- (20) Native Corporations hold their land under ANCSA if you're
- (21) going
- (22) to evaluate the market that this property is in?
- (23) I think you've already testified to that I'll move on
- (24) Counsel Exhibit 8121
- (25) I showed you this in your deposition I believe memorandum
- (26) from the United States Department of the Interior to the Arctic

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- (1) National Wildlife Refuge Negotiating Team from the Assistant
- (2) Secretary for Fish & Wildlife and Parks dated February 20
- (3) 1987 and you read this?
- (4) A I remember the document
- (5) Q Yes And it concerned an exchange that didn't actually
- (6) happen didn't go through because as most Alaskans know
- (7) ANWR
- (8) didn't go through right?
- (9) A That's correct
- (10) Q And when the Assistant Secretary was talking to his
- (11) negotiating team he told his negotiating team what it is that
- (12) they were to take into consideration in valuing the exchange
- (13) He said the fair market value appraisals the unique
- (14) environmental qualities and productivity the recreational
- (15) value the economic value of associated resources the threat
- (16) of inconsistent land uses the effect of any easements and
- (17) other interests retained the effect of Section 22(g) and 14(h)
- (18) restrictions as applicable the statutory prohibitions against
- (19) condemning the lands the unique opportunity to acquire the
- (20) lands from a few landowners including the cumulative size of
- (21) the parcels offered the management efficiencies to be gained
- (22) and the established congressional precedence
- (23) He said that right?
- (24) A Yes
- (25) Q And he went on to say when he was talking about those
- (26) congressional precedents that in Alaska Congress has twice

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- (1) authorized exchanges to occur on the basis of public interest
- (2) values Section 22(f) as amended of ANCSA in 1996 et cetera -
- (3) do you see that section there?
- (4) A Yes I do
- (5) MR OPPENHEIMER Your Honor just out of curiosity
- (6) we've had one statement and no question and Mr. Petumenos
- (7) answered his previous question I object we're not getting
- (8) questions
- (9) THE COURT We'll talk about it respectfully counsel
- (10) MR OPPENHEIMER Yes The objection for the record
- (11) Your Honor is it's pure argument
- (12) THE COURT Thank you What's in the record is in the
- (13) record I'm not going to take it out of the record You can
- (14) proceed on the basis Mr. Petumenos that there will be an
- (15) objection if there's not a question mark at the end of your
- (16) sentence
- (17) MR PETUMENOS I think I get that Judge thanks
- (18) BY MR PETUMENOS
- (19) Q Now the - one of the things that you did in connection
- (20) with your work on concluding that there was - you did a couple
- (21) things You concluded there was no market for natural land
- (22) right?
- (23) A That's correct
- (24) Q And you also concluded that the market to the extent that
- (25) it exists for these kinds of properties is ambivalent to their

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- (1) the title
- (2) MR OPPENHEIMER Page counsel?
- (3) MR PETUMENOS Yes 7407
- (4) A Could I see the entire page Mr. Petumenos?
- (5) BY MR PETUMENOS
- (6) Q I hope you can or I could come up and hand it to you
- (7) This is the first page of the survey I just want to ask you
- (8) about -
- (9) A Could I just quickly see the second page too?
- (10) Q Sure That's actually the one I want to get to I'm
- (11) mixing them up Okay? Kind of hard to read isn't it?
- (12) A Hard to read
- (13) Q Is that better?
- (14) A Little better
- (15) Q Better yet?
- (16) A Yes
- (17) Q The question I want to ask you about is there's a question
- (18) there that says integrity an issue And then in parentheses
- (19) it says possibly ask re Have they purchased land that has
- (20) been oiled And in this particular instance the answer was -
- (21) and this will be impossible for you to read so I'll read it
- (22) for you - do an environmental assessment, don't buy it if it
- (23) has contamination unless high reason value can be cleaned
- (24) up
- (25) no liability to them no have not bought oiled land - were

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- (1) oiling?
- (2) A Yes
- (3) Q Yes And one of the things that you did in support of that
- (4) analysis is you talked to the governments involved in a formal
- (5) survey process?
- (6) A I'm not sure what you mean by formal survey process We
- (7) did talk to people involved with the federal government
- (8) acquisition
- (9) Q What I mean is you went through the trouble and the
- (10) structure of putting together written down questions that
- (11) were - that the surveyor could go down and review one after
- (12) the other and the same questions were there for each survey
- (13) more or less right?
- (14) A They were a guide for the - for the survey but they
- (15) weren't necessarily questions that had to be answered every
- (16) time had to be asked and answered every time
- (17) Q That's one of my - the points I want to get into
- (18) Counsel Exhibit 8114
- (19) One of the questions that appeared on your form - I'm just
- (20) going to sort of take one at random here - is what about
- (21) integrity Let's just put that on the Elmo here
- (22) This is what the form looked like right? It was in this
- (23) instance research - entitled Research Concerning the Market
- (24) for Natural Land the Capacity of Not for Profit to Acquire
- (25) Land and the Concept of Public Value or Contingent Value was

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- (1) Do you want me to show them to you so that I can make sure
- (2) that - maybe you're better at reading the writing than I am
- (3) A Okay I've read it I think you read it properly
- (4) Q Okay Now at some point - and I'll represent to you
- (5) correct me if you have a different recollection - there are
- (6) several other questionnaires in here where people said similar
- (7) things about oiling do you remember that about not being
- (8) concerned about oiling?
- (9) A Yes
- (10) Q And at some point you stopped asking the question?
- (11) A I didn't - I didn't conduct the survey but the person who
- (12) did the survey did ask the question sometimes and sometimes
- (13) she did not ask the question
- (14) Q You wrote a typewritten summary of these surveys and the
- (15) typewritten summary that was part of your report you said
- (16) experience in administering this survey showed it would be
- (17) unwise to ask specifically about oiling Do you see that?
- (18) A Yes
- (19) Q Now there's another document that's in this exhibit that
- (20) talks about the people that you interviewed
- (21) I'm at Page 403 counsel
- (22) And these are the people that were questioned in the
- (23) survey like the trust for public lands the national park
- (24) trust Ducks Unlimited These are private nonprofit agencies
- (25) that sometimes purchase the kind of land that we're talking

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- (1) about here right?
 (2) A Yes they are
 (3) Q They are And there is a distinction between what happened
 (4) here and one particular survey respondent This one says left
 (5) message Then it says interviewed 5/24 and there are little
 (6) notes indicating when people were interviewed here and what
 (7) date that s in the exhibit true?
 (8) A Yes
 (9) Q Now what I want to draw your attention to is there was a
 (10) person who worked for the American Land Conservancy named
 (11) Cynthia Raburn and what it says about her left message for
 (12) Harriet Burgess eleven six late p m Cynthia Raburn called
 (13) four seven and am faxing crossed out and says faxed
 (14) questionnaire right?
 (15) A Yes I see that
 (16) Q And this is the fax? April 6th 1993 you sent a fax to
 (17) Cheryl Inghram and so the questionnaire now - and the
 (18) questionnaire s attached consisting of three pages - the
 (19) questionnaire now unlike the others is going into the hands
 (20) of the person -
 (21) MR OPPENHEIMER No what -
 (22) MR PETUMENOS Same exhibit at the end It s 420
 (23) MR OPPENHEIMER Okay
 (24) BY MR PETUMENOS
 (25) Q This one is different because now instead of being on the

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- (1) having difficulty getting some people to respond to our survey
 (2) when we told them that we were involved in the Exxon Valdez oil
 (3) spill
 (4) Q You were getting some people to respond to your survey that
 (5) oiling made a difference to them as well weren't you?
 (6) A Yes we were
 (7) Q And there s a number of surveys in here where that question
 (8) is blank?
 (9) A I m not sure about that Mr Petumenos
 (10) MR PETUMENOS Your Honor I move the admission of
 (11) plaintiffs Exhibit Number 8114 the Clarion file on these
 (12) surveys
 (13) (Exhibit 8114 offered)
 (14) MR OPPENHEIMER No objection Your Honor
 (15) THE COURT It s admitted
 (16) (Exhibit 8114 received)
 (17) BY MR PETUMENOS
 (18) Q Now you talked about the - in this bar chart here these
 (19) two blue bar - sorry these guys down on the end here these
 (20) two big ones on the end
 (21) MR STOLL It s on the Barco
 (22) MR PETUMENOS Okay thanks
 (23) BY MR PETUMENOS
 (24) Q Right there And you told the jury that one of the
 (25) significant things about this - these transactions were that

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- (1) phone asking the questions the actual questionnaire is being
 (2) sent to the respondent am I right? It s going to Cheryl
 (3) Inghram who we know is with -
 (4) A Cheryl Inghram is with Clarion
 (5) Q Going to Cynthia Raburn Cheryl Inghram is the questioner
 (6) and Cynthia Raburn is the respondent?
 (7) A That s correct
 (8) Q She was asked to respond actually to the faxed survey?
 (9) A That s correct
 (10) Q Let s look at the question where it says is integrity an
 (11) issue see that?
 (12) A Yes
 (13) Q And someone at Clarion has removed from the survey what is
 (14) on all the other surveys that are filled out right here where
 (15) on all the other surveys it says is oiling an issue and its
 (16) gone from that particular document isn t it?
 (17) A Yes because that statement on the survey questionnaire
 (18) about possibly asking about oiling was intended for the person
 (19) who s conducting the survey possibly make a question about
 (20) that So this particular survey was sent out and the question
 (21) on oiling wasn t necessary because it was an instruction for
 (22) the person doing the survey
 (23) Q Were they to see how the interview was going first before
 (24) they asked the question?
 (25) A Yes I would say that s a fair statement because we were

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- (1) the property was oiled correct?
 (2) A That s correct
 (3) Q Now you have reviewed haven t you the Seldovia Native
 (4) Association appraisal by Dr Mundy?
 (5) A I have looked at the - at the appraisal
 (6) Q Do you know how much time the persistence factor continues
 (7) for the Seldovia Native Association?
 (8) A I believe it was one year
 (9) Q One year So according to Dr Mundy s own analysis by
 (10) 1990 even he says the damages for Seldovia Native Association
 (11) are over isn t that right?
 (12) A That would be his - his stigma period yes they d be
 (13) over
 (14) Q And these sales didn t happen until three years later?
 (15) A The negotiations were going on before that
 (16) Q The negotiations were going on before there was any
 (17) settlement fund as well wasn t there?
 (18) A Yes there were and it took the settlement fund to create
 (19) the cash for it to happen
 (20) Q But the interest in the government in this particular
 (21) property had been going on for years?
 (22) A Years and years and years
 (23) Q So there was nothing about the oil spill that created the
 (24) government s interest in the property because that interest
 (25) already existed for years and years and years?

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- (1) A One of the things we look at in these situations is whether
 (2) a transaction stops as a result of an oil spill We looked at
 (3) that in the other case studies that we did as well
 (4) Q The other one that you have there for the Afognak Island -
 (5) which is just north of Kodiak?
 (6) A Yes
 (7) Q That - that property was according to Exxon at least
 (8) lightly oiled?
 (9) A Yes
 (10) Q And if we were to be consistent with Dr Mundy s - I
 (11) understand that Dr Mundy didn t appraise or evaluate the
 (12) damage of Afognak but if we were to understand based upon
 (13) your review of Dr Mundy s work how very - how lightly oiled
 (14) is handled by him five six years would be beyond the period
 (15) of time that Dr Mundy would apply the damage for lightly oiled
 (16) property am I right?
 (17) A I would have to look at all of his pieces of property
 (18) There s a difference between his stigma period and his
 (19) persistence period for purposes of oiling and there were some
 (20) pieces of property where he may assign the one year stigma
 (21) period and he may have persistence that goes on for a number
 (22) of years
 (23) Q On lightly oiled property?
 (24) A I d have to look at the reports to see
 (25) Q Now pretty early on when you started doing your studies

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- (1) you got into a meeting with two scientists named Dr Gilfillan
 (2) and Dr Page am I right?
 (3) A That s correct
 (4) Q And you told us that your getting together with Gilfillan
 (5) and Page was as a result of the - of the reading that you had
 (6) done and you were the first one to contact Exxon about
 (7) meeting
 (8) with them do you remember that?
 (9) A That s my recollection
 (10) Q So you re telling us that this was your idea that Gilfillan
 (11) and Page would be the scientists to go talk to?
 (12) A My recollection is that we wanted to talk to some
 (13) knowledgeable scientists and we had seen Doctors Gilfillan
 (14) and
 (15) Page s name mentioned in some of the studies that we
 (16) gathered
 (17) and we approached Exxon about talking to them
 (18) Q The only two scientists that you talked to in person up
 (19) until the time of your deposition in the world about the Exxon
 (20) Valdez case were Gilfillan and Page?
 (21) A I m not sure that s true We did research at other
 (22) institutions and I don t know if anyone else from Clarion
 (23) actually talked to scientists at other institutions or not I
 (24) didn t personally talk to any other scientists
 (25) Q I m talking about you personally
 (26) A Yes I did not personally talk to any others
 (27) Q The only ones you ever talked to were Gilfillan and Page?
 (28) A That s correct

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- (1) Q And an attorney from Exxon was present when you did so?
 (2) A Yes We were very careful when we got names of scientists
 (3) to try to find out if there was any problem in our talking to
 (4) them
 (5) Q But Exxon insisted on having an attorney present?
 (6) A Not sure that they insisted They said there would be an
 (7) attorney present
 (8) Q Page 282 line 8 through 13
 (9) The question in your deposition under oath Mr Roddewig
 (10) Why was the attorney present?
 (11) Well Exxon insisted on having an attorney present so there
 (12) would be someone there as an observer of what was said in the
 (13) meeting I guess so that when questions like this came up
 (14) there was an attorney that was present who could be referred
 (15) to
 (16) A Exxon insisted on it
 (17) Q Your question - your answer Were there some notes of
 (18) that meeting?
 (19) A Yes
 (20) Q Counsel Exhibit 8129
 (21) Yes there s one set for Mr Roddewig one set for
 (22) Mr Page
 (23) Showing you what s been marked as Exhibit 8129 take a look
 (24) at that and tell me if you recognize it
 (25) A These appear to be my notes from the meeting with

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- (1) Professors Gilfillan and Page
 (2) Q Exhibit 8115 counsel
 (3) Exhibit 8115 is an exhibit of the notes of your partner
 (4) Mr Page - Mr Papke who was also at the Gilfillan and Page
 (5) meeting am I right?
 (6) MR OPPENHEIMER Your Honor I think this ought to be
 (7) done by questions The witness may well be able to confirm
 (8) this but - foundation is the objection
 (9) MR PETUMENOS Foundation questions foundation for
 (10) the exhibit
 (11) BY MR PETUMENOS
 (12) Q These are the notes of Mr Papke for that meeting am I
 (13) right among other things?
 (14) A They appear - I m not sure if they include more than his
 (15) notes I think they do include more than his notes of the
 (16) meeting but some of what s here I recognize as his notes
 (17) BY MR PETUMENOS
 (18) Q One of the entries that is in that meeting with the - now
 (19) just make sure we understand it - an Exxon attorney
 (20) Mr Gilfillan Mr Page Mr Roddewig Mr Papke right?
 (21) A That s my recollection
 (22) Q The purpose of this meeting was to gather information for
 (23) your - for your opinion?
 (24) A Well I wouldn t say that it was - well it was to gather
 (25) information for us to form our opinion

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- (1) Q Yes it was
 (2) A Yes
 (3) Q One of the things that is in those notes is the statement
 (4) time is on the side of the defense?
 (5) A Not in my notes
 (6) Q In Mr Papke's notes though isn't it?
 (7) A Yes
 (8) Q What reason does an independent expert have in knowing
 that
 (9) time is on the side of the defense when he's being retained for
 (10) the purposes of litigation?
 (11) A I don't remember that comment by them and I don't
 remember
 (12) the context in which it was made whether it was about some
 (13) other oil spill or this oil spill I don't remember that
 (14) comment
 (15) Q You have trouble remembering this meeting don't you?
 (16) A It was a long time ago
 (17) Q You can't remember that there was a discussion about the
 (18) Santa Barbara spill and an issue of whether there were
 (19) different errors of oil spills
 (20) MR OPPENHEIMER Can we approach the bench Your
 (21) Honor?
 (22) THE COURT Yes
 (23) (At side bar on the record)
 (24) MR OPPENHEIMER A couple of things First I
 (25) continue to believe this violates the order with respect to

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- (1) communications with counsel and I would assert that objection
 (2) as to this communication Unfortunately we did not We
 (3) always bring those orders with us we did not bring them
 (4) today
 (5) THE COURT We're at the end of the day
 (6) MR OPPENHEIMER We're at the end of the day The
 (7) other objection is I didn't go into these other spills
 (8) THE COURT I hear a door creaking
 (9) MR OPPENHEIMER I hear a door creaking too
 (10) MR PETUMENOS On what
 (11) THE COURT On the other oil spills
 (12) MR OPPENHEIMER I just wanted to make my position
 (13) known If we're going to go into these I'm going to reserve
 (14) my right to go through that door
 (15) MR PETUMENOS I'm going into a different point so I
 (16) can probably -
 (17) THE COURT You want to leave it for now and -
 (18) MR PETUMENOS Yeah let's try it in the morning
 (19) That would be fine
 (20) (Sidebar concluded)
 (21) THE COURT We've decided to quit for the day I'm
 (22) going to let you go now Please don't discuss the case or form
 (23) or express any opinion about the case until it's submitted to
 (24) you for deliberation See you tomorrow
 (25) You can step down

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- (1) (Jury out at 1 27 p m)
 (2) MR OPPENHEIMER Your Honor in keeping with our new
 (3) found sensibility of exhibits I have a list of exhibits from
 (4) this morning's testimony I'd like to move in
 (5) MR PETUMENOS I'm convinced I have a list of
 (6) objections Could I have time to deal with that?
 (7) THE COURT In fact I'll go get my notes on the other
 (8) question and bring them in here so I can give you the basis on
 (9) the decision on the videotape and in the meantime please
 (10) refine your objections so we don't deal with those exhibits
 (11) that are objected to
 (12) MR PETUMENOS We will do that We'll work together
 (13) on doing that How much time do we have Judge? Are you
 just
 (14) going to come right back to the bench?
 (15) THE COURT How much time do you need? I can be back
 (16) here in two minutes
 (17) MR PETUMENOS Let's do that first We can confer on
 (18) them
 (19) THE CLERK Please rise This court stands in
 (20) recess
 (21) (Recess from 1 28 p m to 1 30 p m)
 (22) THE CLERK Please rise This court now resumes its
 (23) session Please be seated
 (24) THE COURT Now let's do the exhibits first
 (25) counsel

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- (1) MR OPPENHEIMER Yes Your Honor We have a long
 (2) list we can read to which there is no objection We have four
 (3) there is The exhibits as to which there are no objections
 (4) are Defendants 10506 10243 10621 10625A 1 10625A 5
 (5) 10402A 10514B 10264B 10248A 10536 10625A 23
 10625A 6
 (6) 10218B 10265A 10376 10627 10625A 16 10521 10403A
 10518B
 (7) 10524 10246 10535 10622 10234A 12082
 (8) (Exhibits defendants 10506 10243 10621 10625A 1
 (9) 10625A,5 10402A 10514B 10264B 10248A 10536
 10625A 23
 (10) 10625A 6 10218B 10265A 10376 10627 10625A 16 10521
 (11) 10403A 10518B 10524 10246 10535 10622 10234A 12082
 (12) offered)
 (13) MR OPPENHEIMER Then we have four exhibits as to
 (14) which there is an objection and actually it's really just
 (15) three because one is the chart about which we had hearing
 (16) practice and -
 (17) MR PETUMENOS I'm not sure about the issue whether
 (18) it goes to the jury has been determined has it Judge?
 (19) MR OPPENHEIMER In terms of the numbers those in
 (20) dispute are 10478A and 10478A 1
 (21) (Exhibits 10478A and 10478A 1 offered)
 (22) THE COURT Which are what?
 (23) MR OPPENHEIMER Those are the land purchase - it is
 (24) this chart with and without the 93 and 94 bars The 1 is
 (25) this chart that Your Honor's looking at now that has the 93

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(1) and 94 bars The one that is - has no decimal point 10478A
 (2) is the one that we redacted those two bars from as well as the
 (3) footer
 (4) MR PETUMENOS My objection to that is Judge I
 (5) understand that you found the probative value of the subject
 (6) area to be more probative than prejudicial under these
 (7) circumstances but you can limit the prejudice to us by having
 (8) this be in the testimony and not entered into the jury room
 (9) where it can be emphasized or the issue of the settlement can
 (10) be emphasized and we are appealing to your discretion
 (11) THE COURT You know actually the other thing that
 (12) occurs to me is that there are a number of illustrative
 (13) exhibits I've admitted without objection I don't want to be
 (14) unthoughtful or inconsistent here Sometimes inconsistency is
 (15) a good thing and sometimes it's a bad thing You can be rigid
 (16) about consistency but I think - I believe I've admitted a
 (17) number of illustrative exhibits like this
 (18) If this were a small trial and was illustrative I'd say no
 (19) and allow it to be used in final argument but I'm not sure by
 (20) excluding this I'd be inconsistent with a number of rulings
 (21) I've made in the past and I frankly admit to you counsel I
 (22) can't recall those rulings I just have the gut feeling that
 (23) that's true
 (24) On the other hand it seems to me that if I let you use
 (25) this diagram in final argument you've gotten the benefit out

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(1) of it and in fact I don't know why one diagram wouldn't do
 (2) MR PETUMENOS That was my second point It further
 (3) emphasizes the point to - I had thought the purpose of the
 (4) other diagram without the other two bars in there was counsel's
 (5) attempt to and successfully attempt to be sure that he was on
 (6) the right side of the Court's ruling
 (7) MR OPPENHEIMER Point of fact that's a correct
 (8) observation I should have thought of that before I moved the
 (9) admission This that we're looking at now that has all the
 (10) data is the one that makes sense That's 1
 (11) THE COURT I'm going to keep it out counsel You
 (12) can use it in final argument if someone chooses to do so and
 (13) re-explain the information as it relates to the testimony
 (14) MR OPPENHEIMER Your Honor the other two exhibits
 (15) are 13072C and 13073B and those are what we've been calling
 (16) our take away charts and those I think are an important
 (17) summary Your Honor will recall the other exhibit that I
 (18) mentioned is what I sometimes call sonic take away chart
 (19) which
 (20) is the one that goes from 18 million down to 5.9 and this I
 (21) think is a highly useful summary document with nice
 (22) compliment
 (23) and foundation in the record and I think it would be useful
 (24) and I think it clarifies the parties' position
 (25) (Exhibits 13072C and 13073B offered)
 (26) MR PETUMENOS Judge there's a couple things about
 (27) these two wasn't sure if you could see them from up there so I

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(1) didn't know if you knew what they looked like from this point
 (2) THE COURT I remember them counsel
 (3) MR PETUMENOS Do you have copies of those up there
 (4) with you?
 (5) MR OPPENHEIMER These came up on the Elmo
 (6) MR PETUMENOS I'm not always sure Anyway there's
 (7) a couple problems here I think these - these exhibits are
 (8) argumentative One of the things that I raised before and I
 (9) did not realize the extent to which counsel was going to go
 (10) with this - with this area but in our deposition of
 (11) Mr. Roddewig we affirmatively asked him if he had reduced his
 (12) studies to specific dollar figures and whether he was in a
 (13) position to do that and he said no
 (14) THE COURT When was he deposed in December?
 (15) MR PETUMENOS He was deposed in December when
 (16) discovery was open We got material that supports this This
 (17) is the business about the material coming in yesterday at
 (18) 10:00 Now what we've got here is a specific calculation down
 (19) to a thousand dollar figure
 (20) THE COURT Is that the first time you've seen that
 (21) figure?
 (22) MR PETUMENOS The first time that we saw this figure
 (23) was in the trial exhibits that were filed by counsel And I
 (24) thought the proffer was before or the basis for it -
 (25) understand when we see the trial exhibits we have no idea

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(1) who's testifying to it whether it's Mr. Dorchester who has
 (2) done an appraisal or Mr. Roddewig until the Friday before
 (3) when we - we get a sense of who's testifying to what
 (4) I was a little unsure as to how this whole thing was coming
 (5) together until I heard the testimony but what I think I see
 (6) now is darn close to an appraisal We have taken Mundy's
 (7) numbers ICF numbers and now we're calculating down to the
 (8) one
 (9) thousand dollar amount and at best I think at this point what
 (10) we have is somebody who has done a market study who is
 (11) trying
 (12) to come up with some theories as to how it might apply to the
 (13) current circumstances and so forth To elevate it to this
 (14) level where we're actually making it look like we've got an
 (15) appraisal about which there's been no deposition I think is
 (16) improper and I think very definitely for substantive reasons
 (17) should be illustrative exhibit only
 (18) MR OPPENHEIMER Your Honor we've been talking about
 (19) this exhibit since before the trial Again this was the
 (20) exhibit where we talked about the fact that - and I did elicit
 (21) this on his cross that these were approximate numbers
 (22) because
 (23) among other things this came up simultaneously really with the
 (24) new information we were getting from Mundy And you'll recall
 (25) that we said at the time we are breaking down the analysis
 (26) here into these components for purposes of making a clear
 (27) point and we're going to have a problem because some of
 (28) these
 (29) numbers will change because he was changing some of his
 (30) data

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- (1) and it was agreed that we could go ahead and use these with
 (2) approximate numbers in the opening
 (3) I m not saying that that resolves this issue but it
 (4) certainly is clear chronologically that when we got information
 (5) from Mr Mundy which clearly was new information
 nondisclosed
 (6) information prior to that point that we raised all these charts
 (7) which disclose what they disclose then we still had stuff to
 (8) find out from Mr Mundy and you gave us his deposition and we
 (9) took it and we lived with the consequences of finding - if we
 (10) had questions we asked in other words
 (11) This stuff has been on the table from before the trial and
 (12) we discussed I think very clearly our intentions as to how
 (13) we re going to use it used it that way today Now the
 (14) numbers continue to be approximate Whether it s an appraisal
 (15) or not from Mr Petumenos point of view it clearly isn t
 (16) What it is is a - this is the application of this expert s
 (17) conclusions to the Mundy analysis of claims and his
 (18) explanation of how he responds to each of those categories
 and
 (19) as I say all of these - the numbers were different because of
 (20) the problem we had with Mr Mundy s new data But these have
 (21) been on the table since before the trial started with a lot of
 (22) discussion about them
 (23) THE COURT What these exhibits are is if you - for
 (24) instance with the one that has the actual dollar figures I
 (25) mean essentially it s saying to the jury if you don t accept

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- (1) the assumption that landlocked properties are part of the
 (2) damages in this case you subtract out \$6 552 000?
 (3) MR OPPENHEIMER Correct
 (4) THE COURT Just exactly the kind of thing you d say
 (5) in final argument
 (6) MR DIAMOND Your Honor I have a certain interest
 (7) because I -
 (8) THE COURT Hold on hold on you may have counsel
 (9) but after a while repetitive argument - these exhibits are
 (10) valuable I agree with you they re valuable because they show
 (11) your claims and you can show your claims in final argument
 and
 (12) you can show them with these exhibits I m not going to send
 (13) them into the jury room
 (14) MR DIAMOND May I just be heard on that before this
 (15) ruling becomes final and unalterable? There are lots of charts
 (16) that have been offered by plaintiffs experts with respect to
 (17) the damage analysis
 (18) THE COURT I know that but have I refused to have
 (19) them in the record over objections?
 (20) MR DIAMOND Well we did not think it was
 (21) objectionable to have an expert s analysis of a damage
 (22) calculation in evidence That s what this is He has started
 (23) with Mundy s numbers
 (24) THE COURT I ll tell you what counsel - and this
 (25) may be an undue burden on everybody involved in this case
 but

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- (1) to the extent that - as I said I knew inconsistency would be
 (2) an issue here The extent that I have made mistakes about
 (3) argumentative exhibits if I have or you ve allowed exhibits
 (4) to go in without objection that are like this exhibit I m
 (5) willing to try and edit the record because I think these
 (6) things are unnecessary There are many things in this record
 (7) that are unnecessary I ve let them in because there have been
 (8) no objections
 (9) MR DIAMOND Well we certainly agree that there are
 (10) many things that have come in unnecessarily I would just - I
 (11) would like to state my strong difference of opinion that these
 (12) are argumentative since I m going to have my hand in arguing
 (13) this case at its conclusion this is the expert s analysis
 (14) THE COURT Which he s testified to
 (15) MR DIAMOND But so has Dr Lobdell and his numbers
 (16) are in and so has Dr Johnson and her numbers are in
 (17) THE COURT You heard the offer I made to you
 (18) counsel
 (19) MR DIAMOND I m just suggesting that perhaps numbers
 (20) are not necessarily argumentative simply because they derive
 (21) from somebody else s work
 (22) THE COURT I think you re right I m not disagreeing
 (23) with you there This is not a wholly argumentative exhibit
 (24) It s also illustrative and it s valuable because it - it
 (25) tended to show the jury in graphic terms what this - this

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- (1) witness is claiming This witness claimed it verbally And so
 (2) to the extent that this particular exhibit is in it s
 (3) cumulative and it has a danger that the jury is going to look
 (4) at it and be blinded by its graphic quality and forget what the
 (5) testimony was and just look at the exhibits and say oh I
 (6) know what I can do I can get \$18 million by doing all this
 (7) subtraction It s a powerful exhibit and I ll let you use it
 (8) to a certain degree I just won t let you use it to the degree
 (9) that it obscures the evidence in the case and that s - I
 (10) mean that s what I do with illustrative exhibits
 (11) MR DIAMOND In terms of our review of the
 (12) plaintiffs exhibits that are already in just so that we have
 (13) a sense for what your - what your dividing line is there are
 (14) exhibits that total up the claims to \$86 751 000 that are in
 (15) evidence and I would not - I would not necessarily assume
 (16) that those are argumentative Perhaps you re telling me that
 (17) they are
 (18) THE COURT What I m telling you is that - what I m
 (19) telling you is that this discussion is about two exhibits To
 (20) the extent you think the record is somehow skewed by the fact
 (21) that I ve kept these two exhibits out you re welcome to go
 (22) back and review the record to see whether or not I should take
 (23) out other exhibits
 (24) On the other hand you have these things to face One you
 (25) didn t object right and that may be a real possibility Two

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- (1) I reserve the right to use individual judgment with regard to
- (2) each exhibit I will not apply a tit-for-tat ruling on this
- (3) I'll determine if you bring it up which exhibits come out and
- (4) which exhibits stay in I make absolutely no promises that I
- (5) will be unreasonably consistent here
- (6) Thank you counsel
- (7) MR STOLL I'm ready to rule
- (8) THE COURT So where are we?
- (9) MR PETUMENOS I think we're done for the day
- (10) THE COURT I have one thing to do
- (11) MR FORTIER Your Honor we just filed a motion
- (12) THE COURT I saw it
- (13) MR FORTIER And I wanted to get it in tomorrow
- (14) morning
- (15) THE COURT I've got it here
- (16) MR FORTIER Let me tell you a little bit of the
- (17) history if I could Judge There was supposed to be a hearing
- (18) this afternoon before Master Ruskin on the deposition itself
- (19) THE COURT On the Lattery deposition?
- (20) MR FORTIER Yes My concern is hearing on
- (21) deposition what's still there for script isn't going to answer
- (22) what our concern is and that's that any reading at all the
- (23) purpose of bringing in the Lattery deposition is to show how
- (24) Mundy is perceived by the state with regard to other lands in a
- (25) completely different transaction that occurred years ago So

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- (1) our reading of it is that this is a direct - this case and
- (2) Footing and Schneider (phonetic) are directly on point with
- (3) each other
- (4) THE COURT Okay I see the motion When do you want
- (5) to respond?
- (6) MR DIAMOND I don't know that counsel was asking you
- (7) to do anything because this is in front of the Discovery
- (8) Master
- (9) THE COURT He's asking me to read the motion
- (10) MR FORTIER I was Your Honor I was asking him to
- (11) read the motion even though I sit in the back of the room
- (12) MR DIAMOND I object to him asking you to read the
- (13) motion because I don't think it is proper for counsel to usurp
- (14) the process we have of having the Discovery Master review the
- (15) processes coming in the back door before the process is
- (16) complete If they want to appeal something he does that's all
- (17) right We have litigated an awful lot of this issue before
- (18) David Ruskin with the understanding that if any party's
- (19) aggrieved by his ruling they can come to you on an appellate
- (20) basis We have not resolved this They haven't even raised
- (21) this -
- (22) THE COURT You think the Discovery Master's going to
- (23) make an evidentiary ruling precluding the testimony of an
- (24) expert witness?
- (25) MR DIAMOND There have been innumerable rulings on

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- (1) issues of relevance by the Discovery Master Some for us
- (2) some
- (3) again us Some we've lived with I guess all we've lived
- (4) with because I don't think we've appealed any adverse rulings
- (5) THE COURT When will you have a decision?
- (6) MR DIAMOND He rules expeditiously I assume by the
- (7) end of the day
- (8) THE COURT So I won't read this until tomorrow
- (9) MR PETUMENOS Can I respond to that issue?
- (10) THE COURT No counsel I can understand how you
- (11) might have some disagreements but they're irrelevant for my
- (12) purpose If I have to deal with this motion I'll certainly
- (13) read it I'll read it timely so that nobody suffers but to
- (14) the extent that Master Ruskin's process that he has in the
- (15) works affects this you can tell me about that later And of
- (16) course Exxon will have an opportunity to respond to this
- (17) motion
- (18) MR FORTIER My concern Your Honor was -
- (19) THE COURT Now once - once we find that Master
- (20) Ruskin has not excluded everything then the motion is as far
- (21) as I'm concerned probably going to be asserted So the
- (22) question would be when does Exxon want to reply?
- (23) MR DIAMOND There is a hearing at 3:30 so we should
- (24) have a ruling by then We'd like to get the benefit of his
- (25) wisdom before we reply We'll try to have something to you
- (26) tomorrow morning if -

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- (1) THE COURT That's fine no problem
- (2) MR PETUMENOS Judge I have a concern about the fact
- (3) that - this is not an attempt please understand to
- (4) circumvent Master Ruskin As this trial has progressed issues
- (5) of relevance in front of Master Ruskin put him in a
- (6) disadvantage when he hasn't heard the trial and some of the
- (7) witnesses are coming so fast from the time the issues are
- (8) raised I think we're tripping ourselves up by not coming to
- (9) you This is by no means an attempt to get around Master
- (10) Ruskin but just as a practical matter he hasn't heard the
- (11) trial at this point on issues of relevance and some of the
- (12) witnesses - I think Mr Lattery is scheduled for tomorrow
- (13) MR FORTIER Mr Lattery is scheduled for tomorrow
- (14) which is one of my reasons for concern Your Honor That plus
- (15) an issue of preclusion as to what Master Ruskin may or may not
- (16) include
- (17) THE COURT I understand that counsel Wait a
- (18) minute wait a minute To the extent that you're complaining
- (19) about the process before Master Ruskin no matter how many
- (20) words of wisdom you give me right now I am not going to
- (21) decide
- (22) the issue It's irrelevant for my purposes I will not deal
- (23) with it I've got too many other issues to deal with It's a
- (24) little late to be changing the process you've been engaging in
- (25) so diligently for months
- (26) Anything else?

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- (1) MR DIAMOND No Your Honor
 (2) THE COURT Okay Here s the decision on the - on
 (3) the videotape
 (4) The rule that s - that s implicated here is Evidence Rule
 (5) 801(d)(2)(D) which takes out of the hearsay ban a statement -
 (6) I m paraphrasing here counsel but this is a pretty close
 (7) paraphrase - a statement by an agent or a servant concerning a
 (8) matter within the scope of his agency or employment made
 during
 (9) the existence of the relationship
 (10) Reading this section literally if I were just to read the
 (11) section literally without looking at the cases and the
 (12) interpretations that have been made of the federal rule and the
 (13) Alaska rule these tapes would contain admissible statements
 (14) because they concern a matter within the scope of the
 (15) relationship if these two declarants are either agents or
 (16) servants
 (17) The question the first question that s raised and Exxon
 (18) raises it is if the declarants are independent contractors
 (19) does that preclude a finding that they are agents of Exxon for
 (20) the purposes of this ruling
 (21) Based on my review of the case law and those cases that I
 (22) accept as persuasive and my own reading of the rule I say that
 (23) the answer to that question is no But cases that support that
 (24) proposition are Collins versus Wayne Corporation Brown &
 Root
 (25) versus American Home Assurance Company and Hartford Fire

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- (1) itself says that there should be a scope of work attached
 (2) which would have described his - his tasks more completely I
 (3) assume and which was part of the contract has not been
 (4) produced by Exxon At my rate it s clear that Suchanek was to
 (5) investigate and report Dames & Moore who would then report to
 (6) Exxon in the investigation of the intertidal and subtidal
 (7) environmental impact of the Exxon Valdez oil spill
 (8) His - Suchanek s scope of potential work may very well
 (9) have included as Dr Freitas did quote expert testimony
 (10) unquote His it doesn t specifically say that Freitas
 (11) does that she was hired for possible expert testimony That s
 (12) in Exhibit 2 You can see Exhibit 2 to Exxon s reply memo
 (13) April 7th 1998 - 1989 letter
 (14) All of the statements in his interview quote - and I m
 (15) quoting from the rule - concern a matter within the scope of
 (16) his relationship unquote with Dames & Moore/Exxon
 (17) Freitas consulted with Arthur D Little who contracted with
 (18) Exxon to assist Exxon in responding to the Exxon Valdez oil
 (19) spill That s in Exhibit 2 of the reply The work covered
 (20) field - and this is all - I think it s an exact quote field
 (21) sampling sample analysis oil spill chemistry and damage
 (22) assessment consulting risk assessment and expert testimony
 (23) unquote Exhibit 2 page one Freitas herself says she was
 (24) quote chief chemist employed by Dr - By Arthur D Little
 (25) directly contracted to Exxon to do chemical analysis

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- (1) Insurance Company versus The M/V Savannah you know the
 (2) citations
 (3) The second question is Are Suchanek and Freitas either
 (4) agents or servants within the meaning of the rule? And the
 (5) answer as I ve given it to you this morning is yes I ve
 (6) gone - by the way I don t have a ruler here but I think
 (7) we ll all accept the fact that you ve given me about eight
 (8) inches of material on this and I went through it again last
 (9) night It s not surprising I was - I had a little trouble
 (10) with this problem and I - I appreciate it I m not
 (11) criticizing you for it You gave me lots of material
 (12) including I might add a whole big thick sheath of the
 (13) material regarding to - mostly to Mr Suchanek s employment
 (14) which I have also reviewed
 (15) He acted as a principal - this is his title Principal
 (16) Investigator for the Kodiak Island Alaska Peninsula Recovery
 (17) and Impact Studies overseeing all biological studies
 (18) including intertidal and subtidal environmental impact
 (19) assessment of the Exxon Valdez oil spill That s a - that s
 (20) in defendants Exhibit A to the original opposition memo that s
 (21) filed on this motion It s also in Exhibit 3 the scope of his
 (22) duties is also in Exhibit 3 to the reply memo
 (23) The scope of work which - which I think - which is
 (24) missing here it s referred to Exxon takes the position that
 (25) they don t think they did a scope of work but the document

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- (1) That s - those are quoted words with ellipses in there
 (2) because it s not everything she said but those are the
 (3) pertinent things she said with regard to who she was working
 (4) for and what she was doing
 (5) All of the statements in her interview quote concern a
 (6) matter within the scope of her relationship unquote with
 (7) Arthur D Little/Exxon
 (8) Neither of these declarants were Exxon employees Exxon
 (9) had control over Dames & Moore and thus Suchanek quote
 with
 (10) respect to the scope of work and general results required
 (11) unquote That s Exhibit B to the original defense response at
 (12) article 13 All materials resulting from Dames & Moore s work
 (13) were to be Exxon property That s the same exhibit at article
 (14) 7 And now I m talking about the March 28th contract between
 (15) Dames and Moore and Exxon
 (16) And the Dames & Moore/Suchanek contract made Suchanek s
 (17) work product the property of Dames and Moore and not
 Suchanek
 (18) Exhibit E to the defense supplemental reply at paragraph 10
 (19) Day to day control to be exercised by Exxon is vague from the
 (20) evidence presented It would appear that Suchanek could
 (21) perform his work as he saw fit However Suchanek was to be a
 (22) part of the Dames and Moore team that investigated and
 reported
 (23) to Exxon within the scope of the assignment that - that came
 (24) down from Exxon through Dames & Moore to Suchanek
 (25) Freitas did essentially the same thing And at least

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- (1) Freitas - well we know Freitas was contemplated to be a
 (2) possible expert witness in this case because the document
 says
 (3) so And it's hard for me to believe on the basis of all the
 (4) evidence I've reviewed that in fact it wasn't exactly the same
 (5) for Suchanek
 (6) On the basis of all of the evidence presented I find the
 (7) two declarants to be Exxon's agents for the purposes of Alaska
 (8) Rule 801(d)(2)(D) even though they may have been
 independent
 (9) contractors for other purposes I also find their statements
 (10) to concern matters within the scope of their agency made
 (11) during the existence of the re - the agency relationship
 (12) which is all the rule requires Finally the statements are
 (13) relevant and they are not excludable under Rule 403 And in
 (14) view of these findings I don't think there's any need to rule
 (15) on the present sense impression arguments because that
 entire
 (16) tape comes in under my finding These statements are
 (17) admissible under Rule 801(d)(2)(D) and therefore I'll allow
 (18) them to be played to the jury
 (19) Is there anything further?
 (20) MR DIAMOND Your Honor I think the record on this
 (21) one is perfected as could be Our point of departure with you
 (22) principally is over the issue of control and I simply observe
 (23) that I find the most cogency in the statements you made
 (24) yesterday concerning whether a contractor is authorized to
 make
 (25) impromptu sidewalk press statements whether that's binding

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- (1) against the employee - employer but I think the positions
 (2) have been drawn by the parties and the record is clear on this
 (3) one
 (4) THE COURT Yes and the only thing I'd say in
 (5) response to that is counsel after when I considered the
 (6) matter more thoroughly I believe I responded to a
 (7) superficially attractive argument of yours that in the final
 (8) analysis I do not accept
 (9) The other thing I will - I do want to ask you is - and I
 (10) don't think I've asked it in the course of these proceedings
 (11) about this motion what is it that you disagree with about
 (12) anything that's on those tapes?
 (13) MR DIAMOND I think our principal - principal
 (14) problem is with very off the cuff remarks by Suchanek
 (15) concerning the sweeping remarks about everything being
 dead
 (16) Obviously a position made by a biologist without a great deal
 (17) of thought and probably if asked to reflect on it he would
 (18) agree that it was untrue And I agree with you if somebody
 (19) employs a scientist you take the risk that they may make
 (20) statements within the scope that get you into trouble but this
 (21) fellow is not and I think that's a real danger I'm sure I
 (22) will hear about Mr Suchanek's proclamations on the beach at
 (23) Perevalnie in closing argument and I don't think they're
 (24) terribly probative
 (25) THE COURT Here's what he said but - the

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- (1) interviewer says have you found anything surprising and he
 (2) says not really when you've got a whole complete cover of
 (3) oil most of the organisms appear to be dying but that's not
 (4) too surprising
 (5) That's what he said but in essence what he appears to be
 (6) talking about is a limited stretch of beach where there's
 (7) complete cover of oil and he's looked at the organisms and they
 (8) appear to be dying
 (9) MR DIAMOND You'll remember what started this whole
 (10) thing is my problem that I never - I will not have an
 (11) opportunity to ask Dr Suchanek what he meant by that what he
 (12) meant by dying what he meant by coating of oil what he really
 (13) observed and that's you know that's the problem When you
 (14) admit statements of this nature made to a video camera all you
 (15) get to do is cross examine the video camera operator and not
 (16) what the individual who made the statements really thinks about
 (17) it
 (18) THE COURT Well yeah and of course the
 (19) cross-examination is the issue with regard to admissions The
 (20) admissions come in
 (21) MR DIAMOND I understand that once -
 (22) THE COURT You're not saying this person is
 (23) absolutely unattainable are you?
 (24) MR DIAMOND He is not an employee and that's what
 (25) distinguishes the situation

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- (1) THE COURT Well so I guess I have to ask you the
 (2) question have you made efforts to find him?
 (3) MR DIAMOND I haven't thus far because I didn't
 (4) think the statement was coming in
 (5) THE COURT It's coming in
 (6) MR DIAMOND I understand
 (7) MR STOLL We have Your Honor
 (8) THE COURT You found him?
 (9) MR STOLL Yes we found him He says that he has to
 (10) check with the university or with the Dames & Moore attorney
 (11) before he can talk to us Dr Freitas interestingly is an
 (12) employee of Exxon right now and has been all through this
 (13) entire period of time So if all they have to do is call the
 (14) companies and say to their attorney I mean they contract with
 (15) these people all the time talk to us
 (16) THE COURT So counsel -
 (17) MR DIAMOND And the latter piece of information is
 (18) something Mr Stoll has not shared with me before this very
 (19) moment
 (20) THE COURT Now you know the record as it stands is
 (21) this you've known for some time that these two people were
 (22) potential witnesses or that their admissions may be included in
 (23) the record That puts you I think on inquiry notice to try
 (24) to find out where they were The fact that you - I'm not
 (25) going to criticize you for not doing that until the ruling is

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- (1) made
- (2) On the other hand if Freitas is an Exxon employee you can
- (3) get her I suspect And since the - since the plaintiffs
- (4) within a relatively short period of time found Suchanek I m
- (5) assuming unless you give me some contrary evidence that both
- (6) of these people you could find and to the extent you need to
- (7) clarify their remarks you could do it
- (8) MR DIAMOND I think that may well be presumably
- (9) true The question is making mountains out of molehills and
- (10) you know we re going to - we re going to have to measure how
- (11) big of a mountain this really - this really is
- (12) THE COURT Which is my point That s why I m
- (13) engaging you in this conversation
- (14) MR DIAMOND I understand I understand I have
- (15) talked to Mr Stoll during the break about the playing of the
- (16) videotape He wants a little bit of a snippet in between the
- (17) two interviews included Based on his representations to me as
- (18) to what s in there I have no problem I ll take a look at it
- (19) tonight and confirm that but what we would suggest is that at
- (20) some point in order to make sense in our presentation we ll
- (21) stop tomorrow and allow the videotape to be played
- (22) THE COURT You can pick the right time That s fair
- (23) enough
- (24) MR DIAMOND Thank you
- (25) MR STOLL Your Honor as I indicated they can just

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- (1) tell us when they want to have it played and we ll agree
- (2) THE COURT Excuse me?
- (3) MR STOLL Whenever they want us to play it as long
- (4) as the jury is present we ll - not midnight I know a
- (5) special private midnight showing
- (6) THE COURT All right we re off the record
- (7) THE CLERK Off record
- (8) (Recess at 2 04 p m)

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- (23) 8130 received 6052
- (24) 8113 received 6052
- (25) 8114 received 6069

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- (1) STATE OF ALASKA)
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5 10 97

Look-See Concordance Report

 UNIQUE WORDS 2,621
 TOTAL OCCURRENCES 11,981
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 TOTAL WORDS IN FILE 35,026

SINGLE FILE CONCORDANCE**CASE SENSITIVE**

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Thursday August 18 1994
) 8 47 a m
 (6))
 (8) VOLUME 39 Pages 6104 through 6285
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
 (17) FOR THE PLAINTIFF
 N ROBERT STOLL
 Stoll Stoll Berne & Lokting
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 503/227 1600
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 907/277 4222

Vol 39 6105

(1) OR THE DEFENDANTS
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 Reported by
 (9) JOY S. BRAUER RPR
 Registered Professional Reporter
 (10) Midnight Sun Court Reporters
 2550 Denali Street Suite 1505
 (11) Anchorage Alaska 99503
 907/258 7100

Vol 39 6106

(1) PROCEEDINGS
 (2) (Jury in at 9 47 a m)
 (3) THE CLERK. Please rise
 (4) (Call to Order of the Court)
 (5) THE COURT Good morning counsel
 (6) MR OPPENHEIMER Your Honor good morning
 (7) We've been asked by your staff to make a brief request
 (8) procedurally when we entered all of those exhibits at the end
 (9) of the day yesterday as to which there was no objection we
 (10) did not formally get Your Honor's statement that they were
 (11) admitted
 (12) THE COURT They're admitted
 (13) (Exhibits DX10506 10243 10621 10625A 1 10625A 5
 (14) 10402A 10514B 10264B 10248A 10536 10625A 23
 10625A 6
 (15) 10218B 10265A 10376 10627 10625A 16 10521 10403A
 10518B
 (16) 10524 10246 10535 10622 10234A and 12082 received)
 (17) MR OPPENHEIMER Thank you Your Honor
 (18) MR PETUMENOS Good job Judge
 (19) THE COURT I'm not going to recite them for you
 (20) counsel
 (21) MR OPPENHEIMER No I promised everyone I would not
 (22) do that
 (23) MR PETUMENOS Mr Roddewig come on up here into
 (24) lawyer land - doctor land
 (25) CROSS EXAMINATION OF RICHARD J. RODDEWIG
 (Resumed)

Vol 39 6107

(1) BY MR PETUMENOS
 (2) Q Yesterday we were talking about a meeting between you and
 (3) Mr Papke and Mr Gilfillan and Mr Page and an attorney from
 (4) Exxon named Robert Profy?
 (5) A Yes I remember the meeting
 (6) MS SMITH Tim they're doctors
 (7) MR PETUMENOS I'm sorry?
 (8) MS SMITH They're doctors
 (9) BY MR PETUMENOS
 (10) Q The meeting just to remind us was one that you say you
 (11) requested not Exxon?
 (12) A That's my recollection
 (13) Q The meeting was one that you wanted so that you could learn
 (14) some of the technical aspects of spills?
 (15) A Information about technical aspects of some spills
 (16) Q And there were notes taken of the meeting by both you and
 (17) by Mr Papke?
 (18) A That's correct
 (19) Q And we showed them to you yesterday exhibits 8129 and
 (20) 8115?
 (21) A I remember seeing them yesterday
 (22) Q Now I was looking at the notes -
 (23) MR OPPENHEIMER Your Honor I'm going to object
 (24) under 613(b) any reading from any notes other than the
 (25) witness I think the record is clear from yesterday he was

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- (1) neither refreshed nor remembered the notes from Mr Papke
He
(2) was able to identify the handwriting and that s it so there s
(3) no basis for them being published
(4) THE COURT Let me see the notes please
(5) MR PETUMENOS Sure
(6) (Bench conference off the record)
(7) THE COURT Show them to him counsel
(8) MR PETUMENOS I m sorry?
(9) THE COURT Show them to him
(10) BY MR PETUMENOS
(11) Q Yes Do you remember seeing these yesterday these notes
(12) and these here?
(13) A Yes I remember them
(14) Q And that s what they are they re the notes of you and
(15) Mr Papke?
(16) A Yes I believe they are
(17) Q And since you were going to this meeting for the purpose of
(18) obtaining technical information about - about the spills you
(19) were writing down those things that you thought were
important
(20) I assume?
(21) A Well I don t always write down everything from a meeting
(22) Mr Petumenos I write down things that I think are most
(23) important when I hear them but I don t copy down every word
at
(24) every meeting
(25) Q Well you re having difficulty remembering portions of this

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- (1) meeting aren t you?
(2) A I remember quite a bit about the meeting
(3) Q Well let s discuss specific things from my review of the
(4) notes
(5) MR OPPENHEIMER Your Honor again I m going to
(6) reassert the objection to the extent they come from notes other
(7) than this witness notes They can t be published orally or
(8) otherwise unless there s a foundation under 613(b)
(9) MR PETUMENOS I m going to explore his recollection
(10) right now
(11) THE COURT You can t use the notes to explore his
(12) recollection in front of the jury you can use the notes to
(13) refresh his recollection about what may have been at the
(14) meeting
(15) MR PETUMENOS I m going to that s exactly what I m
(16) going to do
(17) BY MR PETUMENOS
(18) Q A discussion about time being on the side of the defense
(19) do you remember a discussion about that?
(20) A I don t remember that
(21) Q And those notes don t refresh your recollection?
(22) MR OPPENHEIMER Your Honor this is asked and
(23) answered This was the subject of yesterday s -
(24) THE COURT That s true it was Let s get over this
(25) and go on to the next one We can - we can do it one time I

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- (1) just - I want this to flow a little bit counsel
(2) MR PETUMENOS Yes it will as soon as I can get my
(3) questions out here
(4) BY MR PETUMENOS
(5) Q And you don t remember anything about there being too
much
(6) pollution for the Zoe Colocotroni spill?
(7) THE COURT I don t know which notes you re referring
(8) to counsel Which notes are you referring to?
(9) MR PETUMENOS Referring to the notes in front of the
(10) witness right now Judge
(11) MR OPPENHEIMER Your Honor that includes both sets
(12) of notes clearly in violation of the rule
(13) THE COURT Yes
(14) MR PETUMENOS No I don t think so because we are
(15) talking here about co-authors of a report and it s no
(16) difference -
(17) THE COURT Here s what I want you to do counsel I
(18) want you to ask him the following question Did you talk about
(19) the following subjects okay?
(20) MR PETUMENOS Uh-huh
(21) BY MR PETUMENOS
(22) Q Did you talk about the Zoe Colocotroni spill being too
(23) polluted to study?
(24) A I remember talking about the Zoe Colocotroni spill but I
(25) don t remember discussion about it being too polluted to

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- (1) study
(2) Q Do you recall a discussion about the existence of surveys
(3) regarding perceptions of oil spills in this meeting where it
(4) was disclosed to you that there were other surveys out there
(5) regarding how oil spills are perceived?
(6) MR OPPENHEIMER Your Honor again what s happening
(7) is there s now a compound question which assumes some facts
(8) that aren t in evidence with respect to disclosure We re
(9) moving away from just asking the witness what he recalls
having
(10) been discussed It s the same objection It s really just an
(11) oral publication of the information
(12) MR PETUMENOS Judge I m entitled to his
(13) recollection of the meeting There s nothing wrong with the
(14) question
(15) THE COURT Counsel am I wrong if he doesn t -
(16) MR OPPENHEIMER Never
(17) THE COURT If he doesn t -
(18) MR OPPENHEIMER Pardon me Your Honor
(19) THE COURT Never is the right answer
(20) MR OPPENHEIMER Never is the right answer Never is
(21) always the right answer
(22) THE COURT He gets to ask him if he recalls certain
(23) things in the meeting and if he doesn t - if he doesn t
(24) recall those things he gets to show him the notes to see if
(25) they refresh his recollection If they don t refresh his

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- (1) recollection and it's the statement of the witness he gets to
- (2) impeach him with what he's written down on the paper Am I
- (3) wrong or right?
- (4) MR OPPENHEIMER You're right about that not with
- (5) someone else's statements
- (6) THE COURT Exactly that's the distinction we're
- (7) going to make Only try to refresh recollection If the
- (8) recollection is not refreshed with the other notes you're left
- (9) to impeach him with the notes - with his own notes
- (10) MR PETUMENOS I believe Your Honor's right
- (11) BY MR PETUMENOS
- (12) Q Do you remember Mr Roddewig a discussion about -
- (13) where
- (14) was I - surveys existing regarding perceptions of oil spills
- (15) that was discussed at that meeting or do you have no
- (16) recollection of that?
- (17) A I have no recollection of that
- (18) Q Do you remember at this meeting with the Exxon lawyer
- (19) Mr Page and Mr Gilfillan discussing the issue of whether
- (20) some scientist who had studied oil spills were honest and some
- (21) were dishonest?
- (22) A No I don't remember a discussion of honesty or dishonesty
- (23) among scientists
- (24) Q You don't remember any discussion at that meeting about
- (25) the
- (26) fact that one of the biggest problems in connection with an oil
- (27) spill is the perception created by the media?

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- (1) A I don't recall that as I sit here today
- (2) Q And you don't remember any statements to the effect that in
- (3) the experience of Mr Page and Mr Gilfillan few people wanted
- (4) to go back and look at the property after the oil had been -
- (5) after the property had been initially oiled even a year later?
- (6) A Which property are you talking about?
- (7) Q Property that gets oiled in oil spills?
- (8) A I'm sorry what was the question again?
- (9) Q You don't remember a conversation with them about the fact
- (10) that in their experience once property is oiled people don't
- (11) bother to go back and look at it in subsequent years to
- (12) determine whether it's oiled or not?
- (13) A I don't remember that
- (14) Q You don't remember them suggesting to you that you should
- (15) go study the Florida barge spill?
- (16) A I remember a discussion of the Florida barge spill but I
- (17) don't remember whether they made a recommendation that we
- (18) should go study it or not
- (19) Q You don't remember that they made some conclusions
- (20) regarding the Florida barge spill in this meeting do you?
- (21) MR OPPENHEIMER Your Honor may we approach the
- (22) bench?
- (23) THE COURT Yes you may Please bring the notes with
- (24) you
- (25) (At sidebar on the record)

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- (1) MR OPPENHEIMER My reading of the notes is very
- (2) different from Mr Petumenos
- (3) THE COURT If these are shorthand statements
- (4) Mr Petumenos is making his question is testimony it's a
- (5) problem
- (6) MR PETUMENOS I'll move on I'll get off the
- (7) subject
- (8) THE COURT Be careful with it I'm going to have to
- (9) interrupt and send the jury out if I see a problem
- (10) MR PETUMENOS I'm going to get off the subject
- (11) entirely It's breaking up the examination
- (12) THE COURT You're right
- (13) (Sidebar concluded)
- (14) BY MR PETUMENOS
- (15) Q Okay Now let's go to the Florida barge spill What I
- (16) have done Mr Roddewig is - using the figures that are in
- (17) your report I have taken what represents 10.8 million gallons
- (18) of oil the Exxon Valdez oil spill and I have here by
- (19) determining from your report the amount of gallons spilled in
- (20) the Florida oil spill by relative volume the amount that was
- (21) spilled in the Florida spill And I want to show them to you
- (22) and ask you whether you think this looks like an accurate
- (23) illustration if you will of the amount of oil spilled between
- (24) the two spills?
- (25) MR OPPENHEIMER Your Honor there's no foundation

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- (1) for this demonstration I don't know that it goes anywhere
- (2) but it seems to me that to show the witness something that
- (3) Mr Petumenos has put together that we have no basis for
- (4) determining is correctly done lacks foundation for this
- (5) witness by probative value and to the extent it's a
- (6) compilation there's no background data in the rules an
- (7) objection we met yesterday
- (8) THE COURT The objection's overruled
- (9) BY MR PETUMENOS
- (10) Q That look about right?
- (11) A I have no way of knowing Mr Petumenos
- (12) Q Well let's see if we have a way of knowing On page 76 of
- (13) your report the spill incident reportedly released 175,000
- (14) gallons of Number 2 fuel oil is that about right?
- (15) A Yes I remember that
- (16) Q The amount of oil spilled in the Exxon Valdez oil spill
- (17) according to your calculations - just yours now - is 10.8
- (18) million gallons of oil?
- (19) A We didn't do any calculations Mr Petumenos That's the
- (20) number that we most often saw in the literature
- (21) Q I understand It's the number you were using in your
- (22) report?
- (23) A We were using that number
- (24) Q And if you take the percentage of oil spilled between the
- (25) Exxon Valdez and the Florida spill - could I have the Elmo

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- (1) please? And you -
 (2) MR OPPENHEIMER Counsel what page? I actually like
 (3) the little glass bottles better
 (4) MR PETUMENOS I was trying to spare the jury Judge
 (5) one more bar graph
 (6) MR OPPENHEIMER But he failed
 (7) MR PETUMENOS But I failed
 (8) BY MR PETUMENOS
 (9) Q Anyway this is the difference in the amount of oil spilled
 (10) that you selected for detailed review and the Exxon Valdez and
 (11) that's out of your report isn't it?
 (12) A Well I have to do the calculation to see if that's
 (13) accurate or not Mr Petumenos
 (14) Q Have a calculator?
 (15) A Yes
 (16) Q Oh good Divide 10.8 million gallons into 175,000
 (17) gallons
 (18) MR OPPENHEIMER Your Honor to speed this up we'd
 (19) be happy to stipulate that the Florida barge spill is smaller
 (20) than the Exxon Valdez spill
 (21) THE COURT 1.6 percent right?
 (22) A Okay Well if that is an accurate representation of the
 (23) percentages it's still not that significant in light of the
 (24) differences of the coastlines and areas that were impacted by
 (25) the spill Four miles in Massachusetts compared to the size of

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- (1) LaTouche Island?
 (2) A No I haven't
 (3) Q The jury has
 (4) MR OPPENHEIMER Your Honor -
 (5) THE COURT Strike the remark the jury is to
 (6) disregard it Counsel don't do that again
 (7) MR PETUMENOS I won't I promise you I won't
 (8) BY MR PETUMENOS
 (9) Q Now Mr Roddewig there's some other differences here
 (10) Could we have the exhibit of - that shows the area -
 (11) Mr Oppenheimer that shows the locality with the arrow that
 (12) goes over there and tells us - the one that shows Cape Cod and
 (13) Falmouth area I have neglected to bring my notes
 (14) If you live -
 (15) MR OPPENHEIMER 10243
 (16) MR PETUMENOS 10243
 (17) BY MR PETUMENOS
 (18) Q If you live in the Falmouth area there are some
 (19) significant differences than if you live say in the village
 (20) of Chenega would you say?
 (21) A There are certainly differences between Falmouth
 (22) Massachusetts and Chenega
 (23) Q And I'm going to tell you Mr Roddewig that this is going
 (24) to be - this is going to be Mr Petumenos revenge on
 (25) Mr Clough because - I'm sorry he's not in the courtroom -

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- (1) Prince William Sound
 (2) BY MR PETUMENOS
 (3) Q Really not significant Well that was the next question
 (4) I was going to ask you because I wanted you to tell the jury
 (5) what you think the amount of oiled shoreline was in Prince
 (6) William Sound the lower Kenai Kodiak and the Shelikof Straits
 (7) as a result of this 10.8 million gallon spill?
 (8) A My recollection is that it's - about 1200 1400 miles of
 (9) shoreline received some oiling at one point or another during
 (10) the course of the spill and the amount of oiled shoreline went
 (11) down every year
 (12) Q And in the Florida barge situation the amount of shoreline
 (13) oiled according to your own report was four?
 (14) A About four miles that's correct
 (15) Q So if we were to take a graph and take the four miles into
 (16) the 1100 or 1200 miles it would be worse in terms of the
 (17) relative sizes?
 (18) A Intensity of the oil that hit the shore too The oil hit
 (19) Wild Harbor Estates very heavily hit that river area there
 (20) very heavily and you have to take that into consideration
 (21) too when you're talking about something like this
 (22) Q The intensity of the oiling is important?
 (23) A The amount of oil that hits the shoreline is important
 (24) There was a lot of oil that hit Wild Harbor Estates
 (25) Q Have you seen the Otto Sieber tape of the oil hitting

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- (1) because I was born and raised on Nantucket Island this island
 (2) right offshore of Falmouth My father used to take me to the
 (3) beach and all that Falmouth has a healthy series of roads
 (4) people stores bakeries things like that?
 (5) A Yes Falmouth is a developed community But at the time
 (6) quite a bit of the area there on Cape Cod was undeveloped
 (7) about 70 percent of the inland area was not developed
 (8) Q Well in 1969 - by the way any significance to the fact
 (9) that this spill was 26 years ago?
 (10) A Yes it's significant because it gives us a chance to go
 (11) back and see what the real estate impacts have been over a
 (12) long
 (13) period of time
 (14) Q That helped you?
 (15) A Yes
 (16) Q It was a benefit?
 (17) A Yes it was
 (18) Q That was an asset?
 (19) A It was a benefit
 (20) Q Were there liabilities?
 (21) A Yes It was difficult to get information about the oil
 (22) spill from 1969 and difficult to get some of the market
 (23) analysis
 (24) Q There were roads leading from the subdivision that you're
 (25) talking about in 1969?
 (26) A Yes there were

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- (1) Q And a person could get into a car and could drive from the
 (2) subdivision that you studied to a beach that wasn't oiled
 (3) couldn't they?
 (4) A Yes they could do that
 (5) Q And a person in Chenega who wants to get out of the oil
 (6) spill area in the Exxon Valdez case and they get into a boat
 (7) do you know how long it's going to take them to travel by boat
 (8) outside the Exxon Valdez oil spill area?
 (9) A Well that's different from asking how long it would take
 (10) them to get to a beach that wasn't oiled which is what you
 (11) asked me about Falmouth There were beaches that weren't
 (12) oiled
 (13) in Prince William Sound and they could have gotten to those by
 (14) boat
 (15) Q Let's try my question Do you know how long it would take
 (16) somebody in a boat from Chenega to get outside of the oil spill
 (17) area?
 (18) MR OPPENHEIMER Question's ambiguous in the context
 (19) of the exchange here with respect to what you mean by an oil
 (20) spill area You do not mean an unoiled beach
 (21) MR PETUMENOS I mean outside the area where you
 (22) don't see any oil anywhere
 (23) MR OPPENHEIMER My objection stands
 (24) THE COURT What is the objection?
 (25) MR OPPENHEIMER Well you might not see oil anymore
 (26) on a beach around a cove If the question is - I don't

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- (1) understand the question
 (2) THE COURT It's a vague question
 (3) MR OPPENHEIMER It's vague and ambiguous with
 (4) respect to the oil spill
 (5) THE COURT Rephrase it
 (6) BY MR PETUMENOS
 (7) Q How long would it take somebody to get in a boat and travel
 (8) so that there is no oil on the left of them no oil on the
 (9) right of them outside of the oil spill area?
 (10) A Mr Petumenos depends on the -
 (11) THE COURT Do you know?
 (12) A I don't know
 (13) MR OPPENHEIMER Thank you for making my objection
 (14) Your Honor
 (15) BY MR PETUMENOS
 (16) Q How long would it take somebody to get in a car and do the
 (17) same thing in Falmouth in 1969 do you know?
 (18) A Take just a few minutes because there were some beaches
 (19) right nearby that weren't oiled and there were beaches in
 (20) Prince William Sound that weren't oiled
 (21) MR PETUMENOS Could we have Joel - let me ask a
 (22) few questions first
 (23) BY MR PETUMENOS
 (24) Q You had a fairly well structured direct examination and you
 (25) prepared it carefully would you agree?

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- (1) MR OPPENHEIMER Your Honor relevance
 (2) THE COURT Sustained sustained It's an
 (3) argumentative question
 (4) MR PETUMENOS Well could we have Exhibit 10 -
 (5) 10229 on the screen - A - on the screen
 (6) Q Exhibit 10229A was an exhibit prepared for this trial
 (7) MR OPPENHEIMER Your Honor may we approach the
 (8) bench?
 (9) THE COURT Sure
 (10) (At side bar on the record)
 (11) MR PETUMENOS This is the defendant's exhibit
 (12) THE COURT All I'm asking this is the exhibit?
 (13) MR PETUMENOS This is the exhibit
 (14) THE COURT What's the objection?
 (15) MR OPPENHEIMER The objection is it's going into
 (16) irrelevant privileged and improper cross-examination The
 (17) reason for that is this wasn't used - this wasn't used on
 (18) direct and the juxtaposition here is leading right to a
 (19) discussion of what kind of discussion was -
 (20) THE COURT This exhibit wasn't used?
 (21) MR OPPENHEIMER No Am I correct Mr Petumenos?
 (22) MR PETUMENOS It is but this is perfectly proper
 (23) bias presentation in that he had this prepared for the jury
 (24) and -
 (25) MR OPPENHEIMER No Your Honor we cut down much of

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- (1) our direct for time purposes and other purposes It's wholly
 (2) inappropriate I would have to take the stand and say why I
 (3) set my direct up as I did We're under an obligation to
 (4) provide all the exhibits we may use which we always do and
 (5) the fact that - and I will tell the reason many of the
 (6) exhibits supplied were not used because I felt we were going on
 (7) just about as long as any jury would want to listen to this
 (8) data I stopped it I thought it was more effective that
 (9) way It is wholly inappropriate for this witness to be
 (10) burdened with my tactical decisions
 (11) THE COURT I understand your objection Counsel
 (12) what are you driving at?
 (13) MR PETUMENOS I am driving at a perfectly legitimate
 (14) cross examination for bias that would give relevant
 (15) information The most relevant information was not presented
 (16) before the jury
 (17) THE COURT Why don't you elicit that information?
 (18) MR PETUMENOS That's what I'm trying to do
 (19) THE COURT Not by saying to the jury look at what
 (20) they didn't give you This is an exhibit as far as I can tell
 (21) so far that was prepared by counsel Maybe it wasn't used
 (22) but it's the information that's important not the exhibit
 (23) MR PETUMENOS It's in his report The exhibit was
 (24) not prepared -
 (25) MR OPPENHEIMER They used the page from his report

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- (1) THE COURT Well if it's in the report use the
 (2) report
 (3) MR OPPENHEIMER You've got it in the page of the
 (4) report use it there
 (5) THE COURT You could do it it's not as if it's a
 (6) great heavy burden One thing you don't get to do is make
 (7) Mr Oppenheimer a witness which is what you're trying to do
 (8) MR PETUMENOS I'll do it that way
 (9) (Sidebar concluded)
 (10) MR PETUMENOS Defendants Exhibit 10229A Now
 (11) Exhibit 10229A shows the sales of the Wild Harbor Estates over
 (12) time
 (13) MR OPPENHEIMER Your Honor excuse me but it was my
 (14) understanding this same data which is in the witness report
 (15) was - was the page from his report was that was going to be
 (16) used or will counsel simply stipulate that this is the data
 (17) from his report?
 (18) THE COURT Actually counsel I have a modification
 (19) of the - the strict interpretation you want It seems to me
 (20) that if it's in the report and it correlates with this
 (21) exhibit -
 (22) MR OPPENHEIMER Which it does
 (23) THE COURT - then Mr Petumenos can use the report
 (24) and the exhibit
 (25) MR OPPENHEIMER That's fine with us that's fine

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- (1) with us We just want to be clear it's from the report
 (2) THE COURT So what page of the report are we talking
 (3) about?
 (4) MR OPPENHEIMER One second and we'll give it to Your
 (5) Honor
 (6) THE COURT And does the witness have that in front of
 (7) him?
 (8) MR PETUMENOS He has it on the screen
 (9) THE COURT I know the exhibit I'm talking about the
 (10) report
 (11) MR OPPENHEIMER The statement is from his report
 (12) and Mr Roddewig are you able to - we have a Bates stamp
 (13) number on the bottom
 (14) MR PETUMENOS Can I proceed Judge?
 (15) THE COURT Yes go ahead
 (16) MR PETUMENOS Thank you
 (17) BY MR PETUMENOS
 (18) Q One of the things that is immediately apparent from this
 (19) exhibit Mr Roddewig is that you have no sales data none on
 (20) this subdivision prior to the spill with respect to prices?
 (21) A Well the project just opened in 1968 and there were some
 (22) sales in 1968 but they were not for arm's length
 (23) consideration
 (24) Q That's right They were sales that you couldn't show that
 (25) there was even any money exchanged for them you had no
 idea

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- (1) you were worried about that and you excluded them from your
 (2) consideration of the Florida barge spill?
 (3) A Well I wouldn't put it that way Mr Petumenos I
 (4) remember there were some sales I don't remember if there
 was
 (5) no money exchanged for them without looking at my report My
 (6) recollection is that some of them were exchanged for some
 (7) consideration but when we pulled up the documents on them
 and
 (8) looked at them we didn't consider them to be arm's length
 (9) transactions so we -
 (10) Q So you didn't consider them for your analysis?
 (11) A We reported them in the report We considered them but
 (12) for purposes of focusing on the increase in market value and
 (13) the number of - of transactions in Wild Harbor Estates we
 (14) didn't put them in this chart
 (15) Q Tell the jury how many lots there were in these Florida
 (16) barge - in the Wild Harbor Estates Subdivision?
 (17) A I believe there were 174 That's what I remember
 (18) Q I'm showing the jury now Exhibit 10514B which is your work
 (19) on the housing market data housing starts for 1969 and 1970
 (20) Now in 1969 there were two vacant lots prior to 1969 which
 (21) transferred which you weren't sure were arm's length
 (22) transactions right?
 (23) A I remember there were some vacant lot sales prior to 1969
 (24) I don't remember if it was two or more than two
 (25) Q There was another one just weeks prior to the spill that

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- (1) also you had no information on with respect to whether it was
 (2) an arm's length transaction or not that was transferred within
 (3) a couple weeks after the spill do you remember that?
 (4) A I'm sorry I'm confused You said there was another one a
 (5) couple weeks before the spill
 (6) Q Or right around the time of the spill that was also not an
 (7) arm's length transaction?
 (8) A There may have been I remember there were a number of
 not
 (9) arm's length transactions that occurred just before the spill
 (10) Q And then right after the spill there were two improved
 (11) with houses on them lots that were transferred and I assume
 (12) those were lots that were built on that had been previously
 (13) described by you as having been transferred without the arm's
 (14) length transaction right would have had to be?
 (15) A No would not necessarily have had to be The developer
 (16) could have built the houses on the lots himself and sold them
 (17) off
 (18) Q In 1970 with respect to vacant lots the subdivision in
 (19) terms of the sales of vacant lots went dead no sales of
 (20) vacant lots in 1970?
 (21) A Yes and we reported on that in our report
 (22) Q And -
 (23) A And investigated it
 (24) Q And this data from Barnstable County and Falmouth shows
 (25) increases in the housing market data for the same period of

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- (1) time as you just testified am I right?
- (2) A Yes But remember the reason for the drop in the lots in
- (3) 1970 that we talked about in the reports is the foreclosure of
- (4) the project due to the poor planning of the roads and the fact
- (5) the water -
- (6) Q Just a minute
- (7) A And the water -
- (8) MR OPPENHEIMER Let him finish his answer
- (9) MR PETUMENOS I move to strike as nonresponsive and
- (10) I'll explain why in a moment
- (11) THE COURT That's fair enough It's nonresponsive
- (12) I'll strike the explanation You can always go back into it
- (13) MR OPPENHEIMER I understand Your Honor
- (14) BY MR PETUMENOS
- (15) Q What we didn't hear from you on direct was this project
- (16) for the person that owned it for the developer that owned it
- (17) was over in 1970 because he couldn't make his debt and the
- (18) project was foreclosed upon is that right?
- (19) A And the - yes and the reason that the project was
- (20) foreclosed upon -
- (21) Q We'll get to the reason in a minute We'll get to the
- (22) reason in a minute Just answer my question That happened
- (23) in
- (24) August of 1970?
- (25) A That's correct
- (26) Q Now the reason the only person that you talked to with -

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- (1) who was involved in that foreclosure either as the
- (2) developer - and by you I mean Clarion now because I
- (3) understand you didn't do all the interviews - the only person
- (4) you talked to who had personal knowledge was in a position to
- (5) have personal knowledge as either the developer the
- (6) developer's attorney the creditor the creditor's attorney was
- (7) an attorney for the creditor who couldn't remember very much
- (8) about that transaction isn't that right?
- (9) A Mr Petumenos we talked to other people and we tried to
- (10) find the people who were involved in the transactions and we
- (11) did find other people We even talked to the daughter of -
- (12) Q Excuse me
- (13) A - one of the developers who died
- (14) THE COURT He can finish his answer
- (15) A We talked to the daughter of one of the people who died
- (16) One of the principal players was dead We couldn't talk to
- (17) him We continued to investigate We found a relative
- (18) Relative said she didn't have any information that would help
- (19) us so then we continued to explore with other people in the
- (20) community We talked to the listing broker who worked on the
- (21) project
- (22) MR PETUMENOS Excuse me Judge -
- (23) THE COURT I'd just like you to listen to the
- (24) question Listen to the question because it's slightly
- (25) different from the answer Go ahead

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- (1) BY MR PETUMENOS
- (2) Q People who were actually involved in the foreclosure
- (3) proceedings parties to it - I am not criticizing you if you
- (4) couldn't find them because it was a long time ago I want to
- (5) know if you talked to anybody who was involved in that
- (6) foreclosure who could give you a reason for it was directly
- (7) involved in it?
- (8) A The - the attorney was the closest person to the
- (9) foreclosure He actually worked for one of the creditors
- (10) Q And he didn't - he couldn't tell you what the reason for
- (11) the foreclosure was?
- (12) A He didn't remember that the spill was a reason and he
- (13) didn't remember what the other reasons were
- (14) Q He didn't know couldn't answer the question?
- (15) A My recollection is he couldn't remember I don't remember
- (16) if he couldn't recall I didn't actually conduct the
- (17) interview somebody else in the office conducted the
- (18) interview
- (19) Q Is the passage of time a bit of a liability for getting a
- (20) hold of the parties to this foreclosure Mr Roddewig?
- (21) A Yes it was It was difficult to do and we explored every
- (22) avenue we could find
- (23) Q Gone on to the next spill the Arco Anchorage I don't
- (24) know if counsel wants to go through this again but here we
- (25) are the Exxon Valdez and the Arco Anchorage Does that look

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- (1) about like a fair representation of the amount of gallons
- (2) spilled between the two to you?
- (3) A I'm to take the representation on that I'll take a
- (4) representation on that It was about 239 000 gallons in the
- (5) Arco Anchorage
- (6) Q And the Elmo please?
- (7) MR OPPENHEIMER Counsel-
- (8) THE COURT Can you see it?
- (9) MR OPPENHEIMER I can Your Honor but this is -
- (10) although it is the same type of graph as we saw before this
- (11) exceeds the four -
- (12) THE COURT What?
- (13) MR OPPENHEIMER Exceeds the four-exhibit rule that
- (14) applies to this particular cross-examination
- (15) THE COURT Come here come here This is better than
- (16) jockeying isn't it
- (17) MR OPPENHEIMER Yes Your Honor
- (18) (At side bar on the record)
- (19) MR PETUMENOS All I'm doing is doing them one at a
- (20) time The chart builds from one to the other
- (21) THE COURT This is not the -
- (22) MR OPPENHEIMER It's not designated It's the
- (23) fourth one and it doesn't matter We were held to our three
- (24) and they should be held to their three
- (25) MR PETUMENOS I have marked it as a single exhibit

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- (1) because all I m doing with the jury is showing as we go
(2) through
(3) THE COURT I know what you re doing Why couldn t he
(4) get up on a blackboard and draw this stuff in and question the
(5) witness? I mean what real prejudice is there?
(6) MR OPPENHEIMER Well but Your Honor if we re going
(7) to - if there wasn t going to be a three exhibit rule which
(8) was the result of two hearings we had we probably would have
(9) done the same thing and prepared more exhibits I mean if -
(10) I mean seriously -
(11) THE COURT But I have to go to the harder question
(12) counsel It s not what you probably would have done it s
(13) whether or not this cross examination would be furthered by
(14) this graphic representation as opposed to watching
(15) Mr Petumenos stumble around and draw this on the sheet in
(16) front of the jury You want me to have him do that?
(17) MR OPPENHEIMER I prefer almost anything to that
(18) But let me suggest - let met suggest that these are obviously
(19) nonused exhibits but if there is something of substance Your
(20) Honor that has background information in it I observe it to
(21) the law that s -
(22) THE COURT I tell you what you have one of these you
(23) have given to the other side?
(24) MR PETUMENOS Judge I had this marked as a single
(25) exhibit I don t remember right now

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- (1) THE COURT Be responsive counsel
(2) MR PETUMENOS I m trying to Your Honor
(3) THE COURT Do you have other things like this you re
(4) going to use in cross examination? Because if you do I m
(5) going to make you give them to the other side take a break so
(6) they can look at them so it s fair that they can respond to
(7) them all right?
(8) MR PETUMENOS How long have we been going?
(9) THE COURT I don t know It s been so much fun I ve
(10) lost track of -
(11) MR PETUMENOS I know but I have to say with things
(12) like this that I think are hypertechnical the flow of the
(13) cross examination is being unnecessarily broken up
(14) THE COURT I don t disagree with you counsel but I
(15) have to give a fair shake to both sides The issue really is
(16) whether you got some tricky exhibit here that counsel needs to
(17) see
(18) MR PETUMENOS No no I will show him -
(19) THE COURT Your answer is no They need to know
(20) that
(21) MR PETUMENOS There s two more little blue bars
(22) coming up There s four - four sites
(23) THE COURT That s all?
(24) MR PETUMENOS This is one exhibit I m just showing
(25) it building it over time

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- (1) MR DIAMOND Your Honor just for the record the
(2) reason - the reason we were objecting is not that this is such
(3) a novel exhibit but the rule was designed so we could prepare
(4) our witnesses at least 24 hours in advance with respect to
(5) lines of examination that obviously were going to be suggested
(6) by the exhibits It s a little unfairness to pop up with new
(7) exhibits that we - at least a minimum of 24 hours of
(8) preparation time
(9) THE COURT I don t disagree with that general
(10) proposition counsel It s just that this exhibit - this
(11) exhibit is simply - is essentially Mr Petumenos way of
(12) structuring his questions and he could do that without this
(13) exhibit It would be painful
(14) MR OPPENHEIMER It would be painful
(15) THE COURT Understood
(16) MR OPPENHEIMER But on the substantive issue I
(17) think Your Honor s suggestion we see the additional exhibits is
(18) called for
(19) THE COURT Yeah I have a feeling there s only a
(20) couple more bar signs
(21) MR OPPENHEIMER I would suggest that now is a good
(22) time to take a break We ll take a look at those and if we
(23) have any objection we ll raise them before
(24) THE COURT Good suggestion When did we come in
(25) here what time? It s been about an hour

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- (1) (Sidebar concluded)
(2) THE COURT I m going to let you go out for a while
(3) MR PETUMENOS Mr Oppenheimer -
(4) THE COURT We can do it on the record
(5) (Jury out at 9 27 a m)
(6) MR PETUMENOS I also want the Court to see -
(7) THE COURT The jury is not present
(8) MR PETUMENOS I also want the Court to see what the
(9) whole exhibit -
(10) MR OPPENHEIMER May the witness step down Your
(11) Honor?
(12) THE COURT Yes he can
(13) MR OPPENHEIMER I m sorry I motioned before I
(14) asked It was an instinctive reaction
(15) MR PETUMENOS The parties in this court Judge have
(16) routinely when they used the compact disks do a thing with
(17) exhibits called chart building You hit the laser with a
(18) series of little buttons you hear it go beep and the chart
(19) builds itself into the final chart We don t have the luxury
(20) sometimes of being able to run a disk which requires us to go
(21) send it down to a place out of the state so we can do that
(22) And normally these exhibits are one exhibit
(23) I will show counsel and the Court that that s exactly what
(24) this is It is a bar graph for the first spill we re going to
(25) discuss the second spill we re going to discuss the third

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- (1) spill we re going to discuss and the fourth spill we re going
 (2) to discuss of which you put in the last one as a single
 (3) exhibit And they have come to the bench to say excuse me
 (4) Judge this is more than three broken up my examination
 made
 (5) it very difficult to get any flow going here
 (6) I think this is - I'll stop there But the other exhibit
 (7) that I have here is very similar in that I have taken the glass
 (8) vials put them on a backing labeled them so the jury can see
 (9) what they look like together in comparison I have that here
 (10) if the Judge would like to see it which is a similar
 (11) illustrative exhibit to the one I've been using in front of the
 (12) jury one by one I will look at my outline at your
 (13) instructions to make sure that - although we've not done this
 (14) before I'll do it - so that we make sure that he sees all of
 (15) my exhibits were withheld for purposes of impeachment if he
 (16) doesn't share them with the witness I believe I have four on
 (17) this examination because you gave me an extra one yesterday
 to
 (18) counter the late produced exhibit Remember we talked about
 (19) the -
 (20) MR OPPENHEIMER That's correct
 (21) MR PETUMENOS - production okay So it's not
 (22) three
 (23) MR OPPENHEIMER I didn't say it was three I said it
 (24) was four
 (25) MR PETUMENOS Mr Diamond said it was three

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- (1) MR DIAMOND I was corrected
 (2) MR PETUMENOS And so my concern right now is that
 (3) with objections like this and approaches to the bench - and
 (4) it's your discretion I understand that maybe some of these
 (5) objections need to be dealt with from the podium or something
 (6) because it really is breaking up the flow of the examination to
 (7) the prejudice of the cross examination at this point and I
 (8) think this particular objection is a good example
 (9) MR OPPENHEIMER Your Honor I would just - I would
 (10) make a couple of points because I think that this is a not an
 (11) unimportant subject I don't have a problem with the exhibits
 (12) that they're talking about I was cautioned on two separate
 (13) occasions when I had had two out of the three that I had one
 (14) more We played by the rules Everybody should play by the
 (15) rules
 (16) The other observation about objections I think is -
 (17) well I believe that there is a lot of lawyer testifying going
 (18) on in this cross examination and I don't know whether it's
 (19) accidental or not but many of the questions this morning did
 (20) not comport with my reading of the materials that would form a
 (21) good faith basis on those basis
 (22) I've worked with Mr Petumenos now long enough to know that
 (23) it must be inadvertence I believe that but I do also have an
 (24) obligation to the client to the facts in the case and as long
 (25) as they're going to be such lengthy speaking objections

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- (1) consistently raising assertions of facts I'm obligated to
 (2) defend the record and I'm obligated to defend the witness from
 (3) a situation in which really Mr Petumenos is doing the
 (4) testifying
 (5) Yesterday to be perfectly honest I felt I was lax in that
 (6) regard and I went back over the record and I do believe the
 (7) entire line of questioning with respect to his statements at his
 (8) deposition where he was questioned about something he
 didn't
 (9) know at the deposition and was essentially cross examined on
 (10) that matter I should have been much more alert What
 (11) happens it was the end of the day it was neither relevant or
 (12) satisfactory impeachment under 613 When I looked at that
 (13) record and saw how misleading it was I reminded myself of a
 (14) famous statement I am not a potted plant
 (15) If Mr Petumenos will limit his factual assertions to those
 (16) necessary to make the statement I can limit my objection
 (17) Whether he can do that or I can there's nothing here for the
 (18) Court to do No one is asking you to do anything I assure
 (19) the Court I am not raising objections for any improper
 (20) purposes and I believe Mr Petumenos even if he and I
 (21) disagree on how much factual information is in his question
 (22) also believes he is pursuing it appropriately and the process
 (23) is I will make objections appropriately and the Court will
 (24) make a ruling I am mindful of the - I don't want to break up
 (25) anyone's flow and I assure the parties that's not the attempt

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- (1) here but every single question is argumentative and has
 (2) enormous amounts of factual material and is compound and is
 (3) creating an atmosphere that requires me to in my professional
 (4) judgment to keep the record clear I feel obligated to do
 (5) that I will not do it as much if the questions have less
 (6) factual material
 (7) MR PETUMENOS Let me escalate this some I will try
 (8) to ask questions as precisely as I can without getting into a
 (9) colloquy about whether I believe that that representation of
 (10) yesterday's cross-examination is right or not I will try to
 (11) be as precise as I can with my objections I am getting
 (12) concerned that unlike yesterday this witness between
 (13) yesterday and today is giving answers that are not responsive
 (14) the way they were yesterday He - he went right into reasons
 (15) for his conclusions about the -
 (16) THE COURT I understand what you're saying counsel
 (17) He's arguing with you there's no question about that but -
 (18) and I can control that and I will so he should be talked to
 (19) To the extent that he starts to volunteer information and make
 (20) what opposing counsel might consider to be speeches I'm
 going
 (21) to stop him without objection
 (22) MR OPPENHEIMER Your Honor you should - I
 (23) respectfully - I know the Court will listen to the context of
 (24) the question because reasonable minds differ on these things
 (25) I will talk to him but I will also - I will also respectfully

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- (1) suggest and I don't think the parties are or court whatever
 (2) decides to proceed where the questions are as loaded as some
 of
 (3) these are with so many different points and tangents that the
 (4) fact this witness believes a full answer has to be more than
 (5) yes or no I think it's going to come up
 (6) THE COURT I will allow him to explain assuming it
 (7) comes up It's a discretionary matter with me I just don't
 (8) want to have to stop him time and time again I know the
 (9) difference between an explanation that's within the scope of
 (10) the question and when it goes beyond it and when I see one
 (11) that goes beyond it because I see this examination is sort of
 (12) getting out of hand I may very well stop him and tell him to
 (13) be responsive and you don't want me to have to do that So
 (14) let's - let me talk all right?
 (15) Let's talk about these - these exhibits Tell me what the
 (16) situation is You've gotten four identified for
 (17) cross examination - unidentified for cross examination
 (18) MR OPPENHEIMER No the rule is cross examination
 (19) exhibits are to be predesignated 24 hours in advance There
 (20) are normally three
 (21) THE COURT You get three
 (22) MR OPPENHEIMER Three that you can just bring in
 (23) In this particular situation based on the conference we had
 (24) yesterday with respect to our last two exhibits there's a
 (25) fourth limited to matters pertaining to that exhibit the

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- (1) little less concern Anytime a witness is confronted with a
 (2) demonstrative - this witness also is sick Your Honor he's
 (3) fighting a cold and that was - that took a little bit out of
 (4) his energy level to have to deal with that The point is you
 (5) get three of those four on another subject on this
 (6) examination and those are the ground rules
 (7) THE COURT Okay but I want to understand the
 (8) situation clearly Has Mr Petumenos exceeded the limit of
 (9) four now?
 (10) MR OPPENHEIMER He has not He has one more related
 (11) to the take down chart that's conservative I count the pairs
 (12) as two
 (13) MR PETUMENOS Pairs meaning all four?
 (14) MR OPPENHEIMER Pairs two each pair on a different
 (15) spill
 (16) MR PETUMENOS I have one tube of black stuff that
 (17) represents the Exxon Valdez I have four tubes of black stuff
 (18) that represent the four spills that he has related to which is
 (19) an exhibit it's a chart build It comes into a composite to
 (20) show the jury in a single exhibit a comparison of the amount of
 (21) oil in the spills studied to the Exxon Valdez spill I believe
 (22) that to be one exhibit I am presenting that exhibit in the -
 (23) in a form that I'm entitled to present to have my
 (24) cross examination flow We'll talk about the Florida spill
 (25) we'll talk about -

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- (1) background material for that exhibit And those are the rules
 (2) and I think the important thing is that we - we have been -
 (3) we have been playing by those rules for five weeks I - I
 (4) understand that - that some of the exhibits that are being
 (5) used right now are ones that conceivably could be drawn I
 (6) understand all that but we understood that when we limited
 (7) ourselves We never used more than our number and frankly
 we
 (8) had a little procedure we used to track it
 (9) THE COURT How many has Mr Petumenos used?
 (10) MR OPPENHEIMER In all fairness I'm counting
 (11) conservatively counting each of those two things as one He
 (12) has provided two sets or two pairs of vials each one
 (13) pertaining to a different case study so those are two
 (14) exhibits And assuming that all of his charts that he has
 (15) depicted up here are in fact a sequence which is the way
 (16) photographs are done
 (17) I would not - I would agree that that could be done on
 (18) this type of chart and this data That's three so my strong
 (19) conviction is he's got one more and it pertains to the
 (20) take away chart We have not - otherwise we have had no
 (21) opportunity as Mr Diamond properly pointed out at the bench
 (22) a part of this has to do with a compromise you recall that the
 (23) plaintiffs said we don't want an ambush waiting in the wings
 (24) It's a balance because there is some ambush I would have
 (25) liked quite honestly to prepare him to say what he said with a

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- (1) THE COURT Tell me something that exhibit has those
 (2) vials and you're simply detaching them as the
 (3) cross examination
 (4) MR PETUMENOS I was going to detach them I became
 (5) concerned if I did it that way they might fall out in Your
 (6) Honor's courtroom so what I did was I duplicated the ones on
 (7) the chart so they wouldn't fall out and secure the other four
 (8) and I'll withdraw those and those will be gone and the final
 (9) exhibit will be one exhibit like that and that will be it
 (10) THE COURT Let's talk about that All of the vials
 (11) then you say is one exhibit?
 (12) MR PETUMENOS That's right
 (13) THE COURT All of the bar graphs ultimately would
 (14) be incorporated in one exhibit?
 (15) MR PETUMENOS They're identical I don't need both
 (16) of them one or the other All they have is a paper
 (17) description of what's in the vial
 (18) THE COURT It's your contention -
 (19) MR PETUMENOS It's true
 (20) THE COURT - you've used two exhibits
 (21) MR PETUMENOS Going to count that as two all
 (22) right?
 (23) THE COURT Are you telling me you have one two
 (24) three or some other number of extra exhibits you're going to
 (25) use in cross examination?

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- (1) MR PETUMENOS I don't - could I work that out over
 (2) the break? I'm not sure I'm not sure this is not a tempest
 (3) in a teapot I don't think there are any others Hold on a
 (4) second I might need some help here
 (5) I believe even under that count I will not exceed the
 (6) limit
 (7) THE COURT Everyone under what count?
 (8) MR PETUMENOS The count the Court just made If you
 (9) count the bar graph I'm building here as one and the vials of
 (10) oil which depict the same information as two I have I think
 (11) the exhibit that Mr. Oppenheimer alluded to relating to the
 (12) material that came to us late I don't think I have anything
 (13) else
 (14) THE COURT Well you better be right counsel
 (15) because if I see one now - after having questioned you if I
 (16) see one now that exceeds the limit you're not going to use
 (17) it
 (18) MR PETUMENOS I understand But we have two left
 (19) THE COURT Now let me give you an interpretation so
 (20) you understand this
 (21) I think these are - the bar graphs are one exhibit I
 (22) think the vials are one exhibit I think that counsel has
 (23) chosen to make his cross examination effective by building the
 (24) exhibit I think that's legitimate
 (25) All right it may come as a surprise to you but it's to me

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- (1) four pieces of paper here but they're all part of the same
 (2) graph can I use them as one And then I'll say yes and you
 (3) have no problem
 (4) MR PETUMENOS Okay understand
 (5) MR OPPENHEIMER But that would be a bench
 (6) conference Your Honor not an ex parte conference?
 (7) THE COURT Sure or something out of the presence of
 (8) the jury That's exactly what I'm suggesting is you certainly
 (9) don't want to do it - it's bad enough to have all the
 (10) objections in front of the jury I'd prefer to get rid of them
 (11) and make everything flow both sides of the examination All
 (12) right?
 (13) MR PETUMENOS I think that's a good suggestion
 (14) We'll just do it generically
 (15) THE COURT Now is there anything else
 (16) MR OPPENHEIMER No I don't believe so
 (17) MR PETUMENOS Can the lawyers get a time at break?
 (18) THE COURT Yes
 (19) THE CLERK Please rise This court stands in
 (20) recess
 (21) (Recess from 9 42 a.m. to 9 57 a.m.)
 (22) (Jury in at 9 57 a.m.)
 (23) THE CLERK Please rise This court now resumes in
 (24) session Please be seated
 (25) BY MR PETUMENOS

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- (1) looking at the sense of it it - each are one exhibit All
 (2) right so that's two
 (3) You got the extra exhibit and then you got one more and
 (4) that's it Okay?
 (5) Now be careful from now on because I'm not - I don't
 (6) like to limit counsel from doing innovative and creative things
 (7) in the courtroom On the other hand when you've made these
 (8) agreements and one party has lived with them if I see - I
 (9) mean I may have to make a discretionary call here that limits
 (10) you if in fact what you've done is hid something So in the
 (11) future if this question - if a question arises in your mind
 (12) you have to approach me first so I don't get hit with it cold
 (13) like I got hit with it today All right? It's the proponent's
 (14) burden to ask me for definition of rules and I will deal with
 (15) them
 (16) MR PETUMENOS Do we do that ex parte?
 (17) THE COURT No
 (18) MR PETUMENOS How do we - think the issue is
 (19) whether an exhibit is to be disclosed or not?
 (20) THE COURT Here's what you do
 (21) MR PETUMENOS Tell me
 (22) THE COURT You don't give it to them you come to the
 (23) bench and you say I've got this - for instance what you could
 (24) have done here - and I'm not faulting you because you couldn't
 (25) have anticipated this - you could have said look I've got

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- (1) Q Okay the Arco Anchorage spill in Port Angeles Washington
 (2) in addition to the amount of oil spilled in Arco Anchorage
 (3) there were some other differences between it and the Exxon
 (4) Valdez in that within five hours after the spill containment
 (5) boom was being deployed and vessels were working around
 (6) the -
 (7) the tanker to contain the spill is that so?
 (8) A There was cleanup and containment at Port Angeles but
 (9) there wasn't cleanup or containment like that at the places
 (10) where we studied
 (11) Q No within five hours after the spill containment boom was
 (12) being deployed and vessels were working around the tanker
 (13) that
 (14) was spilling the oil is that so?
 (15) A I don't recall
 (16) Q Okay
 (17) MR PETUMENOS Counsel page 122 of his report
 (18) MR OPPENHEIMER Are you going to show it to him to
 (19) refresh his recollection?
 (20) MR PETUMENOS I'm going to show it to him as a prior
 (21) statement which I think is appropriate
 (22) THE COURT You should try to refresh his recollection
 (23) first
 (24) MR PETUMENOS That's correct
 (25) MR OPPENHEIMER It's not impeachment
 (26) THE COURT First you show him the report If it
 (27) refreshes his recollection then you don't have to use the

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- (1) report because it's his recollection now
- (2) MR PETUMENOS Oh all right Right there
- (3) A Okay
- (4) BY MR PETUMENOS
- (5) Q Let me ask you the question again Within five hours after
- (6) the spill containment boom was being deployed and vessels were
- (7) working around the tanker to contain the spill?
- (8) A Yes that's correct
- (9) Q Yes that's correct
- (10) THE COURT Can I ask you a question counsel so we
- (11) can make this flow Do you have your report in front of you?
- (12) A Yes I do
- (13) THE COURT Just refer him to a page and he can look
- (14) at the page from now on
- (15) BY MR PETUMENOS
- (16) Q Another difference between the Exxon Valdez and the Arco
- (17) Anchorage spill was that cleanup lasted 110 days?
- (18) THE COURT This is for - for which spill?
- (19) MR PETUMENOS For the Arco Anchorage spill
- (20) A Yes and we looked at that in the context of doing our
- (21) studies at Mains Farm and Observatory Point
- (22) BY MR PETUMENOS
- (23) Q The Exxon Valdez cleanup took a lot longer than 110 days?
- (24) A Yes it did We considered that in observing the Mains
- (25) Farm and Observatory Point situation to the Exxon situation

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- (1) Q Of 5 690 barrels spilled of this - which is represented in
- (2) this little vial here 3 126 were recovered?
- (3) A There was recovery in both the Arco Anchorage spill and
- (4) also in the Exxon Valdez spill
- (5) Q In the Port Angeles spill 3 126 barrels of oil of 5 690
- (6) were recovered true or not?
- (7) A That's my recollection from the report
- (8) Q Now one of the things that I want to keep in mind when we
- (9) discuss the rest of the spills because it will be important to
- (10) my examination is the date of the spill December 21 1985
- (11) am I right?
- (12) A Yes
- (13) Q Okay see if we can keep that in mind
- (14) MR OPPENHEIMER I've written it down
- (15) BY MR PETUMENOS
- (16) Q Exhibit 102188 is your matched pairs exhibit for this
- (17) spill am I right?
- (18) A Yes it is
- (19) Q The first matched pair contains a sale on June of 1983 two
- (20) years before the spill matched to a sale of January of 1990
- (21) How long after the spill?
- (22) A That would be about just over four years after the spill
- (23) Q And the difference is two years before the spill to that
- (24) amount of time after the spill?
- (25) A It's January of 1990 from December of 85 would be just

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- (1) over -
- (2) Q June of 83 was two years - was more than two years -
- (3) maybe a year and a half before the spill ever happened right?
- (4) A Yes that's right
- (5) Q And the matched pair that you selected was nearly a year -
- (6) nearly five years after the spill?
- (7) A Not a question of selecting a matched pair Mr Petumenos
- (8) These are the sales that were there in the subdivision
- (9) Q The next one October of 1983 was two years or so before
- (10) the spill yes?
- (11) A Yes it was
- (12) Q And the matched pair that you selected to compare it to was
- (13) some five years after the spill correct?
- (14) A I think - no now you're not stating it properly here
- (15) Mr Petumenos Each one of these sales is the sale and the
- (16) resale of the same property in the subdivision
- (17) Q Right
- (18) A It's not a sale of two different properties that are being
- (19) compared
- (20) Q Right
- (21) A These are the sales in the subdivision that sold before the
- (22) spill and sold after the spill
- (23) Q Right And this one was sold five years after the spill
- (24) right?
- (25) A That's correct

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- (1) Q The next one?
- (2) A You're analyzing the exact impact of the spill on a long
- (3) period of time to properly compare it to the potential impacts
- (4) that might be present in Alaska
- (5) Q This one was in May of 1989 when it resold That was four
- (6) years after the spill right?
- (7) A It would be about three and a half years after the spill
- (8) And once again the same point the sales are the sales and
- (9) we collected them all and reported on them and analyzed them
- (10) all
- (11) Q I won't go through the rest of them because the jury can
- (12) see the date but once again the date of the spill was -
- (13) MR OPPENHEIMER December 21 1985
- (14) MR PETUMENOS Thank you Mr Oppenheimer
- (15) BY MR PETUMENOS
- (16) Q Now counsel page 137 of the report -
- (17) May I have the Elmo please?
- (18) Not on your chart these are more matched pairs that you
- (19) did right?
- (20) MR OPPENHEIMER I'm sorry counsel what page from
- (21) the report is that?
- (22) MR PETUMENOS 137
- (23) A These are matched pairs in the Mains Farm subdivision not
- (24) in the Observatory Point subdivision
- (25) BY MR PETUMENOS

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- (1) Q The dates of the resale that you selected for the chart on
 (2) Mains Farm are also depicted on the chart so the jury can see
 (3) them right?
 (4) A Those are ones that we selected for the chart from the 28
 (5) sales in Mains Farm
 (6) Q Two years after the spill five years after the spill five
 (7) years after the spill and in June of 1987
 (8) Now these are some other matched pairs right there
 (9) There's one sold in 1986 little closer in time to the spill
 (10) This figure right here is the decrease in price between the
 (11) price before the spill and the price after the spill am I
 (12) correct?
 (13) A And the report analyzes that and indicates the reasons for
 (14) it
 (15) Q Right Now I just want to get straight what the figure
 (16) is This figure right here is the decrease in price from
 (17) the - the before price in 1981 to the after price after the
 (18) spill in 1986 true or not That's what this minus two three
 (19) six percent means?
 (20) MR OPPENHEIMER Mr Roddewig you can look at the
 (21) full page in the report
 (22) A That shows the annual average decrease between 1981 and
 (23) 1986 and we analyzed in the report
 (24) BY MR PETUMENOS
 (25) Q 82 to 86 down again right?

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- (1) A Yes
 (2) Q 81 to 87 down again right?
 (3) A And we've analyzed all those in the report
 (4) Q And I have taken this page - Mr Oppenheimer mentioned
 (5) that you can look at the whole page and you surely can -
 (6) because the ones that I highlighted for this spill of the size
 (7) that it was and for the spill of the cleanup that you've
 (8) testified to all of the factors surrounding it I highlighted
 (9) the ones where there was a matched pair sale in 1986 and 1987
 (10) on that page Did I miss any?
 (11) A Yes there's a 1981 to 1987 with an increase of 4 84
 (12) percent
 (13) Q Show me
 (14) A Oh I'm - it is highlighted you've got that one
 (15) highlighted There's a 1985 to 1987 increase at 13 88 percent
 (16) that's highlighted
 (17) Q Right Did I miss any? Did I not highlight any that were
 (18) sold before the spill and then sold again in 1986 or 1987?
 (19) A No but you didn't highlight the ones at the bottom that
 (20) are pre spill post-spill sales as well
 (21) Q Right And the reason I didn't do that - I think I may
 (22) have missed one here let's highlight it the 1979 to 1987 is
 (23) that one?
 (24) A That's one and so are the next ones
 (25) Q What is that one?

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- (1) A That's a long-term change in price and we analyzed that in
 (2) the report and compared it to the other ones that we saw
 (3) including the next four when we did our overall analysis of
 (4) all the matched pairs Then we compared these to the
 (5) transactions for the county as a whole
 (6) Q You're right I missed one You're right I stand
 (7) corrected That one from 1979 to when it sold in 1987 went
 (8) up one-half of one percent -
 (9) MR OPPENHEIMER Went down
 (10) MR PETUMENOS Oh went down of one-half of a
 (11) percent
 (12) MR STOLL Per year average
 (13) MR PETUMENOS Right
 (14) BY MR PETUMENOS
 (15) Q Of the ones that we now have highlighted here we have one
 (16) two three four five six seven that went down and we have
 (17) one that went up - two that went up correct?
 (18) A As we explain in the report you have to look at what
 (19) happened in the marketplace in all of those years and compare
 (20) them to each other and to the marketplace and we did that and
 (21) explained all the reasons in the report for why that occurs
 (22) and there is no -
 (23) MR PETUMENOS Your Honor -
 (24) THE COURT Yes sir just answer the question
 (25) please The explanation you can give on redirect when your

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- (1) counsel has you as a witness
 (2) BY MR PETUMENOS
 (3) Q Did I state the proposition correctly that of the ones
 (4) that I highlighted two of them went up?
 (5) A Of the ones that had the resale date in 1986 and 1987
 (6) that's correct
 (7) Q This spit that was oiled -
 (8) A Dungeness Spit?
 (9) Q Yes Anybody live on it?
 (10) A It's a national wildlife refuge
 (11) Q Anybody live on it?
 (12) A Nobody lives on the spit itself because it's owned by the
 (13) federal government
 (14) Q At the base of the spit there is a paper mill?
 (15) A No that's not correct Mr Petumenos The paper mill is
 (16) located on Etta's Hook in Port Angeles Dungeness Spit does
 (17) not have a paper mill on it It's a national wildlife refuge
 (18) Q The spit ends on the mainland?
 (19) A Dungeness Spit?
 (20) Q Yes
 (21) A Yes it ends on the mainland
 (22) Q What's there at the base of the spit?
 (23) A More of the national wildlife refuge that goes up the
 (24) bluff and then you have Mains Farm right next to it You're
 (25) confusing them

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- (1) Q Bear with me a second Port Angeles is about 80 miles west
 (2) of Seattle?
 (3) A That s right
 (4) Q The area around the harbor at Port Angeles is the center of
 (5) much of the industrial activity of the local economy?
 (6) A But that s not where Dungeness Spit is That s where the
 (7) booming was for the tanker
 (8) Q You have reported that the Port Angeles harbor has a
 number
 (9) of industrial uses on and near its shore that may have
 (10) contributed to the environmental conditions found by scientists
 (11) post spill?
 (12) A Again that was at Etta s Hook not at Dungeness Spit
 (13) Dungeness Spit is located about 10 or 15 miles east of Port
 (14) Angeles and the oil flowed along the shoreline and hit
 (15) Dungeness Spit
 (16) Q What is it that s near Etta s Hook?
 (17) A Etta s Hook is in Port Angeles There s a Coast Guard
 (18) station out at the end and there s a paper plant at the base
 (19) of it It s an industrial area in Port Angeles and that s
 (20) where the booming and containment and most of the heavy
 (21) clean up activity was concentrated
 (22) Q Now let s go on to the next spill You may have guessed
 (23) I have a little glass vial The Nestucca spill Look about
 (24) right as we ve discussed before in terms of comparing it to
 (25) the Exxon Valdez?

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- (1) MR STOLL It s Nestucca
 (2) MR PETUMENOS It s Nestucca
 (3) MR STOLL I grew up nearby there
 (4) MR PETUMENOS Everybody s from somewhere
 (5) A Yes I ll take your representation from that but again
 (6) it s the amount on the shoreline how many miles are affected
 (7) BY MR PETUMENOS
 (8) Q Amount on the shoreline and how many miles are affected
 (9) Do you know what page that report begins?
 (10) A Follows the Port Angeles one I think it s at 152 or so
 (11) 151
 (12) Q Okay I appreciate your help 110 miles of shore?
 (13) A That s the total area of the shoreline that had some kind
 (14) of oil scattered along it but Ocean Shores was heavily hit by
 (15) that spill That was the most intensively hit area and that s
 (16) the one we studied
 (17) MR PETUMENOS I move to strike as nonresponsive
 (18) THE COURT I won t strike it Go ahead
 (19) BY MR PETUMENOS
 (20) Q Hundred and ten miles of shore was the total area that
 (21) was - that was oiled am I right?
 (22) A That s correct It received oiling of one kind or
 (23) another It wasn t totally oiled
 (24) Q The clean up effort - what was the date of this spill?
 (25) A This spill was about three years after the previous spill

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- (1) that we talked about was December 22nd of 1988
 (2) Q And the clean up effort continued until June 22nd of 1989?
 (3) A That s right
 (4) Q And more intensive activities in the cleanup though had
 (5) ended well before that date with the most active work on the
 (6) Ocean Shores beaches having been completed within the first
 few
 (7) weeks?
 (8) A Yes Ocean Shores received a heavy clean up activity in the
 (9) first few weeks and then they moved down to other places
 (10) further up the coast that weren t oiled as heavily
 (11) Q The most active work on the Ocean Shores beaches was
 (12) completed within the first few weeks correct?
 (13) A That s correct but the total cleanup wasn t declared over
 (14) until June
 (15) Q Now the same sorts of things There were roads in this
 (16) area?
 (17) A Yes there were roads in Ocean Shores
 (18) Q You can get in your car and you can go in your car to a
 (19) clean beach it is not wilderness area am I right?
 (20) A It s not wilderness area you can go to a clean beach just
 (21) the way that you could in Prince William Sound find some clean
 (22) beaches there
 (23) Q Same way?
 (24) A And we compared that - well not by - by boat in Prince
 (25) William Sound but you could find clean beaches in Prince

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- (1) William Sound in the Exxon Valdez spill and you could find
 (2) clean beaches in Ocean Shores during the Ocean Shores
 cleanup
 (3) Q Now the average prices three months after the Nestucca
 (4) spill you found that there was a slight decline in average
 (5) prices for vacant lots which were not typically found for that
 (6) period in prior years isn t that your testimony?
 (7) A Yes we did For the ocean - for the oceanside areas we
 (8) found that but when we looked at the total sales transactions
 (9) for all of Ocean Shores we couldn t find any impact on all of
 (10) the community
 (11) Q Now the American Trader spill that was - tell the jury
 (12) where that was again
 (13) A American Trader was in Huntington Beach south of
 (14) Los Angeles and that occurred in February of 1990 following
 (15) the Exxon Valdez spill
 (16) Q The fourth and final - well before I put it in the thing
 (17) the fourth and final spill the American Trader and rather
 (18) than show you the individual one I ve now put them together
 (19) Look like a fair representation of the relative size of the two
 (20) spills?
 (21) A Yes we did compare them the same way
 (22) Q One inch to a million gallons here Now there s some very
 (23) significant differences between the Huntington Beach area and
 (24) Prince William Sound and the lower Kenai and Kodiak isn t
 (25) there?

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- (1) A Well they re both real estate markets and we were
 (2) analyzing real estate markets There s differences between
 (3) every real estate market
 (4) Q Here are some of the things that you can do in this area
 (5) that you re talking about You can get in the car and you can
 (6) go to Disneyland?
 (7) A Yes you can go to Disneyland from Huntington Beach
 (8) Q There are thousands -
 (9) A I did it once
 (10) Q There are thousands of people that live in that area doing
 (11) lots of different things?
 (12) A I think Orange County population as we reported is about
 (13) 2 400 000 people and Huntington Beach has a population of
 (14) about 180 000 as of the date of the spill It s a very
 (15) shoreline related community very much oriented towards the
 (16) shoreline
 (17) Q Well let s talk about that shoreline related community
 (18) Oil began washing ashore on February 8th A total of 28 miles
 (19) of beach was oiled
 (20) A Yes about 28 miles of beach and that spill was about
 (21) 399 000 gallons so again it s the intensity of the oiling on
 (22) the shoreline that is very significant and small - small
 (23) spill like that can have a very intense impact on a small
 (24) shoreline area
 (25) Q That s interesting because do you know how much oil came

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- (1) ashore from the spill of this size?
 (2) A I don t know the exact amount of oil that came ashore and
 (3) I don t know the exact amount of oil that came ashore in the
 (4) Exxon Valdez spill as well
 (5) Q Well we know in the other spill that a certain number of
 (6) barrels were estimated as having been recovered correct
 (7) because you put that in your report?
 (8) A Which spill?
 (9) Q The one in Washington we talked about how many barrels
 (10) were recovered and how many weren t?
 (11) A Some spills in the clean up effort they get a pretty good
 (12) idea of how many barrels are recovered Other spills they
 (13) don t necessarily or the information isn t there We reported
 (14) on that information whenever we found it
 (15) Q So your information is that these beaches were heavily
 (16) heavily oiled?
 (17) A Huntington Beach right in front of the area that we
 (18) studied had very severe oiling on more than one occasion The
 (19) oil came ashore they would clean it up and it would drift out
 (20) there and come ashore again There were two or three different
 (21) oiling incidents in Huntington Beach during the period of time
 (22) that we studied it
 (23) Q Huntington Beach is a place where people swim?
 (24) A Yes they do and the beaches were closed for a number of
 (25) weeks after the oiling

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- (1) Q That s right The beaches were closed for a matter of
 (2) weeks and then they were reopened again isn t that so?
 (3) A That s correct
 (4) Q It was not one month in some instances It was a matter of
 (5) days in some instances on these heavily oiled beaches?
 (6) A I don t think that s correct Mr Petumenos My
 (7) recollection is that by the end of March all of the Huntington
 (8) Beach beaches were opened and that s more than a matter of
 (9) days
 (10) Q Well some of them were opened in a matter of days am I
 (11) right?
 (12) A My recollection is by the end of March -
 (13) Q Well let s take a look
 (14) A - all the beaches in Huntington Beach were opened and the
 (15) spill occurred in the first week of February
 (16) Q This is worth talking about Let s take a look
 (17) A I think it s on page 171
 (18) Q Let me try and do it see if I can find what I m looking
 (19) for No the one I m interested in is on page 166
 (20) A Yes And what it says there is that -
 (21) Q Just a minute I ll ask you the question in just a minute
 (22) A I m sorry I apologize
 (23) Q Approximately 2 2 miles of the city s beaches located
 (24) between Gold and West Street and Beach Boulevard were
 (25) reopened
 (25) not at the end of March but on March 1st 1990 right?

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- (1) A The first set of beaches were reopened then
 (2) Q And how long did that take?
 (3) A That was about 22 days after the spill
 (4) Q On March 2nd 1990 the beach - the Huntington State
 (5) Beach
 (6) from Beach Boulevard to Magnolia Street was reopened am I
 (7) right?
 (8) A An additional section of beach was reopened then
 (9) Q The balance of Huntington State Beach comprising 1 4 miles
 (10) from Magnolia Street to the Santa Ana River jetty was reopened
 (11) March 14th am I right?
 (12) A That s correct
 (13) Q That same day 2 6 miles from the Bolsa Chica beach - from
 (14) the Bolsa Main Lifeguard Tower to the southeast on Golden
 (15) West
 (16) Street were reopened am I right?
 (17) A On March 14 and if you look at page 171 you ll see the
 (18) last areas reopened to the public were some of the rocky bluffs
 (19) at the north end of the Huntington Beach area and they
 (20) reopened in early April of 1990
 (21) Q Right So they were reopening beaches throughout the
 (22) month
 (23) of March?
 (24) A That s correct As they completed cleanup and beaches
 (25) were
 (26) cleaned they d reopen them
 (27) Q And your point is right that the last cleanup the last
 (28) reopening occurred then but my point being that other
 (29) beaches
 (30) were opened sooner?

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- (1) MR OPPENHEIMER Asked and answered
 (2) A Yes
 (3) THE COURT It could use a little clarification
 (4) counsel The objection s overruled
 (5) BY MR PETUMENOS
 (6) Q So the folks who were living in Surf City - I won t make
 (7) you sing it Mr Roddewig
 (8) A Can t remember many of the words anymore Mr
 Petumenos
 (9) Q Were free to go back to the beach and swim in it and surf
 (10) in it and do what they do by April?
 (11) A I m sorry by?
 (12) Q April?
 (13) A By April that s correct
 (14) Q And this was the beach that you testified to on direct
 (15) where the folks came in and broke a deal?
 (16) A Yes the Japanese investors arrived during the cleanup and
 (17) looked at a property right on the - the beach across the
 (18) street from the beach and informed the seller that they were
 (19) not interested in buying because of the clean up activity
 (20) Q Let s talk about stigma
 (21) MR PETUMENOS Your Honor I ll just put this on the
 (22) Elmo briefly I move into evidence Exhibit 8131 the bar
 (23) chart sparing the jury the opportunity to break the glass
 (24) (Exhibit 8131 offered)
 (25) THE COURT These two exhibits are identical except

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- (1) that one s physical and the other one is just the graph
 (2) right?
 (3) MR PETUMENOS That s correct
 (4) THE COURT I ll admit it
 (5) (Exhibit 8131 received)
 (6) BY MR PETUMENOS
 (7) Q Stigma and real estate First of all to be precise for
 (8) the jury the definition of stigma is a stain or reproach on
 (9) one s reputation?
 (10) A That s -
 (11) MR OPPENHEIMER Your Honor there s - are you just
 (12) asking for the definition you ve just read because there s no
 (13) foundation that this witness is going to be agreeing to a
 (14) particular definition unless - just out of the dictionary
 (15) This is not being attributed to anybody
 (16) THE COURT Wait a minute is that passage from the
 (17) report?
 (18) MR PETUMENOS Yes I was first going to ask him if
 (19) it s correct so I wouldn t have to go back and -
 (20) MR OPPENHEIMER I misunderstand stood Judge I
 (21) withdraw my objection
 (22) THE COURT Okay
 (23) A Yes that s the dictionary definition we cited in our
 (24) report before we talked about stigma in real estate
 (25) BY MR PETUMENOS

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- (1) Q Now the concept of stigma in connection with real estate
 (2) is not new?
 (3) A That s correct It s an old concept and as we talk about
 (4) in the report there are even situations in which houses that
 (5) are reported to have ghosts or ghostly events in them have
 been
 (6) stigmatized something that the real estate markets are
 (7) familiar with
 (8) Q Long before the modern area of concern surrounding
 (9) environmental issues there was the concept of stigma applied
 (10) to property?
 (11) A Yes that s correct
 (12) Q Sometimes properties would be stigmatized because they
 were
 (13) too close to a swamp if that was undesirable?
 (14) A Yes that s possible that a property close to a swamp
 (15) could be stigmatized in value
 (16) Q And the swamp doesn t have to be part of the property
 (17) boundary for the property to be stigmatized does it?
 (18) A That s correct There are situations in which proximity to
 (19) a - another kind of use can have an effect on a property
 (20) value We talk about those in the report
 (21) Q You write Others were stigmatized by being in the wrong
 (22) area a common form of stigma in this country has been applied
 (23) to properties in neighborhoods in which the residents were of
 (24) the wrong color or spoke the wrong language?
 (25) A Well unfortunately in the past that was often the case

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- (1) Q And the issue of environmental contamination in real estate
 (2) that you have taught on - incidentally has the Exxon Valdez
 (3) assignment your role in it been important to you
 (4) professionally?
 (5) MR OPPENHEIMER Vague and ambiguous
 (6) THE COURT Sustained You can rephrase the
 (7) question
 (8) BY MR PETUMENOS
 (9) Q Well you mentioned that you taught courses for the
 (10) Appraisal Institute on contamination on contaminated
 (11) properties in your direct remember that?
 (12) A Yes I have and I still do
 (13) Q Did you teach a single such course before your retention as
 (14) an expert in the Exxon Valdez case for the Appraisal
 (15) Institute?
 (16) A I had taught seminars for the Appraisal Institute many
 (17) years ago but I hadn t taught a seminar on environmental risk
 (18) because they didn t have a seminar on that prior to the Exxon
 (19) Valdez incident First seminar they developed is the one that
 (20) I was asked to develop
 (21) Q Your testimony on direct I think lasted about oh couple
 (22) of hours or so The total amount of money that Clarion
 (23) received on this assignment as of the time of your deposition
 (24) was between one million and one and a half million dollars is
 (25) that right?

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- (1) A That s for all of the work that we d done in all of the
 (2) cases over the four and a half years That would be the
 (3) amount
 (4) Q How much has Clarion been paid to date as you sit there
 (5) now?
 (6) A My best estimate is that it would be just over a million
 (7) and a half total for all of the work we ve done in all of the
 (8) cases and we ve done a lot of work over four and a half or
 (9) five years now
 (10) Q That s a pretty accurate figure?
 (11) A That would be my best estimate The - I haven t added it
 (12) all up Mr Petumenos but that s my best estimate And that
 (13) would include - let me just finish - that would include my
 (14) expenses for all the time that we went out to various locations
 (15) where we did case studies both of our offices in Denver and
 (16) Chicago have been involved
 (17) Q Well let s talk about one more thing In one of these
 (18) spills I wonder if you could help me which one it was there
 (19) was an Indian reservation nearby the spill area am I right?
 (20) A Actually in both the Port Angeles spill where we looked at
 (21) Observatory Point and Mains Farm and also in the Ocean
 (22) Shores
 (23) spill there is an Indian reservation located on the Olympic
 (24) Peninsula
 (25) Q Tell the jury if you interviewed a single Native American
 in the course of your work when you described to

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- (1) Mr Oppenheimer that you did these surveys and generally
 you
 (2) concluded that they supported your conclusions Generally
 (3) speaking tell me if you interviewed a single Native American
 (4) from any of those properties?
 (5) A We didn t because the reservation was not located near the
 (6) case study areas that we were working on There was a
 (7) reservation on the Olympic Peninsula but it wasn t in Ocean
 (8) Shores and it wasn t in Port Angeles or Observatory Point or
 (9) Mains Farm
 (10) Q And when you went in to do this study as to whether there
 (11) was stigma you concluded that there was no reason to go
 some
 (12) distance from the spill area to determine what those people
 (13) felt about it?
 (14) A No the Indian reservation was not in Grays County as far
 (15) as I can - I can recall It was many miles removed from Ocean
 (16) Shores and many miles removed from Port Angeles
 (17) Q Let s talk about a spill that you didn t include as a
 (18) detailed study Nova Scotia?
 (19) A Yes
 (20) Q They speak English in Nova Scotia?
 (21) MR OPPENHEIMER Your Honor may we approach the
 (22) bench?
 (23) (At side bar on the record)
 (24) MR OPPENHEIMER I have a concern and I want to state
 (25) it very carefully because I don t want to make an improper

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- (1) accusation I know Mr Petumenos I have a concern here
 (2) truthful one that the last series of questions and including
 (3) a series that started with the reference to stigma in certain
 (4) communities of race is improperly introducing the notion that
 (5) this witness is somehow biased
 (6) I do not for the life of me understand why the question
 (7) was phrased in terms of whether he talked to Native Americans
 (8) He could have been asked about the property owners and I am
 (9) concerned that the following question about whether people
 (10) speak English if it goes in the same direction I will voice a
 (11) very strong objection that this witness is being improperly
 (12) characterized as having some racial insensitivity for talking
 (13) or not talking to people
 (14) Now if that is no part of this I will - but I really do
 (15) not understand why the question was phrased in terms of
 Native
 (16) Americans and I m concerned especially if the next set of
 (17) questions has any suggestion Your Honor that this witness
 (18) didn t talk to somebody because he s biased
 (19) MR PETUMENOS The problem - the question goes to
 (20) the way that these people use and own their land We re
 (21) talking about land use and we re talking about how people use
 (22) the land in that area
 (23) THE COURT Which people?
 (24) MR PETUMENOS The people that reside and live in the
 (25) areas in the oil spill areas that he studied The reference

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- (1) to the Native Indian reservation was made by Mr Roddewig in
 (2) his report and he has a - a statement in there that he didn t
 (3) think that it mattered didn t think he wanted to go there
 (4) didn t think - answers he s given here in court I m entitled
 (5) to inquire that similar properties that were the subject of
 (6) these studies were not addressed by the witness that the
 (7) inquiry -
 (8) MR OPPENHEIMER I don t object to that I don t
 (9) object to that
 (10) THE COURT Hold on a second Let s break it down
 (11) The last part the question about speaking English was the back
 (12) reference to what this witness said about not going to a
 (13) foreign country
 (14) MR OPPENHEIMER Your Honor I agree with that and
 (15) if that s where this is going - what I m doing is sounding
 (16) cautionary I am not asserting here and based upon my having
 (17) gotten to know Mr Petumenos I can t believe this is
 (18) intentional because if there is a drift here I sensed a
 (19) reaction to the Native American question
 (20) THE COURT You re entitled to make an objection and
 (21) I ll rule on your objection Counsel knows what the issue is
 (22) now
 (23) MR OPPENHEIMER I wanted to do it heads up I
 (24) wanted to do it heads up because this is unfair cross
 (25) MR PETUMENOS Let met make sure because in this

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- (1) particular spill the thrust of my cross examination here is we
 (2) were talking about similar oiling conditions similar property
 (3) and that they were oil spill related properties in Nova Scotia
 (4) and that there was - I m not sure I have to look through the
 (5) cross here but I want to make sure there might not have been
 (6) some Native owned property in the spill that he elected not to
 (7) study and if that s true I think I m entitled to get into
 (8) it
 (9) MR OPPENHEIMER Your Honor -
 (10) MR PETUMENOS Let me check make sure this isn t an
 (11) issue
 (12) MR OPPENHEIMER If it s not an issue okay
 (13) Otherwise if it s a repetitive series of questions suggesting
 (14) he doesn t talk to Native Americans I do have a problem
 (15) MR PETUMENOS That same objection could have been
 (16) raised -
 (17) THE COURT This isn t a round table discussion
 (18) counsel There s no objection pending The question is
 (19) whether you re going to go into the subject so I have to be
 (20) alerted to it
 (21) MR PETUMENOS Do you want to come back to the bench
 (22) if I do?
 (23) THE COURT If you feel that it s necessary yes
 (24) MR PETUMENOS Okay
 (25) (Sidebar concluded)

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- (1) BY MR PETUMENOS
 (2) Q We were talking about the Chedabucto Bay Nova Scotia
 (3) spill and there were two spills in that area?
 (4) A Yes there was one in 1970 and another one in 1979
 (5) Q 10 090 metric tons in one spill and 7 500 metric tons in
 (6) another That sound right?
 (7) A Yes And I think when you convert that into gallons it s
 (8) something like 3 000 000 gallons or 3 400 000 gallons for the
 (9) first spill and about 2 400 000 gallons for the second spill
 (10) very sizable spills
 (11) Q You did not subject that spill to detailed case study did
 (12) you?
 (13) A We went up there and we did a complete analysis of the
 (14) area We talked to the provincial assessor we talked to the
 (15) MAI in Halifax and they said there were no sales transactions
 (16) It was a very thin market and they said there was no way you
 (17) could do a detailed case study up here
 (18) Q Let me just ask my question You divided your reports into
 (19) different areas The ones you called the detailed case studies
 (20) are the ones the jury has heard about today the four that
 (21) we ve just got on the Barco here?
 (22) A Yes they have
 (23) Q And this study this oil spill in Nova Scotia was not one
 (24) of them?
 (25) A We called that an overview case study

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- (1) Q Now the water temperatures are cold in that area am I
 (2) right?
 (3) A Yes they are
 (4) Q There is ice in the water in that area am I right?
 (5) A There s ice in the wintertime
 (6) Q And there is ice in Prince William Sound in - there was
 (7) ice in Prince William Sound in March of 1989 wasn t there?
 (8) A Yes
 (9) Q Attempts to remove oiled sediments in this spill in Nova
 (10) Scotia resulted in some mixing of oiled material deeper into
 (11) the beach is that right?
 (12) A Yes There - there was some of that and we looked at all
 (13) those factors in looking at the Nova Scotia spill but again
 (14) there were no sales transactions to analyze
 (15) MR PETUMENOS I move to strike the last part of the
 (16) answer
 (17) THE COURT Sustained the last part is stricken
 (18) BY MR PETUMENOS
 (19) Q The physical characteristics of the beaches in Nova Scotia
 (20) were rocky and cobble am I right?
 (21) A Yes they are
 (22) Q The tidal shifts in that area were among the largest in the
 (23) world am I right?
 (24) A Yes they are
 (25) Q And the tidal shifts in Prince William Sound and in the

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- (1) Kenai are among the largest in the world am I right?
 (2) A Tidal shifts are large I don t know if they re among the
 (3) absolute largest in the world or not
 (4) Q There is limited development in the area of the Nova Scotia
 (5) spill am I right?
 (6) A Yes there is
 (7) Q There is wilderness land in the area of the Nova Scotia
 (8) spill am I right?
 (9) A Yes there is
 (10) Q There is Native owned land in the area am I right?
 (11) A I believe there is but I don t - I would have to look at
 (12) the report to see if we discussed it
 (13) Q The principal communities in that area are oriented toward
 (14) fishing?
 (15) A Fishing is a very important part of the economy in that
 (16) part of Nova Scotia
 (17) Q There is an active cannery operation up there?
 (18) A Yes
 (19) Q Fishing has been in decline in the area of Nova Scotia over
 (20) the last number of years?
 (21) A Yes it has
 (22) Q Tourism is important to the area?
 (23) A Yes it is Tourism is also important in some of the other
 (24) areas as is fishing
 (25) MR PETUMENOS I move to strike

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- (1) THE COURT I won't strike that counsel
 (2) BY MR PETUMENOS
 (3) Q And your claim is that you couldn't find anything to study
 (4) in this spill sufficient to make it a detailed case study am I
 (5) right?
 (6) MR OPPENHEIMER Misstates the prior testimony
 (7) MR PETUMENOS I'll let him answer go ahead
 (8) THE COURT The witness can answer go ahead
 (9) A That's not what we said We went up to Nova Scotia and
 (10) consider it to be an area that's comparable in many ways and
 (11) the spill to be comparable in many ways to the Valdez spill
 (12) We went up there and we talked to the local assessor and the
 (13) local MAI appraiser in Halifax and they said there are simply
 (14) no sales up here for you to do the type of real estate analysis
 (15) you're proposing to do We talked to the people that were
 (16) knowledgeable about the local marketplace They indicated
 (17) that
 (18) the spill had no impact on the local marketplace and that a
 (19) study would be fruitless
 (20) Q I asked you the following question You take the position
 (21) in this courtroom that there was insufficient information to
 (22) make this a detailed case study am I right?
 (23) A Yes based on -- based on our conversations up there
 (24) that's right
 (25) Q All right
 (26) MR PETUMENOS I have no further questions

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- (1) MR OPPENHEIMER Your Honor if we take a brief
 (2) break I think I might be able to shorten up the redirect
 (3) organize my notes
 (4) THE COURT Sure
 (5) THE CLERK Please rise Court stands in recess
 (6) (Jury out at 10 47 a m)
 (7) (Recess from 10 47 a m to 11 05 a m)
 (8) THE CLERK This court now resumes its session
 (9) Please be seated
 (10) MR PETUMENOS Judge in keeping with our agreement
 (11) I wanted to move into evidence those exhibits that I would like
 (12) to move into evidence
 (13) THE COURT Fine yes I'd like that counsel yes
 (14) MR PETUMENOS I'd like to move in as -- I'd like to
 (15) actually remark defendants 102 - 10229A as plaintiffs since
 (16) we used it Exhibit 8191 and move it into evidence This is
 (17) the chart --
 (18) (Exhibit DX10229A offered)
 (19) THE COURT I'll leave it with the designation it's
 (20) got but is that the one I admitted or not?
 (21) MR OPPENHEIMER No you haven't but we have no
 (22) objection to it
 (23) THE COURT I'll admit it as it's designated
 (24) (Exhibit DX10229A received)
 (25) MR PETUMENOS That is then defendants exhibit

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- (1) 10229A And Exhibit 8191 then I would like to move into
 (2) evidence page 137 of the report the table that I showed of the
 (3) matched pairs
 (4) (Exhibit PX8191 (page 137) offered)
 (5) MR OPPENHEIMER No objection
 (6) MR PETUMENOS I'm going to try and find the one --
 (7) THE COURT What is the designation on it?
 (8) MR PETUMENOS I'm sorry?
 (9) THE COURT What's the marking on it now?
 (10) MR PETUMENOS 8191 as soon as we put the sticker on
 (11) it
 (12) THE COURT 8191 That's plaintiffs exhibit?
 (13) MR PETUMENOS Yes I'll try to find the one with
 (14) the highlighting but I can't seem to find it right now but if
 (15) I don't it will be the one without the highlighting
 (16) MR OPPENHEIMER No objection
 (17) THE COURT It's admitted
 (18) (Exhibit PX8191 (page 137) received)
 (19) MR OPPENHEIMER Mr Roddewig welcome back
 (20) THE COURT Only those two? Is that it only those
 (21) two?
 (22) MR PETUMENOS That's it
 (23) REDIRECT EXAMINATION OF RICHARD J. RODDEWIG
 (24) BY MR OPPENHEIMER
 (25) Q Mr Roddewig I'm going to show you the page that

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- (1) Mr Petumenos just took out that is now what plaintiffs
 (2) 8191 I believe in your report which you have there it is
 (3) page 80257 6
 (4) A Yes
 (5) Q Your page 137 See if I can do this without blocking the
 (6) view Are you able to see this well enough to --
 (7) A Yes I am
 (8) Q Mr Roddewig you were asked some questions about some
 (9) matched paired sales in connection with this table which is
 (10) defendants 10265 A Do you recall that on your
 (11) cross examination?
 (12) A Yes I do
 (13) Q Let me focus this Well I guess that's the best we can
 (14) get for now but we don't need all that much focus actually for
 (15) my questions on this chart
 (16) What is this table? First of all does it come from your
 (17) report?
 (18) A Yes it does It's from our ocean -- I'm sorry from our
 (19) Arco Anchorage study the Port Angeles spill Mains Farm
 (20) subdivision
 (21) Q Just so we're clear all the data behind all of the tables
 (22) which we've been showing is from one of your reports that
 (23) you've submitted in this litigation is that correct?
 (24) A Yes it is
 (25) Q How many pages do your reports amount to?

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- (1) A Hundreds hundreds of pages
- (2) Q And they include all of the data you ve collected?
- (3) A Yes they do
- (4) Q And you produced this statement?
- (5) A Well they include our analysis of all the data we ve
- (6) collected but we ve collected boxes and boxes and boxes of
- (7) data
- (8) Q Are you referring to Bekins boxes?
- (9) A Yes
- (10) Q How many of those would you say go behind the study?
- (11) A I think we provided to the plaintiffs 22 or 25 of those
- (12) and a lot of the materials that we provided were just cover
- (13) sheets from books that we didn t put the full copy of the book
- (14) in
- (15) MR PETUMENOS I ll stipulate to that counsel a lot
- (16) of stuff
- (17) BY MR OPPENHEIMER
- (18) Q Can you think of anything Mr Roddewig that your team
- (19) looked at over four and a half or five years that you testified
- (20) to that you didn t put in your report or put in the boxes
- (21) behind it that were given to the plaintiffs?
- (22) A Absolutely everything that we collected was given to the
- (23) plaintiffs
- (24) Q Okay let s go to this table Remind us again these are
- (25) matched pairs for Mains Farm is that correct?

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- (1) A Yes they are
- (2) Q And how many do we have there?
- (3) A On the whole table we have 28
- (4) Q Okay Now explain to the jury why you had us put together
- (5) this table with the ones you chose here on lots 50 62 69 and
- (6) 79 to illustrate your point about the conclusions you drew from
- (7) that table?
- (8) A We found 28 sales and resales of lots in Mains Farm Some
- (9) of the sales and resales occurred - both the original sale and
- (10) the resale both occurred before the spill incident some of the
- (11) matched pairs - pardon me involved a sale and a resale where
- (12) the sale was after the spill and the resale was after the
- (13) spill
- (14) These four are the part of the group of matched sales where
- (15) the sale occurred before the spill and there was a resale of
- (16) the same property after the spill These four are the four
- (17) that are closest in time to the spill where the before sale
- (18) was closest -
- (19) Q Let me stop you because that may be a little confusing
- (20) When you say closest in time I know your voice is - you re
- (21) getting a cold but Mr Petumenos indicated that there are some
- (22) sales resales I should say the ones that would be one of
- (23) these blue bars that are closer to the date of the oil spill
- (24) isn t that right?
- (25) A That s correct

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- (1) Q He marked some of those We don't have the markings but
- (2) you recall he put some of those in yellow up here?
- (3) A Yes
- (4) Q Do those that he put in yellow have another characteristic
- (5) that is important to you in choosing the examples you chose to
- (6) illustrate the point to the jury?
- (7) A Yes The original sale date would have been many years
- (8) before the oil spill occurred
- (9) Q Just to be clear did you in reaching your conclusions
- (10) analyze all of these matched pairs in other words did you
- (11) just look at these or did you analyze all of these?
- (12) A We looked at all 28 and we reported on all 28 in the
- (13) report
- (14) Q So this exhibit is illustrative correct?
- (15) A Yes it is
- (16) Q Not everything?
- (17) A No it s not everything
- (18) Q Mr Roddewig do you think this is fairly illustrative of
- (19) the point you were making?
- (20) A Yes it is
- (21) Q There was some talk about a bankruptcy at one of the case
- (22) study sites - I m sorry remind me which it is?
- (23) A That was at Falmouth Massachusetts with the Wild Harbor
- (24) Estates subdivision
- (25) Q That s discussed in your report as well?

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- (1) A Yes it is
- (2) Q All of the information pertaining to that is in your report
- (3) as well?
- (4) A Yes it is
- (5) Q You were asked a narrow question about the types of people
- (6) you talked to and you answered that narrow question Now I d
- (7) like to have you tell the jury who did you talk to in
- (8) analyzing the - the bankruptcy in 1970 in that case study?
- (9) A We talked to lots of people in the Falmouth area about the
- (10) bankruptcy and about the oil spill We found from the
- (11) conversations that the chairman of the planning board indicated
- (12) that the - the reason that the project failed in 1970 was due
- (13) to problems it had had with its road system and its water
- (14) system The road system was crumbling wasn't planned and
- (15) designed right and the water pipe system in the subdivision
- (16) was leaking He actually had the planning board have a
- (17) hearing
- (18) on revoking the permit because the planning and construction
- (19) problems were so bad
- (20) A scientist at Woods Hole Institute Mr Hansen (phonetic)
- (21) who was familiar with the spill and indicated to us that the
- (22) spill had no impact on Wild Harbor Estates he was on the
- (23) planning board at the time and he remembered the problems
- (24) with
- (25) the road system and the water system falling apart There was
- (26) also a local broker who had a recollection of the oil spill
- (27) and she remembered that the oil - oil spill had no impact on

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- (1) the -- on the project at Wild Harbor Estates I should add --
- (2) that was a long pause
- (3) MR PETUMENOS Just a second may we approach the
- (4) bench?
- (5) THE COURT Yes
- (6) (At side bar on the record)
- (7) MR PETUMENOS On direct examination I objected to
- (8) him giving the opinions and conclusions of those that did not
- (9) have personal knowledge about the events in Falmouth On
- (10) cross examination I restricted my questions to those that had
- (11) personal knowledge about the foreclosure
- (12) THE COURT Okay
- (13) MR PETUMENOS This question just elicited -- and I
- (14) move to strike the testimony -- is hearsay and is based upon
- (15) not one person who has personal knowledge about the
- (16) foreclosure
- (17) proceedings not one
- (18) MR OPPENHEIMER Well Your Honor two things have
- (19) happened here Clearly we are entitled to rebut the
- (20) suggestion that he didn't do adequate due diligence which
- (21) goes
- (22) to the methodology
- (23) Second his -- the people he talked to are the sort of
- (24) people he talks to all the time when he does this kind of
- (25) research It clearly forms the basis for his expert opinion
- (26) There was no objection made when the question was asked and
- (27) the
- (28) information was elicited and the -- the capability for him to

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- (1) form a judgment that these witnesses are reliable witnesses is
- (2) well within his expertise I don't see that there's a
- (3) problem
- (4) And Mr Petumenos did ask a whole series of questions
- (5) which were very narrowly tailored and were answered
- (6) technically
- (7) correctly about people in a certain category and the witness
- (8) answered those because that's the way he'd been asked in his
- (9) deposition and he's a precise individual and clearly we get
- (10) to ask who he talked to I don't think the objection's well
- (11) taken at all
- (12) THE COURT I don't need anymore argument counsel
- (13) The motion's denied
- (14) MR PETUMENOS I'm not going to reargue the issue
- (15) but I want to -- counsel? Where'd he go?
- (16) THE COURT Mr Oppenheimer we need you
- (17) MR OPPENHEIMER I'm returning
- (18) MR PETUMENOS All right I still have rulings based
- (19) upon the -- I want to make sure I know the ground rules for the
- (20) other questions coming That ruling is based upon
- (21) cross examination that was done about the foreclosure but
- (22) we're not opening the door beyond direct to all hearsay
- (23) THE COURT That's the basis of this ruling
- (24) MR OPPENHEIMER Okay
- (25) (Sidebar concluded)
- (26) MR OPPENHEIMER Are you plugged back in there

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- (1) Mr Roddewig? I will make this short
- (2) BY MR OPPENHEIMER
- (3) Q You recall being asked questions about these demonstration
- (4) pieces?
- (5) A Yes I do
- (6) Q Are you able to -- let me move it back so you can see the
- (7) map I want you and the jury to be able to see it Can you
- (8) see the map well enough to answer a few questions?
- (9) A Yes I can see it
- (10) Q You were asked some questions about the relative volume of
- (11) oil spilled I wonder if I could ask Mr Diamond's indulgence
- (12) for a minute I ask you to assume that this is also oil and I
- (13) want to have you explain something in terms of one of the
- (14) factors involved here Eyak land so do you have an
- (15) understanding as to how much -- don't answer my question just
- (16) yes or no do you have an understanding as to how much oil
- (17) touched Eyak's shores?
- (18) A Yes I understand that
- (19) Q Tell me to stop when I've poured out all of the oil that
- (20) should be left in this when we have the amount of oil that
- (21) touched Eyak's shores Empty?
- (22) A Drop a few more out
- (23) Q Little droplet no oil on Eyak's shores right?
- (24) A Nothing
- (25) Q Inland properties if we did the same thing with this file

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- (1) would we get the same result? I won't do that you drink diet
- (2) and this is real I'm telling you same thing no oil in that
- (3) inland area?
- (4) A Same thing you'd have to dump all that out
- (5) Q Would we have to dump all this vial out? Oh don't even
- (6) think about it -- would we have to dump all this vial out if we
- (7) determined oil got into the upland areas more than a quarter
- (8) mile from the shore?
- (9) A Yes you would
- (10) Q When you give consideration in your work to the impact of
- (11) an environmental event do you find that you are required quite
- (12) often to make adjustments for differences in the actual
- (13) physical properties of the event?
- (14) A Yes you do
- (15) Q Okay and that's true in the case of analyzing oil in the
- (16) case studies you did here as well isn't it true?
- (17) A Yes it is
- (18) MR PETUMENOS I object to the leading of the witness
- (19) on redirect
- (20) THE COURT Don't lead him any more counsel The
- (21) question's out and answered so I won't do anything about it
- (22) now but don't lead
- (23) MR OPPENHEIMER Yes Your Honor
- (24) BY MR OPPENHEIMER
- (25) Q Mr Roddewig I'm going to show you what we have marked
- (26) as

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- (1) defendants 15494 and ask for you to confirm for me if you
(2) would that this is a copy of your reports in this matter?
(3) A Yes it is
(4) Q And the backup materials that you were talking about the
(5) 20 boxes I m not going to bring them in and show them to you
(6) obviously but to the best of your knowledge and by reference
(7) does it include 100 percent of all of the records of interviews
(8) and fieldwork that you re aware of?
(9) A Yes it does
(10) MR OPPENHEIMER Your Honor we would move the
(11) admission of these reports defendants 15494
(12) MR PETUMENOS Judge I think we ought to take this
(13) up at a later time
(14) THE COURT I ll take it up out of the presence of the
(15) jury
(16) MR OPPENHEIMER No further questions for this
(17) witness Your Honor
(18) RE CROSS EXAMINATION OF RICHARD J RODDEWIG
(19) BY MR PETUMENOS
(20) Q Mr Roddewig this business about the roads crumbling and
(21) the problems with the planning board and all of the problems
(22) that this subdivision had leading up to its demise in 1970 -
(23) A Yes
(24) Q - doesn t that make this case specific case study a
(25) difficult comparison because the problems with the road and the

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- (1) coming up You can certainly qualify him right now as an
(2) expert no problem I don t want to hold up the jury But
(3) those exhibits contain survey materials with what I regard as
(4) expert opinion on the entire market the impact of the oil
(5) spill similar to Mr Roddewig on the entire market the
(6) impact of the oil spill similar to Mr Roddewig s testimony
(7) which was held that the market has had no influence on the oil
(8) spill
(9) MR DIAMOND It s coming up late in the examination
(10) Could we take this up later at a break
(11) THE COURT Sure
(12) MR PETUMENOS That s fine Your Honor
(13) THE CLERK Sir can you attach the microphone and
(14) remain standing for the oath to your tie Please raise your
(15) right hand
(16) (The Witness Is Sworn)
(17) THE CLERK Please be seated
(18) Sir for the record can you please state your full name?
(19) A My name is Steven MacSwain
(20) THE CLERK Please spell your last name
(21) A M a c S w a i n
(22) THE CLERK And your occupation?
(23) A I m a real estate appraiser and a consultant
(24) THE CLERK Thank you
(25) DIRECT EXAMINATION OF STEVEN MacSWAIN

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- (1) planning board and all of that if it caused no lots to be
(2) sold tells us nothing about the Falmouth oil spill?
(3) A No that s not correct We also -
(4) MR PETUMENOS I have no further questions
(5) MR OPPENHEIMER I have nothing on redirect Your
(6) Honor
(7) THE COURT:- Excuse me?
(8) MR OPPENHEIMER I believe the witness hadn t
(9) finished his answer but I believe we ve spoken to it before I
(10) have nothing further
(11) THE COURT All right that s fine You may step
(12) down
(13) Counsel approach the bench I want to deal with something
(14) here while exhibits are shifting
(15) (Bench conference off the record)
(16) MR DIAMOND Your Honor we call as our next witness
(17) Steven MacSwain
(18) MR PETUMENOS Before you do that counsel I need to
(19) approach
(20) (At sidebar on the record)
(21) MR DIAMOND That s the shortest examination I ve
(22) ever done before drawing an objection
(23) MR PETUMENOS This is one of those issues that I
(24) think may require some extended colloquy There are exhibits
(25) that are in the MacSwain direct I don t know when they re

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- (1) BY MR DIAMOND
(2) Q The clerk stepped on my line I was going to ask whether
(3) you were not a lawyer You re not a lawyer?
(4) A No sir
(5) Q My next question was You re not another real estate
(6) appraiser are you?
(7) A Yes I am
(8) Q What are you here to tell the jury Mr MacSwain?
(9) A I m here to give an overview of the plaintiffs lands from
(10) a real estate perspective Also I d like to describe the real
(11) estate markets both before the spill and after the spill And
(12) lastly I d like to talk about how the spill did not hurt these
(13) real estate markets
(14) Q Are you an Alaskan?
(15) A Yes I am
(16) Q Life long Alaskan?
(17) A Yes I am Yes I am I was born and raised in Alaska
(18) Q Where have you spent your professional career?
(19) A In - in Alaska South Central Alaska
(20) Q The entire career?
(21) A Yes
(22) Q How many years experience do you have doing real estate
(23) consulting work for appraisal work?
(24) A I ve been a real estate appraiser for approximately 25
(25) years

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- (1) Q Over that period of time give the jury a sense of how many
- (2) appraisals you've done
- (3) A I've done thousands of appraisals in Alaska
- (4) Q Involving Alaskan lands?
- (5) A Yes
- (6) Q Give us a sense of geography Where have the properties
- (7) been that you've been involved in appraising?
- (8) A My experience has been statewide all over the state of
- (9) Alaska primarily in South Central Alaska Anchorage and the
- (10) areas of the Kenai Peninsula
- (11) Q Have any specialty?
- (12) A Yes matter of fact I do
- (13) Q Tell us
- (14) A One of my specialties is the appraisal of oceanfront
- (15) properties and also I have a lot of experience in appraising
- (16) remote wilderness type of lands
- (17) Q Have you ever appraised any lands owned by Alaska Native
- (18) regional corporations?
- (19) A Yes I have
- (20) Q How many of them?
- (21) A I've appraised lands for all of the 12 of the Alaska
- (22) regional Native corporations
- (23) Q Have any of the Native Corporations ever been your client
- (24) in connection with those appraisals?
- (25) A Yes I have had clients as Native Corporations lots of

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- (1) them
- (2) Q There are 12 Native Corporations?
- (3) A Well there's 12 regional corporations there's a couple
- (4) hundred Native Village Corporations
- (5) Q Of the regional corporations 12 regional corporation how
- (6) many have been your clients at one time or another?
- (7) A Of the 12 regional corporations I've had as clients 10 10
- (8) of the 12 have been clients of mine
- (9) Q That includes Mr Petumenos client Chugach Alaska
- (10) Corporation?
- (11) A Yes that's correct I have appraised property for CAC
- (12) Q You've also done appraisal work for Cook Inlet region
- (13) Kodiak the Aleut Corporation Bristol Bay Nana Kenai Native
- (14) Association Chickaloon Native Association Iliamna Native
- (15) Corporation Kijik Corporation is that true?
- (16) MR PETUMENOS Object to leading and compound Just
- (17) kidding
- (18) MR DIAMOND Preliminary Your Honor
- (19) A Yes I have had those corporations as clients and many
- (20) other Native Corporations
- (21) BY MR DIAMOND
- (22) Q Has any of your work for Native Corporations involved
- (23) Alaskan properties in South Central Alaska?
- (24) A Yes they have
- (25) Q Can you give us just a couple of examples?

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- (1) A Well for CIRI which is the Anchorage based regional
- (2) corporation I appraised Fire Island for CIRI and I've also
- (3) appraised large acreage parcels for CIRI in the west part of
- (4) the Cook Inlet area around Beluga also appraised their main
- (5) office building their corporate headquarters on C street
- (6) Q You did some work for Seldovia Native Association as well?
- (7) A Yes Seldovia or SNA has also been a client of mine and I
- (8) appraised oceanfront properties for SNA
- (9) Q You've also been hired to do appraisal work for government
- (10) agencies?
- (11) A Yes I have I've done a lot of work for various
- (12) governmental agencies
- (13) Q And with Mr Petumenos consent correct me if I'm wrong
- (14) but the list includes Bureau of Land Management National Park
- (15) Service Fish & Wildlife Service the FDIC and the United
- (16) States Coast Guard?
- (17) A Yes those and other governmental agencies
- (18) Q You've also done real estate evaluation work for Alaskan
- (19) state agencies have you not?
- (20) A Yes the state government
- (21) Q And that list includes at least 12 government agencies
- (22) including the Department of Natural Resources the Division of
- (23) Parks and Outdoor Recreation the Department of Fish and
- (24) Game
- (25) correct?
- (26) A Yes I have appraised property for those agencies

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- (1) Q Okay One of the plaintiffs here is a municipal
- (2) corporation Ever done any work for Alaska municipalities?
- (3) A Yes I've done a lot of work for Alaska municipalities
- (4) particularly in South Central Alaska
- (5) Q How about Mr Stoll's client the Kodiak Island Borough?
- (6) A Yes the KIB Kodiak Island Borough has also been a major
- (7) client of mine
- (8) Q Okay Other municipalities that you've done appraisal work
- (9) for include the Kenai Peninsula Bureau City of Valdez the
- (10) City of Cordova City of Seward the City of Anchorage City of
- (11) Homer?
- (12) A Yes I've appraised property for all of those cities
- (13) Q You get around I don't want to ask you about the
- (14) thousands of - you described thousands of appraisal jobs
- (15) you've had I know there's one you're particularly proud of in
- (16) which you were retained by both sides to a dispute is that
- (17) correct?
- (18) A Yes that's correct
- (19) Q Tell the jury about that one
- (20) A Well there was a - there was a big case called the Alaska
- (21) Mental Health Lands case It's involving nearly a million
- (22) acres of land many thousands of parcels and they had - they
- (23) put together an evaluation panel to try to get three MAI
- (24) evaluation experts and I was selected jointly by both sides as
- (25) agreed upon as somebody that would be fair to appraise all of

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- (1) these lands in this large land case
- (2) Q Do you ever get involved in evaluating the impact of
- (3) environmental accidents on real property values?
- (4) A Yes I do
- (5) Q Have you ever done that in the past?
- (6) A Yes I have
- (7) Q Give us an example
- (8) A The one case that comes to mind was - I believe it s
- (9) called the Crown Point chemical spill happened about 1986
- down
- (10) on the Kenai Peninsula There was an Alaska Railroad tanker
- (11) car that was leaking and I was asked by the plaintiffs in this
- (12) case that were suing the Alaska Railroad and a few chemical
- (13) corporations and I was asked to go down and analyze the
- (14) effects of this spill on property values
- (15) Q Is it common for an appraiser to have to consider
- (16) environmental issues?
- (17) A Yes it is
- (18) Q You mentioned MAI designation the jury s heard a bit about
- (19) that You hold the MAI designation?
- (20) A Yes I do
- (21) Q Are you also certified by the State of Alaska?
- (22) A Yes I am
- (23) Q Could you describe for us what the State certification
- (24) program consists of?
- (25) A The State certification program is a voluntary program that

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- (1) was recently initiated a couple years ago It s not required
- (2) in the state to do appraisal You don t have to have a
- (3) license but it is a voluntary program that I am a - I am
- (4) certified
- (5) MR PETUMENOS Your Honor I m going to object to the
- (6) legal conclusion about that That may be an issue that s in
- (7) dispute in the trial as to whether this is a voluntary program
- (8) or not
- (9) THE COURT If it s in dispute counsel the witness
- (10) can give his version
- (11) MR DIAMOND This is the first that I knew that this
- (12) was another disputed issue
- (13) MR PETUMENOS Perhaps I ll cross examine him on it
- (14) MR DIAMOND He s simply offering his own
- (15) understanding Your Honor
- (16) THE COURT The objection s overruled
- (17) MR DIAMOND Okay
- (18) BY MR DIAMOND
- (19) Q In terms of the rigor of the requirements how hard it is
- (20) to qualify is it more difficult to get an MAI or state
- (21) certification?
- (22) A The MAI designation is much more rigorous than the state
- (23) certification program
- (24) Q In your profession which is considered more prestigious?
- (25) A Definitely the MAI is considered to be the - well it s

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- (1) the highest ranking designation It s put out by the Appraisal
- (2) Institute and it s - it s the - definitely the more stronger
- (3) designation
- (4) Q All right Are you a member of any professional
- (5) associations in the appraisal profession?
- (6) A Yes I am I m member of the Alaska Chapter of the
- (7) Appraisal Institute and also a member of the Anchorage Board
- (8) of Realtors and a few other organizations involving real
- (9) estate
- (10) Q And you re a college graduate?
- (11) A Yes I am
- (12) Q From where and when?
- (13) A I graduated from the University of Alaska in the Fairbanks
- (14) campus in 1969 I have a degree in business administration
- (15) Q Have you ever qualified as an expert in court before?
- (16) A Yes I have
- (17) Q How many times have you testified?
- (18) A Approximately ten times
- (19) MR DIAMOND Your Honor at this time I tender
- (20) Mr MacSwain as an expert in real property analysis and
- (21) valuation in general and in particular with respect to large
- (22) acreage wilderness parcels in South Central Alaska
- (23) MR PETUMENOS I will reserve my cross examination on
- (24) qualifications until my turn
- (25) THE COURT He s qualified to give expert opinion

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- (1) within that area
- (2) BY MR DIAMOND
- (3) Q Let s talk about how you came to be involved in all of
- (4) this Mr MacSwain You were retained by Exxon to do some
- work
- (5) in this case were you not?
- (6) A Yes I was I was retained by some lawyers that were
- (7) working for Exxon
- (8) Q When was that?
- (9) A I was retained in May of 1990
- (10) Q You were here when Mr Bill Mundy testified the real
- (11) estate Mr Mundy?
- (12) A Yes I was
- (13) Q And did you get a chance to take a look at some of the
- (14) letters of solicitation that he sent out looking for work after
- (15) the spill?
- (16) A Yes
- (17) MR PETUMENOS Your Honor I would at this point wish
- (18) to approach the bench on this one
- (19) (At side bar on the record)
- (20) THE COURT Where are you going?
- (21) MR DIAMOND How he was engaged whether he went
- (22) after it
- (23) MR PETUMENOS I don t mind that but I don t want
- (24) him giving opinions about the proper nature of the -
- (25) THE COURT I don t either

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- (1) MR DIAMOND About what?
- (2) MR PETUMENOS About Dr Mundy's conduct Dr Mundy
- (3) testified these were former clients of his and I don't think
- (4) he's qualified to give -
- (5) MR DIAMOND He's not -
- (6) THE COURT He's talking about how he was hired
- (7) MR PETUMENOS Why is he mentioning Dr Mundy's
- (8) letters except to pose it in front of the jury
- (9) THE COURT I agree that's the implication Let's
- (10) move on I don't want to hear it
- (11) (Sidebar concluded)
- (12) BY MR DIAMOND
- (13) Q Could you describe for the jury how you got involved in the
- (14) case?
- (15) A I was contacted in January 1990 of my interest to do - to
- (16) work on this assignment
- (17) Q You were contacted by some Exxon lawyers?
- (18) A No I was - yes some Exxon lawyers law firm called Bogle
- (19) & Gates They have an office in Seattle and Anchorage
- (20) Q When you were first contacted did you have any notions in
- (21) your own head about the range of possible damage that lands in
- (22) the Prince William Sound and Kenai might have suffered?
- (23) A No I did not
- (24) Q What did you expect to find when you started out?
- (25) A Well having done a lot -

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- (1) MR PETUMENOS I think that's irrelevant Judge
- (2) THE COURT I don't think it is counsel The
- (3) objection is overruled
- (4) A Having appraised a lot of property in Alaska I was
- (5) generally familiar with the lands in you know remote and not
- (6) having a lot of people out there I knew that but in terms of
- (7) any effect on the - on land values out in the area I hadn't
- (8) been asked to do any work yet
- (9) BY MR DIAMOND
- (10) Q Okay When did you begin work on this matter?
- (11) A It was right after I was engaged would have been summer of
- (12) 1990
- (13) Q And did you do your work alone?
- (14) A No I - we worked - we had a partner in this job a
- (15) fellow by the name of Don Dorchester who is another MAI has
- (16) an office in the Lower 48
- (17) Q How did it happen that you worked with Mr Dorchester on
- (18) this assignment?
- (19) A Well Mr Dorchester and I have worked on several other
- (20) similar assignments in Alaska simply being that they were
- (21) involving large acreage land valuations and since this was an
- (22) environmental case which Don Dorchester had had a lot of
- (23) experience in I thought that he would - the two of us would
- (24) make a real good team working together
- (25) Q You mentioned that you had worked with Mr Dorchester

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- (1) previously?
- (2) A Yes I have several cases here in Alaska Don Dorchester
- (3) is past national president of the American Institute of Real
- (4) Estate Appraisers and he's very well-known around the
- (5) country
- (6) both nationally and internationally He's been - taught a lot
- (7) of courses
- (8) MR PETUMENOS I'm going to object to one expert
- (9) giving his partner's -
- (10) THE COURT The objection is sustained The jury can
- (11) disregard that
- (12) BY MR DIAMOND
- (13) Q Did your team involve others beside yourself and
- (14) Mr Dorchester?
- (15) A Yes it did We both MacSwain Associates and the
- (16) Dorchester Company each one of our firms have a number of
- (17) associates
- (18) Q And those professionals were also brought in to do work?
- (19) A Yes that's correct
- (20) Q How did you divide things between you and Mr Dorchester?
- (21) A Well each one of us had different areas of expertise to
- (22) lend to this assignment My primary emphasis being an
- (23) Alaskan
- (24) and doing a lot of work up here I focused on Alaskan issues
- (25) and there were other areas that Mr Dorchester focused on
- (26) Q You're going to be telling us in some detail later on about
- (27) exactly what you did but there was a fair amount of hoofing it

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- (1) around through the state on various means of conveyance
- (2) talking to lots of people Did you take lead in that?
- (3) A Yes that was one of my principal areas of responsibility
- (4) was the - what we call market interviews and going out and
- (5) talking to market participants and gathering very large
- (6) database of comparable sales information
- (7) Q Aside from your professional experience as an appraiser in
- (8) Alaska do you have any personal experience or background
- (9) with
- (10) respect to remote Alaskan real estate?
- (11) A Yes I do
- (12) Q Tell the jury
- (13) A Well I've - if I could tell them a little personal story
- (14) here I have been involved in the real estate market in these
- (15) markets My wife and I inherited this cabin on the Kenai
- (16) Peninsula about 1980 had to spend a lot of money fix it up
- (17) It's down in Summit Lake which most of you I'm sure have
- (18) driven by this cabin but back - as you recall we went into
- (19) the - excuse me the great Alaska real estate recession in
- (20) about 86 1988 I was kind of hurting so we put the cabin up
- (21) for sale and I was unable to sell the cabin so following the
- (22) oil spill I -
- (23) Q Let me interrupt you because you told me where it was
- (24) yesterday but on this map I don't know if you can see it
- (25) it's near Seward isn't it?
- (26) A Yes It's about four miles out of Seward

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- (1) Q On the Seward Highway?
- (2) A Yes just north of the - of what they call - the CAC has
- (3) a parcel there called the Snow River parcel
- (4) Q That s -
- (5) A Just up the road from CAC
- (6) Q CAC parcel is located pretty close to the Seward highway
- (7) isn't it?
- (8) A Yes it is It's right on the Seward highway
- (9) Q And your cabin was real close by?
- (10) A Yes just up the road
- (11) Q We've been told that s stigma land Was your cabin
- (12) stigmatized by the oil spill?
- (13) A No just the opposite I noticed a lot of activity people
- (14) going to Seward so I put the for sale sign up on the cabin
- (15) again and lo and behold in the winter of 89 and 90 finally
- (16) got a buyer and got the cabin sold That was my experience in
- (17) the Kenai Peninsula recreational market
- (18) Q You - that was the extent of your personal experience?
- (19) A Yes that is
- (20) Q You've had many opportunities to get out there since have
- (21) you not?
- (22) A Yes that's correct
- (23) Q Okay In addition to being a remote parcel property owner
- (24) you've hunted and fished in remote regions of Prince William
- (25) Sound and the Kenai?

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- (1) A Yes all my life
- (2) Q Tell the jury
- (3) A I've - born and raised in Seward and did of course a lot
- (4) of hunting and fishing not quite so much as I used to but
- (5) I've also been a commercial fisherman for a number of years in
- (6) this area
- (7) Q You prepared a videotape for us did you not?
- (8) A Yes I have
- (9) Q Why?
- (10) A I thought it would be a good way to take the jury out into
- (11) the field and give them a perspective of the - of the Native
- (12) lands good overview
- (13) Q Why is that important in your mind?
- (14) A Well it's important to get out there and see these lands
- (15) The best thing is to get out and see them but I guess the
- (16) video would be the next best thing
- (17) Q The - the visuals that we're going to see on the video
- (18) the pictures is it representative of what we - any one of us
- (19) would see in we went out to Prince William Sound and the Kenai
- (20) on any particular day?
- (21) A Yes it is But keep in mind that a lot of the footage is
- (22) taken during the summertime so you know it does - it is
- (23) representative of what the property looks like but most of the
- (24) footage is in the summer and spring so got to keep that in
- (25) mind

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- (1) Q Why is most of the footage in summer and spring?
- (2) A Well that s - many of these areas are difficult to get to
- (3) in the wintertime particularly by boat and airplane We have
- (4) weather problems
- (5) MR PETUMENOS Excuse me Judge I consented we have
- (6) the understanding I think that he s going to be allowed to put
- (7) the Sound on with this video These points part of these -
- (8) in order to speed things up these points are on the video I
- (9) listened to it I would object as cumulative at this point.
- (10) MR DIAMOND Your Honor I was only establishing a
- (11) foundation at what time they're going to see is
- (12) representative that s all
- (13) THE COURT So are you done with that?
- (14) MR DIAMOND I am done with it
- (15) THE COURT All right we can play the video
- (16) MR PETUMENOS Might it inquire some foundational
- (17) points before the jury sees the video since I won't get to talk
- (18) about the narration when it comes
- (19) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
- (20) BY MR PETUMENOS
- (21) Q Mr MacSwain was this video commercially produced?
- (22) A No I don't view it as commercially produced I was the
- (23) person primarily responsible and I had some help from various
- (24) technicians but it wasn't like a - it was out somebody else
- (25) did it like you know a video postcard that sort of thing

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- (1) Q Let me ask you this did you take the video?
- (2) A I took - I was involved with a lot of the photography
- (3) yes that's correct
- (4) Q The voice over that we're going to hear was that a written
- (5) script that you were reading from?
- (6) A Yes that was a script that I put together
- (7) Q Did you write that by yourself?
- (8) A I was the author of that script I had consulted with
- (9) others on the script
- (10) Q Tell the - tell us who assisted you in writing the script
- (11) that goes with this video?
- (12) MR DIAMOND Your Honor I'm going to object This
- (13) is really in the nature of cross examination
- (14) MR PETUMENOS Well if they're going to play the
- (15) video I think -
- (16) THE COURT Let's not have a whole lot of talk about
- (17) it counsel I'll allow a few more questions
- (18) MR PETUMENOS Thank you Judge
- (19) BY MR PETUMENOS
- (20) Q Tell us who assisted you with this script that you were
- (21) reading?
- (22) A Well there's various people that do this thing for a
- (23) living that are - like MPA it's the firm that does the
- (24) technical bit They assisted Primarily it was various
- (25) technical people but it's my script and I'm the one that -

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- (1) Q Did lawyers help you with the script?
 (2) A Lawyers looked at the script I don't view it as help but
 (3) they -
 (4) MR DIAMOND Your Honor I object to that answer and
 (5) move it be stricken
 (6) THE COURT You're not a party here yet counsel
 (7) BY MR PETUMENOS
 (8) Q Whether you regarded it as help or not lawyers
 (9) participated in the script?
 (10) A Yes they did and that was a good point that Mr Diamond
 (11) made There were a few errors that they made and I had to go
 (12) back and redo it
 (13) Q And did anybody else help you with the script besides
 (14) lawyers technical people relating to the production of the
 (15) video?
 (16) A There are - yes there are - there were a number of
 (17) technical people There was technical people from Exxon that
 (18) had expertise in doing these types of things
 (19) Q So this was a group effort?
 (20) MR DIAMOND What was a group effort?
 (21) MR PETUMENOS This video
 (22) A Yes I had help putting together the video This is -
 (23) bear with me this is my first video and -
 (24) MR PETUMENOS It's a good video don't worry I
 (25) have no further questions

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- (1) MR DIAMOND Your Honor before we play the video I
 (2) would just like to note for the record that this was made in
 (3) large part before the resolution of the claims of the village
 (4) municipalities so there are still references to Larsen Bay
 (5) Ouzinkie and the like but we didn't want to have to go back
 (6) and have Mr MacSwain do it again
 (7) THE COURT Thank you I appreciate that
 (8) clarification
 (9) MR DIAMOND I'm going to have Joel play the
 (10) videotape but I'm going to ask him to stop it at some places
 (11) because I want you to expand upon some places
 (12) MR PETUMENOS I didn't think that was the
 (13) arrangement I thought the reason we were playing the video is
 (14) so we didn't have to do a direct and video as well as a sound
 (15) we view
 (16) THE COURT Counsel do we need a hearing outside of
 (17) the jury?
 (18) MR PETUMENOS No I guess not Let's stop it and -
 (19) let them do it Bob
 (20) MR STOLL I don't know I thought that was what the
 (21) representation was too
 (22) THE COURT I tell you what I'll do this hold on
 (23) I'll do this for you To the extent that something a question
 (24) is asked that raises an issue at the time the question is
 (25) asked you can tell me that and then I'll - if I have to

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- (1) I'll send the jury out All right? Otherwise it'll just -
 (2) MR STOLL I just don't understand the -
 (3) MR PETUMENOS I'm supposed to object when he stops
 (4) the video and asks the question
 (5) MR STOLL I see okay
 (6) MR DIAMOND She can't program a VCR either You
 (7) turned off all of the light switches Excuse me Your Honor -
 (8) MR PETUMENOS Anybody sneak out while the lights
 (9) were off?
 (10) MS SMITH Sorry
 (11) MR DIAMOND Okay Joel
 (12) (Videotape Played)
 (13) VIDEO SPEAKER The purpose of this video is to
 (14) provide an overview of the lands for which the plaintiffs in
 (15) this case have brought damage claims The video will show you
 (16) the lands from a real estate perspective and will focus on the
 (17) limited extent to which the lands have been used and
 (18) developed
 (19) over the years
 (20) As you can see on this map all of the plaintiffs lands
 (21) are located in the South Central Region of Alaska The South
 (22) Central Region extends from Cordova on the east to the end of
 (23) Kodiak Island in the southwest a distance of over 400 miles
 (24) Most of the area is remote wilderness land Although this
 (25) entire area is referred to as South Central Alaska it also can
 be generally divided into three different subregions Prince

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- (1) William Sound the Kenai Peninsula and Kodiak The lands in
 (2) each of these areas looks somewhat different and the spill
 (3) affected each of these areas differently Let's first look at
 (4) Prince William Sound
 (5) Four of the plaintiff Native corporations hold lands in
 (6) Prince William Sound Chenega Corporation holds lands on
 (7) Chenega Evans Knight and LaTouche Islands as well as other
 (8) lands Chenega's lands were in the direct path of the spill
 (9) Eyak Corporation holds lands near Cordova Their lands
 (10) were not oiled by the spill
 (11) Tatitlek Corporation holds lands between Cordova and Valdez
 (12) which were not hit by the spill except for a small area on
 (13) Bligh Island claimed to have been lightly oiled
 (14) Finally Chugach Alaska Corporation also owns lands on the
 (15) eastern side of the Sound and in other areas which were not
 (16) oiled Chugach also has holdings on Knight and LaTouche
 (17) islands which did have some oiling
 (18) Two other Native Corporations have land holdings on the
 (19) Kenai Peninsula They are Port Graham Corporation and
 (20) English
 (21) Bay Corporation Some of the lands of these corporations were
 (22) oiled by the spill but others were not In general the
 (23) oiling of the shorelines on the Kenai Peninsula was much less
 (24) severe than oiling to the lands in Prince William Sound
 (25) Finally the Kodiak Island Borough and four villages have
 asserted claims for lands that they hold on Kodiak Again not

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- (1) all of these lands were oiled by the spill and the degree and
- (2) nature of oiling in this region was much less than either in
- (3) Prince William Sound or on the Kenai Peninsula
- (4) There are very few city cities in the South Central
- (5) Region Valdez is the largest city in Prince William Sound
- (6) It lies at the end of the Trans Alaska Pipeline system and is a
- (7) terminal where tankers are loaded to carry North Slope crude
- (8) oil to the Lower 48
- (9) Seward my hometown enjoys a significant tourist trade
- (10) It has a large harbor and some industry such as a coal
- (11) shipping terminal and a sawmill
- (12) Cordova located in the eastern part of Prince William
- (13) Sound is a community largely dependent on commercial
- (14) fishing
- (15) Whittier located in the western part of Prince William
- (16) Sound was originally established as a remote command post
- (17) during World War II and now has a harbor for pleasure boats
- (18) and
- (19) a dock for cruise ships
- (20) Homer which lies on the southwestern Kenai Peninsula also
- (21) has a significant tourist trade in the summer months
- (22) The total of all the people living in these communities is
- (23) less than six percent of the population of Anchorage
- (24) The other communities in Prince William Sound and on the
- (25) lower Kenai Peninsula are Native villages and the community of
- (26) Seldovia In the Sound there are two villages The first is
- (27) Tatitlek and in the Eastern Sound with a total population of

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- (1) 119 The other is the New Village of Chenega Bay which was
- (2) reestablished in 1984 and now is home to 94 people
- (3) On the Kenai Peninsula there is Port Graham where 166
- (4) people live and English Bay home to 158 residents The
- (5) largest of the communities south of Kachemak Bay is Seldovia
- (6) on
- (7) Seldovia Bay where 316 people live As you can see the 1990
- (8) population of all these villages is much smaller than the other
- (9) communities in the area previously shown
- (10) On Kodiak the same pattern holds true Most of the
- (11) residents of the island live in the City of Kodiak while a few
- (12) others live in the Native villages We show here only the four
- (13) villages that are asserting land claims in this region There
- (14) are other villages on Kodiak but they were not involved in our
- (15) work Villages that asserted land claims include Ouzinkie
- (16) Port Lions Larsen Bay and Old Harbor
- (17) As can be seen in the video of each of these villages it
- (18) is apparent that the Native villages are located in the more
- (19) remote areas of the island Altogether the villages that have
- (20) asserted land claims here include less than 14 percent of the
- (21) total population of the City of Kodiak
- (22) MR DIAMOND We can pause it there Joel Linda can
- (23) you flick on the lights
- (24) MS SMITH I'll try
- (25) BY MR DIAMOND
- (26) Q In the video you talk about population in the cities in

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- (1) this region as well as the - the villages but you don't talk
- (2) about population statistics for the other areas Have you
- (3) prepared some visuals for us so that we get a sense for how
- (4) many people live outside the cities and villages?
- (5) A Yes I have
- (6) (Video is paused)
- (7) MR DIAMOND Aren't we a team
- (8) MS SMITH I have no problem with charts
- (9) BY MR DIAMOND
- (10) Q I'm going to put up DX14016 2 Is this a chart that you
- (11) had prepared?
- (12) A Yes it is
- (13) Q Okay could you come down and tell us what we're looking at
- (14) here? What does this chart depict?
- (15) A This is a population map of Western Prince William Sound
- (16) and what we have here is a map showing the population
- (17) number
- (18) of people that live in this area outside of the - the villages
- (19) and the cities It's based on the 1990 census The total
- (20) number of people that live - and these are census tracks here
- (21) the olive and the orange are the plaintiff lands and the total
- (22) number of people that live within the census tracks 42
- (23) people
- (24) Q So in Western Prince William Sound excluding - there's
- (25) only one village in Western Prince William Sound is that
- (26) Chenega?

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- (1) A Yes that's correct Chenega Bay
- (2) Q Excluding Chenega in Western Prince William Sound the
- (3) area
- (4) in olive up there we have 42 people on Native Corporation
- (5) land?
- (6) A No in the entire census track which would include the
- (7) Native Corporations These Native Corporation lands are within
- (8) the census track so that would be the entire population
- (9) outside of Chenega Bay
- (10) Q And if we add back in the village of Chenega Bay what does
- (11) that bring the total population to in this area of Western
- (12) Prince William Sound?
- (13) A Just a little over a hundred
- (14) Q Did you make a similar map for the outer Kenai here?
- (15) A Yes I have
- (16) Q I'm going to show you what's been marked as DX10416 1 Is
- (17) this the chart you had prepared I take it?
- (18) A Yes it is
- (19) Q Take the jury through this chart
- (20) A Again it's a population map and it's a larger area
- (21) Seward's up here and from Seward all the way down to the
- (22) coast
- (23) is about a hundred miles and these are - this is one big
- (24) census track area The total number of people that live in
- (25) this area outside of the villages 26 people
- (26) Q That ranges all the way up from east of Resurrection Bay in
- (27) Seward?

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- (1) A Right the east end here This little black dot is Seward
 (2) and Kenai Fjords all the way here about a hundred miles
 (3) Q That doesn't mean that there are - that doesn't mean there
 (4) are 26 people residing outside the villages on the orange
 (5) areas the Native Corporation property?
 (6) A No That's the total number of people within the census
 (7) track See the olive is the census track and the Native
 (8) Corporation is the orange and it would be the total number of
 (9) people with the entire census track
 (10) Q So excluding the two villages in this area it would be
 (11) some number less than 26 living on Native Corporation
 property?
 (12) A Yes that is correct
 (13) Q If we add back the two villages Native villages on the
 (14) outer Kenai what does that bring the total population to?
 (15) A Well the villages populations Port Graham and English
 (16) Bay are approximately 150 each so the total population of the
 (17) entire area would be just a little over 300
 (18) Q So the total number of people we're talking about who live
 (19) on Native Corporation property that was oiled Kenai and
 (20) Western Prince William Sound is how many?
 (21) A Would be just a little over 300 -
 (22) Q Including Prince William Sound?
 (23) A Including Prince William Sound?
 (24) Q Western Prince William Sound
 (25) A Okay we have a little over a hundred in Prince William

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- (1) Sound and a little over 300 here so it would be between four
 (2) and five hundred
 (3) Q Thanks you can take the stand
 (4) MR DIAMOND Joel you want to start that up again?
 (5) (Videotape Played)
 (6) VIDEO SPEAKER Now let me show you some footage of
 (7) what the lands in this area look like We begin with a
 (8) panorama of Prince William Sound shot from the air at a spot
 (9) just above Flemming Island and looking to the southwest
 (10) MR DIAMOND Stop it there You don't have to come
 (11) down but could you just - well maybe you should Just give
 (12) us some orientation as to what we're looking at here
 (13) MR PETUMENOS Isn't it in that little inset
 (14) counsel right there?
 (15) A Okay this little inset here is a view that we had from a
 (16) helicopter from about a mile up and we're looking out in a
 (17) southwesterly direction We're right above Flemming Island
 and
 (18) the view is looking out southwesterly and what we're going to
 (19) do is move slowly around and take a whole - a 360
 (20) counterclockwise direction there and give you a really good
 (21) overview what Prince William Sound looks like so you get a feel
 (22) for the vastness
 (23) Q And that little yellow beacon is going to rotate and give
 (24) us a perspective of what we're seeing?
 (25) A Yes that is correct It's going to rotate It's the view

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- (1) you have out - you open up a helicopter stick the video out
 (2) and it's going to show you scan around look at the entire
 (3) sound
 (4) MR DIAMOND Okay Joel
 (5) (Videotape Played)
 (6) A This footage was taken in the summer of 1989 on a really
 (7) nice day
 (8) VIDEO SPEAKER As the camera pans around to the south
 (9) you see Evans LaTouche and Montague Islands
 (10) MR DIAMOND Joel hold it a second
 (11) BY MR DIAMOND
 (12) Q Give us some sense of the size of what we're looking at
 (13) here
 (14) A These are - these are big islands Again we're right
 (15) above Flemming Evans is a long island It's a little over 20
 (16) miles LaTouche Island here is about 12 miles long The
 (17) biggest island in the Sound is Montague Island It's almost 50
 (18) miles long and what you see on the topography is basically
 (19) these islands are actually mountains that rise out of the sea
 (20) Q If you motored around Montague Island how long would it
 (21) take you?
 (22) A If the weather was good it's about a full day trip It's
 (23) a big island
 (24) Q I see snow on some of those peaks What kind of elevations
 (25) are we looking at here?

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- (1) A The peaks on Evans get a couple thousand feet Likewise
 (2) with LaTouche Montague is even higher three or 4 000 feet
 (3) Q Okay -
 (4) A Which would include also the plaintiff lands
 (5) MR DIAMOND Joel you want to start again
 (6) (Videotape Played)
 (7) VIDEO SPEAKER Which include lands owned by the
 (8) Chenega and Chugach Alaska Corporations And at Knight
 Island
 (9) portions of which are also owned by Chenega and Chugach
 (10) (Video paused)
 (11) BY MR DIAMOND
 (12) Q We've heard quite a bit of testimony about Point Helen and
 (13) Knight Island Can we see that in this picture yet?
 (14) A Yes This is a view of Knight Island Point Helen is down
 (15) here the south end A lot of the discussion that you've heard
 (16) during the trial is a shoreline that's located on the other
 (17) side of the island here This is Montague Strait
 (18) Q If we wanted to look up toward the direction of Bligh Reef
 (19) where would we be looking here?
 (20) A Bligh Reef is located that way
 (21) Q What's the interior of Knight Island like?
 (22) A It's - Knight Island is one of the steeper islands out
 (23) there you can see that's why they call it I guess Captain
 (24) Cook whoever named the island Knight Island it's very high
 (25) peaks go up to 3 000 feet

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- (1) Q How much of the island is covered by steep grade?
 (2) A Most of the island is very steep 3 000 feet is -
 (3) MR PETUMENOS Judge I think this is on the video
 (4) if I m not mistaken
 (5) MR DIAMOND I don t think so I wouldn t have
 (6) stopped and asked if it was on the video
 (7) THE COURT How much longer are we going to go before
 (8) we start up again?
 (9) MR DIAMOND This is the last question
 (10) THE COURT All right
 (11) A 3 000 feet is like Mount Marathon in Seward Most
 (12) everybody in the jury knows what Mount Marathon looks like
 (13) These mountains on Knight Island go to 3 000 feet
 (14) MR DIAMOND Roll it Joel
 (15) (Videotape Played)
 (16) VIDEO SPEAKER As well as other islands that are held
 (17) by the State and federal governments Chenega Island is held
 (18) by the Chenega Corporation and is where the Old Village of
 (19) Chenega is located
 (20) As we look back to the northeast you will see the mainland
 (21) again one where the largest of the Chenega Corporation
 (22) parcels
 (23) is located These shots give you a view from the water of what
 (24) the lands in Prince William Sound look like As you can see
 (25) much of the land rises from the water as steep hills or
 (26) cliffs The shorelines in many places are rocky or have rock

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- (1) outcroppings making access by boat difficult although there
 (2) are some bays and pocket beaches in some areas
 (3) The land is forested but much of the forest is sparse or
 (4) difficult to log so the lands are not economical for timber
 (5) harvesting There has been logging however on Native
 (6) Corporation lands in the Eastern Sound on Montague Island
 (7) and
 (8) on the outer Kenai coast as you will see in a minute
 (9) For the most part however the lands of Prince William
 (10) Sound have not been developed in any way This is remote
 (11) wilderness most of which we call limited use land
 (12) Now I m going to show you some terrain of lands on the
 (13) outer Kenai Peninsula Much of the southern coast of the Kenai
 (14) Peninsula is made up of the Kenai Fjords If anything the
 (15) lands in the fjords are perhaps even more rugged than Prince
 (16) William Sound The fjords are also directly exposed to the
 (17) Gulf of Alaska which makes for more severe seas and weather
 (18) than in Prince William Sound Here much of the shoreline is
 (19) nothing more than sheer rock cliffs rising steeply to
 (20) elevations of 1500 feet or more Some of the lands on the
 (21) Kenai coast have less severe slopes but still the immediate
 (22) shoreline areas are bedrock
 (23) Turning now to the Kodiak Region the terrain in this
 (24) region is once again rocky and mountainous There are notable
 (25) differences in forestation in the Kodiak area in the northeast
 (26) on Afognak Island The land was heavily timbered although

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- (1) much of the timber has now been harvested To the south on
 (2) Kodiak Island however there are no forests The land in this
 (3) region is sparsely vegetated
 (4) Let s return to the map of South Central Alaska with the
 (5) ownership parcels on it You may notice that most of the land
 (6) is not near the communities and while roads connect most of
 (7) the
 (8) cities to Anchorage no roads extend to the plaintiffs lands
 (9) therefore a significant limitation of lands in Prince William
 (10) Sound is that getting to the lands can be difficult time
 (11) consuming sometimes hazardous and expensive In bad
 (12) weather
 (13) they may be inaccessible Access to Chenega is one example
 (14) Chenega is 100 miles from Anchorage Although Chenega has
 (15) an
 (16) airstrip airline service is weather dependent and expensive
 (17) The other option would be to go from Anchorage to Seward by
 (18) car or train and then take a boat to Chenega a voyage that
 (19) would take at least four to six hours in a large fast boat with
 (20) good weather and seas
 (21) Access to the Kenai Fjords can be difficult too although
 (22) the fjords are not far from Seward when measured in air miles
 (23) a trip by boat would take a half a day or more Tour boats
 (24) travel out of Seward to the fjords in the summer but seas and
 (25) weather can make the same route treacherous in the wintertime
 (26) Windy Bay which is located even farther to the southwest
 (27) on the peninsula is another example of a remote location
 (28) although Windy Bay is not far from Homer by air the flight is

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- (1) through mountain passes along a route that is not always
 (2) passable By boat you would again have to travel the open
 (3) seas
 (4) of the Gulf of Alaska
 (5) I have mentioned rough seas and weather but it may be
 (6) difficult to understand what I mean from the pictures you ve
 (7) seen so far in this video and the many other shots of Prince
 (8) William Sound and the Kenai Most of the pictures you have
 (9) seen and will see are taken in the summer when conditions are
 (10) good enough to allow access and photography You ll see very
 (11) little of what the Sound and the seas look like in the rest of
 (12) the year but let me give you a sample
 (13) During the winter the seas and weather in the Gulf and the
 (14) Sound are much more severe Obviously fishermen and other
 (15) brave souls go out in conditions like these but tourists and
 (16) people who might buy recreational properties likely would not
 (17) And stormy weather is not the only problem Many times even
 (18) in the summer fog and clouds prevent access by air Certainly
 (19) Alaskans are used to inhospitable conditions but conditions
 (20) like these nonetheless have an effect on the demand and
 (21) values of real estate
 (22) Next let s look at the type of commercial uses that have
 (23) been made of lands in Prince William Sound and on the outer
 (24) coast of the Kenai Peninsula By far the most significant
 (25) land use in this area has been logging This is a timber
 (26) operation on lands owned by the Port Graham Corporation at

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- (1) Windy Bay You can see in this video areas of the forest that
 (2) have been clearcut
 (3) Another type of land use in the area is for recreational
 (4) subdivisions When I include recreational subdivisions here I
 (5) mean a piece of property that has been platted and subdivided
 (6) and marketed to people as individual lots This map
 (7) illustrates five recreational subdivision properties in Prince
 (8) William Sound Horseshoe Bay on LaTouche Island has never
 been
 (9) marketed
 (10) Ellamar which lies 20 miles south of Valdez is the most
 (11) established of the subdivisions Ellamar opened in 1983 By
 (12) 1992 approximately 50 lots had been sold in the subdivision
 (13) Over 100 lots remain unsold today As you can see few houses
 (14) have been built on the lots By the end of 1987 the developer
 (15) had constructed a new dock and built roads to provide access
 to
 (16) the upland lots
 (17) The Fidalgo subdivision also is located near Valdez just
 (18) 25 miles to the south Fidalgo opened in 1982 and in 11 years
 (19) just over half of the nearly 200 lots in the subdivision had
 (20) been sold Interestingly over 50 of the lot sales took place
 (21) in 1992 after the oil spill The developer has said the spill
 (22) and cleanup may have helped sales by bringing attention to the
 (23) Sound and pumping money into the economy We saw no
 cabins on
 (24) any of the lots in the Fidalgo subdivision
 (25) Here you see Canoe Passage which was developed on land

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- (1) owned by the Eyak Corporation near Cordova A little over half
 (2) of the 45 lots in the subdivision have been sold since 1984
 (3) The LaTouche town site subdivision on LaTouche Island
 opened in
 (4) late 1970s Most of the lots in the subdivision sold at that
 (5) time The State was making plans to construct a small boat
 (6) harbor but that fell through The debris you see in the video
 (7) are remains of the mining operation and town that once were
 (8) located on this site
 (9) There are no private subdivisions along the outer coast of
 (10) the Kenai Peninsula but the State has had two land offerings
 (11) in this area The State offerings throughout Alaska have
 (12) generally been well received in large part because the
 (13) offerings are usually at very modest prices and with generous
 (14) terms Even so there has been very little development on the
 (15) lots that were sold in these two subdivisions as you can see in
 (16) the Petrof View subdivision
 (17) The Blying Sound subdivision has been given a nickname in
 (18) the real estate field It is called the killer subdivision
 (19) because of its location on the Gulf of Alaska where rough
 (20) weather and seas can make access difficult or dangerous
 (21) Again this is an instance when the pictures you see here
 (22) taken under ideal summer conditions can be somewhat
 (23) deceiving
 (24) There are many more subdivisions on the Kenai Peninsula
 (25) but they are not located on the outer coast The most popular

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- (1) area of oceanfront recreational land on the Kenai is in the
 (2) south Kachemak Bay which is widely developed with
 recreational
 (3) subdivisions and cabins This area is much more accessible
 (4) from Anchorage and has less rugged land than the Sound and
 the
 (5) outer Kenai coast
 (6) The Kodiak is also an area that is more developed than the
 (7) Sound There are a number of remote recreational lands in the
 (8) Kodiak Region This is one of them Onion Bay on Raspberry
 (9) Island just northwest of Kodiak Some of the land on Onion Bay
 (10) was formally owned by the Kodiak Island Borough The
 borough
 (11) marketed the land in 1990 after the oil spill and sold all of
 (12) the lots in a short period of time We focused in this video
 (13) on the places in Prince William Sound Kenai and Kodiak where
 (14) there are land uses Keep in mind that the majority of the
 (15) land is remote undeveloped wilderness If you added up all
 (16) the developed acreage it would still total less than one
 (17) percent of all the land in the region These pictures give you
 (18) a perspective of the undeveloped wilderness from Prince
 William
 (19) Sound to Kodiak
 (20) MR DIAMOND Your Honor both Mr Petumenos and
 (21) Ms Smith have asked me to take a break
 (22) THE COURT And I want to take a break too
 (23) MS SMITH Let met turn on the lights
 (24) THE CLERK Please rise This court stands in
 (25) recess

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- (1) (Jury out at 12 20 p m)
 (2) (Recess from 12 20 p m to 12 33 p m)
 (3) THE CLERK Please rise This court now resumes its
 (4) session
 (5) THE CLERK Please be seated
 (6) MR DIAMOND Joel can you scan back to the Silver
 (7) Lake parcel segment on the video?
 (8) BY MR DIAMOND
 (9) Q Mr MacSwain tell us what we re looking at here
 (10) A This is a photo of the - of the CAC Silver Lake parcel
 (11) Q For the jury s benefit could you identify where the Silver
 (12) Lake parcel is on the map?
 (13) A Yes The Silver Lake parcel is located on the eastern
 (14) Prince William Sound It s an upland parcel basically no -
 (15) doesn t have any water frontage at all There s a very small
 (16) part of it touches it it touches the lagoon but for all
 (17) intents and purposes it s an upland parcel which is very
 (18) mountainous as you can tell by the photo here The mountains
 (19) go to about 6 000 feet
 (20) Q CAC is Chugach Alaska Corporation?
 (21) A Yes that is correct
 (22) Q Mr Petumenos client?
 (23) A Yes
 (24) Q To the best of your knowledge was there any oiling
 (25) anywhere besides this parcel?

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- (1) A No there s - this is a landlocked parcel there s no
 (2) oiling at all
 (3) Q You ve reviewed Mr Mundy s report Mr Green s report
 (4) before coming to court today?
 (5) A Yes I have
 (6) Q Did they - did Dr Mundy draw any conclusions as to
 (7) damages that were sustained by the Silver Lake parcel as a
 (8) result of the oil spill?
 (9) MR PETUMENOS I m going to object to their expert
 (10) reciting the damage conclusions of our expert as - as
 (11) irrelevant
 (12) THE COURT Objection s overruled
 (13) A Yes Dr Mundy estimated that this parcel here was damaged
 (14) for three years and he estimated that the amount of damage
 was
 (15) roughly \$2 6 million
 (16) BY MR DIAMOND
 (17) Q Okay you said the terrain is pretty rough Is that pretty
 (18) much true throughout the parcel?
 (19) A Yes As I said it s very mountainous It s - you have
 (20) mountains that go to almost 6 000 feet which is twice the
 (21) elevation of Mount Marathon in Seward
 (22) Q We ve heard the terms mountains and glaciers Do we see a
 (23) glacier here?
 (24) A Yes there s a little bit of a glacier you can see
 (25) Q What glacier is on Silver Lake parcel?

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- (1) A Silver Lake Glacier as I recall Could double check the
 (2) map
 (3) MR DIAMOND Joel could you skip to the Nellie Juan
 (4) parcel?
 (5) MR PETUMENOS Could we have a time of year for that
 (6) photograph?
 (7) A Yes -
 (8) MR DIAMOND You talking about this one or the Silver
 (9) Lake photograph?
 (10) A For this particular photograph right here?
 (11) MR PETUMENOS Right
 (12) A I have a complete photo log There s over 60 segments and
 (13) as I recall this was footage that was taken in May June of
 (14) 94 during the springtime It was not in the winter it was
 (15) in the summertime I d have to double check to make certain
 (16) but to the best of my knowledge it was about that time
 (17) period
 (18) BY MR DIAMOND
 (19) Q This says Nellie Juan parcel Can you identify that for us
 (20) on the map? I put up the southwest Prince William Sound map
 (21) A The Nellie Juan parcel is this parcel that s located right
 (22) here It s - again it s a landlocked parcel It doesn t
 (23) have any road access and it s a very large parcel It s about
 (24) 30 000 acres roughly
 (25) Q It s not far from - well what about 15 miles from the

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- (1) Snow River parcel which is also landlocked?
 (2) A Right the Snow River parcel is located right here The -
 (3) there s a correction I want to make on the video I said that
 (4) none of the plaintiffs parcels had road access and I was
 (5) referring to the oceanfront properties It was an oversight on
 (6) my part Actually the Snow River part does have access but it
 (7) is a landlocked parcel in answer to your question
 (8) Q Snow River in fact straddles the Seward Highway?
 (9) A Yes that s correct
 (10) Q Just on the Seward Highway?
 (11) A Yes just down from where I used to own that cabin
 (12) Q Let s go back to the Nellie Juan parcel not to belabor the
 (13) obvious but it s got no shoreline and wasn t oiled?
 (14) A Yes that s correct
 (15) Q What were Dr Mundy s conclusions with respect to this
 (16) parcel?
 (17) A It was Dr Mundy s conclusion that this parcel was also
 (18) adversely affected by the oil spill He said that it would be
 (19) damaged for three years and his - roughly his total damage for
 (20) this parcel was at \$2 5 million
 (21) Q How far was the nearest oiling to this parcel in air miles?
 (22) A The - according to the oiling maps the nearest oiling is
 (23) located right down here in Day Harbor this little bay here
 (24) called Driftwood Bay This is Resurrection Bay Seward is
 (25) located in this bay here Seward is about oh roughly eight

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- (1) miles from the Nellie Juan parcel You d have to be a pretty
 (2) tough person to get across this terrain here but Seward s
 (3) eight miles away and the nearest oiling is located 15 miles
 (4) away
 (5) Q Did Dr Mundy s conclusion about damage to this parcel on
 (6) account of the oil spill make any sense to you?
 (7) A No
 (8) MR PETUMENOS Objection that s argumentative
 (9) THE COURT I ll allow it Go ahead
 (10) A No it doesn t make any sense at all
 (11) BY MR DIAMOND
 (12) Q Is it something you looked at and will be telling us later?
 (13) A Yes that s correct
 (14) Q We see another glacier in this photograph?
 (15) A Yes there s some glaciers in there
 (16) Q Let s jump to North LaTouche Island
 (17) A This -
 (18) Q Wait a second
 (19) A I was just going to point out that frozen lake there was
 (20) Nellie Juan Lake
 (21) Q All right This is another shot from the video stop it
 (22) there What are we looking at here?
 (23) A This is - this is the north LaTouche parcel
 (24) MR PETUMENOS What s the date here if I could ask
 (25) counsel?

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- (1) MR DIAMOND Ask me?
 (2) MR PETUMENOS Well I can ask him unless you know
 (3) MR DIAMOND We have it written down Do you want
 (4) it? Can I look it up and give it to you at the next break?
 (5) BY MR DIAMOND
 (6) Q Do you know off the top of your head when this was taken?
 (7) A To the best of my recollection this - the date of this
 (8) photo was May or June of 1994 just taken this year
 (9) Q Show us on the map of Western Prince William Sound where
 (10) we re at what we re looking at
 (11) A Okay this photo here is about 2 000-foot elevation and
 (12) we re looking - we re coming in a northerly direction right
 (13) over this ridge line and we re looking in a northwesterly
 (14) direction The mountains you see here are right about
 (15) 1500-foot level It's Chenega land Sleepy Bay is right
 (16) here Probably heard an awful lot about Sleepy Bay and if you
 (17) look on the left hand part of the video up here in the corner
 (18) that's the eastern edge of Sleepy Bay
 (19) Q Does LaTouche have a mountain range that runs down
 through
 (20) it like a spine?
 (21) A There is a couple yes It's called the LaTouche Peaks
 (22) There's actually there's a - I think it's - there's -
 (23) Gibbons Peak is right here between the boundary of the two
 (24) parcels and LaTouche Peaks are down here on the CAC parcel
 (25) Q I think you told us those peaks rise to 2 000 feet?

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- (1) A Yes they - 1500 2 000 feet in that range
 (2) Q From a real estate standpoint what uses can you make of
 (3) rough terrain like that?
 (4) A Very little use economic use Virtually none It's
 (5) limited use type of lands
 (6) Q Dr Mundy made some conclusions about damage to CAC
 (7) portions of LaTouche Island?
 (8) A Yes as a matter of fact he did Dr Mundy's -
 (9) Q I may have misspoken Are you talking about the Chenega
 (10) portion on the top or the CAC portion?
 (11) A I was talking about the Chenega portion
 (12) Q Okay what did he conclude?
 (13) A His conclusion was that this parcel here is damaged for 21
 (14) years and it was also his conclusion that this parcel suffered
 (15) roughly \$2 5 million worth of damage
 (16) Q Did that include the 1500 to 2 000-foot mountain peaks in
 (17) the center of the parcel?
 (18) A Yes it did I was going to go on to say that in his -
 (19) before the oil spill he said that this parcel was worth these
 (20) mountains were worth \$3 million and after the oil spill he
 (21) says they're worth \$600 000 so they're just 20 percent left
 (22) residual and he blames it on the oil spill
 (23) MR PETUMENOS Your Honor I am going to object at
 (24) this point to the misrepresentation of Dr Mundy's work I
 (25) don't think this is accurate I don't think it's appropriate

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- (1) for this expert to be expounding on the testimony that the
 (2) jury's heard with respect to Dr Mundy
 (3) THE COURT Thank you counsel
 (4) BY MR DIAMOND
 (5) Q Did you draw conclusions about any parts of this parcel?
 (6) A Yes we did
 (7) Q You can tell us later -
 (8) THE COURT Hang on I have to deal with that
 (9) objection I am sorry I thought you were going to -
 (10) MR DIAMOND I'm sorry
 (11) THE COURT The objection is overruled and the reason
 (12) it's overruled is because this witness understanding of what
 (13) Mundy's analysis was is important so the jury can understand
 (14) what this witness conclusions are So the objection is
 (15) overruled
 (16) MR DIAMOND I'm sorry to interrupt you Okay you
 (17) can resume the stand
 (18) BY MR DIAMOND
 (19) Q You seem to know the parcels at issue pretty well in this
 (20) litigation Mr MacSwain Have you ever been to any of them?
 (21) A Yes I have I've been to these parcels many times
 (22) Q Which ones have you been to?
 (23) A Been to all the parcels
 (24) Q Just once once each?
 (25) A No I've been to the - we've been out in the field here

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- (1) working this job since 1990 and I've inspected these lands
 (2) each year I've been out viewing these properties oh a
 (3) number of - number of times I would say I was -
 (4) approximately 15 different trips were made to these subject
 (5) parcels as part of this job
 (6) Q When you say you visited them you mean you flew over
 them?
 (7) A No we - yes we did fly over them but we also visited
 (8) the parcels by boat and walked on the lands spent a great deal
 (9) of time out there
 (10) Q These were all in the neighborhood of one-day trips?
 (11) A No -
 (12) MR PETUMENOS Objection leading
 (13) BY MR DIAMOND
 (14) Q Were these all in the nature of one day trips or longer?
 (15) MR PETUMENOS Still leading
 (16) A No they were not
 (17) THE COURT Not leading objection's overruled
 (18) A Some trips were one day trips by airplane but also made by
 (19) helicopter and also by boat and then we'd have a little zodiac
 (20) and be out for at least a week at a time I'd estimate that
 (21) over the last four years I've been out in the field
 (22) approximately 60 days
 (23) BY MR DIAMOND
 (24) Q You say you used the word we Who did you make these
 (25) trips with?

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- (1) A Our - my partner in this job was Don Dorchester and my
 (2) team and also my associate Dan Chance who is a major player
 (3) as part of the evaluation team
 (4) Q Have you ever been to any of the intertidal zone on any of
 (5) the parcels?
 (6) A Yes I have been there many times
 (7) Q How about the interiors how have you inspected the
 (8) interiors?
 (9) A The interiors are - have been inspected by airplane
 (10) helicopter They re very difficult to get to steep rugged
 (11) terrain
 (12) Q Okay You ve made some charts for us or had them made
 (13) Let me show you DX10268
 (14) Am I on Joel?
 (15) What does this exhibit depict for us?
 (16) A This is a map that depicts our field inspections in 1990
 (17) As you can see there were three different overflights two of
 (18) which were fixed wing and one was by helicopter shows the
 (19) different areas we went to in Prince William Sound and the
 (20) outer Kenai
 (21) Q That was summer of 1990?
 (22) A Yes
 (23) Q Let me show you DX10269 What s this?
 (24) A Again that s another map that shows our field inspections
 (25) or the places that we went to and this particular map depicts

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- (1) of Kodiak Island
 (2) Q Okay I don't have any more maps did you see any of the
 (3) parcels in 1993?
 (4) A Yes I did
 (5) Q Tell us what you did
 (6) A Made several more trips to Kodiak and also made another
 (7) trip to Prince William Sound
 (8) Q How about 1994?
 (9) A 1994 I made a couple more trips again another trip to
 (10) Kodiak and also a trip to Prince William Sound and the outer
 (11) Kenai
 (12) Q Have you ever gone out and looked at any of these parcels
 (13) particularly the shoreline segments with any of the scientists
 (14) who ve been studying scientific issues?
 (15) A Yes As a matter of fact I have gone out with a
 (16) scientist
 (17) Q Who is that?
 (18) A The two gentlemen that testified earlier I was out with
 (19) Dr Page and Dr Gilfillan
 (20) Q Additionally have you been out to any of the subdivisions
 (21) that you showed on the video the recreational subdivisions?
 (22) A Yes I have I ve inspected all of the subdivisions in
 (23) Prince William Sound and we made detailed field notes and
 (24) photography and got a real good feel for what the subdivisions
 (25) are like

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- (1) the route that we had by the boat We were out oh varied
 (2) but sometimes a week at a time Went out of Seward and up to
 (3) Western Prince William Sound and made a tour and came back
 (4) to
 (5) Seward went back all the way down outer Kenai coast visited
 (6) each one of all the shorelines very carefully
 (7) Q How much time did you spend making this trip?
 (8) A This was a good part of the month of July the summer of
 (9) 1991
 (10) Q That s the only time you ve been there in 1991?
 (11) A No I went out again in 91
 (12) Q I show you DX10270 Is this what - where you went out in
 (13) the fall of 1991?
 (14) A Yes this is a fall trip was about a week-long tour that
 (15) we had We didn t finish all the areas we wanted to see in
 (16) 91 so we went out again the first week in September and
 (17) visited both Western Prince William Sound and also spent the
 (18) evening at Cordova came up the eastern part of the Sound and
 (19) spent the evening in Virgin Bay at Ellamar subdivision
 (20) Q You did some more touring in 1992 of these parcels didn t
 (21) you?
 (22) A Yes I did
 (23) Q Take a look at 10271 Tell the jury what this is
 (24) A Made a number of trips in 1992 Also as you see by the
 (25) map here helicopter and boat trips and in addition to Prince
 William Sound and the Kenai we did a very thorough inspection

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- (1) Q A little bit later today or maybe in fact tomorrow
 (2) morning you re going to be talking about some comparables
 (3) and
 (4) transactions involving property Have you been out to look at
 (5) those?
 (6) A Yes I have
 (7) Q I m trying to think back whether some of the experts that
 (8) we have heard have not made any or certainly not as extensive
 (9) field visitations as you Why - why do you spend so much time
 (10) in the field?
 (11) MR PETUMENOS Judge I want to object to the
 (12) commentary prior to the asking of the questions
 (13) MR DIAMOND I withdraw it and I will refrain
 (14) BY MR DIAMOND
 (15) Q Why did you spend so much time from 1990 to 1994 looking
 (16) at
 (17) these parcels?
 (18) A Well it s important if you re appraising property to get
 (19) out there and see what it looks like and that s the first
 (20) thing you do in any assignment you have As an appraiser you
 (21) need to get out and get down and walk around and understand
 (22) the - you know what the property s like
 (23) Also we need - a very important part of our job since
 (24) we re talking about such a large area we did a land use study
 (25) wanted to see all the different types of land uses in the area
 so it s very important to get out there It s difficult to do
 an appraisal without - particularly with a large area like

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- (1) this It takes a lot of time
- (2) MR DIAMOND Your Honor I would move into evidence
- (3) the trip maps DX10268 10269 10270 and 10271
- (4) (Exhibit DX10268 10269 10270 and 10271 offered)
- (5) MR PETUMENOS No objection here Judge
- (6) MR DIAMOND And the two population maps DX13416 2
- (7) and 13416 1
- (8) (Exhibit DX13416 2 and 13416 1 offered)
- (9) MR PETUMENOS No objection
- (10) THE COURT They re admitted all of the exhibits
- (11) (Exhibit DX10268 10269 10270 10271 DX13416 2 and
- (12) 13416 1 received)
- (13) MR DIAMOND And the videotape DX13181 C
- (14) (Exhibit DX13181 C offered)
- (15) THE COURT It s admitted
- (16) (Exhibit DX13181 C received)
- (17) MR STOLL Your Honor could I be heard later on the
- (18) narration of it?
- (19) THE COURT Sure
- (20) MR PETUMENOS I would like to be heard too
- (21) MR DIAMOND I would like to be heard too
- (22) MR PETUMENOS Anybody else?
- (23) BY MR DIAMOND
- (24) Q Mr MacSwain I want to change gears a little bit and I
- (25) want to talk about the different income uses that there might

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- (1) could you rent the mainland property for \$2 7 million a year?
- (2) A No you couldn t In the real world this is not
- (3) possible
- (4) Q Explain
- (5) A Well to get a rent of \$2 7 million you got to have
- (6) somebody that wants to pay that amount of money and in the
- (7) real world this is just not possible It has to be a - you
- (8) have to have a some type of commercial business to justify
- (9) paying That s a lot of money \$2 7 million it s not real
- (10) Q No use you could make of 30 000-acre parcel in Prince
- (11) William Sound that would generate that in your opinion?
- (12) A No it s not possible in my opinion
- (13) Q How about some of these other large parcels that are the
- (14) subject of this litigation thousands and thousands of acres
- (15) In your view could you rent those for nine percent of their
- (16) appraisal valuation?
- (17) A Not the large parcels That s not what happens in the real
- (18) world
- (19) Q Can these properties generate much income at all?
- (20) A Very little income is what these property use Matter of
- (21) fact I agree with - one thing I agree with Dr Mundy on he
- (22) stated that there s very little income that s received from
- (23) these lands and that is - that is correct
- (24) Q What is the percentage of Prince William Sound lands that
- (25) are covered by leases?

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- (1) be for large tracts of wilderness property That s something
- (2) you looked at?
- (3) A Yes it is
- (4) Q I m going to show you a page and I m going to put it on
- (5) the Elmo this is from plaintiffs exhibit 1541 in evidence
- (6) Dr Mundy s report I think you ve already told us that you ve
- (7) examined that prior to coming here today concerning the
- (8) Chenega s mainland parcel You re familiar with Chenega s
- (9) mainland parcel?
- (10) A Yes I am
- (11) Q That s the one located right up here on the mainland?
- (12) A Yes that is correct
- (13) Q Joel?
- (14) I m going to zoom into the right-hand impaired valuation
- (15) portion of this Incidentally how large a parcel is the
- (16) mainland parcel?
- (17) A This is a big parcel It s approximately 30 000 acres
- (18) Q Dr Mundy computed the unimpaired income stream of this
- (19) property using a 9 percent rental rate did he not?
- (20) A Yes that is correct
- (21) Q And he derived an assumed income stream or revenue
- (22) stream
- (23) of close to \$2 7 million a year for 30 years Did I accurately
- (24) state that?
- (25) A Yes you are correct
- (26) Q Let s talk real world Mr MacSwain In the real world

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- (1) A Very small percentage of lands covered by leases in Prince
- (2) William Sound
- (3) Q How about plaintiffs property?
- (4) A Likewise very little of their lands are leased
- (5) Q If you were a land manager and you had responsibility for
- (6) generating income with some of these large parcels what -
- (7) what commercial or income generating uses could you make?
- (8) A The existing land rentals are few and far between but you
- (9) have some recreational there s recreational sites fish sites
- (10) and there s - I can recall one commercial tourism lease that
- (11) sort of thing
- (12) Q You re not talking about the entirety of the parcel
- (13) talking about pieces of it?
- (14) A Yes just a small part For example the recreational part
- (15) lease that I m thinking about is a one acre site
- (16) Q How about timbering?
- (17) A There are - there is some timberlands but those are where
- (18) the Native Corporations sell the timber rights not rentals
- (19) Q While we re on the subject did you look at the issue of
- (20) how if at all the oil spill affected or disrupted any
- (21) timbering operations in Prince William Sound and the Gulf of
- (22) Alaska?
- (23) A Yes we did We looked at that carefully
- (24) Q What did you conclude?
- (25) A There was not any effect on timber operations due to the

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- (1) oil spill
 (2) Q Let's talk about the effects the spill had according to
 (3) your research on income producing uses that the plaintiffs
 (4) were making of their property before the spill That is
 (5) something you've studied?
 (6) A Yes it is
 (7) Q What did you find?
 (8) A The - excuse me could you repeat that question please?
 (9) Q What did you find what did you conclude with respect to
 (10) the effects of the spill on the income that was being generated
 (11) by parcels owned by plaintiffs that had been under lease before
 (12) the spill?
 (13) A We have found that the rental activity increased somewhat
 (14) after the spill and the amount paid actually increased in a few
 (15) cases after the spill
 (16) Q Did you come prepared ready to talk specifics you have
 (17) some examples?
 (18) A Yes I do I have some examples
 (19) Q What's the first one?
 (20) A The first one that comes to mind maybe I can show you on
 (21) the map here
 (22) Q I'm going to get the easel Which map do you want?
 (23) A The - the big guy there will work
 (24) Q This is our high tech solution to this
 (25) A Okay the first one comes to mind that I think the jury's

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- (1) so we could - we could see what happened and make our
 (2) analysis There was also a real estate appraisal done on the
 (3) property
 (4) MR PETUMENOS Judge I still would like to hear
 (5) what - what he looked at not conclusively but what
 (6) information he had
 (7) MR DIAMOND Your Honor I think he just said he
 (8) looked at all the pieces of paper he could get leases
 (9) THE COURT If it's a foundational objection the
 (10) objection's overruled
 (11) MR DIAMOND Okay
 (12) BY MR DIAMOND
 (13) Q What - tell us about what happened to the - Mr Porter's
 (14) lease at Busby Island after the spill?
 (15) A Well the rent increased after the spill Right after the
 (16) oil spill rent went up
 (17) Q How come?
 (18) A Well there was an appraisal that was done on the property
 (19) in 1989 and based on the appraisal the - the lease was
 (20) adjusted upwards substantially
 (21) Q What was the outfit that did the appraisal?
 (22) A It was appraisal firm called Mundy Day and Associates
 (23) Q That's not our Mr Mundy is it? Dr Mundy who testified
 (24) here?
 (25) A I'm not sure if I understand your question our but it's

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- (1) heard about before right here on Busby Island just a few
 (2) miles away from the Bligh Reef is a recreational site that is
 (3) leased by the Tatitlek Native Corporation to a fellow from
 (4) Fairbanks called Harry Porter It's a recreational site lease
 (5) Q When you say it's owned by Tatitlek is that a parcel
 (6) that's - for which they're claiming damages here?
 (7) A Yes that is correct
 (8) Q All right How far back did the Porter lease go?
 (9) A It's a small parcel just less than an acre 75 acres
 (10) Q In time how far back did Mr Porter start leasing that
 (11) property if you know?
 (12) A Mr Porter entered into a lease with Tatitlek Corporation
 (13) in 1980
 (14) MR PETUMENOS As we get into this transaction
 (15) Judge if we could have some foundation for the statements that
 (16) are about to be made I would make an anticipatory objection
 (17) BY MR DIAMOND
 (18) Q Okay tell us all the things that you've done to inform
 (19) yourself of the facts and circumstances surrounding
 (20) Mr Porter's lease both before and after the spill
 (21) A We did everything that a good real estate appraiser would
 (22) do We got copy of the lease got a copy of all the documents
 (23) correspondence We asked lawyers that are involved give us
 (24) find us everything you can about this transaction so we wanted
 (25) to get the - we wanted to get the history on the transaction

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- (1) Dr Mundy who has previously testified here in this trial
 (2) Q This is like a family after a while?
 (3) MR PETUMENOS Excuse me I'm confused is it
 (4) Dr Mundy that did the appraisal?
 (5) THE COURT That's the answer
 (6) MR PETUMENOS Okay
 (7) A My testimony is it was the appraisal firm of Mundy Day and
 (8) Associates is the one that did the appraisal
 (9) BY MR DIAMOND
 (10) Q Who actually signed the letter was it Mr Mundy or
 (11) somebody else in his firm?
 (12) A It was his partner Jack Day is the one that did the
 (13) appraisal
 (14) Q So the lease was renewed after the spill and the price
 (15) adjusted upward?
 (16) A Yes substantially
 (17) Q From what to what?
 (18) A Mr Porter was paying \$500 per year for this site and
 (19) based on the Mundy Day appraisal it was increased to \$1200
 (20) per year
 (21) Q Did the appraisal say anything about stigma?
 (22) A No it did not
 (23) Q Did Mr Mundy's firm just miss the fact that there had been
 (24) an oil spill?
 (25) A No the - they cite the oil spill as one of the signs of

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- (1) increased activity in the area and also the appraisal talks
- (2) about economy being real bad except for the oil spill and its
- (3) increased activity
- (4) Q What conclusions did you draw from this transaction?
- (5) A I concluded that this rental as well as others that there
- (6) were increases in rental income in Prince William Sound after
- (7) the oil spill
- (8) Q Is this a parcel for which Tattilek is claiming damages?
- (9) A Yes it is These are Tattilek lands here this general
- (10) area right here up in here
- (11) Q Did Tattilek suffer any decline in income on Busby Island
- (12) as a result of the spill?
- (13) A No As I stated the - the rent went up There was no
- (14) decline in income
- (15) Q Did you look at the other side of the transaction
- (16) Mr Porter?
- (17) A Yes I did I also examined correspondence that Mr Porter
- (18) had to Tattilek Corporation and I think it was in the fall of
- (19) 1989
- (20) Q Was Mr Porter at least based on that review suffering
- (21) any symptoms of stigma?
- (22) A Just the opposite Mr Porter was very aggressive He
- (23) said that he was - he's happy to continue his lease and that
- (24) he was willing to pay for the rent in advance
- (25) Q The Busby Island property is not far from where the Exxon

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- (1) Valdez went aground is it?
- (2) A No it's not It's located just a few miles away from
- (3) this - the closest transaction I know to the incident
- (4) Q You came prepared to talk about another lease that along
- (5) with the Busby Island lease sort of brackets Bligh Reef
- (6) Which one is that?
- (7) A Yes that's correct That would be the next closest lease
- (8) that I'm aware of and it's a commercial lease here in Growler
- (9) Island
- (10) Q Tell us about it
- (11) A Growler Island is a lease from CAC Mr Petumenos client
- (12) to a company called Stan Stephens Charters out of Valdez and
- (13) he runs a recreational tourism business there
- (14) Q Have you been there?
- (15) A Yes I have
- (16) Q Is this on land for which damages are being claimed in this
- (17) lawsuit?
- (18) A Yes it - that's correct
- (19) Q Oiled or unoiled property?
- (20) A This is an unoiled property
- (21) Q Tell us what happened to Mr Stephens lease or the income
- (22) that was generated by Mr Stephens lease before the spill
- (23) compared to after the spill
- (24) A The income generated by this lease increased after the oil
- (25) spill

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- (1) Q Why was that?
- (2) A Well this lease is based on the number of people that
- (3) Mr Stephens brings out to this island He has a tourism
- (4) business What they do is overnight or day trips and it's -
- (5) they go out and view the glacier and the number of people
- (6) increased after the oil spill so therefore the rental that
- (7) was paid to CAC increased correspondingly The lease was
- (8) based
- (9) on the number of people that - there's a per-head rental rate
- (10) and more people more rent
- (11) Q What conclusions did you draw from your examination of the
- (12) circumstances surrounding the Stephens lease and the income
- (13) it generated?
- (14) A That was another example to me that rentals were increasing
- (15) in Prince William Sound after the oil spill
- (16) MR DIAMOND You can retake the stand
- (17) May I approach counsel approach?
- (18) (Bench conference off the record)
- (19) THE COURT I'm going to - if you can just go in the
- (20) nextdoor room I'll try to bring you back in quickly
- (21) (Jury out at 1 09 p m)
- (22) MR DIAMOND Your Honor I'll repeat the proffer that
- (23) I made at - made at side bar that the claim here is that
- (24) these parcels were damaged as a result of the spill And we've
- (25) seen charts from both Dr Mundy and Dr Green saying they
- (26) should - the plaintiffs should be compensated because they've

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- (1) lost use of their property and that's an incident of
- (2) ownership
- (3) The purpose of the testimony that I want to introduce is to
- (4) show that in fact that did not occur that in many respects
- (5) commercial income generating use did not decline it went up
- (6) and in some instances it went up because property that before
- (7) the spill had no demand suddenly was desired by Exxon and
- (8) other
- (9) people involved in the cleanup for use as staging areas and for
- (10) other purposes and that they entered into leases with a number
- (11) of Native Corporations for the use of their property
- (12) The conclusion to be drawn from that is that in terms of
- (13) the effect of the spill on the production of income commercial
- (14) utility of this land it in fact increased as a result of the
- (15) spill It was not as at least two experts have said totally
- (16) devastated and totally wiped out
- (17) THE COURT What volume are we talking about? How
- (18) much value are the leases do you know?
- (19) MR DIAMOND Mr MacSwain have you aggregated it?
- (20) A Yes I have some rough ballpark estimates It's
- (21) substantially higher than - well it's higher than the Porter
- (22) lease which was \$1200 a year There's -
- (23) THE COURT Just give me an overall aggregate figure
- (24) A I'll give you the range That would be twenty \$30 000
- (25) just guesstimate
- (26) THE COURT What significance do these leases have to

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- (1) you?
- (2) A It shows that there was a lot of leasing activity in 1989
- (3) in that the - it's something that we took into consideration
- (4) in our work as well as -
- (5) THE COURT In what sense? What conclusion do you
- (6) draw from the leases that were from the oil company and the oil
- (7) company related people in order to provide staging areas for
- (8) the cleanup? Do you - do you conclude from that that - that
- (9) land values these lands values weren't damaged is that an
- (10) important part of your analysis?
- (11) A No the - we do have land damages in our work Our - my
- (12) conclusion is that the rental received from the oil spill was
- (13) short term income and it didn't have a positive effect on land
- (14) values but it's something we took into consideration in our
- (15) analysis It showed leasing activity It's all part of that
- (16) market data that we collected We didn't conclude that based
- (17) on this short term sudden you know high rentals
- (18) For example in Valdez some of the other communities
- (19) there were leases where property owners received you know
- (20) bonus for that year and our conclusions were that you know
- (21) this is a short term spike in the market but the - as far as
- (22) any impact on property values we didn't conclude that nor
- (23) likewise did we deduct from our damages because the property
- (24) owners received this income but it is part of our analysis
- (25) As an appraiser you have to look - you can't ignore what's

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- (1) Mr MacSwain's testimony thus far and in fact they had a
- (2) value added because of the spill Because these plaintiffs
- (3) were earning money from this property which was allegedly
- (4) rendered worthless for a period of time that they otherwise
- (5) wouldn't have been making
- (6) THE COURT So I want to hear your argument to the
- (7) jury if I let this evidence in Tell me what you're going to
- (8) argue
- (9) MR DIAMOND My argument is let's look critically at
- (10) Dr Mundy's testimony and Mr Green's testimony and let's look
- (11) at all the goose eggs they have in the columns all the zeros
- (12) These properties were worth zero They couldn't be sold they
- (13) had no market value they couldn't be used for anything Does
- (14) that comport with the testimony that you've heard in this
- (15) case?
- (16) It doesn't for two reasons Number one the spill did not
- (17) have any overall or overriding effect on the income generation
- (18) capacities of these properties The leases that we've looked
- (19) at stayed in place and in some instances went up In
- (20) addition these plaintiffs were making money that they wouldn't
- (21) have made from their properties had there not been any spill
- (22) And in these particulars does that comport with zeros for the
- (23) value of these properties in years one two and three
- (24) Something's wrong with Dr Mundy's analysis He's not telling
- (25) you everything Something wrong's with Dr Green -

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- (1) out there and that was what my job was to be as
- comprehensive
- (2) as possible
- (3) THE COURT Tell me if I'm wrong I want to
- (4) understand You looked at it because it was a fact that - it
- (5) was important to investigate all the facts right?
- (6) A Yes sir Yes Your Honor
- (7) THE COURT You saw where there were these
- (8) transactions?
- (9) A I'm sorry?
- (10) THE COURT You saw that these transactions occurred?
- (11) A Yes we did That's what my job was to do - to look at
- (12) all the information
- (13) THE COURT You decided that these transactions had no
- (14) part in your analysis of damages in this case right?
- (15) A Yes that is correct
- (16) THE COURT Thank you
- (17) MR DIAMOND With respect to market value I don't
- (18) know that the witness is relying on them I want to introduce
- (19) this evidence independent of their damage analysis simply so
- (20) that I'm in a position to argue that in terms of the use value
- (21) of these properties which we have been told by two experts
- (22) went to zero no residual value at all because of the spill
- (23) that is not true
- (24) In fact they had value They had value generally
- (25) commercially That was not disturbed and that's

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- (1) THE COURT You mean the oil spill because it
- (2) required large amounts of workers for cleanup to go to the area
- (3) increased the value of the property
- (4) MR DIAMOND You used value
- (5) THE COURT That's what the argument is
- (6) MR DIAMOND You used value I'm not talking market
- (7) value that was transitory
- (8) THE COURT Increased the income stream
- (9) MR DIAMOND Increased the income generation yes
- (10) and put money in the pockets of landowners who are claiming
- (11) that their properties were rendered valueless
- (12) THE COURT All right I'm not going to allow it
- (13) MR DIAMOND Your Honor I'm going to ask him -
- (14) THE COURT At the very least I'm not going to allow
- (15) it under Rule 403 Clearly the prejudicial effect outweighs
- (16) the minimal probative value especially in view of what the
- (17) witness has said about these transactions
- (18) MR DIAMOND I'm going to ask him some general
- (19) questions about Native Corporation leases and the effect of the
- (20) spill whether it ended up in any being canceled whether it
- (21) ended up in any leases being renegotiated That doesn't really
- (22) implicate Exxon I'm just asking him general questions about
- (23) the leasing market after the spill
- (24) THE COURT I think that's fine sure
- (25) MR DIAMOND I think so too

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- (1) MR PETUMENOS I have no objection with that
 (2) THE COURT How much further do you think you have to
 (3) go?
 (4) MR DIAMOND I m not going to conclude with him so
 (5) why don t we go to 1 30 and then we ll go
 (6) THE COURT We ll go to 1 25 and then we ll quit
 (7) MR DIAMOND Actually Your Honor I have a couple
 (8) more questions and I start a segment that I would like to do
 (9) intact May I have a minute to confer?
 (10) THE COURT Sure
 (11) MR PETUMENOS If it matters Judge I m tired
 (12) THE COURT Yeah I am too I understand how you
 (13) feel counsel
 (14) MR DIAMOND Might I suggest that this would be an
 (15) opportune time for the 90 seconds that it ll take to play the
 (16) Katzke videotape can we do that now? I thought that that was
 (17) going to be played at a time -
 (18) THE COURT Just say whether or not you - if you
 (19) object to it I won t allow it to be played
 (20) MR STOLL I object Your Honor
 (21) THE COURT We ll do it another time So you want to
 (22) break for now?
 (23) MR DIAMOND Yes I do
 (24) THE COURT I m not going to bring them in here You
 (25) simply let them go for the day tell them not to talk about the

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- (1) case at all
 (2) THE CLERK Tomorrow 8 30
 (3) THE COURT Yes You may step down Thanks
 (4) MR DIAMOND I realize you re tired Mr Petumenos
 (5) and I have another issue that s going to come up with respect
 (6) to this witness
 (7) THE COURT With this witness? What s the issue?
 (8) MR DIAMOND The issue is whether the witness can
 (9) testify about interviews that he conducted in connection with
 (10) formulating his opinion That was roughly half of the work
 (11) that he did talking to market participants in various segments
 (12) of the market both geographically and commercially what they
 (13) perceived and how they saw the spill impacting their
 (14) particular sector of the world
 (15) THE COURT And he s - I ll just wait until he gets
 (16) out of the courtroom
 (17) He s going to testify that that s a common procedure used
 (18) by people in his field in order to come to their conclusions?
 (19) MR DIAMOND It s a required procedure
 (20) THE COURT The interview of the various people who
 (21) like assessors and things like that
 (22) MR DIAMOND He talked to assessors he talked to
 (23) brokers he talked to real estate salespeople he talked to
 (24) lenders he talked to developers he talked to subdividers and
 (25) each of them brings a perspective to bear on his ultimate

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- (1) opinions in the case He is going to identify the range of
 (2) people he talked to and then he s going to get into the
 (3) discussion of some generalities what was the perspective that
 (4) you learned from this group of people and how did that
 (5) influence your opinion and he s going to get into some
 (6) specific examples With respect to this person what kind of
 (7) information did you rely on in formulating your opinion I
 (8) will point out to the Court that in many cases these are the
 (9) same people that Dr Mundy interviewed They re the same
 (10) people that Dr Mundy relied on in formulating his opinions and
 (11) they re all contained in Dr Mundy s report
 (12) We have long long ago furnished during the discovery
 (13) interview notes prepared by Mr MacSwain of all of these
 (14) interviews and I know for a fact that many have been - many
 (15) of them have been contacted by the plaintiffs and interviewed
 (16) themselves in addition to the interviews that Dr Mundy was -
 (17) had conducted
 (18) THE COURT All right thank you Mr Petumenos?
 (19) MR PETUMENOS Thank you Judge I think I would
 (20) like to approach the Court with the exhibits that I think give
 (21) the clear picture of the nature of our objection
 (22) MR DIAMOND There s really only one That s two
 (23) copies of the same thing
 (24) MR PETUMENOS Why don t you show me the ones you
 (25) intend to introduce and I ll -

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- (1) MR DIAMOND I don t intend to introduce any of
 (2) them I intend to have them testify -
 (3) MR PETUMENOS To the content in here?
 (4) MR DIAMOND - to the content of these This is
 (5) Exhibit 10238A
 (6) MR PETUMENOS Wait you re going too fast for me
 (7) Okay that helps a lot
 (8) THE COURT Okay I see it It s Exhibit DX10238A 5
 (9) MR PETUMENOS The issue I think here is clearly
 (10) wrong under the evidence rules as to how far the survey
 (11) business goes and how far if you recall during the examination
 (12) of Mr Roddewig the objections were that I was trying to draw
 (13) the line at was the statements by Mr Roddewig that were based
 (14) upon the personal knowledge of the witness - of the
 (15) out of court declarant interview as opposed to the conclusion
 (16) and opinion of the out of court declarant surveyed who would
 (17) be
 (18) required to exercise his judgment his analysis his expertise
 (19) his experience to make inferences from the things that he
 (20) observed and then come to an overall conclusion as to yet
 (21) another matter
 (22) What we have here is one expert attempting to put into
 (23) evidence the expert opinion of another expert never disclosed
 (24) no report no cross examination no deposition no analysis
 (25) if - if the analysis took place it took place unknown to the
 plaintiffs and this witness then will be putting expert

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- (1) witness opinion in on expert witness opinion And there has to
 (2) be a line under Rule 703 and 704 on the kinds of facts and
 (3) data relied upon so that the other side is not prejudiced by
 (4) the extraneous information
 (5) The offer of proof tears to shreds the -- both courts
 (6) federal and state -- pretrial orders relating to the orderly
 (7) discovery and understanding of the expert witness process
 (8) would place upon the burden of the plaintiffs to go out and
 (9) challenge the expert testimony that underlies this expert
 (10) testimony for each of the witnesses involved who are shown to
 (11) the jury to be giving opinions about the market and about the
 (12) oil spill impact on the market and are being -- their
 (13) qualifications are being stated as people who are in a position
 (14) to know This is beyond the pale
 (15) It would seem to me that the most this witness can do is
 (16) say that he surveyed He conducted surveys of the market and
 (17) based upon those surveys he has made the conclusion that
 (18) there's been a -- there's been no impact to the market or
 (19) whatever it is he's going to say But for him to be going
 (20) through as the exhibits do or orally testify one by one that
 (21) each of these people know what they're talking about are
 (22) experienced are qualified and they reached the opinions
 (23) derivative to his opinion is improper it's prejudicial and it
 (24) shouldn't be allowed
 (25) THE COURT Thank you counsel

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- (1) MR DIAMOND Your Honor just so the record is clear
 (2) these are not the only people he talked to He talked to
 (3) somewhere in the neighborhood of 600 market participants
 (4) These are representatives examples that he has selected from
 (5) his interview notes which Mr Petumenos has had for years as
 (6) indicating the kind of reaction he got in various segments of
 (7) the real estate market I have two very strong differences
 (8) with Mr Petumenos as a matter of law
 (9) Number one I don't think this is -- this is expert opinion
 (10) that he is relying on But before we get to that point the
 (11) only question here under the rules is whether this is the kind
 (12) of information that an expert of Mr MacSwain's profession
 (13) would routinely rely on If it is and I think there's no
 (14) question about the fact that it is he is entitled to rely upon
 (15) it and he's entitled to -- he's entitled to talk about it
 (16) Experts can testify about what other experts have told them and
 (17) I have cases in front of me if you'd like some citations for
 (18) that proposition
 (19) But let's ask first are we dealing with what would be
 (20) expert testimony if it came in live in court I don't think it
 (21) is and you know I cite no less than authority the astute
 (22) trial Judge who decided Schymanski versus Coventz 674 P2d
 271
 (23) THE COURT That was a good judge I'll take judicial
 (24) notice of that
 (25) MR DIAMOND I was really thinking of the Supreme

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- (1) Court Justice who wrote the appellate decision
 (2) THE COURT Too bad Actually I'll take judicial
 (3) notice of that too
 (4) MR DIAMOND It is on all fours You admitted as lay
 (5) testimony a third party's opinion as to the value of property
 (6) and Judge Serdahely wrote the evidence established that
 Oatman
 (7) suggests some firsthand knowledge about the property that
 (8) Oatman visited the sites an hour and a half prior to giving the
 (9) testimony Oatman made some inquiries about the real estate
 (10) market in the area and Oatman had experience and expertise in
 (11) the real estate field to enable him to evaluate the data he
 (12) derived from the firsthand perceptions and Mr Oatman was
 (13) declared by both the trial court and the Supreme Court as a --
 (14) as a witness giving lay opinion testimony not expert opinion
 (15) testimony
 (16) But even if we did not have such compelling and convincing
 (17) authority in the State of Alaska the fact remains that even if
 (18) you view Mr Nachez (phonetic) who is a real estate broker
 (19) specializing in remote Prince William Sound property values as
 (20) an expert when he says that his clients didn't complain to him
 (21) even if you assume that's expert testimony there is nothing
 (22) wrong with an expert relying on and talking about what other
 (23) experts have told him
 (24) And I don't have to cite anywhere outside the trial
 (25) transcript Dr Johnson close to my heart as she is relied on

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- (1) tons of expert opinions concerning spill impacts to
 (2) archaeological sites from admitted experts both on the Native
 (3) Corporation side and the Exxon side who were not in court who
 (4) formulated opinions and she came in and testified as to the
 (5) conclusions she reached based on -- on what other experts had
 (6) observed in the field
 (7) This is no different That was fair game because we knew
 (8) who the people were We had been provided in discovery
 (9) Dr Johnson's backup and as to matters relevant It came in
 (10) I just don't see this as distinguishable from that
 (11) So our positions are they're not -- Mr MacSwain is not
 (12) going to be summarizing expert testimony He's going to be
 (13) summarizing lay opinions that would be admissible in their own
 (14) right And number two even if you consider them experts it
 (15) comes in because he's entitled to rely and talk about what
 (16) other experts have told him
 (17) THE COURT Thank you
 (18) MR PETUMENOS Two points Judge
 (19) This application's being made under Rule 705(c)
 (20) Secondly the case that's being cited if I'm not mistaken
 (21) related to a specific piece of property If you take a look at
 (22) what's being offered here in these exhibits it's nothing of
 (23) the sort It is not about somebody who had perceived facts or
 (24) data relating to a particular house or a particular lot We're
 (25) talking about vague and amorphous statements about entire

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(1) markets I - in reviewing appraisals I've never seen a
 (2) measurable effect either positive or negative because of the
 (3) Exxon Valdez oil spill on property values No market
 (4) resistance to purchasers purchasing recreational property
 (5) parentheses in general on Kodiak Island due to the oil
 (6) spill and so on
 (7) If you look at these quotes you will discover that the
 (8) limit exception that's in the common law relating to a lay
 (9) person's ability to talk about value relating to a specific
 (10) property to which he's familiar is markedly different and the
 (11) case is markedly different from what's being attempted here
 (12) The next two points are we have had these interview notes
 (13) since the production of expert reports when fact discovery was
 (14) closed and so that we were without the benefit of the
 (15) discovery process to discuss with these witnesses what they
 (16) actually said
 (17) I will tell you that some of the phone calls and the
 (18) conversations we've had with some of the people that
 (19) Mr. MacSwain has interviewed are coming up with a different
 (20) story than some of the matters that are being - that they're
 (21) being quoted on and it raises the specter in rebuttal of going
 (22) through and calling to the stand selected people to come in and
 (23) say hold it nobody told me that what I was going to be doing
 (24) is coming up with an opinion to be introduced in a court of law
 (25) about an oil spill nobody told me we were talking about remote

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(1) testimony is - and the testimony of these statements is within
 (2) the meaning of the rule These are - these are facts or data
 (3) of a type reasonably relied upon by experts in a particular
 (4) field in forming opinions or inferences on a subject
 (5) Now that - that isn't the end of the question If you go
 (6) to Rule 705(c) that says when the underlying facts or data
 (7) would be inadmissible in evidence for any purpose other than to
 (8) explain or support the expert's opinion or inference the Court
 (9) shall exclude the underlying facts or data if the danger that
 (10) they will be used for an improper purpose outweighs their value
 (11) in support for the expert's opinion If the facts or data are
 (12) disclosed before the jury a limiting instruction by the Court
 (13) shall be given upon request
 (14) My answer to that is that the danger that these facts or
 (15) data will be used for an improper purpose does not outweigh
 (16) their value as support for the expert's opinion but I'll give
 (17) a limiting instruction as the rule says if one of the parties
 (18) requests it and if they request it in writing and I approve
 (19) it
 (20) MR. PETUMENOS We do request it and I would make a
 (21) further request that the instruction be given at the time that
 (22) the testimony comes in
 (23) THE COURT Sure and I think that's appropriate Do
 (24) you have a limiting instruction?
 (25) MR. PETUMENOS I will have it for the Court in the

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(1) properties when I got the phone call I was talking about
 (2) downtown Kenai or downtown Kodiak and all those
 (3) clarifications
 (4) if this material comes in in the form it's coming in So I
 (5) think the Evidence Rule 705(c) protects us from the - from the
 (6) kind of prejudice that we're getting and the confusion and the
 (7) extended period of time that this rebuttal would require
 (8) I think the case is inapposite clearly and I think you
 (9) have to exclude these kind of remarks
 (10) THE COURT Thank you counsel
 (11) I know - Mr. Stoll I know your MO now so I'm going to
 (12) have you speak now because then I'm going to make the ruling
 (13) and -
 (14) MR. STOLL Your Honor I'm not going to - I'm not
 (15) going to
 (16) THE COURT You thought Mr. Petumenos was right on
 (17) right on the mark right?
 (18) MR. STOLL Exactly
 (19) THE COURT Thank you
 (20) This is - this is a problem I think under Rule 703 and
 (21) 705 A witness expert witness can use as the basis of his
 (22) opinion the facts or data which are perceived by or made known
 (23) to him at or before the hearing Facts or data need not be
 (24) admissible in evidence but must be of a type reasonably relied
 (25) upon by experts in a particular field in forming opinions or
 inferences upon the subject It seems to me that this

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(1) morning or this afternoon if you like
 (2) THE COURT Do me a favor will you get it to my
 (3) chambers say around four and I'll be able to look it before
 (4) I leave today
 (5) MR. STOLL Your Honor can I just ask a question for
 (6) clarification?
 (7) THE COURT Uh huh
 (8) MR. STOLL Can the witness testify can Mr. MacSwain
 (9) testify not only to facts and data but to opinions rendered by
 (10) the people? In other words this is not simply - not simply
 (11) ask you know were there so many transactions you know I
 (12) did
 (13) 300 transactions last year did 300 transactions this year but
 (14) in addition to that the ultimate issue in the case was there
 (15) an impact on the oil spill could he testify to that also?
 (16) THE COURT Well first that isn't the ultimate issue
 (17) in this case
 (18) MR. STOLL That's one of the ultimate issues
 (19) MR. DIAMOND May I make one observation?
 (20) THE COURT No First that is not the ultimate issue
 (21) in this case and second the answer to that question is yes
 (22) he can - if - assuming that he testifies foundationally that
 (23) this is the type of things that experts in his field normally
 (24) rely upon in order to base their opinions then and that other
 (25) people's opinions that they examine in detail get from those
 people who are involved perhaps in the real estate market

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- (1) are those things that they normally rely on in coming to their
- (2) conclusions the answer is yes they can he can testify to
- (3) those conclusions
- (4) MR STOLL We respectfully object to that conclusion
- (5) THE COURT That s the point that touches really on
- (6) the 705(c) problem and what I ve determined is that it s
- (7) probative value is not outweighed by its prejudicial effect
- (8) Unfair prejudicial effect -
- (9) MR STOLL Your Honor by this - I just want to ask
- (10) another question for clarification
- (11) THE COURT Yes
- (12) MR STOLL Can we - you re not making any ruling -
- (13) never mind
- (14) THE COURT Go ahead counsel Drop the other shoe I
- (15) want to know what s coming
- (16) MR STOLL Well I anticipate it s not - it s not
- (17) a - I m not asking a ruling on this It deals with rebuttal
- (18) because I m preparing rebuttal case so it s going to be - I
- (19) can anticipate fair extensive -
- (20) THE COURT I can anticipate it too you re entitled
- (21) to call your witnesses and if they say I never said this he s
- (22) lying there ll be a lot of testimony
- (23) MR DIAMOND I need to correct the record with
- (24) respect to two exhibits The population maps were
- (25) misidentified it should be 10416 1 and 2

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- (1) (Exhibits DX10416 1 and DX10516 2 offered)
- (2) THE COURT Those are the things that are in
- (3) MR DIAMOND Yes
- (4) THE COURT Okay Anything else to take up now?
- (5) MR PETUMENOS There is a problem I was concerned
- (6) about the probouleutic rule and the order you signed about
- (7) three exhibits per witness I m concerned about the probative
- (8) issue real estate issue that s before the Court
- (9) Mr Dorchester who I am worried is at the end of this
- (10) process and I don t want the Court to be in a position where
- (11) you re faced with cutting off essentially the appraiser is
- (12) being offered this witness apparently is fairly limited but
- (13) there are people on the list who are giving the real -
- (14) addressing the real estate issue between Mr Dorchester and
- (15) these last two witnesses on the subject of real estate and I m
- (16) becoming concerned although you ve stated the burden is on
- (17) the - and the risk is on the defendants I m worried because
- (18) if you re faced with that issue because would be hard pressed I
- (19) think you could enforce the order but the consequences would
- (20) be draconian and I don t want there to be any confusion about
- (21) the fact that that s the Court s order if you re going to
- (22) call real estate experts they re going to have to face the
- (23) risk
- (24) THE COURT Well if there s anything that opposing
- (25) counsel are educated on it s this issue Anything else?

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- (1) MR OPPENHEIMER Your Honor I don t know if you want
- (2) to take it up now or tomorrow but we do have our DX15494
- (3) which is Mr Roddewig s report
- (4) MR PETUMENOS Oh yes
- (5) THE COURT Yeah I would like to take that up now
- (6) that s good
- (7) MR OPPENHEIMER Would Your Honor like to hear our
- (8) position on it?
- (9) MR PETUMENOS It s my objection I think
- (10) MR OPPENHEIMER You re right let s hear it Tim
- (11) MR PETUMENOS I thought this offer was made for the
- (12) purpose of requiring me to object to it in front of the jury on
- (13) redirect because I can t believe the offer that if you take a
- (14) look at the - at the report which you ll do in a second it
- (15) is replete with all kinds of inadmissible material
- (16) We have not admitted a report I never even dreamed of
- (17) admitting a report in this case from any of the experts and I
- (18) think the position of Exxon here is from an evidentiary
- (19) standpoint a little petulant because Mr Mundy if you recall
- (20) was cross examined on his report and on the things that he said
- (21) and didn t say pages of his report were used on
- (22) cross examination I have been involved in some colloquy with
- (23) counsel over completeness in Rule 106 issues regarding if he
- (24) takes a page out of the report what other pages must go with
- (25) it so there s contextual completeness But the motion that

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- (1) all of his reports come in because he gets cross examined on
- (2) whether or not a particular chart fairly represents the issue
- (3) on a study that he made then allows the entire report to come
- (4) in is not a close question I don t think
- (5) MR STOLL Your Honor - excuse me I just want to
- (6) add there s two - two - at least two that I can recall where
- (7) we faced this very issue during plaintiffs case One was with
- (8) the - there was the five year after matter that was done by
- (9) the Trustees so called five year after study You - there
- (10) was reference to particular pages the pages could be shown to
- (11) the jury we offered the entire report They elicited that
- (12) those - those sections from the witness and you kept that
- (13) report out
- (14) In the case of Mr Carlson who testified there were
- (15) certain pages that were referenced in his testimony
- (16) Mr Oppenheimer objected to his report going in That was
- (17) sustained We put in only the pages that dealt with - that
- (18) were the charts that were testified to
- (19) So the - I recognize the Court is not - doesn t have to
- (20) be consistent as you indicated yesterday but there s a
- (21) fairly - I think it s just classic hearsay in this
- (22) THE COURT Counsel?
- (23) MR OPPENHEIMER Your Honor I think the Court can be
- (24) completely consistent
- (25) THE COURT I need to see it

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(1) MR OPPENHEIMER Sure absolutely What clearly came
 (2) across I think from the cross-examination was an attempt to
 (3) discredit the witness on the grounds of - on the grounds of
 (4) disclosure And the consistent theme was that he was hiding
 (5) information from the jury and I think with this witness that s
 (6) particularly inapposite because if anybody has disclosed data
 (7) it is this witness and Clarion and I think that it is
 (8) imperative for us to dispel the notion before this jury that
 (9) there was anything that they weren't being told
 (10) I don't - I don't think that there s any question of what
 (11) the intent was and I think the effect that some of the
 (12) questions before some of the answers came out was to suggest
 (13) that there was - there was an issue of nondisclosure and this
 (14) is one of the most thoroughly disclosed databases I think you
 (15) could ever ask for He doesn't - there isn't anything that
 (16) came out in his cross Your Honor that wasn't in his report
 (17) basically And I think it s important for the jury to
 (18) understand that that s the case and that that s the nature of
 (19) their work
 (20) And I would be happy to have it admitted for the purpose of
 (21) that point I m not trying to - to do it otherwise and I
 (22) think that s not dissimilar from the Court s ruling yesterday
 (23) when Mr Mundy s article was introduced I might add to show
 (24) bias on the part of the author of a different report that this
 (25) was a report that Mr Roddewig was aware of I think frankly

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(1) the cross examination of Mr Roddewig was tough and was
 (2) designed to demonstrate a real significant deceitfulness I
 (3) don't think it succeeded but that s not going to be comforting
 (4) without all the evidence in and I think we re entitled to
 (5) establish that this is - this is a fellow who s put all of his
 (6) data on the table for examination and is hiding nothing
 (7) Whether you agree or disagree with his conclusions the fellow
 (8) didn't hide anything
 (9) THE COURT Okay thank you counsel This report
 (10) is - I don't know how many pages it is It s hundreds of
 (11) pages though correct?
 (12) MR OPPENHEIMER It s voluminous yes
 (13) THE COURT And certainly the cross-examination
 (14) brought in an issue disclosure was one thing it brought into
 (15) issue and the thoroughness of his analysis was another since
 (16) he concentrated on four in depth studies and there was lots of
 (17) other data there too But the direct was thorough and the
 (18) cross was thorough and there s lots of things in this report
 (19) lots of things that don't deal with the issues that were raised
 (20) by either the direct or the cross I can't imagine that
 (21) putting this - this report in this record as much probative
 (22) value at all if we consider that the meat of his testimony of
 (23) his analysis is in the direct and the cross and the redirect
 (24) and the entire examination
 (25) But what this - this exhibit does or has the possibility

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(1) of doing is simply miring the jury down in pages and pages and
 (2) pages of minutia for no discernible purpose that I can see
 (3) except to show that the man was thorough They know they
 know
 (4) he was thorough They know how long he worked on this
 They
 (5) know how much money he got for it and they know with some -
 (6) with a great degree of certainty I think what he did and
 (7) according to the plaintiffs what he didn't do So to the
 (8) extent that this report is probative it s - it s classically
 (9) confusion duplicative the kinds of things that you keep
 (10) things out of the record for so I m going to - I m going to
 (11) keep it out
 (12) MR OPPENHEIMER May I make a request Your Honor
 (13) under 1006? I would then like the opportunity - since some of
 (14) it I believe has gone in - to do what has been done with the
 (15) proffer we made of Mr Mundy s Roman III 26 which I am
 chagrined
 (16) to say still hasn't been put on the record yet I m sure
 (17) Mr Petumenos and I will complete that in a day or so I d
 (18) like the same opportunity to come back to the Court - and
 (19) perhaps we ll get a stipulation on those areas that were
 (20) touched specifically so the jury can see the context for some
 (21) of that data
 (22) THE COURT Sure
 (23) MR PETUMENOS My position on that is that s fine I
 (24) moved in the portion of the report he s entitled under 106 I
 (25) that s what happened with the Mundy report I think

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(1) Mr Oppenheimer moved in a page of the Mundy report I
 asked
 (2) for 106 latitude and I m willing to do the same
 (3) THE COURT That s fine
 (4) MR DIAMOND I have one last page which I ve already
 (5) given a copy marked this for identification 14037 This
 (6) results from my review last night of every exhibit that the
 (7) plaintiffs have offered into evidence with numbers on them and
 (8) in response to the Court s observation that the take away chart
 (9) that we had assembled in this court was very powerful and
 (10) argumentative and therefore inadmissible what I simply did
 (11) was went back and put the numbers down on paper I think the
 (12) objection the objection continues Your Honor I ve just
 (13) pulled examples of the - the kind of documents that this
 (14) exhibit is intended to respond to And I ve just pulled at
 (15) random the series of spread sheets that Mr Mundy used that
 are
 (16) in evidence that lead to the 80 - if I may approach - this is
 (17) the sequence of documents that they have for each parcel
 (18) ultimately adds up to the 80 million dollar number
 (19) Basically Dr Mundy is of the opinion that there is \$80
 (20) million worth of damage done on the real estate side There is
 (21) in evidence voluminous - not terribly voluminous but in
 (22) evidence at least a quarter to half-inch of paper by which
 (23) those numbers are built up starting from the lowest common
 (24) denominator and getting higher and higher and higher That s
 (25) why he did the analysis

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- (1) Dr Roddewig's analysis not to be pejorative about it in
 (2) any way was de constructionist. He started with a number and
 (3) went back and said assuming Dr Mundy's numbers are right
 (4) what is appropriate here if you take into account what I think
 (5) was really harmed by the spill and it came down - down to a
 (6) number which he then qualified
 (7) It seems to me that we have rendered - we've taken out
 (8) anything of the chart that would be argumentative. It is
 (9) simply his numbers. It is simply the mathematics he does to
 (10) calculate it and it is simply the counterpart to Dr Mundy's
 (11) analysis and we would proffer that because if some numbers
 go
 (12) into the jury room we think in fairness all the numbers ought
 (13) to go into the jury room
 (14) THE COURT Let me understand you correctly
 (15) counsel. These plaintiffs' exhibits these are things that are
 (16) in evidence?
 (17) MR DIAMOND Yes
 (18) MR PETUMENOS My turn yet?
 (19) THE COURT Yeah I suppose the question the big
 (20) question we ask is if I - if I've already let in - objection
 (21) or no if I've already let in value and damage summaries that
 (22) show huge numbers why shouldn't I let in the defendants
 (23) analysis that subtracts from those numbers?
 (24) MR PETUMENOS Because this document violates one of
 (25) your court orders I don't have any objection to

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- (1) Mr Dorchester's spread sheets and his damage numbers for his
 (2) appraisal that was done and they have them and they can
 (3) introduce them into evidence and that's appropriate. It's
 (4) their appraiser he's done a USPAP appraisal under the
 (5) standards he's certified it as Dr Mundy has and that's what
 (6) we - that's the proof we came prepared to meet
 (7) The number calculations on this chart are contained in no
 (8) report of Dr Roddewig not one. And you issued an order
 (9) saying that no expert testifies to matters which are not
 (10) contained in his report. The time that we raised this at first
 (11) which was can he testify about what Dr Mundy has done the
 (12) matters that were in the deposition were do you have opinions
 (13) about Dr Mundy yeah I do. But the other questions that were
 (14) asked specifically where have you taken your market studies
 (15) the things that were in the report done an estimation of value
 (16) so that we can understand what it means down to a number and
 a
 (17) value so that we can cross examine it understand it know the
 (18) basis for it and he said no I have not reduced that to
 (19) specific numeric value statements
 (20) We received this very late in the game with no report. We
 (21) got the backup the day before the testimony was to go into
 (22) trial for the report that was the stuff that came in and I
 (23) got any extra exhibit and so forth which I came to the
 (24) conclusion there was no way to use my exhibit I should show
 (25) you what I had prepared but the problem was going to be I
 have

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- (1) a contrary view of how this might work but the witness hadn't
 (2) seen it he hadn't done the calculations I'd have had a huge
 (3) foundation problem to meet the proof. This exhibit violates
 (4) the Court's orders. You can't testify to matters not contained
 (5) in the report. I think it prejudices us severely because this
 (6) is and appears to be and will confuse the jury to be as he
 (7) says a deconstructive appraisal
 (8) THE COURT Counsel tell me something did I exclude
 (9) the testimony about these numbers? Have I forgotten
 something
 (10) that occurred here?
 (11) MR PETUMENOS No but I think what happened was you
 (12) allowed because of the questions in the deposition him to
 (13) talk about his disagreements with Mundy all right? I don't
 (14) think we ever reached the issue of whether or not if it's not
 (15) in his report he gets to elevate to the - to the degree this
 (16) document does his opinion about what the value should be
 (17) because that has never been a part of any report
 (18) THE COURT Well wait a minute. He testified to
 (19) these numbers. Did I get an objection?
 (20) MR PETUMENOS Yes you got -
 (21) THE COURT This objection?
 (22) MR PETUMENOS Yes you got this prior to the
 (23) testimony that he gave when I - when I pointed out to you that
 (24) it hasn't been part of the report and counsel's response was
 (25) this is merely an attack on Dr Mundy that we're going to make

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- (1) and he was asked in his deposition whether he disagreed with
 (2) Dr Mundy and the counsel didn't - didn't ask any further
 (3) questions
 (4) THE COURT Now I see what you mean. In other words
 (5) what - just answer me these questions
 (6) MR PETUMENOS Sure
 (7) THE COURT What he did was he said Mundy says
 (8) \$86 751 000 then he said and this is the way Mundy's report
 (9) records the numbers landlocked properties were \$6 552 000
 (10) right? So if you don't believe the landlocked properties
 (11) should be - suffered any damage you simply subtract Mundy's
 (12) figure from Mundy's figure right?
 (13) MR OPPENHEIMER Yes that's correct
 (14) MR PETUMENOS I think that there are substantial
 (15) problems with what he has done in that regard
 (16) THE COURT Wait a minute wait a minute. We're
 (17) talking about the analysis he went through. Isn't that what he
 (18) did?
 (19) MR OPPENHEIMER Yes Your Honor that's correct
 (20) MR PETUMENOS I'm not sure
 (21) MR OPPENHEIMER Your Honor he could have been
 (22) cross examined he wasn't cross examined. This has been -
 (23) this testimony came in after these arguments were resolved
 (24) The testimony was structured to address the Court's ruling and
 (25) came in. The materials that were ordered to be produced were

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- (1) produced They were reviewed to the extent that I was told
 (2) that there would be this fourth you know ambush in the weeds
 (3) exhibit it was going to go to the computation Counsel didn't
 (4) use it That's counsel's choice that's fine But this is
 (5) water under the bridge
 (6) The only issue before us now is whether the graphic depicts
 (7) testimony that's already in part of our case He is - ought
 (8) to be treated in all fairness like all the other numeric
 (9) graphs Frankly it seems to me we had another example of this
 (10) today with the build-up table that came in of - of the oil
 (11) vials I just think that all we really need to do we've taken
 (12) out sort of the graphical argumentative material much to my
 (13) chagrin I thought they made things clearer We have left the
 (14) hard numbers and I don't think there's anything more that
 (15) could be done to make these more like - they're now a little
 (16) less interesting in my opinion - more like the 15 or 16 other
 (17) materials that we've already got in here for the other side
 (18) MR PETUMENOS Judge I need to answer your
 (19) question I don't think these are Mundy's numbers These are
 (20) Mr Roddewig's analysis and calculation of what Mr Mundy's
 (21) numbers are about which -
 (22) THE COURT But its contention was that they're
 (23) Mundy's numbers You had the opportunity to cross-examine
 (24) him
 (25) on that didn't you?
 (26) MR PETUMENOS No that's my point If I had had a

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- (1) report that told me how he analyzed these numbers if I had had
 (2) the opportunity to depose him on how he analyzed these
 (3) numbers
 (4) I would have been content perhaps to try and cross-examine
 (5) him I had no file on this I had no discovery on this on
 (6) this issue and the reason I didn't cross-examine him is
 (7) because this was not the subject of proper discovery as the
 (8) numerous orders in this court I think were entered into to
 (9) protect counsel and to be prepared for cross examination of
 (10) this nature Basically this all came in at trial
 (11) MR OPPENHEIMER That's right Your Honor and it's
 (12) in it's part of the record it's part of our evidence It's
 (13) his calculation
 (14) MR STOLL Your Honor the problem is that where he
 (15) has landlocked numbers or he has other underground property
 (16) interest there's nowhere I believe in Mundy's report where
 (17) he has that figure And so -
 (18) THE COURT I know that's the problem counsel but
 (19) here's my problem So why didn't you ask him where'd you
 (20) get
 (21) this figure and then we would know and if - if you felt at a
 (22) disadvantage in asking that question why didn't you ask me to
 (23) either go out of the presence of the jury to allow you to ask
 (24) those questions or say I need a recess I don't have the
 (25) appropriate material if I ask this question I might get
 (26) bombed Nobody asked me that You just went through the
 (27) cross examination and now after the fact you want to make

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- (1) this argument It's a little late
 (2) MR STOLL I think the objection was made Your
 (3) Honor
 (4) THE COURT Look the objection was made but certainly
 (5) not in this context You've had the examination I've
 (6) never - nothing in the examination counter - curtailed the
 (7) testimony regarding these numbers which the jury has seen
 (8) And
 (9) frankly I don't - this is not credible argument So the
 (10) exhibit's in
 (11) (Exhibit DX14037 received)
 (12) MR DIAMOND Thank you Your Honor
 (13) THE CLERK What's the Exhibit Number?
 (14) MR DIAMOND 14037
 (15) THE COURT Is there anything else?
 (16) MR STOLL Your Honor there is something else but I
 (17) think I'll wait
 (18) THE COURT Yes it's probably wise of you to do
 (19) that
 (20) MR STOLL Huh?
 (21) THE COURT I think that would be wise We'll take a
 (22) recess
 (23) THE CLERK Please rise This court stands in
 (24) recess
 (25) (Recess at 1:57 p.m.)

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- (1) STATE OF ALASKA)
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5 10 97

Look-See Concordance
Report

UNIQUE WORDS 2,825
TOTAL OCCURRENCES
12,789
NOISE WORDS 385
TOTAL WORDS IN FILE
38,041

SINGLE FILE CONCORDANCE

CASE SENSITIVE

NOISE WORD LIST(S)
NOISE NOI

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Friday August 19 1994
) 8 37 a m
 (6))
 (8) VOLUME 40 Pages 6286 through 6441
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C SHORTELL
 Superior Court Judge
 (16) APPEARANCES
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(1) PROCEEDINGS
 (2) (Jury in at 8 37 a m)
 (3) THE CLERK. Please rise
 (4) (Call to Order of the Court)
 (5) THE COURT Good morning
 (6) MR DIAMOND Good morning Judge
 (7) THE COURT Good morning
 (8) DIRECT EXAMINATION OF STEVEN MacSWAIN (Resumed)
 (9) BY MR DIAMOND
 (10) Q Mr MacSwain when we broke yesterday we were talking
 (11) about leases of property owned by the Native Corporations and
 (12) you were telling us about two one on Busby Island the Porter
 (13) lease and one on Growler Island Stan Stephens lease Did
 (14) the Tatitlek Corporation receive appreciably greater income
 (15) from those leases after the spill than before?
 (16) A Yes that is correct
 (17) Q Was it a big amount was it a big chunk?
 (18) A Well the percentage was a big chunk
 (19) Q How about in absolute terms?
 (20) A Well it was like two and a half times \$500 to \$1200, it s
 (21) very significant
 (22) Q That s not a temble amount of money in the grand scheme
 (23) of things Why do we care about it?
 (24) A Well it s important to show or find out what s happening
 (25) and we can see that the rentals did increase and that s an -

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(1) example
 (2) Q During the course of your work on this matter you gathered
 (3) a fair amount of information on leases of property in Prince
 (4) William Sound Gulf of Alaska Kodiak?
 (5) A Yes I did
 (6) Q What leases did you look at?
 (7) A I looked at all the leases that we could find every - did
 (8) a very thorough examination just anything that was out there
 (9) Examined all of the - the plaintiffs leases that were
 (10) available and all of the other leases that we could confirm
 (11) Q Did you learn during the course of your review of any
 (12) leases that were canceled as a result of the spill?
 (13) A No I was - did not find any leases that were canceled
 (14) because of the spill
 (15) Q Did you learn of any leases that were renegotiated downward
 (16) on account of the spill?
 (17) A No there were no leases that were downward adjusted
 (18) Q Did you learn of any lease negotiations that were
 (19) terminated because of the spill?
 (20) A No I m not aware of any leases that were terminated
 (21) because of the spill
 (22) Q Let me ask you the same series of questions but with
 (23) specific reference to leases that the plaintiff Native
 (24) Corporations in this case had with respect to properties that
 (25) are in issue here Were there any leases on their property

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- (1) that were terminated on account of the spill?
 (2) A There were no leases that I m aware of that were terminated
 (3) because of the spill
 (4) Q Did plaintiffs have any leases that were renegotiated
 (5) downward because of the spill?
 (6) A No they did not
 (7) Q Did you find any evidence of any lease negotiations that
 (8) the plaintiffs had ongoing at the time of the spill that were
 (9) canceled terminated or disrupted in any way?
 (10) A No I did not find any leases that were terminated
 (11) Q Enough - enough about leases I now want to talk to you
 (12) about sales of real estate in Prince William Sound and the Gulf
 (13) of Alaska and the Kodiak area And if I can I would like to
 (14) divide the discussion we re going to have really into three
 (15) categories I d like to talk to you first about the sale of
 (16) large tracts of remote wilderness property anything over a
 (17) thousand acres And then I d like to talk to you next about
 (18) still tracts of wilderness property but smaller tracts
 (19) anything over a hundred acres up to a thousand And finally
 (20) I d like to talk to you about individual lots and small units
 (21) of property okay?
 (22) A Okay
 (23) Q Let s start with the large tracts of remote wilderness
 (24) land The plaintiffs in this case do own large tracts of
 (25) property in Prince William Sound and the Gulf do they not?

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- (1) A No there were no large tracts by these plaintiffs on the
 (2) market
 (3) Q Had there been any sales by these plaintiffs of large
 (4) tracts of property in the five years prior to the oil spill?
 (5) A No The - prior - prior to the oil spill?
 (6) Q Yes
 (7) A There were no sales
 (8) Q Have there been any examples of large plots of land selling
 (9) in any of the spill affected areas since the oil spill?
 (10) MR PETUMENOS I m object Your Honor isn t this
 (11) cumulative of Mr Roddewig s testimony?
 (12) THE COURT No counsel Objection s overruled
 (13) A Yes there have There have been a couple sales of large
 (14) tracts after the oil spill
 (15) BY MR DIAMOND
 (16) Q In formulating your opinion concerning the market for large
 (17) tracts of property have you taken those into account?
 (18) A Yes we have considered the sales of large tracts
 (19) subsequent to the oil spill
 (20) Q You told us yesterday there s little market - told us
 (21) again there s little market for large tracts of property Do
 (22) the sales that have taken place since the spill alter that
 (23) opinion in any way?
 (24) A Well yes there has been increased interest in large
 (25) tracts but it s still a - it s not a very active market

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- (1) A Yes that is correct That is by far the - the situation
 (2) I think 99 percent of the land that are plaintiffs lands
 (3) involve what we refer to as large tracts of land
 (4) Q Anywhere between a thousand ranging up to - what s the
 (5) largest?
 (6) A 50 000 acres as I recall was - Silver Lake parcel was
 (7) their largest parcel
 (8) Q You told us yesterday you ve been to them Are they all
 (9) beautiful pieces of property?
 (10) A Yes yes they are They re very scenic and beautiful and
 (11) particularly on a nice day
 (12) Q Would you tell the jury what kind of market has existed for
 (13) the sale of large tracts of wilderness property in Prince
 (14) William Sound the Gulf Kodiak?
 (15) A That market before the spill was basically nonexistent
 (16) hadn t been any sales of large tracts in Prince William Sound
 (17) Q At the time of the oil spill were there any pending sales
 (18) by plaintiffs of large tracts of land?
 (19) A No there were no pending sales of these large tracts
 (20) Q So the spill didn t disrupt any ongoing sales by the
 (21) plaintiffs?
 (22) A No disruption
 (23) Q At the time of the - of the spill was there - were there
 (24) any large tracts of property on the market by these
 (25) plaintiffs?

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- (1) We ve had just two sales but we have considered that that
 (2) factor
 (3) Q Tell us about the two sales
 (4) A The two sales - one of the sales I think - actually I
 (5) think you might - the jury might have heard of both of the
 (6) sales The first one that comes to mind is the 24 000 acre
 (7) sale in South Kachemak Bay involving Seldovia Native
 (8) Corporation That s where Seldovia Native or SNA sold its land
 (9) to the State of Alaska in 1993 It s a large block of land
 (10) that s now part of the Alaska state park system
 (11) Q All right Can you describe for us the history of that
 (12) transaction? It s something you ve studied is it not?
 (13) A Yes it s something I ve studied very closely over the
 (14) years It s been - this is a very long transaction that s
 (15) been going on for many years There was a - you live in
 (16) Alaska you ve probably heard about it There s been various
 (17) proposals by the State to either buy the land or exchange other
 (18) properties for this land and it wasn t till 1993 that
 (19) eventually the deal came together
 (20) Q Was any unusual pressure brought to bear in connection
 (21) with
 (22) that transaction?
 (23) MR PETUMENOS Your Honor may we approach the
 (24) bench?
 (25) THE COURT Yes you may
 (At side bar on the record)

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- (1) MR DIAMOND This is a transaction in which the
 (2) Native Corporation that owned it threatened to clearcut its
 (3) forests and create a - artificially inflated the price It is
 (4) basic - basic opinion he is expressing is that the spill did
 (5) not disrupt any market that existed before because there really
 (6) was no market The two post spill transactions were number
 (7) one funded by Trustee money and number two the price was
 (8) created by a very artificial mechanism the threat of
 (9) government pressure as Professor Green described it when he
 was
 (10) on the stand
 (11) THE COURT I do remember he did describe that
 (12) didn't he?
 (13) MR PETUMENOS Judge the problem I have is that
 (14) calling it pressure on government giving an opinion that s
 (15) it s pressure on the government for a property owner to conduct
 (16) an activity they have a legal right to conduct on it seems to
 (17) me to be -
 (18) THE COURT I would tend to agree with you but the
 (19) problem is that the plaintiffs witnesses testified about it
 (20) MR DIAMOND I could rephrase the question to avoid
 (21) that I'll just ask him whether it arose under unusual
 (22) circumstances
 (23) THE COURT What s he going to say to you in response
 (24) to that?
 (25) MR DIAMOND I hope he says - I hope he describes

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- (1) the situation that developed I thought the objection was to
 (2) the way I phrased the question not to the substance of the
 (3) anticipated response
 (4) MR PETUMENOS Well I'm a little - my memory s not
 (5) perfect I can't remember whether Mr Green's material came
 up
 (6) on cross-examination or direct I think it was cross
 (7) THE COURT It doesn't make any difference If it s
 (8) in the record with one witness it s come in I might be
 (9) inclined to keep it out if it hadn't been mentioned but if
 (10) it s already been discussed the supposed prejudice is already
 (11) in the record
 (12) MR PETUMENOS I understand your point Judge I
 (13) think my objection goes to the motion that somehow they are
 (14) acting improperly or inappropriate
 (15) THE COURT I want to avoid that because this is a
 (16) different area of discussion and I don't want the prejudice to
 (17) spill over That s the problem
 (18) MR DIAMOND I understand On the other hand Green
 (19) was not the only one who talked about this This is one of
 (20) Mundy's comparables for establishing a fair market value of
 (21) price The circumstances surrounding the sale obviously are
 (22) relevant as to whether it s comparable
 (23) MR PETUMENOS Sure The circumstance is fine I
 (24) don't have a problem with that but to characterize it as a
 (25) threat or pressure because a company wants to log their land

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- (1) and engage in industry is I think improper
 (2) THE COURT That was specifically discussed I'm
 (3) going to allow it and you make your questions as neutral as
 (4) possible all right?
 (5) MR DIAMOND I will okay
 (6) (Sidebar concluded)
 (7) BY MR DIAMOND
 (8) Q Why don't you come down and show us where we're talking
 (9) about
 (10) Mr MacSwain would you just remind the jury where are we
 (11) talking about when we talk about Kachemak Bay sale?
 (12) A Okay the Kachemak Bay sale is a large tract right here
 (13) just off the end of Homer Spit just a few miles away Every
 (14) time you go to Homer go to lands end look right out the
 (15) window there and there it is It s 24 000 approximately
 (16) acres right here
 (17) Q Had this been a subject of discussion in Alaska for some
 (18) time the acquisition of this parcel?
 (19) A For a long time that s right
 (20) Q By whom?
 (21) A The long-time negotiations between the Seldovia Native
 (22) Corporation were based out of Seldovia here and the State of
 (23) Alaska Department of Natural Resources had been negotiating
 (24) with the State for years and years and years to -
 (25) Q What did the State want it for?

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- (1) A Well there had been a threat to do some clearcutting of
 (2) the approximately 4 000 acres It s merchantable timber and
 (3) there had been a threat by - the Seldovia Natives had sold the
 (4) four or 5 000 acres of timber rights and the timber company
 (5) wanted to cut the trees down and then the environmental
 groups
 (6) got all you know concerned that they thought that having this
 (7) area clearcut wouldn't be very attractive so there was a lot
 (8) of pressure put on the politicians et cetera to have the
 (9) State of Alaska purchase this property
 (10) Q This - this transaction was the subject of some discussion
 (11) with Dr Mundy when he was here in court was it not?
 (12) A Yes it was
 (13) Q Is this a transaction in which he gave two different
 (14) appraisals?
 (15) A Yes it was
 (16) Q At two different times?
 (17) A Two different times and two different purposes
 (18) Q And two different numbers?
 (19) A Yes he had two different numbers
 (20) Q Was this parcel to your knowledge oiled?
 (21) A Yes it was oiled
 (22) Q Did the Exxon Valdez oil spill in your opinion adversely
 (23) affect the marketability of the Kachemak Bay property for the
 (24) Seldovia Native Association?
 (25) A No it did not Just to the contrary it actually helped

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- (1) put this transaction together
 (2) Q Explain
 (3) A Well one of the problems that this property - one of the
 (4) reasons it never sold before there was a lack of funds and
 (5) there was a lot of - you know state legislators who wanted to
 (6) do this deal but politics got involved and there was - you
 (7) know money's gone down since you know the late 1980s so
 (8) there was a funding problem but after the oil spill came we
 (9) had a - a fund called the Oil Spill Trustee Fund and these
 (10) funds became available and it was these moneys the oil spill
 (11) Trustees and oil spill-related funds that were the moneys that
 (12) became available to purchase this property
 (13) Q You said that there were two transactions during the - in
 (14) the five years since the oil spill of large parcels of remote
 (15) wilderness property in the spill affected areas Can you show
 (16) us where the second is?
 (17) A Not on this map It would be a map of Kodiak
 (18) Mr Diamond
 (19) Q This is a map of Kodiak Will this do?
 (20) A Yes this will do
 (21) Q Show us where we're talking about
 (22) A Okay The other - the other large tract of land that sold
 (23) after the oil spill was up here on Afognak Island on the north
 (24) end of Afognak Island There is a large parcel approximately
 (25) 40 000 acres that was sold in 1993 and this was a transaction

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- (1) that it was - the seller was - it was a partnership two
 (2) Village Corporations Akhiok Kaguyak Village Corporation and
 (3) Old Harbor were the sellers and the buyer was again the
 (4) State of Alaska that purchased this property as part of a new
 (5) state park
 (6) Q When was this sale consummated?
 (7) A In late 1993
 (8) Q Was this property oiled?
 (9) A Yes it was oiled
 (10) Q In your opinion did the Exxon Valdez oil spill interfere
 (11) in any way with the purchase and sale of this parcel?
 (12) A No it did not interfere with the sale It actually -
 (13) quite frankly I'm not sure what would have happened if it
 (14) hadn't been for the availability of the funds from the Oil
 (15) Spill Trustees
 (16) Q Did the spill have any effect on the transaction?
 (17) A Yes it did It - like I said it - because of the
 (18) spill I think the funds became available and it was able to
 (19) sell The large part of this property was oiled As I recall
 (20) it was like 35 percent of the shoreline was oiled This parcel
 (21) that sold had a lot of shoreline approximately 70 miles of
 (22) shoreline This parcel up here you probably heard a lot about
 (23) is the Shuyak Island parcel This is the Kodiak Island
 (24) Borough's largest parcel It was located right next door
 (25) Q When you say the oil spill helped this was this another

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- (1) Trustee purchase with oil spill funds?
 (2) A Yes this was funded by the Oil Spill Trustees
 (3) Q And when did the sale take place?
 (4) A 1993
 (5) Q You talked about - when you talk about Kachemak you said
 (6) that there was some threat of clearcutting which prompted that
 (7) sale Did anything similar happen with respect to this
 (8) parcel?
 (9) A Yes It was a similar situation The - part of this
 (10) area there's a lot of logging activity going on and there was
 (11) a concern that hey let's slow things down and keep this
 (12) property in its more natural state
 (13) Q Is this called the Seal Bay parcel?
 (14) A Yes this is referred to as the Seal Bay parcel
 (15) Q In your judgment did the oil spill have any negative
 (16) impact on this transaction in any way?
 (17) A No it did not adversely affect this parcel at all
 (18) Q Did you discuss that subject with the buyer or seller of
 (19) the transaction?
 (20) A Yes discussed it with the buyer There were a couple
 (21) different buyers involved Initially what happened was this
 (22) parcel was sold to the Nature Conservancy for a very short
 (23) period They were kind of an intermediary and then the Nature
 (24) Conservancy turned around and transferred the property to the
 (25) State of Alaska So I discussed the sale quite extensively

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- (1) with the Nature Conservancy and also with the State officials
 (2) and also examined it a very thorough examination of all of the
 (3) documents and records
 (4) Q And did anybody tell you that the spill had a negative
 (5) impact on this transaction?
 (6) A No it did not have a - the spill did not have a negative
 (7) effect on this large acreage transaction
 (8) Q Other than these two sales in the decade surrounding the
 (9) spill going back ten years from today were there no other
 (10) transactions involving large tract parcels of remote wilderness
 (11) property in any of the spill-affected areas?
 (12) A No there have been no other sales in the spill affected
 (13) area
 (14) Q You can take your seat again
 (15) Let's talk about the second category of properties that I
 (16) mentioned Still tracts of remote wilderness land in the Sound
 (17) and the Gulf and Kodiak area but a little smaller somewhere
 (18) between a hundred acres and a thousand acres Do the
 (19) plaintiffs in this case own any parcels that fall into that
 (20) category?
 (21) A Yes they do But it's a very - very small percentage of
 (22) their overall landholdings
 (23) Q Have you studied sales of medium sized parcels however
 (24) you
 (25) would characterize parcels in that size category?
 (25) A Yes I have

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- (1) Q All of them?
 (2) A Yes I have made an attempt to look at all the sales that
 (3) are out there
 (4) Q I m going to refer to them as small tracts if I may Were
 (5) there any pending sales of small tracts of wilderness land
 (6) owned by these plaintiffs that were disrupted by the spill?
 (7) A Not to my knowledge were there any sales in this category
 (8) that were - were disrupted by the oil spill
 (9) Q Did you find any evidence that these plaintiffs had any -
 (10) any small tracts of land on the market at the time of the
 (11) spill?
 (12) A I m not aware of any of these lands being on the market
 (13) prior to the spill
 (14) Q Let me ask you the same question with respect to the small
 (15) tracts of land that I did with respect to the large ones What
 (16) sort of market has there been over the past decade?
 (17) A Slow
 (18) Q What do you mean by that?
 (19) A Very few transactions Prior to - the five years prior to
 (20) the oil spill in this area I can think of only one sale of
 (21) oceanfront property in this category
 (22) Q In the decade surrounding the spill have there been any
 (23) transactions in this size category involving plaintiffs lands?
 (24) A None that I m aware of
 (25) Q How many have there been since the spill?

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- (1) A There s been a few subsequent to the spill but still not
 (2) very many
 (3) Q Can you give us an illustration?
 (4) A There are a couple examples I could show you on Kodiak
 (5) Island
 (6) Q You want to use the map?
 (7) A Yes please
 (8) Q I knew I should have left it up
 (9) MR PETUMENOS We re good at this together
 (10) MR DIAMOND Yeah
 (11) MR PETUMENOS We ought to work together more often
 (12) BY MR DIAMOND
 (13) Q Which one are you going to tell us about?
 (14) A Well there s one I think the jury s already heard about
 (15) It s a sale right here on Afognak Island it s located right
 (16) here called Raspberry Straits This is Raspberry Island right
 (17) here Afognak Island It s on the south end of Afognak
 (18) Island It s about 270 acres plus or minus
 (19) Q We ve heard prior testimony about a sale or purchase by a
 (20) religious group called the Old Believers
 (21) A Yes this is the same one I m referring to
 (22) Q Can you tell us the history of this transaction?
 (23) A The - this is a sale that took place over - over a one -
 (24) over a one year time period It was - initially there was an
 (25) option to purchase this land in 1988 and it was land owned by

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- (1) some - a Native couple husband and wife Native BIA
 (2) allotment and the Russian Old Believers selected this site
 (3) There was a family of 17 - 17 different families 34 people
 (4) involved in this regular community moved over and they
 entered
 (5) into this option agreement in 1988 And then the BIA had this
 (6) appraisal done on the property for about \$400 000 and
 (7) eventually in late 1989 the deal closed the transaction what
 (8) we call the sale date occurred and the property sold for
 (9) one - almost \$1 2 million or about three times the 1988
 (10) appraisal
 (11) Q Was this oiled property?
 (12) A Yes it was
 (13) Q We ve heard testimony and I think you just said the
 (14) transaction spanned over a period of time started before the
 (15) spill but wasn t closed until after the spill Have you
 (16) looked at the transaction documents?
 (17) A Yes I have very carefully
 (18) Q Do you have any view any opinion as to had this piece of
 (19) property been adversely affected by the spill the buyer could
 (20) have gotten out of the deal
 (21) MR STOLL Your Honor excuse me I have an
 (22) objection
 (23) THE COURT You want to come up here?
 (24) MR PETUMENOS This is one of those areas counsel I -
 (25) don t really know much about

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- (1) MR STOLL Calls for a legal conclusion
 (2) MR DIAMOND I just object to being double teamed
 (3) (At side bar on the record)
 (4) THE COURT All right I thought that was part of the
 (5) process You have a question?
 (6) MR DIAMOND The question was whether he has an
 (7) opinion as to whether the buyer could have gotten out of the
 (8) deal if the property was harmed by the spill
 (9) MR STOLL Isn t that a legal -
 (10) THE COURT Yeah it is kind of an all-encompassing
 (11) question isn t it?
 (12) MR DIAMOND How would you like me to phrase it?
 (13) MR STOLL Swell I don t think he s qualified as a
 (14) lawyer is he?
 (15) THE COURT Factually the question I think it could
 (16) be a factual question could be a legal question right?
 (17) MR STOLL It s a contract
 (18) MR DIAMOND He studied the documentation the
 (19) documentation has certain provisions that allow cancellation if
 (20) the property isn t delivered in its condition at the time the
 (21) purchase an agreement was initially signed He knows
 customs
 (22) THE COURT Stay away from his opinion He can
 (23) describe the specific provisions of the contract Okay make
 (24) sure he stays away from the opinion
 (25) (Sidebar concluded)

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- (1) BY MR DIAMOND
 (2) Q In the documentation for this transaction were there any
 (3) provisions concerning what condition the property would have
 (4) to be in at the time the deal ultimately closed?
 (5) A Yes there was
 (6) Q And in your 25 years of real estate experience was the
 (7) provision in this deal unusual or did it differ dramatically in
 (8) any way from what s typically in real estate transaction
 (9) documents of this kind?
 (10) MR PETUMENOS Objection leading
 (11) THE COURT I'll allow it Go ahead
 (12) A It was similar language that property that you see in a lot
 (13) of these documents that the property be purchased in its
 (14) existing condition
 (15) BY MR DIAMOND
 (16) Q Describe for us what kind of provisions the agreements
 (17) have
 (18) A As I recall there s some language in there that says the
 (19) property is to be purchased in its present condition I can t
 (20) recall the exact verbiage but something along those lines
 (21) Q Does that mean that if the property had been damaged by
 (22) the oil spill even though the contract had been entered into
 (23) before the spill that the Old Believers could have canceled
 (24) the transaction after?
 (25) MR STOLL Excuse me Your Honor same objection

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- (1) THE COURT Sustained
 (2) BY MR DIAMOND
 (3) Q In your 25 years of experience in the real estate business
 (4) or drawing from your 25 years of experience what typically
 (5) happens if there is a purchase agreement for a piece of
 (6) property and some intervening event takes place and the
 (7) property is harmed or damaged in some way? How is that
 (8) typically resolved?
 (9) MR STOLL Excuse me Your Honor it s vague and
 (10) ambiguous some intervening
 (11) THE COURT I really don t understand the question
 (12) MR DIAMOND May we approach - well I won t
 (13) approach I m listening for objections from the right ear and
 (14) I m hearing them from the left
 (15) MR STOLL Hey it s stereo
 (16) THE COURT Would you like Mr Stoll to move over
 (17) here?
 (18) MR DIAMOND I would much prefer that Mr Stoll sit
 (19) down It s difficult enough to satisfy Mr Petumenos
 (20) THE COURT I understand that counsel but it s a
 (21) necessity in this instance because there are differing
 (22) interests involved
 (23) MR PETUMENOS I m ignorant as to some things
 (24) including this one
 (25) MR STOLL He didn t grow up here

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- (1) BY MR DIAMOND
 (2) Q What typically happens in real estate deals if during the
 (3) pendency but before closure before the deal is closed some
 (4) damage is done to the property how is that resolved
 (5) typically?
 (6) MR STOLL Excuse me Your Honor same objection
 (7) THE COURT Sustained the objection s sustained
 (8) BY MR DIAMOND
 (9) Q Do you have any experience in terms of real estate
 (10) transactions in which some - something happens which
 (11) changes
 (12) the condition of a parcel during the pendency of the
 (13) transaction?
 (14) A Yes I do have
 (15) MR STOLL It s the same same objection
 (16) MR DIAMOND May we approach on this one?
 (17) THE COURT One more time
 (18) MR PETUMENOS I'll stay here Judge
 (19) THE COURT Thanks I appreciate that
 (20) (At side bar on the record)
 (21) MR DIAMOND If allowed he s going to say that this
 (22) is very conventional in real estate industry What happens is
 (23) if the buyer thinks that the property is worthless either
 (24) there is a renegotiation or the seller has to repair the damage
 (25) before the closing and that s a common occurrence in real
 estate transactions And that he investigated it he

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- (1) investigated whether that happened here and in fact there was
 (2) no request for any renegotiation of the contract
 (3) THE COURT That s the - that s the information you
 (4) need to get
 (5) MR DIAMOND Unless I have a premise
 (6) THE COURT You ve already got it You ve already got
 (7) the provisions of the contract The question is could
 (8) there - could the buyer have taken - have taken advantage of
 (9) certain provisions of the contract
 (10) MR STOLL That calls for a legal condition
 (11) inclusion
 (12) THE COURT Right And I don t - frankly the
 (13) question of typicality to me is the point so what the crux
 (14) of the issue is can they do something right?
 (15) MR STOLL Well Your Honor I don t think he can
 (16) express an opinion as to whether they could have renegotiated
 (17) the contract
 (18) THE COURT The provisions in the contract -
 (19) MR STOLL I think he can ask him
 (20) THE COURT The provisions in the contract he s
 (21) already described those right? So did they did they assert
 (22) any of those provisions with regard to the sale after the
 (23) spill
 (24) MR STOLL He can ask him that
 (25) THE COURT That s a fact and that s it

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- (1) MR STOLL I agree with that
 (2) MR DIAMOND We got it
 (3) (Sidebar concluded)
 (4) BY MR DIAMOND
 (5) Q You talked to both buyer and seller in the transaction or
 (6) their representatives?
 (7) A Yes I did
 (8) Q After the oil spill did the Old Believers or any of their
 (9) representatives ask for any change adjustment or renegotiation
 (10) of any of the terms of the agreement?
 (11) A No they did not.
 (12) Q How do you know that?
 (13) A Because I - I spoke with the real estate broker from
 (14) Kodiak who was very involved with this transaction She put
 (15) the whole deal together starting in late 87 when she found
 (16) the property and was working with the you know property
 (17) owners and she was intimately involved This is a
 (18) transaction took a lot of work and I did a very extensive
 (19) interview with her regarding all the details and discussed it
 (20) with her very thoroughly
 (21) Q And what did she tell you on this specific point?
 (22) MR STOLL Your Honor I don't
 (23) THE COURT Is this simply going to duplicate what
 (24) he's already said?
 (25) MR DIAMOND I don't know I haven't heard the

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- (1) answer yet
 (2) THE COURT You don't know? The objection's
 (3) sustained
 (4) BY MR DIAMOND
 (5) Q What conclusions did you draw from the Old Believers
 (6) transaction?
 (7) A Well I concluded that the property sold for a heck of a
 (8) lot more than what it was appraised for number one Number
 (9) two is I concluded that the oil spill did not affect this
 (10) transaction at all in terms of going through and that
 (11) according to the real estate broker that was involved the oil
 (12) spill did not have an - it was totally a nonissue
 (13) MR STOLL Just a minute Your Honor I object to him
 (14) expressing the opinion What he reports is the opinion of
 (15) another person on the impact of the oil spill
 (16) THE COURT All right the objection's sustained and
 (17) I'm going to strike the last sentence The jury is to
 (18) disregard it
 (19) BY MR DIAMOND
 (20) Q You can take your seat again
 (21) Let's talk about individual lots briefly and the effect of
 (22) the spill on the sale of individual parcels and by that I'm
 (23) saying one two three anywhere up to what 99 acres Are
 (24) there such tracts of land in Prince William Sound?
 (25) A Yes there are They're located primarily in what we call

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- (1) these remote recreational subdivisions
 (2) Q That's true for the outer Kenai as well?
 (3) A Yes
 (4) Q And I believe you told us there are what five or six
 (5) on - remote subdivisions?
 (6) A Approximately six in Prince William Sound
 (7) Q Are most of the privately-owned lots on subdivisions in
 (8) Prince William Sound and the outer Kenai?
 (9) A Quite far almost exclusively they're located within these
 (10) subdivisions
 (11) Q How many on subdivisions?
 (12) A Very few
 (13) Q Why is that?
 (14) A The - there is - this is not a very active market and
 (15) there just seems to be - very little land becomes available
 (16) Q Have there been many, very many properties lot properties
 (17) outside of subdivisions that have changed hands in the last
 (18) decade?
 (19) A In Prince William Sound?
 (20) Q Prince William Sound or the outer Kenai
 (21) A Virtually none It's been a very slow inactive market
 (22) Q The plaintiffs don't have any parcels that are just small
 (23) individual lots or very small parcels do they?
 (24) A No they do not As I testified earlier about 99 percent
 (25) of their lands are these large acreage blocks

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- (1) Q Well why should the jury care about the market for small
 (2) parcels of property?
 (3) A I felt it was important to go out and look at recreational
 (4) subdivisions and look at them as a barometer to see you know
 (5) the conditions both before the spill and after the spill give
 (6) us some type of indication if the spill had any effect just
 (7) another - another source to look at.
 (8) Q Do transactions of individual lots tell us anything about
 (9) whether the area was stigmatized as Dr Mundy says?
 (10) A The examination of these lots yes would tell us if
 (11) there's been any effect on the lots in that category both
 (12) before the spill and after the spill
 (13) Q Let's start with Prince William Sound Did you analyze
 (14) sales of recreational lots in Prince William Sound both before
 (15) and after the spill?
 (16) A Yes I did I did a very thorough examination of
 (17) recreational lots in Prince William Sound
 (18) Q When you say thorough examination what do you mean?
 (19) A I mean that there - we looked at everything We went to
 (20) the title company went to the - examined all of the
 (21) transactions back to the - to the date that the subdivisions
 (22) were initially opened I went and spoke with the developers of
 (23) the - of these recreational remote recreational subdivisions
 (24) talked to real estate brokers involved with these subdivisions
 (25) talked to buyers of lots in the subdivisions Did everything

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- (1) that I knew as a - as an appraiser to investigate this part
 (2) of the market
 (3) Q Did you draw any conclusions with respect to the effects of
 (4) the oil spill on the number of transactions of properties in
 (5) this category in Prince William Sound?
 (6) A Yes I did
 (7) Q What?
 (8) A I concluded that the - the values the prices that were
 (9) being paid for lots before the spill and after the spill were
 (10) stable no change As far as the number of transactions we
 (11) noticed some increased market activity after the spill but all
 (12) in all the values prices had basically stayed the same
 (13) Q Okay You wanted to talk this morning about some specific
 (14) examples One is Ellamar?
 (15) A Yes
 (16) Q Okay I m going to get the map out again remind us where
 (17) this is I have one other - sorry to do this to you Judge
 (18) Okay show us where Ellamar is
 (19) A Ellamar subdivision is located right in here between Bligh
 (20) Island and the Village of Tatitlek just north of Tatitlek
 (21) right here in call it Virgin Bay, about oh 20 miles from
 (22) Valdez Ellamar subdivision right in there
 (23) Q Did you look at sales in the Ellamar subdivision before and
 (24) after the spill?
 (25) A Yes I did I looked at all of the transactions

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- (1) Q Okay Are the lands on which Ellamar is located the
 (2) subject of this litigation?
 (3) A No they re not They re located on privately owned land
 (4) Q Are they close to any of the plaintiffs property?
 (5) A Yes They re adjacent to the Tatitlek Native Corporation
 (6) lands
 (7) Q You prepared a chart showing sales activity that is
 (8) defendants 10305 Is this the chart you prepared?
 (9) A Yes it is
 (10) Q Could you tell the jury what that depicts?
 (11) A This - this is a ten-year sales history of transactions in
 (12) Ellamar subdivision The subdivision was opened up in 1983
 (13) and as you can see in the first year which is typical of
 (14) most of these subdivisions there was a flurry of activity We
 (15) had 15 lots sold and it drops off significantly kind of bumps
 (16) along here and then there s an up tick in 1988 This was the
 (17) year that the developer spent about \$400 000 building roads to
 (18) the upland lots Before 1987 the upland lots did not have any
 (19) access and in 1987 the roads and the dock were completed
 (20) The
 (21) developer put in about two miles of roads which is kind of
 (22) unusual for a remote subdivision but in that year through
 (23) some increased marketing activity and the fact that they had
 (24) access to the upland lots we had - there were seven upland
 (25) lots that sold one oceanfront lot 1989 went back to our -
 kind of our normal pattern here one oceanfront lot that sold

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- (1) and one upland lot 1990 increased 1991 flurry of activity
 (2) 1992 flurry of activity
 (3) This trend in looking at all of the other subdivisions
 (4) that we concluded that looking at the prices that were paid
 (5) that the values were stable during this time period But it s
 (6) important to note again I want to emphasize that it was in
 (7) 1987 increased marketing activity and literally roads put to
 (8) the upland lots and heavily advertising for that and you had
 (9) seven lots that sold up here
 (10) Q Is that just your conjecture from the numbers and knowing
 (11) when the roads were put in or did you do any other
 (12) investigations to determine that the increase in 88 was
 (13) attributable to the new construction new marketing?
 (14) A No this is based on what we found by interviewing the
 (15) developer and the broker of the subdivision and finding out
 (16) what actually happened and talking to you know both the
 (17) buyers and the sellers of lots in Ellamar subdivision
 (18) Q Did you also look at price that individual lots were
 (19) getting at the Ellamar subdivision both before and after the
 (20) spill?
 (21) A Yes I did a very careful examination of the prices
 (22) Q I m going to show you a graph that s been marked
 DX10284A
 (23) Is this something you prepared?
 (24) A Yes it is
 (25) Q The first two pairs of bars are labeled Ellamar and the

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- (1) third is Kasitna Bay Kasitna Bay is not part of the Ellamar
 (2) subdivision?
 (3) A No Kasitna Bay is located in South Kachemak Bay
 (4) Q This is something we re going to get to later?
 (5) A Yes
 (6) Q Tell us what this graph shows respecting - with respect to
 (7) the Ellamar subdivision
 (8) A Well what we have here are two examples of lots The
 (9) first example is of an oceanfront lot and over here is an
 (10) example of an upland lot
 (11) Q Is this called what Mr Roddewig called a matched pair
 (12) analysis?
 (13) A Yes that s correct
 (14) Q Remind us again what s that?
 (15) A Matched pair analysis It s appraiser language but
 (16) basically what it is you re comparing either the same lot that
 (17) sold one time and then subsequently sold at a later time or a
 (18) very similar lot and you can see the change that has occurred
 (19) over time
 (20) Q Tell us what the first pair of transactions represents
 (21) here
 (22) A The first pair represents two oceanfront lots They are
 (23) located side by side and they were purchased by the same
 (24) buyer In 1986 the buyer paid \$40 000 for this lot and in -
 (25) right after the spill the adjacent lot the same buyer of the

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- (1) 86 lot paid \$5 000 more I want to note however that this
 (2) is not - this particular lot was designated C or commercial
 (3) so it sold - typical lot in Ellamar subdivision oceanfront
 (4) lot doesn't sell for \$40 000 but this particular one had a
 (5) commercial zoning but it has a recreational use so it's -
 (6) it's not a commercial zone as we would think of in terms of
 (7) Anchorage but it did command a higher price and it was also a
 (8) larger lot But the point is is that this is a representative
 (9) sampling of a lot oceanfront lot in Ellamar subdivision
 (10) selling for 40 000 in 1986 and 45 000 right after the spill
 (11) Q That's the same buyer and virtually identical lot next
 (12) door?
 (13) A Yes that is correct
 (14) Q In your view is that - is that a very good indication of
 (15) changes in value?
 (16) A Yeah there are sales in Ellamar subdivision You can look
 (17) at prices in there and some of them go up a little bit some
 (18) of them go down but I think that this is a good
 (19) representation It doesn't necessarily tell me if you look at
 (20) all the data that the prices were going up but I think in my
 (21) opinion that the prices stayed the same in Ellamar
 (22) Q Tell us about the second matched pair you have there
 (23) A The second pair this represents an upland lot typical
 (24) upland situation in Ellamar subdivision These are two lots
 (25) that are located adjacent to each other They were both

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- (1) purchased by the same buyer Mr and Mrs McCarthy I got my
 (2) cheat notes here The lot was - the first lot was purchased
 (3) in 1988 for \$11 500 Then right after the oil spill the
 (4) second upland lot was purchased for \$14 000
 (5) Q By whom?
 (6) A By the same party the Mr and Mrs McCarthy Actually
 (7) the agreement was entered into in 1989 and but - for whatever
 (8) reason it - I don't know because it was remote property and
 (9) the recording office is in Valdez they didn't record it until
 (10) 1990 but based on my examination of this we put it in the
 (11) 1990 category
 (12) Q What does the second transaction tell you?
 (13) A The second transaction is a representative sampling in
 (14) Kasitna Bay Kasitna Bay for those -
 (15) Q I'm still on the second one I haven't gotten to Kasitna
 (16) Bay
 (17) A Excuse me
 (18) Q The second Ellamar transaction what conclusion did you
 (19) draw from that?
 (20) A Similar to the first Ellamar subdivision sale there were
 (21) prices for upland lots paid a little higher and a little bit
 (22) lower but if you look at all the data it shows places were
 (23) basically level the same before the spill and after the
 (24) spill
 (25) Q Did you also look at the Fidalgo subdivision?

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- (1) A Yes I did
 (2) Q Where is that one?
 (3) A Fidalgo subdivision is located in Port Fidalgo It's the
 (4) next bay or two down from Ellamar It's located here in
 (5) eastern Prince William Sound
 (6) Q Is Fidalgo on Native Corporation property?
 (7) A No it's located right in here It's located very near the
 (8) corporation property however
 (9) Q And why should the jury care about Fidalgo subdivision
 (10) sales?
 (11) A Well for the same reason that you know we looked at
 (12) Ellamar it was - it's a barometer of sales activity in Prince
 (13) William Sound even though the Native Corporation don't have
 (14) these - do not have these lots that typically they're these
 (15) large blocks of land but it's something more market data that
 (16) we should consider
 (17) Q I'm going to show you what has been marked for
 (18) identification as DX10516 It's a - why don't you tell us
 (19) what this is
 (20) A Okay This is a 12-year sales history of lots lot sales
 (21) in Fidalgo subdivision Again at the beginning or when the
 (22) developer opened up the subdivision - and this is a typical
 (23) trend - there's this pent up demand if you will and we had a
 (24) flurry of activity 24 lots sold Of course our economy was
 (25) doing a little bit better back in the early 1980s and there -

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- (1) was more discretionary income available to buy these lots but
 (2) you had that flurry of activity and that dropped down in '82
 (3) went from 24 to 7 and in 1983 went to 9 lots
 (4) And what the developer told me is - and the real estate
 (5) broker involved he said that sales activity really came to
 (6) a - a halt here '84 '85 and what he did is he took his
 (7) subdivision off the market and didn't - didn't do any
 (8) marketing until after the oil spill And in the winter of
 (9) 1991 in the early part of the 1992 he did this heavy
 (10) marketing of the subdivision and was very pleased and had -
 (11) sold 67 lots had a very very good year 1992
 (12) Q Okay Do you have price comparisons similar to what we
 (13) have looked at for the Ellamar subdivision for Fidalgo?
 (14) A Yes we examined sales prices in - in Fidalgo both before
 (15) the spill and after the spill
 (16) Q Conclusions consistent with what you saw at Ellamar?
 (17) A Similar prices that were paid both before the spill and
 (18) after the spill
 (19) Q Let's go to the Kenai area Let me pull that map out Did
 (20) you look at any transactions in subdivisions along the Kenai?
 (21) A Yes I did
 (22) Q The Kenai really is two different marketing areas isn't it
 (23) for purposes of rec property recreational property?
 (24) A Yes that would be a good way of characterizing it
 (25) Q Explain to the jury what the different areas are

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- (1) A Well we have what we refer to as the outer Kenai Seward
 (2) down through the Kenai Fjords and around through this area
 (3) And as you recall yesterday on the video that I did this area
 (4) has very few recreational subdivisions We had that up here in
 (5) Blying Sound area We had that Blying Sound remote program
 (6) killer subdivision And down here off of - right in this
 (7) general area is another subdivision called Petrof View
 (8) subdivision It's a state subdivision
 (9) Q Were there enough transactions in those two subdivisions to
 (10) do any kind of serious analysis?
 (11) A No the sales activity in these two areas has been very
 (12) slow and there really wasn't enough data to make a conclusive
 (13) comparison
 (14) Q Where is the other large recreational subdivision area
 (15) along the Kenai Peninsula at least shore front?
 (16) A Well you have these - this area here The second area
 (17) would be what is known as South Kachemak Bay and as you
 (18) recall
 (19) on the video this area here is - is heavily developed with
 (20) oceanfront recreational subdivisions
 (21) Q Okay That South Kachemak Bay area is in the stigma zone
 (22) according to Dr Mundy?
 (23) A Yes According to Dr Mundy this area here I guess and
 (24) the south part of Kachemak Bay - I'm not sure exactly where he
 (25) draws the line but it falls within this area that was
 (26) stigmatized

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- (1) Q Did you look at sales both the number of sales before and
 (2) after the spill in south Kachemak?
 (3) A Yes I did
 (4) Q Any particular ones or all of them?
 (5) A All of them
 (6) Q Did you draw any conclusions about the effect of the
 (7) sale - of the spill on the number of transactions in South
 (8) Kachemak Bay area?
 (9) A Yes I did
 (10) Q What?
 (11) A Concluded that the number of transactions actually
 (12) increased noticeably after the oil spill
 (13) Q What do you attribute that to?
 (14) A The - several factors I guess Alaska getting this
 (15) severe depression real estate depression 86 through 88
 (16) 1989 things started turning around economy started picking
 (17) up Just things got generally better
 (18) Q Have you taken a look at the - the prices before the spill
 (19) and after the spill in subdivisions along South Kachemak Bay?
 (20) A Yes I have
 (21) Q And voila that reference to Kasitna is that a reference
 (22) to the Kenai subdivision?
 (23) A Well it's a reference to a lot - recreational oceanfront
 (24) lot sale that sold in South Kachemak Bay Kasitna Bay is
 (25) located right here For those of you that have been to Homer

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- (1) recreating you've probably heard about McDonald Spit it's a
 (2) very well-known landmark McDonald Spit is right here and the
 (3) Little Bay right inside McDonald Spit is referred to as Kasitna
 (4) Bay
 (5) Q Is Kasitna Bay close to any of the plaintiffs properties
 (6) here?
 (7) A Yes the plaintiff properties are located just south few
 (8) miles away
 (9) Q Port Graham?
 (10) A Yes And English Bay
 (11) Q And what's your understanding as to the nature of oiling in
 (12) the Kasitna Bay area?
 (13) A It's my understanding that it was very lightly oiled or
 (14) actually there was some tar balls and - on the Homer Spit
 (15) but wasn't heavily oiled by any means but it definitely -
 (16) there were reports that there was oiling inside Kachemak Bay
 (17) Q Okay let's go back to DX10284A and your bar chart
 (18) respecting Kasitna Bay Can you describe that matched sale
 (19) transaction?
 (20) A This transaction is one of many we have in South Kachemak
 (21) Bay It's a representative sampling again Most of the data
 (22) clearly shows increases after the oil spill It's - the - if
 (23) I could explain that this area here is - I guess it's close
 (24) access to Homer easier to get to and more developed It has a
 (25) much more active real estate market a stronger market by far

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- (1) but this transaction in Kasitna Bay it's the - it's the same
 (2) lot The lot sold in 1986 for \$90,000 nice lot beautiful
 (3) view looking out over McDonald Spit back towards Mount
 (4) Redoubt
 (5) and Iliamna and then after the spill it sold for \$95,000 an
 (6) increase of \$5,000
 (7) Q There's only one pair of bars on the chart for Kasitna or
 (8) for Kachemak Bay Why aren't there more?
 (9) A Why? Ran out of space here I could put a lot more
 (10) transactions down there I have a number of examples to show
 (11) that prices increased and actually the increase started
 (12) occurring in 1989 1990 It's - values are coming back
 (13) again
 (14) Q You didn't want to create sensory overload?
 (15) A Well I just wanted to pick an example to show the jury
 (16) Q That's a representative number?
 (17) A Yes that's a representative sample
 (18) Q Okay Did you also discuss this transaction with the -
 (19) any of the parties?
 (20) A Yes I did
 (21) Q And what did you find out from them?
 (22) A Well I found out that the oil spill was a nonmarket issue
 (23) did not effect the transaction at all
 (24) MR PETUMENOS I'm sorry are we talking about the
 (25) July 92 transaction
 (26) MR DIAMOND The Kasitna Bay transaction

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- (1) BY MR DIAMOND
- (2) Q Let's turn to Kodiak. You can resume the stand for a
- (3) while
- (4) THE COURT Mr Diamond, it's been about an hour, do
- (5) you want to take a break?
- (6) MR DIAMOND That would be fine
- (7) THE CLERK Please rise. This court stands in
- (8) recess
- (9) (Jury out at 9 40 a.m.)
- (10) (Recess from 9 40 a.m. to 9 50 a.m.)
- (11) THE CLERK Please rise. This court now resumes its
- (12) session. Please be seated
- (13) THE COURT Where is Mr Stoll? He wanted to see me
- (14) right?
- (15) MR DIAMOND Oh, I'm sorry
- (16) THE COURT Oh, that's all right
- (17) MR PETUMENOS While we're waiting for him, I have a
- (18) matter
- (19) THE COURT Yeah, go ahead
- (20) MR PETUMENOS First of all, I need to apologize to
- (21) the Court. I assigned a lawyer to work on that instruction
- (22) after court yesterday. He said I got too much work. I'm
- (23) overwhelmed. I forgot to reassign it at 7 00 last night. I
- (24) went, oh, foey, and I got you the instruction early this
- (25) morning, but I didn't have it yesterday afternoon as you

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- (1) asked
- (2) THE COURT That's all right
- (3) MR PETUMENOS Secondly, maybe Mr Diamond will tell
- (4) you this is my fault, but I did not know that this witness was
- (5) going to address the Seal Bay and Kachemak Bay transactions
- (6) Mr Roddewig had filed a report on the lack of a market for
- (7) natural land and that report specifically addressed that
- (8) material. I thought he was the witness on that. I have - I
- (9) also wasn't sure that stuff was getting in, but it is, and I
- (10) have a couple of exhibits that I'd like to use on the
- (11) cross-examination, but I haven't designated them
- (12) THE COURT Tell him what the exhibits are
- (13) MR PETUMENOS They're appraisals and documents
- (14) relating to those transactions
- (15) MR DIAMOND So long as I have a reasonable
- (16) opportunity to consult with the witness about them
- (17) THE COURT I hear you, that's fine
- (18) MR DIAMOND While we're doing mea culpas, you gave
- (19) me until today to respond to the archaeology motion, and I'm
- (20) still on the first draft. Can I have the weekend for that?
- (21) THE COURT It's mea maxima culpa, right?
- (22) MR DIAMOND Unless you were planning to spend all
- (23) weekend reading the papers
- (24) THE COURT The answer to that question is yes. I so
- (25) rarely say that word. I like to blurt it out

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- (1) MR PETUMENOS I think we should have all these
- (2) discussions between 9 30 and 10 00 and -
- (3) THE COURT That's right, we should all have bananas
- (4) to give ourselves lots of potassium. Will somebody please get
- (5) in Stoll, because he's the person that asked me to come in
- (6) without the jury
- (7) MR PETUMENOS I got it
- (8) MR DIAMOND Did you want to see us?
- (9) THE COURT I did not - yeah, but I wanted to see you
- (10) with the jury
- (11) MR PETUMENOS Judge, we're looking for him. He will
- (12) be here shortly. I wanted to tell the Court I filed a couple
- (13) pleadings today
- (14) THE COURT I they I saw them counsel. One's a
- (15) motion to exclude testimony of Ted Myers
- (16) MR PETUMENOS Yes, you asked me for a brief on the
- (17) collateral impeachment
- (18) THE COURT Yes, I've read it.
- (19) MR PETUMENOS And the second was related to a - we
- (20) had another report filed by Dorchester in this claim
- (21) THE COURT I haven't seen that
- (22) MR DIAMOND We didn't file it. We provided them with
- (23) an update
- (24) MR PETUMENOS As I said, that's the other pleading I
- (25) filed

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- (1) THE COURT I haven't seen that one. I'll see if I
- (2) can - I think it may be in the in-basket. I saw some papers
- (3) there
- (4) Mr Stoll, did you want to see me out of the presence of
- (5) the jury?
- (6) MR STOLL Yes, I'm sorry. Your Honor, I didn't
- (7) realize you'd reconvened
- (8) THE COURT That's all right. What is it?
- (9) MR STOLL I just wanted to preserve my record. I
- (10) had not been objecting to him making statements about
- (11) statements, except one occasion I did, but I hadn't been
- (12) objecting to him making statements as to what other peoples
- (13) opinion was as to the effects of the EVOS on land sales because
- (14) of the Court's ruling yesterday afternoon. I just want to
- (15) affirm that I don't have to stand up every time that happens in
- (16) view of the Court's ruling yesterday
- (17) THE COURT You don't have to stand up if that
- (18) happens, but the objection you made today in the context of the
- (19) testimony I just felt was a good objection, and so I sustained
- (20) it. There may be those times when - when I would take the -
- (21) I would not allow the evidence, and it seemed to me that under
- (22) the circumstances it was absolutely unnecessary to testify to
- (23) that particular opinion
- (24) But -
- (25) MR STOLL I understand, there were two other - the

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- (1) point I was making was that there were at least two other
 (2) occasions when this witness this morning testified about what
 (3) somebody else - I think one was in Kachemak Bay that had had
 (4) no effect that somebody told him that the EVOS had no effect
 (5) on sales and there was another place where he said that the
 (6) EVOS had no effect on - on sales
 (7) THE COURT Well I don't remember specifically
 (8) counsel
 (9) MR STOLL But I just wanted to make sure that I
 (10) knew - I didn't want to be jumping up and down every time that
 (11) happened in view of the Court's ruling
 (12) THE COURT I can understand that Let me do it this
 (13) way There's a lot of material opinion material in that one
 (14) exhibit that was given to me and in general I - I authorized
 (15) the use of that kind of testimony over your objection There
 (16) may be specific examples when the testimony is either
 (17) unnecessary or as the record develops I can see that it
 (18) should stay out I'll take the burden of letting you know that
 (19) I think that's an issue Otherwise and I don't do this very
 (20) often but - so that I'll relieve you of the duty to object on
 (21) those - on those questions
 (22) If I see an issue though I'll let you all know so that
 (23) you can argue
 (24) MR STOLL Fine Your Honor if I think there's a
 (25) particular situation -

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- (1) THE COURT You're entitled to object Anytime you
 (2) want to object you're entitled to
 (3) MR STOLL I know that I just didn't want to
 (4) interrupt the flow
 (5) MR PETUMENOS Reminds me of that thing from Rumpel
 (6) Judge if you're going to try the case don't lose it
 (7) Remember that one?
 (8) THE COURT I thought that was Ben Walters that said
 (9) that
 (10) MR DIAMOND The Ellamar blowup I identified
 (11) incorrectly on the record It is 1035A (sic) I left out the
 (12) A
 (13) We also want to alert you jointly I think to a potential
 (14) scheduling snafu that I fear I may have created In an effort
 (15) to get an out of town witness on and off the stand we decided
 (16) to postpone some local witnesses who were in between that
 (17) witness and Mr MacSwain because they were available here
 (18) next
 (19) week without any problem and asked them to come back on
 (20) Monday Unfortunately Mr Stoll who's doing the
 (21) cross examination of that out-of town witness did not get word
 (22) of this until I reached him at home last night at 9 00 and said
 (23) he might have some problems with that arrangement given the
 (24) notice We've gotten two of the three witnesses back but one
 (25) the third is not available now to testify today so we may end
 up with a slightly abbreviated day if the Court consents and

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- (1) I know Mr Petumenos has no objection to that happening I
 (2) don't know about Mr Stoll
 (3) MR STOLL I have no - as I told him last night I
 (4) have no objection to that
 (5) THE COURT Yeah the only thing I have objection to
 (6) is the word slightly
 (7) MR DIAMOND We're ready to go
 (8) THE COURT Let's bring them in
 (9) MR STOLL Well we're all keeping our sense of
 (10) humor
 (11) THE COURT In the morning yes
 (12) MR STOLL Oops I think slight is up
 (13) (Jury in at 9 58 a m)
 (14) THE COURT All right the jury is present counsel
 (15) go ahead
 (16) BY MR DIAMOND
 (17) Q Okay Mr MacSwain let's bring Mr Stoll to his feet and
 (18) talk Kodiak
 (19) Did you investigate the number of transactions in the
 (20) Kodiak area before and after the spill? And again I'm
 (21) talking about individual lot transactions very small parcels
 (22) A Yes I did
 (23) Q How did you do that?
 (24) A Went to the fellow that owns the title company down there
 (25) in Kodiak his name's Tim Hurley and did a - asked him to do a

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- (1) thorough examination of all of the transactions both before
 (2) the spill and after the spill on Kodiak Island
 (3) Q When was that?
 (4) A I asked him to do this work in June of 1993
 (5) Q Did you know Hurley before that?
 (6) A Yes I had I'd known him because of all my work on
 (7) Kodiak
 (8) Q Is he a knowledgeable fellow about the real estate market
 (9) in the Kodiak area?
 (10) A Yes he is
 (11) Q Did you ask him whether he had any opinions at that
 (12) juncture about potential impact of the spill on the real estate
 (13) market in Kodiak
 (14) MR STOLL Your Honor same objection
 (15) THE COURT I think the answer is a yes or no answer
 (16) right?
 (17) MR DIAMOND Yes
 (18) THE COURT Did you?
 (19) A Yes I did
 (20) BY MR DIAMOND
 (21) Q And what did he tell you?
 (22) A He said he was unaware of any changes in transactions
 (23) Q Had he done any analysis of the market -
 (24) A No
 (25) Q - before you approached him?

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- (1) A No he had not
 (2) Q Did you engage him to do that work?
 (3) A Yes I did I asked him to do some research for me
 (4) Q Describe what kind of research you had him do?
 (5) A I had him do several examinations of the - the public
 (6) records said Tim go back ten years 1980 through 1993 and
 (7) tell me the total number of transactions in Kodiak I just
 (8) want to know how many property conveyances there were over
 that
 (9) time period just to give an overview
 (10) Also I had him trying to identify well where is - I
 (11) knew the lands that we were appraising at the time were
 (12) primarily remote lands and some of them were recreational
 (13) lands out on the road system out of Kodiak You have several
 (14) different areas there s Pasagshak and Anton Larsen,
 (15) recreational and I also said everything more than 15 miles
 (16) out of town kind of falls in that general recreational market
 (17) Tell me what the number of transactions both before the spill
 (18) and after the spill go to the public records and give me the
 (19) facts
 (20) And also I said do - tell me Tim before the spill and
 (21) after the spill the number of transactions within the
 (22) villages Remember yesterday I showed the villages of
 Ouzinkie
 (23) and Port Lions Larsen Bay and Old Harbor just tell me what s
 (24) happening out there both before the spill and after the spill
 (25) just in the number of real estate transactions when people

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- (1) sell property
 (2) Q Why didn t you do the work yourself?
 (3) A Primarily a time factor We had a - I could have done the
 (4) same work but it s - this is something he specializes in and
 (5) I just wanted to - he has a good reputation I knew he was
 (6) competent to go to the public records and give me this data
 (7) which he did
 (8) Q Was he compensated for his time?
 (9) A Yes I paid him for his research to go to - title company
 (10) time as we call it
 (11) Q Is that unusual?
 (12) A No it s not
 (13) Q What did Mr Hurley report back to you just in general
 (14) terms about numbers of transactions?
 (15) A In general terms he reported back to me that both before
 (16) the spill and after the spill there did not appear to be an
 (17) effect on the number of transactions generally speaking
 (18) Q Okay Do you have with you the number of rural or remote
 (19) transactions that you assembled through the years before the
 (20) spill and then you have after the spill?
 (21) A Yes I have his report to me right here
 (22) Q Could you just share with the jury what the raw numbers
 (23) are?
 (24) MR STOLL Excuse me Your Honor could I just ask a
 (25) question here in view of a possible objection?

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- (1) THE COURT Yes
 (2) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
 (3) BY MR STOLL
 (4) Q These are the numbers you assembled or these are
 numbers
 (5) that you re reporting Mr Hurley reported to you that he got
 (6) from somewhere else?
 (7) A These are the numbers that Mr Hurley got from the state
 (8) recorders office based on his examination and reported to
 (9) me
 (10) MR STOLL That s all
 (11) DIRECT EXAMINATION OF STEVEN MacSWAIN (Resumed)
 (12) BY MR DIAMOND
 (13) Q Okay, I dare not do this because nobody can ever read my
 (14) handwriting but just on the flip chart here - I ll get you a
 (15) pen How s your handwriting?
 (16) A Horrible
 (17) Q Any volunteers? Just give us what the raw numbers are so
 (18) the jury can see
 (19) A Okay
 (20) Q You have to write a little bigger than that because the
 (21) folks in the back of the room did not bring their binoculars
 (22) with them
 (23) You want to start again? That s all right go ahead I
 (24) think I now have an adverse witness Judge
 (25) A Part of the reason I wanted to write small Mr Diamond is

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- (1) running out of space here
 (2) Q All right quit whenever you re out of room
 (3) A Okay In - let s go back to the first here back in
 (4) 1982 Now these were the total records in Kodiak which
 (5) included the City of Kodiak and the entire Kodiak Island so I
 (6) just want to give a general overview of the number of
 (7) transactions I ll go kind of fast here and write them down
 (8) for you
 (9) Q You can call them out
 (10) A 2 724 in 82 83 there was 3630 In 84 we had 3844
 (11) In 85 there was a lot of transactions in Kodiak for 4 050
 (12) In 1986 there were 3479 In 1987 - it was a big year 4308
 (13) 1988 it dropped off downward trend here 3100 before the
 (14) spill 3102 For 89 little bit more here 2915 1990
 (15) started picking up again 3269 1991 staying right around
 (16) that 3 000 2903 In 1992 little over 3 000 again 3198
 (17) This is - were the total number of conveyances in Kodiak
 (18) Q Do you have a 1993 number or that - is that -
 (19) A I had him do the work in the summer of 1993 so it s not
 (20) complete yet
 (21) Q Those are total - the first column total number of
 (22) transactions in Kodiak?
 (23) A Yes the total number of transactions in Kodiak just
 (24) exploring the market trying to identify a trend of
 (25) transactions

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- (1) Q Did he assemble for you numbers of what you had defined as
 (2) rural more than 15 miles out of the city limits of Kodiak
 (3) City?
 (4) A Yes he did
 (5) Q For all the years or just some of the years?
 (6) A I went back to 86
 (7) Q Why don't you next do your entries now do another column
 (8) give us those numbers
 (9) A See this is more than - told you about my handwriting -
 (10) more than 15 miles outside of Kodiak
 (11) Q That's okay we'll remember
 (12) A Okay 15 miles So we did starting in 86 - 92 91
 (13) 90 89 88 87 and 86 Okay 1986 we had 106
 (14) transactions In 1987 81 transactions In 1988 99
 (15) transactions In 1989 86 transactions In 1990 there were
 (16) 272 transfers of property transactions In 1991 we went to
 (17) 97 transactions In 1992 110 so it fluctuated right near 90
 (18) to a hundred in that general range
 (19) Q Did you and Mr Hurley try to make some sense out of these
 (20) numbers?
 (21) A I did mostly Hurley did - was basically to report the
 (22) facts to me
 (23) Q Okay What did you conclude from the analysis of the
 (24) numbers?
 (25) A I concluded - and also I spoke with Mr Hurley after we

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- (1) did this work I said well what does - I asked him what
 (2) does this tell you? He says well it doesn't appear that
 (3) there was -
 (4) MR STOLL Oh excuse me Your Honor I would object
 (5) to him testifying as to an opinion by Mr - if that's where
 (6) we're going I don't know
 (7) MR DIAMOND I'll lay some foundation If you'd like
 (8) THE COURT I'd like the witness to bypass it Let's
 (9) hear what his opinion is this witness opinion
 (10) BY MR DIAMOND
 (11) Q What conclusions did you draw from the numbers?
 (12) A I concluded that the - there definitely was not a
 (13) suspension of sales in this category
 (14) Q You mean the market activity did not stop?
 (15) A Market activity did not stop In fact In 1990 there
 (16) was - there was a big jump but also I should put down the -
 (17) of this 272 this involves one of the Native Corporations in
 (18) Kodiak the Larsen Bay Native Corporation they deeded 167
 (19) lots
 (20) to their shareholders put it out in the marketplace So if
 (21) you subtract 167 this is the shareholders and Larsen Bay
 (22) which is on the west part of Kodiak Island this year would
 (23) have shown about 105 sales that were the non Native
 (24) Corporation
 (25) shareholders
 (26) But what I concluded just to summarize is that market
 (27) activity continued throughout There are a number of little

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- (1) stories you know why things went up a little bit one year
 (2) down the other but the overall conclusion is that in this
 (3) particular segment of the market the transactions continued
 (4) marched right along
 (5) Q Did you consult with Mr Hurley to find out whether there
 (6) were any - any things that happened unique to Kodiak that
 (7) might have influenced the market?
 (8) A Yes I did
 (9) MR STOLL Excuse me Your Honor excuse me - could
 (10) I just have a moment?
 (11) MR PETUMENOS Can I confer with counsel?
 (12) MR STOLL Mr Petumenos has persuaded me to withdraw
 (13) my objections
 (14) MR DIAMOND Thank you Mr Petumenos
 (15) MR PETUMENOS You're welcome Anything I can do to
 (16) help
 (17) BY MR DIAMOND
 (18) Q I think the question was did you talk to Mr Hurley about
 (19) any events unique to the Kodiak market that might have - might
 (20) affect the analysis of these numbers?
 (21) A Yes I did
 (22) Q What did he tell you?
 (23) A I just added these were more Native Corporation transfers
 (24) of properties in the subsequent years 167 in 1990 throughout
 (25) to 92 In answer to your question he told me that - number

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- (1) one that there was the several factors that affected the
 (2) market in terms of the number of properties that came on line
 (3) First of all we had the Larsen Bay Village Corporation
 (4) activity 167 but he also reminded me which I was aware of
 (5) in 1988 there was what we call the Kupreanof land disposal
 (6) program
 (7) Q That's something that Pat Carlson talked about when he was
 (8) here with us?
 (9) A Yes he did
 (10) Q How did that influence the analysis of these numbers?
 (11) A Well in 1988 the - the number of lots on the market
 (12) increased substantially There was - the State had a large
 (13) land disposal and there was more land that was out in the
 (14) private sector so the supply increased
 (15) Q Mr Carlson said that he didn't think that that land
 (16) offering had any market impact when he testified Do you agree
 (17) with that judgment?
 (18) A No I do not agree with that
 (19) Q Why?
 (20) A Well when you're doing a study of the real estate market
 (21) you look at a lot of things You look at what properties sell
 (22) for you look at the availability of land if there's a - if
 (23) there's a sudden oversupply of lots available then all of a
 (24) sudden the - the guys who own the land you know they can't
 (25) quite sell the property as much as they used to at least the

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- (1) demand is not quite there It's just a simple
 (2) supply and-demand relationship
 (3) Q How many - I don't know if you told us this how many lots
 (4) were involved in Kupreanof?
 (5) A About 33 lots came on line in 1988 These were people
 (6) that - that won the lottery the right to go forward and
 (7) acquire this land from the State
 (8) Q Is that a significant number in terms of the market for
 (9) remote recreational properties in Kodiak?
 (10) A Yes it is significant
 (11) Q Did you learn of any other events unique to Kodiak that
 (12) affect the analysis or could affect the analysis of these
 (13) numbers?
 (14) A I already mentioned that the Russian villagers the Old
 (15) Believers bought some land in 1988 and that was - there was
 (16) 17 families so that was - in 1989 excuse me So you had 33
 (17) lots in Kupreanof plus the 17 buyers in the Russian villagers
 (18) so there's 50 transactions that were occurring right here in
 (19) this time period
 (20) Q How about the Larsen Bay offers?
 (21) A Yes we had the flooding of the market 1990 with Larsen
 (22) Bay
 (23) Q Taking all those things into account is it still your best
 (24) judgment that the spill did not have an effect on the number of
 (25) transactions in rural Kodiak property?

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- (1) A Yes It's my opinion that based on my analysis that the
 (2) oil spill did not affect the number of transactions on Kodiak
 (3) Q Did you discuss that conclusion with Mr Hurley after you
 (4) analyzed the numbers?
 (5) A Yes I did
 (6) Q Did he see anything different in this to suggest a
 (7) different result to you?
 (8) A No he did not
 (9) Q Okay At some time after you did this analysis did you
 (10) learn that Mr Hurley had earlier voiced some opinion that the
 (11) spill might have had an adverse effect on the real estate
 (12) market? Let me ask that question again because it was
 (13) unclear
 (14) After you analyzed the numbers and reached the judgment
 (15) that you did did you find out that Mr Hurley some time
 (16) before that had told some other people that in his view the
 (17) spill did have an impact on the real estate market?
 (18) A I'm aware of a comment that he made to some other real
 (19) estate consultants but -
 (20) Q Did that change your opinion?
 (21) A The comment or the data?
 (22) Q The comment
 (23) A The comment no The comment was an off the cuff
 (24) comment
 (25) that he made to some other consultants but I took that into
 consideration together with all this data and a lot of other

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- (1) things
 (2) MR DIAMOND If I could figure out how to close this
 (3) I would
 (4) MR STOLL There's a little button
 (5) BY MR DIAMOND
 (6) Q I want to talk to you for a moment finally about prices in
 (7) the Kodiak market Did you analyze pre- and post spill sales
 (8) in the Kodiak Region from a price perspective?
 (9) A Yes I did
 (10) Q And generally what - what did you find?
 (11) A Generally what I found is that the prices stayed the same
 (12) There was a little change level of prices before the spill and
 (13) after the spill little change
 (14) Q And did you prepare a chart to illustrate those
 (15) conclusions?
 (16) A Yes I did
 (17) Q And is this it?
 (18) A Yes it is
 (19) Q I'm referring to DX10227 You want to come down and tell
 (20) us what is depicted on this last set of bar graphs?
 (21) Tell us what we're looking at
 (22) A Okay this is a chart again it's what we call a matched
 (23) pair analysis It's representative transactions typical of
 (24) what I found in - in Kodiak both before the spill and after
 (25) the spill

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- (1) Q The first series of transactions is labeled Onion Bay I
 (2) think we've heard some discussion about it Can you remind us
 (3) where it is on the map?
 (4) A Yes Onion Bay is located on Raspberry Island The City
 (5) of Kodiak is right in here and Raspberry Island is located
 (6) between Afognak Island and Kodiak Onion Bay is this little
 (7) guy right in here
 (8) MR DIAMOND Can everybody see that or is the
 (9) glare - glare?
 (10) A Oh you have the - here it is
 (11) MR DIAMOND Any better? Okay
 (12) BY MR DIAMOND
 (13) Q For those who were blinded by the fluorescent lights show
 (14) us again
 (15) A Onion Bay again Kodiak Afognak Island this is Raspberry
 (16) Island Onion Bay is right in here
 (17) Q There's a KIB subdivision that's at issue in this case on
 (18) Onion Bay?
 (19) A Well there's a KIB land in here and there's also a KIB
 (20) subdivision that KIB sold five lots right after the oil spill
 (21) Q Tell us what we see on the bar chart under Onion Bay
 (22) A The Onion Bay we have sales both before - or a sale both
 (23) before the spill and after the spill 1985 there were two
 (24) lots that sold in Onion Bay for \$25,000 each oceanfront lot in
 (25) Onion Bay

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- (1) After the spill in the fall of 1989 it shows an increase
 (2) where a local real estate attorney by the name of Mr Hancock
 (3) purchased the lot for - Kodiak local purchased the lot for
 (4) \$29 000
 (5) Q Does that make it a suspect transaction because it was
 (6) purchased by an attorney?
 (7) A Yes anytime an attorney is involved I'm suspect
 (8) The next three transactions are Kodiak oceanfront lots
 (9) involving the Kodiak Island Borough probably heard previous
 (10) testimony on this and it shows prices in the low 30 000 to
 (11) mid 30 000 price range
 (12) Q The Onion Bay sales these last three part of an auction?
 (13) A Yes it was part of an auction
 (14) Q You were here when Mr Carlson talked about that and said
 (15) they probably ought not to be considered in a price analysis
 (16) remember that?
 (17) A No
 (18) Q Do you think it's fair to look at those Onion Bay
 (19) transactions in assessing the effect of the spill on price?
 (20) A Yes I think it's important We looked at these
 (21) transactions all the transactions in Onion Bay as well as all
 (22) the transactions that occurred in Kodiak Island And I think
 (23) that's important that - particularly if you have transactions
 (24) before and after you see what the trend is what the effects
 (25) of the oil spill - there was oil in Onion Bay Not very much

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- (1) but a little few tar balls went in there but it was oiled
 (2) according to the information that I gathered
 (3) Q Okay the next set of transactions concerns Hidden Basin
 (4) Where is that on the map?
 (5) A Hidden Basin is located south of the City of Kodiak This
 (6) is Ugak Bay and Hidden Basin is back at the very west end of
 (7) the bay right in here As you recall earlier in the week when
 (8) Mr Byars testified and had a video really pretty video
 (9) showed as he went along the shoreline you saw the shoreline
 (10) of Ugak Bay came in there and showed Hidden Basin and
 (11) showed a few you know cabins and people fishing and activity in the
 (12) summer of 1989
 (13) Q Tell us what those three transactions are
 (14) A Hidden Basin three transactions One transaction in 1988
 (15) was a sale in Hidden Basin went for \$36 000 Here is not the
 (16) same lot but similar lots in Hidden Basin Not much
 (17) difference in the character of the lots but it - similar lot
 (18) sold after the oil spill this next guy sold for almost
 (19) \$40 000 and the other one sold for \$35 000 about the same
 (20) price as right before the spill Two 1989 are right here and
 (21) the blue and the green represents the pre spill sale
 (22) Q Ugak Bay (sic) where is that? That's Ugak Bay I'm
 (23) sorry
 (24) A Ugak Bay that's not too far away just the big guy here is
 (25) Ugak Bay and these are transactions on the south side of the

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- (1) bay Again as you recall from that video it showed going
 (2) around the south shore there and these are pre spill in the
 (3) green lots sold for generally stay around \$20 000 in this
 (4) area after the spill from \$20 000 and this one here sold for
 (5) 18 750 but after looking at all the details and going out and
 (6) looking - we looked at all these properties and looking at
 (7) the physical features it didn't show any difference in price
 (8) both before the spill and after the spill
 (9) Q And finally Pasagshak Bay where is that on the map?
 (10) A That's also on Ugak Bay It's actually a Little Bay on the
 (11) north side of - of Ugak Bay It's right in here It's on the
 (12) road system but it's a very popular recreational subdivision
 (13) for Kodiak residents There are a couple of year round homes
 (14) there but it's a - it's a really good fishing stream and
 (15) also on Mr Byars video he took you down and showed you
 (16) that little stream that came in and it's a very popular
 (17) recreational area
 (18) What happened here is I have two transactions They were
 (19) both purchased by the same buyer They're two oceanfront lots
 (20) located side by side Right before the spill he paid \$15 000
 (21) for the lot and right after the spill he bought the adjoining
 (22) lot for \$25 000
 (23) Q Incidentally you Ugak Pasagshak Bay transactions are in an
 (24) area that's clustered by what five or so KIB parcels?
 (25) A Yes that is correct

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- (1) Q We see a bunch of bars on this chart Are these the only
 (2) transactions you looked at concerning Kodiak recreational
 (3) sales?
 (4) A No they're not We looked at a number of transactions
 (5) and this is a fair representation of the transactions that we
 (6) analyzed
 (7) Q You don't want to tell the jury about all the rest of them?
 (8) A That's - no I need to get out of here and enjoy the
 (9) weather
 (10) Q What conclusions did you draw from all of the transactions
 (11) that you looked at on Kodiak concerning the effect of the spill
 (12) and price of recreational property there?
 (13) A I concluded that the oil spill was a nonfactor on prices
 (14) and that the prices did not change because of the oil spill
 (15) nor did it have an effect on the number of transactions both
 (16) before the spill and after the spill
 (17) Q Do you remember - I hazard to ask you now but Pat
 (18) Carlson's discussion about four transactions in Deadman's Bay
 (19) and Sulua Bay that he described or identified as S-1 S-2 S-3
 (20) and S-4?
 (21) A Yes I do remember that
 (22) Q He didn't express an opinion but his two pre spill sales
 (23) were prices higher than the two post spill sales Have you
 (24) studied those four transactions?
 (25) A Yes I have I've studied those four transactions and

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- (1) others as well in that same area
 (2) Q Do you think it's fair to conclude that at a minimum
 (3) those transactions and the others that took place in Deadman's
 (4) Bay and Sulua Bay show a price decline in that area of Kodiak?
 (5) A No. If you look at all the transactions in that area -
 (6) and there was a number of other transactions right in that
 (7) time period 88
 (8) Q How many?
 (9) A At least eight or ten that I can recall right in that -
 (10) those two bays that he was comparing
 (11) Q I interrupted your answer go ahead and finish
 (12) A I was going on to say that if you look at all the data
 (13) that - and look at the analysis that the evidence does not
 (14) show a decline in value. For example I could just take - one
 (15) of his transactions involved a purchase of an oceanfront lot
 (16) for \$5 000 an acre. It was purchased by the U S Fish &
 (17) Wildlife Service in 1989 and Pat indicated that prices had
 (18) gone down but this property was based upon a 1989 appraisal
 (19) which considered -
 (20) Q Let me stop you because that's a little confusing. This
 (21) was one of the transactions that he cited as being a post spill
 (22) transaction which was a lower price than a transaction that
 (23) took place before the spill?
 (24) A Yes that's correct. He had stated that this - this was
 (25) an indication that prices had gone down. And I was going on to

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- (1) say that this was one of several transactions that the Fish &
 (2) Wildlife Service purchased and had appraised appraisal which
 (3) reviewed and they bought this property. This one that he said
 (4) that was a lower price they bought it at the fair market value
 (5) and there was no adjustment in the appraisal at all for the oil
 (6) spill and the appraisal was done in 1989. So they paid market
 (7) value and the reason they paid the 5 000 versus where he
 (8) mentioned 6 000 per acre for lots in 1988 was that it was a
 (9) different lot and we're not looking at the same lot
 (10) So you have to be very careful when you listen to
 (11) appraisers talk about matched pair analysis. You know you
 (12) can cherry pick these things and you got to either get the same
 (13) lot that's the ideal situation and see what sold one time and
 (14) look at the next one or else a very similar lot but you have
 (15) to look at all of the data which I did
 (16) Q When you talk about the Fish & Wildlife Service 89
 (17) transaction by law the government has to pay fair market
 (18) value?
 (19) A Yes by law they're required to pay fair market value
 (20) Q And the appraisal that was done was done to justify that
 (21) that was being purchased at fair market value?
 (22) A Yes That is required that in order before they buy the
 (23) property they have to pay fair market value
 (24) Q You confused me a little bit because you said that
 (25) appraisal relied on transactions that took place before the

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- (1) spill Why - why is it relevant?
 (2) A It's relevant because the - the appraiser relied on this
 (3) data and the prices that were paid before the spill and -
 (4) Q Without any adjustment?
 (5) A There was no adjustment in the appraisal at all on this
 (6) appraisal as well as many others I reviewed in this area by
 (7) the Fish & Wildlife Service. They made no adjustments in their
 (8) appraisal to account for the oil spill
 (9) Q You can sit down
 (10) MR DIAMOND Your Honor at this time I'd move into
 (11) evidence DX10305A the Ellamar sales graph DX10284A the
 (12) Prince William Sound and Kenai matched pair sales DX10516
 (13) the
 (14) Fidalgo sales and DX10227 the Kodiak transactions
 (15) (Exhibits DX10305A, DX10284A DX10516 and DX10227
 (16) offered)
 (17) THE COURT They're all admitted
 (18) (Exhibit DX10305A DX10284A DX10516 and DX10227
 (19) received)
 (20) MR DIAMOND I would also like to move into
 (21) admission - move into evidence once we identify it with a -
 (22) MS SMITH Chuck the number's right there the
 (23) sticker
 (24) MR DIAMOND I would also like to move into evidence
 (25) DX14784 and that's the flip chart that Mr. MacSwain did -
 (26) concerning the number of transactions in Kodiak
 (27) (Exhibit DX14784 offered)
 (28) THE COURT It's admitted

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- (1) (Exhibit DX14784 received)
 (2) BY MR DIAMOND
 (3) Q Mr. MacSwain you dazzled some of us with numbers and
 (4) bars
 (5) and charts and statistics. Did you rely on anything more
 (6) subjective in forming the conclusions that you did formulate
 (7) about the lack of impact of the spill on the market for real
 (8) estate in Prince William Sound the Kenai and Kodiak?
 (9) A Yes I did
 (10) Q What?
 (11) A We did what we call - refer to as market interviews which
 (12) is going out and interviewing people that are involved in these
 (13) real estate markets and interviewing them and getting their -
 (14) their perceptions of the oil spill and also information about
 (15) properties in these areas. Did a very very thorough study
 (16) Q For what sort of information?
 (17) A Looking at information such as land use economic trends
 (18) market trends and as I stated to find out what perceptions
 (19) that the market participants had about the oil spill and
 (20) property values
 (21) Q How many interviews did you conduct since 1990?
 (22) A Market participants in excess of 150 and that doesn't
 (23) include a number of real estate transactions that I confirmed
 (24) which is over 400 so between the two - well in excess of
 (25) five 600
 (26) Q Over what period of time?

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- (1) A Since I started the job in 19 – summer of 1990
 (2) Q How major an effort was all this?
 (3) A It was a major effort on my part It was a significant
 (4) part of my – my work estimate maybe a quarter of my time was
 (5) out talking to people and getting their – getting
 (6) information That was one of the areas that I was the
 (7) principal coordinator on – for this assignment
 (8) Q Is this a common practice of real estate appraisers to rely
 (9) on subjective impressions of market participants?
 (10) A Yes it is
 (11) Q Describe that
 (12) A Well one of the – one of the first things you do when you
 (13) do an appraisal is you look and see what you re appraising you
 (14) go to the market It s the market transactions It s the
 (15) information you re gathering it s a very basic first step in
 (16) the appraisal process
 (17) Q How are you qualified to conduct interviews of this kind?
 (18) A I guess on the job training I ve been involved in this
 (19) business for 25 years and it just – it s part of being a real
 (20) estate appraiser You go out and you have to find out how the
 (21) market – if you re doing a market value appraisal you go to
 (22) the real estate market and because of doing this in my
 (23) business that I feel I m qualified
 (24) Q During the course of the interview process did you gain
 (25) access to any databases of real estate transactions and

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- (1) information?
 (2) A Yes I did several
 (3) Q Describe them
 (4) A Went to – first of all my company the Appraisal Company
 (5) of Alaska which I was the president in 1976 to 1986 is one of
 (6) the largest firms in the state I went back to my former firm
 (7) and gathered all the data in our office involving
 (8) transactions The next step I went to the various agencies
 (9) some of the agencies like the State of Alaska and the federal
 (10) agencies They have these large databases of real estate
 (11) transactions and we had them do some computer runs of data
 (12) and we looked at the whole universe of information and looking
 (13) for all the waterfront transactions in Alaska all the large
 (14) acreage transactions and did a very thorough study
 (15) Q Was one of those agencies the Alaska Department of Natural
 (16) Resources?
 (17) A Yes it was
 (18) Q How much time did you spend looking at their information?
 (19) A Spent a lot of time at the State of Alaska DNR is very
 (20) involved with the land disposal programs and leasing of land
 (21) and they have a – the largest database So that was an – the
 (22) agency that I went to many times 40 50 times at least
 (23) Q Some people mistook you for an employee there didn t
 (24) they?
 (25) A Yeah They were getting to know me pretty well
 (26) Q Did you talk to the head of the DNR or head of the

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- (1) appraisal branch Mr Lattery?
 (2) A Many times
 (3) Q Were the interviews you conducted typically one-shot deals?
 (4) A Well if there were people that dealt in these real estate
 (5) markets it was the Dennis Lattery s with DNR or another agency
 (6) that had dealt with Prince William Sound that were in the
 (7) realty department I would go back and interview these people
 (8) on a – well a number of times or at least a minimum of once
 (9) a year to find out what s happening with their – in their
 (10) area Kenai Peninsula Borough for example that has
 (11) assessors
 (12) that are out that do evaluations I would go and visit with
 (13) them at least once or twice a year finding out what s
 (14) happening in their areas
 (15) Q Did you do anything to confirm information that was given
 (16) to you by folks you talked to?
 (17) A Yes I did
 (18) Q Tell us
 (19) A Went out and – went out and looked at the properties and
 (20) did – verified to see if their facts were correct
 (21) Q After you spoke with people and they provided you
 (22) information did you do anything to confirm that you had taken
 (23) it down correctly?
 (24) A Excuse me I didn t hear that last part
 (25) Q Did you do anything to confirm that your notes about the
 (26) interviews were correct and the information you were relying on

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- (1) was in fact what the folks intended to give you?
 (2) A Yes There were a number of occasions when – I ll do an
 (3) interview with what we call these market participants and there
 (4) were – if it was a complex issue I d call these people back
 (5) and say I just want to make sure I got my facts correct and
 (6) follow up Or if – there was a lot of times my partner on
 (7) this job Mr Dorchester would be with me and we d go back
 (8) and we d look at our notes you know did you take the notes
 (9) and if there was something that he had in his notes that you
 (10) know I heard a little differently I would call up and I would
 (11) verify with the people that I interviewed if the facts were
 (12) correct
 (13) Q And the important notes that you took were transcribed?
 (14) A Yes they were They were transcribed by R&R Court
 (15) Reporters
 (16) Q Those have all been furnished to the plaintiffs in this
 (17) case?
 (18) A Yes they have
 (19) Q During the course of these interviews did you ever suggest
 (20) to the people you were talking to that the oil spill did or
 (21) didn t have an effect on the real estate market?
 (22) A No I did not
 (23) Q What did you try to do?
 (24) A Well what I tried to do is get a – seeking an unbiased
 (25) answer And it s very important when you re doing these

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- (1) interviews that you you know try to get your opinions passed
 (2) on to the people you re speaking with so you re looking -
 (3) you re seeking honest answers and trying to get their views
 (4) rather than your own
 (5) Q If the oil spill didn t come up during the course of the
 (6) conversation would you then specifically raise it?
 (7) A Yes I would If they had specific knowledge of the area
 (8) If they were somebody that had - was just involved in
 (9) Southeast Alaska or you know wasn t related to the oil spill
 (10) I wouldn t bring it up But I would bring it up if it wasn t
 (11) brought up during the course of the interview
 (12) Q How did you select the people you talked to?
 (13) A I selected the people based on people that were involved in
 (14) this area If they had any knowledge at all Primarily I went
 (15) to everybody that I could possibly think of that had
 (16) information about the oil spill area
 (17) Q I m going to show you a chart that you had prepared if I
 (18) can find it This is DX10238A 1 Is this a chart you prepared
 (19) for us?
 (20) A Yes it is
 (21) Q What is depicted on this chart?
 (22) A This chart represents the various market interview sources
 (23) people that I went to and interviewed
 (24) Q During the course of making the rounds and talking to
 (25) people picking brains did you find that generally you were

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- (1) following the same path that Dr Mundy had tread?
 (2) A Not really
 (3) Q Did that surprise you?
 (4) A Matter of fact it did For example some of the agencies
 (5) that are involved in these areas are major players in Prince
 (6) William Sound for example the federal government has the
 (7) national forest and they have a realty department The Kenai
 (8) Fjords likewise in the outer Kenai they have a realty
 (9) department And the State of Alaska has - owns a lot of land
 (10) and Kenai Peninsula Borough and I quite oftentimes would ask
 (11) has - Dr Mundy is on the other side of this case has anybody
 (12) seen him and he was not really - hadn t been around very
 (13) much if at all
 (14) Q When you dealt with somebody who had access to
 (15) particular - particular sources of information did you
 (16) sometimes ask them to do follow-up work for you?
 (17) A Yes I did
 (18) Q Give us some examples of that
 (19) A Well as I stated I went through all of the real estate
 (20) brokers in Kenai Peninsula - excuse me In Prince William
 (21) Sound that had dealt with these recreational subdivisions and
 (22) if these people I asked them to do some research for me I -
 (23) you know gather all your sales data and you know I told them
 (24) that - I asked them to do it and I told them that I d pay
 (25) them for it

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- (1) Likewise with the real estate appraisers there s a number
 (2) of appraisers that do work in these areas and if they had a
 (3) lot of data I would contract out with them and have them
 (4) provide me the information that they researched For example
 (5) in - in on the Kenai Peninsula there s one other MAI His
 (6) name is Dave Derry He s very familiar with the markets down
 (7) in South Kachemak Bay I asked Dave to do a little study for
 (8) me and gather all of the transactions in South Kachemak Bay
 (9) both before the spill and after the spill so I had him do some
 (10) more work for me
 (11) Q Did you pay anybody just for interviews?
 (12) A No I did not
 (13) Q How many people received compensation for their time?
 (14) A Well the people - I d estimate 10 12 that did other
 (15) work for me
 (16) Q Generally how much did they receive?
 (17) A Well it varied Anywhere from a couple hundred dollars
 (18) to if there was a lot of work four or five thousand dollars
 (19) Q Is that standard appraisal practice to pay folks who
 (20) provide you with research?
 (21) A Yes it s standard practice It s common sense, too if you
 (22) ask somebody to do something for you I believe in
 (23) compensating
 (24) them
 (25) Q I m not going to ask you to describe to the jury what 150-
 market participants told you during the course of four years

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- (1) but I think we d like to get some highlights of what people who
 (2) were active in the real estate markets thought and put up on
 (3) the Barco what s been marked for identification as DX10238A 5
 (4) Is this a sampling of information that you received during
 (5) the course of your several years of interviews?
 (6) A Yes it is I think it s a fair sampling of typical
 (7) comments that I received
 (8) Q And these are comments that you selected to give the jury
 (9) an accurate portrayal of what the market participants were
 (10) telling you had happened?
 (11) A Yes it is I think it s a good cross-section
 (12) Q I m going to zoom in on the first one here Who is Don
 (13) Nattress?
 (14) A Don Nattress is the real estate broker that was involved in
 (15) the Fidalgo subdivision right after the oil spill
 (16) Q He told you that the oil spill had absolutely no negative
 (17) impact on property values whatsoever and that he never had a
 (18) client and/or property owner complain about the oil spill s
 (19) effect on property values is that correct?
 (20) A Yes that is correct
 (21) Q Is he in your view a good source of information
 (22) concerning the perspective from a real estate broker
 (23) standpoint?
 (24) A Yes he is He s involved in the area and I felt that
 (25) Mr Nattress as well as others are definite people that I

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- (1) wanted to interview
- (2) MR PETUMENOS Judge may I request a cautionary
- (3) instruction?
- (4) MR DIAMOND I think we -- may we approach on that?
- (5) THE COURT Yeah sure
- (6) (At side bar on the record)
- (7) MR DIAMOND I had understood you were going to do
- (8) that at the close of this testimony not right in the middle of
- (9) it
- (10) THE COURT I don't think that makes any difference
- (11) whether it's in the middle or not I mean this is the time
- (12) isn't it?
- (13) MR DIAMOND It is the time I have not had an
- (14) opportunity to review what's been proposed to you this
- (15) morning
- (16) THE COURT I'll give you a break
- (17) MR DIAMOND Take a break?
- (18) THE COURT You've got it.
- (19) MR DIAMOND I'll get it from Tim
- (20) THE COURT We'll take a break and I'll come in before
- (21) the jury does
- (22) MR PETUMENOS Okay
- (23) (Sidebar concluded)
- (24) THE CLERK Please rise This court stands in
- (25) recess
- (26) (Jury out at 10 50 a m)

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- (1) (Recess from 10 50 a m to 11 04 a m)
- (2) THE CLERK Please rise This court now resumes in
- (3) session Please be seated
- (4) MR DIAMOND Your Honor I've taken a look at the
- (5) proposed jury instruction during the -- during the break
- (6) Stylistically I have a problem with the last sentence which
- (7) repeats the jury instruction for the second time But I asked
- (8) Mr Petumenos whether he was certain this was an accurate
- (9) statement of the law that opinions don't come in to prove the
- (10) opinions I know the rule talks about facts relied on by an
- (11) expert that otherwise would be inadmissible don't come in to
- (12) prove the truth of the matters asserted It's always been my
- (13) understanding that an expert can rely on and utilize the
- (14) opinions of other people with expertise and I just question
- (15) whether this is an accurate statement of the law
- (16) THE COURT You question but you don't know the
- (17) answer?
- (18) MR DIAMOND I don't know the answer to that
- (19) THE COURT You know actually that may be a good
- (20) objection as it relates to the last sentence The fact that I
- (21) repeat you are not to consider the opinions of others on which
- (22) the testifying expert relied for the truth of the matter
- (23) asserted in the opinion that's confusing because in essence
- (24) the basis of the opinion that the expert testifies to is
- (25) important in their consideration of whether the opinion is

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- (1) correct and that the opinion states in essence the same
- (2) thing that the underlying opinions stated then this is a
- (3) misleading instruction
- (4) Counsel?
- (5) MR PETUMENOS Are you addressing Mr Petumenos?
- (6) THE COURT Uh huh
- (7) MR PETUMENOS Could I get to the podium so I'm near
- (8) a mike?
- (9) I have two responses One is that the opinion of others
- (10) relied upon by an expert is still hearsay If I could be
- (11) candid with the Court I think the problem here is that we are
- (12) compounding error upon error I think the --
- (13) THE COURT I always like it when counsel are candid
- (14) about their own opinions
- (15) MR PETUMENOS Well here's what -- no I just really
- (16) think this is what -- this issue on the instruction is what
- (17) raises the problem we argued yesterday Facts and data are
- (18) different than opinions but they're both hearsay when they're
- (19) by an out-of-court declarant Hearsay is admissible to support
- (20) an expert's opinion but the Court has the -- the authority
- (21) and I thought you ruled yesterday that the opinion cautionary
- (22) instruction is appropriate for whenever the Court believes that
- (23) the out-of-court data when the fact or data is in hearsay form
- (24) and requires a cautionary instruction
- (25) I think the word -- I'm not trying to argue with the

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- (1) Court I just think the reason that the subparagraph C is
- (2) written in terms of facts or data is that the rule did not
- (3) contemplate that experts would be allowed to testify to
- (4) out of court declarant expert opinions as a basis for their --
- (5) for their opinion that it was supposed to be limited to facts
- (6) or data You have taken a broad rule of that and concluded
- (7) that you can testify to out-of-court opinions but that doesn't
- (8) mean that the protections of the subsection aren't there
- (9) I would further note -- and I can't recall with
- (10) specificity Judge Shortell but I think you gave that same
- (11) language about the jury not consideration for the truth of the
- (12) matter for the basis of the opinion in connection with
- (13) Dr Johnson's testimony about the work and writings of the
- (14) archaeologists that were not in court that were referred to in
- (15) her testimony because of the -- is that the instruction you
- (16) gave there?
- (17) THE COURT Uh-huh
- (18) MR PETUMENOS I think that instruction was applied
- (19) for by the evidence under the exact same subdivision of the
- (20) evidence rules
- (21) THE COURT Counsel here's what you -- here's what I
- (22) gave the jury
- (23) MR DIAMOND I have it
- (24) THE COURT You do?
- (25) MR DIAMOND Yeah

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- (1) THE COURT It's different language but it may be the
 (2) same message
 (3) MR DIAMOND It refers to - I had it and I lost it
 (4) What that related to was the underlying facts What happened
 (5) I think that's what we asked for It was hearsay evidence of
 (6) what essentially happened and we asked the Court to instruct
 (7) the jury that considering the facts they could not come in to
 (8) prove what happened but simply to support the expert's
 (9) ultimate opinion
 (10) Go to Mr Petumenos instruction I think you raise a very
 (11) good concern The last sentence is confusing because it ends
 (12) with the word opinion and it's unclear whether that's
 (13) Mr MacSwain's opinion or the opinion of others on which he is
 (14) relying in part to formulate his own So there is - this
 (15) would be construed to mean don't pay any attention to what the
 (16) witness says to the extent that it's based on an out-of-court
 (17) statement
 (18) That I think is a - is a valid problem What I really
 (19) was referring to was the issue that's suggested by the previous
 (20) sentence which says that opinions may only be considered by
 you
 (21) to explain or support the opinion given by the testifying
 (22) expert in court and are not to be considered for the truth of
 (23) the matter truth of those opinions I don't know that that's
 (24) a correct statement of the law
 (25) THE COURT The rule the Rule 705 says when the

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- (1) underlying facts or data would be inadmissible in evidence
 (2) under any other circumstance than to explain the expert's
 (3) opinion or inference the Court shall exclude the underlying
 (4) facts or data if the danger they will be used for an improper
 (5) purpose or validly outweighs the support and I've concluded
 (6) that's not true And then it goes on to give the instruction
 (7) It is true isn't it that these are admissible for the
 (8) purpose of explaining or supporting the expert's opinion or
 (9) inference
 (10) MR DIAMOND The only question I raise is are they
 (11) facts are they data? Is an opinion that's relied on different
 (12) than a fact and different than data?
 (13) THE COURT Yeah right
 (14) MR DIAMOND Because the rule as I understand it is
 (15) that an expert can rely on another - another expert's opinion
 (16) even if that expert is not in court
 (17) THE COURT Sure but it's his opinion that's the
 (18) issue the one who's testifying
 (19) MR DIAMOND And the question is Does the
 (20) out of court expert - expert's opinion therefore not come in
 (21) to prove the truth of the matter asserted I don't know the
 (22) answer to that question Do you consider it facts or data like
 (23) any other facts or data? I would think that Mr Petumenos is
 (24) correct and an instruction that it does not come in to prove
 (25) the truth of the out of court opinion would be appropriate I

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- (1) just don't - I've never seen a case that suggests that that's
 (2) so with respect to opinions as opposed to facts and other
 (3) data There may well be cases -
 (4) THE COURT There what?
 (5) MR DIAMOND There may well be them What I would
 (6) suggest is you simply give the instruction as stated in the
 (7) rules and do this in terms of facts and data and we don't
 (8) have a problem because I think we all agree that the rule is
 (9) what it is
 (10) THE COURT The problem is the rule doesn't give you
 (11) the limiting instruction it only gives you the sort of vague
 (12) guidelines for - I mean it doesn't tell you what the
 (13) instruction should be
 (14) MR DIAMOND Then I think what we can do is simply
 (15) substitute the word opinions for 'facts and data' in the
 (16) second sentence of Mr Petumenos instruction
 (17) THE COURT In the second sentence?
 (18) MR DIAMOND You are instructed that -
 (19) THE COURT Any facts or data which the expert gives
 (20) which are not his own but are the facts or data of others
 (21) which he spoke to or relied on are not to be considered for the
 (22) truth
 (23) MR DIAMOND Yeah
 (24) THE COURT That's what you want to do?
 (25) MR DIAMOND We agree that that's an accurate

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- (1) statement of the law Leave it opinion I don't know that it's
 (2) an accurate statement of the law
 (3) THE COURT I like that counsel you listen
 (4) That's - that's good You want this language striking the
 (5) word opinion Facts or data which the expert gives which are
 (6) not his own but are the facts or data of others which he spoke
 (7) to or relied on are not to be considered for the truth of those
 (8) facts or data but may only be considered by you to explain or
 (9) support the opinion given by the testifying expert in court
 (10) MR DIAMOND Yes and then I would strike the last
 (11) sentence
 (12) THE COURT That's your proposal counsel?
 (13) MR DIAMOND I would also strike from the third line
 (14) the word opinions just to make it consistent Now says facts
 (15) or data or opinions
 (16) THE COURT Well I don't know You know counsel
 (17) that's sort of splitting hairs isn't it? Opinions are part of
 (18) the facts or data aren't they - aren't they?
 (19) MR DIAMOND Mr Stoll is about to say no
 (20) MR STOLL No I'm sitting down
 (21) MR DIAMOND That's the luxury of being here not
 (22) there I don't know the answer to the question
 (23) THE COURT Okay go ahead
 (24) MR PETUMENOS Judge I think Mr Diamond's logic is
 (25) circular The issue of whether or not an out-of-court material

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(1) or hearsay whether in the form of opinion or whether in the
 (2) form of fact whether or not an expert can rely on it is what
 (3) brings rise to the rule If an expert can rely on another -
 (4) on another expert's opinion or a lay person's opinion for
 (5) reaching his conclusion he can also rely on facts or data
 (6) Data is a broad term designed to encompass all of the
 (7) things that would otherwise not be admissible in court but
 (8) which are admissible to support the expert's opinion including
 (9) other opinions as I understand the logic of the Court's ruling
 (10) yesterday If that's true If that's true we are entitled to
 (11) an instruction that specifically identifies the out-of-court
 (12) material to which the instruction applies and to exclude the
 (13) word opinion from the instruction could be implied to the
 (14) jury that opinions - and certainly what Mr. Diamond has argued
 (15) today opinions are different they're not subject to the
 (16) cautionary instruction and they clearly are
 (17) You have ruled that the out-of-court material is admissible
 (18) to support the opinion the same as any other fact or data
 (19) which means it's subject to the instruction It's still out of
 (20) court We still don't have the - the holder of the opinion
 (21) here to testify to take the oath to cross-examine
 (22) The instruction should specifically identify the offending
 (23) material - or the material that's for a limited purpose and
 (24) should apply the instruction to it So I think it would be
 (25) highly prejudicial to the plaintiffs if you adopted

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(1) Mr. Diamond's language I think it's circular
 (2) THE COURT Well I could do away with this problem
 (3) and make you all angry by simply saying really what you're
 (4) talking about is statements of people whether facts or data or
 (5) opinions is just a particularized statement Statements
 (6) includes everything else
 (7) MR. PETUMENOS You could You could do that That
 (8) would all - I think that would be an appropriate application
 (9) of the rule It applies to anything that would otherwise not
 (10) be admissible in court but for the expert being here
 (11) THE COURT I hear you I mean personally I think
 (12) that the opinions - the only thing that causes me to have
 (13) caution here is that I've had the drafted opinion - drafted
 (14) instruction Counsel raises a point that he thinks he might be
 (15) able to research and find some case law in support of his
 (16) position but I've seen no authority from either side on this
 (17) issue and the real issue is do underlying statements of
 (18) hearsay declarants come in for the truth of the matter
 (19) asserted and the answer is no It's no right?
 (20) MR. DIAMOND I don't want to be too quick to answer
 (21) that question because if the underlying statement is an
 (22) opinion I don't know whether the rule that opinions (sic) can
 (23) rely and utilize the opinions of others might create an
 (24) exception to the hearsay rule and therefore make that
 (25) admissible I'm not saying that is the law I'm just saying

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(1) having been presented with this jury instruction in the last
 (2) half hour I don't have an answer for you
 (3) MR. PETUMENOS The only point I would add is that I
 (4) think in the Johnson situation that was a mixed question of
 (5) fact and opinion because those field notes were being taken by
 (6) other experts
 (7) THE COURT Well so is this
 (8) MR. PETUMENOS Right That's why I -
 (9) THE COURT This is a mixed question too
 (10) MR. PETUMENOS Right That's why I think the
 (11) instruction that you gave before the tenor of it to give a
 (12) lesser instruction now would not be appropriate
 (13) THE COURT Okay this is what I'm going to do
 (14) counsel I'm going to use the word statements rather than
 (15) use the words "facts or data or opinions" so I'm going to take
 (16) out all of those statements - those particular words and say
 (17) statements as a description of the kind of evidence that is the
 (18) underlying testimony that underlies the basis of this expert's
 (19) testimony and I'm going to strike the last sentence That's
 (20) the instruction I'll give unless somebody wants me to defer on
 (21) it
 (22) MR. PETUMENOS No that's fine I just want to make
 (23) sure I understand the spirit of the Court's ruling By using
 (24) the broader term statements you intend to encompass the
 (25) opinions so that -

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(1) THE COURT I do -
 (2) MR. PETUMENOS So that counsel will not be in a
 (3) position to argue that the instruction excludes them
 (4) THE COURT Well counsel is not in that position
 (5) unless he shows me more than his own gut feeling that there
 (6) may
 (7) be some authority out there that supports his position On the
 (8) other hand if he shows me authority that supports his
 (9) position I may give him the agreement I just don't think it's
 (10) there
 (11) MR. PETUMENOS His authority should be more
 (12) authoritative
 (13) THE COURT I don't want it to be an underlying
 (14) opinion of some lawyer on the staff All right Are we
 (15) ready?
 (16) MR. DIAMOND We're ready
 (17) (Jury in at 11:22 a.m.)
 (18) THE COURT The jury is present counsel Before you
 (19) begin your next questioning there's something I have to
 (20) instruct you on now I think it's appropriate for me to give
 (21) an in-trial instruction to you at this point
 (22) As you know this is an expert witness testifying and his
 (23) opinion can be based on what we might normally consider to be
 (24) hearsay statements from other people out of court all right?
 (25) I've given you one instruction on this general issue and that
 (26) was the instruction relating to the plaintiffs' archaeology

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- (1) expert but I'm going to give this one again because I'm sure
 (2) in the course of a long trial like this some of these concepts
 (3) get lost and then I'll be instructing you further on it at the
 (4) end of the case It's just that I think it's important for me
 (5) to give you this instruction now
 (6) Ladies and Gentlemen of the Jury you may hear testimony in
 (7) this case from experts which may include reference to
 (8) underlying statements of others on which the expert relied in
 (9) formulating the opinions that he will testify about on the
 (10) witness stand You are instructed that any statements which
 (11) the expert gives which are not his own but are the statements
 (12) of others which he spoke to or relied on are not to be
 (13) considered for the truth of those statements but may only be
 (14) considered by you to explain or support the opinion given by
 (15) the testifying expert in court Now this relates to experts
 (16) this expert and perhaps later experts who may be testifying
 (17) here
 (18) BY MR DIAMOND
 (19) Q Mr MacSwain when we broke we were talking about
 (20) Mr Nattress views of the effects of the spill on real
 (21) property values from the standpoint of a real estate broker
 (22) Were Mr Nattress comments to you representative of what you
 (23) heard from other real estate brokers?
 (24) A Yes they were
 (25) Q You list as another category of people assessors and you

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- (1) have a comment - it's failing me Joel
 (2) You have a comment that you brought to share with us from
 (3) Gary Fandel who said market activity picked up after the
 (4) spill Economically the quote spill was one of the best
 (5) things that happened
 (6) Who is Gary Fandel?
 (7) A Gary Fandel is an appraiser that works for the assessing
 (8) department for the Kenai Peninsula Borough and he covers the
 (9) area the outer Kenai South Kachemak Bay and also the Cook
 (10) Inlet West Cook Inlet remote property is one of his
 (11) specialties
 (12) Q Why would a borough assessor be in a position to know if
 (13) the spill had effect on market activity?
 (14) A The assessor does similar things appraisers do in that
 (15) they go out and they you know confirm sales transactions
 (16) look at the number of the activity and that sort of thing
 (17) Q Were Mr Fandel's comments to you about the - the effects
 (18) or noneffects of the spill representative of what you heard
 (19) from other assessors?
 (20) A Yes they were typical comments we received For example
 (21) we also talked to - interviewed my ex partner Mike Renfro
 (22) who is the assessor for the communities of Cordova Valdez
 (23) Whittier and talked to him and he also stated the same thing
 (24) that he did not see any impact of the oil spill on property
 (25) values

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- (1) Q You also have a comment from Bill Roberts a Kodiak
 (2) appraiser who told you that no impact of the spill on Kodiak
 (3) remote - I'm sorry no impact of the spill on Kodiak remote
 (4) properties The visual effect of the spill was a nonissue was
 (5) that what he told you?
 (6) A Yes that is correct That's what he told me
 (7) Q Who is Bill Roberts?
 (8) A Bill Roberts is a real estate appraiser who lives and works
 (9) on Kodiak and is involved with the appraisal of remote lands on
 (10) Kodiak Island
 (11) Q Is he a knowledgeable fellow?
 (12) A Yes he is
 (13) Q I seem to recall having seen the name Roberts on the
 (14) letterhead of Mr Shorett who testified here Is there a firm
 (15) by the name of Shorett and Roberts?
 (16) A No they're two separate firms Shorett is a firm out of
 (17) Seattle and Roberts has his firm in Kodiak
 (18) Q Okay so the two are not connected at all Mr Roberts and
 (19) Mr Shorett?
 (20) A Well they did do an appraisal together on Kodiak but you
 (21) know they're two separate firms
 (22) Q Were Mr Roberts comments to you typical and
 (23) representative of what you heard from other appraisers in the
 (24) area?
 (25) A Yes they were They're typical of a number of other

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- (1) appraisers that all of the appraisers that I interviewed other
 (2) than the plaintiffs appraisers made comments like this
 (3) Q Another one such appraiser was Mr Derry who you
 (4) previously identified for us as an MAI based in Homer Did he
 (5) tell you quote in general market activity increased in 1989
 (6) as a result of more properties listed and available for sale
 (7) and additional income and cash available by potential buyers
 (8) created by money for the oil spill based on an ongoing
 (9) analysis of the South Kachemak Bay property sales there is no
 (10) market identified impact on property values as a result of the
 (11) oil spill?
 (12) A Yes those were the exact words in a letter to me
 (13) Q Is this representative of the comments you collected among
 (14) market participants in the Kenai?
 (15) A Yes it is
 (16) Q You also list a comment from a Dennis Lattery who I think
 (17) you've previously identified who said in reviewing appraisals
 (18) I've never seen a measurable effect either positive or
 (19) negative because of EVOS on property values Is that what he
 (20) told you?
 (21) A Yes it is
 (22) Q Why would Mr Lattery be in a position to know in your
 (23) judgment?
 (24) A Mr Lattery's been involved working for the State of Alaska
 (25) for a number of years 20-some years He's a senior review

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- (1) appraiser for the Department of Natural Resources so he has an
 (2) opportunity to review a number of appraisals in this entire
 (3) area. He also owns a lot in Onion Bay
 (4) Q You were told very much the same thing by Mike Bennett who
 (5) also worked for DNR?
 (6) A Yes Mr Bennett - this is a quote from Mr Bennett
 (7) Q And it's no market resistance to purchase recreational
 (8) property on Kodiak Island due to the oil spill?
 (9) A Yes that is correct Mr Bennett was the state appraiser
 (10) who did the appraisal on Kupreanof subdivision after the oil
 (11) spill
 (12) Q Were the statements of Mr Lattery and Mr Bennett
 (13) representative of the views of state officials that you talked
 (14) to?
 (15) A Yes they were
 (16) Q Finally you included a comment from a fellow by the name
 (17) of Bob Rice Did Mr Rice tell you in examining appraisals
 (18) I've not seen any measurable proof that EVOS affected the
 (19) market either positively or negatively in the 1989-1994 time
 (20) period and the oil spill damage was biological and not
 (21) economic?
 (22) A Yes those are his exact words in a written statement that
 (23) he provided me Mr Rice is very involved He's head of the
 (24) Realty Department for Fish & Wildlife Service and Fish &
 (25) Wildlife Service owns a very large portion of Kodiak Island

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- (1) and they're in the process of acquiring property in Kodiak So
 (2) he's very familiar with transactions and appraisals on Kodiak
 (3) Island
 (4) Q Did you also interview bankers?
 (5) A Yes I did
 (6) Q What did they tell you?
 (7) A I interviewed two major banks in the state they're both -
 (8) National Bank of Alaska and also First National Bank Each one
 (9) of these banks have branch offices in the spill affected area
 (10) Cordova Valdez Seward Homer and Kodiak And basically
 (11) what these bankers told me was that the lands that I was
 (12) studying it's not an area where they make real estate loans
 (13) And as far as they were concerned that the oil spill had been
 (14) a nonissue and they were - there was some concern in 1989
 (15) the lenders indicated that to me but they didn't reject any
 (16) loans because of the oil spill
 (17) Q Did you interview any representatives of Native
 (18) Corporations?
 (19) A Yes I did I also interviewed Native Corporations
 (20) Q Any of the plaintiffs?
 (21) A No I was restricted from talking to the plaintiffs but I
 (22) spoke with others that have land in the oil spill area
 (23) Q Give us a representative example
 (24) A The Aleut Native Corporation they own over a million some
 (25) acres on the Alaska Peninsula which is at the south end of the

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- (1) oil spill According to the SCAT maps it would be the - it
 (2) would be the west end of the oil spill whereas Eyak and
 (3) Tatitlek would be on the - on the east end kind of like the
 (4) book ends So I interviewed the land manager for the Aleut
 (5) Native Corporation to see what - you know what their opinions
 (6) were regarding the oil spill
 (7) Q Okay their lands were not oiled but they were very close
 (8) to oiled property?
 (9) A Yes that's correct The oiling maps show that the oil
 (10) came right up you know a few miles away from their property
 (11) They're just a little further west as the oil spill's coming
 (12) down through the Kenai and Kodiak their lands are on the
 (13) Alaska Peninsula and they have very large landholdings on the
 (14) Alaska Peninsula
 (15) Q Was there a similarity in your mind between the Aleut
 (16) landholdings and the Eyak and Tatitlek landholdings?
 (17) A Yes I thought it would be useful to analyze Both of
 (18) these properties had shown that they were not oiled and I
 (19) was - I wanted to know what their perception of the oil spill
 (20) was on non-oiled property
 (21) Q What did Mr Stanton tell you?
 (22) A He said it was a nonissue as far as their corporation was
 (23) concerned
 (24) Q Was that representative of what you heard from Native
 (25) Corporations that you talked to?

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- (1) A Yes it was for those that owned property that I
 (2) interviewed in the oil spill area
 (3) Q You don't mean to tell us Mr MacSwain that in the
 (4) hundreds of interviews you conducted nobody expressed the
 (5) opinion that the oil spill had a negative impact on the real
 (6) estate market do you?
 (7) A No that's not my findings There were some negative
 (8) comments
 (9) Q Could you describe them for us?
 (10) A Some of the comments that I heard was that the opinions
 (11) were that if there was - some of the parcels that were oiled
 (12) they felt that they were impaired and that there would be some
 (13) interruption in the use But only during the time period
 (14) that - during the clean up period or when they felt that the
 (15) properties were no longer being interfered with But - I'm
 (16) done
 (17) Q Do you mean to tell us that taking into account all of the
 (18) statistical data that you've looked at all of the people
 (19) you've talked to over the four years and all the thinking that
 (20) you've done on the subject are you suggesting that the oil
 (21) spill was a good thing for the property values of these
 (22) plaintiffs?
 (23) A No I do not I think that there were - there were some
 (24) properties that were temporarily impaired which we've
 (25) estimated damages for But clearly the - the mountains and

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- (1) the glaciers and the non-oiled properties there s not a shred
 (2) of evidence that these properties were hurt by the oil spill
 (3) MR DIAMOND I have no further questions
 (4) CROSS EXAMINATION OF STEVEN MacSWAIN
 (5) BY MR PETUMENOS
 (6) Q Mr MacSwain good morning
 (7) A Good morning Mr Petumenos
 (8) Q We had a conversation in the men s room in which I asked
 (9) you if you were an athlete
 (10) A Well -
 (11) Q You told me that you were and I asked you the question -
 (12) because when I was in college I was a terrible quarterback and
 (13) you remind me of some of the line backers I met in the course
 (14) of my career - and I want to ask you if I make you mad during
 (15) this cross-examination let me know in advance because I don t
 (16) want old memories And I also told you in that same
 (17) conversation I m at a disadvantage because I broke the zipper
 (18) on my pants so I m going to have to stay behind the podium as
 (19) much as possible
 (20) MR DIAMOND A blessing for the rest of us
 (21) MR PETUMENOS That is a true story
 (22) MR STOLL You ll do anything for a line
 (23) MR PETUMENOS Not that
 (24) BY MR PETUMENOS
 (25) Q You were retained by Bogle & Gates initially?

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- (1) A Yes that is correct
 (2) Q You had been retained by Bogle & Gates on at least a prior
 (3) engagement if not more?
 (4) A Yes I was previously retained by Bogle & Gates on one
 (5) assignment in the 1980s
 (6) Q You have testified in court about a dozen times you stated
 (7) and the last time was about three or four years ago is that -
 (8) MR DIAMOND I think that mischaracterizes the
 (9) testimony
 (10) MR PETUMENOS Does it?
 (11) BY MR PETUMENOS
 (12) Q Explain it to me You ve been qualified as an expert how
 (13) many times?
 (14) A My testimony was that - that I ve qualified as an expert
 (15) in court about 10 or 12 times and I ve also been a master
 (16) in - which is a mini - a mini Judge in determining just
 (17) compensation cases for various municipalities
 (18) Q Now you have never been qualified as an expert in court
 (19) involving contaminated properties have you?
 (20) A No I have not
 (21) Q You mentioned that you were involved in the Crown Point
 (22) disaster That was a spill of railroad cars and formaldehyde
 (23) wasn t it?
 (24) A Yes that is correct
 (25) Q You never wrote a written report in that case did you?

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- (1) A No we just did a preliminary analysis
 (2) Q Nothing was ever written down and submitted?
 (3) A No
 (4) Q Your first experience as an appraiser with an oil spill?
 (5) A As far as a crude oil spill yes you re correct I ve had
 (6) an opportunity many times in the course of my business to
 (7) appraise property that had environmental problems and this is
 (8) the first time that I ve appraised - had an assignment like
 (9) this
 (10) Q This is the first time in your career that you have ever
 (11) testified in court to a survey of opinions of others on the
 (12) markets?
 (13) A No that is not correct That s not the first time that
 (14) I ve surveyed market participants that are involved in real
 (15) estate markets
 (16) Q It s the first time you ve ever surveyed market
 (17) participants in a market to determine whether or not
 (18) contamination had an impact on the market though isn t it?
 (19) A No that s not at all correct When I did the work on the
 (20) Crown Point chemical spill we did a survey of the real estate
 (21) market and talked to buyers and sellers and tried to get their
 (22) perceptions of the spill on property values
 (23) Q I missed something did you testify in court on Crown
 (24) Point?
 (25) A No I said that - maybe I misunderstood the question -

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- (1) Q My question was This is the first time you have ever
 (2) testified in court about a survey relating to contaminated
 (3) properties?
 (4) A Yes this is the first time I ve testified in court
 (5) Q Right Now you are presently the owner of MacSwain and
 (6) Associates?
 (7) A Yes I am
 (8) Q And you do the billing for MacSwain and Associates?
 (9) A Yes I do
 (10) Q Throughout 1993 this particular litigation had pretty much
 (11) had MacSwain and Associates committed to the firm of Bogle &
 (12) Gates for this engagement?
 (13) A Yes This assignment has been a major part of my work the
 (14) last three years
 (15) Q 1992 it was the major part of your work?
 (16) A Yes it was
 (17) Q More than 50 percent of your work in 92?
 (18) A To the best of my recollection I d have to check my
 (19) records but it was - 1992 that sounds about right
 (20) Q You know that you ve billed Bogle & Gates in regard to the
 (21) Exxon Valdez engagement in 1990 between a hundred and two
 (22) hundred thousand dollars?
 (23) MR DIAMOND May I ask counsel to clarify what he
 (24) means by engagement whether he s talking about this
 (25) litigation or all litigations

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- (1) THE COURT Sure
 (2) MR PETUMENOS I am This litigation Exxon Valdez
 (3) MR DIAMOND The case that brings us together today?
 (4) MR PETUMENOS That s the one
 (5) MR DIAMOND Or all the cases?
 (6) MR PETUMENOS Exxon Valdez Between a hundred and
 (7) two hundred thousand dollars
 (8) MR DIAMOND Still unclear to me
 (9) THE COURT Distinction was was he working on all the
 (10) cases or just working on this one
 (11) MR PETUMENOS Let me rephrase
 (12) THE COURT That s what counsel s asking
 (13) BY MR PETUMENOS
 (14) Q You know you have billed Bogle & Gates with regard to the
 (15) Exxon Valdez engagement approximately one hundred to two
 (16) hundred thousand in 1990 alone?
 (17) MR DIAMOND Your Honor I think it s ambiguous
 (18) THE COURT No it s not ambiguous it s all the
 (19) cases
 (20) MR DIAMOND If that s what he means
 (21) A Without going back and checking it would be my estimate
 (22) that - that those numbers sound about right but there was a
 (23) lot of other work that we did besides this case
 (24) BY MR PETUMENOS
 (25) Q In 1991 \$300 000 same question

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- (1) BY MR PETUMENOS
 (2) Q Would you agree that as of the time of your deposition
 (3) somewhere between - you estimate somewhere between 1 3
 (4) million
 (5) and 1 4 million without counting your 1994 billings was paid
 (6) to you in connection with the Exxon Valdez case?
 (7) A To the best of my recollection those numbers sound about
 (8) right But I want to emphasize those are gross billings and
 (9) I have you know several associates and support staff and a
 (10) number of expenses major expenses that are included in those
 (11) numbers those aren t just Steve MacSwain dollars
 (12) Q What would it be through today?
 (13) A It would be more than that amount
 (14) Q Can you give us an estimate?
 (15) A The - I would say since the deposition I had in Seattle
 (16) that it would be several hundred thousand dollars higher than
 (17) that amount
 (18) Q And when we re talking about MacSwain and Associates this
 (19) is different from and different gross billings than
 (20) Mr Dorchester?
 (21) A That s right Mr Dorchester has his own separate firm
 (22) Q Now you co-authored an appraisal with Mr Dorchester on
 (23) this case yes?
 (24) A Yes I did
 (25) Q And so the fees that you ve described for the jury in this
 case are for your part of the appraisal that you did with

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- (1) A Again my answer is - without you know having my records
 (2) in front of me that sounds about right but I couldn t - I
 (3) don t want to speculate to that
 (4) Q Approximately 300 000?
 (5) A Again that would be just a - a very rough estimate but I
 (6) don t want to speculate that that would be an exact figure
 (7) Q Is it right within a hundred thousand dollars?
 (8) A Yes I think that s in the ballpark
 (9) Q In 1992 \$400 000?
 (10) A Yes I did And I want to emphasize there was other work
 (11) that we did besides this case here
 (12) Q 1993 a half million dollars?
 (13) A Again I - I don t want to speculate to those numbers
 (14) They sound about right but I - I can t - I don t know
 (15) without going back and looking at my records
 (16) MR PETUMENOS Counsel deposition page 155 line 6
 (17) through line 15
 (18) MR DIAMOND Hold on for a moment
 (19) MR PETUMENOS Sure
 (20) MR DIAMOND For purposes of refreshment?
 (21) MR PETUMENOS No I want to read it to him
 (22) MR DIAMOND I don t know that there s anything to
 (23) impeach Your Honor
 (24) THE COURT I don t know either
 (25) MR PETUMENOS I ll move on

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- (1) Mr Dorchester but do not include the work that he did on that
 (2) same appraisal am I right?
 (3) MR DIAMOND Your Honor I m going to object to the
 (4) use of this case He s already said that this involved other
 (5) things
 (6) THE COURT Sustained
 (7) MR PETUMENOS Good point
 (8) THE COURT Objection sustained
 (9) MR PETUMENOS Good point
 (10) BY MR PETUMENOS
 (11) Q The Exxon Valdez case?
 (12) A Yes my billings are for this case and a lot of other work
 (13) that we did billings for my associates and all of our team
 (14) here in Alaska
 (15) Q The consult- -
 (16) A The gross billings
 (17) Q The consultancy to the Bogle & Gates in the Exxon Valdez
 (18) oil spill litigation has been the assignment that has brought
 (19) you the most revenue in your professional career from a single
 (20) client?
 (21) A Yes that is correct I ve been working on this job since
 (22) 1990 and it s been a major part of my work spent a lot of
 (23) time working on it so it - yes it would be the largest
 (24) assignment that I ve had in my 25 year career
 (25) Q Now it is true that you know a lot of people in the real

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- (1) estate industry in Alaska
 (2) A Yes that's true After 25 years you get to know a lot of
 (3) people in the real estate industry in Alaska
 (4) Q You have a lot of friends in the real estate industry that
 (5) you've known for years?
 (6) A Yes I have a lot of friends and I think there's probably
 (7) a few people out there that don't like me also
 (8) Q Mr Hurley is a friend of yours? I think you said that on
 (9) direct
 (10) A I - yes he is
 (11) Q Is Mr Lattery a friend of yours?
 (12) A Yes he's a friend He's not somebody I socialize with I
 (13) know him through business
 (14) Q Now you mentioned on direct that you talked to Mr Hurley
 (15) and as I understand it this market survey that you did is
 (16) contained in a chapter of your report right? It's chapter 4
 (17) or 6 or something like that where this information is
 (18) contained?
 (19) A Yes We have one chapter that focuses on the market
 (20) interviews However the data that we collected from our
 (21) market interviews is interspersed throughout our appraisal
 (22) report
 (23) Q In the - in this survey are all of the people that you
 (24) included you've written down all the people that you made part
 (25) of the survey right so that we can know who they are names

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- (1) of them?
 (2) A I'm not certain I understand your question
 (3) Q Was Mr Hurley part of the survey?
 (4) A Yes Mr Hurley was part of the survey
 (5) Q Now you indicated to me that - or indicated to
 (6) Mr Diamond in direct that Mr Hurley who is a friend of
 (7) yours made an offhand comment to another real estate analyst
 (8) prior to the time that you talked to him right?
 (9) A Yes that's correct That's what Mr Hurley told me that
 (10) he had made a comment to another appraiser which he
 (11) subsequently explained to me that he retracted his comment
 (12) after - based on new information that he - he did for me
 (13) Q An offhand comment you said on direct?
 (14) A Yes that is correct Those are Mr Hurley's exact words
 (15) to me regarding the market - excuse me to the best of my
 (16) recollection he used the word offhand or something to that
 (17) effect It was a flippant comment or offhand something like
 (18) that basically in that context
 (19) Q The real estate analyst to whom he made the offhand
 (20) comment
 (21) was Mr Gary Papke Mr Roddewig's partner right?
 (22) A Yes that's correct Mr Papke -
 (23) Q That's my only question right now It was Mr Papke to
 (24) whom he made the comment and that is Mr Roddewig's
 (25) partner
 (26) am I right?
 (27) A Yes you're correct I just wanted to explain

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- (1) THE COURT No I think you'll have an opportunity
 (2) when your counsel questions you
 (3) BY MR PETUMENOS
 (4) Q Now Mr Papke was conducting his own survey at the time
 (5) this offhand comment was made wasn't he?
 (6) A Yes Mr Papke had - was doing a survey or doing the basic
 (7) work that appraisers do when they're interviewing people
 (8) Q And Mr Papke was sitting down with another person just
 (9) like you and Mr Dorchester would sit down and was taking
 (10) careful notes wasn't he?
 (11) MR DIAMOND I'm going to object this is without
 (12) foundation
 (13) THE COURT Do you know?
 (14) A No Your Honor I do not know
 (15) BY MR PETUMENOS
 (16) Q You do not know? Then let me ask you Would the
 (17) circumstances of the statement that Mr Hurley gave to
 (18) Mr Papke and his associates be fact or data that you would
 (19) consider in evaluating Mr Hurley's statement to you?
 (20) MR DIAMOND Object as confusing at the minimum and
 (21) probably calling for speculation if I understand it correctly
 (22) THE COURT The objection's overruled
 (23) Do you remember the question?
 (24) A Yes I do This was all I was aware of this comment that
 (25) Mr Hurley said to Mr Papke I heard about it it was brought

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- (1) up in my deposition and I subsequently followed up on this
 (2) comment
 (3) BY MR PETUMENOS
 (4) Q Well let me just ask you Would the circumstances
 (5) surrounding the way that that statement from Mr Hurley was
 (6) elicited with Mr Papke be - be fact or data that would be
 (7) important for you to understand in evaluating Mr Hurley's
 (8) statement to you?
 (9) MR DIAMOND I'm going to object because there's no
 (10) foundation that he knows the circumstances surrounding the
 (11) statement that Mr Hurley made to Mr Papke
 (12) THE COURT Your objection is overruled counsel
 (13) You can answer
 (14) A I'm not entirely certain that I understand your question
 (15) but I'll give it my best shot The - I'm aware that a comment
 (16) was made to Mr Papke and I was - this information was
 (17) passed
 (18) on to me and then I did my research so that's -
 (19) Mr Petumenos that's the best answer I can give you
 (20) MR DIAMOND May I have a moment? I've been given
 (21) something new
 (22) MR PETUMENOS May I approach the bench?
 (23) THE COURT Yes You mean both of you?
 (24) MR PETUMENOS Just me These are the transcript
 (25) references for my next offer of proof Judge
 (26) THE COURT I see

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- (1) MR PETUMENOS I have it on videotape
 (2) (Pause)
 (3) MR DIAMOND May we approach?
 (4) THE COURT Yes
 (5) (At side bar on the record)
 (6) THE COURT Has the witness ever seen this? What do
 (7) you propose to do?
 (8) MR PETUMENOS Play it
 (9) THE COURT I won't let you do that but what I will
 (10) let you do I'll send the jury out he can watch it then you
 (11) can ask him questions about it
 (12) MR PETUMENOS I want the jury to know
 (13) THE COURT I know what you want the jury to know
 (14) counsel I just told you what I was going to do
 (15) (Sidebar concluded)
 (16) THE COURT I'm going to send you out
 (17) (Jury out at 11 55 a m)
 (18) THE COURT All right I'm going to explain this to
 (19) you so I don't get in an argument with you counsel I don't
 (20) want a lot of argument on this
 (21) First this is an interview with Mr - or a deposition
 (22) with Mr Papke and it's things that this witness has never
 (23) seen before and it relates to the circumstances under which
 (24) Mr Hurley's statement was taken I concede to you that
 (25) that's - that's a material point for you to examine on In

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- (1) other words it is not this witness testimony so he can't be
 (2) impeached with it unless he sees it knows what's in it and
 (3) you ask direct questions about the circumstances relating to
 (4) the interview He can't know anything about those
 (5) circumstances if he hasn't seen this until he sees the
 (6) statement You understand me?
 (7) MR PETUMENOS Yeah I do understand you May I ask
 (8) a few questions of the witness for foundational purposes?
 (9) THE COURT Sure
 (10) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
 (11) BY MR PETUMENOS
 (12) Q Mr MacSwain you talked to Mr Papke about the interview
 (13) that he conducted with Mr Hurley true?
 (14) A Yes that is true
 (15) Q And you inquired into the circumstances of that interview
 (16) right with Mr Papke?
 (17) A To the best of my recollection I did inquire into that
 (18) interview with Mr Papke
 (19) Q What did Mr Papke tell you about the interview?
 (20) A To the best of my recollection what he told me was that he
 (21) had met with Mr Hurley not for a long time and had an
 (22) interview with him and Mr Hurley had made a comment - and I
 (23) can't recall the exact words but it was a comment about Kodiak
 (24) real estate market and this was before Mr Hurley - that I
 (25) had talked to Mr Hurley

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- (1) Q Based upon your conversation with Mr Papke did you
 (2) conclude that the comment that had been made to him from
 (3) Mr Hurley was offhand?
 (4) A It wasn't - no it wasn't until that I had a subsequent
 (5) meeting with Mr Hurley and got the nature of where this
 (6) information - how this - the context of the information as it
 (7) was passed on to Mr Papke that I started formulating my
 (8) opinion regarding the - the context that the comment was
 (9) made
 (10) MR PETUMENOS Judge may I make a brief offer of
 (11) proof because I'm not sure the Court understands my offer
 (12) THE COURT Sure
 (13) MR PETUMENOS I am not offering the statement as a
 (14) prior inconsistent statement of the witness I am offering the
 (15) statement to show the jury that there was facts or data that
 (16) were available to him that he did not receive and then I'm
 (17) entitled to show the jury the facts or data that he didn't have
 (18) in front of him when he decided to rely upon the Hurley
 (19) statement
 (20) I think the - it is always correct for particularly in a
 (21) survey situation for an examiner to place in front of the jury
 (22) other facts other information that the expert didn't inquire
 (23) into fully or completely know so that you can show the jury the
 (24) extent to which the reliance by the witness is - is reliable
 (25) and on that basis I think I have - I think I have the - my

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- (1) offer is good on the issue of playing the tape to the jury
 (2) which shows the exact nature of the contact between the prior
 (3) witness and this witness
 (4) I will further indicate I don't even mind if the witness
 (5) is here because it's no secret that the difference between the
 (6) interview with Mr Papke and what occurred later is that
 (7) Mr Hurley was paid money through Mr MacSwain I think this
 (8) is a critical area into the credibility of the surveys which
 (9) is highly potentially damaging evidence to the plaintiffs
 (10) case
 (11) THE COURT Really counsel what you want to do is
 (12) you want to show this videotaped deposition so that you can get
 (13) that information in front of the jury without this witness
 (14) having had an opportunity to see what's in the interview and to
 (15) be able to answer questions about it I won't allow that
 (16) It's unfair
 (17) MR PETUMENOS If I show him the transcript then
 (18) may I make the offer of -
 (19) THE COURT You may show - you may show him the
 (20) transcript If that's not adequate then he's going to see the
 (21) videotape
 (22) MR DIAMOND May I just interject before we start the
 (23) proceedings?
 (24) THE COURT Yes
 (25) MR DIAMOND If I understand Mr Petumenos correctly

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- (1) what he wants to do is to suggest that Mr. MacSwain didn't
 (2) follow up on information that he should have and of which he
 (3) was on notice. I think that's what he's saying.
 (4) If - I don't know whether you heard the same thing I
 (5) heard, but that's how I processed it. If that's the case,
 (6) what's relevant here is what he knew at the time about
 (7) Mr. Papke's interview with Mr. Hurley, the chronology of that
 (8) and then what he did.
 (9) Now we can sit here and reeducate him as to what the facts
 (10) really were according to a deposition transcript, but that has
 (11) no bearing on the reasonableness of how he acted under the
 (12) circumstances. If this is truly what Mr. Petumenos wants to
 (13) do, then the foundation for it is what did you know and when
 (14) did you know it, not what we can tell you now and aren't you in
 (15) agreement that you would have - that you acted poorly under
 (16) the circumstances that we can all realize with 20/20 hindsight.
 (17) THE COURT: Counsel, don't you think the question of
 (18) what might have been available on reasonable investigation
 (19) might be in question here? I'm not commenting on that issue.
 (20) I mean, I'm not saying that he was unreasonable. I'm only
 (21) saying that a thorough examination includes not only the
 (22) information that he had at his disposal, but the information he
 (23) might have gathered.
 (24) MR. DIAMOND: Or that he - I would agree with you to
 (25) the extent it was information he understood was reasonably

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- (1) available, and I think counsel is free to inquire about that.
 (2) THE COURT: And the witness is free to answer.
 (3) MR. DIAMOND: But sitting here and educating him to an
 (4) entirely different set of facts - I don't know that that's
 (5) what's going to happen - has no bearing on what he might
 (6) answer. I would like to supplement the offer of proof by
 (7) simply having the witness on the record explain the chronology
 (8) of this and explain what he was told and when he was told
 (9) because this could be characterized by some as a bit of a witch
 (10) hunt, and we only have the answers to a couple of very artfully
 (11) phrased leading questions. So I don't know that you have the
 (12) entire chronology.
 (13) THE COURT: We certainly don't have the complete
 (14) record. I'll agree with you there. For one reason or another
 (15) we don't have a complete record.
 (16) MR. DIAMOND: May I ask him to describe -
 (17) THE COURT: The witness can look at the deposition
 (18) excerpt, and if he wants to look at the video, he may look at
 (19) the video.
 (20) MR. DIAMOND: May I put it on the record now before he
 (21) sees that what his chronology was?
 (22) THE COURT: No, you can't.
 (23) Would you have the jury go back to the normal jury room?
 (24) MR. DIAMOND: I was just going to have him testify on
 (25) the chronology so that the record is clear, how he acted

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- (1) THE COURT: Sure.
 (2) MR. PETUMENOS: Judge, I just want to make sure you
 (3) understand, Mr. Diamond has not completely - or given you
 (4) the complete offer of proof. Could the witness be excused while I
 (5) make the offer of proof? Never mind, I'll make it with him
 (6) here.
 (7) It is not simply the reasonableness of Mr. MacSwain's
 (8) conduct, although that may be part of the offer. It is also
 (9) the credibility of the underlying statement.
 (10) THE COURT: That's implicit. I didn't say that, but
 (11) that's true.
 (12) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
 (13) BY MR. DIAMOND
 (14) Q: Mr. MacSwain, would you describe for Judge Shortell the
 (15) circumstances under which you learned of the Hurley comment
 (16) to Papke, the timing in respect to the work that you did with
 (17) Mr. Hurley?
 (18) A: Sure. The date that Mr. Papke met with Mr. Hurley, I
 (19) understand, is around the middle of April of '93, April 15th
 (20) tax date, and he interviewed Hurley as well as other duties
 (21) and then -
 (22) Q: Did you know he was going to do that?
 (23) A: No, I did not. Excuse me, Mr. Hurley came to town and -
 (24) Mr. Papke came to town and he said, "Who are the people in
 (25) Kodiak that you should see?"

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- (1) I said, well, there's a title guy and real estate people
 (2) and I just gave him the names of where to do the research.
 (3) So yes, I was aware that Mr. Papke was going to meet with
 (4) Mr. Hurley, which apparently he did.
 (5) Then in June of '93, I went to Kodiak to do my research.
 (6) Q: Let me interrupt you, prior to that time, had Mr. Papke
 (7) reported to you on his conversations with Hurley?
 (8) A: Yes, he had. He had -
 (9) Q: Prior to the time you talked to Hurley?
 (10) A: Yes, he did.
 (11) Q: What did he tell you?
 (12) A: To the best of my recollection, he said that he had this
 (13) brief meeting with Mr. Hurley, and other than - he said he -
 (14) he said Mr. Hurley had made a comment to him and, to the best
 (15) of my recollection, it was during this time period, but it was
 (16) either during the summer - I can't honestly recall if it was
 (17) before the meeting or the summer. I just - I had heard that
 (18) comment, and it was in the context - it wasn't a major part of
 (19) the interview. It was like Mr. Hurley just made a comment to
 (20) Mr. Papke, and when I went to Kodiak in June of '93, Mr. Hurley
 (21) brought it up.
 (22) He says I had some economist, he called him from Chicago
 (23) and I met with him briefly. And you know, I said, well, what
 (24) did you tell him? And he said, well, that - well, I didn't
 (25) really tell him much. He said, I don't have an opinion right

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- (1) now I asked him if he had any knowledge of the oil spill
 (2) having an effect on property values He said he was unaware of
 (3) any I said look what I'm trying to do is my job and I want
 (4) you to go and do that research on the number of transactions
 (5) go to the State Records Office and tell me how many deals -
 (6) how many sales there are in Kodiak which he did And he also
 (7) did for the outlying areas in the villages you know did that
 (8) work
 (9) That was about the extent of this Papke comment until
 (10) December 93 when I was in a deposition with Mr Fortier
 (11) Mr Fortier handed me some notes from Mr Papke and as I
 (12) recall in the deposition there was a handwritten note I
 (13) think it was from Mr Papke's associate Mr Kabat and it said
 (14) Hurley - there was a simple little comment said Hurley said
 (15) that the oil spill hurt something hurt values or whatever
 (16) So that was the first time that I had come across anything
 (17) written other than I had very little discussion with Papke and
 (18) Hurley about this comment It was - it didn't seem like a big
 (19) deal
 (20) So later a couple months later I called up in February
 (21) Tim Hurley and I was following up on some other research
 (22) some
 (23) other transactions that we were researching and I says by the
 (24) way I says at my deposition there was a comment that you
 (25) made
 (26) that I saw I'm aware of says that you made a comment to
 (27) Mr Papke And at that time Mr Hurley just chuckled and

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- (1) says well Steve I was really busy that day and it was just
 (2) a you know an off the comment - comment that I made I
 (3) wasn't - I really hadn't done the research and I hadn't given
 (4) it much thought These are some out-of-town consultants from
 (5) Chicago he kind of you know like we're Alaskans and you
 (6) know I'll tell you but I didn't really have that much time
 (7) for these guys So I says fine I just want to get the facts
 (8) so that's basically the story
 (9) MR DIAMOND That's basically the story
 (10) THE COURT That's basically the story that the jury's
 (11) going to get
 (12) MR DIAMOND We have no problem but it ought to come
 (13) out through this witness and not through hearsay statements
 (14) and I think you agree
 (15) THE COURT Say that again
 (16) MR DIAMOND I said I think that's fine we have no
 (17) problem with it but it ought to come out through this witness
 (18) and not through otherwise introduction of hearsay from an
 (19) individual who's going to be the next witness
 (20) THE COURT Thank you for making your record
 (21) counsel
 (22) MR PETUMENOS Judge the issue -
 (23) THE COURT Now as I said the witness will be given
 (24) the video - the transcript He will read the transcript If
 (25) he wants to look at the videotape he will look at the

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- (1) videotape and we'll come back in here and the examination will
 (2) proceed
 (3) MR PETUMENOS I think I am now listening a lot
 (4) better and I understand
 (5) THE COURT But the transcript or the videotape will
 (6) not be used as the method of questioning You must ask him
 (7) direct questions about the circumstances of the meeting Now
 (8) that he's reviewed this you can refer to it if in fact, his
 (9) testimony is inconsistent with something in the transcript
 (10) okay?
 (11) MR PETUMENOS I would like a short break if I could
 (12) get one to -
 (13) THE COURT That's exactly what I'm going to do
 (14) MR PETUMENOS Great
 (15) THE COURT How much time do you need?
 (16) MR PETUMENOS I want to review the transcript of
 (17) this gentleman's statement that he's just testified to
 (18) THE COURT Sure What do you say we - 15 minutes?
 (19) MR PETUMENOS Yeah that would be fine And could I
 (20) have since we're on cross-examination an order that
 (21) Mr MacSwain not confer with counsel during the break?
 (22) THE COURT Not confer with counsel Counsel did you
 (23) hear that?
 (24) MR DIAMOND I'm sorry I had somebody else talking
 (25) in my ear

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- (1) THE COURT Request that the witness not confer with
 (2) you during this break
 (3) MR DIAMOND That's fine
 (4) MR STOLL Or any other Exxon counsel
 (5) THE COURT Yes Is there somebody else you'd like me
 (6) to preclude? Maybe he shouldn't say anything to anybody
 (7) even
 (8) in the restroom
 (9) THE CLERK Please rise This court stands in
 (10) recess
 (11) (Recess from 12:12 p.m. to 12:35 p.m.)
 (12) THE CLERK This court now resumes its session
 (13) Please be seated
 (14) THE COURT Yes Mr Petumenos
 (15) MR PETUMENOS I just want one quick point of
 (16) clarification I want to make sure that it is within your
 (17) understanding that now that I've shown him I may tell the -
 (18) or ask him the question of what it is that he apprise the jury
 (19) through questioning the witness what it is he has reviewed at
 (20) the break as a foundational testimony to my next question Is
 (21) there any problem with that? In other words I want to ask
 (22) him during the break you had a chance to review
 (23) Mr Papke's -
 (24) THE COURT I think you can ask him but my preference
 (25) would be you simply ask him the questions relating to the
 (26) circumstances and say and what have you taken into

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- (1) consideration in - what information is at your disposal in
 (2) giving this answer And say have you reviewed the videotape
 (3) or the deposition excerpts of Mr Papke
 (4) MR PETUMENOS That s what I was going to do
 (5) MR DIAMOND In fairness to Mr MacSwain the jury
 (6) ought to be advised he read this now at counsel s request
 (7) during the break
 (8) THE COURT Sure
 (9) MR DIAMOND I have no problem with that
 (10) MR PETUMENOS I don t either
 (11) MR DIAMOND So long as I m concerned that the road
 (12) we re heading down is impeachment by virtue of somebody
 else s
 (13) testimony
 (14) THE COURT Counsel if I were you I d be worried
 (15) too
 (16) MR PETUMENOS I m ready for the jury Judge
 (17) (Jury in at 12 37 p m)
 (18) THE COURT All right the jury is present
 (19) Go ahead Mr Petumenos
 (20) MR PETUMENOS Thank you Judge
 (21) CROSS EXAMINATION OF STEVEN MacSWAIN (Resumed)
 (22) BY MR PETUMENOS
 (23) Q In your May 1993 report you reported Mr Hurley s
 (24) statement that he didn t think that the oil spill had any
 (25) impact on the market Isn t that true?

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- (1) A I don t think that s correct
 (2) Q You did not report on Mr Hurley s answers in the May 1993
 (3) report?
 (4) A The - no not to the best of my recollection I ll have
 (5) to double check to make certain
 (6) Q 7622 I m going to show you - was it reported in a later
 (7) report?
 (8) A Yes I believe that to be more accurate
 (9) Q What date was it reported?
 (10) A That would have been in - later in the summer I think it
 (11) was August 1993
 (12) Q August 1993 all right And what you wrote in your report
 (13) was Mr Hurley a long time businessman on Kodiak was not
 (14) happy with the oil spill as there were boats and booms and
 (15) skimmers at his wife s favorite fishing spot on Afognak Island
 (16) in 1989 Mr Hurley said however he is unaware of any effect
 (17) on property values or any noticeable changes in the number of
 (18) conveyances due to the spill That s what you put in your
 (19) report about Mr Hurley?
 (20) A Yes that s correct That s what Mr Hurley told me
 (21) Q And that is the only thing you put in your report about
 (22) Mr Hurley? You want to look?
 (23) A Please Yes we did put this in the report about
 (24) Mr Hurley The - there may well have been - and I have to
 (25) examine our report to - to make certain but as I recall

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- (1) there were other - after I had interviewed Mr Hurley in the
 (2) summer of 1993 we followed up later in the summer did our
 (3) report there may have been other citations in there but this
 (4) one particular comment you have here appears to be a very
 (5) accurate representation of what Mr Hurley told me
 (6) Q All right Now -
 (7) Elmo please
 (8) At the time that you wrote this you knew that Mr -
 (9) THE COURT Counsel there s other material on this
 (10) document
 (11) MR PETUMENOS I m sorry?
 (12) THE COURT There s other material on this document
 (13) MR PETUMENOS Okay there we go How s that?
 (14) THE COURT Okay
 (15) BY MR PETUMENOS
 (16) Q At the time that you wrote this report you knew that
 (17) Mr Hurley had been interviewed by Mr Papke?
 (18) A Yes to the best - best of my recollection I knew that
 (19) Mr Hurley had had a meeting earlier in the year I think it
 (20) was around April 1993 with Mr Papke
 (21) Q And you knew that at the time you wrote this report you
 (22) thought it was an offhand remark that he had made to Mr
 Papke?
 (23) A Yes there was - we had discussions about the Hurley and
 (24) Papke meeting I had a discussion with Mr Hurley about the
 (25) meeting and also I had all this information that I got from

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- (1) Mr Hurley that I took into consideration as well as
 (2) Mr Dorchester in doing our report that summer
 (3) Q The question was you knew that Mr Hurley had had a -
 (4) well let me ask you this At the break you had the
 (5) opportunity to read portions of the deposition of Mr Papke
 (6) Do you still think that the conversation - you just - this is
 (7) the first time you had an opportunity to review it I
 (8) understand but during your review at the time of the recess
 (9) do you still think that the conversation with Mr Hurley and
 (10) Mr Papke was an offhand remark?
 (11) MR DIAMOND Your Honor may I ask that counsel
 (12) simply describe for the jury the circumstances under which the
 (13) witness reviewed that testimony so that -
 (14) THE COURT Well I ll describe it I was provided
 (15) with a statement and I said that the witness should review it
 (16) and review it thoroughly and that s why we took the break
 (17) MR PETUMENOS Could you read the question back?
 (18) (Question read)
 (19) MR DIAMOND I ll object to it as irrelevant calling
 (20) for hearsay The only foundation is what he read during the
 (21) course of the break I don t know what that - what that goes
 (22) to
 (23) THE COURT The objection s overruled You can
 (24) answer
 (25) A It was a long sentence and I ll - or question I ll give

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- (1) you - my best answer is that I was told about a meeting When
- (2) I met with Mr Hurley he indicated that he had this meeting
- (3) with Mr Hurley -
- (4) MR PETUMENOS Excuse me Judge my question is Do
- (5) you still think after reading that transcript that - with
- (6) what you know now after this reading today that the
- (7) conversation - that the statement that Mr Hurley made to
- (8) Mr Papke was an offhand remark?
- (9) THE COURT That calls for a yes or no answer but you
- (10) can explain after you give the yes or no answer
- (11) A Thank you Your Honor
- (12) Yes I still think it was an offhand remark There is a
- (13) bit of - this is the first time I've looked at the deposition
- (14) and there is - there's more that's said than - than I was
- (15) aware of but after speaking to Mr Hurley and Mr Papke about
- (16) this issue in the whole context of how it was relayed to him
- (17) Mr Hurley indicated to me that - that Mr Papke and another
- (18) fellow had come into Kodiak and that he was - was very busy at
- (19) the time and he was throwing out - this is what he told me in
- (20) June of '93 - he was throwing out comments about the remote
- (21) real estate market when he really hadn't done the work So I
- (22) took it to mean then and then I had subsequent conversations
- (23) with Hurley and Papke later that - that Mr Hurley had not
- (24) done his work yet regarding a - the number of transactions
- (25) So even after reading the deposition of Mr Papke this is the

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- (1) first - I would still say it was - it was an offhand
- (2) comment There's more words that were said now than I was
- (3) aware of but it still doesn't change my opinion
- (4) MR PETUMENOS I move to play the tape
- (5) THE COURT I'm going to allow it to be played
- (6) MR DIAMOND May we approach?
- (7) THE COURT Sure
- (8) (At side bar on the record)
- (9) MR DIAMOND Your Honor it still remains hearsay
- (10) under 801 there is no basis for the admission of the - the
- (11) tape
- (12) THE COURT Only way the jury can understand his
- (13) opinion that this was an offhand remark and the circumstances
- (14) surrounding that is to know exactly what he's reviewed
- (15) including this excerpt in coming to that opinion
- (16) MR DIAMOND Well Your Honor Mr Petumenos could
- (17) have showed him anything could have showed him the letter
- (18) from
- (19) Aunt Tilly and say do you still hold the same opinion and
- (20) create that to get in the other hearsay now we'll put in Aunt
- (21) Tilly's letter
- (22) THE COURT Counsel we've had a lot of discussion on
- (23) the bases for opinions In order to know whether this is a
- (24) good opinion or a bad opinion the jury has to know all of the
- (25) circumstances Mr Papke's going to be the next witness isn't

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- (1) MR DIAMOND He will be here Monday yes
- (2) THE COURT So I suspect that any problems you might
- (3) have with what originally goes with this particular testimony
- (4) they are minimized by the fact you have Mr Papke available for
- (5) examination but this is clearly an appropriate method in order
- (6) to test this witness opinion
- (7) (Sidebar concluded)
- (8) (Videotape Played)
- (9) VIDEO VOICE
- (10) Q When you use the term market participant in connection
- (11) with your work in this case what do you mean?
- (12) A I mean that to mean people who would have in the course of
- (13) their normal business would have some opportunity to gather
- (14) or
- (15) have information relating to the real estate market
- (16) Q And in your opinion was Mr Hurley a market participant
- (17) for purposes of the Kodiak real estate market?
- (18) A By the definition I just stated yes he would be
- (19) Q Okay And in your opinion was Mr Hurley a market
- (20) participant for purposes of the remote Kodiak real estate
- (21) market?
- (22) A Yes
- (23) Q In April of 1993 you and Mr Kabat had a conversation with
- (24) Mr Hurley as part of your collection of information in this
- (25) case correct?

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- (1) Q And at that meeting - face to face meeting?
- (2) A It was a face to face meeting
- (3) Q And at that face to face meeting you and Mr Kabat you
- (4) both took notes regarding what Mr Hurley told you correct?
- (5) A Yes we did
- (6) Q And what Mr Hurley told you at that meeting was that the
- (7) Exxon Valdez oil spill had a significant impact on the real
- (8) estate markets on Kodiak Island correct?
- (9) A Well I think I would want to refer to my notes to be
- (10) precise in the language but it was something to that effect
- (11) if I recall correctly
- (12) Q All right So it's your best recollection as you sit
- (13) here - and I understand this is without your notes - that
- (14) Mr Hurley indicated at that meeting his impression that the
- (15) Exxon Valdez oil spill did have a negative impact on the real
- (16) estate markets on Kodiak correct?
- (17) A It's my best recollection as I sit here that it was a
- (18) negative impact yes
- (19) Q You have in front of you what we've marked as
- (20) Exhibit 72121 What is the exhibit sir?
- (21) A Appears to be a copy of my notes conversation that I had
- (22) with Tim Hurley Western Alaska Land Title Company
- (23) Q And these are the notes from the April 1993 interview that
- (24) you and Mr Kabat conducted with Mr Hurley?
- (25) A That's correct

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- (1) Q And that interview took place on Kodiak -
 (2) A Yes it did
 (3) Q - Island? I m sorry
 (4) A I m sorry
 (5) Q And these notes are in your handwriting correct sir?
 (6) A Yes they all appear to be in my handwriting
 (7) Q We ll just refer to it as the April 1993 interview okay?
 (8) Which part of your notes Exhibit 72121 refer to Mr Hurley s
 (9) comments regarding the negative impact of the Exxon Valdez
 oil
 (10) spill on the Kodiak real estate market?
 (11) UNIDENTIFIED SPEAKER Assumes facts not in evidence
 (12) A Well do you want me to look for information in my notes
 (13) that refer to Mr Kodiak - Mr Hurley s opinions on the Kodiak
 (14) market or the impact of the spill on the Kodiak market?
 (15) Q Yes
 (16) A The - my description of that commentary is on the last
 (17) page of the notes
 (18) Q Okay and you just reviewed the entire document correct?
 (19) A Yes
 (20) Q And the last page bears Bates number 377663 is the last
 (21) few digits correct?
 (22) A That s correct
 (23) Q Where on that page of Exhibit 72121 does it refer to
 (24) Mr Hurley s comments regarding the impact of the Exxon
 Valdez
 (25) oil spill on Kodiak?

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- (1) A Towards the bottom of that page it says turn people out on
 (2) buying - well it says - looks like it says out but I m
 (3) not sure if that s correct Turn people out on buying
 (4) property definite impact about when Trillium died comma
 (5) before Native kicked in everything died about that time
 (6) Nobody wanted remote property
 (7) Q Okay Is it your understanding sir that what he was
 (8) telling you was that the Exxon Valdez oil spill had a definite
 (9) negative impact on the real estate markets of Kodiak?
 (10) UNIDENTIFIED SPEAKER Asked and answered several
 (11) times
 (12) A Mr Hurley according to my notes said that the spill had
 (13) had a definite impact on the real estate market And then he
 (14) recited a number of items or issues that appear to be related
 (15) to that impact
 (16) Q And how would you describe those as items related to that
 (17) impact? Are they positive or are they negative with respect to
 (18) the real estate market on Kodiak?
 (19) UNIDENTIFIED SPEAKER Objection to form and - (video
 (20) indiscernible)
 (21) A They are effects They are things that happened according
 (22) to Mr Hurley in the market If he used the word died that
 (23) seems to me to have a negative connotation to it
 (24) Q Let me direct your attention to the last page of
 (25) Exhibit 72109 which are Mr Kabat s notes and you ll notice

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- (1) that his references to the discussion with Mr Hurley regarding
 (2) the Exxon Valdez oil spill also are on the last page of his
 (3) notes and let me direct your attention to the portion of Mr
 (4) Kabat s notes which state EVOS What do you understand
 EVOS to
 (5) mean?
 (6) A I would assume that means Exxon Valdez Oil Spill
 (7) Q Okay So it states Exxon Valdez oil spill hurt land market
 (8) for remote sites Do you see that, sir?
 (9) A Yes I do
 (10) Q Is that consistent with your understanding of what
 (11) Mr Hurley told you and Mr Kabat at the interview?
 (12) A Well I can't tell you whether or not Mr Hurley used the
 (13) term "hurt" in his statement or whether that s just Mr Kabat s
 (14) characterization of his comments My best recollection of what
 (15) Mr Hurley told me is what s in my notes as presented here
 (16) Q Is Mr Kabat s note inconsistent with what you recall
 (17) Mr Hurley saying at the April 1993 interview?
 (18) A It s not inconsistent with the general tenor of
 (19) Mr Hurley s comments
 (20) (Video concluded)
 (21) MR DIAMOND Your Honor before the questioning
 (22) resumes I would ask that additional segments of the videotape
 (23) be played During the course of the break Mr MacSwain read
 (24) something in the neighborhood of 60 pages of deposition -
 (25) transcript This was an edited version and it leaves out

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- (1) portions of what he read Specifically I would like to play
 (2) pages 427 beginning with line 4 through 428 line 6
 (3) THE COURT Counsel I ll let you do that when you get
 (4) the witness back
 (5) BY MR PETUMENOS
 (6) Q Mr MacSwain you know do you not that Mr Papke was
 (7) conducting a survey not unlike the survey that you were
 (8) conducting true?
 (9) A No I m not certain of the exact type of a survey that
 (10) Mr Papke was doing What I am aware of is that he was doing a
 (11) market interview
 (12) Q He used the word on the tape market participant did you
 (13) hear that?
 (14) A Yes I did
 (15) Q And you use the word market participant don t you?
 (16) A Yes I do
 (17) Q In connection with this survey or you did?
 (18) A Yes that s correct
 (19) Q Now you testified - well let me ask you you had a
 (20) meeting in which Mr Hurley explained the reasons why he said
 (21) what he did to Mr Papke in this market survey sometime in
 (22) August am I right?
 (23) A No you re not right
 (24) Q When - did you ever have a meeting with Mr Hurley in
 (25) which he gave you an explanation as to why it was he gave
 those

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- (1) answers to Mr Papke?
 (2) A Yes I did
 (3) Q And what he told you was that some economist had called him
 (4) from Chicago and that he had met with him briefly and said
 (5) well he didn't really have an opinion right now That's what
 (6) he says - that's what he told you that he told Mr Papke
 (7) right?
 (8) A Something similar to that yes that's correct.
 (9) Q And then he said something to the effect of he was busy
 (10) having a really busy day hadn't given it much thought didn't
 (11) he?
 (12) A Yes something - those may not have been his exact words
 (13) but something along those lines is what he indicated to me
 (14) Q And this is what happens when you do surveys of this sort
 (15) isn't it Mr MacSwain?
 (16) MR DIAMOND Objection argumentative and confusing
 (17) MR PETUMENOS I haven't even finished the question
 (18) THE COURT The question isn't done
 (19) MR DIAMOND That's why it was confusing
 (20) MR PETUMENOS This is what happens when you do
 (21) surveys like this Mr MacSwain people get busy and they say
 (22) things without giving it much thought isn't that so?
 (23) THE COURT Objections overruled
 (24) A Yes you have to be very careful when you're interviewing
 (25) people about real estate markets and you know sometimes

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- (1) people do get busy You are correct Mr Petumenos
 (2) BY MR PETUMENOS
 (3) Q Now you said with respect to Mr Hurley you have the
 (4) sheet of the numbers that Mr MacSwain wrote on 14734 You
 (5) said - by the way how much money did Mr Hurley get?
 (6) A I'm not certain of the exact amount I could only
 (7) estimate
 (8) Q Let's see what you said in your deposition
 (9) MR DIAMOND Had he finished his answer Your Honor?
 (10) MR PETUMENOS I'm sorry were you done?
 (11) MR DIAMOND I think he was saying he could
 (12) estimate
 (13) A I was just going to give an estimate But it's been quite
 (14) some time so I could just give you an estimate only
 (15) BY MR PETUMENOS
 (16) Q What do you think it is?
 (17) A It seemed like a few thousand dollars could have been
 (18) 3 000 I can't recall exactly
 (19) Q And you said that you went and hired Mr Hurley because he
 (20) was a specialist in the area that you were hiring him for do
 (21) you remember that on direct?
 (22) A Yes I do Mr Hurley has a title plant in Kodiak and
 (23) he's a good source of information and he's knowledgeable
 (24) about
 (25) real estate transactions
 (26) Q Let's discuss what he did He went into the assessor's

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- (1) office is that right?
 (2) A To the best of my recollection he went to the State
 (3) Recorder's Office and -
 (4) Q Right good point the State Recorder's Office And he -
 (5) A Excuse me I wasn't finished
 (6) Q Go ahead
 (7) THE COURT Go ahead
 (8) A I wasn't finished I think he also checked with the
 (9) Assessor's Office but to the best of my recollection he went
 (10) to various governmental agencies to get the recording
 (11) information I didn't actually go out with him but this is
 (12) just what he told me
 (13) BY MR PETUMENOS
 (14) Q You said that he supplied you with the facts on direct
 (15) and that you did the analysis right?
 (16) A Yes he supplied me with the facts and I did discuss the -
 (17) the facts with him and to get his read and opinions on it see
 (18) if he saw anything This is an area that he had a lot of
 (19) experience in and I - I was curious if I was analyzing this
 (20) I was bouncing my view of this the number of transactions off
 (21) Mr Hurley and so I did discuss the facts with him after he -
 (22) he provided me with the facts
 (23) Q Let's hope we get done soon my arm is getting tired
 (24) What he did for you in the recorder's office was add up the
 (25) total number of transactions year by year isn't that what he

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- (1) did in the recorder's office?
 (2) A Yes that is correct
 (3) Q And that took Mr Hurley's specialty right?
 (4) A Yes it did It's a - it's a skill that I could also have
 (5) done but Mr Hurley being more familiar with the State
 (6) Recorder's Office and the Assessor's Office he was in a
 (7) position to do it faster than I
 (8) Q You couldn't think of anybody to substitute who hadn't
 (9) been the subject of a previous survey and given an opinion to
 (10) do this adding up for you?
 (11) A There are - yes there are others that could have done
 (12) this work but Mr Hurley was - in addition to just doing
 (13) this you know counting the transactions going to the
 (14) recorder's office he also has a large title plant and copies
 (15) of plat maps and that sort of thing and I wanted to have one
 (16) firm do all this work for me so I subcontracted out the title
 (17) work to Mr Hurley
 (18) Q Now Mr Hurley changed his mind sometime after he did this
 (19) work for you for these couple thousand dollars right?
 (20) A No I think the way Mr Hurley explained it to me that when
 (21) he had made this - had this interview with - with Mr Papke
 (22) that he really hadn't done his - his homework yet and done the
 (23) research and I didn't view it as changing his mind He had
 (24) made a comment to me that - that time and another time that
 (25) his - his meeting with Mr Papke was a very brief - he really

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- (1) hadn't given it much thought. But after he'd done the research
 (2) for MacSwain & Associates and we discussed it and I said
 (3) well what do you think here Tim and his - his view was
 (4) similar to the view that I have today
 (5) Q Uh huh and all these other people that you called up did
 (6) they do independent research in between the time that they
 gave
 (7) you the information or was it often the case that you talked
 (8) to them on the phone you wrote down what they said and that
 (9) made it into the survey?
 (10) MR DIAMOND Your Honor I'm going to object
 (11) There's no foundation for this
 (12) MR PETUMENOS I'll rephrase I don't like my own
 (13) question
 (14) THE COURT All right
 (15) BY MR PETUMENOS
 (16) Q Very frequently when you took your surveys of these
 (17) hundred and some people it consisted of a telephone call
 some
 (18) questions and their answers written down by you am I right?
 (19) A No you're not right In most of the people that - this
 (20) 150 market participants that I'm referring to the great
 (21) majority of them I made a special effort to meet with them
 (22) and you know spend some time and I did a lot of followup in
 (23) meetings This was not just a simple you know call you up
 (24) telephone survey that type of thing These were in-depth
 (25) what we call market interviews so it wasn't just a - you

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- (1) know a call up and do a telephone write down a few
 comments
 (2) Q Of the 150 people how many did you interview more than
 (3) once?
 (4) A It's difficult to estimate but I will give you an
 (5) estimate - this is just a rough estimate - my estimate is
 (6) about a third that I - that I would go back to and have
 (7) follow up tracking what we call key market participants 50 to
 (8) 75 out of a 150 and that's just a ballpark estimate
 (9) Q And when you went back and interviewed a person more
 than
 (10) once on each occasion that you did the interviews did you
 (11) take notes?
 (12) A No not on each occasion There are some times when I'd go
 (13) back and gather information from the files For example if I
 (14) was going back to DNR and I saw somebody that I previously
 (15) interviewed they may have information in the files and I was
 (16) collecting data
 (17) Q I want to talk to you about your note taking practices
 (18) next Counsel Exhibit 9005?
 (19) MR DIAMOND I have it A particular page?
 (20) MR PETUMENOS Yes there are particular pages I'm
 (21) going to be showing him 819 and 820 and 720 and -
 (22) MR DIAMOND Tim refers to a copy which they're
 (23) shuffled
 (24) MR PETUMENOS You know what I have copies for you
 (25) how's that? What I don't have a copy of that I'm showing you

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- (1) is the typewritten section They might be in there actually
 (2) May I approach the witness?
 (3) BY MR PETUMENOS
 (4) Q Interview with Mr Duke Bertke Mr Bertke get any money?
 (5) A Yes Mr Bertke did get some small amount of money He did
 (6) some research for me subsequent to speaking with him
 (7) Actually I interviewed him several times and during this time
 (8) period Mr Bertke researched his records spent some time
 (9) doing some work and I felt it appropriate to compensate him
 (10) It was like a couple hundred dollars would be my estimate
 (11) Q Now there is in the handwritten notes - and I've
 (12) highlighted it for you - market is most important comp -
 (13) comps may not be comparable You see that?
 (14) A Yes I do
 (15) MR DIAMOND Your Honor are we looking at 720?
 (16) MR PETUMENOS Correct
 (17) MR DIAMOND You understand these to be the witness
 (18) notes?
 (19) MR PETUMENOS I understand this to be the interview
 (20) notes of Mr Bertke are they?
 (21) MR DIAMOND I think you said - you identified them
 (22) as the witness notes I don't think there's a foundation for
 (23) that yet
 (24) MR PETUMENOS All right thank you
 (25) BY MR PETUMENOS

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- (1) Q You recognize this document?
 (2) A Yes I do
 (3) Q What is it?
 (4) A These are the interview notes by Mr Dorchester with
 (5) Mr Bertke
 (6) Q Okay And in the - after you did the handwritten notes
 (7) you would then do a typewritten version of the handwritten
 (8) notes am I right?
 (9) MR DIAMOND I'm going to object to that it's
 (10) confusing Counsel means Mr Dorchester's notes
 (11) THE COURT You've got me confused You mean
 (12) Mr Dorchester's notes?
 (13) MR PETUMENOS Let me ask a few more questions This
 (14) survey was conducted by just you or by Mr Dorchester as
 (15) well?
 (16) A This survey was conducted by myself and Mr Dorchester
 (17) BY MR PETUMENOS
 (18) Q Some people were interviewed by Mr Dorchester some
 people
 (19) were interviewed by you?
 (20) A Yes that's correct And I need to explain that I had - I
 (21) was the lead in going out and speaking to the Alaskans This
 (22) was a - you know my neck of the woods and I would take
 (23) Mr Dorchester with me on many occasions as often that we
 (24) could get everybody together and I'd take Mr Dorchester with
 (25) me and on most of the interviews Mr Dorchester and I

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- (1) participated with these market participants
 (2) Q Okay Now the point I'm trying to get at with respect to
 (3) the market participants - and tell me if you know - your
 (4) practice is in different than Mr. Dorchester's. You see here
 (5) at the top market is not - is most important comps may not
 (6) be comparable. Do you see that?
 (7) A Yes I do.
 (8) Q Find it in the typewritten notes.
 (9) MR DIAMOND Your Honor I'm going to object it's
 (10) argumentative. He's comparing Mr. MacSwain's notes to
 (11) else's typewritten notes. That's simply not cricket.
 (12) MR PETUMENOS That's exactly what I'm doing and I
 (13) have a very important point to make.
 (14) THE COURT Come to the bench.
 (15) (At side bar on the record)
 (16) THE COURT Let me understand this. Just explain it
 (17) to me. You've got handwritten notes, right?
 (18) MR DIAMOND These are handwritten notes.
 (19) THE COURT Then they're transcribed?
 (20) MR DIAMOND No, these are different notes that are
 (21) transcribed than these notes.
 (22) MR PETUMENOS No, they're not.
 (23) MR DIAMOND You haven't laid a foundation for that.
 (24) THE COURT Yeah, I see what you mean. This is -
 (25) this is Dorchester's, this is his.

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- (1) MR DIAMOND Right.
 (2) MR PETUMENOS No, let me ask questions. That's not
 (3) correct.
 (4) THE COURT Look.
 (5) MR PETUMENOS Right.
 (6) THE COURT This was Dorchester's notes, this is
 (7) somebody else's, because he refers to Dorchester, right?
 (8) MR PETUMENOS No, Bertke was interviewed by
 (9) Dorchester.
 (10) THE COURT We need a foundation. We definitely need
 (11) a foundation.
 (12) MR PETUMENOS I'll ask a few more questions.
 (13) (Sidebar concluded)
 (14) BY MR PETUMENOS
 (15) Q The person taking the notes for this particular interview
 (16) was Mr. Dorchester, right?
 (17) A Yes, that's correct. And also there's some notes here
 (18) taken by Mr. MacSwain.
 (19) Q Okay. And where are they?
 (20) A On the right hand side here. On the left hand I have
 (21) Mr. Dorchester's, and on the right hand are notes of mine.
 (22) Q Oh, I see. I see. Did you ever take handwritten notes
 (23) before they got into the typewritten version?
 (24) A Yes, I did. I took handwritten notes, and I had R&R Court
 (25) Reporters type my - some of my handwritten notes.

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- (1) Q Different interview. Mr. Doug Longacre, whose notes are
 (2) these on the left hand side?
 (3) A On the left hand side is Mr. Dorchester's notes, and on the
 (4) right hand side are my notes.
 (5) Q Okay. I note that in the file - let me see if I
 (6) understand what's going on here. In the file for
 (7) Mr. Dorchester, we have all of his handwritten notes preserved
 (8) of what he took at the time, correct, everything he wrote down
 (9) at the time?
 (10) A I - I couldn't answer that. I'm not - I'm not sure
 (11) because as I sit here today, I'm not sure that these are all of
 (12) his notes.
 (13) Q There are no notes, no handwritten notes from you in any of
 (14) these interviews, is there?
 (15) A No, that's not correct.
 (16) Q The ones I've showed you?
 (17) A Oh, yes. There are - there are some -
 (18) Q Some handwritten -
 (19) A - some handwritten comments on these typewritten notes.
 (20) Q Now, were you here when there was an examination of
 (21) Mr. Roddewig about the survey that he did -
 (22) A Yes, I was here -
 (23) Q - for the jury?
 (24) A - for Mr. Roddewig's -
 (25) Q There were questions I asked him about how the surveys were -

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- (1) filled out, and so forth, by hand, do you remember that?
 (2) A Yes, I recall that line of questioning.
 (3) Q And I asked him some questions about the typewritten
 (4) version of those notes, do you remember that?
 (5) A Yes, I do.
 (6) Q All right. Tell the jury what became of your handwritten
 (7) notes.
 (8) A The handwritten notes with these two interviews here were
 (9) given to a certified court reporter in Anchorage, and I had the
 (10) court reporter type my handwritten notes. And after they typed
 (11) my notes, they - they - we got rid of the handwritten notes
 (12) and we went with the - the more legible, typed version from
 (13) R&R Court Reporters.
 (14) Q You threw them away?
 (15) A Yes, that's correct.
 (16) Q You tore them up?
 (17) A Yes, that's correct. Used - went to the typewritten
 (18) Which is - which is exactly my - my version of my handwritten
 (19) notes from a certified court reporter.
 (20) MR PETUMENOS May we approach the bench at this
 (21) time?
 (22) (At side bar on the record)
 (23) MR PETUMENOS There was a court order.
 (24) MR DIAMOND I didn't hear you.
 (25) MR PETUMENOS There was a court order in the case.

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- (1) that Judge Holland entered
- (2) MR DIAMOND I m sorry I can t hear you
- (3) MR PETUMENOS I m trying to keep the witness from
- (4) hearing
- (5) There is a court order in this case that this Court entered
- (6) and that Judge Holland entered did it by reference to Judge
- (7) Holland s entry that no one was to destroy any documents
- (8) related to the oil spill case You entered it at the beginning
- (9) of the case and I wish to inquire of him about it and I want
- (10) to approach the bench first
- (11) MR DIAMOND Your Honor this is potentially very
- (12) powerful I d ask that it be done out of the presence of the
- (13) jury first and we not have an expedition in front of the jury
- (14) on this issue This is the first I ve heard of it
- (15) THE COURT First you ve heard of the order?
- (16) MR DIAMOND Yeah
- (17) THE COURT Have you got the order?
- (18) MR PETUMENOS Yeah I ve got the order
- (19) THE COURT Show me the order
- (20) MR PETUMENOS In order of explanation you - you
- (21) did this by court reference and Judge Holland s order is in
- (22) there too
- (23) THE COURT This is June 29th 1989 What page are we
- (24) on?
- (25) MR PETUMENOS Gosh Judge I - Judge Holland s

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- (1) order is on the back the last section I probably have one
- (2) highlighted here I m not sure which one it is
- (3) THE COURT Here it is it s on Page 3
- (4) MR DIAMOND It s on page -
- (5) THE COURT Three
- (6) MR PETUMENOS Then I have the other orders attached
- (7) and I have the orders you incorporated attached to the order
- (8) I simply wish to inquire very quickly of him whether he was
- (9) aware of the order
- (10) THE COURT Well it s on Page 4 really the lead in
- (11) paragraph is on Page 3
- (12) MR DIAMOND I m looking through the categories to
- (13) see what -
- (14) THE COURT Five paragraph five on Pages 4 and 6
- (15) MR DIAMOND Your Honor this is really - look at
- (16) B(3) on page 5
- (17) THE COURT I m sure he can explain this counsel
- (18) MR DIAMOND Well if this was - if this was either
- (19) a question of interpretation or question of judgment by a
- (20) lawyer in the case who screwed up that ought not to be - this
- (21) witness ought not to be tarred with that There s no basis for
- (22) counsel to inquire - for counsel to believe right now that
- (23) this witness had any knowledge of any such order And just
- (24) throwing this out -
- (25) THE COURT He is your witness counsel He s your

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- (1) expert and he should have been advised of those things
- (2) MR DIAMOND But if he wasn t why should that go to
- (3) his credibility? That s dynamite stuff All I m asking is
- (4) that the inquiry be made initially outside the presence of the
- (5) jury If in fact he was aware of it and he made the judgment
- (6) to throw these out that s fine
- (7) MR PETUMENOS Excuse me the witness is listening to
- (8) the conference
- (9) THE COURT I hear you I hear you And I m going to
- (10) let the examination proceed
- (11) (Sidebar concluded)
- (12) BY MR PETUMENOS
- (13) Q 23rd day of June 1989 Judge Shortell entered an order in
- (14) this case ordering that documents related to the Exxon Valdez
- (15) oil spill not be destroyed Did you know that?
- (16) A Yes I was aware of that
- (17) Q You were?
- (18) MR PETUMENOS Would it be an appropriate time for a
- (19) break Judge?
- (20) THE COURT You want to quit for the day?
- (21) MR PETUMENOS Yes
- (22) THE COURT I suppose it s okay with me the only
- (23) question I have for you counsel is how much longer do you
- (24) think your examination is going to take?
- (25) MR PETUMENOS Perhaps an hour and a half

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- (1) THE COURT Okay all right
- (2) This is a weekend remember that now Don t talk to
- (3) anybody about the case and don t form or express any opinion
- (4) on
- (5) it until it s submitted to you for deliberation See you on
- (6) Monday at 8 30
- (7) (Jury out at 1 20 p m)
- (8) THE COURT Are there any exhibits to move in?
- (9) MR DIAMOND I ve done all of my exhibits Your
- (10) Honor
- (11) THE COURT Anybody else?
- (12) MR STOLL Your Honor I just - I just want to take
- (13) one -
- (14) THE COURT Wait are there any exhibits to move in?
- (15) I d like to get my questions answered before you ask yours
- (16) MS SMITH I have one correction in the record on an
- (17) exhibit. DX - I ve been informed that DX14403 4 should be
- (18) DX14003 4
- (19) THE COURT Thank you very much counsel
- (20) MS SMITH You re welcome
- (21) THE COURT All right Mr Stoll
- (22) MR STOLL Your Honor I was just referring to an
- (23) exhibit actually There was a question of the videotape of
- (24) Mr MacSwain and I don t have - we ve already registered an
- (25) objection to that exhibit
- (26) THE COURT The videotape of Mr MacSwain?

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- (1) MR STOLL I mean the videotape that he showed
 (2) yesterday and you said that we could take up the matter -
 (3) whether that is an exhibit or whether the narration the
 (4) narration over -
 (5) THE COURT Right okay I got you
 (6) MR STOLL So that s - I don t care when we bring it
 (7) up but I thought -
 (8) THE COURT Bring it up now because I know the
 (9) issue
 (10) MR STOLL Your Honor we don't have an objection to
 (11) the videotape the visual part of it but we do have an
 (12) objection to the narration going into the - into the jury room
 (13) with the tape
 (14) THE COURT Okay Counsel?
 (15) MR DIAMOND Your Honor the videotape doesn t make a
 (16) whole lot of sense unless you have some of the audio
 (17) identifying what you re looking at and why you re looking at
 (18) the things you re looking at If there are particular portions
 (19) that counsel think are beyond narration or some conclusions or
 (20) anything might be opinion we re happy to edit it out and just
 (21) give you a list But you know this is sort of like
 (22) furnishing the jury with a book but taking out the words It s
 (23) not terribly illuminating without some description and there
 (24) are not a lot of visual descriptors in that videotape and it
 (25) was done with the intent that there be narration over it

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- (1) MR STOLL Your Honor the report of a witness would
 (2) not be admissible as hearsay nor would the - the idea that
 (3) this narration was to save time in this witness testimony We
 (4) don t put in - into evidence the transcript of when a
 (5) witness - one of our experts for instance testifies about a
 (6) individual whether it s a chart or anything else and if
 (7) Mr Diamond s argument is the same then we should put in the
 (8) transcript of our witnesses describing you know one of their
 (9) things I don t think it s appropriate to have this narration
 (10) of this one exhibit where he says this was oiled this wasn t
 (11) oiled et cetera I think that there s other video in here in
 (12) evidence that does not have any narration by the witness
 (13) MR DIAMOND I believe that the door should swing
 (14) both ways In fact Mr Costello s videotape I believe is in
 (15) evidence with Mr Costello s narration of it Counsel for
 (16) plaintiffs have offered into evidence and have - it has been
 (17) received into evidence - innumerable photo albums with
 (18) captions written by the witnesses describing what the
 (19) photographs are This is no different
 (20) THE COURT Is this the same old argument we didn t
 (21) object so therefore -
 (22) MR DIAMOND I m just suggesting that there is some
 (23) lack of merit within counsel s argument as evidenced by what
 (24) they have offered into evidence
 (25) THE COURT I see I see It s an insincere argument

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- (1) it s that one?
 (2) MR STOLL It s insincere
 (3) MR PETUMENOS If he wishes to make the objection
 (4) now Judge we can withdraw the narration from ours
 (5) THE COURT If you re willing to do that that would
 (6) be fine because I think the narration shouldn't come in to
 (7) me especially on this one And I thought of this as it was
 (8) being played the narration really is testimony It s not -
 (9) it isn't like some things just a few little things This was
 (10) essentially the testimony Now the testimony is in the
 (11) record It s in the record like any other testimony so fine
 (12) take the narration out of all these things I think that -
 (13) frankly I think I could either admit or not admit them and be
 (14) well within any rational rule of law But I d prefer to get
 (15) them all out
 (16) But now counsel you see what s happened here is that may
 (17) do for videotape narration but what do we do about all those
 (18) exhibits that have little stickies on them that - that may
 (19) somehow be argued are simply a point of view rather than
 (20) anything that s probative I mean that s the morass that you
 (21) get yourself into and through no fault of your own in a big
 (22) trial sometimes you do object sometimes you don't object and
 (23) sometimes there s material that s innocuous and sometimes
 (24) there s material that s cumulative
 (25) My ruling goes only to this narrations on videotape They

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- (1) don t go into the jury room The videotapes do To the extent
 (2) that the jury wants to ask to see the videotape with the
 (3) narration then of course they ll be allowed while they re
 (4) deliberating to do that
 (5) MR PETUMENOS Judge I have a courtesy copy of the
 (6) motion I filed on motion to strike the report I m not sure
 (7) you have it
 (8) THE COURT Strike the report?
 (9) MR PETUMENOS The Dorchester report that was filed
 (10) on August 9
 (11) THE COURT I think I have it Let me see it just to
 (12) see
 (13) MR PETUMENOS If you have it you can throw it away
 (14) if you don t -
 (15) THE COURT I m sure I have it somewhere question is
 (16) whether I can find it
 (17) MR PETUMENOS That will make it easier
 (18) THE COURT I have this yes definitely have it
 (19) MR PETUMENOS You do
 (20) MR DIAMOND We will file a response
 (21) THE COURT When?
 (22) MR DIAMOND Think they re piling up these
 (23) responses
 (24) THE COURT There s a lot of paper in this case this
 (25) great paperless trial

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- (1) MR DIAMOND You can see we re hardly using any
- (2) poster boards now that we have the electronic media
- (3) Mr Dorchester s not scheduled until I think at the earliest
- (4) the end of next week so we will have something to you early
- (5) next week
- (6) THE COURT That s fine How about Tuesday?
- (7) MR DIAMOND That s fine
- (8) THE COURT Okay Now this is what you re not going
- (9) to hear from me today Anything else? You re not going to
- (10) hear that from me so nobody gets in trouble We re going to
- (11) go off the record
- (12) THE CLERK Please rise This court stands in
- (13) recess
- (14) (Recess at 1 27 p m)

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- (1) EXHIBITS
- (2) DX10305A DX10284A DX10516 and DX10227 offered
6352
- (3) DX14784 offered 6352
- (5) DX10305A DX10284A DX10516 and DX10227 received
6352
- (6) DX14784 received 6353

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- (1) INDEX
- (2) DIRECT EXAMINATION OF STEVEN MacSWAIN
(Resumed) 6288
- (3) BY MR DIAMOND 6288
- (5) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
6336
- (6) BY MR STOLL 6336
- (8) DIRECT EXAMINATION OF STEVEN MacSWAIN
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- (9) BY MR DIAMOND 6336
- (11) CROSS EXAMINATION OF STEVEN MacSWAIN
6382
- (12) BY MR PETUMENOS 6382
- (14) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
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- (15) BY MR PETUMENOS 6395
- (17) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
6400
- (18) BY MR DIAMOND 6400
- (20) CROSS EXAMINATION OF STEVEN MacSWAIN
(Resumed) 6406
- (21) BY MR PETUMENOS 6406

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- (1) STATE OF ALASKA)
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
Notary Public for Alaska
- (22) My Commission Expires 5 10 97

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 UNIQUE WORDS 2,179
 TOTAL OCCURRENCES 10,536
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 NOISE WORD LIST(S)
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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No JAN 89 2533 Civil
) Anchorage Alaska
 (5) The FXXON VALDEZ) Monday August 22 1994
) 8 38 a m
 (6))
 (8) VOLUME 41 Pages 6442 through 6608
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (15) APPEARANCES
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(1) PROCEEDINGS
 (2) (Jury in at 8 38 a m)
 (3) THE CLERK Please rise
 (4) (Call to Order of the Court)
 (5) THE CLERK Please be seated
 (6) MR. PETUMENOS Good morning Judge Good morning
 (7) Mr. MacSwain
 (8) A Good morning Mr. Petumenos
 (9) CROSS EXAMINATION OF STEVEN MACSWAIN (Resumed)
 (10) BY MR. PETUMENOS
 (11) Q Mr. MacSwain I have to tell you that's one of the best
 (12) first videos I've ever seen You can come to my daughter's
 (13) birthday party any time and bring your helicopter Could we
 (14) have - I noticed that when we were watching the video we were
 (15) somewhere around this area right here when you were spinning
 (16) around in a 360 am I right?
 (17) A I'm sorry I can't see where you're pointing at
 (18) Q I'm pointing Mr. MacSwain to the area around Old Knight
 (19) Island Archipelago?
 (20) THE COURT Better show the jury
 (21) MR. PETUMENOS I'm going to I'm going to show him
 (22) first and then I'll show the jury
 (23) Q Was that about the area that you took the 360?
 (24) A The area we took the 360 was right over Flemming Island
 (25) Q Could you show us here on the Barco just one time real

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(1) quick?
 (2) A Well located right over here on the western part of Prince
 (3) William Sound
 (4) Q Great Mr. MacSwain thank you We're looking at the 360
 (5) of the video We were able to see pretty clearly across the
 (6) Sound some of the lands of Tatitlek and Eyak am I right?
 (7) A They were
 (8) Q That's one of the things you pointed out for us?
 (9) A As the helicopter was spinning around the camera shot out
 (10) and in the background quite a ways away because we're
 (11) talking long distances here far far away Here is Eyak lands
 (12) on the eastern part of the Sound and then the northern part of
 (13) the - is Tatitlek so in the background you could see quite a
 (14) ways away where Eyak and Tatitlek lands
 (15) Q Far far away You can resume the stand please and I'll
 (16) ask my next question I'm going to need the light pen for
 (17) this You've done some work for some Native Corporations?
 (18) A Yes Mr. Petumenos I've done a lot of work for the Native
 (19) Corporations
 (20) Q Then you know that the Aleut Corporation's lands in the
 (21) easternmost part cut across the Sand Point area would you
 (22) agree?
 (23) A Yes I would agree that the general location of their lands
 (24) are in that Sand Point area
 (25) Q All right And on direct you talked about the Aleut

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- (1) Corporation stating that the oil spill was not a factor and
 (2) you talked about the Aleut Corporation and Tatitlek and Eyak
 (3) being bookends do you remember that?
 (4) A Yes I do
 (5) Q Let s talk about bookends
 (6) A The Aleut Corporation lands are -
 (7) THE COURT Hang on hang on Wait for a question
 (8) BY MR PETUMENOS
 (9) Q Bookends Mr MacSwain?
 (10) MR DIAMOND Does that count as one surprise exhibit
 (11) or two Your Honor?
 (12) THE COURT Resourceful in the question natural
 (13) resource the ducks
 (14) BY MR PETUMENOS
 (15) Q Now let s talk about oiling from the perspective of Exxon
 (16) as you understand it You understand that the Prince William
 (17) Sound area on the western side above where your helicopter
 (18) was
 (19) is what Exxon contends was the most heavily oiled area in the
 (20) oil spill area am I right?
 (21) A Yes You are correct that this is the area that is viewed
 (22) by Exxon and others as the area that was most heavily oiled
 (23) Q And some people have described the Kenai Fjord Kenai
 (24) Peninsula area as a second spill because it was a different
 (25) kind of oil more weathered not as much there is that right?
 (26) A Yes I have heard that description

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- (1) Q And then as we get down towards Kodiak we learn that the
 (2) term very light oiling appeared for the first time isn t that
 (3) a term they used for the Kodiak area?
 (4) A Yes that is a term that is described for the oiling
 (5) generally for Kodiak
 (6) Q And the Shelikof Straits the oiling was lighter still?
 (7) A Shelikof -
 (8) Q Shelikof Straits are down in this area across from Kodiak
 (9) down in here right?
 (10) A Yes you re correct The Shelikof Straits include lands
 (11) oceanfront lands around Kodiak and also lands that are on the
 (12) Alaska Peninsula
 (13) Q And I would assume that as we get down towards Sand
 (14) Point
 (15) the oiling gets lighter and lighter?
 (16) A Yes that s my understanding that the further that the oil
 (17) went out the lighter it got
 (18) Q Even people from Exxon state that - well do you know
 (19) about any massive kills of birds in the area that I m circling
 (20) right here?
 (21) A No I do not have information about massive kills of birds
 (22) in that - that area there
 (23) Q How about in this area here?
 (24) A My answer would be the same
 (25) Q How about in this area here?
 (26) A My answer would be that I don t have you know specific

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- (1) information about exact number of bird kills but I understand
 (2) there were some
 (3) Q How about seals and otters in that area Massive kills of
 (4) seals and otters in that area?
 (5) MR DIAMOND Your Honor I object It s beyond the
 (6) scope of direct beyond the scope of the proffer
 (7) THE COURT Overruled the objection is overruled
 (8) A Not to my knowledge that there were massive kills of sea
 (9) otters
 (10) BY MR PETUMENOS
 (11) Q How about this area right here? Exxon scientists have
 (12) testified and acknowledged that in the first year of the spill
 (13) there were massive kills of wildlife in the area that I ve just
 (14) circled in Prince William Sound am I right?
 (15) A Yes
 (16) MR DIAMOND I ll object as irrelevant whether the
 (17) witnesses have testified to Mr Petumenos assertion If he
 (18) wants to ask whether -
 (19) THE COURT The question is whether the witness heard
 (20) them Did you hear them?
 (21) A Yes I ve - I ve heard scientists testify that there were
 (22) kills and certainly I ve heard the word massive but I
 (23) understand there was substantial number of sea otters that
 (24) were
 (25) killed
 (26) BY MR PETUMENOS

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- (1) Q So while Tatitlek and Eyak may be bookends they re
 (2) different bookends aren t they?
 (3) A No not necessarily We looked at - I looked at the Aleut
 (4) lands and also the Tatitlek lands because these were non oiled
 (5) lands and I wanted to see the - the views of the Native
 (6) Corporations on non oiled lands and the Tatitlek and Eyak
 (7) lands
 (8) were quite - particularly the Eyak lands were some distance
 (9) from the oil spill
 (10) Q Do you mean to suggest to this jury that the lands of the
 (11) Aleut Corporation were the same situation as the Eyak lands?
 (12) A Excuse me Mr Petumenos I m not sure if I understand the
 (13) question
 (14) Q I ll withdraw it May I have a print of this please?
 (15) Now I m going to ask you a question and see if you can
 (16) tell me whether or not you think that the question has any
 (17) relevance to this case If a tree falls in the forest
 (18) Mr MacSwain and no one is there to hear it does it make a
 (19) noise?
 (20) MR DIAMOND Objection argumentative
 (21) THE COURT Sustained
 (22) MR PETUMENOS Let me ask you a hypothetical You
 (23) want to play hypothetical with me?
 (24) MR DIAMOND Objection argumentative Does he want
 (25) to play argumentative?
 (26) MR PETUMENOS I m sorry Judge -

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- (1) THE COURT I m sorry I didn t even hear that
 (2) counsel Your objection is sustained
 (3) BY MR PETUMENOS
 (4) Q Let s assume I m Kevin Costner And I own land -
 (5) MS SMITH Chuck no foundation
 (6) MR DIAMOND Assumes facts not in evidence Your
 (7) Honor
 (8) BY MR PETUMENOS
 (9) Q And I own land in and around one of Mr Roddewig s oil
 (10) spills and the oil gets all over my beach and all over my
 (11) property which I own on the coast of California and nobody can
 (12) swim in it for awhile and nobody can use the beach for awhile
 (13) but during the period of time that the oil is there I m out on
 (14) location making a movie and so I m not living in my house any
 (15) damage to my lands Mr MacSwain?
 (16) MR DIAMOND Objection Your Honor calls for a legal
 (17) conclusion
 (18) MR PETUMENOS I d like to know the witness views as
 (19) an expert on the subject Judge
 (20) THE COURT The objection s sustained
 (21) BY MR PETUMENOS
 (22) Q You talked about there being no actual - not much actual
 (23) lease activity in Prince William Sound For purposes of
 (24) determining for a piece of property that is not normally
 (25) leased if you wanted to determine how it was damaged on a

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- (1) temporary basis you understand my hypothetical now? That
 (2) there s no lease activity on the property and never has been
 (3) but you want to find out what the value of the property is for
 (4) a temporary period of time how would you do it?
 (5) A You would go to the market and look for leases that were
 (6) out there and make - do your research and take the available
 (7) data and make your best judgment based on what s available
 (8) out
 (9) in the real estate market
 (10) Q And you would have to do that whether the property was
 (11) leased or not wouldn t you subject property?
 (12) A Yes we call that looking at comparables looking at
 (13) comparable rentals and looking at the rental market and from
 (14) that - the data that you collect in the real estate market
 (15) then you can make your - your estimate for your subject
 (16) property
 (17) Q And that s in fact what you did in this case for your
 (18) estimation?
 (19) A Yes that s what we did We looked at the existing rentals
 (20) that were in Prince William Sound on the subject lands and we
 (21) also went to the real estate market and looked at comparables
 (22) and based on that data we made our estimate of what the rent
 (23) - rental would be
 (24) Q Now you talked a little bit with us about this lease that
 (25) was on Busby Island with Harry Porter and you said you did a
 very thorough investigation into that situation did you?

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- (1) A Yes I did I looked at all the documents that were
 (2) available I call it a - the standard research you would do
 (3) you look at the - I looked at an appraisal I looked at a
 (4) lease document I looked at correspondence between the
 (5) parties
 (6) involved It would be the typical work I would do as far as
 (7) you know examining a lease
 (8) Q When did the Harry Porter lease begin?
 (9) A To the best of my recollection it was in 1980 That was
 (10) the information that I was provided
 (11) Q And it had a provision in it that the lease rate could be
 (12) increased how often?
 (13) A As I recall the - it was initially a ten-year lease but
 (14) then after ten years as I recall there were two five-year
 (15) options so just going on memory without having the document
 (16) in front of me it was like a 20-year lease
 (17) Q The landlord had the ability to raise the rent didn t he
 (18) over - from time to time under the lease?
 (19) A Yes that s correct and that s typically what happens is
 (20) that after a certain period of time then the parties get
 (21) together and based on the market conditions at that time they
 (22) can either get an appraisal or negotiate but it called for a
 (23) rental adjustment after X number of years
 (24) Q Was it annually or X number of years or don t you
 (25) remember?
 A As I recall without having the document in front of me

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- (1) initially it was a - it was a ten-year period And then at
 (2) 1990 it called for a new look see if you will to see what
 (3) fair market conditions were And then as I recall it called
 (4) for two five-year options
 (5) Q This lease had never been adjusted since its beginning in
 (6) 1980 am I right?
 (7) A Yes you re right as far as I know
 (8) Q So there had never been an increase at all not in 1981
 (9) two three four five all the way to 1990?
 (10) A Yes that s correct And it was level during that time
 (11) period when the real estate market was also flat
 (12) Q Well is that the case or is it the case that nobody even
 (13) tried to increase the lease? There was no attempt to increase
 (14) it during that ten year period?
 (15) A I m unaware of anybody that tried to increase the rent
 (16) during that time period but based on my recollection of the
 (17) lease it was - it was fixed during that ten-year time
 (18) period
 (19) Q Your recollection of the lease is there was no provision in
 (20) it for ten years to increase it?
 (21) A Yes that is the best of my recollection that it was level
 (22) for ten years
 (23) Q All right Now the total amount of money we re talking
 (24) about here went from five hundred to twenty-five hundred a
 (25) year?

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- (1) A Yes that's correct. It was what a little over two times
 (2) the - twice as much as it was previously based on an
 (3) appraisal that was done in 1989
 (4) Q Now for \$700 a year if you were the landlord how much
 (5) money would you spend on the appraisal to increase the rent
 (6) on
 (7) a property for \$700 a year?
 (8) MR DIAMOND Objection argumentative
 (9) THE COURT I'll allow it. Go ahead answer it.
 (10) A I - I don't have an opinion on that. I don't know.
 (11) BY MR. PETUMENOS
 (12) Q This is your testimony on direct and I forget how many
 (13) times but on a number of occasions you called this thing that
 (14) Mr. Day did an appraisal. Is it an appraisal under USPAP?
 (15) A I was - the - according to USPAP it most likely is not
 (16) an appraisal. When I was referring to an appraisal I was
 (17) referring to the letter that Tattilek sent to the - Mr. Porter
 (18) that lives in Fairbanks. And in that the letter to
 (19) Mr. Porter they referred to it as an appraisal but by strict
 (20) USPAP standards this report has a value in it it most likely
 (21) would not meet USPAP standards
 (22) Q And for \$700 a year worth of rent this thing that was not
 (23) an appraisal did not do a study of the oil spill did it?
 (24) A No this - this report or whatever you want to call it
 (25) that conveyed the recommended fair market rental it did not -
 (26) it was not an in depth oil spill study but it did cite the -

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- (1) on Page 2 of the report has a paragraph in there where they
 (2) talk about economic conditions in Alaska being real down
 (3) except for this recent incident which is located a few miles
 (4) away so the - by reading it it implies that there's a pick
 (5) up of market activity. It's not an in depth study. It's a
 (6) very brief report.
 (7) Q Now you made a number of representations about the
 (8) testimony of others in your direct. You talked about what
 (9) Mr. Mundy was contending and you talked about what Mr.
 (10) Green
 (11) was contending in their opinions do you remember that?
 (12) A Yes I do.
 (13) Q Now do you think it's important when you engage in
 (14) conflicting opinions and are trying to assist the jury in the
 (15) differences between you that you accurately state the
 (16) contentions of the opinion that you're criticizing?
 (17) A Yes I make every effort to be accurate based on the
 (18) information that I have read that I had cited excerpts from
 (19) their reports.
 (20) Q This is your testimony on direct before this jury. Did
 (21) Dr. Mundy draw any conclusions as to damages that were
 (22) sustained by the Silver Lake parcel as a result of the oil
 (23) spill?
 (24) Yes Dr. Mundy estimated that this parcel here was damaged
 (25) for three years and he estimated the amount of damage was
 (26) 2.6
 (27) million.

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- (1) That's wrong isn't it?
 (2) A If you give me a chance to - I have the excerpts of his
 (3) report right here and give me a chance to review it.
 (4) Q Sure. See if he doesn't apply a stigma damage of one year
 (5) to this parcel.
 (6) A Based on my reading of Dr. Mundy's report he states here
 (7) that stigma period of one year. However if you read further
 (8) in the numbers and he has a one year discount factor of 13.4
 (9) Then in years two and three he has a discount factor for this
 (10) rental of 11.4 per year. Then in the fourth year he goes
 (11) through what appears to be the normal situation of a rental
 (12) rate of - discount rate of 9.4 so the - my understanding of
 (13) this is that this property is adversely affected for three
 (14) years based on the mathematical calculations that are
 (15) indicated in Dr. Mundy's report.
 (16) Q The income stream that Dr. -
 (17) A Excuse me.
 (18) Q I'm sorry go ahead finish.
 (19) A As the jury can see - could you raise that up just a bit?
 (20) I'll show you talk the jury through this. Just a little bit
 (21) higher please. Little bit higher. Yes right.
 (22) Here he states that the stigma period is one year. And
 (23) then you go down to year one and he discounts has a discount
 (24) rate of 13.4 then he has what appears to be for lack of a
 (25) better word a cool down period where he discounts the rental

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- (1) at a discount rate of 11.4. And then it comes up with some
 (2) numbers here rather confusing here but it's kind of all
 (3) hypothetical and projections but that's in years two and three
 (4) it's 11.4 then he says it goes to - in year four normal
 (5) times 9.4
 (6) It's my interpretation of this 13.4 11.4 in years two and
 (7) three that he is - he's making a mathematical calculation for
 (8) the oil spill for three years so that's why I said that it was
 (9) - it looks like - this is not my report but it's my reading
 (10) of this that he is adversely downgrading this property for a
 (11) three year time period.
 (12) Q Year one impaired income is zero. Year two the impaired
 (13) income matches what the unimpaired income is is that correct?
 (14) A Right it's projecting -
 (15) Q Now -
 (16) A \$2.5 million dollars for these mountains and glaciers
 (17) here.
 (18) Q See the total damage to the parcel?
 (19) A Yes the one on the left-hand corner down here that says -
 (20) Q You agree with that because that's what you testified to
 (21) before the jury was the \$2.5 million figure?
 (22) A To the best of my recollection I testified that it was
 (23) approximately \$2.6 million in addition to this -
 (24) Q Let me refresh your recollection. This is what you
 (25) testified to

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- (1) A Looks like -
 (2) Q 2 5 see it? That s your testimony?
 (3) A Right roughly two and a half million dollars
 (4) THE COURT Counsel wait a minute That s a
 (5) different parcel
 (6) BY MR PETUMENOS
 (7) Q I m sorry that s the Nellie Juan parcel hold on
 (8) A If you go to the Silver Lake parcel I believe my testimony
 (9) was 2 6
 (10) Q Hold on you re right
 (11) A Thank you Your Honor
 (12) Q Keep after me Judge
 (13) A Right here it is My memory s better than yours
 (14) My testimony was that the - this landlocked parcel was -
 (15) it was Dr Mundy s opinion that this was damaged \$2 6 million
 (16) What was shown on the previous sheet was 2 4 million for the
 (17) surface estate and he also estimated that the land the
 (18) subsurface part of this parcel was also damaged close to two
 (19) hundred - quarter of a million dollars roughly
 (20) Q My point is this even at 2 6 the surface estate here at
 (21) 2 4 is all in the first year and there s some additional money
 (22) for the subsurface that brings it to roughly 2 6 am I right?
 (23) A Ballpark numbers yes
 (24) Q So what Dr Mundy is doing is taking a damage figure for
 (25) Silver Lake for one year not for three as you said on direct?

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- (1) A No in my view he s made an adjustment here for three
 (2) years Now it s - I m not entirely sure where Dr Mundy s
 (3) coming from here but based on my review of his calculations
 (4) it appears he s making some type of mathematical adjustment
 (5) This is his work product and he knows it better than I but
 (6) he s saying that this large landlocked parcel has been
 (7) adversely affected for just a little over two and a half
 (8) million dollars and it s my -
 (9) Q My question is other -
 (10) A And my answer to your question is that there appears to be
 (11) - it s black and white here He s made a mathematical
 (12) calculation of 13 4 11 4 for years two and three so he s
 (13) doing something in here for this - this adverse effect of the
 (14) real estate market and I - that s -
 (15) Q In any event -
 (16) A That s my view that there s something he s accounting for
 (17) appears to be years two and three where he makes this
 (18) transition from bad times at 13 4 then he goes to 11 4 in
 (19) years two and three I m not certain why he does all this but
 (20) something is - he s doing some figuring in here to
 (21) mathematical calculation that s the best as I can see it
 (22) Q In any event in the first year of this 2 6 2 47 is
 (23) reflected as the first year s damages and you re not sure what
 (24) he s doing with the interest rates but whatever s going on
 (25) 2 470 is happening in the first year not over three years am

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- (1) I right?
 (2) A Yes you are And as best as I can recall or I can
 (3) understand this is that there s a - there s a huge sum of
 (4) damages and it s in that two and a half million dollar - I
 (5) couldn t tell you exactly what he s doing here but there is a
 (6) mathematical calculation that he s doing in here that it s
 (7) different than the normal situation of a discount rate of 9 4
 (8) Q This is your testimony on Nellie Juan which I put up a
 (9) little early We go through the same process are we going to
 (10) find that the vast majority over - well over 90 95 percent
 (11) of this \$2 5 million is the first year?
 (12) A Right There s - he s really hit this property hard that
 (13) first year This is - again this is another one of those -
 (14) as the jury recalls it s that upland parcel
 (15) Q Keep my question in mind Mr MacSwain My question is
 (16) this Of the \$2 5 million figure that you testified to
 (17) according to Dr Mundy s chart how much is accrued in the
 (18) first year?
 (19) A He s hitting this - he s slamming this property pretty
 (20) hard that first year
 (21) Q How much?
 (22) A Looking at the unimpaired income in the first year looks
 (23) like 2 3 if I understand his calculations roughly
 (24) Q You understand that Dr Mundy when he was looking at land
 (25) on the east side Tatitlek and Eyak apart from this business

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- (1) that you don t completely understand about the interest rates
 (2) was applying a one year stigma for the majority 95 percent or
 (3) better of the lands of the damage on the lands on the east
 (4) side you understand that don t you?
 (5) A Without having all the parcels in front of me I couldn t
 (6) even answer on that I m - I just can t recall I know that
 (7) he s got these huge damage figures for these unopened
 properties
 (8) in the Eastern Sound I couldn t tell you without having the
 (9) document in front of me
 (10) Q Back to our discussion about leases we talked a moment
 ago
 (11) about the fact that if you had property that wasn t actually
 (12) leased the way that you would do it to determine temporary
 (13) damage to property would be to look at other leases
 (14) comparable situations to come up with a lease rate even if
 (15) the property weren t leased isn t that right?
 (16) A Yes that is correct
 (17) Q This is your testimony on direct in which you re commenting
 (18) on Dr Mundy using a revenue stream over time And you said
 (19) let s talk real world Mr MacSwain In the real world could
 (20) you rent the mainland property for 2 7 million a year? And you
 (21) said no you couldn t In the real world this is not
 (22) possible right?
 (23) A Yes that is correct
 (24) Q Now in your methodology you use a hypothetical license
 (25) for nonexclusive use for all of the land that was oiled

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- (1) throughout the Sound don't you?
- (2) A No that's - that's not a real accurate way of describing
- (3) what we did
- (4) Q Okay let's see if we can walk through it You looked at
- (5) leases for comparable lands and you came up with a range of
- (6) different leases as - as a percentage of value didn't you do
- (7) that?
- (8) A Yes we looked at all the leases that were available to
- (9) examine We looked at permits we looked at licenses we
- (10) looked at all types of different rental situations and how
- (11) people rent property out for other people to use it so we
- (12) looked at -
- (13) Q In the real world -
- (14) A - many other things besides the licenses
- (15) Q In the real world Mr MacSwain you couldn't sell licenses
- (16) on this oiled property for every piece of property down the
- (17) western side of Prince William Sound in 1989 you wouldn't have
- (18) been able to do that in the real world would you?
- (19) A I'm not sure if I understand your question Mr Petumenos
- (20) Q You wouldn't be able to sell licenses on the land that you
- (21) appraised in the real world or every piece of property in
- (22) Western Prince William Sound in 1989 you wouldn't have been
- (23) able to do that isn't that so?
- (24) A Well with your hypothetical I'd have to know more about
- (25) it but are you - I'm not sure if I understand your - your

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- (1) hypothetical correctly I'll give it my best shot here If
- (2) you're saying that everything out there is leased at one time
- (3) my answer would be no that it's not - it's not - excuse me
- (4) it's not likely that would happen
- (5) Q It was a method that you used to help you arrive at your
- (6) calculation of damages right?
- (7) A Yes that's our method was to estimate a rental in terms
- (8) of measuring damages to the properties that were adversely
- (9) affected
- (10) MR PETUMENOS Okay counsel do you have the
- (11) Exhibit 10227? Is that on the Barco? That might be just as
- (12) easy without getting an easel out Defense 10227?
- (13) MR DIAMOND Remind me what it is
- (14) MR PETUMENOS Yes this is the matched pair
- (15) exhibit Is it on the -
- (16) MR GROSS Is there a letter following the number?
- (17) MR PETUMENOS No
- (18) MR GROSS I don't have it right now but I might be
- (19) able to find it
- (20) MR DIAMOND At Mr Petumenos request I brought
- (21) them all back today
- (22) MR PETUMENOS Thank you Mr Diamond Appreciate
- (23) it
- (24) BY MR PETUMENOS
- (25) Q The information that is not contained in this Onion Bay

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- (1) sale Onion Bay matched pair is the information on among
- (2) other things the acreage of the various properties am I
- (3) right?
- (4) A Yes you're correct on this paragraph here that we do not
- (5) show the acreage
- (6) Q This is not a price per acre this is the gross price of
- (7) the individual lots that we're talking about?
- (8) A Yes that is correct
- (9) Q And so this chart doesn't take into account differences
- (10) between the lots?
- (11) A Yes this chart merely shows the - on the left side there
- (12) what the - what the sites sold for and then in the lower
- (13) portion it indicates the year that they sold
- (14) Q Now some of these lots in blue you can take your boat up
- (15) to step off the boat and walk onto the property am I right?
- (16) A Yes I - I believe you're right I haven't physically
- (17) done that myself I went into Onion Bay and we toured around
- (18) in a - a zodiac took pictures and also flew over this
- (19) property so I haven't been able to personally verify that you
- (20) can get off the boat Some of these lots may be - the
- (21) shoreline may be a little more difficult than others but
- (22) generally this bay at Onion Bay is nice bay to access has
- (23) direct access profile
- (24) Q What about this green guy right here does he have direct
- (25) access profile like the blue ones?

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- (1) A I'd have to go back and read my transaction write up to be
- (2) able to answer that question I can't recall as I sit here
- (3) Q Let me see if I can help you
- (4) Take a look at this document please and look it over
- (5) And particularly down in here you might want to take a look
- (6) and see if that refreshes your recollection about this green
- (7) parcel
- (8) A This is very difficult to read Mr Petumenos I see the
- (9) sales price and the rest of it is - access is along - I'm
- (10) sorry I can't read this writing some type of trail
- (11) Q Yes access is along I believe it says a ridged trail
- (12) right?
- (13) A Yes You're correct that's what it says
- (14) Q So this isn't boat access like the blue ones that we have
- (15) in 1989 is it?
- (16) A What you showed me is an assessor's form that has some
- (17) handwritten notes on it I have a lot of information on all
- (18) these transactions and what we call comparable sales books
- (19) detailed spell out the access As I sit here today I am
- (20) unable to verify if this handwritten note is accurate I don't
- (21) - I don't know without going back and you know reviewing my
- (22) records
- (23) Q This is the tax assessment form from Kodiak for the parcel
- (24) - for one of the parcels that could be represented by that
- (25) green bar you will agree with that won't you?

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- (1) MR DIAMOND Your Honor may I just interrupt
 (2) Mr Petumenos for a moment and take a look at that?
 (3) MR PETUMENOS Sure
 (4) THE COURT Uh huh
 (5) BY MR PETUMENOS
 (6) Q I'll ask some questions about that. Actually this green
 (7) bar could be one of two parcels because as you testified on
 (8) direct there were two parcels in 1985 side by side or close by
 (9) or something like that both selling for 25 000 and you just
 (10) put the green bar down once am I right?
 (11) A Yes that's correct I don't have the information in front
 (12) of me but to the best of my recollection it was two lots
 (13) Q What I have here is the tax assessments on both of them
 (14) the tax assessor's form on both of them and both of them say
 (15) that access is other than - the other one says right here
 (16) steep access right?
 (17) A Yes this is correct This is what it says on the
 (18) assessor's form
 (19) Q And access is an attribute that affects value on a
 (20) waterfront property isn't it?
 (21) A Yes access is important The - also what's important is
 (22) that these sites have a lot of similar characteristics
 (23) They're all located within Onion Bay and the access here
 (24) wouldn't be as critical if you were out in a more exposed area
 (25) but it is something that you take into consideration when

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- (1) you're analyzing properties
 (2) Q And in fact the assessor when he was assessing the
 (3) property for tax purposes there's a little form here and it
 (4) says access and he has put minus 25 percent for access
 (5) based
 (6) on this property hasn't he?
 (7) A Yes there appears to be an adjustment here in the
 (8) assessor's opinion that there is - he accounts for access
 (9) Q Now these other bar graphs that you put up here - and by
 (10) the way these are all in 12/90 these three bars you could
 (11) have just as easily put these three bars in descending order
 (12) and we'd see a different picture wouldn't we? I'm sorry are
 (13) you reading - have I lost you?
 (14) A No you haven't lost me I was referring - I have a
 (15) closer view of this right here in front of me my notes and
 (16) I'm with you
 (17) Q Oh okay okay The three bars here - simple point the
 (18) three bars here that are 12/90 could have just as easily been
 (19) put down in reverse order and then we would see a different
 (20) picture?
 (21) A Yes we could have moved the bars around in any way that
 (22) you want This represents three of five lots that the borough
 (23) sold in that subdivision and these are a representative
 (24) sampling of lots in Onion Bay in 1990
 (25) Q And this isn't just true of Onion Bay Every one of these
 bar graphs that you show here showing increases in some

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- (1) instances of value have no information on amenities or acreage
 (2) on this chart do they?
 (3) A No these - this bar graph shows the - what the property
 (4) sold for and the date of sale We have all that other
 (5) information in our appraisal report and then more information
 (6) in our files and backup information It's not possible to put
 (7) every factor on a simple bar graph We're trying to show the
 (8) basics what it sold for and when on this matched pair
 (9) analysis
 (10) Q It is important to show the jury all the information that
 (11) they need to make a reasoned judgment would you agree?
 (12) MR DIAMOND Objection argumentative
 (13) THE COURT I'll allow it to be answered Go ahead
 (14) A Yes it's important to show a fair representation of what
 (15) these transactions are about and I - there's only so much you
 (16) can put on a simple bar graph and you can't possibly put every
 (17) factor involved on a bar graph We could have other bar
 (18) graphs and I can even answer to the best of my knowledge
 (19) what
 (20) I know about them but this bar graph here shows the prices
 (21) and
 (22) also dates
 (23) Q DX10271 we've got a red line here of your visits to
 (24) Kodiak and a blue line as well right? Tell the jury when
 (25) your very first field inspection of Kodiak took place what
 year?
 A As part of this job it was in the - to view the property

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- (1) was in 1992 I had made an earlier trip to Kodiak to talk to
 (2) people in Kodiak about the real estate market but in terms of
 (3) going out and looking at the properties what we call field
 (4) inspections the summer of 1992 was the first year as part of
 (5) this job I had been involved working at Kodiak for a large
 (6) number of years going back 20 years I've done a lot of work
 (7) in Kodiak but as part of this job going out and viewing
 (8) properties it would have been in the summer of 1992
 (9) Q And you know that the damages that Kodiak Island Borough
 (10) is
 (11) seeking in this case had already expired by the time you saw
 (12) the land for the first time?
 (13) A I'm not sure if I understand your question Our assignment
 (14) was to go out and analyze the effects of the oil spill on
 (15) Kodiak That was the reason that - that - actually we
 (16) didn't begin our Kodiak appraisal of the Kodiak properties
 (17) until 1993 The 1992 trip was kind of a general overview of -
 (18) we were looking at comparable transactions we were looking at
 (19) - we knew that there were some claims out there but we
 (20) hadn't been asked to do our work yet until the summer of - I
 (21) think it was June of '93 so we had - we thought there was a
 (22) possibility that we would be asked to do this but the - the
 (23) '92 work was looking at sales looking at land use and that
 (24) sort of thing
 (25) Q Mr MacSwain you reviewed Mr Shorett's work right?
 A Yes that is correct I have reviewed Mr Shorett's work

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- (1) Q For what period of time does Mr Shorett claim damages one
 (2) year two years three years four years do you know?
 (3) A As I recall the Shorett work has a damage estimate for one
 (4) year It's just like very big market suspension something
 (5) like that It's difficult to tell in my view looking at
 (6) Mr Shorett's work but it was - as I recall it was like a
 (7) one year thing type of thing
 (8) Q Exhibit 10284 DX
 (9) Judge Members of the Jury these are the same exhibits
 (10) that were on blowups before
 (11) Once again for the Ellamar exhibit - we'll try to pick up
 (12) speed here so we don't spend the whole morning - but it's the
 (13) same situation isn't it? These are gross prices without
 (14) taking into account acreage?
 (15) A Yes you're correct The acreage figures are not on this
 (16) graph
 (17) Q And the differences between amenities on the lot - lots
 (18) are not on this graph?
 (19) A Yes you are correct They're not on this graph
 (20) Q Things like access aren't on this graph?
 (21) A Yes things like access and property features are not on
 (22) this graph However I'm very familiar with these parcels
 (23) I've been out to Ellamar several times and made every effort to
 (24) examine all the property there just as best as I could in
 (25) making my analysis

- (1) right?
 (2) A The Ellamar transaction yes you're correct That sale
 (3) occurred in the summer of 1991
 (4) Q You mentioned before that the real estate market was very
 (5) flat during the mid 1980s do you remember that -
 (6) A Yes I recall that
 (7) Q - in my questions to you this morning?
 (8) There was a serious recession in Alaska in the mid 1980s
 (9) wasn't there?
 (10) A Yes the - actually it was flat in the middle 80s and
 (11) then in about 86 through 1988 we took a real dive in South
 (12) Central Alaska
 (13) Q The years that you picked for the before sale date was 86
 (14) 88 and 86 in the middle of that recession right?
 (15) A Well yes you remember right but let me explain It's
 (16) not like I just picked these I don't pick when property
 (17) sells I just look - we looked at transactions before and we
 (18) have some transactions for 1988 we have them 87 86 and
 (19) what we're trying to do here were select transactions that were
 (20) either the same property or very similar and it just so
 (21) happens that these sold in 86
 (22) And I have other data all during this time period and you
 (23) have to be real careful when you do this matched pair analysis
 (24) that you get similar properties And these I felt were good
 (25) representations because the first one are two lots side by side

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- (1) Q Now the other thing about this graph is that you know that
 (2) aside from this interest discounting dispute we have here over
 (3) this two or three percent five percent whatever it is that
 (4) Dr Mundy ran the damages for the Eyak and Tatitlek lands that
 (5) were not oiled for one year
 (6) With the understanding that you have the dispute with me
 (7) about the interest rates - and there's a little bit more there
 (8) you don't understand but basically the bulk - well over 90
 (9) percent of the land damage by Mr Mundy of the eastern side of
 (10) the Sound is one year?
 (11) A The best as I can recall from Dr Mundy's work is that a
 (12) good part of his - his damage estimate was in that first year
 (13) that's when he was - considered to be as I recall - I don't
 (14) think - as I recall he didn't have a larger damage estimate
 (15) you know out there in time but the larger part of the dollars
 (16) was in the first years
 (17) Q And one of your bar charts is for Kasit - how do you say
 (18) it?
 (19) A It's pronounced Kasitna Bay
 (20) Q July of 1992 three years after the spill right?
 (21) A Yes This transaction this matched paired analysis here
 (22) is one of many that we have in South Kachemak Bay and it's
 (23) only a representative sampling of the real estate market in
 (24) South Kachemak Bay
 (25) Q The other one is June of 91 two years after the spill

- (1) purchased by the same buyer I felt that that was important to
 (2) show what was happening and likewise the other second
 (3) Ellamar transaction it was Mr and Mrs McCarthy they bought
 (4) an upland lot in 1988 and the - actually they - they bought
 (5) the lot in 89 The deal was all worked out and it was - it
 (6) was a couple months later that in February they closed it but
 (7) we used the 1990 date of sale seemed to be more consistent
 (8) with the other work we were doing
 (9) Q Just like Onion Bay typical transactions just like Onion
 (10) Bay?
 (11) A I'm sorry I - just like Onion Bay I'm not with you
 (12) here
 (13) Q You selected typical matched pairs just like you did in
 (14) Onion Bay?
 (15) A No this is a little bit different because in Onion Bay
 (16) the - as I recall the Onion Bay we didn't have the same lots
 (17) that sold before If I had it we would have used it If we'd
 (18) had a lot sold in 1988 and the same lot sold in 1989 you
 (19) better believe it it would have been right up there You can
 (20) only use what you have
 (21) MR PETUMENOS Judge I'm ready to take a break
 (22) THE COURT Okay fine
 (23) THE CLERK Please rise This court stands in
 (24) recess
 (25) (Jury out at 9 37 a m)

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- (1) (Recess from 9 37 a m to 9 52 a m)
 (2) (Jury in at 9 52 a m)
 (3) THE CLERK. This court now resumes its session
 (4) Please be seated
 (5) THE COURT Where are we?
 (6) MR DIAMOND My witness is still in the restroom
 (7) Your Honor If Mr Petumenos wants to ask and answer the
 (8) question we might be okay
 (9) THE COURT Very effective technique
 (10) MR PETUMENOS Except for the asked and answered
 (11) objection
 (12) BY MR PETUMENOS
 (13) Q You have always been I think quick to point out that you
 (14) believe government pays or is obligated to pay fair market
 (15) value for the purchases that they make?
 (16) A Yes those are the laws that the government has is that
 (17) they re required to pay market value for properties that they
 (18) acquire Sometimes this isn t always the case there s
 (19) political factors that go beyond market value but the laws of
 (20) the land are that the government is to pay market value for
 (21) property
 (22) Q Do you recall what Mr Mundy had as the price per acre for
 (23) natural land for the lands that he appraised?
 (24) A Yes I have a - a rough idea of what he s referring to
 (25) there

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- (1) Q What do you remember?
 (2) A It was around \$1 000 an acre in that general neighborhood
 (3) Q Would it be more like 950 somewhere in there anyway?
 (4) A Well the reason I m having difficulty with this is that
 (5) I ve reviewed a number of his appraisals over the last couple
 (6) years and his price has changed He used to be higher four
 (7) years ago and it s been coming down and I -
 (8) Q I m talking about the one - excuse me excuse me I m
 (9) talking about the exhibit that was before the jury that you
 (10) have reviewed that was the final figure the final report
 (11) before the jury here Do you remember that it was somewhere
 (12) between 950 and a thousand an acre?
 (13) A That sounds about right yes
 (14) Q All right Now regardless of where the money came from
 (15) for the Seal Bay transaction you would agree with me that the
 (16) government paid for the Seal Bay Afognak Island transaction
 (17) about \$924 an acre?
 (18) A Yes that s correct The Seal Bay property was property
 (19) that had a timber highest and best use and the bulk of that
 (20) money that was paid were for timber values It had a real high
 (21) timber value Matter of fact if you pulled out the timber
 (22) value and you looked at the residual you re looking at a value
 (23) of two or three hundred dollar range but there was this very
 (24) high price paid for the Afognak parcel It was heavily wooded
 (25) had Sitka spruce on it and it had a separate timber valuation

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- (1) that means that there was money to be made from this parcel
 and
 (2) it was reflected in the appraisal
 (3) Q That s right But what you also need to tell the jury is
 (4) that the Native Corporation refused to sell at all without
 (5) inclusion of some of what you call the mountaintops and
 (6) glaciers in the deal isn t that right?
 (7) A I m uncertain of the exact negotiations that were going on
 (8) between the corporations but as I recall there was - there
 (9) were negotiations This deal happened a lot quicker than the
 (10) Kachemak Bay which spanned over 15 20 years but all this
 (11) came about and to the best of my recollection was after the
 (12) oil spill and the moneys became available -
 (13) Q Excuse me excuse me Mr MacSwain My question is this
 (14) The Native Corporations refused to sell just the good stuff and
 (15) required in order for the deal to go through that the
 (16) mountaintops and glaciers be included in the parcel is that
 (17) right or wrong?
 (18) A Yes you re correct And I can only tell you - what I do
 (19) know is that there are two parcels here one was the Seal Bay
 (20) part of it and the other was the other part that wasn t quite
 (21) as desirable physically speaking It s called the Tonki Bay
 (22) parcel had some more mountains
 (23) Q And the Native Corporations weren t content to be left with
 (24) just mountaintops and glaciers at the end of the spill -
 (25) excuse me at the end of the sale they insisted on selling the

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- (1) whole thing and when they sold the whole thing and you divide
 (2) the acreage by the price it comes out to \$924 an acre isn t
 (3) that a fact?
 (4) A Yes I think the price figure is in the ballpark but I d
 (5) have to go back and check to make certain but it sounds about
 (6) right for the parcel that was heavily timbered
 (7) Q The \$924 an acre figure I m giving you includes land that
 (8) is mountain and glaciers you know that to be true?
 (9) A Again I d have to review it but -
 (10) Q I may have misspoke
 (11) A But in answer to your question I don t think we re looking
 (12) at a lot of glaciers on this parcel
 (13) Q You re right
 (14) A This parcel here has some steep area but we re down -
 (15) Kodiak is down in an area where there are not a lot of
 (16) glaciers
 (17) Q You re right I misspoke Mr MacSwain when I talked about
 (18) glaciers but it is true that land that you would have
 (19) categorized as limited use land cliffs mountaintops things
 (20) like that were in the sale?
 (21) A Yes there were - part of this property did include some
 (22) land that was rather steep and had cliffs on it
 (23) Q All right Now I want to go back and talk about the
 (24) survey business that we were talking about at the close of
 (25) business yesterday for just a little bit

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- (1) This is a quote from your report supplemental report
 (2) number one volume one of four chapter four out of Page 4 9
 (3) Interviews with local Kodiak officials and real estate market
 (4) participants we asked for their opinions regarding the effects
 (5) the oil spill may have had on the Kodiak real estate market
 (6) Because of the litigation there is some local reluctance to
 (7) discuss market issues or oil spill effects but we found no one
 (8) who stated that there had been any adverse real estate effects
 (9) of the Exxon Valdez oil spill
 (10) Is the statement after the word but true?
 (11) A Yes it is
 (12) Q You found no one who stated that there had been any
 adverse
 (13) real estate effects of the Exxon Valdez oil spill?
 (14) A That's correct And I - I will state that the intent here
 (15) was to - we didn't find anybody that had any specific
 (16) information to show that - if I had to do this over again I
 (17) would have worded it a little bit differently but the general
 (18) intent is here we didn't find anybody that had any examples to
 (19) show any data that there was any effect of the oil spill
 (20) Getting information in Kodiak I might add is a little bit
 (21) difficult There was a number of people that were reluctant to
 (22) talk
 (23) Q Mr Duke Bertke was a person you interviewed?
 (24) A Yes that's correct Duke Bertke is a person that I
 (25) interviewed a number of times He's very involved in Prince

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- (1) William Sound He's familiar with Canoe Passage Subdivision
 (2) and he's somebody I talked to frequently
 (3) Q He's one of the people you paid?
 (4) A Yes he's one of the people that did some research for me
 (5) and gathered through his - went through his records and I
 (6) compensated him for his -
 (7) MR DIAMOND Your Honor may I ask that counsel at
 (8) least identify documents before he puts them up on the Barco
 (9) for the jury?
 (10) THE COURT Yes please do that
 (11) MR PETUMENOS I'm sorry counsel I'll do better
 (12) than that for you There's a copy for you It's from the
 (13) report
 (14) MR DIAMOND May I just find out where this is from?
 (15) MR PETUMENOS Yes this is chapter 6 page 24 of the
 (16) I think the May report Is that enough may I proceed here?
 (17) BY MR PETUMENOS
 (18) Q Your statement indeed some brokers and developers we
 spoke
 (19) with offered the view that the spill may have actually helped
 (20) sales of remote recreational properties because of the
 (21) increased awareness et cetera You see that statement down
 in
 (22) the footnote?
 (23) A Yes I do
 (24) Q Here's the footnote the first citation of authority there
 (25) for that statement is an interview with Mr Duke Bertke

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- (1) right?
 (2) A Yes that's what it says
 (3) Q The importance of notes Mr MacSwain here's the actual
 (4) notes that you wrote on this topic and it contains a footnote
 (5) in your notes does it not?
 (6) A I'm not certain that these are my notes or indeed
 (7) Mr Dorchester's I need some more - I need the entire
 (8) document here
 (9) MR DIAMOND Your Honor may we proceed in having
 (10) some foundation laid before documents are published so we
 avoid
 (11) another instance of counsel showing something that's not the
 (12) witness and has not been authenticated
 (13) THE COURT How do you want him to proceed counsel?
 (14) Do you want him to go back and forth to the witness delivering
 (15) copies each time?
 (16) MR DIAMOND If he can show it to him first ask
 (17) whether he knows what this is and we can authenticate this
 (18) MR PETUMENOS I'll get us by this
 (19) THE COURT I really don't want a shuttle taking place
 (20) here I don't think it's necessary
 (21) BY MR PETUMENOS
 (22) Q This is typewritten notes of an interview with Duke
 (23) Bertke Do you recognize it?
 (24) A Yes I do
 (25) Q Whose are they?

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- (1) A They're a little difficult to read but they appear to be
 (2) mine
 (3) Q Okay Now next to the statement that is triggered in the
 (4) report there's a footnote that didn't make it into the report
 (5) am I right? And the footnote says Bertke did say that there
 (6) may be some site specific spots where oiling may have affected
 (7) values That's what you wrote in your footnote right?
 (8) A Yes that's correct This is what he indicated to me that
 (9) there were - he had been talking to the - or entertaining the
 (10) idea of maybe listing some property in Chenega at one time
 and
 (11) he thought maybe there was some - could have been some
 areas
 (12) that were heavily oiled that he felt that would have been
 (13) impaired by the oil spill
 (14) Q Mr Longacre do you know who Mr Longacre is?
 (15) MR PETUMENOS Sorry I'm doing it again to you
 (16) counsel I apologize These are all part of Exhibit 9004
 (17) MR DIAMOND Thank you
 (18) BY MR PETUMENOS
 (19) Q Your report at page 6 24 we were told by bank officers
 (20) that their lending policies for remote properties have not
 (21) changed at all as a result of the spill and it's footnoted
 (22) again to an interview with Doug Longacre That's the source of
 (23) that statement am I right?
 (24) A Yes that is correct
 (25) Q And again at another page of your report you say the same

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- (1) thing that their lending policies have not changed as a result
 (2) of the oil spill?
 (3) MR DIAMOND I m going to object Counsel is
 (4) switching one report with another report that were prepared
 (5) over different times and not identifying that fact Just a
 (6) little bit misleading
 (7) MR PETUMENOS I have no problem with explaining
 (8) which report came from where That s fine
 (9) THE COURT Okay
 (10) BY MR PETUMENOS
 (11) Q You want to explain that Mr MacSwain how the two things
 (12) I just showed you differ?
 (13) A Yes I would appreciate if you would tell me what document
 (14) this is coming from Maybe that will better help me answer the
 (15) question for the jury
 (16) MR PETUMENOS Page C4 of the report
 (17) MR DIAMOND Which report?
 (18) MR PETUMENOS Judge may I approach the witness and
 (19) show him?
 (20) BY MR PETUMENOS
 (21) Q Now the point that I want to get to - I m at now 924
 (22) counsel of that exhibit - is this - Mr MacSwain you talked
 (23) about the loan policies of the banks not changing because of
 (24) the spill but what isn t in your report was his statement that
 (25) loans in remote areas for raw land and/or proposed
 developments

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- (1) are virtually nonexistent in both the before and after
 (2) situation pre and post Exxon Valdez So what you are saying
 (3) in your report was the loan policy that didn t change for loans
 (4) that weren t being made isn t that a fact?
 (5) A Yes that s correct This is what we were told by the
 (6) lenders is that these are in areas that are too risky and
 (7) they re just - they re not - they typically don t make loans
 (8) out in these areas so that yes this is what he told us
 (9) Q Did Mr Norm Lee tell you that he thought there may have
 (10) been a value loss due to the oil spill?
 (11) A Yes he did This is in the very - quite some time ago
 (12) He did indicate to me that - he hadn t done his research yet
 (13) but he thought there was something out there and he was in
 the
 (14) process of doing his work and he d made a comment to me
 about
 (15) that
 (16) Q Chapter 6 of your May 1993 report contains the chapter
 (17) about the surveys that you did that included Mr Lee s
 (18) interview That question s confusing Let me try again I m
 (19) going to approach him with chapter 6 of the May 1993 report
 (20) Thanks
 (21) A Welcome
 (22) Q Chapter 6 of the May 1993 report contains your report of
 (23) the interviews that you did up until that date?
 (24) A Yes this is the chapter that deals with interviews
 (25) Q Mr Lee s remarks make it into the report?

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- (1) A As I recall that the - Mr Lee s comments didn t make it
 (2) into the report Mr Lee subsequently - subsequently went out
 (3) and did some research and found that the oil spill did not
 (4) adversely affect property values so -
 (5) Q Well that s interesting because it is the case isn t it
 (6) that in connection with this settlement that you described with
 (7) Seal Bay one of the things that the federal government
 (8) asserted - which Mr Lee works for the federal government -
 (9) one of the things that they asserted was a damage to resources
 (10) to the federal government including land is that right?
 (11) A No that s not right Mr Lee does not work for the
 (12) government today He s retired from the government
 (13) Q The time that you interviewed him was he working for the
 (14) government?
 (15) A Yes he was He was the chief review appraiser for the
 (16) National Park Service
 (17) Q At the time that you interviewed him was there as part of
 (18) the settlement with the federal government that you ve alluded
 (19) to with the Seal Bay transaction a claim for loss to natural
 (20) resources owned by the federal government including land -
 (21) A I think -
 (22) Q - as a result of the Exxon Valdez oil spill?
 (23) A Your question needs an explanation The sale from the
 (24) Village Corporation the Akhiok-Kaguyak and the Old Harbor to
 (25) the government was not a settlement as I understand it was

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- (1) an - it was an acquisition of property
 (2) Q That s not my question I understand what you re trying to
 (3) explain but that s not what I m trying to get at Maybe I ll
 (4) try again
 (5) You have the comments here of a federal appraiser right?
 (6) A Yes that is correct
 (7) Q What I am asking you is whether or not when the federal
 (8) government settled this claim with the Exxon folks one of the
 (9) things they settled for was a - a damage to natural resources
 (10) including land?
 (11) MR DIAMOND Your Honor I ll object as irrelevant
 (12) and question whether Mr Petumenos really wants to open up
 the
 (13) door to the litigation
 (14) (At side bar on the record)
 (15) THE COURT Where are you going counsel?
 (16) MR PETUMENOS That s the only question I m going to
 (17) ask
 (18) MR DIAMOND There s no foundation that this
 (19) witness -
 (20) THE COURT I m sure foundation can be laid The
 (21) question is what are you going to do in response to this
 (22) particular line of inquiry?
 (23) MR DIAMOND As much as I can I imagine I don t
 (24) know whether a foundation can be laid whether the government
 (25) was asserting a real property claim and how much that figured

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- (1) into their settlement analysis I doubt counsel can lay a
 (2) foundation
 (3) MR PETUMENOS My concern obviously Judge that
 (4) they've called up a real estate - they called a government
 (5) appraiser have it for us in the federal government behind the
 (6) remark that there was no damage to federal lands because of
 the
 (7) Exxon Valdez oil spill and that is a component of the very
 (8) settlement that he's told the jury resulted in the Seal Bay
 (9) transaction
 (10) So the impression the misimpression is being left with the
 (11) jury that the federal government believes that their land isn't
 (12) damaged and that's not the case nor is it the case with the
 (13) State So I'm not getting into the amounts or anything like
 (14) that but I am entitled it seems to me to say that whatever
 (15) this fellow his job was with - with the federal government
 (16) his position that the Exxon Valdez oil spill didn't harm the
 (17) federal government is at odds with the federal government
 (18) THE COURT Yes but you don't know the particulars of
 (19) the settlement do you?
 (20) MR PETUMENOS I have the consent decree which states
 (21) that the natural resource damages were for a bunch of other
 (22) things including land So I have a good face basis for that
 (23) impression
 (24) THE COURT I'm not saying that counsel I'm
 (25) inclined to let it in The problem is I'm worried about the

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- (1) response because I suddenly feel - I don't know whether I'm
 (2) going to be feeling it but it may be something you're not
 (3) going to like So you've got the choice
 (4) MR PETUMENOS Okay I understand the situation
 (5) MR STOLL We understand
 (6) MR DIAMOND And I would continue to - if
 (7) Mr Petumenos wants to get into this I have no objection to
 (8) that I just question the - number one whether he can lay a
 (9) foundation with respect to this witness about the nature of how
 (10) that case was settled particularly whether the federal
 (11) government allocated anything to the real property claims
 (12) which would be a necessary predicate He can't say -
 (13) THE COURT That may be so He has to lay the
 (14) foundation first if you're going to continue this line of
 (15) inquiry
 (16) MR PETUMENOS All right
 (17) (Sidebar concluded)
 (18) MR PETUMENOS I don't know how difficult this will
 (19) be but could you read the last question?
 (20) (The prior question was read)
 (21) MR PETUMENOS That's natural resources
 (22) MR DIAMOND I object as lack of foundation
 (23) BY MR PETUMENOS
 (24) Q Do you know Mr MacSwain?
 (25) A The - yes I do that there is a fund that was set up

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- (1) almost a billion dollar fund and they were involved with this
 (2) fund to study - to pay for any future damages to the oil
 (3) spill
 (4) Q Based upon in part damage to natural resources including
 (5) land?
 (6) A Yes I believe that's correct
 (7) Q Now like Mr Diamond I can't go through 150 people in
 (8) your survey in the time I have with the jury either but maybe
 (9) just a couple more
 (10) Mr Longacre you cite in your report Who is
 (11) Mr Longacre? He's an attorney isn't he? A bank - excuse
 (12) me a banker?
 (13) A Yes Mr Longacre is a vice president with the First
 (14) National Bank of Anchorage He's also the overseer of all the
 (15) branch banks in First National He makes all the lending
 (16) decisions for Cordova Valdez Seward Homer and Kodiak
 Each
 (17) one of these towns have First National Bank offices there
 (18) He's the guy that - he gives the go or no go decisions
 (19) regarding real estate loans and he also oversees the branches
 (20) Q Right And he's one of the people you cited as support for
 (21) your statements that lending policies for remote properties
 (22) hadn't changed since the spill?
 (23) A Yes that's correct This is what he told me
 (24) Q These are the loans that are not made And the other
 (25) things that he told you that didn't make it into the report -

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- (1) also from that same exhibit counsel - 8 28 92 and these are
 (2) your notes?
 (3) A Yes you are correct These are my notes
 (4) Q Okay O Connell and Pargetter who are they?
 (5) A Jim O Connell and Mr Tom Pargetter they're
 (6) vice presidents with the National Bank of Alaska
 (7) Q Same thing though right? Where you cited them for this
 (8) policy change the - a lack of policy change of remote
 (9) properties with bankers?
 (10) A I'd have to look at the report to see if there is an exact
 (11) citation but generally we did refer to bankers as part of
 (12) this interview process
 (13) Q National Bank of Alaska per O Connell there are a lot of
 (14) rumors or talk in the industry i.e. the plankton is not there
 (15) something has happened to the fish PWS fishery is a serious
 (16) concern Kodiak has a less negative impact O Connell
 (17) indicated they had no scientific knowledge regarding the
 (18) spill's effect on salmon only rumors and hearsay
 (19) MR DIAMOND The subject of hearsay I'll object to
 (20) counsel reading in blatant hearsay
 (21) THE COURT I'm going to allow it counsel It's part
 (22) of the questioning of this witness He obviously saw fit for
 (23) it
 (24) BY MR PETUMENOS
 (25) Q This material about the concern the uncertainty

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- (1) surrounding the oil spill area in 1992 that this banker had
 (2) didn't make it into your report?
 (3) A The - no it did not and what - what we were reporting
 (4) in our report is what the primary reason for talking to the
 (5) bankers is see what their lending policy has to do with real
 (6) estate That was our mission I'm not a scientist here
 (7) zoologist but we wanted to know how the bankers viewed
 lending
 (8) decisions and this is what we were referring to as far as that
 (9) part of the report regarding the effect on real estate what
 (10) their policies were
 (11) Q To get the whole story of the interview it's important to
 (12) look into your notes isn't it?
 (13) A Yes looking at my notes is all part of our research
 (14) MR PETUMENOS If I can review my notes Judge I may
 (15) pass the witness
 (16) BY MR PETUMENOS
 (17) Q Do you think that the owner of the Ellamar subdivision
 (18) thinks the oil spill had adverse impact on the property or do
 (19) you know?
 (20) A Yes I - excuse me I spoke with Mr and Mrs Groh quite
 (21) extensively and at one time Mr Groh who has had a claim
 (22) against Exxon I'm not sure what the status is right now but
 (23) he refers to his wife Lucy Groh who provided me with a lot of
 (24) - all of the details that were in the office regarding the
 (25) land transactions and I didn't get into with her whether or

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- (1) not the oil spill had an adverse effect I was merely
 (2) gathering information and she gave - gave it to me So she
 (3) didn't you know go into - we didn't discuss that as part of
 (4) it but Mr Groh at one time did have a - a claim initially
 (5) when I first met with him but he referred us to his wife
 (6) Lucy who is more familiar with the subdivision and that's
 (7) what I wanted to know She said she's got the details and the
 (8) facts so I'm not certain -
 (9) Q Well sometimes -
 (10) A I'm not certain exactly what the current position is
 (11) Q Sometimes you asked people the question of whether or not
 (12) they thought property was impacted by the oil spill
 (13) apparently and sometimes you didn't right?
 (14) A Yes that's correct For example when I spoke with Kodiak
 (15) Island Borough while they were still talking to me they were
 (16) a litigant suing Exxon and it -
 (17) MR PETUMENOS Judge excuse me I asked I think a
 (18) fairly specific question
 (19) THE COURT Answer the question if you will Please
 (20) just answer the question
 (21) BY MR PETUMENOS
 (22) Q Okay Sometimes you asked people what their opinion was
 (23) regarding the impact of the Exxon Valdez oil spill on the
 (24) market and sometimes you didn't?
 (25) A Yes that's correct If they didn't have the you know

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- (1) knowledge of the oil spill area I wouldn't ask them And if
 (2) they were a litigant that was involved there were
 (3) instructions - I was instructed not to get into that if they
 (4) were plaintiffs For example I mentioned the borough Kodiak
 (5) Island Borough
 (6) Q So if they had made a claim against Exxon you wouldn't ask
 (7) the question?
 (8) A Yes in this particular case I was careful not to get
 (9) involved between you know the parties and I wasn't certain
 (10) that this was an area that I should get into
 (11) Q So you didn't have a standardized questionnaire like
 (12) Mr Roddewig where you asked the same questions sort of
 (13) scientifically to each respondent in the survey?
 (14) A No my method of interviewing here in Alaska is different
 (15) than the techniques that he used in his examination of oil
 (16) spills in the Lower 48
 (17) MR PETUMENOS I have no further questions
 (18) MR STOLL I have a few questions Your Honor
 (19) dealing with Kodiak
 (20) CROSS EXAMINATION OF STEVEN MacSWAIN
 (21) BY MR STOLL
 (22) Q I guess we don't have in the courtroom the flip chart that
 (23) you wrote on yesterday that was made an exhibit Do you recall
 (24) that?
 (25) A Yes I recall that

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- (1) Q Friday I guess it was
 (2) A Mr Stoll I don't know where it's at
 (3) Q All right And you listed a number of transactions or
 (4) numbers annual - annual numbers for each year This is the
 (5) material you got from Mr Hurley in Kodiak?
 (6) A Yes that is correct I recall that
 (7) Q And then you wrote on - during the break you wrote on the
 (8) chart I believe you wrote total sales do you recall that?
 (9) A Yes I - I do recall that and that was - that was just a
 (10) generic sales I'm referring to property conveyances as I
 (11) understand the data
 (12) Q Now you testified in response to a question by
 (13) Mr Petumenos that you thought it was important to give the
 (14) jury accurate information so they could make a reasoned
 (15) judgment do you recall that?
 (16) A Yes it's important
 (17) Q Now actually the material that you wrote down on this
 (18) chart that you gave the jury in your handwriting was - came
 (19) out of - the figures came out of a letter from Mr Hurley to
 (20) you dated June 22 1993 isn't that correct?
 (21) A Yes that's correct I have the -
 (22) Q Could I have the Elmo please?
 (23) A Letter right here
 (24) Q This is the letter right here is this right? This is
 (25) Exhibit 9011 I just wrote that on there That's the exhibit

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- (1) number This is the letter isn't this right?
 (2) A Yes you're correct Mr Stoll
 (3) MR PETUMENOS Hold it still counsel I can't read
 (4) it when you're moving it
 (5) MR STOLL I just want to flip over to the next page
 (6) he's identified the letter
 (7) BY MR STOLL
 (8) Q Now attached to that was his exhibit and the numbers that
 (9) you wrote on the board to the jury are these numbers here
 (10) right? Aren't these the ones that you wrote up on the board
 (11) A Yes they are unless I switched a digit there I made
 (12) every effort to -
 (13) Q No I understand -
 (14) A To write what I saw here down on the exhibit
 (15) Q I'm assuming that you wrote the correct numbers on there
 (16) but the title of this column - this doesn't say total sales
 (17) this says total recordings and filings for the year on all
 (18) kinds of properties isn't that correct?
 (19) A Yes that's correct And as I stated the - I wrote down
 (20) Kodiak sales It was generic all property transfers
 (21) Q Well just a minute -
 (22) A And this is - this is what it means It's everything the
 (23) whole shebang -
 (24) Q Right This doesn't - this doesn't just include sales
 (25) though does it? This includes anytime there is a filing or

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- (1) recording on a parcel of property in Kodiak Island Borough
 (2) anywhere in the borough whether it's downtown Kodiak
 whether
 (3) it's Larsen Bay whether it's in a remote property it's any
 (4) kind of a filing isn't that correct?
 (5) A Yes that's correct This is the whole universe of
 (6) filings It's just one measure that - yes it's everything
 (7) as I understand it
 (8) Q And the -
 (9) A As it's stated right here it's - it's recordings and
 (10) filings in Kodiak
 (11) Q Right So recordings and filings includes when a creditor
 (12) files a lien on a piece of property that's a filing isn't
 (13) that correct?
 (14) A Yes Mr Stoll This is everything This is one measure
 (15) of market activity It's not - it may not be perfect but
 (16) it's - we were looking at trying to measure the number of
 (17) transactions and this is one segment we looked at It's not
 (18) the whole story but it's all these things that you so stated
 (19) Q I'm just trying to go back to give the jury - you wrote
 (20) these numbers down You in your own handwriting wrote on
 the
 (21) document total sales And the point I want to make is is
 (22) that this does not include just sales It includes any kind of
 (23) filing whether it's a lien whether it's a mortgage whether
 (24) it's a gift whether it's a sale whether it's a transfer
 (25) because of an inheritance all of that is a recording or

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- (1) filing isn't that correct?
 (2) A Yes that's correct And you know when I made the little
 (3) handwritten note there you're right I should have probably
 (4) been more - better to put total recordings but it includes
 (5) sales
 (6) Q All right Now Mr Hurley - Mr Hurley when he sent this
 (7) information to you he made this clear to you though didn't
 (8) he notwithstanding what you told the jury?
 (9) MR DIAMOND Your Honor I'm going to object to this
 (10) line This was not done in front of the jury At the
 (11) conclusion of the witness testimony I requested of
 (12) Mr Petumenos whether we could label the chart in some
 fashion
 (13) so we'd all remembered what it was Those were my words
 (14) Perhaps I should be cross examined not this witness
 (15) THE COURT Perhaps I'd have to review the transcript
 (16) to rule specifically Do you want me to review the record?
 (17) MR DIAMOND I'm reminding counsel If he doesn't
 (18) agree with me perhaps he could consult with Mr Petumenos
 (19) MR STOLL I was present when he said can we label
 (20) this and the witness wrote total sales on there It's his
 (21) handwriting
 (22) MR DIAMOND I think the record will reflect and
 (23) Mr Petumenos will confirm why don't we have him write
 (24) something like Kodiak sales?
 (25) MR PETUMENOS I think counsel is right It was off

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- (1) the record but other counsel is correct that Mr MacSwain
 (2) wrote it in his handwriting
 (3) THE COURT Counsel this is a bone of contention I
 (4) want the record - since you both made it a bone of contention
 (5) I want the jury to know what happened
 (6) MR DIAMOND As Mr Petumenos just indicated it
 (7) happened off the record in a conversation between us
 (8) THE COURT It doesn't make a difference counsel
 (9) Instead of lawyers testifying I prefer to have the record
 (10) shown to the jury so they know what's happening because it's
 (11) bewildering I'm sure to the jury the way you're speaking of
 (12) it both of you So if you want to follow up on this get that
 (13) colloquy in front of the jury let them see what happened and
 (14) then the jury can see what happened
 (15) MR PETUMENOS Judge can I offer another solution?
 (16) THE COURT Yes
 (17) MR PETUMENOS I can offer a stipulation I think
 (18) counsel will accept
 (19) THE COURT Yes go ahead
 (20) MR PETUMENOS The stipulation was Mr Diamond asked
 (21) while we were off the record that the title be put on the
 (22) document and that Mr MacSwain put the title on the document
 (23) with my consent while we were off record because it was
 (24) untitled
 (25) MR DIAMOND That's fine with the supplement that I

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- (1) was the one who told him how to title it
 (2) MR PETUMENOS That's fine
 (3) MR DIAMOND So stipulated
 (4) MR STOLL Your Honor I don't think it - the
 (5) witness - that's fine
 (6) THE COURT What's - all right I'll accept that
 (7) stipulation counsel You can ask some more questions but if
 (8) I see some more confusion this jury's going to see the whole
 (9) record
 (10) MR STOLL That's fine
 (11) BY MR STOLL
 (12) Q Now then he had another - he had another column in his
 (13) letter to you that you didn't write down and that's the one
 (14) called total number of conveyances outside of 15 mile radius of
 (15) the city of Kodiak correct?
 (16) A That's correct And as I recall I thought I wrote that
 (17) down but maybe I forgot
 (18) Q I'm sorry that counsel didn't - you know we don't have
 (19) that document here but at any rate - and this is
 (20) conveyances Now when this - when we talk about
 (21) conveyances
 (22) here though this also includes any transfers correct?
 (23) Doesn't mean a sale an arm's length sale conveyances means
 (24) when a person gives a gift to their grandchild or to their -
 (25) or to somebody else isn't that correct?
 (26) A Yes this would include property conveyances just activity

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- (1) showing transfers of property in - in that radius
 (2) Q All right And it also includes when there's a - for
 (3) instance in a divorce proceeding a piece of property an
 (4) interest can be conveyed from one spouse to another spouse
 (5) or
 (6) former spouse isn't that correct?
 (7) A Yes you're correct This is - as I understand it from
 (8) Mr Hurley this was a total - there's one measure of looking
 (9) at transactions We've also gone back and examined it for you
 (10) know market transactions but this was just a measure of
 (11) showing activity which would include you know -
 (12) Q For instance it also includes the 272 figure there?
 (13) A All transfers
 (14) Q That includes when Larsen Bay Tribal Council distributed
 (15) some of its holdings to members of the Tribal Council isn't
 (16) that correct? I think you testified about that
 (17) A Yes that's correct That's right after the oil spill when
 (18) a number of lots the supply came on the market in 19 - about
 (19) 1990 as I recall
 (20) Q And conveyances also includes when there's foreclosures
 (21) isn't that right?
 (22) A Yes it - as I understand it from Mr Hurley these are
 (23) the total conveyances of market activity all the action in
 (24) that area
 (25) Q So when you - when an appraiser does an appraisal of
 (26) property he is required under your ethical rules is he not

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- (1) to look at arm's length transactions for comparable properties
 (2) or comparable sales isn't that correct? Arm's length
 (3) transactions isn't that right?
 (4) A The ethics you're not spelling that out exactly precisely
 (5) as you so stated but the ethics of my projection is to report
 (6) the data as accurately as you can you are correct
 (7) Q And an arm's length transaction is when you have so-called
 (8) disinterested parties not somebody giving a gift to a child or
 (9) it's not a transfer because of a divorce or a foreclosure
 (10) something of that nature is it?
 (11) A Yes that's correct There can't be any duress in an arm's
 (12) length transaction
 (13) Q And when he was first asked by Mr Papke - I think you
 (14) went into this - Mr Hurley said that there was an impact on
 (15) the - by the Exxon Valdez oil spill on property transactions
 (16) in Kodiak isn't that correct?
 (17) A Yes initially from my - what I understand subsequent to
 (18) Mr Papke met with Mr Hurley that he had indicated that there
 (19) had been a negative effect However as Mr Hurley told me
 (20) when I spoke with him that he hadn't done his research yet and
 (21) he changed his mind or he indicated to me that - that it was
 (22) only a brief comment that he had - had made to Mr Papke
 (23) Q This was this videotape we saw of Mr Papke's deposition
 (24) when he described how this comment was made in this
 (25) interview
 (26) that he had with him which you attributed - I think the

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- (1) interview occurred in Mr Hurley's office isn't that right?
 (2) A Yes as I understand it Mr Papke did meet with Mr Hurley
 (3) in Kodiak
 (4) Q Now you - you had a quote up that your counsel had of
 (5) Mr Roberts He's an appraiser in Kodiak correct?
 (6) A Yes that is correct
 (7) Q And you - you said that he was a knowledgeable or very
 (8) knowledgeable person in the marketplace there isn't that
 (9) correct?
 (10) A Yes Mr Roberts is a Kodiak appraiser and he's
 (11) knowledgeable and we've had a lot of dialogue with him
 (12) regarding the Kodiak market
 (13) Q And the comment that you made or you quoted the one
 (14) sentence - I don't know if it was a quote but you paraphrased
 (15) or something that he said about lack of impact that was a
 (16) comment that you supposedly got from him in a bar isn't that
 (17) right? Didn't you talk to him in a bar isn't that where that
 (18) conversation occurred?
 (19) A Actually that comment happened in his office and
 (20) Mr Roberts and I are friends and we went out to the bar had a
 (21) beer yes
 (22) Q And did you - could I have the Elmo? And I'm referring
 (23) now to Mr Roberts deposition testimony
 (24) Did you know that Mr Roberts - did you know that
 (25) Mr Roberts had his deposition taken in this case?

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- (1) A No I m not aware of Mr Roberts deposition
 (2) Q And you don t know that he said that he thought -
 (3) MR DIAMOND Your Honor I m going to object this is
 (4) hearsay
 (5) THE COURT Sustained
 (6) BY MR STOLL
 (7) Q Now you also talked to Mr Carlson isn t that correct?
 (8) A Yes that is correct
 (9) Q And Mr Carlson I think you ve described as experienced
 (10) and knowledgeable and a contemporary assessor with good
 skills?
 (11) A Yes he is
 (12) Q And he did an analysis of the Kodiak Island Borough remote
 (13) property did he not?
 (14) A Yes he did He did a - looked at the number of
 (15) transactions he did some research
 (16) Q And you know that he testified in this case do you not?
 (17) A Yes I m aware of that
 (18) Q Were you here when he testified?
 (19) A Yes I was
 (20) Q And you heard him testify then that the - there was a
 (21) dropoff in sales of arm s length transactions as a result of
 (22) the Exxon Valdez oil spill?
 (23) A Yes I heard him testify to that However we strongly
 (24) disagree with that -
 (25) Q You disagree?

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- (1) A - based on our research
 (2) Q Your research is this list of - by Mr Hurley of
 (3) recordings the number of recordings of all kinds whether they
 (4) were arm s length transactions or otherwise or even if they
 (5) were conveyances or otherwise?
 (6) A Yes the work that Mr Hurley provided to us was part of a
 (7) very comprehensive study we did of Kodiak but it s certainly
 (8) by no means our only basis for our opinion that the market of
 (9) remote properties in Kodiak was not affected We did a lot of
 (10) other work besides this work that Mr Hurley provided us
 (11) Q I d like to turn our attention to the so-called Old
 (12) Believers transaction This was the transaction involving
 (13) about 270 acres that members of a Russian Orthodox religious
 (14) sect I guess purchased in Kodiak
 (15) A Yes that s correct This is 1989 sale on Afognak Island
 (16) south end
 (17) Q And this is the arrangement that was entered into and the
 (18) agreement was actually entered into in early 1988 isn t that
 (19) correct?
 (20) A Yes There was an option to purchase in 1988 by a family
 (21) of 17 and it closed in late 1989
 (22) Q All right And so the contention that you make is that
 (23) because they closed this transaction the oil spill had no
 (24) effect on this - on Kodiak is that basically your
 (25) contention?

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- (1) A Yes That is my contention that the fact that they went
 (2) through with the transaction the fact that we - or I spoke
 (3) with the real estate broker extensively about this sale and got
 (4) all the - all of the details it was my opinion that this
 (5) transaction was not - even though it was oiled it was not
 (6) impacted by the - the oil spill
 (7) Q Now let s analyze this First of all this sold for a
 (8) million two hundred thousand dollars isn t that right?
 (9) A Yes that s an approximate price
 (10) Q That s about 38 39 hundred dollars an acre Well it s
 (11) more than that maybe
 (12) A Yes
 (13) Q There was some improvements in there?
 (14) A I think your numbers are about correct It s about three
 (15) times the 1988 fair market value appraisal by Mr Roberts
 (16) Q Well there was another appraisal for a million two was
 (17) there not? You didn t tell the jury about that one did you?
 (18) A I m not aware of another appraisal of 1 2
 (19) Q Well the BIA the Bureau of Indian Affairs has to have an
 (20) appraisal right to do a transaction isn t that correct?
 (21) A Yes that s generally the policy that the BIA does
 (22) appraisals when they re involving the Native allottees when
 (23) they sell property there s an appraisal that s done
 (24) Q And the BIA were the Trustees of this particular property
 (25) isn t that correct?

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- (1) A Yes that s correct
 (2) Q So they had to have an appraisal to support the
 (3) transaction Isn t that correct?
 (4) A Yes that s why they hired Mr Roberts in Kodiak and
 (5) Mr Roberts told us about his appraisal and also we got
 (6) information from BIA and I m only aware of the - of the
 (7) Roberts \$400 000 appraisal
 (8) Q I see so you don t know about that one Okay even on
 (9) that - even that 400 000 that s about \$1700 an acre?
 (10) A Right It s roughly about a third of what the property
 (11) ultimately sold for in 1989
 (12) Q And the - at the time of the oil spill the purchasers had
 (13) about \$200 000 of earnest money down didn t they?
 (14) A I m not certain of the - of the exact amount of dollars of
 (15) earnest money Initially in 1988 there were two parcels
 (16) involved and to the best of my recollection it was husband
 (17) and wife Native elderly couple and they had like \$20 000 per
 (18) parcel earnest money There may have been other moneys as
 the
 (19) deal progressed along but the number that comes to mind that
 (20) was an earnest money of \$20 000 per husband and wife
 (21) Q There was a - there was an initial earnest money of
 (22) \$20 000 each or \$40 000 total correct?
 (23) A Yes To the best of my recollection that was the deal
 (24) that they initially started with
 (25) Q And then there was another - upon BIA approval there was

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- (1) another \$80 000 to each of them isn't that correct?
 (2) A I'd have to go back and examine the documents
 (3) MR STOLL Your Honor may I approach the witness?
 (4) BY MR STOLL
 (5) Q Just to refresh your memory I don't want to make - those
 (6) look like the documents on this transaction?
 (7) A Yes they do They appear to be the documents
 (8) Q And doesn't that provide that upon BIA approval the amount
 (9) of another \$80 000?
 (10) MR DIAMOND May I look over your shoulder counsel?
 (11) MR STOLL Sure
 (12) A Yes that's what the document says here If in fact they
 (13) paid the \$80 000 I m - I m - I don't know
 (14) BY MR STOLL
 (15) Q So after BIA approval then they were obligated to put a
 (16) total two hundred - 200 000 down?
 (17) A I saw an \$80 000 -
 (18) Q They paid 20 - they paid 20 on each with the original -
 (19) in other words a total of \$40 000 at the beginning correct?
 (20) A Yes that's my understanding
 (21) Q And then they paid another \$80 000 to each of them right?
 (22) MR DIAMOND Asked and answered He doesn't know
 (23) Your Honor
 (24) A I saw an \$80 000 figure I haven't carefully examined that
 (25) document to verify that You didn't give it to me very long

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- (1) here
 (2) BY MR STOLL
 (3) Q I'm sorry This is the one for one of them it's right
 (4) there and here's the one for the other one right there
 (5) A Yes okay I see that I believe you're correct
 (6) MR DIAMOND Can I see those Bob?
 (7) MR STOLL Sure
 (8) BY MR STOLL
 (9) Q And at that time when they - these 17 families that were
 (10) going to move to this parcel they had already made
 (11) arrangements to sell their homes had they not?
 (12) A I - I don't know
 (13) Q Well didn't they - I think you testified about them
 (14) living over in Kenai
 (15) A Yes they're from that neck of the woods But as far as
 (16) selling their homes I'm not - I don't know
 (17) Q Well do you think that when you use - do a real estate
 (18) analysis and you're trying to analyze a transaction and whether
 (19) there is any compulsion by the buyer or the seller one should
 (20) look into the circumstances under which that transaction
 (21) occurred?
 (22) A Yes that's important to look at circumstances but I
 (23) didn't go out independently and find out for each one of the 17
 (24) families what the status of their home was
 (25) Q So if the - after the oil spill incidentally at the time

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- (1) of the oil spill this was the only two hundred and - the only
 (2) reasonably large parcel that was available on the marketplace
 (3) isn't that correct in Kodiak?
 (4) A I don't - I don't think that's correct There are other
 (5) parcels out there This is a parcel that the Russian Old
 (6) Believers identified as a parcel they wanted and that they were
 (7) going to have it no matter what price And the - in the
 (8) appraisal business and also BIA will tell you that this was a
 (9) - a big premium was paid for this property that it's very
 (10) unusual to spend a million dollars for private property
 (11) oceanfront property and this was I think the highest land
 (12) sale that I was aware of in South Central Alaska on the ocean
 (13) Then of course we had these others Kachemak Bay and Seal
 (14) Bay but this was - this was a big deal and happened in 19 -
 (15) during that 1989 time period
 (16) Q Can you identify one other parcel of property that was on
 (17) the market that they could have bought in 1989 if they had
 (18) backed out of this transaction in Kodiak?
 (19) A Yes I'm familiar with a few other parcels that were
 (20) available
 (21) Q But this was -
 (22) A But this was a parcel that they wanted and it had all the
 (23) elements they wanted a lot of water frontage a - it had
 (24) proximity to the fishing grounds where they went to and it had
 (25) - it was specially picked for this family They wanted it no

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- (1) matter what from what I understand and they went through
 with
 (2) it
 (3) But there were other properties that were out there to
 (4) answer your question Fish & Wildlife Service for example
 (5) purchased I think it was about 150 acres during the same time
 (6) period and another couple bays down that after - well I saw
 (7) the Russian villagers land and I saw what the Fish & Wildlife
 (8) purchased and there are some similarities between the two
 (9) They're both good sized
 (10) Q And do you think that if a purchaser was going to - if
 (11) they walked away from a transaction if they were going to lose
 (12) \$200 000 of earnest money that that would be a certain
 (13) compulsion on that purchaser to go through with the
 (14) transaction?
 (15) A I think you have a lot - more money you get into it the
 (16) harder it is to walk away I think you're correct
 (17) Q And would you also think there's a certain compulsion
 (18) with - 17 families had already sold their homes over in Kodiak
 (19) - in Kenai and didn't have any place to go unless they
 (20) closed this transaction do you think that would be a little
 (21) compulsion for them to go through with the deal?
 (22) A Yes you're correct There's a lot of factors involved in
 (23) a real estate transaction particularly when you get 17
 (24) families together and I've reviewed the document and I was
 (25) always amazed to see that 17 different husbands and wives

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- (1) signing this document It was quite a task to get all that to
 (2) go through
 (3) Q And incidentally in addition to the other 150 acre
 (4) transaction that you mentioned with Fish & Wildlife and the
 (5) 270 acre transaction that you talked about with the Old
 (6) Believers and the thousands of acres transferred in the
 (7) Kachemak Bay and the thousands of acres in the Afognak
 these
 (8) are all remote properties There was also back in 1984 there
 (9) was thousands of acres the Trillium partners bought about a
 (10) thousand acres just in Kodiak isn't that correct? That was
 (11) one transaction isn't that correct?
 (12) A Yes the Trillium partners purchased a large chunk of
 (13) acreage in about the middle of the 1980s 84 approximately
 (14) Q And incidentally with respect to the Kachemak Bay and
 (15) Afognak in those transactions with the Trustees the Kodiak
 (16) Island Borough got none of that money isn't that correct? Any
 (17) of that - they didn't get any of the proceeds of this money
 (18) from the - from the Trustees from the sales on Afognak or
 (19) Kachemak Bay isn't that correct?
 (20) A The - the money that was received was paid to the Native
 (21) Corporations
 (22) Q None of the plaintiffs -
 (23) A You're correct none of the plaintiffs in this case as far
 (24) as I'm aware
 (25) Q And I'd like to just refer to that - well let me ask you

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- (1) one other question -
 (2) A I want to add that the - just to follow up on your
 (3) question Trillium Corporation I want to make a correction
 (4) The acreage that you're referring to is not one parcel this is
 (5) a number of parcels that were scattered throughout Kodiak so
 (6) it wasn't like a thousand acre chunk They purchased a number
 (7) of cannery sites that were picked up by Alaska Packers years
 (8) ago and they're scattered all over So it wasn't like one
 (9) parcel it was - 600 acres I think it was in about 1984
 (10) Q It was one transaction though it was all bought at the
 (11) same time from Del Monte who owned Alaska Packers isn't that
 (12) correct?
 (13) A Yes that's correct But these were not contiguous lots
 (14) you know like Seal Bay and you know where the Russian
 (15) Believers had 270 acres right together for their village The
 (16) Trillium partners were - these were a number of small parcels
 (17) that were scattered all around If you add up all the acreage
 (18) then it does become a large number but it was not one specific
 (19) site
 (20) Q Now in the transactions that we've talked about here
 (21) these properties selling for thousands of dollars an acre
 (22) during that same period of time there were these Open To
 (23) Entry OTE transactions by the State isn't that correct?
 (24) A Yes
 (25) Q Those were in the mid 80s and the Kupreanof transactions

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- (1) where the State did a lottery of some property isn't that
 (2) correct?
 (3) A Yes
 (4) Q Those happened during the same time period right?
 (5) A Yes that's correct The State has had several different
 (6) remote parcel programs homestead programs in the 1980s
 (7) Q And notwithstanding the fact that the State has had these
 (8) programs there's still been private sales for property remote
 (9) property involving thousands of dollars an acre isn't that
 (10) correct in Kodiak?
 (11) A Yes the - like I said there were others besides the
 (12) Kupreanof program In the early 1980s in Kodiak there was a
 (13) land disposal program called the Ugak Program and it was -
 (14) there was several hundreds of acres that were put out through
 (15) the market but only a relatively small amount were oceanfront
 (16) parcels I think 10 or 25 whereas the Kupreanof which came on
 (17) line 88 89 time period a lot more oceanfront parcels
 (18) involved
 (19) Q And I'd like to - could I have DX102- - oh perfect You
 (20) read my mind
 (21) Now I was just looking at this when you were being
 (22) examined by Mr Petumenos and I was just sort of curious
 about
 (23) - I'd like to - for instance I represent Kodiak Island
 (24) Borough I'm sort of interested in this Onion Bay transaction
 (25) Now remember Mr Petumenos showed you the - showed you

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- (1) the assessor's card on the green barred parcel that was sold in
 (2) 1985 right?
 (3) A Yes that's correct
 (4) Q And this was sold for \$25 000 isn't that - let me give
 (5) you the - I've got a hard copy of this Do you have a hard
 (6) copy of this? Oh you do okay great Isn't that right?
 (7) A Yes there were two sites here that were sold for 25 000
 (8) each
 (9) Q That's bad writing but anyway - and these other parcels
 (10) that sold out here in - after the spill the average of these
 (11) what would you say about \$30 000?
 (12) A Well they sold in the thirties They go -
 (13) Q Well one is a little less than thirty and then this is a
 (14) little over thirty little over - what would you say thirty
 (15) thirty one thousand?
 (16) A Right generally in the low thirties There were other
 (17) lots -
 (18) Q All right Let's call it -
 (19) A They were all sold at that same time period actually sold
 (20) for higher than that but I just picked these as representative
 (21) sampling recrea -
 (22) Q And these again - excuse me
 (23) A These are recreational sites These - I'm done
 (24) Q Now Mr Petumenos made the point that it's important to
 (25) look at the differences in the terrain of the properties to see

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- (1) if they re comparable truly comparable properties and the
 (2) first one that s green is the one that s got the steep cliff on
 (3) it and you have to get the access on the trail right?
 (4) A Yes there are physical differences between these parcels
 (5) There s also size differences
 (6) Q Right
 (7) A For example -
 (8) Q Let s just take -
 (9) MR DIAMOND Let him finish his answer
 (10) MR STOLL I m sorry go ahead
 (11) A I was going to tell you Mr Stoll that the green sites
 (12) were a total of ten acres five acres each and the next one
 (13) over that - the 1989 is a parcel that was like three some
 (14) acres so there s - no two properties are the same You have
 (15) to look at all the different factors
 (16) BY MR STOLL
 (17) Q If you re going to compare the terrain though and you re
 (18) going to take the 25 percent discount for terrain which the
 (19) assessor said if you took the 25 percent off of here that
 (20) would be about a - what would it be about 7750 according to
 (21) my calculation deduction so this would bring this value down
 (22) to about \$23 000 isn t that right?
 (23) A Your math I assume is right but you just don t look at
 (24) one component You have to look at you know the other
 (25) factors You have size you have location you have just a

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- (1) number of different factors It s not as simple as just doing
 (2) it the way you did it and saying this is what it adjusts out
 (3) to You have to look at all these other factors
 (4) Q Well Mr - were you here when Mr Carlson testified
 (5) about the matched - what he - he considered pairing of
 (6) property before and after and he found about a 23 percent
 (7) decrease in the per acre price of comparable property what he
 (8) considered comparable property before and after the Exxon
 (9) Valdez oil spill?
 (10) A Yes As I recall Mr Carlson had a very small statement
 (11) regarding some four transactions in the southwestern part of
 (12) Kodiak which I disagree with his analysis You have - just
 (13) threw out four sales and there s a lot of other sales in that
 (14) area which I d be happy to show you that show that there
 (15) wasn t any decline So yes I was here for that testimony
 (16) MR STOLL Thank you very much
 (17) MR PETUMENOS Judge I have some exhibits to move
 (18) in
 (19) THE COURT Yes fine
 (20) MR PETUMENOS I would move in 8501 which I will
 (21) call the bookend exhibit that was on the screen
 (22) (Exhibit 8501 offered)
 (23) MR DIAMOND I object to that
 (24) THE COURT Let s just bypass it I want to know the
 (25) ones that there is no objection to

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- (1) MR PETUMENOS All right I would move into evidence
 (2) Exhibit 8502 the Court order from yesterday
 (3) (Exhibit 8502 offered)
 (4) MR DIAMOND The entirety of the Court order? You
 (5) didn t identify any of them Tim
 (6) MR PETUMENOS I would be willing to work with
 (7) counsel to make the relevant parts available Any objection to
 (8) that?
 (9) MR DIAMOND Not if it all comes in
 (10) MR PETUMENOS And I would move into evidence - bear
 (11) with me a second -
 (12) MR DIAMOND Can we do this after my redirect Your
 (13) Honor?
 (14) MR PETUMENOS - 8005
 (15) (Exhibit 8005 offered)
 (16) THE COURT How about this I ll give you a break
 (17) Get your lists together you can talk about the exhibits that
 (18) were previously moved in but that haven t been admitted yet
 (19) and I ll determine whether or not I should admit them when I
 (20) come back all right
 (21) MR DIAMOND I have about ten minutes of redirect
 (22) Your Honor
 (23) THE COURT I m not going to go ahead with that right
 (24) now I want the exhibit problems worked out and the jury
 (25) deserves a break too

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- (1) THE CLERK Please rise This court stands in
 (2) recess
 (3) (Jury out at 11 03 a m)
 (4) (Recess from 11 03 a m to 11 27 a m)
 (5) THE CLERK Please rise This court now resumes its
 (6) session Please be seated
 (7) THE COURT Counsel you wanted to see me without the
 (8) jury?
 (9) MR PETUMENOS Yes Judge On your screen I think I
 (10) have put up on the transcript screen Mr MacSwain s answer to
 (11) question that I asked him on cross-examination You can t see
 (12) the question it s about three pages before We ve copied it
 (13) down verbatim The question was What I am asking you is
 (14) whether or not from when the federal government settled this
 (15) claim with the Exxon folks one of the things they settled for
 (16) was damage to natural resources including land And the
 (17) question that - the answer that was given following the bench
 (18) conference - and I m concerned that the witness can hear
 (19) conferences from where he sits - was the answer you see in
 (20) front of you
 (21) During the answer -
 (22) MR DIAMOND The Court s at an advantage because I
 (23) don t know what the answer is
 (24) MR PETUMENOS The answer is when he took the
 (25) opportunity to say that there was a billion dollar fund

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- (1) created
 (2) THE COURT He said yes I do there was a fund that
 (3) was set up almost a billion dollar fund and they were
 (4) involved with this fund to study for any future damages
 (5) There s a word here that s indecipherable now to - probably
 (6) to study for any future damages to the oil spill That s what
 (7) he said
 (8) MR PETUMENOS Right And the question I have
 (9) here - which I won t make you go back three pages but we ve
 (10) written it down - the question to which the response was
 (11) before the colloquy with counsel is what I am asking you is
 (12) whether or not when the federal government settled this claim
 (13) with the Exxon folks One of the things they settled for was
 (14) damage to natural resources including land
 (15) I did not move to strike the answer as nonresponsive
 (16) because I did not want to draw attention to the jury about it
 (17) My - my concern now is - my understanding is that on redirect
 (18) Mr Diamond may be going into this area and before we have
 (19) the jury here I d like to know where he s going
 (20) MR DIAMOND The only thing I was going to ask him to
 (21) do was be a little more precise He used a hyperbole and said
 (22) it was almost a billion dollars He used that statement That
 (23) is not a correct statement
 (24) THE COURT How much is it?
 (25) MR DIAMOND Nine hundred million

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- (1) MR PETUMENOS I tried to focus my question and I
 (2) think I did I don t know why that needs to be brought up
 (3) again
 (4) THE COURT It doesn t It doesn t period If
 (5) that s the only thing you re going to ask
 (6) MR DIAMOND Just wanted to correct the record
 (7) THE COURT Sometimes correcting the record can be
 (8) more trouble than it s worth counsel
 (9) Is that all I was called in here for?
 (10) MR STOLL Your Honor not with this witness but
 (11) with the next witness - maybe we could take this up at this
 (12) point if he s got a relatively short redirect - there s a -
 (13) the next witness is the assessor from Kenai Peninsula Borough
 (14) Mr Hearer and we don t have an objection to him testifying
 (15) that he did not depreciate the assessed value of real property
 (16) in KPB after the spill We do object to him rendering an
 (17) expert opinion that the spill had no effect on real property
 (18) values There is - there is a difference there
 (19) THE COURT If I don t know the difference by now
 (20) counsel I have - I haven t been at the attendance of this
 (21) trial
 (22) MR STOLL I didn t mean to suggest that the Court
 (23) didn t know the difference
 (24) THE COURT So what do you want me to do preclude
 (25) that last line of inquiry?

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- (1) MR STOLL Yes Your Honor
 (2) MR DIAMOND Well Your Honor he is going to
 (3) testify I m at a little bit of disadvantage because I ve never
 (4) spoken to this witness in my life And he s just arrived and I
 (5) was going to ask the Court for a brief recess after we finished
 (6) the redirect so that I could find out specifically what he was
 (7) going to testify on this and area subjects
 (8) THE COURT How long?
 (9) MR DIAMOND Five minutes
 (10) THE COURT Oh okay
 (11) MR DIAMOND It is my understanding that in the
 (12) aftermath of the spill and he will so testify he undertook to
 (13) look at the effects of the spill on property for which he had
 (14) responsibility Property in the borough subject - on the tax
 (15) roles and he had understood he had a legal responsibility to
 (16) adjust the price downward if in fact the spill created an
 (17) area wide effect that would have affected parcels He looked
 (18) at that question and concluded that no adjustment was
 (19) appropriate that there was no such effect That s essentially
 (20) his testimony
 (21) THE COURT Well in other words if I understand the
 (22) situation correctly he s going to say that he - he made
 (23) certain decisions regarding the valuation of the property
 (24) within his borough right
 (25) MR DIAMOND Correct

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- (1) THE COURT And then he s going to say what the
 (2) guidelines were that ruled the decisional process that he was
 (3) involved in right?
 (4) MR DIAMOND Correct
 (5) THE COURT Okay
 (6) MR STOLL But he s not going to testify - if I
 (7) understand counsel correctly he s not going to testify that he
 (8) determined that there was no effect caused by the oil spill
 (9) THE COURT No no effect or -
 (10) MR STOLL No he ll - he s not going to say there
 (11) was no effect
 (12) THE COURT Only by implication but clearly by
 (13) implication
 (14) MR STOLL I understand He can - he can - the
 (15) implication they can leave - we don t agree with the
 (16) implication but he can testify that there was no change no
 (17) downward change -
 (18) THE COURT Right
 (19) MR STOLL - as a result of the oil spill
 (20) MR DIAMOND I think I can also ask him whether he
 (21) determined the fair market value of the properties on his tax
 (22) rolls for which he had legal responsibility to assess the fair
 (23) market value decline And if - if it did why and if it
 (24) didn t whether that - that led him not to make any change to
 (25) the assessed valuation of the property on the tax rolls

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- (1) THE COURT You don't know what you're going to ask
 (2) him do you?
 (3) MR DIAMOND You get that impression?
 (4) I have a reasonably good idea what I'm going to ask him
 (5) I'm more unclear about what the answers will be
 (6) THE COURT My whimsical sense of humor suggests maybe
 (7) I ought to bring him in in front of the jury and you could
 (8) experiment
 (9) MR DIAMOND That would be cruel of you Your Honor
 (10) THE COURT Yes you're probably right Every once in
 (11) awhile you have to be cruel to cut through things
 (12) I'll take the break and then you can tell me after the
 (13) break what you intend to ask him Is there anything that
 (14) Mr Diamond said that he might be asking objectionable from
 (15) your standpoint?
 (16) MR STOLL The only thing that is sort of ambiguous
 (17) what he's exactly going to ask but I think that - the only
 (18) thing again is if he asks this witness whether he made the
 (19) study or did an analysis as to whether or not the oil spill had
 (20) an effect on property values in his borough or anywhere else
 (21) for that matter and he says yes I did and I found that it
 (22) made - it did not affect the value of property in the borough
 (23) THE COURT He is going - he may say I had to
 (24) determine whether or not fair market value had declined and I
 (25) found that it didn't and therefore I didn't revise the

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- (1) valuation
 (2) MR STOLL He can say that
 (3) MR DIAMOND That's - that's what I understand to be
 (4) the substance of his testimony
 (5) THE COURT So far I hear no objection to anything
 (6) that's been mentioned
 (7) Counsel I don't particularly want to come in and out of
 (8) here and in and out of here You find out what the witness is
 (9) going to say If you have a question about it that it - you
 (10) know there might be something that I would take a stance at
 (11) you have to call me in On the other hand if you - you see
 (12) nothing that's outside what you've already said you might ask
 (13) and since there is no objection then you don't have to do that
 (14) and you can simply go to the jury
 (15) MR DIAMOND Fine Do you want me to do that now
 (16) before you bring the jury back?
 (17) THE COURT Well where are they?
 (18) THE CLERK In the pit
 (19) THE COURT Yes I can wait for five minutes Can you
 (20) do it in five minutes?
 (21) MR DIAMOND I can do it in five minutes
 (22) THE COURT Good I think that's good yes
 (23) THE CLERK Please rise This court stands in
 (24) recess
 (25) (Recess taken at 11 35 a m to 11 40 a m)

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- (1) (Jury in at 1 40 a m)
 (2) THE CLERK This court now resumes its session
 (3) Please be seated
 (4) REDIRECT EXAMINATION OF STEVEN MacSWAIN
 (5) BY MR DIAMOND
 (6) Q I think you've set the record for the longest
 (7) cross examination and I'll endeavor not to set the longest
 (8) record for redirect It's sometimes difficult being an expert
 (9) witness in a case against a government agency is it not?
 (10) A Yes it can be sometimes
 (11) Q Mr Petumenos produced some assessors records during
 (12) cross-examination You hadn't seen those before he showed
 (13) them
 (14) A I can't recall seeing them before
 (15) Q Okay During the course of the litigation those came from
 (16) the Kodiak Island Borough assessor's office?
 (17) A Yes they did as far as I'm aware
 (18) Q During the litigation you had some problems getting
 (19) information from the Kodiak Island Borough's assessor?
 (20) A Yes I did
 (21) Q Tell the jury
 (22) A The borough slammed the door on me There was a client
 (23) that I had before I was the contract assessor to do a complete
 (24) reevaluation before the oil spill and started working on this
 (25) job Initially they provided data to me and then for whatever

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- (1) reason they said here's the public office and they said that
 (2) I could no longer get information from the borough because I
 (3) was working for Exxon
 (4) Q I'm going to show you what we'll mark as defendants
 (5) 14785 Could you tell the jury what this document is?
 (6) A This is a fax that was sent to me by Bud Cassidy He's the
 (7) land manager for Kodiak Island Borough and we were
 (8) gathering
 (9) information on leases and whatnot and Mr Cassidy said you
 (10) know he was getting it for me was very cooperative and the
 (11) next day I received this fax he said no more cut off
 (12) Q Despite that were you able to get all of the - all of the
 (13) underlying data to analyze the Kodiak situation that you
 (14) required?
 (15) A Yes we had other ways of getting the data
 (16) Q I'm going to ask you some questions about DX10227 put up
 (17) on the - you remember this chart don't you?
 (18) A Yes I do
 (19) Q Both Mr Petumenos and Mr Stoll asked you questions
 (20) about
 (21) the pre spill transaction that property and the other
 (22) properties depicted on this graph
 (23) My question to you is In your professional judgment when
 (24) all things are considered do you believe the parcel reflected
 (25) by the pre-spill transaction is comparable to the parcels that
 (26) you looked at that transacted after the spill?
 (27) A Yes I do I feel that it's my opinion that these are

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- (1) similar properties They re not identical They re all
 (2) located within Onion Bay and they represent parcels that have
 (3) a recreational site highest and best use
 (4) Q The pre spill parcel is - is larger than some of the
 (5) parcels that sold after the spill?
 (6) A Yes it is that s correct The - the green bar
 (7) represents ten acres of land and two five acre parcels as
 (8) opposed to the second transaction which was purchased in
 1989
 (9) which is a three some acre parcel So you have property
 (10) differences other than access
 (11) Q If all of these parcels went on the market on roughly the
 (12) same day in your professional opinion would you expect them
 (13) to sell for roughly comparable prices?
 (14) A Yes there is - there would be a range that they would
 (15) sell in Matter of fact the borough assessor appraised these
 (16) for the - for this auction and he had a range there in the
 (17) low thirties Ultimately they sold for higher - most of them
 (18) sold for higher than his appraisal but generally you re
 (19) talking about - you can look at this on a per site and also on
 (20) a per acre basis but generally there s a range Particularly
 (21) in a well confined area like this like Onion Bay
 (22) Q Mr Petumenos made the point that with respect to some of
 (23) these parcels you did not take into account acreage that all
 (24) you ve done here is express the transaction process That s
 (25) correct that was a correct observation on his part wasn t it?

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- (1) A Yes that was a correct observation on the part of
 (2) Mr Petumenos
 (3) Q But you have analyzed these parcels on a per acre basis
 (4) haven t you?
 (5) A Yes I have
 (6) Q Let s take the Hidden Bay parcels by way of demonstration
 (7) Can you tell us what - maybe I ve cut off the numbers but
 (8) expressed on a per acre basis what these parcels sold for?
 (9) A Yes The green on Hidden Basin the first parcel sold for
 (10) 1988 sold for \$7200 per acre and the next transaction in 1989
 (11) Q Let me write it down for you You said the first one was
 (12) 7200?
 (13) A Yes approximately \$7200 an acre This is all part of your
 (14) transaction analysis sheet We break it out per acre basis
 (15) per site We talk about all the different property
 (16) characteristics involved in the transaction
 (17) The 1989 the 8/89 transaction that sold for about \$8200
 (18) per acre
 (19) Q How about the third transaction?
 (20) A The third one the 12/89 is approximately \$7300 per acre
 (21) Q Did you look at all of your comparables in terms of
 (22) per acreage values as well just as a double check?
 (23) A Yes we did We analyzed them on a per site and per acre
 (24) basis
 (25) Q Here if you look at this third transaction which on your

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- (1) graph is lower than the pre spill transaction July 88 if you
 (2) look at it on a per acre basis the third sale is in fact
 (3) fetched more money after the spill than the pre spill
 (4) transaction is that correct?
 (5) A Yes that s correct It s a little bit smaller site and it
 (6) - what happened there is it - looks like the price per acre
 (7) went up just a little bit You have size differences you have
 (8) access differences There s just a number of things to
 (9) consider when properties sell
 (10) Q Are you of the view that comparing these properties on the
 (11) absolute dollar curves is a fair way of presenting it rather
 (12) than per acre?
 (13) A Well no I m not You have to look at the per site the
 (14) per acre but there is generally a trend particularly on these
 (15) - these recreational sites you ll see kind of a range of
 (16) what - what sites sell for remote sites recreational sites
 (17) Q My question was a little bit different than - if Joel will
 (18) give me back the entire chart
 (19) My question was These are expressed on an absolute dollar
 (20) basis not a per acre basis Do you think this fairly reflects
 (21) your findings with respect to transactions before and after the
 (22) spill?
 (23) MR PETUMENOS I ll object as asked and answered just
 (24) a few moments ago
 (25) THE COURT Why isn t it asked and answered counsel?

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- (1) MR DIAMOND I don t think he understood the comport
 (2) of my question
 (3) MR PETUMENOS I ll object I think we re leading and
 (4) coaching the witness at this point
 (5) THE COURT I ll let him answer go ahead
 (6) MR DIAMOND You may answer
 (7) A Yes this accurately represents on a per site and it shows
 (8) you a trend of what - both before and after
 (9) BY MR DIAMOND
 (10) Q You told us that in your view the Nellie Juan parcel and
 (11) I believe the mainland parcel were impaired by Dr Mundy for a
 (12) three year period remember that?
 (13) A Yes I do
 (14) Q There was some lengthy discussion with Mr Petumenos as
 to
 (15) whether you were right or not I m going to show you on the
 (16) Elmo Page 3-42 Dr Mundy s report and direct your attention
 (17) to the paragraph that I ve highlighted which says - includes
 (18) a sentence by Dr Mundy that a risk premium of 200 basis
 (19) points for an 11 4 percent rate has been applied to the
 (20) unimpaired rate for two years beyond the persistence period to
 (21) account for the remaining uncertainty Is that what you were
 (22) referring to as an additional two years?
 (23) A Yes that s correct So you had one plus two made three
 (24) and he notes here that there is two more years for this more
 (25) uncertainty so this is what I was referring to

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- (1) Q When we were together on Friday Mr Petumenos asked you
 (2) about your conversations with Mr Hurley and whether reading
 (3) deposition testimony of Mr Papke changed your opinion that
 (4) what Mr Hurley had originally told Mr Papke was an offhand
 (5) remark do you remember that testimony?
 (6) A Yes I do
 (7) Q We took a rather lengthy break on Friday so that you could
 (8) read deposition testimony that you had not read before?
 (9) A Yes that's correct
 (10) Q We only saw excerpts of that deposition but tell the jury
 (11) how many pages that you reviewed during the course of the
 (12) break
 (13) A It was a short novel about 60 or 80 pages that I examined
 (14) during the - during the break
 (15) Q I don't think you meant to imply anything by your term
 (16) novel did you?
 (17) A No I meant -
 (18) Q Withdrawn?
 (19) A No I meant it was like reading a short book There were a
 (20) lot of - I read a lot of pages
 (21) Q But Mr Petumenos didn't show us all of that did he?
 (22) A No he did not
 (23) MR PETUMENOS Judge I don't object to him showing
 (24) him any other part of the deposition he wants to show him
 (25) MR DIAMOND Oh good

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- (1) BY MR DIAMOND
 (2) Q There was discussion that you read during the course of
 (3) the break by Mr Papke about his conversations with you that
 (4) were not shown is that right?
 (5) A Yes that is correct There were a lot of other
 (6) discussions in the part of the deposition
 (7) MR DIAMOND Your Honor you said when I got the
 (8) witness back I could show a brief excerpt I'd like to show
 (9) two minutes worth of additional Papke deposition
 (10) THE COURT Sure go ahead
 (11) MR PETUMENOS No objection
 (12) (Videotape Played)
 (13) VIDEO OPERATOR We're now back on the record The
 (14) time is now 4 25 p m
 (15) BY VIDEO QUESTIONER
 (16) Q To your knowledge sir did Mr MacSwain ever interview
 (17) Mr Hurley relating to Mr Hurley's opinions regarding the
 (18) impact of the Exxon Valdez oil spill on Kodiak real estate?
 (19) A My understanding is that Steve MacSwain did tell me that he
 (20) had talked to Mr Hurley on that issue
 (21) Q And what did Mr MacSwain tell you about that?
 (22) A My recollection is that he told me that Mr Hurley told him
 (23) he wasn't sure I had - I had understood his statement with
 (24) respect to the impact on the spill correctly
 (25) VIDEO QUESTIONER I'm sorry can I have that read

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- (1) back? I totally missed it
 (2) VIDEO COURT REPORTER (Reading) My recollection is
 (3) that he told me that Mr Hurley told him he wasn't sure I had
 (4) understood his statement with respect to the impact on the
 (5) spill correctly
 (6) BY VIDEO QUESTIONER
 (7) Q So let me see if I have this straight When - when did
 (8) you talk with Mr MacSwain about this topic?
 (9) A It was sometime after my first conversation with
 (10) Mr Hurley I think probably in the summer of this year past
 (11) year
 (12) Q So that would have been the summer of 1993?
 (13) A That's correct
 (14) Q And so it was sometime between - strike that It was
 (15) sometime during June July or August of 1993?
 (16) A That's correct
 (17) Q And during this conversation in that time period with
 (18) Mr MacSwain he told you that he had had a conversation with
 (19) Mr Hurley correct?
 (20) A I think - maybe I should try to clarify the sequence of
 (21) events here because we're getting confused
 (22) Q Yes
 (23) A I had a conversation with Mr Hurley in I think April of
 (24) 1993
 (25) Q Yes

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- (1) A I asked Mr Hurley among other things most primarily a
 (2) factual nature for his impression of what had happened in the
 (3) market since the Exxon Valdez oil spill And I would need to
 (4) refer to my notes to clarify whether or not my question or his
 (5) response related to the remote market particularly or to the
 (6) larger Kodiak Island burry (sic) market - excuse me Borough
 (7) market
 (8) Sometime after that conversation in the course of a
 (9) conversation with Mr MacSwain I recounted to him Mr
 (10) Hurley's
 (11) impression I believe - and I may - this is - I'm not quite
 (12) certain about this recollection - that subsequent to that
 (13) conversation Mr MacSwain had another conversation with
 (14) Mr Hurley and he told Mr Hurley of my impression of his
 (15) impression of the market which was there had been a
 (16) significant impact roughly paraphrasing
 (17) Mr MacSwain said that Mr Hurley indicated to him that I
 (18) may have misunderstood or misapprehended his statement on
 (19) that
 (20) issue I haven't had any subsequent conversations with
 (21) Mr Hurley to try to clarify that point
 (22) (Videotape concluded)
 (23) MR DIAMOND Page 426 line 1 through Page 428
 (24) line 6
 (25) BY MR DIAMOND
 (26) Q You went to Kodiak and asked Mr Hurley to do some work
 (27) for
 (28) you in connection with collecting Kodiak data?

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- (1) A Yes that is correct
 (2) Q Did he jump at the chance?
 (3) A No he didn't. He was very busy at the time. I had to -
 (4) Q Tell us about the discussion you had where he agreed
 (5) ultimately to help you out?
 (6) MR PETUMENOS I'll object to hearsay
 (7) THE COURT Is it hearsay counsel?
 (8) MR DIAMOND It is hearsay offered to respond to the
 (9) suggestion that Mr. Petumenos made concerning the
 motivations
 (10) involved
 (11) THE COURT All I had to hear was the first word
 (12) counsel. The objection is sustained.
 (13) MR DIAMOND Then offered not to prove the truth of
 (14) the matter asserted. May we approach on this because I think
 (15) this is important.
 (16) THE COURT Yes.
 (17) (At side bar on the record)
 (18) MR DIAMOND It's offered to put in context the
 (19) suggestion made on Friday by Mr. Petumenos examination that
 (20) Mr. MacSwain when he found out that Mr. Hurley had
 previously
 (21) said something potentially damaging to Exxon's case went out
 (22) and hired him and basically paid him a bribe to do work but to
 (23) change his opinion. In fact the witness will testify that
 (24) Mr. Hurley was not at all anxious to do any work was not at
 (25) all anxious to make money from this and did it basically as a

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- (1) personal favor to Mr. MacSwain after he literally begged
 (2) Mr. Hurley to do the work. It rebuts the suggestion that was
 (3) made on Friday that this was in the nature of a payoff to get
 (4) the data.
 (5) THE COURT Did you intend to suggest that on Friday?
 (6) MR PETUMENOS I think that the answer to that is
 (7) that at this - I don't think I said anything as strong as the
 (8) word bribe.
 (9) THE COURT No that's - that's the first time I
 (10) thought of that being an issue in the case.
 (11) MR PETUMENOS But my response is that counsel's
 (12) comments go to the relevance of the proof but not to the fact
 (13) of whether or not he's offering it for the truth of the
 (14) matter. He's clearly offering it for the truth of the matter.
 (15) THE COURT Just listen to me for a minute. Maybe we
 (16) can clarify this. It may very well be hearsay because the
 (17) witness was saying something like I don't want to do it and that
 (18) could be to prove the truth of the matter asserted but it's
 (19) not for that purpose because really all it does is explain
 (20) that this person had to go to great lengths to convince him
 (21) that he should do it out of personal friendship so it's not to
 (22) prove the truth of the matter asserted.
 (23) MR PETUMENOS Well with respect I think that the
 (24) immaterial part of the testimony is that the witness the
 (25) out of court declarant statement that he was busy that he was

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- (1) doing it to be a friend all of that if they want to get that
 (2) testimony in they have to bring him here so I can
 (3) cross examine him if that was his motivation or if he even
 (4) said it because the relevance of the proof is that he was not
 (5) doing it to get money but that he was doing it for other
 (6) reasons. That requires us to understand the credibility of the
 (7) out of court declarant and therefore goes to the truth of the
 (8) matter. The only relevance of this conversation is the
 (9) out of court declarant's motivation in engaging the services
 (10) that's offered for the truth of the matter.
 (11) THE COURT Why don't you - can't you simply say -
 (12) what you're going to say is he didn't jump at the chance and
 (13) what is your response then?
 (14) MR DIAMOND Okay can I ask him that?
 (15) THE COURT Yes.
 (16) (Sidebar concluded)
 (17) BY MR DIAMOND
 (18) Q When Mr. Hurley didn't exactly jump at the chance to do
 (19) this work for you what was your response to that?
 (20) A My response was that I explained to Mr. Hurley that I was
 (21) short of manpower I needed some help and I knew that
 (22) Mr. Hurley had the information and I - I was rather insistent
 (23) I need to hire somebody to get this work done I have - we
 (24) have to get this job done before the end of the summer. The
 (25) attorneys have asked us to complete this job by August and I

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- (1) need - I need your help Tim and he wasn't - he was very
 (2) busy.
 (3) MR PETUMENOS I'll object I'll object to anything
 (4) beyond the scope of the question which was -
 (5) THE COURT It's not to prove the truth of the matter
 (6) asserted by the out of court declarant it's only to explain
 (7) why this witness did what he did and what the circumstances
 (8) were.
 (9) A Mr. Hurley said that he was - he was very busy he wasn't
 (10) too excited about doing the work but he'd known me for a long
 (11) time and he also expressed some concern that he knew that I
 (12) was - what I was working on and he expressed some concern
 (13) that the Kodiak Island Borough was a good client of his and
 (14) that he didn't want to get caught up in the middle of all this
 (15) and I said Tim I just want to know the facts I want to know
 (16) - I want to hire you to produce the numbers the number of
 (17) transactions I need your help and - and he reluctantly said
 (18) I'll - I will do this work for you Steve. And what he did is
 (19) he did a lot of things besides gather the number of
 (20) transactions. He researched the records for warranty deeds
 (21) deeds of trust.
 (22) MR PETUMENOS Judge objection to the narrative form
 (23) of the response.
 (24) THE COURT Hold on hold on Yes.
 (25) MR DIAMOND I'll ask another question.

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- (1) BY MR DIAMOND
 (2) Q Mr Petumenos suggested there was no reason why you
 (3) couldn't have done this yourself. Was there a reason why you
 (4) couldn't do all of this work yourself?
 (5) A Yes, there was. As I so stated, we were -- MacSwain and
 (6) Associates is not a huge firm. I have my associate there in
 (7) Anchorage. I had flown down to Kodiak to inspect some
 (8) properties that we -- that weather did not permit the year
 (9) before. We'd had a real difficult time getting to Shuyak
 (10) Island for example, and we had -- I went through Kodiak about
 (11) the middle of June, and we were watching the weather for about
 (12) two weeks, and the weather was bad, it was foggy. I had a
 (13) little weather window, so I went down there, and I needed -- I
 (14) needed some help, and Hurley's good at it, he's got a nice title
 (15) plant, been around a long time, but he didn't jump at the
 (16) opportunity. I had to use my long time Alaskan association
 (17) there and say, Tim, I need you to do this, so it wasn't as if
 (18) he jumped on the assignment.
 (19) Q Why two or three thousand dollars just for one page of
 (20) numbers?
 (21) A No, it wasn't just for one page of numbers. This is only a
 (22) part of what Mr. Hurley did for me. He examined the records
 (23) he looked for transactions that had sold, he provided numerous
 (24) warranty deeds, 30 or 40 approximately, of properties, market
 (25) transactions, deeds of trust, copies of plats, and provided

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- (1) information on Native Corporation lands, the Larsen Bay lands
 (2) that were conveyed out to the Larsen Bay shareholders. There
 (3) was a lot of other work he did besides this letter. This is
 (4) only a small part of it.
 (5) Q Over what period of time was he helping you out?
 (6) A About two months, off and on, June and August, that was
 (7) the primary work that he did for me. We had to get our
 (8) appraisal done by the end of the summer.
 (9) Q Let's talk about your handwritten notes. Mr. Petumenos has
 (10) all but charged you with destroying evidence in this case.
 (11) MR PETUMENOS: Objection.
 (12) THE COURT: Counsel, that remark is stricken. The
 (13) jury is to disregard it. I don't want to hear that kind of
 (14) commentary again.
 (15) BY MR DIAMOND:
 (16) Q There was a question about Judge Shortell's order and
 (17) whether you violated Judge Shortell's order by not retaining
 (18) your handwritten notes. Do you believe you violated any
 (19) order?
 (20) A No, I do not believe I violated the order.
 (21) Q Explain.
 (22) A The handwritten notes that I had are -- I took those to the
 (23) state certified court reporter, and they're -- a duplicate of my
 (24) notes, my interview notes that he was referring to.
 (25) Q When you say a certified court reporter, a person like

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- (1) Joy who's creating the record in this case?
 (2) A Yes, they have -- R&R court reporters have an office here
 (3) in town, and I had them type my notes, so this is a duplicate
 (4) of my handwritten notes.
 (5) Q Why did you think that was okay?
 (6) A It's my understanding that -- that if you do a duplicate of
 (7) your notes in a typewritten form, that this would be in
 (8) compliance with Judge Shortell.
 (9) Q What was your reason for going through the process of
 (10) having typewritten verbatim notes created of your handwritten
 (11) notes?
 (12) A The central -- there was about -- I have about 50 typed
 (13) handwritten notes, and these are what I call the key market
 (14) participants, the people that are involved with realty, and I
 (15) was tracking the market over time, and I wanted to make certain
 (16) that the record was preserved, and rather than, you know,
 (17) having piles and piles of yellow tablet sheets of notes, I
 (18) thought that this would be the best way to accurately represent
 (19) what I was finding and in my -- through my research.
 (20) Q Did you keep it a secret that you were replacing your
 (21) handwritten notes with verbatim transcripts of them?
 (22) A No, I didn't.
 (23) Q You mentioned your understanding of the Court order,
 (24) Judge Shortell's order. Is this part of the order that you were
 (25) provided with when you first started working on the case?

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- (1) A Yes, I believe it is.
 (2) Q And you understood that you didn't have to preserve exact
 (3) duplicates of documents?
 (4) A Yes, that was my understanding.
 (5) Q And you -- did you consider the transcript that the court
 (6) -- certified court reporter prepared of your notes to be exact
 (7) duplicates?
 (8) A Yes, I thought that that would be correct.
 (9) MR DIAMOND: No further questions.
 (10) RECROSS EXAMINATION OF STEVEN MacSWAIN
 (11) BY MR PETUMENOS:
 (12) Q The difference between what this court reporter is doing
 (13) now and what you did is, she's taking down things that we say
 (14) and that she hears, right? But what you did is you sent
 (15) handwritten notes to the court reporter of what you had written
 (16) down, that's different, isn't it?
 (17) A Yes, the similarity is that they're both in state, you
 (18) know, certified reporters, and what I did is I took my notes
 (19) usually I drive them down to R&R court reporters and give them
 (20) to them, and they would type my notes and I review them for
 (21) typos and make my corrections.
 (22) Q Do you know what these are?
 (23) A These are not my notes. As I recall, it's been some time
 (24) since I reviewed these. These are notes of Don Dorchester, to
 (25) the best of my recollection.

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- (1) Q Were those notes submitted to a court reporter?
- (2) A I don't know
- (3) Q Is there in those notes areas where the handwriting
- (4) couldn't be read or blanks?
- (5) A There are some spaces in here with dots on them I'm not
- (6) - I'm not certain if that means there was a word left off or
- (7) - or it couldn't be read I don't know
- (8) Q These are the handwritten notes Mr MacSwain?
- (9) MR DIAMOND Your Honor these are -
- (10) MR PETUMENOS I'm showing them to you before I show
- (11) them to the witness
- (12) MR DIAMOND These are not Mr MacSwain's notes
- (13) MR PETUMENOS I realize that
- (14) BY MR PETUMENOS
- (15) Q These are the notes of your partner who was doing
- (16) interviews as well right?
- (17) A Yes Mr Dorchester was involved in a great deal of the
- (18) interviews that I had with the Alaska market participants
- (19) Q Unlike you he didn't destroy his notes did he?
- (20) A In this particular case he has both a typed version and a
- (21) handwritten version I'm not certain of all of his notes what
- (22) the status is
- (23) Q You can look at those handwritten notes and you can fill in
- (24) the blanks I've highlighted it for you where all the places
- (25) where the person typing it couldn't read the writing right?

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- (1) A Yes to be as accurate as possible It's my testimony that
- (2) my typewritten notes reflect exactly my interviews
- (3) Q But I can't look at them now to find out can I?
- (4) MR DIAMOND Objection argumentative
- (5) MR PETUMENOS I'll withdraw it
- (6) MR DIAMOND Asked and answered
- (7) MR PETUMENOS I'll withdraw it
- (8) BY MR PETUMENOS
- (9) Q Mr MacSwain what I asked you on cross examination about
- (10) Mr Hurley was not whether you had insufficient time to conduct
- (11) the work but what I asked you on cross examination was the
- (12) following question You couldn't think of anybody to
- (13) substitute who hadn't been the subject of previous survey and
- (14) given an opinion to do this adding up for you
- (15) Do you think Mr MacSwain in retrospect that it would
- (16) have been wiser to retain people to do work for you that
- (17) weren't the subject of your surveys?
- (18) A Mr Hurley - in answer to your question Mr Hurley is the
- (19) title man in town and it was just natural that I asked him
- (20) about his opinion and I would have - if there were others in
- (21) town that were knowledgeable I would have asked them also
- (22) but
- (23) I felt him to be knowledgeable in addition to having the work
- (24) that I wanted him to do and I felt it would be appropriate
- (25) MR PETUMENOS No further questions
- (26) MR STOLL I have a couple questions Your Honor

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- (1) A Yes there seems to be a correlation between the
- (2) typewritten yellow and the yellow that you have on the - on
- (3) the handwritten notes
- (4) Q But we can't do that with your notes because you tore them
- (5) up and you threw them away?
- (6) A What I did is I had the court reporter duplicate my
- (7) handwritten notes and I reviewed it and we - we produced the
- (8) duplicated and once we knew that we had the exact duplicate
- (9) then we threw away the handwritten on these - these notes
- (10) because we knew we had it exactly as - took a couple times to
- (11) edit and that sort of thing but the effort was to make it
- (12) duplicated
- (13) Q Mr MacSwain why didn't you just keep them in your
- (14) possession? Why tear them up?
- (15) A It's my understanding from the Court order that the
- (16) duplicate is a proper procedure
- (17) Q What would have - what was wrong with just keeping them?
- (18) A The - it's my opinion that typed notes are easier to read
- (19) and I wanted to make it easier for you to look at and whoever
- (20) that had to read the notes My handwriting is horrible And I
- (21) have a lot of - you know I provided through document
- (22) production boxes and boxes of handwritten notes but these
- (23) were
- (24) important ones that I wanted to make certain they were
- (25) preserved and that's why I went through the court reporter
- (26) Q And that's the only explanation you can give me?

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- (1) RECROSS EXAMINATION OF STEVEN MacSWAIN
- (2) BY MR STOLL
- (3) Q Mr MacSwain you could have hired someone like Mr
- (4) Roberts
- (5) to do an evaluation as to whether there was damage couldn't
- (6) you?
- (7) A Yes As a matter of fact Mr Roberts did some work for
- (8) me did a lot of work for me and I offered to pay him but he
- (9) didn't - we never got to that stage and later he got involved
- (10) with another project
- (11) Q And he did a damage analysis finding there was damages in
- (12) Kodiak didn't he?
- (13) MR DIAMOND Objection Your Honor hearsay
- (14) BY MR STOLL
- (15) Q Did you -
- (16) THE COURT It sounds like it's going to lead to
- (17) hearsay counsel
- (18) BY MR STOLL
- (19) Q Did you take into consideration what - in formulating your
- (20) opinion what Mr Roberts later found as to - as to the effect
- (21) of the oil spill on Kodiak remote properties?
- (22) A Yes I did
- (23) Q And he found did he not -
- (24) MR DIAMOND Your Honor I'm going to object it's
- (25) hearsay and beyond the scope of the redirect
- (26) MR PETUMENOS May we approach the bench on this?

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- (1) THE COURT Yes
 (2) (At side bar on the record)
 (3) MR PETUMENOS Judge he can't -
 (4) MR DIAMOND I can't hear you
 (5) MR PETUMENOS He can't be permitted to take into
 (6) account Mr Hurley's later work He can't be permitted to
 (7) testify and take into account Mr Hurley's later work and not
 (8) be subjected to cross examination on somebody who did later
 (9) work and concluded the opposite of what Mr Hurley did
 (10) THE COURT It's not hearsay
 (11) MR PETUMENOS This is a survey cross it's not -
 (12) all of this is hearsay in the sense of what he relied upon in
 (13) purposes of forming his opinion
 (14) THE COURT His work was unbiased and he just picked
 (15) the people available to him If there's somebody who he could
 (16) have picked that had an opinion negative to your client and he
 (17) studiously avoided that person and that's an issue in this of
 (18) incidental evidence -
 (19) MR DIAMOND Well the guy he hired had a negative
 (20) opinion
 (21) THE COURT What?
 (22) MR DIAMOND The guy he hired had a negative opinion
 (23) THE COURT We've been through that in great detail
 (24) MR DIAMOND I don't know what Mr Roberts' report
 (25) is

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- (1) THE COURT You don't know anything about it?
 (2) MR DIAMOND I don't know anything about it
 (3) MR STOLL Certainly you know about it Mr Roberts
 (4) did damage analysis with Shorett as to the village properties
 (5) and found that there was damage to the properties as a result
 (6) of the -
 (7) THE COURT I'm going to take it out of the presence
 (8) of the jury I'm going to send you out to the pit I hope
 (9) this will be short but I'm not promising anything
 (10) (Jury out at 12:18 p.m.)
 (11) THE COURT All right counsel ask the question
 (12) This is an offer of proof
 (13) MR STOLL Your Honor I'd like to do this I can
 (14) make the offer of proof without the witness present
 (15) THE COURT No I want you to ask your questions of
 (16) the witness so I know what the proposed testimony is
 (17) MR STOLL All right
 (18) VOIR DIRE EXAMINATION OF STEVEN MacSWAIN
 (19) BY MR STOLL
 (20) Q Mr - when you formulated your opinion you've testified
 (21) that you considered what Mr Roberts found is that right?
 (22) After he did a study isn't that right?
 (23) A Yes that is correct
 (24) Q And didn't he conclude that he looked through the borough
 (25) remote property record cards to determine if there was - what

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- (1) number of sales occurred in 1989 as opposed to 1988 and he
 (2) found a dropping off a dropping off of remote property sales
 (3) and the only thing he could attribute that change in volume to
 (4) was the spill isn't that correct?
 (5) A As I recall there's some analysis similar to that
 (6) However I want to go on to add that Mr Roberts I've examined
 (7) a large number of other appraisals that he did for non
 (8) plaintiffs in the same area all over Kodiak and there's no
 (9) negative adjustment due to the oil spill He makes a comment
 (10) in his report that he's referring to referring to the - as I
 (11) recall that verbiage comes from the four municipalities and
 (12) four villages Ouzinkie Port Lions Old Harbor and Larsen Bay
 (13) but when Mr Roberts does appraisal work for others FDIC
 (14) U S
 (15) Fish & Wildlife Service - and I've looked at a lot of his
 (16) appraisals - he did not make a negative adjustment to account
 (17) for the oil spill So Mr Stoll is only referring to part of
 (18) the story
 (19) There's a lot of other data that I've reviewed in addition
 (20) to talking to Mr Roberts a lot in 1991 1992 and it wasn't
 (21) until the winter of '92 when he was asked by I guess the other
 (22) guy Shorett and did this damage assessment in the four
 (23) villages and he did come up with a small amount of money just
 (24) in the small little part of the market but there's a lot more
 (25) to the story
 (26) MR STOLL Can I ask one more question Your Honor?

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- (1) THE COURT Yes
 (2) BY MR STOLL
 (3) Q Did - when he was - when Mr Roberts was doing all this
 (4) analysis and these other appraisals that you've referred to
 (5) the FDIC et cetera was he doing a damage analysis or was he
 (6) just doing an appraisal?
 (7) A He was doing the market value of these properties but in a
 (8) market value appraisal Your Honor you account for market
 (9) conditions If there's - if there is a decline in the real
 (10) estate market because of a reason whether it's earthquake
 (11) tidal wave oil spill whatever You account for it and you
 (12) make an adjustment and he did not in all these other
 (13) appraisals except for what I have reviewed for these four
 (14) municipalities these four villages just in the village that
 (15) - the villages themselves not in the outlying remote lands
 (16) such as Mr Stoll has as his client which Kodiak Island
 (17) Borough owns
 (18) Q The question I've got Mr MacSwain is first of all what
 (19) years was he doing these appraisals for FDIC?
 (20) A The first FDIC appraisal that I'm aware of is right after
 (21) the oil spill I think it was in 1990 I'd have to check my
 (22) records to be exact
 (23) Q Do you recall when in 1990?
 (24) A I can't recall the exact month but we talked to
 (25) Mr Roberts in detail about his appraisal This was an FDIC

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- (1) appraisal he did on Shuyak Island and at that time we talked
 (2) to him what's happening out there have you seen any effects
 (3) of the oil spill on -- on the market He goes no it wasn't
 (4) an issue
 (5) The year before in '88 he did that appraisal for BIA
 (6) Subsequent to the 1990 appraisal he did for FDIC he did a --
 (7) he's done a number of appraisals for U S Fish & Wildlife
 (8) Service involving all these lands that government is looking to
 (9) purchase as far as the oil spill buy out and none of these
 (10) appraisals has the -- has Mr. Roberts made an adjustment a
 (11) negative adjustment to account for the oil spill
 (12) Q He is simply making an evaluation an appraisal as to the
 (13) value of the property on a particular date isn't that what's
 (14) done in an appraisal?
 (15) A Yes just because you're doing an evaluation for plaintiff
 (16) doesn't mean you have a different purpose His purpose was to
 (17) do market value and to measure any damages
 (18) Q The question -- the question Mr. MacSwain is whether --
 (19) there's two issues here One is whether there is an appraisal
 (20) of property as of a particular period of time and the other
 (21) thing is doing a damage analysis as to whether that value has
 (22) been affected by anything else isn't that correct?
 (23) A Yes that's exactly my point For example when Dr. Mundy
 (24) did the appraisal for SNA when he sold the land to the State
 (25) he had a purpose to get He said one purpose is to get you

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- (1) know a high value When he did appraisal for SNA under
 (2) another purpose he said that I'm measuring damages Two
 (3) different situations and that's what -- the point I'm trying
 (4) to get across to you
 (5) Q So when Roberts did the stuff for BIA or FDIC or anybody
 (6) else he was doing a valuation as to what the property was
 (7) worth on a particular date he was not asked to do an analysis
 (8) as to whether there was damage as a result of the Exxon Valdez
 (9) oil spill was he?
 (10) A No he wasn't But if you read his analysis and you look
 (11) at his data and how he analyzes his data he does not account
 (12) for any change in market conditions due to the oil spill and
 (13) that's the point I'm trying to make to you Mr. Stoll
 (14) Q He's not asked -- he wasn't asked to do that though was
 (15) he?
 (16) A An ethical appraiser doesn't -- reports the data that you
 (17) find and reflects it into his opinion of market value just
 (18) like he did the market value appraisal on the villages He
 (19) estimated market value and he says there's something else
 (20) that's out there and he came up with some damages and when
 (21) that work the joint project was done with Mr. Shorett
 (22) MR. STOLL Your Honor I think it's all admissible
 (23) but I don't know that I want to go into this line
 (24) THE COURT Counsel -- tell me yes or no counsel
 (25) That's the first thing I have to know

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- (1) MR. DIAMOND I think it's all inadmissible but my
 (2) colleagues are all urging me to allow Mr. Stoll to open up the
 (3) door
 (4) MR. STOLL Your Honor I think it's all admissible
 (5) but I want to get over -- I want to get out of here this
 (6) afternoon they've got another witness I want to get that
 (7) witness -- get through that so --
 (8) THE COURT So you're not --
 (9) MR. STOLL I'm not
 (10) THE COURT You're not going to ask those questions?
 (11) MR. STOLL I'm not going to -- right
 (12) THE COURT Okay let's bring the jury back in
 (13) (Jury in at 12:26 p.m.)
 (14) THE COURT All right the jury is present counsel
 (15) MR. STOLL I have no further questions
 (16) THE COURT Is there anything else counsel?
 (17) MR. DIAMOND Nothing further
 (18) THE COURT You can step down sir
 (19) MR. DIAMOND Your Honor we call as our next witness
 (20) the Kenai Peninsula Borough assessor Wayne Haerer
 (21) H a e r e r Joy
 (22) THE CLERK Sir can you attach the microphone to your
 (23) tie and remain standing for the oath? Please raise your right
 (24) hand
 (25) (The Witness Is Sworn)

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- (1) THE CLERK Please be seated
 (2) Sir for the record can you please state your full name?
 (3) A Wayne Dean Haerer
 (4) THE CLERK Can you please spell your last name?
 (5) A H a e r e r
 (6) THE CLERK And your occupation?
 (7) A Director of Assessing for Kenai Peninsula Borough
 (8) THE CLERK Thank you
 (9) DIRECT EXAMINATION OF WAYNE D. HAERER
 (10) BY MR. DIAMOND
 (11) Q Good morning Mr. Haerer my name is Chuck Diamond We
 (12) met
 (13) briefly just a few moments ago I'm one of the lawyers for
 (14) Exxon I have some questions for you and I apologize we've
 (15) kept you waiting as long as we have
 (16) What do you do for a living?
 (17) A I'm Director of Assessing for the Kenai Peninsula Borough
 (18) I administer all the property assessing programs exemption
 (19) programs and property valuation advisement for Kenai
 (20) Peninsula
 (21) Borough
 (22) Q How long have you had the job?
 (23) A I've been with the Kenai Peninsula Borough for a little
 (24) over five years
 (25) Q Can you give the jury just a brief rundown on your
 (26) background?
 (27) A I've been involved in real estate appraisal assessment

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- (1) administration for a little over 20 years I've served both
 (2) in the capacity as appraiser assessor and private
 (3) appraiser/consultant within those 21 years
 (4) Q Your immediate prior job before coming to Kenai was in
 (5) Kodiak?
 (6) A That is correct I was the assessor for the Kodiak Island
 (7) Borough
 (8) Q Can you tell us what - what an assessor does?
 (9) A Primarily the assessor is in charge of valuing property in
 (10) accordance with state law In the state of Alaska you're
 (11) charged with valuing the property at its fair market value on
 (12) an annual basis carrying out and administering exemption
 (13) programs I oversee in the Kenai Peninsula Borough a staff
 (14) of 20 including mappers statisticians computer experts and
 (15) a field of appraisers
 (16) Q What does "fair market value" mean in that context?
 (17) A Fair market value is - represents the value that a willing
 (18) buyer/willing seller would pay for a given piece of property
 (19) neither being under duress the property being held for
 (20) adequate time on the market relative to all fair market value
 (21) concepts is what we're charged with in the state of Alaska
 (22) Q When you were the assessor in Kodiak did you also have
 (23) responsibility for making sure the properties were assessed at
 (24) fair market value?
 (25) A That is correct

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- (1) Q Who followed you in that position after you left?
 (2) A Mr. Pat Carlson was the - was my successor when I left
 (3) Kodiak for Kenai Peninsula Borough
 (4) Q Did you have any role in him getting that job?
 (5) A Yes I did sir I recommended him to Mayor Jerome Selby
 (6) as - to be my replacement
 (7) Q A few weeks ago Mr. Carlson was with us and he testified
 (8) that one of the reasons he didn't change the values of remote
 (9) property on Kodiak after the spill was because in his view
 (10) properties were underassessed prior to the spill Has anybody
 (11) advised you of that?
 (12) A The - that statement has never been borne out prior to
 (13) that being told to me prior to this case
 (14) Q When you left Kodiak Island Borough did you believe
 (15) remote properties were underassessed?
 (16) A No sir I did not
 (17) Q When had you last reassessed remote properties in the
 (18) borough?
 (19) A Best of my recollection in 1986 or '87 I and my
 (20) appraiser Mr. Bill Roberts at that time conducted a fairly
 (21) exhaustive reappraisal of all remote property in Kodiak Island
 (22) Borough from one end of the archipelago to the other We
 (23) examined all of the relevant sales analyzed the sales we went
 (24) so far as to creating zones from one end of the archipelago to
 (25) the other and in this stratification of parcel characteristics

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- (1) and sales analysis we ended up with - with a reappraisal and
 (2) reevaluation of all remote property
 (3) Q When you left the job did you leave a written report or
 (4) memorandum for Mr. Carlson and Mayor Selby concerning the
 (5) status of his assessments?
 (6) A Yes I did The best of my recollection it was a three
 (7) four page memo outlining some of the areas in which primarily
 (8) projects areas not to be construed as geographic areas but
 (9) projects that were underway that I was working on and
 (10) recommended for further scrutiny by the new assessor
 (11) Q Since the time you left Kodiak in 1989 through today has
 (12) Mr. Carlson ever reported to you or commented or indicated in
 (13) any way that he felt your assessments of remote property in
 (14) Kodiak as of early 1989 were under market value?
 (15) A To the best of my knowledge and recollection Mr. Carlson
 (16) has never contacted me and inquired or discussed matters
 (17) pertaining to remote parcel valuations no sir he has not
 (18) Q Okay How large is the area covered by the Kenai Borough
 (19) Peninsula - Kenai Peninsula Borough?
 (20) A Kenai Peninsula Borough consists of twenty-five - little
 (21) over 25 000 square miles of land and water
 (22) Q About how much of that is on the tax rolls subject to your
 (23) assessment responsibilities?
 (24) A Of the 25 000 square miles perhaps less than 10 percent of
 (25) that area is taxable

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- (1) Q Why the difference?
 (2) A Primarily because the majority and bulk of the land mass
 (3) excluding the water is federal state owned lands borough
 (4) some city owned lands and Native Corporation lands
 (5) Q Okay When you say 10 percent of the parcels if you
 (6) express that in terms of acreage what percentage of the
 (7) acreage of the borough is on the tax rolls?
 (8) A Acreage wise I could not even speculate at this time as to
 (9) what the percentage ratio is
 (10) Q Are there something in the neighborhood of 60 000 parcels?
 (11) A Approximately 60 000 real estate parcels yes
 (12) Q What Native Corporation lands lie within the borough?
 (13) A There's two regional corporations Chugach and CIRI and I
 (14) believe about nine Village Corporations within the Kenai
 (15) Peninsula Borough
 (16) Q Are any of the Native Corporation properties subject to
 (17) assessment?
 (18) A Yes all of them to some extent or another
 (19) Q What governs whether you tax Native Corporation
 (20) properties?
 (21) A Provisions of the Alaska Native Claims Settlement Act
 (22) govern the taxability of Native properties primarily if the
 (23) property becomes subdivided developed timber activity
 (24) et cetera will trigger taxability of Native lands
 (25) Q Are any of the parcels that lie within the borough that are
 owned by Port Graham English Bay or Chugach Alaska
 Corporation

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- (1) subject to assessment?
 (2) A Yes there are
 (3) Q Which ones?
 (4) A Port Graham - may I ask you to repeat the corporations for
 (5) me please again?
 (6) Q Port Graham English Bay and Chugach Alaska Regional
 (7) Corporation?
 (8) A Okay Port - all three of those corporations are subject
 (9) to property assessment taxation primarily as a result of timber
 (10) harvest activity
 (11) Q Are some properties in and around the villages of
 (12) Port Graham and English Bay taxed?
 (13) A In or around the villages there s very few properties that
 (14) are taxable near those villages because - well if I can step
 (15) back a second the few properties that are taxable are Native
 (16) allotments that have been released under trusteeship to private
 (17) ownership and there s a few permits but essentially there s
 (18) very - very little taxable property in those two villages in
 (19) the near proximity
 (20) Q Port Graham owns a parcel I believe it s referred to in
 (21) this litigation as the Windy Bay parcel Is that on the Kenai
 (22) Peninsula Borough tax rolls?
 (23) A Yes it is
 (24) Q Is that because it s developed?
 (25) A That is correct

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- (1) Q How about Chatham is there a development in that area
 (2) Port Chatham?
 (3) A Port Chatham I believe there is I m not intimately
 (4) familiar with the activity and assessment on that particular
 (5) location but I believe in discussions with some of my
 (6) appraisers that some of the activity triggered taxability and
 (7) hence they were appraised
 (8) Q Do you have responsibility for fixing fair market value for
 (9) any parcels under private ownership on the outer Kenai the
 (10) coastal area going up toward Seward and Resurrection Bay?
 (11) A Yes I do
 (12) Q What parcels?
 (13) A There - there are parcels - there s patented mining
 (14) claims located within some of the bays near some of the
 (15) glaciers located up in that particular area Nuka Island I
 (16) believe there s several privately held parcels On some of the
 (17) islands out in Resurrection Bay there is private parcels
 (18) There s permits We conduct leasehold interest or possessory
 (19) interest appraisals throughout that area as well as Day Harbor
 (20) on the east side near the Prince William Sound side of
 (21) Resurrection Bay
 (22) Q Let s go northwest up to Kachemak Bay Let me ask you the
 (23) same question with respect to South Kachemak Bay Do you
 (24) have
 (25) responsibility for fixing fair market value for parcels along
 the water on South Kachemak Bay?

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- (1) A Yes I do
 (2) Q What s up there that s on the tax rolls?
 (3) A There s numerous privately held properties starting with
 (4) Seldovia the city of Seldovia and going east by northeast
 (5) all along the shoreline there s numerous privately held
 (6) interests in that area
 (7) Q Let me wind the clock back to 1989 March of 1989 There
 (8) was an oil spill Did that prompt you to make any inquiries
 (9) concerning your responsibilities as the Kenai Borough
 (10) assessor?
 (11) A Yes it did Shortly after the spill I discussed with the
 (12) borough attorney the applicability and implementation of a
 (13) statute regarding the rollback of assessments with respect -
 (14) with regard to a natural disaster I believe that s
 (15) AS 29 45 230 and we both decided that under the language of
 (16) that statute that it applied to only natural disasters declared
 (17) by the President and/or the Governor
 (18) We further sought another opinion from the State assessor
 (19) and the State assessor requested the Attorney General s
 (20) opinion
 (21) regarding this matter and stated that if it was declared - if
 (22) the spill specifically was declared a disaster by the President
 (23) of the United States or the Governor of the State that the
 (24) spill would qualify So yes that triggered the initial
 (25) review
 Q All right Did you make these inquiries on your own or in

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- (1) response to property owner complaints?
 (2) A This was prompted primarily by my own initiative and also
 (3) discussions with the borough Mayor Don Gilman and borough
 (4) attorney Tom Boedeker The three of us decided to right
 (5) away begin looking into the matter
 (6) Q Out of a sense of fairness to borough property owners or
 (7) for some other reason?
 (8) A Primarily in a sense of responsibility under the laws that
 (9) we are charged with carrying out We had just set the assessed
 (10) values for that year prior to the happening of the spill and
 (11) this particular statute gave us - would have given us the
 (12) authority if enacted by the borough assembly the opportunity
 (13) to go back if we determined that there was damage as a result
 (14) of the disaster if it was declared as such to change the
 (15) assessed values and give tax relief
 (16) Q What did you do when you found out that you had legal
 (17) authority to roll back the assessed valuations if in fact, the
 (18) oil spill affected the fair market value?
 (19) MR STOLL Excuse me Your Honor assumes a fact not
 (20) in evidence and I d like to - we ve heard Mr Diamond testify
 (21) here a little bit I d like to have no leading questions
 (22) THE COURT You d like to have what?
 (23) MR STOLL No leading questions
 (24) THE COURT Fair enough No leading questions
 (25) BY MR STOLL

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- (1) Q What did you do?
 (2) MR STOLL That's vague and ambiguous. What we -
 (3) we - well, that particular question is -
 (4) THE COURT You're right. You're right. Rephrase.
 (5) BY MR DIAMOND
 (6) Q Did you undertake an examination of the fair market value
 (7) of property in the borough after your conversations with state
 (8) officials?
 (9) A What I myself and under my direction my appraisers did
 (10) were to examine all facets of the economy that relate to the
 (11) value, the market value of property. We looked at sales tax
 (12) receipts, we looked at rents, leases, we looked at building
 (13) activities. We looked at listings, see if there was any
 (14) abnormalities with regards to properties going up for sale. We
 (15) listened to property owners in the normal course of our work.
 (16) The appraisers physically visit the properties and normally the
 (17) property owners every three years in the normal reappraisal
 (18) cycle, so they had an opportunity to visit with people with
 (19) the owners and absent appeals, absent major downturns in any
 (20) of these facets, let me say that that's the method we employed in
 (21) making examinations.
 (22) Q How long did you and your staff make this examination?
 (23) A Directly for probably two years afterwards. The statutory
 (24) provision allows only for that one year. So we kept an acute
 (25) say, eye out for any of these happenings within that given

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- (1) year 1989. They could not have been implemented, as I
 (2) understand it, for 1990, but by charge of law, if there was
 (3) effects by anything, whether it was the spill or whether it was
 (4) by the oil industry, timber industry, fishing industry,
 (5) tourism, we take those into accounts in our reflecting our
 (6) assessments.
 (7) Q Did you determine after this two-year period of examination
 (8) that any rollback of assessed valuation was necessary because
 (9) of the oil spill?
 (10) A We determined that there was no necessity to adjust values
 (11) or roll the values back as a result of the spill.
 (12) Q What was the basis for that determination?
 (13) A Absent -
 (14) MR STOLL Excuse me, Your Honor, I think we're
 (15) getting into an area that the witness is not permitted to
 (16) testify.
 (17) THE COURT I'm lost, come up here.
 (18) (At side bar on the record.)
 (19) MR STOLL He was asked whether he - what was the
 (20) basis of not making adjustment after the oil spill, and I think
 (21) that the answer is going to be that he concluded that there was
 (22) no effect of the oil spill, and I think that's -
 (23) THE COURT I don't know whether it is or not. Is
 (24) it? Is that what he's going to say?
 (25) MR DIAMOND He's going to say that his examination

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- (1) determined with respect to parcels on the property rolls
 (2) including those adjacent to Native Corporation properties, they
 (3) were - are worth as much as they had been before the spill. I
 (4) mean, that's his findings. That's what he did.
 (5) MR STOLL He's already testified to that, though.
 (6) THE COURT No, he hasn't.
 (7) MR STOLL This business about what is the basis of
 (8) - for his determination, it's the question of what is the
 (9) basis, and that's the thing I object to.
 (10) THE COURT All right, the objection's overruled.
 (11) (Sidebar concluded.)
 (12) MR DIAMOND Joy, could you read the last question?
 (13) (The prior question was read.)
 (14) A The basis for the determination was the lack of any
 (15) sufficient or credible information showing any kind of adverse
 (16) impact on the - on the real property values resulting directly
 (17) to the spill.
 (18) BY MR DIAMOND
 (19) Q Did that include the shorefront properties on the outer
 (20) Kenai, as well as the shorefront properties on South Kachemak
 (21) Bay?
 (22) A That is correct.
 (23) Q Is there some mechanism, if a property owner is aggrieved
 (24) by your decision, to take it up with you or some higher
 (25) authority?

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- (1) A Annually, we sent out assessment notices. These
 (2) assessments
 (3) notices state the value for that year and, through that
 (4) process, each taxpayer has a 30-day appeal period in which to
 (5) lodge an appeal or a grievance administratively to the
 (6) assessing department. Typically, what happens is that the
 (7) taxpayer will discuss their problems with the appraiser for
 (8) that area and, if there is no satisfactory explanation or
 (9) resolve to that administrative appeal, they are - they file an
 (10) appeal to the Board of Equalization and are heard before the
 (11) Board of Equalization within a couple of weeks after that.
 (12) Q Is it rare for that to happen?
 (13) A No, sir, it isn't.
 (14) Q How many appeals are filed in the Kenai Peninsula Borough
 (15) a
 (16) year?
 (17) A Within the 30-day appeal period, we average over 400
 (18) administrative and informal appeals annually.
 (19) Q Following the - the oil spill, was any appeal or other
 (20) grievance about valuations lodged with your office or the Board
 (21) of Equalization by the Port Graham Corporation?
 (22) A To the best of my knowledge, no.
 (23) Q How about English Bay?
 (24) A To the best of my knowledge, no, sir.
 (25) Q How about Chugach Alaska Corporation?
 (26) A No, sir.
 (27) Q Finally, your office reports, does it not, analyzed figures

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- (1) of the annualized figures of the total assessed value of the
- (2) property in the borough?
- (3) A That is correct
- (4) Q And that's broken down into various categories real
- (5) property - I'm sorry there are various categories real
- (6) property personal property other types of taxable property?
- (7) A Correct We have three - three principal categories real
- (8) property personal property and oil and gas property Oil and
- (9) gas property as defined by AS 47 56 which is oil and gas
- (10) property assessed by the state but is taxable by the borough
- (11) Q Counsel for Kodiak Island Borough was good enough to
- (12) share
- (13) with us some compendium of your statistics for various years
- (14) Have you had an opportunity to take a look at those?
- (15) A I have had briefly yes
- (16) Q Those show fluctuations in the total value of all the real
- (17) property in the borough during the course of the 80s and I
- (18) believe over the 90s with total valuation of real property
- (19) dropping from 87 to 88 and again 88 89 and some other
- (20) years Have you looked at those figures?
- (21) A Most certainly have
- (22) Q What was the reason for the decline in the gross fair
- (23) market value of all of the assessed real property on your tax
- (24) rolls during those years?
- (25) A The decline in assessed values started in the -
- (26) approximately 1988 resultant of the downturn in the oil

- (1) jury is to disregard it
- (2) BY MR DIAMOND
- (3) Q Did the decline in the gross fair market value of borough
- (4) property that you report annually that took place in late 80s
- (5) have anything to do with the oil spill?
- (6) A The decline in the late 80s was most significantly
- (7) impacted or generated by the oil prices on the North Slope and
- (8) in Cook Inlet
- (9) MR DIAMOND No further questions
- (10) CROSS-EXAMINATION OF WAYNE D HAERER
- (11) BY MR STOLL
- (12) Q Mr Haerer we just met just a few minutes before we
- (13) testified I haven't talked to you before have I?
- (14) A No sir To the best of my knowledge I have not talked to
- (15) you or seen you before
- (16) Q I represent Kodiak Island Borough During the last few
- (17) years the Bureau of Assessment - or Department of
- (18) Assessment
- (19) in Kenai Peninsula Borough has had certain litigation with some
- (20) of the plaintiffs in this - in this case isn't that correct?
- (21) A That is correct
- (22) Q You've had litigation with Mr Petumenos client Chugach
- (23) relative to assessments isn't that correct?
- (24) A That is correct also
- (25) Q You've had litigation with Mr Fortier's client Port
- (26) Graham in fact that went all the way to the Alaska Supreme

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- (1) industry the real estate values from basically Fairbanks to
- (2) Homer was - the rail belt if you would - were affected
- (3) dramatically and we lowered values in the central peninsula
- (4) area in one year 35 percent The market fell that
- (5) significantly
- (6) Oil and gas properties the platforms in the Inlet all of
- (7) the ancillary on shore facilities the value of those
- (8) properties went down dramatically during those years The life
- (9) of the oil fields were rapidly declining and still are as a
- (10) matter of fact Oil and gas when you look at the total
- (11) taxable value in aggregate of Kenai Peninsula Borough oil and
- (12) gas represents 40 percent of that total value so when oil and
- (13) gas values go down so does the total So along with it the
- (14) - we found the residential real estate values were going down
- (15) as they were in Anchorage and other places Mat Su Valley
- (16) In 1990 and 91 when looking at the the graphs charts
- (17) that are being referred to and you look strictly at the
- (18) residential real property values they began to stabilize
- (19) After 1991 in '92 the values started to strengthen There was
- (20) more new construction more - the market values were on the
- (21) upswing The economy started to pick up
- (22) Q The declines in the late 80s though had nothing to do
- (23) with the oil spill though is that right?
- (24) MR STOLL Your Honor leading
- (25) THE COURT Sustained The question is stricken The

- (1) Court isn't that correct?
- (2) A They were - excuse me they were one of the litigants in
- (3) the Supreme Court case regarding interpretation of what is
- (4) taxable and what isn't under the ANCSA provisions
- (5) Q The answer is yes they were litigants with the assessor's
- (6) office?
- (7) A Yes
- (8) Q And did you - were you told that Mr Selby the Mayor of
- (9) Kodiak Island Borough one of the first things that he told
- (10) Mr Carlson when he became assessor was to -
- (11) MR DIAMOND Your Honor I object I think there's a
- (12) hearsay statement coming here
- (13) MR STOLL It's not a hearsay statement He was here
- (14) in court
- (15) THE COURT Yes I think that objection's going to be
- (16) overruled Let's find out what your question is
- (17) MR STOLL Okay
- (18) MR DIAMOND If it's sustained it'll be too late
- (19) Judge
- (20) THE COURT Then it will be correct
- (21) MR STOLL And the jury will be instructed
- (22) THE COURT Too late but correct counsel
- (23) BY MR STOLL
- (24) Q Had you been told Mr Selby when he was here in court and
- (25) subject to cross examination by Mr Diamond or others testified

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- (1) that one of the first things that he told Mr. Carlson to do
- (2) when he became assessor was to reappraise the remote properties
- (3) of Kodiak Island Borough?
- (4) A No sir I did not know that
- (5) Q And you've testified I believe that there's a
- (6) substantial amount of oil business in Kenai Peninsula Borough
- (7) isn't that correct?
- (8) A That is correct
- (9) Q Soldotna and Kenai are the base of operations for a number
- (10) of offshore oil rigs in Cook Inlet?
- (11) A That is correct
- (12) Q And most of the remote real property in Kenai Peninsula
- (13) Borough is tax exempt I think you've already testified to
- (14) that right?
- (15) A That is correct
- (16) Q And I think you mentioned to me out in the hallway that all
- (17) but about one percent of it is - is exempt isn't that -
- (18) A That was my approximation yes
- (19) Q So only about one percent of this remote property is -
- (20) now I'd like to -
- (21) Could I have the Elmo on please?
- (22) This is a little map of this part of your material from
- (23) Kenai Peninsula Borough Does that look like one of your maps
- (24) of the tax - tax code areas?
- (25) A That is correct that's computer-generated tax code

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- (1) AeroMap
- (2) Q All right
- (3) A I'm not sure for what year though
- (4) Q And - well this says 1994 I'm sorry
- (5) A Okay
- (6) Q And the areas that I have highlighted are what's called -
- (7) let me see if I can zoom in on this - TCA67 Isn't that the
- (8) areas that are in yellow there?
- (9) A That is correct
- (10) Q And those are generally speaking the remote areas in
- (11) Kenai Peninsula Borough isn't that correct?
- (12) A TCA67 would -
- (13) Q Let me rephrase the question I'm sorry
- (14) The remote areas of Kenai Peninsula Borough that were oiled
- (15) are contained in TCA67 is that right?
- (16) A That would be most correct from what I understand
- (17) Q That's what I meant to ask And those areas are not the
- (18) areas where most of these oil - oil equipment and oil rigs
- (19) are isn't that - isn't that right?
- (20) A That is correct
- (21) Q And between 1988 and 1989 the one percent or whatever it
- (22) is of the remote properties in TCA67 the one percent that's
- (23) taxable - non - nonexempt property those values as a total
- (24) went down between 1988 and 89 isn't that correct? Do you
- (25) recall?

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- (1) A I don't recall specifically I don't have - there's 13
- (2) 14 tax code areas in the borough and they change every two
- (3) years the boundaries change and I couldn't stipulate to that
- (4) specifically
- (5) Q Okay Tax Code Area 67 though has - let me back off
- (6) here for a second These other tax code areas for instance
- (7) there's one here TCA40 TCA - excuse me TCA57 those are
- (8) areas within - those are for instance cities or more
- (9) populated areas the ones I just was pointing to for instance
- (10) isn't that correct?
- (11) A That is correct
- (12) Q And those boundaries of those more populated areas
- (13) expand
- (14) and those boundaries change somewhat over the years isn't that
- (15) right?
- (16) A Yes they do
- (17) Q Now the broad area of TCA67 though since you've been
- (18) the
- (19) assessor those have remained pretty much the same isn't that
- (20) right?
- (21) A That would be correct
- (22) Q Okay
- (23) MR STOLL May I approach the witness Your Honor?
- (24) THE COURT Yes
- (25) MR STOLL Maybe I'll just show you on the - on
- (26) the -
- (27) BY MR STOLL

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- (1) Q I'm going to show you what's been marked as Exhibit 8235
- (2) You're familiar with this document?
- (3) A Yes I am
- (4) Q And 1988 this is the one for 1988 we have Tax Code Area
- (5) 67 and the assessed value for this - when it says actual
- (6) assessed value this would be that one percent or whatever
- (7) that is of the property that's actually taxed is that right?
- (8) Is that what that column means?
- (9) A That's correct That is taxable assessed value
- (10) Q Okay So for 1988 the actual assessed value is
- (11) \$43,962,000 is that what that means?
- (12) A That is correct
- (13) Q And then for the subsequent year 1989 - and this is
- (14) Exhibit 8234 - Tax Code Area 67 has gone down to forty -
- (15) \$41,151,000 is that right?
- (16) A That's correct
- (17) MR DIAMOND What was that number?
- (18) MR STOLL It's 8234
- (19) BY MR STOLL
- (20) Q And when does this 30-day period end that in 1989 when
- (21) did the - when did the taxpayer the real property taxpayer
- (22) that owns this one percent of the land that's taxable when did
- (23) he have to file his appeal by?
- (24) A I believe April 30th
- (25) Q All right So the tax statement went out the 1st of April

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- (1) and he's got 30 days within which to - to do an appeal?
- (2) A Formally that is correct
- (3) Q Now if a person owned a - say an individual owned a - a
- (4) parcel of remote property that was down on the coast of Kenai
- (5) Peninsula Borough say it was a property that was accessible
- (6) only by boat and they had a little - they had a recreational
- (7) lot if the person had - assuming it was taxable property
- (8) they had a \$30 000 lot there are some lots like that there
- (9) isn't that right?
- (10) A 30 000 would be on the low end
- (11) Q What would be forty fifty thousand sixty thousand?
- (12) A If the property is - especially on the southern end since
- (13) there is a great deal of scarcity of privately held property
- (14) along there and if it had safe anchorage and was accessible by
- (15) sea plane it would command significantly higher value
- (16) predicated on the size but let's assume that a five acre tract
- (17) would probably command anywhere from 8 000 to 12 000
- (18) dollars an
- (19) acre
- (20) Q All right So if they had a - a person had a five acre
- (21) tract - and you said this is because - my value is low
- (22) because there's a scarcity of property that's available am I
- (23) right?
- (24) A That's correct
- (25) Q And if they had a five - five acre site that was 8 000 an
- (26) acre that would be \$40 000?

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- (1) A Okay
- (2) Q Okay And also part of Exhibit 8228 are the millage
- (3) rates for various years Does this look like one of your
- (4) charts on millage rates?
- (5) A It is a chart of our mill rates yes sir
- (6) Q Okay And so this means does it not that for every
- (7) thousand dollars of value of assessed value - assuming the
- (8) property is assessed at the full market value - that the
- (9) property would be - the person would pay real property taxes
- (10) of \$5 75 per thousand is that what it means?
- (11) A That is correct That is correct
- (12) Q Okay So if a person - and incidentally this is the
- (13) year 1989 millage rate and this was the same millage rate for
- (14) 1988 does that sound about right to you? That's what this
- (15) document is?
- (16) A Yes that's correct
- (17) Q So if the person was able to get one of these scarce
- (18) parcels and had it for \$40 000 he would pay 40 -
- (19) Could I have a blank screen here?
- (20) He'd pay 40 times \$5 75 and that would equal -
- (21) A Slightly over half
- (22) Q - a little over 200 230 dollars That's pretty bad
- (23) writing Now the - that would be a year?
- (24) A That is correct That would be their annual tax liability
- (25) for that property

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- (1) Q Now if those people thought that the property value - and
- (2) if this assessment this natural disaster statute if they were
- (3) able to - if they knew about the statute and they knew to go
- (4) in and appeal and file the appeal during this 30 day period in
- (5) April of 1989 if they did all that and they went in and they
- (6) said I want to use a discount factor of other - or an interest
- (7) factor of let's say 12 percent 12 percent would be - 12
- (8) percent of \$230 equals \$27 60 according to me Does that
- (9) sound about right to you?
- (10) Now - yes?
- (11) A I'll believe you You have the calculator
- (12) Q Okay And -
- (13) MR DIAMOND Could Mr Stoll tell us what the 12
- (14) percent is?
- (15) MR STOLL If the person thought that the value had
- (16) gone down 12 percent in that particular - you know a
- (17) temporary decline for that year it'd be 12 percent Okay? If
- (18) that - that's what my 12 percent is
- (19) BY MR STOLL
- (20) Q And they get - they get this - as I understand your
- (21) testimony they get this disaster reduction only for one year
- (22) isn't that right?
- (23) A That is correct as I understand it
- (24) Q Now do you have a lot of - what I'd like to know is you
- (25) had mentioned these 400 appeals that you have annually
- (26) Those

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- (1) aren't all in remote areas are they?
- (2) A No sir They come from all segments and sectors of the
- (3) Kenai Peninsula Borough
- (4) Q And the vast majority of them are not from the remote
- (5) areas isn't that correct?
- (6) A I would say the majority comes from the road system
- (7) Q And of the - do you have - are a lot of those appeals
- (8) people seeking \$27 you know in that kind of range reduction
- (9) in the property taxes have you heard many people -
- (10) A Would you repeat the question do we have very many?
- (11) Q Yes do you have very many that the goal is to say \$27 for
- (12) one year on their property taxes or do you know?
- (13) A People do not -
- (14) Q Maybe you don't know
- (15) A People do not know what their tax liability necessarily is
- (16) going to be when they're sent an assessment notice They're
- (17) sent the assessment notice and that's all that is known by the
- (18) taxpayer Not until the borough assembly sets the mill rate in
- (19) July after - well after the appeal period is there a mill
- (20) rate and a ratio for the taxpayer to know what their tax
- (21) liability is going to be for that year based on the assessed
- (22) value So people do appeal having no knowledge of what the
- (23) probable net results will bring them with regards to their tax
- (24) liability It's predicated on - on whether or not the
- (25) taxpayer believes that that assessed value is representative or

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- (1) in excess of fair market value
 (2) Q Am I correct Mr Haerer that if the person owned a
 (3) \$40 000 piece of property total taxes would be \$230 and if he
 (4) - if he had a - if he thought that his - there had been a
 (5) disaster here and he could save some 12 percent in that one
 (6) year the 12 percent he would save would be \$27 60 in taxes?
 (7) A I have had appeals that would represent much less than
 (8) that primarily on the principle of the matter
 (9) Q I see Now you re - I think you testified about the
 (10) appraisers the appraisers doing a - a reappraisal on a cycle
 (11) of every three years of property?
 (12) A That is correct
 (13) Q So that means they re not - each parcel is not appraised
 (14) every year is that right?
 (15) A That s not totally true The Constitution of the State of
 (16) Alaska state statutes and borough ordinances charge - charge
 (17) us with valuation of all property in the borough at 100 percent
 (18) fair market value Another statutory provision states that
 (19) municipalities must reappraise establish a reappraisal cycle
 (20) and in the Kenai Peninsula Borough it s three years We
 (21) statistically reappraise every year We physically inspect all
 (22) properties primarily improved properties within that three -
 (23) on a cyclical basis every three years Remote or let s put
 (24) it this way vacant land normally does not change its
 (25) characteristics and its features therefore it is not always

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- (1) inspected within that three years unless it s reported or
 (2) observed some kind of a physical change in the property But
 (3) if it s an improvement if there s buildings or improvements on
 (4) the property they will be physically inspected every three
 (5) years
 (6) Q Could I have you go back to the Elmo please?
 (7) Now down here along the coast and Tax Code Area 67 those
 (8) remote properties the one percent that were taxable those
 (9) were not physically inspected by your appraisers in doing a
 (10) reappraisal in 1989 were they?
 (11) A Would you point out again specifically the areas that you
 (12) were alluding to
 (13) Q Well along the coastline here?
 (14) A The entire TCA67
 (15) Q Were all those properties - were those properties
 (16) physically inspected the remote - the remote properties
 (17) physically inspected by your appraisers as part of the
 (18) reappraisal process in 1989?
 (19) A I recall two of my appraisers spent considerable amount of
 (20) time in Kachemak Bay that summer of 1989 My appraiser for
 (21) Seward was in - I recall over in Day Harbor but the remainder
 (22) of the properties from Resurrection Bay to the Chugach Islands
 (23) I don t recall them specifically being inspected physically
 (24) that - that year
 (25) Q And - thank you that s good

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- (1) MR STOLL Mr Petumenos I think has some
 (2) questions
 (3) MR PETUMENOS Could I have the defendants exhibit
 (4) map with just the property on it the one we ve used again and
 (5) again on the Elmo - I mean on the Barco
 (6) MR DIAMOND Your Honor may we approach just
 (7) momentarily?
 (8) (At side bar on the record)
 (9) MR DIAMOND Your Honor this witness testimony was
 (10) entirely generic with the exception of brief testimony about
 (11) his prior experience at Kodiak There was no reason for the
 (12) second cross-examination other than the second
 (13) cross examination there are no unique interests
 (14) THE COURT Where are you going?
 (15) MR PETUMENOS I just want to establish his
 (16) jurisdiction on the Native Corporation properties I think the
 (17) testimony would be where you see the colors on the map that
 (18) he
 (19) doesn t have jurisdiction over all of those properties to tax
 (20) THE COURT I thought that was the import of the
 (21) testimony on the cross
 (22) MR PETUMENOS Well the problem is he said he had
 (23) authority over the Chugach Alaska Corporation and I don t
 (24) think he does
 (25) THE COURT He can clarify that
 (26) (Sidebar concluded)

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- (1) MR STOLL Can I just ask one question?
 (2) BY MR STOLL
 (3) Q The tax the millage rate in Kodiak is roughly the same as
 (4) it is - little less than it is for the remote areas as it is
 (5) in Kenai Peninsula Borough isn t that correct? Do you recall
 (6) that?
 (7) A I do not recall specifically what the mill rate was when I
 (8) left Kodiak outside of the urban area I don t recall what it
 (9) was
 (10) Q Do you recall if I told you it was around \$4 50 that that
 (11) sounds about right?
 (12) A I believe that would be a reasonable - yes
 (13) Q And most of the remote property in Kodiak was also tax
 (14) exempt isn t that correct?
 (15) A That is also correct
 (16) MR STOLL Thank you
 (17) CROSS EXAMINATION OF WAYNE D HAERER
 (18) BY MR PETUMENOS
 (19) Q Very quickly because it s getting near the end of the day
 (20) I m Tim Petumenos I represent Chugach Tatitlek and Eyak
 (21) The - you mentioned that you had tax authority over the
 (22) Chugach Alaska Corporation Do you have any taxing authority
 (23) over any of the - I m showing you Prince William Sound here
 (24) as you can perhaps tell Any tax jurisdiction whatsoever over
 (25) the circle I ve just made?

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- (1) A No sir
- (2) Q And the surface estate of the Chugach Alaska Corporation I
- (3) will tell you includes this parcel and this parcel and you
- (4) have no authority over those am I right?
- (5) A That is correct
- (6) Q Do you have some authority over this parcel is it within
- (7) your jurisdiction do you know?
- (8) A That would be very close because the Kenai Peninsula
- (9) Borough boundary comes down the middle of Turnagain Arm
- (10) and
- (11) then bypasses Whittier on the west and zigzags down in that
- (12) particular area So I - I don't recognize it specifically
- (13) and as I stated earlier there's 60,000 parcels of property
- (14) and I personally am not intimately familiar with all of them
- (15) Q I understand Let me put it to you that this property
- (16) right here is undeveloped If it is undeveloped Then do you
- (17) have any taxing authority over this parcel if I give you that
- (18) information?
- (19) A Under those auspices - if it's undeveloped not
- (20) timbered - it would not be taxable I'd still have the
- (21) authority the assessment authority over that property if it's
- (22) within the Kenai Peninsula Borough
- (23) Q But there's no point in assessing it is there because you
- (24) can't tax it?
- (25) A Typically not
- (26) MR PETUMENOS Could we have the exhibit for the

- (1) there was any kind of development subject to the provisions of
- (2) ANCSA it would become taxable
- (3) Q Okay even if it was in interim conveyance status if they
- (4) start to develop it you can tax it?
- (5) A That is correct
- (6) Q But if any of this land is not developed you can't tax it
- (7) right?
- (8) A That is correct
- (9) MR PETUMENOS You can't take a picture that fast
- (10) can you?
- (11) MR GROSS Sorry?
- (12) MR PETUMENOS Can you take a picture that fast or
- (13) can you? Thank you
- (14) BY MR PETUMENOS
- (15) Q And finally this area here is the area you were telling
- (16) us about around the villages where you said there wasn't too
- (17) much in the way of property that you tax for Port Graham and
- (18) English Bay
- (19) A Within the village of Nanwalek and Port Graham and there's
- (20) very little taxable property within the - within the vicinity
- (21) of the villages themselves
- (22) Q And when you said that you had sent people out to look at
- (23) the property in '89 and following the statute or whatever you
- (24) mentioned Kachemak Bay which is in here where that pen is
- (25) showing?

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- (1) Kenai Peninsula please the second one? If I - could I go to
- (2) the next one and still get a picture of this one? Please
- (3) BY MR PETUMENOS
- (4) Q I also - counsel asked me to clarify that I also just
- (5) circled Chenega land when I was on the previous map as well
- (6) Now if I were to tell you that these - let me ask you
- (7) this if I were to tell you that there were no surface estate
- (8) lands owned in this area by the Chugach Alaska Corporation
- (9) would that comport with your understanding?
- (10) A I could not specifically stipulate to that because I know
- (11) that there's - I recall properties perhaps it's timber
- (12) leases then that is in the ownership of Chugach There's
- (13) also possessory interest in Resurrection Bay opposite of
- (14) Seward city owned lands that the Chugach Native Corporation
- (15) has had in possession and ownership of the improvements I.e
- (16) a logging - or excuse me a lumber mill
- (17) Q Is that what you meant by the Chugach Alaska Corporation
- (18) taxing then? That's what you were thinking of?
- (19) A That's what I was probably referencing
- (20) Q Okay Now with respect to this area here if I were to
- (21) tell you that this area here were the subject of selected but
- (22) not conveyed - or in the status of interim conveyance with the
- (23) federal government and not developed then you would have
- (24) no
- (25) taxing authority over it is that right?
- (26) A Not - not exactly Even under interim conveyance mode if

- (1) A From Seldovia yes that would be a close approximation
- (2) from Seldovia all the way if you took a circle all the way
- (3) around Kachemak Bay
- (4) Q Is that the fair circle what I've done or -
- (5) A No expand your circle from - all the way on both sides of
- (6) the Kachemak Bay
- (7) Q Why don't you - can you give him a pen? I'll give you a
- (8) green color and you can do it
- (9) A Then I'll stop right there because there is all along the
- (10) road system north -
- (11) Q Do the same thing for me for Seward
- (12) A Seward?
- (13) Q Where you actually visited in 1989
- (14) A Day Harbor my chief appraiser was in Day Harbor in that
- (15) vicinity and over there - there's parcels over there
- (16) There's privately held parcels right in that - some of those
- (17) islands just outside Resurrection Bay There's - outside the
- (18) city limits I believe just outside of the city limits of
- (19) Seward which would be contained in Tax Code Area 67 that
- (20) you're referring to there's - there's some property right in
- (21) there that is outside city limits but our focus - our focus
- (22) was not remote parcels Our focus was on the entire borough
- (23) and was not limited to strictly the value of remote parcels
- (24) but also the economy of the coastal communities of Homer
- (25) Seward Seldovia et cetera

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- (1) Q Your focus was not remote parcels I heard you say that you
 (2) looked at sales listings leases and rents and -
 (3) MR DIAMOND Your Honor I thought this was going to
 (4) be confined to jurisdictional issues unique to Chugach Alaska
 (5) that was going to be offered
 (6) THE COURT You're allowed How much further have you
 (7) got to go?
 (8) MR PETUMENOS I've got three questions left
 (9) THE COURT Okay finish it up
 (10) BY MR PETUMENOS
 (11) Q And you didn't look at - didn't necessarily have any sales
 (12) or listings in the property that you see here as colored did
 (13) you?
 (14) A To the best of my recollection there - properties that
 (15) are on this screen in color I don't recall any sales
 (16) Q Right And you didn't visit according to the green that
 (17) we have here any of the Native Corporation lands that list -
 (18) that's listed in color here ever in connection with the
 (19) study
 (20) MR DIAMOND Personally him?
 (21) MR PETUMENOS No or his appraisers
 (22) A We were - I personally have been to Windy Bay Rocky Bay
 (23) - I have personally at one time or another inspected every
 (24) bay of the entire peninsula from Seward on down Specifically
 (25) the summer of 89 following and subsequent to the spill I

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- (1) nor my appraisers were along this area but we also did not
 (2) find any properties listed for sale through any of the typical
 (3) means of property listings
 (4) BY MR PETUMENOS
 (5) Q I understand You did not in connection with this study
 (6) visit this land to study about the oil spill You may have
 (7) visited it in some other way occasion but you've never
 (8) visited in connection with this study am I right?
 (9) A Not those specific properties along here
 (10) MR PETUMENOS Thank you Judge
 (11) REDIRECT EXAMINATION OF WAYNE D HAERER
 (12) BY MR DIAMOND
 (13) Q Mr Haerer the red circle that Mr Petumenos drew I think
 (14) he said that's the area around the villages that is not taxed
 (15) There are taxable parcels in that circle aren't there?
 (16) A They're - to the best of my recollection And I say that
 (17) because again I don't personally go out on every parcel and
 (18) appraise them but in the Chugach Islands there's privately
 (19) held parcels In Rocky Bay Windy Bay the logging operations
 (20) the track the staging areas that the logging operations occupy
 (21) are taxable and have been appraised The personal property
 (22) contained thereon are - are taxable and that pretty much
 (23) speaks to that area within the red circle
 (24) Q Your examination was market wide wasn't it? You didn't
 (25) focus parcel by parcel you were looking at effects of the

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- (1) spill market wide?
 (2) A That's correct
 (3) Q Had this entire area been stigmatized by the oil spill
 (4) such that property values were suspended or greatly curtailed
 (5) your examination would have picked that up wouldn't it?
 (6) A I would have believed it should have because I felt that
 (7) we did a thorough comprehensive analysis At the same time
 (8) if I recall Bradley Lake hydroelectric project was going on in
 (9) the upper Kachemak Bay area and there was a tremendous
 (10) influx
 (11) as well as outflux of taxable property things going on
 (12) fluctuations in taxable values for that Tax Code Area 67 were
 (13) affected by taxable values within that one project If I
 (14) recall there was - I think it was a \$10 million laser tunnel
 (15) boring machine that went on the tax roll for one of those years
 (16) and then was - was removed and other properties came on in
 (17) place So fluctuations in taxable values for that whole tax
 (18) code area could be affected one way or the other by some
 (19) certain things like Bradley Electric Project
 (20) MR DIAMOND Do you have Mr Stoll's equation? Can
 (21) you put that up
 (22) THE COURT Counsel how much further do you have to
 (23) go?
 (24) MR DIAMOND Just two minutes He's out of town
 (25) I'd like to let him go
 (26) THE COURT Okay

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- (1) BY MR DIAMOND
 (2) Q On Mr Stoll's chart here his example if a property owner
 (3) thought that for the year following the spill his property was
 (4) worth zero on the market no marketability the tax savings
 (5) would have been \$230 if you had -
 (6) A Correct
 (7) Q Under this hypothetical?
 (8) A Under that hypothetical situation
 (9) Q Do you get complaints and appeals for amounts of \$230 or
 (10) less?
 (11) A I believe that every year we have at least several that are
 (12) very insignificant and infinitesimal values or tax savings as a
 (13) result of the reduction in the assessed value Many people
 (14) appeal because they don't feel that their property is taxable
 (15) because they don't get any services from the borough
 (16) especially in the remote areas
 (17) Q Did you receive appeals from anyone concerning the -
 (18) claiming that the oil spill had reduced their property values?
 (19) A No sir To the best of my knowledge there were no
 (20) appeals informally administratively or formally directly
 (21) attributable to the oil spill
 (22) Q How many inquiries were made to your office not formal
 (23) appeals but just inquiries about whether the spill would
 (24) result in a reduction of property taxes?
 (25) A My appraiser for the Seward area had one call - and I

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- (1) don't recall if it was within the appeal period or if it was
 (2) later on in the summer - from a landholder I believe over in
 (3) Day Harbor called and inquired if there was any reductions in
 (4) assessed value actually asked are there any tax reductions as
 (5) a result of the spill And the appraiser talked to him and
 (6) there was no follow up or follow through by the taxpayer and
 (7) that was the only indication or any sign of anyone inquiring
 (8) about values and the spill
 (9) Q So just one out of 60 000 parcels?
 (10) A That is correct
 (11) Q Finally Mr Stoll showed you two annual reports one for
 (12) July 88 and one for July 89 If you can take the July 89
 (13) report of assessment in tax - taxation the values that are
 (14) reflected in here are as of what date?
 (15) A As of January 1
 (16) Q So the 1989 report reflects fair market value of properties
 (17) from January 1988 to December 31 1989 - or January 1 1989?
 (18) A The 1988 assessed values are January - from January 1 -
 (19) actually January 2nd technically speaking January 2nd of
 (20) 1987
 (21) Q Well I'm holding up a report that says July 31 1989
 (22) This would reflect the values of the Kenai Peninsula Borough
 (23) the prior year 1988?
 (24) A That is correct
 (25) Q And the 1988 report would reflect fair market value in

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- (1) 1987?
 (2) A That is also correct
 (3) Q So what Mr Stoll had you do was to compare changes from
 (4) 1987 two years before the spill to 1988 one year before the
 (5) spill?
 (6) A That would be correct
 (7) MR DIAMOND Thank you No further questions
 (8) MR PETUMENOS While he's getting that I have one
 (9) question and only one
 (10) THE COURT Go ahead
 (11) RECROSS EXAMINATION OF WAYNE D HAERER
 (12) BY MR PETUMENOS
 (13) Q The Windy Bay timbering operation that you mentioned that
 (14) wasn't taxed at all in 1989 it wasn't taxed until 1990 am I
 (15) right?
 (16) A The Windy Bay - I don't recall specifically The Windy
 (17) Bay Rocky Bay timber operation some of that has been made
 (18) taxable The rest of it is pending taxability subsequent to a
 (19) final determination by myself and our legal staff as to how
 (20) it's going to be assessed and taxed
 (21) BY MR PETUMENOS
 (22) Q My question was just whether it was taxed in 1989 sir
 (23) A I don't recall specifically sir
 (24) RECROSS EXAMINATION OF WAYNE D HAERER
 (25) BY MR STOLL

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- (1) Q I have just one question Mr Haerer I show you what has
 (2) been marked as Exhibit 8233 and this is the report for 1990
 (3) is that correct for - for Kenai?
 (4) A You keep sliding it around
 (5) Q I'm sorry am I doing this right?
 (6) A Yes there is it report must be mailed before July 31st
 (7) 1990
 (8) Q And I turn your attention to the page dealing with the Tax
 (9) Code Area 67 and the value then by 1990 is a total for all
 (10) properties in the remote area is \$42 765 200?
 (11) A That is correct
 (12) Q And then just to go back to the 1988 one that's still less
 (13) than the 1988 total assessed value this is Exhibit 8235 isn't
 (14) that correct?
 (15) A That's what those numbers state yes sir
 (16) MR STOLL That's all
 (17) MR DIAMOND Nothing further
 (18) THE COURT All right you can step down sir
 (19) I'll let you go Don't talk about the case with anyone and
 (20) we'll see you tomorrow at 8 30
 (21) (Jury out at 1 40 p m)
 (22) THE COURT Counsel the jury is not present
 (23) Anything further?
 (24) MR DIAMOND Yes some exhibits Your Honor
 (25) MR STOLL Your Honor on the exhibits I would

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- (1) offer -
 (2) MR DIAMOND May I go back to the prior witness so
 (3) we can -
 (4) MR STOLL I'm sorry
 (5) MR DIAMOND With respect to Mr MacSwain there were
 (6) two exhibits on redirect 14785 and -786 785 was the letter
 (7) from Kodiak Island Borough and -786 was simply the numbers
 (8) that he gave us on this chart for per acre values
 (9) (Exhibits 14785 and 14786 offered)
 (10) MR PETUMENOS I don't think we have any objection to
 (11) those Judge
 (12) THE COURT They're admitted
 (13) (Exhibits 14785 and 14786 received)
 (14) MR PETUMENOS I had some to admit from my
 (15) cross examination
 (16) THE COURT Of the same witness?
 (17) MR PETUMENOS Of the same witness
 (18) MR PETUMENOS Would the Court indulge me at this
 (19) late hour just one minute to find them?
 (20) THE COURT Sure but Mr Stoll fill the gap
 (21) MR STOLL Your Honor the exhibits I've got is 8228
 (22) which is the map of the millage rate exhibits and then 8233
 (23) which is the 1990 assessment report 8234 which is 1989 and
 (24) 8235 which is 1988's annual report and assessment taxation
 (25) (Exhibits 8228 8223 8234 and 8235 offered)

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- (1) MR DIAMOND Your Honor these reports have lots of
- (2) information in them The numbers are in the record I know
- (3) you re anxious to avoid larding it up what is reasonably
- (4) necessary
- (5) THE COURT Can you take pages out of it?
- (6) MR STOLL We can take the cover page
- (7) THE COURT I ll admit the pages testified to
- (8) MR DIAMOND There may be some cover pages I would
- (9) like as well May I consult with counsel about that
- (10) MR STOLL Why don t you just tell us whatever you
- (11) want in there and maybe we ll agree to that
- (12) THE COURT Go ahead
- (13) MR PETUMENOS I move into evidence Exhibit 9004
- (14) which is the notes of the various survey respondents in
- (15) Mr MacSwain s cross examination the pages testified to only
- (16) (Exhibit 9004 offered)
- (17) MR DIAMOND Your Honor that s plainly hearsay
- (18) these are out of court statements made to him and they re only
- (19) excerpts
- (20) THE COURT You want the complete -
- (21) MR DIAMOND If counsel wants to put in a complete
- (22) compendium we would agree to do that -
- (23) THE COURT You got it
- (24) MR PETUMENOS All right Exhibit 9004 then is
- (25) admitted? That is a question

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- (1) THE COURT Yes that s right I m sorry I should
- (2) have explained
- (3) (Exhibit 9004 received)
- (4) MR PETUMENOS Exhibit 8500 is the Kodiak Island
- (5) Borough tax sheets relating to the two properties in the
- (6) green - with the green bar that the witness acknowledged was
- (7) those things although he said he hadn t seen them before he
- (8) did recognize what they were and I move them into evidence
- (9) They reflect - the relevance is that they reflect the poor
- (10) access to the properties involved and that s Exhibit 8500
- (11) (Exhibit 8500 offered)
- (12) MR DIAMOND Your Honor I don t know that there s
- (13) any foundation for the document The witness had not seen
- (14) them
- (15) before They re handwritten documents I have -
- (16) THE COURT I ve lost them Come and show me what
- (17) they are
- (18) MR PETUMENOS Perhaps on the foundation issue if
- (19) the issue is whether or not these are the tax records of the
- (20) borough the tax assessment cards of the borough to save us
- (21) the time of my having to call the tax assessment witness in
- (22) rebuttal counsel and I can work out a stipulation on the
- (23) authenticity and foundation of the documents rather than
- (24) belabor this
- (25) THE COURT Okay counsel what about it?
- (26) MR DIAMOND I m happy to consult with

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- (1) Mr Petumenos I would like to talk to my witness about
- (2) these -
- (3) THE COURT Sure fine
- (4) MR DIAMOND - whether they re actually government
- (5) records or not
- (6) THE COURT I m admitting them you have to get them
- (7) out They re in the record you can move to get them out
- (8) Them being -
- (9) MR PETUMENOS I move in 8502
- (10) THE COURT - 8500
- (11) (Exhibit 8500 received)
- (12) MR PETUMENOS Sorry Judge I interrupted
- (13) I move in 8502 which is the Court order and I will work
- (14) with counsel on what pages are appropriate pages to move in
- (15) so
- (16) we keep out -
- (17) (Exhibit 8502 offered)
- (18) THE COURT Sure there s only one appropriate page
- (19) MR PETUMENOS I think you incorporate by reference
- (20) the federal orders so I ll have to make reference to that
- (21) MR DIAMOND No objection
- (22) MR PETUMENOS I don t know if the Court s available
- (23) this afternoon There may be a dispute about some exhibits for
- (24) tomorrow s witness that you asked us to take up in advance
- (25) when
- (26) we can I have not yet had an opportunity to find out from
- (27) Exxon what - whether they re going to pursue the exhibit

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- (1) THE COURT Who s tomorrow s witness?
- (2) MR PETUMENOS Mr Papke in this instance and I
- (3) don t know whether - could I notify the Court if I need a
- (4) hearing this afternoon?
- (5) THE COURT Sure
- (6) MR OPPENHEIMER Your Honor I don t see any reason
- (7) why this can t - Mr Petumenos and I have talked on occasion
- (8) and if it comes up we ll raise it before the jury
- (9) MR PETUMENOS And I have an issue pending that I
- (10) don t think is controversial I ve been dealing with
- (11) out of state counsel on the issue I guess relating to the
- (12) discovery of verbatim tape recordings of witnesses I had
- (13) learned from a witness I interviewed that Exxon is in
- (14) possession of a verbatim tape recorded statement of a witness
- (15) The defendants counsel has asked me find authority for
- (16) discoverability of a verbatim taped statement which I think is
- (17) routine in Alaska I will go find the authority if the Court
- (18) requires but I think it would be a routine matter to have that
- (19) material turned over and I was going to seek an order right
- (20) now to have it turned over
- (21) THE COURT This is a taped statement for which a
- (22) transcript has been prepared?
- (23) MR PETUMENOS I don t know if a transcript has been
- (24) prepared or not but it is not a writing down of notes of a
- (25) witness It is my understanding it is a verbatim taped

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- (1) statement
- (2) THE COURT Okay counsel
- (3) MR DIAMOND Your Honor this is not my work product
- (4) but it s work product of another attorney on the case
- (5) THE COURT A taped statement of the witness?
- (6) MR DIAMOND The rule says the witness is entitled to
- (7) it if he so requests It does not say that the verbatim
- (8) transcript is so requested and I ve consulted with Alaska
- (9) counsel who tell me this is not routinely discoverable The
- (10) questions that a lawyer decides to pose during the course of an
- (11) interview are his own work product Counsel is free to inquire
- (12) and has inquired of the very same witness into those matters
- (13) but what we choose to ask the witness about is our own - is
- (14) our work product whether we take notes of those questions or
- (15) whether we record them and the answers verbatim
- (16) THE COURT You got a case for that proposition
- (17) counsel?
- (18) MR DIAMOND I will look for a case My reading of
- (19) the rule says that the verbatim transcript is something that
- (20) must be turned over to the witness if he so requests Several
- (21) weeks ago we asked Mr Petumenos for authority for his
- (22) proposition and he hasn t furnished us -
- (23) THE COURT That may be so What rule are you talking
- (24) about? By the way what in state counsel gave you that
- (25) information counsel?

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- (1) MR DIAMOND What in state counsel?
- (2) THE COURT Yes
- (3) MR DIAMOND Through Mr Grant I understood that
- (4) that was the advice that was given to him by Mr Bauermeister
- (5) and Mr Serdahely that verbatim interviews still have
- (6) attorney s work product
- (7) THE COURT Then Mr Bauermeister is here Maybe he
- (8) can cite the authority
- (9) MR DIAMOND I just asked him for the rule
- (10) THE COURT Well if there s case authority He s an
- (11) Alaskan lawyer he should know what the case is if in fact
- (12) there is a contested issue
- (13) MR BAUERMEISTER Judge I have the cases in my
- (14) office You want me to go get them?
- (15) THE COURT Absolutely
- (16) MR PETUMENOS Apparently we re not going to resolve
- (17) that in the next two minutes My last matter is -
- (18) THE COURT Wait a minute I want to know the scope of
- (19) the dispute What rule are you referring to? I still have
- (20) that question pending
- (21) MR DIAMOND Tim do you know what rule it is? You
- (22) cited it today
- (23) MR PETUMENOS I am only aware of a Supreme Court
- (24) case which the name escapes me right now which was very
- (25) recent that seemed to indicate to me that an adjutor s

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- (1) verbatim tape statement was not investigatory or work product
- (2) and had to be disclosed and I have routinely got tape recorded
- (3) statements just turned over in discovery So I was - I don t
- (4) know what rule you re relying on either Langdon the
- (5) Langdon
- (6) versus Champion case is the one I m referring to
- (7) MR FORTIER 1988 case Your Honor I think in the
- (8) past year there s - I can t remember the case but -
- (9) MR PETUMENOS Counsel s right The Langdon versus
- (10) Champion case is the one I m remembering
- (11) THE COURT Is what?
- (12) MR PETUMENOS Is the one I m remembering in which
- (13) there was an attempt to withhold a verbatim statement from the
- (14) other side on the grounds of work product and it was -
- (15) MR OPPENHEIMER Do you recall was that an adjutor
- (16) who took the statement?
- (17) MR FORTIER It was
- (18) MR PETUMENOS I don t think it makes any difference
- (19) whether it was an attorney or not
- (20) MR OPPENHEIMER To the application of the privilege
- (21) and work product rules
- (22) MR FORTIER I believe it doesn t make any
- (23) difference
- (24) THE COURT That means counsel under that - at
- (25) least as I understand the general proposition you re putting
- (26) forward that all you have to do to shield anybody from

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- (1) discovery is have a lawyer ask him the questions instead of an
- (2) investigator Does that make sense to you?
- (3) MR OPPENHEIMER Your Honor having jumped into this
- (4) foray because I can t stay away from a good legal argument -
- (5) THE COURT You take the punishment
- (6) MR OPPENHEIMER The cases I m familiar with I m not
- (7) Alaska counsel but the Ford issue that controls this in the
- (8) federal court makes it quite clear if a lawyer asks questions
- (9) during interview the lawyer s questions are protected The
- (10) identity of the witness the right to ask questions of that
- (11) witness is not affected by that rule but the actual lawyers
- (12) questions are protected because they re irrelevant and work
- (13) product
- (14) THE COURT All you would do is give the answers?
- (15) MR OPPENHEIMER The lawyers are entitled to the
- (16) information and in discovery to the identity of the witness
- (17) So they may ask their own questions and if they have a private
- (18) interview of their own their questions are entitled to
- (19) protection but I m speaking to what I understand to be the
- (20) federal rule I don t purport to speak to Alaska law
- (21) THE COURT Does that apply to statements taken of
- (22) clients or does it apply to statements taken of disinterested
- (23) fact witnesses?
- (24) MR OPPENHEIMER The Ford case is a disinterested
- (25) third party fact - not a party a fact witness

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- (1) THE COURT This is an interesting issue counsel and
 (2) I want to explore it to great depth and you have to get me
 (3) every single piece of authority
 (4) MR DIAMOND Can I stop looking for the rule because
 (5) I can't put my hands on it
 (6) THE COURT It's enough that you don't know the rule
 (7) counsel
 (8) MR PETUMENOS As the Court is aware under the
 (9) adaptations of the civil rules now without request I think
 (10) under 16 1 verbatim taped statements must be turned over I
 (11) think that's also the case with federal rule
 (12) THE COURT I understand what Mr Oppenheimer's
 (13) saying I want to see the cases because I'd be interested to
 (14) see what the analysis is find out why a fact witness would be
 (15) shielded his statement would be shielded from discovery
 (16) MR PETUMENOS Finally I want to move into evidence
 (17) Exhibit 8501 which is the little circles I've been drawing
 (18) with respect to Mr MacSwain on cross examination this is my
 (19) bookend exhibit if you will
 (20) (Exhibit 8501 offered)
 (21) THE COURT Just as long as you don't move the geese
 (22) in counsel
 (23) MR PETUMENOS I'd be in big trouble with my wife if
 (24) I lost the evidence
 (25) MR DIAMOND This is the only one of the bunch that I

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- (1) object to and that's because the circles that were drawn by
 (2) Mr Petumenos - though I can't seriously believe he wants this
 (3) in evidence are you -
 (4) MR PETUMENOS I do
 (5) MR DIAMOND He does He drew circles around Prince
 (6) William Sound and he got nonresponsive answers so there are
 (7) not nonresponsive answers but the witness could not agree
 with
 (8) his statements So what we have are markings by counsel and
 (9) assertions but the witness responded I don't know
 (10) MR PETUMENOS I don't think that's accurate I
 (11) don't think the witness did respond that -
 (12) THE COURT I'll defer on that and you can provide me
 (13) the transcript that supports admission of that document
 (14) MR PETUMENOS Then lastly I keep saying that
 (15) Exhibit 8505 and Exhibit 8508 are the circles that I drew in
 (16) connection with the last witness regarding the jurisdiction
 (17) (Exhibits 8505 and 8508 offered)
 (18) THE COURT Counsel?
 (19) MR DIAMOND My only problem with these is that
 (20) there's - if you try to match up the transcript since they
 (21) weren't identified at the time it's going to be hopeless and
 (22) I had - I had some questions of Mr Haerer about the red
 (23) circle which I thought was inaccurate and he said it was
 (24) inaccurate So this one I have problems with I don't have
 (25) any problems with 8508

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- (1) THE COURT They're both admitted
 (2) (Exhibit 8505 and 8508 received)
 (3) MR PETUMENOS This is a clerk thing Mr Gargan had
 (4) moved in PX3217 sometime ago probably a million years ago
 now
 (5) it seems like and he should have moved in DX3217 That
 (6) correction for the record
 (7) (Exhibit DX3217 offered)
 (8) THE COURT It would be DX exhibit rather than PX
 (9) All right anything else? Okay if you need to call me this
 (10) afternoon again I don't guarantee that I'll be available but
 (11) I'll certainly try to make myself available especially for
 (12) those discovery points I've really perked up on this one
 (13) MR DIAMOND I'm really happy Mr Oppenheimer jumped
 (14) into the fracas He'll visit with you this afternoon
 (15) MR OPPENHEIMER Never volunteer in this case Never
 (16) volunteer in this case
 (17) THE CLERK Please rise This court stands in
 (18) recess
 (19) (Recess at 1 55 p m)

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(1) STATE OF ALASKA)
(2) Reporter s Certificate
(3) DISTRICT OF ALASKA)
(6) I Joy S Brauer RPR a Registered Professional
(7) Reporter and Notary Public
(8) DO HERBY CERTIFY
(9) That the foregoing transcript contains a true and
(10) accurate transcription of my shorthand notes of all requested
(11) matters held in the foregoing captioned case
(12) Further that the transcript was prepared by me
(13) or under my direction
(14) DATED this day
(15) of 1994
(21) JOY S BRAUER RPR
Notary Public for Alaska
(22) My Commission Expires 5-10-97

Vol 40 6607

(1) EXHIBITS
(2) 8501 offered 6515
(3) 8502 offered 6516
(4) 8005 offered 6516
(5) 14785 and 14786 offered 6593
(6) 8228 8223 8234 and 8235 offered 6593
(7) 9004 offered 6594
(8) 8500 offered 6595
(9) 8502 offered 6596
(10) 8501 offered 6602
(11) 8505 and 8508 offered 6603
(12) DX3217 offered 6604
(14) 14785 and 14786 received 6593
(15) 9004 received 6595
(16) 8500 received 6596
(17) 8505 and 8508 received 6604

Look-See Concordance Report

 UNIQUE WORDS 2,517
 TOTAL OCCURRENCES
 11,518
 NOISE WORDS 385
 TOTAL WORDS IN FILE
 35,414

SINGLE FILE CONCORDANCE**CASE SENSITIVE**

 NOISE WORD LIST(S)
 NOISE NOI

 INCLUDES ALL TEXT
 OCCURRENCES

 IGNORES PURE NUMBERS

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(1) IN THE SUPERIOR COURT OF THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Tuesday August 23 1994
) 8 39 a m
 (6))
 (8) VOLUME 42 Pages 6609 through 6802
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
 (17) FOR THE PLAINTIFF
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 2550 Denali Street Suite 1505
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(1) PROCEEDINGS
 (2) (Jury in at 8 39 a m)
 (3) (Call to Order of the Court)
 (4) THE CLERK Please be seated
 (5) THE CLERK Sir can you attach the microphone and
 (6) remain standing for the oath?
 (7) MR. DIAMOND I'm supposed to say first we call as
 (8) our next witness Berne Vockner
 (9) A How does it work?
 (10) THE CLERK That's fine Could you stand up now for
 (11) the oath please Raise your right hand
 (12) (The Witness is Sworn)
 (13) THE CLERK Please be seated
 (14) Sir for the record can you please state your full name?
 (15) A Full name is Berne Vockner V o c k n e r
 (16) THE CLERK Can you spell your first name please?
 (17) A B like in boy e r n e, better known as Berne
 (18) THE CLERK And your occupation?
 (19) A Real estate broker
 (20) DIRECT EXAMINATION OF BERNE VOCKNER
 (21) BY MR. DIAMOND
 (22) Q Good morning Mr. Vockner
 (23) A Good morning
 (24) Q How long have you been involved in real estate?
 (25) A Since '71

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(1) Q And has that been here in Alaska?
 (2) A Yes that's correct
 (3) Q People arrive in Alaska in interesting ways I understand
 (4) you got here on skis Tell the jury about that
 (5) A Almost like that I was a member of the Austrian ski team
 (6) and was fortunate enough to come over here and see this
 (7) beautiful country and basically made efforts to come over here
 (8) for a longer period and accomplished that, and finally ended up
 (9) in Fairbanks Alaska in the mid 60s and - 64 actually
 (10) 65 and was up in Fairbanks to 70 and had my own ski shop
 (11) sporting goods up there And then -
 (12) Q You got involved in real estate in an interesting way
 (13) Tell us
 (14) A Well what happened is some partners of mine in a ski shop
 (15) had an option on a building and the ski shop kind of was doing
 (16) medium well in Fairbanks where the cold and all that is
 (17) expected probably but First National Bank expanded and the
 (18) location was right next to it and when the option was
 (19) exercised we made pretty good money on that at least for me
 (20) at the time And I thought well if real estate business must
 (21) be real easy I got my license and basically that's how I got
 (22) into real estate How little did I know then
 (23) Q How long have you been selling real estate out of
 (24) Anchorage as opposed to Fairbanks?
 (25) A I never sold real estate in Fairbanks I started selling

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- (1) in Anchorage in '71 got my broker license probably two three
 (2) years later maybe four years don't know exactly anymore and
 (3) basically had my own business ever since
 (4) Q Have you done things ally to real estate other than just
 (5) acting as a broker for buyers and sellers?
 (6) A I've done some development and things like that Basically
 (7) all aspects and phases of real estate from subdividing
 (8) development condominiumizing owning apartment buildings
 (9) name
 (10) it I've probably done it
 (11) Q Have you been on a board of a local bank?
 (12) A Right I was for about six years on board of First
 (13) Interstate Bank was on the loan committee there and several
 (14) other committees and went through the good and bad years of
 (15) the bank
 (16) Q Do you currently have a specialization?
 (17) A Yeah firm specializes basically in remote properties We
 (18) only do that anymore We found kind of a corner in the market
 (19) nobody really is doing to any great extent and it - for a
 (20) small firm like we are it's just myself and my wife it's
 (21) adequate business and seemed to work out quite well for us
 (22) Q Do you handle properties for buyers and sellers in the
 (23) Prince William Sound?
 (24) A That's correct I work basically the whole state Prince
 (25) William Sound is a small aspect of our business but we
 (26) basically cover the whole state

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- (1) Q How about the outer Kenai and Kachemak Bay area?
 (2) A We have properties in Kenai Kachemak Bay also
 (3) Q Okay Could you just give us - I put on the Barco a map
 (4) of the South Central Region Just tell us where the principal
 (5) recreation areas are and what's there in South Central Alaska
 (6) that you handle
 (7) A The principal areas we're dealing in and probably one of
 (8) our bigger areas I would say would be what I call the
 (9) Matanuska Susitna area or the basin basically down in by the
 (10) mountains as you look north McKinley Alaska Range and
 (11) same
 (12) basically westerly That's probably our biggest area for
 (13) recreation I'll try to draw a circle around here
 (14) Q And what are some of the other areas where you -
 (15) A Some of the other areas I would say again go down into the
 (16) - to the Kenai Peninsula come over to those areas and then
 (17) we're dealing quite a bit out over in this area here and also
 (18) in the interior area and farther north
 (19) Q In terms of names the interior region includes Talkeetna?
 (20) A Personally I - I don't call Talkeetna interior region
 (21) but I guess you could
 (22) Q You handle properties there?
 (23) A Yeah we handle properties in Talkeetna actually quite a
 (24) bit of property up there It's quite popular in the wintertime
 (25) with snowmobilers and recreation type of purposes
 (26) Q Okay Most of your buyers looking for recreational

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- (1) properties?
 (2) A Yeah it's that and we also deal in lodges but most of
 (3) our buyers it's basically some form or another of recreation
 (4) Q Tell us where your buyers come from
 (5) A I would say it's a mix of roughly about oh 60/40 I want
 (6) to say 60 percent being out of state buyers and 40 percent
 (7) being locals somewhere in that neighborhood
 (8) Q And how do you get them?
 (9) A Through advertising We advertise probably in all major
 (10) magazines what have something to do with recreation type of
 (11) deal Also we publish one of our color brochures here and
 (12) this one goes out basically 40 000 copies per year in form of
 (13) direct mail and other forms of inquiries It's going to be
 (14) mailed out that way It's updated continuously by an insert
 (15) sheet so most of our buyers basically come through advertising
 (16) or word of mouth We're pretty much known as the ones to talk
 (17) to when you look for something
 (18) Q I see a prospective buyer here at counsel table
 (19) A I hope so
 (20) Q I'll introduce you at the next break
 (21) A Okay
 (22) Q How many brokers are there that specialize in remote
 (23) recreational property in South Central Alaska?
 (24) A I think there's a few of them dabbling in it but I believe
 (25) that we're probably the only one who's doing it at any great

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- (1) scale
 (2) Q What's your best estimate as to the percentage of the
 (3) market that you have?
 (4) A I would say we probably have 75 percent of the market in
 (5) sales
 (6) Q Is it difficult for you as a broker to know what's
 (7) available for sale in the remote recreational property market?
 (8) A Not really because you constantly talk with people who
 (9) either own property have property or read the advertising in
 (10) the paper so you pretty much keep up to date what's going on
 (11) out there
 (12) Q Okay What percentage of the listings for remote
 (13) recreational sites in Prince William Sound and the Kenai do you
 (14) expect end up as your listings?
 (15) A I would say - and I want to exclude some private
 (16) subdivision - some people did themselves on their own
 (17) marketing I would say - other than that I would say we end
 (18) up in those areas probably with half of the properties and
 (19) maybe more
 (20) Q I want to talk to you about the markets for various kinds
 (21) of properties in Prince William Sound and the Gulf of Alaska
 (22) is there much of a market for large wilderness tracts
 (23) something in the thousands of acres?
 (24) A Really there isn't People usually looking for five-acre
 (25) parcels and five acres for a lot of people is a pretty good

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- (1) chunk of remote properties The large parcels first of all
 (2) the only thing I can use probably compare is one of the local
 (3) brokers has a large 4500 acre parcel here across the Inlet
 (4) basically covers the whole northern peninsula what backs up to
 (5) the Inlet on the Kenai side and it's been on the market I
 (6) would say now for probably two years and possibly longer
 (7) And I meet with him now and then for lunch and he wants me to
 (8) sell it and I wish I could if I would have any buyers but
 (9) basically no activities on it
 (10) Q Is there any history of sales of large parcels of remote
 (11) wilderness in Prince William Sound or the Gulf of Alaska other
 (12) than for park land?
 (13) A Not to my knowledge but maybe something out I haven't
 (14) seen but I would say I don't know of any large parcels in
 (15) acreage you're describing
 (16) Q Any brokers who specialize in large tracts of wilderness
 (17) property?
 (18) A Not really They'd be starving to death
 (19) Q Any banks that finance those kinds of purchases?
 (20) A Not to my knowledge And I take that back if somebody has
 (21) a million dollars in the bank they probably lend them the
 (22) million dollars back but there is physically no financing
 (23) available for that
 (24) Q Let's talk recreational properties in Prince William Sound
 (25) Kenai What does that mean?

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- (1) A At this time means to us we define recreation property
 (2) properties what can be used for - for some purpose such as
 (3) fishing hunting photography or for some people just to
 (4) plain get away and hide from the telephone
 (5) Q Are most of the recreational properties in Prince William
 (6) Sound and the Gulf near the water?
 (7) A I would say a good portion although there is some
 (8) properties or subdivision where they have waterfront lots in
 (9) the front of the subdivision and in the back they have other
 (10) properties Usually the back lots you can't give away
 (11) Q Let's talk subdivisions versus privately owned lots in
 (12) Prince William Sound and the Kenai Let's take Prince William
 (13) Sound first Are most of the recreational properties in
 (14) subdivisions or in private lots?
 (15) A Most we have are subdivision with the exception of very -
 (16) actually one of them was a private lot a bigger parcel
 (17) Q How about along the Kenai?
 (18) A Pretty much the same There is somewhat private parcels in
 (19) there but it's - again you know I would describe it more or
 (20) less as a subdivision unless they are huge parcels
 (21) Q I want to talk to you about the market for remote
 (22) recreational property generally in South Central Alaska in the
 (23) few years prior to the oil spill The oil spill was March of
 (24) 1989 Can you describe for the jury what the market was like
 (25) back in 1987 and 1988?

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- (1) A The market for recreation property was basically as good as
 (2) nonexistent The local economy basically went through hell
 (3) Houses were selling for half the prices People left in
 (4) droves They couldn't make the house payment and they sure
 (5) the heck didn't buy any recreation property when they couldn't
 (6) make the house payments so basically was no market We had
 a
 (7) saying basically you had to attach literally dollar bills to
 (8) the property in order to get a buyer It just didn't exist
 (9) Q Any bank foreclosures?
 (10) A Yeah there was tremendous amount of bank foreclosures
 and
 (11) it got worse There was also - I believe there was 13 bank
 (12) failures during that period and basically it was a great
 (13) deep depression here
 (14) Q How many listings did you have in South Central Alaska for
 (15) recreational properties in the two years prior to the oil
 (16) spill?
 (17) A I would say we probably had about 15 listings in the area
 (18) and that was just basically nothing happening
 (19) Q How does that compare to today?
 (20) A Right now we would have in about total of roughly 300
 (21) listings And the area you're talking about call it down to
 (22) Homer and those areas probably 15 some listings
 (23) Q In terms of buyer inquiries that you were getting in 1987
 (24) and 1988 what was the level of buyer interest?
 (25) A Very very low Basically nonexistent

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- (1) Q How does that compare to today?
 (2) A The buyer inquiry in total is lot stronger now and also we
 (3) have more inquiries in the area you were describing earlier
 (4) Q Were the market conditions in Prince William Sound
 (5) comparable to the market conditions generally in South Central
 (6) Alaska for remote recreational property in 1987 and 1988?
 (7) A Very much so I would say equal and possibly worse
 (8) because really nobody had any need to be out there Some
 (9) parcels along the highway up there maybe there was a need if
 (10) somebody wanted to just basically drop out and live off of
 (11) Welfare out there and that's the only buyers we seen then
 (12) Q How about the market for Kenai? Was that comparable to
 the
 (13) market elsewhere?
 (14) A Yeah I would say the whole South Central Region here
 (15) colored in green was the same
 (16) Q There eventually was a recovery You're still in the
 (17) business I take it?
 (18) A Barely yeah
 (19) Q When did things start picking up?
 (20) A Things started picking up I would say about 91
 (21) properties at least We got more inquiries and we seen some
 (22) pickup of the economy I related to the factors that basically
 (23) the FDIC sold a lot of give away properties off I wouldn't
 (24) want to say sell they auctioned them off and gave them away
 (25) and it created probably a void in the market All the parcels

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- (1) were picked up by investors and all that and they brought them
 (2) either back on the market or there was just - it got absorbed
 (3) all the extra stuff out there and I'm talking about the
 (4) economy here on the local basis I mean every week there was
 (5) another auction about something happening here and there
 and
 (6) total give away prices and once that got absorbed it seemed
 (7) that the market started slowly coming back
 (8) Q But the market remained pretty much dormant in 1989 and
 (9) 1990?
 (10) A Yeah there wasn't a whole lot of activity I mean it was
 (11) basically nobody was buying was still in a deep depression
 (12) the whole area
 (13) Q When you say things started recovering in 1991 you have in
 (14) mind listings buyer inquiries?
 (15) A All the of those I would say I had more activities all
 (16) the way around
 (17) Q Did you start seeing a recovery in Prince William Sound
 (18) generally the same time that the remote recreational property
 (19) market improved throughout South Central Alaska or was there
 (20) some sort of lag?
 (21) A Slower probably than some of the other places just
 (22) because of the nature of the properties but there was some
 (23) more activities happening
 (24) Q What do you mean by just by the nature of the properties?
 (25) A Well you got to keep in mind Prince William Sound people

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- (1) love it They hear a lot about it It's a beautiful place to
 (2) be but in order to go to some of the properties we have you
 (3) need to have a fair-sized boat otherwise yeah they may find
 (4) you down in the deep ocean next time around
 (5) So in order for people to go out there they got to make an
 (6) investment of roughly call it 30 to 70 thousand dollars for a
 (7) boat to be safe enough to go out to the properties and
 (8) although it sounded really good for mom and pop to have a
 (9) little lot out there once they look around and see what's all
 (10) involved in order to get out there they kind of scratch their
 (11) head and say now wait a minute if we have to buy that big of
 (12) a boat maybe we just pull in one of those bays every different
 (13) day and have our own barbecue on the boat and stay there and
 (14) we don't have to buy the lot don't have to build an expensive
 (15) cabin and more mobile to move around So it's - it kind of
 (16) is a really tough one from that aspect to sell the properties
 (17) Somebody really really got to have a need and use to really be
 (18) out there and the money to do it
 (19) Q Okay Is that also true with respect to the outer Kenai
 (20) the area below Kachemak Bay?
 (21) A Kenai is so much more of - call it the Homer area You
 (22) got so much more boating activity down there It's so much
 (23) easier to get to those places Getting down to Whittier you
 (24) basically bound by a schedule by the train schedule so it
 (25) makes it very difficult Also it's very very hard to get a

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- (1) boat slip or tie down It's basically a hassle all the way
 (2) through and then people usually choose the seaway out and go
 to
 (3) Seward or basically go down to the Homer here
 (4) Q The recovery in the Kenai area did that also begin in
 (5) 1991?
 (6) A Yeah pretty much all at the same time
 (7) Q I want to talk to you about your knowledge of effects of
 (8) the spill the oil spill on the market in which you operate
 (9) Do you know of any - any deals any transactions for remote
 (10) recreational property in Prince William Sound or the Kenai that
 (11) were canceled as a result of the spill?
 (12) A I didn't have any so nothing was canceled
 (13) Q How about deals that were renegotiated?
 (14) A None of my deals Like I said I didn't have any There
 (15) was no - no renegotiation no nothing happening
 (16) Q Do you have any knowledge of any deals whether yours or
 (17) anybody else's that were in negotiations that got suspended on
 (18) account of the spill?
 (19) A No I don't
 (20) Q Since March of 1989 how many - how many buyers do you
 (21) think you've dealt with concerning remote recreational property
 (22) in South Central Alaska?
 (23) A How many buyers actually closed in South Central Region?
 (24) Q No how many people have contacted you buyers or
 (25) prospective buyers?

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- (1) A Prospective buyers since '89 to now? I would say probably
 (2) fifteen twenty thousand maybe more
 (3) Q That many people?
 (4) A Yeah
 (5) Q You've talked to that many people?
 (6) A Yeah We talk to them or basically send them out
 (7) brochures
 (8) Q How many buyers or potential buyers have you actually
 (9) spoken with either face to face or on the phone?
 (10) A For South Central Region again?
 (11) Q Yeah
 (12) A During the same period?
 (13) Q Since the oil spill
 (14) A I would say pretty much the same answer I gave you
 (15) Q How many of them have mentioned the oil spill in any way?
 (16) A I would say we had very very little mentioning at all I
 (17) would say a total of one or two people ever even brought it -
 (18) even brought it ever up about it and then it was not a - not
 (19) directly about buying it was maybe somebody calling from -
 (20) from the 48s and saying I heard the oil spill or something
 (21) like that but they weren't necessarily looking for the area
 (22) It was just very very casual mention type of deal
 (23) Q This is not something that you're answering for the first
 (24) time today I've asked you to think about this question for a
 (25) number of days?

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- (1) A Right
 (2) Q And you can only think of two people who mentioned it?
 (3) A Yeah I can only think of one person and I believe it was
 (4) even during the oil spill And the reason I remember is we
 (5) found out later on that we both were in Fairbanks during the
 (6) flood which was in the late 60s and he was looking for some
 (7) property I believe he must have been a hunting guide or
 (8) something like that because he needed something where he
 could
 (9) work out basically a small commercial operation and at the
 (10) time I - I didn't have anything to suit him and basically
 (11) it - it didn't work out but I don't know if the guy ever
 (12) found something or not but nevertheless that's the only one I
 (13) can really remember because of - turned out basically we were
 (14) living next to each other
 (15) Q Have any of your clients your buyers or prospective
 (16) buyers asked you to steer them away from Prince William
 Sound
 (17) or the Kenai because of the spill?
 (18) A No
 (19) Q Have any told you that they feared contamination on account
 (20) of the spill?
 (21) A Never came up
 (22) Q Other than the two people that you've been able to
 (23) recollect over the past five years can you think of any
 (24) potential buyers who've questioned you about the spill?
 (25) A No

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- (1) Q About its continuing environmental effects?
 (2) A No
 (3) Q About possible cleanup or compliance problems if they
 (4) bought property in this area?
 (5) A No
 (6) MR DIAMOND Thank you very much
 (7) MR PETUMENOS Could I have the map back up?
 (8) CROSS EXAMINATION OF BERNE VOCKNER
 (9) BY MR PETUMENOS
 (10) Q Mr Vockner good morning
 (11) A Good morning
 (12) Q My name is Tim Petumenos and I represent the Native
 (13) Corporations in this case We have never talked before right?
 (14) A I don't recall
 (15) Q Not one second one minute right?
 (16) A Are you the gentleman who wanted to talk to me and talk to
 (17) me on the telephone?
 (18) Q No I don't think so
 (19) A And I was very busy If it was you I'm sorry but I - we
 (20) had a real whirlwind of inquiries of attorneys I kind of got
 (21) into this thing and I didn't have the time If it was you I
 (22) apologize
 (23) Q It was - how many times did you talk to Exxon lawyers?
 (24) A Probably three times
 (25) Q And I think you described this trial as a three-ring

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- (1) circus
 (2) A I did yeah
 (3) Q Yes And it became a -
 (4) A I did not describe the trial as a three ring circus I
 (5) described the way people tried to contact me and wanted
 (6) information and I said I don't want to get in a three ring
 (7) circus about that so you misused the -
 (8) Q Okay So what happened was you met with Exxon three
 times
 (9) but by the time we called you you were tired of lawyers and
 (10) didn't want to meet right?
 (11) A Actually you were the second - if it was you in fact
 (12) who called you would have been the second one after Exxon
 and
 (13) I was very very busy This is our time basically like the
 (14) farmer's say you got to make hay when the sun shines so I
 (15) didn't have the time I apologize
 (16) Q The apology's accepted and I understand completely
 (17) MR DIAMOND I told him he could do some free
 (18) advertising today
 (19) MR PETUMENOS Okay
 (20) BY MR PETUMENOS
 (21) Q Exhibit 8504 And I want you to know I'm going to move
 (22) this into evidence and if Mr Diamond objects it's his
 (23) fault
 (24) MR DIAMOND That was part of the agreement?
 (25) A That's between you two I got nothing to do with that

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- (1) BY MR PETUMENOS
 (2) Q There's at least 12 people who get to read it anyway
 (3) A Good You want more?
 (4) Q Exhibit 8504 Mr Vockner is your brochure How often do
 (5) they come out?
 (6) A Twice a year
 (7) Q Twice a year and what is the brochure for this one?
 (8) What's the date period of time?
 (9) A We don't keep any dates on it purposely since we only do
 (10) it twice a year People think they get outdated information
 (11) I believe you got the newest one there
 (12) Q Okay In the area of the outer Kenai - and what I'm
 (13) talking here about the outer Kenai is the area from - you
 (14) know where Nanwalek or English Bay is?
 (15) A Yeah
 (16) Q All the way up the coast here the Kenai Fjords and that
 (17) area you don't have in this brochure any listings or any
 (18) properties in that area do you?
 (19) A No not right now
 (20) Q Not a one And in the Prince William Sound area if you
 (21) look at this page right here where it says oceanfront
 (22) properties -
 (23) A I got to put my specs on here
 (24) Q Sure I'll find it for you
 (25) A Okay

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- (1) Q I was looking through your brochure and these are the only
 (2) properties that I could find that you have listed in Prince
 (3) William Sound -
 (4) A Okay
 (5) Q - area Alice Cove?
 (6) A Okay
 (7) Q Where is Alice Cove?
 (8) A General description would be between Cordova and Valdez
 (9) Q Well I know this is going to be off probably by a whole
 (10) bunch but I'm just going to put a little dot here if that's
 (11) okay More or less right in there where I put it?
 (12) A That's close enough yeah
 (13) Q And then you have another one on LaTouche Island?
 (14) A That's correct
 (15) Q An acre and a quarter?
 (16) A We got several on LaTouche Island but yeah We probably
 (17) got four or five properties in LaTouche Island
 (18) Q Are they all in the same place?
 (19) A All in the same subdivision correct The reason you
 (20) probably don't see them all it's very bad when people see
 (21) there's like five or six properties in a subdivision so we
 (22) only usually list maybe one or two so it's better marketing
 (23) for us works better
 (24) Q That's it right? Is there any others in your brochure?
 (25) A Yeah I see a whole bunch of oceanfront properties here

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- (1) Q Yeah I see them too but I'm talking about the Prince
 (2) William Sound outer Kenai area not Kachemak Bay or this area
 (3) where the red line is Do you see any others?
 (4) A Maybe Jack Bay in there but it possibly may not be in
 (5) there No it's not in there but we had one in Jack Bay
 (6) too
 (7) Q For the people who are calling you and not asking about the
 (8) oil spill in your listings there the only thing they would
 (9) find in your brochure is this one and this one right?
 (10) A That's correct out there yeah
 (11) Q Let me show you next also what's been marked as Exhibit
 (12) 8503 Do you know a fellow named Hub White?
 (13) A No
 (14) Q Take a look at 8503 and tell me if you recognize it
 (15) A It went to Associated Inc 326 Center Avenue Suite 1
 (16) Do you want me to read the whole thing?
 (17) Q No I just want you to - I just want to know if you
 (18) recognize the letter
 (19) A I don't recognize the letter no I can read it You want
 (20) me to read it and see if I recognize it then?
 (21) Q I don't think so I just wanted you to - is this a letter
 (22) that you ever received or saw?
 (23) A No
 (24) Q Did you ever get involved with this property in Port Lions?
 (25) A Yes

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- (1) Q Okay And how did you get involved?
 (2) A A lady contacted me through her children who live up here
 (3) elderly lady that her husband passed away and she wanted to
 (4) sell the property If this is the one we're talking about in
 (5) Port Lions yeah and we did sell that property
 (6) Q Do you remember when you sold it?
 (7) A I want to say maybe 91 92 somewhere in there
 (8) Q All right Now they were pretty desperate to sell their
 (9) property in 1989 is that right?
 (10) A I don't know
 (11) Q You don't know that? When did they first come to you?
 (12) A Probably maybe six months before we had it - when we had
 (13) it listed She came to me wanted me to sell the property and
 (14) basically that's what we did
 (15) Q Do you know when they first came to you approximately?
 (16) A No don't remember but it was - I recall relatively short
 (17) listing period for the property so I would say probably a
 (18) six month period for that type of property
 (19) Q I'm sorry when did you say that it sold 92 you said?
 (20) A I want to say 91 92 somewhere in there
 (21) Q All right Describe the property for the jury
 (22) A Property was an older bander bolt construction I don't
 (23) know if you're familiar with bander bolt It's basically a
 (24) prefabricated log type of packet The logs are about four inch
 (25) type of logs with tongue and groove two-story with downstairs

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- (1) in disrepair bad maintenance type of property He was
 (2) indicating to rent it as a lodge and all that although I found
 (3) very indication - very little indication from the neighbor
 (4) that it ever was used as a lodge
 (5) Basically what happened was that the neighbors who do run a
 (6) commercial operation now and then used to have a lodge but
 (7) the
 (8) property itself was not used as a lodge at all The
 (9) people - when the husband passed away the elderly lady
 (10) ended
 (11) up with the property had no means of - of income or to
 (12) support the property Also if I recall there was some kind
 (13) of balloon payment due She had no money to pay for it and
 (14) basically we found - helped her to get out of her problem and
 (15) we found a - an attorney from California who at the time
 (16) bought quite a bit of property up here
 (17) Q Mr Vockner?
 (18) A And he bought the property
 (19) Q Mr Vockner excuse me I just wanted you to describe the
 (20) property
 (21) A Well the property itself was what I would call on a
 (22) scale from one to ten probably a four to five being on the
 (23) worst side instead of on the better side but that's basically
 (24) what the property was
 (25) Q Okay Maybe Mr Stoll can help me If the property's near
 (26) Port Lions can you put the dot up there?
 (27) A It's in Port Lions

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- (1) Q It's in Port Lions?
- (2) A Yeah
- (3) MR STOLL Right about - right about there?
- (4) A Yeah
- (5) BY MR PETUMENOS
- (6) Q Okay do you remember - is your recollection -
- (7) A Do I get to read that letter now?
- (8) Q Well not out loud I'm afraid because you don't recognize
- (9) it it wasn't written to you or anything like that We have
- (10) rules of evidence here we have to follow
- (11) A Okay so what do you want me to do with it then?
- (12) Q I want you to look at it
- (13) A You want me to look at the letter but don't read it
- (14) okay I looked at it thank you
- (15) Q Mr Vockner?
- (16) A I don't know what to do with this but please I'm sorry
- (17) what should I do with it?
- (18) Q Would you read it to yourself?
- (19) A I can read it to myself okay
- (20) Q I need a sore throat or something this morning
- (21) MR DIAMOND May I ask perhaps we ought to do it at
- (22) sidebar I'm wondering why the counsel wants a letter read that
- (23) he hasn't seen
- (24) (At sidebar on the record)
- (25) THE COURT So where are you going

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- (1) MR PETUMENOS I'm trying to refresh his recollection
- (2) as to the history of the property
- (3) THE COURT As to the history of the property
- (4) MR PETUMENOS Right which is contained in the
- (5) letter I thought the rule of being able to refresh with a
- (6) bowl of spaghetti is the issue here I'm not reading it to the
- (7) jury
- (8) THE COURT You see all you have to do is ask and you
- (9) receive
- (10) MR DIAMOND That's all I wanted
- (11) (Sidebar concluded)
- (12) A Okay I read the letter
- (13) BY MR PETUMENOS
- (14) Q Does that letter refresh your recollection with respect to
- (15) the history of this property and how long it was on the
- (16) market?
- (17) A Not really because that's the first time I seen the
- (18) letter and the only contact I had was - was obviously with a
- (19) widow of the gentleman who signed it Hub White and I dealt
- (20) with Mrs White
- (21) Q Did Mrs White ever tell you how long she had had the
- (22) property on the market?
- (23) MR DIAMOND Objection hearsay Any information
- (24) he's got prior to his involvement is going to be hearsay
- (25) MR PETUMENOS Judge hearsay is what we've been

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- (1) hearing about people calling him It's not offered to show the
- (2) proof of the matter it's to show what the market was
- (3) THE COURT Give me the question again
- (4) MR PETUMENOS Did she ever tell you how long this
- (5) property was on the market before you got it
- (6) THE COURT Objection sustained
- (7) MR PETUMENOS I have no further questions
- (8) MR DIAMOND No questions
- (9) MR STOLL I just have one question
- (10) CROSS EXAMINATION OF BERNE VOCKNER
- (11) BY MR STOLL
- (12) Q In your brochure - is there any property listed here for
- (13) Kodiak in this brochure?
- (14) A No there's not a Kodiak right now and the only 15
- (15) oceanfront properties we have are the ones in the brochure
- (16) describing basically the Prince William Sound and coming up
- (17) through the Homer Kachemak Bay area and that's the
- (18) property
- (19) More than glad to give everybody one of them if they want it
- (20) Maybe you buy something from me
- (21) MR PETUMENOS Judge please I move it into
- (22) evidence
- (23) (Exhibit 8504 offered)
- (24) MR DIAMOND No objection
- (25) THE COURT It's admitted And sir you can step

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- (1) THE CLERK What's the number?
- (2) THE COURT 8503 I'm sorry 8504
- (3) (Exhibit 8504 received)
- (4) MR OPPENHEIMER Your Honor Exxon's next witness
- (5) will be Mr Gary Papke Before he comes up I thought we might
- (6) take one minute to organize things
- (7) THE COURT One minute counsel?
- (8) MR OPPENHEIMER Perhaps we should take a break now
- (9) and we'll be able to go faster later
- (10) THE CLERK Please rise This court stands in
- (11) recess
- (12) (Jury out at 9 20 a m)
- (13) 9 20 a m
- (14) (Recess from 9 20 a m to 9 34 a m)
- (15) (Jury in at 9 34 a m)
- (16) THE CLERK This court now resumes its session
- (17) Please be seated
- (18) MR OPPENHEIMER Your Honor Exxon calls Gary Papke
- (19) THE CLERK Sir can you attach the microphone to your
- (20) tie and remain standing for the oath? Please raise your right
- (21) hand
- (22) (The Witness is Sworn)
- (23) THE CLERK Please be seated
- (24) Sir for the record could you please state your full name?
- (25) A My name is Gary Papke P a p k e

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- (1) THE CLERK And your occupation?
 (2) A I m a real estate consultant and appraiser
 (3) THE CLERK Thank you
 (4) DIRECT EXAMINATION OF GARY PAPKE
 (5) BY MR. OPPENHEIMER
 (6) Q Mr Papke good morning
 (7) A Good morning
 (8) Q We ve seen some videotape of you It s good to see you in
 (9) person
 (10) A I m a familiar face apparently
 (11) Q We re going to try to do the impossible and actually have a
 (12) brief piece of expert testimony So I d like to start by
 (13) having you tell us where did you go to elementary school -
 (14) no Mr Papke what do you do for a living?
 (15) A I m a real estate consultant and appraiser
 (16) Q Who do you work with?
 (17) A I work for Clarion and Associates
 (18) Q Is that the same company that Mr Roddewig is a principal
 (19) of?
 (20) A Yes he is my partner
 (21) Q Okay he s your partner Very briefly and not starting
 (22) with elementary school tell us about your college background?
 (23) A My college degree My Bachelor s degree is from Gustavus
 (24) Adolphus in Minnesota small industrial arts college My
 (25) Master s is from the University of Illinois

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- (1) Q Did you have an area of specialization?
 (2) A My area of specialization is environmental and land use
 (3) planning
 (4) Q Are you an MAI?
 (5) A No I m not I am a candidate though for MAI
 (6) Q Are you an appraiser?
 (7) A I am an appraiser
 (8) Q Have you taken courses after graduate work in the area of
 (9) appraisal?
 (10) A I ve completed the entire series of courses required for
 (11) the MAI offered by the Appraisal Institute
 (12) Q Tell us a little bit about the kind of work you ve done
 (13) since - well clearly from the beginning work that relates to
 (14) your expertise today?
 (15) A Well my first professional work was while I was still in
 (16) graduate school I worked under a contract with the U S
 (17) Environmental Protection Agency in I think it was 1973 or 4
 (18) doing research related to the implementation of the new Clean
 (19) Water Act that was passed in 1972
 (20) Q That was your first job?
 (21) A That was the first professional experience I had while
 (22) still in graduate school
 (23) Q What did you do after that?
 (24) A From there I went to work for one of the regional
 (25) organizations that was actually implementing that new Clean

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- (1) Water Act in the eastern Illinois area around Chicago This
 (2) was an organization called the Northeastern Illinois Planning
 (3) Commission It s a quasi governmental organization made up
 (4) of
 (5) local officials from various municipalities and counties as
 (6) well as private citizens and it s responsible for planning for
 (7) regional project - projects and it was implementing really
 (8) one of the first regional comprehensive water pollution control
 (9) programs in the country
 (10) Q What kind of work did you do at the Northeastern Illinois
 (11) Planning Commission?
 (12) A I did a lot of different things Research on a variety of
 (13) pollution related issues Things like pollution in Lake
 (14) Michigan pollution from various sources like agricultural
 (15) runoff and urban storm water runoff the costs of -
 (16) calculations of costs of treating industrial and domestic waste
 (17) water many different things
 (18) Q All right After the commission what did you do?
 (19) A I left there in 1984 after about nine years or so or more
 (20) and went to work for a real estate consulting appraisal firm
 (21) called Shlaes & Company Ultimately that firm sort of evolved
 (22) into Clarion Associates when four of the senior staff formed
 (23) Clarion Associates in 1988
 (24) Q So Clarion was formed in 88 and you ve been with Clarion
 (25) since then?
 (26) A I have yes

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- (1) Q Am I correct then you ve been a real estate consultant
 (2) appraiser for about a decade?
 (3) A Just about exactly a decade that s correct
 (4) Q During that period of time what kind of work have you done
 (5) in that capacity?
 (6) A Wide variety of basic appraisal work for larger properties
 (7) farms office buildings shopping centers the usual
 (8) explanation of things that an appraiser would get involved in
 (9) but we ve also done a lot of more unusual assignments both
 (10) Shlaes and Clarion things like valuations of historic and
 (11) natural resource properties impact analyses associated with
 (12) various large projects
 (13) For example I was a consultant in Williamson County
 (14) Tennessee just after the Saturn plant was located there by GM
 (15) and helping them to sort out and develop a response to the
 (16) impact that was having on the agricultural resources and the
 (17) other resources I ve done work up in the State of California
 (18) evaluation of the Headwaters Forest which is really the
 (19) largest remaining - largest old growth redwood forest still in
 (20) private hands It s up near Eureka I ve done work on an open
 (21) space program lived in Libertyville Township Illinois where
 (22) I was consultant there for two or three years working with them
 (23) trying to acquire farms and woodlands and develop them This
 (24) was the outskirts of Chicago metropolitan area
 (25) That s an example of the kinds of things we do In addition

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- (1) to the basic appraisal kinds of things
 (2) Q Sounds to me like part of what you've been involved in is
 (3) analyzing environmental factors on surrounding real estate
 (4) A That's one of the things we do. I've done that kind of
 (5) work for things like mining operations, aircraft noise issues
 (6) those sorts of things, yes.
 (7) Q Have you published?
 (8) A I have.
 (9) Q What areas?
 (10) A I've published a couple of articles in the appraisal
 (11) literature, and also published on market analysis for one of
 (12) the planning magazines.
 (13) Q We've heard a little bit about market analysis before.
 (14) Have you done those during your career?
 (15) A Pretty much constantly throughout my career, that's
 (16) correct.
 (17) Q How many market studies would you say you've done as part
 (18) of your work?
 (19) A It's hard to estimate precisely, but I'd guess it's 50 or
 (20) 60.
 (21) Q 50 or 60. And some of the publications involved market
 (22) studies?
 (23) A Yes, I wrote an article on market analysis.
 (24) Q What about teaching, have you been involved teaching
 (25) appraisal in market analysis?

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- (1) A Well, I've taught various seminars for professional
 (2) organizations. In particular, I've taught a graduate course at
 (3) the University of Illinois on the issues of - or on the
 (4) techniques of real estate analysis, including market analysis.
 (5) Q Including market analysis?
 (6) A That's correct.
 (7) Q And have you been qualified as an expert in court before?
 (8) A Yes, I have.
 (9) Q How many times, what areas?
 (10) A I think three times in the areas of real estate consulting
 (11) and appraisal.
 (12) Q And have you testified as an expert on occasions outside of
 (13) court?
 (14) A Yes, I have in many municipal, county, state
 (15) administrative hearings and sessions.
 (16) MR OPPENHEIMER: Your Honor, we'll cut to the chase
 (17) and tender Mr. Papke as an expert in appraisal and real estate
 (18) consultation, including market analysis.
 (19) THE COURT: He's accepted in that area.
 (20) BY MR OPPENHEIMER:
 (21) Q For this case, Mr. Papke, did you do some work to determine
 (22) whether there was some sort of a stigma or market disruption
 (23) effect from the Exxon Valdez oil spill?
 (24) A Yes, I did.
 (25) Q Tell the jury generally what you did.

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- (1) A Well, I had - had heard the points made that there had
 (2) been some major disruption or stigmatization of the market in
 (3) South Central Alaska following the spill, and as time went on
 (4) it seemed to me that one of the most logical ways of addressing
 (5) that issue, rather than dealing with it hypothetically, was to
 (6) actually go out and examine the market-related information that
 (7) had evolved over the five years since the spill. So I went out
 (8) looking for sources of information that I could rely upon to
 (9) show me whether or not there had been an impact, measurable
 (10) impact of the spill on the market as a whole.
 (11) Q Okay, tell the jury, with respect to the testimony you're
 (12) going to give today on the work you're talking to us about,
 (13) what - what market data do you - what do you mean by that,
 (14) what is it and where did you find it?
 (15) A Well, the two particular sources of market information that
 (16) we identified as being most useful for this purpose are both -
 (17) they're both public - public information. One is the
 (18) recordings of real estate-related documents that are required
 (19) anytime somebody enters into a transaction in real estate.
 (20) Those documents are recorded in the public records and
 (21) they're compiled on a local basis, and they're compiled on a state
 (22) level, and that's a good source of information properly handled
 (23) on the - on the health and the activity in the real estate
 (24) market over a period of time.
 (25) Q Let's break this up, start with the first of the two.

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- (1) Public recordings of real estate transactions, what's that
 (2) mean?
 (3) A Well, public recordings, anytime somebody enters into a
 (4) variety of real estate transactions, but particularly when you
 (5) buy a piece of property, they're required to record the deed
 (6) and mortgage agreement associated with that. Those
 (7) recordings
 (8) are as I said, collected locally and maintained locally and
 (9) reported to the State. The state keeps thorough records and
 (10) has, I think, for nearly two decades or more on those
 (11) recordings at a state level, so it gives you an opportunity to
 (12) look at consistently collected, objectively collected
 (13) information over an extended period of time, including in this
 (14) case, before the spill and after the spill, to see if you can
 (15) see any changes in the markets.
 (16) Q So this is a good source of data because it's been kept a
 (17) long time and it's been kept by the State. Does it have any
 (18) other qualities that makes it a good source of data for
 (19) research?
 (20) A Well, it is - it is comprehensive. I mean it's - it
 (21) covers the entire state so you can make comparisons between
 (22) different areas of the State. It's kept over a long period of
 (23) time, as I said, and it's not - it's objective. It's not been
 (24) collected for any purpose of litigation. It's collected for an
 (25) entirely different reason, but you can look at it and try to -
 (26) to see what conclusion you might draw for various purposes.

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- (1) Q So the data you're looking at is data that wasn't collected
 (2) for this case it's state collected data that you then have
 (3) taken a look at?
 (4) A It is identical to the information that the State uses
 (5) Q How did you get the information?
 (6) A We obtained it from the contractor who provides the
 (7) services to the State in compiling this information on a
 (8) statewide basis. It's a private company that also makes it
 (9) available the data available to the individuals or companies
 (10) like ours
 (11) Q And what did you do with it when you got it?
 (12) A We put it into our computer system and processed it in
 (13) various ways and tried to look for trends changes over time
 (14) that that information would suggest to us as an indicator of
 (15) whether there had been any significant effect from the spill on
 (16) the - on the area wide markets
 (17) Q I won't keep people in suspense in keeping with the notion
 (18) that we're going to try to move quickly here. What did you
 (19) find?
 (20) A We found no impact of the spill on the market on the
 (21) area wide market
 (22) Q May we have defendants 10263?
 (23) Mr Papke I think you can see on your computer screen what
 (24) we have on the Barco. Tell us what we're looking at here
 (25) A These are the districts the recording districts in South

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- (1) Central Alaska within which the local recording offices
 (2) collect the information from real estate transactions and other
 (3) recordings. These that we have taken and grouped together
 (4) into
 (5) three areas one being Prince William Sound on the right the
 (6) middle one Kenai and the last one on the far southwest
 (7) Kodiak which is its own recording district
 (8) Q Mr Papke I'm going to ask you to come down and show you
 (9) defendants 10298A
 (10) Joel I'm sorry can you keep the prior exhibit on the
 (11) Barco which is the map?
 (12) Mr Papke what is defendants Exhibit 10298A telling us?
 (13) A This is a chart that shows the total recordings of deeds
 (14) with mortgages for the period of time from 1980 to 1992 and
 (15) let me clarify deeds recorded with mortgages are just those
 (16) situations in which somebody records the - the deed of a
 (17) property transaction and a mortgage at the same time. And the
 (18) reason why we're doing this is because many different things
 (19) are included in public recordings and if you looked at all of
 (20) that stuff which we have also looked at but if you look at
 (21) all of the other things that are in total recordings you don't
 (22) get quite as clear a picture of the actual real estate
 (23) transactions. And we were trying to as closely as possible
 (24) isolate out those things those events in the recordings that
 (25) represent actual transactions in the market and based upon our
 review of the information and consultation with the person

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- (1) who's been compiling this for the State. This is a useful way
 (2) to do it and one that's been used by the major banks in the
 (3) area among other clients of that contractor
 (4) Q So tell us we have a - we have a - what I believe you
 (5) folks call a curve here at the bottom. What is that showing?
 (6) A This represents the change in the number of recordings year
 (7) by year from 1980 to 1992 within the spill area and what we're
 (8) calling the spill area are those three areas of Prince William
 (9) Sound the Kenai and Kodiak. And they're compiled - it shows
 (10) you the total against this graph are the - or the scale on
 (11) the left you can see it's changing over time. You can see
 (12) this large peak in the early 80s and then the drastic decline
 (13) and the gradual recovery that you - I think we just heard
 (14) about earlier. I was in the courtroom this morning and heard
 (15) the discussion of people coming out of this difficult time in
 (16) the mid 80s and hesitant to buy remote real estate during
 (17) that period of time
 (18) Q So that's actually what we see reflected here in this drop
 (19) from 84 down into this 87 area and back up?
 (20) A That's right. The real estate market information is kind
 (21) of mirroring the economic conditions and I think that's an
 (22) indication to me that it's showing useful patterns here
 (23) Q Okay now before we get into your explaining to us why you
 (24) have statewide on top just looking at the spill area data
 (25) does that allow you to reach some conclusions about the effect

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- (1) or lack of effect of the spill?
 (2) A Yes. During the - the year of the spill and -
 (3) Q Stand back just a little bit so everybody can see
 (4) A I'm sorry. During the year of the spill 1989 and the
 (5) year after the spill 1990 there was a natural increase in the
 (6) number of recordings in those three areas that I mentioned
 (7) earlier Prince William Sound Kenai and Kodiak
 (8) Q Now earlier you'd said you had seen an increase and this
 (9) offering that's showing us -
 (10) A This is showing the increase after the spill that's
 (11) correct
 (12) Q Now I notice that there's a dip in '91
 (13) A There is a dip in '91 and the number of recordings go down
 (14) between 1990 levels and 1991
 (15) Q And did that cause you to do some further analysis?
 (16) A Yes we wanted to figure out whether that was a unique
 (17) quality of the spill-impacted area as we've defined it or
 (18) whether it was similar to what was going on in the rest of the
 (19) State and that's why we've included this chart on the top
 (20) which is summing up on statewide of all the same type of deeds
 (21) recorded with mortgage situations
 (22) Q And what did you observe when you compared the two?
 (23) A There's a very similar - much - great deal of similarity
 (24) in the pattern same drop here between 1990 and '91, and the
 (25) same recovery or reversal of that trend in 1992. Suggests to

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- (1) me that the cause of this - whatever the cause of this is
 (2) something that is happening statewide and not something that's
 (3) isolated to the spill impacted area
 (4) Q And therefore do you believe the spill caused the '91
 (5) dip?
 (6) A No I don't think it did at all
 (7) Q Mr Papke the land that plaintiffs are claiming on in this
 (8) case is not located in the cities would you agree with that?
 (9) A My understanding it's not in the city that's correct
 (10) Q This data - from the recordings here this does include
 (11) some information from places like Cordova Seward Whittier
 (12) Kodiak City isn't that correct?
 (13) A It does include the cities in that - that area that's
 (14) correct as well as the remote properties in that area
 (15) Q So it also includes the remote properties?
 (16) A That's correct
 (17) Q But tell the jury if you would why you believe that the
 (18) - the data even though it has that data from those cities
 (19) is still instructive on the issues you're testifying about?
 (20) A Well the issue this is addressing is a question of
 (21) market wide disruption whether something happened as a
 (22) result
 (23) of the spill that affected real estate in the area and caused
 (24) a - caused a disruption or a suspension of the market If
 (25) there was something that could affect the remote properties
 (26) that are being discussed in this courtroom it would - it

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- (1) would show up in this information as well These communities
 (2) in the area are as connected in many ways to the water the
 (3) fish the wildlife and natural resources of the area as are the
 (4) remote properties So I can't imagine a situation in which a
 (5) major impact a major disruption that affected one category of
 (6) properties in this area would not affect others and show up in
 (7) these trends
 (8) Q You talked about another type of data You said you have
 (9) two sources of information What was the second source of
 (10) information?
 (11) A The second source?
 (12) Q Do you want me to put that table up for you?
 (13) A Yeah I had another chart here
 (14) Q Actually if you will hold this for just a second I'll
 (15) bring the easel over We're about to put up defendants
 (16) Exhibit 10285A
 (17) First of all you said your second source of information
 (18) was assessment data Explain what is that?
 (19) A Well the assessment data is the information that's
 (20) collected or developed on a local level for purposes of - of
 (21) calculating local real estate taxes In each local tax
 (22) district there is an assessor who assesses the value of
 (23) properties and then uses that as a basis for collecting taxes
 (24) and this information is also public record information This
 (25) sort of stuff is the public record on the numbers of

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- (1) transactions how much is happening in the market at any given
 (2) time This sort of stuff is the public record on the values of
 (3) properties what changes are going on in the marketplace with
 (4) respect to the value of real estate
 (5) What we have here though is actually - it's not just the
 (6) information that the local assessor in Kodiak or Kenai or
 (7) Valdez or Cordova would develop but it is something in fact
 (8) that the State uses called full value of real estate
 (9) Q Tell us what that is
 (10) A That's a - what happens is the State is required to make
 (11) sure that these local assessments closely track what's
 (12) happening in the market so they require the local assessors to
 (13) submit comparable sales in the - when they submit their
 (14) assessments for their district it's to make comparable sales
 (15) information on actual transactions in the area The State has
 (16) a process that they use to adjust the local assessments to this
 (17) full value estimate and make it closely approximate the market
 (18) value and so the intention is to make this and it's a
 (19) statutory requirement that it be closely related to the market
 (20) conditions in the district at the time
 (21) Q So when you got these records of full value what did you
 (22) do?
 (23) A We compiled them again into the same areas roughly the
 (24) same areas as we talked about before The spill area being
 (25) Prince William Sound and Kenai and Kodiak and the other areas

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- (1) of the State - well everything is outside of those areas
 (2) But what this showed us was a trend that - of declining values
 (3) in local real estate markets in the - from the mid to the late
 (4) 80s continuing to decline in 1989
 (5) Now in this case the - any information in '89 is
 (6) pre-spill because the local assessments are done on
 (7) January 1st so they were all done by the time of March of
 (8) 1989 and then a leveling off and a gradual increase again
 (9) coming back an increase in value between 1991 and 1992
 (10) Q And the conclusion you drew from that?
 (11) A Well again we wanted to make sure we were understanding
 (12) exactly what was going on in here with this very level
 (13) actually a small decline in this first year and a level period
 (14) in the second year and so for that purpose we compared it to
 (15) the State - or in this case to other areas of Alaska and
 (16) found a very similar pattern in fact a steeper decline here
 (17) and a leveling off and an increase And again suggests to me
 (18) there's nothing in that that shows me a dramatic or significant
 (19) market wide disruption as a result of the spill
 (20) Q Thank you You can take your seat now Mr Papke
 (21) Mr Papke I want to change subjects for a second We
 (22) heard testimony in this courtroom not long ago about a meeting
 (23) that you and your partner Mr Roddewig had with Drs Page -
 (24) Drs Page and Gilfillan Do you recall that meeting?
 (25) A I recall the meeting yes I do

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- (1) Q How long ago was that meeting do you have a date?
 (2) A That was in the fall of 1990 so it's almost four years
 (3) ago
 (4) Q What was your understanding of the purpose of that
 (5) meeting?
 (6) A The purpose of that meeting was to provide us with an
 (7) orientation to the general issues associated with technical
 (8) research on oil spills and it's part of our preparation for
 (9) beginning to think about other spills that we might examine
 (10) Q Whose idea was it to meet specifically with Drs Page and
 (11) Gilfillan?
 (12) A Well I think I heard my partner recall that he thought it
 (13) was our idea I had recalled that I had - that I thought it
 (14) was Exxon's suggestion that we meet with them I had asked
 (15) them my recollection who they could advise us to meet with
 (16) and Exxon had in fact identified these individuals it's one
 (17) or the other I'm not sure which frankly
 (18) Q Mr Papke was that a meeting to discuss litigation
 (19) strategy in this case?
 (20) A No it wasn't
 (21) Q Was litigation strategy about this case discussed at that
 (22) meeting?
 (23) A No it wasn't
 (24) Q We heard reference to a phrase that Mr Petumenos read to
 (25) Mr Roddewig out of your notes

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- (1) And counsel at this time I would wish to publish from
 (2) exhibit plaintiffs 8181 Page 3183
 (3) MR PETUMENOS No objection
 (4) BY MR OPPENHEIMER
 (5) Q First let me bring this up so you can see the whole page
 (6) and I'm going to give you a copy of your notes I'm giving
 (7) you Mr Papke plaintiffs Exhibit 8181 Would you tell us if
 (8) you recognize this and what it is?
 (9) A Yes this is a copy of the notes I took during the meeting
 (10) in 1990 with Drs Gilfillan and Page
 (11) Q Would you do me the favor of turning to the page that's -
 (12) well it has lots of numbers on the stamp but the last four
 (13) numbers are - pardon me my eyes aren't good enough it's
 (14) 3183
 (15) A Yes I have it
 (16) Q Okay now just confirm for us, please that's a page from
 (17) your notes
 (18) A Yes that is
 (19) Q These were notes that were taken at the meeting?
 (20) A They were taken at the meeting that's correct
 (21) Q Now I hope I'm making everybody dizzy here but let me
 (22) just get this - here is a part of your notes that I'd like to
 (23) draw your attention to and which we were all drawn to by prior
 (24) questioning Time is on the side of the defense What was the
 (25) topic of discussion to which that note refers?

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- (1) A The discussion was on the - the defense of claims in the
 (2) Amoco Cadiz case that they were discussing with us or
 (3) presenting information to us in
 (4) Q And what was being said on that topic?
 (5) A The point being made was that as time went on as the
 (6) factual information came out on the - the actual conditions on
 (7) the shore after the spill that the - the claims declined as
 (8) the information came out
 (9) Q What was the type of information that was being discussed
 (10) that came out that caused that to happen?
 (11) A It was the scientific information on the actual recovery of
 (12) the shoreline
 (13) Q Does this have anything to do this sentence that you wrote
 (14) down and the topic that was being discussed with some
 (15) discussion of timing of this case?
 (16) A No it didn't have anything to do with that at all
 (17) Q Now do you recall - well do you recall the exact words
 (18) from that meeting?
 (19) A Time is on the side of the defense?
 (20) Q Yes
 (21) A No I don't recall those exact words
 (22) Q And do you recall whether Drs Page or Gilfillan said
 (23) that?
 (24) A No I don't recall who said that
 (25) Q Do you recall whether anyone said it or whether it might

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- (1) have been a reference to something else?
 (2) A Well I could have written it down as something that I was
 (3) thinking I could have heard somebody say it I don't know
 (4) I can't recall who said that if anyone said it
 (5) Q What is the five in the corner of your notes here? I see a
 (6) circle five What is that all about?
 (7) A The five is a - it's one of my techniques when I'm in a -
 (8) in this case a seminar or a presentation where people are
 (9) giving me a lot of handout materials to refer to My technique
 (10) of relating the points in my notes to the points in the handout
 (11) materials
 (12) Q Were you at your deposition asked about this page of your
 (13) notes and the phrase time is on the side of the defense?
 (14) A Yes I was
 (15) Q Were you asked by Mr Petumenos what does that refer to
 (16) just the way I just asked you a moment ago?
 (17) A Yes I was
 (18) Q How many days were you deposed on these notes?
 (19) A Two separate days
 (20) Q The day you were asked what that referred to which of the
 (21) two days was that?
 (22) A That was the first day and I didn't at that point have in
 (23) front of me the - the handouts that would go with this point
 (24) to allow me to understand what it was all about
 (25) MR OPPENHEIMER Counsel I'll going to show the

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- (1) witness plaintiffs 8182
 (2) BY MR OPPENHEIMER
 (3) Q Mr Papke would you tell us what plaintiffs Exhibit 8182
 (4) is?
 (5) A These are the handout materials from that meeting and they
 (6) include a - my annotations my numbering system that relates
 (7) them to my notes
 (8) Q And these were the materials you did not have in front of
 (9) you the day that you were asked what that sentence means is
 (10) that correct?
 (11) A Yes I didn't have these until I brought them in myself at
 (12) the second day of the - of discussion on this in the
 (13) deposition
 (14) Q Now the second day at your deposition did Mr Petumenos
 (15) go back and ask you what does that sentence refer to?
 (16) A Well he asked me some things about that sentence but he
 (17) didn't ask me its meaning
 (18) Q Did not ask you its meaning
 (19) MR OPPENHEIMER Counsel I'd like to publish from
 (20) the handout Exhibit 8182 Page 3204
 (21) MR PETUMENOS No objection
 (22) BY MR OPPENHEIMER
 (23) Q Mr Papke did I remember to give you a copy of this?
 (24) A I do have it
 (25) Q Okay Would you do me a favor then turning to 3204?

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- (1) A Yes I have it
 (2) Q Okay Now on - is this the handout you're referring to?
 (3) A This is the handout that's correct
 (4) Q Or a page of the handout
 (5) MR PETUMENOS Could I approach counsel just for a
 (6) second?
 (7) MR OPPENHEIMER Yes
 (8) (Discussion between counsel off record)
 (9) BY MR OPPENHEIMER
 (10) Q Mr Papke this doesn't show up too well on the Barco but
 (11) if you look in the upper right hand corner do you see a number
 (12) up there?
 (13) A Yes that's a five
 (14) Q That the number that corresponded with your notes?
 (15) A Yes that's the number That's correct
 (16) Q I'd just like to - I'm going to put your notes back on
 (17) again 8181 Page 3183 And I'm pointing to the five so
 (18) that's the five that corresponds to the five on the handout
 (19) note?
 (20) A Yes
 (21) Q Did you indicate during the first day of your deposition
 (22) that it would be helpful to you if you could read these two
 (23) things together?
 (24) A Yes I said it would more than be helpful I thought it
 (25) was essential that I have the two pieces of information because

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- (1) they are integral to my recollection of the meeting
 (2) Q Were you given that opportunity?
 (3) A Not during the first day no
 (4) Q Would you take the copy that you have there Mr Papke of
 (5) your notes Exhibit 8181 I want to go to another section of
 (6) them
 (7) MR OPPENHEIMER Counsel I'd like to publish Page
 (8) 3182 of Mr Papke's notes Exhibit 8181
 (9) MR PETUMENOS 3182?
 (10) MR OPPENHEIMER Yes
 (11) MR PETUMENOS No objection
 (12) BY MR OPPENHEIMER
 (13) Q Mr Papke if once again you would turn to Page 3182 of
 (14) your notes
 (15) A Yes
 (16) Q Just confirm for me those are part of the notes from the
 (17) same day is that correct?
 (18) A That's correct
 (19) Q Would you read the portion that I have highlighted in
 (20) yellow there to - to the jury? Let me just zoom a little
 (21) bit It's hard to read but if you'd go ahead and start here
 (22) where I believe it says congressional but continues reading
 (23) down through the highlighted portion?
 (24) A Ultimate punishment making me read my own handwriting
 (25) Q I'm punishing you for having handwriting as bad as mine

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- (1) A Says GP congressional research study One of the biggest
 (2) problems is the perception created by the media some images
 (3) few people want to go back and look a year later P average
 (4) perception is oil spill is worse than a nuclear explosion G
 (5) oil spill is very photogenic
 (6) Q Let's focus on a few things here This sentence which
 (7) Mr Roddewig was asked about Few people want to go back
 and
 (8) take a look a year later Does that sentence refer to any
 (9) discussion about real estate markets that is is that
 (10) referring to buyers of real estate?
 (11) A No that's referring to the news media
 (12) Q Was there any discussion at this meeting with Drs Page and
 (13) Gilfillan on the subject of how real estate markets behave?
 (14) A No
 (15) Q Was there any discussion with Drs Page and Gilfillan other
 (16) than about the technical orientation and their understanding of
 (17) certain other spills?
 (18) A No that was the focus it was the technical orientation
 (19) and their insights on what they knew about other spill
 (20) locations
 (21) Q There's a P and a G here you see that?
 (22) A Yes
 (23) Q Were you asked about that on both days of your deposition?
 (24) A I was asked during my deposition I think it might have
 (25) been on both days I don't recall for certain

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- (1) Q Were you able to say definitively what the P and G stood for?
- (2) A No not definitively I think I did speculate it was probably related to Page and Gilfillan
- (3) Q Okay Can you do any better than that today with your recollection on what the B and the G are?
- (4) A No I can't recall them saying those particular people saying those particular things but I could speculate that's the case
- (5) Q There's a reference to a survey here Mr Papke?
- (6) A Yes
- (7) Q You see that says survey average perception Were you asked quite a few questions about whether there was a survey of perceptions?
- (8) A During my deposition?
- (9) Q Yes
- (10) A Yes
- (11) Q Do you recall today whether there was any survey that that note refers to?
- (12) A No I don't recall what that note refers to
- (13) Q And are you aware of any survey regarding average perception of oil spills that Clarion has ever come across in its work that wasn't included in its report or in the associated materials?
- (14) A No I don't recall seeing a survey like that and I can't

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- (1) recall anything that is in our files
- (2) Q Would you say that at this meeting Drs Page and Gilfillan made a couple of basic points to you and to Mr Roddewig?
- (3) A Yes I think there was some major points that they were making in their presentation
- (4) Q This is back in 1990 now is that correct?
- (5) A That's correct
- (6) Q Tell the jury what those major points were
- (7) A Well I think what stands out in my mind is the theme that - with time the facts of an oil spill situation come out and that the initial negative response whether it's a media one or a technical response is moderated by the actual facts
- (8) As time goes on the information comes out and people's perceptions change and the scientific research shows changes over time
- (9) Q Time is on the side of the defense is that what that refers to what you've just told us?
- (10) A Well that refers in particular to the Amoco Cadiz situation but that is the phenomena they were talking in the Amoco Cadiz case yes
- (11) MR OPPENHEIMER Counsel I'm going to - would like to publish to the jury from Exhibit 8181 Page 3185 of the notes
- (12) MR PETUMENOS No objection
- (13) BY MR OPPENHEIMER

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- (1) Q Mr Papke if you would turn to that page of your notes
- (2) A What was the number?
- (3) Q I'm sorry it's Page 3185 of Exhibit 8181
- (4) A All right
- (5) Q Could you - well first of all we see the number 10 there Again does that go to the handout?
- (6) A Yes that would be my system relating the two
- (7) Q Would you read for us from your notes from the first highlighted line down through the end of the highlighted line?
- (8) A Ten how do you tell when it's over shore communities are not static shore populations come and go Maine cove only four of 80 the same 1950s to 19 - I can't read that the rest of that copy
- (9) Guilds of species capable of doing the same job Who's larvae was there when the space opened up Nature constantly changing incorrect to speak of recovery as returning to pre-spill conditions Can't compare before and after Have to compare places that were oiled to places that were not oiled
- (10) Q Again this is 1990 what was the topic of conversation here with Drs Page and Gilfillan?
- (11) A Well this was actually part of their presentation to us their orientation session for us and the theme was - one of the theme I think I took away from the meeting was that natural systems are variable and that you can't assume that recovery is defined by returning exactly to the same

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- (1) conditions set of conditions prior to the spill because those conditions would have changed in any event and that you need to compare one location to another not before and after on the same location and assume that returning to that same condition is full recovery
- (2) Q Much has been made of the fact that you spoke with Drs Page and Gilfillan Did they tell you what to do in your work after you left that meeting?
- (3) A No they didn't
- (4) Q How did you use what they - well I am not asking you to go into the details on your case study work Let me rephrase the question
- (5) Was the information that Drs Page and Gilfillan provided you at this meeting your only information about matters scientific and technical regarding the oil spills?
- (6) A No we - we have in our files boxes and boxes of technical reports that we've reviewed We've been to various oil spill conferences independently we've been to Woods Hole and Bedford
- (7) Institute oceanographic institute libraries done research there We've been to a lot of different places in the grand scheme of things with a half-day meeting that's not that significant except that I found them to be very insightful people took away some good lessons
- (8) Q Out of all your work this meeting was a half-day back in 1990?

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- (1) A Yes
 (2) Q You re not a scientist are you Mr Papke?
 (3) A No I m not
 (4) Q Does anything that you or Mr Roddewig or Clarion have done
 (5) in this case are you asking the jury to treat that as
 (6) scientific information of the type that Dr Page and Gilfillan
 (7) worked on?
 (8) A No we re presenting the real estate information
 (9) Q Mr Papke do exhibits 8182 your notes and exhibit -
 (10) pardon me excuse me Do exhibits 8181 your notes which
 we ve
 (11) got on the screen and exhibits 8182 the handout to the notes
 (12) help you to accurately testfy about the events that occurred
 (13) at the meeting back in 1990 with Drs Page and Gilfillan?
 (14) A Yes they do
 (15) Q And did you make these notes when those events were fresh
 (16) in your mind?
 (17) A Yes they re made during the meeting
 (18) Q Do you believe them to be accurate and knowledgeable
 (19) rendition of the matters that you then knew?
 (20) A Yes
 (21) MR OPPENHEIMER No further questions
 (22) CROSS EXAMINATION OF GARY PAPKE
 (23) BY MR STOLL
 (24) Q Good morning Mr Papke
 (25) A Good morning

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- (1) Q My name s Bob Stoll I represent Kodiak Island Borough
 (2) We ve never met before have we?
 (3) A I don t think so
 (4) Q Now most of your work over the years has been in
 (5) administrative work in getting projects approved or
 (6) developments approved and in that area as opposed to
 (7) appraising isn t that correct?
 (8) A No I don t think that s an accurate characterization of my
 (9) work no
 (10) Q Are you certified as an appraiser in any state other than
 (11) Illinois?
 (12) A Yes I am
 (13) Q And where is that?
 (14) A I m certified in Illinois
 (15) Q I said other than Illinois?
 (16) A I m certified in Illinois I m certified in Minnesota and
 (17) I m certified in Alaska
 (18) Q I see since your deposition last December?
 (19) A That s correct.
 (20) Q Prior to your retention by Exxon in this case you d never
 (21) been retained to analyze the effect of an oil spill on real
 (22) estate is that correct?
 (23) A No as we found out it s not a common undertaking
 (24) Q And there s only two or three occasions where you ve
 (25) analyzed issues of pollution as they relate to real estate

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- (1) before this case?
 (2) A I don t know the precise number We have analyzed some
 (3) incidents or conditions of pollution yes
 (4) Q I think you testified in your deposition one or - two or
 (5) three times
 (6) A I may have well said that yes
 (7) Q And your base of operations is in Chicago?
 (8) A Yes that s right Our office is in Chicago and we also
 (9) have an office in Denver
 (10) MR STOLL Could I have up on the Barco screen
 (11) please Exhibit 10263?
 (12) MR OPPENHEIMER PX or DX?
 (13) MR STOLL DX that s the recording districts
 (14) MR OPPENHEIMER Recording districts okay
 (15) BY MR STOLL
 (16) Q Now this is the - this is the areas that you ve called
 (17) the spill areas?
 (18) A Well we referred to it for our purposes as the
 (19) spill impacted areas or spill affected areas
 (20) Q And that s all the areas that have in the yellow the
 (21) yellow areas?
 (22) A That is the compilation of those recording districts that
 (23) would include the spill affected areas that s correct
 (24) Q And in these three areas most of the population in those
 (25) three areas is in cities as opposed to off the road system?

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- (1) A Most of the population would be in the cities that s
 (2) right
 (3) Q And - now would you agree Mr Papke that when analyzing
 (4) real estate and the impacts of various events on real estate
 (5) there are some numbers that can be relevant to that analysis
 (6) and some numbers even though objectively derived that are
 (7) irrelevant to that analysis?
 (8) A Well I -
 (9) Q Do you agree with that general proposition?
 (10) A I suppose in any situation there s some information that s
 (11) relevant and some information that s not and some that s
 (12) somewhere in between
 (13) MR STOLL Could I use your board?
 (14) MR OPPENHEIMER Sure
 (15) MR STOLL 10298A
 (16) MR PETUMENOS That s also on the Barco if you want
 (17) it blown up
 (18) MR STOLL This is okay I d just as soon have it
 (19) with the screen here
 (20) BY MR STOLL
 (21) Q Can you see that all right Mr Papke?
 (22) A Yes I can
 (23) Q Now the area that you call the spill area here that is -
 (24) just so we get this straight that includes all these - all
 (25) these yellow areas?

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- (1) A Yes it s the recording districts in those yellow areas
 (2) that s right
 (3) Q All right And were you here - I think it was yesterday
 (4) when the - one of the witnesses I think it was Mr MacSwain
 (5) maybe it was your partner Mr Roddewig testified about a
 (6) survey that they did and they found that the - in interviews
 (7) with banks - I guess it was Mr MacSwain You know who -
 (8) A I wasn t here for his testimony
 (9) Q All right Are you aware that Mr MacSwain testified about
 (10) surveys with the bankers and they found that there was - they
 (11) did not - generally speaking did not loan money on remote
 (12) properties in Alaska?
 (13) MR OPPENHEIMER No foundation Your Honor The
 (14) witness has testified he wasn t here for the testimony
 (15) MR STOLL He may have been - he may know about the
 (16) information
 (17) MR OPPENHEIMER Are you just asking him the fact?
 (18) THE COURT Ask him if he knows
 (19) BY MR STOLL
 (20) Q Do you know that fact?
 (21) A I don t know about that particular survey by Mr MacSwain
 (22) Q Do - are you aware of interviews that - you conducted
 (23) some interviews isn t that correct?
 (24) A We talked to people in the process of collecting our data
 (25) yes

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- (1) Q So-called market participants?
 (2) A Yes some of them
 (3) Q Okay Are you aware that in remote areas most of the
 (4) property is sold without mortgages to banks?
 (5) MR OPPENHEIMER Assumes facts not in evidence no
 (6) foundation
 (7) THE COURT Sustained The objection s sustained
 (8) BY MR STOLL
 (9) Q Are you familiar with how sales are financed in remote
 (10) areas?
 (11) A In a general way yes
 (12) Q Are they - is it - do you have an understanding as to
 (13) whether or not banks loan money on sales?
 (14) A My understanding?
 (15) Q Of remote land
 (16) A My understanding is that most banks consider remote
 (17) properties purchases too nsky to get involved in and they
 (18) don t loan on them
 (19) Q And this the transactions that you ve got in this exhibit
 (20) 10298A are only where there is a deed transferred and it s
 (21) recorded with a mortgage is that correct?
 (22) A Yes where those two kinds of documents are recorded
 (23) simultaneously for the same property that s right
 (24) Q So if it s a transaction for cash or if it s a seller
 (25) selling on contract that would not be included in this - in

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- (1) this figure isn t that correct?
 (2) A That would not be included but the typical transactions in
 (3) remote areas that I see in which there are seller financing
 (4) would be included in this
 (5) Q If there was a mortgage?
 (6) A Yes if there s seller financing correct
 (7) Q Well a lot of seller financing is done with sale and
 (8) contract isn t that correct?
 (9) MR OPPENHEIMER Assumes facts not in evidence No
 (10) foundation
 (11) MR STOLL I can ask him the question
 (12) THE COURT I ll let you ask that question Can you
 (13) answer it?
 (14) A I don t - are you asking me how much is seller financing
 (15) versus contract?
 (16) BY MR STOLL
 (17) Q I m asking you doesn t seller financing frequently involve
 (18) sales on contract or do you know? Maybe you don t know
 (19) A My recollection of the typical situation that I d seen was
 (20) that there was seller financing with a mortgage But I don t
 (21) have particular numbers in my mind no
 (22) Q You don t have any?
 (23) A No
 (24) Q Now the other exhibit that you used that involved assessed
 (25) values of property that included the entire area contained in

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- (1) these - in your yellow area again that s what you call the
 (2) spill area?
 (3) A It included Kodiak Island Borough Kenai Peninsula
 Borough
 (4) and Cordova and Valdez districts that s right
 (5) Q Do you have an understanding as to the percentage of those
 (6) areas that are - of the remote areas in those - in those
 (7) areas that you ve called the spill area that are exempt from
 (8) real estate taxes?
 (9) A Well there s a fair amount of remote area that s
 (10) Native owned or borough-owned or state-owned and therefore
 (11) there s no taxes paid on that I understand that yes
 (12) Q Or federally owned?
 (13) A Or federally owned right
 (14) Q And in fact isn t it as high as maybe 99 percent of the
 (15) remote area?
 (16) A You have to tell me what remote area you re referring to I
 (17) guess before I could form an impression
 (18) Q Let s take Kodiak and Kenai
 (19) A That seems high to me but I don t have an alternative to
 (20) offer to you
 (21) MR STOLL That s all I have I think Mr Petumenos
 (22) may have a couple questions
 (23) MR PETUMENOS How long have we been in session
 (24) Judge?
 (25) THE COURT About an hour

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- (1) MR PETUMENOS Can we take a break?
 (2) THE COURT You want to take a break?
 (3) MR PETUMENOS I would
 (4) THE COURT Sure
 (5) THE CLERK Please rise This court stands in
 (6) recess
 (7) (Jury out at 10 28 a m)
 (8) (Recess from 10 28 a m to 10 42 a m)
 (9) (Jury in at 10 42 a m)
 (10) THE CLERK This court now resumes its session
 (11) Please be seated
 (12) MR PETUMENOS May I proceed Judge?
 (13) THE COURT Yes uh huh
 (14) CROSS EXAMINATION OF GARY PAPKE
 (15) BY MR PETUMENOS
 (16) Q The Page/Gilfillan meeting Mr Papke - first of all you
 (17) and Mr Roddewig have different recollections as to how this
 (18) meeting got started don't you?
 (19) A Well as to how it was scheduled but not as to its
 (20) purpose
 (21) Q Well Mr - Mr Roddewig thinks that he was going through
 (22) some articles and saw the name Page and Gilfillan and he
 (23) came
 (24) up with the idea of Page and Gilfillan Page and Gilfillan
 (25) meeting is that right?
 (26) A I believe he said that he thought that was how it happened

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- (1) yes
 (2) Q And what you remember happening is that Clarion contacted
 (3) Exxon for assistance in locating a knowledgeable scientist?
 (4) A That was my recollection that we wanted someone who
 (5) could
 (6) provide us with a background orientation we wanted - we
 (7) asked
 (8) our client if they could recommend anyone to do that for us
 (9) Q You thought it appropriate to ask the client meaning
 (10) Exxon about appropriate contacts in the scientific community
 (11) and by that client you meant Exxon right?
 (12) A Yes It's a standard procedure for appraisers to ask - to
 (13) work with their clients technical consultants and if Exxon
 (14) knew of people who had expertise in the area I had no problem
 (15) with working with those people
 (16) Q You can't remember who you contacted but you think it was
 (17) either Jim Stevens who is Exxon counsel in house or Bogle &
 (18) Gates their litigating attorneys?
 (19) A That's most likely I would think
 (20) Q And you recall having no choice in the matter as to which
 (21) scientists would attend the meeting right?
 (22) A I didn't identify them myself you know I had no basis
 (23) for making a choice I wasn't an expert on the qualifications
 (24) of people researching oil spills so - I didn't ask for a
 (25) choice
 (26) Q You recall having no choice in the matter as to which
 (27) scientists would attend the meeting?

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- (1) A I didn't ask for a choice I took their recommendations
 (2) and was pleased with the result
 (3) Q You got no explanation as to why there was an attorney
 (4) present?
 (5) A No I don't think we did no
 (6) Q What - now this business of the notes versus the handouts
 (7) that was the first day versus the second day of the deposition
 (8) do you remember how it happened that the - that the handouts
 (9) ended up in the deposition the second day?
 (10) A Yes I complained that I couldn't really understand the
 (11) context of these notes that you provided me unless I had the
 (12) handouts that I knew went with them so I went back to my
 (13) office and brought them in the second day
 (14) Q Do you remember my saying to you -
 (15) Counsel at Pages 329 to 330 - no excuse me Page 3 -
 (16) MR OPPENHEIMER I'm sorry give me the citation
 (17) again
 (18) MR PETUMENOS I'll give it to you 330 line 15
 (19) through 3 - 333 line 15 through 333 line 22
 (20) MR OPPENHEIMER Your Honor it's improper
 (21) cross examination It's not inconsistent with anything the
 (22) witness has said There's no foundation for it There's no
 (23) pending question It's not impeachment It's - what it is
 (24) is argument of counsel
 (25) THE COURT Let me see it

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- (1) (At side bar on the record)
 (2) MR PETUMENOS It's clipped there for you Judge
 (3) THE COURT 333 lines 15 through 23 right?
 (4) MR OPPENHEIMER Start at 330
 (5) MR PETUMENOS No the second reference 333
 (6) MR OPPENHEIMER I'm sorry what is the reference?
 (7) THE COURT What do you want to ask?
 (8) MR PETUMENOS The inference was left on direct that
 (9) the deposition examiner me was unfair to him in not allowing
 (10) him to review these handouts In fact what happened at the
 (11) deposition is I requested that he bring them back the next day
 (12) and he review them overnight and he was instructed by Exxon
 (13) counsel not to do it not to review them
 (14) MR OPPENHEIMER That's not true He did review
 (15) them He did bring them back He was asked the following
 (16) day -
 (17) THE COURT That's a misleading - that's misleading
 (18) isn't it?
 (19) MR PETUMENOS No it isn't
 (20) THE COURT He may have been instructed that during
 (21) the deposition but the fact is he did exactly what you asked
 (22) him to
 (23) MR PETUMENOS I can show you another transcript
 (24) reference the next day May I?
 (25) THE COURT Yes

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- (1) MR OPPENHEIMER I suggest page 648
 (2) MR PETUMENOS This is my offer Yeah 648 I have
 (3) it clipped for you Judge
 (4) THE COURT Okay
 (5) MR PETUMENOS I intended to elicit this next -
 (6) THE COURT Hold it
 (7) So what's your point?
 (8) MR PETUMENOS My point is that I - I asked him to
 (9) bring the notes Exxon first resisted I asked him to look at
 (10) the notes overnight Exxon instructed him not to do it without
 (11) authorization from the client The next day he showed up with
 (12) the notes and said he had thumbed through them briefly as he
 (13) says in the transcript
 (14) The impression was left on direct examination that he was
 (15) being treated unfairly that he was being asked questions
 (16) without being allowed -
 (17) THE COURT Counsel you cannot get - you're not
 (18) going to get in the colloquy of counsel So just forget that
 (19) right now
 (20) MR PETUMENOS All right
 (21) THE COURT And you can ask him whether or not he was
 (22) asked to bring back his notes and if he said he reviewed them
 (23) briefly because that's fair enough for his testimony Forget
 (24) the colloquy okay?
 (25) MR PETUMENOS Okay

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- (1) (Sidebar concluded)
 (2) BY MR PETUMENOS
 (3) Q What happened that first day of the deposition is that I
 (4) asked you if you would bring the notes the next day?
 (5) A After some discussion yes you did finally ask me to bring
 (6) the notes from my files the next day
 (7) Q And I asked you to review them overnight?
 (8) A You asked me to bring the notes in and have me review them
 (9) overnight that's correct
 (10) Q And the next day you came in and you stated that you had
 (11) - that you hadn't scanned -
 (12) MR OPPENHEIMER Your Honor reading from the
 (13) deposition without a question to determine whether it's
 (14) impeaching is improper
 (15) THE COURT Ask the question first counsel
 (16) BY MR PETUMENOS
 (17) Q Overnight despite asking you to look at the handouts and
 (18) asking you to bring them the next day you didn't review them
 (19) in detail did you?
 (20) A I picked them up out of my files and I flipped through
 (21) them and it was a very busy time and I didn't have a great
 (22) deal of time between the end of a very lengthy session on one
 (23) day and an early start the next day to do a lot of detailed
 (24) review I looked at them and I brought them in I would like
 (25) to have had them you know to look at a week before or

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- (1) whatever the normal procedure of predesignation was but I
 (2) didn't have so -
 (3) Q If you'd wanted to look at them overnight you could have?
 (4) A To the extent I had the time to do that that's correct
 (5) Q All right Now the - what you learned when you went to
 (6) the meeting was that Mr Page and Mr Gilfillan were the oil
 (7) company experts who testified on behalf of the oil company in
 (8) the Amoco Cadiz litigation?
 (9) A That - I don't recall that characterization The oil
 (10) company experts? They were - they were professors from an
 (11) independent university or college as I understood it that
 (12) they had done some research on the Amoco Cadiz that's
 (13) correct
 (14) Q Did you understand that they had been retained by the oil
 (15) companies or the defendants in the Amoco Cadiz litigation?
 (16) A I guess I understood that I didn't discuss who in
 (17) particular that was retaining them to do this work but they
 (18) were finding results that were - that were related to the
 (19) damage claims
 (20) Q Now in this handout that you got - what was the first
 (21) page of this handout?
 (22) The Elmo please Exhibit 8182
 (23) And the title of all the handouts was entitled Scientific
 (24) Issues Relating to Damages From the Amoco Cadiz Oil Spill
 (25) Litigation that Pertain to the Exxon Valdez That's what the
 title page says right?

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- (1) A That's correct
 (2) Q And what you received from Messrs Page and Gilfillan in
 (3) this meeting with counsel present was a virtual blueprint of
 (4) the defense in this case wasn't it?
 (5) MR OPPENHEIMER Your Honor it's argumentative May
 (6) we approach the bench?
 (7) THE COURT Sustained sustained the objection is
 (8) sustained
 (9) BY MR PETUMENOS
 (10) Q In the notes did you discuss - your notes reflect that
 (11) you discussed oil seeps in Alaska
 (12) A I believe we discussed that or were presented information
 (13) on that yes
 (14) Q Oil seeps in Alaska didn't have anything to do with Amoco
 (15) Cadiz did it?
 (16) A The point was it was a matter of comparison of other spills
 (17) to the Exxon Valdez case that is correct That was what our
 (18) purpose was and they're talking about the Exxon - conditions
 (19) in the Exxon Valdez situation compared to other situations
 (20) that doesn't surprise me It wasn't a matter of discussing
 (21) defense strategy for this case or anything of that nature
 (22) Q Well let's take a look Can't overemphasize the
 (23) importance -
 (24) Counsel Page 3184
 (25) Can't overemphasize the -

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- (1) MR OPPENHEIMER Could I get it counsel 3184?
 (2) MR PETUMENOS Right
 (3) A You re in my notes now?
 (4) MR OPPENHEIMER May the witness have his notes?
 (5) A I have them
 (6) THE COURT He has them
 (7) MR OPPENHEIMER Has them 3184
 (8) BY MR PETUMENOS
 (9) Q Can t overemphasize the importance of considering other
 (10) possible impacts that give same apparent effects like severe
 (11) winter That was discussed?
 (12) A That was a point that was made yes that other things
 (13) besides the oil spills they find in their technical research
 (14) can affect the same animal populations
 (15) Q They discussed how do you tell when it s -
 (16) I m following on the next page counsel
 (17) How do you tell when it s over shore communities are not
 (18) static and shore populations they re contained in your notes?
 (19) A All those things are related to the point I made earlier
 (20) that the - one of the themes of the discussion was how these
 (21) situations change over time and that scientific research
 (22) indicates that the recovery is - is usually more rapid than
 (23) initial reactions are
 (24) Q Typically pollution stressed communities are simple you
 (25) see that?

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- (1) A I m not sure where you are there
 (2) Q Same page Where it says 11
 (3) A I guess I ve lost track What number are you on?
 (4) Q 3185
 (5) A 3185 I see that
 (6) Q And there was testimony in this case about the food
 (7) chain - and whether or not the food chain is complex or
 (8) simple?
 (9) MR OPPENHEIMER Relevance no foundation
 (10) argumentative
 (11) THE COURT Overruled
 (12) BY MR PETUMENOS
 (13) Q Were you here for that?
 (14) A I m sorry I m trying to find the notes that this relates
 (15) to again so I make sure I don t misunderstand Typically
 (16) pollution stressed communities are simple you were asking
 (17) about
 (18) Q Yes that s what it says in the notes doesn t it?
 (19) A And my reference is to a handout that talks about the
 (20) biology of shorelines and measurement of diversity health of a
 (21) community all generalized issues associated with oil spills
 (22) obviously
 (23) Q Next page at 22 it says baseline or pre-spill information
 (24) doesn t tell you a damn thing because nature varies so much
 (25) Do you see that?

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- (1) MR OPPENHEIMER It goes on counsel
 (2) MR PETUMENOS I can t read it
 (3) MR OPPENHEIMER Signal to noise problem
 (4) BY MR PETUMENOS
 (5) Q Signal to noise problem Do you see that?
 (6) A I see that
 (7) Q And there was testimony in this trial wasn t there about
 (8) whether you can go to baseline in the oil spill?
 (9) A I don t know I haven t followed the technical testimony
 (10) in this trial
 (11) Q In the handouts page 11 - 212 is the bates number
 (12) MR OPPENHEIMER No objection 3212
 (13) MR PETUMENOS 3212
 (14) MR OPPENHEIMER No objection
 (15) BY MR PETUMENOS
 (16) Q The way this was laid out by Mr Papke - by Mr Page and
 (17) Gilfillan was -
 (18) MR OPPENHEIMER No foundation for that question
 (19) THE COURT Sustained By Mr Page and Gilfillan
 (20) MR PETUMENOS Pardon?
 (21) BY MR PETUMENOS
 (22) Q This was a handout that was given to you all these
 (23) handouts were given to you by Page and Gilfillan right?
 (24) A That s my recollection yes
 (25) Q One of these gentlemen was talking about this page at some

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- (1) point in the presentation right?
 (2) A That would be my assumption yes I ve got notes on that
 (3) I assume
 (4) Q And what they were talking about here was a claim made in
 (5) the Amoco Cadiz right?
 (6) A Yes
 (7) Q The top it s the claim at the bottom is the scientific
 (8) basis for rebuttal and the result says drastically reduced
 (9) award right?
 (10) A That s correct
 (11) Q It s a fact isn t it Mr Papke that Mr Page and
 (12) Mr Gilfillan were telling you how it was that they defended
 (13) the Amoco Cadiz case?
 (14) A They were recounting the facts that as the information came
 (15) out as the facts came out on the Amoco Cadiz case the levels
 (16) of claims that were made were reduced
 (17) Q Did it strike you that Mr Page and Mr Gilfillan were
 (18) advocates for the oil company point of view?
 (19) A No
 (20) Q No? Now this business about the survey at 3182 if there
 (21) were - one of the things that you were going to study that
 (22) you thought you were going to study ultimately was market
 (23) impact stigma perception things like that right?
 (24) A Pardon me? Would you repeat the question please?
 (25) Q One of the things that you thought you might end up

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- (1) studying were things like market perception stigma things
 (2) like that?
 (3) A Well we always are studying the market reaction to things
 (4) yes and the real estate market perception of a situation so I
 (5) would - I don't recall specifically where our thinking was at
 (6) that point but I would assume we were anticipating studying
 (7) the market reaction
 (8) Q You have a note that says survey people - the survey
 (9) business about people thinking that an oil spill is worse -
 (10) the average perception is oil spill is worse than a nuclear
 (11) explosion?
 (12) MR OPPENHEIMER Assumes facts not in evidence to the
 (13) extent it assumes the existence of such a survey
 (14) THE COURT Oh the objection is overruled
 (15) BY MR PETUMENOS
 (16) Q That's what your note says?
 (17) A The note says survey average perception is oil spill is
 (18) worse than nuclear explosion
 (19) Q Did you ever once as you developed your work on stigma
 (20) call Page and Gilfillan back about the survey?
 (21) A Well I'm not sure this refers to survey I don't recall
 (22) whether there was a survey or not It may well be but we
 (23) didn't come across it in our research and we looked at many
 (24) different sources of information so I don't have any
 (25) information of a survey like that

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- (1) Q Your deposition was taken when?
 (2) A December of last year
 (3) Q December of last year and you were asked about this note
 (4) then?
 (5) A I may have been
 (6) Q And you didn't recall anything about the note did you?
 (7) A Was this the first day when I had information all of the
 (8) information in front of me or the second day?
 (9) Q Either day
 (10) A Well it might make a difference what I might have recalled
 (11) what day it was whether I had complete information or not
 (12) Q Did you recall either day anything about the survey being
 (13) discussed?
 (14) A I don't recall now what survey this would refer to so you
 (15) know -
 (16) Q Between the time of your deposition and trial did you ever
 (17) call back Page and Gilfillan to try and locate the survey?
 (18) A I don't remember -
 (19) Q Relating to the average perception being worse than a
 (20) nuclear explosion?
 (21) A What we have done in our work is study the facts of the
 (22) market not the - not the perception I mean that was the
 (23) point of this is that the perception initially can be
 (24) different than the facts both scientifically and our
 (25) conclusion in terms of the market research The real estate

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- (1) market perception can be different than media perception or
 (2) public perceptions at the onset of the spill
 (3) MR PETUMENOS Read the question back
 (4) (The prior question was read)
 (5) BY MR PETUMENOS
 (6) Q Could you answer that question Mr Papke?
 (7) A No I haven't talked to them since 1990
 (8) MR PETUMENOS No further questions
 (9) MR OPPENHEIMER Just very quickly Your Honor
 (10) REDIRECT EXAMINATION OF GARY PAPKE
 (11) BY MR OPPENHEIMER
 (12) Q Mr Papke in your notes Exhibit 8181 -
 (13) Joel if I could have the Barco
 (14) This was the subject that we were just on regarding these
 (15) average perceptions Do you see that?
 (16) A Survey average perception yes I do
 (17) Q Yes Now I don't notice a little circled number next to
 (18) that that would relate to the handout but is there in fact
 (19) such a number in your notes? I draw your attention to the
 (20) preceding page
 (21) A Yeah the numbering starts at the top of the preceding
 (22) page it's 1 2 and then 3
 (23) Q Okay then 3?
 (24) A Then it goes on
 (25) Q Is it your understanding that there's a corresponding point

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- (1) in the handout that goes with that section?
 (2) A Well there should be
 (3) MR OPPENHEIMER Okay counsel I'll be publishing
 (4) Page 3202 from Exhibit 8182
 (5) MR PETUMENOS Could I just see it?
 (6) MR OPPENHEIMER Sure
 (7) BY MR OPPENHEIMER
 (8) Q Mr Papke is that the section of the handout to which you
 (9) were making a cross reference?
 (10) A Yes I think that is the related handout to this part of my
 (11) notes I see also it says congressional research study in the
 (12) notes and also in the - in the article that's cited here
 (13) Q And again we're making a point in answering Mr
 (14) Petumenos
 (15) questions phrasing few people want to go back and take a look
 (16) a year later this was a reference to the media again and to
 (17) that portion of the handout?
 (18) A That's right That was a reference to the media
 (19) perception media reporting
 (20) Q Very quickly here I have Exhibit 10298A Again this is
 (21) the table deeds recorded with mortgages and you were asked
 (22) on
 (23) cross Don't most of the people in the spill area live in the
 (24) cities? So my question is Does that make a darn bit of
 (25) difference to the relevance of this data?
 (26) A This data would show if there's a market wide stigma The
 (27) cities aren't that distinct from the rest of the area

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- (1) including the remote properties The cities are on the same
- (2) resources The cities are interrelated with the recreational
- (3) values in the Sound They re interrelated with the fishing
- (4) These are fishing communities These are recreational centers
- (5) the people who go out and use the recreational sites the
- (6) remote sites many of them live in the cities
- (7) If there was an effect that affected the remote properties
- (8) it would affect the city properties as well It would affect
- (9) the guy who sells supplies to the fisherman in town and the
- (10) person who runs the fast food restaurant It would show up
- (11) someplace in the city markets just as well as it shows up in
- (12) the remote markets
- (13) Q How about this business about the road system? In terms of
- (14) the relevance of this data does it matter that some of the
- (15) data in here is from transactions on the road system?
- (16) A No the road system
- (17) MR PETUMENOS Objection leading
- (18) A Isn t a clearly defining characteristic some of the
- (19) properties on the road system in places like Kodiak are just as
- (20) much recreational properties as some that are off the road
- (21) system There s not a clear distinct line that I ve seen in
- (22) these markets between the remote and the urban and the
- (23) interim
- (24) properties
- (25) BY MR OPPENHEIMER
- (26) Q Is it possible though that for some different purposes

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- (1) other than analyzing an oil spill and the effect of an oil
- (2) spill that maybe you would draw distinctions between some of
- (3) these markets?
- (4) A I suppose it might be possible if you had a more narrow
- (5) purpose in mind
- (6) Q I don t know whether Mr Stoll was correct or not when he
- (7) suggested that 99 percent of the - of remote properties are
- (8) untaxed but let s assume that that s true make a whit of
- (9) difference to your conclusions from - well I don t need to
- (10) take it out the other table that you showed which was the
- (11) full value study the - does it make a whit of difference to
- (12) that if that s true?
- (13) A No because what we re at that charting there is changes
- (14) trends over time and the fact that a particular category of
- (15) properties isn t in there is still - we re looking at that
- (16) particular kind of taxed property before and after the spill
- (17) and looking for changes and it would show up if it was there
- (18) MR OPPENHEIMER Mr Papke thank you No further
- (19) questions
- (20) MR STOLL I just have one question
- (21) RE-CROSS-EXAMINATION OF GARY PAPKE
- (22) BY MR STOLL
- (23) Q You didn t break out the remote properties from the urban
- (24) properties in this - could you go back to that last - well I
- (25) guess it s the one that s - it s right here On this

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- (1) Mr Papke in your report you did not prepare a - an
- (2) analysis break out the deeds recorded with mortgages
- (3) between
- (4) the remote areas and the urban areas did you?
- (5) A I don t recall that we did no
- (6) MR STOLL That s all
- (7) THE COURT You can step down sir
- (8) MR OPPENHEIMER Your Honor I do have one quick -
- (9) one question promise just one
- (10) FURTHER REDIRECT EXAMINATION OF GARY PAPKE
- (11) BY MR OPPENHEIMER
- (12) Q In your work did you examine those transactions in remote
- (13) properties and reach any conclusions that were in any way
- (14) inconsistent with what you told the jury today?
- (15) A No I did look at all those - many of the - most all of
- (16) those remote property transactions and what I found was
- (17) consistent with the general patterns I see in these trends
- (18) MR OPPENHEIMER No further questions Your Honor
- (19) Stole
- (20) THE COURT You may step down sir
- (21) MR STOLL Just a minute Your Honor Your Honor may
- (22) I have just a moment?
- (23) Nothing further Your Honor
- (24) MR OPPENHEIMER Thank you Mr Papke
- (25) MR DIAMOND Your Honor the defendants call as their
- (26) next witness Mr Norm Lee

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- (1) THE CLERK Can you go around to the stand and attach
- (2) the microphone to your jacket lapel Please stand and raise
- (3) your right hand for the oath
- (4) (The Witness Is Sworn)
- (5) THE CLERK Please be seated sir
- (6) For the record can you please state your full name
- (7) A Norman Lee
- (8) THE CLERK Spell your last name please
- (9) A L e e
- (10) THE CLERK And your occupation?
- (11) A Real estate appraiser
- (12) THE CLERK Thank you
- (13) MR DIAMOND Mr Lee I ve given you some water
- (14) because I know you re suffering from head cold
- (15) A Thank you sir
- (16) MR DIAMOND If your voice gives out let us know and
- (17) we ll take a break
- (18) DIRECT EXAMINATION OF NORMAN LEE
- (19) BY MR DIAMOND
- (20) Q You are recently retired from the federal government?
- (21) A Yes sir
- (22) Q What did you do - how long did you work for the federal
- (23) government?
- (24) A I was with them for 25 years
- (25) Q And what did you do for the federal government?

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- (1) A Real estate appraiser for the entire 25 years
 (2) Q What was the last position you held before retiring?
 (3) A For the past seven years I was chief real estate appraiser
 (4) for the Alaska Region for the National Park Service And
 (5) collaterally I was reviewing appraiser for Fish & Wildlife
 (6) Service and for the Bureau of Land Management
 (7) Q When did you retire?
 (8) A May 20th
 (9) Q Was it chief appraiser for the National Park Service?
 (10) A Yes sir
 (11) Q What does a chief appraiser for the National Park Service
 (12) do?
 (13) A I was in charge of all of the real estate appraisal
 (14) activities for the Alaska Region That included contracting
 (15) for outside appraisers review of appraisals and also I did
 (16) field appraisals myself usually the more complex properties
 (17) Q Okay Working for the federal government as an appraiser
 (18) do you move around from time to time?
 (19) A Yes sir I do
 (20) Q Was your last tour of duty here in Alaska?
 (21) A The last seven years was here in Alaska Before then I
 (22) was in Montana also California Nebraska
 (23) Q And since retiring from ~ from the federal government do
 (24) you now reside both in Alaska and Montana?
 (25) A I m in the process of moving to Montana

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- (1) Q What s your background?
 (2) A As far as -
 (3) Q Professional background
 (4) A Professional? As I said 25 years with the federal
 (5) government I have a Bachelor s degree from University of
 (6) Wisconsin I ve attended a number of the Appraisal Institute
 (7) courses in fact I think I ve taken all of their courses
 (8) courses presented by the American Society of Farm Managers
 (9) and
 (10) Rural Appraisers and also the International Right-of-Way
 (11) Association
 (12) Q Why in the world does the federal government need a real
 (13) estate appraiser?
 (14) A It needs a - any action that involves real estate whether
 (15) it s sales purchases leases we have to establish what s
 (16) called fair market value
 (17) Q Why? The government s got all that money should be able
 (18) to pay whatever it wants?
 (19) A It s both for the protection of the landowner when you re
 (20) purchasing property and for the protection of the taxpayer
 (21) Q In what way?
 (22) A To know that we are paying a fair price for the property
 (23) that we receive
 (24) Q And what does the appraiser federal government appraiser
 (25) bring to that process?
 (26) A Through his experience and expertise he is the one who

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- (1) establishes fair market value
 (2) Q You said you were a chief appraiser for the National Park
 (3) Service but a review appraiser for other federal government
 (4) agencies Could you explain to the jury what the difference is
 (5) between the two?
 (6) A Well a chief appraiser would have all functions including
 (7) the appraisal contracting and review whereas with Fish and
 (8) Wildlife Service and with Bureau of Land Management I simply
 (9) reviewed their appraisals
 (10) Q Does review also include approval of appraisals?
 (11) A Yes it does
 (12) Q And what - what does that mean to approve an appraisal?
 (13) A Well before an appraisal can be used in an action
 (14) involving a government agency it has to be reviewed and
 (15) approved
 (16) Q And approved means - what does that tell us?
 (17) A Well that means that it s acceptable and suitable for use
 (18) by a government agency It s similar to a contractor s
 (19) warrant they - you have to be - have so much experience and
 (20) so much expertise before you re allowed to contract It s the
 (21) same thing with a review appraiser You have to meet certain
 (22) qualifications
 (23) Q And does the appraisal itself have to meet certain
 (24) requirements?
 (25) A Definitely

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- (1) Q Tell us what those are in general terms?
 (2) A It has to meet approved or accepted appraisal premises and
 (3) theory It has to meet or follow current case law with the
 (4) federal government There s a book called The Uniform
 (5) Appraisal Standard - I m sorry Uniform Appraisal Standards
 (6) for Federal Land Acquisition and that goes through in quite a
 (7) bit of detail what s acceptable in a federal appraisal Most
 (8) state governments also follow this particularly if they re
 (9) using any federal funding
 (10) Q In addition to your work for the federal government during
 (11) the latter part of your tenure did you also do work or have
 (12) responsibilities for the Exxon Valdez Oil Spill Trustee
 (13) Council?
 (14) A Yes I was part of the Trustee Council s Land Acquisition
 (15) Team
 (16) Q What - what did you do for the team?
 (17) A Mainly it was in an advisory capacity drawing up a
 (18) statement of work for real estate appraisal for use in
 (19) contracting firm appraisals and also working under what s
 (20) called a memorandum of understanding between the agencies
 (21) Q Okay I would like you to describe for the jury the extent
 (22) of the federal government s landholdings in the State of
 (23) Alaska And if things went as planned I should have - we
 (24) should have a map And we do
 (25) If you wouldn t mind coming down you can put the little

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- (1) transformer in your pocket stay hitched up to the tether and
 (2) I'm going to ask you to take a look at what we previously
 (3) marked as DX12082 Try not to stand between the map and the
 (4) jury
 (5) A Okay
 (6) Q And take us on a tour of what the federal government owns
 (7) in the State of Alaska
 (8) A Well most everything that's colored either this color or
 (9) this color or green and this color -
 (10) Q These colors don't show up real well in the transcript
 (11) A I'm sorry I'm color blind So I believe this is a dark
 (12) brown a tan a beige and a light green on this map The dark
 (13) brown colors are National Park Service responsibilities This
 (14) area here here Denali National Park Lake Clark Katmai
 (15) Aniakchak Wrangel St Elias Kenai Fjords Glacier Bay These
 (16) are - the tan ones are Fish & Wildlife Service ANWR Yukon
 (17) Kuskokwim Delta and then the beige colored are Bureau of
 (18) Land Management lands and then the Forest Service Chugach
 (19) National Forest and Tongass National Forest
 (20) Q In total as a percentage of all of the square miles of
 (21) real estate in Alaska how much does the federal government
 (22) own?
 (23) A It's about 58 percent
 (24) Q And of the 58 percent which is an astounding figure how
 (25) much is national park lands?

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- (1) MR PETUMENOS Your Honor could we dispense with the
 (2) remarks again?
 (3) THE COURT I'm sorry counsel I couldn't hear you
 (4) MR PETUMENOS Could Mr Diamond ask questions and
 (5) not make remarks?
 (6) MR DIAMOND I apologize with Mr Petumenos but for
 (7) all of the people to complain about remarks I will try to
 (8) just ask questions now
 (9) MR PETUMENOS I try to keep my remarks a humorous
 (10) but not substantive
 (11) THE COURT Counsel could we get on to the meat of
 (12) the case both of you? Thank you
 (13) BY MR DIAMOND
 (14) Q What percentage of the federal government holdings are
 (15) National Park Service land?
 (16) A Approximately one-third
 (17) Q Compared to all of the Park Service lands throughout the
 (18) United States what percentage of Park Service lands are here
 (19) in Alaska?
 (20) A About 50 percent of all the park lands about the same in
 (21) Alaska as it is in all the Lower 48
 (22) Q All right You began mentioning before that some of the
 (23) properties owned the parcels owned by the federal
 (24) government were in the area affected by the Exxon Valdez oil spill in
 (25) 1989?

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- (1) A Yes sir that would be the Kenai Fjords National Park
 (2) Q You can retake your seat There is significant Native
 (3) Corporation land ownership in the Kenai Fjords National Park
 (4) area?
 (5) A Yes sir
 (6) Q Could you describe that for the jury?
 (7) A Both English Bay and Port Graham Native Corporations have
 (8) ownerships within the Kenai - boundaries of the Kenai Fjords
 (9) National Park
 (10) Q This case also involved Kodiak Does the federal
 (11) government own land on Kodiak?
 (12) A Yes Fish & Wildlife Service has extensive holdings on
 (13) Kodiak Island
 (14) Q I'd like to turn the clock back to 1989 the time of the
 (15) oil spill What was your position then?
 (16) A At that point in time I was chief appraiser for the
 (17) National Park Service
 (18) Q Were you activated in some capacity as a result of the
 (19) spill by the federal government?
 (20) A Yes
 (21) Q When was that?
 (22) A About April 5th of '89 I was called in as part of the
 (23) Incident Command Team Incident Command Team is like a
 (24) disaster control unit and it draws from a number of different
 (25) agencies state and federal agencies for expertise in such

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- (1) things as forest fires or in this case the oil spill
 (2) Q And what were you asked to do?
 (3) A I was part of the law enforcement branch at that time or
 (4) in that capacity and I was asked to look at the lands that
 (5) were potentially going to be hit by the oil spill
 (6) Q Was that to accumulate baseline data?
 (7) A That was to accumulate baseline data to be used in
 (8) potential litigation
 (9) Q What do you mean potential litigation?
 (10) A In potential litigation by the federal government and the
 (11) State government against Exxon
 (12) Q What specifically did you do in attempt to accumulate
 (13) baseline data can you describe for the jury?
 (14) A Well one of the first things I did was to fly the
 (15) coastline starting as Resurrection Bay flew all the coastline
 (16) of Kenai Fjords National Park on down the coastline over to
 (17) the south end of Lake Clark McNeil River Katmai and
 (18) Aniakchak and then we flew - also flew the coastline of
 (19) Kodiak Islands
 (20) Q Did you see any oil?
 (21) A I saw oil sheen off of Resurrection Bay and then at the
 (22) end of the study or that initial part of the study I saw some
 (23) tar balls at the northeast corner of Kodiak Islands
 (24) MR PETUMENOS Your Honor may we approach?
 (25) THE COURT Uh huh

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- (1) (At side bar on the record)
- (2) THE COURT Go ahead
- (3) MR PETUMENOS This relates to the issue of whether
- (4) this is an expert witness or a lay witness I had no idea
- (5) that s what was being elicited and I m still not sure now as
- (6) to whether or not this witness was part of the federal
- (7) government s expert witness team that analyzed the oil spill
- (8) for the lawsuit that was never - never went to trial It was
- (9) never litigated
- (10) If that s where this is going that he s going to be giving
- (11) his opinion about what he did for the Trustees and for the
- (12) federal government directly on the oil spill for purposes of
- (13) litigation this is not a - once again as you recall this is
- (14) not an expert witness all the problems with the orders and all
- (15) that
- (16) THE COURT Where s it going?
- (17) MR DIAMOND He ultimately will tell about a study
- (18) that he was asked to conduct initially an informal study then
- (19) it was a funded study by the Department of Interior to assess
- (20) the effects of the spill if any on property ownership on
- (21) property owned by National Park Service specifically the Kenai
- (22) Fjords National Park area
- (23) He s going to describe in very general terms what he did
- (24) He s going to report on the - what his recommendations
- (25) findings and recommendations to representatives of the

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- (1) Department of the Interior with respect to the impact of the
- (2) spill on park owned land
- (3) MR PETUMENOS This is -
- (4) MR DIAMOND What he did what he found
- (5) MR PETUMENOS This is 702 expert testimony
- (6) THE COURT I agree It s expert testimony
- (7) MR DIAMOND How does this differ from Mr Haerer s
- (8) testimony yesterday?
- (9) THE COURT I m dealing with this one counsel Do
- (10) you want to hear it out of the presence of the jury? You re in
- (11) jeopardy of losing this witness
- (12) MR DIAMOND Yeah I would like to be heard
- (13) (Sidebar concluded)
- (14) THE COURT Okay I have to send you out
- (15) (Jury out at 11 25 a m)
- (16) THE COURT The objection is counsel - and you ve
- (17) said at the bench here what you - what you intend to elicit
- (18) from this witness The objection is that this is an expert
- (19) witness and he was not designated as an expert witness and
- (20) within the scope of prior rulings in this case you re not
- (21) allowed to elicit expert testimony from this witness And
- (22) generally I agree with that proposition You re not allowed
- (23) to elicit expert testimony from this witness If this is a
- (24) fact witness you better tell me why he s a fact witness
- (25) MR DIAMOND He is a fact witness because part of his

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- (1) responsibilities as chief appraiser -
- (2) MR PETUMENOS Excuse me Judge I don t mean to
- (3) interrupt -
- (4) THE COURT Please sit down
- (5) MR PETUMENOS I wanted to get the witness excused
- (6) MR DIAMOND That s fine Would you just disconnect
- (7) yourself and step out
- (8) (Witness excused)
- (9) MR DIAMOND Your Honor as I suggested up at
- (10) sidebar this is indistinguishable from the situation we dealt
- (11) with yesterday and we ve dealt with in general terms with
- (12) Mr Haerer and other witnesses As part of his job he was
- (13) instructed to make a determination in his capacity as an
- (14) appraiser whether park land which is very close to land in
- (15) some circumstances coterminous with land owned by the
- (16) plaintiffs was adversely - the market value of such land was
- (17) adversely impacted by the spill This was part of his job
- (18) responsibilities He and another -
- (19) THE COURT Part of his job responsibilities for the
- (20) impending litigation?
- (21) MR DIAMOND Was this done in connection with the -
- (22) the federal government s - I think he would testify if asked
- (23) that he understood that part of the reason he was being asked
- (24) to do this was to make a judgment whether the federal
- (25) government was going to seek recompense or restoration means

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- (1) from Exxon
- (2) THE COURT So the answer to the question is yes
- (3) MR DIAMOND I m sorry?
- (4) THE COURT The answer to the question was yes
- (5) MR DIAMOND Was this done solely for purposes of
- (6) litigation? I think his response would be we wanted to know
- (7) what effect if any it had on our lands
- (8) THE COURT All right You don t know what he s going
- (9) to say but you know that he will answer that at least in
- (10) part it was for purposes of perhaps giving opinions in
- (11) impending litigation right?
- (12) MR DIAMOND I think that in part that is correct.
- (13) Just as Mr Hearer said he undertook his investigations
- (14) because he had responsibility to determine whether he had to
- (15) adjust property values This fellow was asked to do the same
- (16) work with respect to parcels which as I said are next to and
- (17) co- in some cases coterminous with the plaintiffs property
- (18) as to whether they had been adversely affected He looked at
- (19) market data and he - he looked at various things He
- (20) interviewed various people and he reported - reported back to
- (21) the secretary or to representatives of the Department of
- (22) Interior that as to park-owned land he found no indication
- (23) that there had been any impairment of value of that land
- (24) Again I don t see how this differs in material respects
- (25) from the testimony that we ve received yesterday He is not

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- (1) commenting generally about the effect of the oil spill on these
 (2) lands He s not talking generally He s talking about the
 (3) specific lands owned by the Park Service for which he had
 (4) responsibility I guess also some Fish and Wildlife Service
 (5) since that was a combined undertaking
 (6) THE COURT All right One distinction counsel is
 (7) that I don t remember hearing any objection to Mr Haerer s
 (8) testimony
 (9) MR DIAMOND I believe a motion was filed as to
 (10) Mr Haerer
 (11) THE COURT Well it may have been filed because it
 (12) was resolved I don t remember a specific objection Was
 (13) there a specific objection?
 (14) MR DIAMOND Yes I believe Mr Stoll stood up and
 (15) made objections at various points during the course of
 (16) Mr Haerer s testimony
 (17) THE COURT I have to examine the rulings at that time
 (18) to see whether or not I d be somehow inconsistent in striking
 (19) this witness testimony if it s expert as opposed to fact
 (20) testimony
 (21) MR PETUMENOS Judge my reaction to counsel s
 (22) argument is that there is a major distinction between
 (23) Mr Haerer s testimony and this witness testimony several
 (24) The first is that Mr Haerer was conducting his inquiry for
 (25) purposes of some statutory duty outside of this litigation not

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- (1) for the purpose of convincing people that the oil spill was
 (2) harmed property but in order to do tax things which has the
 (3) indicia of reliability behind it that this witness doesn t
 (4) And secondly as I - there s a little history behind this
 (5) that I think the Court should be aware of in the federal
 (6) litigation there were attempts to depose or get information
 (7) from federal employees related to the - to the litigation and
 (8) there is a federal statute involved that prohibits you from
 (9) subpoenaing certain employees I believe Exxon actually even
 (10) filed a lawsuit to get access to this information and Judge
 (11) Holland ruled that none of us could have it In other words
 (12) no one has had access to the federal experts the federal
 (13) employees who would be involved in this matter The federal
 (14) government of course got a consent decree for damages to
 (15) natural resources including land This gentleman is a retired
 (16) federal employee so therefore he falls out of the usual rule
 (17) and the statute doesn t prohibit people from - from calling
 (18) him to the witness stand
 (19) But we have no deposition we have no access to the other
 (20) experts in the federal government that may disagree with him
 (21) and surely there must be because the federal government filed
 (22) an action maintaining the opposite contention never disclosed
 (23) as part of the expert discovery and this witness has already
 (24) testified I believe - that s when I stood up - that for
 (25) purposes of litigation he is conducting - he s conducting

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- (1) this inquiry looked for oil and is apparently going to say
 (2) that there was no damage
 (3) This is devastating outcome determinative proof without
 (4) our having - with our having basically an empty file sitting
 (5) over here and a complete circumvention of the pretrial orders
 (6) and rules and I move to strike it
 (7) MR DIAMOND If I may respond to Mr Petumenos
 (8) comments he says this Some reason Mr Lee s testimony is
 (9) not
 (10) as trustworthy as Mr Haerer s is because it was made at least
 (11) in part for litigation purpose I would submit - think about
 (12) that it probably makes his testimony more trustworthy rather
 (13) than less trustworthy because if his purpose was to find any
 (14) conceivable basis for a claim he certainly would be slanting
 (15) in the direction of the plaintiffs
 (16) To the extent that his testimony is to the contrary it
 (17) suggests that this is far more trustworthy than any other kind
 (18) of testimony under the circumstances the study was done I m
 (19) not aware of any rule that says merely because somebody
 (20) makes
 (21) an inquiry that is litigation motivated that the inquiry ought
 (22) not to be received in evidence Beyond that he is testifying
 (23) basically as a private property owner He was the government s
 (24) representative in connection with its ownership of lands and
 (25) he is testifying as to matters of value as to which he has a
 (26) basis to formulate an opinion and I think that s classic
 (27) THE COURT Don t you think that s a bit of a stretch

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- (1) counsel a retired federal employee testifying as a property
 (2) owner?
 (3) MR DIAMOND He was the federal employee who was
 (4) asked to be the government s representative as a landowner
 (5) and
 (6) make the determination as a landowner whether his principals
 (7) property had been adversely impacted
 (8) MR SANDERS It s no different than if we re dealing
 (9) with corporate lands We had an officer of the corporation on
 (10) the stand or someone who was an officer of the corporation at
 (11) the time the determination was made And that s classic
 (12) permissible testimony and he certainly has a basis for
 (13) rendering an opinion
 (14) In response to the notion that somehow the plaintiffs are
 (15) surprised and prejudiced this fellow has been on our witness
 (16) list since - since day one There is no - as he would
 (17) testify If asked there is no voluminous file to discover
 (18) because none exists They have had equal access to him as
 (19) we
 (20) have and in fact he submitted to a lengthy interview by
 (21) plaintiffs counsel I believe two weeks ago and so they know
 (22) exactly what he is going to say
 (23) Is this potentially case devastating testimony? That may
 (24) be a bit hyperbolic but we think this is very very important
 (25) testimony This is testimony by a representative of probably
 (26) the largest landowner in the area who made a detailed and
 (27) careful analysis of the situation and found that there was no

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- (1) market wide stigma effect
 (2) Your Honor if we were dealing with more traditional damage
 (3) claims maybe this kind of testimony might be deemed a little
 (4) bit remote but the basic gist of the claim that we're trying
 (5) to defend ourselves against is this notion that the spill had
 (6) this horrible market wide impact It brought all buyers and
 (7) sellers to their knees It stopped all transactions It
 (8) rendered all property valueless over a 1200 mile line of
 (9) coastline And here is a fellow who stands in the shoes of a
 (10) property owner that owns a large piece of it
 (11) He's got a basis to testify he's done his homework He is
 (12) important testimony We view this as very important testimony
 (13) as does Mr. Petumenos and to my way of thinking it's not -
 (14) it's not expert It's not expert opinion testimony You will
 (15) remember in addition we went through gyrations concerning
 (16) questions of who's an expert and who's not You ordered us to
 (17) disclose in summary fashion all of the information that -
 (18) THE COURT Let me see the disclosure
 (19) MR. DIAMOND What's that?
 (20) THE COURT I'd like to see your disclosure on this
 (21) witness
 (22) MR. DIAMOND I don't know that we have that in the
 (23) courtroom
 (24) MR. STOLL I have a copy Your Honor
 (25) THE COURT Let me see it

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- (1) MR. STOLL I'm sorry Your Honor I had the one for
 (2) Vockner I don't have the one for -
 (3) MR. PETUMENOS I would ask the Court to see it as
 (4) well I won't say I have a recollection of it but I -
 (5) THE COURT I've seen some of them I'd like to see
 (6) this How long is it going to take you do get it to me?
 (7) MR. DIAMOND I can have somebody run back to the
 (8) offices or I can call somebody to bring it over Ten minutes
 (9) THE COURT That's fine I'm going to tell the jury
 (10) to take a half hour break That means they'll be allowed to -
 (11) MR. STOLL Excuse me Your Honor I do have it here
 (12) THE COURT Let's see it
 (13) All right The expected testimony disclosed here is the
 (14) following Mr. Lee will testify concerning the investigation
 (15) that was performed to address the impacts the Exxon Valdez oil
 (16) spill might have had on the value of Park Service lands He
 (17) will also testify concerning federal lands acquisition - what land
 (18) acquisition and the government's acceptance or rejection of the
 (19) natural lands theory
 (20) In addition Mr. Lee will testify concerning governmental
 (21) review of appraisals performed by Bill Mundy and land
 (22) acquisition by the Oil Spill Trustees Defendants believe
 (23) Mr. Lee will there testify that after investigation he
 (24) concluded on behalf of the National Park Service that the oil
 (25) spill did not negatively impact the value of Park Service

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- (1) lands Defendants also believe Mr. Lee will testify to that
 (2) the federal government has rejected the natural lands theory as
 (3) not being reflective of market value
 (4) Let me just tell you what I think about this particular
 (5) disclosure and what falls within the expert testimony and the
 (6) factual testimony that's been allowed in this case and may -
 (7) may be allowed with this and other witnesses
 (8) He may very well be entitled to testify concerning the
 (9) investigation performed to address the impacts of the Exxon
 (10) Valdez oil spill to give a basis for any later factual Fort
 (11) Myers testimony he might give He can certainly testify
 (12) concerning the federal land acquisition and the government's
 (13) acceptance or rejection of the natural lands theory I think
 (14) that's a factual piece of testimony that - that might be
 (15) helpful to this jury and it's not expert testimony
 (16) In addition Mr. Lee will testify concerning governmental
 (17) review of appraisals performed by Bill Mundy and land
 (18) acquisition by the Oil Spill Trustees That discloses nothing
 (19) to me I don't know what it means So to the extent that you
 (20) could flesh it out maybe - maybe it's factual testimony
 (21) maybe it's expert testimony
 (22) Defendants believe Mr. Lee will testify that after -
 (23) investigation he concluded on behalf of the National Park
 (24) Service that the oil spill did not negatively impact the value
 (25) of the Park Service lands That's essentially similar to the

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- (1) Haerer testimony And there's - there may be distinctions in
 (2) the record also and that's what I said about reviewing the
 (3) record to determine whether or not objections were made or in
 (4) fact concessions were made that Mr. Haerer could testify by
 (5) the plaintiffs which I believe to be the - the record but I
 (6) may be mistaken about that But what I'm trying to tell you
 (7) here is if a concession was made on one witness doesn't mean
 (8) that the objection is bad with regard to the other - to
 (9) another?
 (10) Defendants also believe Mr. Lee will testify that the
 (11) federal government has rejected the natural lands theory as not
 (12) being reflective of market value That's up in the - that's
 (13) I think in essence the same as the second sentence in this
 (14) disclosure which I've said is factual
 (15) So there's factual matter here The question would be
 (16) whether he can also testify he did an all-encompassing study
 (17) flew around looked at things evaluated the effects of the
 (18) spill and now has an opinion that the spill did not negatively
 (19) affect property values and the answer to that question
 (20) counsel is no You cannot
 (21) MR. DIAMOND So that I understand you and don't
 (22) disappoint in any respect - do I understand you to be saying
 (23) that he can report as to factual - the factual matters that he
 (24) reported to his superiors in the Department of Interior
 (25) THE COURT Well that depends The question is

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- (1) whether you get the opinion in disguised as a report to the
 (2) superiors and the answer to that question is no
 (3) MR DIAMOND It seems to me the Court is saying I can
 (4) have him testify as to work he did to determine the impact of
 (5) the spill on - on federal park lands but I cannot have him
 (6) testify as to his findings his conclusions or what he
 (7) reported to his superiors in -
 (8) THE COURT No I don't know that that's the issue
 (9) because I haven't heard what the findings and conclusions
 (10) were If they for instance relate to the natural lands
 (11) theory something like that -
 (12) MR DIAMOND No it does not I'm talking
 (13) specifically about whether the oil spill negatively impacted -
 (14) negative overall impact on Park Service lands and in the oil
 (15) spill affected areas he will testify after looking at all the
 (16) things that I looked at including condition of those
 (17) properties and including all sorts of market indicators I
 (18) concluded that it did not have such an impact and -
 (19) THE COURT And your argument would be because he's
 (20) given that opinion your argument would be ultimately in this
 (21) case that since these lands are next to the plaintiffs' lands
 (22) that opinion as no negative effect should transfer to the
 (23) plaintiffs' land also
 (24) MR DIAMOND It is probative on the absence of the
 (25) stigma wide effect in all of the spill affected areas that the

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- (1) counsel
 (2) MR PETUMENOS Judge when I object I'm going to
 (3) object on 702 grounds as a code so you know what I'm doing
 (4) when I object
 (5) THE COURT If you're lucky you won't have to object
 (6) to this
 (7) MR PETUMENOS I'm not feeling very lucky today
 (8) THE COURT That's why I had this hearing
 (9) MR DIAMOND I would like to perfect my offer I can
 (10) either put him on the stand and make an offer of proof
 (11) THE COURT I think that's probably wise
 (12) MR DIAMOND Or if you can take my statements as
 (13) offer of proof if that's okay with counsel
 (14) MR PETUMENOS That's fine with me I'm content with
 (15) the record as it is
 (16) THE COURT Are you or do you want to flesh it out
 (17) with his testimony
 (18) MR DIAMOND Let me consult with my co counsel
 (19) (Discussion off record between counsel)
 (20) MR DIAMOND My more judicious colleagues think we
 (21) ought to put him on and go through his testimony
 (22) THE COURT I think it's probably wise and - and I'd
 (23) like to hear it too to see whether - whether or not there's
 (24) some modification that has to be made but how long is that
 (25) going to take?

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- (1) largest single property owner concluded that the spill did not
 (2) have such an effect on oiled properties that are owned by the
 (3) federal government yes and I would - I wish to argue that
 (4) I'm calling this witness to support that argument
 (5) THE COURT Well you can't He's an expert He's an
 (6) expert and this is the time when the line has to be drawn
 (7) You have towns that - what I've said to you time and time
 (8) again is if these witnesses are fact witnesses you can - if
 (9) you can show a colorful argument that they're fact witnesses
 (10) I'll allow them to testify I will not allow them to testify
 (11) as disguised experts and that's exactly what this expert is
 (12) with regard to some of his proposed testimony Now others are
 (13) factual I'll try to make as much of an effort as I can to
 (14) distinguish between them and give you the factual testimony
 (15) MR DIAMOND And I simply respect any disagree with
 (16) that conclusion solely because what he is going to testify to
 (17) is not an opinion that he is rendering as to this case as to
 (18) these properties but he is solely testifying as to a fact or a
 (19) conclusion that he reached not concerning these plaintiffs not
 (20) concerning this case concerning other parcels which may be
 (21) probative I understand your position but that is our
 (22) position
 (23) THE COURT I think I understand
 (24) MR DIAMOND If I could have a few more minutes
 (25) THE COURT I do believe I understand your position

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- (1) MR DIAMOND We can do that in five minutes
 (2) THE COURT Let's do it then Do it now Call the
 (3) jury and tell them it's going to be at least 20 minutes
 (4) And I'd like to say something else here counsel I want
 (5) the timing of these objections to come at a different time I
 (6) would have said - if I hadn't seen that there was some things
 (7) here that are factual testimony I would have said it's really
 (8) unfair to make this kind of an objection when you know the
 (9) objection is out there at a time when part of the testimony has
 (10) come in because then I have to strike the whole testimony and
 (11) that would - that would be unfair under the circumstances so
 (12) I want the objection up front from now on all right?
 (13) MR PETUMENOS Yes Judge I didn't realize he had
 (14) done this for purposes of litigation until he testified
 (15) THE COURT Well it isn't the purpose - that's a
 (16) component counsel but that's not the - the sole basis for my
 (17) ruling My ruling is based on clear warning that I've given in
 (18) this case that these witnesses would be treated as fact
 (19) witnesses because that's the way they were designated If in
 (20) fact they are expert witnesses pure expert testimony will not
 (21) be allowed
 (22) Sir would you come back on the stand please?
 (23) VOIR DIRE EXAMINATION OF NORMAN LEE
 (24) BY MR DIAMOND
 (25) Q Mr Lee we were talking about your responsibilities as a

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- (1) member of the Incident Command Team Did those
 (2) responsibilities ultimately lead you to open an informal
 (3) investigation as to the effects of the oil spill on land owned
 (4) by the federal Park Service both oiled and unoiled?
 (5) A Yes it did
 (6) Q Could you describe for the Court what you – when you
 began
 (7) making those inquiries?
 (8) A I started basically right after the oil spill in kind of an
 (9) informal basis and then in either late 89 or early 90 I
 (10) made a proposal to the interagency team that was part of this
 (11) litigation with Exxon to do a more formal study
 (12) Q Okay let's talk about the informal study you did
 (13) initially Would you describe what you did?
 (14) A Well as part of my real estate appraisal activities I'm
 (15) constantly checking on comparable sales talking with people
 (16) and so I was visiting with other appraisers and doing normal
 (17) comp sales investigation
 (18) Q Did you need to know the effects of the spill on market
 (19) value of federally owned property in order to be able to
 (20) determine the market value of property that the government was
 (21) considering buying or selling in that area?
 (22) A Yes because any – any factor that affects value would
 (23) have an effect on the market value of the property and that
 (24) would include hazardous materials
 (25) Q And do you have an ongoing responsibility to stay current

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- (1) on market value of Park Service land in the area?
 (2) A Yes well or any lands that the Park Service was going to
 (3) be dealing with yes
 (4) Q At some time the informal – I believe you did some data
 (5) collection as well as part of the informal inquiry you made?
 (6) A Yes
 (7) Q Tell us what you did
 (8) A Again it was part of normal data collection you would do
 (9) in any real estate activity I didn't go into anything
 (10) specific at that time because I didn't have any funding to do
 (11) anything specific
 (12) Q You did place some ads in appraisal oriented periodicals?
 (13) A Yes I did I placed ads or I wrote to the International
 (14) Right of Way Association to have an ad placed in their
 (15) magazine and I also wrote to the Appraisal Institute to have
 (16) an ad placed in the appraisal journal
 (17) Q Did you also undertake to gather data from local real
 (18) estate appraisers and the assessors?
 (19) A Yes I was talking with kind of the normal interplay that
 (20) we do between appraisers in the area
 (21) Q At some point these informal inquiries got formalized
 (22) didn't they?
 (23) A Yeah they did Again in early 1990 I was given the
 (24) go ahead to continue this project I was given some funding
 (25) for travel and for salary and per diem

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- (1) Q Okay Had you reached any conclusions final or tentative
 (2) as a result of the informal inquiries you'd made?
 (3) A No no conclusions
 (4) Q Over what period of time were you funded for more formal
 (5) studies?
 (6) A Well it was kind of an indefinite period of time There
 (7) was approximately three months that I actually worked on the
 (8) project but I had other projects going at the time
 (9) Q Did you work alone?
 (10) A No there was an appraiser with Fish & Wildlife Service
 (11) that worked with me part of the time and then I was constantly
 (12) dealing with people in other agencies particularly Fish &
 (13) Wildlife Service and to a lesser degree the U S Forest
 (14) Service maps GIS et cetera
 (15) Q Part of the research involved a transactional analysis as
 (16) well?
 (17) A Yes
 (18) Q Can you tell us what you did in that regard?
 (19) A I did – and we looked at Valdez Recorder's Office Kenai
 (20) Borough and Kodiak Borough
 (21) Q And part of this also involved interviewing market
 (22) participants?
 (23) A Yes we talked to realtors other appraisers assessors
 (24) Q Ultimately did you make a – a report to your superiors in
 (25) the Department of Interior?

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- (1) A I made a verbal report only
 (2) Q They didn't want a report did they?
 (3) A No they did not want anything in writing
 (4) Q Could you describe who you met with when you met with
 (5) them and what you said?
 (6) A Well there was some ongoing discussions but the eventual
 (7) one was a meeting with the regional director from Fish &
 (8) Wildlife Service and the regional director with the National
 (9) Park Service when a group of us got together and made our
 (10) presentations as far as what our findings were
 (11) Q All right And what – what did you report at that
 (12) meeting?
 (13) A I reported that there was no loss of value to the lands
 (14) any federal lands affected by the spill
 (15) Q To whom did you make this?
 (16) A To the regional – primarily to the regional director of
 (17) the Fish & Wildlife Service Walt Stigletts and to the
 (18) Regional Director of the National Park Service which would be
 (19) Ed Munson (phonetic)
 (20) Q And what was the response?
 (21) A They were very sorry to hear that
 (22) Q Was part of the reason that you conducted both the informal
 (23) and formal investigation was to – was part of the reason for
 (24) doing that to enable you to do day to-day appraisal
 (25) activities?

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- (1) A Yeah that was part of it yes
 (2) Q Could you describe that to the Judge?
 (3) A Which aspect are you talking about the -
 (4) Q How that - how those findings and how the inquiries fit in
 (5) with your day to-day appraisal needs?
 (6) A Well I was doing appraisals in the Kenai Fjords area
 (7) Seward I was also reviewing appraisals in Kenai area and in
 (8) Kodiak Island so an ongoing analysis of the market conditions
 (9) and what was going on in the market was necessary
 (10) MR DIAMOND Your Honor that concludes my offer of
 (11) proof
 (12) MR PETUMENOS May I have some questions for the
 (13) record Judge?
 (14) THE COURT Yes
 (15) VOIR DIRE EXAMINATION OF NORMAN LEE
 (16) BY MR PETUMENOS
 (17) Q Mr Lee how did Exxon first learn of your work?
 (18) A First learn of my work?
 (19) Q Yes
 (20) MR DIAMOND If -
 (21) THE COURT If you know
 (22) MR DIAMOND If you know
 (23) A I m not positive
 (24) BY MR PETUMENOS
 (25) Q Well did you talk to anyone who you knew was employed by

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- (1) Exxon as some point?
 (2) A I talked with Steve MacSwain He knew that I was doing
 (3) this project
 (4) Q Did you have the permission of the federal government to
 (5) talk to Mr MacSwain about your work for the Trustees in
 (6) connection with the litigation?
 (7) A I didn t know I needed their permission
 (8) Q The answer though is no?
 (9) A Yes
 (10) Q No you didn t have permission?
 (11) A Okay No I did not have permission
 (12) Q Okay And -
 (13) A I would point out that any - you know would you re -
 (14) would you restate that or resay that question?
 (15) Q Sure When you talked to Mr MacSwain did you talk to him
 (16) about the work that you did for the pending litigation?
 (17) A For the pending litigation?
 (18) Q Well actually did you talk to him for about the work that
 (19) you did in connection with the federal government litigation?
 (20) MR DIAMOND I think the question was did he have the
 (21) permission
 (22) MR STOLL He s asking a different question
 (23) MR DIAMOND Would you like to elaborate on something
 (24) or -
 (25) MR PETUMENOS Go ahead Whatever it is you re

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- (1) thinking you need to say go ahead
 (2) A Okay Well Steve MacSwain knew that I was doing some
 work
 (3) on the litigation against Exxon but you know we had ongoing
 (4) discussions as part of the - we were appraisers we were all
 (5) part of the professional community
 (6) BY MR PETUMENOS
 (7) Q Did you have the permission of the federal government to
 (8) disclose to Mr MacSwain the fact that you were doing work on
 (9) the litigation for the federal government?
 (10) A No I did not
 (11) Q There were other people working on the litigation for the
 (12) federal government who were appraisers besides you?
 (13) A Just one other did it formally on a part time basis
 (14) Q And was that person your superior or not?
 (15) A No she was not
 (16) Q She wasn t Who was she? Did she work for you or a
 (17) different agency?
 (18) A She worked for Fish & Wildlife Service
 (19) Q Had the federal government made any decision as to who if
 (20) anyone would testify for it in connection with the litigation
 (21) that you know of?
 (22) A No they had not
 (23) Q Has the federal government ever authorized your disclosure
 (24) of the verbal report you gave to them in connection with the
 (25) litigation to the public?

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- (1) A As far as I know they have not
 (2) Q The work that you did in connection with the effects of the
 (3) oil spill on federal lands was used for two purposes as I
 (4) understand it One was to report to your superiors related to
 (5) litigation?
 (6) A Uh huh
 (7) Q And the other was for you to be aware of it in connection
 (8) with other purchases that may come up by the federal
 government
 (9) or the Trustees?
 (10) A Yes
 (11) Q And that same data or opinion of yours is there any
 (12) distinction the fact it was being used for two purposes the
 (13) work is still the same right that you did?
 (14) A The work would still be the same yes
 (15) Q I don t think - I think I know the answer to this you
 (16) never received any money or funds for your time from Exxon?
 (17) A No no sir I have not
 (18) Q With the work -
 (19) A With the exception of the \$40 I received with the subpoena
 (20) Q But you did receive salary working for the federal
 (21) government when you prepared this report to your superiors?
 (22) A Yes sir
 (23) Q And lastly you have never been deposed in this case?
 (24) A No sir I have not
 (25) Q You have never written a written report that we can

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- (1) review?
- (2) A No sir
- (3) Q You did a survey you don't have - do you have the survey
- (4) notes?
- (5) A No I do not
- (6) Q Who has them?
- (7) A If there's any notes they were in the files and it's my
- (8) understanding that both Exxon and the plaintiffs in this case
- (9) had access to those files
- (10) Q That's interesting Why do you say that?
- (11) A Because both Exxon and the plaintiffs were - came to the
- (12) office I'm guessing about two years ago and went through all
- (13) the files in the office
- (14) Q This survey that you did for litigation purposes you are
- (15) sure was disclosed to the other parties in the lawsuit?
- (16) A As - again I don't have any notes from that survey
- (17) Whether what was disclosed or not I do not know
- (18) Q Did you ever take any notes from that survey?
- (19) A Any notes that I took were destroyed
- (20) Q By who?
- (21) A I'm not positive
- (22) Q By you?
- (23) A Some of them could have been yes sir
- (24) Q Were you ever told that there was an order in connection
- (25) with the oil spill case prohibiting destruction of records?

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- (1) A No sir
- (2) MR PETUMENOS That's all
- (3) VOIR DIRE EXAMINATION OF NORMAN LEE
- (4) BY MR DIAMOND
- (5) Q You spoke to Mr MacSwain as well as other appraisers
- (6) local appraisers in the area?
- (7) A Yes
- (8) Q When you first spoke to Mr MacSwain was that for purposes
- (9) of gathering information from him?
- (10) A For gathering information yes
- (11) Q And during the course of that did you tell him why you
- (12) wanted the information?
- (13) A Yes I did
- (14) Q At that time had he yet been engaged by Exxon to your
- (15) knowledge?
- (16) A I don't know As far as I know he was not
- (17) Q Do you currently understand he became engaged by Exxon?
- (18) A Yes
- (19) Q In May of 1990?
- (20) A In May of - I didn't know what the date was but -
- (21) Q Your talks preceded that your initial talks?
- (22) A Yes substantially before that
- (23) Q You have been interviewed by lawyers for the plaintiffs in
- (24) this case have you not?
- (25) A Yes

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- (1) Q Could you describe for the record when and the
- (2) circumstances under which that interview took place?
- (3) A Approximately three or four weeks ago Chris Kende
- (4) Q Kende?
- (5) A Kende interviewed me
- (6) Q And where did that take place?
- (7) A I believe it was the Alaska Breakfast Club
- (8) Q Did he buy you breakfast?
- (9) A Yes he did
- (10) Q How long did you spend with him?
- (11) A About 45 minutes
- (12) Q Did you answer all of his questions?
- (13) A As far as I know I did
- (14) Q Did you answer them all truthfully?
- (15) A Yes
- (16) Q Did you talk about the work you had done in connection with
- (17) the oil spill effects on Park Service land?
- (18) A Yes
- (19) MR DIAMOND I think that concludes the offer of
- (20) proof Your Honor May I -
- (21) THE COURT I have a couple questions
- (22) VOIR DIRE EXAMINATION OF NORMAN LEE
- (23) BY THE COURT
- (24) Q When did you first talk to the Exxon lawyers or their
- (25) representatives about your proposed testimony in this case?

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- (1) A About five -
- (2) MR DIAMOND May I object to that? It may be a
- (3) little ambiguous under the circumstances because he has
- (4) spoken
- (5) to Mr MacSwain
- (6) BY THE COURT
- (7) Q I'm sorry when did you talk to MacSwain first?
- (8) A Oh I talked with Steve ever since I've moved to the State
- (9) Q About this case?
- (10) A About this case?
- (11) Q Uh huh
- (12) A I'm guessing maybe 91 He - he in an interview of me
- (13) let me know that he was working on the case
- (14) Q Okay Did he ask you for your opinions at that time?
- (15) A I don't remember whether it was specific opinions or not
- (16) I know he asked me a number of questions
- (17) Q Did you discuss your - your work and what your conclusions
- (18) were at that time?
- (19) A I discussed my work and yeah I guess we did discuss some
- (20) of my conclusions yes
- (21) Q So MacSwain knew in 1991 that you concluded that there
- (22) was
- (23) no stigma effect from the spill?
- (24) A Yes
- (25) Q Okay Now after that did you talk to any of the Exxon
- (26) lawyers about your proposed testimony in this case?
- (27) A About five or six weeks ago

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- (1) Q That was the first time you talked to an Exxon lawyer?
- (2) A Yes
- (3) Q Was it the first time you talked to anybody besides
- (4) Mr MacSwain about your proposed testimony in this case?
- (5) A Yes
- (6) Q Okay and what did you discuss?
- (7) A We discussed - well basically it revolved around what
- (8) Mr MacSwain had - his discussions with me in that I had
- (9) found no damages
- (10) THE COURT All right thank you
- (11) MR PETUMENOS Judge your questions prompted some
- (12) questions about what you asked about with respect to
- (13) Mr MacSwain
- (14) THE COURT Go ahead
- (15) FURTHER VOIR DIRE EXAMINATION OF NORMAN LEE
- (16) BY MR PETUMENOS
- (17) Q You in fact were interviewed by Mr MacSwain on
- (18) November 20 1990 does that sound right?
- (19) A Yes I - you're talking about that memo Yes I've seen
- (20) that
- (21) Q You've seen the memo they gave you the memo that
- (22) Mr MacSwain wrote about you?
- (23) A They showed it to me yesterday or two days ago
- (24) Q It states Lee stated quote that he thinks there may be
- (25) value loss due to the oil spill but had not yet found the data

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- (1) to draw a conclusion of measurable value loss So what you
- (2) told Mr MacSwain at the time was you thought there was or
- (3) there could be a value loss?
- (4) A I - as near as I can tell that's a compilation of
- (5) conversations because I had already completed my study by
- (6) that
- (7) time
- (8) MR PETUMENOS May I show the Court?
- (9) THE COURT Yes What is this counsel this you
- (10) provided me?
- (11) MR PETUMENOS Those are the notes of the MacSwain/
- (12) Dorchester survey process relating to this witness and the date
- (13) they interviewed him and how they compiled the answers
- (14) MR DIAMOND I believe counsel's already elicited
- (15) this but you can question the witness about it That appears
- (16) to be a compilation of things that he talked to MacSwain about
- (17) over probably a 12 month period of time
- (18) THE COURT It does?
- (19) MR DIAMOND That's - that's his interpretation of
- (20) the document Obviously he didn't write it so -
- (21) THE COURT Yeah I'd just like to find that out
- (22) You've read this document?
- (23) A I've looked it over yes sir
- (24) THE COURT You think this is not a one-time
- (25) interview?
- (26) A I don't believe it is because he talks about meeting in

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- (1) the airport and I believe that was Seattle and he was going
- (2) one way and I was going the other and we chatted for maybe
- (3) two
- (4) minutes
- (5) THE COURT Where does he talk to you about meeting
- (6) you in the airport?
- (7) A I believe isn't that in the first paragraph?
- (8) THE COURT No this starts in - well take a look
- (9) A By November of 1990 I had already made my conclusions or
- (10) already had completed my survey
- (11) THE COURT Well that may be so but look at what he
- (12) reports as what your conclusions were They're different than
- (13) what you testified to here today aren't they?
- (14) A That's the reason why I think this was done before - I
- (15) mean he's talking about a conversation before
- (16) THE COURT I see I see
- (17) A A conversation before November
- (18) THE COURT Okay At any rate you had more than one
- (19) conversation with him at different times?
- (20) A Yes sir
- (21) THE COURT Okay Counsel?
- (22) MR PETUMENOS Could that be marked? Do you want
- (23) that marked as part of the Court file?
- (24) THE COURT I'm not going to mark it but if you want
- (25) to mark it it's fine with you - fine with me
- (26) MR PETUMENOS I don't know how to do that

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- (1) THE COURT I don't either
- (2) MR DIAMOND Might I ask one follow up question?
- (3) VOIR DIRE EXAMINATION OF NORMAN LEE
- (4) BY MR DIAMOND
- (5) Q Mr Lee prior to June of this year you were still an
- (6) employee of the federal government?
- (7) A Yes sir
- (8) Q And you understood you were off limits to the parties on
- (9) either side of this case?
- (10) A That was my understanding I was told that I could not
- (11) talk about the case - well not talk about the case but I
- (12) wasn't able to be a witness or be interviewed by the parties to
- (13) the action
- (14) THE COURT You didn't interpret Mr MacSwain as being
- (15) a representative of the defendants in this case?
- (16) A Any discussions I had with him were strictly of an
- (17) appraisal nature comparable sales or something like that And
- (18) the discussions that I had with him went back to '91
- (19) THE COURT Anything else?
- (20) MR DIAMOND Nothing further I would like to be
- (21) heard just a little bit further in light of his testimony
- (22) THE COURT Yes I'd like the witness out of the
- (23) courtroom
- (24) MR DIAMOND Thank you Mr Lee
- (25) (Witness excused)

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- (1) MR DIAMOND Your Honor in view of the testimony I
 (2) think the Court ought to reconsider because it now is apparent
 (3) that there were - there were a variety of purposes for which
 (4) he conducted the study It was not only a litigation study
 (5) He did so because that was part of his job to stay current on
 (6) market values in the Kenai area and this was information he
 (7) acquired in order to just simply carry out his normal
 (8) responsibilities It makes him much more akin to the testimony
 (9) that I think the Court has already said falls on the other side
 (10) of the line since there s an ordinary occupational purpose for
 (11) him to have done what he did and make the judgments that he
 (12) did
 (13) Beyond that it s now clear that all parties have had
 (14) access to all documents that might exist that there was
 (15) discovery conducted of the federal government and I now
 recall
 (16) that that is correct
 (17) THE COURT All documents?
 (18) MR DIAMOND I don t know that there is -
 (19) THE COURT What documents were those?
 (20) MR DIAMOND Well we collected - we collected tons
 (21) and tons of documents from the federal government Sitting
 (22) here today I don t know that we can identify any of those as
 (23) being his - his work product but -
 (24) MR CLOUGH I can speak to that point Mr Diamond
 (25) because my office supervised that effort and we served a very

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- (1) extensive document production request on all the federal
 (2) agencies including the Park Service which I can tell you
 (3) would have encompassed the materials in his files It was a
 (4) joint effort conducted with the plaintiffs and literally scores
 (5) of boxes of documents were produced
 (6) THE COURT Counsel am I missing something here
 (7) counsel Is it the fact that this witness may report that it
 (8) was expressly verbal and never committed to writing according
 (9) to important to your analysis
 (10) MR DIAMOND Is that important to my analysis?
 (11) THE COURT Yes because what documents would have
 (12) been reviewed at that point
 (13) MR DIAMOND I don t know what documents exist
 (14) existed or have ever existed And Mr Clough s files there
 (15) may well be something relevant to this We didn t focus on the
 (16) fact that we might have documents from him until about seven
 (17) minutes ago But the other significant point is that he was
 (18) unavailable to anybody until he severed the tether with the
 (19) federal government on - on June 1 He has been on our
 witness
 (20) list for as long as we have known about him and he has been -
 (21) THE COURT On your fact witness list?
 (22) MR DIAMOND Well he was not available to us at the
 (23) time we designated any expert witnesses nor do I think it
 (24) would have been appropriate to designate a federal
 government
 (25) employee as an expert in this case I mean I ve always viewed

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- (1) experts as the kind of people that you pay in exchange for
 (2) testimony
 (3) THE COURT You mean if they give expert opinion but
 (4) it s free they aren t experts
 (5) MR DIAMOND Well you know is he giving expert
 (6) opinion that s free or is he giving lay opinion giving
 (7) opinion that is permissible for a lay witness or his
 (8) occupation of his responsibilities
 (9) He says he had the job of knowing what property values were
 (10) at all times and that this was part of his ongoing activities
 (11) I think the test is whether he s got a foundation for those
 (12) opinions which he certainly does and whether it is helpful
 (13) testimony literally it is helpful testimony in fact so
 (14) helpful that Mr Petumenos is desperate to keep it out
 (15) But I think we now do have a basis when given my prior
 (16) understanding Maybe under the Court s view we didn t
 (17) THE COURT Counsel I want to ask you a couple
 (18) questions It occurred to me that I was wondering how many
 (19) experts you had on the question of stigma in this case so I
 (20) reviewed my notes So far Roddewig Papke and MacSwain
 have
 (21) all testified about stigma right? And their - their belief
 (22) Each one of them has said there s no stigma in this case
 (23) right
 (24) MR DIAMOND From a different - pointing to
 (25) different market evidence or relying on different things

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- (1) they ve analyzed things differently
 (2) THE COURT On the question of stigma you ve had three
 (3) experts testify so far right?
 (4) MR DIAMOND Really depends how you characterize
 (5) stigma
 (6) THE COURT Well they used the word
 (7) MR DIAMOND Yes the word came up during the course
 (8) of those three witness testimony
 (9) THE COURT Okay You ve got Mr Dorchester on the
 (10) line Is he going to testify about stigma
 (11) MR DIAMOND Is Mr Dorchester?
 (12) THE COURT Yeah
 (13) MR DIAMOND I believe Mr Dorchester will be
 (14) rendering expert opinion on -
 (15) THE COURT That s four you re over the line
 (16) MR DIAMOND Your Honor it depends how you cut it
 (17) What Mr MacSwain talked about was evidence that he looked
 at
 (18) concerning impacts transactional impacts that - that he
 (19) examined Mr Roddewig talked about other oil spills and what
 (20) one could conclude from looking at other oil spills Mr Papke
 (21) today talked about gross reporting data and what that shows
 (22) they are not offering the same expert - expert testimony We
 (23) haven t offered two witnesses yet who ve talked about - who ve
 (24) offered the same expert testimony
 (25) THE COURT Is the issue counsel whether there s

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- (1) stigma?
 (2) MR DIAMOND That is an issue in its most general
 (3) broadest sense yes
 (4) THE COURT And they've approached it from different
 (5) angles right?
 (6) MR DIAMOND They have testified about different
 (7) subject matters relating to that broad issue yes But you
 (8) know I could - the question could be negligence and I could
 (9) have one witness talk about the brakes and I could have
 (10) another witness talk about the headlights and I could have
 (11) another witness talk about the construction and I could have
 (12) another witness talk about the road service
 (13) THE COURT Yes but it's bingo at the end of the
 (14) third witness
 (15) MR DIAMOND Your Honor if you read the rules it
 (16) says on any subject
 (17) THE COURT On any - it says on any issue counsel
 (18) MR DIAMOND I'll have to go back but I certainly
 (19) take your -
 (20) THE COURT Why don't you do that?
 (21) MR DIAMOND I certainly take your word for it I
 (22) saw your finger in the page of the book
 (23) THE COURT No it's my recollection just as fallible
 (24) as yours counsel go ahead and look
 (25) MR DIAMOND Let's take a look I'm full of

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- (1) trepidation because I always lose these challenges with you
 (2) Your Honor
 (3) THE COURT Well I hope so
 (4) MR DIAMOND You are right it says no more than
 (5) three expert witnesses may testify for each side as to the same
 (6) issue in any given case
 (7) THE COURT So you've had three
 (8) MR DIAMOND Unless the Judge permits
 (9) THE COURT So you've had three testifying on the
 (10) issue of stigma you've got one more slated and I'm not going
 (11) to strike that witness and one of those witnesses who's
 (12) testified to stigma has incorporated this very witness the
 (13) witness who is now on the stand his opinion into his analysis
 (14) right?
 (15) MR DIAMOND Is one of the things that he relied on
 (16) that is - that is true in reaching his conclusions I don't
 (17) think we brought that up I think that came out during the
 (18) course of cross-examination of Mr MacSwain
 (19) THE COURT That may be so On the other hand -
 (20) MR DIAMOND They offered -
 (21) THE COURT On the other hand it's clear that
 (22) Mr MacSwain talked to this particular witness and incorporated
 (23) the information this witness gave him into his own opinion that
 (24) there was no stigma right?
 (25) MR DIAMOND He - yes I think that is an accurate

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- (1) statement which suggests something else to me
 (2) Plaintiffs I need my resource who would know the answer
 (3) to this off the top of his head and if he is viewing in
 (4) another courtroom I hope he assists me But it is my
 (5) recollection that plaintiffs offered into evidence and it was
 (6) received yesterday the interview notes that Mr MacSwain did
 (7) of Mr Lee so now the record has what you have in front of you
 (8) as Mr Lee's opinion of the effects of the oil spill
 (9) THE COURT These notes are in the record?
 (10) MR DIAMOND Those were part of the package that
 (11) Mr Petumenos offered I think I objected to because it was
 (12) under inclusive and you admitted the entire package into
 (13) evidence Having opened the door I think I now -
 (14) THE COURT I shouldn't have asked you that question
 (15) should I counsel?
 (16) MR DIAMOND I'm sorry?
 (17) THE COURT Never mind Well counsel if this
 (18) particular opinion is in the record then this witness should
 (19) have the opportunity to explain
 (20) MR DIAMOND I totally agree with you
 (21) MR PETUMENOS I don't
 (22) THE COURT Is it in the record?
 (23) MR PETUMENOS What happened was I asked permission
 (24) to mark those that were testified to from the exhibit and only
 (25) those And counsel stood up and said I disagree you have to

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- (1) put in the whole exhibit And then you said the whole exhibit
 (2) is admitted
 (3) THE COURT Yeah I think I remember that So what do
 (4) you want me to do about it? If it's in the record he gets to
 (5) explain
 (6) MR PETUMENOS Well I clearly do not want to have
 (7) Mr Lee testifying to the expert opinion that he's done this
 (8) whole big - the point was this The point of the offer was
 (9) Mr MacSwain accurately relating the information in his file
 (10) for his opinion not whether the witness has changed his mind
 (11) unbeknownst to Mr MacSwain or if there was some other thing
 (12) that Mr MacSwain knew
 (13) What was at issue there was the fairness of the
 (14) presentation to Mr MacSwain It doesn't - because
 (15) Mr MacSwain comes in and does a survey and we
 (16) cross-examine
 (17) him on what is in and what is out of his opinion does not open
 (18) the door to every witness that he's ever talked to coming in
 (19) and being an expert witness in our case And in fact when I
 (20) thought the Court had done was draw the line at saying he can
 (21) come in and testify to the surveys but it doesn't mean that
 (22) the individual people can come in and testify to their
 (23) opinions And so -
 (24) THE COURT But they're experts
 (25) MR PETUMENOS Right yes and that's the issue that
 (26) is confronting us now So the fact that Mr MacSwain - I find

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- (1) a number of inconsistencies in counsel s argument
- (2) THE COURT I do too counsel but let s not go over
- (3) it I think the record is complete
- (4) MR DIAMOND Here is the record Your Honor at page
- (5) 6483 of yesterday s transcript Do you have a copy?
- (6) THE COURT No go ahead and read it
- (7) MR DIAMOND This is cross examination Chapter 6 of
- (8) the May 1993 report contained your report of the interviews
- (9) that you did up to that date
- (10) Answer Yes this is the chapter that deals with
- (11) interviews
- (12) Question Mr Lee s remarks make it into the report?
- (13) Answer As I recall that the - Mr Lee s comments didn t
- (14) make it into the report Mr Lee subsequently - subsequently
- (15) went out and did some research and found that the oil spill did
- (16) not adversely affect property values so -
- (17) He was cut off
- (18) Question Well that s interesting because it is in this
- (19) case isn t it that in connection with the settlement you
- (20) described of the Seal Bay one of the things that the federal
- (21) government asserted - which Mr Lee works for the federal
- (22) government - one of the things that they asserted was a
- (23) damage
- (24) to resources to the federal government including lands isn t
- (25) that right?
- (26) Answer No that s not right Mr Lee does not work for

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- (1) the government today He s retired from the government
- (2) Question At the time that you interviewed him he was
- (3) working for the government
- (4) Answer Yes he was He was chief review appraiser for
- (5) the National Park Service
- (6) Question At the time you interviewed him there was as
- (7) part of the settlement with the federal government you alluded
- (8) to with the Seal Bay transaction a claim for loss of natural
- (9) resources owned by the federal government including land?
- (10) Answer I think -
- (11) Question As a result of the Exxon Valdez oil spill
- (12) Answer Your question needs an explanation The sale from
- (13) the Village Corporation the Akhiok-Kaguyak and the Old
- (14) Harbor
- (15) to the government was not a settlement as I understand it was
- (16) - it was an acquisition of the property
- (17) That s not my question I understand what you re trying to
- (18) explain but that s not what I m trying to get at Maybe I ll
- (19) try again You have the comments here of the federal
- (20) appraiser
- (21) Yes
- (22) And what I m asking you is whether or not when the federal
- (23) government settled this claim with the Exxon folks one of the
- (24) things that they settled for was a damage to natural resources
- (25) including land
- (26) Colloquy colloquy colloquy My objection is overruled

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- (1) Question Do you know Mr MacSwain?
- (2) Yes I do That s the fund that was set up almost a
- (3) billion dollar fund and they were involved with this fund to
- (4) study to pay for future damages
- (5) Based upon in part damages to natural resources
- (6) including lands?
- (7) Yes I believe that s correct
- (8) So what the evidence was introduced with respect to Mr Lee
- (9) is that Mr Lee worked for the federal government did some -
- (10) made some inquiries and as a result of that the federal
- (11) government was able to settle its litigation and get paid for
- (12) natural resources damage including land If that doesn t open
- (13) up the door I don t know what does
- (14) MR PETUMENOS There s a part he left out which was
- (15) that Mr Lee concluded - which is already in the record and
- (16) he just read it - that Mr Lee concluded there was no damage
- (17) to the Exxon - to the land as a result of the Exxon Valdez
- (18) THE COURT Where is that?
- (19) MR PETUMENOS He read that to you
- (20) MR DIAMOND This was an answer which the witness
- (21) began to give but he was cut off
- (22) As I recall that Mr Lee s comments didn t make it into
- (23) the report Mr Lee subsequently - subsequently went out and
- (24) did some research and found that the oil spill did not
- (25) adversely effect property values so - and that s the end of

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- (1) the answer
- (2) THE COURT Okay it s in It s in the record It s
- (3) in the record in the testimony and - and the record also
- (4) includes this - this incomplete analysis of - I mean
- (5) incomplete report of what Mr Lee - the conclusions Mr Lee
- (6) might have come to because the MacSwain document only
- (7) talks
- (8) about his tentative opinions
- (9) MR DIAMOND Only talks about his -
- (10) THE COURT His tentative opinions Lee s tentative
- (11) opinions doesn t talk about the subsequent opinion
- (12) MR DIAMOND How does the jury know?
- (13) THE COURT Wait a minute wait a minute you always
- (14) argue when you re winning counsel You should not do that
- (15) MR OPPENHEIMER Sit down
- (16) THE COURT What I see here is that the opinion is in
- (17) the record one and two that the process is incompletely
- (18) described because MacSwain s document seems to indicate
- (19) that
- (20) Lee didn t have a final opinion even though he testified he
- (21) did
- (22) Now because this document s in the record it seems to me
- (23) that maybe I have to allow an explanation of that particular -
- (24) the process to show that yes that there was an incomplete
- (25) opinion at the beginning subsequently evaluated and came to a
- (26) separate opinion which is consistent with the testimony that s
- (27) already in the record

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- (1) But the question is whether I should allow him to go
 (2) through the entire expert analysis talking about how many
 (3) beaches he saw and what he did and what the basis of his
 (4) opinion was and then finally what his opinion was And the
 (5) answer is no The bare opinion is fine because it's included
 (6) in MacSwain's analysis but - and the explanation is fine
 (7) because the record is - is confusing but he will not be able
 (8) to testify to a lengthy or even a normal expert analysis We
 (9) haven't had too many of those in this case but - but - but
 (10) I'll - we're not going to have it in this one
 (11) MR PETUMENOS Do I understand correctly he'll be
 (12) allowed to testify what he told Mr MacSwain only?
 (13) THE COURT Yes because that question is raised
 (14) raised whether or not MacSwain correctly used his information
 (15) MR PETUMENOS That's fine That's the limit I
 (16) heard I just wanted to make sure I understand
 (17) THE COURT Yes
 (18) MR DIAMOND What he did - I'm sorry not what he
 (19) did How this came about what conclusions he drew
 (20) THE COURT What conclusions he drew with regard to
 (21) this document that MacSwain reported and subsequent the
 (22) subsequent conclusion which is already in the record by virtue
 (23) of MacSwain's testimony It's only to show that the - it's
 (24) only to make the record complete regarding the question that
 (25) was raised with Mr MacSwain but it also gets his opinion in

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- (1) unfortunately it gets his opinion in
 (2) MR DIAMOND What I will take him through is the
 (3) chronology of this was he did this informal study that he told
 (4) you about He reached no definitive conclusions he had
 (5) conversations with Mr MacSwain in connection with that He
 (6) told Mr MacSwain he reached no - no conclusions He then
 (7) undertook a formalized study He then reached a conclusion
 (8) that this is his conclusion this is what he told Mr MacSwain
 (9) THE COURT Yes
 (10) MR DIAMOND Okay I need five minutes
 (11) THE COURT Sure I'm going to give you more than five
 (12) minutes counsel
 (13) MR PETUMENOS Just so the record is clear we object
 (14) to this testimony for all the reasons stated
 (15) THE COURT Sure And I think the record's complete
 (16) enough now
 (17) Counsel this has been very helpful to me and it should
 (18) have been helpful to you You understand now don't you you
 (19) don't get to put experts on when you've designated them as fact
 (20) witnesses and when they duplicate more than three opinions
 (21) from
 (22) experts you've already - you're going to get in You
 (23) understand?
 (24) MR DIAMOND I do We've discussed in general terms
 (25) what issue meant in terms of this rule and I think until this
 morning I didn't know what your views were I do I now know

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- (1) what your views are and we will heed to the line
 (2) THE COURT And of course if I'm wrong counsel
 (3) you're entitled to bring that to my attention
 (4) MR PETUMENOS I have my co counsel going -
 (5) THE COURT Yes I know I can see him doing that He
 (6) gets nervous when there's a ruling that he hasn't participated
 (7) in
 (8) MR PETUMENOS I guess I am too because the concern
 (9) we have is if the testimony is going to be what did you tell
 (10) Mr MacSwain exactly and when that's one thing But if he's
 (11) going to - he's already testified I was hired by the federal
 (12) government I was working on the litigation
 (13) THE COURT Yes he has
 (14) MR PETUMENOS And if he comes in and says I did
 (15) extensive study in the litigation
 (16) THE COURT I told you he's not going to do that
 (17) MR STOLL Your Honor just so I - I'm sorry to
 (18) belabor this but as I understand this the thing I'm concerned
 (19) about is that Mr MacSwain has testified that he conducted
 (20) some
 (21) surveys and the information the hearsay information that he
 (22) got in that is not offered for the truth of what that - that
 (23) hearsay information is only that the witness Mr MacSwain
 (24) had a foundation for his conclusion
 (25) THE COURT Right
 MR STOLL Now if Exxon is - I don't think that

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- (1) they're being permitted but it sounds awful - the thing I'm
 (2) getting agitated about is that it - it sounds as if because he
 (3) relied upon in part or considered I should say I don't know
 (4) whether he relied upon but considered a statement made by
 (5) 150
 (6) people one of those people happens to be an expert that then
 (7) they can bring in one of the people that - that he considered
 (8) and have that person express their opinion -
 (9) THE COURT The answer to that question is they
 (10) can't But they certainly can if cross-examination has thrown
 (11) - has thrown into confusion what the witness said to the
 (12) expert And that's what happened here MacSwain being the
 (13) expert Lee being the witness
 (14) MR STOLL So the question is They can ask him
 (15) what - only what he told MacSwain?
 (16) THE COURT They can ask him did you tell him what's
 (17) incorporated - what's in this document that's in evidence
 (18) MR STOLL That document -
 (19) THE COURT Was that your opinion at the time -
 (20) MR STOLL Excuse me Your Honor
 (21) THE COURT Did you subsequently give him other
 (22) information?
 (23) MR STOLL The document you're holding up is not the
 (24) document in evidence
 (25) THE COURT I'm sorry yeah that's right it's not
 You're right But the document that I saw gives an incomplete

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- (1) story about what this opinion - this expert's opinion was
 (2) right? Because it only - MacSwain's document which is in
 (3) evidence only talks about the initial interview that he had
 (4) with Mr Lee and in fact he then testified in the record that
 (5) - that Lee subsequently changed his opinion The question is
 (6) whether or not Mr MacSwain is - that one question involved
 (7) here counsel is whether or not MacSwain accurately reported
 (8) what Lee the information Lee gave to him and that was thrown
 (9) into question by plaintiffs counsel's cross examination
 (10) Therefore clarification is necessary
 (11) MR STOLL I'm not sure that that's what the record
 (12) indicates but I - well I understand the Court's -
 (13) THE COURT Go back over the record counsel I just
 (14) reviewed it If I'm wrong please let me know
 (15) MR STOLL Okay I will
 (16) THE COURT You'll have some time in the break
 (17) MR STOLL Thank you Your Honor
 (18) THE CLERK Please rise This court stands in
 (19) recess
 (20) (Recess from 12 29 p m to 12 44 p m)
 (21) THE CLERK This court now resumes its session
 (22) Please be seated
 (23) THE COURT Counsel you asked to see me out of the
 (24) presence of the jury?
 (25) MR PETUMENOS Yes You invited counsel to let you

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- (1) know if there were other parts of the record to support our
 (2) contention so that the record is not confused or not
 (3) significantly confused to allow this testimony that we find
 (4) highly problematic and Mr Stoll pointed out a couple pages of
 (5) the transcript
 (6) THE COURT This is 6483 and 6484?
 (7) MR PETUMENOS Yes sir
 (8) THE COURT That's the very passage that was read into
 (9) the record by Mr Diamond isn't it?
 (10) MR PETUMENOS I don't know I'm not sure
 (11) THE COURT I think it is
 (12) MR STOLL I think it is Your Honor
 (13) MR DIAMOND I began reading at 6483 line 9
 (14) Mr Norm Lee
 (15) THE COURT Right Question did Mr Norm Lee -
 (16) MR STOLL Your Honor I think it is the same
 (17) passage The point I was making or tried to make wanted to
 (18) review during the recess was that I think that the record is
 (19) clear as to what apparently Mr Lee is going to testify to now
 (20) in other words that apparently he made some statement to
 (21) Mr MacSwain at a preliminary stage then he made another
 (22) statement to him later on that affirmed what Mr MacSwain
 (23) said
 (24) And our objection to this witness giving his expert opinion
 (25) is this is not a means of clarifying the record because the

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- (1) record is clear reading that sequence as to what Mr MacSwain
 (2) did He got one opinion from Mr Lee that said he didn't think
 (3) there was any effect and then he subsequently got an opinion
 (4) from Mr Lee that there was an effect That - that's in the
 (5) record And that's all that Mr Lee is going to testify to
 (6) THE COURT Counsel did you read the last passage on
 (7) page 6484?
 (8) MR STOLL Yes Your Honor
 (9) THE COURT Well isn't the implication there that
 (10) federal government took the position that - that there was
 (11) damage to the - to the - to these land values even after
 (12) Mr Lee reported them?
 (13) MR STOLL Yes Yes Your Honor
 (14) THE COURT So doesn't that perhaps throw some doubt
 (15) into the question of whether Mr MacSwain was accurately
 (16) reporting what Mr Lee told him?
 (17) MR STOLL We're not con - we're not contesting
 (18) that All we're saying is that - and we will under any
 (19) circumstances and that is is that Mr Lee expressed his
 (20) opinion to Mr MacSwain apparently different opinions on
 (21) different times and that the federal government took the
 (22) position different than what Mr Lee told him So that is not
 (23) - I mean that's true whether he testifies or doesn't
 (24) testify and the difficulty that - that I'm having is that
 (25) under the rationale of counsel then they are able to because

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- (1) this MacSwain interviewed 150 people they can come out and
 (2) bring anybody in there that - some of whom may be experts
 and
 (3) have them come in and testify
 (4) THE COURT Now they can't but when there's testimony
 (5) in the record cross-examination by counsel just provides
 (6) another reason why I should allow this in and I've already
 (7) said I'm going to allow it in counsel Your record is clear
 (8) I'm going to allow it in under the conditions I announced
 (9) before the break
 (10) MR DIAMOND And I spent the break telling the
 (11) witness what the guidelines are
 (12) THE COURT All right I appreciate that counsel
 (13) MR DIAMOND If it doesn't work it's not my fault
 (14) THE COURT This is - I don't know -
 (15) MR STOLL That's my copy Your Honor
 (16) THE COURT Okay thanks Is this yours?
 (17) MR STOLL Yes Yeah both mine
 (18) (Jury in at 12 48 p m)
 (19) THE COURT All right the jury is present We can
 (20) all sit down all of us except for the questioner
 (21) DIRECT EXAMINATION OF NORMAN LEE (Resumed)
 (22) BY MR DIAMOND
 (23) Q Who are you again? You're Norm Lee You're an appraiser
 (24) You used to work for the federal government You retired at
 (25) the end of May this year correct?

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- (1) A Yes sir
 (2) Q All right We were talking about your work on the Incident
 (3) Command Team immediately following the oil spill and I think
 (4) when we last left you we were flying high above the Kenai
 (5) coast and talking about oil spills
 (6) I want to ask you In connection with your work on the
 (7) Incident Command Team did you undertake to make any
 inquiries
 (8) about the impact of the oil spill on Park Service land?
 (9) A Yes
 (10) Q And why was that?
 (11) A Well as part of being a federal employee I - I keep
 (12) track of what's going on as far as land values We're
 (13) reviewing appraisals and acquiring lands any - so I just
 (14) generally keep track of land values and land value trends
 (15) Q Why would it be important for you to know in your job what
 (16) effect if any the spill had on Park Service lands?
 (17) A Well anything that affects value in this case the oil
 (18) spill or any - anything along that line If it affects has
 (19) an effect on value or a potential effect on value it has to be
 (20) taken into account in an appraisal
 (21) Q All right The - can I call this an informal
 (22) investigation informal inquiry would that be a fair
 (23) characterization?
 (24) A It was informal in the fact that it was not funded until
 (25) some time early in 1990

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- (1) A I've known Steve ever since 1987 when I moved here
 through
 (2) professional organizations and just as part of the appraisal
 (3) community
 (4) Q How big is the appraisal community in Anchorage?
 (5) A Oh there's probably somewhere around a hundred
 (6) appraisers There's about 40 of them that are working in the
 (7) area that I work in
 (8) Q And do appraisers like lawyers get together monthly and
 (9) eat rubber chicken and exchange war stories?
 (10) A Yes and particularly the International Right-of Way
 (11) Association has a meeting and luncheon every month
 (12) Q And has it been your experience that you bump into
 (13) Mr MacSwain usually at least once a month?
 (14) A He's also a member of it and I've talked to him on
 (15) occasion yes
 (16) Q Did you talk to Mr MacSwain about the impact or potential
 (17) impact of the oil spill on property values why you were
 (18) conducting this - these informal inquiries?
 (19) A Yes He was one of the people that I interviewed when I
 (20) was doing this informal study
 (21) Q And why were you interviewing people?
 (22) MR PETUMENOS Objection Judge
 (23) THE COURT No, that's - you can say why Why were
 (24) you?
 (25) A Just looking for background information and any information

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- (1) Q All right Well let's talk about it as informal before it
 (2) was funded in 1990 I don't want to get into details of what
 (3) you did but I understand part of what you did was to talk to
 (4) various people involved in the real estate market.
 (5) MR PETUMENOS Objection
 (6) THE COURT Sustained, the objection's sustained
 (7) MR DIAMOND Your Honor, what I want to do is simply
 (8) lay a foundation for his conversation with Mr MacSwain that
 (9) already appears on record in this case
 (10) MR PETUMENOS Objection
 (11) THE COURT Let's start talking about the
 (12) conversations with Mr MacSwain first. If it's necessary for
 (13) me to allow you to explain in more detail the underlying
 (14) process then I may do that counsel but I won't do it now
 (15) MR DIAMOND Okay
 (16) BY MR DIAMOND
 (17) Q During - let me ask you first. When did you first start
 (18) making this making these inquiries?
 (19) A Would be April of '89
 (20) Q All right Did you talk to Steve MacSwain - you know who
 (21) Steve MacSwain is don't you?
 (22) A Yes
 (23) Q He's a real estate appraiser in town?
 (24) A Yes
 (25) Q How do you know him?

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- (1) that someone could share with me
 (2) BY MR DIAMOND
 (3) Q Tell us about the conversation with Mr MacSwain best you
 (4) can recall it.
 (5) A I just asked him if he had any comparable sales that
 (6) indicated a loss in value as a result of the oil spill or
 (7) hazardous material spill In addition I was looking for any
 (8) comp sales It's part of my job any transactions that have
 (9) occurred
 (10) Q All right Did you tell Mr MacSwain why you were
 (11) interested in the information?
 (12) A Yes I explained to him that I was looking for background
 (13) data that I was going to be making a proposal to the Federal
 (14) Department of Interior Fish & Wildlife Service and the Park
 (15) Service on the litigation against Exxon
 (16) Q All right -
 (17) MR PETUMENOS Judge I am going to object and move
 (18) to strike
 (19) THE COURT I won't strike that, counsel The motion
 (20) is denied
 (21) BY MR DIAMOND
 (22) Q Did - did you exchange views with Mr MacSwain during the
 (23) course of this conversation or conversations about what you
 (24) thought the effects of the spill might be at that juncture?
 (25) A Yes

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- (1) Q What did you tell him?
 (2) A I explained to him that I thought there would be a value
 (3) loss as a result of the oil spill to the federal lands
 (4) Q Did you tell him that was a definitive judgment? One that
 (5) you had made after looking at this in a very studied and
 (6) careful fashion?
 (7) MR PETUMENOS I m object to leading
 (8) MR DIAMOND I m trying to be careful in this area
 (9) and that s why I m leading
 (10) THE COURT I ll allow that question
 (11) A I m not sure I ll call it definitive judgment It was a
 (12) view that I had
 (13) BY MR DIAMOND
 (14) Q You ve seen a copy of Mr MacSwain s 11/20/90 file memo
 (15) concerning Norm Lee have you not?
 (16) A Yes I have
 (17) Q And you ve seen the entry that Lee stated quote that he
 (18) thinks that there might be a value loss due to the oil spill
 (19) but had not yet found the data to draw a conclusion of
 (20) measurable value loss?
 (21) A Yes
 (22) Q Is that a rough - roughly fair characterization of what
 (23) you told MacSwain during the course of this informal inquiry
 (24) that you were making?
 (25) A Yes

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- (1) Q To your knowledge when you spoke with Mr MacSwain, had
 he
 (2) yet been retained by Exxon to do work in this case?
 (3) A He did not indicate that to me no-
 (4) Q All right. And you believe this conversation would have
 (5) taken place when late 1989 or early 1990?
 (6) A Probably late 89 That was the time when I was starting
 (7) this investigation
 (8) Q Okay You then said you were funded by the Department of
 (9) Interior?
 (10) A Yes
 (11) Q On behalf of what agencies?
 (12) A Fish & Wildlife Service and National Park Service,
 (13) primarily U S Forest Service was also brought in and I
 (14) don t know whether they supplied any funding or not.
 (15) Q And specifically what question or questions were you asked
 (16) to - to answer?
 (17) MR PETUMENOS Objection
 (18) THE COURT Yeah the objection s sustained
 (19) BY MR DIAMOND
 (20) Q Over what period of time did you conduct this formal
 (21) study?
 (22) A It started in spring of 1990 and went on for approximately
 (23) three or four months
 (24) Q And you were looking at what issue?
 (25) MR PETUMENOS Objection

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- (1) THE COURT No the objection is overruled
 (2) BY MR DIAMOND
 (3) Q What issue were you looking at over this one-year period?
 (4) A Looking for any potential loss of land values to the
 (5) federal lands
 (6) Q Including lands that the federal government owns in the
 (7) Kenai Fjords area?
 (8) A Yes sir
 (9) Q Are there Native Corporation parcels proximate to those
 (10) lands lawyer talk for nearby?
 (11) A There are - there are inholdings within the boundaries of
 (12) Kenai Fjord National Park
 (13) Q What does that mean?
 (14) A There are either selection rights or they ve been conveyed
 (15) to the Native Corporations but they re within the external
 (16) boundaries of the national park
 (17) Q All right Were lands that had been selected by the Native
 (18) Corporations not yet been conveyed so that they were still
 (19) under the jurisdiction of the Park Service?
 (20) MR PETUMENOS Objection
 (21) THE COURT The objection -
 (22) MR DIAMOND It s an inartful way I m just trying to
 (23) understand the relationship
 (24) THE COURT Doesn t matter counsel The objection s
 (25) sustained

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- (1) BY MR DIAMOND
 (2) Q Okay let s talk about the study At some point you
 (3) reported conclusions to superiors in the Department of
 (4) Interior?
 (5) MR PETUMENOS Objection
 (6) THE COURT Yeah that s sustained counsel We re
 (7) talking about the - the relationship between MacSwain and this
 (8) witness That s what s important.
 (9) MR DIAMOND Okay
 (10) BY MR DIAMOND
 (11) Q At some point after your study concluded did you have a
 (12) conversation with Mr MacSwain about that?
 (13) A Yes he was asking me some information
 (14) Q Okay give us a sense of time here when did you conclude
 (15) your study?
 (16) A Approximately the end of 1990 or early 91 It was prior
 (17) to the settlement agreement between the federal government
 and
 (18) Exxon
 (19) Q All right Can you - can you date the conversation you
 (20) had Mr MacSwain - with Mr MacSwain by reference to the
 (21) settlement of the federal government s litigation with Exxon?
 (22) MR PETUMENOS Objection
 (23) MR DIAMOND Before or after?
 (24) MR PETUMENOS Objection
 (25) THE COURT The objection s overruled Can you -

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- (1) A Which conversation are we talking about?
- (2) THE COURT The second one
- (3) A Well I had several conversations
- (4) BY MR DIAMOND
- (5) Q At some point did you discuss with Mr MacSwain the
- (6) findings that you had made as a result of the year long
- (7) investigation that you just told us about?
- (8) MR PETUMENOS Objection
- (9) MR DIAMOND I'm just trying to -
- (10) THE COURT Objections overruled
- (11) A Yes I did
- (12) BY MR DIAMOND
- (13) Q When do you think that took place?
- (14) A As near as I - that was after the settlement with -
- (15) between Exxon and the federal government.
- (16) Q And did that settlement include settlement of any land
- (17) claims?
- (18) A I don't believe it did I wasn't party to the - the
- (19) intimate details of that
- (20) MR PETUMENOS I move to strike for lack of
- (21) foundation
- (22) THE COURT You move to strike the - I don't believe
- (23) it did
- (24) MR PETUMENOS I don't believe it did but I don't
- (25) have any knowledge of the details and so forth I move to

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- (1) strike on lack of foundation
- (2) THE COURT I'll strike it. Jury is to disregard it.
- (3) BY MR DIAMOND
- (4) Q It was after - let me - did you understand the settlement
- (5) to be the settlement of all claims that the federal government
- (6) had against Exxon?
- (7) A Yes
- (8) Q So there were no outstanding disputes at the time you
- (9) talked with him?
- (10) A No
- (11) Q What did you tell him that you had concluded with respect
- (12) to the impact of the oil spill on Park Service land in the
- (13) Kenai Fjords area?
- (14) MR PETUMENOS Objection
- (15) THE COURT The objections overruled
- (16) A That I found no loss in value to the lands as a result of
- (17) the oil spill
- (18) BY MR DIAMOND
- (19) Q I want to change subjects Are you familiar with remote
- (20) wilderness property in Alaska?
- (21) A Yes
- (22) Q Are you familiar with the market for remote wilderness
- (23) property in Alaska?
- (24) A Yes
- (25) Q How so? Tell us why

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- (1) A That's been - part of my job has been either appraising or
- (2) reviewing almost all of the remote land acquisition that the
- (3) federal government's been involved in in Alaska in the last
- (4) seven years
- (5) Q What percentage of the Park Service's acquisition is of
- (6) remote wilderness property as opposed to developed
- (7) commercial
- (8) property?
- (9) A Approximately 90 percent.
- (10) Q During the seven years that you acted as chief appraiser
- (11) for the Park Service how many appraisals do you think that you
- (12) reviewed concerning remote wilderness property?
- (13) A Approximately 300
- (14) Q And what do you - what percentage would you think
- (15) concerns
- (16) remote wilderness property?
- (17) A That was the question you just asked approximately 300
- (18) Q Okay all right And the percentage of that would be
- (19) roughly 90 percent?
- (20) A The 300 would be the number of remote parcels
- (21) Q So the answer is 100 percent?
- (22) A 100 percent of the 300
- (23) Q I'm sorry for the dumb question
- (24) Does the National Park Service currently purchase much
- (25) remote undeveloped land in Alaska?
- (26) A I'm not sure what you mean by "much" It makes offers
- (27) whenever it has funding and there's a willing seller

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- (1) available
- (2) Q Let me ask you for the seven years that you were with the
- (3) Park Service up in Alaska was the Park Service a big buyer a
- (4) big player in that market?
- (5) A No
- (6) Q Why?
- (7) A Well they simply don't have the funding
- (8) Q How much land did the Park Service acquire while you were
- (9) chief appraiser for roughly a seven-year period?
- (10) A Oh approximately a thousand to 1500 acres
- (11) Q You say it doesn't have enough money I thought the
- (12) federal government has tons of money
- (13) A Well -
- (14) Q Not for Alaska?
- (15) A Their annual appropriations as part of the budget process
- (16) that Congress and the President give to different agencies and
- (17) Alaska gets a portion of that.
- (18) Q Is Alaska currently on the - the low end of the totem pole
- (19) in terms of the priorities with land acquisition?
- (20) MR PETUMENOS Objection, leading
- (21) THE COURT Well I'll allow it. Go ahead
- (22) A For the most part, Alaska land purchases are not a high
- (23) priority item
- (24) BY MR DIAMOND
- (25) Q In the Park Service?

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- (1) A In the Park Service yes
 (2) Q Why is that?
 (3) A Simply because there s so much wilderness lands within
 (4) Alaska that they - they would prefer to spend the money where
 (5) the demographics are better, in other words they re looking
 (6) for where there s higher visitation They re looking more
 (7) towards urban areas where you have stronger urban influence
 (8) Q Okay you ve been involved in a number of acquisition that
 (9) the Park Service and other federal agencies has made is that a
 (10) true statement?
 (11) A Yes sir
 (12) Q All right Are there any rules that apply or control the
 (13) price that the government may or may not pay for property it
 (14) acquires?
 (15) A Well an offer to purchase has to be based on an appraisal
 (16) of the fair market value of the property
 (17) Q Why?
 (18) A Well law for one Public Law 91 646 in 1970 said that
 (19) you had to have an approved appraisal of market value in order
 (20) to make a - make an offer to purchase
 (21) Q What s fair market value mean in that context?
 (22) A It s set by the courts It s the price that - most
 (23) probable price that a piece of property would sell for with
 (24) the transaction occurring between the willing seller and the
 (25) willing buyer, neither under compulsion

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- (1) Q A willing government buyer or just a willing general buyer?
 (2) A In that definition we re talking about a willing private
 (3) - in effect a private party
 (4) Q So the government can't pay more than fair market value
 (5) but surely there must be some exceptions
 (6) A There are some exceptions where they would pay more than
 (7) market value yes
 (8) Q In your seven years in Alaska how many exceptions were
 (9) there?
 (10) A With the Park Service there have been two
 (11) Q Describe them for us
 (12) A One was a quarter-acre city - or lot within the city of
 (13) Skagway and the other was an administrative site at Siana
 (14) Q How big was the administrative site?
 (15) A About one acre
 (16) Q We re talking about just a very little small portion of
 (17) property?
 (18) A Yes that s correct.
 (19) Q How did the federal government manage or how did the Park
 (20) Service manage to get permission to violate the law?
 (21) A Well they didn't violate the law They had the law
 (22) changed They went before Congress and next got an
 (23) appropriation or waiver
 (24) Q Is that required before the federal government pays more
 (25) than fair market value?

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- (1) A Anytime an agency pays more than fair market value in
 (2) Alaska yes
 (3) Q You have heard - strike that Have you heard of the terms
 (4) 'natural lands or environmental preservation lands used in
 (5) connection with the appraisal of properties that are proposed
 (6) for purchase by the federal government?
 (7) A Yes I have
 (8) Q Tell us in what connection have you heard those terms?
 (9) A Well I ve reviewed several appraisals where they ve used
 (10) that term as the highest and best use determination for
 (11) property
 (12) Q How many times have you seen that on - on 300 or so
 (13) appraisals that you ve told us you ve reviewed?
 (14) A In Alaska four times
 (15) Q Who were the appraisers?
 (16) A Bill Mundy did two of the appraisals and Fred Ferrara did
 (17) two of the appraisals
 (18) Q Have you ever seen land classified in that highest and best
 (19) use category by any other appraisers who were involved in
 (20) federal government land acquisitions?
 (21) A No
 (22) Q In the - to focus on the Mundy appraisals in which land
 (23) was put in a highest and best use category called natural lands
 (24) or environmental preservation lands were those - did you
 (25) accept those appraisals?

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- (1) A No They were not acceptable
 (2) Q And they were therefore rejected by the National Park
 (3) Service?
 (4) A Well they rejected it yes as part of the review process
 (5) Q Can you explain to the jury why?
 (6) A Well natural lands as a concept used by Mr Mundy is not
 (7) acceptable under federal acquisition and - or under state
 (8) acquisition either
 (9) Q What s wrong with it?
 (10) A Basically it misuses the data That would be the best way
 (11) of explaining it The problem with it -
 (12) Q Perhaps you better tell us what - what this natural lands
 (13) thing is before you tell us why it s no good for purposes of
 (14) the federal government
 (15) A It s a highest and best use category that states that the
 (16) federal government or a government agency would be the only
 (17) one
 (18) who would acquire the property In other words it s a
 (19) single-use buyer
 (20) Q And is there a problem because it - it looks to government
 (21) purchases of property without regard to whether the
 (22) government
 (23) in that transaction paid fair market value?
 (24) A Yes
 (25) Q Explain
 (26) A Well there are several examples The Pnbilof where an
 (27) appraiser has used a comparable sale that didn t reflect

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- (1) economic value one would be the Pribilof Bird Cliff
 (2) acquisition
 (3) Q The natural lands theory would allow the use of the
 (4) Pribilof land acquisition as a comparable you say when you
 (5) think it shouldn't?
 (6) A Yes - I don't subscribe to the natural land theory so I'm
 (7) kind of going out of context in this but using the natural
 (8) land theory they in effect said that any sales which were
 (9) purchased by the federal government could be used as a
 (10) comparable sale
 (11) Q What's wrong with using the Pribilof acquisition as a - as
 (12) a benchmark for fair market value of property that the
 (13) government acquires?
 (14) A Because it doesn't reflect economic value It doesn't
 (15) reflect what a normal market would pay for that piece of
 (16) property
 (17) Q Well what was different about that transaction so that it
 (18) didn't reflect fair market value?
 (19) A That transaction reflected a bailout of a Native
 (20) Corporation
 (21) Q Perhaps you better tell us a little bit more about this
 (22) A Okay It was set up as a congressional action to purchase
 (23) properties I believe it's on St Paul Island Pribilof, what's
 (24) known locally as the Pribilof Bird Cliffs and as part of that
 (25) action it also provided for money for a Native Corporation

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- (1) MR PETUMENOS Your Honor, may we approach the
 (2) bench?
 (3) THE COURT Yes uh huh
 (4) (At side bar on the record)
 (5) MR PETUMENOS I want to make sure I understand this
 (6) Judge this expert testimony at this point I thought he was
 (7) going to say that he has rejected as a matter of fact natural
 (8) lands theory
 (9) THE COURT His department did
 (10) MR PETUMENOS Yes but to be going into -
 (11) THE COURT To determine whether or not the federal
 (12) government would be the buyer and -
 (13) MR PETUMENOS Right and I don't object to that
 (14) testimony but we're getting way far afield here
 (15) THE COURT We are
 (16) MR DIAMOND I'm trying to ask him why it was
 (17) rejected, and the way to do that is to explain the problem with
 (18) the comparables that they presented as a part of natural lands
 (19) appraisals
 (20) THE COURT You know here's the problem with this
 (21) now we're getting to bailouts of Native corporations There's
 (22) all kinds of stuff I don't want.
 (23) MR DIAMOND I didn't expect that to come in All I
 (24) want him to do is talk about - the problem is it says any
 (25) government purchase and some of them are not fair market
 value

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- (1) and are not barometers of fair market value That's the
 (2) problem He's got examples of that that were used from the
 (3) appraisals
 (4) THE COURT It's not going to make any difference
 (5) It's not going to make any difference Don't go into the
 (6) examples
 (7) MR DIAMOND I won't
 (8) (Sidebar concluded)
 (9) BY MR DIAMOND
 (10) Q Mr Lee has the National Park Service ever approved an
 (11) appraisal of property that was proposed for government
 purchase
 (12) that used the natural lands land category?
 (13) A Not in Alaska
 (14) Q I want to return ever so briefly to -
 (15) MR DIAMOND May I have a moment with counsel Your
 (16) Honor?
 (17) THE COURT Uh-huh
 (18) (Discussion off record between counsel)
 (19) MR PETUMENOS The matter he was conferring with me
 (20) on is Mr Stoll's client Maybe he should confer with
 (21) Mr Stoll
 (22) MR DIAMOND The objection I anticipated I
 (23) anticipated from Mr Petumenos
 (24) MR PETUMENOS Perhaps I can confer with Mr Stoll
 (25) perhaps I can make it

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- (1) BY MR DIAMOND
 (2) Q I want to go back -
 (3) MR STOLL Your Honor, maybe we should take this up
 (4) with the Court.
 (5) THE COURT Sure I don't need you on this one
 (6) (Discussion at bench off the record)
 (7) BY MR DIAMOND
 (8) Q I want to go back briefly to the time period of time when
 (9) you were attempting to ascertain the impact of the oil spill on
 (10) Park Service land In the course of conducting that study,
 (11) part of your inquiries were to talk to people in the market as
 (12) to property values?
 (13) A Yes sir
 (14) Q Among the people who you interviewed was one Pat
 Carlson
 (15) the assessor for Kodiak Island Borough?
 (16) A Yes that's correct.
 (17) Q And give us a rough approximation, when did you talk to
 (18) him?
 (19) A Sometime late spring or summer of 1990
 (20) Q Why did you talk to him?
 (21) A I was again checking all the sources for information on
 (22) loss in value as a result of the oil spill And I was - he
 (23) was one of the last people that I talked to I visited with
 (24) some folks down there and they told me that Pat was probably
 (25) the most knowledgeable person on Kodiak Island

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- (1) Q Why was the impact of the spill on Kodiak Island property values or property market important to you?
- (2) A Well the most private landholdings or coastal landholdings are in the spill area are found on Kodiak Island
- (3) Q Did you discuss with Mr Carlson whether you should take a look at the transactional records in the recorder's office in the assessor's office?
- (4) A I introduced myself and I explained to Mr Carlson what I was doing that I was looking for information on the potential litigation case against Exxon as a result of the oil spill I asked him to share his records with me He indicated that he was also doing something similar
- (5) Q And what did he say in response to your request that he share his records?
- (6) A He said well he really didn't think that his records would be much help to me
- (7) Q Why?
- (8) A Because he had had no indication that the oil spill had caused a loss in value
- (9) Q In Kodiak Island?
- (10) A On Kodiak Island yes sir
- (11) Q Was that important to the conclusions that you ultimately reached?
- (12) A Well that was kind of the nail in the coffin syndrome, I guess I concluded my study at that point in time

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- (1) MR DIAMOND No further questions
- (2) CROSS-EXAMINATION OF NORMAN LEE
- (3) BY MR PETUMENOS
- (4) Q Mr Lee you have spent your entire career - up until a few months ago 25 years I think it is -
- (5) A Yes sir
- (6) Q - in government service?
- (7) A Yes sir
- (8) Q You have never been an appraiser in the private sector?
- (9) A No I do private appraising also
- (10) Q Now I mean - now you do but during this 25-year period you were a civil servant?
- (11) A I also did private appraising and teaching
- (12) Q Most of your time was spent working for the federal government during this 25 years?
- (13) A Most of my time, yes sir
- (14) Q What percent?
- (15) A Well I was 100 percent employee of the federal government I also did some outside work though
- (16) Q And sometimes the government participates in the market as - or participates in the economy as a regulator; right?
- (17) A Yes
- (18) Q Sometimes it participates in the economy as a market participant itself?
- (19) A Yes

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- (1) Q In other words it purchases and sells and does things like that?
- (2) A Yes sir
- (3) Q And in the connection in which you served the federal government very frequently you found yourself in the role as the purchaser of property?
- (4) A My agency did yes
- (5) Q Yes And you were assisting your agency in purchasing property as a market participant as a buyer and there were sellers out there with whom you would negotiate prices?
- (6) A Yes
- (7) Q And the public interest that the Park Service protects when it purchases property is to get property into public hands for the - to the end of preserving it am I right?
- (8) A Yes that's one of the objectives
- (9) Q Now you said that a natural land highest and best use had never been accepted in Alaska
- (10) A That's correct
- (11) Q Is that because it's been accepted somewhere else?
- (12) A As far as I know it's not been accepted anywhere else but I can only talk to Alaska
- (13) Q All right You have reviewed appraisals and accepted them when the word used was not natural land but land for - to be held for conservation purposes?
- (14) A I may have If you have a specific example -

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- (1) Q Well would that be something that off the top of your head would cause you pause if someone called the highest and best use for conservation?
- (2) A Yes it would cause me pause
- (3) Q Do you remember doing a review appraisal in connection with
- (4) a proposed exchange in the Dall Lake area?
- (5) A In the Dall Lake area
- (6) Q With Callista (phonetic)?
- (7) A Yes
- (8) Q And in that review appraisal did you not - did you not approve an appraisal where the highest and best use of the land was for conservation?
- (9) A I'd have to look at it. I reviewed two or three appraisals of the Callista exchange but I'd have to look at the context
- (10) MR DIAMOND Exhibit number?
- (11) MR PETUMENOS It's not been marked yet as an exhibit but you can take a look at the clipped area I'll let you take a look at it right there
- (12) MR DIAMOND Do you have a copy?
- (13) MR PETUMENOS Do we have a copy for counsel?
- (14) MR DIAMOND Your Honor this is the first time I've seen this Can I have just a minute?
- (15) MR PETUMENOS Sure I guess I'm not "Your Honor"
- (16) MR PETUMENOS What I want to show him the -
- (17) THE COURT Well hang on counsel Let Mr Diamond

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- (1) review it
 (2) MR PETUMENOS I understand I just wanted to let
 (3) him know what portion I was going to show the witness What I
 (4) was going to show him Mr Diamond is page 7 of the appraisal
 (5) MR DIAMOND I m missing - I think I m missing the
 (6) appraisal I have his memo and then I just have pages six and
 (7) seven
 (8) MR PETUMENOS Take a look at mine then
 (9) I m not upset Judge I m just having trouble with a
 (10) contact lens
 (11) See if this helps you out Mr Lee
 (12) BY MR PETUMENOS
 (13) Q Do you recognize your signature on this memorandum of
 (14) July 9 1992 Norman Lee?
 (15) A Yes
 (16) Q And in the top of the page here you say a portion of the
 (17) tract is encumbered by ANCSA Section 22(g), which restricts
 (18) development in uses the appraisal determines a highest and
 (19) best use of recreation and conservation of wildlife habitat?
 (20) A Yes
 (21) Q And when the appraisal determined that it was for
 (22) conservation of wildlife habitat you approved it?
 (23) A It also made a reference to recreation
 (24) Q So that made a difference?
 (25) A Yes sir

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- (1) Q Now, there are a number of appraisers in the private sector
 (2) who disagree with you about your view of natural land would
 (3) you agree?
 (4) A I ve heard that yes, that there are some appraisers
 (5) Q And the way the theory would go for those that disagree
 (6) with you who are on the other side of the federal government
 (7) equation you being the purchaser and they perhaps being the
 (8) sellers is that they contend that what the federal government
 (9) is trying to do is drive the price down for purchases of future
 (10) purchases
 (11) A Are you asking me - is that a question?
 (12) Q Yes
 (13) A No I don t believe that s true
 (14) Q Well if we were to take, for example the Seal Bay
 (15) transaction as a comparable, you are familiar with the Seal Bay
 (16) transaction you were involved in it?
 (17) A I was not involved with it, no I m somewhat familiar with
 (18) it but I was not involved in it.
 (19) Q You know that there was a \$924-per-acre price paid by the
 (20) federal government?
 (21) A Are you talking about what the Trustees paid?
 (22) Q What the federal government and the state in combination?
 (23) A I m not positive what the price was I can t confirm
 (24) that.
 (25) Q Let s assume that it was \$924 per acre all right? Is it

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- (1) fair to use that transaction as a comparable in your view?
 (2) MR DIAMOND I ll object as an incomplete
 (3) hypothetical It - he doesn t know what price was paid
 (4) THE COURT He can testify if it s incomplete He can
 (5) answer the question though
 (6) A Again without going into specifics on the transaction but
 (7) there was substantial timber value involved in that property
 (8) In fact I believe that was the bulk of the value and so if
 (9) that was being compared to other timber properties yes it
 (10) could be -
 (11) BY MR PETUMENOS
 (12) Q There was mountaintops and glaciers in that transaction
 (13) wasn t there?
 (14) A I -
 (15) Q Excuse me there weren t glaciers There were mountaintops
 (16) and cliffs and rocks and things like that in that transaction
 (17) wasn t there?
 (18) A Again I m not familiar with the particulars of the
 (19) transaction
 (20) Q Really what we re talking about here Mr Lee is not
 (21) whether it s natural land or conservation land or what the
 (22) label is for highest and best use We re talking about money
 (23) aren t we?
 (24) MR DIAMOND Objection argumentative
 (25) THE COURT I think the meaning is clear The - If

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- (1) it s not clear the witness can say so
 (2) A As an appraiser I m not concerned about money I m
 (3) concerned about the method that the appraiser arrives at a
 (4) value conclusion What dollar conclusion they come up with is
 (5) not a concern
 (6) BY MR PETUMENOS
 (7) Q The concern is that the federal government has been for a
 (8) number of years either - well let me back up The Park
 (9) Service isn t the only way that the federal government
 (10) purchases land is it?
 (11) A No sir, there are other agencies that do that.
 (12) Q There are other agencies, and the Congress of the United
 (13) States does it sometimes directly?
 (14) A Yes sir
 (15) Q And they do that by legislation?
 (16) A Yes
 (17) Q And what is going on in this controversy between some of
 (18) the people in the private sector who are doing appraisals and
 (19) some of the government appraisers is the people in the private
 (20) sector want to use as comparables for future sales other
 (21) transactions that Congress and others have - have purchased
 (22) from the private sector?
 (23) A That is one method that they use in this natural lands
 (24) approach
 (25) Q And the government appraisers who are using scarce

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- (1) resources and have as you point out limited budgets they
- (2) often object to the use of these prior transactions between
- (3) government and private sector sellers in valuing future
- (4) transactions that's the nature of the controversy?
- (5) A They object to it but not on the basis of the money that
- (6) was paid but in the methodology that's used
- (7) Q And one of the things that has happened is people have
- (8) written appraisals the government - and have used terms like
- (9) conservation or natural land The government has said no no
- (10) no you can't do that In a review appraisal like yours there
- (11) have been occasions where the appraisal then gets reworded
- (12) with
- (12) the same price per acre and the transaction goes through Can
- (13) you think of any instances like that?
- (14) A Yeah, I can where the transactions that were used as
- (15) comparable sales met the definition of fair market value
- (16) Q Is one of the conversations that you had with Mr MacSwain
- (17) a two-minute conversation in an airport?
- (18) A Yes
- (19) Q And did that make it into Mr MacSwain's written material?
- (20) A I believe it did
- (21) Q Is it the case that you had a conversation with Mr Carlson
- (22) - I think you mentioned that, in this survey business that
- (23) Mr MacSwain did, you had a conversation with him you
- (24) thought
- (24) that perhaps there might have been some impact on the oil
- (25) spill you looked at some things and you changed your mind

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- (1) right?
- (2) A That's - yes
- (3) Q That's the sum of it?
- (4) A Yeah
- (5) Q And when you talked to Mr Carlson do you know whether
- (6) the
- (6) same thing happened whether you talked to him and then he
- (7) did
- (7) some work and he changed his mind in the other direction?
- (8) A No I have no way of guessing what Mr Carlson did
- (9) Q Now, if I wanted to take a look at your surveys and
- (10) determine what people said and what you - let me ask you did
- (11) you take notes when you did these surveys?
- (12) A I took some brief notes yes
- (13) Q And if I wanted to take a look at those notes right now and
- (14) try to figure out whether it's a two-minute conversation in an
- (15) airport or whether somebody changed their mind would you
- (16) have
- (16) the notes to be able to show me?
- (17) A No I do not have those notes
- (18) Q Did you destroy them?
- (19) A Either they were destroyed or I destroyed them yes sir
- (20) Now you're talking about notes that are in reference to the
- (21) Exxon in the federal case
- (22) Q I'm talking about the survey that you said you did that
- (23) kept you abreast for of the situation for valuation purposes
- (24) that you testified to on direct?
- (25) A Yes that was done before the settlement with the federal

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- (1) government
- (2) Q Now I think I got this straight but you never talked to a
- (3) single Justice Department attorney about the settlement?
- (4) A No sir I did not
- (5) Q You have no idea whether the consent decree that the
- (6) federal government entered into in the settlement of that
- (7) matter contained natural resource damages including land do
- (8) you?
- (9) A I have no idea no sir
- (10) Q You have no idea?
- (11) A No sir
- (12) Q And if it did do you believe that the federal government
- (13) came to a different conclusion than you did about whether there
- (14) was natural resources damages to land?
- (15) A I - that would be pure speculation on my part
- (16) MR PETUMENOS I have no further questions
- (17) MR STOLL I have one question, Your Honor
- (18) CROSS-EXAMINATION OF NORMAN LEE
- (19) BY MR STOLL
- (20) Q There's other organizations other than the federal
- (21) government that buys large parcels of land like the natural
- (22) land - Natural Land Conservancy, and other groups like that
- (23) isn't that correct?
- (24) A Yes
- (25) THE COURT Is that it counsel?

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- (1) REDIRECT EXAMINATION OF NORMAN LEE
- (2) BY MR DIAMOND
- (3) Q Before you step down the problem with this - these
- (4) natural land appraisals, I gather from your answer to
- (5) Mr Petumenos question is not the name you called them it's
- (6) not the nomenclature?
- (7) MR PETUMENOS I object to leading
- (8) THE COURT Yes don't lead counsel
- (9) BY MR DIAMOND
- (10) Q Does the problem have something to do with the
- (11) comparables
- (11) that are used to fix market value?
- (12) A Yes
- (13) Q Try explaining that to me - explain that to me What is
- (14) the problem?
- (15) A Well, using comparables that aren't truly comparables that
- (16) don't reflect what's going on in the economic climate in the
- (17) private market
- (18) Q In what way? Why wouldn't a prior sale be a comparable?
- (19) A Well a prior sale might be - well as an example in the
- (20) Callista appraisal that Mr Mundy did he used a sale from the
- (21) Gulf Coast of Florida north of Tampa, with 60 miles of Gulf
- (22) frontage
- (23) Q Why doesn't that establish fair market value for property
- (24) in Alaska?
- (25) A I don't think that's comparable to the Yukon Kuskokwim

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- (1) Delta
- (2) Q Little different environment?
- (3) A Little different environment little different
- (4) demographics
- (5) Q Have any of these - these natural land appraisals that you
- (6) mentioned that you rejected of Mr Mundy used comparables
- (7) where the purchase price really wasn't just a price paid for
- (8) land?
- (9) A Yeah another example would be Attu Island
- (10) Q Well what - why is that an example?
- (11) A Well in the congressional legislation that laid out the
- (12) compensation to be paid for those lands it also included an
- (13) apology to the Native people that lived there So the money
- (14) that was paid was more in the form of an apology to the people
- (15) for being relocated during World War II
- (16) Q But Mr Mundy in the appraisal you looked at thought that
- (17) that was a benchmark of fair market value for property the
- (18) government was interested in purchasing?
- (19) A Yes
- (20) Q You don't have any notes of your conversation with
- (21) Mr Carlson I gather from your prior answer?
- (22) A No I don't.
- (23) Q And you don't have any notes from any of those
- (24) conversations do you?
- (25) A No

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- (1) Q Why is that?
- (2) A I - when I was doing the investigation for the federal
- (3) government they specifically asked me not to keep any notes
- (4) because they didn't want anything discovered under litigation
- (5) Q Finally you don't know whether the settlement that the
- (6) federal government entered into with Exxon got the federal
- (7) government any compensation for damage to any of its National
- (8) Park Service lands, do you?
- (9) A No I do not
- (10) Q But you made a recommendation as to whether the
- (11) government
- (12) should seek compensation for that, didn't you?
- (13) MR PETUMENOS I'll object.
- (14) THE COURT Sustained The objection is sustained
- (15) Sustained, counsel
- (16) MR DIAMOND No further questions
- (17) RECROSS-EXAMINATION OF NORMAN LEE
- (18) BY MR PETUMENOS
- (19) Q Mr Lee Dr Mundy has turned up on the other side of a
- (20) number of transactions that you worked on with the federal
- (21) government right?
- (22) A Yes sir
- (23) Q And there have been times, Mr Lee when you have reviewed
- (24) an appraiser that was - appraisal that was commissioned by the
- (25) federal government and the transaction has gone through at
- (26) substantially higher levels than what the appraisal that you

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- (1) reviewed called for?
- (2) A I don't believe so
- (3) Q Let's discuss Kachemak Bay Were you involved in that at
- (4) all?
- (5) A I was not involved in that no sir
- (6) Q Are you familiar with what happened there?
- (7) A I am yes
- (8) Q And what happened there was -
- (9) MR DIAMOND Your Honor beyond the scope of the -
- (10) the redirect
- (11) THE COURT How many questions do you have counsel?
- (12) MR PETUMENOS Not many
- (13) THE COURT I'll give you three You better get it
- (14) done in three
- (15) MR PETUMENOS They have to be long questions
- (16) BY MR PETUMENOS
- (17) Q What happened there was the Trustees had an appraisal the
- (18) seller the private person had another appraisal and it was
- (19) submitted to a panel of three appraisals that everybody picked
- (20) together and the price came out higher than - substantially
- (21) higher than the government appraisal am I right?
- (22) MR DIAMOND I object. It's compound more than
- (23) three questions
- (24) THE COURT It's okay It's all right I'm going to
- (25) count that as one counsel I'm going to allow the witness to

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- (1) answer it.
- (2) A That's my understanding yes sir
- (3) BY MR PETUMENOS
- (4) Q All right. And there have been occasions where
- (5) transactions have gone through where the seller's appraisal
- (6) right, and the government appraisal the final price for the
- (7) transaction had been somewhere in between the two?
- (8) A I'm sure there have been some somewhere but I'm not
- (9) familiar with them
- (10) MR PETUMENOS I have no further questions
- (11) THE COURT You can step down sir Thanks very much
- (12) and you can step out folks We'll see you tomorrow at 8 30
- (13) Don't talk about the case with anyone
- (14) (Jury out at 1 34 p m)
- (15) THE COURT Okay now hold on First me
- (16) Mr Oppenheimer?
- (17) MR OPPENHEIMER Yes Your Honor
- (18) THE COURT The Ford case
- (19) MR OPPENHEIMER Your Honor I have spent my evening
- (20) preparing witnesses and not pursuing the intellectual pursuit
- (21) Perhaps I should have If Your Honor can wait for me to
- (22) become
- (23) properly prepared I would actually enjoy the discussion
- (24) THE COURT I'm sure you would and so would I but in
- (25) order to be fully informed I need the Ford case
- (26) MR OPPENHEIMER Indeed I am told that the cases

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- (1) have been collected I can't say I've broken a sweat doing
 (2) it
 (3) MR PETUMENOS Judge there is a serious side to the
 (4) colloquy here and that is the witness for whom the tape
 (5) recording was made and for which disclosure has not been
 made
 (6) is testifying tomorrow
 (7) MR OPPENHEIMER You see I don't even know who this
 (8) witness is I jumped into the foray yesterday out of intense
 (9) intellectual curiosity
 (10) MR DIAMOND This is a witness that is scheduled for
 (11) tomorrow If we can discuss this this afternoon we will get
 (12) you the case
 (13) THE COURT Sure I think that's a good idea but
 (14) counsel you've got to get me the cases if you rely on them
 (15) MR PETUMENOS I would like the witness deferred If
 (16) I can There's not going to be time for me to digest this tape
 (17) recording and the statement if it is disclosed to us
 (18) MR DIAMOND I looked at it The transcript is not
 (19) that lengthy
 (20) THE COURT The transcript of the tape recording
 (21) MR DIAMOND Yeah and we have a transcript He does
 (22) not have to listen to it He can read it if it's ordered
 (23) disclosed
 (24) THE COURT Tell you what can we use an alternative
 (25) method? Could you give me the transcript? I'll read the

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- (1) transcript and see whether you should turn it over I mean
 (2) that may be really dispositive as far as I'm concerned I
 (3) won't - If I think it shouldn't be turned over I won't If
 (4) you get me some cases but I need to know what - whether this
 (5) is a tempest in the teapot or something serious
 (6) MR DIAMOND I'll have that brought to you within the
 (7) next ten minutes
 (8) THE COURT Okay that's fine
 (9) MR PETUMENOS But there was some sort of
 (10) misunderstanding because I had asked for this tape about
 (11) what three weeks ago or four weeks ago
 (12) MR DIAMOND And it's my understanding that Mr Grant
 (13) left a message with Mr Petumenos about two weeks ago
 (14) MR PETUMENOS Yesterday
 (15) MR DIAMOND Two weeks ago
 (16) THE COURT We can talk about it at 3:30 counsel
 (17) We're not going to talk about it now Yes
 (18) MS SMITH Mr Stoll and I need you to arbitrate a
 (19) small dispute small relative to the rest of this
 (20) Last Friday we designated Dr Brannon as our salmon expert
 (21) to testify this Thursday and we designated his exhibits He
 (22) testified in the federal court so there's been a ton of
 (23) exhibits designated for his cross in the federal court, but now
 (24) we're over here Brannon has to go back to Idaho for teaching
 (25) and other issues and we notified the plaintiffs Monday at

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- (1) 10:30 that instead of Thursday morning first thing he'll go on
 (2) tomorrow morning first thing The issue is when their cross
 (3) designations are due
 (4) I told Bob that it seemed to me since we had moved him up a
 (5) day that they should have more time to figure out the cross if
 (6) they were going to add anything to the federal designations
 (7) and that if he could - we could speak between 6:00 or 7:00
 (8) tonight that gives me a few hours this evening to prepare the
 (9) witness for tomorrow morning Mr Stoll declined and said I
 (10) should take it up with you and so I am
 (11) It's a balance between giving him enough time to prepare -
 (12) which he should have - and not having my witness ambushed
 (13) other than the three he gets which I should have and I would
 (14) like to ask the Court if we could get the cross by seven
 (15) o'clock tonight which gives me a few hours to get this guy
 (16) ready
 (17) THE COURT Is this just designation of exhibits that
 (18) are necessary?
 (19) MS SMITH Yes sir
 (20) MR STOLL Your Honor yesterday afternoon at 2:30 -
 (21) I was not told by counsel at 10:30 Apparently they sent a
 (22) message to my office but did not tell me Although we spent
 (23) the day together she did not tell me in court so I got back
 (24) at 2:30 as soon as I got there I called them Ms Smith
 (25) called me about six o'clock last evening I said I have no

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- (1) objection to them moving the witness up a day but I said there
 (2) was - I was preparing the Papke - anticipating doing the
 (3) Papke examination and they had another witness on today
 (4) Mr Hancock, who didn't testify but he was going to testify
 (5) and I'm supposed to do that cross-examination
 (6) We have these sort of back to back When we get the list
 (7) on Friday we get it Friday evening on Saturday morning we
 (8) parcel out the work and we plan out what's going to happen for
 (9) the following week We had anticipated that I was going to get
 (10) an outline on the cross you know get the material for Brannon
 (11) after I was done today and then have tomorrow - you know
 (12) tonight and tomorrow to look at the exhibits and what all we
 (13) needed to so we could designate it for tomorrow morning for
 (14) Thursday
 (15) So when I got the word at 2:30 yesterday afternoon I said
 (16) there was no way that I could go through the outline for
 (17) cross-examination plus go through all the exhibits and as Ms
 (18) Smith has indicated there are many documents associated with
 (19) this witness So what I said was I would make every effort to
 (20) designate - first of all I had no objection to moving him up
 (21) a day although it put - fouled up my schedule a little bit
 (22) Secondly I would designate the documents as quickly as I
 (23) could I thought that I could probably designate all of the
 (24) documents by 7:00 p.m. this evening but I didn't know that for
 (25) sure because I didn't - I hadn't even looked at the outline

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- (1) So I was at a - or at all the documents so I said I'll do the
 (2) best I can. And I will do that. But I don't think that when
 (3) they designate a witness for a day and then move up the whole
 (4) process by a day it's not - if it had been a Friday witness
 (5) for Thursday it would have been one thing but when they
 moved
 (6) it up in this time frame it creates a problem. Particularly a
 (7) witness a scientist that's got a lot of documents associated
 (8) with it. I've got to go through those documents.
 (9) THE COURT: What do you want me to do, counsel?
 (10) MR STOLL: Well Your Honor, I would propose that we
 (11) will do every effort as I indicated to Ms. Smith that we
 (12) provide her with a list. I think we may have already provided
 (13) her - her office at least - with a list. I asked my
 (14) associate to send something over there, you know, during the
 (15) course of the day as they found things but - and I will
 (16) review the exhibits and the outline as soon as I finish lunch
 (17) and try to get back to her.
 (18) I don't think there's going to be a problem on this, but if
 (19) I have a problem I'll advise her as soon as I find that
 (20) there's a problem. And we will give them the documents but
 (21) the documents normally wouldn't be due until 8:30 tomorrow
 (22) morning.
 (23) THE COURT: How many documents do you anticipate you
 (24) will be using for the cross-examination?
 (25) MR STOLL: I have - at this point Your Honor, I

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- (1) the admission of
 (2) THE COURT: Okay go ahead.
 (3) MR STOLL: One is Exhibit 9011.
 (4) MR DIAMOND: Can you tell us which -
 (5) MR STOLL: Yeah this was with Mr. MacSwain
 (6) yesterday this is the letter from Mr. Hurley to Mr. MacSwain
 (7) dated June 22, 1993 with the various data, you know the
 (8) recordings and all that.
 (9) THE COURT: I thought that was in. What's the number
 (10) again?
 (11) MR STOLL: It's 9011.
 (12) (Exhibit 9011 offered)
 (13) THE COURT: It's admitted.
 (14) (Exhibit 9011 received)
 (15) MR STOLL: The other then Your Honor I don't know
 (16) if this is in evidence or not. This goes back to Dr. Neff
 (17) This was a drawing that I did on the - you know going to the
 (18) water column.
 (19) THE COURT: And a very lovely graphic too, counsel.
 (20) MR STOLL: Well I wasn't asking for any plaudits.
 (21) Your Honor but thank you. At any rate it's Exhibit 8109.
 (22) (Exhibit 8109 offered)
 (23) THE COURT: You want that in?
 (24) MR STOLL: Yes Your Honor.
 (25) THE COURT: Why?

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- (1) have absolutely no idea. I've - I told her last night that I
 (2) anticipated designating just from a safety precaution without
 (3) looking at the outline, all of the documents that were
 (4) designated in federal court. I don't know that there are any
 (5) additional documents but I haven't even looked at the
 (6) exhibits.
 (7) THE COURT: Okay why don't I - this is a hard sort
 (8) of dispute to resolve because I really want to accommodate
 (9) your efficiency concerns but I want it to be fair and I also
 (10) do not want to be dealing with this question at 8:30 tomorrow
 (11) morning. So why don't I give you this you give them your
 (12) list it's got to be done by 7:00. If you find subsequent to
 (13) 7:00 if you have extra exhibits you are required to let them
 (14) know all the way up until 11:00 tonight, and then you've got to
 (15) let them see them. Your list that is given to them by 7:00 is
 (16) definitive but I'll give you a - an extra number of exhibits
 (17) that you can designate between 7:00 and 11:00 and I'm going
 to
 (18) limit that to ten. And after 11:00 there will be no further
 (19) designation.
 (20) MR STOLL: That's fine Your Honor I think I can
 (21) live with that.
 (22) THE COURT: Is that okay? Can you live with that?
 (23) MS SMITH: Yes.
 (24) MR STOLL: That's fine.
 (25) Your Honor I have a couple exhibits I'd just like to move

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- (1) MR STOLL: Because it goes with my questions to him
 (2) that he and I went over as to different areas in the water
 (3) column.
 (4) THE COURT: It's admitted.
 (5) (Exhibit 8109 received)
 (6) MR DIAMOND: We have some artwork that was done by
 (7) our five-year-old.
 (8) MR STOLL: Probably better.
 (9) THE COURT: I just don't want to see at the end of
 (10) this case taking that and putting it on a plate and giving it
 (11) to me as some sort of a certificate for my part of
 (12) participation in this case.
 (13) MR STOLL: We have a better one than that Your
 (14) Honor.
 (15) MR DIAMOND: Your Honor there's a question asked at
 (16) the conclusion of Mr. Haerer's testimony plaintiffs wanted to
 (17) move in the tax property by area tables and they are exhibits
 (18) 8233, 8234 and 8235. We have no objection to the admission of
 (19) the page on each which concerns East Peninsula Road District
 (20) District 87 as well as the cover page which shows the date.
 (21) MR STOLL: That's fine.
 (22) THE COURT: It will be admitted that way then.
 (23) (Exhibits 8233, 8234, 8235 received)
 (24) THE COURT: Okay hold on I'm going to get rid of
 (25) some extra plastic and paper I think. No I guess these are

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- (1) all tomorrow s huh?
- (2) THE CLERK. Most of them are We got nd of the other
- (3) ones
- (4) THE COURT I ll see you at 3 30 on that other
- (5) dispute? I ll see you in the plural or just in the singular?
- (6) MR OPPENHEIMER I m sorry?
- (7) THE COURT Am I going to have a battalion of lawyers
- (8) here or -
- (9) MR OPPENHEIMER You will have a platoon or maybe a
- (10) point man
- (11) THE COURT I prefer a squad
- (12) MR OPPENHEIMER A squad
- (13) THE CLERK Please rise This court stands in
- (14) recess
- (15) (Recess at 1 46 p m)

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- (1) STATE OF ALASKA)
(2) Reporter s Certificate
(3) DISTRICT OF ALASKA)
(5) I Joy S Brauer RPR a Registered Professional
(7) Reporter and Notary Public
(8) DO HERBY CERTIFY
(9) That the foregoing transcript contains a true and
(10) accurate transcription of my shorthand notes of all requested
(11) matters held in the foregoing captioned case
(12) Further that the transcript was prepared by me
(13) or under my direction
(14) DATED this day
(15) of , 1994
(21) JOY S BRAUER RPR
Notary Public for Alaska
(22) My Commission Expires 5-10-97

Look-See Concordance Report

 UNIQUE WORDS 2,720
 TOTAL OCCURRENCES 12,954
 NOISE WORDS 385
 TOTAL WORDS IN FILE 39,260

 SINGLE FILE CONCORDANCE

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- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 34N 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Wednesday August 24 1994
) 8 45 a m
 (6))
 (8) VOLUME 43 Pages 6803 through 6970
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
 (17) FOR THE PLAINTIFF
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 (10) Midnight Sun Court Reporters
 2550 Denali Street Suite 1505
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- (1) PROCEEDINGS
 (2) (Jury In at 8 45 a m)
 (3) (Call to Order of the Court)
 (4) THE COURT Good morning
 (5) MS SMITH Good morning
 (6) Your Honor I've been asked to let you know that we're
 (7) calling a witness out of order He needs to go back to his
 (8) teaching responsibilities I know the jury is dying to hear
 (9) about the market I know you are but we're going to do
 (10) something different today and then we'll go back so Exxon
 (11) calls Dr Ernest Brannon to the stand
 (12) THE CLERK Sir can you please stand by the chair and
 (13) attach the microphone to your tie Can you please raise your
 (14) right hand for the oath?
 (15) (The Witness is Sworn)
 (16) THE CLERK Please be seated Sir for the record
 (17) can you please state your full name?
 (18) A Ernest Leroy Brannon
 (19) THE CLERK Could you please spell your last name
 (20) A B-r-a-n-n-o-n
 (21) THE CLERK And your occupation?
 (22) A I'm a Professor at the University of Idaho
 (23) THE CLERK Thank you
 (24) DIRECT EXAMINATION OF ERNEST L. BRANNON
 (25) BY MS SMITH

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- (1) Q Well I think we might have just covered this but where do
 (2) you work Dr Brannon?
 (3) A I work at the University of Idaho in Moscow, Idaho
 (4) Q Moscow Idaho?
 (5) A Yes Moscow It used to be called Piggville and they -
 (6) they decided that wasn't attractive enough so they changed it
 (7) to one of the capitals in the world, and they called it Moscow
 (8) Q Are you a tenured Professor?
 (9) A Yes I am
 (10) Q How long have you been a Professor at the University of
 (11) Idaho?
 (12) A I've been five years at the University of Idaho
 (13) Q Are you also a Director of the Aquaculture Research
 (14) Institute?
 (15) A Yes, I am
 (16) Q And what does that institute do?
 (17) A The research institute was developed by the University of
 (18) Idaho to address the needs for research extension with regards
 (19) to the commercial industry in Idaho, the trout culture
 (20) industry Idaho has the largest trout culture commercial
 (21) trout culture program in the United States, and also to address
 (22) the conservation hatchery needs on the Columbia River with
 (23) regards to chinook salmon steelhead and the commercial
 (24) fishery
 (25) Q The jury by now knows that when I stand at the podium I'm

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- (1) going to talk about science and usually about critters and not
- (2) the cuddly ones Which ones are you going to tell the jury
- (3) about today?
- (4) A We're going to talk about the pink salmon in Prince William
- (5) Sound
- (6) Q Are the pinks also known as humpies?
- (7) A Yes, they are
- (8) Q All right Before we start with them where did you go to
- (9) school?
- (10) A I went to school at the University of Washington My
- (11) undergrad work then I came back in 1966 and finished my
- (12) Doctorate at the University of Washington in 1972
- (13) Q All right How did you come by your interest in fish?
- (14) A Well I was raised in a salmon hatchery actually so I've
- (15) been in fisheries all my life and it's just been a real
- (16) interest I'm concerned about wildlife and resources and so
- (17) it was a natural opportunity to take advantage of it.
- (18) Q I'm sorry, that's so funny Where was the salmon hatchery
- (19) where you were raised?
- (20) A It was on the Dungeness River, across from Vancouver Island
- (21) on the Olympic Peninsula
- (22) Q All right And what did your family do at the hatchery?
- (23) A My father was a superintendent of a hatchery the hatchery
- (24) manager for many many years, and I spent my first 18 years
- (25) being indoctrinated in fish culture

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- (1) Q All right Have you spent your career studying fish?
- (2) A Yes I have
- (3) Q And what has been the focus of your career?
- (4) A My focus has been looking at the better understanding of
- (5) life history fish behavior as it would apply to how we can
- (6) incorporate those life history stages into a better management
- (7) program for our commercial and sport fisheries
- (8) Q All right Have you tried to put hard science together
- (9) with practical management?
- (10) A Yes I have And I think a good example of that is in fish
- (11) culture for many many years we didn't really appreciate the
- (12) importance of life history or genetics for that matter in the
- (13) fish we were culturing In British Columbia, one of the large
- (14) rivers we had 30 years of taking eggs from sockeye and the
- (15) biologists for those 30 years back in the turn of the century
- (16) didn't even realize that sockeye required a lake habitat, and
- (17) so that was 30 wasted years of egg taking putting sockeye in
- (18) streams that weren't appropriate for that species
- (19) Q Okay Tell the jury about your work for the International
- (20) Pacific Salmon Fisheries Commission?
- (21) A Well the Salmon Commission is an agency that regulates the
- (22) fisheries that both Canadians and U S citizens indulge in in
- (23) the Straits of Juan de Fuca Georgia Strait Puget Sound and
- (24) they manage those fisheries I was the employee there for
- (25) about 20 years with the Salmon Commission involved in life

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- (1) history studies and research
- (2) Q Okay Was the Salmon Commission established under
- (3) treaty?
- (4) A Yes they were
- (5) Q And before there was a Salmon Commission were there fish
- (6) wars?
- (7) A Yes there were fish wars
- (8) Q And are there now fish wars again?
- (9) A Continuing yes
- (10) Q All right Did you ultimately end up as the chief
- (11) biologist for the Salmon Commission?
- (12) A Yes I - I left the Salmon Commission as the chief
- (13) research biologist
- (14) Q All right What did you do after you left?
- (15) A I took a position at the University of Washington and was
- (16) there about 18 years as a Professor
- (17) Q All right And now you teach at University of Idaho?
- (18) A Yes
- (19) Q What do you - what do you teach?
- (20) A I teach salmon life history and aquaculture
- (21) Q Are you on the Board of the Western Regional Aquaculture
- (22) Center?
- (23) A Yes I am
- (24) Q And what is that?
- (25) A The Department of Agriculture U S Department of

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- (1) the Western Regional Aquaculture Center including Alaska and
- (2) 12 states on the western coast The center funds research
- (3) associated with fish culture and - and other aspects of
- (4) primarily salmon and trout culture for the benefit of the
- (5) commercial and sport fisheries
- (6) Q All right And were you the Chairman of the Board of
- (7) Directors of the center for two years?
- (8) A Yes from 1990 to 1992, I was chair of the Board
- (9) Q Do you render advice to commercial and sport fishing
- (10) groups?
- (11) A Yes I do
- (12) Q All right And does that list include the Pacific Marine
- (13) Fisheries Council Trout Unlimited the Northwest Steelhead
- (14) and
- (15) Salmon Council the Pacific Trollers Association and the Puget
- (16) Sound Gillnetters Association?
- (17) A Yes it includes all those for various times
- (18) Q All right Have you been advisor to Native American
- (19) tribes?
- (20) A Yes I've been advisor to several tribes with regards to
- (21) enhancement opportunities they can take hatchery
- (22) development
- (23) and fisheries management
- (24) Q All right Do you give advice to the government by
- (25) agreeing to sit on technical committees?

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- (1) ultrasonic testing system?
- (2) A Yes In Lake Pend Oreille in northern Idaho Lake Pend
- (3) Oreille is a very deep lake and a very clear lake and the U S
- (4) navy has a submarine detection testing lab there for torpedoes
- (5) and submarines and they use the ultrasonic devices to
- (6) intercept those images And they were concerned about how
- (7) this
- (8) might affect fish or I guess the community was concerned
- (9) about
- (10) how it might affect their fishing opportunities so we did -
- (11) gave them advice on their effects of their ultrasonic testing
- (12) on sockeye salmon in Pend Oreille
- (13) Q And you're not paid for any of this advice are you?
- (14) A No
- (15) Q But you do consulting work as well?
- (16) A Yes I do
- (17) Q All right Have you done consulting work for the City of
- (18) Seattle?
- (19) A Yes The city of Seattle Cedar River is the water supply
- (20) for the city of Seattle and I was advising them with regards
- (21) to spawning channel for sockeye salmon
- (22) Q All right Have you received grants for scientific work
- (23) from the government?
- (24) A Yes
- (25) Q All right Did you receive a grant from the Bonneville
- (26) Power Administration?
- (27) A Yes I did

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- (1) Q What did you look at?
- (2) A Well I've actually received several and the Bonneville
- (3) Power Administration was concerned about habitat and
- (4) sockeye
- (5) salmon recovery and state your general distribution genetic
- (6) characteristics of sturgeon and the research dealt with those
- (7) subjects
- (8) Q Did you receive a grant from the National Science
- (9) Foundation?
- (10) A Yes I did The National Science Foundation is primarily a
- (11) funding federal agency for basic research and we looked at
- (12) homing in coho salmon through the National Science
- (13) Foundation
- (14) Q How about your grant from the U S Department of
- (15) Commerce,
- (16) the Sea Grant, what was that about?
- (17) A Sea Grant, that would have been looking at the culture of
- (18) chinook salmon and coho salmon for enhancement purposes
- (19) Q Did you receive a grant from the petroleum industry?
- (20) A Yes I received a grant from the American Petroleum
- (21) Institute about 1983
- (22) Q What did you do?
- (23) A We looked at effects of petroleum on the homing ability of
- (24) chinook salmon and coho salmon because of the concern that
- (25) petroleum might alter the behavior patterns of the Puget Sound
- (26) salmon if oil were to be spilled in the - in the Sound
- (27) Q All right Have you done any other research on the effects
- (28) of oil on salmon?

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- (1) A Yes I have I've done bioassays on salmon young salmon
- (2) and adult salmon and also looked at the effects of oil on the
- (3) flavor characteristics of harvested salmon steelhead trout
- (4) actually
- (5) Q Okay now I want you to brag Were you chosen to receive
- (6) the Conservationist of the Year award by the Puget Sound
- (7) anglers?
- (8) A Yes I received the various awards from sport agencies
- (9) sport groups and - and the Conservationist of the Year award
- (10) was awarded three times actually along with other recognition
- (11) awards
- (12) Q All right Were you the first Professor at the University
- (13) of Washington to be given the Mason Keeler Endowed Chair?
- (14) A Yes I was
- (15) Q Have you published more than 60 articles in scientific
- (16) journals?
- (17) A Yes I have
- (18) Q On what subjects? Don't give us all the titles just
- (19) subjects
- (20) A Fish behavior and culture of salmon and trout.
- (21) Q Have you been qualified as an expert in salmon biology and
- (22) behavior including the effects of oil on salmon in a U S
- (23) District Court?
- (24) A Yes I was
- (25) MS SMITH All right, Your Honor I offer Dr Brannon

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- (1) here as an expert in salmon biology and behavior including the
- (2) effects of oil on salmon
- (3) THE COURT All right, he's qualified in that area
- (4) BY MS SMITH
- (5) Q Dr Brannon what are you here to talk to the jury about
- (6) today?
- (7) A I'm here to talk about the effects of the Valdez oil spill
- (8) on pink salmon in Prince William Sound
- (9) Q All right Now don't leave us in suspense how are the
- (10) pink salmon in Prince William Sound doing today?
- (11) A It's doing great.
- (12) Q So the pinks are back in large numbers in 1994?
- (13) A Yes they are
- (14) Q In order to understand what's going on with salmon could
- (15) you give us a short course in the life cycle of the salmon? I
- (16) show you DX7124BB Why don't you come on down
- (17) Joel, I'm also going to put it up on the Barco And Tom
- (18) Warren is going to be my lovely assistant today
- (19) Maybe the best thing for you to do, - if anybody can't
- (20) see let us know - is if you stand there I'll stand here
- (21) Tell the jury what this shows
- (22) A Well this shows the life cycle of pink salmon in - in a
- (23) circular form here starting as an adult, going through the
- (24) juvenile stages and returning back to the adult stage
- (25) Q All right And tell us what happens starting with when

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- (1) the adult pink comes back to the Sound to spawn?
 (2) A Well pink salmon are age two fish at maturity They re
 (3) two years of age, which is unique amongst all the Pacific
 (4) salmonids
 (5) Q When you say age two fish you talk scientist stuff does
 (6) that mean they live for two years?
 (7) A Two years of age
 (8) Q And then they die?
 (9) A And then they die after spawning Now we ll start with the
 (10) adult stage Here s the adult male and they ll come back into
 (11) Prince William Sound right around - in midsummer, July
 (12) August. They ll enter the spawning streams they home back to
 (13) their - to their Native stream their home stream and the
 (14) female will be carrying from a thousand eggs to 1500 eggs
 (15) She ll deposit those eggs right after she enters the fresh
 (16) water, within a week or so of entering the fresh water stream
 (17) in several little nests of a few hundred eggs each, and these
 (18) nests in total, then, are referred to as the salmon redd, the
 (19) r-e-d-d These eggs incubate in the gravel, she covers them
 (20) over - buries them and covers them over so they re protected
 (21) That s why she only has a thousand eggs instead of 100 000
 like
 (22) other marine species because she protects them by covering
 them
 (23) in the substrate of the stream, the gravel of the stream
 (24) They ll hatch out right around Christmas! Time little before
 (25) Christmas! Time first part of November through the end of

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- (1) November, and then become what we call then the alevin
 which
 (2) is a little embryal fish with a large yolk sac from the egg it
 (3) was carrying This is its lunch sack to carry it through until
 (4) spring emergence in the spring of the year So it would be
 (5) over Christmas over the new year be absorbing its yolk clear
 (6) into the spring of the year March April May
 (7) Now at that time, the yolk is gone and they ve got to
 (8) start feeding, and the only source they have for those millions
 (9) of fish that are in those streams is to go directly to the
 (10) marine environment and feed in saltwater so they don t feed in
 (11) fresh water They only use the fresh water as their incubation
 (12) room They ll come out May April even into June into the
 (13) marine environment and start feeding in the nearshore marine
 (14) environment.
 (15) Q All right. And Dr Brannon, when you say "nearshore"
 (16) what do you mean by that?
 (17) A Well nearshore for pink salmon in Prince William Sound is
 (18) the whole of Prince William Sound It s - It s not
 (19) necessarily near shallow water, but it s categorically
 (20) considered nearshore compared to the open ocean distance
 from
 (21) shore That will include then that shallow area right next
 (22) to the beach where they ll reside - some will reside very
 (23) temporary all the way out into deep water in Prince William
 (24) Sound And they ll feed in that top two meters about six feet
 (25) from the surface down six feet deep primarily

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- (1) They ll remain in Prince William Sound until the beginning
 (2) of fall around midportion of August end of August they will
 (3) be what we call the fingerling stage that s about three or
 (4) four inches long and they ll then head out to the open ocean
 (5) They ll go out into the Pacific and go around the Alaska gyre
 (6) That will mean that they go down the west side of the Pacific
 (7) off of Japan quite a ways off of Japan go across the Pacific
 (8) to the North American coastline and then follow-up the North
 (9) Pacific or the Northeastern Pacific back into Prince William
 (10) Sound at about this stage so they ll grow from the small
 (11) three- or four-inch fish in the - from August through the
 (12) winter through the rest of the winter and come back around
 (13) August again as this size enter the stream and go back to
 (14) their home stream to spawn and start the whole cycle over
 (15) again
 (16) Q All right And how long are they out in the ocean?
 (17) A About a year little over a year and a half
 (18) Q How many miles do they travel?
 (19) A A pink salmon will make a circuit is as much as 6,000
 (20) miles in that time
 (21) Q When you talk about the Alaska gyre what s that?
 (22) A That s the counterclockwise swirl in the North Pacific and
 (23) it helps feeding salmon because it creates upwelling of rich
 (24) nutrient resources and it s a very productive feeding area
 (25) And that s of course a very large current

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- (1) Q How do the salmon know to come back from 6 000 miles and
 (2) end up at their home stream to spawn?
 (3) A The babies at this stage actually imprint on the odor of
 (4) the stream and each stream will have its own unique odor
 (5) profile These little guys imprint on it they remember it
 (6) and they go out to sea and come back as adults and remember
 (7) that odor profile And when they get close to the fresh water
 (8) they ll recognize their home stream so they smell their way
 (9) home in part
 (10) But on the high seas and in deep water off of - of Prince
 (11) William Sound they ll use other source of navigation We
 (12) believe they use magnetic forces They are oriented
 (13) magnetically, they inherit the ability to know north from south
 (14) and west from east, and they also use we believe celestial
 (15) characteristics the moon the sun to navigate
 (16) MS SMITH Your Honor I move the admission of
 (17) DX7124BB
 (18) (Exhibit DX7124BB offered)
 (19) MR STOLL No objection
 (20) THE COURT It s admitted
 (21) (Exhibit DX7124BB received)
 (22) BY MS SMITH
 (23) Q Why don t you stay here and let me show you DX14052A
 Tell
 (24) the jury what this shows
 (25) A Well this of course is Prince William Sound in its

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- (1) entirety and it shows these blue triangles and these blue
 (2) triangles are salmon spawning streams that the pink salmon
 (3) use. You can see they're scattered around the perimeter of
 (4) Prince William Sound as well as down through the island area
 (5) and when the oil spill occurred it - of course it went down
 (6) through this part of Prince William Sound and engulfed this
 (7) part of the area affecting some of the salmon streams in that
 (8) area.
 (9) Q All right. And about how many salmon streams are there in
 (10) the Sound?
 (11) A There's in excess of 700 salmon spawning streams.
 (12) Q And what percentage of the streams were oiled?
 (13) A Well, this district right here has about 15 percent of the
 (14) streams in Prince William Sound and about a third of those were
 (15) oiled.
 (16) Q So is that less than five percent of the pink salmon
 (17) streams in the Sound?
 (18) A Yeah, a little less than five percent of the salmon streams
 (19) in all of Prince William Sound.
 (20) MS SMITH: Okay, Your Honor. I move the admission of
 (21) DX14052A.
 (22) (Exhibit DX14052A offered)
 (23) MR STOLL: No objection.
 (24) THE COURT: It's admitted.
 (25) (Exhibit DX14052A received)

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- (1) BY MS SMITH
 (2) Q Dr. Brannon, are there also pink salmon streams in the
 (3) Kenai and Kodiak?
 (4) A Oh, yes. There's salmon streams throughout all of Alaska.
 (5) Q By the way, do all pink salmon now come from streams?
 (6) A In Prince William Sound, the historic pattern, of course,
 (7) is they all came from natural streams, fresh water streams.
 (8) But in - since the mid-70s with the development of hatchery
 (9) programs in Prince William Sound, there's been an increasing
 (10) amount of fish produced by hatcheries, so in excess of 50
 (11) percent of the salmon in Prince William Sound are produced by
 (12) hatcheries.
 (13) Q Okay. And did the hatchery fish in 1989 incubate in water
 (14) through which the oil spill had passed?
 (15) A No, no. The hatchery water supplies are associated with
 (16) either lakes or reservoirs away from the marine environment so
 (17) the incubation water source would not have been affected by
 (18) the Prince William Sound oil spill.
 (19) Q All right. What is the Prince William Sound Aquaculture
 (20) Corporation?
 (21) A That is the group of four hatcheries in Prince William
 (22) Sound that have developed nonprofit hatcheries for the
 (23) development/enhancement of the pink salmon runs. In fact,
 (24) other salmon runs, but principally pink salmon runs in Prince
 (25) William Sound for commercial harvest.

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- (1) Q Do they call that PWSAC?
 (2) A Right.
 (3) Q And there's five hatcheries in the Sound, but only four in
 (4) PWSAC?
 (5) A Yes. There's another in Valdez in this area, right in this
 (6) area, and Valdez is not part of that PWSAC.
 (7) Q All right. I'm going to show you DX0127B, and are these
 (8) clips that we put together from a promotional tape made by
 (9) PWSAC?
 (10) A Yes. The tape is - is a general description of what goes
 (11) on in the hatchery.
 (12) MS SMITH: Tom, you ready?
 (13) MR WARREN: Yeah.
 (14) Q Tell us what we're seeing.
 (15) (Videotape Played)
 (16) A Well, this is the scene out in front of one of the PWSAC
 (17) hatcheries, the salmon coming back to the hatchery. They'll
 (18) come back to the hatchery just as they will come back to the
 (19) fresh water stream. They will tend to put these into large net
 (20) pens where they can start the harvest or spawning procedures.
 (21) This is an example of the tender and the net pens, the fish
 (22) being concentrated and they'll take them into their selection
 (23) area by pumping the fish, like a large vegetable pump, moving
 (24) the fish out of the - out of the pen into the hatchery, where
 (25) they'll select their spawners as well as market the fish.

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- (1) Their spawners then are spawned in the hatchery in
 (2) protected environments and then the eggs are put into these
 (3) trays. Instead of in the gravel in the stream environment or
 (4) substrate, they're put in the trays. They're pouring the eggs
 (5) into the tray. The eggs will incubate there and hatch and come
 (6) out in the spring in this area as small little yolk-absorbed
 (7) fry.
 (8) They'll then go into a collector before they put them out
 (9) into the ocean. They'll count and measure them, and they'll
 (10) also clip the adipose fin to identify them as a hatchery fish.
 (11) They'll put them in these pens and then they will feed them
 (12) until the right time for release, which is when the plankton
 (13) bloom is at its best in Prince William Sound. Here's the
 (14) little fry getting ready to go out. They release them there at
 (15) the appropriate time to get maximum survival.
 (16) (End of videotape)
 (17) Q So these hatchery fish are not incubating in the gravel in
 (18) the streams?
 (19) A No, they're in the protected hatcheries and because of
 (20) that, of course, they get very high survival rates in the
 (21) hatchery. In the natural stream you might get only one to two
 (22) percent, maybe as good as ten percent survival in the stream.
 (23) In hatcheries, they can get up over 90 percent survival.
 (24) Q All right. And do the hatchery fish come back to spawn at
 (25) the hatchery?

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- (1) A Yes they do They'll home to the hatchery just like they
 (2) home to the stream and that's what allows the hatcheries to
 (3) develop that program and harvest the fish coming back
 (4) MS SMITH Your Honor, I move the admission of
 (5) DX0127B
 (6) (Exhibit DX0127B offered)
 (7) MR STOLL No objection
 (8) THE COURT It's admitted
 (9) (Exhibit DX0127B received)
 (10) BY MS SMITH
 (11) Q Why don't we come back down and put the life cycle back
 (12) up Do salmon scientists refer to salmon by their brood years?
 (13) A Yes The brood year is the year they were spawn so the
 (14) 1988 brood would have spawned and the progeny would be the
 1988
 (15) brood progeny
 (16) Q All right And are there odd years and even year brood
 (17) years?
 (18) A That's right And that's unique with pink salmon because
 (19) like coho and sockeye and chinook, you have age three four
 and
 (20) five coming back and those year classes can mix and spawn a
 (21) three and a four could come back in the same year from
 (22) different brood years and spawn So they are, in essence a
 (23) population that's quite well mixed over several year classes
 (24) Q Okay And -
 (25) A With pink salmon they are two-year fish and so when this

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- (1) fish is getting ready to come back to spawn, the next brood
 (2) year is out here as juveniles and they have no way of coming
 (3) back and spawning with these fish So the odd and the even
 (4) cycles are almost as subspecies they're so distinct or
 (5) isolated
 (6) Q Okay And the jury's probably wondering why we've done
 (7) this Are there two brood years of salmon that were at risk as
 (8) the result of the oil spill?
 (9) A Yes
 (10) Q And -
 (11) A And because they are two-year fish, it was two-year classes
 (12) that were potentially exposed or potentially at risk in the
 (13) oil
 (14) Q And what are the two brood years that could have been
 (15) affected by the oil?
 (16) A The 1988 which were incubating at the time of the oil
 (17) spill and the 1989 that came back and their eggs were placed
 (18) in gravel that could have been oiled
 (19) Q All right Let's start with 1988 Where were they on -
 (20) in March of 1989 when the oil spill occurred?
 (21) A Okay the -
 (22) Q What part of the cycle?
 (23) A The 88 brood came back as adults in the fall of 88
 (24) spawned were incubating in the gravel and were almost at that
 (25) point of yolk absorption when the March oil spill occurred the

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- (1) end of March and so the oil would have hit those streams at
 (2) the very end of the incubation period and they would have
 been
 (3) experiencing oil or some oil in the marine environment during
 (4) their summer early growing period
 (5) Q All right And when did the 1988 brood year complete its
 (6) spin around the Alaska gyre and come back into the Sound to
 (7) spawn?
 (8) A The 88 brood came back in 1990 as a two-year fish
 (9) Q And that would be called the 1990 return?
 (10) A Yes the 1990 returns
 (11) Q All right And does the government track the returns of
 (12) salmon?
 (13) A Oh yes They - they do extensive survey, because the
 (14) Alaska Fish and Game is the one that manage the fishery and
 (15) they want to make sure that they distribute the fish to their
 (16) spawning grounds, as well as allow a good fishery So they
 (17) will assess the stream production in the spring of the year as
 (18) the little fry are coming out They'll make an assessment of
 (19) how well they did in order to have a base number they can
 (20) predict in terms of how many are going to come back in two
 (21) years And then before the fish are actually spawning in the
 (22) stream they'll be out there intercepting them, sometimes with
 (23) a test fishery and monitor the days of opening the days of
 (24) closure to make sure that the fish are getting in to the
 (25) spawning grounds And so they'll monitor them from before the

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- (1) season all through the season and after spawning right
 through
 (2) the spawning period
 (3) Q All right So ADF&G just doesn't take a count at the end
 (4) of the spawning season they're tracking in the whole time?
 (5) A Well not out in the marine environment the high seas but
 (6) certainly when they're in Prince William Sound they will
 (7) Q And do they publish the returns?
 (8) A Yes, they do
 (9) Q And, in fact, during the pink salmon season do they
 (10) publish announcements or bulletins that give updates on how
 the
 (11) pink salmon are doing?
 (12) A There'll be almost daily bulletins or announcements coming
 (13) out that give the approximate level of catch that's going on
 (14) They'll give the days of opening days of closure a regular
 (15) news line
 (16) Q Can you get information by fax and by phone as to the
 (17) harvest?
 (18) A They'll give you numbers to phone in so you can get the
 (19) daily - daily counts as well as what's closed and what's
 (20) open
 (21) Q All right Can the returns for brood year, the 88 or the
 (22) 89 tell us anything about the effect of oil on them?
 (23) A Well sure, the adult returns coming back will tell you a
 (24) lot about how well the fish did that year So if you get a -
 (25) a good return the population did well If you get a poor

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- (1) return for some reason the population did not do well
 (2) Q The 1988 brood year the guys that were out here came all
 (3) the way around - out here when the spill occurred came all
 (4) the way around came back and spawned in 1990 how was the
 (5) 1990
 (6) return?
 (7) A The 1990 return was excellent The 1990 was the biggest
 (8) return year in the history of Prince William Sound
 (9) Q All right I show you DX5115CC Tell the jury what this
 (10) shows
 (11) A This is the pink salmon run in Prince William Sound and it
 (12) starts back here in the 70s and the green bars or the green
 (13) part of the bars represents the wild run and the gold part of
 (14) the bar represents the hatchery run And you can see the
 (15) hatchery started right about two years before the first fish
 (16) came back so right in this area and the runs were very small
 (17) historically In fact that was the norm prior to the fishery
 (18) that we're seeing here two to five million fish annually would
 (19) come in And then the hatchery started You can see the
 (20) hatchery contribution increased and got very large
 (21) In fact as the hatcheries produce more fish it tends to
 (22) reduce the number of fish coming back in the wild environment
 (23) That's just a characteristic of hatcheries with coho chinook
 (24) pink salmon whatever you're dealing with there seems to be
 (25) an
 (26) effect to dampen the wild run but in general you can see that
 (27) the salmon runs increased in the 80s very good rearing

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- (1) conditions in the 80s And then in the nineties you can see
 (2) what happened here a great large run and this is the return
 (3) from the 1988 brood You can see the wild run here jumping
 (4) way
 (5) up to here and the hatchery fish expanding way up here to the
 (6) largest run in the history of Prince William Sound So that
 (7) was a very good year and it shows the population changes
 (8) over
 (9) time in Prince William Sound
 (10) Q All right And what did you conclude about the effect of
 (11) oil on the 88 brood year based on the 90 return?
 (12) A Well that the return in 90 was so good that - that I
 (13) could only conclude that there was no measurable impact of the
 (14) oil spill on the pink salmon of the 88 brood
 (15) MS SMITH Your Honor I move the admission of
 (16) DX5115CC
 (17) (Exhibit DX5115CC offered)
 (18) MR STOLL No objection
 (19) THE COURT It's admitted
 (20) (Exhibit DX5115CC received)
 (21) BY MS SMITH
 (22) Q All right Let's go to the 1989 brood year These guys
 (23) were the guys that weren't around and got spawned into the
 (24) gravel - why don't you tell them You tell them not me
 (25) Where were they during the oil spill?
 (26) A Okay now in contrast to the 88 brood the 89s came back
 (27) and spawned in streams - remember in Prince William Sound I

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- (1) showed where the oil went and - and there was a percentage of
 (2) the streams oiled there and oil would have entered those
 (3) streams and been sitting there at some degree when these fish
 (4) came back to spawn And when they spawned then they were
 (5) spawning in the gravel that could have contained oil So these
 (6) fry were exposed potentially to oil in their entire incubation
 (7) period whereas the 88 brood was exposed only at the very
 (8) end
 (9) and they're in the marine environment
 (10) So the 89 brood had just the incubation environment. It's
 (11) six to seven months of the year They were exposed in the
 (12) gravel potentially at risk to oil When they emerged in the
 (13) spring they came out in the marine environment and of course
 (14) the oil was gone in the spring of 1990 when they came out in
 (15) Prince William Sound So their primary risk area was in the
 (16) incubation environment
 (17) Q All right And when did the fish that incubated at risk
 (18) come back all the way around the Alaska gyre and come back
 (19) to
 (20) spawn? What return is that?
 (21) A 1989 plus two would be 1991 returns
 (22) Q All right And tell the jury what happened to those fish
 (23) What were the 1991 returns? And I refer you back to
 (24) DX5115CC
 (25) A Well the 1991 returns came back in again very large
 (26) numbers In fact, it was the second largest run in the history
 (27) of Prince William Sound and very good hatchery return The
 (28) wild run was certainly respectable as good as the mean over

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- (1) the last few years and it was a very very productive run
 (2) Q All right And what did that cause you to conclude about
 (3) the effect of the oil on the 89 brood year that returned in
 (4) 1991?
 (5) A Well I concluded that if there was an effect, it was
 (6) immeasurable I couldn't detect it, based on adult returns
 (7) Q All right We're going to go on to talk about some
 (8) scientific studies and I'm going to have you use the easel so
 (9) I think why don't you just stand there for a second, let me ask
 (10) you some questions rather than getting back up on the stand
 (11) and coming back down
 (12) Dr Brannon have you reviewed the testimony of a fellow
 (13) named Dr Mundy?
 (14) A Yes I have
 (15) Q All right And just so the jury remembers we've had two
 (16) Mundy's testify in this trial There's the fish Mundy named
 (17) Phillip and the damage Mundy or the market Mundy named
 (18) Bill
 (19) This is Phillip right?
 (20) A Yes
 (21) Q Okay And does Mr Mundy think that the oil spill impacted
 (22) the pink salmon?
 (23) A Yes that's what his testimony is
 (24) Q All right And does he acknowledge the 90 and the 91
 (25) returns?
 (26) A Yes he does

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- (1) Q All right Then what does he rely on?
 (2) A Dr Mundy relies on some information from Mr Bue a
 (3) Trustee scientist and from early marine growth studies from
 (4) the Trustee scientists
 (5) Q Let's start with the Bue study
 (6) And Tom if you're back there someplace can you show the
 (7) jury what Mr Bue found?
 (8) A I will summarize it Mr Bue looked at the potential
 (9) impact of oil by looking at oil streams and unoled streams as
 (10) controls And he went and sampled them and looked at the
 (11) mortality if there was any difference in mortality You
 (12) remember these wild streams will have pink salmon mortalities
 (13) that can range from 100 percent down to maybe 80 or 60
 (14) percent
 (15) In some extreme situations So mortality is very high in these
 (16) streams And what Mr Bue went to look at is there a
 (17) difference in mortality between the oiled and the reference
 (18) streams
 (19) And so he took two categories, we'll call these the
 (20) streams, and this will be the oiled stream or the group of
 (21) oiled streams, he looked at about 16 streams and this will be
 (22) the unoled streams
 (23) He went in and sampled twice He sampled right shortly
 (24) after spawning in this period If we look at growth and
 (25) incubation going along that axis and he found in the oiled
 streams he had a higher mortality We'll call that 30 percent,

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- (1) as just a number And in the unoled streams he had
 something
 (2) like 19 or 20 percent, and he concluded that there was a
 (3) difference then from oiling
 (4) But Mr Bue also sampled in the spring of the year just
 (5) before the fish go back into the marine environment as fry
 (6) And in this situation he found that the mortality or the
 (7) survival of fish in here, let's call it survival was the same
 (8) the same survival in oiled streams versus unoled streams And
 (9) so this was, in fact, what I believe the - Mr Bue should have
 (10) used to assess the streams Mr - or Dr Mundy tended to
 (11) ignore this fact and concentrated on this mortality to conclude
 (12) that the oiled streams had higher mortality than the unoled
 (13) streams
 (14) Q And do you believe that spring sampling is important?
 (15) A Well spring sampling in Bue's case as well as the Alaska
 (16) Fish and Game's normal management routine was based on
 (17) just live fry here but based on the total eggs deposited in
 (18) the stream And so yes this is a very important part of the
 (19) assessment, and Mr Bue should have looked at that and
 (20) Mr Mundy should have considered that.
 (21) Q All right. Do you believe that this study shows that
 (22) there's some kind of damage as the result of the oil stream -
 (23) oil spill on egg mortality on the eggs?
 (24) A Now say again
 (25) Q Do you believe - do you believe that this study shows that

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- (1) there was damage at the result of the oil spill on the eggs?
 (2) A No no I think that this here is evidence that there was
 (3) no difference in the streams In fact If you look at the
 (4) cause of mortality here in looking at his data I concluded
 (5) that it wasn't associated with oil but it was associated with
 (6) the sampling
 (7) Q Tell the jury about the other sampling
 (8) A The other study looked at growth in the early marine
 (9) environment and they concluded that the oiled areas had
 slower
 (10) growing fish than the unoled areas and because size can -
 (11) can result in better survival If you've got better size they
 (12) concluded that there was a mortality associated with the oiled
 (13) streams higher mortality than with the unoled areas
 (14) Q And even in this study, did they only see a growth effect
 (15) in 1989?
 (16) A Their - their estimate of growth and survival is only
 (17) associated with 1989
 (18) Q Do you agree with the study?
 (19) A I - I believe that they sampled in the wrong spot to
 (20) assess it but they only found it in 1989 so - and - and if
 (21) - if there was a big impact, you'd have seen it here 1989
 (22) we're talking - not talking about the '89 brood we're talking
 (23) about the '89 growth conditions resulting in the very large
 (24) return, the biggest return in the history of Prince William
 (25) Sound So if there was a growth effect - I'm not saying there

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- (1) wasn't, but if there was growth effect it would have been very
 (2) small
 (3) Q In addition to monitoring the returns in 1990 and 1991 of
 (4) the '88 and '89 brood years did you conduct your own studies?
 (5) A Oh yes, I did
 (6) Q All right, and let me show you DX14056 14056
 (7) MR STOLL Can I just have a moment Your Honor?
 (8) BY MS SMITH
 (9) Q Tell the jury about this chart?
 (10) A Well, this is the summary of the pink salmon scientific
 (11) studies that I was responsible for Exxon asked me to develop
 (12) the research program on pink salmon in Prince William Sound to
 (13) look at the potential effects oil spill might have on pink
 (14) salmon
 (15) And what I did was to look at the life history, again
 (16) pulling out what I felt was the critical life history stages to
 (17) examine potential effects of oil and that involved the effects
 (18) that oil might have had on the egg incubation stages, survival
 (19) of the fry at emergence as well as their condition the
 (20) juvenile growth in 1990 when they were in the marine
 (21) environment, adult spawning behavior both the enumeration and
 (22) where they were distributed in the spawn grounds in the
 (23) spawning streams and then the egg viability of those fish
 (24) exposed to oil as a long-term effect that oil might have So
 (25) it was these life history stages that I examined to detect any

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- (1) potential effect that oil might have on the survival of these
 (2) fish
 (3) Q All right And Dr Brannon If we go back to the life
 (4) cycle for just a moment what you're saying is you took the
 (5) critical stages in the life cycle of the salmon where they
 (6) could have been affected by the oil and designed studies to
 (7) test that?
 (8) A Yes I concentrated of course on the incubation
 (9) environment because that was where the greatest potential risk
 (10) existed from the standpoint of the fisheries biologist's point
 (11) of view and looked at the marine conditions both in the
 (12) juveniles as well as the adult returns
 (13) Q What was your conclusion from all your studies?
 (14) A Well in each of the studies taken separately I concluded
 (15) there was no measurable impact If there had been an impact
 (16) it was small enough that I could not detect it in my scientific
 (17) studies and I felt that it was really confirmed by these large
 (18) returns of the years potentially most at risk in 1990 and
 (19) 1991 And in fact by the - by the great return that's
 (20) occurring even in 1994
 (21) MS SMITH All right Your Honor I move the
 (22) admission of DX14056
 (23) (Exhibit DX14056 offered)
 (24) MR STOLL Your Honor I'd like to take this up
 (25) later

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- (1) THE COURT I can't hear you counsel
 (2) MR STOLL I'm sorry I'd like to take this up
 (3) later It wasn't on my list.
 (4) THE COURT All right. I'll take it up later
 (5) MS SMITH It is on your list. I just showed it to
 (6) you
 (7) BY MS SMITH
 (8) Q Dr Brannon Isn't your conclusion counter intuitive? How
 (9) can you have 11 million gallons of oil get dumped into the
 (10) Sound and have no effect on the Sound?
 (11) A Well it is counter intuitive We've seen the media
 (12) coverage of the oil spill and the perception that the public
 (13) had about the oil spill was certainly that it had the
 (14) widespread effect. That's - that's why we don't use just
 (15) impressions to determine the effect. We - we look at it from
 (16) the scientific standpoint and try to discern where the effect
 (17) occurred If it in fact occurred
 (18) Q Have pink salmon coexisted with hydrocarbons in Prince
 (19) William Sound?
 (20) A Well Prince William Sound is probably not unique in that
 (21) regard but there are salmon spawning streams in Alaska that
 (22) have oil seeps and I think - I think Dr Page covered some of
 (23) that in his testimony and these oil - oil seeps put out oil
 (24) continuously and over time in - it results in a significant
 (25) amount of oil going out and these fish tolerate that. I mean

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- (1) hydrocarbons are not - are not abnormal to the life
 (2) processes They are organic compounds and associated with -
 (3) with animal life in the past so you would expect that a
 (4) natural compound like this life systems to evolve to adapt
 (5) tolerate a certain level and I think pink salmon have
 (6) demonstrated that Some of these streams are actually index
 (7) streams that I know Fish and Game uses to estimate adult return
 (8) in the next year class
 (9) Q Okay let's go back to DX5115CC 92 and 92 - 92 and 93
 (10) returns look like a bit of a slump don't they?
 (11) A They were down from the previous years significantly
 (12) down
 (13) Q Did the oil spill cause this?
 (14) A I don't believe the oil had anything to do with that
 (15) reduction That's demonstrated by the two years at risk being
 (16) the record returns and the conditions in Prince William Sound
 (17) that would have been associated with - with their poor
 (18) condition I believe was - has been demonstrated by Alaska
 (19) Fish and Game and certainly by the University of Alaska's
 (20) research where they look at food supply and temperature And
 (21) in these two years when these fish were in Prince William
 (22) Sound feeding as juveniles it was cold years and the food
 (23) supply was down
 (24) Q All right And was the slump limited to the path of the
 (25) oil spill or was it Sound wide?

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- (1) A Well it was Sound wide And the other unique thing is
 (2) remember we talked about the year classes the even and the
 (3) odd
 (4) years the 88 and 89 and how oil had impacted the streams in
 (5) one case and primarily the marine environment in the other
 (6) case If that were the situation then if you're going to
 (7) have an effect from either one of those you'd have expected to
 (8) have seen it in a disproportionate return in '92 or '93 and
 (9) yet we both have the same kind of uniform or low return in both
 (10) brood years
 (11) Q All right, let's look at '94 How come it says - on
 (12) DX5115CC how come it says harvest only?
 (13) A Well this is the - we get this figure from the daily
 (14) announcements that Alaska Fish and Game puts out, and
 (15) because
 (16) they don't know yet how much escapement is going back to the
 (17) natural streams they only report what's actually been caught.
 (18) They'll report the fish tickets how many fish were actually
 (19) turned in and you'll have a - an escapement that will be
 (20) added to this and included on top of the catch so it will be
 (21) even bigger than it is now
 (22) Q All right And how's the 1994 harvest of pink salmon in
 (23) Prince William Sound doing?
 (24) A Oh it's doing exceptionally well It's the - it's the
 (25) third - it will be the third largest population return in the
 history of Prince William Sound In the recorded history of
 Prince William Sound But even more important out of the last

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- (1) five years from the oil spill we've had three record years
 (2) and it's the third of those three
 (3) Q All right. And is this over yet?
 (4) A No
 (5) Q They're still coming in?
 (6) A That's as of August 18th and we'll add to that the rest of
 (7) the catch, as well as the escapement. It probably won't
 (8) surpass the 1991 run but it will be up probably in the 33-34
 (9) 35 million range
 (10) Q All right. And let me show you DX6328AA. What does this
 (11) show?
 (12) A Well, this is the average return for the last ten years as
 (13) of August the 18th and so we'll look at the Alaska Annual
 (14) Management Report fish returns and we can sum them up and take
 (15) a mean as of the 18th of August and you'll see here that the
 (16) mean is around 18 million fish in that ten-year average. That
 (17) includes these big ones and just in 1994 through that same
 (18) time period you're seeing almost double the run in 1994 over
 (19) the annual mean. For the ten-year mean
 (20) Q It's a good harvest?
 (21) A Good harvest
 (22) MS SMITH: Your Honor, I move the admission of
 (23) 6328AA
 (24) (Exhibit DX6328AA offered)
 (25) MR STOLL: No objection

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- (1) THE COURT: It's admitted
 (2) (Exhibit DX6328AA received)
 (3) BY MS SMITH
 (4) Q Dr Brannon, are you familiar with the Trustees Council
 (5) draft restoration report?
 (6) A I've heard of it, yes
 (7) Q Have you read it?
 (8) A No, I haven't.
 (9) Q All right. If I told you that the Trustees Council says
 (10) that the pink salmon are not recovered from the effects of
 (11) Valdez oil, would you agree with that?
 (12) A No, of course not. The - the responsibility I think of
 (13) the Trustees to put out restoration plans and I'm sure that is
 (14) a Restoration Plan that was well in advance of the returns that
 (15) we're having in 1994
 (16) Q All right, so you think this was prior to the harvest
 (17) coming in in '94?
 (18) A I do, yes. That is such a strong evidence
 (19) Q All right, have you personally been out to the Sound this
 (20) summer to look at the pink returns?
 (21) A Yes, I've been enumerating streams in Prince William Sound
 (22) so I've been out there over the last three weeks
 (23) Q You went out last week?
 (24) A Yes
 (25) Q You went out Sunday and Monday of this week?

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- (1) A Yes, I did
 (2) Q Did you go to Snug Harbor?
 (3) A Yes, and Snug Harbor is showing a great return. It's one
 (4) of the oiled streams. It was one of the more severely oiled
 (5) streams. In fact, it was one of the streams in Bue's study
 (6) that he used to measure the effect of oil versus non-oiled
 (7) environmental conditions
 (8) Q All right. Is the scene at Snug Harbor typical of what's
 (9) going on in pink salmon streams around the Sound?
 (10) A Of the streams I've been enumerating, yes
 (11) Q I'm going to show you DX6387. In just a minute
 (12) MR DIAMOND: Lights?
 (13) MS SMITH: Lights
 (14) (Videotape Played)
 (15) A Okay, now this will be - here's Snug Harbor, you can see
 (16) the bay there at Snug Harbor as we're coming in. This will be
 (17) the stream in Snug Harbor where the fish are spawning
 (18) Wherever you see a large group of sea gulls, you know fish are
 (19) there and the fish are coming back into Prince William Sound
 (20) and certainly into Snug Harbor
 (21) Q Joel, can you stop it for a second?
 (22) A In great numbers
 (23) Q When you run it, you can see it better but what is the
 (24) black?
 (25) A Well, the black are adult salmon and then you'll see some

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- (1) white marks here and those are the spawned out carcasses, fish
 (2) that have come in, spawned and died, and these here are the
 (3) adult pink salmon in the stream getting ready to spawn. This
 (4) is what makes fisheries biologists excited because this is
 (5) what our work is all about.
 (6) This is off the mouth now of Snug Harbor. Remember in
 (7) the very oiled area and these adults are coming back into the
 (8) stream. You can see the observer looking over the stream and
 (9) these fish are coming up into the riffle areas where they'll
 (10) dig nests to spawn. And these large ones with the humps of
 (11) course are the males and there are lots of males fighting over
 (12) the females. A female will choose the redd site to spawn in
 (13) and the males will court her and she will choose one to spawn
 (14) with
 (15) Here's a good underwater picture. Isn't this great?
 (16) Showing the number of adult fish at the mouth of the stream
 (17) fighting to get up there. There's almost not enough water to
 (18) - to handle the spawning area
 (19) Q Now, are they spawning here or are they cueing up to go
 (20) into the spawning area?
 (21) A Some of these fish will be spawning, others will be
 (22) holding. These fish right here are off the mouth, holding in
 (23) the mouth of the stream. You can see they're all fresh, all
 (24) nice, brightly colored and ready to go into the stream
 (25) Now this here is the very mouth of the stream, yet they'll

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- (1) be spawning at certain tide levels Here's a stream coming
 (2) by Look how many fish are there Can we go back here and
 (3) look at that?
 (4) Q Sure
 (5) A Look at here the mass of fish Leave it running so you
 (6) can - you can see the movement. Yeah just - there's over
 (7) in that mass of fish there's over 3 000 fish right in that one
 (8) hole
 (9) MR STOLL Which way are they going?
 (10) A They'll be spawning some in this spot, others way up in
 (11) this stream here see right on down through in the intertidal
 (12) area and out to the mouth And as the photographer is leaving
 (13) here he's getting some pictures you can see the mass of
 (14) fish here - let's stop right here - you can see the mass of
 (15) fish
 (16) Q Everything that's black is fish?
 (17) A And then the white carcasses Thank you So that is the
 (18) situation at Snug Harbor and it's characteristic of many, many
 (19) of the streams that I was looking at in Prince William Sound
 (20) this last week
 (21) Q All right
 (22) MS SMITH Your Honor I move the admission of
 (23) DX6387
 (24) (Exhibit DX6387 offered)
 (25) MR STOLL No objection

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- (1) THE COURT It's admitted
 (2) (Exhibit DX6387 received)
 (3) (Videotape concluded)
 (4) MS SMITH Okay thank you Dr Brannon I have no
 (5) further questions
 (6) THE COURT Counsel you want to start or do you want
 (7) to take a break?
 (8) MR STOLL Why don't we take a break It might make
 (9) it a little faster
 (10) THE COURT Okay
 (11) MR PETUMENOS Judge could the Court remain just one
 (12) second?
 (13) THE COURT Sure Send the jury out. Go ahead
 (14) (Jury out at 9 47 a.m.)
 (15) MR PETUMENOS I just wanted to advise the Court of
 (16) where we were with respect to our hearing yesterday afternoon
 (17) THE COURT Oh, right.
 (18) MR PETUMENOS Mr Diamond was willing to turn over
 (19) the entire statement to me if I was willing to permit the
 (20) witness to go on tomorrow, in other words I had to stay up and
 (21) get - get things ready I agreed to that, and I have the
 (22) statement so that issue is behind us The only concern I have
 (23) is that I believe that there is a legal issue in connection
 (24) with that issue that I will need to take up And after having
 (25) reviewed the transcript I don't think it'll take very long

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- (1) but I wanted to advise the Court. I don't know what time -
 (2) can we get on the stand late today because I've been sitting in
 (3) the back preparing But I do have a legal issue to advise the
 (4) Court about
 (5) THE COURT Describe the - don't do it in detail I
 (6) just want to get a summary of what the legal issue is
 (7) MR PETUMENOS One of the principal things I think
 (8) the witness is being called to testify to is a document
 (9) relating to his assessment of land values in 1981 or 2 or
 (10) something like that which my review of the information tells
 (11) me it was part of a settlement negotiation with the federal
 (12) government and I have an application under the rule with
 (13) respect to settlement negotiations as to whether it's
 (14) admissible
 (15) THE COURT Settlement negotiation
 (16) MR PETUMENOS Over a lawsuit and other negotiations
 (17) relating to land selection with Chugach I believe it's an
 (18) offer of compromise under the rule and that's the issue
 (19) THE COURT I can deal with it later
 (20) MR DIAMOND I just wanted to state for the record
 (21) that we had turned this over as a result of - of yesterday
 (22) afternoon's decision and realization that we could not redact
 (23) this to make it satisfactory and yet be able to put the witness
 (24) on so we really -
 (25) THE COURT Sometimes we have to make hard choices

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- (1) counsel
 (2) MR DIAMOND It was a difficult choice
 (3) MR PETUMENOS I just wanted the Court to understand
 (4) why it was in the same day of the testimony I'm asking you to
 (5) rule on a legal issue I just wanted you to understand what
 (6) led up to that.
 (7) THE COURT I thought he was going to go on tomorrow
 (8) MR PETUMENOS Mr Diamond asked me to allow him to
 (9) come on today and I agreed
 (10) THE COURT I see I'm sorry I misunderstood you
 (11) MR PETUMENOS Which was the quid pro quo for my
 (12) getting the whole statement, but that leaves me in the awkward
 (13) position of going to the Court the same day of the witness
 (14) THE COURT What's the document, counsel?
 (15) MR DIAMOND The document is a memorandum that was
 (16) prepared by Chugach Alaska during the course of its land
 (17) selection process It was publicly distributed It was in
 (18) response to a Forest Service I believe Forest Service
 (19) prepared analysis for properties
 (20) THE COURT What do you mean by publicly distributed?
 (21) MR DIAMOND It was distributed outside of Chugach
 (22) It's not just an internal document, my understanding but I'm
 (23) happy to address the legal issue because I think not to mix
 (24) metaphors but it's a red herring This is not covered by the
 (25) rule in any -

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- (1) THE COURT Let me see the document I'll read it on
 (2) the break
 (3) Sir, you can step down, if you want to get a drink of water
 (4) or something
 (5) THE COURT Tell you what counsel give it to the
 (6) clerk She'll bring it back
 (7) MR STOLL Your Honor we can take up this objection
 (8) of this last document I never received the document It
 (9) wasn't on the list that I was provided Apparently Ms Smith's
 (10) Intern to her firm generated a list of exhibits for her that
 (11) was different than the one they served on us so we never saw
 (12) that exhibit until the jury did
 (13) THE COURT Which exhibit is it?
 (14) MR STOLL It's the summary chart. I don't think
 (15) they need it I think it's already admitted but it's 1006 -
 (16) THE COURT Let's see the chart.
 (17) THE COURT It's very interesting
 (18) MR STOLL It is It's very effective
 (19) THE COURT And absolutely unnecessary
 (20) MR STOLL Right.
 (21) THE COURT You can take a small loss can't you
 (22) counsel?
 (23) MS SMITH Yes
 (24) MR STOLL She got it all before the jury
 (25) THE COURT The objection's sustained but it is in

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- (1) this morning and the nice photographs that you had - video
 (2) The - up until this run - incidentally - well up until this
 (3) run there was quite some anxiety wasn't there among
 (4) scientists as to what was going to happen this year and with
 (5) the - with the pink salmon generally after the experiences in
 (6) 1992 and 1993?
 (7) A Well I wouldn't classify it as - or categorize it as
 (8) anxiety There was certainly uncertainty whether the run was
 (9) going to be big or not but that was not related to oil it was
 (10) related to the environmental conscious conditions We have a
 (11) cooling going on in the North Pacific which will affect
 (12) survival and the concern with regards to returns in '94 was
 (13) that how might our density effects and plankton levels and
 (14) temperatures affect those returning runs So there was concern
 (15) about that, you're right.
 (16) Q And the Trustees Ms Smith referred to the Restoration
 (17) Plan of the Trustees last November, November of '93 in which
 (18) they made some reference to concerns of what had happened to
 (19) pinks as a result of the oil spill You're aware that as
 (20) recently as March of this year Dr Spies - you know who
 (21) Dr Spies is?
 (22) A Yes I do
 (23) Q And he's a well known scientist is that -
 (24) A He's the chief scientist for the Trustees and a fair man I
 (25) believe

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- (1) the record there's no question about it
 (2) MR DIAMOND You think she can take a small loss?
 (3) THE COURT I'm not saying it might not have effects
 (4) later but - may I go now counsel? I think I need some
 (5) coffee
 (6) THE CLERK. Please rise This court stands in
 (7) recess
 (8) (Recess from 9:52 a.m. to 10:10 a.m.)
 (9) (Jury in at 10:10 a.m.)
 (10) THE CLERK. This court now resumes its session
 (11) Please be seated
 (12) THE COURT Yes
 (13) MS SMITH Your Honor I'm moving for the admission
 (14) of DX14787, which is Mr Brannon's oilled unrolled stream
 (15) chart.
 (16) (Exhibit DX14787 offered)
 (17) MR STOLL. I have no objection
 (18) THE COURT It's admitted
 (19) (Exhibit DX14787 received)
 (20) CROSS EXAMINATION OF ERNEST L. BRANNON
 (21) BY MR STOLL.
 (22) Q Good morning Dr Brannon
 (23) A Good morning
 (24) Q My name's Bob Stoll I represent the plaintiffs in this
 (25) case and I appreciate very much your very informative talk

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- (1) Q Yes And Dr Spies issued a report as recently as March of
 (2) this year called the Five Years Later A Status Report On The
 (3) Exxon Valdez Oil Spill?
 (4) MS SMITH Your Honor I simply want to stop here
 (5) There's no foundation That report's from November 1993
 (6) MR STOLL. It says March 1994 on the cover
 (7) MS SMITH Look on the next page
 (8) MR STOLL It's adopted but -
 (9) THE COURT Show him the document.
 (10) BY MR STOLL.
 (11) Q The cover of this is dated March 1994?
 (12) A Yes
 (13) Q And it's adopted from -
 (14) THE COURT Speak up counsel so the jury can hear
 (15) you
 (16) MR STOLL. I'm sorry
 (17) BY MR STOLL.
 (18) Q And it's adopted or at least portions of it are adopted
 (19) but it's a November 1993 meeting
 (20) A Yes The date is 1993 (sic) but the report certainly is
 (21) March 1994 of the date
 (22) Q The release date?
 (23) A Right.
 (24) Q And so as recently as March of this year Dr Spies was
 (25) writing at least in this report, that there were differences

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- (1) on salmon egg mortality in oiled and unoled - oiled versus
 (2) unoled streams as a result of the oil spill isn't that
 (3) correct?
 (4) A I'm sorry would you state that again?
 (5) Q Dr Spies in his report this Five Years Later report was
 (6) still attributing differences in egg mortality salmon egg
 (7) mortality as a result of the oil spill isn't that correct?
 (8) A That's right He was attributing the mortality that was
 (9) reported in the oil spills by the Trustee scientists as caused
 (10) by the oil spill but he was only - only informed about the
 (11) results of their study and really didn't look at the cause of
 (12) those mortalities I think he would have a different opinion
 (13) now with the further assessment of those mortalities
 (14) Q Well I don't know the answer to that truthfully but the
 (15) issue is at least as of March 1994 when the Trustees issued
 (16) this report this was what was being - this is what he was
 (17) publishing at least at that time?
 (18) A That's right In '83 they had no idea what the 1994 run
 (19) was going to be
 (20) Q '93 right And in fact in '92 and '93 they were some
 (21) of the worst runs in history?
 (22) A Oh no They were low compared to '90 '91 but by no
 (23) means the worst You can look back in the '70s they had lower
 (24) runs than that
 (25) Q In the '80s is when a lot of the hatcheries - there's five

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- (1) hatcheries in Prince William Sound is that correct?
 (2) A That's correct.
 (3) Q And in the '80s is when most of the hatchery fish sort of
 (4) came on line isn't that correct?
 (5) A Yes and very good growing conditions
 (6) Q And when the hatchery fish go out to - they incubate if
 (7) you will in the fresh water there but when the fry go out,
 (8) they go out and feed in the saltwater isn't that correct?
 (9) A That's right
 (10) Q And the - incidentally the run so far this year are
 (11) actually below ADF&G estimates aren't they?
 (12) A Oh no no They're well above The estimates for the
 (13) wild runs is about 600,000 They've caught now over three
 (14) million wild fish So the catch is well in advance of their
 (15) best predictions
 (16) Q I'm showing the witness exhibit 6571 Doesn't this
 (17) indicate that they are below?
 (18) A No what this shows is the return success back to the wild
 (19) streams in the face of a very large commercial fishery Now
 (20) when you're fishing on hatchery fish you're catching 95
 (21) percent of the return Whereas wild runs you only want to
 (22) catch about 30 maybe at the most 50 percent in order to get
 (23) sufficient escapement, so these figures are representative of
 (24) the hatchery catches on wild and hatchery runs where they're
 (25) fishing in a 95 percent intensity

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- (1) And if you're - for instance in the Eastern District, if
 (2) you're getting four percent back even though it's below what
 (3) they would expect at this time it's because of the high
 (4) fishery and that's right on - that's right on target. In
 (5) fact it's probably better than on target.
 (6) Q I see In addition you mentioned Dr Spies - talked a
 (7) little bit about Dr Spies and Dr Mundy - formulated his
 (8) opinion as to the effects of the oil spill on - on salmon runs
 (9) long before he was ever retained by the plaintiffs in this
 (10) action isn't that correct?
 (11) A I believe there is a statement to that effect yes
 (12) Q And there's also a fellow named Stan Rice You know Stan
 (13) Rice?
 (14) A Yes I do
 (15) Q And Mr Rice is also a eminent scientist, is he not?
 (16) A Yes he's well known especially in the federal
 (17) government.
 (18) Q And he and - and you respect his views?
 (19) A Yes I do
 (20) Q And he and other scientists concluded that the level of
 (21) oiling could have a significant effect on salmon embryos isn't
 (22) that correct?
 (23) A The level of oiling in Prince William Sound?
 (24) Q No I'm sorry if - if the level of hydrocarbons gets to
 (25) a certain point that it can have a significant effect on

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- (1) salmon embryos?
 (2) A Yes based on laboratory studies he can demonstrate that
 (3) high concentration of oil can have a negative effect on growth
 (4) of pink salmon and other salmon
 (5) Q And in fact most of - until the - your retention by the
 (6) - by Exxon in this case I believe and I'm not - you've had
 (7) a lot of experience on this salmonid family but most of the
 (8) work has been in trout and other species of salmon am I
 (9) correct in that?
 (10) A Oh no I was with the Salmon Commission nearly 20 years
 (11) and our responsibility was sockeye and pink salmon
 (12) Q I see And you - you wrote an article called the
 (13) Influence of Crude Oil and Dispersants on the Sensory
 (14) Characteristics of Steelhead in Marine Waters?
 (15) A Yes - pardon me I was thinking of their sensory abilities
 (16) rather than our sensory abilities
 (17) Q And steelhead are part of the salmonid family, also?
 (18) A Yes
 (19) Q And in that paper you reported that tanker transport of oil
 (20) along the Pacific Coast of North America can result in serious
 (21) oil spills and have significant implications to the fishing
 (22) industry?
 (23) A Yes
 (24) Q And you recognized in that report that the fish can absorb
 (25) hydrocarbons?

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- (1) A Yes they can They'll take it up if they're swimming in
 (2) it
 (3) Q And you - you also indicated in that article that sniffing
 (4) raw or cooked fish may not detect the - that contamination has
 (5) occurred in the salmonid family fish?
 (6) A The human sensory capacity is probably better than most
 (7) analytical instruments very low concentrations might not be
 (8) detectable to the human being but they have an extremely
 (9) sensitive capability and that was with those concentrations
 (10) tested which were about 5 parts per million or 500 parts
 (11) per billion
 (12) Q And would you tell the jury what bioaccumulation is?
 (13) A That would be the accumulation of the by products of
 (14) petroleum oil in the - in the soluble form would be the
 (15) pickup of those in the tissue and accumulation of those in the
 (16) tissue
 (17) Q Now you're not saying are you that because there's oil
 (18) seeps into Prince William Sound that therefore any quantity
 (19) of further hydrocarbons in the water is not going to - could
 (20) not have an effect on salmon fry are you through
 (21) bioaccumulation?
 (22) A Well certainly the accumulation of hydrocarbons if - for
 (23) instance if they're picking up some from the seeps in the
 (24) natural streams, would they pick up more if there was an oil
 (25) spill certainly

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- (1) MR STOLL That's all I have
 (2) A Pardon me?
 (3) MR STOLL That's all the questions I have Thank
 (4) you very much Doctor
 (5) MS SMITH Thank you Dr Brannon
 (6) THE COURT Thank you sir
 (7) MR DIAMOND That was briefer than anticipated May
 (8) I have just a minute to see if the witness has arrived
 (9) MR DIAMOND Your Honor with the Court's permission
 (10) our next two witnesses will be testifying by deposition The
 (11) readers will be here momentarily
 (12) MR CLOUGH We're ready to go with the first one
 (13) Your Honor here We'll try and keep a high dramatic tenor to
 (14) this proceeding I think we're done with the salmon too
 (15) MS SMITH I wanted to leave that up for the rest of
 (16) the trial
 (17) MR CLOUGH Oh okay that's fine
 (18) THE CLERK Ma'am can you stand and attach the
 (19) microphone to your jacket lapel there Raise your right hand
 (20) (The Witness is Sworn)
 (21) THE CLERK Please be seated Ma'am for the record,
 (22) could you please state your full name?
 (23) A Linda Floyd
 (24) THE CLERK Can you please spell your last name?
 (25) A F-l-o-y-d

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- (1) THE CLERK Thank you
 (2) MR CLOUGH With the Court's permission we'll
 (3) proceed
 (4) DIRECT EXAMINATION OF LINDA FREED (Read)
 (5) BY MR CLOUGH
 (6) Q The following are excerpts from the sworn deposition
 (7) testimony of Linda Freed on December 18th 1992 July 9th
 (8) 1993 and September 8th, 1993 Ms Freed is and was at the
 (9) time of the spill the community development director for the
 (10) Kodiak Island Borough Her duties focused on development
 (11) of
 (12) comprehensive plans and the broader use - excuse me
 (13) broader
 (14) issues that impacted land use regulations, and I shall read the
 (15) questions With permission of plaintiff's counsel as we talk
 (16) about particular parcels I'll be putting on the screen the
 (17) plaintiff's exhibit showing the parcels but we will not ask
 (18) the witness to speak to it just to give the jury a reference
 (19) point to the areas the testimony deals with
 (20) Are you generally familiar with the property that is the
 (21) subject of Patrick Carlson's March 1992 appraisal report which
 (22) is plaintiff's trial Exhibit 906?
 (23) A Not specifically I'm aware that the borough owns remote
 (24) property I'm aware of some of the general locations but it's
 (25) a very broad knowledge as opposed to specific information
 (26) Q Are you familiar with the uses to which the lands that are
 (27) subject of Mr Carlson's report were put prior to the oil

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- (1) spill?
 (2) A I know very generally
 (3) Q Let's explore the general knowledge you have about those
 (4) and starting with Sitkinak I presume from your earlier
 (5) answers there's some mining activity on Sitkinak?
 (6) A There's been proposed mining activity I'm not aware of
 (7) what extent the activity has actually taken place I know what
 (8) has been permitted and there are active claims active in the
 (9) sense that they have permits to do commercial placer mining
 (10) Q What is placer mining?
 (11) A It's beach mining
 (12) Q So people are in the position of being able to mine if they
 (13) wish to because they have permits or do they still need to -
 (14) to do something to get permission to actually placer mine on
 (15) Sitkinak?
 (16) A No they actually have - one operator has a permit both
 (17) from the local government and the State government to allow
 (18) them to mine on Sitkinak Island
 (19) Q Do you know the name of the operator?
 (20) A Yoram Palkovitch
 (21) Q Are you aware of any other individuals or entities that are
 (22) permitted to mine on Sitkinak at this time?
 (23) A No
 (24) Q Was anyone permitted to mine Sitkinak in 1989?
 (25) A I believe - I'd have to go back to my records but I'm -

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- (1) I m fairly confident that Yoram s permits were issued prior to
 (2) 89 and he has continued to renew those permits to allow his
 (3) activity
 (4) Q Do you know of anyone else who was permitted to engage in
 (5) mining activities on Sitkinak in 1989?
 (6) A I can t recall others
 (7) Q Are you aware of any other uses to which the Sitkinak
 (8) property was put prior to the oil spill?
 (9) A There has been military use on the property and we did a
 (10) review for cleanup on the island of military debris I believe
 (11) there s still some Coast Guard communication equipment there
 (12) In addition I don t know if they re current at this time but
 (13) I believe before the oil spill there were current grazing
 (14) leases from the State of Alaska for activity on the island
 (15) Q Do you know who held those grazing leases?
 (16) A No
 (17) Q Do you know if they actually used the land for grazing
 (18) purposes?
 (19) A I believe they did at one time use the land for cattle
 (20) grazing It was an issue that was raised when we did the
 (21) review for the mining application as to whether there would be
 (22) conflicts between the grazing activity and the mining
 (23) activity
 (24) Q Do you know whether the grazing has been continuous on
 (25) Sitkinak?

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- (1) A No I don t
 (2) Q Prior to the spill can you think of any other uses to
 (3) which the Sitkinak property was put prior to the spill?
 (4) A None that I m aware of
 (5) Q Are you aware of any impairment of these land uses as a
 (6) result of the oil spill?
 (7) A No
 (8) Q Turning now to the Ugak property - turning now to the
 (9) Ugak property - turning now to the Ugak property which is the
 (10) subject of the exhibit are you familiar with the use to which
 (11) the Ugak land was put prior to the oil spill?
 (12) A The only uses I m familiar with are hunting and - and
 (13) fishing activity that s occurred in the area, sport hunting and
 (14) fishing
 (15) Q Are you aware of any impairment to the hunting and fishing
 (16) activities on Ugak as a result of the oil spill?
 (17) A Not that I m aware of
 (18) Q Are you aware of the uses to which the Eagle Harbor
 (19) property had been put prior to the oil spill?
 (20) A My knowledge of all the parcels in the Ugak area would be
 (21) similar
 (22) Q So that would be that the use was hunting and fishing
 (23) sport hunting and fishing?
 (24) A And I would say not that I know for a fact that that
 (25) happens on borough property but that the bay the area is
 used

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- (1) for sport hunting and sport fishing
 (2) Q And you are not aware of an impairment of that activity as
 (3) a result of the oil spill?
 (4) A No I m not
 (5) Q Let s turn our attention now to Shearwater Bay off
 (6) Killuda
 (7) A I m not familiar with activities in that area
 (8) specifically
 (9) Q And am I correct that you re not aware of any impairment to
 (10) activities as a result of the oil spill?
 (11) A No huh-uh
 (12) Q One tends to follow the other?
 (13) A Yes
 (14) Q The same question with respect to the Kizhuyak Bay
 (15) properties Bear with me
 (16) A The only thing that I m familiar with in the vicinity is
 (17) the Terror Lake hydro project and proposed expansion of hydro
 (18) in the area.
 (19) Q Are you aware of any other uses for that property?
 (20) A Not that I know of
 (21) Q And again I assume you re aware of no impairment to use
 (22) land use in that area as a result of the oil spill?
 (23) A Not that I m aware of
 (24) Q Was there any impact on the Borough s Terror Lake
 (25) activities?

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- (1) A The Terror Lake project is not the borough s The - the
 (2) Kodiak Electric Association manages that project.
 (3) Q Are you aware of any impacts of the spill on their
 (4) activities?
 (5) A No I m not aware of any
 (6) Q Are you aware of the land uses on Kupreanof prior to the
 (7) oil spill?
 (8) A I m not familiar enough with that area to - to know
 (9) exactly what s happening on that parcel
 (10) Q Do you have any knowledge of any impairment of land use
 on
 (11) Kupreanof as a result of the oil spill?
 (12) A No
 (13) Q With respect to Raspberry Island are you familiar with
 (14) land uses on Raspberry Island prior to the spill?
 (15) A Yes
 (16) Q Tell me what -
 (17) A To some degree
 (18) Q - you know about that.
 (19) A There is - there s remote residential development in the
 (20) area there s commercial fishing activity in the area and
 (21) there s considerable upland hunting activity on Raspberry
 (22) Island
 (23) Q Are you aware of any impairment to any of those land uses
 (24) as a result of the oil spill?
 (25) A None that I m aware of

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- (1) Q Shuyak Island are you aware of land use on Shuyak Island
 (2) prior to the oil spill?
 (3) A Yes
 (4) Q Tell me what you know about that
 (5) A It's predominantly recreational activity
 (6) Q Any other activities?
 (7) A There is a lodge but I would consider that sort of
 (8) supplemental to the recreation activity There is also
 (9) commercial fishing activity offshore and when I talk about
 (10) recreational activity that includes sport hunting and -
 (11) excuse me sport fishing and some hunting although hunting is
 (12) not as significant activity as it is on - in other parts of
 (13) the borough
 (14) Q When you say that the commercial fishing is offshore are
 (15) you distinguishing something like a setnet site?
 (16) A Yes There are not setnet sites on Shuyak It's the
 (17) seiners fish the area.
 (18) Q Are you aware of any impairment of any of these land uses
 (19) as a result of the oil spill?
 (20) A I'm aware that lands on Shuyak Island were oiled and that
 (21) there was concern among recreation users about the impact of
 (22) that oil on recreation use of the property A portion of the
 (23) property had also been identified as possibly being designated
 (24) as state game refuge and there was concern about habitat
 impact
 (25) on - because of the oil spill

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- (1) Q Any other impairments you can think of?
 (2) A No I think that's probably the broad understanding I have
 (3) of the impact of the spill on the island
 (4) Q I am correct that you did not see oiling personally on
 (5) Shuyak Island
 (6) A That's correct
 (7) Q You indicated that there was a concern among recreational
 (8) users -
 (9) A Uh huh
 (10) Q - that the recreational uses of Shuyak would be impacted
 (11) by the oiling?
 (12) A Uh-huh
 (13) Q Are you aware of any actual impairment of recreational
 (14) use?
 (15) A No not directly
 (16) Q Are you aware indirectly?
 (17) A I know people who do not choose to kayak up there during
 (18) 89 because there was reportedly oil on the beaches
 (19) Q Uh huh Any other examples of actual impairment that you
 (20) can think of?
 (21) A Not that I know of directly that I can - that I can think
 (22) of specific examples
 (23) Q Do you think there is a concern today on the part of
 (24) recreational users about the effects of the oil spill on Shuyak
 (25) - excuse me about the effects of oil on Shuyak?

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- (1) A I don't really know I haven't talked to anyone directly
 (2) about it
 (3) Q Do you have any knowledge as to whether anyone currently
 is
 (4) using Shuyak for recreational purposes?
 (5) A Yes
 (6) Q And what is your understanding?
 (7) A I believe people continue to use Shuyak Island for
 (8) recreational purposes
 (9) Q When did you first become aware that people were using
 (10) Shuyak for recreation again?
 (11) A Again I would think about a year later
 (12) Q When you say a year later are you referring to the summer
 (13) of 90?
 (14) A Yes Yeah Because people don't choose to kayak much in
 (15) April
 (16) Q So in the summer of 90 you think recreational use was
 (17) being made of Shuyak Island again?
 (18) A I think people were using the island at that time
 (19) Q Do you have any specific information about someone who
 (20) didn't fish on Shuyak because of the oil spill?
 (21) A No
 (22) Q And the same question for hunting
 (23) A Again I'm not very familiar with hunting activity on
 (24) Shuyak
 (25) Q So you're not aware of what the impairment -

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- (1) A No
 (2) Q - to hunting would have been?
 (3) A No
 (4) Q Just so I'm clear you mentioned one friend who had not
 (5) gone on a kayak trip Was there actually more than one
 (6) person? Was -
 (7) A No
 (8) Q - that a family?
 (9) A It was an acquaintance
 (10) Q So the only individuals who reported to you that they had
 (11) changed their plans for the land use on Shuyak as a result of
 (12) the oil spill were the - was the acquaintance who spoke to you
 (13) about kayaking?
 (14) A Right. And that's because I have - I believe probably
 (15) because I have an interest in kayaking that activity and have
 (16) participated in that, myself on Shuyak
 (17) Q Are you aware of any recreational businesses that went out
 (18) of business as a result of the oil spill?
 (19) A Not that I'm aware of no I don't have knowledge on that
 (20) subject
 (21) MR CLOUGH Thank you Your Honor that concludes
 (22) the deposition testimony of Linda Freed of KIB
 (23) MR STOLL Excuse me did you read into the record
 (24) when the deposition was taken?
 (25) MR CLOUGH Yes it was part of the introduction to

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- (1) the statement
 (2) Your Honor for our next witness we'd like to introduce
 (3) the deposition testimony of Mr. Charles Cassidy of Kodiak
 (4) Island Borough
 (5) THE CLERK. Sir, can you attach the microphone to your
 (6) jacket lapel and remain standing for the oath? Please raise
 (7) your right hand
 (8) (The Witness is Sworn)
 (9) THE CLERK. Please be seated
 (10) Sir, for the record, could you please state your full
 (11) name?
 (12) A Kevin Davidson Callahan
 (13) THE CLERK. Could you please spell your last name?
 (14) A C a l l a h a n
 (15) THE CLERK. Thank you
 (16) MR. CLOUGH. Bear with me for one second
 (17) Mr. Callahan, I'll get the maps in order for you
 (18) DIRECT EXAMINATION OF CHARLES CASSIDY (Read)
 (19) BY MR. CLOUGH
 (20) Q The following are excerpts from the sworn deposition
 (21) testimony of Charles Edward Cassidy, Jr., whose nickname is
 (22) Bud. Mr. Cassidy has been the resource management officer
 (23) for the Kodiak Island Borough since 1985. Mr. Cassidy's primary
 (24) function as resource manager is that of a land manager for
 (25) KIB. As part of his duties, he is involved with KIB's

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- (1) acquisitions and sales of land. Mr. Cassidy received a
 (2) Bachelor of Arts degree from the University of Montana in 1979
 (3) and a Master's degree in regional planning from the University
 (4) of Alaska Anchorage in 1987. Mr. Cassidy was deposed in this
 (5) case on December 16th, 1992, July 8th, 1993, and September
 (6) 7th, 1993.
 (7) Are you familiar with the Kodiak Island Borough properties
 (8) that are the subject of Patrick Carlson's March 1992 appraisal
 (9) report, plaintiffs' trial Exhibit 908?
 (10) A Yes
 (11) Q By the way, let's give that exhibit a name. Can we agree
 (12) that it will be the Carlson assessment of March 1992?
 (13) A Sure
 (14) Q I'm sorry, you said you were familiar with the properties
 (15) that are the subject of the Carlson March assessment?
 (16) A Yes
 (17) Q I'd like to have you take a look at the portion of the
 (18) Carlson March 1992 assessment which appears to describe a
 (19) collection of properties on Sitkinak Lagoon on Sitkinak
 (20) Island. And my question is: Are you familiar with those
 (21) properties?
 (22) A I'm familiar to a certain extent, yes.
 (23) Q Do you know what use the borough was making of that
 (24) property in 1989 prior to the oil spill?
 (25) A It was vacant property.

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- (1) Q Is the property on Sitkinak used for recreational purposes
 (2) by anyone or - did I miss - excuse me
 (3) Do you know if the borough was collecting any rents from
 (4) the property?
 (5) A No rents
 (6) Q Do you know whether any of the property on Sitkinak Island
 (7) any of the borough property was oiled?
 (8) A I have no idea.
 (9) Q Do you have any information as to whether use of the
 (10) property was impaired in any way by the oil spill?
 (11) A No
 (12) Q Is the property on Sitkinak Island used for recreational
 (13) purposes by anyone?
 (14) A I can't tell you what it's used for. I can surmise I
 (15) know of some grazing leases down there.
 (16) Q Do you know whether any of those grazing leases were on
 (17) the borough property that's depicted?
 (18) A They are not on it.
 (19) Q They are not?
 (20) A They are not.
 (21) Q I should have inferred that from your last answer. I'm
 (22) sorry. So you're not in a position to tell me, for example,
 (23) whether the property is used for fishing?
 (24) A Recreational fishing? I can't tell you that, either. I'm
 (25) not sure what was on that.

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- (1) Q Fair enough. You do not have an understanding of how this
 (2) property was used prior to the spill?
 (3) A Correct.
 (4) Q Fair enough. I would like now to draw your attention to
 (5) that portion of the Carlson March 1992 assessment that appears
 (6) to be a discussion and depiction of borough property at the
 (7) northwest end of Hidden Basin at Ugak Bay. And again, my
 (8) question is: Are you familiar with these properties?
 (9) A I'm familiar with the properties, yes.
 (10) Q Do you have any knowledge of any oiling of that property?
 (11) A No
 (12) Q Do you know how that property was used prior to the oil
 (13) spill?
 (14) A No
 (15) Q Bud, I'm now going to show you the portion of the Carlson
 (16) March 1992 assessment that describes the southwest end of
 (17) Hidden Basin at Ugak Bay. My first question is: Are you
 (18) familiar with these properties?
 (19) A Yes
 (20) Q Do you know whether they were oiled?
 (21) A No
 (22) Q Do you know what use was made of these properties prior to
 (23) the oil spill?
 (24) A No
 (25) Q Do you have any information about whether the oil spill

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- (1) Impaired the use of those properties?
 (2) A No
 (3) Q I d like to show you the portion of the Carlson March 1992
 (4) assessment that describes the head of Ugak Bay at Hidden
 (5) Basin And again my question is Are you familiar with those
 (6) properties?
 (7) A Yes
 (8) Q Do you know whether they were oiled?
 (9) A No
 (10) Q Do you know how they were used prior to the oil spill?
 (11) A No
 (12) Q Do you have any information as to whether the oil spill
 (13) impaired the use of those properties?
 (14) A No
 (15) Q To try to speed this up a little bit, I'm going to try
 (16) something and let's see if it works If it is at all confusing
 (17) to you just tell me and we ll break it out parcel by parcel
 (18) again
 (19) I m going to give you pages of the Carlson March 1992
 (20) assessment that appear to discuss and depict the rest of the
 (21) borough remote properties that are the subject of the
 (22) assessment, in other words, those in Ugak Bay, Killuda Bay
 (23) Kizhuyak Bay, the Kupreanof Peninsula, In Onton Bay on
 (24) Raspberry Island and on Shuyak Island
 (25) My first question - I d like to ask you about them

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- (1) collectively My first question is going to be whether you are
 (2) familiar with these properties and I'll give you the entire
 (3) collection of pages here
 (4) Are you familiar with the borough properties that are
 (5) depicted in those pages?
 (6) A Yes
 (7) Q Do you have knowledge about the oiling of any of those
 (8) properties?
 (9) A No
 (10) Q You were referring in your answer to borough properties?
 (11) A Borough properties correct
 (12) Q Do you know how any of those properties were used prior to
 (13) the spill?
 (14) A No
 (15) Q Among the pages you looked at there is a section which
 (16) describes the borough holdings on Shuyak Island Is that
 (17) correct?
 (18) A Correct
 (19) Q When you say that you re not familiar with the uses made of
 (20) the property depicted in these pages prior to the oil spill
 (21) are you saying that you re unfamiliar with the use that anyone
 (22) puts those properties to?
 (23) A I m saying that though there s probably specific places
 (24) where people visit as far as the type of use that occurs there
 (25) besides recreational I have no other feel for any specificity

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- (1) Q Let s focus just on recreational for a moment In the
 (2) answers you've given me about this report thus far in your
 (3) testimony when you said you had no information about the use
 (4) to which property was being put prior to the oil spill were
 (5) you including no information regarding recreational use?
 (6) A I don't have any specific recreational information I m
 (7) assuming that folks are hunting walking the property but I
 (8) don't have any information on specifics, where it occurs what
 (9) the levels of recreation are If it s visited once a month or
 (10) every other year that type of thing
 (11) Q Okay That -
 (12) A I don't have any specific information
 (13) Q That answers my question there That s also true based on
 (14) your answer, but just confirm for me, if you will for Shuyak
 (15) Island as well
 (16) A Correct
 (17) Q Do you have any information regarding whether the oil spill
 (18) impaired the use of any of the properties in the Ugak Bay,
 (19) Killuda Bay Kizhuyak Bay on the Kupreanof Peninsula In
 (20) Onton
 (21) Bay on Raspberry Island or on Shuyak Island?
 (22) A No
 (23) Q Since the oil spill have you had occasion to do any
 (24) recreation on borough waterfront land or near borough
 (25) waterfront land?
 (26) A There s a parcel close to town Mill Bay Beach that I've

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- (1) been on that s borough-owned property but I haven't been on
 (2) any remote parcels
 (3) Q And I think we talked about that previously, so I m not
 (4) going to revisit that issue with you today Have any of your
 (5) personal plans and by that I would include your family to use
 (6) borough property for recreation been impaired as a result of
 (7) the oil spill? And I m excluding - you don't need to go back
 (8) and tell me about Mill Bay because we have that in the record
 (9) A You asked me if any of my plans have changed when using
 (10) borough property?
 (11) Q As a result of the oil spill effect on the property
 (12) A Besides the Mill Bay parcel I haven't gone back to any
 (13) borough parcels
 (14) Q Have you spoken with anyone who has had their recreational
 (15) plans affected as a result of the oil spill s effect on
 (16) property?
 (17) A On property anyway, not just borough property?
 (18) Q Let s start with just borough property
 (19) A You're saying subsequent to the oil spill?
 (20) Q Correct
 (21) A No I can't think of any
 (22) Q Have you had conversations with anyone whose recreational
 (23) plans had to change as a result of the oil spill s effect on
 (24) non-borough Kodiak property?
 (25) A No

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- (1) Q Have you had any conversations with individuals whose
(2) subsistence use of any land in Kodiak has been affected by the
(3) oil spill?
(4) A No
(5) Q Next we will read excerpts from Mr. Cassidy's deposition
(6) regarding KIB sale of land in Onion Bay and on the road system
(7) near Kodiak City also referred to as Land Sale Number 11
(8) The 1990 land sale involved both the parcels on Onion Bay
(9) and some parcels on the road system?
(10) A Correct
(11) Q And the total number of parcels was four or five. Is that
(12) correct?
(13) A In Onion Bay
(14) Q What about on the road system?
(15) A I'd have to go back to the land sale document to be
(16) absolutely sure
(17) Q What's your best estimate sitting here today?
(18) A Twenty
(19) Q Twenty? Relative to land - excuse me - relative to sales
(20) prior to that time would you characterize that as a large sale
(21) or a small sale?
(22) A We've had tremendous sales in the past so I would say
(23) given the total borough picture it was a modest sale
(24) Q Do you remember when in 1990 the sale occurred? You said
(25) the end but do you remember what month?

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- (1) A I would say November
(2) Q During the time you were preparing for Land Sale 11 did
(3) anyone say anything was there any discussion that you were
(4) aware of - or a party to - about postponing it because of
(5) lack of interest in the land because of the oil spill?
(6) A I don't recall any discussion about postponing the land
(7) sale
(8) Q Getting back to Land Sale 11 and the lots in Onion Bay
(9) it's my understanding that four of those lots sold at the
(10) auction and that one was sold over the counter subsequently
(11) Do you recall that being the case? Again if it's not, we can
(12) look
(13) A I think it's - they all sold except for one that was sold
(14) over the counter
(15) Q It would appear to me from the documentation that the
(16) over-the-counter sale wasn't long after the bids?
(17) A Wasn't long after. In fact it may have been the next day
(18) but it was - it was relatively soon after the auction
(19) Q In addition to the fact that you were involved in the oil
(20) spill was one reason that Land Sale 11 was - let me back up
(21) Do you recall when Land Sale 11 was originally scheduled to
(22) take place?
(23) A The process leading up to a land sale can be long
(24) especially one like this where we have to get survey
(25) information. I can't tell you if it was before the oil spill

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- (1) or not. I'm assuming it was before the oil spill when I did
(2) some of my preliminary work and identified potential candidate
(3) sites for the land sale
(4) In preparation for the land sale we had to do a boundary
(5) survey on Raspberry Island and that was done prior to the oil
(6) spill and I can recall that because the survey work was
(7) suspended because the surveyor could not get a helicopter. All
(8) the helicopters were being utilized for the oil spill so he
(9) could not fly over there to finish up the survey
(10) Q I think you were explaining that during the oil spill the
(11) surveyor who was doing the work on Onion Bay could not get a
(12) helicopter to continue the survey work?
(13) A That's correct
(14) Q Were there other incidents in which the oil spill detoured
(15) people who were working on the sale?
(16) A We had a number of lots in the Chiniak Subdivision that
(17) were scheduled for land sales. A road had to be constructed to
(18) provide access to those lots. The borough code requires all
(19) parcels have access, road access - I should say access
(20) Oceanfront property doesn't have to have road access
(21) Because
(22) of the fact a number of construction companies were busy with
(23) the oil spill there wasn't equipment available to construct
(24) the road so construction of the road was postponed hence the
(25) plat was postponed, hence approval by planning and zoning
commission was also delayed

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- (1) Q By the time of Land Sale 11 in late 1990 - and I believe
(2) you indicated it may have been November of 1990 - I take it
(3) the road work had been completed?
(4) A Correct
(5) Q What is the largest sale of Kodiak Borough off-road
(6) property you can think of in terms of acreage?
(7) A Onion Bay properties
(8) Q And then the largest sale you can think of at fair market
(9) value or higher, obviously depending on how the bidding goes
(10) would be the Onion Bay development?
(11) A Correct
(12) Q You indicated earlier that the sale had been delayed
(13) because the people who were functioning to implement the
(14) sale
(15) yourself the surveyor, maybe others, were either precluded
(16) from getting their work done or couldn't because they were
(17) investing their own time in oil spill related activities?
(18) A Yes
(19) Q Is it also the case that the sale was delayed because of
(20) the need to postpone some hearings so the homes could
(21) participate does that ring any bell?
(22) A We did postpone the hearings because of the homes being
(23) out
(24) of the State you bet.
(25) Q So just for the record the Land Sale 11 was delayed
because of the fact that the people who needed to work to do
work to put it on were diverted because of oil spill related

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- (1) activities and because the hearings were delayed so the homes
 (2) could participate?
 (3) A That's another - sure sure
 (4) Q Can you think of any other reason?
 (5) A Well we discussed the road out in Chiniak being
 (6) completed
 (7) Q You are correct I didn't mean to put words in your
 (8) mouth I had put that in the category of an activity which was
 (9) not being performed because the construction crews I think
 you
 (10) testified were involved with cleanup-type efforts is that
 (11) correct?
 (12) A (Nods head up and down)
 (13) Q I'm sorry, you have to audibilize
 (14) A Yes I was going to state that I think before the 1990
 (15) sale we hadn't had a sale since 1986 I see my role as trying
 (16) to orchestrate things coming together to have a land sale
 (17) Certainly when we decided that there was Onion Bay properties
 (18) coming on line for sale we knew that we needed to get a survey
 (19) done That was independent of the Holmes request for a delay
 (20) The survey still had to be done That wasn't postponed or
 (21) modified because of the Holmes but certainly that was a factor
 (22) in orchestrating everything to come together at the same time
 (23) to have the sale
 (24) Once the survey was completed which was post oil spill
 (25) the ball was rolling again and the ball continued We had that

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- (1) land sale shortly after the survey was completed I can't give
 (2) you the time frame of when the Holmes was delayed but
 certainly
 (3) It was - there was some delay there but the survey was the
 (4) primary reason for not having the land sale because we had it
 (5) almost immediately after the survey was completed and
 approved
 (6) Q Are you comfortable with the conclusion that as of January
 (7) 1990, Land Sale 11 was back on track without any continuing
 (8) delay effects from the oil spill?
 (9) A Yeah I would say that I was back in - the analogy would
 (10) be the orchestration pit, and orchestrating things So yes I
 (11) think we had things back on track and that the wheels were
 (12) turning for eventual land sale yes
 (13) Q As best you could tell from your position as the conductor
 (14) of this orchestra there weren't parts of the orchestra that
 (15) were still being held back because of the oil spill still in
 (16) 1990?
 (17) A I can't think of anything Nothing comes to my mind
 (18) Q Let me follow this a little further in connection with
 (19) whatever discussions you had on fair market value in
 connection
 (20) with Land Sale 11 If I may Just focussing on that - and I'm
 (21) attempting to see if this refreshes your recollection any
 (22) further than what we've already discussed - just focussing on
 (23) the discussions you and Pat Carlson would have had regarding
 (24) Land Sale 11 can you recall anything at all that he said
 (25) specifically about the oil spill's effect on land values?

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- (1) A I can tell you that prices weren't set on the properties
 (2) for Land Sale 11 prior to the oil spill because we weren't that
 (3) far along yet We were still talking about construction of the
 (4) roads subdivision plats It's like a set of dominos certain
 (5) things have to get done before another thing is started so
 (6) there really wasn't a feel for prices of land There was not
 (7) any specific numbers generated for potential parcels
 (8) Q Let me - to clarify further at any time up until the sale
 (9) was actually held was there ever any discussion of cancelling
 (10) it because of the oil spill's effect on property?
 (11) A No sir not that I'm aware of
 (12) Q Would I be correct in saying therefore that you were
 (13) neither pleased nor disappointed in the prices you got?
 (14) A In some cases we were pleased and other cases I can't say
 (15) we were disappointed Again they sold for fair market value
 (16) and that's sort of our minimum expectation There are some
 (17) that sold for greater than fair market value that we certainly
 (18) were pleased about.
 (19) Q Do you remember which those were?
 (20) A Primarily the - one in particular is a Bells Flats parcel
 (21) Q That's a one-acre parcel?
 (22) A That's a one-acre minimum It's probably bigger than one
 (23) acre
 (24) Q Does it have any shoreline?
 (25) A No

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- (1) Q Does any of the Bells Flats property have shoreline?
 (2) A No
 (3) Q Do you recall whether you got any above fair market value
 (4) prices for shoreline property?
 (5) A Yes
 (6) Q Do you recall where? Was that in Onion Bay?
 (7) A Onion Bay
 (8) A Anyplace else?
 (9) A I'm sure Bells Flats property we got above fair market
 (10) value and I don't know if any of the Chiniak parcels I think
 (11) two of the Bells Flats parcels have been higher than fair
 (12) market value
 (13) Q Have you had occasion to be involved in a land sale where
 (14) property was contaminated in any way or where a
 determination
 (15) was made by the borough that some disclosure with respect to
 (16) contamination needed to be made?
 (17) A No
 (18) Q Did you draft a brochure for sale 11?
 (19) A Yes
 (20) Q Did you consult with anyone in doing that?
 (21) A After I completed it, I ran it through the borough attorney
 (22) for any legal things that I may have missed or needed to
 (23) include
 (24) Q Without getting into any of those discussions with the
 (25) borough attorney did you give any consideration to saying

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- (1) anything in the brochure about the oil spill?
 (2) A No
 (3) Q Was the brochure completed after the oil spill occurred?
 (4) A After the oil spill correct.
 (5) Q Were there any disclosures in the brochure with respect to
 (6) any aspect of the oil spill?
 (7) A No
 (8) Q So we are clear the view has been expressed that as a
 (9) result of the oil spill for a period of at least one year
 (10) Kodiak Island rural properties off the road system became
 (11) unmarketable My question is do you agree?
 (12) A My opinion? My opinion is we sold land in 1990 November
 (13) of 1990 If there is a period between then to the previous
 (14) land sale then I don't know if I'd have an opinion We again
 (15) had the sale in Onion Bay which was a reasonable sale We
 (16) had
 (17) - we had all the lots sell out although there were different
 (18) circumstances people with vested interests in property But
 (19) back to the original question about do I have an opinion on
 (20) period of time when borough land -
 (21) Q Was unmarketable?
 (22) A - was unmarketable I'm probably not the best one to talk
 (23) about that because I wouldn't have any firsthand information
 (24) We weren't trying to sell land There was no land over the
 (25) counter for sale I'm trying to think if anyone came into my
 office saying when are we going to have some borough land for

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- (1) sale again I think most people were too involved with the oil
 (2) spill
 (3) My opinion would be we sold some land in Onion Bay in
 (4) November probably some pent up demand If we were to offer
 (5) in
 (6) that year time frame I'm not sure what the - the result would
 (7) have been My opinion is that people that had a vested
 (8) interest, had set sites there certainly wanted to own their
 (9) property They may have shown an interest in purchasing
 (10) property in that time frame but when we talk to folks that may
 (11) not have had a vested interest, I'm probably not the best one
 (12) to answer that question
 (13) Q Let's rule out - in interpreting your answer rule out one
 (14) alternative I do not hear you saying - correct me if I'm
 (15) wrong - that you believe that there was a suspension of
 (16) marketability as a result of the oil spill You do not hold
 (17) that opinion I'm not asking whether you hold the contrary
 (18) opinion but you don't have that opinion?
 (19) A My opinion would be the people that I know that were
 (20) interested in purchasing Onion Bay land, it's my opinion they
 (21) would have purchased it in that one-year time frame Based on
 (22) your question about did I feel there was a suspension of
 (23) marketability of rural land I just wanted to clarify that.
 (24) Even though we had the land sale November of '90 we were
 (25) preparing for that land sale So even though I don't have a
 feel for if a parcel - piece of property would have sold

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- (1) within a one-year time period It was always our general
 (2) feeling that there was some marketability to the lands That's
 (3) why we were putting the land sale together for Onion Bay
 (4) Q Finally Mr Cassidy testified about KIB's property on
 (5) Shuyak Island
 (6) Bud Exhibit 103239 which is before you appears to be a
 (7) March public hearing draft of the Shuyak Island Comprehensive
 (8) Plan My copy runs from KIB's 80732 through KIB's 80749
 (9) And
 (10) after you have had a chance to look at that, if you can tell me
 (11) if you have seen it before and what it is?
 (12) A Yes I've seen it and it is exactly what you stated, a
 (13) draft copy of a comprehensive plan for Shuyak Island
 (14) Q I believe you testified earlier that - well excuse me I
 (15) may be mispeaking You were involved, were you not, in
 (16) working on this, working on the comprehensive plan for Shuyak
 (17) Island?
 (18) A I was the primary author of this document.
 (19) Q Okay Would you describe for me how you first became
 (20) involved in the effort to draft a comprehensive plan for Shuyak
 (21) Island and generally what you did in connection with that
 (22) effort?
 (23) A Okay The Shuyak Island Comprehensive Plan was
 (24) generated
 (25) because of the general controversy of conflicting uses on
 Shuyak Island There was concern by individuals about
 retaining the sort of natural character of Shuyak Island then

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- (1) there were the development forces who wanted to dispose of
 (2) land
 (3) on Shuyak Island cut timber and do a number of other
 (4) commercial-oriented ventures so the plan was requested by
 (5) the
 (6) Kodiak Island Borough Assembly At the same time I was
 (7) working on my Master's thesis and was able to use the Shuyak
 (8) Island Comprehensive Plan to satisfy my thesis requirements
 (9) Q You mentioned that the future of land use on Shuyak Island
 (10) had become a controversial subject by the time the decision
 (11) was
 (12) communicated to you that a Comprehensive Plan was to be
 (13) designed is that correct?
 (14) A Uh-huh
 (15) Q I'm sorry, you'll have to audibilize for us
 (16) A Yes, yes
 (17) Q Was there a catalytic event of some kind some reason why
 (18) the controversy was present at that point?
 (19) A Probably the major event was the establishment of - on
 (20) Shuyak Island of a cabin system Folks there were concerned
 (21) about the fact that the geographic setting of Shuyak - the
 (22) analogy is like a wheel where there are so many indentations,
 (23) fjords bays that impact in one place would actually impact the
 (24) rest of the island The other concern was a possibility of
 (25) disposing land on Shuyak Island to private individuals
 Q What gave rise to the concern about disposing of land to
 private individuals?
 A Look at my dates but I think it was the Echavaria/

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- (1) Hendricks potential Echavaria/Hendricks sale U S 1701
 (2) Q I see So the inclusion of Shuyak property in Land Sale 9
 (3) drew some attention am I correct?
 (4) A Right
 (5) Q What was the nature of the controversy over the disposal of
 (6) land to private individuals whether it should occur at all
 (7) for example?
 (8) A Correct
 (9) Q Was there some negative reaction to the inclusion of U S
 (10) 1701 in Land Sale 9?
 (11) A The reaction was more general in that should we dispose of
 (12) land to private individuals on Shuyak Folks were concerned
 (13) that it is only going to be 1701 Folks were concerned also
 (14) that state parks was contemplating a cabin system so I think
 (15) those issues together - Shuyak has always had a fairly
 (16) emotional history Whenever Shuyak is brought up there is
 (17) always a fair amount of testimony to leave it like it was
 (18) This was similar to that kind of testimony
 (19) Q Now, in 1989 were there any plans to dispose of any
 (20) property on Shuyak Island Borough property?
 (21) A No plans
 (22) Q Were there any plans in 1990 to dispose of any Shuyak
 (23) Island property?
 (24) A There were no plans to dispose There was always the
 (25) concept of trading for state land off of Shuyak Island but

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- (1) that was something we'd been working on for years and hadn't
 (2) gotten any further along with the State than when we first
 (3) proposed it but as far as disposing of it to private
 (4) individuals there was no plan in 1990
 (5) Q In fact there haven't been any plans from the time of the
 (6) oil spill to the present to dispose to private parties of land
 (7) on Shuyak Island is that right?
 (8) A That's correct
 (9) Q How close are you today to potentially exchanging Shuyak
 (10) Island lands with the State?
 (11) A No closer today than we were some time ago
 (12) Q Years?
 (13) A Years ago
 (14) Q If you were going to recommend that there be a - some land
 (15) disposal in Shuyak what would be the steps - excuse me what
 (16) would the steps be that you would have to go through? And
 (17) putting aside whether you think that would be a good idea
 (18) whether anyone would do that or not, let's just assume that a
 (19) decision was made to dispose of property I'm interested in
 (20) what steps you - would you have to go through
 (21) A To put land on the market on Shuyak Island the first thing
 (22) we would need to do is get a survey to identify which lands we
 (23) were considering disposing of There's probably decisions
 (24) before that
 (25) Q Let me stop you there is any - other than U S tracts

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- (1) is any of the borough property on Shuyak surveyed at this
 (2) point?
 (3) A No
 (4) Q And therefore obviously in 1989 it wasn't surveyed
 (5) either?
 (6) A It was not surveyed in 1989
 (7) Q Sorry to interrupt you You said first you have to
 (8) survey
 (9) A I better preface that remark by saying I would first go to
 (10) the Assembly to see if they would be willing to dispose of this
 (11) land I would not do all this work spend all this money and
 (12) find out they weren't even interested in selling the land I
 (13) would go before the Planning and Zoning Commission and the
 (14) Assembly to discuss disposing lands on Kodiak Island on
 Shuyak
 (15) Q Is it fair to say this would be an emotional topic?
 (16) A This would be a tough topic
 (17) Q Not the sort of decision that's going to be made overnight?
 (18) A Certainly not overnight
 (19) Q Am I correct that you're not aware of any plans that the
 (20) borough had to sell borough property on Shuyak Island in 1989
 (21) prior to the spill?
 (22) A That direction would come from the Assembly and there was
 (23) never any direction given
 (24) Q What would be your estimate of the time it would take from
 (25) the decision that some sort of sale would take place to the

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- (1) identification of lands, a survey of those lands and the
 (2) putting together of a land sale?
 (3) A There are a number of things we can do simultaneously and
 (4) I think we could do it - we could do it in a period of a
 (5) year
 (6) Q When you say that are you saying it would take about a
 (7) year?
 (8) A Take about a year The one thing that might slow it down
 (9) that we have no control over, is the fact that we get our
 (10) survey instructions our formal survey instructions from the
 (11) State of Alaska They are the ones that have to approve the
 (12) plat, approve the survey work So if we started the survey in
 (13) the fall had all the survey work done probably take the
 (14) winter to do the plat send the plat back and forth between the
 (15) State and the surveyor for any minor corrections In the
 (16) spring or summer we would - we have an opportunity to make
 (17) changes should the public hearing process require changes
 (18) Instead of ten lots to seven lots, or something, and then make
 (19) those changes in the field At the same time we could put the
 (20) boiler plate together for something like - like the brochure
 (21) land sale brochure A year is optimistic but -
 (22) Q Shuyak is currently zoned conservation is that correct?
 (23) A Correct
 (24) Q That's a minimum of five acres per lots?
 (25) A (Nods head up and down)

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- (1) Q Can you imagine any scenario in which all of the coastal
- (2) property was surveyed and sold in one sale all of the Kodiak
- (3) Island Borough coastal property on Shuyak was surveyed and
- (4) sold
- (5) In one sale?
- (6) A Can I imagine that?
- (7) Q Yes
- (8) A No I could not imagine that
- (9) MR CLOUGH Your Honor that concludes the deposition
- (10) testimony of Bud Cassidy of Kodiak Island Borough
- (11) THE COURT Okay we're going to take a break
- (12) counsel
- (13) THE CLERK. Please rise This court stands in
- (14) recess
- (15) (Jury out at 11 08 a m)
- (16) (Recess from 11 08 a m to
- (17) (Jury in at 11 28 a m)
- (18) THE CLERK. This court now resumes its session
- (19) Please be seated
- (20) MR DIAMOND Your Honor the defendants call to the
- (21) stand as our next witness Mr Ben Hancock
- (22) THE CLERK. Can you stand and raise your right hand?
- (23) (The Witness Is Sworn)
- (24) THE CLERK. Please be seated
- (25) Sir for the record can you state your full name?
- (26) A My full name is L peridot Ben B-e-n Hancock

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- (1) H-a-n-c-o-c-k.
- (2) THE CLERK. And your occupation?
- (3) A Attorney
- (4) THE CLERK. Thank you
- (5) MR DIAMOND I'll try not to hold that against you
- (6) DIRECT EXAMINATION OF L BEN HANCOCK
- (7) BY MR DIAMOND
- (8) Q Mr Hancock where do you reside?
- (9) A I reside in Kodiak Alaska
- (10) Q How long have you lived in Kodiak?
- (11) A I knew that question was going to be asked I moved over
- (12) there in '75 or '78
- (13) Q What brought you to Kodiak?
- (14) A I took over Roy Matson's practice when he became a judge
- (15) Q Okay How long have you been practicing law?
- (16) A Twenty-five years
- (17) Q Where were you before you were in Kodiak?
- (18) A Anchorage
- (19) Q Doing what kind of law?
- (20) A Oh it was a general practice geared quite heavily to
- (21) bankruptcy at that time
- (22) Q And what was the attraction to Kodiak?
- (23) A The attraction to Kodiak was that we didn't have the
- (24) traffic jams that we had in Anchorage
- (25) Q You're talking about traffic jams in the courthouse?

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- (1) A No no I'm talking about the traffic jams driving right
- (2) down Tudor Road is when we decided to move to Kodiak
- (3) Q I understand you've cornered the market on a part of the
- (4) legal practice in Kodiak. You do a lot of conveyancing work
- (5) don't you?
- (6) A That is correct.
- (7) Q Would you tell the jury what land or real estate
- (8) conveyancing work is all about?
- (9) A Okay What I do my office is right next to the - the
- (10) land title company They will order the conveyancing
- (11) documents The conveyancing documents normally consist of
- (12) a
- (13) deed which is the basic conveyancing document, and many
- (14) times
- (15) transactions are seller finance, and with the seller finance
- (16) transaction we will also do up the deed of trust, which is
- (17) really another name for a mortgage and we'll do up the
- (18) promissory note
- (19) Q And you draw up all those documents and get them all
- (20) signed
- (21) and notarized?
- (22) A No no
- (23) Q No?
- (24) A That's where I stop I prepare the documents based on an
- (25) order from the title company The title company does the
- (26) actual closing of the transaction and makes the actual - see,
- (27) there's a reporting requirement for attorneys if we do them
- (28) and therefore I don't do any closing The title company does

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- (1) it and takes care of the Internal Revenue service problems
- (2) Q But you draw the documents?
- (3) A Yes
- (4) Q Okay Roughly what percentage of the conveyancing work
- (5) do
- (6) you do in Kodiak?
- (7) A Probably 60 70 percent. There are two title companies in
- (8) town now and I do all the work for one and I don't do any
- (9) work for the other one
- (10) Q Frequent contact with buyers and sellers of real property
- (11) in Kodiak?
- (12) A Yes
- (13) Q Give us some - some sense of the size of that community in
- (14) terms of the real estate community
- (15) A Oh the community itself is probably about eight to ten
- (16) thousand people I mean it's not unusual for people to come
- (17) in walk into my office and talk to me about a piece of
- (18) property they're thinking about buying or thinking about
- (19) selling and quite frankly I don't bill them for that
- (20) service
- (21) Q You generally regarded it as a knowledgeable guy on Kodiak
- (22) real estate matters?
- (23) A Reasonably so
- (24) Q Where do you live what part of Kodiak?
- (25) A I live on Rezanof which is about a mile from the downtown
- (26) area on the main street - I mean the main highway

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- (1) Q You own your own home?
 (2) A Yes
 (3) Q Do you own any other property on Kodiak Island?
 (4) A Let s see I own a piece of property on Onion Bay two lots
 (5) in Larsen Bay and the city of Larsen city of Larsen and I
 (6) have one parcel down on Amook Pass there
 (7) Q We re going to talk about -
 (8) A Quite frankly the last three parcels I've never seen
 (9) Q I won't ask you why you bought them then
 (10) A You can ask I mean it - I m just being honest with you
 (11) I ve never seen those three parcels I know approximately
 (12) where they re at
 (13) Q We ll talk to you about your Onion Bay parcel in a few
 (14) minutes Do you recall the oil spill in March of 1989?
 (15) A Yes
 (16) Q Did the oil spill have any perceptible effect on the level
 (17) of conveyancing work that you were doing?
 (18) A I couldn't see where it did
 (19) Q You went back and looked at numbers of transactions that
 (20) you were involved in both in 88, 89 and 90?
 (21) A Yes
 (22) Q Can you tell us what you found just roughly?
 (23) A 88 I think there was about a hundred and fifteen 89
 (24) was about a hundred and seventy, and '90 was about 190 and
 (25) then it has tapered down since then to probably a hundred

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- (1) transactions a year
 (2) Q So the year of the spill and the year after the spill were
 (3) bigger years in terms of conveyancing than before?
 (4) A There was more conveyancing yes
 (5) Q It didn't appear to you that the oil spill brought real
 (6) estate transactions to a halt in Kodiak did it?
 (7) A No
 (8) Q In terms of the conveyancing work that you do is that real
 (9) purchase and sale transactions or are a lot of those gifts and
 (10) marital settlements and the like?
 (11) A The ones I m referring to are all orders from the title
 (12) company and that - therefore it s - real money is passing
 (13) People have bought title insurance there - you know there
 (14) may be funds coming from a bank or seller taking back
 (15) financing but it s normally between - basically between
 (16) strangers Fact is a good part of those sales were sales that
 (17) were arranged by real estate agents
 (18) Q Those are real transactions as opposed to just - just one
 (19) member of a family conveying to another?
 (20) A There are very - I mean I m not saying I've never done
 (21) that but gift conveyances probably would be one conveyance a
 (22) year that would be a gift conveyance and you know whenever
 (23) people get a dissolution I m always insistent of - will ask
 (24) them sometimes I will see them on the street and say you
 (25) better come up and get a deed to take care of that but that s

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- (1) - It doesn't amount to that much either
 (2) Q Are your conveyances all city property in the city of
 (3) Kodiak?
 (4) A No they re city, borough anyplace on the island and
 (5) there s an occasional off island transaction
 (6) Q That s very rare for you though?
 (7) A Very rare for me
 (8) Q To your knowledge did any pending transaction involving
 (9) Kodiak property fall out of bed on account of the oil spill?
 (10) A I take it by that term you re saying that it -
 (11) Q It s a legal - legal term for the deal falling apart or
 (12) not getting consummated
 (13) A Not that I m aware of
 (14) Q To your knowledge did any land transaction in Kodiak get
 (15) renegotiated downward on account of the spill?
 (16) A No
 (17) Q Never heard of that?
 (18) A No
 (19) Q Okay I d like to talk to you about your Onion Bay lot
 (20) A Yes
 (21) Q We have a - I borrowed a map from the plaintiffs Do you
 (22) recognize this generally as -
 (23) A Oh yes
 (24) Q - the area where your property s located?
 (25) A That is correct.

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- (1) Q Why don't you come down and just show us where you
 bought
 (2) on Onion Bay
 (3) They re not leaving they re just moving
 (4) MR STOLL Don't be so sure
 (5) BY MR DIAMOND
 (6) Q Give us a basic geographic orientation
 (7) A Can you give me a pointer?
 (8) Q I can
 (9) A This here is Kupreanof Strait we normally - as far as
 (10) getting to Onion Bay you generally come through Whale Pass
 (11) Kupreanof Strait, and you d come this way whether you re
 (12) flying or by skiff
 (13) Q I m going to turn this so everybody can see it. It s a
 (14) little bit angled
 (15) A My property that I have purchased is about a three-acre
 (16) parcel that lays right here Which it has reasonably decent -
 (17) decent waterfront and it s - it s a good place to anchor your
 (18) boat.
 (19) MS SMITH Chuck we can't see over here at all
 (20) BY MR DIAMOND
 (21) Q I think you just stood right in front of it. Could you
 (22) just point that out again?
 (23) A My property is this little three and a half - about a
 (24) three-and-a-half-acre chunk right here
 (25) Q How do you get there from Kodiak City?

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- (1) A We either fly or take a boat
 (2) Q Why did you buy the parcel?
 (3) A Why did I buy the parcel? I was - I had been thinking
 (4) about - I had been thinking about buying a parcel and this was
 (5) listed in the newspaper
 (6) Q Would you tell the jury when you bought this parcel?
 (7) A It was summer of 89 I understand from documents that it
 (8) was recorded in June - or September 4th but I had purchased
 (9) it prior to that
 (10) Q The oil spill took place what about 60 days before you
 (11) negotiated the purchase?
 (12) A Took place in March March 27th if I remember right
 (13) Q And you bought it a couple months later?
 (14) A Yes
 (15) Q Did you miss the facts that there had been an oil spill?
 (16) A Never gave it any consideration
 (17) Q Why?
 (18) A Didn't - didn't affect us
 (19) Q Didn't affect your purchasing decision?
 (20) A No No I bought the property because I wanted it.
 (21) Q Do you know of anybody who was deterred from buying
 (22) property in Onion Bay on account of the oil spill?
 (23) A At the time I bought it that was the only parcel that was
 (24) on the market so no, it was not - I certainly wasn't aware of
 (25) anybody that was deterred as a result of it.

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- (1) Q I'm going to show you one other graph You've become a -
 (2) you've been reduced to a bar on a bar chart.
 (3) I'm going to put up what's previously been marked DX10227
 (4) and there are a series of five Onion Bay transactions and I
 (5) believe prior testimony from Mr. Carlson and Mr. MacSwain
 have
 (6) identified your transaction as being the one that's listed as
 (7) September of 1989
 (8) A That is correct That was for - \$29,000 is what I paid
 (9) for that.
 (10) Q You shared the price of the transaction with Mr. Carlson?
 (11) A Oh yes I told him
 (12) Q There has been - do you know that the property that sold
 (13) in 1985 the Star property?
 (14) A Yes, I'm familiar with it.
 (15) Q There's been a suggestion that the Star property is not
 (16) comparable in value to your property because it lacks as good
 (17) access as your property That's true is it not?
 (18) A The access is not quite as good that's true
 (19) Q Are there attributes to the Star property that was bought
 (20) and sold in 1985 that make it -
 (21) A Well there's - one is larger and two there's more
 (22) flat buildable ground there And I guess we'd get into
 (23) arguments probably the Star property has got - maybe it has a
 (24) nicer view than mine It looks down the bay and mine looks up
 (25) the bay

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- (1) Q In your opinion is your parcel of comparable value to the
 (2) Star parcel?
 (3) MR STOLL Excuse me Your Honor may I approach the
 (4) bench?
 (5) THE COURT Sure
 (6) (At side bar on the record)
 (7) THE COURT What is it?
 (8) MR STOLL I don't think he's qualified as an expert.
 (9) THE COURT He doesn't have to be qualified as an to
 (10) give an opinion on his own property
 (11) MR STOLL For his own property I agree with that.
 (12) The opinion on the Star property, where we're going from
 (13) there -
 (14) MR DIAMOND I just want to elicit the fact that the
 (15) suggestion has been made that because the Star property did
 not
 (16) have as good access and was not as valuable he's going to
 (17) comment on the value of his property with reference to the
 (18) neighbor's property and say they're both comparable in value
 (19) taking all things into account
 (20) THE COURT I'll allow it.
 (21) (Sidebar concluded)
 (22) BY MR DIAMOND
 (23) Q The question I have for you Mr. Hancock is when you take
 (24) all of the attributes of your property, unimproved into
 (25) account, do you think that your property and the Star property

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- (1) are roughly of comparable value?
 (2) A If they were both unimproved they'd be equal
 (3) approximately the same value
 (4) Q And they were both purchased - they were both purchased
 (5) and sold in the respective years in unimproved conditions were
 (6) they not?
 (7) A Mine is unimproved and as far as I know Star's was I
 (8) was never out there at that time It has quite a nice house on
 (9) it now, though
 (10) Q You can take the stand I just have one - one or two
 (11) further questions for you
 (12) Your wife holds public office in Kodiak does she not?
 (13) A That is correct. She's on the Kodiak Island Borough
 (14) Assembly
 (15) Q And she knows you're hear testifying today?
 (16) A Yes
 (17) MR DIAMOND No further questions
 (18) CROSS-EXAMINATION OF L. BEN HANCOCK
 (19) BY MR STOLL
 (20) Q Mr. Hancock your wife voted with the other Assembly
 (21) members to pursue this lawsuit claiming damages to Kodiak
 (22) Island Borough's properties?
 (23) MR DIAMOND I'll object as irrelevant
 (24) MR STOLL Well you brought it up
 (25) THE COURT Counsel the last question made it

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- (1) relevant
 (2) BY MR STOLL
 (3) Q Isn't that correct?
 (4) A Quite frankly I do not know how she voted on the issue
 (5) because all items that involve litigation are confidential and
 (6) she never discloses them to me
 (7) Q Mr Hancock have you broken down done an analysis of
 (8) these transactions that you've handled for the title company
 (9) between remote properties and urban properties?
 (10) A No I have not And my records without pulling each -
 (11) each file, there would be no way of doing it
 (12) Q You d need to go through each transaction and evaluate
 each
 (13) one separately to do that?
 (14) A Yes
 (15) Q But in your - off the top of your head do you think that
 (16) the vast majority of those are close in to the city of Kodiak?
 (17) A The vast majority of transactions are people buying and
 (18) selling homes
 (19) Q Residential -
 (20) A Residential homes within the city - within the city and
 (21) borough within a - oh since there s some of them out in
 (22) Bells Flats within a 15-mile radius
 (23) Q And do you do appraisals?
 (24) A No
 (25) Q And the property that you bought in Onion Bay, you say that

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- (1) was the only one that was on the market at that time?
 (2) A At that time it was the only one Since then, the borough
 (3) put about six parcels up for sale across the way, and -
 (4) Q Well, there was - you re talking about this auction that
 (5) happened in 19- late 1990 five lots?
 (6) A Were there five? They re nice lots about five of them
 (7) Q That s a beautiful area up there isn't it?
 (8) A Yes
 (9) Q Onion Bay And you had been looking - I think you told me
 (10) this just shortly before you testified you d been looking up
 (11) there for some period of time?
 (12) A No I d never been to Onion Bay before
 (13) Q I see You d been looking - I thought you said you d been
 (14) looking for a lot?
 (15) A Oh I d been thinking about a lot. I hadn't actually
 (16) physically been out and looked at any of them
 (17) Q And this lot that you had - you bought, this was on the
 (18) market for \$35 000?
 (19) A That s what they were asking yes
 (20) Q And it had been on the market for at least four months to
 (21) your knowledge?
 (22) A No I think I called up when I first saw it in the paper
 (23) so I mean if it had been on the market, I don't know, but I m
 (24) just saying when I first saw the ad is when I called up It
 (25) was listed by Kelly Wakefield, realtor

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- (1) Q Incidentally you said something about eight or ten
 (2) thousand people Actually the population of Kodiak is about
 (3) 15 000 isn't it? Do you know?
 (4) A I have no reason to make a census and Chamber of
 Commerce
 (5) has one set of figures and other people have other sets of
 (6) figures
 (7) Q Okay thank you that s all
 (8) MR DIAMOND Nothing further
 (9) THE COURT You can step down thank you
 (10) MR DIAMOND Your Honor, our next witness is Carl
 (11) Propes
 (12) MR PETUMENOS Your Honor may we approach
 (13) THE COURT Well it s a matter I have to hear out of
 (14) the presence of the jury isn't it?
 (15) MR PETUMENOS Yes
 (16) THE COURT I'll do it.
 (17) I have to send you out. This may take a little bit of
 (18) time You can go back to the good room
 (19) (Jury out at 11 48 a m)
 (20) MR PETUMENOS Judge, as a matter of jury efficiency
 (21) and so forth I had agreed with Mr Diamond Mr Propes could
 be
 (22) called today because Mr Diamond indicated to me that
 (23) Mr Propes couldn't testify tomorrow but he can I talked to
 (24) him He doesn't have a problem with that I don't know if
 (25) it s the order of Exxon s witnesses that is the issue or not.

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- (1) I did agree he could testify today if Mr Diamond would give me
 (2) the whole statement, that's my deal But with this issue to
 (3) come up I don't know what Mr Diamond s position is but it is
 (4) not a problem with Mr Propes He can testify tomorrow
 (5) MR DIAMOND Your Honor I never said Mr Propes
 (6) couldn't testify tomorrow
 (7) THE COURT Doesn't matter counsel Let s get to the
 (8) substance of the matter
 (9) MR PETUMENOS Discuss it now?
 (10) THE COURT Yes Did you want to say something Mr
 (11) Stoll?
 (12) MR STOLL I was just laughing because Joel the
 (13) technician made a comment. I indicated to him that there was
 (14) 15 depo reads coming up, and he asked if he could borrow the
 (15) real estate appraisal book to read for light entertainment.
 (16) THE COURT Anybody who laughs when they hear there
 (17) are 15 depositions to read in has been a lawyer too long
 (18) MR STOLL I agree with that also Your Honor I was
 (19) more laughing about reading a real estate appraisal book for
 (20) light entertainment.
 (21) MR DIAMOND Didn't know we were going to have voir
 (22) dire of the jury (sic) Is that counsel s intent?
 (23) MR PETUMENOS Yes in aid of objection
 (24) THE COURT This is the witness you said -
 (25) MR DIAMOND Oh I m sorry voir dire of the witness

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- (1) THE COURT Jury's out of the courtroom let the
 (2) record reflect
 (3) MR DIAMOND I'm sorry I misspoke May I be heard
 (4) on this?
 (5) THE COURT Well -
 (6) MR DIAMOND He hasn't asked permission
 (7) THE COURT I think the witness testimony is probably
 (8) - I'll need to hear the witness testimony On the other
 (9) hand it's your exhibit so it seems to me it's your
 (10) examination
 (11) MR PETUMENOS You want me to get away from the
 (12) podium?
 (13) MR DIAMOND The only objection to the exhibit - I'm
 (14) not offering the exhibit into evidence I'm offering some
 (15) information from the exhibit. But the only objection I have
 (16) heard is that the exhibit itself, is an offer of compromise
 (17) under 408
 (18) THE COURT Let's have the witness testify to what it
 (19) was
 (20) MR DIAMOND Your Honor, I think - there's a
 (21) fundamental misconception in Mr. Petumenos' argument about
 (22) the
 (23) scope of 408 We briefed this once before in relation to
 (24) another matter and 408 applies to offers of compromise that
 (25) are offered to prove liability in the matter pending before the
 Court Even if Mr. Petumenos was right that this - this

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- (1) document and this information was used as an offer of
 (2) compromise to settle 1982 litigation with somebody - which I
 (3) don't believe it was - 408 doesn't apply
 (4) MR PETUMENOS Your Honor I disagree with that
 (5) rendition of 408 Because 408 talks both about liability and
 (6) the amount of the claim See if I can find my paper clip
 (7) here
 (8) THE COURT The claim which was disputed as to either
 (9) validity or amount -
 (10) MR PETUMENOS Right
 (11) THE COURT - is not admissible to prove liability
 (12) for or any claim in the amount.
 (13) MR DIAMOND In the litigation in which it was
 (14) offered You can't use somebody's offer of compromise to
 (15) prove
 (16) how he values that claim We litigated this It was a side
 (17) issue in connection with the TAPP flow issues and it was
 (18) briefed to the Court. And we cited to you Bigelow Sanford
 (19) Inc versus Specialized Commercial Floors et seq We also
 (20) cited Am Jur Evidence and Am Jur Compromise The basic rule
 (21) is
 (22) that statements that are made if relevant even in other
 (23) litigation in connection with compromise are admissible in
 (24) another action This is solely - I think -
 (25) THE COURT You don't happen to have copies of those
 cases do you?
 MR DIAMOND I had sent over to me solely the

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- (1) sections of our brief and I don't have the cases with me
 (2) THE COURT Let me see it There's a lot of
 (3) paper under the-dam thing
 (4) MR DIAMOND I don't remember it
 (5) THE COURT Good I'm glad I'm not the only one
 (6) Counsel I don't see a single case in this - in this brief
 (7) that - that meets the - that is on point In other words
 (8) that's - that holds that a settlement - let's just assume
 (9) this is an offer of compromise made in another litigation It
 (10) says an offer of compromise in another litigation by the same
 (11) party right? It's in this litigation
 (12) MR DIAMOND True, same party
 (13) THE COURT Okay It is not covered by this rule Do
 (14) you have a case that says that specifically?
 (15) MR DIAMOND I don't have a case specifically with
 (16) me but in fairness to me this issue was raised all of about
 (17) an hour and a half ago I haven't researched it
 (18) THE COURT I'm certainly not saying you're loading up
 (19) on me, but there's nothing in this brief that tells me that
 (20) gives me a case that holds squarely in line with your position
 (21) is there?
 (22) MR DIAMOND There is nothing in that brief, no And
 (23) I don't remember the facts of the Bigelow case
 (24) THE COURT Well Bigelow said that it was
 (25) inadmissible

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- (1) MR PETUMENOS Judge I have been reading the
 (2) commentary to the rule while you were reading the brief and
 (3) the commentary to the rule discusses that the rule has
 (4) expanded
 (5) the scope of the common law to -
 (6) THE COURT It does
 (7) MR PETUMENOS - to include statements of fact and
 (8) conduct, and beyond mere offers of compromise and so forth
 (9) Perhaps there's not a dispute between counsel and I as to what
 (10) the facts are and we could forego the examination of
 (11) Mr. Propes but I don't know whether you want me to - to state
 (12) what I think the facts are whether you'd rather have me
 (13) examine Mr. Propes
 (14) THE COURT Go ahead He can certainly correct you if
 (15) he thinks you're wrong
 (16) MR PETUMENOS Okay my understanding - and
 (17) Mr. Propes can correct me if I'm wrong My understanding is
 (18) this There was a lawsuit between the federal government and
 (19) the Chugach Alaska Corporation because of the fact and it's
 (20) somewhat technical, because of the fact that due to the
 (21) existence of the Chugach National Forest and the availability
 (22) of land that the Chugach region did not get under ANCSA the
 (23) appropriate amount of - of land and the quality of land that
 (24) the - that ANCSA would have required
 (25) That lawsuit ended up in a settlement whereby the parties
 agreed to go through a process including the Chugach -

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(1) something called the Chugach study whereby they would attempt
 (2) to work out among them what lands Chugach would get what
 (3) selections they'd make what relinquishments they would make
 on
 (4) existing selections to try to resolve the problem
 (5) The - in the course of doing that the federal government
 (6) retained a company called ISER, the Institution for Social and
 (7) Economic Research which put values on the land for the
 purpose
 (8) of attempting to negotiate and make an offer of settlement on
 (9) - in November - well in the fall of 1981 That document
 (10) placed value as to various land parcels on behalf of the
 (11) federal government in that ISER was a contractor with the
 (12) federal government, to assist them in the settlement
 (13) negotiations and backed up the offer to give Chugach the
 (14) lands
 (15) Chugach responded to that offer with its own valuation of
 (16) the lands and Mr Propes was the author of that response The
 (17) memorandum, which is the defendants' exhibit which is before
 (18) you and the testimony that would surround it was Mr Propes
 (19) attempt to say to the federal government. No I don't agree
 (20) with you that the amount of money - the value of the lands
 (21) that you're offering Chugach for selection are as high as you
 (22) say they are Here's what I think they are
 (23) Mr Propes was not an appraiser did not conduct an
 (24) appraisal Did not do any sales comps but just based upon his
 (25) experience, put some numbers down on the - after reviewing the

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(1) parcels and what he knew about them based on his experience
 as
 (2) to the amount that he thought was really at issue and this was
 (3) a - a - the response or the counter to the settlement offer
 (4) that the federal government made in connection with this
 (5) process
 (6) The process continued on There were more counteroffers
 (7) there was more negotiation back and forth Mr Propes was
 (8) central to the negotiating process on behalf of the Chugach
 (9) Alaska Corporation to settle this dispute between the federal
 (10) government and Chugach As the Chugach land manager he
 was in
 (11) the middle of these negotiations
 (12) The relevance of the offer that Exxon is making here is
 (13) that what Chugach really thinks that these lands are worth -
 (14) if you look at the column nothing or a million or in 1981
 (15) they stated that this land was not worth near what they say it
 (16) is now which I think squares exactly with the rule which says
 (17) that in the commentary discusses the things that said
 (18) positions are taken in the course of negotiations parties need
 (19) to be free to make them without it coming back to haunt them
 (20) and so forth
 (21) That's the public policy behind the rule It's the public
 (22) policy behind the fostering settlements and allowing people to
 (23) negotiate freely and what is happening to Chugach here is
 (24) those statements are in fact coming back to haunt them
 (25) MR DIAMOND Before Mr Petumenos launches into his

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(1) argument may I state for the record strong disagreement with
 (2) his recitation of the facts and perhaps he ought to elicit
 (3) from the witness himself the chronology
 (4) THE COURT Fine put the witness under oath
 (5) THE CLERK. Sir can you stand and raise your right
 (6) hand please?
 (7) (The Witness is Sworn)
 (8) THE CLERK. Please be seated and can you attach the
 (9) microphone either to your tie or to your jacket lapel please?
 (10) No the little piece that's connected to that.
 (11) Sir for the record can you state your full name please?
 (12) A My name is Carl Propes Jr
 (13) THE CLERK. And would you spell your last name?
 (14) A Sure P-r-o-p-e-s
 (15) THE CLERK. And your occupation?
 (16) A I own a furniture store in Anchorage called Scan Home
 (17) Furniture and I also work as a part time employee for Nana
 (18) Corporation
 (19) THE CLERK. Thank you
 (20) VOIR DIRE EXAMINATION OF CARL PROPEs
 (21) BY MR DIAMOND
 (22) Q Good morning Mr Propes You were land manager for
 (23) Chugach Alaska from 1976 to 1983?
 (24) A That's right.
 (25) Q Could you describe for the Court the status of Chugach's

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(1) land selections under ANCSA when you first became involved
 with
 (2) the corporation?
 (3) A Chugach had already made their land selections under
 ANCSA
 (4) In compliance with the 1974 1975 ANCSA deadlines And they
 (5) had selected essentially all of the land that had been
 (6) withdrawn for them in the various withdrawal areas around the
 (7) Chugach region
 (8) Q When you got involved you - you criticized the lands that
 (9) had been selected or lands that had been offered for selection
 (10) to Chugach or had some difficulty with the selections?
 (11) A When I got involved after I had been there a little while
 (12) I became familiar with the fact that most of the regional
 (13) corporations land selections were removed from the coast
 were
 (14) largely inaccessible or covered by glaciers to a large extent
 (15) and not what you would think of as being the character of lands
 (16) which were traditionally used by the Chugach people
 (17) Q There then began a process by which to change modify,
 (18) amend or alter the land selections of Chugach Alaska
 (19) Corporation?
 (20) A Yes The corporation made the decision to proceed down
 the
 (21) road to try to improve their - their land settlement.
 (22) Q Can you describe for Judge Shortell what happened how
 that
 (23) process worked in real - I understand this is years of
 (24) history but in thumbnail fashion
 (25) A The CIRI land exchange had occurred been finalized in

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- (1) 1975 so we had the experience of that where another
 (2) corporation that started out with largely inaccessible lands
 (3) had through negotiation and through legislation had improved
 (4) their - their lot quite a bit So we had the - the
 (5) precedence of that And most of the people that have been
 (6) involved both from Chugach and on the federal side in ANCSA
 (7) were aware that Chugach's situation was - was roughly equal to
 (8) CIRI's initial situation
 (9) But as a smaller corporation with less political clout we
 (10) weren't first up at the bat to try to improve our settlement
 (11) CIRI was But since they had accomplished so much with their
 (12) exchange we thought it was worth pursuing basically the same
 (13) approach either administratively or legislatively if we
 (14) needed to to improve our settlement.
 (15) Q What happened after that?
 (16) A We began a series of testimony to familiarize Interior
 (17) Department officials congressional officials with our
 (18) situation That began in about 1977 at least from my
 (19) recollection And then each of the - the years after that we
 (20) put forth different proposals of different areas that would
 (21) constitute an acceptable land settlement to Chugach This was
 (22) mostly done in the context of the D-2 the various D-2 land
 (23) bills that were before Congress in the late 70s
 (24) And when the final D-2 bill ANILCA was enacted in 1980
 (25) We were unsuccessful at having a specific new and improved
 land

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- (1) settlement for Chugach included in that legislation We were
 (2) unsuccessful because in order for anything to be included in
 (3) ANILCA you needed to have the support of different interest
 (4) groups And in our case where most of the region was
 occupied
 (5) by the Chugach forest, it was important to have the Forest
 (6) Service on board It was important to have the Interior
 (7) Department supporting you because of their role in
 implementing
 (8) ANCSA It was important to have the State supporting you and
 (9) perhaps most importantly it was important to have the
 (10) environmental community supporting you And the rule of
 thumb
 (11) back then is of those four groups if you had three out of the
 (12) four supporting your specific proposal it could be included in
 (13) ANILCA. If you lacked at least three out of the four, it
 (14) wouldn't fly
 (15) Q And through 1980 you lacked three out of the four?
 (16) A That's right.
 (17) Q Through 1980 no litigation between Chugach and the United
 (18) States over this issue?
 (19) A No that's not entirely correct.
 (20) Q Tell us
 (21) A There was litigation I don't remember exactly what year
 (22) it was filed It may have been before I first came to Chugach
 (23) '75 or something like that And it asserted different claims
 (24) on different parts of ANCSA but one - the significant one
 (25) the one that you're asking me about, had to do with the basic

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- (1) insufficiency of the regional - what they call regional
 (2) deficiency withdrawal areas where Chugach selected their
 (3) lands the basic insufficiency or inadequacy of those areas
 (4) because of their remoteness from the coast and their steep
 (5) terrain and things like that So that litigation was
 (6) pending
 (7) Q And when was that resolved?
 (8) A I want to say that certain claims were resolved at
 (9) different times in that but I'm not sure that the entire case
 (10) was resolved until the Chugach region settlement was in place
 (11) in 1983 And you can correct me if I'm wrong but perhaps as
 (12) part of that settlement Chugach agreed to dismiss with
 (13) prejudice the remaining claims
 (14) Q Okay let's go back to 1980 and the D-2 bill that was
 (15) enacted in 1980 That created a study a study process?
 (16) A There were three Chugach sections in the D-2 bill One did
 (17) create the Chugach study process and I'll mention the others
 (18) if you like
 (19) One was a partial settlement of claims in the litigation
 (20) that you referred to on village selections under what's called
 (21) 12(b) of ANCSA To allow the village to take their second
 (22) round land selections, the villages of Chenega Eyak and
 (23) Tatitlek their second round land selections from national
 (24) forest lands - this gets very complicated - over and above
 (25) the three townships that ANCSA had

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- (1) Q Let me interrupt because I don't know if that's relevant to
 (2) what Judge Shortell has The D-2 D-2 bill that was as a
 (3) result of the study Chugach had undertaken and not the results
 (4) of ongoing litigation is that correct?
 (5) A That's correct.
 (6) Q The study undertaken lasted for congressional stipulation
 (7) 12 months?
 (8) A Yes
 (9) Q And in connection with that study did the United States
 (10) come forward with a new proposed selection from which
 Chugach
 (11) could pick lands otherwise known as a draw?
 (12) A At least one time, and probably several times during the
 (13) course of that study
 (14) Q We've heard reference to the ISER valuation That was an
 (15) outgrowth of this D-2 study?
 (16) A Yes
 (17) Q Could you describe that to Judge Shortell?
 (18) A Okay It came as quite a surprise to us during the course
 (19) of the study and I think it was in the summer of '81 that the
 (20) Forest Service, apart - I believe this is the case - apart
 (21) from the study group the Chugach land study group had
 (22) separately contracted with ISER an arm of the university to
 (23) perform analysis of different land settlement proposals that
 (24) were being talked about in the context of the study And they
 (25) had contracted there was a \$200,000 - give or take a few

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- (1) thousand - dollar contract with ISER to work for the Forest
 (2) Service on that.
 (3) Q In connection with the D-2 study was Chugach presented
 (4) with a so to speak new menu of parcels from which to select?
 (5) A Chugach did more of the presenting than being presented
 (6) to. The study started December 2nd of 1980 and we got four or
 (7) six months into a one-year study and we were still going
 (8) through the preliminaries as I recall. Nobody had put a
 (9) specific package on the table to negotiate from so it - as I
 (10) recall, Chugach made the first specific offer and then
 (11) counteroffers and different offers follows from that.
 (12) Q All right. In connection with that though a parcel
 (13) became identified and ISER went through and placed values on
 (14) those various properties?
 (15) A Yes.
 (16) Q In response to that, did you undertake to collect a crew of
 (17) consultants to evaluate parcels that were included in the
 (18) ISER menu?
 (19) A We had a group of consultants that worked for us on an
 (20) as-needed basis during the course of the Chugach region
 study,
 (21) you know, from different background different expertise.
 (22) Q Judge Shortell has my only copy of a memorandum that you
 (23) prepared in late 1981 -
 (24) MR PETUMENOS Here you go counsel!
 (25) MR DIAMOND Thanks

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- (1) BY MR DIAMOND
 (2) Q - which we previously marked as DX12855
 (3) MR PETUMENOS He has one there too
 (4) MR DIAMOND You have one in front of you?
 (5) A Yeah I've got one
 (6) MR PETUMENOS Only one that doesn't have one now is
 (7) me
 (8) BY MR DIAMOND
 (9) Q Is this the analysis of which you just spoke?
 (10) A Is this -
 (11) Q The memorandum that you prepared in late 1981?
 (12) A Yes
 (13) Q And the financial analysis of the parcels that were then
 (14) being proposed -
 (15) A Yes
 (16) Q - In the Chugach take?
 (17) A Yes
 (18) Q This wasn't prepared in connection with an attempt to
 (19) resolve any litigation or make an offer to the other side in
 (20) litigation was it?
 (21) A Well technically there may have been litigation pending
 (22) on this general issue at the time. You can check the records
 (23) to see when CNIV Clep B (phonetic) or whatever it was called
 (24) at the time settled but this was more in the context of
 (25) negotiation and proposals and counterproposals during this

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- (1) Chugach region study in an attempt to settle our - our land
 (2) claims
 (3) Q Was this Chugach's though best attempt to come up with a
 (4) value that you thought was appropriate for the various parcels
 (5) then being proposed that Chugach take?
 (6) A If I could put this in context a little bit, Chugach didn't
 (7) believe that it - it should have to place a value on the lands
 (8) that either were in our proposal or in some other proposal
 (9) Q Why not?
 (10) A Well the whole purpose of putting a value on would be to
 (11) limit the worth of the settlement that we would end up with and
 (12) be able to measure it in context of the original lands that
 (13) were set aside for us
 (14) Q Which you thought were really -
 (15) A Were grossly inadequate
 (16) Q Right
 (17) A So anything of the same value as the original withdrawal
 (18) would have also been grossly inadequate. But nevertheless
 (19) since it was done outside the context of the Chugach land study
 (20) group, it was done by one participant, the Forest Service hired
 (21) ISER to come up with a value. So in the context of
 (22) negotiations we felt since they had come up with values and
 (23) we didn't agree with their values we felt compelled to respond
 (24) and come up with our counter values
 (25) Q All right. And was this the corporation's best estimate of

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- (1) the commercial value that could be placed on the 25 parcels or
 (2) groups of parcels that were then being proposed that
 Chugach
 (3) take?
 (4) A Keeping in mind that we didn't have appraisers running all
 (5) over this property appraising them and that there were
 (6) financial constraints on what we could do and everything else
 (7) yes it was our best estimate at the time of what the value of
 (8) those lands was
 (9) Q When you say ours you mean yours and the consultants
 and
 (10) the board members who were participating in the process?
 (11) A Well largely, mine, because I was the person responsible
 (12) for pulling together the advice from the different consultants
 (13) putting together the package getting approval, if necessary
 (14) from the management of the corporation to do it, and to the
 (15) extent that generally it would have been the Chairman of the
 (16) Board that would have been involved with us in the
 (17) negotiations getting his approval to it, yes
 (18) Q But ultimately these numbers were reviewed by and
 approved
 (19) by the highest echelons of the corporation?
 (20) A I don't believe that these - that this memo would have
 (21) gone to the Chugach board for approval -
 (22) Q I meant the chairman -
 (23) A - If it was management's
 (24) Q I meant the Chairman of the Board
 (25) MR PETUMENOS Objection he's interrupting the

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- (1) witness
 (2) MR DIAMOND I m sorry
 (3) A I think this is management s representation and if the
 (4) chairman had felt it advisable to take it to the board he
 (5) probably would have
 (6) MR DIAMOND One moment Your Honor
 (7) BY MR DIAMOND
 (8) Q You mentioned the ongoing political process of getting the
 (9) ANCSA selections issue resolved Did you share this
 (10) document - I mean Chugach share this document with the
 (11) representatives of the federal government with whom you were
 (12) dealing on a political level?
 (13) A I mentioned earlier off the record I don t have a specific
 (14) recollection of passing this out to the Chugach land study
 (15) group but I can only believe that it was produced for that
 (16) purpose and that it was done
 (17) Q Tell us again what the Chugach land study group was
 (18) composed of
 (19) A Was composed of the Interior Department the Agriculture
 (20) Department the State of Alaska and Chugach to conduct this
 (21) one-year study
 (22) MR DIAMOND Your Honor I have nothing further
 (23) MR PETUMENOS I have a few questions Judge
 (24) VOIR DIRE EXAMINATION OF CARL PROPES
 (25) BY MR PETUMENOS

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- (1) Q You mentioned the litigation and you said you would have
 (2) to take a look at the records to see quite how that was fitting
 (3) In I have here a plaintiffs exhibit 8237 entitled Report
 (4) on the Relinquishment of Overselections for Chugach Natives
 (5) Incorporated dated March 8th 1983 which is your document.
 (6) Would you like to take a look at that? Yes It s plaintiffs
 (7) 8237
 (8) And in the introduction you discuss the pendency of
 (9) litigation and settlements that had been reached that were
 (10) connected to these negotiations on page I think, three of the
 (11) introduction Can you recognize that?
 (12) A Uh-huh
 (13) MR DIAMOND Could I have a moment, counsel?
 (14) MR PETUMENOS Sure
 (15) MR DIAMOND Page 37
 (16) MR PETUMENOS See if I can help you show you what
 (17) it is You re at the right, right page
 (18) BY MR PETUMENOS
 (19) Q Now Chugach had pursued and threatened all avenues
 (20) including court action to try to get - get the result it
 (21) wanted am I right?
 (22) A Yes
 (23) Q And there was a settlement of this lawsuit that required
 (24) during the year that we re talking about when you wrote this
 (25) memo in 1981 that Chugach do certain things to try and get this

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- (1) resolved right?
 (2) A I - I see it says that there was a - the litigation was
 (3) dismissed in 1981
 (4) Q And it was dismissed in 1981 pursuant to a settlement
 (5) agreement whereby Chugach was going to have to take some
 (6) action
 (7) to file some relinquishments and, during this year they were
 (8) supposed to take some action as part of the settlement
 (9) agreement am I right?
 (10) A (Nods head up and down)
 (11) Q You have to speak out loud for the record
 (12) A I assume you re correct I - you know I m familiar with
 (13) this - with the - you know I m familiar with this with the
 (14) litigation and - I don t recall The specific duty was not
 (15) just to study things
 (16) Q One of the things that you were hoping to do out of the
 (17) study group was to come to an agreement or an agreed upon
 (18) set
 (19) of land that would resolve the dispute?
 (20) A From our standpoint that was the only purpose of the study
 (21) group
 (22) Q And the fact that you would give your positions back and
 (23) forth in the study group, that was part of the negotiating
 (24) process am I right?
 (25) A Our positions on -
 (26) Q On how much the land was worth?
 (27) A Sure

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- (1) Q What land you should select?
 (2) A Sure
 (3) Q And that was if you were able to reach this agreement, it
 (4) would - it would forego the need potentially for giving up
 (5) litigation again -
 (6) A Yes
 (7) Q - for requiring additional legislative activity?
 (8) A Uh-huh
 (9) Q And for requiring additional administrative activity by the
 (10) Department of the Interior -
 (11) A Correct.
 (12) Q - If you were able to agree?
 (13) A Uh-huh
 (14) Q And the discussion here about consultants, I understand
 (15) there were people talking to you, but the person responsible
 (16) for putting these numbers together, the person that did it was
 (17) you?
 (18) A That s correct.
 (19) Q And you are not an appraiser?
 (20) A Correct.
 (21) Q You did not look at sales comps to come up with these
 (22) numbers?
 (23) A That s generally correct.
 (24) Q There was no - you re not an MAI or subject to the
 (25) Appraisal Institute?

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- (1) A No
 (2) Q And you did not conduct an appraisal pursuant to the
 (3) requirements of - do you know what USPAP is?
 (4) A No
 (5) Q Okay There's a short introduction here Judge in the
 (6) front of the book that gives you the background to what is a
 (7) somewhat complicated situation but those are all the questions
 (8) I have
 (9) THE COURT Hold on let me read this first
 (10) MR DIAMOND May I know exactly what counsel pointed
 (11) out to you?
 (12) THE COURT Memorandum of Understanding dated
 (13) September 17 1982
 (14) MR PETUMENOS There's an introduction section there,
 (15) I meant to point out to the Court, that sort of goes through
 (16) the history for you in written form
 (17) THE COURT This is plaintiffs' 8237 that we're
 (18) talking about; right?
 (19) MR PETUMENOS Yes, Judge I'm not sure I pointed
 (20) out the right pages to you there
 (21) THE COURT I've got it. It's the introduction that
 (22) talks about September 17th, 1982 I was just curious
 (23) counsel I was going beyond what you gave me
 (24) MR PETUMENOS Curiosity -
 (25) THE COURT Yeah I know what it did to the cat, I

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- (1) hope it doesn't do it to me
 (2) MR OPPENHEIMER He hadn't finished the sentence
 (3) though
 (4) THE COURT Do you have any questions Mr Diamond?
 (5) MR DIAMOND Yeah just two follow-up questions
 (6) VOIR DIRE EXAMINATION OF CARL PROPE
 (7) BY MR DIAMOND
 (8) Q You say you're not an appraiser You didn't really think
 (9) that bringing professional appraisers in to evaluate these
 (10) remote parcels would be terribly worthwhile, did you?
 (11) A No that's - that's correct.
 (12) Q Explain
 (13) A From my experience - and I have quite a bit of experience
 (14) at retaining appraisers to do different projects - when you're
 (15) valuing remote property like this large tracts, from the
 (16) standpoint of not necessarily what one appraisal theory or
 (17) another might say that the land is worth But from the
 (18) standpoint as an owner what could Chugach If we ended up
 (19) with
 (20) this settlement derive from this property I - I didn't feel
 (21) that bringing an appraiser in would lead us far in that
 (22) direction
 (23) Q One final question the numbers that are on your 11/30
 (24) 1981 memo in your CNI which then stood for Chugach Native
 (25) Incorporated - that wasn't my question these weren't phoney
 (26) baloney numbers just made up to low ball somebody into

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- (1) negotiation were they?
 (2) A No they weren't They were - they represented at least
 (3) my honest representation as to what I thought these different
 (4) tracts were worth from a potential owner's standpoint
 (5) Q Okay And they were exchanged with representatives of the
 (6) federal government as part to the study group process?
 (7) A Again I said I don't specifically remember passing it out
 (8) but I can't believe that it wasn't distributed to the study
 (9) group
 (10) Q One final question The Page 3 which - of 8237 which
 (11) Mr Petumenos showed you seems to suggest that the litigation
 (12) was settled in '81 prior to the date of your memorandum Does
 (13) that comport with your recollection now?
 (14) A You guys should check the records on it. That's for you to
 (15) determine This was longstanding litigation that had been
 (16) going on since before I started to work for Chugach and at
 (17) different times different claims in that were settled with
 (18) prejudice or dismissed with prejudice But I don't know if all
 (19) of the litigation was over in '81 or if it was only settled as
 (20) part of the '80 - 1982 CNI land settlement agreement You
 (21) need to check the record
 (22) Q But you don't recall preparing this, considering the issues
 (23) and incorporated it into it in connection with that settlement
 (24) agreement?
 (25) A That's correct.

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- (1) MR PETUMENOS I just have one question
 (2) VOIR DIRE EXAMINATION OF CARL PROPE
 (3) BY MR PETUMENOS
 (4) Q The reason - I think you told me before the reason that
 (5) you didn't want to obtain an appraiser, or consult an appraiser
 (6) back in 1991 (sic) is that ANCSA was just getting started?
 (7) THE COURT Wrong date counsel, you said 1991
 (8) MR PETUMENOS I said 1991?
 (9) THE COURT You said 1991
 (10) BY MR PETUMENOS
 (11) Q 1981 ANCSA was just getting started back then?
 (12) A No
 (13) Q Well I mean there hadn't been much experience with the
 (14) ownership of the lands in '81, had many exchanges taken place
 (15) by that time?
 (16) A Not many I mentioned the CIRI exchange that had taken
 (17) place by then
 (18) Q Right. You've indicated to me that now in 1994 there's a
 (19) lot more experience with wilderness property and with remote
 (20) lands and that the - the issue of having an appraiser get
 (21) involved in that sort of thing now is vastly different in 1981
 (22) when you were looking at it?
 (23) A I didn't mean to indicate that. I don't think I said that.
 (24) Q Is it your position today that appraisers have no role to
 (25) play in that area?

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- (1) A No You'd have to take a look at the specific assignment
 (2) and make a determination. What I said was that I've had a lot
 (3) of recent experience retaining appraisers for specific
 (4) projects but those projects aren't necessarily the same as
 (5) what we were working on here in 1981
 (6) Q Okay
 (7) MR PETUMENOS I have nothing further
 (8) THE COURT I need to know something here. Your memo
 (9) is entitled proposed federal settlement of 11/13/81, correct?
 (10) A Correct
 (11) THE COURT What federal settlement are you talking
 (12) about?
 (13) A The offer made to us by the federal government during the
 (14) context of the Chugach land study sometime preceding that
 (15) November date in '81, the federal government made one or two
 (16) or
 (17) three different offers with different tracts in each to us. So
 (18) those tracts were on the bargaining table and so -
 (19) THE COURT All the tracts listed here?
 (20) A I believe so. They had either been put on the table by
 (21) Chugach or by the federal government.
 (22) THE COURT All right. And this - and this was an
 (23) attempt to resolve the disputed claim between Chugach and
 (24) whom?
 (25) A I - you mean that document?
 (26) THE COURT Yes

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- (1) A That document was - the purpose of it was to - for
 (2) Chugach to critique or come out with our values for those
 (3) specific properties and to point out the contrast between our
 (4) valuation and federal - or the Forest Service valuation
 (5) THE COURT Okay. I'm trying to figure out who the
 (6) dispute is between. Chugach is clearly a disputant here?
 (7) A The dispute on values?
 (8) THE COURT Yes
 (9) A It would have been between what we thought particular lands
 (10) were worth - we meaning Chugach - and what the ISER
 (11) values
 (12) were on those particular tracts
 (13) THE COURT And who did ISER represent?
 (14) A ISER worked for the Forest Service
 (15) THE COURT And was the Forest Service disputing your
 (16) claim?
 (17) A We were not claiming the lands were worth anything. They
 (18) initiated that process by coming up with values. We were
 (19) responding
 (20) THE COURT Clearly disputing their claims?
 (21) A Correct
 (22) THE COURT Okay. Thank you
 (23) Anything else?
 (24) MR DIAMOND Not of the witness
 (25) THE COURT Now, knowing what my MO is counsel do
 (26) you really think I'm going to decide this question now?

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- (1) MR DIAMOND Do I think you're going to decide it?
 (2) THE COURT That I'm going to decide this question
 (3) You've given me a two-page memo that doesn't deal with the
 (4) question
 (5) MR DIAMOND I am not suggesting that you shouldn't
 (6) decide this now - that you should - shouldn't consider this a
 (7) little bit more. This is a real problem for us because this -
 (8) THE COURT Well no. Actually it occurs to me that I
 (9) need to know what parts of the document you want to get in
 (10) MR DIAMOND In fact really all I expected to talk
 (11) to him about was the valuation that the corporation came up
 (12) with for two parcels here
 (13) THE COURT Okay which ones?
 (14) MR DIAMOND The two oiled parcels that Chugach owns
 (15) LaTouche and Knight Island
 (16) THE COURT That's number 13 on the memo
 (17) MR DIAMOND And number 23
 (18) THE COURT And number 23 on the memo
 (19) MR PETUMENOS May I approach the Court with another
 (20) exhibit?
 (21) THE COURT Well wait a minute now counsel
 (22) The Knight Island for instance says ISER value not
 (23) given. Why should Chugach -
 (24) MR DIAMOND I'm not using that part. The right hand
 (25) column their internal valuation the CNI value they came up

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- (1) with a value when this parcel was put on the table what's the
 (2) value to us the corporation of that parcel
 (3) THE COURT And what did they say?
 (4) MR DIAMOND What did they say?
 (5) THE COURT Yeah
 (6) MR DIAMOND It has no value to us
 (7) THE COURT I don't know whether they did or not. Do
 (8) you have the memo in front of you there? The zero there, does
 (9) that mean no value, or you're just not responding because
 (10) value
 (11) is not given by ISER?
 (12) A It meant no value
 (13) THE COURT It meant - to you it meant nothing
 (14) A We thought that it would cost more to administer the lands
 (15) as an owner than we would get in immediate revenue that could
 (16) be measured from that property
 (17) THE COURT Why? Why did you think that?
 (18) A Well if - the main reason that that particular tract was
 (19) in the proposal was for its mineral value, which is an
 (20) extremely long term and there may be a one or two or three
 (21) percent probability that a mine will ever be developed there of
 (22) commercial grade. Therefore we didn't feel, from an owner
 (23) standpoint, that it was realistic to attribute any value to
 (24) that, because of the - the slim chance that we would ever
 (25) derive any income from it.
 (26) And in terms of a secondary value, which would be real

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- (1) estate or its surface value except for a few lots that could
 (2) be carved out on a couple of coves on that island. It's very
 (3) precipitous and no significant timber value or real estate
 (4) value.
 (5) THE COURT: Okay. Now on LaTouche Island, the
 (6) difference is -
 (7) A LaTouche is similar to Knight Island in that it has mineral
 (8) potential but again very long-term. But I felt at the time
 (9) that it was dissimilar in that it wasn't quite as precipitous
 (10) as Knight Island and you'd have better opportunity for deriving
 (11) some surface - some value, some return from the surface
 (12) estate from lot sales, house development, and things like
 (13) that, and so that's how - that's why we used that to come up
 (14) with a million dollars.
 (15) MR. PETUMENOS: May I approach the Court with an
 (16) exhibit?
 (17) THE COURT: Yeah.
 (18) MR. PETUMENOS: This is how Exxon intends to use the
 (19) proof. And -
 (20) THE COURT: Hold on. Okay.
 (21) MR. PETUMENOS: I would expand. In addition to my
 (22) objection from the -
 (23) THE COURT: Wait, wait, I want to ask you a question.
 (24) Counsel, did Mundy value the LaTouche Island parcel at
 (25) \$12,640,000?

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- (1) MR. PETUMENOS: I think that's the unimpaired value.
 (2) THE COURT: And what's the damages claimed?
 (3) MR. PETUMENOS: I'd have to take a look. I think
 (4) that's the unimpaired value.
 (5) THE COURT: Knight Island, six, eight, forty-eight is
 (6) the unimpaired value?
 (7) MR. PETUMENOS: I believe so. And I would want to
 (8) expand the objection here to include Rule 403.
 (9) THE COURT: Well, sure, I mean, there's lots of things
 (10) that occur to me that this may be inadmissible for independent
 (11) reasons.
 (12) MR. DIAMOND: I'm sorry, I didn't hear that.
 (13) THE COURT: May be inadmissible for independent
 (14) reasons, but I haven't had the time to consider it. It's not
 (15) the easiest legal question in the world, and this evidence
 (16) appears to me to be the kind that's very susceptible to
 (17) misinterpretation, so I have to deal with it and I have to deal
 (18) with it on my schedule and not on yours.
 (19) MR. DIAMOND: You know, Your Honor, I - I don't - I
 (20) don't suggest you do anything, anything else. This - this
 (21) presents a problem for us both in terms of our order of proof
 (22) trial presentation. This is not an issue that has been - that
 (23) just jumped out of the - out of the box this morning or
 (24) yesterday or the day before.
 (25) THE COURT: Yes, but it just jumped into mine.

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- (1) MR. DIAMOND: That's true. I guess my quarrel is with
 (2) plaintiffs' counsel's not raising this at an earlier time when
 (3) we could have dealt with it. You could have dealt with it in a
 (4) more reflective way, and it would not have had as derailing
 (5) effect as it may have on our trial presentation.
 (6) THE COURT: It's a shame, but counsel, this is - this
 (7) is one of those things that my - my instincts tell me I better
 (8) not decide it off the cuff.
 (9) MR. DIAMOND: You should go with your instincts, then.
 (10) THE COURT: Okay, so what do we do?
 (11) MR. DIAMOND: He is leaving the country on Friday?
 (12) A Sunday.
 (13) THE COURT: Well, you're not going to be testifying on
 (14) Saturday, I can guarantee you that. All right. So I mean, you
 (15) have to - you have to - I guess the issue is you have to
 (16) determine what you want. You can't have him now or you can
 (17) have him without this evidence, one of the two.
 (18) MR. DIAMOND: I'll wait.
 (19) THE COURT: And if, in fact, you want him to testify
 (20) he's not going to testify before tomorrow because I'm going to
 (21) need to consider this this afternoon at the earliest and - and
 (22) I don't know that I won't delay it even further. I'm not
 (23) promising anything.
 (24) MR. DIAMOND: It would be our strong preference to put
 (25) him on first tomorrow. If we can resolve this this afternoon.

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- (1) subject to his availability tomorrow.
 (2) THE COURT: What do we have this afternoon, Pat?
 (3) THE CLERK: I didn't think you had anything, but I'll
 (4) call.
 (5) THE COURT: Wasn't this the time that I was set to do
 (6) the criminal case that I put off until November?
 (7) THE CLERK: One of us can run down, nobody's there.
 (8) THE COURT: Counsel, I'm just trying to figure out
 (9) when we can do this. I'd like to do it about 3:00 this
 (10) afternoon.
 (11) Okay, you can step down, sir, obviously you're not going to
 (12) be testifying right now.
 (13) Do you have somebody to fill?
 (14) MR. DIAMOND: No.
 (15) THE COURT: You don't?
 (16) MR. DIAMOND: Well, we have some short - about 30
 (17) minutes worth of deposition testimony that we could do now.
 (18) THE COURT: What a way to end the day, huh, counsel?
 (19) MR. DIAMOND: We expected the cross-examination of -
 (20) THE COURT: Sure. Well, I just want to go with what
 (21) we can fill with, and since depositions are all that's
 (22) available, that's what we'll fill with.
 (23) MR. DIAMOND: This will be read for the first time by
 (24) the readers. I have a feeling.
 (25) MR. OPPENHEIMER: Who stands up, Your Honor?

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- (1) THE COURT Mr Ford isn't it?
- (2) MR OPPENHEIMER Yes Richard
- (3) MR DIAMOND I wonder if you could ask
- (4) Mr Oppenheimer of his opinion about this legal issue get me off the hook?
- (5) THE COURT Actually I've had time to review that
- (6) opinion and by golly it does have some relevance
- (7) MR OPPENHEIMER It does and Your Honor - Your
- (8) Honor, it was disclosed to me last night that the person who
- (9) found it at my request was also diligent enough interestingly
- (10) to Sheppardize it and it has been cited by the Alaska Supreme
- (11) Court now If you ask I will provide you with that as well
- (12) THE COURT I believe you I was just - when I read
- (13) it I first thought gee this hasn't got anything to do with
- (14) the issues and I looked further and by golly it did
- (15) MR OPPENHEIMER I have no idea what leapt into my
- (16) mind at the time
- (17) THE COURT Counsel are you ready to go because if
- (18) you want a break I'll give you a break
- (19) MS SMITH I'm sorry?
- (20) THE COURT I'll give you a break so you can get
- (21) ready If you need one
- (22) MS SMITH I don't think it makes any difference
- (23) THE COURT Bring the jury down let's bring them
- (24) down You can have your exhibits back both of you
- (25)

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- (1) MS SMITH Your Honor - well Bob I'm unimpeaching
- (2) our honor, so come on up here for a second It turns out the
- (3) exhibit that Mr Stoll said we didn't provide him DX14058 he
- (4) signed for last Saturday
- (5) THE COURT When I made the ruling, I thought it
- (6) didn't make any difference I mean it didn't really make any
- (7) difference to me This is not -
- (8) MS SMITH All right I just didn't want it to be
- (9) left that we -
- (10) THE COURT I tried to make it clear, the reason I
- (11) kept it out is simply because it's in the testimony and the
- (12) separate exhibit was absolutely unnecessary
- (13) MR STOLL The problem is Judge, I mentioned to
- (14) Linda that there's a ruling in our office, never give me the
- (15) only copy of the exhibit. What happened was this came in late
- (16) and I -
- (17) THE COURT Gee I don't know why they do that.
- (18) MR STOLL I know exactly why I lose it all the
- (19) time
- (20) MR DIAMOND Are we taking this opportunity to dump
- (21) on Mr Stoll off the record
- (22) THE COURT No, we're on the record
- (23) MR STOLL Dumping all over me you know loud and
- (24) clear
- (25) THE COURT You can go off the record now

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- (1) (Recess at 12 38 p m to 12 42 p m)
- (2) (Jury in at 12 42 p m)
- (3) THE COURT You can be seated We're going to have
- (4) some more deposition testimony at this time I believe
- (5) counsel -
- (6) THE CLERK We're still missing a juror
- (7) THE COURT Oh okay
- (8) THE COURT You can swear the witness
- (9) THE CLERK Sir - ma'am please raise your right
- (10) hand
- (11) (The Witness is Sworn)
- (12) THE CLERK Please be seated and can you attach the
- (13) microphone please to your sweater
- (14) Ma'am, for the record, could you state your full name
- (15) please?
- (16) A Heather Kitson, K I-t-s-o-n
- (17) THE CLERK Thank you
- (18) MS SMITH I'm going to read some depositions, we're
- (19) going to have a different reader come in for each witness
- (20) we'll just roll them in and out and I'm going to do by
- (21) corporation We're going to start with Eyak. Exxon calls by
- (22) deposition Nancy Barnes
- (23) And the introductory statement is The following are
- (24) excerpts from the sworn deposition testimony of Nancy Barnes
- (25) who was deposed in August of 1993 At the time of her

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- (1) deposition Ms Barnes had been a member of the Eyak
- (2) Corporation Board of Directors since at least 1984 Ms Barnes
- (3) also served as chairman of the Eyak Corporation Board of
- (4) Directors from 1988 to 1992.
- (5) DIRECT EXAMINATION OF NANCY BARNES (Read)
- (6) BY MS SMITH
- (7) Q Do you recall during the time that you were chairman did
- (8) you have any land use policies that governed Eyak
- (9) Corporation's
- (10) lands?
- (11) A Yes we had land policies
- (12) Q Speak up just a tiny bit. Do you recall what those
- (13) policies were?
- (14) A No there was probably various policies that would be on -
- (15) in the files I couldn't say for sure
- (16) Q Do you recall whether there were any particular policy as
- (17) to whether or not shareholder approval was required before
- (18) lands were sold?
- (19) A Yes that was - that's always been a given
- (20) Q Could you tell me the policy on that one?
- (21) A There - no, ANCSA lands are for sale I couldn't - I
- (22) don't even know if it's a written policy The shareholders
- (23) mandated this at the annual meeting years ago and the Board's
- (24) always honored that and feels strongly and has made that
- (25) statement.
- (26) Q And to the best of your understanding during the time that

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- (1) you were Chairman of the Board that remained the corporation s
- (2) policy that no Eyak Corporation ANCSA lands were for sale?
- (3) A That s right to this day
- (4) Q We talked - I had a follow up question We talked before lunch a little bit about the need for shareholder approval in order to sell any lands
- (5) A Uh huh
- (6) Q That policy has remained consistent has it not from the time that what you know whether it was an informal or a formal resolution in the present is that correct for Eyak Corporation?
- (7) A Since I've been on the board it s just always been a policy in my mind that you know, that ANCSA lands are not for sale
- (8) Q You said it s been a policy in your mind Has it been one that s been applied in the corporation as well?
- (9) A Yes and it s also in our mission statement
- (10) Q Are there any of Eyak Corporation s lands that have been sold during the time that you were the Chairman of the Board?
- (11) A No
- (12) MS SMITH We now call by deposition Lucas Borer
- (13) MR STOLL She doesn't look like a Lucas to me
- (14) MS SMITH You want to go, Bob? We can -
- (15) THE CLERK Can you raise your right hand please?
- (16) (The Witness Is Sworn)

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- (1) THE CLERK Please be seated
- (2) Sir for the record can you state your full name?
- (3) A David Cress Johnson
- (4) THE CLERK And spell your last name please
- (5) A J-o-h-n-s-o-n
- (6) THE CLERK Thank you
- (7) MS SMITH All right this is the statement on Lucas Borer The following excerpts are from the sworn deposition testimony of Lucas Borer who was deposed in December of 1992
- (8) Mr Borer served as a member of the Eyak Corporation Board of Directors from 1984 to 1988 Mr Borer served as acting general manager and general manager of the Eyak operation CEO of the Eyak Corporation and Chairman of the Board of the Eyak Corporation Board of Directors Mr Borer held various positions with Eyak Corporation and its subsidiaries until 1992
- (9) DIRECT EXAMINATION OF LUCAS BORER (READ)
- (10) BY MS SMITH
- (11) Q So I guess the - the piece of the prioritization process that I m really asking about - maybe my question wasn't as good as it could have been - is how Eyak decided what land it wanted to select and which land it wanted to either leave low on the list or even off the priority list?
- (12) A Primarily dollar value Whatever would create the biggest bang for the buck

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- (1) Q Dollar value in the sense of development value?
- (2) A Anything that in your wildest dream could possibly make money
- (3) Q Now what are those the primary ways that land among the selections that Eyak made could make money?
- (4) A Timber tourism mining
- (5) Q What was the last one?
- (6) A Mining
- (7) Q Well the results of mining belong to Chugach regional corporation don't they?
- (8) A Yes
- (9) Q So did Eyak have a direct interest in the mining?
- (10) A Yes
- (11) Q How?
- (12) A They pay Chugach a royalty and they would go mine
- (13) Q So the expectation is that Chugach would not itself do the mining on Eyak lands?
- (14) A Chugach itself never did any mining as far as I know on Eyak lands
- (15) Q Any other major ways to make money from the land?
- (16) A I m sure there are a number of them but basically those are the things that popped right out to mind but there were brainstorming sessions of just anything you could dream up
- (17) Q During your tenure with the corporation, did Eyak offer to sell any of its property?

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- (1) A Yes When I came on there, they had land for sale
- (2) Q And what happened in connection with those offers?
- (3) A We - that s pretty broad Basically we sold land until we got a resolution passed to sell no more lands
- (4) Q Do you recall approximately when that resolution was passed?
- (5) A I think it was in 87 It would have been after the NOL transaction as I recall
- (6) Q Did the prioritization process affect which - what lands would be conveyed?
- (7) A Yes
- (8) Q Okay how did it affect what lands would be conveyed?
- (9) A If it was low on the priority list below your entitlement it's not going to get conveyed
- (10) Q Did you select more lands than were within your entitlement?
- (11) A Yes
- (12) Q Why did you select more land than you were entitled to?
- (13) A Because the lands hadn't been surveyed so you don't know Since the water is not counted against you you don't know how much land is in each section so you have to do overselection
- (14) Q When you did your reprioritization did you review all of the lands that had previously been selected in order to confirm that you were getting the most bang for your buck with the selections?

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- (1) A Tell me what you mean by review "
- (2) Q Well you looked at every parcel that had been previously
- (3) selected to make sure it was in the right priority correct?
- (4) A Well let's put it this way I skipped over the ones that
- (5) were tops of glaciers and things like that I didn't even
- (6) bother going there Okay I didn't think in my lifetime the
- (7) glacier would leave or in anybody else's Yes we went through
- (8) each section we being primarily myself and looked at each
- (9) section to figure out where the most value was and that's of
- (10) the land that had not yet been conveyed
- (11) MS SMITH All right thank you Mr Borer
- (12) We call by deposition Dee Lane
- (13) Don't leave it's not that bad
- (14) MR STOLL I don't know
- (15) MS SMITH I did consider sitting here reading the
- (16) question and running up and giving the answer because that's
- (17) sort of a lawyer's dream
- (18) MR PETUMENOS It's a Woody Allen movie too
- (19) THE CLERK Ma'am would you stand and raise your
- (20) right hand?
- (21) (The Witness Is Sworn)
- (22) THE CLERK Please be seated and attach the
- (23) microphone
- (24) Ma'am for the record could you state your full name and
- (25) spell your last name?

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- (1) A My personal name or this name?
- (2) THE CLERK Yes your name
- (3) A Heidi Downey D-o-w-n-e-y
- (4) THE CLERK Thank you
- (5) MS SMITH All right, the following are the excerpts
- (6) from the sworn deposition testimony of Dee Lane who was
- (7) deposed in December of 1992 Ms Lane was employed by the
- (8) Eyak
- (9) Corporation as the land manager from August 22nd 1989
- (10) through
- (11) June 28 1991
- (12) DIRECT EXAMINATION OF DEE LANE (Read)
- (13) BY MS SMITH
- (14) Q When you came on board Dee in August of 1989 did the
- (15) corporation have any formalized land use policy?
- (16) A One I know of is that they wouldn't sell any land That
- (17) was definitely a policy There may have been others but I
- (18) developed some and they were for the most part, approved by
- (19) the Board
- (20) Q And while you were considering the issue in a corporate
- (21) capacity the corporation was pretty clear that it wanted to
- (22) timber its lands rather than preserve them in the natural
- (23) state?
- (24) A There once again you wind up - the shareholders -
- (25) perhaps holding a different view than the administration
- (26) Q I understand okay The administration's standpoint I
- (27) should say

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- (1) A Right.
- (2) Q The corporate, the Board of Directors and governance had -
- (3) were in favor of timbering?
- (4) A The policy makers were in favor of timbering
- (5) Q As opposed to preservation?
- (6) A Correct is what - I guess I mean I can't say for sure
- (7) but I would guess that that was given what I know of them
- (8) Q Given your work there as land manager for a year or two?
- (9) A Right.
- (10) Q Given the total of Eyak lands selected is 148,000 acres
- (11) would it be accurate to say that the existing uses all
- (12) combined, were a very small portion of all that?
- (13) A That's correct
- (14) Q Is it true that a very substantial proportion of the Eyak
- (15) holdings were going to be used for timberlands or simply for
- (16) subsistence lands and weren't going to be -
- (17) A That's true
- (18) Q - developed or -
- (19) A Sure because it's wooded remote lands, not on the coast.
- (20) The coastal strip of course, is good stuff, no matter where
- (21) you are if you're on the water hey?
- (22) Q And most of the sites that you were mapping and
- (23) determining
- (24) uses for were on the coast?
- (25) A Yes they were along the water for the most part, whether
- (26) it was the coast or the lakes or the river or whatever

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- (1) Q Are you aware of any solid or hazardous wastes that are on
- (2) Eyak lands?
- (3) A Well yeah we had - we had two sites that - the Chase
- (4) site at the round house that was a really bad situation And
- (5) later on - and it would have been reflected in this
- (6) document - we had some diesel fuel spots out at the quarry
- (7) site and for some peculiar reason, the State Department of
- (8) Environmental Conservation decided to get really hard on us
- (9) and
- (10) I just went right along with them and anything they wanted, I
- (11) was willing to do And that was just before I was laid off,
- (12) just before I was fired, and that may have played a part in it
- (13) because I just figured it didn't pay to do anything, but just
- (14) do what they asked I mean it was minor We asked the
- (15) contractor to do X, Y, Z, and they did it, and I got in hot
- (16) water over it.
- (17) Q Are those the only two sites like that that you can think
- (18) of?
- (19) A Well we also had - we had a lot of debris that had been
- (20) dumped on that Chase site, so we had a combination of old
- (21) trailers and broken-down cars and trucks with all the windows
- (22) broken out and only one tire, and stuff like that, so we had to
- (23) clear that, too
- (24) Q Any other sites, though, that had had hazardous or solid
- (25) waste on them?
- (26) A Scattered all over Eyak lands there People use them for

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- (1) garbage dumps so it was my - the shareholders hated having
 (2) their lands covered with debris and so we made a real effort
 (3) to try to get that removed cleaned up and out of there So
 (4) that was some of this And some of it was like barrels of oil
 (5) and you know bad stuff and some of it was just people's
 (6) garbage They just took the garbage bags out and dumped
 them
 (7) over the edge of -
 (8) Q Is there any material that would reflect where those
 (9) disposal sites were so to speak?
 (10) A No
 (11) Q Can you estimate for me how many there were dozens?
 (12) A I'd say maybe a dozen
 (13) MS SMITH Thank you
 (14) We call to the stand by deposition Steven Ujjoka
 (15) U j j o - k a and he is the last Eyak person
 (16) THE CLERK. Sir please raise your right hand
 (17) (The Witness is Sworn)
 (18) THE CLERK. Please be seated
 (19) Sir for the record can you attach the microphone and
 (20) state your full name?
 (21) A My name is Daniel Eugene Egging last name is spelled
 (22) E-g-g i n-g
 (23) THE CLERK. Thank you
 (24) MS SMITH Okay the following are excerpts from the
 (25) sworn deposition testimony of Steven Ujjoka who was deposed
 in

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- (1) December of 1992 At the time of his deposition Ujjoka had
 (2) been the controller for the Eyak Corporation for 11 years
 (3) DIRECT EXAMINATION OF STEVEN UJJOKEA (Read)
 (4) BY MS SMITH
 (5) Q Question to the best of your knowledge is there any oil
 (6) from the Exxon Valdez on Eyak corporate lands now?
 (7) A No
 (8) Q That's no you don't know or no there is not?
 (9) A No to the best of my knowledge there is no oil on Eyak
 (10) lands
 (11) Q Did oil reach the shores of Cordova?
 (12) A No it did not
 (13) Q In your capacity as controller for the Eyak Corporation
 (14) did you see all revenues that came into the corporation?
 (15) A Yes that come directly to the Eyak Corporation, yes And
 (16) the marina and Eyak development and Eyak timber yes
 (17) Q Are any of the revenues of any of the Eyak entities
 (18) primarily dependent on tourism?
 (19) A No
 (20) Q Do any of the Eyak entities rent camp sites?
 (21) A Yes the Eyak Corporation does
 (22) Q Is there a registered camp site use on a yearly monthly or
 (23) any other basis?
 (24) A Well our primary - I shouldn't say camp site We have a
 (25) cabin rental agreement with Alaska Wilderness Outfitters I

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- (1) believe it is
 (2) Q Remind me of the name of that cabin
 (3) A There is one in Simpson Bay and one in Alice Cove and then
 (4) there are two tent sites that they have - oh and there's one
 (5) in Sheep Bay that we just -
 (6) Q Sheep Bay cabin?
 (7) A Yeah
 (8) Q So there are three cabins?
 (9) A Yes
 (10) Q And how many tent sites?
 (11) A Two I believe
 (12) Q Do they have names?
 (13) A Not that I'm aware of There is Sheep - in Simpson Bay
 (14) but I don't recall names for them
 (15) Q So two Simpson Bay camp sites so that's five total What
 (16) would you call them camping areas or do you lump this in
 some
 (17) way?
 (18) A They're all lumped under one contract
 (19) Q And those are all with Alaska Wilderness?
 (20) A Yes
 (21) Q Does - do any of the Eyak entities obtain any other
 (22) revenues related to tourism other than those that contract with
 (23) Alaska Wilderness?
 (24) A No
 (25) Q Now when did the contract start with Alaska

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- (1) Wilderness?
 (2) A About 1985 I believe
 (3) Q Was that for all five of those locations?
 (4) A No I believe it was originally started with just - the
 (5) Alice Cove and Simpson Bay cabins
 (6) Q And when were the others added the other three sites?
 (7) A The camp sites I believe were added in about 88
 (8) Q And the Sheep Bay cabin?
 (9) A Just this past year
 (10) Q 1992?
 (11) A Yes Well no 91 I'm sorry
 (12) Q Have the revenues stayed about the same for those five
 (13) locations since the beginning of the contract?
 (14) A The original revenues were lower because they did some
 (15) in-kind services fixing up the cabins
 (16) Q Okay Now, Alaska Wilderness took over maybe in 85 or 86
 (17) the rental of those cabins as shown on the exhibit that lists
 (18) the income?
 (19) A Uh huh
 (20) Q It looked to me like they paid their yearly lease rate
 (21) without any default or changes after the spill Is that your
 (22) recollection?
 (23) A Yes
 (24) Q And it looks like that payment was \$5,000 a year until the
 (25) last year where it went up another 2,000, I guess for the extra

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- (1) land they were getting is that correct?
 (2) A Yes
 (3) Q How much extra land did they get for the \$2 000? You
 (4) probably know that much
 (5) A Well it was for the use of the cabin in Sheep Bay
 (6) Q One cabin?
 (7) A Yes
 (8) Q One site?
 (9) A Yes
 (10) Q Had the corporation ever to your knowledge tried to lease
 (11) that cabin before?
 (12) A No
 (13) Q Were there ever any competing offers for that cabin that
 (14) you know of?
 (15) A Yes there were
 (16) Q Okay thank you
 (17) MS SMITH We now call by deposition Mary Gordaoff
 (18) And we've moved over to Tatitlek Corporation
 (19) Can we have the Elmo?
 (20) THE CLERK. Ma'am can you raise your right hand
 (21) please?
 (22) (The Witness is Sworn)
 (23) THE CLERK. Please be seated and attach the
 (24) microphone
 (25) MS SMITH You do not bear a striking resemblance -

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- (1) THE CLERK. Ma'am for the record can you state your
 (2) full name and spell your last name?
 (3) A Yes My name is Teresa Eileen Dawson that's D-a-w-e-o-n
 (4) THE CLERK. Thank you
 (5) MS SMITH Introductory statement is that the
 (6) following are excerpts from the sworn deposition testimony of
 (7) Mary Gordaoff who was deposed in December of 1992 At the
 (8) time of her deposition Ms Gordaoff had served on the Tatitlek
 (9) Corporation Board of Directors from 1982 through 1992 and
 was
 (10) President of Tatitlek Corporation from 1984 through 1992
 (11) DIRECT EXAMINATION OF MARY GORDAOFF (Read)
 (12) BY MS SMITH
 (13) Q And of the Tatitlek lands that were included as subsistence
 (14) lands only a very small fraction of those lands had been
 (15) affected by the oil spill directly is that right? Because you
 (16) already said it's just a small beach area that has any oil left
 (17) on it right?
 (18) A Yes
 (19) Q And it was only a small beach area that was oiled even at
 (20) the time of the spill correct?
 (21) A Yes
 (22) Q Has the spill changed the Tatitlek Corporation's ability to
 (23) use its lands in any way?
 (24) A You mean the Tatitlek Corporation lands? No
 (25) Q Actually is there anything that the Tatitlek Corporation,

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- (1) when it - was in a position to do with its land before the oil
 (2) spill that it now cannot do because of the oil spill?
 (3) A No not that I know of
 (4) Q Okay Well is there anything that the Tatitlek
 (5) Corporation does today with its lands that is different from
 (6) what it did say, on January 1 1989?
 (7) A The only thing different that we have done is we have
 (8) allowed our shareholders to have some land out in the Sound
 (9) Q And that's the so-called Shareholder Home Site Program?
 (10) A Correct
 (11) Q Of which there were 248 or so plots distributed and most of
 (12) those brought - bought back by the corporation is that right?
 (13) A Half of them Not most of them
 (14) Q Other than the shareholder home sites, has Tatitlek offered
 (15) to sell its land to any parties since 1980?
 (16) A No
 (17) Q My understanding is that the Tatitlek Corporation has had
 (18) in effect for quite some time a no-sale corporate lands
 (19) policy is that right?
 (20) A That's correct.
 (21) Q Is there any indication that you know of that that policy
 (22) could be modified in any way in the near future?
 (23) A Maybe a complete change of the Board and the President
 (24) Q Right, but short of a palace coup this is the way things
 (25) are going to remain?

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- (1) A That's exactly right.
 (2) Q So would it be fair to say that from the time you became
 (3) President, that's the time when the really solid policy of not
 (4) selling the lands came into effect?
 (5) A Yes
 (6) Q And that will continue as long as you have anything to say
 (7) about it right?
 (8) A Absolutely
 (9) MS SMITH All right. Thank you
 (10) We call to the stand by deposition James Romerdahl
 (11) THE CLERK. Sir, please remain standing and raise your
 (12) right hand
 (13) (The Witness is Sworn)
 (14) THE CLERK. Please be seated and attach the
 (15) microphone
 (16) Sir for the record, can you please state your full name?
 (17) A Jonathan E Sperber
 (18) THE CLERK. Can you spell your last name?
 (19) A S-p-e-r-b-e-r
 (20) THE CLERK. Thank you
 (21) MS SMITH All right, here's the introductory
 (22) statement. The following are excerpts from the sworn
 (23) deposition testimony of James Romerdahl who was deposed in
 (24) August of 1992 Mr Romerdahl has been the financial
 (25) consultant to the Tatitlek Corporation since July, 1987

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- (1) Mr. Romerdahl was designated by the corporation as a person
 (2) knowledgeable on the corporation's use and management of its
 (3) lands and his testimony binds the corporation
 (4) DIRECT EXAMINATION OF JAMES ROMERDAHL
 (5) BY MS. SMITH
 (6) Q What businesses does the Tattiek Corporation currently
 (7) own if any?
 (8) A Well, they - when you say owned business they don't own
 (9) the stock of any business but they own a building over in
 (10) Valdez called the Tattiek Business Center. It's like a
 (11) two-story 12,000-square-foot log office building. For what
 (12) it's worth, it's one of the nicer buildings, office buildings
 (13) in Valdez.
 (14) Q I also ran across references to a Heather Island project?
 (15) A Yes.
 (16) Q Is that still up in the air?
 (17) A It's still up in the air. Heather Island is right off of
 (18) the Columbia Glacier and, you know, it's a fantastic view of
 (19) the glacier and there has been discussion for a number of years
 (20) about putting some kind of a tourist-related facility there.
 (21) And even before I came on board, there was evidence in the file
 (22) that you know, feasibility kind of studies about what kind of
 (23) traffic they could expect and I think it's discussed at least
 (24) annually it's discussed about you know, how we could do this.
 (25) We had actually asked Laventhol and Horwath prior to their

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- (1) going into Chapter 11 to do a feasibility study on Heather
 (2) Island. It's still something - it's planned but it's not -
 (3) there's been no, you know, architectural renderings or
 (4) anything drawn up for it.
 (5) Q Is there any claim in this case that the oil spill
 (6) interfered with the development of Heather Island?
 (7) A No.
 (8) Q How about for the corporation of the Valdez Office Center?
 (9) Was that affected by the spill in any way?
 (10) A No. I would say it was affected in a positive way. We had
 (11) additional rental income during that period.
 (12) Q How much?
 (13) A I'd say at the building and I don't know in terms of
 (14) dollars right offhand. I would say several thousand dollars per
 (15) month additional rental income.
 (16) Q Several is more like two, five, ten thousand?
 (17) A I would say five probably.
 (18) Q For what period of time?
 (19) A For you know, relatively short, less than a year.
 (20) Q Beginning?
 (21) A Right after the spill, essentially until - I think our -
 (22) most of the leases that we had were like six-month leases. It
 (23) wasn't a huge impact but it was a positive impact.
 (24) Q So approximately April of '89 to April of '90?
 (25) A Approximately yeah.

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- (1) Q Have you heard about any impairment of the portions of
 (2) Tattiek's lands that were oiled in terms of just recreational
 (3) value?
 (4) A Well, Tattiek doesn't really encourage recreation on their
 (5) land. As a matter of fact, they're posting - currently
 (6) posting no trespassing signs on their land.
 (7) Q Is that what this no trespassing notice is designed to do?
 (8) A Yes.
 (9) Q Have you actually posted these papers?
 (10) A This no trespassing notice was - published in the Valdez
 (11) and the Cordova paper, maybe even Anchorage. I'm not sure,
 (12) just to discourage people from trespassing on Tattiek lands
 (13) but there's actually in addition to this, there's signs being
 (14) posted on the land.
 (15) Q How about any impairment other than recreational value
 (16) for Tattiek's shareholders?
 (17) A I'm not aware of any.
 (18) Q Any other impairments of the oiled portions of Tattiek's
 (19) lands that you know about?
 (20) A No. I'm not aware of any.
 (21) Q We've already talked about development plans. I take it
 (22) that there are no development plans on any of Tattiek's
 (23) properties that were impaired by the spill, correct?
 (24) A That's correct.
 (25) MS. SMITH: Thank you.

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- (1) Our last Tattiek deposition is Alfred Shepperd.
 (2) THE CLERK: Sir, can you raise your right hand?
 (3) (The Witness Is Sworn)
 (4) THE CLERK: Please be seated and attach the
 (5) microphone.
 (6) Sir, for the record, could you state your full name
 (7) spelling your last name?
 (8) A Peter D. Christensen C-h-r-i-s-t-e-n-s-e-n.
 (9) THE CLERK: Thank you.
 (10) MS. SMITH: The following are excerpts from the sworn
 (11) deposition testimony of Alfred Shepperd, who was deposed in
 (12) December of 1992. Mr. Shepperd is a professional forester who
 (13) has done timber appraisal work for several Native Corporations
 (14) in the State of Alaska, including Tattiek Corporation. In
 (15) 1989, Mr. Shepperd performed an appraisal of timber on
 (16) Tattiek Corporation land. Mr. Shepperd was called as a fact witness.
 (17) DIRECT EXAMINATION OF ALFRED SHEPPERD
 (18) BY MS. SMITH
 (19) Q Do you recall when you performed the 1989 appraisal
 (20) whether the occurrence of the Exxon Valdez oil spill was a
 (21) factor at all in your consideration of the value of the timber?
 (22) A No.
 (23) Q Did you ever consider whether you should consider or use it
 (24) as a criteria for determining the value of the appraisal?
 (25) A No.

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- (1) Q And why did you not do that?
- (2) A I used for those - for those small appraisals I used
- (3) timely log sales. Whether the Exxon Valdez spill influenced
- (4) that or not I don't know. I doubt it very seriously.
- (5) Q The factors that you identified as being important in the
- (6) determination of an appraisal price are quality, quantity and
- (7) access, and then of course price. Do you know whether the
- (8) Exxon Valdez oil spill affected the quantity of any timber in
- (9) the Tatitlek Corporation holdings?
- (10) A You mean the standing timber?
- (11) Q Right.
- (12) A No.
- (13) Q Do you know - you say no, it did not affect the quality
- (14) to your knowledge?
- (15) A No.
- (16) Q Did it affect the quantity of the timber?
- (17) A No.
- (18) MS SMITH: Your Honor, this would be a good place to
- (19) stop.
- (20) THE COURT: Okay, fine. Thank you very much.
- (21) counsel.
- (22) Okay. I'll let you go for today. Don't talk about the case
- (23) to anybody and don't form or express any opinion on it until
- (24) you - I'd like to give you one instruction, since we've got a
- (25) little bit of time today.

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- (1) This trial has sort of dragged in spots. Part of the
- (2) reason is because, for various reasons - including some of my
- (3) own insufficiency - we've started late and we've had long -
- (4) some long breaks. I'm getting worried about the - how long
- (5) this trial is going to go, and I've urged the parties to be
- (6) efficient about the way they present the case, but I think I
- (7) have to follow the same dictates, so I'm making every effort to
- (8) get here on time so we can start at 8:30 and I'd like you to
- (9) do that too. One juror gone until 8:45 keeps us out of the
- (10) courtroom until 9:00 and that's a half an hour of trial time
- (11) and the trial just drags on.
- (12) So if we all adhere to the same standards and we're here on
- (13) time and then we leave on time, we'll probably get this trial
- (14) done a little bit faster and that'd help us all, I think. So
- (15) I'd appreciate it if all of you would be here on time -
- (16) tomorrow. Thank you.
- (17) (Jury out at 1:10 p.m.)
- (18) MR DIAMOND: 3:30?
- (19) THE COURT: No, 2:30, counsel. I canceled my 2:30
- (20) quite awhile ago, so I've got a hole there. I'd like to do it
- (21) between 2:30 and 3:30. Now to help - as of course you're duty
- (22) bound to do if you've got - I want some cases here. I want
- (23) you to get on your computers and - or you could even go to the
- (24) library and read those cases and bring them to me, okay?
- (25) MR DIAMOND: I wonder whether it wouldn't make sense

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- (1) starting a little bit later to give us a little bit more time.
- (2) THE COURT: I don't suppose so. I've got a hearing at
- (3) 3:30 that's the problem. I can start at 3:00. I just have a
- (4) feeling discussion will go on and on, as they usually do.
- (5) MR PETUMENOS: Are we doing a hearing tomorrow?
- (6) MR DIAMOND: Hearing tomorrow.
- (7) MR PETUMENOS: Hearing tomorrow. Well, I would -
- (8) MR STOLL: As opposed to a hearing.
- (9) MR PETUMENOS: There are some hearing papers in your
- (10) chambers.
- (11) THE COURT: Yeah, and I'll tell you whether or not
- (12) I'll consider them today. I mean you know, you can only give
- (13) me so much and I can only deal with so much, and if I can't
- (14) deal with it, you see what I do. I just put you off. So - so
- (15) I'll take a look at them. If there's something I can help you
- (16) with this afternoon, I'll certainly try to do it. 2:30.
- (17) THE CLERK: Please rise. This court stands in
- (18) recess.
- (19) (Recess at 1:12 p.m.)

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- (1) INDEX
- (2) DIRECT EXAMINATION OF ERNEST L. BRANNON 6805
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- (1) STATE OF ALASKA)
- (2) Reporter's Certificate
- (3) DISTRICT OF ALASKA)
- (5) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5-10-97

Look-See Concordance
Report

UNIQUE WORDS 2,895
TOTAL OCCURRENCES
11,791
NOISE WORDS 385
TOTAL WORDS IN FILE
34,096

SINGLE FILE CONCORDANCE

CASE SENSITIVE

NOISE WORD LIST(S)
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INCLUDES ALL TEXT
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- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
(2) THIRD JUDICIAL DISTRICT
(4) In re) Case No. 344-89-2533 Civil
) Anchorage Alaska
(5) The ECHO VALDEZ) Widesby August 24 1994
) 2 45 pm
(6))
(8) Pages 1 through 56
(10) TRANSCRIPT OF PROCEEDINGS (Continued)
(11) HEARING
(13) BEFORE THE HONORABLE BRIAN C. SHORTELL
Superior Court Judge
(16) APPEARANCES
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Vol 1 3

- (1) PROCEEDINGS
(2) THE CLERK Please rise this court now resumes its
(3) session
(4) THE CLERK Please be seated
(5) THE COURT Counsel I have - I think I have all the
(6) materials necessary for both issues Which one do you want to
(7) do first?
(8) MR. PETUMENOS Who would you like to hear from
(9) first?
(10) THE COURT I have no preference counsel
(11) MR. DIAMOND We have our papers arrayed on the - the
(12) Proper issue the 408 issue
(13) THE COURT Okay I'll do that one first
(14) MR. PETUMENOS Who has - I guess - does the
(15) objector have the burden of proof here or the proponent?
(16) THE COURT The objector goes first
(17) MR. PETUMENOS A couple of points You asked - it
(18) was the issue raised this morning as to whether or not the
(19) settlement had to be in this case or not
(20) THE COURT I see your cases I've read them
(21) MR. PETUMENOS It clearly doesn't. The rule and the
(22) commentary also clearly apply to materials that are in support
(23) of and dialogue as well as the actual offer of compromise. It
(24) also - I also submitted a case indicating that it does not
(25) have to be a - a dispute that is suited out. In other words

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- (1) it doesn't have to be joined in the form of a complaint and
(2) summons. If it is part of a - of a dispute that - or a
(3) settlement that needs to be reached in connection with a claim
(4) there is the case that I have in there that indicated that it
(5) was a presuit settlement negotiation
(6) THE COURT Right I read it
(7) MR. PETUMENOS The situation here is that there was a
(8) lawsuit the lawsuit was partially settled. There were some
(9) provisions with respect to the lawsuit relating to how the
(10) settlement would be effectuated and what they would do with
(11) respect to making certain deficiency selections. There was
(12) ANILCA which provided for a mechanism whereby the parties
(13) could get together under the Chugach Study Group and
according
(14) to both the ISER report which the defendants have brought
here
(15) and what the witness said this morning was a mechanism to
(16) negotiate the land claims out. And this was part of that study
(17) group and part of those negotiations which is why you see at
(18) the top of the document the term Response to the Federal
(19) Settlement Offer of November of 19 - whatever it is 81
(20) What was going on there was - I believe the testimony of
(21) the witness although uncertain the preponderance of the
(22) testimony is that he would not have prepared such a document
(23) except to produce it and to - as rebuttal to the federal
(24) government's proposal while expressing some uncertainty. I
(25) think that's his best recollection is that it was turned over

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(1) to others. So the case cited by defendants about an internal
 (2) memoranda. I think is inapposite given the record that we have
 (3) before us. And I think that Rule 408 bars the proof.
 (4) There is another issue of course and that is Rule 403.
 (5) This is -- this is material that is what 13 years old. The
 (6) context in which the material was presented I think makes it
 (7) of very questionable reliability in that it was a negotiation
 (8) between the parties in which the writer had every incentive and
 (9) every reason to try and come up with as low as numbers as he
 (10) could given his goals in the negotiating circumstance which
 (11) is part of what implicates 408.
 (12) Even if this Court would conclude it's a close question
 (13) under 408 I think that the 403 problems abound both in terms
 (14) of the timing and in terms of who this witness is. He's not an
 (15) appraiser he never did an appraisal. He did not go to the
 (16) board with this material. This was part of an ongoing
 (17) negotiation relating to the claims of the corporation. The
 (18) amount of work that was done was -- was minimal. In fact one
 (19) of the -- to express the complete hyperbole the notion that
 (20) the Knight Island parcel was worth nothing zero would seem to
 (21) underscore that point. The confusion of issues that that would
 (22) create and the prejudice to the plaintiffs that that would
 (23) create is enormous. I mean the exhibit that -- the colored
 (24) exhibit that I showed you earlier demonstrates precisely how
 (25) Exxon wants to use this. They want to use this essentially as

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(1) an admission by the plaintiffs that what we really think our
 (2) land is worth is zero as opposed to \$12 million. I think that
 (3) misuses the evidence. It requires us to go into all the
 (4) details confusion of issues that we may not be able to
 (5) unconfuse and this matter is complicated enough as it's even
 (6) hard to articulate for purposes of the evidentiary ruling. So
 (7) I think there's a very strong 403 argument in addition to the
 (8) 408 argument.
 (9) And then lastly I know the witness said that oh yes
 (10) that is my best honest effort but would we expect him to
 (11) say? He's not going to say on the stand that I low balled the
 (12) federal government. I came up with dishonest figures but
 (13) counsel is going to be careful to elicit this is a real fair
 (14) studied view on your part isn't it and he will dutifully say
 (15) yes and the prejudice I think to us will be fairly serious.
 (16) THE COURT Thank you very much counsel.
 (17) MR DIAMOND Your Honor one of the difficulties in
 (18) sort of dealing with these things on the eleventh hour is this
 (19) is an admittedly sticky issue and I have not had time to let
 (20) all these issues percolate the way I think we all would prefer
 (21) them to percolate. So my thinking here is not totally
 (22) coalesced but it does seem to me that there really -- there
 (23) are three issues. Is this an offer of settlement? I guess
 (24) that's the basic question.
 (25) THE COURT Is that really the issue?

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(1) MR DIAMOND Well I think it is because if you stop
 (2) to think if this were in the context of just a regular you
 (3) know negotiation --
 (4) THE COURT This statement's made -- don't you concede
 (5) that these are statements made in the course of the negotiation
 (6) process for settlement --
 (7) MR DIAMOND No.
 (8) THE COURT -- of a disputed claim.
 (9) MR DIAMOND No the rule talks about offering into
 (10) evidence statements made in settlement negotiations. We don't
 (11) want to offer into evidence anything that this witness or any
 (12) other agent of Chugach said in a settlement negotiation. This
 (13) is something different.
 (14) What they did was they looked at a collection of parcels
 (15) and did an internal evaluation trying to come up with an
 (16) estimate of fair market value for those properties. And you've
 (17) had a chance to look through it. It's carefully -- it's a
 (18) careful analysis. They do a number of things. They do some
 (19) income flow analysis.
 (20) If a party filed in an ordinary commercial negotiation --
 (21) which I would suggest this is not a far cry from -- this is the
 (22) ANCSA selection process. It's negotiation with the federal
 (23) government. Goes back to its office and sort of cranks out
 (24) now look the other side is suggesting we take this what's it
 (25) worth. And they bring in consultants and they think about and

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(1) the corporation and duly authorized people come up with
 value
 (2) that's a fact.
 (3) Now merely because they then go into a negotiation -- and
 (4) I'll address the rest of the rule -- but merely because they go
 (5) into a negotiation and put that piece of paper on the table
 (6) and let's say it's a settlement negotiation they put it on the
 (7) table that doesn't insulate it. The rule is quite clear that
 (8) if the -- the underlying evidence that you're trying to get in
 (9) is admissible merely because it was communicated in a
 (10) settlement conference or a settlement negotiation doesn't
 (11) render it inadmissible that's expressly stated in the rule.
 (12) THE COURT Wait a minute wait a minute counsel.
 (13) Maybe I'm misunderstanding the facts here. The facts as I
 (14) understand them is the dispute existed the memorandum was
 (15) prepared in order to resolve -- in order to address some of the
 (16) issues in the dispute the direct issue being the valuation of
 (17) two parcels of property and then that memo was used in the
 (18) course of the -- of the negotiations.
 (19) MR DIAMOND Well there is no testimony from this
 (20) witness that it was used. He thinks it may have been he
 (21) doesn't know whether it was. And used means was it shown to
 (22) the other side. But let's assume there's no pending
 (23) litigation which I think is a fair assumption. It's a point
 (24) I'm going to get to. Let's just assume this is in the context
 (25) of an ordinary commercial negotiation. Somebody wants to sell

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(1) a piece of property somebody wants to buy a piece of property
 (2) and the party who is on the buying side asking to attach some
 (3) value to it goes in -- goes and does an internal assessment of
 (4) value and comes up with a valuation a well thought out
 (5) reasoned valuation Ten years later there's litigation over
 (6) that parcel and the party is offering evidence which showed --
 (7) evidence that the property was worth far more at the time than
 (8) what they concluded in the course of the negotiations Would
 (9) that be admissible evidence? And I'm suggest it would be
 (10) admissible evidence
 (11) Now that's basically what happened here The Chugach
 (12) Alaska Corporation was involved in a negotiation with the
 (13) federal government over what lands it would receive under
 (14) ANCSA and what the witness testified to was that there was an
 (15) ongoing political process The D 2 study was commissioned by
 (16) Congress to sort all of this out and there was a -- a bundle
 (17) of parcels identified by the federal government as -- as a
 (18) bundle which the federal government proposed that the
 (19) corporation take The corporation then went and did as it
 (20) would do in any commercial negotiation it -- it tried to
 (21) assign some value to that to see whether that made any sense
 (22) Now that in and of itself is discoverable and admissible if
 (23) otherwise relevant
 (24) Now the next step was maybe or maybe not they put it on
 (25) the table in negotiation but assuming that it was admissible

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(1) -- it's discoverable in the first place merely because it was
 (2) -- it was used in the negotiating context doesn't render it
 (3) inadmissible We're not offering it -- we're not offering
 (4) evidence of an offer of compromise to the claim and we're not
 (5) offering evidence of statements made in a settlement We're
 (6) offering evidence of statements made in the board room when
 (7) they were considering the value of these properties
 (8) So I guess my first point of departure with Mr. Putnam is
 (9) does this fall within the rubric of the rule at all
 (10) THE COURT What's the title of that document
 (11) counsel?
 (12) MR. DIAMOND It says proposed federal settlement of
 (13) 11/13/81 total land value before taxes and 7(i) Remember this
 (14) is ANCSA This is the Alaska Native Claims Settlement Act
 (15) What they were doing is trying to resolve ANCSA rights What
 (16) settlement rights does the Native Corporation have? I don't
 (17) know that you ought to attach undue significance to one word
 (18) on
 (19) a document If you look through the whole thing there's no
 (20) real discussion any litigation any -- any conflict in this
 (21) thing They were trying to resolve their rights under the
 (22) Alaska Native Claims Settlement Act
 (23) THE COURT Counsel isn't it true that pre-lawsuit
 (24) offers compromise of statements made in offers to compromise
 (25) are not admissible
 (1) MR. DIAMOND Not admissible to prove certain things

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(1) yes to prove validity or invalidity of the claim or the amount
 (2) of the claim
 (3) THE COURT Right
 (4) MR. DIAMOND But if -- if somebody does an internal
 (5) valuation -- Your Honor I think the point here is this really
 (6) is in the nature of an internal valuation of a bundle of
 (7) parcels that may have been used -- or may not have been used
 (8) in
 (9) the context of settlement but it does not alter the nature of
 (10) what they did What they did was they used their best efforts
 (11) to come up with some values for some parcels of land And
 (12) that's what the testimony was this morning Merely because
 (13) they used that over the negotiating table ought not to render
 (14) it inadmissible
 (15) Second point we cited you to the Summa case and I'm sorry
 (16) we didn't provide you with the entirety of the case I haven't
 (17) read the entirety of the case There's a discussion of the 408
 (18) aspects of that case which we did provide you and in that
 (19) case the Court is quite clear to say we're dealing with a
 (20) different negotiation
 (21) THE COURT Yeah the facts in that case was during
 (22) the trial court questioned Laurens brother Z R Laurens
 (23) concerning the settlement discussions of a different claim
 (24) related to a prior loan transaction in which shares of Summa
 (25) stock served as collateral
 (1) MR. DIAMOND I didn't mean to suggest the cases are

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(1) factually identical or even similar but if you look at the
 (2) holding in that case what the Court said is we're dealing with
 (3) a different negotiation here negotiation over a different
 (4) issue What are we -- what are we trying to do with this
 (5) evidence? We're offering it to prove what the corporation
 (6) truly thought these properties were worth Not Dr. Mundy but
 (7) what the corporation truly believed these properties to be --
 (8) to be worth That was not the subject of the negotiation
 (9) That was not the issue in the negotiation that took place
 (10) in 1981 That was over the -- what the Native Corporation was
 (11) entitled to under ANCSA and what would be a fair resolution of
 (12) its ANCSA claims We're not offering this to prove anything
 (13) about what would be a fair resolution of the ANCSA claims that
 (14) were then outstanding We're offering it for an entirely
 (15) different purpose And I think just to use the word -- read
 (16) the word claims in Rule 408 and say well there was a
 (17) negotiation -- I'm sorry amount in Rule 408 and say well in
 (18) 1982 they were talking about amounts and we're talking about
 (19) amounts here really is overly simplistic What amounts? That
 (20) amount
 (21) of property would be adequate to fairly satisfy this
 (22) corporation's ANCSA rights It's not the issue that we're
 (23) trying to prove with this -- this evidence in this case
 (24) Entirely different and I don't think a party ought to be able
 (25) to shield its own admissions simply by saying well you know

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- (1) we used that to negotiate some amount or we used that in
 (2) connection with negotiations over a different amount over a
 (3) different subject under a different statute many many years
 (4) ago and that's what's being suggested here somehow they
 can
 (5) shield it
 (6) So I - I don't believe this is really truly an offer of
 (7) settlement under the rule or even settlement discussions
 (8) We're not offering to do that. This is an internal valuation
 (9) that was done for point number two an entirely different
 (10) purpose. We're not dealing with the same amount and I guess
 (11) there's a third issue the commentary - and again I apologize
 (12) that you're getting this stuff in rough and tumble form -
 (13) THE COURT Can I ask you a question counsel Have
 (14) you read the Hudspeth case
 (15) MR DIAMOND I skimmed the Hudspeth case
 (16) THE COURT Take a look at paragraph 13 page 1204
 (17) MR DIAMOND Your Honor I guess I have to go back
 (18) and learn the facts of this case But paragraph number four
 (19) simply says - does not
 (20) THE COURT No the one about holdings is Rule 408
 (21) does apply to situations where the parties seeking to
 (22) reintroduce evidence of compromise was not involved in the
 (23) original compromise that's one holding The other appears to
 (24) be that the claims involved in the present case are not the
 (25) same claims that were involved in the Pine Products case I

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- (1) mean in the case under contention
 (2) MR DIAMOND Again Your Honor I have not had an
 (3) opportunity to ask you to study the facts of this whether you
 (4) have
 (5) THE COURT I've had about the same opportunity as you
 (6) have just that I reviewed them prior to the time I came in
 (7) and I think this case directly addresses the points you just
 (8) made and it seems to hold absolutely contrary to your point of
 (9) view and it's a Ninth Circuit appellate court case
 (10) MR DIAMOND I believe the Summa case was Ninth
 (11) Circuit as well I gave you my only copy
 (12) THE COURT District Court here District Court
 (13) Summa - I'm sorry I'm wrong about that It's the Tenth
 (14) Circuit and it's an appellate case
 (15) MR DIAMOND This says were not the same claims the
 (16) amounts in controversy could have been the same amounts in
 both
 (17) litigations I don't know And if they were then I think this
 (18) would be consistent with the position I'm taking
 (19) THE COURT Okay
 (20) MR DIAMOND I will take a look at it
 (21) The third point I was going to make is that it does not
 (22) appear that there - any of this happened in the context of
 (23) litigation According to the information we've been able to
 (24) assemble in an hour and a half's time and we went back and
 got
 (25) the - the ISER report that was done in 1981 in connection with

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- (1) this ongoing litigation which basically has a brief
 (2) description of the status of things And according to my
 (3) reading the claims the ANCSA claims that it were in litigation
 (4) were resolved before this ever happened The only unresolved
 (5) part of the lawsuit that was still outstanding in 1981 did not
 (6) concern this issue and in any event was abandoned by the
 (7) Native Corporations I'll show this to you at pages 11 - I'm
 (8) sorry I guess it's Roman II 12 I've already shared it with
 (9) counsel I don't claim to be an expert but this is what we've
 (10) been able to find out over lunch
 (11) THE COURT Okay Let me take a look
 (12) I'm at a loss here counsel because I remember certain
 (13) things on the document that may be consistent with this and
 may
 (14) be contrary to it Do you have that document there?
 (15) MR DIAMOND You're talking about the -
 (16) THE COURT The actual memo
 (17) MR DIAMOND The settlement itself the schedule
 (18) itself
 (19) THE COURT Right right This says proposed federal
 (20) settlement of 11/13/81 Wasn't the lawsuit finally settled in
 (21) 82? Didn't I - didn't I see that somewhere?
 (22) MR PETUMENOS That was in I think the memorandum
 (23) from Mr Propus where he described - gave you the
 introduction
 (24) this morning and they talked about a settlement and amended
 (25) settlement I think that's what Your Honor may remember he

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- (1) said reading his own memorandum
 (2) THE COURT Is it the plaintiffs contention here that
 (3) the lawsuit was partially settled and it was still unsettled at
 (4) the time of this 11/31 memo of Mr Propus?
 (5) MR PETUMENOS It is the plaintiffs contention that
 (6) Chugach was pursuing all remedies including litigation and
 (7) judicial proceedings The settlement as I understand it
 (8) contained a provision that they would seek to see if they could
 (9) negotiate a settlement through the ANILCA process not ANCSA
 a
 (10) counsel states And the ANILCA process involved this Chugach
 (11) Study Group which is what this pertains to directly Chugach
 (12) was free to sue again if this process didn't work out
 (13) THE COURT Counsel listen to this because this is
 (14) what I think - I think what Mr Petumenos says is true and I
 (15) think those are the facts
 (16) MR DIAMOND What I read there and part of the -
 (17) again part of the problem doing this without adequate research
 (18) is I think everybody's working on guesswork As I understand
 (19) both the witness testimony and this document the litigation
 (20) in large measure was settled in 1977 There were some
 (21) unresolved issues which continued on The document I just
 (22) handed you the ISER report is consistent with the witness
 (23) testimony that they decided to deal with the question of land
 (24) selections on a political level and not a litigation level
 (25) The ISER report -

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THE COURT Always know though reservin_ the right to litigate if they couldn't do it by negotiation right

(1) MR DIAMOND Well whenever parties - have a statutory right if they're unsatisfied with the way the government deals with them I guess they always have a right to litigate All I'm saying is that they chose to resolve this through the political process and that really got us to where we are now

(2) THE COURT Right

(10) MR DIAMOND Not the litigation process That's the - the ISER report seems to suggest that the litigation at least over these claims was no longer pending or no longer being actively pursued What remained was - was an entirely different issue that got resolved in 1982 and we - we referred you to the Alaska Evidence Rules commentary at Page 460 where it is stated where - where statements made in compromise negotiations are not used to advance litigation relating to the validity invalidity or the amount of the underlying claim admission is proper It seems to me that we're not dealing with litigation What Mr Propes testified to was at most this was an evaluation that was done as a result of the study group activities in 1981 which Congress had commissioned to try to accommodate Chugach's desires under ANCSA in - in an amicable way But I think the nub of this is sort of a fairness argument turned around We have a

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corporation that with some level of - some great level of work hired consultants and gave a lot of thought to the question of what value should be placed on these parcels long before there was this litigation And did so as the witness said not to low ball somebody in a negotiation to get them to put more money on the table They weren't even interested in that but to come up with an assessment of whether they were being dealt with fairly in terms of their ANCSA rights I mean he quite plainly said these were not numbers that were conjured up for purposes of the bargaining table This was their best effort and their best judgment as to what these parcels were worth

(13) Given that why should they be shielded in unrelated litigation ten years ago if they were not used for litigation purpose originally? And I think it's clear that these were not used for a litigation purpose originally This reflects - you now have my copy - but the corporation's best judgment as to value then

(12) THE COURT Counsel do you think the figure zero is the corporation's best judgment of the value of a large parcel of land?

(3) MR DIAMOND Not to reveal work product but I asked him about that during the course of - of meetings prior to this morning and he said you know that in fact - maybe there was a couple of hundred thousand dollars value in there

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(1) but he said and he will testify to the fact and I think he may have said it to you you can't own land for free It costs you something and if you're looking at the value of a parcel of property you look at what it can do for you but you also have to look at what it's going to cost you and they did not want this parcel They took it as an accommodation to the federal government They did it as part of you know a give and take of a congressionally mandated process with all of the involved federal agencies They did not particularly want Knight Island did not have a great deal of value Suddenly in this litigation it's got \$7 million worth of value

(17) Now you know I think that's - that's something that the jury ought to know

(14) THE COURT Thank you counsel I appreciate it

(15) Anything else Mr Petumenos?

(16) MR PETUMENOS I don't have much except it's important to get tape recorded statements from counsel sometimes because you find that there are things in there that help Page 64 of that statement I don't think you got that far yesterday

(21) THE COURT I did not

(22) MR PETUMENOS Says - they're talking about Bering coal field

(4) Grant You mean that you don't want to pick that one up for three or four million

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(1) Propes It's interesting that we would ever value anything more than ISER you know from a strategic - if we were just looking from a strategic -

(4) Grant Are there other signs?

(5) Propes Sure according to their performance

(6) Grant So it's purely appraisal solely for negotiating purposes Yeah I tell you I didn't quite appreciate the import of that when I first read it because I didn't know how ISER fit into this and I didn't realize the context of all this was all negotiations with the settlement agreement - Et cetera et cetera and other context in other statements

(13) THE COURT That's on what page?

(14) MR PETUMENOS Page 64 of the taped statement

(15) THE COURT What's the exhibit number?

(16) MR DIAMOND This is not an exhibit this was the document you -

(18) THE COURT No it's Court's Exhibit XXX We made it an exhibit yesterday

(20) MR DIAMOND And I would like you to read the entirety of that comment

(3) THE COURT You read it

(3) MR PETUMENOS Would you like me just to read it?

(4) Should I just bring it up to the bench or something?

(5) THE COURT That's all right whoever has the nicest

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(1) voice
 (2) MR PETUMENOS That's clearly Mr. Diamond. Don't go
 (3) too far from the page.
 (4) THE COURT I didn't say who had the nicest voice.
 (5) You want to make admissions counsel. It's up to you.
 (6) MR DIAMOND What he said was he went on to say
 (7) Mr. Grant asked him was that your best judgment back in 1981
 (8) and the answer he got then was sure it was his best judgment
 (9) in 1981. There are other statements on that subject elsewhere
 (10) in the transcript.
 (11) THE COURT I'm sure there are counsel.
 (12) MR DIAMOND If you give me a moment I will find
 (13) them.
 (14) THE COURT I trust you, counsel. I'm sure there are
 (15) passages in that transcript that could be interpreted favorably
 (16) to Mr. Petumenos' point of view at this time and passages that
 (17) can be interpreted favorably to yours.
 (18) MR DIAMOND And I think if Mr. Prope's testifies we
 (19) will hear about those passages correctly handled.
 (20) MR PETUMENOS Judge, I'm prepared to submit the
 (21) issue.
 (22) THE COURT First the rule prohibits evidence of
 (23) conduct or statements made in compromise negotiations which
 (24) is
 (25) what this was. It's the kind of -- it's an unusual fact
 (26) pattern but it seems to me that that's what it is. The

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(1) distinctions that are drawn here whether this was in or
 (2) prelitigation negotiation seem to me to be handled by maybe
 (3) conflicting decisions in the cases. But it appears to me that
 (4) the overall policy of the rule is to encourage settlement
 (5) negotiations encourage the parties to take positions in
 (6) settlement negotiations with regard to settling their -- their
 (7) disputed claims. That's exactly what this document is part of
 (8) and it's exactly what Mr. Prope took part in and -- on behalf
 (9) of Chugach.
 (10) That's -- these -- this particular memo and the values that
 (11) are set therein appears to be that type of negotiation and
 (12) therefore Rule 408 bars it.
 (13) Beyond that I've heard enough evidence from the witness
 (14) himself and enough arguments from the parties and I've seen
 (15) enough in the statement I read to show me that this evidence
 (16) should also be excluded by Rule 403 even if it were not
 (17) excluded by Rule 408. So both objections are well taken and
 (18) therefore the memo itself will not be admitted.
 (19) Now the problem is that he's got factual testimony that --
 (20) that probably is -- there's lots of it in this memo but he can
 (21) also testify to facts. So what do I do about that? What do
 (22) you intend to present since I'm excluding the settlement
 (23) negotiations?
 (24) MR DIAMOND Well I'd be inclined to -- to proffer
 (25) him to talk about internal discussions as to the value of

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(1) various parcels that were tendered as -- in potential
 (2) resolution of corporation's ANCSA rights whether -- what they
 (3) thought of them. He already -- he testified today about
 (4) LaTouche and Knight why he -- why the corporation he in his
 (5) capacity as land manager thought the parcels had very little
 (6) value to the corporation that they were not -- very little
 (7) income potential and that the corporation ascribed very little
 (8) value to them.
 (9) THE COURT Counsel?
 (10) MR PETUMENOS Judge, I'm -- I don't think this is a
 (11) major baby in the bath water problem. When Mr. Diamond first
 (12) made his offer of proof he stated he wasn't going to try to
 (13) commit the memo. If the underlying testimony surrounding the
 (14) memo comes in all the damage is done.
 (15) THE COURT I agree with you to some extent. On the
 (16) other hand he's -- he's knowledgeable about the particular
 (17) parcels. Why can't he testify about the particular -- for
 (18) instance there's things in his transcript that talk about how
 (19) one -- one parcel is all vertical and that -- and unusable and
 (20) that seems to me to be a legitimate factual item he could
 (21) testify to exclusive of settlement negotiations he took part
 (22) in. I don't -- I think that -- and I don't think I could be
 (23) persuaded otherwise here that my ruling encompasses this
 (24) testimony relating to discussions that furthered the
 (25) negotiation is inadmissible therefore any roundtable

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(1) discussions in that admissions of other people during those
 (2) discussions would be inadmissible.
 (3) On the other hand factual information that this witness
 (4) knows about particular characteristics of the parcels at issue
 (5) seems to me to be just standard fact.
 (6) MR PETUMENOS I would say that if the issue is Can
 (7) he come in and describe Knight Island whether it has good
 (8) anchorage or whether it has -- or whether LaTouche Island has
 (9) good mineral potential or something like that that that
 (10) testimony I think is a bona fide fact at this point.
 (11) Exxon has got through Mr. Dorchester film after film and
 (12) testimony after testimony about why they -- they determined
 (13) that the land is limited use land and why they -- the property
 (14) is steep in this location and has poor anchorage here. Your
 (15) Honor hasn't seen it yet but there is a parcel by parcel film
 (16) in which Mr. Dorchester describes exactly that painstakingly
 (17) and the land hasn't changed its vertical nature in 14 years. I
 (18) fear that if that testimony is elicited through this witness
 (19) that more will happen and the import of the evidence that the
 (20) Court has ruled to exclude will get before the jury.
 (21) THE COURT Yeah I'm worried about that too.
 (22) MR DIAMOND It's a difficult line. Maybe I need to
 (23) reopen my argument. Part of the problem is the corporation
 (24) looked at these parcels through this witness and made a
 (25) judgment of them individually and collectively. He will

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(1) testify for example that Knight Island was not worth very
 (2) much to them. They didn't ascribe very much value to Knight
 (3) Island. They didn't ascribe very much value to LaTouche. The
 (4) only island they ascribed - the only parcel they really
 (5) ascribed great value to was Patton Bay because of its timber
 (6) and it's being valued without timber in this case and these
 (7) were not viewed as very valuable pieces of property. They were
 (8) viewed as having far less value than Dr. Mundy says in his
 (9) report and as a result they tried to get property in the
 (10) State of Washington, State of Oregon, State of Utah instead of
 (11) these parcels.
 (12) THE COURT: This was all part of the settlement
 (13) process, right?
 (14) MR. DIAMOND: This was part of the selection process.
 (15) It was all part of the ANCSA selection process, what parcels
 (16) were they going to get under ANCSA. It's a settlement often used
 (17) in the connection with the selection process.
 (18) THE COURT: When did they - I'm not understanding the
 (19) time frame here. Were we talking about pre 1978?
 (20) MR. DIAMOND: No, talking about '82, '83, '84 - '81
 (21) through '84, he left in '84.
 (22) (Brief interruption for technical difficulties)
 (23) MR. DIAMOND: Our basic purpose in using this witness
 (24) is to point out the inconsistencies and positions the
 (25) corporation took in 1981 and '82 with positions they're taking,

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(1) now as to 1989 value figure. This witness will testify the
 (2) values didn't change in that time period. The '89 value should
 (3) be the same roughly as the '81-'82 value with respect to the
 (4) oil and parcels. They didn't attach really any value to them.
 (5) They would have preferred not taking them. They didn't have
 (6) any cultural significance. You know, I would like to take them
 (7) as far as I can, consistent with the Court's ruling, and I
 (8) think he's prepared to say that internally the corporation
 (9) decided that Knight Island - that Knight Island was probably
 (10) more trouble than it was worth and had zero value to the
 (11) corporation at the time, and that LaTouche Island certainly did
 (12) not have anywhere near the value that Mr. Mundy currently
 (13) ascribes to it as of 19 - 19 - his 1989 valuation date
 (14) because the prospect of getting any kind of mineral out of it
 (15) was next to zero, and it had very, very few settlement sites.
 (16) That seems to me to be in the nature of admissions. These are
 (17) things that the corporation decided to do when he still was
 (18) with the corporation before litigation started. I think I
 (19) ought to be able to get into that. I will avoid any discussion
 (20) of the ANCSA resolution process. I will avoid any discussion
 (21) of how this all came up to the extent that I - that I can
 (22) without depriving of any context, but I still think I'm
 (23) entitled to put that kind of information in front of the trier
 (24) of fact.
 (25) THE COURT: Counsel, I don't think you can do that. I

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(1) frankly don't think you can do it. I mean, it seems to me an
 (2) impossible task because really, really what this witness is
 (3) testifying to is the course of the settlement negotiations and
 (4) positions taken by the corporation during the settlement
 (5) negotiations, which I think Rule 408 bars. But under - but in
 (6) the context of this trial, Rule 403 is very powerful also. So
 (7) independently, they both seem to me to bar that.
 (8) I just want to - I want to give you a fair opportunity to
 (9) get legitimate factual testimony in, but I - I don't want to
 (10) erode that ruling, so - and I think what I'm asking you to do
 (11) right now is sort of analyze as you talk, which is not a -
 (12) not a good command for anybody, including me. So if you - if
 (13) you can come up with some legitimate - as Mr. Oppenheimer
 (14) seems to have said down, he was going to propose the same
 (15) thing.
 (16) MR. OPPENHEIMER: I was prompted to reflection.
 (17) THE COURT: I'll give you time to try to do this, but
 (18) I'm very skeptical that you'll be able to do it because I
 (19) believe that what you will be doing is inevitably intruding on
 (20) Rule 408 and Rule 403.
 (21) MR. DIAMOND: Well, I - let me just deposit a
 (22) hypothetical. What if they had a document that was purely
 (23) internal and never been circulated to anybody, which had the
 (24) same numbers on it, and they hired Arthur Anderson and
 (25) DeLoitte
 (1) Haskin, and everybody - everybody else to come up with this
 (2) and it was an internal document, never communicated in the

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(1) course of negotiation, the same numbers on it. Would that be
 (2) barred by 408? Let's put aside 403. You know, I think
 (3) probably not. What I'm suggesting is this witness has in his
 (4) head that report because all that work was done.
 (5) Now, if I'm not going to get into conversations either
 (6) about any ongoing negotiations with the federal government, if
 (7) I'm not going to ask him what did you say, if I'm not going to
 (8) ask him what positions did you take in resolution of this
 (9) claim, can I still get to what internal evaluation did the
 (10) corporation place. I don't know that that intrudes on 403 -
 (11) I'm sorry 408. To exclude it on 403, I agree, is highly
 (12) prejudicial, highly, highly prejudicial, but so is every
 (13) damning admission that every party makes.
 (14) This is a pretty damning admission that these parcels are
 (15) not worth nearly what the plaintiffs are now contending. I
 (16) don't view that as the kind of prejudice that gets evidence
 (17) excluded, but that's the distinction I draw. I would like to
 (18) get into his head and ask him not about the positions taken in
 (19) settlement, but what determinations were made by the
 (20) corporation as to the bundle of parcels that they were looking
 (21) at and that they ultimately ended up with in large measure.
 (22) MR. PETUMENOS: Judge, I want to remind you of
 (23) something the witness said this morning. I fear to have this
 (24) door pop open a crack and have the whole thing come in. This
 (25) witness said with respect to this ISER study that he didn't

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(1) welcome or want the valuation of the property on a dollar
(2) basis that this was something that ISER did
(3) THE COURT Yeah I know he said that ISER brought up
(4) the values and they were sort of required to respond against
(5) their will because they didn't want the property to be
(6) valued
(7) MR. PETUMENOS And my reason for - for bringing that
(8) up is that contrary to what Mr. Diamond's saying there isn't
(9) a study independent of responding to this ISER material that
(10) Mr. Propes went out and did to put dollar values to the
(11) property for the purpose of some corporate reason or some
(12) corporate endeavor that he was involved in or that he can
(13) separate out in the form of his testimony
(14) What Mr. Diamond's proposing is almost worse which is to
(15) have the witness come in and testify to we didn't think much
(16) of this land we didn't think much of that land and then for
(17) the jury not to know the context of the statement and it
(18) leaves us at even more of a disadvantage under those
(19) circumstances which is why I think the Court's - the Court's
(20) earlier remarks are correct that you can't do that with this
(21) witness without treading upon the ruling and trying to go
(22) around it and having a statement come in in a vacuum makes it
(23) worse particularly since the context of the study and the
(24) valuation is what we know it is
(25) Then the jury's left with the impression he was walking

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(1) around with no purpose saying this about the land or with some
(2) other corporate purpose in mind when we know the reason for it
(3) is the area Your Honor is excluding
(4) THE COURT I'm going to stop the discussion and the
(5) reason I'm going to do it is I've told you what is necessary
(6) But I do want to tell you it's got - if you're going to get
(7) anything I've got to know exactly what it is I don't have a
(8) vague subject matter description that would allow the witness
(9) to ramble on the stand because I know that he'll get into
(10) prohibited areas I know that from 80 pages of transcript
(11) I also - I need to know how this could possibly be
(12) distinguished from the settlement process and frankly I don't
(13) think you can do it But you can think about it and see what
(14) you can do And I know you've got time constraints but the
(15) time constraints are going to take second position here I
(16) mean to the extent that this process takes awhile and this
(17) witness jets off to wherever he's going I'm sorry but I can't
(18) help that This is - this is an issue that has to be explored
(19) fully and I have to know and be secure when he gets on the
(20) stand that I'm not eroding the plaintiffs' rights in this area
(21) because I believe their position is well taken on this issue
(22) Now let's get to the next one and I've got a 3:30 hearing
(23) that I've got to get to pretty quickly so we're going to take
(24) this one in 15 minutes
(25) MR. OPPENHEIMER I think the next issue is

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(1) Mr. Meyers
(2) THE COURT Yes
(3) MR. OPPENHEIMER This is not our motion but if you
(4) like I can go first in this There's a motion to exclude the
(5) testimony of Mr. Ted Meyers He's chief pathologist
(6) THE COURT Is his testimony going to be solely
(7) limited to the statement made by the witness on the stand about
(8) agreeing with his position?
(9) MR. OPPENHEIMER The answer is yes but I do need to
(10) - to make a qualification to the Court I thought you might
(11) ask me that and I've given that some thought That is his
(12) primary purpose But in order for him to do that he will
(13) necessarily need to discuss his own views to some degree and
(14) the reason for that is twofold
(15) One because two implications were made about him that we
(16) think are inconsistent with what he will testify the facts
(17) are One that he was under a political constraint to act
(18) conservatively and maybe put a spin or alter his views in a
(19) newsletter that was the subject of suggests That's point
(20) one
(21) And then point two of course is that there - there will
(22) be a dispute as to what the - what he said with respect to
(23) legitimizing or not legitimizing Dr. Kocan's theories of
(24) immunization or immunology suppression
(25) It's late in the day and I'm not exactly sure what the

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(1) scientific terminology is but the immunization theory of
(2) Dr. Kocan and in that regard I did not want to be in any way
(3) misleading to the Court I think that it is - for the purpose
(4) is to set the record straight and to make it clear that we
(5) believe the evidence will show that the State does not
(6) legitimize Dr. Kocan's theory It's a position that we believe
(7) is far from collateral I don't know that the Court needs me to
(8) address that I think it's very close to being self-evidently
(9) clear It was at the heart - his theory of immunity
(10) suppression is obviously at the heart of the lawsuit
(11) between the oil spill and these viruses We've cited in our
(12) brief the provisions of his testimony where he makes that quite
(13) clear and I think the impression he left was inescapable It
(14) certainly is to me Again looking at the transcript that
(15) Dr. Meyer was legitimizing his theory by describing it as a -
(16) as a legitimate view
(17) In point of fact I conclude Dr. Meyer's testimony will be
(18) very much to the contrary but there will be some contextual
(19) information so he will speak a little bit about what his
(20) position is and why the statements he made why the positions
(21) he took in a newsletter that's already been introduced in
(22) evidence and discussed by Dr. Kocan or what they were and
(23) that
(24) they're legitimately held and they weren't coerced by his
(25) supervisors or because he was a State employee So that really
is the extent of it

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(1) There's more in our papers Your Honor but I think in
 (2) terms of the chronology I think it's reasonably clear but
 (3) just to reprise quickly for you certainly the whole business
 (4) about the conversation was unknown to any of us until it came
 (5) out at trial And I believe Your Honor's already drawn the
 (6) same conclusion I have about the context in which it came out
 (7) That although it came out in response a question on cross it
 (8) was -- it was -- it was an unexpected answer It was not
 (9) elicited by the question pursue It seems very clear it was
 (10) anticipatory
 (11) In any event none of us had any idea that he had had this
 (12) conversation and certainly not the foggiest idea that he would
 (13) claim any sort of immaterial prematurity of state legitimacy or
 (14) legitimacy even from Dr Meyers as respected authority in this
 (15) toxicology area
 (16) There would have been no opportunity to have identified
 (17) this issue earlier and as I say I think it's as to the garish
 (18) argument it manifestly this is at the heart at the heart of
 (19) Dr Kocan's theory and to suggest that the State endorses it
 (20) in any way shape or form I think is very powerful testimony
 (21) goes right at the heart of it
 (22) THE COURT All right thank you
 (23) MR PETUMENOS Judge I have a couple points As I
 (24) understand it Exxon now in response to this herring issue is
 (25) planning on calling three separate experts

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(1) THE COURT Let's talk about Meyers first
 (2) MR PETUMENOS And I'm going to talk about Meyers
 (3) first
 (4) THE COURT That's all I want to talk about first
 (5) I'll make the ruling on Meyers then we'll go on
 (6) MR PETUMENOS Okay Mr Ertz who has done the
 (7) research and is in court here and who wrote the briefs for you
 (8) will address the issue what we mean by impeachment on a
 (9) collateral matter It does not mean that the testimony isn't
 (10) relevant It doesn't mean that impeachment on a collateral
 (11) matter doesn't mean that the subject matter of the issue is not
 (12) relevant to the lawsuit The question is Do we buy a new
 (13) expert when they raise on cross examination a conversation
 (14) that
 (15) took place between that expert and another expert because if
 (16) that were the case it happened this morning when we were
 (17) cross examining the fisheries expert and he said yes I know
 (18) Dr Spies But I will warrant that if he were to look at the
 (19) evidence that's in now that he would change his mind Well
 (20) does that mean now because we got a nonresponsive answer
 (21) on
 (22) cross examination that we get to call Dr Spies to say no I
 (23) haven't changed my mind he's wrong and you know fill in
 (24) those interstices and I think I'll let Mr Ertz address the
 (25) law but I think the law clearly looks for purposes of
 (26) impeachment on a collateral matter It is not whether herring
 (27) is relevant not whether that's an issue in this case but

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(1) whether you can ask a question on cross examination and open
 (2) up
 (3) a whole area of proof when you get -- when you don't get the
 (4) answer that you like And I'll defer to Mr Ertz on the law
 (5) with respect to that in the evidence code because I think
 (6) that's the situation
 (7) MR ERTZ Your Honor with respect to Dr Meyers
 (8) basically there are two issues his expert testimony and the
 (9) collateral impeachment I think the most obvious problem that
 (10) we have is we are running into the same object of how can we
 (11) separate out this witness testimony There is no way for the
 (12) witness to testify about his opinions and how the herring is
 (13) without entering expert testimony The witness has not
 (14) complied with either Pretrial Order 38 Pretrial Order 81 any
 (15) of the discovery rules He has not tendered an expert report
 (16) He has not tendered a resume or CV He has not tendered any
 (17) of
 (18) his background documents He has not tendered any of his
 (19) scientific studies Basically he's a total unknown to the
 (20) plaintiffs From that standpoint none of his expert opinion
 (21) testimony should be allowed
 (22) That being the case the only issue that is relevant for
 (23) his testimony --
 (24) THE COURT Wait a minute counsel He's -- he's
 (25) certainly not a total unknown to the plaintiffs expert
 (26) Right?
 (27) MR ERTZ To Dr Kocan

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(1) THE COURT Yes because the plaintiffs expert
 (2) specifically talked about him and what he thinks about this
 (3) theory
 (4) MR ERTZ Actually Your Honor the -- I won't argue
 (5) that he's a total unknown to our expert but the point
 (6) however in context is defendants were asking our witness
 (7) isn't it true that Dr Meyers would say this or would say that
 (8) and our expert disagreed However we have no idea what the
 (9) foundation or the basis of those opinions would be We don't
 (10) have any idea of what the -- what the background of those
 (11) opinions one way or the other would be and that's the problem
 (12) with the -- basically the surprise to plaintiffs of having
 (13) Dr Meyers testify
 (14) Basically what we have is a newsletter which describes his
 (15) efforts at identifying this virus and their sources in the
 (16) Pacific herring It really contains one minor comment saying
 (17) there's no evidence of a link to the Exxon Valdez oil spill
 (18) It doesn't talk about the immunosuppression theory,
 (19) whatsoever
 (20) and Exxon was using that document to cross examine the
 (21) witness
 (22) and kind of implying Dr Meyers opinions or theories But
 (23) quite frankly there's no -- no evidence in the record
 (24) necessarily to support that other than the newsletter
 (25) If in fact Dr Meyers has not complied with any of the
 (26) expert discovery rules he has not tendered any type of an
 (27) expert report Basically there's been no compliance
 (28) whatsoever

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(1) with the discovery rules Defendants have known about this
 (2) and in fact they tendered an expert in federal court
 (3) Dr Pearson Dr Pearson was found unqualified to testify to
 (4) this issue and he was knocked out
 (5) They also tendered another expert Ralph Elston
 (6) Mr Elston was not allowed to testify in federal court He is
 (7) the next subject matter of a motion to preclude but the fact
 (8) of the matter is Dr Meyers at no time has been advanced as an
 (9) expert on this issue
 (10) That being the case the question is Is his testimony
 (11) relevant to establish any of the issues in the case or is it
 (12) simply a matter of collateral impeachment The issue on the
 (13) collateral impeachment is did you have a phone conversation
 (14) with Dr Kocan what did you tell him what did you say is he
 (15) telling the truth when he talks about what occurred during that
 (16) conversation The credibility of the witness during that
 (17) conversation is really what is at issue whether or not
 (18) Dr Kocan has accurately relayed to the jury that phone
 (19) conversation That is clearly a collateral issue The cases
 (20) are very clear that when -
 (21) THE COURT Counsel what he said on - in his
 (22) testimony that Mr Meyers quote thought the
 (23) immunosuppression
 (24) theory was perfectly legitimate unquote didn't he?
 (25) MR ERTZ That is what he said in the context of a
 (26) question by Exxon saying Isn't it true that Dr Meyers would

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(1) disagree with you? The answer is simply implied by the
 (2) question and the fact that the witness had a different opinion
 (3) or a different answer that surprised counsel doesn't take away
 (4) from the fact that counsel was implying a certain answer and
 (5) was simply surprised by it
 (6) But the - the rule on collateral impeachment is that
 (7) basically when that happens and in criminal context - let me
 (8) put this in criminal context - a prosecutor asks a defendant
 (9) Isn't it true that you've been convicted before on a similar
 (10) charge? The witness answers no - but the prosecutor would
 (11) The prosecutor is surprised because he knows that that witness
 (12) has been convicted Nevertheless the rule is the prosecutor
 (13) is not allowed to put on a witness to impeach the credibility
 (14) of that answer He takes the answer as it is given and that
 (15) is a collateral matter It really has nothing to do with the
 (16) expert testimony the VHS virus the herring the biomass The
 (17) question is the credibility of the witness in response to that
 (18) particular question by Exxon and it is a collateral impeachment
 (19) matter
 (20) THE COURT Thank you very much counsel
 (21) MR OPPENHEIMER Your Honor here's why I think it
 (22) isn't The essence of collateral impeachment is credibility
 (23) attacks and while I think there may be some fallout on
 (24) Dr Kocan's credibility as a result of the testimony that is
 (25) not it's primary purpose I mean what we had is a situation

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(1) where under cross examination the witness was being pressed
 (2) on a position that has been taken through federal court and
 (3) otherwise which is that there is - there is not historically
 (4) been a statement by him to the effect that anybody in the State
 (5) endorses his theory of the linkage between the oil spill and
 (6) this immunity issue and the virus
 (7) And we've recounted in our papers how even that linkage
 (8) didn't come from Dr Kocan until June As of January in his
 (9) deposition he was testifying he had no opinion on that
 (10) subject In June he testifies he does have an opinion and
 (11) then when asked here for confirmation that this newly advanced
 (12) opinion is at least still inconsistent with the State he says
 (13) as a matter of fact just three days ago I had a conversation
 (14) with the State through Dr Meyer its highest ranking
 (15) toxicologist said this theory is perfectly legitimate
 (16) Our primary purpose in having Dr Meyer testify is to make
 (17) it very clear two things very clear that that is not the
 (18) State's position and that - that Dr Meyer does not take the
 (19) contrary position out of some sort of political compunction
 (20) But because his position is what it is as a scientist and
 (21) toxicologist there will be a - there will be fallout on
 (22) Dr Kocan If Dr Meyers testimony is credible and comes in
 (23) as I believe it will and I think we're entitled to that
 (24) fallout as well That's the give and play of all this But it
 (25) is not being introduced solely on his credibility issue I

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(1) would go so far as to say though that even if it were in
 (2) this area this is quite distinguishable from a situation where
 (3) your only purpose in asking a question on cross where you get
 (4) an answer that is inconsistent and you want to go prove it up is
 (5) to go at somebody's credibility This is not a question of
 (6) past conduct or prior conviction type or character or any of
 (7) that This is - this is - and it is not just a herring issue
 (8) Your Honor it is the theory that this witness uses to tie
 (9) herring to the oil spill and the State just does not endorse
 (10) it
 (11) THE COURT I understand the issue of both parties
 (12) It's very clear to me that this is not collateral impeachment
 (13) and I'm going to allow the testimony
 (14) All right now what's the next one?
 (15) MR PETUMENOS We have a motion with respect to the
 (16) same motion filed in federal court with respect to the late
 (17) filed expert witness
 (18) THE COURT Elston
 (19) MR PETUMENOS The Elston motion Basically we are
 (20) again in a position of facing an expert about - with which
 (21) we've had no deposition we got a very abbreviated report in
 (22) the middle of trial which we have had the ability to read and
 (23) nothing else As I say the defendants now are seeking to
 (24) call I think three witnesses on herring the one they always
 (25) had this fellow and now Dr Meyer This third one it seems

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(1) to me should be stricken
 (2) You entered an order I think sometime the beginning of
 (3) June that said no more reports no more reports Now I think
 (4) it was directed at us but in your way I think you also spread
 (5) your order around the courtroom to the other - to all
 (6) parties The issue of this immune virus was a huge one in this
 (7) case Everybody knew that it was happening the issue of
 (8) whether it could be tied to the Exxon Valdez case was one that
 (9) both parties in this case were aware of And Dr Kocan was
 (10) deposed in I think June They have a deposition in their
 (11) possession and we have nothing If they thought that they
 (12) needed to rebut this evidence it should have been done well
 (13) before it was I ask that you follow Judge Holland's rule -
 (14) ruling -
 (15) THE COURT Did he issue a written ruling by the way
 (16) counsel?
 (17) MR PETUMENOS No it was in transcript form When I
 (18) was going back and reviewing the transcripts of these various
 (19) experts and so forth actually I was reviewing the expert
 (20) that they have always intended on calling testimony when
 Exxon
 (1) made the proffer in federal court that they wanted to call
 (2) Elliott (sic) and that when I saw the application to Judge
 (3) Holland to - to add this other expert witness and Judge
 (4) Holland ruled with - in fact on a record that would have
 (5) been much more favorable to Exxon than this one is in terms of

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(1) the amount of notice that it was too late and if Exxon wanted
 (2) to address the issue of the virus and the oil spill given the
 (3) fact that the spectre was raised in January and while the
 (4) witness had not completed his work or didn't have any opinion
 (5) about it at that time that Exxon could have done something
 (6) about it and chose not to and it was simply not going to let a
 (7) new expert and new report come in at that lawsuit date so it
 (8) was on the record in federal court
 (9) I think he may have said it in transcript in the papers so
 (10) you have it there of what he said and I think enough is
 (11) enough We've got now Dr Meyers to contend with with no
 (12) report no deposition We have the - the herring expert that
 (13) Exxon has always had albeit not qualified under
 (14) immunotoxicology I think they have it covered with Dr
 (15) Meyers I don't think we ought to be prepared now for yet a
 (16) third expert with no file These witnesses are very difficult
 (17) to cross examine very difficult to understand without some
 (18) deposition behind it and we simply will not have one on
 (19) Dr Elston can I do it with all the stuff that's coming down
 (20) on us now I don't think you're interested in ordering
 depositions at this point
 (1) THE COURT Thank you counsel Do go ahead
 (2) MR OPPENHEIMER Your Honor I'm not sure that any of
 (3) us know the full background of Judge Holland's ruling I'm
 (4) looking at the transcript myself We just got these papers

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(1) today but I don't know that it - I don't know why it should
 (2) control the outcome here The -
 (3) THE COURT Tell me how you view the situation with
 (4) regard to these - that I'm not talking now about Meyers I'm
 (5) talking about Elston and the other expert on the issue Do you
 (6) have another expert?
 (7) MR OPPENHEIMER Dr Pearson
 (8) THE COURT Right
 (9) MR OPPENHEIMER This is one of the dilemmas of
 (10) treating things like herring as a single topic Dr Pearson
 (11) was apparently disqualified in federal court from speaking to
 (12) toxicological issues His background was not adequate of
 (13) that That was as a result of his answering - you know
 (14) scientists are maybe clearer than we lawyers about where the
 (15) expertise begins and ends because he explains as I
 understand
 (16) it I haven't reviewed the transcript but my understanding
 (17) from sources who have is that he - his testimony made clear
 (18) that he would not feel comfortable giving expert testimony as a
 (19) toxicologist and the reason all of this comes up as it does I
 (20) think the chronology's important for this case which is that
 (1) in January in Dr Kocan's testimony Bert Cooper of our office
 (2) took his testimony and elicited from him that he had no opinion
 (3) with respect to the immunization theories that he's now
 (4) describing That situation did not change until a supplemental
 (5) deposition was taken in approximately mid June and at that

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(1) point Your Honor -
 (2) THE COURT Well hadn't you anticipated that Pearson
 (3) would testify on this
 (4) MR OPPENHEIMER Yes we had that's correct
 (5) THE COURT When did you designate Pearson?
 (6) MR DIAMOND May I step on your toes just for a
 (7) moment There are several issues There are two issues with
 (8) respect to herring There's always been the argument that oil
 (9) and herring don't mix and when you dip herring in oil they
 (10) suffer genetic defects That's Mr Pearson We've been
 (11) prepared to address that claim That's - he's been on our
 (12) witness list The claim that came up in the June deposition of
 (13) Dr Kocan which was different than the earlier deposition
 (14) that in addition to oil and herring not mixing the exposure to
 (15) herring weakens species
 (16) THE COURT You're simply saying it's a subset you
 (17) didn't know about?
 (18) MR OPPENHEIMER It's a second theory as a matter of
 (19) fact And Mr Diamond as usual has helped correct the record
 (20) here
 (1) The second of those two theories the idea that the event
 (2) reduced the ability of these fish to fend off a virus is
 (3) essentially a theory that previously Mr Kocan had said he
 (4) would not espouse He had no opinion in January In June in
 (5) his supplemental deposition he does and at that point in time

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(1) we all believed on this team that the likely result would be
 (2) that Dr Pearson would be able to address that issue. There
 (3) was as I understand it a simultaneous attempt to back that
 (4) up though and to deal with the new theory and find out
 (5) whether other expertise might be called into play
 (6) Elston was - was considered in that context but when
 (7) Dr Pearson was found not to be qualified in the federal court
 (8) with respect to this matter which I believe was on July 7 we
 (9) frankly felt that now we - you know we might encounter
 (10) probably would encounter the same situation in this court and
 (11) at that point I believe Dr Elston was put on our list I can
 (12) double check but I believe it was the 11th - pardon me the
 (13) 14th. So within a week we confirmed with him that he in fact
 (14) could fill in where we thought Dr Pearson had probably been
 (15) able to go and may still this Court may have different views
 (16) of his qualifications. I have stated them as I believe they
 (17) were characterized in the federal court. Perhaps there would
 (18) be a different result here but -
 (19) THE COURT Is Dr Pearson slated to testify first?
 (20) MR OPPENHEIMER Is he first? I'm told yes he is
 (21) slated to testify before Dr Elston. I see a practical light
 (22) going on. To the extent that that provides a possible
 (23) practical alternative to a solution for this then he is going
 (24) first. But in any event our thinking had been that it was
 (25) necessary at that point.

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(1) Again still responding Your Honor I mean in all fairness
 (2) to a theory I realize things move quickly in the case at
 (3) least procedurally in front of the jury they might not but
 (4) really responding to a theory that had only been espoused in
 (5) mid June by a month later there was an expert and that
 (6) against a backdrop where until the 7th of July we thought we
 (7) probably had the expert to deal with the problem but federal
 (8) - the fear of God when the result occurred in federal court
 (9) THE COURT There's been no report here
 (10) MR OPPENHEIMER There is a report now
 (11) THE COURT When was the report delivered?
 (12) MR OPPENHEIMER Recently Your Honor. It was
 (13) delivered to - August 16th Your Honor
 (14) THE COURT That's kind of late
 (15) MR OPPENHEIMER The theory's kind of late Your
 (16) Honor Your Honor if we had not - I would - I would respect
 (17) any suggestion that if this were a case where we hadn't asked
 (18) the question in deposition or where we hadn't chosen to take
 (19) advantage of a deposition many things I could postulate but
 (20) to be in a situation where as recently as January of this year
 (21) we could have ruled - did rule Dr Kocan out on this very
 (22) theory because of the direct question put to him. And then
 (23) after our witness list is in on June 8 to learn that in fact
 (24) he espouses this other theory perhaps you know in retrospect
 (25) we should have identified Dr Elston instead of believing in

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(1) good faith we could have relied on Dr Pearson
 (2) We may still in this courtroom rely on Dr Pearson but I'm
 (3) assuming the scenario in which he is once again found not to be
 (4) qualified to go into the toxicological issues. If that's the
 (5) case we are left without an expert to deal with a theory
 (6) that's only been around since mid June and which was
 (7) specifically denied as a theory at the beginning of the year
 (8) THE COURT I hear you counsel I understand what
 (9) the situation is. Of course I don't think I can make a ruling
 (10) until after I hear Pearson
 (11) MR DIAMOND Your Honor it's not our intention to
 (12) offer Pearson on the subject of - on the genetic subject
 (13) simply because he's subject to rather stark impeachment in
 (14) view of rejection of that testimony in federal court
 (15) THE COURT Why?
 (16) MR DIAMOND I would think -
 (17) MR OPPENHEIMER I would assume it would be brought
 (18) up
 (19) THE COURT Well stark impeachment because of what he
 (20) said right?
 (21) MR DIAMOND Well I haven't read the transcript but
 (22) I assume some dialogue
 (23) MR PETUMENOS Judge -
 (24) THE COURT Stark impeachment because of what a
 (25) witness said is something counsel has to deal with right so if

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(1) it's not your intention to do that it sounds like a strategic
 (2) choice it's not something having to do with the situation
 (3) you're faced with by the federal order
 (4) MR OPPENHEIMER Your Honor I may have jumped too
 (5) quickly at the practical
 (6) THE COURT I'm not going to require you to do that
 (7) counsel. You maybe opened up an avenue I'm telling you I'm
 (8) not going to do it until I hear Dr Pearson testify. If you
 (9) choose though not to present him on the subject when you
 (10) always assumed he was a qualified expert on it I'll certainly
 (11) take it into consideration I'm going to make independent
 (12) judgments on these things and if he doesn't testify I mean if
 (13) you voluntarily keep him from testifying in that area you're
 (14) stuck with your choice counsel and then I'll deal with this
 (15) situation
 (16) MR OPPENHEIMER Could I address that issue just
 (17) briefly Your Honor?
 (18) THE COURT Yes
 (19) MR OPPENHEIMER Because I really do think I may have
 (20) invited some confusion in the area. The - I think the dilemma
 (21) we are in is that you know in an attempt not to proliferate
 (22) experts we certainly were proceeding as I understand it from
 (23) what I will call the fish team that Dr Pearson seemed to
 (24) those in the know to be capable of addressing the subject
 (25) It's now clear that his - there is a record that as a

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(1) trial lawyer I think that the practical reality here is that we
 (2) can't -- we can't put him on subject to the kind of
 (3) cross examination I doubt we'll get a stipulation that it
 (4) won't occur on this issue. And with that in mind I guess I
 (5) really shouldn't even have invited any speculation. I think
 (6) we're in a position where we can't call him as a practical
 (7) matter on this issue.
 (8) THE COURT: But I'm going to tell you now. I will
 (9) consider that to be a strategic choice. He said something --
 (10) you assumed he was going to be your witness on this issue. He
 (11) said that he wasn't qualified on the issue. You've chosen not
 (12) to call him because of what he said, not because of the federal
 (13) court. I mean that's the only finding I think I can make on
 (14) the representations you make to me and the situation as it
 (15) exists. So if you choose to do that, then I'll move on to the
 (16) next issue. I would think you better think about this before
 (17) you --
 (18) MR. DIAMOND: The difficulty we face, and I think what
 (19) we're squirming with is will we hear Mr. Petumenos or his
 (20) surrogate say isn't it a fact that your qualifications were
 (21) deemed insufficient and inadequate to render testimony in
 (22) a federal court on this issue?
 (23) THE COURT: No, no, no, because I wouldn't allow
 (24) that. On the other hand, if he said I'm not qualified, that's
 (25) a different issue.

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(1) MR. OPPENHEIMER: We will review his testimony with
 (2) that in mind, with the understanding he won't be asked that
 (3) question.
 (4) MR. PETUMENOS: I won't ask him what the Judge said
 (5) but I will ask him what he said his qualifications were.
 (6) THE COURT: Of course, and I would too.
 (7) MR. OPPENHEIMER: And we will double check exactly
 (8) what he said as long as he's not left with the preemptor of
 (9) federal judge practice.
 (10) THE COURT: No, as you know from hard experience what
 (11) the federal courts do and what I do is sometimes different.
 (12) MR. OPPENHEIMER: We respect the independency of the
 (13) Court.
 (14) MR. DIAMOND: I know you are running a half an hour
 (15) late already.
 (16) THE COURT: I am, yes, counsel.
 (17) MR. DIAMOND: And I have endeavored to keep my
 (18) bellyaching to a minimum during the course of this trial, not
 (19) always successfully.
 (20) THE COURT: And I truly appreciate that, counsel, and
 (21) I hope you'll continue that.
 (22) MR. DIAMOND: I will, and I hope you will not take the
 (23) following comments to constitute bellyaching, but we're having
 (24) a real difficult time moving our case along because every time
 (25) we stand up with a witness or every time we sit down with a

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(1) witness, we end up with rather protracted proceedings outside
 (2) the presence of the jury on issues that were clearly known to
 (3) the other side days, if not weeks, if not months ago.
 (4) Today is a perfect example. Mr. Petumenos knew exactly
 (5) what we were going to do with Mr. Propes, has known what we
 (6) were going to do with Mr. Propes for weeks, if not -- if not
 (7) months, and I'm not singling him out. We had problems with
 (8) Mr. Haerer, the assessor, or we had lengthy proceedings
 (9) outside.
 (10) the presence of the jury while he cooled his heels. The jury
 (11) wasted its time. We are trying to get our case concluded by
 (12) the middle of next week, but we are losing ground.
 (13) THE COURT: What do you want me to do?
 (14) MR. DIAMOND: I would like you to issue an order that
 (15) if they have a problem with any of our witnesses' testimony
 (16) they raise the objections and bring it on for hearing at least
 (17) 48 hours in advance -- or 36, the afternoon prior to the day of
 (18) the day of the day of their appearance, so that we can make
 (19) some intelligent planning. Depending on the outcome of
 (20) today's
 (21) hearing, our Friday, Thursday and Friday were potentially --
 (22) THE COURT: I'm willing to make that order, but I'd
 (23) confine it to 24 hours in advance, because I think that's fair
 (24) enough.
 (25) MR. PETUMENOS: There's one day, Judge, that can't
 (26) apply to, and that is we don't get who they're calling on
 (27) Monday until after the close of business on Friday.

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(1) MR. DIAMOND: That's true, it can't apply to Monday.
 (2) witnesses, that would be unfair.
 (3) THE COURT: Okay, so on Friday -- why can't you give
 (4) the notice a day earlier for --
 (5) MR. DIAMOND: On Monday, witnesses?
 (6) THE COURT: Yeah, on Thursday.
 (7) MR. DIAMOND: We could try to do that.
 (8) MR. PETUMENOS: That would be very helpful, and I
 (9) would endeavor to comply. The other thing that's happened --
 (10) I'm not criticizing counsel, we did it too -- is witness
 (11) shuffling.
 (12) THE COURT: This is a complicated trial, and I can
 (13) understand how things can happen. I think Mr. Diamond's
 (14) complaint is legitimate in that it asks for a ruling that sets
 (15) the stage for further proceedings. Now, the question would be
 (16) what I do in the event there's a violation of the order. And
 (17) I'll tell you what I'll do so you know where I am.
 (18) I mean, I do not -- because of an affront to my supposed
 (19) dignity -- strike witnesses. I examine the circumstances of
 (20) each supposed violation and try to find the appropriate
 (21) sanction. Usually the appropriate sanction is a personal
 (22) sanction on counsel, money, and I -- and I order that that come
 (23) out of the lawyer's pocket and not the client's. And that
 (24) generally is enough warning.
 (25) Now, if it were a bad enough sin, I might do something

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(1) else but I start with the least draconic sanction and I work
 (2) from there so - and besides we've had to be flexible all of
 (3) us throughout this whole trial I mean I've seen flexibility
 (4) as well as lack of flexibility from both the parties in this
 (5) case but so far I'm certainly not in a state of constant
 (6) tantrum throwing which indicates to me that you're really -
 (7) you may have reason to bellyache but you certainly don't have
 (8) reason to take your toys and go home And so I'd ask you to
 (9) just continue in that spirit
 (10) I gave you the order you want I'll respond to it but
 (11) don't think it's a promise that somehow I'm going to toss a
 (12) witness out the door if somehow there's a small violation or
 (13) something that I can't cure with an order that's short of
 (14) striking testimony I mean everybody should understand that
 (15) after having dealt with me for some time that I choose the
 (16) sanction I think is appropriate and not one strictly to - for
 (17) vengeance sake okay
 (18) MR DIAMOND We're not seeking any sanction
 (19) whatsoever we just would like to be able to move it along a
 (20) little bit faster
 (21) THE COURT Me too I would too Actually if you
 (22) say you think you can finish your case by next Wednesday I
 (23) just received the best news I've had in a week
 (24) MR DIAMOND I said we have endeavored to do things
 (25) to make that happen We keep going two steps forward one
 step

(1) THE CLERK Off record
 (2) (Recorded at 4:04 p.m.)

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(1) back
 (2) THE COURT I will endeavor to endeavor
 (3) MR PETUMENOS I'm sorry I missed that the defense
 (4) is resting this coming Wednesday?
 (5) THE COURT No they're trying very hard to get the
 (6) case concluded by next Wednesday
 (7) MR PETUMENOS I didn't hear that
 (8) MR DIAMOND That was our original target
 (9) THE COURT I wanted to give you a little good news
 (10) counsel
 (11) MR PETUMENOS I'm delighted
 (12) MR DIAMOND We certainly would hope that - I have
 (13) had conversations with Mr. Petumenos about some of the
 (14) breadth
 (15) of his cross examinations which I know will preclude that from
 (16) happening
 (17) THE COURT Don't be such a pessimist counsel
 (18) MR PETUMENOS Depends how long my sanction hearing
 (19) takes
 (20) THE COURT Yeah that sanction hearing might eat up a
 (21) little bit of time but remember that Kodiak Island Borough's
 (22) counsel was very brief in cross examination today and very
 (23) proud of himself too
 (24) MR DIAMOND I believe he had one question for every
 (25) seven documents he served as cross examination material
 THE COURT All right we're off the record

(1) STATE OF ALASKA)
 (2) Reporter's Certificate
 (3) DISTRICT OF ALASKA)
 (4) I Joy S. Brauer RPR a Registered Professional
 (5) Reporter and Notary Public
 (6) DO HERBY CERTIFY
 (7) That the foregoing transcript contains a true and
 (8) accurate transcription of my shorthand notes of all requested
 (9) matters held in the foregoing captioned case
 (10) Further that the transcript was prepared by me
 (11) or under my direction
 (12) DATED this day
 (13) of 1994
 (14) JOY S. BRAUER RPR
 (15) Notary Public for Alaska
 (16) My Commission Expires 5/10/97

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XXX [1] 20 18

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24 17
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You've [1] 49 11
you've [3] 7 16 30 14 38 9
yours [1] 21 17

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Z R [1] 11 21
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26 10 15

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (3) In re) Case No. JAM 89 2533 Civil
 (4)) Anchorage, Alaska
 (5) The EIXON VALDEZ) Thursday August 25, 1994
 (6)) 8:30 a.m.
 (7))
 (8) VOLUME 44 Pages 6971 through 7151
 (9) TRANSCRIPT OF PROCEEDINGS (Continued)
 (10) TRIAL BY JURY
 (11) BEFORE THE HONORABLE BRIAN C. SHORTELL
 (12) Superior Court Judge
 (13)
 (14) APPEARANCES
 (15) FOR THE PLAINTIFF
 (16) N. ROBERT STOLL
 (17) Stoll Stoll Berne & Lokting
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 (20) 503/227 1600
 (21) TIMOTHY J. PETUMENOS
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 (30) 907/277 4222

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(1) PROCEEDINGS
 (2) THE CLERK: Please rise
 (3) (Call to Order of the Court)
 (4) THE CLERK: Please be seated
 (5) THE COURT: Yes, counsel, you wanted to see me without
 (6) the jury.
 (7) MR. DIAMOND: Yes, I did. Your Honor, I spoke with
 (8) Mr. Petumenos last evening and again this morning and we
 (9) agreed to discuss with you what we intend to elicit from
 (10) Mr. Propes so that there is no misunderstanding so that
 (11) counsel has an opportunity to object.
 (12) I'll tell you what we're not going to deal with. We're not
 (13) going to deal with the settlement memorandum. We're not
 (14) going to deal with the numbers we discussed yesterday afternoon.
 (15) What Mr. Propes is going to testify about really is an offshoot
 (16) of what Mr. Gordaoff already testified to and was covered
 (17) somewhat in an exhibit. If I can show you two things, give you
 (18) the transcript of July 8th and DX15218 in evidence.
 (19) THE COURT: Could you tell me something, is this
 (20) something you left here or did I leave it here last night?
 (21) MR. DIAMOND: It's mine. I searched all evening for
 (22) that.
 (23) THE COURT: I'll bet I'd have wanted it, too.
 (24) MR. DIAMOND: Specifically, there were questions posed
 (25) to Mr. Gordaoff on page 1347 of the transcript beginning at

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 (15) JOY S. BRAUER, RPR
 (16) Registered Professional Reporter
 (17) Midnight Sun Court Reporters
 (18) 2550 Denali Street, Suite 1505
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(1) lines 13 concerning the Chugach Alaska settlement selector
 (2) criteria.
 (3) THE COURT: Well, only lines 16 through -
 (4) MR. DIAMOND: Just very briefly there, and it was
 (5) also - the negotiation process that took place in 1982 came up
 (6) again two pages later on page 1357 beginning on line 1
 (7) through
 (8) about line 13.
 (9) THE COURT: Yeah, I got it.
 (10) MR. PETUMENOS: Is that -
 (11) MR. DIAMOND: It is 1357 which you got to flip two
 (12) pages.
 (13) THE COURT: Yeah, I got it.
 (14) MR. DIAMOND: Additionally, the exhibit 15218, fourth
 (15) page in under Land Settlement discusses in general terms the
 (16) land settlement procedure which produced the 1982
 (17) agreement.
 (18) THE COURT: Yeah, I see it.
 (19) MR. DIAMOND: Okay, that's the background. I really
 (20) have two questions for Mr. Propes other than sort of
 (21) background.
 (22) Information for him. The two questions I am going to be asking
 (23) him is whether all of the lands that the corporation attempted
 (24) to trade for in the negotiations in 1982 were culturally
 (25) significant and I am going to ask him about Mr. Gordaoff's
 (26) statement that everybody was interested in acquiring these
 (27) lands during the course of the negotiation process. I'm going
 (28) to ask him whether it's not true that certain of the parcels in

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- (1) litigation here that the corporation received were in fact,
 (2) sort of last minute giveaways by the federal government to
 (3) which the federal government attached little value and the
 (4) negotiating team didn't particularly seek to acquire and
 (5) obviously have him identify which ones those were and what the
 (6) circumstances were
 (7) THE COURT That's Knight Island and what?
 (8) MR DIAMOND There are five that fall into that
 (9) category There are Snow River Raging Creek Comfort Cove
 (10) Knight Island LaTouche Island Those were - all three of
 (11) them were last minute add-ons to give the corporation acreage
 (12) to meet certain acreage requirements Two of them were low
 (13) priority The government did not attach a very high interest
 (14) in retaining them
 (15) THE COURT Which two?
 (16) MR DIAMOND Knight and LaTouche
 (17) MR PETUMENOS Am I to understand there is going to
 (18) be no attempt to make a numerical value of these lands
 (19) whatsoever no dollar amounts are going to be elicited?
 (20) MR DIAMOND No dollar amounts
 (21) THE COURT Good
 (22) MR PETUMENOS May I have a moment to confer with the
 (23) witness?
 (24) THE COURT With the witness?
 (25) MR PETUMENOS Yes

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- (1) THE COURT Sure but only a moment counsel I don't
 (2) want a long conversation I told the jury we had to be on
 (3) time remember
 (4) MR DIAMOND May I have a moment to confer with the
 (5) witness too? I'm not sure I want him out there alone
 (6) THE COURT You want to confer at the same time
 (7) counsel? If you get into an argument out there I can't help
 (8) it
 (9) MR DIAMOND Mr Petumenos appears to be woodshedding
 (10) my witness
 (11) THE COURT Oh well that can happen Counsel tell
 (12) him to come back in here I want the jury in You want your
 (13) exhibits back counsel? Do you want your exhibits back?
 (14) MR DIAMOND Thank you There is one other matter I
 (15) want to bring up and I think Mr Petumenos needs to be
 (16) present. It concerns having a witness in court when another
 (17) witness testifies
 (18) THE COURT Who's the witness?
 (19) MR DIAMOND The following witness is Mr Nagel who
 (20) was the assessor They're going to talk about different
 (21) things I thought it important to have Mr Nagel present so he
 (22) knows what the jury is told about ANCSA so he doesn't repeat
 (23) THE COURT He's a fact witness?
 (24) MR DIAMOND He's a fact witness
 (25) THE COURT I won't allow it If you can give me a

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- (1) specialized reason counsel the fact witnesses the
 (2) exclusionary rule has been revoked and I see no reason to do
 (3) away with it for this witness
 (4) MR DIAMOND You did away with it with respect to one
 (5) witness for Kodiak Island Borough
 (6) THE COURT I'm sure I did but there was a reason
 (7) MR DIAMOND The reason is he is also going to be
 (8) talking about certain aspects of the ANCSA selection process
 (9) I don't want the witness to go back and start repeating things
 (10) the jury has already been told If he's present he will know
 (11) what they know It will be a lot easier for him to testify
 (12) He is not going to be poisoned by anything Mr Propes says
 (13) MR PETUMENOS Judge the difference between
 (14) Mr Carlson and these witnesses is Mr Carlson had already
 (15) testified when he made the application and the rule applies to
 (16) - is principally designed to keep witnesses on the same side
 (17) from hearing one another's testimony This is a matter of
 (18) control of examination by counsel by the attorney and in
 (19) terms of not repeating things that can easily be done that way
 (20) and there's nothing unusual about making sure that they don't
 (21) go over ground twice
 (22) THE COURT I hear you counsel I want the jury in
 (23) here I'm not going to do away with the exclusionary rule for
 (24) these witnesses
 (25) (Jury in at 8 41 a m)

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- (1) MR DIAMOND Your Honor the defense calls as its
 (2) next witness Mr Carl Propes I don't believe he's been sworn
 (3) before the jury
 (4) THE CLERK Sir can you stand raise your right
 (5) hand
 (6) (The Witness is Sworn)
 (7) THE CLERK Please be seated
 (8) Sir for the record would you please state your full name?
 (9) A My name is Carl Propes Jr
 (10) THE CLERK Please spell your last name
 (11) A It's spelled P-r-o-p-e-s
 (12) THE CLERK And your occupation?
 (13) A My occupation is I own a furniture store Scan Home
 (14) Furniture in Anchorage and I'm a part time employee of Nana
 (15) Regional Corporation
 (16) THE CLERK Thank you
 (17) DIRECT EXAMINATION OF CARL PROPPES JR
 (18) BY MR DIAMOND
 (19) Q What do you do for Nana Regional Corporation Mr Propes?
 (20) A I work on the business side in their operations
 (21) particularly helping them manage their businesses in the Nana
 (22) region
 (23) Q What businesses are those?
 (24) A We have a tour business We have a hotel and restaurant
 (25) We own a variety of real estate in Kotzebue primarily that we

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- (1) manage a museum operation
 (2) Q And how long worked for Nana?
 (3) A I've worked as an employee for a little over a year Prior
 (4) to that I was a consultant with them since 1988
 (5) Q Is that your first venture or was your association with
 (6) Nana your first venture into land management issues with
 Native
 (7) Corporations?
 (8) A No I started working with Native corporations in 1975
 (9) when I was employed as a summer intern with Doyon in
 (10) Fairbanks In 1976 I went to work for what was then called
 (11) Chugach Natives Incorporated now CAC as their land
 manager
 (12) and worked with them from 1976 to 1982 or early 83
 (13) Q Let's talk about - when you say Chugach Native that's now
 (14) the corporation that's come to be known as Chugach Alaska
 (15) Corporation Mr Petumencos client?
 (16) A Yes
 (17) Q And you do know Mr Petumencos?
 (18) A Yes
 (19) Q And is that from the days when you worked at CAC?
 (20) A I don't believe they were counsel of the corporation back
 (21) then
 (22) Q What were your responsibilities as land manager during the
 (23) period 1976 to 1983?
 (24) A Land manager may have been a fancy title I was one of -
 (25) oh it varied from two or three people in the land department

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- (1) Chugach had a land entitlement under the Native Claims
 (2) Settlement Act and it was essentially our responsibility to
 (3) select those lands to specify which ones we wanted to receive
 (4) title to to work closely with the government to try to obtain
 (5) title to those as clean of title as we could and then to
 (6) begin the land planning process for them determine what was
 in
 (7) the best interests of the corporation as to how to manage
 (8) them
 (9) Q To whom did you report in the corporation?
 (10) A I reported to the president of the corporation
 (11) Q And who was that in 1976?
 (12) A 1976 It was a gentleman by the name of Cecil Barnes
 (13) Q Did it change over time?
 (14) A Sure
 (15) Q Annually?
 (16) A No not necessarily but there were oh probably four or
 (17) five different presidents that I can think of during the seven
 (18) years I worked there
 (19) Q All right You were a member of the management team?
 (20) A If - if there was a management team I guess I was a
 (21) member of it
 (22) Q It was a small group of -
 (23) A It was a small corporation
 (24) Q When you arrived in 1976 had the lands that Chugach would
 (25) receive under ANCSA been resolved?

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- (1) A Yes and no If I could explain that.
 (2) Q Please do
 (3) A Lands had been withdrawn which is a technical term Lands
 (4) had been -
 (5) Q You better define withdrawn because it's counter
 (6) intuitive
 (7) A The government had made lands available for the Native
 (8) Corporation as part of the Native Claims Settlement Act, but
 (9) because of the rules that those lands were made available
 (10) under most of them ended up being glaciers and mountaintops
 (11) and relatively remote lands inaccessible to most of the
 (12) Chugach people
 (13) Q When is this in time when are we talking about?
 (14) A Well the Native Claims Settlement Act was passed in 1971
 (15) and there were various time frames and deadlines under that to
 (16) the corporations to acquire their lands They - the
 (17) corporations made their - again a term of art - land
 (18) selections in 1974 and 1975 to meet deadlines then
 (19) Q All right And the initial selection that Chugach made
 (20) you said was from an allotment given to it by the federal
 (21) government that was not terribly satisfactory?
 (22) A That's correct. We had to follow the rules of selecting
 (23) these lands so we could only select what were made available
 (24) for us at the time and those were not very satisfactory to the
 (25) corporation

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- (1) Q And who were the agencies or the folks making land
 (2) available from which you could select?
 (3) A Well it was done by the Secretary of Interior but we
 (4) would work most closely with the Bureau of Land Management
 to
 (5) select them
 (6) Q And whose lands was the federal government giving away?
 (7) A It was federal land
 (8) Q Owned by or administered by what agencies?
 (9) A Well administered by different agencies either the BLM
 (10) itself or the Forest Service those are the two primary ones
 (11) To a limited extent the corporation was able to acquire either
 (12) Fish and Wildlife Service lands or national park lands
 (13) Q Were those agencies thrilled with the idea of giving their
 (14) property away to Native Corporations?
 (15) A I don't think so no
 (16) Q How would you describe the tension in the process?
 (17) A Well the - the agencies didn't have a lot of say about
 (18) it because it was a - it was a federal law what lands were
 (19) made available to the corporation but it took the agencies -
 (20) the BLM in particular - a long time to actually transfer title
 (21) to these properties and back then a lot of us thought they
 (22) were dragging their feet. In fact, there was some litigation
 (23) over that issue
 (24) Q We're not going to talk about that this morning but let me
 (25) ask you this As of the end of the 70s according to Chugach

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- (1) Native Inc. Annual report, which is DX15218 in evidence the
 (2) corporation described the initial selection as 50 percent of
 (3) the land which was originally available to Chugach was glaciers
 (4) and ice fields the balance being inaccessible and of little
 (5) value is that an apt characterization?
 (6) A It's pretty apt, but it might have been a slight
 (7) exaggeration but that's how we generally characterized the
 (8) lands
 (9) Q When you got involved in the process after these selections
 (10) had been made and after the corporation was faced with the
 (11) prospect of taking mountains and glaciers did you in
 (12) management resolve to try to do something different?
 (13) A Yes we did
 (14) Q Tell us about that.
 (15) A Again I began working for the company in 1976 and by 1977
 (16) primarily Cecil Barnes and myself had decided to try to obtain
 (17) a better land settlement from the federal government than what
 (18) we had to date back then and we would do it primarily by
 (19) piggybacking if you will some legislation onto the D-2 land
 (20) process that was starting back at that time
 (21) Q And what did you end up piggybacking onto the D-2
 (22) process?
 (23) A Well from 1976 to maybe 1979 or early 1980 we
 (24) negotiated for improved lands with higher economic value and
 (25) lands more accessible to where the Chugach people lived in the
 villages in the region primarily in Prince William Sound in

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- (1) that area but we were unsuccessful at negotiating a specific
 (2) exchange for specific new lands So therefore what was
 (3) suggested to us and what later occurred was that we sign up
 (4) sign on to a study process called the Chugach Region Study
 that
 (5) was included in the D-2 bill called ANILCA and which created
 (6) a one-year study from December of '80 to December of '81
 (7) During which time the Chugach Corporation the State
 Department
 (8) of Natural Resources people the Forest Service and the
 (9) Interior Department would get together in kind of a formal
 (10) study process with the objective being to - to see if they
 (11) could come up with a better land settlement for Chugach
 (12) Q Did this ultimately lead to a lengthy series of
 (13) negotiations in the early 1980s with the federal government?
 (14) A Yes it did
 (15) Q Taking place among other places in Washington D C ?
 (16) A Yes
 (17) Q Mr. Gordaoff Keith Gordaoff testified I hate to say it
 (18) six weeks ago in this courtroom that he was quite active and
 (19) described this process of discussions of the trades with the
 (20) different government agencies and quote pairing up the land
 (21) acquisition with the different agencies Were you involved
 (22) with that process?
 (23) A Yes I was
 (24) Q Describe generally how that - how that unfolded and what
 (25) took place

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- (1) A Well from the time the Chugach Region Study started in
 (2) 1980 through our final lands settlement in late '82 or early
 (3) '83 it was I guess like any negotiation where our side
 (4) would put forth an offer and the other side would counter it
 (5) and we'd go back and forth discussing - since this was a land
 (6) settlement a real estate exchange we would discuss specific
 (7) parcels what their value was to us why it would make sense
 (8) for them perhaps to be transferred out of federal management
 (9) to the Native Corporation things like that.
 (10) Q All right. In lieu of the mountains and glaciers that you
 (11) were trading away were all of the lands that the corporation
 (12) attempted to trade for parcels that were culturally significant
 (13) to Chugach?
 (14) A No not all of the lands
 (15) Q Give us some examples of what you tried to trade for
 (16) A Again I'll put it in context. About midway through the
 (17) Chugach Region Study so this would have been the summer of
 (18) '81 we made some specific proposals to acquire lands with
 (19) short term economic value and specifically we worked with
 (20) Sea-Alaska Corporation and they suggested some lands that
 they
 (21) would be supportive of Chugach acquiring
 (22) Q Where were those lands?
 (23) A In Southeast Alaska with commercial timber on them
 (24) Q Do you know in the Juneau area?
 (25) A Yes We also worked with the Forest Service in analyzing

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- (1) specific properties in Oregon and Washington that were in
 (2) national forests or managed by the BLM there which had timber
 (3) on them
 (4) Q Chugach was trying to get lands under ANCSA in
 Washington
 (5) and Oregon?
 (6) A That's correct
 (7) Q Why?
 (8) A For their economic potential
 (9) Q And these were timberlands?
 (10) A Yes in that case they were We also worked with the BLM
 (11) and nominated certain lands in Wyoming and Utah for their coal
 (12) lands Again federal lands there were - maybe adjoining
 (13) lands were under federal coal leases that these lands would
 (14) have been in the path of development would have been logical
 (15) to lease in the future for development
 (16) Q Was the corporation successful in trading some of its
 (17) Prince William Sound and Alaska lands for Lower 48 lands?
 (18) A No we weren't
 (19) Q Why?
 (20) A We - again putting this in context we were a small
 (21) corporation with a small staff and a very small budget and we
 (22) were probably over our heads in trying to do that where -
 (23) it's difficult enough in Alaska to try to do a land exchange
 (24) imagine what it's like for a small company here to go into a
 (25) more developed area with more entrenched interests whether it

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- (1) be the federal agencies managing the land or the timber
 (2) companies used to working on federal timber sales or coal
 (3) leases. So we more or less got in over our head and we didn't
 (4) have the political muscle in order to effect that.
 (5) Q I want to talk about the negotiations that culminated. I
 (6) think you said you had a settlement in 1983?
 (7) A Yes.
 (8) Q Mr. Gordaoff characterized the lands that Chugach
 (9) ultimately got in Prince William Sound as lands that it seemed
 (10) like everybody was interested in acquiring. Is it true that
 (11) some of the lands that the federal government ultimately threw
 (12) into the pot for Chugach were really giveaways at the last
 (13) minute?
 (14) A Yes, it is.
 (15) Q Which parcels do you have in mind?
 (16) A Well, specifically Comfort Cove - I'm referring to this
 (17) list here - Comfort Cove, Raging Creek and Silver Lake -
 (18) Q Let me put that on the Elmo. I'm going to -
 (19) MR. PETUMENOS: Have I seen this?
 (20) MR. DIAMOND: Yes, this is PX1214. Mr. Mundy's chart
 (21) of lands.
 (22) BY MR. DIAMOND:
 (23) Q You've seen this document before today, Mr. Propes?
 (24) A Yes, I have.
 (25) Q I'm also going to set up the - a map of the Prince William

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- (1) Sound properties and maybe you can come down and show us
 what
 (2) you're talking about. This is DX13198. If you stay hooked up
 (3) then they'll be able to make a record. Just put the
 (4) transformer in your pocket.
 (5) You got it there?
 (6) A Just about.
 (7) Q Okay, we were talking about some parcels of land that would
 (8) be a fair characterization Chugach got because the federal
 (9) government wasn't real interested in keeping them?
 (10) A That's correct.
 (11) Q You mentioned Comfort Cove.
 (12) A Um-hum.
 (13) Q Where is Comfort Cove?
 (14) A Comfort Cove is over in this area, Port Gravina, in between
 (15) Eyak and Tatitlek areas.
 (16) Q Those - that was one of the parcels that was added at the
 (17) last minute?
 (18) A Yeah.
 (19) Q Can you explain that?
 (20) A It - I don't recall precisely how that was added at the
 (21) last minute, whether it was an area that was actually suggested
 (22) by Chugach or offered by the government, but I recall that it
 (23) wasn't in any of our wish lists initially that we were looking
 (24) for. It wasn't a high priority to Chugach, and probably the
 (25) way to characterize it, it was make-up acreage, where from

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- (1) Chugach's standpoint, any additional lands in Prince William
 (2) Sound or near Prince William Sound, like Comfort Cove, were
 (3) more valuable to us than more remote properties, like we had
 (4) originally.
 (5) Q The original ones were further east?
 (6) A The snow and ice that we were trying to get rid of. So it
 (7) was more valuable than that, but at the same time it didn't
 (8) offer really any - or any significant potential for economic
 (9) development or return to the company.
 (10) Q Was Comfort Cove perceived to have any appreciable
 economic
 (11) value to the corporation by the bargaining team?
 (12) A Nothing appreciable. I don't recall, and I don't know for
 (13) a fact if there's any commercial timber there, there may be
 (14) some, but again it's a relatively small parcel that wouldn't
 (15) support a sale on its own, so you would need to work with
 (16) adjoining landowners to put together something.
 (17) Q Again, where was that location?
 (18) A Comfort Cove is right here.
 (19) Q Is that in the middle of Eyak land?
 (20) A Yes, that is in the middle of Eyak land.
 (21) Q Was that one of the reasons why it was thrown into the pot
 (22) do you remember?
 (23) A Yes, also for land consolidation purposes. It made sense
 (24) if some land could be added in Prince William Sound to form
 (25) better land management package, better boundaries. Both from

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- (1) our standpoint and from the government's standpoint, it made
 (2) some sense.
 (3) Q There were two other parcels that the federal government
 (4) threw into the pot at the last minute to close the
 (5) negotiation. What was the next one?
 (6) A There is Raging Creek.
 (7) Q Did that have any appreciable value to the bargaining
 (8) team?
 (9) A No.
 (10) Q Why?
 (11) A Again, for the same reasons as Comfort Cove, it was
 (12) primarily valuable because it formed a better land management
 (13) package and because it was still in the general proximity of
 (14) Prince William Sound.
 (15) Q And what was the third one that was thrown in at the last
 (16) minute?
 (17) A At Silver Lake.
 (18) Q Did that have appreciable value to the negotiating team?
 (19) A That probably had more value than the other parcels. One
 (20) obviously it's a lot larger. Number two, there's a large lake
 (21) there which has some hydro power potential. Again, though
 (22) wasn't highly sought after by Chugach because we didn't think
 (23) it had any immediate or short - relatively short term economic
 (24) potential.
 (25) Q Was that also subject to a federal power easement, made

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- (1) somewhat - "worthless" might be too strong a word but
 (2) undercut its value substantially?
 (3) A I recall that it was and I haven't had a chance to check
 (4) back and see but certain lakes that have been set aside for
 (5) power projects would have power site withdrawals or
 (6) classifications on them which could allow the federal
 (7) government to come in even after they're privately owned and
 (8) build a power - build a dam there without compensating the
 (9) corporation. I don't recall specifically if Silver Lake was in
 (10) that category but it may have been.
 (11) Q Other than the three that were added at the last minute
 (12) were there any other parcels that Chugach got at the bargaining
 (13) table principally because the federal agencies didn't - didn't
 (14) covet them very much?
 (15) A Well I think it's - it's helpful to see this on kind of a
 (16) sliding scale or a spectrum. Those three parcels were added. I
 (17) believe all the way into 1982 when Chugach land study
 process
 (18) had failed and we were negotiating directly with Congress and
 (19) with the White House on a settlement and those were some
 (20) acreages added at the last minute to give us more bulk acreage
 (21) in Prince William Sound that it wasn't very difficult for the
 (22) federal agencies or in that case the Forest Service to part
 (23) with. So that would have been on one end of the spectrum
 (24) Then areas like Knight Island - or excuse - yeah Knight
 (25) Island here Rua Cove and LaTouche Island down here which
 are

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- (1) also now owned by Chugach would also be along that
 spectrum
 (2) They were not the most highly sought after properties by
 (3) Chugach but they did represent a couple of things
 (4) Number one some more acreage in Prince William Sound that
 (5) the shareholders were generally more familiar with than the
 (6) more remote areas. And number two some very speculative
 (7) long term mineral potential in both cases.
 (8) Q Let's take Knight Island first. Was that perceived to have
 (9) any substantial economic value to the corporation at the time
 (10) of the negotiations?
 (11) A No it really wasn't.
 (12) Q Tell us why.
 (13) A There had been some mining back around the turn of the
 (14) century copper mining at Rua Cove on Knight Island and
 maybe
 (15) one or two other places on that tract. But during the time I
 (16) was with Chugach we tried to interest various mining
 companies
 (17) to go out on the property and explore and that is a pretty
 (18) good indication generally of whether remote areas have value
 (19) for minerals and generally we were unsuccessful at getting
 (20) much exploration done there.
 (21) Specifically no company was interested in putting that
 (22) under a - a mineral lease or making a firm commitment to do
 (23) any development there. So that led us to believe that it
 (24) really didn't have much mineral potential at least where -
 (25) from an owner's standpoint it's probably hard to imagine this

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- (1) for people that are not in the business of working with Native
 (2) Corporations managing large tracts of land but there's a lot
 (3) of expense with managing land and you don't necessarily get a
 (4) return from it. And we were real concerned at Chugach that we
 (5) had spent a lot of money on a land settlement worked for years
 (6) on it we didn't want to end up with something and still see
 (7) the corporation go bankrupt. We wanted to make sure that
 there
 (8) was some - at least some properties had some good relatively
 (9) short term economic potential.
 (10) Q Knight Island was not one of them?
 (11) A Knight Island was not one of them.
 (12) Q You said it had little value for its mineral deposits at
 (13) least based on the inquiries that you made. Have any other
 (14) value any other commercial value?
 (15) A Generally I didn't feel that it did. I don't know if -
 (16) if you're familiar with the terrain there but for the most
 (17) part it's very steep like a lot of Prince William Sound is
 (18) and except for a couple of the - the coves or bays there it's
 (19) difficult to get from - from water onto land. So in terms of
 (20) surface values which would be mostly for remote parcels or
 (21) cabin sites and things like that there wouldn't have been many
 (22) feasible sites within that selection.
 (23) Q Okay. Still on this side of the spectrum that you're
 (24) talking about between lands that are sought - highly sought
 (25) after and lands that just are added where does LaTouche
 Island

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- (1) fall in that spectrum?
 (2) A It's similar to Knight Island where Chugach was desirous
 (3) of obtaining LaTouche Island even though we put a nominal
 (4) value on it at the time like Knight Island there had been
 (5) historic mining there at the old LaTouche town site and we
 (6) thought if - if the price of copper ever did go up and Knight
 (7) Island became a viable mineral area so would LaTouche
 Island
 (8) So if anybody owned it I think it made sense for the Native
 (9) Corporation to own it so they could take advantage of that if
 (10) that ever occurred.
 (11) LaTouche is a little different than Knight Island I guess
 (12) in two ways. Number one the Chenega Village Corporation
 (13) already owned the northern tip of LaTouche Island so it made a
 (14) little bit better argument for the southern portion to go into
 (15) Native ownership too to consolidate that.
 (16) And then number two LaTouche isn't quite as precipitous as
 (17) Knight Island is so arguably - arguably there'd be more
 (18) surface value to cabin sites and things like that.
 (19) Q Was it perceived as having any appreciable immediate near
 (20) term income production value?
 (21) A Not any - you know I'm not sure what you mean by
 (22) appreciable but small amounts thousands or tens of
 (23) thousands or hundreds of thousands of dollars or something
 on
 (24) that order but nothing really substantial.
 (25) Q You've had an opportunity to look at this map before court

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- (1) and you know which parcels are in dispute here involving your
 (2) former employer Chugach Alaska Corporation Which of these
 (3) came to the corporation by way of these negotiations in the
 (4) early 1980s and which parcels were part of the original
 (5) settlement?
 (6) A Okay Well you need to understand that this map shows
 (7) both village and regional land
 (8) Q Right We've denominated with the CAC each of the
 Chugach
 (9) Alaska parcels
 (10) A Right right The Chugach parcels here that came to the
 (11) corporation originally under the 1971 settlement act, that I
 (12) can recall anyway were Nellie Juan and the Nelson Bay
 (13) Townsite
 (14) Q All the rest were acquired during the course of
 (15) negotiations?
 (16) A I believe so yes
 (17) Q Were any of these parcels Mr Propes selected for their
 (18) subsistence value?
 (19) A No At least from my standpoint they were not
 (20) MR DIAMOND I have no further questions thank you
 (21) You can retake the stand
 (22) CROSS-EXAMINATION OF CARL PROPES JR
 (23) BY MR PETUMENOS
 (24) Q Mr Propes Mr Diamond said something about the attitude
 (25) of the federal government in the course of these selections

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- (1) that I didn't hear you adopt, but I saw you smile He said
 (2) were these federal agencies anxious to give away their land?
 (3) This was not giving away land to the Native Corporations was
 (4) it?
 (5) A I guess it depends what you know what seat you're sitting
 (6) in From Chugach's standpoint no it was not.
 (7) Q This was a congressional determination that the aboriginal
 (8) rights of the Native Americans in Alaska were being settled as
 (9) a result of the Alaska Native Claims Settlement Act?
 (10) A Yeah that's correct
 (11) Q Something that they were entitled to from having been here
 (12) since the day of the Russians?
 (13) A Absolutely
 (14) Q And a big problem that you encountered was there were
 (15) certain people in the federal bureaucracy that didn't tumble
 (16) with that notion was that right?
 (17) A Sure
 (18) Q And even up until the time that you left, there were people
 (19) in the federal bureaucracy who still were having difficulty
 (20) with the proposition that Native Corporations were obtaining
 (21) this land?
 (22) A And I imagine there still are
 (23) Q Proved till today?
 (24) A I imagine
 (25) Q Now one of the things that I want to point out when was

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- (1) your very last day at the Chugach Alaska Corporation how
 many
 (2) years ago?
 (3) A I worked for them as a full-time employee from 1976 till
 (4) January of 1983 then I consulted with them for the balance of
 (5) 1983
 (6) Q So it was nine years ago when you were last on the staff?
 (7) A That's correct
 (8) Q And -
 (9) A Or 12 - 12 years ago
 (10) Q Twelve years ago thank you And in your consulting since
 (11) the time that you left, with other corporations and so forth
 (12) you know that there have been a number of land exchanges
 that
 (13) have taken place between Native Corporations and the federal
 (14) government?
 (15) A I'm aware of a couple um-hum
 (16) Q You know there've been some purchases by the federal
 (17) government by the State government, of Native Corporation
 (18) land?
 (19) A Yes
 (20) Q And you know that there has been purchases for
 conservation
 (21) reasons since that time since you left?
 (22) A Yes um-hum
 (23) Q And value has been received by Native Corporations for -
 (24) for conservation reasons you know that?
 (25) A Um-hum

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- (1) Q Mr Gordaoff testified in court that one of the things that
 (2) were being considered at the time of the initial selections
 (3) particularly in the Nellie Juan area was a potential for
 (4) exchange in the future am I right?
 (5) A That's a good point it was
 (6) Q And a potential economic value to the corporation would be
 (7) its ability to exchange land that might be very beautiful and
 (8) very naturally pristine?
 (9) A Um hum that's correct
 (10) Q People in this court have described the Bay of Isles as one
 (11) of the more beautiful spots in Prince William Sound and that's
 (12) on Knight Island is that right?
 (13) A I agree
 (14) Q People have described that Knight Island parcel as the
 (15) jewel of Prince William Sound in terms of its beauty and its
 (16) natural resources
 (17) A Um-hum
 (18) Q True?
 (19) A I think it could be described that way
 (20) MR PETUMENOS No further questions
 (21) REDIRECT EXAMINATION OF CARL PROPES JR
 (22) BY MR DIAMOND
 (23) Q Mr Propes you said there were federal agencies that were
 (24) not anxious to see some of these lands go over to Native
 (25) ownership Was there also opposition by other constituencies?

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- (1) A Yes there was
 (2) Q Tell us
 (3) A In negotiating not the original land selections but the -
 (4) the later Chugach settlement, it was necessary to negotiate
 (5) with - in addition to the federal agencies the State their
 (6) interests and also with different environmental groups
 (7) Q What was the source of their opposition or the reason for
 (8) their opposition?
 (9) THE COURT Whose counsel?
 (10) MR DIAMOND The Native - I'm sorry the
 (11) conservation groups Thank you Your Honor
 (12) A Well they weren't necessarily opposed They were in some
 (13) cases they weren't in others and it would vary from one group
 (14) to the other depending on exactly what their interest was in a
 (15) particular parcel But to put it in context, during the D-2
 (16) process and the Carter administration in order to get
 (17) legislation in the administration's D-2 bill they were a
 (18) player at the table and - and they needed to - to be on
 (19) board and be supportive of what you were trying to do
 (20) MR DIAMOND Nothing further
 (21) MR PETUMENOS No recross?
 (22) THE COURT You can step down sir thank you
 (23) (Witness excused)
 (24) MR DIAMOND Your Honor we call as our next witness
 (25) Peter Nagel

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- (1) MR PETUMENOS Your Honor may I have one minute?
 (2) Maybe a minute and a half?
 (3) THE COURT For what?
 (4) MR PETUMENOS Middle age
 (5) THE COURT No - sure you can
 (6) You can get the witness up here counsel
 (7) THE CLERK Sir can you raise your right hand for the
 (8) oath please?
 (9) (The Witness is Sworn)
 (10) THE CLERK Please be seated
 (11) Sir for the record I need you to state your full name and
 (12) please spell your last name
 (13) A Peter Christian Nagel last name N-a-g-e-l
 (14) THE CLERK And your occupation?
 (15) A Lands and permit specialist with Alyeska Pipeline Service
 (16) Company
 (17) THE CLERK Thank you
 (18) THE COURT We'll have to wait for just a minute
 (19) MR DIAMOND No further questions Your Honor Thank
 (20) you very much
 (21) THE COURT The witness has been sworn Mr Petumenos
 (22) but that's all
 (23) MR PETUMENOS Thank you Judge I appreciate it very
 (24) much
 (25) DIRECT EXAMINATION OF PETER C NAGEL

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- (1) BY MR DIAMOND
 (2) Q I saw in the courtroom before the jury assembled that you
 (3) shook Mr Propes hand Do you know Carl Propes who just
 (4) testified?
 (5) A Yes I do
 (6) Q Tell us how you know him
 (7) A I met Carl he was one of the first people I met when I
 (8) moved to Alaska in 1979
 (9) Q And did you sort of succeed him in office at Chugach Alaska
 (10) Corporation?
 (11) A Sort of
 (12) Q Tell us when you were - you were employed by
 (13) Mr Petumenos client Chugach Alaska?
 (14) A From 1984 to 1991 almost exactly seven years to the day
 (15) Q What jobs did you hold while you were with the
 (16) corporation?
 (17) A I was hired as the assistant land manager title of land
 (18) planner in 1984 assistant to the vice-president of lands at
 (19) the time and then I - although the title the vice-president
 (20) of lands changed when he left I became the head of the land
 (21) department as land manager And then for my last two or three
 (22) years as director of lands and resource planning
 (23) Q A lot of titles Did the job change a lot over the seven
 (24) years?
 (25) A To the extent that the responsibilities just grew it was

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- (1) a small land department there was myself and a cultural
 (2) resource manager and eventually we acquired a secretary and
 (3) then my last year there I had an assistant in the land
 (4) section
 (5) Q You're the only one sitting in court who's been a land
 (6) manager for a Native Corporation so tell us what does a land
 (7) manager do?
 (8) A The primary responsibility is to acquire the properties
 (9) from the federal government and once those properties were
 (10) identified through the law through the withdrawals by the
 (11) Secretary of Interior setting them aside for the corporation
 (12) to select, there were still the minute details of how those
 (13) lands were described in the deeds what encumbrances those
 (14) lands were subject to what other third party rights the
 (15) company's title would be subject to That would be the primary
 (16) purpose was to acquire title to the properties and make sure
 (17) that title was as good as it possibly could be
 (18) Secondly once the properties were acquired was to manage
 (19) them manage their use protect the company from exposure to
 (20) risk by third parties unauthorized or irresponsible use
 (21) and - and most - more importantly would be to inventory the
 (22) resources on those properties begin to assess their - their
 (23) values and how they could be used by the company to improve its
 (24) worth as a corporation as opportunities came along
 (25) Q Was Chugach Alaska the first Native corporation you worked

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- (1) for?
- (2) A No it was the third
- (3) Q Tell us the - your history working in land management for
- (4) Native Corporations
- (5) A I worked for Eklutna Incorporated the Native Village
- (6) Corporation for the Anchorage area for a year before arriving
- (7) at Chugach and for Calista Corporation for two years before
- (8) that the Native Regional Corporation for the Yukon Kuskokwim
- (9) Delta
- (10) Q Did - let's go back to the period of time seven years you
- (11) were at Chugach Did the corporation have various land use
- (12) categories for its properties?
- (13) A Approximately I believe in 1988 the company took up
- (14) again a concerted comprehensive land use planning process
- (15) That process during my time at Chugach was not brought to
- (16) completion but it was given direction and a blessing by the
- (17) Board It identified four major land holdings if you will
- (18) categories income lands -
- (19) Q Before you get into those let me ask you this because
- (20) some of us may not be aware of it There are 12 Chugach
- (21) Alaska
- (22) Corporation parcels in dispute in this case Is that the sum
- (23) total of the corporation's holdings?
- (24) A No
- (25) Q You managed other parcels as well?
- (26) A Correct

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- (1) Q We've been looking at parcels that are in Prince William
- (2) Sound and to some extent subsurface estates in Kenai Where
- (3) are other parcels located?
- (4) A The parcels are - they run from along the coastal fringe
- (5) the coastline from Homer to Yakutat exclusive of Homer and
- (6) Yakutat So just south of actually Homer starting in the Port
- (7) Graham area through Prince William Sound out - out through
- (8) the Copper River Delta across Cape Yakataga to Icy Bay just
- (9) west of Yakutat.
- (10) Q We've been looking at parcels mostly on the water within
- (11) in most cases 20 30 miles from the water Does the
- (12) corporation own inland parcels as well more inland parcels?
- (13) A The one parcel more inland is up the Richardson Highway
- (14) actually in Ahna territory and it was a special - it was
- (15) made especially to Chugach through the 1982 settlement
- (16) agreement with the concurrence of Ahna
- (17) Q Let's go back I interrupted you You were telling us the
- (18) land use categories land management had for administering its
- (19) property What were the four?
- (20) A The four categories were income which would be applied to
- (21) a property that had immediate income-producing potential
- (22) investment which would be applied to a property that had an
- (23) identifiable and reasonable possibility of producing income
- (24) over a longer term perhaps a generation even or more Trade
- (25) properties which were immediately identifiable as having some

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- (1) exchange potential primarily with a government entity either
- (2) the State of Alaska or the federal government. And then I
- (3) would say cultural preservation or perhaps even preservation
- (4) properties that were identified as having a need to retain in
- (5) company ownership forever basically because of their
- (6) traditional use and cultural value
- (7) Q Among the parcels in dispute in this case there's only one
- (8) that was held primarily for its cultural value?
- (9) A As far as the land planning process goes and exclusive of
- (10) any of the cultural and historic sites specifically identified
- (11) under the Native Claims Act yes there was one parcel easily
- (12) identified
- (13) Q Tell the jury which one that is
- (14) A That is Nuchek Island
- (15) Q You're going to be telling us a little bit more about that
- (16) later but I wanted just to put in the scheme of things your
- (17) land use categories Within the categories of income and
- (18) investment were properties further broken down by their
- (19) resource values?
- (20) A Yes I mean every parcel of land could have trees on it
- (21) economic value minerals on it of economic value be those
- (22) gold copper sand and gravel coal the liquid minerals oil
- (23) and gas and they could have value as real estate for primarily
- (24) tourism or commercial recreation There could be other values
- (25) such as the production of hydroelectric power that might be of

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- (1) interest to a power company and those I would say are the
- (2) main categories
- (3) Q You haven't mentioned subsistence as a land use category
- (4) A Subsistence would - would - would be part of the cultural
- (5) value of a property The reason I don't mention it is that it
- (6) did not occupy a lot of the Chugach land department's time It
- (7) was - in planning subsistence use or resolving subsistence
- (8) use conflicts with other developments that the company had on
- (9) Chugach Alaska Corporation property
- (10) Q On Chugach Alaska property it was not a - a higher
- (11) priority item?
- (12) A No in that it - it did not present itself as such The
- (13) uses were not occurring on the Chugach Alaska Corporation
- (14) property
- (15) Q I want to talk to you a moment about Chugach Alaska's
- (16) corporate policy during the seven years you were there with
- (17) respect to parcels that were selected but not yet conveyed a
- (18) term we've heard before Is that a term you're familiar with?
- (19) A Yes
- (20) Q What does it mean?
- (21) A The word selected or selection is a term of art that
- (22) comes from the Alaska Native Claims Settlement Act. It is - I
- (23) would equate it similarly to a miner staking his claim on a
- (24) mineral property on open public lands He does not - by
- (25) staking those corners of that claim and working that claim he

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- (1) doesn't own the property but he has certain rights to receive
 (2) ownership to that property in the future if he can perform in
 (3) certain ways just as that miner stakes his land a Native
 (4) Corporation including Chugach would stake the corners of
 (5) their claims under the Alaska Native Claims Settlement Act and
 (6) its own settlement agreement and thereby assert their right to
 (7) receive title actual - the deed to that property at some time
 (8) in the future
 (9) Q At the time of the oil spill March of 1989 were any of
 (10) the dozen parcels that are in dispute in this case selected but
 (11) not yet conveyed?
 (12) A Yes
 (13) Q Which ones?
 (14) A Now we're looking at -
 (15) MR PETUMENOS Judge can we approach the bench on
 (16) this?
 (17) THE COURT Um-hum
 (18) (At side bar on the record)
 (19) MR PETUMENOS As I understand where we are on this
 (20) subject -
 (21) MR DIAMOND I can't hear you Tim I'm sorry
 (22) MR PETUMENOS As I understand where we are on the
 (23) subject, we are going to be instructing the jury under OPA 90
 (24) as to what the right to claim in this case for as to what the
 (25) lands are and I don't understand what the relevance of the

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- (1) factual inquiry is at this point
 (2) THE COURT What is the reason for -
 (3) MR DIAMOND He's beginning to testify there was a
 (4) corporate policy in place with respect to the selected but
 (5) unconveyed lands The corporation did not physically use
 (6) them
 (7) or exploit them
 (8) THE COURT When in 1984
 (9) MR DIAMOND 1989 the time of the oil spill or
 (10) after they didn't use the three properties involved a lot of
 (11) acreage
 (12) THE COURT What properties are those?
 (13) MR DIAMOND Silver Lake Nellie Juan Comfort Cove
 (14) And that there was no - our argument is there was no
 (15) interference with use
 (16) THE COURT I got you I understand
 (17) MR PETUMENOS The problem is this The only -
 (18) under the Alaska Supreme Court case that we're operating
 (19) under
 (20) the only way to evaluate temporary loss is through loss of use
 (21) for a period of time that the property was impaired which was
 (22) the analysis that we put on If we have an assignment from the
 (23) federal government as we contend that loss of use is perfectly
 (24) valid to be asserted by the Native Corporations If the Court
 (25) rules that we don't have that right under OPA 90 then it
 (26) doesn't matter either way
 (27) THE COURT That may very well be so counsel at the

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- (1) end of the process but right now there's a factual dispute
 (2) and regards your claim of loss of use therefore regardless of
 (3) whether or not the parcels were being used is a factual matter
 (4) for determination by the jury unless or until I take it away
 (5) from them
 (6) MR PETUMENOS We may have to instruct it away from
 (7) them later you're saying?
 (8) THE COURT I may have to take a claim out but that
 (9) happens all the time in these cases
 (10) MR PETUMENOS I realize if you take the claim out we
 (11) have no issue but if you leave the claim in we are - under
 (12) the government's use we have to instruct this testimony away
 (13) We'll have to instruct this testimony away because it will be
 (14) irrelevant if we have the government's loss of use claim
 (15) THE COURT I see what you're saying That may be
 (16) so I don't know the answer to that question yet.
 (17) MR PETUMENOS Okay thanks Judge
 (18) (Sidebar concluded)
 (19) BY MR DIAMOND
 (20) Q Selected but unconveyed parcels owned by - claimed in this
 (21) litigation by Chugach Alaska Corporation can you come off the
 (22) witness stand and show us which ones we're talking about
 (23) You
 (24) can just put that transformer in your pocket
 (25) How many were there at the time of the oil spill that
 (26) Chugach Alaska had selected but not yet had been received

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- (1) conveyance of?
 (2) A There was Nellie Juan Silver Lake and my recollection is
 (3) Comfort Cove was not yet conveyed
 (4) Q All right At the time you left -
 (5) A I could just add a small portion of Snow River and a small
 (6) portion of MacLeod
 (7) Q Had not yet been conveyed?
 (8) A Right
 (9) Q With respect to the three that had not been conveyed in
 (10) entirety at the time of the oil spill had any of those been
 (11) conveyed at the time you left the corporation?
 (12) A No Perhaps Comfort Cove was conveyed before I left
 (13) Q That was sometime in 1991?
 (14) A I left in April '91
 (15) Q To your knowledge have the others yet been conveyed?
 (16) A Silver Lake has been conveyed I believe Comfort Cove
 (17) Nellie Juan I do not believe have been conveyed
 (18) Q Nellie Juan still is technically government owned
 (19) ownership?
 (20) MR PETUMENOS Object to foundation
 (21) THE COURT Sustained
 (22) BY MR DIAMOND
 (23) Q Let me ask you about the corporation's policy with respect
 (24) to these kinds of parcels while you were there Did Chugach
 (25) Alaska Corporation have a policy with respect to physically

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- (1) occupying or exploring parcels that were selected but not yet conveyed?
- (2) A Well its policy was that it clearly - that it would not occupy or exploit properties that it did not own without the landowner's permission
- (3) MR PETUMENOS Judge I'm going to move to strike the answer The answer was insofar as it did not own is a legal conclusion which was not called for by the question
- (4) THE COURT The motion is denied Go ahead
- (5) BY MR DIAMOND
- (6) Q When you used that term did not own you mean selected but not conveyed?
- (7) A Yes
- (8) Q While you're here you agreed to take us on a - let me ask you first March of 1989 you were in the employ of Chugach Alaska?
- (9) A Yes
- (10) Q Did you have any responsibilities in connection with the oil spill response of the corporation?
- (11) A Yes
- (12) Q Just describe in shorthand fashion what you did
- (13) A Well I - I would characterize it as Chugach Alaska Corporation's man in the trenches I spent a good deal of time in Valdez from the beginning setting up a response office headquarters in Valdez getting the office space telephones

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- (1) that sort of thing which took an undue amount of time
- (2) Negotiating with Exxon to put a team of land resource monitors in the field that could assist Exxon in their response effort
- (3) and minimize as any additional damages to Chugach resources
- (4) during that response effort In other words help - help Exxon through the Sound as much as possible
- (5) Q Also do any damage assessment?
- (6) A Only in the sense of acquiring the documentation of oiling that was part of the public response effort planning effort and - and response effort.
- (7) Q I'm not going to ask you any more questions about that because I want you to talk about something slightly different I - I would like you to take us on a tour if you will in any fashion you would like of the 12 Chugach Alaska parcels that are in dispute in this case and tell us what they were being used for at the time of the oil spill their prospective uses under the Chugach Alaska land use plan and whether any of those actual or potential uses were disrupted or interfered with in any way by the oil spill So where do you want -
- (8) THE COURT Mr Diamond It seems that this is an appropriate time to take a short break don't you think?
- (9) MR DIAMOND That would be fine
- (10) THE COURT Before he starts on this
- (11) MR DIAMOND That would be fine
- (12) THE CLERK Please rise This court stands in

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- (1) recess
- (2) (Jury out at 9 34 a.m.)
- (3) (Recess from 9 34 a.m. to 9 55 a.m.)
- (4) (Jury in at 9 55 a.m.)
- (5) THE CLERK This court now resumes its session
- (6) Please be seated
- (7) BY MR DIAMOND
- (8) Q Mr Nagel when we broke you were going to take us on a tour of the 12 Chugach Alaska parcels in dispute in this litigation and tell us how they were being used and how they were planned to be used at the time of the oil spill March 1989 How do you want to do this? Where are we going to start?
- (9) A Before we start, I just want to make two points Number one that the land plan that I described with the four categories of - of land - land values if you will was to be used by the Board for two purposes
- (10) Number one is identify where the company should invest dollars and effort in marketing those properties immediately and in the near term And number two is provide some base knowledge for the other properties that it could have as a reference when the marketplace brought - out of the blue brought offers to use those parcels so that it wasn't making a decision on these offers without any background context at all as to what role these properties could play in developing the

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- (1) corporation's future and its worth
- (2) Q What was the second point we need to keep in mind?
- (3) A And the second point is that as I run you through this tour you're probably going to be thinking boy if I had an opportunity to select land for this use I think I could do a lot better job and would select something else to be used for this particular purpose he's talking about And the thing to keep in mind is - and I believe you heard it - have heard it before is that Chugach didn't have the opportunity to select its top priority parcels in every case It did get some of its priority its first priority parcels through the 1982 settlement agreement, but not in every case So to a certain extent it was what was available to select through the various land laws and through the political process in the Chugach settlement agreement, and I want to - even was a close call even to the point when the Secretaries of Agriculture and Interior signed the document?
- (4) Q Where do you want to start from?
- (5) A Maybe I could use your pointer Chuck I think the way to run you through a tour is to tell you the way I got to know Prince William Sound through my work at Chugach Anyone who knows the Sound will tell you it's a difficult place to access unless you have time and a stout fishing vessel Chugach's corporate headquarters were in Anchorage and so we will return to Anchorage to access different parts of the Sound through

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- (1) this tour that I will run - promise to run you through
 (2) The closest community to Anchorage in Prince William Sound
 (3) is the community of Whittier really a community Chugach held
 (4) dear to its heart as in terms of where the corporation was
 (5) going with its property developments
 (6) Q What are the parcels near Whittier?
 (7) A The Passage Canal parcel about 300 acres and Shotgun
 Cove
 (8) parcels about 100 acres altogether To get there drive down
 (9) get on the train into Whittier I'd recommend against a plane
 (10) and these parcels were envisioned by the company as the
 (11) end-of the-road development for the Anchorage recreational
 (12) market.
 (13) Q Can you explain that?
 (14) A It - at Shotgun Cove it envisioned a floating breakwater
 (15) boat slips for recreational vessels primarily and those boat
 (16) slips be attached to condominiums developed on the upland
 for
 (17) weekend - or year-round - I mean it would be about an hour
 (18) from Anchorage for that matter occupancy and other
 commercial
 (19) development that would support fishermen hunters
 sightseers
 (20) sailors and so forth similar to the kinds of businesses you
 (21) see in Seward today
 (22) The Passage Canal parcel was envisioned as a quarry site
 (23) for road construction from Whittier to Shotgun Cove and some
 (24) home site parcels and single-family residential home sites
 (25) Q At the time of the spill how were those two parcels being

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- (1) used?
 (2) A There was no actual activity going on on the parcels at the
 (3) time There was a road built through the Passage Canal parcel
 (4) but there was no activity at the time Most of the company's
 (5) efforts were spent in perfecting the title to the parcels
 (6) working with the City of Whittier in developing and promoting
 (7) improved vehicle access through the railroad corridor
 (8) Q Development of those two parcels was dependent upon
 (9) improved car access to Whittier from Anchorage?
 (10) A No I would say it was not But that would certainly be
 (11) its highest and - highest value development and would receive
 (12) the most income for the company and therefore the company
 (13) wisely did not go out and enter into an agreement with the
 (14) developer an experienced developer in my tenure there or
 (15) before because it realized that the company could put some
 (16) effort into developing that access just as well on its own and
 (17) when the access was improved it could then enter into a longer
 (18) term development agreement that would tie up that - that land
 (19) with a third party
 (20) Q Mr Nagel were any of the actual or planned uses of CAC's
 (21) properties at Passage Canal or Shotgun Cove negatively
 affected
 (22) by the oil spill in any way?
 (23) A To my knowledge no
 (24) Q All right where do we go next?
 (25) A Okay back to Anchorage and either an eight hour
 automobile

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- (1) journey or 45-minute flight on your Dash 8 to Valdez Valdez
 (2) a very important community in the Chugach region one that
 (3) perhaps Chugach had the most estranged relationship with but
 (4) nevertheless a long history of cooperation especially during
 (5) pipeline construction and before It did not have many
 (6) properties in the Valdez area but Growler Island really one
 (7) of the plums of the Chugach property inventory is best
 (8) accessed out of Valdez It was planned for - it was its
 (9) highest value tourism property It is close to the tour routes
 (10) between Valdez and Whittier The cruise ships the large
 (11) cruise ships the Alaska ferry goes right by Growler Island
 (12) It has an excellent view of the grand daddy of all Alaskan tide
 (13) water glaciers Columbia Glacier and with the exception of
 (14) Tattiek Corporation properties it has the best - best view
 (15) of that Columbia Glacier
 (16) Q How was Growler Island being used by the corporation in
 (17) March of 1989?
 (18) A It was in its third year I believe under permit
 (19) year-by year permit to a charter operator out of Valdez a
 (20) responsible charter operator And I stress year to year
 (21) because the company really was trying to keep control of the
 (22) properties as much as possible and not entering a 20-year lease
 (23) with an operator because the company imagined that it would
 (24) not be too far in the future where a major tour operator - I
 (25) mean of international caliber - base might approach the

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- (1) company and be interested in a development on Growler
 Island
 (2) It's a beautiful island with a varied shoreline and gravel
 (3) spits and sort of half islands and bays and meadows
 (4) Q Correct me if I'm wrong I think we've heard about Growler
 (5) Island is that the island where the concessionaire Steve -
 (6) Stan Stephens -
 (7) A Yes he is on Growler Island At least was on at the time
 (8) under permit to Chugach Alaska Corporation
 (9) Q Were any of the corporation's actual or planned uses of
 (10) Growler Island adversely affected in any way by the oil spill?
 (11) A No
 (12) Q Okay
 (13) A I would only say that there was some discussion with Stan
 (14) again he was talking about renewing his permit that year and
 (15) there was some discussion as to whether or not he would be
 (16) available given his support of the spill response to run the
 (17) concession off the island and he decided to run it -
 (18) Q Okay
 (19) A - Instead of dedicate himself to the response
 (20) Q Where do we go next?
 (21) A Then I think the next parcel accessed out of Valdez would
 (22) be Silver Lake parcel
 (23) Q We've heard a little bit about Silver Lake Tell us how
 (24) that was being used in 1989 and what the planned uses were if
 (25) any

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- (1) A Well it was not being used actively It wasn't owned
 (2) yet Its planned use is most obviously as a hydroelectric
 (3) power site It had been reserved for a power site in the '30s
 (4) and was actively studied by public agency power planners right
 (5) up through the 1980s to provide power from the large Silver
 (6) Lake and it's good head to the copper valley electric
 (7) corridor tying into Solomon Gulch and perhaps even
 stretching
 (8) some land - some transmission lines to Cordova
 (9) Other than that, it is - its next most obvious value would
 (10) be the timber holdings Really though restricted to the
 (11) fringes of Silver Lake that would really only be developed in
 (12) conjunction with the Taitlek Corporation timber development
 (13) next door
 (14) Q That's a fairly mountainous parcel Isn't it?
 (15) A Yes it's very steep One thing I might add on Silver
 (16) Lake I'm not sure if it was covered before was that it's
 (17) about 55,000 acres The hydro potential is a very small part.
 (18) I believe that it was acquired in such a large block in return
 (19) for Chugach's promise through the settlement agreement to
 give
 (20) up significant inholdings in a national park the Wrangel
 (21) St. Elias National Park nearby up the Copper River valley and
 (22) it was identified in the land plan as a trade parcel to expand
 (23) Chugach's oil and gas holdings in the eastern Chugach Forest
 -
 (24) right about where the clerk's head is - should those oil and
 (25) gas properties prove worthy of pursuit.

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- (1) Q You've already covered actual uses because you said there
 (2) were none Were any planned uses of CAC's Silver Lake parcel
 (3) adversely affected in any way by the oil spill?
 (4) A No
 (5) Q Where do we go now?
 (6) A Back to Anchorage really and get on the jet and fly to
 (7) Cordova a fine jetport
 (8) Q This is getting expensive
 (9) A Well it - it is the quickest way to get around Prince
 (10) William Sound
 (11) Q We're in Cordova where do we go from Cordova?
 (12) A Cordova has a small municipal airport closer to town The
 (13) jetport is 13 miles out. You get on a small charter plane in
 (14) Cordova or a fishing vessel or other vessel and what I think
 (15) would be best is to cover the Comfort Cove the Raging Creek
 (16) and the Nelson Townsite parcels together
 (17) They - their acquisition by Chugach in terms of resource
 (18) values primarily is a little bit of timber around their fringe
 (19) perhaps quite a bit of timber in Raging Creek although very
 (20) mountainous Nelson Townsite has some good timber around
 its
 (21) fringe again would be developed probably only in conjunction
 (22) with development of Eyak Corporation timber next door
 (23) The other purpose that Chugach acquiring those parcels
 (24) served was to clean up the boundary to make simpler the
 (25) ownership boundary between public lands and Native private

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- (1) lands in the area. If Chugach had not picked this up Eyak wa.
 (2) not going to pick it up and that would be sort of an island of
 (3) Chugach Forest ownership inside Eyak property And the
 feeling
 (4) was that Chugach and Eyak could more cooperatively manage
 lands
 (5) than - than Eyak the Chugach Forest. It's a minor point, but
 (6) I think it did play a role in identifying these parcels
 (7) The one interesting thing about Nelson Townsite it's
 (8) called that because a group of hearty souls in the early
 (9) American area paper platted a hundred odd lots along this riv
 (10) bottom land It's fairly low I don't know what impact the -
 (11) I would think the earthquake 64 earthquake would have raise
 (12) it if anything but a low flat area. And they felt that the
 (13) Rude River aptly named would take them into the interior and
 (14) get access to the Kennicott - valuable Kennicott copper mine
 (15) Q Did it?
 (16) A They were rudely awakened and ended about here in a box
 (17) canyon jammed with glaciers and the successful access
 pioneers
 (18) were the Copper River railroad up the Copper River to Chitina
 (19) River and -
 (20) Q You've talked to us about resources on Comfort Cove
 Raging
 (21) Creek and Nelson Townsite Were there any actual uses bein
 (22) made of those three parcels by the corporation at the time of
 (23) the oil spill?
 (24) A I believe the timber had been sold not developed Other
 (25) than that, no uses

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- (1) Q All right. Did the oil spill have any negative impact on
 (2) any actual or planned uses for any of those three parcels to
 (3) your knowledge?
 (4) A No
 (5) Q Where do we go now?
 (6) A Okay We should go to the - the gem of the Chugach
 (7) property holdings not only from a - not primarily from a
 (8) income-producing potential although not insignificant
 (9) potential there but from a cultural point of view
 (10) Q And you're talking about?
 (11) A Traditional point of view and that is Nuchek Island An
 (12) island exquisite in its setting I don't know if any of you
 (13) have been to Port Constantine but it is a beautiful part of
 (14) Prince William Sound
 (15) Q You identified I believe or maybe it was Mr. Propp this
 (16) parcel as the only - only one of the dozen that was held
 (17) primarily for cultural value Could you describe to the jury
 (18) the cultural history of Nuchek Island?
 (19) A Well it really is a product of its location being in
 (20) the - the best protected harbor area on the coast of the - of
 (21) the North Pacific ocean between Cook Inlet, I suppose and
 (22) Yakutat, Nuchek precontact pre-Russian contact was a
 (23) crossroads a cultural crossroads in Alaska with the Eyak
 (24) Ahnna people from their major settlement at Alekanik The
 (25) Aleut the Cook Inlet region Eskimo and the Tlingit, all the

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- (1) way from southeast, crossing paths at - at Nuchek Island
 (2) With the arrival of the Russians it became one of the
 (3) largest Russian settlements in the Russian era. Fort
 (4) St. Constantine and I believe Isabelle although I'm not
 (5) sure it was a man and woman's name. There was a Russian
 (6) Orthodox church there during - during the American era.
 (7) Captain Cook - well perhaps before the American era but
 (8) Captain Cook, Captain Vancouver, the Spanish explorers who
 (9) gave
 (10) the names to Cordova and Valdez, all weighed anchor in this
 (11) strategically located fort.
 (12) The Chugach, many of the Chugach Native peoples, chiefs are
 (13) buried at Nuchek Island.
 (14) Q I've put on the Elmo Plaintiffs 1214 so people can get
 (15) spellings of these places if they want to note them.
 (16) While we're on the subject of Nuchek Island, was there any
 (17) oiling of Nuchek Island as a result of the oil spill?
 (18) MR. PETUMENOS: Objection to foundation with this
 (19) witness.
 (20) MR. DIAMOND: He's already testified that he, in his
 (21) capacity, reviewed -
 (22) MR. PETUMENOS: I withdraw the objection.
 (23) A: Not to my knowledge, there was not.
 (24) BY MR. DIAMOND:
 (25) Q: No?
 (26) A: No.

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- (1) Q: Okay. At the time of the oil spill, how was Nuchek Island
 (2) being used?
 (3) A: It was in the early planning stage. I think a lot of the
 (4) effort was spent on controlling unauthorized public use of the
 (5) island and any damage to the valuable archaeological
 (6) resources
 (7) located there. There was a title there, a small inholding at
 (8) the south end of the island that Chugach was working, working
 (9) with those property owners and really laying plans for
 (10) obtaining funding and to reconstruct and preserve and
 (11) catalogue
 (12) the archaeological resources there and develop really a
 (13) Chugach cultural center that the company felt could - could
 (14) blossom into a national, if not international, cultural center
 (15) that could then take advantage of the international tourism
 (16) traffic that went right by its front door.
 (17) It also thought that it could provide a support role in oil
 (18) spill response preparedness for the future and indeed there
 (19) is a oil spill response equipment staged not at Nuchek Island
 (20) but nearby in Port Etches.
 (21) Q: Were any of the corporation's actual or planned uses of
 (22) Nuchek Island disrupted or interfered with in any way by the
 (23) oil spill?
 (24) A: No.
 (25) Q: Where do we go now?
 (26) A: Back to Anchorage - back to Cordova, back to Anchorage
 (27) and
 (28) get on the train or the vehicle and drive the highway to

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- (1) Seward here and -
 (2) Q: Where is the first stop?
 (3) A: Either going highway or train, you'll pass through the Snow
 (4) River parcel. Both the tracks and the highway pass through the
 (5) parcel.
 (6) Q: Can you describe that parcel for us?
 (7) A: It is a pretty valley that has timber that has since been
 (8) logged by Chugach, but it still is a - it's a nice valley. It
 (9) has the Snow River running through it. It's at the headwaters
 (10) of the Kenai Lake, which goes back this way. It has renewable
 (11) good renewable high quality gravel potential and in fact had
 (12) a lease at the time to a gravel developer. It also being about
 (13) 20 minutes from Seward, has potential for commercial
 (14) recreation. I wouldn't imagine home sites, really, but - but
 (15) commercial recreational lots.
 (16) Q: At the time of the oil spill in 1989, how was that parcel
 (17) being used?
 (18) A: There was a little bit of gravel development on it. I
 (19) don't believe the logging had started yet.
 (20) Q: Planned uses included -
 (21) A: There was some communications sites. Alascom had a tower.
 (22) Q: And what were the forward looking planned uses for the
 (23) parcel?
 (24) A: Really multiple resource development, gravel, timber,
 (25) recreational lot developments. It is in a bit of a utility

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- (1) corridor, so it was approached by Alascom and Chugach
 (2) Electric.
 (3) Association negotiated some easements.
 (4) Q: Were any of the corporation's actual or planned uses of the
 (5) Snow River parcel disrupted or adversely affected in any way by
 (6) the oil spill?
 (7) A: No, not that I could see.
 (8) Q: Where do we go now?
 (9) A: Okay, so in Seward, get on a good - get in with a good air
 (10) taxi operator and there's really two ways to get into Prince
 (11) William Sound from - from Seward. I think I'll take the
 (12) alternate route first, which would be to go back up, fly over
 (13) the south fork Snow River area and up the south fork, up over
 (14) the saddle and over Nellie Juan Lake. Nellie Juan Lake sits
 (15) right about in here, I believe, and fly down the Nellie Juan
 (16) River Valley where it empties into King's Bay and out Port
 (17) Nellie Juan and right into the heart of Western Prince William
 (18) Sound.
 (19) Q: Are we going to stop at Nellie Juan on the tour?
 (20) A: Well, you can if you have floats on your plane. It's a -
 (21) it would be excellent float plane access if the weather
 (22) permitted.
 (23) Q: Can you drive there?
 (24) A: No, you cannot drive there. However, I might say the
 (25) corporation, in its - in its road building desire to see
 (26) certain roads built, thought that perhaps from the Seward

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- (1) Highway - this property is adjacent to the State's property
 (2) here that the State has subdivided for the Blying Sound state
 (3) land subdivision which is individual recreational lot parcels
 (4) and those -
 (5) Q You referred to that -
 (6) A That is a hardy group that gets to their parcels by taking
 (7) their small craft out into Blying Sound and up into the head of
 (8) the bay and the company - well perhaps some distant time in
 (9) the future there might be a road built to access that land
 (10) through Nellie Juan
 (11) Q I think that's the subdivision we've heard referred to as
 (12) the Dying Subdivision Have you ever heard of that?
 (13) A It - it's - that would be an adventure to - to get
 (14) there
 (15) Q Tell us about how Nellie Juan was being used at the time of
 (16) the oil spill
 (17) A Again the company had deployed some geologists there to
 (18) inventory its - the mineral potential under permit to the
 (19) Chugach Forest, and it did not own the property yet, so -
 (20) Q So there were no -
 (21) A So there was no - but it planned that around the lake
 (22) shore there could be individual recreational lots as well as
 (23) perhaps enough market for a lodge hunting lodge owner - it is
 (24) also the Nellie Juan River is a world class kayaking white
 (25) water type river and that lodge could perhaps support that

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- (1) type of activity as well And I should say hydroelectric
 (2) power It's not that far from the Chugach Electric power
 (3) grid
 (4) Q Were any of the corporation's actual or planned uses for
 (5) the Nellie Juan parcel adversely affected in any way by the oil
 (6) spill?
 (7) A I would say no
 (8) Q Where do we go now?
 (9) A Okay let's go back to Seward and go the preferred route
 (10) into Prince William Sound or the one I took most was out
 (11) Resurrection Bay and hug the coast, or out over some of
 (12) these - some of these peninsulas and hug the coast, and let's
 (13) go out to Patton Bay and MacLeod before - Patton Bay is -
 (14) holds the highest value timber in Prince William Sound Big
 (15) trees south slope nice flat valleys where they can grow
 (16) tall And that was why it was acquired by the company and
 (17) that was indeed how it was being developed and its use was
 (18) being planned
 (19) Before any tree was cut Chugach did have agreement with an
 (20) air taxi operator out of Seward to service the bear hunting and
 (21) deer hunting their deer hunting and bear hunting clients most
 (22) of them from Anchorage But there were air taxi operators that
 (23) wanted to fly there out of Anchorage but the weather
 (24) conditions - with the tide there's no airstrip up there no
 (25) upland airstrip - really precluded those Anchorage operators

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- (1) from really servicing their clients regularly with any surety
 (2) of being able to pick them up
 (3) The Seward operator was the best. He had four cabin sites
 (4) two on the north side and two on the south side of Box Point,
 (5) and that really provided Chugach with a little bit of income
 (6) but also a way of regulating and controlling public use of its
 (7) properties there
 (8) Q So that was the -
 (9) A Again timber was the highest. There is a good salmon
 (10) silver salmon stream here good salmon stream here It's a
 (11) nice place to recreate and I think that one thing the land
 (12) department was pleased with the timber development plans not
 (13) only because you know it was involved and in supporting
 (14) those
 (15) efforts through title work and so forth but that it improved
 (16) the long term multiple use opportunities on that parcel once
 (17) the timber operation had moved through
 (18) Q Let me ask you a question did Chugach Alaska sell its
 (19) timber rights on Patton Bay parcel prior to the oil spill?
 (20) A I believe so yes
 (21) Q With respect to the recreational use being made you said
 (22) flying in hunters to lodges that were on the site did the oil
 (23) spill in 1989 interfere with that use in any way?
 (24) A No Well I'm not sure I - the air taxi operator was
 (25) pretty well exhausted by the end of the first season of the oil
 spill response in supporting that.

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- (1) Q What do you mean "supporting"?
 (2) A Well he was an air taxi operator and knowledgeable air
 (3) taxi operators were in big demand to support that oil spill
 (4) response And I - it seems to me I know there was discussion
 (5) about whether or not he would open his camps this year and
 (6) want
 (7) to service them Chugach you know thought they would like to
 (8) see him out there because the deer hunting would definitely go
 (9) on the deer hunters wanted - still wanted to hunt and - and
 (10) I can't remember if he just said no we're not going there
 (11) this year but I know he did come back the year after Or
 (12) he - you know the response effort was wrapping up in
 (13) mid-September and the deer hunting really didn't start -
 (14) although the season started in August, it really didn't start
 (15) getting active until the snows pushed the deer down closer to
 (16) the shore which would be sometime in October and I believe
 (17) that he was back in there that year
 (18) Q That year being 1989?
 (19) A Yes
 (20) Q While we're on Montague Island there's another CAC parcel
 (21) there MacLeod?
 (22) A And that was acquired really to support the timber
 (23) operation here and enable the logs to come out via a road that
 (24) the company has since built to this protected mostly protected
 (25) harbor on the inside coast of Montague Island on the west side
 coast. There is timber here

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- (1) Q Why not take them right out of Patton Bay by boat or barge?
- (2) A That could be done. This has been studied but as you
- (3) could imagine the weather conditions there could spell
- (4) disaster. Not only for a ship for sure if a storm came up
- (5) suddenly. You'd think you could plan around that but the dock
- (6) would have to be so substantial that it would be a significant
- (7) investment to build a dock that could withstand your North
- (8) Pacific exposure.
- (9) Q At the time of the oil spill was MacLeod being used for
- (10) any other purpose other than supporting Patton Bay timber
- (11) operations?
- (12) A Chugach's property no. There was a bear hunting lodge
- (13) nearby on forestland.
- (14) Q Were there any planned uses of MacLeod beyond timber
- (15) support?
- (16) A Yes. I think commercial recreation. The Chugach National
- (17) Forest plan and decision document to build this road
- (18) recognized
- (19) that with that road once timber or even as timber moved
- (20) through recreational opportunities would be enhanced both
- (21) on
- (22) public lands on South Montague Island that were more easily
- (23) accessible and on Chugach Alaska Corporation properties
- (24) And
- (25) this would be - I don't know sort of the commercial hub. If
- (26) you will of that. That all sounds pretty exciting. I don't -
- (27) I mean I don't know what kind of commercial hub it might be
- (28) but you might have some kind of a lodge and tent camp people

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- (1) can get out of the shelter while they're waiting for the
- (2) transportation.
- (3) Q Let me ask you this. Did the oil spill interfere with any
- (4) actual or planned uses of MacLeod?
- (5) A Well as - other than timber no.
- (6) Q Let's go to the next stop here which is where?
- (7) A You could get across the Montague Strait from MacLeod
- (8) whether you're in a boat or a plane get yourself around this
- (9) very steep rugged coast of LaTouche Island onto the inside of
- (10) LaTouche Island which is a nice much more gradual
- (11) somewhat
- (12) wooded slope.
- (13) And this island primarily the value of this property was
- (14) owned for its mineral potential. You'll notice this green
- (15) these green areas actually should not indicate Chugach
- (16) National
- (17) Forest ownership but should indicate other private property
- (18) ownership. This is - this area here is the site of the
- (19) Beatson copper mine. You fly over today you'll see the glory
- (20) hole where the mine where the hillside fell into the excavated
- (21) subterranean mining passages.
- (22) Q Before you get to the history of LaTouche - which I know
- (23) you will talk about - LaTouche is shared by Chugach with the
- (24) Chenega Corporation?
- (25) A The surface estate boundary Chugach owns the mineral
- (26) subsurface estate of the entire island except for those private
- (27) parcels and one other parcel but - and Chugach owns the -

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- (1) the surface estate on the south two-thirds three-quarters and
- (2) Chenega owns the surface estate on the north quarter.
- (3) Q And next you'll probably ask us to believe Alaska's second
- (4) largest city was once located on what's now Chugach property
- (5) on
- (6) LaTouche Island?
- (7) A That's what you say. Chuck. I know it was a very big - a
- (8) community of metropolitan proportions in the early American
- (9) era. The Beatson mine was a copper mine. It was a low grade
- (10) ore that was mixed. I believe at Beatson or perhaps at
- (11) Cordova with a high grade Kennicott copper ore coming down
- (12) the
- (13) Copper River railroad from Kennicott and that low grade ore. It
- (14) was lower grade. It was higher in sulfur content and that
- (15) improved the smelting process when it was smelted in Seattle.
- (16) Q Did a large community flourish on LaTouche Island?
- (17) A Yeah. It was - I believe it was two to three thousand
- (18) people at the - surrounding Beatson copper mine. They were
- (19) living on this - I believe they were living mostly on this
- (20) patented this mining - this patented mining claim complex
- (21) here. A lot of the island - I believe a lot of the island
- (22) was logged to support that operation.
- (23) Q At the time of the oil spill how was Chugach's portion of
- (24) LaTouche Island being used?
- (25) A It was in a low profile very - you know with - the
- (26) company was not spending a lot of money is what I'm trying to
- (27) say but it was marketing the properties to the mineral

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- (1) industry. I believe the timber was sold such as it was
- (2) Q And what planned uses did the corporation have for
- (3) LaTouche?
- (4) A Other than mineral and timber this area right in here has
- (5) some commercial recreation potential around Horseshoe Bay
- (6) The
- (7) State of Alaska owns the north headland of Horseshoe Bay and
- (8) it is a designated marine park. For anyone traveling by small
- (9) vessel between Seward and Prince William Sound it might be a
- (10) nice place to stop. But of course that - those were the
- (11) plans.
- (12) Q Did the oil spill interfere in any way with any actual or
- (13) planned uses that Chugach Alaska for its LaTouche Island
- (14) property?
- (15) A Not that I could see.
- (16) Q All right. Are we going home now?
- (17) A Well let's go to - there is one more parcel. Knight
- (18) Island.
- (19) Q Tell us about it.
- (20) A Knight Island is owned - it was identified in the Chugach
- (21) planning process during my tenure there really for its mineral
- (22) potential. It is dotted by patented and abandoned mining
- (23) claims throughout its area. It was identified really for
- (24) its - there's some gold potential there and some copper and
- (25) some other what's known as rare earth minerals but there was
- (26) no long term exploration agreement that the company had with

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- (1) any particular mining company but the mining companies would
- (2) come through now and then and take a look at it, and public
- (3) agency mineral agencies would come through and take a look at
- (4) it
- (5) Its timber was sold. It did have some timber. Chugach
- (6) sold the timber so there was a willing buyer for that. And it
- (7) does have recreational commercial recreational potential
- (8) although I would add on that that I think Chugach recognized
- (9) that commercial recreation opportunities on Knight Island and
- (10) LaTouche Island would really follow the Chenega Corporation
- (11) plans for providing that same opportunity to the - to the
- (12) public
- (13) Q Why?
- (14) A Because of their remoteness. Chenega Corporation
- (15) properties were better situated. There was more - they're
- (16) better situated just in - not to mention the fact that perhaps
- (17) someday Chenega community itself might develop as a
- (18) commercial support center
- (19) Q Finally let me ask you about Knight Island. Did the oil
- (20) spill interfere with any of the corporation's actual or planned
- (21) uses of Knight Island?
- (22) A Not to my knowledge
- (23) Q Go home now?
- (24) A Let's go home
- (25) MR. DIAMOND: Then I'm all done, thank you. No.

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- (1) further questions. You may resume the stand.
- (2) CROSS-EXAMINATION OF PETER C. NAGEL
- (3) BY MR. PETUMENOS
- (4) Q Mr. Nagel, who between you and Mr. Pete Gordaoff is in a
- (5) better position to discuss the corporation's policy on its
- (6) lands with respect to subsistence uses?
- (7) MR. DIAMOND: Your Honor, I'll object as without
- (8) foundation and argumentative.
- (9) THE COURT: The objection is overruled.
- (10) A Mr. Gordaoff, other than the answer to the question what
- (11) did the - what was the land section's involvement in
- (12) subsistence use planning, inventory and conflict resolution?
- (13) BY MR. PETUMENOS
- (14) Q The shareholders of the Chugach Alaska Corporation, the
- (15) corporation made the lands of the Chugach Alaska Corporation
- (16) available to its shareholders for subsistence use, didn't it?
- (17) A That was - yes, in fact it did. There was no official
- (18) written policy or program - well, I think there actually was.
- (19) There was a written policy, yes, there was.
- (20) Q And subsistence didn't often come up with your Department
- (21) because often these uses that you are planning about and
- (22) thinking about weren't necessarily inconsistent with certain
- (23) subsistence uses, true?
- (24) A That's correct.
- (25) Q But if there were times when subsistence uses would

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- (1) conflict with certain development potential that would be a
- (2) subject that the corporation would - would discuss and
- (3) consider carefully?
- (4) A That's correct.
- (5) Q And Mr. Nagel, you have never killed a seal?
- (6) A No.
- (7) Q You are not a pilot?
- (8) A No.
- (9) Q You have never had a seining boat?
- (10) A No.
- (11) Q You don't know around the areas of Prince William Sound
- (12) where the best place is to collect herring or kelp?
- (13) A No.
- (14) Q You don't know where the seals were in 1988 versus where
- (15) the seals were in 1989 for harvest?
- (16) A That's correct. Chugach owned only one parcel of
- (17) submerged
- (18) land so all of our work was oriented toward the upland land
- (19) holding management.
- (20) Q Chugach only owned one parcel of submerged land?
- (21) A Tidelands.
- (22) Q Where was that?
- (23) A Nelson Townsite.
- (24) Q They owned shore front at Knight Island?
- (25) A Yes.
- (26) Q In the Bay of Isles?

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- (1) A Yes.
- (2) Q And the people of the Chugach region used the Bay of Isles
- (3) for subsistence or don't you know?
- (4) A I don't know. I am not aware that they did. I know that
- (5) there was subsistence uses of LaTouche Island, people of
- (6) Chenega, along the LaTouche Island shore.
- (7) Q And the people of Chenega, many of them, not most - not
- (8) all are shareholders of the Chugach Alaska Corporation?
- (9) A Indeed.
- (10) Q So to the extent that you were saying to the jury that the
- (11) oil spill didn't interfere with the use of the land, you are
- (12) not talking about potential subsistence uses of the land when
- (13) you were making those remarks?
- (14) A Well, it's - I think to a certain extent I am in the
- (15) extent that most of the - to my knowledge, most of the
- (16) subsistence uses of lands were marine based and did not get
- (17) onto actual Chugach Alaska Corporation ownership.
- (18) Q Mr. Gordaoff is in a better position to testify to that
- (19) than you, do you agree?
- (20) A Yes.
- (21) Q Now -
- (22) A I can say there's one area that the land department did get
- (23) involved in subsistence, a subsistence use issue, and that was
- (24) when the state court decision in Kodiak was made that
- (25) expanded
- (26) your category of subsistence users, essentially, and a lot of

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- (1) the Native Corporations were closing their properties to
 (2) nonshareholder subsistence use in order to protect the
 resource
 (3) and their traditional uses of the lands and a lot of them it
 (4) was a larger threat. Chugach wrestled with that problem but
 (5) did not determine that its lands would be closed to subsistence
 (6) use to nonshareholder subsistence use because the conflict
 (7) was not perceived to be - not perceived to exist.
 (8) Q Also in your testimony you were asked about not all the
 (9) land being of cultural and historic use and I listened
 (10) carefully to your answer and you said other than land
 (11) specifically obtained for that purpose or something like
 (12) that. Do you remember that testimony?
 (13) A No
 (14) Q Okay There are lands of the Chugach Alaska Corporation
 (15) which are called 14(h)(1) sites?
 (16) A Yes
 (17) Q And 14(h)(1) sites are by their - by definition
 (18) historical and archaeological sites around Prince William Sound
 (19) that Chugach owns and has selected under ANCSA?
 (20) A Yes
 (21) Q And you didn't talk about any of those in your direct did
 (22) you?
 (23) MR DIAMOND I'm going to object Your Honor as
 (24) irrelevant and misleading
 (25) MR PETUMENOS I'm entitled to explore what other

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- (1) lands in this tour that the witness omitted from the direct
 (2) MR DIAMOND Counsel might if they were - if they
 (3) were claimed for in this case which they are not
 (4) MR PETUMENOS Well not -
 (5) MR DIAMOND Let's approach
 (6) (At side bar on the record)
 (7) MR DIAMOND Your Honor my objection is the 14(h)(1)
 (8) sites were expressly withdrawn from this case They're not in
 (9) Dr Mundy's reports or analysis No damages are being sought
 (10) for any effects to 14(h)(1) This is misleading and unfair
 (11) MR PETUMENOS No there's damages testified to by
 (12) Dr Lobdell for restoration
 (13) MR DIAMOND Not land damages counsel
 (14) MR PETUMENOS I - they certainly are land damages
 (15) THE COURT You're limiting your witness only to the
 (16) issue of land damage?
 (17) MR DIAMOND That's all he's talked about
 (18) THE COURT We need to clarify that for the record so
 (19) the jury understands it
 (20) MR DIAMOND I'm happy to clarify it for the record
 (21) THE COURT Isn't that what this testimony goes to?
 (22) MR DIAMOND He hasn't talked about 14(h)(1) sites
 (23) He hasn't talked about archaeological sites He hasn't talked
 (24) about damage to archaeological resources
 (25) THE COURT The jury might be confused and think that

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- (1) he's talking about all the categories of damages that are being
 (2) claimed here and doesn't Mr. Petumenos have the right to
 (3) explore that to show that his testimony is only limited to land
 (4) damages?
 (5) MR DIAMOND In a nonargumentative way I think
 (6) you're right probably Judge
 (7) THE COURT Okay counsel You do that
 (8) MR PETUMENOS Nonargumentative We'll make it
 (9) work
 (10) (Sidebar concluded)
 (11) BY MR PETUMENOS
 (12) Q You know Dr. Lora Johnson?
 (13) A Yes
 (14) Q You know Dr. Jack Lobdell?
 (15) A Yes
 (16) Q And you know that they have done an investigation into
 (17) cultural and historical sites in the Chugach region in
 (18) connection with the oil spill?
 (19) A Yes
 (20) Q And in your direct - just so I understand so that it will
 (21) be clarified - none of the lands that were the 14(h)(1) lands
 (22) which were the subject of that investigation were testified to
 (23) by you in your direct right?
 (24) A No
 (25) Q And Mr. Nagel how much time did you spend with

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- (1) Mr. Diamond preparing your direct testimony?
 (2) A Four hours
 (3) Q Four hours preparing the testimony about the tour of
 (4) Prince William Sound?
 (5) A Well I think that was something that I thought up He
 (6) asked me to describe the properties and I thought that - that
 (7) that would be a good way to describe the properties rather than
 (8) going through them alphabetically for example
 (9) Q How much time did you spend with Mr. Jim Grant an
 attorney
 (10) with Bogle & Gates?
 (11) A Five hours concurrently overlapping
 (12) Q Now Mr. Nagel your background is that you are - you have
 (13) a Bachelor's degree from Yale in classics?
 (14) A Yes
 (15) Q History archaeology things like that?
 (16) A Yes
 (17) Q You came to Alaska and you worked for Eklutna Inc. a
 (18) Native Corporation?
 (19) A Yes
 (20) Q Were you fired from that position?
 (21) A Yes
 (22) MR DIAMOND Your Honor I'm going to object
 (23) THE COURT I've got to know how far this is going to
 (24) go counsel I guess you have to approach the bench
 (25) (At side bar on the record)

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- (1) MR PETUMENOS This is the cross for bias -
 (2) MR DIAMOND Tim I cannot hear you
 (3) THE COURT Just - I just wanted to know if he was
 (4) fired from an associate corporation it's another thing to tie
 (5) it in with whatever happened in his employment
 (6) MR PETUMENOS Right, he is - what I'm going to say
 (7) so you know he worked for the Eklutna Corporation He was
 (8) fired He worked with the Calista Corporation and was fired
 (9) He worked for the Chugach Alaska Corporation and was laid off
 (10) in March of 1991 While the litigation was pending and after
 (11) having worked with the Chugach Alaska Corporation on this
 case
 (12) he was hired by Alyeska where he now works where he is a
 (13) litigant against us in this case
 (14) This is perfectly legitimate bias cross that he has a bias
 (15) against Native Corporations now and a bias in favor of the
 (16) Defendants now because of his current employment. Perfectly
 (17) appropriate 613 cross on bias and I believe this is in line
 (18) MR DIAMOND Your Honor I assume that that is
 (19) irrelevant in any event under 403 Highly prejudicial He
 (20) was terminated I don't know the circumstances I assume
 (21) counsel has a good faith basis for saying this
 (22) THE COURT He said yes to the first question
 (23) MR PETUMENOS I even asked him
 (24) MR DIAMOND He was very careful to say he was not
 (25) fired by Chugach Alaska

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- (1) THE COURT Laid off
 (2) MR DIAMOND He was laid off This is clearly the
 (3) suggestion of improper conduct that by being fired where we
 (4) have no basis where it's plainly collateral it's unfair
 (5) unfair impeachment because he wasn't fired by this Plaintiff
 (6) THE COURT He was laid off
 (7) MR DIAMOND If he wants to ask him about being laid
 (8) off by Chugach that's fine I object to the testimony of
 (9) being fired by parties who are not even before the Court
 (10) THE COURT I don't think I can limit it counsel I
 (11) mean it goes to a valid issue He may very well be biased in
 (12) this case because of the way the Native Corporations have
 (13) treated him in the past.
 (14) MR DIAMOND Okay my objection is made
 (15) (Sidebar concluded)
 (16) BY MR PETUMENOS
 (17) Q After you left the Eklutna Corporation you were hired by
 (18) the Calista Corporation another regional corporation?
 (19) A No
 (20) Q Did you work for them at some time after Eklutna?
 (21) A No
 (22) Q Did you ever work for Calista?
 (23) A Yes I worked for them before Eklutna
 (24) Q Were you fired from Calista?
 (25) A Yes

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- (1) Q You worked for the Chugach Alaska Corporation until 1991?
 (2) A Yes
 (3) Q And you were laid off by the Chugach Alaska Corporation?
 (4) A Yes that's correct.
 (5) Q The Judge told me that when I was out of the room the only
 (6) thing that had happened was that you were sworn I didn't hear
 (7) you tell the jury where you work now
 (8) A Alyeska Pipeline Service Company
 (9) Q You work for Alyeska Pipeline Service Company now?
 (10) A That's correct.
 (11) Q And that is owned in part by Exxon?
 (12) A That is correct.
 (13) Q And you went from the Chugach Alaska Corporation to the
 (14) Alyeska Corporation as a job while this litigation was pending?
 (15) A Yes
 (16) Q You had worked with the corporation to assist in this
 (17) litigation before you left, with the Chugach Alaska
 (18) Corporation?
 (19) A To a certain extent, but I would say I was not involved at
 (20) the highest decision-making levels of Chugach Alaska
 (21) Corporation or even the middle decision-making levels
 (22) Q When you applied to the Alyeska Corporation while this
 (23) litigation was pending did the Alyeska Corporation know that
 (24) you had been a Chugach Alaska Corporation employee while
 this
 (25) litigation was pending?

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- (1) MR DIAMOND Objection no foundation whether he
 (2) knew what the corporation knew
 (3) BY MR PETUMENOS
 (4) Q Did you tell them in a resume or otherwise?
 (5) A Well certainly I knew people at Alyeska through the oil
 (6) spill response effort. And yet I repeat that I was - what
 (7) little advice I did give on the litigation aspect, the damage
 (8) claims aspect of Chugach was I would say not - that advice
 (9) was not taken and I was really not part of those
 (10) deliberations
 (11) Q My question is different When you applied to the Alyeska
 (12) Corporation did you - did they know based upon having had
 (13) acquaintance with you or based upon resumes conversations
 (14) things that you told them that you were coming from the
 (15) Chugach Alaska Corporation when you were hired?
 (16) A Yes Definitely they knew
 (17) Q They knew and so they were hiring somebody they knew
 while
 (18) litigation was pending against them in this case who had been
 (19) the land manager for Chugach Alaska Corporation right?
 (20) A Yes
 (21) Q Now a number of people from the Chugach Alaska
 Corporation
 (22) have been deposed by Exxon and Alyeska, you know that?
 (23) A A number of people from Chugach
 (24) Q Yes
 (25) A I don't know that but I would take your word

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- (1) Q Neither Exxon nor Alyeska ever noticed your deposition did they?
- (2) A I was told that I would be deposed I could count on it
- (3) but I was not.
- (4) Q And that's because Alyeska had access to you to talk to you all they wanted because you were their employee?
- (5) MR DIAMOND Objection argumentative no foundation This is the reason he wasn't deposed
- (6) THE COURT Sustained You can rephrase
- (7) MR PETUMENOS I don't think I have any further questions of this witness
- (8) A I would just like to add that I am grateful that I have the position with Alyeska Pipeline Our fifth child in - under six is due soon and my wife who is a Chugach shareholder which makes for some odd bedfellows in our home these days is
- (9) also grateful that I have this job
- (10) MR PETUMENOS I guess I have another question
- (11) BY MR PETUMENOS
- (12) Q Do you like your job at Alyeska?
- (13) A There are days I do yes
- (14) Q And you want your supervisors at Alyeska to be happy with you because you have a family to support like all the rest of us?
- (15) A I want to do the best job for the company and whether it pleases my supervisors or not it certainly is something that I

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- (1) take into consideration
- (2) MR PETUMENOS I have no further questions
- (3) A But I have not received any pressure and if anything I am receiving pressure from both sides and I feel that what I know is the truth is obviously the right thing to say here
- (4) REDIRECT EXAMINATION OF PETER C NAGEL
- (5) BY MR DIAMOND
- (6) Q Let me ask you a question about 14(h)(1) sites 14(h)(1) sites are selections that Chugach made because of historical or cultural importance?
- (7) A Yes that's correct
- (8) Q And some of those are located on parcels that we've seen on the map?
- (9) A Yes Not as 14(h)(1) sites because they have been absorbed by the larger parcel 14(h)(1) ownership ownership of an historic site carries a covenant that the land cannot be developed for other purposes This covenant is not cast in stone although it is difficult to remove but some of the corporations such as CIRI have acquired title to land along the Russian River popular fishing river in Alaska under the 14(h)(1) provision as a historic site for obvious purposes that this high value fishing area and then they have sought to have that covenant removed so that they can develop that property protect the resources protect the archaeological resources but develop some of the acreage nearby to support

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- (1) the commercial recreation opportunities to take advantage of that land
- (2) Q Correct me if I'm wrong but 14(h)(1) sites were not an area of responsibility of yours while you were at Chugach Alaska?
- (3) A I would say that's incorrect that it was my responsibility as the director of the land section and I worked closely - the cultural resource manager reported to me
- (4) Q That's why I asked you to correct me if I was wrong Chugach owned some 14(h)(1) sites which are not incorporated within the boundaries of the 12 parcels that we've seen here is that right?
- (5) A Oh yes Many Does it - did you ask owns or selected?
- (6) Q Well I'm always careful in this area Does it own or does it -
- (7) A I don't believe it owns
- (8) MR PETUMENOS I'll object to foundation unless he's going to testify as to point in time
- (9) THE COURT Do you know or don't you?
- (10) MR PETUMENOS As of what point in time?
- (11) A As of the time I left it owned none no parcels no 14(h)(1) parcels outside of those that had been absorbed by the larger parcels depicted on the map
- (12) BY MR DIAMOND
- (13) Q So they stood selected but not conveyed?

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- (1) A Correct
- (2) Q None of those are depicted on the map?
- (3) A Correct
- (4) Q Those parcels that are not conveyed within the boundaries of the parcels?
- (5) A Correct
- (6) Q Is it your understanding that none of them are being claimed for in this litigation?
- (7) A I take your word
- (8) Q Okay Finally Mr Nagel have you made yourself available and spoken with counsel for the Plaintiffs in this case just like you've made yourself available to counsel for the Defendants?
- (9) A Yes
- (10) MR DIAMOND I have no further questions
- (11) CROSS-EXAMINATION OF PETER C NAGEL
- (12) BY MR PETUMENOS
- (13) Q On these 14(h)(1) sites and the other archaeological sites you know Mr Nagel that it was corporate policy to keep these sites as confidential as possible
- (14) MR DIAMOND Your Honor I object as beyond the scope
- (15) THE COURT Sustained the objection is sustained
- (16) MR PETUMENOS I have no further questions
- (17) THE COURT You can step down sir

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- (1) A Thank you
 (2) MR DIAMOND Your Honor our next witness is going to
 (3) testify by way of deposition about a brief one I think we
 (4) have three that are coupled together
 (5) THE COURT How brief? How brief?
 (6) MR OPPENHEIMER I rise from behind the Barco Your
 (7) Honor I almost never disagree with my partner of 18 years
 (8) but it's not - it's not three it's four It might be a good
 (9) time for a break.
 (10) THE COURT Good That's what I was searching for
 (11) counsel
 (12) THE CLERK Please rise This court stands in
 (13) recess
 (14) (Jury out at 10 54 a m)
 (15) (Recess from 10 54 a m to 11 07 a m)
 (16) (Jury in at 11 07 a m)
 (17) THE CLERK This court now resumes its session
 (18) Please be seated
 (19) MR PETUMENOS Could we approach the bench?
 (20) THE COURT Sure
 (21) MR PETUMENOS I don't need a record
 (22) (Bench conference off the record)
 (23) THE COURT Swear the witness
 (24) THE CLERK Sir please raise your right hand
 (25) (The Witness is Sworn)

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- (1) THE CLERK Please be seated
 (2) Sir for the record would you please state your full name?
 (3) A I'm Daniel Gage Taft T a f t
 (4) THE CLERK Thank you
 (5) MR OPPENHEIMER Part of the day we've all been
 (6) waiting for
 (7) The following are excerpts from the sworn deposition
 (8) testimony of Paul Tweter who was deposed in April and July
 (9) 1992 Mr Tweter served as the timber manager for Chugach
 (10) Alaska Corporation from 1988 to 1991 and as the land and -
 (11) land and timber manager for the corporation in 1991 and 1992
 (12) Mr Tweter was designated by Chugach Alaska Corporation as
 (13) a person knowledgeable about Chugach's real property
 (14) damages
 (15) His testimony is binding on the corporation
 (16) DIRECT EXAMINATION OF PAUL TWEITER (Read)
 (17) BY MR OPPENHEIMER
 (18) Q Start our questions Mr Tweter Have you - have any of
 (19) the properties that had been selected by Chugach but not
 (20) conveyed as of October 1988 since been conveyed?
 (21) A I don't believe so
 (22) Q Have any of the selections been relinquished since October
 (23) of 1988?
 (24) A I guess you would call it nominated for relinquishment
 (25) But it has not gone through the final processing with the BLM
 (26) They are currently addressing those relinquishments

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- (1) Q Was this a series of nominations for relinquishment that
 (2) took place within the last two years?
 (3) A The - the most recent one I believe is - as I think I
 (4) explained last time we met - was in March of 1991
 (5) Q And you participated in that process?
 (6) A Yes
 (7) Q What does it mean to nominate properties for
 (8) relinquishment?
 (9) A Well essentially what we were doing was making a list.
 (10) The corporation had you know within their overselection area
 (11) a - a total number of acres more acres than - than what they
 (12) were supposed to have They had reduced that overselection
 (13) acreage down to no more than 125 percent of what they had k
 (14) available to be conveyed and I think that was roughly 125 000
 (15) acres that they had to reduce that down to
 (16) Q 125 000 acres?
 (17) A Yes out of the selection areas
 (18) Q Okay
 (19) A And so what the corporation did then was place a form
 (20) notification request to the Bureau of Land Management to hav
 (21) certain portions within there relinquished from our selection
 (22) rights and then prioritized I believe as I explained before
 (23) prioritize properties for the conveyance
 (24) Q Did Chugach in that process get down to 125 000 acres?
 (25) A I believe so

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- (1) Q Do you know when these nominations were submitted to the
 (2) Bureau of Land Management?
 (3) A Again March of 1991
 (4) Q Now you participated in the discussions about which lands
 (5) to relinquish right?
 (6) A Yes sir
 (7) Q In the course of those discussions did it ever come up
 (8) that certain lands should be relinquished because they'd been
 (9) injured by the oil spill?
 (10) A Not to my knowledge no
 (11) Q To your knowledge was the oil spill not a factor in
 (12) deciding which lands to relinquish and which to retain?
 (13) A That was not a factor in the discussions that I was
 (14) involved in with regard to which lands to retain and which
 (15) lands to relinquish I am not aware of it being a factor in
 (16) any other discussions
 (17) Q Of the discussions that you are aware of did Chugach ever
 (18) recommend to any of the Village Corporations that they should
 (19) relinquish any of their lands that had been oiled by the Exxon
 (20) Valdez oil spill because those lands had lost value because o
 (21) the spill?
 (22) A Not to my knowledge
 (23) Q You said the Snow River parcel has been used in the past
 (24) for gravel extraction?
 (25) A Yes

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- (1) Q When was that?
- (2) A Chugach currently has a - a materials lease on that
- (3) property I think - I believe that they entered into that
- (4) agreement that in 1986 and that it was a ten-year agreement
- (5) Q Who was the lessor - I'm sorry the lessee?
- (6) A That was Afognak Logging Company
- (7) Q So that gravel use is still going on now?
- (8) A That's correct yes
- (9) Q Was that use interrupted in any way by the oil spill?
- (10) A Not to my knowledge I don't -
- (11) Q Has Chugach made any other use of any other portion of the
- (12) Snow River parcel?
- (13) A Yes we have
- (14) Q What?
- (15) A Chugach harvested a portion of the timber on that tract.
- (16) Q Was that timber operation interfered with or obstructed
- (17) because of the oil spill?
- (18) A I don't believe it was
- (19) Q Are there any other uses of the Snow River parcel?
- (20) A Not that - well by 'uses -
- (21) Q I mean any uses
- (22) A Permitted permitted uses?
- (23) Q That Chugach has made of the property
- (24) A No not to - not to - not to my knowledge
- (25) Q Have there been any development plans for the Snow River

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- (1) parcel other than the use as gravel extraction and timber?
- (2) A Nothing formal no
- (3) Q With the exception of that road access has the Nellie Juan
- (4) parcel Number 8 here on Exhibit 7054 have any uses of the
- (5) Nellie Juan parcel been affected or impacted by the Exxon
- (6) Valdez oil spill?
- (7) A Again as far as Chugach uses Chugach - that's not
- (8) Chugach ownership at this time
- (9) Q No I understand
- (10) A So we have no uses with regards to what uses are
- (11) Q Maybe I should rephrase that question because I had been
- (12) talking about development plans and I apologize I skipped
- (13) gears again With the exception of that road access that we've
- (14) been talking about, have any development plans of Chugach
- (15) related to the Nellie Juan parcel been affected or impacted by
- (16) the Exxon Valdez oil spill?
- (17) A Not that I have been associated with or aware of
- (18) Q Number nine is the -
- (19) A I believe it's referred to as the Whittier tract
- (20) Q How about we call it the Whittier tract?
- (21) A Okay
- (22) Q Has Chugach made any use of the Whittier parcel in the
- (23) period that it's owned it?
- (24) A I don't believe so no
- (25) Q Have there been any development plans for that parcel?

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- (1) A That particular parcel would be involved potentially with
- (2) the Shotgun - the development of the Shotgun Cove It's -
- (3) it's a tract of land that would be accessed along with a road
- (4) to Shotgun Cove
- (5) Q I take it there's no road presently from Whittier to
- (6) Shotgun Cove?
- (7) A That's correct there is not
- (8) Q To your knowledge Mr Twenter you know of no specific
- (9) development plans or work that was going to be done for
- Shotgun
- (10) Cove that was put off because of the oil spill is that
- (11) correct?
- (12) A To my knowledge no
- (13) Q Let me ask you about parcel 12 Is that on LaTouche
- (14) Island?
- (15) A That's LaTouche Island yes
- (16) Q Has Chugach ever made any use of the property that it owns
- (17) on LaTouche Island?
- (18) A I believe there may have been some individual land use
- (19) permits but I'm not real familiar with them
- (20) Q What do you mean by individual land use permits?
- (21) A Well I think that - I think a land use permit had - and
- (22) again I'm not real sure but I believe LaTouche Island is one
- (23) where the Department of Fish and Game has conducted I think
- (24) the stream surveys stream - fish surveys on that particular
- (25) island

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- (1) Q Are there any other land use permits for Chugach's property
- (2) on LaTouche Island that you know of?
- (3) A I believe a land use permit to Exxon was included
- (4) Q During the cleanup?
- (5) A Yeah in the cleanup
- (6) Q Any others?
- (7) A I don't recall
- (8) Q Has Chugach ever formulated any plans for development of
- (9) LaTouche?
- (10) A Not to my knowledge any formal plan
- (11) Q Has Chugach ever made any use of the Knight Island
- (12) property?
- (13) A Not to my knowledge other than it is - the timber was
- (14) sold under stumpage to timber trading company
- (15) Q What does it mean that timber was sold under stumpage?
- (16) A The cutting rights
- (17) Q When did that happen?
- (18) A That I believe early 1987
- (19) Q Any other uses of the property besides that by Chugach?
- (20) A Again I don't believe so
- (21) Q So I take it there were no uses that were interrupted by
- (22) the oil spill?
- (23) A Not to my knowledge no
- (24) Q Has Chugach ever had any development plans for that
- (25) property?

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- (1) A Well obviously the - when we sold the cutting rights of
 (2) the timber to Timber Trading Company a development plan so
 (3) they anticipate timber harvesting and road construction you
 (4) know clearing on that.
 (5) Q How much timberland did you sell to or timber rights did
 (6) you sell to Timber Trading Company?
 (7) A The entire timber
 (8) Q Other than this construction of the road and these
 (9) permitting delays that you're talking about, has there been any
 (10) other interference of use on either parcel 14 MacLeod or
 (11) parcel 15 Patton Bay?
 (12) A Not to my knowledge
 (13) Q Has there been any development plans for either of those
 (14) two parcels that Chugach has canceled because of the oil spill?
 (15) A Not to my knowledge no
 (16) Q What is parcel 16?
 (17) A Parcel 16 is -
 (18) Q On Hinchinbrook?
 (19) A Yeah that's Nuchek Island
 (20) Q Has Chugach ever made any use of the Chugach - pardon
 (21) me
 (22) has Chugach ever made any use of the Nuchek Island
 (23) property?
 (24) A Chugach not Chugach No
 (25) Q Has any licensee or lessee of Chugach ever used the
 (26) property?
 (27) A We have - Chugach has in the past given a land use permit

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- (1) to an individual who has property on the island and the land
 (2) use permit was to allow him to land his plane on an airstrip
 (3) that was on - partially on Chugach ownership
 (4) Q I assume this is a fairly small license fee?
 (5) A Yes it is
 (6) Q Other than that, has there been any use of that island?
 (7) A Not to my knowledge no
 (8) Q I take it there were no uses of the island that were
 (9) interfered with because of the oil spill then?
 (10) A There were no existing Chugach operations out there that
 (11) were affected no
 (12) Q Parcel number 17 what is that?
 (13) A Growler Island
 (14) Q Is this the island that is used occasionally by tour
 (15) operations going to the Columbia Glacier?
 (16) A That's correct
 (17) Q Can you give me an estimate of what the annual revenues
 (18) from those fees have been from the period of 1989 to the
 (19) present?
 (20) A They've - they have been steadily increasing I believe
 (21) in part because the - the fee that - that Chugach has charged
 (22) has gone up But last year I believe that Chugach received
 (23) roughly \$45 000
 (24) Q Had there been additional or increased number of visitors
 (25) from 1989 to the present?

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- (1) A I believe so but I'm not sure to what extent
 (2) Q Parcel number 20 since we're over near Tatitlek anyway -
 (3) A That's the Silver Lake tract
 (4) Q All right Have there ever been any timber operations on
 (5) the Silver Lake parcel?
 (6) A No
 (7) Q Have there been any other uses of the property made by
 (8) Chugach?
 (9) A I don't believe so
 (10) Q Have there been any other development plans for the
 (11) property?
 (12) A Yes there has There has - in the past, there has been
 (13) consideration in utilizing the Silver Lake area for a
 (14) hydroelectric project.
 (15) Q Have there been any interferences of use on this Silver
 (16) Lake tract as a result of the oil spill?
 (17) A Not to my knowledge
 (18) Q Has there been any disruption of the planning or
 (19) consideration of the hydroelectric project because of the oil
 (20) spill?
 (21) A I don't believe so No
 (22) Q Parcel 21 is this Eyak land?
 (23) A That's correct
 (24) Q Let me ask you about the whole east side of the Chugach
 (25) properties going basically from Tatitlek to the east down the

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- (1) coast Are you aware of any oiling in that direction at all?
 (2) A I'm not aware of any no
 (3) Q All right This Comfort Cove property has Chugach made
 (4) any use of it?
 (5) A Not to my knowledge
 (6) Q Are there any planned or prospective uses for it?
 (7) A Again not to my knowledge problems
 (8) Q Any interference of use because of the oil spill?
 (9) A I don't believe so
 (10) Q Parcel 24 looks like Raging Creek
 (11) A Correct
 (12) Q Have there been any uses of this property?
 (13) A Not that I'm aware of no
 (14) Q Has there - pardon me was there any interference of use
 (15) because of the spill?
 (16) A I don't believe so
 (17) Q Ever been any development plans for the property?
 (18) A Not that I'm aware of
 (19) Q Number 25 do you know what that is?
 (20) A I believe that's Nelson Townsite
 (21) Q Looks like it's called Nelson Bay on this map?
 (22) A Yeah
 (23) Q Has Chugach ever made any use of that property?
 (24) A Not that I'm aware of no
 (25) Q Was there ever any interference of use of that parcel of

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- (1) property because of the oil spill?
- (2) A Not that I m aware of
- (3) Q Was there any interference or postponement of any
- (4) development plans for that property because of the oil spill?
- (5) A No I don't believe so
- (6) Q 26 and 27 look like they re closely together and right near
- (7) Cordova I m not sure what they are
- (8) A That would be - there s two tracts that Chugach owns
- (9) within the city limits of Cordova One of them is referred to
- (10) as the Lutheran Townsite
- (11) Q That one according to the map is 27?
- (12) A Okay And then -
- (13) Q 26 the map says is Cordova Federal Reserve?
- (14) A Right.
- (15) Q Were there any uses of those two parcels that were
- (16) interfered with or interrupted because of the oil spill?
- (17) A I don't believe so
- (18) Q Have there been any development plans for those parcels
- (19) that were canceled or abandoned or put off because of the oil
- (20) spill?
- (21) A No I don't believe so
- (22) Q You told me in your testimony yesterday I think you told
- (23) me before that Chugach s policy is that it will not sell its
- (24) lands right?
- (25) A It s Alaska Native Claim Settlement Act lands yes

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- (1) Q Its Alaska Native Claim Settlement Act lands Is that true
- (2) both for surface estate and subsurface estate?
- (3) A That s correct I believe
- (4) Q So it s Chugach s policy not to do an outright sale of any
- (5) of its subsurface mineral rights?
- (6) A I believe that s correct
- (7) Q Or any subsurface rights?
- (8) A I - I believe so yes
- (9) MR OPPENHEIMER Thank you Mr Twenter
- (10) (Witness excused)
- (11) MR OPPENHEIMER Your Honor Exxon calls next to
- (12) testify in order by deposition Mr John Black
- (13) THE CLERK Can you please raise your right hand?
- (14) (The Witness is Sworn)
- (15) THE CLERK Please be seated and attach the
- (16) microphone
- (17) Sir for the record I need you to state your full name and
- (18) please spell your last name
- (19) A My name is Daniel Eugene Egging last name spelled
- (20) E-g-g-i-n-g
- (21) MR OPPENHEIMER Following are excerpts from the
- (22) sworn testimony of John Black who was deposed in April 1992
- (23) and June 1993 Mr Black worked as an oil spill consultant for
- (24) Chugach Alaska Corporation in 1989 He served as Chugach s
- (25) executive vice-president from 1990 to 1991 Mr Black was

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- (1) designated by Chugach Alaska Corporation as knowledgeable
- (2) about
- (3) Chugach s real property claims His testimony is binding on
- (4) the corporation
- (5) DIRECT EXAMINATION OF JOHN BLACK (Read)
- (6) BY MR OPPENHEIMER
- (7) Q When you came to Chugach in September of 1989 did they
- (8) lease any of their land?
- (9) A To someone else yes There were a few odd little leases
- (10) very small amounts tiny little resort on Growler Island near
- (11) the glacier Columbia Glacier There s one or two very small
- (12) interests like that If I remember right
- (13) Q Did those leases exist before the oil spill?
- (14) A Well that one did
- (15) Q Do you know if the oil spill interfered with any of the
- (16) leases or contracts from which Chugach received income from
- (17) the
- (18) land its lands?
- (19) A I don't
- (20) Q Well was the Growler Island lease canceled because of the
- (21) oil spill?
- (22) A Not as far as I remember
- (23) Q I m trying to keep it to Chugach land
- (24) A Canceling of leases or interfering with business
- (25) operations? I really can't think of any
- (26) Q Okay
- (27) A Actually land use permits changed somewhat because there

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- (1) was a lot of people interested in doing research on oiled
- (2) beaches and so on It wasn't a business I mean it didn't
- (3) amount to a hill of beans
- (4) Q The Growler Island lease was for pour the entire island?
- (5) A No it was a small piece of land on the north of the island
- (6) where they had a resort A fellow called Stephens I think it
- (7) was operated a resort sort of a fly in and boat tours type
- (8) of operation
- (9) Q What else is Growler Island used for?
- (10) A There s a tiny bit of timber I think it would be
- (11) noncommercial Its future would be definitely tourist
- (12) potential property
- (13) Q LaTouche Island is that an island owned by Chugach?
- (14) A Well the north part is owned by Chenega but pretty much
- (15) all the rest is owned by Chugach There is a couple of private
- (16) old mining sites sites of previously existing active mines on
- (17) the island which are still privately owned
- (18) Q Does Chugach receive any income or has it received in the
- (19) past any income from LaTouche Island?
- (20) A Again probably minor land use sites I don't personally
- (21) know of any other income
- (22) Q MacLeod are you familiar with that parcel?
- (23) A Montague Island yes I know where it is fairly familiar
- (24) with it
- (25) Q What type of parcel is it?

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- (1) A It's timber timberlands
 (2) Q Has there ever been any consideration of developing
 (3) MacLeod?
 (4) A They talk about developing it as a shipping plant for
 (5) logging other areas as in fact, a harbor if you want to and
 (6) some timber on it, and I don't recall if that timber was sold
 (7) or not as part of the Patton Bay deal
 (8) Q Do you know if any other income has been generated from
 (9) that parcel by Chugach?
 (10) A I don't know of any
 (11) Q Nellie Juan are you familiar with that parcel?
 (12) A I know where it is up in the valley of central or sort of
 (13) the northeast central Kenai Peninsula
 (14) Q It's an inland parcel correct?
 (15) A Yes
 (16) Q I should have asked you that about the other parcels
 (17) Other than Mr Stephens uses of Growler Island is it used in
 (18) any other way?
 (19) A By the company?
 (20) Q Yes
 (21) A I don't think so
 (22) Q How about Knight Island?
 (23) A Same thing most of these holdings are assets with -
 (24) assets which have been conveyed to them Potentially - I mean
 (25) obviously are selected because they are valuable properties

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- (1) but they are at the moment passive investments
 (2) Q There are no structures built on Knight Island by Chugach?
 (3) A Not by Chugach I don't think
 (4) Q LaTouche Island?
 (5) A Again not by Chugach Just some old buildings around the
 (6) old mine sites and so on but not by Chugach
 (7) Q But there's no use of LaTouche Island by Chugach at this
 (8) time?
 (9) A It depends what you mean by use I mean they are actively
 (10) looking all the time for somebody who would want to explore for
 (11) minerals or enter into an exploration agreement or royalty
 (12) agreement on mining so it doesn't mean it's useless It
 (13) doesn't mean it's not valuable It just means it's not
 (14) currently developed
 (15) Q No I mean is there any human activity on behalf of Chugach
 (16) Corporation on the island?
 (17) A On behalf of Chugach? Limited amounts of timber cruising
 (18) exploration work cultural resource searches and things like
 (19) that yes but virtually nothing else
 (20) Q You're familiar with Mr Mundy's opinion that inland
 (21) parcels have lost value because of a stigma on the parcels?
 (22) A Yes
 (23) Q Do you have any specific facts which support that opinion?
 (24) A Specific facts? No
 (25) MR OPPENHEIMER Thank you

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- (1) (Witness excused)
 (2) MR OPPENHEIMER Your Honor Exon calls next in
 (3) order by deposition Edgar Blatchford Your Honor this will
 (4) be one of the two last to be read at this time and it will be
 (5) relatively short.
 (6) THE COURT All right, thank you
 (7) THE CLERK Please raise your right hand
 (8) (The Witness is Sworn)
 (9) THE CLERK Please be seated
 (10) Sir for the record can you please state your full name
 (11) spelling your last name?
 (12) A Jonathan E Sperber S-p-e-r-b-e-r
 (13) THE CLERK Thank you
 (14) MR OPPENHEIMER The following are excerpts from the
 (15) sworn deposition testimony of Edgar Blatchford who was
 (16) deposed
 (17) In November and December 1992 and September 1993
 (18) Mr Blatchford served as Chairman of the Board for Chugach
 (19) Alaska Corporation from 1983 through 1988 He returned as
 (20) chairman following the oil spill in 1989 and continued in that
 (21) position until 1991
 (22) DIRECT EXAMINATION OF EDGAR BLATCHFORD (Read)
 (23) BY MR OPPENHEIMER
 (24) Q Do you know of any reference in any set of minutes of the
 (25) land committee or the Board of Directors of Chugach from the
 (26) period 79 to 82 where any parcel of land was picked primarily

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- (1) for subsistence reasons?
 (2) A No I don't but I do know that all lands had subsistence
 (3) purposes attached to it
 (4) Q Do you know of any instance any parcel of land that
 (5) Chugach selected in the period 1979 to 1982 that was picked
 (6) primarily for subsistence reasons?
 (7) A No I do not
 (8) Q Do you know of any parcel of land that Chugach picked at
 (9) any time from 1979 to the present primarily for subsistence
 (10) reasons?
 (11) A No I do not
 (12) Q Do you know what land uses Chugach had as of 1989 say
 (13) just
 (14) before the oil spill what land uses were being used by the
 (15) corporation for what purposes?
 (16) A In 1989?
 (17) Q Um-hum
 (18) A In 1989 we had some lands leased for tour boat operations
 (19) Q Are you referring to Growler Island?
 (20) A Stan Stephens yeah
 (21) Q Is that Growler Island?
 (22) A Growler yeah Growler Island
 (23) Q Okay
 (24) A I don't know whether it was - and there were permits that
 (25) the land department took care to allow people to go onto
 (26) Chugach lands I never bothered with those because it's just

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- (1) single transactions
 (2) Q Are you talking about like hunting and fishing guides
 (3) things like that?
 (4) A Yes
 (5) Q Other than those kinds of permits and the lease with Stan
 (6) Stephens do you know of any other uses Chugach was making
 (7) of
 (8) any of its lands -
 (9) A We were -
 (10) Q - immediately prior to the spill?
 (11) A We were - no no We were doing surveying but not in the
 (12) legal sense of the word but looking at the properties
 (13) Q So there were no other development projects or timber
 (14) operations or mining operations or anything like that going on
 (15) just before the spill?
 (16) A No not that I recall
 (17) Q Can you identify any of the Chugach lands any of the
 (18) parcels of Chugach lands that were ever income producing for
 (19) the company?
 (20) A No
 (21) Q At any time that you've been involved with Chugach Alaska
 (22) Corporation or its predecessor has Chugach ever offered to
 (23) sell any of its ANCSA lands to anyone?
 (24) A No
 (25) Q Has anybody ever offered to buy ANCSA lands from
 Chugach?
 A Not that I can recall

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- (1) Q Have the directors ever considered the possibility of
 (2) selling any ANCSA lands?
 (3) A No
 (4) Q Does the Board of Directors of the company have any policy
 (5) formal or informal about the ANCSA lands and whether they
 (6) should be sold?
 (7) A Yes
 (8) Q What is that policy?
 (9) A Well between the time 1977 and 1991 during my tenure on
 (10) the Board the policy was simple no sale of ANCSA lands
 (11) Q Ever?
 (12) A Ever yeah
 (13) Q It was considered an important part of the company?
 (14) A Yes
 (15) Q And even though the company's objective might have been
 (16) to develop the lands there would be no sale of those lands?
 (17) A Yes
 (18) MR OPPENHEIMER Thank you
 (19) (Witness excused)
 (20) MR OPPENHEIMER Your Honor our last deposition
 (21) witness to be read at this time Gene Kompkoff
 (22) THE CLERK Please raise your right hand
 (23) (The Witness is Sworn)
 (24) THE CLERK Sir for the record can you please state
 (25) your full name and spell your last name?

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- (1) A Peter D Christensen C h r i s t e n s e n
 (2) THE CLERK. Thank you
 (3) MR OPPENHEIMER The following are excerpts from the
 (4) sworn testimony of Gene Kompkoff who was deposed on Pearl
 (5) Harbor Day 1992 - apologize for the slight diversion -
 (6) December 7 1992 I couldn't help myself Mr Kompkoff
 (7) served
 (8) as general manager for Chugach Development Corporation in
 (9) 1990
 (10) DIRECT EXAMINATION OF GENE KOMPCKOFF (Read)
 (11) BY MR OPPENHEIMER
 (12) Q You said that subsistence was a concern in land
 (13) development correct?
 (14) A Yes
 (15) Q Chugach didn't have any sort of formal review process that
 (16) the corporation had to go through before approving a
 (17) development project taking into account what the subsistence
 (18) effects would be did it?
 (19) A Not that I can recall
 (20) Q But that subject was raised on occasion at the Board of
 (21) Directors?
 (22) A Yes
 (23) Q Do you remember any development projects that were
 (24) proposed
 (25) by Chugach management that the Board rejected because they
 thought it would be - because they thought it would negatively
 effect subsistence?

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- (1) A No I don't
 (2) Q Do you remember any development projects that
 (3) management
 (4) proposed that the Board significantly modified in order to
 (5) protect some subsistence interest?
 (6) A No I don't
 (7) MR OPPENHEIMER Thank you
 (8) (Witness excused)
 (9) MR CLOUGH Your Honor for our next witness we'd
 (10) like to call Dr. Ted Meyers in real time I've been asked to
 (11) point out
 (12) THE CLERK. Please raise your right hand
 (13) (The Witness is Sworn)
 (14) THE CLERK. Please be seated and attach the microphone
 (15) to your tie
 (16) MR CLOUGH And this is the real Dr. Ted Meyers
 (17) THE CLERK. Sir for the record I need you to state
 (18) your full name?
 (19) A Theodore Richard Meyers
 (20) THE CLERK. And please spell your last name
 (21) M-e-y-e-r-s
 (22) THE CLERK. And your occupation?
 (23) A I am a chief fish pathologist for the State of Alaska
 (24) Alaska Department of Fish and Game
 (25) THE CLERK. Thank you
 DIRECT EXAMINATION OF THEODORE C MEYERS

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- (1) BY MR. CLOUGH
 (2) Q Good morning Dr. Meyers. I'd like to ask you this
 (3) question in particular. Where are you from?
 (4) A Juneau, Alaska.
 (5) Q It's the first time it's come up in weeks. Your Honor,
 (6) And are you married, sir?
 (7) A Yes, I am, and have one child.
 (8) Q Could you briefly describe your educational background for
 (9) the jury?
 (10) A I have a Bachelor's of Science degree in fisheries
 (11) management from Utah State University, Master's degree in fish
 (12) diseases from Oregon State University, and a Ph.D. in
 (13) veterinary medicine from Cornell University.
 (14) Q Dr. Meyers, what is your current employment?
 (15) A I am the chief fish pathologist for the State of Alaska,
 (16) and basically in charge of two laboratories, one in Anchorage
 (17) and one in Juneau.
 (18) Q Are you a board certified fish pathologist?
 (19) A I am board certified by the American Fisheries Society for
 (20) health section as a fish pathologist.
 (21) Q If you could help out the jury and myself, what is a fish
 (22) pathologist and what do you do?
 (23) A Well, a fish pathologist basically looks at the cause and
 (24) effect of diseases in animals, and in my case it's fish.
 (25) Basically, we like to characterize what is causing the disease

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- (1) fish there that had skin lesions and would we be interested in
 (2) looking at them? Yes, we were, and they sent us samples and
 (3) that's how we got involved.
 (4) Q And why were you called in as chief fish pathologist?
 (5) A That is basically one of our responsibilities in the
 (6) program of the State is to investigate any fish health problem
 (7) in wild fish or hatchery fish.
 (8) Q Dr. Meyers, I'd like to ask you, have you ever spoken with
 (9) a Dr. Richard Kocan?
 (10) A Yes, I have.
 (11) Q And are you aware that Dr. Kocan has testified as an expert
 (12) witness on behalf of the Plaintiffs in this litigation on the
 (13) topic of the declines in the Prince William Sound herring runs
 (14) in 1993?
 (15) A Yes, I am.
 (16) Q How are you aware of that, sir?
 (17) A When he called me, he did inform me that he was testifying
 (18) for the Plaintiff side of the case. He had also asked me at
 (19) the time what I thought about - or what I told the Defendants
 (20) side of the case, primarily. That is the main reason why he
 (21) called. Is that he had heard I talked to the Defendants, and he
 (22) wanted to know what I told them.
 (23) Q Now, this call that you're talking about here, did this
 (24) occur prior to the time that Dr. Kocan testified here in court
 (25) to this jury?

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- (1) what effect it has on the animals, and even what effect it may
 (2) have on population of animals.
 (3) Some of the other duties that I have, I am a diagnostician
 (4) primarily, and that means I get into the laboratory and at the
 (5) bench and do the actual work. But I also am an administrator
 (6) and I have to manage the fish health program statewide and
 (7) again, I manage two laboratories.
 (8) The other responsibility I have is a regulatory one, in
 (9) which I am signatory on permits for transferring fish or
 (10) shellfish interstate within the State of Alaska. The - I'd
 (11) like to point out that we service about 40 different hatcheries
 (12) in the State of Alaska, and we are also responsible for
 (13) servicing anybody who is concerned about a dead fish or
 (14) something wrong with a fish. We get fish right off the street
 (15) from sportsmen and so forth, but we're also involved in looking
 (16) at wild fish populations as well.
 (17) Q How long have you been chief fish pathologist for the State
 (18) of Alaska?
 (19) A I've been in this position since December in 1985.
 (20) Q In the course of your work as chief fish pathologist, have
 (21) you had occasion to study the Prince William Sound herring
 (22) runs?
 (23) A Yes, I have. In 1993, our own herring biologists in the
 (24) field at Cordova called us up and were concerned about the
 (25) decline of herring, and had informed us that there was some

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- (1) A Yes, it did.
 (2) Q And subsequent to his testimony, have you had an
 (3) opportunity to review the trial transcript of what Dr. Kocan
 (4) testified to?
 (5) A Yes, I have, since you provided them to me.
 (6) Q Make that clear, I, as counsel for Exxon, provided you a
 (7) copy of that transcript. Is that correct?
 (8) A That's correct.
 (9) Q And we asked you to look at it, correct?
 (10) A That's correct.
 (11) MR. PETUMENOS: Can we approach the bench just one
 (12) second? Small matter, Judge, little matter.
 (13) THE COURT: We don't need you up here.
 (14) (Off the record discussion at the bench.)
 (15) BY MR. CLOUGH:
 (16) Q So back to where we were. You did have an opportunity to
 (17) review the trial transcript of Mr. - of Dr. Kocan's testimony
 (18) here in state court. Is that correct?
 (19) A That is correct.
 (20) Q Now, when Dr. Kocan called you, before he testified, what
 (21) did he tell you about why he was calling you?
 (22) A He wanted to know what I had discussed with the Defendants
 (23) regarding the VHS virus in herring.
 (24) Q And what did you tell him?
 (25) A I basically told him that we felt that this virus was - we

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- (1) had no evidence to indicate that it was linked to the Exxon
 (2) Valdez oil spill and that we thought it was an opportunistic
 (3) pathogen that is indigenous in herring populations not only in
 (4) Prince William Sound but elsewhere because it has been
 (5) isolated elsewhere in herring and that we felt that it
 (6) occasionally may cause lesions in herring and possibly some
 (7) mortality in herring when those fish are stressed and there
 (8) are various things out there that may stress those fish and I
 (9) went into some of the detail on that
 (10) Q Now what I'd like to do if I could here - give me just a
 (11) second to pull them together - is show you a couple of the
 (12) excerpts of Dr. Kocan's testimony the stuff that you reviewed
 (13) in the transcript, and then ask you some questions on it
 (14) If we could have the Elmo here please
 (15) Dr. Kocan was asked Are you aware that Dr. Meyers of
 (16) ADF&G is of the opinion that if the 1989 year class had a
 (17) compromised immune system for three to four years as you
 (18) suggest, he believes that those herring would have died well
 (19) before 1993
 (20) Dr. Kocan's answer was No he didn't indicate that to me
 (21) three days ago he indicated that my concept was perfectly
 (22) justified
 (23) Now did you have an opportunity to review this portion of
 (24) Dr. Kocan's transcript?
 (25) A Yes I did

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- (1) Q Do you recall if in fact, you discussed this issue with
 (2) Dr. Kocan during the course of your telephone call with him
 (3) three days before his testimony?
 (4) A We discussed this issue He had mentioned that he had this
 (5) theory of the immunosuppression He did not give me any
 (6) details but -
 (7) Q Did you tell - I'm sorry
 (8) A He did not give me any details of what that theory was but
 (9) I told him that indeed if these fish were immunosuppressed
 (10) that they could not have survived three to four years They
 (11) would fall prey to any other disease agents out there not just
 (12) VHS virus
 (13) Q Did you tell him that you thought his theory was perfectly
 (14) justified?
 (15) A I did not say that.
 (16) Q I'd like to show you some later portions of his testimony
 (17) Later on Dr. Kocan was asked Now is it fair to say that your
 (18) theory of how the collapse occurred in 1993 rests on the
 (19) accuracy of this immunosuppression theory
 (20) And he responded To a large degree yes
 (21) In your call with Dr. Kocan did you discuss the
 (22) immunosuppression theory with him?
 (23) A Not in detail He merely suggested that these fish may be
 (24) immunosuppressed and asked my opinion on it
 (25) Q And what opinion did you give him?

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- (1) A My opinion was that on the surface that may be a plausible
 (2) explanation but when you look at the circumstantial evidence
 (3) that we have that that theory does not hold water
 (4) Q Looking a little bit farther down he was asked And your
 (5) theory also rests on the proposition that their immune systems
 (6) were compromised for three or four years at least up to 1993?
 (7) And he responded To one degree or another yes
 (8) And then was asked And if that is incorrect, your theory
 (9) would fail?
 (10) And Dr. Kocan said Yes
 (11) Did you discuss this point with Dr. Kocan during the
 (12) telephone call?
 (13) A That was one of the major points that I tried to make to
 (14) him on the telephone conversation was that if these fish were
 (15) immunosuppressed they would not survive for three to four
 (16) years Any animal that is immunosuppressed falls prey to very
 (17) common disease agents that are not necessarily diseases in a
 (18) normal circumstance
 (19) Q And this is one of the main reasons why in your words you
 (20) said his theory just didn't hold water?
 (21) A That's correct
 (22) Q Just one more portion of it here So just a few moments
 (23) later Dr. Kocan was asked So at least three years after the
 (24) spill your theory rests on the theory that they were in
 (25) isolation during that period of time?

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- (1) And he said Up to the third year yes
 (2) Did you agree with that portion of Dr. Kocan's theory?
 (3) A I do not disagree with that simply because of the term
 (4) isolation Those fish in Prince William Sound are not
 (5) isolated in a physical sense They are in a body of medium
 (6) cold water and when virus or any other disease agent is shed
 (7) in the water there is no way to isolate one group of animals
 (8) from another and those fish basically swim where they may
 (9) Any fish that are shedding let's say virus particles into the
 (10) water any fish below them or downstream or down current or
 (11) whatever would be exposed to that virus So no they were not
 (12) isolated
 (13) Q And this is another reason why you disagree with
 (14) Dr. Kocan's immunosuppression theory isn't that correct?
 (15) A That's correct
 (16) Q Now I'd like to show you Dr. Meyers what was during
 (17) Dr. Kocan's testimony marked Defendants Exhibit 2019 Have
 (18) to widen the zoom here a little bit and I'm going to tighten
 (19) it once we've shown generally what it is
 (20) Rather than me describe it why don't you tell the jury
 (21) generally what this document is If you would sir
 (22) A This is a short article that I submitted to the Fish Health
 (23) Section Newsletter about VHS virus in herring
 (24) Q What is the Fish Health Section Newsletter?
 (25) A The newsletter is a nonpeer reviewed noncopyrighted

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- (1) vehicle for quick dissemination of information to fish
 (2) pathologists So consequently many of the things that are
 (3) published in here may end up later as full papers in peer
 (4) reviewed journals in which case this article also ended up in
 (5) a peer review journal with supporting data
 (6) Q Now I notice the title Isolation of North American Viral
 (7) Hemorrhagic Septicemia Virus et cetera et cetera Can you
 (8) summarize in ordinary English for me essentially what this
 (9) article says?
 (10) A Basically what we're describing here is the isolation of
 (11) VHS virus from herring in association with skin lesions that we
 (12) think are caused by the virus We think again that this is
 (13) an opportunistic pathogen that, when the fish are stressed for
 (14) various reasons - and we give some of the reasons here in this
 (15) article Some of those reasons are density dependent factors
 (16) fishing pressure In some cases we have seen VEN virus which
 (17) is another virus infection of herring that will stress these
 (18) fish further We don't see that in Prince William Sound but
 (19) we see it in other herring where we find VHS
 (20) And nutritional deficiency is another possibility that we
 (21) suggested as a stressor because these fish had lost weight over
 (22) the winter At any rate we think it's an opportunistic
 (23) pathogen and it's capable of killing a few fish occasionally
 (24) when there is stress in the population We go on to describe
 (25) some of the lesions in more technical detail that we think are

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- (1) Q These conclusions?
 (2) A Yes I did see that.
 (3) Q In fact, is there any data or backup work supporting the
 (4) conclusions set forth in this newsletter?
 (5) A There is data to support this It has been published in a
 (6) journal article and Diseases of Aquatic Organisms that just
 (7) came out about a month ago
 (8) MR CLOUGH I'd like to publish to the jury Your
 (9) Honor Defendants Exhibit 14035 the cover page I'm going to
 (10) have to widen again
 (11) BY MR CLOUGH
 (12) Q Could you tell the jury what this is please?
 (13) A This is basically the cover page of the journal article
 (14) that was published that has all the information and more By
 (15) more I mean supporting data that will substantiate the fish
 (16) health newsletter article
 (17) Q And I notice you have a number of - and this is a peer
 (18) reviewed publication?
 (19) A That's correct.
 (20) Q What's the publication sir?
 (21) A Diseases of Aquatic Organisms
 (22) Q I notice you have a number of coauthors here who worked on
 (23) this project with you Can you tell the jury who they were and
 (24) who they were associated with?
 (25) A Yes Sally Short is my microbiologist, one of my

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- (1) caused by the virus and then we go into a discussion of how we
 (2) think this isolation from herring relates to previous
 (3) isolations of the same virus in Pacific cod and in coho and
 (4) chinook salmon in Washington State back in 1988 1989
 (5) Q Now I have obviously highlighted a portion of this here
 (6) see how it blows up on the machine here I'd like to direct
 (7) your attention to the first sentence of the highlighted
 (8) section where you put in there there appears to be no
 (9) relationship of VHSV isolation with the Exxon Valdez oil spill
 (10) of 1989 since the virus has been isolated from areas other
 (11) than PWS Now is that your opinion sir?
 (12) A That is correct
 (13) Q And did you tell that to Dr Kocan in the course of your
 (14) telephone conversation?
 (15) A That is correct Since this article was published or when
 (16) this article was published there have been other isolations of
 (17) VHS virus in British Columbia and Puget Sound and we've
 (18) isolated it in several other places in Alaska as well
 (19) Q In the remainder of Dr Kocan's transcript that you
 (20) reviewed did you read the portion where he essentially
 (21) criticized this article?
 (22) A Yes I did
 (23) Q And do you recall the portion where he said he had seen no
 (24) data or supporting backup work on this for this conclusion?
 (25) A Yes

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- (1) microbiologists in Juneau Karen Lipson is one of my
 (2) microbiologists in Juneau William Batts is a technician in
 (3) the Seattle Fish and Wildlife Service lab Dr Winton is a
 (4) principal scientist in the same laboratory in Seattle And
 (5) John Willcock and Evelyn Brown are herring biologists in
 (6) Cordova
 (7) with the ADF&G
 (8) Q Now I want to clarify one thing here in both your
 (9) newsletter and your testimony You've made it clear have you
 (10) not that you believe - you do not believe that the Exxon
 (11) Valdez oil spill caused immunosuppression in Prince William
 (12) Sound herring? That's what you do as a fish pathologist you
 (13) determine diseases and their cause and effects is that
 (14) correct?
 (15) A That is correct.
 (16) Q And again you told this to Dr Kocan before he testified
 (17) before this jury?
 (18) A That is correct.
 (19) Q One more question about Dr Kocan's testimony
 (20) And it's on page 1975 of the transcript, counsel
 (21) Did you read the portion - oops that's the wrong
 (22) portion Page 1974
 (23) Do you recall in your review of Dr Kocan's testimony where
 (24) he indicated after looking at your article that Dr Meyers
 (25) he's a very good fish pathologist but he also worked for a
 state agency and he has to be conservative in his statements

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- (1) Did you read that in Dr. Kocan's transcript?
 (2) A Yes I did
 (3) Q My question for you is I'd like you to tell this jury
 (4) whether your role as chief fish pathologist for the Alaska
 (5) Department of Fish and Game has caused you to alter any of
 (6) the
 (7) opinions and testimony you have given them here in this
 (8) courtroom?
 (9) A No it has not. I basically run a laboratory where we are
 (10) public servants. Any information coming out of that laboratory
 (11) is public information. When opinions are asked of me I give
 (12) honest opinions based on the data at hand
 (13) Q Why are you testifying here today sir?
 (14) A The reason I'm here today is basically on a personal
 (15) nature. I felt it necessary to correct the record in terms of
 (16) what my opinion really is on VHS in herring in Prince William
 (17) Sound
 (18) MR CLOUGH Thank you sir. No further questions
 (19) CROSS-EXAMINATION OF THEODORE C. MEYERS
 (20) BY MR. PETUMENOS
 (21) Q Good morning Dr. Meyers. My name is Tim Petumenos. I'm
 (22) from Birch Horton Bittner and I represent some of the
 (23) Plaintiffs here. Are you mad at Dr. Kocan?
 (24) A Not really
 (25) Q No? And is basically what happened here you and he got
 (26) on
 (27) the telephone and all of the sudden your phone started ringing

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- (1) off the hook with experts from Exxon lawyers calling you up
 (2) who said what, things like that right?
 (3) A I wouldn't say ringing off the hook
 (4) Q Well you got about three phone calls from Exxon?
 (5) A Let's see I had three phone calls from Exxon correct and
 (6) one from Dr. Kocan
 (7) Q And you had one from us?
 (8) A And one from you that's correct
 (9) Q So maybe not ringing off the hook but things got active?
 (10) A It's been busier
 (11) Q All right. And being conservative about one's views you
 (12) don't regard that as a criticism as a scientist do you?
 (13) A Not particularly. I - I basically tell the truth
 (14) Q And Dr. Kocan said that you were a very good fish
 (15) pathologist and he thought that you took a conservative
 (16) approach. You don't regard that as criticism do you?
 (17) A It depends how you define conservative. It's the
 (18) implication in the testimony
 (19) Q Conservative in the sense you want to be very sure before
 (20) you make a statement about something a conclusion?
 (21) A We definitely are sure about our data before we make a
 (22) statement based on that data that's correct
 (23) Q Now I thought I'd go back and see if there are potentially
 (24) some areas of agreement between you and Dr. Kocan. I
 (25) understand counsel has covered some of the differences
 (26) between

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- (1) you. I notice you mentioned that sometimes the immune
 (2) system
 (3) can be affected by density?
 (4) A Um-hum
 (5) Q In other words can the transmission of disease organisms
 (6) organisms and things like that be more rapid when you've got a
 (7) large population of fish out there?
 (8) A Yes it can
 (9) Q And that's something that you read him talking about in the
 (10) transcript, as well?
 (11) A Yes I did
 (12) Q Okay. And the other thing that I read in your article
 (13) here - well and in the transcript that the virus that we're
 (14) talking about was known in salmonids or salmon species in
 (15) Atlantic waters from Europe from some time ago for some time?
 (16) A That's - that's not quite correct
 (17) Q Tell me
 (18) A VHS virus in Europe is a completely different
 (19) Q Strain?
 (20) A Strain genetically than VHS virus in North America
 (21) Q Yes. And - but that strain that was in Europe I
 (22) understand it's a little different was known some time ago?
 (23) A Yes since 1938
 (24) Q Okay. And a strain of VHS virus in the Pacific context was
 (25) only recently known or discovered not to say it didn't exist
 (26) but it has only recently come up?

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- (1) A The North American strain was first discovered in 1988
 (2) Q 1988. That's just a year before the oil spill?
 (3) A Correct
 (4) Q All right. And the other sort of general proposition that
 (5) I saw in here that I'm curious as to whether you had any
 (6) quarterly WSA statement that in general terms the way the
 (7) immune system - by the way are you an immunotoxicologist
 (8) yourself?
 (9) A No I'm not an immunotoxicologist
 (10) Q Have you studied the immune system?
 (11) A I have studied the immune system. It's one of the
 (12) disciplines that we do look at in fish
 (13) Q And one of the things that he said in here is that, in
 (14) general terms the way the immune system works in animals
 (15) and
 (16) so forth it - the immune system basically works the same way
 (17) in animals with obviously some differences but you heard him
 (18) describe how it works and that's true among different species
 (19) right?
 (20) A That's basically correct. Fish are a little more primitive
 (21) than higher animals but they do have an immune system
 (22) Q Now in the course of his testimony Dr. Kocan talked about
 (23) the HIV virus as an analogy do you remember that?
 (24) A Vaguely yes
 (25) Q Yes. And what we know about the HIV virus is that for
 (26) example the Center for Disease Control in studying humans in

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- (1) the virus went crazy for a number of years trying to figure out
 (2) how it worked?
 (3) MR CLOUGH Objection Your Honor I don't believe
 (4) that was within Dr Kocan's testimony Beyond the scope
 (5) also
 (6) BY MR PETUMENOS
 (7) Q Let me just ask the question directly Isn't that so?
 (8) MR CLOUGH Objection foundation
 (9) THE COURT I'm going to allow him to answer it Go
 (10) ahead
 (11) A Would you rephrase the question please?
 (12) MR PETUMENOS Sure
 (13) BY MR PETUMENOS
 (14) Q The Center for Disease Control went through a lot of work
 (15) and difficulty when the HIV virus first came on the scene
 (16) trying to figure out what it was and how it worked?
 (17) A There's no analogy between HIV and VHS whatsoever
 (18) Q They're both viruses?
 (19) A They're both viruses
 (20) Q The HIV virus we know can exist in human beings for years
 (21) before any symptom or overt illness comes to the fore am I
 (22) right?
 (23) A That's correct
 (24) Q Now you say the HIV virus has no relationship whatsoever
 (25) to this virus but in point of fact this virus this strain of

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- (1) disease from this virus ever shown up in any other fishery
 (2) other than Prince William Sound in Alaska?
 (3) A No we first isolated the virus in herring in 1993 We
 (4) feel though - let me qualify that - that that virus has been
 (5) indigenous to herring populations from Puget Sound all the way
 (6) up to Kodiak Island for millennia
 (7) Q Right but what I'm talking about -
 (8) MR CLOUGH Excuse me I don't believe the witness
 (9) was finished answering
 (10) MR PETUMENOS I'm sorry were you done?
 (11) THE COURT You were done weren't you?
 (12) A Well I was going to add also that the occurrence in cod
 (13) can be probably explained by the fact that cod are predators on
 (14) herring obviously and we found the virus in skin lesions of
 (15) cod Cod tend to hang around large herring schools herring
 (16) shed virus into the water the virus infects the cod lesions
 (17) and therefore we found - first found the virus in cod
 (18) lesions In fact, it's a rare event in cod we only found it
 (19) in three cod total We've looked at several cod from Prince
 (20) William Sound including other places So what you're
 (21) describing is the epizootology of that virus
 (22) BY MR PETUMENOS
 (23) Q I was going to get to that. You indicate that you in your
 (24) article Defendants 2019 - I was reading it, it says the
 (25) virus may be an opportunistic pathogen causing periodic

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- (1) the virus has only become known in the Atlantic version since
 (2) 1988?
 (3) A I fail to see the analogy
 (4) Q Well let me ask you this Do you think that this subject
 (5) of how this virus works in herring - by the way the
 (6) particular mortality of herring in the Prince William Sound
 (7) area was not just a small fish kill it was a huge one right?
 (8) A I would wish to qualify that There were no dead fish ever
 (9) found in Prince William Sound
 (10) Q 100 000 tons didn't show up?
 (11) A No dead fish found So it's anybody's guess as to what
 (12) happened to those fish The mortality requires dead bodies
 (13) Q All right, but it's a - an important issue to the people
 (14) who live there?
 (15) A That's correct
 (16) Q And it was a huge failure of a return I mean a big one?
 (17) A Is that the question?
 (18) Q Yes
 (19) A Yes it was
 (20) Q And the first sign of this virus turning up in fish in
 (21) Alaska was in 1989 in cod in Prince William Sound?
 (22) A 1990
 (23) Q 1990 thank you In cod in Prince William Sound?
 (24) A That's correct
 (25) Q As of that point in time 1990 a year after the spill had

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- (1) occurrence of external and internal lesions in herring
 (2) following stress from various factors including VEN infection
 (3) spawning commercial fishing or nutritional deficiency through
 (4) lack of forage
 (5) Are you aware of any studies that suggest that pollution or
 (6) hydrocarbons can stress a fish and make - and hurt its immune
 (7) system?
 (8) A There are studies out there including those that have been
 (9) published by both sides investigating the Exxon oil spill that
 (10) certainly pollution - not just oil but other things can
 (11) effect or stress fish However I wish to point out that we're
 (12) talking about fish in 1993 not fish in 1989
 (13) Q I understand Now this is a matter that was the issue of
 (14) whether or not the oil spill affected the herring in that these
 (15) lesions were connected to the herring was the subject of a
 (16) great deal of public concern would you agree?
 (17) A Yes I would agree to that.
 (18) Q Showing you 8148 -
 (19) MR CLOUGH Do you have a copy for me?
 (20) MR PETUMENOS Actually I don't. It was served on
 (21) you I believe
 (22) MR CLOUGH Is there -
 (23) MR PETUMENOS There is and I wanted to show him the
 (24) article in general
 (25) MR CLOUGH I'd like to see it too

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- (1) MR PETUMENOS Judge I'd like to get the article
 (2) identified first and then discuss what portions of it
 (3) MR CLOUGH This is the first I've seen it.
 (4) THE COURT Let him take a look first, counsel
 (5) MR PETUMENOS I think I served him the entire
 (6) exhibit.
 (7) THE COURT I heard you So did the jury
 (8) MR PETUMENOS Did you serve it?
 (9) BY MR PETUMENOS
 (10) Q In the We Alaskans' portion of the Anchorage Daily News on
 (11) May 1 1994 there's a big picture of a whole bunch of herring
 (12) and a big headline that says What Killed the Herring? And
 (13) the subject of this article Dr Kocan was the controversy
 (14) surrounding what we're talking about here
 (15) MR STOLL He's Dr Meyers
 (16) MR PETUMENOS Dr Meyers excuse me
 (17) MR CLOUGH It seems to be just a statement by
 (18) counsel describing the article There's no pending question
 (19) THE COURT Put a question mark at the end of the
 (20) sentence counsel
 (21) MR PETUMENOS Is that right?
 (22) A I'm sorry would you repeat that?
 (23) MR PETUMENOS Sure
 (24) BY MR PETUMENOS
 (25) Q The subject of this article - I assume you've read it.

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- (1) you're quoted in it
 (2) A Let me clarify something first of all I gave a lot of
 (3) telephone interviews during that period of time and some of
 (4) the articles that are written from those interviews did justice
 (5) to what I said and some did not.
 (6) Q That happens
 (7) A They quoted me out of context so I have not seen this
 (8) article
 (9) Q You've never seen it before?
 (10) A I have not seen it.
 (11) Q Okay why don't you take a look and tell me whether or not
 (12) this article discusses this is in the Sunday section of the
 (13) paper this whole controversy and concern surrounding
 (14) whether
 (15) this oil spill might have had some connection with this virus?
 (16) A Is this the specific question counsel?
 (17) Q Yes that's the question
 (18) A Would you repeat it please?
 (19) THE COURT Just -
 (20) A I'm sorry but I don't understand the question
 (21) THE COURT Tell me whether or not this article
 (22) discusses this whole controversy and concern concerning
 (23) whether this oil spill might have had something to do with this
 (24) virus
 (25) A Okay I have not read this article I could not answer to
 (26) that

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- (1) THE COURT You're being asked to review the article
 (2) sir Review the article and then you can answer the question
 (3) MR CLOUGH And my objection is this is asking for a
 (4) hearsay statement, because they're asking basically this
 (5) witness to repeat a hearsay statement from the article
 (6) THE COURT The objection is overruled because it is
 (7) not hearsay counsel It does not ask for a hearsay statement
 (8) because it's not asserted to prove any matter -
 (9) A Is there a particular area in here? This whole thing seems
 (10) to deal with herring
 (11) MR PETUMENOS I'll represent to you rather to save
 (12) time that you were interviewed in the article the whole issue
 (13) is the concern controversy even fear over what caused the
 (14) loss of herring and whether it had anything to do with the oil
 (15) spill
 (16) MR CLOUGH Objection Your Honor
 (17) THE COURT Yes what's the objection?
 (18) MR CLOUGH There's no question He's just making a
 (19) representation he's making a statement
 (20) THE COURT That's exactly what he's doing
 (21) MR PETUMENOS Preliminary
 (22) THE COURT Counsel do you want me to recess while he
 (23) reviews the article?
 (24) MR PETUMENOS I don't think it's necessary Judge
 (25) MR CLOUGH I'd say yes Your Honor It's a very

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- (1) lengthy article He hasn't had a chance -
 (2) MR PETUMENOS I'll move on I'll bypass the second
 (3) question
 (4) THE COURT You'll bypass the article?
 (5) MR PETUMENOS I'll bypass the article
 (6) THE COURT All right good
 (7) BY MR PETUMENOS
 (8) Q Do you know whether or not or do you think it is important
 (9) to the people of Alaska and the people of Prince William Sound
 (10) that this matter be studied further and we get some more
 (11) definitive data on what's going on out there?
 (12) A Absolutely I agree
 (13) Q Okay and do you know whether or not the Trustees in fact
 (14) are considering doing that right now with respect to future
 (15) studies with respect to the herring?
 (16) A Yes they are
 (17) Q So you and Dr Kocan have a good faith scientific
 (18) disagreement over this topic but it is your view also that
 (19) there is enough uncertainty about the topic that we ought to
 (20) study it some more?
 (21) A Absolutely
 (22) MR PETUMENOS I have no further questions
 (23) REDIRECT EXAMINATION OF THEODORE C MEYERS
 (24) BY MR CLOUGH
 (25) Q There's some - may be some confusion as to just what the

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- (1) topics so I want to narrow the one point, critical point.
 (2) Why exactly do you as you're sitting here today do you
 (3) believe that the Exxon Valdez oil spill did not cause the - an
 (4) outbreak of VHS in Prince William Sound area?
 (5) A Basically because we're finding the virus in other places
 (6) in Alaska in British Columbia and Puget Sound and we have
 (7) other cases in Alaska where we have found VHS in herring
 (8) which
 (9) are dying and they're not necessarily spawning fish they are
 (10) young of the year two-year-old herring and in those cases we
 (11) think it's a density dependent kind of a situation where the
 (12) fish are stressed and they die from the disease but it's not a
 (13) major mortality and it subsides and it's self-limiting
 (14) Q And this is what you told Dr. Kocan before he came in here
 (15) in court and testified?
 (16) A I have told Dr. Kocan basically that, and there are other
 (17) things. We also looked at Prince William Sound herring in
 (18) October in 1993 and found no lesions and no virus from the
 (19) same fish in the same areas. So we think it's probably a
 (20) seasonal event or it could be related as I said before to
 (21) stress under certain circumstances.
 (22) MR CLOUGH Thank you nothing else Your Honor
 (23) MR PETUMENOS Dr. Meyers thank you for your
 (24) testimony
 (25) A Thank you
 (26) MR DIAMOND Take a break Your Honor?

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- (1) THE COURT Sure
 (2) THE CLERK Please rise This court stands in
 (3) recess
 (4) (Jury out at 12 10 p m)
 (5) (Recess from 12 10 p m to 12 25 p m)
 (6) (Jury in at 12 25 p m)
 (7) THE CLERK This court now resumes its session
 (8) Please be seated
 (9) MR OPPENHEIMER Your Honor I'm back with my
 (10) notebook to call to the stand Exxon's next witness in order by
 (11) deposition Donald Emmal. He looks remarkably like a prior
 (12) witness we had this morning.
 (13) THE COURT Counsel is that what we've got for the
 (14) rest of the day is depositions?
 (15) MR OPPENHEIMER No I don't believe that -
 (16) MR DIAMOND Your Honor in an attempt to be humane
 (17) about this we're sort of spreading the depositions around. We
 (18) have four short depositions right now and we hope to conclude
 (19) the day with a live and lively witness.
 (20) THE COURT Okay the deposition readers that have
 (21) previously been sworn they don't have to be sworn again.
 (22) MR OPPENHEIMER Thank you Your Honor
 (23) The following are excerpts from the sworn deposition
 (24) testimony of Donald Emmal who was deposed in November
 (25) and
 (26) December 1992 and November 1993. Mr. Emmal is president of

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- (1) English Bay Corporation and was designated by the
 (2) corporation
 (3) as the person most knowledgeable on the corporation's use
 (4) and
 (5) management of its lands and cultural sites
 (6) I was warned by my colleagues not to eat peanuts at the
 (7) break.
 (8) DIRECT EXAMINATION OF DONALD EMMAL (Read)
 (9) BY MR. OPPENHEIMER
 (10) Q What use is the corporation currently making of the lands
 (11) it has selected in the Kenai Fjord area?
 (12) A The use of the lands of course has to do with the
 (13) identification of the archaeological and historical sites and
 (14) as far as being on land of course we don't have ownership
 (15) direct ownership but we with respect to those kinds of sites
 (16) have asserted tentative ownership to the Park Service and
 (17) others who are interested. There are no other uses of lands
 (18) other than looking at them and trying to figure out their
 (19) potential use for our use or reconveyance to the government.
 (20) Q There haven't been any buildings placed on there or any
 (21) developments at all by English Bay Corporation?
 (22) A No there have not been by us. The Park Service has
 (23) indicated that it wants to put a series of cabins throughout
 (24) the park for tourists people who - and also for people who
 (25) backpack and do that kind of thing and hunt.
 (26) They're also talking about enlarging the visitor center to
 (27) see some of the glaciers up near the Seward end. So they have

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- (1) ongoing plans for tourists park use or these kinds of things
 (2) but as far as the corporation we haven't.
 (3) Q And that includes on the lands that English Bay has
 (4) selected?
 (5) A I believe that that's true that some of the lands that
 (6) we've selected that they would be used for this purpose by the
 (7) park. As far as our own people using the park at the present
 (8) time they're restricted from using it for hunting fishing
 (9) subsistence purposes because it's in the park and not owned
 (10) by
 (11) us.
 (12) Q They're restricted from using it?
 (13) A Yes They cannot use - they can't subsistence use or hunt
 (14) or fish except for recreation type fishing like anybody else
 (15) can do in the park.
 (16) Q All right. You mentioned that English Bay Corporation has
 (17) played an active role in trying to identify archaeological
 (18) sites in the Kenai Fjords selected lands is that correct?
 (19) A Well not active in the sense that we go out looking for
 (20) them active in the sense that the regional corporation knows
 (21) about them. And in the case of the ones that we talked about
 (22) earlier that I communicated with the Park Service about as I
 (23) said here's one that's been located and found and it's on
 (24) our - your land so go ahead and notify the park and the
 (25) government that you don't want them on it, and that's what
 (26) we've done. But as far as us identifying any closer than what

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- (1) we described earlier is thinking that all of the shoreline
 (2) areas are - either are or potentially are sites of previous
 (3) habitation we haven't done any exploration
 (4) Q Can you tell me has the Exxon Valdez oil spill at all
 (5) impacted your negotiations with the National Park Service
 (6) A You've got more You've got another line
 (7) MR OPPENHEIMER I'm going to check and make sure
 (8) we're not crossing - it's deleted on mine Is it acceptable
 (9) if we read this question?
 (10) I'm sorry I'm sorry pardon me Let me back up and start
 (11) the question over
 (12) BY MR OPPENHEIMER
 (13) Q Can you tell me has the Exxon Valdez oil spill at all
 (14) impacted your negotiations with the National Park Service
 (15) concerning possible conveyance of the properties?
 (16) A I think negotiations may be a - too strong of a term
 (17) general discussions about the possibilities I'm not directly
 (18) negotiating with the Park Service or anybody else for the sale
 (19) of lands and although we've discussed it with both the
 (20) shareholders and the Board I don't have the authority Today
 (21) I couldn't sell - just sell the lands
 (22) Q All right So you're in a stage of preliminary
 (23) discussions?
 (24) A I think the evaluations of really what to do with the lands
 (25) and since the Park Service has expressed some interest
 looking

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- (1) into the possibility of reacquisition by the government
 (2) Q Has that process been delayed at all by the Exxon Valdez
 (3) oil spill?
 (4) A The preliminary discussion process has not been delayed by
 (5) the -
 (6) Q Has the government expressed any concern about the
 impact
 (7) of the oil spill with regard to a possible transaction on the
 (8) fjord lands?
 (9) A The government's never discussed that in any way with me
 (10) Q All right While you've been president do you recall any
 (11) proposals coming to English Bay Corporation to develop or
 build
 (12) on any of its lands other than the logging operation?
 (13) A No serious proposals And by that I mean there have been
 (14) a number of people who've contacted the board and said we'd
 (15) like to come in and build something you know a lodge or
 (16) explore the possibilities of doing some kind of building In
 (17) each case I've told the Board to have those people write to me
 (18) and include a description of what they want to do along with
 (19) their financial statements I've never gotten a letter from
 (20) anybody that included those things or made further inquiry
 (21) So usually those people are - that want to go on and do
 (22) something and usually they want - my impression is that they
 (23) would want the corporation to finance them them doing
 (24) something
 (25) MR OPPENHEIMER Thank you Mr Taft

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- (1) Your Honor our next witness in order by deposition is
 (2) Mr Robert Kvasnikoff
 (3) The following are excerpts from the sworn testimony of
 (4) Robert Kvasnikoff who was deposed on September 18 1992
 (5) Mr Kvasnikoff served as a member and chairman of the English
 (6) Bay Corporation Board of Directors from 1977 to 1992 He also
 (7) served as president for approximately five years prior to
 (8) 1984
 (9) DIRECT EXAMINATION OF ROBERT KVASNIKOFF (Read)
 (10) BY MR OPPENHEIMER
 (11) Q In your capacity as the Chairman of the Board for some
 (12) time are you familiar with the general business activities of
 (13) the corporation?
 (14) A When I was in yes
 (15) Q Could you tell me what businesses the corporation has
 (16) engaged in in the last ten years?
 (17) A We were set up under the Alaska Claims Settlement Act to be
 (18) a profit-making corporation and that's what we have pursued
 (19) Every avenue that we have tried to pursue has been profit
 (20) making
 (21) Q And could you tell me what different avenues the
 (22) corporation has pursued in terms of generating profits?
 (23) A Mainly the timber sale
 (24) Q Was there just one timber sale?
 (25) A Yes

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- (1) Q Any other types of businesses within the past ten years?
 (2) A I do not remember
 (3) Q Mariculture?
 (4) A No
 (5) Q Land leases?
 (6) A No
 (7) Q Land sales?
 (8) A No
 (9) Q Did the corporation issue permits for hunting or fishing on
 (10) its lands?
 (11) A Not that I know of
 (12) Q Has the corporation ever in the last ten years been
 (13) involved in any sort of tourism related activities?
 (14) A No
 (15) MR OPPENHEIMER Thank you
 (16) (Witness excused)
 (17) MR OPPENHEIMER Your Honor Exxon calls next by
 (18) deposition Collin Middleton
 (19) The following are excerpts from the sworn testimony of
 (20) Richard Collin Middleton who was deposed in November 1992
 and
 (21) November 1993 Mr Middleton is corporate counsel and
 (22) assistant secretary for English Bay Corporation since 1984 He
 (23) has represented them as litigation counsel prior to that time
 (24) starting in 1978 Mr Middleton was designated by the
 (25) corporation as one of the persons most knowledgeable about the

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- (1) organizational structure of the corporation the business
 (2) activities and financial affairs of the corporation and the
 (3) evaluation and appraisal of English Bay Corporation's real
 (4) property allegedly damaged by the oil spill
 (5) DIRECT EXAMINATION OF COLLIN MIDDLETON (Read)
 (6) BY MR. OPPENHEIMER
 (7) Q Is it correct to your knowledge there have been no
 (8) interim conveyances to English Bay Corporation of the Kenai
 (9) Fjords lands at this stage?
 (10) A That's right.
 (11) Q Are you aware of any planned use of the Kenai Fjords that
 (12) has been delayed or disrupted by the oil spill?
 (13) A The planned use of the Kenai Fjords that has been sort of
 (14) ongoing was to trade them off. We've seen you know
 (15) indications of that, I think in 1987-1988. Those were prior
 (16) to the oil spill. The trade for the Kenai Fjords has taken
 (17) somewhat longer perhaps than we assumed it was - or would
 (18) it be conceivable that part of the delay was because everybody's
 (19) attention including that of the Park Service and so forth
 (20) was diverted to the oil spill from doing this
 (21) I don't understand that I can't tell you I can't
 (22) quantify it and I don't know if that's true but that's a
 (23) conceivable - that's a conceivable thing. Other than that,
 (24) other than trading I can't think of - of nothing else. I
 (25) don't think anybody from English Bay you know I guess I

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- (1) can't - again I can't recall any plans nor do I think there
 (2) were any - there were anywhere people from English Bay were
 (3) intending to go down to the Kenai Fjords and set up shops or
 (4) houses or something like that I haven't heard that
 (5) Q You don't have any information on that?
 (6) A That's right
 (7) Q Now with regard to the other English Bay Corporation lands
 (8) on the peninsula are you aware of any developments or any
 (9) plans of English Bay Corporation for use of the lands that have
 (10) been disrupted or delayed?
 (11) A No
 (12) Q Did English Bay Corporation suffer any loss or harm to its
 (13) timber operations as a result of the Exxon Valdez oil spill?
 (14) A Not that I know of
 (15) Q Has the corporation had any economic activities in that
 (16) sense of the word in which it suffered a loss or harm as a
 (17) result of the oil spill?
 (18) A Not that I know of
 (19) Q Has English Bay Corporation suffered any lost
 (20) opportunities again in the sense of economic business
 (21) activities as a result of the Exxon Valdez oil spill?
 (22) A None that I can think of
 (23) MR. OPPENHEIMER Thank you
 (24) (Witness excused)
 (25) MR. OPPENHEIMER Your Honor our last deposition

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- (1) witness Emily Swenning
 (2) THE CLERK Would you raise your right hand please
 (3) (The Witness is Sworn)
 (4) THE CLERK Please be seated and attach the
 (5) microphone
 (6) Ma'am for the record could you please state your full
 (7) name spelling your last name?
 (8) A Leslie Ann Exley E x-l-e-y
 (9) THE CLERK Thank you
 (10) MR. OPPENHEIMER The following are excerpts from the
 (11) sworn testimony of Emily Jane Swenning who was deposed on
 (12) September 29, 1992. Ms. Swenning has been a member of the
 (13) Board of Directors for the English Bay Corporation and
 (14) corporate secretary since 1987
 (15) DIRECT EXAMINATION OF EMILY J. SWENNING (Read)
 (16) BY MR. OPPENHEIMER
 (17) Q While you've been on the Board has the Board been
 (18) involved
 (19) in considering any development on English Bay Corporation
 (20) lands?
 (21) A No What do you mean by development?
 (22) Q Any developments any projects of any nature?
 (23) A No
 (24) Q Do you know if English Bay currently has any plans to
 (25) develop any of its lands?
 (26) A No

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- (1) Q Do you know whether English Bay Corporation currently has
 (2) any plans to sell any of its lands?
 (3) A No
 (4) Q No you're not aware of any?
 (5) A No I'm aware that we - I mean we're not
 (6) Q Part of the problem is mine I didn't phrase the question
 (7) well enough Is English Bay Corporation currently leasing any
 (8) of its lands to your knowledge?
 (9) A We are
 (10) Q To whom?
 (11) A Collin
 (12) Q During what period of time was that?
 (13) A The logging season
 (14) Q Other than that, are you aware of any lands that are being
 (15) leased by English Bay Corporation?
 (16) A No
 (17) Q Are you aware of any lands that have been leased at any
 (18) time at all while you've been on the Board?
 (19) A No
 (20) Q To your knowledge does English Bay Corporation have any
 (21) current plans to develop any recreational facilities on any of
 (22) its lands?
 (23) A No
 (24) Q Has that subject ever been discussed while you've been on
 (25) the Board to your recollection?

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- (1) A No I don't remember
- (2) Q Other than in the village itself are you aware of any
- (3) current plans English Bay has for any residential developments
- (4) on its lands?
- (5) A No
- (6) Q And do you recall that subject ever having been discussed
- (7) while you've been on the Board?
- (8) A No
- (9) Q To your knowledge does English Bay currently have any
- (10) plans to develop tourism on any of its lands?
- (11) A No
- (12) Q Has that ever been discussed while you've been on the
- (13) Board?
- (14) A Yes
- (15) Q And generally what's been the nature of those discussions?
- (16) A Nothing I mean it just came up and we all said no
- (17) Q Is that something that the corporation is not interested in
- (18) promoting?
- (19) A Yes I think so
- (20) Q Why is that to the best of your knowledge?
- (21) A I mean because - I mean that's our lands We use it
- (22) Q Right. Is it your experience of serving on the Board that
- (23) the corporation is not interested in bringing tourists into the
- (24) area?
- (25) A Not that I know of no

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- (1) Q Have there been any discussions of adopting any land use
- (2) policies?
- (3) A Not that I know of no
- (4) Q Have there been any plans contemplated for developing
- (5) tourism or recreational activities?
- (6) A No
- (7) Q As to the Kenai Fjord property it's correct that there has
- (8) never been a commercial use of that property to your
- (9) knowledge?
- (10) A Right
- (11) Q And there's been no recreational or tourism use of that
- (12) property?
- (13) A I don't think so
- (14) Q Is there any ongoing use currently by the Village
- (15) Corporation of the Kenai Fjord property?
- (16) A I don't know no
- (17) Q Is there any planned use to your knowledge?
- (18) A Not to my knowledge no
- (19) Q Well let's talk about the Kenai Peninsula area Have
- (20) there been any planned developments commercial use
- (21) recreational use tourist use of the Kenai Peninsula that have
- (22) been impacted by the oil spill to your knowledge?
- (23) A No
- (24) Q To your knowledge is there any planned uses of that nature
- (25) now for that?

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- (1) A No
- (2) MR OPPENHEIMER Thank you
- (3) (Witness excused)
- (4) MR OPPENHEIMER That concludes these depositions
- (5) Your Honor
- (6) MR DIAMOND Your Honor we call as our next witness
- (7) Dr Robert Day I'll get him
- (8) MR CLOUGH Yes you take the stand up there
- (9) THE CLERK Sir can you remain standing and raise
- (10) your right hand?
- (11) (The Witness is Sworn)
- (12) THE CLERK Please be seated and attach the
- (13) microphone
- (14) Sir for the record can you state your full name?
- (15) A My name is Robert Hugh Day H u-g-h D-a-y my last name
- (16) THE CLERK And your occupation?
- (17) A I'm a senior scientist at Alaska Biological Research
- (18) THE CLERK Thank you
- (19) DIRECT EXAMINATION OF ROBERT H DAY
- (20) BY MR CLOUGH
- (21) Q Hi Mr Day Good afternoon sir
- (22) A Hello
- (23) Q You live up in Fairbanks?
- (24) A Yes I do
- (25) Q And how long have you lived in Alaska sir?

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- (1) A I've lived in Alaska just over 20 years
- (2) Q Give you the toughest question you're ever going to get
- (3) today Have you ever testified in court before?
- (4) A No
- (5) Q Little nervous?
- (6) A Yes
- (7) Q It's okay Why are you here today? What do you have to
- (8) show the jury?
- (9) A I am here to show the jury some photographs from a trip I
- (10) took out in Prince William Sound in July and some other
- (11) photographs that were taken sometime in the last few weeks out
- (12) in Prince William Sound also
- (13) Q Now you're going to have to speak up just a little bit at
- (14) the end there
- (15) A I'm sorry okay
- (16) Q When you say July that's July of this summer?
- (17) A July of this year just within the last four to six weeks
- (18) Q And how did you have occasion to go out to the Sound?
- (19) Why
- (20) did you go out to the Sound this summer?
- (21) A Exxon Company called called up our company - we do work
- (22) under contract for them - and they said would you - would it
- (23) be possible for you to go out into Prince William Sound for a
- (24) few days here in July and go take pictures of what - what
- (25) you see and perhaps come show them in the trial

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- (1) Fairbanks?
- (2) A Alaska Biological Research
- (3) Q What do you do for ABR?
- (4) A I am what's called a senior scientist. I help direct
- (5) research
- (6) Q And in the course of your work experience do you have
- (7) experience going out into the field and locating and
- (8) identifying wildlife?
- (9) A Yeah I've spent 20 years doing this in Alaska
- (10) Q And have you experienced photographing wildlife out in the
- (11) field?
- (12) A Twenty years up here in Alaska also yes
- (13) Q Now what exactly did Exxon ask you to do this summer?
- (14) A Well they -
- (15) Q Would it help if we had the chart up here for that? I've
- (16) got a big chart of Prince William Sound would that help at
- (17) all?
- (18) A What do I do with all this?
- (19) Q You just tote it along with you
- (20) A Okay
- (21) MR CLOUGH With the Court's permission I'm going to
- (22) set this up here -
- (23) THE COURT Sure
- (24) MR CLOUGH Is the glare messing that up too much?
- (25) You all can see that okay? High tech

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- (1) A Okay so what was the question again? I've lost track
- (2) BY MR CLOUGH
- (3) Q You went out - you said Exxon asked you to go out to
- (4) Prince William Sound Where did you go?
- (5) A Okay In a very quick sense we came out of Whittier on
- (6) across the northern part of the Sound into the Columbia Bay -
- (7) Columbia Bay area up here and this is a - as I understand it
- (8) a subsistence hunting area for Natives of Tatitlek Village and
- (9) on - spent the night up here in a place called Long Bay up
- (10) near the head of it Worked our way back down past what's
- (11) called Lone Island on down into a scary named place named
- (12) Dangerous Passage up into Icy Bay place called Nassau
- (13) Flord
- (14) Icy Bay itself on down this vicinity called Shelter Bay Iktua
- (15) Bay Iktua rocks out here in Prince of Wales Passage Over
- (16) here at the mouth of Sawmill Bay near Chenega Village and on
- (17) up here on the western side southwestern part of Knight
- (18) Island and I was on the boat for a total of five days
- (19) Q You say it was a boat you all traveled around on?
- (20) A It was - the five days and then a couple days later
- (21) after I had gone back come off the boat gone back into
- (22) Anchorage I came back and did a very quick aerial survey
- (23) flight for a few hours out here in the Sound and I wasn't
- (24) paying a lot of attention for the first part. The plane flew
- (25) roughly in this vicinity down around Knight Island and Green
- (26) Island and back up and I - I was interested in looking up

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- (1) here in a place called Unakwik Inlet, and over here in Columb
- (2) Bay again
- (3) Q Now the photos we're going to see these are from
- (4) generally the areas you've just described to the jury?
- (5) A Yes
- (6) Q Did you take all the photos yourself?
- (7) A No I didn't. I took most of them that I'm going to be
- (8) showing
- (9) Q And all the photos that we're going to show the jury that
- (10) were taken from the summer of 1994?
- (11) A Yes
- (12) Q And you've personally been to all of the locations that
- (13) we're going to see in the photos which you're going to identify
- (14) on the map as we go along here?
- (15) A Yeah
- (16) Q And are the photographs that you're going to show the jury
- (17) are they representative of the types and numbers of different
- (18) wildlife that you observed on your travels out there in Prince
- (19) William Sound?
- (20) A Yes
- (21) MR CLOUGH Your Honor we've got a series of photos
- (22) for the Barco and one for the thing and they are Defendants
- (23) Exhibit 8301A 1 through -38
- (24) MR PETUMENOS Judge do I understand that some of
- (25) the photographs were taken in '93 and some in '94?

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- (1) A No they're all within the last six weeks in 1994
- (2) MS SMITH John do you want the lights on or off?
- (3) MR CLOUGH Going to leave the lights on for this
- (4) but got a short video at the end We'll dim them for that.
- (5) BY MR CLOUGH
- (6) Q All right Mr. Day if you could walk us through the
- (7) photographs tell what they're showing where they are use the
- (8) map to show us where they are and just take it away
- (9) A I hope you can see this better than I can back there
- (10) Okay this is the - out in Columbia Bay here coming up into
- (11) the bay And I don't know if any of you have been out to
- (12) Columbia Bay but there's a very large glacier called the
- (13) Columbia Glacier and we came into this area and we saw some
- (14) seals There were only maybe five to seven seals we saw out
- (15) this loose ice off the face of what we would call the sill but
- (16) you'll notice here there's some very large pieces of ice
- (17) what - I'll show you in the next photograph these are pieces
- (18) of ice perhaps the size of the building trapped against this
- (19) very shallow pile of dirt where the glacier face used to be
- (20) if I could have the next one
- (21) Now when I - I first came to Columbia Glacier in 1976
- (22) and when I first came there the actual face of the glacier was
- (23) out here That's where that big row of very large ice was that
- (24) I just showed you Well in the intervening years it's
- (25) actually retreated like four miles or something four or five

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- (1) miles And so when I - when I first came here there was a
 (2) huge amount of ice sitting off the face of the glacier and
 (3) it's the photographs you see in the advertisements It's just
 (4) a great wall of ice and there were seals and birds and
 (5) everything hanging out off of here
 (6) Well the problem was I couldn't see behind this very large
 (7) ridge of ice here You can see it's a very strong line in the
 (8) water And so what it has is a lot of ice trapped behind it
 (9) between it and the face of the glacier
 (10) So I - I am going to jump from the ship here very quickly
 (11) and show you just a few aerial photographs because I've spent
 (12) a lot of time in these fjords that have glaciers in them and I
 (13) always see seals but I couldn't see behind this big wall of
 (14) ice which is why I came in on the plane
 (15) This is a group of harbor seals here actually behind that
 (16) great wall of ice that - that you could see in those previous
 (17) paragraphs This is a group I don't know probably 20 or 25
 (18) something like this and the day I was in here in July I
 (19) think there was maybe 250 to 400 seals very rough very rough
 (20) count, and a group of anywhere like this 20 25 up to 60 75
 (21) animals something like that. There were a lot of seals in this
 (22) vicinity
 (23) Q I think we've got a blowup of another photograph from back
 (24) in there
 (25) A Oh okay

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- (1) MR CLOUGH Ms Gustafson if you could take that up
 (2) there
 (3) BY MR CLOUGH
 (4) Q Tell us what we see in this one where this one's from
 (5) A What this is is a photograph taken - this was not taken by
 (6) me It was taken a few weeks ago - of the - of probably some
 (7) of the same groups of seals probably the same seals as we saw
 (8) over there And again on some days the smaller groups may
 (9) coagulate into large groups It really - I think it probably
 (10) varies a lot. But just in this group right here there's
 (11) probably a hundred seals 75 seals there's a lot of seals
 (12) here and you see all these spots These are animals four or
 (13) five feet long so this is taken from quite high and they're
 (14) extending beyond the photograph in both directions
 (15) Q Okay
 (16) A On the same aerial photo trip on the side we went into
 (17) this place called Unakwik Inlet which is west. Here's
 (18) Columbia Bay so this is west of there and my understanding is
 (19) this is an alternative hunting site for hunters from Tatitlek
 (20) Village to go look for seals And you can see here this is
 (21) Meares Glacier coming down into the head of the inlet and this
 (22) is what Columbia used to look like I mean the ice comes
 (23) right down into the ocean and you can go right up to the - to
 (24) the face ice calves off There wasn't a lot calved off this
 (25) day but I'll show you a photo of some of this ice in here and

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- (1) see how it turns out.
 (2) All these little dark spots on the ice these are more
 (3) harbor seals This is - see if we can blow it up and make it
 (4) seem reasonable to you This is anywhere between one and
 (5) four
 (6) seals on individual little pieces of ice and the day I was in
 (7) here I think I saw I'm sure at least a hundred seals
 (8) Other things that I saw in Unakwik Inlet that day one of
 (9) the neatest things was - was sea otters And it was really
 (10) neat for me because it's probably more sea otters I've seen
 (11) here than I've seen anywhere else probably the Aleutian
 (12) Islands where there's a lot of sea otters down in southwestern
 (13) Alaska One of the neat things is sometimes apparently here
 (14) they haul out in large numbers on the ice There's probably
 (15) about 20 or 25 here Here's one hanging out in the water
 (16) Other things that were out there this is just a small
 (17) tidal island and a lot of gulls These are probably mew gulls
 (18) and glaucous-wing gulls and black-legged kittiwakes When I
 (19) got the photographs back all the dots here these are sea
 (20) ducks harlequin ducks or scoters sitting in the water three
 (21) flocks here altogether I didn't notice that when I was flying
 (22) over it in the first place
 (23) Okay so I'm going to jump back to the boat stuff and I
 (24) think that's pretty much what I'm going to talk about from here
 (25) on out
 (26) After I left Columbia Bay the first day we came up here

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- (1) into this place called Long Bay and dropped the anchor for the
 (2) night and there's some - there's some neat little rocks here
 (3) as you go into Long Bay little islands and islets and there's
 (4) a lot of sea otters hanging out. Here's one two three four
 (5) five but some of them look kind of large and what these
 (6) are - at least these two maybe this one - these are sea
 (7) otters with pups And when you first see them from a distance
 (8) they're like what's going on they look kind of strange
 (9) And you get up close you realize that there are pups that ride
 (10) on their bellies
 (11) Just to show you another picture here's a really large pup
 (12) riding on mom's belly here But usually when they're quite
 (13) small all you see is something that looks like it's got a very
 (14) fat belly these little fuzzballs
 (15) Coming out then from Columbia from here into outer
 (16) Columbia Bay we came on a flock of surf scoters and I was
 (17) able to get some neat photos of them because it was such a big
 (18) flock I was able to see it from a long way away and get ready
 (19) with the camera but actually I'm going to show you two photos
 (20) here and think of them as being side by side so this is the
 (21) left side of the photo There are actually some birds off the
 (22) ends of the photo There's this big long string of surf
 (23) scoters and see where this - the position of this iceberg
 (24) changes on the next one And I'll - I'll show you the right
 (25) side of the photo

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(1) There's that iceberg there gives another the string
 (2) continues on and there was some birds that continued on off
 (3) the photograph Surf scoters are real common They're sea
 (4) ducks that - you see them in the Sound throughout the year
 (5) and sometimes you see them in large flocks Sometimes you
 see
 (6) them in small flocks
 (7) Okay then on the way down towards the southwestern part of
 (8) the Sound we came down here by this buoy off of what's called
 (9) Lone Island about four miles south of the buoy - or of the
 (10) island is this little shallow reef and they have a buoy
 (11) marking it with a big bell and it's on an anchor chain so it
 (12) sits there on an anchor And as the thing rocks back and forth
 (13) it clangs the bell Well steller sea lions like to haul out
 (14) on this sort of thing a picture there Sometimes you see
 (15) them This guy I don't know if he was getting tired of having
 (16) the bell ring by his head or what but he ended up leaning up
 (17) against the clanger here
 (18) Q Looks like some of us on occasion I hate to tell you
 (19) MR PETUMENOS That's a ring seal
 (20) A Yeah Anyway we continued on down past here and into -
 (21) this general area is called Icy Bay here and there's this
 (22) little offshoot on the north side called Nassau Flord which
 (23) again my understanding is that this is subsistence hunting
 (24) area for Natives of Chenega Village and so we wanted to go in
 (25) here and take a peek And what this is is this is what I

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(1) remember Columbia Bay was like in the 70s There's this huge
 (2) wall of ice with a lot of ice calving off the face of it and
 (3) just seals hauled out everywhere These things - I have other
 (4) photographs - they were just disappearing all the way back
 (5) back to the glacier face
 (6) I wish I had taken this photo but my friend Rick took it
 (7) and I just think it's a neat photo
 (8) MS SMITH What is it?
 (9) A This is another - I'm sorry it's another harbor seal who
 (10) came up in the ice He was kind of interested in us as much
 (11) as we were in them
 (12) Out in Icy Bay some of the things we saw are things like
 (13) harlequin ducks and we saw harlequin ducks small flocks like
 (14) this five to ten birds scattered throughout the Sound on the
 (15) trip And this is a black-legged kittiwake which I have some
 (16) better photos of coming up into Icy Bay It also is a tide
 (17) water glacier and here the wind must have been blowing down
 (18) the glacier and it blew a lot of the ice out And kind of
 (19) behind me here is a kittiwake colony and they like to come out
 (20) and sit on the sides They're little tiny gulls is what they
 (21) are with little black legs and feet
 (22) And farther up the - up the Icy Bay we passed this
 (23) kittiwake colony and there was this rock side on the right
 (24) We weren't paying a lot of attention to it and we heard this
 (25) whistling sound and looked up and realized there were some

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(1) hairy marmots some of those who come from the Lower 48
 (2) probably heard of groundhogs These are Alaska versions of
 (3) groundhogs basically or a little bit bigger And there was a
 (4) whole family of them There was like seven of them scamper
 (5) up through the rocks and this guy stopped long enough for m-
 (6) to finally get a photo of one
 (7) Q This - where is this one from?
 (8) A Okay this photo is a place called Gnack Cove (phonetic)
 (9) which is just out - there's a little cove out here of Nassau
 (10) Flords still in the same vicinity This is what a kittiwake
 (11) colony looks like Like I say kittiwakes nest little gulls
 (12) adapted for nesting on cliffs not your normal seagulls kind of
 (13) thing They make the nests out of mud and grass they mold
 (14) together in the narrow ledges Quite quite small and
 (15) sometimes the nests have these enormous colonists several
 (16) hundreds or thousands of pairs This was a pretty good size
 (17) colony here
 (18) Okay on down to Shelter Bay here down in here just bald
 (19) eagle bald eagles saw everywhere in the Sound Pretty
 common
 (20) birds scattered all along the shoreline Sea otters down
 (21) there guy just hanging out by himself And these are kind of
 (22) neat birds They're also down here in Shelter Bay These are
 (23) called pigeon guillemots and those of you know what a puffin
 (24) is they're relatives of puffins that kind of thing Really
 (25) bright scarlet legs and feet, and inside their mouths are the

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(1) same color Really neat-looking little guys
 (2) Okay on up around from Shelter Bay into this place called
 (3) Iktua Bay so we're just north of Chenega Village actually on
 (4) the north side of the island These are - there's a bunch of
 (5) rocks here rock islands inside the bay and a lot of seals
 (6) haul out there These are again harbor seals And just
 (7) another photo here to show you something that's kinds of neat
 (8) These are slightly different - I mean they behave slightly
 (9) differently from the seals that live on the ice because these
 (10) guys have to worry about the tide coming up and down What
 (11) they do is they'll come up to the rocks shallow areas they
 (12) like to haul out on As the tide's falling they fall asleep
 (13) and the tide goes down it comes back up several hours later
 (14) This guy here well as they're sleeping the fur dries out
 (15) they look real kind of fuzzy like this as they're sleeping and
 (16) the tide comes back they start looking like the beautiful gray
 (17) seals like we saw in the other pictures This guy is sleeping
 (18) and we woke him up and he roused up And it's just that his
 (19) fur is kind of wet here and the rest is dry
 (20) Just outside of there is some neat little rocks out in
 (21) Prince of Wales Passage called Iktua rocks And just -
 (22) these - actually three species in the photo these are called
 (23) pelagic cormorants These are all kind of brown not very easy
 (24) to see in the projection They're brown probably young birds
 (25) produced in the last two years something like that These are

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- (1) black-legged kittiwakes and a little tern
 (2) Q Little white dot was the tern?
 (3) A Yeah little dot right here Also a fair number of mom sea
 (4) otters Here's mom and she has a pretty small little fuzzball
 (5) sitting on the belly here
 (6) Around into - this photo's around into the mouth of
 (7) Sawmill Bay itself We cruised around some of the islands out
 (8) at the mouth one evening and took some photos These are
 (9) glaucous-winged gulls and this is what you guys probably see
 (10) around here a lot. They're a common sea gull along the coast
 (11) here These are all adult birds And then again these are -
 (12) these are young birds probably produced in the last two or
 (13) three years something like that
 (14) Also neat thing we saw in - in Sawmill Bay are common
 (15) mergansers and this is a pretty commonly nesting sea duck in
 (16) Prince William Sound and they're kind of neat ducks in that
 (17) they have teeth on their bills and they're adapted for feeding
 (18) on fish They're also kind of strange in that they're ducks
 (19) that nest in holes in trees And when these little babies are
 (20) a day or two old they actually pop them out of the holes in
 (21) the trees and walk them to the ocean They raise them here in
 (22) fresh water streams or in this case down along the ocean
 (23) And sometimes you know I mean it was quite a range in size of
 (24) these birds This is taken the same day in the same place
 (25) these guys are essentially as big as mom They're essentially

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- (1) fully feathered
 (2) Okay these photos here I did not take but they're places
 (3) that I've been before and I just wanted to show you I didn't
 (4) get a chance to get there this year
 (5) BY MR CLOUGH
 (6) Q These photos we're going to see here the wildlife all
 (7) locations you've been to before in your travels to Prince
 (8) William Sound?
 (9) A Yes
 (10) Q And are they representative of scenes that you've seen in
 (11) Prince William Sound since the oil spill?
 (12) A Oh yes
 (13) Q Okay
 (14) A What this is this is on the eastern side of Knight Island
 (15) here a place called Snug Harbor and there's a stream that
 (16) flows into the head of it here And it was a pink salmon run
 (17) in this stream and when you get a big - big salmon run like
 (18) this you get a lot of food available and a lot of gulls move
 (19) in These are glaucous-wing gulls and probably mew gulls
 (20) and
 (21) sometimes if you're lucky you'll get to see black bears who
 (22) are also attracted to these photos - or to these locations
 (23) And one of the neat things is this guy is that he's sneaking
 (24) away with a salmon in his mouth like a cigar
 (25) MR PETUMENOS Sure that's not an elephant?
 BY MR CLOUGH

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- (1) Q Where are we now?
 (2) A This is in a place called Bay of Isles up here in the
 (3) northeastern part of Knight Island itself and this is
 (4) actually a picture of two - well there are actually two bald
 (5) eagles one here and there's one up here And like I said
 (6) you see eagles scattered along the shoreline of Prince William
 (7) Sound pretty commonly And out at the mouth of Bay of Isles
 (8) are some little islands here little rocks and islands and
 (9) there's some small nesting colonies of birds glaucous-wing
 (10) gulls and pretty common roosting spot for things like
 (11) cormorants that aren't breeding They're young birds that hang
 (12) out here during the summer
 (13) Q These pictures were all taken this summer in 1994?
 (14) A Again these were all taken just within the last six
 (15) weeks Here's a photo from another place in Knight Island
 (16) this is down in Herring Bay and the southwestern part of
 (17) Herring Bay and it's a place where seals like to haul out.
 (18) And these again are harbor seals And you can see here these
 (19) are individual seals hauled out on this island here this rock
 (20) there's quite a few here all down in here scattered
 (21) throughout, there's probably anywhere from 20 - at least 20
 (22) here Actually some disappearing out of the photo here in the
 (23) southwestern part of the bay
 (24) Other - another neat thing that - we only saw a few of -
 (25) are mule deer or they call them black tail deer Sitka black

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- (1) tall deer And during the summer they're mostly inland but
 (2) as the summer progresses you start seeing the first animals
 (3) move to the sea and they'll come out in the fall and winter
 (4) They're forced out by the heavy snow inland and you'll see
 (5) them more and more commonly later in the summer on the
 (6) beaches This was taken down at Green Island and it's the
 (7) only one here I think the day I was there I saw three hanging
 (8) out on the beaches
 (9) Another neat thing that Rick Johnson my colleague from ABR
 (10) who was out after I got off the ship saw - and it's something
 (11) I always had trouble getting photographs of is - are what are
 (12) called mixed species feeding flocks of sea birds and this is
 (13) down here near Channel Island And you see this sort of thing
 (14) throughout the Sound and it's always hard to get pictures of
 (15) it What this is is there's a whole bunch of different
 (16) species of birds These are glaucous-wing gulls black-legged
 (17) kittiwakes in here and mew gulls And these are tufted
 (18) puffins all the black guys and there's a marbled murrelet or
 (19) two
 (20) What happens the kittiwakes are good at finding food
 (21) They fly up high above the water They spot the food and start
 (22) feeding All the other birds watch for kittiwakes to start
 (23) feeding They go over and start - they become attracted and
 (24) they go in and start basically getting free food that the
 (25) kittiwakes have found for them

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- (1) And this is down at a place called Point Helen just east,
 (2) northeast of the point here southern tip of Knight Island
 (3) these are steller sea lions I've been by there I usually see
 (4) them hanging around here For some reason there's a few
 (5) places where they seem to like to hang out during the summer
 (6) and saw these - I always liked these guys they always seemed
 (7) to have a good time during the summer hanging out.
 (8) Q Did you also bring a video that was taken from your 1994
 (9) summer boat tour?
 (10) A Yes
 (11) Q And let me ask you a couple questions Did you shoot the
 (12) video yourself?
 (13) A No I didn't
 (14) Q Were you there when the scenes were filmed?
 (15) A Yeah he was in the boat with us
 (16) Q Who did the shooting?
 (17) A A fellow named - I think it's Tom Phillapont
 (18) Q And did you review all the videotaped footage taken from
 (19) your five-day trip boat trip through Prince William Sound?
 (20) A Yes I did
 (21) Q Did you participate in basically the culling out of the
 (22) segments to show the jury?
 (23) A Yes
 (24) Q And did you select segments that were in your opinion
 (25) representative of the types of wildlife that you saw throughout

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- (1) your five-day boat trip in July?
 (2) A Yes
 (3) MR CLOUGH Let's dim the lights and show the video
 (4) A Is that going to be on here?
 (5) MR CLOUGH Thank you It's the DX13310 Your
 (6) Honor
 (7) MS SMITH Yeah It's going to be on here
 (8) A Oh on here okay
 (9) (Videotape played)
 (10) A This is the first day coming into Long Bay that evening I
 (11) told you all the rocks and the islands lot of - of sea otters
 (12) and birds hanging out Here's a mom sea otter swimming with
 (13) a pup This is part of that flock of surf scoters I was telling
 (14) you about.
 (15) This is down near - on the way toward Icy Bay place
 (16) called Junction Island another seal haulout we just happened
 (17) to come in and swing by
 (18) Q Are they pretty noisy?
 (19) A Seals from what I've seen tend to be pretty quiet.
 (20) Q It's the sea lions that are noisy?
 (21) A Sea lions make a lot of noise yeah Seals tend to be
 (22) pretty quiet
 (23) This is coming into the Nassau Fiord area as I showed you
 (24) before And actually this is a telephoto very big telephoto
 (25) on this video camera so it was actually a very small swell

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- (1) but it looks enormous But it sounded like dynamite blowing
 (2) off the pieces of ice coming down in the water and you get the
 (3) swell and there'll be another explosion
 (4) This guy here is all sleepy not paying attention
 (5) This is that kittiwake kittiwake colony I was telling you
 (6) about. Occasionally they'll do this You'll see a mass group
 (7) of them coming off They all start calling to each other
 (8) Extends these are all rows of nests here on little ledges all
 (9) across the whole cliff face several hundred feet up and many
 (10) hundreds of feet long but here's one of the nests actually
 (11) two nests side by side
 (12) Here's a bald eagle in Shelter Bay again and these are
 (13) northwestern crows these are - you guys they're small
 (14) versions of ravens like you guys probably see flying around
 (15) Anchorage in the fall and winter These are just some
 (16) cormorants hanging out, and gulls
 (17) What else? Oh here's some of the seals that were hanging
 (18) out in Iktus Bay several of them here This is not great
 (19) resolution There's a marbled murrelet, kind of a neat little
 (20) relative of the puffins and the guillemots again This guy's
 (21) about to have the tide come up on him
 (22) This is actually a cormorant got in the middle of a group
 (23) of seals
 (24) These are black oystercatchers which are shore birds with
 (25) these big orange kind of clothes pin type bills They're found

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- (1) along the shorelines in the Sound
 (2) Sea otter moving along eating something Here's some
 (3) kittiwakes and here's an arctic tern which are kind of
 (4) related to gulls They're little tiny guys I think you see
 (5) them at Potter's Marsh here in the Anchorage area. There's a
 (6) mom and little puppy riding on it. These are some other kinds
 (7) of shore birds called surf birds that come in and feed on the
 (8) shorelines after they finish breeding
 (9) There's some more surf birds
 (10) Mom with another pup This is a harlequin duck here
 (11) female plumage bird These are - I think these must be your
 (12) salmon fry little salmon jumping out of the water and right
 (13) nearby are all the glaucous-wing birds And this I showed you
 (14) the pictures of mergansers the sea ducks with the teeth on their
 (15) bills This is what you see is the mom with a bunch of little
 (16) guys just going away from you as fast as they can swim They
 (17) are great blue herons Those of you from the Lower 48
 (18) probably
 (19) have seen them in marsh areas Here's one coming in to land
 (20) big big tall birds probably about this big Two of them there
 (21) in the tree Here's another little better in-focus picture of
 (22) an oystercatcher There's a second member of the pair there
 (23) They're kind of sneaking around They had a youngster that
 (24) was
 (25) about three-quarters grown something like that. He doesn't
 (26) have this - he looks kind of fuzzy still and doesn't have that
 (27) bright orange or red bill

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- (1) Humpback whale screwing around one evening And you'll
 (2) often see the flukes come out of the water as they're diving
 (3) like that, whammo And this is actually its foreflippers and
 (4) you'll often see them do that playing around
 (5) There's his back, he's blowing Here's the nostrils has a
 (6) piece of kelp there across scattered across his back In a
 (7) minute here you'll see his face come out of the water There's
 (8) his mouth right there
 (9) These guys are really - these are called Dall's porpoises
 (10) black guys got white bellies and if you've spent any time at
 (11) sea anywhere in Alaska practically they like to come up and
 (12) visit the boat You can see them swimming along here and they
 (13) come to the surface and see them just go (indicating) and
 (14) they're already on the way back down they've already exhaled
 (15) and inhaled
 (16) This is over on the western side of Knight Island and
 (17) there's - these are arctic terns again there was a nesting
 (18) colony over we ran across over here in western side of Knight
 (19) Island And a bald eagle
 (20) Again this is all on the western side of Knight Island
 (21) MR CLOUGH Okay if we could have the lights back
 (22) up Chuck
 (23) (Video concluded)
 (24) BY MR CLOUGH
 (25) Q Mr Day that whole video was just shot this summer July of

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- (1) A Oh I was out there a couple of times constituting I
 (2) don't know three weeks probably
 (3) Q 1990?
 (4) A Many times constituting a few months probably
 (5) Q 1989?
 (6) A Let me see here I was out there a couple of times
 (7) constituting several weeks
 (8) Q Listening to your voice as you describe these photographs
 (9) I have the sense that you like this area a lot?
 (10) A I like it a lot
 (11) Q It's even magical isn't it?
 (12) A Yes
 (13) Q And you don't even live there year-round?
 (14) A No
 (15) MR PETUMENOS I have no further questions
 (16) MR CLOUGH Thanks Mr Day
 (17) THE COURT You can step down sir thank you
 (18) Shall I let the jury go for the day counsel?
 (19) MR CLOUGH Yes Your Honor
 (20) MR DIAMOND Unless they're dying to hear another
 (21) deposition read by Mr Oppenheimer
 (22) THE COURT Or another reader right? I'll let you
 (23) go and don't talk about the case with anyone and don't form or
 (24) express any opinion on it until it's submitted to you for
 (25) deliberation See you tomorrow 8 30

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- (1) 1994 right?
 (2) A Yes
 (3) Q All the wildlife we saw out there was stuff you saw in just
 (4) a five-day boat trip in Prince William Sound right?
 (5) A Yes and the one-day aerial photography
 (6) Q And that's not - the stuff you saw in the video wasn't the
 (7) only wildlife you saw there was actually a lot more wasn't
 (8) there?
 (9) A Yes
 (10) MR CLOUGH No further questions Thank you for
 (11) bringing it in
 (12) A Am I supposed to go up here?
 (13) MR STOLL You're supposed to go up there yes
 (14) A I am okay
 (15) CROSS-EXAMINATION OF ROBERT H DAY
 (16) BY MR PETUMENOS
 (17) Q Mr Day am I correct that you spent a total of five to six
 (18) days in Prince William Sound in 1994?
 (19) A Yes
 (20) Q And a total of how many days in 1993 in Prince William
 (21) Sound?
 (22) A Probably a couple of weeks maybe week and a half
 (23) Q Couple weeks In 1992?
 (24) A I was not out there in 1992
 (25) Q In 1991?

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- (1) (Jury out at 1 21 p m)
 (2) MR PETUMENOS Judge I was thinking about the issue
 (3) we argued yesterday afternoon regarding the virus and the
 (4) herring and all that and after you made your ruling that
 (5) Dr Meyers could testify I made the decision that I was not
 (6) going to make objections or attempt to limit this testimony
 (7) today in the least Do my cross-examination now in the hope
 (8) that we would get this issue before the jury and Exxon's
 (9) position before the jury in such a way that we could deal with
 (10) the issue of the next witness being not qualified in the area
 (11) the one that they had designated and the other witness who had
 (12) not been previously disclosed
 (13) In view of the testimony today my position with the Court
 (14) would be that the issue has been covered I did not limit
 (15) Exxon's testimony in my - in their direct I think the issue
 (16) of the opposing views of whether this oil spill caused this
 (17) virus is before the jury And I think that there should be no
 (18) further testimony on the subject as cumulative
 (19) THE COURT Just tell me what you have stated
 (20) counsel so I know what's to come
 (21) MR DIAMOND On virus?
 (22) THE COURT Um hum
 (23) MR DIAMOND I imagine we will - at the Court's
 (24) suggestion we will attempt to qualify our next expert who is
 (25) an expert on herring so that he can speak to this issue as

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- (1) well I have not had a chance to confer with my colleagues to
 (2) see if there is any different consensus building - consensus
 (3) building doing it any differently
 (4) With respect to Dr Elston I - if Dr Pearson testifies
 (5) on the virus then I imagine we probably will not call
 (6) Dr Elston if that is what counsel was asking
 (7) MR PETUMENOS No I was suggesting The problem you
 (8) see Judge is that I reviewed the transcript. I believe that
 (9) there is a serious issue as to the qualifications of the next
 (10) witness on this subject. Not the ruling of the federal court,
 (11) but the facts The facts that supported the ruling of the
 (12) federal court suggests that there may be a - a lack of
 (13) expertise in the area of virology or immunology with respect to
 (14) the next expert. We have the problem the dilemma of having
 (15) the witness that they designated not being qualified. A
 (16) witness that they didn't designate without - who hasn't been
 (17) deposed and Dr Meyers And my position is that this - this
 (18) topic Exon 5 had a fair opportunity to present the evidence
 (19) on the issue of the virology, based upon today's testimony
 (20) THE COURT So I have to determine the qualifications
 (21) of the first expert and then depending on what I do the
 (22) parties will have to adjust to that, right?
 (23) MR DIAMOND I believe that is - that is correct.
 (24) THE COURT We'll do it when it's time counsel I'm
 (25) certainly not going to say you can't call one or both of these

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- (1) Some facts have been brought to my attention with respect
 (2) to the potential jury view issue that I know you have decided
 (3) that you are going to postpone ruling on until the close of all
 (4) evidence and I think we understand the - your reasoning in
 (5) that regard
 (6) The folks who just got through going through the scheduling
 (7) process on the federal side for this brought some facts to my
 (8) attention and said - and asked me whether the Judge really
 (9) realized the implications of waiting until the close of all
 (10) evidence and I had to say he probably didn't because I
 (11) haven't until I had the conversation with them And I asked
 (12) them to sort of put together the facts in a usable form
 (13) THE COURT Actually counsel I have some knowledge
 (14) for this because I have been ordered myself not to read the
 (15) paper and I know you've had some difficulty with that trip
 (16) MR DIAMOND They presented the information in
 (17) graphical form and as is their want, and -
 (18) MS SMITH Don't we have a blowup?
 (19) THE COURT This is a graph that shows how the chances
 (20) are lessened in getting in as time goes by
 (21) MR DIAMOND This is a graph which shows the
 (22) available windows of opportunity
 (23) MR STOLL When money is no object -
 (24) MR DIAMOND If this is going to - to happen and I
 (25) always - I always enjoy the opportunity to make Mr Stoll

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- (1) witnesses at this time just like I said yesterday
 (2) MR DIAMOND In terms of scheduling again subject
 (3) to conferring with my colleagues we had a number of experts
 (4) slated for tomorrow that I think we are - may well be inclined
 (5) not to call in attempt to abbreviate things
 (6) THE COURT Not to call at all?
 (7) MR DIAMOND Not to call at all but that would be
 (8) subject to conversations with Mr Petumenos after court. If
 (9) that happens we have not yet - since we only designate
 (10) witnesses in week increments they have not had any notice of
 (11) any additional witnesses to follow on so we can't advance
 (12) anybody And there was a reasonable possibility that we will
 (13) get our depositions read and we will finish before 1:30
 (14) THE COURT I was going to ask you if we could recess
 (15) at 12:00 actually for my reasons
 (16) MR DIAMOND That would be very difficult, but we
 (17) will make every attempt to do that I think we could probably
 (18) drop some witnesses if we need to do that.
 (19) THE COURT The thing I like about you counsel is
 (20) you listen
 (21) MR DIAMOND I have one other matter to raise with
 (22) the Court And yesterday I said I was endeavoring to make it
 (23) through this trial without bellyaching and today I represent
 (24) to you I'm endeavoring to make it through the trial without
 (25) going to the well too many times on the same matter

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- (1) laugh but -
 (2) THE COURT Do I get to cross-examine you?
 (3) MR DIAMOND I'll get back to you with the answer
 (4) But what they have done is chart out the windows in which the
 (5) tide conditions are going to be suitable both for Prince
 (6) William Sound - did I give you the Gulf of Alaska chart as
 (7) well?
 (8) THE COURT No that is all you gave me
 (9) MR DIAMOND Here is the Prince William Sound chart
 (10) And for all intents and purposes if this is going to happen ---
 (11) the green bands are your windows of opportunity If it's going
 (12) to happen There are opportunities to do it next week with
 (13) high tide conditions prevailing and I'm told those are
 (14) essential to land the helicopters to see anything - I'm sorry
 (15) low tide That is not going to repeat itself again until the
 (16) 8th of September at which time we're going to be under ten
 (17) hours of daylight
 (18) I am not asking for a ruling from you today We are very
 (19) anxious to have this happen We are very anxious to have it
 (20) happen during our case in chief I understand your reasons for
 (21) wanting to wait, but our concern is no decision is a decision
 (22) for all intents and purposes and it is not simply a matter of
 (23) the daylight and the tides We have weather conditions
 (24) worsening If you like I could give you all the charts about
 (25) precipitation and temperature and wave heights I won't - I

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- (1) won't belabor the point.
 (2) THE COURT How many sites did you have picked for the federal excursion?
 (3) MR DIAMOND I think there were three each for a total of six
 (4) THE COURT And how many did you get into?
 (5) MR DIAMOND I think only three and they were only looking at Prince William Sound sites We would like to get this jury to the Kenai as well which really really requires two days of - of travel
 (6) THE COURT So you want me to take up two days for this view?
 (7) MR DIAMOND We would like -
 (8) THE COURT Two days?
 (9) MR DIAMOND - two days
 (10) THE COURT All right, thank you
 (11) MR CLOUGH Your Honor I just had three exhibits from today's witnesses For Dr Meyers Exhibit 2019 the newsletter that was testified about both during Dr Kocan's testimony and today
 (12) (Exhibit 2019 offered)
 (13) MR PETUMENOS I think I have an objection to that I think we -
 (14) THE COURT I'm not going to let it in
 (15) MR CLOUGH For the photographs there are 6301A and

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- (1) for Bob Day and the video is 13310
 (2) (Exhibits 6301A and 13310 offered)
 (3) MR PETUMENOS No objection
 (4) THE COURT I'll let them in yes
 (5) (Exhibit 6301A and 13310 received)
 (6) THE COURT Counsel these are such good exhibits that I'm going to have them marked as the Court's exhibit next in order all right? The declining daylight hours exhibits I do appreciate the hard work
 (7) MR PETUMENOS Judge I understand that you're not taking argument on this issue now
 (8) THE COURT True
 (9) MR PETUMENOS I have never argued yet on this issue but I do have an argument
 (10) THE COURT Well you've never argued verbally
 (11) MR PETUMENOS Right.
 (12) THE COURT Okay
 (13) MR PETUMENOS That's usually the only way I do it
 (14) THE COURT Oh that's not quite true counsel
 (15) MR PETUMENOS I have help on the other stuff
 (16) THE COURT I see it wasn't your argument you only signed the document
 (17) Is there anything else?
 (18) MR DIAMOND Nothing further
 (19) THE COURT Who are we going to hear tomorrow if we

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- (1) hear them all?
 (2) MR DIAMOND We have Dr Pearson scheduled for tomorrow and we have Chenega witnesses and Port Graham or -
 (3) Port Graham witnesses for tomorrow
 (4) THE COURT And the direct of Dr Pearson - let me just think now Dr Pearson is the qualification issue right?
 (5) MR DIAMOND Yes He will testify - he is clearly qualified to testify as to the genetic implications of oiling
 (6) You remember Dr Kocan had two theories that he talked about
 (7) One was the emergent theory He is clearly qualified to talk about that I don't think the Plaintiffs dispute that. There won't be a challenge to his qualifications There may be a challenge to his qualifications to talk about the viral impact, the viral theory that Dr Kocan enunciated We probably have 40 minutes of deposition reading We were anticipating Dr Pearson to go about two hours direct and cross
 (8) THE COURT Is he first?
 (9) MR DIAMOND He is scheduled for - he's up first
 (10) THE COURT So two hours direct and cross?
 (11) MR CLOUGH Max Your Honor Well depending on the cross I would say that's an upper end estimate
 (12) THE COURT So consuming an hour for direct
 (13) MR DIAMOND About an hour for direct
 (14) MR PETUMENOS No less than four and a half Judge
 (15) THE COURT So you defer the question of his

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- (1) qualifications on the virus question until - after about an hour of testimony I can excuse the jury and hear the qualifications on that?
 (2) MR DIAMOND I think what we prefer to do is just have him - we will put on all of his qualifications and then maybe at a - at a first break we could have voir dire
 (3) THE COURT Sure that's a good idea fine All right I'll be looking forward to it
 (4) MR DIAMOND Thank you
 (5) THE CLERK Please rise This court stands in
 (6) recess
 (7) (Recess at 1 33 p m)

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- (1) STATE OF ALASKA)
- (2) Reporter's Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5-10-97

Look-See Concordance
Report

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UNIQUE WORDS 3,033
TOTAL OCCURRENCES
12,913
NOISE WORDS 385
TOTAL WORDS IN FILE
37,133

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SINGLE FILE CONCORDANCE

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

1 In re) Case No JAN 89 2533 Ci 11
2) Ancho age Alaska
3 The FIKON VALDE) Friday August 6 1994
4) 8 35
5)

6 VOLUME 45 Pages 7152 through 7102
7 TRANSCRIPT OF PROCEEDINGS (Continued)
8 TRIAL BY JURY

9 BEFORE THE HONORABLE BRIAN C. SHORTELL
10 Superior Court Judge

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(1) PROCEEDINGS
(2) (Jury in at 8 35 a.m.)
(3) (Call to Order of the Court)
(4) THE COURT Good morning everybody
(5) MR. OPPENHEIMER Your Honor this morning we're going
(6) to be doing some deposition testimony. In that regard I have
(7) been asked to observe that this will be a short day shorter
(8) day than normal.
(9) THE COURT Yes I didn't tell you this I asked the
(10) bailiff to tell you on the break but we'll be recessing at
(11) 12:00 today and the parties have given me an estimate that
(12) this case will conclude sometime next week probably late in
(13) the week.
(14) Now that only means conclude the evidence. It doesn't
(15) mean conclude the instructions or the final argument but at
(16) least there's a - we can see the end now. And so can the
(17) parties.
(18) MR. OPPENHEIMER So as the train continues through
(19) the tunnel we call Gail Evanoff by deposition.
(20) THE COURT You're previously sworn so you don't have
(21) to do it again.
(22) MR. OPPENHEIMER The following are excerpts from the
(23) sworn deposition testimony of Gail Evanoff who was deposed in
(24) April and September of 1992. Ms. Evanoff has been
(25) vice president of corporate operations for Chenega Corporation.

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(1) since June of 1989 and CEO since January of 1992. Ms.
Evanoff
(2) has also served as president and secretary of Chenega
(3) Corporation. Ms. Evanoff has been designated by the
(4) corporation as the most knowledgeable person on the
(5) corporation's business activities and the management of its
(6) lands.
(7) DIRECT EXAMINATION OF GAIL EVANOFF (Read)
(8) BY MR. OPPENHEIMER
(9) Q Have there to your knowledge since 1987 been any sales
(10) or - well first of all sales of Chenega Corporation lands to
(11) any other entities or parties?
(12) A No.
(13) Q Are there presently pending any sales of Chenega
(14) Corporation lands to any third parties?
(15) A No.
(16) Q I take it then that the two thirds vote of the
(17) shareholders necessary for approving a sale or conveyance has
(18) not been used for a sale?
(19) A Sale of our lands is not an issue any longer with the
(20) corporation.
(21) Q I'm sorry what?
(22) A Sale of our lands is not an issue with the corporation.
(23) Q Has not been an issue or wouldn't be an issue?
(24) A Is not an issue.
(25) Q Could it potentially be an issue?

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- (1) A I don't know
 (2) MR OPPENHEIMER Thank you
 (3) (Witness excused)
 (4) MR OPPENHEIMER
 (5) Your Honor we call next in order by deposition Feona
 (6) Sawden
 (7) THE CLERK Ma am would you clip the mike onto your
 (8) sweater and remain standing for the oath And would you raise
 (9) your right hand
 (10) (The Witness Is Sworn)
 (11) THE CLERK Thank you You may be seated
 (12) Ma am for the record would you please state your full
 (13) name?
 (14) A Heather Kitson K i t s o-n
 (15) THE CLERK Thank you
 (16) MR OPPENHEIMER The following are excerpts from the
 (17) sworn testimony of Feona Sawden who was deposed on
 December 9
 (18) 1992 Sawden was on the Port Graham Corporation Board of
 (19) Directors from 1976 through 1989
 (20) DIRECT EXAMINATION OF FEONA SAWDEN (Read)
 (21) BY MR OPPENHEIMER
 (22) Q Did the Board ever discuss developing a land use plan for
 (23) corporate lands? --
 (24) A Yes
 (25) Q When did that happen?

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- (1) A I think in - in late 70s
 (2) Q Did someone in particular make a proposal that the
 (3) corporation should develop the land use plan?
 (4) A They were just ideas that were given by other people
 (5) outside the Board
 (6) Q Would those other people be from the regional corporations?
 (7) A Yes and the accountants
 (8) Q Was that Touche Ross at the time?
 (9) A Yes
 (10) Q Why was - why d d Touche Ross think that the corporation
 (11) should have a land use plan?
 (12) A So that they can start earning money for the corporation
 (13) Q What was your understanding of how a land use plan would
 (14) result in money to the corporation?
 (15) A Bringing in tourists
 (16) Q Did the corporation develop any sort of land use plan?
 (17) A No
 (18) Q At this point in time what is the primary or main use of
 (19) the corporate lands?
 (20) A Right now there's nothing that I know of
 (21) Q Would you say that the primary use of the corporate lands
 (22) is subsistence use?
 (23) A Yes
 (24) Q Do you know of any instance where the corporation had to
 (25) change or alter some plan it had with regard to land use or

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- (1) development as a result of the Exxon Valdez oil spill?
 (2) A I don't know
 (3) MR OPPENHEIMER Thank you
 (4) (Witness excused)
 (5) MR OPPENHEIMER Your Honor Exxon calls next in
 (6) order by deposition Patrick Norman
 (7) The following are excerpts from the sworn testimony of Pat
 (8) Norman who was deposed in April September and December
 1992
 (9) Mr Norman served on the Port Graham Corporation Board of
 (10) Directors from 1978 to 1984 He has been the president of the
 (11) corporation from 1984 to the present Mr Norman has been
 (12) designated by the corporation as the person most
 knowledgeable
 (13) on the corporation's use and management of its lands
 (14) DIRECT EXAMINATION OF PATRICK NORMAN (Read)
 (15) BY MR OPPENHEIMER
 (16) Q What about land sales is that a business the corporation
 (17) engages in?
 (18) A No
 (19) Q Does the Village Corporation have any present intention to
 (20) sell any of its lands?
 (21) A No there's a policy that the land cannot be sold
 (22) Q Does that policy apply to all of the land that has been
 (23) conveyed or selected?
 (24) A Correct
 (25) Q Does this policy also apply to developing the same lands as

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- (1) opposed to selling?
 (2) A Developing?
 (3) Q For instance developing recreational subdivisions or
 (4) putting a fishing lodge business on one of the lands
 (5) improvements to the land?
 (6) A No development of the property is not the same because
 you
 (7) wouldn't sell it You could lease it exchange it but you
 (8) wouldn't sell it
 (9) Q When will you find out or when will the corporation find
 (10) out if you know when the land conveyance process will be
 (11) completed with those selections finalized for the lands in the
 (12) Kenai Fjords area?
 (13) A I believe that three years is the time it'll take to where
 (14) we will get interim conveyance to the lands three years
 (15) Q Could you explain to me the significance of the three year
 (16) delay in having the lands interim conveyed? What would you
 (17) have been able to do presently if they were interim conveyed
 (18) that you can't do now because it's three years off into the
 (19) future?
 (20) A Well the major thing is right now we are prohibited from
 (21) dealing with companies that would be interested in building a
 (22) lodge in Kenai Fjords because it's not interim conveyed It's
 (23) still under the park jurisdiction We have to wait until we
 (24) get interim conveyance to start getting a monetary benefit from
 (25) our land selections there

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- (1) Q Do you know what was discussed at the August 9 board
 (2) meeting?
 (3) A Yes
 (4) Q And what was that?
 (5) A There was a proposal by the Park Service to build two
 (6) public use cabins and renovate an existing one and turn around
 (7) and lease those cabins from us for a period of 7 to 12 years
 (8) when we get the interim conveyance to those lands
 (9) Q Where are these located?
 (10) A One is up in Yalik Bay and they propose to build one other
 (11) one in - below Delight Lake and the other one that is in
 (12) Quartz Bay
 (13) Q Under this proposal the corporation would not receive any
 (14) compensation until they receive conveyance?
 (15) A Right
 (16) Q What is the current schedule for the corporation to receive
 (17) conveyance?
 (18) A I would say two years
 (19) Q And is August 1992 about the time frame that the National
 (20) Park Service first approached the corporation on this
 (21) particular proposal?
 (22) A No they approached us in July and we worked on - on the
 (23) documents since then
 (24) Q July 1992?
 (25) A Yeah

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- (1) Q And were those lease agreements entered into?
 (2) A Yes
 (3) Q When was that?
 (4) A I think in September
 (5) Q And what are the terms of the lease or leases?
 (6) A They're \$2400 per year per cabin. The Yalik Bay one is for
 (7) seven years and the Delight is - Delight and Quartz Bay one
 (8) are for 12
 (9) Q Is it true that the corporation will not receive any of
 (10) those lease payments until two years or whenever the
 (11) conveyance
 (12) takes place?
 (13) A Right
 (14) Q In terms of tourism related uses of the corporation lands
 (15) recreational uses of the corporate lands is that a seasonal
 (16) use?
 (17) A Yes
 (18) Q How would you define the season of use?
 (19) A I don't know May through September
 (20) Q Is that season based upon the weather?
 (21) A A major portion yes
 (22) Q Are there any times during the year when corporate lands
 (23) are difficult to reach due to weather or unpredictability of
 (24) weather?
 (25) A Yes
 (26) Q Are there areas of the corporate lands that you would

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- (1) consider remote? And I mean remote from a population center
 (2) A Yes
 (3) Q And would those lands be located the most remote lands
 (4) owned by the corporation?
 (5) A I would say the stuff in the Kenai Fjords
 (6) Q Mr Norman you - you've just been given a copy of exhibit
 (7) 18038 which purports to be a market and financial feasibility
 (8) study of a fishing wilderness lodge and recreational
 (9) subdivision at Port Graham and Rocky Bay Alaska Do you
 (10) have
 (11) that document in front of you?
 (12) A Yes
 (13) Q And have you seen this document before?
 (14) A I have
 (15) Q Is this the feasibility study that we've made reference to
 (16) before that was commissioned by the corporation and prepared
 (17) by
 (18) Jim LaBelle and George Cannelos?
 (19) A Yes
 (20) Q And was that prepared in October of 1986?
 (21) A Yes it was
 (22) Q To your knowledge this is the final text?
 (23) A The text - I think this is the final text yes
 (24) Q And can you recall whether this feasibility study was
 (25) something that was initially proposed by Port Graham
 (26) Corporation or did Mr LaBelle or Mr Cannelos make a
 (27) proposal
 (28) that they could do this on behalf of the corporation?

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- (1) A No we had - I think we had made a decision that we wanted
 (2) a feasibility study done on tourism and some other people -
 (3) excuse me - and then as a result of talking with Jim LaBelle
 (4) and some other people up here they submitted a proposal that
 (5) we accepted
 (6) Q How was it you sought out Mr LaBelle if that was the
 (7) case?
 (8) A I think it was just his relationship with Chugach and his
 (9) prior - prior knowledge of Port Graham and Rocky/Windy Bay
 (10) area
 (11) Q Was it your direction to Mr LaBelle and Mr Cannelos that
 (12) they study the feasibility of a tourism project in a particular
 (13) area?
 (14) A Yeah it was in the Rocky/Windy Bay area
 (15) Q If you could turn to - it's Page 3 of the text of the
 (16) report and it's got a numeral three at the bottom of the page?
 (17) A Okay
 (18) Q And this would be the third paragraph down beginning with
 (19) although -
 (20) A Right
 (21) Q The full paragraph reads quote although the original
 (22) emphasis of this study was on Rocky and Windy Bay we
 (23) reluctantly cannot recommend a project there at this time end
 (24) quote
 (25) A Right

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- (1) Q Quote although the area has excellent fishing the
 (2) unreliable summer weather in the Gulf of Alaska prevents daily
 (3) fly in access a critical component of any lodge operation end
 (4) quote?
 (5) A Right
 (6) Q Just in terms of the fly in access do you agree with the
 (7) report's conclusion that there was a certain number of days
 (8) when you would not be able to fly to the site?
 (9) A I - yeah right we did
 (10) Q Do you have any information or does the corporation have
 (11) any information that the estimates of the number of days you
 (12) would not be able to fly into the site was somehow inaccurate
 (13) or unreliable as of the time this report was made?
 (14) A Unless they've got the - those statistics on fly in
 (15) weather days somewhere in this document -
 (16) Q I think they do and actually I'm looking for them
 (17) Mr Norman if I could direct your attention to Page 44 of
 (18) this document fourth paragraph down indicates quote Bower
 (19) estimates that small aircraft would have difficulty flying to
 (20) destinations along the north gulf coastline about 25 to 35
 (21) percent of the time during the summer end quote
 (22) Is that data to your knowledge in any way inaccurate?
 (23) A I wouldn't know but that would still be 75 to 80 percent
 (24) access - accessibility still
 (25) Q Going back to Page 3 where we started out the last

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- (1) paragraph on the page where the report indicates quote in
 (2) addition the Rocky/Windy Bay area loses much of its scenic
 (3) appeal due to the massive timber clearcuts from the early
 (4) 1970s end quote
 (5) Did the corporation disagree with this conclusion?
 (6) A No we didn't disagree with that that conclusion It -
 (7) but it - it only removed a certain segment of a potential
 (8) tourism people that wanted to go out there and see the scenic
 (9) beauty But that's something in Rocky/Windy Bay is more of a
 (10) fishing fishing type operation than than scenic
 (11) Q Did you specifically disagree with the study's statement in
 (12) that paragraph that quote land is plentiful and relatively
 (13) inexpensive for those seeking recreational tracts and Rocky
 (14) Bay's remoteness would lead to high front end development
 (15) costs end quote Did you specifically disagree with their
 (16) conclusion that this type of recreational land is plentiful and
 (17) relatively inexpensive?
 (18) A We didn't have any reason to dispute it at that time but
 (19) the - our - our feeling was that our land was - wasn't in
 (20) areas that were - were land was plentiful and relatively
 (21) inexpensive This is land on the outer coast where nobody's
 (22) got anything It's remote and I'm sure there's people out
 (23) there that could afford to build something out there and go
 (24) there in the summertime
 (25) Q I guess that's the other side of it Did you disagree with

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- (1) the conclusion that the very type of remoteness that you've
 (2) described would actually lessen the chances this would be a
 (3) feasible project?
 (4) A I believe Jim LaBelle and Cannelos believed that but it
 (5) wasn't necessarily our - our position
 (6) Q You indicated earlier in terms of the problem with weather
 (7) that being able to get people down to the Rocky Bay Windy
 Bay
 (8) area 70 to 80 percent of the time was still good enough to make
 (9) the lodge feasible?
 (10) A I would think so yes
 (11) Q If I could direct your attention to page 46
 (12) A 46?
 (13) Q And if you could review the second paragraph on that page
 (14) it's under the heading Access to Rocky Bay and while you're
 (15) doing that I'll simply quote it for the record Quote
 (16) providing safe and alternative means of access to the Rocky
 Bay
 (17) sites is essential Alaskan visitors travel on limited time
 (18) They're usually on the move trying to experience as much of
 (19) the state as possible A failure to transport guests to the
 (20) lodge because of the limited access would quickly spell ruin to
 (21) an otherwise viable business Consider the effect on travel
 (22) agents and booking companies if their customers complain that
 (23) they could not reach Rocky Bay Lodge because of the rain or
 (24) clouds Customers would demand their money back Agents
 would
 (25) be reluctant to further sell Rocky Bay Lodge in the industry

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- (1) end quote
 (2) Have you had a chance to read that as well?
 (3) A Yeah
 (4) Q Is that a conclusion that the corporation disagreed with at
 (5) the time of this report?
 (6) A No
 (7) Q Is that a conclusion that the corporation disagrees with at
 (8) the present?
 (9) A No we don't We wouldn't disagree with it at this point
 (10) but this - this concern I think was somewhat addressed with
 (11) the building of the landing strip in - in Windy Bay which
 (12) was - we gave them permission to build that landing strip you
 (13) know somewhat in response to the concerns expressed in this
 (14) document
 (15) Q And at the time this document was drafted was it only
 (16) seaplane access?
 (17) A Yes
 (18) Q So based upon that you would say that access is better now
 (19) than it was in '86?
 (20) A Yes
 (21) Q Would the weather and the low fog that affects float plane
 (22) access to Windy and Rocky Bay also affect access to a landing
 (23) strip on Windy and Rocky Bay?
 (24) A It - it could yeah It could yes
 (25) Q Mr Norman other than the feasibility study that we have

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- (1) before us has the corporation ever performed any other type of
 (2) feasibility study or financial analysis of recreational
 (3) subdivisions?
 (4) A I don't think so
 (5) Q Other than the study we have before us has the Port Graham
 (6) Corporation ever performed or had performed on its behalf any
 (7) analysis or feasibility study done of wilderness lodges of the
 (8) type discussed in this exhibit?
 (9) A I - I don't think so No I don't think so
 (10) Q We were looking at the LaBelle Cannelos feasibility
 (11) study - I believe it was exhibit 18038 - do you recall that
 (12) Mr. Norman?
 (13) A Yes I do
 (14) Q Given that fact can you tell me what steps if any the
 (15) corporation took subsequent to October of 1986 to put in a
 (16) wilderness lodge anywhere whether it was at Windy Bay
 Rocky
 (17) Bay or anywhere else?
 (18) A Well one of the things immediately after we received this
 (19) document was to send out letters and pictures of the Rocky Bay
 (20) area and the Port Graham site area that was named in there
 (21) too I think eight different tour companies within the State
 (22) and without - Princess Cruises - there's various lodge
 (23) operations in the state we sent letters to
 (24) Q And when were those letters sent out?
 (25) A During the latter part of 1986

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- (1) Q What was the purpose of sending out those letters which
 (2) included as you already testified to pictures of Rocky and
 (3) Windy Bays?
 (4) A To let the people and outfits know our corporation was
 (5) interested in developing tourism on our - on our property and
 (6) expressing that we'd be interested in - in - in proposals or
 (7) joint venture effort regard to tourism out in Rocky Bay or the
 (8) Port Graham area
 (9) Q Would you tell me what response you got to this request for
 (10) solicitation of a proposal or joint venture?
 (11) A I believe we received only two two responses One was
 (12) from Alaska Sojourns Another one was - was from a contact
 (13) that Jim LaBelle arranged and that -
 (14) Q Do you recall who that LaBelle contact was?
 (15) A I'm trying to remember his name I can't remember his
 (16) name but he was - he was a consultant you know
 (17) entrepreneur He started businesses and got them going and
 (18) then he sold them
 (19) Q Let's start with Alaska Sojourns What was the nature of
 (20) the response that they provided?
 (21) A This person was interested in - in arranging a land lease
 (22) with us in the Kenai Fjords area
 (23) Q What was the nature of their proposal for the land lease
 (24) what were the terms they were suggesting?
 (25) A They weren't suggesting anything other than interest When

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- (1) we contacted them back we told them that we didn't have
 (2) interim conveyance to the land at this time and - but we would
 (3) hold his name on a list of people we could contact once we got
 (4) interim conveyance to it His - what he wanted was a
 (5) permanent site location where he could build a lodge or keep a
 (6) camp on a permanent basis throughout the summer
 (7) Q Mr. Norman would you describe for me the response you
 had
 (8) from - I say you I mean the corporation - that is from the
 (9) LaBelle contact or consultant?
 (10) A This person was developing a - a restaurant and a building
 (11) up here in Anchorage His interest was providing us experience
 (12) in developing projects up to the point where we would take over
 (13) the project and run it ourselves and in that period of time
 (14) while he was working with us we would be paying him a
 (15) management fee
 (16) Q When you say development of the project what do you
 mean
 (17) by that?
 (18) A A lodge
 (19) Q Now what other development services was this individual
 (20) offering?
 (21) A Marketing and training on how to - how to operate a lodge
 (22) operation
 (23) Q Anything else in terms of development services that he was
 (24) offering?
 (25) A I believe that was - that was it

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- (1) Q Subsequent to this response from this particular
 (2) consultant what communication if any has the corporation
 had
 (3) with this individual?
 (4) A We haven't
 (5) MR OPPENHEIMER Thank you
 (6) Your Honor our next witness by deposition Mary Malchoff
 (7) and this will be the last of the depositions at this time
 (8) THE COURT You haven't been sworn yet have you?
 (9) A Not today
 (10) THE COURT Were you sworn before?
 (11) A Yes I was
 (12) THE COURT Okay you're still under oath
 (13) MR OPPENHEIMER I think Terry I now realize one of
 (14) the benefits of having a tie
 (15) A I guess that'll work Does that work?
 (16) THE CLERK Yes
 (17) MR OPPENHEIMER I think it's fine
 (18) The following are excerpts from the sworn testimony of Mary
 (19) Malchoff who was deposed on November 2 and 3 1992
 (20) Ms. Malchoff was the president of Port Graham Corporation
 until
 (21) 1984 She has served on the Port Graham Board of Directors
 (22) since 1986 and is the Chairman of the Board since 1990
 (23) DIRECT EXAMINATION OF MARY MALCHOFF (Read)
 (24) BY MR OPPENHEIMER
 (25) Q During the time you were president do you recall whether

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- (1) there were proposals of any type relating to tourism or
 (2) sightseeing or fishing anything like that?
 (3) A I - there probably was There is every year that I can
 (4) remember
 (5) Q Can you recall what types of proposals that the Board
 (6) expressed interest in?
 (7) A There was a lodge lodge feasibility study
 (8) Q Was this the Jim LaBelle and Cannelos study?
 (9) A Um hum
 (10) Q Did they generate a report?
 (11) A Yes
 (12) Q Have you looked at that?
 (13) A Yes
 (14) Q What was discussed in that report?
 (15) A Because of the high cost it wasn't feasible for us to do
 (16) it on our own for Port Graham Corporation to do it on their
 (17) own
 (18) Q Did the report discuss then an alternate proposal that
 (19) the project was still feasible if someone else put the money or
 (20) was it - did the corporation just drop it?
 (21) A We dropped it
 (22) Q Earlier you indicated that the board had developed some
 (23) policies for investment of corporate moneys based upon a type
 (24) of risk that the corporation wanted to incur is that a fair
 (25) statement?

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- (1) A Our guideline policy?
 (2) Q Right
 (3) A Low risk
 (4) Q Did the corporation or the Board of Directors ever discuss
 (5) what type of risk might be involved with tourism projects?
 (6) A Yes
 (7) Q Did the board come to any conclusions about whether or not
 (8) tourism was something that was low risk or high risk?
 (9) A High risk
 (10) Q And can you recall why the Board reached that conclusion?
 (11) A Because it was in an isolated area at the time - or not
 (12) in - it is in an undeveloped area
 (13) Q When you refer to that area what area were you looking at
 (14) in terms of tourism?
 (15) A Rocky Bay Windy Bay Picnic Harbor Chugach East
 Chugach
 (16) Island
 (17) Q Has there been any discussion of resurrecting the
 (18) feasibility study the LaBelle and Canal proposal for the lodge
 (19) and Picnic Harbor in Windy Bay or that area?
 (20) A How could we when the recommendation was not feasible
 (21) Q I think you indicated that the corporation would consider
 (22) use of its land but would not consider a sale of its land
 (23) Has the corporation made any efforts to advertise the
 (24) availability of its lands for any purpose?
 (25) A None that I know of

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- (1) MR OPPENHEIMER Thank you
 (2) MR CLOUGH Your Honor for our next witness we d
 (3) like to call Dr Walt Pearson
 (4) Dr Pearson if you could step up to the stand and if you
 (5) could bear with me just for a second Your Honor I m going to
 (6) haul out some charts and stuff
 (7) THE CLERK Sir would you clip the microphone to your
 (8) tie and remain standing for the oath Would you raise your
 (9) right hand?
 (10) (The Witness Is Sworn)
 (11) THE CLERK Thank you You may be seated
 (12) Sir for the record would you please state your full name
 (13) spelling your last name?
 (14) A I m Walter Howard Pearson P e a r s o n
 (15) THE CLERK And sir what is your occupation?
 (16) A I m an environmental scientist
 (17) THE CLERK Thank you
 (18) DIRECT EXAMINATION OF WALT H PEARSON
 (19) BY MR CLOUGH
 (20) Q Dr Pearson thank you for covering me while I was getting
 (21) stuff up here
 (22) Tell the jury where you live sir
 (23) A I live in Port Angeles Washington
 (24) Q And how about tell us a little bit about yourself just
 (25) some background?

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- (1) A I was raised in New England went to school at Bates
 (2) College in Maine ran off to Alaska after that took my Masters
 (3) degree from the University of Alaska did a stint in the Army
 (4) outside Washington D C in a laboratory went to Oregon
 (5) state came back to the Pacific Northwest after a stint with
 (6) National Marine Fisheries Service
 (7) Q And where are you currently employed sir?
 (8) A I have kind of two jobs right now I m project or program
 (9) director for the Environmental Studies Program that Washington
 (10) University - West - Washington U n i v e r s i t y started in
 (11) Port Angeles I m also a senior research scientist with the
 (12) Battelle Marine Sciences Lab in Sequim Washington which is
 (13) about 15 miles away from Port Angeles
 (14) Q And how would you describe your area of professional or
 (15) scientific expertise?
 (16) A I m an environmental scientist I m very broadly trained
 (17) and a lot of experience with multidisciplinary projects that
 (18) have to resolve contentious environmental issues I have
 (19) expertises in fisheries biology herring biology marine
 (20) biology oceanography and the toxicology of oil as it relates
 (21) to marine organisms
 (22) Q And just to give the jury a preview we re here today to
 (23) talk about herring aren't we?
 (24) A Yes we are
 (25) Q Now how many years have you been with Battelle?

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- (1) A Sixteen years in October
 (2) Q What is Battelle and how does it work?
 (3) A Battelle is a large not for profit research and development
 (4) company It was founded out of the will or behest of Gordon
 (5) Battelle who made his fortune in the steel industry and it
 (6) was set up so that science could serve mankind We do a lot of
 (7) basic research and applied research for both government and
 (8) private industry
 (9) Q Now you mentioned - I believe you mentioned you d gone
 to
 (10) Bates College could you sort of carry through with your
 (11) educational background for the jury?
 (12) A Yes I went to Bates College and graduated in 1967 I
 (13) took a Bachelor of Science degree in biology My thesis topic
 (14) then was the effects of pesticides on animals in salt marshes
 (15) on Cape Cod I then went to the University of Alaska College
 (16) of Alaska I guess they call it Fairbanks now but those days
 (17) Fairbanks hadn't gobbled up college yet I was there taking a
 (18) Master's degree Master of Science degree in biological
 (19) sciences with an emphasis in marine sciences I took that
 (20) degree in 1970 and went off to the Army - actually I went off
 (21) to the Army a little bit before I was awarded the degree
 (22) Spent some time in the Army then went to Oregon State in
 (23) Corvallis Oregon in oceanography I did a lot of work there
 (24) also on statistics and population biology My thesis topic
 (25) there was the effects of pollutant PCBs on the behavior of a

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- (1) as it were and I did work on the effects potential effects
 (2) on - of dredge material on fisheries particularly crab
 (3) fisheries but other fisheries as well and helped them with
 (4) contentious environmental problems I ran an expert panel for
 (5) the Corps advising them on - on how to mitigate fisheries
 (6) issues related to the dredging
 (7) The other main thrust of work that I've done at Battelle
 (8) has been the investigation of the effects of oil and gas
 (9) exploration on fish I've done two studies major
 (10) multidisciplinary studies that have been - one that's
 (11) investigated the effects of seismic exploration air gun
 (12) operations on fish catchability fish behavior and
 (13) catchability
 (14) I've also done work on the effects of seismic - seismic
 (15) energy releases on Dungeness crab larvae The bulk of the
 work
 (16) I've done over the years has been in a multidisciplinary mode
 (17) where I've got a - led big teams of - of people from many
 (18) disciplines and I've been the team leader
 (19) I've also previous to the oil spill we're talking about
 (20) here investigated one oil spill that occurred in Puget Sound
 (21) near our laboratory That was the Arco Anchorage spill
 (22) Q Now prior to your work on the Exxon Valdez spill did you
 (23) have any prior occasion to study the effect of oil on herring?
 (24) A Yes I did I did do a study in the early 80s and - 82
 (25) and 83 reported in 1985 on the effects of oil on Pacific

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- (1) small crab that lived along the Oregon shore
 (2) Q And have you done some work for the National Marine
 (3) Fisheries Service after you got your Ph D?
 (4) A Yes Shortly before the degree was actually awarded I
 (5) went to Sand Brook New Jersey where I worked with the
 (6) National Marine Fisheries Service which is a division of NOAA
 (7) as a research fisheries biologist There I started examining
 (8) the effects of temperature on crab behavior and then got into
 (9) work or started the work on the effects of oil on fish and
 (10) shellfish
 (11) Q And you've been with Battelle I believe you said 16 years
 (12) sir?
 (13) A Sixteen years in October
 (14) Q Could you please give the jury a description of the type of
 (15) work you've been doing for Battelle over that period of time?
 (16) A I've been mainly involved in three kinds of scientific
 (17) projects In the first years at Battelle the fate and effects
 (18) of oil were emphasized and I did work studying the effects of
 (19) oil on the behavior and biology of several fish starting
 (20) with - and shellfish starting with the Dungeness crab but
 (21) also some work with - funded by NOAA and EPA on the work -
 on
 (22) crabs was funded by NOAA The work on fish was funded by
 EPA
 (23) Later in my career I began to do work with the - on
 (24) issues related to dredging The core of engineers wants to
 (25) dredge a harbor they have to do something with all that dirt

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- (1) herring production
 (2) Q Were you the principal investigator on that project?
 (3) A Yes I was
 (4) Q Have you published any scientific articles sir?
 (5) A I have about over 40 technical reports and somewhere
 (6) between 20 some odd peer reviewed journal articles About
 just
 (7) a little bit less than 20 of my journaled articles pertain to
 (8) oil and gas - or not - oil effects on fish and shellfish
 (9) Q Have you authored any articles on diseases in herring?
 (10) A Yes I have with -
 (11) Q And what was that?
 (12) A With Dr Elston our - our disease specialist at - at
 (13) Sequim I offered a paper on particular kind of lesions that
 (14) were found in Pacific herring larvae
 (15) Q When you say Sequim that's where the Battelle fish lab
 (16) is right?
 (17) A Yes I'm sorry We call that the Sequim lab There's two
 (18) labs two marine labs Battelle has one in Duxbury and one in
 (19) Sequim
 (20) Q And prior to the oil spill have you authored articles
 (21) particularly on the effects of oil on herring?
 (22) A Yes we have particular reports
 (23) Q Are you a member of any professional organization sir?
 (24) A Yes I am American Fisheries Society Western Society of
 (25) Naturalists New York Academy of Sciences American
 Association

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- (1) for the Advancement of Science also the Society of
 (2) Environmental Toxicology and Chemistry
 (3) Q Now you mentioned something to the jury a minute ago in
 (4) one of your responses I wanted to explore You said in a bunch
 (5) of your work before the oil spill you've been the head of -
 (6) team leader of multidisciplinary efforts Explain to the jury
 (7) the type of work you did in that respect and what you - what
 (8) exactly you mean by a multidisciplinary effort
 (9) A Okay I'll go to the last part first A multidisciplinary
 (10) effort is one that requires the expertise of several scientists
 (11) or several scientific disciplines and it has to be blended and
 (12) focused on a particular problem The world is complex I
 (13) guess it always has been but somehow we've made it or found
 (14) it more complex in recent years and particularly in environmental
 (15) matters It's very rare that any one particular discipline has
 (16) all the answers to the questions
 (17) So you need a team of people that work as a team not just
 (18) a bunch of people that are kind of collected together but you
 (19) have to bring Ph D and Masters level and Bachelors level
 (20) people together into a team and apply their expertises to the
 (21) solution of or resolution of the environment issue at hand and
 (22) I've done that for several projects Probably the one I'm most
 (23) proud of is the ones that we've done on the seismic work where
 (24) we found that actually we upheld the claims of the fishermen
 (25) In that case that there was some justification to their claims

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- (1) that the seismic guns would change the behavior of fish and
 (2) that this affected their catchability But to run that
 (3) project I had to bring in statisticians I had to bring in
 (4) fishermen I had to bring in statisticians and several other
 (5) people
 (6) On other projects I've run - I've been involved with
 (7) resource economists and as well as dredging engineers and
 (8) fisheries experts Statisticians we work with quite a lot
 (9) most every project seems to have a statistician
 (10) Q Now were you asked to put together this type of a
 (11) multidisciplinary team approach for the Exxon Valdez oil spill?
 (12) A Yes sir
 (13) Q And can you tell the jury what were you guys asked to put
 (14) together as a team to study?
 (15) A Essentially we were asked to take a look at the effects of
 (16) the Exxon Valdez spill on Pacific herring in Prince William
 (17) Sound and in the first two years we looked at these kinds of
 (18) things
 (19) Later in 1993 when there was a decline in the fishery and
 (20) the presence of - or observation of lesions in the herring we
 (21) were also asked to look at the disease state of samples from
 (22) Prince William Sound and investigate the potential causes of
 (23) that decline and that disease
 (24) Q Dr Pearson you were designated as the team leader for
 (25) this project right?

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- (1) A Yes I was
 (2) Q Do you know why they picked you? When I say they do
 (3) you
 (4) know why you were picked I should say?
 (5) A Several reasons As I mentioned before I had the
 (6) experience with the leading of multidisciplinary teams I'd
 (7) also done work in Alaska both in terms of my education but
 (8) I'd also run a major diving project research diving project in
 (9) the Bering Sea The project to be run was going to involve
 (10) scientific diving in Alaskan waters So I had the experience
 (11) with that kind of a project I had at that point something on
 (12) the order of 12 years of work on oil and gas issues and on the
 (13) fate and effects of oil on marine organisms I had specific
 (14) experience with the effects of oil on herring reproduction
 (15) Q What type of a team terms of size and diversity did you
 (16) put together to look at this herring issue?
 (17) A Well it was quite a diverse team Over the whole life of
 (18) the project now from the five years that it's been running
 (19) we've had all kinds of people with different expertises come in
 (20) and out of the project about 80 some odd people over the
 (21) whole
 (22) life of the project
 (23) In those first days we had people that were good field
 (24) people scientific divers we had chemists we had
 (25) statisticians we had toxicologists that worked in the
 (26) laboratory We had a larvae fish expert We added later in
 (27) the process when we got to the data analysis phase Dr

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- (1) Mochness from Norway He's with the Institute of Marine
 (2) Research up there and is an expert in herring recruitment who
 (3) joined the team to help do our data analysis and
 (4) interpretation
 (5) Dr Ralph Elston of our laboratory who is a disease fish
 (6) disease expert joined the team in '89 and has been very -
 (7) working pretty hard in the last two years on issues that have
 (8) arisen in '93 and '94
 (9) Q And has the team included aquatic toxicologists and fish
 (10) pathologists?
 (11) A Yes it has
 (12) Q All these different folks from the different disciplines
 (13) who supervises all of them for this team?
 (14) A I do sir on this project
 (15) Q And do you review the data and the work that they're doing
 (16) and - for this project?
 (17) A Yes sir
 (18) Q And do you work with them in the development of the
 (19) conclusions of the project?
 (20) A Yes sir It's - as I said it's a team approach and the
 (21) different people have to contribute different things at
 (22) different points The statistician is very heavily involved in
 (23) the early parts of the work for example in the design of the
 (24) study and their expertise comes in again in the data analysis
 (25) part

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- (1) Q Now prior to the oil spill did you have prior experience
 (2) working with aquatic toxicologists and fish pathologists?
 (3) A Oh yes routinely
 (4) Q And did you supervise their work in the past?
 (5) A Yes
 (6) Q And have you coauthored scientific papers with aquatic
 (7) toxicologists and fish pathologists?
 (8) A Yes sir
 (9) Q Can you give us some examples
 (10) A Well in terms of the fish pathologist the work that we ve
 (11) done before on the API study on herring led to a series of
 (12) technical reports that were coauthored with a fish pathologist
 (13) who did what they call histopathology the examination of the
 (14) fish tissues for untoward alterations And there was a peer
 (15) reviewed journal article that came out of that dealing with the
 (16) intestinal lesions or intestinal problems in larval herring
 (17) which hadn't been examined to that point before
 (18) In terms of the toxicological work a lot of the work we ve
 (19) done over the years on fate and effects of oil has involved
 (20) coauthoring of papers with - and reports with marine and
 (21) aquatic toxicologists
 (22) Q Now I think you said you had 80 some odd people at one
 (23) time or another working on this team for you
 (24) A Right I mean that includes everybody Some people only
 (25) came in for a few weeks and other people have been involved

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- (1) for some time
 (2) Q Okay Now I want to ask you about just one of those guys
 (3) you How much of your personal time have you spent working
 (4) on
 (5) this project over the last five years?
 (6) A In the first three years of the project probably about 80
 (7) percent After that 50 percent Now it's about 20 to 25
 (8) percent
 (9) Q Were you able to get out in the field up here yourself?
 (10) A Yes For probably about two months or so in most of it in
 (11) 1989
 (12) MR CLOUGH Your Honor at this time we would like
 (13) to tender Dr Pearson as an expert as an environmental
 (14) scientist with particular expertise in fisheries biology
 (15) herring biology marine biology and toxicology especially
 (16) involving the effect of hydrocarbons on marine life
 (17) MR PETUMENOS I'd like some voir dire Judge
 (18) THE COURT All right go ahead
 (19) VOIR DIRE EXAMINATION OF WALT H PEARSON
 (20) BY MR PETUMENOS
 (21) Q Dr Pearson you talked a lot about the other people that
 (22) you worked with and supervised?
 (23) A Yes
 (24) Q But I want to talk to you about your expertise in
 (25) particular You are not an expert in immunotoxicology?
 (26) A That's correct

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- (1) Q And immunotoxicology is a term that refers to the immune
 (2) system being harmed by a toxic compound?
 (3) A Yes
 (4) Q You are not an expert in genotoxicology?
 (5) A Yes correct
 (6) Q And that's the study of toxic insult to the genetic portion
 (7) of the organism?
 (8) A Yes sir
 (9) Q You do not consider yourself an expert in cytotoxicity?
 (10) A That's correct
 (11) Q And cytotoxicity has to do with the effects of toxins on
 (12) the cell?
 (13) A Correct
 (14) Q And you are not a virologist?
 (15) A Correct
 (16) Q And the study of virology is the study of viruses am I
 (17) right?
 (18) A Yeah
 (19) Q And would it be fair to state that someone like a surgeon
 (20) relies on people like anesthesiologists x ray technicians
 (21) nurses and things like that and when you talk about the
 (22) people that you work with and rely on that's the sort of thing
 (23) we're talking about here in your field am I right?
 (24) A Yes But I have to have a basic working knowledge of a lot
 (25) of those fields as well As I mentioned for example with

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- (1) statistics I have a minor in statistics so I have some
 (2) expertise in statistics although I'm not a statistician
 (3) Q Right Now you talked about for example a project you
 (4) worked on with dredging with engineers and so forth?
 (5) A Yes
 (6) Q You have never given an expert opinion on engineering?
 (7) A No
 (8) Q You have never given expert opinion on dredging despite
 (9) the fact that you worked on a project that involved that?
 (10) A This is my - this Exxon Valdez thing and the federal case
 (11) in this case is my first time as an expert witness
 (12) MR PETUMENOS Judge the witness is qualified
 (13) obviously in certain areas but not in the areas that I
 (14) believe he by his admission has stated
 (15) THE COURT Do you want to do any further
 (16) qualification counsel?
 (17) MR CLOUGH I think what might be best is if we could
 (18) approach the Court either bench or outside the presence of the
 (19) jury
 (20) THE COURT It would have to be outside the presence
 (21) of the jury Do you want to do it now or later?
 (22) MR CLOUGH I think it probably would be best to do
 (23) it now
 (24) THE COURT This may take some - you're out of here
 (25) (Jury out at 9 15 a m)

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(1) MR CLOUGH Your Honor I think it's been well
 (2) established in voir dire to date about Dr Pearson's
 (3) expertise in the areas I recited particularly herring
 (4) biology He's authored articles on herring biology the
 (5) effects of oil on herring he's authored on that He's done
 (6) the API studies on it He's studied the effects of oil and
 (7) marine fisheries during his work for Battelle for EPA for
 (8) NOAA for the American Petroleum Institute and others He
 was
 (9) employed by the National Marine Fisheries before that on the
 (10) East Coast He was generally doing the same type of research
 (11) So particularly I don't think there's any issue on the
 (12) expertise of the toxicology involving the effects of
 (13) hydrocarbons on marine life Additionally he has offered
 (14) scientific paper on herring and herring disease in particular
 (15) Now all we're seeking to do in terms of the - I think the
 (16) area that Mr Petumenos is concerned about is we will - we
 (17) were planning to ask Dr Pearson to very briefly describe the
 (18) work that his team had done on this issue that being the VHS
 (19) virus issue and then to state whether he agrees with the
 (20) opinion Dr Kocan has offered to the jury as to whether the VHS
 (21) virus is responsible for some drop in the biomass And if
 (22) not why not what's the basis for that opinion?
 (23) That's as far as we were going to go with it It's about
 (24) five minutes of questions if that much
 (25) THE COURT I'd like to hear them go ahead and ask

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(1) them
 (2) MR CLOUGH We get to do a run through here Let me
 (3) find the right page Heck you know it's as simple as we just
 (4) said
 (5) VOIR DIRE EXAMINATION OF WALT H PEARSON
 (6) BY MR CLOUGH
 (7) Q Have you had an opportunity to review Dr Kocan's
 (8) testimony?
 (9) A In state court yes
 (10) Q Right And were you here when Dr Meyers also testified?
 (11) A Yes I was
 (12) Q And have members of your group on your supervision been
 (13) studying the issue of herring disease and the VHS issue in
 (14) particular?
 (15) A Yes we have
 (16) Q Based upon all the information available to you and your
 (17) experience as an environmental scientist covering these fields
 (18) through many years in your opinion - let me ask do you agree
 (19) with Dr Kocan's opinion that the VHS virus that the oil
 (20) spill - excuse me let me rephrase this correctly Your Honor
 (21) so we frame the issue - do you agree with Dr Kocan's
 (22) immunosuppression theory?
 (23) A No I do not
 (24) Q Can you explain to the Court the basis for why you
 (25) disagree?

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(1) A My reasons are very similar to Dr Meyers and are based on
 (2) the stuff that Dr Elston's also telling me that's similar to
 (3) Dr Meyers The reason that the theory doesn't hold water is
 (4) one of timing The - if the fish were indeed
 (5) immunosuppressed particularly the 89 year class was
 (6) immunosuppressed it would not have survived for three years
 or
 (7) four years from 1989 to 1993 We would have either seen sicker
 (8) fish in the 89 year class or we would have seen the
 (9) disappearance of that 89 year class
 (10) The Fish and Game data or fisheries data which I've
 (11) examined indicates that the 89 year class came back as
 (12) expected My discussions with Fritz Funk who is the herring
 (13) biologist for the whole State of Alaska indicates that the 89
 (14) year class in Prince William Sound is of the same proportion as
 (15) the 89 year class in Sitka So comparing those two fish -
 (16) herring fisheries indicates that there's no
 (17) underrepresentation for the 89 year class
 (18) So in terms of evidence for immunosuppression I don't find
 (19) it The timing's wrong
 (20) The issue of isolation again based on the fisheries data
 (21) that we have we know that the fish do in fact swim together
 (22) they're not isolated Also the discovery by Dr Meyers of the
 (23) VHS virus in fish that are young of the year and only
 (24) two year olds in other words juvenile fish also indicates
 (25) that if the - if the fish were immunosuppressed we should

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(1) have seen something sooner because these fish the juvenile
 (2) fish have the virus
 (3) MR PETUMENOS I'm sorry Judge I can't hear him I
 (4) can't hear you sir
 (5) BY MR CLOUGH
 (6) Q Just speak up a little bit for that last part
 (7) Dr Pearson
 (8) A I'm sorry the last part on the isolation I disagree with
 (9) the isolation for a couple of reasons One is that the data
 (10) from the fishery that indicates that the fish can occur in the
 (11) same areas particularly over the winter The other is that
 (12) the isolation or discovery of the virus by Dr Meyers in fish
 (13) that are only - that are young of the year fish and
 (14) two year old fish juvenile fish indicates that the juvenile
 (15) fish aren't isolated from the adult fish or from the virus
 (16) anyway And that again points to the fact that the - any kind
 (17) of untoward effect due to immunosuppression should have
 shown
 (18) up sooner
 (19) MR CLOUGH That Your Honor was the gist of the -
 (20) as far as we were going to go with it
 (21) THE COURT Do you have any questions counsel?
 (22) MR PETUMENOS Yes Your Honor thank you
 (23) VOIR DIRE EXAMINATION OF WALT H PEARSON
 (24) BY MR PETUMENOS
 (25) Q As I understood what you just told me you are testifying

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- (1) based upon things that you've read in and other people that
 (2) you've talked to?
 (3) A I'm testifying based on the analysis that I and my team
 (4) did. Based on my analysis of the fisheries data which I'm -
 (5) have dealt with for some time. I have an expertise in and on
 (6) my analysis of Dr. Meyers' statements and Dr. Elston's
 (7) statements.
 (8) Q Okay. Exxon did not do and you haven't done any
 (9) immunotoxicological experimental studies with respect to
 (10) Prince
 (11) William Sound herring?
 (12) A Nobody has so that no one has specifically tested whether
 (13) any of the fish involved here are immune compromised.
 (14) Q How about genotoxicological experiments in Prince William
 (15) Sound have you done any of those?
 (16) A I haven't.
 (17) Q Has anybody from Exxon done any of those?
 (18) A Not that I know of.
 (19) THE COURT Has anyone? That you know of?
 (20) A There's some genotoxic kinds of things that have been done
 (21) in some of the Trustees studies but they're not quite the
 (22) experimental demonstration I think he's trying to allude to.
 (23) THE COURT Okay.
 (24) BY MR. PETUMENOS
 (25) Q Well Dr. Kocan did some genotoxicological studies didn't
 (26) he?

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- (1) A He did an experiment in which one of his endpoints was a
 (2) genotox endpoint yes upon exposure to - to oil.
 (3) Q All right. Exxon did not do any specific sampling to
 (4) determine whether the immunological systems of Prince William
 (5) Sound herring were impacted by the oil spill did they?
 (6) A No they didn't but there's some indications of whether
 (7) that was the case based on the histopath data that one has
 (8) from the examination of the '93 and '94 specimens and I
 (9) believe if you would question Dr. Meyers further you would
 (10) have found that his examination of pathology of the other
 (11) organs would have shown that they were not
 (12) immune compromised
 (13) because they were showing the natural responses to a number
 (14) of
 (15) the parasites.
 (16) Q Now when you talk about questioning Dr. Meyers further -
 (17) A I mean if we had - if you had gone into that question
 (18) with him I think -
 (19) Q But I'm going into the question with you. Are you going to
 (20) be testifying to this jury what Dr. Meyers would have said if
 (21) I'd asked him questions further?
 (22) A No I guess not but -
 (23) THE COURT Well counsel that would require you to
 (24) be careful remember that
 (25) MR. PETUMENOS Let me get into that
 (26) BY MR. PETUMENOS
 (27) Q When you say that Dr. Meyers would say something that he

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- (1) didn't say in court what do you base that on?
 (2) A Conversations with him.
 (3) Q All right. So what you would be doing if I were to get
 (4) into the area as the Judge says is testifying to what
 (5) Dr. Meyers - what you say Dr. Meyers told you?
 (6) A Correct.
 (7) Q And Dr. Meyers is - has got some background in
 (8) immunotoxicology?
 (9) A He has background in immune systems yes and he could -
 (10) part of his job is to determine whether the disease status of
 (11) the organisms he's examining and part of that is to - he can
 (12) see evidence in histopathology whether the immune system is
 (13) functioning or not.
 (14) Q I'm not sure but I think I asked him if he was an
 (15) immunotoxicologist and I believe he told me no. Do you have
 (16) different information?
 (17) A I'm just trying to say that while he's not an immune
 (18) toxicologist he has expertise that bears on the problem.
 (19) Q So you would be relying on something that he - how long
 (20) was the conversation that you had with him about this?
 (21) A I don't - I don't recall. It was - this particular topic
 (22) was one of several. It probably took five minutes.
 (23) Q And have you ever prior to the Exxon Valdez oil spill
 (24) done experiments or data gathering with respect to the impacts
 (25) of pollutants on the immune systems of fish ever?

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- (1) A No.
 (2) Q Have you in terms of immunotoxicology you have never
 (3) studied environmental effects on the fish prior to the Exxon
 (4) Valdez oil spill ever?
 (5) A In terms of immunotoxicology?
 (6) Q That's right.
 (7) A No I have not.
 (8) Q Prior to the Exxon Valdez oil spill you had no experience
 (9) in examining an impact of a toxin on the cells of fish ever?
 (10) A That's not quite true. Some of the stuff that we did in
 (11) the herring study it deals with morphological abnormalities
 (12) and has some implications for cellular structure but it was
 (13) not a cytogenetics or cytological examination if that's the
 (14) question.
 (15) Q That's the question a cytological examination?
 (16) A No or - I didn't do that I guess is what the question
 (17) was.
 (18) MR. PETUMENOS That's all the voir dire I have
 (19) Judge.
 (20) MR. CLOUGH Just a couple of follow up if I may
 (21) Your Honor.
 (22) VOIR DIRE EXAMINATION OF WALT H. PEARSON
 (23) BY MR. CLOUGH
 (24) Q As part of your work through the years is it part of your
 (25) ordinary course of business as a scientist to consult with

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- (1) representatives of the fisheries departments for the various
 (2) states and the federal government?
 (3) A Yes
 (4) Q And have you over the course of the years prior to your
 (5) conversation with Dr. Meyers spoken with other members of the
 (6) Alaska Department of Fish and Game on other issues?
 (7) A On other issues yes
 (8) Q And you obtained data from them that you rely upon in the
 (9) course of your work?
 (10) A Yes
 (11) Q As a part of your work in your field to rely upon
 (12) information that you receive from people like Dr. Meyers who
 (13) are employed as fisheries - I guess he's the chief fish
 (14) pathologist for the State of Alaska right?
 (15) A He's the chief pathologist for the State yes fish
 (16) pathologist
 (17) Q And finally are you being asked or at least are you
 (18) prepared to offer any opinions as a quote immunotoxicologist
 (19) here today?
 (20) A I'm offering opinion as an environmental scientist
 (21) examining an environmental issue with fisheries implications
 (22) Q And you do have expertise as a fisheries biologist?
 (23) A Yes sir
 (24) Q And you do have expertise particularly on herring biology?
 (25) A Yes

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- (1) Q And the effects of oil on herring?
 (2) A Yes
 (3) Q And on - at least you've authored an article on herring
 (4) disease coauthored it as well right?
 (5) A Yes
 (6) Q And you have specifically spent much of your career working
 (7) on the particular issue of the effects of oil on marine life?
 (8) A Correct
 (9) THE COURT Okay did you want to ask more questions?
 (10) MR PETUMENOS No I have no more questions for the
 (11) witness
 (12) THE COURT Give me the specific description of the
 (13) expertise of this witness that you want me to say he's
 (14) qualified in
 (15) MR CLOUGH We have here Your Honor an
 (16) environmental scientist with particular expertise in fisheries
 (17) biology herring biology general marine biology and
 (18) toxicology especially involving the effect of hydrocarbons on
 (19) marine life
 (20) THE COURT He's clearly qualified to give opinions in
 (21) those areas and what I've heard of the offer of proof here is
 (22) well within that expertise so I'll allow him to testify within
 (23) that expertise
 (24) I won't allow him to testify to the Meyers conversational
 (25) efforts Simply a repetition of an opinion that Dr. Meyers was

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- (1) not questioned on On the other hand if counsel opens the
 (2) door then I'll have to consider that question anew and that's
 (3) up to - up to Plaintiffs counsel to determine how to question
 (4) about that
 (5) MR PETUMENOS May I be heard before the ruling I
 (6) haven't argued yet the issue
 (7) THE COURT You can be heard counsel but frankly I
 (8) know where I am here If you want - if you think you can
 (9) convince me that I'm wrong you're welcome to try
 (10) MR PETUMENOS I'm going to try I agree with much
 (11) of what you said actually about the expertise relating to
 (12) toxicology generally but the area that I didn't hear and the
 (13) area which I think is critical here is on the issue of
 (14) virology on genotoxicology and the issues relating to the
 (15) virus The reason I'm very concerned about that area is this
 (16) is a virus that has only been recently discovered in 1988 in
 (17) the Pacific area
 (18) The whole concept of virology and the study of viruses is a
 (19) very very difficulty one It's not well understood in many
 (20) respects by virologists who study it all the time The issue
 (21) that the witness is testifying to is his opinion that because
 (22) the fish didn't die or they didn't see effects of the 1989
 (23) class earlier that Dr. Kocan must therefore be wrong People
 (24) who are in the area would have vast room for disagreements as
 (25) to whether a virus often takes a number of years before in the

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- (1) immune system which I neglected to mention is such that it
 (2) causes the manifestations of the weakness in the immune
 (3) system
 (4) and the virus to manifest itself in a way that people can see
 (5) This witness has testified during the voir dire process
 (6) that he has the opinion that Dr. Kocan is wrong because the
 (7) fish didn't die or manifest problems before 1993 He's not
 (8) qualified in that area to discuss that issue This is a highly
 (9) technical area which the jury will not be in a position to
 (10) tell whether or not this witness as a quote environmental
 (11) scientist with toxicology specialties is qualified to say
 (12) those things about the virology and the immune system and all
 (13) that and it is for the Court to protect the parties when it
 (14) comes to clearly defining the expertise so that the jury's not
 (15) confused or misled by an opinion that - that an expert is not
 (16) qualified to give
 (17) And I think that it would be to the prejudice of the
 (18) Plaintiffs if the Court doesn't do something instruct the
 (19) jury tell them something about the limits of this
 (20) qualification when it comes to this area or it will appear to
 (21) the jury that he can say more than he really can on the record
 (22) before us
 (23) THE COURT I don't hear a response counsel The
 (24) ruling remains the same Because it's a long string of
 (25) qualifications I'm going to make you state the qualifications
 (26) and I'm simply going to say he's qualified to give opinions in

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(1) that area and expert testimony in those areas of expertise but
 (2) what Mr. Petumenos says may be persuasive to the jury. To me
 (3) it's a question of cross examination: whether or not the
 (4) qualifications and the back up material that this witness talks
 (5) about are convincing when placed against the opinions of
 (6) another expert. That's simply - that's something for the jury
 (7) to decide, but he's clearly qualified to give this testimony
 (8) at least on the testimony I've heard. I don't know what the
 (9) testimony was in - I know what the testimony was in the
 (10) federal court, and I know federal court didn't qualify him, but
 (11) this is - this is a different question, and I've heard
 (12) qualifications that indicate to me that he's clearly
 (13) qualified.
 (14) MR. CLOUGH: I will recite that. I have it written
 (15) down word for word so we'll get it right. To avoid any
 (16) problem, when I ask him the question of what's the basis for
 (17) your disagreement with Dr. Kocan, he has several things based
 (18) on his own knowledge, his team's work, a third and separate
 (19) distinct thing would be what he learned from Dr. Meyers, both
 (20) sitting here in court and in conversations. We can limit it to
 (21) just what he heard observing as an expert, which he's entitled
 (22) to do to listen to other expert opinions being rendered in
 (23) court, and I'll at this time instruct you in response to my
 (24) question: not to invoke the conversations, just limit your
 (25) basis to what you heard from Dr. Meyers here in court, is that

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(1) in compliance with your directive is
 (2) THE COURT: Yes.
 (3) MR. PETUMENOS: My understanding is the - at this
 (4) point, that the opinions to be given on the subject are limited
 (5) to the offer of proof we've heard today. We're not going
 (6) further.
 (7) THE COURT: Yes, absolutely strictly.
 (8) MR. CLOUGH: I read the questions strictly from the
 (9) outline, not that I have an outline with specific questions.
 (10) THE COURT: I'm going to take a break, counsel, and
 (11) you should, too.
 (12) THE CLERK: Please rise. This court stands in
 (13) recess.
 (14) (Recess from 9:34 a.m. to 9:45 a.m.)
 (15) (Jury in at 9:45 a.m.)
 (16) THE CLERK: Please rise, this court now resumes its
 (17) session, please be seated.
 (18) THE COURT: Yes, counsel.
 (19) MR. CLOUGH: Your Honor, it is my pleasure to tender
 (20) Dr. Pearson as an expert, as an environmental scientist with
 (21) particular expertise in fisheries biology, herring biology,
 (22) general marine biology and toxicology, especially involving the
 (23) effect of hydrocarbons on marine life.
 (24) THE COURT: You wonder if I'm going to repeat that to
 (25) you, don't you? He's qualified in all of those areas. He can

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(1) give expert opinion and he can give expert testimony in those
 (2) areas.
 (3) DIRECT EXAMINATION OF WALT H. PEARSON (Resumed)
 (4) BY MR. CLOUGH:
 (5) Q Now, Dr. Pearson, you were here yesterday while Dr. Meyers
 (6) talked about the virus part of Dr. Kocan's theory, all these
 (7) doctors here. I want to talk to you now, though, about the
 (8) other parts of Dr. Kocan's theory, okay?
 (9) Now, your research project that you designed for Battelle
 (10) were you given independence - heck with that. How did you go
 (11) about designing the project and what did you set it up to do?
 (12) A The very first thing we did was grab a statistician and the
 (13) literature and design a project based on what you knew about
 (14) what the literature said about toxicology of oil, herring eggs
 (15) and using a statistician to help you get scientifically valid
 (16) sample sizes and correct design. You then proposed that to the
 (17) sponsor. The sponsor says yea or nay and then you go off and
 (18) execute the project. And we were given great latitude
 (19) complete control over the science that we had to do and we
 (20) went off and executed the project.
 (21) Q That project has gone on for five years?
 (22) A Yes, it has. The basic, the biggest bulk of the work was
 (23) done the first three.
 (24) Q Now, the jury's going to recall that there's no dispute
 (25) that there was a drop in what's called the herring biomass in

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(1) 1993 and 1994, correct?
 (2) A Correct. Well, the drop was in '93 with a continuation of
 (3) a lower level in '94.
 (4) Q Now, based on your five years of work as team leader of
 (5) this project, have you formed an opinion whether the Exxon
 (6) Valdez oil spill is responsible for that drop in the herring
 (7) biomass in 1993?
 (8) A I have an opinion.
 (9) Q Tell the jury what that opinion is, sir.
 (10) A I believe that the drop of the biomass that you saw in 1993
 (11) was due to a number of factors that were operating in the
 (12) natural environment, and it is not related to the oil spill.
 (13) As in many declines of fisheries populations, a number of
 (14) things have to come together and line up together, and then you
 (15) see the decline. Anyone I think who is trying to propose a
 (16) single solution or a single factor involved in the decline
 (17) is - is not looking at all the stuff that's going on.
 (18) Q Now, Dr. Pearson, to allow you to explain that, we're going
 (19) to start by talking about - explain the basis for your
 (20) opinion, we're going to start by talking about the life cycle
 (21) of herring. We heard about the life cycle of salmon earlier
 (22) this week. Let's talk about herring.
 (23) Looking at Defendants Exhibit 9169A here, could you explain
 (24) for the jury about the life cycle of herring? If you feel more
 (25) comfortable coming down and pointing to the big screen, you
 can.

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- (1) do it that way Whatever works for you
 (2) A We re going to - to talk about the life cycle of the
 (3) herring and we ll begin with -
 (4) Q Let me get you a pointer here Sorry to interrupt Doctor
 (5) that way we can all see
 (6) A Okay we ll begin with the eggs The eggs are laid in the
 (7) intertidal and subtidal zone on seaweed and kelp and they
 (8) incubate in Prince - this is done usually in April and they
 (9) incubate for about 20 or 21 days and that s represented by
 (10) this little slice of tan here the beginning part of this life
 (11) cycle
 (12) After 21 days of incubation they hatch the larvae hatch
 (13) out which are this life stage here and they remain as larvae
 (14) through most of the summer At the end of the summer they
 (15) metamorphose into juveniles kind of looking like small adults
 (16) but they re not yet sexually mature
 (17) The fish then grow increasing in size and sometime from
 (18) the age of two to the age of five they begin to mature An
 (19) individual fish might mature at some point in here depending
 (20) on how he reaches - he or she reaches a certain size Some
 (21) fish begin to mature come into the spawn population at two
 (22) about 30 percent come into the spawn population about three
 (23) about three quarters two thirds or three quarters come into
 (24) the spawning population at age four and then by the time
 (25) they re five or certainly six most all of the fish are

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- (1) sexually mature and part of the spawning population
 (2) Herring in Prince William Sound live 12 perhaps 14 years
 (3) but 12 is a good number And unlike salmon that spawn and
 (4) then
 (5) die herring come back after they reach sexual maturity
 (6) Herring come back every year to spawn So a female is going
 (7) to
 (8) produce eggs and spawn over from somewhere around three or
 (9) four
 (10) years of age until they pass away at 12 or 14
 (11) Q Now when Dr Meyers was talking about herring stuff
 (12) yesterday he was using terms year classes and dominant year
 (13) classes Can you explain to the jury what those are with
 (14) regard to herring?
 (15) A Okay A year class is those herring that are born in a
 (16) given year in a given region So in 1989 all of the herring
 (17) that came from the eggs deposited that year and hatched out
 (18) that year are members of the 1989 year class A dominant year
 (19) class we need to - to realize that when you look at a herring
 (20) population they re composed of herring of different ages and
 (21) it s not uniformly distributed
 (22) There are some year classes that are very very much more
 (23) abundant than other year classes This happens about every
 (24) four years in Prince William Sound a new very abundant
 (25) dominant year class emerges By dominant we mean it
 (26) makes
 (27) up more than about 50 percent of the total number of fish in
 (28) the spawn population in Prince William Sound
 (29) Q Now have you prepared an animation to show the jury to

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- (1) explain some of this year class stuff?
 (2) A Yes we have
 (3) Q Let s see it
 (4) (Videotape played)
 (5) A The animation is drawn from Fish and Game records and it s
 (6) going to talk to you or illustrate the age structure of the
 (7) herring population In Prince William Sound - and just a
 (8) preview - this is the kind of bar graph that illustrates the
 (9) point that the 84 year class is the dominant one
 (10) When you look at the population the population has fish of
 (11) different ages in it depicted by the different colors here and
 (12) you can count these fish and age them using scales which Fish
 (13) and Game does to count out the number of fish in the different
 (14) ages and you can kind of stack them on top of one another
 (15) Here we go To get an illustration of where the ages are
 (16) These age three fish here are the dominant year class in this
 (17) illustration That s the 84 year class so in 198 - 1987
 (18) that s three-year olds the 84 year class became the dominant
 (19) year class And then moving on to 88 they re a year older
 (20) so they re four year olds but they re still the dominant year
 (21) class making up something on the order of - I can t see the
 (22) thing here but I think it s about 70 or 80 percent of the
 (23) population in Prince William Sound
 (24) And then in 1989 the year of the spill the 84 year class
 (25) made up over 70 percent of the population in Prince William

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- (1) Sound They were five year old fish at that point
 (2) Now moving to 1990 the 84 year class is still strong and
 (3) still the dominant year class making up about 70 percent again
 (4) of the fish in Prince William Sound
 (5) Now in 1991 you should start seeing the beginning of the
 (6) next dominant year class and lo and behold the 88 year class
 (7) starts to come in at three years of age right on time
 (8) Q So at least in the 80s every four years we have the
 (9) Olympics presidential elections and a new dominant herring
 (10) class?
 (11) A Yes but I wouldn t draw any correlation to that
 (12) Q I m not a scientist
 (13) A So in 1992 then the 84 year class is faded from
 (14) dominance although it s still somewhat strong and then the
 (15) 88 year class has emerged as the dominant year class Then
 (16) we have some data from 1993 which indicates that the 88 year
 (17) class is now making up something on the order of 60 percent of
 (18) the fish in Prince William Sound So you can see this kind of
 (19) bar graph and if you go back even further into the data you
 (20) see the same kind of pattern where generally a strong year
 (21) class emerging every four years in Prince William Sound
 (22) Here s an example of the harvest or an illustration of the
 (23) harvest from the 70s when the sac roe fishery began and you
 (24) can see that the years after there was no fishery or only a
 (25) small fishery in 1989 but the years after the spill the

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- (1) harvest was above average and in two years a record harvest
 (2) for Prince William Sound
 (3) Q Now I think we've got one - we only have three of the big
 (4) charts today for you but one of them I think summarizes what
 (5) we were just seeing about the dominant year classes
 (6) A Yes
 (7) Q This is defendant's exhibit 5239BB?
 (8) A And here again you can see that the '84 year class okay
 (9) kept as a dominant and that there's no change in the - in
 (10) the - there's no skewing of the structure of the age
 (11) structure of the population moving from before the spill
 (12) after the spill and that the '88 year class emerged as
 (13) expected
 (14) Q Now we've also heard the term biomass a couple times
 (15) here in court What's a biomass with respect to herring?
 (16) A The biomass is the weight of all the herring in Prince
 (17) William Sound If they talk about the biomass of Prince
 (18) William Sound the herring biomass in Prince William Sound
 (19) they're talking about the weight of all the herring in Prince
 (20) William Sound If they're talking about the spawn biomass in
 (21) Prince William Sound they're talking about the weight of all
 (22) the adult fish that are capable of spawning that are in Prince
 (23) William Sound
 (24) Q What I'd like to do next if we can put this one down is
 (25) ask you about for the three years after the spill what the

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- (1) information shows about this biomass for Prince William Sound
 (2) herring And we're looking here at Defendant's exhibit 4946A
 (3) Could you tell the jury what this shows?
 (4) A This shows the harvests and the harvests are related to
 (5) the biomass because the Fish and Game sets a quote which is
 (6) 20 percent of the biomass When the biomass is above what they
 (7) call a threshold level and it depicts the harvests from the
 (8) '70s through 1993 and indicates that if you look at this in
 (9) general that the harvests after the spill were above average
 (10) in 1990 and records in 1991 and 1992
 (11) Q Now Dr. Pearson the fact that we had record harvests in
 (12) '91 and '92 what does that tell you if anything about the
 (13) effects of the oil spill on herring in Prince William Sound?
 (14) A That any effects were not - did not occur at the
 (15) population level
 (16) Q When you say did not occur at the population level you
 (17) mean not a significant effect is that another way of putting
 (18) it?
 (19) A Not a significant effect on the herring population
 (20) Q I'd like to talk to you - well actually have you talk to
 (21) the jury about the different ways during 1989 that herring
 (22) could have been exposed to oil from the Exxon Valdez oil
 (23) spill
 (24) A Okay
 (25) Q How could it have occurred?

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- (1) A Well let's talk about three kinds of - of groups of
 (2) herring Could we get this guy back up here?
 (3) Q You bet This guy being 5239BB
 (4) A Okay the chart of the age structure - and you need to
 (5) understand a little bit about this because the routes by which
 (6) oil might have impacted the different groups of herring is
 (7) different
 (8) For the fish that were adults predominantly the '89 - '84
 (9) year class in 1989 and the fish this way on the chart you
 (10) have one kind of exposure The exposure would have been
 (11) generally through water column concentrations For the
 (12) juvenile fish those fish that are predominantly in the '88
 (13) year class that were one year old at the time of the spill
 (14) Again you're looking at a water column kind of - of - kind
 (15) of exposure But for the '89 year class which would be these
 (16) guys here you're looking - because they were eggs and larvae
 (17) at the time of the spill and particularly because they were
 (18) eggs just after the spill we have to examine a different route
 (19) by which they could have been exposed because one of the
 (20) things that we know from the previous work that we've done and
 (21) from the Canadian work is that intimate contact between the oil
 (22) and the eggs is what produces untoward effects in the larvae
 (23) that hatch out of those eggs And as I mentioned earlier the
 (24) eggs are deposited in the intertidal zone and the subtidal zone
 (25) in Prince William Sound so that at the time of the spill the

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- (1) concern was for the eggs in the - that were going to be
 (2) incubating in the intertidal and sub - shallow subtidal zone
 (3) of Prince William Sound
 (4) Q And that was one of the major focuses of your study wasn't
 (5) it?
 (6) A Yes it was
 (7) Q Let's get you untangled there so you've got a little
 (8) more - you're a little hung up There you go
 (9) Let's talk about that '89 year class for just a second
 (10) Dr. Kocan spent much of his testimony here in state court
 (11) talking about the '89 year class My question for you though
 (12) to start is Even if there ever - excuse me even if there
 (13) had never been an oil spill no oil spill at all in 1989 would
 (14) that '89 year class have ever turned out to be much of the
 (15) biomass in 1993?
 (16) A No Again the reason for that is the age structure of the
 (17) population and particularly the size of the dominant year
 (18) classes in comparison with the other year classes If you look
 (19) at the '84 year class and then look at the size of the year
 (20) class that - that was immediately after that I guess you see
 (21) the '85 year class you can see that it was never very high
 (22) compared to the '84 And that's generally the case that the
 (23) year class that follows the dominant year class is a small year
 (24) class And in fact this - if you go back further in the -
 (25) in the Fish and Game data and compare the - these over a

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- (1) number of - of instances of the emergence of the dominant year
 (2) class you see that generally the stronger the dominant year
 (3) class the less strong the year that follows
 (4) And so the 88 year class was the one that was expected to
 (5) be the dominant year class following the spill and to and
 (6) behold the 88 year class was so that the 89 year class was
 (7) never expected to be a dominant year class and it was never
 (8) expected to amount to much more than a few percent of the age
 (9) structure or the population in Prince William Sound So that
 (10) even if you lost the whole of the 89 year class you could not
 (11) have in any way explained the decline in 1993
 (12) Q Let me make sure I'm following you there The decline in
 (13) 1993 was roughly about 75 percent of the herring biomass?
 (14) A Yes from about 100 000 tons to something on the order of
 (15) 30 000 tons
 (16) Q And you're saying even if there had been no oil spill this
 (17) 89 class would only have been a few percent of the total
 (18) herring biomass out there in '93?
 (19) A Correct
 (20) Q When you say a few percent put a number on that if you
 (21) can or an estimate?
 (22) A The Fish and Game estimates for '93 were between two and
 (23) four percent depending if it was weight or numbers you were
 (24) talking about
 (25) Q So what you're saying even if that two to four percent had

- (1) exposed to oil from the Exxon Valdez?
 (2) A Yes we did
 (3) Q And what data did you look through for that? I think I've
 (4) got another chart here
 (5) A Okay yes
 (6) Q This is Defendants Exhibit 521488 Is that close enough
 (7) for everybody?
 (8) A The bottom line here is that the eggs were deposited along
 (9) about a hundred miles 98 4 miles of shoreline in Prince
 (10) William Sound in 1989 and that there's a very little overlap
 (11) between where the spawn was and where the oiling was in
 1989
 (12) The purple represents those areas where there was herring
 spawn
 (13) along the shoreline The magenta represents those areas
 where
 (14) there was shoreline oiling but no herring spawn And the
 (15) yellow represents those areas where there was both spawn and
 (16) oiling along the shoreline And as you can see there's areas
 (17) here to the north and to the northeast that received herring
 (18) spawn but no oiling
 (19) As you probably recall the tanker went aground somewhere
 (20) in this region here and the oil slick kind of came down this
 (21) way and a lot of heavy oiling occurred on this Knight Island
 (22) Green Island region but in 1989 there was no spawning in
 (23) these regions And in fact Knight Island hasn't received much
 (24) of spawning at all in the last decade
 (25) Q Now have - do you know if the Trustees Council has looked

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- (1) been totally wiped out in '89 it couldn't explain the missing
 (2) 75 percent in '93?
 (3) A That's correct
 (4) Q Now is it your opinion that the oil spill did wipe out
 (5) that 89 year class?
 (6) A No
 (7) Q Okay Well Dr Kocan essentially concluded that the oil
 (8) spill did have a significant effect on the 89 year class
 (9) Based on your research and work do you agree with that?
 (10) A The Fish and Game data's quite clear that the 89 year
 (11) class is returning as expected When I talked to Fritz Funk
 (12) who's the herring biologist for the State of Alaska who's doing
 (13) some more sophisticated modeling the 89 year class is
 (14) returning as expected and the 89 year class is performing in
 (15) proportion to what the 89 year class - the 89 year class in
 (16) Prince William Sound is performing in the same proportions as
 (17) it is in Sitka which is one of the fisheries they use to
 (18) compare with at least the herring fisheries that they compare
 (19) with Prince William Sound
 (20) Q Did you -
 (21) A So the evidence is the 89 year class is not affected
 (22) It's within normal expectation
 (23) Q Did you also look at the question of just how many of those
 (24) eggs and larvae back in 1989 the 89 year class that were out
 (25) there in Prince William Sound just how much of them were

- (1) at this same issue you know what percent of the spawn may
 (2) have been exposed to oil?
 (3) A When you take all of this data into account we came up
 (4) with about nine to ten percent overlap between the spawning
 (5) length of spawn along the shoreline and oil along the
 (6) shoreline Dr Spies chief scientist for the Trustee Council
 (7) did a similar kind of analysis and concluded that between five
 (8) and ten percent of the spawn along the shoreline had received
 (9) some kind of oiling I might point out too that these areas
 (10) where there was oiling were generally light to moderately
 (11) oiled not heavily oiled
 (12) Q So it's your conclusion that basically the 89 larvae and
 (13) herring the 89 year class weren't impacted based on what you
 (14) saw later on from the ADF&G data correct?
 (15) A They weren't impacted at the population level There is
 (16) indications from the study that I've done - that I did that
 (17) where in fact there was intimate contact between the oil and
 (18) the eggs there were untoward effects and that was limited
 (19) generally to this region here in Cabin Bay where we found
 (20) tarry deposits on the - on the fucus where the eggs were
 (21) This turned out to be highly - have high elevations of
 (22) petroleum hydrocarbons when we analyzed them in the
 laboratory
 (23) and that they had a lower percent development than - than that
 (24) that occurred elsewhere in the Sound
 (25) Q And that was just one of many locations that you examined

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- (1) correct?
- (2) A That s correct
- (3) Q And that was the only location we found that impacted like
- (4) this?
- (5) A That it was - where there was an impact related to the
- (6) hydrocarbons
- (7) Q So based on the ADF&G data your own survey and in fact
- (8) the oiling information that shows a 90 percent of the spawn
- (9) were never oiled it s your opinion that there was not a
- (10) population level impact on the 89 year class?
- (11) A That s correct
- (12) Q Okay you can retake the stand there I m going to put
- (13) these down so that people can see you Put them down for a
- (14) minute
- (15) Now before we move on to the juveniles I want to ask you
- (16) just a couple more questions if I could about those larvae
- (17) from 89 Have you had an opportunity to look at the exhibits
- (18) that Dr Kocan brought into the jury here in state court?
- (19) A Yes I have
- (20) Q And do you remember that he had some exhibits of
- (21) essentially herring larvae with various types of deformities?
- (22) A Yes sir
- (23) Q My question to you Dr Pearson is Do those types of
- (24) deformities occur naturally in herring larvae even when they
- (25) haven t been exposed to oil?

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- (1) A Yes they do The abnormalities occur under a number of
- (2) kinds of stressors and these kinds of morphological
- (3) abnormalities occur in response to a variety of stressors many
- (4) of which occur naturally such as low dissolved oxygen when the
- (5) eggs are deposited very very thickly Kind of the guys on the
- (6) bottom of the pile don t get enough oxygen and they can die or
- (7) show abnormalities when they hatch Very cold very warm
- (8) temperatures can do it high solar insulation when the tide
- (9) goes out and you have a long low tide in midday and sunny
- (10) weather you can induce abnormalities then too
- (11) Q Now is this issue of - it sounds weird to say natural
- (12) abnormalities or -
- (13) A Naturally occurring abnormalities
- (14) Q Naturally occurring abnormalities has this been well
- (15) researched and documented?
- (16) A Yes it has sir
- (17) Q Did you bring any examples of that research with you here
- (18) today?
- (19) A Yes we did
- (20) Q I think I have a bar coded version one of them for you
- (21) This is Defendants Exhibit 14036 Can you tell the jury what
- (22) this is showing them?
- (23) A Okay these are what are called scanning electron
- (24) micrographs where they ve taken the larvae and actually coated
- (25) them with gold and put them under a scanning electron

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- (1) microscope And I d like to call your attention to two
- (2) larvae
- (3) One this larvae up here that s contorted or has the
- (4) scoliosis that Dr Kocan talked about and another down here
- (5) that has a missing jaw or reduced jaw
- (6) Q Let me show you something here that you can do There s a
- (7) light pen and I think if you tap the color -
- (8) A Color?
- (9) Q Or else just use the pointer Yeah you got a pointer
- (10) there
- (11) A Yeah So this particular larvae has scoliosis You can
- (12) see the curve there And this particular larva - oops what
- (13) did I do?
- (14) Q I think we re really looking very closely at this
- (15) particular larva
- (16) A Well I won t - I ll be a little more gentle here This
- (17) particular larva has reduced - reduced jaws Both of these
- (18) kinds of abnormalities are common and in this particular case
- (19) these larvae came from a bay in British Columbia that did not
- (20) have any kind of oil spill or any kind of pollutant event going
- (21) on but where the larvae did - were exposed as eggs to high
- (22) temperatures during midday low tides that occurred during
- (23) honey - sunny hot weather
- (24) The larvae that were captured in that bay averaged about a
- (25) rate of about 25 percent were abnormal and in some cases

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- (1) were - up to 68 percent had this missing jaw kind of
- (2) abnormality
- (3) Q So these types of abnormalities happen in herring
- (4) generally huh?
- (5) A Yes sir You have to understand that - that it s a long
- (6) gauntlet from the egg stage to an adult And with a fish like
- (7) herring that spawn repeatedly and where the female may
- (8) produce
- (9) a hundred and fifty to two hundred thousand eggs over their
- (10) lifetime only two of those eggs turn into adults to keep the
- (11) population stable So the natural mortality is something on
- (12) the order of - I got to think this out - 99 9993 percent
- (13) Q Now did you review Dr Kocan s research where he put some
- (14) eggs and larvae in with some oil and mixed them up and then
- (15) was
- (16) observing deformities?
- (17) A Yes
- (18) Q And did Dr Kocan s own research show that these type of
- (19) abnormalities occur totally naturally in many instances?
- (20) A Well his - his rate of - in his controls the rate of
- (21) his abnormalities was on the order of 40 45 percent I
- (22) believe
- (23) Q And when you say in his controls you mean his tests that
- (24) didn t have any oil in them at all?
- (25) A That didn t have any oil associated with them at all
- (26) Q And did you also review his data and procedures for the
- (27) tests where he did use oil the ones where he mixed oil for the

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- (1) water?
- (2) A Yes he did controls with his treatments yes
- (3) Q And did you form any opinions as to why - for the ones
- (4) where he used the oil why there was an increase in the
- (5) abnormalities?
- (6) A Yes The - the oil in that case would increase the
- (7) frequency of the abnormalities See the abnormalities as I
- (8) mentioned are a general response to stress It could be low
- (9) oxygen could be other kinds of things There may be some
- (10) other things involved but they occur naturally And then when
- (11) you have another insult like a pollutant added on top of that
- (12) then you increase the frequency and sometimes the severity of
- (13) the abnormalities
- (14) Q Now these tests that Dr Kocan did in his lab did they
- (15) reflect the oiling conditions that you observed in your two and
- (16) a half months of studies in the field in Prince William Sound
- (17) in 1989?
- (18) A No they did not And that's not only the stuff that we
- (19) looked at but the stuff that Dr Neff looked at and that the
- (20) Trustees looked at The regime that Dr Kocan applied in his
- (21) laboratory work was different substantially different and more
- (22) severe than what happened in the field in 1989 He used fresh
- (23) oil
- (24) As you recall - or may recall the spill happened in
- (25) late - late March the 24th of March The beginning of

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- (1) spawning in the northwest corner of the - of the - of Prince
- (2) William Sound started in the first of April The bulk of the
- (3) spawning occurred in mid April so the weather was oiled (sic)
- (4) by the time it came up on the beaches where near where the
- (5) spawn was And he used it repeatedly in a static renewal assay
- (6) or bioassay He also used higher levels than that which were
- (7) found in the field
- (8) Q So if I understand what you're saying he used fresh oil
- (9) instead of weathered oil right?
- (10) A Right
- (11) Q He put more oil in there than you found out there in the
- (12) field?
- (13) A Correct
- (14) Q And he repeated it the dosages he did it more than once
- (15) he kept adding more in?
- (16) A Yes
- (17) Q Let's move on and talk about the juveniles now The next
- (18) type of herring that might have been impacted - I'm just
- (19) putting this one back on the screen to remind the jury that
- (20) we've got the three three basic year classes - the 89s which
- (21) are the eggs and the larvae correct?
- (22) A Correct
- (23) Q And the juveniles that was the 88 year class correct?
- (24) A Correct
- (25) Q Now based on the work you've done the data you've looked

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- (1) at is it your opinion that the juvenile herring suffered a
- (2) population level impact as a result of the Exxon Valdez oil
- (3) spill?
- (4) A No they didn't have an impact that was evidence at the
- (5) population level There's two reasons why I believe that
- (6) When you look at the Fish and Game data as I mentioned the
- (7) 88 year class emerged to be the dominant year class as
- (8) expected in 1990 - or started to emerge in '91 and then was
- (9) the dominant year class in 1992
- (10) The other is is that it was one of the strongest dominant
- (11) year classes in the data set from this evidence all the way
- (12) through recent time
- (13) Q Let's just remind the jury just how those 88 guys did
- (14) here Looking back to Defendants Exhibit 5239 can you -
- (15) using the pointer there if I hold this up for you - show the
- (16) jury - or is it easier if you come down?
- (17) A Essentially the 88 year class emerged as expected and
- (18) when you look these are the harvests and as you recall it's
- (19) related to the biomass levels And so if you took a percentage
- (20) here against the harvest or the biomass you come out with a
- (21) good number of fish in the 88 year class
- (22) Q So these juveniles were exposed up here in 1989 correct?
- (23) A Correct
- (24) Q But nevertheless they came back in the numbers?
- (25) A Correct but the reason they did that is that their

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- (1) exposure in 1989 because of where they were and the events
- (2) of
- (3) the spill was quite low And when you look at the water
- (4) quality data that Dr Neff discussed earlier in the trial here
- (5) and you look at the - the data from NOAA you find that the
- (6) water column concentrations of petroleum hydrocarbons was
- (7) on
- (8) the order of five ppb at most that it peaked in April and fell
- (9) exponentially after that to background concentrations and
- (10) beyond that in the Prince William Sound - and beyond
- (11) that there's some evidence that the bulk of the larvae - or
- (12) correction the bulk of the juveniles in Prince William Sound
- (13) actually spent a good part of their time growing up off of
- (14) Kenai
- (15) Q Oh really?
- (16) A Yes
- (17) Q Well I guess that leaves the adults for us to talk about
- (18) What happened if anything to the adult herring in Prince
- (19) William Sound in 1989?
- (20) A Again the 89 - 84 year class which was -
- (21) Q You want this exhibit again Dr Pearson?
- (22) A This one is kind of an important chart to our
- (23) understanding The 84 year class remained dominant There
- (24) wasn't any skewing of the age class distribution When you
- (25) look at the - at the movement of these from one year to the
- (26) next there was no indication that there was changes in the
- (27) natural mortality that would be reflective of some kind of

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- (1) impact on the 84 year class in the adult fish
 (2) Again the same reason why we don't see anything at the
 (3) population level for these fish is because their exposure was
 (4) low and not sufficient to cause impacts. You need several
 (5) hundred times the level of water column concentration that was
 (6) found in 1989 to pose a problem to adult and juvenile herring
 (7) Q One thing I just want to make clear too all of the data
 (8) set forth on this chart - which is again Exhibit 52398B -
 (9) where does it come from?
 (10) A Comes from Fish and Game reports
 (11) Q Alaska?
 (12) A Alaska Fish and Game reports
 (13) Q Thank you
 (14) A Alaska Department of Fish and Game reports give you the
 (15) full title
 (16) Q I won't hold you to that Doctor
 (17) All right let's sort of review where we are. You
 (18) testified that you didn't see a population level impact on the
 (19) eggs and the larvae?
 (20) A From the 89 year class that were 89 - that were eggs
 (21) and larvae at the time of the spill
 (22) Q You testified that the juveniles didn't get hurt or at
 (23) least population level impact again right?
 (24) A Right
 (25) Q And same thing for the adults?

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- (1) A Correct
 (2) Q Well if the oil spill didn't hurt the eggs the larvae
 (3) the juveniles or the adults what the heck happened to 75
 (4) percent of the biomass of the Prince William Sound herring in
 (5) 1993?
 (6) A I think that I have to preface that with a - with a
 (7) statement that nobody knows for sure and that's - I agree
 (8) with Fish and Game in that regard but I have to point out that
 (9) there are several things that have been happening in that
 (10) system for some time now and that I believe those kinds of
 (11) natural factors have contributed to the decline that we see
 (12) in - or saw in 1993
 (13) And I'd like to point out as I go through my explanation
 (14) here that the - I think the events that happened happened in
 (15) the 92 to 93 time frame to reduce the biomass and the
 (16) biomass just continued at that lower level moving from 1993 to
 (17) 94. There wasn't like a second hit in 1994
 (18) Q Why don't you review for the jury what these natural
 (19) factors are
 (20) A Okay
 (21) Q When you look at the biomass estimates in Prince William
 (22) Sound for Pacific herring you can see that they have been
 (23) going up for some time that moving from the 70s to the 80s
 (24) biomass almost doubled. Let me show you what's been
 (25) marked as Defendants Exhibit 8524?

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- (1) A Okay So in the - in the 70s you can see that the
 (2) biomass levels were on this - the order of 25 000 tons
 (3) Moving into the 80s they're bouncing around 50 000 tons
 (4) Moving into the late 80s they're up around 75 000 tons. And
 (5) then in 1992 they - they're up around oh a hundred and -
 (6) hundred and ten thousand tons. And the prediction for 1993
 (7) was
 (8) 134 000 tons. So the biomass has been going up in Prince
 (9) William Sound and that essentially leads one to suspect that
 (10) there's a density dependent response. Generally when you
 (11) have
 (12) a large biomass you could get - that means less food per
 (13) fish
 (14) Q What does exhibit - Defendants Exhibit 8525 show here?
 (15) A The other thing that's been going on in Prince William
 (16) Sound that hasn't been going on in some of the other areas of
 (17) Alaska with the herring fisheries is the release of pink salmon
 (18) fry. And this again has gone up exponentially over the same
 (19) years that we've been talking about. And in the late 80s and
 (20) 90s has come to the point where it's above five hundred
 (21) million half a billion half a billion fish per year
 (22) Q We've got Defendants Exhibit 5331. Can you tell the jury
 (23) what this shows?
 (24) A This is one of the pieces of evidence that's very
 (25) persuasive for me about some of the things that have been
 going
 (1) on and it shows the growth of the six year - six year old
 (2) seven year old herring in Prince William Sound in recent time

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- (1) Normally the herring gain weight from the fall fishery to
 (2) the spring bait fish - from the fall bait fishery to the
 (3) spring fisheries and starting about the midtime of the 80s
 (4) that - the amount of that gain has been decreasing each year
 (5) and in 1992 that decrease actually disappears and it became a
 (6) negative. It became a loss of weight in the 1992 and 1993
 (7) season
 (8) So there's evidence with the increasing biomass and that
 (9) this growth data - this is just one kind of growth data -
 (10) there's two or three other kinds we can look at that illustrate
 (11) the same point. There's some kind of indication that there's
 (12) been malnutrition problem going on in Prince William Sound
 (13) with
 (14) the herring and that that reached some kind of break point
 (15) perhaps in the - or change or flip flop in 1992 and 93
 (16) The other thing I should point out is that the zooplankton
 (17) studies that Dr. Cooney has been doing - he's with the
 (18) University of Alaska - he's a biological oceanographer with the
 (19) University of Alaska - and he's been studying zooplankton in
 (20) Prince William Sound for some time. His data also - although
 (21) it's limited I have to say but it's the only stuff we've got
 (22) but it indicates that with the exception of two years 1985 and
 (23) 1989 the zooplankton levels in Prince William Sound have been
 (24) falling from the 80s. So we've got the biomass going up
 (25) we've got indications that there's effects on the growth of the
 Pacific herring and we've got some indications that there may

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- (1) be issues having to do with the food supply some kind of
 (2) lowering of the food supply
 (3) Another factor is temperature and temperature has been
 (4) decreasing in recent years and the work of Dr Royer at the
 (5) University of Alaska who is a specialist physical
 (6) oceanographer that studies the Gulf of Alaska has - his work
 (7) has shown that there s an 18 6 year cycle to water temperature
 (8) in the Gulf of Alaska and that we ve entered the low point
 (9) the cold point the cold part of that cycle
 (10) Q Now this drop in the biomass in 1993 is sometimes referred
 (11) to as a fishery crash In your research and work over the
 (12) years have you studied fishery crashes throughout the world?
 (13) A Yes We took a look at - at 47 crashes or significant
 (14) declines of herring around the world Herring are one of the
 (15) fish that are noted for - for declines substantial declines
 (16) And in that case in that look see we found that about 70
 (17) percent of the declines noted around the world were associated
 (18) with some sort of overfishing 40 percent were associated with
 (19) some sort of change in food supply 38 or 40 percent were
 (20) associated with some sort of change in temperature We -
 (21) you ve noted that that adds up to over 100 percent and that s
 (22) because a lot of these factors actually occur together Very
 (23) often there is not one single factor that produces a decline
 (24) It s the lining up of several factors pointing in the same
 (25) direction of - all at once that can contribute to the decline

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- (1) Q How about right here in Alaska did the herring
 (2) populations biomasses here in Alaska fluctuate up and down
 (3) like this?
 (4) A Yes it does sir
 (5) Q Let me show you what s been marked Defendants
 (6) Exhibit 14041A and could you either using the pointer or
 (7) coming down to the Barco either way explain to the jury what
 (8) we ve got here?
 (9) A In this case we re looking at Sitka Sound and Togiak
 (10) which s in the Bristol Bay a ez Be ng Sea The Sitka Sound
 (11) fishery is about half - the Sitka Sound biomass is about half
 (12) that of Prince William Sound and Togiak is probably at least
 (13) twice the Prince William Sound biomass About a hundred and
 (14) -
 (15) so this is hundred percent in Togiak is about a hundred and
 (16) twenty - 250 000 tons and in Sitka it s on the order of
 (17) 63 000 tons I believe But and this - the graph shows you
 (18) the percentage of the maximum or peak biomass This is all
 (19) Fish and Game data and you can see that in Sitka in two years
 (20) there was a decline of about 60 percent This particular
 (21) decline by the way in Sitka happened before - started to
 (22) happen before the spill moving from 88 to 89 and then to 90
 (23) and was in fact associated with some of the growth things poor
 (24) weighted age that we described for Prince William Sound or
 (25) have seen in some of the data for Prince William Sound
 (26) Togiak you move from 250 000 tons down to something that

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- (1) was 30 percent of that in one year
 (2) Q And just to make it clear here there s been no oil spilled
 (3) down in Sitka over this period of time has there?
 (4) A That s correct This is natural fluctuation in the
 (5) population levels of herring in these two regions Nothing to
 (6) do with pollution in that at all
 (7) Q So could you summarize for the jury what your best opinion
 (8) as to what s happened to the herring population in Prince
 (9) William Sound in 1993?
 (10) A I think you ve got the lining up of several natural factors
 (11) that have - have produced malnutrition issues in the fish and
 (12) that may open them up to infection or expression of the
 (13) disease as well And that this is all natural things that are
 (14) going on and it has nothing to do with the Exxon Valdez oil
 (15) spill
 (16) MR CLOUGH No further questions
 (17) MR PETUMENOS Can we take a break Judge?
 (18) THE COURT Sure
 (19) THE CLERK Please rise This court stands in
 (20) recess
 (21) (Jury out at 10 32 A M)
 (22) (Recess from 10 32 a m to
 (23) (Jury in at 10 45 a m)
 (24) THE CLERK This court now resumes its session
 (25) Please be seated

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- (1) CROSS EXAMINATION OF WALT H PEARSON
 (2) BY MR PETUMENOS
 (3) Q Dr Pearson we were talking in the men s room at the
 (4) break Don t worry don t worry
 (5) THE COURT Who is we counsel?
 (6) MR STOLL You can come out Tim
 (7) BY MR PETUMENOS
 (8) Q And we were talking about Cape Cod and Nantucket Island
 (9) where I come from
 (10) A Right
 (11) Q And I have to tell you it s pleasant to hear somebody
 (12) speak correctly again
 (13) A I hear you Actually I got kidded about it my accent
 (14) years ago and tried to get rid of it but it just didn t work
 (15) it came back
 (16) Q If I keep talking to you for long enough mine s going to
 (17) come back too
 (18) A Good enough
 (19) Q Now you know I think you said at the end of your
 (20) examination that some of the things that you think were a
 (21) substantial factor in causing this crash - and is crash a
 (22) fair term?
 (23) A Crash decline collapse
 (24) Q - in 1993 was malnutrition?
 (25) A There s evidence that there were nutritional problems

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- (1) yeah based on the weight weight data
 (2) Q And one of the things that can cause malnutrition is
 (3) overpopulation?
 (4) A You get very high population levels the more food – the
 (5) more fish you have essentially the less food per fish given a
 (6) steady food supply and if the – if the food supply is going
 (7) down then even more – even less food per fish
 (8) Q Now you agree don't you that the oil spill was a
 (9) substantial factor in causing there to be no fish harvests of
 (10) any appreciable amount of herring in 1989 is that right?
 (11) A About 18 percent of the – of the biomass was not harvested
 (12) in 1989
 (13) Q And that was because of the oil spill?
 (14) A Correct fisheries closure because of the oil spill
 (15) Q There were other predators of herring in 1989 that were
 (16) killed because of the oil spill weren't there?
 (17) A In some marine mammals and some marine birds prey on
 (18) herring yes and those populations suffered some impact or
 (19) mortality because of the spill yes They're not the only
 (20) predators however
 (21) Q Now as I understand where we are here these graphics that
 (22) you did today by the way were they prepared by Exxon?
 (23) A Yes based on Fish and Game data or data out of our
 (24) studies There's a graphics department that – that Exxon has
 (25) that – and I work with them and review the graphics

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- (1) Q We also talked about the – well isn't it a fact that the
 (2) herring which feed feed in and around the microlayer of the
 (3) sea?
 (4) A Not all the time They can feed there but herring as
 (5) adults – the biggest problem that a herring has the instant
 (6) he hatches out and for the rest of his life is to eat without
 (7) being eaten And one of the behaviors that herring have
 (8) evolved to do that is vertical migration so that during the
 (9) day they hang low in the water column sometimes just off the
 (10) bottom and vertically migrate at dusk and dawn
 (11) Q We had a Native fisherman Mr Gordaoff who testified that
 (12) they come to the surface to feed in the evening Does that
 (13) comport with your understanding too?
 (14) A They come to the surface waters and depending on where
 (15) food is
 (16) Q And the microlayer is at the surface?
 (17) A Correct It's the very top part of the ocean
 (18) Q And the microlayer is a place where pollutants gather in
 (19) concentrations many times that of the rest of the water column
 (20) is that right?
 (21) A That's correct
 (22) Q Now I want to ask you about what herring feed on What do
 (23) herring eat in the course of their lives?
 (24) A Generally copepods but also some euphausiids They're
 (25) eating in the zooplankton both as juveniles both as larvae

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- (1) juveniles and adults The bigger you get the bigger your food
 (2) but when you're an adult you're feeding on adult copepods
 (3) generally and euphausiids
 (4) Q Now the work that Exxon has done in connection with the
 (5) abundance of the zooplankton following the spill was around
 (6) the
 (7) AFK Hatchery?
 (8) A That kind of work was actually done by Dr Cooney in terms
 (9) of his monitoring of the zooplankton levels at the different
 (10) hatcheries or regions outside the hatcheries
 (11) Q The AFK Hatchery is not an area where herring spawn is
 (12) it?
 (13) A No it isn't It's – but it's an area that is in the
 (14) southern part of the Sound maybe representative particularly
 (15) at the spot where they took that data may be representative of
 (16) the pelagic areas in the Sound where the herring feed
 (17) Q Well can – Exxon did no other work with respect to
 (18) zooplankton abundance did it following the spill?
 (19) A No it didn't Though I believe there's also some Fish and
 (20) Game data that indicates that there wasn't any effect on the
 (21) zooplankton in 1989
 (22) Q Let me talk to you about what Exxon did can I?
 (23) A Okay
 (24) Q All right My question is Did Exxon do any research or
 (25) studies on the abundance of zooplankton following the Exxon
 Valdez oil spill?

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- (1) A Not that I'm aware of
 (2) Q Now as I understand it from your testimony before this
 (3) litigation had you done some work for Exxon in the American
 (4) Petroleum Institute before?
 (5) A Before the Exxon Valdez spill?
 (6) Q Yes
 (7) A Yes sir
 (8) Q And your initial report in this litigation which was
 (9) presented to the Plaintiffs was reviewed by Exxon first?
 (10) A Not first Everything that goes out of my –
 (11) Q No before the Plaintiffs got it
 (12) A – out of Battelle has an internal review including an
 (13) editor a manager and a peer reviewed scientist
 (14) Q No no before the Plaintiffs got it –
 (15) A Yes
 (16) Q – Exxon reviewed it first?
 (17) A The client always gets a review on all our projects
 (18) Q And it was internally reviewed by a fellow named Mr Al
 (19) Maki?
 (20) A Internally means within Battelle no
 (21) Q Well after it came out of Battelle Mr Al Maki looked at
 (22) it?
 (23) A Yes
 (24) Q And who is Mr Maki?
 (25) A He's a scientist that works for Exxon

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- (1) Q Mr. Konkel reviewed it?
- (2) A I don't know if Mr. Konkel reviewed it
- (3) Q Mr. Milton (phonetic) reviewed it?
- (4) A I don't know whether Mr. - Dr. Konkel or Dr. Milton
- (5) reviewed the ASTM paper. The person I dealt with on the ASTM
- (6) paper was Dr. Maki
- (7) Q A technical representative from Exxon?
- (8) A Yes
- (9) Q And at the time of your deposition in '93 speaking of
- (10) Battelle the bulk of your funding about 80 percent of it had
- (11) been in connection with the Exxon Valdez oil spill was that
- (12) right?
- (13) A In the first three - three or so years of the study
- (14) yeah
- (15) Q About 80 percent?
- (16) A That's about right
- (17) Q And you had some - a few people working outside of
- (18) Battelle but at one time you had as many as 60 people more or
- (19) less working on this project?
- (20) A Yes At the time of that deposition that was the kind of
- (21) figure I gave off the top of my head. We went back and looked
- (22) tried to calculate it and remember everybody who worked on the
- (23) project and came up with something more like 80
- (24) Q And this was funded by Exxon?
- (25) A Correct

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- (1) Q Now was there a larval study that was started in May but
- (2) that was not pursued because of the gear that you were using to
- (3) collect larvae or something like that?
- (4) A That's correct
- (5) Q And you would have liked to have had more information than
- (6) you had about the larvae wouldn't you?
- (7) A A scientist always wants more information and more data
- (8) Q Okay And one of the reasons that you would have liked to
- (9) have had more information on the larvae because it would have
- (10) been helpful to know where they were located late in the
- (11) season in 1989 right?
- (12) A That's correct
- (13) Q There is -
- (14) A They disappear from the gear from both the Trustees
- (15) studies and our studies sometime in June and July
- (16) Q There is a serious lack of information about where
- (17) juveniles hang out in Prince William Sound juvenile herring
- (18) would you agree?
- (19) A We don't know definitively that's correct
- (20) Q Now the juveniles that we're talking about are this 1988
- (21) class that you mentioned when you were going through all
- (22) these
- (23) charts -
- (24) A Correct
- (25) Q - and graphs and this was going to be the next dominant
- (26) class for the herring population and the ones that were hatched

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- (1) in 1988 right?
- (2) A Correct
- (3) Q So their location during the oil spill when all the oil
- (4) came down where they were in 1989 is something that would
- (5) have been - well something you would have liked to have had
- (6) a
- (7) lot more data on than you had?
- (8) A Yes and there is some data that Fish and Game collected in
- (9) July of '89
- (10) Q And as I understand what you know about that at this
- (11) point - could we have the Prince William Sound map on the
- (12) Barco - the location of juveniles in 1989 is in - I
- (13) understand it's not quite completely known but what people do
- (14) think based upon what they've looked into is that a lot of them
- (15) are in the southwest section of the Sound?
- (16) A That's based on data that comes from the '20s and '30s
- (17) during the reduction fishery when a good deal of the fishing
- (18) which included fishing - in the reduction era they were after
- (19) not just the adult fish but the juveniles as well. They
- (20) wanted any fish they could get. And in those years they did a
- (21) lot of fishing in the southern part here in this - in this
- (22) region and our suppositions about where the juveniles are
- (23) come from that set of data which is you know something on
- (24) the order of 50 years old now
- (25) Q Right And I thought I heard you say in your direct
- (26) examination -

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- (1) MR. CLOUGH Excuse me I'm not sure Dr. Pearson was
- (2) finished with his response. Were you? Were you done
- (3) Dr. Pearson?
- (4) A I could continue with the data that was taken in '89 if
- (5) you want
- (6) MR. PETUMENOS I'm going to ask you you'll get your
- (7) opportunity because I was just going to ask you about that
- (8) BY MR. PETUMENOS
- (9) Q The data that was taken in 1989 they did control fishery
- (10) testing didn't they?
- (11) A Yes in the Kenai region in July of 1989
- (12) Q And one of the things they found was they found a lot of
- (13) the juvenile herring in the southwest side still and they
- (14) found some more outside of the Kenai Peninsula?
- (15) A They found about sixty two or sixty five thousand tons of
- (16) juvenile herring in the Kenai region
- (17) Q When you mean the Kenai region - could we have the
- (18) next -
- (19) A Well it would kind of be -
- (20) Q We'll get it for you. They also found some in southwest
- (21) Prince William Sound though right?
- (22) A That I don't recall from Mr. Cooney's report
- (23) Q Is this the area you're talking about here?
- (24) A Yes from Seward down to - on the south south side here
- (25) so this region

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- (1) Q Now when we asked you the question about the southwestern
- (2) area of the Sound in another proceeding counsel 6456 line 2
- (3) of the federal trial proceedings you were asked this question
- (4) you gave this answer
- (5) And did Dr Norcross find that most of the larval herring
- (6) that were taken in the trawls were taken primarily from the
- (7) oiled areas in the southwest area of the Sound
- (8) Your answer was I believe that's correct
- (9) A Yes but you've switched life stages on me from juvenile
- (10) to -
- (11) Q From larval to - okay good point The larval trawls
- (12) then also established that the larvae were hanging out in the
- (13) southwest section of the Sound?
- (14) A Yes but I think some of her trawls go like south of Naked
- (15) Island so they were a little bit further north than - than
- (16) the areas you're talking about
- (17) Q Okay let's get the Prince William Sound map up again
- (18) Just so the jury remembers have I got Naked Island right
- (19) there?
- (20) A Yes
- (21) Q And we're talking about the area south of Naked Island?
- (22) A Correct
- (23) Q Now There's no question in your mind but that was the area
- (24) through which the oil flowed is there?
- (25) A It flowed through that area in the last part of March or

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- (1) the early part of April There were no larvae in the water
- (2) column in April because they were all eggs at that time and
- (3) Norcross found none when she did her trawls or her tows I
- (4) should say
- (5) Q The other thing I wanted to ask you is You were talking
- (6) about the overlays of where the herring spawn and the ten
- (7) percent figure that you came up with and you were talking
- (8) about the relationship to oiled beaches Do you remember that
- (9) testimony?
- (10) A Correct
- (11) Q Now the source of your data for that - well first of
- (12) all herring spawn and fertilize their eggs in the intertidal
- (13) and subtidal zones is that right?
- (14) A That's correct shallow subtidal
- (15) Q Right And the data that you put on the chart was oiled
- (16) beaches right?
- (17) A Plus where Fish and Game had observed and verified that
- (18) there was spawn along those beaches
- (19) Q Correct You correlated oil on beaches to Fish and Game
- (20) spawn locations?
- (21) A Yes
- (22) Q The source of the oiled beaches data were they SCAT
- (23) maps?
- (24) A They were essentially severing that we could find from both
- (25) the Trustees and the Exxon studies in both 1989 and 90 So
- (26) if we saw some oiling in 90 that wasn't reported in 89 we

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- (1) added that to the - to the pot as it were
- (2) Q SCAT maps from 89 and then whatever surveys were done
- (3) in
- (4) 90 was the source of your data?
- (5) A Yes
- (6) Q All right And so if there were oil slicks that went
- (7) offshore and into the ocean area but weren't mapped as having
- (8) come ashore you didn't include that information?
- (9) A For - for that map that I showed?
- (10) Q Right
- (11) A No
- (12) Q And you know that there were areas where the oil came by
- (13) the beaches in the form of a slick and didn't come ashore in
- (14) the subtidal zone?
- (15) A Or didn't come ashore on the intertidal?
- (16) Q Right
- (17) A Yes But most of that happened in the - in late March and
- (18) early April The bulk of the slick had moved out the bulk of
- (19) the slick had moved out of the - either had - well about 30
- (20) percent of the oil had evaporated in the first few weeks and
- (21) about 30 - about 25 percent of the rest of the oil had moved
- (22) out of the Sound by the first week in April and then -
- (23) Q Well let me ask you -
- (24) A And then the spawning started
- (25) Q Let me ask you that
- (26) MR CLOUGH Excuse me Your Honor he clearly did

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- (1) interrupt the witness
- (2) MR PETUMENOS I'm sorry were you done Doctor?
- (3) A I kind of lost the train of thought there
- (4) THE COURT Try not to step on his last words I
- (5) don't think you interrupted him there counsel
- (6) MR PETUMENOS I apologize if I did I certainly
- (7) didn't mean to
- (8) A What I was trying to speak to there sir was the kind of
- (9) scenario that I believe you're trying to talk about here was
- (10) something that I believe would have been more prominent at
- (11) the
- (12) time that the spawn was on the beaches
- (13) BY MR PETUMENOS
- (14) Q I understand your point but let me ask you this - maybe
- (15) you don't know tell me if you do - was there in 1989 in the
- (16) opening weeks of the spill substantial reoiling of beaches and
- (17) new beaches oiled as the - as the tides and waters pulled oil
- (18) off of beaches and back into the water?
- (19) A The movement of oil from off the beach and down the beach
- (20) and that kind of thing?
- (21) Q Yes
- (22) A I believe that's the case in the earlier days yes
- (23) Q Yes And the fact that the slick went by and down the
- (24) southwest side we know that oil was stranded on the beaches
- (25) and came back into the water after that date?
- (26) A Yes

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- (1) Q Okay Now the other thing I wanted to ask you about is we
 (2) talked a little bit about Dr Kocan's work I think you
 (3) quarrel with the fact don't you that Dr Kocan reinstituted
 (4) oil into the mix of the water from time to time - wait I
 (5) wanted to back up to one more point I forgot something I'll
 (6) come back to this in a minute
 (7) Did you watch the Rosenthal video by chance at any point
 (8) in your work?
 (9) A I believe the Rosenthal video is the video that was shown
 (10) to me in federal during my federal testimony
 (11) Q Where is Herring Bay?
 (12) A Herring Bay is on Knight Island
 (13) Q Let me see if I get it right How about right in here
 (14) somewhere?
 (15) A Maybe a hair north but I think that's about right
 (16) Q Okay Is Herring Bay on your list of places where herring
 (17) spawn in 1989?
 (18) A There was - there was no spawning in Herring Bay in 1989
 (19) Q Really? In the - in the photographs and underwater video
 (20) of - of Mr Rosenthal did you see them looking at spawn in
 (21) the video?
 (22) A Yes
 (23) Q All right And do you know why they call it Herring Bay?
 (24) A I assume that in the days of the reduction fishery there
 (25) was some herring there

- (1) A Yes
 (2) Q Yes And fish move around too don't they?
 (3) A Yes they do sir
 (4) Q And so they go from place to place and they can go from oil
 (5) slick to oil slick can't they?
 (6) A Anything's possible
 (7) Q Have you done any specific analysis with respect to the
 (8) food chain effects or accumulation from food chain effects
 (9) other than looking at literature?
 (10) A No sir
 (11) Q No field studies on that by Exxon?
 (12) A No
 (13) Q No?
 (14) A There's some - some accumulation chemistry that we did on
 (15) adult herring in 1989 but not specifically related to food
 (16) chain issues
 (17) Q Herring we know bioaccumulate hydrocarbons?
 (18) A Bioaccumulation process in herring includes uptake
 (19) metabolism and expiration yes
 (20) Q And the Trustees found that the fish that were hanging
 (21) around the intertidal zone were bioaccumulating hydrocarbons
 (22) am I right by examining the bile of the fish?
 (23) A That's the case with some of the fish but not all of the
 (24) fish Yes species of fish But I think in the case of
 (25) herring they don't have biodata or that the biodata didn't

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- (1) Q Now I was going to talk to you a bit more about the notion
 (2) of reinstituting oil over time and you said that the - you
 (3) didn't like the way that Dr Kocan did his work in the
 (4) laboratory Incidentally did Exxon take any samples from 1989
 (5) and put it into a laboratory and conduct any tests on the
 (6) samples that you took from herring in 1989 to take a look at
 (7) how hydrocarbons affected those samples at any time?
 (8) A You mean -
 (9) Q Exxon now
 (10) A - an experimental exposure in the laboratory?
 (11) Q Yes sir
 (12) A No we did not That kind of work was done as part of the
 (13) API studies in the eggs
 (14) Q Well for 1989 using 1989 samples
 (15) A No
 (16) Q Exxon did not do any laboratory work did they on that
 (17) topic?
 (18) A Not an experimental exposure to oil
 (19) Q So not in the concentrations that they would have preferred
 (20) to have they didn't do anything?
 (21) A No we don't
 (22) Q And Dr Kocan from time to time put additional oil into the
 (23) environment the laboratory environment and isn't it true that
 (24) the oil in Prince William Sound moved around for a period of
 (25) time?

- (1) indicate uptake
 (2) Q Well you're aware of research conducted by Dr Rice and
 (3) research conducted by Dr Kocan on events of exposure to
 (4) herring on hydrocarbons in varying amounts over varying
 (5) periods
 (6) of time that research was done?
 (7) A I don't believe that Dr Rice did the work with Dr Kocan
 (8) but Dr Rice has done work on a number of issues related to oil
 (9) in herring
 (10) Q And that's - API's the American Petroleum Institute?
 (11) A That's correct
 (12) Q The American Petroleum Institute study that was done ten
 (13) years ago other than that you didn't do any similar work in
 (14) 1989 did you?
 (15) A No I did not repeat the API study in '89
 (16) Q And I'd like to know about whether or not the microlayer
 (17) that we talked about here was there any quantification studies
 (18) done of the microlayer and how many pollutants the microlayer
 (19) in a quantified way accumulated as a result of the Exxon
 (20) Valdez oil spill that Exxon did?
 (21) A There was some study done on sheens and the prevalence of
 (22) sheens
 (23) Q No I'm talking about quantifying the microlayer the
 (24) pollutants in the microlayer not sheens?
 (25) MR CLOUGH Your Honor excuse me I believe the
 (26) witness was interrupted this time He was literally in

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- (1) midstride
 (2) THE COURT Let's start again counsel I'll be
 (3) watching it counsel don't step on his words anymore
 (4) MR PETUMENOS Okay
 (5) BY MR PETUMENOS
 (6) Q The quantification of pollutants in the microlayer
 (7) following the Exxon Valdez oil spill was that ever done by
 (8) Exxon?
 (9) A There was some - from my understanding there was some
 (10) sampling of sheens which would be one component of the
 (11) microlayer when there was visible oil there that was done and
 (12) that there was some quantification of the levels there but I
 (13) can't recall any other ones
 (14) Q That wasn't done in 1989 was it?
 (15) A That was I think started in the fall of '89 and extended
 (16) through the '90 winter of '89 and '90
 (17) Q The sheen sampling surveys that were done by Exxon were
 (18) done after the clean up program was terminated?
 (19) A I believe that's correct but I don't know for sure
 (20) Q Mr Taft might know a bit more about that
 (21) A I'm sure I'm sure that he knows more
 (22) Q You're not aware of any - you didn't consider any
 (23) quantified data from those sheen surveys did you numbers of
 (24) pollutants in the sheens?
 (25) A No

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- (1) Q Now you talked about the work that was done in the water
 (2) column It's clear that when oil comes in contact with eggs in
 (3) herring some bad things can happen to the herring right?
 (4) A That's correct
 (5) Q So when herring spawn is oiled comes in contact with the
 (6) oil it is often the case as the tide comes in the clean
 (7) water can come in over the top of that - those eggs am I
 (8) right?
 (9) A Yes
 (10) Q And so studying the water column is not going to tell you
 (11) very much about what's happening to the eggs and the
 (12) embryos
 (13) that have been touched with oil if that's the case?
 (14) A That can be the case It speaks to the water column
 (15) exposure One of the reasons that our study included sub
 (16) sampling of the eggs and sending of those sub samples to the
 (17) laboratory was to get at such issues
 (18) In the field we examined the eggs for visible signs of tar
 (19) and films on them before they were shipped to the laboratory
 (20) They were examined again in the laboratory for such things and
 (21) sub samples were taken and sent to the chemistry lab to
 (22) measure
 (23) the amount of hydrocarbons that were in the eggs on kelp
 (24) samples
 (25) And we did find tarry deposits in the field in one
 (26) location and brown films in - on the eggs in other locations
 (27) Q And then the other thing I wanted to ask you is Dr Kocan

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- (1) did some work on chromosomal damage and you know that he
 (2) did
 (3) that?
 (4) A Anaphase aberrations yes
 (5) Q Exxon did not do any work on chromosomal aberrations in
 (6) herring as a result of the oil spill did they?
 (7) A No they did not
 (8) Q And the other thing I wanted to perhaps remind the jury of
 (9) when Dr Kocan testified did you say you were here or read his
 (10) testimony?
 (11) A I did not hear - I was not here when he testified in this
 (12) court
 (13) Q But you read his testimony?
 (14) A But I read his testimony
 (15) Q And you understand that he does not dispute - an area
 (16) where you and he agree is you - is he does not dispute that
 (17) there are lots of larvae or - and embryos that are deformed as
 (18) a natural consequence of the species and he said that in his
 (19) direct examination you saw that?
 (20) A I believe so yes
 (21) Q Right And nature with respect to herring the way it
 (22) handles this it puts out a huge number of potential little
 (23) fish?
 (24) A Right
 (25) Q And a large number of them aren't going to make it because
 (26) they're going to be deformed There's a lot of them that don't

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- (1) even start out right But what Dr Kocan studied would you
 (2) agree was whether or not the presence of hydrocarbons
 (3) increases that level or ratio of aberrant fish in a control
 (4) environment versus his laboratory environment that's what he
 (5) was looking at?
 (6) A His laboratory study was a - was an experimental study to
 (7) get at the dose that would be required to produce an increase
 (8) in that frequency yes
 (9) Q Yes And so what he was looking at was the amount of
 (10) aberrant little fish more than you'd find in the absence of
 (11) hydrocarbons that was the purpose of his work?
 (12) A Yes The problem though is his exposure regime and how
 (13) that relates to what happened in the field
 (14) Q Yes I understand you disagree with that The other thing
 (15) that happened was that people went into the field and looked at
 (16) the same sorts of things from the Trustees am I right?
 (17) A Yes that's correct
 (18) Q And one of the things that Dr Kocan did is he compared
 (19) those ratios that were coming in from the field with what he
 (20) was seeing in the laboratory?
 (21) A Yes
 (22) Q And Exxon didn't do anything like that because you didn't
 (23) do any laboratory studies like that?
 (24) A That's correct There is the stuff from the API thing that
 (25) can help us there

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- (1) Q You were content with the American Petroleum Institute's
 (2) study of ten years ago to rely on that instead of doing any
 (3) additional studies?
 (4) A I'm not sure that any scientist is 100 percent content but
 (5) it was adequate to the task yes
 (6) Q And do you agree with him that in the levels that he put
 (7) into this laboratory study - and he showed the jury how that
 (8) matched or related to what they found in the field - do you
 (9) agree with him that the levels he was dealing in you couldn't
 (10) see the oil in the water?
 (11) A For his lowest levels?
 (12) Q For the levels at which he began to see differences
 (13) A Visible?
 (14) Q Yes
 (15) A That's possible But I also have a disagreement with him
 (16) about the extent of droplets in his treatment regime too
 (17) Q My question is Could you see it?
 (18) A I don't know for sure But -
 (19) Q Now there were samples taken from Prince William Sound
 (20) that showed that there were - there was hepatic necrosis in
 (21) herring in oiled areas of Prince William Sound?
 (22) A They had hepatic necrosis in both controlled and oiled
 (23) areas but they had moderate to severe necrosis in some of the
 (24) oiled areas -
 (25) Q And moderate to severe necrosis what we're talking about

- (1) Q You know a -
 (2) A I simply confirmed that with him
 (3) Q You know a person who is a - works with ADF&G who studies
 (4) herring named Evelyn Biggs Brown?
 (5) A Yes sir
 (6) Q And you know that she disagrees with you in concluding that
 (7) the spill did not affect or cause the 1993 or 1994 crashes?
 (8) A She has caveated that in recent time but I think she still
 (9) has some disagreement with me on that yes
 (10) Q And some other researchers fellow named - or some people
 (11) named Moles and Mr Rice again have concluded that at
 (12) certain
 (13) levels of oil exposure herring have more parasites and the
 (14) parasites that they have move to other parts of their body?
 (15) A I don't recall about the more parasites but Dr Moles -
 (16) Dr Moles' stuff from exposure experiment indicated that there
 (17) was a shift in the parasites from the mesentery to the muscle
 (18) tissue in herring at very high levels of oiling
 (19) Q And in your own 1989 field research you found that some of
 (20) the herring larvae had swollen pericardial abnormalities in the
 (21) oiled areas?
 (22) A We're switching to the larvae again now?
 (23) Q Yes
 (24) A Swollen pericardials were found in Prince William Sound in
 (25) both 1989 and '90 They were also found in Sitka in 1990 at
 approximately the same rates as they were in Prince William

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- (1) here is -
 (2) A Livers
 (3) Q - lesions on fish livers?
 (4) A Yes
 (5) Q And -
 (6) A That was 20 percent of the - a small sample size
 (7) Q And there was also an increased mortality of herring in
 (8) oiled areas that was the result of field surveys by the
 (9) Trustees am I right?
 (10) A Say that again sir
 (11) Q There was an increased rate of mortality of herring in the
 (12) oiled areas that were studied by the Trustees in 1989?
 (13) A Are you speaking of adult herring?
 (14) Q I think I am yes
 (15) A The - if you're referring to the - to the quote in
 (16) Dr Marty's report about that that was an estimate based on
 (17) his experience as a histopathologist I asked him specifically
 (18) whether that was a measured thing or derived from - from a
 (19) laboratory experiment and he told me that was not the case it
 (20) was his estimate that there would be a ten percent increase in
 (21) mortality as a result of that kind of frequency of hepatic
 (22) necrosis
 (23) Q This is a conversation you say you had with him as opposed
 (24) to what he wrote down in his report?
 (25) A In his report you can see that it's an estimate

- (1) Sound
 (2) Q Now it's interesting because this particular kind of
 (3) abnormality the swollen pericardial abnormality had
 (4) theretofore only been seen under chemical exposure in a
 (5) laboratory or in an oil spill situation isn't that right?
 (6) A That's correct And one of the reasons I wanted - this is
 (7) an example of some of the freedom I got from - and backing I
 (8) got from Exxon on this
 (9) One of the reasons I wanted to go to Sitka was that I
 (10) wanted to find out for sure whether there was a background
 (11) level a natural occurring background level for this particular
 (12) abnormality and so at their considerable expense we did go to
 (13) Sitka in the 1990 and when you look at the return the data
 (14) from 1990 you find that for combining for the reference areas
 (15) in Prince William Sound the oiled areas in Prince William
 (16) Sound and Sitka the level of that abnormality is around 7
 (17) percent almost identical in all those areas
 (18) Q So the freedom that you got from Exxon was to go out and
 (19) look for things that would refute the notion that this oil
 (20) spill had something to do with the swollen -
 (21) A Well it could have gone either way It could have - if
 (22) it had come back zero from Sitka okay I would have had a
 (23) much
 (24) different conclusion about those abnormalities and I would be
 (25) saying different things here today
 Q You said that 40 percent of the oil that came out of the

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- (1) Exxon - well I think I've already asked you that I think
 (2) I'll move on
 (3) Do I understand that part of the reason that you think that
 (4) perhaps this 1993 crash happened is because we had severe
 (5) winters?
 (6) A That could be a contributing factor yes
 (7) Q You talked to Mr. Gilfillan or Mr. Page about severe
 (8) winters?
 (9) A Not specifically no
 (10) Q Have you heard before that severe winters have been
 (11) compared to oil spills in prior litigation involving oil
 (12) spills?
 (13) MR CLOUGH Objection Your Honor
 (14) THE COURT I can't understand the question counsel
 (15) BY MR PETUMENOS
 (16) Q Well have you heard that oil companies have defended
 (17) themselves in oil spill cases by pointing to severe winters in
 (18) other oil spills?
 (19) MR CLOUGH Objection Your Honor argumentative
 (20) facts not in evidence
 (21) THE COURT Sustained don't -
 (22) A I -
 (23) THE COURT Don't answer the question The question
 (24) is sustained The jury is to disregard the question
 (25) MR PETUMENOS I have no further questions

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- (1) MR CLOUGH I do
 (2) REDIRECT EXAMINATION OF WALT H PEARSON
 (3) BY MR CLOUGH
 (4) Q All right Dr. Pearson we're going to clear up a few
 (5) implications that have been raised here in the last half hour
 (6) So first of all at least it seemed to me Mr. Petumenos very
 (7) clearly implied that your conclusions -
 (8) MR PETUMENOS Judge Judge
 (9) THE COURT Objection sustained Ask questions
 (10) counsel
 (11) MR CLOUGH I will do that Your Honor Thank you
 (12) BY MR CLOUGH
 (13) Q Did you at any point from the first day you worked on this
 (14) project up and through the present time 11/26 in the morning
 (15) have you ever altered a single finding or conclusion that you
 (16) have done this study at the request of Exxon or anybody else?
 (17) A No We speak out of the data
 (18) Q In your entire professional career -
 (19) A And the literature
 (20) Q In your entire professional career have you been asked by a
 (21) client to change a conclusion?
 (22) A Once
 (23) Q Who did it?
 (24) A EPA
 (25) Q What happened when they did that what did you tell them?

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- (1) A I did put a small caveat in but the conclusion couldn't be
 (2) changed because the data didn't allow that to happen and the
 (3) report stood
 (4) Q And if Exxon had come and told you change your
 (5) conclusions what would you have told them?
 (6) A I couldn't do it unless the data required that kind of
 (7) thing
 (8) Q That's Battelle policy isn't it?
 (9) A That's correct
 (10) Q That's why it's a nonprofit organization
 (11) A I don't know about that part but -
 (12) Q But that's why it's out there to do fair and unbiased
 (13) multidisciplinary scientific research?
 (14) A We work for - 80 percent of our work is for the federal -
 (15) is with the government about 20 percent overall with
 (16) industry We do a lot of work on contentious matters We have
 (17) to be straight or we don't get further work
 (18) Q I'm going to set up the easel here and probably ask you
 (19) just to come on down because I'm going to be referring to this
 (20) exhibit -
 (21) MR CLOUGH With your permission Your Honor I'm
 (22) going to block you off again - through the course of a lot of
 (23) the redirect here
 (24) BY MR CLOUGH
 (25) Q Now I just want to clarify again a couple other things

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- (1) here You were asked about - and I do not have the right
 (2) words here but - some type of chromosome study Dr. Kocan
 (3) did
 (4) right?
 (5) A Yes
 (6) Q Wasn't that of the '89 year class?
 (7) A The study that he looked at was of the '89 - there were
 (8) two studies One that he did in the laboratory after the
 (9) spill okay and that would have been like the '91 or '92 year
 (10) class the eggs that came in '91 or '92 and then he looked at
 (11) another study that was actually done by another investigator
 (12) Dr. McGurk and that study was done in 1989 with eggs that
 (13) came
 (14) from Prince William Sound and I'm not clear which one
 (15) you're -
 (16) Q Well let me put it this way His studies were of eggs and
 (17) larvae right Dr. Kocan's studies?
 (18) A Eggs yes
 (19) Q Eggs And the eggs that were exposed - if we're going to
 (20) use that word - that were out there in 1989 the year of the
 (21) oil spill were the 1989 year class?
 (22) A That's correct
 (23) Q And the two things we know about the 1989 year class is no
 (24) matter what if they had been wiped off the face of the earth
 (25) they still couldn't have been responsible for a 75 percent drop
 in the biomass in 1993 is that right?
 MR PETUMENOS Judge that's a bit leading I think

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- (1) THE COURT Yes counsel that is leading It s
 (2) true Let s stay away from the leading questions
 (3) MR CLOUGH I m trying to move along I ll -
 (4) THE COURT Don t try to move it along counsel
 (5) Don t lead
 (6) MR CLOUGH I respect that Your Honor I won t
 (7) lead
 (8) BY MR CLOUGH
 (9) Q Can any drop in the 1989 year class explain the drop in the
 (10) biomass in 1993?
 (11) A No
 (12) Q Why not?
 (13) A Because the 89 year class was never expected to be a
 (14) substantial part of the biomass As you can see here it s
 (15) down on the order of two four or five percent Even if it had
 (16) been totally wiped out never appeared at all you re still
 (17) only talking about a five percent change in the biomass and
 (18) that s substantially different than the decline we saw from
 (19) 100 000 ton to 30 000 ton
 (20) Q Okay I d like you to step over here by the Barco for just
 (21) a second
 (22) You were asked whether you had done a lab study about
 (23) exposure to eggs remember that?
 (24) A Yes -
 (25) Q And you didn t do a lab study did you?

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- (1) A An experimental lab study no Experimental exposure
 (2) study no
 (3) Q What you did is you went out in the field and studied
 (4) actually in the field in Prince William Sound didn t you?
 (5) A Yes And we brought eggs back from the field and incubated
 (6) them in the laboratory
 (7) Q I d like to show you what s been marked Defendants Exhibit
 (8) 5197 and ask you to tell the jury about your field study What
 (9) does this show us?
 (10) A Okay What we did in 1989 and 90 was to go out in Prince
 (11) William Sound into a number of areas In 90 we also included
 (12) Sitka and took samples of the eggs on kelp along transects
 (13) We took it at different depths or different tidal heights some
 (14) from the intertidal some from the subtidal in Prince William
 (15) Sound Brought the eggs back - we examined in the field as I
 (16) mentioned earlier for signs of oil on the eggs packaged them
 (17) up brought them back to the laboratory incubated them in
 (18) continuous flow conditions in a laboratory in a special
 (19) incubation chamber that allowed us to capture the larvae when
 (20) they hatched and looked at the condition of the larvae We
 (21) looked at the egg density as well and the development of the
 (22) eggs when they came into the laboratory to how many had
 (23) been
 (24) fertilized and undergone some development
 (25) So these are a series of what we call endpoints biological
 endpoints or biological indicators about - and there are

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- (1) different aspects about the health or status of the larvae
 (2) The first case we re looking at the percent developed or the
 (3) percent hatched and later These deal with the condition of
 (4) the larvae that hatch out And we also had taken subsamples
 (5) and shipped those to the laboratory so we had measures of the
 (6) hydrocarbon content in the eggs on kelp samples so that we
 (7) had
 (8) these endpoints tightly coupled to the hydrocarbon content in
 (9) the eggs on kelp
 (10) We then used a statistical procedure called regression to
 (11) test whether there was any relationship between the amount of
 (12) development or what have you and the hydrocarbon content
 (13) And as you can see here our results show that only in a
 (14) limited case at Cabin Bay where we saw these effects on -
 (15) where we had the tarry deposits that - did we see an untoward
 (16) effect
 (17) In 1990 we repeated that including the Sitka data and
 (18) again we saw no relationship between the biological endpoint
 (19) and the amount of hydrocarbons in the eggs on kelp sample
 (20) Q And this is a field study conducted actually out there in
 (21) Prince William Sound in 89 and 90?
 (22) A Yes
 (23) Q Now did Dr Kocan do a field study?
 (24) A In 1989 and 90?
 (25) Q Right
 A No he did not

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- (1) Q His was a laboratory study right?
 (2) A That s correct and it was done later
 (3) Q Now you had testified earlier about the exposure levels of
 (4) oil that Dr Kocan -
 (5) A He did do a field study in 91 I believe
 (6) Q I d like to talk to you now about his lab study though
 (7) Remember you testified about the oil exposure levels that he
 (8) used I d like to show you what s been marked as Defendants
 (9) Exhibit 8983 and could you tell the jury what this shows about
 (10) the levels of oil exposure that Dr Kocan used in his
 (11) laboratory experiment?
 (12) A Yes This shows the - or characterizes the exposure
 (13) regime in his laboratory study He took an oil and water
 (14) mixture and shook it up and let it separate in a separatory
 (15) funnel drew off the water from below and then every - and
 (16) that became his stock solution and he diluted that out into
 (17) different concentrations This particular graph represents his
 (18) lowest exposure concentration which he characterized as 10
 (19) ppb
 (20) or about 9 4 I think 9 7 ppb
 (21) Q And how do these compare to the actual exposure levels you
 (22) found in your fieldwork?
 (23) A In the fieldwork in the water column exposures we re
 (24) seeing something at 5 ppb at the highest at the peak so -
 (25) whatever I did with this -
 Q Here I -

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- (1) A Okay so we'd have to draw a line here and below and
 (2) that's where the water column concentrations were in Prince
 (3) William Sound in 1989
 (4) And then in 1990 they're kind of down a line along the
 (5) bottom there
 (6) Q Wouldn't even be able to see them on the chart really?
 (7) A Well it would be along the zero line
 (8) Q Okay Now you were also asked on cross examination
 about
 (9) the fact that there wasn't a harvest in 1989 and how that might
 (10) have contributed to population density do you remember those
 (11) questions from Mr. Petumenos?
 (12) A Yes
 (13) Q Have you looked at the issue about whether the foregoing of
 (14) the harvest in 1989 what effect that might have had on the
 (15) biomass?
 (16) A Yes we have
 (17) Q I'd like to show you what's been marked Defendants Exhibit
 (18) 8521 Could you explain to the jury what this shows and the
 (19) conclusions you've drawn on this issue?
 (20) A Okay This is the estimate of the biomass in Prince
 (21) William Sound in 1989 and the yellow here represents the
 (22) amount of harvest that was foregone in 1989 And as you
 (23) recall the '84 year class was the dominant year class and it
 (24) had almost fully recruited to the fishery at that point and so
 (25) what happens is that as natural mortality increases or -

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- (1) actually doesn't increase but runs its course the amount of
 (2) fish that arrive from that closure actually becomes a much
 (3) smaller percentage
 (4) The other thing that's happening is that the biomass was
 (5) increasing so there were kind of two things that were going on
 (6) at the same time And when you get to 1992 which was the -
 (7) where the biomass was projected at oh I guess 120 000 tons
 (8) and came in at about a hundred and eight or a hundred and
 (9) nine
 (10) thousand tons you see that the amount of biomass of herring
 (11) that could be attributed to this closure is just a sliver of
 (12) the total amount
 (13) Q Next I'd like to turn your attention back to the chart
 (14) Dr. Pearson DX5239BB You were asked a bunch of questions
 at
 (15) different times on cross examination about various things on
 (16) larvae and eggs The larvae and eggs in Prince William Sound
 (17) the year of the oil spill would have been the 1989 year class?
 (18) A Correct
 (19) Q Could you show us again with the chart what the ADF&G
 data
 (20) shows happened to them when they grew up?
 (21) A The '89 year class?
 (22) Q Right
 (23) A That's this year class right here which is representing
 (24) something on the order of two to four percent of the biomass in
 (25) Prince William Sound
 (26) Q And they were never expected to represent any more than

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- (1) that were they?
 (2) A Certainly no more than five percent
 (3) Q And according to the ADF&G data did the '89 year class
 (4) grow up into about the percentage expected?
 (5) A Yes Yes It - the '89 year class is performing within
 (6) ex - is performing within expectation
 (7) Q You were also asked a lot of questions about juveniles do
 (8) you remember that on cross examination?
 (9) A Right
 (10) Q I believe on direct you mentioned something about the fact
 (11) that juveniles hang out in Kenai or at least there's some
 (12) evidence of that?
 (13) A Yes
 (14) Q What - tell the jury what you know about that
 (15) A There's a couple things We should back up a little bit to
 (16) the mid '80s when the Fish and Game people in the district
 (17) the Lower Cook Inlet District which includes those two
 (18) subdistricts that are called the Outer and Eastern District -
 (19) do we have a map of Kenai again? Could I - could I borrow -
 (20) Q Let me see what I can drum up for you here
 (21) A The Lower Cook Inlet Herring District includes this portion
 (22) of Alaska as well as two subdistricts called the Outer and
 (23) Eastern Subdistrict that are along the Kenai south side of the
 (24) Kenai Peninsula And the remarks I'm speaking about refer to
 (25) these two districts not the Kamchatka Subdistrict which is

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- (1) kind of around the corner here
 (2) And what they observed in the mid '80s was that there were
 (3) a lot more juvenile fish in this region than - than led to the
 (4) amount of spawning that occurred there They also made a
 (5) notation that when they saw a lot of these juvenile fish It
 (6) was just before there was a big year class in Prince William
 (7) Sound So they hypothesized then that the juvenile fish were
 (8) hanging out here particularly the ones that become strong year
 (9) classes and then moved into Prince William Sound when they
 (10) reached sexual maturity at age three and four
 (11) What happened in 1989 was that they did a specific survey
 (12) in these - these different fjord systems and at six places
 (13) along there they did test sampling They found between '89 -
 (14) between 98 up to 100 percent of the fish they were seeing there
 (15) were one year old and two - one year old fish And they
 (16) estimated the tonnage at something like - either sixty two or
 (17) sixty five thousand ton I can't remember the exact number
 (18) but in that - it was 30 some odd in one and 30 some odd in the
 (19) other district
 (20) When you look at that number of fish and you take - apply
 (21) the mortality schedule which is 68 percent of the fish survive
 (22) from one year to the next that's the number that Fish and Game
 (23) now uses and you have to - you have to back calculate you
 (24) know how many fish there were based on the tonnage of
 course
 (25) but you get a number of fish you apply the tonnage and you

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- (1) come up with something on the order of about a million - a
 (2) billion and a half fish which is about the amount of fish that
 (3) Fish and Game indicates were recruited into the Prince William
 (4) Sound fishery as three year old fish
 (5) Q Let's look at that data because I think that's back -
 (6) excuse me back on the other chart
 (7) A Well you won't have it all quite here because that
 (8) statistic comes from Dr Funk's model of the herring herring
 (9) in Prince William Sound
 (10) Q What does this chart though show us?
 (11) A This shows us the harvest which is related to the biomass
 (12) but essentially we're talking about these fish here
 (13) Q And they also came back in the size and percentage that
 (14) were expected?
 (15) A Yeah The point is is that they're a strong year class
 (16) the 88 year class is a strong year class
 (17) Q And finally again the adults the adults that were
 (18) swimming around in Prince William Sound in 1989 which year
 (19) class were they?
 (20) A Essentially they were dominated by the 84 year class You
 (21) can see no skewing of the age structure and they hung on
 (22) actually a bit longer than other spawning year classes
 (23) MR CLOUGH No further questions Your Honor
 (24) THE COURT Thank you counsel
 (25) MR PETUMENOS I just have a few Judge

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- (1) THE COURT Should he stay down there or -
 (2) MR PETUMENOS No he can take the stand I think
 (3) THE COURT You can go back to the stand sir
 (4) MR PETUMENOS Can everybody see the witness through
 (5) what we've got there?
 (6) THE COURT Can you all see him? Good
 (7) MR PETUMENOS Do you want to take your notes
 (8) counsel? I can't read them anyway but -
 (9) MR CLOUGH That's two of us
 (10) RE-CROSS EXAMINATION OF WALT H PEARSON
 (11) BY MR PETUMENOS
 (12) Q Mr Clough made the point that Dr Kocan didn't do field
 (13) studies until - what date did you - you corrected yourself
 (14) and you said -
 (15) A I believe that he did his first field study in 1991
 (16) Q Right But - but to tell the complete story Dr Kocan
 (17) was specifically hired to look in the laboratory at issues that
 (18) were raised by field studies that had been done by the Trustees
 (19) in 1989?
 (20) A I'm not sure whether that's - I'm not - I suspect that's
 (21) part of the story but I don't know for sure what his
 (22) engagement was
 (23) MR CLOUGH Excuse me objection foundation
 (24) THE COURT I think the objection just went out the
 (25) window counsel I'll allow the answer to stand

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- (1) BY MR PETUMENOS
 (2) Q When you read Dr Kocan's testimony did you get the
 (3) exhibits in front of you too or did you just read the
 (4) testimony?
 (5) A I think I read the testimony I was - I think I looked at
 (6) some of the exhibits yes but I'm not sure I had the exhibits
 (7) at the same time I was reading the testimony
 (8) Q Okay maybe then that makes the question difficult for you
 (9) but when you were talking here a moment ago on redirect on
 (10) the amount of oil that he put into his laboratory studies did you
 (11) ever bother to take a look at the graphs that were created from
 (12) what was observed in the field in 1989 and then compare it to
 (13) the laboratory work that Dr Kocan did to see how they matched
 (14) up?
 (15) A I'm not sure exactly what - what you're talking about
 (16) here but one of the issues is that the levels that he's - he
 (17) only talks about 10 ppb in his study there and -
 (18) Q I understand -
 (19) A And he's actually got a lot more hydrocarbon in there than
 (20) he's reporting
 (21) Q I understand but let me just ask you again maybe you
 (22) don't know the answer
 (23) A I'm not -
 (24) Q Did you take a look at the graphs of the information that
 (25) was recovered from the field by the Trustees in 1989 and

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- (1) compare it to the lab work that was done by Dr Kocan to see
 (2) how well they matched up?
 (3) A Well I guess it escapes me so -
 (4) Q All right One final thing you have cited to ADF&G a
 (5) bunch of times and I wanted to ask you on this year class
 (6) business - counsel Defendants Exhibit 9247 - have you read
 (7) a draft report by ADF&G dated June 8 1994 entitled the Exxon
 (8) Valdez oil spill and Pacific herring in Prince William Sound a
 (9) summary of injury from 1989 to 1994?
 (10) A Could I see the cover page?
 (11) Q You sure may By Evelyn Brown and Timothy Baker and
 (12) some folks?
 (13) A A host of others yes
 (14) Q You've read that?
 (15) And counsel at Page 33 they write one indisputable
 (16) difference between these two populations is the Exxon Valdez
 (17) oil spill The relationship between oil exposure in 1989 and
 (18) 19 - and 1990 and effects in 1993 and 1994 cannot be
 (19) scientifically tested However the strength of the evidence
 (20) for causality can be weighed using a set of criteria similar to
 (21) those used in epidemiology and the Fox 1991 study is cited
 (22) The chronological relationship between exposure to the Exxon
 (23) Valdez oil and the fishery collapse is consistent with the
 (24) population dynamics of Prince William Sound herring The
 (25) most toxicologically sensitive life stage embryological in the

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- (1) 1989 year class is suspected to have sustained the greatest
- (2) exposure to the Exxon Valdez oil This year class was not
- (3) studied until 1993 when decreased abundance of all year
- (4) classes was observed
- (5) All year classes were small at age -
- (6) MR CLOUGH Excuse me Mr Petumenos This has been
- (7) a relatively lengthy reading by counsel with no questions
- (8) whatsoever
- (9) MR PETUMENOS I m reading the entire paragraph and
- (10) I ll stop
- (11) THE COURT How much lengthier is it going to be?
- (12) MR PETUMENOS Paragraph has another sentence
- (13) THE COURT Finish the sentence
- (14) MR PETUMENOS All year classes were small in 1993
- (15) and 1994 indicating pre existing stress In 1993 the year
- (16) class was further excluded in the spawn population when the
- (17) VHS
- (18) episodic reduced reproduction and lower numbers were
- (19) observed
- (20) in all year classes
- (21) Do you agree with the statement of ADF&G written in 1994?
- (22) MR CLOUGH Oh Your Honor that is a
- (23) misrepresentation of the document That as I understand it
- (24) is a draft of the report by ADF&G
- (25) THE COURT Yes revise the question It s a draft
- (26) It s a draft study right?
- (27) MR PETUMENOS It s a draft report as I said and it

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- (1) is written by Evelyn Brown ADF&G Timothy Baker ADF&G
- (2) Fritz
- (3) Funk ADF&G -
- (4) THE COURT Counsel the only issue is is it a draft
- (5) or final product?
- (6) MR PETUMENOS It s a draft
- (7) THE COURT So with that as a predicate you can
- (8) answer the question
- (9) MR CLOUGH I have another objection however Your
- (10) Honor It s a very lengthy paragraph quite a few different
- (11) sentences quite a few different points He s asking him
- (12) whether - without having it in front of him whether he agrees
- (13) with the entirety of the two minute reading
- (14) THE COURT Do you have any other objection before I
- (15) rule?
- (16) MR CLOUGH No that was the only other one
- (17) THE COURT Can you answer the question? If you need
- (18) a copy of it you can read it
- (19) A I respectfully submit that I may agree with some of the
- (20) paragraph but I m sure I don t agree with all of it so we d
- (21) have to go back through it kind of line by line
- (22) MR PETUMENOS I m not going to take the time to do
- (23) that Judge I am finished with this examination
- (24) THE COURT You can step down sir Thanks very
- (25) much Watch the microphone
- (26) THE COURT Counsel that s it for the day right?

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- (1) MR DIAMOND Well Your Honor my colleagues had
- (2) anointed me the deposition reader of the day but I can t bring
- (3) myself to do that at ten minutes to 12 00 on the last day of
- (4) the week so we ll hold it for another day
- (5) MR STOLL Your Honor we do have that tape that we
- (6) had that was put off and since we re finished early we can
- (7) finish that in ten minutes
- (8) THE COURT We ll do that on Monday I m going to let
- (9) you go and I don t want you to talk to anybody about the case
- (10) and not to form or express any opinion on it until it s
- (11) submitted to you for deliberation
- (12) I have a couple of things counsel August - counsel you
- (13) got to listen to me now August 29th is the first day of
- (14) school And there s at least one juror here who needs to
- (15) rendezvous with school authorities early in the morning so
- (16) I - I have told her and whoever else is involved in that kind
- (17) of an occurrence that I won t start at 8 30 We re going to
- (18) start at 10 00 on Monday If that causes some scheduling
- (19) problems you can tell me about it after I let the jury go and
- (20) we ll figure out solutions to the problems
- (21) MR PETUMENOS I m relieved Judge I have a similar
- (22) rendezvous myself
- (23) MR DIAMOND Are we going to pick up the time later?
- (24) THE COURT Probably if we have to I certainly
- (25) don t want the trial to be prolonged because I took an hour and

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- (1) a half out of the trial day so I ll figure something out
- (2) The second thing is of course the Labor Day is the
- (3) following Monday and some - one of you or more of you have
- (4) asked is Labor Day a time we d be in session The answer is
- (5) no it s a holiday and I will not keep you here for a
- (6) holiday So I don t know what stage this trial will be in or
- (7) whether it will be your deliberations but it s not my
- (8) intention to have you in session on Labor Day okay?
- (9) Now you can go and come in on Monday at 10 00
- (10) (Jury out at 11 52 a m)
- (11) THE COURT Okay the jury is not present Yes?
- (12) MR DIAMOND Your Honor on scheduling matters we
- (13) served the Plaintiffs with notice yesterday afternoon of our
- (14) intention to rest on Wednesday of next week We have cut a
- (15) number of witnesses that we were planning on using on the
- (16) theory that enough - enough is enough
- (17) That has -
- (18) THE COURT That s a conclusion that I deeply
- (19) appreciate
- (20) MR DIAMOND That s precipitated some differences of
- (21) opinions in terms of some procedural matters that we didn t
- (22) anticipate having to deal with as soon as we are and some of
- (23) it arose last night in response to the - the notice that we
- (24) served One concerns service of the witness witness list and
- (25) exhibit list Plaintiffs intend to use in connection with

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- (1) rebuttal if any and Mr Oppenheimer s prepared to address
 (2) that
 (3) THE COURT Sure
 (4) MR DIAMOND We also need to advance to your
 (5) attention today hopefully an immaterial pending dispute with
 (6) respect to deposition excerpts of three Coast Guard Admirals
 (7) that are a part of our lineup We need to get closure on that
 (8) because they re videotaped depositions and we need to get
 the
 (9) final cut done so we can play them
 (10) THE COURT Can we do that between 8 30 and 10 00 on
 (11) Monday?
 (12) MR DIAMOND We could do it then or now It s not a
 (13) major issue
 (14) THE COURT It s not?
 (15) MR PETUMENOS I m not sure I m prepared to address
 (16) the Admiral issue
 (17) THE COURT Just give me a general description of the
 (18) issue
 (19) MS SMITH Your Honor the - it s actually a
 (20) federal/state jurisdictional dispute we need you to resolve
 (21) The videotapes are what we call the Admirals It s the federal
 (22) on scene coordinators They have - designations and cross
 (23) designations of these depositions were done We have a letter
 (24) which - I brought everything but we have a letter that where
 (25) we give our we set forth the agreement as to what we re going

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- (1) to use the other side comes back and counter designates
 we re
 (2) all in agreement the package is done And since it s video
 (3) it all gets cut into and edited into the final
 (4) In phase three of the federal Exxon wanted to use the
 (5) Admirals and the - the federal Plaintiffs did not want Exxon
 (6) to use the Admirals They ended up going to Master Ruskin
 and
 (7) in addition Judge Holland got involved in the dispute Master
 (8) Ruskin decided that the admi a s wou'd ge used in phase three
 (9) and have already gone on through video but he did - he did
 (10) limit the testimony in certain regards
 (11) The State Plaintiffs now came back to us with a letter last
 (12) night There were some conversations earlier in the week
 (13) saying that they want us to be bound by the federal
 (14) determination that certain things can t be used here Our
 (15) contention is simple One we had a deal and it seems to me
 (16) that in this case it s hard enough to get a deal We have a
 (17) deal we have it in writing
 (18) THE COURT You mean you had a deal that applied to
 (19) this case?
 (20) MS SMITH Yes this would be ours and this would be
 (21) their counters and everyone agreed as to the endproduct And
 (22) this was before the federal brouha And number two that the
 (23) considerations in the phase three federal case are quite
 (24) different for a whole host of reasons than what s going on in
 (25) this case

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- (1) And so somehow this Court and this case and these parties
 (2) should not be bound by the decision as to what stayed in or out
 (3) of the Admirals presentation in phase three of the federal
 (4) case so we would like to stick by the agreement that s already
 (5) been made between the parties and not have to recut this and
 (6) relitigate it
 (7) If we do have to relitigate it it s a - it s a big
 (8) brouha It probably can t be done on Monday because it s got
 (9) to be recut And in our experience - and I m sure people
 (10) would agree - you open up one thing a little bit and we re off
 (11) and running
 (12) THE COURT What s the subject matter of the
 (13) testimony?
 (14) MS SMITH The subject matter of their testimony is
 (15) the cleanup the standard used by the federal government of
 who
 (16) was in charge the degree of oiling on the shorelines the
 (17) persistence the reasons the cleanup terminated and the
 (18) standards that the Federal On Scene Coordinator applied and
 (19) also the input by the Native Corporations the fishermen the
 (20) Alaska Department of Fish and Game ADEC et cetera
 (21) THE COURT The versions that you have that you want
 (22) to use how long are they?
 (23) MS SMITH There s three Admirals who succeeded to
 (24) the post One s about - about a half hour - this is both
 (25) sides stuff - half hour half hour and maybe 15 minutes

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- (1) THE COURT That s for the three?
 (2) MS SMITH Yeah
 (3) THE COURT Okay Counsel do -
 (4) MR PETUMENOS Judge I am totally unprepared on this
 (5) issue I didn t know it was coming up today I don t know
 (6) there s a few things that counsel said that sound right to me
 (7) That is the issues in phase three are different than the issues
 (8) here I don t know whether or not in the designating and
 (9) counterdesignating whether we have made a deal as she says
 (10) need to work on it I m happy to work on it but -
 (11) THE COURT Who wrote the letter?
 (12) MS SMITH I ve got the letter
 (13) THE COURT Who wrote it?
 (14) MS SMITH We wrote the letter and -
 (15) THE COURT Who wrote the response though?
 (16) MS SMITH Philip Griffin wrote a - Philip Griffin
 (17) wrote the - I ll give it I have it for both of you and it s
 (18) just very quick It just says this memorializes our resolution
 (19) and he writes back with the counters he s supposed to write
 (20) back with
 (21) I ll give one to you too
 (22) MR PETUMENOS Thank you
 (23) THE COURT I was talking about the letter that gave
 (24) objection to the finished version that changed the rules
 (25) MS SMITH It s the one that s caused the dispute?

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- (1) THE COURT Yes I just want to know who signed it
 (2) MS SMITH Mr Fields Alan Fields
 (3) THE COURT I understand your position counsel and
 (4) here s - I ll just give you the guidelines One if a deal
 (5) was made the deal gets adhered to Two the federal
 (6) proceedings are different than these proceedings so I - I m
 (7) going to rule on this question independently
 (8) MR PETUMENOS Sure
 (9) THE COURT Three if it s a horrendous problem to
 (10) recut this tape - I don t think it is but if it is a
 (11) horrendous problem or even a substantial problem you should
 (12) be
 (12) putting your efforts elsewhere all of you And four if this
 (13) testimony is relevant and it sounds like it is it s unlikely
 (14) that I ll cull it out Okay?
 (15) MR PETUMENOS We ll take a look Judge
 (16) MR OPPENHEIMER Your Honor we have one other issue
 (17) I think which is that pursuant to PTO 40 there s a procedure
 (18) whereby -
 (19) MR PETUMENOS Can I take this down Judge
 (20) THE COURT Yeah it s a good idea I haven t been
 (21) able to see you for about an hour
 (22) MR OPPENHEIMER We give notice of the time by which
 (23) we expect to finish our case in chief which we did yesterday
 (24) designating Wednesday of next week and 48 hours from that
 (25) time PTO provides that the identity and sequence of witnesses

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- (1) for rebuttal is supposed to be provided to us Mr Stoll and I
 (2) have -
 (3) THE COURT -8 hours
 (4) MR OPPENHEIMER 48 hours Mr Stoll and I have had
 (5) a colloquy that - of the many we ve had that I do understand
 (6) I don t understand this one and I m drawn back to the Court s
 (7) ruling early on in this case on a matter where you told the
 (8) story of a Judge who was dealt a statutory construction issue
 (9) and his response was counsel there s 16 words in the statute
 (10) which one of them don t you unde stand And I wou'd
 (11) respectfully suggest that that s exactly what we have here If
 (12) Your Honor would like I have PTO 40 and provision marked
 (13) THE COURT Sure
 (14) MR OPPENHEIMER At the tab
 (15) THE COURT Thanks
 (16) MR OPPENHEIMER The only other issue that has been
 (17) raised I hesitate to characterize it this way but it appears
 (18) to go to the good faith of our trial estimate and I - I hope
 (19) that this argument doesn t turn on that point because our
 (20) estimate and our delivery of notice was not taken lightly and
 (21) frankly we had a fairly long internal conference yesterday
 (22) where we took into account the sorts of things people do at
 (23) this stage in a trial polled where we thought we were and what
 (24) we thought we wanted to accomplish made some hard cuts
 (25) here
 (25) and there and tried to be mindful of the fact that this jury s

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- (1) been sitting here a long time and we don t think it frankly
 (2) does our case any good to go a second past what we need to to
 (3) make our point
 (4) So the delivery of our notice yesterday was every bit in
 (5) good faith and represented our collective trial team judgment
 (6) as to our ability to finish our case in chief on Wednesday and
 (7) with that as a premise I think PTO 40 is very clear that we
 (8) should be given the data in 48 hours
 (9) THE COURT You mean on the weekend as opposed -
 (10) MR OPPENHEIMER Oh yes But of course that s not
 (11) an unusual phenomena in terms of deadlines in this case
 (12) We re
 (12) constantly delivering things to each other
 (13) THE COURT When did you deliver the notice?
 (14) MR OPPENHEIMER It was delivered yesterday
 (15) THE COURT What time?
 (16) MR STOLL 6 00 p m
 (17) MR OPPENHEIMER At 6 00 p m
 (18) THE COURT Six o clock on the 25th right?
 (19) MR OPPENHEIMER I m sorry
 (20) THE COURT Six o clock on the 25th right so your
 (21) deadline would be six o clock on the 27th
 (22) MR OPPENHEIMER Correct Your Honor
 (23) THE COURT Mr Stoll?
 (24) MR STOLL I m not sure there s a problem here quite
 (25) honestly

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- (1) THE COURT Tell me there isn t and I ll believe you
 (2) MR STOLL I don t know there isn t that s the
 (3) problem But I advised - first of all I don t question them
 (4) acting in good faith There s never been an issue about that
 (5) The issue is that what I advised them last night was we did not
 (6) anticipate that they were going to be able to finish by
 (7) Wednesday and frankly we thought they were going to go
 (8) through the end of next week We yesterday afternoon started
 (9) working on our rebuttal - well we had some ideas sort of
 (10) amorphous but we started working on that We did not know
 (11) when we got the notice we weren t able to contact people that
 (12) we thought were the likely witnesses that we would call on
 (13) rebuttal
 (14) What we propose to do is we will make every effort to give
 (15) them our rebuttal list tomorrow and what we would propose to
 (16) do though is that there may be some people that we can t
 (17) reach either today or - you know because it s the weekend we
 (18) may not be able to reach till Monday Those that we can t
 (19) we d be willing to live with a limit up to five that we can t
 (20) reach tomorrow we would give them those up to five names
 (21) on
 (21) Monday And with those we would give them the - you know
 (22) we
 (22) would give the exhibits That would give them three - the
 (23) soonest we would put on any witnesses is Thursday under this
 (24) regime That would give them three days time
 (25) We will - I can tell you as an officer of the Court we

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- (1) will do every effort to advise them on Thursday and I might
 (2) say that when they moved up this witness earlier this week
 (3) Dr Brannon and I thought there might be a problem we
 (4) provided them with all of the exhibits and everything by the
 (5) seven o'clock time that they requested I mean we did that
 (6) even though we had time until 11 00 at night we didn't utilize
 (7) that So we would do the same thing in this - in this
 (8) scenario
 (9) I don't think that it's really an issue about whether -
 (10) what the reading is of PTO 40 We felt that PTO 40 meant that
 (11) five days maybe we're wrong maybe we're right I don't know
 (12) but five trial days we would get five trial days notice
 (13) before we would have to give the 48 hours notice
 (14) But be that as it may what we will try to do - and I
 (15) think we'll be able to succeed quite frankly - is give them
 (16) all of our rebuttal witnesses Saturday
 (17) THE COURT Saturday by six o'clock
 (18) MR STOLL Yes I don't think that's going to be a
 (19) problem but I just - as soon as they told us last night I
 (20) advised them because they sent me a cover letter saying now
 (21) you've got to give us this by six o'clock Saturday night
 (22) essentially And I said I don't know whether we can or not
 (23) because I've been in court today Maybe everybody's
 (24) contacted
 (25) and we have no problem but I just - I'm just acting -
 (26) THE COURT Okay thank you

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- (1) MR PETUMENOS Judge one further point is we have
 (2) Monday's witnesses served from our discussion before
 (3) yesterday but Tuesday's and Wednesday's witnesses we don't
 (4) have yet
 (5) THE COURT Sure right that's true Go ahead
 (6) Mr Oppenheimer
 (7) MR OPPENHEIMER Your Honor Mr Diamond earlier in
 (8) the week or at the end of last week - I can't remember the
 (9) exact chronology - but prior long prior to today indicated
 (10) to the Court we were going to try to finish by Wednesday
 (11) THE COURT Well I don't know about anything prior
 (12) MR OPPENHEIMER Certainly before yesterday
 (13) THE COURT Before today
 (14) MR OPPENHEIMER Before today before yesterday
 (15) MR STOLL I don't question that
 (16) MR OPPENHEIMER Okay I guess what I hear here
 (17) Your Honor -
 (18) THE COURT Counsel I'm going to propose a solution
 (19) MR OPPENHEIMER Then I'll stand quietly and listen
 (20) THE COURT Then you can argue
 (21) MR OPPENHEIMER Okay
 (22) THE COURT First you have to comply with the
 (23) pretrial order so you have to file the list by six o'clock on
 (24) Saturday Second there may be extenuating circumstances
 (25) and
 (26) I don't want to have to consider them because I don't know what

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- (1) they are now But you know who you - you know the short list
 (2) of people that you want to call It's only a question of
 (3) whether or not you contact them So list them List them as
 (4) witnesses and then tell them on Monday if you're going to take
 (5) them off the list
 (6) MR STOLL Okay
 (7) MR OPPENHEIMER Your Honor I assume that the
 (8) recommended solution is not otherwise a modification of PTO
 (9) 40
 (10) because there's an exhibit requirement too
 (11) THE COURT Yes but - yes that's true and to the
 (12) extent that you can't file the exhibits you have to give them
 (13) a written detailed reason why you can't file the exhibits and
 (14) then I'll take it up on Monday which I don't want to do so
 (15) don't bring it to me
 (16) MR PETUMENOS Judge on the issue of bellyaching and
 (17) staying out of sanctions land I have a number of objections
 (18) to the Mundy proof
 (19) THE COURT Okay
 (20) MR PETUMENOS That were related to the Thursday
 (21) afternoon filing Do you want to address those now or do you
 (22) want to address those on Monday?
 (23) THE COURT A number?
 (24) MR PETUMENOS Yeah I'm afraid
 (25) THE COURT A number above 50?
 (26) MR PETUMENOS No it's not but the witness

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- (1) testifying on Monday is Mr Dorchester who you've heard a lot
 (2) about
 (3) THE COURT Oh right yeah
 (4) MR PETUMENOS And there's also a woman named
 (5) Meidinger who has got a few problems in her testimony I think
 (6) THE COURT Well I have a problem because I have a
 (7) full calendar this afternoon and unless the 1 00 drops out -
 (8) call Scarlet and see if that 1 00 dropped out
 (9) MR CLOUGH While we're calling Your Honor can I
 (10) just move in the exhibit 5 -
 (11) THE COURT Not yet I want to concentrate on one
 (12) thing at a time
 (13) THE COURT I have a full - absolutely full calendar
 (14) so - are these objections related to the pleadings you filed
 (15) on this issue on these issues?
 (16) MR PETUMENOS Yes I think in a couple of instances
 (17) I think they're covered by pleadings already filed and in a
 (18) couple of instances they're - they're - they're routine
 (19) more routine matters of exhibit - for example we have an
 (20) order that says that the witness may only testify to matters in
 (21) the report and you issued an order to that effect
 (22) THE COURT Right
 (23) MR PETUMENOS And I have got exhibits here and I
 (24) guess proposed testimony by Mr Dorchester which sure
 (25) sounds to
 (26) me like it's been from sitting in the courtroom watching

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- (1) people adding things and taking in o account things that are
 (2) outside of the report I have matters like tha' to raise
 (3) There is a matter relating to -
 (4) THE COURT Wait a minute let s - if your contention
 (5) is that the - the testimony s limited to the matters in the
 (6) report and not the subject matter of the report and how it -
 (7) how this witness views contrary testimony I don't know of any
 (8) order that I ve entered that says that they re limited on that
 (9) issue
 (10) MR PETUMENOS No I understand
 (11) THE COURT So you re not making that contention?
 (12) MR PETUMENOS I m not talking about exhibits created
 (13) that show that Mundy is wrong or a bad guy
 (14) THE COURT No but you did say it sounded like he
 (15) was going to testify about things he heard in this court and I
 (16) don't know of any order that I ve issued that says that s
 (17) inappropriate
 (18) MR PETUMENOS I guess I m being a little inartful
 (19) but one of the exhibits that s to be specific relates to a
 (20) whole host of materials that were created by Veco Veco had a
 (21) very large volume of documents relating to where they went
 (22) what cleanup they did and Dr Dorchester was - Dr
 (23) Dorchester - Mr Dorchester was deposed on it He said he
 (24) didn't look at it It was not material that he considered It
 (25) is not in his report and now exhibits are showing up with the

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- (1) Veco data on it bar graphed The Veco data was in the control
 (2) of Exxon for a long time and I know I m going to hear the
 (3) argument that Mr Bush et cetera et cetera referred to it
 (4) but it s going to leave us in a position with no discovery on
 (5) the extent to which he s considered it on documents that have
 (6) been in Exxon s con rol the whole time That s a snapshot of
 (7) the kind of thing we re talking about
 (8) MR DIAMOND Your Honor that subject is fully
 (9) briefed and I invite you to look at ou response to Mr
 (10) Petumenos paper but you remember this started because ICF
 (11) changed their numbers and their data just before we were
 (12) supposed to start trial That created a cascading effect
 (13) because Mr Mundy changed his data and this all started
 (14) because
 (15) ICF incorporated Veco data
 (16) THE COURT Is it your view that if I decide the issue
 (17) based on the pleadings that it will probably resolve these
 (18) questions these objections?
 (19) MR DIAMOND Yes and it will do substantial justice
 (20) in the matter I m sure
 (21) THE COURT Don't be so sure counsel
 (22) MR DIAMOND e ve put forth all the arguments the
 (23) chronology s there I would invite you looking at the papers
 (24) THE COURT I ve skimmed those documents but I haven't
 (25) read them in detail so I ll have to do that
 (26) MR PETUMENOS We filed some pleadings relating to

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- (1) the Dorchester report and he s coming up on Monday
 (2) THE COURT He is coming up on Monday?
 (3) MR DIAMOND Yes
 (4) THE COURT Is he the first witness?
 (5) MR DIAMOND He is not - he probably will be the
 (6) first witness after some deposition read that we were trying to
 (7) do this morning We had slated two witnesses in advance of
 (8) them but the probability of being able to get them on on
 (9) Monday
 (10) now looks remote So I think we ought to count on Dorchester
 (11) being the lead off witness on Monday
 (12) MR STOLL Your Honor we filed a motion with respect
 (13) to Mr Pagano who was -
 (14) THE COURT I saw the motion
 (15) MR STOLL - designated as the first witness and I m
 (16) now advised by Mr Diamond that Mr Pagano is not going to
 (17) testify on Monday and may not testify at all and so under those
 (18) circumstances you don't need to spend your time reading it
 (19) THE COURT Fine make your choice now He s not
 (20) going to testify is he?
 (21) MR DIAMOND I think he s going to be a casualty of
 (22) sort of the late start
 (23) THE COURT Fine then he s not going to testify
 (24) MR STOLL Your Honor I assume that you ve already
 (25) sub silentio here through this whole process ruled that the
 (26) previous order of the Court on the limit of three witnesses on

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- (1) an issue is being removed as far as Mr Dorchester s
 (2) concerned
 (3) THE COURT I didn't think it was sub silentio
 (4) counsel I thought it was out loud I said it if I recall
 (5) on the record
 (6) MR STOLL Okay
 (7) MR PETUMENOS Any way Judge we have a number of
 (8) issues I was just trying to schedule not argue them So I
 (9) don't know whether it - I take it -
 (10) THE COURT See we have an hour and a half on
 (11) Monday I m willing to take the hour and a half on Monday
 (12) The problem is with this Dorchester testimony it s going to
 (13) put you at a disadvantage if I can't rule today and I think I
 (14) probably can rule today even with a full calendar so I ll try
 (15) to get to that and give you a ruling even if it s only a
 (16) shorthand ruling that I pass on by telephone on the Dorchester
 (17) matter
 (18) Now I don't know about the particulars of those exhibits
 (19) you ve got counsel but probably my ruling will deal with -
 (20) will resolve maybe not to your satisfaction but it will
 (21) resolve the issues of the specific documents and if it doesn't
 (22) I m willing the take that up on Monday
 (23) MR PETUMENOS We will need the hearing in any event
 (24) because of the Meidinger exhibits which is unrelated
 (25) THE COURT We ll get in here at 8 30 on Monday and go

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- (1) to ten if I have to on any questions you raise Please I m
- (2) not asking you raise a whole lot
- (3) MR PETUMENOS That should be enough time I m
- (4) trying to comply with what you asked me to do is tell you
- (5) day to day ahead of time
- (6) THE COURT I know I appreciate that
- (7) MR FORTIER Your Honor in addition to that we
- (8) also - we may have a dispute over a deposition read one of
- (9) the archaeology deposition reads
- (10) THE COURT Well you know what the first rule of
- (11) cross examination is counsel The first rule there may be a
- (12) dispute is don t
- (13) MR FORTIER All right There may be one
- (14) MR CLOUGH I ve got the Pearson exhibits I m
- (15) mindful of your schedule I m prepared to go through them
- (16) quickly now
- (17) THE COURT No that would be fine
- (18) MR CLOUGH I d like to move in the following
- (19) Defendants Exhibit 9169A the herring life stages
- (20) (Exhibit 9169A offered)
- (21) MR PETUMENOS No objection
- (22) THE COURT It s admitted
- (23) (Exhibit 9169A received)
- (24) MR CLOUGH Defendants exhibit 8595 the animation on
- (25) the herring year classes

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- (1) (Exhibit 8595 offered)
- (2) MR PETUMENOS No objection
- (3) THE COURT It s admitted
- (4) (Exhibit 8595 received)
- (5) MR CLOUGH Defendants exhibit 5239BB the chart
- (6) there
- (7) (Exhibit 5239BB offered)
- (8) MR PETUMENOS No objection
- (9) THE COURT Admitted
- (10) (Exhibit 5239BB received)
- (11) MR PETUMENOS Am I getting any points here Judge?
- (12) MR CLOUGH Defendant s exhibit -
- (13) THE COURT My memory s fallible counsel
- (14) MR CLOUGH Defendants exhibit 4946A the herring
- (15) harvest information
- (16) (Exhibit 4946A offered)
- (17) MR PETUMENOS I think it s already in
- (18) THE COURT It s admitted
- (19) (Exhibit 4946A received)
- (20) MR PETUMENOS It s admitted
- (21) MR CLOUGH Defendant s exhibit 5214BB the maps
- (22) showing the overlay of oling and spawn
- (23) (Exhibit 5214BB offered)
- (24) MR PETUMENOS No objection
- (25) THE COURT Admitted

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- (1) (Exhibit 5214BB received)
- (2) MR CLOUGH Defendants exhibit 14036 which have been
- (3) the examples of deformities in non exposed larvae
- (4) (Exhibit 14036 offered)
- (5) MR PETUMENOS No objection
- (6) THE COURT Admitted
- (7) (Exhibit 14036 received)
- (8) MR CLOUGH Defendants exhibit 14041A chart showing
- (9) changes in Alaska herring biomasses
- (10) (Exhibit 14041A offered)
- (11) MR PETUMENOS No objection
- (12) THE COURT Admitted
- (13) (Exhibit 14041A received)
- (14) MR CLOUGH Defendants exhibit 5331B weight change
- (15) in herring
- (16) (Exhibit 5331B offered)
- (17) MR PETUMENOS No objection
- (18) THE COURT Admitted
- (19) (Exhibit 5331B received)
- (20) MR CLOUGH Defendants Exhibit 8525 hatchery fry
- (21) releases
- (22) (Exhibit 8525 offered)
- (23) MR PETUMENOS No objection
- (24) THE COURT That s admitted
- (25) (Exhibit 8525 received)

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- (1) MR CLOUGH Exhibit 8524AA biomass has been
- (2) building
- (3) (Exhibit 8524AA offered)
- (4) MR PETUMENOS No objection
- (5) THE COURT Admitted
- (6) (Exhibit 8524AA received)
- (7) MR CLOUGH Defendants exhibit 8521B with biomass
- (8) estimates
- (9) (Exhibit 8521B offered)
- (10) MR PETUMENOS No objection
- (11) THE COURT Admitted
- (12) (Exhibit 8521B received)
- (13) MR CLOUGH Defendants 5197A Dr Pearson s herring
- (14) study chart
- (15) (Exhibit 5197A offered)
- (16) MR PETUMENOS No objection
- (17) THE COURT Admitted
- (18) (Exhibit 5197A received)
- (19) MR CLOUGH And Defendants exhibits 8983 Dr Kocan s
- (20) lowest exposure
- (21) (Exhibit 8983 offered)
- (22) MR PETUMENOS No objection
- (23) THE COURT Admitted
- (24) (Exhibit 8983 received)
- (25) MR PETUMENOS I move into evidence Exhibit 8511 my

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- (1) carefully prepared printout of the map showing the location
- (2) of - well that I used in cross examination and 8512 which is
- (3) the same thing I would like to have those labeled though as
- (4) cross examine exhibits for Dr Pearson so the jury knows what
- (5) they are may recollect
- (6) (Exhibit 8511 and 8512 offered)
- (7) MR CLOUGH Looking at these I m not sure I know
- (8) what they are and can recollect at this point They re just a
- (9) line and a circle and I think I d object to them
- (10) MR PETUMENOS What they talked about - what they
- (11) depict is the location of Herring Bay in the cross examination
- (12) which -
- (13) THE COURT Yes I remember them they re admitted
- (14) (Exhibit 8511 and 8512 received)
- (15) MR PETUMENOS Thank you
- (16) MR PETUMENOS That s Plaintiffs 8511 and 8512
- (17) THE COURT Okay both of them are admitted
- (18) MR PETUMENOS And I have the permission of the Court
- (19) to put that label on it?
- (20) THE COURT Yes Okay that s it huh?
- (21) MR PETUMENOS That s it
- (22) THE COURT I ll see you on Monday at 8 30 and I will
- (23) try to get you a ruling on the Dorchester overall Dorchester
- (24) question by 4 30 today
- (25) MR CLOUGH Thank you Your Honor

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- (1) THE CLERK Please rise This court stands in
- (2) recess
- (3) (Recess now 12 13 p m)

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(1) STATE OF ALASKA)
(2) Reporter s Certificate
(3) DISTRICT OF ALASKA)
(5) I Joy S Brauer RPR a Registered Professional
(7) Reporter and Notary Public
(8) DO HERBY CERTIFY
(9) That the foregoing transcript contains a true and
(10) accurate transcription of my shorthand notes of all requested
(11) matters held in the foregoing captioned case
(12) Further that the transcript was prepared by me
(13) or under my direction
(14) DATED this day
(15) of 1994
(21) JOY S BRAUER RPR
Notary Public for Alaska
(22) My Commission Expires 5 10 97

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Yalik [2] 7160 10 7161 6
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zero [2] 7255 22 7264 7
 zone [6] 7204 7 7210 24
 7211 2 7242 13 7246 21
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 24

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No. 3AN 89 2533 Civil
) Anchorage, Alaska
 (5) The EXXON VALDEZ) Monday, August 29, 1994
) 8:41 a.m.
 (6))
 (8) Pages 1 through 50
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) HEARING
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
 (17) FOR THE PLAINTIFF
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 503/227 1600
 TIMOTHY J. PETUMENOS
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(1) PROCEEDINGS
 (2) (Call to Order of the Court)
 (3) THE COURT: Okay, we're on the jury - we're on the
 (4) record without the jury present.
 (5) Counsel, what did you want to bring up first?
 (6) MR. OPPENHEIMER: Your Honor, good morning. We
 (7) believe we have a serious set of issues with respect to the
 (8) proposed rebuttal case. There has been a flurry of activity
 (9) over the weekend, an exchange of lists that frankly don't
 (10) seem to me to take into account the requirements that there be
 (11) serious practical consideration given to the rebuttal case.
 (12) We have - we have had asserted to us that the rebuttal
 (13) case if we close on Wednesday - which is still clearly our
 (14) intention and we believe we can do it - the rebuttal case will
 (15) be on Thursday and Friday.
 (16) We have, by our last count, 32 witnesses. I have a fair
 (17) amount of argument of a type related to the history of this
 (18) case on virtually all of those witnesses, but there's one
 (19) essential observation I would make about the entire list, which
 (20) is that if it is - if it is anything, it is a reiteration of
 (21) evidence which has already either taken place in the direct
 (22) case or which should have, because it was reasonably
 (23) anticipated. And what we're confronted with, frankly, is a
 (24) proposed rebuttal case that couldn't possibly be done in two
 (25) days, and as to which in every case I can see by looking

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(1) through the proposed exhibits and the proposed witnesses
 with
 (2) one exception, is simply reiterative of direct case material
 (3) or material which should have been raised in the direct case.
 (4) Rebuttal is not a place to reargue. Rebuttal is not a
 (5) place to have a last word. Rebuttal is not a case - not a
 (6) place to call experts to opine on disputes between experts
 (7) where there's already been testimony on that issue. And the
 (8) fact of the matter is nothing that we received over the weekend
 (9) corresponded to a serious rebuttal list on the serious rebuttal
 (10) issues.
 (11) We have, for example - and I can do this with, I think
 (12) virtually every one of these witnesses - Dr. Peterson, whom
 (13) the Court will remember is back on this list. Dr. Peterson
 (14) was the ecologist who did that very elaborate food chain as to
 (15) which there was our rebuttal testimony in the form of
 (16) Dr. Gilfillan. Dr. Peterson is back on this rebuttal list with
 (17) his food chain again.
 (18) Now, I - I really seriously question the - even, frankly,
 (19) the good faith of the proposal for another exegesis on this
 (20) food web issue when I think the jury has heard as much on that
 (21) issue as anybody can reasonably be expected to hear. Both
 (22) sides have had an opportunity to put the cases on with respect
 (23) to those issues, and the idea that all of those exhibits
 (24) virtually all of the exhibits that are designated for these
 (25) witnesses have already been used, that we're going to go back

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(1) into areas that have been thoroughly addressed in the direct
 (2) case is -- is improper rebuttal and there's no way to
 (3) practically address whether there is any serious legitimate
 (4) rebuttal in the case given the information we were given over
 (5) the weekend
 (6) We spent a great deal of the weekend just trying to pass
 (7) through all of this and there's no legitimate joining of the
 (8) issue Your Honor in terms of what could conceivably be
 (9) appropriate testimony because we started with a list on Friday
 (10) of 36 witnesses we immediately wrote a letter objecting
 (11) Almost immediately there was some reduction in the number of
 (12) witnesses after a 24-hour period We still have over 30
 (13) witnesses most of whom or many of whom we break it down in
 (14) the brief have already been called a large number of whom
 (15) have never ever been on a witness list one at least who is an
 (16) expert on expert testimony There is in other words no way
 (17) for us to have a serious conversation about whether there is
 (18) actually a legitimate rebuttal case hidden in all of this
 (19) someplace but we -- we strongly object to the notion that
 (20) rebuttal is an opportunity to put on the direct case one last
 (21) time It's -- it's not fair to the parties it's not fair to
 (22) the jury it's confusing of the issues and frankly if it's
 (23) permitted I think the Court in fairness would realize that
 (24) we should put on a surrebuttal case and if there's one thing
 (25) frankly we wish not to do is to do something like that

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(1) That Your Honor is the essential nut of this problem We
 (2) have broken down the witnesses We don't like footnotes but
 (3) it seemed the easiest way to do it We've broken the witnesses
 (4) down into the categories We have outlined for the Court some
 (5) of the history that the Court probably is -- is very familiar
 (6) with where our own witnesses as we have proceeded in our
 case
 (7) have had their testimony where they were not on a witness list
 (8) carefully calculated to those issues that we could not have
 (9) anticipated Wayne Purdom was an example we allude to at
 (10) Page 3 of our motion That's appropriate In other words we
 (11) have lived by the rule that rebuttal under the history of this
 (12) case and under Alaska precedent is properly limited to those
 (13) new issues that could not reasonably be anticipated And we
 (14) have had some testimony kept out I think appropriately so
 (15) We've had it calibrated to the issues and if you go through
 (16) and see all of these old names again which have come up on
 (17) direct coming back again or if you see all these new names
 (18) which have never been on a witness list it -- it simply
 (19) defeats the legitimate purposes of rebuttal It is
 (20) fundamentally unfair
 (21) There is an area of exception though which I'm not sure
 (22) our papers elucidate quite clearly enough I'd like to just
 (23) focus on briefly Your Honor has expressed the view and I
 (24) think it is correct and consistent with the proper notion of
 (25) rebuttal that in certain circumstances we have seen some areas

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(1) in the case where possibly there is new matter I say
 (2) possibly because I am -- I am not entirely convinced but I
 (3) think it's a matter on which reasonable minds might differ
 (4) Your Honor has expressed the view a couple of times that
 proper
 (5) rebuttal would consist for example of testimony from
 (6) individuals whom Mr MacSwain indicated he had interviewed if
 (7) they had a different view of the interview than he did
 (8) I question whether that's really a new matter only because
 (9) Mr MacSwain as you know has been thoroughly deposed his
 (10) work papers have been produced and I believe all those
 people
 (11) could easily have been put on the witness list but I do
 (12) believe that that is an example of something and there is one
 (13) witness I believe that falls in that category too by --
 (14) THE COURT Cook?
 (15) MR OPPENHEIMER Pardon me?
 (16) THE COURT Cook?
 (17) MR OPPENHEIMER Yes
 (18) And so we do not mean to suggest that -- that we don't
 (19) recognize the potential for a legitimate rebuttal case but
 (20) Your Honor it isn't this case that's been proposed It isn't
 (21) this case that we spent all weekend analyzing and the very
 (22) first exhibit that we have is the witness list with exhibits
 (23) It's Exhibit A that goes through all of their proposed
 (24) witnesses with exhibits and if you look at it Your Honor it
 (25) looks every -- we have -- we have a list of people who look in

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(1) every respect like the direct case with the exception of some
 (2) names that have never been on any witness list and I think
 (3) it's fairly clear what the nature of the problem is and it's a
 (4) serious one
 (5) The other observation I would make is that we have three
 (6) individuals on this list who are Department of Interior
 (7) people I don't know if Your Honor is familiar with the
 (8) history of that but we've been unable to take any discovery of
 (9) Department of Interior people I don't know whether they're
 (10) seriously candidates for testimony here or not I frankly do
 (11) not know how many of the people on this list Plaintiffs
 (12) seriously believe will come in and testify on rebuttal I
 (13) guess frankly I have my doubts that they're all serious
 (14) contenders But to the extent they are serious contenders and
 (15) they intend to call DOI representatives we have a separate
 (16) problem which is that we have been unable to conduct any
 (17) discovery of the individuals They're now able to come to
 (18) court by arrangement with the plaintiffs I think the
 (19) procedural objection is on a due process violation at this
 (20) point I think we should address that separately
 (21) I question whether we're going to need to Your Honor
 (22) because I don't know that that's -- they are serious contenders
 (23) for testimony here today Marty Suuberg for example is a
 (24) lawyer of the Department of Interior I think it would be
 (25) tripping lightly through a mine field for any of us to try to

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(1) elicit unprotected statutory testimony from Marty but it's
 (2) hard to address because I don't know how seriously they intend
 (3) to proceed on that basis
 (4) One other issue there's a separate section on one of their
 (5) experts Maury Seldin where I think we have another
 (6) independent issue Mr Seldin is - should we want for another
 (7) such individual another appraisal expert And he was
 (8) commissioned to produce a report which he did in October of
 (9) 93 and his charge was to look at the Clarion/Mundy dispute
 (10) as it was memorialized in their exchange of articles which
 (11) Your Honor may recall We have in the record from Mr Papke's
 (12) cross-examination - and he was asked to look at their
 (13) theoretical debate on this natural lands issue and - and
 (14) render an opinion as to who was right basically and he did
 (15) that in a highly theoretical paper There was an in limine
 (16) motion brought primarily on the grounds that he lacked
 (17) foundation for his opinion That motion was understandably
 (18) denied It was before the evidence
 (19) Now we're looking at a situation where he's being proposed
 (20) for rebuttal where if he is anything at all he's cumulative
 (21) of Dr Mundy potentially very prejudicial in that he might be
 (22) perceived as somehow expressing the appraisal profession's
 (23) view of the debate between Mr Roddewig and Mr Mundy which he
 (24) does not which would open the door to surrebuttal And what the
 (25) Appraisal Institute is actually doing on this issue which

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(1) seems very far removed from any important issues in the case
 (2) and importantly there is absolutely no argument not a
 (3) scintilla of argument that his testimony was not anticipated
 (4) before the direct closed because he was commissioned to
 (5) render an opinion on exactly the issues that everyone knew
 (6) Mr Roddewig was going to testify to and did So he's - he's
 (7) one of those arbitrating experts who's being brought in to tell
 (8) the jury which group of experts they should believe in that was
 (9) commissioned by the Plaintiffs It's cumulative He's
 (10) potentially prejudicial and whatever else he is he is not a
 (11) rebuttal expert
 (12) THE COURT Thank you
 (13) MR STOLL Your Honor I'm responsible for this and
 (14) I take responsibility I haven't finished reading their brief
 (15) I got it about three minutes before you came on the bench
 (16) As I indicated in my letter to counsel yesterday we
 (17) anticipate and as I indicated on Friday we anticipate by the
 (18) close of today to have a substantially shorter list The
 (19) problem we had which we raised with the Court on Friday
 (20) afternoon was that we did not know who was going to be
 (21) available and we thought there was a problem of locating
 (22) people over the weekend There was a problem locating
 (23) people over the weekend We have made progress We've made
 (24) substantial progress even since I wrote my letter yesterday
 (25) afternoon and before I got into all the details of the matters

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(1) contained in their brief that we got this morning I'd like to
 (2) just submit a few of the - few points if I may and I think
 (3) this may largely be resolved by this afternoon because we
 (4) anticipate we've got people making calls now and we've had
 (5) them - we've done it ourselves this weekend but I'd like to
 (6) respond to just a few of the comments made by Mr
 (7) Oppenheimer
 (8) First of all I do not believe that it's our responsibility
 (9) in our case in chief to anticipate every defense or everything
 (10) that they are going to raise In fact I think it's even with
 (11) those we can anticipate if it's not - if it does not go to
 (12) our proof of our case in chief it is not our responsibility to
 (13) put on issues put on evidence that is - we don't think is -
 (14) pertains to our case in chief I don't know that there's
 (15) frankly much in the way of witnesses that fall in that - that
 (16) category
 (17) There is no question that in the designation that we made
 (18) on Saturday we designated a number of people and a number
 (19) of exhibits to be - to have a safety valve because of the - what
 (20) the Court's admonition was on Friday afternoon that we better
 (21) get these names out and list people With respect to
 (22) Dr Peterson Dr Gilfillan when he testified started quoting
 (23) what Peterson said or would say under certain circumstances
 (24) There was no way that we could anticipate Gilfillan making
 (25) statements about what Peterson was going to say We have
 (26) scheduled Peterson for a maximum of 30 minutes

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(1) They have - they brought in a retired Department of
 (2) Interior appraiser Norm Lee you'll recall there was quite a
 (3) bit of controversy as to whether or not Mr Lee could even
 (4) testify and he has made a number of representations that we
 (5) think are false to put it bluntly and we think that we're
 (6) entitled to - to prove that in rebuttal
 (7) THE COURT Give me an example What kind of
 (8) representations did he -
 (9) MR STOLL Well he made statements that he
 (10) reported - he did a formal report to the Department of
 (11) Interior and said that - that - well first of all he did
 (12) an informal little study about whether there was any damage to
 (13) park - Park Service property and then he got funding to do a
 (14) formal report He did a formal report He was instructed to
 (15) destroy his notes and that the implication clearly was that he
 (16) filed a report and recommended that there was no damage and
 (17) that they shouldn't proceed with any kind of damage claim
 (18) Now the fact of the matter is is that the people that
 (19) we've talked to at the Department of Interior have indicated
 (20) that that number one there was no formal presentation by
 (21) Mr Lee that there was no instruction to destroy notes in
 (22) fact the instructions were to the contrary to save all
 (23) documentation of the investigation and that he did not come in
 (24) and make a recommendation not to proceed with the litigation
 (25) The people that we intend to call I believe - I haven't

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- (1) been directly involved in this but most of them or all of them
 (2) are retired people recently retired people from the Department
 (3) of Interior There may be one - one exception to that and
 (4) we - we can substitute maybe a retired person for the person
 (5) with DOI if they have a complaint about that
 (6) Mr Seldin was the subject of a pretrial motion in limine
 (7) which Your Honor denied and he was designated at that time
 as
 (8) a - specifically as a potential rebuttal witness
 (9) Mr Petumenos is more familiar with Mr Seldin than I am
 (10) frankly but it's my understanding that there was a motion in
 (11) limine that dealt with him and he is not going to rehash our
 (12) case in chief and that is the purpose of all these people We
 (13) don't - we want to get this trial over with get it to the
 (14) jury as quickly as possible but we - they have raised some
 (15) issues in their case in chief which are - which we need to
 (16) respond to and it's not simply rehashing our case in chief I
 (17) have indicated in my letter yesterday that I anticipated that
 (18) our direct testimony on our rebuttal would last no more than
 (19) six hours and quite frankly we're willing to live by that
 (20) representation
 (21) So I do not believe Your Honor that this is - I mean I
 (22) anticipate some further cuts In fact I know of a couple
 (23) already that will be cut
 (24) THE COURT Tell me
 (25) MR STOLL There's no way -

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- (1) THE COURT Let's get those names out right away
 (2) MR STOLL Just a moment Your Honor
 (3) MR PETUMENOS Judge while he's doing that can I
 (4) address the Seldin issue?
 (5) THE COURT No I want to do it one at a time
 (6) MR PETUMENOS I'm sorry?
 (7) THE COURT I'd like to do it one at a time
 (8) MR STOLL Mr Wiggins is not going to be testifying
 (9) Your Honor and I can't remember who the other one was I had
 (10) another one but I can't remember who that is right now
 (11) THE COURT Okay
 (12) MR STOLL But frankly I counted the number here and
 (13) the most - I don't know how they got to 32 the most probable
 (14) ones as I've indicated in my letter to them yesterday was 18
 (15) I think it's likely that we will not have 18 I don't - you
 (16) know we anticipate having no more than possibly ten and
 (17) they're going to be very short They're going to be limited to
 (18) a specific points that were raised by the Defendants in their
 (19) case in chief We're not going to get into a retrial of - of
 (20) Plaintiffs case in chief
 (21) THE COURT All right Thank you counsel
 (22) MR PETUMENOS Thank you Judge
 (23) I just wanted to remind you of the Maury Seldin issue The
 (24) way the discovery plan worked was that the Defendants -
 excuse
 (25) me the Plaintiffs declared their experts and filed reports and

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- (1) they were deposed then the Defendants declared their experts
 (2) and there was a provision for the Plaintiffs to declare
 (3) rebuttal experts in the fall of 1983 (sic) Mr Seldin was
 (4) hired and retained in time under the discovery plan as a
 (5) rebuttal expert witness to rebut a report prepared by
 (6) Mr Roddewig relating to the existence or nonexistence of
 (7) natural lands as a market Mr Seldin was then deposed by the
 (8) Defendants He filed a report in the fall of '83 (sic) as a
 (9) rebuttal expert and the Defendants filed a motion in limine on
 (10) Mr Seldin I indicated in our briefing that he was a rebuttal
 (11) expert to rebut the testimony that Mr Roddewig was anticipated
 (12) to give on the issue of natural lands That's a critical issue
 (13) in our case because it relates to the issue of whether or not
 (14) as we'll hear today in detail the land is limited use land
 (15) and therefore not worth very much and not harmed because
 (16) there's no economic development but whether it's highest and
 (17) best use is natural lands or conservation land which can be
 (18) harmed by the oil spill and on that issue may turn the case
 (19) and it's always been anticipated that - that Mr Seldin would
 (20) be a rebuttal expert
 (21) He has done more than simply look at things theoretically
 (22) He has examined - as we indicated in our briefing he's
 (23) examined the market the number of transactions things of that
 (24) nature so that this - this comes as no surprise to the
 (25) Defendants and I don't agree that we have to take on the

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- (1) Defendants theory of the case in our case in chief and rebut
 (2) it first before they start And that's the reason for the
 (3) discovery plan and the way it was and I just wanted to remind
 (4) the Court of what the procedural history of Mr Seldin was in
 (5) that
 (6) THE COURT Thank you
 (7) MR OPPENHEIMER Your Honor the - starting with
 (8) Mr Seldin the discovery plan simply created a process
 whereby
 (9) experts could be qualified for trial and provide a report after
 (10) both experts have testified It was both a discovery and
 (11) qualifying event It had no effect on what was proper rebuttal
 (12) or not There is nothing out there that says that there is a
 (13) group of experts who may be a rebuttal expert We had the
 same
 (14) opportunity at one point The - everything that has been said
 (15) about - certainly about Mr Seldin underscores the fact that
 (16) it's not proper rebuttal In Alaska Airlines versus Sweat
 (17) which is a 1977 Alaska case It's written that whether a
 (18) rebuttal witness should be included on a pretrial witness list
 (19) in absence of specific provision from the pretrial order should
 (20) be dependent on whether the testimony sought to be rebutted
 (21) could reasonably be anticipated prior to trial and the cases
 (22) speak to the issue of it being appropriate that if in your
 (23) direct you can anticipate the testimony in the Defendants
 (24) case that you properly should address it in your case
 (25) The fact of the matter is that the - the defense of

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(1) Mr Mundy's natural land concept is inherently a part of his
 (2) affirmative case for damages and it is - it has been a debate
 (3) that has - has been going on in this case since it began and
 (4) all that is happening here is that Mr Seldin is being used to
 (5) remind the jury of the position that Mr Mundy staked out a
 (6) second time after our case and that's what's so inappropriate
 (7) about it. It adds nothing to Mr Mundy. It's classic expert
 (8) counting. It's cumulative. The fact that they bring in
 (9) another expert we could bring in another expert and this
 (10) could go on for a long time. It adds nothing to anyone's
 (11) understanding. All it is intended to do is to reiterate a
 (12) point that everybody knew was being made at the very
 beginning
 (13) as to which Mr Mundy has testified as to which Dr Green has
 (14) testified as to which Mr Roddewig and Mr Papke have
 (15) testified. We don't need another expert on this subject and
 (16) it certainly isn't fair to have another expert who's not
 (17) responding to any new matter whatsoever.
 (18) A couple of points about both Doctors Peterson and Lee and
 (19) then a suggestion perhaps as to - as to how to deal with
 (20) this because we're taking - we're taking some witnesses out
 (21) of context and frankly Your Honor we have a problem with all
 (22) of the witnesses. We have the condition of those that have
 (23) been discussed. Mr Carlson who's coming back with all his old
 (24) exhibits so it is not limited to those we're talking about.
 (25) Dr Peterson is apparently coming back to talk about testimony

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(1) that Mr Gilfillan gave when he was quoting and discussing
 (2) Dr Peterson's testimony from the direct. Again that is not
 (3) anything new. It is not anything which gives rise to new
 (4) matter for rebuttal. There is no indication whatsoever that
 (5) any of that information wasn't anticipated. Indeed it's been
 (6) the subject of a debate in this case from day one.
 (7) Dr Gilfillan identified no new matter that would make it
 (8) appropriate for Dr Peterson to come back. It is not
 (9) appropriate rebuttal to have Dr Peterson come back and
 remind
 (10) the jury that he's a person with certain views that he's
 (11) already expressed and that he has a chart which he's already
 (12) showed that he wants to remind them about.
 (13) Norm Lee testified because - to the matters he did that
 (14) were discussed a moment ago because he was
 cross-examined on
 (15) the subject of his notion of the value of property changing
 (16) In other words you recall that he was cross-examined on the
 (17) issue of whether he had originally held the view that there was
 (18) damage to the lands in the Kenai Fjords area and then that
 (19) there wasn't and the door was opened on cross-examination.
 (20) There is no - there is no significant reduction in the dispute
 (21) and the number of witnesses that are cumulative or simply
 (22) repetitive of direct in Mr Stoll's suggestion that Mr Wiggins
 (23) and some unknown witness will be cut off this list.
 (24) Mr Wiggins and unknown witness are certainly helpful but
 (25) we still have no indication that for example Mr Carlson who

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(1) is coming back is going to testify to anything that he hasn't
 (2) already testified to or that he isn't going to go into matters
 (3) for which he has not rendered an expert opinion or that he
 (4) isn't going to go into matters that we didn't raise. I am
 (5) sure - I am sure that there was an expectation that we would
 (6) have certain witnesses testify in more detail on Kodiak. We
 (7) did not do that. We did not do that because frankly we
 (8) thought in all candor that claim is not the biggest claim in
 (9) this case.
 (10) The jury's getting tired. We cut material out.
 (11) Mr Carlson was sitting in this courtroom and in the television
 (12) room waiting. I believe for that testimony so that he could
 (13) rebut it. It didn't come on and that's the point. We're going
 (14) to - we're going to be faced with a rebuttal case that isn't a
 (15) rebuttal case that's going to have people like Mr Carlson
 (16) testifying about things that they thought were going to come up
 (17) but didn't but about matters that are not new but are old and
 (18) in the case like Dr Peterson just repeating their theories
 (19) again for the jury to hear.
 (20) Procedural point let's assume we cut this down to
 (21) somewhere between 10 to 18 witnesses. Does anybody
 seriously
 (22) believe we can do that in two days? I suggest to you that
 (23) either I've lost track of how we have been doing things or
 (24) there's no possibility of accomplishing that. I don't imagine
 (25) any scenario in which the cross of Dr Seldin with all it

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(1) implicates for what the Appraisal Institute is doing on this
 (2) subject and a very theoretical piece is going to be more than
 (3) three - less than three-quarters the length of his direct. If
 (4) we add these up they just don't add up. So we have a
 (5) logistical problem and more importantly we have a procedural
 (6) problem and we have never been given any indication that
 there
 (7) is actually new matter to be addressed by these witnesses. And
 (8) the number of - of exhibits that repeat themselves through the
 (9) exhibit list is I think a very strong indication that it's
 (10) just - this is just a chance to retry issues that have been
 (11) tried in the direct and that's - that's not rebuttal.
 (12) And lastly the fact that most of these - many of these I
 (13) shouldn't say most that's not correct they're set forth at
 (14) Page 2 note three we have a number of witnesses I guess one
 (15) of them Mr Wiggins is now off the list but these are people
 (16) that have never been on the witness list just never been on a
 (17) witness list at all.
 (18) THE COURT Anything else?
 (19) MR STOLL Your Honor what I would respectfully
 (20) suggest is that we are as I indicated earlier number one we
 (21) did not anticipate them resting on Wednesday. We had
 (22) previously intended last week this weekend we were going to
 be
 (23) cutting down we were going to get a witness list and we were
 (24) going to tell them early this week as to who our rebuttal
 (25) witnesses were. We did not think that there was a chance that

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- (1) they were going to finish on Wednesday and so they took -
 (2) frankly took us by surprise We were presently surprised by
 (3) that but it was a surprise to us Thursday night when we got
 (4) their notice and what I would respectfully suggest is that we
 (5) will number one this afternoon we will give them a revised
 (6) list that will be substantially pared down Number two
 (7) contrary to what Mr Oppenheimer says I think the proof is in
 (8) the pudding and we will put on our case our rebuttal case
 (9) it will be limited to new matter that Defendants brought up
 (10) The reason that we think that these witnesses will be very
 (11) short as opposed to what they testified in the case in chief
 (12) is because we re not going to have them go through everything
 (13) that they ve said before We think that s old matter We
 (14) don t think that it s appropriate to do that What we re going
 (15) to do is limit it to the new items that the Defendants raised
 (16) that are not appropriate for us to bring up in our case in
 (17) chief and that s why we have scheduled if you look on the
 (18) letter that I sent counsel yesterday I think that the longest
 (19) witness that we ve got on there is 65 hours And we can live
 (20) with -
 (21) THE COURT This includes Seldin?
 (22) MR STOLL That includes Seldin
 (23) MR OPPENHEIMER That is Seldin Your Honor
 (24) MR STOLL And so I think if we re - If we intend to
 (25) go in with bullet points Your Honor and not - that are

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- (1) addressed to what they put on not go in to you know whole
 (2) regurgitation of what we did in our case in chief That s not
 (3) the purpose of rebuttal we know that and we don t think you d
 (4) tolerate it and we don t have any intention of - of going
 (5) through that exercise We re going to - we re going to put on
 (6) a proper rebuttal case and I think that we will - there ll be
 (7) a substantial reduction by - by the end of this afternoon
 (8) THE COURT Okay counsel tell me tell me the ones
 (9) that you know are going to be on the final list so that we at
 (10) least have a pool
 (11) MR STOLL Well I know that - I know that
 (12) Mr Carlson will be on there and this relates to - this
 (13) relates to items that they brought up some of their new graphs
 (14) that actually they reconstructed during the course of trial
 (15) Toby Clark - Toby Cook who is an interviewee of
 (16) Mr MacSwain Mr Roberts will probably be deleted but he
 (17) was
 (18) also quoted by Mr MacSwain Mr Goodwin Maury Seldin
 (19) William Wallace who is the appraiser for Seal Bay transaction
 (20) that Defendants brought in over our objection Dr Peterson
 (21) Leland Shackelton
 (22) THE COURT Who?
 (23) MR STOLL Leland Shackelton
 (24) Now there are others Your Honor that we - excuse me
 (25) there s Roy Robertson and John Christiansen
 (26) Now those people we know are available and we may cut

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- (1) some of those also but we know that those people are
 (2) available The other people we should know by the end of
 (3) today
 (4) THE COURT Are you telling me that all of the other
 (5) people are people that you haven t been able to contact yet?
 (6) MR STOLL That is - well one of them I haven t
 (7) talked to Your Honor that I - but I understand he has been
 (8) talked to Edgar Blatchford and we have talked to other -
 (9) you asked me two questions As I understood it one was who
 (10) did we think was most probable to be on there and who was
 (11) available I m giving you - that s the synthesis of both -
 (12) those are two different lists For instance we ve got
 (13) Mr Selby I put on here as probably delete I think we
 (14) probably will delete him but I ve got to check the
 (15) transcript I mean there s some issues that they have - they
 (16) have gone and they quote somebody or something and we ve
 (17) got to
 (18) go through the transcript It s not just a - you ve got to
 (19) find out whether the person s available and then you also have
 (20) to find out whether it s worthwhile putting that - you know
 (21) putting that person on That s what we re in the midst of
 (22) going through and I can tell the Court right now I ve got a
 (23) file on these various witnesses right here and I thought that
 (24) if I had time during the day while I was in court I would you
 (25) know try to make some further cuts so that we could get you
 (26) know get this done and I anticipate that when we get out of

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- (1) court this afternoon I ll go back and we ll have a meeting
 (2) you know internal meeting And there s people trying to reach
 (3) these people during the day and we will be able to advise
 (4) counsel by the end of today as to you know a shorter list
 (5) But I again will reiterate number one we have no
 (6) intention of putting on an improper rebuttal case We don t
 (7) think the Court would tolerate it Number two that we can
 (8) limit our direct testimony to six hours and we ll abide by
 (9) that by that limitation We have no intention of going beyond
 (10) that much time on direct And if we end up - if that - and I
 (11) could also say that I don t think that any of these witnesses
 (12) including Mr Petumenos working with Mr Seldin but I don t
 (13) anticipate any of these people would go longer than you know
 (14) 40 minutes
 (15) THE COURT Okay thank you
 (16) MR OPPENHEIMER Your Honor this is very
 (17) frustrating frankly We have through the course of this
 (18) trial done our best to comply with - with the trial plan and
 (19) what I hear is that for a variety of logistical reasons it s
 (20) just not going to happen here And I guess I need to see past
 (21) that to the practical realities because it doesn t perhaps do
 (22) any of us any good to dwell on that but it is clear to me that
 (23) the - the fact that we have been saying for a week that we d
 (24) be through on Wednesday we confirmed that on Thursday and
 (25) that
 (26) triggered the requirements that have not been met essentially

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- (1) is admitted and it's a question of logistical difficulties
 (2) okay But if that's the case we are still in an atmosphere in
 (3) which we are confronting a rebuttal case that isn't a rebuttal
 (4) case Let me go through very quickly what we've just heard
 (5) Mr. Carlson's coming back because we constructed some new
 (6) graphs through trial Well Your Honor will recall we had a
 (7) little magnetic chart that we used with minimum on his cross
 (8) He talked about that He has no right to come back as a
 (9) rebuttal witness having spent some more time reflecting on his
 (10) cross-examination and do a little more direct That could have
 (11) been done
 (12) THE COURT That's absolutely true counsel Let's
 (13) skip -
 (14) MR. OPPENHEIMER Okay Toby Cook Mr. Cook's
 (15) interview with Mr. MacSwain was put in during his cross was
 (16) not mentioned on his direct so it's a classic collateral case
 (17) at best I don't think Your Honor would have permitted
 (18) Mr. Cook to have testified if he'd been on the witness list for
 (19) that purpose to begin with If he's coming in here to give
 (20) additional testimony based on an interview that was raised in
 (21) cross I question the propriety of that but I will say that it
 (22) does fall into the Court's definition of rebuttal given
 (23) earlier
 (24) Mr. Roberts quoted by Mr. MacSwain you know the - the
 (25) idea that that's what his testimony -

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- (1) THE COURT Counsel Mr. Roberts is off is probably
 (2) off right?
 (3) MR. OPPENHEIMER Is off okay Well in that case I
 (4) won't address him further Mr. Shackleton and Mr. Wallace are
 (5) not on a witness list and by the rule that governed Wayne
 (6) Purdom it seems very clear to me that -
 (7) THE COURT He's not on a witness list?
 (8) MR. OPPENHEIMER No Somebody correct me if I'm
 (9) mistaken but Lee Shackleton and William Wallace neither are
 (10) on a witness list
 (11) MR. STOLL Your Honor number one I don't think they
 (12) need to be on a witness list Number two we didn't know of
 (13) their - that there was any - that these issues were going to
 (14) come up Mr. Wallace was a person involved in the Seal Bay
 (15) transaction which we thought was not going to be in evidence
 (16) and -
 (17) MR. OPPENHEIMER The Seal Bay transaction is a comp
 (18) that Mr. Mundy used I just don't understand the concept
 (19) THE COURT Take it easy now
 (20) MR. OPPENHEIMER I should Your Honor It's Monday
 (21) In any event Mr. Wallace and Mr. Shackleton are not on the
 (22) witness list -
 (23) MR. STOLL Mr. Shackleton is coming in Your Honor
 (24) only because of their testimony of Norm Lee
 (25) THE COURT Well on the witness list issue known

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- (1) rebuttal witnesses have to be on the witness list, so I'd have
 (2) to explore whether or not these were known rebuttal witnesses
 (3) MR. OPPENHEIMER As I say Your Honor we're
 (4) apparently getting an appraiser in Mr. Wallace on a comp that
 (5) Mr. Mundy used I mean it seems to me that we're very far
 (6) afield of our case and that to the extent that the - that the
 (7) propriety of that transaction was an issue it has been fully -
 (8) dealt with in the direct case as Dr. Peterson - I have heard
 (9) nothing - as entertaining as Dr. Peterson might be I have
 (10) heard nothing that would suggest it's proper for him to come
 (11) back and regale the jury again If you look at his exhibit
 (12) list it's a reprise It's sort of the top ten hits from his
 (13) original production and it's just inappropriate
 (14) Edgar Blatchford - Edgar Blatchford -
 (15) THE COURT Edgar Blatchford is not on the list at
 (16) present
 (17) MR. OPPENHEIMER And he was put in by deposition If
 (18) ever - I believe the parties had more negotiation over the
 (19) deposition designations in this case than any other case I've
 (20) ever been in It is inconceivable to me that either he
 (21) couldn't have had cross designations which would have taken
 (22) care of this during our case or he couldn't have been
 (23) anticipated before There's absolutely nothing we elicited
 (24) from him that wasn't memorialized in stone and negotiated six
 (25) weeks before the trial It doesn't make sense to wait and

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- (1) treat that as rebuttal when in fact it's just not new Not
 (2) new
 (3) MR. PETUMENOS The problem is I think Judge -
 (4) THE COURT I'm going to cut you off counsel We've
 (5) only got so much time in the day and the fact is that some of
 (6) these witnesses certainly look like rebuttal witnesses to me
 (7) and some of them may have some problems in that you may -
 (8) there may be an accusation that you knew that they - they were
 (9) rebuttal witnesses but you didn't put them on the list, and
 (10) there are probably a host of other accusations I could listen
 (11) to this morning but then I'm going to have to listen to them
 (12) the next time this comes around so I would prefer to listen to
 (13) them only once
 (14) The fact is that you've got - you've now given me a list
 (15) of nine witnesses that you say are certain I consider that
 (16) the other witnesses are improbable and therefore I won't deal
 (17) with them specifically To the extent that a witness rebuts
 (18) particular things said in - in another - in a defense
 (19) witness testimony that may or may not be legitimate rebuttal
 (20) but you're being strategically vague about what these witnesses
 (21) are going to testify to and the Defendants are in a - in a
 (22) state of uncertainty and paranoia which probably is a
 (23) realistic state of mind at this point But we're just going to
 (24) have to funnel this all down and find out whether it's really a
 (25) major issue It's become a much less major issue just in this

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- (1) discussion and by this evening you're going to have to make
 (2) your decision. I don't want you dropping names on the defense
 (3) at 11:00. Counsel, you're going to have to make your
 (4) decisions all of them by 4:30 today.
 (5) MR STOLL: Your Honor, could we have still six
 (6) o'clock?
 (7) THE COURT: Six o'clock.
 (8) MR PETUMENOS: The only problem we have for that
 (9) Judge, is that witnesses who haven't testified yet today
 (10) tomorrow and Wednesday and with that caveat -
 (11) THE COURT: Well, that's true. If there's some
 (12) blinding revelation that you get in the defense case in the
 (13) next two days, you're going to have to let me know about it.
 (14) MR STOLL: Your Honor, I'd just like to say one
 (15) thing, that is that this business about us not complying with
 (16) the trial plan -
 (17) THE COURT: Counsel, that one goes by me at this
 (18) point. The trial plan has been trumped on by all of you. And
 (19) the listing of - of a number of witnesses for strategic
 (20) purposes that aren't going to be called is a sin that's been
 (21) committed by every party in this case.
 (22) MR PETUMENOS: Judge, Mr. Oppenheimer was very good
 (23) at seizing the podium this morning first thing. I had asked
 (24) for this hearing to resolve some Dorchester issues, which is
 (25) actually going to happen at 10:00, so I wanted to move on to

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- (1) in comparison, apparently to Dorchester and MacSwain who
 (2) allegedly relied upon all these other things and it
 (3) misrepresents it.
 (4) You'll notice that ICF is not mentioned under Dr. Mundy's
 (5) name. I don't believe I can't read this copy. I can't even
 (6) find where Mundy is on the screen. So I think the document is
 (7) misleading insofar as it attempts to indicate to the jury what
 (8) other experts have relied upon. It's incomplete. It doesn't
 (9) tell them what other experts have relied upon and leaves the
 (10) impression that Dorchester and MacSwain have looked at so
 (11) much more when they underrepresent what our experts have looked
 (12) at.
 (13) And I don't know what the foundation is for them concluding
 (14) what it is that we relied on, but I know that in the way this
 (15) exhibit is constructed, it's misleading and wrong. Mundy has
 (16) relied upon reports, whereas Dorchester and MacSwain have
 (17) relied upon all this other good stuff, including everything
 (18) that Mundy has relied upon, and I think that it's an unfair
 (19) exhibit.
 (20) THE COURT: This is the - the distillation of the
 (21) problems, all the problems that were anticipated, this one
 (22) issue.
 (23) MR PETUMENOS: This is the first one.
 (24) MR DIAMOND: Well, nature abhors a vacuum and
 (25) suddenly Mr. Petumenos found himself with an hour and a half
 of argument.

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- (1) those.
 (2) THE COURT: Right, yeah.
 (3) MR PETUMENOS: Many of the objections that I had have
 (4) been resolved by virtue of the fact that two witnesses that
 (5) were scheduled for today have been dropped. Apparently
 (6) anticipating a cellar argument on my part on the exhibits, so
 (7) they dropped them. There are only a couple left, and the first
 (8) is an exhibit for Dorchester's direct, it's exhibit 14044. If
 (9) I could approach the Court, I'll tell you my concern. The
 (10) writing is ours and you can ignore it. That's just a note that
 (11) was made.
 (12) Apparently this document is designed to inform the jury of
 (13) what it is that Dorchester and MacSwain relied upon in reaching
 (14) their conclusions, but I think its real intent is to make a
 (15) representation about what others relied upon and stating they
 (16) relied upon a broader range of material than did Dorchester and
 (17) MacSwain.
 (18) I will show you an example. This is - this is allegedly
 (19) what ICF - bringing it up on your screen so you can read it a
 (20) little better - relied upon, and it is - it's not accurate.
 (21) It doesn't accurately state all of the material that - that
 (22) ICF relied on, simply under Dr. Mundy, you'll see that
 (23) Dr. Mundy is listed there. I can't read it on the screen very
 (24) well, as having relied on just a couple of matters, and this is
 (25) a critical point, as having just relied on a couple of matters

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- (1) THE COURT: Well, that's natural.
 (2) MR DIAMOND: Well, I'm nonplused because all the
 (3) exhibits we planned to use -
 (4) THE COURT: The only way I'm going to find out if this
 (5) is an unfair exhibit is listen to the testimony.
 (6) MR DIAMOND: I was about to say, and I appreciate
 (7) Mr. Petumenos' advanced warning of his cross-examination on
 (8) this exhibit. I'm happy to illuminate you, but I think
 (9) Dorchester will explain what this represents where it came
 (10) from and his understanding of it. You know, I can synopsise
 (11) that now, but I don't know if it's any benefit to you. I think
 (12) if there's an objection, it ought to await the introduction or
 (13) an offer of this exhibit into evidence.
 (14) THE COURT: Thank you. Anything else, counsel?
 (15) MR PETUMENOS: Not on this exhibit. I'm taking them
 (16) one at a time, so that we could -
 (17) THE COURT: Go to the next issue, then. I'm certainly
 (18) not extracting this exhibit. At this point, I certainly have to
 (19) hear about it from the witness.
 (20) MR PETUMENOS: You may have the same answer with the
 (21) next exhibit because my problem with 13095C 1, I don't
 (22) understand it. I don't - I've asked counsel to explain it to
 (23) me and I still don't understand it, but it is apparently some
 (24) sort of a representation as to income flow that Mundy - it's
 (25) Dorchester's rendition of what Mundy has done. I can't figure

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- (1) out what's on the Y axis I can't figure out how we get to -
 (2) to \$6 199 607 when we've got these colors that appear to be -
 (3) if you take the gray we're at 12 million after two years If
 (4) you take the red we're at 8 million after two years I'm
 (5) trying to understand it Judge and I can't get them to make
 (6) any sense out of it for me
 (7) THE COURT Yes counsel?
 (8) MR DIAMOND We have on the Barco only half of this
 (9) and it's a little bit confusing
 (10) THE COURT Is the other one total post spill claim
 (11) damages?
 (12) MR DIAMOND I have a board of this
 (13) MR PETUMENOS How did I know
 (14) THE COURT Yeah I have the second half
 (15) MR DIAMOND You have the second page
 (16) THE COURT This is it right
 (17) MR DIAMOND I should say yeah it's a little bit
 (18) unfair to ask the lawyer to explain this all I have to do is
 (19) ask the questions The witness is the one who's going to
 (20) explain it
 (21) What this represents is up to '89 actual income derived by
 (22) Port Graham Corporation from the use of its lands The post
 (23) '89 figures represent the amount of economic rent that
 (24) Dr Mundy said these properties should generate for the
 (25) succeeding whatever period it was 30 years The level of

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- (1) impairment is the gray If you look at his work sheets he
 (2) says that -
 (3) THE COURT I see it
 (4) MR DIAMOND That all of Port Graham's properties
 (5) should produce revenues amounting to \$6.2 million annually
 He
 (6) impairs the property and says that for the first two years
 (7) there will be no revenue earned by those properties and then
 (8) diminishing amounts of revenue through the succeeding seven
 (9) years If you add up the grays on these bars they - which
 (10) are roughly six for the '89 another six for '90 and then
 (11) diminishing amounts they add up to the total post spill
 (12) claimed damages for Port Graham \$16.2 million so the
 (13) difference between the red and the gray depicts the total
 (14) amount of lost rent that Dr Mundy calculates this corporation
 (15) lost on all of its properties during the relevant period He
 (16) is using this chart to contrast Dr Mundy's theoretical
 (17) analysis with pre spill reality to show that this is a little
 (18) bit Alice in Wonderland like That's how the chart works
 (19) MR PETUMENOS What is - I'll ask the question
 (20) through the Court what is \$6 199 607?
 (21) MR DIAMOND \$6 199 607 calculated all that the Port
 (22) Graham properties should have earned annually using his
 (23) valuation and a nine percent rental rate You remember he
 (24) appraises the properties comes up with I don't know in the
 (25) case of Port Graham '80 a hundred million dollars He then -

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- (1) little bit less He then uses a nine percent rental rate and
 (2) says you should be able to earn with these properties nine
 (3) percent of their total valuation which amounts to 6 199 607
 (4) annually This is simply a comparison of what he says the
 (5) properties should have earned the level of his impairment and
 (6) the pre spill real life situation That's what this chart
 (7) does and it's part of - it's part of Dr Dorchester - Mr
 (8) Dorchester's criticism of Dr Mundy's approach
 (9) MR PETUMENOS Judge I think - I'm not sure - I
 (10) still don't think I understand it I don't understand where
 (11) the numbers are coming from exactly but the problem I have
 (12) here is that both experts in establishing a value have used
 (13) hypothetical lease rates Dr Dorchester does in the form
 (14) of - he uses a license analogy and no licenses were actually
 (15) put forward This is a misrepresentation - a clear
 (16) misrepresentation of what Dr Mundy is asserting This is a
 (17) comparable based upon what Dr Mundy has determined for
 what
 (18) the law requires him to show which is loose - theoretical
 (19) lost use because you can't take the full market value of the
 (20) property The law requires him to hypothecate an income
 (21) stream That was Exxon's motion itself They're the ones
 (22) that said you have to do it this way or you violate the Supreme
 (23) Court case So he does it and then they attack him for doing
 (24) what the law requires in the case of temporary impairment by
 (25) contrasting the fact that the rental wasn't actually obtained

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- (1) That's what the law requires him to do on land rather than
 (2) determine the market value
 (3) Mr Dorchester because he follows the law does the same
 (4) thing and comes up with a different rental rate a different
 (5) licensing rate he comes up with a lease value and thinks that
 (6) because an oil spill is not an exclusive trespass that you
 (7) follow the low end of the lease rate that he hypothecates
 (8) Both experts are doing that and this is a completely unfair
 (9) attack on Dr Mundy who is doing nothing more than what the
 (10) law requires which is to establish a hypothetical income
 (11) stream in order that the entire difference between before and
 (12) after on market value of the property is not taken And I
 (13) thought that's what this was but now that I know this is what
 (14) it was I think the exhibit is objectionable
 (15) THE COURT Counsel you were right I'm not going to
 (16) make a ruling on this yet If your arguments are well taken at
 (17) the end of the testimony I may not let the exhibit in
 (18) MR PETUMENOS Can we make our arguments before it's
 (19) published? My concern is that the exhibit is admitted when
 (20) it's published
 (21) THE COURT Probably yes yes
 (22) MR PETUMENOS The last issue is an application to
 (23) the Court for cross-examination under your order 63 and I will
 (24) show the Court that This is a motion in limine -
 (25) MR DIAMOND Can I just see it?

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(1) MR PETUMENOS Sure this is on the Keating matter
 (2) I have two applications to make on cross examination The
 (3) other I'd like to make before I - right before I do the cross
 (4) because I don't want to disclose to the witness but this one
 (5) is open and notorious and everybody knows about it and it's an
 (6) order and I'm under instructions to approach the Court and
 (7) that's what I want to do
 (8) I put on the Court - on the bench and you'll have time I
 (9) think to consider this before the actual cross because there
 (10) will be a substantial direct The case entitled Babinec vs
 (11) State which I've served on counsel It stands for the
 (12) proposition that it is error not to permit counsel to
 (13) cross examine on previous appraisals and positions taken
 (14) which
 (15) are inconsistent to the - potentially inconsistent to the
 (16) position being taken in the case at bar It basically says the
 (17) prior work and prior opinioned testimony is fair game for
 (18) cross examination The background to this particular issue is
 (19) interesting in that the Court required as part of the
 (20) discovery plan that each expert submit a - a recitation and a
 (21) list of all prior testimony given in prior cases to this one
 (22) for the express purpose of allowing counsel to locate
 (23) inconsistent testimony or other points of view that the witness
 (24) has engaged in
 (25) In this particular instance it is the position of the
 Plaintiffs that the memorandum that was supplied to the parties

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(1) in the pretrial order was misleading in that it did not
 (2) disclose the testimony in the Keating case It termed it in
 (3) terms of a retention on behalf of the - of an insurance
 (4) company that was handling a directors and officers civil
 (5) litigation when in fact at the deposition Mr Dorchester
 (6) conceded that he was hired by the public defender's office in
 (7) connection with the criminal case in the Charles Keating
 (8) matter and that he in fact testified and I have a copy of
 (9) the testimony in Los Angeles California in which he testified
 (10) on behalf of the defense in the criminal case in the Keating
 (11) matter and the import of his testimony in the Keating case was
 (12) that Mr Keating was being tried for fraud in connection with a
 (13) savings and loan matter and part of the case was that the land
 (14) and property in the case was - was not properly disclosed in
 (15) terms of its true value did not have any economic merit and
 (16) that money was obtained as a consequence and Mr
 Dorchester's
 (17) role in that case was to testify that this property had
 (18) economic merit and economic value in the face of the
 (19) government's contention the United States government's
 (20) contention that it did not And this entire prior testimony
 (21) was omitted from - or phrased in such a way in the disclosures
 (22) to the Plaintiffs that it was impossible to tell that
 (23) Dr Dorchester - or Mr Dorchester had so testified and I
 (24) believe that under the Babinec case both the fact the manner
 (25) in which he failed to disclose the prior involvement and the

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(1) subject matter of that prior involvement is proper
 (2) cross-examination I don't intend to elicit whether
 (3) Mr Keating was convicted or not or whether his testimony was
 (4) accepted or not but the fact that he testified and on that
 (5) subject and did not fairly disclose it in compliance with the
 (6) pretrial order is my application
 (7) THE COURT Okay but I can't - the pretrial order
 (8) says I'll have a hearing on this and hear the questioning and
 (9) decide what I admit if anything and that's exactly what I
 (10) intend to do So I don't think that argument is a necessity
 (11) point
 (12) MR PETUMENOS Should we schedule that for the
 (13) afternoon or something?
 (14) THE COURT Well I don't know How long is this
 (15) witness going to testify today
 (16) MR STOLL You have him down for five hours
 (17) MR DIAMOND That's direct and cross My guess is
 (18) it's somewhere between - right around two and a half or three
 (19) hour direct
 (20) THE COURT He goes on at 10 00?
 (21) MR DIAMOND He goes on at 10 00 yeah
 (22) THE COURT Well then maybe I'll just break at the
 (23) end of his direct testimony
 (24) MR DIAMOND Yeah Your Honor I was - I was just
 (25) going to address the merits briefly because I don't intend to

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(1) object to Mr Petumenos cross-examination to the extent it's
 (2) cross-examining an earlier appraisal Mr Dorchester did or even
 (3) curtail his ability to challenge whether Mr Dorchester did not
 (4) disclose relevant information on his vitae
 (5) The only thing we object to is the use of Charles Keating
 (6) I mean if this were - if this all involved litigation
 (7) involving Tom Cruise Mr Petumenos would not be in such a
 (8) hurry to talk about the client for whom all of this was done
 (9) He just wants to get Charles Keating's name in front of the
 (10) jury You know it seems to me -
 (11) THE COURT I'm surprised Mr Keating isn't on the
 (12) witness list
 (13) MR STOLL He's out of subpoena range Your Honor
 (14) out of subpoena range
 (15) MR DIAMOND Wait till 6 00 p.m. this afternoon
 (16) THE COURT Okay At any rate -
 (17) MR STOLL Stay tuned
 (18) MR DIAMOND Quite frankly I love spending my
 (19) afternoons in this courtroom as well as my morning but I do
 (20) have another witness I have to prepare for tomorrow and - he
 (21) can do whatever he wants on cross-examination so long as he
 (22) doesn't start talking Charles Keating
 (23) THE COURT Fine Does that resolve most of the
 (24) problems Mr Petumenos?
 (25) MR PETUMENOS I think it pulls the entire import of

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- (1) the cross examination out I think Mr Dorchester was very
 (2) clever in his disclosures about this matter and I think he was
 (3) clever in his disclosures about this matter because it was
 (4) Mr Keating and because he was trying to keep us from finding
 (5) out -
 (6) THE COURT What probative force does the name Charles
 (7) Keating have to this case?
 (8) MR PETUMENOS That - that Mr Dorchester testified
 (9) in a highly celebrated case and took a position that was
 (10) arguably inconsistent with the positions that he takes here
 (11) He comes off here as a very conservative very - play it very
 (12) close to the USPAP standards and read everything strictly and
 (13) so forth when in fact in a very celebrated case as he well
 (14) knew he testified to a position that was creative at best
 (15) and it goes to his bias and it goes to his credibility that
 (16) rather than forthrightly state that he was involved for the
 (17) defense in the Keating case he attempted to keep it from us
 (18) To take that proof away from us is to make it look like it
 (19) was some inadvertent thing or it was some neglectful thing that
 (20) he just didn't describe it right and so forth when in fact it
 (21) was one of the largest cases that this man has ever testified
 (22) in and we don't believe it was a mistake and I think we're
 (23) entitled to raise that inference with the jury and the fact
 (24) that it was such a celebrated case and the fact that it was
 (25) such a hotly contested case in the public eye and he didn't put

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- (1) it down accurately I think is relevant to his credibility
 (2) THE COURT You need a hearing to develop your theory
 (3) of why Mr Keating's name should be mentioned here?
 (4) MR PETUMENOS No I think that the request - the
 (5) hearing was something that the Court had said in its order
 (6) THE COURT Right
 (7) MR PETUMENOS And I'll leave it to the Court as to
 (8) whether there are any further factual predicates necessary but
 (9) the only thing that would come out in the hearing that perhaps
 (10) you don't have in front of you now would be what the
 memorandum
 (11) said that was provided to Bogle & Gates and what the true
 (12) facts are as to what his retention was as to opposed to what he
 (13) wrote down I think matters of that nature but I'm not sure
 (14) that's much in dispute The memorandum is what the
 memorandum
 (15) is
 (16) THE COURT Do you have the memorandum?
 (17) MR PETUMENOS I think I do Let me see if I can
 (18) find it
 (19) MR DIAMOND I think it was all covered in the
 (20) earlier briefing
 (21) THE COURT Here's the deal You can't mention
 (22) Mr Keating's name until I tell you to if I tell you to I'll
 (23) read the memorandum but it's almost crystal clear to me that
 (24) Mr Keating's name has no probative force in this case But
 (25) you know you never know what a witness is going to say so I

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- (1) reserve the - the ability to evaluate the record after he
 (2) testifies and determine whether or not I'm wrong and if I
 (3) think that a door has been opened or if somehow Mr Keating's
 (4) presence is required in this courtroom in one form or another
 (5) I'll let you know
 (6) MR PETUMENOS Would you like me to bring you the -
 (7) THE COURT I want to read the memo
 (8) MR PETUMENOS Yes I have it here
 (9) THE COURT I have a 2:30 slot open today 2:30 to
 (10) 3:30 so if there's something you need to discuss that's the
 (11) time to set it
 (12) MR DIAMOND I have one small application but I'll
 (13) wait for -
 (14) THE COURT Sure
 (15) MR PETUMENOS I think the matter that relates to the
 (16) Keating testimony is at number nine on the disclosure statement
 (17) as opposed to the - and I believe the true facts are that he
 (18) was retained and paid by the public defender United States
 (19) Public Defender Agency in connection with the Keating criminal
 (20) trial
 (21) MR DIAMOND Your Honor Mr Petumenos deposed
 (22) Mr Dorchester for a day - Mr Dorchester was deposed for a
 (23) day and a half on this He was not paid by the public defender
 (24) in Los Angeles he was called to testify he testified I've
 (25) stood at this lectern for more days than I care to think about

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- (1) listening to statements that's arguably not true Dr Freitas
 (2) has never been an Exxon employee We can start cataloguing
 (3) them Mr Petumenos knows that Dr Dorchester was not
 (4) compensated when he testified in the Keating matter He was
 (5) called by the public defender
 (6) THE COURT Counsel now that I gave you an
 (7) opportunity to get some therapy but it's not important for
 (8) this issue
 (9) MR DIAMOND So that I can head off a problem on
 (10) cross-examination Plaintiffs 8312
 (11) MR PETUMENOS I'm sorry?
 (12) MR PETUMENOS That was the one I was going to raise
 (13) but not until cross-examination again
 (14) MR DIAMOND I can only - I can only imagine how
 (15) much Mr Petumenos is looking forward to this
 (16) cross-examination because he's got some very colorful exhibits
 (17) that he's pre-designated There is a theory on the Plaintiffs
 (18) side that under the regulations promulgated by whoever
 (19) license - whoever certifies appraisers that if you do an
 (20) appraisal in Alaska and hold yourself out and therefore if
 (21) you're not certified - this is not licensure if you don't
 (22) hold certification of the State of Alaska you're guilty of a
 (23) misdemeanor and I expect Mr Petumenos would want to
 accuse
 (24) Mr Dorchester of committing various misdemeanors in the
 State
 (25) of Alaska because he did appraisals on the 80-some parcels

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(1) involved in this case The statute however section 8 87 34
 (2) of the Business and Professions Code makes clear that it s not
 (3) a violation of law in the State of Alaska for an uncertified
 (4) appraiser to perform appraisal work
 (5) THE COURT So the misdemeanor is you say you re a
 (6) certified real estate appraiser right?
 (7) MR DIAMOND Yes Before - cross examination is
 (8) allowed suggesting a violation of law by Mr Dorchester I
 (9) would ask that we approach and this be thoroughly fleshed out
 (10) unless you want to decide the issue now
 (11) MR PETUMENOS This was the issue I was going to
 (12) approach the Court on I wouldn t want you to think I was
 (13) going to wade into this without talking to you The issue is
 (14) not as clear as Mr Diamond indicates The misdemeanor
 (15) provision of the statute says that if you hold yourself out as
 (16) a certified real estate - certified appraiser you are
 (17) prosecutable for a class B misdemeanor However the
 (18) Department issued a regulation under the Administrative Code
 (19) and defined what holding yourself out as a certified appraiser
 (20) is and they defined it as holding out as a certified real
 (21) estate appraiser in any way includes anyone who performs
 (22) appraisal services on real estate located in Alaska That s
 (23) how they have defined the term that s in the statute
 (24) Now the import of my cross-examination is to show to - if
 (25) you recall Mr MacSwain attempted to talk about how it wasn t

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(1) really very important to be certified in Alaska it s much
 (2) better to be certified nationally as part of the Appraisal
 (3) Institute That it s really not a big deal and the standards
 (4) are much greater for the Appraisal Institute than they are for
 (5) the State of Alaska and we are entitled to rebut that to show
 (6) that there is a statutory scheme that greatly encourages and
 (7) provides for deterrence and for incentives that you be licensed
 (8) in Alaska before you conduct these appraisals including the
 (9) misdemeanor provision
 (10) I don t intend to accuse him of a crime but I do think
 (11) it s correct to point out what the regulation says and what the
 (12) law says I also think it s correct to point out that he has
 (13) not got standing to sue for his fee if his client withholds
 (14) the fee from him because that is an indication from the
 (15) regulator of another very strong message that you are not to be
 (16) doing appraisals in Alaska unless you are certified Further
 (17) there are provisions for out of the state
 (18) THE COURT How can that be counsel when the statute
 (19) says appraisals by an uncertified appraiser is permitted?
 (20) MR PETUMENOS How can it be that you have a criminal
 (21) statute that says that if you hold yourself out as a real
 (22) estate appraiser in Alaska you re guilty of a misdemeanor and
 (23) then you define it in the regulations as anybody who does a -
 (24) performs appraisal services on real estate located in Alaska
 (25) A construction of it is that you can do your real estate

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(1) appraising elsewhere but you can t do it on real estate
 (2) located in Alaska That s what the regulation seems to
 (3) indicate They have defined it and I have - is a copy of the
 (4) Administrative Code regulation in front of you?
 (5) MR PETUMENOS To compare the regulation to the
 (6) statute it appears clear that such a prosecution would survive
 (7) a motion for dismissal because the element of the offense as
 (8) contained in the misdemeanor statute says that one of the
 (9) elements is that you must hold yourself out as an appraiser
 (10) and that s further defined and published to the entire world as
 (11) including any appraisal done in Alaska You don t have to be
 (12) certified obviously to do appraisals elsewhere
 (13) THE COURT Well all I see counsel is at best a
 (14) bewildering administrative scheme and regulation that may very
 (15) well be absolutely invalid so why should I allow that
 (16) particular issue to be explored?
 (17) MR PETUMENOS Well then I think we ought to
 (18) cross-examine it that way I won t accuse him of violating a
 (19) misdemeanor statute but I think it is fair to say that it is
 (20) not something that is to be taken lightly It s not something
 (21) that is a - as Mr MacSwain described it as an oh never mind
 (22) sort of thing when there are a number of provisions in the
 (23) course of the statute that make it clear that the regulators
 (24) are attempting to deter and attempting to establish that
 (25) licenses in Alaska are important.

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(1) This goes to the qualifications of the various experts
 (2) before the - before the jury because Dr Mundy is certified
 (3) in Alaska and Dr Dorchester is not - Mr Dorchester is not
 (4) And when they get the instruction on how to evaluate
 (5) conflicting expert testimony of course the qualifications of
 (6) the various experts are relevant to the determination of who to
 (7) follow And if the statute and regulations at best put into
 (8) question as to whether this is good practice and whether there
 (9) is a strong legislative intent here to keep appraisals from
 (10) happening by uncertified appraisers that information needs to
 (11) be in front of the jury so they can evaluate the qualifications
 (12) and where I was going to raise it was in the course of the
 (13) qualifications cross I don t think I have to - I m willing
 (14) to cross-examine him on the notion that there is conflicting
 (15) statements here including the one that you described in the
 (16) regulation that I described but I think it s fair
 (17) cross examination when the attempt was made of Mr
 MacSwain to
 (18) describe how insignificant the certification process is when
 (19) there s certainly another view
 (20) THE COURT What do you want me to do counsel? What
 (21) are you asking for? That s all I want to know
 (22) MR DIAMOND What am I asking?
 (23) THE COURT Yeah
 (24) MR DIAMOND I m asking for an order precluding
 (25) cross-examination which suggests that it was a violation of law

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- (1) for Mr. Dorchester to do appraisal work in the state of
- (2) Alaska. Counsel has agreed to -
- (3) THE COURT: Granted, motion granted.
- (4) MR. PETUMENOS: I'm sorry, could I hear the order
- (5) again?
- (6) THE COURT: Run that back again, please, for Mr.
- (7) Petumenos.
- (8) (Read back Mr. Diamond's request.)
- (9) THE COURT: And the motion was granted.
- (10) MR. PETUMENOS: May I understand what I may not do -
- (11) THE COURT: You can talk about the importance of
- (12) certification. You can talk about his qualifications. You
- (13) simply can't - well, maybe I better make it more explicit.
- (14) Don't bring up the criminal statute. Don't bring it up.
- (15) MR. PETUMENOS: All right. But I can bring up the
- (16) other provisions relating to you can't sue for a fee and all
- (17) those other things?
- (18) THE COURT: Well, I don't know why I can't
- (19) understand what - what probative force that would have
- (20) MR. PETUMENOS: Because the legislature has
- (21) determined in an attempt to deter appraisals by out-of-state
- (22) appraisers who aren't certified that there are certain benefits
- (23) that they will not confer upon someone who does that work. For
- (24) example, you act at your peril in Alaska if you're not
- (25) certified, because if your client says I don't want to pay you

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- (1) they don't have to, and that is an expression of legislative
- (2) intent that this certification process is important, and
- (3) they're trying to deter people from doing it as opposed -
- (4) THE COURT: You can't mention it now. I'll hear what
- (5) the answers are, and maybe I'll relax that particular order.
- (6) But right now, I don't want you going into the statute.
- (7) MR. PETUMENOS: I can't go into certification in
- (8) Alaska at all?
- (9) THE COURT: Yes, you can go into certification. I
- (10) don't want you talking about a fact that he can't sue for a fee
- (11) under the statute. I don't think it has any probative force at
- (12) all. It might have later on, but we'll see.
- (13) What I'm not intending to do, Mr. Petumenos, is let you get
- (14) your foot in the door and kick the door open, and the only way
- (15) I can do that, given the arguments you've just told me you're
- (16) going to make, is to make you - make it perfectly
- (17) understandable what I'm saying here.
- (18) Anything else?
- (19) MR. DIAMOND: Briefly, I have to apologize for my
- (20) outburst. Not only was it intemperate, it was unfounded.
- (21) THE COURT: What outburst was that, counsel?
- (22) MR. DIAMOND: When I suggested Mr. Petumenos misspoke
- (23) when he said that Mr. Dorchester was compensated by the
- (24) public defender. In fact, I am corrected by my colleagues; he was
- (25) compensated by the public defender. I misunderstood the

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- (1) record. That's not to suggest I couldn't cite other examples.
- (2) There is one area that we had talked about previously.
- (3) You've asked us not to explore it without raising it with you.
- (4) First, other economic arrangements between Exxon and these
- (5) plaintiffs. You will remember at one juncture we wanted to
- (6) offer evidence through Mr. MacSwain of lease arrangements
- (7) between Exxon and I believe Chenega, and maybe some of
- (8) the other Native Village Corporations in terms of the income stream
- (9) that they earned. It - we don't intend to offer that evidence
- (10) for the same purpose with Mr. Dorchester, however.
- (11) Mr. Dorchester is going to offer testimony about what a
- (12) reasonable license fee would be in the commercial market
- (13) between parties dealing at arm's length for exclusive and
- (14) nonexclusive rights to enter and use property. He has looked
- (15) at what some of the Native Corporations actually charged
- (16) Exxon
- (17) and Alyeska for a similar right to use the property. I don't
- (18) believe he's talking about gross amounts of dollars. He's
- (19) talking about percentages, and in this instance, those leases
- (20) are very germane to what his opinion as to what an appropriate
- (21) license fee would be. I think this is different than the uses
- (22) that we proposed to make of that before, and I would ask
- (23) permission to be able to go into that with him.
- (24) THE COURT: Counsel?
- (25) MR. STOLL: Could we just have a moment, Your Honor?
- (26) MR. PETUMENOS: I think the answer to this lies in the

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- (1) facts that there are other areas or other ways in which they
- (2) can come up with a value, or have come up with a value for
- (3) permanence without raising the notion that Exxon paid the
- (4) corporations' money. It's a probative value, prejudice
- (5) argument. There are, I believe, recitations in the report to
- (6) other forms of comparables, other ways, or it could be referred
- (7) to without pointing out from whom the source of funds came
- (8) but
- (9) I think to come in and talk about Exxon paying the money is
- (10) what the order covers, and I think it's easily remedied without
- (11) mentioning that Exxon paid the funds.
- (12) MR. DIAMOND: I'm happy to ask the witness to do
- (13) that. It seems like it's somewhat transparent. He'll be
- (14) talking about what Native Corporations received for making -
- (15) granting access to use their lands in connection with the
- (16) cleanup. I'm happy to have the witness not talk - not use the
- (17) word Exxon.
- (18) THE COURT: Fine. So am I correct you've resolved
- (19) this dispute between yourselves?
- (20) MR. PETUMENOS: Well, if he's going to say permits and
- (21) money received for permission to come on for the cleanup, no
- (22) that doesn't resolve it, because that telegraphs to the jury
- (23) what - that it's from Exxon. I don't see the reason that he
- (24) has to do that. I'm trying to prevent the prejudice in a real
- (25) and substantive way.
- (26) THE COURT: The context has to be shown. That's

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- (1) fine You can say that You can say - don't use Exxon's
- (2) name any other - otherwise and you can phrase your question
- (3) just the way you said you were going the phrase it
- (4) MR OPPENHEIMER Your Honor even though the vacuum I
- (5) think is closed it is 10:00 a request procedurally with
- (6) respect to the list that's coming in at 6:00 this evening The
- (7) only way we're going to be able to tell and hopefully we won't
- (8) have any problem but if there is a matter that we're going to
- (9) wish to address with respect to the rebuttal issues we're
- (10) going to need some indication of - of the scope I think of
- (11) the proposed rebuttal testimony by witness Certainly judging
- (12) by the exhibits we can't do that now I assume the exhibits
- (13) are getting cut down too I have to believe that's the case
- (14) THE COURT I can't resolve this question for you now
- (15) counsel It seems to me that if the witness is given and
- (16) projected to be a half an hour long that cues you into one
- (17) fact that's important and that is that this is not going to be
- (18) extensive testimony If the exhibits are cut down that'll -
- (19) that'll help you even more If you're still bewildered at the
- (20) end of this time then you have to approach me but we have
- (21) time to do that
- (22) MR OPPENHEIMER Understood Your Honor
- (23) MR PETUMENOS I just wanted to get my page back
- (24) THE COURT Your what?
- (25) MR PETUMENOS My exhibit page back that I handed

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- (1) up
- (2) THE COURT Oh I may have lost it counsel What was
- (3) the -
- (4) MR PETUMENOS It was the Administrative Code
- (5) regulation
- (6) MR DIAMOND And I gave you the statute
- (7) THE COURT Here's the statute here's the code and
- (8) real estate appraisers thing and here is your - in fact I'm
- (9) going to keep this one Do you have a copy of this?
- (10) MR PETUMENOS Memorandum yes I have another copy
- (11) Judge
- (12) THE COURT The memorandum from Mr. Grant to
- (13) Mr. Dorchester and paragraph 9 particularly which describes
- (14) the - the services rendered because I think it's not as -
- (15) as - it appears to me not as tricky as Mr. Petumenos would
- (16) have said it was I think it supports a ruling keeping out
- (17) Mr. Keating's name and therefore I'm going to mark this as
- (18) court's next in order 32 okay
- (19) MR PETUMENOS May I have Plaintiffs Exhibit 8312
- (20) marked for Court's next in order?
- (21) THE COURT What is that
- (22) MR PETUMENOS That is the administrative code and
- (23) statute
- (24) THE COURT Yeah 33
- (25) MR PETUMENOS 33 thank you Judge Symptom stole

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- (1) Your Honor on Friday when we finished early we suggested at
- (2) that point running the Katzke tape
- (3) THE COURT Right
- (4) MR STOLL And you said to put that off till today
- (5) and we could just if it's all right just run it I think it's
- (6) all cued up take five minutes
- (7) MR DIAMOND Your Honor we would ask that they just
- (8) put that on during their rebuttal case
- (9) THE COURT I think it's entirely appropriate to put
- (10) it on in the rebuttal case That's the logical place for it
- (11) MR STOLL Okay
- (12) THE COURT I'm going to take a brief break counsel
- (13) THE CLERK Please rise This court stands in
- (14) recess
- (15) (Recess at 10:04 a.m.)

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- (1) STATE OF ALASKA)
- (2) Reporter's Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Joy S. Brauer RPR a Registered Professional
- (7) Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) JOY S. BRAUER RPR
- Notary Public for Alaska
- (22) My Commission Expires 5-10-97

Look-See Concordance
Report

UNIQUE WORDS 1,379
TOTAL OCCURRENCES 4,216
NOISE WORDS 385
TOTAL WORDS IN FILE
12,965

SINGLE FILE CONCORDANCE

CASE SENSITIVE

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(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 (Civ11
) Anchorage Alaska
 (5) The EXXON VALDEZ) Monday August 29 1994
) 10 20 a m
 (6))
 (8) VOLUME 46 Pages 7303 through 7414
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
 (17) FOR THE PLAINTIFF
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(1) PROCEEDINGS
 (2) (Jury in at 10 20 a m)
 (3) THE CLERK. This court now resumes its session
 (4) Please be seated
 (5) THE COURT Counsel?
 (6) MR DIAMOND I would take note of the first day of
 (7) school and still we are enjoying our summer vacation
 (8) Good morning ladies and gentlemen of the jury Exxon
 (9) calls as its next witness Don Dorchester
 (10) (The Witness Is Sworn)
 (11) THE CLERK Please be seated
 (12) Sir for the record could you please state your full name?
 (13) A My name is John middle initial D Dorchester Jr That s
 (14) spelled D-o-r-c h-e s t-e r And I go by my middle name of
 (15) Don
 (16) THE CLERK. And your occupation?
 (17) A My occupation is real estate appraiser and consultant
 (18) THE CLERK. Thank you
 (19) DIRECT EXAMINATION OF JOHN D. DORCHESTER JR
 (20) BY MR DIAMOND
 (21) Q And real estate analyst?
 (22) A A real estate analyst
 (23) Q Mr Dorchester what are you going to tell us this morning?
 (24) A We were engaged to make an economic analysis of the effect
 (25) of the Exxon Valdez oil spill on the plaintiffs lands To do

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(1) FOR THE DEFENDANTS
 CHARLES P. DIAMOND
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 (9) JOY S. BRAUER RPR
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 (10) Midnight Sun Court Reporters
 2550 Denali Street Suite 1505
 (11) Anchorage Alaska 99503
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(1) the work my firm and I were joined up with Steve MacSwain and
 (2) his associates here in Anchorage to perform very extensive and
 (3) thorough research to do this work and I m here this morning to
 (4) tell each one of you that the plaintiffs did suffer damage but
 (5) not nearly as much as the plaintiffs have claimed
 (6) Q Before we get into your opinions I d like to talk to you
 (7) briefly about your background Where were you educated?
 (8) A I was graduated from the University of Oklahoma and I
 (9) graduated from there in 1957 with a dual major I had a degree
 (10) in finance and another degree - another part of a degree in
 (11) accounting And then after four years of army duty went back
 (12) to the University of Oklahoma and completed a Master s
 program
 (13) again with a dual program Half of my Master s work was in the
 (14) school of urban and regional planning and the other portion of
 (15) the Master s program was sponsored by the American Institute
 of
 (16) Real Estate Appraisers was in the School of Economics so the
 (17) eventual Master s degree was in land economics
 (18) Q What did you do in the army?
 (19) A A lot of things
 (20) Q So did we all
 (21) A Some we can t talk about
 (22) When I graduated from the University of Oklahoma I
 (23) received a regular army commission reported to Fort Benning
 (24) Georgia completed the basic training school and ranger school
 (25) while I was there and then reported to First Infantry

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- (1) Division Fort Riley Kansas where I spent most of the next
 (2) two years as a ranger unit commander
 (3) After those two years I was transferred to the finance
 (4) corps went to Bremerhaven Germany and sent the next two
 (5) years in a variety of assignments but the principal post was
 (6) that of finance and accounting in Bremerhaven
 (7) Q And I understand you had some real estate responsibilities
 (8) in the army but your first appraisal really preceded it
 (9) didn't it?
 (10) A Yes it did
 (11) Q Tell us what was your first appraisal and how did you get
 (12) involved in that?
 (13) A My dad who's still living is an MAI as well and my dad
 (14) I guess as many appraisers do took me with him to inspect
 (15) farms and ranches and residences from the time I was real
 (16) small He let me write up my first farm appraisal when I was
 (17) 13 years old and he let me sign my first appraisal when I was
 (18) 16 But I really didn't decide that I wanted to be an
 (19) appraiser for my career I guess until after I had spent a
 (20) couple of years in the army
 (21) Q You briefly considered another career didn't you?
 (22) A Yes I did For awhile in high school and particularly to
 (23) some extent in college I thought I was an athlete Spent a
 (24) lot of time playing football and basketball particularly
 (25) baseball and thought very seriously about a professional

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- (1) baseball career
 (2) Q Well and you had a tryout with the Pirates?
 (3) A Yes I did
 (4) Q And it's a good thing you didn't go into the big leagues
 (5) because you'd be unemployed today?
 (6) A That's correct
 (7) Q How many years experience do you have doing real estate
 (8) appraisals?
 (9) A Well it's over 40 years now 42 three years I suppose
 (10) Q How many pieces of property have you appraised?
 (11) A Thousands In - in some of the work we've done for
 (12) assessing work alone as a contract appraiser to public
 (13) agencies I have been involved in over 400 000 appraisals just
 (14) in that alone but in other types of work many thousands
 (15) Q Are you part of a firm?
 (16) A Yes I am I'm a part of the Dorchester Group which as a
 (17) partnership headquartered in Scottsdale Arizona
 (18) Q Did your father still practice appraisal work?
 (19) A No my dad retired a number of years ago He's 87 going
 (20) on 88 And no longer does any appraisals but he doesn't
 (21) hesitate to tell me about the appraisals that I work on when we
 (22) talk about them
 (23) Q I was having to be careful when I used the acronym Do you
 (24) hold an MAI? I think I've got the -
 (25) A Yes I do the MAI designation of the Appraisal Institute

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- (1) Q How long have you been an MAI?
 (2) A I've held the MAI designation since 1967
 (3) Q Have you held any leadership positions in the Appraisal
 (4) Institute or any of its predecessor organizations?
 (5) A Yes I have
 (6) Q Tell us
 (7) A I - the predecessor organizations were the American
 (8) Institute of Real Estate Appraisers and the Society of Real
 (9) Estate Appraisers I am still in both of the organizations
 (10) But for example just on the - just on the American
 (11) Institute I held most of the leadership positions from chapter
 (12) through national offices and I served the American Institute
 (13) as its national president in 1981 and '82
 (14) Q That's the top dog of all the appraisers?
 (15) A Well it's the one they shoot at at least
 (16) Q Have you ever been involved in promulgating assisting in
 (17) promulgation standards for appraisers?
 (18) A Yes I have I've been quite active in the standards field
 (19) going back into the late 1960s I was involved in the
 (20) revisions of the Appraisal Institute the old American
 (21) Institute of Real Estate Appraisers Code of Ethics in 1960
 (22) through '72 More recently I guess in 1981 I was appointed
 (23) the first Appraisal Standards Board for any of the appraisal
 (24) organizations in the United States and what we developed that
 (25) year and what grew out of that became the basic format for what

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- (1) is now the licensing and certification programs around the
 (2) United States That operates through a federal - not agency
 (3) but I guess a group called the Appraisal Foundation
 (4) Q Have you held ambassador status with the United Nations?
 (5) A In the - in the standards field again I've represented
 (6) the United States since 1981 as its representative to the World
 (7) Standards Committee and as a result of that have been
 (8) designated by that group as their - it's sort of a loose I
 (9) guess ambassadorial term but I do represent them to the
 (10) United Nations at meetings at the United Nations
 (11) Q Mr Dorchester have you received any professional awards
 (12) or honors?
 (13) A Yes I've received a number of them
 (14) Q Any you want to discuss with us this morning?
 (15) A Not terribly
 (16) Q Have you received any appraisals - awards outside the
 (17) appraisal field which you're particularly proud of?
 (18) A Yes a few One in particular that is fairly close to my
 (19) heart In the - in the early 1960s after graduation from my
 (20) Master's program I lived in Tulsa Oklahoma And Tulsa at
 (21) that time is called both America's most beautiful city and
 (22) America's most segregated city I was asked by the Mayor to
 (23) serve as the first chairman of the Housing Commission for the
 (24) City of Tulsa We developed a program for opening the
 (25) community to people of all races to live anywhere they could

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- (1) afford and anywhere they wanted to and that program was
 (2) completed from start to finish in just a little over two years
 (3) Q For which you received the key to the City of Tulsa?
 (4) A That's correct
 (5) Q Have you ever taught in the appraisal area?
 (6) A Yes I have That's been one of the areas I suppose I've
 (7) spent a good deal of my time in in terms of organizational
 (8) work Again starting back in the 1960s I became involved in
 (9) the authorship of various courses for - and seminars for the
 (10) Society of Real Estate Appraisers that I mentioned awhile ago
 (11) Later in the 1960s I became more involved in the old American
 (12) Institute educational programs and over the years have
 (13) authored or coauthored or rewritten or done something to most
 (14) of their required courses many of the - the nonrequired
 (15) courses seminars and - even a lot of the publications of the
 (16) organizations
 (17) Q You're based down in the Lower 48?
 (18) A That's correct
 (19) Q Is this your first venture into appraisal work in Alaska?
 (20) A No it's not I've had several previous engagements in
 (21) Alaska In the early 1980s Steve MacSwain and I were involved
 (22) on behalf of the Alaska Power Authority on a project up in the
 (23) Healy Cantwell area The Ahtna Natives own land in that area
 (24) and there was a dispute between them as the owners and the
 (25) Alaska Power Authority that was wanting to run some utility

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- (1) lines So Steve and I joined up to do work on that And then
 (2) later in the 1980s he and I were involved together in work that
 (3) we performed up on the north side of the Brook Range in the
 (4) gates of the arctic area
 (5) Q Have you had any prior experience in doing appraisal work
 (6) in connection with environmental accidents?
 (7) A Yes I have
 (8) Q Describe that for the jury
 (9) A There are actually I guess both direct and indirect work
 (10) here In the late 1970s environmental issues really came to
 (11) the forefront in real estate and in real estate appraisal I
 (12) was quite active at that time both with the Appraisal
 (13) Institute and at one time on the Board of Directors nationally
 (14) for the National Association of Realtors And we had to face
 (15) issues of substances like - I think the first one I recall was
 (16) urea foam formaldehyde UFFA A material that is used in
 (17) making plywood that's something that winds up in much of the
 (18) furniture that most people have in their homes cabinets
 (19) things like that
 (20) From there asbestos issues and other issues of how should
 (21) professionals go about dealing with various sorts of
 (22) contaminants On a professional basis I was involved again in
 (23) the fairly early 1980s with a series of PCB this is a coolant
 (24) material in electrical transformers PCB transformer explosions
 (25) which can be very very deadly and disastrous later asbestos

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- (1) cases and other types of situations
 (2) Q You mentioned Mr MacSwain Why was it that you teamed
 (3) up
 (4) with Mr MacSwain for this project rather than just having your
 (5) firm handle it all?
 (6) A Well there are a couple of reasons First of all Steve
 (7) received the first contact with what ultimately became our
 (8) client Bogle and Gates law firm relative to this case He
 (9) and I had worked together before I had very high regard for
 (10) him and for his associates so working in this case together
 (11) sort of made sense if we were to be engaged at all from the
 (12) first But I think even behind that it's important to go to
 (13) our MO how do we normally operate how the company has
 (14) been
 (15) organized in one way or another and I have been involved
 (16) personally since at least the mid-1960s in dealing with real
 (17) estate all across the country
 (18) And going back for almost 20 years now when we have gone
 (19) out to other states places that aren't in our backyard we've
 (20) always associated with people that are local to that area I
 (21) believe it's very important that we have the local expertise
 (22) the local knowledge the local contacts the local ground
 (23) trooping of people that are local to an area so we've always
 (24) done that
 (25) I think it would be fair to say that if Steve hadn't been
 (26) the one to contact me if I'd been the one who received the
 (27) first call I would still have sought Steve out in this case

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- (1) and hopefully he would have agreed to work with us
 (2) Q How long have you and Mr MacSwain worked together?
 (3) A I think we've known each other now for over 15 years We
 (4) met at Gates of the Arctic Institute Of courses originally
 (5) I came up here I think several times to teach seminars or
 (6) other issues for the local appraisal institute chapter and
 (7) we've known each other for a long time professionally
 (8) Q I imagine this morning is not your first opportunity to
 (9) testify as an expert in court
 (10) A No it isn't
 (11) Q How many times have you testified as an expert?
 (12) A I don't know the exact number It's actually not a lot
 (13) for I guess over 40 years of involvement in this field but I
 (14) think maybe 15 plus or minus something like that
 (15) MR DIAMOND Your Honor we would tender
 (16) Mr Dorchester as an expert on the valuation of lands
 (17) including damages to lands cause by environmental accidents
 (18) MR PETUMENOS I'll reserve my questions on
 (19) qualification and save them for my cross-examination
 (20) THE COURT Thank you that's fine He's qualified to
 (21) testify as an expert
 (22) (Discussion off the record re technical problem)
 (23) BY MR DIAMOND
 (24) Q That must have been powerful testimony you broke the
 (25) computer

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- (1) I'd like to talk to you now about the work that you
 (2) undertook on behalf of Exxon in this and related matters
 (3) You've already told us you joined up with Mr. MacSwain. Did
 (4) you assemble a larger team of professionals?
 (5) A Yes, we did. And in our office alone, over the years that
 (6) we've been involved with this going back to 1990, we've had I
 (7) think about seven professionals have been involved at one time
 (8) or another and the support staff, not all at one time, but
 (9) probably would total somewhere between 15 and 20 people that
 (10) have worked on the job at one time or another. Plus of
 (11) course, Steve and his associates.
 (12) Q Who did Mr. MacSwain bring into the picture?
 (13) A Steve had Dan Shantz, who is a very well known and highly
 (14) regarded appraiser here in Anchorage, and various other
 (15) people that he's had in his support of his office.
 (16) Q So at times there were as many as 30 people working on
 (17) this?
 (18) A Over the years I would say that's true.
 (19) Q Why so many?
 (20) A It was a big job.
 (21) Q Why so big?
 (22) A Well, part of what made it big, I think the jury has
 (23) already heard that Prince William Sound alone occupies about
 (24) 15,000 square miles of the earth. If you take that window and
 (25) just sort of put it down several times to cover all the Kenai

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- (1) Peninsula and Kodiak, you can see that there's a big chunk of
 (2) this planet that was involved in this job. But it isn't just
 (3) the size I think that made it a big job. Our approach to this
 (4) work was to consider every individual property separately. We
 (5) didn't try to make a gross mass appraisal. We didn't try to
 (6) make a lot of assumptions. We tried to view and consider each
 (7) property as an individual property.
 (8) We looked at them individually. We estimated highest and
 (9) best use appraisal, term meaning what's the most productive
 (10) use of land individually for each piece of property. We made field
 (11) inspections, not only of the properties we were dealing with
 (12) but potentially competitive properties. We gathered market
 (13) information and went out and looked at transactions that had
 (14) actually occurred. We analyzed oiling information and did that
 (15) on a site-specific basis. We raised the question of how might
 (16) the oil have damaged this property. And for what time.
 (17) Q You say that contrasts to what you did, which was parcel by
 (18) parcel with mass appraisal techniques. Remind us, what is a
 (19) mass appraisal?
 (20) A Mass appraisals are where you don't do what I just said. A
 (21) mass appraisal would be where we would say, let's just make a
 (22) series of assumptions by class of property or by type of
 (23) situation, and we'll apply those - those results or those
 (24) formulas across a broad property type or situations.
 (25) Q You have familiarized yourself with the approaches taken by

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- (1) all of the three experts who have testified for the plaintiffs
 (2) Dr. Mundy, Professor Green, and Mr. Shorett?
 (3) A Yes, I have.
 (4) Q Did any of the plaintiffs' experts use mass appraisal
 (5) techniques as opposed to parcel by parcel scrutiny?
 (6) A To some extent, I believe each of them have used mass
 (7) appraisal techniques in their appraisal alternatives.
 (8) Q Let's start with Mr. Shorett, who talked about Kodiak
 (9) market. Was his a mass appraisal?
 (10) A I believe Mr. Shorett's appraisal would have to be classed
 (11) almost purely as a mass appraisal.
 (12) Q Why?
 (13) A Mr. Shorett relied on individual property appraisals that
 (14) were made by Pat Carlson. But for his analysis, that is
 (15) Mr. Shorett's, he applied a single formula or a single concept
 (16) to all of the property and say that was that for one year
 (17) they would either have no marketability or no use or some
 (18) combination that have.
 (19) Q So he didn't look at each parcel, parcel by parcel?
 (20) A I - as a matter of fact, he only had, I believe, a
 (21) two-page letter and there was no mention of oiling. For
 (22) example, there was really no - no specific research or
 (23) parcel by parcel analysis that he performed.
 (24) Q What about Professor Green, who testified on Port Graham
 (25) English Bay and Chenega?

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- (1) A Professor Green also had a number of mass appraisal
 (2) aspects.
 (3) to his work. He made an assumption that all the properties
 (4) were paired for one year, then for the next couple of years he
 (5) found shoreline portions that were oiled, areas I believe
 (6) within a quarter mile of the water. In each of the instances I
 (7) think he said there was maybe 15 percent of the use of the land
 (8) that still might be retained. But in his approach, I really
 (9) didn't see individual property considerations of features
 (10) effects of oil and such things, things of that, that an
 (11) individual appraisal would have done.
 (12) Q How about Mr. Mundy, was his a mass appraisal or parcel by
 (13) parcel or some combination of the two?
 (14) A I think - I guess the acid test on Mr. Mundy would be
 (15) whether or not, at the parcel specific level, he analyzed the
 (16) effects of oil on highest and best use. And as I understand
 (17) his work, and as I understand his reliance on tables and curves
 (18) and graphs that were given to him by ICF, I think I would also
 (19) conclude that his work was a mass appraisal as well.
 (20) Q You already told us this was a very big job. How did it
 (21) compare to some of the large things you had done in the past?
 (22) A Well, I've been fortunate enough to be involved in some
 (23) large engagements. I was involved in Hawaii in a land
 (24) reformation case that involved a lot of problems and some very
 (25) difficult issues. I was asked to appraise at one time or be
 (26) involved in the review of appraisals of over a hundred thousand

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- (1) acres in the Everglades in Southern Florida I mentioned large
 (2) scale appraisals that we've done On various times I've been
 (3) involved with and have been the contract appraiser for the
 (4) revaluation of all of Tulsa County Oklahoma and all of the
 (5) city of Dearborn Michigan And just a few years ago we
 (6) appraised on behalf of one client their ownership of about 25
 (7) percent of one of the richest and most populous counties in the
 (8) United States Orange County California but I would say in
 (9) many regards this case was probably the most demanding
 because
 (10) of the various types of things that we hit in this case
 (11) Q I assume not only was it extensive it probably was
 (12) expensive What were the fees charged Exxon for the
 (13) professional services rendered in connection with the Exxon
 (14) Valdez oil spill by you and your colleagues?
 (15) A I'm not certain as to exactly what our fees were but when
 (16) you ask me that I've estimated that our professional fees
 (17) probably ran somewhere between two and a half and three
 million
 (18) dollars for this job
 (19) Q There are 80 parcels involved in this case If my math is
 (20) correct that puts your fee somewhere in the neighborhood of
 (21) thirty \$30 000 a parcel is that a fair way of looking at it?
 (22) A I don't believe it is and I'm sure glad that we didn't
 (23) agree to do a job on a fee per parcel because it would not have
 (24) worked very well
 (25) The number of parcels have changed pretty dramatically over

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- (1) the time that we've been involved The plaintiffs appraisers
 (2) for example on occasion have given us changes in boundaries
 (3) changes in ownership and sent us right back to square one to
 (4) redo our actual analysis on an actual parcel basis many times
 (5) In addition to that we have had to look not only at the
 (6) individual look sees as we talked about a while ago but we've
 (7) also had to make very extensive market analysis Early on we
 (8) were involved looking not only at the lands of this case but
 (9) also other litigants including lands owned by the federal
 (10) government lands owned by the state and --
 (11) Q Why were you looking at federal and state lands?
 (12) A Prior to -- prior to this trial there were issues and
 (13) lawsuits that were brought over the oil spill by both the
 (14) federal and the state governments as -- as plaintiffs
 (15) Q Have you looked at parcels owned by private parties other
 (16) than the Native Corporations involved in this case?
 (17) A Yes we have The total number of parcels that we've
 (18) actually looked at by the time you get through with all of
 (19) this will run up into several thousands of parcels
 (20) Q And the several millions of dollars of professional fees
 (21) that have been charged Exxon for this work that's not just
 (22) this case?
 (23) A Not at all That's for everything I've just talked about
 (24) Q Additionally have your firm been compensated or
 reimbursed
 (25) for compensations?

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- (1) A Yes we have
 (2) Q Quite modestly I assume?
 (3) A No it's been very expensive work I would estimate again
 (4) that the fees for expenses in this job probably amounted to a
 (5) million dollars or more We've had travel We had to spend a
 (6) lot of time away from the office There's always costs of
 (7) doing that Particularly for the amount of time we spent in
 (8) the field Additionally we've established rather
 (9) sophisticated computer systems to handle all of the information
 (10) that we have We have developed a quite large and
 (11) sophisticated mapping system so there's just a lot of
 (12) additional expenses that have gone into this
 (13) Q Let's switch gears from what it all cost to what it was
 (14) you did I wanted to talk to you briefly about some of the
 (15) basic real estate concepts that we're going to be dealing
 (16) with Highest and best use a term known to you?
 (17) A Yes it is
 (18) Q Fondly used in the appraisal business?
 (19) A It's the cornerstone of any appraisal work that an
 (20) appraiser may do
 (21) Q Have you prepared a videotape that endeavors to explain the
 (22) meaning of that term here for the facts here?
 (23) A Yes I did
 (24) Q Why did you do this?
 (25) A I did this for several reasons First of all the notion

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- (1) of highest and best use is so fundamental to understanding
 what
 (2) an appraiser does that I felt the ladies and gentlemen of the
 (3) jury should have a chance to have a little bit of textbook
 (4) information if you will
 (5) And secondly I think an understanding of highest and best
 (6) use gives each of you a chance to understand some of the
 (7) differences between what we've done and what you have heard
 (8) from other witnesses
 (9) And I guess finally it gives us a chance to see the actual
 (10) properties that were involved with the areas and properties
 (11) that are involved in this case
 (12) MR DIAMOND Your Honor I'd like to play on the
 (13) Barco DX13182B as in boy Mr Dorchester's highest and best
 (14) use videotape
 (15) MR PETUMENOS There's no objection Judge
 (16) A While this is coming up if I may I might just mention we
 (17) do mention one land use type in here that's no longer involved
 (18) in this trial
 (19) BY MR DIAMOND
 (20) Q That's because of the city of Ouzinkie is no longer
 (21) involved in this case?
 (22) A That's correct
 (23) Q And this was prepared before that all happened?
 (24) A That's right
 (25) (Videotape Played)

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- (1) VIDEO SPEAKER In simple materials highest and best
 (2) use means the most profitable likely use for a given piece of
 (3) land For example if a property could be used to build either
 (4) a house or a store the highest and best use for the property
 (5) probably would be for use as a store because that would be
 more
 (6) profitable
 (7) A professional appraiser's definition is more specific It
 (8) considers four elements First the use must be physically
 (9) possible for a given location If a site would be a good
 (10) location for a hunting lodge except that you can't get to the
 (11) location by road boat or float plane then using the land for
 (12) a hunting lodge is not physically possible
 (13) Second the use must be legally permissible For example
 (14) if you wanted to build a hunting lodge and a wildlife refuge
 (15) that might not be legally permissible
 (16) Third the use must be market supported You might have a
 (17) great location for a lodge but there may be - no one would
 (18) pay for another lodge in the area People must want to go
 (19) there or the use is not market supported
 (20) And finally the use must be financially feasible Let's
 (21) say that everything else works out but it would cost you five
 (22) million dollars to build your lodge that would probably not be
 (23) financially feasible
 (24) Thus a property's highest and best use is determined by
 (25) first looking at the physical characteristics of the land then

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- (1) considering the land use regulations and market conditions in
 (2) the area
 (3) We determine highest and best use separately for each of
 (4) the properties we appraised The following will show you the
 (5) methods we used to determine highest and best use for each
 (6) parcel
 (7) Prince William Sound Kenai and Kodiak are areas of vast
 (8) remote wilderness The waters of Prince William Sound alone
 (9) occupy an area of approximately 15 000 square miles an area
 (10) about the size of Connecticut The closest point of Prince
 (11) William Sound to Anchorage is the city of Whittier which is
 (12) about 50 miles away
 (13) The area is sparsely settled with only a few small cities
 (14) and villages Total population in all of the city and villages
 (15) in Prince William Sound was about 6500 in 1990 Whittier
 (16) Valdez and Cordova are the largest of these communities
 (17) Southwest of Prince William Sound is an area open to the Gulf
 (18) of Alaska known as Blying Sound Seward which is on
 (19) Resurrection Bay is the only city in this area Its 1990
 (20) population was about 2500 The rest of this area is remote and
 (21) uninhabited
 (22) The third area we studied includes the outer Kenai
 (23) Peninsula and portions of the Inner Kenai Peninsula on the
 Cook
 (24) Inlet The peninsula measures about 100 air miles from
 (25) Resurrection Bay to its southwestern tip This area is

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- (1) extremely rugged and isolated and is known for this rocky
 (2) coastlines glaciers and hazardous waters
 (3) As you go down the coast of the outer Kenai Peninsula the
 (4) area is virtually uninhabited There are no cities or villages
 (5) until you reach the Cook Inlet where the communities of Port
 (6) Graham English Bay Seldovia and the city of Homer are
 (7) located
 (8) Q Kodiak was the final area of our market studies About
 (9) 6800 people live in the city of Kodiak which is 250 miles from
 (10) Anchorage Most of Kodiak's remaining residents live in small
 (11) villages and remote areas
 (12) Throughout this region land use is almost exclusively
 (13) limited to the waterfront or to lands close to the shoreline
 (14) Property values and land uses are highest along the
 (15) shoreline The uplands have few if any uses and they have
 (16) lower values than the shoreline areas Even inland lots in
 (17) remote subdivisions have lower values and limited marketability
 (18) compared to shoreline properties
 (19) In determining highest and best use for each property we
 (20) appraised the shoreline areas were very important to us For
 (21) each property we considered the following factors How
 (22) accessible is the property? By that we mean how difficult is
 (23) it to get there by road boat or float plane What is the
 (24) profile of the shoreline and the uplands? Is it steep gently
 (25) sloped or level? All of which affect how the land can be

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- (1) used
 (2) What is the shoreline exposure of the property? Is the
 (3) property on a protected bay or does it lie on a coastline
 (4) subject to storms and violent seas? What type of sediment is
 (5) there on the shoreline? A sand beach is generally more
 (6) desirable than a bedrock shore How far is the property from
 (7) the nearest town? Ordinarily land closer to population centers
 (8) is worth more Are there any utility services such as water
 (9) sewer electricity or roads on or near the property? For all
 (10) but a few of the properties we studied there were none
 (11) And finally what was the nature and extent of oiling on a
 (12) property's shoreline and when was the oil removed? What was
 (13) important to us here was whether oiling temporarily impaired
 (14) use of the shoreline area to an extent that would affect a
 (15) property's value or real estate earnings as the shoreline was
 (16) cleaned by Exxon and by natural forces impairment was
 (17) reduced
 (18) Now let me illustrate some of these factors more
 (19) specifically A few moments ago I mentioned shoreline
 (20) sediments as being an important part of highest and best use
 (21) There are four types of shoreline sediments in the area of the
 (22) spill First is bedrock which is found throughout Prince
 (23) William Sound and along most of the Kenai Peninsula
 (24) Next is rock rubble This consists of large chunks of
 (25) broken up bedrock Boulder/cobble is the third sediment type

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- (1) Cobble measures from about the size of a charcoal briquette to
- (2) the size of a volleyball Just walking across these first
- (3) three types of shorelines is difficult
- (4) The fourth type of sediment is called pebble granule
- (5) These shorelines are made up of very small rocks or sand Less
- (6) than one percent of the shorelines in the spill area are
- (7) classified as pebble granule and some of those are located at
- (8) the base of steep cliffs In all of this area there are only a
- (9) few places that you would think of as a beach
- (10) Access to most of the lands is by water Access can be
- (11) difficult often expensive and frequently dangerous
- (12) Particularly for those areas exposed to the Gulf of Alaska
- (13) With the exception of certainly lands in the Kachemak Bay
- (14) area and with three small parcels on Kodiak no parcels are
- (15) accessible by road
- (16) Another factor of special importance to us is shoreline
- (17) profile In the area of the spill many shorelines have a
- (18) limited somewhat shallow area along the water Often with
- (19) rock outcroppings that extended offshore Other shorelines are
- (20) rock cliffs Typically there are a few small inlet coves where
- (21) one can reach the uplands area where access is possible
- (22) usually have greater potential use and more value For some
- (23) shorelines there are no places to enter the uplands at all
- (24) Finally let me show you what I meant by shoreline
- (25) exposure Properties that are not sheltered especially those

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- (1) directly exposed to the Gulf of Alaska are less useful than
- (2) those more protected from severe weather and seas There is
- (3) always an area of potential tsunami hazard as people who went
- (4) through the 1964 earthquake know all too well according to a
- (5) U S Army map shows tsunamis in areas exposed to Gulf of
- (6) Alaska
- (7) reach from 15 feet to over 50 feet
- (8) In addition to physical characteristics we also studied
- (9) real estate market conditions in determining highest and best
- (10) use for each property We found for instance that there is
- (11) very little market demand for recreational lots in Prince
- (12) William Sound and on the outer coast of the Kenai Peninsula
- (13) This is partly because these lands are so remote and hard
- (14) to get to But also these areas compete with Kachemak Bay on
- (15) Cook Inlet where there are more than 15 subdivisions of
- (16) recreational lots closer to Anchorage and much easier to get
- (17) to
- (18) Overall we found that there was an ample supply of
- (19) recreational lots in Prince William Sound both before and after
- (20) the spill but very little demand for these lots
- (21) We considered a variety of different types of potential
- (22) land uses but we found that only five different types of
- (23) highest and best use applied to the properties we appraised
- (24) The five are marine commercial recreational sites and
- (25) subdivisions residential sites or locations for future
- (26) community settlement timberlands and lands with little

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- (1) development potential which we have called limited use lands
- (2) Let me show you examples of each of these categories
- (3) The first is a category we called marine commercial uses
- (4) These include sites for fishing or hunting lodges staging
- (5) areas for setnet fishing and locations for canneries and
- (6) hatcheries
- (7) The second category of highest and best use we found is
- (8) recreational sites These are small sites usually less than
- (9) ten acres that private individuals own for cabins camping
- (10) fishing and the like Recreational subdivisions which you see
- (11) here are areas where an owner has divided a larger piece of
- (12) land into a number of recreational sites Because of limited
- (13) demand for recreational subdivision lots we did not find any
- (14) oiled properties that we felt should be assigned highest and
- (15) best use as recreational subdivision properties
- (16) The third category of highest and best use is land for
- (17) residential and settlement uses Residential land is what it
- (18) sounds like properties on which private homes could be built
- (19) Settlement land is slightly different Settlement lands are
- (20) ones near a community that might be an area in the future
- (21) where
- (22) the village could expand We found only one parcel of
- (23) settlement land near the village of Ouzinkie
- (24) The fourth category is timberland Logging and timber
- (25) operations account for the largest developed land use in the
- (26) area of the spill At the time of the spill and afterward

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- (1) timber operations have continued at Windy Bay Two Moon Bay
- (2) on
- (3) Afognak Island and elsewhere in the spill area
- (4) The final highest and best use category applied is what we
- (5) have called limited use lands These are lands that are large
- (6) remote and usually rugged wilderness parcels These are
- (7) lands
- (8) with no economic uses They have no near-term prospect of
- (9) being developed and no known commercially viable timber or
- (10) mineral resources
- (11) As the name suggests the uses of these lands are limited
- (12) and usually consists of hunting fishing collecting firewood
- (13) subsistence activities and other outdoor recreation There is
- (14) virtually no demand or market for these lands
- (15) The majority of the lands we considered fell into the
- (16) category of limited use lands
- (17) (End of video)
- (18) BY MR DIAMOND
- (19) Q While Linda is getting the lights why do we care what
- (20) category a particular parcel falls into? In measuring damages
- (21) what consequence is it that a parcel may be just vacant
- (22) wilderness as opposed to commercial land?
- (23) A Well I think it's just basically a common sense thing
- (24) You couldn't very well sell a house for the same price that an
- (25) office building would sell for You have to look at real
- (26) estate as a market would look at it and be realistic You
- (27) have to live in the real world and the real world deals with

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- (1) the pricing or the valuing of land based on what it s highest
 (2) and best use
 (3) Q If you interfered with land that s put to a more valuable
 (4) productive use then the consequences are greater than if you
 (5) interfere with land that s not used at all?
 (6) A Generally that s correct If I have a better highest and
 (7) best use that s impaired with that s an opportunity for that
 (8) damage or that effect to be a higher amount
 (9) Q All right On the videotape you talk about four principal
 (10) land uses that are relevant here settlements no longer being
 (11) relevant
 (12) Have you gone through all of the acreage that comprises
 (13) plaintiffs land and broken it down in some form that we can
 (14) digest?
 (15) A Yes I have I ve prepared a chart on that
 (16) Q Let me show you DX14039 If I ve done my home work it
 (17) would be here
 (18) Why don t you come off the witness stand
 (19) (Off record)
 (20) BY MR DIAMOND
 (21) Q What are we looking at here?
 (22) A This is a summary - this is a summary if I can borrow a
 (23) pencil here - of the types of highest and best use that we
 (24) have estimated for the plaintiffs lands that received any
 (25) oiling We - thank you

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- (1) The last type that we mentioned in the video limited use
 (2) we estimated just a little under 275 000 acres of the oiled
 (3) properties were limited use And that means that almost 86
 (4) percent of the total lands that we dealt with are in the
 (5) limited use highest and best use category Timberlands were
 (6) another 45 000 plus acres and that s about 14 percent of the
 (7) total acres
 (8) Q Let me stop you Does that mean there were roughly 45 000
 (9) acres being timbered at the time of the spill?
 (10) A No not actually Some of that is - is still native tree
 (11) stand That doesn t mean there s actual logging operations
 (12) going on Some of it is potential timber operation
 (13) Q Highest and best use of that land would be timber?
 (14) A That s correct In other words if the property were to
 (15) sell the market would buy it based on its understanding that
 (16) it has economic value for timber purposes
 (17) Q Even if it wasn t used for timber?
 (18) A Even if nobody was out there cutting
 (19) Q Your next category is recreational sites?
 (20) A Yes recreational sites were about 39 acres of the total
 (21) and marine commercial Those are income producing types of
 (22) uses for the shorelines Another 79 acres So you can see
 (23) from the totals about 99 percent of all the lands fell either
 (24) into the income producing timber category or potentially
 (25) producing or limited use lands

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- (1) Q Only 39 acres suitable for recreational sites Aren t
 (2) there much larger percentages of Prince William Sound that we
 (3) would like to recreate in?
 (4) A Well I think there are two answers for that First when
 (5) you look at the markets in Prince William Sound you can see
 (6) that there is an ample supply of recreational sites that are
 (7) there There are a lot of lots could be purchase and they
 (8) haven t been purchased But in addition to that we also found
 (9) other lands that are not owned by the plaintiffs in this case
 (10) that we believe do have potential for the development of
 (11) additional recreational lots So when the market says we need
 (12) some more lots we believe that there was other land
 (13) competitively probably was better land
 (14) Q So therefore recreational use for those other sites by the
 (15) plaintiffs are not in the 39 acres wouldn t be feasible?
 (16) A It s an economic feasibility None of those tests of
 (17) highest and best use that s correct And there is for the -
 (18) these 39 acres or sites we said would be feasible for sale in
 (19) the market as a recreational site
 (20) Q You ve actually been on most if not all of the parcels
 (21) that are in dispute in this case?
 (22) A That s correct Either on the parcels or on the
 (23) shorelines or if we got there at high tide or in bad weather
 (24) conditions maybe we weren t actually able to get off on the
 (25) shore but we ve been up close and personal on

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- (1) Q Are most of these parcels actually being used for their
 (2) highest and best use?
 (3) A Not actually I guess limited use you could say was being
 (4) used for its highest and best use because not a lot of use As
 (5) you travel through these areas you don t really see a lot of
 (6) uses out there You will see depending on when you re there
 (7) some hunting activities that are going on or people that are
 (8) camping kayaking and other types of recreational activities
 (9) taking place from time to time and we did see some of those
 (10) But you re not talking about stadiums full of people you re
 (11) talking about far more land than there are people to enjoy I
 (12) think in a main I d say we saw what activities were going on
 (13) but these are - these are not very active areas
 (14) Q Did you see much income being produced by uses on the
 (15) plaintiffs parcels?
 (16) A From an income standpoint the plaintiffs parcels
 (17) principal reliance on as a source of income would be on their
 (18) timber properties There are - and we looked at a number of
 (19) documents relating to possible mining operations We read
 (20) and - information about and interviewed people about other
 (21) income ideas that he had but in the main the plaintiff
 (22) corporations had very little income being earned from their
 (23) lands other than timber
 (24) Q Has that historically been the case?
 (25) A Yes it is That has been the historical case

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- (1) Q You studied fairly favorably both the historical
 (2) income producing uses of these lands and income potential
 did
 (3) you not?
 (4) A Yes I did I studied a number of audited financial
 (5) statements that were furnished by the plaintiff corporation to
 (6) say take a look at what they showed in their own statements
 (7) where the actual incomes had been produced on their lands for
 (8) about the five years prior to the oil spill
 (9) Q All right And I take it that your findings generally show
 (10) actual income being produced was far less than the incomes
 that
 (11) Dr Mundy used in his projections?
 (12) A Absolutely
 (13) Q Have you prepared some charts for us to illustrate that?
 (14) A Yes I have
 (15) Q I m going to put before you
 (16) MR PETUMENOS Excuse me counsel I m not sure if -
 (17) there s an issue that I have some questions about
 (18) MR DIAMOND That is the chart I tried to explain to
 (19) Mr Petumenos before we assembled
 (20) THE COURT Do you have to have something out of the
 (21) presence of the jury? It s about time for the break anyway
 (22) MR PETUMENOS That would be fine
 (23) THE COURT I ll send you out since this is our normal
 (24) time anyway
 (25) (Jury out at 11 15 a m)

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- (1) MR PETUMENOS Those charts are all on the CD rom
 (2) MR DIAMOND Yeah I was going to show them to -
 (3) MR PETUMENOS That s fine Any one of them will
 (4) do
 (5) MR DIAMOND 14046B This is the first half of it
 (6) VOIR DIRE EXAMINATION OF JOHN D DORCHESTER JR
 (7) BY MR PETUMENOS
 (8) Q Mr Dorchester I have two questions about this particular
 (9) exhibit if I may
 (10) As I understand what this exhibit depicts is prior to 1989
 (11) we see the work that you just described for the jury as
 (12) reflecting what you looked at from the annual reports?
 (13) A That s correct In this instance of Chugach Alaska
 (14) Corporation
 (15) Q So these are the actual revenues that were realized in the
 (16) form of checks or rent or permits or something like that?
 (17) A It s what they reported as revenues in their statements
 (18) Q Now in your own work one of the things that you did to
 (19) help the jury value the damages that were - you say that
 (20) Native Corporations did incur was you studied lease rates and
 (21) comparable lease rates and came up with a range of lease
 (22) rates Am I right?
 (23) A That s correct Lease - lease and license and permit
 (24) various types of revenue forms
 (25) Q And because you concluded that an oil spill was most like a

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- (1) license nonexclusive use license you took the lower end of
 (2) the lease rate range that you came up with as the likely rent
 (3) for the permanent right or license?
 (4) A For the license - that s a part of the mechanic of what we
 (5) did but just a part
 (6) Q Right And those - like that mechanic that you went
 (7) through does not reflect actual payments on these licenses
 (8) that ever took place in the world in reality right?
 (9) A In some instances it may because we - we certainly
 (10) considered the real world as to rents and if rent from a
 (11) property was a real world situation we did I think what
 (12) you re asking me here is - is this real world
 (13) I believe it s real world in two instances First it can
 (14) be used as a sort of truth check for what it is that Dr Mundy
 (15) did in his work
 (16) Q I m focused in on what you did in your work
 (17) A That s what I m doing and secondly it can be used
 (18) exactly the same way on our work
 (19) Q So the point is that for every single license that you
 (20) hypothecated that existed on land that was oiled and using
 (21) your scenario now there s not a license that goes with it on in
 (22) the real world for Chenega Island and LaTouche Island there
 (23) isn t such a license?
 (24) A Well again let s be careful about that one because there
 (25) may in fact be licenses I m aware of several instances

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- (1) where licenses do exist where we show a license might -
 (2) Q But not in every single parcel that you would estimate?
 (3) A No that s right What they are are estimates of rents
 (4) that we believe would reasonably state a rental that would be
 (5) just compensation
 (6) Q Now I understand that you quarrel with the amount that
 (7) Dr Mundy has hypothecated and you think it s too much and
 (8) all that and that s one of the points you want to make to the
 (9) jury That s right?
 (10) A Yes
 (11) Q Yes But the fact that you come up with a hypothetical
 (12) situation or income stream hypothetical income stream that s
 (13) something - that s the only way really you can estimate damage
 (14) to land which is temporary in nature and which may or may not
 (15) be sold on a market during a period of time is that a fair
 (16) statement?
 (17) A I think it s fair to say that the estimation of rents as an
 (18) indicator of possible damages is a proper procedure The
 (19) difference that I have here is the magnitude and the methods
 (20) that are applied but the basic concept ones that I think is
 (21) valid
 (22) Q And the title of this chart says Pre spill Actual Land
 (23) Revenues vs Mundy s Theoretical Land Revenues right?
 (24) A That s correct
 (25) Q And you did not take actual revenues either when you set it

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- (1) forward into the future for potential damages you had to
 (2) hypothecate as well?
 (3) A Well I think that's partially true I guess one of the
 (4) differences is that if we had the other chart up here
 (5) Dr Mundy is saying that this income is going to be nearly ten
 (6) million 8 hundred thousand dollars going out for something like
 (7) 30 years
 (8) Q Right
 (9) A That - that is certainly theoretical and not something
 (10) that I did There are a number of other differences but that
 (11) would give you an example
 (12) Q You had a different theory as to when you should end the
 (13) income stream right - that is to 1990 or 1991 something like
 (14) that but you had to come up with a theory as well as to when
 (15) you thought the income stream ended so your difference with
 (16) Dr Mundy is not that he estimated it but when he decided it
 (17) was or -
 (18) MR DIAMOND I'm going to object this is becoming
 (19) cross-examination
 (20) MR PETUMENOS This is my last question
 (21) MR DIAMOND Then I won't object Mr Petumenos
 (22) knows how to shut me up right?
 (23) A The differences that I had the lengths and methodology of
 (24) his methods is a part of it
 (25) MR PETUMENOS That is my last question I'm true to

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- (1) my word
 (2) THE COURT All right So where are we?
 (3) MR PETUMENOS In aid of objection I think that my
 (4) objection stands which is that Mundy is being taken to task in
 (5) this exhibit for coming up with these theoretical income
 (6) stream which is really required by law and this - this
 (7) exhibit could give a misimpression to the jury that there's
 (8) something wrong with coming up with theoretical land revenues
 (9) when both appraisers have done so and the law requires it and
 (10) that's the problem I have with this witness
 (11) MR DIAMOND There's nothing in the record about what
 (12) the law requires And the testimony of this witness will
 (13) unfold his view and theoretical underpinnings of what he did
 (14) are vastly different from Dr Mundy In any event this chart
 (15) is simply intended to depict reality versus a theoretical
 (16) construct that Dr Mundy truly believes in which is the basis
 (17) for his damage analysis This witness will explain that this
 (18) is quite different Dr Mundy does not rest on any
 (19) underpinnings required by law These are rather appraisal
 (20) concepts and his is quite different
 (21) Counsel is free to cross-examine the witness on this
 (22) exhibit free to challenge whether in fact he Dr Dorchester
 (23) is guilty of the same since he is charging Dr Mundy of
 (24) committing but that doesn't make the exhibit not useful in
 (25) making the point that he wants to make

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- (1) MR PETUMENOS It is a record that we have had some
 (2) summary judgment and how that appraiser must do his job
 under
 (3) the circumstances what I've referring to
 (4) THE COURT The objection is overruled I'm going to
 (5) take a break
 (6) (Recess from 11 22 a.m. to 11 30 a.m.)
 (7) THE CLERK This court now resumes its session
 (8) Please be seated
 (9) MR DIAMOND Fire at will Your Honor?
 (10) THE COURT I won't give you that much permission
 (11) counsel but go ahead
 (12) DIRECT EXAMINATION OF JOHN D DORCHESTER JR
 (Resumed)
 (13) BY MR DIAMOND
 (14) Q Mr Dorchester we have an array in front of the jury of
 (15) the daddy of all bar charts You were talking about income
 (16) potential plaintiffs land and Mr Mundy's assumptions about
 (17) income Is this the chart you prepared to illustrate the point
 (18) you were making before we broke?
 (19) A Yes it is
 (20) Q We'll all take a deep breath and have you explain it to
 (21) us
 (22) A I'll try to be as brief with it as I can
 (23) First of all if you just take this line right here and
 (24) look at everything to the left of it and everything to the
 (25) right of it this line is on 1989 the year of the oil spill

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- (1) And for the Chugach Alaska Corporation what I've attempted to
 (2) do here is to look at the five years preceding or prior to the
 (3) spill at the actual revenues that were earned from land
 (4) operations based on audited statements that were furnished by
 (5) the plaintiff corporations As you can see 1989 is about
 (6) 183 000 in '85 over 200 000 in '86 and so forth
 (7) So the actual total pre spill revenues for these five years
 (8) totaled a little under a half a million dollars Then if you
 (9) look at everything on the right hand side of this 1989 year
 (10) these are the annual revenues that Dr Mundy showed in his
 (11) report as being applicable for purposes of estimating damages
 (12) for each of the years going out for I think some 30 years
 (13) Q Let me interrupt you Is this just one Chugach parcel or
 (14) all of the 12 parcels that Chugach is claiming damages for?
 (15) A This is the sum of all Chugach parcels I'm trying to hold
 (16) enthusiastic down to as few bar things as we had to deal with
 (17) For example notice that this line in Dr Mundy's numbers goes
 (18) out straight across there That is the line dollars in
 (19) millions over here he's showing \$10 800 000 per year of
 (20) revenues being earned on these properties starting in 1989
 and
 (21) going on out off the chart here
 (22) The reason that I've shown gray and red is that in his
 (23) calculations he said that all of this \$10 800 000 of revenues
 (24) would be lost Theoretical revenues at this point would be
 (25) lost for the year of the oil spill And then after that the

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- (1) corporation would be able to earn what you see in red from the
 (2) lands never having done anything like that before And that
 (3) they would loose the part that I still show some gray so each
 (4) year the amount of the loss diminishes until finally when we
 (5) get out here it's a relatively small amount But with this
 (6) Mr Mundy estimates total damages of almost \$25 million
 (7) Q So if we add it up this represents what 10 8 million and
 (8) this is probably another three million and two and a half - if
 (9) we added up all the gray boxes we come up with 24 918 839?
 (10) A Not quite Because what he does then is he says the worth
 (11) of a dollar in the future is not as much as it is today so he
 (12) does find a present worth of those But these are the basic
 (13) revenue numbers that he uses for his damage calculation
 (14) Q What does this chart tell you?
 (15) A Well it tells me several things First of all I don't
 (16) have a particular problem with an appraiser dealing with some
 (17) form of projected income numbers That's an accepted
 technique
 (18) for looking at real estate damages But what I think is really
 (19) noteworthy here that is suddenly in 1989 his numbers would
 (20) indicate that we're going to have something like \$10 800 000 a
 (21) year that the corporation oil or no oil should be earning or
 (22) could be earning And it's this possibility of earning that's
 (23) the problem that I have I believe this is highly theoretical
 (24) and even after having read his reports I see no market basis
 (25) for his numbers

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- (1) Q Okay Have you prepared similar analyses for the other
 (2) plaintiffs?
 (3) A Yes I have
 (4) Q For whom Dr Mundy has done analyses?
 (5) A That's correct For each of the plaintiff corporations
 (6) Q I should say for the record that the chart for Chugach
 (7) Alaska is Exhibit DX14046B and if I could just ask Joel to
 (8) flash up on the Barco the chart of DX14045?
 (9) MR PETUMENOS May I have the same continuing
 (10) objection as we go through each corporation?
 (11) THE COURT Yes
 (12) MR PETUMENOS Thank you Judge
 (13) BY MR DIAMOND
 (14) Q Isn't technology wonderful?
 (15) Is the analysis and are your conclusions generally the same
 (16) for the Chenega Corporation?
 (17) A Yes they are They would be the same for each of the
 (18) corporations The charts are still calculated in the same
 (19) way We still have the Native corporations own audit
 (20) statements for the five years previous and we're dealing with
 (21) Dr Mundy's theoretical revenues for each of the years
 (22) thereafter
 (23) Q Just to save time rather than putting all of them in we
 (24) would like to move the chart they're made up for each of the
 (25) Native corporations into evidence and those include the

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- (1) Chugach which we put up in cardboard DX14046B DX14045
 Eyak
 (2) that's DX14049 Port Graham is 13095C Tatitlek was
 DX13091A
 (3) and English Bay which is DX14047
 (4) (Exhibits DX14046B DX14045 DX14049 DX13095C
 DX13091A
 (5) and DX14047 offered)
 (6) MR PETUMENOS May it please the Court I reserve as
 (7) to whether these are illustrative or -
 (8) THE COURT Sure your motion - I'm not going to
 (9) decide your motion now counsel
 (10) MR DIAMOND Okay
 (11) BY MR DIAMOND
 (12) Q In addition I move into evidence the breakdown of the
 (13) highest and best use DX14039
 (14) (Exhibit 14039 offered)
 (15) MR PETUMENOS I have no objection to that But
 (16) the -
 (17) THE COURT I'm sorry I just found out that the
 (18) jurors can't see the -
 (19) MR DIAMOND Oh I'm sorry We moved into evidence
 (20) the highest and best use breakdown was DX14039
 (21) THE COURT For the highest and best use It's
 (22) admitted
 (23) (Exhibit 14039 received)
 (24) MR DIAMOND There was no objection to that
 (25) THE COURT Yes

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- (1) MR DIAMOND Before we forget the video which we
 (2) will redact pursuant to our agreement DX13182B
 (3) (Exhibit DX13182B offered)
 (4) MR PETUMENOS I don't know what's left of the video
 (5) narrative on that particular video but -
 (6) MR DIAMOND I wouldn't either but that's what they
 (7) wanted
 (8) MR PETUMENOS Okay I have no objection
 (9) THE COURT It is admitted
 (10) (Exhibit DX13182B received)
 (11) BY MR DIAMOND
 (12) Q Okay Let me do some housecleaning and you can take the
 (13) stand again
 (14) I'd like to start by talking about limited use lands
 (15) Mr Dorchester because - are you shadowed out of there? Why
 (16) don't you come down because the jury can't see you if I have
 (17) that up
 (18) Let's start with limited use lands because that comprises
 (19) clearly the largest single use of the four categories At the
 (20) time of the oil spill was there a significant market in Prince
 (21) William Sound in Kenai for limited use property?
 (22) A No there was not
 (23) Q Had there been some market activity in the past?
 (24) A There really had not been much market for limited use
 (25) transactions - limited use lands in virtually any of the areas

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- (1) of the spill
 (2) Q You prepared a chart which is DX10236 dealing with Prince
 (3) William Sound remote land sales I'll put that up
 (4) Can you tell us what this depicts?
 (5) A Yes What I did here was simply total the number of sales
 (6) that we found in Prince William Sound that had over ten acres
 (7) checking each of the years starting 1978 and running all the
 (8) way out through 1992
 (9) Our market research found that there were a total of six
 (10) sales of larger than ten acres The total acreage for those
 (11) sales was a little over 1300 acres 1335 acres You can see
 (12) each year of the bars down here this is the total number of
 (13) acres that is sold by year There were a number of years that
 (14) there really weren't any sales of lands of over ten acres in
 (15) Prince William Sound
 (16) Q Okay Do you mean to suggest that the parcels at issue in
 (17) this case have no market value?
 (18) A No I don't at all I think what's important to - to
 (19) think about when you think about limited use lands is that the
 (20) state of Alaska has millions and millions of them They're not
 (21) by themselves unique They're beautiful and wonderful but
 (22) there's a lot of it From a market standpoint the question is
 (23) who will buy them and what will they pay We have to ask that
 (24) question as a basis for asking what would a fair and just
 (25) compensation for these lands be if some of them are damaged

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- (1) So when we look at the limited use lands I think we have
 (2) to recognize that the markets are very thin sales of limited
 (3) use land particularly large transactions are few and far
 (4) between and we have to be very careful because there are very
 (5) large numbers of acres associated with them We have to be
 (6) very careful about how to value them when we're going to
 (7) calculate rents or do other things with them
 (8) Q You told us with - particularly with respect to limited
 (9) use land in the Sound and Kenai there is very little income
 (10) being generated It is true is it not though the plaintiff
 (11) Native Corporations use that property for subsistence
 purposes?
 (12) A Actually no That is not true
 (13) Q Explain
 (14) A Let me see if I can explain it this way
 (15) The Native Corporations are separate and distinct from the
 (16) shareholders from the corporations and I think we need to look
 (17) at that distinction to understand what's happening here
 (18) As far as the individual shareholders of the corporations
 (19) I understand that they have made claims for subsistence
 (20) harvest
 (21) MR PETUMENOS Excuse me Judge may we approach the
 (22) bench?
 (23) (At side bar on the record)
 (24) MR PETUMENOS I'm not sure what his testimony is
 (25) going to be

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- (1) MR DIAMOND The difficulty whether or not there was
 (2) subsistence and whether he took subsistence into account in
 (3) assessing lands damages His explanation is going to be no
 (4) because subsistence is not an income producing activity or part
 (5) of the Native Corporations And that to the extent that there
 (6) was impairment it was to subsistence users who are
 (7) different - he's got an illustration with a co-op and how you
 (8) value damage to the co-op
 (9) Then I'm going to ask him a question that you reserved
 (10) during your jury instruction which was whether - the oil
 (11) spill reduced the value of the Native Corporations' property or
 (12) caused them damages by interfering with the corporations' use
 (13) of their land to the extent that there was any interference
 (14) with subsistence He's going to render an opinion on that but
 (15) it goes to whether it was with subsistence is an interference
 (16) with use or produces -
 (17) THE COURT Okay
 (18) MR PETUMENOS I don't think that's in the purview of
 (19) an appraiser to be telling the jury that land owned by a
 (20) corporation which he elects to give a benefit to the
 (21) shareholders by making it available for subsistence is not a
 (22) asset or benefit to which the Native Corporations come into I
 (23) heard the testimony start to lead There were claims being
 (24) made by native shareholders and that he hold the claim and not
 (25) the native corporation which I don't think an appraiser can by

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- (1) testifying to and it would be a -
 (2) THE COURT Mr Dimond?
 (3) MR DIAMOND The jury has been so instructed That's
 (4) not a controversial fact It's a necessary predicate for his
 (5) explanation of why when he was doing work to conclude
 damage
 (6) to land damage to the land owner isn't necessarily - precept
 (7) that he has to take into account the way these landowners and
 (8) use this property There was no content flowing from any
 (9) interference with the subsistence use or any reduction in
 (10) subsistence harvest so that's not injury to land
 (11) THE COURT I'll allow it
 (12) (End of bench conference)
 (13) BY MR DIAMOND
 (14) Q I don't remember where I was
 (15) I asked you I believe we were talking about injury to the
 (16) income production of these properties and you said there was
 (17) very little of that And I think I then asked you you had
 (18) begun answering the question of whether in fact the Native
 (19) Corporations themselves used these properties limited use
 (20) properties for subsistence properties and I believe you had
 (21) begun answering the question
 (22) A Yes what I wanted to do is to make a distinction between
 (23) the Native Corporations or plaintiffs in this case and their
 (24) individual shareholders My understanding is that the
 (25) individual shareholders have brought an action over in the

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- (1) federal court for issues relating -
- (2) MR PETUMENOS I think this varies from the offer of
- (3) proof objection
- (4) THE COURT Let s not talk about any other
- (5) litigation Just -
- (6) BY MR DIAMOND
- (7) Q The jury has already been instructed on the subject but
- (8) explain to us the distinction between shareholders in this
- (9) instance and the Native Corporations themselves?
- (10) A I think there s a difference between shareholders who may
- (11) have an opportunity to have outside of this court an ability
- (12) to have a claim -
- (13) MR PETUMENOS Objection Judge this is the same
- (14) answer
- (15) THE COURT Go ahead This is to explain why he did
- (16) not include a subsistence calculation in his damages
- (17) calculations correct?
- (18) MR DIAMOND Correct
- (19) A (Continuing) Rather confusing situation here is that I
- (20) believe individual shareholders have an ability outside of this
- (21) case to raise claims over claims of loss of subsistence
- (22) harvesting of traditional foods past present and future And
- (23) as far as the corporation is concerned here this - the
- (24) corporations that are involved in this case do not charge their
- (25) individual shareholders for subsistence So in income and

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- (1) between damage to the corporations or damage to the individual
- (2) shareholders Could you share that with us?
- (3) MR PETUMENOS Please let me interrupt Judge I do
- (4) have an objection to this line I think it s a legal
- (5) conclusion and beyond the scope of this witness expertise
- (6) THE COURT Thank you counsel The objection is
- (7) overruled
- (8) A From an appraisal standpoint I think from a viewpoint of
- (9) someone who is dealing with real estate this issue could be
- (10) compared a little bit with a farmer's co-op We had them back
- (11) in Oklahoma when I was growing up The idea is that farmers
- (12) get together They share their crops to the extent that they
- (13) share those foods for their own subsistence They have a
- (14) chance to eat - one can grow potatoes another tomatoes or
- (15) carrots or whatever and they can share them The co-op also
- (16) has an opportunity to share whatever comes in there And I
- (17) think this is very very much comparable to that situation
- (18) Here there is an opportunity for individuals to share I
- (19) believe it s that issue that s not really a part of what we re
- (20) dealing with here that the individual shareholders might be
- (21) raising as claims But with regard to the co-op or with regard
- (22) to the Native Corporation in this instance what we need to
- (23) look at is Did they suffer? Did they lose income? Did they
- (24) lose their ability to market? Did they lose value of what they
- (25) have? So to me it s sort of like looking at this somewhat

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- (1) earnings capabilities the charging for subsistence or money
- (2) earned from subsistence is just not something that goes through
- (3) the books or not an income source as far as these corporations
- (4) are concerned
- (5) And we also looked at not just the income but we also
- (6) looked to see whether or not there was any general loss of
- (7) marketability of the lands or any general loss in the value of
- (8) the lands from any of these causes And we just simply didn t
- (9) find any market basis to believe that there was for the
- (10) corporations
- (11) Q Judge Shortell has told us that evidence of damage to
- (12) subsistence resources might be relevant to at least determining
- (13) whether the value of the Native Corporations property has been
- (14) reduced or whether damage to subsistence resources interfered
- (15) with the corporations use of those properties Do you have an
- (16) opinion on that question?
- (17) A Well basically I think that s what I ve been talking about
- (18) here My opinion is that the Exxon Valdez oil spill did not
- (19) have an effect on those lands based upon the fact that they are
- (20) not revenue generating for subsistence based on the fact there
- (21) was no general loss and either marketability or market value
- (22) That is not to say that we didn t find some of the properties
- (23) that were impaired by the oil spill I don t want to leave
- (24) that impression at all
- (25) Q You came up with an analogy to explain the distinction

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- (1) like a farmers co-op
- (2) Q Damage to the farmers farmlands by some accident which -
- (3) which the farmer wouldn t also be damaged to the amount -
- (4) A From an appraisal standpoint if we said the individuals
- (5) had a damage and then we said the corporation had a damage
- (6) we d be doubling up in what we were doing We have to say it
- (7) goes one place or another
- (8) Q If you don t look at subsistence tell us what is the
- (9) right way to go about valuing wilderness properties?
- (10) A The right way to value wilderness properties and
- (11) particularly in Alaska is to look at those properties from a
- (12) standpoint of their highest and best use You have to look at
- (13) each of them individually If there are portions of a total
- (14) ownership that have a higher and better use just that small
- (15) part it should be separated out It should be dealt with on
- (16) its own
- (17) The limited use property needs to be looked at on its
- (18) highest and best use then needs to be looked at from a
- (19) standpoint of who would buy it what would they pay for it and
- (20) what sort of rentals might the real world reasonably believe
- (21) that this property could earn And if we could put all those
- (22) together we could get a pretty good idea of what the property
- (23) is worth and what it would rent for
- (24) Q Did you make any effort to determine what somebody would
- (25) pay for remote wilderness land like that out in Prince William

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- (1) Sound?
- (2) A Yes I did
- (3) Q How did you do that?
- (4) A We did quite a bit of research on this Steve MacSwain
- (5) for example had pretty extensive experience in remote
- (6) properties That's one of the things he specializes in does
- (7) day in and day out I think at one time or another we gathered
- (8) something in excess of a hundred different types of
- (9) transactions involving leases permits licenses various type
- (10) of arrangements on coastal properties for Alaska
- (11) And what we did is we simply tried to sift through all of
- (12) that and say what will it tell us about the types of income
- (13) that could reasonably from a market viewpoint be earned on
- (14) remote lands
- (15) We had some difficulties doing that One of the - one of
- (16) the principal difficulties we had was that the very large
- (17) tracts thousands and thousands of acres typically don't
- (18) rent The very large tracts very rarely sell So the
- (19) information was fairly thin and what we eventually did we had
- (20) some information about licenses and permits right on the lands
- (21) that we were dealing with but not extensive information
- (22) there But we eventually said of the lease information we
- (23) looked at a range of perhaps six to eight percent of the
- (24) underlying value seemed to be market supported for those
- (25) circumstances where someone was actually leasing a property

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- (1) Q I'm talking more in terms of sale what someone would pay
- (2) You looked at that with that purpose too?
- (3) A Yes we did
- (4) Q I'm going to ask for DX10255 to be put up on the Barco
- (5) We have 10255 DX coming up on the screen
- (6) Are these a series of transactions that you looked at to
- (7) determine market value of remote wilderness property?
- (8) A Yes they are
- (9) Q Can you give us through this chart tell us what it depicts
- (10) and what you distilled this list from?
- (11) A If I can get through the iron jungle here Let me try not
- (12) to fail
- (13) Basically in the explanation I was just doing I said we
- (14) needed to be able to value the lands in order to apply for -
- (15) to find something about the rents This is a summary of some
- (16) of the information that we developed about market transactions
- (17) market information that we had about limited use transactions
- (18) We gathered a total of something under 20 transactions from
- (19) the market that we were able to deal with
- (20) Q What kind of population did you start with in transactions?
- (21) A I think our original sales database began with well in
- (22) excess of 2 000 total transactions of all types not limited
- (23) use But if there were limited use transactions out there I
- (24) think we pretty well had them
- (25) Q What did you find from doing this research?

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- (1) A What we found was that depending upon the nature of the
- (2) property the size of the property location things like that
- (3) that we had transaction information that indicated that limited
- (4) use properties would sell anywhere from something in the
- (5) range
- (6) of \$50 a square foot up to about \$500 per square foot. I have
- (7) one bar on here that you can see goes well out past that
- (8) range This is a sale in the Salome Creek area in Kodiak
- (9) actually not a limited use transaction but it had some
- (10) characteristics that were sort of like limited use and we put
- (11) it in here because it tended to show where the upper limit of
- (12) the range might be
- (13) Q I think you just said square foot
- (14) A I should have said per acre sorry Those would be really
- (15) big numbers
- (16) Q Did you find a relationship between the size of a parcel
- (17) and the price that someone would pay dollars per acre?
- (18) A Yes we did And we found that that - that size
- (19) difference continued on out until the parcels were really very
- (20) quite large We talked with government appraisers people that
- (21) were involved in state and federal levels that were involved
- (22) with many of the large scale land transactions and they pretty
- (23) uniformly said that you would make major assumptions for the
- (24) size of a tract as you got into much larger sizes
- (25) Q Did you make - did you find there was a relationship
- (26) between the presence or absence of shoreline components of
- (27) the

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- (1) parcels and the price that somebody would pay?
- (2) A Yes I did Once again appraisers I think apply just a
- (3) common sense approach but it's recognized by the market
- (4) and
- (5) that is the land that is closer to the shoreline tends to have
- (6) a higher unit value per acre value in this case than the land
- (7) that's away from the shore And in the transactions that we
- (8) looked at where there was ocean frontage or major water
- (9) frontage those differences were reflected
- (10) Q You concluded a value between 300 and \$700 per acre?
- (11) A That's correct In our work what you see in the yellow
- (12) band here a range of 300 to \$700 per acre to reflect the fact
- (13) some of the properties we dealt with we felt might have some
- (14) reasonably short term development potential for at least
- (15) portions of the property and we used a little bit higher range
- (16) of dollars per acre for these properties than we might
- (17) otherwise have used
- (18) Q Did you then just take an arithmetic average of the high
- (19) and the low and apply 500 per acre to each of the parcels that
- (20) were determining the value?
- (21) A Not at all You just don't find professional appraisers
- (22) using averages as the numbers that they apply What we did is
- (23) we tried to take a look at these types of transactions get a
- (24) good sense of where the variations came about and then try to
- (25) make comparisons back and forth between them and each of
- (26) the
- (27) properties that we dealt

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- (1) Q So each of the plaintiffs parcels that you took a look at
 (2) you assigned a specific number based on the specific factors
 (3) germane to each parcel?
 (4) A That's correct
 (5) Q You also told us there was about 15 percent of the lands
 (6) you looked at were timberlands. You didn't go about calculate
 (7) value per acre of timberlands, did you?
 (8) A No, we didn't.
 (9) Q Was that because of some conclusion you reached
 concerning
 (10) the impact, the effects or absence of effects of the oil spill
 (11) on timber?
 (12) A I - I think the answer is yes. Our market research showed
 (13) us that there really was no indication that there was any
 (14) economic effect of the oil spill on timber. We hired, as a
 (15) subcontractor, a forester who knew these lands very well, dealt
 (16) with the lands, had dealt with many of the Native
 (17) Corporations. That is his advice, and in looking at other
 (18) information that's been made available to us through the trial
 (19) pretty well confirmed by the other sources of information we
 (20) had.
 (21) Q Give me a moment. I've shuffled my exhibits.
 (22) Okay. I'm back on track.
 (23) I want to talk to you about oiling in the area and the
 (24) impact of oiling on property values. Let's begin with your
 (25) analysis of portions of the parcels that were actually

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- (1) adversely affected by the oil spill. Is that something you
 (2) looked at?
 (3) A Yes, it is.
 (4) Q Have you prepared another chart for us, yet another bar
 (5) chart that illustrates various categories that you put the
 (6) parcels in?
 (7) A Yet another bar graph.
 (8) Q This is 10231B DX.
 (9) Tell us what you're looking at here.
 (10) A What I've tried to do here is to show you the - the
 (11) shoreline areas that we dealt with that were oiled and were
 (12) important to our analysis versus the land claims that have been
 (13) brought by the plaintiffs.
 (14) Over on this side, this was a red or orange bar, shows that
 (15) their total claims apply to 629,000 plus acres, whether oiled
 (16) or not.
 (17) The yellow bar in the middle shows the total of those
 (18) acres where there are land claims of properties that are shown
 (19) as oiled.
 (20) Q Are these all of the parcels in Prince William Sound, Kenai
 (21) and Kodiak?
 (22) A Yes, they are. This is the total of all of the parcels.
 (23) Q So roughly half of the total parcels that we're talking
 (24) about in terms of acreage did not get oiled?
 (25) A That's correct. If you took the difference between these

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- (1) two, you'd see it's about half. But actually it's a little
 (2) more than that because of this yellow bar, quite a bit of
 (3) yellow bar is actually areas well removed from the oceanfronts
 (4) or the coastlines, the proverbial mountaintops and glaciers.
 (5) Q So the 319 is not acres that actually had oil on them
 (6) those are the total size of all the parcels that had some oil
 (7) on them?
 (8) A That is correct.
 (9) Q Okay.
 (10) Did you include in this analysis of what got oiled, all
 (11) parcels with oil, regardless of how slight?
 (12) A No, we did not. Not in our analysis anyway. We had some
 (13) situations where oil in - in our judgment created the
 (14) possibility of an economic or a market impact. There was some
 (15) situations where it may not have - or may not have created as
 (16) much impact.
 (17) Q Did you in terms of this coming up with the 319,000 acres
 (18) those are all - the total acreage of all parcels that got any
 (19) oil on it?
 (20) A As far as they're concerned, yes. As far as our
 (21) calculations were concerned, we actually calculated that the
 (22) shoreline portions, what we refer to as shoreline related
 (23) areas.
 (24) Q I was going to ask you about that next. It's a
 (25) significantly smaller bar, colored blue, what does that depict?

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- (1) A That is the total of the acreage that we used for the
 (2) shoreline related areas of the oiled properties.
 (3) Q Now, are you talking about the total number of acres that
 (4) would be encompassed if you took that band along the
 shoreline
 (5) where oil was deposited on all of these properties, are you
 (6) talking about something more than that?
 (7) A I'm talking about something substantially more than that.
 (8) I'm not just talking about the beaches. I have, I hope, a
 (9) photograph here that I might be able to show you.
 (10) Q DX8933. You want me to set this up on a separate easel
 (11) or -
 (12) A I think that would be fine right there.
 (13) Q Sleepy Bay. Is this an area you've been to?
 (14) A Yes, it has been here a number of times.
 (15) Q Tell us what you mean by shoreline-related area.
 (16) A Shoreline related area, in our analysis, was what we
 (17) believe that the market would consider as the area that, if
 (18) someone were going to be using the shoreline, they would say
 (19) we'd like to have in terms of a portion of the uplands to use
 (20) along with that. In this case, without getting technical as to
 (21) how we went about it, shoreline-related area is a very common
 (22) sense approach that I think each of you probably just
 (23) intuitively would come up with about the same thing.
 (24) Shoreline related area here is pretty close to what you see in
 (25) just the broken here, in addition to those portions that are

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- (1) actually along the shoreline Where we would stop
 (2) shoreline-related area in our analysis would be when you start
 (3) getting back a substantial difference say half mile or more
 (4) away from the shoreline or where you started getting into steep
 (5) rocky cliffs going over hills that clearly put you back into
 (6) interior portions of a site
 (7) Q Well your whole purpose on this job was to estimate
 (8) damages occasioned by the oil spill Why were you only
 looking
 (9) at shoreline related areas and why was it necessary to separate
 (10) those from the mountains and the glaciers lands?
 (11) A Well first of all let me correct something if I said
 (12) that We didn't look only at the shoreline related areas In
 (13) our analysis we considered everything that you see here on
 (14) this LaTouche parcel and things you can't see behind it We
 (15) started off by looking at the entire ownership of each parcel
 (16) owned by each plaintiff But the farther we went with our
 (17) market research the more it became pretty clear that someone
 (18) was not likely to rent any of those areas that were back
 (19) there Rentals were few and far between to begin with so even
 (20) rentals down on the shoreline rental areas might be somewhat
 (21) hypothetical but clearly there was no reason to include the
 (22) remainder of that
 (23) Q Does this also have something to do with the assumptions
 (24) you were making or findings you made with regard to the oiling
 (25) and the impact on lands adjacent to the water and how far back

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- (1) that goes?
 (2) A Yes it did The oiling clearly was something that - as
 (3) to the oiled and clean up was something that happened around
 (4) the shoreline But a reasonable user of this property might
 (5) also say - but I need to use some of the land that's up above
 (6) that - not without limit but certainly a part of it
 (7) Q Have you brought with you today a video which depicts the
 (8) sort of the distinction between what you consider
 (9) shoreline related access and the balance of some of these
 (10) parcels?
 (11) A Yes I did I brought a video - this one I think is
 (12) pretty simple to see where these differences are but I thought
 (13) I would bring one to show one of the plaintiffs parcels that
 (14) was damaged over a period of years and there was no
 distinction
 (15) made in this particular parcel I believe this was appraised
 (16) by Dr Mundy No distinction made between shoreline related
 (17) areas as we call them and uplands
 (18) Q I'm going to show you a map topographical map which
 we've
 (19) identified as DX14061
 (20) Can you see the Barco as well? What does this depict?
 (21) (Videotape Played)
 (22) A This is a flight that was taken it's just off of Port
 (23) Fidalgo here As you can see this is Landlocked Bay Ellamar
 (24) and Tatitlek right here And this flight sort of starts from
 (25) the water goes over a small piece of land here before it goes

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- (1) onto the valuation parcel And then the flight's over The
 (2) parcel picks up right here I think you'll have a little time
 (3) code at the bottom that shows when we go on the parcel and
 all
 (4) we do is just fly a straight line across the parcel like this
 (5) to the far side
 (6) You'll see Billygoat Mountain right here see Mount Benson
 (7) several other higher peaks along the way and the black that you
 (8) see here is an outline of the parcel itself
 (9) Q I'm going to move in over here so that the jurors can see
 (10) the -
 (11) MR PETUMENOS Could I ask a question about exhibit
 (12) before you?
 (13) THE COURT Sure
 (14) VOIR DIRE EXAMINATION OF JOHN D DORCHESTER JR
 (15) BY MR PETUMENOS
 (16) Q Who chose the route of flight?
 (17) A This was something that we discussed for some time Just
 (18) seemed to me it was a reasonable idea to angle across here
 from
 (19) sort of southwest to northeast
 (20) Q You had taken the flight from say here or here the
 (21) amount of land that you would have traversed before you got in
 (22) the parcel would be much less is that right?
 (23) A It's absolutely correct that if you had started right down
 (24) here although this parcel still isn't on the water it would
 (25) have been closer If you had started right there it would be

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- (1) a little bit farther away I suppose if we went over these mud
 (2) flats here I suppose we would have been closer here
 (3) MR DIAMOND Your Honor I'm going to run what's been
 (4) previously marked as 13183A DX This is an overflight of the
 (5) silver lake parcel if I can get to my (indicating)
 (6) (Video runs)
 (7) DIRECT EXAMINATION OF JOHN D DORCHESTER JR
 (Resumed)
 (8) BY MR DIAMOND
 (9) Q Does this represent the distance between what you would
 (10) view as shoreline-related area and uplands and inlands?
 (11) A Yes it does The - the path we're going here shows that
 (12) this property is almost entirely an inland property Portions
 (13) we might have called shoreline-related area as we got down
 into
 (14) these areas right here but the vast majority of this property
 (15) is all upland inland other than shoreline-related area
 (16) Q Okay I realize these are two parcels And we don't reach
 (17) Silver Lake until we reach the interior but explain to us your
 (18) approach to distinguishing between what you would consider
 (19) shoreline related access and the balance of the parcel
 (20) A Shoreline related areas would be most of these lower areas
 (21) that you see right here (indicating) When we hit an area like
 (22) this which is - it's moving around on me but when you hit
 (23) steeper slopes something that isn't user friendly something
 (24) that people wouldn't typically use if they were out there
 (25) hunting and camping and picnicking or doing subsistence

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- (1) activities they would be less likely to use here
 (2) You can see coming from the water on up you've got a
 (3) fairly good slope going up there but that's good land that you
 (4) could walk on you could use fairly easily When you get up
 (5) here to just what you can see just below the top we're
 (6) starting to get into steeper cliffs steeper terrain and from
 (7) a market standpoint it's unlikely that someone who might be
 (8) licensing or renting the shoreline areas would say oh yeah
 (9) I'll also pay you for those cliffs back there and that's part
 (10) of what we're trying to make an estimate of here
 (11) MR DIAMOND Joel can you see the screen? You can
 (12) speed that up until the clock comes in the right hand corner
 (13) because I don't think we've yet hit the parcel
 (14) A You can see this is pretty steep right here and we're not
 (15) quite to the property here
 (16) BY MR DIAMOND
 (17) Q If memory serves me correctly that may be Billygoat Hill
 (18) so we may be approaching it
 (19) A That's correct
 (20) Okay just crossed this boundary right over here
 (21) Q Are we looking at anything you would consider
 (22) shoreline related area?
 (23) A No not at all
 (24) Q Why?
 (25) A It just isn't realistic and the market wouldn't look at

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- (1) this as oceanfront or shoreline related at all
 (2) Q How fast are we flying?
 (3) A I think this is taken at varying speeds depending on some
 (4) wind conditions but probably in the range of 50 miles an hour
 (5) I think The - they speed it up just a little bit at one
 (6) point but probably 50 60 miles per hour probably
 (7) Q The modern - the miracles of modern technology
 (8) I'm going to ask Joel to move us up to 100 miles an hour so
 (9) we don't spend the balance of the morning in the Silver Lake
 (10) parcel
 (11) Did you do an analysis of what was shore related area and
 (12) what was uplands and inlands for each of the parcels that you
 (13) looked at?
 (14) A Yes we did For every property that we dealt with we
 (15) went out and researched sort of on the ground or on the water
 (16) to see what its characteristics were We brought information
 (17) back in did some fairly sophisticated computer mapping to
 (18) study shoreline related areas and did that for every single
 (19) parcel that we dealt with Coming up on three minutes here
 (20) Let me just tell you we're about right here (indicating)
 (21) Q Moving at a hundred miles an hour?
 (22) A Yes that's correct about a hundred miles an hour
 (23) Q Were the considerations that you used for distinguishing
 (24) shoreline related from the balance of the parcels the same for
 (25) every property?

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- (1) A Yes they were The same basic tests were applied to each
 (2) property How far from the water is it how steep is the
 (3) terrain would it be reasonable to believe that someone who
 was
 (4) interested in paying money as rentals buyer or renter for the
 (5) shoreline areas would pay rent for this at the same rate or
 (6) would include this in a license a lease permit, whatever it
 (7) might be that they were dealing with
 (8) Q Haven't you in essence cut up parcels and incorporated a
 (9) good part which you have analyzed and left the plaintiffs with
 (10) the bad part?
 (11) A No not at all Absolutely not What we did as I said
 (12) earlier we did consider the entire property and what we're
 (13) trying to do in considering shoreline related area is presently
 (14) a couple of these things First the shoreline-related areas
 (15) are more valuable on a per acre basis than the inland areas so
 (16) if we're dealing with the areas that received any damage from
 (17) the oil spill we should reflect the higher value that applies
 (18) to the shoreline related areas
 (19) Secondly if the marketplace isn't going to rent the
 (20) uplands in association with the shorelines we just didn't want
 (21) to include these kinds of acres and these kinds of lands in a
 (22) part of our calculations because the market clearly wouldn't do
 (23) that We're seven minutes we're up to about right here right
 (24) now just past that -
 (25) Q All right not shoreline related I take it?

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- (1) A Well not this shore anyway
 (2) Q All right Did any of the plaintiffs experts use a
 (3) similar approach to trying to identify the shoreline areas that
 (4) could have been impacted from the spill versus the balance of
 (5) the property?
 (6) A Well in a sense the idea of shoreline-related areas was
 (7) used by several of the appraisers in varying ways
 (8) Q How about Professor Green?
 (9) A Professor Green after the first year of his analysis said
 (10) that he would consider the lands that were within about a
 (11) quarter of a mile of the water as the areas that might be
 (12) receiving damage and he dealt with those lands over years two
 (13) and three just as they were along the oceanfronts
 (14) Q So he cut them up the way - in a similar fashion to the
 (15) way you do it?
 (16) A Well actually we would have calculated I think more
 (17) area He went a quarter of a mile in many instances we went
 (18) deeper Some instances we didn't go that far but we looked
 (19) more on a property by property basis I think he just used a
 (20) flat judgment across all of them
 (21) Q How about Pat Carlson did he distinguish shoreline-related
 (22) areas from inlands?
 (23) A Pat Carlson in his appraisal seemed to work off of a
 (24) series of small property units The bulk of his properties he
 (25) said had a highest and best use for recreational purposes ten

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- (1) acres as an ideal site Comparison of his comparables seemed
- (2) to reflect that he was working around sort of an idealized
- (3) ten acre site We re eight minutes 48 we re about right
- (4) there then We re just start to go swing around at the end of
- (5) this property
- (6) Q Don t see too much of the shoreline related there?
- (7) A Well you re up high I couldn t have - I m not sure
- (8) whether there s actually water or sort of - looks like it from
- (9) here but - that s where it would be off in that direction
- (10) Q You re telling us about Mr Carlson?
- (11) A Yes Mr Carlson - let me just give you an example
- (12) Maybe there is an easier way to do it
- (13) In his discussion of the Shuyak parcel I think he
- (14) mentioned that he separated something like 4800 acres of the
- (15) shoreline about one quarter mile deep along the Shuyak
- (16) parcel
- (17) from what he called the excess lands and he valued the
- (18) shoreline parcel for shoreline value and then gave something
- (19) like a 27 percent of that value basic value to the inland
- (20) portions that he dealt with
- (21) Q Okay
- (22) MR DIAMOND Your Honor I ve lost track how long
- (23) I ve been going
- (24) THE COURT Do you want to take a break?
- (25) MR DIAMOND We re going to reset some other things
- (26) THE COURT Okay sure

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- (1) (Jury out at 12 25 p m)
- (2) (Recess from 12 25 p m to 12 37 p m)
- (3) (Jury in at 12 37 p m)
- (4) THE CLERK Please rise This court now resumes its
- (5) session
- (6) Please be seated
- (7) BY MR DIAMOND
- (8) Q All right Mr Dorchester during the break I consulted
- (9) with Mr Petumenos and he is not the origin of this analogy
- (10) but someone suggested to me that separating the shoreline-
- (11) related area from the interior of the parcel in looking at the
- (12) effect of the entire parcel and contamination happened at the
- (13) shoreline as it - akin to putting trash on somebody s front
- (14) lawn and saying doesn t that reduce the market value of their
- (15) backyard Do you think that s an apt analogy?
- (16) A No I don t It certainly - you could do something in a
- (17) frontyard that could have an effect on an entire property but
- (18) I think the video that you just saw shows you In the context
- (19) of what we re doing here that it would be very unreasonable to
- (20) say that some oil on a shoreline would have any effect on those
- (21) inland portions of that parcels that were five six seven
- (22) miles away
- (23) Q You told us that Pat Carlson looked at inlands and uplands
- (24) differently from the shoreline and that Professor Green did
- (25) likewise How about Bill Mundy?

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- (1) A Bill Mundy made no difference whatsoever between
- (2) shorelines
- (3) and uplands What we just saw was Dr Mundy s parcel in its
- (4) entirety with no relation to shorelines
- (5) Q How about Mr Shorett?
- (6) A Mr Shorett just made an overall assumption that everything
- (7) was impaired for one year without actually looking at any
- (8) separate oiling or any special application of property by
- (9) property analysis
- (10) Q Does it make sense to you from a real estate point of view
- (11) that the interior mountains and glaciers on any property would
- (12) be affected by a oil spill the same way that a shoreline would?
- (13) A No it doesn t I have no experience in all of my years in
- (14) appraising that would suggest to me that that s correct I
- (15) think it s counter intuitive and it s certainly not with a -
- (16) what was indicated to us by our market research in this case
- (17) Q You ve told us that you have looked at making judgments
- (18) about how much of the acreage was shoreline related and you
- (19) told us about making judgments about what that land was worth
- (20) on a per-acre basis Did you also look at on a
- (21) parcel by parcel basis the extent to which parcels were oiled?
- (22) A Yes I did
- (23) Q Tell us about that what you did?
- (24) A May I use the Sleepy Bay map again?
- (25) Q Sure Photograph
- (26) A Photograph

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- (1) Q Everybody makes that mistake here
- (2) This is DX8933
- (3) A Let me give you an example of how we looked at oiling
- (4) Let s assume that we had a report of several hundred yards of
- (5) oiling and a fairly significant type of oiling Let s assume
- (6) that that several hundred yards is right here up in the head of
- (7) the bay This stream right here is a pretty important land
- (8) feature the ability to get to the near shoreline-related areas
- (9) is pretty important and it would mean that oiling in this area
- (10) would probably have a relatively high influence on how the
- (11) market would look at this property Appraisers call it the
- (12) utility of the property But take the same amount of oil take
- (13) the same type of oil and put it along this rocky headland here
- (14) which doesn t have quite the same characteristics of shoreline
- (15) entry and put some probably on the line which also has little
- (16) bit different characteristics Now we wouldn t have the same
- (17) effect on what for many people I think would believe the
- (18) marketplace would be the most important part of this
- (19) So in our oiling analysis what we looked at was where was
- (20) the oil what kind of oil was there nature and effect of oil
- (21) and then the ultimate question is what influence might that
- (22) have had on the ability of this property to function at
- (23) whatever its highest and best use might be
- (24) Q And you and your colleagues spent an awful lot of time
- (25) looking at all of the available oil data?

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- (1) A We sure did
 (2) Q Are you relying just on what Exxon gave you?
 (3) A Not at all We felt it was important to test the
 (4) information we had received from Exxon We tried to check all
 (5) of the information against all of the other information in our
 (6) work
 (7) Q Did that include information compiled by plaintiffs and
 (8) their experts?
 (9) A That s correct it sure did
 (10) Q What did you look at in that category?
 (11) A When we looked at information compiled by the plaintiffs
 (12) we looked among other things at the plaintiffs experts
 (13) reports We thought that they were dealing with oil we
 (14) thought about me looking at how they considered it and what
 we
 (15) did with it - we didn t find an awful lot of information
 (16) there frankly but we had other information that was furnished
 (17) to you - us through the discovery process either by
 (18) appraisers or others and anything we received we looked at
 (19) Q All right let s try to bring some of this on home
 (20) On a parcel by parcel basis you made a judgment about how
 (21) about of this - how much of this is shoreline related You ve
 (22) looked at market factors to determine what the value of that
 (23) shoreline related acreage is You looked on a parcel by parcel
 (24) basis the extent of the oiling along the shoreline Why did
 (25) you do this and what did you do with the information?

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- (1) A The reason we did that was in order for us to estimate a
 (2) fair compensation for the plaintiffs lands or any damage that
 (3) had occurred we felt that we needed to first start off with a
 (4) realistic measurement of the area and a realistic valuation of
 (5) that area
 (6) The next thing we needed to do was to see what income if
 (7) there was actual income on that land was impaired If we had
 (8) a hundred dollars of income before and had sixty dollars of
 (9) income afterwards it would be very easy to say you must have
 (10) had an effect on \$40 of income if this is the only thing that
 (11) happened
 (12) Unfortunately most of these properties weren t rented or
 (13) weren t producing much income so what we had to do was to
 find
 (14) what we believe was a reasonable market tie to an income
 figure
 (15) that would give us a basis as much as we could in the real
 (16) world to say what sort of rent conceivably might have been
 (17) earned on this individual parcel or parcel by parcel in our
 (18) analysis
 (19) Q You began this morning by implicitly criticizing Mr Mundy
 (20) who used rental rates to come up with hypothetical income
 (21) streams Aren t you guilty of his sin?
 (22) A A little bit but I don t think in the same way And -
 (23) and let me see if I can explain why I think we re different
 (24) First of all Dr Mundy in his analysis values everything
 (25) you see here and some things you don t He values every acre

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- (1) of the impaired parcel
 (2) Second thing he does he uses a per acre value that is
 (3) quite high for the numbers that we were able to develop from
 (4) the market
 (5) Third he develops rental figures on that using a nine
 (6) percent rental rate which was not consist went the information
 (7) that we found and therefore we do not believe has a market
 (8) support
 (9) Our approach to this is really the other way around He s
 (10) developing gross hypothetical revenues as I referred to it
 (11) awhile ago Our approach is a different way
 (12) In the absence of actual income here as a measure of fair
 (13) and just reasonable compensation for each of these owners
 what
 (14) we have attempted to do is to say what market basis do we have
 (15) for the kind of income that might conceivably have been earned
 (16) on a property by-property basis
 (17) Q Are you answering the question of what Exxon would have
 (18) paid in sort of uncoerced circumstances had it sought
 (19) permission to use the land and interfere with it in the way
 (20) that ultimately happened?
 (21) A Well not just estimating I think what might be charged
 (22) Exxon for purposes of the clean up What I m doing is saying
 (23) given that they had to come on these lands in order to do the
 (24) clean up what effect did the oil what the oil did all of the
 (25) activities have on the reasonable use of these lands that we

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- (1) felt the market would recognize as related to the oceanfront
 (2) related to the water where there was impairment
 (3) Q All right Ultimately you made a - came up with a rental
 (4) rate and rental amounts for each respective parcel?
 (5) A That s correct
 (6) Q In the real world would the plaintiffs have earned those
 (7) rates -
 (8) A Well -
 (9) Q - absent an oil spill?
 (10) A Well remember those big bar charts we put up earlier the
 (11) humongous things? I think those showed in the real world they
 (12) had not done so and what we were trying to do in our
 (13) projections of numbers was not to say that they actually would
 (14) earn revenues on all of these properties As a matter of fact
 (15) I think in the real world it would be extremely unlikely that
 (16) the revenue projections that I have made would actually be -
 (17) expect to be earned on a property by-property basis What I ve
 (18) done is said if you look at one property at a time let us find
 (19) a rental rate that the market says is a conceivable rental rate
 (20) for the lands involved and if that were to be rented what would
 (21) that rent be It s - if you will It s a little hypothetical
 (22) admittedly but it s I believe a fair and just way to say
 (23) how can we estimate a just compensation for the damages that
 (24) are created on these properties as a result of the oil spill
 (25) Q You said you went looking for a market-based transaction

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- (1) analogy to come up with a fair rental rate of the - most of us
 (2) think of rental rates we think in terms of 650 a month or
 (3) 2 000 a year You're looking for a percentage?
 (4) A That's correct
 (5) Q Why?
 (6) A In dealing with lands like this it's not at all unique
 (7) Because there isn't a standard lot size Well you can't say a
 (8) lot sells for 10 000 because we don't just have lots - that
 (9) may happen in rec subdivisions but on these very large parcels
 (10) it doesn't We have information that indicates that for
 (11) coastal Alaska properties it is very common to state the
 (12) amount of rent paid was a percentage of whatever the
 underlying
 (13) value is And in fact in this case we actually had
 (14) agreements that we looked at where Native Corporations had
 (15) entered into rental arrangements where they used a license
 (16) contract as the basis for the rental agreement and they stated
 (17) in many instances the rent as a percentage of what underlying
 (18) value might be
 (19) Q All right Did you look at lots and lots of licenses and
 (20) leases to act sort of as comparables to come up with what you
 (21) thought would be reasonable to apply here?
 (22) A Yes we did
 (23) Q What kind of licenses and leases did you look at?
 (24) A It was a combination of things The original group of
 (25) information we looked at there were over a hundred individual

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- (1) transactions of some sort I think ultimately we had
 (2) substantially more than that So they ranged all the way from
 (3) leases where someone has full right of possession and use of
 (4) the property for usually twelve months longer periods of time
 (5) down to short term permits where someone had the ability to go
 (6) out and hunt or camp or do things on a site under a license
 (7) arrangement for a fairly short time
 (8) Q What is the activity that ensued as a result of the spill
 (9) more akin to a license or permit as opposed to a lease to
 (10) exclusively use the property?
 (11) A In my judgment I think it should be approached on what has
 (12) been commonly used in these areas as a license arrangement
 (13) Let me see if I can illustrate what the difference is
 (14) If we had a lease - and I don't want to get hung up on
 (15) semantics but as I use the terms in my report if we had a
 (16) lease and the shoreline-related areas someone might come
 (17) along if they were to rent this area at all they might very
 (18) well say well here's what I'm going to pay you for the
 (19) ability to be the only person out there using this land for
 (20) the period that I'm there full exclusive use and that's
 (21) really not what happened here
 (22) Q How do you know that?
 (23) A Well I remember in 1990 standing somewhere right in this
 (24) section right here and on Sleepy Bay - in Sleepy Bay and one
 (25) of the security guards on the beach for the clean up crew had

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- (1) a hard hat with a big sign on it that said pest control And
 (2) I went over to him and I said What is pest control? And he
 (3) said Well one of my jobs is to make certain that none of the
 (4) workers here have any problems with bears The bears on the
 (5) island and they walk down here up the stream there's a
 (6) possible safety hazard But he said Right now I'm actually
 (7) having to turn that around and worry about the other side
 (8) because we have some people back up in here that are hunting
 (9) and I'm a little concerned make certain that there aren't any
 (10) shots fired down here that could endanger any of the clean up
 (11) crew
 (12) So in the actual use of these lands during the oil spill
 (13) there was use of the uplands in many instances and we felt
 (14) that it wouldn't be appropriate to say let us pick a rate
 (15) which theoretically would give you full use and possession of
 (16) the lands when that's really not what happened
 (17) Q Was there a big difference between license rates
 (18) nonexclusive license rights and full leases?
 (19) A There is some difference For example I think Chugach
 (20) Alaska Corporation in some of their land dealings some of the
 (21) contracts we've looked at used license rates in a range of
 (22) three percent We found other license rates that could range
 (23) from two three four five percent I think the Department of
 (24) Natural Resources for the State had rates that went clear down
 (25) to five percent So there - there was some difference in

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- (1) them
 (2) Q What rate did you ultimately use and why?
 (3) A I ultimately used six percent
 (4) Q Why?
 (5) A The basic reason for it was that although we had some
 (6) information about these license arrangements and rents that
 (7) went down three four five percent six percent was the low
 (8) end of the range of rents that was charged for full use and
 (9) possession
 (10) So if I could say I have a lot of information about full
 (11) use and possession and I know that those rates range generally
 (12) from six to eight percent but now what I'm going to do is have
 (13) much larger properties than normally applies in those lease
 (14) situations and say I'm going to deal with lands on a
 (15) nonexclusive right that means people the Natives can continue
 (16) to do other things on the land at the same time that the
 (17) clean up occurs then it's probably something less than that
 (18) We didn't have a lot of data just not much market activity
 (19) and eventually I adopted the lower limit of the lease range as
 (20) the highest which we adopted for our licenses
 (21) Q We're going to talk in some detail a little later maybe
 (22) tomorrow morning about how you did this actually on a
 (23) parcel by parcel basis and what numbers get generated but I
 (24) wanted to divert for a minute and just talk about differences
 (25) between you and the plaintiffs experts If we can talk about

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- (1) differences and I guess commonalities too let's talk about
 (2) probable purchasers for this land probable people who would
 (3) come in and buy them
 (4) Have you reviewed Dr Mundy's conclusions with respect to
 (5) that?
 (6) A Yes I have
 (7) Q And who do you think are likely purchasers?
 (8) A Well I think there's a distinction that has to be made
 (9) here To some extent I agree with Dr Mundy that if there is
 (10) to be a purchaser the most likely purchaser probably for many
 (11) of these lands is a federal or state government To some
 (12) extent that's been borne out on recent transactions in
 Kachemak
 (13) Bay and the Lucile Bay here down in Kodiak but more
 (14) importantly I think we have to say does that mean that because
 (15) they may be the most probable that there is in fact a likely
 (16) purchaser And I don't really believe that we have a likely
 (17) purchaser situation here
 (18) Q Dr Mundy reached some conclusions with respect to the
 (19) likely impact of an oil spill on purchasers of these properties
 (20) by governmental agencies Have you reviewed those
 conclusions?
 (21) A Yes I have He conducted some seminars - some surveys
 (22) among a number of people in order to see how they felt
 (23) Q Do you basically agree with Dr Mundy's conclusions?
 (24) A As to these part of his findings?
 (25) Q Yes

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- (1) A I think they parallel very much what he found from our
 (2) market research as well
 (3) Q I'm going to put on the Elmo a portion of Dr Mundy's
 (4) report dated October 30 1993 to Chenega Corporation This is
 (5) DX14058 and I'm going to show pages Roman III 25 and 26
 (6) MR PETUMENOS This is Judge part of an exhibit
 (7) previously that was used in cross-examination for Dr Mundy
 (8) about which we have had conversations with counsel about
 (9) putting in the entire section
 (10) MR DIAMOND I'm going to have him address certainly
 (11) conclusions Dr Mundy made and whether he agrees with them
 or
 (12) not
 (13) THE COURT I'll decide later
 (14) BY MR DIAMOND
 (15) Q Let me show you what we've marked as - these are pages 25
 (16) and 26 and what I'll do is zoom in on the highlighted section
 (17) if I can get the whole section there
 (18) Which of the conclusions Dr Mundy reached concerning the
 (19) potential impact of the oil spill on remote parcels did you
 (20) agree with?
 (21) A All of the organizations would like to be acquiring lands
 (22) in the Prince William Sound and Kenai Fjords areas Never saw
 (23) a government organization yet that wouldn't like to acquire
 (24) more land so that one holds
 (25) Few if any lands are actually being - are actually being

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- (1) acquired due to financial constraints (sic) That's correct
 (2) We talked to quite a number of people at the state and federal
 (3) government level They all agree to the same problems Fairly
 (4) limited budgets not enough budgets in many instances to
 (5) maintain properties that they already own let alone acquire
 (6) new
 (7) The purpose of their acquisitions is to obtain and hold
 (8) lands for a long period of time That's correct When they
 (9) buy land they're buying land for the long haul in these types
 (10) of lands at least
 (11) These individuals see the oiling problem as a transitory
 (12) one a short-term in relation to long term ownership policies
 (13) That was correct as well We just did not find any significant
 (14) questions of effect of the oiling on property values from those
 (15) entities
 (16) The organizations would acquire unique natural resource
 (17) lands even if oiled because of this long-term ownership
 (18) attitude Same basic conclusion I just stated
 (19) Some of the organizations indicated they would expect price
 (20) adjustments due to the oiling Others indicated that since the
 (21) problem was one of a transitory nature they would not expect
 (22) price adjustments
 (23) I won't pretend to tell you that I know what Dr Mundy
 (24) meant by that but I will tell you that we concurred with what
 (25) I think he meant at least to the extent that we did find

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- (1) damage or economic impairment to oiled lands
 (2) Q Okay During what period time though?
 (3) A We found economic damage during the periods that the oil
 (4) would create some impairments to the highest and best use of
 (5) the properties that we were appraising
 (6) Q Let's move from an area where you agree with Dr Mundy -
 (7) i.e. the probability that oil spill wouldn't interfere with
 (8) government purchases - to an area where you disagree His
 (9) basic approach to appraising remote wilderness property -
 (10) you're familiar with the concept the term phrase that he uses
 (11) called natural lands?
 (12) A Yes I am
 (13) Q What price per acre does that have in place on some of the
 (14) mountains and glaciers that you saw in the Silver Lake
 (15) overflight?
 (16) A I think Mr Mundy in his latest work had used \$950 per
 (17) acre
 (18) Q Does that make sense to you?
 (19) A No it doesn't
 (20) Q Where do you think he went wrong?
 (21) A There are quite a number of places that I think Mr Mundy
 (22) went wrong on both his concept and on his valuation of these
 (23) so-called natural lands
 (24) Dr Mundy's theme here is that there are people who will
 (25) pay more for natural lands than they would for other lands

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- (1) because they have no economic potential Sort of a backwards
 (2) thing
 (3) He says that the natural lands concept is not an economic
 (4) concept and yet he values these lands using the concept of
 (5) highest and best use and calls his answer on the valuation
 (6) market value I have difficulty with those very severe
 (7) difficulty with them
 (8) Second area that I have difficulty with is that in order
 (9) to find comparables for the valuation of these natural
 (10) so-called lands Dr Mundy really doesn't pay much attention to
 (11) the details of the transactions with which he's dealing What
 (12) I mean by that is he specifically will ignore whether the land
 (13) that is being bought and sold might have highest and best use
 (14) in the economic world the real world for some other use
 (15) So what Dr Mundy does is he says if the intent of the
 (16) purchaser - I know this is complicated but the best I can do
 (17) with it - he says if the intent of the purchaser is that I
 (18) will use this land for a park then it doesn't make any
 (19) difference whether its economic highest and best use in it's
 (20) intended as a park it's a park comp Let me tell you where I
 (21) have trouble with that
 (22) If I were appraising a park in a small town anywhere in
 (23) the United States and I had a comparable in New York City for
 (24) the expansion of Central Park I think the land in Central Park
 (25) would be pretty high value because the market's going to say

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- (1) you're going to have to buy it for what people in New York pay
 (2) for land in the Central Park area so the intent of the buyer
 (3) would have nothing to do with the price it's what you can do
 (4) with the land if it's not a park that determines its price
 (5) But under Dr Mundy's methods he could use that park sale at
 (6) Central Park as a comparable for natural lands in a small
 (7) town
 (8) Conversely I suppose I haven't seen him do this -
 (9) conversely I suppose he could take park land that was
 (10) purchased for addition of a green belt area in that small town
 (11) and I suppose use that as a comparable if he was dealing with
 (12) the expanse of Central Park in New York So it doesn't make
 (13) sense It isn't real world
 (14) Q Let's move from Central Park in New York to Tudor and C in
 (15) Anchorage He mentioned a parcel he was testifying right by
 (16) the corner of Tudor and C as an example of natural lands Do
 (17) you know that parcel?
 (18) A Yes I do
 (19) Q You went out and took some pictures of it?
 (20) A Sure did
 (21) Q What's this?
 (22) A This is the - over the right side here this is the
 (23) Anchorage business park which is located out at Tudor and C
 (24) We're at 48th Street right here and we're standing on the
 (25) paved area which is both part of the street and part of a

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- (1) parking area You can see a part of an office building over
 (2) here on the right of the photo right next to it parking lot
 (3) see some big antennas there on the back side there
 (4) Q The City of Anchorage bought the property on the left?
 (5) A They bought land right in here as a part of a wetlands and
 (6) this is the business park wetlands area
 (7) Q What did the city of Anchorage pay for this?
 (8) A I understand from a friend they paid about a dollar a
 (9) square foot 43-some odd thousand dollars per acre
 (10) Q Because this natural lands was \$4300 a acre -
 (11) forty three - whatever it was Does that tell us that land in
 (12) Prince William Sound is worth a dollar a square foot?
 (13) A It shouldn't But I think this is an example that he used
 (14) in saying here is an acquisition it was natural land it was
 (15) for a wetlands purposes and there was - I guess he could use
 (16) a dollar a square foot for a comparable
 (17) MR PETUMENOS I'm a little confused The witness is
 (18) not suggesting a deviation in the comp is he?
 (19) THE COURT He can clarify it Go ahead
 (20) BY MR DIAMOND
 (21) Q This was a parcel that Dr Mundy used to illustrate his
 (22) concept of natural land?
 (23) A That's my understanding I think this was just
 (24) illustrative of his methods and his concepts
 (25) Q Did he use the Pribilof Islands as a comparable?

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- (1) A Yes he did
 (2) Q Is that in your view justified?
 (3) A No I don't believe it is at all in the way he did this
 (4) This is another one of the problems I have with many of the
 (5) things that Dr Mundy did in his analysis
 (6) The Pribilof Island transaction which took place back in
 (7) the earlier 1980s was primarily designed as a financial
 (8) assistance project for the owners And it was a
 (9) congressionally mandated financial assistance because funds
 (10) were needed and Congress in its capacity determined that it
 (11) would make the financial assistance
 (12) A part of what was done was the deed or dedication of some
 (13) lands as a part of the total financial package that were
 (14) identified and made a part of the Pribilof Island transaction
 (15) The total transaction was much more than that To me it's kind
 (16) of like saying if you went to the store and you bought a
 (17) hundred dollars worth of bread and meat and potatoes I don't
 (18) think anybody would say I bought a hundred dollars worth of
 (19) potatoes or 100 dollars worth of meat or anything else I
 (20) bought groceries
 (21) And the Pribilof Island transaction I don't think it was
 (22) appropriate to say it was all of the 400-and-some-odd dollars
 (23) per acre whatever number that he used for land Because
 (24) there was much more to it that was not land related
 (25) Q Does Professor Green use the same sort of government

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- (1) acquisition comparables that Dr Mundy uses?
- (2) A He sure does
- (3) Q And he used them in this case?
- (4) A Yes he did
- (5) Q You have the same criticism of Professor Green?
- (6) A I sure do It's just not a correct way to look at these
- (7) types of transactions I have no problem with someone looking
- (8) at whatever economic reasoning might have been used The
- (9) Pribilof Island transaction just as an example was appraised
- (10) after the transaction and I think that the appraisers
- (11) estimated something under a hundred dollars per acre for the
- (12) land portion of it I have no problem with understanding what
- (13) sort of economic reasoning what sort of factual study of land
- (14) might have gone into the transaction but a congressionally
- (15) mandated transaction isn't the same as just a normal market
- (16) transaction as to the total purchase price
- (17) Q Kodiak Pat Carlson did an appraisal He was not
- (18) testifying as an expert He did an appraisal of the lands at
- (19) issue here owned by the Kodiak Island Borough prior to the oil
- (20) spill Are you familiar with his appraisal?
- (21) A Yes
- (22) Q He doesn't use the natural lands concept does he?
- (23) A No
- (24) Q So you think his appraisal is squeaky clean?
- (25) A Not so

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- (1) Q What exceptions do you take to the way he went out
- (2) appraising the Kodiak Island Borough properties?
- (3) A If we say - to take the Shuyak parcel as an example we're
- (4) talking about a parcel that has 26 000 some odd acres Pat
- (5) Carlson did this and his appraisal was he picked out nine
- (6) comparables The comparables that he picked out ranged for
- (7) eight of them I think between something like three and maybe
- (8) seven eight nine acres None of them was even over ten
- (9) acres
- (10) The one comparable that he had that was over ten acres was
- (11) the Aleneva the Old Russian Believers transaction which was
- (12) over 200 acres but still a long way from 26 000-plus acres
- (13) So part of the problem that I have is that Pat in his
- (14) appraisal made an assumption that you don't make any
- (15) adjustment over a fairly small I think 160-acre property And
- (16) I think he misunderstood the information and used the wrong
- (17) comparables in what he did there
- (18) Q What does that do to the value of the property that he
- (19) appraised?
- (20) A Well for that property it varies substantially overstates
- (21) what I believe the market would recognize was the value of the
- (22) property at least for the uses that he appraised it for which
- (23) would be for general recreational purposes In Mr Carlson's
- (24) appraisal he says that of the 26 some odd thousand acres
- (25) about 4800 4 800 of those acres I think a little under that

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- (1) were shoreline acres
- (2) And in his appraisal he also said that for rec sites - he
- (3) didn't say let's divide this up into rec sites I'm going to do
- (4) that as an example But he said that rec sites if you sold
- (5) remote land typically should be ten acre sites That was the
- (6) ideal size for a rec site
- (7) So if we - if we looked at his numbers to see do they make
- (8) any economic sense we could take the 4800 acres that he dealt
- (9) with as the shoreline area divide that by the ten acres that
- (10) he says is an ideal size site and I got 480 individual rec
- (11) sites that I've created in order to justify whatever value that
- (12) I put on that site
- (13) So without even getting into the value side of it there's
- (14) an underlying question here that I have as to I wonder if he
- (15) really meant you could develop and the market would support
- (16) 480
- (17) sites
- (18) Q Do you have a view on that?
- (19) A I sure do I don't believe they could examine in the short
- (20) run Kodiak has - you could argue a little bit as to what a
- (21) typical market absorption is for lots in a given year but I
- (22) don't think people would argue too badly when we said ten
- (23) lots If you did say ten lots 480 lots it takes 48 years to
- (24) sell off all of those lots and it's a long time to sell them
- (25) at the prices that he put on them I don't believe that the

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- (1) sell them all at one time would come close to enough
- (2) justifying the value he put on there
- (3) Q A final area where I know you disagree with several of the
- (4) plaintiffs experts and that's stigma whether the oil spill
- (5) basically rendered all of the plaintiffs parcels whether
- (6) oiled or un-oiled valueless for some period of time Did you
- (7) look at that question?
- (8) A Yes I did
- (9) Q Did you look at it with respect to large areas like those
- (10) which comprises 99 percent of the plaintiffs parcels?
- (11) A Yes I did
- (12) Q What did you conclude?
- (13) A I concluded there was no evidence whatsoever of stigma
- (14) associated with the Exxon Valdez oil spill We saw just a
- (15) little while ago the sections from Dr Mundy's report where he
- (16) talked with people who said we're buying for the long haul
- (17) we - well all the things we said
- (18) What I think is important is that it just is counter
- (19) intuitive to believe that where there are very thin markets to
- (20) begin with where there are purchasers who are primarily
- (21) federal and state government federal and state governments
- (22) when they will buy to believe that they would think that the
- (23) oil spill actually stigmatized these lands And I think that's
- (24) been pretty well borne out by the purchases subsequent to the
- (25) spill in the Kachemak Bay area and also Seal Bay

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- (1) Tukilike (ph)
 (2) Q In other words Mr Mundy espoused that view in his written
 (3) report?
 (4) A That's correct. He did express a different view. We don't
 (5) see any evidence of downward adjustments on these purchases
 for
 (6) any effect of the oil spill even in Pat Carlson's appraisal
 (7) We don't really see an adjustment in there that appears to pick
 (8) up any differences for stigma or any such thing attributable to
 (9) the oil spill
 (10) Q When you look at smaller parcels as well, did you see a
 (11) cessation of market activity, buyers stopping to buy and
 (12) sellers being stuck where they were in place?
 (13) A No, when we started looking at the smaller tract, not to
 (14) the just the big tracts, we really found just the opposite. We
 (15) didn't find a situation where the rate of sales was declining
 (16) significantly, we actually saw some boosts in sales. We didn't
 (17) see any decline in prices, we didn't see anything that would
 (18) indicate that there was any stigma there. And if there had
 (19) been stigma, I think particularly for these types of markets
 (20) you would expect in an economic downturn these are the first
 (21) properties to probably lose in value, market comes back up are
 (22) the last to come back up in value. You'd expect them to be
 (23) pretty sensitive to stigma, and we just didn't see it there.
 (24) Q All right.
 (25) Finally on the subject of the plaintiffs' experts, I want

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- (1) to talk about the differences between how you dealt with oiling
 (2) information and the way, specifically, Dr. Mundy dealt with
 (3) oiling information.
 (4) Tell us your understanding what use Dr. Mundy made of
 (5) oiling information and persistence data?
 (6) A My understanding is that Dr. Mundy gave the ICF firm some
 (7) instructions that said, "I want you to prepare some charts and
 (8) graphs for me - this is my words - prepare some charts and
 (9) graphs for me that will tell me how long you see oil will be
 (10) out there until the beaches are clean, if you will, how long it
 (11) will be out there almost in any form.
 (12) And what ICF then did was their work and they reported back
 (13) some charts or graphs, some information that Dr. Mundy then
 (14) applied as the market standard.
 (15) So rather than to say let us look at oiling on a
 (16) property specific basis, and if I may for just a minute.
 (17) Q Let's use Point Helen, because that's probably a better
 (18) example.
 (19) Explain for us how Dr. Mundy used the ICF data in
 (20) connection with his assessment of damages to Point Helen?
 (21) A Well, I believe that, rather than to say was there
 (22) specifically oiling in this segment here or this segment here
 (23) or this segment here, Dr. Mundy would have said, for whatever
 (24) this total shoreline measures, what percentage of it out of the
 (25) ICF tables and for various coastal types I do have, what are

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- (1) subsistence figures that they give with which I will accept
 (2) those figures as the market standard for what the market would
 (3) say is the damage period.
 (4) Q How long did ICF and Dr. Mundy find the persistence would
 (5) last?
 (6) A I've forgotten the exact numbers, but I think it may run
 (7) out to 20 years or so.
 (8) Q Does that have any bearing on real estate concepts of
 (9) value?
 (10) A Not that we could find from our market research. Just not
 (11) at all. We didn't find the market reacting in - either in the
 (12) stigma sense that he reports for one, two, or three years of
 (13) removal of all of the properties, depending on what class they
 (14) fall into, or the damaging of everything that's here, let alone
 (15) how he handled the actual oiling along the shorelines.
 (16) Q By contrast, did you look at the effect of the oil and the
 (17) presence of the oil on real estate utilization and utility of
 (18) this parcel?
 (19) A That's correct. Our viewpoint was very simple. How would
 (20) the market view the oil? What would they do with it? Would
 (21) they still use the land? Would they not use the land? If
 (22) they'd use the land, would they say I've used it, but I won't
 (23) pay as much, and at some point when would they say now I'll
 (24) have to pay the full side, so we looked at it from both the
 (25) buyer and seller, renter - both sides of the equation.

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- (1) landlord or tenant view.
 (2) Q You didn't think this property would be impaired from a
 (3) real estate standpoint for 20 or so years, like Dr. Mundy?
 (4) A Not at all. There's just no indication from a standpoint
 (5) of looking at highest and best use, what I call the utility of
 (6) the land, that is how people would use the land at its highest
 (7) and best use that there would be any indication that there
 (8) would be long, long periods of loss.
 (9) Q Is this a Chenega parcel?
 (10) A Yes, it is.
 (11) Q Did you take into account what the representatives of the
 (12) Chenega Corporation thought the effect of the oil spill was on
 (13) utilization?
 (14) A To some extent, I think I did.
 (15) Q I'm going to put the Barco to some extent (to some
 (16) extent).
 (17) This is DX15552-26. Am I connected?
 (18) What are we looking at?
 (19) A This is a fairly typical form of the 1992 FINSAP for
 (20) shoreline clean-up assessment team activities. This is pretty
 (21) hard to read, but there are various government, Exxon, Native
 (22) Corporations and other representatives that went out on these
 (23) teams jointly to survey these various oiled areas.
 (24) This particular form, the yellow highlighted area is one
 (25) that the Native Corporations, Chenega Corporation's land

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- (1) manager made his comments and what you see written over here
- (2) on the right side are the comments that are blown up in yellow
- (3) Q In terms of -- in evaluating the oil and the effect on the
- (4) persistence of real estate at Point Helen what do you find in
- (5) that quotation to be instructive?
- (6) A There are several things that are very important to us from
- (7) a real estate perspective
- (8) First of all at the first part of Mr Ward's statement he
- (9) says storm burms (sic) look real good The little asphalt and
- (10) surface oil is well weathered and very dry
- (11) So he is seeing oil there
- (12) I was surprised to see the beach in such good condition
- (13) considering the history Numerous pits revealed no significant
- (14) moose (sic) or oil in any amount that could be considered
- (15) retrievable or more importantly a threat to Chenega
- (16) So all of that first of all says We saw oil I'm
- (17) beginning to evaluate the effect of it from use standpoint
- (18) And the latter part of his statement is This beach is
- (19) usable to the village people for any and all subsistence
- (20) activities A very good surprise so it helps us to look for
- (21) the whole notion of how can you use it is it in a situation
- (22) where it is fully usable is there still some use impairment or
- (23) not
- (24) Q In looking at the continuing effect or effects on the lands
- (25) and all the easements in disputes here did you look at all of

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- (1) the information?
- (2) A Yes I did
- (3) Q How do you compare that in comparison to ICF subsistence
- (4) curve in ranging the effects?
- (5) A I'd have a whole lot rathered have had this kind of
- (6) information than any sort of hypothetical tables that I don't
- (7) believe purport to apply to any one situation My comment is
- (8) specifically for that real estate on that day This is a
- (9) representative of the Native Corporations I think this is the
- (10) kind of information that is very useful to someone who's doing
- (11) real estate analysis
- (12) Q And Mr Ward was land manager he was not in a position
- (13) involved in litigation?
- (14) A I -- I have no idea whether he may have some
- (15) MR PETUMENOS Objection to foundation
- (16) BY MR DIAMOND
- (17) Q What did you understand Mr Ward's job title to be?
- (18) A I understand his job title to be land manager for Chenega
- (19) Corporation for purposes of this survey
- (20) Q Okay Let me take this down
- (21) I promised the jury that when you were talking about your
- (22) general approach to assessing damages to these parcels we
- (23) would talk specifically about a couple as illustrative of how
- (24) you went about coming up with a fair compensation figure for
- (25) the effects of the oil Did you prepare some videotape to

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- (1) say demonstrate your approach to this question?
- (2) A Yes I did
- (3) Q All right Covering what six or seven different parcels?
- (4) A Yes Covering a number of parcels but I won't ask anyone
- (5) to endure all of those I have a couple of them that I've
- (6) bought along here that I think would be very useful
- (7) Q We're only going to show two Your Honor of the multitude
- (8) that were prepared at enormous effort.
- (9) What's the first example that you wanted to share with the
- (10) jury?
- (11) A The first example is the LaTouche parcel and it is one
- (12) that I think gives us a chance to sort of fill in and around a
- (13) little bit some of the things we've talked about for Sleepy
- (14) Bay the photo that we've had in concepts of shoreline-related
- (15) areas and our consideration of the land
- (16) Q Okay My able assistant's left so --
- (17) MS SMITH I'm here
- (18) MR DIAMOND Oh my able assistant moved
- (19) MR DIAMOND Your Honor at this time we will play
- (20) DX13172A
- (21) (Video played)
- (22) VIDEO SPEAKER LaTouche Island is located there
- (23) southwestern Prince William Sound about 70 flight miles from
- (24) Whittier
- (25) The island is divided into two parcels called North

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- (1) LaTouche Island owned by Chenega Corporation and South
- (2) LaTouche
- (3) Island owned by the Chugach Alaska Corporation
- (4) There are also two smaller privately owned subdivisions on
- (5) the western side of the island
- (6) We visited these parcels in 1990 1991 and 1992 Our
- (7) investigation indicates that two of the native corporation
- (8) parcels have limited use
- (9) The north LaTouche parcel measures roughly two-and-one-half
- (10) miles north to south and two-and three-quarters miles east to
- (11) west
- (12) It contains nearly 3400 glaciers and has roughly 6.6 miles
- (13) of shoreline Prominent features on the island include Sleepy
- (14) Bay on the north and steep rocky terrain on the eastern
- (15) shore There is a pink salmon spawning stream at the
- (16) southeast
- (17) corner of Sleepy Bay
- (18) The north and east sides of the parcel are exposed to
- (19) storms and high seas Because of this Sleepy Bay is not
- (20) considered a safe anchorage The intertidal area of Sleepy Bay
- (21) is strewn with rock and rubble The terrain just south of
- (22) Sleepy Bay slopes upwards to the mountains Based on these
- (23) features and terrain we determined that about 1400 acres of
- (24) the north LaTouche parcel or about 40 percent of the entire
- (25) parcel are shoreline related
- (26) The south LaTouche Island parcel includes most of the
- (27) southern portion of the island It contains about 14,900 acres

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- (1) and over 23 miles of shoreline Overall this parcel measures
- (2) about 12 miles north to south and about four miles east to
- (3) west
- (4) The east side of the parcel is dominated by a ridge of
- (5) mountains that rises steeply out of the ocean to elevations of
- (6) nearly 2 000 feet
- (7) The eastern coast consists primarily of steep cliffs with
- (8) instable slopes On the south end of this coast the shoreline
- (9) is lined with rock reefs The land here slopes gently to the
- (10) mountains
- (11) Both the eastern and southern areas are exposed to heavy
- (12) seas The western side of this parcel slopes from the mountain
- (13) ridge on the east side of the island down to the shoreline of
- (14) LaTouche Passage This view from LaTouche Passage shows the
- (15) mountain ridge rising high over the slopes of the western side
- (16) of the parcel
- (17) The south LaTouche parcel contains about 4 300 acres that
- (18) are shoreline related As you can see the shoreline related
- (19) area on the eastern side of the parcel is rather narrow because
- (20) of the steep cliffs on that coast
- (21) For the north LaTouche parcel the initial survey in 1989
- (22) revealed wide surface oiling in these areas of the shore
- (23) Moderate oiling here and light and very light oiling here
- (24) Sleepy Bay received the heaviest oiling of all the
- (25) shorelines on these two parcels and was among the heaviest

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- (1) oiled in all of Prince William Sound Later surveys of this
- (2) area show how the surface oiling diminished by 1990
- (3) 1991
- (4) 1992
- (5) And 1993
- (6) For the south LaTouche Island parcel the 1989 survey
- (7) revealed wide surface oiling in these areas of the shore
- (8) Moderate oiling here and light or very light oiling here The
- (9) narrow eastern shoreline received most of the oiling on this
- (10) parcel
- (11) In 1990 extensive surveys of the shoreline found
- (12) considerable reduction in surface oiling Surveys of this area
- (13) of the eastern shore showed further reductions in surface
- (14) oiling in 1992 and in 1993
- (15) There are two areas of land which I mentioned earlier that
- (16) are privately owned These two areas are the LaTouche town
- (17) site subdivision and Horseshoe Bay This is LaTouche town
- (18) site a recreational subdivision that was offered for sale in
- (19) the late 1970s This subdivision of more than 165 lots is
- (20) located near an abandoned copper mine In the days of the
- (21) copper mine a small town was located here but the remaining
- (22) buildings were destroyed by fire
- (23) Remnants of the original mining operation are still present
- (24) at this site
- (25) Many lots were sold in the subdivision when it opened

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- (1) Around that time there was discussion of state funding for a
- (2) boat harbor at LaTouche which the harbor was never built
- (3) Over
- (4) the last ten years that has been some effort to sell property
- (5) at LaTouche townsite but no sales or developments have taken
- (6) place
- (7) The other privately held acreage on the western side of
- (8) LaTouche Island is at Horseshoe Bay This land was
- (9) developed - purchased by a developer in 1979 with the intent
- (10) of dividing and marketing recreational sites but that has not
- (11) happened There are no significant improvements at
- (12) Horseshoe
- (13) Bay Like LaTouche town site the Horseshoe Bay town site is
- (14) near an abandoned mine
- (15) The history of these two subdivision properties reflects
- (16) the limited demand for recreational properties in remote areas
- (17) of Prince William Sound
- (18) Other sites on the western side of LaTouche might appear to
- (19) be used for recreational development However based on the
- (20) lack of success of subdivisions here and elsewhere in Prince
- (21) William Sound such development seems unlikely in the near
- (22) future
- (23) In past years logging has taken place in some areas on the
- (24) east side of the island as indicated by clear-cut areas such as
- (25) this one Logging was not going on at the time of the spill
- (26) and has not been resumed
- (27) At the time of the oil spill both Native Corporation

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- (1) parcels - LaTouche Island consisted of unimproved remote
- (2) wilderness much of the land is rugged and inaccessible both in
- (3) the uplands and on the shorelines
- (4) This is land that is not economically viable for
- (5) development but can be used for hunting fishing collecting
- (6) firewood subsistence and other similar activities
- (7) Because of their location topography and lack of utility
- (8) we have classified these two Native-owned properties as having
- (9) a highest and best use we call limited use And our assessment
- (10) of damages is based on this finding
- (11) (Video ended)
- (12) BY MR DIAMOND
- (13) Q Your Honor I would like to turn next to his assessment of
- (14) damages for the north LaTouche parcel It is now 1 30 and I
- (15) probably have another hour
- (16) THE COURT Let's go I'll let you go Don't talk to
- (17) anybody about the case and don't form or express any opinion
- (18) in
- (19) the case until it is submitted to you for deliberation 8 30
- (20) tomorrow
- (21) (Jury out at 1 30 p m)
- (22) THE COURT Anything else?
- (23) MR DIAMOND I have some exhibits to offer from
- (24) today
- (25) I don't know that we resolved the dispute over which
- (26) portions of the Mundy report would be put in but I would like

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- (1) to offer into evidence what we marked as DX14058 which are
- (2) pages 25 and 26 part III Dr Mundy's analysis of the effects
- (3) of the spill on government purposes
- (4) (Exhibit DX14058 (pages III-25 and III 26 offered)
- (5) THE COURT You want them in?
- (6) MR DIAMOND He would like those in
- (7) MR PETUMENOS Judge can I reserve?
- (8) THE COURT You don't want them in?
- (9) MR PETUMENOS I'm trying to determine from
- (10) Mr Oppenheimer if this is the same page from the report that
- (11) was used in Mundy cross examination or from the same section
- (12) because what I had told Mr Oppenheimer was there's an entire
- (13) section on marketability from the report tells the full story
- (14) and he - I wanted to submit the entire section and that's
- (15) still my position I think that it's the same section of the
- (16) report that's coming up again
- (17) MR OPPENHEIMER The page that we talked about was
- (18) Roman III-26 When you said the full section I thought it
- (19) meant the full section on the government marketing issue and
- (20) that should be both 25 and 26
- (21) MR PETUMENOS No I meant the entire section If I
- (22) could show it to the Court at some future time
- (23) THE COURT I appreciate that Thank you
- (24) MR DIAMOND In addition to that noncontroversial
- (25) one DX15552 26 which is the FINSAP report on Point Helen that

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- (1) was shown on the Barco DX10231B the oiled versus un-oiled
- (2) bar graph DX is 3 -
- (3) (Exhibit DX15552 26 offered)
- (4) MR PETUMENOS Excuse me can we do them one at a
- (5) time?
- (6) THE COURT So you object to either one of those?
- (7) MR PETUMENOS I don't object to the FINSAP document
- (8) no
- (9) THE COURT Admitted First one
- (10) (Exhibit DX15552 26 received)
- (11) MR DIAMOND 10231B which is oil versus un-oiled
- (12) acreage
- (13) (Exhibit DX10231B offered)
- (14) MR PETUMENOS I don't object to that
- (15) THE COURT Admitted
- (16) (Exhibit DX10231B received)
- (17) MR DIAMOND DX893 - I'm sorry I don't want
- (18) that DX13183A is the Silver Lake overflight video
- (19) (Exhibit DX13183A offered)
- (20) MR PETUMENOS I have no objection to that
- (21) THE COURT Admitted
- (22) (Exhibit DX13183A received)
- (23) MR DIAMOND 102336 DX the bar graph showing Prince
- (24) William Sound sales of more than ten acres
- (25) (Exhibit DX10236 offered)

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- (1) MR PETUMENOS Don't object to that
- (2) THE COURT Admit it
- (3) (Exhibit DX10236 received)
- (4) MR DIAMOND And 10255 DX the one I can't remember
- (5) what it is Just a second
- (6) Oh yes that was the limited use Can't read my last
- (7) word Limited use comps that he used It was on the Barco
- (8) The bar graph of -
- (9) (Exhibit DX10255 offered)
- (10) MR PETUMENOS Is that the one we've been fussing
- (11) about?
- (12) MR DIAMOND No the one with the portion of the
- (13) bars
- (14) MR PETUMENOS I have no objection to that
- (15) THE COURT Admitted
- (16) (Exhibit 10255 received)
- (17) MR DIAMOND Okay That's all at this time
- (18) THE COURT Anything else?
- (19) MR PETUMENOS No I've been doing so well today I'm
- (20) going to collect my winnings and try again tomorrow
- (21) MR FORTIER I was going to raise some issues on the
- (22) archaeology exhibits
- (23) THE COURT Not now
- (24) MR FORTIER Not now?
- (25) THE COURT This is one of those dangerous times

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- (1) counsel
- (2) MR FORTIER I realize that Your Honor
- (3) THE COURT We'll do it another time
- (4) MR FORTIER I just didn't want to go to jail for
- (5) failing to -
- (6) THE COURT In civil cases I rarely put lawyers in
- (7) jail
- (8) MR FORTIER Okay When you said bring your
- (9) toothbrush I forgot mine today
- (10) THE COURT But I already told you I have from 2:30
- (11) to 3:30 available if it's important enough to deal with or if
- (12) it's a relatively short thing we can schedule it alternate
- (13) another time
- (14) MR FORTIER I don't know if Dr Deacon is going to
- (15) be on tomorrow We do have some issues with the exhibits if
- (16) he is on tomorrow
- (17) THE COURT Is he?
- (18) MR DIAMOND He should start depending on how long
- (19) Mr Petumenos's cross-examination of Mr Dorchester should
- (20) start at some point late tomorrow I have spoken with
- (21) Mr Fortier about his objections maybe we can resolve them
- (22) THE COURT I'll set it for 3:00 because I figure we
- (23) should be able to do it within a half an hour If you resolve
- (24) your difficulties you can come and put yourselves on the
- (25) record or if - or you can tell me there's no need to have a

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- (1) hearing and I'll take it off okay?
- (2) MR DIAMOND Very good
- (3) THE COURT Thanks
- (4) (Recess at 1 37 p m)

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- (1) EXHIBITS
- (2) DX14046B DX14045 DX14049 DX13095C DX13091A and
- (3) DX14047 offered 7345
- (4) 14039 offered 7345
- (5) DX13182B offered 7346
- (6) DX14058 (pages III-25 and III 26 offered 7407
- (7) DX15552 26 offered 7408
- (8) DX10231B offered 7408
- (9) DX13183A offered 7408
- (10) DX10236 offered 7408
- (11) DX10255 offered 7409
- (13) 14039 received 7345
- (14) DX13182B received 7346
- (15) DX15552 26 received 7408
- (16) DX10231B received 7408
- (17) DX13183A received 7408
- (18) DX10236 received 7409
- (19) 10255 received 7409

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- (1) STATE OF ALASKA)
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA)
- (6) I Marianne Y Lindley RPR CM a Registered
- (7) Professional Reporter and Notary Public
- (8) DO HERBY CERTIFY
- (9) That the foregoing transcript contains a true and
- (10) accurate transcription of my shorthand notes of all requested
- (11) matters held in the foregoing captioned case
- (12) Further that the transcript was prepared by me
- (13) or under my direction
- (14) DATED this day
- (15) of 1994
- (21) MARIANNE Y LINDLEY < RPR CM
- Notary Public for Alaska
- (22) My Commission Expires 8 21 95

Look-See Concordance Report

 UNIQUE WORDS 2,290
 TOTAL OCCURRENCES 8,384
 NOISE WORDS 385
 TOTAL WORDS IN FILE
 24,605

SINGLE FILE CONCORDANCE**CASE SENSITIVE****NOISE WORD LIST(S)
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- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 (2) THIRD JUDICIAL DISTRICT
 (4) In re) Case No 3AN 89 2533 Civil
) Anchorage Alaska
 (5) The EXXON VALDEZ) Tuesday August 30 1994
) 8 30 a m
 (6))
 (8) VOLUME 47 Pages 7415 through 7565
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)
 (11) TRIAL BY JURY
 (13) BEFORE THE HONORABLE BRIAN C. SHORTELL
 Superior Court Judge
 (16) APPEARANCES
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- (1) PROCEEDINGS
 (2) THE CLERK Please rise
 (3) (Call to Order of the Court 8 35 a m)
 (4) THE COURT You can all be seated Counsel you
 (5) wanted to see me out of the presence of the jury
 (6) MR. OPPENHEIMER Your Honor yes just very briefly
 (7) We continue to have some problems with the rebuttal witness
 (8) list
 (9) THE COURT I read the memo counsel but I really
 (10) don't want to take that up this morning
 (11) MR. OPPENHEIMER No In fact all I wanted to bring
 (12) to the Court's attention is that it was broken down on a
 (13) witness by witness basis and at the end of the day what we
 (14) would want to do is talk to the Court about a convenient time
 (15) to discuss it In fact we wanted to make clear that the
 (16) Court could not go through that much information obviously on
 (17) each witness but we thought it was important to get down to
 (18) where the rubber met the road on each individual witness That
 (19) was filed this morning
 (20) THE COURT Sure I'll take it up I just don't think
 (21) this is the time I want to tell you something about one of
 (22) the jurors Tracy Sheldon you may remember during
 (23) questioning you may remember some of us wouldn't because
 (24) there's been so much time between the time he was questioned
 (25) and now but remember he was looking for a job? Well he

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- (1) found one and now of course he's dying to be excused He
 (2) called in yesterday afternoon and sort of thought I would just
 (3) excuse him and I told my secretary to say no I wouldn't
 (4) excuse him and I would intend to - unless there's no
 (5) objection - to call whoever it is his new employer and say
 (6) look it's only another week please this is very important
 (7) and you've got to leave him on this jury And they might not
 (8) go for that I don't know yet so I'm not sure of the
 (9) situation I only know that he definitely wants to go And for
 (10) good reason too Remember he hasn't had a job for a long
 (11) time
 (12) Okay so now if you want me to excuse him I'll consider
 (13) excusing him right now If you don't want me to excuse him
 (14) I'll explore it further
 (15) MR. DIAMOND May I confer with counsel for a moment?
 (16) MR. STOLL Your Honor I think what we'd like -
 (17) MR. DIAMOND Your Honor what we - may we approach
 (18) the bench and confer off the record?
 (19) THE COURT Sure Off the record
 (20) (Bench conference off the record)
 (21) THE COURT Is there anything else before we start?
 (22) MR. STOLL No Your Honor
 (23) THE COURT I don't know whether all the jurors are
 (24) here Mr. Sheldon hasn't come here yet
 (25) MR. PETUMENOS This may all be moot then

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- (1) (Jury in at 8 42 a m)
 (2) THE COURT All right the jury s present Let s go
 (3) on the record
 (4) THE CLERK On record
 (5) THE COURT Mr Diamond
 (6) MR DIAMOND Thank you Good morning ladies and
 (7) gentlemen
 (8) CONTINUED DIRECT EXAMINATION OF JOHN D
 DORCHESTER JR
 (9) BY MR DIAMOND
 (10) Q Good morning Mr Dorchester I fear the jury was a little
 (11) slow coming up because they know we re going to discuss
 numbers
 (12) this morning
 (13) We left yesterday afternoon talking about LaTouche Island
 (14) You said it had two parcels You ve chosen one of those two
 (15) parcels as an example to illustrate how you went about
 (16) estimating fair compensation for the oiling of one of those
 (17) sites Which one are we going to deal with?
 (18) A The north parcel of the two
 (19) Q You did a damage valuation for each of the oiled parcels?
 (20) A That s correct
 (21) Q And you prepared this in booklet form?
 (22) A Yes I did
 (23) Q So the jury doesn t think they have to write everything
 (24) down we ll submit this to you as an exhibit after Mr
 (25) Dorchester s testimony

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- (1) Tell us about the north LaTouche parcel that you evaluated?
 (2) A The north LaTouche parcel is a parcel that we estimated to
 (3) have highest and best use of limited use It contains a total
 (4) of 3 381 acres a part of the parcel is Sleepy Bay area that we
 (5) talked about yesterday And I see there s a photo down here on
 (6) the floor It is owned by Chenega Corporation and constitutes
 (7) the top 20 percent or so of LaTouche Island
 (8) Q All right and you prepared for this parcel as you did all
 (9) of the other parcels a two-page damage evaluation summary?
 (10) A That s correct I did
 (11) Q Is that two-page summary I assume by its name it s a
 (12) summary of other information?
 (13) A That s correct All of our field notes our individual
 (14) analysis sheets other summary forms books pages a lot of
 (15) information are still in our files But this is intended just
 (16) as a brief summary of some of the key information and some of
 (17) the key elements of our analysis
 (18) Q Okay The collection of summaries is DX14028 This does
 (19) not contain valuations for any unoiled parcels does it?
 (20) A No it does not
 (21) Q Why?
 (22) A The issue of whether or not unoiled properties should be
 (23) impaired we viewed as a market issue Our market interviews
 (24) our market research our analysis of the sales information and
 (25) other market information we had pretty clearly showed that

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- (1) unoiled properties should not be considered as economically
 (2) impaired by the oil spill
 (3) Q Okay I m going to put on the Elmo with Joel s
 (4) assistance a page of the first of the two pages from your
 (5) damage valuation summary dealing with north LaTouche
 Island
 (6) I m going to hand you the pointer and invite you to come down
 (7) to the Barco screen and just go through this You can tell me
 (8) what I ought to blow up and focus on
 (9) A Well just first of all as the title says it s an
 (10) impairment analysis summary form Most of the information
 (11) that you see down to the lower part of it is summary
 (12) information about the property This is reflective of a lot of
 (13) the information we have back at the office that I mentioned
 (14) Right here we have highest and best use estimate of limited
 (15) use and right here we have our calculated shoreline related
 (16) area that we talked about yesterday With this property 1 300
 (17) and I believe that s 97 of the total acres of the parcel about
 (18) 41 percent of the total property and then below -
 (19) Q Let me zoom in this so the jury can see it better What s
 (20) this matrix?
 (21) A This matrix shows the information that was developed from
 (22) our oiling research We showed here the information that was
 (23) reflected in each of the shoreline cleanup assessment team
 (24) surveys on this property starting with 1989 and going through
 (25) 1993 And just as an example the 1989 survey showed that

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- (1) 33 823 of the total shoreline feet were oiled some degree of
 (2) oil That s about 97 percent of the total shoreline of the
 (3) north LaTouche parcel for 1989
 (4) 1990 same type of information oiling information now
 (5) shows that a little over 27 000 feet are oiled That s about
 (6) 78 percent of the total shoreline and so forth on down 91
 (7) we re down to 67 percent of the shoreline that shows oiling 23
 (8) percent and then 30 percent on POSTSAP in 1993
 (9) Q You have a second table on your damage your impairment
 (10) analysis summary that deals with percent estimates or
 estimates
 (11) of - try that again percent impaired on the bottom I d
 (12) like you to explain for the jury how these relate to the table
 (13) that we just saw I think what I will do put this - well I
 (14) can t do both at once can I?
 (15) Okay how s that for impromptu?
 (16) A Works pretty well
 (17) Q Take us through how these two tables relate to one
 (18) another
 (19) A We should have redesigned the sheet This is the table
 (20) that we just talked about which was the percent of the
 (21) shoreline that was reflected as being oiled in the shoreline
 (22) cleanup assessment team surveys
 (23) Down here what we have is our calculation of the impairment
 (24) for this property Behind the sheet up here is information
 (25) about our acreage values the numbers of acres consideration

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- (1) of the total parcel and then the shoreline related area and
 (2) ultimately here we concluded that these shoreline related
 (3) areas had a market value of \$650 000 for shoreline related
 (4) area
 (5) Q That s taking the 1 397 acres times the value per acre that
 (6) you assigned to this shoreline related acreage?
 (7) A That s correct Then what we did down here to calculate
 (8) our impairment we started with the value of the
 (9) shoreline related area you ll notice that it stays the same in
 (10) each of the years There was no market information that
 (11) indicated that there was any market shift of market values or
 (12) market prices over the time of the oil spill any general
 (13) shift
 (14) In the first year our analysis was that the
 (15) shoreline related area was effectively 100 percent impaired
 (16) This compares with the 97 percent of oiled shoreline but we
 (17) felt that the nature of the oil the location of the oil
 (18) activity going on effectively impaired the entire - more than
 (19) 1 000 acres of shoreline-related area
 (20) The calculation that we did then was to multiply six
 (21) percent times \$650 000 and this indicated that a just and
 (22) reasonable compensation for the impairment of that land for the
 (23) first year of the oil spill would have been \$39 000
 (24) Q Remind us where the six percent comes from?
 (25) A Six percent is the market rate that we used as a license

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- (1) reasoning that I did for the first year I said that the second
 (2) year s impairment would be six percent times a hundred
 thousand
 (3) dollars - or times \$650 000 all of that was impairment for
 (4) the year so that is a total of \$39 000 impairment for the
 (5) second year
 (6) Q Did you have to go through the same process of making a
 (7) judgment with respect to each parcel each year what percent
 (8) of impairment to assign to it?
 (9) A Yes we did We - we took our field notes we took the
 (10) oiling information we took maps took all of the information
 (11) we had on a property by property basis and from year to year
 (12) as cleanup occurred as weathering and - as the oil began to
 (13) dissipate and no longer be there we looked to see where
 (14) remaining oil was and what effect if any it was likely to
 (15) have on the remaining use of the property And this is an
 (16) example of - although oiling had reduced to about 78 percent
 (17) we still said that it was sufficient that it constituted a full
 (18) impairment of the whole shoreline related area
 (19) Q All the way around the parcel?
 (20) A All the way around the parcel
 (21) Q Third year you looked at MAYSAP data among other things
 (22) which showed 67 percent of the shoreline still oiled Now are
 (23) you making adjustments here for the degree of oiling?
 (24) A Really not We - we are looking at oil and where it is
 (25) It s possible that - first of all the 67 percent includes

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- (1) rental rate for purposes of estimating just compensation It
 (2) was the - the lower end of the range of full exclusive -
 (3) exclusive possession and use leases that we found and this
 was
 (4) not an exclusive type of use situation so we said that ought
 (5) to set the upper limit of what people would pay for
 (6) nonexclusive use of a shoreline
 (7) Q If I can put that into more simple words this is sort of a
 (8) proxy for what an arm s length lessor and lessee might agree to
 (9) pay and receive for 1 400 acres on LaTouche?
 (10) A In fact possibly an upper limit of what might happen I
 (11) don t suggest here that this parcel necessarily and all
 (12) parcels certainly would actually rent for that But in terms
 (13) of estimating a just compensation it is - it s my judgment
 (14) that that is a fair and just rental to use in the calculation
 (15) of a damage impairment or a damage estimate
 (16) Q In the second year the SCAT surveys reported 78 percent of
 (17) the shoreline oiled but you used 100 percent impairment
 (18) number?
 (19) A That s correct
 (20) Q You make a mistake?
 (21) A No not at all The 78 percent of actual shoreline oiling
 (22) reported in 1990 we felt was of a nature and locations that
 (23) the effect of it on the use of the property was still enough to
 (24) say that there was a 100 percent effective impairment of the
 (25) use of that property during the second year So by the same

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- (1) light and very light oiling in it But our real concern was
 (2) the basic nature of the oil and the extent of oil and location
 (3) of oil in a - in a real world look see at the use of land
 (4) Q In the third year your level of impairment matches the
 (5) percent oiled?
 (6) A That s correct
 (7) Q Serendipitous?
 (8) A No not really They didn t have to come out the same
 (9) number Our judgment was that that was a pretty good
 measure
 (10) of the effect on the property in the third year but there was
 (11) no absolute tie between the two
 (12) Q In the fourth year the percent of impairment drops off
 (13) rather radically down to what it s five percent?
 (14) A That s correct In the fourth year I ve shown a five
 (15) percent impairment of this property
 (16) Q Why? Why did you choose that number?
 (17) A The remaining oil that we found in the fourth year was -
 (18) was in locations and was of a nature that we felt that five
 (19) percent was a - a reasonable and fair compensation for any
 (20) remaining disruption of use of this property as of that fourth
 (21) year
 (22) Q Okay Was your opinion concerning disruption of use and
 (23) the fact that it had been tailing off confirmed by statements
 (24) made by the landowner people who worked for Chenega
 (25) Corporation?

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- (1) A Yes it was
 (2) Q What do you have in mind?
 (3) A We looked at various inspection forms if you will that
 (4) the shoreline cleanup assessment teams used in their work
 (5) Q Let me show you one of those which is DX15552 28 and
 (6) Joel if I could have the -
 (7) MR PETUMENOS Three fives in that number?
 (8) MR DIAMOND Three fives
 (9) BY MR DIAMOND
 (10) Q What is this Mr Dorchester?
 (11) A This is - this form over here is something that you
 (12) obviously can't read from where you're sitting but it is a
 (13) very typical form from the 1992 FINSAP shoreline cleanup
 (14) assessment team reports These forms are filled out by each of
 (15) the members of the team We have ADEC We have NOAA
 (16) Q Let me see what happens if I try to blow this up - not
 (17) much happens if I try to blow it up Okay You were saying
 (18) ADEC NOAA and -
 (19) A And other members of the team They might vary from time
 (20) to time Exxon is also a member of the team
 (21) One of the particular members of the team that was of
 (22) importance to us is Chenega Corporation's own land manager
 (23) representative who was a member of the team The land
 (24) manager
 (25) went along to make observations and in many instances the
 (26) observations made by the owner's representative gave us at

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- (1) least some view some look at the use of the property through
 (2) their eyes So it was another dimension to our understanding
 (3) something about the shorelines and possible effect
 (4) Q I notice the Coast Guard representative pointed out that
 (5) there was still some evidence of oiling in the wave shadows
 (6) Was that comment coupled by Mr Ward's observations
 (7) instructive
 (8) to you in any way?
 (9) A Yes it was
 (10) Q How so?
 (11) A In a number of ways I said this was relatively typical
 (12) This assessment form showed that the various individuals who
 (13) filled it out saw that there was still oil there Mr Ward in
 (14) his statement said area has light asphalt in a few places
 (15) broken by survey team Heavier oil also removed by team This
 (16) beach very usable by residents of Chenega
 (17) Q All right This report covers a beach segment on the
 (18) parcel?
 (19) A That's correct
 (20) Q All right and was it your understanding that these FINSAP
 (21) surveys were done in 1992 of those beach segments that the
 (22) end
 (23) of the 1991 season were thought to be the most likely
 (24) candidates for further cleaning?
 (25) A That's correct I think a key element of the 1992 FINSAP
 (26) was to go to those locations that from previous surveys still
 (27) gave some reason for concern or some reason to say let's go

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- (1) back and see what's happening on that site FINSAP generally
 (2) was not an attempt to redo what had been done in recent years
 (3) Q Were there other FINSAP reports in 1992 concerning the
 (4) north Chenega property?
 (5) A Yes there were - there were quite a number of FINSAP
 (6) reports
 (7) Q Let me show you another one which is DX15552 29 This
 (8) concerns - do you remember what beach segment this
 (9) concerns?
 (10) A I'm having difficulty reading it
 (11) Q LA 18 segment A?
 (12) A LA 18 A
 (13) Q And that's also along the shoreline of the north Chenega
 (14) parcel?
 (15) A That's correct
 (16) Q I'm sorry north LaTouche parcel?
 (17) A LaTouche yes 18-A is written up in the heart of the head
 (18) of Sleepy Bay
 (19) Q Let me blow up Mr Ward's comment What was the
 (20) significance of this comment to you?
 (21) A Significance again is that the surveys are still showing
 (22) that there was some oil there The question is what is the
 (23) effect of the oil in my perspective from a real estate view?
 (24) Mr Ward the land manager for the owner again says major
 (25) mechanical has done a great job This beach looks great A
 (26) very high use area for the village of Chenega A mess in 89

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- (1) and a very good cleanup job has returned this beach to normal
 (2) Q Okay Let me show you 155 - 15552 30 Did we get that on
 (3) the screen? Okay that's - is that Mr Ward's comments for
 (4) LA 20-D on Sleepy Bay?
 (5) A Yes it is
 (6) Q And tell us what you found instructive about this FINSAP
 (7) report?
 (8) A Again we have the same situation of on site eyeball
 (9) evidence that's very specific as to location We have other
 (10) entries on the same form that are very specific as to nature
 (11) and extent of oiling that's observed and again the Chenega
 (12) Corporation's representative says Small asphalt that was
 (13) located was broken up by crew No subsurface located This
 (14) area usable by Chenega residents
 (15) Q And finally let me show you 15552 31 Tell us what this
 (16) is?
 (17) A This is a portion of LA 21 if I'm reading that correctly
 (18) which is around a little bit further on the west side we're
 (19) out of Sleepy Bay at this point but still on the north part of
 (20) LaTouche In other words we've come out around the top here
 (21) and LA 21 will be somewhere in this area right here
 (22) (Indicating)
 (23) Q What was instructive about this form to you?
 (24) A We have the same type of eyeball information on a very
 (25) specific location and a specific oiling basis And again Mr

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- (1) Ward said Light subsurface under cobble armor weathering
 (2) well Surface was small patches asphalt which the crew broke
 (3) up This area is usable by Chenega with no fear of human
 (4) contact with oil
 (5) Q These forms also enable the various representatives to
 (6) signify whether they thought treatment had been completed or
 (7) whether further treatment was required and I believe this one
 (8) shows the ADEC representative - I'll show you a hard copy
 (9) And determined no treatment was required
 (10) Was that generally true of the other segment reports we
 (11) just looked at?
 (12) A For each of these I believe it was generally true Some
 (13) of the - it's interesting to read through these forms It's
 (14) one of the reasons why we didn't just hang our hat on them but
 (15) they were used in our analysis
 (16) In some instances you'll find disagreements among the teams
 (17) as to the - the nature and the treatment of the oil And it's
 (18) very helpful to us to be able to read through those mostly
 (19) from a user perspective but I think your question was no
 (20) treatment required as to this property and that's correct
 (21) that's what the land manager marked
 (22) MR DIAMOND Joel if we could go back to the Elmo
 (23) BY MR DIAMOND
 (24) Q The property seems to have improved rather dramatically by
 (25) 1992 but you show five percent impairment in the fourth year?

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- (1) A That's correct
 (2) Q Why did you continue to view this parcel as impaired beyond
 (3) 1992?
 (4) A In 1992 we still had oiling information that indicated
 (5) that there were some pockets of oil that were still not really
 (6) all the way back from a user standpoint to a point that
 (7) someone using that part of the property might not have had
 (8) some
 (9) impairment in the use that they - they wanted to make of the
 (10) property
 (11) So in 1992 and in 1993 both there were indications of
 (12) some remaining oil and it was necessary for us to make
 (13) judgments as to whether or not from a real estate perspective
 (14) the nature the location and the extent of that oil would have
 (15) been market recognized as a problem economically
 (16) Q Okay I'm going to ask you just to translate this now into
 (17) your view of the appropriate amount of dollars of compensation
 (18) for the loss of utility on this parcel during the entire four
 (19) year period that you found it to be impaired Can you just
 (20) run - show us how you did that and what you came up with?
 (21) A Yes the calculations are basically what I went through a
 (22) few moments ago The simple math of it is to take \$650,000
 (23) which is our estimated value of the shoreline related area
 (24) times six percent and that would - would give us for any
 (25) particular year the - the economic impairment of that
 shoreline for that year if we are looking at it from a just

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- (1) and reasonable compensation viewpoint
 (2) For those years that we did not find that there was a total
 (3) impairment that number would then be multiplied times
 (4) whatever
 (5) the impairment percentage is For example in the third year
 (6) here we said there was about a two-thirds impairment We
 (7) multiply the \$39,000 times 67 percent mathematically that
 (8) gives us the number here I believe that's \$26,100
 (9) Q And if you aggregate out all of those impairment figures
 (10) that yields a total of about \$106,000 for this parcel?
 (11) A That's correct that's about \$106,000 for this parcel
 (12) Q In contrast to your approach and your findings what did
 (13) Dr Mundy do with this parcel?
 (14) A Dr Mundy for this parcel first of all made an appraisal
 (15) of the land value which incorporated everything that is
 (16) colored in here on the map He did that without a special
 (17) look see at impairment for individual areas and without a
 (18) recognition of a shoreline-related area as we did And I
 (19) believe his eventual calculation on that was an estimate of
 (20) about 21 and a half years of some form of impairment and a
 (21) total of over \$2.4 million of economic impairment.
 (22) Q Where did he get his 21 years from?
 (23) A The 21 years came primarily from ICF ICF had given him
 (24) tables that were projective tables that said take this graph
 (25) and this curve or this table and apply it to this type of
 shoreline and that would project out to give you I believe

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- (1) 19 and a half years and he added two more years on top of that
 (2) as a kind of a cool down period at the end
 (3) Q Did it appear to you that Dr Mundy took into account in
 (4) any fashion Mr Ward's comments about the usability of this
 (5) parcel?
 (6) A I honestly don't know if he ever read those comments but
 (7) if he did they clearly are not reflected in his numbers or in
 (8) his analysis
 (9) Q Okay In addition to Dr Mundy's analysis of the harm or
 (10) damage suffered by Chenega the owner of the north LaTouche
 (11) parcel did Dr Mundy also purport to quantify harm suffered by
 (12) the owner of the subsurface rights?
 (13) A Yes he did
 (14) Q Explain to us what that is who that is and what that
 (15) means
 (16) A The regional corporation Chugach Alaska Corporation
 (17) owns
 (18) the subsurface rights under the Village Corporation's lands
 (19) In this case Dr Mundy said that there would be something in
 (20) excess of another \$200,000 of damage to those subsurface
 (21) lands Supposedly I guess mineral interests and such things
 (22) as that
 (23) Q And how long did he think that the underground rights would
 (24) be impaired by the oil spill?
 (25) A The underground rights would be impaired for the same
 period of time about 19 and a half years for the persistence

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- (1) period and a couple of more years for the cool down period
 (2) Q Does that make sense to you?
 (3) A It just is not real world
 (4) Q Explain
 (5) A First of all I don't know - if we deal with subsurface
 (6) rights let's assume there's gold there I have real
 (7) difficulty understanding what an oiling on a shoreline is going
 (8) to do to a gold mine It's a little hard for me to understand
 (9) that for the next couple of decades that if there's - that
 (10) there's gold underground that someone wouldn't go after it and
 (11) go after it rather quickly and do it as soon as they could and
 (12) I see no logic behind the idea that oil on a shoreline is going
 (13) to prevent us from whatever a reasonable economic use of
 (14) those
 (15) subsurface rights would be within the bounds of the rights of
 (16) an owner So there's just no logic to it and certainly we
 (17) didn't find any market support for that notion
 (18) Q Dr Mundy's total damage estimates for the north LaTouche
 (19) Island parcel subsurface and surface together amount to
 (20) what?
 (21) A Subsurface and surface together would be about 2 - \$2 7
 (22) million
 (23) Q And what was your estimate of reasonable compensation for
 (24) the impairment to this parcel?
 (25) A Our estimate is I believe you said about \$106 000
 (26) MR DIAMOND Your Honor at this time I would

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- (1) introduce DX13172 A the video DX14028 Dr Dorchester's
 (2) impairment analysis for this parcel and the other parcels and
 (3) DX15552 28 29 30 and 31 the FINSAP reports for Sleepy Bay
 (4) LA 20 B and LA 21
 (5) (Exhibit DX13172 A the video DX14028 Dr Dorchester's
 (6) impairment analysis for this parcel and the other parcels and
 (7) DX15552 28 29 30 and 31 the FINSAP reports for Sleepy Bay
 (8) LA 20-B and LA 21 offered)
 (9) MR PETUMENOS There's no objection to those
 (10) exhibits Judge with the exception that counsel and I have
 (11) with one that relates to the forms here
 (12) MR DIAMOND We're submitting the forms without any
 (13) of the preliminary matter contained
 (14) THE COURT That's fine I'll admit them with that
 (15) condition
 (16) (Exhibit DX13172 A the video DX14028 Dr Dorchester's
 (17) impairment analysis for this parcel and the other parcels and
 (18) DX15552 28 29 30 and 31 the FINSAP reports for Sleepy Bay
 (19) LA 20-B and LA 21 received)
 (20) BY MR DIAMOND
 (21) Q Mr Dorchester you promised us two movies yesterday You
 (22) were going to show us how you ran through your calculations
 (23) on
 (24) two parcels And show us the two parcels Where are you
 (25) going
 (26) to take us for the second one
 (27) A The second of the two is the southeast Kenai block

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- (1) Q Can you give us just a little description while Ms Smith
 (2) makes her way towards the light switch to buy her some time?
 (3) A Sure The southeast Kenai block is down on the - the
 (4) Kenai Peninsula It's an area that we'll show you in just a
 (5) few minutes is primarily a timber area and I'll just kind of
 (6) let the video speak for itself
 (7) Q And Ms Smith will not leave until I apologize publicly in
 (8) front of the jury for calling her my assistant yesterday she's
 (9) asked me to explain that in fact it's just the opposite
 (10) (Videotape Played)
 (11) VIDEO SPEAKER The southeast block Kenai Peninsula
 (12) parcel is located on the Kenai Peninsula which lies between
 (13) Cook Inlet and the Gulf of Alaska The highest and best use of
 (14) the southeast block Kenai Peninsula parcel is for timber and
 (15) related operations While the spill cleanup may have delayed
 (16) the construction of a log transfer site for a short time the
 (17) spill did not impair the harvesting of timber in this area
 (18) The Port Graham Corporation presently owns this land
 (19) although the company sold the timber rights on the land in
 (20) 1987 The parcel is far removed from any towns or villages and
 (21) is not accessible by car The eastern portion of the region is
 (22) dominated by the Harding Ice Field and its associated
 (23) glaciers The parcel covers almost 23 000 acres and has over
 (24) 25 miles of shoreline
 (25) In making our appraisal we divided this property into two

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- (1) portions One is a small 30 acre land area used for a log
 (2) transfer dock located on the north shore of Windy Bay The
 (3) second portion includes all the rest of the land For
 (4) simplicity we will refer to all the land as one parcel
 (5) You are about to see what a part of the shoreline looks
 (6) like from a helicopter We start off looking towards Rocky
 (7) Bay We turn towards Windy Bay The cleared areas are
 (8) portions of the forest that were clear-cut
 (9) We'll now look north towards the shore of Windy Bay The
 (10) coast of Windy Bay is ringed with mountains that rise to an
 (11) elevation of 2500 feet Mountains dominate the uplands of this
 (12) parcel This parcel of land extends nearly six miles inland
 (13) from the shore in some places To give you a perspective the
 (14) distance from the shoreline to the peak of this mountain
 (15) represents only one-sixth of the depth of the parcel
 (16) A key step in appraising a waterfront property is
 (17) determining where the shore related areas end and the uplands
 (18) begin At this location at Windy Bay the division between the
 (19) two areas would look something like this
 (20) This is the shoreline related area for the parcel totaling
 (21) approximately 5 400 acres or about 24 percent of the parcel
 (22) In 1989 portions of the shoreline were hit by oil from the
 (23) spill The shoreline received wide oiling in these areas
 (24) Moderate oiling here and light or very light oiling here
 (25) This segment of the Windy Bay shoreline was one of the most

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- (1) heavily oiled areas of this parcel and retained oil the
- (2) longest Later surveys of this portion of the shoreline show
- (3) how the surface oiling diminished by 1990 1991 1992 and
- (4) 1993
- (5) Much of the shoreline of this parcel is rocky appropriate
- (6) for the name Rocky Bay which lies at the mouth of the Rocky
- (7) River These rocky headlands look even more imposing when
- (8) viewed from the water They make access by boat very difficult
- (9) or impossible in many places
- (10) As we move further west the rocky headlands level off and
- (11) open up to occasional pocket coves but at places the
- (12) shoreline is bordered by rock reefs revealed here during low
- (13) tide These reefs make landings by boat and float plane
- (14) hazardous
- (15) Both before and after the spill the southeast block Kenai
- (16) Peninsula parcel was either used for timber harvesting or was
- (17) clear cut timberland This footage was taken during the
- (18) shoreline surveys approximately six months after the spill in
- (19) 1989 In the upper left hand corner of this frame you can see
- (20) a small portion of the early clearcutting that was done on this
- (21) parcel
- (22) As shown by this 1992 footage logging continued during the
- (23) three years after the spill even as clean up operations took
- (24) place on the shorelines Shortly after the spill the log
- (25) transfer dock for loading timber onto barges was constructed

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- (1) New roads buildings and staging areas were also built to
- (2) support logging operations
- (3) By 1994 many of the hillsides surrounding Windy and Rocky
- (4) Bay were clear-cut Here s what the parcel looked like from
- (5) the air in 1994 crossing from Rocky Bay to Windy Bay and
- (6) along the north shore of Windy Bay Here we see extensive
- (7) clearcutting
- (8) The oil spill did not disrupt timber operations Logging
- (9) continued throughout the years following the spill and still
- (10) continues today The highest and best use of this parcel has
- (11) been and continues to be its timber The value of the land to
- (12) the Port Graham Corporation is in its timber Our assessment
- (13) of damages is based on this finding
- (14) (Videotape concluded)
- (15) BY MR DIAMOND
- (16) Q While the lights are coming on Mr Dorchester Port Graham
- (17) Corporation sold all of that timberland sold the timber rights
- (18) before the spill?
- (19) A That s correct the timber rights had already been sold
- (20) Q You said on the videotape that you treated this parcel for
- (21) your analysis really as two parcels Could you explain to us
- (22) why you did that again?
- (23) A Yes We did this throughout our appraisal analysis When
- (24) we looked at each of the properties if we felt that there was
- (25) a possibility that a smaller portion of a very large ownership

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- (1) might have a higher and better use for the small portion we
- (2) would - we would carve those out and we would say let us
- (3) identify that as being owned by the same parcel owner but here
- (4) is a property that without impairment to the remainder of the
- (5) ownership they could separate out and we believe obtain a
- (6) higher value for and this is a good example of it
- (7) In Windy Bay we found that the log transfer site in Windy -
- (8) Bay about 30 acres had a value that should be recognized and
- (9) we valued that separately created a different parcel out of
- (10) it and estimated impairment to that property
- (11) Q All right let s start with what I know you call Rocky Bay
- (12) which is the large bulk of the southeast Kenai Peninsula block
- (13) owned by Port Graham Its highest and best use is timber?
- (14) A That s correct
- (15) Q What effect did you find that the spill had on utility or
- (16) utilization of this parcel?
- (17) A We found that the oil spill really had no effect on timber
- (18) per se The timber wasn t oiled there were contracts for
- (19) timber that were entered into in the region after the oil
- (20) spill Logging continued here We saw no reason to believe
- (21) that the value of the timberlands were disturbed in any way
- (22) Q All right I put on the Barco the page from your impairment
- (23) analysis - analysis summaries second page dealing with that
- (24) portion of the southeast Kenai Peninsula parcel that you
- (25) classified as timberland Show us where that s reflected in

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- (1) your damage assessment
- (2) A That s reflected right here in the zeros that we put under
- (3) total impairment You ll notice that there s some zeros above
- (4) and we re not saying that the property has no value we re
- (5) saying that it wasn t necessary for us to estimate the value of
- (6) the property to estimate a just compensation because the
- (7) analysis indicated that there was no impairment to the land
- (8) Q So in your view Port Graham suffered no damage by virtue
- (9) of the spill to the - the use or value of this parcel?
- (10) A That s correct
- (11) Q All right Let s talk about the transfer facility Call
- (12) this a dock?
- (13) A You could call it a dock
- (14) Q The timber loading dock How did you go about estimating
- (15) just compensation for impairment to this parcel?
- (16) A At the time of the oil spill this was a facility that was
- (17) about to be constructed and the question that we had to face
- (18) is was there any effect of the oil spill on the provision of
- (19) that facility to be able to do any work on it The site
- (20) itself that we carved out was about 30 acres and although it
- (21) did receive oiling and the oiling was there in a pretty fair
- (22) amount over a period of time our research indicated that there
- (23) was at best a slight delay in the construction of the dock
- (24) facilities that were there We had frankly some contrary
- (25) information but we believe that the information as to delay

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- (1) was reasonable and sufficient enough to -- to give us a basis
 (2) to say that that dock or transfer facility should be impaired
 (3) for one year
 (4) Q Okay let me show you the second page of your impairment
 (5) analysis and I'll zoom in to the table on the bottom Where
 (6) is your conclusion reflected on this table?
 (7) A Using the same analysis that we did for the LaTouche
 (8) parcel we've estimated the market value of the resource
 (9) transfer facility the 30 acre parcel at \$200 000
 (10) Q I can't get you to call it a dock can I?
 (11) A That dock
 (12) Q Okay
 (13) A We estimated it was -- the dock was 100 percent impaired
 (14) for one year and at our six percent rental rate that we used
 (15) six percent times \$200 000 gives us \$12 000 as a just and
 (16) reasonable compensation for -- really wasn't a dock it was
 (17) land but they were going to build a dock on it Whatever you
 (18) want to call it for that parcel
 (19) Q That's why I'm not an appraiser
 (20) Let's talk about Dr Mundy's analysis How did he treat
 (21) the southeast Kenai Peninsula parcel?
 (22) A He approached this very much the same way that he did the
 (23) other appraisals I won't repeat all of the things that he
 (24) did but his -- his ultimate judgment here was that this
 (25) property should be impaired for approximately 12 years He

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- (1) had I believe nine and a half years of -- of his persistence
 (2) period two years of additional impairment period on the top of
 (3) it and estimated about \$2.8 million in damages for this
 (4) property
 (5) Q Have you seen any evidence whatsoever that the
 (6) utilization of this parcel for its highest and best use timber
 (7) cutting will be interfered prospectively from now into the
 (8) future for another six years?
 (9) A None at all except for the cutting of the logs that's
 (10) taking place and it takes awhile to regrow them and reforest
 (11) at a time but there's no evidence here of any kind that I was
 (12) able to find that indicates that there was an impairment
 (13) Q Did Dr Mundy also conclude that there was impairment to
 (14) the land underneath the roots of the trees that were being cut
 (15) down?
 (16) A Yes he did
 (17) Q Explain
 (18) A Once again he said that the regional corporation's
 (19) subsurface rights here should also be damaged for the same
 (20) time periods and I think he estimated a little over \$200 000 of
 (21) damage for those subsurface rights
 (22) Q That is Mr Petumenos client Chugach Alaska Corporation?
 (23) A That's correct
 (24) Q Tell us how Professor Green dealt with the southeast Kenai
 (25) Peninsula parcel?

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- (1) A Professor Green dealt with it as a part of a much larger
 (2) parcel To try to figure out a -- an impairment value that he
 (3) put on here you really have to allocate out of the rest of his
 (4) estimate I attempted to do that and I believe a fair and
 (5) reasonable allocation of his total impairment would indicate
 (6) that he viewed this as about a million dollars of impairment
 (7) but that's -- that's my -- my estimate of the way he did his
 (8) numbers
 (9) Q What was his estimated period of impairment?
 (10) A His impairment period as I recall was three years There
 (11) was one year of kind of a stigma period and a couple years of
 (12) the shoreline related areas being impaired after that
 (13) Q Does Dr Green appear -- I'm sorry Professor Green appear
 (14) to have taken into account in any fashion the fact that this
 (15) parcel was used for timbering operations before the spill
 (16) during the spill and cleanup and after?
 (17) A I don't see any indication that he did
 (18) Q Now you went through the process that you've just
 (19) described for us on these two parcels the north LaTouche
 (20) parcel and the Windy Bay parcel on all of the parcels that are
 (21) owned by the Plaintiff Native Corporations and the Kenai
 (22) Borough -- I'm sorry the Kodiak Island Borough?
 (23) A That's correct
 (24) Q All of them that were oiled?
 (25) A Yes that's correct

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- (1) Q And you prepared a summary form a chart indicating your
 (2) conclusions?
 (3) A Yes I did
 (4) Q All right this is also part of the summary booklet that
 (5) we'll be giving to the jury If I can go wide enough just in
 (6) case anybody wants to take a look at this later take one line
 (7) item if you can and what I can do is zoom in just run
 (8) through us what the numbers represent Let me double the size
 (9) here
 (10) A I think this would be a lot easier to read in paper
 (11) obviously But if we take this section right here these are
 (12) properties that we specified as valuation parcels for our
 (13) calculation of a just compensation here and they are all
 (14) properties that are owned by Chenega Corporation The form
 (15) shows the name of the parcel the owner what we found to be
 (16) its highest and best use and then we have total acres
 (17) shoreline related acres and our estimates of value for the
 (18) shoreline related areas So it's just a summary of the
 (19) calculations used in the -- in our impairment estimates
 (20) Q And on the right hand side what are in these columns?
 (21) A On the right hand side of the form for each of the four
 (22) years for which we found that there was impairment in any of
 (23) these areas for each of those properties we show the
 (24) percentage of the impairment for that property by years and the
 (25) calculation of what just compensation would be for that year

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- (1) And then finally in this - this right-hand column a sum of
 (2) each of those four years of impairment estimates
 (3) Q You've prepared for us a summary chart of the totals for
 (4) each of the Plaintiffs in this case?
 (5) A Yes I have
 (6) Q And that's DX10461 A Is this that chart?
 (7) A Yes it is
 (8) Q Explain to the jury what this depicts
 (9) A If we take the - if we take the bottom lines for each of
 (10) the owners on that chart and just simply go off to the right
 (11) side and say what was the total For Chugach Alaska
 (12) Corporation the processes that I've just outlined to you were
 (13) applied and we estimated total oil spill related impairment
 (14) this is the just compensation \$234 500 For Chenega
 (15) Corporation the calculations indicate compensation that
 (16) should be paid to them \$770 200 English Bay Corporation \$383 200
 (17) (sic) Port Graham Corporation \$137 500
 (18) You'll notice that we didn't find any impairment for the
 (19) Eyak and the Tatitlek lands We found only one of those
 (20) parcels that had any indication of any oiling It was examined
 (21) and not felt to be enough to create an impairment to the use of
 (22) that property And then for the Kodiak Island Borough we
 (23) found \$105 400 of just compensation that should be paid and
 (24) the total of all of those is \$1 300 800
 (25) MR DIAMOND Your Honor this would be a good time to

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- (1) take a break
 (2) THE COURT Okay thanks
 (3) THE CLERK Please rise This court stands in
 (4) recess
 (5) (Jury out at 9 35 a m)
 (6) (Recess from 9 35 to 9 54 a m)
 (7) THE CLERK Please rise
 (8) THE CLERK This court now resumes its session
 (9) THE COURT Counsel I hope you're all here
 (10) THE CLERK Please be seated
 (11) MR STOLL Is the Judge here?
 (12) THE COURT The jury is not present counsel Counsel
 (13) I've had a discussion in chambers with everybody I think
 (14) representing the parties except for Mr Stoll and Mr Fortier
 (15) and I'm sure the message has been sent to them but just for
 (16) the record Mr Sheldon sent me a three page note today and
 (17) when he did I - it details his finances and things like that
 (18) and the hardship that he's going through I then talked to
 (19) him and I've told counsel this and I strongly said I'd like
 (20) to keep you - I have to keep you for another week at which
 (21) point he broke down And he - apparently what has
 (22) happened
 (23) is that even though he works for a governmental entity they
 (24) refuse to make up his salary probably because he's a
 (25) part timer or maybe because he's a civilian employee I don't
 know why But they didn't they didn't pay him for the jury

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- (1) service so he's really on the thin edge financially And my
 (2) approach to the parties in chambers and it would be the same
 (3) here is that he's on the thin edge financially he clearly
 (4) is - is beyond the point where he can concentrate on the
 (5) evidence in this case and I suggested that the parties might
 (6) want to stipulate
 (7) They agreed that they would stipulate and that the
 (8) stipulation if I understand it correctly is as follows I'll
 (9) let him go we will have 12 jurors If in fact we lose
 (10) another juror one other juror then we will go with a vote of
 (11) ten for any verdict but all the parties agree that they will
 (12) go with 11 jurors There is no agreement with regard to any
 (13) other situation except for the loss of one more juror am I
 (14) correct counsel?
 (15) MR DIAMOND You are correct Your Honor
 (16) MR STOLL And Your Honor I was advised of this and
 (17) Mr Fortier and I both agree to this and this is consistent
 (18) of course with the position we've had from the outset on
 (19) people with hardship so -
 (20) THE COURT All right thank you I'm going to mark
 (21) this note that he sent me as Court's Exhibit 34 right?
 (22) THE CLERK 34
 (23) THE COURT And then what I'm going to do is I'm
 (24) simply going to take him out in the hall tell him he's
 (25) excused let him go now and then we'll go with 12 all right?

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- (1) THE CLERK Off record
 (2) (Off record at 9 57 a m)
 (3) (Jury in at 10 05 a m)
 (4) THE CLERK Please rise This court now resumes its
 (5) session
 (6) Please be seated
 (7) THE COURT Yes counsel
 (8) BY MR DIAMOND
 (9) Q Mr Dorchester Joy corrected us when we were off the
 (10) record I believe you said the English Bay oil spill related
 (11) impairment was a number larger than 83 200 It is 83 200
 (12) according to your calculations?
 (13) A That's correct 83 200 If I said a different number I
 (14) misspoke
 (15) Q Okay the - your total of 1 330 000 includes Kodiak Island
 (16) Borough?
 (17) A Yes it does
 (18) Q And without Kodiak Island Borough the number is closer to
 (19) what a million 250?
 (20) A A million two plus
 (21) Q We have placed before the jury let me get over here
 (22) DX13072 C and 13073-B which were charts that were
 (23) introduced
 (24) into evidence during the course of Mr Roddewig's testimony
 (25) You've seen these before?
 A Yes I have

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- (1) Q All right As I understand it this number purports to be
 (2) the total Native Corporation land damages as calculated by
 (3) Dr Mundy is that your understanding as well?
 (4) A Yes it is
 (5) Q He s at 86 million you re at a million two and change
 (6) That s a bit of a chasm?
 (7) A Yes it is
 (8) Q Can you explain to us the discrepancy?
 (9) A Well I think basically what this chart does is show the
 (10) areas of the difference and maybe that s the importance of
 (11) it One of the - the principal areas - I think all of you
 (12) can see that I have with Dr Mundy s numbers right now starts
 (13) off with the landlocked parcels
 (14) If we look at Nellie Juan Snow River Silver Lake we re
 (15) dealing with land that s back away from the ocean they re
 (16) landlocked parcels and I believe he had about six and a half
 (17) million dollars for those
 (18) For the other properties that are oceanfront but not oiled
 (19) Dr Mundy s numbers are another \$15 741 000 so that ll show
 (20) you where over twenty what two million dollars of difference
 (21) are just in those two concepts alone
 (22) Dr Mundy also said that in addition to - to these there
 (23) are some other underground those are the regional
 (24) corporation
 (25) rights which he valued at \$5 7 million approximately and we
 (26) disagreed with those numbers

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- (1) Q Those are rights owned by Chugach Alaska Corporation?
 (2) A That s correct those are the CAC rights What we did
 (3) here the calculations were made by Mr Roddewig on the
 (4) upland portions and what he did here was apply the same kind
 (5) of standard that Dr Green Professor Green had used of a
 (6) quarter of a mile of shoreline related area very much the same
 (7) type of calculation that Pat Carlson used in the process of his
 (8) valuation of the Shuyak parcel and if we discount the use of
 (9) these uplands away from the shoreline areas on that type of
 (10) calculation Dr Mundy s numbers at that point are just a
 (11) little under \$19 million
 (12) Q All right he s just under \$19 million without those
 (13) deducts I ll take that from you - you re at a million two
 (14) and change That still is a significant difference
 (15) A It s still a big difference
 (16) Q How do you explain that discrepancy?
 (17) A Well if we continue with Mr Roddewig s chart he said
 (18) that - I believe in his testimony - there were three
 (19) principal areas of difference One of the principal areas is
 (20) that Dr Mundy uses \$950 per acre for what he refers to as
 (21) his - as his natural land In his depositions he had
 (22) testified to about \$500 per acre if you didn t have the premium
 (23) for the natural land and Mr - Mr Roddewig said I need to
 (24) take away for those lands that are left of the 18 900 000 the
 (25) overvaluation if you will of this premium

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- (1) He also said that he had disagreements at that point with
 (2) two other things continuing land uses met Dr Mundy s stigma
 (3) I guess the tag s a little confusing here but Dr Mundy said
 (4) there would be an interruption of - total interruption of use
 (5) because of stigma
 (6) Q Regardless of how much the property was oiled for the first
 (7) years?
 (8) A Regardless of how much it was oiled over the first part of
 (9) the oil spill period And then in addition to that Dr Mundy
 (10) used the ICF long term persistence tables projecting out to
 (11) some degree of cleanliness so those three when also
 (12) considered on what you see as the yellow bar on the right hand
 (13) chart over here in Mr Roddewig s calculations took the
 (14) number from \$18 900 000 down to just a little under \$6
 (15) million
 (16) Q All right With those adjustments Dr Mundy s numbers are
 (17) reduced to \$6 million you re at a million 200 000 and change
 (18) You re still about what four four or five times lower than
 (19) Dr Mundy s numbers Why is he so much higher?
 (20) A Mr Roddewig also testified that he didn t - he didn t say
 (21) that there was a \$6 million value based on Dr Mundy s
 (22) numbers His testimony was that it would probably be
 (23) something
 (24) less than that I looked at what he - what Mr Roddewig has
 (25) done here and it seems to me that there are several things
 (26) that he still has not considered in his analysis

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- (1) He did talk about this difference of premium for natural
 (2) land values but in our analysis we have a number of land use
 (3) types for which we have some lower land values We also have
 (4) some for which we had perhaps some higher land values than
 (5) were shown but the net of that is probably lower rather than
 (6) higher
 (7) The second thing I think is the difference between what Mr
 (8) Roddewig probably included in this blue and where we are is
 (9) our
 (10) estimates of highest and best use on a parcel specific basis
 (11) where we separated out some of the pieces that were very small
 (12) properties and we valued them as smaller properties We also
 (13) recognized timber as a type of property for which there really
 (14) wasn t any economic impairment
 (15) And we also had a difference in rental rates Dr Mundy
 (16) in his analysis had based his economic impairment on a
 (17) theoretical income stream at nine percent of whatever his
 (18) underlying value is What we have done in estimating just
 (19) compensation as I explained is we used a six percent rate so
 (20) part of the difference will also be in the difference between a
 (21) six or a nine percent rate
 (22) Q In an attempt to sort of bridge the gap here have you
 (23) looked at your numbers using not the six percent rental rate
 (24) that I know you think is appropriate but a nine percent rental
 (25) rate?
 (26) A Yes I have

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- (1) Q And what happens they go up or down?
- (2) A I m going to put up a blank board let me move this one
- (3) over here
- (4) Q Your numbers in your report now moved into evidence are
- (5) based on a six percent rental rate What happens on a
- (6) corporation by corporation basis if you were to use a nine
- (7) percent rental rate
- (8) A If I could find a marker here -
- (9) Q I just happen to have one?
- (10) A Thank you very much If we were to calculate the - the
- (11) estimates that we made for Chugach Alaska Corporation at nine
- (12) percent we d have a slightly different amount here Let me
- (13) see if I can show you what these would be
- (14) I m afraid I might get off on my lines so if I may let me
- (15) just abbreviate owner and I ll try to get out of the way so
- (16) you won t have to look through me here And if I may also
- (17) abbreviate CAC for Chugach Alaska Corporation if we
- (18) calculated the rents at a nine percent rent our number would
- (19) have been \$352 000
- (20) Calculations for Chenega Corporation and let me just
- (21) abbreviate Chenega Village Corporation would be \$1 155 000
- (22) For English Bay Corporation let me put English Bay Village
- (23) Corporation \$125 000 Sorry about that squeak
- (24) For Port Graham Village Corporation this would be
- (25) \$206 000 For Tatitlek -

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- (1) Q Next is Eyak on that chart?
- (2) A For Eyak - Eyak Village Corporation and for the Tatitlek
- (3) Village corporation we still would have zeros And then
- (4) finally for the Kodiak Island Borough calculation of the rents
- (5) at a nine percent rate would result in \$158 000 and the total
- (6) of that is just short of \$2 million it s \$1 996 000
- (7) Q I also asked you to take another look at your numbers with
- (8) the assumption across the board that if any parcel had at
- (9) least ten percent of its shoreline oiled that you determined
- (10) that parcel was 100 percent impaired for the year That s not
- (11) an assumption you used in your analysis is it?
- (12) A No it s not That s not an assumption we made at all
- (13) Q It s a much more generous assumption?
- (14) A It reflects something beyond what I think the market
- (15) indicated was appropriate
- (16) Q But you ran the calculations for me any way?
- (17) A Yes I did
- (18) Q What numbers are yielded if you use a more generous oiling
- (19) percentage approach
- (20) A Let me just abbreviate that I used 100 percent impairment
- (21) wherever we showed greater than a ten percent impairment in
- (22) any
- (23) particular year so if a year we said the shoreline was 67
- (24) percent as we did one year on LaTouche we would say that s
- (25) 100 percent for purposes of this calculation Still holding
- (26) nine percent constant -

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- (1) Q Nine percent or six percent?
- (2) A I m sorry nine percent - or six percent in this
- (3) calculation This would give us \$266 000 Let me just write
- (4) these down quickly
- (5) MR PETUMENOS Excuse me Mr Diamond could we have
- (6) it more accurate that he s using six percent instead of nine
- (7) there We re not going to be able to tell
- (8) BY MR DIAMOND
- (9) Q Why don t you just write on top six percent rental?
- (10) A Okay this is six percent rental
- (11) Q Or license?
- (12) A Thank you because I did misspeak there For Chenega
- (13) Village Corporation this would be 1 305 000 English Bay
- (14) 196 000 for Port Graham 152 000 Eyak and Tatitlek still
- (15) remain zero and for the Kodiak Island Borough this would be
- (16) \$248 000 and this calculation would bring us to \$2 167 000
- (17) Q All right
- (18) And finally did you run the calculation using both
- (19) assumptions the more generous oiling assumption and
- (20) Dr Mundy s nine percent rate instead of your six percent rate?
- (21) A I combined the two the nine percent rate and the hundred
- (22) percent impairment assumption yes
- (23) Q Why don t you label that column both and tell us what that
- (24) does to your damage valuation?
- (25) A For Chugach Alaska Corporation that would give us

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- (1) \$399 000 Chenega Corporation \$1 957 000 English Bay
- (2) Corporation \$294 000 Port Graham Corporation \$229 000 of
- (3) course it still is zero for Eyak and Tatitlek Village
- (4) corporations and for the Kodiak Island Borough \$371 000 for
- (5) a total of \$3 250 000
- (6) Q And for the record I am going to designate your artwork as
- (7) DX14788 Mr Dorchester what does this analysis tell you?
- (8) A I think it tells us how - how sensitive my numbers are
- (9) the million 330 thousand dollar total estimate of just
- (10) compensation to differences of opinion on first of all the
- (11) rent rate six percent versus nine percent a reasonable range
- (12) of difference or viewing the effect of shoreline effects of
- (13) oiling and even both of them If you put them both together
- (14) it simply says that if someone were to - to differ from my
- (15) numbers and differ on the up side from what I've done how
- (16) sensitive are my numbers to those assumptions
- (17) Q What does it tell you about the comparison between your
- (18) numbers and your approach and Dr Mundy s approach which
- (19) he
- (20) yields close to \$87 million?
- (21) A If this had come out in the range of 20 or 40 or 60 million
- (22) dollars I would have said that there might have been some
- (23) more
- (24) reasonable range of difference between us But these were
- (25) some
- (26) of the - the critical areas that we were dealing with the
- (27) basic valuation of land the rent and the issue of - of
- (28) actual impairment of use to properties

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- (1) We're dealing here with Plaintiff corporations as we said
 (2) earlier the issue of individual shareholder subsistence is
 (3) being handled elsewhere so it seems to me that this is a good
 (4) reasonable truth test on whether anyone would necessarily buy
 (5) my numbers on the -- to the nickel if you would. They're not
 (6) unreasonable numbers in the grand scheme of things because
 a
 (7) sensitivity test even with these assumptions that I believe
 (8) are both high in terms of my family budget those are big
 (9) dollars huge dollars but in terms of comparison with
 (10) Dr. Mundy not very big difference at all
 (11) Q We have an array of numbers before us Mr. Dorchester. In
 (12) your professional opinion based on your close to 35 years of
 (13) experience doing this what do you think is fair and just
 (14) compensation to the Plaintiffs for the effects of the oil spill
 (15) on their property?
 (16) A It's my belief that 1,330,800 is proper. It's fair and
 (17) just as an amount of compensation for the Plaintiff
 (18) corporations in this case for the damages that they suffered
 (19) to the real estate as a result of the Exxon Valdez oil spill
 (20) MR DIAMOND Thank you. I have no further questions
 (21) Your Honor
 (22) Your Honor I have a few more exhibits to offer into
 (23) evidence but I will do that at the conclusion
 (24) THE COURT Yes okay
 (25) MR DIAMOND Your witness counsel

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- (1) MR PETUMENOS No questions Mr. Dorchester
 (2) THE WITNESS Are we through?
 (3) CROSS EXAMINATION OF JOHN D. DORCHESTER JR.
 (4) BY MR. PETUMENOS
 (5) Q While I'm getting set up here I was trying to figure out
 (6) the relevance of your history as a baseball player Mr.
 (7) Dorchester What position did you play?
 (8) A I started out as a first baseman played first base until
 (9) all the rest of the guys I played with grew up past me and got
 (10) a little meaner and madder than I was and I moved to third
 (11) base My professional try-out was as a third baseman
 (12) Q You never had a catcher's mitt in your hand have you?
 (13) A I caught a little bit as well
 (14) Q That was the only thing I could think of that might --
 (15) going to the qualifications that might be a little bit more
 (16) relevant
 (17) Could I see Plaintiffs Exhibit 8300? No 8308
 (18) A There is it in front of me
 (19) Q Showing you what's been marked as Exhibit 8300 you know
 (20) what that is right?
 (21) A Yes I do
 (22) Q That's the Uniform Standards of Professional Appraisal
 (23) Practice and that's a document with which you are intimately
 (24) familiar?
 (25) A That's correct

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- (1) Q And those standards require that a appraiser do certain
 (2) things specifically before he calls his work an appraisal
 (3) right?
 (4) A That's correct
 (5) Q And there are things in the Uniform Standards of Appraisal
 (6) Practice that an appraiser must do before he calls his document
 (7) a review appraisal?
 (8) A He or she that's correct
 (9) Q There is a certain -- there are a certain number of things
 (10) that a appraiser must do before he calls his document a mass
 (11) appraisal?
 (12) A That's correct
 (13) Q And a mass appraisal is something that is sanctioned and
 (14) regulated and approved of by the Uniform Standards?
 (15) A Yes it is
 (16) Q Now Mr. Dorchester ever in your life before the Exxon
 (17) Valdez oil spill did you do an appraisal of Alaska land that
 (18) would conform and be an appraisal under USPAP?
 (19) A I believe the answer is yes
 (20) Q Okay Did you do a review appraisal or did you do an
 (21) appraisal?
 (22) A It was principally an appraisal
 (23) Q And you followed all of the guidelines of USPAP?
 (24) A At the time that I did that I don't believe there was a
 (25) USPAP I don't think it was possible to follow USPAP at that

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- (1) time
 (2) Q How long ago was it?
 (3) A As I sit here I don't recall the dates They may have
 (4) been at the same time The standards would not have been
 (5) substantially different
 (6) Q How long ago was it? A year?
 (7) A That would have been the late -- mid to late 1980s
 (8) Q So this USPAP business relatively recent phenomenon the
 (9) standards that have come out?
 (10) A Yes it is The Uniform Standards themselves are an
 (11) outgrowth of standards that the Appraisal Institute or the
 (12) American Institute of Real Estate Appraisers that I talked
 (13) about earlier had prior to that but they were adopted into a
 (14) federal form through an organization that was formed called the
 (15) Appraisal Foundation and as I sit here I don't recall the
 (16) dates Mr. Petumenos but I think maybe 1989 or about -- about
 (17) that was when the standards were first adopted
 (18) Q Around the same time as the oil spill?
 (19) A That's correct
 (20) Q All right And the occasions in which you have done a
 (21) USPAP appraisal and I guess it's kind of hard to ask you this
 (22) if it was before 1989 but you understand what I mean by
 USPAP
 (23) appraisal with all of the care and standards complied with and
 (24) all of those Ts crossed and Is dotted you know what I mean by
 (25) that when I say USPAP appraisal?

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- (1) A I think so
- (2) Q Prior to the Exxon Valdez oil spill had you ever done an
- (3) appraisal to specifically come up with a value for wilderness
- (4) property before? Not when it was attached to some other urban
- (5) property but specifically come up with a value for wilderness
- (6) property ever before in your career before the oil spill?
- (7) A Yes I have
- (8) Q How many times?
- (9) A At least once in a valuation setting and another time
- (10) in - I m not sure exactly how to style it but the - the
- (11) Everglades engagement that I had working for the United States
- (12) general accounting office with over 100 000 acres of primarily
- (13) swampland was partially valuation but not actually an
- (14) appraisal and partly consulting
- (15) Q Swamp in Florida?
- (16) A That s correct
- (17) Q And prior to the Exxon Valdez oil spill had you ever done
- (18) a damage analysis on an oil spill before?
- (19) A No I had not
- (20) Q Now one of the things that we know - I found myself
- (21) agreeing with you as to some of the things that you said in the
- (22) beginning of your examination on direct Mr Dorchester and
- (23) that is that this was a very challenging appraisal assignment
- (24) right?
- (25) A That s correct

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- (1) Q It involved land that is very unique in the sense that
- (2) Native Corporations with the way they own land and the way
- (3) they acquire the land there is no other ownership quite like
- (4) it is there?
- (5) A I think part of what you re saying is absolutely correct
- (6) If you look at the native Alaskans the - some of the rights
- (7) of ownership some of the ways that they have acquired
- property
- (8) are quite unique
- (9) From a real estate market standpoint the real estate is
- (10) primarily what we were dealing with and in terms of large
- (11) scale land I m not sure I would put exactly the same style of
- (12) uniqueness to it As I testified there are many millions of
- (13) acres of remote wilderness land in Alaska alone So to that
- (14) extent these are - these are certainly beautiful and special
- (15) properties but I have some difficulty with uniqueness
- (16) Q Well have you ever heard before of anyone evaluating these
- (17) unique wilderness properties and how they re damaged in an
- oil
- (18) spill before?
- (19) A I don t recall of any specific case studies We looked and
- (20) didn t find any particular case studies to go by I did talk
- (21) with people for example in France in - relative to a very
- (22) large oil spill We did some preliminary analysis but really
- (23) didn t find any one pattern to go by
- (24) Q So we re really facing here the application of standards
- (25) that were promulgated in 1989 the same time as an oil spill

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- (1) and as I understand it those standards were designed to cover
- (2) all kinds of appraisal problems urban commercial the
- (3) routine the house and to establish some standards for
- (4) appraisers to follow is that correct?
- (5) MR DIAMOND Your Honor I -
- (6) Q Description -
- (7) MR DIAMOND I just object it s rather lengthy and
- (8) compound Mr Petumenos is stringing together at least three
- (9) pieces to each puzzle If he could just ask one at a time
- (10) I ll have an opportunity to object to each one individually
- (11) the witness can answer each one individually
- (12) THE COURT You might as well rephrase your question
- (13) counsel It s out the window by now
- (14) MR PETUMENOS The objection was as long as the
- (15) question
- (16) BY MR PETUMENOS
- (17) Q Mr Dorchester in 1989 when these standards were passed
- (18) they weren t just passed to handle the question of how you
- (19) value an oil spill in Alaska they were passed to cover the
- (20) whole gamut of real estate appraisal and how it should be
- (21) conducted am I right?
- (22) A That s correct The intent of these standards is to
- (23) establish standards for everyone and for all - all types of
- (24) appraisal situations There have been amendments from time
- to
- (25) time there are various additions in the form of guide notes or

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- (1) other advisories that may occur from time to time to try to
- (2) make them relevant as time changes or to explain things but
- (3) the intent is that they apply universally
- (4) Q Now prior to the passage of USPAP in 1989 a number of
- (5) states had the requirement that - or the mechanism that by
- (6) which appraisers could become certified in various states am I
- (7) right?
- (8) A You re saying prior to the passage of Title 11 is that
- (9) what you re referring to now?
- (10) Q What I m saying is that prior to 1989 when the USPAP came
- (11) in some states had procedures whereby appraisers could
- become
- (12) certified?
- (13) A I m trying to be responsive to your question and not
- (14) confused Stop me if I m not USPAP is the standards that go
- (15) with a program The program was a program that was
- presented
- (16) by the Appraisal Institute and a number of other organizations
- (17) to the United States Congress with a request that there be
- (18) some means of licensing and/or certification of appraisers
- (19) throughout the United States So it isn t USPAP that is the
- (20) vehicle here
- (21) Q Right you are missing me That s not my question
- (22) A All right Then secondly prior to the time that the
- (23) vehicle was created I - I just don t as I sit here remember
- (24) whether there were any states that created certification as
- (25) such but I do know that for a number of years there were -

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- (1) it was not at all unusual for many states to have licensing
 (2) requirements where if an appraiser were to be able to appraise
 (3) in a given state that appraiser would have to have a broker's
 (4) license usually Not an appraisal certification but a
 (5) broker's license to be able to do anything in that state
 (6) unless they associated with a local licensed broker
 (7) Q Now you spent much of your career in the Chicago area?
 (8) A Well a period of about eight years but I think the bulk
 (9) of my career has been spent headquartered in Oklahoma but
 (10) doing work across the country
 (11) Q When you were working in Chicago did they have a
 (12) certification process?
 (13) A Certification process did come in and I believe was finally
 (14) approved and sort of formalized actually about the time that
 (15) we moved to Scottsdale just shortly before that
 (16) Q Were you ever certified where you worked in Chicago?
 (17) A No I was not
 (18) Q Did Arizona have a certification process?
 (19) A Yes it does
 (20) Q Did you ever get certified there?
 (21) A I have not gotten a certification in Arizona
 (22) Q Did - does Alaska have a certification process?
 (23) A Alaska does have
 (24) Q Are you certified in Alaska?
 (25) A No and I think it's important to understand why

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- (1) Q Well my question right now is - let's answer the question
 (2) why in a minute My question right now is are you certified in
 (3) Alaska?
 (4) A You promise we'll come back
 (5) Q I promise we'll come back
 (6) A I've already answered no I am not certified currently in
 (7) Alaska
 (8) Q Are you certified anywhere in any state in the United
 (9) States?
 (10) A No not yet
 (11) Q And there is a procedure whereby if you're certified in
 (12) another state you can become certified in Alaska by doing a
 (13) few things having your certification apply over for some work
 (14) that you want to do here isn't there?
 (15) A There is a procedure whereby a recognition of an out of
 (16) state certification can be applied in the state of Alaska
 (17) Q And you know that there are some agencies like the Federal
 (18) Deposit Insurance Corporation which before they will allow an
 (19) appraiser to work for them they require that the appraiser be
 (20) certified in the state where they're doing the work?
 (21) A That's a question?
 (22) Q Yes
 (23) A It's partly correct The regulatory agencies such as
 (24) FDIC have what they call a de minimis rule which means that
 (25) appraisals can be conducted on houses for example that I

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- (1) believe currently are under \$250,000 without the use of
 (2) certified appraisers There's a lot going on right now with
 (3) what is still a very new program of certification in the United
 (4) States FDIC and various others who are still involved
 (5) with - I don't want to call it certification an experiment
 (6) yet but it is still trying to - to get its feet on the ground
 (7) and still trying to - to sort of take shape and for FDIC as
 (8) an example they do not require as I understand for houses
 (9) that would be valued at under \$250,000 that a certified
 (10) appraiser be involved with that appraisal
 (11) Q But big appraisals they do?
 (12) A Large appraisals they do Excuse me FDIC not
 (13) necessarily
 (14) Q Are there other agencies that require the same thing?
 (15) A As you may remember I was asked questions about that
 (16) during my deposition
 (17) Q I know but I want to ask you - I'm asking you now on the
 (18) stand Are there other agencies that do that too?
 (19) A Good let me answer you my current understanding I
 (20) understand that from an administrative standpoint that many of
 (21) the federal agencies and in many of the states state agencies
 (22) do seek certified appraisers and some of them have written
 (23) policy saying we'd like to do so
 (24) What they've found is that in many circumstances the
 (25) standards for certification are not considered to be as high as

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- (1) professional designations such as the MAI or the appraisal
 (2) designation and as a result in many complicated properties
 (3) which I believe is the gist of your question they may very
 (4) well go to someone without regard to certification
 (5) I received for example inquiries from the U.S. Army Corps
 (6) of Engineers just recently on the valuation and dealing with
 (7) very large military bases that have been closed I've been
 (8) asked by Resolution Trust Company to do valuations and
 (9) consulting work on very large properties so it isn't an easy
 (10) answer I apologize for the long one but it isn't as easy as
 (11) just a yes or no
 (12) Q Do you think that the certification requirements for the
 (13) state of Alaska are serious and important?
 (14) A I think the certification requirements for the entire
 (15) United States as they are being implemented are both
 (16) important and serious yes
 (17) Q And one of the reasons that the - by the way in the
 (18) course of that long answer did you get out what you wanted to
 (19) say to me before or do you have another long answer to give
 (20) me
 (21) MR DIAMOND That was why he was not certified in
 (22) Alaska?
 (23) BY MR PETUMENOS
 (24) Q I can't even remember but are you content now that you've
 (25) been dealt with fairly?

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- (1) A Actually I didn't but you want me to go ahead and do
 (2) that?
 (3) Q Not particularly but if you feel like you need to -
 (4) A I won't no
 (5) Q Now one of the reasons behind certification in the state
 (6) one of the reasons why a state might have an interest in having
 (7) people certified in their own state is to ensure some
 (8) familiarity with the appraiser and the work that they are doing
 (9) inside the state does that make sense to you?
 (10) A Yes it does
 (11) Q Let's talk about your familiarity with Native Corporation
 (12) land I want to go right to this issue of the shareholder
 (13) having a claim somewhere else and the corporation having a
 (14) different interest that business that we talked about on
 (15) direct
 (16) Does a shareholder of an Alaska Native Corporation own one
 (17) square inch of property?
 (18) A As - as a shareholder?
 (19) Q Right
 (20) A They may but it - as a part of their involvement in the
 (21) corporation I believe it's the corporation that owns the
 (22) land
 (23) Q The corporation is a separate entity and it is the title
 (24) holder and the owner of the land right?
 (25) A That would be my understanding

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- (1) Q That's right and the shareholder receives certain
 (2) benefits any shareholder in any corporation receives certain
 (3) benefits from the corporation do you agree?
 (4) A If the corporation is functioning on their behalf I would
 (5) certainly hope so
 (6) Q Sometimes of course they can lose money?
 (7) A Sometimes they can lose money
 (8) Q But the reason for being a shareholder is to try to get
 (9) some benefit from the corporation correct?
 (10) A That's correct
 (11) Q It can be in the form of a dividend a check money that
 (12) the corporation pays to each shareholder right?
 (13) A That's a kind of benefit yes
 (14) Q Yes and are you familiar with the language of ANILCA and
 (15) its relationship to how these corporations got their lands?
 (16) A I'm familiar generally with the processes but I wouldn't
 (17) know the legal language off my head no
 (18) Q I'd like to read to you from Title 16 chapter - Section
 (19) 3101?
 (20) MR DIAMOND Before counsel does that I will object
 (21) in advance because I think this is going to go into legal
 (22) opinion of the witness
 (23) THE COURT I'll take that objection under advisement
 (24) counsel
 (25) MR DIAMOND Thank you

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- (1) BY MR PETUMENOS
 (2) Q Oops I think I gave you the wrong one On the
 (3) congressional statement of purpose Congress said It is the
 (4) intent of Congress in this act to preserve unrivaled scenic and
 (5) geological values associated with natural landscapes to
 (6) provide for the maintenance of sound populations of and
 habitat
 (7) for wildlife species of -
 (8) MR DIAMOND I'll let you finish that phrase
 (9) MR PETUMENOS Judge why don't we take care of the
 (10) objection because I'd like not to have the examination broken
 (11) up I wish to ask the witness how this affects his valuation
 (12) of the lands the congressional intent that created these lands
 (13) in the first place It relates to how the parcels were
 (14) originally conveyed the size in which they were conveyed and
 (15) the intent of the conveyance
 (16) MR DIAMOND Your Honor this question necessarily
 (17) conveys a statement about what the law is And this is a
 (18) selected reading out of a selective portion of one section
 (19) which constitutes one of many of very complicated sections for
 (20) the scheme I don't think the proper way to instruct the jury
 (21) on what the law is by counsel asking a lay witness questions
 (22) about it
 (23) MR PETUMENOS Judge this witness went into in
 (24) detail the difference between a shareholder and a corporation
 (25) and whether this is a benefit that the shareholders get and so

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- (1) forth I believe this goes right to the heart of that
 (2) testimony on direct
 (3) THE COURT Let me give you a couple of questions
 (4) counsel and if we get mired down in that statute we're going
 (5) to get off it really quick
 (6) MR PETUMENOS We won't
 (7) BY MR PETUMENOS
 (8) Q What I'm going to do is I'm going to read you the
 (9) congressional intent of ANILCA and ask you if you took it into
 (10) consideration in coming to the conclusions that you came to as
 (11) an appraiser in the course of your work
 (12) It is the intent of Congress in this act to preserve
 (13) unrivaled scenic and geological values associated with natural
 (14) landscapes to provide for the maintenance of sound
 populations
 (15) of and habitat for wildlife species of inestimable value to the
 (16) citizens of Alaska and the nation including those species
 (17) dependent on vast relatively undeveloped areas to preserve in
 (18) their natural state extensive unaltered arctic tundra boreal
 (19) forest and coastal rain forest ecosystems to protect the
 (20) ecosystems related to subsistence needs to protect and
 (21) preserve historic and archaeological sites rivers and lands
 (22) and to preserve wilderness resource values and related
 (23) recreational opportunities including but not limited to
 (24) hiking canoeing fishing and sport hunting within large
 (25) arctic subarctic wildlands and on free-flowing rivers and to

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- (1) maintain opportunities for scientific research and undisturbed
- (2) ecosystems
- (3) Did you take that congressional intent of ANILCA into
- (4) account in your work?
- (5) A As an appraiser I'd say to the extent that the marketplace
- (6) for lands was taking that into consideration To the extent it
- (7) is reflected in rentals that people pay then probably yes
- (8) But not as a - as a separate item that as an appraiser I would
- (9) make adjustments for Something that I guess from an appraisal
- (10) viewpoint goes to what we call general information general
- (11) background data I think it's important and one of the
- (12) beauties of Alaska that congressional actions such as this
- (13) have created enormous amounts of wilderness refuges parks
- (14) large scale areas out there
- (15) All of those are a part of sort of the backdrop for the
- (16) properties that we're dealing with and to the extent that
- (17) those programs are in effect yes But if you're asking me did
- (18) I have a line item in any of my calculations that dealt with
- (19) those no and I don't believe from an appraisal standpoint
- (20) appraisers would do that We went to the marketplace We said
- (21) what would the market reasonably pay for lands like this based
- (22) upon that what is a reasonable rental what is a fair and just
- (23) compensation that should be paid for what we believe to be the
- (24) economic effect of the lands and that's what we reported
- (25) Q Now we covered the fact that a corporation can write a

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- (1) check in the form of a dividend but a corporation can confer
- (2) benefits other than with money do you agree?
- (3) A Yes they could also confer other sorts of benefits You
- (4) may have some difficulty once you get into that as to whether
- (5) or not it - the benefits are really those of a shareholder or
- (6) whether they are an extension of rights that everybody in the
- (7) corporation has I think it might be a very complicated
- (8) question
- (9) Q Well if the corporation decided to confer a benefit on its
- (10) shareholders by making its lands available in the form of food
- (11) lifestyle and subsistence culture does that have value?
- (12) A I believe it does have value and as a matter of fact I
- (13) think that's the reason why claims for losses of that value
- (14) have been brought outside of here and are being addressed I
- (15) think that's what we called the subsistence harvesting of
- (16) traditional foods if I understand you
- (17) Q The problem is though Mr Dorchester is that if these
- (18) corporations wanted to there is nothing preventing them from
- (19) fencing off the lands and stopping people from - from engaging
- (20) in the use of the land for subsistence purposes should they so
- (21) desire right?
- (22) A Are you talking about their own shareholders?
- (23) Q That's right
- (24) A If they wanted to do that to their shareholders I presume
- (25) they could I don't know whether they have under ANILCA and

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- (1) others the right to do it I just don't know that
- (2) Q The other thing they could do is they could engage in
- (3) commercial use of the land that would be inconsistent with
- (4) subsistence use and cut the people off from the use of the land
- (5) that way couldn't they?
- (6) A It's certainly possible
- (7) Q Now we're talking here a little bit about - in every
- (8) appraisal under USPAP there is a section of the report that
- (9) is entitled the assumptions that the appraiser - oh I had
- (10) another question to ask you wait a minute on the
- (11) qualifications again This is a small point but bear with
- (12) me
- (13) You're Mr Dorchester not Dr Dorchester right?
- (14) A That's correct
- (15) Q Okay and we saw a publication once that had you listed as
- (16) a Ph D on this Do you remember that in your deposition?
- (17) A Yes I do
- (18) Q And you remember your telling us that whenever you see
- (19) that that happened without your knowing it because there was
- (20) a conference or something you said and they published this
- (21) conference and they called you a doctor and you're not?
- (22) A That's correct I think at that conference the one you're
- (23) referring to - I might mention this is not at all unusual
- (24) just as the jury has heard a lot of people in here referred to
- (25) as Mr who have Ph D and vice versa

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- (1) Q I guarantee you it's not I did it myself
- (2) A Yes because I do a lot of work internationally as well
- (3) It is common when guests come in from outside of a country in
- (4) our field for them to be referred to as doctor
- (5) Q But the point I was going to make is - you've been here
- (6) for most of this trial?
- (7) A Yes I have
- (8) Q You have been taking notes while many of the other
- (9) witnesses testified throughout the case?
- (10) A That's correct
- (11) Q And you were here for opening statement?
- (12) A No I was not
- (13) Q Then perhaps you don't know that one of the attorneys here
- (14) referred to you as Dr Dorchester in the opening statement and
- (15) I think what you told us in that deposition was whenever you
- (16) know that happens you take steps to correct it and make sure
- (17) that it's accurate right?
- (18) A That's correct
- (19) Q I didn't hear you in your direct go through your academic
- (20) degrees but maybe you did I'm not sure In any event after
- (21) you sat through this whole trial for days -
- (22) A I'm sorry did I miss a question on that?
- (23) Q No After you went through this whole trial -
- (24) MR DIAMOND Objection mischaracterization He just
- (25) said he didn't sit through the whole trial or are you referring

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- (1) to another trial?
 (2) BY MR PETUMENOS
 (3) Q With the exception of a few days Were you here for
 (4) Dr Mundy's testimony?
 (5) A Let me clarify I had a family emergency and I left for
 (6) part of the trial so I just don't want to agree with both of
 (7) the statements that's why I was worried about whether you had
 (8) a question that was pending there I did I sat in I think on
 (9) most of Dr Mundy's testimony I'm not sure I sat in on all of
 (10) it
 (11) Q Did you review the transcript?
 (12) A I have not read all of his transcript
 (13) Q Sat in on Dr Green's testimony?
 (14) A Yes
 (15) Q Sat in on Mr Shorett's testimony?
 (16) A No I did not I was not here
 (17) Q Did you sit in on a number of other scientists and other
 (18) people sitting and watching TV in the other room?
 (19) A Sure did
 (20) Q And so you are in the position of having come in here to
 (21) talk about what other people have done having listened to all
 (22) the testimony whereas perhaps some of them have not been in
 (23) the same position do you agree?
 (24) MR DIAMOND Objection argumentative
 (25) THE COURT No I'll allow it go ahead you can

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- (1) answer
 (2) A Certainly I have listened but they have not had a chance
 (3) to hear me if that's what you're saying
 (4) BY MR PETUMENOS
 (5) Q And the other thing is you actually wrote a report on
 (6) August 8th or 9th or something like that?
 (7) A That's correct
 (8) Q And in your report you talk about - you're updating
 (9) things that you're relying on after you were sitting in this
 (10) courtroom taking a lot of notes?
 (11) MR DIAMOND Can we approach?
 (12) (At side bar on the Record)
 (13) MR DIAMOND Now I have to call in the check that
 (14) you left on the table When you allowed ICF to file related
 (15) amendments to their reports and Dr Mundy to submit new
 (16) reports you remember we objected because it would catch us
 (17) off guard We were going to have to go back and redo everything
 (18) and we talked about protecting us from prejudicial statements
 (19) like the question just asked connoting that this witness did
 (20) something untimely and lay in the weeds and surprised
 (21) everybody
 (22) with new information after the fact I think in light of the
 (23) history that this all happened because it was Plaintiffs
 (24) making not Defendants that question ought to be stricken
 (25) The jury ought to be told to disregard it
 (26) MR PETUMENOS That objection might be well taken if

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- (1) the report was limited to what Mr Diamond said but the import
 (2) of parts of this report was he was caught on the fact of
 (3) non-hazardous substances which had nothing to do with
 (4) anything
 (5) new that he had failed to realize that hazardous substances
 (6) were defined as petroleum under Alaska law He also updated
 (7) his report on oiling information that was available since
 (8) 1993 This is - in other words we moved to strike the report
 (9) and Your Honor denied the motion to strike it but it's
 (10) certainly fair game to ask questions about the report now that
 (11) it's in and the report is not just going to rebutting late
 (12) filed information by Dr Mundy It goes to much more
 (13) I want to make sure that this witness when I get into
 (14) cross-examining him on the issue of hazardous waste issue
 (15) doesn't say oh that's all in my report I've already written
 (16) that I want the jury to know when it was written in time
 (17) because the report covers a good deal more than what Mr
 (18) Diamond says
 (19) MR DIAMOND And counsel knows because it was in our
 (20) opposition papers that the reason those things were in his
 (21) report was because they were required by USPAP Had
 (22) Plaintiffs
 (23) not changed their data we wouldn't have had to file a
 (24) supplemental report Under USPAP the fact that he did have to
 (25) file a supplemental report required him to update to make it
 (26) current and to account for all information known to him at the
 (27) time it was prepared So they create a target and now they

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- (1) want to shoot at it that's a little bit unfair
 (2) THE COURT I know it is counsel I've almost lost
 (3) sight of it in the thick of the words you've all thrown at me
 (4) but it appears to me - it appears to me this is legitimate
 (5) cross-examination and I'm going to allow it
 (6) (Sidebar concluded)
 (7) THE COURT Mr Petumenos pick a time to take a
 (8) break We need to take a break soon
 (9) MR PETUMENOS The jury just popped up
 (10) THE COURT I was just wondering which one of you was
 (11) up the fastest
 (12) MR PETUMENOS Should I object vehemently at this
 (13) point Your Honor? We'll take break right now if you like
 (14) THE COURT Okay
 (15) THE CLERK Please rise This court stands in
 (16) recess
 (17) (Jury out at 10 54 a m)
 (18) (Recess from 10 54 a m to 11 07 a m)
 (19) (Jury in at 11 07 a m)
 (20) THE CLERK Please rise This court now resumes its
 (21) session
 (22) Please be seated
 (23) THE COURT Go ahead counsel
 (24) MR PETUMENOS Thank you Judge
 (25) BY MR PETUMENOS

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- (1) Q Mr Dorchester before Juror Owens sprang to his feet in
 (2) anticipation of a break we were talking about the report that
 (3) you wrote in August and you wrote that report and you added
 (4) some things based upon information that you d been gathering
 up
 (5) and through the time you wrote it right?
 (6) A That s correct
 (7) Q All right August 9th was what about - I can t remember
 (8) now?
 (9) A Lifetime ago
 (10) Q Two weeks ago long time ago Now the actual dollars and
 (11) numbers that resulted from those additions to your report
 (12) didn t amount to very much did it?
 (13) A I don t believe the dollars of results amounted to a lot
 (14) but I think as you know since late last year and throughout
 (15) this year clear up until the eve of trial we received
 (16) constant changes in the - the boundaries and in the
 (17) descriptions of the properties With Dr Mundy s numbers
 (18) arriving almost as the trial was starting
 (19) Q I understand that -
 (20) A So although it didn t result in big numerical differences
 (21) as to our answers in a very short time we have had to go
 (22) through virtually an entire recalculation of everything we
 (23) did
 (24) Q Let s go through some of the assumptions that are in your
 (25) original appraisal report And you know that there has to be a

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- (1) section on the assumptions that an appraiser makes he must
 (2) clearly indicate what assumptions he s making in the course of
 (3) his report am I right?
 (4) A That s correct
 (5) Q One of the assumptions - if I could have the Elmo
 (6) please - is We have assumed all information being provided
 (7) to the consultants by our client and other sources consulted is
 (8) correct That is one of the assumptions that you wrote in your
 (9) report?
 (10) A Yes it is If you notice it says We performed
 (11) independent verifications where possible and have no reason to
 (12) believe any research data furnished are not correct
 (13) Q That s correct and you have come to the conclusion that
 (14) the information from your client is correct and you ve come to
 (15) the conclusion that you ve been able to independently verify
 (16) that information and find no reason to believe any research is
 (17) incorrect Now -
 (18) MR DIAMOND Objection compound three questions
 (19) THE COURT Sustained
 (20) BY MR PETUMENOS
 (21) Q One of the other assumptions then that you made in your
 (22) report of 19 - May of 1993 counsel at Page 15 in the
 (23) assumptions section was that crude oil spills are excluded
 (24) from the category of hazardous substance as defined by
 CERCLA
 (25) and you dropped a footnote to the Comprehensive
 Environmental

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- (1) Response Compensation and Liability Act of 1980
 (2) Now this information regarding whether or not CERCLA
 (3) excluded petroleum from the hazardous substance was that
 one
 (4) of the pieces of information that came from your client?
 (5) A No it is not
 (6) Q Isn t it a fact that CERCLA didn t exclude petroleum as a
 (7) hazardous substance but in fact CERCLA didn t deal with
 (8) petroleum at all because it had already been dealt with in
 (9) previous legislation relating to the spilling of oil?
 (10) A That s not completely my understanding
 (11) Q All right Let s take a look Counsel Exhibit 8309?
 (12) MR DIAMOND Just one second please Your Honor I
 (13) feel an objection coming on This is the - this is a
 (14) legislative report concerning Public Law 96 510 If we re
 (15) going to get into the meaning of CERCLA which most of my
 (16) partners can t understand and this witness understanding of
 (17) that I think we re going beyond any area of expertise he s
 (18) been offered and getting into legal opinions
 (19) MR PETUMENOS In Mr Dorchester s report he
 (20) discusses the fact that petroleum is not a hazardous substance
 (21) and on that basis is not an appropriate candidate for stigma
 (22) and he sites as his authority the fact that CERCLA excluded
 (23) petroleum as a hazardous substance and I wish to discuss that
 (24) with him as well as the legislation that governs this trial
 (25) under the Alaska Statutes on that subject

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- (1) MR DIAMOND Your Honor I don t think the stigma is
 (2) tied at all to that determination but if counsel wants to quiz
 (3) the witness on his understanding which he s already done and
 (4) if counsel can persuade you that his understanding of the law
 (5) is correct then counsel can argue this to the jury at the
 (6) appropriate time but this is not the appropriate time with the
 (7) witness to debate the meaning of the statute and whether he
 (8) correctly or incorrectly interprets it
 (9) THE COURT I don t know whether he s going to do that
 (10) counsel I give you the same ruling Mr Petumenos I give you
 (11) a couple of questions and if in fact what we re doing is
 (12) you re going to recite the terms of the statute at great length
 (13) and discuss arcane points of law then you aren t going to be
 (14) able to do it
 (15) MR PETUMENOS I promise this isn t going to be
 (16) arcane I hope it will be to the point
 (17) BY MR PETUMENOS
 (18) Q Counsel page 6169 of the legislative history of CERCLA?
 (19) MR DIAMOND Which paragraph?
 (20) MR PETUMENOS The first
 (21) BY MR PETUMENOS
 (22) Q There is - I read you the following passage from the
 (23) report?
 (24) MR DIAMOND Could you give us one second please
 (25) MR PETUMENOS Sure

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- (1) BY MR PETUMENOS
 (2) Q There is no denying that hazardous substances present a
 (3) threat to the public and the environment and that an
 (4) appropriate compensation and liability scheme should be
 (5) developed for them. However, the issues of oil pollution
 (6) liability and compensation have had extensive review and have
 (7) essentially been resolved while the many different issues of
 (8) hazardous substance liability and compensation have only
 (9) recently been open to public discussion and congressional
 (10) review.
 (11) Does that passage assist you in determining whether or not
 (12) in CERCLA Congress excluded petroleum as a hazardous
 (13) substance
 (14) or had already dealt with it in previous legislation?
 (15) MR DIAMOND: Objection, calls for a legal opinion.
 (16) THE COURT: Sustained.
 (17) BY MR PETUMENOS
 (18) Q Let's talk about hazardous substances in terms of the
 (19) Alaska statute that we are operating under today, and just to
 (20) point out what I'm talking about, the report at page 21 under
 (21) the chapter that you wrote, "Oiling's Nature and Effect," one of
 (22) the things that you rely upon is the statement as explained in
 (23) this chapter, "Oil spills differ from other types of
 (24) environmental accidents. Unlike highly toxic accidents that
 (25) may create substantial health concerns, oil spills are short
 (26) lived, transitory and not likely to cause risk. Crude oil is

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- (1) Q Well, let me --
 (2) A We --
 (3) Q -- ask you a few more questions so I can get at --
 (4) MR DIAMOND: May he continue his answer?
 (5) THE COURT: He may finish his answer, go ahead.
 (6) A In our original report, among other things we had done as
 (7) part of our research at that point, was in-house, I have someone
 (8) who does the kind of paralegal research for me and we had
 (9) looked at the Alaska statute. We also had an opportunity
 (10) during the part of the time starting in 1990 to be involved
 (11) with the Alyeska Pipeline work, when there was -- there were
 (12) different issues at that point, and we heard and learned from
 (13) lawyers that were involved in that case that for purposes of
 (14) this type of work, A, the Alaska law, and this is 46-03-826,
 (15) which deals and you don't have that up here, Mr. Petumenos --
 (16) but the portion of the law that deals with the liability for
 (17) cleanup, that is who it is that is responsible -- responsible
 (18) for paying in the event that there is an oil spill, defines
 (19) hazardous substance as one of -- excuse me, not petroleum as
 (20) you said, but oil in the same definition as hazardous
 (21) substance.
 (22) But I'd like to point out to you that other sections of
 (23) this same law that deal with definitions of hazardous
 (24) substances, we're talking about the Alaska Statutes, I believe
 (25) chapters eight and nine of this, as I recall, also define

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- (1) not considered a hazardous substance. Do you see that
 (2) sentence
 (3) that you wrote?
 (4) A Yes, I do.
 (5) Q And that's a statement that you made in your '93 report?
 (6) A Yes, it is.
 (7) Q You now know that under Alaska law and the law that we are
 (8) contending within this courtroom, in fact, that the definition
 (9) of hazardous substance under Alaska law and the law that this
 (10) jury will be instructed under includes in its definition
 (11) petroleum, you know that?
 (12) A You've got a number of items in there, Mr. Petumenos. Let
 (13) me -- I hope I can remember all of them and see if I can get
 (14) them.
 (15) Q Let me try it a different way.
 (16) A First of all, I think you said that I know that the jury's
 (17) going to receive instructions on something. I'm not sure what
 (18) that was, so if I could come back -- if you'd ask me that.
 (19) Q Let me put a new question to you.
 (20) In this last report that you did a couple weeks ago, you
 (21) didn't just talk about new material that came in from Dr. Mundy
 (22) and ICF and so forth, you added a -- a part of your report to
 (23) reflect your understanding now that under Alaska law
 (24) petroleum
 (25) is considered a hazardous substance, didn't you?
 (26) A In part, that's true. But I think I need to explain what
 (27) happened here.

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- (1) hazardous substances with regard to releases, with regard to
 (2) other matters in Alaska law, and they specifically do not
 (3) include oil or crude oil as a part of the statute.
 (4) So as -- as I told you, or at least as I told your
 (5) associates in our depositions, yes, I was aware that there is
 (6) an Alaska statute that includes hazardous substances in the
 (7) portion of the law that deals with liability. I don't think
 (8) there's any question as to who's liable here. They will pay
 (9) for the liabilities that they have.
 (10) The question here is I don't think the statute's trying to
 (11) establish a scientific definition. As a matter of fact, if you
 (12) want to take two out of three, this statute, itself, in two of
 (13) the three chances that it can define hazardous substance
 (14) doesn't include oil. So there was a pretty substantial
 (15) background that said to me, as an appraiser, I need to take a
 (16) practical approach to this. I need to look at this as I
 (17) believe the market is doing it. The market knows that Exxon is
 (18) responsible. They've accepted the liability publicly and
 (19) factually, and the question from this point on is not matters
 (20) of -- I'm not sure I understand the word arcane, but arcane
 (21) law, but the question of what is the -- the economic impact on
 (22) the properties that were owned by the plaintiffs and that's
 (23) what I proceeded with.
 (24) Q In your report, you made -- your '93 report, you made no
 (25) mention anywhere when you discussed oil not being a
 (26) hazardous

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- (1) substance of this provision did you?
- (2) A I did not as a matter of fact until it was raised at my
- (3) deposition which came after that report I didn't really
- (4) believe anyone would raise that as an issue so I was a bit
- (5) surprised when I had an opportunity to issue the more - more
- (6) recent report I simply clarified that for you
- (7) MR PETUMENOS Judge I move to strike the answer I
- (8) asked him whether he had written it down in his report I
- (9) think I am entitled at some point to get answers to the
- (10) questions that I ask
- (11) THE COURT The motion is denied counsel
- (12) BY MR PETUMENOS
- (13) Q What is guide note eight Mr Dorchester do you know what
- (14) guide note eight is?
- (15) A Yes I do
- (16) Q And guide note eight is a guide note relating to the -
- (17) these USPAP standards that you are so very familiar with?
- (18) A That's correct
- (19) Q And guide note eight has in it - guide note eight is in
- (20) fact called - that's exhibit 8299 counsel consideration of
- (21) hazardous substances in the appraisal process isn't that the
- (22) title of it?
- (23) A Yes it is
- (24) Q And you were aware of the title probably without my telling
- (25) you just by telling you it was guide note eight?

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- (1) A That's correct and I think I probably should correct the
- (2) record I believe I agreed with you when you said this was the
- (3) Uniform Standards of Professional Practice which is
- (4) Plaintiffs Exhibit 8300 Actually it's a part of it because
- (5) that's not in here I suspect -
- (6) Q No it's not in that exhibit you're correct But the point
- (7) I was making is more substantive The Appraisal Institute puts
- (8) out guide notes?
- (9) A The Appraisal Institute or USPAP?
- (10) Q Well the same - I guess I'm getting confused The USPAP
- (11) standards include guide notes along with them?
- (12) A Yes they do and that's why I'm trying to clarify the
- (13) record I identified this as the uniform standards but as I
- (14) thumb through looking for the guide note I notice that this is
- (15) not a complete document
- (16) Q It is in my hand it is Exhibit 8299 Mr Dorchester?
- (17) A Good then this will be a partial document
- (18) MR PETUMENOS Your Honor the document in front of
- (19) the witness is the USPAP standards themselves the actual
- (20) standards
- (21) THE COURT Okay
- (22) BY MR PETUMENOS
- (23) Q Now the guide note eight as that term describes - well
- (24) first of all an appraiser has the duty under guide note eight
- (25) to disclose the presence of hazardous substances and to

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- (1) disclose the fact that what you find on the property is a
- (2) hazardous substance that's part of what guide note eight is
- (3) concerned with right?
- (4) A That's correct
- (5) Q And can you tell me please whether or not guide note
- (6) eight includes a definition let me just show it to you
- (7) perhaps of what hazardous substances are and whether the
- (8) definition of hazardous substances under guide note eight
- (9) includes oil?
- (10) A Are you going to show me the document so I can follow with
- (11) it
- (12) Q Do I need to or do you know that?
- (13) A I think I understand the document but I couldn't tell you
- (14) I could cite this huge document word for word
- (15) Q Bear with me just one second For the purpose of - on
- (16) page D-21 for the purpose of this guide note hazardous
- (17) substances covers any material which within around or near a
- (18) property may have a negative effect on its value
- (19) Accordingly the principles discussed in this guide note apply
- (20) equally to hazards that may be contained within the property
- (21) such as friable asbestos and external hazards such as toxic
- (22) waste or contaminated groundwater
- (23) Now this guide note as I read it to you here Mr
- (24) Dorchester would appear to include any material that comes in
- (25) on the property that affects its value and you have conceded

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- (1) in your direct examination that petroleum on this property has
- (2) affected its value am I right?
- (3) A Yes but let's - let's not get confused I'm sorry you
- (4) didn't let me read the document along with you because like
- (5) anything let's read it in the context The guide note I
- (6) believe also says pretty clearly that it is not trying to
- (7) render scientific information it's not trying to establish
- (8) something that's beyond simply giving guidance to appraisers
- (9) The guidance and intent of guide note eight is to do very much
- (10) what you just read and that's to make sure that an appraiser
- (11) doesn't ignore a factor which in the marketplace might have
- (12) an effect on value
- (13) I'm sure you've read my report and I think you would say
- (14) it's rather inescapable that I said there were a lot of oil out
- (15) there that I've disclosed the fact that it's there We may
- (16) differ a little bit as to how you characterize it but I've
- (17) handled it in what I believe to be a way that not only comports
- (18) with guide note eight but the standards at large
- (19) Q Is before you guide note eight?
- (20) A Yes
- (21) Q What is the Exhibit Number please?
- (22) A Yes
- (23) Q Exhibit Number please that's on the corner could you
- (24) help?
- (25) A I'm sorry?

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- (1) Q The Exhibit Number?
 (2) A Oh I'm sorry it's 8299
 (3) MR PETUMENOS Your Honor I move the admission of
 (4) Exhibit 8299 into evidence
 (5) (Exhibit 8299 offered)
 (6) MR DIAMOND May we reserve on that Your Honor
 (7) THE COURT Yes
 (8) BY MR PETUMENOS
 (9) Q The point that I'm trying to discuss with you Mr
 (10) Dorchester you understand is not whether or not you
 (11) discussed
 (12) oil in your report but your contention and is it still your
 (13) contention that oil is not a hazardous substance? Is that
 (14) still your contention as you sit here today?
 (15) A It is -- it is my contention that for the practical
 (16) purposes of what we're doing as I said earlier there is an
 (17) Alaska statute with regard to hazardous substances that says it
 (18) is for purposes of deciding who is liable to pay It is not a
 (19) hazardous substance under CERCLA That has been accepted
 (20) in
 (21) other court actions and I followed that as some guide and
 (22) with regard to the Plaintiffs Exhibit 8299 where it says it
 (23) is not the purpose of this guide note to provide technical
 (24) instructions or explanations concerning detection or
 (25) measurement of hazardous substances I believe it's consistent
 (26) with USPAP
 (27) Q One more point on hazardous substance and then we'll quit

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- (1) Are you familiar with a report called the final report of the
 (2) Task Force on appraiser's environmental responsibility
 (3) presented to the Appraiser Institute?
 (4) A Yes I am
 (5) Q Exhibit 8310 page 8 at the end of that final report on an
 (6) appraiser's responsibility in such appraisals there is a
 (7) series of terms or there's a section called terminology that
 (8) was attached to the report And I'll draw your attention to
 (9) Number 6 definition there of hazardous waste or contaminated
 (10) sites is sites on which a release has occurred or is suspected
 (11) to have occurred of any hazardous substance hazardous waste
 (12) or
 (13) petroleum products and on which release or suspected release
 (14) has been reported to a government entity that is how this
 (15) report terms the term hazardous waste isn't it?
 (16) A Yes it is and I'd like to explain what it means because I
 (17) was at the public meeting where this committee reported the
 (18) results and there was also a presentation at the same time by a
 (19) representative of the American Society of Testing Materials
 (20) who appeared before the same appraisal group When I heard the
 (21) word as you just read it Mr Petumenos petroleum products I
 (22) went up front at a break and said hey guys tell me what you
 (23) mean
 (24) And they were talking about refined petroleum products
 (25) When I talked with the ASTM representative he said that they
 (26) had dealt a number of times with the issue of whether or not

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- (1) crude oil as was spilled in the Exxon Valdez oil spill
 (2) should for practical purposes be considered as a hazardous
 (3) material and he said what hung them up was that --
 (4) MR PETUMENOS Excuse me judge there is a -- I'm
 (5) sorry to interrupt
 (6) A -- this --
 (7) THE COURT Stop stop
 (8) MR PETUMENOS I'm sorry to interrupt My question
 (9) was whether or not this document said what it said and now
 (10) we're getting to second and third level
 (11) THE COURT The objection's sustained If it's
 (12) necessary to do so counsel I'll let you question the witness
 (13) when redirect
 (14) MR PETUMENOS I move the admission of Exhibit 8310
 (15) (Exhibit 8310 offered)
 (16) MR DIAMOND Could we reserve on that please
 (17) THE COURT Yes
 (18) BY MR PETUMENOS
 (19) Q At this point in time when the document went out and you
 (20) had this -- you saw it as you testified were you retained by
 (21) Exxon at that time?
 (22) A At the time this report was made?
 (23) Q Right
 (24) A I believe so I think -- I believe this was last year that
 (25) it came out as I recall

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- (1) Q You had a particular interest in the subject?
 (2) A Absolutely I wanted to know what they meant.
 (3) Q Now it is true that in your report you talk about the
 (4) fact that because oil is not a hazardous substance that the
 (5) issue of stigma is not something that's generally raised by
 (6) something that isn't normally considered a hazardous
 (7) substance
 (8) isn't that one of the ways that you have used the term?
 (9) A I apologize to you I missed the question on the
 (10) supposition there
 (11) Q No apology necessary Maybe it was a long question Let
 (12) me try it again
 (13) Did you not in your report discuss the fact that oil was
 (14) not a hazardous substance in connection with whether or not
 (15) you
 (16) thought stigma would be a consequence of an oil spill?
 (17) A I don't recall the statement exactly in that context
 (18) Q How do you recall it?
 (19) A I just don't recall the statement I think you'd have to
 (20) help me with anything that you have in mind
 (21) Q I'll get to that later
 (22) A Promise?
 (23) Q Could I have -- let's turn to a subject area that is I
 (24) think a huge as you point out difference between you and the
 (25) Plaintiffs experts
 (26) You have said in your direct examination that a cornerstone
 (27) of appraisal work is highest and best use and would you agree

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- (1) that a huge difference between you and the Plaintiffs experts
 (2) is this issue of highest and best use?
 (3) A Yes it is
 (4) Q And the contention you make with the Plaintiffs experts is
 (5) their notion that land for conservation or land for - to be
 (6) held in its natural state cannot be a highest and best use and
 (7) that's a big issue between the two between the two sides
 (8) isn't it?
 (9) A Yes it is for several reasons with that of course
 (10) Q And you've given them on your direct Now I want to talk
 (11) to you a little bit about this picture that we had of the park
 (12) Tudor and C and Central Park and you remember those
 (13) questions
 (14) on direct?
 (15) A I don't believe I called Tudor and C a park as such I
 (16) think that's wetlands but the example was a park in a small
 (17) town
 (18) Q Park in a small town?
 (19) A Yes
 (20) Q Okay Now highest and best use category in an appraisal
 (21) can be something like multi unit residential would that be a
 (22) highest and best use?
 (23) A Yes it could
 (24) Q And we'd be talking there about apartment buildings right?
 (25) A Sure
 (26) Q And there's no doubt in your mind that the highest and best

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- (1) use of multi unit residential could be a highest and best use
 (2) in Anchorage Alaska?
 (3) A That's correct
 (4) Q And there's no doubt in your mind that a highest and best
 (5) use of apartment buildings could be the highest and best use in
 (6) Manhattan New York?
 (7) A That's correct
 (8) Q But the problem is you wouldn't use as a sales comparable
 (9) an apartment building in Anchorage Alaska with one that
 (10) fronted on Central Park because it would be very very
 (11) different right?
 (12) A Isn't just me It's buyers and sellers and renters I
 (13) don't think anybody in the Anchorage paper is going to say
 (14) rent my apartment here because they're charging \$2,000 for
 (15) these in Manhattan
 (16) Q Right but the same highest and best use may exist it's
 (17) just a question of which comparables within the highest and
 (18) best use you use am I correct so far?
 (19) A On your examples with the multifamily that's correct As
 (20) long as you're staying with an economic use just simply saying
 (21) location may be a difference yes
 (22) Q So if one were to conclude - just for purposes of
 (23) argument I understand you don't agree with it - if one were
 (24) to conclude that there is a highest and best use for natural
 (25) lands or conservation land one would still be faced with the

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- (1) problem of determining which comparables within that highest
 (2) and best use to use for a given appraisal am I right?
 (3) A In a theoretical stance the answer is a partial yes The
 (4) problem is we cannot talk about natural lands or sometimes
 (5) it's been referred to as public interest lands and use the
 (6) words highest and best use in the same context This is -
 (7) this is a very very important distinction
 (8) Q I understand that distinction and I'm not trying to -
 (9) A May I finish
 (10) Q I'm not trying to quarrel with you You don't like it as a
 (11) highest and best use? I'm trying to get you to be responsive
 (12) to my question
 (13) MR DIAMOND May he finish the answer that was
 (14) responsive
 (15) THE COURT The questioner can ask the question the
 (16) witness can answer the question but I'm not going to allow the
 (17) explanation at this point counsel Most of these questions
 (18) can be explored on redirect and that's the way I'm going to
 (19) rule from now on
 (20) BY MR PETUMENOS
 (21) Q So Mr Dorchester I understand that you disagree with
 (22) that - with that use of highest and best I'm making a
 (23) different point If one were to assume that there was a
 (24) highest and best use of property for a park then the task
 (25) would be to make sure that one compared parks in Anchorage
 with

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- (1) parks in Anchorage and not parks in Anchorage with parks in
 (2) Manhattan or Central Park is that okay as a concept?
 (3) A As a professional in my field I don't know how to - how
 (4) to work with your hypothetical because you're talking about
 (5) non economic uses and highest and best use
 (6) Q Let's talk about that First of all to make it clear
 (7) Dr Mundy never used the park at Tudor and C as a
 (8) comparable
 (9) did he?
 (10) A No Again I think he referred to it as wetlands
 (11) Q Or wetlands he never used it to compare it to property in
 (12) lower Kenai or Prince William Sound?
 (13) A Not to my knowledge
 (14) Q Okay Now -
 (15) A I think - excuse me I think he used it as an example of
 (16) the idea how you could transfer values from one area to another
 (17) within what he called a highest and best use category
 (18) Q Now let's assume that I want to - I'm a Native
 (19) Corporation and I want to clear-cut my property okay? And
 (20) you
 (21) offer me \$700 an acre not to clear-cut the property okay? And
 (22) I do a calculation and I look how much per acre I can make
 (23) cutting timber and I say no I won't sell you the property
 (24) Are you with me so far?
 (25) A Yes
 (26) Q And then we negotiate further and I say no again and then
 (27) we get up to \$975 an acre and I do my calculation as to how

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- (1) much money I'm going to make to clear-cut the property and I
 (2) go Mr. Dorchester we have a deal \$975 an acre
 (3) Right as I understand your proposition if we took a whole
 (4) string of transactions like that at \$975 an acre or a thousand
 (5) whatever they come out to be you won't look at them for
 (6) determining the value of property similarly situated am I
 (7) right?
 (8) A That's not correct May I explain why?
 (9) Q Yes
 (10) A First of all the you here is a pretty important word
 (11) You said you won't My job is not to buy and sell real estate
 (12) to make comparables My job is to look at the marketplace In
 (13) this case the you is federal and state governments primarily
 (14) as they have been cited as the purchasers in Dr. Mundy's and
 (15) other appraisal reports In that regard those same government
 (16) agencies when they are purchasing real estate as agencies
 (17) must follow federal guidelines and federal laws that require
 (18) that they deal with market value and in appraisal lands they
 (19) cannot appraise lands under the - under the natural lands
 (20) theory that - that you referred to that's been rejected for
 (21) their purposes many many times
 (22) So in order for you to get me to answer your question I'm
 (23) having to adopt a premise that really is not what's happening
 (24) here and is not what happens in the real world It is true
 (25) as has happened in a number of instances and let's take Seal

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- (1) Bay Tonki Cape as an example and let's take the Kachemak
 Bay
 (2) transaction as example lands have been acquired in both of
 (3) those instances under the threat that there would be clear-cut
 (4) timber operations
 (5) In both of those circumstances the threat is of timber of
 (6) logging and it is timber that is the highest and best use
 (7) The problem here is to say because they're not going to be
 (8) cut because they will be acquired by government that the
 (9) highest and best use isn't timber That's my problem
 (10) Q Let's talk real world I'm a Native Corporation I have a
 (11) choice I can timber my property or I could sell it for
 (12) conservation purposes Now do you know Mr. Dorchester
 (13) whether or not when timber operations take place jobs are
 (14) created?
 (15) A To some extent they are yes
 (16) Q And do you know that for example one of the things that
 (17) Native Corporations try to do with their economic development
 (18) is obtain job opportunities for their shareholders is that
 (19) something they do?
 (20) A Sure
 (21) Q And so a prudent property owner taking a look at their
 (22) choices would you agree might actually require a higher price
 (23) than the exact equal price from the timber operation before
 (24) they would sell their land for conservation? That's at least
 (25) theoretically true isn't it?

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- (1) A Not in the marketplace because it takes two to tango You
 (2) have to have a buyer who is going to buy and why would a
 buyer
 (3) pay more than market value?
 (4) Q Well -
 (5) A The seller may want it but it is the buyer that makes the
 (6) other side of the transaction
 (7) Q Well Mr. Dorchester you've made the point that the
 (8) government is required to pay market value right?
 (9) A Basically that's correct
 (10) Q Basically that's correct and the government has bought
 (11) land for conservation haven't they?
 (12) A Yes they have
 (13) Q Let's talk about how you have valued some of these
 (14) transactions
 (15) Counsel do you have the exhibit that shows the bar graph
 (16) with the range of the values
 (17) MR. DIAMOND On the Barco or -
 (18) MR. PETUMENOS Barco would be great
 (19) BY MR. PETUMENOS
 (20) Q Do you remember the exhibit that had the little yellow
 (21) range in there and the bar graphs going sideways about how
 much
 (22) your limited use properties were valued at?
 (23) A Yes I do
 (24) MR. DIAMOND Joel it's 10255
 (25) MR. PETUMENOS 10255 is correct

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- (1) BY MR. PETUMENOS
 (2) Q This is entitled limited use price per acre and it is the
 (3) way in which you decided how much the property was worth
 with
 (4) respect to some of the comparables that you looked at right?
 (5) A Yes These - these were some of our basic market
 (6) transactions that we considered in developing unit prices for
 (7) limited use lands
 (8) Q But these aren't the actual transaction prices where there
 (9) was a transaction are they?
 (10) A In some instances It is not the - the total consideration
 (11) for all of the things involved in the deal
 (12) Q Because you adjusted a number of them down didn't you?
 (13) A Well actually no What I've done is deal only with the
 (14) land component of the transactions I tried not to make any
 (15) adjustments to what is the land part of the transaction
 (16) Q I have up here before the jury Exhibit 8185 I'm not sure
 (17) that the jury can read all the numbers can you? Can you just
 (18) about get them?
 (19) I've taken this chart if you'd like to come down I don't
 (20) want to be unfair to you
 (21) A You might ask and let me see what I can do first
 (22) Q This is taken from your tables 8-1 and 8-2 from your
 (23) report It contains a number of the limited use transactions
 (24) that you used to come up with the value for limited use and
 (25) I've put the private I guess transactions in red and I put

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- (1) the public ones in black I've put in this column the price
 (2) per acre in the case of any transactions that actually went
 (3) through and it was a transaction and I put the amount that
 (4) you valued it at in the right hand column and see if this
 (5) doesn't make sense to you
 (6) The Tazimina Lake transaction was \$406 per acre and you
 (7) valued it at 405?
 (8) A I think that's just a question of rounding Lake Tazimina
 (9) Q The Ahtna Air Force backscatter was \$457 per acre and you
 (10) valued it to 250 You took it down didn't you?
 (11) A Actually no again you're saying 400 and some odd dollars
 (12) per acre If you divide total consideration of land and all
 (13) other factors by the number of acres that are there the answer
 (14) is yes If you deal with the portion of that that is land and
 (15) the economic valuation of land the answer is no
 (16) Q I understand you have explanations for these things but
 (17) first I want to go through them and see if I have them right
 (18) MR DIAMOND I'm going to object to that comment
 (19) Your Honor argumentative
 (20) THE COURT Start again counsel start again Just
 (21) ignore it and start again
 (22) MR PETUMENOS Sure
 (23) BY MR PETUMENOS
 (24) Q I want to go through them and see if I have the numbers
 (25) right and we'll do that first okay?

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- (1) A Not trying to interrupt but that's why I wanted to make
 (2) sure we were together on that point
 (3) Q The second backscatter transaction was 476 per acre and
 (4) you valued at 185 Same situation?
 (5) A May I have that same reservation on the other number
 (6) Q You may There's a third one 528 per acre and 250 is what
 (7) you came up with
 (8) A And the third one is what?
 (9) Q Backscatter
 (10) A Thank you
 (11) Q The Kachemak Bay transaction if you divide the acres up
 (12) and you come up with - that came out to be \$923 per acre and
 (13) you valued it at 300 to 500?
 (14) A In each instance again I'm not valuing anything on that
 (15) chart All I'm doing is taking the numbers that were actually
 (16) dealt with in the transaction There's no - no estimate from
 (17) me of value in there at all
 (18) Q The second Kachemak Bay transaction we have here with
 (19) DNR
 (20) 937 per acre is the transaction you were 300 to 400 the way
 (21) you adjusted it am I right?
 (22) A Again no adjustment there That's what the appraisers
 (23) used on the land portions that were involved in that
 (24) transaction
 (25) Q You took the appraiser's numbers not the actual
 (26) transaction number is that right?

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- (1) A Because I was dealing just with the land part of the
 (2) transaction
 (3) Q The next few which are quite low you accepted Gates of
 (4) the Arctic \$50 and \$50 and by the way Gates of the Arctic
 (5) that's way up in the tundra in the interior?
 (6) A That's correct
 (7) Q No waterfront there is there?
 (8) A Well there's some lakes
 (9) Q Lakes? The Pribilof Islands \$632 to 83 to \$93 is what
 (10) you did on that one and we talked about the Pribilof some and
 (11) I understand that you contend that there was a financial
 (12) distress component to that transaction?
 (13) A That's correct and again there is substantial explanation
 (14) there
 (15) Q For the corporation yes and but the Pribilof Island
 (16) cliffs so the jury knows are some of the most beautiful bird
 (17) rookeries in the whole world aren't they?
 (18) A That's my understanding and that was apparently reflected
 (19) in the land valuation that you have on the right hand side
 (20) Q Well - and the issue of course in any transaction is
 (21) sometimes an appraiser like with a house has to adjust a
 (22) transaction up or down because the house is bigger the house
 (23) is smaller the house is in a slightly different neighborhood
 (24) it's older things like that right?
 (25) A Yes but not at this step The first thing we have to do

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- (1) is to verify and the appraisal process is to first of all make
 (2) certain that we have solid information to begin with Text
 (3) courses professional training say that before you start making
 (4) an adjustment to a transaction you have to make first of all
 (5) certain that you're dealing with land or with building or with
 (6) something that is - that is comparable and so you don't -
 (7) don't have any adjustments here Mr Petumenos I just want to
 (8) make sure we're communicating
 (9) Q Well I have another exhibit Exhibit 8322 it's on your
 (10) screen right there and the jury can see it as well Now what
 (11) I've done here - or what I have had someone do for me in the
 (12) different colors is the red with the exception of Point
 (13) Possession and I think maybe one other I'm not sure but are
 (14) the - are either the actual - where there has been a sale
 (15) the red is the actual sales price per acre and the green is the
 (16) amount that you put onto table 8-2 of your report and I'd like
 (17) you to take a look at it and tell me if you think it is by and
 (18) large accurate?
 (19) A I think in substance the bars look approximately correct
 (20) but I - I'd have to sit down and verify it Mr Petumenos
 (21) Q What I've tried to do here Mr Dorchester is show the
 (22) value that you put in blue the sales price in red and where
 (23) there was an appraisal but no transaction I put that in
 (24) green Do you see that on the key there?
 (25) A Yes but you're still making a fundamental statement that's

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- (1) incorrect and may I – may I clarify?
 (2) Q You can after just one more question and that is do you
 (3) see where the Seal Bay Tonki Cape transaction is at nine
 (4) hundred and something an acre?
 (5) A Yes I do
 (6) Q There is no bar there for the Dorchester analysis of that
 (7) because you didn't consider it Have you considered it that I
 (8) don't know about?
 (9) A We certainly were aware of it
 (10) Q You didn't use it as a comparable for purposes of
 (11) determining the limited use lands that you described?
 (12) A That's correct
 (13) Q Please sir you had an explanation?
 (14) A Yes let me pick on that one and I'll be as brief as I
 (15) can The Seal Bay Tonki Cape transaction at over nine
 (16) hundred – \$900 is primarily a timber transaction If you go
 (17) to the – to the basic valuations there you can see that two
 (18) of the appraisals on this show – one of them showed timber
 (19) values in excess of the total price So to put that on a
 (20) limited use price per acre chart is just the wrong place for it
 (21) to be And secondly you – you keep saying you put on
 (22) Let me take ANWR as an example This is a – this is a
 (23) property that Dr Mundy appraised for Native Corporations
 (24) The – it wasn't Dorchester it was government appraisers that
 (25) appraised this at about \$100 per acre and the \$800 you have on

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- (1) here I think may be wrong on that one As I recall from the
 (2) general accounting office's report when they rejected this
 (3) they cited something more like \$600 per acre and a part of – a
 (4) part of their criticism was exactly what I think you're asking
 (5) me to try to agree to here and that is that I'm putting
 (6) numbers on something
 (7) ANWR is an appraisal that is done on the – I believe it's
 (8) blue by other than Dorchester The other numbers here are
 (9) portions of a total deal which do not involve in the entirety
 (10) real estate They include other considerations besides real
 (11) estate and – and that's the difference
 (12) Q Well I think I'll take your – let's assume you're correct
 (13) and we're down to here instead of 600 – I'm not saying you
 (14) are – perhaps we'll have some testimony in our rebuttal case
 (15) about it but nevertheless when I say you I'm talking about
 (16) this blue bar here which was taken from your report when you
 (17) used these comparables to determine the value for limited use
 (18) Am I making a mistake there?
 (19) A No I'll buy into that It is absolutely correct that what
 (20) we did was report the numbers that we found from our research
 (21) I just wanted to make sure you're not saying they're my
 (22) numbers These are numbers that other appraisers throughout
 (23) the State of Alaska use and other appraisers who deal with
 (24) these use as well
 (25) Q You also did not consider the Kachemak Bay Seldovia Native

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- (1) Association transaction either did you?
 (2) A Not as a comparable Very similarly to Seal Bay Tonki
 (3) Cape a substantial portion of that was timber Portions of it
 (4) was mineral interests and for other portions appraisals that
 (5) I've seen on portions of those lands indicate that that is a
 (6) long way from being only a limited use transaction
 (7) Q But this has implications for this parcel definition
 (8) business that you talked about in your direct doesn't it
 (9) that – the shoreline-related area that you talked about
 (10) because we know in Seal Bay that the Native Corporation
 (11) insisted in that transaction that property that had no value
 (12) for timber be included in the sale right?
 (13) A I'm not sure exactly what all happened I do know that
 (14) some land was added and I don't know the particulars of why
 (15) Q You think it would be important to know that?
 (16) A If I were using it as a – as a comparable I guess I
 (17) would But it was basically a timber transaction We had
 (18) already found that for the properties we were dealing with
 (19) none of the timber properties were affected by the oil spill
 (20) Q Well I'm talking about –
 (21) A These acquisitions as a matter of fact are by the oil
 (22) spill Trustees
 (23) Q I know who they are from?
 (24) A Well –
 (25) Q I'm asking you whether or not it might be helpful to know

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- (1) in connection with this rather major transaction for
 (2) conservation purposes whether or not additional lands totally
 (3) unrelated to logging were part of the deal?
 (4) MR DIAMOND Objection asked and answered
 (5) THE COURT He can answer it.
 (6) A Again as you said that's not in my report and I think I
 (7) just explained why we haven't included this as a part of our
 (8) report
 (9) BY MR PETUMENOS
 (10) Q And this is the report that has gone up until a couple of
 (11) weeks ago where you were updating information?
 (12) A That's correct
 (13) Q I want to next talk to you about again on this issue of
 (14) highest and best use and how you categorize lands on the
 (15) videos I heard you say something that I found interesting
 (16) You said none of these beaches are what you would consider
 (17) to be a beach remember that?
 (18) A I don't think I said none did I?
 (19) Q Some small percentage I'll give you that My point is
 (20) this Who is the you that you are saying wouldn't consider
 (21) it to be a beach? The people of Prince William Sound who live
 (22) there?
 (23) A No I think that was probably a – a rather universal
 (24) thing Let's put it this way not Waikiki in the sense of
 (25) that When you hear the word beach I think people tend to

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- (1) have an image in their mind I'm not saying there aren't some
 (2) wonderful shorelines there because there certainly are
 (3) Q Could we have --
 (4) MR DIAMOND What are we having?
 (5) MR PETUMENOS I'm going to show you a portion of
 (6) your video that you showed on direct I may ask you to freeze
 (7) it at places
 (8) (Videotape Played)
 (9) MR PETUMENOS Freeze that right there
 (10) BY MR PETUMENOS
 (11) Q Now were you here for Dr. Peterson's testimony?
 (12) A No I was not
 (13) Q That's unfortunate because I -- I noted a certain
 (14) similarity between a -- this frame right here and one of the
 (15) exhibits that Dr. Peterson showed to the jury in the big --
 (16) remind the jury the big one with all the little things stuck on
 (17) it in the course of his testimony
 (18) As I understand it if this beach were prolific in its
 (19) ability to support marine life that didn't go into your
 (20) calculation of value did it?
 (21) A I missed the question here Are you asking me a
 (22) hypothetical?
 (23) Q Well did you ever take into account as an item of value
 (24) whether or not a beach was a critical component to the
 (25) ecosystem?

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- (1) A Again I'll be brief I think it's fair game to say that
 (2) when we looked at the shoreline here at Point Helen this is a
 (3) very good example of what I think most people wouldn't think of
 (4) in terms of beach meaning sand something you'd lay back on
 (5) sun or that type of thing We call this a direct entry area
 (6) It's a shoreline that you can come ashore on but if we could
 (7) look just off to the right here you would see very extensive
 (8) storm berms you would see a fetch of water coming in there
 (9) where the rounded rock and much of the evidences that you
 have
 (10) here are that this is an area that gets pounded pretty well
 (11) We considered those kinds of features in assessing the land use
 (12) utility of the land we were looking at
 (13) Q You considered access whether you could get a boat
 ashore?
 (14) A That's correct
 (15) Q You considered whether the water was rough around it?
 (16) A Well in the sense of safe anchorages from a user
 (17) standpoint how would the market look at this land
 (18) Q You considered development potential?
 (19) A That's correct
 (20) Q Did you ever consider the importance of a beach to its
 (21) ability to produce living animals critical to the ecosystem
 (22) yes or no?
 (23) A Again I'm asking are you asking that as a hypothetical
 (24) situation?
 (25) Q No actually

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- (1) A To the extent that that question is raised by buyers and
 (2) sellers and renters in the marketplace the answer is yes But
 (3) did I try to separate out why they buy and why they rent what
 (4) they do in the way they do no You could -- you could make a
 (5) construct with all sorts of questions like that We just
 (6) simply went to the market and said how would people act on
 each
 (7) individual location based on its characteristics and based on
 (8) the oiling
 (9) MR PETUMENOS How long have we been in session Your
 (10) Honor?
 (11) THE COURT About an hour
 (12) MR PETUMENOS We can take a break
 (13) THE COURT Okay
 (14) THE CLERK Please rise This court stands in
 (15) recess
 (16) (Jury out at 12:01 p.m.)
 (17) (Recess from 12:01 p.m. to 12:18 p.m.)
 (18) (Jury in at 12:18 p.m.)
 (19) THE CLERK This court now resumes its session
 (20) Please be seated
 (21) BY MR PETUMENOS
 (22) Q Can the highest and best an appraiser determines exists
 (23) have an impact on how he determines to define the real estate
 (24) parcels?
 (25) A Yes it can

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- (1) Q So in addition to the controversy I guess I'm trying to
 (2) get at without getting into an argument about who's right here
 (3) Mr. Dorchester the issue of the proper highest and best use to
 (4) use for this land can effect the amount of money that one
 (5) determines the property's worth true?
 (6) A That's correct
 (7) Q And it can determine what size parcel -- what size the
 (8) parcel is depending upon what highest and best you
 determine
 (9) that's an important fallout if you will from that
 (10) determination?
 (11) A That's correct To be clear you're still going to deal
 (12) with the same ownership but the amount if you're saying an
 (13) ownership has more than one use how many acres you put into
 (14) each use could have an effect on the value
 (15) Q Now again talking real world and history of some of these
 (16) parcels LaTouche Island north has never been subdivided in
 (17) fact the way you propose to do it has it in the real world?
 (18) A Are you saying it's never been a single parcel?
 (19) Q No I'm saying it's never -- LaTouche Island north the one
 (20) we saw the video on it's never been in fact divided into a
 (21) shoreline-related area and an uplands?
 (22) A No that's not correct at all First of all I didn't
 (23) divide it It is still the same ownership It is still the
 (24) same property
 (25) Q I'm sorry I didn't say you did I'm asking you whether or

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- (1) not - let's start from the point in time when it was conveyed
 (2) from the government to the Native Corporation Did it go as
 (3) one block?
 (4) A I believe so yes
 (5) Q And did LaTouche Island south the rest of it that went to
 (6) the Chugach Alaska Corporation did it go as one block?
 (7) A That's my understanding
 (8) Q And in fact in the real world has that property since
 (9) the Native Corporations have owned it ever been subdivided?
 (10) A The Native Corporation portions of the ownership?
 (11) Q Correct
 (12) A And subdivide you mean a subdivision of some sort
 (13) Q Divided into parts upland shoreline related has that
 (14) ever happened in fact?
 (15) A No and it wasn't in my work either
 (16) Q Now the other thing that has happened here with respect to
 (17) the valuation issues that we have between the parties is the
 (18) issue of lease rates
 (19) Now you determined that the best analogy to what happened
 (20) in this oil spill was a license nonexclusive license and
 (21) we'll get to that in a minute but in order to value the
 (22) nonexclusive license you came up with the range of lease rates
 (23) for property didn't you?
 (24) A That's approximately correct
 (25) Q All right And you did not use lease rates for large

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- (1) remote land parcels because you couldn't find any to compare
 (2) to?
 (3) A That's correct
 (4) Q Now you did use leases involving public agencies
 (5) including the BLM?
 (6) A They were among those we considered
 (7) Q The Forest Service?
 (8) A Yes
 (9) Q DNR Department of Natural Resources as comparables?
 (10) A That's correct
 (11) Q And your rationale for doing that was that unlike sales
 (12) transactions involving public entities public lease
 (13) transactions reflect market rents because public properties
 (14) compete with private properties correct?
 (15) A Partially correct but perhaps I should explain on that
 (16) one
 (17) Q Actually I just took that right out of your report Go
 (18) ahead and explain?
 (19) A Yes It is partially correct The situation here is that
 (20) for many of these properties they are smaller properties
 (21) Government entities when they enter into the leasing of these
 (22) properties for example the Alaska Railroad not as a
 (23) government but DNR and others they - they try not to disrupt
 (24) the private market and secondly I think they in many of
 (25) these transactions at least try to get what they can out of

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- (1) the marketplace It would be undue competition if they - if
 (2) they weren't at least somewhat conscious of the rest of the
 (3) market in what they're doing
 (4) Q Exhibit 8317 counsel You are aware are you of a Bureau
 (5) of Indian Affairs study entitled market analysis of surface
 (6) leases for native allotments in Alaska?
 (7) A I'm not certain by title
 (8) Q I had I think specified this as part of the exhibits I'd
 (9) show you on cross-examination
 (10) MR DIAMOND 8317?
 (11) MR PETUMENOS 8317
 (12) MR DIAMOND I'm sorry
 (13) BY MR PETUMENOS
 (14) Q Do you know what native allotments are?
 (15) A Yes
 (16) Q What are they?
 (17) A They are - my sense of it is sort of like head rights
 (18) They are land that is obtained as a part of their native
 (19) entitlements
 (20) Q And if I showed you the title of it would it refresh your
 (21) recollection as to whether you've seen it before? Showing you
 (22) 8317?
 (23) A May I -
 (24) Q Sure Look at the table of contents it might help
 (25) A I'm sorry I - if you designated it I just don't recall

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- (1) Q Okay Well the Bureau of Indian Affairs in 1990 did a
 (2) study of lease rates on native allotments and concluded that
 (3) the range of -
 (4) MR DIAMOND Your Honor I'm going to object
 (5) hearsay Counsel is just reading in facts into the record
 (6) THE COURT Sustained
 (7) BY MR PETUMENOS
 (8) Q Well do you think it would be important to take into
 (9) account a study like the one done by the Bureau of Indian
 (10) Affairs on the lease rates that were prevalent for native
 (11) allotments?
 (12) A We tried to get everything we could I'd like to know more
 (13) about what the study is to answer you
 (14) Q Well if the purpose of the study was to provide rental
 (15) value guidelines for the leasing of native owned lands in
 (16) Alaska so the data can be useful for planning a surface lease
 (17) or to evaluate outside proposals to lease native properties
 (18) does that sound like something that would be interesting?
 (19) A Yes I'm still not sure who's leasing to who Is this
 (20) lease rates for the owners of the allotments to lease the
 (21) others?
 (22) Q It says The study includes private and public sector
 (23) leases throughout Alaska The emphasis on the study will be
 (24) leases occurring or updated since 1985 done by the Bureau of
 (25) Indian Affairs

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- (1) A Right Leases for Alaska are only allotments is that
- (2) correct?
- (3) Q That's what the study indicates that it's talking about
- (4) native owned lands?
- (5) A Right
- (6) Q Would that be something you might be interested in studying
- (7) if you were going to attach lease rates for -
- (8) A I think so. We tried to get all the information we could
- (9) Q You missed this one
- (10) A I just don't recall the document
- (11) Q Would it change your opinion if I were to tell you that
- (12) the Bureau of Indian Affairs -
- (13) MR DIAMOND To the extent counsel's going to read
- (14) this into the record I object -
- (15) THE COURT Sustained the objection's sustained
- (16) MR PETUMENOS May I show it to the witness?
- (17) THE COURT Yes
- (18) BY MR PETUMENOS
- (19) Q Let me show you a couple of the conclusions that were
- (20) reached on the lease rates for this area. I have two clipped
- (21) sections. This one and the one next to it
- (22) MR DIAMOND Can you tell me what page you're on?
- (23) MR PETUMENOS I'm sorry I sure can. Page 2 where
- (24) it says market data analysis and lease rates and the public
- (25) sector section. And what I'm doing is I'm showing him the

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- (1) conclusions some of the conclusions of the study without
- (2) saying aloud what they are
- (3) Maybe you could just read the highlighted portions and I'll
- (4) ask you a question about it
- (5) BY MR PETUMENOS
- (6) Q Having read those conclusions from the BIA study is this
- (7) something that you would have wanted to spend some more
- (8) time
- (9) and attention on to reflect on to determine whether your lease
- (10) rates were low in this particular instance?
- (11) A I'd like to have any kind of information like this but I'd
- (12) point out to you that it says Leases involving commercial
- (13) uses for heavy majority over recreational and residential
- (14) uses. These are - the types of lease or rental materials we
- (15) were looking for were primarily land
- (16) Q Now may I read the document Judge since the witness
- (17) seems
- (18) to want to?
- (19) MR DIAMOND No it's still hearsay
- (20) THE COURT You've made that ruling counsel?
- (21) MR DIAMOND I've considered this carefully Your
- (22) Honor and in my judgment it's still hearsay
- (23) THE COURT At this point I agree with you counsel
- (24) BY MR PETUMENOS
- (25) Q This might have warranted some more study by your group
- (26) would you agree?
- (27) A I don't know that it wasn't studied I just don't recall

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- (1) the document
- (2) Q Okay Now the next thing we have to talk about is the
- (3) fact that - the other thing that happened here is that you
- (4) decided that the best way to analogize what happened to this
- (5) land here to a real estate transaction would be to call it a
- (6) nonexclusive license right?
- (7) A That's correct
- (8) Q All right And real world are you aware of some
- (9) nonexclusive licenses that existed in Prince William Sound?
- (10) A Yes I am
- (11) Q Are you familiar with say the license that's on Chugach
- (12) property land use permit of Stan Stephens Charters?
- (13) A Yes I am familiar with that - that there is such a
- (14) thing
- (15) Q All right Let's take a look at Exhibit 8302 counsel
- (16) I'm going to show you a photograph of what it looks like when
- (17) we grant a license on our lands and how it's used Have you
- (18) ever seen that property before and does it look like that this
- (19) particular license?
- (20) A I haven't - haven't seen it this angle I think we - I
- (21) think we've flown over this
- (22) Q Now Mr Dorchester is this an example -
- (23) MR DIAMOND I'm going to object to this as
- (24) argumentative Your Honor
- (25) MR PETUMENOS It's a picture of an oiled beach

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- (1) Judge I think the jury's seen it before
- (2) MR DIAMOND Fine for closing argument but not a
- (3) question to the witness
- (4) THE COURT Well let's wait for the question
- (5) MR DIAMOND Can we take it off the screen until he
- (6) asks the question
- (7) THE COURT Yes take it off - take it off the
- (8) screen
- (9) BY MR PETUMENOS
- (10) Q What you have done is analogized the license like the
- (11) photograph that we just saw to oiling on beaches right?
- (12) A I'm - I'm not - I'm sorry I just don't understand the
- (13) question
- (14) Q Well you didn't want to use the lease because you thought
- (15) the lease rate would be too high because people could still use
- (16) the land while it's oiled right?
- (17) A Well I - all I was trying to do is describe what
- (18) happened In the oil spill there was continued opportunity
- (19) and in fact use of the lands over and above what happened on
- (20) the shorelines I was just trying to find a rental that would
- (21) match the real world of what happened
- (22) Q And the real world of what happened was the picture I put
- (23) up there on Chugach that's an example of such a license isn't
- (24) it?
- (25) A I'm not certain Is this a license arrangement?

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- (1) Q A permit yes
- (2) A It is a permit?
- (3) Q Yes
- (4) A All right Then that would be an example of a nonexclusive
- (5) permit or license yes
- (6) Q And that is the real estate device that you used to help
- (7) you value the damage the lease permits and licenses right?
- (8) A I m having difficulty matching the photograph to the - to
- (9) the concept of rent
- (10) Q So am I Let me move on Remember we talked about this
- (11) nonexclusive use business and you talked about the fellow
- (12) walking along the beach with a pest control hat remember?
- (13) A Yes I do
- (14) Q And you said it was reversed that instead of them trying
- (15) to keep the bear from the people he was trying to keep I
- (16) guess the people on the mountain from getting near the people
- (17) on the beach?
- (18) A No I think what he was concerned with was that there was
- (19) hunting going on and he wanted to make certain that if anyone
- (20) came down in that locale that the people on the beach were
- (21) safe
- (22) Q Right so I think the - the sort of humorous thing we went
- (23) through was that the pest in this instance was the people of
- (24) the uplands that were doing the hunting?
- (25) A Not at all I think that s a - an inference that is

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- (1) certainly not intended on my behalf
- (2) Q Well certainly their use?
- (3) A The fact is that he - his hat is pest control and my
- (4) understanding is that bears were referred to as pests on the
- (5) shoreline
- (6) Q The fact is that it is likely from what you know about the
- (7) Native Corporations that it was a native shareholder that was
- (8) using the property because those are generally who are
- (9) provided
- (9) the opportunity to hunt in that area isn t that right?
- (10) MR DIAMOND Objection calls for speculation
- (11) THE COURT Sustained sustained
- (12) BY MR PETUMENOS
- (13) Q Let me ask it this way Do you know whether or not this
- (14) was at Sleepy Bay?
- (15) A It definitely was Sleepy Bay
- (16) Q Do you know whether that area is generally open to people
- (17) to hunt who are not shareholders do you know?
- (18) A I know that it is hunted by people who are not
- (19) shareholders
- (20) Q Legally?
- (21) MR DIAMOND Objection calls for legal conclusion
- (22) THE COURT Sustained
- (23) BY MR PETUMENOS
- (24) Q Let s talk about oiling Now if I m not mistaken could
- (25) we run the animation that was the other exhibit that was on Mr

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- (1) Dorchester s direct This is one of your parcel videos I
- (2) wanted to run back
- (3) (Videotape Played)
- (4) BY MR PETUMENOS
- (5) Q You stated that you looked at lots of different data on
- (6) oiling but in point of fact when it came down to determining
- (7) whether there was oil present on the property or not you used
- (8) the various surveys that were conducted didn t you? Could
- (9) you
- (9) stop it right there? Am I right?
- (10) A That was the principal source but it was not the only
- (11) source
- (12) Q I noticed that when you were flipping from one year to the
- (13) other and we saw these little lines there is a parentheses
- (14) right there and it says surveyed segments doesn t it?
- (15) A Yes it does
- (16) Q And what this map with the colors on it tells the jury is
- (17) how the level of oiling was determined on segments that were
- (18) in fact surveyed by the process right?
- (19) A That s correct
- (20) Q And it does not tell us what the oiling was on areas that
- (21) were unsurveyed right?
- (22) A That is correct
- (23) Q And it is true that in your report if a shoreline was
- (24) unsurveyed you concluded it was not oiled?
- (25) A That is not correct

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- (1) Q Did you change your methodology from your May 1993
- (2) report
- (2) to the August report?
- (3) A We really didn t change our methodology at all It was
- (4) simply a matter of considering information that was eventually
- (5) made available to us by Plaintiffs and by other sources We
- (6) considered that information and where we found that there was
- (7) some evidence of oiling that may not have been reflected fully
- (8) in any earlier report we considered it and it was used in our
- (9) calculations
- (10) Q Let me find a deposition reference here if I can about this
- (11) unsurveyed being oiled Did you in fact at one time conclude
- (12) during your analysis that if property was unsurveyed that it
- (13) was not - that it was not sufficient oiling on it for you to
- (14) conclude it was impaired?
- (15) A I don t believe that was the conclusion I think the
- (16) principal conclusion was that if something was not surveyed it
- (17) didn t mean that it wasn t observed but that we just didn t
- (18) have the information That s the principal presumption we
- (19) dealt with
- (20) Q How much if you can tell me in terms of a percentage how
- (21) much money did you add to the damage calculation for this
- (22) additional oiling information that you looked at? Let me -
- (23) let me withdraw that question and ask another
- (24) Did you have this information we re talking about when
- (25) we - when you did your May 1993 report?

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- (1) A No I did not
 (2) Q So when you did your May of 1993 report you did not have
 (3) the Veco information on where clean up crews went?
 (4) A That s correct
 (5) Q You did not have some of this other data that you said you
 (6) considered that was not part of the surveys right?
 (7) A That s correct
 (8) Q So in your May of 1993 report you relied exclusively on
 (9) the surveys for determining where oiling was?
 (10) A No that s not correct
 (11) Q How am I wrong?
 (12) A Surveys were the principal source but not the only
 (13) source We went out there and looked
 (14) Q Okay
 (15) A We were out there as well and I could cite a lot of other
 (16) sources
 (17) Q How much money did you say the Native Corporations were
 (18) entitled to in your May of 1993 report in terms of total
 (19) damages?
 (20) A Well you remember that the reports that I issued in May
 (21) included properties that are not in this case so -
 (22) Q This case?
 (23) A I have - I just don t know
 (24) Q You don t know?
 (25) A I don t know

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- (1) Q Isn t it a fact that you have not appreciably raised the
 (2) damages to these Plaintiffs in this case as a consequence of
 (3) any further work that you did between your May of 1993 report
 (4) and now?
 (5) A I think that s a fair conclusion I don t know what the
 (6) earlier total was because we didn t try to go from one number
 (7) to another We simply did our work each time frame but my
 (8) recollection is with regard to the properties in this case
 (9) there were only a few adjustments that were made as a result of
 (10) the additional information
 (11) Q In the thousands of dollars not the tens of thousands
 (12) right?
 (13) A Actually I believe it s in the tens of thousands
 (14) Q But not the hundreds of thousands?
 (15) A I just would hate to sit here and speculate with you
 (16) Q Did you determine that the SCAT surveys were the most
 (17) reliable source of information for oiling?
 (18) A For purposes of our work I think they were substantially
 (19) the most reliable source because they were definite they gave
 (20) us information such as Mr Ward s comments that I showed
 (21) earlier that gave us an opportunity to have sort of an eyeball
 (22) view and they also particularly starting in 1990 included
 (23) joint teams joint views of the shorelines So to that extent
 (24) we felt that they were the most of any of the sources we had
 (25) the most appropriate and most definitive

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- (1) Q I think we have a substantial misunderstanding Mr
 (2) Dorchester The SCAT surveys only took place in 1989?
 (3) A Yeah we are - we are using different terminology To me
 (4) SCAT surveys are all of the surveys you re absolutely correct
 (5) Q In fact the one -
 (6) A The 19 -
 (7) Q Excuse me let me ask a few questions here The one you re
 (8) referring to with all these comments on it by definition
 (9) couldn t be a SCAT survey isn t that right? Because the SCAT
 (10) surveys in 1989 didn t have comments from the various
 (11) landowners the State and others That didn t happen in 1989?
 (12) A Let me clarify my answer here What you re saying is
 (13) correct as to the fact that a survey which is referred to as
 (14) the SCAT survey was done in 1989 It is also true that all of
 (15) the surveys were referred to as SCAT processes or SCAT
 (16) surveys And in my testimony to this jury they ve heard me
 (17) talk frequently about shoreline cleanup assessment teams
 (18) S-C A T so I have no problem with what you re saying There
 (19) is a survey that by its name took the original name of SCAT and
 (20) it was called that
 (21) Q Mr Dorchester these clarifications are important to me
 (22) so if you ve been using SCAT to cover all of the surveys I
 (23) wish to clear it up okay?
 (24) A Okay
 (25) Q All right What s the difference between SCAT and SCAT2?

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- (1) A Well if we talk about the names of a map a series of
 (2) specific activities I think it s proper to say SCAT is the -
 (3) the series of field surveys and mapping that were done in 1989
 (4) time frame
 (5) SCAT2 is a revision of that information that was done with
 (6) quality control and was done with a process to make the
 surveys
 (7) that were done in 1989 capable of being compared from year to
 (8) year in the years to come
 (9) Q That s one view In fact what happened Mr Dorchester
 (10) you know is that SCAT was data that was inputted from the
 (11) field by ciencial staff most of the time in 1989 is that
 (12) right or don t you know that?
 (13) A I don t know that
 (14) Q SCAT2 do you know was bringing together some
 (15) geomorphologists to reanalyze the data a long time after the
 (16) actual data was taken out in the field and turned into SCAT2
 (17) do you know that?
 (18) A I don t know that I can agree with that but we could get
 (19) the general agreement that SCAT2 was the quality check and
 sort
 (20) of redefinition so that the processes could be used in future
 (21) years Certainly agree with that
 (22) Q Now then the surveys began to be called something else as
 (23) the years went on They were called SSAT ASAP MAYSAP all
 (24) those names you re familiar with those?
 (25) A And Abendigo that s correct

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- (1) Q And what happened was a large number of beaches that were
- (2) surveyed in the SCAT process were never surveyed again in
- (3) subsequent years is that so?
- (4) A As to the - going to have trouble talking with you on
- (5) this I guess As to the SCAT process I believe that s
- (6) correct I don t believe that s correct as to whether or not
- (7) they were observed whether someone went out there and looked
- (8) As a matter of fact the Native Corporation representatives
- (9) representatives from NOAA Coast Guard all of the various
- (10) entities had ample opportunity to go out and look and what
- (11) happened after that first year was where should we go back and
- (12) give prime priorities for the treatment activities
- (13) Q And there s another issue isn t there Mr Dorchester
- (14) about oiling and that is that you re very focused or we have
- (15) been very focused in this trial for a long time on is this
- (16) beach oiled that beach oiled and so forth If the jury were
- (17) to conclude after the facts and the instructions that damage to
- (18) land can occur whether or not oil physically touched a beach -
- (19) have you done an appraisal of the Tatitlek Corporation land?
- (20) A Yes we have
- (21) Q You have? Have you done an appraisal of the Eyak
- (22) Corporation land?
- (23) A To the extent that we have made the consideration yes To
- (24) the extent that we ve done valuations no because of the issue
- (25) of the oiling

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- (1) Q Then that s what I m talking about Have you done and made
- (2) any valuation conclusions about the Tatitlek lands? Did you
- (3) study that?
- (4) A No we have not
- (5) Q Did you make any valuation conclusions about the Eyak
- (6) lands? Did you study that?
- (7) A I have not done that
- (8) Q You know that Dr Mundy has?
- (9) A That s my understanding yes
- (10) Q So in this court the only valuation studies of Tatitlek
- (11) and Eyak lands that have been done are those by Dr Mundy?
- (12) A I believe that s correct
- (13) Q It is the only appraisal this jury has to rely upon with
- (14) respect to value of these lands should it conclude that it is
- (15) not necessary for oil to physically touch property before
- (16) compensation is due is that right?
- (17) MR DIAMOND Objection asked and answered and
- (18) argumentative
- (19) THE COURT Sustained
- (20) MR PETUMENOS I ve thoroughly confused Ms Johnson
- (21) here - here we go
- (22) BY MR PETUMENOS
- (23) Q Now this business with Steve Ward I notice that in your
- (24) direct examination Steve Ward was the only person that you
- (25) quoted from the FINSAP surveys is that right?

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- (1) A I believe that s correct
- (2) Q Steve Ward was not an oil geomorphologist that s right
- (3) isn t it or don t you know?
- (4) A I don t know
- (5) Q Well in quotes to the jury did you notice some
- (6) grammatical mistakes in his notes?
- (7) A Yes I did
- (8) Q Some spelling mistakes in his notes?
- (9) A Yes
- (10) Q Yes? Did he appear from his comments to be a highly
- (11) educated beach geomorphologist?
- (12) MR DIAMOND I m going to object to the question as
- (13) calling for speculation
- (14) THE COURT Sustained it s sustained
- (15) BY MR PETUMENOS
- (16) Q Let me ask you this did you take a look at some of the
- (17) 1993 shoreline assessment surveys that were done after Mr
- (18) Ward
- (19) made his comments for some of the same parcels we re talking
- (20) about?
- (21) A Yes I did
- (22) Q Putting on the Barco for just a minute DX15552 24 You
- (23) might want to get out Exhibit 9067 at the same time
- (24) MR DIAMOND Can I just take a look at it first?
- (25) MR PETUMENOS Sure
- (26) MR DIAMOND 90677

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- (1) MR PETUMENOS 9067
- (2) BY MR PETUMENOS
- (3) Q Now just to remind the jury when we talk about the 1993
- (4) surveys that were done sometimes called POSTSAP is that
- (5) right?
- (6) A Yes it is
- (7) Q And these were done by the Trustees a year ago to go out
- (8) and see how things were?
- (9) A They were done by the Trustees in 1993
- (10) Q Here we go here s one that you talked about on your
- (11) direct Everything is doing well whatever it says there and
- (12) I want to show you the same property in POSTSAP And the
- (13) comments that are there sometime later
- (14) MR DIAMOND Could we have a date on that?
- (15) MR PETUMENOS This is just the POSTSAP 1993 report
- (16) I don t have the specific date Large amounts and high
- (17) concentration?
- (18) A Excuse me I missed what the property is
- (19) BY MR PETUMENOS
- (20) Q It s Evans Evans Island
- (21) MR DIAMOND This is ADEC not POSTSAP?
- (22) MR PETUMENOS Northeastern Evans Island a survey
- (23) done in 1993
- (24) BY MR PETUMENOS
- (25) Q Okay -

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- (1) A I m sorry you said that this was the statement that -
 (2) Q This is a survey -
 (3) A Mr Ward made on the same property
 (4) Q Right this is on - this is the FINSAP done in 1990 -
 (5) May 1992 Okay I believe I m showing you a document from
 (6) 1993 which is another survey that was done by the Trustees
 (7) MR DIAMOND Your Honor can the entire document be
 (8) placed in front of him? Because I think counsel misspoke when
 (9) he said this was a POSTSAP survey
 (10) MR PETUMENOS I ll stand corrected Let me just get
 (11) to the point of the document so I could move on
 (12) BY MR PETUMENOS
 (13) Q In this survey they found large amounts and high
 (14) concentrations of subsurface oil exist on this site Oil in
 (15) HORs - and what does HOR stand for? I forgot
 (16) A Heavy Oil Residue
 (17) Q Heavy oil residue occurs at two distinct sites One of the
 (18) sites is a mussel bed No apparent improvement in subsurface
 (19) oil has occurred since 1991 and oil amounts were
 underestimated
 (20) in previous years especially 1991 No cleanup occurred at
 (21) these sites in 1991 1992 That s in the same general area
 (22) Evans Island I think you re more familiar with these than I
 (23) am but Evans 036-A and that s what was concluded in 1993
 (24) Did you look at that material?
 (25) A Yes I did

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- (1) Q DX15552 28 and we re going to go to Exhibit 9064 Remind
 (2) the jury here s old Steve Ward saying things are pretty -
 (3) going pretty well and then the 1993 ADEC restoration project
 (4) survey for this property Katie Farley of DNR writes This
 (5) site is used by subsistence users and anadromous fish These
 (6) activities would be affected by the condition of the site as
 (7) is The feasibility of further restoration should be
 (8) discussed Did you look at that as well?
 (9) A Yes I did
 (10) Q Exhibit 15552 26 This is the guy where - place where he
 (11) says This beach is usable to the village and so forth that
 (12) you showed on direct?
 (13) A That s correct
 (14) Q In 1993 counsel Exhibit 9066 Katie Farley has a somewhat
 (15) different view The areas where the subsurface oil was
 (16) heaviest should be cleansed for restoration purposes The two
 (17) areas near two meter or high rock and cable rock are close in
 (18) proximity and are both oiled enough to warrant more additional
 (19) work This area is significant for commercial fishing
 (20) subsistence use and it goes on and I can t read it all but I
 (21) think I ve read enough for my purposes Did you consider this
 (22) too?
 (23) A Yes I did May I explain what we did with her why
 (24) Q I assume you found it not persuasive to change the damage
 (25) estimate?

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- (1) A I think that would be maybe a misstatement
 (2) Q You can explain go ahead To explain the damage
 estimate?
 (3) A The way we read these statements and the others on the
 (4) form you re pulling some of them out but these are
 (5) instructive statements and they re very helpful to us
 (6) You ll note in many of these surveys at the same time that
 (7) other people on the team are making the basic statement that
 (8) oil is in a location and is in a form that it s not hurting
 (9) anything there s no - no real problem to the environment I
 (10) was having difficulty following the segments because I couldn t
 (11) see all of those but in 1993 it was unfortunate but there
 (12) was also new oil found on some of these same areas that you ve
 (13) been talking about not - not Exxon oil but let s just focus
 (14) on - on the oil that we know about
 (15) The oil geomorphologists and the others from NOAA and
 (16) others who were there I think in the 1992 surveys were
 (17) contributors to the reason that both the federal government and
 (18) the State of Alaska signed off at the - at - early in 1992
 (19) saying no further cleanup was necessary Did that mean there
 (20) was no oil out there? Not at all
 (21) As we saw from some of Mr Ward s comments that I cited on
 (22) my direct examination he said there was oil and so did other
 (23) members of the team The question was what would its effect
 (24) be on someone who might use the real estate And some of the
 (25) information that you re talking about here Mr Petumenos is

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- (1) exactly the reason why In several of the properties you just
 (2) dealt with we did increase the extent of our impairment
 (3) estimates for the 1992 1993 year
 (4) Q Thousands? Hundreds?
 (5) A Whatever it amounted to Whatever would be just
 (6) compensation
 (7) Q Mr Dorchester let s talk about subsurface for just a
 (8) second I don t want to spend too much time on it because I
 (9) think the battle lines are drawn but the - it is a fact that
 (10) in the Kachemak Bay transaction first of all Native
 (11) Corporations are unique in that they own the land in a split
 (12) estate when the village owns the land is that right?
 (13) A That s correct
 (14) Q Unlike land almost anywhere else from its inception the
 (15) land title is split between those that own the subsurface
 (16) estate and those that own the surface estate right?
 (17) A I think that s what I just answered that s correct
 (18) Q And the person - and the entity that owns the subsurface
 (19) estate is the regional corporation in this case Chugach Alaska
 (20) Corporation Now you are aware of at least one transaction in
 (21) which land was purchased for conservation in the Kachemak
 Bay
 (22) area right?
 (23) A Yes
 (24) Q And the regional corporation in the Kachemak Bay
 (25) transaction was the Cook Inlet Regional Corporation am I

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- (1) right?
 (2) A Yes
 (3) Q And the Cook Inlet Regional Corporation didn't get money in
 (4) that transaction for mining land did they?
 (5) A I believe they got money for not mining land
 (6) Q Right They got money because when it came time for the
 (7) government to purchase the land for conservation they wanted
 (8) to extinguish the subsurface holder's rights correct?
 (9) A Well I think the plain world way of saying that is that
 (10) there was a threat that there would be mining there and they
 (11) extinguished the threat
 (12) Q The threat? It's a legal use of their land they can mine
 (13) it because they're entitled to mine it?
 (14) A Sure but you're talking about the public view
 (15) Q So the fact is that for purposes of a park they did not
 (16) want Cook Inlet mining the land and they paid Cook Inlet so
 (17) they could be sure that that wouldn't happen right?
 (18) A That's my understanding
 (19) Q And you are aware that there is a substantial amount of oil
 (20) in the subsurface today out in Prince William Sound?
 (21) A I don't know the substantial
 (22) Q All right
 (23) A I certainly know there is oil in the subsurface yes
 (24) Q Now couple more things and we can quit for the day Or I
 (25) can quit for the day Maybe somebody else has more

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- (1) of environmental contamination scientific evidence as
 (2) summarized above reflects that oil spills do not have long term
 (3) environmental health consequences therefore it is
 (4) inappropriate to extrapolate conclusions about market stigma
 (5) effects from cases involving other types of environmental
 (6) contamination in a case involving an oil spill
 (7) So it is the case that you did find the issue of whether
 (8) oil was a hazardous substance as being one that was related to
 (9) your analysis about stigma true?
 (10) A I missed a word I'm sorry
 (11) Q I'm not speaking loud enough?
 (12) A No I think I was listening too closely I apologize
 (13) Q Try not to listen too clearly It is true that you in your
 (14) analysis of whether stigma occurred - let me back up Could
 (15) you read the question back?
 (16) (Record read)
 (17) A Not quite The real question was not what anybody might
 (18) want to put on here as a particular tag the question was is
 (19) there anything that would indicate that there is stigma I
 (20) don't - I don't believe as I understood what I wrote there
 (21) just from your reading that it said quite what you said Our
 (22) question was was there stigma not is there some moniker or
 (23) tag of a special sort
 (24) Q You agree that in certain circumstances the perception that
 (25) the market was affected by an oil spill could contribute to the

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- (1) You'll accept the premise that stigma can have an effect on
 (2) the market under appropriate circumstances?
 (3) A Yes I do
 (4) Q You agree that market disruption can cause stigma to a
 (5) particular piece of property?
 (6) A I think it may be the other way around I suppose that if
 (7) we find that a market disruption has occurred because of
 (8) some - some phenomenon some event it's possible that there
 (9) is stigma I think maybe it's the other way than the way you
 (10) said it
 (11) Q All right You concede do you not that an oil spill can
 (12) cause stigma?
 (13) A Yes I do
 (14) Q And you concede that at least hypothetically an oil spill
 (15) could cause stigma to property that was not physically touched
 (16) by oil?
 (17) A As a hypothetical that could occur
 (18) Q Now earlier we talked about the issue of hazardous
 (19) substances and stigma and you wanted me to point that out to
 (20) you and 2-15 and you said - and I haven't highlighted all of
 (21) the parts I'm interested in here but the concept of stigma has
 (22) been developed from other types of environmental accidents
 (23) and
 (24) you list some jury can read it nuclear accidents toxic
 (25) chemical spills and the like and then you make an important
 distinction between an oil spill and other more hazardous types

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- (1) market actually being affected by the spill?
 (2) A Yes I do
 (3) Q And you concede that the value of property is directly
 (4) related to the opinions of the portions of the public which
 (5) might constitute the market for property?
 (6) A In its basic form that's correct But there's more to it
 (7) than that
 (8) Q Now in all your work that you've done from Exxon have you
 (9) ever performed any formal study to determine what the public
 (10) perception of the oil spill was?
 (11) A Yes I have
 (12) Q Did you do that since your deposition?
 (13) A No
 (14) Q Counsel Page 1606
 (15) MR DIAMOND I hesitate to ask you what day this is
 (16) from?
 (17) MR PETUMENOS It would be a very effective technique
 (18) on your part because I'm not sure I'm at line 15
 (19) BY MR PETUMENOS
 (20) Q Did you perform or did you or any of your team members
 (21) perform any type of research to determine what the public was
 (22) understanding to be the effects of the spill in the year
 (23) following the spill
 (24) We made no formal studies as such We were much more
 (25) aware
 of news media's the various media sources that I think I wanted

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- (1) to refer to earlier and as we talked about with other
 (2) professionals it was I think fairly commonly spoken that
 (3) there was a difference between the news media reporting of
 (4) various events that were not -- newsworthy and perhaps you
 (5) might actually find what was actually happening in Prince
 (6) William Sound
 (7) So you did no formal study did you?
 (8) A I think we have to get to the context of the question and
 (9) that helped. We didn't do a formal opinion poll which is the
 (10) kind of thing that some people do and there are now published
 (11) reports on for the Valdez oil spill. In the context of this
 (12) line of questioning it was a question of did we do news media
 (13) or larger scale opinion polls? But as I said in that
 (14) paragraph we did talk with people we did make
 (15) considerations
 (16) particularly talking with professionals and others I think
 (17) Steve MacSwain talked quite a bit about that when he
 (18) testified
 (19) Q You did or at the time you reached your opinion or were
 (20) deposed you had only done a cursory examination of the
 (21) Clarion
 (22) report am I right?
 (23) A Trying to get time frames together We had what nine
 (24) days of depositions and I don't -- they wrote several reports
 (25) Q Did you do a more thorough study of the Clarion report
 (26) since your deposition or during your deposition?
 (27) A Could you tell me which report we're talking about?

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- (1) Q I'm talking about the report that Clarion did on -- not on
 (2) natural lands and whether there are natural lands but the
 (3) substantive report on different oil spills and market
 (4) perceptions and things like that
 (5) A I think they did several I'm not -- I'm just not
 (6) triggering on what you're asking here
 (7) Q Did you ever do more than conduct a cursory analysis of
 (8) their reports?
 (9) A I've not done any -- any -- well we did our own studies
 (10) here Not to the extent that Mr. Roddewig did but what I did
 (11) was I read his report in the context and I don't know how to
 (12) call that cursory
 (13) Q I'll just show you a little something that might be
 (14) interesting I'm going to show you a National Geographic map
 (15) of a very general nature that was put together in 1994 and I
 (16) think you'll see that on this map of Alaska there's the kind
 (17) of thing children might see perhaps in a school or something
 (18) like that Does it look like it's got pictures of bears and
 (19) whales and --
 (20) A Puffins
 (21) Q Puffins and it gives a picture of the history of Alaska
 (22) and what Alaska natives are and so forth and then it has a
 (23) little description of Prince William Sound along with all the
 (24) history of all the things that have gone on in Alaska And do
 (25) you see in the history of Prince William Sound whether or not

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- (1) this --
 (2) MR DIAMOND I'm going to object as hearsay He's
 (3) reading into the record what's on the document it's clearly an
 (4) out of court statement
 (5) MR PETUMENOS It's not for the truth of the matter
 (6) It's for how the oil spill is published in the world and how
 (7) broadly Prince William Sound has become known as a place
 (8) where
 (9) the oil spill took place
 (10) MR DIAMOND We previously dealt with that in
 (11) connection with exclusions concerning other witnesses
 (12) testimony I object on the same grounds as we objected then
 (13) THE COURT The objection's overruled
 (14) BY MR PETUMENOS
 (15) Q And under Prince William Sound in this National Geographic
 (16) society map they talk about -- a couple of things about it
 (17) Can you read just the section here under Prince William Sound
 (18) the paragraphs?
 (19) A Sure It says one quarter of the United States oil
 (20) production passes through the Sound tankers fill up at Valdez
 (21) terminus of the pipeline that begins 800 miles to the north at
 (22) Prudhoe Bay On Good Friday 1989 the tanker Exxon Valdez
 (23) ran
 (24) aground on Bligh Reef spilling 11 million barrels Despite
 (25) millions of dollars and untold hours of cleanup oil residue
 (26) still stains a few beaches
 (27) MR DIAMOND Your Honor I'm going to object to

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- (1) this This is blatant hearsay and it's not being offered for
 (2) any relevant purpose
 (3) THE COURT How much more is it counsel?
 (4) MR PETUMENOS He's about at the end
 (5) THE COURT You can finish The objection's
 (6) overruled Go ahead
 (7) A Another Good Friday disaster emanated from the Prince
 (8) William Sound area in 1964 The strongest earthquake yet
 (9) measured in North America exploded from an epicenter 40
 (10) miles
 (11) west of Valdez killing 131 people and devastating Anchorage
 (12) where one side of the street dropped 11 feet
 (13) BY MR PETUMENOS
 (14) Q So in this particular publication -- may I show this to the
 (15) jury?
 (16) THE COURT No it's been read for them
 (17) MR PETUMENOS I wasn't going to read it to them I
 (18) just wanted them to see the pictures and things like that
 (19) THE COURT You can hold it up
 (20) MR PETUMENOS Can I hold it up?
 (21) BY MR PETUMENOS
 (22) Q This map just to give the jury the character of the kind
 (23) of thing it is what Prince William Sound is known for is oil
 (24) passing through it an earthquake and an oil spill right?
 (25) MR DIAMOND Objection argumentative
 (26) THE COURT Sustained

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- (1) BY MR. PETUMENOS
 (2) Q You once said in a report that a -- that standard for
 (3) determining whether or not a person would buy or sell a
 (4) property would be a knowledgeable buyer or seller having
 (5) done
 (6) inquiry under the circumstances or words to that effect isn't
 (7) that more or less the standard or can you make it better for
 (8) me if I restate it?
 (9) A That sounds pretty good
 (10) Q And you conclude that a knowledgeable buyer and seller
 (11) looking at the oil spill would know or would come to the
 (12) conclusion that there was no further need for concern with
 (13) respect to the real property is that right?
 (14) A I'm not sure I understand your question
 (15) Q You conclude that a potential buyer or seller looking into
 (16) a real estate acquisition or a real estate transaction would
 (17) know after inquiry that there was a concern to have about the
 (18) oil spill?
 (19) A That's the question I have. What do you mean after
 (20) inquiry?
 (21) Q After looking into it the way a reasonable prudent buyer
 (22) and seller would?
 (23) A Done a lot of work with railroads and prudent -- prudent
 (24) people involved there know that there can be some very severe
 (25) contamination in railroad rights-of-ways. Prudent buyers and
 (26) sellers where they have materials that are frequently

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- (1) transported on railroads that may leak and spill probably
 (2) still would make inquiry by having professionals take a look
 (3) So that's why I was trying to distinguish whether you meant
 (4) that was something that they would subsume or whether that's a
 (5) part of the process
 (6) Q I'm not talking about railroads. Mr. Dorchester, I'm
 (7) talking about property in the oil spill area
 (8) A Okay
 (9) Q Did you conclude that a reasonable buyer and seller after
 (10) making diligent inquiry would conclude that as of 1992 I
 (11) think it is that oil would no longer be a concern for real
 (12) estate purposes?
 (13) A Our -- our estimates went out into 1993 and from the
 (14) information that I have available to me I believe it would be
 (15) reasonable that prudent buyers and sellers could buy the
 (16) property without any special concern from the Exxon Valdez oil
 (17) spill
 (18) Q And you were in court for some of the scientific testimony
 (19) that took place here?
 (20) A That's correct
 (21) Q You listened to Mr. Kocan and to Mr. Pearson true about
 (22) herring?
 (23) A No I did not
 (24) Q Did you listen to Mr. Gilfillan and Mr. Peterson?
 (25) A Did not hear Mr. Peterson. I was here for I believe all

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- (1) of Mr. Gilfillan -- Dr. Gilfillan's --
 (2) Q Did you listen to any of the Plaintiffs' scientists?
 (3) A I don't believe I got here that early
 (4) Q So you're not aware the extent to which this \$3.5 million
 (5) is that what it was fee that your company got for the work
 (6) that you did is that the right figure?
 (7) A I think if -- if everything is summed including expenses
 (8) it could be three and a half to four million range
 (9) Q Now you said that you had become involved with a lot of
 (10) different Plaintiffs but it is true isn't it that the
 (11) largest single private property owner in the cases that you --
 (12) the largest single property owners in the cases that you've
 (13) studied are in this courtroom?
 (14) A The first part of that you said I've been involved with a
 (15) lot of Plaintiffs?
 (16) Q Yes you have been defending Exxon as an expert on real
 (17) estate matters for more than just the Plaintiffs in this
 (18) courtroom you said on direct am I right?
 (19) A That is totally wrong. I'm here in a completely objective
 (20) and unbiased sense. I'm not defending anybody. I'm here to
 (21) tell the jury what I believe what I studied how I arrived at
 (22) my conclusions
 (23) Q I'll modify my question because my point is a different
 (24) one
 (25) You were retained as an expert in real estate matters to

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- (1) look at more than the Plaintiffs in this case?
 (2) A You're talking about other parties?
 (3) Q That's right
 (4) A That's correct
 (5) Q And this time that you spent was would you agree
 (6) overwhelmingly on the properties presented by the Plaintiffs in
 (7) this case?
 (8) A I'm trying to find a frame of reference for the
 (9) overwhelming. From the time that we began receiving reports
 (10) from the Plaintiffs' experts in this case that is correct
 (11) Prior to that -- and that would have been what about March of
 (12) 1993 -- so a little over a year ago. Prior to that time I
 (13) would say that there were a lot of different things that were
 (14) happening
 (15) Q Now the Plaintiffs in this case represent the largest
 (16) private property owners in Prince William Sound by far?
 (17) A In terms of acreage at least yes
 (18) Q They represent the largest private property owners on the
 (19) Kenai Peninsula by far? The Kenai Fjords?
 (20) A I believe that's correct
 (21) Q Now we had some discussion here in this trial about words
 (22) and what words can mean. Do you believe that the Exxon
 (23) Valdez
 (24) oil spill was one of the world's largest environmental
 (25) contamination accidents?
 (26) A I don't know a frame of reference. I know that there

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- (1) are - if you just state oil spills a number of oil spills
- (2) that are much larger I don't have a frame of reference for
- (3) the word large there It was a big - it was a big accident
- (4) It was a terrible thing
- (5) Q When you were discussing the Exxon Valdez oil spill you
- (6) never referred to this oil spill as one of the world's largest
- (7) environmental contamination accidents did you?
- (8) MR DIAMOND Objection vague as -
- (9) THE COURT Sustained
- (10) MR PETUMENOS I'm sorry I need some help
- (11) THE COURT Sustained sustained The ruling's been
- (12) made move on
- (13) MR PETUMENOS I want to amend the question so I can
- (14) ask it - I was just looking for some guidance that's all
- (15) THE COURT I wasn't going to give it to you
- (16) counsel
- (17) MR PETUMENOS I see I'll try to do my job better
- (18) Judge
- (19) BY MR PETUMENOS
- (20) Q Did you ever use the term in your report in referring to
- (21) the Exxon Valdez oil spill that it was one of the world's
- (22) largest environmental contaminating accidents?
- (23) A I don't recall
- (24) Q However in your resume when describing the experience
- (25) that you have you describe the experience I believe of the

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- (1) Exxon Valdez oil spill as serving as a consultant to the legal
- (2) team handling one of the world's largest environmental
- (3) contamination accidents Isn't that how you describe it in
- (4) your resume?
- (5) A At the time that was written that was actually relating to
- (6) a nuclear case that I'm working on
- (7) Q Showing you counsel what has been marked as Exhibit
- (8) 8296
- (9) would you take a look at the highlighted portion and tell me if
- (10) you think that's true
- (11) A No I don't I believe reading this this probably did
- (12) relate to the Exxon Valdez oil spill
- (13) MR PETUMENOS I have no further questions
- (14) MR STOLL Your Honor I have a few questions but
- (15) could we start tomorrow? I'd like to -
- (16) THE COURT How few?
- (17) MR STOLL I've got about 20 minutes of questions
- (18) THE COURT I'll let you go Don't talk to anybody
- (19) about the case and don't form or express any opinion on it
- (20) until it's submitted to you for deliberation We'll see you
- (21) tomorrow at 8:30
- (22) (Jury out at 1:20 p.m.)
- (23) THE COURT You can step down
- (24) (Witness excused)
- (25) THE COURT All right counsel anything brief we can
- (26) take up?

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- (1) MR PETUMENOS I love this time of day Could we go
- (2) over that question I was going to ask you?
- (3) MR OPPENHEIMER Your Honor -
- (4) THE COURT Well first I'll ask the big question
- (5) MR OPPENHEIMER Perhaps I should move away from the
- (6) podium
- (7) THE COURT How many witnesses are now on the
- (8) Plaintiffs rebuttal list?
- (9) MR OPPENHEIMER I'm going to have to defer because
- (10) we're having trouble figuring it out from the list I believe
- (11) it to be over 18 total
- (12) MR STOLL Your Honor as I advised Mr. Oppenheimer
- (13) last evening we anticipate calling no more than 15 witnesses
- (14) and we listed I believe 17 on our list
- (15) THE COURT You've only got 17 listed now?
- (16) MR STOLL I think that's correct but can I have a
- (17) moment Your Honor?
- (18) MR OPPENHEIMER That's one number I haven't added up
- (19) here Your Honor what we did was to - and the reason we have
- (20) a fairly lengthy document we have - it's an appendix really
- (21) that goes through each witness That's the only thing we could
- (22) think to bring the issue to a head and perhaps Your Honor's
- (23) questions will cause you not to have to read all of them if
- (24) some of them are currently withdrawn
- (25) THE COURT I'm hoping

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- (1) MR OPPENHEIMER I understand
- (2) MR STOLL Your Honor we have listed in the
- (3) communication I sent to Mr. Oppenheimer last - early last
- (4) evening 6:30 something 12 people for sure a possibility of
- (5) possibly as many as five more
- (6) THE COURT Are they listed?
- (7) MR STOLL Yes they're all listed All the names
- (8) are on there I don't believe that anything that's been said
- (9) today changes the names
- (10) THE COURT Do you have that -
- (11) MR STOLL I might also advise that there is at least
- (12) one of the people that we have listed that I know is going
- (13) to -
- (14) MR OPPENHEIMER May I just borrow your list? I
- (15) apologize but all the lists I brought - we have here -
- (16) Your Honor I can give you the list Yeah that's the one from
- (17) last night One two six seven eight nine 10 11 12 13
- (18) 14 15 16 17 18 - I believe it's 19 but it depends In
- (19) some cases we don't know which four of these six would be
- (20) called I'm counting either Cliff or Lucy Groh where there's
- (21) an alternative either Nick or Paula where there's an
- (22) alternative But the fact is this is the most recent list that
- (23) we got and there's no way to tell which of those that are in
- (24) the categories of choice would be chosen but even by the
- (25) smallest count I think it's 19

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- (1) THE COURT Well it's 19 but if one of the Grohs goes
 (2) out -
 (3) MR OPPENHEIMER No that's assuming each case where
 (4) there's a double count we just take one and it's using four
 (5) as a number for counting purposes where they have six
 (6) THE COURT Here's what I'm going to do This is my
 (7) settlement conference technique but I'm going to adapt it for
 (8) you two I'm going to give you half an hour right now I'm
 (9) going to have you go in a room I'm going to have you each
 (10) prepare a list When the lists are down to 17 and you both
 (11) have exactly the same names on your list we'll all know what
 (12) witnesses are going to be called at least proposed to be
 (13) called Then I can start this discussion
 (14) MR OPPENHEIMER Sounds fine
 (15) MR STOLL Fine Your Honor Your Honor could I ask
 (16) one question though?
 (17) THE COURT Yes
 (18) MR STOLL With respect to the Grohs apparently
 (19) there's a death eminent in the family they don't know which
 (20) one is going to be available so I don't know until - their
 (21) basic testimony is going to be - they're the owners of the
 (22) Ellamar the developers and owners of Ellamar subdivision
 (23) project and I won't know frankly until - I think they've
 (24) both been deposed haven't they
 (25) MR FORTIER Just Lucy has Actually just Mrs Groh

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- (1) that I can have him here by Tuesday to testify live for sure
 (2) because of the medication's effect and it's apparently a sinus
 (3) infection so altitude affects him Or I would need the
 (4) Court's discretion to call him by telephone if it became
 (5) necessary or because of the other scheduling in the case to
 (6) call him earlier
 (7) I think it's perhaps premature to make the application
 (8) because I don't know how long we're going to take this week
 (9) and maybe Tuesday will just be fine but if it's not I want to
 (10) alert the Court that I have that problem and I'm trying to get
 (11) a hold of Dr Seldin to tell him how it's likely to come out
 (12) THE COURT I understand I don't think we can do
 (13) anything about it right now This - has the defense's
 (14) estimate of when it's going to rest changed?
 (15) MR DIAMOND Well we anticipated we would be done
 (16) with Mr Dorchester by now The cross went longer than
 (17) anticipated We will still push very much to finish tomorrow
 (18) THE COURT Okay great thank you
 (19) MR OPPENHEIMER Shall I take that back Your Honor?
 (20) THE COURT Please
 (21) MR OPPENHEIMER Please It hopefully will get
 (22) shorter when we return it to you
 (23) THE COURT If we can get below 17 you'll both have
 (24) done a significant public service Anything else?
 (25) MR PETUMENOS You want me to move in exhibits later

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- (1) has been deposed
 (2) MR STOLL But their testimony is going to be
 (3) essentially I think - well similar I don't know exact word
 (4) for word but the point is that they don't - I'd like to count
 (5) them as one I don't know which one -
 (6) THE COURT I'm going to count them as one
 (7) MR PETUMENOS Judge I'd like to let you know about
 (8) a pending problem
 (9) THE COURT Hang on let's see if there's anything
 (10) else to discuss about this problem Is there any point the
 (11) list is there anything else you want to make known to me
 (12) before you go in and prepare your final lists?
 (13) MR OPPENHEIMER No as long as it's understood that
 (14) we do have individual comments I'm sure on those that will be
 (15) on the list
 (16) THE COURT I understand but once we know what
 (17) witnesses are going to be called then I can deal with the
 (18) witnesses
 (19) MR OPPENHEIMER Understood
 (20) THE COURT Go ahead
 (21) MR PETUMENOS I have a problem just with the illness
 (22) of a witness Dr Seldin who is our only expert on rebuttal
 (23) apparently has taken ill and he's well enough to testify but
 (24) perhaps not well enough to fly I will spare you the details
 (25) but they have him on some sort of medication My choices are

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- (1) are you tired or -
 (2) THE COURT I don't know Are we going to have
 (3) controversy about them?
 (4) MR PETUMENOS The cross exhibits I don't know
 (5) Counsel?
 (6) THE COURT Wait actually what you should do is over
 (7) the evening talk about it so that your agreements are clear
 (8) all right?
 (9) MR OPPENHEIMER Your Honor after our half hour
 (10) colloquy should we return and continue to discuss this matter
 (11) with you or do you want to schedule a time?
 (12) THE COURT You should resolve this and you should not
 (13) return But in the event that you can't do that I'll be
 (14) available
 (15) MR OPPENHEIMER Very good
 (16) THE CLERK Please rise This court stands in
 (17) recess
 (18) MR STOLL Your Honor excuse me could we use the
 (19) jury room?
 (20) THE COURT Why do you always do this after I've stood
 (21) up Can you do it in the jury room?
 (22) MR STOLL Can we just the three of us go in the
 (23) jury room
 (24) THE COURT Sure that's what I was suggesting
 (25) (Recess at 1 28 p m)

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- (1) INDEX
(2) CONTINUED DIRECT EXAMINATION OF JOHN D
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- (1) STATE OF ALASKA)
(2) Reporter s Certificate
(3) DISTRICT OF ALASKA)
(6) I Joy S Brauer RPR a Registered Professional
(7) Reporter and Notary Public
(8) DO HERBY CERTIFY
(9) That the foregoing transcript contains a true and
(10) accurate transcription of my shorthand notes of all requested
(11) matters held in the foregoing captioned case
(12) Further that the transcript was prepared by me
(13) or under my direction
(14) DATED this day
(15) of 1994
(21) JOY S BRAUER RPR
Notary Public for Alaska
(22) My Commission Expires 5 10 97

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- (1) EXHIBITS
(2) DX13172-A the video DX14028 Dr Dorchester s
(3) Impairment analysis for this parcel and the other parcels
(4) and DX15552 28 29 30 and 31 the FINSAP reports
(5) for Sleepy Bay LA 20 B and LA 21 offered 7436
(6) 8299 offered 7495
(7) 8310 offered 7497
(9) DX13172-A the video DX14028 Dr Dorchester s
(10) Impairment analysis for this parcel and the other parcels
(11) and DX15552 28 29 30 and 31 the FINSAP reports
(12) for Sleepy Bay LA 20 B and LA 21 received 7436

Look-See Concordance
Report

UNIQUE WORDS 2,579
TOTAL OCCURRENCES
10,639
NOISE WORDS 385
TOTAL WORDS IN FILE
32,589

SINGLE FILE CONCORDANCE

CASE SENSITIVE

NOISE WORD LIST(S)
NOISE NOI

INCLUDES ALL TEXT
OCCURRENCES

IGNORES PURE NUMBERS

WORD RANGES @ BOTTOM
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