

***Exxon Valdez* Oil Spill**

**State Trial Transcript**

**Case Number 3AN-89-2533 civil**

**1994**

**Volume 48 - Volume 53**

**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 ) Wednesday August 31 1994  
 ) 8 30 a m  
 (6) )  
 (8) VOLUME 48 Pages 7566 through 7749  
 (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 8 35 a m )  
 (3) (Call to Order of the Court)  
 (4) MR STOLL Good morning Your Honor  
 (5) THE COURT Good morning  
 (6) MR STOLL Good morning ladies and gentlemen  
 (7) CROSS EXAMINATION OF JOHN D DORCHESTER JR  
 (8) BY MR STOLL  
 (9) Q Mr Dorchester there were three things that you said in  
 (10) the last two days that in particular sort of stuck in my mind  
 (11) Of course I represent the Kodiak Island Borough and you got  
 (12) my attention in your report when you thought that the just  
 (13) compensation as you put it for Kodiak Island Borough was  
 (14) about \$2 25 an acre  
 (15) MR DIAMOND Is that a question Your Honor or part  
 (16) of Mr Stoll s closing argument given a week in advance? I  
 (17) object to the statement  
 (18) THE COURT Thank you counsel It s out the window  
 (19) counsel but please ask questions  
 (20) BY MR STOLL  
 (21) Q In the areas that you ve lived Mr Dorchester Tulsa  
 (22) Chicago and Scottsdale Scottsdale s sort of the more affluent  
 (23) portion of Phoenix outside of Phoenix?  
 (24) A Portions are portions aren t  
 (25) Q There s no intertidal zones in those areas is there?

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(1) A That s correct  
 (2) Q And they re not in a situation where the value of the land  
 (3) in those communities gets value from the wildlife or from the  
 (4) fish that adjoin the property isn t that correct?  
 (5) A That s correct  
 (6) Q And I d like to talk a little bit about Kodiak You  
 (7) mentioned that there is 6800 people you believed in the City  
 (8) of Kodiak Do you know what the rest of the population of  
 (9) Kodiak Island Borough is?  
 (10) A I don t recall off the top of my head I think it s  
 (11) perhaps in the 8 000 range plus or minus  
 (12) Q Would it surprise you if you knew that there was testimony  
 (13) earlier that it was about 15 000?  
 (14) A No that is correct I was thinking more local not the  
 (15) entire borough  
 (16) Q The economy do you know what the economy of Kodiak is  
 (17) based upon?  
 (18) A I think it s based on a number of things The principal  
 (19) portion of the - of the economy in Kodiak is pretty well  
 (20) driven by fishing It s - I think most people would call  
 (21) Kodiak a fishing economy But there is also substantial income  
 (22) there that is government income from the Coast Guard base  
 and  
 (23) from other types of operations as well  
 (24) Q And prior to - at least prior to 1989 with the little -  
 (25) the general dip in economy in Alaska It wasn t as severe in

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- (1) Kodiak but Kodiak had a fairly stable economy prior to 1989  
 (2) would you agree with that statement?  
 (3) A Not quite I think you said a little dip in the economy  
 (4) There were pretty clear signs from part of the research that we  
 (5) had that property values in various places in the state dropped  
 (6) as much as 35 to 70 percent in some circumstances and I  
 (7) wouldn't call that a little dip in the economy I would agree  
 (8) that Kodiak did not seem to have the same impact of the  
 (9) economic downturn of the '86 and latter part of the decade  
 (10) period that other portions of the state did  
 (11) Q I was commenting about the small downturn involved with -  
 (12) with Kodiak not the rest of the state because the rest of the  
 (13) state there's no question that it was impacted but prior to  
 (14) 1989 would you agree - at least prior to 1989 would you  
 (15) agree that Kodiak had a reasonably stable economy?  
 (16) A I think in general terms relative to other portions of the  
 (17) state yes To say that it was stable - fishing varied from  
 (18) year to year prices of fish varied so when you say stable I  
 (19) don't want you to think that's a level line if I agree with  
 (20) you Stable means relative to other parts of the state it  
 (21) probably didn't have the same types of peaks and valleys that  
 (22) other portions of the state did  
 (23) Q Thank you And when did you first - you first went to  
 (24) Kodiak in 1992?  
 (25) A That's correct my first trip there was 1992

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- (1) Q Was that - I think Mr MacSwain testified that with  
 (2) respect to this engagement that was the first time that he had  
 (3) gone to Kodiak Did you go with Mr MacSwain?  
 (4) A That was not correct at all Mr MacSwain has been to  
 (5) Kodiak many many times over his 25 years as a professional  
 (6) appraiser in the state  
 (7) Q No I said with respect to this engagement  
 (8) A Oh I apologize I'm uncertain if this was his first trip  
 (9) to Kodiak in this engagement But the second part of your  
 (10) question yes he was with me when I made my trip there in '92  
 (11) Q And you made a comment or you had a graph or something  
 (12) as  
 (13) I recall that you said there was six sales in Prince William  
 (14) Sound of over ten acres in a period of some years do you  
 (15) recall that testimony?  
 (16) A I recall that  
 (17) Q And did you know that there were - during the same time  
 (18) period there was well over 50 sales of ten acres at least ten  
 (19) acres in Kodiak Island Borough?  
 (20) A I haven't counted them but I am aware that there were a  
 (21) number of sales there yes  
 (22) Q And several of those involved hundreds of acres and a few  
 (23) even thousands of acres Isn't that correct?  
 (24) A Certainly hundreds of acres You might have to remind me  
 (25) on the thousands as to which ones you're referring to  
 (26) Q And are you aware - you're familiar with the Nature

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- (1) Conservancy aren't you?  
 (2) A Yes I am  
 (3) Q And are you familiar with the recent offer that was turned  
 (4) down by the Ayakulik Native Corporation for a million dollars  
 (5) for 575 acres about \$1700 an acre by the Nature Conservancy  
 (6) in  
 (7) Kodiak?  
 (8) A When you say recent what are you referring to?  
 (9) Q In the last year  
 (10) A 1993 1994 time frame?  
 (11) Q Yes um hum?  
 (12) A I've heard that there was something I'm not familiar with  
 (13) what occurred there  
 (14) Q I see You didn't investigate that?  
 (15) A Well that was pretty far long gone after the oil spill  
 (16) and its effects in Kodiak I'm just aware that there was some  
 (17) discussion and I can't - I can't tell you anything beyond  
 (18) that  
 (19) Q Now there's no glaciers in Kodiak you agree with that?  
 (20) A In the conventional sense no There's some pretty good  
 (21) snow up in the mountains part of the time  
 (22) Q In the wintertime?  
 (23) A Absolutely but you can see snow there in the summer in  
 (24) portions of it as well  
 (25) Q None of it is on any Kodiak Island Borough parcels that are  
 (26) subject to this litigation isn't that correct?

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- (1) A I believe that's correct  
 (2) Q Now with respect to the appraisals that were done for the  
 (3) municipalities in this litigation you made some statement  
 (4) about the Plaintiffs have changed the boundaries or the -  
 (5) something like that Kodiak has never changed the boundaries  
 (6) of its parcels has it?  
 (7) A No they haven't it's been -  
 (8) Q Thank you And there were some village municipalities that  
 (9) were involved and those also never changed their boundaries  
 (10) have they?  
 (11) A I believe that's correct  
 (12) Q And Carlson Mr Carlson the assessor for Kodiak Island  
 (13) Borough never did a mass appraisal of the KIB property did  
 (14) he in this - in this litigation for the parcels that are  
 (15) involved in this litigation?  
 (16) A I would have some difficulty with that In terms of mass  
 (17) appraising I think what Mr Carlson did was not too far from a  
 (18) technique of mass appraising that we have used ourselves in  
 (19) the  
 (20) past but you could argue that it wasn't He did at least  
 (21) show an individual value for each of the properties that he  
 (22) dealt with  
 (23) Q And mass appraisal as you pointed out in answer to Mr  
 (24) Petumenos question is an accepted method accepted by the  
 (25) Appraisal Institute and the Appraisal Foundation and in  
 (26) accordance with USPAP isn't that correct?

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- (1) A That s correct I have no problem with the basic concept  
 (2) of the mass appraisal It s the question of the depth and the  
 (3) application of what you - what you develop by it  
 (4) Q And Bill Roberts and Larry Shorett who did the appraisals  
 (5) for the village municipalities when they did a damage  
 (6) analysis they - they found -  
 (7) MR DIAMOND Your Honor I m going to object I  
 (8) believe that that report - those claims are out of this case  
 (9) If Mr Stoll wants to open up a door here I think we probably  
 (10) ought to discuss it at the bench  
 (11) MR STOLL I m just asking if they were -  
 (12) (Bench Conference on the Record)  
 (13) MR DIAMOND The Shorett and Roberts report was a  
 (14) report estimating damages for the villages for which we have a  
 (15) settlement and agreement that Roberts is not part of this case  
 (16) nor is his report part of this case  
 (17) MR STOLL The problem I have Judge is that they  
 (18) with another witness asked if Roberts was - had made a  
 (19) statement about there being no damage It was MacSwain and  
 (20) I  
 (21) want to elicit from this witness that Roberts did define  
 (22) damages Otherwise I m faced - this one question  
 (23) Otherwise I m faced with the situation of having - I mean  
 (24) they were complaining yesterday about the rebuttal case You  
 (25) want me to call Roberts I ll have to call Roberts and you  
 (26) know lay it on but I thought you wanted me to cut down my

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- (1) witnesses  
 (2) MR DIAMOND Remember Mr Roberts was the subject of  
 (3) a lengthy voir dire voir dire out of the presence of the jury  
 (4) by Mr Stoll of Mr MacSwain We held a hearing as to whether  
 (5) that would be admissible Mr Stoll spent about ten minutes  
 (6) questioning Mr MacSwain on the subject of Mr Roberts and his  
 (7) reports Mr MacSwain testified at length about those  
 (8) probably not to the satisfaction of Mr Stoll because when he  
 (9) finished the voir dire you said he was allowed to pursue it  
 (10) He chose not to That was with the witness to whom the  
 (11) statement was made by Mr Roberts the witness who quoted  
 (12) Mr  
 (13) Roberts This witness is a different witness  
 (14) MR STOLL He knows that there was a damage claim  
 (15) There was a damage value to the property That s all I want to  
 (16) determine  
 (17) THE COURT What do you want -  
 (18) MR DIAMOND He wants to bring in a hearsay appraisal  
 (19) to -  
 (20) MR STOLL I m not going to bring an appraisal -  
 (21) THE COURT All he wants to do is say Roberts found  
 (22) damage and that s it limited to that  
 (23) MR STOLL That s it that s all  
 (24) MR DIAMOND That s hearsay Where s Mr Roberts?  
 (25) MR STOLL You want me to do it -  
 (26) THE COURT Do it in rebuttal

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- (1) MR STOLL I ll bring Roberts in in rebuttal then  
 (2) MR DIAMOND Okay  
 (3) MR STOLL Okay what?  
 (4) THE COURT Okay  
 (5) MR STOLL That s what we ll do  
 (6) THE COURT You skip it and bring it up in rebuttal  
 (7) MR STOLL No I can ask the question - just a  
 (8) minute Okay what?  
 (9) MR DIAMOND Okay bring it up in rebuttal We ll  
 (10) take a shot and we can cross-examine Mr Roberts This is  
 (11) without -  
 (12) THE COURT I hear you counsel  
 (13) MR DIAMOND We have other objections  
 (14) THE COURT I figured you would I never get them all  
 (15) at once  
 (16) (End of bench conference)  
 (17) BY MR STOLL  
 (18) Q Now when Mr Carlson did his appraisals of the 13  
 (19) individual parcels of Kodiak Island Borough he used various  
 (20) comparables for each of the parcels isn t that correct?  
 (21) A Yes it is  
 (22) Q And he determined - he determined a - the comparables  
 (23) were - strike that  
 (24) The comparables involved raw land correct?  
 (25) A That s - I believe they re all raw land transactions If

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- (1) not he treated them as though they were  
 (2) Q I think the - the exhibit will show that they were but at  
 (3) any rate then he figured out a value per acre correct? I  
 (4) mean by dividing the number of acres the price by the number  
 (5) of acres of the comparable isn t that correct?  
 (6) A I m not sure which value you re talking about. You re  
 (7) talking about a value -  
 (8) Q Well he determined -  
 (9) A - for the comparable?  
 (10) Q The comparable?  
 (11) A That s correct  
 (12) Q And then he made an adjustment for the size of the - he  
 (13) made several adjustments in that to determine whether that  
 (14) property was comparable isn t that correct?  
 (15) A Yes it is  
 (16) Q And one of the things that he used was the size of the  
 (17) parcel isn t that correct?  
 (18) A That s correct  
 (19) Q And then sometimes because it was a smaller parcel he  
 (20) made  
 (21) an adjustment in excess of 50 percent of the price per acre  
 (22) isn t that correct?  
 (23) A Yes it is  
 (24) Q Now you made a comment that Mr Carlson s appraisals  
 (25) didn t take in or didn t account for stigma and his - his  
 (26) appraisals were a baseline appraisal as of March 23 1989

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- (1) Isn't that correct?
- (2) A Excuse me this is Mr - Mr Carlson's appraisals?
- (3) Q Yes
- (4) A I missed the other word baseline appraisal? I'm sorry
- (5) Q Well let me strike the word baseline His appraisals were
- (6) as of March 23 1989 correct?
- (7) A That's correct
- (8) Q The day before the spill?
- (9) A That's correct
- (10) Q And so there wouldn't be any stigma if there was a stigma
- (11) the day before the spill because the spill hadn't occurred at
- (12) that point right?
- (13) A I think you're asking me two questions and I'll give you a
- (14) yes but let me qualify it if I may It's true that the value
- (15) that Mr Carlson reflects as of the day prior to the spill
- (16) would reflect a value of the properties as though they were
- (17) unaffected by the oil
- (18) Q Thank you
- (19) A But in doing that in his appraisal he had to use
- (20) comparable sales of properties or he did use sales of
- (21) properties that occurred after the spill So in his appraisal
- (22) he has the opportunity in the handling of the comparables that
- (23) he used number of the sales which occurred in 1989 during the
- (24) year of the oil spill he would have had an opportunity to
- (25) adjust or reflect or do something to those sales if he felt

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- (1) that there was an effect
- (2) In fact what he did for the 1989 sales was he said that
- (3) the 1989 sales from - from an appraisal standpoint were higher
- (4) than the values would have been prior to the spill and that's
- (5) the basis of my statement that his appraisal did not reflect
- (6) stigma
- (7) Q Well his appraisal had a number of - the comparables had
- (8) a number of adjustments in it didn't it?
- (9) A Yes one of them was that particular adjustment
- (10) Q Now if there's hazardous substance on a piece of property
- (11) by law the seller has to disclose that don't they?
- (12) A If there - if there's a feature that is a significant
- (13) representation - or a significant factor of any sort I
- (14) believe they have to make that representation
- (15) Q And are you familiar with a purchase by the U S Fish &
- (16) Wildlife of three recreational lots they wanted to add to a
- (17) park? This was a sale that went through that actually began
- (18) before the spill but was completed after the spill?
- (19) A I'm familiar that there were several yes
- (20) Q And even though this was going to become limited use
- (21) property as part of this park the Fish & Wildlife had to
- (22) purchase those lots on a recreational lot value basis isn't
- (23) that correct?
- (24) A That's correct As normal for a government acquisition
- (25) they had to appraise the property at its market value in the

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- (1) private sector even though it might be added to a park
- (2) Q And are you aware that before the Fish & Wildlife completed
- (3) that sale they had engineers and scientists conduct a
- (4) environmental audit on those properties to make sure that there
- (5) was no oil residue remaining on those properties?
- (6) A I'm not familiar with the extent of any studies they made
- (7) Q Would you agree that the average person acquiring
- property
- (8) other than a - maybe the government would not have the
- (9) resources normally or would not be interested in extending
- (10) the resources at least in doing an environmental full blown
- (11) phase one or phase two particularly level two environmental
- (12) audit before purchasing property?
- (13) A Well as to part of your question I can certainly agree
- (14) You said or would want to We looked at - in the Kodiak
- (15) area at a number of transactions that did occur after the oil
- (16) spill some of which did involve properties that the purchaser
- (17) knew to have been oiled and they didn't have those types of
- (18) audits performed
- (19) Q You're familiar with the so called bundle of rights that
- (20) are inherent in the ownership of real estate?
- (21) A Yes I am
- (22) Q And there's been books written by the Appraisal Institute
- (23) on these bundle of rights?
- (24) A That's correct
- (25) Q And those rights include the right to use the real estate

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- (1) correct?
- (2) A That's correct
- (3) Q And to sell it if you want to sell it?
- (4) A That's correct
- (5) Q Not to sell it if you don't want to sell it?
- (6) A Sure
- (7) Q To give it away?
- (8) A Yes
- (9) Q And if you're adjoining water what's called the littoral
- (10) rights?
- (11) A You have littoral rights yes
- (12) Q Would you explain to the jury what littoral rights are?
- (13) A I'm sure not an expert I think this is a legal question
- (14) and it's a complicated legal question but in the same sense
- (15) that someone owns - who owns land away from an ocean body
- say
- (16) around lakes and streams has what's called - or rivers has
- (17) what's called riparian rights which means certain rights for
- (18) those that about those types of water bodies Littoral rights
- (19) are the rights that go along with people who own land on - on
- (20) an oceanfront or other type of sea or ocean body as I
- (21) understand it
- (22) Q And a part of those rights are the right to be able to
- (23) get - if there's fish or other marine animals in that body of
- (24) water to fish for them and get them out of that water isn't
- (25) that correct? Isn't that your understanding?

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- (1) MR DIAMOND Your Honor I'll object as calling for  
 (2) legal conclusions  
 (3) MR STOLL I'm asking for his understanding  
 (4) THE COURT I'll allow him to answer  
 (5) BY MR STOLL  
 (6) Q Isn't that correct?  
 (7) A Yes and again like all private rights subject to certain  
 (8) controls Zoning obviously is a land use control There can  
 (9) be other kinds of controls on the use of nearby waters  
 (10) Q And if - if a property is - would you agree with the  
 (11) general statement that if a property is based upon its  
 (12) proximity to a natural resource and that natural resource goes  
 (13) away or disappears that the value of that property might  
 (14) diminish? Would you agree with that statement?  
 (15) A I missed the first part You said if a property - are you  
 (16) talking about a property's value?  
 (17) Q Yes a property's value excuse me  
 (18) A Yes I think it's fair to say that location if you will  
 (19) is important to the valuation of real estate and if something  
 (20) affects the value of that location it could have an effect on  
 (21) the value of the given property  
 (22) Q Thank you And in appraising the fair market value of  
 (23) property there's certain assumptions an appraiser utilizes  
 (24) isn't that correct?  
 (25) A Well you might need to -

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- (1) Q I'm sorry well let me be more specific  
 (2) A Thanks  
 (3) Q They - the appraiser I think you mentioned one with Mr  
 (4) Petumenos yesterday about the buyer and seller being  
 typically  
 (5) motivated I think there was some discussion about that or  
 (6) maybe a variant of that? That's - at least that's one of the  
 (7) assumptions isn't that correct?  
 (8) A That the buyer and seller are typically motivated?  
 (9) Q Yes  
 (10) A Yes it is  
 (11) Q And another assumption is that there is a - that the  
 (12) property to be sold is exposed on the market for a reasonable  
 (13) period of time for property of that type? Isn't that another  
 (14) assumption?  
 (15) A I'm not sure you stated that quite correctly but let me -  
 (16) let me just - I don't think I'll disagree with you I just  
 (17) want to make sure we say it the same way  
 (18) Q All right fine  
 (19) A It doesn't mean that the individual property that's being  
 (20) appraised must be put on the market and advertised for sale or  
 (21) marketed for a period of time but in estimating the market  
 (22) value you would say let's estimate a value as though the  
 (23) property had had an opportunity for proper marketing and  
 proper  
 (24) exposure to those who would normally buy that property  
 (25) Q Right And another assumption that the appraiser is

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- (1) required to make is that it is not a sale under compulsion the  
 (2) seller is not compelled to sell that's an assumption that is  
 (3) required isn't that correct?  
 (4) A That's correct but usually I think it's - it's stated a  
 (5) little bit different I think it says undue duress or undue  
 (6) compulsion Any buyer clearly has to have a motivation or  
 (7) they're not going to part with money  
 (8) Q Oh buyer okay go ahead  
 (9) A So a buyer will - will say I'm going to sit on my  
 (10) billfold until I have sufficient motivation and reason to part  
 (11) with my dollars so it's not to say there won't be some strong  
 (12) motivation but undue a force something that someone cannot  
 (13) walk away from I guess is the flip side of that  
 (14) Q My question was really to - you can say the same thing  
 (15) about the buyer but the seller is also not under any undue  
 (16) compulsion isn't that correct?  
 (17) A That's correct same concept would apply to the seller  
 (18) Q It's not a - not a so-called liquidation sale or like a  
 (19) bankruptcy sale or something like that isn't that correct?  
 (20) A That is correct  
 (21) Q And when the appraiser does a fair market value of a parcel  
 (22) of property that's being sold or when the appraiser is  
 (23) determining the fair market value of a parcel of property he  
 (24) is appraising that parcel He is not assuming - he's not to  
 (25) assume that all property in the region or that area of town is

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- (1) being liquidated at the same time isn't that correct?  
 (2) A Generally that's correct There's some technical reasons  
 (3) that I could disagree with you but in the typical appraisal  
 (4) when someone appraises a single property I think what they do  
 (5) is look at the frequency of sales that is fairly common for  
 (6) that time and assume that that wouldn't change If they owned  
 (7) a lot of properties it wouldn't be to their advantage to sell  
 (8) them all at one time  
 (9) Q But the appraiser would look at if you owned a lot of  
 (10) properties he'd look at each property and appraise that  
 (11) property as if that - what is the fair market value of that  
 (12) particular parcel as opposed to if this person was going to  
 (13) dump everything on the market at one time isn't that correct?  
 (14) A Yes but the point I'm making is that if you have an owner  
 (15) that you're appraising all of their lands then the question  
 (16) becomes would they all sell in one day that - that does  
 (17) become a question that an appraiser might deal with  
 (18) MR STOLL Could we have on the Trial-Link please  
 (19) DX10255?  
 (20) BY MR STOLL  
 (21) Q I'd like to turn to your appraisal Mr Dorchester This  
 (22) exhibit DX10255 contains the comparables I think you  
 (23) testified yesterday or the day before the comparables that you  
 (24) utilized in determining the market value of the shoreline areas  
 (25) of - what you called limited use property of the Plaintiffs

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- (1) correct?
- (2) A That is correct
- (3) Q Now in the first place with respect to these - you ve
- (4) got only three private transactions and with respect to these
- (5) first two those two properties are located in Palmer are they
- (6) not?
- (7) A Probably a little closer to Wasilla
- (8) Q Okay Anyhow and those properties those two parcels at
- (9) least portions of those properties are underwater isn t that
- (10) correct?
- (11) A Portions are on occasion These are - these are
- (12) properties that can be used for what we ve called limited use
- (13) purposes You can do hunting you can do other - other types
- (14) of outdoor activities there but they re - a portion of one of
- (15) the properties is developable developable but the bulk of
- (16) them are not developable properties in the normal sense
- (17) Q And this one on Point Possession now that - that s not
- (18) really a transaction that went through is it?
- (19) A No it is not
- (20) Q And the figure that you ve got here that is a - that s an
- (21) appraisal that somebody did isn t that right?
- (22) A Yes it is
- (23) Q And the offer there was an offer on this property though
- (24) right?
- (25) A I m not certain

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- (1) Q Well do you recall that there was an offer that was
- (2) something in excess of \$700?
- (3) A I ll give you a qualified yes If I could explain what my
- (4) difficulty is?
- (5) Q Surely
- (6) A I ve had an opportunity to both interview the broker who
- (7) has the listing on this property and to hear the testimony of
- (8) Professor Green Professor Green described I believe what he
- (9) said were two previous escrows and a current escrow
- (10) indicating
- (11) that there were three offers
- (12) My understanding is that from talking to the listing broker
- (13) on this property that there was dialogue at some time after a
- (14) 1986 appraisal on this property for the owner at \$500 per
- (15) acre There was discussion with several parties about a
- (16) possible purchase of the property I don t believe a contract
- (17) was ever drawn I never - from the broker
- (18) He indicated to me there was not one No money ever
- (19) exchanged hands so there certainly couldn t have been an
- (20) escrow in the conventional sense and he recently confirmed
- (21) with my associate in this work Steve MacSwain that although
- (22) he had had discussions recently with someone who expressed an
- (23) interest in the property again there was no offer no escrow
- (24) or anything of that nature
- (25) So I m sorry to equivocate on the offer but in terms of

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- (1) whether the discussions that have occurred on this property
- (2) ever really matured to the point that they could fully be
- (3) called an offer
- (4) Q And the offer was in excess of \$4 million for that
- (5) property?
- (6) MR DIAMOND I object as mischaracterizing he just
- (7) said there wasn t an offer
- (8) THE COURT Sustained sustained
- (9) BY MR STOLL
- (10) Q Now you ve got here certain public purchases and the only
- (11) one that is in Kodiak is the Salomie Creek isn t that
- (12) correct?
- (13) A Yes it is
- (14) Q And so this one sold for nearly \$800 an acre is that
- (15) correct?
- (16) A That s correct
- (17) Q And you didn t mention yesterday but you re aware first
- (18) of all that was not - didn t face on any water whatsoever
- (19) isn t that correct? It was not on oceanfront property?
- (20) A Well you said no water at all I think there s a stream
- (21) that runs right through there
- (22) Q Okay there s a little stream excuse me?
- (23) A Well that s water
- (24) Q Okay there s no - there s no oceanfront though is that
- (25) correct?

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- (1) A That s correct This is back a ways from the ocean
- (2) Q A few miles back?
- (3) A Don t know that it s quite that far But it s not right on
- (4) the ocean
- (5) Q And you didn t mention yesterday but are you aware that
- (6) this property that sold for nearly \$800 an acre has very
- (7) substantial contamination to it does it not?
- (8) A For - for purposes of other development possibly yes
- (9) but it was purchased - it has for a long time been a rifle
- (10) range for that type of use it - it has exactly what you
- (11) would expect on a rifle range and that is the things that fall
- (12) out when you shoot rifles It was purchased to - to make
- (13) certain that it could be used as a rifle range for the citizens
- (14) of the area
- (15) Q Well it s a little more than a rifle range Isn t it -
- (16) wasn t it a military range that used a little more than rifles
- (17) on it? I mean there s some big gunnery shells and things like
- (18) that and there was some concern about unspent shells and
- (19) things
- (20) of that - in that area?
- (21) A You d have to call those real big rifles
- (22) Q Big rifles okay
- (23) A Certainly other types of ordnance a shooting range
- (24) Q And I guess - and you and your comparables here - this is
- (25) the KIB one - you didn t put down the Seal Bay and Tonki Cape

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- (1) A That s correct I did not This report was – the report  
 (2) that these were taken from I believe was produced prior to  
 (3) the time that that transaction even closed  
 (4) Q Well this – this graph that you ve done here was done  
 (5) this year though wasn t it?  
 (6) A Sure taken from our May 1993 report  
 (7) Q And in the Seal Bay transaction that sold for about \$950  
 (8) an acre isn t that right? You divide the total price by the  
 (9) number of acres involved?  
 (10) A And you re saying forget the types of land just divide  
 (11) total acres into total price?  
 (12) Q Yes  
 (13) A That would be correct  
 (14) Q And that over 60 percent of – of that property was what s  
 (15) called Tonki Cape which is – I will agree with you there  
 (16) there is a mountain there on – on Kodiak isn t that correct?  
 (17) A Yes there is  
 (18) Q Now in your appraisals – let me say one or thing about  
 (19) this This is – the rest of these things that you used here  
 (20) are so-called exchanges including these exchanges in the  
 (21) Arctic Circle?  
 (22) A When you say I used the exchanges actually what I did is I  
 (23) used the economic reasoning as to land that was a part of these  
 (24) various what we call market transactions  
 (25) Q And none of these properties or every one these properties

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- (1) are in Kodiak are they?  
 (2) A None of the others that – other than the Salome Creek –  
 (3) are located in the Kodiak area  
 (4) Q You can take it down Now you – you actually appraised  
 (5) only three of the 13 Kodiak Island Borough parcels that are  
 (6) involved in this litigation isn t that correct?  
 (7) A We – we looked at each of the KIB properties and had to  
 (8) make our evaluations as to whether or not there was any  
 (9) economic effect of the oil spill Ultimately three of them  
 (10) were selected as valuation parcels because we believed that  
 (11) there was some degree of economic impairment  
 (12) Q The answer to my question is that there were only three of  
 (13) the 13 were actually appraised by you is that correct?  
 (14) A I just want to make certain we re together on the word  
 (15) appraised It s not to say we forgot We actually did do an  
 (16) appraisal analysis on three properties  
 (17) Q I m not suggesting Mr Dorchester you forgot I m just  
 (18) saying that there was only three of them the appraisal use  
 (19) the phrase is a term of art under the Appraisal Institute is  
 (20) it not?  
 (21) A Yes yes it is  
 (22) Q And you only did three appraisals three parcels of the  
 (23) Kodiak Island Borough property isn t that right? \_  
 (24) A Yes that same term of art as far as the Appraisal  
 (25) Institute means consider as well as to value So I just

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- (1) wanted to make sure we were – we were on the same  
 wavelength  
 (2) Q And you found that there was based upon the SCAT oiling  
 (3) maps you found that oil was reported on five of the parcels  
 (4) correct? You determined that there was no economic  
 impairment  
 (5) on two of those parcels?  
 (6) A I think I m guilty of doing something I did yesterday with  
 (7) Mr Petumenos I listened too closely But parts of the  
 (8) question did we base our analysis on the SCAT maps? Yes in  
 (9) part From that did the SCAT maps indicate that there was  
 (10) some degree of oiling on other than the three? The answer is  
 (11) yes Did I answer your question?  
 (12) Q I think you did And you concluded that unsurveyed  
 (13) segments were unoiled segments isn t that correct?  
 (14) A No  
 (15) Q All right His deposition – you had your deposition taken  
 (16) on January 25 of this year?  
 (17) A I believe that s correct  
 (18) MR DIAMOND Let me read it before you publish it  
 (19) MR STOLL Okay  
 (20) MR DIAMOND Do you know what volume number that is?  
 (21) MR STOLL Yeah it s volume six Here I ll just  
 (22) give it to you  
 (23) MR DIAMOND Volume six?  
 (24) MR STOLL Here  
 (25) MR DIAMOND I d like to read it before you –

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- (1) MR STOLL Fine  
 (2) MR DIAMOND I object to the use of this as  
 (3) impeaching it s not  
 (4) (Bench Conference on the Record)  
 (5) THE COURT Why isn t it impeaching?  
 (6) MR DIAMOND Because the question he was asked –  
 (7) THE COURT Don t type Okay go ahead  
 (8) MR DIAMOND – is different than the question he was  
 (9) asked in deposition and the answer he gave  
 (10) THE COURT It s impeaching material Go ahead  
 (11) (Bench conference concluded)  
 (12) BY MR STOLL  
 (13) Q With regard were you asked this question With regard to  
 (14) the oiling summaries or surveys or oiling surveys which you  
 (15) reviewed did you conclude that unsurveyed segments were  
 (16) unoiled segments?  
 (17) Answer That is the way that they were treated yes  
 (18) Question That s the way they were treated in your report  
 (19) If they showed unsurveyed you considered them unoiled is  
 that  
 (20) correct?  
 (21) Answer That s correct  
 (22) Is that right?  
 (23) A Yes it is I gave you a no just a moment ago Let me  
 (24) explain the difference Could you put that back up so I could  
 (25) look – look at it?



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- (1) Q Surely  
 (2) A You see here --  
 (3) Q Just a minute let me see --  
 (4) A When it stops  
 (5) Q Go ahead Sorry  
 (6) A Said did you conclude that they were unoiled segments I  
 (7) said that s the way they were treated I didn t say that we  
 (8) said that they were unoiled There s I think even a more  
 (9) fundamental issue here than just this statement As we sit  
 (10) here as you very well know after this deposition I was given  
 (11) a very sizable amount of oiling information by the Plaintiffs  
 (12) As I told you at the deposition I was not going to restrict my  
 (13) analysis of oiling only to those things that I had as of that  
 (14) deposition I ve also asked and continuously had sought  
 (15) information from the Plaintiffs on any specific oiling  
 (16) information that I could be given  
 (17) We did receive additional information and I have considered  
 (18) that information so to say that the oiling summaries or oiling  
 (19) surveys were either all that we considered or the only way that  
 (20) we treated the information would be incorrect and that s the  
 (21) reason I just gave you a no  
 (22) Q Well let me ask you this question The -- this was taken  
 (23) in January of 1994 correct?  
 (24) A Yes it is  
 (25) Q And that was after all what s called discovery was

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- (1) completed other than the discovery involving the experts  
 (2) isn t that correct?  
 (3) MR DIAMOND I m object as mischaracterizing I  
 (4) don t think there s a basis for the question Your Honor If  
 (5) you want me to approach I ll explain --  
 (6) THE COURT The objection s sustained You can ask  
 (7) another question counsel  
 (8) BY MR STOLL  
 (9) Q Let me ask this question Prior to your deposition taken  
 (10) there were virtually all of the Plaintiffs whether they were  
 (11) in this court or some other court had their depositions taken  
 (12) isn t that correct? Including people on Kodiak?  
 (13) A I -- I don t know I ve never looked to see that I just  
 (14) don t know  
 (15) Q Well you know that there was -- there were many many  
 (16) depositions taken by the lawyers for Exxon?  
 (17) A Yes Your question was all of the Plaintiffs in this  
 (18) case I guess I was thinking of all the people who have  
 (19) talked but more technically I guess I am aware that  
 (20) depositions have been taken of officials of the Kodiak Island  
 (21) Borough  
 (22) Q And those were taken as well as many residents of Kodiak  
 (23) long before January 1994 isn t that correct?  
 (24) A I don t know time frames Certainly many depositions have  
 (25) been taken prior to mine

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- (1) Q And the -- we asked before your deposition to get all of  
 (2) the Veco reports on oiling didn t we?  
 (3) MR DIAMOND Your Honor there s no basis to question  
 (4) the witness on this  
 (5) THE COURT Sustained Objection s sustained  
 (6) BY MR STOLL  
 (7) Q Did you ask Mr Dorchester for the Veco reports from Exxon?  
 (8) A You re talking about the Veco reports that the Plaintiffs  
 (9) furnished to me after my -- my deposition?  
 (10) Q Well we didn t get them until then but right  
 (11) A Just trying to establish what you re talking about  
 (12) Q Yeah Did you ever ask Exxon for their internal -- the  
 (13) reports they got from Veco?  
 (14) MR DIAMOND Your Honor assumes Exxon got reports  
 (15) from Veco assumes facts  
 (16) THE COURT Change the question counsel  
 (17) BY MR STOLL  
 (18) Q Did you ever request from Exxon Veco reports of oiling?  
 (19) A I don t recall having made a specific request as to Veco  
 (20) records What I did do was make a request as to information  
 (21) that would be available  
 (22) Q And so you -- you had the information that Exxon gave you?  
 (23) A Well that was available to us through the various  
 (24) processes I don t know how -- how else to answer it  
 (25) Q Now one of the parcels that you found that was oiled was

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- (1) the so-called Onion Bay west parcel?  
 (2) A That s correct  
 (3) Q And that s this parcel right here (Indicating)?  
 (4) A Yes it is  
 (5) Q And you found that this parcel was oiled isn t that  
 (6) correct?  
 (7) A That s correct  
 (8) Q But you determined that there was no economic impairment  
 (9) to  
 (10) that parcel no damage is that correct?  
 (11) A That is correct  
 (12) Q And incidentally were any of the -- you mentioned Monday  
 (13) that there were 39 recreation sites there were only 39  
 (14) recreational sites that you found that were damaged -- I didn t  
 (15) quite understand if they were oiled or damaged in the -- of all  
 (16) the Plaintiffs property there were only 39 Are any of these  
 (17) 39 sites ones in this Onion Bay west property?  
 (18) A I m unclear what you re asking  
 (19) Q Well you had some graph and I m sorry I can t remember  
 (20) the number but you had -- it was -- I think you had 39 -- in  
 (21) all of the Plaintiffs property there was only 39 recreational  
 (22) sites Not just Kodiak Island Borough but Prince William  
 (23) Sound southern Kenai there were only 39 recreation sites and  
 (24) my question is was any of those 39 sites any of this property  
 (25) here in Onion Bay?  
 (26) MR DIAMOND I object It mischaracterizes the prior

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- (1) testimony  
 (2) MR STOLL Do you recall what I'm talking about?  
 (3) THE COURT I'll let the witness answer. If you have  
 (4) problems answering the question, let us know.  
 (5) A I have no recollection of what you're talking about. Mr  
 (6) Stoll.  
 (7) BY MR STOLL  
 (8) Q Do you consider any of these properties in Onion Bay  
 (9) recreational sites?  
 (10) A The portions of the Onion Bay west property that are inside  
 (11) Onion Bay do have potential for rec site development. The  
 (12) portion that's on the outer part on the Kupreanof Strait are -  
 (13) you've got some pretty steep land there, you've got a good  
 (14) fetch of water coming in there, and I don't think people would  
 (15) in the marketplace recognize those as rec subdivision lands.  
 (16) There is a parcel, as you come inside on the KIB lands, as you  
 (17) come inside Onion Bay, there is a little property in there that  
 (18) has some rec potential. Then when you go farther up into the  
 (19) bay, there are some lands that probably don't have as - as  
 (20) good a potential as some of the other lands in that area, but  
 (21) do have some rec potential. We simply said that their  
 (22) potential for rec sites as of the year of the spill was  
 (23) somewhat deferred.  
 (24) Q Now - oh, here we are. I did misspeak - misspeak. Mr  
 (25) Petumenos kindly found me the exhibit.

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- (1) MR PETUMENOS Always willing to help  
 (2) BY MR STOLL  
 (3) Q It's DX14039. It's 39 acres. The question I've got is  
 (4) any of the 39 acres, this property in Onion Bay?  
 (5) A No, they're not.  
 (6) Q And none of the 79 marine commercial's considered in that  
 (7) is it?  
 (8) A That's correct. In both instances, those refer to lands  
 (9) that are in Prince William Sound.  
 (10) Q I see. Now, the thing that you've got here, the thing that  
 (11) was bothering me or concerning me, you say here, Plaintiffs  
 (12) that to me implies all Plaintiffs. And then the other comment  
 (13) is you have that received any oiling, and Kodiak considers  
 (14) itself a Plaintiff and you've testified that Onion Bay did get  
 (15) oiling, correct?  
 (16) A That's correct. I think also as I explained though that  
 (17) this is a summary of what we had identified as our valuation  
 (18) parcels, so it is - it is consistent with precisely what I  
 (19) told you.  
 (20) Q I see. Now, you also found oiling in Ugak Bay, isn't that  
 (21) correct?  
 (22) A Yes, it is.  
 (23) Q And the property on - in Ugak Bay in Hidden Basin, you  
 (24) found that was oiled, but again, you found no damages, is that  
 (25) correct?

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- (1) A That's correct. The oiling there was very light, sporadic  
 (2) and in a location that we didn't believe it would create any  
 (3) market disruption for the sale of those properties.  
 (4) Q At least according to the information you had?  
 (5) A According to all of the information, oiling information  
 (6) that we looked at.  
 (7) Q And did you walk that property, incidentally?  
 (8) A No, I haven't.  
 (9) Q Did you walk the property on Onion Bay?  
 (10) A No, I - I did go into Onion Bay in a skiff, went all  
 (11) around those shorelines, and also on several occasions flew  
 (12) over the property in various aircraft.  
 (13) Q Did you walk the property, the Kodiak property in  
 (14) Shearwater?  
 (15) A No.  
 (16) Q And now that property, you found 100 percent of the  
 (17) shoreline of the 143 acre parcel was oiled, isn't that  
 (18) correct?  
 (19) A That's correct. I think that's an example of 100 percent  
 (20) impairment of the property.  
 (21) Q And for that parcel, you found a total of \$7500 of damage?  
 (22) A That sounds correct.  
 (23) Q Now, that's - that's about - that's one of the parcels  
 (24) incidentally, that you appraised?  
 (25) A Yes, it is.

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- (1) Q And your appraisal on that was \$125,000 for the 143 acres  
 (2) isn't that correct?  
 (3) A I could look up my numbers, but if -  
 (4) Q Go ahead, if you -  
 (5) A That is correct.  
 (6) Q And that's about three times - three times the price of  
 (7) \$39,000 paid in 1987 for a 12 acre parcel nearby, is that about  
 (8) right? Three times -  
 (9) A Your math is -  
 (10) Q Well, my math is about right?  
 (11) A Your mouth - math - excuse me, math sounds okay, but your  
 (12) premise isn't good.  
 (13) Q I see. And Shuyak is another parcel of Kodiak Island  
 (14) Borough's parcels that you found that was oiled, am I correct?  
 (15) A Yes, it is.  
 (16) Q And you also found damage there?  
 (17) A That's correct.  
 (18) Q And why do people use the property, what's your  
 (19) understanding of why people use the property in Shuyak?  
 (20) How's  
 (21) that property used?  
 (22) A Shuyak is a popular area for hunting or general outdoor  
 (23) recreation. There is boating and kayaking activity out in the  
 (24) area. It's a little bit remote and some of the waters on the  
 (25) Shelikof Strait can be pretty rough at certain times, but in  
 the right weather, very popular recreation area.

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- (1) Q Well the property along the – the Kodiak property along  
 (2) the Shelikof Straits as you put it is fairly protected is it  
 (3) not?  
 (4) A It s pretty – I m sorry?  
 (5) Q Pretty well protected isn t that correct? There s a lot  
 (6) of little inlets in there?  
 (7) A Once you get into them there are a number of places that  
 (8) you could be protected but as I m sure you know properties  
 (9) that are over on the Shelikof Strait you have to go through  
 (10) the strait to get there  
 (11) Q Well you can come right through here The Shuyak –  
 (12) MR PETUMENOS The jury can t see it  
 (13) MR STOLL I can just hold it up here that s okay  
 (14) BY MR STOLL  
 (15) Q People coming from the City of Kodiak would come – would  
 (16) come through the Shuyak Straits isn t that correct?  
 (17) A In all probability  
 (18) Q And – and then you have these little harbors down in here  
 (19) isn t that correct?  
 (20) A That s correct  
 (21) Q And you didn t find any significant interference with these  
 (22) uses in 1989 or 1990 of this property?  
 (23) A Well enough that we did find impairment for that property  
 (24) yes  
 (25) Q Relatively small amount isn t that correct?

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- (1) A Nearly \$80 000 is a lot of money to me I don t know what  
 (2) the comparison of small is  
 (3) Q Well everything is relative I guess –  
 (4) A Let s put it this way I think that based on the  
 (5) shoreline-related area here the extent and the nature of the  
 (6) oil approximately \$80 000 is a reasonable just compensation  
 (7) for the impairment to the owner of this property for the oil  
 (8) spill  
 (9) Q Now that s your opinion as to what is just compensation  
 (10) You re going to let the jury decide that though aren t you?  
 (11) MR DIAMOND Objection argumentative  
 (12) THE COURT Sustained  
 (13) BY MR STOLL  
 (14) Q Eagle Harbor and Ugak Bay that s another parcel that you  
 (15) found that was oiled?  
 (16) A Yes  
 (17) Q And you found damages there also?  
 (18) A That s correct  
 (19) Q And there s no mountaintops there is there?  
 (20) A No There s a pretty good sized hill there but no – no  
 (21) mountaintop  
 (22) Q And when you did your evaluation of that you assumed that  
 (23) you d cut off the access to the back part – portion of the  
 (24) property and so you valued only the shoreline to get your  
 (25) damage figure isn t that right?

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- (1) A That s totally incorrect You said that we would cut off  
 (2) access to the back As we explained earlier we looked at the  
 (3) entire property here The Eagle Harbor property is another one  
 (4) of the Kodiak Island Borough s property that has some potential  
 (5) for residential development We think it s a good property  
 (6) Because there was something of an oversupply of remote  
 parcels  
 (7) as of the time of the oil spill we looked at this for the  
 (8) impairment that it had for what you d do with it until you  
 (9) could start developing lots and we said that that was a  
 (10) limited use We used the shoreline-related area again but we  
 (11) didn t separate or sever or cut off or do any such thing as  
 (12) that We simply looked at the portions of this that are on the  
 (13) waterfront portions that would have been affected by the oil  
 (14) spill and we found our impairment based on those areas  
 (15) Q Now the access to the portion any portion that s more  
 (16) than 1300 feet away from any of these shorelines the only –  
 (17) of any of these parcels of Kodiak Island Borough the only  
 (18) access to those parcels normally is through the shoreline  
 (19) isn t that right?  
 (20) A Sure And that s exactly why the concept of the  
 (21) nonexclusive use means that in no way have we affected any of  
 (22) the access to the uplands Any way that you d normally go to  
 (23) the uplands you d go to the uplands  
 (24) Q And so if you had a parcel that was – the shoreline was  
 (25) oiled and one of them at least you found was 100 percent

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- (1) shoreline oiled the person going to that property would have  
 (2) to go through the oil to get to the parcel then go up to the  
 (3) uplands right?  
 (4) A Well as you know that didn t occur here  
 (5) Q Well I don t think that s the case  
 (6) MR STOLL But any way Your Honor I think this would  
 (7) be a good time for – I ve got something I want to take up with  
 (8) the Court before –  
 (9) THE COURT Okay I ll send the jury out  
 (10) (Jury out at 9 35 a m )  
 (11) THE COURT Okay counsel the jury s not present  
 (12) MR STOLL Your Honor I d like to do this just  
 (13) before we resume if we could  
 (14) THE COURT Okay  
 (15) MR STOLL Thank you  
 (16) THE CLERK Please rise This court stands in  
 (17) recess  
 (18) (Recess from 9 36 a m to 9 50)  
 (19) THE CLERK Please rise This court now resumes its  
 (20) session Please be seated  
 (21) MR STOLL Your Honor there s three areas that I  
 (22) want to ask him questions about and I thought it would be  
 (23) appropriate to take these up because I m sure there s going to  
 (24) be objection  
 (25) The first question is that he made a statement on a couple

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- (1) of occasions yesterday about Exxon assuming responsibility
- (2) And I think the facts are that Exxon assumed responsibility
- (3) after we obtained judgment on the pleadings Before that they
- (4) filed a denial and I'd like to ask him isn't it true that
- (5) they denied liability in this litigation until after we got a
- (6) judgment against them That's the first area Take these one
- (7) at a time or all three?
- (8) THE COURT Counsel
- (9) MR DIAMOND Mr Stoll is correct I do object to
- (10) that We've been hassling this out ever since voir dire of
- (11) whether Exxon assumed responsibility or not If memory serves
- (12) me correctly and Mr Stoll can correct me if I'm wrong but
- (13) any such statements yesterday were prompted in response to
- (14) cross examination They were passing comments not very
- (15) direct This witness has got no knowledge about the - the
- (16) procedural history of this case and it's not appropriate
- (17) cross examination
- (18) MR STOLL Your Honor he made a - he made a lot of
- (19) nonresponsive answers yesterday and really today but he
- (20) made a
- (21) nonresponsive answer to Mr Petumenos yesterday and
- (22) gratuitously -
- (23) MR DIAMOND Give me a second
- (24) MR STOLL Sure It's page 7490
- (25) MR DIAMOND Page 74 -
- (26) MR STOLL 90 line 17 he's talking about - he's

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- (1) the objection is sustained
- (2) MR STOLL I'm going to withdraw the next - next
- (3) question
- (4) Your Honor on the question about Mr Roberts that we just
- (5) had discussion at sidebar about I would like to argue that the
- (6) fact that I didn't choose to ask Mr MacSwain as to whether or
- (7) not the fuller amplification of what Mr Roberts supposedly
- (8) told him I think I'm still entitled to ask this witness
- (9) whether or not he is aware that Mr Roberts made a damage
- (10) analysis
- (11) THE COURT What do you intend to ask him after that
- (12) MR STOLL That's all I mean that he found
- (13) damages
- (14) THE COURT Why do you think you need that in the
- (15) record?
- (16) MR STOLL Because they put - Your Honor they put a
- (17) blurb up on the screen a bunch of Mr MacSwain's
- (18) interviewees
- (19) I'll call them that for want of a better word and one of them
- (20) was Roberts and they've got this quote attributed to him that
- (21) I don't think is accurate
- (22) THE COURT Let's see the blurb
- (23) MR STOLL Pardon me?
- (24) THE COURT Let's see the blurb
- (25) MR STOLL I'm sorry Your Honor I don't have it
- (26) here

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- (1) talking about - the question was In the last report you did
- (2) a couple weeks ago you didn't just talk about new material
- (3) that came in from Dr Mundy and ICF and so forth You added a
- (4) part of your report to reflect your understanding now that
- (5) under Alaska law petroleum is considered a hazardous
- (6) substance didn't you?
- (7) In part that's true but I think I need to explain what
- (8) happened here
- (9) And then he explains about his original report and then he
- (10) says - this goes on for some length
- (11) Then he says The market knows that Exxon is responsible
- (12) They have accepted the liability publicly and factually and
- (13) the question from this point on is not matters of - I'm not
- (14) sure I understand the word arcane but arcane law but the
- (15) question of what is the - the economic impact of the
- (16) properties which were owned by the Plaintiffs and that's what
- (17) I proceeded with
- (18) The point is that he made the statement here and he just
- (19) brings in this business about - this guy's a very professional
- (20) witness obviously He brings in this business about the
- (21) Defendants accepting responsibility which they didn't do until
- (22) after we got a judgment against them And it was
- (23) nonresponsive
- (24) to the -
- (25) THE COURT I understand I understand what you're
- (26) saying counsel I'm not going to get into this debate now so

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- (1) MR PETUMENOS It's Defendants exhibit Defendants
- (2) exhibit of the quotes
- (3) MR DIAMOND I don't have the MacSwain exhibits
- (4) MR STOLL We don't know the number though is the
- (5) problem
- (6) MR PETUMENOS Well they know the number
- (7) MR STOLL Says something like there was no impact
- (8) or -
- (9) THE COURT I want to see it
- (10) MR DIAMOND Your Honor we have an exhibit list but
- (11) we don't have the exhibit list broken down by witnesses
- (12) MR PETUMENOS We've got the transcript if you want
- (13) to standby we can find it for you
- (14) THE COURT Yeah find it and provide me evidence from
- (15) the record it would be very appreciated
- (16) MR STOLL Doing a word search Your Honor with the
- (17) computer
- (18) THE COURT Mr Stoll's calling Chicago
- (19) MR DIAMOND I can save him the trouble It
- (20) wasn't - it wasn't offered into evidence
- (21) THE COURT What wasn't?
- (22) MR PETUMENOS Do you have the number?
- (23) MR DIAMOND No these appear to be
- (24) cross-examination
- (25) MR PETUMENOS Tim I'm getting there

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- (1) MR DIAMOND Since I was asking the question I  
 (2) didn't take notes Your Honor I - we really did want to  
 (3) finish today -  
 (4) MR PETUMENOS DX try DX10238-A 5 it  
 (5) THE COURT It'll do us all a lot of good Mr  
 (6) Diamond if I could get us out of the way  
 (7) MR DIAMOND I was going to represent to the Court my  
 (8) recollection of the exhibit  
 (9) MR PETUMENOS 10238-A 5 I'm kind of guessing but I  
 (10) think this might be -  
 (11) THE COURT Are we getting it?  
 (12) MR PETUMENOS The operator tells me this don't work  
 (13) the disk is full the sheet doesn't play  
 (14) THE COURT Here's the deal counsel This was  
 (15) discussed at the bench at the last session You asked me - I  
 (16) tried to take it as soon as we recessed You asked me for  
 (17) time You can't provide citations from the record All I can  
 (18) deal with is representations of counsel This is an absolutely  
 (19) utterly minor point This objection is sustained  
 (20) MR STOLL Okay  
 (21) THE COURT Let's go on get the jury in  
 (22) MR DIAMOND Ready for the jury I believe  
 (23) THE COURT Yes that's what I said  
 (24) MR DIAMOND And a witness too  
 (25) MR STOLL Your Honor we are - I might take

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- (1) something - while they're getting the jury  
 (2) THE COURT Yes go ahead  
 (3) MR STOLL There's an exhibit that we received last  
 (4) evening from Defendants that they intend to offer on Otto  
 (5) Harrison later today and it's a - the notice the class  
 (6) notice of the subsistence class settlement Not only does this  
 (7) violate the rule of having produced exhibits last Friday but  
 (8) we think that it's irrelevant unfairly prejudicial et  
 (9) cetera  
 (10) THE COURT Thanks  
 (11) MR DIAMOND I was going to raise it with you  
 (12) obviously before the witness testified We're jumping ahead  
 (13) three witnesses now because we also have matters to discuss  
 (14) on  
 (14) the next witness We can take it up now or -  
 (15) MR STOLL I was just trying to save time while the  
 (16) jury wasn't here  
 (17) MR PETUMENOS This is a big issue This is - would  
 (18) require undoing an order at this point  
 (19) THE COURT Why do you want to use it?  
 (20) MR DIAMOND In light of the way this case has  
 (21) developed in light of the emphasis on damage to subsistence  
 (22) resources days if not weeks and weeks of testimony on that  
 (23) The pivotal issue in this case because the only - the only  
 (24) impact on use as best we can tell from testimony is on  
 (25) subsistence We have in the record testimony that a claim

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- (1) was made on behalf of the shareholders of these corporations  
 (2) The last notice indicates the claim was made not only on behalf  
 (3) of the shareholders but on Village Corporations as well  
 (4) including Village Corporations from Chenega English Bay Port  
 (5) Graham Tatitiek We think the jury is entitled to know that  
 (6) not only were claims made but that those individuals have been  
 (7) compensated for that harm Because we want to argue that  
 (8) it's - if they award damages for loss of subsistence harvest  
 (9) here it's going to be a double recovery It's going to be a  
 (10) double hit on Exxon Exxon's going to pay twice for the same  
 (11) injury Right now they don't know that All they know is that  
 (12) some ephemeral claim is floating out there in federal court  
 (13) They have no idea what it is whose benefit it is or how it's  
 (14) going to come out It has been settled That's a fact I  
 (15) think it's a fact the jury is entitled to know  
 (16) THE COURT Fine I don't counsel You can't use  
 (17) it Bring them in  
 (18) MR DIAMOND For the record I'd just like to get the  
 (19) Exhibit Number in the record  
 (20) THE COURT Sure  
 (21) (Jury in at 10:04 a.m.)  
 (22) MR STOLL The Exhibit Number that we just referred  
 (23) to is DX14062  
 (24) MR DIAMOND Your Honor so that it's part of the  
 (25) record can we make that court's exhibit next in order?

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- (1) (Exhibit Courts 35 offered)  
 (2) THE COURT Yeah 35 Courts exhibit 35  
 (3) (Exhibit Courts 35 received)  
 (4) MR STOLL I have no further questions Your Honor  
 (5) MR DIAMOND So sudden caught me off guard  
 (6) REDIRECT EXAMINATION OF JOHN D DORCHESTER JR  
 (7) BY MR DIAMOND  
 (8) Q Some housekeeping Mr Dorchester I'm going to show you  
 (9) Plaintiffs Exhibit 8317 This is the Bureau of Indian Affairs  
 (10) Juneau area office market analysis of service leases report  
 (11) that Mr Petumenos showed you yesterday and asked you  
 (12) whether  
 (12) you had recognized it I know you wanted to correct the record  
 (13) on this  
 (14) A Yes yes I -  
 (15) Q Have you had a chance to look at that overnight?  
 (16) A Yes I have  
 (17) Q In fact is that something that you had seen prior to  
 (18) yesterday?  
 (19) A It is indeed I guess I was listening too close again to  
 (20) one of Mr Petumenos questions I thought he was saying a  
 (21) study of leases of allotments and this is a study that was  
 (22) done for people by the BIA of rents -  
 (23) MR PETUMENOS Excuse me?  
 (24) A That we hoped would establish rents  
 (25) MR PETUMENOS Just one second Judge if we're now

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- (1) going to address the document I believe what happened on cross
- (2) was I asked him about the document He said he didn't
- (3) recognize it and all my inquiries thereafter were sustained
- (4) when the objections were asked So I would believe this would
- (5) be beyond the scope of cross at this point and not proper
- (6) redirect
- (7) MR DIAMOND I don't see why The question was
- (8) raised Exhibit was identified We just simply want to
- (9) correct the record so there's no misimpression here Counsel
- (10) is free to inquire on recross about how the witness may have
- (11) used it
- (12) MR PETUMENOS I have the transcripts here of exactly
- (13) what happened
- (14) MR DIAMOND I have the entire transcript if you
- (15) want
- (16) THE COURT This is enough You can question him
- (17) BY MR DIAMOND
- (18) Q I forgot where you were when you were interrupted
- (19) A I think I could give you a very short answer Not having a
- (20) chance really to study or look at this document yesterday we
- (21) went rather quickly I misinterpreted it When I looked at the
- (22) entire document I definitely did recognize it as one that we
- (23) did rely on As a matter of fact it is referenced in our
- (24) report pieces of the information from this are included in the
- (25) report that I wrote

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- (1) Q I'm going to put on the Elmo a page from PX8123 your May
- (2) 1993 report and it is table 8.5 Just tell us what this table
- (3) is generally so we know what we're looking at
- (4) A This table is a summary of lease and other forms of rental
- (5) information that we obtained from various sources long-term
- (6) leases short term use permits and so forth The highlighted
- (7) line here simply is the range of long term lease rates that was
- (8) cited from this study for example
- (9) Q They are one in the same?
- (10) A They are one in the same
- (11) Q So you did take into consideration the report that you had
- (12) forgotten about yesterday?
- (13) A Yes we did
- (14) MR PETUMENOS Could you leave that out counsel so
- (15) I could address it on recross?
- (16) MR DIAMOND What's that?
- (17) MR PETUMENOS Leave it out so I can address it on
- (18) recross Don't let it go too far
- (19) MR DIAMOND It's yours
- (20) BY MR DIAMOND
- (21) Q ANILCA versus ANCSA Mr. Dorchester you were asked
- (22) some
- (23) questions about ANILCA the Alaska Natural Interest Lands
- (24) Conservation Act remember that yesterday?
- (25) A Yes I do
- (26) Q And Mr. Petumenos shared with us Congress's intent in

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- (1) enacting ANILCA and said it was to preserve and protect scenic
- (2) environmental and ecological values remember that?
- (3) A Yes
- (4) Q What did ANILCA do?
- (5) A ANILCA was an act that was also called the D-2 Lands Act
- (6) to my knowledge It's primarily the act that established very
- (7) large park wildlife refuge areas It was a national parks
- (8) type of legislation
- (9) Q All right It wasn't ANILCA that created Native
- (10) Corporations or gave Native Corporations their original
- (11) allotment of lands?
- (12) A That's correct It's separate from what I think the jury's
- (13) heard referred to a number of times as ANCSA the national -
- (14) the Alaska Native Claims Settlement Act which was earlier
- (15) about 1971
- (16) Q Was any of the congressional intent language that was read
- (17) to you yesterday as you understand it Congress's intent in
- (18) enacting ANCSA?
- (19) A I don't believe it was
- (20) Q Okay different act different Congress?
- (21) A Different act different Congress
- (22) Q Highest and best use you were asked whether about
- (23) controversy between calling wilderness property natural lands
- (24) or environmental preservation lands versus the term you used
- (25) limited use lands Is this a battle over nomenclature over

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- (1) terms and terminology?
- (2) A I - I believe it's possible to perceive the difference as
- (3) just a battle over words I don't have any problem if anyone
- (4) wants to use the word natural lands for - for anything
- (5) appraising so the nomenclature makes no difference In my
- (6) experience particularly with farm and rural properties we've
- (7) typically used the word natural lands to mean those that have
- (8) not been tilled disturbed developed any kind of land that is
- (9) still natural land but I don't have any problem with the tag
- (10) What is important I think is the understanding of comparing
- (11) the highest and best use with a proper highest and best use
- (12) that is comparable to it and getting sales that are comparable
- (13) to be able to make comparable analyses
- (14) Q Are you saying if the dispute isn't over the terms and
- (15) terminology it's over what comparables can be used?
- (16) A It's either over the selection of the comparables or once
- (17) they're selected how you would analyze those comparables
- (18) Q You were asked questions both yesterday and again this
- (19) morning by Mr. Stoll about the Seal Bay Tonki Cape
- (20) transaction and you're familiar with the underlying
- (21) appraisal?
- (22) A Yes I am
- (23) Q That appraisal used the term lands held for natural
- (24) preservation or resource preservation or words to that effect
- (25) did it not?

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- (1) A Yes it did  
 (2) Q Does that render that appraisal no good?  
 (3) A No it doesn't Not by itself  
 (4) Q Did you view the appraisal to meet professional standards?  
 (5) A I actually didn't review this appraisal from the standpoint  
 (6) of - of trying to see whether or not it met standards The  
 (7) state of Alaska did that and initially rejected the appraisal  
 (8) as having some deficiencies But the name of the firm that did  
 (9) the appraisal is International Forestry Consultants they're a  
 (10) forestry firm  
 (11) The review of the appraisal clearly showed that  
 (12) International Forestry Services attributed 36 and a half  
 (13) million dollars of the Seal Bay Tonka Cape - actually Seal Bay  
 (14) properties to timber and the other land that was not timber  
 (15) in - in the review was valued at about \$260 61 62 an  
 (16) acre The timberland was valued at over \$2 000 per acre  
 (17) So the distinction here again is making certain that  
 (18) regardless of what we call it we understand that the property  
 (19) was appraised based on timber potential 36 and a half million  
 (20) dollars of that was considered to be for timber and other  
 (21) lands without timber values were shown to have value at  
 (22) whatever their highest and best use might be  
 (23) Q So the fight is over comparables and what price you get out  
 (24) of comparables?  
 (25) A That's correct

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- (1) Q Let's try to put this dispute into proportion Let's  
 (2) assume Mr Dorchester that you and Mr Roddewig and Mr  
 (3) MacSwain and anybody who agrees with you are all wet and  
 that  
 (4) wilderness property in Prince William Sound and the Gulf really  
 (5) ought to be valued not at your 300 to \$500 an acre but at  
 (6) Dr Mundy's \$950 an acre With me?  
 (7) A I believe so  
 (8) Q Have you gone back and recalculated your numbers  
 assuming a  
 (9) value for all land that you classified as limited use at  
 (10) Dr Mundy's \$950 per acre natural lands valuation?  
 (11) A Yes I have  
 (12) Q Could you share with us what those numbers are? You can  
 (13) come down and I'm going to ask you if there is room just give  
 (14) us an additional column on what's been marked as DX14788  
 (15) I think I took the marker home last night  
 (16) All right If we assume that all of the land that you  
 (17) classified as limited use land was valued at \$950 an acre and  
 (18) not 3 to \$500 an acre what happens to the total damage  
 (19) figures that you've computed for each of these Plaintiffs? And  
 (20) why don't you just insert a column if you can here or  
 (21) wherever you think you could fit it in?  
 (22) A It's okay to mark on this?  
 (23) Q It's okay to mark on it  
 (24) A Not sure what to call this Let me just say  
 (25) Q Call it 950 an acre We'll all remember what the

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- (1) assumption is here  
 (2) A In the work that I performed if we had used Dr Mundy's  
 (3) \$950 an acre for everything that we called limited use Chugach  
 (4) Alaska Corporation would have approximately a \$496 000  
 (5) impairment Chenega Village Corporation would have - these  
 (6) are all rounded slightly - \$1 500 000 English Bay  
 (7) Corporation would be \$235 000 Port Graham Village  
 Corporation  
 (8) would have \$304 000 Still would not have any change for Eyak  
 (9) or Tattilek Village corporations Kodiak Island Borough would  
 (10) be \$161 000 and that's a total of \$2 million 695 - call it  
 (11) 696 thousand dollars  
 (12) Q Okay so even if Dr Mundy's right and you are wrong an  
 (13) assumption I know that you're not quick to indulge your  
 (14) numbers come up from roughly a million three to two six?  
 (15) A That's correct  
 (16) Q So this is over a million three?  
 (17) A That's over a million three  
 (18) Q You can take your seat - actually I was going to ask you  
 (19) to explain to us one other chart that Mr Petumenos put on  
 (20) the - the Elmo yesterday This is PX8332  
 (21) You were telling us yesterday - remind us it's a little  
 (22) bit difficult to see on the - colors get faded out on the  
 (23) Barco but just remind us your understanding of what this graph  
 (24) reports to compare what the blue is and what the red is?  
 (25) A This purports to show in one color the market transaction

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- (1) land values that we found for each of these transactions from  
 (2) our research of each of the transactions It shows in another  
 (3) color with the long lines coming out here to the right a  
 (4) total consideration including land and whatever else is  
 (5) involved in the transaction  
 (6) Q All right Your numbers did you have to take a sales  
 (7) price number that you got from some sale agreement and try to  
 (8) figure out what part of that was for real estate and what part  
 (9) was for something else?  
 (10) A Actually no  
 (11) Q Why not?  
 (12) A That had actually already been done for us What we did  
 (13) was go to various source documents as an example one of  
 (14) the - one of the easiest to look at is the ANWR information  
 (15) In this case the United States general accounting office  
 (16) had made an investigation of the proposed exchange They  
 wrote  
 (17) a report which was submitted to Congress and in that  
 exchange  
 (18) they said the Department of the Interior had appraisals that  
 (19) showed that the collective value of the lands proposed for the  
 (20) exchange was in the vicinity of \$100 for value Despite  
 (21) that - and I mentioned to Mr Petumenos yesterday this line  
 (22) here was actually incorrectly drawn it's a little bit less  
 (23) than that I believe Despite that there were a tran- - a  
 (24) proposed transaction that was to occur based on appraisals  
 (25) using the natural lands concept Public interest value was the

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- (1) operative term that was used And the general accounting  
 (2) office said no we reject the notion that this transaction  
 (3) should occur at this very dramatically inflated number and we  
 (4) believe they said to Congress that it should be viewed under  
 (5) the Department of Interior s numbers more for your market  
 value  
 (6) estimate than the other number  
 (7) What we did - we didn t make up the hundred dollars per  
 (8) acre or the transaction which included in this instance other  
 (9) types of consideration than just the land We went to the  
 (10) documents we found those numbers there and in each of the  
 (11) instances that - some of the bars we don t have in our report  
 (12) but in each of the instances where those transactions are in  
 (13) our report we went to the people who were involved we went to  
 (14) the records that were involved where we could get them and we  
 (15) simply took the land values out that have been estimated as a  
 (16) part of the transaction  
 (17) Q Okay I want to ask you about Kachemak SNA and Seal Bay  
 (18) but I m going to come back to those  
 (19) You told us yesterday with respect to some of the other  
 (20) transactions where you had a price per acre for the real estate  
 (21) but that there was some larger price per acre because there was  
 (22) more than real estate consideration being given to the  
 (23) government you only looked at the real estate price paid per  
 (24) acre for the real estate  
 (25) Could you give us some examples of what else the buyers

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- (1) here were buying in these transactions that was not real estate  
 (2) which led them to pay a total price higher than if they were  
 (3) just buying the land?  
 (4) A Let me give you a couple maybe just real quickly If we  
 (5) look at the Pribilof Island transaction the Pribilof Island  
 (6) transaction was partially a financial aid and partially was a  
 (7) payment by the United States to make a - almost a retribute  
 (8) payment an amends for mistreatment of the people there over a  
 (9) very extended period of time So it was determined by  
 Congress  
 (10) that there should be a payment to these people Once that  
 (11) decision was made there was an amount of money that was set  
 (12) aside appropriated to make that payment and somewhere in  
 the  
 (13) process it was also determined that the bird cliffs which are  
 (14) basically virtual cliffs of wonderful birds should be included  
 (15) in the transaction after the transaction was actually put  
 (16) together as a financial and repayment for past sins purpose for  
 (17) Congress  
 (18) The lands were appraised for their market value by the same  
 (19) government that made the payment and they were appraised  
 more  
 (20) in the vicinity of \$100 per acre  
 (21) Q The hundred dollars per acre then is the government s  
 (22) number for the land value if that s all it was buying?  
 (23) A If it were only buying land \$100 per acre would have been  
 (24) the numbers based on the evidence that we have that would  
 have  
 (25) been used

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- (1) Q That s a government number not a Dorchester number?  
 (2) A It s not a Dorchester number at all  
 (3) Q Backscatter transactions you have this much per acre for  
 (4) the real estate but the total consideration on a per acre  
 (5) basis is more On the backscatter transactions what in  
 (6) addition to land did the government buy?  
 (7) A Backscatter is also a very unique transaction If we tried  
 (8) to use the transaction prices as total prices for comparison  
 (9) purposes we may never have another comparison like it in the  
 (10) history of the world Backscatter was a national security  
 (11) project at the time of the Cold War while there still were  
 (12) major concerns about the establishment of the over-the horizon  
 (13) radar systems for national defense purposes Studies were  
 made  
 (14) as to where certain sites could be built Once those sides  
 (15) said they go here it was necessary for government to acquire  
 (16) those sites and two things happened The sites were appraised  
 (17) as to their land values The land values from those appraisals  
 (18) by the same government are the ones that we used  
 (19) Again I didn t make them up but the total consideration  
 (20) that was negotiated was negotiated with some very good  
 (21) negotiations And a price that was paid because of the  
 (22) national security and the duress of needing to do it now  
 (23) eventually resulted in a higher total consideration price  
 (24) There were also some other things in the total price  
 (25) besides just that

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- (1) Q All right the price per acre for just the land where do  
 (2) these come from?  
 (3) A Those came from the government s appraise of the land  
 (4) Q So those are government numbers not Dorchester numbers?  
 (5) A That s absolutely correct  
 (6) Q I said I was going to ask you - oh Kachemak Bay 1 and 2  
 (7) You have a number per acre for the limited use part of the  
 (8) land but there is a total transaction price when expressed on  
 (9) a per acre basis that s even more What did the government  
 buy  
 (10) in these transactions in addition to limited use lands?  
 (11) A For Kachemak Bay 1 and 2 not a thing But they did  
 (12) exchange property based on - on a basis of land values and  
 (13) what I ve done here is just simply show the land value portion  
 (14) that they acquired that is limited use land versus other types  
 (15) of land use  
 (16) Q They bought land that was suitable for higher and more  
 (17) profitable purposes in addition?  
 (18) A Again maybe it s better to say this In the exchange the  
 (19) way that both of these two Kachemak Bay exchanges occurred  
 the  
 (20) parties agreed that a single appraiser would appraise the  
 (21) part - the lands of both parties Once that appraiser  
 (22) finished with his or her work what they then did was they said  
 (23) let us sort of trade back and forth here on what lands are  
 (24) going to go until we eventually have an equal value on each  
 (25) side and we can swap So these are both intended to be equal



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- (1) value exchanges  
 (2) On Kachemak Bay 1 what I did again although Kachemak Bay  
 (3) I has only a fairly small amount of what we call limited use I  
 (4) went to the appraisals that were used for this transaction and  
 (5) I found that limited use non waterfront land was appraised in  
 (6) the transaction at \$300 per acre I found that limited use  
 (7) waterfront property in that transaction in Kachemak Bay was  
 (8) appraised at \$500 per acre  
 (9) In the 83 exchange which is Kachemak Bay 1 there were  
 (10) two other kinds of land that were also exchanged and the  
 (11) appraiser distinguishes the various types of land One kind  
 (12) was what you might call a moderately developed recreational  
 (13) type land that had at least proximity to roads and utilities  
 (14) Those - those lands were valued at \$800 per acre and some of  
 (15) the lands that were involved in the exchange had roads  
 (16) electric telephone not exactly what - what we would call  
 (17) limited use lands and those were appraised in that transaction  
 (18) for over \$1 000 per acre  
 (19) Q All right But the numbers that you used were the numbers  
 (20) that were given by the appraisers to the remote limited use  
 (21) land portion of those transactions?  
 (22) A That s correct Again they re not Dorchester numbers  
 (23) They re numbers that came directly out of the transaction  
 (24) Q Kachemak SNA that s Seldovia Native Association?  
 (25) A Yes

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- (1) Q And Seal Bay/Tonki Cape - no Dorchester line here?  
 (2) A No Dorchester line  
 (3) Q You didn t use them?  
 (4) A That s correct  
 (5) Q Because they were at such a high price?  
 (6) A Not at all  
 (7) Q Well why didn t you use them?  
 (8) A These transactions really occurred pretty much at the tail  
 (9) end of the bulk of our analysis period but also very  
 (10) important on the Kachemak Bay transaction the Kachemak  
 Bay  
 (11) transaction with the Oil Spill Trustees probably would not  
 (12) have happened based on my discussions with the state  
 director  
 (13) of parks and various other people if it hadn t been for the  
 (14) oil spill funds So there was a little bit of special funding  
 (15) that was available for these to occur unlike the market at  
 (16) large  
 (17) But the transaction itself the Kachemak Bay purchase by  
 (18) the Oil Spill Trustees included land that - of three kinds  
 (19) Part of it which was the part that really motivated the  
 (20) transaction was timberland and the timberland price that was  
 (21) paid is over \$1 000 an acre for land that has productive  
 (22) timber The surface estate has mixed possible uses and of the  
 (23) portion of the price that was paid for the surface about \$651  
 (24) per acre were paid and for the subsurface portions of the  
 (25) site the Trustees paid about \$100 an acre

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- (1) Q Guide Note 8 PX8299 that Mr Petumenos wanted the jury to  
 (2) be able to consider when they deliberate you re familiar with  
 (3) Guide Note 8?  
 (4) A Yes I am  
 (5) Q And Mr Petumenos also showed you a final report of the  
 (6) Task Force on appraisers environmental responsibility PX8310  
 (7) are you familiar with that?  
 (8) A Yes  
 (9) Q Collectively what obligations do these impose on  
 (10) appraisers?  
 (11) A They help to - to spell out the most fund- - fundamental  
 (12) I think responsibility of an appraiser in both doing their  
 (13) work and in reporting the results of their findings and that  
 (14) is to not intentionally mislead to - to make certain that if  
 (15) there is a hazardous condition if there s any sort of  
 (16) condition defective plumbing some feature in the property  
 (17) that is reasonable for the market to know about that the  
 (18) market - or that the appraiser not obscure or hide whatever  
 (19) that is Consider what you should consider and report it  
 (20) Q If there had been some contaminating event like oil or  
 (21) petroleum product on the property would that be something  
 that  
 (22) an appraiser would be ethically bound to disclose?  
 (23) A I believe it is very important that the disclosure be  
 (24) made I don t know that you have to call it anything in  
 (25) particular as long as you make certain that your report is

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- (1) clear that it is there It s not - again It s not a  
 (2) nomenclature thing as much as it is a fact situation  
 (3) Q Okay PX8123 you recognize this as a copy of your 1993  
 (4) report?  
 (5) A Yes I do  
 (6) Q Mr Petumenos asked you these questions in connection with  
 (7) your report Do you think your report fairly discloses the  
 (8) existence of an oil spill and the effects on Plaintiffs  
 (9) property and are you comfortable with the jury having a look at  
 (10) this?  
 (11) A I m absolutely comfortable with it I d love for them to  
 (12) do it  
 (13) MR DIAMOND Your Honor at this time we would offer  
 (14) all three into evidence  
 (15) MR PETUMENOS Counsel has done this before He s  
 (16) moved reports into evidence in front of the jury where none of  
 (17) the reports the Court has ruled on I d like to reserve my  
 (18) argument on this  
 (19) THE COURT All right you can reserve  
 (20) BY MR DIAMOND  
 (21) Q The natural abundance of Plaintiffs property I believe  
 (22) Mr Petumenos elicited the fact that you didn t take into  
 (23) account separately in your appraisal of the Plaintiffs lands  
 (24) the rich abundance of the natural life they support is that  
 (25) right?

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- (1) A As a separate line item consideration of adjustment for  
 (2) that that s correct  
 (3) Q And you didn t take into account separately the breath  
 (4) taking grandeur and beauty of these lands?  
 (5) A Once again as a separate adjustment of a line item no I  
 (6) did not  
 (7) Q Are you just a heartless soulless person?  
 (8) MR PETUMENOS Objection Judge  
 (9) THE COURT Sustained  
 (10) BY MR DIAMOND  
 (11) Q Why didn t you take those into account separately?  
 (12) A Well I hope in fact that they are taken into account If  
 (13) we ve done our market research and if we ve done our  
 (14) calculations correctly to the extent that the market values  
 (15) themselves they re a part of the market Any honest appraiser  
 (16) has to - to make very certain as a professional that he or she  
 (17) is not trying to appraise a property as they individually would  
 (18) feel or believe about the property We have to divorce  
 (19) ourselves from the property and our own individual biases and  
 (20) our own individual feelings So the question here has nothing  
 (21) to do with how I feel about it I have to overcome those  
 (22) feelings to do an unbiased job But the question is how would  
 (23) the marketplace reflect their views and to the extent that all  
 (24) of those issues that Mr Petumenos asked me about are  
 (25) reflected  
 (25) in the market that s the reason we go to the market to get

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- (1) market information for comparisons  
 (2) Q Finally the subject we spent over 20 minutes on yesterday  
 (3) certification You are not certified in the state of Alaska  
 (4) correct?  
 (5) A That s correct  
 (6) Q And you re not certified in the state of Arizona correct?  
 (7) A No I m not  
 (8) Q Would you like to tell the jury why you re not certified?  
 (9) A This - this ll sound a bit immodest and I ll apologize in  
 (10) advance for that but with over 40 years in the appraisal  
 (11) field I ve had an opportunity to - to grow in my reputation  
 (12) and in my - my clients to a point where I m frequently called  
 (13) on to - to deal with very large and challenging assignments  
 (14) I go all over the United States I do work internationally  
 (15) We ve just been asked to do work in Ghana I ve been asked  
 (16) not  
 (16) too long ago to make an evaluation for all of the real estate  
 (17) for India s national railroad system I could give you other  
 (18) examples but in doing all of that through the years with my  
 (19) involvement as a - as a president of the Appraisal Institute  
 (20) and a lot of the engagements that I ve had I ve grown to a  
 (21) point where frankly my clients don t look to certification  
 (22) That s not essentially what they do  
 (23) In my work around the United States I do - I do something  
 (24) very much I guess like lawyers do to an extent  
 (25) I believe Mr Stoll is a member of the bar in the state of

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- (1) Oregon and when he comes to the State of Alaska -  
 (2) MR PETUMENOS Judge I m going to object Mr Stoll  
 (3) filed certain motions with this court so he could -  
 (4) THE COURT I believe that s what the witness is going  
 (5) to describe counsel You can draw the analogy  
 (6) MR PETUMENOS I ll ask my questions on recross  
 (7) perhaps  
 (8) A There are - based on exactly what he should do All I m  
 (9) saying is that there are procedures whereby in various  
 (10) professional fields when one goes from one state to another  
 (11) state to do practice that you can qualify to do that.  
 (12) In the appraisal field at the moment we have this new  
 (13) thing called certification and the one thing that we have  
 (14) tried very hard to do is to make certain that when someone does  
 (15) go from one jurisdiction to another if you re certified in  
 (16) Arizona and you come to Alaska to do work that you do  
 (17) associate with someone in that area someone who does know  
 (18) the  
 (18) markets and does know the ropes in that area That s exactly  
 (19) what I did here That s exactly what I did in associating with  
 (20) Mr MacSwain  
 (21) For my practice at this point of my career if I did that  
 (22) in every state I d spend all my time taking exams and working  
 (23) on certification requirements that my clients actually don t -  
 (24) don t have me do and it has not been a hinderance in anything  
 (25) that I do

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- (1) BY MR DIAMOND  
 (2) Q Is there a more practical reason why you have not sought  
 (3) certification in any state?  
 (4) A Well there s a - there s also another reason that comes  
 (5) into play When the certification program was first put  
 (6) together I was one of the - the authors of the national exam  
 (7) set that was put together for the certification process to be  
 (8) given to people in the various states and I decided at that  
 (9) point that I wouldn t take the exam for a few years until I  
 (10) could totally disassociate myself from what I did in writing  
 (11) the exam  
 (12) Q So having written the test you weren t going to take it?  
 (13) A That s correct  
 (14) MR DIAMOND I have no further questions Your  
 (15) Honor  
 (16) You can resume the stand  
 (17) RE CROSS EXAMINATION OF JOHN D DORCHESTER JR  
 (18) BY MR PETUMENOS  
 (19) Q One of the things that s helpful about certification is  
 (20) that when you practice in a state from day-to-day you can  
 (21) become more familiar with some of the unique lands that a state  
 (22) has within it would you agree?  
 (23) A Yes I would  
 (24) Q Now you told the jury on redirect that somehow this  
 (25) statute that I read to you on ANILCA was distinguishable from

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- (1) the Alaska Native Claims Settlement Act and I think the import  
 (2) of what you're saying is that it wasn't important to how Native  
 (3) Corporations owned their land is that your inference?  
 (4) A No not at all I - if I understood the question  
 (5) Q Well let me ask -  
 (6) A It was -  
 (7) Q If you would answer my question Let me see if I can ask  
 (8) the questions for just a little while  
 (9) Where did you get your information about the import of  
 (10) ANILCA on Native Corporation lands? Did you do it yourself?  
 (11) A I don't believe that the basic question - first of all  
 (12) yes I'm talking about what I have read about ANCSA and  
 (13) ANILCA The question that was asked of me yesterday about  
 (14) congressional intent -  
 (15) Q No my question so far Mr Dorchester is whether you did  
 (16) the work yourself or whether you asked somebody else to help  
 (17) you?  
 (18) A No I had read quite a bit about ANCSA and ANILCA  
 (19) Q Now then you know if you've read quite a bit about ANCSA  
 (20) and ANILCA that Congress found Section 3111 of ANILCA  
 (21) that  
 (22) The continuation of the opportunity for subsistence uses by  
 (23) rural residents of Alaska including both natives and  
 (24) non natives on the public lands and by Alaska natives on  
 (25) native lands is essential to native physical economic  
 traditional and cultural existence and to non-native physical

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- (1) economic traditional and social existence that was one of the  
 (2) findings of Congress right? In ANILCA?  
 (3) A You said findings of Congress?  
 (4) Q Yes  
 (5) A You're talking about the statute?  
 (6) Q I'm talking about the congressional declaration of findings  
 (7) in Section 3111 you've read it?  
 (8) A The answer is - to that is yes and -  
 (9) Q All right the other thing I wanted to ask you is whether  
 (10) the Alaska Native Claims Settlement Act was in fact amended by  
 (11) ANILCA?  
 (12) A To some extent it was yes  
 (13) Q It was changed right?  
 (14) A Portions of it were changed  
 (15) Q You know that the Chugach region in particular received  
 (16) certain concessions about the way that they could select their  
 (17) lands and what lands that they could select in ANILCA?  
 (18) A I do recall there was some changes  
 (19) Q And those changes were consistent with the congressional  
 (20) declaration of findings that took place in ANILCA am I right?  
 (21) MR DIAMOND Objection no foundation inconsistent  
 (22) MR PETUMENOS Well do you know  
 (23) THE COURT Go ahead answer that  
 (24) A I don't have a basis I don't know what all of the changes  
 (25) are as I sit here

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- (1) BY MR PETUMENOS  
 (2) Q There was protection for land owned by Native Corporations  
 (3) provided for in ANILCA based upon the findings right?  
 (4) A Could you tell me what you have in mind there?  
 (5) Q There were provisions that protected Native Corporation  
 (6) lands from certain things that could happen adverse to it in  
 (7) the marketplace?  
 (8) A I'm having trouble tracking It's a very broad question  
 (9) I think there were various portions of ANILCA that have  
 (10) probably created doubts and questions that I'm not sure  
 (11) whether  
 (12) they protect because of the doubts but certainly there was an  
 (13) intent to do what you're saying  
 (14) Q There were interim conveyances of land made to Native  
 (15) Corporations with co-equal status of patent in ANILCA?  
 (16) A As you know I'm not a lawyer I have some - some  
 (17) difficulty answering that as to - as to how the effect of it  
 (18) is I don't know the legal answer to it  
 (19) Q It allowed for land exchanges of equal value and for  
 (20) public interest value as part of the statute didn't it?  
 (21) A I don't believe that's correct  
 (22) Q You don't? Give me a minute Judge and I'll find it for  
 (23) him  
 (24) MR FORTIER I get to help  
 (25) MR PETUMENOS You're the expert  
 MR PETUMENOS Section 1621 paragraph F

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- (1) MR DIAMOND Before you publish it 16 -  
 (2) MR PETUMENOS 21 paragraph F entitled land  
 (3) exchanges Page 458  
 (4) MR DIAMOND Your Honor I propose instead we call  
 (5) Mr Fortier who's the expert on the subject I don't know  
 (6) that it is particularly relevant to pursue this course with  
 (7) this witness on a door that Plaintiff opened not Defendant  
 (8) THE COURT For now the objections overruled  
 (9) MR DIAMOND Figure it out  
 (10) MR PETUMENOS Thank you very much  
 (11) BY MR PETUMENOS  
 (12) Q I'm going to show you a portion of the ANILCA statute on  
 (13) land exchanges to see - how did that yellow turn purple on  
 (14) me? The secretary the secretary of defense the secretary of  
 (15) the agriculture in the state of Alaska are authorized to  
 (16) exchange lands or interest therein including native selection  
 (17) rights with the corporations organized by native groups  
 (18) Village Corporations regional corporations and the  
 (19) corporations et cetera  
 (20) It goes on to say Exchanges shall be made on the basis of  
 (21) equal value and either party may pay to the exchange cash in  
 (22) order to equalize And it goes on to the next page  
 (23) The value of property exchanged provided that when the  
 (24) parties agree to an exchange and the appropriate secretary  
 (25) determines it is in the public interest such exchanges may be

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- (1) made for other than equal value
- (2) So I m right and you re wrong right Mr Dorchester?
- (3) A Absolutely wrong
- (4) Q Okay absolutely wrong?
- (5) A Could you leave that up there I d need to tell you why
- (6) Q This is the part of you that is not the lawyer speaking
- (7) now?
- (8) A It s correct I m talking to you as an appraiser who
- (9) talked with the general accounting office who looked at this in
- (10) the ANWR exchange and dealt exactly with this issue
- (11) Your question to me was about public interest value those
- (12) were the three words that you put together The line you see
- (13) here provided that when the parties agree to an exchange and
- (14) the appropriate secretary determines it is in the public
- (15) interest the word value is not right there As a government
- (16) officer in the finance corps I spent hundreds of millions of
- (17) dollars in the public interest When I was with the urban
- (18) renewal authority I spent millions of dollars in the public
- (19) interest I ve dealt in public and private respects with
- (20) public interest in many many different ways If public
- (21) interest is to build - buy land for a city hall or to buy land
- (22) for expansion of court system or something like that you must
- (23) first of all find that it s in the public interest
- (24) The value that you use in your valuations is market value
- (25) not public interest value What this says is as is true for

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- (1) certain transactions under this act that such exchanges may be
- (2) made for other than equal value It does not say public
- (3) interest value Public interest I think is a very important
- (4) part of - of government transactions It is part of the basis
- (5) of market value and just compensation and it s different than
- (6) the question you asked me so I m sorry to say wrong but I
- (7) disagree
- (8) Q Well I disagree too Mr Dorchester because the question
- (9) I asked you was whether or not exchanges for other than equal
- (10) value was included in ANILCA
- (11) A Well I d be happy to have that question read back The
- (12) question that I ve answered no to was a question that said
- (13) public interest value and if I misunderstood it - I d be
- (14) happy to go back and correct the record but that s -
- (15) Q But let s get to the point You could have an exchange for
- (16) equal value ten bananas on this side of the scale and ten
- (17) bananas on the other side of the scale but what this statute
- (18) authorizes is that in the case of these kinds of exchanges
- (19) where the secretary determines that it s in the public
- (20) interest you don t have to have ten on each side isn t that
- (21) what it says?
- (22) A In a colloquial sense yes but it s not unlimited
- (23) Q All right and let s talk about the Alaska Native Claims
- (24) Settlement Act that Mr Diamond mentioned Does it have
- (25) similar provisions like the one we just read in ANILCA?

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- (1) A I don t recall them there I just don t remember
- (2) Q Does that refresh your recollection?
- (3) A Yes
- (4) Q Does that refresh your recollection?
- (5) A Yes and it s basically the same language that we just
- (6) talked about in ANILCA
- (7) Q So it is in ANCSA as well
- (8) Now you gave me on direct exam - under cross-examination
- (9) when I asked you the first time the highest and best use of
- (10) property can affect the parcelization do you remember that on
- (11) cross-examination?
- (12) A Yes I do
- (13) Q Have you changed your mind?
- (14) A No I haven t
- (15) Q When you drafted these numbers here based upon the \$950
- (16) assumption did you change the shoreline-related area that you
- (17) used in these other calculations when you came up with these
- (18) numbers?
- (19) A No but I also wouldn t want to agree that the \$950 is for
- (20) a highest and best use
- (21) Q Mr Dorchester you and I don t agree on very much but
- (22) could you just answer my question did you use the same
- (23) parcelization here as you did in all these others?
- (24) A Yes I did
- (25) Q And when you looked at these - when you did these numbers

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- (1) did you use the same oiling data that you did on all the others
- (2) here?
- (3) A That s correct
- (4) Q Did you use a nine percent rent or a six percent rent or
- (5) what when you did these numbers?
- (6) A I couldn t see what you were pointing to I m sorry
- (7) Q The \$950 assumption column that you just drafted for us
- (8) today?
- (9) A That s at - that s still at six percent
- (10) Q That s at six percent And did you use this license theory
- (11) that you have here when you said that you had the property 100
- (12) percent impaired in some instances due to the oiling but it is
- (13) a fact that when you used this licensing model that you use
- (14) you are using the license model because you conclude that the
- (15) land is never 100 percent impaired because it is available for
- (16) other uses right?
- (17) A Well that s not quite correct Some of the properties
- (18) that we have that are smaller properties we impaired at 100
- (19) percent of the total property so for those types of
- (20) properties you would have 100 percent impairment of the entire
- (21) property in my calculations even though you re right in the
- (22) real world there still would be an opportunity for that
- (23) property to be used
- (24) Q But you used a six percent lease rate because you d
- (25) concluded that a license for nonexclusive use was the proper

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- (1) model right?  
 (2) A For the basic concept that's correct  
 (3) Q And nonexclusive use means that the use was available for  
 (4) other reasons even while the oil was there right? That's  
 (5) what nonexclusive use in the license - as a license means?  
 (6) A It means legally that's correct When we impair the  
 (7) property at 100 percent I think you could argue that we said  
 (8) you really couldn't use it but as I just said in fact in  
 (9) many of the instances in the real world you could have used it  
 (10) Q In the history of the world to use your phrase has  
 (11) anybody applied this license theory to land valuation in the  
 (12) oil spill before that you know of?  
 (13) A In the oil spill?  
 (14) Q In any oil spill ever in the history of the world?  
 (15) A I'm not certain as to what appraisals have been done in oil  
 (16) spills previously The research that I did into the issue of  
 (17) what appraisals have been done indicated that in general the  
 (18) concept is not foreign to what had been done  
 (19) Q Had anybody used the license theory before is my question  
 (20) Mr Dorchester not what appraisals you looked at Did  
 (21) anybody  
 (22) use your theory of a nonexclusive license before in connection  
 (23) with an appraisal for other oil spills ever?  
 (24) A I think I have to answer you in a more - a broad sense  
 (25) This is a somewhat common occurrence in terms of looking at  
 land If we are dealing with impairment and just compensation

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- (1) questions and we have not impaired the land regardless of  
 (2) what the cause is not just this oil spill or another oil  
 (3) spill but any sort of cause it's appropriate to do this So  
 (4) In that sense yes I can think of many circumstances not just  
 (5) limited to oil but in - in appraisals and just compensation  
 (6) generally  
 (7) Q Give me a name of an appraiser in an oil spill who has used  
 (8) the license theory before can you do that?  
 (9) A In an oil spill?  
 (10) Q Yes  
 (11) A It's my belief that an appraiser named Philippe Malaquand  
 (12) used the similar concept in the valuations of some properties  
 (13) in the Amoco Cadiz oil spill This is in France I had  
 (14) discussions with Philippe and we joked back and forth a little  
 (15) bit about how similar appraisal techniques are in France and in  
 (16) the United States  
 (17) Q Mr Dorchester were there land claims in the Amoco Cadiz  
 (18) case?  
 (19) A You asked had appraised? Philippe has property in the  
 (20) area and was asked to do appraisals in the area  
 (21) Q Did you - are you talking about a damage analysis in  
 (22) connection with a claim?  
 (23) A I don't know I know that Philippe did appraisals in that  
 (24) oil spill  
 (25) MR PETUMENOS I have no further questions

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- (1) MR DIAMOND I have no further questions  
 (2) MR STOLL Your Honor I've got - I've got two  
 (3) questions  
 (4) MR DIAMOND I'm heart broken Did I raise anything  
 (5) in redirect concerning Kodiak Your Honor? I would object  
 (6) THE COURT I don't know counsel but I can't see Mr  
 (7) Stoll so I don't know what he's going to ask  
 (8) RE CROSS EXAMINATION OF JOHN D DORCHESTER JR  
 (9) BY MR STOLL  
 (10) Q Mr Dorchester you found values in all - you now didn't  
 (11) find the \$1200 an acre averaged value that Mr Carlson found in  
 (12) Kodiak for the various properties I mean he used different  
 (13) values for each parcel individually but it worked out -  
 (14) MR DIAMOND May I - I object to Mr Stoll standing  
 (15) up speaking in paragraphs putting in all sorts of his  
 (16) evidence Can we at least swear him so that we have -  
 (17) THE COURT Counsel counsel everyone speaks in  
 (18) paragraphs  
 (19) MR DIAMOND I object  
 (20) THE COURT It's a necessity of speech Go ahead Mr  
 (21) Stoll Please ask a question direct question please  
 (22) MR STOLL Thank you Your Honor  
 (23) BY MR STOLL  
 (24) Q You found generally the values were higher in Kodiak than  
 (25) in Prince William Sound?

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- (1) A For many of the types of properties yes  
 (2) Q We still disagree but you did find that What on this  
 (3) guideline - Guide Note 8 and the disclosures that are required  
 (4) of appraisers the reason for requiring that disclosure is  
 (5) because hazardous substance on property is considered  
 (6) maternal  
 (7) to a buyer isn't that correct?  
 (8) A It - I think it could be a - a maternal circumstance  
 (9) depending on what the facts of the - of the particular  
 (10) circumstance are  
 (11) Q Now incidentally you made this analogy to lawyers and so  
 (12) on and practicing law You're familiar with the fact that the  
 (13) bar examiners when they - the people that write the bar  
 (14) exams those people are - they have to pass the test  
 (15) themselves as well they can't just write the exam and then  
 (16) they automatically become the bar - a member of the bar you  
 (17) know that don't you?  
 (18) A Same thing is true in my field I would have to take and  
 (19) pass the exam  
 (20) MR STOLL Thank you  
 (21) MR DIAMOND Nothing further  
 (22) THE COURT We're going to take a break counsel  
 (23) THE CLERK Please rise this court stands in recess  
 (24) (Witness excused )  
 (25) (Jury out at 10 59 a m )  
 (Recess from 10 59 a m to 11 16 a m )

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- (1) THE CLERK Please rise This court now resumes its  
 (2) session Please be seated  
 (3) MR PETUMENOS Shall I wait a second  
 (4) THE COURT Go ahead  
 (5) MR DIAMOND We need a ruling now  
 (6) THE COURT You got it  
 (7) MR PETUMENOS There are two matters coming up with  
 (8) the next witness which is Mr Dekin the archaeological expert  
 (9) for Exxon One of them is I got served last night As I think  
 (10) I told the Court I was not feeling well yesterday I m feeling  
 (11) about the same today but that s irrelevant  
 (12) After I went home last night we got served with a book A  
 (13) book an exhibit that is a book and Exxon s position is they  
 (14) only want to use one page of the book but obviously if they  
 (15) use one page of the book I might like to have the opportunity  
 (16) to look at the other pages of the book This exhibit was  
 (17) supposed to be served on Friday last I think we ve been  
 (18) trying to be flexible with counsel over things like this but  
 (19) this is I think overlying and I think -  
 (20) THE COURT Can I see the page counsel?  
 (21) MR DIAMOND There s actually two paragraphs on the  
 (22) page May I - I ll let you read first then I ll explain  
 (23) THE COURT Yes thank you  
 (24) MR DIAMOND Starting with contents  
 (25) THE COURT Happy to see it s not Hamlet Context?

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- (1) MR DIAMOND Context  
 (2) THE COURT Okay I ve read it  
 (3) MR DIAMOND To put the book in context disputing  
 (4) context when I sat down with Professor Dekin and talked about  
 (5) his examination over the weekend he had brought a page of  
 (6) this  
 (7) with him but didn t bring the book with him and we talked about  
 (8) using it We promptly notified the other side that we intended  
 (9) to use it I think that was Monday of this week if not over  
 (10) the weekend I m not sure which and I thought the page had  
 (11) gone over to Mr Petumenos on - on Monday or the weekend  
 (12) whenever we had added that document to the list  
 (13) It turned out that the folks who were implementing that  
 (14) instruction were waiting to get a copy delivered because this  
 (15) book was not in Anchorage and it didn t come in until  
 (16) yesterday When it came in they photocopied the whole thing  
 (17) I had thought the page had already gone over I apologized to  
 (18) Mr Petumenos I gave him the page this morning He knows  
 (19) what  
 (20) I m going to use it for and where I m going to use it I have  
 (21) a strong suspicion that this witness will - witness  
 (22) cross examination will continue into tomorrow morning given  
 (23) the fact that he s not going to start immediately and if Mr  
 (24) Petumenos wants to spend this evening reading this book he ll  
 (25) probably have an opportunity to do it then  
 (26) THE COURT So you agree you can t use it today  
 (27) MR DIAMOND I m sorry?

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- (1) THE COURT So you agree you can t use it today  
 (2) MR DIAMOND I was going to use it very briefly in  
 (3) passing on my direct What I m saying he ll have the  
 (4) opportunity to read it before he does his cross  
 (5) THE COURT What s the point counsel? Everything I  
 (6) read sort of favors the Plaintiff s point of view  
 (7) MR DIAMOND Well then either of two things  
 (8) happened Either I showed you the wrong page or I ve made a  
 (9) horrible blunder that Your Honor saved me from  
 (10) THE COURT You have the opportunity to correct that  
 (11) MR DIAMOND We think it s favorable it is  
 (12) illustrative of contemporary thinking - not contemporary  
 (13) thinking thinking among archaeologists of a point that really  
 (14) goes to the - the core of the witness presentation and also  
 (15) goes to the difference between the sides as to these  
 (16) archaeological claims  
 (17) THE COURT Well that s - there s some heat there  
 (18) counsel but no light What do you mean? I mean I don t  
 (19) understand what you just said  
 (20) MR DIAMOND About context?  
 (21) THE COURT What are you going to use it for?  
 (22) MR DIAMOND It s an example of a learned treatise  
 (23) admissible under 803 parens 22  
 (24) THE COURT I m not asking about his ability I m  
 (25) asking you what are you going to argue from this page?

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- (1) MR DIAMOND Can t you wait till next week?  
 (2) THE COURT I can wait counsel Mr Petumenos can t  
 (3) MR DIAMOND Okay It all goes to what is an  
 (4) archaeological site You know our position is that no sites  
 (5) were oiled because whatever oiling happened at beaches  
 (6) happened  
 (7) at locations that are not archaeological sites They re far  
 (8) removed from the resources themselves This deals with the  
 (9) question of what do archaeologists consider a site That  
 (10) really goes to the heart of the dispute here because if you  
 (11) draw the boundaries large enough you can always draw them  
 (12) to  
 (13) encompass oil and then you would say the site was oiled Our  
 (14) position is that is not consistent with any rational thinking  
 (15) among archaeologists not consistent with the way this was  
 (16) done This is an illustration of the fact that simply  
 (17) artifacts that are off the site scattered artifacts that might  
 (18) be found in an intertidal zone that have washed out of the  
 (19) site have no archaeological value they are not part of the  
 (20) site  
 (21) Dr Dekin can do this so much better than I  
 (22) THE COURT I know he can He can do it better than  
 (23) this book too  
 (24) MR DIAMOND Can we wait and hear his testimony  
 (25) THE COURT It s - well you can t use it now and -  
 (26) today you cannot use it period Mr Petumenos can have an  
 (27) opportunity to read this entire book over the evening and then

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- (1) he'll restate his objections I suppose in the morning and  
 (2) then I will tell you that I'm very skeptical that I'll let you  
 (3) use this book now I'm confident I'm confident that the  
 (4) testimony will simply if it needs to repeat these things but  
 (5) you know the thing that I was pointing out was this book says  
 (6) to every archaeologist an artifact is worthless without its  
 (7) context Isn't that the Plaintiffs theory?  
 (8) MR DIAMOND No that's our theory That's our  
 (9) theory why -  
 (10) THE COURT Why did we have all this testimony about  
 (11) restoring the archaeological context then?  
 (12) MR DIAMOND We wonder why we had that testimony  
 (13) But now I have the worst of all worlds because I can't use it  
 (14) but Mr Petumenos can and you've already said it's favorable  
 (15) THE COURT No I'm only saying he can broaden his  
 (16) education I'm not saying that he can use it  
 (17) MR DIAMOND Okay We have a short depo read before  
 (18) the next witness  
 (19) MR PETUMENOS I had another matter Mr Diamond on  
 (20) the same witness  
 (21) We had a witness on the stand to talk about I believe it  
 (22) was either OPA 90 materials or it was I think more accurately  
 (23) the 14(h)(1) status selected archaeological sites We came to  
 (24) the bench The Court said this is a matter for the Court why  
 (25) can't this be a matter for the Court

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- (1) I think I'm on the same wavelength on that I think Your  
 (2) Honor recalls the bench conference but the issue was I was  
 (3) going to get into the whole selected but not conveyed area  
 (4) and you told me that it was a matter for instruction for the  
 (5) Court and was under advisement by the briefs and I wasn't  
 (6) allowed to get into it  
 (7) I wanted to make sure that the same rule holds true for Mr  
 (8) Dekin in that he is not going to opine about which - whether  
 (9) they're selected or conveyed or underscore the point  
 (10) I have a paragraph of the - we've mentioned to you from  
 (11) time to time of the consent decree with the federal government  
 (12) in connection with our - the Native Corporation's attempts to  
 (13) enjoin the federal/state settlement for fear that they would  
 (14) infringe - affect our rights on selected but not conveyed  
 (15) lands and the provision of the settlement which I have is one  
 (16) paragraph  
 (17) MR DIAMOND Not an issue with this witness  
 (18) THE COURT Not an issue All right let's get the  
 (19) jury in here  
 (20) MR PETUMENOS I really wanted to show him that  
 (21) paragraph too  
 (22) (Jury In at 11 26 a m )  
 (23) THE COURT All right the jury's present counsel go  
 (24) ahead  
 (25) MR DIAMOND Your Honor Mr Oppenheimer stood up and

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- (1) that can only mean one thing deposition reading but they're  
 (2) three very short excerpts and they're a prelude to the next  
 (3) live witness he's an archaeologist These three depositions  
 (4) concern archaeologist issues  
 (5) MR STOLL That was a warm up  
 (6) THE COURT He's speaking in paragraphs he's speaking  
 (7) in paragraphs  
 (8) MR OPPENHEIMER Somehow Your Honor we've managed  
 (9) to find some deposition transcript where no one speaks in  
 (10) paragraphs This is the time of day we've all been waiting  
 (11) for hope everyone has their coffee Exxon's next witness by  
 (12) deposition Mr Patrick Norman  
 (13) THE COURT If you've been previously sworn simply  
 (14) give you name for the record as you come up here  
 (15) A Peter Christensen  
 (16) MR OPPENHEIMER Was a time Your Honor when the  
 (17) witnesses I examined looked different from one another but -  
 (18) The following are excerpts from the sworn testimony of Pat  
 (19) Norman who was deposed on archaeology issues on  
 (20) September 11  
 (21) 1992 and November 11 1993 Mr Norman served on the Port  
 (22) Graham Corporation Board of Directors from 1978 to 1984 He  
 (23) has been the president of the corporation from 1984 to the  
 (24) present Mr Norman has been designated by the corporation  
 (25) as  
 (24) the person most knowledgeable on the corporation's use and  
 (25) management of its cultural sites

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- (1) DIRECT EXAMINATION OF PATRICK NORMAN (Read)  
 (2) BY MR OPPENHEIMER  
 (3) Q Are you familiar with the term vandalism?  
 (4) A Yeah  
 (5) Q What does that mean to you?  
 (6) A It's looking or taking digging around in obvious cultural  
 (7) site to obtain artifacts and stuff like it.  
 (8) Q In your mind would that include the work of  
 (9) archaeologists or is that something outside the formal  
 (10) archaeological process or excavation process?  
 (11) A I believe it's outside  
 (12) Q Is it your understanding it would be unauthorized digging?  
 (13) A Unauthorized digging yes  
 (14) Q Have you been to Grungy Cove since your first visit in  
 (15) 1989?  
 (16) A Yeah  
 (17) Q How many times?  
 (18) A 89 90 twice 91 once is that four four times  
 (19) Q Have you ever observed any vandalism on this particular  
 (20) cultural site?  
 (21) A I'm not aware of vandalism from that particular site no  
 (22) Q Did you also visit the Windy Bay SEL 179 site in 1989?  
 (23) A Yeah  
 (24) Q Have you visited it since?  
 (25) A Yes

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- (1) Q When was that?
- (2) A In the fall survey of 89 spring survey of 1990 the fall
- (3) survey of 1990 the spring survey of 1991 and then the fall of
- (4) 91
- (5) Q Are you aware of any vandalism or disturbances at this
- (6) site Windy Bay SEL-179 WB-3?
- (7) A I noticed no vandalism that I could detect on that site
- (8) no
- (9) Q Are you aware by any means including others whether there
- (10) has been some vandalism at this site?
- (11) A No
- (12) Q I d like to turn now to the next site which the Badger
- (13) Cove Island CB-1 one Are you aware of anyone who has
- (14) visited
- (15) this site since your last deposition session?
- (16) A No
- (17) Q Is the corporation aware of any evidence or reports of
- (18) vandalism at this site since your last deposition?
- (19) A No
- (20) Q In your prior deposition you referred to several sites in
- (21) the Kenal Fjords area and I believe actually three sites all in
- (22) Yalik Bay?
- (23) A Yeah
- (24) Q Let s talk about the first Yalik Bay site Are you aware
- (25) of anyone who has visited this site since your last deposition
- session?

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- (1) A Yeah
- (2) Q Who was that?
- (3) A Me and my two Board of Directors
- (4) Q And that was Lydia Robart and Melvin Malchoff or Herman
- (5) Moonin?
- (6) A It was Herman Moon - Moonin excuse me
- (7) Q Is the corporation aware of any evidence or reports of
- (8) vandalism at this site?
- (9) A No
- (10) Q Let s now turn to the second Yalik Bay site Is the
- (11) corporation aware of any evidence or reports of vandalism at
- (12) this site following the oil spill?
- (13) A No
- (14) Q Let s turn to the third site in Yalik Bay Is the
- (15) corporation aware of any evidence or reports of vandalism at
- (16) this site following the oil spill?
- (17) A None that s been reported to us no
- (18) Q Is Port Graham Corporation making a claim for a site
- (19) located in Northwestern Lagoon in Harris Bay?
- (20) A Yes
- (21) Q With regard to this site Is the corporation aware of
- (22) evidence or reports of vandalism at this site following the oil
- (23) spill?
- (24) A None that s been reported to us
- (25) Q Are you aware of any cultural materials or artifacts that

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- (1) have been collected at this site?
- (2) A No
- (3) Q Mr Norman prior to the oil spill did Port Graham
- (4) Corporation conduct or commission any type of survey of
- (5) cultural resources on its lands?
- (6) A No
- (7) Q Mr Norman are you aware that any of the archaeological or
- (8) cultural sites on Port Graham lands have suffered from erosion
- (9) of some form?
- (10) A Yes
- (11) Q Was the corporation aware of that prior to the oil spill?
- (12) A Yes
- (13) Q What if anything did Port Graham Corporation do to
- (14) prevent additional erosion at archaeological and cultural
- (15) sites?
- (16) A We didn t do anything
- (17) Q Is the corporation aware of any instance prior to the oil
- (18) spill where it received a report of any type of vandalism or
- (19) disruption to an archaeological or cultural site on its lands?
- (20) A Yeah we - we are yeah
- (21) Q And when did that occur?
- (22) A Gees I don t know the exact time but I think there was
- (23) one in our corporation property in Port Graham
- (24) Q And this was before you became president?
- (25) A No durng During

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- (1) Q Do you remember the approximate year?
- (2) A No
- (3) Q What year did you become president?
- (4) A 89
- (5) Q This report -
- (6) A Excuse me 84 I misspoke
- (7) Q This report of disturbance was before the oil spill?
- (8) A Yeah
- (9) Q Who made the report?
- (10) A I think Robert McMullen talked to me about his concern
- (11) about the archaeological site that s on the cannery property we
- (12) own which is - which is eroding or had been eroding into -
- (13) you know into the bay right in the village of Port Graham
- (14) Q And this is the site that you re referring to about the
- (15) report of disruption?
- (16) A Disruption?
- (17) Q When - you indicated that during the time of your
- (18) presidency and sometime prior to the oil spill the
- (19) corporation received a report of some type of disruption to an
- (20) archaeological or cultural site
- (21) A Well I was - I was referring to disruption as Robert
- (22) McMullen bringing to me his concern about the property the
- (23) cannery property where the archaeological site is
- (24) Q So he expressed his concern that this site was threatened
- (25) by erosion?



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- (1) A Right  
 (2) Q Did he identify what he thought contributed to the erosion?  
 (3) A Honda traffic over the – over the beach Truck traffic  
 (4) skiff being pulled up and down over it the tide taking gravel  
 (5) off the beach  
 (6) Q And what if anything did the corporation do in response  
 (7) to Mr McMullen s concerns?  
 (8) A Well before that the village had been allowed the take  
 (9) gravel from the beach to gravel sandy – or gravel icy roads  
 (10) and also gravel the airport But after he expressed his  
 (11) concern we – or I took a look at it and said that well  
 (12) we re taking the gravel from this right below where the site  
 (13) is and that was meaning that the gravel that was covering the  
 (14) site and what we thought was protecting it was you know  
 (15) eroding back down into the places where we were taking the  
 (16) gravel out So we announced over the CB and let everybody  
 (17) know who – you know – the village government who was taking  
 (18) gravel that their area was closed to the taking of gravel that  
 (19) that area was closed to taking gravel They had to go to the  
 (20) other side of the spit there to get gravel to sand roads and/or  
 (21) whatever village projects were going on  
 (22) Q What if anything did the corporation do to address Mr  
 (23) McMullen s concerns about Honda and skiff traffic on the site?  
 (24) A Just to keep – keep them from taking the gravel which –  
 (25) which after awhile the gravel moving from I don t know 6- or

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- (1) 700 feet away just by tidal action moved – moved over and  
 (2) filled in that area again which is currently being pushed up  
 (3) and covering that site right now But we – we still get wind  
 (4) and wave action that moves the ground around so much  
 because  
 (5) it s not compacting down onto the site yet  
 (6) Q Is it that the site is no longer in danger of being harmed  
 (7) by Honda traffic or skiff traffic?  
 (8) A Oh it s – it s still a danger right now with the Hondas  
 (9) and skiffs going – being pulled up over it It s still –  
 (10) that part is still there but with the build-up of beach gravel  
 (11) back again we re hoping that it doesn t – it covers it in  
 (12) enough to where it s not eroding the mud and shells and stuff  
 (13) over the beach The skiffs will be towed up over the – over  
 (14) the gravel  
 (15) Q Prior to the oil spill did the corporation ever attempt to  
 (16) repair or restore a site that was threatened by erosion?  
 (17) A Not to my knowledge  
 (18) MR OPPENHEIMER Thank you (Witness excused)  
 (19) MR OPPENHEIMER Our next witness by deposition is  
 (20) Gail Evanoff  
 (21) THE CLERK Ma am please state your name for the  
 (22) record  
 (23) A Leslie Exley  
 (24) THE CLERK Thank you  
 (25) MR OPPENHEIMER The following are excerpts from the

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- (1) sworn deposition testimony of Gail Evanoff who was deposed  
 on  
 (2) archaeological issues in April 1992 and January 1994 Ms  
 (3) Evanoff has been vice president of corporate operations for  
 (4) Chenega Corporation since June of 1989 and chief financial  
 (5) officer since January of 1992 Ms Evanoff has also served as  
 (6) president and secretary of Chenega Corporation Ms Evanoff  
 (7) has been designated by the corporation as the person most  
 (8) knowledgeable on the corporation s management of its cultural  
 (9) sites  
 (10) DIRECT EXAMINATION OF GAIL EVANOFF (Read)  
 (11) BY MR OPPENHEIMER  
 (12) Q Are you aware of any instance where a board member of  
 (13) Chenega Corporation expressed the opinion that the  
 corporation  
 (14) should not excavate cultural sites on its lands?  
 (15) A I – I believe the corporation to represent that we did not  
 (16) want excavation  
 (17) Q Who else did you represent that to?  
 (18) A I believe it was SHPO Exxon DNR  
 (19) Q Do you recall whether you told them that you didn t want  
 (20) sites excavated?  
 (21) A I can respond to sites I m responding to the trouble that  
 (22) we had an understanding of the excavation of Kake Cove  
 (23) Q Did the corporation ever take the position that it did not  
 (24) want sites excavated before the oil spill?  
 (25) A Yes

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- (1) Q Just limiting ourselves for the moment to before the spill  
 (2) period why did the corporation not want cultural sites on its  
 (3) lands excavated? Was there some particular reason?  
 (4) A Yes That reason being out of the utmost and sincere  
 (5) respect of our shareholders  
 (6) Q Before the oil spill was it the corporation s intention to  
 (7) leave the sites unexcavated?  
 (8) A Yes  
 (9) Q Has that policy in any way changed since the oil spill?  
 (10) A No  
 (11) Q For the same reasons?  
 (12) A Yes  
 (13) Q Excluding those persons who are either shareholders of  
 (14) Chenega Corporation or who reside in Chenega does the  
 (15) corporation have any evidence that any other clean up workers  
 (16) have returned to corporate lands since the time that clean up  
 (17) operations stopped?  
 (18) A No  
 (19) Q Once again since the time that cleanup on Chenega lands  
 (20) stopped is the corporation aware of any evidence that there  
 (21) has been vandalism or disturbance of cultural sites on Chenega  
 (22) lands?  
 (23) A I don t recall  
 (24) Q Do you have any recollection that there were incidents of  
 (25) vandalism that occurred after the conclusion of clean up

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- (1) operations?
- (2) A I don't know
- (3) MR OPPENHEIMER Thank you
- (4) (Witness excused)
- (5) MR OPPENHEIMER Your Honor we'd call as our next
- (6) witness by deposition John Johnson and I note here with great
- (7) relief that someone has notated on my version short version
- (8) so not much to deal with
- (9) A My name is Daniel Egging E-g-g I n-g
- (10) MR OPPENHEIMER The following are excerpts from the
- (11) sworn testimony of John Johnson who was deposed in
- (12) December
- (13) 1993 and January 1994 Mr Johnson is the cultural resources
- (14) manager for Chugach Alaska Corporation And he's also a
- (15) Chugach shareholder Mr Johnson was designated by
- (16) Chugach
- (17) Alaska Corporation as the most knowledgeable person on the
- (18) location and management of archaeological and cultural sites
- (19) on
- (20) Chugach lands both before and after the oil spill
- (21) DIRECT EXAMINATION OF JOHN JOHNSON (Read)
- (22) BY MR OPPENHEIMER
- (23) Q Up until the time of the spill and during the time that
- (24) you worked for Chugach Alaska Corporation was it your
- (25) understanding that Chugach was interested in developing
- (26) tourism?
- (27) A That is correct
- (28) Q How did you become aware of that?

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- (1) A Through the land department
- (2) Q Was that something that was discussed frequently?
- (3) A Yes
- (4) Q Did the corporation ever consider whether its cultural
- (5) resources may actually compliment its efforts to attract
- (6) additional tourists or recreational visitors?
- (7) A Definitely
- (8) Q Could you describe that for me?
- (9) A People are interested in learning native history and a
- (10) place like Nuchek would be a - a good example where you
- (11) have
- (12) plans for a cultural center
- (13) Q Were the corporation's plans in this regard limited to
- (14) Nuchek or were there other sites or resources it had
- (15) considered promoting as part of a tourism or recreational
- (16) industry?
- (17) A I think just about any one of these places in Prince
- (18) William Sound tie with cultural and tourism
- (19) Q If I understand you correctly Chugach believed it would be
- (20) beneficial to a certain extent to promote its cultural
- (21) resources as a part of a tourism effort?
- (22) A That's right
- (23) Q Could you characterize the relationship between Exxon
- (24) cultural resources program and Chugach's oil spill response
- (25) team as one of mutual cooperation?
- (26) A I believe that was their intention

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- (1) Q Your intention or Exxon's intention?
- (2) A I believe both
- (3) Q Would you characterize the relationship between the two
- (4) programs as one of mutual professional respect?
- (5) A I believe they did their best effort to try to respect each
- (6) other professionally
- (7) Q Both sides?
- (8) A I believe so
- (9) Q Do you think that Exxon's placing of archaeological
- (10) constraints on particular beach segments somehow tipped off
- (11) the
- (12) presence of cultural resources in a particular beach section?
- (13) A I don't believe so
- (14) Q Was it Chugach's position that they supported closing off
- (15) certain sections of the beach in terms of access by clean up
- (16) workers?
- (17) A That is correct
- (18) Q If you suspected that a cultural site might be in danger
- (19) due to vandalism or erosion would you immediately excavate it
- (20) or would you wait and see if that threat comes to pass?
- (21) A I'd say monitoring the site would be a good step that a
- (22) person could start with
- (23) Q Would that be the first step?
- (24) A I think that would be a real good step to start with I
- (25) don't know if it's so much the first but it makes the logical
- (26) progression

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- (1) Q Based upon your dealings with native leaders in attempting
- (2) to obtain consensus on these matters generally would you
- (3) believe that in the future you would evaluate a site to see if
- (4) it actually is being damaged or impacted before conducting a
- (5) salvage excavation?
- (6) A I think that would be a logical step to pull your
- (7) information together evaluate it then proceed from your
- (8) evaluations
- (9) Q John if you could take a look at Exhibit 108 108 it is
- (10) entitled quote environmental damage to cultural resources
- (11) Chugach Alaska Corporation archaeological damage claims
- (12) 1993
- (13) end quote by John E Lobdell for Chugach Alaska Corporation
- (14) It's a fairly lengthy document. Have you seen this document
- (15) before?
- (16) A Yeah I believe I have
- (17) Q To your knowledge John is this a list of the sites that
- (18) Chugach Alaska Corporation is claiming as damaged as a
- (19) result
- (20) of the Exxon Valdez oil spill?
- (21) A I believe that's correct
- (22) Q Did you participate in any way with the selection of these
- (23) 34 sites?
- (24) A Boy real small I guess Not that much
- (25) Q What can you recall about that?
- (26) A Just saying that these sites - verifying these sites are
- (27) within the spill area Basically Lora Johnson and Jack Lobdell

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- (1) are responsible for this I haven't really had much input into  
 (2) this entire - this process  
 (3) Q But you do have knowledge of the sites themselves?  
 (4) A That's true  
 (5) Q And I understand that this is Dr. Lobdell's report. The  
 (6) only reason I'm really using it today is so that we have this  
 (7) list of sites in front of us?  
 (8) A Okay  
 (9) Q Why don't I ask you a general question so I can eliminate  
 (10) another question out of my outline for each site?  
 (11) A Sure  
 (12) Q Does Chugach have a present intention to excavate any of  
 (13) the sites on this list any of the list of 34 sites?  
 (14) A I believe the only one that's been actively discussed is  
 (15) the Crafton Island cave  
 (16) Q And on this list could you just read the number and the  
 (17) description?  
 (18) A Crafton Island  
 (19) Q Because there is several Crafton Island?  
 (20) A Right I believe it's Crafton Island north 10957  
 (21) Q Had anyone ever told you before the spill that that site  
 (22) was known to non-natives?  
 (23) A Boy I can't remember off the top of my head on that one  
 (24) Q And you mentioned earlier that this is a site that CAC has  
 (25) a pleasant intention to excavate?

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- (1) A We don't - it's been discussed I mean we don't have any  
 (2) plans to start excavating tomorrow. But that's - but that  
 (3) one's been talked about for awhile  
 (4) MR. OPPENHEIMER Thank you  
 (5) (Witness excused)  
 (6) MR. DIAMOND Your Honor we call as our next witness  
 (7) in the flesh Professor Al Dekin  
 (8) THE CLERK. The little - the end of it you need to  
 (9) attach to your tie  
 (10) A I guess the question is where do you put the other one. Do  
 (11) you have a suggestion on that?  
 (12) THE CLERK. You can stick it in your pocket if you're  
 (13) going to be moving around  
 (14) A Thank you  
 (15) THE CLERK. Could you please stand and raise your  
 (16) right hand  
 (17) (The Witness Is Sworn)  
 (18) THE CLERK. Please be seated Sir for the record  
 (19) could you please state your full name?  
 (20) A Albert Arch A r c h Dekin D-e k i n Junior  
 (21) THE CLERK. And your occupation?  
 (22) A I'm a consulting archaeologist and a professor of  
 (23) anthropology  
 (24) THE CLERK. Thank you  
 (25) DIRECT EXAMINATION OF ALBERT DEKIN JR

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- (1) BY MR. DIAMOND  
 (2) Q And the only suggestion that we have for you now that  
 (3) you're wired up is not to step in a bathtub  
 (4) How long have you been an archaeologist?  
 (5) A I've been an archaeologist since about 1963. For about 31  
 (6) years  
 (7) Q How did you become to be an archaeologist?  
 (8) A I went through Dartmouth College and majored in  
 (9) anthropology. In 1965 I graduated I went to Michigan State  
 (10) University and graduated with a doctorate 1975 again in  
 (11) anthropology  
 (12) Q Why did you become an archaeologist?  
 (13) A I thought it was more interesting than being a lawyer  
 (14) Q I can't imagine  
 (15) Do you have any specialties in archaeology?  
 (16) A I am a - a - an archaeologist I am a cultural resource  
 (17) manager and my specialties are in the archaeology of the Arctic  
 (18) and Subarctic and in the northeastern United States  
 (19) Q So that we all know what we're talking about why don't you  
 (20) define for us what we mean when we use the term archaeology?  
 (21) A Archaeology is a subfield of anthropology. Anthropology  
 (22) being the study of humans. Archaeology being the subfield  
 that  
 (23) deals with the reconstruction of past life ways based upon the  
 (24) interpretation of the things that people left behind  
 (25) Basically trying to reconstruct the behavioral context as what

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- (1) people were actually doing from the archaeological context the  
 (2) things they left behind  
 (3) Q Basically putting pieces back together and figuring out  
 (4) what they looked like back then?  
 (5) A Trying to  
 (6) Q You said you also had a specialty in cultural resource  
 (7) management. What's that?  
 (8) A Cultural resource management shifts the role of the  
 (9) archaeologist from a consumer of the resource that is from an  
 (10) excavator who digs up sites to a manager of that resource who  
 (11) makes decisions that might affect it evaluates them protects  
 (12) them and so on  
 (13) Q How does that differ from just your science of archaeology?  
 (14) A Well the scientific aspects of archaeology really focus on  
 (15) the reconstruction of the past using all of this evidence that  
 (16) one obtains from an archaeological site  
 (17) Cultural resource management is much more a concern for the  
 (18) resource itself that is the sites and their contents. A  
 (19) concern for making sure that modern land use for example  
 does  
 (20) not - does not damage them. A concern for fulfilling  
 (21) governmental responsibilities  
 (22) For example there are a lot of laws and regulations  
 (23) that - that affect these sites and a concern that people who  
 (24) wish to modify the land or whether by getting a permit from the  
 (25) Corps of Engineers or something else actually have to respect

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- (1) the archaeological sites that might be there and so the  
 (2) cultural resource management is a much broader field than  
 (3) simply archaeology. It deals with historic resources as well  
 (4) and so forth and it focuses on the managerial aspect of it  
 (5) Very much like a land manager with responsibility for their own  
 (6) resources  
 (7) Q Does the matter which brings us together this morning is  
 (8) that the first matter you've worked on in Alaska?  
 (9) A No, it's not.  
 (10) Q Why don't you tell the jury about your background in Alaska  
 (11) and Alaskan archaeology?  
 (12) A My graduate work in anthropology brought me some  
 (13) familiarity with Alaska's pre-history and history through  
 (14) course work. And then my doctoral research in eastern Canada  
 (15) in the early - in the mid '60s brought me a greater  
 (16) familiarity with some of the earlier periods in Alaskan  
 (17) archaeology because that was seen as the source for the  
 (18) people  
 (19) whom I was studying who had migrated from northern Alaska  
 (20) through Canada to the eastern Arctic and so I had some  
 (21) familiarity with Alaska from - from that  
 (22) I also wrote a book and several articles on the history of  
 (23) Arctic archaeology and had significant components of Alaskan  
 (24) archaeology in there  
 (25) Q Have you been supervising archaeologists on any projects in  
 (26) Alaska?

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- (1) A Yes. I first came to Alaska in 1975. I worked for the  
 (2) University of Alaska in Fairbanks, worked there for over a  
 (3) year where I was supervisory archaeologist on the  
 (4) Trans-Alaska  
 (5) Pipeline construction again in a capacity trying to prevent  
 (6) the damage to archaeological sites from the construction of  
 (7) that rather large land - land altering facility  
 (8) Q Any others since then?  
 (9) A Yes. In 1975 I - I'm sorry 1976 I went to New York  
 (10) but I came back in 1981 to conduct some excavations in  
 (11) advance  
 (12) of facilities construction in the present City of Barrow. That  
 (13) is they were going to build utilidors and so on so again in a  
 (14) preventive way we tried to excavate in advance of construction  
 (15) so that they would not damage the very significant cultural  
 (16) resources that underlie the present City of Barrow  
 (17) Q We'll come back to Barrow but have you done work on  
 (18) Sitkinak Island for the National Park Service?  
 (19) A Yes I did. I worked on Sitkinak Island at about the same  
 (20) time down off Kodiak again a federal parcel was intended to  
 (21) be transferred and the federal government wanted to make sure  
 (22) that there were not significant archaeological sites inside it  
 (23) before they did the transfer so we did fieldwork down there  
 (24) Q And before you went to work for Exxon you had been  
 (25) retained by the Forest Service in connection with the Exxon  
 (26) Valdez spill?  
 (27) A Yes

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- (1) Q Tell us about that  
 (2) A I again working out of Binghamton University I put  
 (3) together a proposal to do work in response to their request  
 (4) which assessed the impact of the oil spill on archaeological  
 (5) sites and that was for the - for the Forest Service in 1991  
 (6) Q All right. Let's go back to the work you did in Barrow  
 (7) which was what year?  
 (8) A 81 to 83  
 (9) Q And Mr. Petemenos is undoubtedly familiar with this because  
 (10) he carries around National Geographic maps and he  
 (11) undoubtedly  
 (12) read the article you wrote in your work but tell us about the  
 (13) work you did in Barrow?  
 (14) A In 1981 we were excavating in advance of the construction  
 (15) of the utilidors up there and we were working for the Bureau of  
 (16) Indian Affairs and the National Park Service. In 1982 our  
 (17) sponsor became the North Slope Borough and we worked for  
 (18) an  
 (19) additional year there. While we were there we encountered  
 (20) a - a collapsed house that illegitimate excavators had  
 (21) uncovered on the bluff edge up there where it was eroded and  
 (22) people were digging in it and they came down in the middle of  
 (23) this intact house. When we - became aware of it and received  
 (24) permission to conduct the investigation we started digging in  
 (25) this intact house that turns out to have been almost 500 years  
 (26) old  
 (27) Q When I say "intact" it contained the frozen remains of two

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- (1) individuals and it contained skeletonized remains of three  
 (2) others. The preservation was so good that the bodies were  
 (3) carefully excavated and taken to Fairbanks for autopsies for  
 (4) example. What was important about this which became  
 (5) dubbed in  
 (6) the press at the time and then we used it a little bit later  
 (7) on. I must admit was they called it the frozen family because  
 (8) there were these five individuals that were in this one house  
 (9) But what was interesting from an archaeological point of  
 (10) view is that it wasn't just the freezing of the bodies  
 (11) themselves that gave us the biological ability to investigate  
 (12) them not me personally of course but it was the fact that  
 (13) the - that the find was kind of frozen in context that is  
 (14) the house when it was frozen froze these people but it also  
 (15) froze as a snapshot the artifacts that they had in use the  
 (16) things that they'd brought out the dinner that they had the  
 (17) night before and so forth all - all frozen there in tact so  
 (18) that when we conducted the excavation we could find things in  
 (19) their place of last use and that's quite remarkable  
 (20) It's an unusual event really unique I guess I'd have to  
 (21) say especially in Alaska to have this kind of ability to  
 (22) study things as they were kind of frozen in time and frozen in  
 (23) context so that you could see not just the artifacts  
 (24) themselves but the way in which people had arranged them so  
 (25) that they could use them. That was particularly interesting  
 (26) Q The term context has particular meaning to archaeologists

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- (1) I take it?  
 (2) A Yes it does  
 (3) Q And that is something that becomes important to your  
 (4) testimony?  
 (5) A It is - it is essential to understand the meaning of  
 (6) context and association  
 (7) Q Other than the National Geographic piece you wrote on the  
 (8) frozen family in Barrow have you published about work you ve  
 (9) done in Alaska?  
 (10) A Yes we have extensive series of reports that were  
 (11) published by the North Slope Borough that covered the  
 fieldwork  
 (12) we did there in those three years and I have some other  
 (13) government reports and documents and so on that cover that  
 (14) The National Geographic article is probably the most popular of  
 (15) that sort  
 (16) Q Have you been involved in any cultural resource  
 management  
 (17) in Alaska?  
 (18) A Yes In addition to the studies I ve talked - I ve talked  
 (19) about I was also retained as a consultant to review the  
 (20) University of Alaska at Fairbanks work on the Susitna dam and  
 (21) lake archaeology program back when that program was  
 proposed as  
 (22) a archaeology project  
 (23) In other words they conducted a lot of research in advance  
 (24) of that because the dam itself would flood a lot of  
 (25) archaeological sites and might destroy them and so we did  
 work

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- (1) on that and my job was to review the quality of the work by the  
 (2) University of Alaska museum in fulfilling the needs of the  
 (3) federal government and the needs of the sponsor at that time  
 (4) Q Okay I m going the read into the record a hearsay  
 (5) statement which was just handed me but it says ask him to slow  
 (6) down so that Joy doesn t lose her mind Could you talk a  
 (7) little bit more slowly?  
 (8) A I will try as long as the adrenaline cooperates  
 (9) Q You re not a professional witness you a little  
 (10) uncomfortable up there?  
 (11) A I might be I do lecture and I do lecture often and I do  
 (12) lecture rapidly and I m sorry I ll -  
 (13) MR PETUMENOS Probably get your chance when we get  
 (14) together tomorrow?  
 (15) A I might prefer to go more slowly wrth you perhaps sir  
 (16) MR DIAMOND We ll try to do this in 15 minutes  
 (17) BY MR DIAMOND  
 (18) Q You said you went to New York is that where you currently  
 (19) teach?  
 (20) A I am an associate professor of anthropology at the State  
 (21) University of New York at Binghamton New York  
 (22) Q That seems rather strange you have a specialty in Arctic  
 (23) archaeology but you you teach in New York?  
 (24) A If you look at the population spread around the country  
 (25) there are a lot more people wanting - wanting educational

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- (1) opportunities Because there s simply more people in New  
 York  
 (2) the number of opportunities to teach in Alaska are relatively  
 (3) few The number to teach my specialty are relatively fewer  
 (4) Q You re undoubtedly a member of many professional  
 (5) organizations?  
 (6) A I am  
 (7) Q Fellow of the American Anthropological Association the  
 (8) American Association for the Advancement of Science and the  
 (9) Society for American Archaeology?  
 (10) A That s true  
 (11) Q Did I leave any important ones out?  
 (12) A Those are the national organizations for which I usually  
 (13) work  
 (14) Q And you ve served on federal advisory committees?  
 (15) A I have  
 (16) Q Which ones?  
 (17) A I presently serve on the committee for the Society for  
 (18) American Archaeology to advise the National Park Service  
 (19) nationally on the nomination review and inclusion of  
 (20) significant historic properties as national historic  
 (21) landmarks Alaska has quite a few actually  
 (22) Q We know this is your first time testifying in court Have  
 (23) you ever testified anywhere else?  
 (24) A Yes I ve testified on several other cases before the New  
 (25) York State Public Service Commission reviewing the necessity

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- (1) for archaeological and historical research in advance of power  
 (2) line construction and I also testified before the U S Senate  
 (3) Committee on Law representing the Society for American  
 (4) Archaeology and attempting to influence the U S compliance  
 (5) with international regulations on trafficking in the - in  
 (6) antiquities  
 (7) MR DIAMOND I m certain you ll find this is lot more  
 (8) hospitable and friendly than Congress  
 (9) I would tender Professor Dekin as an expert in the fields  
 (10) of archaeology and cultural resource management  
 (11) MR PETUMENOS No objection Judge  
 (12) THE COURT He s qualified in those areas  
 (13) BY MR DIAMOND  
 (14) Q Before we get into the work that you did and the opinions  
 (15) that you formed from that let s familiarize everyone with some  
 (16) underlying principles of archaeology and Arctic archaeology  
 (17) What are the kinds of archaeological resources or what are  
 (18) the categories of archaeological resources that predominate in  
 (19) Prince William Sound and the Gulf and how are they broken  
 down?  
 (20) A We can I think reasonably divide the history of people  
 (21) of people in this area into three periods The prehistoric  
 (22) period is that period from the earliest evidence we have of  
 (23) human occupation up to the coming of people who were writing  
 (24) written records basically the Russians So the prehistoric  
 (25) period extends from whenever people first came to the coming  
 of

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- (1) the Russians the late 1700s That's the prehistoric  
 (2) The historic period represents that period from the  
 (3) Russians on up to the modern era The modern era being by  
 (4) convention in some cases by legal definition the last 50  
 (5) years I like to think of the modern era in reference to my  
 (6) own age actually I'm just over 50 It means that I'm not  
 (7) quite an historic artifact but my mother was certainly living  
 (8) in a different culture than the one which I do so it's that  
 (9) cultural difference I think is important  
 (10) Q We're on the cusp but I'm on the other side Let's go back  
 (11) to prehistoric What kind of cultural resources  
 (12) archaeological sites are found in prehistoric resource  
 (13) locations?  
 (14) A Well prehistoric sites in the Kenai and in Prince William  
 (15) Sound basically represent the shoreline activities as most of  
 (16) them are along the shoreline activities of groups of people  
 (17) who live there subsisting on the natural resources so on as  
 (18) many people do today These archaeological sites represent the  
 (19) places where they lived and worked They represent the  
 (20) locations where they left behind artifacts and other things  
 (21) that I'll mention in a second of - that represent the way in  
 (22) which they lived in that location okay  
 (23) So these sites might include - and the most frequent  
 (24) artifacts usually are stone tools or fragments of stone tools  
 (25) and so forth All right These are knives or choppers or

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- (1) scrapers there's lots of words for them but they're basically  
 (2) the tools that people used in that location They represent  
 (3) the dominant artifact that we find in archaeological sites from  
 (4) this period  
 (5) You also find because people lived there that they had -  
 (6) they had facilities and features that is jargonizing terms but  
 (7) basically hearths and houses and pits to store things and so  
 (8) forth In those fires they would have charcoal the remains of  
 (9) last night's dinner and bones and so on sometimes shells A  
 (10) wide range of materials that gets dropped and left behind when  
 (11) people live in this particular kind of situation  
 (12) And so there are  
 (13) Q Next - go ahead I'm sorry?  
 (14) A There are lots of different kinds of locations too  
 (15) People sometimes lived a long time in one spot they sometimes  
 (16) went to camps in the summer and so you get a mixture of these  
 (17) kinds of sites but they all have in common they left these  
 (18) things behind in one location  
 (19) Q Those are prehistoric sites before 1700?  
 (20) A That's right  
 (21) Q What kind of archaeological resources do you find in  
 (22) historic sites?  
 (23) A The period since the late 1700s as you're - as everyone I  
 (24) think is probably aware is marked by a lot of changes The  
 (25) Russians brought in trade goods They forced people to work

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- (1) for them they did a whole bunch of things they really moved  
 (2) people around in the landscape and changed the way in which  
 (3) people related to the land and subsistence So there are some  
 (4) significant changes that occurred I wouldn't say immediately  
 (5) but with the onset of Russian influence  
 (6) As the artifacts changed you begin to get more metal that's  
 (7) introduced You don't get significant changes immediately in  
 (8) locations that people used necessarily but you do later on  
 (9) during this period Even coming up to the 1800s and so on you  
 (10) do begin to get construction of salteries you get construction  
 (11) of hatcheries you get fox farms you get all sorts of other  
 (12) things that represent again changing ways in which people  
 (13) live in these particular areas  
 (14) Q You find the remnants of their occupations and businesses  
 (15) and -  
 (16) A Yes you do and you begin to find the artifacts are  
 (17) different You get nails that are - well that are machine  
 (18) made and wood that's machine made and so forth so it's the  
 (19) character of the archaeological record really shifted markedly  
 (20) Q You then said that there were modern sites Do you  
 (21) understand that there are none involved in this case?  
 (22) A Yes Plaintiffs have not made - my understanding  
 (23) Plaintiffs have not made a claim for modern sites but there  
 (24) are a lot of places where people are still living and working  
 (25) and modifying the land and there are fish camps and hunting

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- (1) camps and so forth  
 (2) Q We have been told that archaeological sites in Prince  
 (3) William Sound and the Gulf are threatened or under threat.  
 (4) What is the single greatest threat to archaeological resources  
 (5) in South Central Alaska?  
 (6) A The biggest threat to archaeological resources at the  
 (7) present time is erosion  
 (8) Q Okay What are the other threats if there are others?  
 (9) A There are some less - significantly less important effects  
 (10) from animals and also from present land use People are  
 (11) very - again from a cultural resource management viewpoint  
 (12) people are very conscious of the potential impact from logging  
 (13) and other kinds of construction airports and things of that  
 (14) nature So there are some threats but they are usually  
 (15) regulated and they're far less important than the ongoing  
 (16) threat of erosion  
 (17) Q Why is erosion such a great threat to archaeological  
 (18) resources here?  
 (19) A Erosion is a - such a threat largely because of the  
 (20) changing relations between land and sea down there Most of  
 (21) you are aware I'm sure that the land changed significantly in  
 (22) 1964 in this part of the world in some places the land rose  
 (23) up to 40 feet and some places it dropped and what that does is  
 (24) it means the previous deposits that were on the shore above the  
 (25) land in some cases dropped down into the water where they are

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- (1) subject to ongoing erosion from tides and storms and so forth  
 (2) and it causes - it destroys the archaeological context of the  
 (3) sites that are there We'll talk about that later but it has  
 (4) a very severe effect on them  
 (5) Q I know you've agreed to do a drawing for us to show us  
 (6) archaeological sites and their interface with the marine  
 (7) environment Let me set up a white board for you Will you  
 (8) give me a hand?  
 (9) A Good  
 (10) Q You thought you were only testifying You got your magic  
 (11) markers with you?  
 (12) A I do  
 (13) Q Don't trip Where would you like this?  
 (14) A I wanted to work from the other side That's fine Thank  
 (15) you  
 (16) My intent is to show you the relationship between the  
 (17) present shoreline how sites are built up and formed and then  
 (18) what happens when you change the - change the relationship  
 (19) between the shore and the water and erosion and so on and  
 (20) my style well you'll see what it is  
 (21) Q Or lack of style?  
 (22) A Yes as the case may be This is supposed to represent the  
 (23) bedrock underlying the shore and so forth This is above and  
 (24) this is supposed to represent the - the present water High  
 (25) water if you like to think of it that way

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- (1) At the time at which an archaeological site is formed  
 (2) people living in this area have a tendency to live close to the  
 (3) shore but not under it all right so they live shore wide  
 (4) along the shore in places that are flat have good resources  
 (5) water things of that nature all right So when they - when  
 (6) they stop and camp and live here they in some cases you  
 know  
 (7) stop build a fire They may create then out of the rocks  
 (8) and stones there some sort of alignment a hearth or something  
 (9) like that they may bring and drop off other debris shell food  
 (10) debris and so on They may construct a little dwelling which  
 (11) they then leave behind and so on  
 (12) And as you can see over a long period of time the stuff  
 (13) builds up all right and it builds up in a particular way It  
 (14) builds up so that the pattern it's something you can observe  
 (15) For example you can find 12 rocks in an archaeological site  
 (16) and they may not mean too terribly much but if they're  
 (17) arranged in a circle and they have charcoal in the middle of  
 (18) them it's that arrangement that's important  
 (19) As you build up archaeological sites over time you get this  
 (20) sort of matrix that emerges as stuff is laid down one on top of  
 (21) the other and you get artifacts that are broken and left  
 (22) behind in that - in this sort of structure So an  
 (23) archaeological site is a very complex - is very complex in  
 (24) terms of its content It's also very complex in terms of the  
 (25) relations between the things that are there

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- (1) For example you would expect if there had been a large  
 (2) fire over the surface and people came back that all of the  
 (3) stuff below the fire would be observable to you as below the  
 (4) fire because there would be this charcoal lens that would cover  
 (5) the whole thing okay so you have to pay particular attention  
 (6) to the content and to the structure of these archaeological  
 (7) deposits because it is the content and the structure that the  
 (8) archaeologist studies that tries to reconstruct the behavior  
 (9) that causes it in the first place Okay?  
 (10) Q Okay that's - you've built a site for us What happens  
 (11) and what are the causes of erosion of sites like that in Prince  
 (12) William Sound?  
 (13) A You do get a little bit of marginal erosion from water  
 (14) running down over the surface and so on and then there are  
 (15) other animals and plants that will affect the surface trees  
 (16) fall down animals will dig and burrow a little bit so forth  
 (17) then the water will get in and wash some stuff around so you do  
 (18) get some - some change Things don't stay that way the way  
 (19) they were deposited always But what really impacts it is when  
 (20) you raise the level of the sea or - or drop the level of the  
 (21) land  
 (22) Q How do you manage that?  
 (23) A Well earthquakes do a real good job At a couple  
 (24) locations the Sound we really know quite a bit about the  
 (25) timing of these the 1964 earthquake rose - raised only in a

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- (1) couple places the sites for which Plaintiffs claim damages but  
 (2) in most cases they dropped them okay So when you drop a  
 site  
 (3) into the intertidal zone through simply the action of the  
 (4) waves and the water and so on it starts to wash away the  
 (5) charcoal it starts to wash away some pieces of shell and so  
 (6) forth It leaves behind in some cases some of the heavier  
 (7) things all right The heavier things are things like rock  
 (8) all right principally fire crack rock maybe around the hearth  
 (9) and so on  
 (10) Q Fire crack rock is -  
 (11) A Well you -  
 (12) Q We -  
 (13) A Oftentimes with rapid thermal change things contract and  
 (14) expand You get water in the middle it boils and cracks the  
 (15) rock and so on Fire crack rock is a frequent thing on  
 (16) beaches People are making it today where they're camping  
 out  
 (17) there and using stones to build a hearth and so on So fire  
 (18) crack rock is one thing that's produced in an archaeological  
 (19) site as a result of people living there and building fires  
 (20) The other kind of rock that's important to us of course  
 (21) are the stone artifacts that I'll tell you about all right  
 (22) and those are principally left behind because what washes  
 away  
 (23) is the matrix of the archaeological deposit and what's left  
 (24) behind are these rocks  
 (25) Well the point I'm trying to make here is simply that -

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- (1) that the site and the things that could be studied in the site  
 (2) is eroding All right and what's left behind are these  
 (3) scattered rocks and so forth that are simply in some cases  
 (4) being washed around in the - in the intertidal zone and it is  
 (5) particularly important I think to recognize what's being lost  
 (6) in this process or what's been lost all right  
 (7) And what's lost is this - is this matrix up here this  
 (8) archaeological context which once started off as this very  
 (9) significant and rich record of - of the behaviors of people in  
 (10) that location and now for one reason or another is  
 (11) disappearing and so on and what's left behind are these  
 (12) artifacts that are out of context  
 (13) Okay the word that's often used to describe these is  
 (14) disassociated That's important Context and association are  
 (15) the key - are the key concepts that underlie archaeology all  
 (16) right? The reason we're able to reconstruct past societies is  
 (17) because we look at these sites we look at them in their  
 (18) context and we see what's associated one with the other and we  
 (19) interpret those associations So when you erode it out you  
 (20) lose context you lose association and you're left with  
 (21) scattered artifacts and so on that are virtually impossible to  
 (22) interpret and compare one with the other because of the matrix  
 (23) the context is gone  
 (24) Q If you're left with scattered artifacts I mean aren't  
 (25) they still of some value?

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- (1) A They're - there may be some limited value only insofar as  
 (2) they represent objects As they represent something  
 worthwhile  
 (3) studying in its own - in its own right all right but what's  
 (4) missing from that is its origin its source and any other  
 (5) information that you might get from comparing it to other  
 (6) things in there All right so you lose the ability in the  
 (7) case of rocks most cases to date them and you don't know  
 (8) where they came from  
 (9) It's interesting this principle is so widespread that when  
 (10) DeLaguna whom you may recall wrote the principal work on  
 The  
 (11) Archaeology of Prince William Sound when she came to  
 analyze  
 (12) the artifacts she obtained from her research and conversations  
 (13) with people and excavations and so on she did not include in  
 (14) her analysis or her description artifacts that she picked up  
 (15) off the beach because they were not - they did not have the  
 (16) context and they were not important to her And she could not  
 (17) tell much from them okay  
 (18) Q You talked about the 64 earthquake Have estimates been  
 (19) made about the effects of the 64 earthquake on archaeological  
 (20) resources in the Sound?  
 (21) A Yes there are several archaeologists who went out almost  
 (22) immediately the summer following the earthquake and studied  
 (23) sites on the coast in Kodiak and in Kenai and so on and I  
 (24) don't think they got up to Prince William Sound and did  
 (25) fieldwork there but their estimate was that up to 50 percent

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- (1) of the significant coast sites that they had looked at okay  
 (2) had been already destroyed almost immediately by the - by  
 (3) the - or were in the process of being destroyed by the  
 (4) earthquake and the tsunami and the erosion that followed  
 (5) Q You mentioned DeLaguna The jury probably hasn't heard  
 (6) that name for quite some time She was an archaeologist who  
 (7) studied Prince William Sound in the 30s?  
 (8) A In the 1930s  
 (9) Q And she authored a book?  
 (10) A Chugach Pre History in 1956  
 (11) Q It's available in the Alaska public library?  
 (12) A It is available in the Alaska public library I think  
 (13) there was a discussion on this Knowing people's great  
 (14) interest in that I actually looked to see where you could get  
 (15) a copy if anyone were interested  
 (16) Q But before you do that because Mr Petumenos moved into  
 (17) evidence I think the check out slip from the book we had  
 (18) here?  
 (19) MR PETUMENOS I moved in the book didn't I?  
 (20) MR DIAMOND He moved the whole book  
 (21) MR PETUMENOS I moved the book  
 (22) MR DIAMOND That's the one I have to return  
 (23) MR PETUMENOS That's the hard-ball litigation too  
 (24) BY MR DIAMOND  
 (25) Q The Alaska library is okay because how many publications

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- (1) do they have in the library?  
 (2) A There are 19 copies available in the state of Alaska  
 (3) outside of Anchorage There are 19 copies available in  
 (4) Anchorage there are 7 copies that circulate that I know of  
 (5) and the rest are distributed amongst libraries and amongst  
 (6) schools  
 (7) Q You picked a copy up here in a Seattle book shop?  
 (8) A We bought a copy in Seattle at a used book store so we  
 (9) could return the one to the library here  
 (10) Q Did DeLaguna talk about the effect of pre 1964 earthquakes  
 (11) in her work?  
 (12) A She did She was very much aware that the changing levels  
 (13) of the sea had had some influence on the archaeological  
 (14) record She noted that there are a lot of places where there  
 (15) were dead trees for example where the land had been  
 dropped  
 (16) and she could see that that was an evidence of a change She  
 (17) also looked at a number of places where people had once  
 found  
 (18) artifacts or had found artifacts on the beach but where her  
 (19) conclusion was the site was no longer there All right and  
 (20) one of those is Sawmill Bay a site we'll talk about later on  
 (21) but she - she described these in her book as locations of  
 (22) former sites because she recognized that these sites had been  
 (23) largely destroyed  
 (24) Q Prior to the oil spill what steps were being taken if  
 (25) any by the Native Corporations in Prince William Sound and  
 the



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- (1) Gulf against the effects of erosion?
- (2) A Basically none
- (3) Q Dr Johnson - I think you were present when Dr Johnson testified?
- (4) A Yes I was
- (6) Q She said that Chugach had in place a cultural resource management program prior to the oil spill Do you agree with that?
- (8) A No
- (10) Q What do you base that on?
- (11) A Basically I - I think they had some practices that dealt with the treatment of information from archaeological sites but as we've seen they really were not taking a very active role in their protection excavation so on especially from erosion
- (16) Q You mentioned as a third source of - second source was I think animals and you also mentioned human development airports and the like as threats to archaeological resources How about vandalism in Prince William Sound?
- (20) A Vandalism has been significant in a number of parts of Alaska In Prince William Sound however compared to these other parts vandalism is certainly a low frequency event In the sites for which Plaintiffs make a claim for damages there are only two out of the 44 sites for which they're claiming that vandalism had occurred and I know of no other

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- (1) instances from vandalism in - in the - in the sites under litigation here
- (3) Q Was vandalism before the spill sufficiently widespread that anyone had looked at that?
- (5) A There are several people who had remarked on the vandalism in Alaska especially in Alaska's northern coastal sites where ivory is a - is a commodity that people know of but I don't think anyone - certainly the Plaintiffs haven't produced any information that there was a systematic review of vandalism in these particular sites
- (11) Q Before we get to the nitty-gritty in this case I want to ask you about one other term that I know has some importance the term archaeological - helpful if I can say this wouldn't it?
- (15) A Takes practice
- (16) Q Archaeological site What is an archaeological site?
- (17) A Okay an archaeological site is a location where past human behaviors have left behind evidence in the context in which it was found - in which it was deposited sorry That is it's a place that has artifacts and stuff from past behaviors and it's in the archaeological context in which it was laid down
- (22) Q What does that mean?
- (23) A Well it means that it's a place like this where it has context and association basically It's the limited - it's the place where the artifacts are in place and the

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- (1) relationships between them can be studied
- (2) Q Is that the Al Dekin/Exxon definition?
- (3) A No it's the basic and fundamental definition used in the discipline
- (5) Q Generally accepted?
- (6) A Generally accepted
- (7) Q By practicing archaeologists?
- (8) A People will play with the words but they won't play with the idea
- (10) Q You're familiar with the work done by Johnson and Lobdell in this case Do they seem to take a different approach to site definition?
- (13) A The concept of site which they have used and which underlies the basis of their reports is I think quite different
- (16) Q Explain
- (17) A The - the margins of sites especially coastal sites are beaches The beaches often contain these disassociated artifacts that we've seen and the definition that Drs Johnson and Lobdell have used includes this vicinity this area around the site okay in their definition of site And as you can tell if you do that It means that you define the site to include this intertidal zone with disassociated artifacts and that is of course where the oil was in some cases all right so their argument is that by defining a site in this particular

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- (1) way they then are allowed to say that the site was oiled
- (2) It's a very crucial difference because if they have testified that a site was oiled then the implication is that some damage occurred to the intact archaeological deposits and that's in fact not the case
- (6) What happens is that oiling in the intertidal zone may have done some other things but it did not damage as we'll talk about in a little while it did not damage the intact archaeological deposits that form the core of what I would call a site
- (11) Q Is the Johnson/Lobdel approach to site definition consistent with generally accepted cultural resource management principles?
- (14) A No it's not
- (15) Q Explain
- (16) A Well in cultural resource management you're very very concerned about the spacial relations and how to bound sites and so on For example much of people's interest in cultural resource management is in some cases finding a way to build a pipeline or something through a site so you want to know where important things are or where less important things are so you can - you can build it So you pay particular attention to the location of things in space okay and these things are like housepits and so on you want to know where they are You want to know where the edge of the site is and then you may

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- (1) allow people to build things there all right as the cultural  
 (2) resource management decision because you know now that  
 there s  
 (3) nothing in that particular location that would be harmed  
 (4) okay So they pay particular attention to the spacial  
 (5) dimensions of archaeological deposits their content and their  
 (6) margins all right and how they define it becomes you know of  
 (7) particular import  
 (8) Q Let s put this in concrete terms I know you have some  
 (9) examples to use to illustrate the difference between what you  
 (10) view sites to be and the way the Plaintiffs are construing that  
 (11) term Verdant Cove?  
 (12) A I sure hope that s the right one  
 (13) Q Verdant Cove?  
 (14) A Verdant Cove  
 (15) Q This is DX14034-A 40 It s getting to be longer than my  
 (16) social security number  
 (17) MS SMITH Chuck would you repeat that  
 (18) MR DIAMOND I m sorry 14034 A 40 If I just  
 (19) sliced you in half apologize  
 (20) BY MR DIAMOND  
 (21) Q Is this a site for which a claim is being made in this  
 (22) case?  
 (23) A Yes it is  
 (24) Q By whom do you remember? I won t embarrass you?  
 (25) A Go ahead

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- (1) Q We have it on a piece of paper English Bay does that  
 (2) sound familiar?  
 (3) A Yes it is  
 (4) Q \$3 2 million claim?  
 (5) A 3 2 million  
 (6) Q This is one of the Plaintiffs larger damage claims is it  
 (7) not?  
 (8) A It s the second largest claim in this case for  
 (9) archaeological resources  
 (10) Q You know that to be Verdant Cove the photograph we re  
 (11) looking at?  
 (12) A It is  
 (13) Q Using the photograph illustrate what you mean when you  
 use  
 (14) the term archaeological site and what you mean when you say  
 the  
 (15) Plaintiffs experts misuse it  
 (16) A All right let s start with the Plaintiffs definition  
 (17) Plaintiffs define Verdant Cove as a - as an archaeological  
 (18) site - wow all right to include the beach and its content  
 (19) all right even though there are no intact archaeological  
 (20) deposits at this location in the beach okay They also define  
 (21) it on the basis of the - the rather large land form that is  
 (22) the - this large geomorphic if I may feature this set of  
 (23) beaches and so on and they then include since they include  
 (24) the beach they re able to say that the site was oiled and  
 (25) since they include this big land form they re able to ask for

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- (1) an amount that s \$3 2 million  
 (2) Q You better explain that Why do they - why can they ask  
 (3) for \$3 2 million?  
 (4) A Because Dr Lobdell s estimate is based upon what it would  
 (5) cost to excavate the archaeological context in this location  
 (6) all of it Well may not excavate it all but that was what he  
 (7) had in mind when he did it  
 (8) Q He works on a square foot basis?  
 (9) A Well he doesn t work completely that way but it is  
 (10) clearly the volume of material or the area of material to be  
 (11) investigated that drives his cost figures  
 (12) Q Okay  
 (13) A So the bigger the site the more it costs to excavate It s  
 (14) a good example of what drives the Plaintiffs cost figures  
 (15) throughout the case which is the amount of archaeology to be  
 (16) done not the amount of damage that was incurred So the  
 amount  
 (17) of archaeology to be done here is basically all of the brown  
 (18) area that you see although they don t have plans to excavate  
 (19) it all The impact was because some portions of the beach are  
 (20) believed to be oiled and we can demonstrate that there was  
 (21) oiling  
 (22) Q Hold it The position sounds very logical to me Are  
 (23) there archaeological resources at this location?  
 (24) A Yes there are  
 (25) Q So it s an archaeological site?

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- (1) A It is an archaeological site but it s not the whole thing  
 (2) and it s not the whole beach  
 (3) Q What s the archaeological site?  
 (4) A The archaeological site here is principally the area that  
 (5) includes the trees but does not extend to the beach and  
 (6) includes a swale in this particular area here includes an area  
 (7) back in this direction in association with a cabin which I can  
 (8) never find back in here and there s a prehistoric conservation  
 (9) of artifacts back here and there s another one of this location  
 (10) here just this side of this little pond  
 (11) Q What s in the trees just in front of the swale?  
 (12) A In the trees I think the swale goes - is kind of in the  
 (13) middle between them but in the trees there are some deposits  
 (14) from the late - well I guess it would be the early Russian  
 (15) period the late 1700s to I think it s about 1800 estimated  
 (16) on the basis of the artifacts and then there s an older area  
 (17) back here that - I m sorry a younger area back in front of it  
 (18) that s a bit more modern and it represents the 19th century  
 (19) The other artifacts back in here seem to - they don t have any  
 (20) diagnostic things really characteristic artifacts that you  
 (21) can really tell the age just looking at them artifacts in  
 (22) here  
 (23) But there are some prehistoric artifacts there some flakes  
 (24) of stone and so on and some charcoal okay and it s  
 (25) interesting perhaps only to me and so I won t say it very

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- (1) long but there are a lot of different beach regions here that  
 (2) have been built up over time and some of the older ones are  
 (3) back further toward the land That s all  
 (4) Q How do you know all this?  
 (5) A I actually have spent some time looking at the records of  
 (6) this particular investigation and reading reviewing what the  
 (7) Park Service who owns this site has been investigating in the  
 (8) last two summers 92 and I think in 93 rather they  
 (9) investigated this particular locale and so they know a lot  
 (10) more about what these are archaeologically than we did  
 (11) several years ago and it s because they re interested in it  
 (12) and it s one of the larger sites that the Park Service has  
 (13) Q How does the Park Service define sites at Verdant Cove?  
 (14) A The Park Service - this used to be a site called XBS-014  
 (15) Alaska national heritage resources listing that was on the  
 (16) basis of a bulldozer trail in here apparently that opened up  
 (17) these artifacts from the Russian period destroyed the context  
 (18) spread them out erosion took over and people picked them up  
 (19) people who live around the corner here So they picked these  
 (20) up and they only dated from the Russian period  
 (21) The Park Service went in investigated this more carefully  
 (22) and divided this not into just one archaeological site with  
 (23) XBS 014 but into four one here one there one there and one  
 (24) over here Park Service taking the approach much as I do  
 (25) that these represent four distinct periods of occupation four

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- (1) distinct periods - areas with intact archaeological deposits  
 (2) so they have now assigned in the AHRS four different numbers  
 to  
 (3) this instead of the one they assigned before based on the  
 (4) better knowledge  
 (5) Q Did any of those four get oiled?  
 (6) A No there was light oiling and it was only on the beach  
 (7) Q If there was human habitation back here and the humans  
 who  
 (8) used this area or who lived here left rich resources back  
 (9) behind the trees or up in the tree line up here don t you  
 (10) think there s going to be buried archaeological treasures on  
 (11) the shoreline in the intertidal zone?  
 (12) A It is true that there can be movements up and there can be  
 (13) movements down but the problem with that presumption is it  
 (14) remains just that it s a could be There could be here  
 (15) there could be there and there could be a lot of different  
 (16) places but the fact of the matter is the Park Service went and  
 (17) looked and they didn t find any and it s in their interest to  
 (18) take that sort of approach and see just where these artifacts  
 (19) are  
 (20) So far as we can tell the artifacts are as I ve described  
 (21) them and they were removed from and distanced from any  
 (22) evidence for oiling  
 (23) In point of fact at this location I don t think anyone s  
 (24) ever suggested that there was vandalism or there was any other  
 (25) sort of effect on these resources at all

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- (1) Q Assume for a moment that there was a scattered artifact  
 (2) here a stone artifact here and maybe another one here that was  
 (3) present at the time of the oil spill could have been oiled?  
 (4) A Could have been  
 (5) Q Well so then why shouldn t we go in and dig up all of the  
 (6) four sites that the Park Service has identified?  
 (7) A I think there are two reasons One is that these  
 (8) disassociated artifacts that I ve talked about have already  
 (9) lost - some people some archaeologists estimate over 90  
 (10) percent of their informational value because they ve been  
 (11) disassociated so they ve already lost whatever value they once  
 (12) had to archaeologists or most of it certainly and so oiling  
 (13) doesn t have much of an impact on that  
 (14) Moreover they re stones the oil doesn t intrude  
 (15) significantly into that particular material mostly unless  
 (16) it s porous and these aren t And the other - the other  
 (17) thing is that there s - there s been no harm to them All  
 (18) right you pick them up you wash them you put them back and  
 (19) they have as much value as they did before as when they did  
 (20) afterwards okay there s really no appreciable harm that comes  
 (21) from oiling anything out here in the ITZ intertidal zone if  
 (22) it s stone  
 (23) Q Well we ve heard about radio carbon dating Does it mess  
 (24) up radio carbon dating?  
 (25) A First off you don t have any intact deposits to date and

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- (1) second off you need organic material to do radio carbon  
 (2) dating Radio carbon dating dates organic material from the  
 (3) time it died how long it s been  
 (4) Q You re moving too fast for me Organic material?  
 (5) A I know  
 (6) Q What s organic material?  
 (7) A Organic - radio carbon dates really the amount of radio  
 (8) activity in organic - that is the product of - the product of  
 (9) growth of plants and animals material  
 (10) The issue here in a real nutshell is that there s a certain  
 (11) proportion of radio carbon to carbon all right and when the  
 (12) animal dies it stops taking in any and the decay of the radio  
 (13) carbon that s in the animal starts then all right and you can  
 (14) measure the time it s been since the animal died  
 (15) Q You can do that with stones too?  
 (16) A No you can t do that with stones  
 (17) Q Why why?  
 (18) A Stones are not organic Stones are mineral in their  
 (19) origin  
 (20) Q They don t have carbon?  
 (21) A Some do Matter of fact you do get stone in coal for  
 (22) example and petroleum is - is a carbon that s very old but  
 (23) in most cases they re older and they don t have any  
 (24) radioactive carbon left in them it s been so long  
 (25) Q Okay I know you have another example let s do that

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- (1) quickly and then take a break  
 (2) This is a photograph of a place you recognized?  
 (3) A I've been there yes Point Helen  
 (4) Q All right we're going to use this with the sincerest  
 (5) apologies to my wife in whose office this used to hang  
 (6) This is DX8939 a photograph of Point Helen and we will  
 (7) not move this into evidence because it's already been  
 (8) claimed Is this an archaeological site?  
 (9) A There are archaeological deposits here at Point Helen The  
 (10) archaeological deposits are basically back up over this modern  
 (11) edge of the beach this berm back in this area behind here  
 (12) They - it represents what archaeologists call a midden which  
 (13) is basically a site I talked about before with a mixture of  
 (14) charcoal and all sorts of other debris So it's basically back  
 (15) up here where the trees are  
 (16) Q Plaintiffs are claiming damages for Point Helen  
 (17) archaeological damages for this place aren't they?  
 (18) A Yeah yes they are  
 (19) Q Was there any oiling in the location where there is a  
 (20) buried midden?  
 (21) A No I think you may have heard that Point Helen was  
 (22) heavily hit by oiling and so on but the heaviest concentration  
 (23) of oil was around here and all the materials I reviewed said  
 (24) oil on this beach was very light but that's not the big  
 (25) issue

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- (1) The big issue is the land has risen twice the land rose in  
 (2) 1964 and there's a higher set of beaches right here and so on  
 (3) The difference between the impact to archaeological deposits  
 (4) and any oiling that might have been there is on the order of I  
 (5) don't know 60 feet 70 feet something like that horizontal  
 (6) Q How do Lobdel/Johnson deal with this?  
 (7) A They again use the concept that includes the beach in the  
 (8) site I started to call this idea damaged - whoops Falling  
 (9) apart  
 (10) Q Is that the microphone or your button?  
 (11) A The microphone couldn't handle the speed I guess I'm  
 (12) sorry  
 (13) Q We're still receiving so that's okay  
 (14) A Thank you This damage damage by proximity I don't know  
 (15) what that means but it's - the point here is I believe the  
 (16) claim is based on the idea that oil will get near things not  
 (17) on them not in them but near them and in this case they  
 (18) extend that to archaeological sites and by calling the  
 (19) intertidal zone part of the site they then bring oil up closer  
 (20) to it and they can talk about damage even though there's no  
 (21) evidence for any intrusion of oil by any means whatsoever into  
 (22) these upland areas especially here at Point Helen in spite of  
 (23) the fact there was a lot of oil way out here  
 (24) MR DIAMOND Let's take a break  
 (25) THE COURT All right

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- (1) THE CLERK Please rise This court stands in  
 (2) recess  
 (3) (Jury out at 12 32 p m )  
 (4) (Recess from 12 32 p m to 12 47 p m )  
 (5) (Jury in at 12 47 p m )  
 (6) THE CLERK Please rise This court now resumes its  
 (7) session Please be seated  
 (8) MR DIAMOND Your Honor at Joy's request we've  
 (9) tranquilized the witness over the break and he's promised now  
 (10) to speak a little more slowly  
 (11) BY MR DIAMOND  
 (12) Q Let's talk about the work that you did in looking at the  
 (13) various sites that are in dispute in this case Have you ever  
 (14) been to any of them?  
 (15) A Yes I've - I've been to a large number of sites in the  
 (16) area I've - as the list of sites changed in the last several  
 (17) months I ended up - I've been to half a dozen of these sites  
 (18) and I've flown over another 14 or so  
 (19) Q All right when was the first time you've been out to  
 (20) Prince William Sound?  
 (21) A I was first in Prince William Sound in 1991 I spent two  
 (22) months in the field and I spent a month in the Kenai  
 (23) Fjords/Prince William Sound area  
 (24) Q Looking at archaeological resources and sites?  
 (25) A Yes digging test holes in archaeological sites and taking

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- (1) samples from them  
 (2) Q Been back since 1991?  
 (3) A Yes I was back in 1993 and visited a number of sites on  
 (4) the ground at that time and then in 1994 to supplement the  
 (5) work I'd done in the middle the documents I've reviewed and  
 (6) so  
 (7) forth we flew over a number of sites at that time  
 (8) Q You mentioned testing What kind of testing have you done?  
 (9) A We dug in 1991 for the Forest Service we dug into a number  
 (10) of sites in Prince William Sound and the Kenai Fjords looking  
 (11) for evidence for - for oiling in upland sites and upland  
 (12) areas  
 (13) Q Okay You said you've also looked at some documents?  
 (14) A Yes  
 (15) Q Couple of documents big stack a box?  
 (16) A No I - I bought two four-drawer filing cabinets for my  
 (17) office and they're full and I had to buy another one There  
 (18) are a lot of documents associated with this particular  
 (19) exercise and I have read a large number of those I've read  
 (20) the reports by Plaintiffs by Plaintiffs experts I've read  
 (21) depositions that people have made some we heard this  
 (22) morning  
 (23) and I've interviewed archaeologists who've worked in the area  
 (24) I've talked to as many people as I could on the subject of  
 (25) these sites I also reviewed the current scientific  
 (26) literature talked to people who've given papers at meetings  
 (27) and so on just to try and make sure I'm current with it and

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- (1) was able to talk for example about Verdant Cove with relative
- (2) knowledge that it s - it s up to date
- (3) Q Have you made a study of the field notes that were compiled
- (4) at the time the cleanup was going on?
- (5) A Yes I have reviewed the field notes and the documents of
- (6) the oil spill response team for Chugach Alaska Corporation the
- (7) Cultural Resource Program for Exxon There was a lot of notes
- (8) made available from the National Park Service from the other
- (9) federal agencies who were involved from Plaintiffs experts and
- (10) so on yes I ve reviewed a lot
- (11) Q And the statement documents as well?
- (12) A Yes
- (13) Q From the SHPO?
- (14) A Yes
- (15) Q I think you used that term first what s that stand for?
- (16) A State historic preservation officer
- (17) Q State historic -
- (18) A Historic preservation officer
- (19) Q Thank you How much time in total have you spent reviewing
- (20) materials and looking at sites?
- (21) A A little over 1100 hours
- (22) Q Does that include the two months you spent in 1991?
- (23) A No it does not
- (24) Q So in addition to those two months you put in 1100 hours?
- (25) A In the last two years

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- (1) Q I understand that you ve approached this assignment on a
- (2) site by site basis?
- (3) A That s correct
- (4) Q Why?
- (5) A In the illustration that I gave you and in the
- (6) discussion - on the board and in the discussion we had about
- (7) the boundaries of archaeological sites you should be very
- (8) clear that sites are unique locations in space and time all
- (9) right People lived there and during - you can only be in
- (10) one spot at a time People lived there they worked there
- (11) they moved on they did other sorts of things So each
- (12) archaeological site represents a unique series of historic
- (13) events that produced it and then is represented by a unique
- (14) historic event afterwards some sites were raised some sites
- (15) were lowered some were dug into some weren t So each
- (16) archaeological site just like each house or neighborhood you
- (17) might be familiar with has a unique position in space and time
- (18) and history So it s very important that you look at them very
- (19) carefully on a one by one basis because you can never say that
- (20) because one house gets hit by an airplane all the houses get
- (21) hit by airplanes It doesn t work that way So each site has
- (22) a unique thing and each site has a unique issue
- (23) Q What s the university of number of sites we re dealing with
- (24) in this case?
- (25) A The Plaintiffs are making claims for 44 archaeological

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- (1) sites
- (2) Q In your review of those 44 sites and the effects that the
- (3) oil spill had or didn t have did they seem to fall into any
- (4) general pattern or any general categories?
- (5) A Yes After I got working with them and trying to make them
- (6) a bit more understandable to me I - I discerned three
- (7) different groupings
- (8) Q You prepared DX14043-A which is a summary of the three
- (9) types of sites according to your research Let me put this
- (10) up You can come down if you d like
- (11) A All right
- (12) Q We can - we can all read the words but let s - take us
- (13) quickly through Type I Type II and Type III and the attributes
- (14) of sites that made you classify them in this fashion
- (15) A There are - there are several different kinds of subtypes
- (16) in here but I won t - I ll try and explain those to you as we
- (17) go There are a large number of sites There are 22 sites
- (18) for one reason or another do not seem to have intact
- (19) prehistoric or archaeological deposits so far as we know
- (20) That s either because there - there s nothing there that seems
- (21) to result from past behavior There s simply no evidence -
- (22) evidence of it Is the evidence in place? There are a whole
- (23) bunch of sites in which the evidence is not in context There
- (24) is not intact - they re not intact archaeological deposits so
- (25) those are not sites There are locations where there might be

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- (1) artifacts in the intertidal zone for example but they re not
- (2) sites And then there are several places where there is some
- (3) evidence and there is some indication that there are intact
- (4) archaeological deposits but they re from the modern era We
- (5) don t know that they re prehistoric or historic
- (6) So there are as I said what 22 sites I think in this
- (7) particular category Half the Plaintiffs case
- (8) Q Would you call those sites which are not sites?
- (9) A Well you could say that they re not sites At least the
- (10) evidence doesn t show that they re sites
- (11) Q Type II?
- (12) A Type II there are actually sites there There are 18
- (13) sites in this category all right These are bona fide intact
- (14) archaeological deposit from the prehistoric and historic
- (15) period but they weren t affected by oiling so the question is
- (16) are there archaeological resources there? Yes Are they
- (17) important and significant could you investigate them? Yes
- (18) were they affected by oil cleanup or vandalism? No
- (19) Q Okay what -
- (20) A So Type II has as I say 18 - 18 sites in it and they
- (21) could certainly benefit from the present knowledge that we
- (22) have they could certainly benefit from archaeological
- (23) investigation but they weren t harmed
- (24) Q What s Type III?
- (25) A Type III is a - is a little bit more complicated It s -

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- (1) as you can see from what it says these are intact prehistoric  
 (2) and historic archaeological deposits There are things there  
 (3) and because their proximity to oiling all right some of the  
 (4) things are in the intertidal zone For example where there  
 (5) was light oiling because of their proximity to it they might  
 (6) have been harmed might have been damaged but I can't say  
 that  
 (7) they are harmed I can see no detectable evidence of injury to  
 (8) these and the question here is did any impacts that might  
 (9) have occurred significantly impair the character of  
 (10) previously - of preexisting research potential of the intact  
 (11) archaeological resources was there any harm to the items at  
 (12) these sites  
 (13) Q Before we can take a look at some of the individual sites  
 (14) and have you explained why they fit into one of the three  
 (15) categories an earlier version of this chart said rather than  
 (16) no detectable Exxon Valdez oil spill injury said no  
 (17) significant injury This one says no detectable injury Why  
 (18) did you change that?  
 (19) A We were trying - my parallel was significant here and I  
 (20) was afraid if I used it up here when I got to thinking about  
 (21) it it would imply there had been all sorts of impact that I  
 (22) just didn't think it was important and that's not the case  
 (23) The point is that we can't tell cannot detect any impact to  
 (24) these particular resources  
 (25) Q There are two sites which you would concede seem to have

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- (1) been impacted sometime around 1989 but we don't know  
 whether  
 (2) it's related to the oil spill or not?  
 (3) A That's correct There are eight sites in this - in this  
 (4) category Two sites were vandalized in 1989 but I cannot tie  
 (5) it directly to the Exxon Valdez oil spill in terms of people  
 (6) Q All right Let's talk sites which are not sites I think  
 (7) we have a listing and we'll put on the Barco You said 22  
 (8) sites? Joel could you turn on the magic wand over at counsel  
 (9) table Jeff will zap DX14054-B  
 (10) A Some magic is slower than others  
 (11) Q Voila okay Hard to read but what's this list?  
 (12) A This is a list of the sites I included in Type I These  
 (13) are sites that are claimed by Port - well whatever Port  
 (14) Graham Corporation Below that was English Bay and so on  
 (15) okay In the left hand column in the middle are the common  
 (16) names of the sites and in the right-hand I have inserted the  
 (17) amount of dollars for which Plaintiffs are claiming damages  
 (18) Q Total amount is close to \$5 million?  
 (19) A Yes four nine zero two  
 (20) Q Let's have you explain to the jury why you put various  
 (21) sites in this category and let's take as an example Little  
 (22) Bay  
 (23) A All right  
 (24) Q I know we don't have a photograph of Little Bay but the  
 (25) diagram - why is it that you view Little Bay as a site which

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- (1) is not a site  
 (2) A Little Bay Chenega Corporation is asking for \$196 000  
 (3) Little Bay is a classic site of intertidal zone artifacts  
 (4) alone all right In Little Bay the sea level has risen to  
 (5) the point where the only information we have of archaeological  
 (6) materials in that are all scattered in the intertidal zone  
 (7) The fieldwork that I have reviewed the notes from and so forth  
 (8) do not indicate the presence of any intact archaeological  
 (9) deposits at that location So that all that's left is a  
 (10) scatter of stone artifacts in the intertidal zone as a result  
 (11) of this erosion Not denying that a site may once have been  
 (12) there okay but in this particular location the only evidence  
 (13) that we have no evidence of upland sites no evidence on the  
 (14) beach all we have is a scatter of artifacts  
 (15) Q Why is that not important if there's some artifacts on the  
 (16) intertidal zone?  
 (17) A Well if you use the Plaintiffs definition of site  
 (18) clearly there's a site there But there isn't much to  
 (19) investigate if all you have is - is a scatter of stone tools  
 (20) in the intertidal zone and there also isn't much to  
 (21) investigate if they were all picked up cleaned washed  
 (22) processed and sent to the museum in Fairbanks which is what  
 (23) happened to these  
 (24) Q Short Arm shipwreck is that on your list?  
 (25) A Yes it is

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- (1) Q If Jeff will zap our map  
 (2) A Down here Chugach site for \$89 000  
 (3) Q Show us where that is on the map and we'll put up  
 (4) DX10030-B?  
 (5) A Short Arm shipwreck is up here on Knight Island  
 (6) Q All right and we have a photograph of the shipwreck Is  
 (7) that it?  
 (8) A It's upside down but it is  
 (9) Q First I have to read the number that's why it's upside  
 (10) down It's DX14034-A 43 Now why is this not a site why is  
 (11) this site that's not a site? I see an artifact lying right  
 (12) on the shore  
 (13) A There certainly is an artifact on the beach  
 (14) Q What are we looking at here?  
 (15) A This is actually a misnomer This is actually Short Arm  
 (16) ship part All there is at this location is this part of a  
 (17) hull inverted so on of a - of a boat that floated in on the  
 (18) tide all right There is absolutely nothing about this  
 (19) particular location the surrounding characteristic anything  
 (20) or the boat itself or the boat part itself that indicates  
 (21) that it's associated with anything at that location all  
 (22) right It simply floated in here It could have floated in  
 (23) there it could have floated in someplace else it could have  
 (24) floated in almost a number of different places It happens to  
 (25) have floated in here

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- (1) Well why is that important? Well it's very important  
 (2) because there - it also implies very clearly that there's no  
 (3) evidence that the ship wrecked here. There's no evidence that  
 (4) it made an impact here of any sort that it spilled its cargo  
 (5) or anything like that. It's just a thing that floated in.  
 (6) Okay. Consequently there isn't any rationale for studying  
 (7) this location. As a matter of fact I don't know of anybody  
 (8) who's ever been out there recently. It may have floated out  
 (9) All right? And so the concern here is that I don't know how  
 (10) one would meaningfully spend whatever it was \$96,000 or  
 (11) something like that at that particular location. That would  
 (12) either do one of two things: would remedy on some sort of  
 (13) damage or would be worthwhile in terms of investigation.  
 (14) Now I assure you that given that sort of money an  
 (15) archaeologist could go and investigate the adjacent area, look  
 (16) around the beach and find something to spend it on, all right,  
 (17) but it wouldn't have anything to relate to this artifact that  
 (18) floated in and it wouldn't have anything related to the oil  
 (19) spill.  
 (20) Q If a storm came up and heavy seas blew this back out, would  
 (21) the Short Arm shipwreck cease being a site under Plaintiffs  
 (22) definition?  
 (23) A It certainly would, except it might make a site someplace  
 (24) else under Plaintiffs' definition.  
 (25) Q Badger Cove, where is Badger Cove? We're going to put up  
 a

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- (1) map of the Gulf which is -  
 (2) A Right down here.  
 (3) Q Let me put it in the record, 14014-A, yeah, is the map  
 (4) you're looking at, I neglected - oh, I did read that in, is  
 (5) this a photograph of Badger Cove?  
 (6) A Badger Cove Island.  
 (7) Q Okay, this is DX14034 A-1. Pretty spot. Why is this a  
 (8) spot site that's not a site?  
 (9) A Well, this is a site that if we had any good evidence might  
 (10) be, but we don't. The records for this location, the field  
 (11) notes and so forth, talk about possible depressions on the top  
 (12) surface up here, they talk about possible housepits, that's an  
 (13) interpretation of what these depressions might be.  
 (14) Q What's a housepit?  
 (15) A I'm sorry, many of the houses out here are semi-  
 (16) subterranean, people dig a foundation kind of thing and build a  
 (17) house in the hole kind of, all right, and they at least have a  
 (18) depression that when the house collapses, falls in, when people  
 (19) abandon it, it leaves a little depression.  
 (20) Q Why is that valuable?  
 (21) A It's an indicator, it's the sort of thing you would look  
 (22) for and a reasonable thing you look at. You walk along, find a  
 (23) flat spot, see a depression and say, well, this could be a  
 (24) house.  
 (25) Q Why is that significant from an archaeological standpoint?

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- (1) A With these sorts of indicators, we've seen rock in the  
 (2) intertidal zone that's sometimes an indicator. We've seen  
 (3) sometimes simply the location is important. It's points of  
 (4) land, it's flat, lying near a salmon stream, all types of  
 (5) environmental indicators. Depressions are simply one  
 (6) Q I interrupted you. You're saying this was - why do we not  
 (7) think Badger Cove is a site?  
 (8) A For several reasons, one is that that's the only bit of  
 (9) evidence we had. Somebody went there, crawled up on top of  
 it  
 (10) without finding anything around it, all right, crawled up on  
 (11) top and said, boy, there are depressions here, these are  
 (12) probably housepits. Well, probably doesn't buy it in the way  
 (13) in which we approach the data, all right. I mean it could be  
 (14) probably almost anything. But probably housepits doesn't  
 (15) make it a housepit, all right.  
 (16) So my quibble here, it's not simply a semantic difference  
 (17) is that the location of cultural resources here has not been  
 (18) proved, all right.  
 (19) Q If in fact we assume that those are housepits and there  
 (20) may be valuable resources buried there, and if we assume that  
 (21) there was some oiling along the shore, would this become a  
 Type  
 (22) II?  
 (23) A It would. It's unaffected by oil, we have no indication by  
 (24) anyone that there's been any vandalism, any oil spill impact  
 (25) here and the oil ever got up there or whatever. It is very -

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- (1) this is what ten feet. This is a long ways away from any oil  
 (2) at that location.  
 (3) Q Port Graham, I believe, is seeking \$1.3 million for this  
 (4) site. Wouldn't you like to have \$1.3 million to investigate  
 (5) Badger Cove Island?  
 (6) A Well, I'm not sure. We could perhaps spend a couple  
 (7) thousand and see if there's anything really there, but I'm not  
 (8) sure we have any evidence we should spend all that money. I  
 (9) would also point out to you that depressions of this sort in, I  
 (10) guess, I can't say in treed areas because it looks like there's  
 (11) been a lot of logging up here, but in areas where there are  
 (12) trees and so forth, the most common cause of depressions is  
 (13) when trees get blown down and the roots drag up dirt and so  
 on.  
 (14) so forth. I'm not saying that's what this is, that would be  
 (15) just as bad as probably saying this is a housepit, but I'm  
 (16) saying there are a lot of reasons you can get depressions.  
 (17) Housepit is one of them.  
 (18) Q Let's talk about one more flat type site, Flat Island, and  
 (19) I don't believe we have a -  
 (20) A Flat Island.  
 (21) Q That's an English Bay site as well. Joel, I'm going to need  
 (22) the Elmo because we don't have a photograph of that. Let me  
 (23) center it and blow it up. Why do they call it Flat Island?  
 (24) A I think it's because it's flat.  
 (25) Q What are we looking at?

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- (1) A Well I shouldn't say it quite this way but you can't see  
 (2) this but there are some suspicious depressions on the surface  
 (3) of this island but it's -- the archaeologist who went there  
 (4) noted that there were suspicious depressions and several  
 (5) people  
 (6) have flown over it and also said that there were suspicious  
 (7) depressions But once again we don't have any direct  
 (8) evidence  
 (9) that any archaeological resources exist at this site And  
 (10) simply calling it a suspicious depression is you know it's  
 (11) simply not enough And so I would regard this as Type I It's  
 (12) not a proven archaeological site There's no data that  
 (13) suggests that it is except someone's interpretation that an  
 (14) irregularity in the surface indicates the presence of cultural  
 (15) resources  
 (16) Q Again assuming that there is something up there any  
 (17) potential impact from oil?  
 (18) A No The site is -- these are steep sided walls and I don't  
 (19) know how far away that is from the -- from the oil in the  
 (20) intertidal zone but it's quite a distance  
 (21) Q If we assume there is something there you would classify  
 (22) it as a Type II site which was not threatened by the oil?  
 (23) A Certainly and -- and it's not unusual for people to go out  
 (24) and do further research and find out that these things actually  
 (25) are sites I'm not saying that this is definitely not I am  
 (26) saying it's not proved we don't know all right and I'm not  
 (27) going to guess that it is to the tune of however much money

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- (1) he's asking for  
 (2) Q You were here when Dr Lobdell testified He agrees with  
 (3) you that no impact from the Exxon Valdez oil spill?  
 (4) A Yes Both -- both he and Dr Johnson in their testimony  
 (5) said that there was no impact for these sites from the oil  
 (6) spill  
 (7) Q Let's go to Type II Let me take this down  
 (8) You have a list of the Type II sites which Jeff is going to  
 (9) zap up on the Barco I'm sorry is that on the Barco or do we  
 (10) have a hard board?  
 (11) JEFF No it's on the Barco  
 (12) MR DIAMOND It's on the Barco okay  
 (13) BY MR DIAMOND  
 (14) Q This is DX14043A Remind us again Type II sites differ  
 (15) from --  
 (16) A These are -- these are clearly demonstrated archaeological  
 (17) sites with intact archaeological deposits where the context  
 (18) could be investigated all right There are -- there are 22 --  
 (19) there are 18 and they add up to \$19 million  
 (20) Q Two-thirds of the damages that Plaintiffs are seeking?  
 (21) A Two-thirds  
 (22) Q I think I may have misspoke This is DX14054B You want  
 (23) to give us some examples of Type II sites?  
 (24) A What do we have? Disk Island  
 (25) Q Disk Island This is a photograph DX14034A 9

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- (1) A Disk Island is a Chugach Alaska site They are asking for  
 (2) I'll get the number right \$711 000  
 (3) Q Jeff you want to put up the map and Dr Dekin just  
 (4) orient us where are we looking here?  
 (5) A It's down here  
 (6) Q Above Knight Island --  
 (7) A It's a little island between Knight Island and Eleanor is  
 (8) it? No Ingot  
 (9) Q Tell us about this site  
 (10) A Disk Island is a -- the cave here and it's a little hard  
 (11) to see but it's in the -- this is a vertical place all right  
 (12) and it's back in kind of a crack between the forest floor and  
 (13) is on and the -- in this area here So these -- you can walk  
 (14) back in here all right and --  
 (15) Q Been there?  
 (16) A Yeah there are other larger openings  
 (17) Q Have you been to this place?  
 (18) A Yes I have And these are rocks that have fallen off of  
 (19) the edge and so on Okay So Disk Island is an intact cave  
 (20) with cultural deposits The surface has been churned a little  
 (21) bit or scuffed up by otters apparently but it is -- it is a  
 (22) bona fide archaeological site and it's the sort of site that  
 (23) one could reasonably investigate  
 (24) Q But it's a site that you've said was not jeopardized at all  
 (25) by the oil spill?

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- (1) A No it -- the evidence is very clear This site is  
 (2) approximately 250 feet in a straight line distance from the  
 (3) water from the shoreline all right A vertical distance I  
 (4) would hesitate to guess but it's significant This is a steep  
 (5) slope So it's 250 feet away from any sort of impact by  
 (6) oiling There's nothing in the records to indicate that anyone  
 (7) has ever visited this in some clandestine way to mess with it  
 (8) or to vandalize it or anything like that. There's no  
 (9) indication that -- that oil -- oiling ever got up there in any  
 (10) way shape or form whatsoever It is -- it is pristine in the  
 (11) same way -- same condition it was in 1988  
 (12) Q Chugach Alaska is seeking what \$711 000?  
 (13) A That's correct And once again one could spend that kind  
 (14) of money investigating this site --  
 (15) MR PETUMENOS Perhaps the witness could wait for a  
 (16) question  
 (17) A I'm sorry  
 (18) BY MR DIAMOND  
 (19) Q Do you see any connection that would justify spending  
 (20) \$711 000 of Exxon's money to investigate the site?  
 (21) A No I do not  
 (22) Q Panhat Point that's another example of a Type II site?  
 (23) A Yes it is  
 (24) Q Let's go to the map and orient us DX10030B  
 (25) A Panhat Point is down here



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- (1) Q We got it already You brought with you a photograph of  
 (2) Panhat Point?  
 (3) A Anchorage Island yes  
 (4) Q This is DX14034B 29 Okay why did you classify this as a  
 (5) Type II site?  
 (6) A Well again this is a bona fide archaeological site with  
 (7) intact - intact archaeological deposits worthy of  
 (8) investigation of the archaeological context in the upland  
 (9) These are fairly large bedrock outcrops You can see some  
 (10) remnants here with a very clear deposit on the - on the top of  
 (11) them and a site that raised in 1964 in the 1964 earthquake  
 (12) raising these deposits even further above the level of the sea  
 (13) Q What are the deposits there?  
 (14) A They re approximately two feet thick of cultural deposits  
 (15) including charcoal and shell and bone and stone artifacts of  
 (16) various types and so on located extensively on the top of  
 (17) this and a little bit more over here but not that much  
 (18) Q In the trees?  
 (19) A Yes in underneath the trees  
 (20) Q How do you know this?  
 (21) A I was there in 1991 and I was there in 1993  
 (22) Q This was a shoreline that received some oil?  
 (23) A There was light oiling at - or light to moderate in this  
 (24) portion of beach here The only artifacts in this beach are -  
 (25) that I know of are a few scattered pieces of stone over here

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- (1) and a few pieces of rock fire crack rock over near this  
 (2) particular tree But those are probably from the period before  
 (3) 1964 all night and eroded a considerable long time ago  
 (4) Q Did the spill in your judgment have any effect on the  
 (5) intact archaeological deposits up in the tree line?  
 (6) A No there s no - no indication of any sort of damage or  
 (7) visitation or oiling or anything of the intact cultural  
 (8) deposits in this location  
 (9) Q Okay How does your analysis of the effects of the spill  
 (10) on this location differ from Dr Johnson s?  
 (11) A Well Dr Johnson includes the beach area in her definition  
 (12) of site and then says that the site is oiled  
 (13) Q You disagree?  
 (14) A I disagree  
 (15) Q Northwestern Lagoon do you know that one?  
 (16) A Yes I do  
 (17) Q Is that it?  
 (18) A It is  
 (19) Q DX12084A 4 What are we looking at in this photograph?  
 (20) A This is a photograph of Northwest - of the site called  
 (21) Northwestern Lagoon Northwestern Lagoon is actually the -  
 (22) the early part of Northwestern Fjord which extends way up in  
 (23) here So Northwestern Lagoon is this area of water back here  
 (24) but this is called the Northwestern Lagoon site  
 (25) Q What s on Northwestern Lagoon?

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- (1) A There are a series of - of pits and depressions that were  
 (2) identified as many as 15 years ago if I remember correctly  
 (3) and have been investigated by the National Park Service This  
 (4) again is in a national park They did investigations here as  
 (5) recently as 1993 and it s very clear that there are intact  
 (6) archaeological deposits at this location in this area on - and  
 (7) going back a little bit further below us here on the end of  
 (8) this nicely stable cusplate - spit I guess is what it s  
 (9) called Anyway it s a spit of land  
 (10) Q Why - are you of the opinion this is a true archaeological  
 (11) site by the way?  
 (12) A Yes it s an archaeological site  
 (13) Q Why do you say it s not impacted by the oil spill?  
 (14) A No one has ever suggested there was vandalism here No  
 (15) one  
 (16) has ever suggested there was any sort of oiling here Matter  
 (17) of fact the beach was not oiled was not cleaned and was not  
 (18) SCAT d because it is just - it has simply never been shown to  
 (19) have oil on it and so you have this site which sits out there  
 (20) in principally the same condition that it was in 1988 is being  
 (21) investigated by the National Park Service because they  
 (22) continue  
 (23) to have an interest in it it s one of the larger locations of  
 (24) human occupation in the park and it s one for which I can find  
 (25) no evidence of harm  
 (26) Q Port Graham is seeking seven and a half million dollars  
 (27) though?

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- (1) A This is the largest claim in the case in terms of  
 (2) archaeological deposits  
 (3) Q Was this the location at which Dr Johnson admitted that  
 (4) she had made a mistake in determining that it was oiled and in  
 (5) fact admitted it wasn t?  
 (6) A Yes I believe she thought at one point that this was  
 (7) oiled  
 (8) Q And you were present when Dr Lobdell testified about this  
 (9) site?  
 (10) A Yes I was  
 (11) Q What did he tell us?  
 (12) A He said he did not know of any oil spill impact to this  
 (13) site  
 (14) Q Let s do a couple of more of these and we ll talk about  
 (15) your Type III sites Dogfish Bay are you familiar with that  
 (16) site?  
 (17) A Yes I am  
 (18) Q Is that it?  
 (19) A Um hum  
 (20) Q You hold it I m going to take this down so we don t have  
 (21) a crash Let me read the number for the record  
 (22) A Oh I m sorry  
 (23) Q I ll do it from my notes This is DX14034A 10 What are  
 (24) we looking at?  
 (25) A This is - Dogfish Bay is way out here

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- (1) Q That s an English Bay claim?
- (2) A Yes it is According to the notes that I reviewed and
- (3) having looked at this location the kind of view you have here
- (4) from the air the archaeological deposits I believe to be
- (5) confined to the area in under the trees There are historic
- (6) and maybe even some modern but it certainly hasn t had so much
- (7) use recently so there are historic records artifacts under
- (8) there metal bowls things of that nature So the site seems
- (9) to be confined to this particular area And as you can see
- (10) it s quite distant from - from anything that s intertidal or
- (11) wet or whatever I don t think there s any indication that
- (12) any oiling any vandalism or any harm from the Exxon Valdez
- (13) oil spill or cleanup came to this site
- (14) Q What type of oiling was there?
- (15) A There was very light There was not a lot of oiling out in
- (16) that area I m not sure - I m not even sure how much there
- (17) was
- (18) Q Is there any evidence in the record of any impact on the
- (19) archaeological - intact archaeological resources that you ve
- (20) just pointed out by clean up workers or clean up activity?
- (21) A No there s no indication of harm to this archaeological
- (22) resource There s still archaeological potential in this
- (23) particular area and I don t believe that either Dr Lobdell or
- (24) Dr Johnson indicated that harm had come to the site as a
- (25) result of the oil spill

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- (1) Q Okay How about vandalism has there been any vandalism
- (2) here?
- (3) A No
- (4) Q This is a \$1 8 million claim?
- (5) A I believe that s the case
- (6) Q Let s do finally McArthur Pass Show us where McArthur
- (7) Pass is In the middle?
- (8) A McArthur Pass is right here
- (9) Q I m going to show the jury DX16242 Recognize that to be a
- (10) photograph of McArthur Pass?
- (11) A It is McArthur Pass
- (12) Q Have you ever been there?
- (13) A I was there in 1991 and then I flew over it again this last
- (14) spring
- (15) Q What did you do there in 1991?
- (16) A We dug some test sites some holes in the uplands to see if
- (17) oil had - had penetrated into them
- (18) Q The jury might remember this as the site that was
- (19) purposefully left untreated in 1989 -
- (20) A That s correct it was
- (21) Q - because of archaeological sensitivities Tell us where
- (22) the archaeological deposits are
- (23) A There are - the archaeological - the impact to
- (24) archaeological deposits which comprise the site are in this
- (25) area up here all along almost every place you see

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- (1) Q What s interesting about this site from an archaeological
- (2) standpoint?
- (3) A From an archaeological point of view it is quite
- (4) remarkable This is a - a tree whose roots are out here in
- (5) the intertidal zone It s light colored granite here as you
- (6) might interpret that This area dropped in the 1964
- (7) earthquake so it dropped trees and other sorts of things that
- (8) were once on the land down into the intertidal zone where they
- (9) died and so on What s interesting to me archaeologically
- (10) is this light-colored area through here which has not been
- (11) colonized by lichens or anything else to make them darker
- (12) like some of this other rock since 1964 So you can really see
- (13) where the deposits were in 1964 before the - before the land
- (14) dropped
- (15) And so my belief is in interpreting this and having been
- (16) there and looked at the artifact distribution that the
- (17) artifacts that you see in here where we found a large number
- (18) of artifacts in the intertidal zone came from this little
- (19) shelf that has not yet been recolored and so on Matter of
- (20) fact you can still see some remnants These are some
- (21) salt tolerant grasses up here some remnants of that former
- (22) soil in this particular location
- (23) It s interesting a lot of artifacts get kind of spread
- (24) throughout the intertidal zone as a result of the erosion
- (25) They were however not impacted significantly from oiling

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- (1) You can still see some little oil spatters in some locations
- (2) here and there were some artifacts that got oil on them
- (3) Again they re stone artifacts and unaffected
- (4) Q Is this in the Kenai Fjords National Park?
- (5) A Yes it is The site was intentionally investigated in
- (6) 1989 with the combination of Exxon investigating the intertidal
- (7) zone and the Park Service and Fish & Wildlife and with the
- (8) assistance of Chugach Alaska Corporation actually
- (9) investigating some areas of the uplands So there s a lot
- (10) known about this site
- (11) Q Port Graham did we say or English Bay?
- (12) A I don t remember It s an English Bay site
- (13) Q You can see that there was some artifacts scattered in the
- (14) intertidal zone that may have been or was in fact oiled
- (15) Shouldn t English Bay get \$850 000 for that?
- (16) A Based on the - on the concept that the oil created some
- (17) sort of harm to these artifacts I suppose one has - one could
- (18) make a case but the problem is that from an archaeological
- (19) point of view there is no harm to them The artifacts in
- (20) point of fact have been picked up They ve been picked up in
- (21) part because they were - the study was performed by the Park
- (22) Service National Park Service Fish & Wildlife Service and so
- (23) on They collected a lot of artifacts from this Those
- (24) artifacts and the Exxon artifacts have been curated collected
- (25) cleaned and so on There really isn t anything further to do

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- (1) with them okay The nature of these kinds of finds which are  
 (2) out here in the intertidal zone and are disassociated is the  
 (3) fact that they re strayed they re out of context there is  
 (4) very little to do to them and no archaeologist such as  
 (5) DeLaguna for example would include them along with the kind  
 (6) of analysis that you could do from the very rich context that  
 (7) you want to investigate in the uplands there Okay so there  
 (8) really isn t a lot to be done with them and there really isn t  
 (9) a lot of basis for harm  
 (10) Q Were the artifacts that were scattered harmed by being  
 (11) oiled?  
 (12) A No They ve been – they were picked up and cleaned  
 (13) Those that were found that hadn t already been washed away  
 by  
 (14) the tides and storms were picked up and curated  
 (15) Q And finally what about oiling of the intact archaeological  
 (16) deposits didn t there –  
 (17) A There s no indication of any oiling to these deposits  
 (18) whatsoever No one has ever suggested that oil got up here  
 (19) into the uplands No one has ever suggested that the uplands  
 (20) have be vandalized or otherwise harmed by the spill or its  
 (21) cleanup  
 (22) Q And incidentally the artifacts that were collected from  
 (23) the intertidal zone is that state land?  
 (24) A That is not an area in which I have expertise in terms of  
 (25) knowing who owns what but I was told that this area this land

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- (1) down here –  
 (2) MR PETUMENOS Your Honor I ll object to the  
 (3) testimony  
 (4) THE COURT Sustained  
 (5) MR DIAMOND And I will withdraw the question  
 (6) THE COURT Sustained  
 (7) MR PETUMENOS Good  
 (8) BY MR DIAMOND  
 (9) Q Type III –  
 (10) THE COURT How long is Type III going to take  
 (11) counsel?  
 (12) MR DIAMOND I d really hoped to get through these  
 (13) THE COURT Doesn t look like it  
 (14) MR PETUMENOS Quite a few pages there  
 (15) MR DIAMOND I think we have probably another 15 20  
 (16) minutes to go  
 (17) THE COURT We ll break for the day See you tomorrow  
 (18) at 8 30 Don t talk about the case with anybody including  
 (19) your fellow jurors Don t form or express any opinion on it  
 (20) until its submitted to you for deliberation  
 (21) (Jury out at 1 25 p m )  
 (22) THE COURT All right counsel anything to take up on  
 (23) the record?  
 (24) MR PETUMENOS Yes Judge I want the Court to be  
 (25) aware that I did not object but once in the entire direct

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- (1) examination of the expert for the first time in the history of  
 (2) the case and I have nothing to take up this afternoon  
 (3) THE COURT I have an award to give you at the end of  
 (4) the case counsel  
 (5) MR DIAMOND Was that a credit  
 (6) THE COURT Don t forget there s 15 minutes more to  
 (7) go  
 (8) MR DIAMOND I assume that was a compliment to the  
 (9) examiner  
 (10) MR PETUMENOS There were times when you didn t have  
 (11) to examine he just did it for you  
 (12) THE COURT Where are we?  
 (13) MR STOLL Your Honor the only thing – I just  
 (14) thought we d discuss briefly – we don t – it s no big deal  
 (15) but the schedule from now on –  
 (16) THE COURT Yeah I wanted to do that  
 (17) MR STOLL Particularly with respect to the jury  
 (18) instructions and all that I ve talked to Mr Oppenheimer  
 (19) about that and he thinks that they will not have theirs  
 (20) completed until probably Friday We ll exchange on Friday  
 and  
 (21) work through the – you know weekend Mr Oppenheimer and I  
 (22) will and then hopefully the ones that we disagree on we will  
 (23) submit to Your Honor on Tuesday  
 (24) THE COURT All right  
 (25) MR STOLL But the schedule as it looks now it

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- (1) looks like we will not be able to put on any – or many if  
 (2) any rebuttal witnesses tomorrow So we ll start on –  
 (3) probably on Friday go till Tuesday which is when Mr Seldin  
 (4) is available anyhow So that sort of works out but – so  
 (5) what we could do In terms of this schedule is – is we could  
 (6) argue the instructions Tuesday afternoon perhaps  
 (7) THE COURT We re going to take the full day for the  
 (8) instructions counsel  
 (9) MR STOLL Pardon me?  
 (10) THE COURT We re going to take a full day  
 (11) MR STOLL On instructions?  
 (12) THE COURT Yes and we re going to take enough time  
 (13) to do these instructions give you time to prepare your final  
 (14) arguments  
 (15) MR STOLL Fine  
 (16) THE COURT Which means I think that if I do it in a  
 (17) day the next day we will probably take off  
 (18) MR STOLL Okay so if that s – if that s the  
 (19) program then we would do the instructions on – just as an  
 (20) example if we finished our rebuttal case and they did not have  
 (21) a surrebuttal case we would do the instructions on Wednesday  
 (22) take off Friday and then – excuse me Thursday and then close  
 (23) on Friday?  
 (24) THE COURT Probably  
 (25) MR STOLL All right The other matter I would

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- (1) raise which we don't have to argue now but they submitted a  
 (2) proposed protocol for handling exhibits  
 (3) THE COURT I saw it counsel  
 (4) MR STOLL And we don't agree with it  
 (5) THE COURT There's substantial problems with the  
 (6) protocol but I don't want to discuss it now either  
 (7) MR STOLL That's fine I just want - if they were  
 (8) going to do anything like that to prepare all this is -  
 (9) rather than go through the normal procedure -  
 (10) THE COURT The clerk is preparing no more than 50  
 (11) pages in rebuttal to that protocol so she's been limited to 50  
 (12) pages but she has some definite criticism and -  
 (13) MR STOLL I'm glad it wasn't my suggestion Your  
 (14) Honor I'm sure whatever the clerk says is just fine  
 (15) THE COURT Don't be so sure counsel She might  
 (16) change her mind  
 (17) MR STOLL Anyway I don't think there's anything  
 (18) THE COURT Okay  
 (19) MR OPPENHEIMER Your Honor I -  
 (20) THE COURT I still don't understand though  
 (21) Who's - how many more witnesses do we have for the defense?  
 (22) MR DIAMOND We have one more live witness after  
 (23) Dr Dekin  
 (24) THE COURT Who is that?  
 (25) MR DIAMOND Otto Harrison

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- (1) THE COURT Oh okay  
 (2) MR DIAMOND I think between - or only  
 (3) cross examination of this witness and the three videotaped  
 (4) depositions we have scheduled for tomorrow and Mr Harrison  
 (5) that probably will consume the entirety of tomorrow  
 (6) THE COURT So Friday the rebuttal case goes on?  
 (7) Yes?  
 (8) MR STOLL Yes  
 (9) MR OPPENHEIMER Your Honor the other procedural  
 (10) matter is that we don't yet have a definitive list of order of  
 (11) witnesses and we are missing legible - or actually missing  
 (12) exhibits on -  
 (13) THE COURT Is this the subject we've been discussing  
 (14) two for two days?  
 (15) MR OPPENHEIMER No In fact this is a new and  
 (16) novel aspect of it which hopefully we can resolve because I  
 (17) actually have a specific request for relief Our  
 (18) cross-examination designations would be due at 8:30 tomorrow  
 (19) morning This is for exhibits and there's - we - we're not  
 (20) in a position to do that We have an old list which was at  
 (21) the time it was given to us represented to be the order but a  
 (22) number of things have happened since then including  
 (23) in chambers yesterday and there's a scheduling problem  
 (24) because  
 (24) Dr Peterson apparently has to testify on Friday and so if you  
 (25) take those things into consideration the - the old list even

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- (1) if it was intended to have told us what the order is doesn't  
 (2) work for that purpose  
 (3) We're also in possession of illegible exhibits for all but  
 (4) four of Dr Peterson's numerous exhibits We just can't - we  
 (5) can't read them We have been told - we've asked repeatedly  
 (6) for legible copies We're told there's a logistical problem  
 (7) they're coming from I'm not quite sure Montana I assume  
 (8) Dr Peterson is in Montana but in any event we're in no  
 (9) position to provide cross exhibits at 8:30 tomorrow If we get  
 (10) a list that is definitive as to order and if we get  
 (11) Dr Peterson's exhibits by mid afternoon seems to me we could  
 (12) be in a position by tomorrow evening to provide our cross  
 (13) designations  
 (14) Mr Stoll and I were talking about that before I came up to  
 (15) the podium here I hope for all that's an acceptable  
 (16) stipulation If it's not we need that relief  
 (17) MR STOLL Well Your Honor In the first place with  
 (18) respect to Dr Peterson in the - from the beginning we have  
 (19) told them that Dr Peterson had to testify on Friday I don't  
 (20) know what the problem is on this legibility of these - of some  
 (21) particular exhibits This is the first frankly I'd heard  
 (22) about that Maybe they've communicated with someone in my  
 (23) office or something about it I will find out about that If  
 (24) they do not have legible copies of some exhibits they may not  
 (25) be able to respond to those particular items but I think that

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- (1) to anything else we've always said Dr Peterson had to testify  
 (2) this Friday because he came out from North Carolina and we  
 (3) would anticipate putting him on on Friday and so I would say  
 (4) that they on anything else other than if there's a particular  
 (5) problem with some specific exhibits that they would need to  
 (6) provide us with cross-examination exhibits  
 (7) Similarly -  
 (8) THE COURT What do you mean by anything else?  
 (9) MR STOLL Well I don't know what else They're  
 (10) talking apparently about a few exhibits that were designated  
 (11) for Dr Peterson as opposed to other exhibits that were -  
 (12) MR OPPENHEIMER I can clarify Your Honor We -  
 (13) with the exception of four exhibits for Dr Peterson we either  
 (14) are missing or have illegible copies of all of the remaining  
 (15) That is to say we have nothing other than the four from the  
 (16) full set  
 (17) As to all the of the other witnesses the problem we have  
 (18) is that in terms of determining who would actually be up  
 (19) tomorrow other than Dr Peterson - pardon me on Friday other  
 (20) than Dr Peterson who has been identified as somebody who  
 (21) had  
 (21) to testify on Friday we don't know where the list stands right  
 (22) now That's why there's no way to comply with tomorrow at  
 (23) 8:30  
 (24) MR STOLL I disagree with that Your Honor because  
 (25) Mr Shackleton who is the number one person on the list was

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- (1) going to testify tomorrow Until about halfway through this  
 (2) morning I thought there was a possibility that he would still  
 (3) testify tomorrow So actually they should have given us the  
 (4) cross examination documents on Shackelton this morning  
 which  
 (5) they didn't do  
 (6) With respect to - there's a number of witnesses here Mr  
 (7) Robertson who is the next listed witness was supposed to be  
 (8) called for tomorrow morning They should have given us the  
 (9) exhibits on him today We didn't receive anything on him - I  
 (10) mean last night They were telling us that they were going to  
 (11) finish today So they should have anticipated that these  
 (12) witnesses were going to go on If there's anyone - I would  
 (13) agree with them if there was anyone that was going to go on  
 (14) Tuesday that was not going to go Friday but every one of the  
 (15) other witnesses was going to go either tomorrow or Friday So  
 (16) there's no reason why they should not be in a position to  
 (17) produce the cross-examination documents  
 (18) THE COURT Except that your exhibits are illegible  
 (19) MR STOLL No I'm saying with the exception of this  
 (20) one group of exhibits for Dr Peterson Other than that -  
 (21) THE COURT That's not what I heard from counsel  
 (22) MR OPPENHEIMER There are missing exhibits from  
 (23) other witnesses The illegible ones are limited to  
 (24) Dr Peterson but there are two other problems with what  
 (25) counsel's saying One is that you'll recall until yesterday

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- (1) there was no - there was no pared down list Yesterday was  
 (2) the pared down list  
 (3) MR STOLL That's not true  
 (4) MR OPPENHEIMER That is true and the other thing  
 (5) we just received while I was sitting here in court what I  
 (6) understand to be from my office the pared down exhibit list  
 (7) that was discussed yesterday So we - we just haven't had  
 (8) materials to respond to these people for -  
 (9) THE COURT Let me tell you you're going to have to  
 (10) solve this problem yourselves As far as Peterson is  
 (11) concerned when are they going to get the legible exhibits?  
 (12) MR STOLL I didn't even know there was a problem  
 (13) Your Honor until he just mentioned it to the Court  
 (14) THE COURT You have to get them legible exhibits by  
 (15) 4:00 or this rule - or what I'm going to do now is not in  
 (16) effect And then they have to - they have to give you  
 (17) their - their cross examination exhibits by 8:00 Regard to  
 (18) Shackelton -  
 (19) MR OPPENHEIMER I'm sorry by 8:00 tomorrow night?  
 (20) THE COURT Tonight  
 (21) MR OPPENHEIMER No Your Honor they're not due  
 (22) until 8:30 tomorrow morning Your Honor these are highly  
 (23) technical exhibits  
 (24) THE COURT I don't see the problem  
 (25) MR OPPENHEIMER They're technical they're random

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- (1) sampling exhibits there's going to be some thought some  
 (2) considerable thought - it's not something we can produce our  
 (3) exhibits overnight  
 (4) THE COURT All right So - so with regard to - if  
 (5) you get legible copies of Peterson's exhibits by 4:00 you can  
 (6) certainly designate Peterson by 8:30  
 (7) MR OPPENHEIMER In the morning?  
 (8) THE COURT Yeah  
 (9) MR OPPENHEIMER Your Honor I don't think that's  
 (10) possible because I don't think the exhibits can be actually  
 (11) created -  
 (12) THE COURT I think it's possible counsel You tell  
 (13) me - if you don't do it by 8:30 you're going to have to tell  
 (14) me why And with regard to Shackelton is there a legibility  
 (15) problem here?  
 (16) MR STOLL No  
 (17) THE COURT Is there any other problem?  
 (18) MR OPPENHEIMER Other than that until yesterday he  
 (19) wasn't definitively on the list  
 (20) MR STOLL He's always been on the list  
 (21) THE COURT Doesn't make any difference The question  
 (22) is can you prepare and the answer my answer to you is yes  
 (23) you can So designate him by 8:30  
 (24) Now with regard to any other witness on the rebuttal  
 (25) witness list you don't have to - what time did you want to

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- (1) designate the cross examination exhibits by?  
 (2) MR OPPENHEIMER At the end of the day tomorrow Your  
 (3) Honor  
 (4) THE COURT You got it  
 (5) MR OPPENHEIMER Can I - can I ask - can I ask  
 (6) this? I can't imagine that this would make it any more  
 (7) difficult for Mr Stoll I think our greatest problem in terms  
 (8) of meaningfully complying with the schedule really is  
 (9) Dr Peterson right now That is the really heavy technical  
 (10) science issues I would offer a trade here We have a lot of  
 (11) exhibits for Mr Carlson Mr Carlson may also be up on  
 (12) Friday I had the most direct responsibility for Mr Carlson  
 (13) so I have a good handle on whether something can or cannot  
 be  
 (14) done overnight I would rather endeavor to comply with the  
 (15) Court's deadline for Mr Carlson's exhibits and seek extra time  
 (16) for Dr Peterson's cross because I - in all seriousness that  
 (17) is a very technical area We need to consult with our  
 (18) technical science people We don't even know what we're  
 (19) consulting about yet and I speak to the heart of the issue when  
 (20) I say that I do not believe it's feasible for us especially on  
 (21) that witness to be able to address those issues  
 (22) THE COURT I hear you -  
 (23) MR STOLL Can I ease up on this Your Honor?  
 (24) THE COURT Only if you can propose a solution  
 (25) counsel I don't want any argument

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- (1) MR STOLL No I have a solution I don't want to  
 (2) argue In fact a minute ago he just wanted to keep talking  
 (3) I was going to ease up on the 8 30 thing I was going to  
 (4) propose that  
 (5) THE COURT What you're going to give him until  
 (6) nine?  
 (7) MR STOLL No Originally I was thinking like 10 30  
 (8) or 11 00 or something like that  
 (9) THE COURT That's what I was afraid you would tell  
 (10) him  
 (11) MR OPPENHEIMER This is I think a bet being made  
 (12) after the horse has come in Your Honor I don't know  
 (13) MR STOLL No no you want to continue to argue?  
 (14) MR OPPENHEIMER No speak speak speak  
 (15) MR STOLL I'm going to give you something You  
 (16) don't want it don't take it  
 (17) MR OPPENHEIMER This is a ranty I'm inviting  
 (18) Mr Stoll to speak  
 (19) MR STOLL Your Honor what I would suggest I'm  
 (20) going to go back to my office as I mentioned several times I  
 (21) didn't even know about a problem with the legibility -  
 (22) THE COURT Sure  
 (23) MR STOLL If Mr Oppenheimer had a problem with  
 (24) this he and I talked about it earlier today He could have  
 (25) told me

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- (1) THE COURT What's the solution counsel?  
 (2) MR STOLL The solution is we will produce legible  
 (3) copies this afternoon They will have until noon tomorrow to  
 (4) produce counter designations on those The one area that I  
 (5) also want to take an exception though to the Court is on  
 (6) these other - there's some other witnesses very short  
 (7) witnesses but I would like to know there's a number of them  
 (8) that I have to put on on Friday and I would like to know  
 (9) tomorrow morning if all - they've always been on the list  
 (10) they've always been early on the list and frankly they should  
 (11) have - if they had any designations for them they should have  
 (12) been to us this morning and those - I'm just going to give the  
 (13) names -  
 (14) THE COURT No not yet Tell me about that is that  
 (15) acceptable to you?  
 (16) MR OPPENHEIMER Yes Your Honor We can live with  
 (17) that  
 (18) THE COURT 12 00 12 00 all right  
 (19) MR STOLL Your Honor the other names are Roy  
 (20) Robertson Toby Cook Mike Goodman and Paula Phelps If  
 (21) they  
 (22) have any - I don't know that they will have any but if they  
 (23) have any designations frankly they should have given us those  
 (24) this morning  
 (25) MR OPPENHEIMER Hold on these are the people who  
 (26) are going on Friday?

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- (1) MR STOLL Yes  
 (2) MR OPPENHEIMER That's an excellent reason why we  
 (3) couldn't have complied They don't show up in that order on  
 (4) the list I understand you're changing the order  
 (5) MR STOLL Just a minute -  
 (6) THE COURT Counsel if I hear one more item of  
 (7) argument out of you you're both going out of the courtroom  
 (8) and  
 (9) so am I Now do you want to solve this problem or do you want  
 (10) to bicker?  
 (11) MR OPPENHEIMER The former Your Honor  
 (12) THE COURT Let's go The solution counsel not the  
 (13) argument  
 (14) MR STOLL Your Honor the proposal is that they give  
 (15) us instead of giving those exhibits today to us they can give  
 (16) them to us tomorrow morning at 8 30  
 (17) THE COURT Can you live with that counsel?  
 (18) MR OPPENHEIMER On those four yes Your Honor  
 (19) THE COURT Fine See how easy it was counsel?  
 (20) MR STOLL Thank you  
 (21) MR OPPENHEIMER Thank you  
 (22) THE COURT Now is there anything else?  
 (23) MR DIAMOND I just didn't want you to lose sight  
 (24) of the fact that we still had -  
 (25) THE COURT Which site is that counsel?  
 (26) MR DIAMOND Mr Oppenheimer is -

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- (1) THE COURT Is it a Class 1 site or a Class 2 site or  
 (2) Class 3?  
 (3) MR DIAMOND I have a pending directed verdict motion  
 (4) that hasn't been ruled on yet which I think has gotten sort of  
 (5) lost in the shuffle  
 (6) THE COURT It hasn't been ruled on yet I thought  
 (7) since nobody said anything about it I thought you were just  
 (8) letting things go I mean you could have set it any time  
 (9) MR DIAMOND And it was simply a matter of getting  
 (10) ready for the next day and not having any time to schedule  
 (11) that We're in the middle of examination of the archaeology  
 (12) expert we intended to call I guess my preference at this  
 (13) point is let's finish it and deal with that at the close of  
 (14) evidence with other directed verdicts  
 (15) THE COURT That's my preference too  
 (16) MR DIAMOND I just didn't want you to think we were  
 (17) abandoning it  
 (18) THE COURT No  
 (19) MR DIAMOND We just don't have time for it  
 (20) THE COURT Counsel It's on my desk in a very  
 (21) prominent position waiting just waiting for you to give me the  
 (22) signal to rule If you gave me the signal to rule now I would  
 (23) rule now  
 (24) MR DIAMOND You would?  
 (25) THE COURT Yes

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- (1) MR DIAMOND Then I won t give you the signal now
- (2) THE COURT All right Anything else brief?
- (3) MR FORTIER Brief? Your Honor could we file a
- (4) sur reply before you do anything?
- (5) THE COURT Sur reply to what?
- (6) MR FORTIER To the motion
- (7) THE COURT A sur reply?
- (8) MR FORTIER Yeah Can we do that?
- (9) THE COURT You can file anything you want to
- (10) counsel as long as it doesn t contain scandalous or
- (11) impertinent material
- (12) MR CLOUGH The traditional standard
- (13) MR FORTIER I don t do that Your Honor
- (14) THE COURT Okay Is there anything else? Thank you
- (15) very much counsel
- (16) MR DIAMOND Thank you Your Honor
- (17) THE CLERK. Please rise The court stands in recess
- (18) (Recess at 1 44 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 3,056  
 TOTAL OCCURRENCES  
 12,941  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE  
 39,118

## 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 Civ1  
 ) Anchorage Alaska  
 (5) The EXXON VALDEZ ) Thursday September 1 1994  
 ) 8 30 a m  
 (6) )  
 (8) VOLUME 49 Pages 7750 through 7912  
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)  
 (11) TRIAL BY JURY  
 (12) BEFORE THE HONORABLE BRIAN C. SHORTELL  
 Superior Court Judge
- (16) APPEARANCES  
 (17) FOR THE PLAINTIFF
- H ROBERT STOLL  
 (18) Stoll Stoll Berne & Lakting  
 209 Southwest Oak Street  
 (19) Portland Oregon 97204  
 503/227 1600
- TIMOTHY J. PETUMENOS  
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 (22) 907/276 1550
- SAMUEL J. FORTIER  
 (24) Fortier & Mikko  
 2550 Denali Street Suite 604  
 Anchorage Alaska 99503  
 (25) 907/277 4222

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- (1) PROCEEDINGS  
 (2) (Jury in at 8 40 a m )  
 (3) THE CLERK. Please rise  
 (4) (Call to Order of the Court)  
 (5) MR DIAMOND Good morning Your Honor  
 (6) THE COURT Good morning  
 (7) MR DIAMOND Over the evening we ve reset Professor  
 (8) Dekin to play at 33 rpm instead of 78 rpm So his voice may be  
 (9) a little bit slower but also lower  
 (10) CONTINUED DIRECT EXAMINATION OF ALBERT DEKIN  
 (11) BY MR DIAMOND  
 (12) Q We were talking about Type II and Type III sites when we  
 (13) broke yesterday Professor Dekin and you gave as an example  
 of  
 (14) a Type II site Verdant Cove one that was not sufficiently -  
 (15) to any oil to have been threatened These are bona fide sites  
 (16) none the else are they not?  
 (17) A All of these Type II sites are important archaeological and  
 (18) heritage resources from a number of different perspectives  
 (19) They re all important in terms of their value to the people who  
 (20) live in the region They re extremely important  
 (21) archaeologically to the - those who wish to try and understand  
 (22) the changing dynamics of human pre-history and so forth  
 (23) There s no question but they are of archaeological value and  
 (24) historical value That is actually the essential part of what  
 (25) makes them a Type II

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- (1) FOR THE DEFENDANTS
- CHARLES P. DIAMOND  
 (2) M. RANDALL OPPENHEIMER  
 LINDA JANE SMITH  
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 213/669 6000
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- Reported by
- JOY S. BRAUER RPR  
 (9) Registered Professional Reporter  
 Midnight Sun Court Reporters  
 (10) 2550 Denali Street Suite 1505  
 Anchorage Alaska 99503  
 (11) 907/258 7100

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- (1) Q And they re an important part of the Chugach history and  
 (2) culture and legacy in the region?  
 (3) A They absolutely are  
 (4) Q Let s go to Type III sites You prepared a list of those  
 (5) sites you classified in that category I ll ask Jeff to put up  
 (6) on the Barco DX14054 B How many are there?  
 (7) A There are eight sites in this category  
 (8) Q Totaling what two and a half million dollars roughly in  
 (9) claims?  
 (10) A Roughly  
 (11) Q Have you been able to categorize these sites in any way?  
 (12) A Yes I think it s best to divide them into three relatively  
 (13) small in this case groups  
 (14) The first I would include Kake Cove and the Lower Passage  
 (15) site part of it called Louis Bay lamp site These represent  
 (16) two sites which were - which have intertidal deposits  
 (17) Q What does that mean?  
 (18) A They have intact archaeological deposits within the tidal  
 (19) range in the beach And this is very unusual  
 (20) Q Well yesterday - yesterday you told us if I can pick  
 (21) this up that if you have intertidal archaeological deposits  
 (22) over time erosion wears them away and you re just left with  
 (23) archaeological artifacts scattered?  
 (24) A That s one thing that happens The other that happens is  
 (25) that in some cases these sites are not subjected to as rapid

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- (1) erosion as one might expect on a more exposed coast and so the
- (2) erosion will take off the top levels or the upper levels of the
- (3) site but will leave in some cases the bottom the bottom
- (4) layers which is in some rare cases two in this instance have
- (5) artifacts in them in the place in which they were deposited
- (6) that is in their archaeological context
- (7) Q They're in sufficient proximity to the water such that the
- (8) event of the oil spill they could have conceivably been areas
- (9) where oil was deposited?
- (10) A Yes it is conceivable that oil may have come into the
- (11) beach and mixed with the gravels and so on at both of these
- (12) locations
- (13) Q That's Kake Cove and did you say Lower Passage?
- (14) A It's the Louis Bay lamp site in the Lower Passage
- (15) Q You're going to tell us about that more later?
- (16) A I will
- (17) Q What are the other categories?
- (18) A The other categories include four historic sites that have
- (19) deposits and facilities constructed in the intertidal zone that
- (20) also may have come into contact with oil if there were
- (21) sufficient oil in the intertidal zone at that location
- (22) Q How many are in that category?
- (23) A There are four in that category Old Chenega Village has a
- (24) part of it Sawmill Bay Thumb Bay Sawmill Squirrel Island
- (25) and - I'm sorry not Old Chenega Sawmill Bay Thumb Bay

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- (1) Sawmill Squirrel Island and Shipyard
- (2) Q That takes care of six of the eight You have two -
- (3) A The last two sites are sites which there is clear
- (4) indication there was vandalism during 1989 These are the Old
- (5) Chenega Village which had apparently graffiti put on a wall
- (6) there in 1989 and also the Crafton Island north site which
- (7) had had some vandal holes dug into it in 1989
- (8) Q Despite the fact that those sites were subject to
- (9) vandalism and despite the fact that two of the eight were
- (10) intertidal deposits you said none of them suffered any
- (11) detectable Exxon Valdez oil spill injury?
- (12) A That's correct
- (13) Q Why don't you start explaining the first category You
- (14) said Kake Cove and Lower Passage form that category?
- (15) A Yes
- (16) Q You want to use a diagram?
- (17) A I could As we spoke a moment ago this particular diagram
- (18) shows that all the archaeological deposits have been - have
- (19) been removed at this location and all that is left are these
- (20) disassociated artifacts but that doesn't always happen
- (21) With a large archaeological midden and a very thick kind of
- (22) forest subsoil with plants and so forth in it when the
- (23) archaeological site is built sort of okay you get these
- (24) artifacts built within it And the lower layers are very high
- (25) in organa You can see this if you go to some of these

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- (1) locations If you're ever out in the bush here you can see
- (2) that the lower levels of sites - oftentimes the lower levels
- (3) of bank cuts are very strongly organic very thick heavy
- (4) matted and often waterlogged deposits and it's the
- (5) waterlogging that's particularly important in this example
- (6) They are waterlogged usually from fresh water from the
- (7) uplands Usually they're connected to the uplands in some way
- (8) in terms of drainage and so they're waterlogged They
- (9) preserve wooden and bone artifacts extremely well all right
- (10) and you will even find twigs you'll find leaves and spalls and
- (11) all sorts of things in them They become very compact and
- (12) quite massive whereas the upper layers have a lot of charcoal
- (13) in it a lot of stone they break up a lot more easily
- (14) What happens is when the site gets kind of dropped from
- (15) erosion you often get this veneer left out there As a matter
- (16) of fact there are relevant lick - so-called relevant lick
- (17) deposits that is remainders of soils in the intertidal zone
- (18) occurs fairly frequently but there are only two examples in
- (19) the Plaintiffs - site for which the Plaintiffs claim damages
- (20) which there are actually artifacts in them These are Kake
- (21) Cove and Louis Bay lamp site and these artifacts are
- (22) embedded
- (23) in the surface and embedded in here despite the fact that the
- (24) intertidal zone now comes up above them and water washes
- (25) over
- (24) them They're still intact archaeological deposits and they
- (25) can be studied

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- (1) Q You keep referring to Louis Bay?
- (2) A That's the Lower Passage
- (3) Q Why is it Louis Bay?
- (4) A That's the name on the Alaska Heritage form for it
- (5) Q I don't think we have a photograph of Louis Bay lamp site
- (6) but we do have a photograph of Kake Cove Let's go to the
- (7) Barco and put up 10030-A and have Professor Dekin show us
- (8) A Kake Cove is here on Chenega Island
- (9) Q That is a Chenega claim?
- (10) A Yes it is
- (11) Q I'm going to put up DX14034 A 15 Turn it right side up
- (12) Is this Kake Cove?
- (13) A This is a photograph of Kake Cove
- (14) Q Dr Johnson showed us a video of some I believe it was
- (15) state archaeologist You were present for the video?
- (16) A Yes I was
- (17) Q State archaeologists walking the shoreline and there was
- (18) some bags of refuse up here on the -
- (19) A Yes it's not clear to me exactly where that was I
- (20) believe they were on the western end of the cove
- (21) Q But that was the Kake Cove area?
- (22) A Yes it was
- (23) Q Tell us about this site
- (24) A Kake Cove is very interesting because of the changing sea
- (25) level in this location The deposits are actually in here

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- (1) These little brown spots are not them that's more - but  
 (2) they're in the lower intertidal zone. The area actually rose  
 (3) in the 1964 earthquake so these are deposits that once were  
 (4) even further below the level of the sea okay and so it is -  
 (5) you can't exactly tell this but it is a fairly sheltered  
 (6) cove. It is not exposed to the passing zone. The beach does  
 (7) not have the large cobbles and so forth. This is an area that  
 (8) is relatively sheltered and the movement of the land versus  
 (9) the sea actually dropped these deposits down into the water a  
 (10) long time ago. There was a major tectonic activity. Major  
 (11) change earthquake probably in about a thousand A.D. so there  
 (12) was some major shifts. The 1964 earthquake actually brought it  
 (13) back up so it could be investigated.  
 (14) Q In low tide if you flew over that could you see the  
 (15) deposits?  
 (16) A At low I'm not sure whether - how low it would have to  
 (17) be but certainly at lower low tides you can see brown peat  
 (18) deposits very organic things. Not uncommon to see these on  
 (19) sites of this nature.  
 (20) Q That acts like a veneer and protects the resource?  
 (21) A It's very dense and it's very - usually waterlogged.  
 (22) Q This beach did receive some oiling according to the  
 (23) records?  
 (24) A Very light.  
 (25) Q But it's conceivable that some of that oil washed over the

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- (1) Kake Cove deposits?  
 (2) A It is.  
 (3) Q Well then how do you know that there was no detectable  
 (4) Exxon Valdez injury?  
 (5) A Well this site was studied by the State of Alaska. They  
 (6) came out and dug some test excavations into the peat at low  
 (7) tide trying to manage the water so it didn't flood them out  
 (8) and they then took some samples for evaluation for petroleum  
 (9) hydrocarbons from the deposits themselves and they also  
 (10) took a sample of artifacts to study and so on.  
 (11) They also took some samples for radio carbon dating and  
 (12) they received negative results on the chemical tests from the  
 (13) deposits. And they also found that the radio carbon dates that  
 (14) they took were what they expected from the - the  
 (15) identification of the artifacts that were associated with it.  
 (16) So they found that there was not any indication that the  
 (17) oiling had occurred in this locale had actually penetrated  
 (18) these artifacts and made them either difficult or impossible to  
 (19) date.  
 (20) Q You also said Lower Passage what you called the Louis Bay  
 (21) lamp site?  
 (22) A Yes it's up here.  
 (23) Q Okay is similar to Kake Cove?  
 (24) A It is. It has intact archaeological deposits in the  
 (25) intertidal zone with artifacts in it.

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- (1) Q It's in an area that was oiled?  
 (2) A Lightly.  
 (3) Q Well again how do we know that none of that oil permeated  
 (4) into the archaeological resources there?  
 (5) A That one is a little bit more complicated.  
 (6) In 1991 we investigated the gravels overlying these intact  
 (7) deposits and we dug through them and got down into the  
 (8) deposits themselves and we did some tests in the gravel that overlay  
 (9) the deposits on top of them and we did find evidence for  
 (10) oiling in that location at that time.  
 (11) There was some remnant petroleum hydrocarbons whose  
 (12) sources we're not sure of but that's neither here nor there  
 (13) right now. So we investigated the - in the Louis Bay lamp  
 (14) site. We took some samples out of the immediate vicinity of  
 (15) the artifacts. We took samples out of the gravel. In the  
 (16) gravel we found oil in the deposits containing the artifacts  
 (17) we did not.  
 (18) And so what you have at Louis Bay lamp site is a veneer on  
 (19) the top of gravel and at the time we were there it had some  
 (20) remnant oil in it you could see and test for. Below that there  
 (21) was this waterlogged deposit of peat containing artifacts into  
 (22) which the oil had not penetrated all right because there was  
 (23) water in it. And so when we investigated that we did these -  
 (24) this series of split samples we tested for oil and we did not  
 (25) find any.

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- (1) Q Is it the case that the veneer on top of these resources  
 (2) that has protected it from erosion apparently also protected it  
 (3) from oil?  
 (4) A Well I don't think the gravel protected it from oil  
 (5) except insofar as it kept it from getting churned up and so  
 (6) forth by the tide. It's important to distinguish here and  
 (7) this is not a semantics - it's not a word game here. It's  
 (8) important to distinguish between oil that may have got on the  
 (9) underlying deposits and oil that got in the underlying  
 (10) deposits. We have no evidence for oil getting in. We have  
 (11) evidence for oil on the top in the gravels and so forth but  
 (12) not penetrating.  
 (13) Q You mentioned that of the eight Type III sites sites that  
 (14) were sufficiently close to oiling to have been jeopardized  
 (15) four of them were historic sites that in your opinion were  
 (16) not in any way harmed by the spill. Any examples of those?  
 (17) A Yes. These sites were - had in common the fact that they  
 (18) had - people had constructed things in the intertidal zone  
 (19) all right.  
 (20) Q We have a picture of the shipyard?  
 (21) A Yes.  
 (22) Q This is DX14034 A 33. Is that on this map that we have on  
 (23) the Barco?  
 (24) A Shipyard? It's right there.  
 (25) Q That's Chenega site - I'm sorry Chugach site?

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- (1) A Chugach site  
 (2) Q Tell us what we re looking at  
 (3) A Shipyard site is named because there used to be some marine  
 (4) facilities there You can tell that this is not a dock  
 (5) because the - they get closer to the water as you go down so  
 (6) it was clearly a sloping surface when that was - when that was  
 (7) made  
 (8) These are pilings they date from historic and early 1900s  
 (9) and so on They probably have survived in this environment  
 (10) because they ve been treated They would not normally last  
 (11) quite as long and it is in an area where it is possible okay  
 (12) that oil may have come in contact with these particular things  
 (13) pilings There are pilings at two other locations if I recall  
 (14) correctly and the four sites that are in this category all  
 (15) have something built into the - into the intertidal zone such  
 (16) as this  
 (17) Q For those of us who don t have much maritime experience  
 (18) what do they do to wood that they use as pilings -  
 (19) A Creosote was a very common treatment in the early part of  
 (20) the - part of the century  
 (21) Q And what s that made out of?  
 (22) A It s a petroleum by-product  
 (23) Q So these wooden structures already had oil in them before  
 (24) they were manufactured and placed in the site?  
 (25) A It s very likely

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- (1) Q If Jeff would put back up the list of Type III sites  
 (2) DX15054B which are the other three that are like Shipyard?  
 (3) A Yes Squirrel Island Thumb Bay Sawmill and Sawmill Bay  
 (4) Q Give us a brief description of each since we didn t bring  
 (5) photographs  
 (6) A Okay Sawmill Bay consists of - a fairly complex actually  
 (7) grouping of materials some in the intertidal zone and the  
 (8) predominant finds there are finds in the historic period and  
 (9) they do include pilings the possibility of some docks and  
 (10) things of that nature Again in an area which might have been  
 (11) subjected to oiling  
 (12) Q But again the remnants are such that they wouldn t have  
 (13) been affected by the oil?  
 (14) A They are of this character Thumb Bay Sawmill is  
 (15) similar The most obvious remnant at Thumb Bay Sawmill are  
 (16) some rails that look like they were from a marine railway or  
 (17) something to skid logs and they are also in the intertidal  
 (18) zone and they are made of steel they re twisted they re rusty  
 (19) and so on I can t see how oil would have either penetrated  
 (20) them or harmed them  
 (21) Q What s the third?  
 (22) A The third is Squirrel Island  
 (23) Q What s there?  
 (24) A Squirrel Island has a fox farm on it for access back and  
 (25) forth across the beach They also built a dock and some other

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- (1) kinds of facilities that extended out into the intertidal zone  
 (2) and could have been oiled if there were oil that came into that  
 (3) particular locale  
 (4) Q Would the effects of the oiling on those dock structures be  
 (5) the same as you described for the shipyard?  
 (6) A I don t see how the research potential of these facilities  
 (7) in the intertidal zone would have been harmed  
 (8) Q That takes care of six of the eight Type III locations that  
 (9) you ve identified What are the other two?  
 (10) A The other two are Crafon Island north and Old Chenega  
 (11) Village  
 (12) Q Let s focus first on Old Chenega Village I think we all  
 (13) know where Old Chenega Village is so we ll skip the map but  
 (14) if Jeff would put up DX14034 24 - or 25 What are we  
 (15) looking at here?  
 (16) A It s a photograph taken from close to the water level of  
 (17) Old Chenega Village The structures here include a old school  
 (18) house  
 (19) Q Any evidence of any harm to anything on the shoreline as a  
 (20) result of oiling?  
 (21) A No There are some pilings that are - that are remnant in  
 (22) the shoreline and there are - we observed I think some  
 (23) fragments of plates and some historic debris down there but  
 (24) not in the context in which it was intact  
 (25) Q No intact archaeological deposits along the shoreline?

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- (1) A No  
 (2) Q Let s take a look at the interior of the school house  
 (3) which is DX14034 26 I think we ve seen this photograph  
 (4) before Is this the site where there was graffiti during the  
 (5) course of 1989?  
 (6) A There is graffiti here which has its own date of 1989 in  
 (7) the middle of a wall which has dates that I don t know range  
 (8) from 85 87 and so on so yes  
 (9) Q In DX14034 28 this is the interior of the school house?  
 (10) A This is another room in the school house which is - is  
 (11) kind of rapidly losing its integrity from a variety of forces  
 (12) perhaps  
 (13) Q Jeff let s go back to 26 Now there was graffiti placed  
 (14) on this wall apparently sometime in 1989 at least one or two  
 (15) occasions?  
 (16) A Right there are 89 dates here and here and here and there  
 (17) is some reason to believe because they re made in a similar  
 (18) style and made with the same type of magic marker apparently  
 (19) they date from the same time  
 (20) Q Why do you conclude there was no injury to this resource of  
 (21) the Chenega people?  
 (22) A There are basically two - two lines of thinking I think on  
 (23) this One is that it represents an historic record of the  
 (24) modern - of the modern era It represents a place where  
 (25) people have come from we can t tell where and written words



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- (1) on the wall from time to time And so the addition of graffiti  
 (2) in 1989 is really one more application of - of graffiti in  
 (3) this kind of long tradition in - well I m not sure how long  
 (4) it is but this kind of tradition of graffiti  
 (5) It is however an unfortunate kind of event and while it  
 (6) may express some sentiments that were widely expressable at  
 the  
 (7) time I don t know that we necessarily can tell that it was  
 (8) Exxon s personnel or Exxon s responsibility for that graffiti  
 (9) even though it did seem to occur at the same time that people  
 (10) were in the area  
 (11) Q According to the record that you studied was an  
 (12) investigation conducted of this graffiti?  
 (13) A Yes there were  
 (14) Q What did it reveal?  
 (15) A They did not know the people responsible for it  
 (16) Q Does this site have a long history of graffiti  
 (17) A I m not sure how long is long It goes back at least four  
 (18) or five years before the spill  
 (19) Q Are you aware of any steps that were ever taken by Chenega  
 (20) to protect the site?  
 (21) A Not so far as I can tell either from this graffiti or from  
 (22) the gradual disintegration of the building once the village was  
 (23) abandoned in 1964  
 (24) Q Take off your archaeologist s hat for a moment and put on  
 (25) your cultural resources manager hat What would you do to

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- (1) protect the integrity of this site in the future?  
 (2) A Well graffiti represents a interesting historic record  
 (3) There are a number of places around the country  
 (4) Q Only to an archaeologist?  
 (5) A No there are a number of places around the country where  
 (6) people have protected and preserved graffiti and so on  
 (7) Probably one that sticks in my mind recently was the Berlin  
 (8) Wall was a really - real big collection of graffiti that has  
 (9) actually been broken up and I ve seen pieces of it people have  
 (10) brought back because they thought it was important I wouldn t  
 (11) call this a Berlin Wall don t misunderstand that But  
 (12) certainly graffiti has an expression of human sentiment and  
 (13) movement and so on has a long history It s also very  
 (14) defacing and very harming  
 (15) All right I wouldn t doubt that for a moment but it is  
 (16) interesting and where there have been occasion for historic  
 (17) records under the purview of the federal government, I m  
 (18) thinking there are some old military installations where people  
 (19) in the 1900s wrote graffiti on the wall and so forth Cultural  
 (20) resource managers have when they changed the function of  
 those  
 (21) facilities tried to protect the record as it stands So from  
 (22) a management point of view in some cases this represents a  
 (23) record that we would you know one might not wish to be lost  
 (24) On the other hand if people who feel strongly about it would  
 (25) like something done with it then that also seems like a

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- (1) reasonable thing to take into mind  
 (2) Q What would you do?  
 (3) A I would try and protect it a little bit Either from  
 (4) further defacement or from - from loss One of the  
 (5) suggestions that was made to me when we - when I talked  
 about  
 (6) it with a variety of people was to paint it over all right  
 (7) Now painting it over just seems to me to invite the next  
 (8) person who comes through to put more on but nonetheless  
 I m  
 (9) not sure I would do that I think I would probably try and  
 (10) cover this over with some other material like plywood or  
 (11) something so it s there if anyone ever cared about it -  
 (12) destroying the stuff is forever all right so if one cared  
 (13) about it I would cover it over then I would try to secure the  
 (14) building a little bit so it doesn t happen But once again I  
 (15) think the people whose building this is ought to - ought to  
 (16) decide what to do with it  
 (17) Q As a cultural resource manager do you see any  
 (18) justification for spending tens or thousands of dollars to  
 (19) excavate the site on account of the graffiti?  
 (20) A No anything one would excavate would be totally unrelated  
 (21) to the graffiti  
 (22) Q We re left with one last site on your list a Crafton  
 (23) Island cave?  
 (24) A Yes  
 (25) Q Show us where that is We ll put up D10030-B again the

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- (1) map  
 (2) A Here is Crafton Island  
 (3) Q That is another Chugach Alaska site?  
 (4) A Yes it is  
 (5) Q We don t have a photo It s on the Barco The photo we  
 (6) have is electronic it s PX12882 Tell us what we re looking  
 (7) at  
 (8) A This is a photograph I think you ve seen before It s a  
 (9) large and prominent cave very close to the water with  
 (10) deposits in the rear of the cave The cave seems to have nsen  
 (11) in 64 providing a slightly additional measure of protection to  
 (12) the resources that are in the back Those that are in the  
 (13) front are apparently lost already to the erosion there  
 (14) Q Is this a real and important site?  
 (15) A This is a real site It s unfortunate that because of its  
 (16) prominence - this site is visible for I d say a mile away if  
 (17) you re looking at it very carefully It sits right on the edge  
 (18) of an area which is transitted by people coming out of  
 (19) Whittier very easily seen on the edge of the shore and people  
 (20) have been going there apparently for a long time Vandalism in  
 (21) this cave goes back a long ways  
 (22) The Park Service which owns this particular cave had some  
 (23) investigations in 1960s when they tried to collect materials  
 (24) from the surface and so on because they felt they were being  
 (25) impacted There also have been a number of reports of people

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- (1) through the years digging holes into this cave again because  
 (2) it s so prominent  
 (3) Q Was this the site of any disturbance in 1989?  
 (4) A Yes there are several - there are several instances  
 (5) recorded in the field notes and by observers that people  
 (6) unknown people did actually dig into this in 1989  
 (7) Q Do we know whether they damaged it or not?  
 (8) A That s hard to tell The excavations were into the top  
 (9) layers of the cave It s really hard to tell whether they dug  
 (10) just into deposits which had already been turned over and  
 (11) churned by other people digging or by animals because they  
 (12) said it s a cave that can often be used by sea otters - land  
 (13) otters rather and so on So it s really hard to tell whether  
 (14) the clandestine excavation - the diggers got down into the  
 (15) deep deposits or not but nonetheless it is a violation  
 (16) certainly of the integrity of the site and it represents I  
 (17) think a significant event very harmful one  
 (18) Q Did you see anything in the record of this disturbance that  
 (19) establishes that Exxon employees were responsible?  
 (20) A No As a matter of fact I think both of these examples  
 (21) the Old Chenega example and this example from Crafton Island  
 (22) north no one knows who did it and I believe that Dr Johnson  
 (23) testified that she didn t know either  
 (24) Q Was there any clean up work at Crafton Island?  
 (25) A No

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- (1) Q How come?  
 (2) A Well it wasn t oiled there  
 (3) Q You can take your seat again Let me take this off the  
 (4) Barco  
 (5) You prepared a number of summary charts breaking these 44  
 (6) sites down by the Plaintiff who is claiming damages for them  
 (7) and summarizing your views did you not?  
 (8) A Yes I did  
 (9) Q I m going to show the jury DX14055-C 4 and 5 Apparently  
 (10) we consolidated this onto one hard board to save timber If  
 (11) you can see that just tell us generally what the jury will be  
 (12) looking at if they go back and study this after -  
 (13) A I think I should get up  
 (14) Q All right  
 (15) A This chart includes all of the sites for which Chugach  
 (16) Alaska Corporation is claiming damage They re listed on this  
 (17) side in the common name This is the amount of damages  
 (18) they re  
 (19) asking for each of the sites not including monitoring  
 (20) This is my abstract description of the site and my  
 (21) evaluative conclusions As you can see I used the Type I Type  
 (22) II Type III descriptor and the Type I s generally at the top  
 (23) and Type II s in the middle and Type III s at the bottom  
 (24) Q The site description where does that come from?  
 (25) A Comes from my research on the notes and records from the  
 case

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- (1) Q And damages claimed by Plaintiffs where does that come  
 (2) from?  
 (3) A That comes from the Plaintiffs exhibits  
 (4) Q Did you prepare a similar chart with respect to each of the  
 (5) four Plaintiffs here?  
 (6) A Yes I did DX14055-C 3 Is that a summary chart for the  
 (7) Chenega Corporation claims?  
 (8) A Yes it is As you can see it s structured in a very  
 (9) similar manner to the other one  
 (10) Q And DX14055 2 (sic) Is that a similar chart for English  
 (11) Bay?  
 (12) A Yes It is Includes their claims total claims at the top  
 (13) and the claims organized like the other two  
 (14) Q Finally DX14055-C 1 Is that a similar chart for the Port  
 (15) Graham claims?  
 (16) A Yes It is  
 (17) Q Okay none for Tatttlek or Eyak?  
 (18) A No  
 (19) Q They have no claims?  
 (20) A Not in this case  
 (21) Q Let s talk briefly about the threat of future vandalism to  
 (22) these and other Prince William Sound and Kenal locations To  
 (23) your knowledge has either Dr Johnson or Dr Lobdell done  
 (24) any  
 (25) studies concerning the rates of vandalism either before or  
 after the spill?

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- (1) A None that I ve seen  
 (2) Q Is there any information documenting an increase in  
 (3) vandalism to archaeological sites in Prince William Sound or  
 (4) the Gulf of Alaska since the oil spill?  
 (5) A No And not on the Plaintiffs - lands for which the  
 (6) Plaintiffs claim damages either  
 (7) Q Is there any evidence of a single act of post spill  
 (8) vandalism at any of the Plaintiff sites?  
 (9) A Just the 1989 ones at Old Chenega and at Crafton Island  
 (10) north cave  
 (11) Q Since the end of 19 - I m sorry 1989 has there been any  
 (12) reported acts of vandalism to any of these 44 sites?  
 (13) A No And the Plaintiffs experts testified I think to the  
 (14) same - to the same point Especially with regard to native -  
 (15) to Village Corporation lands  
 (16) Q As a cultural resource manager and as an expert in Alaskan  
 (17) archaeological resources Is that surprising to you?  
 (18) A No It s not This particular - this particular region  
 (19) the lower Kenal Fjords and Prince William Sound is different  
 (20) from a number of places in Alaska The problems that they re  
 (21) having elsewhere with regard to the mining of archaeological  
 (22) sites for ivory sales for example are not here The sites  
 (23) are of a different character They are located in a  
 (24) different - in different kinds of terrain The artifacts that  
 (25) they contain are different There are not so many sites with

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- (1) really fine preservation due to waterlogged sediments and so  
 (2) on where you get really excellent preservation of perishable  
 (3) artifacts  
 (4) The character of the sites here though it's extremely  
 (5) important and very significant both from an archaeological  
 (6) point of view and from the point of view of people whose  
 (7) heritage it represents it is not the sort of thing that has  
 (8) figured strongly in either creating a market for these items on  
 (9) the open illicit market or a tracking bound  
 (10) Q It's your opinion that the oil spill did not put any of  
 (11) these 44 sites in any greater risk of vandalism?  
 (12) A No  
 (13) Q In the absence of any real threat of vandalism do you see  
 (14) any justification for the two decade long \$30 million program  
 (15) of archaeological excavation at these 44 sites the Plaintiffs  
 (16) seek to have Exxon finance?  
 (17) A As I've said before these are certainly significant sites  
 (18) and an archaeologist I think would be very interested in  
 (19) trying to learn more about the content and how they relate one  
 (20) to the other and how they might inform us of the pre-history  
 (21) and so forth of the area Clearly they are attractive from a  
 (22) research point of view Clearly they're also important to the  
 (23) people who live here but I do not see any justification for a  
 (24) program which is based upon the notion that these were  
 (25) harmed by Exxon when the empirical the on the ground  
 research

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- (1) that we did and others have done does not demonstrate that  
 kind  
 (2) of damage and does not link this program of research to harm  
 (3) MR DIAMOND Thank you I have no further  
 (4) questions  
 (5) MR PETUMENOS Judge I would require a short break  
 (6) There was a crush in the lobby today My stuff just got here  
 (7) THE COURT Sure okay no problem  
 (8) THE CLERK Please rise This court stands in  
 (9) recess  
 (11) (Jury out at 9 15 a m )  
 (12) (Recess from 9 15 a m To 9 30 a m )  
 (13) (Jury in at 9 30 a m )  
 (14) THE CLERK This court now resumes its session  
 (15) Please be seated  
 (16) CROSS EXAMINATION OF ALBERT DEKIN  
 (17) BY MR PETUMENOS  
 (18) Q Good morning Professor Dekin I have to tell you I think  
 (19) these people who are getting on you about speaking too fast  
 (20) have definitely not got children like I do in college because  
 (21) I figure you can graduate them in about two years and we could  
 (22) save a bunch of money if we had more people like you  
 (23) I want to talk about your field experience in Alaska and  
 (24) the Gulf of Alaska You started out telling us that your  
 (25) dissertation was in the eastern Arctic Baffin Island

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- (1) Greenland right?  
 (2) A That's correct  
 (3) Q Now you know that Alaska aside from being huge  
 (4) geographically is also diverse and huge in terms of its  
 (5) cultural and its archaeological history?  
 (6) A Yes that's correct  
 (7) Q There are a huge number of different languages that were  
 (8) spoken by ancient peoples in Alaska?  
 (9) A Yes  
 (10) Q And the way they lived their lives depended greatly upon  
 (11) the kind of terrain that they lived in true?  
 (12) A True  
 (13) Q And so the Baffin Island situation might be comparable to  
 (14) some aspects of Alaska pre-history but not all?  
 (15) A No the overlap is very great in terms of the way in which  
 (16) these people were adapting to a marine coastalized  
 (17) environment the kind of animals they were hunting and so  
 (18) forth but probably the biggest difference between the two is  
 (19) the absence of trees in Baffin Island  
 (20) Q That's right in Baffin Island we're not dealing with the  
 (21) forested situation that we have in Prince William Sound are  
 (22) we?  
 (23) A No  
 (24) Q And the only two coastal archaeological projects in the  
 (25) Gulf of Alaska prior to your retention by Exxon that you worked

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- (1) on was the Sitkinak Island and one Forest Service?  
 (2) A That's correct  
 (3) Q And the first project was a survey and limited testing of a  
 (4) Coast Guard parcel on Sitkinak Island is that right?  
 (5) A That's correct  
 (6) Q And I used the word limited because that's the word that  
 (7) you used when you wrote up your report on it?  
 (8) A That's fair  
 (9) Q And you were in the Sitkinak area for only four days in  
 (10) 1983?  
 (11) A That's I think the amount of time of actual fieldwork  
 (12) not the amount of type of study  
 (13) Q No I'm talking about fieldwork?  
 (14) A That's true  
 (15) Q I'm talking about the experience of looking at things and  
 (16) from the clues that you see trying to figure out what's there  
 (17) in the field You spent four days at Sitkinak right?  
 (18) A That's correct  
 (19) Q And your second archaeological project you spent your time  
 (20) with the Forest Service from about August 1st of 1991 through  
 (21) September 23rd of 1991?  
 (22) A That's correct  
 (23) Q The sum total of your coastal archaeological fieldwork  
 (24) then prior to your retention as an expert for Exxon in Alaska  
 (25) was less than two months?

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- (1) A That s not quite correct I mean that s the sum total as  
 (2) you ve described it but actually my fieldwork in coastal areas  
 (3) has lasted for approximately 30 years during the time I ve been  
 (4) doing archaeology  
 (5) Q Coastal archaeological areas in Alaska sir the Gulf of  
 (6) Alaska and the Prince William Sound area?  
 (7) A Certainly I have fieldwork in coastal areas in Alaska  
 (8) that really span the State from Kaktovik around to Point Hope  
 (9) down through to Sitkinak and then back on and down through  
 (10) to  
 (11) Sitka So my fieldwork in coastal Alaska is actually a little  
 (12) bit larger than that What you ve described is my fieldwork in  
 (13) the Prince William Sound and Kenai Fjords area  
 (14) Q Right and I m not talking about this area of no trees and  
 (15) tundra and ice like Kaktovik and Barrow and things like that  
 (16) I m talking about the cultures that live in the kind of areas  
 (17) we find in the Gulf of Alaska and Prince William Sound the  
 (18) trees and so forth I m correct aren t I It s less than two  
 (19) months prior to your Exxon Valdez retention?  
 (20) A In the trees yes  
 (21) Q All right in the trees Now let s take the site that I  
 (22) think you have the – apparently the most difficulty with of  
 (23) all maybe not but the Short Arm shipwreck That s the boat  
 (24) It s called the Short Arm shipwreck but it could be called the  
 (25) Short Arm ship part couldn't it?  
 (26) A I believe I said that

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- (1) Q Yes you did say that and I m wondering does this  
 (2) particular area have an Alaska Heritage Resource Survey  
 (3) number?  
 (4) A Yes it does As a result of the Cultural Resource  
 (5) Program the – all s – any indication that there were  
 (6) cultural resources of whatever sort significant  
 (7) insignificant large small and so on was reported to the  
 (8) State and received and HRS number  
 (9) Q So it has one doesn't it?  
 (10) A Yes it does  
 (11) Q And you told the jury yesterday and you may have  
 (12) misspoke  
 (13) that the Plaintiffs were claiming \$96 000 for damage to that  
 (14) Isn't the true figure \$69 000?  
 (15) A May be 69  
 (16) Q 69?  
 (17) A I may have had my words mixed  
 (18) Q Your what?  
 (19) A My words mixed  
 (20) Q You really do have to listen to you carefully professor  
 (21) A And you too sir  
 (22) Q We ll agree to do that both ways how s that  
 (23) Have you ever been to the Anchorage Museum of History and  
 (24) Art?  
 (25) A Yes I have  
 (26) Q In the second floor of that museum?

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- (1) A Yes I ve spoken there  
 (2) Q Is there a 33 foot boat hanging in that museum?  
 (3) A Boy there could be  
 (4) Q Could be And it was a ship part at one time in the  
 (5) Beaufort Sea in north Alaska wasn't it?  
 (6) A I think I recall that I haven't seen that in some time  
 (7) Q Well what happened there was there was a ship part in  
 (8) north Alaska and it was brought down I think on a C 130 and  
 (9) rebuilt do you know that?  
 (10) A I don't recall that part of it but –  
 (11) Q And it turned out to be one of the more interesting and  
 (12) best reconstructed specimens of the type of whaling boat that  
 (13) was being used in the north coast of Alaska that anyone has  
 (14) ever found right?  
 (15) A I don't recall the specifics of that but –  
 (16) Q And do you know whether the ship part – whether or not the  
 (17) ship part that s at that location that the State has given an  
 (18) AHRS site number to has some important historic maritime  
 (19) history component to it?  
 (20) A The part itself from the – from the field notes and from  
 (21) talking to the people who investigated it is if I recall  
 (22) correctly wooden is not distinctive at least in the people s  
 (23) experience who had worked on it and so on and is – is  
 (24) isolated and in contrast to the specimens that you spoke of  
 (25) before from northern Alaska outside of where the trees are

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- (1) there seem to be some – nothing – rather nothing associated  
 (2) with it and it seems to be still affected by water as on the  
 (3) beach or strand line  
 (4) Q Well the field costs being claimed by the Plaintiffs in  
 (5) this case is for the cost of specialists to travel to the site  
 (6) assess the value of the site the potential damage to the site  
 (7) and return Isn't that what the – what the cost involves? Do  
 (8) you know?  
 (9) A No You could refresh my memory but –  
 (10) Q Have you got the opinion then that this ship part which  
 (11) the State has given this number to is just simply not worthy  
 (12) of even investigating?  
 (13) A There was no indication that it was from anything other  
 (14) than the modern era of the last 50 years so far as I could see  
 (15) and the reading of the notes and records that were a part of  
 (16) it  
 (17) Q Now we – let s talk about what you talk about with  
 (18) respect to the size of a site and site definition Type II  
 (19) Little Bay this is a place where artifacts in the Intertidal  
 (20) zone were found?  
 (21) A Found and recovered yes  
 (22) Q And it is the case is it not that you contend that  
 (23) artifacts that are found in the Intertidal zone are without  
 (24) archaeological context –  
 (25) A That s correct

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- (1) Q - in this area?  
 (2) A Their associations are very suspect cannot be  
 (3) established  
 (4) Q Okay so the basic thing to do is to sort of pick them up  
 (5) and we don't have to worry too much about where they are  
 (6) because the context is lost any way?  
 (7) A If one wishes to do anything with them - there are a  
 (8) number of things that one could do to artifacts of that sort  
 (9) DeLaguna for example left them where they were and did not  
 (10) include them - did not collect them or include them in her  
 (11) analysis  
 (12) Other people have made a systematic habit of picking them  
 (13) up so that they're no longer visible on the beach and they're  
 (14) no longer being dispersed and in some cases they make  
 (15) excellent teaching collections I myself have collected them  
 (16) for that purpose They also make good examples to use in  
 (17) schools and so on There are some things you can do with  
 (18) them Archaeological research in the intact archaeological  
 (19) context is not something you can do  
 (20) Q Let's take a look at Exhibit 9043 counsel figure 92 at  
 (21) page 191 I'm going to show you sir a portion of the -  
 (22) MR DIAMOND Just one moment Tim  
 (23) MR PETUMENOS That's all right I'm going to stay  
 (24) with you 9043 and I'm going to show you a little - what I'm  
 (25) going to show you is from the Exxon Cultural Resources

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- (1) Program Now so that the jury remembers the Exxon Cultural  
 (2) Resources Program is the one that Exxon put together as they  
 (3) investigated archaeological sites -  
 (4) MR DIAMOND Your Honor -  
 (5) MR PETUMENOS - as they went along  
 (6) MR DIAMOND No Mr Petumenos is testifying now  
 (7) MR PETUMENOS No no I'm going to put it to a  
 (8) question and if you wait to the end you'll hear it  
 (9) BY MR PETUMENOS  
 (10) Q The Exxon Cultural Resources Program is the program that  
 (11) Exxon had underway during the course of the cleanup right?  
 (12) A That is correct  
 (13) Q And they would investigate archaeological sites as they  
 (14) went along and found them true?  
 (15) A They investigated every example of artifact or cultural  
 (16) resource that they encountered according to the protocols that  
 (17) they established  
 (18) Q Now what I have here is a map of Little Bay and what is  
 (19) depicted you will agree -  
 (20) MR DIAMOND Not in here 9043?  
 (21) MR PETUMENOS Yes Counsel's copy of the map has  
 (22) apparently dropped out of his copy  
 (23) BY MR PETUMENOS  
 (24) Q What I'm showing you is a map of what the Exxon Cultural  
 (25) Resources Program did at Little Bay and that's one of the

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- (1) things you studied was their report?  
 (2) A Yes  
 (3) Q And you'll agree with me that on this map what we have here  
 (4) is the high tide line going right along here?  
 (5) A I can't read it on the copy that's in front of me  
 (6) Q The - I'll show you the copy in just a minute so you can  
 (7) confirm that little point but what this is is it not is a  
 (8) careful careful mapping of artifacts found at Little Bay in  
 (9) their precise location?  
 (10) A I would say that's a map of the location of the artifacts  
 (11) in Little Bay on the date in which they made the map  
 (12) Q And they carefully put down where it was and what it was in  
 (13) location to other artifacts as they were found am I right?  
 (14) A Yes Apparently  
 (15) Q So that they could determine where one artifact was in  
 (16) relation to another true?  
 (17) A It's true that they seem to have been able - to have done  
 (18) that I'm not exactly sure why  
 (19) Q And what we see here - now I'll show it to you see if you  
 (20) can agree that this line right here - you're right it is hard  
 (21) to read but this right where my thumb is says mean high tide  
 (22) where that line is?  
 (23) A Says mean tide zone  
 (24) Q Mean tide zone okay so I can leave my thumb where it is  
 (25) and put it back on the Barco here so the jury can see my

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- (1) thumb So this line right here is the mean high tide zone?  
 (2) A No that's mean tide - mean tide zone I don't know what  
 (3) that means  
 (4) Q Mean tide zone and we see a number of artifacts on this  
 (5) side of the line and a whole number of other ones on the other  
 (6) side of the line am I right?  
 (7) A Yes  
 (8) Q Okay then we'll leave site definition for a minute  
 (9) Could we have the Flat Island photo please  
 (10) Archaeologists look for pieces of puzzles am I right?  
 (11) A That's one way to describe it yes  
 (12) Q One of the things that's helpful to assist an archaeologist  
 (13) in determining the pieces of puzzles is experience in the area  
 (14) in which you are doing your fieldwork would you agree with  
 (15) that?  
 (16) A Experience gives you the - the knowledge of what are some  
 (17) of the things you might expect based on either your own direct  
 (18) experience or the experience of others  
 (19) Q Did you walk on Flat Island?  
 (20) A No  
 (21) Q No? Who - do you know who took this photograph?  
 (22) A That particular photograph I don't know Looks like it's  
 (23) taken from a helicopter  
 (24) Q It was Dr Jack Lobdell wasn't it?  
 (25) A I don't see anything that shows who took the photograph

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- (1) but it could be  
 (2) Q Well you used them in your direct I was just curious if  
 (3) you knew where the -  
 (4) A It was a photograph of Flat Island There are only three  
 (5) people in this case who have observed this island Dr  
 (6) Lottrell and Dr Johnson and Dr Lobdell and of those three  
 (7) the only person who stood on the ground is Dr Lottrell I may  
 (8) be wrong on the visitation actually  
 (9) Q You may be wrong?  
 (10) A Yes  
 (11) Q Now when we want to distinguish now Mr Lottrell is a  
 (12) Chugach archaeologist?  
 (13) A He was employed by the oil spill response team I believe  
 (14) yes  
 (15) Q By Chugach?  
 (16) A I believe so  
 (17) Q And Dr Johnson was Chugach archaeologist?  
 (18) A Yes  
 (19) Q And Dr Lobdell was retained by Chugach?  
 (20) A The latter two were experts in this case yes  
 (21) Q Now the things that an archaeologist looks at to determine  
 (22) whether or not a housepit exists on land are some of the  
 (23) following see if you agree That the pit is oval rather than  
 (24) round?  
 (25) A Pits that - that only assumes that it s rectangular rather

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- (1) than square in terms of original house shape Erosion so  
 (2) forth kind of rounds out the corners Pits can be round pits  
 (3) can be oval  
 (4) Q Is it a clue whether they are laid out in parallel form  
 (5) rather than in a random way?  
 (6) A By that you mean the walls are parallel to each other so  
 (7) that it s a parallelogram  
 (8) Q That they are laid out in parallel form rather than random?  
 (9) A Oh you mean multiple pits?  
 (10) Q Yes  
 (11) A So they might be arranged in linear fashion?  
 (12) Q Right  
 (13) A Like on a beach or something like that?  
 (14) Q Yes  
 (15) A Linear arrangements true linear arrangements without noise  
 (16) and so forth true linear arrangement  
 (17) Q That the hole s alignment is facing the ocean?  
 (18) A That can be important in conjunction with the others yes  
 (19) Q That there is no evidence of fallen trees nearby?  
 (20) A Evidence of fallen trees is difficult to establish The  
 (21) nearby question is what s critical here I ve investigated  
 (22) archaeological sites where there hasn t been a tree on the site  
 (23) in 10 000 years and you can still find depressions on it from  
 (24) trees falling So proximity to trees - surface proximity to  
 (25) trees is not that important

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- (1) Q We re talking about clues factors things that maybe not  
 (2) by themselves you would check off but things you pay  
 (3) attention to?  
 (4) A I agree to that  
 (5) Q So no fallen trees nearby would be something you would pay  
 (6) attention to?  
 (7) A You would observe the present condition of trees yes  
 (8) Q Fire crack rock in the pits themselves would be an  
 (9) important clue would you agree?  
 (10) A If one has excavated the pit it s not so much fire crack  
 (11) rock as it is the association of the fire crack rock with  
 (12) whatever it is you re trying to establish exists there  
 (13) Q Is it one of the things that is a clue that you d look for?  
 (14) A Dr Johnson used a good word it s an indicator something  
 (15) to take into account That s fine  
 (16) Q The different color of the vegetation and the height of the  
 (17) vegetation in the depression is that something you look for?  
 (18) A Not necessarily That can be a natural factor as a result  
 (19) of different drainage and so on It does not necessarily  
 (20) indicate that the hole is cultural  
 (21) Q Is it a clue?  
 (22) A Not necessarily  
 (23) Q Well isn't it a fact that when you have a house  
 (24) depression you generally have higher carbon content in the  
 (25) soil because of the material that s left behind?

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- (1) A It is - it is - it is possible that the inside that the  
 (2) cultural deposits have minerals and other nutrients in them  
 (3) that cause the grass to be different I do not know  
 (4) necessarily the distinction between inside of the house and  
 (5) the margins of the house For example the soil next to it can  
 (6) cause that sort of a difference  
 (7) Q Would you agree that one of the things an archaeologist  
 (8) like Dr Lobdell who had done all that work in Kachemak Bay  
 (9) that the jury has heard about that one of the things that he  
 (10) might look at or someone like him with experience is the  
 (11) different color of vegetation and the height of it because of  
 (12) the clue that there s carbon content in the soil and therefore  
 (13) the plants grow differently there?  
 (14) A Yes  
 (15) Q And entryways?  
 (16) A Complicated features like entryways and multiple -  
 (17) multiple chambered rooms yes all of these are features of  
 (18) houses that when you look for depressions would cause you to  
 (19) interpret it that way  
 (20) Q Do you know whether Mr Lottrell dug some pits in this  
 (21) particular area?  
 (22) A No my recollection of the records that Mr Lottrell  
 (23) provided and were provided to me to review show that he  
 (24) made  
 (25) none of the observations that you just described  
 (26) Q Really? How about Dr Lobdell did he make any of these

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- (1) observations?  
 (2) A I do not recall Dr Lobdell saying very much about those  
 (3) particular observations in his field notes of his helicopter  
 (4) ride no  
 (5) Q How about Dr Johnson did she make any of those  
 (6) observations?  
 (7) A I believe they both remarked about depressions that they  
 (8) could observe from the surface I do not believe they spoke to  
 (9) vegetation differences or fire crack rock or any of the other  
 (10) indicators we ve talked about in the last couple minutes  
 (11) Q The difference between them and you is that they were on -  
 (12) at least you re not sure about two of them but you know that  
 (13) they were on this island and you were not to observe these  
 (14) things?  
 (15) A I m not sure what they observed  
 (16) Q Have you ever heard of the term called - another clue  
 (17) refuge island or refuge rock?  
 (18) A Yes I have  
 (19) Q And that s a place where a family historically goes to kind  
 (20) of get out of harm s way isn t it?  
 (21) A Social groups would go there I m not sure they were  
 (22) necessarily organized as families but the concept seems to  
 (23) involve seeking a refuge to a place which is more easily  
 (24) protected or has you know 360 degree visibility other than  
 (25) where you were presently living

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- (1) Q That s a feature of Flat Island?  
 (2) A Flat Island is a very small island which has 360 degree  
 (3) visibility from what I ve been able to see about it and it  
 (4) does jet up out of the - out of the water quite  
 (5) precipitously The sides are straight as I remember  
 (6) Q Isn t it a fact also that there is - is there a spit  
 (7) that s available here at low tide do you know?  
 (8) A I don t recall reading that in the notes  
 (9) Q All right Now the pits that we re talking about can you  
 (10) see them in the picture the depressions that you were talking  
 (11) about?  
 (12) A No I don t  
 (13) Q Okay Do you see any areas that have a different color  
 (14) than other ones?  
 (15) A Well there s a lot of yellow in the middle of it and some  
 (16) brown to the left and there s some gray in the foreground But  
 (17) the photograph frankly lacks the kind of resolution that I  
 (18) think from this vantage point would allow us to determine  
 (19) that  
 (20) Q Well did the depressions that we re talking about face out  
 (21) to sea?  
 (22) A I don t believe the field notes indicate that  
 (23) Q You don t know one way or the other?  
 (24) A No the field notes on this site are very sparse A lot of  
 (25) the material that you ve just talked about that one would

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- (1) reasonably make an observation in the field is not included in  
 (2) the field notes including the aspect that is the direction in  
 (3) which they face  
 (4) Q Fair enough So what you re relying upon is the absence of  
 (5) information in the field notes you re not relying about  
 (6) affirmative information that these doctors may have gathered  
 (7) together?  
 (8) A The testimony that they gave and the records that they  
 (9) provided which should have - which should be supportive of a  
 (10) case in this regard and the location of cultural resources at  
 (11) that location did not contain that information  
 (12) Q Is there a sea lion haul-out near this location?  
 (13) A I do not recall anything in the notes or the information  
 (14) provided me that would answer that question  
 (15) Q You don t know? True you don t know?  
 (16) A True I don t know  
 (17) Q You have any evidence of trees on this island?  
 (18) A There s nothing in the information or the records or the  
 (19) field notes or the people who ve been there or in the vicinity  
 (20) that showed whether there were trees or not  
 (21) Q Now you know that Dr Lobdell has testified that he  
 (22) believes after his investigation that there is a high  
 (23) probability that the depressions on this island are houseprts  
 (24) and you and he disagree about that is that correct?  
 (25) A That s correct

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- (1) Q Badger Cove Island that s another one that is not a site?  
 (2) A That s correct  
 (3) Q Were there artifacts found at Badger Cove in 1990 and  
 (4) 1991?  
 (5) A Not - there were no intact archaeological deposits found  
 (6) at this location  
 (7) Q Were artifacts found at Badger Cove beach in 1990 and 1991?  
 (8) A There s some interesting problems with Badger Cove and  
 (9) Badger Cove Island The notes are extremely confused and  
 (10) some  
 (11) people testified artifacts were found on Badger Cove Island  
 (12) when in reality if you read the notes they say they were found  
 (13) on the beach  
 (14) Q Were artifacts found on Badger Cove beach in 1990 and  
 (15) 1991?  
 (16) A Badger Cove beach in so far as a distinct location from  
 (17) the island the answer is I believe yes  
 (18) Q All right I think I misspoke I think Badger Cove is the  
 (19) one that has the spit at low tide between the island and the  
 (20) shoreline am I right?  
 (21) A Yes I ve seen that  
 (22) Q And at low tide Badger Cove Island is not an island?  
 (23) A Well at very low tide there is - there is a gravelly  
 (24) sandy spit that connects it to the mainland yes  
 (25) Q And this distinction that you re making between Badger Cove  
 (26) Island - and you make a distinction between Badger Cove  
 (27) Island  
 (28) a minute ago and Badger Cove beach is that what you re telling

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- (1) me?
- (2) A Yes and I don't mean the spit There are other locations
- (3) in the Badger Cove vicinity where artifacts have been found
- (4) but they re not found on this particular Island
- (5) Q Now the depressions that are on this island do you
- (6) remember where they are? Are they in the trees?
- (7) A No
- (8) Q Are they facing out to sea?
- (9) A They are facing in that - in that very unusual grassy spot
- (10) that faces directly out into the open ocean
- (11) Q Are they oval as opposed to - they re ovoid aren t they
- (12) doctor?
- (13) A I don t recall that Mr Lottrell s notes on the surface say
- (14) ovoid or not but they could be
- (15) Q There is no - nothing in any note that you found
- (16) indicating evidence of fallen trees in the depression is
- (17) there?
- (18) A As in remnant pieces of - of - of trees that would still
- (19) be there that you could see in that photograph no You have
- (20) to realize I m looking at the photograph of it as you are
- (21) mine s upside down though
- (22) Q Right there next to you?
- (23) A I see it
- (24) Q Next to your elbow there it is?
- (25) A I see it

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- (1) MR STOLL I ll turn it over?
- (2) A Thank you
- (3) BY MR PETUMENOS
- (4) Q Now do you remember in your Sitkinak report finding
- (5) artifacts in the surrounding area on the beach?
- (6) A Yes they had eroded out of the edge of a spit of a
- (7) remnant beach Sorry
- (8) Q And do you remember stating in your report that since your
- (9) investigations had revealed no other possible sources of the
- (10) slate finds on the active beach that it was reasonable to
- (11) infer that you were dealing with a single source of artifacts
- (12) in the area?
- (13) A Single source being the remnant beach yes
- (14) Q You inferred in your report and I can read it to you if
- (15) you want that finding the artifacts in the beach area and
- (16) having no other source of it that you could find told you that
- (17) they were from a single source and you began looking for the
- (18) site right?
- (19) A No we d already found the site actually and it was only
- (20) after we investigated the site that - and knew that there was
- (21) a single occupation at that location that - and not a
- (22) multiple occupation not a complex series of levels and so
- (23) on -
- (24) Q I stand corrected I stand corrected You came to the
- (25) conclusion that these artifacts that were on the beach came

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- (1) from the site that you found because you ruled out any other
- (2) potential source?
- (3) A Yes and we tested and observed the vicinity and could not
- (4) find any other locale
- (5) Q Now let s talk about - I m under some time constraints
- (6) here so I can t go through every one of your items on your
- (7) report with the detail that I d like but I want to start with
- (8) the Windy Bay midden which is in your exhibit that we had
- (9) blown up just a moment ago And to remind the jury I have it
- (10) in a somewhat different form I m putting up counsel exhibit
- (11) 14055-B By the way we have a 140055 a 140055-A and a
- (12) 140055-B don t we Dr Dekin? You don t know that?
- (13) A If you say so
- (14) Q Well the reason I m saying so is that this chart appears
- (15) under those numbers that we were served with and looks - did
- (16) you prepare these charts?
- (17) A Yes I did
- (18) Q You did?
- (19) A Yes
- (20) Q Maybe it s just the numbers you don t recognize and I
- (21) would understand that.
- (22) A That s correct
- (23) MR DIAMOND Tim did you say C or B?
- (24) MR PETUMENOS You have a C too? I only have an A
- (25) and a B

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- (1) MR DIAMOND No there s a C
- (2) MR PETUMENOS Great Let s get that one too Is
- (3) that a C?
- (4) MR DIAMOND For Port Graham?
- (5) MR PETUMENOS Can I borrow it?
- (6) MR DIAMOND If you give it back
- (7) MR PETUMENOS I ll give it back
- (8) BY MR PETUMENOS
- (9) Q These exhibits were prepared just before trial weren t
- (10) they?
- (11) A Yes they were
- (12) Q And did you have some confusion as to whether some of
- (13) these
- (14) sites should be Type I Type II or Type III?
- (15) A There are two locations especially since you bring it up
- (16) involving Windy Bay where the notes and so forth are
- (17) extremely
- (18) confused and it was only when I was able to review the files
- (19) on the sites when I got to Anchorage that I could reconcile
- (20) that
- (21) Q Okay so you had to change your conclusions around on a
- (22) couple of these sites because you - you thought you misread
- (23) the notes?
- (24) A No I couldn t recall I did not have - when I made the
- (25) table I did not have access immediately to all the files that
- I needed to make that distinction and so I kept it in mind and
- when I was able to find the files I was able to make the



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- (1) change  
 (2) MR PETUMENOS Let s take - is the most recent  
 (3) version of these C counsel  
 (4) MR DIAMOND You -  
 (5) MR PETUMENOS Let me see the C one because I want  
 (6) to make sure I have it right Windy Bay  
 (7) BY MR PETUMENOS  
 (8) Q Two houseprts CMTs observed surface remains do not  
 (9) establish the presence of intact archaeological resource  
 (10) deposits Type I  
 (11) A Can you help me with the sequence of these exhibits? If  
 (12) these are the sequence that you represented I just -  
 (13) Q I m sorry I don t understand your question I d be glad  
 (14) to help  
 (15) A I m trying to figure out the DX s This is your  
 (16) nomenclature not mine  
 (17) Q Actually it s Mr Diamond s not mine but we ll tell you  
 (18) that it s 14055-C that I m looking at This is the one you  
 (19) showed to the jury I m trying to use the most recent version  
 (20) so I don t have you saying something that you said before that  
 (21) was different  
 (22) Now what we ve got here then for Windy Bay is no  
 (23) presence of archaeological deposits right Type I?  
 (24) A That s correct  
 (25) Q Now counsel DX16144 3 in the Alaska Heritage Resource s

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- (1) survey this is what the State said you agree?  
 (2) A You have to be very careful with whether this is Seldovia  
 (3) 179 or Seldovia 180 The records are massively confusing in  
 (4) this regard and the location of a midden at Windy Bay midden  
 (5) is - is one thing The location of Windy Bay beach is  
 (6) another so it s very hard to - see I would like to make sure  
 (7) we re talking about the same location  
 (8) Q Well If it s important that we be careful could you tell  
 (9) me I keep taking these from you counsel - did you make that  
 (10) distinction in your summary to the jury?  
 (11) A Yes I believe we called them two different sites One has  
 (12) a midden and one does not  
 (13) Q One has what?  
 (14) A Midden and one does not  
 (15) Q And the one that has midden is the one we re talking about?  
 (16) A Is the Type  
 (17) Q And the one I just showed you on the screen says midden  
 (18) underneath it?  
 (19) A That s correct  
 (20) Q We re talking about the same one?  
 (21) A That s fine I m sorry thank you  
 (22) Q So what the State archaeological folks said about this was  
 (23) this site is composed of black organic midden exposed in cut  
 (24) bank that contains fire crack rock a possible house depression  
 (25) and culturally modified trees It goes on to talk about

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- (1) artifacts collected in 1989 ulu fragments white stone -  
 (2) what s a granite labret?  
 (3) A You insert it into your - it s a decorative - it s a  
 (4) decorative artifact which is inserted into a lip or nose or -  
 (5) it wouldn t call it a earring but it s form of that  
 (6) Q Form of jewelry from times gone past?  
 (7) A That s correct  
 (8) Q And it ends The extent of the uplands deposit cannot be  
 (9) ascertained without subsurface testing Ground is obscured by  
 (10) heavy vegetation is that right?  
 (11) A That s true  
 (12) Q Now a midden is not a disassociated artifact is it?  
 (13) A No but this is - the field notes on this describe an  
 (14) organic midden without any artifacts  
 (15) Q Well let me just - just answer my question A midden is  
 (16) not a disassociated artifact is it?  
 (17) A If it s intact it s a midden it s an intact  
 (18) archaeological deposit  
 (19) Q Now you had an opportunity to review the Plaintiffs  
 (20) similar exhibit which sort of summarized the field notes and  
 (21) the information on it didn t you?  
 (22) A Yes I did  
 (23) Q And what Drs Johnson and Lobdell said about this site -  
 (24) I m sorry I m going almost as fast as the witness is This is  
 (25) 1366-C

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- (1) Is this - Is this a recitation of what we just saw in the  
 (2) AHRs summary?  
 (3) A Both of these documents are taken from the Exxon field  
 (4) notes  
 (5) Q All right  
 (6) MR DIAMOND May I see your Port Graham chart?  
 (7) MR PETUMENOS Now?  
 (8) MR DIAMOND Yeah I m confused  
 (9) MR PETUMENOS Sam could you help him out so I  
 (10) could -  
 (11) MR DIAMOND Counsel this is a new exhibit ?  
 (12) MR PETUMENOS I think at this point it s exactly  
 (13) same  
 (14) MR DIAMOND No this is Windy Bay midden beach this  
 (15) is Windy Bay midden  
 (16) MR PETUMENOS I m using the Windy Bay  
 (17) MR DIAMOND This was superseded This is Windy Bay  
 (18) beach Type I this is Windy Bay midden Type II  
 (19) BY MR PETUMENOS  
 (20) Q So what happened here - counsel s pointing out to me is  
 (21) this Windy Bay midden exhibit right here you had as - as of  
 (22) not very long ago I think before you got on the airplane a  
 (23) Type I site true?  
 (24) A I believe that s the case My records -  
 (25) Q And then you changed it as counsel points out to me to a

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- (1) Type II -  
 (2) A Yes  
 (3) Q - site and very recently?  
 (4) A Yes  
 (5) Q And you said I think just now that that was because the  
 (6) notes were confusing?  
 (7) A Well the deposition of Dr Johnson on this site confuses  
 (8) the two locations between Windy Bay and Windy Bay midden  
 and I  
 (9) was - I was wanting to be very careful with that and so when  
 (10) I came here I reread the field notes and so forth established  
 (11) that the presence of a midden was at this site and changed it  
 (12) to a Type II  
 (13) Q You didn't say a moment ago that Dr Johnson's deposition  
 (14) was confusing you said that the notes that were underlying the  
 (15) sites were confusing just now in the court a few minutes ago  
 (16) MR DIAMOND Objection whatever he said he said  
 (17) counsel  
 (18) THE COURT Sustained objection sustained  
 (19) BY MR PETUMENOS  
 (20) Q This is the State's survey on this very site and there  
 (21) isn't anything very confusing about the fact in this  
 (22) deposition - in this summary that this is a site is it?  
 (23) A The - when you deal with second level information like the  
 (24) AHRS it's very important to go back and check the field notes  
 (25) and so on to see what's actually found there when you're

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- (1) trying to be very careful to see what the empirical is Field  
 (2) observations say it's important to go back and look for each of  
 (3) these sites I did that It was in this location that I didn't  
 (4) want to be misspoken I didn't want to be confused on this  
 (5) particular issue  
 (6) Q This was fairly late in your 1100 hours of work in looking  
 (7) at all the different notes and so forth wasn't it because it  
 (8) was just before you came up on the airplane to testify?  
 (9) A It's true  
 (10) Q And this is one of the first documents because it's the  
 (11) State survey It's the summary of all of the stuff that they  
 (12) got that one would expect that you'd look at would you agree  
 (13) Professor Dekin?  
 (14) A I looked at all of these but these are all second level  
 (15) pieces of information They're all abstracted from field notes  
 (16) to which I had access so a prudent archaeologist dealing with  
 (17) records of this sort would go back and look at the field notes  
 (18) and would see just what the empirical - what the real record  
 (19) looks like in order to make these kind of decisions  
 (20) Q Here's another survey on the same site  
 (21) A Does this have -  
 (22) Q What do -  
 (23) A Does this have a different date from the previous one?  
 (24) These AHRS forms have dates in the lower left hand corner  
 (25) Q The one I just showed you was March 16th of 1992

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- (1) A And this one?  
 (2) Q And this one is January 30th of 1990?  
 (3) A Yes  
 (4) Q So there were two two surveys like this on this site?  
 (5) A They update these periodically depending on the  
 (6) information The State received all the records from the Exxon  
 (7) Valdez Cultural Resource Program and made amendments to  
 the  
 (8) records They do it all the time  
 (9) Q Now this particular location had a monitor on it didn't  
 (10) it during the cleanup?  
 (11) A The midden area they were very careful to monitor it during  
 (12) cleanup  
 (13) Q Thick mousse in the upper tidal zone?  
 (14) A My understanding of the map that I believe Mr Mack  
 (15) (phonetic) made of the time of the cleanup in his records show  
 (16) that this particular area where he was monitoring was very  
 (17) carefully cleaned up I don't recall that it said thick mousse  
 (18) in the upper intertidal zone at this location  
 (19) Q SCP you'll agree from the Plaintiffs exhibit stands for  
 (20) in the key the cultural resources survey is that right that  
 (21) was conducted by Exxon and in a note that Dr Johnson found  
 (22) continue hand cleanup of mousse and oil debris low pressure  
 (23) flushing on cobbles moderate to high pressure on rocks  
 (24) boulders priority beach monitor required right?  
 (25) A I believe beach B is not located in the immediate vicinity

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- (1) of the site  
 (2) Q Well that's your definition of immediate vicinity right?  
 (3) A I think it's 600 meters  
 (4) Q By the way when you found these artifacts in your other  
 (5) investigation on Sitkinak Island how far were the artifacts  
 (6) that you found in the beach from the site that you had  
 (7) previously located?  
 (8) A If you can picture a - a beach of this sort with a  
 (9) perpendicular erosion face across it all the artifacts were  
 (10) immediately in front of the beach or within 15 or 20 feet of  
 (11) the - of the place where they were coming from apparently  
 (12) Q Did you find some sites in the upland areas in that study?  
 (13) A On Sitkinak Island?  
 (14) Q Yes  
 (15) A The only sites we observed in the upland areas were sites  
 (16) associated with the construction of the Coast Guard facilities  
 (17) in World War II  
 (18) Q The people who were monitoring this Windy Bay midden said  
 (19) that it was a sensitive site and required caution during the  
 (20) cleanup?  
 (21) A That's true That's why Mr Mack was there  
 (22) Q And I was sort of interested in your - your theories of -  
 (23) you mentioned you were an archaeologist - you did some  
 (24) archaeological work in Barrow?  
 (25) A I have

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- (1) Q I used to be the DA in Barrow when I was early in my career  
 (2) and I didn't have much choice  
 (3) A It's nice to meet you professionally here  
 (4) Q I don't think you and I met up there. You don't regard  
 (5) yourself particularly as an expert in criminology, do you?  
 (6) A No, sir.  
 (7) Q Because I was interested in your theories about whether or  
 (8) not one can expect that things like vandalism are going to  
 (9) occur in an area. Do you understand that one of the reasons  
 (10) that the Cultural Resource Program was so careful monitoring  
 (11) the cleanup effects and the clean up workers was because they  
 (12) were concerned about potential vandalism?  
 (13) A That was one of the missions of the Cultural Resources  
 (14) Program and that was one of the reasons why people would  
 (15) monitor cleanup and - and all of the activities that they were  
 (16) observing.  
 (17) Q And if you lived in a high crime area, would you leave your  
 (18) bicycle out in front of your garage?  
 (19) MR DIAMOND: Objection, argumentative.  
 (20) THE COURT: Sustained.  
 (21) BY MR PETUMENOS:  
 (22) Q Do you, as an archaeologist who is trying to determine the  
 (23) way an archaeological site should be handled, do you wait for  
 (24) the site artifacts to be stolen before you determine that some  
 (25) remedy is to take place to prevent it?

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- (1) A I'm not sure I would describe a cultural resource  
 (2) management solution that uses those words in the way in which  
 (3) you use them.  
 (4) Q Well, you did one in Barrow?  
 (5) A Yes, we did.  
 (6) Q And there was some sort of a pipeline that was going to go  
 (7) through an area that had - some sort of a construction project  
 (8) was going to go through an archaeological site?  
 (9) A More like a network of utility, but yes, that's correct.  
 (10) Q And one of the concerns in that situation was people coming  
 (11) around and the site being exposed, am I right?  
 (12) A Not really. The site was well known to - to everyone who  
 (13) lived in the area. The edges of the site were being eroded  
 (14) actively and people were digging in them, and our job was to  
 (15) excavate the archaeological context with the site broadly, not  
 (16) to - not to work on or police particular activities.  
 (17) Q No, I understand that. But you knew that more people would  
 (18) be coming into the area to perform the construction?  
 (19) A I guess we knew that.  
 (20) Q Dr. Dekin, this is not an uncommon issue, is it?  
 (21) A No.  
 (22) Q I mean I'm not raising a novel idea. Frequently in the  
 (23) course of construction projects and things like that, when  
 (24) archaeological sites are discovered, a fellow like you comes in  
 (25) to determine what needs to be done to protect it, right?

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- (1) A That's correct.  
 (2) Q And you will agree with me that you don't wait in those  
 (3) circumstances when you see a threatening situation for the  
 (4) archaeological artifacts to be - to be lifted first before you  
 (5) take action in some circumstances?  
 (6) A This is the after-the - the closing the barn door after  
 (7) the horse is stolen type question.  
 (8) Q Well, I think so, yes. You agree with that, don't you?  
 (9) A I think one has to make a judgment about the actual risk  
 (10) involved and what needs to be done, and you take that into  
 (11) account and do it, decide what it is that needs to be done.  
 (12) Q And when you talked about Dr. Lobdell's testimony  
 (13) yesterday, were you here in court when he said about Windy  
 (14) Bay - that he had some concerns about potential vandalism in  
 (15) the Windy Bay area?  
 (16) A I believe I remember him saying that.  
 (17) Q He said that there was a natural erosion face, but it  
 (18) looked like - like it was being helped along by someone, do  
 (19) you remember that?  
 (20) A I remember him saying that.  
 (21) Q Next one, Lower Passage. Counsel, I'm putting on the first  
 (22) portion of the chart relating to Lower Passage.  
 (23) MR DIAMOND: His chart?  
 (24) MR PETUMENOS: His chart.  
 (25) MR DIAMOND: Which version?

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- (1) MR PETUMENOS: Well, happily, in this case, doesn't  
 (2) matter, because the different versions of the chart that he's  
 (3) done are the same for Lower Passage.  
 (4) BY MR PETUMENOS:  
 (5) Q Okay, Lower Passage, this is the Chugach site we talked  
 (6) about, Accumulated - accumulation of multiple unrelated  
 (7) finds, you say, disassociated artifacts in the intertidal zone,  
 (8) intact upland and intertidal zone archaeological deposits,  
 (9) modern land use, you say, collapsed cabin with CMTs, that's  
 (10) your description?  
 (11) A Yes, it is.  
 (12) Q And you typed this a Type I, a Type II, and a Type III?  
 (13) A That's correct.  
 (14) Q So there are - there are all three things that go along  
 (15) with this. You say - I'll have to pick it up to read it. It  
 (16) will be quicker, members of the jury, Disassociated artifacts  
 (17) do not establish presence of archaeological deposits, upland  
 (18) cabin not affected by oil cleanup or vandalism, oiling in  
 (19) intertidal zone with intact deposits, but the deposits were not  
 (20) affected by the oil spill cleanup activities or vandalism, Type  
 (21) I, Type II, and Type III.  
 (22) Plaintiffs' counsel, 1538.  
 (23) MR DIAMOND: Is there a question that I missed in  
 (24) there?  
 (25) MR PETUMENOS: I'm drawing his attention, the jury, s

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- (1) attention to the area we re going to next Judge is what I m  
 (2) trying to do so the jury understands what the next exhibit is  
 (3) going to be  
 (4) MR DIAMOND Thank you  
 (5) BY MR PETUMENOS  
 (6) Q I m going to show you next Plaintiffs Exhibit 1538 the  
 (7) collection of materials in the Plaintiffs chart from the site  
 (8) that we re talking about from the notes okay? Now you  
 (9) studied these charts and you know that CRE stands for Cultural  
 (10) Resources Programs SCAT reports?  
 (11) A I usually - I usually look at that in conjunction with all  
 (12) of the acronyms but I believe that s correct  
 (13) Q Right and those notes showed in April 29 of 1989 moderate  
 (14) but mostly lightly oiled conditions?  
 (15) A Correct  
 (16) Q On April 29 we got another one that said medium and heavy  
 (17) oil conditions right?  
 (18) A Right  
 (19) Q One of these issues where different people looking at a  
 (20) site see different things?  
 (21) A Or different times  
 (22) Q Or different times yes that s right Light oil with tar  
 (23) like consistency on July 23rd 89?  
 (24) A Yes  
 (25) Q Medium to very light oil with subsurface oil?

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- (1) A Yes  
 (2) Q And cleanup started early and without monitors resulting  
 (3) in grooves in middle beach zone and negligible disservice to  
 (4) site But what we know here is that when this site - and you  
 (5) have some dispute as to whether it is a site I understand but  
 (6) this cleanup at this location started without a monitor?  
 (7) A You re - you do mischaracterize my concern There are  
 (8) actually four different sites at this location lumped into one  
 (9) by Plaintiffs and some of these apply to some of those sites  
 (10) and some of these - that s why it s a multiple resource  
 (11) that s why it s one two three but I ll be careful with it if  
 (12) you will  
 (13) Q I will I will be careful with it. So when you re telling  
 (14) me there are some - when you say Type I you re only referring  
 (15) to part of the site and you ve got a point there are four  
 (16) different Seward numbers there but you agree these are sites?  
 (17) A Oh yes there s no question about that  
 (18) Q The cleanup in this area began without a monitor?  
 (19) A That s correct this is one of two sites for which  
 (20) Plaintiffs claim damages and which cleanup occurred without a  
 (21) monitor  
 (22) Q Artifact broken during earlier beach treatment now more  
 (23) fragmented and noted number of more visible artifacts now  
 (24) absent September 13th 1990  
 (25) A The field note says that a - an artifact may have a recent

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- (1) break  
 (2) Q Was there a stone lamp discovered while spraying with high  
 (3) pressure hoses in the site?  
 (4) A The way in which this site was brought to the attention of  
 (5) the Cultural Resources Program was that clean-up workers  
 using  
 (6) high pressure hoses to clean the site discovered a lamp and  
 (7) did what they were supposed to do which is to stop work and  
 (8) call the Cultural Resource Program and brought it to their  
 (9) attention  
 (10) Q In order to do that In order for the nozzle operator to  
 (11) stop cleaning up and report it he had to know what a stone  
 (12) lamp was right?  
 (13) A I believe that people working on the crew were familiar  
 (14) with the shape of stone lamps and so on  
 (15) Q And they were familiar with that because Exxon trained them  
 (16) to know what a stone lamp looked like?  
 (17) A Exxon did train them I m not sure whether they had prior  
 (18) knowledge or not  
 (19) Q Thank you There were excavation pits dug most likely to  
 (20) dig out tar mats and tar patties on the site May 5th 1990  
 (21) A I believe that the field notes describe small pits going 10  
 (22) to 15 centimeters deep into the gravels and the interpretation  
 (23) of the observer was that they had removed tar paths so on -  
 (24) tar paths very good tar -  
 (25) MR DIAMOND Are you done?

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- (1) A I am done  
 (2) BY MR PETUMENOS  
 (3) Q There was another entry May 23rd 19920 Exxon concerned  
 (4) Exxon security for clean up crew would discover the location  
 (5) was concern about that  
 (6) A I don't have it in front of me  
 (7) Q You don t remember that?  
 (8) A No  
 (9) Q The bluff area appearing to be disturbed in a visit on May  
 (10) 23rd 1990  
 (11) MR DIAMOND Is there a question pending?  
 (12) BY MR PETUMENOS  
 (13) Q Do you remember that?  
 (14) A No  
 (15) Q My expert on archaeology - that s not me I took one  
 (16) course in archaeology at the University of Mexico in 1970  
 (17) so -  
 (18) Now that was our one two three sites that we just talked  
 (19) about That was I think Lower Passage that we ve gone  
 (20) through  
 (21) A That s the one that I referred to earlier as the Louis Bay  
 (22) lamp site which is one of the sites that is at that location  
 (23) Q Right and I m trying to go through with you the different  
 (24) kinds of categories that you have described In April of 1990  
 (25) there were even more artifacts found at that site do you

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- (1) remember that?
- (2) A The Louis Bay lamp site part had artifacts exposed in the
- (3) intertidal zone There is also a locus called locus B in the
- (4) earlier AHRs notes that had intertidal zone artifacts but did
- (5) not have evidence for intact archaeological deposits so yes
- (6) there are several locations here of artifacts in the intertidal
- (7) zone
- (8) Q Now insufficient investigation has been done - I mean
- (9) I'm not sure if this is the site but I often heard you say in
- (10) your direct so far as we know from time to time when you were
- (11) talking about the description of the sites and I appreciated
- (12) that because as I understand it with your work the work that
- (13) you've done in Alaska that when you determine the various
- (14) parts of a site it's important you have to do some digging
- (15) if you will as an archaeologist or some initial monitoring
- (16) and so forth to get the complete picture before you really do
- (17) know what the size of a site is and whether it's related and
- (18) things like that would you agree?
- (19) A In order - in order to find out for sure whether there are
- (20) intact archaeological deposits you have to dig a hole
- (21) Q Let's do one more Unless you've got something I'm looking
- (22) for - McArthur Pass - how long have I been going Judge?
- (23) THE COURT An hour
- (24) MR PETUMENOS I've got papers all over this would
- (25) be a great time to take a break

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- (1) THE CLERK. Please rise This court stands in
- (2) recess
- (3) (Jury out at 10 30 a m )
- (4) (Recess from 10 30 a m to 10 44 a m )
- (5) (Jury in at 10 44 a m )
- (6) THE CLERK. Please rise This court now resumes in
- (7) session
- (8) Please be seated
- (9) MR PETUMENOS Before I go into these fascinating
- (10) documents about McArthur Pass Professor Dekin I just wanted
- (11) to cover perhaps a point that may not get us too far into the
- (12) documents
- (13) BY MR PETUMENOS
- (14) Q You'll give me that nobody knew that there was an oil spill
- (15) about to happen in March of 1989 before it happened?
- (16) A I think that's fair
- (17) Q There was almost an immediate concern on the part of the
- (18) people responding to the spill about the protection of
- (19) archaeological sites?
- (20) A Almost immediate within several weeks I think and there
- (21) was an awareness yes if that's what you mean yes
- (22) Q And the people who were trying to protect these sites had
- (23) an incredibly difficult task would you agree with that?
- (24) A I think the logistics that were necessary to get people
- (25) where they needed to be and to try and protect sites was very

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- (1) difficult yes
- (2) Q And without faulting or criticizing anybody's attempts you
- (3) know that there were times when sites received beach treatment
- (4) and were - a bunch of people arriving at them without any
- (5) monitoring?
- (6) A There were two occasions where sites were cleaned without
- (7) monitors that were sites the Plaintiffs have claimed
- (8) Q Exhibit 9023 counsel Page 3 is a report that you wrote -
- (9) MR DIAMOND Just give me a second
- (10) MR PETUMENOS Sure
- (11) BY MR PETUMENOS
- (12) Q A report that you wrote at one time said about the
- (13) problem The control of cleanup personnel was a difficult
- (14) task given the large numbers of people involved and the way
- (15) that they were organized by vessels and tasks An important
- (16) element of protecting archaeological sites and historic
- (17) resources was to restrict access by unauthorized personnel
- (18) The restriction of cleanup personnel to the beach and off the
- (19) adjacent upland was important albeit initially difficult to
- (20) enforce both when people were working and when they were
- (21) off
- (22) duty
- (23) Is that a paragraph that you wrote sir?
- (24) A Yes I wrote that
- (25) Q McArthur Pass is a place where you say that it is a Type II
- (26) area Is that right?

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- (1) A I believe that's the case
- (2) Q Am I up to date on your current thinking? Disassociated
- (3) artifacts oiled and collected in the intertidal zone upland
- (4) CMTs midden deposits located in national park The intact
- (5) archaeological deposits were not affected by the oil spill
- (6) cleanup activities or vandalism so it's a Type II issue for
- (7) you isn't it?
- (8) A Yes it is I'm not certain that's the right version but
- (9) what I've said is what I've said
- (10) Q The oiling conditions on this site were bad right?
- (11) A There was - the appearance of oiling on this site was made
- (12) bad at least in part because they delayed cleaning it in
- (13) 1989 The beach was not cleaned in 1989 so it sat there oiled
- (14) for a year And this was because of the cultural resources and
- (15) the location and the - there were some concerns expressed
- (16) over
- (17) how it should be cleaned and so on so the end result it was
- (18) not cleaned in 1989
- (19) Q They were facing two bad choices essentially They could
- (20) either go in and clean an archaeological site or leave it alone
- (21) was the subject of some discussion in 1989?
- (22) A I believe it is a complicated issue some of which are
- (23) those
- (24) Q And this was a place where they had the nozzlemen
- (25) watching
- (26) out for artifacts remember that?
- (27) A I saw a field note that referenced that yes I'm not sure

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- (1) it was this time I believe that was in 1990 when they were  
 (2) doing the cleanup  
 (3) Q The AHRS designation for this site calls it a site that is  
 (4) in the - extends from the beach into the uplands would you  
 (5) agree with that?  
 (6) A The site is in the uplands  
 (7) Q Well did the AHRS designation the State survey describe  
 (8) it as a site that extends from the beach into the uplands?  
 (9) A You have to remember that the State did no survey The  
 (10) characterization of this as a state survey is actually not the  
 (11) case The State did no fieldwork in this area to gain that  
 (12) conclusion All the AHRS forms are based on secondary  
 (13) information the information of others This is based on the  
 (14) Exxon field notes  
 (15) Q Well you've relied on secondary information didn't you  
 (16) Dr Dekin?  
 (17) A I've relied on all the information primary and secondary  
 (18) and when in doubt go to the primary  
 (19) Q Would you give me the fact that after the State looked at  
 (20) secondary information they concluded that that the site  
 (21) extended from the beach to the uplands according to the AHRS  
 (22) form?  
 (23) A If you will show me the AHRS form I'll be pleased to  
 (24) refresh my memory that those were the words that were used  
 (25) Q DX counsel 161431 let's see what it exactly says so we

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- (1) won't have a quarrel about it  
 (2) A Certainly  
 (3) Q The site consists of prehistoric and historic remains with  
 (4) an estimated 112 meters by 30 meters area along the beach and  
 (5) the adjacent uplands is that what it says?  
 (6) A It does  
 (7) Q Giving the jury a chance to read it so that they can  
 (8) understand between us exactly what the State concluded  
 based  
 (9) upon their review of the work  
 (10) The reason that there was a delayed cleanup was that  
 (11) artifacts were thought to be present in the intertidal zone  
 (12) hidden by oil true?  
 (13) A There were disassociated artifacts in the intertidal zone  
 (14) and people were concerned about how to deal with them  
 (15) Q There is a long word beginning with the word P that talks  
 (16) about archaeological context and provenience?  
 (17) A Provenience  
 (18) Q Tell the jury what provenience means?  
 (19) A It means location  
 (20) Q And when we talk about doing a provenience study we talk  
 (21) about mapping the artifacts exactly where they are?  
 (22) A Provenience actually if you look in the dictionary means  
 (23) a little bit more It talks about origin but it does talk  
 (24) about location and provenienced artifacts are artifacts whose  
 (25) location and origin can be known The term is most widely used

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- (1) in museums where when artifacts are taken from the  
 (2) archaeological context and are brought forth and sold perhaps  
 (3) in the museum market but you don't know exactly where it  
 came  
 (4) from you don't know which tomb in Egypt it came from for  
 (5) example these are called unprovenienced artifacts and you  
 (6) don't know where they're from  
 (7) Q Let's talk about what Exxon thought about this sort of work  
 (8) and whether it was important to your provenience study of these  
 (9) artifacts that you call disassociated  
 (10) I'm showing you Exhibit 8516 It's actually an article by  
 (11) Robert Betz Chris Wooley and Charles Mobley and James  
 Haggarty  
 (12) and Aaron Kroll (phonetic) Recognize any of those names?  
 (13) A Yes I do  
 (14) Q Mr Wooley he's Exxon?  
 (15) A He worked with the Exxon CRP yes  
 (16) Q Charles Mobley he worked with Exxon?  
 (17) A Yes he did  
 (18) Q James Haggarty he worked with Exxon?  
 (19) A Yes he did  
 (20) Q How about the other two?  
 (21) A I think so  
 (22) Q The Exxon work plan Page 44 counsel six field tasks were  
 (23) identified to answer questions One map the artifacts in the  
 (24) intertidal zone do you see that?  
 (25) A Yes I do

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- (1) Q All right so part of the Exxon work plan was to map these  
 (2) artifacts that you call disassociated in the intertidal zone?  
 (3) A So that we don't confuse the jury perhaps we can see the  
 (4) preceding paragraphs that talk about this as being a work plan  
 (5) prepared in conjunction with the National Park Service  
 (6) Q Okay you want to make that amendment? I can show it to  
 (7) them  
 (8) A Yeah I would - I would like to see that  
 (9) Q It says Exxon's work plan at the top which is why I said  
 (10) that  
 (11) A Yes it says In response to the National Park Service  
 (12) scope of work I mean it's particularly important to know that  
 (13) the origin of the work plan and the field tasks and so on come  
 (14) largely from a Park Service directive  
 (15) Q All right so the Park Service directed Exxon that they  
 (16) wanted these disassociated artifacts in the intertidal zone  
 (17) mapped?  
 (18) A Yes they did - no I'm sorry that was a task that I do  
 (19) not know how that particular task was derived not having been  
 (20) there but they - whoever implemented that did it in response  
 (21) to the NPS scope of work That's all I'm sorry  
 (22) Q Okay Now let's talk about what they said about -  
 (23) MR DIAMOND Before you do that can you give me a  
 (24) copy of this? It was not pre-designated  
 (25) MR PETUMENOS Oh I beg your pardon I'm going to

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- (1) put a rather lengthy actually I think I'll read it out loud  
 (2) rather than put it on the -- on the machine here Because it  
 (3) relates to this business about disassociated intertidal  
 (4) artifacts that we're talking about  
 (5) And this is also from the article that these Exxon folks  
 (6) have written about the importance of artifacts in the  
 (7) intertidal zone It begins the intertidal portion -- make  
 (8) sure I read it right  
 (9) Investigations of SEL-188 -- that's McArthur Pass?  
 (10) A Yes  
 (11) Q -- have contributed new temporal and technological data  
 (12) from the outer Kenai peninsular coast The intertidal portion  
 (13) of the site has contributed some information to the regional  
 (14) chronology but such intertidal lithics scatter generally have  
 (15) quotes no integrity of location and are therefore of limited  
 (16) value for interpretation A point that I think you wanted the  
 (17) make to the jury right?  
 (18) A I have made that point yes  
 (19) Q Yes but then it goes on and it says Due to the scarcity  
 (20) of archaeological semblances from the area however the  
 (21) artifacts themselves are of some importance and they've cited  
 (22) a study McMahon and Holmes from 1987 are you familiar with  
 (23) that study?  
 (24) A Not off the top of my head no  
 (25) Q Are you familiar with this article I'm reading from?

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- (1) A Yes I am I'm not familiar with McMahon and Holmes 1987  
 (2) Q In a regional context this data indicate the need for a  
 (3) more thorough understanding of site distribution and density on  
 (4) the outer Kenai Peninsula prior to intensive site excavation  
 (5) Is that a statement you agree with?  
 (6) A The issue of site intensity refers to where people lived  
 (7) and in what numbers how many sites are located in certain  
 (8) stretches of land and so forth and the point here is that one  
 (9) can gain some information about the nature of occupation  
 (10) there  
 (11) because you say they used stone tools they used you know  
 (12) lots of fire crack rock or lots of adzes and you can get some  
 (13) information how the site was used What you can't tell is how  
 (14) old it is or what the relationship is to the complex history of  
 (15) that site  
 (16) Q Then you also agree that when the data is scarce that the  
 (17) archaeological information in the intertidal zone themselves  
 (18) is of importance?  
 (19) A I have said before that there are some things that one  
 (20) could learn from that and most of that information is  
 (21) obtainable by picking up all the artifacts and putting them in  
 (22) a bag and having them cleaned and curated  
 (23) Q They also write Collection and analysis of site data  
 (24) through systematic shoreline survey constitutes the essential  
 (25) first phase in understanding the human history of the outer  
 Kenai Peninsula

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- (1) A That is how that site was discovered since the time that  
 (2) the DeLaguna referred to it in 1936 -- or 56  
 (3) Q That's right  
 (4) Q The fact that artifacts are in the intertidal zone doesn't  
 (5) make them unimportant does it?  
 (6) A No it means once they've been noticed and identified then  
 (7) the importance is almost entirely realized  
 (8) Q Well you know you're not telling this jury that all of  
 (9) the artifacts in the intertidal zone in McArthur Pass have been  
 (10) found are you?  
 (11) A No but the vast majority have It has been -- I realize  
 (12) people are still finding artifacts there but the major source  
 (13) of those artifacts was the 1964 earthquake which dropped  
 (14) significant flat-lying portions of the upland border into the  
 (15) intertidal zone  
 (16) It is not the case that the present rate of erosion and  
 (17) dropping of artifacts is the same as that one cataclysmic  
 (18) event So no there still can be artifacts there and yes  
 (19) they find them in that location but the artifacts in there are  
 (20) not of such importance that they should be mapping them the  
 way  
 (21) In which many of these people did In point of fact the  
 (22) mapping seems to have been the result of concern by the  
 (23) agencies involved as to ownership rather than as a scientific  
 (24) significance  
 (25) Q In fact let's talk about this excavation I want to move

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- (1) to a different topic now which is how archaeologists do their  
 (2) work once -- should this jury determine that archaeological  
 (3) work is necessary I'd like to cover with you how  
 (4) archaeologists do their work in this -- in this circumstance  
 (5) I'd like to borrow from your work in Barrow Alaska to help me  
 (6) do that Is it true that the Barrow excavation site was done  
 (7) to mitigate the primary and secondary effects of previous  
 (8) excavations and construction projects?  
 (9) A That is generally part of it The overall scope however  
 (10) was to obtain a broad database knowledge of the range of  
 (11) activities that were conducted in the site It's a very large  
 (12) site and the research designed for that did not specify that  
 (13) you had to go down this street and excavate this house that was  
 (14) encountered  
 (15) Q I think you missed my question  
 (16) A I'm sorry  
 (17) Q I think you didn't answer my question Was the Barrow  
 (18) excavation done to mitigate the primary and secondary effects  
 (19) of previous excavations and construction projects which had  
 (20) uncovered the site?  
 (21) A I don't believe that was the primary emphasis hinging on  
 (22) the term previous  
 (23) Q Counsel the Dekin deposition at page 28 line 77  
 (24) MR DIAMOND Line 77  
 (25) MR PETUMENOS Lines 7 through --

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- (1) MR DIAMOND 17  
 (2) MR PETUMENOS Let s try line 3 to line 23 how s  
 (3) that  
 (4) BY MR PETUMENOS  
 (5) Q This is the question and answer that you gave –  
 (6) MR DIAMOND Can I read it first and decide that it  
 (7) may be appropriate? You decide  
 (8) MR PETUMENOS Let me put another question I don t  
 (9) want to hold this up  
 (10) BY MR PETUMENOS  
 (11) Q Do you agree that one of the major tasks that you had when  
 (12) this problem in Barrow was presenting itself to you was to  
 (13) undertake an assessment of the previous archaeological  
 (14) investigations the impact of previous construction projects  
 (15) and the ongoing impact of vandalism?  
 (16) A Yes  
 (17) Q And that was part of your investigation as to determine  
 (18) what to do with the site?  
 (19) A I don't believe that what to do with the site was really  
 (20) the objective here  
 (21) Q You didn't excavate the entire site in Barrow did you?  
 (22) A No we did not  
 (23) Q You excavated a sample of houses and house mounds that  
 (24) were  
 (25) part of the research design?  
 (26) A That s correct

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- (1) Q You tested inter-mounds to show the relationship  
 (2) interrelationship and context of the ruins?  
 (3) A We conducted the first inter mound testing that as far as I  
 (4) know had been conducted in the area  
 (5) Q Before you began that work you had to do a research  
 (6) design?  
 (7) A Yes we did  
 (8) Q You did a surface survey?  
 (9) A We observed the surface characteristic of the houses The  
 (10) thing you have to remember about houses in Barrow as you  
 (11) may  
 (12) be aware is that they have been dug into in the past by people  
 (13) over the last hundred years and so on so that yes we assessed  
 (14) the surface  
 (15) Q All I m trying to get at you did a surface survey and  
 (16) mapped the site first before you went in?  
 (17) A At the same time  
 (18) Q You made a collection of artifacts and prepared them for  
 (19) curation that was part of the project?  
 (20) A Yes we did  
 (21) Q And then you wrote a report?  
 (22) A Yes we did  
 (23) Q And that kind of sequence that we discussed the study  
 (24) ahead of time the mapping and the digging and determining  
 (25) where to dig and all that that s a fairly common way that  
 (26) archaeologists approach a problem isn t it?  
 (27) A The word for that I think that s often used is staged

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- (1) research design  
 (2) Q Staged research design?  
 (3) A Yes in sequence  
 (4) Q And then you wrote an article on that work?  
 (5) A I wrote several of them  
 (6) Q And some of the articles you wrote on that work you  
 (7) coauthored with Dr Jack Lobdell?  
 (8) A Yes I did  
 (9) Q And I assume when you wrote this article with Dr Jack  
 (10) Lobdell you didn t put your name to it because you were  
 (11) dealing  
 (12) with somebody who didn't know what he was doing?  
 (13) A There are many areas of Jack s work for which I have the  
 (14) greatest respect  
 (15) Q Well put Sitkinak that was sponsored by the National  
 (16) Park Service?  
 (17) A Yes it was  
 (18) Q And it s an island in the oil spill area just south of  
 (19) Kodiak?  
 (20) A I – boy I don t recall that oil got quite that far if  
 (21) it did it was extremely light but I don t know how you bound  
 (22) the oil spill area in that location  
 (23) Q That s not important to my question  
 (24) A Okay  
 (25) Q When you surveyed Sitkinak you and your team walked 44  
 (26) person miles looking for artifact scatter?

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- (1) A If that s what it says  
 (2) Q And this artifact scatter you were looking for where was  
 (3) it located?  
 (4) A We were looking for artifact scatters anywhere we could  
 (5) find them exposed surfaces on the surface of vegetation on  
 (6) the beach  
 (7) Q Tell the jury why you spent 44 miles looking for artifact  
 (8) scatter Why was that important in the Sitkinak –  
 (9) A This gets back to something I talked about earlier with  
 (10) regard to cultural resource management being different from  
 (11) archaeology One of the problems when you do cultural  
 (12) resource  
 (13) management surveys in areas you want to keep careful record  
 (14) of  
 (15) where you look and don't find anything because in this case  
 (16) the Park Service was working for the Coast Guard and they  
 (17) wanted to get rid of this parcel they wanted to sell it and  
 (18) so our job was to find not just where things are but where  
 (19) things weren t all right  
 (20) So we paid particular attention in the fieldwork to keep  
 (21) good records on where we went what we found and what we  
 (22) didn t  
 (23) find and that s why the 44 miles or – whatever it was miles  
 (24) and so forth is very important to us to do that and to keep  
 (25) reasonably – I m sorry really accurate records so that a  
 (26) person reviewing it later on would know where we went what  
 (27) we  
 (28) found and what we didn't find  
 (29) Q That was the only reason you did it the only –



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- (1) A Enlighten us yes  
 (2) Q The other reason was the scattered artifacts and fire crack  
 (3) rock helped you located one archaeological site in the parcel?  
 (4) A They are indicators they are indicators of that yes  
 (5) you re absolutely right  
 (6) Q You made surface collections of artifacts for your sponsor  
 (7) and arranged for the curation?  
 (8) A We collected artifacts on the beach we felt were associated  
 (9) with that find and those were the surface collections we made  
 (10) Q You took photographs of the site and the artifacts you  
 (11) found?  
 (12) A Yes we did  
 (13) Q Took soil samples and charcoal samples?  
 (14) A Yes we did  
 (15) Q You dug 19 one meter square test pits?  
 (16) A If you say so  
 (17) Q Don t remember?  
 (18) A I don t - I do not remember how many test pits we dug  
 (19) Q Does it sound about right?  
 (20) A It s in that range perhaps  
 (21) Q You cut a profile along the edge of the site to understand  
 (22) the stratigraphic context of the ancient place?  
 (23) A Yes we did  
 (24) Q And then you wrote a report?  
 (25) A Yes we did

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- (1) Q And then the taxpayers paid you for it?  
 (2) A Yes they did  
 (3) Q And all of those tasks were necessary for your work?  
 (4) A They were necessary because - for the federal government  
 (5) in that location and fulfill applications under various laws  
 (6) and regulations  
 (7) Q In the Sitkinak report you provided the federal  
 (8) government - federal land managers with a tentative mitigation  
 (9) plan for mitigation of the erosional damage that you found  
 (10) there right?  
 (11) A We - this was a parcel transfer and so the federal  
 (12) government was about to lose its authority and control over  
 (13) this parcel  
 (14) Q Right  
 (15) A So our job was to tell them what was there and to make some  
 (16) recommendations for them to choose from in terms of what -  
 (17) what might be a reasonable approach to protecting the site  
 (18) Q You gave them two options?  
 (19) A I think we did  
 (20) Q The first option you gave them was to physically stabilize  
 (21) the beach without excavating it?  
 (22) A I m not sure there s independent options but go ahead  
 (23) Q Option two was to mitigate through data recovery from the  
 (24) area not effected by erosion or in other words through a  
 (25) controlled study and excavation?

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- (1) A Yes  
 (2) Q And you recommended the second option?  
 (3) A I believe the qualification in that report was if you are  
 (4) unable to put such restrictions in the deed such that the next  
 (5) owner will have to respect the integrity of the site and not  
 (6) damage it and I may have put another one that yes then you  
 (7) should go ahead and excavate it before you sell it Or the  
 (8) alternative of course is not to sell it  
 (9) Q Now you recommended that 120 square meters should be  
 (10) excavated which would require three field works or a four  
 (11) member archaeological team sound right?  
 (12) A If you remember - if you say so counsel  
 (13) Q If I m wrong you need to tell me because I can get out  
 (14) the exhibit if you think I am  
 (15) A No if the details of this are important to this let s get  
 (16) them out Otherwise I will accept your version  
 (17) Q If at any time you think I m saying something incorrectly  
 (18) you let me know  
 (19) One of the things you said when you discarded that first  
 (20) option was that attempts to intervene in the natural erosion  
 (21) deposition cycle may commit the managers of these resources  
 (22) to  
 (23) long term maintenance expenditures does that sound right?  
 (24) A It does  
 (25) Q And in other words to backfill stabilize and monitor a  
 beach to have somebody watching it that can be expensive  
 too?

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- (1) A Well this is a particular kind of beach As I indicated  
 (2) before I think when we first started talking about it this  
 (3) was a beach which is right now perpendicular to the present  
 (4) shoreline and so that on-shore movement of water was just  
 (5) eating away at the end of it, so if it continued to erode in  
 (6) that direction the whole beach was going to go This is not a  
 (7) beach that is moving in against an upland it had a particular  
 (8) relationship to that particular site in that particular  
 (9) location  
 (10) Q Thank you for that distinction My point I want to make  
 (11) sure the jury understands is that monitoring a beach for a long  
 (12) period of time can be expensive?  
 (13) A I believe the point was monitoring and protecting  
 (14) Q Yes  
 (15) A Which would - in this case would involve a continuous  
 (16) kind of erosion and watching it go  
 (17) Q That s particularly true in a remote location isn t it  
 (18) where it costs more money and logistical support to perform  
 (19) these functions?  
 (20) A I think that s a fair statement That the further you have  
 (21) to travel the more expensive it would be if you were to  
 (22) undertake projects of this sort  
 (23) MR PETUMENOS I have no further questions  
 (24) MR DIAMOND I m going to put on the Elmo Flat Island  
 (25) REDIRECT EXAMINATION OF ALBERT DEKIN

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- (1) BY MR DIAMOND  
 (2) Q You've never set - set down on the top of Flat Island  
 (3) have you?  
 (4) A No  
 (5) Q Neither has Jack Lobdell?  
 (6) A I only know one person who says he set down on that in a  
 (7) helicopter is Mark Lottrell  
 (8) Q And Mark Lottrell worked for Chugach Alaska?  
 (9) A Yes he did  
 (10) Q Did he say there were in fact proven housepits on the top  
 (11) of Flat Island?  
 (12) A No he uses the word possible for - for his information  
 (13) Q So the only record of the only person who has ever walked  
 (14) that island with an archaeological expertise has said maybe  
 (15) it's there maybe it's not?  
 (16) A That's correct  
 (17) Q In your examination of the record did you see any  
 (18) indication that would suggest to you any conceivable way that  
 (19) if housepits exist where Mr Lottrell said they might exist or  
 (20) might not that location could have been oiled?  
 (21) A No There's - the level of oiling in this particular area  
 (22) is - is very light I think there were scattered mouse balls  
 (23) and tar balls and so on and so forth so no  
 (24) Q You don't think that this location even if there are  
 (25) housepits there were hurt in any way by the Exxon Valdez oil

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- (1) spill?  
 (2) A No even if Mr Lottrell turns out to have been correct and  
 (3) there are upon further investigation intact archaeological  
 (4) deposits at this location there's absolutely no indication of  
 (5) any harm from the oil spill or the clean up activities  
 (6) Q And there's another archaeologist who's testified in this  
 (7) room who agrees with you?  
 (8) A Yes Dr Lobdell I believe said that when he testified  
 (9) before  
 (10) Q Got it yet?  
 (11) MR PETUMENOS I do not. I'm going to need a minute  
 (12) to get that for you Do you know where it is  
 (13) MR FORTIER What are you looking for?  
 (14) MR DIAMOND PX9043 The copy I had did not have the  
 (15) map you put on there  
 (16) MR PETUMENOS Oh I know where it is  
 (17) BY MR DIAMOND  
 (18) Q The Windy Bay midden you broke Windy Bay into two sites  
 (19) you said you revised your - your exhibits to make sure you  
 (20) were right? Has your report gone through several revisions to  
 (21) take into account the changing nature of the Plaintiffs' claims  
 (22) as well?  
 (23) A Yes it has Originally looked at a much larger number of  
 (24) sites and locales and so on and just keeping track of them was  
 (25) a - was a major task for me and seemed like we were always

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- (1) making revisions to the information we had  
 (2) Q With respect to the Windy Bay midden Mr Petumenos  
 (3) reminded us that - I think Dr Lobdell said that he had  
 (4) recently been there before he testified and that it seemed to  
 (5) him that the erosion might have - might be - might have been  
 (6) helped along by some other forces do you remember that  
 (7) testimony?  
 (8) A I remember that and I think Mr Petumenos reminded me  
 (9) Q Did Dr Lobdell prepare field notes of his visit to Windy  
 (10) Bay?  
 (11) A Yes he did  
 (12) Q Now tell us about the importance of accurate field notes  
 (13) in the discipline of archaeology  
 (14) A There is a - there is a phrase that says that the only  
 (15) difference between a vandal and an archaeologist is the  
 (16) accuracy of the records the archaeologist keeps I don't  
 (17) necessarily subscribe to all the dimensions of that but record  
 (18) keeping is particularly important. Field records are the only  
 (19) link from the observations that are made to the interpretations  
 (20) that other people wish to make of them and in the absence of  
 (21) the person who does it then you have to rely solely on the  
 (22) records and so on So records field records are particularly  
 (23) important  
 (24) Q Have you reviewed Dr Lobdell's field notes of his visit to  
 (25) Windy Bay?

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- (1) A I have paid particular attention to the recent field visits  
 (2) of the Plaintiffs' experts including Dr Lobdell  
 (3) Q Is there anything in Dr Lobdell's field notes of his visit  
 (4) to Windy Bay to suggest that the erosion of that midden was  
 (5) being helped along by any other forces?  
 (6) A His field notes imply that the only - the only factor  
 (7) influencing erosion at Windy Bay that is included in his field  
 (8) notes is a statement of shoreline erosion  
 (9) MR DIAMOND Got my map yet?  
 (10) MR PETUMENOS I'm looking but I can't look and  
 (11) listen at the same time So I'm - I have another one - it's  
 (12) just like it you want to look at that one  
 (13) BY MR DIAMOND  
 (14) Q Well let's talk about scattered artifacts in the  
 (15) intertidal zone We saw a map of Seward 072 remind me  
 (16) Seward  
 (17) 072 is -  
 (18) A Little Bay  
 (19) Q Little Bay What happens to artifacts that are scattered  
 (20) around the intertidal zone due to wave action in storms?  
 (21) A They move around quite a bit We've seen a videotape that  
 (22) shows really storm beaches that artifacts move around in but  
 (23) it is not at all unusual for archaeologists going back to  
 (24) places where the artifacts in the intertidal zone have spaced  
 (25) over a week or ten days or some time apart to see very  
 different distributions of these artifacts They move around a

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- (1) great deal Actually they don't always move down slope  
 (2) Sometimes they splash up so you really cannot interpret a lot  
 (3) of the associations that you might see at any particular  
 (4) observation you cannot - you cannot assume that those are the  
 (5) result of human action  
 (6) Q Okay They get pounded a bit?  
 (7) A They can They also get bumped between rocks and so on  
 (8) There's all sorts of things that can happen to them The only  
 (9) thing that you can be sure of is that they're not in the  
 (10) location in which they were originally deposited  
 (11) Q From an archaeological standpoint it is therefore probably  
 (12) the best practice to pick them up curate them and collect  
 (13) them?  
 (14) A I think they should be picked up put in a bag and taken  
 (15) care of I mean protected and so forth but used for - for  
 (16) as many things as one can with them not necessarily for a  
 (17) reinterpreting the circumstances of the site  
 (18) Q And that's what happened with respect to scattered  
 (19) intertidal artifacts found during the course of the Exxon  
 (20) Valdez oil spill cleanup?  
 (21) A The Exxon Valdez oil spill program the Cultural Resource  
 (22) Program actually was authorized to pick up artifacts on State  
 (23) land in those circumstances where they believed they might be  
 (24) threatened or there might be special kind of circumstances  
 (25) that required them to be protected So they used the judgment

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- (1) in the field to pick these up and so on and in some cases they  
 (2) did  
 (3) There was overriding concern it seems to me not for the  
 (4) location as being important for the purposes of doing  
 (5) archaeological research but for the purposes of satisfying the  
 (6) various land owners who had competing interests in these  
 (7) areas A lot of the plotting seemed to me to be done for the  
 (8) purposes of management and managers rather than for  
 (9) archaeology  
 (10) Q Do you know of any harm done to any scattered intertidal  
 (11) artifacts by the oil spill?  
 (12) A By the oil spill no I do not  
 (13) Q You said that the Cultural Resources Program had  
 (14) permission  
 (15) to pick them up from the intertidal zone Permission from  
 (16) whom?  
 (17) A They had permits from the federal and state landowners  
 (18) to - when they were operating in their locations to pick up  
 (19) make collections if they needed to  
 (20) MR DIAMOND Nothing further  
 (21) MR PETUMENOS Counsel I have the map You want the  
 (22) map?  
 (23) MR DIAMOND Nothing further  
 (24) RECROSS EXAMINATION OF ALERT DEKIN  
 (25) BY PETUMENOS  
 (26) Q You're not - are you contesting Dr Lobdell's testimony

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- (1) that he saw something that he thought was being helped along  
 (2) Is that what I'm to understand?  
 (3) A No I think Dr Lobdell's field notes clearly state that  
 (4) there is some erosion at that location and that the housepit  
 (5) was being helped along by erosional forces What I'm  
 (6) contesting is the interpretation of his testimony that it was  
 (7) being helped along by somebody digging and so on because  
 (8) that's not what his field notes say  
 (9) Q So you don't think that I'm taking his testimony in correct  
 (10) context?  
 (11) A No I believe you are accurately representing what he said  
 (12) in his testimony What I'm saying is that my reading of his  
 (13) field notes do not say that  
 (14) Q There is a - counsel 9030 there is a - on this business  
 (15) of whether or not work was done by the corporations that you've  
 (16) mentioned on redirect the things they should have done things  
 (17) like that there is a - there is an article that you wrote  
 (18) entitled Professional Training Practices and Ethics by Albert  
 (19) A Dekin Junior you remember that article?  
 (20) A That was sometime ago but I remember it  
 (21) Q 1982 it seems recent to me but in that you talk about  
 (22) some of the ethics and concerns of your profession and some of  
 (23) the ways your profession is interacting with indigenous people  
 (24) in fact?  
 (25) A Yes it's very important

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- (1) Q And you conclude in that article I believe with the  
 (2) following language  
 (3) MR DIAMOND I'm going to object as beyond the  
 (4) scope  
 (5) MR PETUMENOS I think it has to do with the issue of  
 (6) whether the Native corporations had properly taken care of  
 (7) their own sites and had not - had engaged in certain  
 (8) practices - had not engaged in certain practices that the  
 (9) doctor thinks they should have which I think was raised in  
 (10) redirect and it relates to funding and money and whether they  
 (11) have the ability to do it  
 (12) THE COURT Objection sustained  
 (13) MR PETUMENOS I don't think I have any further  
 (14) questions of you Thank you for your testimony  
 (15) MR DIAMOND Your Honor we call as our next witness  
 (16) by deposition but fortunately by videotape deposition Coast  
 (17) Guard Admiral Yost and I would suggest we play this one and  
 (18) take a break  
 (19) THE COURT That's fine  
 (20) MR PETUMENOS Judge this is coming a little out of  
 (21) order from what we anticipated can I make sure we have our  
 (22) script together  
 (23) (Discussion off record between counsel)  
 (24) MR CLOUGH As Mr Diamond said these are videotaped  
 (25) depositions One thing you'll notice is it's very obvious that

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- (1) there s cuts back and forth I wanted to let the jury know  
 (2) that this is the result of a process with both the Plaintiffs  
 (3) and Defendants where we ve gone through it and agreed upon  
 the  
 (4) proper information they re in context no one s been going  
 (5) through and cutting the videotape back and forth without  
 (6) showing it to the other side You will see Admiral Yost s head  
 (7) will be on this side and be on this side It appears  
 (8) disconcerting because in fact there s over two days of  
 (9) deposition and we ve selected portions to show you here  
 (10) The introductory statement for Admiral Yost goes as  
 (11) follows The following are excerpts from the sworn videotape  
 (12) deposition of Admiral Paul A Yost Junior in November 1992  
 (13) At the time of the Exxon Valdez oil spill Admiral Yost was  
 (14) commandant of the United States Coast Guard Joel?  
 (15) ( Videotape Played)  
 (16) DIRECT EXAMINATION OF PAUL YOST (Video)  
 (17) BY VIDEO EXAMINER  
 (18) Q Would you state your name for the record sir?  
 (19) A Paul A Yost Junior  
 (20) Q And what is your current business address Admiral Yost?  
 (21) A 2000 K Street Northwest Washington D C Suite 303  
 (22) Q You are the former commandant of the United States Coast  
 (23) Guard  
 (24) A I am  
 (25) Q What changes have occurred in your employment?

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- (1) A I finished my four year term as the commandant of the Coast  
 (2) Guard in the end of May 1990 The next day I assumed the  
 (3) responsibilities and position as the president of the James  
 (4) Madison Memorial Fellowship Foundation here in Washington  
 D C  
 (5) I think that s the major change or addrtion to this bio  
 (6) Q And that has been your sole employment since the  
 completion  
 (7) of your service?  
 (8) A It has  
 (9) Q And are you currently an active officer of the United  
 (10) States Coast Guard or is your status retired?  
 (11) A I m currently retired  
 (12) Q As of March 23 1989 when - when you were in the position  
 (13) of commandant of the United States Coast Guard was it your  
 (14) view as the commanding officer of all potential Coast Guard  
 (15) on scene coordinators that it was their duty to take charge and  
 (16) after receiving advice from the committee make necessary  
 (17) decisions in a timely way?  
 (18) A It was my view that a Federal On Scene Coordinator in  
 (19) order to be effective must take charge make things happen  
 (20) and make decisions and at the same time bring the committee  
 (21) along with him if he possibly can and in almost every case  
 (22) it is possible to do that  
 (23) Q Well there came a time did there not Admiral Yost when  
 (24) you personally reviewed the cleanup plan proposed by Exxon  
 (25) Shipping Company to deal with the oil which had come ashore  
 is

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- (1) that correct?  
 (2) A There came a time when the president of the United States  
 (3) assigned me to take charge of that oil spill and that was some  
 (4) days or weeks later at which time I did take charge of that  
 (5) oil spill  
 (6) Q That s what I meant by saying there came a time when you -  
 (7) A There came a time there came a time  
 (8) Q And that was out of the ordinary for you?  
 (9) A That was extraordinary in the history of the Coast Guard  
 (10) Q And at that point in time you - although you still had  
 (11) the chain of command and staff supporting you you personally  
 (12) reviewed what was being done Is that correct?  
 (13) A I personally reviewed what was being done in a general  
 (14) sense from the very beginning When I took over the  
 (15) responsibility I went to the scene set up an operations  
 (16) center with my top staff on scene and took over the - the  
 (17) direct coordination of all parties including Exxon in  
 (18) responding to that oil spill  
 (19) Q And part of that was reviewing the plan that Exxon had  
 (20) developed for - for cleaning the beaches and removing the oil  
 (21) that was still in the water from the water Is that correct?  
 (22) A Yes  
 (23) Q And you sat down with Mr Harrison of Exxon and reviewed  
 (24) his intentions and plans with him Is that correct?  
 (25) A Yes

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- (1) Q And you told him in no uncertain terms what it is that you  
 (2) expected him to do and where you thought his plan was  
 (3) inadequate Isn't that correct?  
 (4) A I had a professional relationship with Otto Harrison I  
 (5) considered him a - a responsible professional and we sat down  
 (6) and discussed the plan He was extremely frank and so was I  
 (7) and where there were differences of opinion we d largely work  
 (8) those out between us largely  
 (9) Q My point was you - you dealt with him directly?  
 (10) A I did  
 (11) Q Admiral Yost can you place approximately -  
 (12) A I may be able to by going through some of this material I  
 (13) would say we re talking about some time mid April  
 (14) Q 1989?  
 (15) A Yes  
 (16) Q You descnbed going to Alaska and setting up an operations  
 (17) center with your top staff For how long were you physically  
 (18) present in Alaska operating in that mode?  
 (19) A At that - at that time I was physically present for all  
 (20) intents and purposes or as the Federal On Scene Coordinator  
 (21) for three to six days  
 (22) Q At which point you were replaced by one of your  
 (23) subordinates?  
 (24) A When I went to Alaska with the intention of running that  
 (25) oil spill myself I directed the commander of the Pacific area

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- (1) three star admiral Vice Admiral Clyde Robbins to meet me
- (2) there He worked with me as I set up that operation and took
- (3) charge of the oil spill from the - from a federal
- (4) coordinator s point of view When I left I left Clyde Robbins
- (5) in charge to report directly to me through a direct chain of
- (6) command directly to me no filters as I went back to
- (7) Washington
- (8) Q Okay and that was at the end of the 6 days that you
- (9) mentioned was that correct?
- (10) A I said three to six days I m not sure
- (11) Q All right And so that would - that would have been
- (12) sometime in approximately April of 1989 is that correct?
- (13) A That s the best of my memory
- (14) Q For how long did Admiral Robbins remain in charge as your
- (15) direct adjunct in Alaska again this is approximately?
- (16) A Except for a week or so of leave that I gave him at some
- (17) point during the summer the whole summer Basically the
- (18) whole summer
- (19) Q Through September of 1989?
- (20) A I think so yes
- (21) Q And then was he replaced by another Coast Guard official?
- (22) A When the clean up operation was largely shut down for the
- (23) winter months my memory is Admiral Robbins went back to
- (24) San Francisco and Admiral Ciancaglini who was by that time the
- (25) district commander moved in and took over the winter

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- (1) operation
- (2) Q And did Admiral Ciancaglini remain in direct contact with
- (3) you in the same mode that Admiral Robbins had been in contact
- (4) with you?
- (5) A He did Now Admiral Ciancaglini had a chain of command
- (6) through the Pacific area commander who was Admiral
- (7) Robbins
- (8) but for this purpose he had direct access to me and we talked
- (9) frequently directly but certainly we cut in the Pacific area
- (10) commander who d been up there all summer
- (11) Q During that - and during that phase of the relationship
- (12) was that the time at which the 1990 cleanup plan was presented
- (13) to the Coast Guard by Exxon?
- (14) A Yes
- (15) Q And ultimately with changes and supplementations
- (16) adopted?
- (17) A That s my memory the cleanup plan for the next summer
- (18) Q And were you directly involved in supervising or -
- (19) supervising the Coast Guard position with respect to the
- (20) development of that?
- (21) A I was I had to approve the plan
- (22) Q And did so?
- (23) A I did approve the plan It took some iteration but that s
- (24) normal in that kind of a plan
- (25) Q Iteration meaning that something was proposed
- (26) counterproposals were made discussions occurred and all
- (27) parties came together in a - in a common plan which ultimately

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- (1) they agreed was the -
- (2) A That s true for both summer plans yes
- (3) Q Okay and in both summer plans you Admiral Yost
- (4) approved
- (5) those plans?
- (6) A I did
- (7) Q And is it accurate that you represented to congress that in
- (8) your professional judgment those plans represented the
- (9) optimum
- (10) response to this spill considering the - all the circumstances
- (11) existing in Alaska at the time?
- (12) A I think I would phrase it slightly differently and maybe
- (13) it s the same thing but in my view those plans considering
- (14) all of the issues that we can go into if you like was the best
- (15) plan we could get under the circumstances I don t know what
- (16) optimum is but I guess under the circumstances that was the
- (17) best plan we could get If that s optimum yeah
- (18) Q Well perhaps we can go back through this testimony but I
- (19) believe you testified that you were satisfied that considering
- (20) the logistics and all of the other circumstances existing this
- (21) was all that could be done at the time these plans that is?
- (22) A As the Federal On Scene Coordinator I would have been
- (23) more
- (24) highly pleased if we had been able to man that first summer
- (25) the beach cleanup heavier It was Exxon s view that due to
- (26) the infrastructure that was - had to be put in there that we
- (27) had the maximum manning that could be supported
- (28) After discussions with my highers on that including my

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- (1) direct boss Secretary Skinner I agreed with that plan
- (2) Q Did you attend the 43rd Arctic Science Conference in Alaska
- (3) earlier this year?
- (4) A I did
- (5) Q And is it at that conference did you state that in your
- (6) opinion Exxon had been named as the outstanding corporate
- (7) citizen in connection with its response to the Exxon Valdez oil
- (8) spill?
- (9) A I did say that I ve said it several times
- (10) Q And did you believe that Exxon had done an outstanding job
- (11) of cleaning the beaches which had been impacted by oil from
- (12) the spill?
- (13) A I felt the result of that cleanup was - was very very
- (14) good and it was gone about in a craftsman like manner That
- (15) doesn t mean that everything was done in my view just exactly
- (16) the way that I would do it But you know it was a craftsman
- (17) like job and I take my hat off to Exxon and Otto Harrison for
- (18) the job they did
- (19) Q Did - did you state at that conference that in your
- (20) opinion there was no lasting ecological damage after
- (21) completion of the cleanup?
- (22) A I gave that opinion as a layman That is still my
- (23) opinion I would - I would state it a little differently
- (24) for - for this record I don t think that there is any
- (25) ecological damage to the environment in the state of Alaska

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- (1) that will be long lasting or that - that borders on a tragedy  
 (2) or a disaster  
 (3) Q Do you know of any spill in history where so large a force  
 (4) of personnel was brought to respond than was used in the  
 summer  
 (5) of 1989 in the cleanup pursuant to the plan you approved?  
 (6) A I m not familiar with the - the Cadiz spill We did send  
 (7) people there to study that spill during the Exxon Valdez  
 (8) response but it s my feeling that with the possible exception  
 (9) of that spill there was no spill where more people were  
 (10) involved or more infrastructure had to be provided in a remote  
 (11) area We broke ground in that  
 (12) Q Is it - is it accurate to say Admiral Yost that when you  
 (13) became involved you found that - that Exxon was able to - to  
 (14) mount such an effort more effectively than the United States  
 (15) government would have done in the same circumstances?  
 (16) A That - that was my impression and I so stated it both  
 (17) publicly and up my chain of command  
 (18) CROSS EXAMINATION OF PAUL YOST (Video)  
 (19) BY VIDEO EXAMINER  
 (20) Q And did you ever testify to Congress about the observations  
 (21) you made when you visited the beaches?  
 (22) A I remember one piece of testimony that seemed rather  
 (23) striking at the time and my explanation to the committee on  
 (24) one particular beach we were having a major problem with  
 (25) cleaning it and going back the next day and it would be all the

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- (1) oil had been picked up by the tide out of the cobble stones and  
 (2) then redeposited and it just seemed like an endless job  
 (3) cleaning you go back it was just as bad as before you  
 (4) started yes  
 (5) Q And on that occasion did you testify to Congress that the  
 (6) surface of the beach appeared clean but when you dug down  
 with  
 (7) your glove eight inches the glove was - was completely  
 (8) covered with oil?  
 (9) A I remember - I remember making exactly that - that  
 (10) testimony  
 (11) Q Well can you - can you describe in your own words what  
 (12) you told Congress about that subject?  
 (13) A Yes I was trying to express to Congress the frustration  
 (14) that I had and it was shared by the workers and was shared by  
 (15) the Exxon management of cleaning the surface of a - of a  
 (16) beach and then going after it was cleaned digging down six  
 (17) inches or so and finding pools of oil imbedded in the cobble  
 (18) stones and then having on the next range of tide that tide  
 (19) come up 16 feet and then go back down having picked up that  
 (20) oil from below the surface and deposited it right back where  
 (21) you d just spent time and effort of hundreds of people with hot  
 (22) water and boilers out there cleaning it and it would just look  
 (23) like you weren t making any progress and it was - it was  
 (24) frustrating It was frustrating to Exxon it was frustrating  
 (25) to me It was frustrating to everybody

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- (1) (Video concluded )  
 (2) MR CLOUGH Your Honor that concludes the deposition  
 (3) testimony of Admiral Yost  
 (4) THE COURT All right we ll take a break  
 (5) THE CLERK. Please rise This court stands in  
 (6) recess  
 (7) (Jury out at 11 40 a m )  
 (8) (Recess from 11 40 a m to 11 53 a m )  
 (9) (Jury in at 11 53 a m )  
 (10) THE CLERK. Please rise This court now resumes its  
 (11) session Please be seated  
 (12) MR CLOUGH Your Honor the following are excerpts  
 (13) from the sworn videotaped deposition testimony of Admiral  
 Clyde  
 (14) E Robbins December 1992 Admiral Robbins graduated from  
 the  
 (15) United States Coast Guard Academy in 1954 In 1983 Admiral  
 (16) Robbins was appointed district commander of the 149th Coast  
 (17) Guard district based in Hawaii In 1988 he went to San  
 (18) Francisco as the area commander for the Pacific area which  
 (19) includes Alaska In mid April 1989 Admiral Robbins was  
 (20) appointed Federal On scene Coordinator of the cleanup of the  
 (21) Exxon Valdez oil spill  
 (22) ( Videotape Played )  
 (23) DIRECT EXAMINATION OF CLYDE ROBBINS (Video)  
 (24) BY VIDEO EXAMINER  
 (25) Q Would you state your full name for the record please?

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- (1) A I m Clyde E Robbins  
 (2) Q By whom are you currently employed?  
 (3) A I m employed by - I m active duty Coast Guard officer  
 (4) assigned to the Department of Transportation  
 (5) Q As the Pacific area commander from 1988 to 1990 you  
 (6) supervised the number of districts in the west?  
 (7) A That s correct  
 (8) Q And part of your command encompassed the 17th district in  
 (9) Alaska?  
 (10) A That s correct  
 (11) Q How many personnel did you have under your authority as  
 the  
 (12) area commander in the Pacific?  
 (13) A Approximately?  
 (14) A I think around 10 000  
 (15) Q So on approximately April 9 you took over from Admiral  
 (16) Nelson as the Federal On Scene Coordinator?  
 (17) A No not really I arrived on the 9th and then I was there  
 (18) and I helped with some reorganization and understudied what  
 (19) Admiral Nelson was doing and the commandant and I spent a  
 long  
 (20) time traveling around to the spill seeing what the problems  
 (21) were there and I actually relieved Admiral Nelson on the 15th  
 (22) or 16th I believe the 16th was my full first full day on the  
 (23) job as the Federal On Scene Coordinator  
 (24) Q Well in general taking over that position what did you  
 (25) understand the duties of a Federal On Scene Coordinator to be

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- (1) In a spill?
- (2) A First of all we have a national contingency plan which
- (3) sets forth the duties of the Federal On Scene Coordinator
- (4) That became my bible but to put it in - in layman's terms
- (5) what I felt my duty was was to take charge of the spill make
- (6) sure it - that the - the cleanup the control of the spill
- (7) was in the best interests of the federal government and the
- (8) people that lived in Alaska
- (9) Q A moment ago you had what you termed a Freudian slip
- you
- (10) described the position as federal on scene commander and I
- (11) take it the coordinator was not the - not a commander under
- (12) the national contingency plan?
- (13) A The national contingency plan is a consensus document It
- (14) was an agreement by a number of interest groups that put
- (15) together the document and as a result does not assign
- (16) commanders it assigns coordinators which leaves some
- question
- (17) in the minds of some as to who's in charge And my - it was
- (18) my goal when I took over as Federal On Scene Coordinator to
- (19) become as close to a commander as possible without walking
- all
- (20) over the national contingency plan and I let it be known to
- (21) everyone that asked that it was I that was in charge of the
- (22) spill
- (23) Q Why did you do that?
- (24) A It needed the leadership It needed - it needed - there
- (25) was a lot - there were - there were a number of organizations

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- (1) around that would liked to have been in charge too many and
- (2) as a result we needed some kind of a central thread through
- (3) all of this where that organization that was responsible for
- (4) the cleanup the actual physical cleanup was - was clear as
- (5) to who was in charge and who was making the decisions
- (6) Q Now you've retained the assignment of the Federal
- On Scene
- (7) Coordinator through roughly mid September 1989?
- (8) A Till the end of September I think September 30th was my
- (9) last day
- (10) Q Admiral you've indicated that you and Admiral Nelson
- (11) inspected for the first week after you and he arrived in April
- (12) and then during that time some reorganization was ordered
- (13) What was the nature of that reorganization?
- (14) A Well actually I did the reorganization after I took over
- (15) from Admiral Nelson There was some - some things that I
- (16) observed that I felt were important that needed to be
- (17) improved For one thing I - I felt that we needed some
- (18) organizations set up in the outlying areas of Kodiak Homer and
- (19) Seward to make sure that they were prepared for the arrival of
- (20) oil because it was obvious that it was going to go out of
- (21) Prince William Sound and down along the coast so we needed
- (22) some kind of an organization not unlike what we had in Valdez
- (23) but maybe not to the level that we had in Valdez We needed to
- (24) get that on the road
- (25) We needed to set up a system where all of these many

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- (1) Interest groups could have a say in how we were going to clean
- (2) the - the individual beaches individual shoreline segments
- (3) and there are many variety of segments so you couldn't
- (4) possibly treat them all the same Some had a little bit of
- (5) oil some had a lot of oil so we had to set up some kind of an
- (6) organization that was on automatic pilot that would go through
- (7) these beaches these shoreline areas be able to determine
- what
- (8) kind of cleanup was needed what the effects were on the
- (9) ecology what the effects were on the - there were - there
- (10) were old graves and that sort of thing
- (11) We had to make sure that everything was taken into account
- (12) and that these - because these interest groups had a very deep
- (13) seeded interest in what went on and rightfully so so we set
- (14) up an organizational structure with committees Sounds very
- (15) bureaucratic and I was very concerned about it when I set it
- (16) up but a dictator in this case was not what we needed We
- (17) needed these committees assigned in the four areas so that
- they
- (18) could make their own determinations make their
- recommendations
- (19) to the on-scene coordinator on what they thought the cleanup
- (20) ought to be
- (21) And the way we eventually set it up was - and eventually
- (22) was within days we had the Exxon people in company with
- Fish
- (23) and Game and DEC and Coast Guard went out they appraised
- (24) these beaches they looked at the oil they made
- (25) recommendations to these committees depending on which
- area it

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- (1) was and then the committee looked it over made - made what
- (2) they thought was a good recommendation to me and then I
- signed
- (3) off on the sheet on how that particular segment of shoreline
- (4) would be cleaned up That worked very well
- (5) Q You told me that you wanted to establish regional command
- (6) posts out of Kodiak Homer and Seward to deal with the
- (7) potential need for response in those areas correct?
- (8) A That's - that's correct
- (9) Q And eventually you had a deputy or a representative in
- (10) each of those locations?
- (11) A That's correct I had an assistant Federal On-Scene
- (12) Coordinator and I gave him a lot of authority I felt that
- (13) being that far away that he needed to be able to make
- (14) decisions and of course that was one of the problems I had
- (15) with State and others was that they didn't put anybody on
- (16) scene that could make decisions in a timely fashion They had
- (17) to go back to their offices and frankly offices are inhabited
- (18) by bureaucrats that sit back there I've been a bureaucrat, I
- (19) am one right now that when you're sitting in a nice cushy
- (20) office it's nice and warm it's not the same as being out in
- (21) boots and slickers trying to keep warm and doing a job So
- (22) your decision in some ways could be considered better I
- (23) suppose because you're not influenced by the local
- conditions
- (24) but on the other hand you don't know what the heck is going
- on
- (25) at the local area and sometimes decisions get held up as a

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- (1) result of that  
 (2) So I felt that it was important that the authorities be  
 (3) delegated down as low as possible so decisions could be  
 made  
 (4) And I think that generally worked  
 (5) Q So you put into place a system to assess the shoreline  
 (6) segments?  
 (7) A Yes  
 (8) Q Now was that group called the shoreline assessment team?  
 (9) A I believe it was  
 (10) Q And you also put in place an organization to assess the  
 (11) recommendations for each segment did you not?  
 (12) A Yes  
 (13) Q And was that the ISCC the Interagency Shoreline Cleanup  
 (14) Committee?  
 (15) A Yeah that s exactly what it was  
 (16) Q Was it your goal through those committees to solicit as  
 (17) much input as possible in determining what ultimately would be  
 (18) done to a beach?  
 (19) A Yes  
 (20) Q Did you think that was important?  
 (21) A I thought it was very important because there - certainly  
 (22) I didn t have all the information I needed There was no way I  
 (23) could collect all the information that was needed before I made  
 (24) decisions so the best way to do that was to put people that  
 (25) were expert in those subjects together have them iron it out

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- (1) and make recommendations to me Unless there was  
 something so  
 (2) obvious that they had missed which never occurred  
 (3) incidentally I went along with what they recommended  
 because  
 (4) they - it was just - it was a way of getting that kind of  
 (5) information together where it made sense  
 (6) Q Was it your goal in establishing the SCAT crew and the  
 (7) ISCC to cause the affected parties to the maximum extent  
 (8) possible to agree on what should be done to a given beach?  
 (9) A Yes  
 (10) Q And what s your estimation as to how that process worked  
 (11) during the summer of 1989?  
 (12) A I think it worked and in a situation like that you - you  
 (13) operate on the basis of complaints and I didn t get many  
 (14) complaints Occasionally I got a - a letter or someone who  
 (15) had stopped by I would talk to them and tell them why we did  
 (16) something and how we came to our decision but generally it  
 (17) was not - it didn t seem to be a problem  
 (18) Now that doesn t mean in those groups there was complete  
 (19) agreement I m sure that there were many arguments that went  
 on  
 (20) by the number of hours that they spent together and there were  
 (21) some that probably went away less than satisfied but at least  
 (22) it was the - the most consensused decision we could come up  
 (23) with  
 (24) Q And why had you suggested 15 September as a target end  
 date  
 (25) for that year s cleanup?

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- (1) A We again had a meeting with a number of the people that  
 (2) were - that were involved particular State and Exxon and  
 (3) various representatives of the State organizations and federal  
 (4) organizations and the fishermen talked to the fishermen to  
 (5) find out what kind of weather we could expect at the end of the  
 (6) summer and when we could expect to have to close up shop  
 (7) because of weather conditions  
 (8) It was decided at that meeting that 15 September was  
 (9) probably the last date that we could plan on working in the  
 (10) area So it was agreed that that would be the tentative date  
 (11) for stopping operations That wasn't a firm decision at that  
 (12) point but that was the target date  
 (13) Q And I take it you suggested that target date in part for  
 (14) safety reasons?  
 (15) A Absolutely Primarily safety reasons I felt that we  
 (16) needed to gear our operation in a manner that had an end  
 point  
 (17) so that they d know how much equipment and what needed to  
 be  
 (18) done in what length of time and that they could work toward  
 (19) that end because we - there was a lot that needed to be done  
 (20) but we didn t want to endanger the lives of people cleaning up  
 (21) the spill by the adverse weathers - weather that occurs up  
 (22) there  
 (23) Q Well having spent the summer of 89 there and having seen  
 (24) the oil firsthand uncleaned hit the beach in 89 what was  
 (25) your reaction to the beach as you saw when you went back in

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- (1) 91?  
 (2) A Frankly I was surprised because I had said that I thought  
 (3) that we were looking at seven to ten years before the shoreline  
 (4) would be as clean as it is now and as clean as it was in 91  
 (5) I was quite surprised that it had been as effective as it was  
 (6) I think that s a combination of the cleanup a combination of  
 (7) the winter storms and the bioremediation activities It all  
 (8) came together and from my non technical view when I say not  
 (9) technical I m not a biologist or anything like that but  
 (10) from - certainly from appearances and from what little I was  
 (11) able to look at it s a lot better than I thought it would be  
 (12) Q Admiral in the third paragraph of Exhibit 46 463 you  
 (13) state in part referring to the national contingency plan  
 (14) under this plan I am charged with coordinating federal oil and  
 (15) hazardous substance spill response State and local agencies  
 (16) participate in this process through representation on the  
 (17) regional response team paren RRT close paren and through  
 (18) direct contact with the OSC  
 (19) Was it your intent here as well to make clear that you were  
 (20) the one who was in charge under the national contingency  
 plan?  
 (21) A Yes  
 (22) Q By the middle of April you d been on scene only a week to  
 (23) ten days?  
 (24) A That s correct  
 (25) Q Had you had a chance to gauge the size of the Exxon



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- (1) organization that was in place?  
 (2) A Yes  
 (3) Q Admiral before we took that brief break you told me that  
 (4) the issue of federalization didn't die away real quickly Did  
 (5) there ever come a point when you seriously considered that the  
 (6) spill ought to be federalized?  
 (7) A Never  
 (8) Q You told me that you understood that Mr Harrison Exxon's  
 (9) general manager for the cleanup had an unlimited checkbook  
 (10) How did you get that understanding?  
 (11) A He told me  
 (12) Q What did that say to you in terms of Exxon's commitment to  
 (13) clean up the spill?  
 (14) VIDEO ATTORNEY Objection leading  
 (15) THE WITNESS I felt that they were committed That  
 (16) was never - never an issue with me I of course worked very  
 (17) closely with the Exxon organization I needed to and so I had  
 (18) a feel for it that other people did not That didn't play in  
 (19) the Lower 48 I found when I went down there and visited but  
 (20) I felt that they were very committed to it both for the summer  
 (21) of '89 and follow on summers as was necessary  
 (22) BY VIDEO EXAMINER  
 (23) Q Did you also have your own scientific advisors?  
 (24) A Yes  
 (25) Q And by organization who were your own scientific advisors?

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- (1) A NOAA members of NOAA rotated through the operations up  
 (2) there although they - the same faces were there off and on  
 (3) most of the time  
 (4) Q And was NOAA your principal technical source for advice?  
 (5) A Yes  
 (6) Q In terms of your personal staff?  
 (7) A Yes  
 (8) Q Based on the advice from NOAA did you come to a  
 conclusion  
 (9) as to whether sinking oil from the Valdez was going to be a  
 (10) problem?  
 (11) A Based on this memorandum and from the advice they gave  
 me  
 (12) I was pretty well convinced that sinking was not a problem  
 (13) Q So whether you measured it in miles as Exxon reported or  
 (14) Clyde's under the Coast Guard analysis you came out to the  
 (15) same point by the end of the summer of '89?  
 (16) A Made no difference At the end of the summer you could see  
 (17) you were about done and there were some things that Exxon -  
 (18) and we would have liked to have had more time to spend on  
 them  
 (19) but frankly after what we saw after the winter we  
 (20) accomplished what needed to be done  
 (21) Q And with that advice in hand you gave your approval?  
 (22) A That's correct  
 (23) Q In the second paragraph on the first page you say  
 (24) Accordingly I find your plan to be well designed a well  
 (25) designed approach but needing elaboration The following list

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- (1) of items once accomplished will result in a plan I can and  
 (2) will support. And you list a number of things Item four  
 (3) states Anticipate a review of the adequacy of the beach  
 (4) clean up effort in spring 1990 renewed clean-up efforts may  
 (5) be required at that time  
 (6) Did Exxon agree to that term?  
 (7) A Privately yes  
 (8) Q And who made you that commitment?  
 (9) A Otto Harrison possibly others above him but I know Otto  
 (10) did  
 (11) Q Did Exxon stand by that commitment?  
 (12) A Yes  
 (13) Q In item one on that page you say Substantially increase  
 (14) your work force with a view toward increasing the rate of beach  
 (15) cleanup Did Exxon respond to your request for an increased  
 (16) work force size?  
 (17) A Yes they did  
 (18) Q And did Exxon in fact increase its work force?  
 (19) A Yes  
 (20) Q Now you made requests at several points that the work  
 (21) force be increased did you not?  
 (22) A Yes  
 (23) Q On each occasion did Exxon respond affirmatively?  
 (24) A Yes  
 (25) Q At the very beginning of the cleanup season that started

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- (1) the manual cleanup season I take it no one had an extremely  
 (2) precise view as to exactly how many people would be required?  
 (3) A We were all guessing a little bit  
 (4) Q And I take it -  
 (5) A We knew it was going to take a lot of people but other  
 (6) than that putting a - getting a handle on the numbers was  
 (7) very difficult  
 (8) Q Your goal was to make sure you had the numbers whatever  
 (9) those numbers were?  
 (10) A Yes  
 (11) Q By this point the end of May 1989 you had a commitment  
 (12) from Exxon to come back if cleanup were required?  
 (13) A That was never a question On the informal arrangements  
 (14) that I had with Exxon there was never a doubt in my mind that  
 (15) they were coming back  
 (16) Q Were there employed during the summer of '89 any  
 (17) techniques that you regarded as new and innovative?  
 (18) A Well they were to me The - there were new innovative  
 (19) techniques used first of all in the kind of equipment that was  
 (20) used One as I recall was a - a boom like operation that  
 (21) was - that was designed redesigned by Exxon from concrete  
 (22) delivery devices to put high pressure hot water on cliff faces  
 (23) and that sort of thing from a barge and I found those very  
 (24) effective  
 (25) They were able to - where you couldn't work on the

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(1) shoreline they were able to with this boom get in close to  
 (2) the shore and -- and wash down the shoreline very well and not  
 (3) expose the people to a lot of hazards that otherwise would  
 (4) have -- would have been necessary That was one innovation  
 (5) The -- the hot water the -- the provision of hot water was  
 (6) very interesting as the summer went along because these  
 (7) massive boilers were put on barges and provided unlimited  
 (8) amounts of hot seawater to help us wash down the beach  
 (9) The equipment that was put in place of that sort the  
 (10) construction of it was certainly innovative The process was  
 (11) still the same Use hot water and wash it off the beach  
 (12) The -- the area where probably the innovation was the  
 (13) greatest and there d been work done on this before was  
 (14) bioremediation We tried some other things There were some  
 (15) failures too but at least we kept trying but with  
 (16) bioremediation that was a -- a -- certainly innovative We  
 (17) were able -- and I say we Exxon was doing it all I was doing  
 (18) was supervising it They were paying for it and everything  
 (19) but they worked with the EPA they funded a program for  
 (20) bioremediation where the normal microbes that live in the soil  
 (21) up there would be encouraged to eat the oil and to do that  
 (22) they added nutrients in a very deliberate well measured way  
 (23) to the area that was covered with oil and allow the microbes  
 (24) to -- to work at the oil The first time we used it at the  
 (25) first test site within ten days the oil on all the surface of

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(1) the rocks disappeared just wasn't there anymore It was very  
 (2) quick The action below the surface was somewhat slower but  
 (3) still in all over the couple of years hence it appears to me  
 (4) that it was a very effective way to fight an oil spill after  
 (5) you got the main portion of the oil off It won't -- it wasn't  
 (6) very effective for the heavy coverages of oil that forms --  
 (7) that forms a tar like substance The microbes apparently can't  
 (8) get to it or it would take years for them to do it so you had  
 (9) to do some cleaning before that but certainly in the final  
 (10) stages it eliminated the need to sand -- or water blast the  
 (11) beaches and that sort of thing You could kind of let the  
 (12) natural microbes take over and do the job  
 (13) I'm sure there were other innovations because there was  
 (14) new equipment and all sorts of things being used all of the  
 (15) time Every time I went out I saw a new piece of equipment  
 (16) being -- being tried but there were some things that were  
 (17) tried by Exxon such as -- which were in effect surfactants  
 (18) Now I'm not a technician as I've said so -- or biologist or  
 (19) whatever it takes to know about those things but a surfactant  
 (20) breaks the surface effect of -- the surface tension of an oil  
 (21) and we would -- we had hoped that what it would do is when we  
 (22) tested it was that it would break the surface effect You  
 (23) could then wash the oil the oil would be removed it would be  
 (24) able to to -- it would float down to -- into the water where it  
 (25) could be picked up with skimmers

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(1) We tried that We ran a number of tests These kind of  
 (2) tests in Alaska as a sidebar I should point out are tough to  
 (3) do You have a lot of bad weather you have to set up with a  
 (4) lot of sample taking and that sort of thing and it's  
 (5) excruciatingly slow and frustrating to get everything put  
 (6) together so you can run these tests but the people that know  
 (7) about this business felt that at least some tests were needed  
 (8) before we actually went to any kind of full scale application  
 (9) With the Corexit we tried it I was not convinced from  
 (10) the Corexit test that it was effective in cleaning off the  
 (11) oil It certainly cleaned the surface to some degree but as a  
 (12) long -- the amount of oil that was collected in the water that  
 (13) was supposed to have been washed off the beach was not  
 (14) significant and therefore eventually I ruled it out But we  
 (15) were -- and the reason I'm telling you this is that we were  
 (16) trying everything possible that we could to get the oil off the  
 (17) shoreline and not hurt the ecology of the area  
 (18) Q In your view were the goals set for the 1989 clean up  
 (19) program met?  
 (20) A The goals that I had met -- I had set had been met.  
 (21) Q Having observed the Exxon operation for nearly six months  
 (22) by the time the cleanup came to an end were you able to make  
 (23) any judgments for yourself about the level of the financial  
 (24) commitment that Exxon had made to the cleanup?  
 (25) A I never felt that money was an issue in the cleanup If --

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(1) In some cases as an example the recovery of otters I thought  
 (2) they bent over backwards to spend money in that area that  
 (3) probably a lot of which was wasted I felt that if equipment  
 (4) was needed if it was -- if there was a way in this world of  
 (5) getting it there Exxon was able to get it Money just wasn't  
 (6) an issue  
 (7) Q Based on your experiences did you make any judgment  
 (8) about  
 (9) the quality of the management team Exxon had put together to  
 (10) mount the cleanup?  
 (11) A I thought the quality of the management team that Exxon had  
 (12) put together was very high If I had a like incident that I  
 (13) was going to manage I would try to get Otto Harrison to head  
 (14) it I thought that he did a superb job and very difficult  
 (15) conditions That doesn't mean that he was Charlie nice guy by  
 (16) any stretch of the imagination He's a tough individual  
 (17) that -- that does a very good job of managing a -- an extremely  
 (18) large and complicated operation  
 (19) Q Did you make any judgment over the course of the summer  
 (20) concerning the scientific team Exxon put together to respond to  
 (21) the spill?  
 (22) A I found the work that Exxon's scientific team did -- did in  
 (23) coordination with NOAA and EPA very valuable to me I can't  
 (24) comment on their scientific capability because I'm not a  
 (25) scientist but certainly it was great great help to us as  
 we -- as we performed the cleanup during the summer

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- (1) (Video concluded )  
 (2) MR CLOUGH Your Honor that concludes Admiral  
 (3) Robbin s deposition testimony offered by the Defendants We  
 (4) have one last deposition in the course of the defense  
 (5) presentation of this trial is a videotaped deposition of  
 (6) Admiral Ciancaglino Your Honor it will take us to close to  
 (7) the close of the day We could take a short pause now or I  
 (8) could pause the video partway through  
 (9) THE COURT It s about an hour long?  
 (10) MR CLOUGH Yes Your Honor  
 (11) THE COURT We ve been in here half an hour Let s do  
 (12) it now  
 (13) MR DIAMOND Would you like us to break it about  
 (14) halfway through so we can stretch  
 (15) THE COURT I ll see If I see signs that there s  
 (16) attention lapse  
 (17) MR CLOUGH There s a couple times on this one where  
 (18) the video is stopped any way to show a document that the  
 (19) admiral is being questioned about Just to put the document on  
 (20) the Elmo That will give you an opportunity if you re looking  
 (21) for a break  
 (22) THE COURT Okay  
 (23) MR CLOUGH The introductory statement the  
 (24) Defendants for Admiral Ciancaglino s testimony is as  
 (25) follows The following are excerpts of the sworn videotaped

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- (1) deposition testimony of Admiral David E. Ciancaglino in  
 (2) December 1992 Admiral Ciancaglino relieved Admiral Robbins  
 (3) as Federal On-Scene Coordinator of the Exxon Valdez oil spill  
 (4) for a short period of time in August 1989 and took over as  
 (5) FOSC on September 30th 1989 Admiral Ciancaglino continued  
 (6) in  
 (7) that a capacity until the conclusion of the cleanup in 1992  
 (8) ( Videotape Played)  
 (9) DIRECT EXAMINATION OF DAVID CIANCAGLINI (Video)  
 (10) BY VIDEO EXAMINER  
 (11) Q Would you state your full name for the record please?  
 (12) A My name is David E. Ciancaglino  
 (13) Q And for the record why don t you spell that?  
 (14) A C i a n-c a-g l i-n o  
 (15) Q And what is your current position?  
 (16) A My current position is the chief of the office of command  
 (17) control and communications for the United States Coast Guard  
 (18) I am a rear admiral in the United States Coast Guard  
 (19) Q So you began your Coast Guard career by attending the  
 (20) Coast  
 (21) Guard Academy?  
 (22) A Yes I did  
 (23) Q And what year did you graduate?  
 (24) A I graduated in 1960  
 (25) Q Prior to the Exxon Valdez was there any particular area in  
 (26) which you specialized during the course of your career?  
 (27) A I was a Coast Guard aviator - let me back up on that I

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- (1) first went to sea for two years regular line officer aboard  
 (2) ship standing watches underway in the North Atlantic and then  
 (3) I spent eight tours as a Coast Guard operational aviator  
 (4) qualified in both fixed wing and rotary wing aircraft flying  
 (5) all types of missions for the United States Coast Guard in  
 (6) various locales throughout the world  
 (7) And then I spent a number in important staff positions  
 (8) leadership and management roles up to the Exxon Valdez  
 (9) occurrence  
 (10) Q In March of 1989 where were you stationed?  
 (11) A I was stationed with the commander of the Pacific area My  
 (12) position at that time was chief of staff for the commander of  
 (13) the Pacific area which relates to the Number 2 person in the  
 (14) area  
 (15) Q What did you understand your duties to be when you  
 (16) relieved  
 (17) Admiral Robbins?  
 (18) A My duties as I understood them to be was to - was to  
 (19) monitor the cleanup To be in - to be in charge make sure  
 (20) things - that the cleanup was effected and then when it  
 (21) wasn t going the way we thought it should be then take  
 (22) appropriate action That s what - that s generally what my  
 (23) responsibility was  
 (24) Q You became the Federal On Scene Coordinator in what  
 (25) October 1 89?  
 (26) A 30 September

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- (1) Q 30 September?  
 (2) A Of 89  
 (3) Q A now you indicated that you recollected several issues  
 (4) either from your - your start in August or as a result of  
 (5) taking over command September 30 1989 Before I get to  
 (6) those  
 (7) issues I want to ask you a little bit about how the FOSC  
 (8) operation worked  
 (9) First of all I take it you - you had to deal with a  
 (10) number of technical issues involved with the cleanup?  
 (11) A Yes  
 (12) Q Did you have a technical - a group of technical advisors  
 (13) on your staff to advise you?  
 (14) A Yes I did but the - my scientific advisor was NOAA  
 (15) National Oceanographic Atmospheric Administration But we  
 (16) had - we had teams already in place from representatives of  
 (17) different federal and state organizations there who would  
 (18) provide counsel to the Federal On Scene Coordinator Those  
 (19) were established and in place when I got there for the August  
 (20) stunt And the following year I changed it okay  
 (21) Q Did you believe did you finally believe in the summer of  
 (22) 1989 as to whether bioremediation was a useful tool in dealing  
 (23) with the cleanup?  
 (24) A Absolutely I was - I was then and I still am a supporter  
 (25) of the bioremediation technique that we used in Alaska  
 (26) Q You indicated that another of the issues which came up

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- (1) during the summer of 1989 was the issue that - I believe you  
 (2) said the cleanliness or the cleaning of the shorelines?  
 (3) A Yes  
 (4) Q You ever - did you ever get drawn into a debate during  
 (5) 1989 as to what the appropriate definition of clean was for the  
 (6) beaches?  
 (7) A I got - let me put it this way I don't remember the -  
 (8) when it happened but I certainly got drawn into that  
 (9) discussion how clean was clean And I don't remember if it  
 (10) was during that two week period I don't remember or if it was  
 (11) during my stint as the Federal On Scene Coordinator but that  
 (12) was a controversy That was a big one but I don't know if  
 (13) what you said during the summer of 89  
 (14) Q Why don't we come back to that topic  
 (15) A In fact I thought that was in 90 1990 But I could be  
 (16) wrong Well let me just say one thing here I know I'm adding  
 (17) things I shouldn't speak up here but it doesn't matter it  
 (18) didn't matter how clean you cleaned the shorelines there were  
 (19) a certain set of persons that were not satisfied all the  
 (20) time There were some - some people Chenega Village  
 (21) Corporation on their lands they wanted it - Chenega Village  
 (22) Corporation C-h-e-n-e-g-a who wanted absolutely every spec  
 (23) oil off their land There was no compromise to the day we  
 (24) walked off the shoreline three years later every spec That  
 (25) is the degree of cleanliness that they wanted We couldn't

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- (1) give it to them  
 (2) There were others that would accept a lesser degree you  
 (3) know But - but so this became an issue with the State of  
 (4) Alaska trying to determine what - what criteria they would  
 (5) use to determine how clean is clean the federal government  
 (6) standards and so - even the Park Service They wanted every  
 (7) spec drop off of it People compromised They had to  
 (8) because they knew it was an impossibility to wipe every little  
 (9) pebble stone in 3 000 miles or whatever it is of shoreline so  
 (10) it was a big issue  
 (11) And when we walked off no matter when it was if it was  
 (12) the - this is - my statement here will hold true whether it  
 (13) was the summer of 89 or through 90 91 all the way up  
 (14) through 92 that there were a number of shorelines there that  
 (15) we had difference of opinion about whether or not they were  
 (16) clean enough to everybody's satisfaction and we would - we  
 (17) had a method how to resolve them and that was it  
 (18) Q Admiral when you used the term walk off for example walk  
 (19) off at the end of the cleanup what do you mean by that?  
 (20) A Well we terminated the cleanup on a particular shoreline  
 (21) clean up operations  
 (22) Q And clean-up operations were terminated whether it was on a  
 (23) shoreline or for the summer only upon approval by the Coast  
 (24) Guard?  
 (25) A By the Federal On Scene Coordinator yes that's right

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- (1) Let me - let me backtrack But it just wasn't the Coast Guard  
 (2) saying we're done We had people on the shoreline that - that  
 (3) represented the State of Alaska the land manager whoever  
 (4) that  
 (5) may be If we were - if we were in the southern part of the  
 (6) Sound normally Chenega Village Corporation or Chugach  
 (7) Corporation or - or the State - State Department of  
 (8) Wildlife or the State Department of Natural Resources We had  
 (9) about 30 40 different land managers so what I'm saying to you  
 (10) is that before my decisions were made to whether or not to walk  
 (11) off I had an input from the land manager from the State of  
 (12) Alaska from the Coast Guard from Exxon and from my  
 (13) scientific advisor NOAA Most of - mostly all of shorelines  
 (14) most of them most of them we were in agreement Where we  
 (15) weren't then we had a decision making process to resolve those  
 (16) disputes  
 (17) Q To some people the term walk off might have a negative  
 (18) connotation and I don't think you're meaning to indicate that?  
 (19) A No I'm not I mean the decision was made to terminate  
 (20) clean up operations on a shoreline That's what - that's what  
 (21) that mean  
 (22) Q And when you for example on a given shoreline ultimately  
 (23) approved termination of work on that shoreline you were  
 (24) satisfied that the appropriate activity had been undertaken for  
 (25) that particular shoreline?  
 (26) A I was satisfied based on the inputs of those different

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- (1) organizations that I mentioned and if I had any question then  
 (2) I would send - then representatives from those organizations  
 (3) higher up in the decision making process would go check it out  
 (4) and normally they came to agreement and then if they didn't -  
 (5) if they were still - difference of opinion with them then I  
 (6) would go out there with the land manager and take a look at it  
 (7) and make a decision Most - most of the time by far I  
 (8) agreed with the course of action desired by the land manager  
 (9) if it was reasonable And that - and they were reasonable  
 (10) mostly all the time  
 (11) Q You've sort of indicated this indirectly but I take it one  
 (12) of your goals as on scene coordinator was to try and develop a  
 (13) consensus for decisions?  
 (14) A That's right But I - I was the one who made the final  
 (15) decision That is correct We had different groups of people  
 (16) we were organized I thought in a very unique and a fine way  
 (17) which I think can be used as an example to other - others that  
 (18) are involved in a spill of such significance  
 (19) Q And I take it it was your practice to solicit input from  
 (20) anyone who was potentially affected by a given decision?  
 (21) A Absolutely From the beginning whether it - if it  
 (22) involved going off on a shoreline say the beginning of the  
 (23) season before we would start the cleanup we would send  
 (24) teams  
 (25) out to a shoreline to assess the shoreline and these teams  
 (26) would be comprised if you want to get into the nitty-gritty of

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(1) it now I would tell you of representatives of the State of  
 (2) Alaska Exxon NOAA the Coast Guard the land manager We  
 (3) also had some technicians there a geomorphologist and  
 (4) intertidal biologists We also had some people there that - a  
 (5) photographer - no not necessarily a photographer but people  
 (6) who could do hand cleanups If they were on a shoreline and  
 (7) all it required was a little simple Type A what we call  
 (8) cleanup with hands and rakes and stuff like that so when they  
 (9) walked off they said well we don't have to touch this again  
 (10) we don't have to come back and bring people here to clean up  
 (11) That was our people  
 (12) They - they would go and assess those shorelines and the  
 (13) shorelines they were to assess would be determined by these  
 (14) different organizations like Chenega or Chugach or Kodiak  
 (15) People telling me and also our own experts in the different  
 (16) organizations saying we ought to go take a look at Knight  
 (17) Island these particular shorelines So when all these inputs  
 (18) came in on what shorelines we should look at we're talking  
 (19) hundreds of miles we would take a look at that We would  
 (20) decide as a group with the experts people who have had  
 years  
 (21) and years and years of experience from different organizations  
 (22) we would say these are the ones we should be looking at  
 (23) And we would go out there and assess them and those  
 (24) results would come in to an organization and this was after  
 (25) September of '89 through an organization called the Technical

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(1) Advisory Group Technical Advisory Group the acronym TAG  
 (2) T A G Technical Advisory Group was comprised of experts  
 from  
 (3) the State of Alaska Coast Guard Exxon and NOAA and they  
 would  
 (4) take a look at the input from the people who walked the  
 (5) shorelines representatives from all over the place and they  
 (6) would - they would get this information and then they would  
 (7) send it over to the State of Alaska to the State Historical  
 (8) Preservation Office And they would also send the shoreline  
 (9) assessment to that same one to the - to a land manager higher  
 (10) up in the chain for the decision making process than the  
 (11) individual who walked the shoreline  
 (12) And that Technical Advisory Group would say what do you  
 (13) think about what they saw on the that - on your - on that  
 (14) shoreline from an archaeological point of view because they  
 (15) were very concerned about that and also from our own you're  
 (16) the manager of that shoreline what do you think  
 (17) This is what they saw this is what they recommend this is  
 (18) what we're recommending for cleanup what do you think  
 They  
 (19) would get that input they would consider it and that  
 (20) technical advisory team would make a - make a  
 recommendation  
 (21) to me  
 (22) I would go review it but before I made the final decision  
 (23) I sent it one more time in an effort to accommodate the land  
 (24) manager because that is the individual that I had to say at  
 (25) the end of the entire cleanup I have completed the cleanup on

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(1) your shoreline to the best of our - best of our ability So I  
 (2) wanted that man to be in that decision making process all the  
 (3) way And before I made a decision about what I would  
 (4) ultimately do on the cleanup on a particular shoreline the -  
 (5) the highest land manager gave me an input  
 (6) And based on what that land manager had to say I changed  
 (7) about ten percent of the recommendations coming in from the  
 (8) Technical Advisory Group and - and I think those  
 (9) recommendations were about 99.9 percent of the time  
 (10) inconsonance with what the land managers wanted And so  
 that  
 (11) was the decision making process  
 (12) So once I made a decision it went off back to Exxon the  
 (13) paperwork They would develop a cleanup plan teams  
 (14) equipment things like that and then it would be taken care  
 (15) of  
 (16) And then during the cleanup process there would be people  
 (17) on scene comprised of the land manager the Coast Guard  
 Exxon  
 (18) NOAA and the State of Alaska who would monitor the cleanup  
 (19) And while we're on it might as well just continue on  
 (20) And if there was a difference of opinion on whether or not  
 (21) that shoreline was clean enough by the people on scene - you  
 (22) got to remember there's cleanup going on large numbers of  
 (23) shorelines and we had people in charge of certain groups of  
 (24) shorelines for a particular day If there was a difference of  
 (25) opinion we'll say between the - the State of Alaska and the

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(1) Coast Guard about whether or not it should be cleaned then  
 the  
 (2) State of Alaska and the Coast Guard and also Exxon and also  
 (3) NOAA had people higher up in the chain that were responsible  
 (4) say for Prince William Sound Kenai Peninsula Kodiak area  
 (5) who would fly from wherever they were in Prince William Sound  
 (6) aboard a ship or out on another shoreline they would fly to  
 (7) the scene these people with more experience and they would  
 (8) make a decision and most of the times it was resolved there  
 (9) But at times it wasn't resolved There was still  
 (10) conflict differences of opinion And so what we would - they  
 (11) would come up and notify us and we would send the Technical  
 (12) Advisory Group out Remember this group of experienced  
 people  
 (13) they would go to the scene and I think it was 99.999 percent of  
 (14) the times the matter was over after those guys visited But  
 (15) in those instances and there's very few maybe a half a  
 (16) dozen - a dozen we'll say times in which they didn't agree  
 (17) then I would go out there make a decision And I think  
 (18) mostly most all the time my decision would be toward that  
 (19) land manager what he wanted and that was it. Once I said  
 (20) clean it up again or no we're done that was it.  
 (21) But my decision did not prevent the State of Alaska or  
 (22) anybody else to go ahead and clean up more if they so desired  
 (23) but they had to do it on a not-to-interfere basis with the  
 (24) general cleanup which the federal on-scene coordinator was  
 (25) monitoring or later on directing Do you understand what I

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- (1) said
- (2) Q Yes sir You described an entire process that would lead
- (3) to if necessary your making a decision as to whether a beach
- (4) was clean or not clean?
- (5) A That's right I showed you the decision making process and
- (6) then the means to take care of alterations
- (7) Q And I take it you had substantial input from everyone
- (8) affected making those decisions?
- (9) A That's exactly right.
- (10) Q And while you -- but you had the final authority as to
- (11) whether the job that Exxon did on a given beach fulfilled its
- (12) obligation or not?
- (13) A From a federal government point of view that is correct
- (14) but as I said at the end if the State of Alaska was not
- (15) satisfied with what we did they have the right to go clean
- (16) that shoreline further if they so desire
- (17) We worked as closely as we could with the State of Alaska
- (18) By we I mean all of us Exxon Coast Guard NOAA In an effort
- (19) to -- so there would be very little controversy to minimize
- (20) the controversies to accommodate the State of Alaska as best
- (21) as we possibly could to the people what we were really
- (22) concerned about
- (23) Q By the time you were called upon to make a decision as to
- (24) whether a beach had been cleaned to federal standards or not
- (25) you had all the input you could conceivably get?

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- (1) A All else failed that's exactly right We -- in some
- (2) instances we could pretty much predict which shorelines we
- (3) would have a problem with because of the mag -- the amount of
- (4) oil that was on there and the sensitivities to the people who
- (5) live in a particular area
- (6) Q Admiral as part of the process of gaining input and
- (7) information from groups affected by the cleanup response did
- (8) you regularly visit the communities in the spill area?
- (9) A Yes I did I visited all the areas In the Kodiak area
- (10) Kenai area and the Prince William Sound area including
- (11) Cordova and Valdez and wherever else
- (12) Q Did you believe that was important to keep you informed of
- (13) the concerns of all affected people?
- (14) A It was -- yes that was extremely important not only to
- (15) keep me informed about the concerns of the people using your
- (16) words but also that they know the people know what was
- (17) going on what we were doing I wanted to keep them informed as
- (18) best
- (19) that we could They -- you know you can read in the papers
- (20) and see news clips on television about what was going on but
- (21) we had representatives in those different communities that
- (22) would brief the people
- (23) They had little committees and communities that were
- (24) affected and not only that but as a Federal On Scene
- (25) Coordinator it was my responsibility I felt to go out and
- (26) visit the communities the leaders of the communities I should

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- (1) say and the different committees that were set up to clean
- (2) large areas
- (3) Example Homer although very little oil if any got up
- (4) into the Homer area it did get up into the southern part of
- (5) the Kenai Peninsula and a little bit went up into the Kachemak
- (6) Bay area but a whole bunch of it went on the bottom part of
- (7) the Kenai area
- (8) Mayor Don Gilman from Homer and other areas from Soldotna
- (9) plus citizens from the fisheries groups and the State of Alaska
- (10) and Exxon were there They formed a -- at what time they -- if
- (11) I remember correctly it's called -- it was MAC at the time it
- (12) was called Multi Agency Committee comprised of people to
- (13) consider oil pollution problems from the Exxon Valdez in their
- (14) big area of responsibility Well Kenai is a big area There
- (15) was a similar one in Kodiak And so I would visit these
- (16) committees plus I would visit with the mayors separately to
- (17) talk about what was going on and periodically the
- (18) commandant
- (19) would come through into Anchorage and we would have the
- (20) committee -- the mayors of the large communities that were
- (21) affected I think we call them the oiled Mayors we would bring
- (22) them in and -- and tell them what was going on and then
- (23) answer
- (24) any of their questions
- (25) We did everything we could to accommodate the people I'm
- (26) not saying we satisfied them but I assure you we did
- (27) everything we could

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- (1) Q Is Exhibit 45246 a letter you sent to Steve Provant?
- (2) A Yes it is
- (3) Q On or about October 26th 1989?
- (4) A On about 26 August 1989
- (5) Q Yes and does that refresh your recollection that during
- (6) the summer of 1989 the State had made a request that there be
- (7) further testing of use of hot water injection method to deal
- (8) with subsurface oil?
- (9) A That is correct
- (10) Q And by this letter did you indicate that you didn't wish
- (11) to pursue that method during the summer of '89?
- (12) A That is correct
- (13) Q Why not?
- (14) A Because we were going -- our intentions were at that time
- (15) to have everybody off the shoreline by about the 15th of
- (16) September which is a little over two weeks away and the
- (17) reason for the 15th of September was the fact that based on
- (18) historical weather data provided by the whether -- National
- (19) Weather Service over here the Prince William Sound and the
- (20) Gulf of Alaska area weather changed drastically almost
- (21) exponentially and you could expect a pattern of severe storms
- (22) come rolling through there
- (23) So from a safety point of view solely from a safety point
- (24) of view we picked in 1989 it was Admiral Robbins in 1989 who
- (25) designated that date and I designated the same date in '90 and

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- (1) 91 - in 90 and 91 as the dates in which we would terminate  
 (2) clean up operations So I considered his - the State of  
 (3) Alaska request and Mr Provant was the State On Scene  
 (4) Coordinator at the time and I responded to him like I say  
 (5) three weeks there s just no way that we could have done an  
 (6) adequate evaluation then So I suggested to him why don t  
 you  
 (7) do it if you want to over the winter or whenever you want  
 (8) and that s how we left it  
 (9) Q You indicated that weather pattern - the weather changed  
 (10) exponentially after September 15th based on historical  
 (11) records What did you mean by that?  
 (12) A I mean that based on historical data provided by the  
 (13) National Weather Service and there is written data on that  
 (14) that we took a look at we were advised by that organization  
 (15) that there would be a severe weather pattern that would come  
 (16) across Alaska and through the Prince William Sound and Gulf  
 of  
 (17) Alaska area where our people were working Kodiak area Kenai  
 (18) area there that would cause high winds high seas Based  
 (19) on - and the weather changed quickly  
 (20) Normally we had nice weather in the summertime rain fog  
 (21) sun or something like that Not much - not many high wind  
 (22) conditions But the frequency of the high winds and the  
 (23) frequency of the severe storms coming through went up  
 (24) significantly increased significantly I should say so not  
 (25) only that but became more violent in the wintertime and of

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- (1) course in the middle of winter it s at its worst  
 (2) And so we in an effort to provide the - the safety to our  
 (3) people and in fact that was the number one consideration  
 (4) safety was paramount to our people we decided the Federal  
 (5) On Scene Coordinator decided 15 September would be the cut  
 off  
 (6) date in which we would have people removed from the work  
 areas  
 (7) Q Did you believe that that was the last prudent date on  
 (8) which you could reasonably plan for operations in a given year?  
 (9) A Absolutely There s no question in my mind or actually -  
 (10) or I can t speak for Admiral Robbins but I think that was a  
 (11) decision that he made and the reason why he made it.  
 (12) Q Okay let s mark as Exhibit 45247 pre-designated exhibit  
 (13) 14 which is a letter to Admiral Ciancaglini dated April -  
 (14) August 17 1989 from Otto Harrison with an attachment August  
 (15) 15 1989 status and 1989 90 Alaska winter program?  
 (16) A Okay then this would be the first plan I approved and I  
 (17) approved all after this okay And now to answer your  
 (18) question the process again I wanted to get as much input as  
 (19) I possibly could from as many groups of people as possible  
 (20) The winter plan as other plans were sent out to the State of  
 (21) Alaska We gave them I think I don t know 20 copies or  
 (22) something like that to send out to various organizations within  
 (23) the State of Alaska whether it was Natural Resources or ADEC  
 (24) or Fish and Game you name it They were responsible for  
 (25) disseminating it in the State of Alaska Sent to EPA Fish &

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- (1) Wildlife sent it to members of the Alaska Regional Response  
 (2) Team sent it Chenega Village Corporation sent it to the  
 (3) mayors  
 (4) I also sent copies up to the commandant s office - not  
 (5) commandant s office but Admiral Sipes office the chief of  
 (6) marine safety and environmental protection up in Coast Guard  
 (7) headquarters office And when I sent to Admiral Sipes it was  
 (8) also a joint copy for the commandant s use I gave it to the  
 (9) commander of the 17th Coast Guard district staff which is my  
 (10) staff in Juneau to review It was given to NOAA You can see  
 (11) I was giving it to a large group of people to review and  
 (12) respond to me with inputs I collected their inputs  
 (13) I reviewed it and I responded to Exxon in a very general  
 (14) way I tried not to provide any great degree of specificity  
 (15) unless there was a sensitive issue that we were talking about  
 (16) and in most cases there wasn t I kept the response general  
 (17) and I responded accordingly  
 (18) Then one more thing before I would respond to Exxon I  
 (19) would have a representative from the commandant s office  
 review  
 (20) it for the commandant and the commandant or his  
 representative  
 (21) would get back to me and tell me what they thought and any  
 (22) comments and based on that I would go and - and I would go  
 (23) and sign off the response So it s a rather large input from  
 (24) everyone I just wanted everybody to have a say in it  
 (25) Doesn t mean I did everything that everybody wanted but they

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- (1) had a say and I tried to incorporate as best we could their  
 (2) concerns  
 (3) Q Now you in fact approved Exxon s 1989 1990 winter plan  
 (4) yes?  
 (5) A Yes I did  
 (6) (Videotape paused )  
 (7) MR CLOUGH Your Honor at this point I d like to  
 (8) show to the jury Defendants Exhibit 2324 which is the  
 (9) document the winter plan the admiral has been discussing  
 (10) Go ahead  
 (11) (Videotape Played)  
 (12) Q Before approving the winter plan while you may not have  
 (13) addressed every single detailed item you had to be satisfied  
 (14) with the general commitment that Exxon was making by  
 tendering  
 (15) the plan?  
 (16) A Oh absolutely no question about it Oh yes there was  
 (17) no question in my mind about Exxon s commitment There was  
 (18) none Although I - I would imagine there were some and I m  
 (19) just speculating here and I shouldn t do that  
 (20) Q Your counsel will tell you -  
 (21) A But at the time there was talk - I have to say this there  
 (22) was talk in the newspapers talk by some some people in the  
 (23) State of Alaska people who didn t - weren t in the know too  
 (24) much about whether or not the Coast Guard would require  
 Exxon  
 (25) to come back you see and we were - we would we all

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- (1) recognized there was oil still out there in fact it went on to  
 (2) the next season that same thing will the Coast Guard require  
 (3) the - Exxon to come back in '91 And will the Coast Guard  
 (4) require Exxon to come back in '92 That was always a question  
 (5) by people you know in different organizations most certainly  
 (6) this year  
 (7) Q This year being 1989 -  
 (8) A '89 '89 to go through and do the '90 cleanup  
 (9) Q And in the winter plan Exxon committed to programs to  
 (10) assess what the needs were for the coming season?  
 (11) A Yes  
 (12) Q And you were satisfied with that commitment?  
 (13) A Oh yeah completely satisfied  
 (14) Q Returning to the winter program in Exhibit 45248 you gave  
 (15) your approval of the - of the Exxon winter program?  
 (16) A Yes  
 (17) Q And you set out some conditions for your approval in  
 (18) paragraphs A B and C?  
 (19) A Yes  
 (20) Q And Exxon indicated its willingness to abide by those  
 (21) conditions did it not?  
 (22) A Yes it did I don't know of one instance in any plan that  
 (23) I submitted that Exxon did not comply with the provisions I  
 (24) don't know of any  
 (25) Q Was it your experience that Exxon consistently followed the

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- (1) conditions of your approvals of its plans?  
 (2) A Yes  
 (3) MR CLOUGH Defendant's Exhibit 2325 the approval  
 (4) letter the admiral was discussed  
 (5) (Videotape paused)  
 (6) MR DIAMOND Your Honor we've been going about an  
 (7) hour do you want to take a five minute break and push through  
 (8) to the conclusion  
 (9) THE COURT Yes We'll take a break  
 (10) THE CLERK Please rise This court stands in  
 (11) recess  
 (12) (Jury out at 12:57 p.m.)  
 (13) (Recess from 12:57 p.m. to 1:06 p.m.)  
 (14) (Jury in at 1:06 p.m.)  
 (15) THE CLERK This court now resumes its session  
 (16) Please be seated  
 (17) MR CLOUGH With the Court's permission we'll  
 (18) proceed  
 (19) THE COURT Yes counsel  
 (20) (Videotape Played)  
 (21) Q You indicated that by the time you took over the problem  
 (22) was one of a lesser magnitude What do you mean?  
 (23) A Well when the spill occurred if I remember correctly  
 (24) 11.2 million gallons of oil spilled into Prince William Sound  
 (25) and out and into the Kenai Kodiak and Katmai areas Impacted

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- (1) the shorelines You had I don't know 1300 vessels a  
 (2) thousand aircraft 10 000 people and a host of others out there  
 (3) doing the cleanup on the first year The name of the game was  
 (4) to get as much oil as you possibly could get up before weather  
 (5) the bad weather around mid September precluded you from  
 doing  
 (6) any safe operations It was a tremendous undertaking and it  
 (7) was well done by admiral - by Admiral Robbins  
 (8) When I took charge we completed the operational phase We  
 (9) weren't on the shorelines cleaning oil anymore officially We  
 (10) were going to start next spring so enormous amount of oil was  
 (11) picked up that summer of '89 When we got into the spring  
 (12) enormous amount of oil was cleansed off the shoreline by the  
 (13) wave actions by the storms and deposited somewhere out to  
 sea  
 (14) on the bottom or whatever so we still had a lot of oil by  
 (15) anybody's imagination on the shorelines but nothing of the  
 (16) magnitude that confronted them in '89 Therefore we could cut  
 (17) down the size of the number of vessels that we used aircraft  
 (18) logistics problems people staffs et cetera In - from the  
 (19) clean up operations from '90 through '91 through '92 it got  
 (20) less and less and less numerous in all - in all areas  
 (21) Q As you came to the end of the cleanup season for 1989 what  
 (22) was your assessment of the job that Exxon had done for the  
 (23) summer of 1989?  
 (24) A I thought from a responsible party point of view they did  
 (25) everything that anybody could conceivably do when you  
 consider

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- (1) the environment in which we had to work to clean up a massive  
 (2) amount of oil There was oil spread over an area from - and  
 (3) what we normally used to - as a comparison is from New  
 (4) England from Massachusetts all the way down to Virginia and  
 (5) you're working in some places with tidal ranges of 26 feet  
 (6) You're working on sheer cliffs boulders rocks very bad  
 (7) terrain in all types of weather And so it was a monumental  
 (8) task for everyone and Exxon whenever - I can't speak for  
 (9) Admiral Robbins but any time I asked Exxon for something  
 they  
 (10) normally accommodated the Federal On Scene Coordinator  
 And  
 (11) when they didn't It was because it was something that really  
 (12) physically could not be done or they were able to prove from a  
 (13) scientific point of view it should not be done  
 (14) I don't remember those instances but I know this they  
 (15) reacted as responsibly as anybody could in that incident And  
 (16) you know and I have praise for them I have praise for the  
 (17) Coast Guard people I have praise for the State of Alaska  
 (18) people who were out there working very very hard the whole  
 (19) time and the federal agencies and - and just the people from  
 (20) the communities Everybody worked hard They all did  
 (21) Q This may be a dangerous question admiral but from time to  
 (22) time during the summer of 1989 various people asked that the  
 (23) federal government federalize the clean-up operation Did you  
 (24) ever form the view as to whether the Coast Guard had for any  
 (25) reason taken over the spill in 1989 could have done a better



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- (1) job than Exxon did?  
 (2) A In my mind there s no way that the federal government  
 (3) could – could have come even close to doing the job that  
 (4) either Exxon or anybody else could have done out there and  
 the  
 (5) reason is that once we federalize then we go through the  
 (6) processes of ordering equipment and people and all and the  
 (7) government process at that time and still is to a great  
 (8) degree cumbersome and it would have taken time and  
 probably  
 (9) far more money than we had to spend – that we could spend the  
 (10) public s money on on a cleanup that massive  
 (11) You – we ve tried to – as long as the – the responsible  
 (12) party whoever it would be is acting in a responsible way –  
 (13) and we would monitor what they did then there s no reason to  
 (14) federalize absolutely no reason and that s how we do it  
 (15) today  
 (16) Q Now the memorandum itself is entitled NOAA  
 (17) recommendations for 1990 cleanup of the Exxon Valdez oil  
 (18) spill Did you specifically ask NOAA to make you a set of  
 (19) recommendations for the 1990 cleanup season?  
 (20) A I don t remember if I specifically asked or we decided  
 (21) amongst ourselves hey this would be a good idea if we did  
 (22) this I don t remember But I know I knew about it before it  
 (23) was started  
 (24) Q Now did NOAA provide you advice as to what standard you  
 (25) should adopt as to what clean means for the purposes of the

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- (1) spill?  
 (2) A I m getting confused whether it was NOAA or Coast Guard  
 (3) policy because Coast Guard has federal standards which I  
 (4) don t remember anymore but there s no question that NOAA  
 (5) provided me information about what – how to what degree we  
 (6) should clean the shoreline and essentially it was to clean it  
 (7) no – to – to ensure that we get a net environmental benefit  
 (8) out of it and where you get to a point except in an unusual  
 (9) circumstance where you re causing more harm than good in a  
 (10) cleanup then it s time to stop I think that was basically  
 (11) what we – what we – was the basic general rule that we used  
 (12) for the entire cleanup  
 (13) Q Okay I d like to mark now as Exhibit 45267 a memorandum  
 (14) dated April 28 1990 from Admiral Ciancaglini to Admirals Yost  
 (15) Lusk and Sipes  
 (16) Admiral did you prepare the two-page memorandum that s  
 (17) dated April 28 1990?  
 (18) A Yes I did  
 (19) Q And did you send it to Admirals Yost Lusk and Sipes on or  
 (20) about April 28 1990?  
 (21) A Yes I did  
 (22) Q And is this another of your periodic reports to  
 (23) headquarters that you prepared personally?  
 (24) A Yes it is  
 (25) Q In the first paragraph you report progress on approving

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- (1) the paperwork for various segments You indicate that 50  
 (2) percent to that point involved no treatment Was that a  
 (3) surprise to you?  
 (4) A I would say that it wasn t a big surprise but it was a  
 (5) surprising result of the anticipation that we had throughout  
 (6) the winter about how – how much the wave action would play in  
 (7) trying to clean the shorelines So I – if I remember  
 (8) correctly we were – the amount of cleansing was greater than  
 (9) what we ex – what I expected and I was very pleased about it  
 (10) We knew there would be a cleansing action but to what degree  
 (11) and I think it was more than what any of us realized really  
 (12) None of us had ever tracked that before no one had ever done  
 (13) that  
 (14) Q So based upon your review of the Amoco Cadiz and other  
 (15) sites you expected a good deal of natural cleansing?  
 (16) A No question Especially in the high energy areas But the  
 (17) degree of it was an enormous amount for Mother Nature and so  
 I  
 (18) was happy to hear that you know and waiting for other results  
 (19) as they did the shoreline surveys  
 (20) Q Admiral let me show you pre-designated Exhibit 132 which  
 (21) is a letter from you to the Chugach Alaska Corporation dated 14  
 (22) September 1990 and we ll mark this as 45286 Did you send  
 (23) Exhibit 45286 to the Chugach Alaska Corporation on or about  
 14  
 (24) September 1990?  
 (25) A Yes I did

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- (1) Q And your signature appears in the signature block?  
 (2) A Yes it does  
 (3) Q Did you send letters similar to this to other agencies and  
 (4) communities affected by the spill at the end of the 1990  
 (5) season?  
 (6) A Yes I did  
 (7) Q And was this basically your report to each of those  
 (8) organizations on where you saw the cleanup process had  
 moved by  
 (9) the end of 1990 cleanup season?  
 (10) A Yes that was the purpose of the letter  
 (11) Q In the first sentence of Exhibit 45286 you say on  
 (12) September 15 we ll draw to an end a very successful cleanup  
 (13) season thanks to the cumulative efforts of the State of  
 (14) Alaska Exxon federal and local agencies native Alaskans  
 (15) local communities and various organizations  
 (16) Why did you believe that 1990 had been a success?  
 (17) A A success because we accomplished all that we set out to  
 (18) do based on our – our general plan the work plan the  
 (19) shoreline assessments and the – and the amount of cleanup  
 (20) that – that we did We did everything we – that could  
 (21) possibly be done in that year That s why it was successful  
 (22) The shorelines were treated to the degree that we wanted them  
 (23) to be treated at the end of that particular season Not  
 (24) necessarily to the fullest degree that we felt it needed but  
 (25) to the degree that we could possibly do that year and we knew

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- (1) we were coming back So we - we did everything we set out to
- (2) do It was very successful
- (3) Q Did Exxon meet the commitments it made for the 1990 cleanup
- (4) season?
- (5) A Yes
- (6) Q In the second paragraph you note that there have been
- (7) substantial changes in the beach in the 18 months since the
- (8) spill and then you note there is no reason why we can't expect
- (9) similar improvement this coming winter Did the beaches
- (10) improve over the winter of 1990/91?
- (11) A Yes they did
- (12) Q And how was that determined?
- (13) A That was determined by the surveys that were done if I
- (14) remember correctly in 1990 compared to the surveys conducted
- (15) in the spring assessment of 90 - let me backtrack It was
- (16) based on the condition of the shorelines in 1990 as compared to
- (17) the site surveys or the shoreline surveys that were conducted
- (18) in 91
- (19) Q I believe you told me as we looked at the plans for 1990
- (20) that you wanted by August 15th to start in place a process of
- (21) surveying?
- (22) A Yes
- (23) Q And did that take place after August 15th?
- (24) A To the best of my knowledge yes
- (25) Q And did that then serve as a baseline for assessing what

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- (1) Mother Nature did over the winter?
- (2) A Yes As the previous years using the ADEC State of Alaska
- (3) base that we used to compare to the 1990 spring assessment
- (4) Q What was the status of the beaches as you began the cleanup
- (5) season for 1991?
- (6) A The status - more cleanup was required but to a far
- (7) lesser degree than in 19 - 1990 that we left the shorelines
- (8) in good condition in 1990 Mother Nature the storms seas
- (9) wind conditions snow ice whatever had its effect on the
- (10) shorelines and provided further cleansing action And so when
- (11) we came back in 91 we had - I guess we pretty much estimated
- (12) exactly what they would look like and so we - the shorelines
- (13) I felt were in good shape in 91 but still required a full
- (14) season cleanup but with a reduced crew than what we had in
- (15) 90 - in 1990
- (16) MR CLOUGH Plaintiffs Exhibit 3925 the 14
- (17) September 1990 letter from the admiral to Chugach Alaska
- (18) Corporation he gave the testimony about
- (19) (Videotape paused)
- (20) (Videotape Played)
- (21) Q But when you came to the end of the 1991 season what was
- (22) your assessment of what kind of a cleanup season you had had?
- (23) A Again highly successful We set out to - we accomplished
- (24) what we set out to do I had hoped that we would be finished
- (25) but - but we knew we would have to come back in 92 but we

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- (1) knew also it would be a short time because we knew the winter
- (2) action would work on what we accomplished or the condition of
- (3) the shorelines that we left them in in 91 and so we knew that
- (4) what we would do in 92 would be very minimal and it was
- (5) Q Did you expect that the winter storms from 1991 1992 would
- (6) further reduce whatever oiled remained on the beaches?
- (7) A Yes
- (8) Q And was that expectation born out by surveys conducted in
- (9) spring 92?
- (10) A Yes we did another survey in the spring of 92
- (11) Q And was a work plan drawn up for 1992?
- (12) A Yes it was
- (13) Q And how did the scope of the 92 activity compare to the
- (14) previous year's work?
- (15) A Significantly reduced
- (16) Q And in terms of number of beaches to be treated how
- (17) substantial was the reduction?
- (18) A I don't remember the exact numbers but it was
- (19) substantial If I had a document in front of me you - it was
- (20) substantial Which meant the - the - the manner in which we
- (21) planned for the previous seasons and what we - the type of
- (22) cleanups that we did on those shorelines that it was right it
- (23) was proper because you kept on seeing an exponential
- (24) improvement on those shorelines but again the important - an
- (25) important cleanup method was Mother Nature with those storms

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- (1) really helped us
- (2) Q Now did there come a time in the summer of 1992 when you
- (3) concluded that the cleanup activity should be terminated?
- (4) A Yes
- (5) Q How did you make that judgment?
- (6) A I made the judgment on the fact that we had reached a
- (7) point as I said previously that any further cleanup on any of
- (8) the shorelines would cause more harm than good We had met
- (9) the
- (9) federal standards and therefore from a federal point of view
- (10) that's all I can address the shorelines were deemed to be
- (11) clean
- (12) In addition to that we had worked closely with the State
- (13) of Alaska to find out if they had any shorelines that they felt
- (14) did not meet the standard There were a few We went and
- (15) worked them off and so when we came off the shoreline we were
- (16) all in agreement that the - that the cleanup was complete
- (17) both from a federal and a state perspective
- (18) Q In coming to the conclusion that the cleanup efforts could
- (19) appropriately be terminated did you have the advice of your
- (20) scientific advisors at NOAA?
- (21) A They were always there I don't remember them saying yes
- (22) we recommend you terminate no It was just conversation like
- (23) we're having now We worked closely day in and day out
- (24) together and we had meetings throughout the week you know
- (25) and you knew when the time came that hey we're for instance a

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- (1) month in advance well we have about a hundred and two  
 (2) shorelines to go it looks like we'll probably finish on  
 (3) schedule now  
 (4) We're knowing that when we finish that that'll be it We  
 (5) worked to completion in '92 And we knew that we would  
 (6) complete in '92 based on the condition of the survey in '92  
 (7) We knew that We just put enough people on the shorelines to  
 (8) complete I think I directed Exxon to complete by no later  
 (9) than 15 June I could be wrong on that date and we did But  
 (10) yet it was something you knew  
 (11) Q So your decision came out of a process of ongoing  
 (12) consultations with your advisors?  
 (13) A And every - and with the State of Alaska and with Exxon  
 (14) That is correct And with other parties the land managers  
 (15) that's correct  
 (16) Q Were you satisfied when you determined that clean-up  
 (17) activities could appropriately be terminated that you had met  
 (18) all reasonable concerns by affected parties?  
 (19) A Absolutely because I would not have terminated the  
 (20) operation unless we met all concerns as far as I concerned  
 (21) Unless it was unreasonable and the State of Alaska nor anyone  
 (22) else in my mind was unreasonable with the exception of  
 (23) Chenega Village Corporation and I know exactly where they're  
 (24) coming from They wanted every drop of oil off the shorelines  
 (25) and we just could not do that

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- (1) Q Why couldn't you do that?  
 (2) A It's impossible It's an impossibility to remove every -  
 (3) by every drop I mean every - every stain every - every  
 (4) little - every little indication of a petroleum product on all  
 (5) shorelines It's something that you just can't do It would  
 (6) take you years and years and years enormous amounts of  
 (7) money  
 (8) to do for what environmental benefit gain? In my mind very  
 (9) very little  
 (10) Those shorelines relatively speaking were - were clean  
 (11) and with time Mother Nature again would cleanse them over  
 (12) here We saw no problem with them with wildlife walking the  
 (13) shoreline Saw no problems with picking of any of the berries  
 (14) on the shorelines  
 (15) From our perspective we had a health advisory team  
 (16) comprised of State of Alaska the federal government on the  
 (17) direction of Dr Nighswander - I mispronounced the name I  
 (18) know I always did mispronounce his name I'm sorry - but he  
 (19) and his group worked for a couple of years I purposely funded  
 (20) them to assure that in an effort to alleviate the fears of the  
 (21) native Alaskans that their shorelines were clean to go and -  
 (22) and to kill the deer and the bear and eat the berries there  
 (23) But the elders in some of the elders' mind and maybe all  
 (24) their minds that they felt that still it wasn't right to do  
 (25) that and so therefore the elders influenced the decision the  
 (26) actions of the remaining people in the community

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- (1) Q Based on the input from your scientific advisors were you  
 (2) satisfied that the cleanup had addressed any health concerns  
 (3) that - that were associated with subsistence living on the  
 (4) part of the natives?  
 (5) A As far as I was concerned yes And far as I was  
 (6) concerned the group that I just referred to they confirmed  
 (7) in my mind our actions  
 (8) Q Did you send Exhibit 45288 to Mr Harrison on June 11  
 (9) 1992?  
 (10) A Yes I did  
 (11) Q And your signature appears in the signature block?  
 (12) A Yes it does  
 (13) Q With this letter did you advise Mr Harrison that in your  
 (14) view clean up operations should be terminated?  
 (15) A Yes I did  
 (16) Q In bringing the clean up operations to a close were you  
 (17) satisfied with - with the performance of Exxon that you had  
 (18) overseen for almost four years four summers?  
 (19) A Yes I was It was - and I'll add onto that not only yes  
 (20) but it was totally professional and superb You had  
 (21) professionals on scene You had operators You didn't have -  
 (22) from the State of Alaska point of view there weren't  
 (23) politicians in there there weren't managers in there These  
 (24) were operators These were people who - who were trained in  
 (25) specific areas to do specific jobs They knew what they were

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- (1) doing They were very very good at what they did  
 (2) (Videotape paused)  
 (3) MR CLOUGH Your Honor we've got about ten minutes  
 (4) remaining  
 (5) THE COURT Finish it  
 (6) MR CLOUGH Okay Joel we don't need to introduce  
 (7) this next exhibit We can do that with Mr Harrison tomorrow  
 (8) Just go ahead with the video  
 (9) (Videotape Played)  
 (10) Q As of June of 1982 - 1992 when it was determined to cease  
 (11) clean-up operations were there shorelines which remained  
 (12) contaminated by oil spilled by the Exxon Valdez?  
 (13) A Well it's - your definition of contamination there were  
 (14) shorelines that had oil still on them but as I said in my  
 (15) previous testimony you couldn't remove every bit of oil on  
 (16) those shorelines To the best of our knowledge there were no  
 (17) large concentrations of shoreline - of oil anywhere on any of  
 (18) the shorelines in Prince William Sound Kenai Kodiak and the  
 (19) Katmai areas We took care of that  
 (20) Q So your understanding is that there did remain oil on the  
 (21) surface of some of the shorelines but not in heavy or marked  
 (22) concentration?  
 (23) A If there were - if there was oil remaining on the  
 (24) shoreline it was extremely light and as far as we were  
 (25) concerned posed no harm to the public or the environment If

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- (1) it did then we would not have released that shoreline We  
 (2) would have continued working on it  
 (3) Q And again as of June of 1992 was there oil remaining  
 (4) underneath the surface of shorelines? For example  
 underneath  
 (5) the surface of beaches on some - in some areas?  
 (6) A There was some subsurface oil in - in some locations in  
 (7) Prince William Sound yes there was  
 (8) Q And -  
 (9) A But again in our mind it posed no problem If it did we  
 (10) would have affected the cleanup on it  
 (11) Q In June of 1992 did there remain oil within the waters of  
 (12) Prince William Sound?  
 (13) A To the best of my knowledge no There was no leaching  
 (14) caused by the Exxon Valdez spill  
 (15) Q What do you mean by leaching?  
 (16) A Oh I meant that the movement of oil from a shoreline to  
 (17) the water That's the only way the oil would be on the water  
 (18) if there - if it was - we called it leaching from a  
 (19) shoreline and we took care of all leaching or migration oil  
 (20) migration problems before we departed scene Where the  
 problem  
 (21) was - never mind  
 (22) Q In your opinion have the areas which were impacted by oil  
 (23) from the Exxon Valdez been restored to their pre-spill  
 (24) condition?  
 (25) A No they were not

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- (1) Q And in what ways do they differ from the pre spill state?  
 (2) A Because they are very very close to their pre-spill  
 (3) condition and the way they differ is the small amount of oil  
 (4) that remains in very very scattered remote locations  
 (5) throughout Prince William Sound the Kenai Katmai and Kodiak  
 (6) areas There's very very little oil There's trace of oil  
 (7) out there now And with time Mother Nature as it has done in  
 (8) other spills it will be gone  
 (9) Q Are there shoreline segments or areas of - whose physical  
 (10) condition has been altered as a result of clean up operations  
 (11) from their pre-spill state?  
 (12) A They were originally altered to affect a cleanup but  
 (13) restored back to its original condition as best as we possibly  
 (14) could do and there are photographs on any shorelines that are  
 (15) in question that we have We have photographs I believe from  
 (16) just about every shoreline we worked  
 (17) For instance significant - significant clean-up work  
 (18) intrusive work was done on Smith Island on - on LaTouche  
 (19) Island on Knight Island and others like that but yet you go  
 (20) and take a look at them they look like they were before the  
 (21) spill occurred from a contour point of view Not only that  
 (22) but you - you put it back next big storm that comes along and  
 (23) it's already happened Mother Nature puts it back the way it  
 (24) should be  
 (25) It - by the way those shorelines change in the winter and

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- (1) in the summer Those storms make it happen In the winter  
 (2) they're rather steep the shorelines because of the heavy  
 (3) heavy surf pounding them and rolling things around big  
 (4) boulders and all In the summertime less storm action  
 (5) they're more shallow than in the wintertime It's a very  
 (6) interesting phenomena  
 (7) Where I foresaw problems and that could be for a long  
 (8) time are the low energy shorelines where you had just a rise  
 (9) and fall of tide with very little mixing action caused by the  
 (10) waves and we had areas like that in Prince William Sound and  
 (11) elsewhere  
 (12) Q I'm not - I'm not sure we've met our minds have met on  
 (13) this question  
 (14) A You want a number of years?  
 (15) Q Yes  
 (16) A I can't give you a number of years but based on Amoco  
 (17) Cadiz and based on the Motor Vessel Arrow in a few years  
 (18) those high energy shorelines and all were cleansed of oil The  
 (19) only place they had problems was in the low energy areas and  
 it  
 (20) still existed in 20 years and 10 years afterwards In those two  
 (21) cases respectfully  
 (22) But in most of the area in Prince William Sound if you  
 (23) want to lock yourself into that particular area are either  
 (24) high energy or moderate energy areas I don't foresee a  
 (25) problem except in a couple isolated places in - in Prince

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- (1) William Sound where you would possibly have a problem and I  
 (2) think Knight Island 135 B if that is the one that had the  
 (3) little marsh area in its bog area I should say that one -  
 (4) that one there would pose a problem but that was under the  
 (5) auspices of the Chugach - Chugach Corporation and with our  
 (6) cooperation we brought in a - an expert from France to  
 (7) propose a course of action for them in that particular  
 (8) sensitive area very sensitive area there In fact it was  
 (9) cleaned with people kneeling on plywood large slabs of  
 plywood  
 (10) so we would impart very little handprints or footprints onto  
 (11) the boggy area  
 (12) That's how - that's how careful everybody was And the  
 (13) cleanup was in that particular area very sensitive area was  
 (14) affected to the satisfaction of the Chugach Corporation  
 (15) Doesn't mean it was cleaned to their satisfaction but it meant  
 (16) that everything that possibly could be done based on national  
 (17) and international experts was done to that particular area  
 (18) MR CLOUGH That concludes Admiral Ciancaglini's  
 (19) testimony  
 (20) THE COURT Thanks I'll let you go without the usual  
 (21) speech You know what I'll say so I'll see you tomorrow at  
 (22) 8 30  
 (23) (Jury out at 1 37 p m)  
 (24) MR CLOUGH Your Honor while we're getting the  
 (25) lights I'd like to move into evidence defendant's exhibit

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- (1) 2324 2325 and 3925 the three documents that the admiral testified to and were put up on the Elmo
- (2) MR PETUMENOS Have these been already thrashed out with the master or are these still objected to? I d like to reserve until I get a chance to -
- (3) THE COURT All right It - okay I m going to recess
- (4) MR DIAMOND I have exhibits Do you want to take care of that now or later?
- (5) THE CLERK Please rise This court stands in recess
- (6) MR OPPENHEIMER Your Honor I m sorry we do have - we do have matters for tomorrow s witnesses I misunderstood the Court s statements We have exhibits and pursuing our practice of heads up we have Pat Carlson exhibits He s theoretically on tomorrow
- (7) THE COURT What do we have to resolve?
- (8) MR OPPENHEIMER Well Your Honor we have a series of exhibits as to which the only conceivable testimony is expert testimony He s a non designated expert and there s no 1006 backup In any event we have -
- (9) THE COURT I ll see you in chambers Bring the exhibits
- (10) THE CLERK Off record
- (11) (Recess at 1 38 p m )

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- (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 accurate transcription of my shorthand notes of all requested matters held in the foregoing captioned case
- (8) Further that the transcript was prepared by me or under my direction
- (9) DATED this day
- (10) of 1994
- (11) JOY S BRAUER RPR
- (12) Notary Public for Alaska
- (13) My Commission Expires 5-10-97

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## Look-See Concordance Report

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UNIQUE WORDS 2,928  
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TOTAL WORDS IN FILE  
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## SINGLE FILE CONCORDANCE

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## Vol 50 7913

(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 September 2 1994  
                       ) 8 30 a m  
 (6) )  
 (8) VOLUME 50 Pages 7913 through 8092  
 (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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 (25) Anchorage Alaska 99503  
       907/277 4222

## Vol 50 7915

(1) PROCEEDINGS  
 (2) (Jury in at 8 35 a m )  
 (3) (Call to Order of the Court)  
 (4) MR CLOUGH Good morning Your Honor  
 (5) THE COURT Yes counsel  
 (6) MR CLOUGH With your permission Your Honor it s my  
 (7) pleasure to be able to call as Exxon s final witness in this  
 (8) case on behalf of Exxon Corporation Mr Otto Harrison  
 (9) THE COURT Now I d like you to know this is not the  
 (10) last witness in the case because there is such a thing as  
 (11) rebuttal so don t - don t think this is the last day  
 (12) MR CLOUGH I noticed a general leaning towards the  
 (13) door there  
 (14) MR PETUMENOS Did you talk to the jury yet about how  
 (15) Thanksgiving s going to be handled?  
 (16) MR CLOUGH I thought you were on the Halloween  
 (17) committee  
 (18) THE CLERK Raise your right hand please  
 (19) (The Witness Is Sworn)  
 (20) THE CLERK Please be seated Sir for the record  
 (21) can you please state your full name?  
 (22) A My name is Otto R Harrison H a r r i s o n  
 (23) THE CLERK And your occupation?  
 (24) A President of Exxon Pipeline Company  
 (25) THE CLERK Thank you

## Vol 50 7914

(1) FOR THE DEFENDANTS  
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       Registered Professional Reporter  
 (10) Midnight Sun Court Reporters  
       2550 Denali Street Suite 1505  
 (11) Anchorage Alaska 99503  
       907/258 7100

## Vol 50 7916

(1) DIRECT EXAMINATION OF OTTO R. HARRISON  
 (2) BY MR CLOUGH  
 (3) Q Good morning Mr Harrison sir  
 (4) A Good morning  
 (5) Q Mr Harrison you ve been a witness here in the courtroom  
 (6) throughout most but not all of the trial This is your  
 (7) opportunity to tell the jury a little bit about yourself  
 (8) A I was born in Texas lived my early life the Texas I  
 (9) attended a couple of years of a military academy went into the  
 (10) Army for two years as an enlisted man spent most of that in  
 (11) Germany Came back and finished college at the University of  
 (12) Texas in Austin I graduated with a degree in petroleum  
 (13) engineering Went to work for a predecessor of Exxon  
 (14) Corporation at that time In 1959  
 (15) I also in 1959 married a delightful young girl from  
 (16) Austin and we re celebrating our 35th wedding anniversary this  
 (17) month We have four children three grandchildren and a fourth  
 (18) grandchild on the way  
 (19) MR CLOUGH Your Honor because Mr Harrison is our  
 (20) final witness I have received a special indulgence of  
 (21) Plaintiffs counsel in advance for this next exhibit  
 (22) BY MR CLOUGH  
 (23) Q Mr Harrison could you please identify for this jury  
 (24) what s been marked for identification as DX99999?  
 (25) A That s a photograph at Easter of my granddaughter

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- (1) Jennifer when she was 16 months old  
 (2) MR CLOUGH It s the nicest looking thing we had to  
 (3) put up there today Your Honor We can take that down now  
 (4) BY MR CLOUGH  
 (5) Q How long have you been employed with Exxon Corporation  
 (6) sir?  
 (7) A 35 years  
 (8) Q And can you tell the jury generally about your career with  
 (9) Exxon?  
 (10) A I started off as an engineer My wife and I probably moved  
 (11) some 28 times or so during that period of time but we ve been  
 (12) fortunate to work in lots of interesting places and lots of  
 (13) interesting projects We were involved when computer -  
 (14) computerization first came about and we were involved in  
 (15) automating a good part of our production operations I was  
 (16) involved in the first deep-water underwater 2 000 feet or  
 (17) plus technology and the development of that in the Gulf of  
 (18) Mexico I spent a couple of years in Libya in ESSO Libya  
 (19) which is an affiliate of Exxon Corporation where we have a  
 (20) large or had at that time a large oil and gas operation and  
 (21) the first commercial L&G plant in the world I was one of the  
 (22) last three people we had out of Libya  
 (23) I went to work in Australia in about 1982 and worked there  
 (24) until I came to Valdez in about 19- - in April of 1989 and in  
 (25) September of 1992 I became president of Exxon Pipeline

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- (1) Company  
 (2) Q Mr Harrison where were you on March 24th 1989 the day  
 (3) the spill happened?  
 (4) A In Australia The Easter holiday is a very big school  
 (5) holiday It s at the end of the school season so their  
 (6) seasons are reversed so it s at the end of summer and we were  
 (7) at Easter camp There was a church group had a camp each  
 year  
 (8) during that period of time and my wife and I taught  
 (9) water skiing so at that time we were at a place teaching  
 (10) water skiing There were no newspapers there was no radio  
 (11) there was no TV We were in a location that the Aussies call  
 (12) the Outback That s where I was that day  
 (13) Q How and when did you first hear of the Exxon Valdez spill?  
 (14) A I first heard of the spill probably four or five days  
 (15) later after we returned from that holiday came into the  
 (16) office and picked up the information that was off of the office  
 (17) bulletins I may have seen something in the paper that  
 (18) morning but it was on my return to work  
 (19) Q Now how was it that you eventually came to Valdez Alaska  
 (20) to work on the spill effort?  
 (21) A I was called early one morning by a gentleman by the name  
 (22) of Sid Reso who was then president of Exxon Company  
 (23) international and Sid called me at about five or 5 30 in the  
 (24) morning so I m not sure I remember the first 10 or 15 minutes  
 (25) of the conversation but he did describe to me what was going

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- (1) on as a result in response of the oil spill that it was a big  
 (2) job that it would take awhile to get the job done that we  
 (3) wanted to be sure the job got done right and we did whatever  
 (4) was needed to do it right He asked me if I would come over  
 (5) and manage that job and I agreed and came to Valdez  
 (6) Q Did you subsequently have a conversation with the CEO or  
 (7) chief executive officer of all of Exxon Corporation?  
 (8) A Yes I did Larry Rawl was CEO of Exxon Corporation at  
 (9) that time After I was in Valdez probably three or four days  
 (10) and I don t remember the exact day I did talk to Larry on a  
 (11) telephone call and he reiterated several things He  
 (12) reiterated the importance of the job the importance of doing  
 (13) the job right He also assured me that whatever authority he  
 (14) had as CEO of Exxon that he was giving to me giving all the  
 (15) authority that he could from that position that I had  
 (16) unlimited monetary authority to pursue the cleanup effort and  
 (17) that if anybody in Exxon got in my way just to let him know  
 (18) Q When did you arrive in Valdez sir?  
 (19) A April the 5th of 1989  
 (20) Q And what did you do when you got there?  
 (21) A I spent the first day in briefing sessions getting up to  
 (22) date about what was going on The second day I spent most of  
 (23) the day in overflight of Prince William Sound area and around  
 (24) into the Gulf of Alaska primarily taking a look at where the  
 (25) oil was on the water at that time As you know the

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- (1) corporation had expressed public apology for the spill and -  
 (2) and we sincerely regret the spill ever occurred In looking at  
 (3) the amount of oil that was on the water at that time it was  
 (4) clear to me that it was a major incident We had a big job to  
 (5) be done and - and we needed to get after it  
 (6) Q I d like to Your Honor put up here on the easel our  
 (7) billboard map of Prince William Sound And Mr Harrison if  
 (8) you could come down I d like you to show the jury where you  
 (9) went - was that your first real overflight over Prince William  
 (10) Sound?  
 (11) A Yes it was  
 (12) Q First of many?  
 (13) A First of many  
 (14) Q Using the billboard map Defendants Exhibit 13198 - have  
 (15) I tied up your cord there?  
 (16) A I think you have tied up my cord  
 (17) Q Mr Harrison using the map here could you show the jury  
 (18) generally where you went on that first overflight and describe  
 (19) the situation as you saw it  
 (20) A Somewhere -  
 (21) Q This is April 5th Is that correct sir?  
 (22) A This is April the 6th of 1989 If I can do this without  
 (23) tripping over the wire we of course - we of course flew out  
 (24) of Valdez We covered the arm went out to where the tanker  
 (25) was of course there was no oil in this area We then did fly

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- (1) on down through the south We looked at Naked Island here  
We
- (2) went over the main route of where the oil occurred which was  
(3) moving out through this area right here  
(4) We covered the edge of Montague We looked at Smith we  
(5) looked at Seal Island Applegate Rocks which are in here  
(6) Green Island we covered the area of Knight Island went down  
(7) of course and looked at LaTouche and Evans Island down  
(8) overflight of Sawmill Bay and Chenega Village back in through  
(9) these passages right here We came up here on the backside  
of  
(10) Knight Island  
(11) This was before we had really identified that a later storm  
(12) brought some oil over here into Lone Island and Perry Island  
(13) but we did cover this area because there s an oyster farm up  
(14) here at Perry Island  
(15) And we looked back in this - this area right here because  
(16) there s some other fisheries hatcheries that are of importance  
(17) in that area and we pretty well spent the day covering the  
(18) area  
(19) We also as we got down here went on out into the Gulf of  
(20) Alaska The oil at that time had not - was not moving very  
(21) far down coast it tended to be moving out and accumulating at  
(22) that particular point  
(23) Q You said in addition to the overflight you received some  
(24) briefings back in Valdez during this period?  
(25) A Yes sir

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- (1) Q What was - describe for the jury what the overall  
(2) situation was as of this time  
(3) A There were three main efforts going on Of course there  
(4) was the - the lightering effort that was going on on the  
(5) vessel That work was being wrapped up There was booming  
of  
(6) critical resources such as down at Sawmill Bay and the other  
(7) hatcheries that were going on and there were skimming  
(8) operations that were occurring throughout Prince William  
(9) Sound  
(10) Q Had any focus begun on the long term shoreline cleanup  
(11) effort yet at that time?  
(12) A The shoreline cleanup effort was not under - underway at  
(13) that time There was some evaluation going on but in all  
(14) cases oil was still impacting the shoreline and had not  
(15) contacted the shoreline in a number of places  
(16) Q Upon your arrival in Valdez sir as manager of this  
(17) operation what did you do to get that cleanup effort started?  
(18) A We went around and started off to be sure that we had clear  
(19) priorities and the priorities that we were to establish of  
(20) course were to finish the lightering take care of the vessel  
(21) because the vessel still had a million barrels on it We  
(22) needed to do that safely and we did do that safely We didn t  
(23) spill any oil or get anybody hurt in that process  
(24) We needed to boom the critical resources such as  
(25) hatcheries and streams that needed to be taken care of We

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- (1) needed to get the free oil off the water We then needed to  
(2) move in to the cleanup phase on the shorelines and we also  
(3) needed to listen to and work with and respond to the  
(4) communities the Native corporations the Native villages and  
(5) other public interest groups and the fishermen that were in the  
(6) area and above all we needed to have a safe operation  
(7) Q Now at the time that you arrived in Valdez what were some  
(8) of the government organizations that were already present  
(9) on scene working on the spill response in this - the exhibit  
(10) we re going to show the jury here is DX6343 on the Barco here?  
(11) A When I arrived on scene we had a federal on scene  
(12) coordinator and of course you heard some of that from the  
(13) testimony of the two admirals yesterday but the federal  
(14) on scene coordinator in this case who is the U S Coast Guard  
(15) and in 1989 was primarily Admiral Robbins During the summer  
(16) cleanup phase  
(17) They were responsible for making the calls and for  
(18) coordinating the effort of the other federal agencies that had  
(19) a responsibility or input to the process In addition there  
(20) was a state on scene coordinator The state on scene  
(21) coordinator was the commissioner of the Department of  
(22) Environmental Conservation that was Dennis Kelso and  
Dennis  
(23) Kelso had the responsibility of coordinating and handling the  
(24) input from the other state agencies that are shown here for  
(25) input

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- (1) In addition we had input from a lot of other public bodies  
(2) or interested parties  
(3) Q When you say interested parties other interested parties  
(4) what other types of interested parties were present and  
(5) on scene in Valdez at this time other than governmental  
(6) entities?  
(7) A Fishermen and fishermen groups There were environmental  
(8) groups there that were present There were a number of  
(9) community groups that were represented there were  
(10) representatives from - from time to time from the villages or  
(11) the corporations the Native corporations  
(12) Q Now during the month of April did the commandant of the  
(13) Coast Guard Paul Yost come up to Valdez?  
(14) A Yes sir  
(15) Q And did you meet with him at that time?  
(16) A Yes sir  
(17) Q And if we could have the next exhibit please which I  
(18) believe is 14059 2 is that the commandant you re meeting with  
(19) there?  
(20) A That is Admiral Paul Yost who is commandant of the Coast  
(21) Guard at that time  
(22) Q And what did you work on with Admiral Yost in April of  
(23) 1989?  
(24) A The primary thing we worked on was the first general plan  
(25) for shoreline cleanup The way the process worked and again

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- (1) you heard a little bit of that described yesterday is with  
 (2) input from a lot of people and we had a lot of good input from  
 (3) the Native organizations and from fishermen and from other  
 (4) interested parties  
 (5) We developed a general plan for shoreline cleanup that we  
 (6) submitted to Admiral Yost as well as the other government  
 (7) bodies on April the 15th of 1989  
 (8) Q Now Admiral Yost I believe in his testimony said he was  
 (9) up there for about five or six days that first stint Was he  
 (10) replaced by Admiral Robbins as federal on scene coordinator?  
 (11) A Admiral Clyde Robbins yes sir  
 (12) Q And Mr Harrison did Admiral Robbins as FOSC establish  
 (13) an  
 (14) organizational structure for the spill effort?  
 (15) A Yes he did  
 (16) Q If we could have the next exhibit please DX2293 Can you  
 (17) blow that one up a little bit for us Joel if possible?  
 (18) Can you identify this document tell us what it says or  
 (19) what the admiral was doing?  
 (20) A Admiral Robbins felt there was a need to define for all  
 (21) parties involved to lay out a procedure of how information  
 (22) would flow and both Admiral Robbins and his successor  
 (23) Admiral  
 (24) Ciancaglini were very interested that they got input from all  
 (25) parties and that there was a structure for that to happen and  
 (26) that there was also a structure that allowed decisions to be  
 (27) made And so this letter was his cover letter on that

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- (1) organization chart to set up that structure  
 (2) Q And counsel that was DX2293  
 (3) And was this organizational structure that was used to  
 (4) implement that first general plan that you were talking about?  
 (5) A Yes sir  
 (6) Q Now we have another exhibit here I'd like to put up on the  
 (7) easel for you Mr Harrison This is hope I don't hit you  
 (8) with it - DX5127  
 (9) Using DX5127 can you explain to the jury how the cleanup  
 (10) planning and implementation process worked?  
 (11) A The FOSC here of course is the federal on scene coordinator  
 (12) for the U S Coast Guard These as we showed you on the  
 (13) other  
 (14) chart are all of the various federal agencies that had input  
 (15) to that chart to the decisions Here are the state agencies  
 (16) that had input and here are the outside groups from which he  
 (17) took input  
 (18) Now it didn't flow quite the way it was on this chart  
 (19) because there was a continuous flow between groups There  
 (20) was  
 (21) a flow that would occur from the state agencies and the federal  
 (22) agencies There were other committees that were meeting  
 (23) There was direct flow from this group into these other two  
 (24) groups We were discussing with outside parties a number of -  
 (25) number of things at the same time so there was kind of an  
 (26) almost ongoing dialogue but once the official plan was  
 (27) submitted it went to the FOSC He then sent it out to all

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- (1) these groups for comment and then would come back and then  
 (2) give his comments and when we integrated his comments then  
 (3) approved the plan  
 (4) Q I see NOAA there under the federal agencies Did they have  
 (5) a special role in this process?  
 (6) A The National Oceanographic Atmospheric Administration are  
 (7) the technical advisors for the U S Coast Guard in oil spills  
 (8) and they have a group of people in NOAA who responds to oil  
 (9) spills all over the United States and actually all over the  
 (10) world and these - these gentlemen and these ladies have a lot  
 (11) of expertise in that area  
 (12) Q Did the Coast Guard bring any of its own special experts up  
 (13) to work on this effort?  
 (14) A Yes the Coast Guard has a number of strike teams and  
 (15) those strike teams have some immediate response capability  
 (16) and  
 (17) they made that strike team capability available in Prince  
 (18) William Sound  
 (19) Q I'm take this one down - actually we'll leave that up  
 (20) there for a second I'd like to put up what's been marked  
 (21) previously as Defendants Exhibit 7020AA I'd like to ask you  
 (22) a couple questions now  
 (23) Once that general plan was approved - the one you were  
 (24) talking about all right - did that authorize Exxon to go out  
 (25) and start cleaning beaches?  
 (26) A No it did not

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- (1) Q Why not?  
 (2) A Once you had the general plan laid out - and the general  
 (3) plan in it described a number of factors described weather  
 (4) some general environmental archaeological type  
 (5) considerations  
 (6) equipment and manpower buildup Then you had to come  
 (7) back on  
 (8) these shorelines -  
 (9) Q Let's bring that a little closer because that's a tough  
 (10) one to see I'll hold it over here  
 (11) A On these shorelines once they were surveyed they were  
 (12) divided up into what we call segments Some logical site  
 (13) beach kind of headland between headland would be called a  
 (14) segment  
 (15) And before we could work on a segment we had to submit a  
 (16) plan to the Coast Guard and that plan could only be submitted  
 (17) after it had been visited by an archaeologist a  
 (18) geomorphologist and intertidal biologist - and you've heard  
 (19) about all these kind of folks through the testimony  
 (20) They actually went to the location to determine if there  
 (21) were special archaeological considerations were there special  
 (22) environmental considerations what the degree of oiling was  
 (23) and from that they made a recommendation on what should  
 (24) be  
 (25) done to that site  
 (26) That in turn went back in and we turned that into a work  
 (27) plan which the admiral then submitted back to - for comment  
 (28) to several committee groups and for feedback and he  
 (29) eventually

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- (1) approved a segment by segment work plan for going out and  
 (2) picking any one of these particular sites as to what work would  
 (3) be done on it and there was a work plan defined for each of  
 (4) those sites  
 (5) Q Thank you Why don t you go ahead and retake your seat  
 (6) here I ll try and clear the view for the Court  
 (7) I d like if you would sir to describe Mr Harrison  
 (8) your role as manager of the Exxon operation and how you  
 (9) interacted with the federal on scene coordinator the state  
 (10) on scene coordinator and the other officials responding to the  
 (11) spill - and if we could have DX14059 3 please  
 (12) Maybe you could use this picture to sort of identify to the  
 (13) jury what we re looking at who we re looking at and how the  
 (14) process worked?  
 (15) A Well let me start off by saying during the early stages in  
 (16) 1989 we had a public forum a meeting that occurred every  
 (17) night from seven till 10 00 That would have a large number of  
 (18) people in it and you see at this table - you probably can t  
 (19) see it very well but I m down at the end of the table  
 (20) Next to me is Admiral Yost There s Dennis Kelso Admiral  
 (21) Robbins is there There s a large number of their staff  
 (22) We also had attending these meetings whoever wanted to be  
 (23) there Because they were held initially at the courthouse in  
 (24) Valdez and then later at - at other public halls so people had  
 (25) access to those

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- (1) As the year rolled on these meetings dropped down to about  
 (2) three a week still held in the evening but to be sure that we  
 (3) had on going dialogue we continued to be sure that Dennis  
 (4) Kelso Admiral Robbins and myself were communicating so we  
 (5) had  
 (6) ongoing communication sessions during the intervening days  
 (7) so  
 (8) we didn t drop the ball anywhere and so that we were  
 (9) responding as best we could to concerns that the people had at  
 (10) that time  
 (11) Q Now as manager of the Exxon operation was part of your  
 (12) responsibility to get out into the field yourself?  
 (13) A Yes sir  
 (14) Q And how often would you get out and where would you go?  
 (15) A I probably averaged getting out to the field locations out  
 (16) on beaches probably twice a week there would be some weeks  
 (17) that was more than that and in addition I also got out to  
 (18) visit a number of the communities and groups that were also  
 (19) very interested in what was going on in the process  
 (20) Q Now was it your responsibility or one of your  
 (21) responsibilities as manager of the Exxon effort to mobilize the  
 (22) human resources that were applied to the spill cleanup?  
 (23) A Yes sir  
 (24) Q And can you tell the jury what you did in that regard?  
 (25) A Well if I may I ll describe that in kind of three  
 (26) groups We brought in a group of Exxon people about 800  
 (27) people from all around the world Most of them came from the

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- (1) United States but because of the importance of this we had  
 (2) called on people from all over the world We brought in people  
 (3) from - in addition to myself from Australia Malaysia  
 (4) Singapore Norway Germany England Canada Columbia  
 (5) We were  
 (6) able to identify the best resources that we could find and  
 (7) bring them in to work on that project And I do have to say  
 (8) about these folks as with a lot of folks is they were very  
 (9) committed to - to do a good job They really worked harder  
 (10) than I could have asked them to do They really came in and  
 (11) did an outstanding job  
 (12) The next group of people that we brought in were a group of  
 (13) specialists We brought in specialties to fill in in those  
 (14) areas where we didn t have the specialists to do this These  
 (15) are people like archaeologists and geomorphologists and  
 (16) intertidal biologists also people like with OOPS O Brien Oil  
 (17) Pollution Service Jim O Brien himself and Fred Byars and his  
 (18) group of people  
 (19) We brought in those experts identifying again the best  
 (20) we could find with cleanup expertise from around the world to  
 (21) be in there helping us do this particular job  
 (22) In addition we hired people through our contractor here in  
 (23) Alaska we had a prime contractor we had a lot of contractors  
 (24) but we had a prime contractor -  
 (25) MR PETUMENOS I m sorry to interrupt Judge could  
 (26) we approach the bench?

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- (1) (Bench conference on the record)  
 (2) MR PETUMENOS I thought we had an understanding with  
 (3) respect to the orders and so forth that the relevance of the  
 (4) cleanup was the extent to which the beaches were mitigated  
 (5) that we weren t going to talk about the number of boots and the  
 (6) purchases and the amount of money spent We have a  
 (7) narrative  
 (8) response going on here and my objection probably in the first  
 (9) instance is the objection to narrative response I don t know  
 (10) what s coming I think counsel could tighten his questions  
 (11) And secondly so that I have an understanding of where the  
 (12) examination is going it s fair game obviously to have evidence  
 (13) of the cleanup and its effectiveness and how it mitigated the  
 (14) damages on the beaches but we shouldn t be going into how  
 (15) many  
 (16) people were hired from Alaska how many - how much benefit  
 (17) was  
 (18) given all that sort of stuff I thought we had that clear  
 (19) MR CLOUGH There s nothing on the economic In  
 (20) cross-examination the Plaintiffs other times have talked about  
 (21) thousands of people on the beaches 10 000 12 000 people  
 (22) hired  
 (23) for the cleanup effort I was going to ask him to identify the  
 (24) total number and how they re broken down between the water  
 (25) on  
 (26) the shore versus logistical  
 (27) I was also going to ask him not talk about anything  
 (28) further whether Exxon made an effort to acquire local  
 (29) knowledge and expertise in its work for -  
 (30) THE COURT That s not what he s doing counsel and

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- (1) Mr Petumenos is right You ask him specific questions I
- (2) don t want this to be a long drawn-out description -
- (3) MR CLOUGH He was almost at the end of it
- (4) THE COURT - only for the purpose of showing Exxon s
- (5) a good guy Get to it
- (6) MR CLOUGH It s not for the purpose of that Your
- (7) Honor
- (8) THE COURT Listen to me I want you on the issues
- (9) here
- (10) MR CLOUGH Do I have permission to ask those two
- (11) particular questions?
- (12) THE COURT You have permission to ask specific
- (13) questions that are relevant to the issues in this case That s
- (14) what you have permission to do Please do it
- (15) (Bench conference concluded)
- (16) BY MR CLOUGH
- (17) Q Mr Hamson what was the total number of people that
- (18) Exxon brought to work in the cleanup effort during 1989?
- (19) A Little over 11 000
- (20) Q Can you tell the jury how they broke down in their sort of
- (21) general responsibilities?
- (22) A Yes I can Basically we had about at a maximum of that
- (23) 11 000 we had about 7 000 on the water at the peak These
- (24) were people that were supporting the cleanup operations and
- (25) of that about 3500 of those worked on the shoreline So we had

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- (1) them to the shoreline to clean up rocks with white rags and
- (2) unfortunately that was a terrible public affairs related
- (3) decision
- (4) We made the decision not because that was a primary
- (5) cleanup technique we were just trying to constructively use
- (6) the people in the best way that we could during that time frame
- (7) until we got the equipment ready to start the washing
- (8) operation
- (9) Q Now I think the Plaintiffs have on a couple of occasions
- (10) shown the jury pictures Were you in the courtroom when
- (11) Plaintiffs showed the jury pictures of the rock wiping
- (12) operation?
- (13) A I don t recall that
- (14) Q Did that just occur very early in the cleanup effort?
- (15) A Very early in the cleanup effort as far as just one of
- (16) just wiping - wiping rocks with rags That s when that
- (17) occurred Of course in the later years the cleanup we did
- (18) have some manual cleanup that we were doing of residual oil
- (19) that tended to be wedged in between or under rocks
- (20) Q When did the real cleanup effort get going sir?
- (21) A It was before the end of April but in late April we got
- (22) the full fledged operation going
- (23) Q And what were your goals for the cleanup in 1989 - and if
- (24) I could have DX5170 here for the jury this is an exhibit
- (25) previously admitted on the shoreline surveys

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- (1) ground support operation we had a water support operation
- (2) and we had direct cleanup personnel
- (3) Q When did the shoreline cleanup actually get going?
- (4) A During the second half of April in 1989
- (5) Q And can you describe for the jury the start up of that
- (6) process?
- (7) A Yes In Valdez - we did most of our equipment preparation
- (8) in Valdez We were trying to get equipment ready and people
- (9) trained simultaneously and the equipment we were getting
- (10) ready
- (11) initially was landing craft because we were using landing craft
- (12) to get to the shoreline from the hotel ships that we had
- (13) because they were flat bottomed and they could carry
- (14) equipment
- (15) And on these landing craft we were putting pumps and hoses
- (16) and appropriate safety equipment And as we put those things
- (17) together in Valdez we actually got the people trained a little
- (18) bit before we got the equipment ready
- (19) Q And what did you do with the people during that period of
- (20) time?
- (21) A That - that was a question we debated did we turn the
- (22) people loose in Valdez which is a relatively small town or do
- (23) we try to do something constructive And so I made the
- (24) decision that we put them to - put them to work doing
- (25) something that was - was constructive and would tend to keep

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- (1) A Okay our goals of course were to be sure that we got out
- (2) and responded to those locations where the oil had impacted
- (3) the shoreline So we conducted surveys on each shoreline
- (4) segment
- (5) as we described and that came about through several
- (6) processes
- (7) One is we have a large number of overflights that were
- (8) conducted by us and by the federal government and by the
- (9) state
- (10) government to look at where oil might be on the shorelines
- (11) We had a lot of input from local people as to where currents
- (12) would most likely carry oil
- (13) In addition we sent - sent people out to every place that
- (14) we thought there might be oil based on all of that
- (15) information mapping and current data From this you can see
- (16) on this survey that while we surveyed about 3 000 miles or a
- (17) little over 3 000 miles in 1989 under that format a large
- (18) number of that had no oil on it that was surveyed because we
- (19) were trying to err on the side of being sure we looked at every
- (20) place that might possibly have oil As you know only about 15
- (21) percent or so of Prince William Sound had oil or about 85
- (22) percent of it did not
- (23) Of major concern to us are the little - in 1989 are those
- (24) that were on here as the blue mark that is the dark blue
- (25) mark Because that s heavy those are the heaviest

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- (1) obviously where the most intensive work was going to be done
- (2) The work that was on the light and very light areas was
- (3) primarily manual pick up wherever - wherever that occurred
- (4) Q What were the types of cleanup processes that you and the
- (5) people working with you employed in 1989 on the shorelines?
- (6) A We did cold-water wash we did a warm or hot water wash
- (7) We did bioremediation we did some mechanical work such as
- (8) tilling and backhoe work and we did manual pickup which was
- (9) by far covered most of the miles
- (10) Q Did you bring with you a series of photographs showing
- (11) some
- (12) of the results of those techniques?
- (13) A Yes sir
- (14) Q Counsel this is going to be starting with DX8368A and if
- (15) I could get Mr Twelker's assistance here I'm going to set up
- (16) a few
- (17) Mr Harrison why don't you come on down here?
- (18) Mr Harrison first of all these exhibits are labeled
- (19) Green Island 1989 Can you using the Prince William Sound
- (20) map
- (21) which Mr Petumenos is giving me a hand with - thanks Tim -
- (22) can you show the jury where Green Island is?
- (23) A Yes Of course Valdez is off the map up here and the
- (24) first big pass of oil came down this direction Here's Smith
- (25) Island here's Green Island and we're actually going to be
- (26) talking about this end of Green Island which was in the path
- (27) of that oil

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- (1) Q Okay I'd like you to take a look at please sir
- (2) DX8368A and if you could tell the jury what this shows
- (3) please?
- (4) A This shows a heavily oiled beach at Green Island You'll
- (5) see that oil was saturated in between the rock This is a
- (6) cobble beach at Green Island
- (7) When you - when you looked at these you're not surprised
- (8) that a lot of people in 1989 felt we could never clean this
- (9) up They sincerely felt when they looked at these things
- (10) that it was impossible to clean up
- (11) And it was bad It looked bad and it was bad
- (12) And in these heavily oiled segments right here when we
- (13) came in to wash the shoreline - and you heard one of the
- (14) admirals talk about this yesterday - we would wash off the
- (15) shoreline between tidal cycles there are two 15-foot tidal
- (16) cycles a day here
- (17) You'd wash the oil off the shoreline inside a boom pick it
- (18) up with a skimmer come back at the next tidal cycle and it'd
- (19) flushed some more oil out
- (20) We stayed on each beach segment till we flushed the oil out
- (21) and got it to the point where there wasn't heavy oil left on
- (22) the rocks anymore We did that to the approval of the federal
- (23) on scene coordinator's representative the state on scene
- (24) coordinator's representative and in some cases -we had a land
- (25) manager involved in these sites

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- (1) But this is - this is what a heavily oiled segment looked
- (2) like And we're going to describe what happened to this
- (3) segment through history a little bit
- (4) Q Let me cut in front of you here The next one we've got is
- (5) DX6399 Tell the jury what this shows
- (6) A Okay what this is this is the same segment. We are
- (7) looking at the same segment on the beach after it's been
- (8) washed - and you know that if you spilled oil if you've
- (9) change your oil and you spilled oil on your driveway and you
- (10) just washed it off with water you would still have a stain on
- (11) the driveway
- (12) That's what we have here While there's just sheens on
- (13) some of the little pools right here and there isn't any heavy
- (14) oil that would come off on wildlife there is still a stain on
- (15) all of the rocks that are on these shorelines
- (16) And again this caused a lot of concern when people looked
- (17) at this You washed it and when you got through it still
- (18) looked pretty bad
- (19) One of the things that we did during 1989 was develop a
- (20) process called bioremediation and what happens is in the
- (21) waters in these - and on these beaches there are some
- (22) microbes that live that naturally eat hydrocarbons because
- (23) there's natural hydrocarbons in this area from spruce needles
- (24) and popweed and other things that grow out here And what
- (25) we
- (26) would do is add nutrients which are fertilizers - not a whole

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- (1) lot different from your yard fertilizer - add nutrients
- (2) These microbes would grow faster in fact grow a hundred fold
- (3) grow from a tenth of one percent of the microbe population to
- (4) ten percent
- (5) And in the process they would eat oil Now they wouldn't
- (6) work well until you had washed the beach to this stage and
- (7) this was actually the first beach on which we tried
- (8) bioremediation We'd run some tests as a research project
- (9) under the auspices of the Environmental Protection Agency -
- (10) bv
- (11) the way a crisis is a terrible time to run a research project
- (12) but this one happened to work pretty well This was the first
- (13) beach on August the 1st with the beach looking like this we
- (14) put on bioremediation and -
- (15) Q We've got another picture here DX8340 and now a broken
- (16) prior exhibit If you could tell the jury what this one shows
- (17) please?
- (18) A This is three weeks later after bioremediation and what
- (19) you can see here is the forces of nature plus what the microbes
- (20) are eating at that point are taking those oil remaining oil
- (21) stains off the rocks
- (22) Now you can still see some signs of oil that are through
- (23) here but you can see that there has been a very significant
- (24) removal of oil over that period of time and you have both
- (25) things working for you you do have the forces of nature and
- (26) you do have the microbes that are working for you And this



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- (1) was - this was a very successful application  
 (2) Q Now I notice this is labeled August of 1989 and the prior  
 (3) one is also labeled 1989 You say -  
 (4) A Well that's August the 1st and this is about three weeks  
 (5) later in 1989 As I said this is the first one on which we  
 (6) did an application that was not a test. We did about 70 or 80  
 (7) miles of bioremediation in 1989  
 (8) Q If you could give me a hand to hoist up again DX6339 and  
 (9) then three weeks later we've got after the bioremediation  
 (10) DX6340  
 (11) Then we've got Defendants Exhibit 8369A Could you  
 (12) identify the date and location of this for the jury and tell  
 (13) them what it shows?  
 (14) A This is the spring of 1990 So we came back in the spring  
 (15) of 1990 to look at this location Out here at the edge of the  
 (16) water this is just wet and things that are regrowing out  
 (17) here There's - you're really visually not seeing any oil on  
 (18) this location at that time  
 (19) We did come back in here and do on the upper part of the  
 (20) beach a little bit of manual pick up but you can really see a  
 (21) combination of the winter storms plus the cleanup plus the  
 (22) bioremediation has really done a good job on taking care of  
 (23) this beach  
 (24) Q Okay The next one we have here is DX8319A Can you tell  
 (25) the jury when this was taken and what it shows?

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- (1) A This was taken two years later and again we're looking at  
 (2) the same beach area again as you saw in 1990 This beach  
 (3) this beach looks clean It did not require any work in 1992  
 (4) We had a work program but this segment did not require any  
 (5) work  
 (6) Again what you're seeing here along here and in these  
 (7) spots you're not seeing any oil in those locations This is a  
 (8) beautiful spot on Green Island  
 (9) Q Next exhibit in order is Defendants exhibit 637B Who's  
 (10) the guy in this picture?  
 (11) A I went back in 1994 this year to take a look at some of  
 (12) these shorelines We're looking at this same shoreline a  
 (13) little different - little different day so you're seeing  
 (14) different shadows on the rock but again very grateful to see  
 (15) that area looks good  
 (16) We're at a low tide segment so you can see a little more of  
 (17) the biological growth that's occurring out in the area but a  
 (18) beautiful area of Green Island  
 (19) Q By the way is Green Island the same place where Dr Page  
 (20) presented his bouncing soccer ball video to the jury earlier?  
 (21) A This is where he did his Nerf ball exercise  
 (22) Q And lastly we've got DX6349 If you could tell the jury  
 (23) when this was taken and what this shows?  
 (24) A This is again a 1994 photograph This will just put you  
 (25) in perspective on Green Island as to where we were We're

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- (1) looking - looking north here so this is a northward facing  
 (2) beach and actually as the oil came down it tended to pretty  
 (3) heavily impact these northward-facing beaches while on the  
 (4) backside over here you had virtually no oil on the backside and  
 (5) none all the way on the backside of Green Island  
 (6) The segment that we've been looking at is right here  
 (7) We've been looking at this little segment right here There  
 (8) are lots of times you may have seen on TV or other information  
 (9) people that landed right here and they tend to have a lot of  
 (10) photographs of this segment right here particularly in the  
 (11) early days of the oil sites  
 (12) Q Okay if you could resume the witness stand Mr Hamson  
 (13) Thank you for coming down and helping us with that  
 (14) Now Mr Hamson the work that you've described on Green  
 (15) Island that was all conducted in Prince William Sound right?  
 (16) A Yes sir  
 (17) Q You supervised cleanup operations in Kenai and Kodiak in  
 (18) 1989 as well didn't you?  
 (19) A Yes sir  
 (20) Q And what type of cleanup operations were generally  
 (21) conducted in those areas?  
 (22) A Primarily the work was done along the Kenai Kodiak Island  
 (23) Katmai was mainly pick up There was a - there was a little  
 (24) bit of washing there was a little bit of mechanical work but  
 (25) primarily due to the nature of the oiling there the oil was

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- (1) different and concentrations were different and which lent  
 (2) itself to manual pick up  
 (3) Q At the conclusion of the cleanup for the 1989 season in mid  
 (4) September what did you do?  
 (5) A I remained here in Anchorage or I moved from Valdez up  
 (6) here to Anchorage and we - we ran a fairly intensive  
 (7) wintertime program We had about seven or 800 people  
 (8) working  
 (9) Q If we could have DX8285 please? Could you tell the jury  
 (10) what this photograph shows please?  
 (11) A One of our wintertime efforts was to be sure that we got an  
 (12) understanding of what happened to these shorelines during the  
 (13) wintertime So we had a number of sites where we set up what  
 (14) they - what the scientists referred to as transects but all  
 (15) that is is just a survey line that they can come back to  
 (16) repeatedly to continue to look and see what the conditions  
 (17) are And they visited these sites on a regular basis through  
 (18) the wintertime  
 (19) Even though there is a fresh snow that's covered part of it  
 (20) right here they can go back to that same line they can  
 (21) uncover it they can dig holes  
 (22) What they did in those surveys they measured the profile  
 (23) of the beach was the profile changing They looked to see  
 (24) what was the status of oil saturation if there was oil  
 (25) penetration at those points and they looked to see what was

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- (1) the surface oiling conditions along that transect And of  
 (2) course as the tide came in along the intertidal zone the tide  
 (3) would tend to wipe out the snow so it s generally not quite as  
 (4) bad to look on the beaches as you see right here although the  
 (5) environment was a tough environment to work in through the  
 (6) wintertime  
 (7) Q Now on to the next year 1990 Did the cleanup effort  
 (8) continue sir?  
 (9) A Yes sir  
 (10) Q Can you tell the jury what went on in 1990?  
 (11) A Actually In about January of 1990 as a joint effort with  
 (12) the state and the federal government we ran a quick survey to  
 (13) take a look at some of the key shorelines and then we followed  
 (14) that with a more detailed survey in the spring That was - as  
 (15) I say was a combined survey which included the regulatory  
 (16) bodies as well as land managers where appropriate and we  
 took  
 (17) a look during that survey at what was out there and from that  
 (18) we went through essentially the same kind of process we did in  
 (19) 1989  
 (20) We d write a general plan the - we would submit that  
 (21) general plan after we had input from various bodies to the  
 (22) federal on scene coordinator He would distribute that out to  
 (23) a large number of parties for comment and from that we d get  
 (24) back approval and then we d go back and develop segment by  
 (25) segment specific work plans based on the surveys

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- (1) And so the process worked a great deal the same way with -  
 (2) with getting input from all the appropriate parties  
 (3) Q What type of cleanup operations were generally conducted  
 in  
 (4) 1990?  
 (5) A The process was less intrusive in 1990 And primarily the  
 (6) work was manual pick up There was bioremediation There  
 was  
 (7) a little bit of tilling and a little bit of washing that went  
 (8) on where that was appropriate for given sites  
 (9) Again there was a call made on a site by site basis But  
 (10) most of it was in the less intrusive mode of manual pick up and  
 (11) bioremediation  
 (12) Q Did the cleanup continue in 1991 and 1992 sir?  
 (13) A Yes sir  
 (14) Q And what type of survey processes were employed during  
 (15) those years?  
 (16) A We essentially conducted the same sort of survey process in  
 (17) each of those years of going out and doing the survey in the  
 (18) spring and from that survey determining what work should be  
 (19) done submitting plans and getting approval from the FOOSC  
 and  
 (20) the state on scene coordinator There was a more active role  
 (21) in 1991 1992 by the state with actually some additional work  
 (22) being performed on behalf of the state beyond what the FOOSC  
 (23) would have called for  
 (24) Q Now if I could have the Elmo please Joel?  
 (25) Mr Harrison I d like to show you what s been previously

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- (1) admitted as Defendants Exhibit 3938 I ll widen it up first  
 (2) for you then tighten it  
 (3) Can you identify for the jury what this is and how this  
 (4) fits into the process?  
 (5) A If you d blow it back down where I can read it again  
 (6) Q That s a deal How s that?  
 (7) A Okay what - what this was is as we developed the plan  
 (8) and the survey the admiral sent out letters to the various  
 (9) communities and organizations that were concerned to ask for  
 (10) their input He asked for input by letters on one what  
 (11) should be surveyed and then he d later ask questions as to  
 (12) what did they think about the plan  
 (13) There was a large degree of commitment on the part of the  
 (14) state and the federal government to obtain a maximum level of  
 (15) local input  
 (16) Q Let me now show you if I could DX5170 please Using this  
 (17) exhibit Mr Harrison I have a couple specific questions I d  
 (18) like to ask you  
 (19) I note that the total mileage of surveys - of shorelines  
 (20) surveyed decreases substantially from year to year Can you  
 (21) explain to the jury how that process worked?  
 (22) A Yes Basically each year we went back and resurveyed most  
 (23) of what was oiled in the previous years And in addition we  
 (24) added on those sites that were of special interest to local  
 (25) groups the state or the federal government or both went back

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- (1) out to the local groups the villages the communities the  
 (2) boroughs and asked what they were interested in having  
 surveyed  
 (3) and they had input to this process  
 (4) Obviously some of them overlapped and some of them were  
 (5) additions so each year you came up with a survey program that  
 (6) was a composite of essentially looking at about what you  
 looked  
 (7) at the prior year in terms of what was oiled And those  
 (8) special interest sites that were of interest to local parties  
 (9) And if you look at the size of the line essentially each  
 (10) year s survey covers out about to the end of the yellow that  
 (11) was in the prior year s survey  
 (12) Q Now the surveys from 1990 forward they were the so-called  
 (13) joint surveys a single survey conducted by Exxon and the  
 (14) various state and federal agencies?  
 (15) A What year did you ask me about?  
 (16) Q 1990 forward Is that correct?  
 (17) A From 1990 forward all surveys were conducted that are  
 (18) shown here are joint surveys There were multiple surveys in  
 (19) those years There was more than one survey taken during  
 those  
 (20) years and this shows the composite information from those  
 (21) years  
 (22) Q For those joint surveys who made the determination as to  
 (23) what segments of shorelines needed to be surveyed?  
 (24) A The federal on scene coordinator  
 (25) Q Did he make it with input from all these other parties

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- (1) you've been describing?
- (2) A From all those other parties plus he was taking advice
- (3) from his technical advisors NOAA at that point and combined
- (4) all that in his determination as to what should be surveyed
- (5) Q Now were you present in the courtroom yesterday during the
- (6) deposition testimony of the Coast Guard admirals?
- (7) A Yes sir
- (8) Q And were you present during their testimony regarding
- (9) interactions that they had with the landowners?
- (10) A Yes sir
- (11) Q Did you also have interactions with landowners as the Exxon
- (12) manager?
- (13) A Yes I did
- (14) Q Can you describe for the jury how that process worked?
- (15) A I participated as the Exxon representative in those things
- (16) that the admiral described. In addition for our organization
- (17) I established a - a responsive policy. We wanted to have an
- (18) open-door policy for concerns from the communities and the
- (19) Native organizations. We wanted to respond to their concerns
- (20) and in addition we had dealings with them that were outside
- (21) of just the pure cleanup that the admiral was involved with.
- (22) So there was a great deal of correspondence that went on
- (23) between my office and communities and boroughs and Native
- (24) corporations and the local villages and some by telephone
- (25) some by fax and some by individual meetings.

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- (1) Q Now did there come a time when the cleanup was finally
- (2) declared complete?
- (3) A Yes sir
- (4) Q And when was that sir?
- (5) A That was in June of 1992
- (6) Q What happened in 1992 leading up to that decision?
- (7) A Of course we did the spring survey in 1992. We went out
- (8) and did the work that the FOSC and the state on scene
- (9) coordinator required at that point and completed as we did
- (10) each year all the work that was requested to be done.
- (11) Q And what happened at the conclusion of that process in
- (12) 1992?
- (13) A At the conclusion of that process the - the federal
- (14) on scene coordinator declared that from a federal statute
- (15) standpoint all the work had been done and the state
- (16) department - commissioner of the Department of Environmental
- (17) Conservation declared that all of the state and federal laws
- (18) had been complied with in the cleanup phase.
- (19) Q If we could have DX3956 please
- (20) Mr. Hamson looking at your screen here can you identify
- (21) for us what this letter says?
- (22) A This is the letter that the federal on scene coordinator
- (23) sent - sent to me and distributed made public as to his
- (24) decision that there was no further cleanup required.
- (25) Q And this was a letter addressed to you from Admiral

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- (1) Ciancaglini?
- (2) A Yes sir
- (3) Q Dated June 11th 1992?
- (4) A Right
- (5) Q And if I could blow up - see how my blow up skills are
- (6) here today - not as good as I would like. That's going to
- (7) be - oh almost acceptable.
- (8) Can you looking at the letter relate to the jury what the
- (9) admiral told you regarding his decision and what he based it
- (10) upon?
- (11) A The admiral said that based on the result of the
- (12) assessments and the cleanup operation that - that he
- (13) determined on June the 5th 1992 that the Exxon Valdez spill
- (14) cleanup operation should be concluded and he went on further
- (15) to say that you know that complied with all of the
- (16) requirements that he was required to maintain.
- (17) MR CLOUGH Your Honor at this time I'd like to
- (18) move into evidence Defendants Exhibit 3956
- (19) (Exhibit DX3956 offered)
- (20) MR PETUMENOS No objection
- (21) THE COURT It's admitted
- (22) (Exhibit DX3956 received)
- (23) THE COURT Counsel we're going to take a break pretty
- (24) soon. If you want to pick the time we can
- (25) MR CLOUGH Your Honor we're about ten minutes from

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- (1) being finished
- (2) THE COURT You want to finish?
- (3) MR CLOUGH Yes sir I think it would be best if we
- (4) could
- (5) THE COURT That will be fine
- (6) MR CLOUGH If we could drop that and I'd like the
- (7) Elmo here
- (8) BY MR CLOUGH
- (9) Q You mentioned earlier that you received a sign-off from the
- (10) state of Alaska as well sir?
- (11) A Yes sir
- (12) Q And during the years of 1991 and 1992 did the state exert
- (13) its own independent authority over the cleanup effort?
- (14) A Yes sir it did
- (15) Q How did that work?
- (16) A Through the state on scene coordinator who was Ernie Piper
- (17) at that time when that started they felt that they needed to
- (18) require some things that were above and beyond the federal
- (19) standards at that time. And these turned out to be additional
- (20) shorelines to be looked at or additional shorelines to be
- (21) worked on. And we incorporated into the work program in
- (22) those
- (23) years the things that the state wanted to be done so we
- (24) also - we had a work program included everything that the
- (25) FOSC required and everything that the state required in that
- process. They were both taking input from a wide variety of

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- (1) sources
- (2) Q Mr Harrison I d like to show you what s been marked
- (3) Defendants Exhibit 3958 - and first I ll widen it at least a
- (4) little bit - and ask you if you d generally identify what this
- (5) is and then we ll have you go through some of the highlighted
- (6) comments
- (7) A This is the June 22nd letter from John Sandor the
- (8) commissioner of Department of Environmental Conservation for
- (9) the state of Alaska telling us that from the state standpoint
- (10) the cleanup was completed
- (11) Q And under letter did Mr Sandor explain to you or give you
- (12) his evaluation of the cleanup effort which had been performed?
- (13) A Yes he did
- (14) Q And if I could tighten this up here could you direct the
- (15) jury s attention to that?
- (16) A In the third paragraph which is your second paragraph
- (17) highlighted - that s highlighted in yellow he does say that
- (18) every - everyone who was involved - and these are the state
- (19) federal and local people - did a good job He complimented
- (20) Mother Nature in getting the job done and felt that a good job
- (21) had been done
- (22) Q And at the time that this letter was issued on June 22nd
- (23) 1992 had Exxon satisfied all requirements under state of
- (24) Alaska law with respect to the cleanup?
- (25) A Based on what this gentleman told me that s correct.

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- (1) Q Why did you go out there?
- (2) A Well I had - I d spent a lot of my time and effort in
- (3) this and I really wanted to go back and take a look and
- (4) particularly look at the - the sites that had been heavily
- (5) impacted a number of those sites as well as some sites that
- (6) had some unusual sensitivities that we were concerned about
- (7) and I wanted to revisit those
- (8) Q What did you see generally when you went out there sir?
- (9) A You know the - I went out and it was one of those nice
- (10) days and Prince William Sound is spectacular on those nice
- (11) days and with few - few exceptions you know the sound looks
- (12) to be to me as though it s - it s ready for normal use
- (13) It - there s not anything there that would impair normal use
- (14) of the area
- (15) Q Did you bring any photographs with you for the jury other
- (16) than the Green Island one from your tour this summer?
- (17) A Yes sir
- (18) Q If you d come on down if we could drop the screen and set
- (19) this up just one more time And Enc maybe if you could give
- (20) me a hand with these
- (21) Mr Harrison first one we ve got here is Defendants
- (22) Exhibit 6351 Can you tell us what this place is and what the
- (23) picture shows?
- (24) A This is Snug Harbor Snug Harbor is on the east side of
- (25) Knight Island and we re looking from east to west into the

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- (1) Q Mr Harrison at the time of the cleanup was terminated by
- (2) the federal government and the state was there still any oil
- (3) left out there?
- (4) A Yes sir
- (5) Q Can you tell the your what was left?
- (6) A There was - was oil left in places where it had been
- (7) determined where the state and federal government had
- (8) determined that there was no net environmental benefit to
- (9) remove that oil that is to say removing that oil could cause
- (10) more harm than leaving it there The oil was weathered it was
- (11) innocuous not harming the environment it was not leaching
- (12) out
- (13) at that stage And the decision was made to leave oil in those
- (14) places and these places would generally tend to be places that
- (15) were perhaps near something that was environmentally
- (16) sensitive
- (17) and you didn t want to disturb it primarily behind outcrops
- (18) wave shadows boulders those things that kept Mother Nature
- (19) from having as much impact through the storm system as it did
- (20) on some of the ocean beaches So there are places if you
- (21) know
- (22) where to look and if you can identify these areas of wave
- (23) shadow you can go out and turn over rocks in the right places
- (24) and find some - some remnants of weathered oil
- (25) Q Now we saw a picture of you out on Green Island a few
- (26) moments ago In 1994 Obviously you got a chance to go out to
- (27) the Sound in 1994 correct?
- (28) A Yes sir

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- (1) Snug Harbor area And it s of special interest for a couple of
- (2) reasons
- (3) For instance the original research projects that were
- (4) taken out on bioremediation were taken out - were done on
- (5) these shorelines over here This is where we first learned
- (6) working with EPA in testing bioremediation agents that that
- (7) would work in Alaskan waters So these shorelines along here
- (8) were oiled
- (9) Looking all the way into the backup here there is a salmon
- (10) stream actually that salmon stream got a little bit of oil
- (11) into it We did have some booms there but due to a storm
- (12) event we did get some oil into that salmon stream so we have
- (13) always come back to see how that salmon stream has reacted
- (14) Q If you ll give me a hand with that sir next we ve got is
- (15) Defendants Exhibit 6352
- (16) By the way all of these were taken in 1994 when you went
- (17) out there correct sir?
- (18) A Yes sir
- (19) Q Tell us what this one shows
- (20) A Actually all we have done is we have just moved a little
- (21) further into Snug Harbor and all you re just seeing the
- (22) stream - just a little bit close-up right here Normally
- (23) there s a - during this time of year there s a flock of birds
- (24) feeding down here and there are some three to four bears that
- (25) come down here regularly for salmon

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- (1) Q What time of the year was it that you were out there this  
 (2) summer?  
 (3) A In August which is the time of period that you see the  
 (4) pink salmon runs in Prince William Sound in this part of  
 (5) Prince William Sound  
 (6) Q Our next exhibit here is Defendants Exhibit - Defendants  
 (7) Exhibit 6367 - and it has you on your side so let's try and  
 (8) see if we can fix that  
 (9) Tell the jury where you are and what this shows  
 (10) A Okay I am up this stream I have wandered up this stream  
 (11) a little bit I was particularly interested because this  
 (12) stream along in here on both sides is where we had some  
 (13) oiling in 1989  
 (14) You can see the biological growth how dense it is in  
 (15) these and of course what you're seeing in here that's moving  
 (16) in the water in here are pink salmon This is a very heavy run  
 (17) of pink salmon in this stream It was - I could not find  
 (18) signs of oil as we - as we wandered through here  
 (19) So it looks like Mother Nature - even though this area  
 (20) doesn't get a lot of heavy storms looked like Mother Nature  
 (21) has done a very good job of restoring this area  
 (22) Q We've got one more picture from Snug Harbor here  
 (23) Defendants Exhibit 6376 What is this showing us here?  
 (24) A This just gives you an idea of how heavy the pink salmon  
 (25) were in here It was a very heavy run You couldn't walk

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- (1) across this stream without pushing the salmon out of the way  
 (2) And it looked like they were of - to my uneducated eye looked  
 (3) like they were of a good size this year  
 (4) Q Now Mr. Hamson Snug Harbor and Green Island weren't  
 (5) the only places you went to this summer were they?  
 (6) A Oh no I went to places like Smith Island I went to  
 (7) Sleepy Bay I went to Bay of Isles I went to Disk Island and  
 (8) Block Island and Foul Passage and a number of places like that  
 (9) that were heavily oiled in 1989 We did a lot of work in those  
 (10) places Some of those were special interest places and to see  
 (11) how they looked at this period of time  
 (12) Q Did you get back to Point Helen on your trip sir?  
 (13) A Yes sir  
 (14) Q You got out to Point Helen in 1989 too didn't you?  
 (15) A A lot of times  
 (16) Q What was it like out there in 1983?  
 (17) A Point Helen was one of the most heavily oiled sites It is  
 (18) a cobble beach Oil penetrated the beach much like you saw  
 (19) in the Green Island site to a meter or so in depth It was a  
 (20) site that required repeated washings  
 (21) We did do washing in the area We did do bioremediation  
 (22) We did do mechanical tilling work and some storm berm  
 (23) removal  
 (24) In that area It was one of the most heavily treated areas in  
 (25) the process one of the most heavily oiled areas also  
 (26) Q You got out there this summer?

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- (1) A Yes sir  
 (2) Q Mr. Hamson we've got Defendants Exhibit 6377 Is this  
 (3) Point Helen from your trip this summer?  
 (4) A This is Point Helen  
 (5) Q Can you tell the jury what you saw and what the shoreline  
 (6) was like when you were out there this year?  
 (7) A If you walk along Point Helen out here now and along these  
 (8) areas you don't - don't see any signs of surface oil and of  
 (9) course you can't be in this part of Alaska and look on Alaskan  
 (10) shorelines and water and air and mountains without being very  
 (11) humble and very humble about what the forces of nature can do  
 (12) at these sites  
 (13) There is at Point Helen if you come back up the beach  
 (14) kind of behind some of the outcrop rocks which give you a wave  
 (15) shadow if you come to the top of the beach where there are  
 (16) some heavier rock areas you can find a few spots where if you  
 (17) know where to look and turn over the right rocks or dig down  
 (18) enough you can find some subsurface or buried oil at this  
 (19) site But I don't think there's anything at this site that  
 (20) inhibits the use of this site or inhibits the biological  
 (21) regrowth at this site  
 (22) The other thing that you're aware of as you kind of look at  
 (23) this site is you know obviously there are a lot of people  
 (24) that use this area and you just - or I had to be very grateful  
 (25) for the support and the opportunity to work with the fishermen

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- (1) and the Native groups and other local interest groups in the  
 (2) area who gave us a lot of help and a lot of good advice in what  
 (3) we should be doing and how we should be doing it in these  
 (4) areas  
 (5) MR CLOUGH Thank you Mr. Hamson no further  
 (6) questions  
 (7) THE COURT We'll take a break counsel  
 (8) THE CLERK Please rise This court stands in  
 (9) recess  
 (10) (Jury out at 9:44 am )  
 (11) (Recess from 9:44 am to 9:57 am )  
 (12) (Jury in at 9:57 am )  
 (13) THE CLERK This court now resumes its session  
 (14) Please be seated  
 (15) THE COURT Counsel  
 (16) MR PETUMENOS Thank you Judge  
 (17) CROSS EXAMINATION OF OTTO HARRISON  
 (18) BY MR PETUMENOS  
 (19) Q Mr. Hamson I begin this examination with some  
 (20) trepidation because I listened to several people talk about how  
 (21) tough you are I want to start by saying that there's  
 (22) certainly a place for candor and respect in a courtroom and you  
 (23) have done a magnificent job for your company in the course of  
 (24) this cleanup and there isn't much question about that  
 (25) When you were called up to the state of Alaska for this

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- (1) work you knew you had a company that was in a fair amount of
- (2) trouble would you agree?
- (3) A We had a big job to do yes sir
- (4) Q And you are a oil man s oil man would you agree?
- (5) A I have a - a long history in the business yes sir
- (6) Q You were born into an oil industry related family?
- (7) A Born into an oil industry related family
- (8) Q And you went to college at the University of Texas?
- (9) A Right
- (10) Q And got a petroleum engineering degree from Texas?
- (11) A Yes sir
- (12) Q And Texas is sometimes known as an oil state?
- (13) A It is generally known as an oil state
- (14) Q And it s fair to say that your work for Exxon was for 35
- (15) years and you always worked for Exxon since you got out of
- (16) college?
- (17) A With the exception of one year that I spent on loan to the
- (18) EPA in the year the EPA was formed
- (19) Q Is that the year in 1970 when you took a year leave of
- (20) absence to work in Washington as part of president Nixon s
- (21) executive exchange program?
- (22) A Yes that was a program really kicked off by President
- (23) Johnson before and implemented by President Nixon
- (24) Q I m sorry I could barely hear you
- (25) A I m sorry It actually started in the prior administration

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- (1) but first went into effect in the Nixon administration
- (2) Q And it was the Nixon administration that selected you as
- (3) one of the executives to be a part of that exchange program?
- (4) A Yes sir
- (5) Q And among your jobs for Exxon you were general manager
- (6) of
- (7) ESSO Libya?
- (8) A Yes sir
- (9) Q Did you ever meet Mr Khadafy?
- (10) A I did not
- (11) Q Did you have to deal with his government?
- (12) A Yes sir
- (13) Q And was that a challenge sometimes?
- (14) A It was a challenge almost all the time
- (15) Q And I m sure that in selecting personnel around the -
- (16) around the world really that your company selects they want
- (17) to make sure they have the most competent people in the
- (18) places
- (19) they need them the most?
- (20) A Yeah as an employee I hope that s the decision they
- (21) make
- (22) Q And you re the fellow that they selected to deal with that
- (23) problem perhaps among others in Libya in 1982 through
- (24) 1989 you worked in Australia and actually were you the top
- (25) man there?
- (26) A No I headed the production operations and the exploration
- (27) drilling but we also had a refining and a marketing function

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- (1) and an Australian CEO
- (2) Q You were pretty near the top though weren t you?
- (3) A Yes sir
- (4) Q And when you got the call to come to Alaska how many top
- (5) managers were here before you when - when you arrived?
- (6) A Frank Iarossi was the on the scene man who is president of
- (7) Exxon Shipping You know he had a staff that he had pulled
- (8) together at that point
- (9) Q Was there any other executives up here?
- (10) A I don t know who - who came or went during the first 12
- (11) days Ulysse LeGrange who was off the management
- (12) committee of
- (13) Exxon U S A came up on the same flight that I did
- (14) Q Mr Cornett was he here?
- (15) A Yes sir
- (16) Q Who is Mr Cornett?
- (17) A Don at that time was head of what we call our Alaska
- (18) Interest office which is the office we maintain here in
- (19) Anchorage and he served as my public affairs manager
- (20) Q You had a public affairs manager from the beginning?
- (21) A Yes sir
- (22) Q Mr Teal was here?
- (23) A Andy Teal was here when I arrived
- (24) Q Were you part of this emergency - were you present when
- (25) Mr Teal testified Mr Harrison?
- (26) A I was here when - when Mr Teal testified

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- (1) Q Do you remember you recall he testified there was some
- (2) sort of emergency team or plan of folks that would be called in
- (3) the event of a spill?
- (4) A Yes I do
- (5) Q Were you part of that team or on the list of folks that
- (6) were part of that team?
- (7) A No that was a North America team I was part of a team
- (8) that centralized in the Asia Pacific area In other words
- (9) from Singapore south down to Australia
- (10) Q And is it the case that the size of the spill and the
- (11) nature of the task meant that you needed to call more people in
- (12) than just the North American group if you will?
- (13) A I m not sure how many total people are in the North
- (14) American group but obviously we needed to get a lot of people
- (15) on the scene
- (16) Q And they selected you to come in from the outside to be the
- (17) guy in charge?
- (18) A Yes sir
- (19) Q And once you came to the state of Alaska your first day
- (20) was what day?
- (21) A April the 5th of 1989
- (22) Q You stayed the entire time in 1989 by your company s side
- (23) up here in Alaska and worked on this project?
- (24) A Yes sir
- (25) Q You stayed the entire winter of 1989 and stayed with it?

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- (1) A Yes sir  
 (2) Q You were here through 1990 through the 1990 cleanup?  
 (3) A Yes sir  
 (4) Q Didn't leave your company?  
 (5) A No sir  
 (6) Q Didn't take any other assignments except for an occasional  
 (7) perhaps vacation or some time off?  
 (8) A That is correct  
 (9) Q Same in 1991?  
 (10) A Yes sir  
 (11) Q Same in 1992?  
 (12) A Yes sir  
 (13) Q And when does your tenure assisting your company in the  
 (14) Exxon Valdez oil spill stop as the head of operations up  
 (15) here?  
 (16) A You know basically the cleanup ended in June of 1992 We  
 (17) had some demobilization to do at the end of that operation and  
 (18) September of 1992 I went to Exxon Pipeline Company  
 (19) Q And that Exxon Pipeline Company is one of the owner  
 (20) companies for Alyeska here in Alaska?  
 (21) A Yes sir  
 (22) Q So in a way in a sense you're still up here helping the  
 (23) company out?  
 (24) A I - I'm up here about one week a month working on Alyeska  
 (25) issues

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- (1) Q Except for this trial of course when you were here as  
 (2) much as you could be -  
 (3) A Yes sir  
 (4) Q - In the courtroom  
 (5) Now in that same period of time tell me how many admirals  
 (6) we went through We had Admiral Yost for I think about five  
 (7) days?  
 (8) A Well initially Admiral Nelson was on the scene and he was  
 (9) on the scene when I first arrived And Admiral Yost came in  
 (10) then we had Admiral Robbins We had Bill Klme up Admiral Bill  
 (11) Klme for a short period of relief who later became commandant  
 (12) after Admiral Yost retired and then we had admiral David  
 (13) Ciancaglini  
 (14) Q We had Admiral Robbins for the 1989 season except he took  
 (15) some time off in August as I recall?  
 (16) A Yes sir  
 (17) Q And then Mr Ciancaglini came in to take his place for a  
 (18) few weeks?  
 (19) A Yes somewhere in that time frame And I don't remember  
 (20) whether it was before or after today but it was a short  
 (21) period of time when Admiral Robbins had to be gone and Bill  
 (22) Klme came in  
 (23) Q We have another admiral?  
 (24) A Yes  
 (25) Q When Mr Ciancaglini came in to substitute for Mr Robbins

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- (1) was it known that Mr Ciancaglini was going to come in in the  
 (2) fall to take over?  
 (3) A They may have known I did not know that  
 (4) Q In any event in the fall of 1989 we had a new admiral?  
 (5) A Yes sir  
 (6) Q And he went on for the winter of 89 into 90 And he was  
 (7) around for the 90 cleanup right?  
 (8) A Yes sir  
 (9) Q So the 90 cleanup for Mr Ciancaglini was his first  
 (10) summer cleanup?  
 (11) A Except for his relief period for Admiral Robbins  
 (12) Q And then he went away before the cleanup was over and  
 (13) another one came up?  
 (14) A No he - he was the last admiral on the scene  
 (15) Q Who was the last admiral when - who was admiral at the  
 (16) time you got the letter that said things are over?  
 (17) A Admiral Ciancaglini  
 (18) Q Now I noticed that you were very well versed in the  
 (19) location of streams islands things of that nature in Prince  
 (20) William Sound and the Kenai Would you agree that you are?  
 (21) A Briefly well versed  
 (22) Q You can pronounce the villages and the village corporations  
 (23) and you can pronounce them with facility can't you?  
 (24) A I hope I pronounce them right most of the time  
 (25) Q I think you do You were the person in command of the

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- (1) day to-day operations of the spill?  
 (2) A Yes sir  
 (3) Q Could we have exhibit on the Barco we've seen it a number  
 (4) of times  
 (5) I wonder you've seen this in the course of the trial I  
 (6) think and recognize what that is?  
 (7) A Well I'm familiar with - with what's on here I don't  
 (8) remember this specific chart but I'm aware of this  
 (9) Q First of all one of the things I wanted to point out is  
 (10) that I think under other state agencies federal agencies and  
 (11) other it is the case that those entities there are in  
 (12) alphabetical order are they?  
 (13) A They - they look to be  
 (14) Q It wouldn't mean to suggest that in the interagency  
 (15) shoreline cleanup committee Chugach Alaska Corporation had  
 (16) more input than - you wouldn't think that would you?  
 (17) A It would probably depend on the day  
 (18) Q Well isn't there a couple of entities or factors that are  
 (19) missing from this chart that we can think of? How about the  
 (20) media? Was the media around during this cleanup process?  
 (21) A Yes sir  
 (22) Q And you had some staff devoted to dealing with them?  
 (23) A We had a public affairs staff yes sir  
 (24) Q And the other - the other entity I was wondering whether  
 (25) we ought to discuss is politics Did politics ever enter into

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- (1) the work that you did?
- (2) A There - there were - I think there were politics going
- (3) on To the best of my ability I was not involved in politics
- (4) and - and tried to not let it influence doing the right thing
- (5) Q The president of the United States at the time of the Exxon
- (6) Valdez oil spill was George bush?
- (7) A Yes sir
- (8) Q Mr Bush had some connection with Texas?
- (9) MR CLOUGH Objection Your Honor I think -
- (10) THE COURT Sustained objection sustained
- (11) BY MR PETUMENOS
- (12) Q Did you find that the federal government was a bit more
- (13) friendly to Exxon than the state of Alaska?
- (14) A The answer to that is yes and no Depends on which part
- (15) you re talking about If you want me to elaborate on that
- (16) I ll be glad to
- (17) Q Well rather than have you elaborate on such an open-ended
- (18) question let me see if I can put a better one
- (19) The governor of the state of Alaska at the time of the
- (20) spill was Steve Cowper?
- (21) A Yes sir
- (22) Q A Democratic administration?
- (23) A As I recall he was a Democrat
- (24) Q And there were times when the state of Alaska had
- (25) substantial disagreements with how the federal on scene

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- (1) coordinator was conducting his business would you agree?
- (2) A I would say there were - there were probably some times
- (3) although I would say the degree of cooperation was very high
- (4) Q In 1991 the state of Alaska came up with its own plan for
- (5) cleaning up the beaches that it wanted right?
- (6) A That is correct
- (7) Q They didn t have such a plan in 1989 separate?
- (8) A They did not
- (9) Q They did not have such a plan in 1990 separate?
- (10) A Not formally prescribed as that Although the degree of
- (11) cooperation that we had going with them we did some things
- (12) direct response to state request
- (13) Q The mobilization of a crew or crews of the size that you
- (14) were going to require for this cleanup was obviously going to
- (15) take some time once you arrived here is that right?
- (16) A It took some time to train and bring people on line yes
- (17) sir
- (18) Q The first written plan that Exxon was - and please this
- (19) is not meant at all as a criticism I understand the nature of
- (20) the - of the difficulty facing you
- (21) In fact you yourself had no prior experience with a spill
- (22) of this size had you?
- (23) A To my knowledge we haven t ever had a spill of this size
- (24) in Exxon before
- (25) Q And so it was not until about April 15th that the first

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- (1) written plan specifically oriented to executing a cleanup was
- (2) presented to the Coast Guard?
- (3) A That plan was primarily oriented to shoreline cleanup
- (4) Q Yes and that was some three weeks or more after the spill
- (5) had happened?
- (6) A That is correct
- (7) Q And did you provide estimates to the Coast Guard as to what
- (8) you - well let me ask you this
- (9) Have you ever given optimistic or what you would now
- (10) consider to be overly optimistic predictions of how the oil
- (11) spill was going to progress?
- (12) A I don t believe I did
- (13) Q Did you tell the federal on scene coordinator in mid April
- (14) of 1989 that you thought 35 percent of the oil had evaporated
- (15) nine percent had been recovered at sea and only 12 percent of
- (16) it was going the hit the shorelines?
- (17) MR CLOUGH Mr Petumenos is questioning from the
- (18) deposition if I could have an opportunity to get a page
- (19) citation and get it out
- (20) MR PETUMENOS I m asking him directly
- (21) THE COURT Counsel
- (22) MR PETUMENOS I m asking the witness directly
- (23) THE COURT You ll get to that counsel
- (24) You can answer the question sir
- (25) A There was a model that was used in that report developed by

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- (1) Dr Ron Goodman in coordination with NOAA and their models
- (2) virtually gave identical results And we utilized that - that
- (3) model which was the best data available at that time as a
- (4) forecast material
- (5) Q That turned out to be a little optimistic would you agree?
- (6) A They - I m not an expert on those models You know I -
- (7) as I say it was the best data available from any scientific
- (8) source at that time
- (9) Q You ve been asked some questions before and I think you -
- (10) you agree that you have no reason to doubt that somewhere
- (11) around 40 percent of the oil on - that came out of the Exxon
- (12) Valdez stranded on beaches?
- (13) A I think I ve answered that I don t know the number but I
- (14) don t have any basis for questioning you know the experts
- (15) that generate those models
- (16) Q And the person we re talking about is a scientist named Mr
- (17) Jahns I think his name is?
- (18) A Dr Jahns
- (19) Q And who is he?
- (20) A He is currently retired but at the time that he did that
- (21) work he was working in one of our research organizations
- (22) Q So in mid April - and again this is not a criticism but
- (23) again in mid April what you estimated was that you thought 12
- (24) percent would hit the shorelines?
- (25) A Recognizing that - that models are models and models are



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- (1) never an exact reproduction of the real world NOAA and Dr  
 (2) Goodman had a model which they used in various locations  
 and  
 (3) that's what that model predicted yes sir  
 (4) Q And NOAA was the federal estimate along with Exxon's  
 (5) estimate is that what we had?  
 (6) A That's correct At that time to my knowledge the state  
 (7) did not have a model or we would have incorporated that input  
 (8) also  
 (9) Q And in addition to that optimistic prediction by the  
 (10) federal government and Exxon did you not also write a letter  
 (11) at some point suggesting that the fishing season would  
 probably  
 (12) open by May 15th?  
 (13) A At - at that - I don't recall such a letter but we  
 (14) probably estimated that free oil would be off of the waters of  
 (15) Prince William Sound at that time  
 (16) Q You think - do we need to get out the letter or do you  
 (17) think I'm right about -  
 (18) A I'll accept your testimony on that  
 (19) Q All right If at any time you don't want to accept my  
 (20) testimony in all frankness some of this is pretty serious and  
 (21) I want you to correct me if you think I'm wrong rather than  
 (22) skip over it  
 (23) A I'll be glad to  
 (24) Q I know it's late in the trial but I want to make sure that  
 (25) we have accurate information for the jury

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- (1) Now in the April - April 17th letter responding to your  
 (2) first - April 17th of 1989 responding to your first plan the  
 (3) Coast Guard said that they had serious reservations about your  
 (4) ability to respond as quickly as you described in your plan do  
 (5) you remember that?  
 (6) A Yes sir  
 (7) Q And in this plan in mid April the plan did not include at  
 (8) that point a plan to do work on the Kenai Peninsula Cook  
 (9) Inlet or Kodiak archipelago did it?  
 (10) A The plan did not have specifics for such work but it did  
 (11) include the possibility of that work  
 (12) Q And again I'm not criticizing You were working under  
 (13) basically emergency conditions would you agree?  
 (14) A We utilized at that time all of the shoreline data that was  
 (15) available from the state from the federal government and our  
 (16) own surveys and included that information within that plan  
 (17) And there wasn't any information available on those other  
 (18) shorelines at that point  
 (19) Q Now didn't we have kind of a strange situation going on  
 (20) with respect to the posture of some of the parties in this  
 (21) group that we have here on the television screen - the other  
 (22) thing we talked about - by the way is it your testimony that  
 (23) the media and concerns about the media never affected  
 decisions  
 (24) In the cleanup as far as you're aware?  
 (25) A I made no decisions based on media ever

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- (1) Q Did you ever find any of your subordinates doing that?  
 (2) A Not to my knowledge  
 (3) Q Pretty soon on pretty early in the cleanup it became  
 (4) clear did it not that some of these parties were going to be  
 (5) in litigation with one another over the spill?  
 (6) A I had nothing to do with the litigation and didn't ever  
 (7) worry about that  
 (8) Q When did you and I first meet?  
 (9) A Oh I don't know was it when we were neighbors or was it  
 (10) at - on another occasion I only forgot  
 (11) Q The only time we met as neighbors was through my daughter  
 (12) when she sold you some Girl Scout cookies I think?  
 (13) MR CLOUGH Do we have a picture Your Honor?  
 (14) MR PETUMENOS But you bought them so grateful  
 (15) BY MR PETUMENOS  
 (16) Q The Chugach Alaska Corporation filed suit against Exxon  
 (17) fairly early on?  
 (18) A I'm just not - I didn't pay any attention to litigation  
 (19) and I didn't let that have any influence on what I was doing  
 (20) and didn't - didn't have any part of that  
 (21) Q Okay so these shoreline surveys were designed entirely to  
 (22) assist you in the cleanup?  
 (23) A Yes sir  
 (24) Q It had no other function the shoreline surveys other than  
 (25) to help you decide where to put your men and material?

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- (1) A No they had a broader implication than that because it  
 (2) was to decide whether there should be other action taken for  
 (3) environmental considerations or archaeological considerations  
 (4) to take into account special interest areas that some group may  
 (5) have but that's part of how we conducted the cleanup  
 (6) Q I guess I'm trying to include that in the gamut of my  
 (7) question If you had an archaeological site you had to change  
 (8) how you'd approach the cleanup?  
 (9) A Yes sir  
 (10) Q If you had an eagle nest or androgynous - you had a stream  
 (11) of fish?  
 (12) THE COURT We'll strike that one  
 (13) MR PETUMENOS What was that other word we used in  
 (14) there?  
 (15) MR CLOUGH I don't know but we're all ears  
 (16) BY MR PETUMENOS  
 (17) Q It all had to do with men and material right?  
 (18) A It had to do with - not with just men and material but  
 (19) scheduling  
 (20) Q Litigation and determinations that might be made in the  
 (21) course of litigation that might be important to a litigation  
 (22) was not a consideration in these surveys true or not?  
 (23) A It was not  
 (24) Q It was not When you had a - you got a memo back I think  
 (25) from the admiral talking about the - the response to the

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- (1) organization that had been set up early in 1989 Do you  
 (2) remember that memo where he commented on the  
 organization?  
 (3) I m going to try to get that out for you I think it s -  
 (4) A You ll have to help me with that I m not sure of the  
 (5) specific memo you re talking about  
 (6) MR CLOUGH Could we have a Plaintiffs exhibit  
 (7) number?  
 (8) MR PETUMENOS It s actually your Exhibit number  
 (9) 2293 Defendants  
 (10) BY MR PETUMENOS  
 (11) Q And he talked about to you some of the ways in which these  
 (12) committees had been functioning and how he thought they d  
 been  
 (13) functioning and I d like to go over that with you  
 (14) I m at Attachment II of that exhibit counsel  
 (15) MR CLOUGH Could he present a copy to the witness  
 (16) Your Honor or Mr Petumenos -  
 (17) MR PETUMENOS Do you have it? Otherwise I ll just  
 (18) put it on the screen  
 (19) MR CLOUGH It s just hard to read sometimes  
 (20) MR PETUMENOS Sure  
 (21) BY MR PETUMENOS  
 (22) Q I want you to turn if you can to Attachment II It s  
 (23) kind of near the back Can I help you find it? Keep going -  
 (24) oh your lawyers didn t put it on I ll have to use that You  
 (25) don t have it on there?

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- (1) MR CLOUGH I believe this one introduced as 2239  
 (2) doesn t -  
 (3) MR PETUMENOS I m putting on the other part of that  
 (4) exhibit as it was served on us so that we can all look at it  
 (5) together  
 (6) BY MR PETUMENOS  
 (7) Q This is an attachment to the admiral s response to the  
 (8) organization Attachment II that I m putting on the screen in  
 (9) front of you and I m going to kind of go through a couple of  
 (10) the things that he said  
 (11) It says a number of the Interagency committees and  
 (12) operating organizations were established or have evolved in  
 (13) support of the cleanup operations and one of them was this  
 (14) initial organizational structure Valdez steering committee  
 (15) Is this the one that we saw the picture of in your direct  
 (16) examination where people would get together each night and  
 so  
 (17) forth?  
 (18) A Yes sir  
 (19) Q And the admiral said the meeting is generally not  
 (20) constructive and consumes a considerable amount of time and  
 (21) manpower Few decisions are made or actions are initiated  
 from  
 (22) that particular group  
 (23) Do you agree with his assessment of that?  
 (24) A The - it s a problem when you have a meeting that has so  
 (25) many people in it -

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- (1) Q Sure  
 (2) A - even though you spend three hours at it as to how do you  
 (3) allow everybody to have a say and still move to decisions So  
 (4) you know for the amount of time we put in we got a lot of  
 (5) information exchange but you didn t have a lot of time to  
 (6) spend on decision making  
 (7) Q That s right The decisions were really not made in those  
 (8) meetings were they?  
 (9) A Well there were a lot of very important decisions made in  
 (10) those meetings but there were a lot - lot of them that had to  
 (11) be carried over to the next meeting just because you just  
 (12) sheer ran out of time within that meeting  
 (13) Q The admiral writes few decisions made or actions  
 (14) initiated do you see that?  
 (15) A Yes sir  
 (16) Q But there was another committee called the operations  
 (17) coordination committee and the operations coordination  
 (18) committee we know talked about re-deployment of resources  
 (19) prioritization of activities and other actions requiring  
 (20) immediate attention That s what he says right?  
 (21) A Yes  
 (22) Q And Exxon had the lead role and did the implementations  
 (23) with other agencies having their input right?  
 (24) A Yes Of course that s right because we had access to the  
 (25) data relative to people and equipment and obviously had the

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- (1) responsibility of pulling that information together for his  
 (2) use  
 (3) Q Exactly so You had access to the data relating to the  
 (4) resources and the equipment right?  
 (5) A That is correct  
 (6) Q And there was a logistics coordination group on site  
 (7) continuing operational organization set up April 3rd and its  
 (8) main objective was to coordinate air water and land activities  
 (9) associated with logistics of aircraft boats supplies  
 (10) warehouses ADEC Coast Guard Department of Defense the  
 (11) CDFU - which is the Cordova District Fisherman s Union - and  
 (12) occasionally other organizations are represented  
 (13) Exxon has the lead role and implements but other agencies  
 (14) have input that s how that committee worked?  
 (15) A No sir it s not quite how it worked  
 (16) Q So you disagree with the admiral s memo here?  
 (17) A I don t think - it s a simplistic statement That really  
 (18) divides up into about three different groups and if you d like  
 (19) me to explain that I ll be glad to  
 (20) Q The admiral s statement is simplistic?  
 (21) A This statement right here is a simplistic general  
 (22) statement but it doesn t really in the terms that you ve  
 (23) described describe how it - how it really functioned  
 (24) Q Or the terms the admiral described?  
 (25) MR CLOUGH Your Honor I object to the

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- (1) characterization of the admiral s terms It s an attachment to  
 (2) the memo the admiral sent There s no foundation that the  
 (3) admiral wrote any of this just clarification  
 (4) MR PETUMENOS With that clarification  
 (5) BY MR PETUMENOS  
 (6) Q Were there other occasions where you thought that the  
 (7) admiral s understanding of the situation in Prince William  
 (8) Sound was general and simplistic?  
 (9) A I don t think his understanding was I think this  
 (10) paragraph is and I ll be glad to clarify that for you  
 (11) Q I m sure you are Go ahead  
 (12) A Okay There was a separate - he talks about air water  
 (13) and land There was a separate air group and that air group  
 (14) was really primarily coordinated by the FAA out of Valdez -  
 (15) MR CLOUGH Your Honor may we approach?  
 (16) THE COURT Yes I figure you did counsel  
 (17) (Bench conference on the record)  
 (18) MR CLOUGH If we could have just a moment here Your  
 (19) Honor This has been expressed - it wasn t attached as a copy  
 (20) of the exhibit I ve been advised it s actually an Exxon  
 (21) communication that was not authored by the Coast Guard at all  
 (22) attached to somehow to a copy to Plaintiffs -  
 (23) THE COURT This document?  
 (24) MR CLOUGH Yes And if there would be an  
 (25) opportunity for us to have a - maybe a very short recess to

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- (1) check that out otherwise we re going to be pursuing this line  
 (2) of questioning based on the fact it s -  
 (3) THE COURT Your contention is that this is an Exxon  
 (4) document not a Coast Guard document?  
 (5) MR CLOUGH That is correct That s - I ve been  
 (6) advised I d like to have an opportunity -  
 (7) MR PETUMENOS It was attached to the Defendants  
 (8) exhibit  
 (9) THE COURT But you want it right you want to  
 (10) question based on what it is  
 (11) MR PETUMENOS Absolutely  
 (12) MR CLOUGH I just want to check it  
 (13) THE COURT Sure  
 (14) (Bench conference concluded)  
 (15) THE COURT We re going to take a break  
 (16) THE CLERK Please rise This court stands in  
 (17) recess  
 (18) (Jury out at 10 29 a m )  
 (19) (Recess from 10 29 a m to 10 43 a m )  
 (20) (Jury in at 10 43 a m )  
 (21) THE CLERK This court now resumes its session  
 (22) Please be seated  
 (23) MR PETUMENOS Judge we have some clarifying to do  
 (24) In Exhibit DX2293 Plaintiffs were - correct me if I m  
 (25) wrong here Plaintiffs were served with a copy of an exhibit

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- (1) that is in page numerical order We were given this as part of  
 (2) one exhibit by Exxon and we have these little Bates numbers  
 (3) that keep the documents in order and they are in order one to  
 (4) the other  
 (5) Exxon has stated over the break that their research  
 (6) reflects they don t understand why one document is attached to  
 (7) the other and the document that we were served with  
 (8) attachments to the admiral s letter they say is in fact  
 (9) Exxon s document So I m going to have to go over some of the  
 (10) things Judge that we went through before  
 (11) I only have Exxon s representation but I accept it  
 (12) BY MR PETUMENOS  
 (13) Q Now let s start over  
 (14) Attached to this admiral document by your lawyers was this  
 (15) memo here and it says things like A large number of agencies  
 (16) and committees have acquired a large amount of Exxon  
 manpower  
 (17) to participate in and coordinate activities The diverse  
 (18) interests politically motivated action and large numbers of  
 (19) participants some totally unqualified have in general allowed  
 (20) the decision making process and hindered the overall  
 operating  
 (21) efficiency of Exxon s -  
 (22) THE COURT You read it wrong counsel  
 (23) MR PETUMENOS Did I do it wrong?  
 (24) THE COURT You read in general allowed a  
 (25) decision making process

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- (1) BY MR PETUMENOS  
 (2) Q In general slowed the decision making process and  
 hindered  
 (3) the overall operating efficiency of Exxon s organization Then  
 (4) it says Provided to Otto Harrison by Chipper Loggie May 8  
 (5) 1989 and then there are attachments to this memo Am I  
 (6) right?  
 (7) A Yes sir  
 (8) Q And who is Chipper Loggie?  
 (9) A He was our planning manager  
 (10) Q And he worked for you?  
 (11) A Yes  
 (12) Q And so the documents In fact that we were talking about a  
 (13) moment ago Attachment II and the comments about these  
 (14) agencies where I was saying it was the admiral because we  
 (15) thought it was attached to the admiral s memo Is in fact  
 (16) Chipper Loggie s comments your planning person?  
 (17) A As I understand it I haven t seen this document since 89  
 (18) except for just a few minutes ago and you know but - but  
 (19) that s what I understand it to be  
 (20) Q Obviously so because you and I were discussing it like it  
 (21) was the admiral who had written it But now we know If we  
 (22) accept your attorney s representations and we do that this  
 (23) was Exxon talking about the committees function roles and  
 (24) limitations right?  
 (25) A It was a discussion of how the committees were functioning

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- (1) before the admiral - as I understand this in briefly looking  
 (2) at it - before the admiral really implemented the ISCC and  
 (3) smoothed up some of that structure  
 (4) Q So your own planner was saying few decisions were being  
 (5) made by the ISCC and I think in your earlier testimony you  
 (6) agreed with that  
 (7) MR CLOUGH Objection Your Honor  
 (8) THE COURT The objection s sustained so I'll strike  
 (9) counsel s comment The witness can testify as to what the  
 (10) facts are  
 (11) BY MR PETUMENOS  
 (12) Q Do you generally agree with that?  
 (13) A I think I described that there was a lot of time in each  
 (14) meeting that was given to exchanging information and it was  
 (15) not possible to spend as much time as you would like on  
 (16) decisions  
 (17) Q All right And then you disagreed I think with Exxon  
 (18) having the lead role on this - which was it the air land and  
 (19) water?  
 (20) A We were talking about the air land and water and I  
 (21) thought the statement - because it tried to tie logistics into  
 (22) one thing - it was really more complex than that statement  
 (23) indicates and I was offering to elaborate on that for you  
 (24) Q And what he said is coordination group had generally  
 (25) worked reasonably well because of limited number of other

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- (1) interests involved and requirement for on site quick decisions  
 (2) do you see that there? Under problems bottom of the page?  
 (3) A Yes It was also a function of how those things were  
 (4) structured and they were structured that allowed that to  
 (5) happen  
 (6) Q Now this is a fairly common principal of management would  
 (7) you agree Mr Harrison that too many people in a meeting too  
 (8) much diverse input can make running an operation like the  
 (9) cleanup you were trying to conduct very difficult to execute?  
 (10) A I would not say that it s common management practice that  
 (11) all - if I understand what you re implying that all meetings  
 (12) need to be small That s not right There are some meetings  
 (13) that due to the need for information input need to be large  
 (14) You know it - that s - you need to have the situation fit  
 (15) the facts that are at that point  
 (16) Q The planning committee chaired by ADEC after the first  
 (17) several organizational meetings which were led by Exxon s  
 (18) representative is that how it went?  
 (19) A As I say this was how it went This was pre the admiral  
 (20) establishing the ISCC and the structure we saw on the earlier  
 (21) chart  
 (22) Q The committee was composed of - under problems the  
 (23) committee was composed of ten to 15 representatives with  
 (24) diverse interests and limited expertise Do you see that  
 (25) problem?

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- (1) A Yes sir  
 (2) Q We have the science committee and his - his - Mr  
 (3) Loggie s discussion of problems in connection with this  
 (4) committee - Is that phone for you?  
 (5) A Not mine  
 (6) Q It s buried in some Exxon documents We re going to have  
 (7) to wait  
 (8) MR CLOUGH The court reporter s going -  
 (9) MR PETUMENOS It s buried in the court reporter s  
 (10) documents Okay we all set?  
 (11) A Yes sir  
 (12) BY MR PETUMENOS  
 (13) Q Problems in the science committee as in the steering  
 (14) committee it appears that the agencies are positioning  
 (15) themselves for future recourse against Exxon Do you see that?  
 (16) A I see that  
 (17) Q Because of a large number of diversity the committee does  
 (18) not operate efficiently with a lot of time and effort to -  
 (19) intended to satisfy all because of damage assessments and  
 (20) potential litigation some agencies are drawing lines on data  
 (21) sharing Was that a problem?  
 (22) A You have to put that into context to recognize what the  
 (23) problem was If I may do that  
 (24) Q Well do you remember what Mr Loggie told you the  
 (25) problem was? Are you going to be telling us what you think now or what

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- (1) Mr Loggie told you?  
 (2) A I m going to tell you what the problem was not what Mr  
 (3) Loggie told me  
 (4) Q I understand According to Otto Harrison or according to  
 (5) Mr Loggie?  
 (6) A I can only tell you according to me I can never speak for  
 (7) Mr Loggie  
 (8) Q Well let me ask you this Mr Loggie became - ended up  
 (9) having a litigation role himself later on didn t he?  
 (10) MR CLOUGH Objection Your Honor  
 (11) MR PETUMENOS I think this is important  
 (12) THE COURT I don t know what the objection is  
 (13) MR CLOUGH Relevance  
 (14) THE COURT Hold on the objection s sustained - wait  
 (15) a minute wait a minute The objection is overruled Excuse  
 (16) me It s an androgynous ruling  
 (17) MR PETUMENOS I don t want to ask it again because  
 (18) I don t know what will happen  
 (19) Could you read the question back?  
 (20) THE COURT The objection s sustained  
 (21) MR PETUMENOS Could you read the question back?  
 (22) (The following testimony was read  
 (23) Q Well let me ask you this Mr Loggie became - ended  
 (24) up having a litigation role himself later on didn t he?)  
 (25) A That s L-o-g-g I-e Loggie yes But he had no litigation

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- (1) role during the cleanup  
 (2) BY MR PETUMENOS  
 (3) Q But later on did he have a supervisory role for Exxon's  
 (4) natural resource damage assessment team?  
 (5) A I never participated in that I don't know what his role  
 (6) was  
 (7) Q You don't know whether he supervised the scientists and  
 (8) worked on their work?  
 (9) A I do not know I did not participate in that  
 (10) Q So are you going to tell me that the problem with respect  
 (11) to positioning themselves for future recourse against Exxon and  
 (12) the issue of litigation was only a problem that other agencies  
 (13) had and not Exxon?  
 (14) A It was not a - it was never a problem to me as manager of  
 (15) the cleanup operations  
 (16) Q The shoreline committee Mr Loggie writes this committee  
 (17) is the most structured and has the objectives providing advice  
 (18) as follows and it continues This committee has functioned  
 (19) efficiently et cetera  
 (20) Isn't it true that the shoreline committee is a committee  
 (21) where Exxon was extremely active and had a leadership role?  
 (22) A I'm not as clear as I ought to be on how this committee was  
 (23) structured I'm clearer on how the subsequent committee was  
 (24) structured and certainly in all cases the FOSC made the final  
 (25) calls

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- (1) Q Well that's kind of what I'm getting at in terms of how it  
 (2) actually worked In 19- - you talked about these - we've  
 (3) seen these forms that had different people put their input on  
 (4) them and sign up what they thought about the various  
 (5) shorelines  
 (6) and so forth?  
 (7) A Are you talking about part of MAYSAP or SCAT or one of the  
 (8) surveys?  
 (9) Q Well that's my point SCAT in 1989 was different than  
 (10) the shoreline surveys in 1990 1991 and 1992 in that respect  
 (11) wasn't it?  
 (12) A Yes it was  
 (13) Q And in 1989 the shoreline committee when these folks  
 (14) would go out into the field we have the independent  
 (15) contractors for Exxon doing the surveying in '89 right?  
 (16) A The primary work was done by those contractors although  
 (17) the federal government or the state government nor the  
 (18) landowners were ever excluded and they participated in many  
 (19) cases  
 (20) Q But they didn't end up going to too many segments did  
 (21) they in 1989?  
 (22) A I don't know the exact number  
 (23) Q Again I'm not criticizing You folks had an emergency  
 (24) situation you had a job to do and there wasn't time - you  
 (25) were in a tremendous rush to get all this together to be  
 having landowners going in the helicopters with you you were

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- (1) trying to get the job done right?  
 (2) A We always had time for the landowners in whatever year  
 (3) that was  
 (4) Q Well not many landowners got in the helicopter and went to  
 (5) segments that year did they?  
 (6) A The landowners went to some and I'm confident that that  
 (7) was probably their choice  
 (8) Q Actually on May 1st we talked about the - the mid April  
 (9) plan you sent to the admiral On May 1st 1989 you sent  
 (10) your - to the Coast Guard your shoreline restoration plan?  
 (11) A Correct  
 (12) Q That was the more - a more detailed plan?  
 (13) A That - at that time we had more detail and we had more  
 (14) information and so we updated the plan based on the additional  
 (15) information that came in from all these varied sources and  
 (16) indicated there was an expanded work scope  
 (17) Q The mid April plan was sort of described as a scoping plan  
 (18) as I understand the words to scope out the problem right?  
 (19) A Yes sir  
 (20) Q And by May 1 we had a more detailed plan going to the  
 (21) admiral right?  
 (22) A Correct  
 (23) Q And then on May 24th 1989 you submitted an updated  
 (24) shoreline cleanup plan to replace that presented in early May?  
 (25) A On May 24th we submitted a plan that responded to some

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- (1) questions that the FOSC and state on scene coordinator had  
 (2) and  
 (3) again to incorporate the very latest data that was available  
 (4) at that point to best define the plan  
 (5) Q I think you told me that you were in court when we listened  
 (6) to the depositions of the admirals that were on the television  
 (7) screen?  
 (8) A I was  
 (9) Q And there was - I wonder if you could shed some light on  
 (10) one particular passage that Admiral Yost talked about He  
 (11) talked about being concerned with the amount of manpower that  
 (12) was available and on the beach in 1989 and that he went and  
 (13) talked to his boss the Secretary of the Interior  
 (14) Do you remember that testimony?  
 (15) A I recall that testimony  
 (16) Q And that he talked with the Secretary of Interior and then  
 (17) concluded that what Exxon had offered would be acceptable  
 (18) Can  
 (19) you shed any insight to this jury as to how it was did he ever  
 (20) share with you how it was that he went to the Secretary of the  
 (21) Interior and became satisfied with Exxon's plan?  
 (22) MR CLOUGH Objection Hearsay Your Honor  
 (23) THE COURT The objection's overruled  
 (24) Go ahead  
 (25) A I did not know until I saw that deposition that he'd even  
 done that  
 BY MR PETUMENOS

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- (1) Q Were you aware of any – hold on a second I think you  
 (2) said that there was never any discussion ever about  
 (3) federalizing the spill?  
 (4) A Was there discussion on my part about it?  
 (5) Q Well did you ever hear any discussion like that?  
 (6) A I m not aware of the discussions I heard what was in the  
 (7) depositions but you know I was never – I didn t ever  
 (8) participate in any discussion about federalizing the spill  
 (9) Q Wasn t there in fact public statements made by the admiral  
 (10) to the effect that – and I want to know if you re aware of  
 (11) this – to the effect that he wasn t in a position to  
 (12) federalize the spill the most he could do was jawbone and talk  
 (13) and things like that to Exxon?  
 (14) A He may or may not have said it I don t recall  
 (15) Q He mentioned to you that he had frank and honest  
 (16) discussions with you about the issues coming up in the course  
 (17) of the cleanup In the course of those frank and honest  
 (18) discussions did he ever tell you that?  
 (19) A No  
 (20) Q That he wasn t in a position to federalize the spill  
 (21) because federal government was in no position to get the work  
 (22) done?  
 (23) A I don t recall a discussion about that  
 (24) Q Well I think you have said yourself that you agree that  
 (25) Exxon was in a better position to conduct the spill than the

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- (1) federal government ever could be right?  
 (2) A If someone asked me a general question of whether I thought  
 (3) the federal government or Exxon was – would have done the  
 (4) best  
 (5) job I felt that from what I knew about the situation that  
 (6) Exxon was in a better place to do the cleanup job  
 (7) Q Let s talk about bioremediation You supervised the  
 (8) bioremediation program pretty carefully?  
 (9) A If I may answer that in two parts I did not supervise the  
 (10) research project that was supervised by the Environmental  
 (11) Protection Agency After it came out of the research effort  
 (12) and was approved by the RRT and the FOSC then I supervised  
 (13) the  
 (14) application yes sir  
 (15) Q Did you make yourself conversant about what  
 (16) bioremediation  
 (17) was and any of the controversies surrounding it?  
 (18) A I am not a technical expert in that area but I m  
 (19) reasonably knowledgeable about bioremediation  
 (20) Q All right Inipol what s Inipol?  
 (21) A That s the liquid product that we acquired for doing  
 (22) bioremediation We did bioremediation in both the liquid form  
 (23) and a pelletized form  
 (24) Q In order to make this substance work you have to have  
 (25) something called a surfactant right?  
 (26) A I don t think a surfactant was critical in the operation of  
 (27) bioremediation  
 (28) Q Well what a surfactant does is it lifts the oil off of the

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- (1) rocks and so forth to make it available for the – for the  
 (2) creatures to chew on it?  
 (3) A I don t believe that a surfactant is critical in the  
 (4) process of bioremediation  
 (5) Q Was there surfactant in Inipol?  
 (6) A Basically what Inipol the added value it gave was it was  
 (7) an oil loving material so that it tended to preferentially  
 (8) attach itself to the oil in the process and preferentially  
 (9) rather than attaching itself to the rock or to the water and  
 (10) we think that improved its efficiency  
 (11) Q Let s try my question  
 (12) Was there a surfactant in Inipol?  
 (13) A One of the materials may have had some surfactant  
 (14) characteristics but there were no ingredients in Inipol where  
 (15) surfactant was a critical item  
 (16) Q Well surfactant contained something called butoxyethanol  
 (17) didn t it?  
 (18) A That was one of the components  
 (19) Q Now butoxyethanol is a product the principal ingredient  
 (20) of which is contained in a product called Gunk Foamy Engine  
 (21) Brite do you know that?  
 (22) A I m not familiar with that particular aerosol can  
 (23) Q Sometimes people who do car mechanics call it Gunk and  
 (24) it s  
 (25) for cleaning engine blocks And if you take a look here with  
 (26) me I think you ll find that among the ingredients in Gunk is

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- (1) buty- – butoxyethanol You want to accept my representation  
 (2) or are you going to make me try and read this?  
 (3) A I ll accept your testimony on that I m not – I m just  
 (4) not familiar with that product  
 (5) Q The concentration of butoxyethanol in Gunk is about –  
 (6) well the concentration in Inipol is about seven percent do  
 (7) you know that?  
 (8) A I don t recall those exact percentages  
 (9) Q I think the concentration of – we looked at the can – of  
 (10) butoxyethanol in Gunk is about four to five percent?  
 (11) MR CLOUGH Objection Your Honor He s already said  
 (12) he has no foundation for knowing that  
 (13) THE COURT Sustained Objection s sustained  
 (14) BY MR PETUMENOS  
 (15) Q Have you ever taken a look – this is Exhibit 8102 – of  
 (16) the warnings that come with a can of butoxyethanol Gunk as  
 (17) it relates to that particular chemical?  
 (18) MR CLOUGH Objection Your Honor he s already  
 (19) stated he s not familiar with the product  
 (20) MR PETUMENOS I think I m entitled to explore his  
 (21) knowledge He s testified to the effectiveness  
 (22) THE COURT You re not going to get to explore it with  
 (23) this can counsel  
 (24) MR PETUMENOS I was going to explore it with this  
 (25) document actually May I show the Court?

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- (1) THE COURT Yes  
 (2) (Bench conference on the record)  
 (3) THE COURT How are you going to go about this?  
 (4) MR PETUMENOS The witness has testified that  
 (5) bioremediation is a good thing it helps the beaches and so  
 (6) forth This is a chemical that is contained in Inipol but if  
 (7) he knows the answer it would go to the credibility that he  
 (8) doesn't know which the jury is entitled to know  
 (9) Exxon has put him on to testify to the bioremediation issue  
 (10) and I will tell the Court this is the only time Exxon has put a  
 (11) witness on to discuss the bioremediation issue They have left  
 (12) it alone with Mr Teal and others It's my only opportunity to  
 (13) let the jury see that the bioremediation is not the panacea  
 (14) that the witness has testified to on direct  
 (15) THE COURT My problem is I don't recall exactly where  
 (16) you're going directly on this issue and are you going to pull  
 (17) out a can that's a different product?  
 (18) MR PETUMENOS It's the same product it's the exact  
 (19) same  
 (20) THE COURT It has the same ingredient in it but the  
 (21) issue is what does he know about butoxyethanol right? So  
 (22) let's find out that Let's not be talking about Gunk or  
 (23) cleaning car engines or anything like that unless it becomes  
 (24) something that he - that the direct question can't develop I  
 (25) mean the issue is does he know that this is a hazardous

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- (1) substance right? I don't think you've even asked him that  
 (2) question  
 (3) MR PETUMENOS Okay I think I understand  
 (4) THE COURT But I'm going to stop you here counsel  
 (5) so you better go about it directly  
 (6) MR PETUMENOS I think I understand but stop me if I  
 (7) don't  
 (8) THE COURT I will  
 (9) (Bench conference concluded)  
 (10) BY MR PETUMENOS  
 (11) Q Do you know anything about the toxicity of butoxyethanol  
 (12) as contained in Inipol?  
 (13) A I don't recall any of the specifics off the material data  
 (14) sheet We would have given that to our industrial hygiene  
 (15) people to handle  
 (16) Q Do you know whether or not it is important to avoid skin  
 (17) contact with butoxyethanol?  
 (18) A We ran an intensive program to - to be sure that we  
 (19) didn't We ran about 15 or 1600 tests on the people that were  
 (20) involved we found it only to be a problem in one case out of  
 (21) all those tests  
 (22) Q Well do you know whether it is important to avoid inhaling  
 (23) it?  
 (24) A We ran programs to see that people did not inhale it  
 (25) Q So it's important that they not?

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- (1) A You know it's like with any chemical you want to handle  
 (2) it prudently This was not a - what you'd call a dangerous  
 (3) chemical These chemicals in Inipol are also used in salad oil  
 (4) and cosmetics but you know you need to be careful with those  
 (5) things  
 (6) Q Do you know what the indications are of butoxyethanol if  
 (7) it were ever to be ingested by a human being?  
 (8) A Let's see as I recall - and again you're asking me about  
 (9) an industrial hygiene problem that I'm not an expert in but as  
 (10) I recall we ran urine samples looking for blood cell counts  
 (11) which was the primary - primary indicator  
 (12) Q You know that you're supposed to get medical attention  
 (13) immediately if it gets ingested?  
 (14) A I - as I said I'm not - I'm not an expert on that  
 (15) material that issue  
 (16) Q Now we're talking about human beings here but this stuff  
 (17) was sprayed all over the beaches in certain aspects of Prince  
 (18) William Sound and into the ecosystem wasn't it?  
 (19) A It was -  
 (20) MR CLOUGH Objection Your Honor I'm not sure what  
 (21) "this stuff" refers to  
 (22) BY MR PETUMENOS  
 (23) Q Butoxyethanol is a component of this Inipol chemical?  
 (24) A Inipol itself was sprayed on a number of beaches yes  
 (25) sir

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- (1) Q And those are the indications of what you do with  
 (2) butoxyethanol for human beings And there are other living  
 (3) creatures on the beach where this was sprayed wasn't there?  
 (4) A Maybe I need to help the jury by telling you where we  
 (5) sprayed this It was only sprayed in areas that had already  
 (6) been heavily oiled and then washed so you were doing it in  
 (7) areas that already had a heavy impact from oil and you were  
 (8) doing it to get that oil out of there quicker and we did not  
 (9) find any concentrations in water subsequent to spraying that  
 (10) indicated that there was a health hazard either to people or  
 (11) to the environment  
 (12) Q Was it used in the Lower Kenai as well?  
 (13) A We used it - used some in the Lower Kenai As I recall  
 (14) primarily we used the pelletized form there  
 (15) Q Now Dr Peterson in this court talked about sometimes the  
 (16) cleanup choice that was put to the folks who were trying to get  
 (17) the oil up as being between a rock and a hard place and the  
 (18) worst of two bad decisions Do you think the bioremediation is  
 (19) in that category of being a decision that was a tough one to  
 (20) make between two bad decisions?  
 (21) A I'm not -  
 (22) MR CLOUGH Objection  
 (23) BY MR PETUMENOS  
 (24) Q In other words leaving the oil there by itself without  
 (25) using the chemical or adding the chemical was that a tough

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- (1) decision?  
 (2) THE COURT Don t answer Don t answer that  
 (3) MR CLOUGH Objection foundation I don t believe  
 (4) that fairly characterizes Dr Peterson  
 (5) THE COURT It s always a problem when you refer to  
 (6) month-old testimony  
 (7) MR PETUMENOS I ll put on other testimony Judge  
 (8) BY MR PETUMENOS  
 (9) Q Do you think it was a difficult decision to leave the oil  
 (10) in place versus placing a chemical like this on the  
 (11) shorelines?  
 (12) A In my opinion - you understand that I m not a chemical or  
 (13) environmental expert - my opinion bioremediation is one of  
 (14) the silver linings to come out of this process It s a process  
 (15) that is - has low toxicity is non intrusive in nature and is  
 (16) effective and it has had broad acceptance in the technical  
 (17) community and was recently as this year 1994 was written up  
 (18) in the Nature Magazine as a very good process  
 (19) Q Well there was a lot of controversy surrounding  
 (20) bioremediation in the spill area wasn t there?  
 (21) A There was controversy on - on most things we did yes  
 (22) sir  
 (23) Q And the state of Alaska In their treatment plan in 1991  
 (24) said Go ahead and use it but every place you use it we want  
 (25) other tech- - the other traditional techniques used as well

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- (1) right?  
 (2) A I don t remember how they stated that but - but I ll take  
 (3) your testimony on that.  
 (4) Q Now did you supervise the public relations people who were  
 (5) handling the media with respect to the spill s activities?  
 (6) A Supervised a group of public affairs people in Valdez that  
 (7) I would say never handled the media  
 (8) Q Did they try from time to time?  
 (9) A No sir  
 (10) Q Who s Jerry Jackson?  
 (11) A I m sorry That name does not ring a bell to me  
 (12) Q Do we have an exhibit number for this? Give me one  
 (13) MR CLOUGH Counsel before you ask any questions  
 (14) I m sure you re going to -  
 (15) MR PETUMENOS I m going to ask him to refresh his  
 (16) recollection  
 (17) MR CLOUGH Could we have a copy of this please?  
 (18) MR PETUMENOS I m not going to ask him any  
 (19) questions I m just going to show him the document right now to  
 (20) see if it refreshes his recollection  
 (21) MR CLOUGH As to who Jerry Jackson was?  
 (22) MR PETUMENOS Yes  
 (23) BY MR PETUMENOS  
 (24) Q Having read that -  
 (25) A Does not help me

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- (1) Q Can you tell me from the context of that document whether  
 (2) he was part of Exxon s public relations department?  
 (3) MR CLOUGH Objection Your Honor May we approach?  
 (4) THE COURT Yes  
 (5) (Bench conference on the record)  
 (6) THE COURT Where are you going with this?  
 (7) MR PETUMENOS Well obviously where I m going this  
 (8) is an E mail document of the Exxon public relations department  
 (9) as they well know in which they attempt to get the cleanup to  
 (10) be directed in such a fashion that they would get a public  
 (11) relations benefit from it regardless of whether or not it does  
 (12) very much good And that s a topic we ve been well into and  
 (13) fairly into with this witness testimony  
 (14) THE COURT How are you going to - how are you going  
 (15) to get that with him when he doesn t know this person?  
 (16) MR PETUMENOS I think the only question on record  
 (17) was at this point you know can you now tell me that this  
 (18) person was part of the Exxon -  
 (19) THE COURT I know that but is that -  
 (20) MR PETUMENOS I don t have an answer yet  
 (21) THE COURT - a foundation for later?  
 (22) MR PETUMENOS It could be This is a document I  
 (23) think we can establish the foundation for if Exxon won t  
 (24) stipulate that they very well know this is an E mail within the  
 (25) public relations department That s who this guy is

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- (1) MR CLOUGH This is a March 28th document weeks  
 (2) before this guy - or a week before this guy even got out of  
 (3) Australia to get to Alaska I ve never seen it before  
 (4) THE COURT You ve never seen it before?  
 (5) MR CLOUGH No This is one of the surprises  
 (6) THE COURT Okay  
 (7) MR PETUMENOS It comes from Exxon though  
 (8) MR CLOUGH And the document will start being read to  
 (9) the jury when the witness says I don t know anything about  
 (10) this It s clear he doesn t He wasn t even here  
 (11) THE COURT Let me understand what you intend to do  
 (12) You intend to ask him a question - from the context of this  
 (13) document it s clear that Jerry Jackson is part of Exxon s  
 (14) public relations department right?  
 (15) MR PETUMENOS I am trying to get this document into  
 (16) evidence obviously Judge and I m trying to ask questions for  
 (17) a foundation to get it in if I can I haven t got that far  
 (18) before we came to the bench  
 (19) THE COURT The question is once you ask that  
 (20) question is that the last question you re going to ask him  
 (21) about the document?  
 (22) MR PETUMENOS Not necessarily If I can - I m  
 (23) trying to get the document before the jury literally I m  
 (24) trying to get the fact -  
 (25) THE COURT I m going to do it out of the presence of



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- (1) the jury counsel Can you go to something else?  
 (2) MR PETUMENOS I was obviously going to terminate my  
 (3) cross  
 (4) THE COURT I hate to send them out with such a short  
 (5) time You can t use it We ll talk it about it out of the  
 (6) presence of the jury after -  
 (7) MR PETUMENOS Then I ve got to finish on something  
 (8) Let me check my notes  
 (9) THE COURT Okay  
 (10) (Bench conference concluded)  
 (11) BY MR PETUMENOS  
 (12) Q Is Green Island -  
 (13) A Would you like this document back?  
 (14) Q I ll get it back in just a minute it s all right I think  
 (15) as a result of that conversation we re through with that  
 (16) document  
 (17) Is Green Island a shoreline that you particularly like  
 (18) using as an example?  
 (19) A Green Island has special interest since it was the first  
 (20) shoreline that was bioremediated outside of the EPA test  
 (21) project  
 (22) Q And when we were looking at those photographs earlier - I  
 (23) was looking at them carefully myself - those photographs are  
 (24) not taken one to the other on the exact same part of the beach  
 (25) are they?

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- (1) A They are - one of them is flipped to one side but they  
 (2) are taken on the same section of beach yes sir And you ll  
 (3) see on - you saw on the large map that s a - that s a  
 (4) relatively confined section of beach  
 (5) Q Is there such a thing - was there such a thing in the  
 (6) cleanup process as a show beach ?  
 (7) A No sir  
 (8) Q Were there times when media and others were brought to  
 (9) beaches which were - let me back up  
 (10) Were there times when cleanup crews were brought to beaches  
 (11) that had already been cleaned in order to show the media how  
 (12) well the cleanup process had done?  
 (13) A No sir  
 (14) Q Never?  
 (15) A Never  
 (16) MR PETUMENOS I have no further questions  
 (17) MR CLOUGH I m going to need your copy of that memo  
 (18) that you talked about so much  
 (19) MR PETUMENOS They always do this to me Judge  
 (20) after my papers have been totally scattered  
 (21) MR CLOUGH We re hunting for one more thing but  
 (22) while we re looking for that  
 (23) REDIRECT EXAMINATION OF OTTO HARRISON  
 (24) BY MR CLOUGH  
 (25) Q Bioremediation who made the decisions as to which

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- (1) beaches - shorelines beaches whatever - were going to get  
 (2) bioremediated?  
 (3) A All of the final decisions were made by the FOSC  
 (4) Q You mentioned the EMA Did they approve the use of  
 (5) bioremediation of the shorelines offer Prince William Sound?  
 (6) A Yes sir  
 (7) Q Did NOAA the Coast Guard s scientific advisor look at  
 (8) this issue?  
 (9) A Yes sir  
 (10) Q Did they approve the use of bioremediation on the beaches  
 (11) of Prince William Sound?  
 (12) A Yes sir  
 (13) Q Did the FOSC himself Admiral Clancaglini did he approve  
 (14) the use of bioremediation on the beaches of Prince William  
 (15) Sound?  
 (16) A Yes sir  
 (17) Q Did state of Alaska review this issue as well?  
 (18) A Yes sir  
 (19) Q Did the state of Alaska s SOSC - Emie Piper I believe it  
 (20) was - didn t he personally approve the use of bioremediation  
 (21) in Prince William Sound?  
 (22) A The state on scene coordinator approved it as well as  
 (23) their representative on the RRT  
 (24) Q Were you here in the courtroom when Mr Piper testified as  
 (25) the Plaintiffs last witness?

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- (1) A Yes I was  
 (2) Q Do you remember Mr Piper testified that he determined for  
 (3) the state that bioremediation was safe?  
 (4) A I don t recall his exact statement but that was the  
 (5) general direction that I understood  
 (6) Q And he was personally the state s on scene coordinator in  
 (7) 1991 is that right?  
 (8) A Yes sir  
 (9) Q And the state approved the use of bioremediation that year?  
 (10) A Yes sir  
 (11) Q Now to the memo that we spent so much time on which  
 (12) there s some confusion I admit  
 (13) We re going to have to by the way counsel get your copy  
 (14) of it designated with your permission as DX2293 since yours  
 (15) was different than the one I had Can I refer to it as 2293A?  
 (16) MR PETUMENOS I think under the circumstances I d  
 (17) like to have it parked as Plaintiffs exhibit  
 (18) Is that too picky Judge?  
 (19) MR CLOUGH Let s call it Plaintiffs exhibit next in  
 (20) order and you can choose a number  
 (21) MR PETUMENOS The lucky number is 85 - Plaintiffs  
 (22) 8517  
 (23) (Exhibit PX8517 marked)  
 (24) MR CLOUGH Plaintiffs Exhibit 8517 okay  
 (25) BY MR CLOUGH

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- (1) Q I'd like to refer you to the portion of this portion  
 (2) authored by Mr. Loggie. And if we could have the Elmo here  
 (3) okay looking down through this particularly look under  
 (4) logistics and coordination  
 (5) First of all do you see in that paragraph - and let's  
 (6) even go up to operations first. What date is it talking about  
 (7) here what point in time?  
 (8) A April the 3rd 1989  
 (9) Q And farther down what time period are we talking about  
 (10) here under logistics and coordination?  
 (11) A April the 3rd 1989  
 (12) Q Now earlier we were looking during your testimony at the  
 (13) admiral's document. What's the date of the admiral's  
 (14) document?  
 (14) A April the 20th of 1989  
 (15) Q Now is it this document Defendants Exhibit 2293 which  
 (16) established the interagency shoreline cleanup committee  
 (17) process the ISCC?  
 (18) A Yes sir  
 (19) Q And this was Admiral Robbins organizational statement and  
 (20) it says there the organizational structure of the cleanup  
 (21) effort for the Exxon Valdez oil spill?  
 (22) A Yes sir  
 (23) Q And he imposes effective April 20th 1989 correct?  
 (24) A Yes sir  
 (25) Q And was it this ISCC process that was then in place for the

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- (1) remainder of the 1989 season?  
 (2) A Yes sir it was  
 (3) Q Were you present in the courtroom for Mr. Teal's  
 (4) testimony?  
 (5) A I was present for part of it  
 (6) Q And do you know if - well let me just say do you know of  
 (7) your own knowledge this ISCC process described or  
 (8) established  
 (9) in Admiral Robbins memorandum was that in fact - describe  
 (10) how that process worked I don't want to put any words in your  
 (11) mouth  
 (11) A The committee met on a regular basis which I think was  
 (12) daily through 1989 and they took the input that was coming to  
 (13) them from the FOSC itself and from other parties as new  
 (14) information came in for such as when bioremediation came in  
 (15) they took that information from EPA and then they tried to  
 (16) integrate that with all of the interests of the various parties  
 (17) involved as to where did they stand on a specific work plan or  
 (18) how to treat a site  
 (19) Q And that process remained in place but as the TAG  
 (20) committee  
 (21) in 1990?  
 (21) A Yes sir  
 (22) Q And 91?  
 (23) A Yes sir  
 (24) Q And 92?  
 (25) A Yes sir

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- (1) Q And it was that process the ISCC and the TAG that admirals  
 (2) Robbins and Ciancaglini testified to at great length yesterday  
 (3) wasn't it?  
 (4) A Yes it was  
 (5) Q Finally on the issue of picking a show beach or a show  
 (6) place we showed pictures of - let's see we got a picture of  
 (7) you at Point Helen. You went there this summer right?  
 (8) A Yes sir  
 (9) Q And we had some - bunch of pictures out at Snug Harbor  
 (10) And you went there?  
 (11) A Yes sir  
 (12) Q You also went out to Block Island as I recall is that  
 (13) correct sir?  
 (14) A Yes sir  
 (15) Q Let me show you what's been marked as Defendants Exhibit  
 (16) DX6366. This is another beach we went out to in 1994 correct?  
 (17) A That was a very - yes that was a very heavily oiled beach  
 (18) in 1989  
 (19) Q Tell us about Block Island in 1989 and how it looked to you  
 (20) when you went out there this year  
 (21) A In 1989 there was so much oil on Block Island here that  
 (22) in addition to the washing process we were picking up out of  
 (23) pools with things that were just bigger versions of shop vacuum  
 (24) cleaners. It was around in big pools and as we went back to  
 (25) Block Island this year in 1994. To my eye - and I'm not a

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- (1) biological expert - there's lots of growth there's lots of  
 (2) wildlife it's beautiful and you know it's just quite -  
 (3) quite remarkable. As I said you can understand in 1989 why  
 (4) people believed it would never be like this again  
 (5) Q And you got out to Smith Island too didn't you sir?  
 (6) A Yes sir  
 (7) Q In August of this summer?  
 (8) A Yes sir  
 (9) Q Showing you what's been marked Defendants Exhibit 6371  
 (10) What was Smith Island like in 1989?  
 (11) A Very heavily oiled. This was also known as Quayle Beach as  
 (12) it was the site that the vice president visited and made quite  
 (13) critical comments about. In the background there is an  
 (14) archaeological site that's an old Coast Guard pier that  
 (15) actually was up lifted in the 1964 earthquake  
 (16) Q Did you get out there yourself in 1989?  
 (17) A Many times  
 (18) Q What did it look like then?  
 (19) A In 1989 it looked terrible and it was one of those beaches  
 (20) that the admiral mentioned that we washed and washed again  
 (21) and  
 (22) they were concerned we were never going to get off of this  
 (23) site  
 (23) Q What's it look like now?  
 (24) A It - as I said you can't be at one of these beaches with  
 (25) just - without being humbled at what the beaches look like and

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- (1) what kind of forces of nature are involved It is - it's a
- (2) spectacular spot
- (3) MR CLOUGH Thank you Mr Harrison Thank you very
- (4) much
- (5) MR PETUMENOS Couple questions real quick
- (6) RE CROSS EXAMINATION OF OTTO HARRISON
- (7) BY MR PETUMENOS
- (8) Q The beach that Exxon and the federal government chose to
- (9) bring Vice President Quayle to was not a show beach?
- (10) A I did not choose that I had nothing to do with the
- (11) designation of the beach or the timing of the visit and that
- (12) was totally a Coast Guard -
- (13) Q Didn't have anything to do with that
- (14) And can you tell me Mr Hamson if there had been no oil
- (15) on a beach that you owned would you want to be spraying
- (16) Inipol
- (17) on a beach where your children were going to be eating the
- (18) food?
- (19) MR CLOUGH Objection Argumentative Your Honor
- (20) MR PETUMENOS I want to see how safe he thinks it
- (21) is
- (22) THE COURT You can - you can answer it Go ahead
- (23) A Everything that I know about Inipol - and you understand
- (24) I'm not an industrial hygiene expert - says that that's not a
- (25) problem
- (26) MR PETUMENOS I have no further questions

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- (1) THE COURT You can step down thank you
- (2) MR PETUMENOS Your Honor I would like to move into
- (3) evidence Judge the exhibit that has now been marked the new
- (4) 8517
- (5) THE COURT 8517?
- (6) MR PETUMENOS Correct
- (7) (Exhibit 8517 offered)
- (8) THE COURT Any objection counsel?
- (9) MR CLOUGH No
- (10) THE COURT It's admitted
- (11) (Exhibit 8517 received)
- (12) MR DIAMOND Mr Petumenos stepped on my lines I
- (13) was about to say on the 50th day of this trial and on the 19th
- (14) day of our presentation save and except some exhibits that we
- (15) have to offer into evidence and a request that you have under
- (16) advisement Exxon rests
- (17) THE COURT Thank you
- (18) MS SMITH I'm leaving
- (19) THE COURT I thought we were going to be at the 51st
- (20) day counsel before you finished
- (21) Counsel are you ready to put on your rebuttal?
- (22) MR STOLL Yes Your Honor
- (23) THE COURT I think I'm going to give the jury a
- (24) break because I want to discuss what we've discussed in the
- (25) past and I want to get a feel for how long this case is going

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- (1) to take and who's going to testify so I'll let you out
- (2) This may take a little bit of time I think because I'm
- (3) going to take a break at the end of this break so I'd suspect
- (4) that we're going to - maybe it won't start before 12:00
- (5) You're free for about 15 minutes to roam around within limits
- (6) but I want you back here by 10 minutes to so that when I get
- (7) you you can come right in okay?
- (8) (Jury out at 11:32 a.m.)
- (9) THE COURT The jury's not present
- (10) Mr Stoll give me a list of your first four witnesses I
- (11) just want to know -
- (12) MR STOLL Your Honor we only plan on having three
- (13) witnesses today live - live witnesses Dr Peterson Roy
- (14) Robertson and Toby Cook And I advised counsel of that last
- (15) night They're all ready for that
- (16) THE COURT So are you ready to go?
- (17) MR DIAMOND Are we ready to go?
- (18) THE COURT With these witnesses yes
- (19) MR DIAMOND Yes
- (20) You may want to take up the issue of Toby Cook Toby Cook
- (21) is one of the witnesses not on any witness list
- (22) THE COURT Okay and you know what I've said in
- (23) chambers counsel you have to show me why a witness not on
- (24) the
- (25) witness list should be allowed to testify
- (26) MR STOLL Well Mr MacSwain testified in his direct

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- (1) testimony that - this is at page 6478
- (2) THE COURT I can't read that counsel Okay got
- (3) it
- (4) MR STOLL He talked to various people in Kodiak and
- (5) he said categorically We found no one who stated there had
- (6) been any adverse real estate effects of the Exxon Valdez oil
- (7) spill
- (8) Then he was asked - well you can read it
- (9) THE COURT I see it I've read it
- (10) Okay So what's Mr Cook going to testify to?
- (11) MR STOLL Mr Cook had a couple conversations with
- (12) Mr MacSwain He told him - he's a - or was at the time a
- (13) real estate broker in Kodiak He said specifically that he had
- (14) lost a sale as a result of the oil spill Mr MacSwain goes
- (15) on - I think I can't remember if it's in this paragraph or
- (16) another one - that if there was any specific examples that he
- (17) would make a note of that specific example Mr Cook will
- (18) testify that he told Mr MacSwain about that and that he did
- (19) find that it had an impact on the remote market that the buyer
- (20) of the property in fact forfeited their earnest money because
- (21) of their concerns as a result of the oil spill which is a very
- (22) unusual matter and he's known Mr MacSwain for some period
- (23) of
- (24) time and he was surprised to hear that Mr MacSwain said what
- (25) he testified to
- (26) THE COURT Tell me why he wasn't on the witness

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- (1) list  
 (2) MR STOLL We didn't know that Mr MacSwain was going  
 (3) to say that take that position that he had no -  
 (4) MR PETUMENOS There's one other thing I don't know  
 (5) if the Court knows about and we had a evidentiary dispute if  
 (6) you would call it going on about how far Mr MacSwain was  
 (7) going to testify and whether or not he was going to be allowed  
 (8) to get into opinions of others within his report And then  
 (9) when you said that he could you also indicated that we would  
 (10) be allowed to call people to refute that if it should turn -  
 (11) you know once you made your evidentiary ruling that it was  
 (12) coming in  
 (13) THE COURT Show me - I think you're right counsel  
 (14) but I want the record to reflect the specific discussion that  
 (15) took place if you can find it  
 (16) MR PETUMENOS I'd sure - I'd sure try  
 (17) THE COURT Do a very hard job and I'm -  
 (18) MR STOLL I'm not prepared on that Your Honor but  
 (19) we'll do what we can do He's our last witness and if we -  
 (20) THE COURT I'll tell you whether or not he can  
 (21) testify today so you'll know exactly what's coming  
 (22) MR DIAMOND Your Honor may I be heard on this?  
 (23) THE COURT Yes  
 (24) MR DIAMOND Toby Cook's name has not come up once in  
 (25) this trial by name No document offered into evidence has the

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- (1) name of Toby Cook on it Has not been mentioned yet  
 (2) What Mr MacSwain testified to - if I could have the Elmo  
 (3) Joel - he went on to say when asked that question I would  
 (4) state that the intent here was we didn't find anybody that had  
 (5) any specific information to show If I had it to do over  
 (6) again I would have worded this a little differently but the  
 (7) general intent is here we didn't find anybody that had any  
 (8) examples to show any data that there was any effect of the oil  
 (9) spill  
 (10) Getting information in Kodiak I might add is a little bit  
 (11) difficult there were a number of people who were reluctant to  
 (12) talk  
 (13) In his direct examination Mr MacSwain testified - and  
 (14) I'm referring to page 6381 of the transcript - he was asked  
 (15) specifically at lines 3 through 16 whether he was saying that  
 (16) quote Nobody expressed the opinion that the oil spill had a  
 (17) negative impact on the real estate market And he went on to  
 (18) say that was not his testimony and described some of the  
 (19) negative comments that were made to him  
 (20) It is - there was a statement made to you that they did  
 (21) not know about Toby Cook That is not correct They've known  
 (22) about Toby Cook because Mr Shorett interviewed Toby Cook  
 (23) at  
 (24) about the same time Mr MacSwain interviewed Toby Cook but  
 (25) let  
 (26) me show you a document that is not in evidence It is the  
 (27) MacSwain/Dorchester report dated August 1993 and at page  
 (28) C2

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- (1) this is a discussion of people interviewed by them and this is  
 (2) the statement they attributed to Toby Cook  
 (3) THE COURT This is a Plaintiffs document?  
 (4) MR DIAMOND No this is a defense report that was  
 (5) furnished to the Plaintiffs over a year ago  
 (6) THE COURT Oh I see okay  
 (7) MR DIAMOND They have known about Toby Cook They  
 (8) have known what Toby Cook said because Mr Shorett  
 interviewed  
 (9) Toby Cook I think a year and a half ago They have known  
 (10) since we furnished this report what Mr MacSwain's  
 (11) understanding of the Toby Cook discussion was They chose  
 (12) deliberately not to ask Mr MacSwain about any discussions  
 with  
 (13) Toby Cook They chose not to ask Shorett about any  
 discussions  
 (14) with Toby Cook  
 (15) In fact what this sort of amounts to is creating an  
 (16) inconsistency that doesn't exist that you can bring in a  
 (17) witness who's never been designated never identified and  
 (18) therefore never imposed and impeaching a witness who's  
 already  
 (19) testified as to something he didn't testify to  
 (20) If Mr MacSwain had testified in court that he had a  
 (21) conversation with Toby (sic) MacSwain that was before the jury  
 (22) and if he put it in such a way as it was inconsistent with what  
 (23) Toby Cook was prepared to testify to here that would be a  
 (24) different thing but Mr MacSwain has never had any  
 opportunity  
 (25) to go into this in front of the jury and in fact if he - if

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- (1) he had his description of that conversation more full  
 (2) description of that conversation would have been I'm sure  
 (3) the same as what Mr Cook will offer here  
 (4) But on this record there's no basis particularly with  
 (5) respect to a witness they've known about for over a year who  
 (6) their own expert relied on not to put him on the witness list  
 (7) and then sort of bushwhack us in rebuttal by having this  
 (8) witness show up after discovery's closed and he's never been  
 (9) part of it  
 (10) THE COURT Okay Thank you counsel  
 (11) MR PETUMENOS Judge I have two things to add One  
 (12) is that - I realize we have the presumption here against us  
 (13) and we're trying to meet it but I'd ask the Court to also keep  
 (14) in mind that we went through a lot of battling about -  
 (15) THE COURT Counsel let me - as I explained to you  
 (16) in chambers so you understand I used that presumption on  
 you  
 (17) as an analogy All it means is that you had to produce  
 (18) material that would give me - would give some sort of a  
 (19) articulate reason why you - this witness wasn't on the witness  
 (20) list and then as we all know that presumption the  
 (21) presumption drops out and I just decide the case You're not  
 (22) working uphill now I'm only deciding it based on everything I  
 (23) hear  
 (24) MR PETUMENOS I appreciate that Judge And one of  
 (25) the things I just wanted you to be aware of there was a lot of

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- (1) fighting and controversy about the length of witness lists and  
 (2) our - we were all under pressure to keep them down We had  
 (3) no -  
 (4) THE COURT There was that -  
 (5) MR PETUMENOS We had no intention of calling Toby  
 (6) Cook in our case in chief by any means and there was this  
 (7) evidentiary issue we were fighting We were hoping the  
 (8) testimony would be a lot more limited from Mr MacSwain than it  
 (9) was but I have the passage also that I recall There may be  
 (10) others and it just seems to me that the categorical statement  
 (11) of -  
 (12) MR DIAMOND Could you state for the record what  
 (13) you -  
 (14) MR PETUMENOS I m sorry counsel  
 (15) THE COURT 6264 to 6267  
 (16) MR PETUMENOS I should let you read rather than  
 (17) talk  
 (18) THE COURT Where do you want me to -  
 (19) MR PETUMENOS If you go to bottom of the page you re  
 (20) on and go to the next one I think there s a mark on the next  
 (21) page  
 (22) THE COURT 6268? Yes 6268 is the page  
 (23) MR DIAMOND I don t have that transcript with me  
 (24) So I m sure counsel will enlighten me  
 (25) THE COURT Okay I see the reference It s at 6268

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- (1) lines nine to 22  
 (2) MR PETUMENOS And the problem we face is there were  
 (3) 150 interviews by Mr MacSwain and he made the categorical  
 (4) statement in the portion of the cross that Mr Stoll cited to  
 (5) you that there were no data or specific incidents that could  
 (6) support the negative comments that were made about the  
 Kodiak  
 (7) area And this next witness it is my understanding will have  
 (8) such specific data to back up the comments that he gave to Mr  
 (9) MacSwain that he gave them to Mr MacSwain  
 (10) THE COURT Anything else?  
 (11) MR STOLL No he said it  
 (12) THE COURT Okay here s the situation as I see it  
 (13) MacSwain was cross-examined at length He was never asked  
 (14) about this statement to Mr Cook He - he was from  
 (15) everything I can see he was known as a witness prior to  
 (16) trial He certainly should have been known as a possible  
 (17) witness prior to trial The Plaintiffs certainly had full and  
 (18) fair opportunity to cross-examine Mr MacSwain and in fact  
 (19) they - they cross-examined him about material that might have  
 (20) been contrary to his opinions or contrary to the general drift  
 (21) of his testimony They should have asked him about Mr Cook  
 (22) in order to provide the basis for Mr Cook s rebuttal  
 (23) testimony They didn t do it Clearly they did it for a  
 (24) strategic reason I can t think of any other reason they  
 (25) didn t do it. He s not going to be allowed to testify

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- (1) MR STOLL Your Honor may I just respond to what  
 (2) you -  
 (3) THE COURT No no here s the reason why You just  
 (4) had an opportunity to argue this issue Mr Stoll You chose  
 (5) not to do it Now the arguments over I ve made the ruling  
 (6) MR STOLL That s fine I d accept the ruling Your  
 (7) Honor I d just like to clarify something  
 (8) THE COURT No no no The answer is no All right  
 (9) I m going to take a break  
 (10) THE CLERK Please rise This court stands in  
 (11) recess  
 (12) (Recess from 11 45 a m to 12 02 p m )  
 (13) (Jury in at 12 02 p m )  
 (14) THE CLERK This court now resumes its session  
 (15) Please be seated  
 (16) THE COURT Mr Stoll before you start I m going to  
 (17) tell the jury what my expectation is for the rest of the  
 (18) trial  
 (19) You ll hear two Plaintiffs rebuttal witnesses today and  
 (20) then we will recess Then on Tuesday you ll get a full day of  
 (21) testimony the rest of the Plaintiffs rebuttal case and I  
 (22) don t know whether there will be any other testimony that day  
 (23) but I m hoping that the evidence will close then on Tuesday  
 (24) And then I have to make the decision how much time you get off  
 (25) while we work on the instructions and I ll let you know about

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- (1) that on Tuesday all right?  
 (2) Counsel  
 (3) MR STOLL Thank you Your Honor We re going to -  
 (4) ladies and gentlemen we re going to move around a little bit  
 (5) because our witnesses - by move around I mean from point to  
 (6) point and it s going to be very brief hopefully responding  
 (7) to not all points but certain points that were made by the  
 (8) Defendants or some of their witnesses And so it may seem at  
 (9) times that we re somewhat abruptly moving from one area to  
 (10) another but that s the nature of rebuttal case  
 (11) We call - I d like to introduce my co-counsel from Kodiak  
 (12) Mr Jamin who s going to conduct the next witness  
 (13) Dr Peterson  
 (14) THE COURT If you ll clip on the microphone please  
 (15) sir You don t have to take the oath again because you  
 (16) previously testified but you understand you are still under  
 (17) oath?  
 (18) A Yes  
 (19) THE COURT All we need to have you do is give your  
 (20) name for the record  
 (21) A My name is Charles Henry Peterson  
 (22) DIRECT EXAMINATION OF CHARLES HENRY PETERSON  
 (23) BY MR JAMIN  
 (24) Q Your Honor good afternoon Ladies and gentlemen good  
 (25) afternoon

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- (1) Dr Peterson after you testified about the ecological  
 (2) interrelationships of biota in the Prince William Sound and the  
 (3) effects of the Exxon Valdez oil spill there were three issues  
 (4) that were presented by Defendants we re going to approach  
 (5) today One involved the objectivity of trustee science the  
 (6) second how to define recovery in the sound and the third  
 (7) study designed to best determine recovery Now let s take a  
 (8) look at the first one  
 (9) Focusing upon your role as a peer reviewer for the  
 (10) trustees can you explain the relationship between scientists  
 (11) applying for grants to do work to do science and the peer  
 (12) reviewers themselves?  
 (13) A Yes I d be happy to The peer reviewers are selected on  
 (14) the basis of their academic excellence from scientists around  
 (15) the country and even outside the country to serve as  
 (16) independent reviewers of the science that is proposed to be  
 (17) done of the study designs and of the reports that are created  
 (18) on the outcome of that science  
 (19) So the peer reviewers are fully independent They have no  
 (20) stake in whether it s thumbs up or thumbs down on a particular  
 (21) study They are hired and paid to come and give their very  
 (22) best critical and unbiased scientific advice and that s in  
 (23) fact the function that they play  
 (24) Q Dr Peterson how many peer reviewers would it take to  
 (25) approve a particular request?

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- (1) A For a grant proposal that comes in to the trustee council  
 (2) or for a report based upon that work two to three peer  
 (3) reviewers who are experts on the particular area in question  
 (4) are employed to review that work Then in addition the study  
 (5) proposals and at times also the results of these studies are  
 (6) discussed in a very broad and open meeting that is attended by  
 (7) many additional reviewers so that comments can be heard  
 (8) openly  
 (9) so that debates about design and what is best debates about  
 (10) conclusions and how well they are founded are quite broad  
 (11) across all those peer reviewers present  
 (12) Q Does the chief scientist have any separate role in  
 (13) reviewing requests for funding?  
 (14) A Yes the chief scientist conducts his own review and he  
 (15) does it in consultation and in participation with these other  
 (16) reviews that I ve told you about  
 (17) Q How about the trustees themselves Dr Peterson?  
 (18) A The trustees as well conduct a review based upon the  
 (19) recommendations of the peer reviewers and the chief scientist  
 (20) Q Dr Peterson let me cut right to it Mr Gilfillan  
 (21) suggested that there might be some built in bias to find damage  
 (22) or else scientists would not be able to continue working Can  
 (23) you explain why projects which did not find impact might not be  
 (24) funded?  
 (25) A Yes I d be pleased to The role that we as pier reviewers  
 are playing on behalf of the trustees is to assist them in

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- (1) their mission Their mission was to use public resources to  
 (2) try to understand the effects of the spill the recovery from  
 (3) the spill and what might need to be done to restore  
 (4) populations and resources damaged by the spill It would be  
 (5) totally inappropriate to use public moneys to spend on a  
 (6) project that a scientist just found - that interested him but  
 (7) that was unrelated to the purpose of what the trustees were  
 (8) doing  
 (9) Q Dr Peterson if there was any such bias as Dr Gilfillan  
 (10) suggested would it be part of your job to weed it out?  
 (11) A That - that s exactly one of the major jobs that we as  
 (12) peer reviewers have is to make the science as very best as it  
 (13) possibly can be  
 (14) Q And did you ever see any such bias?  
 (15) A Only rarely  
 (16) Q And to the extent that you did see such bias what was your  
 (17) responsibility?  
 (18) A My responsibility was to identify it make sure that that  
 (19) bias did not persist either in the study designs or the  
 (20) decisions or in the reports And in fact I did that I  
 (21) think I and other peer reviewers have written and talked at  
 (22) length about our critical comments where the criticism was  
 (23) necessary and those criticisms have been taken into account in  
 (24) the decisions and in the rewriting of those reports  
 (25) Q Dr Peterson last question on this issue Was the sort of

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- (1) bias which Mr Gilfillan postulated a factor in any of the  
 (2) scientific results you reported on in this courtroom?  
 (3) A No It was not  
 (4) Q Let s take a moment to look at another criticism that has  
 (5) been leveled at the particular approach that trustee science  
 (6) took  
 (7) There was an issue raised by Dr Gilfillan about whether  
 (8) the trustees used the proper definition of recovery in looking  
 (9) at resources What is your understanding of what Dr  
 (10) Gilfillan s contention was?  
 (11) A Well I think if -  
 (12) Q And if you want to use the board you may  
 (13) A Thank you I think I can best illustrate that in my mode of  
 (14) drawing  
 (15) The basic contention is as follows There could indeed be  
 (16) different ways of defining recovery and Mr Gilfillan raises  
 (17) an issue about how the trustees and the scientists working for  
 (18) the trustees indeed define recovery Let me draw a graph and  
 (19) what I m going to draw on this graph is numbers of some  
 (20) species  
 (21) or resource A and then I m going to draw how those numbers  
 (22) change over time  
 (23) Now the issue here is as follows We have this point  
 (24) represents the numbers at some time that occurs before the  
 (25) spill we have some numbers of those organisms before the  
 spill Then the spill occurs and I ll indicate that by the

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- (1) arrow  
 (2) And after the spill has occurred we have some new  
 (3) numbers Let s put it there Now that could be called an  
 (4) after point  
 (5) Now it is possible that one might want to compare the  
 (6) before to the after and say that that is indeed a measure of  
 (7) the damages done by the spill However that is not the  
 (8) measure that the trustees used although Mr Gilfillan was  
 (9) concerned that that was indeed the measure  
 (10) Instead and let me draw this here and continue it out for  
 (11) some additional times and let me call this the oiled numbers  
 (12) Instead what the trustees did was as follows  
 (13) The trustees looked at what are called reference sites and  
 (14) the measure of the effect of the spill is then the difference  
 (15) between the reference and the oiled sites afterwards and you  
 (16) can see that can be different from the before and after and  
 (17) here s the philosophy  
 (18) Reference sites are intended to be sites that looked  
 (19) exactly like the oiled ones before the spill occurred such  
 (20) that they plot the trajectory over time of what the system  
 (21) would have looked like in the absence of the spill  
 (22) And so the definition of a damage of an injury to the  
 (23) spill is the difference between what you see at oiled sites  
 (24) and what you would have seen had there been no oil and this  
 (25) difference of course can be tracked through time And recovery

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- (1) occurs at the time where those converge so there is no longer  
 (2) a difference between the oiled sites and how those sites would  
 (3) have appeared in the absence of the spill  
 (4) Mr Gilfillan contended that the trustee science definition  
 (5) included not only this but also a comparison before and after  
 (6) the spill that ignores what the natural changes in the system  
 (7) are doing over that time In fact there is very little before  
 (8) data that one could even ever use for a particular resource to  
 (9) make the before/after comparison And for the coastal ecology  
 (10) programs and for virtually all other resources the  
 (11) comparisons made are the very comparison that is suggested  
 (12) by  
 (13) Mr Gilfillan and used by Exxon science comparing oiled and  
 (14) referenced shorelines  
 (15) Q So Dr Peterson the reference line might be for the  
 (16) particular species A what would have happened but for the  
 (17) spill?  
 (18) A Yes that s exactly what the reference line is meant to -  
 (19) to show  
 (20) Q All right Let me turn this so His Honor can look at it  
 (21) just a bit  
 (22) Is that enough Your Honor you can see it  
 (23) THE COURT That s fine  
 (24) BY MR JAMIN  
 (25) Q And then the solid line is what happens with the spill  
 (26) with the effect of the spill?

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- (1) A That is correct  
 (2) Q All right Now Dr Peterson I want to get a sense of  
 (3) from the approach of a scientist why studying recovery this  
 (4) way is so important  
 (5) Why do you go out in nature and try to study recovery as  
 (6) opposed to in the lab?  
 (7) A Here is the reason that the trustees did this and  
 (8) presumably the reason that Exxon did it as well The damages  
 (9) that occur from a spill to animals in nature and plants in  
 (10) nature to the natural ecosystem are a consequence of many  
 (11) many  
 (12) processes that occur to affect them These are processes that  
 (13) include such things as toxic effects of oil dissolved in water  
 (14) the toxic effects of contact with oil the effects of  
 (15) smothering by oiling on the shores the effects of eating  
 (16) oil-contaminated prey in the system  
 (17) The effects of oiling on feathers or fur that prevent  
 (18) thermo regulation and keeping of animals or birds warm and  
 (19) several others that I won t mention When one goes out into  
 (20) the field this way in nature and if one designs a well-designed  
 (21) powerful program that can separate oiled and reference sites  
 (22) what you have done is to do a program that looks at the whole  
 (23) listing damages that occurred from the spill  
 (24) That contrasts with the approach where you try to  
 (25) understand the minutiae of particular effect by bringing it  
 (26) into the laboratory For example in water-dissolved toxicity

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- (1) testing that being just one component of the way that oil  
 (2) affects the organisms we can never build enough of those  
 (3) component studies in the laboratory to do any sort of a job of  
 (4) combining them especially in the interactive ways that they  
 (5) affect organisms just the way for example that medications  
 (6) often interact in their effects  
 (7) And so the field is the ultimate arbiter of what happened  
 (8) when you design a good study that separates oil and reference  
 (9) sites  
 (10) Q All right  
 (11) A And this has been recommended by two reviews of the  
 (12) National Academy of Sciences of oil spill effects and what  
 (13) should be done to understand them  
 (14) Q All right So focusing on the first question with respect  
 (15) to the - the idea of defining recovery do I understand  
 (16) correctly that the trustees and Exxon are using the same  
 (17) definition sir?  
 (18) A Yes they are basically using the same definition The  
 (19) implementation differs  
 (20) Q Let s take a look at that implementation now and let s try  
 (21) to get a feel of how the implementation could occur  
 (22) What are the basic ways that one could set up a study  
 (23) design to deal once one has this definition of recovery  
 (24) defined?  
 (25) A There are two fundamental designs that one could pursue

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(1) One is called a randomized design and the other is called a  
 (2) paired design I think I might ask to refer to -  
 (3) Q We have a map of the sound Doctor which is Plaintiffs  
 (4) Exhibit 1161  
 (5) A To the shoreline of Prince William Sound as an example to  
 (6) help explain what I'm talking about A randomized design  
 works  
 (7) as follows One goes to the spill area and selects some number  
 (8) of oiled sites to look at and selects those at random so  
 (9) there's no bias to that selection draws some number at  
 (10) random In fact the number of sites for a given shoreline  
 (11) type that was used in the Exxon science was four they selected  
 (12) four of these shorelines at random  
 (13) Then what one does in the randomized design is to select  
 (14) some number - four usually - of reference sites These  
 (15) would be unoiled sites against which to compare them so as to  
 (16) make this comparison that we would like to make to assess the  
 (17) damages from the spill That's the randomized design  
 (18) The paired design and that was the design used by the  
 (19) University of Alaska's study and the trustee science the  
 (20) paired design goes as follows It too preserves the  
 (21) principal of randomness by selecting several oiled shores at  
 (22) random and four was traditionally the number that they  
 (23) selected for most shoreline types  
 (24) So they had four sites that were oiled but then for the  
 (25) reference sites there's a fundamental and intrinsic and basic

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(1) difference The reference sites chosen for the University of  
 (2) Alaska study were paired sites For each individual oiled site  
 (3) that was chosen an unoiled reference site was chosen such  
 that  
 (4) it met several criteria to make that site more similar to what  
 (5) the oiled one would have looked like before the oil  
 (6) These criteria were geographic proximity so that it was  
 (7) close by slope of the shoreline geological characteristics of  
 (8) the shoreline wave energy that was striking the shoreline and  
 (9) orientation of the shoreline whether it faced a particular  
 (10) direction  
 (11) Those were the characteristics that were used to help  
 (12) ensure that there was a good matching between the oiled site  
 (13) and the reference site so that the reference site really did  
 (14) look like what the oiled site would have looked like in the  
 (15) absence of the spill  
 (16) Now this is a common methodology and it's most commonly  
 (17) practiced in medical science as a design as follows If for  
 (18) example you want to test the effectiveness of a new medication  
 (19) and you're giving it to patients and you give other patients a  
 (20) placebo you make a design of pairing whereby if you choose a  
 (21) 40-ish smoking male for getting the drug you choose and pair  
 (22) with it a 40-ish smoking male to get the placebo  
 (23) When you choose a female high schooler who doesn't smoke  
 (24) for the drug you choose a female high schooler who doesn't  
 (25) smoke for the placebo That mechanism of pairing for  
 important

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(1) characteristics that you know can affect the outcome of the  
 (2) experiment how effective the drug might be that means of  
 (3) pairing is the mechanism by which scientists get around the  
 (4) unwanted influence of a lot of other variation and factors in  
 (5) the system  
 (6) And that is the design that was used by the University of  
 (7) Alaska's shoreline study to get around the variability that is  
 (8) intrinsic in a fully randomized design  
 (9) Q Dr Peterson in your opinion should Exxon have used the  
 (10) random sampling design as opposed to the paired design?  
 (11) A No  
 (12) Q Why?  
 (13) A The reason is as follows There is nothing intrinsically  
 (14) wrong with the randomized design that Exxon chose The  
 problem  
 (15) lie in the following That design only works when you have a  
 (16) large number of replicate shoreline sites that you look at  
 (17) And the reason that you need a large number is that if you  
 (18) don't have a large number simple random accident of where  
 that  
 (19) particular sample set is going to fall dictates tremendously  
 (20) what you see And I could give an example  
 (21) In the Exxon shoreline ecology program for their  
 (22) exposed bedrock rocky shoreline-habitat type three out of the  
 (23) four or five shorelines that they looked at as reference sites  
 (24) fell along one shore of a single island Perry Island up  
 (25) here

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(1) And that's much like tossing a coin I mean you could get  
 (2) four heads with high probability you could get four heads in  
 (3) a row Similarly when you allow these random sites to fall  
 (4) where they will in the system you can get those sorts of  
 (5) anomalies and if you have three of those sites on that one  
 (6) island that is simply not representative of all the oiled  
 (7) sites in the system  
 (8) Q All right Now Dr Peterson as I understand it you're  
 (9) suggesting that the random approach that Exxon took in  
 (10) establishing its reference sites led to a set of sites that  
 (11) were not in fact random but you have three was it on Perry  
 (12) Island?  
 (13) A That's correct  
 (14) MS SMITH Objection Your Honor leading  
 (15) THE COURT I'll allow it up to now counsel Watch  
 (16) the leading questions all right?  
 (17) MR JAMIN All right Thank you Your Honor  
 (18) BY MR JAMIN  
 (19) Q Besides the geographic difficulties that you've suggested  
 (20) were there other specific biases that you saw in the choice of  
 (21) sites that Exxon made for its references?  
 (22) A There are many issues that need to be taken into account  
 (23) besides this one of making sure that you've got enough sites so  
 (24) as to get a representative picture that they're scattered  
 (25) around and you don't have the accident of the coin flip and



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- (1) where they happen to be  
 (2) Perhaps the biggest problem associated with these  
 (3) geographic concerns is the following The oil came in from the  
 (4) Bligh Reef area – and we all know came in this direction and  
 (5) moved through and tending to oil shorelines on these islands  
 (6) here  
 (7) The question is if we are going to draw at random  
 (8) shorelines to compare to these that we think look like those  
 (9) shores without oil where do we draw from? What's our  
 universe  
 (10) that we're drawing from to get those random sites? We  
 (11) obviously don't do a universe that includes all of Southeast  
 (12) Alaska because we've gotten out of the system We don't do a  
 (13) universe that includes the eastern part of the sound –  
 (14) Q There's some water there if you'd like?  
 (15) A Thanks Sorry  
 (16) MS SMITH Although your history with water is not  
 (17) good  
 (18) A The warning there  
 (19) (Continued) The issue then here – and this is a very  
 (20) critical point to address – the issue is where do we take  
 (21) these oiled shores from that we're going to make that  
 (22) comparison And Exxon decided to take those oiled – those  
 (23) unoiled reference shorelines from an area that included the  
 (24) mainland coastline and especially the southwest corner of the  
 (25) sound The problem with that is geographically that gets

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- (1) away from where the oil struck so it gives you a higher  
 (2) likelihood that there were intrinsic differences by not doing  
 (3) the pairing but even worse we know that there are effects  
 (4) from runoff of ice melt from glaciers near the shoreline that  
 (5) do such things as retain low temperature of the water reduce  
 (6) the salinity of the water add to the turbidity the materials  
 (7) dissolved and suspended in the water and other factors  
 (8) associated with that that have effects on the animals and make  
 (9) these sites over here intrinsically less biologically rich  
 (10) just by their very location and their nature  
 (11) That means that they don't look like a site out here even  
 (12) in the absence of the spill  
 (13) And in particular for example of the – of the  
 (14) pebble/gravel beach type in the Exxon shoreline program three  
 (15) out of four of their reference sites fell in this southwest  
 (16) corner up against the mainland Two of them in this region at  
 (17) Bainbridge and Port Bainbridge when you look at the data  
 (18) showed gross impoverishment of those sites By that I mean  
 (19) that at both places there were even samples that contained no  
 (20) organisms no plants or no animals  
 (21) Now the presumption that that's what these shores looked  
 (22) like is simply not acceptable When you look at the other  
 (23) reference shore of that program that fell out on Knight Island  
 (24) more appropriately it had some 12 to 16 species hundreds of  
 (25) individuals in the sample

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- (1) So the referenced shores are radically different and it's a  
 (2) difference that is an effect of making the area from which the  
 (3) random sampling was done for those reference shores too  
 broad  
 (4) so that those samples do not naturally look like the samples  
 (5) the sites that got oiled  
 (6) One particular way of putting this is as follows And that  
 (7) is oil did not strike at random so there is no reason to  
 (8) sample at random from the unoiled shores to provide the shores  
 (9) that you're contrasting with the oiled ones The oil came in a  
 (10) particular pattern tended to hit at north ends of islands and  
 (11) in other areas that you could describe in a way that is  
 (12) nonrandom  
 (13) So taking a random sample from a bigger area that includes  
 (14) areas that were not oiled geographically is simply not the  
 (15) right way to make sure that what you have here are places that  
 (16) before the oil spill would have been identical  
 (17) Q Now Dr Peterson besides these design problems that  
 (18) you've suggested to us were there problems from your point of  
 (19) view with respect to the sample sizes as Exxon scientists took  
 (20) samples from the beaches?  
 (21) A Yes These are design issues that I've been talking about  
 (22) and there are problems with the sampling that was conducted  
 (23) even outside of these other concerns that I've raised about the  
 (24) broader design  
 (25) Q Would another board help to describe that?

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- (1) A It would I think you've heard here in this courtroom  
 (2) about how there is patchiness to the way the animals and plants  
 (3) occur on the shorelines Let me just draw some of that  
 (4) And what I'm doing here is not to represent that this is  
 (5) necessarily all one species It might be fucus It might be  
 (6) the rockweed with a number of snails that are crawling  
 (7) crawling around it but it's a particular type of patch It's  
 (8) a patch on the shoreline Patch – patch A  
 (9) Likewise there are other – other patches on this  
 (10) shoreline and by that I mean that this might be a patch of  
 (11) mussels this might be an area with a species of limpet this  
 (12) might be a limpet plus mussel combination  
 (13) This is a depiction of the kinds of patchiness that you  
 (14) might go and the sorts of patterns that plants and animals  
 (15) might occupy on a shoreline  
 (16) Now let me say something first and that is that both the  
 (17) Exxon science program and the programs that were conducted  
 for  
 (18) the trustees and for the government did the same stratifying of  
 (19) the shore – and I'm sorry about that term but what that means  
 (20) is they recognized as I have been here talking to you before  
 (21) that high on the shore and low on the shore makes a difference  
 (22) because of the amount of time the water is covering it  
 (23) And so the first thing they did in all of these studies was  
 (24) to separate the high intertidal zone a middle intertidal zone  
 (25) and a lower intertidal zone And they sampled in each of those

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- (1) zones sampled with some number of replicate - replicate means
- (2) repeated samples in each of those zones
- (3) This is meant to depict just for example a mid intertidal
- (4) zone - I don't mean to pick any in particular. But the first
- (5) thing is subdividing the shore into high, medium and low, and
- (6) samples are allocated some number of samples
- (7) You have to worry about what sample size to use, okay, how
- (8) are we going to sample a shore like this. Well, here is the
- (9) issue
- (10) The Exxon samples in Exxon science were very small relative
- (11) to the samples used in both of the trustee studies, and Exxon
- (12) had two sample sizes, depending upon whether they took a
- (13) core
- (14) into the sediments or whether they took a scrape of organisms
- (15) that were on a rock surface. The sediment core was about that
- (16) size, the scrape sample was about that size
- (17) In contrast, the NOAA study that was conducted - and let
- (18) me write somewhere up here what these actual sizes are
- (19) Q Doctor, there may be another color if that helps at all
- (20) but please go ahead. There's a red here
- (21) A All right. The individual samples taken by Exxon science
- (22) were either 0.31 meters squared, this one - I'm sorry, the
- (23) rectangle or 0.078 meters squared, this core circle. In
- (24) contrast, the NOAA studies had 0.25 meters squared samples
- (25) Well, that sample you can see is eight times even the

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- (1) it's approximately a foot and a half by a foot and a half. I
- (2) don't know how well I can do of getting a foot and a half, but
- (3) it's on the order of that size that I draw right there
- (4) The University of Alaska samples that were taken were
- (5) either 1 square meters, 2 square meters or 1.7 square meters
- (6) and at each time, samples of each of those sizes were taken for
- (7) different purposes. Even the smallest of these, the 1 square
- (8) meters, is still three times, almost four times the size of the
- (9) largest of the Exxon samples
- (10) Now, notice what this does. Why do we sample a shoreline?
- (11) We sample it to get an idea of what lives there, right?
- (12) That's - that's what we're doing
- (13) If the sample we take is small in a patchy environment, we
- (14) don't get the right idea of what lives at the shoreline. We
- (15) don't get a representative picture that averages over all the
- (16) patches on the shore, and although this is a hypothetical
- (17) example, this particular set of samples would be falling
- (18) entirely within patch A and would give you the impression that
- (19) the shore looks like patch A, whereas the larger sample would
- (20) average over several patches and give you a much better
- (21) average
- (22) depiction of what the organisms are on that shoreline
- (23) So sample size is fundamentally an issue, and when you have
- (24) these non-representative small samples, it makes for
- (25) tremendous
- (26) variability in your data, and variability means noise, really
- (27) how much error there is bouncing up and down. And noise in the

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- (1) data is the enemy of the scientist who is trying to find even
- (2) large patterns in the system that are there. So sample size is
- (3) a big difference and an important concern
- (4) Q Besides sample size, Dr. Peterson, is the number of samples
- (5) taken by Exxon in comparison to the trustee studies important
- (6) in trying to figure out whether there has been recovery?
- (7) A Yes, just the way we need several sites to look at, several
- (8) replicate sites so we get an idea of the average conditions, we
- (9) need several replicate samples. The Exxon shoreline study
- (10) used
- (11) three replicate samples. The University of Alaska - and by
- (12) three replicate, I mean every level of the shore, every beach
- (13) they went to, they had three samples that they placed there
- (14) The University of Alaska study used six, a factor of two
- (15) different. The NOAA study used five at the high level of the
- (16) shore, and 10 and 10 at the intermediate and the lower levels
- (17) of the shore
- (18) So there was a fundamental difference which again has the
- (19) effect of making the government science studies much more
- (20) able
- (21) to see effects and to see differences
- (22) Q Dr. Peterson, taking into account both the size of the
- (23) samples that you have in the upper right hand corner, and the
- (24) number of samples which you have over here in the middle
- (25) portion of the right, are you able to give us, for a particular
- (26) type of beach, any estimate as to how - how much difference an
- (27) overall area studied that the two approaches take or lead to?

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- (1) A Yes. When you combine differences in the size of the
- (2) sample and in how many samples you take, and the differences
- (3) run in the same way with the Exxon studies being small samples
- (4) and the Exxon studies being few samples, the combination of
- (5) the
- (6) two makes for tremendous differences in the sampling effort in
- (7) how much is actually sampled to try to give you a picture of
- (8) what's going on in nature. And I'll give an example that I
- (9) calculated on that
- (10) The example is for looking at all types of shorelines, all
- (11) types of different oiled shorelines that are from sheltered
- (12) rocky bedrock shores - the habitat that was most commonly
- (13) oiled in Prince William Sound - and for the mid intertidal
- (14) zone - I just picked the middle intertidal zone for this -
- (15) the Exxon study which sampled quantitatively those shorelines
- (16) only once in 1990. I'll give the number and the area that they
- (17) cover in all of those sites that they looked at in that
- (18) habitat
- (19) The total area that was covered by sampling, the total
- (20) area in that habitat was 1.38 square meters. That is an area
- (21) about the size of this board right here, perhaps just slightly
- (22) larger. From that total amount of sampling, they extrapolated
- (23) to 275 miles of oiled shore of that type, sheltered rocky in
- (24) Prince William Sound. That was the total amount of sampling in
- (25) the mid intertidal of sheltered rocky
- (26) In contrast, the NOAA study in 1992, in that same habitat

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(1) same level of the shore sampled a total of 36 square meters  
 (2) nearly 30 times as much to get their picture of what the system  
 (3) looked like  
 (4) The U of A study for 1990 for that particular level of  
 (5) shoreline for that sheltered rocky habitat in Prince William  
 (6) Sound sampled 230 square meters of the shoreline  
 (7) Now Mr Gilfillan may have spent greater than a hundred  
 (8) days out on the shores of this system but the grand total  
 (9) sampling effort by the armies of people working for the  
 (10) government scientists exceeded what Exxon put in sum by  
 (11) sampling even for a single time - these are just for  
 (12) particular years - by tremendous amounts thereby allowing  
 (13) those programs to learn much more about the condition of the  
 (14) ecosystem and the quantitative amount of damages and  
 (15) recovery  
 (16) Q Now Dr Peterson you've mentioned the - the geography  
 (17) with the sample size with the number of samples and I heard  
 (18) you say that there was sampling by the trustees in a particular  
 (19) year and another particular year you mentioned that is  
 (20) timing an issue the number of times we go out to a particular  
 (21) site? And if so how is that important?  
 (22) A Yes timing is very much an issue I mentioned that the  
 (23) Exxon science shoreline quantitative program sampled only  
 (24) once They sampled in Prince William Sound in 1990 was the  
 (25) single time From that sampling was derived an estimate of  
 (26) what the called percentage recovery of the shoreline

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(1) ecosystem And you've heard those numbers of 73 to 91  
 (2) percent  
 (3) recovered  
 (4) That came from a single point in time from a single point  
 (5) in time It is logically impossible to measure the percent  
 (6) recovery and here's why I'll tell you You need time frame  
 (7) to show what is happening through time to know that any  
 (8) recovery occurred at all and at what rate it's occurring  
 (9) When you go out once - and if we let this be 1990 - if  
 (10) you go out once in 1990 if you do a proper design - which  
 (11) Exxon did not - you have the potential to measure this  
 (12) difference so you can measure the degree to which there is  
 (13) still damage between the oiled and reference shores You do  
 (14) not know anything about the recovery of damage If you  
 (15) presume  
 (16) that those oiled and reference shorelines would all have been  
 (17) significant 100 percent significant after the spill then what  
 (18) you saw here could indeed be the recovery but that difference  
 (19) that you observe may be the same difference that would have  
 (20) been observed in 1989 That difference may be the same  
 (21) difference that would be observed in quantitative studies in  
 (22) 1991  
 (23) In principal recovery demands a time frame - and in fact  
 (24) note how I defined it here - that recovery is the time at  
 (25) which these two converge  
 (26) In contrast the studies by the government didn't go out  
 (27) just the once But the studies by the government - and I'm

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(1) talking about both sets of studies the university and the NOAA  
 (2) studies - have continued to go out for multiple times of  
 (3) sampling There are four sets of samples sample dates by the  
 (4) end of 1991 for the university study There are five sets of  
 (5) sample dates by the end of 1992 for the NOAA study and both  
 (6) studies are continuing to sample into the present to track  
 (7) what the convergence is what the return is and therefore  
 (8) what the recovery is  
 (9) Q Dr Peterson if you consider the design issues that you've  
 (10) talked with us about and the implementation issues that you've  
 (11) talked with us about what are the consequences of the  
 (12) different approach that Exxon took as opposed to the trustees  
 (13) in terms of being able to measure recovery?  
 (14) A The consequences I've alluded to one already and that is  
 (15) without a time frame you simply don't know anything about  
 (16) recovery You don't know whether the differences are growing  
 (17) or shrinking from a quantitative shoreline recovery program  
 (18) In addition however all of these issues plus others that  
 (19) I haven't mentioned create two serious problems in using the  
 (20) Exxon quantitative shoreline ecology study to assess damages  
 (21) or  
 (22) recovery The first I've told you about is the inappropriate  
 (23) selection of reference sites reference sites outside of that  
 (24) zone of the spill on shores that would have looked different  
 (25) whether there'd been no oil or not and that violates what you  
 (26) were trying to do with reference sites The second - and

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(1) there's a bias to that Let me give you a feel for what that  
 (2) bias is  
 (3) If those reference sites are in impoverished areas areas  
 (4) where the biota is depressed already by something that is  
 (5) associated with the terrestrial system - such as the ice  
 (6) melt - if those are depressed already then it's a bias in  
 (7) making it look like the effects of oil are much reduced or even  
 (8) making it look like oil is a positive effect that helps the  
 (9) organisms And this helps explain the unacceptable and  
 (10) inaccurate conclusion that was reached in the Exxon shoreline  
 (11) program of higher abundances on some oiled shores than on  
 (12) unoiled shores  
 (13) In addition the fact that there is not a control for all  
 (14) the sorts of noise all this variability that I talk about the  
 (15) fact that that variability exists in the studies make it very  
 (16) difficult to see an oil spill effect  
 (17) It's like looking through a forest and trying to find a  
 (18) signal The signal might be there and might be large but the  
 (19) design itself doesn't overcome that variability The  
 (20) variability isn't intrinsically nature's variability but it's  
 (21) nature's variability plus what variability is introduced by the  
 (22) study design the study methods the sample sizes and the  
 (23) numbers of samples So that having all the variability like  
 (24) that and as well as having the flawed and biased design means  
 (25) that there is no reliability to the shoreline ecology recovery

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- (1) percentage of 73 to 91 percent  
 (2) Q Dr Peterson can science be inconclusive by design?  
 (3) A Yes it can  
 (4) Q What does that mean?  
 (5) A Inconclusive by design means that if you conduct and  
 (6) design a study that does not control for variation but allows  
 (7) for lots of variation you simply cannot see big signals in the  
 (8) system such as the signal of oil spill and you have that  
 (9) choice when you make a design up front You have the control  
 (10) over what size sample to use where to put the samples how  
 (11) many samples to use whether to use a paired or a random  
 (12) design And so if you make choices not retain lots of  
 (13) variation and lots of noise you up front make the choice that  
 (14) you are not going to detect big signals in the system  
 (15) Q Dr Peterson last question In your opinion do the  
 (16) results of 73 to 91 percent of shoreline recovery that have  
 (17) been touted in this courtroom is the science underneath those  
 (18) results flawed by inconclusiveness of design?  
 (19) A That is exactly the case I have argued and that is my firm  
 (20) belief that they are flawed by the inconclusiveness of the  
 (21) design and the biases in the design  
 (22) MR JAMIN Dr Peterson I'm sure counsel for Exxon  
 (23) has questions Thank you sir  
 (24) CROSS EXAMINATION OF CHARLES HENRY PETERSON  
 (25) BY MS SMITH

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- (1) pre - a return to pre spill which is what the trustees  
 (2) definition in the restoration plan says or a comparison  
 (3) between oiled sites and unoiled never-oiled sites which we  
 (4) call reference sites - you're now saying that the trustees did  
 (5) what Gilfillan and Page did which is they compared reference  
 (6) sites or never-oiled sites to oiled sites?  
 (7) A That's correct That is specifically the way -  
 (8) Q And didn't require -  
 (9) A - the way that the shoreline ecology programs progressed  
 (10) Q No no no I'm asking you about the trustees  
 (11) The trustees definition in the draft restoration plan  
 (12) found that you had to go back to pre-spill conditions and Drs  
 (13) Gilfillan and Page said No no no you have to compare  
 (14) unoiled sites never-oiled sites with oiled sites and see if  
 (15) the critters are the same  
 (16) Are you now saying that the trustees also rejected trying  
 (17) to go back to pre-spill conditions and compared never-oiled  
 (18) sites to oiled sites?  
 (19) A What I am telling you is how the trustees and the  
 (20) scientists operating for the trustees practiced the definition  
 (21) and reached conclusions about recovery  
 (22) Q All right Are you -  
 (23) A And the way in which they did that was in practice to use  
 (24) a comparison just as you mentioned of oiled and reference  
 (25) sites That was for a variety of reasons

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- (1) Q Mr Peterson do you feel like you've earned your  
 (2) doctorate?  
 (3) A Yes  
 (4) Q Would you like to be called Dr Peterson?  
 (5) A I am commonly called Pete if that is of help  
 (6) Q Can I suggest to you that Dr Gilfillan might like to keep  
 (7) his doctorate too?  
 (8) A Let me just say I'm happy to call him Ed if that's your  
 (9) choice I'll call him Doctor or Mister that would be fine  
 (10) Q When you started out on the first two points it sounded  
 (11) like instead of a rebuttal we had agreement so let me see if  
 (12) I can just go through those  
 (13) The first point as I take it was it's not that the  
 (14) trustees are biased but it is true no continuing impact from  
 (15) the oil spill no funding right?  
 (16) A That's correct That is one of the - and in my judgment  
 (17) appropriate criteria for the expenditure of public funds that  
 (18) are designed to assess the spill damage and recovery  
 (19) Q Okay So our point which is your point is if you can't  
 (20) find continuing EVOS impact there's no more money out of the  
 (21) restoration fund?  
 (22) A That's - that's true in general Although I could qualify  
 (23) it for some variety of purposes but that is generally true  
 (24) Q All right And your second point is that on the design of  
 (25) the programs and the definition of recovery - whether it's

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- (1) Q So they rejected?  
 (2) A But in part -  
 (3) MR JAMIN Objection Your Honor she did not let the  
 (4) witness finish  
 (5) THE COURT That's true counsel You have to let the  
 (6) witness answer the question  
 (7) MS SMITH I don't believe he's answering my  
 (8) question  
 (9) THE COURT You may not believe that but you have to  
 (10) come to me So let him finish his answer  
 (11) A I agree in part but it's a rare opportunity unless we knew  
 (12) that pre-spill abundances were  
 (13) BY MS SMITH  
 (14) Q All right So the trustees didn't use the draft  
 (15) restoration plan's definition of recovery Instead they used  
 (16) the same definition as Drs Gilfillan and Page?  
 (17) A To a point There are - my argument here and I hope you  
 (18) understand it and I'm answering your question  
 (19) MS SMITH Your Honor I would like a yes or no to  
 (20) this question  
 (21) THE COURT Give the question again If you can give  
 (22) a yes or no answer please answer yes or no then you'll be  
 (23) allowed to explain all right?  
 (24) MS SMITH Joy can you read it back please  
 (25) (The prior question was read)

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- (1) A The answer is for virtually all resources yes But not  
 (2) for every one  
 (3) MS SMITH Can I have the Elmo? I always do this -  
 (4) okay  
 (5) BY MS SMITH  
 (6) Q This is out of the draft restoration plan It s PX8003  
 (7) page B-4 and don t the trustees say that full ecological  
 (8) recovery will have been achieved when the population of flora  
 (9) and fauna are again present at former or pre-spill abundances  
 (10) healthy and productive and there is a full complement of age  
 (11) classes at the level that would have been present had the spill  
 (12) not occurred? Is that what it says?  
 (13) A I m reading that but I d like to see the document I  
 (14) presume that that s a correct reflection  
 (15) And as well I would like to point out that there are  
 (16) different definitions within that very same document that are  
 (17) inconsistent on this point The document was a draft document  
 (18) and that I think explains the variety of definitions  
 (19) Q You re saying the definition there may be inconsistent with  
 (20) other things in the trustees document?  
 (21) A Inconsistent with things in the document and a red herring  
 (22) as to how it is applied because it was rare that there is  
 (23) pre-spill data so in practice the part of the definition and  
 (24) implementation of assessing recovery was achieved by  
 (25) comparing  
 (25) referenced and oiled shores - or referenced and oiled sites

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- (1) Q They didn t follow the definition?  
 (2) A They did not follow this definition no  
 (3) Q All right And looking at this business about full  
 (4) complement of age classes Dr Gilfillan took issue with that  
 (5) saying that it was awfully difficult to come back and find  
 (6) recovery when say 20-year-old star fish had died - and let  
 (7) me give you an example  
 (8) Let s say I go to the beach with my son and it s a healthy  
 (9) beach and we take a star fish and put it in our aquarium at  
 (10) home and it s a 20-year star fish  
 (11) Under this definition until there s another 20-year-old  
 (12) star fish on that beach that beach is unrecovered right?  
 (13) A That is correct That although making the analogy between  
 (14) the removal of one and the removal of many many from an  
 (15) event  
 (15) on the scale that we re talking about here is of course a  
 (16) huge difference  
 (17) Q Of course it is But I m asking you if I m right and  
 (18) you re saying yes?  
 (19) A I m saying you re right but I again would like to qualify  
 (20) that by saying that there is no to my knowledge point of  
 (21) contention between the Exxon scientists and the government  
 (22) scientists that relate to this issue of age classes and whether  
 (23) the age classes have returned  
 (24) For some resources this would be very important such as  
 (25) long lived marine mammals which do not breed for a large  
 number

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- (1) of years so until recovery includes the recovery of the  
 (2) breeding population of both females and males that population  
 (3) would not be at the same state and as healthy as one that was  
 (4) dominated by young animals that had just recruited But that s  
 (5) the condition under which this particular definition has  
 (6) relevance and is important but I don t personally know of any  
 (7) contention that divides us over that issue I think that that  
 (8) is a red herring  
 (9) Q Well perhaps you didn t read Dr Gilfillan s testimony  
 (10) did you?  
 (11) A I did  
 (12) Q Okay He says that s your definition - you meaning the  
 (13) trustees - and that his is when the reference or oiled  
 (14) never-oiled sites look the same as - same biodiversity same  
 (15) deposition of species same number of species as the oiled  
 (16) sites And now you re saying you used the same definition?  
 (17) A Yes I am saying in practice there was not a situation  
 (18) where these differences between us arose and the portions of  
 (19) similarity are what dictated the way in which both programs  
 (20) proceeded  
 (21) Q Okay let s talk about recovery a little bit more Dr  
 (22) Gilfillan said that by the end of the summer of 1990 which is  
 (23) 15 months after the spill 73 to 91 percent of the intertidal  
 (24) zones that were oiled had recovered Is that correct?  
 (25) A That - that s correct as it applies to his work and as it

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- (1) applies to Prince William Sound the geographic area where  
 that  
 (2) study was conducted  
 (3) Q All right And to figure that out he and Dr Page -  
 (4) MR JAMIN What number is the exhibit counsel?  
 (5) MS SMITH 14002A 2  
 (6) MS SMITH Let me ask you this Joel Can you make  
 (7) it bigger?  
 (8) BY MS SMITH  
 (9) Q And what these are are the 64 - remember this is a  
 (10) blowup remember everything with those guys was a blowup  
 (11) What these are are the dots are the 64 random sites in the  
 (12) Sound that Dr Page and Gilfillan used for their shoreline  
 (13) ecology program in 1990 Is that right?  
 (14) A I don t have any reason to doubt it but I at the same time  
 (15) can t fully confirm it Is this a - from the -  
 (16) Q You re criticizing -  
 (17) A - from the document the ASTM document Is that the  
 (18) source of this?  
 (19) Q Well I guess I want to know whether you know where the 64  
 (20) random sites that they used in the shoreline ecology program  
 (21) were?  
 (22) A I know what has been provided in the ASTM document which  
 is  
 (23) a map much like this although it includes the mainland  
 (24) drafted in which this one does not  
 (25) Q You think it s inaccurate?

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- (1) A I think it s misleading not to have the full geography  
 (2) presented That s perhaps different from inaccurate I don t  
 (3) see - I didn t see any inaccuracies in it but I also have not  
 (4) checked it against the original  
 (5) Q Okay and this is - I don t know if I can read this Mr  
 (6) Warren?  
 (7) MR WARREN 15489  
 (8) BY MS SMITH  
 (9) Q DX15489 Let s go the other way  
 (10) MR WARREN Ms Smith it s sideways  
 (11) BY MS SMITH  
 (12) Q Sideways? Hang on you guys  
 (13) Okay this is David Page s artwork And a beautiful piece  
 (14) it is  
 (15) And what he shows is that on the 64 random sites what  
 (16) they did is they put down three transects and they put down -  
 (17) here s the woods and here s the water And what they did is  
 (18) they put three transects three - they dug and sampled at  
 (19) three sites in the upper intertidal zone three in the middle  
 (20) intertidal zone three in the lower intertidal zone and then  
 (21) six more in the water in the subtidal zone And he said one  
 (22) three were at minus six feet and three were between 10 and 30  
 (23) feet and so at each one of the 64 sites they dug whatever it  
 (24) is 15 pits and sampled them  
 (25) Is that your understanding Dr Peterson?

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- (1) A Yes it is  
 (2) Q All right And then they did a thorough set of chemical  
 (3) biological and toxicological tests on the sediment and the  
 (4) critters from the beaches and they did extensive sampling  
 (5) according to them Do you recall that testimony?  
 (6) A I m aware of the toxicological testing that they did I m  
 (7) aware of the sediment sampling that was done  
 (8) Q All right and let me show you - Joel this is another one  
 (9) to see if you can make bigger It s DX14002A 1 See what you  
 (10) can do for me  
 (11) All right And did Drs Page and Gilfillan testify that  
 (12) in addition to the 64 random sites they also tested the 12  
 (13) most heavily oiled sites which we affectionately called the  
 (14) worst of the worst that were really hard hit like Point Helen  
 (15) and Sleepy Bay is that your understanding?  
 (16) A Yes they described their sampling at the fixed sites that  
 (17) were part of the Exxon science program outside the randomized  
 (18) design program  
 (19) Q Can you tell whether these were the 12 worst of the worst  
 (20) fixed sites that they looked at in addition to the 64 random  
 (21) sites?  
 (22) A With your permission as how you define them these were in  
 (23) fact the 12 sites I m not altogether they were the worst of  
 (24) the worst but they were among the worst  
 (25) Q Is it your understanding that they dug the same 15 pits

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- (1) along three transect lines at the 12 fixed sites in addition to  
 (2) the 64 random sites?  
 (3) A That s - that s correct.  
 (4) Q Okay And Dr Gilfillan testified didn t he that by 1990  
 (5) even the worst of the worst 15 months later were well on  
 (6) their way to recovery didn t he?  
 (7) A I - I can t speak to that explicitly from memory but I -  
 (8) if you say he did I will agree that he probably did  
 (9) Q You re from - you were employed by ICF right?  
 (10) A I was employed for a brief period of time by ICF but in  
 (11) general no that period of time was about September till March  
 (12) of about two years ago  
 (13) Q Do you know Jim Bush?  
 (14) A Yes I do  
 (15) Q All right He testified that 75 to 80 percent of the sound  
 (16) was never oiled at all Do you agree?  
 (17) A Yes if you take the full boundaries of the sound that  
 (18) seems like a reasonable - reasonable number  
 (19) Q Okay and of the part that was oiled 70 to 73 percent was  
 (20) only lightly or very lightly oiled do you agree with that?  
 (21) A Some number in that ballpark conforms with the ADEC data  
 (22) set and the other data sets that I m aware of  
 (23) Q Okay and you ve previously agreed that the oil spill did  
 (24) not kill all the critters in the intertidal zone is that  
 (25) right?

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- (1) A That s correct  
 (2) Q All right Do you agree that many critters that live in  
 (3) the intertidal zone have now recovered?  
 (4) A Yes I do But recovery is incomplete but many have  
 (5) recovered  
 (6) Q You re not telling this jury are you that everything  
 (7) isn t going to recover?  
 (8) A I am not telling them that  
 (9) Q Okay it s just a question of how long it takes?  
 (10) A That s correct  
 (11) Q All right And you ve already told this jury that to the  
 (12) extent that it isn t already recovered fucus is going to  
 (13) recover is that right?  
 (14) A I feel as a scientist although we have not seen that  
 (15) complete recovery that fucus will indeed recover  
 (16) Q Dr Gilfillan s definition of recovery - and I m reading  
 (17) his testimony - is when there is no statistically detectable  
 (18) difference between never-oiled sites and the oiled sites  
 (19) correct?  
 (20) A That conforms with my recollection  
 (21) Q And you serve on the panel of the National Academy of  
 (22) Sciences or you did?  
 (23) A I - I have served on several panels for them and continue  
 (24) to right now as well  
 (25) Q All right they have a National Research Council?

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- (1) A That's correct
- (2) Q All right and I promise I will not read anything from
- (3) this but they publish a 600-page book entitled Oil in the Sea
- (4) Inputs Fates and Effects Are you aware of that?
- (5) A That looks like a familiar document
- (6) Q All right And isn't it a fact that the National Research
- (7) Council has the same definition of recovery that they use that
- (8) Drs Page and Gilfillan used in their shoreline ecology
- (9) program?
- (10) A I can't speak to that from memory but if you'd like to
- (11) hunt it down I'll have a look
- (12) Q All right Let me read it to you It's on Page 487
- (13) The matter of recovery to pre-spill conditions has been the
- (14) subject of some discussion particularly as it relates directly
- (15) to spill impact assessment The notion of pre-spill
- (16) conditions of course implies return to the ecosystem function
- (17) and structure that existed prior to the spill In reality
- (18) that is neither likely nor possible For ecosystems and
- (19) communities are dynamic assemblages forever undergoing
- (20) change
- (20) and cycles of composition A coastal community or benthic
- (21) assemblage is never static and what may have been its
- (22) composition in one year becomes a different composition five
- (23) years hence Therefore the best one can hope for is a return
- (24) to the sort of community composition in terms of biomass and
- (25) species diversity and their cycles characteristic of that

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- (1) particular environment Recovery can thus be reasonably
- (2) addressed only by comparison with what would have occurred
- (3) in
- (4) an undisturbed but otherwise similar ecosystem in the same
- (5) time
- (6) period
- (7) Do you agree with that?
- (8) A Yes I do And now that you've read it that is not the
- (9) definition that you gave a moment ago
- (10) Q That's not the definition I gave you a moment ago?
- (11) A No when you said Do you agree with the way the national
- (12) academy defines it and you read a deposition I'd be happy to
- (13) hear it back that was not the one that we just heard There's
- (14) a very real and fundamental difference between the two
- (15) Q Well the National Academy of Sciences is not saying that
- (16) you have to return to pre-spill conditions in order to find
- (17) recovery is it?
- (18) A No it's following exactly the graph that I gave you that
- (19) compares referenced shores to oiled shores and it's the way
- (20) that the trustee science as in practice used that and the way
- (21) that the Exxon sciences used it as testified by Page and
- (22) Gilfillan
- (23) Q And the reason that the trustees scientists have in
- (24) practice now used Page and Gilfillan and the National Academy
- (25) of Science's definition is because their original definition
- (26) as set forth in their report doesn't work here does it?
- (27) A I have no idea who you mean by 'their' and what you mean
- (28) by

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- (1) original definition
- (2) Q Okay I'll put it back up again Defining and estimating
- (3) recovery trustees draft restoration plan PX8003 page B-47
- (4) A This is the plan from November 1993?
- (5) Q This is the one
- (6) A And you're calling this original? I don't know quite what
- (7) you mean by that I mean I spoke to this particular issue
- (8) saying - and I'll say again I'm happy to that their - that
- (9) this is a draft plan that there are conflicting definitions
- (10) within it And despite what may be written here in practice
- (11) there was very little pre-spill information So in practice
- (12) recovery was assessed by the very same procedure that you
- (13) advocate that Exxon advocates and that you read from from
- (14) the
- (15) National Research Council volume
- (16) Q So you're backing away from this?
- (17) A I'm reiterating what I said awhile ago I don't think I'm
- (18) backing away
- (19) Q I'm somewhat confused by why you're here on rebuttal on
- (20) this point Gilfillan challenged this and you're supporting
- (21) Gilfillan?
- (22) A I am indeed supporting Gilfillan and I tried to make that
- (23) clear that this is the proper way to assess recovery and is
- (24) not in fact the way that the recoveries were assessed in the
- (25) trustee science studies despite some inconsistent definitions
- (26) that occur in the draft document

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- (1) Q All right Let's talk about natural variability That
- (2) means that even in the absence of oil natural populations of
- (3) species rise and fall don't they?
- (4) A That's true
- (5) Q All right Let me show you something DX661AA 662AA and
- (6) 663AA
- (7) MR JAMIN Your Honor those exhibits don't exist on
- (8) our list
- (9) MS SMITH Yes they do One two and three They
- (10) gave you the zero
- (11) These guys have seen these before - not the focus again
- (12) BY MS SMITH
- (13) Q Dr Peterson can you see those from there or do you want
- (14) to come on down?
- (15) A No I can't
- (16) Q Okay come on down
- (17) Okay these are pictures of Crab Bay taken by Houghton and
- (18) presented at the SETAC meeting in November 1993 in
- (19) Houston
- (20) and SETAC as you probably know is Society of Environmental
- (21) Toxicology and Chemistry
- (22) Now Houghton used to work for Exxon and now works for
- (23) NOAA?
- (24) A That's correct He's - he's not an employee of NOAA but
- (25) he's been a contractor
- (26) Q All right And NOAA lists Crab Bay as never oiled are you

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- (1) aware of that?  
 (2) A No I m not aware of its specific designation  
 (3) Q Would you like me to show you their document?  
 (4) A I have no reason to doubt what you re saying  
 (5) Q Okay  
 (6) Now this fucus - is this fucus over here?  
 (7) A Yes certainly appears to be  
 (8) Q All right And how s it doing in 1989?  
 (9) A I simply cannot tell and no one could tell adequately from  
 (10) a picture without having prior information about the abundance  
 (11) at that site and its health at that site If you re asking a  
 (12) question as to its physiology its color - its coloration  
 (13) is -  
 (14) Q You can t tell -  
 (15) A You may want to ask - I want to answer you question  
 (16) Q You can t tell if it s healthy how old it is as a marine  
 (17) biologist you don t know?  
 (18) A I cannot answer all those questions but I can tell you  
 (19) it s a nice yellow color That s indicative of a relatively  
 (20) healthy plant  
 (21) Q You would have to take this into the lab and do sampling in  
 (22) order to answer my questions?  
 (23) A To my satisfaction I would not only have to do that but I  
 (24) would have to have information about the fucus there over a  
 (25) longer period of time to be able to know its status and

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- (1) health  
 (2) Q Okay Dr Gilfillan testified that after he does samples  
 (3) extensive samplings that he can come back to a shoreline and  
 (4) look at the same area year after year after year and use his 25  
 (5) years of experience as a marine biologist in order to know  
 (6) whether this is healthy and thriving You don t think that s  
 (7) right you don t think you can do that?  
 (8) A Neither I nor Dr Gilfillan can use casual observations of  
 (9) the shoreline to replace the quantitative sort of program that  
 (10) was attempted by Exxon and conducted by the government  
 (11) science  
 (12) to assess recovery on that system  
 (13) Q Even if you d sampled it you couldn t come back the next  
 (14) year to the exact same place and use your judgment and your  
 (15) expertise acquired over your entire career to see how this  
 (16) fucus is doing? I m just curious  
 (17) A Oh if you ve got some samples that give you that time  
 (18) history so that you ve got quantitative samples of some sort  
 (19) and you return to the area then indeed you can compare what  
 (20) you have measured before  
 (21) Q All right  
 (22) A To later  
 (23) Q All right  
 (24) Now are you aware that Gilfillan and Page sampled all of  
 (25) their sites the 15 pits in each - in each site of the 64 plus  
 the 12 in 1990 and then came back every year and looked  
 again

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- (1) and you ve just said that if they did that after having done  
 (2) their qualitative and quantitative sampling that they could  
 (3) make a judgment the next year when they went back to see if it  
 (4) was okay or not  
 (5) MR JAMIN Objection to the question Your Honor  
 (6) It s compound There s several questions there -  
 (7) THE COURT Sustained  
 (8) BY MS SMITH  
 (9) Q Okay Are you saying - well I ll rephrase  
 (10) If you had done qualitative and quantitative sampling of  
 (11) this quadrant in year one and you came - and you got the  
 (12) results and you came back in year two could you tell anything  
 (13) by applying your years of experience and the results of the  
 (14) sampling you had had before?  
 (15) A Yes  
 (16) Q Or do you have to sample again?  
 (17) A You would have to sample again to have a quantitative  
 (18) understanding of what the changes are You could get a  
 (19) qualitative understanding by having a fixed site and you knew  
 (20) exactly where you had been before  
 (21) Q Okay you could get a qualitative understanding?  
 (22) A That s - that s true if you accompany that with your data  
 (23) and your recollections in a firm way  
 (24) Q All right Now here this is a never oiled site Crab Bay  
 (25) Houghton s picture fucus 1989 Here is the same fucus they

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- (1) have tags on them In 1991 never oiled It looks oiled  
 (2) doesn t it? Looks like a lot of the oil pictures we got?  
 (3) A Well -  
 (4) Q Can you tell what s happened to this fucus?  
 (5) MR JAMIN Your Honor I object to that question  
 (6) again It s compound and I think it s impossible to -  
 (7) impossible to answer a question  
 (8) THE COURT The last question is the question you  
 (9) should answer Can you tell what s happened to this fucus?  
 (10) BY MS SMITH  
 (11) Q Can you tell what s happened to this fucus?  
 (12) A If you mean can I tell exactly what has caused it to  
 (13) decline in abundance no  
 (14) Q Okay and here s the same - you don t know?  
 (15) A No Nor would anyone else know  
 (16) Q Looks like some of it died?  
 (17) A There s definitely less fucus biomass there present Fucus  
 (18) loses its leaves so that it doesn t necessarily indicate death  
 (19) when there s less biomass but there s certainly less there  
 (20) Q And is this new fucus or old fucus or can t you tell?  
 (21) A It appears to be new  
 (22) Q Okay Here s the same quadrant of fucus in 1993 Can you  
 (23) tell anything about how this fucus is doing?  
 (24) A Oh one can tell that - that the biomass is higher than it  
 (25) was in 1991



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- (1) Q Okay and is this an example again never oiled – if you  
 (2) assume with me that this as Houghton says that this is the  
 (3) same quadrant is this an example of natural variability?  
 (4) A It quite likely is yes  
 (5) Q You can go back if you want Now what natural variability  
 (6) means – I'll wait till you're ready  
 (7) What natural variability means is that if you go back to  
 (8) the same place year after year because of nature and how it  
 (9) works you're not going to find the exact same things there  
 (10) every year you're not going to say – you may not find the  
 (11) same species you may not find the same age you may not  
 (12) find – who knows it'll be different or it could be is that  
 (13) right?  
 (14) A That – that's correct  
 (15) Q Okay And by the way is it your understanding that Page  
 (16) and Gilfillan did go back and re-sample their sites in  
 (17) successive summers?  
 (18) A Page and Gilfillan returned to the 12 fixed sites as  
 (19) they're described in the Exxon shoreline program or people  
 (20) working with them did in their company and re-sampled those  
 (21) in  
 (22) successive summers  
 (23) Q All right And did they return to their other sites do  
 (24) you know?  
 (25) A I don't know the full list of areas that they returned to  
 (26) but I do know that there was a lot of visitation of the sound

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- (1) in many years by both Page and Gilfillan and people working  
 (2) with them  
 (3) Q Are you familiar with the Oil Pollution Act of 1990's  
 (4) definition of recovery?  
 (5) A I doubtless have read it because I was employed by Minerals  
 (6) Management Service and Department of Interior to interpret  
 (7) how  
 (8) their ecology program was responding to the mandates of that  
 (9) act but I certainly don't have it to my memory  
 (10) Q Let me show you DX137 – excuse me 16317 page 100 see if  
 (11) I can do this Okay I'm not sure anybody can read this so  
 (12) let me read it  
 (13) Recovery means the return of the injured natural resource  
 (14) and/or service to its baseline or comparable condition within  
 (15) the constraints of natural or other (human induced)  
 (16) variability  
 (17) Do you agree with that?  
 (18) A No I don't  
 (19) Q You don't agree with the Oil Pollution Act's definition of  
 (20) recovery?  
 (21) A No I don't  
 (22) Q Why not?  
 (23) A For the same reason that you don't that it says return to  
 (24) the baseline conditions and doesn't account for return to the  
 (25) conditions that would apply by environmental change in the  
 (26) interim so it doesn't incorporate the issue that you've been

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- (1) talking about which is return to the conditions that would  
 (2) have existed in the absence of the spill  
 (3) Q But it does take into account natural or other variability?  
 (4) A It has words to that effect It doesn't give a  
 (5) prescription for how to do that  
 (6) Q All right And do you believe at this point that the idea  
 (7) of an equilibrium in the ecosystem that everything stays the  
 (8) same or should return to being the same do you agree with  
 (9) that with that concept?  
 (10) A I don't think any scientist does and certainly I don't  
 (11) MS SMITH Your Honor I have no idea – I guess we  
 (12) only have ten more minutes huh?  
 (13) BY MS SMITH  
 (14) Q I'd like to talk about bias But this time I'd like to  
 (15) talk about it bias as it affects you  
 (16) Dr Peterson do you believe that Exxon should bear the  
 (17) cost of environmental damage from this oil spill even if the  
 (18) damages are imagined or exaggerated?  
 (19) A I believe that – that an oil spill is part of doing  
 (20) business and –  
 (21) Q Dr Peterson I will let you explain just as the Judge  
 (22) said but I need a yes or no  
 (23) Should I repeat the question?  
 (24) A Yes  
 (25) Q Okay Do you believe that Exxon should bear the cost of

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- (1) environmental damage from this oil spill even if the damages  
 (2) are imagined or exaggerated?  
 (3) A Well it's such a bad question I need to answer it with an  
 (4) explanation  
 (5) Q All right hold on a minute  
 (6) Did you write an editorial to the Globe and Mail on August  
 (7) 19th 1994?  
 (8) A I coauthored a letter to the editor It may have been an  
 (9) editorial yes  
 (10) Q All right And was it published?  
 (11) A Yes it was  
 (12) Q All right And were you responding to a piece in the New  
 (13) York Times entitled Exxon is Right Alas?  
 (14) A Yes I was  
 (15) Q And that was entitled July 31st 1994 Is that right?  
 (16) A I will believe you  
 (17) Q Okay and did – and that was written by Jeffrey  
 (18) Wheelwright right?  
 (19) A Yes  
 (20) Q Too many rights Was he the science editor of Life  
 (21) Magazine for 11 years?  
 (22) A I don't know Mr Wheelwright's full background  
 (23) Q And did you say in your published letter or editorial in  
 (24) his August 4th piece Exxon is Right Alas reprinted from the  
 (25) New York Times Jeff Wheelwright concluded that Exxon is  
 (26) right

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- (1) the Alaska s Prince William Sound has recovered from the Exxon  
 (2) Valdez oil spill of five years ago Not only are the  
 (3) Plaintiffs in the continuing civil trial against Exxon for  
 (4) damages said to be wrong but they are also said to be  
 (5) diminishing science itself  
 (6) Did you write that?  
 (7) A I coauthored that  
 (8) Q And you were incensed by Mr Wheelwright s conclusions  
 (9) weren t you?  
 (10) A I thought that Mr Wheelwright did not reach proper  
 (11) conclusions with proper scientific judgment.  
 (12) Q Okay you took particular issue with Mr Wheelwright s  
 (13) statements that Although the oil spill had acute effects like  
 (14) the blackened carcasses of birds which were shockingly  
 (15) obvious after reverberating for a year or two the ecosystem  
 (16) had returned to its normal babble  
 (17) In other words after about a year Prince William Sound  
 (18) had recovered is that right?  
 (19) A Yes that is not correct and I took issue with it  
 (20) Q All right and he d been out to the sound too over the  
 (21) past five years right?  
 (22) A He has certainly been in the sound Not in the capacity of  
 (23) doing science  
 (24) Q All right And from your article DX16138 - I m sorry  
 (25) 16318 let me show you what I was referring to earlier

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- (1) And it says One thing is certain the cost of undetected  
 (2) environmental damage is a burden on society whereas the cost  
 (3) of imagined or exaggerated damage falls on the defendant in  
 (4) this case Exxon  
 (5) Did you and your coauthor Dr Green write that?  
 (6) A Yes we did  
 (7) Q So did you write this in your capacity as a scientist?  
 (8) A Yes indeed  
 (9) Q That is your scientific unbiased opinion?  
 (10) A Yes  
 (11) Q Okay Now you wear at least two hats here don't you?  
 (12) A Here and everywhere but I -  
 (13) Q All right  
 (14) A I ll - until I hear where you re going  
 (15) Q You re a peer reviewer for the trustees?  
 (16) A That s correct  
 (17) Q And you re also paid for your opinions by the Plaintiffs in  
 (18) this case?  
 (19) A That s correct  
 (20) Q And you testified in the federal trial for the Plaintiffs  
 (21) on June 20th?  
 (22) A Yes I - I don t know the date but it s around there  
 (23) Q You started working for the various Plaintiffs against  
 (24) Exxon back in 1992 - someone s getting beeped  
 (25) Did you start working for the Plaintiffs against Exxon in

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- (1) 1992?  
 (2) A In - yes that sounds like a reasonable time frame I  
 (3) don t exactly remember the initiation of any interactions but  
 (4) it s around then  
 (5) Q And you re not just an expert witness for the Plaintiffs  
 (6) are you Dr Peterson?  
 (7) A I wear several hats more than two  
 (8) Q Vis-a-vis the Plaintiffs you also advise them on their  
 (9) litigation don t you?  
 (10) A I work with attorneys when asked talk to them about  
 (11) science so as to advise them about the science yes  
 (12) Q And in your article didn t you say on page 1 It also  
 (13) should be said up front that both of us are advisors and expert  
 (14) witnesses for the Plaintiffs fishermen and others seeking  
 (15) redress in the trial that is now going on so it s not just -  
 (16) A Yes  
 (17) Q You consider yourself an advisor to the Plaintiffs here?  
 (18) A Yes that s what I was responding a moment ago  
 (19) Q Okay and while you are an advisor and an expert witness  
 (20) for the Plaintiffs you continue to be a peer reviewer for the  
 (21) trustees?  
 (22) A I do The trustees consider my judgment sufficiently  
 (23) unbiased and accurate that my involvement with the Plaintiffs  
 (24) has done nothing to terminate the relationship or the work that  
 (25) I ve done for them

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- (1) Q Okay And one of your jobs is to decide in an unbiased  
 (2) fashion in your trustee s hat which intertidal and subtidal  
 (3) studies get funded right?  
 (4) A I participate in large way in that decision yes  
 (5) Q And you have already -  
 (6) Your Honor I don t think I m going to finish  
 (7) THE COURT I m going to try counsel  
 (8) MS SMITH Want me to try?  
 (9) BY MS SMITH  
 (10) Q Dr Peterson when you were here a few weeks ago did you  
 (11) testify that the greatest effects on fishes was the effect that  
 (12) occurred on pink salmon and herring?  
 (13) A I can t recall my exact comments on that to be honest with  
 (14) you  
 (15) Q Would you like to see them?  
 (16) A If this is an issue that I should deal with  
 (17) Q Are you aware -  
 (18) MR JAMIN Your Honor I d like to lodge an objection  
 (19) about scope of cross-examination  
 (20) THE COURT Come up here will you please?  
 (21) (Bench Conference on the record)  
 (22) THE COURT Give me the objection  
 (23) MR JAMIN It s beyond the scope of the direct  
 (24) examination  
 (25) THE COURT Why isn t it?

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- (1) MS SMITH I m going to talk about how the trustees  
 (2) the trustees were wrong as listing salmon as an unrecovered  
 (3) species  
 (4) THE COURT The objection s sustained  
 (5) (Bench conference concluded)  
 (6) BY MS SMITH  
 (7) Q Let s talk very briefly on Friday afternoon at 1 30 about  
 (8) paired site analysis You take issue with Drs Page and  
 (9) Gilfillan s stratified random sampling method is that right?  
 (10) A As it was employed yes  
 (11) Q All right Are you aware that their study was peer  
 (12) reviewed by non affiliated third party reviewers and is on its  
 (13) way to publication?  
 (14) A I have no idea what the status is but as an editor of  
 (15) Ecologia I can tell you that the study would not pass the  
 (16) review from our Journal to be acceptable for publication  
 (17) Q Do you know who James Butler is? He s the Gordon McKay  
 (18) professor of applied chemistry at the University of Harvard  
 (19) past five years?  
 (20) A I don t know Mr Butler He is outside my field  
 (21) Q How about Peter Wells he s a preeminent scholar on  
 (22) toxicology and effect of oil on organisms written about 120  
 (23) organisms you know him?  
 (24) A He s also not a shoreline ecologist I don t know him  
 (25) Q Are you aware that NOAA used a stratified random sampling

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- (1) mechanism Just like Dr Gilfillan in the hot water wash  
 (2) studies?  
 (3) A In some of those studies yes  
 (4) Q When the coasted habitat study that the trustees put  
 (5) together was originally set up a random sampling design was  
 (6) chosen there too wasn t it?  
 (7) A Yes and when the peer reviewer subsequently came in and  
 (8) reviewed the design and did our job in trying to decide whether  
 (9) the science was done as best as it could at that point we  
 (10) argued and devised the design I ve spoken of here so the  
 (11) design  
 (12) was changed after peer review comment  
 (13) Q The random sampling design was rejected at least in part  
 (14) because under that method you guys couldn t see any  
 (15) difference between never-oiled sites and lightly oiled sites  
 (16) is that right?  
 (17) A That is absolutely false The rejection was on the grounds  
 (18) that I ve presented here  
 (19) Q Let me show you DX16328 page 2 and it is the coastal  
 (20) habitat study number one phase one site selection I m going  
 (21) to show you two pages of it  
 (22) This is Page 2 says Additionally It was found that  
 (23) sampling methods could not detect significant injuries on very  
 (24) light or lightly sampled sites And the next page -?  
 (25) A Lightly oiled  
 (26) Q Thank you lightly oiled sites based on this and other

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- (1) information  
 (2) Page 3 The management team recommended several changes  
 to  
 (3) the site selection process in 1990 Number three is sites in  
 (4) the very light light-oiled category should be dropped from the  
 (5) study to allow resources and effort to be devoted to moderate  
 (6) heavy oiled and control sites  
 (7) Is that right?  
 (8) A Yes Those are prepared appropriately  
 (9) Q All right So part of the reason that the random sampling  
 (10) design was dropped was because you couldn t detect any  
 (11) differences between light and very lightly oiled sites and  
 (12) never-oiled sites is that right?  
 (13) A Yes and you ve said it exactly correctly You could not  
 (14) detect Not you did not detect but could The design was  
 (15) incapable with the level of replication of detecting an  
 (16) effect even if it was there For that reason it doesn t pass  
 (17) adequate peer review and there s no reason to spend the  
 energy  
 (18) if you never could detect an effect even if it was present  
 (19) Q But if you only look at heavily oiled and moderately oiled  
 (20) sites which is all they chose the next time around right?  
 (21) Correct?  
 (22) A For the oiling category that s correct but they continued  
 (23) to use reference sites in the way that I described earlier  
 (24) Q Of course but if you only use heavily and moderately oiled  
 (25) sites then that jacks up the damage assessment doesn t it?

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- (1) A No Actually it s quite the other way around The  
 (2) reference sites included lightly oiled sites so that if there  
 (3) were effects of the oil on those lightly oiled sites they  
 (4) would show up in the reference sites and underestimate the true  
 (5) amount of damages that you see  
 (6) Q All right Let me -  
 (7) A But - but the study is appropriately characterized as  
 (8) focused on the heavily oiled sites and does not speak directly  
 (9) to how much damages would have occurred at the lightly oiled  
 (10) sites that is correct  
 (11) Q Well let me show you coastal habitat s study 16325 page  
 (12) 11 and it says If additional studies sites are added in 1990  
 (13) priority should be given to adding sites in the heavy moderate  
 (14) oiling and unoled control categories This will too ensure  
 (15) that the most heavily oiled sites and sites where oil is likely  
 (16) to persist over time are provided the opportunity to be  
 (17) selected I e sites most likely to demonstrate injury Is  
 (18) that what that says?  
 (19) A That s correct  
 (20) Q All right Now when you tried to - to do the paired  
 (21) sites - this is my last point Your Honor  
 (22) When you try to do your paired sites you talked about how  
 (23) important it was to try to make sure that the pairs matched up  
 (24) right?  
 (25) A Yes

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- (1) Q And this - the scientists when they put the paired sites  
 (2) together they looked at the physical characteristics  
 (3) considered for selection including substrate composition  
 (4) wave exposure slope proximity of fresh water and nearby  
 (5) bathymetry - have I said it right?  
 (6) A Yes  
 (7) Q Is that true?  
 (8) A Those were among the factors that were looked at  
 (9) Q All right And you testified in your direct on rebuttal  
 (10) that wave exposure was an important point right?  
 (11) A That s right  
 (12) Q And that s because if a shoreline s getting smashed by  
 (13) waves because it s exposed you wouldn t want to tie it up with  
 (14) a shoreline that s in a little protected inlet where it s  
 (15) sheltered is that right?  
 (16) A Yes In the design you d like to make everything you can  
 (17) be the same between those sites  
 (18) Q Let me show you DX16333  
 (19) Again if you need to come on down come on down I feel  
 (20) like Monty Hall  
 (21) All right I am not going to do a memory test on you at  
 (22) this time of day but let me just ask you Can you tell from  
 (23) these what these represent otherwise I ll let you know  
 (24) A How about letting me know  
 (25) Q All right These are paired a set of paired sites from

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- (1) the trustees study and the top one is the unoiled site and  
 (2) the bottom one is the oiled site The top one is Squire Island  
 (3) and the bottom one is Crafton The top one which is the  
 (4) unoiled site is right here and it s facing east and it s  
 (5) facing south and it s in what looks to me I ll ask your -  
 (6) your agreement it s in a protected cove right here if we ve  
 (7) got this right Am I right?  
 (8) A Looks to me  
 (9) Q And Crafton Island is right here and it s facing right out  
 (10) it s not in a protected cove and it s exposed to whatever s  
 (11) coming in does that look right?  
 (12) A It appears to  
 (13) Q All right And this is your carefully chosen matched pair  
 (14) in the trustees study Seal (sic) and Crafton?  
 (15) A I can t speak to that But I - if you contend that that s  
 (16) the case from the documents I don t know this pair  
 (17) specifically  
 (18) Q All right And didn t Drs Page and Gilfillan expressly  
 (19) calculate what the wave energies were at each site based on  
 (20) historical weather data and the specific geography of the site?  
 (21) A They estimated those wave exposures yes they did  
 (22) Q All right and did they determine how much impact was due  
 (23) to exposure and how much to the spill?  
 (24) A They attempted to do that but they used a statistical  
 (25) analysis that is inaccurate in which they did not meet the

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- (1) assumptions of the analysis and the results are unreliable  
 (2) Q According to you? Have you been out to the Sound this  
 (3) year?  
 (4) A No  
 (5) Q All right And the last time we met you had only been to  
 (6) six out of 97 parcels and that s still the same number right?  
 (7) A I think that s probably true although I ve been on the  
 (8) Kenai since we last been together and that may have included  
 (9) some of the parcels So no  
 (10) Q You finally did get to the Kenai?  
 (11) A I did  
 (12) Q And have you made it to Kodiak?  
 (13) A I ve not made it to Kodiak no  
 (14) Q I m going to put up one last chart I lied about this but  
 (15) this is DX13205A 1 jury s already seen it You can t bear  
 (16) another minute right?  
 (17) These are the places that Dr Gilfillan went to in the  
 (18) Sound and these are the places 13205A 2 that he went to in the  
 (19) Gulf of Alaska and as he testified a dot doesn t just mean he  
 (20) went there once means he s been there - may have been there  
 (21) six or seven times but he only put one dot And he went to  
 (22) over 150 - 195 segments and spent more than 150 days in the  
 (23) sound  
 (24) Can you tell the jury - okay can you just quickly show  
 (25) the jury how many places you ve been that Dr Gilfillan s been

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- (1) to?  
 (2) A Of the ones that Dr Gilfillan has been okay This will  
 (3) take awhile I guess  
 (4) I have been to a pair of sites on Green Island In - which  
 (5) doubtless includes one of these but in that vicinity I have  
 (6) been to multiple sites in the Herring Bay region and to lower  
 (7) Herring Bay I ve been into the Snug Harbor region I ve been  
 (8) in the Bay of Isles at probably two or three sites in that  
 (9) region  
 (10) That Dr Gilfillan has been to? It s not clear to me  
 (11) whether he s been to Jackpot Bay and Cochrane Bay Not on  
 (12) Cochrane for sure  
 (13) We have been at several sites on the northern end of  
 (14) LaTouche We have been at this location in - on the Evans  
 (15) Island near the Chenega Bay community  
 (16) Q That s for a total of eight days or approximately eight  
 (17) days?  
 (18) A That s correct  
 (19) Q How about the Gulf of Alaska?  
 (20) A There are none of the sites in the Gulf of Alaska region  
 (21) that I have personally visited  
 (22) MS SMITH Okay thank you  
 (23) THE COURT Don t unclip the microphone sir I ve  
 (24) got a feeling there may be some more  
 (25) Counsel could you move the diagram the board?

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(1) Mr Jamin any questions? We re going to finish  
 (2) MR JAMIN I m going to finish with two very quick  
 (3) questions if I may  
 (4) REDIRECT EXAMINATION OF CHARLES HENRY PETERSON  
 (5) BY MR JAMIN  
 (6) Q Dr Peterson to your understanding is Mr Wheelwright a  
 (7) scientist?  
 (8) A Mr Wheelwright is not a scientist to my understanding  
 (9) Q And has anything that counsel for Exxon has questioned you  
 (10) about during this cross-examination suggested to you any  
 change  
 (11) you would make to the opinions you gave us on direct?  
 (12) A No I ve seen nothing of new substance  
 (13) MR JAMIN Thank you I have nothing further Your  
 (14) Honor  
 (15) THE COURT Thank you you can step down sir Thank  
 (16) you very much  
 (17) (The Witness was excused )  
 (18) THE COURT Okay so I was wrong You only heard one  
 (19) witness today And I ll probably be wrong again but we re  
 (20) moving along to conclusion here and we re going to take three  
 (21) days this weekend remember that so don t come to an empty  
 (22) courtroom on Monday We ll see you Tuesday at 8 30  
 (23) I m hoping - actually counsel I ve got the full day on  
 (24) Tuesday but I will only devote that full day if we can finish  
 (25) the testimony on Tuesday Is there a reasonable possibility of

(1) argument on the following Monday okay?  
 (2) MR STOLL Fine Your Honor  
 (3) THE COURT That s for you too that information  
 (4) But that s an area you would not be here Thursday and Friday  
 (5) as soon as the testimony ends we ll take two days to prepare  
 (6) the instructions for you and then you ll hear the final  
 (7) arguments of the parties and I ll give you the final legal  
 (8) instructions in the case okay?  
 (9) So you ll probably be off on Thursday and Friday but  
 (10) you ll be in session the following Monday  
 (11) All right You re excused and don t talk about the case  
 (12) with anybody Including your fellow jurors  
 (13) (Jury out at 1 45 p m )  
 (14) MR STOLL Your Honor  
 (15) THE COURT Okay the jury is not present Yes  
 (16) counsel?  
 (17) MR STOLL I just want to see if I can leave  
 (18) THE COURT You mean you were raising your hand to be  
 (19) excused?  
 (20) MR STOLL Yes  
 (21) THE COURT No you can t leave until I find out that  
 (22) everybody has nothing to bring up right  
 (23) MR DIAMOND We have a slough of exhibits to get in  
 (24) and it is at your leisure but the longer we put it off the  
 (25) more difficult it s going to get

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(1) that?  
 (2) MR STOLL Your Honor I think it s - the witness  
 (3) that we - second witness that we had that we had hoped to put  
 (4) on today is leaving this weekend for North Carolina We  
 (5) would - we re going to have to ask the Court s permission to  
 (6) do his testimony by telephone but other than that I think  
 (7) that it s going to be very difficult to finish put all the  
 (8) rebuttal on in four - you know four hours on Tuesday I  
 (9) think it will spill over -  
 (10) THE COURT So Tuesday and Wednesday  
 (11) MR STOLL Yes Your Honor  
 (12) THE COURT Is there a reasonable possibility we will  
 (13) finish everything I m talking about everything in terms of  
 (14) testimony on Tuesday and Wednesday? I m asking more than  
 the  
 (15) Plaintiffs here  
 (16) MR DIAMOND Your Honor we ve only heard one  
 (17) rebuttal witness so it s very difficult to say about  
 (18) surrebuttal We are currently not anticipating any  
 (19) surrebuttal It really depends on our consideration for this  
 (20) testimony and what comes on Tuesday  
 (21) THE COURT Okay So we will try for Tuesday and  
 (22) Wednesday and finishing the testimony If that happens I want  
 (23) you all to know this I anticipate a lot of work after that  
 (24) and - and so I think I m going to take the remaining two days  
 (25) of the week off and then you ll - I ll be planning for final

(1) THE COURT I have no leisure counsel I m willing  
 (2) to do it now I just don t want Mr Stoll having been excused  
 (3) to come in and say he objects to six of the exhibits that I ve  
 (4) admitted  
 (5) MR DIAMOND I don t think he ll object to any of my  
 (6) archaeology exhibits  
 (7) MR PETUMENOS The problem we have Judge is that  
 (8) we - Mr Diamond and I keep on telling the Court that we re  
 (9) going to get together and we haven t done it  
 (10) THE COURT I want you to come back at three o clock  
 (11) and we ll come into session and we ll deal with the exhibits  
 (12) Is there anything else that I have to deal with this  
 (13) afternoon?  
 (14) MR STOLL Your Honor with respect to the rebuttal  
 (15) witnesses I ve talked conferred with Mr Oppenheimer and  
 (16) there is If we have any issues I think we can take them up  
 (17) Tuesday afternoon  
 (18) Isn t that your understanding?  
 (19) MR OPPENHEIMER Yes  
 (20) THE COURT Well that means that there will be no  
 (21) objections to the rebuttal witnesses that we hear Tuesday  
 (22) morning right?  
 (23) MR OPPENHEIMER We don t have the list for Tuesday  
 (24) morning This was one witness Pat Carlson who is probably  
 (25) the most problematic right now but we don t have a list for

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- (1) Tuesday morning
- (2) If Your Honor would like us to take this up -
- (3) THE COURT I want you to come back at 3 00 and we'll
- (4) talk about that also
- (5) MR STOLL Your Honor -
- (6) THE COURT These are critical sessions counsel the
- (7) last five minutes of the trial day I've learned -
- (8) MR STOLL Could we just have a moment Your Honor?
- (9) THE COURT Counsel you can have a year
- (10) MR STOLL No no I don't want a year I want to
- (11) catch an airplane in 30 minutes Your Honor That's what I'm
- (12) trying to deal with
- (13) MR OPPENHEIMER If Your Honor could bear with us I
- (14) think -
- (15) THE COURT Yeah sure
- (16) MR OPPENHEIMER Your Honor we did hear one new thing
- (17) about scheduling today that I don't know if it comes up
- (18) tomorrow or not but this is one of the witnesses by phone
- (19) There may be a problem
- (20) THE COURT Who is that?
- (21) MR OPPENHEIMER I don't know Who is the Plaintiff
- (22) calling -
- (23) THE COURT Who is the North Carolina witness?
- (24) MR OPPENHEIMER Who is the witness by phone?
- (25) MR STOLL Oh that's Mr Robertson who was going to

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- (1) testify next
- (2) MR OPPENHEIMER We have a - I believe we have a
- (3) problem that we have cross-examination documents and other
- (4) problems with that
- (5) THE COURT I'll see you at 3 00 I'll see you at
- (6) 3 00
- (7) MR DIAMOND We'll see you at 3 00
- (8) THE COURT Well wait a minute now I don't know
- (9) whether we're done
- (10) Are we done?
- (11) MR PETUMENOS Problem is Mr Stoll's airplane
- (12) THE COURT It's definitely a problem counsel but -
- (13) MR STOLL It's not the Court's problem it's my
- (14) problem I accept that
- (15) THE COURT So I'll see you at three
- (16) MR STOLL Okay you'll probably see me
- (17) THE COURT You're welcome to try to resolve the issue
- (18) and I'll be happy to hang around until - for some limited
- (19) period of time while you try to resolve that issue I have no
- (20) desire to keep you here chained to the courtroom Mr Stoll
- (21) We've got to resolve that issue because -
- (22) MR STOLL I understand
- (23) THE COURT It's not efficient not to Off record
- (24) THE CLERK Off record
- (25) (Recess at 1 50 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 2nd day of September 1994
- (20) JOY S BRAUER RPR
- (21) Notary Public for Alaska
- (22) My Commission Expires 5-10-97

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## Look-See Concordance Report

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## Vol 1 1

(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 ) Friday September 2 1994  
                           ) 3 15 p m  
 (6) )  
 (8) VOLUME 1 Pages 1 through 77  
 (10) TRANSCRIPT OF PROCEEDINGS (HEARING)  
 (11) TRIAL BY JURY  
 (13) BEFORE THE HONORABLE BRIAN C SHORTELL  
                           Superior Court Judge  
 (16) APPEARANCES  
 (17) FOR THE PLAINTIFF  
           ALLEN FIELD  
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## Vol 1 2

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           JOY S BRAUER RPR  
 (9) Registered Professional Reporter  
           Midnight Sun Court Reporters  
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 (11) 907/258 7100

## Vol 1 3

(1) PROCEEDINGS  
 (2) THE CLERK. Please rise This court now resumes its  
 (3) session Please be seated  
 (4) MR DIAMOND Now the moment we ve been waiting for  
 (5) THE COURT We re on the record  
 (6) MR DIAMOND What I thought I would do I was going  
 (7) to introduce some Dorchester exhibits we have some that are  
 (8) disputed Mr Petumenos is going to introduce some cross  
 (9) Dorchester exhibits some of those are disputed We then have  
 (10) some exhibits that Mr Clough needs to get into evidence and  
 (11) then Mr Oppenheimer and then I have one which I am Ms  
       Smith s  
 (12) surrogate and then we can talk about witnesses If we haven t  
 (13) reached -  
 (14) THE COURT That s a long agenda counsel My mind s  
 (15) already shut off  
 (16) MR DIAMOND All right The Dorchester exhibits  
 (17) which we seek to introduce as to which there are no objections  
 (18) are DX13174A the Windy Bay video which we will submit  
       without  
 (19) any sound and DX10461A Mr Dorchester s summary of oil  
       spill  
 (20) damage by Plaintiff And those are the only two as to which  
 (21) there are no objections  
 (22) (Exhibits 13174A 10461A offered)  
 (23) THE COURT All right they re admitted  
 (24) (Exhibits 13174A 10461A received)  
 (25) MR DIAMOND We previously talked about Mr

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(1) Dorchester s income chart the long series of bar graphs and I  
 (2) have -  
 (3) MR PETUMENOS I ve got them here - -  
 (4) MR DIAMOND Put them on the screen as well  
 (5) THE COURT Okay  
 (6) MR DIAMOND Joel do I have the -  
 (7) MR GROSS You have  
 (8) MR PETUMENOS Judge I don t -  
 (9) THE COURT I ve got them and I ve looked at them  
 (10) MR DIAMOND It s Mr Petumenos objection so I ll  
 (11) let him speak  
 (12) MR PETUMENOS Judge this is the one that you  
 (13) indicated you would allow to be shown to the jury but you were  
 (14) not ruling whether they would actually go in in the form of an  
 (15) admitted exhibit I think I made my concerns about this  
 (16) exhibit known I think that having argued fully my reasons  
 (17) for not wanting to admit it I m renewing the same objections  
 (18) with respect to going to the jury in the form of real evidence  
 (19) given the fact that it is Mr Dorchester s theory about  
 (20) Dr Mundy s theory I think it s been cross-examined The  
 (21) jury has it I believe that Mr Dorchester s methodology was  
 (22) basically terms of concept the same as Mr Mundy s If he  
 (23) wants to opine on what he thinks Mr Mundy s - what was wrong  
 (24) with Mr Mundy s opinion that s fine but I don t think - I  
 (25) think this is in the category of the other exhibits which

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- (1) you've excluded from the jury as illustrative usable in final  
 (2) available for the jury to look at but not of the nature more  
 (3) than an illustrative exhibit that it should go to the jury as  
 (4) a - as for example the damage calculations that the witness  
 (5) himself made about which I have not made an objection So I'm  
 (6) asking the Court to exclude it on that basis  
 (7) THE COURT Thank you  
 (8) MR DIAMOND Your Honor this is the only document  
 (9) which quantifies each corporation's pre-spill land/real  
 (10) estate-based income in years 84 through 88 That appears  
 (11) nowhere else on the record It's not in the record other than  
 (12) in these exhibits  
 (13) THE COURT Wait a minute It's in the testimony  
 (14) isn't it?  
 (15) MR DIAMOND No he has not given the figures the  
 (16) income figures for - and did not for historical -  
 (17) THE COURT You mean the actual total pre spill  
 (18) revenues \$42,375 that figure  
 (19) MR DIAMOND This is data that he is submitting he  
 (20) authenticated that data in his figure This whole notion is  
 (21) pivotal to our presentation of the case pivotal to the way we  
 (22) present it because to the extent that Dr Mundy or anybody else  
 (23) uses a revenue estimate an annual revenue estimate either as a  
 (24) measure of loss of use or as a way of back projecting fair  
 (25) market value We believe the law requires that that income

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- (1) stream be based on some real world as to in fact be a realistic  
 (2) figure and not simply a hypothetical made up one and the  
 (3) reason for this analysis was to illustrate not only the actuals  
 (4) but to compare the actuals against what the Plaintiffs  
 (5) projections are based on to illustrate the fact that there's  
 (6) simply no - no comparison between what was really earned in  
 (7) pre-spill years and what is forecast to be earned upon which  
 (8) the damages are based That's the reason we want these and  
 (9) that's the reason we think they're admissible  
 (10) THE COURT Yes thank you  
 (11) MR PETUMENOS Judge I think Mr Diamond's made my  
 (12) point for me Mr Dorchester did the same thing It's a  
 (13) question of one of argument Mr Dorchester conceded that his  
 (14) figures for the income stream are also hypothetical and the  
 (15) fact that there are some material on here they've chosen not to  
 (16) put in any other exhibit but one in which is a hybrid and  
 (17) contains other material which ought not to go to the jury It  
 (18) seems to me this is the expert's argument  
 (19) It is not the sort of real evidence or the opinion that he  
 (20) formed It's his critique It's his argument about why he  
 (21) doesn't like the other expert's opinion and it is exactly the  
 (22) kind of information that I think you have been telling us in  
 (23) other - with respect to other experts the jury has seen it  
 (24) it's not going in for the jury to use it in final I think  
 (25) that's the category it should properly be in

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- (1) THE COURT I'm just going to ask you a question about  
 (2) this Mr Diamond  
 (3) First he testified about each one of the diagrams and the  
 (4) jury saw the diagrams while he was testifying So the figure  
 (5) itself although he may not have repeated the figure they saw  
 (6) the figure that he was saying was actual total pre spill  
 (7) revenue right?  
 (8) MR DIAMOND I don't know that I showed them all  
 (9) simply to save time I asked him whether he prepared them for  
 (10) each and I believe I authenticated on the record that in fact  
 (11) those were his analysis for each of the corporations but I  
 (12) don't think these were published to the jury  
 (13) THE COURT Now Mr Petumenos did you cross examine  
 (14) on the particulars of this exhibit these exhibits?  
 (15) MR PETUMENOS I can't honestly remember  
 (16) THE COURT I don't remember either  
 (17) MR PETUMENOS But I do remember that all of them  
 (18) were published to the jury at least briefly and I think  
 (19) they're available to both sides to argue If Mr Diamond wants  
 (20) to emphasize what it was that was - that was reflected in  
 (21) those pre spill years and so forth he's free to argue it but  
 (22) I don't think it would be at counsel's disadvantage to follow  
 (23) that rule  
 (24) THE COURT Not disadvantaged as long as you can't say  
 (25) wait a minute nobody said that it's not in evidence right?

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- (1) MR PETUMENOS Right I'm not planning on doing that  
 (2) THE COURT Well these exhibits are just the class of  
 (3) exhibits that I don't allow into the jury room unless there's -  
 (4) some unfairness about it To me these figures are in the  
 (5) record  
 (6) MR DIAMOND Your Honor can I - can I submit  
 (7) instead of them - simply so we have it as a matter of  
 (8) record - I don't think it's a matter of dispute what the  
 (9) actual numbers are for the pre spill years so that at least  
 (10) that data -  
 (11) THE COURT As a fact established by the record  
 (12) MR DIAMOND Yes he indicated he determined that  
 (13) from review of each corporation's financial statements and that  
 (14) they were summarized on these charts We would simply lift the  
 (15) numbers from the charts and submit them as a separate exhibit  
 (16) so that that information will be before the jury  
 (17) THE COURT In what sense so that some sort of  
 (18) exhibit -  
 (19) MR DIAMOND Just a table  
 (20) THE COURT Counsel  
 (21) MR PETUMENOS I just don't understand why it can't  
 (22) be argued  
 (23) THE COURT I believe that these are in the record  
 (24) counsel I mean you can -  
 (25) MR DIAMOND These are -

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(1) THE COURT I think that they are and the reason is  
(2) because he vouched for these - for these - and I don't know  
(3) whether you hit every one of them That's the only - that's  
(4) the only caveat I'd hold out on this one  
(5) To me an exhibit that talks about Tattiek Corporation and  
(6) says actual total pre spill revenues \$42,375 that the witness  
(7) has pointed to means that that fact according to that witness  
(8) is in the record  
(9) MR DIAMOND I think I would take issue with that  
(10) Unless the number appears on the record in terms of testimony  
(11) or unless there is an exhibit that has been admitted I don't  
(12) know that that fact has been proven  
(13) THE COURT And I suppose if I were in your position  
(14) I'd take issue with it too but the fact is that you could  
(15) easily have had him repeat these figures or had him point to  
(16) them and then I wouldn't have the problem I have now which is  
(17) letting in argumentative exhibit into the jury room simply  
(18) because you haven't done that  
(19) MR DIAMOND In my defense when I sent over this  
(20) list of exhibits to counsel I indicated that I assumed these  
(21) were simply - that whatever objections they had were  
(22) objections to form that we could take care of it and was  
(23) releasing Mr Dorchester who's now returned home I mean I  
(24) would simply call him and say Are these the numbers and we  
(25) could get the numbers in I did not note that the problem was

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(1) this confirms my recollection It's page 7344  
(2) MR PETUMENOS Could I see it?  
(3) Right That's what I remember too  
(4) MR DIAMOND I didn't put them up  
(5) MR PETUMENOS You put them up briefly but he didn't  
(6) testify to them  
(7) THE COURT I'm just not sure he put all of them up -  
(8) That's the only question I have  
(9) MR PETUMENOS But Judge I'm not contending that  
(10) the witness would have not testified to those numbers or that  
(11) he's not free to argue all of them in detail If I had  
(12) required that he lay the foundation for each exhibit I would  
(13) have been required to do it right then I didn't do it and I  
(14) didn't do it on purpose because I understand what the witness  
(15) has done He's done an investigation into the pre-spill  
(16) revenues and put them on a chart and counsel's free to argue  
(17) that  
(18) THE COURT Here's what you can do counsel I'm not  
(19) going to let these in  
(20) You can take these charts you can use them in final  
(21) argument You can point to the figure and you can say that  
(22) these - these figures were testified to by the witness  
(23) himself You can repeat the figures and you can say to them  
(24) Since these are illustrative exhibits they will not be in the  
(25) jury room with you when you deliberate but as to these

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(1) in the numbers  
(2) THE COURT You know one thing I have to know Is  
(3) there a dispute about these numbers? Is there?  
(4) MR PETUMENOS A dispute about what the pre spill -  
(5) THE COURT Let's just say give you Tattiek on  
(6) Exhibit DX13091A there's a figure for actual total pre spill  
(7) revenues 42,375 Do you dispute that that was the actual  
(8) total pre spill revenues?  
(9) MR PETUMENOS No not particularly that's not part  
(10) of my final argument I'm not coming to court saying it's more  
(11) than that We have different theories of the case No it's  
(12) not  
(13) THE COURT The question is whether it's accurate  
(14) MR PETUMENOS I don't know if it's accurate It's  
(15) not an issue for us the pre spill revenues Our theory is not  
(16) obviously based on that We're trying two different cases here  
(17) somewhat so my concern is with the material past the Exxon  
(18) Valdez oil spill line and the characterization of Mundy's work  
(19) but I don't understand what Mr Diamond's problem is  
(20) The witness has vouched for and testified to the exhibit  
(21) and he can - under the Court's ruling since the jury's  
(22) already seen it he can display the whole thing and argue from  
(23) it This is what Mr Dorchester said and so I have no idea  
(24) what - what the prejudice Exxon's suffering here is  
(25) MR DIAMOND I do have the transcript and I believe

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(1) figures there's no contrary evidence in the record  
(2) MR DIAMOND Your Honor I had understood the only  
(3) problem with this was that it was argumentative in that it  
(4) contrasted historical revenues with the future revenues Can I  
(5) simply submit these? I will cut off everything beyond -  
(6) THE COURT You can submit anything you want, counsel  
(7) but I'm ruling on this particular exhibit and the answer is  
(8) this exhibit is not going to go in If you want to make up  
(9) another exhibit you're welcome to do that and I may very well  
(10) admit it I don't know what I'm going to do I'll have to see  
(11) it  
(12) But these exhibits just for the clerk are DX13091A  
(13) 13095B 1 13095B 2 14047 1 14047 2 14045 1 14045 2  
10461A  
(14) 13095C 1 13095C 2 14046B 2 14046B 1 Those are all the  
(15) diagrams that the witness testified to that I am not allowing  
(16) in because they appear to me to be argumentative exhibits and  
(17) because the evidence in them is already in the record  
(18) MR DIAMOND The next dispute which has been  
(19) simmering for some time since Dr Mundy's cross-examination  
(20) was the portion of Dr Mundy's report concerning his interviews  
(21) with government and conservation organizations and the  
(22) conclusions he reached We submitted as 14058 the cover  
page  
(23) and pages III - Roman III 25 and -26 Mr Petumenos would  
(24) like larger portions of the report in the record and we think  
(25) what we've excerpted is all that should come in I will show

Vol 1 13

- (1) you where this comes from  
 (2) MR PETUMENOS I m the one making the 106  
 (3) objections Can I tell the Court which portions I want in?  
 (4) MR DIAMOND Yeah I m just going to hand him the  
 (5) entire report and the pages  
 (6) MR PETUMENOS This - I don t know if the Court s  
 (7) ready yet but this page reflects the work that Dr Mundy did  
 (8) on the effect of the oil spill on marketability Page III 25  
 (9) do you have - I don t know if you have - I have the section  
 (10) I wanted to add -  
 (11) THE COURT Yeah I have it It s open to that  
 (12) MR PETUMENOS III-25 is that beginning of that  
 (13) section on marketability This is an issue by the way which  
 (14) is facing both sides and I can t give you the pages right now  
 (15) but there was a cross-examination exhibit on Mr Dorchester  
 (16) which was very similar in which I took some information  
 (17) favorable to the Plaintiffs in their report one page and  
 (18) Mr Oppenheimer has reserved because he wants to put in  
 (19) material under 106 that he thinks ought to be included  
 (20) The problem I have with the one page reference is that if  
 (21) you look at Page III-25 III-26 III 27 a graph all the way  
 (22) through to III-29 that is all of Dr Mundy s analysis  
 (23) reflecting his conclusion about the effect of the oil spill on  
 (24) marketability  
 (25) This cross-examination takes one factor where he found in

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- (1) fairness that there were certain things that the Defendants  
 (2) want to emphasize but in order to understand his opinion you  
 (3) have to have the entire section on why he came up with the  
 (4) opinion he did or it s unfair particularly if it s going into  
 (5) the jury as a single exhibit  
 (6) My solution is that the exhibit doesn t go in because it s  
 (7) a report and it s unfair to take a single page out of it or  
 (8) that the entire section come in And I m willing to abide by  
 (9) the Court s ruling on this with respect to my - my exhibit on  
 (10) Mr Dorchester as well as Mr - maybe it s Mr MacSwain I  
 (11) can t remember now but as well as Mr Diamond s issue here  
 (12) THE COURT Let me understand your position As far  
 (13) as you re concerned this exhibit the one page of the  
 (14) appraisal of Chenega Corporation lands shouldn t come in and  
 (15) neither should the report  
 (16) MR PETUMENOS Either that or if the Court rules  
 (17) that the exhibit should - the page should come in under 106  
 (18) the entire section on effect of marketability needs to come  
 (19) in  
 (20) I think the simplest thing is leave it out and leave it in  
 (21) the record the way it is and allow counsel to argue it They  
 (22) can refer to the page I can then argue back This is part of  
 (23) the story or something like that They ve taken one page out  
 (24) of the report and both sides are on equal footing but I either  
 (25) have an objection to the exhibit because it s taken out of

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- (1) context and it is not a fair representation of the report or I  
 (2) have a 106 objection requiring me to move into evidence the  
 (3) complete document and I m not saying the whole report but  
 (4) that portion of the analysis that leads to the conclusion upon  
 (5) which this particular one page was based  
 (6) THE COURT I understand  
 (7) MR DIAMOND The one thing Mr Stoll s videotape in  
 (8) the litigation over admissibility has taught us is statements  
 (9) of experts obtained by a party do constitute admissions under  
 (10) 801(d)(2)(C)  
 (11) THE COURT Some of us It s taught some of us that  
 (12) counsel  
 (13) MR DIAMOND And I had to learn the hard way But  
 (14) this is admissible as a statement of a party  
 (15) The only thing that we have talked about with respect to  
 (16) this document is who are the likely buyers for these large  
 (17) parcels and that s - that s who s identified in the bottom of  
 (18) Page III 25 and what Dr Mundy concedes he was told by them  
 (19) in  
 (20) his interviews of them And that s carried over into the top  
 (21) of III 26  
 (22) The balance of this gets into lender interviews with  
 (23) respect to lending on property which was not the subject of  
 (24) the testimony 27 deals with Pat Carlson the Kodiak Island  
 (25) assessor and analysis that he s made it has nothing to do  
 with the point for which this was offered III-29 talks about

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- (1) the Ellamar subdivision and Thumb Bay lodge  
 (2) The only part of this that we have talked about is  
 (3) summarized on the top of III-26 and that is what the -  
 (4) mentality of government purchasers of large blocks of remote  
 (5) land and this document constitutes an admission that they buy  
 (6) for the long term and not the short-term that they are not  
 (7) particularly motivated by the presence or absence of oil and  
 (8) that few if any lands are actually being acquired due to  
 (9) financial constraints  
 (10) THE COURT What does the record show when you  
 (11) questioned him? What did he say in response to these  
 (12) particular -  
 (13) MR DIAMOND I ll have to refer to Mr Oppenheimer  
 (14) because he cross-examined Dr Mundy I offered these in  
 (15) connection with Dr Dorchester because Dorchester said that  
 (16) These are my views and I believe Dr Mundy shares them and  
 (17) here s the portion of Dr Mundy s report which confirms my  
 (18) views  
 (19) MR OPPENHEIMER Your Honor I am - we ve all  
 (20) learned lessons in the course of this trial mine is not to  
 (21) quote from the record and I m caught a little off guard but  
 (22) believe it or not I do have that  
 (23) THE COURT If I caught you by surprise it means I  
 (24) did the right thing  
 (25) MR OPPENHEIMER You did the right thing



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- (1) I do in fact carry around a tabbed copy I'll take a look
- (2) at it and go on to another topic and see exactly what we
- (3) crossed him on I do have a correction but I've learned the
- (4) possibility is 50-50 I'll get it right
- (5) THE COURT That's fine So what is the next
- (6) question?
- (7) MR DIAMOND Why don't we go talk about the
- (8) admissibility of the report - no that wasn't his report that
- (9) was Dorchester's report
- (10) You will remember that there was a line of
- (11) cross examination of Mr Dorchester involving whether he had
- (12) adequately disclosed pursuant to USPAP and Guide Note 8
- (13) and
- (14) some committee report the existence of a hazardous substance
- (15) on the Plaintiffs property and whether in fact his appraisal
- (16) report was not deficient in that regard because it did not
- (17) state that there was oil on the Plaintiffs property or
- (18) hazardous substance on Plaintiffs property
- (19) Mr Petumenos during the course of his cross-examination
- (20) you remember in the presence of the jury offered USPAP
- (21) Guide
- (22) Note 8 and the Appraisal Institute committee reports dealing
- (23) with those subjects and left me in a position of having to
- (24) object in the presence of the jury Not at all unrelated to
- (25) that during my course of the redirect of Mr Dorchester I
- (26) offered the entirety of the report into evidence because I
- (27) think he raised the inference that the report was misleading

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- (1) and not informative and I think he registered an objection to
- (2) that offer but we are offering the report If the report
- (3) comes in we have no objection to the introduction of Guide
- (4) Note 8 and the Appraisal Institute committee report and
- (5) whatever else Mr Petumenos would like to offer on the
- (6) subject
- (7) But we think an inference has been raised the jury is
- (8) now - should be afforded an opportunity to read the report if
- (9) they choose to to see whether in fact full disclosure was not
- (10) in fact made
- (11) THE COURT And of course if that report comes in the
- (12) whole Mundy report comes in too right?
- (13) MR DIAMOND I don't see any parallel situation I
- (14) don't know that we cross-examined Dr Mundy in a way that
- (15) suggested his report was not in conformance with USPAP
- (16) MR PETUMENOS Counsel's offer is overbroad You
- (17) have to have more familiarity with the report than you probably
- (18) do but obviously this report is seven volumes or 14 volumes
- (19) and the first volume which contains a lot of the narrative has
- (20) lots more information in it than what is described
- (21) There are two sections of the report both in the
- (22) assumptions category one in which Mr Dorchester states that
- (23) oil is excluded from - as a hazardous substance under CERCLA
- (24) and then his August 9th report a few weeks ago in which he
- (25) points out that oops it is a hazardous substance under state

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- (1) law and it's in the assumptions section of the report and that
- (2) was the area that I went after Mr Dorchester on in my
- (3) cross examination
- (4) This document of course contains Mr Neff and Mr
- (5) Gilfillan's quotes and what he thinks about oil and how much of
- (6) it's on the beaches and what Mr MacSwain's friends tell him
- (7) and sales comps and all sorts of things that are totally
- (8) unrelated to the issue that was being crossed on
- (9) If Mr Diamond - basically right now I believe that the
- (10) offer is - if he's offering the whole report you should -
- (11) you should sustain an objection to it If he wishes to offer
- (12) the assumptions section relating to the hazardous substance
- (13) issue which is where that information is in the report then I
- (14) would move into evidence Guide Note 8 the USPAP and the -
- (15) the
- (16) direction from the Appraisal Institute on hazardous wastes and
- (17) we would all be fairly crossed but the entire report isn't a
- (18) proper offer
- (19) MR DIAMOND I'll submit on that.
- (20) THE COURT I'm not going to decide that until I
- (21) decide the first question
- (22) MR DIAMOND The first question being?
- (23) THE COURT Being the page of the Mundy report or the
- (24) section of the Mundy report or the entire Mundy report.
- (25) MR OPPENHEIMER We have that portion of transcript
- (26) Your Honor This - Tim why don't you this is what I'll show

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- (1) the Judge starting from about line 21 there and stops there
- (2) Assuming that Mr Petumenos has no objection Your Honor
- (3) I'll show you the cross from Mr Mundy - actually started to
- (4) be a little bit confusing about this
- (5) This is actually the different exhibit it's the same two
- (6) pages we're talking about here but there were a series of
- (7) reports done for different clients It's identical wording
- (8) MR PETUMENOS Counsel's right about that.
- (9) MR OPPENHEIMER Your Honor it begins just about
- (10) line 22 on page 297 and goes to the next page
- (11) THE COURT What was the highlighted portion counsel
- (12) do you remember?
- (13) MR OPPENHEIMER Apparently not manifest in the
- (14) transcript Your Honor We were discussing natural lands and
- (15) the point was that the single most prominent purchaser was -
- (16) had the attitude depicted in those conclusions about oil which
- (17) is to say that they bought for the long term and were not as
- (18) concerned about oiling as had been indicated We got into the
- (19) specific conclusions because there was - I would characterize
- (20) it as some equivocation prior to that point - on the part of
- (21) the witness
- (22) There is a separate section of the questioning it then
- (23) changes subjects as I recall
- (24) THE COURT Looks like it does The piece fits -
- (25) pertinent to this page is now some of the government people

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- (1) that you spoke with said they might expect a price adjustment  
 (2) adjustment and others said they wouldn't right?  
 (3) MR OPPENHEIMER Right And he has I believe four  
 (4) conclusions and that was - that was one of them and the other  
 (5) was - yeah it's right here - I don't have the transcript in  
 (6) front of me now Your Honor but I believe the other was that  
 (7) he would acquire the natural resource lands even if oil - with  
 (8) what we had on the - on the Elmo at the time -  
 (9) THE COURT Yeah their feelings were that oiling  
 (10) would be a temporal thing relatively short term in relation to  
 (11) the long term ownership patterns that they have  
 (12) MR OPPENHEIMER Sounds like it Your Honor and this  
 (13) is what was on the Elmo at the time This was the Page  
 (14) III 26 It was this portion that was blown up  
 (15) THE COURT Okay I got you  
 (16) Now you're moving - Mr Diamond I guess you're the  
 (17) person arguing this point This is - we're talking about the  
 (18) Mundy testimony and the -  
 (19) MR DIAMOND The Mundy testimony and the -  
 (20) THE COURT Yes You're arguing this one page should  
 (21) be admitted because it essentially is illustrative of or it  
 (22) shows - it focuses on that cross-examination and shows with  
 (23) more clarity if they're considering both the record and the  
 (24) page what the cross-examination was all about right?  
 (25) MR DIAMOND Independently of the cross-examination

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- (1) I think I'm entitled to offer that page as an admission with  
 (2) respect to how - how governmental organizations view these  
 (3) properties and what they're likely to do Even had there been  
 (4) no cross-examination on that subject I think this comes in as  
 (5) an admission  
 (6) THE COURT Oh I see But since it came in once why  
 (7) should it come in twice?  
 (8) MR DIAMOND Because I think it came in - comes in  
 (9) better in the - in the words of the party himself than  
 (10) during the course of cross-examination  
 (11) THE COURT Who was speaking?  
 (12) MR DIAMOND Mr - Dr Mundy  
 (13) THE COURT And it's his words right?  
 (14) MR DIAMOND You talking about the  
 (15) cross-examination?  
 (16) THE COURT The report is Dr Mundy's report?  
 (17) MR DIAMOND Correct those are his words He is a  
 (18) party for these purposes  
 (19) THE COURT If it is an admission and he's spoken of  
 (20) it on the record isn't that in the party's words?  
 (21) MR DIAMOND I guess it's a difference between  
 (22) testimony in response to cross-examination and the party's own  
 (23) document  
 (24) THE COURT I got you  
 (25) MR DIAMOND I would think the party's own document

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- (1) is more convincing than cross examination  
 (2) MR OPPENHEIMER I think Your Honor also hit the nail  
 (3) on the head in the first point If you look at the cross that  
 (4) we have there in the context of that moment of  
 (5) cross examination on the record I focused on I think two of  
 (6) the four maybe just even one of the four but in context they  
 (7) were all being examined he adopted it of course as part of his  
 (8) report I think it does make the cross-examination clearer  
 (9) THE COURT I understand your point And counsel I'd  
 (10) have taken the same position if I were you It's just that I'm  
 (11) not So here's my ruling on this issue  
 (12) I have a number of choices that I could make here each one  
 (13) of them probably lead me down some path that would not make  
 (14) me  
 (15) happy when I got to the end of the path so I'm going to go  
 (16) with this one and probably - and I'm going to try to be  
 (17) consistent on any other issue that arises that's similar to  
 (18) this  
 (19) First as to Exhibit DX14058 yes it is a clear statement  
 (20) of what Mr Mundy said but he was cross-examined on it and  
 (21) there's also a clear statement of those things that are - that  
 (22) were highlighted in the - in the - in the portion that he was  
 (23) referred to It's - I don't see really a significant  
 (24) difference between them To the extent that he testified about  
 (25) it his words are in black and white and you can refer to them  
 (25) In argument

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- (1) So frankly I see no qualitative difference between the two  
 (2) types of record The one difference I do see that would be  
 (3) helpful to you of course would be that there's ~~one~~ big -  
 (4) black-and white page easy to read fast to read that the jury  
 (5) could then look at and perhaps give undue emphasis when you  
 (6) consider how big this record is  
 (7) So I will not admit the one page  
 (8) Second do I admit the whole section? I don't want to  
 (9) admit the whole section and I don't think Mr Petumenos has  
 (10) shown me a reason why I should because there is a lot of  
 (11) unrelated material there and why should I cause them now to  
 (12) diffuse their focus and not focus on the very questions that  
 (13) were asked this witness because presumably they're the most  
 (14) important things in the defense anyway  
 (15) Finally do I admit the whole report? If I admit this  
 (16) report I have to admit that report don't I? So I have two  
 (17) huge reports with all kinds of material in them that may very  
 (18) well be so totally confusing to the people that one if we're  
 (19) lucky they don't read it and two if they do read it they  
 (20) may be misled So I will not admit the whole report  
 (21) All right so none of it comes in except what was  
 (22) questioned  
 (23) Do I need to explain the next go-round when I get to the  
 (24) next report?  
 (25) MR DIAMOND No but I have a feeling you're not

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- (1) going to split the baby on this one
- (2) THE COURT I m going to try not to counsel but I ll
- (3) admit to you that this is a huge record and that there may be
- (4) some inconsistencies here so if there are you have to point
- (5) them out to me because I ll try to correct them
- (6) MR PETUMENOS I m not aware of any inconsistencies
- (7) I don t think any reports have come in at this point
- (8) MR DIAMOND Mr Petumenos and I have -
- (9) THE COURT That was my impression and I suppose
- (10) after about 13 days of deliberation this jury may very well
- (11) say Could we see the two appraisals and then I ll deal with
- (12) it at that point
- (13) MR PETUMENOS Hopefully consistently
- (14) MR DIAMOND Normally we would handle this a little
- (15) bit differently but if I could just make my objections to the
- (16) admission of Guide Note 8 the guide note that the report
- (17) ostensibly does not report to USPAP and the financial report
- (18) of the Task Force that will complete the circle on this
- (19) issue Those are exhibits 8299 for Guide Note 8 8300 USPAP
- (20) and 8310 the final report Those are all PX exhibits
- (21) MR PETUMENOS Is that what you want to cover now?
- (22) THE COURT If you want to I don t want to let any
- (23) of this in
- (24) MR PETUMENOS Fine I withdraw the offer
- (25) MR DIAMOND The final Dorchester exhibit of which we

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- (1) go ahead and give Dr Mundy s nine percent if you give this
- (2) too if you give this too you can give the Plaintiffs a
- (3) million six instead of 800 000 or a million two instead of
- (4) 400 000 Very dangerous stuff for a Plaintiff under the
- (5) circumstances
- (6) And what we have done for the rebuttal case I can tell
- (7) you is we have done a similar thing because we re concerned
- (8) about it We have had Ms Vicki Adams who works for
- (9) Dr Mundy has basically done the same kinds of calculations
- (10) doing the mirror taking some of Mr Dorchester s figures and
- (11) applying them to Dr Mundy s methodology so the jury can see
- (12) how that comes out
- (13) This was done at the direction of a lawyer and I don t want
- (14) to object to this exhibit but I want - I think what is really
- (15) important is that we get our exhibit in in rebuttal and I
- (16) wanted to take that up now because if only that exhibit goes
- (17) in without rebuttal from the Plaintiffs it does invite
- (18) compromise and is very scary
- (19) The jury sat there and reproduced the chart in their
- (20) notes So my objection - objecting to the exhibit will get me
- (21) nowhere they ve already got it And my only concern is I m
- (22) hearing noises from the Defendants as they object to every
- (23) single rebuttal witness that we have I - and I mean every
- (24) single one that this rebuttal would be out of line for some
- (25) reason that I have yet to understand but I wanted to raise

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- (1) have - for which we have controversy you ll remember at the
- (2) conclusion of Mr Dorchester s direct examination he - he
- (3) gave his computations of damage assuming Mundy s nine
- (4) percent
- (5) lease rate instead of his six percent and a more generous
- (6) oiling assumption and then the combination of both and then
- (7) on
- (8) the following morning we concluded his redirect he added
- (9) another column which now escapes me but there were four
- (10) columns
- (11) of new information yeah using - thank you using \$950 an
- (12) acre -
- (13) THE COURT Right
- (14) MR DIAMOND So he was playing with his numbers his
- (15) basic analysis with Mundy s numbers We offer that into -
- (16) into evidence I think there is a - I ll let Mr Petumenos
- (17) speak
- (18) MR PETUMENOS This issue I think is very serious
- (19) for us in that I was very uncomfortable with the exhibit as it
- (20) was - as it was being constructed because we had of course no
- (21) way to report on it This was what the Court ruled an expert
- (22) could do to rebut another expert
- (23) The thing that s very concerning about the exhibit - and
- (24) I m really not objecting to the admissibility is the bottom
- (25) line but I do have a different concern to raise to the Court
- (26) so we have the whole picture
- (27) It invites a jury compromise I think that s the purpose
- (28) of the offer He s saying if you take my methodology but you

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- (1) with the Court that my concern with this exhibit is that it
- (2) needs - there needs to be a corresponding exhibit to come in
- (3) from the Plaintiffs side in rebuttal and then we have no
- (4) problem
- (5) MR DIAMOND My response to Mr Petumenos and my
- (6) response on the record is I don t see - I don t understand the
- (7) linkage here What we ve said is we think this is admissible
- (8) If he is - has a witness testify who does a similar analysis
- (9) we would think that would be equally admissible
- (10) THE COURT Okay Are you going to object to that
- (11) witness?
- (12) MR DIAMOND We have some other problems with Vicki
- (13) Adams She s not a designated expert Counsel has
- (14) represented
- (15) that she s being offered only for computational purposes
- (16) THE COURT Yeah so -
- (17) MR DIAMOND If that s the case - well what we ve
- (18) said is computational versus judgmental in this area is not
- (19) necessarily an easy line to draw and we asked to see what
- (20) computations will she be offering If they re computational
- (21) we re not objecting to her coming in and doing that If they
- (22) involve some analysis or judgment we may or we may not in
- (23) which case they should have Dr Mundy come back and do it
- (24) And I think Mr Petumenos has some problem with showing us
- (25) those in advance and wants us to agree that we re not going to
- (26) object to Vicki Adams without knowing what her testimony is

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- (1) going to be and we re not prepared to do that
- (2) THE COURT I hear what you re saying
- (3) Counsel do you want to respond to that or do you want me
- (4) to tell you what I m going to do?
- (5) MR PETUMENOS I want you to tell me what you re
- (6) going to do Judge
- (7) THE COURT What I m going to do is I m not going to
- (8) admit the exhibit until I hear the testimony of Adams and if I
- (9) don t hear the testimony of Adams then I ll make the ruling
- (10) and I m not going to tell you how I ll make the ruling because
- (11) I ll have to evaluate it at that time
- (12) But I ll tell you one thing I suspect that the
- (13) objections if they re made will probably not succeed and if
- (14) these calculations are made and there s an exhibit I either
- (15) keep them - I either let them both in or I keep them both
- (16) out
- (17) MR PETUMENOS All right Is that the last one for
- (18) you? I have the cross exhibits for that witness I d like to do
- (19) next so we can dispatch Mr Dorchester
- (20) MR PETUMENOS Sure if you want to read in the
- (21) documents I have no objection to and do the others later
- (22) that s fine with me
- (23) MR CLOUGH Thank you counsel You might recall
- (24) Your Honor that at the end of Teal we started to read them in
- (25) we had to attach the pages because a number of exhibits only

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- (1) had some pages of it Mr Petumenos said he had no objection
- (2) I now have the ones the right numbers for them I guess I ve
- (3) been told I need to read them in for Teal
- (4) MR PETUMENOS The only question I have for you
- (5) counsel is that after consulting with my co-counsel there are
- (6) objections to the summary charts of the Type I Type II and
- (7) Type III If you exclude those as objected to those are
- (8) the - those are the -
- (9) MR CLOUGH You re thinking of Dekin
- (10) MR PETUMENOS Teal? When was that?
- (11) MR CLOUGH A while ago
- (12) DX2282A DX2293 DX5142 DX5156 DX5170 DX8066A
- DX8069
- (13) DX8072 DX8073 DX8075 DX8077 DX8425 DX14025
- DX10645
- (14) DX12987A DX13151A DX13152A DX13161A DX13156A and
- DX14014A
- (15) Additionally Tim moved in as a cross exhibit he moved in
- (16) DX23165 There isn t such one we checked you will take my
- (17) representation you meant 13165 to which we had no objection
- (18) coming in as a cross exhibit
- (19) (Exhibits DX2282A DX2293 DX5142 DX5156 DX5170
- DX8066A
- (20) DX8069 DX8072 DX8073 DX8075 DX8077 DX8425 DX14025
- (21) DX10645 DX12987A DX13151A DX13152A DX13161A
- DX13156A and
- (22) DX14014A offered)
- (23) THE COURT All of those exhibits are admitted
- (24) (Exhibits DX2282A DX2293 DX5142 DX5156 DX5170
- DX8066A
- (25) DX8069 DX8072 DX8073 DX8075 DX8077 DX8425 DX14025

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- (1) DX10645 DX12987A DX13151A DX13152A DX13161A
- DX13156A and
- (2) DX14014A received)
- (3) MR CLOUGH I missed one DX14018A was the final
- (4) one I was told
- (5) (Exhibit DX14018A offered)
- (6) THE COURT That s admitted also
- (7) (Exhibit DX14018A received)
- (8) MR CLOUGH And then I have the Harrison ones here
- (9) I don t believe there s going to be a dispute Most of them
- (10) are photos It s the highlighted ones
- (11) MR CLOUGH For the Otto Harrison exhibits without
- (12) objection from counsel I believe DX2293 DX3938 DX39 -
- (13) actually 3944 was not used today I think it s previously in
- (14) but it was not used today DX3958 DX5127 DX6339 DX6340
- (15) DX6343 DX6349 DX6351 DX6352 DX6366 DX6367 DX6371
- DX6376
- (16) DX6377 DX6378 DX8285 DX8319A DX8368A DX8369A,
- DX14059 2
- (17) and DX14059 3
- (18) (Exhibits DX2293 DX3938 DX3958 DX5127 DX6339 DX6340
- (19) DX6343 DX6349 DX6351 DX6352 DX6366 DX6367 DX6371
- DX6376
- (20) DX6377 DX6378 DX8285 DX8319A DX8368A DX8369A
- DX14059 2
- (21) and DX14059 3 offered)
- (22) THE COURT They are all admitted
- (23) (Exhibit DX2293 DX3938 DX3958 DX5127 DX6339 DX6340
- (24) DX6343 DX6349 DX6351 DX6352 DX6366 DX6367 DX6371
- DX6376
- (25) DX6377 DX6378 DX8285 DX8319A DX8368A DX8369A
- DX14059 2

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- (1) and DX14059 3 received)
- (2) MR PETUMENOS I wanted to move in on the cross
- (3) exhibit the can of gunk
- (4) THE COURT I ve already used it counsel I had my
- (5) motor in my car - it s all used up
- (6) MR PETUMENOS All right Well we ll leave it on
- (7) the record You can do that if you want
- (8) THE COURT I ll try to clean it up
- (9) MR PETUMENOS My exhibits on the Dorchester cross
- (10) back to the Dorchester again first of all are move into
- (11) evidence 8147
- (12) MR DIAMOND No objection - no I do have an
- (13) objection to that one Sorry Why don t you do the ones we
- (14) have no objection to?
- (15) THE COURT Do you have any you know are not going to
- (16) be objected to?
- (17) MR PETUMENOS I think so Exhibit 8302 is the
- (18) photograph of the Growler Island permit that I showed him and I
- (19) want that exhibit in and I believe there s an objection
- (20) (Exhibit 8302 offered)
- (21) MR DIAMOND I think I did object I told you it s
- (22) never been identified other than by you
- (23) MR PETUMENOS I believe that we showed him the -
- (24) MR DIAMOND No objection Growler Island photograph
- (25) THE COURT It s admitted

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- (1) (Exhibit 8302 received)
- (2) MR PETUMENOS The - I move in exhibits 9064 9066 and 9067
- (3) (Exhibit 9064 9066 9067 offered)
- (4) MR DIAMOND No objection Your Honor
- (5) THE COURT They re all admitted
- (6) (Exhibit 9064 9066 9067 received)
- (7) MR PETUMENOS Now - no the objected ones I move in 8147 which is my map of Alaska which contained -
- (8) MR DIAMOND I have to help him along
- (9) MR PETUMENOS I move into evidence DX15552 28 DX15552 26 and DX15552 24 those portions as used in the cross-examination
- (10) (Exhibits DX15552 28 DX15552 26 and DX15552 24 offered)
- (11) MR DIAMOND No objection to those and I should note that 26 is already in evidence
- (12) THE COURT All right they re admitted
- (13) (Exhibits DX15552 28 DX15552 26 and DX1552 24 received)
- (14) MR PETUMENOS Now my map Exhibit 8147 is the National Geographic map used in cross-examination
- (15) THE COURT Well?
- (16) MR DIAMOND Well you remember that s the map with -
- (17) THE COURT How could I forget counsel?
- (18) MR DIAMOND It hangs in every classroom and has some

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- (1) evidence of - how the area is perceived as relates to the real estate value
- (2) THE COURT Okay You've been heard now
- (3) MR PETUMENOS What was it Judge Moody used to say
- (4) You have a right to a hearing but not necessarily relief
- (5) The other one is Exhibit 8185 I believe that this is the blow-up of the comparable sales transactions I understand that Mr Diamond has a - an objection because of what he contends is the witness wouldn't - wouldn't agree that it was accurate I think he didn't want to look at it but he said I'll take your word for it that it s accurate so forth This was the comparables that I put up on the board here that showed
- (6) his limited use transactions the amount of money that was part of the transaction and the amount of money that he valued it at And it was - there were two columns and I was pointing out the extent to which he -
- (7) THE COURT I've lost that one I'd like to look at it before I make a ruling
- (8) MR DIAMOND There are actually two exhibits One s a chart and one s bar graphs 8185 is I believe the -
- (9) MR PETUMENOS Now I have a solution for you Judge that may - may obviously go quicker and that is Mr Carlson who s going to testify in rebuttal helped us construct this chart and can testify to its accuracy as coming right out of the Dorchester report It doesn't require expert testimony for

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- (1) rather memorable things to say about Prince William Sound We
- (2) object on the grounds -
- (3) THE COURT It has birdies on it doesn't it?
- (4) MR DIAMOND What s that?
- (5) THE COURT It has some birdies on it
- (6) MR DIAMOND That s the map that says the most memorable thing that happened in Prince William Sound is the Exxon Valdez went aground
- (7) THE COURT I won't admit it
- (8) MR PETUMENOS Actually I thought you'd already ruled on this
- (9) THE COURT I can't remember whether you moved it in or not but if I ruled on it you go back and I didn't admit it I know that
- (10) MR PETUMENOS That may be but you don't want to let me be heard either I bet
- (11) THE COURT Counsel of course I want to let you be heard if you want to be heard
- (12) MR PETUMENOS I actually do want to be heard on that exhibit I think the issue is whether or not Prince William Sound is known to the world to be as Exxon says it is and that is I think a fairly substantial illustration of how the -
- (13) how the area is perceived and there is no dispute about what it is or the authenticity of it It s not offered for the truth of the matter I think that s what you did rule but as

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- (1) him to do that He simply lifted those transactions and can explain what they mean right out of the report
- (2) THE COURT That s fine but here s what'll happen counsel if he testifies and he testifies to these things I'm not going to let this in independently probably But the answer to your immediate question is 818- - 8185 will not be admitted at this time
- (3) MR PETUMENOS You re doing a good job you ought to keep arguing
- (4) THE COURT Yeah that should be a word to the wise or a no word to the wise counsel Sometimes you get more by remaining silent
- (5) MR DIAMOND Take 8322 because that s the same problem
- (6) MR PETUMENOS 8322 I'll also want to offer after I have the sponsoning witness so I withdraw that at this time
- (7) THE COURT Is that the same sort of thing?
- (8) MR DIAMOND It s a graph of the same information
- (9) MR PETUMENOS Right. It in all candor may be in the same category as the exhibit I was trying to get out -
- (10) THE COURT That s right
- (11) MR PETUMENOS Did get out earlier today I think that s all I have on Mr Dorchester
- (12) THE COURT Where else are we?
- (13) MR DIAMOND Dekin I think none of these are

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- (1) objected to The first two are maps
- (2) THE COURT This is the witness whose name is Arch
- (3) Dekin?
- (4) MR DIAMOND Albert Arch Dekin
- (5) THE COURT That s one of the better names I ve had
- (6) MR DIAMOND I m surprised you heard it because he
- (7) talked so quickly at that point of the examination
- (8) THE COURT That was the slowest speech he had He
- (9) clearly wanted his name to be heard and understood
- (10) MR DIAMOND The first two are maps which Mr
- (11) Petumenos has agreed that they can be admitted subject to his
- (12) verifying and if he s got problems he ll let you know but they
- (13) are DX10030B it s the Chenega and CAC site map and
- (14) DX10041A
- (15) that s the Port Graham and English Bay site map
- (16) (Exhibits DX10030B DX10041A offered)
- (17) THE COURT Those are - that s it? Those are
- (18) admitted and Mr Petumenos can check and see whether
- (19) there s
- (20) some reason why they should come out
- (21) MR PETUMENOS We ve checked There s no reason
- (22) THE COURT They re both admitted
- (23) (Exhibits DX10030B and DX10041A received)
- (24) MR DIAMOND Photographs DX12084A 4 is a photograph
- (25) of Northwest Lagoon
- (26) THE COURT Mr Diamond you should look around
- (27) MS ANDERSON I just heard you pause and I was going

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- (1) to say this spells out which ones you -
- (2) MR DIAMOND I have it
- (3) The photograph of Short Arm Shipwreck is DX14034A 34
- (4) mis identified on the record as 43 The photograph of Panhat
- (5) Point 14034A 29 the photograph of Verdant Cove 14034A 40
- (6) the photograph of Disk Island 14034A 9 the photograph of
- (7) Dogfish Bay 14034A 10 the photograph of Badger Cove
- (8) 14034A 1 the photograph of McArthur Pass DX16242 and I
- (9) can t
- (10) move into evidence the photograph of Point Helen because I
- (11) have
- (12) to give that back to my co counsel
- (13) In addition Professor Dekin s definitions of the three
- (14) types of sites DX14043A and his site location charts
- (15) DX14055C 4
- (16) (DX12084A 4 14034A 34 14034A 29 14034A 40 14034A 9
- (17) 14034A 10 14034A 1 16242 DX14034A and DX14055C 4
- (18) offered)
- (19) MR PETUMENOS Hold on a second
- (20) MR DIAMOND I m sorry
- (21) (Discussion off record between counsel)
- (22) MR DIAMOND Isn t it nice that we have our act
- (23) together?
- (24) Let me go back to the photographs I seem to do better with
- (25) those
- (26) Kake Cove 14034A 15 Shipyard DX14034A 33 Old Chenega
- (27) DX14034 25 26 and 28 and Flat Island DX14034 11
- (28) (Exhibits 14034A 15 DX14034A 33 DX14034 25 26 28 and

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- (1) DX14034 11 offered)
- (2) Okay we have two -
- (3) THE COURT Those are all admitted
- (4) (Exhibits 14034A 15 DX14034A 33 DX14034 25 26 28 and
- (5) DX14034 11 received)
- (6) MR DIAMOND Dr Dekin s Type I Type II and Type III
- (7) locations broken down by Plaintiff is DX14054 B as in boy
- (8) Those are not objected to
- (9) (Exhibit DX14054B offered)
- (10) THE COURT They re admitted
- (11) (Exhibit DX14054B received)
- (12) MR DIAMOND Okay we are offering five charts as to
- (13) which there is objection and this is DX14055C and it is 1
- (14) 2 3 4 and 5 If I may approach this is essentially the
- (15) same information that is contained on the breakdown of Type I
- (16) Type II Type III charts This is organized by - thank you
- (17) Joel - organized by Plaintiff and lists each site the amount
- (18) a brief site description and essentially a simple statement as
- (19) to which category and why
- (20) THE COURT Okay
- (21) (Exhibits DX14055 C 1 2 3 4 5 offered)
- (22) MR PETUMENOS To articulate my objection here
- (23) Judge we d have to go back and talk a little bit about
- (24) consistency in Dr Johnson s testimony
- (25) THE COURT I know

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- (1) MR PETUMENOS This is pure testimony This is not a
- (2) 1006 chart Now it is true that in one instance you can t
- (3) come up - well when we were required to admit our charts we
- (4) were required to put the field notes that supported each and
- (5) every entry behind each and every chart to establish that it
- (6) was a valid 1006 chart so that it could be - the jury could
- (7) determine the extent to which we editorialized that we moved
- (8) things back and forth and so forth
- (9) When we had discussions about these charts that were being
- (10) used by the Exxon expert I am told that there aren t exhibits
- (11) to back this up there aren t notes to back this up This is
- (12) the sum total allegedly of all of his opinion and what he has
- (13) decided as a result of all of the things that he s done and
- (14) as such then it becomes nothing more than the testimony the
- (15) witness put in tabular form And we have not allowed any of
- (16) those exhibits We went to painstaking effort to get our
- (17) charts in by making sure that we had the business records
- (18) behind them of the cultural resources program that there was
- (19) very specific - Exxon hasn t done that
- (20) That s not what this chart purports to be It s really
- (21) nothing more than the tabular recitation of this witness
- (22) testimony and if you remember during the cross-examination
- (23) we
- (24) pointed out that this thing has been changing as he changes his
- (25) mind and as he decides that it should be in this category not
- (26) that category based upon you know his analysis and I don t

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(1) believe this is a proper - this is effectively in the same  
 (2) category as the other materials we've been leaving out and it  
 (3) is not a proper 1006 chart under the evidence code  
 (4) MR DIAMOND We - I didn't anticipate this  
 (5) objection so I don't have their charts in front of me but  
 (6) Dr Johnson's charts were totally different from this They  
 (7) purported to be examples of oiling extracted from field notes  
 (8) and rather than just simply the witness conclusion about - or  
 (9) the witness conclusion about a particular site it was very  
 (10) detailed and purported to summarize what was in a particular  
 (11) field note  
 (12) Our quarrel was that Dr Johnson was mischaracterizing or  
 (13) selectively editing out important information to put all that  
 (14) in context and what you required them to do was whenever they  
 (15) made reference to a specific field note that the field note be  
 (16) attached so that the jury could go back and confirm for itself  
 (17) whether or not the summary of that field note entry was  
 (18) accurate  
 (19) This doesn't purport to do that This is simply a  
 (20) catalog of Dr - Professor Dekin's conclusions on a  
 (21) site by-site basis and it's extremely important to us because  
 (22) we didn't take him through 44 sites We could have kept him on  
 (23) the stand for another full day and gone over every site and had  
 (24) him express why he viewed it as in one category or another  
 (25) this was simply a summary of his - his conclusions

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(1) As to you take - I'm looking at the screen but the fourth  
 (2) one down you can take any one - the first one Badger Cove  
 (3) Island no confirmed evidence of human activity if we were to  
 (4) attach all of the documents upon which that's based according  
 (5) to Professor Dekin it's three file cabinets because that's the  
 (6) summary he reached after reviewing three file cabinets  
 (7) spending in excess of two and a half months in the field over  
 (8) four and a half years talking to innumerable people This is  
 (9) not the analogue to what they offered and there's no reason to  
 (10) expect that we would attach any material under the  
 (11) circumstances of what this chart purports to be  
 (12) THE COURT You don't happen to have the transcript or  
 (13) the foundational testimony here do you?  
 (14) MR DIAMOND I can certainly pull it  
 (15) MR PETUMENOS While they're doing that Judge I  
 (16) have for your review the Port Graham archaeological -  
 (17) Plaintiffs 1366-C so you can see how it was constructed if  
 (18) you don't remember  
 (19) THE COURT I remember counsel  
 (20) MR PETUMENOS It's got all of the - and if you take  
 (21) a look at this chart I think it is correct to say that the -  
 (22) and I'm going to go ahead and jump in and tell you what I think  
 (23) the record says that this witness spent 1100 hours he said  
 (24) reviewing the materials and using the materials to come up with  
 (25) his conclusions and it doesn't just say there's no human

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(1) habitation here or something like that It often says intact  
 (2) archaeological deposits are not affected by the oil spill  
 (3) cleanup activities or vandalism And when you talk to him in  
 (4) the cross-examination about where that comes from he says it  
 (5) comes from the various field notes and the AHRS the same  
 (6) things Dr Johnson was doing  
 (7) And this chart suffers from the problem that you told us we -  
 (8) had to correct before this document could come into evidence  
 (9) And when Dr Johnson was on the stand she was thoroughly  
 (10) cross-examined about this note that note what note does this  
 (11) have to do with it and is this about training about bears or  
 (12) not if you recall She was put through all that  
 (13) This witness didn't purport to have the backup for this  
 (14) chart and Mr Diamond confirmed to me that he doesn't purport  
 (15) to have the backup for this chart making it a very different  
 (16) animal  
 (17) Evidence rule 1006 is very specific on what the  
 (18) requirements are It can't be editorializing it must be whole  
 (19) objective summaries it can't be argumentative and the  
 (20) distinction made between charts that go to the jury and charts  
 (21) that don't under 1006 is if it summarizes voluminous records  
 (22) and meets the tests and documents are produced in court and  
 (23) all  
 (24) those other things then it comes in  
 (25) Exxon never purported that that's what this was and it  
 (26) violates 1006 to enter it and it becomes like all the other

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(1) charts you let in the jury room  
 (2) MR DIAMOND Your Honor It's not a summary  
 (3) THE COURT Do you have the testimony?  
 (4) MR DIAMOND Here is the - on page 7771 beginning  
 (5) at line 5  
 (6) THE COURT Okay I've got it thanks  
 (7) Anything else?  
 (8) MR PETUMENOS I haven't read it  
 (9) THE COURT It was just the foundational testimony  
 (10) counsel It appears on page 7771 and 72  
 (11) MR PETUMENOS Can I see what it says? Unless I'm  
 (12) winning Maybe it would be one of those times when I should  
 (13) sit quiet  
 (14) THE COURT Of course it's not all the foundational  
 (15) testimony His entire testimony is foundational for this  
 (16) document  
 (17) MR PETUMENOS Yeah and that's what I was going to  
 (18) say I'm looking at this portion of the site here I think  
 (19) it's elsewhere in this transcript it's fairly clear that he  
 (20) didn't visit many of the sites himself that he's relying upon  
 (21) the notes and records of others and making his analysis so I  
 (22) don't think that there's anything here that - that surprises  
 (23) me on the foundation I think it's exactly how you called  
 (24) which is that this is the sum total of his review of business  
 (25) records and his summary And the problem of course is that

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(1) unless you have the records behind it s uncross-examineable  
 (2) in the time that the cross-examiner has to go through the  
 (3) chart  
 (4) My concern is the jury will see that well Petumenos stood  
 (5) up and only cross-examined four sites with painstaking you  
 (6) know and time-consuming and boring recitation to show that  
 (7) certain entries on this chart don t comport with the records  
 (8) that are behind it which is what I attempted to do I think  
 (9) on three or four sites and that took an hour  
 (10) If we had had documents that are behind it the way we do in  
 (11) the Plaintiff charts and the jury were able to evaluate the  
 (12) accuracy of this material then we d have a different kettle of  
 (13) fish But I couldn t even request the documents in court  
 (14) because Exxon does not say that that s what this chart purports  
 (15) to be and as such they ve made the decision it seems to me  
 (16) that it doesn t go to the jury or if they haven t made the  
 (17) decision I think you should make the decision that it doesn t  
 (18) go to the jury  
 (19) THE COURT All right Thanks  
 (20) MR DIAMOND Your Honor I don t know if this is one  
 (21) of those cases where I m supposed to remain seated Your  
 Honor  
 (22) THE COURT No its not counsel  
 (23) MR DIAMOND When in doubt I stand up  
 (24) One of the problems here is Mr Petumenos is raising a  
 (25) discovery problem We were never requested backup for this

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(1) chart And had we been requested had we been requested  
 (2) backup we obviously could have pulled all the field notes that  
 (3) relate to each of these sites and given them that because  
 (4) that s what Professor Dekin relied on You know one of the  
 (5) problems in not moving into evidence exhibits as you use them  
 (6) is you lose witnesses  
 (7) In this case I agreed with Mr Fortier that I would not  
 (8) offer this into evidence in front of the jury because he wanted  
 (9) to make an objection to it and when I sent the list of  
 (10) exhibits we were moving into evidence over before Professor  
 (11) Dekin left town I did so with a note saying if there s a  
 (12) problem with the admissibility of this that could be cured by  
 (13) the witness testimony let me know because I m about to  
 (14) release him he s about to go home  
 (15) I don t think these are the kind of summaries for which you  
 (16) would have to supply backup But had somebody asked me to  
 do  
 (17) that I would have been happy to do it We could have you  
 (18) know supplied all of the field notes with respect to all of  
 (19) these 44 sites and they would in fact corroborate Professor  
 (20) Dekin s view that there is no confirmed evidence of human  
 (21) activity with respect to Badger Cove Island and the rest down  
 (22) the line It s a little bit unfair to me now that the witness  
 (23) is off the stand out of town this request is being made after  
 (24) the exhibit s been introduced to say you didn t supply  
 (25) something in discovery that would have permitted us to do

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(1) cross-examination  
 (2) I think that objection is untimely Had they wanted the  
 (3) backup they should have asked for it when they got the  
 (4) exhibit We would have furnished it to them  
 (5) Beyond that this is not the kind of summary of information  
 (6) I think that requires it in any event but I m a little bit at  
 (7) a loss because now I have a problem on my hands if Mr  
 (8) Petumenos is correct that I can t remedy and it was not one of  
 (9) my making it was one of theirs for not bringing this up and  
 (10) requesting the information at an earlier juncture  
 (11) MR PETUMENOS I m afraid Judge we have a problem  
 (12) here because the - Mr Fortier did contact Exxon about this  
 (13) received the same information that I received from Mr Diamond  
 (14) today which is that there were no documents to back up this  
 (15) that s not how this chart was prepared so there were no  
 (16) documents to request be present in court and if you read the  
 (17) chart it confirms it It doesn t purport to summarize any  
 (18) particular note You can tell that by reading the chart, and  
 (19) so there - this never was a 1006 chart for us to make timely  
 (20) objection to  
 (21) That s not what the document is Never has been  
 (22) THE COURT So your argument that it shouldn t be  
 (23) admitted because it s not a proper 1006 chart is not a good  
 (24) argument is it?  
 (25) MR PETUMENOS No it is because the only way a

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(1) chart like this is admissible the only way you can put - if  
 (2) you take a look at 1006 and maybe you know I suggest to the  
 (3) Court we take some time to do that  
 (4) THE COURT Counsel here s what I think this chart  
 (5) is - maybe this will shorten your argument He could have  
 (6) said This is what I did I looked at the situation and I -  
 (7) and I investigated all the records as they re related to Badger  
 (8) Cove Island  
 (9) Now the damages in this case claimed by Plaintiffs for  
 (10) Badger Cove Island are \$1 347 554 53 Now that - those  
 (11) damages are claimed complained complained of because  
 (12) there s - of the site description which is possible housepits  
 (13) and my evaluation of this is there s no confirmed evidence of  
 (14) human activity reflected in the archaeological record Okay  
 (15) how long did it take me to say that?  
 (16) And then if you - there are pages and pages of this of  
 (17) course four full pages and he would have had to - in order to  
 (18) get all this information in the record he would have had to do  
 (19) exactly what I did Badger Cove Island for Yalik Bay Windy Bay  
 (20) main beach Yalik Point Grungy Cove Northwestern Lagoon  
 (21) Windy Bay Yalik Bay and everything else on these four pages  
 (22) MR PETUMENOS I understand your point  
 (23) THE COURT That would have taken a tremendous amount  
 (24) of time What he did is referred to this exhibit and said  
 (25) This is my opinion



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(1) MR PETUMENOS I understand your point I have a  
 (2) response if I can make it  
 (3) The other exhibit that the Defendants have put in to which  
 (4) I didn't object which lists the sites with the Type I and Type  
 (5) II categories which they moved into evidence and which has  
 been  
 (6) admitted puts before the jury and it's just like Mr  
 (7) Dorchester's summary exhibit saying this is what I think the  
 (8) damages should be and so forth which is properly admitted  
 (9) It is this one here  
 (10) THE COURT Let me see it  
 (11) MR PETUMENOS 1006 is designed to provide protection  
 (12) against a witness doing this sort of thing where they put into  
 (13) real evidence argumentative or summary exhibits of testimony  
 (14) which may or may not be supported by the underlying  
 documents  
 (15) which the witness has relied upon That's the reason for  
 (16) 1006 So when you make a valid objection that a document is  
 (17) not properly within the confines and the requirements of 1006  
 (18) it's simply no longer admissible because 1006 tells you how  
 you  
 (19) have to construct a chart like this and you properly held us  
 (20) to those requirements in connection with Dr Johnson's work  
 (21) And so if I make a valid objection to a document because it  
 (22) doesn't meet the requirements of the rule as summarizing  
 (23) voluminous documents which is what the rule precisely goes  
 to  
 (24) issues that can't be testified to succinctly because there's  
 (25) too much material to do it then there are these protections

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(1) don't know the other rules upon which this can properly be  
 (2) based  
 (3) THE COURT Thank you This is a difficult problem I  
 (4) mean because this is - this is one of those exhibits that  
 (5) might be very persuasive and the question is whether or not  
 (6) there's something in it that's inherently unfair I think  
 (7) inherently unfair to the Plaintiffs because they aren't allowed  
 (8) to cross-examine it They had all the records available and  
 (9) they had this particular chart they knew what the theory was  
 (10) and they could have cross-examined on it To rely on rule 1006  
 (11) as a method for keeping this out of evidence I think is  
 (12) inappropriate and therefore that - that objection is  
 (13) overruled  
 (14) To the extent that there are other objections aside from  
 (15) the fact that there's no other rule counsel knows about that  
 (16) would allow the admission doesn't allow me to rule on  
 (17) anything To me this is the witness opinion It's - it's  
 (18) in graphic form and it wasn't verbatim repeated in the record  
 (19) but the way the foundational testimony came up makes it very  
 (20) clear what the witness opinion was and there was an adequate  
 (21) opportunity to cross-examine So in spite of the fact this may  
 (22) be analogized to other exhibits in this case that I've kept  
 (23) out it seems to me to encourage efficient presentation of  
 (24) testimony and because there's no rule that I know of that  
 (25) keeps this particular document out except possibly Rule 403

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(1) that the - that the - that the other party is afforded  
 (2) We did make the request We were told that it wasn't that  
 (3) kind of document and now if it's not a 1006 chart it doesn't  
 (4) come in  
 (5) The summary to remind the jury of where things are are  
 (6) something we haven't objected to but all this editorializing  
 (7) of what the documents say is nothing more than this witness  
 (8) recitation of his opinion not supported by the confines and  
 (9) the requirements of 1006 which is in the section on what is  
 (10) admissible as documentary evidence  
 (11) THE COURT Well that's not exactly true counsel  
 (12) The 1006 says the context of voluminous writings that's not  
 (13) what this is recordings that's not what this is or  
 (14) photographs that's not what this is which cannot be  
 (15) conveniently examined in court may be presented in the form of  
 (16) a chart summary or calculation It's not a 1006 problem  
 (17) MR PETUMENOS But there is no other rule under the  
 (18) 1000 series  
 (19) THE COURT The issue is whether or not I allow this  
 (20) form of testimony as opposed to making him say it all in court  
 (21) one after the other It's not a 1006 problem as I see it  
 (22) MR PETUMENOS Then there would have to be some other  
 (23) rule within documentary evidence code the 1000 series upon  
 (24) which the Defendants can rest their - their theory of  
 (25) admissibility The only one I know is 1006 is the point and I

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(1) I'm - the objection is overruled and the exhibits will be  
 (2) admitted  
 (3) 14055C is that all the only number that's attached to  
 (4) this?  
 (5) MR DIAMOND I think we have to give the point  
 (6) numbers which are one through five one through five  
 (7) THE COURT All right, one through five are admitted  
 (8) (Exhibit 14055C 1 2 3 4 5 received)  
 (9) MR PETUMENOS Judge on this exhibit then I have a  
 (10) related offer Now you have determined to admit them I move  
 (11) into evidence 14055 and 14055A which are the previous  
 iteration  
 (12) of the same document with the differences and B as well  
 (13) (Exhibits 14055 14055A 14055B offered)  
 (14) MR DIAMOND Your Honor I'm not prepared to respond  
 (15) to it I thought we were doing Dr Dekin's cross exhibits on  
 (16) another day  
 (17) THE COURT That's what those are don't they relate  
 (18) to that?  
 (19) MR DIAMOND They do and Mr Petumenos represented  
 (20) to me we were not dealing with those today  
 (21) THE COURT That's fine He's moved them in the  
 (22) motion's pending We're going to have to discuss it on  
 (23) sometime -  
 (24) MR DIAMOND Tuesday?  
 (25) THE COURT - Tuesday

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- (1) MR DIAMOND Finally I was sent to move into
- (2) evidence a portion of DX15288AA which is the trustee s coastal
- (3) habit study number 1 A volume one And it s just a page from
- (4) that page 19 which is the page of - what do you call these
- (5) paired sites? And a photograph photograph that was used
- today
- (6) in Dr Peterson s cross-examination
- (7) (Exhibit DX15288AA offered)
- (8) MR PETUMENOS There s no foundation for the
- (9) photograph
- (10) MR DIAMOND Your Honor there is no foundation for
- (11) the photograph I concede that What I am suggesting is this
- (12) is the study this is the -
- (13) MR PETUMENOS That s not satisfactory I mean -
- (14) MR DIAMOND We ll call the witness in surrebuttal
- (15) MR PETUMENOS I d be willing to work with counsel on
- (16) his offer of proof on surrebuttal but the issue is whether -
- (17) how this photograph was used and so forth This is the
- (18) photograph
- (19) THE COURT I remember the testimony counsel
- (20) MR DIAMOND We ll discuss it
- (21) MR PETUMENOS Was that the only offer you made? Was
- (22) that the only exhibit you just discussed?
- (23) MR DIAMOND On Peterson I m done
- (24) MR PETUMENOS You re done
- (25) MR PETUMENOS Now what do I have?

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- (1) THE COURT Mr Oppenheimer is waiting with bated
- (2) breath
- (3) MR OPPENHEIMER Well I m waiting I m not sure I
- (4) have any bated breath left
- (5) Your Honor maybe while Tim is looking at those notes we
- (6) have - this has now taken on I suppose historical
- (7) dimensions This goes back to Pat Carlson I believe we have
- (8) no objection on these
- (9) There are three documents as to which Mr Field asked for
- (10) an opportunity to speak with Mr Stoll I think it s just
- (11) that - I do not believe there will be an objection but there
- (12) may be crossed lines So he s agreeable to the process
- whereby
- (13) they re admitted If they have a motion it would be pending
- (14) There are a number as to which there is no objection and I
- (15) thought I d take this opportunity to read those in now
- (16) THE COURT As to which there are no objections?
- (17) MR OPPENHEIMER No objections
- (18) THE COURT We ve got somebody here from the other
- (19) side that can relay this information right?
- (20) MR OPPENHEIMER Yes these are the ones Allen as
- (21) to which there are no - these are DX15223 DX15245 DX15249
- (22) DX15250 DX15253
- (23) (Exhibits DX15223 DX15245 DX15249 DX15250 DX15253
- (24) offered)
- (25) MR OPPENHEIMER Then Your Honor I guess I d request

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- (1) some guidance here
- (2) We have a copy of Mr Carlson s appraisal which is PX906
- (3) and you may recall we wanted to introduce some pages Mr
- (4) Stoll wanted to introduce some other pages I have the
- (5) agreed upon combination
- (6) THE COURT Good
- (7) MR OPPENHEIMER There re a fair number of pages
- (8) I m just wondering we could make a copy we could make a list
- (9) literally of the numbers of the pages of 906 because not every
- (10) page although a fair number of it not every page of 906 is
- (11) going in
- (12) THE COURT Why do you want these things why do you
- (13) want to make a copy?
- (14) MR OPPENHEIMER Just because I think it would take
- (15) too long literally to read each of the pages into the record
- (16) There are probably 40 pages That s what we could do
- perhaps
- (17) we ll just renumber it as 906A and a joint submission That s
- (18) what we ll do
- (19) THE COURT Yes thank you
- (20) MR OPPENHEIMER The exhibits which we re getting
- (21) confirmation and they ll be admitted subject to a pending
- (22) motion are the following blowups DX13200A 15490 and
- 15491
- (23) (Exhibits DX13200A 15490 and 15491 offered)
- (24) THE COURT Subject to what pending motion?
- (25) MR OPPENHEIMER Well Your Honor I believe they re

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- (1) being admitted as we have in the past There is no objection
- (2) now and I believe Your Honor s practice has been to say in
- (3) those cases where somebody wanted to in effect double-check
- if
- (4) they had a -
- (5) THE COURT You mean - by subject to a pending
- (6) motion you mean when we move one in?
- (7) MR OPPENHEIMER If they bring one and we re moving
- (8) these last three in now
- (9) THE COURT Good
- (10) MR PETUMENOS I have two motions to -
- (11) THE COURT Let me get that right The last three
- (12) you re simply moving in right?
- (13) MR OPPENHEIMER As I understand it you have no
- (14) objection now to their admission
- (15) MR FIELD Well throughout the course s position on
- (16) certain exhibits move them in admit them subject to letting
- (17) you know if there s a problem
- (18) THE COURT Exactly Once I let them in it s your
- (19) obligation to come tell me why they should come out right so
- (20) those last three are admitted
- (21) MR OPPENHEIMER And the documents I read prior to
- (22) that are also admitted
- (23) THE COURT All of them?
- (24) MR OPPENHEIMER Yes The ones I read prior to the
- (25) last three are without objection

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- (1) THE COURT Yes they re all admitted  
 (2) (Exhibrbs DX13200A 15490 and 15491 DX15223 DX15245  
 (3) DX15249 DX15250 DX15253 received)  
 (4) MR PETUMENOS I move into evidence 8521 and 8522  
 (5) which are the drawings with Mr Peterson that he made this  
 (6) morning on direct  
 (7) (Exhibrbs 8521 8522 offered)  
 (8) THE COURT The drawings of Mr Peterson?  
 (9) MR PETUMENOS They re right here Judge  
 (10) THE COURT You don t want to make a mistake on this  
 (11) do you Mr Diamond?  
 (12) MR DIAMOND No there s serious consequences  
 (13) THE COURT They re lovely Let the record reflect -  
 (14) MR DIAMOND I have no objection except there s  
 (15) something on the back of them I believe  
 (16) MR PETUMENOS Mr Peterson picked up one of the maps  
 (17) and proceeded  
 (18) THE COURT That s right he flipped something around so -  
 (19) MR PETUMENOS So that exhibit has two numbers and  
 (20) it s got a sticker on the front and a sticker on the back  
 (21) Because they are two separate exhibits He was moving too  
 (22) fast  
 (23) THE COURT Is there going to be no objection to  
 (24) these? I think they re going to come in  
 (25) MR DIAMOND I think you ought to admit them subject

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- (1) to somebody else coming in  
 (2) THE COURT All right It s a deal  
 (3) (Exhibrbs 8521 8522 received)  
 (4) MR PETUMENOS Judge it s worse than that It s  
 (5) 8518 and 8519 we move in  
 (6) (Exhibrbs 8518 8519 offered)  
 (7) THE COURT 8518 and 8519 are admitted subject to the  
 (8) Defendants application to take them out  
 (9) (Exhibit 8518 and 8519 received)  
 (10) MR PETUMENOS Thanks for coming Mr Diamond I  
 (11) appreciate it I have some further exhibits to move in but  
 (12) not today because of counsel s not here  
 (13) THE COURT Is that it?  
 (14) MR OPPENHEIMER Well Your Honor subject to how you  
 (15) want to deal with the Tuesday lineup Your question is -  
 (16) THE COURT I d like to deal with it now  
 (17) MR OPPENHEIMER Okay As I understand it we have  
 (18) eight witnesses up for Tuesday  
 (19) THE COURT That doesn t compute for me  
 (20) MR OPPENHEIMER Pardon me?  
 (21) THE COURT I said that doesn t compute for me  
 (22) MR OPPENHEIMER I don t see how it can be done I  
 (23) think maybe the way to do this I believe that we could go in  
 (24) order of the - of the most likely I believe Maury Seldin is  
 (25) scheduled as a high priority on Tuesday and Mr -

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- (1) MR PETUMENOS Probably yes  
 (2) MR OPPENHEIMER And Mr Seldin we have briefed this  
 (3) as part of that appendix we put together Mr Seldin is - or  
 (4) I guess it s Dr Seldin is a Ph D from Florida who was  
 (5) commissioned to write this piece analyzing the Mundy pap  
 and  
 (6) the Roddewig paper and to express his view on the sort of  
 (7) academic debate that s going on with respect to natural lands  
 (8) He was listed on the original witness list He was in fact  
 (9) listed as a rebuttal witness  
 (10) The gist of our position is two-fold One even as to the  
 (11) narrow subject of his report - and we actually attach a table  
 (12) of contents - it s very specific it has headings for  
 (13) example the Mundy article the Roddewig article the  
 (14) comparison of the two - that it s not proper rebuttal because  
 (15) it s - it s obvious on the face of his entire assignment that  
 (16) it was anticipated that this would be a debate between the  
 (17) appraisers and that he would be casting a vote on the issue  
 (18) and I think if it had come up in direct it would have been  
 (19) cumulative We would have argued that We re arguing that  
 (20) now  
 (21) In fact this is not proper rebuttal It opens up the door  
 (22) a little bit beyond where I think this whole dispute needs to  
 (23) be anyway  
 (24) The natural lands debate I think has a small place in  
 (25) this case not a big place even though the appraisers I

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- (1) frankly think have drawn all of us into discussing in more  
 (2) detail than anybody needs to this whole issue because it  
 (3) really shouldn t be taking up as much time as I m afraid it  
 (4) will if we have yet another expert in here talking about it  
 (5) And all fairness if Professor or Dr Seldin comes in to  
 (6) express what might appear to be an authoritative viewpoint or  
 (7) disposition on this debate between the appraisers then I think  
 (8) in all fairness we need to get the Appraisal Institute s view  
 (9) which is not Dr Seldin s and we re going down a road that I  
 (10) think is probably of the utmost interest to the appraisal  
 (11) profession but I question whether we should all be doing it  
 (12) And if we were going to do it I think it ought to have been  
 (13) done in the direct case and we would have raised the issue of  
 (14) cumulativeness at that time  
 (15) The report is so clearly designed to deal with the Roddewig  
 (16) Claron attack on Mundy that it s just - I cannot imagine why  
 (17) it could be considered unanticipated testimony or responsive to  
 (18) new material It was - it was commissioned to deal with  
 (19) exactly what it s going to deal with  
 (20) That s the first problem The second problem is that there  
 (21) were a lot of exhibits I believe still - I know there s a  
 (22) revised exhibit list but still associated with Dr Seldin that  
 (23) go way beyond his report and his theories on natural land  
 (24) There s some oiling maps and I mean the list goes on and on  
 (25) But I - I believe that his testimony is intended to be

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- (1) limited to this natural lands issue to the extent it isn't  
 (2) it's well beyond anything in the scope of the report  
 (3) THE COURT Thank you  
 (4) MR PETUMENOS Judge I can't imagine anything more  
 (5) unfair than to exclude Maury Seldin's testimony The test for  
 (6) rebuttal is not whether we didn't anticipate in fact Exxon  
 (7) has made the exact opposite argument here which is that if  
 (8) you could have anticipated the rebuttal and you should have  
 (9) put  
 (10) it on the witness list to anticipate the rebuttal then you  
 (11) can't call them  
 (12) What we did I think is act in utmost good faith What  
 (13) happened was we submitted our expert reports on time Dr  
 (14) Mundy  
 (15) put forth the natural land theory They filed a report that  
 (16) said Dr Mundy's natural land theory is all wet you can't use  
 (17) it it's improper We then in the fall on time and at great  
 (18) expense and difficulty to get it done on time filed a timely  
 (19) report and indicated that it would be rebutted  
 (20) The test for rebuttal is not whether you can anticipate it  
 (21) or not in your case in chief  
 (22) THE COURT You told them that this rebuttal witness  
 (23) would go on prior to trial as a rebuttal witness?  
 (24) MR PETUMENOS As a rebuttal witness And they  
 (25) actually filed a motion in limine on Dr Seldin before you  
 (26) before trial and when we responded in our brief we said First  
 (27) their first complaint was well he's just going to come in and

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- (1) take sides on an expert issue We said That's perfectly  
 (2) permissible for rebuttal witnesses to do and we intend to call  
 (3) him in rebuttal because we anticipate they would raise it in  
 (4) the defense and you denied the motion in limine And in our  
 (5) briefs we were very specific we were going to call this person  
 (6) in rebuttal  
 (7) There is no surprise with respect to Maury Seldin and I  
 (8) take substantial issue with counsel over the materiality of the  
 (9) issue  
 (10) THE COURT How long is he going to testify for?  
 (11) MR PETUMENOS I can get his testimony on and off in  
 (12) less than an hour  
 (13) THE COURT Less than an hour What was he estimated  
 (14) for?  
 (15) MR OPPENHEIMER He's estimated at 65 - or  
 (16) something? Hang on  
 (17) THE COURT Is he the 65 one?  
 (18) MR OPPENHEIMER No Pat Carlson is the 65 one But  
 (19) there may be two 65 ones 65 is my recollection  
 (20) MR PETUMENOS In any event It is a focused issue  
 (21) THE COURT What's he going to say?  
 (22) MR PETUMENOS Pardon?  
 (23) THE COURT What's he going to say?  
 (24) MR PETUMENOS He is going to say that the natural  
 (25) lands theory is a perfectly viable theory It is increasingly

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- (1) becoming the case that land for conservation is the subject of  
 (2) the highest and best use it's proper to use it as a highest  
 (3) and best use that he has looked into the issue and determined  
 (4) it from a theoretical as well as an actual standpoint and that  
 (5) the import of this controversy Judge is not just some  
 (6) theoretical arcane point because if the natural - as Mr  
 (7) Dorchester conceded if natural - if highest and best use has  
 (8) an impact on parcel definition and if the highest and best use  
 (9) is properly determined to be natural land in this case then  
 (10) our position that entire islands should be considered as part  
 (11) of the land when an island is impacted is very well taken And  
 (12) if Mr Dorchester's right that you have to have a  
 (13) developmental purpose for the land and you have - it has to be  
 (14) able to be built on maybe our position is not well taken  
 (15) We knew this was going to be a very significant issue on  
 (16) this which is why we commissioned Dr Seldin spent \$45,000  
 (17) on  
 (18) him or something like that and set out front and very candidly  
 (19) and gave full disclosure this was going to be part of our  
 (20) rebuttal case And so I think this is a situation where we are  
 (21) on solid ground here having given full disclosure submitted  
 (22) him to deposition provided a report said it was rebuttal  
 (23) said it was rebuttal from the beginning But we're not  
 (24) obligated to grab on to straw men in our case in chief and  
 (25) knock them down before we're allowed to call the testimony  
 (26) We put on our theory it's natural land they put on theirs

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- (1) no it's not and we get to rebut it  
 (2) THE COURT Thank you counsel  
 (3) MR OPPENHEIMER Your Honor a couple points  
 (4) THE COURT First I'd like you to review for me the  
 (5) history of that motion in limine I remember it very vaguely  
 (6) MR OPPENHEIMER Yes there was a motion in limine  
 (7) which we address in our papers again That was a motion  
 (8) which  
 (9) was denied obviously before the evidence had come in and the  
 (10) argument that was made in connection with that was that it was  
 (11) clear that he was - has been clear from the beginning he's  
 (12) been designated as a rebuttal witness  
 (13) That motion did not focus on that aspect at all What it  
 (14) focused on I think in retrospect understanding the Court's  
 (15) procedure with respect to deferring understandably seeing  
 (16) how  
 (17) the evidence comes in before ruling on broad motions like this  
 (18) the omnibus motion and a host of others was part of motions  
 (19) brought on early on the great majority of which were denied  
 (20) and I think in retrospect was pragmatic until the evidence  
 (21) comes in  
 (22) And one of the - you know one of the problems with Dr  
 (23) Seldin is I suppose it's conceivable that he could have  
 (24) testified to something in rebuttal if the witnesses had  
 (25) testified wildly differently from their reports or if the  
 (26) natural lands debate had taken a weird and bizarre turn none  
 (27) of which happened

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- (1) There is nothing which Mr. Petumenos has alluded to which  
 (2) wasn't disclosed in all the reports and depositions of - of  
 (3) our experts. What's really being advocated here is that the  
 (4) Plaintiffs simply get to put up the last natural lands  
 (5) proponent. Dr. Seldin does not disagree with Dr. Mundy or Dr.  
 (6) Green, particularly. He doesn't add to anything they say. He  
 (7) doesn't detract. I suppose from anything they say. He's  
 (8) cumulative. He's another voice. He is, I think -  
 (9) THE COURT: Well, the issue is, is the natural lands  
 (10) theory a viable theory in terms of appraising remote, pristine  
 (11) land, right?  
 (12) MR. OPPENHEIMER: That is certainly an issue in this  
 (13) case, absolutely.  
 (14) THE COURT: Aren't they allowed three experts on any  
 (15) one issue?  
 (16) MR. OPPENHEIMER: But not in rebuttal, Your Honor.  
 (17) Why should - let me ask this -  
 (18) If they are in fact allowed this other expert in rebuttal  
 (19) whose only difference from the prior -  
 (20) THE COURT: Counsel, don't you think it would have  
 (21) been fair if that was going to be your position, that you took  
 (22) it up front so they could know whether or not to present him in  
 (23) their case in chief?  
 (24) MR. OPPENHEIMER: We have always objected to their  
 (25) testimony. They were the ones that elected not to put him on

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- (1) in their case in chief. We have always -  
 (2) THE COURT: You always objected to his testimony?  
 (3) MR. OPPENHEIMER: Correct.  
 (4) THE COURT: I denied a motion in limine striking his  
 (5) testimony.  
 (6) MR. OPPENHEIMER: That's correct.  
 (7) THE COURT: I was never faced with the argument that  
 (8) hey wait a minute now, they're saying it's rebuttal, they  
 (9) should put it on in the case in chief so that I could have said  
 (10) yes, put it on in your case in chief. They're allowed three  
 (11) witnesses, expert witnesses on any one issue and they've had  
 (12) one, right? One?  
 (13) MR. OPPENHEIMER: Depends how we define this, Your  
 (14) Honor. If -  
 (15) THE COURT: I suppose that's true. We don't get the  
 (16) three -  
 (17) MR. OPPENHEIMER: If we're talking about natural or  
 (18) preservation lands, we have at least two, we may - we  
 (19) certainly have at least two.  
 (20) THE COURT: So that's one short of the number they're  
 (21) allowed.  
 (22) MR. OPPENHEIMER: We have three, Green, Shorett and  
 (23) Mundy.  
 (24) THE COURT: But you'll recall you have Roddewig,  
 (25) MacSwain, Dorchester, Haerer and Papke on one issue, right?

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- (1) You did.  
 (2) MR. OPPENHEIMER: I - I am aware that the Court  
 (3) defined the issue as stigma in that case.  
 (4) THE COURT: Under all of those circumstances, if you  
 (5) had said, "This is a witness that should go on in the case in  
 (6) chief, you might have gotten a ruling that he should go on in  
 (7) the case in chief. But you didn't say that, right?"  
 (8) MR. OPPENHEIMER: Your Honor, I think that's fair. I  
 (9) think the motion - I'm trying to think to the motion. I  
 (10) believe the motion did not make that specific argument. I  
 (11) think that's correct, but the position of the parties has  
 (12) always been, and an in limine motion as Your Honor has made  
 (13) clear before the evidence is not - is not law of the case in  
 (14) the sense that it is dispositive to reviewing the issue as the  
 (15) evidence comes out.  
 (16) THE COURT: I didn't say that, counsel. I'm only  
 (17) saying try to explore the various subdivisions of your  
 (18) argument.  
 (19) MR. OPPENHEIMER: Right. And Your Honor, I can't  
 (20) stand here and tell you - I can't disagree with your  
 (21) characterization of that aspect of the motion. What I would  
 (22) say, though, is that if - if - if we were in the direct case  
 (23) now, I would be making the same point, though, with respect to  
 (24) cumulativeness because even though you have three experts in  
 (25) an area -

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- (1) THE COURT: I got you.  
 (2) MR. OPPENHEIMER: You know, this is just flatly  
 (3) cumulative.  
 (4) The other - I think the other issue that this does raise  
 (5) implicates our surrebuttal, which is that I think Dr. Seldin is  
 (6) very clearly going to be used to cast an imprimatur of  
 (7) legitimacy on this theory and I will tell Your Honor that there  
 (8) is evidence with respect to the rules and regulations of the  
 (9) Appraisal Institute and the manner in which this issue is being  
 (10) handled by the professional body, which in all fairness, if we  
 (11) were really going to look at how the profession looks at this  
 (12) and beyond the opinions of those we had in the courtroom  
 (13) ought  
 (14) to be - ought to be brought to bear on the subject. I think  
 (15) it's appropriate then for us to be able to describe to the jury  
 (16) what the Appraisal Institute, which is in effect the regulatory  
 (17) body, is doing with this issue right now.  
 (18) And is it not the case, is it flatly misleading to convey  
 (19) to the jury that this is an uncontroversial issue as to  
 (20) which - or worse yet, that this is an issue that's been  
 (21) resolved in favor of the Mundy position. We have elected  
 (22) because of its relative importance in the case to - to rest  
 (23) our case on - on the testimony of these experts. The jury can  
 (24) assess the experts. They will have heard all of the  
 (25) theoretical arguments. Dr. Seldin's arguments don't add to  
 (25) what Mr. Mundy has said, and not to proliferate the experts.

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- (1) into a position where we have sort of a debate on a
- (2) professional issue
- (3) And the other issue I would add Your Honor is that we do
- (4) have the - if we do go beyond this to permit some of this
- (5) testimony we do have - I have a very significant problem with
- (6) Mr Petumenos point that I believe he said that he - that Dr
- (7) Seldin has actually - has made an actual inquiry into the
- (8) existence of the natural lands market That s not in fact what
- (9) his report does His report is a theoretical analysis of the
- (10) natural lands concept
- (11) THE COURT I m finding it hard to believe that 65
- (12) hours is - 65 hours you can get it in I mean none of you
- (13) have ever been able to get anything in in 65 hours You
- (14) probably have to apply a multiplier of ten to that -
- (15) MR OPPENHEIMER I m worried about that
- (16) THE COURT - to get closer to the amount of time
- (17) that would be necessary so -
- (18) MR OPPENHEIMER I m worried about that too
- (19) THE COURT So fine One - I m going to make the
- (20) ruling - okay?
- (21) One I won t strike the witness Two you made an
- (22) estimate you ve got to live with it Three the testimony at
- (23) this time has to be within the limits of the report Four
- (24) yes it s entirely possible I ll allow surrebuttal testimony
- (25) I mean probably - maybe probable more than entirely possible

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- (1) MR PETUMENOS Judge could we - my only inquiry to
- (2) you is that I would really appreciate it if you would reserve
- (3) on the surrebuttal because I know something about what
- (4) Mr Oppenheimer is saying
- (5) THE COURT I have reserved on the surrebuttal but
- (6) I m telling you now so that you understand the risks that are
- (7) involved here is the way this issue has developed my feeling
- (8) is that I have to be fair to both sides and that means I put
- (9) strict limits on your rebuttal testimony which I ve just
- (10) done
- (11) MR PETUMENOS Okay
- (12) THE COURT And that I leave open the possibility that
- (13) there will be more testimony in surrebuttal regarding this
- (14) particular issue
- (15) MR PETUMENOS That s fine because there s much to
- (16) say about the offer of proof - I m not going to take the time
- (17) now obviously but I have a very strong position on the
- (18) surrebuttal that mirrors some of the positions that Exxon is
- (19) taking on some of our other witnesses regarding - I ll stop
- (20) but I have an argument to make on that that-
- (21) THE COURT I m not precluding those arguments
- (22) counsel but be warned one of the reasons why you should
- (23) make
- (23) this - you should present this testimony efficiently is
- (24) because the more it goes afield and starts delving into all the
- (25) issues in this case the more likely you are to find yourself

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- (1) with a substantial surrebuttal case
- (2) MR PETUMENOS What s next?
- (3) MR OPPENHEIMER Your Honor maybe the next witness
- (4) to go to now is -
- (5) THE COURT Counsel I m afraid I have obligations
- (6) Is there anything that really absolutely has to be dealt with?
- (7) MR OPPENHEIMER Your Honor we have - we have -
- (8) still have for example Gail Evanoff and Pat Norman on the
- (9) list for Tuesday
- (10) THE COURT I think I can probably deal with them in
- (11) the morning okay
- (12) MR PETUMENOS Judge I m having a concern because
- (13) they are objecting to every single witness on rebuttal
- (14) THE COURT Yes they are
- (15) MR OPPENHEIMER That s true We said we are
- (16) MR PETUMENOS I just think it s getting a little out
- (17) of control Because you know we re entitled to put on a
- (18) rebuttal case and no -
- (19) MR OPPENHEIMER You re entitled to put on a proper
- (20) rebuttal case
- (21) MR PETUMENOS No one has put on a witness by-witness
- (22) case
- (23) THE COURT Exxon s attack of the rebuttal has not
- (24) been in line with what s my interpretation of the rebuttal but
- (25) they re entitled to -

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- (1) MR OPPENHEIMER We have done -
- (2) THE COURT We re going to be here at 8 00 on
- (3) Tuesday
- (4) MR FORTIER Your Honor just one small problem
- (5) That s one of the witnesses they want to talk to you about
- (6) Gail Evanoff Chenega Gail wants to go on vacation she may
- (7) be gone she would like to leave I think tomorrow I ve asked
- (8) her to stay till Tuesday for a very short little response It
- (9) would be short
- (10) THE COURT What s she going to say?
- (11) MR FORTIER My co-counsel have told me I was way too
- (12) long on here
- (13) THE COURT What will she say?
- (14) MR FORTIER She wants to responds to the admiral s
- (15) suggestion that Chenega was unreasonable
- (16) THE COURT Suggestion Chenega was unreasonable
- (17) She s going the say Chenega wasn t unreasonable that s what
- (18) she s going to say?
- (19) MR FORTIER She wants to explain the circumstances
- (20) THE COURT If that s what she wants to respond to
- (21) you might have drawn the implication that Chenega was
- (22) unreasonable in the first part of the testimony as the
- (23) testimony developed It struck me that what he was saying was
- (24) they were standing on their rights and he could understand how
- (25) they would stand on their rights but there was just a time

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- (1) when a cost benefit analysis had to be applied to the cleanup
- (2) and that s why he cut it off So she may feel a personal
- (3) imperative to respond to what she thinks is a criticism of her
- (4) but I don t think that necessarily should guide me in
- (5) determining who should testify
- (6) MR FORTIER In determining whether she should
- (7) testify?
- (8) THE COURT Yeah I mean to me -
- (9) MR FORTIER You want to reserve -
- (10) THE COURT It s one of those argumentative points
- (11) that does not needs a whole lot of illustration
- (12) MR OPPENHEIMER She was also on the list before the
- (13) admirals testified the rebuttal list
- (14) THE COURT Before what?
- (15) MR OPPENHEIMER She was on the rebuttal list before
- (16) the admirals testified
- (17) MR PETUMENDS We knew what the admirals were going
- (18) to say
- (19) MR DIAMOND Our principal objection to Gail Evanoff
- (20) I personally prepared the cross-examination on five weeks ago
- (21) when she was scheduled to testify -
- (22) THE COURT All she s going to say is The admiral
- (23) criticized me and I don t think that s right because I was
- (24) reasonable or my corporation was reasonable
- (25) Why - why in God - excuse me Why should I let

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- (1) witnesses her or 15 of them come in here and say I don t
- (2) like this criticism when in fact if you look at the whole
- (3) testimony it simply doesn t lead to the conclusion that she
- (4) thinks it does
- (5) So the answer is no she can t testify She can go on
- (6) vacation though
- (7) MR FORTIER All right Easy way to do it Judge
- (8) MR PETUMENOS Do we get some of our time when we
- (9) lose a witness like this for the other witnesses?
- (10) THE COURT 1 hour?
- (11) MR PETUMENOS 3 we got 20 minutes I got on this
- (12) clerk
- (13) THE COURT Thank you very much
- (14) THE CLERK Please rise This court stands in
- (15) recess
- (16) (Recess at 5 03 p m )

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- (1) EXHIBITS
- (2) 13174A 10461A offered 3
- (3) DX2282A DX2293 DX5142 DX5156 DX5170 DX8066A DX8069
- (4) DX8072 DX8073 DX8075 DX8077 DX8425 DX14025 DX10645
- (5) DX12987A DX13151A DX13152A DX13161A DX13156A and
- (6) DX14014A offered 30
- (7) DX14018A offered 31
- (8) DX2293 DX3938 DX3958 DX5127 DX6339 DX6340 DX6343
- (9) DX6349 DX6351 DX6352 DX6366 DX6367 DX6371 DX6376
- (10) DX6377 DX6378 DX8285 DX8319A DX8368A DX8369A
- (11) DX14059 2 and DX14059 3 offered 31
- (12) 8302 offered 32
- (13) 9064 9066 9067 offered 33
- (14) DX15552 28 DX15552 26 and DX15552 24 offered 33
- (15) DX10030B DX10041A offered 37
- (16) 14034A 34 14034A.29 14034A 40 14034A 9 14034A 10
- (17) 12084A 4 14034A 1 16242 DX14034A and DX14055C 4 offered 38
- (18) 14034A 15 DX14034A 33 DX14034 25 26 28 and
- (19) DX14034 11 offered 39
- (20) DX14054B offered 39
- (21) DX14055 C 1 2 3 4 5 offered 39
- (22) 14055 14055A 14055B offered 52
- (23) DX15288AA offered 53
- (24) DX15223 DX15245 DX15249 DX15250 DX15253 offered 54

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- (1) DX15223 DX15245 DX15249 DX15250 DX15253 DX13200A 15490
- (2) and 15491 offered 55
- (3) 8521 8522 offered 57
- (4) 8518 8519 offered 58
- (5) 13174A 10461A received 3
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- (7) DX8072 DX8073 DX8075 DX8077 DX8425 DX14025 DX10645
- (8) DX12987A DX13151A DX13152A DX13161A DX13156A and
- (9) DX14014A received 31
- (10) DX14018A received 31
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- (12) DX6349 DX6351 DX6352 DX6366 DX6367 DX6371 DX6376
- (13) DX6377 DX6378 DX8285 DX8319A DX8368A DX8369A
- (14) DX14059 2 and DX14059 3 received 32
- (15) 8302 received 33
- (16) 9064 9066 9067 received 33
- (17) DX15552 28 DX15552 26 and DX1552 24 received 33
- (18) DX10030B and DX10041A received 37
- (19) 14034A 15 DX14034A 33 DX14034 25 26 28 and
- (20) DX14034 11 received 39
- (21) DX14054B received 39
- (22) 14055C 1 2 3 4 5 received 52
- (23) DX13200A 15490 and 15491 received 57
- (24) 8521 8522 received 58
- (25) 8518 and 8519 received 58

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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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(2) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
 (3) THIRD JUDICIAL DISTRICT  
 (5) In re ) Case No 3AN 89 2533 Civil  
 ) Anchorage Alaska  
 (6) The EXXON VALDEZ ) Tuesday September 6 1994  
 ) 8 29 a m  
 (7) )  
 (9) VOLUME 51 Pages 8093 through 8294  
 (11) TRANSCRIPT OF PROCEEDINGS (Continued)  
 (12) TRIAL BY JURY  
 (14) BEFORE THE HONORABLE BRIAN C SHORTELL  
 Superior Court Judge  
 (17) APPEARANCES  
 (18) FOR THE PLAINTIFF  
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(1) PROCEEDINGS  
 (2) (Jury out at 8 29 a m )  
 (3) THE CLERK Please rise  
 (4) (Call to Order of the Court)  
 (5) THE COURT Counsel I owe you an apology I forgot  
 (6) all about it  
 (7) MR OPPENHEIMER Well I d love to be able to report  
 (8) to Your Honor that we took advantage of the half hour and  
 (9) stipulated away all of the issues but I assume that the best  
 (10) course of action would be for us to identify what we have  
 (11) THE COURT Yes please  
 (12) MR OPPENHEIMER The witnesses on tap for this  
 (13) morning Your Honor are - let s see there s one two three  
 (14) four five six seven And as to each of them there is a -  
 (15) I think an issue with respect to whether they should be  
 (16) testifying and in one case this is Mr Seldin whom we  
 (17) started to talk about on Friday an issue with respect to the  
 (18) scope of his testimony  
 (19) THE COURT Okay  
 (20) MR OPPENHEIMER And I think at this point probably  
 (21) the - I would take it in anyone s order of preference but we  
 (22) might go immediately to Seldin if you d like  
 (23) THE COURT Who are the first three witnesses?  
 (24) MR OPPENHEIMER Blatchford Christensen and -  
 (25) THE COURT I d like to take them in order

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 (10) Registered Professional Reporter  
 Midnight Sun Court Reporters  
 2550 Denali Street Suite 1505  
 (11) Anchorage Alaska 99503  
 907/258 7100  
 (12)

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(1) MR CLOUGH Luck of the draw Your Honor  
 (2) THE COURT I hope it s good  
 (3) MR CLOUGH Quickly gobbling a minute  
 (4) I think the argument for all three of them is to a certain  
 (5) degree the same in other words they properly have been  
 (6) called as part of the plaintiffs direct case but they don t  
 (7) seem to be anything unique for rebuttal  
 (8) Mr Blatchford is former chairman of the board of Chugach  
 (9) Alaska Corporation A portion of his deposition testimony was  
 (10) read into the record here as part of our case That was the  
 (11) subject of quite a bit of back-and-forth negotiation of over a  
 (12) period of many weeks back and forth between the plaintiffs  
 (13) counsel and our own so there s no question that during the  
 (14) portion they could have put him on during their case They  
 (15) were aware we were looking at using his deposition testimony  
 (16) they chose not to do so He was listed on the original witness  
 (17) list they chose not to call him as part of the original  
 (18) testimony in that case No exhibits have been designated  
 (19) whatsoever  
 (20) Quite frankly I have no idea what he s going to testify  
 (21) about The only thing I do know is whatever issues he s going  
 (22) to talk about are issues the plaintiffs were aware of long  
 (23) before we started our case They chose not to put him on  
 (24) THE COURT Mr Blatchford Tell me about him Who s  
 (25) putting him on?

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- (1) MR PETUMENOS I m putting him on Judge and  
 (2) Mr Blatchford will be testifying to rebut the statements and  
 (3) testimony of Mr Nagel and Mr Propes with respect to the land  
 (4) selection process and Mr Nagel with respect to his position  
 (5) that the oil spill didn t affect any of the lands and  
 (6) Mr Nagel s testimony that he was a low-level manager who  
 (7) wasn t involved in the spill ligation and that his  
 (8) recommendation would – was somehow not taken that there  
 was  
 (9) no damage to the lands  
 (10) Remember Mr Nagel is the person who was –  
 (11) THE COURT Yes I remember  
 (12) MR PETUMENOS And his testimony on direct will take  
 (13) less than 15 minutes probably ten minutes  
 (14) THE COURT Thank you  
 (15) MR CLOUGH The only thing I d add to that Your  
 (16) Honor is Mr Nagel has been on our witness list for quite some  
 (17) time the plaintiffs knew we were going to be calling him on  
 (18) those issues  
 (19) MR DIAMOND May I add something because I put on  
 (20) Nagel and Propes They were called to rebut testimony that the  
 (21) plaintiffs put on in their case in chief that in fact these  
 (22) lands were selected for subsistence purposes that the  
 (23) corporation had the objective of providing resources for its  
 (24) shareholders Had we heard from Mr Blatchford earlier  
 (25) obviously we would have been prepared to deal in our case

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- (1) with rebuttal of what he had to say We were dealing with  
 (2) those witnesses as rebuttal to the plaintiffs case anyway  
 (3) This sounds like an attempt simply to get the last word on  
 (4) the subject depriving us really of an opportunity unless we  
 (5) open up surrebuttal to bring the people back and respond with  
 (6) more evidence of why the plaintiffs chose the lands  
 (7) THE COURT I m going to let him testify  
 (8) Go to the next one  
 (9) MR CLOUGH Mr Christensen –  
 (10) THE COURT What s his name?  
 (11) MR CLOUGH John Christensen  
 (12) Two exhibits have been designated for him one a  
 (13) videotape the day videotape of the plaintiffs on wildlife and  
 (14) one other one on – I believe it s a map Again quite  
 (15) frankly we don t know why he s being called at this stage of  
 (16) the case and why probably best framed if you ask the  
 (17) plaintiffs why he s being called  
 (18) MR PETUMENOS Mr Christensen s testimony will  
 (19) probably take less than 15 minutes on direct He will testify  
 (20) to his review of the wildlife videotape and whether or not it  
 (21) fairly represents the situation in Prince William Sound This  
 (22) was the Exxon videotape with all the animals in it  
 (23) Mr Christensen is the current chairman of the board of  
 (24) Chugach Alaska Corporation but is a person who lived in  
 Chenega  
 (25) Village for years after the spill Fully 95 percent of his

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- (1) meat and fish were obtained through subsistence has been out  
 (2) in the water out in the area  
 (3) He will comment on the – not going to play the wildlife  
 (4) videotape but he s going to comment on the pictures of the  
 (5) wildlife taken there and whether or not they accurately reflect  
 (6) the abundance of the resources He s going directly at the  
 (7) videotape He s also testifying to a map that Mr Nagel  
 (8) prepared in which Mr Nagel placed the designation of the fact  
 (9) that the villages have subsistence economies which is rebuttal  
 (10) to that testimony and he will be on the stand as I say less  
 (11) than 15 minutes  
 (12) THE COURT Thank you  
 (13) MR DIAMOND Your Honor you will recall we had a  
 (14) number of science witnesses scheduled to testify in our case  
 (15) dealing with marine mammals seals otters we had witnesses  
 (16) slated to talk about birds we had witnesses to talk about all  
 (17) the various species We chose not to do it because the  
 (18) plaintiffs case was limited to basically a presentation by  
 (19) Mr Gordaoff and their biological witnesses and we didn t  
 (20) think we needed to do that  
 (21) This again sounds like an attempt to use rebuttal it s  
 (22) an attempt to get the last word on the subject in the  
 (23) circumstances where we purposely did not put on certain  
 (24) evidence because we didn t think it was necessary to rebut the  
 (25) plaintiffs case They want to now bolster their case by

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- (1) coming in and saying in fact the seal population is down and  
 (2) Mr Day misrepresents things bird population is down –  
 (3) basically reopening up issues that we had rebutted in our case  
 (4) and it puts us in the untenable position now of trying to  
 (5) reopen things do we recall science witnesses that we  
 (6) deliberately didn t put on because of their limited  
 (7) presentation  
 (8) I don t think that Mr Petumenos has in mind a proper  
 (9) purpose for rebuttal simply to get the last word  
 (10) THE COURT Well the Nagel proposed testimony is  
 (11) rebuttal  
 (12) MR DIAMOND I didn t quite follow Mr Petumenos he  
 (13) said with respect to subsistence Perhaps he could just repeat  
 (14) that?  
 (15) MR PETUMENOS Sure Mr Nagel had a tendency to  
 (16) de-emphasize the subsistence aspects and not talk about  
 (17) subsistence economy Mr Nagel created a map of the  
 Chugach  
 (18) region when he was with Chugach and he designated the  
 various  
 (19) villages and so forth as having – the primary purpose of  
 (20) having a subsistence economy And that is the map I would  
 (21) wish – the evidence wish to put in on Nagel  
 (22) With respect to the wildlife videotape the wildlife  
 (23) videotape came in for the first time in defense case We re  
 (24) entitled to have someone from the community talk about where  
 (25) those things were taken what they mean all of that where the

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- (1) seals are where they re not Things of that nature Also to  
 (2) point out that a number of the -- of animals that are on the  
 (3) videotape are not subsistence related that they re irrelevant  
 (4) to the subsistence economy  
 (5) THE COURT Okay thank you  
 (6) Counsel I think it s rebuttal It ll be on  
 (7) MR CLOUGH Last one Your Honor the first three is  
 (8) Michael Goodwin Michael Goodwin was a district park ranger  
 (9) for Shuyak Island State Park on Kodiak at the tme of the spill  
 (10) through 1990 Everybody involved in this Kodiak case knows  
 (11) that Shuyak Island regarding its use and oiling of it were  
 (12) the prime issue of Kodiak Island property case about half of  
 (13) the entire claim A number of the witnesses for the plaintiffs  
 (14) have already testified about oiling and usage  
 (15) I could go through the list here --  
 (16) THE COURT I agree with you counsel I think the  
 (17) best way is to find out what he s going to say  
 (18) MR STOLL Your Honor Mr Harrison testified that he  
 (19) had an open checkbook or unlimited checkbook something to  
 (20) effect that he could provide whatever it took to take care of  
 (21) a problem Mr Goodwin will testify that he made several  
 (22) requests repeatedly both locally and met with Mr Harrison  
 (23) and in attempt to try to get resources to -- to clean up the  
 (24) island When he left in October of 1990 the island was still  
 (25) oiled Shuyak was still oiled and that s basically just

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- (1) rebutting what Mr Harrison testified to  
 (2) MR CLOUGH Mr Harrison testified --  
 (3) MR STOLL This is going to take about 15 minutes  
 (4) MR CLOUGH Mr Harrison offered no testimony  
 (5) whatsoever about oiling on Shuyak Island so I think that part  
 (6) of it is clearly not rebuttal He just didn t talk about  
 (7) that  
 (8) The other issue as to the open checkbook I quite frankly  
 (9) don t have any idea what Mr Goodwin s going to say in that  
 (10) particular regard so I m at a bit of a loss to respond to it  
 (11) THE COURT Is he going to testify that his requests  
 (12) were denied because of money reasons?  
 (13) MR STOLL He doesn t know what reason He knows  
 (14) that he made a request repeatedly for -- you know to get -- to  
 (15) get the island cleaned up The only reason that the relevance  
 (16) of the comment I made about it still being oiled is simply that  
 (17) why would he be requesting -- just to put into context he s  
 (18) requesting resources to clean up  
 (19) I mean that s the only purpose of the -- the real thrust  
 (20) of his testimony is that he made requests including direct --  
 (21) when he was unable to get the requests met at the local  
 (22) level -- by that I mean within the Kodiak dealing with the  
 (23) Kodiak -- the Exxon people on Kodiak he then had meetings  
 (24) with  
 (25) Harrison and trying to get the thing cleaned up And it  
 (26) didn t -- the job didn t get done

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- (1) He doesn t know whether they didn t write a check or what  
 (2) but he just knows that he made the request and I think it  
 (3) certainly goes to what Mr Harrison testified to It s very  
 (4) short testimony  
 (5) MR CLOUGH It may be short but it s important if I  
 (6) can briefly respond to it Your Honor First of all seems to  
 (7) me the open checkbook is a bit of a red herring if I dare use  
 (8) that word To get to what I think Mr Stoll wants to put  
 (9) evidence on somebody to talk about 1990 oiling on Kodiak  
 (10) and  
 (11) Mr Stoll put on a number of witnesses and asked about 1990  
 (12) oiling and they all said they weren t aware of it  
 (13) I m going to have to ask your indulgence to remind me of  
 (14) the names -- you asked both fishermen about that and Jerome  
 (15) Selby -- all of them said they did not observe Kodiak oiling in  
 (16) 1990 Because he didn t put on evidence of Kodiak oiling in  
 (17) 1909 we didn t address it Now at the last minute he s trying  
 (18) to put somebody on to talk about oiling in 1990 when clearly  
 (19) it was not evidence put on in plaintiffs case  
 (20) MR STOLL Your Honor we did put on evidence of oil  
 (21) in 1990 but I don t think that s -- that s not the thrust of  
 (22) this witness testimony  
 (23) THE COURT You re willing not to ask him those  
 (24) questions?  
 (25) MR STOLL I will Your Honor but the point is that  
 (26) if when he left --

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- (1) THE COURT You will or you won t?  
 (2) MR STOLL I d like to because it shows between May  
 (3) of 1989 when the oil first came to Kodiak and October of 1990  
 (4) when Mr Goodwin ceased to be the ranger on Shuyak during  
 (5) that  
 (6) entire period of time there was oil that did not get cleaned  
 (7) up That s the thrust of it I mean --  
 (8) THE COURT Yes it s the thrust of it It was the  
 (9) thrust of your indicates in chief too wasn t it?  
 (10) MR STOLL No no I would agree with that statement  
 (11) Your Honor but the point is that they -- they ve raised this  
 (12) issue about Mr Harrison saying Well we cleaned everything  
 (13) up  
 (14) THE COURT I don t remember him saying anything about  
 (15) that You started out with the open checkbook If in fact  
 (16) that deserves rebuttal then I suppose requests for tasks to be  
 (17) done and refusals or inactivity is -- comes within the  
 (18) description of rebuttal  
 (19) MR STOLL Right  
 (20) THE COURT But the question of oiling in 1990 was a  
 (21) case in chief issue wasn t it?  
 (22) MR STOLL There s no question about that Your  
 (23) Honor I m not -- I m not putting him on for that purpose  
 (24) The purpose --  
 (25) THE COURT Then you can t use him for that purpose

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- (1) MR STOLL Well may I just ask the Court this  
 (2) question and that is is that if I ask him Did you make  
 (3) repeated requests and he says Yes and I say When did  
 (4) you stop making these requests and he says In 90 - I m  
 (5) just trying to figure out -  
 (6) THE COURT I suppose that s true if it s part of the  
 (7) pattern it implicitly shows he thought there was oil  
 (8) MR STOLL I don t know how - I mean I m not trying  
 (9) to put him on for that purpose I m just trying to show that  
 (10) he s still making requests and the - the - you know that s  
 (11) the whole purpose Otherwise the inference is that he just  
 (12) made requests in 1989  
 (13) MR CLOUGH First -  
 (14) THE COURT I want you to go talk to him I want you  
 (15) to go talk to him and find out what he says about oiling in  
 (16) 1990 and then come back in and tell me  
 (17) MR STOLL Your Honor we ll say that Mr Clough or  
 (18) his associates interviewed him in person last week  
 (19) THE COURT They may have done that but they didn t  
 (20) know when you were going to present him  
 (21) MR CLOUGH In fact at that time Mr Stoll hadn t  
 (22) even spoken to him  
 (23) MR STOLL One of my associates had talked to him  
 (24) Your Honor  
 (25) MR CLOUGH At some point I ll need a break to do

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- (1) that Your Honor  
 (2) THE COURT At some point I ll need a break too  
 (3) Call and see if the jury is ready  
 (4) MR CLOUGH Will we be able to re-address this issue  
 (5) after I talk to him?  
 (6) THE COURT Yes it appears you will be because it  
 (7) appears I can t separate the 1990 from the open checkbook  
 (8) MR CLOUGH It seems to me Mr Stoll s even conceded  
 (9) he can t concede or connect through Mr Goodwin the denial of  
 (10) request related to a checkbook Unless I misheard he s  
 (11) conceded that in court  
 (12) THE COURT Yeah that s a good argument counsel  
 (13) MR CLOUGH It puts us in a real tough spot Your  
 (14) Honor for example Fred Byars -  
 (15) THE COURT Counsel none of this puts you in a tough  
 (16) spot This is all ten minutes of testimony Let s not put too  
 (17) much hyperbolae in here please This is not disaster for  
 (18) Exxon  
 (19) MR CLOUGH It s not but the point I m trying to  
 (20) make Had this been brought up in direct - Mr Byars worked  
 (21) at Kodiak in 1990 was an observer He testified about 89  
 (22) that s all they put on was 89 He s gone back to Lake  
 (23) Charles If they d put it in on direct it could have been two  
 (24) minutes as a part of our direct and that would have been the  
 (25) issue

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- (1) MR DIAMOND Your Honor we now turn our attention to  
 (2) a bunch of witnesses who are not on the witness list We can  
 (3) deal with them in any order The file I pulled was Lucy Groh  
 (4) THE COURT All right let s talk about Lucy Groh  
 (5) I ve heard her name so much What would she testify to?  
 (6) MR FORTIER Your Honor Ms Groh will testify to  
 (7) sales at Ellamar There were several charts that defendants  
 (8) presented that we hadn t seen before chart number 10305 and  
 (9) 10284 10305 was the sales history chart ten-year chart  
 (10) 10284 was the paired-sales chart - both dealing with Ellamar  
 (11) Mrs Groh and Mr Groh of course own Ellamar  
 (12) THE COURT What s she going to say?  
 (13) MR FORTIER She s going to talk about the sales  
 (14) history there Your Honor And she s also going to talk  
 (15) about - she s also going to discuss the paired-sales chart  
 (16) THE COURT Counsel when I say what is she going to  
 (17) say I don t want a general description I want to know what  
 (18) she is going to say  
 (19) MR FORTIER Okay Your Honor Specifically what  
 (20) she s going to address is the fact that in 1989 there were no  
 (21) sales that -  
 (22) THE COURT Does the chart show that there were  
 (23) sales?  
 (24) MR FORTIER I believe that the chart is indicative  
 (25) of sales going up There was testimony that there was a sale

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- (1) closed in 1989 and then Mr MacSwain I think indicated  
 (2) actually he recorded the sale in 1990 There was also  
 (3) testimony of road and dock in 1987 contributed to sales in  
 (4) 1988  
 (5) MR STOLL Your Honor if I may interrupt my  
 (6) co counsel? The charts that were produced for the first time  
 (7) during the defendants case show the construction there was a  
 (8) number of sales in 1988 and could we have the thing on the -  
 (9) MR FORTIER Take a look at 10305 first  
 (10) MR STOLL And the bottom graph Your Honor shows  
 (11) the - shows the new dock and roads construction and they  
 (12) explain that as the reason for these sales in 1988 and that is  
 (13) the first time that they ever presented any evidence of that  
 (14) There was no - in their expert reports they did not make any  
 (15) reference at all to new roads and dock construction This is  
 (16) completely new stuff that they had not presented previously  
 (17) and this graph itself is totally new  
 (18) As I mentioned -  
 (19) THE COURT And she s going to testify the graph is  
 (20) misleading?  
 (21) MR STOLL Yes because she s going to say the new  
 (22) roads and dock construction were not the reason for the sales  
 (23) going up in 88 and then the subsequent decline in 1989  
 (24) THE COURT What is she going to say the reason was?  
 (25) MR STOLL There was a healthy market I mean the -

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- (1) the construction assisted in that but the point is is that
- (2) the drop in 89 was attributable to the spill And contrary to
- (3) the testimony of their experts in -- in defendants case in
- (4) chief
- (5) THE COURT Okay thank you
- (6) MR STOLL It s going to be again a very short
- (7) witness
- (8) MR DIAMOND I was once defending a criminal case and
- (9) I had an eyewitness take the stand for the prosecution and he
- (10) only testified for five minutes Short witnesses can be
- (11) harmful
- (12) Your Honor we didn t start at the Ellamar evidence If I
- (13) may approach?
- (14) This is the PX1204 which Dr Mundy put in evidence If I
- (15) may direct you to pages 2741 and -42 of Dr Mundy s direct
- (16) testimony he talked about Ellamar sales In fact plaintiffs
- (17) principal evidence
- (18) The plaintiffs principal evidence of a cessation in the
- (19) market in Prince William Sound was Ellamar This was really
- (20) the only table they put in this was Mundy s proof of it and he
- (21) testified as you see at some length and some intensity over
- (22) what happened with respect to sales at Ellamar
- (23) Plaintiffs had every opportunity if his numbers were
- (24) incorrect or his numbers needed to be bolstered to call
- (25) Mrs Groh at the time She s not a surprise to anybody

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- (1) Mr Mundy s numbers come from Lucy Groh or at least an
- (2) interpretation of Lucy Groh
- (3) THE COURT Is this one of the witnesses not on the
- (4) witness list?
- (5) MR DIAMOND Not on the witness list And the
- (6) suggestion we didn t disclose our view of the Ellamar sales is
- (7) wrong There s a copy of Mr MacSwain and Mr Dorchester s
- (8) report which was furnished last year and the table on the first
- (9) page is Ellamar sales
- (10) THE COURT All right
- (11) MR DIAMOND I mean it seems to me this is clearly
- (12) an attempt that they re not satisfied with how Dr Mundy came
- (13) across on Ellamar They want to call somebody else who s
- (14) going
- (15) to talk about the same thing that he talked about after we ve
- (16) already had our one shot at rebutting our Ellamar evidence
- (17) This is not somebody on the witness list somebody they could
- (18) have put on the witness list if they chose and they
- (19) deliberately decided to go with Dr Mundy instead of Dr Mundy
- (20) and Lucy Groh They shouldn t now be permitted to change
- (21) forces
- (22) MR FORTIER Your Honor --
- (23) THE COURT This is a tough one counsel I m going
- (24) to pass until I see the other witnesses to see whether there s
- (25) a pattern here I think she s a legitimate rebuttal witness

(25) When I ask you I m going to want to know why she was left off

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- (1) the witness list
- (2) MR FORTIER That s fine Your Honor
- (3) MR PETUMENOS Perhaps we should take them in the
- (4) order they re going to be called
- (5) THE COURT I thought that s what we were doing
- (6) MR PETUMENOS We just jumped out Some of the
- (7) objections are taking longer than the testimony will take
- (8) MR DIAMOND On Groh I understand the only purpose
- (9) she s being called is to talk about the number of sales There
- (10) was extensive testimony by Dr Mundy about conversations with
- (11) her
- (12) THE COURT I didn t think it was quite limited to the
- (13) number of sales She was going to talk about her opinion
- (14) MR DIAMOND Well that s really a problem because we
- (15) chose not to rebut that in our case It s already come in
- (16) Here is Mundy s testimony at pages 2823 and 2824
- (17) Mrs Groh has already testified through Dr Mundy as to her
- (18) opinions
- (19) THE COURT Yeah you re right
- (20) MR DIAMOND And we made a tactical decision not to
- (21) take Dr Mundy on in our case not to put on any rebuttal to
- (22) that and now we find the witness is coming back I think
- (23) that s clearly improper purpose
- (24) THE COURT Thank you counsel
- (25) All right where s the jury? Tell them to come over here

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- (1) We re going to go with the first three witnesses counsel
- (2) MR DIAMOND May I get that transcript back from
- (3) you?
- (4) THE COURT Show counsel that testimony
- (5) (Jury in at 8 55 a m )
- (6) THE COURT All right The jury is present counsel
- (7) MR PETUMENOS Your Honor the plaintiffs call as
- (8) their next witness Mr Edgar Blatchford
- (9) THE CLERK Sir can you attach the microphone to your
- (10) ue and remain standing for the oath Please raise your right
- (11) hand
- (12) (The Witness Is Sworn)
- (13) THE CLERK Please be seated Sir for the record
- (14) can you please state your full name?
- (15) A Edgar Blatchford Blatchford
- (16) THE CLERK Can you please spell your last name
- (17) A B-as in boy-l-a-t-c-h-f-o-r-d
- (18) THE CLERK And your occupation?
- (19) A I work for the state
- (20) THE CLERK Thank you
- (21) DIRECT EXAMINATION OF EDGAR BLATCHFORD
- (22) BY MR PETUMENOS
- (23) Q Good morning Mr Blatchford
- (24) Mr Blatchford you are the commissioner of the state
- (25) department of community and regional affairs right now?

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- (1) A Yes I am  
 (2) Q That s a cabinet-level position with the government right?  
 (3) A Yes that is  
 (4) Q You are also an Alaska Native?  
 (5) A Yes I am  
 (6) Q And could you tell the jury please what your education  
 (7) is?  
 (8) A Grade school high school Seward Alaska graduate of  
 (9) Alaska Methodist University law degree from the University of  
 (10) Washington School of Law and a masters from Columbia  
 (11) University in New York City  
 (12) Q So you re a lawyer like one of us?  
 (13) A Well I don t prefer to say that  
 (14) Q I know you don t I knew this was my opportunity to make  
 (15) you say it So that s what I did  
 (16) Mr Blatchford have you been chairman of the Chugach  
 (17) Alaska Corporanon Board of Directors?  
 (18) A Yes I have  
 (19) Q And could you tell the jury the periods of time that you  
 (20) served as chairman?  
 (21) A President in 1979 1980 through 83 chairman of the board  
 (22) I think it was 8- -- late 83 through 86 also chairman of  
 (23) the board And right after the oil spill until 1991 I was  
 (24) chairman of the board then  
 (25) Q As chairman of -- in additon to being chairman of the

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- (1) board you had also served as a director of Chugach on other  
 (2) occasions am I right?  
 (3) A Yes  
 (4) Q Were you involved in some of the work that went into the  
 (5) Chugach land selections?  
 (6) A Yes  
 (7) Q Tell the jury what you did for Chugach in the land  
 (8) selection process  
 (9) A As a member of the board of directors of 1977 except for  
 (10) brief periods on until the land selection process was  
 (11) completed the board of directors approved all land selections  
 (12) and all land selections were voted upon by the board  
 (13) Q Did you go to Washington D C to negotiate some of the  
 (14) land selections?  
 (15) A Many times  
 (16) Q Who did you work with back there?  
 (17) A We worked with the congressional delegations and including  
 (18) other states -- well our congressional delegation and other  
 (19) state delegations  
 (20) Q One of the things you were looking for back there was land  
 (21) that would assist the corporation with economic development?  
 (22) A Yes  
 (23) Q What role did subsistence play in looking for land in land  
 (24) selections back in Washington D C when you did that work?  
 (25) A Subsistence was a part of all of the selections

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- (1) Q Would it be correct to say that subsistence played no role  
 (2) in the land selections at Chugach?  
 (3) A That would not be correct  
 (4) Q And you were there?  
 (5) A I was there  
 (6) Q In the -- as the corporation looks at business  
 (7) opportunities for its lands does it consider the impact to  
 (8) potential subsistence to its shareholders?  
 (9) A Yes  
 (10) Q And does it do that frequently?  
 (11) A All the time  
 (12) Q Are there frequent discussions about that among the  
 (13) members  
 (14) of the board of directors?  
 (15) A Yes  
 (16) Q Do you know a person named Mr Pete Nagel?  
 (17) A Yes  
 (18) Q Who is Mr Pete Nagel?  
 (19) A Peter was a member of our management staff from the time  
 (20) he  
 (21) became employed I think it was probably the mid 1980s until  
 (22) most recently  
 (23) Q Was he the land manager for a period of time?  
 (24) A Yes he was  
 (25) Q What does the land manager do?  
 (26) A The land manager is a part of our management team or was  
 (27) a  
 (28) part of our management team during the entire time I was on

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- (1) the board of directors and was called in repeatedly during all  
 (2) board meetings to advise the board of directors on land  
 (3) selections and impacts on Native lands  
 (4) Q Did Mr Nagel when you were chairman of the board after  
 (5) the oil spill was Mr Nagel active in assisting the Chugach  
 (6) Alaska Corporation litigation against Exxon?  
 (7) A Yes  
 (8) Q Did he assist in coming up with document production title  
 (9) documents and so forth to assist the litigation?  
 (10) A Yes  
 (11) MR CLOUGH Objection Your Honor relevance  
 (12) THE COURT Yes Where are we counsel?  
 (13) MR PETUMENOS Mr Nagel specifically stated he was a  
 (14) low-level management employee that had very little to do with  
 (15) the litigation when he was at Chugach  
 (16) THE COURT All right go ahead  
 (17) BY MR PETUMENOS  
 (18) Q During the entire time Mr Nagel assisted the Chugach  
 (19) Alaska Corporation while he was employed there with you as  
 (20) chairman of the board did Mr Nagel ever express to you any  
 (21) reservation or any concern about pursuing that litigation?  
 (22) A Not that I can recall  
 (23) Q Not once?  
 (24) A Not once  
 (25) MR PETUMENOS I have no further questions

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- (1) CROSS EXAMINATION OF EDGAR BLATCHFORD  
 (2) BY MR CLOUGH  
 (3) Q Hi Mr Blatchford My name s John Clough and I represent  
 (4) Exxon Good morning sir?  
 (5) A How are you  
 (6) Q Just a couple of questions for you  
 (7) Back during the land selection process – you recall that  
 (8) you were deposed a while ago in this case right?  
 (9) A Yes I was  
 (10) Q And during that deposition you were asked some questions  
 (11) about the land selection process During it isn t it true  
 (12) sir that Chugach considered how the lands they were selecting  
 (13) could be used to employ Chugach shareholders?  
 (14) A Yes  
 (15) Q And isn t it true sir that another factor you were  
 (16) considering at the time you made the land selection process  
 was  
 (17) how the corporation could earn a profit from the lands it was  
 (18) seeking to select?  
 (19) A Yes  
 (20) Q And isn t it true sir that during the negotiations with  
 (21) the United States the idea of the economic value of the land  
 (22) was discussed repeatedly?  
 (23) A Yes  
 (24) Q In fact over and over again?  
 (25) A Yes

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- (1) Q And isn t it also true sir that you re not aware of a  
 (2) single parcel not even one that was selected primarily for  
 (3) subsistence purposes?  
 (4) A Yes  
 (5) MR CLOUGH Thank you No further questions  
 (6) REDIRECT EXAMINATION OF EDGAR BLATCHFORD  
 (7) BY MR PETUMENOS  
 (8) Q When you say that land was not selected primarily for  
 (9) subsistence purposes are there land uses for economic  
 purposes  
 (10) that are consistent with subsistence use?  
 (11) A Yes  
 (12) Q And can you think of – well I have no further questions  
 (13) Thank you Mr Blatchford  
 (14) THE COURT Don t step down yet sir Hang on just a  
 (15) minute  
 (16) MR CLOUGH Thank you Mr Blatchford No further  
 (17) questions  
 (18) THE COURT Yes you may step down sir  
 (19) MR PETUMENOS Your Honor the plaintiffs will next  
 (20) call Mr John Christensen  
 (21) THE CLERK Sir can you attach the microphone to your  
 (22) lapel there and remain standing for the oath Please raise  
 (23) your right hand  
 (24) (The Witness Is Sworn)  
 (25) THE CLERK Please be seated Sir for the record

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- (1) can you please state your full name?  
 (2) A John Allen Christensen  
 (3) THE CLERK Please spell your last name?  
 (4) A C-h r-i-s t e-n-s-e n  
 (5) THE CLERK And your occupation?  
 (6) A I m presently the chairman of the board of Chugach Alaska  
 (7) Corporation  
 (8) THE CLERK Thank you  
 (9) DIRECT EXAMINATION OF JOHN ALLEN CHRISTENSEN  
 (10) BY MR PETUMENOS  
 (11) Q Mr Christensen good morning How long have you been  
 the  
 (12) chairman of the board of the Chugach Alaska Corporation?  
 (13) A Approximately four months  
 (14) Q Could you tell the jury when – where you reside – where  
 (15) you used to reside before you became chairman four months  
 ago?  
 (16) A I resided in the village of Chenega bay since mud 85 I  
 (17) believe  
 (18) Q All right And tell the jury a little bit about your  
 (19) history in Alaska since the last time that you came into the  
 (20) Prince William Sound area I think you first came in more  
 (21) recently as an adult into Cordova?  
 (22) A I returned to Alaska in August of 78 I resided in  
 (23) Cordova and some rather remote areas on the eastern side of  
 (24) Prince William Sound In it was 82 I believe I moved to  
 (25) the village of Tatulek and resided there until I moved to

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- (1) Chenega in 85  
 (2) Q And you lived in Chenega from 1985 until you became  
 (3) chairman some four months ago?  
 (4) A Yes I still maintain a household there my family just  
 (5) moved into town here in the last week  
 (6) Q Did you raise children in these areas?  
 (7) A Yes  
 (8) Q Tell the jury about your children and how many you raised  
 (9) there  
 (10) A I have three children They spent their time in school in  
 (11) both Tatulek and Chenega Presently they are in ninth tenth  
 (12) and 11th grades  
 (13) Q During the period of time prior to the oil spill and after  
 (14) the oil spill how did you provide the protein for your family?  
 (15) A Can you state that question again?  
 (16) Q How did you provide meat and fish for your family for the  
 (17) period of time before the oil spill from 85 until the period  
 (18) the years after that you lived in Chenega?  
 (19) A Mostly meat and fish we took locally we hunted for it  
 (20) Q Can you give the jury an idea what percentage of your meat  
 (21) and fish was obtained from subsistence activity?  
 (22) A 96 98 percent at least Some years exclusive it was all  
 (23) of it Other years maybe a bit less  
 (24) Q You were on the water and in the land of that area often?  
 (25) A Yes



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- (1) Q Both before and after the oil spill?  
 (2) A Yes  
 (3) Q Have you had the opportunity to take a look at a wildlife  
 (4) video - I m not sure the number - but a wildlife video that  
 (5) was played for the jury here in this - in this trial?  
 (6) A Yes I believe it was titled Prince William Sound Wildlife  
 (7) or something similar to that  
 (8) Q All right Did you notice anything about that wildlife  
 (9) video that you thought required comment insofar as it relates  
 (10) to the subsistence activities in the area that you hunt and  
 (11) fish?  
 (12) A Yes I did The - some of the examples - namely Long  
 (13) Bay which is very near Columbia Glacier and north of Glacier  
 (14) Island Nassau Fjord and the rocks east of Nassau Fjord And  
 (15) in particular they showed quite an abundance of wildlife  
 (16) However those are two areas to my knowledge that weren t  
 (17) oiled and when you compare those to the area - examples of  
 (18) Sleepy Bay on Evans Island and Sawmill Bay it s the - the  
 (19) difference in the abundance of wildlife is obvious sawmill and  
 (20) Sleepy Bay being relatively low in varieties and quantities of  
 (21) marine life  
 (22) Q All right  
 (23) A Marine mammals in particular  
 (24) Q Let s talk about marine mammals  
 (25) Did you notice a substantial difference in marine mammals

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- (1) that you would normally hunt - you normally hunt seal do you?  
 (2) A Yes I do  
 (3) Q And did you notice a substantial decrease in abundance of  
 (4) seal after the oil spill in the areas that you hunt?  
 (5) A Yes  
 (6) Q Did you notice a difference in the age of the animals that  
 (7) you would normally see in the area?  
 (8) A Yes After the oil spill it was - there were very  
 (9) little if any young seals passing through the area in the  
 (10) Southwest District of Prince William Sound  
 (11) Q Did you alter or change your hunting patterns as a result  
 (12) of the oil spill?  
 (13) A Yes  
 (14) Q Tell the jury  
 (15) A Some years - during the year of the oil spill and some  
 (16) subsequent years we ve had to travel farther and into areas  
 (17) that we hadn t hunted as often or previously  
 (18) Q Did you take fewer animals?  
 (19) A Yes In the years immediately preceding - I mean after  
 (20) the oil spill  
 (21) Q And why was that?  
 (22) A They weren t there They weren t in the areas that we  
 (23) could get to by any practical means  
 (24) Q Were you concerned about preserving or conserving the  
 (25) resource?

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- (1) A Personally my personal practice is if - if a particular  
 (2) species is hard for me to find I do not make a great effort to  
 (3) pursue that species  
 (4) Q Why is that?  
 (5) A For the purpose of conservation  
 (6) Q Do you believe that the videotape that you saw fairly and  
 (7) accurately and typically describes the abundance of wildlife in  
 (8) the area in which you fish and hunt in 1994?  
 (9) A I wouldn t call it the abundance I would say it showed  
 (10) the lack of abundance in the areas that we traditionally hunt  
 (11) Q And the jury saw lots of close ups of seals cute seals  
 (12) popping up and down and lots of birds in the area  
 (13) Does that mean to you looking at that video they should  
 (14) conclude that all the resource is back for purposes of use by  
 (15) your people?  
 (16) A No I think the comparison should be between the areas that  
 (17) weren t affected and the areas that were even in the video  
 (18) it s obvious the difference in the quantity like I stated  
 (19) before and the - the variety of wildlife in the video in the  
 (20) areas around Evans Island there were really only a handful of  
 (21) waterfowl evident and a number of seal most of which were  
 (22) large very few young seal And when you compare that to the  
 (23) areas outside of the oiled area that is I believe where the  
 (24) comparison should be made  
 (25) Q Do you know a person named Pete Nagel?

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- (1) A Yes I do  
 (2) Q Showing you what has been marked as plaintiffs Exhibit  
 (3) 8130 I m going to show it to Mr Christensen first  
 (4) Do you recognize 8130?  
 (5) A Yes I do  
 (6) Q All right -  
 (7) MR STOLL It s 8530  
 (8) MR PETUMENOS Okay 8530  
 (9) BY MR PETUMENOS  
 (10) Q Could you tell the jury what 8530 is and who created this  
 (11) map?  
 (12) A That was a map of the Chugach region s land holdings It  
 (13) also indicates the villages holdings at the time and was  
 (14) published in late 88  
 (15) Q All right And at the top of the map here is a key that  
 (16) talks about the various communities of Chenega Bay and  
 (17) Cordova and English Bay and all those Do you see that?  
 (18) A Yes  
 (19) Q And there s a column here that says the major industry for  
 (20) each of those towns and villages do you see that?  
 (21) A Yes  
 (22) MR CLOUGH Your Honor I m going to object on the  
 (23) basis of hearsay He s just having him read the document it  
 (24) appears  
 (25) THE COURT I m not understanding the objection

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- (1) MR CLOUGH It appears he s about to ask the witness
- (2) to read from the document
- (3) THE COURT Is it in evidence?
- (4) MR CLOUGH I don t believe it is
- (5) MR PETUMENOS Let me ask a few more questions
- (6) BY MR PETUMENOS
- (7) Q Who was the person responsible for putting in the
- (8) designation of the major industry for the various villages?
- (9) A This - this map was produced by Chugach land department
- (10) therefore the responsibility would have been the land manager
- (11) Q And -
- (12) MR CLOUGH Your Honor may we approach on this very
- (13) briefly?
- (14) (Bench Conference on the Record)
- (15) MR DIAMOND I guess I should ask Mr Petumenos the
- (16) basis on which this is going to come in either as an exhibit
- (17) or have him read it?
- (18) MR PETUMENOS I m going move the exhibit in because
- (19) it is a map created in the ordinary course of business by the
- (20) Chugach Alaska Corporation and it was created by Mr Nagel
- (21) and
- (22) the portion of the key that we re going to be reading as I
- (23) indicated in the offer of proof this morning before we started
- (24) is that he has defined the industry in each one of the villages
- (25) as a subsistence economy contrary to the impression he left
- (26) with the jury when he testified and I m doing exactly what I

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- (1) said I was going to do before the testimony
- (2) MR DIAMOND It s not a business record so it doesn t
- (3) come in under the business records exceptions not something
- (4) that s prepared ordinarily and systematically It s a one shot
- (5) deal If it s being offered as a prior inconsistent statement
- (6) which I understand Mr Petumenos to say he s violated the
- (7) rule
- (8) MR PETUMENOS It is a business record and I can
- (9) establish that it s a business record
- (10) THE COURT How?
- (11) MR PETUMENOS Because this map is used throughout
- (12) Chugach Alaska Corporation as a planning map as a land
- (13) management map It was in fact the most popular map in the
- (14) oil spill because Exxon asked for hundreds of copies of it and
- (15) it was one of the maps that they used It was used throughout
- (16) the business of the activities of the Chugach Corporation every
- (17) day for a variety of reasons
- (18) MR DIAMOND Simply because it may be something that
- (19) they used repeatedly does not make it a business record A
- (20) business record has to be a document that s systematically
- (21) prepared by the corporation in the course of its business A
- (22) one-shot deal map is not a business record Under
- (23) Mr Petumenos theory any document created by a corporation
- (24) and used repeatedly becomes a business record That s not a
- (25) basis for the exception Something that s prepared of this

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- (1) nature doesn t have the liability as do regular forms that are
- (2) filled out in the ordinary course
- (3) MR PETUMENOS This wasn t - this is no one-shot
- (4) exception to the business records exception This was not
- (5) prepared for litigation it was prepared for the ongoing
- (6) business and used in the ongoing business of Chugach Alaska
- (7) Corporation In fact there s only one such map that s
- (8) relevant to the business
- (9) THE COURT All of this the witness knows?
- (10) MR PETUMENOS Sure I think so
- (11) MR DIAMOND I think this is coming in to impeach and
- (12) that s the real purpose It s unfair impeachment because
- (13) Mr Nagel was not asked -
- (14) THE COURT That s true he wasn t
- (15) MR PETUMENOS Well I don t think - it s not coming
- (16) in as a prior inconsistent statement is the problem It s
- (17) coming in as a business record that this witness created
- (18) THE COURT Yes but the point is counsel you asked
- (19) foundational questions showing Mr Nagel somehow is the
- (20) preparer of this map which is a doubtful proposition and he
- (21) was never asked whether or not he did prepare this map So
- (22) now
- (23) you ve got this witness who may or may not know that he really
- (24) prepared this map or what parts he prepared vouching for the
- (25) map and that Nagel is the person who prepared it He just
- (26) doesn t - I mean I know there is infirmities in that process

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- (1) MR PETUMENOS Let me ask the questions then and
- (2) see - because I don t think there is any doubt about who
- (3) prepared the map in this witness mind He was on the board of
- (4) directors at the time it was prepared I think I can establish
- (5) it s a business record and Mr Nagel prepared it through
- (6) questioning this witness
- (7) THE COURT Maybe you can and can t
- (8) MR DIAMOND Whether Mr Nagel prepared it or not if
- (9) Mr Petumenos wanted to use it to impeach Mr Nagel s prior
- (10) testimony he had an obligation to show the map to Mr Nagel
- (11) to show him the statements to give him an opportunity to
- (12) explain He didn t do that
- (13) MR STOLL They designated this for Nagel
- (14) MR PETUMENOS That s only true if you re talking
- (15) about a statement of a witness who makes a statement at a
- (16) particular time But the preparation of a business record
- (17) is - I m entitled to put in a business record prepared by the
- (18) witness particularly when he says I was working for the
- (19) Chugach Alaska Corporation and subsistence wasn t a big
- (20) deal
- (21) and he s prepared a map that says every one of the
- (22) communities
- (23) that the principal and major industry is -
- (24) THE COURT The map says that?
- (25) MR PETUMENOS It does I ll show the Court The
- (26) key right here says the major industry and it says subsistence
- (27) under each one of the villages

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- (1) THE COURT All right you're going to have to lay the  
 (2) foundation  
 (3) MR PETUMENOS Okay  
 (4) (Bench conference concluded)  
 (5) BY MR PETUMENOS  
 (6) Q The map that we're talking about here was this map used  
 (7) for – in the ordinary course of business by Chugach Alaska  
 (8) Corporation?  
 (9) A Yes  
 (10) Q And was it used for just oil spill litigation-related  
 (11) things or for the business of the corporation as it functioned?  
 (12) A Oh no It was used for general business produced before  
 (13) the oil spill  
 (14) Q All right Who was the person who was in charge of the  
 (15) production of this map?  
 (16) A Mr Nagel  
 (17) Q And this map was used as a land management tool?  
 (18) A Yes  
 (19) MR PETUMENOS Your Honor I would move the map into  
 (20) evidence and seek to publish it before the jury  
 (21) (Exhibit 8530 offered)  
 (22) MR CLOUGH Your Honor we'd object I still don't  
 (23) think the criteria for a business record has been met The key  
 (24) is whether it was prepared and the motion is whether it was  
 (25) offered prepared in the ordinary course of business as part

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- (1) of the ordinary course of business from the corporation  
 (2) The only testimony we've had from the witness is that the  
 (3) map as a map was subsequently used by the corporation but  
 (4) it's  
 (5) clear Mr Petumenos is trying to offer a particular textual  
 (6) portion of the map and there's been no foundation laid as to  
 (7) how that textual portion that was in fact quoting from the  
 (8) rule compiled from information transmitted by a person with  
 (9) knowledge acquired of the regular conduct of business activity  
 (10) prepared under the regular course of business under 803 6 I  
 (11) don't think it meets the hearsay rule  
 (12) MR PETUMENOS I disagree Judge I think this is  
 (13) all the foundation that's required for business record I  
 (14) don't have to establish or take the time for the jury for each  
 (15) and every entry on this map It's sufficient he knows it was  
 (16) prepared by the land department under the supervision of  
 (17) Mr Nagel and that the map was used in the way it was not just  
 (18) for purposes of litigation but conducting all of the business  
 (19) of the corporation  
 (20) THE COURT Sir just give me a description of the way  
 (21) this map was used please  
 (22) A This map has been referred to throughout the course of  
 (23) Chugach business It's been provided to – to prospective  
 (24) partners and people that the corporation wanted to do business  
 (25) with It was utilized as an introduction to Chugach Alaska  
 Corporation contains much text which is historical as well as

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- (1) simply physically accurate at the time at least It's a very  
 (2) detailed map as far as names and places and the actual map  
 (3) portion of the – of the document  
 (4) It's been – since its production it's – it's been used  
 (5) quite heavily in many aspects It's been used outside of  
 (6) Chugach business Many of the air operators prefer to carry  
 (7) this map with them in the course of their business due to the  
 (8) fact that – due to the detail and the names that are on some  
 (9) of these and the locations They're common names that are  
 (10) used  
 (11) today by many people particularly fishermen that aren't  
 (12) printed on the normal maps and air charts  
 (13) THE COURT For how long has the corporation been  
 (14) using this map?  
 (15) A Since it was produced in 1988  
 (16) MR PETUMENOS And Judge this map was designated by  
 (17) the defendants under Mr Nagel's name when – when Mr Nagel  
 (18) was to testify  
 (19) THE COURT What's the number?  
 (20) MR STOLL Your Honor the defendants when they were  
 (21) going to offer this it was defendant's Exhibit DX12615  
 (22) (Exhibit DX12615 offered)  
 (23) THE COURT You want it in under that number?  
 (24) MR PETUMENOS I don't care which number it goes in  
 (25) under  
 THE COURT I think the foundation's adequate

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- (1) counsel I'm going to admit the map  
 (2) MR DIAMOND Can we voir dire him before you rule  
 (3) final?  
 (4) THE COURT Sure  
 (5) MR DIAMOND May I do the voir dire?  
 (6) MR PETUMENOS I thought we had one lawyer per  
 (7) witness  
 (8) THE COURT Doesn't matter to me  
 (9) MR CLOUGH In this circumstance Mr Diamond is more  
 (10) familiar  
 (11) THE COURT Only one lawyer gets to question on this  
 (12) issue but it can be either one of you give you a break  
 (13) VOIR DIRE EXAMINATION OF JOHN CHRISTENSEN  
 (14) BY MR DIAMOND  
 (15) Q Mr Christensen various entries on the nature of CAC's  
 (16) selections there's a legend Subsurface Estates Remaining  
 (17) Selections Where did that information come from in 1988 when  
 (18) this was prepared?  
 (19) A Specifically what information are you speaking of?  
 (20) Q The definition of which parcels were remaining selections  
 (21) as opposed to full free estates  
 (22) A This was information that was all – this was developed by  
 (23) our land department  
 (24) Q How do you know that?  
 (25) A They were directed to develop in that fashion

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- (1) Q Did you direct them?  
 (2) A Not in regards to the production of this map  
 (3) Q So you re just assuming that somebody told them to do it  
 (4) correct? You re just assuming that somebody in the corporation  
 (5) told the land department to do that you have no firsthand  
 (6) information?  
 (7) A Having been a director from 85 on I was aware that this  
 (8) was being produced in our land department certainly And the  
 (9) land department of course -  
 (10) Q But you have no idea -  
 (11) MR PETUMENOS Excuse me Excuse me Judge  
 (12) THE COURT He can finish the answer Go ahead  
 (13) MR DIAMOND You have no idea -  
 (14) THE COURT No no counsel I said the witness can  
 (15) finish  
 (16) MR DIAMOND I thought he had  
 (17) THE COURT Are you finished sir?  
 (18) A I believe so if I understand the question  
 (19) BY MR DIAMOND  
 (20) Q All right let s take the acreages here under Native  
 (21) corporation land holdings Where did that come from do you  
 (22) have any idea?  
 (23) A I m not sure I understand what you re asking here  
 (24) Q Well it has Native corporation land holdings in the margin  
 (25) and it s got acreages Do you know where that came from?

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- (1) Where did the information come from?  
 (2) A These are numbers that would have been developed in our  
 (3) land department The corporation holds these numbers  
 because  
 (4) these are the corporation s  
 (5) Q You re assuming that s where they came from you don t  
 (6) know do you?  
 (7) MR PETUMENOS Your Honor I ll object at this  
 (8) point I think the testimony is clear as to what the source of  
 (9) the document is  
 (10) THE COURT The objection s overruled Go ahead  
 (11) BY MR DIAMOND  
 (12) Q You re making assumptions for the jury you don t know?  
 (13) A As a director I have a - I have a legal right to rely on  
 (14) various experts in our land department was considered experts  
 (15) in the areas of our lands therefore I consider those to be  
 (16) true and correct figures and conduct business from them From  
 (17) those  
 (18) Q Sir I m not disputing your right to rely on - the  
 (19) question is whether the jury should rely on it And my  
 (20) question is do you know specifically where the information in  
 (21) the legend came from?  
 (22) A Only from the information inside our land department  
 (23) That s where I know it came from  
 (24) Q It s your assumption they have these records and they  
 (25) pulled them from their records?

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- (1) A Yes Those records probably are on file  
 (2) Q Is some of the information concerning CAC parcels  
 (3) incorrect? I notice there s a reference reference to deleted  
 (4) on parcel 37?  
 (5) A This was produced in 1988 from information that was  
 (6) current in 1988 There has been since some changes  
 (7) Q So this is not - this currently does not reflect the  
 (8) status of Chugach Alaska Corporation s land holdings?  
 (9) A In some minor areas there have been changes Largely it  
 (10) does reflect the present situation  
 (11) Q There s a discussion of the - the law in the left hand  
 (12) corner Do you know where that came from?  
 (13) A Those are excerpts from the settlement act itself  
 (14) Q They don t seem to be quotations?  
 (15) A I doubt that they re quotations  
 (16) Q Do you know who prepared the summary of the law?  
 (17) A No I don t know I don t know the person that did that  
 (18) Q There s a description of the lands of Chugach Alaska  
 (19) Corporation Where did this information come from?  
 (20) A From our land department  
 (21) Q How do you know that?  
 (22) A They produced the document  
 (23) Q So you just - somebody in the land department you don t  
 (24) know who wrote this up you don t know where from?  
 (25) A No I do not know specifically where from

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- (1) MR DIAMOND Your Honor I think there are  
 (2) substantial questions concerning the reliability of this in  
 (3) many respects It should not be certainly admitted without  
 (4) some limitations This purports to have all sorts of parcel  
 (5) boundaries parcel definitions that have not been attested to  
 (6) It s got all sorts of narrative that the witness can t provide  
 (7) any foundation for We would object to its introduction but  
 (8) if it does come in it should come in for a limited purpose and  
 (9) we ought to have a proffer of what the purpose is  
 (10) THE COURT Okay counsel I think that objection is  
 (11) well taken There s a lot of material on this map that may not  
 (12) be pertinent to the issues in this case The question is what  
 (13) you want to use the map for  
 (14) MR PETUMENOS Your Honor knows the reason I want to  
 (15) introduce it for and I m prepared to proceed with that offer  
 (16) THE COURT You may proceed but I haven t admitted  
 (17) the document  
 (18) MR PETUMENOS I understand I d like to be able to  
 (19) publish that portion of it to the jury that is within the scope  
 (20) of the offer  
 (21) THE COURT Yes you may do that  
 (22) MR DIAMOND Although I will note the witness is  
 (23) unable to say where this came from  
 (24) THE COURT I don t remember that that particular  
 (25) portion of the map was something that was going to be

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- (1) questioned on anyway was it?  
 (2) MR DIAMOND I think that's what counsel wants it  
 (3) for  
 (4) MR PETUMENOS If I could proceed you'd be able to  
 (5) see  
 (6) MR DIAMOND May I ask one additional question  
 (7) then?  
 (8) BY MR DIAMOND  
 (9) Q There's another table up here on the top says Community  
 (10) Profile?  
 (11) A Uh-huh  
 (12) Q And it lists the various Native corporations in Prince  
 (13) William Sound and provides information about each?  
 (14) A Yes  
 (15) Q One of the columns concerns major industry Do you see  
 (16) that over here?  
 (17) MR PETUMENOS Judge he's now taking over my  
 (18) examination  
 (19) THE COURT Give him a couple questions counsel Go  
 (20) ahead  
 (21) BY MR DIAMOND  
 (22) Q Do you know where this came from?  
 (23) A This came from Chugach land department and the work they  
 (24) had done inside the land department  
 (25) Q Including the discussions of Tattilek and Port Graham and

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- (1) Eyak?  
 (2) A Yes  
 (3) Q How do you know that this table came from information in  
 (4) your land department?  
 (5) A Document came from within our land department and all of  
 (6) the information on it was developed or researched by our land  
 (7) department  
 (8) Q How do you know that?  
 (9) A That's its job  
 (10) Q So you're assuming the land department did its job and  
 (11) produced this map?  
 (12) A Yes I would hope they did their job in producing that map  
 (13) Q But you don't know?  
 (14) A It looks accurate to me so I think they did But by my  
 (15) reading of the information and knowledge of the area it looks  
 (16) like they did a very good job  
 (17) Q Do you know whether the land department consulted other  
 (18) people?  
 (19) THE COURT Counsel you are getting a little bit far  
 (20) afield aren't you?  
 (21) MR DIAMOND If you're telling me I am I must be  
 (22) THE COURT I'm certainly not going to say what  
 (23) Mr Petumenos did you're taking over his examination but I  
 (24) think you are going a little far afield  
 (25) MR DIAMOND Your Honor we would object to

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- (1) introduction of the chart He has no firsthand -  
 (2) THE COURT I haven't admitted it yet but I'm going  
 (3) to allow counsel questions on the portion of the map that he  
 (4) thinks are pertinent  
 (5) MR PETUMENOS Actually I'm going to carry it over  
 (6) to the jury the portion that I want to talk about  
 (7) BY MR PETUMENOS  
 (8) Q Mr Christensen would you come with me to the jury? It's  
 (9) going to be very hard for them to see but we're going to take  
 (10) a look  
 (11) First of all the Chugach Alaska Corporation's land  
 (12) department assists the village corporations from time to time  
 (13) with their land problems is that so?  
 (14) A Yes they do  
 (15) Q You're going to have to reattach that microphone  
 (16) Under the direction of Mr Nagel of the land department is  
 (17) there a community profile table on this map?  
 (18) MR DIAMOND Your Honor we would object This is  
 (19) hearsay and the witness is about to - and is showing the jury  
 (20) hearsay information There's been no ruling  
 (21) MR PETUMENOS It's the business record  
 (22) THE COURT Counsel there has been a ruling and the  
 (23) ruling is he can testify to the contents of that map  
 (24) BY MR PETUMENOS  
 (25) Q Tell the jury what your land department determined was the

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- (1) major industry for these various communities that are on the  
 (2) map and maybe just take a look at it one by one and tell us  
 (3) A Chenega Bay major industry is fishing and subsistence  
 (4) Cordova is fishing fish processing tourism logging and  
 (5) subsistence  
 (6) English Bay is fishing and subsistence  
 (7) Eyak is fishing fish processing tourism logging and  
 (8) subsistence  
 (9) Grouse Creek is rail shipping rail shipping services  
 (10) tourism lumber and manufacturing  
 (11) Icy Bay is logging  
 (12) Port Graham is corrections fishing fish processing and  
 (13) subsistence  
 (14) Seward is rail shipping services corrections tourism  
 (15) lumber and manufacturing  
 (16) Tattilek is fishing and subsistence  
 (17) Q I think we've covered all of the villages now haven't we?  
 (18) A Yes  
 (19) Q That's what I wanted the jury to know You can resume the  
 (20) stand  
 (21) There has been some discussion in the case about the use of  
 (22) lands for subsistence as being an emotional or - or as being  
 (23) an emotional value that the shareholders would hold for the  
 (24) land In your experience as a director of the Chugach Alaska  
 (25) Corporation and as chairman is the use of land for subsistence

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- (1) an emotional issue?  
 (2) MR CLOUGH Objection Your Honor First of all I  
 (3) don t think that properly characterizes any testimony I m  
 (4) recalling  
 (5) THE COURT That s the problem when you start with the  
 (6) proposition of testimony weeks away counsel  
 (7) MR PETUMENOS Let me just ask the question directly  
 (8) then  
 (9) THE COURT All right  
 (10) BY MR PETUMENOS  
 (11) Q Do you regard the use of lands for subsistence uses for  
 (12) shareholders to be an emotional issue on an economic one?  
 (13) MR CLOUGH Objection Your Honor I see no  
 (14) relevance to the objection as it applies to emotional issues  
 (15) THE COURT Objection overruled  
 (16) A The use of that land it s not emotional at all It is a  
 (17) real - it s a real thing It s an economic use Subsistence  
 (18) in many of our communities is not an optional thing it s  
 (19) necessary to the future survival and continuing existence  
 (20) BY MR PETUMENOS  
 (21) Q And you have experienced that economic component of  
 (22) subsistence firsthand?  
 (23) A Yes  
 (24) MR PETUMENOS I have no further questions  
 (25) MR CLOUGH Hi I m John Clough I represent Exxon

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- (1) and I have to drop this down so people can see me  
 (2) A Hi John  
 (3) CROSS EXAMINATION OF JOHN CHRISTENSEN  
 (4) BY MR CLOUGH  
 (5) Q Picking up on that question you just got there - I don t  
 (6) want to ask you this about you as an individual I want to ask  
 (7) you about you as a director of Chugach Alaska Corporation  
 (8) Chugach Alaska Corporation does not receive any economic  
 (9) revenues from subsistence does it?  
 (10) A Chugach Corporation does not receive a dollar value for  
 (11) subsistence activities  
 (12) Q Shareholders don t have to pay you any fees?  
 (13) A No they don t  
 (14) Q Don t have to buy a permit?  
 (15) A No they don t  
 (16) Q They don t have to figure out the value and pay a tax or a  
 (17) percentage of it to you in any way?  
 (18) A No  
 (19) Q The other thing I wanted to talk to you about sir was  
 (20) seals which is where we started here You talked about your  
 (21) seal hunting experience  
 (22) Do you recall that you were deposed in May of 1993?  
 (23) A Yes I do  
 (24) Q And at that time you were asked a number of questions  
 (25) about your seal hunting experience in the Chenega area  
 weren t

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- (1) you?  
 (2) A Yes I don t recall the questions specifically but I  
 (3) recall them  
 (4) Q Now at the time your deposition was taken you were asked  
 (5) when was the last time you had personally taken a seal Do you  
 (6) remember that?  
 (7) A I don t remember that specific question but -  
 (8) Q Well maybe I can make it clear  
 (9) Isn t it true that at least as of May of 1993 you hadn t  
 (10) personally taken a seal since before the oil spill?  
 (11) A That s correct  
 (12) Q But you had eaten seal meat in 1989?  
 (13) A Yes I had  
 (14) Q And 1990?  
 (15) A Yes I have  
 (16) Q And 1991?  
 (17) A Yeah I would not doubt that a bit I think I had seal  
 (18) meat  
 (19) Q And the reason you had seal meat is because someone else  
 (20) from the village had shared some with you?  
 (21) A Well that s not exactly correct There was one year Fish  
 (22) and Game provided a - a grant for us to hunt outside of our  
 (23) usual areas where we went to in northern areas of the sound  
 (24) and hunted seal It was my boat that took us there  
 (25) Q But every -

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- (1) A I personally did not shoot the seal I - however many of  
 (2) the hunts are communal in nature It takes more than one to  
 (3) accomplish them  
 (4) Q But you did get seal meat in 89 and all the years  
 (5) thereafter right?  
 (6) A In lesser quantities than previously yes  
 (7) Q Well ADF&G the subsistence division they come through  
 (8) Chenega every year don t they? And they basically take a  
 (9) survey to find out just how much for each of the subsistence  
 (10) resources the various families in the community consume isn t  
 (11) that is right?  
 (12) A They do make surveys I don t know if they re yearly or  
 (13) not I am aware of the fact that they take surveys  
 (14) Q And one of the things they survey you on is how much seal  
 (15) consumption there is right?  
 (16) A I believe those questions are regarding that  
 (17) Q And they prepare statistics on that?  
 (18) A I - I would assume so I don t know what they do with  
 (19) them after they come through  
 (20) Q And another thing the ADF&G does is they try and make their  
 (21) best estimates based on their research as to how many seals  
 (22) are  
 (23) generally within Prince William Sound at any given point in  
 (24) time?  
 (25) A I don t know I m not familiar with how Fish and Game  
 operates internally

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- (1) Q Let s talk just about Chenega  
 (2) Isn t it true sir that over the years really there s -  
 (3) it s mostly Donald Kompkoff and Charles Selanoff (phonetic)  
 (4) that have done most of the seal hunting in that town?  
 (5) A No  
 (6) Q Okay Well let s lump all the hunters in the town  
 (7) together In a typical year how many seals are taken in  
 (8) Chenega?  
 (9) A I wouldn t know that number I would only know what I took  
 (10) from year to year and this many years later I m not sure I  
 (11) could pinpoint what year I took what  
 (12) Q It s been years since you actually went out and hunted?  
 (13) A No no not at all  
 (14) Q When you did hunt what was the typical - how many would  
 (15) you take?  
 (16) A How many would I take?  
 (17) Q Yeah  
 (18) A I would take one if I were successful If I weren t  
 (19) successful I d continue to hunt until I did  
 (20) Q How many of the entire village - you resided in Chenega  
 (21) throughout those years right you testified to that?  
 (22) A Yes I have  
 (23) Q No offense but it s a tiny town?  
 (24) A It s a small village yes  
 (25) Q About how many people live there?

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- (1) A In years I ve lived there I believe between 50 and 80  
 (2) Q And it s fair to say that everybody knows each other pretty  
 (3) well?  
 (4) A They know each other  
 (5) Q Well on a typical year how many seals would the people  
 (6) from the village take?  
 (7) A Prior to 89 I would have to estimate because I don t  
 (8) know that every tme a seal is taken I know people that take  
 (9) considerably more seals than others That s - like I say  
 (10) prior to 89 there was considerably more taken by those  
 (11) individuals than since 89  
 (12) Q Let s talk in a typical year How many seals would the  
 (13) village take?  
 (14) A I can t give you a number on that I could give you a  
 (15) range I think  
 (16) Q And you can t give me a number on how many seals were out  
 (17) there in the southwestern portion of Prince William Sound in a  
 (18) typical year either can you?  
 (19) A No no In that respect I could only relate what I am  
 (20) able to see  
 (21) Q But the ADF&G does keep statistics on how many seals are  
 (22) actually consumed by Chenega don t they?  
 (23) A I don t know that  
 (24) Q And the ADF&G does keep statistics on how many seals are  
 (25) out there in Prince William Sound don t they?

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- (1) A I don t know that either if they do or not I have never  
 (2) seen figures published on how many seals are in the Southwest  
 (3) District of Prince William Sound  
 (4) Q You haven t heard that ADF&G has found there s over a  
 (5) thousand of them out there after the spill?  
 (6) A No I haven t heard that I m not aware of that  
 (7) MR CLOUGH No further questions Your Honor  
 (8) MR PETUMENOS I have no redirect  
 (9) THE COURT You can step down sir Thank you very  
 (10) much  
 (11) MR STOLL We d call Mike Goodwin  
 (12) MR CLOUGH Your Honor you had offered us a break  
 (13) here perhaps taking Mr Goodwin out of order might be an idea  
 (14) as well  
 (15) THE COURT You re asking for a break?  
 (16) MR CLOUGH You d wanted me to speak with the  
 (17) witness I believe  
 (18) THE COURT Oh that s right you re right Excuse  
 (19) me  
 (20) THE CLERK Please rise This court stands in  
 (21) recess  
 (22) (Jury out at 9 45 a m )  
 (23) (Recess from 9 45 a m to 10 06 a m )  
 (24) THE CLERK Please rise This court now resumes its  
 (25) session

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- (1) Please be seated  
 (2) THE COURT Yes counsel  
 (3) MR CLOUGH Your Honor we did have an opportunity  
 (4) Mr Stoll and I to speak to Mr Goodwin out in the -  
 (5) THE COURT I can barely hear you  
 (6) MR CLOUGH That s unusual  
 (7) THE COURT Yes it is unusual  
 (8) MR CLOUGH - out in the hallway I still would  
 (9) like to maintain my objection based on the information that we  
 (10) obtained from Mr Goodwin  
 (11) If I could ask Mr Goodwin to step out -  
 (12) THE COURT Sure  
 (13) MR CLOUGH No offense to you that s a requirement  
 (14) we have to do for the argument  
 (15) It s my understanding the representation was that he was  
 (16) not being called for 1990 oiling issues instead just on this  
 (17) thing about resources The witness has told us that he only  
 (18) met with Mr Harrison once in the course of the two years it  
 (19) was a large meeting with a number of other agencies He did  
 (20) say however that he was stationed on the principal spill  
 (21) response vessel throughout 1990 worked extensively on that  
 (22) He said his request for resources for the most part went  
 (23) through his department His department thereafter took them  
 (24) up  
 (24) with Exxon That was principally how he dealt with resources  
 (25) He did say there may be some instance where he talked with

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- (1) Exxon but mostly it was through his own department that that s  
 (2) how those requests were resolved  
 (3) It appears to me it s a pretty clear case they re trying to  
 (4) get the guy to talk about 1990 oiling issues This is a topic  
 (5) that they listed him on the witness list Presumably they were  
 (6) aware of what he did in 1990 they chose not to put him on as  
 (7) part of the direct case and now he s – also the topic of  
 (8) resources he said the problem the time frame the difficulty  
 (9) getting resources was in 89 that s when most of the problems  
 (10) were he specified the months of June July Said by August  
 (11) September of 1989 more resources were coming through This  
 was  
 (12) the stuff he was requesting through his department  
 (13) This seems to me to get a quick hit on Kodiak oiling in  
 (14) 1990 If they d done it as part of the direct case we d spent  
 (15) less time responding to it than we ve had to spend objecting to  
 (16) it  
 (17) The problem is I m left with almost an impossibility of  
 (18) responding to it It s coming up on rebuttal They could very  
 (19) well have put in 1990 I could have responded to it through  
 (20) cross and direct in just a few minutes and now quite frankly  
 (21) I m at a loss to respond to it  
 (22) MR STOLL Your Honor the purpose of us calling  
 (23) Mr Goodwin is not for the oiling issue but the resources  
 (24) issue  
 (25) THE COURT Your purpose in calling him is to show

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- (1) that Exxon did not have an unlimited checkbook?  
 (2) MR STOLL Well it s –  
 (3) THE COURT What happens then?  
 (4) MR STOLL It s that and not responding Your  
 (5) Honor  
 (6) Mr Clough is correct that a number of his requests were  
 (7) through his department but he also says he had direct  
 meetings  
 (8) with Exxon during 1989 and 1990 when he requested that they  
 get  
 (9) more vessels there He described to Mr Clough how in 1989  
 (10) they had one little rubber boat with an engine that sometimes  
 (11) worked to go around to the beaches and it was a problem and  
 he  
 (12) made the request directly to Mr Harrison for a – for vessels  
 (13) after he was unable to get vessels through the local Kodiak  
 (14) person who was a Mr Peavey and those requests continued in  
 (15) 1990  
 (16) He also said which I agree with Mr Clough that by August  
 (17) or September – or maybe September or later – that resources  
 (18) appeared to be getting better but the fact of the matter was  
 (19) that they didn t go in there as Mr Harrison said and do  
 (20) whatever was necessary and just clean it up That just didn t  
 (21) happen  
 (22) MR CLOUGH I believe that –  
 (23) THE COURT Counsel I just don t see this as a  
 (24) legitimate rebuttal testimony I simply don t see it that way  
 (25) and to the extent it impeaches Mr Harrison on one reasonably

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- (1) minor part of his testimony I just – I don t see a purpose  
 (2) for putting it in except to create a prejudice for defense  
 (3) MR STOLL Well Your Honor what if we kept it just  
 (4) to 1989? I mean I m not – the point is is that  
 (5) Mr Harrison – they made this big point about we did whatever  
 (6) it took to solve this problem  
 (7) THE COURT And I don t – frankly counsel I don t  
 (8) think your proposed evidence shows to the contrary I mean  
 (9) what does it show? It shows that there were bureaucratic  
 (10) hassles in a monstrous cleanup It – it s reasonably  
 (11) unpersuasive on the grand scale of things but its purpose is  
 (12) simply to somehow impeach Mr Harrison and to – and to  
 (13) criticize Exxon for the cleanup which is really – I mean  
 (14) the – the way this monstrous cleanup was handled is not the  
 (15) issue in this case is it?  
 (16) MR STOLL Well Your Honor they ve made it the  
 (17) issue though –  
 (18) THE COURT You ve all made many issues in this case  
 (19) that you should not have done It goes across  
 (20) plaintiff/defendant line We ve all tried this case in ways  
 (21) that could be criticized because they are – they re simply  
 (22) your presentations have been to try and shed – to cause  
 (23) prejudice for Exxon in ways in cosmic ways and their  
 (24) presentation has been to show they re such wonderful people  
 I  
 (25) mean that s just what happens in a trial

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- (1) This is a limited rebuttal point and it s not proper  
 (2) rebuttal The man cannot testify Let s go on to the next  
 (3) one  
 (4) MR DIAMOND Your Honor can we return to Mrs Groh?  
 (5) I ve shared the –  
 (6) MR PETUMENOS Just a minute Just a minute Judge  
 (7) I m not sure we re going to get to Mrs Groh today Can we do  
 (8) them in order?  
 (9) THE COURT Who s next who s next? Yes the answer  
 (10) is yes  
 (11) MR PETUMENOS Mr Wallace is next  
 (12) MR DIAMOND Not on the witness list  
 (13) MR PETUMENOS What?  
 (14) THE COURT You surprised counsel for the first time  
 (15) today  
 (16) MR PETUMENOS He s on today s witness list  
 (17) MR DIAMOND Yes on today s witness list not on the  
 (18) witness list filed in April not on the witness list filed in  
 (19) June not on the witness list filed in July But on today s  
 (20) witness list  
 (21) THE COURT I see  
 (22) MR PETUMENOS I think we talked to the Court about  
 (23) this before but I can t remember  
 (24) Mr Wallace is the appraiser for Seal Bay I received a  
 (25) Seal Bay appraisal when I – for the first time during the



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- (1) trial when I realized the issue Exxon was making of the Seal
- (2) Bay transaction If you will recall what this testimony goes
- (3) to there s a chart that Exxon has created it has Seal Bay and
- (4) Kachemak Bay transaction different colors and very large bars
- (5) at the end and this went to the issue of whether there s a
- (6) market for natural land
- (7) The appraiser for Seal Bay is going to talk about the Seal
- (8) Bay appraisal process how he interrelated with the government
- (9) the issue of highest and best use and the highest and best use
- (10) that he found in that particular transaction and how it relates
- (11) to the government being - government transactions being used
- (12) as comparables to demonstrate that there is a market for
- (13) natural land
- (14) The next two witnesses Mr Wallace and Mr Seldin are
- (15) addressing the natural land highest and best use issues
- (16) That s why they follow in tandem I have about a 20-minute
- (17) direct for Mr Wallace to establish that and we ll be on to the
- (18) next point
- (19) THE COURT Thank you
- (20) MR DIAMOND Your Honor it s - I understand
- (21) Mr Wallace is a paid expert recently retained by the
- (22) plaintiffs never on an expert witness list no expert
- (23) discovery obviously no discovery at all
- (24) THE COURT He did an appraisal on the land didn t
- (25) he?

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- (1) MR DIAMOND Not for anybody in this courtroom He
- (2) did an appraisal at the request of the trustees in connection
- (3) with the Seal Bay/Tonki Cape transaction
- (4) Your Honor that - but the fact is I think he is being
- (5) called at least to present pseudo expert testimony on natural
- (6) lands and other things If he is he clearly should be
- (7) stricken because we ve had no opportunity to conduct any
- (8) discovery of him as an expert
- (9) To the extent he s a lay witness and he has something to
- (10) offer in this case it was the plaintiffs who put this
- (11) transaction into issue and I ll show you Plaintiffs 1182 in
- (12) evidence This -
- (13) THE COURT That s a bewildering document
- (14) MR DIAMOND What s that?
- (15) THE COURT That s a bewildering document
- (16) MR DIAMOND This is a list of comparables Dr Mundy
- (17) used in coming up with his \$950 per acre amount for natural
- (18) lands and he talked about the Seal Bay transaction being a
- (19) transaction on which he was basing his judgment that natural
- (20) lands go for 950 an acre and he testified - could I ask that
- (21) the witness be excused if he is present?
- (22) THE COURT Yes Is he here?
- (23) MR PETUMENOS I don t see him
- (24) MR DIAMOND He testified about this at page 2616 of
- (25) his direct testimony They had every opportunity to talk about

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- (1) the Seal Bay/Tonki Cape transaction in their case in chief and
- (2) in fact did
- (3) We haven t heard any specifics as to what Mr Wallace is
- (4) going to talk about But to the extent that this is an
- (5) appropriate or inappropriate comparable the burden was on
- (6) the
- (7) plaintiffs when they were putting on their case as to whether
- (8) this was an appropriate comparable The only testimony that
- (9) was elicited by the defense in this case was Mr Roddewig s
- (10) testimony that Seal Bay was a post-oil spill transaction
- (11) And that it was funded by the trustees \$900 million and
- (12) therefore it didn t show a negative impact on the real estate
- (13) market In fact it showed a positive impact on the real
- (14) estate market and I believe Mr MacSwain s testimony that the
- (15) reason they didn t use Seal Bay transaction as a comparable
- (16) was
- (17) because Seal Bay was essentially a timber parcel and it was
- (18) valued for its timber value not because it was natural or
- (19) preservation land
- (20) But once again we have a situation if - as I expect -
- (21) this witness is being called in a pseudo expert capacity to
- (22) testify that yes you can use the Seal Bay transaction to make
- (23) a judgment about the value of natural lands something that
- (24) should have been put in the plaintiffs case not on rebuttal
- (25) when we re not in a position to really respond to it
- (26) And additionally this should have been coming in through
- (27) somebody who s qualified as an expert He s going to render
- (28) an

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- (1) opinion this is a legitimate comp for an MAI real estate
- (2) appraiser to use He should have been designated as an
- (3) expert We have the same situation I confronted with the
- (4) Mr Hancock s and the others who were not allowed to provide
- (5) expert testimony
- (6) THE COURT I understand your objection counsel
- (7) MR PETUMENOS Can I focus the discussion a little
- (8) bit more Judge?
- (9) THE COURT First focus on whether or not he s an
- (10) expert
- (11) MR PETUMENOS He is an expert in the sense he is an
- (12) appraiser and did an appraisal in the past If you will
- (13) recall Exxon called to the witness stand a very effective
- (14) witness in the form of Norm Lee who testified that this natural
- (15) lands business was not accepted by the federal government
- (16) that
- (17) nobody accepts it and Mundy s out to lunch and it doesn t
- (18) happen in the real world And this witness is being called on
- (19) that subject to talk about what actually happened in the Seal
- (20) Bay transaction
- (21) THE COURT What s he going to say now?
- (22) MR PETUMENOS What he s going to say happened is
- (23) that he came - the Seal Bay transaction was one in which the
- (24) purchase price was agreed upon and negotiated prior to the
- (25) appraisal process and the appraisal process was done later
- (26) He
- (27) was hired by the trustees to determine whether the value was

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- (1) within the bounds of the appraisal process
- (2) If you remember during the – the back and forth between
- (3) Mr Diamond and I with Norm Lee we asked some questions about
- (4) whether it was nomenclature whether it was semantics –
- (5) THE COURT Yes I remember that
- (6) MR PETUMENOS – or whether it was real
- (7) THE COURT I remember that yes
- (8) MR PETUMENOS And I wished to talk about a real
- (9) world experience between the appraiser and the government as to
- (10) exactly how that came about and how they arrived at value in
- (11) which we believe our version of the facts – which is that the
- (12) government requires you to change some words and change the
- (13) different approach but everybody understands that the values
- (14) are coming out in a natural land way for similar properties
- (15) that are sold that are bought and sold for parks
- (16) THE COURT That s it? That s what the testimony s
- (17) limited to?
- (18) MR PETUMENOS That s correct He s going to talk
- (19) about the back-and-forth between the government appraisers and
- (20) how all that worked and what he found in the course of the
- (21) appraisal what were the most valuable comps and how he
- (22) explained that to the government and how they responded and all
- (23) that
- (24) We re going to discuss that as a rebuttal to Mr Lee who is
- (25) leaving the impression with the jury that this whole natural

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- (1) land concept is out to lunch and nobody accepts it and it never
- (2) comes out that way
- (3) THE COURT Tell me why he was never on a witness
- (4) list
- (5) MR PETUMENOS He was never on the witness list
- (6) because Norm Lee was not – was somebody who had never been
- (7) deposed He was someone who as the Court recalls was a
- (8) federal employee that became retired nobody deposed We had a
- (9) lot of litigation from our side over what he d be allowed to
- (10) testify to and he basically got in I think 90 percent of what
- (11) Exxon wanted him to testify to with respect to both the natural
- (12) lands issue and how governments react to appraisals and so
- (13) forth
- (14) We tried – we interviewed him informally but that informal
- (15) interview did not result – wasn t a deposition couldn t force
- (16) the answers did not result in complete disclosure on our side
- (17) of what was going to happen in the courtroom – I can tell you
- (18) and when we learned you know after what happened what
- (19) went – what the import of the testimony was we began our
- (20) investigation and inquiry to try to determine what appraisers
- (21) on the other side of the transaction like Norm Lee what their
- (22) experience was because Mr Lee was a – was a parks appraiser
- (23) and I think this is proper rebuttal to Mr Lee s testimony that
- (24) the natural lands conservation theory is out to lunch that
- (25) it s not accepted by the government That s not the whole

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- (1) story
- (2) THE COURT I see Thank you counsel
- (3) MR DIAMOND Your Honor Norm Lee is a good example
- (4) Number one Mr Petumenos asked Mr Lee about the Seal
- (5) Bay/Tonki Cape transaction he knew nothing about it He said
- (6) I don t know anything about that transaction and pulled the
- (7) deposition – I mean the trial transcript if you want to see
- (8) that
- (9) Norm Lee was not allowed to testify in any way shape or
- (10) form as an expert You remember the only reason he got to
- (11) testify –
- (12) THE COURT That s right but he was allowed to say
- (13) what the policies of the government were relating to natural
- (14) lands right?
- (15) MR DIAMOND He was which is nothing new We ve had
- (16) Mr Roddewig and Mr Dorchester talking in deposition two
- (17) ago about the problems with the natural land theory is that
- (18) government appraiser –
- (19) THE COURT That may be well so counsel Here you
- (20) have a government witness who s worked for the government
- (21) purporting to speak government policy slightly different than
- (22) two experts arguing about – arguing about whether or not these
- (23) policies are in effect This is – this – it s true he was
- (24) an effective witness
- (25) MR DIAMOND We ve had interviews Mr MacSwain

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- (1) conducted interviews disclosed to the plaintiffs a year ago of
- (2) Mr Rice who works for the government a whole host –
- (3) Mr Lattery who works for the government he testified about
- (4) this in court They knew our position was going to be and has
- (5) been consistently that one of the problems with the natural
- (6) land theory is that government appraisers don t buy it and
- (7) that s not a surprise
- (8) The problem here is that on notice of that they chose not
- (9) to list this fellow as a witness expert or lay Had they
- (10) listed him one way or another we would have had an opportunity
- (11) to depose him take some discovery go into the files
- (12) How do we know at this juncture what conversations he had
- (13) with anybody at the government? How do we know what s in the
- (14) files about what positions the government took? He s going to
- (15) be representing conversations that we have never had an
- (16) opportunity to explore and simply because they didn t put him
- (17) on the witness list when they knew this was going to be an
- (18) issue They ve had other witnesses who have been prepared to
- (19) talk expert witnesses who have been prepared to talk about
- (20) what government policies are
- (21) I m not saying this is not relevant testimony I m just
- (22) saying this is testimony by ambush that you know if they
- (23) wanted to put on somebody who could purport to represent what
- (24) government agencies do he should have been listed so that he
- (25) would have been a fair target for discovery That has been the

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- (1) consistent rule here
- (2) Even – even the Lees we had to disclose information
- (3) about I haven't even had an opportunity to talk to
- (4) Mr Wallace because when we approached him he said he was
- (5) retained as an expert by Mr Petumenos and it would be
- (6) prejudicial to his client's interest I assume CAC to talk to
- (7) us
- (8) We've had no opportunity for discovery no opportunity to
- (9) look at his files
- (10) THE COURT When did you try to talk to him?
- (11) MR DIAMOND When did –
- (12) THE COURT When did you try to talk to him?
- (13) MR DIAMOND Last week
- (14) THE COURT Why didn't you bring this issue to me last
- (15) week?
- (16) MR DIAMOND Your Honor it was scheduled for hearing
- (17) on Friday We didn't get to Mr Wallace
- (18) THE COURT The issue of whether or not he should talk
- (19) to you or the issue of whether or not discovery should be
- (20) taken you could have brought it up and could have been
- (21) decided
- (22) in five seconds and I would have decided it somehow in your
- (23) favor
- (24) MR DIAMOND Your Honor we have been trying to talk
- (25) about witnesses who are not on witness lists who they have
- (26) designated since Tuesday of last week We've all been in

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- (1) trial you and the plaintiffs and defense counsel as well The
- (2) burden here is on the plaintiffs why you should make an
- (3) exception
- (4) THE COURT They've already shown me I should make an
- (5) exception The question is how I protect you That's the way
- (6) I see it How I would have protected you last week is I would
- (7) have said one he's got to – got to be interviewed and if he
- (8) won't be interviewed he's got to be opposed That's what I
- (9) would have said last week
- (10) You put me at a disadvantage here now because – because
- (11) this is the last two days of trial and – and what that does is
- (12) it puts pressure on me to say Oh the witness can't testify
- (13) because the defense hasn't been allowed to depose him
- (14) If – well they could have deposed him if they'd asked me
- (15) timely that's the problem
- (16) MR DIAMOND Your Honor I did not think – I did not
- (17) think to ask you for discovery because I thought the
- (18) appropriate remedy here is he doesn't testify and maybe I
- (19) made
- (20) a misjudgment about that
- (21) THE COURT I disagree He's going to be –
- (22) MR DIAMOND Perhaps the remedy is put him on the
- (23) list for tomorrow and give us an opportunity this afternoon to
- (24) talk to him
- (25) MR PETUMENOS Well Judge first of all this
- (26) witness was on the witness list I think Mr Stoll tells me

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- (1) ten days ago 11 days ago
- (2) THE COURT You put him on a witness list 11 days
- (3) ago?
- (4) MR STOLL Your Honor we put him on a week ago
- (5) Friday – week ago Saturday excuse me
- (6) MR PETUMENOS As to counsel's other arguments you
- (7) remember that Mr Lee testified that he took – he had notes
- (8) and so forth with respect to the federal work that he did and
- (9) so forth We were in the exact same position
- (10) THE COURT True
- (11) MR PETUMENOS We couldn't get those notes we
- (12) couldn't find them Our investigation revealed there were a
- (13) number of witnesses who were prepared to absolutely
- (14) contradict
- (15) Mr Lee's statement and they were federal employees and the
- (16) solicitor general said we could not have them in the process
- (17) under the subpoena
- (18) We were under the same disability of Mr Lee testifying to
- (19) notes he took and federal files I made those arguments to the
- (20) Court and the Court determined that the testimony should go
- (21) forward Plus I'm getting very concerned about my – I had a
- (22) schedule today that would have gotten us through this rebuttal
- (23) on time and we're losing a lot of time with these – with these
- (24) late objections and I'd ask to put the witness on at this
- (25) time
- (26) THE COURT Anything else counsel?

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- (1) MR DIAMOND No
- (2) THE COURT I'm going to let him testify I mean if
- (3) you had asked me last week counsel I'd found some
- (4) appropriate
- (5) things to get you the information you want but it's just – I
- (6) can't strike a witness because you've been dilatory in coming
- (7) to the Court and getting the things you say you need
- (8) Now I'm not sure you need them frankly but I would have
- (9) done something I would have gotten him in here I would have
- (10) made sure you were able to talk to him But now I'm at a total
- (11) disadvantage in the last two days of the case And he's a
- (12) legitimate rebuttal witness
- (13) MR DIAMOND If I understand it what we're dealing
- (14) with in terms of the scope of his testimony is his interactions
- (15) with the government people on Seal Bay Tonki Cape
- (16) THE COURT That's right His interactions with
- (17) them And we're talking about facts here counsel we're not
- (18) talking about opinion right?
- (19) MR PETUMENOS We're talking about facts we're
- (20) talking about opinions that he reached in that other matter and
- (21) how he conveyed them and opinions in the past We're not
- (22) talking about opinions in this case or –
- (23) THE COURT We are not talking about his opinion
- (24) analysis of what governmental policy is what we are talking
- (25) about is what was done not what – what expert conclusions he
- (26) drew right?

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- (1) MR PETUMENOS Yes so long as I don't get overly -  
 (2) overly pinned down because what opinions and conclusions  
 he  
 (3) drew in that matter he communicated to the federal government  
 (4) as a matter of fact and they - there were adjustments made  
 (5) That's what I want to get into  
 (6) THE COURT What - the talks were back and forth is  
 (7) not what I'm skeptical about it's whether he comes on and  
 (8) says This is all I took into account and this is my expert  
 (9) opinion I mean whether he does that implicitly or  
 (10) explicitly I think that's expert testimony You say he's not  
 (11) an expert witness He says he is apparently to Mr Diamond  
 (12) anyway He is not an expert witness He's a fact witness got  
 (13) it?  
 (14) MR PETUMENOS I got it except that he's a fact  
 (15) witness as to an expert appraisal that he gave before  
 (16) THE COURT Yes And he can describe the fact that he  
 (17) did the appraisal  
 (18) MR PETUMENOS Right May I call him?  
 (19) THE COURT Yes  
 (20) Well may I call the jury?  
 (21) MR PETUMENOS Are they still here?  
 (22) THE COURT They're out in the hall yes Bring them  
 (23) in  
 (24) MR DIAMOND We still have Mrs Groh at some point to  
 (25) resolve

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- (1) MR STOLL Your Honor thank you for letting me go  
 (2) early on Friday  
 (3) (Discussion off record )  
 (4) (Jury in at 10 29 a m )  
 (5) THE COURT All right the jury is present go ahead  
 (6) MR PETUMENOS Your Honor the plaintiffs call as the  
 (7) next witness Mr William Wallace  
 (8) MR PETUMENOS Take the stand right there and clip  
 (9) the microphone onto your tie  
 (10) THE CLERK Sir can you stand raise your right hand  
 (11) for the oath please?  
 (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 William B Wallace  
 (16) THE CLERK Please spell your last name  
 (17) A W a l-l-a c e  
 (18) THE CLERK And your occupation?  
 (19) A I'm a consulting forester  
 (20) THE CLERK Thank you  
 (21) DIRECT EXAMINATION OF WILLIAM WALLACE  
 (22) BY MR PETUMENOS  
 (23) Q Mr Wallace good morning  
 (24) A Good morning  
 (25) Q Tell the jury where you work

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- (1) A I work for International Forestry Consultants firm in  
 (2) Bellevue Washington  
 (3) Q Could you tell us a little bit about your background and  
 (4) education please?  
 (5) A I'm a graduate forester have a bachelor of science degree  
 (6) from the University of Idaho I have a master of forestry and  
 (7) forest economics from the University of California I've been  
 (8) employed for - in the forestry and land appraisal profession  
 (9) for about 39 years 30 years with Crown Zellerbach Corporation  
 (10) and seven years as an independent consultant fee appraiser  
 (11) Q You have not been retained as an expert appraiser by any of  
 (12) the plaintiffs in this case to evaluate the damage to the lands  
 (13) related to the oil spill have you?  
 (14) A No I have not  
 (15) Q And you have been asked - you've asked to be  
 compensated  
 (16) for your time to come in and testify away from your business  
 (17) but other than that you have not been an expert retained by our  
 (18) side have you?  
 (19) A That's correct  
 (20) Q And there came a time when the trustees as the jury  
 (21) understands who they are came to you and asked you to  
 conduct  
 (22) an appraisal of the Seal Bay area do you know that?  
 (23) A Yes  
 (24) Q And you're the person that did that appraisal?  
 (25) A The request came from the Department of Natural Resources

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- (1) state of Alaska  
 (2) Q When was that appraisal prepared?  
 (3) A During the summer months of 1993  
 (4) Q Tell us what your involvement in that appraisal was  
 (5) A I was the lead appraiser  
 (6) Q And could you describe the process by which - first of  
 (7) all did the parties - who were the buyers and sellers in that  
 (8) transaction?  
 (9) A I understood that the state of Alaska was the buyer for  
 (10) the record and the sellers were the - the joint venture the  
 (11) Seal Bay Timber Company  
 (12) Q Were there Native corporations essentially that were the  
 (13) sellers?  
 (14) A Yes yes  
 (15) Q And could you describe then did the parties - had the  
 (16) parties agreed upon a price prior to the appraisal that you  
 (17) conducted?  
 (18) A Yes they had  
 (19) Q And what was the purpose of the appraisal?  
 (20) A The appraisal was a condition of the purchase agreement  
 (21) that had been reached Apparently if the appraisal came in at  
 (22) least as high as the agreed price or higher the transaction  
 (23) would go through If it came in something lower the seller  
 (24) had the option to back out - or excuse me the sellers -  
 (25) well I'm a bit confused

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- (1) But there was a – there were contingencies depending on  
 (2) whether the appraisal was higher or lower or at least equal to  
 (3) the purchase price  
 (4) Q Was it like striking a deal to buy a house subject to the  
 (5) appraisal that sort of thing?  
 (6) A That s correct  
 (7) Q Could you describe what the process was in the appraisal  
 (8) that you went through prior to its getting through to final  
 (9) approval?  
 (10) A Well my associate and I examined the property We then  
 (11) conducted a search of records and other people s files to  
 (12) determine data that was available that had a bearing on the  
 (13) question of the value of the property We did a – an analysis  
 (14) and prepared a report So according to the conclusion we  
 (15) reached –  
 (16) Q Did you come to a conclusion at some point during your  
 (17) appraisal as to what the best sales comps were for appraising  
 (18) this property?  
 (19) A Yes That conclusion was reached sort of step-wise as we  
 (20) went along In the process of doing the appraisal we worked  
 (21) closely with the review appraisers for the state of Alaska  
 (22) reviewing with them the data that we had found and our  
 (23) approach  
 (24) Q And tell the jury what you concluded were the best sales  
 (25) comps and the best highest and best use designation that you

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- (1) could come up with at first when doing this appraisal  
 (2) A My first conclusion was apparently the highest and best use  
 (3) was the preservation of the property possibly in public  
 (4) ownership for the preservation of the natural resources to  
 (5) prevent their exploitation  
 (6) Q All right And what you called it in that particular  
 (7) instance was what what was the term you used for that?  
 (8) A Prevention of their exploitation of the natural resources  
 (9) preservation  
 (10) Q Preservation lands?  
 (11) A Yes  
 (12) Q And is that a similar term to natural lands or conservation  
 (13) lands?  
 (14) MR DIAMOND I ll object Your Honor Beyond the  
 (15) scope  
 (16) MR PETUMENOS I m merely trying to explore what he  
 (17) means by the term  
 (18) THE COURT I ll allow it  
 (19) Go ahead  
 (20) A I would say it s essentially the same concept yes  
 (21) Q When you came to that conclusion that was the best way to  
 (22) evaluate the land what kinds of sales comps were you looking  
 (23) at?  
 (24) A I was looking at a – at an array of sales comps that  
 (25) included both private transactions and a number of transactions

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- (1) in which the purchaser was a public agency  
 (2) Q And describe that for the jury what kinds of public agency  
 (3) transactions were you looking at?  
 (4) A Well it seemed that the state of Alaska was – was one of  
 (5) the major purchasers The Fish & Wildlife service was also a  
 (6) purchaser U S Fish & Wildlife Service U S Forest Service  
 (7) was a purchaser as I believe the Park Service  
 (8) Q Did you conduct some inquiry on your own in connection  
 with  
 (9) this appraisal as to whether using that highest and best use  
 (10) and using those sales comps was in compliance with the  
 USPAP  
 (11) and the federal appraisal standard acquisition standards?  
 (12) MR DIAMOND Objection Your Honor Calls for expert  
 (13) testimony  
 (14) MR PETUMENOS This is something he actually did  
 (15) Judge  
 (16) THE COURT Yes he can testfy  
 (17) Go ahead  
 (18) A I reviewed USPAP and I felt that within USPAP there was  
 (19) reason to – to interpret those standards as requiring me to at  
 (20) least consider those transactions I also looked into the  
 (21) language of the federal appraisal manual and discussed the  
 (22) provisions in that manual with the review appraiser at the  
 (23) state of Alaska and investigated the provisions within that  
 (24) manual for departure for unique condituons  
 (25) And it was my opinion that the situation we had at least

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- (1) with respect to the appraisal that I was doing was unique  
 (2) Q In what respect?  
 (3) A In that the public agencies were acting as major  
 (4) participants in what could be categorized as a free and open  
 (5) market  
 (6) Q So you found that there was a market for those kinds of  
 (7) lands?  
 (8) A Yes  
 (9) Q And then did you have a discussion with the governments  
 (10) about your conclusions in that regard?  
 (11) A We had ongoing discussions as the – as the appraisal was  
 (12) done Work papers interim materials were submitted It was  
 (13) my – it was my feeling that we were going along on that track  
 (14) and that it was acceptable I was somewhat surprised to learn  
 (15) that when a – what was to be a draft was submitted and then  
 (16) submitted for review by federal agencies that they found it  
 (17) unacceptable  
 (18) Q All right And did you think it was unacceptable?  
 (19) MR DIAMOND Objection Your Honor This calls for  
 (20) expert –  
 (21) THE COURT Sustained sustained  
 (22) BY MR PETUMENOS  
 (23) Q Did you have discussions with the governments about their  
 (24) point of view and your point of view?  
 (25) A Not at that – I had discussions with my client the state

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- (1) of Alaska I did not have discussions with the other
- (2) government agencies
- (3) Q All right And as a consequence of those discussions how
- (4) did you rewrite your appraisal?
- (5) A I - I agreed and it seemed to be acceptable to the
- (6) governmental agencies to stratify the evidence that I had to
- (7) analyze into private transactions and transactions involving
- (8) purchase by a government agency to redo the analysis looking
- (9) at each of those stratifications and to modify the conclusion
- (10) of highest and best use
- (11) We then reached a conclusion of value based on essentially
- (12) only the evidence from the - what I call the primary evidence
- (13) which was the private transactions
- (14) I felt that I was obligated to report and to show some
- (15) analysis of the public transactions and they seemed to
- (16) substantiate the value conclusion reached in the private
- (17) Q And did you tell the government that you thought that the
- (18) public transactions were still the best comparables that should
- (19) be used?
- (20) A Yes I did
- (21) Q Now when you say the government was acting as a market
- (22) participant in this particular instance what do you mean?
- (23) A I mean that they were involved in - actively involved in
- (24) the purchase of wild lands in a role that did not involve
- (25) the - a threat of condemnation and were in fact in competition

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- (1) with other potential buyers of such properties
- (2) MR PETUMENOS May I have a moment to confer with
- (3) counsel?
- (4) THE COURT Yes
- (5) (Discussion off record between counsel)
- (6) BY MR PETUMENOS
- (7) Q And in addition did you conduct an appraisal of the
- (8) subsurface lands?
- (9) A Yes I did
- (10) Q And why - why were you doing that?
- (11) A I was asked to do that by the client
- (12) Q For what purpose?
- (13) A I understood it to be for the purpose of negotiating a
- (14) purchase of the subsurface rights which were owned by a
- (15) different owner than the surface
- (16) Q They were owned by the regional corporation?
- (17) A Yes
- (18) Q That portion of the transaction has yet to close?
- (19) A That s my understanding
- (20) Q All right What was the reason that your client was
- (21) interested in purchasing the subsurface in this instance if
- (22) you know?
- (23) A I can generally presume that they wished to own the full
- (24) fee
- (25) Q Fee?

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- (1) A Fee ownership
- (2) Q For purposes of conservation?
- (3) A Yes
- (4) Q And in evaluating the subsurface estate did you have
- (5) discussions with the government about how that should
- (6) proceed?
- (7) A Yes
- (8) Q And what was your view as to the value of the subsurface
- (9) and how it should be approached?
- (10) A My statements to my client with respect to the subsurface
- (11) were that it was not possible for me to - to make the
- (12) compromise that I had with the surface estate that the only
- (13) evidence that I could find available in the marketplace was
- (14) transactions in which the government agencies were the
- (15) purchasers
- (16) Q For conservation purposes?
- (17) A Yes for -
- (18) Q Yes?
- (19) A For whatever purpose There were a number of purposes
- (20) other than conservation
- (21) Q Tell the jury why that was the case In other words you
- (22) didn t go into looking at - didn t try to go into looking at
- (23) how much could be mined and how many minerals were there
- (24) Tell
- (25) the jury why that was your approach to go into those
- (26) A My approach is as an appraiser and the evidence I rely on
- (27) is the activity that actually takes place in a marketplace It

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- (1) was apparent from the information that I got that there were
- (2) transactions that involved only subsurface rights and that
- (3) those were an indication of an active market.
- (4) Q Can you give us an example of a comparable that you looked
- (5) at that was like that?
- (6) A Oh I m sorry I didn t come prepared to discuss the
- (7) details
- (8) Q Did you look at Kachemak Bay?
- (9) A Kachemak Bay was one yes
- (10) MR PETUMENOS No further questions
- (11) CROSS EXAMINATION OF WILLIAM WALLACE
- (12) BY MR DIAMOND
- (13) Q Good morning Mr Wallace My name s Chuck Diamond
- (14) and I m
- (15) one of the lawyers representing Exxon
- (16) You had a lot of difficulty getting your appraisals
- (17) accepted by the government agencies in this transaction didn t
- (18) you?
- (19) A I don t know that I would characterize it as difficulty
- (20) I ve had similar experience before
- (21) Q To remind the jury this is the Seal Bay/Tonki Cape
- (22) transaction?
- (23) A Yes
- (24) Q What year?
- (25) A 1993
- (26) Q And this was the transaction by which the trustees Exxon

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- (1) Valdez Oil Spill Trustees purchased large acres in Kodiak?
- (2) A On Afognak Island
- (3) Q On Afognak Island
- (4) Your appraisal report I notice was dated May 1993?
- (5) A The - I believe the appraisal report itself was dated
- (6) September 1993 The effective date of the appraisal was May
- (7) 1993
- (8) Q The document I m looking at is appraisal of Seal Bay unit
- (9) DX16378 and the date on the cover at least says May 14?
- (10) A That s the date of valuation
- (11) Q Okay In August you submitted this for review to whom?
- (12) A To the State of Alaska Department of Natural Resources
- (13) Q And specifically was that to Mr Lattery?
- (14) A Yes
- (15) Q And tell us who Mr Lattery is
- (16) A Mr Lattery is the review appraiser for the state of
- (17) Alaska for the Department of Natural Resources State of
- (18) Alaska
- (19) Q Mr Lattery rejected your appraisal did he not?
- (20) A Mr Lattery informed me that it was not acceptable to the
- (21) other reviewers who represented the federal agencies as part
- (22) of the trust
- (23) Q Well Mr Lattery didn t tell you it was acceptable to him
- (24) did he?
- (25) A No he did not

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- (1) Q Mr Lattery had some problems with your appraisal
- (2) methodology didn t he?
- (3) A I suppose we could say they were problems yes
- (4) Q Well he took - he took exception to the way you had gone
- (5) about doing this appraisal didn t he?
- (6) A He - he felt that it did not comply with the contract
- (7) requirement that it - the provisions of the federal appraisal
- (8) manual be followed
- (9) Q And he felt that in part because you were categorizing
- (10) this land as natural land or some variant thereof correct?
- (11) A Yes
- (12) Q And the other problem he had with your appraisal was your
- (13) use of what the government paid in other transactions for
- (14) preservation land as an indication of the value of Seal Bay and
- (15) Tonki Cape?
- (16) A That s correct
- (17) Q And he made you go back and redo it?
- (18) A That s correct
- (19) Q And you did redo it?
- (20) A Yes
- (21) Q And in your revised report you classified the highest and
- (22) best use you re valuing as management of natural resources
- (23) correct?
- (24) A Yes
- (25) Q And management means management of timber and mineral

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- (1) resources?
- (2) A Whatever resources are there yes
- (3) Q And it was on that basis - well let me - and the other
- (4) change you made for Mr Lattery was that you agreed to use
- (5) private sales private transactions as the primary indications
- (6) of the value of this property didn t you?
- (7) A That s correct I testified to that
- (8) Q And it was on the basis of those changes that the Alaska
- (9) Department of Natural Resources accepted the appraisal?
- (10) A Yes
- (11) Q You know Judy Robinson don t you?
- (12) A I have spoken with her several times by telephone I never
- (13) met her
- (14) Q She too is a review appraiser for the department of
- (15) natural resources?
- (16) A That s correct
- (17) Q And she was given the task of reviewing your appraisal
- (18) after you modified it?
- (19) A She had that - that task yes
- (20) Q And that was in September of 1993?
- (21) A I believe so
- (22) Q I m going to show you a document on the Elmo it will be on
- (23) your television monitor This is - let me give you a copy
- (24) This is DX16379 It s a little bit easier to read
- (25) You ve seen this document before today have you not?

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- (1) A Yes
- (2) Q Did you see it in September or more recently?
- (3) A More recently
- (4) Q In this document Ms Robinson notes that the reason she
- (5) found or was willing to accept your revised appraisal was
- (6) because - if you turn to page 2 the first full paragraph she
- (7) wrote The revised report uses private transactions as primary
- (8) indications of value You see that?
- (9) A I m sorry what paragraph?
- (10) Q The first full paragraph
- (11) A First full paragraph yeah okay
- (12) Q And she communicated this to you didn t she?
- (13) A Yes
- (14) Q But in the next paragraph she says she still has
- (15) discomfort with your report
- (16) A Yes she says that
- (17) Q Now Mr Lattery from DNR and Ms Robinson from DNR were
- (18) not the only people who had problems with your appraisal isn t
- (19) that right?
- (20) A They re the only people who have communicated to me any
- (21) problems
- (22) Q Well you did - I think you told us in response to
- (23) Mr Petumenos questions that you also did a companion
- (24) appraisal of the subsurface rights?
- (25) A That s correct

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- (1) Q And that was submitted to the United States Department of  
 (2) Interior for review?  
 (3) A I - I don't know that It was submitted to the Department  
 (4) of Natural Resources State of Alaska and they may have  
 (5) submitted it for review to a number of -  
 (6) MR PETUMENOS If counsel has a foundation for that  
 (7) exhibit I'd like to have it laid before it's displayed to the  
 (8) jury  
 (9) BY MR DIAMOND  
 (10) Q Did you discuss your appraisal of the subsurface interest  
 (11) in Seal Bay with any representative of the federal government?  
 (12) A No I did not  
 (13) Q Were you advised by state representatives that they had  
 (14) submitted it to the federal government?  
 (15) A I don't recall that I was  
 (16) Q Were you advised by the state people that the federal  
 (17) representatives or that there was some problem with your  
 (18) appraisal of subsurface rights?  
 (19) A No I was not  
 (20) Q Never told that?  
 (21) A No  
 (22) Q To this day you've never heard that your appraisal was  
 (23) rejected?  
 (24) A That's correct  
 (25) Q Well then you haven't seen DX16380 before today I assume?

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- (1) A I've seen it before today but only recently  
 (2) Q You now know as you sit here today that your appraisal was  
 (3) reviewed by Department of Interior Fish & Wildlife Service  
 (4) people?  
 (5) MR PETUMENOS I'll object to foundation There's no  
 (6) foundation for the exhibit which counsel speaks  
 (7) MR DIAMOND He just said he's seen it before today  
 (8) MR PETUMENOS That isn't foundation for the document  
 (9) the fact that he's read it  
 (10) Would you like to see it Judge?  
 (11) THE COURT Yes  
 (12) MR DIAMOND Do you want to see my highlighted copy?  
 (13) (Bench Conference on the record)  
 (14) THE COURT So what do you want me to do?  
 (15) MR PETUMENOS Well Mr Diamond has been very  
 (16) effective throughout the trial in making sure I have a  
 (17) foundation for the document before it's testified to published  
 (18) to the jury This exhibit came over as a defense exhibit as a  
 (19) cross examination exhibit That's all right but there's no  
 (20) foundation whatsoever -  
 (21) MR DIAMOND I'm not going to move it into evidence  
 (22) I would like to publish it because I'd like to ask him some  
 (23) questions about it  
 (24) MR PETUMENOS It has to be admissible first before  
 (25) you publish it

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- (1) MR DIAMOND That's not been the rule we've been  
 (2) observing regularly  
 (3) MR PETUMENOS It certainly is because the Judge has  
 (4) made the ruling I think that exhibits are not sufficient  
 (5) value or portions of them that they don't go back to the jury  
 (6) room But first I've had to lay a rather elaborate foundation  
 (7) as I recall before I could publish it to the jury There is  
 (8) no foundation for the document no one to explain it what is  
 (9) meant by it or the reasons for it or whether it's the final  
 (10) word  
 (11) THE COURT Do you know how he's - I mean I don't  
 (12) know what examination you need with this document Do you  
 (13) know the facts about -  
 (14) MR DIAMOND Do I know the facts about the document  
 (15) or how much time he spent with it?  
 (16) THE COURT Yes  
 (17) MR DIAMOND Your Honor since I haven't been able to  
 (18) talk to him before today -  
 (19) THE COURT He clearly has seen it before  
 (20) MR DIAMOND He has seen it before I'm going to ask  
 (21) him there are statements in this document whether he still is  
 (22) of the view that his methodology is accepted by government  
 (23) appraisers He's basically rendered an opinion That was why  
 (24) he was called to bless natural land appraisals and say the  
 (25) government appraisal is accepted

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- (1) Now I think I'm - should be allowed to test that  
 (2) THE COURT This is Mr Lee's document?  
 (3) MR PETUMENOS Mr Lee was involved Counsel said  
 (4) earlier Mr Lee had nothing to do with the Seal Bay  
 (5) transaction That was in fact false He did have something  
 (6) to do with this as reflected in this document  
 (7) THE COURT Who wrote this document do we know?  
 (8) MR DIAMOND Yeah it's signed by the regional  
 (9) director of Fish & Wildlife  
 (10) THE COURT Where?  
 (11) MR DIAMOND Page two You're looking at an  
 (12) attachment to the letter  
 (13) MR PETUMENOS Whom we can't call Whom I wanted  
 (14) very much to call but he's unavailable  
 (15) THE COURT All right This is a serious enough issue  
 (16) that I think I'll let him explore it in some detail because  
 (17) this is a January 19th '94 document right?  
 (18) MR DIAMOND Right  
 (19) THE COURT I don't know the history of this this  
 (20) correspondence and -  
 (21) MR DIAMOND I'm not offering the document to prove  
 (22) the truth of the matter I'm going to direct him to certain  
 (23) portions of this and say does he still think that government  
 (24) appraisers will accept appraisals that have primary indications  
 (25) of value that are other government transactions does he think



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- (1) that government appraisers don't have a problem with the notion
- (2) of looking at market value with saying government makes the
- (3) market There are statements in here that contradict what he
- (4) was being offered to testify about
- (5) THE COURT You can ask those questions directly Do
- (6) you need the document to ask him that? If he says no maybe
- (7) you can use the document to refresh his recollection or
- (8) something like that right? The issue is whether or not you
- (9) get to use the document as it -- as a contrary witness then
- (10) without me exploring every single aspect of this
- (11) correspondence which I don't want to do right?
- (12) MR DIAMOND All right
- (13) MR PETUMENOS Plus Judge --
- (14) MR DIAMOND But the question is if I get a no
- (15) answer can I come back and use the document?
- (16) THE COURT Yes
- (17) MR PETUMENOS One more thing Judge I think the
- (18) offer of proof is misapprehended I called him for precisely
- (19) the point that the government --
- (20) THE COURT I know that I know that But that's for
- (21) argument right?
- (22) MR PETUMENOS I just don't think it's for
- (23) impeachment
- (24) MR DIAMOND Are we ships passing in the night
- (25) again?

- (1) A That's correct
- (2) Q Your experience is in forest products and forest
- (3) management?
- (4) A Not exclusively
- (5) Q But your area of specialization is in evaluating forest
- (6) land?
- (7) A That's correct
- (8) Q And timber management?
- (9) A Yes
- (10) Q Timber consulting?
- (11) A Yes
- (12) Q And the reason you were brought in to do this appraisal was
- (13) because a principal source of value on the Seal Bay land in
- (14) Kodiak was its timber?
- (15) A I don't know -- don't know the reason I was accepted I
- (16) presume my -- that our proposal was acceptable
- (17) Q It does break my heart to open a folder and find it empty
- (18) Excuse me for one minute Your Honor
- (19) Well I had it here a moment ago
- (20) MR PETUMENOS You want me to help you look for it?
- (21) BY MR DIAMOND
- (22) Q All right I'll try to wing it with you Mr Wallace
- (23) You did an evaluation in your appraisal of the value of the
- (24) timber?
- (25) A That's correct

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- (1) MR PETUMENOS A little bit
- (2) THE COURT How many times?
- (3) (Bench conference concluded)
- (4) BY MR DIAMOND
- (5) Q We were talking about your Seal Bay subsurface rights
- (6) appraisal Let me move from that to a more general question
- (7) In your dealings with government review appraisers it is
- (8) true is it not that they disagree with the notion that you
- (9) can look at a government purchase as an indication of value
- (10) and in effect have government transactions make the market?
- (11) A I'm sorry I --
- (12) Q Let me try to state it --
- (13) A Sounds like you asked me two questions
- (14) Q Let me try to state it more succinctly
- (15) In your dealings with government review appraisers on the
- (16) notion of what are appropriate comparables to look at you have
- (17) encountered government review appraisers who reject the
- (18) notion
- (19) that you can look at what the government pays for other
- (20) wilderness or park land as a benchmark of value for another
- (21) parcel of wilderness or park land?
- (22) A I would guess I would have to say yes to that
- (23) Q Seal Bay is heavily wooded is it not?
- (24) A Relatively so yes There's significant stand of
- (25) merchantable timber
- (26) Q You're from International Forestry Consultants?

- (1) Q On Seal Bay That was roughly 8 000 of the 17 000 acres?
- (2) A If that's what the report says yes That sounds
- (3) familiar
- (4) Q And you did an appraisal of the value of the entire --
- (5) entirety of the parcel timber and the rest of it?
- (6) A That's correct The appraisal that I did was of the
- (7) entirety The timber evaluation was done as a means of getting
- (8) to the appraisal of the entirety
- (9) Q Okay Let me show you page 9 of your appraisal report
- (10) And does that accurately summarize the conclusions you
- (11) reached?
- (12) A Yes
- (13) Q Okay Let's show this to the jury This is page 9 of
- (14) Exhibit 16378 And you found Seal Bay to be -- the Seal Bay
- (15) parcel to be worth in its entirety \$41 million?
- (16) A I believe that was my conclusion yes
- (17) Q And the value of the timber to a forestry products
- (18) company you found by doing complex calculations and
- (19) measurements and other things to be \$36 500?
- (20) A I -- 36 million
- (21) Q I'm sorry \$36 500 000?
- (22) A Yes
- (23) Q Correct?
- (24) A Yes
- (25) Q So a value of this land without its timber was worth -- and

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- (1) this is why I really do need my script sheet here - what
- (2) 5 500 000?
- (3) A I can't answer that question I didn't value the land
- (4) without the timber
- (5) Q Well if one were to subtract - and I just did it wrong -
- (6) the total value from what you have here as the timber value
- (7) you'd be left with \$4 500 000?
- (8) A Your arithmetic is correct
- (9) Q And if one were to divide that \$4 500 000 by the acres one
- (10) would get a per-acre value of \$262 an acre?
- (11) A Your arithmetic is correct
- (12) Q So the value one might get without the timber resources
- (13) would be \$260 per acre and change correct?
- (14) A One might conclude that I did not
- (15) Q The reason DNR accepted your appraisal of Seal Bay and
- (16) Tonki Cape was because of the value of the timber correct?
- (17) A I don't know that
- (18) Q Yes you do don't you?
- (19) A No I don't
- (20) Q No?
- (21) A They accepted the appraisal because it was done to
- (22) standards
- (23) Q Well the price that the trustees had already agreed to pay
- (24) was in the neighborhood of 37 million 37 38 ?
- (25) A I believe 38

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- (1) Q 38 million And so they needed an appraisal to support
- (2) that that showed the value of both Seal Bay and the Tonki Cape
- (3) parcel as being at least that right?
- (4) A That was my understanding
- (5) Q And Exhibit 16379 Mrs Robinson's review of your
- (6) appraisal noted - did it not on page 3 - after criticizing
- (7) your report that even if other techniques were used and other
- (8) fee appraisers consulted the value of the Seal Bay unit and
- (9) the Tonki Cape unit would still exceed 38 7 million She goes
- (10) on to explain why The estimated timber values are 36 5 and
- (11) 3 7 million respectfully
- (12) You've seen that before today?
- (13) A Yes
- (14) Q All right So the state concluded that the value of the
- (15) timber - forget the land The value of the timber on these
- (16) parcels in the commercial world to people who would pay real
- (17) money would be at least as much if not more than what the
- (18) state was agreeing to pay for this as preservation land
- (19) correct?
- (20) A Those figures don't seem to say that
- (21) Q Well if you add 36 5 and 3 7 don't you get more than -
- (22) A You're talking about the sum of the two
- (23) Q Don't you get that?
- (24) A That may well have been Mrs Robinson's conclusion may
- (25) well have been the state of Alaska's conclusion It was not my

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- (1) conclusion
- (2) Q Well it was the state of Alaska's conclusion as
- (3) represented by the document wasn't it?
- (4) A Yes I agree with that
- (5) Q And in fact didn't Ms Robinson conclude that if you
- (6) valued this similar preservation land without any timber -
- (7) I'll show you page 5 of her report If you valued it without
- (8) timber land it would only be worth \$262 per acre?
- (9) A I don't know that that's a conclusion of value That's -
- (10) that table shows the results of applying some arithmetic to the
- (11) figures that were included in the report and I don't know what
- (12) conclusion Mrs Robinson reached as a result of doing this
- (13) Q If Seal Bay and Tonki Cape didn't have valuable timber
- (14) stands the land value - according to this analysis - would
- (15) have only been four and a half million Do you have any reason
- (16) to believe that the trustees would have paid \$38 million for
- (17) properties that was worth four and a half million?
- (18) MR PETUMENOS I'll object to the form of the
- (19) question Judge
- (20) THE COURT Sustained The objection's sustained
- (21) BY MR DIAMOND
- (22) Q Do you have any reason to believe that the Exxon Valdez Oil
- (23) Spill Trustees would have paid \$38 million and change for land
- (24) the only value of which was four and a half million?
- (25) MR PETUMENOS I still object to the form of the

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- (1) question
- (2) THE COURT Sustained The objection's sustained
- (3) MR DIAMOND I have nothing further -
- (4) REDIRECT EXAMINATION OF WILLIAM WALLACE
- (5) BY MR PETUMENOS
- (6) Q Just a few questions
- (7) Tonki Cape what is that land like?
- (8) MR DIAMOND Beyond the scope Your Honor
- (9) MR PETUMENOS No it isn't
- (10) THE COURT Thanks counsel I appreciate it
- (11) MR DIAMOND I withdraw the objection because I've
- (12) been corrected
- (13) THE COURT Your objection's overruled
- (14) A Tonki Cape is a bit different from the Seal Bay portion of
- (15) the - the two properties which almost need to be viewed as
- (16) one property There is much less timber and what timber is
- (17) there is of significantly lower quality for commercial
- (18) purposes
- (19) Q And what did the seller require with respect to this Tonki
- (20) Cape parcel?
- (21) A My information about this whole transaction is a bit fuzzy
- (22) MR DIAMOND Objection hearsay
- (23) THE COURT Hold on Hold on
- (24) MR PETUMENOS With all of the information related
- (25) it's not hearsay because it's not offered for the truth of the

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- (1) matter it s a verbal act  
 (2) THE COURT Give me a question again  
 (3) BY MR PETUMENOS  
 (4) Q What do you understand that the seller required vis-a-vis  
 (5) selling one parcel as opposed to just the timber land as  
 (6) opposed to the Tonki Cape area?  
 (7) MR DIAMOND Your Honor either it s hearsay or it s  
 (8) not relevant I object as hearsay  
 (9) THE COURT I think it is hearsay The objection s  
 (10) sustained  
 (11) MR PETUMENOS One sentence to you?  
 (12) THE COURT Yes  
 (13) MR PETUMENOS The statement is not capable of being  
 (14) true or false It is a verbal act insofar as it set the terms  
 (15) of the transaction It is not hearsay because it -  
 (16) THE COURT I think you can make that argument  
 (17) counsel I don t think it s a legitimate argument and the  
 (18) objection is sustained  
 (19) BY MR PETUMENOS  
 (20) Q Did you - why was it that you were evaluating not just the  
 (21) timber but Tonki Cape as well?  
 (22) MR DIAMOND Objection irrelevant  
 (23) THE COURT Why is it he did what he did?  
 (24) MR PETUMENOS That s correct  
 (25) THE COURT Yes The objection s overruled

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- (1) A My understanding was that -  
 (2) MR DIAMOND Objection hearsay Your Honor we re  
 (3) back to where we started  
 (4) THE COURT I think we are It s going to be too  
 (5) tough to get my way through this thicket counsel that I don t  
 (6) want to excuse the jury Do you want me to excuse the jury?  
 (7) MR PETUMENOS I sure don t but if I can approach  
 (8) the bench -  
 (9) (Bench Conference on the record)  
 (10) MR PETUMENOS Just so you understand where I m  
 (11) going the cross examination established there was timber land  
 (12) and other kind of land The seller refused to sell this land  
 (13) without selling all of it which is - which is critical to the  
 (14) issue that we re talking about with respect to conservation  
 (15) lands  
 (16) THE COURT What you want to do is that the seller  
 (17) refused to sell it without selling all of it?  
 (18) MR PETUMENOS That s the idea  
 (19) THE COURT All right Ask him the direct question  
 (20) MR DIAMOND Your Honor I object to that as beyond  
 (21) the scope I never asked - this gets into what I didn t  
 (22) evaluating the uplands and glaciers apart from other portions  
 (23) The only thing we ve talked about is timber and this was -  
 (24) this was valued on the basis of its timber value  
 (25) THE COURT Well it s timber valuable timber land on

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- (1) one parcel one part of it and not so valuable on the other  
 (2) Isn t that what he just said?  
 (3) MR DIAMOND There s timber stands on both  
 (4) THE COURT One is of lower quality than the other  
 (5) MR DIAMOND That s right  
 (6) THE COURT That s what he just testified to Okay  
 (7) the objection is overruled  
 (8) MR DIAMOND So be it  
 (9) (Bench conference concluded)  
 (10) BY MR PETUMENOS  
 (11) Q It indicates that you evaluated all of the land including  
 (12) Tonki Cape because the seller of the property would not sell  
 (13) for conservation land just the value of the timber but wanted  
 (14) the entire parcel in the transaction?  
 (15) MR DIAMOND Objection hearsay  
 (16) THE COURT That objection is overruled  
 (17) A I was instructed to appraise the - both the Seal Bay and  
 (18) the Tonki Cape parcels because Tonki Cape was at least a  
 (19) contingent part of the entire transaction  
 (20) MR PETUMENOS I have no further redirect  
 (21) MR DIAMOND Nothing further  
 (22) THE COURT You can step down sir Thank you  
 (23) Counsel are we going to need a break before the next  
 (24) witness?  
 (25) MR OPPENHEIMER I think we will Your Honor

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- (1) THE COURT I ll send the jury out  
 (2) (Jury out at 11 10 a m )  
 (3) THE COURT All right Let s all sit down so it s  
 (4) quiet and I can concentrate on what the witness is saying  
 (5) MR OPPENHEIMER Your Honor -  
 (6) THE COURT Mr Diamond for a person who had such a  
 (7) terrible opportunity to prepare you did a reasonably good job  
 (8) on that witness  
 (9) MR DIAMOND But it could have been so much better  
 (10) Your Honor  
 (11) MR OPPENHEIMER Your Honor Mr Petumenos and I have  
 (12) resolved an enormous number of the exhibit problems We re  
 (13) down to I believe just two exhibits which will be used or  
 (14) proposed to be used  
 (15) THE COURT This is for -  
 (16) MR OPPENHEIMER This is for Mr Seldin yes I - I  
 (17) guess he s out of the courtroom  
 (18) We still have a problem Your Honor and I guess it would  
 (19) be - it s useful to go through it briefly because it has to  
 (20) do with the scope of the testimony The exhibits anticipating  
 (21) that we would have more exhibits to deal with Your Honor we  
 (22) had a book prepared but I only need to address one part of it  
 (23) here  
 (24) This was the bench copy of the full set We are down to  
 (25) Exhibit 10478A What that exhibit is is a bar chart of Alaska

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(1) remote property transactions It was used previously in  
 (2) Mr Roddewig s testimony and the two bars at the end were the  
 (3) 93 and 94 transactions of Kachemak and Seal Bay that we  
 (4) talked about  
 (5) The gravamen of the problem is that Dr Seldin is - was  
 (6) commissioned to undertake a review of the Clarion paper and to  
 (7) comment on it and in fact counsel at transcript page 42  
 (8) lines 7 through 22 I think he makes it very clear that what  
 (9) they did was to conduct a review very much limited to the paper  
 (10) and that they did not conduct a market analysis of remote  
 (11) property in Alaska  
 (12) They - they looked at the Clarion report and formed the  
 (13) view that in fact in theory you could have a market for  
 (14) natural lands and that in theory it could be a highest and  
 (15) best use for the reasons stated in their report  
 (16) There is no discussion of the transactions that are  
 (17) contemplated by this table And I - I don t - I don t  
 (18) believe the witness has information about them The only  
 (19) information he did have was produced to him by counsel in New  
 (20) York  
 (21) We - as you know I m not going to re-argue today of  
 (22) course but we have argued in the past that the entire line of  
 (23) testimony is not rebuttal for this reason We understand the  
 (24) Court s position is that at least as I understand it within  
 (25) some limits it is The Court admonished us earlier though

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(1) and take this away and that away it comes out to be five or \$6  
 (2) million And I said Judge they never did this in their  
 (3) report I have no discovery on it there s no deposition on  
 (4) it And your ruling for this case was that comment on the  
 (5) other expert s work is fair game for an expert whether it s in  
 (6) the report or not And you allowed a lot of testimony in the  
 (7) defense case in which the methodologies of the other expert  
 (8) were properly the subject of the defense experts in the case  
 (9) THE COURT Sure but that s not the issue here  
 (10) MR PETUMENOS That is the issue here because this  
 (11) exhibit is a natural lands exhibit which this expert was  
 (12) commissioned to testify about and in this exhibit was  
 (13) specifically used to establish that there are too few  
 (14) transactions in the market to establish a market for natural  
 (15) lands  
 (16) That s the point of this exhibit and so what I want to do  
 (17) is I want to show after going through the testimony and the  
 (18) analysis of Dr Seldin has undertaken show him this exhibit  
 (19) ask him if it changes his mind ask him if it s a fair  
 (20) depiction of what the market is And that is no different than  
 (21) what the Exxon experts have done throughout their case in chief  
 (22) in determining what the other experts are concluding many -  
 (23) all of which was not in deposition all of which was not in  
 (24) reports that Mr Dorchester or Mr MacSwain prepared or  
 (25) Mr Roddewig prepared but that you allowed because you said  
 it

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(1) that both the original time limit for this testimony and the  
 (2) report would be limitations that he d be strictly held to his  
 (3) report and this type of discussion which this exhibit  
 (4) portends - a discussion of remote transactions natural land  
 (5) transactions whatever one wants to call them in Alaska - is  
 (6) well beyond the purview of his work And it creates the  
 (7) concern even though the exhibits we have eliminated - which  
 (8) are numerous and which we understand will represent subjects  
 (9) that he won t be going into - nonetheless there is still a -  
 (10) I think a substantial invitation in this for him to go well  
 (11) beyond anything well beyond anything in his work and simply  
 (12) produce more testimony of the type that Dr Mundy and Dr  
 (13) Green  
 (14) have already spoken to well beyond the scope of his report  
 (15) THE COURT We re limited here now to the question of  
 (16) this exhibit  
 (17) MR OPPENHEIMER I believe so Your Honor  
 (18) THE COURT Okay so limit it to that  
 (19) MR PETUMENOS This argument was exactly the argument  
 (20) that I made and that the Court rejected in connection with the  
 (21) exhibits that were not even testified to by Exxon experts but  
 (22) new exhibits created designed to attack Dr Mundy s work  
 (23) And I remember arguing exactly that there was nothing in  
 (24) the report to give us notice that certain - you remember that  
 (25) we have the take-away chart that Mr Roddewig and  
 Mr Dorchester testified and said if you take Mundy s numbers

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(1) is fair game to attack the testimony of a - of a competing  
 (2) expert in a case ahead of you  
 (3) We have had precious little opportunity to do that because  
 (4) we go first and this is the one area that I wish to take the  
 (5) Exxon experts on with respect to this issue of whether there s  
 (6) a natural land market or not And to be fair the Court should  
 (7) allow me the same latitude to go after their expert opinions as  
 (8) you allowed them without a report and without deposition when  
 (9) they created documents like that take-away chart  
 (10) THE COURT Is this witness going to testify that he  
 (11) did some independent research to back up his conclusions  
 (12) regarding the market here in Alaska?  
 (13) MR PETUMENOS My questions will go like this I ll  
 (14) tell you precisely what I m going to ask I know that s what  
 (15) you like to hear  
 (16) I m going to show him this exhibit I m going to ask him  
 (17) whether or not the number of transactions and the volume of  
 (18) transactions causes him to change his mind about his opinion  
 (19) and ask him why not He s going to talk about it from a -  
 (20) from the standpoint of what constitutes a market I m also  
 (21) going to say to him I m going to tell him - which the witness  
 (22) conceded on the cross-examination that land exchanges are  
 not  
 (23) on that chart and I m going to ask him if that therefore  
 (24) understates the scope of the market and the extent of the  
 (25) market And he will say yes

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- (1) I think that s all fair game  
 (2) THE COURT Solely from an examination of the -- of  
 (3) the document itself and what the Exxon s expert witnesses  
 (4) testified is in the chart as opposed to what s not in the  
 (5) chart  
 (6) MR PETUMENOS And the witness has examined the trial  
 (7) transcript of the contested sum and has reviewed it and he ll  
 (8) rely on that So all the things the jury knows Dr Seldin  
 (9) knows on this topic I will warn counsel on cross-examination  
 (10) and tell the Court so you know Dr Seldin has done a lot of  
 (11) work in this area and if they wade into it in  
 (12) cross-examination it s at their peril because he does know a  
 (13) lot about the existence of these markets and the facts and  
 (14) circumstances surrounding them as a result of retention by  
 (15) another client and so I can t take knowledge or facts out of  
 (16) his head that are in there My examination will be focused as  
 (17) I ve described  
 (18) MR OPPENHEIMER Your Honor I thought we were  
 (19) heading in some area I could stipulate to but I think  
 (20) Mr Petumenos last remark makes me feel like we have in the  
 (21) labor context a steel fist and a velvet glove I m a little  
 (22) concerned that there are questions that logically -- I would  
 (23) treat what s been described as almost a hypothetical where  
 (24) assuming this chart and facts does it change his theoretical  
 (25) opinion based on the review and I think the catch is Your

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- (1) Honor s view that that s probably going to be acceptable to the  
 (2) Court And I understand that  
 (3) I am concerned though because the way it s being set up  
 (4) we have no ability to test the witness knowledge of the actual  
 (5) transactions without at least I think the implication is  
 (6) opening the door to his --  
 (7) THE COURT Well you don t want to test it though  
 (8) right? Because in fact you want to exclude it?  
 (9) MR OPPENHEIMER Well Your Honor let me say with  
 (10) respect to the point about exchanges which is an observation  
 (11) about something that is not on that chart the inference from  
 (12) the witness answer will be that the chart understates the  
 (13) market in Alaska And counsel let me read if I may from  
 (14) pages 80 line 19 through 82 line 12  
 (15) MR PETUMENOS Of what?  
 (16) MR OPPENHEIMER Of his deposition the witness  
 (17) deposition  
 (18) In the course of doing your work here in the Exxon case  
 (19) did you have occasion to research natural land transactions  
 (20) occurring in the state of Alaska?  
 (21) What do you mean by research?  
 (22) Did you go out and try to get information about that?  
 (23) I reviewed some information on transactions  
 (24) Which transactions?  
 (25) Don t remember I was looking at some information about

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- (1) transactions I did not research the information but some  
 (2) transactions came to my attention  
 (3) \*Okay who provided those transactional information to  
 (4) you?  
 (5) My research staff went to New York looked through a whole  
 (6) box of stuff brought some things otherwise assembled  
 (7) materials through counsel as to what relevant information might  
 (8) be and it was provided to me through my research associate  
 (9) What was the purpose for reviewing the transactions that  
 (10) you did review?  
 (11) \*Well you said we review I think it s necessary to have  
 (12) an understanding of background and what s going on and so  
 (13) I ve  
 (14) reviewed a great deal of information simply to give me a better  
 (15) understanding of what s going on in the system  
 (16) Do you know how many land tracts natural land tracts you  
 (17) reviewed in the state of Alaska concerning transactions?  
 (18) No  
 (19) He looked at a box of materials brought back from New York  
 (20) counsel with respect to background information and to allow  
 (21) him to express a view that that table or any other table  
 (22) understates the natural lands or remote property or  
 (23) preservation lands whatever you want to call them  
 (24) transactions in Alaska I think is a very market research-based  
 (25) kind of comment That I would object to still It seems to  
 me that s different and it goes beyond asking him Assume

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- (1) these are the transactions would it change your opinion  
 (2) THE COURT I didn t hear that in the offer of proof  
 (3) did you?  
 (4) MR OPPENHEIMER I thought he was going to be asked  
 (5) specifically Do you understand that the table does not  
 (6) include exchanges?  
 (7) THE COURT Yes and that s because it s based on  
 (8) the -- your witness testimony your witness concession  
 (9) MR OPPENHEIMER Sure But my concern is that he  
 (10) will then be -- I thought I heard Mr Petumenos say he will  
 (11) then be asked \*So does it understate the relevant  
 (12) transactions and that requires you have an opinion about what  
 (13) the market and the relevant transactions is And that it  
 (14) seemed to me was a step beyond your line  
 (15) THE COURT No The way I see the record there s  
 (16) been testimony in the record that indicates that there are  
 (17) exchanges -- your witness conceded that exchanges --  
 (18) MR OPPENHEIMER Sure  
 (19) THE COURT -- that were not included on this  
 (20) particular exhibit  
 (21) MR OPPENHEIMER Absolutely correct  
 (22) THE COURT So in essence what I understood counsel  
 (23) to say was repetition of that testimony to show that there  
 (24) were transactions that were not being included in this  
 (25) diagram

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- (1) MR PETUMENOS And Judge if I may this is - this  
 (2) attempt to question by-question limit our rebuttal witness I  
 (3) think is somewhat disingenuous in view of the fact that we had  
 (4) material from the Dorchester on the Dorchester direct that  
 (5) was filed a few days before he testified  
 (6) We moved to strike that report and it contained a bunch of  
 (7) material that was just before the testimony came on to account  
 (8) for points that the plaintiffs had raised the failure to take  
 (9) into account the VECO cleanup documents which then  
 (10) Mr Dorchester said Oh I relied on all that and I've taken  
 (11) it into consideration all of which was well after his  
 (12) deposition  
 (13) THE COURT Well I'll hear you after I hear  
 (14) Mr Oppenheimer all right?  
 (15) MR OPPENHEIMER Your Honor I think I don't view the  
 (16) record the same way but I - I guess our position trying to  
 (17) limit - I think Mr Petumenos and I have succeeded as you can  
 (18) see from the notebook limiting a lot of dispute  
 (19) I'm not anxious to delay the process The reason though  
 (20) for the question-by-question focus in this area is that this  
 (21) exhibit seems to me was a signal that there were going to be  
 (22) areas that were not only far beyond the report but as Your  
 (23) Honor can remember the reason this came up was that we had  
 (24) strenuously objected for some time this wasn't rebuttal  
 (25) testimony at all

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- (1) And it seems to me that to the extent he's going to  
 (2) testify it is important to adhere to the Court's admonition  
 (3) that it be limited to the Court I understand the Court's  
 (4) position on his ability to speak to this It's almost as if it  
 (5) were a hypothetical and that's why I'm trying to calibrate my  
 (6) last objection  
 (7) THE COURT I think what you're asking me is will he  
 (8) be allowed to testify and not only are these transactions not  
 (9) listed but here are the transactions there are 750 of them and  
 (10) that's what's been left off the report That would be the  
 (11) product of his independent research and that's not what  
 (12) counsel  
 (13) gave me to understand was going to be asked It was simply  
 (14) that the methodology is incorrect because it doesn't include  
 (15) exchange transactions period  
 (16) Now the problem of course comes in cross-examination All  
 (17) I can tell you counsel is you have to be careful  
 (18) MR OPPENHEIMER A welcome admonition Your Honor  
 (19) The other statement I would make obviously I will -  
 (20) we're in an unusual situation because I think the scope of  
 (21) issues - and obviously I will try to keep my objections to a  
 (22) minimum It is - it is important though given the fact that  
 (23) apparently I've just learned this witness has another client  
 (24) for whom he's acquired information that none of us are privy  
 (25) to  
 (1) THE COURT Yes this could be a problem but it won't

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- (1) be a problem as long as you're careful  
 (2) MR OPPENHEIMER And hopefully direct questions will  
 (3) be careful too  
 (4) THE COURT And counsel doesn't go into it  
 (5) Now is there another exhibit that I'm supposed to be  
 (6) looking at?  
 (7) MR OPPENHEIMER Your Honor I think that's currently  
 (8) the only exhibit to be used  
 (9) MR PETUMENOS I gave you three Were the other two  
 (10) not used?  
 (11) MR OPPENHEIMER One you recall was not I D'd and  
 (12) there you agreed not to use it  
 (13) MR PETUMENOS Which one was that counsel?  
 (14) MR OPPENHEIMER I believe 10428A  
 (15) MR PETUMENOS Okay what about 10253?  
 (16) MR OPPENHEIMER Your Honor just one second I'm  
 (17) sorry 10253 was the exhibit not I D'd that's the one you  
 (18) agreed not to use And 1042--  
 (19) MR PETUMENOS -28A  
 (20) MR OPPENHEIMER Your Honor this exhibit is a map of  
 (21) the Mundy land comparables And again there was no - he  
 (22) conducted no research into actual market conditions He did a  
 (23) review of the paper If - well again if he were to start  
 (24) testifying about the national or Alaskan market for natural  
 (25) lands we would have - clearly have our scope objection

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- (1) MR PETUMENOS First of all I don't agree that  
 (2) that's the state of the discovery This exhibit was created by  
 (3) Exxon to try and demonstrate that Dr Mundy was going too far  
 (4) afield to use comparables outside the state of Alaska This  
 (5) witness is an expert on the natural lands markets having done  
 (6) the research on it having had an idea what they're like and  
 (7) that the markets in fact exist highest and best use exists  
 (8) And he's prepared to testify that there is nothing improper or  
 (9) wrong with using comparables outside of the Alaska market so  
 (10) long as you are using comparable or natural land markets And  
 (11) that was the purpose of this exhibit and we are entitled -  
 (12) MR OPPENHEIMER I misspoke Your Honor We do not  
 (13) need to talk about this exhibit because it was not I D'd  
 (14) MR PETUMENOS I think it was shown to the jury  
 (15) MR OPPENHEIMER Our position will be the same  
 (16) THE COURT What is your position?  
 (17) MR OPPENHEIMER Well Your Honor it seems to me  
 (18) that what's just been described requires that you have done  
 (19) some research into the market for natural remote lands and/or  
 (20) the comparable base on which such an appraisal would be  
 (21) made  
 (22) And that's not - it's just not anything the witness has done  
 (23) What he's done is to review a couple of papers  
 (24) THE COURT Papers?  
 (25) MR OPPENHEIMER Papers papers that were - were in  
 (26) the appraisal - we are all enmeshed in the debate

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- (1) THE COURT To the scholarly debate you mean  
 (2) MR PETUMENOS That s not accurate As the  
 (3) deposition states he looked at a ton of information and as he  
 (4) read from the deposition he had a research staff that provided  
 (5) information There are boxes and boxes of materials that this  
 (6) witness - this witness team the expert team reviewed And I  
 (7) know because I sent them down there and there were  
 hundreds of  
 (8) pages of materials And what happened was when the witness  
 (9) was in the deposition he asked him to describe how many  
 (10) transactions from boxes and boxes of materials he s not as he  
 (11) sits there in the deposition able to do it just as any of the  
 (12) other witnesses here were not  
 (13) But to say he looked at two articles and that s it is not  
 (14) accurate It was a completed review of the literature It was  
 (15) review research assistant reviewed actual transactions I  
 (16) fear that the scope of this witness work is being very  
 (17) greatly much more narrowly described than actually what  
 (18) happened  
 (19) MR OPPENHEIMER Your Honor the witness read a  
 (20) couple of papers looked at a box of documents from New York  
 (21) Counsel s spent two weeks on the research and told us he was  
 (22) going to do no more on the research  
 (23) In fact is very limited research work in the extent he s  
 (24) worked for another client that s beyond this case  
 (25) THE COURT I agree with that You ve given me an

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- (1) exhibit that shows locations of various transactions some of  
 (2) which are in Alaska and some of which are in the Lower 48  
 (3) correct?  
 (4) MR OPPENHEIMER I think There s no foundation for  
 (5) that so -  
 (6) THE COURT It certainly look like it I ll testify  
 (7) that s true  
 (8) MR OPPENHEIMER And assuming that s what it is  
 (9) THE COURT And what he s going to say that there s  
 (10) nothing wrong with this methodology because it takes into  
 (11) account these kinds of transactions  
 (12) MR OPPENHEIMER Your Honor he has never formed an  
 (13) opinion or evaluated Mr Mundy s appraisal in this case He s  
 (14) never done that and in fact he does not have an opinion about  
 (15) that He does not - and that is -  
 (16) THE COURT He s going to say that the criticism of  
 (17) this technique is wrong He s going to talk about your  
 (18) witness right?  
 (19) MR OPPENHEIMER Why does that table have anything to  
 (20) do with that conclusion as it would be used -  
 (21) THE COURT It s simply illustrative of where the  
 (22) transactions took place right?  
 (23) MR OPPENHEIMER I don t think he can identify -  
 (24) THE COURT Maybe I m wrong about this just tell me  
 (25) Mundy did an analysis that included these transactions He  
 was

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- (1) criticized by your witnesses because - according to  
 (2) Mr Petumenos anyway - because there weren t - there were  
 (3) lots of transactions in Lower 48 locations and less  
 (4) transactions in Alaska This witness is going to say What s  
 (5) the problem with that?  
 (6) MR OPPENHEIMER I don t believe that s the testimony  
 (7) from any of our witnesses Your Honor I don t believe there s  
 (8) any testimony at all from any of our witnesses  
 (9) THE COURT I frankly don t remember the testimony  
 (10) MR OPPENHEIMER Even if that were true Your Honor  
 (11) he has not done a review of Dr Mundy s appraisal The work he  
 (12) looked at was Dr Mundy s article in the appraisal journal and  
 (13) Claron s article in the appraisal journal and that was the  
 (14) scope of the assignment  
 (15) THE COURT You have given me the best background I  
 (16) need to evaluate this question when it comes up in the  
 (17) testimony and I shall do that  
 (18) MR OPPENHEIMER Good  
 (19) THE COURT Very good  
 (20) MR OPPENHEIMER And may I invoke the Mr Petumenos  
 (21) rule of middle age one time so we have five more minutes on  
 our  
 (22) break?  
 (23) THE COURT You may and please get the documents off  
 (24) my desk  
 (25) MR OPPENHEIMER And it was a nice notebook

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- (1) specially prepared  
 (2) THE CLERK Please rise This court stands in  
 (3) recess  
 (4) (Recess from 11 32 a m to 11 38 a m )  
 (5) (Jury in at 11 38 a m )  
 (6) THE CLERK Please rise This court now resumes its  
 (7) session  
 (8) Please be seated  
 (9) MR PETUMENOS Your Honor for our next witness the  
 (10) plaintiffs call Dr Maury Seldin  
 (11) THE CLERK Sir can you attach the microphone to your  
 (12) tie and remain standing for the oath?  
 (13) A Yes ma am  
 (14) THE CLERK Can you please stand?  
 (15) A Is this good?  
 (16) MR PETUMENOS Dr Seldin you need to stand to take  
 (17) the oath  
 (18) THE CLERK Please raise your right hand  
 (19) (The Witness Is Sworn)  
 (20) THE CLERK Please be seated  
 (21) Sir for the record can you please state your full name?  
 (22) A Maurice M-a-u-r-i-c-e Seldin S-e-l-d-i-n No middle  
 (23) name or initial I go by the name Maury M-a-u-r-y  
 (24) THE CLERK And your occupation?  
 (25) A I am a professor and author an executive and a real estate

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- (1) counselor  
 (2) THE CLERK Thank you  
 (3) DIRECT EXAMINATION OF MAURICE SELDIN  
 (4) BY MR PETUMENOS  
 (5) Q Dr Seldin we are trying to get this trial over with so  
 (6) I m going to assume you have grandchildren and maybe played  
 (7) baseball once upon a time and go right to the point  
 (8) What is your education please since high school?  
 (9) A I have a bachelors and master s degree in business  
 (10) administration with major in real estate and urban and  
 (11) economics from the University of California at Los Angeles a  
 (12) doctorate in business administration from Indiana University  
 (13) with a major in real estate administration and minor fields of  
 (14) finance mining banking business economics applied  
 (15) economics  
 (16) and business government relations  
 (17) Q You got your doctorate 34 years ago?  
 (18) A That would be correct sir  
 (19) Q And from 1965 until 1990 you were professor at American  
 (20) University?  
 (21) A Chair professor I m now chair professor emeritus  
 (22) Q Did you ever -- in what department did you work as a  
 (23) professor all those years?  
 (24) A When I went there was school of business administration  
 (25) later became the college of business administration and I  
 (26) headed the then-program in real estate and land planning It

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- (1) underwent a variety of names and I had a variety of  
 (2) administrative posts throughout the process  
 (3) Q You used to be a dean of the school?  
 (4) A For a short time yes sir  
 (5) Q And have you ever been the chair of your department?  
 (6) A Yes sir  
 (7) Q And when you retired you became -- you got the title of  
 (8) professor emeritus?  
 (9) A That s correct sir  
 (10) Q What is professor emeritus please?  
 (11) A That is a faculty member who having served under the  
 (12) requirements of the university no longer teaches class goes  
 (13) on to retirement and has all faculty privileges  
 (14) Q Your current positions what do you do now that you re no  
 (15) longer actively teaching at American University?  
 (16) A I have been the head of our institute since we started it  
 (17) in the late 60s which was then affiliated with the  
 (18) university I m president chairman of the board of the Homer  
 (19) Hoyt Institute of the support organization the advanced  
 (20) studies and its wholly owned subsidiary Court Advisory  
 (21) Services  
 (22) Q Are you also an associate dean of the Weimer School for  
 (23) Advanced Studies?  
 (24) A Yes sir That s a part of the advanced institute which I  
 (25) head

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- (1) Q What does the Weimer School for Advanced Studies in real  
 (2) estate and land economics do?  
 (3) A It works to advance the state of the art providing a  
 (4) school program for post-doctoral fellow actually very advanced  
 (5) rather than recently completed doctorates Leading real estate  
 (6) professors and professors from related areas such as finance  
 (7) managing government and the like come to study with us for a  
 (8) week in Florida go to their home institutions return and  
 (9) report on their projects It is a very elite cadre of the  
 (10) nation s leading thinkers in real estate  
 (11) Q Does the Weimer school look for fellowships when you say  
 (12) post-doctoral fellowships these are people who already have  
 (13) your Ph D s in the area?  
 (14) A Yes sir  
 (15) Q And do they look for issues in real estate which are new  
 (16) and different and new vistas in the industry?  
 (17) A Yes One of the things we do with the school is look to  
 (18) organize the body of knowledge and so we have designed our  
 (19) curriculum to attack a variety of problems We bring in  
 (20) industry representatives to indicate what s going on in the  
 (21) world and we have provided through the sponsoring  
 (22) organization about \$5 million of research over the last decade  
 (23) in order to advance the state of the art  
 (24) Q Why is it necessary to be doing advanced studies in real  
 (25) estate? Why does the field require new research?

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- (1) A Our nation has made horrendous errors in decisions from the  
 (2) federal government down to state and local governments to  
 (3) businesses to the regulatory authorities We are now  
 (4) recovering from a real estate depression which was brought on  
 (5) by lots of poor policies and poor decision-making from a  
 (6) variety of participants  
 (7) Q As our world modernizes and things get more complex does  
 (8) that have implications for how real estate is studied and  
 (9) valued?  
 (10) A Yes Indeed my professional career is designed to improve  
 (11) the quality of real estate decision-making and we work as a  
 (12) catalyst to do this and the accelerating pace of what s  
 (13) happening is calling for more and more development in the  
 (14) state  
 (15) of the art so that we can approve the decisions  
 (16) Q Have you written textbooks in the real estate area?  
 (17) A Yes sir  
 (18) Q Tell the jury  
 (19) A Well I have written at least a half a dozen books The  
 (20) first was Real Estate Investment Strategy which has been used  
 (21) as a text at Stanford and Harvard but it was really designed  
 (22) for general public It won some awards indeed it won an  
 (23) award from the American Institute of Real Estate Appraisers  
 (24) along with another book Land Investment which I had  
 (25) originally developed the curricula for the Farm and Land  
 (26) Brokers Institute



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- (1) Real Estate Market Analyses which I did with
- (2) Dr Sumichrast housing - Housing Markets another book in
- (3) real estate market analyses with some others Real Estate
- (4) Handbook
- (5) There may be some more but that s a good sampling
- (6) Q When did you first start looking at how changes in the
- (7) business world and in the - in the complexity of the economy
- (8) affect real estate analysis? When did you begin studying that
- (9) issue?
- (10) A I started working as a real estate salesman between my
- (11) sophomore and junior year and in my senior year I lost a sale
- (12) because of the recession and that piqued my interest I went on
- (13) to do graduate work And while I was a doctoral student at the
- (14) Indiana University I wrote a couple articles which were
- (15) published in the Appraiser Journal which dealt with value
- (16) value-related issues
- (17) Q All right
- (18) And Judge at this time I would tender Dr Seldin as an
- (19) expert in market analysis appraising highest and best use
- (20) and related topics
- (21) MR OPPENHEIMER No objection Your Honor with the
- (22) reservation with respect to those issues on natural lands
- (23) THE COURT All right I ll - on the basis of the
- (24) offer I ll accept him as an expert witness
- (25) MR PETUMENOS And I don t accept obviously the

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- (1) reservation that he will be talking about the market his
- (2) market analysis of the natural lands
- (3) THE COURT He s an expert on market analysis
- (4) BY MR PETUMENOS
- (5) Q When you were retained by the plaintiffs in this case what
- (6) were you initially asked to do?
- (7) A To evaluate a paper which we call the acquisition paper
- (8) which included by reference two articles appearing in the
- (9) appraisal journal one by Mundy and one by Roddewig
- (10) Q The paper that you were asked to analyze was it a paper on
- (11) natural land public acquisition of property that was written
- (12) by Mr Roddewig?
- (13) A Roddewig and Papke had jointly authored the paper
- (14) Q I m going to show you what has been marked as Exhibit 8113
- (15) and Exhibit 8130 Could you tell the jury what those two
- (16) exhibits are please?
- (17) A These are two articles which appeared in the Appraisal
- (18) Journal The first is by Victoria Adams and Bill Mundy titled
- (19) Evaluation of High Amenity Natural Land The second is an
- (20) article by Richard Roddewig and Gary Papke Market Value and
- (21) Public Value Exploratory Essay
- (22) Q Are these two of the articles that you studied researched
- (23) and reviewed?
- (24) A Yes sir
- (25) Q Your Honor for the members of the jury both of these

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- (1) exhibits are admitted to the evidence and available for the
- (2) jury in the jury room
- (3) MR OPPENHEIMER With second of the two for purposes
- (4) of showing
- (5) THE COURT That s correct
- (6) BY MR PETUMENOS
- (7) Q As a result of the study I would like to get your view on
- (8) four the key points Do you have an opinion as to whether
- (9) there is a market for natural land?
- (10) A Yes sir I do
- (11) Q Do you have an opinion on whether it is proper appraisal
- (12) practice to find a highest and best use of natural land?
- (13) A Yes I do
- (14) Q Do you have an opinion on the relationship between how you
- (15) determine the size of a parcel and its highest and best use?
- (16) A Yes I do sir
- (17) Q And fourthly do you have an opinion as to whether there
- (18) are actual rental or sale of natural land influences its value?
- (19) A Yes I do
- (20) Q All right let s talk about the - the concept the first
- (21) issue the concept of natural land and markets
- (22) MR OPPENHEIMER Your Honor I hate to do this but
- (23) may we approach the bench?
- (24) THE COURT Sure
- (25) (Bench Conference on the record)

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- (1) MR OPPENHEIMER We have four topics here first and
- (2) third of which are outside of the report
- (3) The first is whether there s a market for natural lands
- (4) The report doesn t go into that It goes into the theoretical
- (5) basis for the conclusion that natural lands could be a highest
- (6) and best use That s point number two and we concede that s
- (7) within the report
- (8) Point number four actual rental or sale affecting value
- (9) Closest the report comes and only because Mr Petumenos
- (10) and I
- (11) have become friends do I concede this would be sale not
- (12) rental Size and highest and best use absolutely not in the
- (13) report
- (14) THE COURT You mean in other words your discovery
- (15) has misled you? Is that what you re trying to tell me?
- (16) MR OPPENHEIMER No He was very clear as to what
- (17) the scope of his work was and it doesn t have anything to do
- (18) with the size and the highest and best use It s not in any of
- (19) the papers and it s not in his report
- (20) MR PETUMENOS I just totally disagree with that
- (21) Once you determine - and this is basic fundamental
- (22) appraising Once you determine what the highest and best use
- (23) is that has an impact on how you determine parcel size parcel
- (24) definition In other words if you were to determine that the
- (25) highest and best use of the property would be for recreational

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- (1) lots If you determine it is natural lands for conservation
- (2) purposes it s a much larger parcel and that is implicit in
- (3) the entire study That s the reason for making - that s part
- (4) of the controversy here
- (5) MR OPPENHEIMER I think implicit in that statement
- (6) is the admission that it s certainly not explicit It isn t
- (7) and I don t think it s anywhere implicit in anything that
- (8) Professor Seldin has done There s just not a word about this
- (9) business of in effect this is a damage question do you need to
- (10) value - do you need to take into account I assume the damage
- (11) to all of the acres
- (12) This is the uplands issue He hasn t expressed any
- (13) viewpoint this witness or written -
- (14) THE COURT All right all right I hear you but the
- (15) problem is I can t evaluate this I ve got to listen to some
- (16) of the testimony and number one seems to me if there s
- (17) anything implicit there s a question is there a market for
- (18) natural lands That s the subject of the debate isn t it?
- (19) MR OPPENHEIMER All he s written on is whether you
- (20) could theoretically have a market for natural lands as opposed
- (21) to having gone out and looked to see if there is a market for
- (22) natural lands
- (23) THE COURT He s written on it
- (24) MR OPPENHEIMER He s only written on the theoretical
- (25) aspects of it I m certainly not aware of any work that there

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- (1) takes some assumptions with regard to perfect markets with
- (2) regard to characteristics associated with resources
- (3) Frequently using widgets - imaginary but you can think of it
- (4) in terms of lumber that each is substitutable for the other
- (5) they re like you can buy them and sell them from samples that
- (6) there are a lot of buyers lot of sellers that everybody knows
- (7) what s going on These conditions do not exist in the reality
- (8) of the real estate market
- (9) Q All right Is that also true for the concept of value?
- (10) A Well that - the concept of value is - is - as has been
- (11) said in court - is a word of many meanings The basic idea of
- (12) value is what you would give up to get something else and it
- (13) is frequently modified to indicate some kind of set of
- (14) conditions associated with it
- (15) And so when you talk about value you need to specify what
- (16) are those conditions and particularly how do those relate to
- (17) the market
- (18) Q Let s talk about for example the term subsistence which
- (19) you are familiar with Is it - when we talk about - could I
- (20) get the question out before I have the objection?
- (21) MR OPPENHEIMER Yes
- (22) MR PETUMENOS Thank you
- (23) BY MR PETUMENOS
- (24) Q When we talk about value does value necessarily have to be
- (25) an exchange of money or dollars or a check for value to be

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- (1) is actually a market for natural lands
- (2) THE COURT I m going to have to hear it I don t
- (3) think the objection is well taken though
- (4) (Bench conference concluded)
- (5) BY MR PETUMENOS
- (6) Q Dr Seldin are you with me?
- (7) A Oh yes I m sorry I thought you were still up there
- (8) Q Sometimes I am up there longer
- (9) THE COURT Sometimes it takes a lot longer than
- (10) that
- (11) BY MR PETUMENOS
- (12) Q I want to talk to you about the concept of markets and the
- (13) real world The jury has seen certain definitions of terms
- (14) like market value and highest and best use and so forth In
- (15) your work did you look at the literature that defined market
- (16) value?
- (17) A Yes sir
- (18) Q And did that literature discuss the literature you read and
- (19) maybe have written over the years discuss how market
- (20) conditions as they relate to the real world?
- (21) A Yes They specify a set of conditions that are
- (22) unrealistic
- (23) Q Explain to the jury
- (24) A The definition of - of value and the whole economics is
- (25) really the classical economics the classical economic

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- (1) exchanged?
- (2) MR OPPENHEIMER So this is not about subsistence?
- (3) Subsistence is -
- (4) THE COURT Hold it counsel
- (5) MR OPPENHEIMER Subsistence is expressly excluded
- (6) from the professor s report
- (7) MR PETUMENOS Wait for the next question
- (8) A Would you repeat the question counsel?
- (9) MR PETUMENOS Yes
- (10) BY MR PETUMENOS
- (11) Q Does the concept of value necessarily require an exchange
- (12) of money?
- (13) A The concept of value does not necessarily require the
- (14) exchange of money and I cannot accept the exclusion of any
- (15) particular area that that would not apply to unless you want
- (16) to specify one but certainly not subsistence
- (17) Q You wouldn t exclude subsistence?
- (18) A I would not exclude subsistence
- (19) Q Why not?
- (20) A Because you may utilize resources that don t involve the
- (21) exchange of money When you buy a home and you live in it
- (22) you
- (23) directly consume the services If you have a private hunting
- (24) preserve you go out and you hunt and you get the benefits of
- (25) it No money is exchanging hands If you live there and

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- (1) exchange has taken place  
 (2) Q What does it take to make a market?  
 (3) A You have to have somebody that wants to buy what you have  
 (4) Because the concept of value is that you're going to give up  
 (5) something to get something else and all you need is somebody  
 (6) who will make the swap who'll do the transaction  
 (7) Q What are the concepts of scarcity and utility as they apply  
 (8) to the existence of the market?  
 (9) A The market is made by buyers and sellers. Sometimes you  
 (10) have a lot of buyers and sometimes you have a few buyers  
 (11) Sometimes you have a lot of sellers sometimes you have a few  
 (12) sellers  
 (13) The market is going to be made by the transactions that --  
 (14) that occur. If there is very little that is offered on the  
 (15) market then the prices tend to be high. If there is very  
 (16) little that's bought on the market prices tend to -- to be  
 (17) low. When they are in balance the market can be in balance at  
 (18) high levels or low levels so you can have some things that are  
 (19) very scarce and strong or weak markets. You can have some  
 (20) things that are very useful and strong or weak markets  
 (21) Q Applying these principals as to what constitutes a market  
 (22) tell the jury what your opinion is as to whether there is a  
 (23) market for natural land  
 (24) A There is a market for natural land  
 (25) Q And in determining whether there is a market for natural

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- (1) buyers  
 (2) But if you own one of those homes and you put it on the  
 (3) market you will find -- and that's what it means put it on  
 (4) the market. If you put it on the market you will find if you  
 (5) have any takers  
 (6) Q Are there other examples of types of properties that you  
 (7) can think of which while they have a thin market are  
 (8) nevertheless there is a market for them for purposes of  
 (9) evaluating them?  
 (10) A Certainly. Right now if you have some office building  
 (11) land the demand for building an office building today in most  
 (12) metropolitan areas is very poor. There's a market for the  
 (13) land you won't get as much today as you would ten years ago  
 (14) or  
 (15) five years ago but you'll find a buyer  
 (16) Q With respect to natural land have you reviewed the federal  
 (17) government's appraisal standards?  
 (18) A Yes sir  
 (19) Q Is there anything in the federal government's appraisal  
 (20) standards that would cause you to conclude that there is not a  
 (21) market for natural land?  
 (22) A That there is not a market for natural land?  
 (23) Q Yes. Anything about the fact that the government may say  
 (24) they don't want you to use government transactions as  
 (25) comparables that makes you conclude there must be  
 therefore  
 (25) no market?

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- (1) land what do you look at? How do you find out?  
 (2) A I look to see whether there have been transactions. And  
 (3) the federal government has four agencies has a congressional  
 (4) authority there are state -- that has bought. There are state  
 (5) governments there are local governments there are national  
 (6) private foundations there are local private foundations there  
 (7) are individuals there are lots of people that are out there  
 (8) that are buying natural land  
 (9) Q When we talk about a market sometimes do we talk about  
 (10) scarcity and demand and as to whether the land is scarce and  
 (11) whether there's a lot of demand for it? Is that a factor in  
 (12) looking at a market?  
 (13) A I don't understand the question sir  
 (14) Q Well let's take an example of a community in which there  
 (15) is a limited market as you've described not many --  
 (16) A Thin market all markets are limited  
 (17) Q What would be a good example of that in the urban context?  
 (18) A Luxury homes you might have a small town and a wealthy  
 (19) enclave of a half a dozen homes you have a very thin market  
 (20) Q Does that mean there is no market for luxury homes?  
 (21) A Not at all. It only means that there -- that since the  
 (22) families that live in those homes may pass them on from  
 (23) generation to generation they don't come on the market very  
 (24) often and also they're very expensive and so unless  
 (25) high income people are moving in there aren't a lot of

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- (1) A Well there are two -- there are two things that are  
 (2) involved in those standards. And although I understand the law  
 (3) requires that they pay market value they are as a matter of  
 (4) practice in the implementation and of the regulation routinely  
 (5) exclude land in the highest and best use category for which  
 (6) they are looking to buy it. Which has the effect of lowering  
 (7) the price they would be willing to -- or have to pay for it if  
 (8) it were conceded that it was really more valuable in that use  
 (9) than the lesser use  
 (10) Also there were two points to your question. The second  
 (11) one was if they are looking to use a market comparison  
 (12) approach and they exclude the transactions which they have  
 (13) been involved in they are attempting to or having the result of  
 (14) reducing the evidence that would indicate the market value by  
 (15) focusing on uses of lesser value  
 (16) Q And when they talk about government comparables not  
 (17) being  
 (18) useful to them do you see anything about the values that were  
 (19) actually exchanged for natural land which supports what you're  
 (20) saying about the practice being different than the standards  
 (21) would suggest?  
 (22) A There are a number of cases in which they have gone out and  
 (23) paid more money than the -- what the appraisal in the case of  
 (24) the Manassas Battlefield they paid a great deal more  
 (25) In the case of the Alpine they paid -- they paid  
 (25) substantially more

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- (1) There are instances in which when they re said and done  
 (2) that they wind up at greater than your appraisal  
 (3) Q What is your opinion as to whether or not land can have a  
 (4) highest and best use of natural land?  
 (5) A It can have it because when you re looking at the value of  
 (6) the land you ask What do you give up in order to get  
 (7) something else and when you re looking to answer that  
 (8) question you want to know how much you can get and so you  
 want  
 (9) to know what do other properties sell for or transact for And  
 (10) so you want to know what transactions have taken place in that  
 (11) category because the highest and best use tells you how  
 you re  
 (12) going to use the land and it s simply a vehicle for applying  
 (13) this methodology  
 (14) Q When is the -- when is it proper to use a highest and best  
 (15) use designation of natural land?  
 (16) A When the category of use of the land has those  
 (17) characteristics that that is the use of the land in which it  
 (18) is its greatest economic value  
 (19) Q Now remind the jury why an appraiser needs to determine  
 (20) the highest and best use of land Why does he do it?  
 (21) A Because the methodology that the appraiser typically uses  
 (22) for this kind of property is studies the subject property and  
 (23) says What do I have here what are the benefits what is the  
 (24) usefulness of it what is the scarcity of it and then goes out  
 (25) to look to see what he can find or she can find in other

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- (1) property where the value has been established  
 (2) The value of this other property could have been  
 (3) established by sale it could have been established by an  
 (4) exchange it could have been established in a variety of ways  
 (5) or indicated in a variety of ways  
 (6) Once the appraiser has an indication of the value of this  
 (7) other parcel of property then makes the adjustments for the  
 (8) differences and the function of the highest and best use is to  
 (9) identify the category of use which you want to have to look for  
 (10) the comparables  
 (11) Q What happens if you don t pick the correct highest and best  
 (12) use when you re doing an appraisal?  
 (13) A You get a wrong answer  
 (14) Q Okay And when you pick the highest and best use -- well  
 (15) when you use the term natural land as you ve reviewed the  
 (16) articles and so forth and done all the literature research and  
 (17) done all your investigations what are the attributes of  
 (18) natural land that we re talking about that would cause it to be  
 (19) the highest and best use of property?  
 (20) A Well natural lands was used by Mundy and Adams in this  
 (21) article and it refers to land that is of scenic beauty of  
 (22) natural resource I think richness in -- in quality Mike  
 (23) Robbins has used the term wilderness land which generally  
 (24) means the land which may have these qualities and attributes  
 (25) but is undisturbed

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- (1) Professor Green used it as environmental land which is  
 (2) perhaps less restricted and in the Seal Bay report they came  
 (3) up with a new one of management for natural resources which  
 is  
 (4) in the same category of it But there are nuances of  
 (5) differences  
 (6) The common attribute is that you have something that you  
 (7) want to conserve or preserve Conservation preservation is  
 (8) kind of a generic We ve talked about categories you can have  
 (9) retail as a highest and best use category but you can have  
 (10) regional malls strip centers subcategories and you can have  
 (11) the natural land or conservation preservation and then  
 (12) subcategories  
 (13) Q All right Does natural land produce services produce  
 (14) something of value?  
 (15) A Oh yes sir  
 (16) Q What? I mean it doesn t make any money?  
 (17) A Doesn t have to make any money I look out my window and  
 I  
 (18) see some beautiful scenery you go through you walk through  
 a  
 (19) park people may use it without disturbing it for hunting and  
 (20) fishing it contributes to the ecology There is a great deal  
 (21) to be said for the values of what we receive when we came on  
 (22) the earth and that provides benefits to us  
 (23) I live at the beach I look at -- I look at natural land  
 (24) and a little island They provide services to me  
 (25) Q So then when we try to determine what this value is that

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- (1) doesn t create money how do we go about determining how  
 much  
 (2) value it creates?  
 (3) A Well there are a couple of fundamental ways in which you  
 (4) can come at the value We talked about one which was to say  
 (5) study the property find other property whose value you can get  
 (6) an indication of and make some comparison  
 (7) The other is to look at the benefits and if the benefits  
 (8) are produced in rent in money because it s an office building  
 (9) or retail or a leased property then you forecast the income  
 (10) and you capitalize it But if you have property like an  
 (11) owner occupied dwelling in which you are going to consume  
 the  
 (12) services or which you typically do not have market transactions  
 (13) that would adequately reflect the full value of those services  
 (14) then that methodology isn t very useful so you go back to  
 (15) looking at the transactions the comparative approach rather  
 (16) than an income capitalization  
 (17) Q That s where we get into highest and best use and start  
 (18) comparing other land that was perhaps transacted?  
 (19) A That s right because as a practical matter while you have  
 (20) a theoretical framework for setting out to do these analyses  
 (21) and you have all kinds of rules policies guidelines doctrine  
 (22) and the like when you go to find the data you can t find the  
 (23) data When you go look for comparables they re real tough so  
 (24) you have to do the best you can and in order to do the best  
 (25) you can the first thing you have to understand is how can the

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- (1) land be used to its greatest economic advantage
- (2) That s what highest and best use is Using it to its
- (3) greatest economic advantage
- (4) Q All right Next point
- (5) A Yes sir
- (6) Q Do you have an opinion as to whether the expression of the
- (7) land s value as natural land is properly demonstrated by the
- (8) past cash rentals that it has generated?
- (9) A In the case of this kind of land it would be evidence that
- (10) would be of no use in getting an estimate of value because the
- (11) cash rentals constitute a small portion of the total services
- (12) that the property rendered
- (13) Q Supposing then that I want to know what the value of this
- (14) land would be over a finite period of time in other words I
- (15) don t want to know what its value is in total but I want to
- (16) know what its value is for say five years and there s no cash
- (17) rental What do I do?
- (18) A There are two ways you can do it You could make a
- (19) valuation of what is it worth now and then what is it worth
- (20) five years from now or 50 years ago using market comparison
- (21) approach in both cases and calculate the difference
- (22) The second way that you could do it is you could find out
- (23) what it s worth today and then ask What is the value of the
- (24) services which have been lost to the property
- (25) Our plumbing broke we had to leave the house for a couple

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- (1) of days We lost the use of the house could have been a
- (2) couple of months We bought a condo the balcony we were
- (3) having problems the people had to move out for six months
- (4) those were lost services and these were owner occupied and
- (5) so
- (6) they were indemnified based upon values of lost services
- (7) Q Sort of a rent sort of analysis?
- (8) A It s a rent but it s not a rent in dollars in which
- (9) they re sold out We don t – these typically these aren t
- (10) rental units it s in terms of the value of services that are
- (11) consumed You can call it an imputed rent if you want what
- (12) you would pay for the services to yourself
- (13) Q So the land does not have to actually be on the market in
- (14) order for it to have value?
- (15) A The land doesn t have to be on the market for it to have
- (16) value
- (17) Q And it doesn t actually have to be rented for dollar
- (18) amounts for it to have value?
- (19) A It doesn t have to be rented for dollar amounts to have
- (20) value or to produce income
- (21) Q That s true of any property?
- (22) A Any property
- (23) Q And natural land is it any different?
- (24) A No exception
- (25) Q I want to show you an exhibit it ll appear on the little
- (26) screen that s right next to you there Dr Seidin

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- (1) A I love technology
- (2) Q DX10478A DX10478A is an exhibit that the jury has seen
- (3) through Mr Roddewig
- (4) You ve seen it before?
- (5) A Yes sir
- (6) Q Anything in this exhibit change your mind about anything
- (7) you ve told the jury to this point?
- (8) A No sir
- (9) Q Why not?
- (10) A Well I see state and federal park purchases in Alaska If
- (11) I want to know the market I want to know exchanges as well as
- (12) purchases of the federal If I want to know the market I want
- (13) to know private purchases in Alaska
- (14) Besides I want to talk about more than Alaska because
- (15) Alaska s part of the 50 states and we re talking in a – a
- (16) broader market You know I see the – the numbers bounce
- (17) around but that s all right That s not unusual
- (18) Q So based upon all of your experience and your work as a
- (19) real estate professor for all these years of these two
- (20) articles the ones that you read about by Dr Roddewig and
- (21) Dr Mundy which in your opinion best applies theories of real
- (22) estate market and highest and best use?
- (23) A Well you talk about theories of real estate market The
- (24) Roddewig article doesn t lay out a theory of real estate
- (25) market it talks about one facet of it and doesn t do a job of

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- (1) it
- (2) The relevant part of the Mundy piece is that it talks about
- (3) framework for valuing natural lands Well the framework
- (4) already existed What Mundy did was go out and name it and
- (5) do
- (6) it but Robbins had done it He called it wilderness land
- (7) Q One last point and that is that you have described I
- (8) think the government in these transactions as a market
- (9) participant We re doing pretty good I m just watching that
- (10) water pitcher
- (11) What do you mean the government is a market participant
- (12) in this context?
- (13) A They come to the table and buy
- (14) Q They have the motivations of a buyer and a seller or a
- (15) buyer in this instance?
- (16) A They re paying the money I guess they want the land
- (17) Q All right Does the fact that the buyer in this particular
- (18) market does not want to recognize a highest and best use of
- (19) natural land change your mind?
- (20) A No The buyer can recognize what – what he wants He s a
- (21) player in the market He s not going to make the rules for the
- (22) seller In fact what you find is the seller makes his own
- (23) rules and if the seller has something that s really very
- (24) valuable to him what you find is that the buyer begins to bend
- (25) beyond what he says he wants to do If he really wants to buy
- (26) it

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- (1) Q But we've heard that the government has these requirements  
 (2) where they must pay what they call market value not a dollar  
 (3) more or a dollar less Does that change your mind about the  
 (4) government's position?  
 (5) A They don't have a divine route to what the market value is  
 (6) more or less They have to go through a process and they've  
 (7) set some standards and they pursue some policies but the  
 (8) standards and policies that they set may not give them the best  
 (9) answer  
 (10) MR PETUMENOS Judge I have no further questions  
 (11) CROSS EXAMINATION OF MAURICE SELDIN  
 (12) BY MR OPPENHEIMER  
 (13) Q Dr Seldin good morning  
 (14) A Good morning  
 (15) Q I introduced myself a little earlier Let me just take a  
 (16) quick example off the bat This is - we're talking a lot of  
 (17) theory here Let me ground just one aspect of it if I may  
 (18) Mr Petumenos and I are both pilots we love to fly  
 (19) Probably an irrational devotion to that I have an old  
 (20) airplane it's very close to me Now you would agree with me  
 (21) would you not that out there there are probably some people  
 (22) that might want to buy that plane -  
 (23) A Well - oh you haven't finished I'm sorry  
 (24) Q I haven't finished I think you can treat this as a  
 (25) hypothetical

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- (1) There are some people out there I want you to assume want  
 (2) to buy my plane and let's assume I want to sell my plane One  
 (3) of the things I'm going to have to take into account is how  
 (4) much they're willing to pay me for my airplane right? The  
 (5) potential sellers out there the other pilots in setting my  
 (6) price?  
 (7) A You don't have to If you want to make a deal it would be  
 (8) worthwhile for you to do that  
 (9) Q If I want to sell it?  
 (10) A If you want to sell it you want to get some estimate of  
 (11) what you think it would be worth to them  
 (12) Q Exactly Exactly  
 (13) Now I could love that plane dearly as I do and I could  
 (14) think it's worth every penny I own which my family thinks I've  
 (15) already invested in it but it wouldn't cause the people who  
 (16) want to buy it to pay me more would it - except in one  
 (17) circumstance?  
 (18) A It may have a great deal of value to you and the people  
 (19) who are going to buy it or are going to pay it relative to the  
 (20) value to them if those don't cross there's no transaction  
 (21) Q Exactly And so -  
 (22) A But let me - let me say that you prefaced this thing with  
 (23) the relationship to theory What I have gone through is  
 (24) grounded in theory that is it is sound accepted body of  
 (25) knowledge It is not something off devoid from reality

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- (1) I have devoted my career and I have been in 43 years to  
 (2) bridging the gap between industry and academia so what I've  
 (3) told you isn't simply what some professor tells his students  
 (4) What I have told you is the way it happens in the world  
 (5) That's what I do  
 (6) Q Okay Just by way of a little bit of background - the  
 (7) jury's probably going to be relieved to hear this - but you  
 (8) are not another MAI is that correct?  
 (9) A That is correct  
 (10) Q Do you consider yourself an appraiser?  
 (11) A I was appraising for the state of California while I was a  
 (12) graduate student at UCLA and I have done a variety of  
 (13) appraisals so if you say am I an appraiser in that I am  
 (14) qualified to do this certainly But I'm not a muddy-shoes guy  
 (15) that earns his living going out doing the appraisals It is  
 (16) part of the work which I do in this broader spectrum of real  
 (17) estate analysis  
 (18) Q And in fact a great deal of your work is involved is it  
 (19) not in some very highly theoretical issues with people whose  
 (20) educations are even beyond the doctoral state is that correct?  
 (21) A A lot of my work has come from people who have problems  
 (22) that are in the business that my - some of my clients are  
 (23) other analysts I've worked with the Appraisal Institute I'm  
 (24) not a member but I've been on the research committees When I  
 (25) taught at American University we offered their courses so I'd

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- (1) work with them on programs  
 (2) So a lot of my work is at shall we say an esoteric  
 (3) schedule It would be more like cardiovascular surgeon than  
 (4) G P  
 (5) Q Okay so just to get clear on the background a little bit  
 (6) more We've heard a lot of discussion in the courtroom about  
 (7) certifications Are you a certified as an appraiser in any  
 (8) states?  
 (9) A No sir  
 (10) Q You really don't need to be for your work do you?  
 (11) A Reminded me of the - of the old story of the Harvard  
 (12) professor who didn't have a doctorate and they said Why don't  
 (13) you take one and he said Well who will examine me I don't  
 (14) need a certification sir  
 (15) Q And are you a member of any professional appraisal groups?  
 (16) A I'm a member of - of a number of academic associations  
 (17) university professors and I'm a member of the American  
 (18) Society  
 (19) of Real Estate Counselors which is a discipline which includes  
 (20) the appraisal and has a lot of - of appraisal of MAI members  
 (21) Q And I believe you were asked at your deposition You were  
 (22) aware of Mr Don Dorchester you know who he is?  
 (23) A Oh yes  
 (24) Q Highly regarded in his field?  
 (25) A Yes  
 (26) Q And I believe you also know Mr Roddewig?

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- (1) A Yes  
 (2) Q I believe as of your deposition you had not – you were  
 (3) not familiar with Professor Green?  
 (4) A That s correct  
 (5) Q So your familiarity with Professor Green s work has been as  
 (6) a result of your assignment in this case?  
 (7) A As a result of my reading some excerpts of testimony  
 (8) Q Okay You have not conducted an appraisal of any lands in  
 (9) this case is that correct?  
 (10) A That s correct My assignment was not to appraise lands  
 (11) Q And in fact you haven t had occasion in your work to date  
 (12) as I understand it to appraise any remote properties in  
 (13) Alaska?  
 (14) A I have had occasion to appraise remote properties I have  
 (15) had occasion to appraise properties that are the sorts of  
 (16) things that would relate to Alaska none of them specifically  
 (17) happen to be in Alaska but I don t consider that to be  
 (18) relevant  
 (19) Q Okay Have you in fact undertaken any appraisal of real  
 (20) estate evaluation work other than this assignment regarding  
 (21) Alaskan real estate?  
 (22) A No sir I have not done any Alaska real estate  
 (23) Q And we re happy to have you with us today  
 (24) Before today when was the last time that you were in  
 (25) Alaska?

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- (1) A I took a cruise of the Intercoastal late 80s early 90s I  
 (2) don t remember  
 (3) Q And your work in this regard that led up to the report  
 (4) that –  
 (5) A Maybe – I think it would be late 80s  
 (6) Q Okay cruise in the late 80s  
 (7) The work that you did that led up to your report in this  
 (8) case that was a relatively expedited schedule for you to  
 (9) complete the report that you did on two papers?  
 (10) A Yes yes The – the time lapse between being retained and  
 (11) asked to produce the paper was very short  
 (12) Q And you did review some materials in connection with that  
 (13) report is that correct?  
 (14) A Yes What I did was to look at a variety of materials  
 (15) before we submitted the report but I was not satisfied that  
 (16) I d had sufficient time to look at everything in the kind of  
 (17) detail that I wanted to  
 (18) Q Before you go on –  
 (19) A The problem was –  
 (20) Q Just focusing on your report Dr Seldin with respect to  
 (21) your report is it the case that the materials that you had  
 (22) made available to you or were made available to you for the  
 (23) purposes of the report you submitted in litigation came from  
 (24) counsel s New York office? Does that ring a bell  
 (25) Mr Donahue?

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- (1) MR PETUMENOS Just a minute I need to approach the  
 (2) bench so he has his facts straight here I want to make sure  
 (3) there s not a misimpression  
 (4) (Bench Conference on the record)  
 (5) MR PETUMENOS Perhaps counsel doesn t know this but  
 (6) the materials that came from the New York office were  
 (7) Mr Roddewig s backup materials about a roomful so it s  
 (8) not – I don t want the impression left it s the lawyer s  
 (9) stuff – It was Mr Roddewig s stuff that he reviewed in  
 (10) connection with the paper  
 (11) MR OPPENHEIMER I was just going off the  
 (12) deposition I won t pursue it It s not that important I ll  
 (13) move to a different question  
 (14) THE COURT Okay  
 (15) (Bench conference concluded)  
 (16) BY MR OPPENHEIMER  
 (17) Q We ve talked a lot of theory let s just round ourselves  
 (18) for context purposes to the case here and the lands here  
 (19) Have you done an analysis of any of the specific lands in  
 (20) this case to determine their highest and best use?  
 (21) A No sir I have not  
 (22) Q And have you done an analysis of any of the lands in this  
 (23) case to determine what their per-acre value is?  
 (24) A No sir I have not  
 (25) Q Are you aware of how much acreage is involved in this case?

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- (1) A No sir I m not  
 (2) Q Have you visited any of the properties that are at issue in  
 (3) this case?  
 (4) A Not – I don t believe so No I would not have  
 (5) because –  
 (6) Q That was not part of your assignment is that correct?  
 (7) A That s correct  
 (8) Q So you actually in this case have not reached a  
 (9) professional conclusion that the lands that all of us folks  
 (10) have been debating about for a couple of months are or are not  
 (11) properly classified as preservation lands or natural lands  
 (12) that s not something you ve formed an opinion on here?  
 (13) A I read looked at a lot of material I ve reviewed some  
 (14) things and while – if you were asking me to give you a report  
 (15) to classify the lands I would want to go get some more  
 (16) information But if you re asking for my judgment do I think  
 (17) that some natural lands were involved in here I m perfectly  
 (18) comfortable saying I have enough information to – to believe  
 (19) that natural lands are involved here  
 (20) Q Okay Did you conduct any research regarding the market  
 (21) for any of the lands involved in this case the specific market  
 (22) for these lands here?  
 (23) A When I received the assignment I looked at such materials  
 (24) as we could get within the period of time and after that  
 (25) period of time I looked at additional materials to – to back

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- (1) up and -  
 (2) Q Let me - Dr Seldin let me because we are under some  
 (3) constraints I just want to focus on the report that s involved  
 (4) in this litigation  
 (5) As of the time of your report had you had an opportunity  
 (6) to investigate the market for the lands that are involved in  
 (7) this case?  
 (8) A The specific lands?  
 (9) Q Yes sir?  
 (10) A No sir I have not  
 (11) Q Okay  
 (12) A That was not my assignment  
 (13) Q Understood understood  
 (14) And by the way do you know the per-acre value that  
 (15) Dr Mundy puts on the natural lands or what he calls the  
 (16) natural lands in this case?  
 (17) A I keep hearing something in the 950-range I m not sure  
 (18) how much acreage that applies to  
 (19) Q Okay And you haven t formed an opinion as to whether  
 (20) that s a right or wrong number?  
 (21) A That s correct I haven t looked to see what natural lands  
 (22) sell for and tried to evaluate it Which would be a very  
 (23) difficult thing to do by the way I mean there s a lot of  
 (24) work to do there  
 (25) Q Did you do any research on the extent of oiling of any of

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- (1) Q And prior to your completing your work did you have any  
 (2) contacts with any of the owners of the Native corporation lands  
 (3) here?  
 (4) A No sir  
 (5) Q How about Mr Stoll s clients here the Kodiak Island  
 (6) Borough? Did you have any conversations with those folks?  
 (7) A No I sat - I sat next to somebody over here and saw  
 (8) somebody but that was - that was it  
 (9) Q You - well let me ask you this  
 (10) Are you aware that Bill Mundy in his analysis used a  
 (11) hypothetical rental rate when he valued the lands he classified  
 (12) as natural lands?  
 (13) A I didn t pay much attention to the specifics of what he  
 (14) was - was doing in it so I m not really prepared to discuss  
 (15) the specifics of his report Because my job wasn t to evaluate  
 (16) his report I deal with theoretical soundness of the process  
 (17) Q So the views you re expressing today are not an evaluation  
 (18) of Dr Mundy s appraisal?  
 (19) A That s correct I m not - this is not an appraisal review  
 (20) function  
 (21) Q Did you become aware in your work that Mr Mundy had  
 (22) testified that there is no rental market for natural lands?  
 (23) A I don t remember seeing that I did review some of his  
 (24) testimony from the transcript  
 (25) Q Counsel we re going the play from Mr Mundy s deposition

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- (1) these lands?  
 (2) A No sir  
 (3) Q Did you do any research to determine impact of the oil  
 (4) spill on the subject lands?  
 (5) A I received materials which I read that gave me some feel  
 (6) for what was going on but my assignment was to look at the  
 (7) theoretical soundness of what was being talked about and so I  
 (8) needed to gather some information to understand that  
 (9) theoretical soundness So I have done research if you wish  
 (10) that has a great deal of detail but the purpose of obtaining  
 (11) that detail was not for the purpose of coming up with the  
 (12) answer to the question of value  
 (13) Q Or to answer the question whether there was any damage  
 (14) from  
 (15) the oil spill?  
 (16) A Or to answer the question of quantifying the damage I  
 (17) think -  
 (18) Q Have you been involved in the appraisal of contaminated  
 (19) land?  
 (20) A I don t recall being involved there We had supported  
 (21) with the Appraisal Institute some matching funds for valuation  
 (22) of contaminated lands so if you say involved I m the CEO of  
 (23) the foundation and I was sitting on the research committee  
 (24) when  
 (25) we decided to do that  
 (26) So it s not something that is unrelated but it - I didn t  
 (27) have any assignments in that regard

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- (1) page 1751 line 20 through 24  
 (2) MR PETUMENOS I would like to listen to Dr Mundy  
 (3) MR OPPENHEIMER If you enjoy technology Doctor  
 (4) you ll love this  
 (5) MR PETUMENOS Get to watch TV again Doctor  
 (6) A Get to watch TV again  
 (7) MR OPPENHEIMER If I get this right  
 (8) A Are you going to bring up a videotape of what he s doing?  
 (9) MR OPPENHEIMER Let s watch this  
 (10) (Videotape Played)  
 (11) BY VIDEO EXAMINER  
 (12) Q Based on the research do you believe there s a rental  
 (13) or lease market for natural lands in Alaska?  
 (14) A I do not believe that there s a rental market for  
 (15) natural lands  
 (16) (End of videotape)  
 (17) BY MR OPPENHEIMER  
 (18) Q You were partnered with Professor Smith is that correct?  
 (19) A Partnered?  
 (20) Q Well on this assignment he participated with you on this  
 (21) assignment? Professor Hal Smith worked with you?  
 (22) A Yes yes  
 (23) Q And you I assume have no hesitation in describing him as  
 (24) an accomplished real estate professional and theoretician?  
 (25) A One of the top five in the country



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- (1) Q Were you aware that Professor Smith found it problematic  
 (2) that Bill Mundy used a rental rate to calculate damages for  
 (3) natural lands even though he did not believe there was a rental  
 (4) market for natural lands?  
 (5) A Would you play the transcript of what he said?  
 (6) Q Absolutely  
 (7) A And if you have a written one it would be good for me to  
 (8) be able to see that  
 (9) Q Counsel it s 167 line 9 through 168 line 4  
 (10) MR PETUMENOS I m familiar with the passage but if  
 (11) we could have the surrounding transcript it would be very  
 (12) helpful And for the doctor as well  
 (13) MR OPPENHEIMER Sure  
 (14) It s highlighted Doctor  
 (15) Did I foul it up Joel? Let me try it again  
 (16) A Oh okay You have -- okay May I see also page 166  
 (17) please?  
 (18) MR OPPENHEIMER I ll let somebody more adept do  
 (19) this  
 (20) MR DIAMOND This is a man who claims to fly a  
 (21) plane?  
 (22) MR OPPENHEIMER Very few people will fly with me  
 (23) (Videotape Played)  
 (24) BY VIDEO EXAMINER  
 (25) Q Now Dr Mundy has testified that there really is no

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- (1) rental value or at least no rental market or lease value for  
 (2) lands as natural lands That being the case do you see any  
 (3) theoretical problem with him applying a rental rate based on a  
 (4) underlying fee value established by a highest and best use of  
 (5) natural lands?  
 (6) A Well if -- if I can assume that what you ve said is  
 (7) correct and accurate I would say yes there is a problem  
 (8) (Videotape concluded)  
 (9) BY MR OPPENHEIMER  
 (10) Q By the way Dr Seldin that was your colleague Dr Hal  
 (11) Smith?  
 (12) A Yes sir That was Hal Smith  
 (13) Q Have you had an opportunity previously to review any of  
 (14) the testimony of Dr Hal Smith?  
 (15) A I took a reading of his deposition probably a couple days  
 (16) before I left town  
 (17) Q Dr Seldin is there a difference between fair market --  
 (18) A I m sorry you -- you posed a question with regard to the  
 (19) rental value and then you showed that  
 (20) If I understood the question that you were asking was about  
 (21) what Dr Smith said and what Dr Smith said was okay because  
 (22) he said If you assume this and if you assume pigs fly then  
 (23) if you assume we had no gravity then the way that question was  
 (24) posed was assuming there is no value the rental value you  
 (25) need to distinguish between the income in cash or the income in

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- (1) services And so the question that was asked of Dr Smith was  
 (2) If you assume there s no income there s no value which is  
 (3) correct But the question was not asked If you assume there  
 (4) was no imputed use of the land and if you ask that question  
 (5) and you answer under that assumption the answer would be  
 (6) correct although it would be correct under an erroneous  
 (7) assumption So there really would be value in other words  
 (8) The wrong question  
 (9) Q Actually I only asked if you were familiar with his  
 (10) testimony but thank you I appreciate it  
 (11) MR PETUMENOS This is in the category I think of  
 (12) Mr Petumenos didn t is ask the question and -- remember that?  
 (13) BY MR OPPENHEIMER  
 (14) Q Doctor is there a difference between value and fair market  
 (15) value? I m asking you to be the theoretician for a moment  
 (16) now  
 (17) A Between value and --  
 (18) Q Value and fair market value  
 (19) A And fair market value  
 (20) Yes fair market value imposes additional conditions  
 (21) Q It is a subset as it were -- at least those of us trained  
 (22) at the University of Chicago would call it this -- a subset of  
 (23) value is that correct?  
 (24) A I don t know that I would use the subset I was UCLA and  
 (25) Indiana I would say it is dealing with different sets of

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- (1) conditions associated with the transaction that is utilized  
 (2) in -- in setting what it would be if indeed there were a  
 (3) transaction  
 (4) Q Understood What I m really trying to get at is in  
 (5) talking to us today about value and describing imputed values  
 (6) the value of land to the people that own land you d still have  
 (7) to know a lot more would you not to know whether in a  
 (8) particular market particular geographic market -- say such as  
 (9) Prince William Sound or Southcentral Alaska -- what would  
 (10) actually be the prices paid for land and how often the land  
 (11) transactions would occur and whether they were likely to occur  
 (12) at all is that correct?  
 (13) A There s a question there I m not sure what it is  
 (14) Q In talking to us about value you re not telling us  
 (15) specifically about the market for land in Prince William Sound  
 (16) are you?  
 (17) A What I m telling you is that even in Prince William Sound  
 (18) where you have conditions and situations which are different  
 (19) from let us say active urban markets these fundamentals  
 (20) principles theoretical structure apply What I can t tell you  
 (21) is what the number is because I don t have the information  
 (22) Q Right Isn t it also true that every time we look to find  
 (23) out whether a piece of land is likely to sell and at what  
 (24) price we have to ask ourselves not only how much is the land  
 (25) worth to the owner but how much is it worth to the buyer?

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- (1) A Say that again because you've got some errors in it  
 (2) Q Okay When we're looking to determine --  
 (3) A He does  
 (4) Q No no I see you writing my questions and I think that's  
 (5) fine Let me try it again  
 (6) In looking to see what a particular piece of land will sell  
 (7) for -- let's break it down  
 (8) A Good good  
 (9) Q -- we have to know not only what it's worth to the seller  
 (10) but to the potential buyer?  
 (11) A You're assuming that you're looking to see what it will  
 (12) sell for  
 (13) Q Yes that would be my premise here That's what I'm  
 (14) looking at  
 (15) A If you want to know what it's worth --  
 (16) Q No no I just want to know what it will sell for I'm  
 (17) being real pedestrian here  
 (18) A You want to know what it would sell for  
 (19) Q Yes  
 (20) A Difference between what it would sell for and what it will  
 (21) sell for  
 (22) Q You've got me there Doctor  
 (23) A Well it's what it would sell for if you were to put it on  
 (24) the market But you don't have to put it on the market to have  
 (25) value What it will sell for is if you're going to put it on

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- (1) the market So let's take the first part of your question  
 (2) If you want to know what it would sell for we go to the  
 (3) next part of the question If you want to know what it will  
 (4) sell for you have to assume it's going to be put on the  
 (5) market  
 (6) Q Okay Assume I put it on the market and I think I now get  
 (7) to ask my question to know what it will sell for?  
 (8) A You want to know what it will sell for  
 (9) Q What it will sell for I need to know not only what it's  
 (10) worth to me as the owner but to the person who might buy it?  
 (11) A Say that one more time please sir  
 (12) Q I am going -- the premise is I am going to put the property  
 (13) on the market  
 (14) A Going to put it on the market  
 (15) Q I'd like to have an idea of what it will sell for Do I  
 (16) not need to know not only what it's worth to me as the seller  
 (17) but to the person who's going to buy it?  
 (18) A No you don't have to know You'd like to know and the  
 (19) better guess that you're able to make as to what it's worth to  
 (20) them the better you're going to be able to price and the  
 (21) better you're going to be able to negotiate So depending  
 (22) upon how much you understand what they want and how badly they  
 (23) want it and how well they'll negotiate and what will go you  
 (24) will then be able to determine a price which would be the most  
 (25) probable price that you could get

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- (1) Q I think I was better off with my airplane question  
 (2) A I'll give you the short answers because I want to get on a  
 (3) flight tonight  
 (4) Q Fair enough  
 (5) You've looked at the federal acquisition guidelines I  
 (6) believe that was your testimony?  
 (7) A Yes sir  
 (8) Q And you have not however -- at least as of the time of  
 (9) your report you had not spoken with any of the federal  
 (10) agencies that are primarily involved in land acquisition is  
 (11) that correct?  
 (12) A That's correct  
 (13) Q So just so I'm clear you did not talk to the Fish &  
 (14) Wildlife Service?  
 (15) A I didn't talk to any of the federal agencies  
 (16) Catch my plane  
 (17) Q Good answer I'm going to make one last and I hope brief  
 (18) foray into the theoretical area -- and I appreciate your  
 (19) corrections of my questions as we go  
 (20) A I'm sorry I don't mean to offend you but I've been in a  
 (21) classroom for 30 years and a great deal of what I've done with  
 (22) my students is to get them to properly structure the questions  
 (23) so that they can properly go through this and I used to teach  
 (24) a strategy course and I've been missing teaching that because  
 (25) this is the kind of analyses we've done so I'm finding this

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- (1) very good because I haven't had a chance to lecture for a  
 (2) while  
 (3) Q Well so am I  
 (4) On the other hand if I have a piece of park land that is  
 (5) in a real expensive neighborhood in a city say let's speculate  
 (6) that there's a little piece of Central Park that hasn't been  
 (7) bought yet and it's owned by a company that has a -- a real  
 (8) high commercial use for it say they're going to put a shopping  
 (9) center there And I'm a government and I want to buy that  
 (10) piece of property to add to Central Park and I'm told there's a  
 (11) comparable piece of property piece of park land in a small  
 (12) town in northern California where there's no competing  
 (13) commercial pressure for the property and that it sold for \$10  
 (14) an acre  
 (15) Would I be correct that because they're both park lands  
 (16) that I should assume I could buy the land near Central Park  
 (17) there in that area for \$10 an acre?  
 (18) A Should have given you a quiz after I talked about retail  
 (19) There are different kinds of retail and you go into a  
 (20) classification of the various kinds of retail because you look  
 (21) if you want to value a mall you see what other malls value  
 (22) for and if you want to value a strip shopping center you look  
 (23) under strip shopping center  
 (24) Now in the case of park lands there are big parks and  
 (25) there are little parks The first thing you want to do is

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- (1) identify the highest and best use which in this case is a  
 (2) particular park land  
 (3) Now you want to narrow the scope in order to get  
 (4) comparables Now obviously some small town in Nevada  
 haven't  
 (5) going to be a very instructive as to what the probable sale  
 (6) price is but according to your other example it may be very  
 (7) useful because it may tell you that in this little small town  
 (8) out West which was right next to the - the big - the park in  
 (9) town such as it was the fathers really wanted it and they  
 (10) were paying a price which if you looked at it relative to the  
 (11) per square foot of the city park would be outrageous but yet  
 (12) they paid for it because they saw that this little piece had  
 (13) some value to it  
 (14) So it could be of some use but it wouldn't be that you'd  
 (15) look at the dollar figure it would be that you would look at  
 (16) what was likely to influence the transaction price  
 (17) Q The school that I believe you mentioned - and maybe you'll  
 (18) give me the correct name - the Weimer school?  
 (19) A Yes sir  
 (20) Q I'm sorry What is the full full name of the Weimer  
 (21) school?  
 (22) A It's the Weimer School of Real Estate and Urban Land  
 (23) Economics  
 (24) Q And that's a school with which you're associated?  
 (25) A Yes sir

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- (1) Q Now Dr Mundy has taken some courses from the - or has  
 (2) participated in a program of some kind at the Homer Hoyt  
 (3) Institute?  
 (4) A Yes he's a fellow of the institute of the Weimer School of  
 (5) the Homer Hoyt Institute  
 (6) Q That's the same institute with which you're associated?  
 (7) A Yes I'm CEO of the three organizations  
 (8) Q And has Dr Mundy is he a member of a consortium called  
 (9) Real Estate - the Real Estate Counseling Group that provided a  
 (10) grant to the Weimer school about \$10,000?  
 (11) A Yes  
 (12) MR OPPENHEIMER Thank you no further questions  
 (13) REDIRECT EXAMINATION OF MAURICE SELDIN  
 (14) BY MR PETUMENOS  
 (15) Q Dr Seldin the fact that Hal Smith sees that the attempt  
 (16) to arrive at a rental rate in the market that doesn't normally  
 (17) rent for dollars -  
 (18) A Give me a moment because my mind is on that 10,000 -  
 (19) Q We'll get to it  
 (20) A - on that \$10,000  
 (21) Q You want to talk about that first? You're in charge  
 (22) A Let's get rid of that because we give away \$5 million in  
 (23) the last decade and -  
 (24) Q You want to talk about the \$10,000 business?  
 (25) A Get rid of the \$10,000

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- (1) Q Tell the jury  
 (2) A That's a - Counseling Group of America is a group of these  
 (3) appraisers They support research It's a loose association  
 (4) We do some very good work They had some money they  
 wanted to  
 (5) support some research They were interested in office  
 (6) buildings they gave us a grant of \$10,000 We spent an  
 (7) additional ten so total about \$20,000 to support some research  
 (8) in office buildings  
 (9) We were looking at was getting some definitions of - of  
 (10) office space in order to develop some information So you  
 (11) know that gift is of no - no consequence  
 (12) Q A graduate student or something got to do some work and  
 get  
 (13) paid?  
 (14) A In this case we hired a contractor but \$10,000 is about  
 (15) the size we might give of a grant to a university to fund a  
 (16) graduate student  
 (17) Q And the Council of Real Estate this group that gave the  
 (18) money doesn't just consist of Dr Mundy but lots of people?  
 (19) A It's a group of other people including a lot of people  
 (20) that I've known over the years and Bill Kinnard who is an  
 (21) honorary fellow in it  
 (22) Q Good enough You didn't - you didn't structure your  
 (23) testimony because years ago this group that Mr Mundy was a  
 (24) part of gave you \$10,000?  
 (25) A No sir had absolutely no bearing

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- (1) Q Now I just have one other question That is We saw the  
 (2) videotape a minute ago with Dr Hal Smith talking about that it  
 (3) indicates - that it is a problem when you have to value rent  
 (4) in a market that doesn't normally receive cash for rental  
 (5) income?  
 (6) MR OPPENHEIMER Misstates the testimony  
 (7) THE COURT You want to show it?  
 (8) MR OPPENHEIMER We have to  
 (9) THE COURT Let's do it because then we won't have a  
 (10) debate  
 (11) MR PETUMENOS How about if I rephrase it or  
 (12) something so that -  
 (13) THE COURT No let him hear the testimony It will  
 (14) be that much faster I assume  
 (15) MR OPPENHEIMER Number six  
 (16) (Videotape Played)  
 (17) BY VIDEO SPEAKER  
 (18) Q Now Dr Mundy has testified that there really is no rental  
 (19) value or lease - no rental market or lease value for lands as  
 (20) natural lands That being the case do you see any theoretical  
 (21) problem with him applying a rental rate based on a underlying  
 (22) fee value established by a highest and best use of natural  
 (23) lands?  
 (24) A Well if - if I can assume that what you've said is  
 (25) correct and accurate I would say yes there is a problem

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- (1) (End of videotape )
- (2) BY MR PETUMENOS
- (3) Q Now the fact that that situation creates a problem does
- (4) that mean that you don t attempt to do it you don t attempt to
- (5) try to find a theoretical rental rate if you want to determine
- (6) the loss of value over time?
- (7) A The wrong question was asked So the right question is if
- (8) you have property which does not rent in the market but which
- (9) produces services of value can you estimate the loss of value
- (10) by estimating the value of the loss of services then
- (11) capitalizing as we talked about in the income and then you
- (12) would have an answer to the question of the loss in value And
- (13) that s correct you can do it that way There s nothing wrong
- (14) with doing it that way
- (15) MR PETUMENOS I have no further redirect
- (16) MR OPPENHEIMER No further questions Your Honor
- (17) THE COURT You can step down sir
- (18) Counsel I m going to send the jury out I want to find out
- (19) where we are actually
- (20) So you can take a break
- (21) (Jury out at 12 50 p m )
- (22) THE COURT All right counsel Where are we?
- (23) THE CLERK Wait wait There s a juror
- (24) MR PETUMENOS Where we are Judge is that the
- (25) following witnesses for today are not mine

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- (1) MR OPPENHEIMER Fleeing from the podium Your Honor
- (2) THE COURT Using the plural here counsel Where
- (3) are we?
- (4) MR OPPENHEIMER Your Honor we have an issue with
- (5) Pat Norman who is on the list And we have the
- (6) by-now-infamous issue of Ms Lucy Groh who I m coming to
- (7) think
- (8) of as a character in a novel I ve heard it so many times
- (9) Those are the last two I believe scheduled for today
- (10) MR STOLL Your Honor we have - we could also play
- (11) the video the videotape
- (12) THE COURT Been waiting for that
- (13) MR DIAMOND So have we
- (14) MR OPPENHEIMER Pat Norman Your Honor
- (15) MR STOLL He hasn t been waiting as long as we
- (16) have
- (17) MR OPPENHEIMER Pat Norman poses the issue of that
- (18) stipulation we ve discussed He and Gail Evanoff were the
- (19) subject of a stipulation they would not be called and we would
- (20) not remark on their absence and we view it as a very
- (21) straightforward proposition
- (22) I ve brought the document I have the documents with me if
- (23) you d like to see them I don t think they re in dispute
- (24) There are two letters involved Your Honor
- (25) MR FORTIER May I see them?
- (26) MR OPPENHEIMER Sure

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- (1) THE COURT Okay I see the letter So what s
- (2) Mr Norman going to testify to?
- (3) MR FORTIER He would testify Your Honor - you
- (4) recall that Exxon s testimony concerned first of all the
- (5) organization of the spill Mr Norman will testify to the lack
- (6) of organization in a place called Windy Bay that he was at
- (7) and the competing instructions he received with regard to how
- (8) to - how to take care of the oil out there
- (9) He ll also testify - another thing that Exxon testified
- (10) to I believe through Mr Teal and Mr Harrison - was that in
- (11) 1992 there was a general consensus between the land owners
- (12) and
- (13) the state government on what needed to be cleaned or what
- (14) was
- (15) cleaned what was not in other words the end of the oil spill
- (16) cleanup period
- (17) Mr Norman will testify to a discussion he had with
- (18) Mr Harrison and Admiral Ciancaglini again in a place called
- (19) Windy Bay with regard to that - that subject with regard to
- (20) the issue of whether or not that area should be demobilized
- (21) whether or not it s gone whether or not it was clean
- (22) He will also testify to what his understanding is of the
- (23) state - of the state standard for - for cleanliness or for
- (24) cleanup after the oil spill
- (25) So it s three - three real short issues He would be
- (26) maybe five minutes maybe ten minutes But not much - no
- (27) longer than ten minutes Your Honor

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- (1) On the stipulations would that I had brought my file it s
- (2) a rather dense issue There s also a letter from Mr Diamond
- (3) that clarifies what the situation is I didn t bring that
- (4) letter with me
- (5) THE COURT Was it after your July 26th letter?
- (6) MR DIAMOND There was an exchange of correspondence
- (7) between Mr Petumenos and myself over what - it meant we
- (8) wouldn t comment in closing argument is all that deals with
- (9) the scope of that and then Mr Fortier closed the loop by
- (10) sending me a marked up copy of his opening statement and
- (11) circled what he didn t want me to talk about in my closing
- (12) argument So the rest of the correspondence only concerns
- (13) what
- (14) I would not do during the course of arguing the case given the
- (15) fact that they were not calling those witnesses
- (16) THE COURT So does your letter agree with the
- (17) conditions that he imposes in his July 26th letter?
- (18) MR DIAMOND As defined by subsequent correspondence
- (19) THE COURT Let s see the subsequent correspondence
- (20) MR FORTIER The intent Your Honor was to -
- (21) MR DIAMOND Your Honor when you say if it changed
- (22) anything I didn t understand what you meant by that
- (23) THE COURT Well did you accept his conditions?
- (24) MR DIAMOND Yes we accepted his condition that we
- (25) would not refer to the fact that he was not calling them
- (26) There then was confusion as to what it meant that we wouldn t

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- (1) refer to them simply not referring to them by name or not  
 (2) referring to them by identity And Mr Petumenos and I worked  
 (3) that out and I subsequently got a letter from Mr Fortier  
 (4) explaining what he understood we would not do in closing but  
 (5) it didn't concern the guts of the agreement  
 (6) MR PETUMENOS Judge there was no agreement between  
 (7) counsel that before we heard the defense case that one of  
 (8) these witnesses might not have some rebuttal We were trying  
 (9) to close our case in chief quicker because of the length of the  
 (10) trial and we tried to get - what we were trying to accomplish  
 (11) simply was if we cut witnesses from the list would counsel  
 (12) not in final argument say ha-ha you didn't call so and so and  
 (13) say thus and such  
 (14) We hadn't heard the defense case yet so we were not tying  
 (15) our hands to call a witness like this to address a specific  
 (16) point on rebuttal but the whole panoply of the direct which  
 (17) covers a lots of things we didn't cover in rebuttal was the  
 (18) subject of the exchange  
 (19) THE COURT That's what it looks like to me too  
 (20) MR OPPENHEIMER Your Honor there are a couple  
 (21) problems with that Maybe I should let the people that spoke  
 (22) speak to the specific issue  
 (23) The nature of our case was of course our rebuttal other  
 (24) than the word which no one wants to utter which is  
 (25) surrebuttal but we did not call Kenai witnesses and we

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- (1) these - these aren't in the nature of rebuttal witnesses  
 (2) THE COURT I want to hear that again This is  
 (3) Mr Norman we're talking about?  
 (4) MR OPPENHEIMER Mr Norman  
 (5) THE COURT What is Mr Norman going to say?  
 (6) MR FORTIER Your Honor Mr Norman is going to -  
 (7) THE COURT Was there a location where there was a bad  
 (8) response from the oil spill cleanup organization?  
 (9) MR FORTIER Yes yeah He's going to address the  
 (10) issue of the way in which the cleanup was handled the fact  
 (11) that -  
 (12) THE COURT What does that rebut?  
 (13) MR FORTIER Pardon?  
 (14) THE COURT What does it rebut?  
 (15) MR FORTIER It rebuts Mr Harrison's testimony and  
 (16) Mr Teal's testimony Your Honor that you know this is  
 (17) something that was well orchestrated We - you recall  
 (18) Mr Teal's testifying that prior to any cleanup crew going out  
 (19) the area was all SCAT'd first they had three people going  
 (20) out One of those people was a geomorphologist who laid out  
 (21) where the oil was and there was a biologist and there was an  
 (22) archaeologist as part of the SCAT team that Exxon sent out  
 (23) Mr Norman will testify that that wasn't the case in an  
 (24) area that's conceded was heavily oiled in the bay area That  
 (25) crew got sent out -

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- (1) didn't - our own people and we didn't have Mr Harrison go  
 (2) into a number of things that he otherwise could have gone  
 (3) into It's - everything I hear tells me that this is an  
 (4) oiling witness  
 (5) THE COURT Is what?  
 (6) MR OPPENHEIMER An oiling witness it's another  
 (7) oiling witness And not to you know press the point or put  
 (8) too fine a point on it but it seems to me if any issue was  
 (9) part of the direct case it was that  
 (10) THE COURT That's a different argument If you hand  
 (11) me these two letters and say there's a solid agreement not to  
 (12) call the witnesses in rebuttal I tell you that it's like all  
 (13) drafting problems you tried your best to wrap it up and you  
 (14) didn't do it  
 (15) MR OPPENHEIMER Your Honor I am - I am becoming  
 (16) more - I'm mindful of the process of statutory construction  
 (17) that works and I agree there is no express reference to  
 (18) rebuttal and I don't base the argument on that What I base  
 (19) the argument on is that when the witnesses were called the  
 (20) parties talked about not discussing that in closing It was  
 (21) certainly our expectation that we weren't going to see these  
 (22) people Aside and apart from -  
 (23) THE COURT You may not Evanoff's already gone  
 (24) MR OPPENHEIMER That's correct And aside and apart  
 (25) from that we have the very clear argument I think that

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- (1) THE COURT Counsel -  
 (2) MR FORTIER And that was it  
 (3) THE COURT I don't think he's a rebuttal witness  
 (4) I'm not going to let him testify On the other hand I think  
 (5) it's only fair to the plaintiffs that I hear from the witness  
 (6) and not from the lawyer So after the trial day is over you  
 (7) can put him on the stand and you can make your offer of proof  
 (8) by virtue of his testimony and then I'll see whether or not  
 (9) this ruling has to be modified  
 (10) MR OPPENHEIMER Your Honor I think that leaves us  
 (11) with Ms Groh  
 (12) MR DIAMOND Ms Groh who I hate to say this is  
 (13) growing on us all the more time we spend on the subject  
 (14) MR FORTIER Your Honor if I could one other issue  
 (15) that I indicated he wanted to testify about or I wanted to put  
 (16) him up for evidence on was the question of landowner input  
 (17) You recall that both Admiral Ciancaglini in his testimony  
 (18) deposition testimony and Mr Harrison talked about the  
 (19) importance of landowner input particularly in '91 and '92 so  
 (20) another area that Mr Norman has first hand knowledge of He  
 (21) was out in the field  
 (22) THE COURT I'll listen to him counsel When he gets  
 (23) on the stand I'll listen to him  
 (24) MR FORTIER Thank you  
 (25) MR DIAMOND If I may approach let me give you two

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- (1) pieces of transcript This is Mr Mundy s discussion which  
 (2) I ve shown counsel now of his conversations with Mrs Groh  
 (3) THE COURT I saw that  
 (4) MR DIAMOND Yeah And this is from the  
 (5) cross examination of Mr MacSwain about his conversations  
 with  
 (6) Mrs Groh  
 (7) THE COURT Okay So on page 4691 whose testimony is  
 (8) this?  
 (9) MR DIAMOND That s MacSwain you have in your right  
 (10) hand  
 (11) THE COURT MacSwain he said I spoke with Mr and  
 (12) Mrs Groh quite extensively and at one time Mr Groh had a  
 (13) claim against Exxon I m not sure what the status is right  
 (14) now but he refers to his wife Lucy Groh who provided me with  
 (15) a lot of all the details that were in the office regarding land  
 (16) transactuons and I didn t get into it with her whether or not  
 (17) the oil spill had an adverse effect I was merely gathering  
 (18) information and she gave it to me  
 (19) So she didn t - you know we didn t discuss that as part  
 (20) of it but Mr Groh at one time did have a claim initially when  
 (21) I first met to him but he refers to his life Lucy who is  
 (22) more familiar with the subject and as you know - Lucy who is  
 (23) more familiar with the subdivision And that s what I wanted  
 (24) to know She said she s got the detail and in fact - so I m  
 (25) not certain exactly what the current position was

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- (1) Then we go to page 2823 and that - who s this?  
 (2) MR DIAMOND Except it came the other way around  
 (3) Mundy testified first then MacSwain  
 (4) THE COURT So this is Mundy right  
 (5) MR DIAMOND You have Mundy in your left hand  
 (6) THE COURT Mundy said - well Mr Oppenheimer I  
 (7) think you re taking things a little bit out of context here  
 (8) The fact of the matter is that in 1958 there were some ten  
 (9) lots that sold in 1989 - I m sorry that s not 1958 it s  
 (10) 1988 right In 1988 there were some ten lots that sold in  
 (11) 1989 the sale activity dropped down to only one lot They had  
 (12) to discount the price of that lot considerably to get that one  
 (13) sale to take place and according to Mr Groh Mrs Groh who is  
 (14) one of the managers of the subdivision the reason that sales  
 (15) dropped dramatically in 1989 was because of the spill They  
 (16) could not market the lots and they tried diligently to do it  
 (17) In 1990 prices of the lot sales went up but it was because  
 (18) they dropped the prices significantly right?  
 (19) MR DIAMOND Right So the state of the record is  
 (20) that Dr Mundy characterized Lucy Groh s opinions on the  
 (21) subject and Mr MacSwain didn t If ever there was less of a  
 (22) case for rebuttal they got to put in their side and we didn t  
 (23) put in our side Now that was a strategic decision on our  
 (24) part motivated by a number of considerations but one of them  
 (25) was to avoid an area that I m sure you would have been pleased

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- (1) with us for avoiding there is litigation between the Grohs and  
 (2) Exxon Compounded by the fact that Mr Groh represented  
 (3) Alyeska in connection with proceedings before the  
 Trans-Alaska  
 (4) Pipeline Liability Fund It was sort of a morass of things  
 (5) As Mr MacSwain said when he testified he was instructed  
 (6) to steer clear of talking substance with anybody who had a  
 (7) claim against Exxon in doing his real estate work for  
 (8) similar - similar reasons We didn t get into a lot of detail  
 (9) about Mrs Groh and Mrs Groh s opinions with him because it  
 (10) would have engendered a fairly lengthy collateral discussion  
 (11) about their litigation and how they resolved their litigation  
 (12) and it - it was something we just decided best be avoided  
 (13) Even though the plaintiffs got their shot at us on what  
 (14) Mrs Groh s views were on the subject what s there to rebut?  
 (15) This is supposed to be rebuttal testimony They re going the  
 (16) call her basically to set forth the same information that  
 (17) Dr Mundy set forth about Ellamar and the same opinions that  
 he  
 (18) attributed to this witness when we have purposefully decided  
 (19) not to get into that I - it strikes me that there is nothing  
 (20) to rebut here  
 (21) THE COURT Okay got you  
 (22) MR PETUMENOS I believe that is an incomplete  
 (23) recitation of the record Dr - Ellamar presents a big  
 (24) problem for Exxon and this is how Exxon has dealt with it  
 (25) Ellamar you recall is on the eastern side of the sound

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- (1) We have a claim for land all around that area The objective  
 (2) record would seem to indicate that there were a lot of sales in  
 (3) 1988 and the market fell off the - fell off the table in  
 (4) 1989 Exxon had to do something with that evidence and they  
 (5) couldn t talk to the person who owned the property because  
 (6) they weren t going to get the right answer  
 (7) What they did instead was they had Mr MacSwain go talk  
 (8) to Mrs Groh and ask a bunch of questions but not the ultimate  
 (9) question and then create a graph that said Oh here s the  
 (10) explanation  
 (11) In 19 - just before 1988 they built a road and a dock  
 (12) and there s limited demand for this property so the road and  
 (13) the dock made people go out and buy it so that s why there s  
 (14) this big bar chart just before the spill and that wiped out all  
 (15) the demand and there wasn t therefore any more customers  
 out  
 (16) there to purchase the property  
 (17) So it s cyclical in that he showed sort of a cyclical  
 (18) program on the chart so therefore in 1989 when the sales went  
 (19) away it was because a whole bunch of people just bought the  
 (20) land after it had just been improved so the demand was slack  
 (21) The people that were around had come in and purchased the  
 (22) property  
 (23) That s what Exxon did with Ellamar and we can bring in the  
 (24) owner of the property to say Nonsense that isn t what  
 (25) happened that isn t how it happened and they should suffer

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(1) the proof  
 (2) They didn't leave Ellamar alone They went out and created  
 (3) this chart and put in this line about docks and roads and  
 (4) things to explain away what was on the objective evidence a  
 (5) big problem for them and it is a very important issue which we  
 (6) can lay to rest or put our best evidence on in about five  
 (7) minutes by having - having the owner of the property who is  
 (8) the best source of the evidence come in and testify  
 (9) Where we are now is of course two experts talked to the  
 (10) owner and get - walk away with different conclusions on it  
 (11) MacSwain with his chart Oh yes I found the real answer it's  
 (12) a dock and a - and a road And Dr Mundy we under those  
 (13) circumstances surely are entitled in a property centrally  
 (14) located in central to the case of this to put on ten minutes of  
 (15) testimony what the owner says actually happened who is the  
 (16) best source of information And I don't think Exxon has left  
 (17) this alone at all  
 (18) MR DIAMOND Your Honor what's happening if we  
 (19) cross examined Dr Mundy on his numbers because he talked  
 to -  
 (20) or his people talked to the Grohs and got a set of numbers and  
 (21) got their interpretation  
 (22) We cross examined Dr Mundy We asked him about the road  
 (23) and the dock and did he take that into account and what the  
 (24) plaintiffs are doing here is the fact of the matter He either  
 (25) forgot that or never considered it and was unable to provide

(1) way you've presented your defense this is one very limited  
 (2) piece of rebuttal evidence and it is rebuttal evidence so I'm  
 (3) going to let her testify  
 (4) MR DIAMOND May we get some -  
 (5) THE COURT There's also another problem which is of  
 (6) course I can hear the cross examination and rehabilitation  
 (7) things going on with regard to relationships and her - and her  
 (8) claim against Exxon and the fact that her husband works for  
 (9) another one of the parties in this case - I mean that  
 (10) troubles me too but who am I - who do I have to rely on to  
 (11) resolve that problem? Not me I'm not going to step out there  
 (12) and limit you now You have to be allowed a fair opportunity  
 (13) to question her If you choose to open doors it's your  
 (14) business  
 (15) MR DIAMOND Is he going to be allowed to express an  
 (16) opinion as to the effect of the oil spill on her sales or  
 (17) simply facts?  
 (18) THE COURT I don't know Are you intending to elicit  
 (19) an opinion?  
 (20) MR PETUMENOS Yes we're entitled to do that a lay  
 (21) opinion of the property owner's own property you ruled is  
 (22) admissible  
 (23) THE COURT Well is that what this is?  
 (24) MR PETUMENOS Yes She is the developer and owner  
 (25) of the property She is there she watched it happen She

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(1) any explanation as to any impact the dock or the new roads  
 (2) might have had because he simply wasn't aware of it when he  
 was  
 (3) cross examined Plaintiffs had every opportunity at that point  
 (4) to supplement their witness list timely This is a witness who  
 (5) is not on the witness list originally and call Mrs Groh during  
 (6) the case in chief We avoided all sorts of issues when we put  
 (7) on our case about the Grohs and about Ellamar because she  
 was  
 (8) not on the witness list and she was not here to testify  
 (9) So I - it - it's not terribly convincing to say that they  
 (10) now need to put on evidence that they were aware of while their  
 (11) case was going on and probably long before that because they  
 (12) took depositions of all of our experts who talked about this as  
 (13) well  
 (14) THE COURT Okay  
 (15) MR PETUMENOS I have nothing further  
 (16) THE COURT I'm going to let her testify  
 (17) Counsel here's the - first the witness list is also -  
 (18) always a troublesome question but the witness list really  
 (19) is - is to provide fair notice and a fair opportunity to  
 (20) question You've clearly had that in this case This is very  
 (21) limited testimony and you know everything she's going to say  
 (22) and have known for some time everything she's going to say so  
 (23) although it concerns me it's not the dispositive question So  
 (24) I'm not going to strike her for that reason  
 (25) It strikes me in terms of the whole record here and the

(1) knows what kind of interest she had in the property before and  
 (2) after the spill and is entitled to go to the - that's what  
 (3) we're all talking about here with this dock and road and all  
 (4) this and the ultimate issue The evidence rules make clear the  
 (5) fact it goes to the ultimate issue does not affect the  
 (6) admissibility of the testimony If it's fair rebuttal that's a  
 (7) fair part of the rebuttal  
 (8) MR DIAMOND I thought the offer was she was going to  
 (9) be called to talk about what effect if any the roads and the  
 (10) dock had or didn't have Now it's being broadened into she's  
 (11) now yet another expert on the effects of the oil spill This  
 (12) really is quite akin to testimony that we -  
 (13) THE COURT Is it the road or the dock or is it the  
 (14) oil spill?  
 (15) MR PETUMENOS It's both Exxon's theory is that the  
 (16) demand went up and all of the customers were gone because  
 of  
 (17) the road and the dock and she's going to say that isn't what  
 (18) happened I had very little interest in the property during the  
 (19) year of the cleanup and the year after the spill no one was  
 (20) interested in it and I think it's because of the oil spill  
 (21) And this is not new or unusual we've always said that the  
 (22) owner of the property can express their opinion In fact  
 (23) that's what Exxon did with the appraiser of Kenai because that  
 (24) was his job And he was not on the expert list either if you  
 (25) recall And he gave his opinion

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- (1) MR DIAMOND Your Honor an owner can express value  
 (2) as to opinion but as to the effect of the oil spill?  
 (3) That s -- that s something quite different than expressing a  
 (4) value expressing opinion as to value But beyond that the  
 (5) only thing our testimony -- I ll show you 10305A in evidence  
 (6) The only thing our testimony was offered to explain was the  
 (7) jump in 1988 sales What Mr MacSwain testified to was it was  
 (8) his understanding that governments went in and marketing was  
 (9) done and that s why there was a big jump in 88 sales He did  
 (10) not testify that the -- it had anything to do with the oil  
 (11) spill And if they want to rebut that notion that the 88 jump  
 (12) was indicative of some greater market out there that might be  
 (13) arguable rebuttal but to then start talking about the dropoff  
 (14) in 1989 being caused by the spill is far greater than any  
 (15) proffer they ve made for this witness and that gets -- it s  
 (16) clearly into opinions that are beyond her realm  
 (17) THE COURT Why are they beyond her realm?  
 (18) MR DIAMOND The effect of the oil spill?  
 (19) THE COURT Yeah Why are they beyond her realm?  
 (20) MR DIAMOND Well you know we were blocked from  
 (21) asking people involved in real estate you know their views of  
 (22) the effect of the oil spill Ben Hancock was one You know  
 (23) you said -- you told us that was -- that was beyond the ambit  
 (24) We started getting into expert testimony  
 (25) THE COURT True true In some senses it s true

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- (1) In others she s different than Hancock I was trying to draw  
 (2) a distinction between what I considered to be expert testimony  
 (3) MR DIAMOND Hancock was also a property owner  
 (4) THE COURT Yes that s true but he was also -- and  
 (5) he was presented as a person who did all kinds of real estate  
 (6) transactions and I was concerned about turning what in  
 essence  
 (7) you kept calling a fact witness into an expert witness I  
 (8) don t think that s what s going on with Ms Groh  
 (9) MR DIAMOND I will remind you of one other precedent  
 (10) with respect to witness lists and that was Mano Frey who we  
 (11) did -- we did modify our witness list to add him We thought  
 (12) as soon as we reasonably could understand that he was going  
 to  
 (13) be relevant and could be called this is somebody who still is  
 (14) off their witness list to this date has not been added to any  
 (15) witness list And I would say even -- even candidness would  
 (16) suggest that the Mano Frey rule apply to the Lucy Grohs of the  
 (17) world  
 (18) THE COURT If there is such a thing yes She can  
 (19) testify counsel I am concerned about -- I mean is she just  
 (20) going the give a bare opinion she didn t think it was the Exxon  
 (21) Valdez oil spill that caused it?  
 (22) MR PETUMENOS She did think yeah  
 (23) THE COURT Well you can t elicit that opinion You  
 (24) can talk about the -- the post-spill facts and if in fact  
 (25) what I hear supports lay opinion I may let it in but you

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- (1) can t ask the question  
 (2) MR PETUMENOS You need a foundation  
 (3) THE COURT Without asking for permission  
 (4) MR PETUMENOS I just want in your analysis to  
 (5) understand If you take a look at the MacSwain exhibit that  
 (6) you admitted with all the quotes on it there are  
 (7) substantial -- substantial recitations in that material of  
 (8) people saying that they didn t think the oil spill had any  
 (9) impact who gave the --  
 (10) THE COURT That s true  
 (11) MR PETUMENOS And who were not even in court for  
 (12) cross-examination  
 (13) THE COURT Yeah that s true  
 (14) MR DIAMOND And with a limiting instruction that it  
 (15) was not being offered for proof  
 (16) THE COURT Counsel you re both marvelous at giving  
 (17) little pieces of arguments in response to other pieces of  
 (18) argument What did I rule? Tell me I ruled that she could  
 (19) testify  
 (20) MR DIAMOND May I now invoke the Mr Petumenos  
 (21) rule?  
 (22) THE COURT No because if you do the jury s gone I  
 (23) want her on and off But you can -- it ll take some time to  
 (24) get her down here counsel you re excused We won t start  
 (25) without you Go ahead

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- (1) MR PETUMENOS Judge the other problem we have is  
 (2) we re going to be able to play this tape right now and with  
 (3) the witnesses that were cut by your rulings, these witnesses  
 (4) are going to have to go on tomorrow We have the tape in the  
 (5) time that we have left  
 (6) THE COURT You want to play the tape?  
 (7) MR PETUMENOS Yeah that s what we want to do next  
 (8) THE COURT Mr Diamond you re excused The jury s  
 (9) coming down We ll come back in and play the tape and that  
 (10) will be the last thing today  
 (11) MR DIAMOND Which tape are we playing today?  
 (12) MR STOLL The Suchanek/Freitas tape  
 (13) MR DIAMOND Mr Stoll and I were going to work out a  
 (14) proper introduction of this tape so we could set it in time and  
 (15) place  
 (16) THE COURT And you did not do that?  
 (17) MR DIAMOND No because we didn t think this was  
 (18) coming on till tomorrow  
 (19) THE COURT Yes that s true It has to be put in  
 (20) context They have to know where it is  
 (21) MR STOLL Yes Your Honor  
 (22) THE COURT Do you have an introductory statement?  
 (23) MR STOLL I was just going to point out on the top  
 (24) of the map show on the map where it is and say that this tape  
 (25) was taken by an independent filmmaker in May 1989 and that



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- (1) the Dames & Moore for whom Suchanek worked and Arthur D  
 (2) Little for whom Dr Freitas worked were hired by Exxon at the  
 (3) time to conduct certain tests  
 (4) MR DIAMOND The only thing I would ask that be added  
 (5) to that and you can introduce it if you want is that this is  
 (6) not taken on a -- on a parcel in dispute in this case  
 (7) THE COURT Yeah and that's true isn't it?  
 (8) MR STOLL It was taken at the north end above our  
 (9) parcel It's not on our parcel  
 (10) THE COURT It is not taken on one of the parcels  
 (11) damages are being --  
 (12) MR STOLL I'll say that  
 (13) THE COURT Add that  
 (14) MR STOLL That's fine  
 (15) THE COURT Let's bring them in  
 (16) MR STOLL Oh Your Honor I'm advised it's July of  
 (17) 89 not May of 89  
 (18) (Jury in at 1:19 p.m.)  
 (19) THE COURT All right the jury is present I'd like  
 (20) you to know we're going to play a videotape for you now as  
 (21) part of the plaintiffs' rebuttal case Mr Stoll will explain  
 (22) the videotape and the circumstances and at the end -- it's I  
 (23) don't know five to ten minutes long Once that's done you'll  
 (24) be done for the day and you'll come back here and listen to the  
 (25) rest of the rebuttal case and I hope the rest of the case

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- (1) tomorrow and we're still I think on the schedule the  
 (2) schedule that I announced to you last week all right So this  
 (3) is the -- but this is the last thing you'll hear today is this  
 (4) videotape  
 (5) MR STOLL Ladies and gentlemen the tape that you're  
 (6) about to see was a videotape that was taken in July of 1989  
 (7) and it is on a -- it was filmed by an independent filmmaker not  
 (8) associated with any of the parties in this case and it  
 (9) occurred up in the north end of Kodiak Island -- of Shuyak  
 (10) Island just above the -- an area above the parcel owned by  
 (11) Kodiak Island Borough up in this area up here  
 (12) And the two people that are interviewed during the course  
 (13) of this tape is a Dr Suchanek who was employed by Dames &  
 (14) Moore and Arthur D Little for whom the other interviewee  
 (15) Dr Freitas worked Both Arthur D Little and Dames & Moore  
 (16) were employed by Exxon Corporation to conduct certain tests  
 (17) in  
 (18) connection with the oil spill  
 (19) (Videotape Played)  
 (20) DR SUCHANEK Okay this is one of the first places  
 (21) hit and we started over on a cobble beach over behind the knoll  
 (22) here which had quite a bit of oil probably half inch to an  
 (23) inch of oil over most of the substrate And we're basically  
 (24) looking at the percent cover of all the major biomass species  
 (25) and taking quadrant removals analyze what biological  
 community  
 (25) is hit now and what biological community may still exist after

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- (1) the cleanup operations and we'll follow this hopefully into  
 (2) the future one or two or maybe three or five years to look at  
 (3) the long term recovery rates of the biological associations  
 (4) that are there and basically we take all the living organisms  
 (5) from the upper tide zone all the way down to the zero water  
 (6) park  
 (7) BY VIDEO EXAMINER  
 (8) Q Have you --  
 (9) A Go ahead  
 (10) Q Have you found anything surprising?  
 (11) A Not really When you've got a whole complete cover of oil  
 (12) most of the organisms appear to be dying so that's not too  
 (13) surprising This particular beach over here has been impacted  
 (14) with a pretty heavy layer of all of the above but they've  
 (15) already had crews coming in to remove several hundred if not  
 (16) thousands of bags of oil from the upper beach zone and so  
 (17) what  
 (18) we're finding is a lot of the -- a lot of the oil has seeped  
 (19) into the sediments and as you walk over it it starts oozing  
 (20) out  
 (21) Q How are the cleanup efforts going?  
 (22) A I don't know I'm not involved in the cleanup efforts so I  
 (23) haven't a clue but they're in here with a landing craft  
 (24) They've been here the last week or so and I guess they're going  
 (25) to hit this beach over here heavily oiled beach  
 (25) Q Your name and your title again please?

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- (1) A I'm Tom Suchanek and I'm chief scientist on this  
 (2) particular crew as biological assessment program  
 (3) Q Sponsored by whom?  
 (4) A Sponsored by Dames & Moore And my affiliation is with the  
 (5) University of California at Davis  
 (6) (New Speaker on Videotape)  
 (7) MS FREITAS This beach here has been cleaned and it  
 (8) looked pretty clean when we first got here but on closer  
 (9) inspection there still is quite a bit of oil on the surface and  
 (10) up here in the splash zone mixed into the sediments so we're  
 (11) sampling here as an example of an area that had been heavily  
 (12) oiled and has now been cleaned and next door on the little  
 (13) cove where the helicopter is now we sampled yesterday a  
 (14) heavily oiled area that still has oil on it and hasn't been  
 (15) cleaned yet  
 (16) BY VIDEO EXAMINER  
 (17) Q Could you show me one of your samples?  
 (18) A I don't think that they'd be too interesting These are  
 (19) some sediment cores that we've taken in several different zones  
 (20) on the beach And these are relatively undisturbed profiles of  
 (21) the -- what's in the sediment and this particular core here is  
 (22) from the splash zone and it looks as if there is oil mixed in  
 (23) fairly deeply through this -- through this particular sample  
 (24) So we've taken core samples in several locations down the  
 (25) beach and then we're taking some surface sediment the top two

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- (1) centimeters of sediment from several zones on the beach and  
 (2) those are stored in pre-cleaned jars like these and sent back  
 (3) to the laboratory for analysis This happens to just be a  
 (4) grain size sample but we re taking samples for basically  
 (5) hydrocarbon analysis volatiles and -  
 (6) Q What s your name and title?  
 (7) A I m Sandy Freitas representing Arthur D Little and I m  
 (8) the chief chemist on this leg of the crews  
 (9) Q And who is sponsoring Arthur D Little?  
 (10) A I am employed by Arthur D Little  
 (11) Q And who are they?  
 (12) A Arthur D Little is doing a lot of the chemical analysis  
 (13) Q Is this for Exxon?  
 (14) A They re directly contracted to Exxon to do chemical  
 (15) analysis  
 (16) Q Well thank you  
 (17) MR STOLL I think that s all we have  
 (18) (Videotape concluded)  
 (19) THE COURT All right thank you I ll let you go  
 (20) Don t talk about the case with anyone and don t form or express  
 (21) any opinion until it s submitted to you for deliberation pretty  
 (22) soon We ll see you tomorrow at 8 30  
 (23) (Jury out at 1 20 p m )  
 (24) THE COURT Lights? Can you get the lights on?  
 (25) Okay counsel now what?

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- (1) MR DIAMOND We have I guess two issues for  
 (2) tomorrow s agenda One is Mr Carlson The other is the  
 (3) question about the - the Alyeska emergency audio tapes  
 (4) Mr Don Cornett made the 23rd the 24th and 25th of March  
 (5) 89 If you would indulge us I d prefer doing that with you  
 (6) this afternoon  
 (7) THE COURT So would I  
 (8) MR CLOUGH There s a third issue the telephonic  
 (9) proposal from the plaintiffs to take telephonic -  
 (10) THE COURT Yeah I see your brief I ve read your  
 (11) brief I can do that as well this afternoon There s nothing  
 (12) on the calendar So you ll be ready to go at 2 30 right?  
 (13) MR PETUMENOS Could we have a little more time? We  
 (14) got served with a rather lengthy brief unless there s no need  
 (15) for us to go into it Civil Rule 99 I think is the one that  
 (16) governs I have no idea what s in that brief I got served  
 (17) with that this morning  
 (18) MR STOLL Which brief?  
 (19) MR PETUMENOS On the telephone business  
 (20) THE COURT Mr Stoll which ones are you going to  
 (21) do?  
 (22) MR STOLL I m going to do all of those Your Honor  
 (23) THE COURT Every one of them?  
 (24) MR STOLL I ve got a reply brief on the telephone  
 (25) THE COURT You don t need the extra time

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- (1) MR STOLL I want to confer with my co-counsel but  
 (2) I ve got a brief here Can I approach the bench?  
 (3) THE COURT Should I consider you to be the left hand  
 (4) or the right hand?  
 (5) MR STOLL I don t know  
 (6) THE COURT Let the record reflect that the Judge has  
 (7) been served with a copy of the rebuttal to Exxon s  
 memorandum  
 (8) regarding proposed telephonic testimony Mr Petumenos -  
 (9) MR STOLL We got their brief this morning and while  
 (10) we were in court we had a response prepared and that s the  
 (11) response with - attached to which are some Alaska cases  
 (12) opposed to New Jersey  
 (13) THE COURT I would set this for three except that I  
 (14) know what three means three means five 2 30 means 4 30  
 (15) MR PETUMENOS Control us control us  
 (16) THE COURT I wish I could counsel That s -  
 (17) that s - that is a continuing issue in this case  
 (18) MR STOLL Your Honor I think we can go ahead at  
 (19) 2 30  
 (20) MR CLOUGH If we could take that one up first  
 (21) that s the one  
 (22) THE COURT The telephonic testimony?  
 (23) MR CLOUGH Yeah  
 (24) THE COURT I ll be happy to do that.  
 (25) MR STOLL Your Honor I have a fourth matter to take

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- (1) up that is they have given us a surrebuttal proposed  
 (2) surrebuttal of Dr Gilfillan which sounds surprnsingly like his  
 (3) case in chief testimony  
 (4) THE COURT Why don t I talk about that at 2 30?  
 (5) MR STOLL That s right Just trying to assess the  
 (6) agenda  
 (7) THE COURT I m very appreciative of it Your Honor  
 (8) MR DIAMOND I just wanted to offer one exhibit from  
 (9) Mr Wallace DX16379 which is Judy Robinson s September  
 16th  
 (10) 1993 review appraisal - review appraisal report on the Seal  
 (11) Bay/Tonki Cape transaction  
 (12) (Exhibit DX16379 offered)  
 (13) MR PETUMENOS We object  
 (14) THE COURT Why?  
 (15) MR PETUMENOS This is a memorandum to the deputy  
 (16) commissioner of DNR from Judy Robinson Neither one of  
 these  
 (17) witnesses have testified The cross-examination was simply is  
 (18) this what it says is this what it says I don t believe it s a  
 (19) proper foundation pour the document We haven t had the  
 (20) opportunity to cross-examine or examine Judy Robinson or the  
 (21) person to whom it was sent No foundation for the document  
 (22) MR DIAMOND Your Honor he did authenticate it He  
 (23) had in fact seen it in connection with the appraisal It s not  
 (24) being offered for the truth of the matters asserted in it It s  
 (25) simply being offered to establish the state of mind of ADNR in

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- (1) that report with respect to whether they accept natural land
- (2) appraisals whether they accept comparables based on other
- (3) government transactions
- (4) THE COURT This is a four pages of text and one page
- (5) of graph attached to a document that s - I haven t read it in
- (6) detail but I do know that the portions that Exxon s counsel
- (7) was interested in he questioned on and in fact the language
- (8) certain parts of the language of the report were - were read
- (9) I don't see any reason to admit this document because it seems
- (10) to me that the substance of Exxon s attack if we can call it
- (11) that loosely is in the record I hate to think that I may be
- (12) exposing myself to another surrebuttal witness but the
- (13) objection is sustained and not - not exactly for the reasons
- (14) that Mr Petumenos gave but simply because there s no need
- for
- (15) this document in the record
- (16) MR DIAMOND You won't see a surrebuttal on account
- (17) of that ruling
- (18) THE COURT Thanks
- (19) MR STOLL Your Honor I didn t give you a copy of
- (20) the case that the defendants relied upon I happen to have an
- (21) extra copy
- (22) THE COURT Is this on the telephonic?
- (23) MR STOLL This is on the telephonic They relied on
- (24) the New Jersey case
- (25) THE COURT That s great Thanks So I ll see you at

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- (1) 2 30 Thanks
- (2) THE CLERK Please rise This court stands in
- (3) recess
- (4) (Recess at 1 32 p m)

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- (1) EXHIBITS
- (2) 8530 offered 8129
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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 2,887
TOTAL OCCURRENCES 13,920
NOISE WORDS 385
TOTAL WORDS IN FILE 42,217

SINGLE FILE CONCORDANCE

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NOISE WORD LIST(S)
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## Vol 1 1

(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 ) Tuesday September 6 1994  
 ) 2 42 p a  
 (6) )  
 (8) Pages 1 through 75  
 (10) TRANSCRIPT OF PROCEEDINGS (Hearing)  
 (11) TRIAL BY JURY  
 (13) BEFORE THE HONORABLE BRIAN C SHORTELL  
 Superior Court Judge  
 (16) APPEARANCES  
 (17) FOR THE PLAINTIFF  
 N ROBERT STOLL  
 (18) Stoll Stoll Berne & Lokting  
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 SAHJEL J FORTIER  
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 2550 Denali Street Suite 604  
 (22) Anchorage Alaska 99503  
 907/277 4222

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(1) PROCEEDINGS  
 (2) (Jury out at 2 42 p m )  
 (3) THE CLERK Please rise This court now resumes its session  
 (4) Please be seated  
 (5) THE COURT Counsel we re on the record The jury is  
 (6) not present What are we going the take up first?  
 (7) MR STOLL Your Honor can I just take a housekeeping  
 (8) matter brought to my attention at the end of the day? Exhibit  
 (9) PX1529 which was the tape that we played at the end of the  
 (10) day I didn t offer that and I offer that at this time  
 (11) (Exhibit PX1529 offered)  
 (12) THE COURT It s admitted  
 (13) (Exhibit PX1529 received)  
 (14) MR STOLL Your Honor as far as we re concerned  
 (15) we d like to take up the Gilfillan surrebuttal but maybe if  
 (16) you want to do it in order I don t care which order  
 (17) MR CLOUGH We d enter a request the Robertson matter  
 (18) be taken up since he s the guy three or four thousand miles  
 (19) away that we need to take up  
 (20) THE COURT That s true  
 (21) MR STOLL That s fine  
 (22) MR CLOUGH Yes I ll go  
 (23) As Your Honor is aware and I think you ve had a chance to  
 (24) read the briefs filed by both parties here we are objecting to  
 (25) Mr Robertson testifying by telephone and objecting for two

## Vol 1 2

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 (8) Reported by  
 JOY S BRAUER RPR  
 (9) Registered Professional Reporter  
 Midnight Sun Court Reporters  
 (10) 2550 Denali Street Suite 1505  
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(1) separate reasons First of all even if he were here in the  
 (2) courtroom we don t think it s improper rebuttal testimony and  
 (3) second of all given the fact he s not in the courtroom and be  
 (4) testifying only by phone for the reasons we set forth in the  
 (5) memorandum we don t think he qualifies under the test set  
 (6) forth in Civil Rule 99(a)  
 (7) The two things I d like to speak to in my argument since  
 (8) I m assuming the Court s had a chance to read the briefs filed  
 (9) by both parties is first of all the general relevance and  
 (10) rebuttal issue and second of all take an opportunity to  
 (11) discuss the cases cited by Mr Stoll as in favor of this  
 (12) liberal Alaska policy for taking telephonic testimony  
 (13) On the first issue based on the representation made by Mr  
 (14) Stoll to us over there in the corner on Friday afternoon  
 (15) apparently Mr Robertson is being called to testify about is  
 (16) this is another attempt to impeach Mr Harrison on an issue of  
 (17) something to use the plaintiffs term show beaches  
 (18) As I understood Mr Stoll s representation to us  
 (19) Mr Robertson will say Exxon had some policy of maintaining a  
 (20) show beach that it took people out to see whether it was media  
 (21) or dignataries or whomever I m not exactly sure That is the  
 (22) only representation we ve been supplied as to what  
 (23) Mr Robertson will actually testify to If there s anything  
 (24) beyond that maybe this will be the good time to hear it  
 (25) THE COURT It s the kicker that worried me that s -

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- (1) and that is on page 2 – in an effort to conceal the real  
 (2) status of the shoreline oiling and cleanup efforts  
 (3) MR CLOUGH That s correct Your Honor and that s  
 (4) what they apparently are going to be offering the testimony  
 (5) for  
 (6) Two points First of all the whole issue of a show beach  
 (7) was just an offhand remark by Mr Petumenos during  
 (8) Mr Harrison s cross-examination he asked him Did you have a  
 (9) policy about show beaches Mr Harrison said no and that was  
 (10) it He didn t follow up with any other questions on any  
 (11) particular beaches  
 (12) Second in this case we have shown this jury scores of the  
 (13) actual shorelines at issue throughout Prince William Sound the  
 (14) Kenai Peninsula and Kodiak I don t know what relevant – even  
 (15) assuming it were true and obviously vigorously deny the truth  
 (16) of this particular allegation but even assuming it were true  
 (17) whether some party had a show beach that they showed  
 members of  
 (18) a media or members of a VIP so to speak I don t know what  
 (19) relevance that is to the issues of this case when the issues of  
 (20) this case are the shorelines at issue and we have shown not one  
 (21) but scores and scores we ve shown the worst we ve shown the  
 (22) moderate and we ve shown the light We ve shown as many as  
 the  
 (23) Court would allow us to show  
 (24) Quite frankly I think this falls in the same category as  
 (25) Mr Goodwin They re really trying to take another shot at

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- (1) Mr Harrison s credibility Having had an opportunity to  
 (2) follow up with specific questions on this issue they chose not  
 (3) to instead they re bringing in Mr Robertson via telephone to  
 (4) try and do that I would say it falls into similar category  
 (5) you ruled on Goodwin We ask it be kept out for that purpose  
 (6) alone  
 (7) THE COURT Let s talk about that purpose first I d  
 (8) rather hear the arguments one at a time  
 (9) MR STOLL Your Honor Mr Clough mischaracterized  
 (10) the testimony Mr Harrison was asked several questions  
 during  
 (11) his examination on Friday He was asked Is it your testimony  
 (12) that the media and concerns about the media never affected  
 (13) decisions in the cleanup as far as you re aware?  
 (14) I made no decision based on media ever  
 (15) And did you find any of your coordinates doing that?  
 (16) Not to my knowledge  
 (17) Then he – then he was asked Did you supervise public  
 (18) relations people He said he supervised them and then he  
 (19) denied that they had anything to do with trying to manage the  
 (20) media  
 (21) Then he was asked was there such a thing as a show beach  
 (22) that question was asked He says no  
 (23) Were there times when cleanup crews were brought to beaches  
 (24) that had already been cleaned in order to show the media how  
 (25) well the cleanup process had gone?

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- (1) No sir never never  
 (2) Then he was – let s see I think that – there may be some  
 (3) other place but those are – basically there s about four  
 (4) places in his examination where Mr Harrison said that they did  
 (5) everything completely above board they never did anything for  
 (6) show He also testified about not having any signoffs – and  
 (7) it wasn t just Mr Harrison it was Mr Teal also not having  
 (8) any signoffs on beaches until they were clean So on  
 (9) Now the testimony of Mr Robertson is going to be –  
 (10) Mr Robertson was the fellow that we brought up here on  
 (11) Wednesday who was going to testify on Thursday and then  
 their  
 (12) case dragged on and we didn t get to him and he was here  
 Friday  
 (13) and had to leave and he s in North Carolina now  
 (14) He is going to testify specifically to Exxon bringing in  
 (15) press at times for media show taking the press to a beach that  
 (16) had already been cleaned flying in two crews from other  
 (17) beaches that were working on cleanup elsewhere bringing  
 them  
 (18) to that beach so that they could look like they were busy at  
 (19) the time that the press was there bringing in a sky crane in  
 (20) fact with a helicopter to show make it look like there was a  
 (21) lot of activity going on and then as soon as the press left  
 (22) getting rid of the sky crane and getting the crews back to  
 (23) where they had been  
 (24) There s a total – total show If you want to call that a  
 (25) show beach I don t – I don t much care but the point is is

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- (1) that they did a total stunt for the media  
 (2) THE COURT So what does that prove?  
 (3) MR STOLL It proves Your Honor that the – it goes  
 (4) to the credibility of what Exxon is saying as to doing  
 (5) everything to clean up these beaches and not to – not to have  
 (6) this – a media presentation which is what they did and they  
 (7) put on testimony from the admirals through Mr Harrison over  
 (8) our objection that saying that they did such a wonderful job on  
 (9) cleanup  
 (10) THE COURT Over your objection?  
 (11) MR STOLL Yes we objected to all of the admirals  
 (12) testimony you recall and –  
 (13) MR CLOUGH That s not correct Your Honor They  
 (14) consented to quite a bit of it on the cleanup issue It was  
 (15) other issues they objected to  
 (16) THE COURT Frankly I don t remember you objecting in  
 (17) any specific way  
 (18) MR STOLL Well that was taken up – excuse me Your  
 (19) Honor it was taken up with the master It was not brought up  
 (20) in this court but if you ll recall in federal court I  
 (21) believe there s like five minutes of testimony We didn t  
 (22) object to that But Exxon over our objection was allowed to  
 (23) bring in the praises of Otto Harrison they were allowed to  
 (24) bring in –  
 (25) THE COURT Wait a minute counsel This is the way I

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- (1) remember it you tell me if I m wrong  
 (2) You took it to the discovery master the discovery master  
 (3) ruled and then I heard nothing further nothing after that  
 (4) MR STOLL You made it clear that what the  
 (5) discovery -  
 (6) THE COURT Counsel there s nothing on the record  
 (7) that indicates that I wouldn t have heard your objections  
 (8) Nothing I - the testimony came to me and I don t recall ever  
 (9) having an opportunity to rule on the question  
 (10) MR CLOUGH Your Honor Mr Petumenos on behalf of  
 (11) the plaintiffs on the cleanup stuff consented to the entry of  
 (12) that at the hearing of the discovery master and we talked it  
 (13) out over the good guy stuff so called good guy stuff They  
 (14) waived the objections in order to focus on the narrow issue of  
 (15) the good guy stuff  
 (16) THE COURT Whatever it was before the discovery  
 (17) master no one sought to review it That s the way I see this  
 (18) record If I m wrong you show me  
 (19) MR STOLL Your Honor I can t point to a point in  
 (20) the record of that That was my impression I can just  
 (21) represent that to the Court I can t say that I know that I  
 (22) did not bring a review - bring the matter to Your Honor for  
 (23) review I don t think that any other plaintiff did after the  
 (24) master ruled but the impression that I got was that before we  
 (25) went into the final hearing before the master that you thought

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- (1) this case?  
 (2) MR STOLL That proves Your Honor one of the issues  
 (3) is what was cleaned They put on a lot of testimony about all  
 (4) these surveys they put on Mr Teal et cetera that they  
 (5) surveyed these beaches and that they were clean they got the  
 (6) signoffs by everybody it goes directly to that point as to -  
 (7) the latter point does to the signing off in the morning to  
 (8) not really caring number one as to whether or not the beaches  
 (9) were clean and number two it goes to them knowing that there  
 (10) was oil - there was subsurface oil on these - on these  
 (11) beaches and that they were not interested in getting rid of  
 (12) that subsurface oil and that the - that the oil persisted at  
 (13) least through 1989 and then after they signed off then they  
 (14) didn t resurvey those beaches  
 (15) THE COURT Did they ever say that the oil didn t  
 (16) persist through 1989?  
 (17) MR STOLL Pardon me?  
 (18) THE COURT Have they ever said that the oil did not  
 (19) persist through 1989?  
 (20) MR STOLL No sir What they said Your Honor was  
 (21) they cleaned the beaches and they said they got a signoff and  
 (22) after the federal on-scene coordinator or whoever the person  
 (23) was signed off then it was deemed clean  
 (24) Now this goes to the very point that it wasn t clean  
 (25) Because if it was clean why wouldn t they wait until later in

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- (1) that it was all - that we could - that that could all come  
 (2) in Maybe I misunderstood I don t -  
 (3) THE COURT Well whatever you may have thought  
 (4) counsel the problem is that there s got to be a record of an  
 (5) objection and there is none  
 (6) MR STOLL I understand I understand  
 (7) At any rate Your Honor this is going to the testimony  
 (8) that the defendants put on as to what the admirals said and  
 (9) what in particular what Mr Harrison said about their efforts  
 (10) to get these - be the good guys and they got everything  
 (11) cleaned and they did everything above board and so on It  
 (12) also goes to the testimony about getting these beaches the  
 (13) signoff on these beaches when they were clean because this  
 (14) witness will testify that they had a process that he was  
 (15) instructed by Exxon supervisors to get signoffs on the beaches  
 (16) in the morning before it got warm during the day because if it  
 (17) was warm in the day the oil would seep up the subsurface oil  
 (18) would seep up and it would be visible to the people signing off  
 (19) on the beaches  
 (20) THE COURT Okay that shows that Exxon - let s  
 (21) assume that this is all true What it tends to show is that  
 (22) Exxon misrepresented in 1989 and 1990 right?  
 (23) MR STOLL Just 1989 Your Honor  
 (24) THE COURT In 1989 they misrepresented the status of  
 (25) certain beaches What does it prove? Does that fact prove in

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- (1) the day when they could see whether the oil was there or not  
 (2) there I mean they had a specific purpose of signing off in  
 (3) the morning so that they wouldn t - the signoff person  
 (4) wouldn t be able to see the oil that was there  
 (5) THE COURT Okay  
 (6) MR STOLL The final matter that he s going to  
 (7) testify to Your Honor is who was in charge And he was - he  
 (8) was on the scene before his - his tenure there lasted I  
 (9) believe from April until September and when Exxon came onto  
 (10) the scene in - this is in Lower Kenai area where Mr Fortier  
 (11) has clients - that Exxon was the person in charge it was not  
 (12) the federal on scene coordinator They had been dealing with  
 (13) the governmental entities and so on before that time Exxon  
 (14) came in and Exxon was in charge  
 (15) In fact he was - he was the supervisor of a team of about  
 (16) 60 people Mr Robertson was a team of about 60 people, I  
 (17) believe And he was told not to contact the governmental  
 (18) people but to deal directly with Exxon In fact he also has  
 (19) an experience of where the federal on scene coordinator,  
 (20) Admiral Robbins came to one of the beaches and told  
 (21) Mr Robertson to clean up that beach that there was some  
 (22) gravel that was oiled He was told to clean up that beach  
 (23) After he - he cleaned up the beach he filled about 1700  
 (24) bags I mean he and his crew 1700 bags of - with oiled  
 (25) debris and then Mr Robertson was flown in a helicopter with

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- (1) his supervisor his Exxon supervisor to a meeting with some  
 (2) other higher-up Exxon officials and he was told that quote  
 (3) We re not in the gravel business and don t pick this stuff up  
 (4) you follow your directions from – from us and if you want to  
 (5) keep your job listen to what we re – what our policies are  
 (6) Or words to that effect  
 (7) THE COURT Thank you  
 (8) MR CLOUGH To a certain extent it seems like  
 (9) they re trying to do testimony attaching the signoff process  
 (10) which is undisputed it s the Coast Guard that signs off on the  
 (11) beaches not Exxon they seem to be attacking the Coast Guard  
 (12) in that What s very clear Your Honor from the  
 (13) representations being made here is that Mr Robertson s  
 (14) testimony is purely one of credibility It s highly  
 (15) inflammatory highly controversial one we obviously highly  
 (16) dispute It seems to me if there was ever an example of  
 (17) testimony that was not appropriate for telephonic testimony  
 (18) this is it  
 (19) This would be the time that I would move on to the second  
 (20) issue unless you want to be heard more on the first one  
 (21) THE COURT The second you mean the – well –  
 (22) MR CLOUGH We really should resolve the first one I  
 (23) suppose  
 (24) THE COURT Well I want you to deal with – the way I  
 (25) see this it comes down to three points One is to impeach

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- (1) Harrison essentially showing that the – that the treatment of  
 (2) these quote show beaches were public relations gimmick and  
 (3) were not as far as I can tell were not a – according to the  
 (4) plaintiffs were not a legitimate good faith effort to do a  
 (5) cleanup Why is that – what s your position on that  
 (6) particular issue?  
 (7) MR CLOUGH The way they re describing it here I  
 (8) don t see why a phony cleanup of a beach is relevant to  
 (9) anything They re not saying that you know We tried to fool  
 (10) them the capacity of the beach they re trying to fool them  
 (11) what workers were doing on it Quite frankly I don t see how  
 (12) that relates to the condition of the environment on the  
 (13) shoreline which is what appears to be the issue in the case  
 (14) THE COURT Okay And then the other is  
 (15) misrepresentation of the beach status  
 (16) MR CLOUGH As to whether it s – Mr Stoll  
 (17) characterized it that the beach was not clean at the time of  
 (18) the statement  
 (19) THE COURT Right To show knowledge That s what he  
 (20) said  
 (21) MR CLOUGH But the testimony has been very clear  
 (22) Your Honor that a beach was not signed off when it was quote  
 (23) cleaned i e devoid of oil It was signed off when the  
 (24) federal on scene coordinator determined that was as much  
 work  
 (25) as could be done on it and what would happen then is the

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- (1) following year if additional survey was needed a beach was  
 (2) surveyed and if additional work was needed at that point  
 (3) additional work was done  
 (4) No one has come into this court and said this signoff what  
 (5) that meant was that meant the beach was absolutely devoid of  
 (6) oil and no one would ever go back and look at it again To the  
 (7) contrary Mr Harrison himself talked about the oil that s  
 (8) still out there today Mr Teal talked about the oil that s  
 (9) still out there today and clearly at the end of 1989 there was  
 (10) a lot of oil still out there on a lot of beaches out there or  
 (11) wouldn t have been so much cleanup done in 1990 and  
 (12) subsequently in 1991  
 (13) THE COURT And finally the last one is who was  
 (14) making the decisions  
 (15) MR CLOUGH It appears to me that with the exception  
 (16) of Mr Stoll s representation as to what Mr Robertson would  
 (17) say on this issue I mean the testimony is absolutely uniform  
 (18) as to the issue of the authority of the federal on-scene  
 (19) coordinator including testimony from witnesses offered by  
 (20) these plaintiffs  
 (21) THE COURT Okay Mr Stoll  
 (22) MR STOLL Yes Your Honor  
 (23) THE COURT How do you respond to the issue of whether  
 (24) or not this is proper rebuttal testimony?  
 (25) MR STOLL Well their witness Your Honor their

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- (1) witnesses are the ones that said that We went out there and we  
 (2) did everything that – the federal on scene coordinator was the  
 (3) person that was in charge it was not us Not necessary in our  
 (4) case in chief to approve –  
 (5) THE COURT You said it in your case in chief  
 (6) counsel you presented evidence to that effect in your case in  
 (7) chief  
 (8) MR STOLL We had some – Your Honor we had some  
 (9) testimony in our case in chief that Exxon was in charge  
 (10) There s no question about that But that was not necessary to  
 (11) the proof in our case in chief of our claims They re the ones  
 (12) that brought in all this business from the admirals and Otto  
 (13) Harrison about – and Mr Teal that we re just following  
 (14) orders  
 (15) As a matter of fact the – the testimony of Mr Robertson  
 (16) that his Exxon supervisors said get the – get the Coast Guard  
 (17) people or the federal people there to sign off in the morning  
 (18) goes to not only that the beaches weren t clean but also goes  
 (19) to the point that – of who was in charge in fact defacto who  
 (20) was in charge because they were able to get these people to  
 (21) sign off And I think it s – it s very significant  
 (22) Mr Harrison said Oh there s some oil out there if you  
 (23) would look in the right places under the right rocks and you  
 (24) know where to look and all that business That s not the same  
 (25) situation as saying where you ve got beaches that are signed

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- (1) off the surveys there s no question that once the beach was
- (2) signed off they didn t resurvey that beach
- (3) And so it s very significant to that number because the
- (4) jury is left with the impression that you start off with X
- (5) hundreds or thousands of miles and that by 1990 the number
- (6) was
- (7) down I believe was down to 300 and-something miles and
- (8) that s
- (9) all the oil -- that s all the beaches that are oiled as of that
- (10) time
- (11) I mean a big issue is how much of this area was oiled and
- (12) how much of it stayed oiled and I think that we re entitled --
- (13) when they put into evidence these people signing off and all
- (14) that business and it being -- it sounds like it s -- I mean
- (15) arguably we think that there s -- there s arguments both ways
- (16) but they put on if you believe what they put on in their case
- (17) that the -- that independent people so called independent
- (18) people signed off during 1989 and 1990 and so on
- (19) 1989 there was a big -- a lot of beaches so called signed
- (20) off on and I think that we re entitled we should be entitled
- (21) to put on evidence that there was a charade going on
- (22) And I mean it goes directly to their case It s not -- it
- (23) would not be appropriate for us in our case in chief to show
- (24) that there was a charade because we don t need to prove that
- (25) for our case in chief but when they put into evidence that
- (26) independent people signed off on all this I think it s
- (27) perfectly relevant

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- (1) baloney I think we re entitled to put that in issue We did
- (2) not put that in issue in our case in chief We did not say
- (3) You had show beaches or you did any media stunts
- (4) THE COURT You didn t?
- (5) MR STOLL I don t believe we did Your Honor
- (6) MR CLOUGH I believe Mr Selby made a number of
- (7) references to the media
- (8) THE COURT He made a number of references to a lot of
- (9) things counsel
- (10) MR STOLL It s true Mr Selby said he disagreed with
- (11) what Exxon did but I don t believe Mr Selby said that he
- (12) was -- I don t think he was asked the question first of all
- (13) and I don t think he testified of any knowledge about the press
- (14) and that -- that sort of business
- (15) MR CLOUGH We want to hear Mr Selby --
- (16) THE COURT Let me just go through my notes here
- (17) counsel because I want --
- (18) MR CLOUGH We have a date and line citation if it
- (19) would help Your Honor
- (20) THE COURT You have one?
- (21) MR CLOUGH Yes
- (22) THE COURT If you have the transcript you can bring
- (23) it to me
- (24) MR CLOUGH I don t have the transcript I have a
- (25) reference to that portion of the transcript for the work we did

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- (1) THE COURT What you re really saying is they lied in
- (2) 1989 and therefore we should be able to present the fact that
- (3) they lied in 1989 to show that they re lying now right?
- (4) MR STOLL No no I m not saying that Your Honor
- (5) What I m saying is is that when they -- in 1989 when there was
- (6) a signoff on a beach it did not necessarily mean that that
- (7) beach was clean That s the point I m not saying that simply
- (8) because they lied once in their life they always lie that s
- (9) not --
- (10) THE COURT That s different than presenting show
- (11) beaches isn t it?
- (12) MR STOLL That is a different issue I agree with
- (13) that
- (14) THE COURT Totally different
- (15) MR STOLL It s not totally different it s somewhat
- (16) related because the show beach for the media I think goes to
- (17) the testimony of Mr Harris n in particular but also these
- (18) other witnesses about what -- what their intentions were in
- (19) terms of whether they were really trying to show people being
- (20) frank and honest and not doing anything for the public you
- (21) know for -- for the media I think it goes directly to that
- (22) point Because they have taken the position Well we were
- (23) just frank and honest whatever the facts were the facts
- (24) were I think that s a lot of baloney and anybody that had
- (25) anything to do with this process knows that that s a lot of

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- (1) on the admirals This was August 4th 1994
- (2) Mr Selby in response to a question from me as a matter
- (3) of fact said that Exxon s response in Kodiak was merely part
- (4) of a public relations campaign and that was at page -- volume
- (5) 29 page 4592 to -93 I think there are other similar
- (6) references That s the quickest one we came up with
- (7) THE COURT Well I ve got lots of notes here
- (8) counsel it would take me too long to go through them in great
- (9) detail It seems to me -- let s separate the issues out On
- (10) the issue of the show beaches it s an issue that Mr Petumenos
- (11) brought up he didn t explain it in any detail he just asked
- (12) the question and then he reemphasized the question once in
- (13) the
- (14) examination
- (15) I m not going to allow this witness to now use that as a
- (16) steppingstone to describe the show beaches which have very
- (17) little if any probative value and have a danger of being
- (18) unfairly prejudicial substantial danger of being unfairly
- (19) prejudicial So that s out the show beach testimony is out
- (20) Now the next -- you go down your list counsel and I ll
- (21) tell you what you can have and what you can t
- (22) MR STOLL Okay Your Honor The next issue is the
- (23) signing off of the beaches
- (24) MR CLOUGH Could I ask to be heard on that for just
- (25) 60 seconds?
- (26) THE COURT Sure sure

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- (1) MR CLOUGH Fundamental misconception on the part of  
 (2) Mr Stoll about the signoffs Every beach every single one  
 (3) was signed off in 1989 And the testimony is absolutely clear  
 (4) on this what the signoff means is you don't do any further  
 (5) work there that year It doesn't mean the beach is clean it  
 (6) doesn't mean you don't go back it doesn't mean there isn't  
 (7) more work  
 (8) THE COURT Show me counsel It isn't absolutely  
 (9) clear to me but you may be right Just show me  
 (10) MR CLOUGH It's in Mr Teal's testimony and we have  
 (11) the forms "further treatment recommended we went through  
 the  
 (12) process great detail how they solicited the input which  
 (13) beaches needed to go back and have resurveyed based on the  
 (14) surveys which beaches needed to go back and be retreated  
 The  
 (15) signoff absolutely does not mean Your Honor that the beach  
 (16) was clean and no one went back to it  
 (17) THE COURT Final signoff is simply a cost benefit  
 (18) analysis right?  
 (19) MR CLOUGH Final signoff occurred in June of 1992  
 (20) by first Admiral Ciancaglini and then the ten days later on  
 (21) the part of the state  
 (22) MR STOLL Your Honor that's their argument if  
 (23) we're going to take their argument -  
 (24) THE COURT Counsel if the record shows it without  
 (25) question you have evidence uncontradicted evidence So why

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- (1) would you have to present a rebuttal witness to simply say what  
 (2) was already in the record unrebutted?  
 (3) MR STOLL Well there -  
 (4) THE COURT Tell me that  
 (5) MR STOLL If that was unrebutted in the record I  
 (6) would agree with that Your Honor but I don't think that's the  
 (7) status of the record I think the status of the record -  
 (8) with all due respect I'm not trying to pick an argument -  
 (9) THE COURT He just conceded it didn't they  
 (10) MR STOLL It's not in the record Your Honor I  
 (11) don't think that's in the record The problem is that I  
 (12) can't - I don't think you know if they've got evidence if  
 (13) they put on evidence in the record to the jury that they had  
 (14) these various people clean (sic) off and then they didn't go  
 (15) back to beaches because they were cleaned up and the  
 number  
 (16) kept on getting smaller smaller that they surveyed because  
 (17) they had been signed off that evidence is in What Mr Clough  
 (18) says without the jury present is all nice and good  
 (19) THE COURT All right So in order to avoid this  
 (20) rebuttal witness they could stipulate right? You could work  
 (21) out a stipulation  
 (22) MR STOLL That would be okay  
 (23) THE COURT Be great with me I'll give you that  
 (24) opportunity  
 (25) MR CLOUGH Stipulation as to what the signoff meant

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- (1) there's no problem in that at all Your Honor  
 (2) THE COURT There's always a problem counsel I  
 (3) mean I know there is a problem  
 (4) MR CLOUGH Experience has proven that  
 (5) THE COURT So what you need to do is get the  
 (6) stipulation and that will avoid the question of this witness on  
 (7) that issue  
 (8) Now what other issues?  
 (9) MR STOLL The last matter Your Honor is the issue  
 (10) about who was in charge whether it was the - whether it was  
 (11) in fact - whether it was Exxon or whether it was the federal  
 (12) on-scene coordinator and I would say that we have several  
 (13) pieces of evidence -  
 (14) THE COURT This witness is going to give his opinion  
 (15) as to who was in charge?  
 (16) MR STOLL No he's going to testify as to what he  
 (17) observed Your Honor  
 (18) THE COURT Tell me again in detail what he's going to  
 (19) say  
 (20) MR STOLL Okay What he's going to testify to is  
 (21) once - he was a supervisor for a fairly large crew or group of  
 (22) crews and he is going to testify that in - in the early  
 (23) period of time before Exxon was actively involved he - he  
 (24) had direct access to governmental people In June Exxon  
 came  
 (25) in and said All directions on what to clean how to clean it

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- (1) so on should go to us Exxon was - in fact then took control  
 (2) of the thing  
 (3) On one occasion after that Admiral Robbins happened to  
 (4) drop by at a particular beach that Mr Robertson was at with  
 (5) his crew or crews and Admiral Robbins saw that there was oil  
 (6) on - that was heavily - there was a lot of oil on the  
 (7) gravel He told them to clean up the gravel to clean up the  
 (8) oiled gravel there  
 (9) They did that They collected something like 1700 bags of  
 (10) material and then following that he was - Mr Robertson was  
 (11) taken with his - taken in the helicopter to a Exxon higher-up  
 (12) person - not Mr Harrison but somebody I think directly  
 (13) below Mr Harrison and was told quote We're not in the  
 (14) gravel business we don't - if you're not going to - we don't  
 (15) want you picking up gravel like this If you're going to do  
 (16) this you're going to be working somewhere - you're not going  
 (17) to be working for us  
 (18) THE COURT Who was told this?  
 (19) MR STOLL Mr Robertson  
 (20) THE COURT Robertson okay  
 (21) MR STOLL And so Mr Robertson - I mean he  
 (22) followed the instructions as he was given to them by Exxon and  
 (23) notwithstanding what the admiral had told him - I think it was  
 (24) that same day may have been the day before but it was you  
 (25) know a short time period before that And that in his

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(1) observations it was always Exxon who was in charge of you  
 (2) know what to clean where to clean it and when to move on  
 and  
 (3) so on  
 (4) I think this also goes if I may – apparently the Court  
 (5) doesn't agree with me on this but I think that it also goes to  
 (6) this business about the signoffs because the federal on-scene  
 (7) coordinator eventually would have to sign off but Exxon tried  
 (8) to get the – have the federal on-scene coordinator have the  
 (9) signoffs done in the morning so that it would look like they  
 (10) were clean  
 (11) Now under the circumstances the federal person may in  
 (12) fact have been the person that signed off but they're given  
 (13) misinformation and that's done by Exxon so in that manner  
 (14) they are in fact controlling the process and we think that  
 (15) that's all relevant to who in fact was – was in charge  
 (16) because the – the evidence I mean Admiral Ciancaglino said  
 (17) I'm in charge Admiral Robbins I'm in charge  
 (18) Mr Harrison The Coast Guard was in charge we weren't in  
 (19) charge we were just you know following orders and that  
 (20) was – that was the story that Mr Teal I think Mr Purdom –  
 (21) I'm not sure about that – and other people from Exxon have  
 (22) testified to Hey we're just following orders from the feds  
 (23) and if they're not given appropriate – if the – if in fact  
 (24) the person that is in charge is Exxon either because they're  
 (25) giving disinformation to the feds or for whatever reason we

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(1) think that's relevant to that – to that very point  
 (2) It goes directly to this question about the cleanup  
 (3) because you've got this impression left that the number of  
 (4) beaches keeps diminishing the surveys keep diminishing  
 because  
 (5) Hey everything is clean It keeps getting cleaner and  
 (6) cleaner and cleaner  
 (7) THE COURT So the issue is in your mind if Exxon is  
 (8) in charge it means the beaches aren't clean?  
 (9) MR STOLL It goes to that issue because they then  
 (10) can leave the scene earlier than they otherwise can than  
 (11) they'd have to leave It does go to that Your Honor  
 (12) I mean they have got – they have put on evidence that  
 (13) everything is clean – I shouldn't say that A few beaches if  
 (14) you know where to look and where to find the oil other than  
 (15) those few beaches you can't find the oil and the issue is in  
 (16) this case is how long this oil lasted in a large number of  
 (17) beaches not just a few beaches that are five years later I'm  
 (18) talking whether there was oiling still remaining in 1990  
 (19) 1991 They contest that  
 (20) A lot of the Naue corporation properties there is a  
 (21) contention that – a persistence – that Mr Bush's persistence  
 (22) curves lasted for two years Exxon's position is well it  
 (23) lasted a year And they – in support of that they've got  
 (24) these signoffs supposedly by independent third parties  
 (25) these – these federal people

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(1) Now in fact if that process was –  
 (2) THE COURT I thought we already arrived at a  
 (3) stipulation on this issue  
 (4) MR STOLL I hope we do Your Honor But the point  
 (5) I'm making though on this is It goes to who's in control  
 (6) and I think the question about who's in control of this process  
 (7) goes to the integrity of what's clean and what's not clean  
 (8) THE COURT Okay  
 (9) MR STOLL That is directly relevant to our case –  
 (10) THE COURT Thank you  
 (11) MR CLOUGH – on the who's-in-charge issue Your  
 (12) Honor  
 (13) THE COURT Uh-huh  
 (14) MR CLOUGH I will try to make a great mental leap  
 (15) and accept for the purposes of this argument that everything  
 (16) Mr Robertson says is true  
 (17) Clearly no one from Exxon has ever testified that Admiral  
 (18) Ciancaglino went out on a beach and supervised the small work  
 (19) crews as they did their work They did that on a daily basis  
 (20) No one's come close to saying anything remotely like that  
 (21) Mr Robertson was a contract employee employed through  
 (22) VRCA one of the cleanup contractors we had Given the most  
 (23) favorable review of the offer of proof made by Mr Stoll what  
 (24) Mr Robertson was told was You don't yourself deal directly  
 (25) with whomever from the Coast Guard is overseeing your work  
 you

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(1) deal with Exxon and let them deal with the Coast Guard Or  
 (2) let's even be more generous and he wouldn't know whether  
 they  
 (3) in fact dealt with the Coast Guard or not because he was –  
 (4) according to Mr Stoll he was told to stay out of it  
 (5) The admirals have testified at great length as to how they  
 (6) had individual on scene coordinators working under their  
 (7) authority set up in the different remote areas The people  
 (8) from Kodiak – because we did have a lot of testimony on  
 (9) Kodiak remember there was no evidence of Kenai put in by the  
 (10) plaintiffs in part of the direct case We didn't have all of  
 (11) the witnesses come in and talk about Kenai and how the same  
 (12) process worked there but how in fact there was tremendous  
 (13) agency oversight of the operations how in fact it was illegal  
 (14) to work on cleaning up the beach without the Coast Guard  
 (15) there  
 (16) Under the most favorable interpretation of Mr Robertson's  
 (17) testimony he was told to – for him as a contractor employee  
 (18) to deal with his contractor Exxon let them deal with the  
 (19) Coast Guard There is nothing in the offer of proof that  
 (20) impeaches on this who's-in-charge issue It just isn't there  
 (21) And clearly it is purely – absolutely purely an issue of  
 (22) credibility From the nature of the other issues and the other  
 (23) testimony we heard from Mr Stoll about Mr Robertson he's a  
 (24) very opinioned individual and when we talked if we get to the  
 (25) the point of talking about Civil Rule 99(a) I'm prepared to



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- (1) offer evidence to the Court as to why he has such strong
- (2) opinions These are not the only dealings he s had with Exxon
- (3) including financial dealings
- (4) THE COURT Tell me what they are counsel and I ll
- (5) know the whole story
- (6) MR CLOUGH Sure The guy and his brother put
- (7) together a oil spill cooperative after the oil spill put
- (8) together a cooperative for 80 000 bucks to working a oil spill
- (9) response cooperative out of Seldovia They got a big no They
- (10) didn t get their money They weren t happy about that They
- (11) complained to a number of people
- (12) The next year they put a together a cooperative only this
- (13) time for several hundred thousand dollars shopped it to Exxon
- (14) Exxon said no Shopped it to the state state said no This
- (15) guy has a history of unfortunately negative interactions back
- (16) and forth with Exxon It s precisely the type of thing three
- (17) or four thousand miles away get up there by phone without the
- (18) jury having the ability to observe his demeanor without me
- (19) showing photographs of areas he worked areas crews worked
- (20) under his supervision perhaps even videotapes of exact areas
- (21) he did in that year totally impossible for me to cross examine
- (22) him that way totally impossible for the jury to observe the
- (23) demeanor
- (24) Plus this guy has been on the witness list the whole
- (25) issue of oiling has been out there forever They meaning the

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- (1) plaintiffs made the tactical decision to let him go back to
- (2) North Carolina on Friday We have no reason to know why he
- (3) went back to North Carolina They made no representation of
- (4) good cause in that respect at all They made no videotaped
- (5) deposition over the weekend no they just sent him home to
- (6) North Carolina leaving us with the really impractical
- (7) situation of trying to cross examine this guy by telephone on
- (8) what is as the Court has referenced highly controversial
- (9) testimony and potentially very prejudicial testimony
- (10) This one witness is being apparently called to challenge
- (11) the credibility of three admirals in the United States Coast
- (12) Guard the head of the Exxon cleanup effort
- (13) In fact Mr Stoll says everybody knows it s a bunch of
- (14) baloney Do you think they could find one person other than
- (15) this one guy who s back in North Carolina to talk to us by
- (16) telephone?
- (17) MR STOLL Your Honor I really take umbrage with
- (18) what Mr Clough said because on Friday I said to him when it
- (19) appeared to me we were going to have a problem with putting
- (20) Mr Robertson on the witness stand on Friday I said If you
- (21) have anything that you want Mr Robertson to look at or see
- (22) please tell me or we ll work out so you can do that He said
- (23) No no no I m just going to take it up with the Court Now
- (24) he basically sandbags us waits until the following Tuesday and
- (25) then brings up all this business about a videotape and film and

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- (1) all this stuff I mean I gave him the opportunity if there
- (2) was a problem and he wanted to take his deposition on Friday
- (3) we would have done that Now he waits until Tuesday the day
- (4) before this witness is going to testify
- (5) I mean we - we gave him information we said We ll send
- (6) anything down - if you want to send it down to North Carolina
- (7) fine If he wanted to take his deposition that would have
- (8) been fine with us We didn t just send him home
- (9) He came up here on Wednesday he was here Wednesday
- (10) Thursday Friday We tried to put him on I m not blaming
- (11) them for their case dragging on but it did and we weren t
- (12) able to get to him on Friday
- (13) But after - when - late on Friday when it became apparent
- (14) that we weren t going to be able to - at least it appeared to
- (15) me it was unclear as to whether we were going to get him on I
- (16) asked Mr Clough specifically about what he wanted to present
- (17) to him he didn t want to have anything to do with it
- (18) We just wanted to take it up with the Court that s fine if
- (19) he wants that But it really ticks me off frankly when he
- (20) comes in here and says Oh well they sent him off to North
- (21) Carolina His family was from North Carolina he had a long
- (22) planned scheduled trip to North Carolina and he was going
- (23) back
- (24) to see his elderly parents That s all
- (25) THE COURT When s he coming back?
- (26) MR STOLL I don t know? When is he coming back next

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- (1) week - end of the week he s coming back
- (2) THE COURT End of this week?
- (3) MR STOLL End of this week I mean they re the
- (4) ones that - we gave them an opportunity if they wanted to do
- (5) it I specifically asked Mr Clough about this and he said
- (6) No I m going to take it up with the Court
- (7) THE COURT Counsel dualing lawyers is not my idea of
- (8) a way to develop an issue like this So you can represent
- (9) until you re both blue in the face and it s not going to have
- (10) much effect on me or any decision I make because I know that
- (11) biased witnesses sometimes can recollect things differently and
- (12) I don t know a way to tell which one of you is biased I m
- (13) sure that it s in good faith whatever you make representations
- (14) to but there s always another side of the story so let s talk
- (15) about the - the substance here okay? And whether or not
- (16) you re ticked off at each other makes no difference to me
- (17) The way I see this testimony as it s proposed is that it s
- (18) largely simply going to be presented for its inflammatory
- (19) value The one issue that would concern me is the signoff
- (20) issue but I - I agree with Mr Clough I think the record s
- (21) pretty clear on that signoff evidence and I believe that the
- (22) parties can stipulate and should stipulate particularly Exxon
- (23) should stipulate because it s the one area of this witness
- (24) testimony that I - that I have some question about
- (25) The other testimony is simply - it s like the Vietnam War

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- (1) all over again the press agents and taking you to the pacified
- (2) towns and we went through that 20 years ago we don't want to
- (3) go through it in this courtroom do we? And there's no
- (4) necessity for it
- (5) Because whether or not Exxon is - is a large organization
- (6) that sometimes uses its power in ways that less powerful people
- (7) might not like is not the issue in this trial so as to the
- (8) rest of the evidence except for the signoff evidence and
- (9) the - that relationship to the cleanup effort and whether or
- (10) not the beaches were clean that evidence to me is all non -
- (11) nonprobative or minimally probative evidence with such a large
- (12) inflammatory content that it would be unfairly prejudicial to
- (13) allow this witness from long distance or short distance to
- (14) testify to it And I'm sure then we get a long
- (15) cross examination about his bad feelings about Exxon and what
- (16) he proposed and we'd get into the - into another side show
- (17) which we do not need in this case
- (18) So he can't testify The ruling - the whole ruling is he
- (19) can't testify because I expect a stipulation If I don't get
- (20) the stipulation I'll tell you what comes next
- (21) MR CLOUGH I'll endeavor to put together a
- (22) stipulation this afternoon
- (23) MR STOLL I'm writing it right now Your Honor just
- (24) take a break
- (25) THE COURT Don't expect me to wait for you counsel

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- (1) I'm going to get to the other issues here
- (2) MR STOLL That's fine
- (3) MR OPPENHEIMER Your Honor I think our next witness
- (4) is probably Mr Carlson Actually I consider myself a friend
- (5) of Mr Carlson so I hate to do this but he's in the courtroom
- (6) and I think for purposes of this conversation we should
- (7) probably ask him to leave
- (8) THE COURT Sure
- (9) MR OPPENHEIMER Pat if you don't mind? We'll only
- (10) say nice things about you but -
- (11) Your Honor this is an issue that we started last Friday
- (12) And I've been trying to think of the best way to deal with it
- (13) the voluminous exhibits and I think I've - I think the best
- (14) way for me to explain the position we have that this is not
- (15) rebuttal testimony is to go at what I think is an important
- (16) part of it
- (17) We're going to hear Mr Carlson is the assessor on Kodiak
- (18) He's not a designated expert in the case He did an appraisal
- (19) which Mr Shorett used as part of his testimony It was his -
- (20) his starting point and he was - he put on direct testimony and
- (21) he was crossed for considerable period of time earlier
- (22) I believe he's now coming back to give a matched-pairs
- (23) damage assessment and it's - it's like another piece of - of
- (24) damage testimony complete with new research The examples
- (25) we've talked about last week -

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- (1) Joel can you get me 8605 or just put on the Elmo?
- (2) This is an example Your Honor it's 8605 and it's - it's
- (3) an analysis of sales that I think will be used to develop an
- (4) opinion that Mr Carlson hasn't previously rendered and was
- (5) not
- (6) asked as part of his original duties to render which was the
- (7) impact of the oil spill on property values
- (8) The examples note - let me refer to a couple of reasons
- (9) The village islands which is the first set of examples in this
- (10) first column here is actually in his report He testified
- (11) about - in his appraisal he's testified about his appraisal
- (12) he could have put that testimony in and did not The Alitak
- (13) Bay bars at the end are his S 1 S-2 S-3 S-4 examples which
- (14) he has in fact already testified about And the Onion Bay
- (15) example is a reworking of his view of the data that showed up
- (16) on one of Mr MacSwain's charts and among other things
- (17) Your Honor the first bar there that's used as an example the June
- (18) 85 bar is not simply Mr Carlson going in and looking at
- (19) transaction numbers He has made an adjustment to that piece
- (20) of property to conform it from his theoretical point of view
- (21) So that it is comparable from his perspective to the Onion
- (22) Bay sales that took place in - in 90
- (23) THE COURT How do you know that counsel?
- (24) MR OPPENHEIMER Because we know what that sale is
- (25) Your Honor we know which Onion Bay sale it is It came from
- (26) Mr MacSwain's chart June of 85 We have what are known as

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- (1) the R-files and other files from discovery We know what the
- (2) transaction price is If I'm mistaken Mr Stoll can tell me
- (3) I'm dead sure I'm right on this - I should never say that in
- (4) this courtroom
- (5) THE COURT What was the transaction number counsel?
- (6) MR OPPENHEIMER The transaction is \$5,000 an acre
- (7) as a transaction It's over 6500 as adjusted What he's done
- (8) is he's moved it up He's moved it up and made adjustments to
- (9) it
- (10) I'm not - I'm not even necessarily criticizing that
- (11) though there's plenty to be said about it All I'm saying is
- (12) that this is expert testimony par excellence and in the case
- (13) of village islands he could have testified about that
- (14) earlier It's already part of the appraisal he testified
- (15) about His appraisal of Alitak he has testified about and
- (16) Onion Bay He's rendering expert opinion in relation to
- (17) matched-pairs analysis What this represents is a brand new
- (18) matched-pairs analysis
- (19) Another example - these are all in the same sequence
- (20) This is something called Sales History of Remote Property in
- (21) Kodiak Island Borough but it has been adjusted to deal with
- (22) various different kinds of sales to lessees
- (23) MR STOLL Excuse me Your Honor we're not using
- (24) this exhibit So save some time
- (25) MR OPPENHEIMER Good super

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- (1) THE COURT Get an award for that one counsel
- (2) MR OPPENHEIMER This one too?
- (3) MR STOLL Right
- (4) THE COURT Just interrupt any time you feel like it
- (5) Mr Stoll
- (6) MR STOLL Just trying to save a little time
- (7) MR DIAMOND He s not going to use the Don Cornett tape can I leave?
- (8) MR OPPENHEIMER Your Honor here s one Not the sort of stuff assessor does in the regular job This is a particularly interesting chart because not only is it complicated and not only do we have no 1006 information that we can figure out supports it though we have been given some backup materials and I assume counsel believes they ve given us the 1006 information it just doesn t correspond to the chart
- (9) Notice he s graphing here Kenai and Valdez percentage change trends in full value of real property Well he is not the assessor of either of those two places That s Kenai which I don t know exactly what that means on this chart but assuming it s TCA 67 in the Kenai Borough that was Mr Haerer that s not Mr Carlson
- (10) Valdez he has nothing to do with Papke s oiled areas
- (11) He s now rendering further expert opinion on statewide and area-wide data and then clearly statewide totals

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- (1) This is the -- this is Pat Carlson s expert testimony on Mr Papke s testimony about statewide trends and area-wide trends and assessment taking into account data from boroughs and cities and making adjustment in them that are clearly not part of his normal business activities
- (2) And then we have backup data that consists of -- of files from the Kenai Borough and not from the Kodiak Island Borough
- (3) Again in support of what is really expert testimony on the subjects that he s either already testified to because as you ll recall we did object to S 1 S 2 S 3 S-4 when they came in or an expert analysis of the Papke data with no limitation whatsoever on the Kodiak basis for that
- (4) And a complete matched pair -- I mean this is like something -- if this is evidence of a drop in prices as a result of the oil spill it is duplicative of the type of testimony they ve already had in terms of the conclusions although it uses a different methodology and in any event it clearly should have been in their case in chief
- (5) There s nothing here that he couldn t have done in their case in chief and should have done as a designated expert and on the village islands it s already in his report
- (6) On Alitak Bay he s already testified so the problem we have with those exhibits that we ve mentioned thus far is that they re just not rebuttal

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- (1) THE COURT Thank you
- (2) MR OPPENHEIMER You re welcome
- (3) THE COURT He going to say --
- (4) MR STOLL May I have the Elmo?
- (5) Your Honor Mr MacSwain was permitted to testify to this graph which is not I might add in Mr MacSwain s report It was prepared a few days before he testified
- (6) THE COURT What s the number?
- (7) MR STOLL It is DX10227 And Mr MacSwain testified that this showed what happened before and after the sale We had no knowledge that this was going to come in during the course of trial
- (8) Now I don t remember if you remember this or not but during the cross examination of Mr MacSwain we asked -- here it is in color that s better Thank you
- (9) During the course of cross examination I believe that I asked Mr MacSwain about the transaction in Onion Bay here in 1985
- (10) THE COURT I think you did You asked him and he said Onion Bay sales was also a minimum bid and four sales in the damage area and non road system and three sales in the same area on the road system
- (11) MR STOLL Right But Your Honor there was -- I asked him some questions about a 1985 sale I believe it was Mr MacSwain

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- (1) THE COURT Oh you mean Mr MacSwain not Mr Carlson
- (2) MR STOLL Yeah right
- (3) THE COURT Okay
- (4) MR STOLL We didn t have -- when Mr Carlson testified we didn t know that this chart DX10227 existed This came up only during defendants case
- (5) THE COURT Okay
- (6) MR STOLL And what they have done here is that they tried to take these Onion Bay sales and show that the prices were actually increasing in Onion Bay And they did two things here In the first place they took a piece of property the one that sold in 1985 and they said that was similar to the other four parcels The second thing that they did is that they took a price in gross -- in other words what did the lots sell for You see these figures are 25 000 to \$35 000 and it makes it look like these are increasing What Mr Carlson did in this -- is there any way we can put these on the same screen?
- (7) THE COURT That s okay I can hang onto it
- (8) MR STOLL Okay
- (9) What he did here with Onion Bay -- when I cross-examined Mr MacSwain one of the things I showed him was the ledger card from the assessor s office and it showed that there had been a -- for this particular lot this lot that sold in 1985

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- (1) there was an adjustment on the valuation on that - this
- (2) pre-existed any lawsuit - of 25 percent for the access to the
- (3) property because that particular parcel is on the top of a
- (4) cliff and ten percent for the view because there's a setback
- (5) requirement and when you're on top of the cliff with the
- (6) setback requirement basically whereas all these other
- (7) properties you can look out and see the water when you're on
- (8) top of the cliff you look out and you see blue sky I mean
- (9) that's - or whatever color the sky happens to be
- (10) The point is that there was this 35 percent adjustment on
- (11) the card long before there was any litigation
- (12) Now what Mr Carlson has done is he has taken - he's done
- (13) two things One is instead of having this as a gross price
- (14) per lot he has taken this down to a unit price per acre and
- (15) so you'll see that the prices over here relate to so much he's
- (16) divided the gross price by the number of acres involved
- (17) The second thing he did was that with respect to the June
- (18) 1985 price he adjusted that with respect to the 35 percent
- (19) adjustment that was contained on the - on the card This was
- (20) not - he's just reporting if you took the thing that was
- (21) already existing on the card before there was any lawsuit made
- (22) this adjustment this is what this - this is what this picture
- (23) would look like for that sale
- (24) That's all he's done He has not used any - I mean
- (25) anybody can do that math

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- (1) THE COURT I can't
- (2) MR STOLL Pardon me?
- (3) THE COURT I can't but that doesn't mean anything
- (4) MR STOLL Well at any rate Your Honor -
- (5) MR OPPENHEIMER It's the reciprocal Your Honor I
- (6) can't multiply and divide either
- (7) MR STOLL At any rate Your Honor that explains
- (8) that figure We gave him the backup material for that
- (9) And with respect to the other exhibit that is PX8604 -
- (10) THE COURT I see it
- (11) MR STOLL Okay With respect to this we furnished
- (12) them also the backup and we sent them last Friday
- (13) incidentally a letter which I've got a draft of here Your
- (14) Honor if I can approach -
- (15) THE COURT Thanks
- (16) MR STOLL - of the backup on all these exhibits
- (17) This material that is contained in 8604 comes from what is
- (18) called the Alaska Taxables that's these documents here
- (19) These
- (20) are public documents anybody can get them
- (21) And what he has done is he took the - this is the assessed
- (22) value full assessed value of all property in the state of
- (23) Alaska that is the green line that's this line here And he
- (24) has taken the total assessed values for Kenai and Valdez which
- (25) is this purple line and then he has taken what Mr Papke
- (26) called his oiled areas which is an area contained of Kenai

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- (1) Valdez Cordova Kodiak - and includes urban areas as well as
- (2) the remote properties
- (3) And this - this graph - this is simply reporting what the
- (4) statistics show in the taxable tables that's all it is No -
- (5) THE COURT What does it rebut counsel?
- (6) MR STOLL Well what it rebuts is it goes to the
- (7) issue about how relevant the evidence was of Mr Papke that he
- (8) put on - he put on two graphs one graph - excuse me Your
- (9) Honor let me just get the graph here Here we are
- (10) He did a - you may recall this graph and incidentally
- (11) this graph was a new graph that was prepared - there was a
- (12) similar -
- (13) MR OPPENHEIMER Look it's not correct -
- (14) MR STOLL I know it is similar to a graph There's
- (15) a large number in the Papke-Roddewig report Your Honor
- (16) which
- (17) is this volume here if I can just show the Court -
- (18) THE COURT Please don't
- (19) MR STOLL Well at any rate there's a large number
- (20) of graphs in the back of this one of which has data that is
- (21) similar to this It's not in the same format as this
- (22) particular graph and in fact at the time of trial we didn't
- (23) know which graphs he was going to use and which we may
- (24) have to
- (25) respond to but at any rate this is one of the ones that he
- (26) used
- (27) And the theory of this graph is that here's the spill

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- (1) area and that the assessed value of all real estate in the
- (2) state of Alaska just the spill area followed the basic
- (3) contours after the spill of what happened the rest of the state
- (4) of Alaska
- (5) Now the significance is that this is a very irrelevant
- (6) data
- (7) THE COURT This the one -
- (8) MR STOLL This is It's very irrelevant because
- (9) the remote property areas in Kenai and Kodiak Island Borough
- (10) are such a small very small percentage of this total
- (11) And two of the other exhibits that counsel objects to
- (12) are - if I may Your Honor this exhibit now this exhibit
- (13) and this is Exhibit 8602A the 89 million dollar figure that is
- (14) the small sliver at the bottom of the page is taken from the
- (15) - you'll recall during the examination of Mr Haerer he
- (16) agreed that the remote areas of Kenai Peninsula Borough or
- (17) Tax
- (18) Code Area 67 and the remote areas of Kodiak are in tax code
- (19) area number five
- (20) This is the - simple addition of the full assessed values
- (21) of those two remote areas
- (22) the blue area which is the 2 962 000 000 dollar figure is
- (23) the total assessed value for what Papke calls his spill area
- (24) In fact I've got another graph which is 8603A which shows
- (25) just the comparison between these two The point is that
- (26) if you have a one percent increase in Papke's spill area which

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- (1) we are going to argue is an irrelevant -- irrelevant data base
- (2) you could have a 50 percent decrease in the assessed values in
- (3) the remote property areas which we contend are the relevant
- (4) areas and it get completely swallowed up by the one percent
- (5) increase
- (6) So all we re trying to do here show what the government
- (7) data demonstrates are the figures so all of this material and
- (8) this goes back to of course this line -- line graph shows that
- (9) the -- the material I mean this is not -- Mr Carlson is not
- (10) going to argue this I -- this is for subsequent but it s
- (11) simply presenting what, if you -- you ve got to look at the --
- (12) what is the relevant area here You can t just take the whole
- (13) state of Alaska or all these other areas in Southeast Alaska
- (14) so that s -- that s basically what that goes to
- (15) THE COURT Thank you
- (16) MR OPPENHEIMER Your Honor could I -- Your Honor
- (17) the subject of all of Papke s testimony was in his report
- (18) Again this -- this table doesn t bear any relationship either
- (19) to the testimony we ve had or to Mr Carlson s area of
- (20) expertise We re still talking about Kenai and Valdez and a
- (21) chart like this you know without expert testimony to explain
- (22) it this is not just the subject of seems to me of an
- (23) argument
- (24) There s expert testimony required to understand the
- (25) derogation of the data and then to the extent somebody s

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- (1) going to draw a conclusion from it I think that s also subject
- (2) to expert testimony
- (3) I will tell you that the backup data we have does not allow
- (4) us to duplicate this in any way shape or form
- (5) THE COURT Does not what?
- (6) MR OPPENHEIMER Allow us to duplicate it
- (7) We take the numbers we don t get this chart I m sure
- (8) that will be the subject if this is allowed in is the subject
- (9) of cross-examination
- (10) It s either been done incorrectly or something s going on
- (11) here
- (12) The two diagrams we have here -- I ll just put one on the
- (13) board
- (14) A couple of points One you ll recall what Mr Papke
- (15) said He was asked about this he was asked a couple of
- (16) times -- Mr Stoll I believe was the cross examiner -- asked
- (17) him you know Isn t it true that remote lands are just a small
- (18) percentage of this? He -- and said he thought they probably
- (19) were
- (20) He was also asked Isn t it true that a lot of the remote
- (21) lands are not in the tax base? Yes all of the points were
- (22) gone through with him
- (23) And on redirect I asked him Assume all of that is true
- (24) does it change your conclusions about the significance of the
- (25) Southcentral? To him he said it did not and that s because

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- (1) whether you reject it or accept it his premise is if you have
- (2) a market -- if you have a trauma significant to impact on the
- (3) properties you ought to see it showing up in all of the
- (4) markets
- (5) So even if hypothetically it wasn t -- that data was not a
- (6) real good magnifying glass on the remote properties it didn t
- (7) matter because he expected to see market reactions in the other
- (8) markets
- (9) So this is not -- this is not rebuttal to Mr Papke
- (10) In addition to that these numbers these full values that
- (11) are being discussed here there is no reporting of something
- (12) called full value This is a number that has been generated or
- (13) adjusted again by Mr Carlson so once we go back to these
- (14) we
- (15) find derogation of the charts requires as much expert testimony
- (16) as interpreting them and getting to a conclusion
- (17) Exhibit 10227 which was the matched pairs that
- (18) Mr MacSwain had from -- I don t have it in front of me but I
- (19) think Pasagshak Hidden Bay Ugak or Uyak I get confused
- (20) Onion Bay all that -- here it is all that data is in the
- (21) MacSwain report and I would -- I would remind us that the chart
- (22) that supposedly rebuts that -- again Your Honor will
- (23) remember -- is a chart that has only one cross over of that
- (24) There s a Onion Bay portion that crosses there Otherwise
- (25) we ve got village islands which again was in his appraisal

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- (1) ask him He testified instead about Alitak which is also on
- (2) the chart It s surprising it s testimony in one case it s
- (3) adding testimony in his report they elected not to testify
- (4) about in the other case in the middle case he is making an
- (5) expert adjustment to the Onion Bay data in order to try to
- (6) argue against MacSwain s matched pair
- (7) The fundamental point here though is if any issue has
- (8) been clear it is that the effect of the oil spill on property
- (9) values is an issue in this case And when we deposed
- (10) Mr Carlson at length over a wide period of time in Kodiak it
- (11) was -- he repeatedly explained to us that his assignment was
- (12) limited to doing the appraisal of Kodiak Borough lands as of
- (13) the day before the spill and he was expressly not invited to do
- (14) any sort of valuation and had not done that and that s why I
- (15) objected as strongly as I did though it came in when he
- (16) testified about S 1 S 2 S 3 S-4 which is the Alitak Bay
- (17) because I really thought that was his expert testimony then
- (18) It did come in but the fact is that I lost that fight but
- (19) that was direct testimony And clearly it is it s testimony
- (20) about whether the oil spill has an impact on values
- (21) He chose to give one matched pairs example and not others
- (22) Now he wants to come back and do more And it s -- it s
- (23) inappropriate
- (24) THE COURT Okay Thank you counsel I ve heard it
- (25) all I ve heard it all

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- (1) The rule – I assume you re referring to Rule 46 as a basis
- (2) for me not allowing this testimony counsel
- (3) MR OPPENHEIMER Your Honor will see me leaping
- (4) rapidly and immediately to Rule 46 I think it might be fair
- (5) to assume that that is the rule I want
- (6) THE COURT I don t know Don t assume anything
- (7) MR OPPENHEIMER If it s the rule of regarding
- (8) subrogations of lawyers in Alaska I will withdraw –
- (9) THE COURT That s 81 counsel
- (10) MR OPPENHEIMER As my counsel suggests I should say
- (11) there s a number of rules on which I rely
- (12) THE COURT I think it s Rule 46(c) The parties may
- (13) there respectfully introduce rebutting evidence only unless the
- (14) Court for good reason and in the furtherance of justice permits
- (15) them to admit further evidence That s the rule isn t it?
- (16) MR OPPENHEIMER It is
- (17) THE COURT To me the witness is this First it
- (18) rebuts specific testimony from witnesses in the defense case
- (19) I don t believe under the circumstances it s necessary to put
- (20) absolutely everything in your case in chief or sacrifice the
- (21) right to – to present rebuttal testimony to specific pieces of
- (22) defense evidence This is – this is a one troublesome aspect
- (23) of this witness testimony and other witness testimony is
- (24) that they have expertise There have been people on both
- (25) sides
- (25) of the case that have – have clearly testified from the basis

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- (1) of their own expertise and Mr Carlson is one of them
- (2) Now he s been called a fact witness but his testimony does
- (3) call into the mix his expertise The defense has done exactly
- (4) the same thing It s not as if this is a one sided deal You
- (5) made your agreements in the case you tried to live with them
- (6) and then – and you made objection when you thought
- (7) somehow the
- (7) testimony was going outside the agreements and I ve tried to
- (8) deal with that shifting situation throughout this trial
- (9) But Carlson has expertise He has the expertise that would
- (10) make it easier for him to prepare his exhibits and in fact to
- (11) investigate these questions and to pull statistical conclusions
- (12) or extrapolations out of the evidence that he reviews and then
- (13) put them on a graph
- (14) So he has expertise but this is not to me clearly expert
- (15) testimony Especially as the parties in this case have chosen
- (16) to define expert testimony Basically both of you have –
- (17) have ignored the expert question And for legitimate reasons
- (18) Because this case would have been a nightmare trying to be
- (19) strict about the rules and designate all kinds of people as
- (20) expert to take all their depositions you found a reasonable
- (21) procedure pretrial to try to deal with the issues
- (22) Now what we have here is Mr Carlson who has expertise but
- (23) who has been allowed to testify in the case in chief evidence
- (24) from his expertise and he s going to do it again in this
- (25) rebuttal case This testimony is well within the area of – of

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- (1) allowed testimony that he gave in his case in chief testimony
- (2) and sure cross-examination on these issues is totally
- (3) appropriate in order to figure out whether or not his testimony
- (4) is persuasive or not So have at it but this is – this is
- (5) rebuttal testimony To the extent that it might not be
- (6) considered to be rebuttal testimony I think that I have the
- (7) discretion to say in the interest of justice he s going to be
- (8) allowed to testify and that s what I m saying right now So
- (9) he ll be allowed to testify
- (10) MR STOLL Thank you Your Honor
- (11) MR OPPENHEIMER Your Honor we have a few more I m
- (12) not sure that everyone is serious about all of these Let me
- (13) take one quick check
- (14) THE COURT Yeah that s a question I should be asking
- (15) you now counsel With every question Are you serious?
- (16) MR OPPENHEIMER Let me just see if – for example
- (17) Your Honor this is the reality check I have a table here
- (18) entitled Native people employed in the 1989 cleanup and I ve
- (19) got to believe that this is – this must begin a series of
- (20) exhibits –
- (21) MR STOLL That s one of your exhibits
- (22) MR OPPENHEIMER It came as part of your DX
- (23) designation
- (24) MR STOLL We gave you a revised list last week
- (25) MR OPPENHEIMER Let me just check and make sure We

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- (1) don t have that exchange 4940 was that replacement for spill
- (2) year?
- (3) MR STOLL No that s not –
- (4) MR OPPENHEIMER Limited uses per acre
- (5) MS JOHNSON That s dropped
- (6) MR STOLL That s dropped?
- (7) MR OPPENHEIMER DX10303 recreational site
- (8) comparables
- (9) MS JOHNSON No no
- (10) MR OPPENHEIMER Same thing
- (11) MR STOLL No no
- (12) MR OPPENHEIMER Same thing
- (13) MR STOLL No we re not using any of those maps
- (14) MR OPPENHEIMER Same thing here? The number is –
- (15) MS JOHNSON It s 10245 A And –
- (16) MS JOHNSON No
- (17) MR OPPENHEIMER How about this one?
- (18) MS JOHNSON No
- (19) MR OPPENHEIMER How about any of these remaining?
- (20) MR OPPENHEIMER Just take a look If you can
- (21) stipulate to those
- (22) (Discussion off record between counsel)
- (23) THE COURT Are we resolving these awaiting
- (24) questions?
- (25) MR OPPENHEIMER Almost Your Honor

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- (1) MR OPPENHEIMER Your Honor you'll recall that  
 (2) Tim - well perhaps you won't only those of us who have -  
 (3) Tim Hurley provided Mr MacSwain with data on properties 15  
 (4) miles out of Kodiak This is a - this is a note of that and  
 (5) apparently among everything else he's going to talk about  
 (6) Mr Carlson's going to talk about I guess the interchange  
 (7) between Mr Hurley and Mr MacSwain on properties 15 miles  
 (8) outside of Kodiak which seems to me whatever else our  
 (9) standards are that doesn't -  
 (10) MR STOLL Let me have this one  
 (11) Your Honor first of all Mr Carlson unlike some other  
 (12) non-expert experts did have his deposition taken I think for  
 (13) nine days maybe it was longer than that but I know it was at  
 (14) least nine days And on June 30th of last year he issued a  
 (15) report called the sales - Sales Frequency Review of - Sales  
 (16) Frequency of Remote Properties And this is - this is the  
 (17) report and this is the deposition the portion - this is most  
 (18) of the portions that dealt with this sales frequency data  
 (19) THE COURT Those books?  
 (20) MR STOLL These are the depositions This is a  
 (21) deposition of Mr Carlson the portion of it that dealt with  
 (22) the sales frequency report Now Mr MacSwain testified that  
 (23) he got some data from Mr Hurley which was contained on this -  
 (24) remember he wrote this on a piece of butcher paper up here for  
 (25) the jury Kodiak sales, and so the question is why didn't -

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- (1) how did Mr Carlson - Mr Carlson reached a conclusion with  
 (2) respect to sales frequency And he testified to that  
 (3) He issued a report on it last year he was deposed on it  
 (4) and he testified about it in his case in chief Why didn't you  
 (5) consider these - this transactional data that is contained in  
 (6) Hurley because this shows that in 1989 the number of  
 (7) transactions supposedly went down by just a slight amount  
 (8) from 3100 to 2900 And he's simply going to explain why he  
 (9) didn't consider this data that's all It's proper rebuttal  
 (10) THE COURT Wait a minute Am I understanding this  
 (11) right? He was asked this question?  
 (12) MR OPPENHEIMER No he was not asked this question  
 (13) MR STOLL No he was not asked it Mr Carlson was  
 (14) not asked this I am - I am going to ask him if permitted  
 (15) on rebuttal When you did your sales frequency analysis why  
 (16) didn't you consider this - the number of transactions that the  
 (17) title company reported as a relevant factor? Because it shows  
 (18) simply a slight dip in these -  
 (19) THE COURT Okay  
 (20) MR STOLL - in these transactions And he's going  
 (21) to explain why he didn't consider that  
 (22) That's all Very short and sweet  
 (23) THE COURT That's all huh?  
 (24) MR STOLL Pardon me?  
 (25) THE COURT That's all huh?

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- (1) MR STOLL He's just going to simply rebut it He's  
 (2) going to say he didn't think it was relevant  
 (3) MR OPPENHEIMER He's rebutting testimony apparently  
 (4) which would be elicited for the first time when he's asked on  
 (5) rebuttal  
 (6) MR STOLL No Mr MacSwain got up there and said  
 (7) contrary to what Mr Carlson said his - he didn't say it in  
 (8) these words but this is the gist of it as I took it that  
 (9) contrary to what Mr Carlson said about sales frequency the  
 (10) number of transactions just percolated right along consistent  
 (11) between pre-spill and post-spill and he used this - these  
 (12) statistics to prove that point  
 (13) THE COURT Okay So Carlson's going to testify that  
 (14) that's not what this shows?  
 (15) MR STOLL That's exactly correct  
 (16) MR OPPENHEIMER I'm sorry I didn't understand the  
 (17) import of Your Honor's question This does show sales outside  
 (18) the 15-mile area What he's going to do is talk  
 (19) philosophically  
 (20) MR STOLL No shows both All sales of Kodiak and  
 (21) one is more than 15 miles outside the Kodiak area and he's  
 (22) going to say why this is not relevant why he didn't -  
 (23) THE COURT Not relevant?  
 (24) MR STOLL Excuse me strike that Why he did not  
 (25) think - why this did not alter his opinion on the sales

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- (1) frequency  
 (2) MR OPPENHEIMER I can really - just seem to me as  
 (3) if the issue is being raised and answered for the first time on  
 (4) his rebuttal  
 (5) THE COURT It purports to rebut what MacSwain said  
 (6) right?  
 (7) MR OPPENHEIMER I think the Judge has already  
 (8) indicated that the testimony is going to be in I don't know  
 (9) Your Honor because I guess what it requires - I guess we're  
 (10) going to be hearing from Mr Carlson is an entirely new theory  
 (11) we haven't heard before seriously because we don't have any  
 (12) idea exactly how he's going to deal with this  
 (13) THE COURT That's true you don't There was a  
 (14) slight kind of a vague statement of what he was going to say  
 (15) wasn't it?  
 (16) MR OPPENHEIMER It was it was  
 (17) THE COURT And that's the problem isn't it you  
 (18) don't know what he's going to say?  
 (19) MR OPPENHEIMER We don't know what he's going to  
 (20) say but we do know that this particular piece of information  
 (21) is something that he - the only way he can testify really  
 (22) about any of this but certainly about this is to express yet  
 (23) another expert opinion  
 (24) THE COURT Maybe I don't know that counsel I  
 (25) know about as much as you do about this

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- (1) MR OPPENHEIMER But but  
 (2) THE COURT I see the figures I can draw conclusions  
 (3) from the figures as well as anybody else might since they are  
 (4) approximately the same and apparently Mr Carlson is going to  
 (5) testify contrary to the conclusion I can reach when you look at  
 (6) that sheet of transactions and that is Hey these don't show  
 (7) the same level of transactions somehow they show that they've  
 (8) gone down  
 (9) I don't know how he's going to come to that conclusion  
 (10) neither do you because you don't know what he's going to say  
 (11) MR OPPENHEIMER I'm willing to venture a wild  
 (12) guess  
 (13) MR DIAMOND The problem we don't know is we don't  
 (14) have a report from him or a deposition  
 (15) THE COURT That's a problem but what do I usually do  
 (16) in that circumstance I usually say to counsel  
 (17) unfortunately - generally it's counsel from the plaintiffs  
 (18) table what's he going to say Not some general description of  
 (19) the area in which he's going to testify I say What is he  
 (20) going to say  
 (21) Mr Stoll what is he going to say?  
 (22) MR STOLL Your Honor what he's going to say I  
 (23) believe is that the - he does not think that this data is -  
 (24) relates to frequency of sales In the first place the letter  
 (25) that this was copied - these numbers were copied off of a

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- (1) letter that we put into evidence with Mr MacSwain the letter  
 (2) from Mr Hurley to Mr MacSwain  
 (3) The first column - can I have that exhibit?  
 (4) MR OPPENHEIMER Sure  
 (5) MR STOLL The first column relates to transactions  
 (6) It does not necessarily mean that there was an arm's length  
 (7) transaction arm's length  
 (8) THE COURT I've heard that before in evidence from  
 (9) somebody Who was it?  
 (10) MR STOLL I think that I got something close to that  
 (11) out of Mr MacSwain in cross examination but I don't think I  
 (12) got the whole -  
 (13) THE COURT Might be might be  
 (14) MR STOLL No I think I did get something close to  
 (15) that out of him Okay then the second column the 15 miles  
 (16) similarly does not relate to arm's length sales transactions  
 (17) and so you cannot - you have to evaluate each transaction  
 (18) separately and that's what he did  
 (19) THE COURT He's not going to say you have to evaluate  
 (20) each transaction separately is he?  
 (21) MR STOLL No he's not going to evaluate each  
 (22) transaction separately Your Honor What he's going to say is  
 (23) to determine whether or not they are arm's length transactions  
 (24) you have to look at each transaction and then he's going to  
 (25) say when he did his sales frequency study which he's testified

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- (1) to he did do that to make sure that each of the transactions  
 (2) was an arm's length transaction  
 (3) MR OPPENHEIMER But Your Honor -  
 (4) MR STOLL So he's going to say that simply taking  
 (5) all these figures as to the numbers of pieces of paper that go  
 (6) through this title office does not - does not give you  
 (7) meaningful information  
 (8) THE COURT I see  
 (9) MR OPPENHEIMER Your Honor the fact that these pick  
 (10) up all the transactions has already been testified to And  
 (11) Mr Carlson's definition of remote isn't this definition  
 (12) Mr Carlson's definition is it's off the road system not 15  
 (13) miles out  
 (14) MR STOLL That's another point I'm sorry you're  
 (15) correct That's another point  
 (16) MR OPPENHEIMER He's already testified to that but  
 (17) for him to delve into these numbers and express a view that  
 (18) they should be adjusted in some way is to jump into an issue  
 (19) between Hurley and MacSwain These are not numbers that he  
 (20) has  
 (21) used that he would compare This once again requires him to  
 (22) do  
 (23) an expert analysis of the data of sales more than 15 miles  
 (24) out Or to repeat testimony we already have  
 (25) THE COURT Fine I think it's rebuttal testimony  
 (26) So it will be allowed  
 (27) MR STOLL Thank you Your Honor

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- (1) THE COURT We have one more thing  
 (2) MR DIAMOND The Alyeska Emergency Center  
 (3) transcripts  
 (4) THE COURT Not an easy thing for me to decide without  
 (5) that transcript  
 (6) MR DIAMOND What I was going to do I have it cued  
 (7) up It's a two minute tape You can listen to the  
 (8) transmissions  
 (9) Before Joel does it let me just put this in context  
 (10) These are made and I have the time codes you'll see them on  
 (11) the bottom of the screen What I have done these are only the  
 (12) excerpts that the plaintiffs want  
 (13) If we get into this we have some 106 problems and we'd  
 (14) like to talk to you about what gets played but we don't think  
 (15) anything should get played These are just their excerpts  
 (16) They're within the first I believe 36 hours after the spill  
 (17) The communications are between one guy from Exxon Don  
 (18) Cornett  
 (19) who was not involved in the cleanup This is - he was the  
 (20) only resident Exxon manager in at the time because Exxon  
 (21) doesn't have ongoing operations in Alaska This is his  
 (22) communications with Alyeska who was then in charge of getting  
 (23) the oil off the water It is not part of the cleanup that the  
 (24) Coast Guard testified to nor that Mr Harrison testified to  
 (25) With that caveat let's roll it  
 (26) (Audio tape Played)



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- (1) MR DIAMOND I think that s the last one  
 (2) THE COURT They would have saved the best for last  
 (3) MR DIAMOND In fairness of the plaintiffs they did  
 (4) put them in chronological sequence They left a lot out but  
 (5) they did put the ones that they used in chronological  
 (6) sequence I want to make two observations and then Mr Stoll  
 (7) can tell us why this ought to come in and I d like to be heard  
 (8) further but if this were Otto Harrison talking to the troops  
 (9) in connection with the cleanup one might reasonably ask what  
 (10) does this have to do with land damages how much oil is still  
 (11) out there what didn t get cleaned up how badly things got  
 (12) oiled I mean this is just sort of unabashed Exxon bashing  
 (13) and I think we would have legitimate arguments to keep this out  
 (14) if it were Otto Harrison in April talking to the Exxon cleanup  
 (15) forces  
 (16) It s not It s a manager here in Exxon who is talking to  
 (17) the Alyeska people and made no independent evidence in this  
 (18) case that Alyeska was responsible for about the first 72  
 (19) hours Alyeska was criticized for doing virtually nothing and  
 (20) we have an Exxon manager trying to kick butt and light a fire  
 (21) under Alyeska to do something So it s even a step removed  
 (22) from the bad guy – good guy/bad guy evidence that we ve been  
 (23) talking about thus far and I think it is wholly irrelevant  
 (24) but to the extent it has any relevance 403 really dictates it  
 (25) be left out because this is really in-the-air stuff and it s

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- (1) really unfair to tar the cleanup people who came in much later  
 (2) with Mr Cornett s perhaps intemperate and not  
 well thought out  
 (3) remarks to people at Alyeska when they were running the show  
 (4) MR STOLL Your Honor on Friday Mr Harrison  
 (5) testified that Don Cornett was in charge of what we call our  
 (6) Alaska interest office He was the guy here in Alaska prior to  
 (7) Mr Harrison s arrival on the scene and we think that it s  
 (8) perfectly irrelevant in view of the testimony that Exxon put  
 (9) on on Friday of the admirals testimony and Mr Harrison s  
 (10) testimony that they were just out here doing good things and  
 (11) they were only interested in getting the beaches clean and so  
 (12) on and I think that this goes to demonstrate that this was a  
 (13) show to some degree in certain places Maybe – there s no  
 (14) question they made efforts in certain areas but it certainly  
 (15) goes to their good faith as they put on all this evidence and  
 (16) the praising of – of themselves both in the letters that they  
 (17) received from other people as well as the testimony of the  
 (18) admirals and Mr Harrison So it I think it goes directly to  
 (19) that point and I think Your Honor indicated on Friday you saw  
 (20) the relevance of this because –  
 (21) THE COURT I said they were going to look – I d  
 (22) certainly consider it counsel  
 (23) MR STOLL I m not suggesting you ruled on it but I  
 (24) think this goes directly to that point and I just think that  
 (25) there s – you know they re able to put all this

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- (1) self-laudatory material in I think we should be able to put  
 (2) something –  
 (3) THE COURT Well this self-laudatory material where  
 (4) were the objections to it?  
 (5) MR STOLL Well Your Honor candidly I thought that  
 (6) we had objected to this If you want me to –  
 (7) THE COURT You may very well be able to find some  
 (8) counsel but my view of it – maybe I m dead wrong about it  
 (9) but most of that stuff came in without objection There was a  
 (10) lot of self-indulgence in this case there s no question about  
 (11) that  
 (12) MR STOLL I understand that Your Honor but I –  
 (13) THE COURT The question is did I get an opportunity  
 (14) to curtail some of that self-indulgent syrupy testimony that  
 (15) was presented and I don t think I did  
 (16) MR STOLL Well Your Honor I thought you had the  
 (17) opportunity truthfully I was not the attorney that was in  
 (18) charge of dealing with that particular thing so I can t say  
 (19) that – I know that I didn t get up and object to it I  
 (20) objected before the master on it and we had a – you know a  
 (21) hearing there and master indicated in talking to you I don t  
 (22) know – I honestly don t know what happened with respect to  
 (23) it I can t make representation to the Court  
 (24) THE COURT Okay Thank you  
 (25) MR STOLL If we could – if that s going to turn on

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- (1) whether it comes in or not then I d like to await  
 (2) Mr Petumenos  
 (3) THE COURT Yeah I don t blame you All right thank  
 (4) you  
 (5) Counsel?  
 (6) MR DIAMOND I don t think there were any objections  
 (7) to you  
 (8) THE COURT Well I got no objections on the admirals  
 (9) testimony not one Now they may have made them in the  
 (10) context of the master s hearing but that s not enough  
 (11) MR DIAMOND I think that s certainly a point but  
 (12) even had objections been made I think what we have here is  
 (13) sort of an escalation and it s an escalation that I think we  
 (14) can lay at plaintiffs doorstep more than our doorstep because  
 (15) they put on their case first – and I m not saying I wouldn t  
 (16) have done the same thing but this all started with Mayor Selby  
 (17) blasting us blasting the cleanup people followed by  
 (18) Mr Piper who joined in in the chorus and said  
 uncomplimentary  
 (19) things about the cleanup When we asked to put on the  
 (20) admirals the master turned us down and said No good-guy  
 (21) stuff  
 (22) We said Well that might be fine under the circumstances  
 (23) but we ve already had bad guy stuff – and the chart that Mr  
 (24) Clough read from before something I prepared for you on the  
 (25) left are each of the excerpts that we sought to get in from the

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- (1) admirals and on the night is what we thought we were  
 (2) rebutting  
 (3) We didn't get everything we wanted Initially we only got  
 (4) four out of ten and then when Mr. Petumenos asked for an  
 (5) additional excerpt we got five out of ten - five out of 11  
 (6) but Mr. Ruskin kept out a good portion of what we wanted and  
 (7) put in only what he thought was necessary to rebut what the  
 (8) plaintiffs had put in in the case in chief We supplied him  
 (9) with all the transcripts and he had overnight to look at all of  
 (10) that  
 (11) What the admirals represent is a measured response They  
 (12) put in some bad-guy stuff we got to put in some good-guy  
 (13) stuff But at least it was measured  
 (14) Mr. Cornett's tapes to the extent that s Mr. Cornett -  
 (15) and I'm not conceding foundation for one minute - but really  
 (16) blows this one-sided  
 (17) Now this really is an escalation in a battle of who's nice  
 (18) and who's not nice and it really does force us to try to  
 (19) figure out now what are we going to do on surrebuttal put all  
 (20) of this in context explain what was going on put on all of  
 (21) the evidence about Alyeska's inaction in the first 72 hours and  
 (22) Mr. Cornett's frustration but really in response to what?  
 (23) Why should this come in?  
 (24) They said some nasty things about us and we got to say what  
 (25) the master thought was a balancing amount of things to counter

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- (1) that and that's where it ought to end I think this really  
 (2) tips the scales decidedly in plaintiffs' favor and unfairly in  
 (3) plaintiffs' favor  
 (4) THE COURT Thank you This is certainly - this is  
 (5) it counsel I've had - unless you have something more to  
 (6) say  
 (7) MR. STOLL No I don't I was just standing up  
 (8) because he was  
 (9) THE COURT Oh okay good It's tempting It's  
 (10) tempting and it does tempt me to let this evidence in which of  
 (11) course is something a judge has to be careful of when he feels  
 (12) tempted because he's always about to make a mistake This is  
 (13) a  
 (14) highly inflammatory piece of evidence taken at a time in the  
 (15) beginning of the spill where I'm sure there was chaos going on  
 (16) all around the speaker It's an incomplete version I'm sure  
 (17) of what was going on and v-ry very prejudicial So the  
 (18) question is what does it prove in a case that should be no  
 (19) matter what the parties think they have to present in order to  
 (20) win it should be about damages because liability is conceded  
 (21) and state of mind is not an issue  
 (22) And frankly I find it not probative on - on the damages  
 (23) issues in this case It's solely to show that Exxon's a bad  
 (24) guy and of course the reason I'm tempted is because Exxon  
 (25) has  
 (26) gone to such great lengths to prove to us all it's such a  
 (27) wonderful guy but most of that was done without objection and

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- (1) I didn't - I'm not going to step in in the middle of  
 (2) somebody's case and stop them when they're congratulating  
 (3) themselves I believe that it's up to the opposing party To  
 (4) make the appropriate objections so I can somehow curtail the  
 (5) scope  
 (6) Now this is an additional piece of evidence that I - that  
 (7) I knew was in the works and that I thought well maybe if I  
 (8) take all these things into consideration at the end of the  
 (9) case maybe somehow this gets in but having now heard  
 (10) almost  
 (11) all of the case I can't - I can't come to any honest  
 (12) conclusion except that this is a piece of evidence that's  
 (13) solely for its unfair prejudicial value and not probative at  
 (14) all on any material issue in this particular trial And  
 (15) therefore I'm not going to allow it much as I'm tempted  
 (16) MR. STOLL Your Honor could we - could I have  
 (17) Mr. Petumenos come back because he was more directly - if  
 (18) it's appropriate? I mean I'll find out first -  
 (19) THE COURT You can have him come back but he was  
 (20) here when I raised this issue today I mean he was here he  
 (21) knows that nobody made any objections to me after the master  
 (22) -  
 (23) MR. STOLL I have to say candidly Your Honor I met  
 (24) with Mr. Petumenos right after leaving here and I didn't  
 (25) realize the lack of objection or alleged lack of objection was  
 (26) an issue on our case and so he asked me if he should come  
 (27) back  
 (28) and I told him I didn't think it was necessary So I didn't

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- (1) know that that argument was going to be presented  
 (2) THE COURT Sure There's no problem with that  
 (3) counsel You can certainly bring him back but the fact is  
 (4) that I think the record clearly shows this matter - the  
 (5) admirals' testimony was referred to the discovery master The  
 (6) discovery master made a decision I don't know what  
 (7) stipulations or concessions were made in that process But I  
 (8) do know that when I got the testimony nobody asked me to  
 (9) review the master's work and therefore that evidence simply  
 (10) came in Because it was more certainly - I didn't think it  
 (11) was appropriate for me at that time to make an independent  
 (12) review without anybody asking me to do so and change the  
 (13) rulings  
 (14) MR. STOLL I understand I understand what you're  
 (15) saying I just -  
 (16) THE COURT That doesn't mean though that Exxon's  
 (17) evidence didn't go beyond that because Mr. Harrison's  
 (18) testimony was on a lot of issues that I felt were minimally  
 (19) relevant to the issues in this case but nobody objected there  
 (20) either  
 (21) MR. STOLL I understand  
 (22) THE COURT We were all here for that  
 (23) MR. STOLL Your Honor can I bring up two matters?  
 (24) THE COURT Yes if they don't take very long Got to  
 (25) do it in five minutes

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- (1) MR STOLL The first is - I guess Mr Clough has  
 (2) left but while we were - other things were going on I  
 (3) drafted a -  
 (4) THE COURT Oh the stipulation  
 (5) MS GUSTAFSON Bob he s here  
 (6) THE COURT What s the other matter?  
 (7) MR STOLL The other matter Your Honor is Dr  
 (8) Gilfillan They have him as a surrebuttal witness I believe  
 (9) we will finish our case before the end of tomorrow so they  
 (10) could put -  
 (11) THE COURT Is he the only surrebuttal witness?  
 (12) MR DIAMOND We don t know yet I think based on the  
 (13) evidence we ve heard thus far he s the only one we currently  
 (14) are suspecting  
 (15) THE COURT He s the only one you re planning right  
 (16) now?  
 (17) MR DIAMOND Yeah  
 (18) THE COURT Well Gilfillan s a separate issue and  
 (19) needs to be developed appropriately and I can t do it now I  
 (20) know it will be an unproductive discussion  
 (21) MR STOLL Okay  
 (22) MR DIAMOND Just so that counsel knows I ve already  
 (23) talked to Mr Petumenos about Mr Gilfillan and we may come to  
 (24) an agreement such that he won t testify with respect to the  
 (25) withdrawal of certain exhibits that are in evidence

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- (1) THE COURT All right  
 (2) MR DIAMOND I wanted to remind the Court that we  
 (3) still have a motion outstanding for a jury view  
 (4) THE COURT So you do  
 (5) MR DIAMOND That we would like to bring on bring to  
 (6) a head at one point or another and I think we re only about 22  
 (7) hours away from the close of evidence in this case and if now  
 (8) is a good time -  
 (9) THE COURT Now is a good time for what?  
 (10) MR DIAMOND To bring it up  
 (11) THE COURT Sure But do you think you can do it in  
 (12) five minutes? It s too complicated an issue but you can  
 (13) certainly bring it up tomorrow  
 (14) All right have you read the stipulation?  
 (15) MR CLOUGH Your Honor as great prognosticator as  
 (16) usual this needs some work I ve asked someone back in the  
 (17) office to pull out Mr Teal s and Mr Harrison s testimony and  
 (18) what I d like to propose to do is give a copy back to Mr Stoll  
 (19) with copies of the testimony upon which it s based so that he  
 (20) can review it  
 (21) MR STOLL Well may I have that please?  
 (22) MR CLOUGH You certainly may  
 (23) THE COURT Tomorrow who s - what witnesses are going  
 (24) on?  
 (25) MR STOLL Mr -

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- (1) MR FORTIER Mr Groh  
 (2) MR STOLL Mr Groh Your Honor  
 (3) MR FORTIER Theoretucally a bit of Mr Norman  
 (4) THE COURT Mrs Groh right?  
 (5) MR STOLL I m told Your Honor - I m not dealing  
 (6) with the Grohs As I mentioned to you last week Your Honor  
 (7) there was a funeral in the family and apparently Mrs Groh is  
 (8) all upset or something Mr Fortier can respond to this  
 (9) THE COURT No don t respond All I want to know is  
 (10) whoever with the name Groh is testifying who s going to be  
 (11) asking the questions You?  
 (12) MR STOLL No  
 (13) MR FORTIER I would imagine Mr Petumenos would be  
 (14) Your Honor  
 (15) THE COURT Good That means that you and Mr Clough  
 (16) will not be needed here tomorrow morning and can work on this  
 (17) tomorrow morning  
 (18) MR CLOUGH Happy to do it Your Honor  
 (19) MR STOLL Your Honor if I may the - I m happy to  
 (20) do it later today or tomorrow morning with Mr Clough The  
 (21) only problem I have is if we re not able to get this resolved  
 (22) on this issue then dealing with Mr Robertson because we  
 (23) made  
 (24) arrangements for a court reporter and so on in North Carolina  
 (25) to you know to be available and swear him and -  
 (26) THE COURT When what time?

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- (1) MR STOLL Well we ve made arrangements for him to  
 (2) be ready at 8 30 We thought the simplest thing to do -  
 (3) THE COURT Then you better get that stipulation  
 (4) tonight counsel  
 (5) MR STOLL That s fine I ve drafted one  
 (6) THE COURT No that s not a stipulation Stipulation  
 (7) is when two people agree -  
 (8) MR STOLL I understand that I m not quarreling with  
 (9) that  
 (10) THE COURT You re going to have to keep working and  
 (11) you re going to have to come to me with a stipulation or I ll  
 (12) rule and it s in both of your interests to come to - the  
 (13) figure out a way to stipulate this one  
 (14) MR STOLL That s fine  
 (15) MR DIAMOND I was going to ask when do we learn  
 (16) which grow will be here in the morning? It may affect the  
 (17) cross examination Some system  
 (18) MR FORTIER I think it s fair to /SAOEU Mr Groh  
 (19) will be here tomorrow morning Mr Groh  
 (20) THE COURT It may be fair to say that but will he  
 (21) MR FORTIER He will be he will be here  
 (22) THE COURT Here s some documents and I believe that  
 (23) they belong to Exxon  
 (24) MR OPPENHEIMER I tell you what I ll grab them and  
 (25) distribute them to people that need them

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- (1) THE COURT Counsel thank you very much
- (2) MR FORTIER Your Honor I just have horrible timing
- (3) I m not going to raise the Norman whether or not he testifies
- (4) THE COURT Who?
- (5) MR FORTIER Mr Norman we were going to take up
- (6) whether or not you have an offer of proof to one point
- (7) Mr Norman s testimony
- (8) THE COURT Right you can bring him in and put him
- (9) on nght
- (10) MR FORTIER Yes Your Honor
- (11) THE COURT Yes you can do that
- (12) MR FORTIER First thing tomorrow morning
- (13) THE COURT You think I can make it by 8 15 You be
- (14) here by 8 15 and I probably will be too
- (15) THE CLERK Please rise This court stands in
- (16) recess
- (17) (Recess at 4 28 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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- (1) EXHIBITS
- (2) PX1529 offered 3
- (4) PX1529 received 3

Look-See Concordance Report

UNIQUE WORDS 1,461
TOTAL OCCURRENCES 5,165
NOISE WORDS 385
TOTAL WORDS IN FILE 16,592

SINGLE FILE CONCORDANCE

CASE SENSITIVE

NOISE WORD LIST(S)
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INCLUDES ALL TEXT OCCURRENCES

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 (2) THIRD JUDICIAL DISTRICT  
 (4) In re ) Case No JAN 89 2533 Civil  
 ) Anchorage Alaska  
 (5) The EXXON VALDEZ ) Wednesday September 7 1994  
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 (6) )  
 (8) VOLUME 52 Pages 8295 through 8471  
 (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 out at 8 25 a m )  
 (3) THE CLERK Please rise  
 (4) (Call to Order of the Court)  
 (5) THE CLERK Please be seated  
 (6) THE COURT Counsel we re on the record Tell me  
 (7) what we re doing  
 (8) MR FORTIER Your Honor one thing we were going to  
 (9) do I think was I was going to make another offer of proof  
 (10) with regard to Mr Norman s testimony Mr Norman is here  
 (11) THE COURT Fine  
 (12) MR FORTIER Call him?  
 (13) THE COURT Get him on  
 (14) MR FORTIER Okay Pat Norman  
 (15) THE CLERK Sir can you attach the microphone there  
 (16) and remain standing for the oath Attach it to your jacket  
 (17) lapel would be good  
 (18) Please raise your right hand  
 (19) (The Witness Is Sworn)  
 (20) THE CLERK Please be seated  
 (21) Sir for the record can you please state your full name?  
 (22) A My name is Pat Norman  
 (23) THE CLERK Can you please spell your last name?  
 (24) A N-o-r-m-a-n  
 (25) THE CLERK And your occupation?

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(1) FOR THE DEFENDANTS  
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(1) A I m the president of the Port Graham Village Corporation  
 (2) THE CLERK Thank you  
 (3) VOIR DIRE EXAMINATION OF PAT NORMAN  
 (4) BY MR FORTIER  
 (5) Q Mr Norman how long have you been the president of Port  
 (6) Graham Village Corporation?  
 (7) A Since 1984  
 (8) Q During the years 1990 through 1992 were you also the land  
 (9) manager for Port Graham?  
 (10) A Yes I was  
 (11) Q What does a land manager for Port Graham do or what did  
 (12) he  
 (13) do during those years?  
 (14) A During 89 to -  
 (15) Q Let s say 91 through - 90 through 92  
 (16) A Well my major responsibility was monitoring the cleanup in  
 (17) the Windy Bay Chugach Bay area  
 (18) Q In monitoring the cleanup can you tell us whether or not  
 (19) you worked with the Coast Guard ADEC and Exxon?  
 (20) A Yes I did  
 (21) Q You went out on trips with them to Windy Bay Chugach Bay  
 (22) area?  
 (23) A Yeah We did spring surveys and fall surveys and I also  
 (24) monitored the work in 1990 91 flew out with ADEC and a  
 (25) couple times with the Coast Guard  
 (26) Q Have you ever heard the term FINSAP?

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- (1) A Yes  
 (2) Q Were you involved in FINSAP as land manager for Port  
 (3) Graham?  
 (4) A Yes I was  
 (5) Q In that capacity did you travel to the Windy Bay Chugach  
 (6) Bay area?  
 (7) A Yes I did  
 (8) Q And who did you travel with?  
 (9) A On the actual survey itself I was out there with an Exxon  
 (10) representative Coast Guard NOAA DEC those are the people  
 (11) that were involved  
 (12) Q Was Exxon with you a representative from Exxon?  
 (13) A Yes  
 (14) Q And can you tell us what you did?  
 (15) A We surveyed two places in Windy Bay one in Chugach Bay  
 (16) We couldn't agree on a - on a recommendation for the Windy  
 (17) Bay  
 (18) area so it was agreed amongst the group to kick it back up to  
 (19) the federal on-scene coordinator and the state on-scene  
 (20) coordinator for a further - further action  
 (21) Q When you say we couldn't agree could you tell us what you  
 (22) mean?  
 (23) A We couldn't agree on - on the ground that - whether there  
 (24) should be cleanup or not The Exxon rep the Coast Guard and  
 (25) NOAA felt that the work didn't need to be done I told them  
 that I couldn't agree with that that there was obvious visible

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- (1) oil that could be picked up the same stuff that were there in  
 (2) 91 We couldn't come to agreement so they agreed to send it  
 (3) up to - to Anchorage here to have it worked on further  
 (4) Q Can you tell us what if anything happened after they kicked  
 (5) it upstairs?  
 (6) A After we were done with the survey I went back home  
 (7) About four days later I think Coast Guard contacted me and  
 (8) flight was arranged out of Anchorage They would pick me up  
 (9) in  
 (10) Port Graham we would go to Windy Bay and actually take a  
 (11) look  
 (12) at the two sections of beach that - that we couldn't agree on  
 (13) the FINSAP survey  
 (14) Q You went out there with the Coast Guard?  
 (15) A Yes  
 (16) Q Who from the Coast Guard?  
 (17) A Admiral Ciancaglini was representing the Coast Guard Otto  
 (18) Harrison was there for Exxon There was a DEC representative  
 (19) and one other Coast Guard rep along with myself  
 (20) Q And did you go to Windy Bay then?  
 (21) A Yeah we - we went to Windy Bay we were able to land at  
 (22) only one spot there It was one of the beaches that we weren't  
 (23) able to agree on I showed the admiral and Otto and the DEC  
 (24) rep the exact locations that we had looked at during the survey  
 (25) and showed them that the stuff was obviously visible could  
 have been easily - easily picked up I showed them a section  
 on the - on the west end where the oil was oozing out of -

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- (1) out from underneath the boulders and cobble on the beach I  
 (2) showed them that  
 (3) Q Did Admiral Ciancaglini and Otto Harrison talk to you about  
 (4) further cleanup?  
 (5) A I - I stated to them that I felt the stuff that was there  
 (6) was - was easily reachable based on my experience over the  
 (7) years over the three-year period Admiral Ciancaglini stated  
 (8) that he couldn't agree with my position because he didn't  
 (9) see - he didn't feel that there was any net - what he termed  
 (10) net environmental benefit through additional cleanup at that  
 (11) site in Windy Bay  
 (12) Q And did anything else happen there? Was there any further  
 (13) cleanup?  
 (14) A After - after further expressing my opinion that I didn't  
 (15) agree with that position the state DEC representative stated  
 (16) that he - what he would do was keep - put that site on the  
 (17) state's continuing contamination list on our behalf and -  
 (18) and from there we - we left We couldn't land at any other  
 (19) sites The tide came in  
 (20) Q And have you been back out there in '93 '94 have you?  
 (21) A I have been  
 (22) Q Can you tell us what you saw?  
 (23) A In '94 I - we looked at the same beach that I showed  
 (24) Admiral Ciancaglini and Otto Harrison The oil was the same  
 (25) It was still flowing out from underneath the rocks and it was

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- (1) exposed more because it's been two more years but the stuff  
 (2) is - is as liquid as it was in '89 It's still sitting there  
 (3) MR FORTIER Thank you That's all Your Honor  
 (4) MR CLOUGH Your Honor we're prepared to argue the  
 (5) rebuttal issue now without any examination of the witness I  
 (6) think the facts are laid out for us  
 (7) THE COURT Okay Go ahead  
 (8) MR CLOUGH I think this is clearly not rebuttal  
 (9) testimony  
 (10) There's two elements to the testimony of the witness as I  
 (11) understand it First of all describing the FINSAP process  
 (12) there's nothing in there which in any way is inconsistent with  
 (13) the testimony presented by either Admiral Ciancaglini or  
 (14) Mr Harrison I have Admiral Ciancaglini's testimony here In  
 (15) fact the process that Mr Norman very honestly described is  
 (16) precisely the process that the admiral described The admiral  
 (17) did not say at the end of all the inspections or anything else  
 (18) he agreed in every single instance he said mostly he agreed  
 (19) with the land manager but not in every single instance and  
 (20) there were times when he did disagree There's just simply -  
 (21) nothing's being rebutted there Not adding anything to the  
 (22) testimony  
 (23) The second issue the '93 oiling that has nothing to do  
 (24) with any of the testimony presented by Admiral Ciancaglini on  
 (25) that issue at all This is just an issue of '94 oiling The

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- (1) plaintiffs are putting on evidence through Mr Bush as part of  
 (2) the direct case this appears to be just more 94 oiling  
 (3) evidence at this late hour  
 (4) I see nothing here that qualifies as rebuttal testimony  
 (5) and I ve also - I have the testimony here of both the admiral  
 (6) and Otto Harrison on this procedure and both of them what  
 (7) they stress is the input from the land owners and the fact  
 (8) they would meet with them and go out but they did not say in  
 (9) every single instance they would agree with them and both of  
 (10) them - especially the admiral admitted that in some  
 (11) circumstances there were disagreements and he had to make a  
 (12) decision  
 (13) THE COURT Counsel?  
 (14) MR FORTIER Your Honor thank you  
 (15) I think we have to go back to Mr Teal s testimony  
 (16) Mr Teal testified that the FINSAP program was designed to  
 (17) identify those areas that had remaining oil and to clean up  
 (18) that oil and thereafter that the beaches were - were  
 (19) demobilized I believe that Mr Harrison testified that  
 (20) virtually every land owner was cooperative and agreed with the  
 (21) admiral on the admiral s decisions except for as he called  
 (22) it Chenega Corporation  
 (23) THE COURT Who testified to that? Ciancaglino  
 (24) testified to that didn t he?  
 (25) MR FORTIER I m sorry Mr - Yeah Admiral

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- (1) Ciancaglino did yes And Mr Norman is from Port Graham  
 (2) Corporation Mr Norman - or Mr Harrison testified that 99  
 (3) percent of all the land owners agreed with the decisions on the  
 (4) first go around Mr Norman has presented testimony that  
 (5) directly addresses the issue of visible oil on the beach what  
 (6) he describes as mousse oozing out of the rocks in an area And  
 (7) he s also described a disagreement with regard to on the one  
 (8) hand not only the land owner but the state of Alaska and on  
 (9) the other hand the Coast Guard and Exxon the end result of  
 (10) which was that the state and Mr Norman agreed that the beach  
 (11) was - was still oiled and therefore contaminated while Exxon  
 (12) and the Coast Guard on the other hand reached an opposite  
 (13) conclusion almost a juxtaposition of the difference between  
 (14) the state standards and federal standards which directly  
 (15) rebuts Otto Harrison s testimony that everybody got along  
 (16) great  
 (17) THE COURT Okay thank you  
 (18) Anything else?  
 (19) MR CLOUGH I think there s been some  
 (20) mischaracterization of some of the earlier testimony from the  
 (21) admiral He did not say Chenega was the only village he  
 (22) disagreed with  
 (23) THE COURT No but Chenega was prominently mentioned  
 (24) as the corporation that was stricter on the clean - on its  
 (25) cleanup standards than any other Native corporation

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- (1) MR CLOUGH What he said was there were some people  
 (2) Chenega Village Corporation for instance who wanted every  
 (3) speck of oil off their land Later on he went through and  
 (4) said I was dealing with 30 to 40 land managers so what I m  
 (5) saying to you before my additions were made whether to walk  
 off  
 (6) I added input from the land managers from the state of Alaska  
 (7) from NOAA from my scientific advisor  
 (8) Then he went on to say If there was still a difference of  
 (9) opinion with them I would go out and take a look at it and  
 (10) make a decision And that s precisely the process that s been  
 (11) described here  
 (12) (The Witness Stepped Down )  
 (13) THE COURT That s true that s true That s one of  
 (14) the virtues of an offer of proof with the witness as opposed to  
 (15) the lawyer is that the offer of proof out of the witness  
 (16) mouth is more particular it s more specific you can hear what  
 (17) the witness is saying as opposed to what the lawyer thinks he s  
 (18) saying To me this is absolutely legitimate rebuttal  
 (19) testimony Now that I hear it it rebuts Ciancaglino and it  
 (20) rebuts Harrison so I m going to allow it  
 (21) We have to find out if the jury s here Is there anything  
 (22) else?  
 (23) MR PETUMENOS Yes there is  
 (24) MR STOLL Your Honor excuse me - I m pleased to  
 (25) say Your Honor that we have some stipulations

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- (1) THE COURT Good good Congratulations  
 (2) MR STOLL Your Honor I would say we have one and  
 (3) three quarters stipulations  
 (4) THE COURT You got my hopes up  
 (5) MR STOLL I know but I wanted you to listen  
 (6) Mr Oppenheimer and I have worked out a stipulation with  
 (7) respect to Mr Roberts who was a - was on our rebuttal  
 (8) witness list and the stipulation if I could just hand it to  
 (9) Your Honor to be read to the jury -  
 (10) THE COURT All right Let s see it Mr Oppenheimer  
 (11) here?  
 (12) MR OPPENHEIMER I am Actually I m just sitting  
 (13) slumped down  
 (14) THE COURT You re not in the usual place  
 (15) MR STOLL He s creeping out today  
 (16) THE COURT Do you want to read this?  
 (17) MR STOLL Pardon?  
 (18) THE COURT Do you want to read this?  
 (19) MR STOLL That s fine Your Honor  
 (20) THE COURT Yeah you can read it  
 (21) MR STOLL That s fine  
 (22) THE COURT This is definitely the stipulation  
 (23) right?  
 (24) MR OPPENHEIMER When Your Honor uses the word  
 (25) definitely I feel compelled to just check once I m sure it

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- (1) is
- (2) MR STOLL It s your letter
- (3) MR OPPENHEIMER If it s my letter I m doubly sure
- (4) It is indeed
- (5) THE COURT So you can read it and I ll tell them -- I
- (6) don t know if I ve done this before but I ll tell them what a
- (7) stipulation is
- (8) MR STOLL Okay
- (9) Your Honor I guess the second stipulation Mr Clough
- (10) advises me is one sentence away from being typed but the
- (11) problem I have this is relates to Mr Robertson Can I just
- (12) have a moment here?
- (13) THE COURT Yes
- (14) His name is Robertson isn t it?
- (15) MR STOLL Robertson
- (16) THE COURT The letter says Roberts
- (17) MR STOLL That s Roberts and the other is
- (18) Robertson
- (19) THE COURT Are they there?
- (20) THE CLERK They re coming into the pit
- (21) MR DIAMOND While they re discussing that Your
- (22) Honor Mr Petumenos and I have reached a stipulation
- (23) Mr Petumenos has agreed to withdraw from evidence Exhibits
- (24) 8518 and 8519 with the understanding that he can nonetheless
- (25) use them during the course of closing argument they just won t

- (1) already made
- (2) THE COURT Hold on 2179 and 2181 are admitted
- (3) that s DX designations
- (4) (Exhibits DX2179 and DX2181 received)
- (5) THE COURT Mr Petumenos you ll have to let me know
- (6) what the number is if you have it
- (7) MR PETUMENOS I ll come back to that
- (8) My understanding from yesterday is that the Court left
- (9) open or asked that I address the issue of the state of the
- (10) record with respect to some of the rebuttal proof that we wish
- (11) to offer on the adequacy of the cleanup and the rulings that we
- (12) were facing I guess there was some issue about the failure to
- (13) object in the -- during the either to the admirals
- (14) THE COURT I wasn t soliciting any comment counsel
- (15) If you want to make comment you re welcome to do it I m on
- (16) the record with my position
- (17) MR PETUMENOS I just wanted to point out a couple of
- (18) things to the Court And I think we need to go back first of
- (19) all to the opening statement of Exxon in which Exxon pointed
- (20) out that it would be part of their case that Mother Nature and
- (21) they mitigated the beaches And that they spared no effort to
- (22) get it done and that their cleanup effort was efficient
- (23) efficacious and successful
- (24) This issue was first then addressed by Mr Piper who
- (25) testified that it was a matter of negotiation cost was a

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- (1) go to the jury in exchange for which we have agreed to drop
- (2) our rebuttal witness Mr -- Dr Gilfillan
- (3) THE COURT Fine so 8518 and 8519 are out of there
- (4) (Exhibits 8518 and 8519 withdrawn)
- (5) MR DIAMOND I would like to move the admission of
- (6) two exhibits that I have been trying to get admitted on behalf
- (7) of Mr Shapira now for four weeks
- (8) MR PETUMENOS Counsel I m not ready
- (9) MR DIAMOND I m going to move the admission despite
- (10) the fact Mr Petumenos is not ready I understand he wants to
- (11) move the admission of similar documents
- (12) They re bulletins from the state of Alaska Epidemiology
- (13) office He wants a third one admitted and I don t think we
- (14) have any problem with that he hasn t identified it for us
- (15) The two we would like entered DX2179 and DX2181 that were
- (16) identified and authenticated during the course of the Bridgen
- (17) cross examination
- (18) (Exhibits DX2179 and DX2181 offered)
- (19) MR PETUMENOS And the one -- you have no objection
- (20) to the one my motions to admit?
- (21) MR DIAMOND I have no -- I can t imagine I would
- (22) have any motion to -- objection to Mr Petumenos but I don t
- (23) know which one it is yet
- (24) MR PETUMENOS I think I already made them at this
- (25) point I think they were all -- think the motions to admit are

- (1) factor that there were lots of disputes that it was not a
- (2) smooth-running situation And Exxon responded with the
- (3) testimony of first Mr Teal to come in and describe the
- (4) efficient nature of the cleanup the fact that the cleanup was
- (5) part of an emergency plan and how hard Exxon worked and
- (6) how --
- (7) what a great job they did and how much oil they got off the
- (8) beaches and how mitigated the damages in fact are
- (9) At that time I attempted to cross-examine the witness with
- (10) the Alyeska control tape and the Court s ruling was "Not with
- (11) this witness you re not You re going to have to do it --
- (12) you know I took it to mean you re going to have to do it
- (13) independently It was not on a relevance basis it was on the
- (14) cross-examination of that witness and we got into a debate
- (15) about whether he was there or not et cetera
- (16) Then the next time the issue raised its head was when Ms
- (17) Smith raised the issue of the admirals and now I ve actually
- (18) got some transcript excerpts in which she raised the issue and
- (19) stated that in view of the testimony that had gone in so far
- (20) they were entitled to show essentially that the cleanup was
- (21) efficacious and on target and so forth And the Court made the
- (22) pronouncement in that exchange that the -- while we knew it was
- (23) going to the master that you found the testimony relevant you
- (24) thought it would be relevant and we should be guided by that
- (25) principle and I have a copy of the -- of that exchange here



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(1) unfortunately this is not on the record but I think it s  
 (2) accurate to say that Exxon came in with a - armed with a  
 (3) slough of transcript references in which the issue that we are  
 (4) talking about here was put into play And as a consequence  
 (5) the master ruled and stated to us that he was in fairly close  
 (6) contact with you which we understood the - to be the case  
 (7) from you as well that he would make the cuts that he made  
 (8) Thereafter Mr Harrison testified and we had a bench  
 (9) conference fairly early on with Mr Clough in which I suggested  
 (10) to the Court that it was clear that what was fair was the  
 (11) extent to which the beaches were mitigated but that I didn t  
 (12) think that we ought to be talking about the number of boot  
 (13) purchases and the amount of money spent The Court agreed  
 (14) and  
 (14) asked Mr Clough to go to the point and Mr Clough said he  
 (15) was  
 (15) going to talk about the number of people that were on the  
 (16) beaches the - and this is at the bench conference the  
 (17) logistical planning and implementation of the plan and then  
 (18) with that guidance the testimony went forward with  
 (19) Mr Harrison  
 (20) There is no question but that the cleanup being put forward  
 (21) in this case from the beginning way back to opening statement  
 (22) and the extent to which it was efficient and directed properly  
 (23) goes to Exxon s claim that the beaches have been mitigated  
 (24) that they have effectively reduced the damages in this case  
 (25) based upon their efforts

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(1) And it seems to me to be perfectly fair rebuttal to show  
 (2) that a lot of the efforts and that the open checkbook that  
 (3) Mr Harrison described went to things that didn t necessarily  
 (4) result in the mitigation of the beaches that they were public  
 (5) relations concerns and so forth He was given a full  
 (6) opportunity to explain the extent to which that was true and  
 (7) the extent to which that wasn t true and he denied that it had  
 (8) any role whatsoever  
 (9) We have two offers of proof in that regard both of which  
 (10) are very brief and very short The first is the tape of which  
 (11) you re aware takes less than ten minutes to play The second  
 (12) is an example of a situation in which exactly what the  
 (13) plaintiffs contend is what the testimony would show which is  
 (14) that there was a beach that was cleaned the cleanup workers  
 (15) were helicoptered at great expense and returned to the beach  
 (16) for the purpose of showing the press how the beach appears to  
 (17) be clean that a cleanup worker will state that he was directed  
 (18) not to turn over rocks and find oil on the underside Matters  
 (19) of that nature that tend to rebut Mr Harrison and the  
 (20) admirals testimony which is self-serving and albeit relevant  
 (21) to the issue of whether or not the issues are in fact mitigated  
 (22) because of a blank checkbook under which they were  
 (23) operating  
 (23) and Your Honor will recall the testimony where he said that he  
 (24) talked to the president of Exxon who told him that he had the  
 (25) key to the corporate city to get the cleanup done And I

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(1) think in view of that this testimony is highly relevant and  
 (2) we should not be left with one side of the story  
 (3) THE COURT The second testimony is Robertson s?  
 (4) MR PETUMENOS That s correct  
 (5) THE COURT I ll hear Robertson just like I heard the  
 (6) last witness to determine whether or not it s really valid  
 (7) rebuttal I m skeptical about it but I ll hear it I m not  
 (8) precluding you from making a real offer of proof which I  
 (9) consider to be testimonial and not representation  
 (10) MR PETUMENOS It will be done by telephone We ll  
 (11) work on getting that arranged  
 (12) MR DIAMOND We re in the middle of a stipulation  
 (13) process to obviate Mr Robertson One lawyer is working to get  
 (14) rid of him  
 (15) THE COURT Why did I hear this?  
 (16) MR CLOUGH We just resolved the stipulation Your  
 (17) Honor  
 (18) MR STOLL We resolved everything other than this  
 (19) issue  
 (20) THE COURT This issue? What s this issue? That s  
 (21) the whole issue isn t it?  
 (22) MR CLOUGH I m sorry I wasn t in the courtroom I  
 (23) had no idea it was being presented We have a stipulation on  
 (24) the one issue he was going to testify to and we re rewriting  
 (25) the final language

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(1) THE COURT Let me hear the stipulation  
 (2) MR CLOUGH I ll bring it up  
 (3) MR STOLL May I just have a moment Your Honor?  
 (4) THE COURT This is part of the cleanup process that s  
 (5) not working well  
 (6) MR DIAMOND They need an Otto Harrison is what they  
 (7) need  
 (8) MR STOLL Your Honor this stipulation doesn t go to  
 (9) what -  
 (10) THE COURT Just read the stipulation for me will you  
 (11) please counsel?  
 (12) MR STOLL Pardon me?  
 (13) THE COURT Read the stipulation  
 (14) MR STOLL You are instructed the fact that the  
 (15) federal on-scene coordinator s local-designated representative  
 (16) quote signed off end quote on a particular shoreline segment  
 (17) at the conclusion of the 1989 cleanup season does not mean  
 (18) that  
 (18) segment was devoid of any oil or oil residue The 1989  
 (19) signoffs represent only the completion of cleanup operations  
 (20) for that season and did not mean that segments would receive  
 (21) no  
 (21) further treatment in future years  
 (22) Should be no - should be - well you are further  
 (23) instructed that the Coast Guard admiral serving as the overall  
 (24) federal on scene coordinator did not personally inspect every  
 (25) shoreline segment signed off at the conclusion of the 1989

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- (1) cleanup season however the FOSC's local representative did  
 (2) inspect each segment and executed the signoff document in  
 that  
 (3) capacity  
 (4) This only goes to the signoff issue  
 (5) MR CLOUGH It was my understanding Your Honor that  
 (6) was what he said was the one issue for us to address and you  
 (7) said we should address it by stipulation  
 (8) THE COURT That's true I said that  
 (9) Mr Petumenos - of course this is standard procedure  
 (10) Mr Petumenos not here comes back in to bolster his record  
 (11) It's not - I mean there's nothing wrong with that I suppose  
 (12) but - but I tell you one thing If I ever try this case  
 (13) again you're all going to be in the courtroom at all times so  
 (14) that I don't get this kind of stuff This is the end of the  
 (15) case and I can handle this  
 (16) But you - that is a stipulation you are going to  
 (17) stipulate to that right?  
 (18) MR STOLL Yes  
 (19) MR CLOUGH Yes Your Honor  
 (20) MR STOLL We'll stipulate to this  
 (21) THE COURT So as I said I'll listen to the witness  
 (22) and determine whether or not he has anything to say but I am  
 (23) not letting him testify in rebuttal and I'm skeptical as to  
 (24) whether or not I will  
 (25) MR DIAMOND This is a quid pro quo Your Honor

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- (1) we're entering into a stipulation to avoid an issue At least  
 (2) that's what we agreed to yesterday  
 (3) THE COURT So you're not going to stipulate?  
 (4) MR DIAMOND It's the quid without the quo here If  
 (5) the witness is going to testify he's going to testify and we  
 (6) ought not to be stipulating to anything We shouldn't have  
 (7) spent all last night negotiating  
 (8) THE COURT That's probably true that's probably  
 (9) true So withdraw your stipulation  
 (10) MR DIAMOND Your Honor I think rather than that  
 (11) we'll ask you to enforce the arrangements you made yesterday  
 (12) you asked us to make yesterday You have far more patience  
 (13) than we do This was ostensibly going to be the last day of  
 (14) trial We spent two and a half hours here yesterday or two  
 (15) hours here yesterday afternoon working these things out  
 (16) Mr Petumenos limited invitation reserved by his co-counsel  
 (17) was to come in and explain to you why they had not waived the  
 (18) objection to the admirals' testimony and -  
 (19) THE COURT That's right that was the subject matter  
 (20) MR DIAMOND The door opens a crack they put a foot  
 (21) in and pretty soon it's wide open  
 (22) No one invited Mr Petumenos to resurrect the issue of a  
 (23) witness who he is not even proffering We resolved this  
 (24) yesterday We spent a lot of time resolving it I think  
 (25) finality ought to be enforced at some point and we ought to

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- (1) have closure on this  
 (2) MR STOLL Your Honor I don't think that's exactly  
 (3) the facts that happened yesterday afternoon  
 (4) THE COURT Okay counsel I've got a jury waiting  
 (5) All right so stop the maneuvering and let's get on with some  
 (6) testimony -  
 (7) MR STOLL Right  
 (8) THE COURT - all right?  
 (9) I will not enforce - I will not keep them from making an  
 (10) offer of proof counsel because I think that would be a  
 (11) mistake That does not mean that I'm going to allow this  
 (12) witness to testify especially in view of the stipulation if  
 (13) the stipulation is still stipulated to  
 (14) MR CLOUGH The stipulation is here Your Honor And  
 (15) one further point as you'll recall we never did address the  
 (16) Rule 99(a) issue  
 (17) THE COURT Is that the telephonic issue?  
 (18) MR CLOUGH That's right because that's yet a  
 (19) separate issue as to whether - I'm assuming after the -  
 (20) THE COURT That's what offers of proof are all about  
 (21) counsel is if in fact telephonic is a problem we'll see about  
 (22) that too  
 (23) Okay who's the witness coming up?  
 (24) MR STOLL We call Mr Norman first Your Honor get  
 (25) the jury in here and make the arrangements for the phone

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- (1) THE COURT Yes that's a good idea  
 (2) (Jury in at 8:55 a.m.)  
 (3) MR STOLL Your Honor may I have that document back  
 (4) with the stipulation on Bill Roberts?  
 (5) THE COURT Yes  
 (6) MR STOLL I can do this later  
 (7) THE COURT All right the jury is present  
 (8) MR FORTIER Your Honor the plaintiffs call Mr Pat  
 (9) Norman  
 (10) THE COURT All right  
 (11) THE CLERK Sir can you attach the microphone to your  
 (12) jacket lapel and remain standing for the oath Please raise  
 (13) your right hand  
 (14) (The Witness Is Sworn)  
 (15) THE CLERK Please be seated  
 (16) Sir for the record can you please state your full name?  
 (17) A My name is Pat Norman  
 (18) THE CLERK Please spell your last name?  
 (19) A N-o r-m a n  
 (20) THE CLERK And your occupation?  
 (21) A I'm the president of the Port Graham Village Corporation  
 (22) THE CLERK Thank you  
 (23) DIRECT REBUTTAL EXAMINATION OF PAT NORMAN  
 (24) BY MR FORTIER  
 (25) Q Good morning Mr Norman

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- (1) A Good morning
- (2) Q Can you tell the jury how long you ve been the president of
- (3) Port Graham Village Corporation?
- (4) A Been the president from since 1984
- (5) Q And Port Graham Village Corporation is located on the
- (6) southern part of the Kenai Peninsula correct?
- (7) A Yes
- (8) Q Now Mr Norman have you ever heard the term land
- (9) manager used during the oil spill years?
- (10) A Yes
- (11) Q Were you a land manager during the oil spill years?
- (12) A Yes I was
- (13) Q Can you tell the jury what a land manager what that term
- (14) meant during the oil spill years? What did a land manager do?
- (15) A I monitored the cleanup activities on our property in the
- (16) Windy Bay Chugach Bay Rocky Bay area I - I went out on the
- (17) spring and fall surveys during 89 90 and 91 and last one
- (18) in 92
- (19) Q By our properties Mr Norman are you referring to the
- (20) properties of Port Graham Corporation?
- (21) A Yes
- (22) Q Okay and you indicated in the Lower Kenai area?
- (23) A Yes that s on the lower part of the peninsula there
- (24) Q That s down in this area here?
- (25) A Yes

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- (1) Q Okay and we were referring of course to Plaintiffs
- (2) Exhibit 1162
- (3) The Windy Bay area is in this area Mr Norman?
- (4) A That s the bay right there
- (5) Q And the Chugach Bay area?
- (6) A That s the next one where your finger is
- (7) Q And both of those are owned by Port Graham Corporation?
- (8) A Yes
- (9) Q Now have you - you re familiar with the term FINSAP?
- (10) A Yes
- (11) Q Was FINSAP the final survey in 1992?
- (12) A Yes we went out in the spring May of 92
- (13) Q Okay And by we who do you mean?
- (14) A There was Coast Guard Exxon representative representative
- (15) from NOAA the state DEC representative We went to Windy
- (16) Bay and Chugach Bay We checked two sites in Chugach - I mean
- (17) in
- (18) Windy Bay one in - one in Chugach Bay
- (19) Q And the Coast Guard was with you on all those trips?
- (20) A Yes
- (21) Q And so was Exxon?
- (22) A Yes
- (23) Q And DEC?
- (24) A Yes
- (25) Q And when you went to Windy Bay can you tell us what you
- (26) observed there in 1992?

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- (1) A In 1992 the two areas that we surveyed there was obvious
- (2) oiling still There was asphalt patches oil that was oozing
- (3) from the boulders cobble on the beach oozing out
- (4) On the Windy Bay sections we could not agree on the beach
- (5) whether there d be cleanup The Coast Guard and Exxon
- (6) wanted
- (7) to recommend no treatment I couldn t agree with their
- (8) recommendation because the stuff was - you know it was
- (9) sitting right there was easily accessible Since I didn t
- (10) agree with them they agreed that they would kick it up to the
- (11) federal on scene coordinator and the state on-scene
- (12) coordinator
- (13) for further review and action
- (14) Q Okay And do you know Mr Norman if that s in fact what
- (15) happened?
- (16) A That is - that is what happened Three - I think three
- (17) or four days later the Coast Guard contacted me to arrange the
- (18) flight into Windy Bay They picked me up in Port Graham The
- (19) representatives on the flight were Admiral Ciancaglino Coast
- (20) Guard person up here in Anchorage Otto Harrison, a DEC rep
- (21) and
- (22) one other Coast Guard rep
- (23) Q Now did you know at the time that Admiral Ciancaglino was
- (24) the federal on scene coordinator?
- (25) A Yes he was
- (26) Q 1992 okay So you went to Windy Bay then I take it?
- (27) A Yeah we went to Windy Bay We were going to check two
- (28) sites We stopped at one I showed them the exact same

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- (1) location we had surveyed we had the disagreement on We
- (2) walked the whole section that - that I felt could use
- (3) additional cleanup I showed them the whole areas that we had
- (4) walked Admiral Ciancaglino stated that even from what I
- (5) showed him he couldn t recommend - or he wouldn t
- (6) recommend
- (7) additional work being done there because the term that he
- (8) used
- (9) net - he felt there would be no net environmental benefit to
- (10) additional cleanup
- (11) And we sat there and - and not so much argued but I was
- (12) trying to make the point that the stuff was as visible and as
- (13) accessible as it was during the work that was done in 89 90
- (14) and 91 It had just become exposed you know it was in the
- (15) spring and I couldn t sway his - sway his opinion
- (16) Q Now Mr Harrison was also there at this meeting of Windy
- (17) Bay?
- (18) A Yeah Mr Harrison was there Because I couldn t change
- (19) the admiral s opinion or Otto s the DEC representative there
- (20) stated that what he would do for Port Graham was to put the
- (21) site on what he called a continuing contamination list
- (22) MR CLOUGH Objection Your Honor hearsay
- (23) THE COURT Counsel it is hearsay isn t it?
- (24) MR FORTIER Your Honor I think it s state of mind
- (25) to what Mr Norman under - not for the truth of the matter
- (26) asserted but rather what Port Graham s land manager was
- (27) understanding was the nature

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- (1) THE COURT The objection s sustained The jury is to  
 (2) disregard the question and the answer  
 (3) BY MR FORTIER  
 (4) Q Now Mr Norman have you been out to the beach since  
 (5) 1993 - or 1992?  
 (6) A Yes We were out there in 1994 just this - I was at the  
 (7) site that I showed Admiral Ciancaglini and Otto Harrison and  
 (8) the DEC rep the same site the oil was still there It s -  
 (9) it s oozed out more into view It s the same - same stuff I  
 (10) showed him in 92 is still there just slowly oozing more and  
 (11) more out into the open  
 (12) MR FORTIER I have no further questions thank you  
 (13) CROSS REBUTTAL EXAMINATION OF PAT NORMAN  
 (14) BY MR CLOUGH  
 (15) Q Hi Mr Norman We ve met a bunch mostly at the coffee  
 (16) shop across the street I ll try and make this quick  
 (17) I want to talk about first of all the process leading up  
 (18) to FINSAP because you were involved were you not sir in  
 (19) inspecting these - these particular beaches at Windy Bay from  
 (20) 1990 all the way up through 92 Isn t is that correct?  
 (21) A Right that s correct  
 (22) Q And you participated - and can I have the Elmo please -  
 (23) this is going to be Defendants Exhibit 1479 next few pages  
 (24) You participated looking at Defendants Exhibit 1479 in the  
 (25) spring shoreline survey done in April of 1990 right?

- (1) A That s true  
 (2) Q And an ADEC representative?  
 (3) A Yes  
 (4) Q And a land manager representative - that being again  
 (5) yourself right?  
 (6) A Yes  
 (7) Q And an Exxon representative?  
 (8) A Yes  
 (9) Q And again you all walked the shoreline?  
 (10) A Sure  
 (11) Q You all looked to see what was there?  
 (12) A We did  
 (13) Q You all furnished that information into the cleanup  
 (14) organization for the Coast Guard to decide what to do next?  
 (15) A Yes  
 (16) Q You had an opportunity to work with the agencies in the  
 (17) spring of 1991 too didn t you?  
 (18) A That s true  
 (19) Q That was called MAYSAP wasn t it?  
 (20) A MAYSAP yes  
 (21) Q And you went out there that year again with an Alaska  
 (22) Department of Environmental Conservation representative?  
 (23) A That s true  
 (24) Q An Exxon representative?  
 (25) A Yes

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- (1) A Yes  
 (2) Q And you went out with the Coast Guard representative and a  
 (3) ADEC representative?  
 (4) A Yes  
 (5) Q And all three of you were able to walk the actual beach?  
 (6) A Yes  
 (7) Q And all three of you were able to give input into the FOSC  
 (8) as to what further cleanup was required correct?  
 (9) A With these forms yes  
 (10) Q That s right And you talked the Coast Guard  
 (11) representative about the shoreline while you were out there  
 (12) didn t you when you walked the shoreline with him didn t you  
 (13) discuss it with him?  
 (14) A Yeah While we were walking we d discuss what was there  
 (15) show each other what we found on the beach yes  
 (16) Q That s how the process would work you d all go out there  
 (17) together you d walk the same stretch of shoreline you d all  
 (18) look at the same things right?  
 (19) A We would yes  
 (20) Q And at the end of the year in 1990 you all had a chance to  
 (21) go out again this was in - you went out there in August of  
 (22) 1990 right?  
 (23) A Yes  
 (24) Q And this time you went out there again with a Coast Guard  
 (25) representative right?

- (1) Q And a Coast Guard or NOAA representative right?  
 (2) A That s true yes  
 (3) Q You walked that same stretch of beach that you walked the  
 (4) year before?  
 (5) A Every year yes sir  
 (6) Q And you looked at what oil was there?  
 (7) A That s true  
 (8) Q And what oil was not?  
 (9) A If it - whatever was on the beach we observed it yes  
 (10) Q And you were given an opportunity to talk to these agency  
 (11) representatives while you were walking the beach?  
 (12) A That s true  
 (13) Q And you were given an opportunity to give your input into  
 (14) the process then too right?  
 (15) A Yes  
 (16) Q And you went out there again in FINSAP the spring of the  
 (17) following year and that s the one that your testimony has been  
 (18) discussing This was in May of 1992 right? Is that correct?  
 (19) If you need I ll blow that up a little bit Pat Can you  
 (20) read that up front?  
 (21) A Yeah that s the WB2 Yeah  
 (22) Q John Bauer went out with you from the Alaska Department of  
 (23) Environmental Conservation right?  
 (24) A Yes  
 (25) Q And he walked the beach with you?

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- (1) A Yeah we were all on the beach together
- (2) Q And after that inspection he indicated that -- I think if
- (3) you look at the box that the treatment was complete is that
- (4) correct?
- (5) I'll blow it up some more for you John Bauer ADEC?
- (6) A Yeah he -- he marked treatment completed on that
- (7) section yes
- (8) Q You went out there with Jim Madden from the Coast Guard
- (9) right?
- (10) A Yes
- (11) Q And he was the local FOSC representative right?
- (12) A Yeah he was the Coast Guard rep
- (13) Q You walked the beach with him?
- (14) A Yes
- (15) Q And you were able to show him your areas of concern?
- (16) A Yeah
- (17) Q And after talking to you and inspecting he decided that no
- (18) further treatment was required correct?
- (19) A That's correct
- (20) Q And you also went out there with Joe Talbot from NOAA
- (21) right?
- (22) A Yeah he was there too
- (23) Q And he walked the beach with you?
- (24) A Yes
- (25) Q You remember pointing out to him your areas of concern?

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- (1) A Yeah we all looked at it at the same time
- (2) Q And you were able to show him what oil that was left that
- (3) you were able to find?
- (4) A Yes
- (5) Q And looking at that he determined no treatment was
- (6) required?
- (7) A Yes he did
- (8) Q And you have a comment here as well at least for this one
- (9) segment on Windy Bay you didn't think any further treatment
- (10) was required for that segment did you?
- (11) A That's true that's an area that was heavily worked in 89
- (12) 90
- (13) Q Now there were two other segments with the various
- (14) agencies that you looked at that year correct in Windy Bay?
- (15) A In May?
- (16) Q Yes As part of FINSAP?
- (17) A Yes
- (18) Q And counsel this is DX14793
- (19) And you did the same process for those segments in 1992
- (20) actually walked it with these guys and inspected it right?
- (21) A Yeah same thing
- (22) Q And let's go through it After the inspection John Bauer
- (23) for ADEC determined that treatment was completed correct?
- (24) A Yes
- (25) Q And Mr Madden for the Coast Guard determined treatment
- was

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- (1) completed correct?
- (2) A That's correct
- (3) Q And Mr Talbot for NOAA determined treatment was
- completed
- (4) correct?
- (5) A That's true
- (6) Q But you disagreed?
- (7) A This is what I testified to where we disagreed on the
- (8) extent of the oiling there and what additional cleanup was
- (9) needed
- (10) Q And that's what happened on the other segment as well is
- (11) Mr Bauer Mr Madden Mr Talbot on behalf of Alaska
- (12) Department of Environmental Conservation the Coast Guard
- and
- (13) NOAA all walked that segment with you looked at what you
- had
- (14) to show them and afterwards made the determination that in
- (15) their opinion no further treatment was required?
- (16) A That's correct
- (17) Q And you disagreed and it's at that point that you -- you
- (18) let them know and as they put it they bumped your question
- up
- (19) to Anchorage right?
- (20) A Yeah that was a direction that was given to us before we
- (21) went out was that if we couldn't agree out on the ground
- (22) that it was to be kicked up
- (23) Q Okay Joel I'd like to have next our videotape exhibit
- (24) Defendants Exhibit 14792 -- with the audio off please
- (25) I'm going to show you some videotape here Mr Norman and

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- (1) I'm going to stop it on occasion to ask you to identify the
- (2) location if you can and identify the individuals involved
- (3) Let me represent to you at the start it's just a videotape of
- (4) your FINSAP inspection of Windy Bay in May of 1992
- (5) (Videotape played)
- (6) MR CLOUGH If we could start Pat by trying to
- (7) identify -- if we could hold it here for a second
- (8) If from recollection you can help me out I think I know
- (9) who most of the people are but you probably know them better
- (10) than I do
- (11) Is that John Bauer of ADEC all the way on the left if you
- (12) can tell? If not we'll let it run and just --
- (13) A I don't recognize who that is
- (14) Q Do you remember that ADEC had a representative out there
- (15) with you that day?
- (16) A Yes
- (17) Q And can you recognize the second from the right if that's
- (18) Jim Madden of the United States Coast Guard the local FOSC
- (19) representative?
- (20) A It probably is but there's so many I can't remember
- (21) individual names anymore
- (22) Q But you do recall as you're sitting here today Patrick
- (23) that Jim Madden of the Coast Guard was out there with you on
- (24) these inspections?
- (25) A From the form you showed yes if that's him

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- (1) Q Now is this generally how the process would work You d  
 (2) go out there on the shoreline with the agency representatives  
 (3) and discuss what you were observing?  
 (4) A Yes  
 (5) Q Let s stop it here Got to ask you who is that - can you  
 (6) identify the individual in the blue jacket on the left hand of  
 (7) the screen?  
 (8) A I know  
 (9) Q That s you right?  
 (10) A Yeah  
 (11) Q This is how - again how the process would work you would  
 (12) actually walk out there with the agency representatives and  
 (13) walk particular segments of the shoreline and discuss what you  
 (14) all were observing right?  
 (15) A Yeah and from - I d offer from my perspective what I saw  
 (16) then what I saw in 91 and 90 while we were going through  
 (17) it  
 (18) Q What I m trying to get across though is that you  
 (19) actually literally all of you went together right there to  
 (20) those spots on the shoreline?  
 (21) A Yeah  
 (22) Q And walked it together right?  
 (23) A Yes sir  
 (24) Q Okay we ll stop it again here  
 (25) Is that Joe Talbott from NOAA in sort of the funny

- (1) Do you know who that is?  
 (2) A I don t know who that is That s one of the skiff  
 (3) operators  
 (4) Q Is he eating a mussel from that beach?  
 (5) A He s eating something from that beach  
 (6) Q Let it run  
 (7) Let s stop it here again for a second  
 (8) Again that s how it worked you d all line up together  
 (9) walk along whatever you could see?  
 (10) A Yeah we d pretty much stretch out walk the whole beach  
 (11) walk the length of it  
 (12) (Videotape concluded)  
 (13) BY MR CLOUGH  
 (14) Q And finally Mr Norman after all these agency reps had  
 (15) made their inspections and they had determined that in their  
 (16) opinion no further treatment was required when your objection  
 (17) was bucked up the chain of command Admiral Ciancaglini  
 himself  
 (18) flew all the way out there to that same beach with you didn t  
 (19) he?  
 (20) A Yeah that s correct  
 (21) Q And so did Otto Harrison?  
 (22) A Yes he did  
 (23) Q And they walked it with you?  
 (24) A They walked it with me yes  
 (25) Q They let you show them what your areas of concern were?

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- (1) semi Australian bush hat there if you can tell?  
 (2) A That s probably him yes  
 (3) Q And occasions when you would point out either asphalt or  
 (4) other material the agency representatives right there would -  
 (5) they could dig it up and carry it off wouldn t they?  
 (6) A Yeah If they could while we were out there  
 (7) Q Continue to let it run  
 (8) They would put it in bags and carry the bags out with you  
 (9) Now you used rubber rafts to cruise along the shoreline?  
 (10) A Yeah like this here  
 (11) Q That s you in the raft there with the agency  
 (12) representatives?  
 (13) A Yes  
 (14) Q And am I correct that essentially what you would do is  
 (15) you d find a place to land you d pull up on the shoreline and  
 (16) as a group you would walk the length of the shoreline that you  
 (17) were inspecting isn t that is right?  
 (18) A Yeah It was called a segment and we would - we would  
 (19) walk from one end to the other  
 (20) Q The entire segment right?  
 (21) A Tide permitting yes  
 (22) Q Or unless there was a place that was so rocky you literally  
 (23) couldn t walk on  
 (24) A Yeah  
 (25) Q Let s stop that

- (1) A On that segment we got to yes  
 (2) Q And you literally had an opportunity to tell them exactly  
 (3) what you were worried about and why?  
 (4) A That s what I did yes  
 (5) Q And you had every opportunity at every stage in this  
 (6) process to make your concerns about that shoreline known  
 (7) didn t you?  
 (8) A At this - at this particular time we were able to do  
 (9) that because that was the process that was set up This was  
 (10) not always the case where if we didn t agree on the beach  
 (11) somebody else would come down and take a look at it but at  
 (12) this time on the final assessment that was the process that  
 (13) was set up to - to handle disagreement  
 (14) Q Even though every single agency representative had said  
 (15) that no further treatment was required just because you still  
 (16) had a concern Admiral Ciancaglini came out there and walked  
 (17) himself?  
 (18) A Yeah that s correct  
 (19) MR CLOUGH No further questions Your Honor  
 (20) REDIRECT REBUTTAL EXAMINATION OF PAT NORMAN  
 (21) BY MR FORTIER  
 (22) Q Mr Norman how long is Windy Bay how long a shoreline  
 (23) area is that?  
 (24) A Probably close to - would be almost two miles  
 (25) Q Okay And Mr - Mr Clough showed you two different

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- (1) shoreline comment sheets one of them was for Subdivision B -  
 (2) A Yes  
 (3) Q - of Windy Bay WB2 and subdivision B right?  
 (4) A Yes  
 (5) Q Now that s not the one you were complaining to  
 (6) Mr Harrison and Otto Ciancaglino (sic) about is it?  
 (7) A No I showed them WB2 D which is further down west of the B  
 (8) segment  
 (9) MR FORTIER No further questions thank you  
 (10) MR CLOUGH Nothing here Thank you Mr Norman  
 (11) THE COURT Thank you You may step down  
 (12) MR CLOUGH I ve been told I ve read in one Exhibit  
 (13) Number wrong it was DX14791  
 (14) MR STOLL Your Honor I have a couple stipulations  
 (15) THE COURT All right  
 (16) MR STOLL Do you want to explain what a stipulation  
 (17) is?  
 (18) THE COURT I don t know if I ve explained this  
 (19) before but a stipulation is simply-agreed upon facts The  
 (20) parties can get together and agree that certain facts don t  
 (21) need to be presented in evidence because they re - they are  
 (22) true So when you get a stipulation of the parties you accept  
 (23) it as true so - and no evidence needs to be presented in  
 (24) order to prove it s true and that s what these are They are  
 (25) an efficiency measure

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- (1) MR STOLL Trying to save time  
 (2) THE COURT Right  
 (3) MR STOLL First one is the fact that the federal  
 (4) on scene coordinator s local-designated representative signed  
 (5) off on a particular shoreline segment at the conclusion of the  
 (6) 1989 cleanup season does not mean that that - that the  
 (7) segment  
 (8) was devoid of any oil or oil residue The 1989 signoffs  
 (9) represented only the completion of cleanup operations for that  
 (10) season and did not mean that segments would receive no  
 (11) further  
 (12) treatment in future years  
 (13) You are further instructed that the Coast Guard admiral  
 (14) serving as the overall federal on scene coordinator did not  
 (15) personally inspect every shoreline segment signed off at the  
 (16) conclusion of the 1989 cleanup season However the federal  
 (17) on scene coordinator s local representative did inspect each  
 (18) segment and executed the signoff document in that capacity  
 (19) The second stipulation is that Bill Roberts an appraiser  
 (20) in Kodiak did appraisals and damage analyses with appraiser  
 (21) Larry Shorett of various oiled parcels owned by Kodiak village  
 (22) municipalities Those appraisers concluded that damages were  
 (23) sustained to those parcels as a result of the Exxon Valdez oil  
 (24) spill  
 (25) Your Honor our next witness is Pat Carlson This will  
 (26) take just a minute to set up Your Honor  
 (27) MR CLOUGH Your Honor I d also like to move in the

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- (1) videotape we just put in which is - I ll have to check  
 (2) MS ANDERSON 14792  
 (3) (Exhibit 14792 offered)  
 (4) MR FORTIER Your Honor I d like to be heard on  
 (5) that if possible  
 (6) THE COURT Counsel I m not going to admit it The  
 (7) jury s seen it They don t need to have it as an independent  
 (8) piece of evidence What s the number just so we know?  
 (9) MR CLOUGH 14792  
 (10) THE COURT 14792  
 (11) MR STOLL Your Honor could we have just a brief  
 (12) break to set up?  
 (13) THE COURT Sure sure I m going to send the jury  
 (14) out I want to ask you a couple questions anyway This may  
 (15) take ten minutes  
 (16) (Jury out at 9 18 a m )  
 (17) THE COURT The reason I didn t - I m here is because  
 (18) I want to find out about Mr Robertson Where is he and is he  
 (19) reachable?  
 (20) MR STOLL We re going to - we ll do Carlson first  
 (21) and then we ll do Robertson Your Honor  
 (22) THE COURT What s your order of witnesses? I want to  
 (23) know everything you re going to present today  
 (24) MR STOLL Oh okay We re going to put on  
 (25) Mr Carlson and then we re going to do the offer of proof on

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- (1) Mr Robertson and then that s the end of our rebuttal  
 (2) THE COURT And there will be no surrebuttal right?  
 (3) MR DIAMOND Your Honor there may well be  
 (4) surrebuttal depending on the - what Mr Carlson has testified  
 (5) to  
 (6) THE COURT Oh okay You said that  
 (7) MR DIAMOND And the scope of his testimony  
 (8) THE COURT What s the estimated time for Carlson?  
 (9) MR STOLL I think he ll be - the direct Your  
 (10) Honor will probably last 35 or 40 minutes  
 (11) THE COURT That was your estimate right?  
 (12) MR STOLL We actually estimated three-quarters of an  
 (13) hour for his direct before but -  
 (14) THE COURT Okay I m just reminding you you have to  
 (15) stay within the estimate  
 (16) MR STOLL I understand  
 (17) THE CLERK Please rise This court stands in  
 (18) recess  
 (19) (Recess from 9 25 a m to 9 45 a m )  
 (20) (Jury in at 9 45 a m )  
 (21) THE CLERK Please rise This court now resumes its  
 (22) session  
 (23) Please be seated  
 (24) MR STOLL Your Honor we ll recall Pat Carlson to  
 (25) the witness stand

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- (1) THE COURT Okay
- (2) THE COURT Mr Carlson since you ve already
- (3) testified you re still under oath all you have to do is give
- (4) your name for the record and don t forget to clip on the
- (5) microphone
- (6) A Yes sir For the record my name is Patrick S Carlson
- (7) DIRECT REBUTTAL EXAMINATION OF PAT CARLSON
- (8) BY MR STOLL
- (9) Q Mr Carlson you re the assessor for Kodiak Island
- (10) Borough?
- (11) A Yes I am
- (12) Q And you ve previously testified in this case After you
- (13) testified Mr MacSwain an appraiser testified and he
- (14) referred to an exhibit that he wrote on DX14784 I only have a
- (15) little copy of it it s a blowup - I mean it s an
- (16) eight-and-a-half-by-eleven of the exhibit and this was on the
- (17) big piece of paper that he wrote on And this purported to be
- (18) information that he had obtained from a Mr Hurley who was
- (19) with a title company in Kodiak
- (20) Have you reviewed Mr MacSwain s testimony with respect to
- (21) this matter?
- (22) A Yes I have
- (23) Q And are you familiar with this document?
- (24) A Yes I am.
- (25) Q Now is this information that s contained on this is this

- (1) represent recordings not sales
- (2) Q Okay And this information was derived from a letter that
- (3) we put into evidence which is a letter from Mr Hurley which
- (4) is PX9011 which is a letter from Mr Hurley to Mr MacSwain
- (5) indicating that this is for conveyance of real property which
- (6) lie outside the 15 mile radius And then the second page of
- (7) this contains this information that is contained on the prior
- (8) exhibit that Mr MacSwain offered
- (9) Now why - why isn t this information helpful in an
- (10) analysis of - of before and after?
- (11) MR OPPENHEIMER Assumes facts not in evidence
- (12) expert testimony and there s no foundation for his testimony
- (13) on this document
- (14) THE COURT The objection s overruled Go ahead
- (15) A The problem with this and especially in a market like
- (16) Kodiak you have numerous properties that are transferred
- (17) they re either a gift they re a corporate name change they re
- (18) maybe a bankruptcy or some other special consideration like a
- (19) divorce or what have you that might cause the transfer In
- (20) effect it is not a sale of the property it is just a transfer
- (21) of the interest of the property
- (22) BY MR STOLL
- (23) Q What difference does that make in terms of whether it s a
- (24) sale or not?
- (25) A Well it would give you a distorted view as to what the

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- (1) helpful to an analysis of the - I guess it s not At least
- (2) from Exxon s standpoint
- (3) MR OPPENHEIMER Or maybe universally
- (4) THE COURT Try to finish the question counsel
- (5) MR STOLL I ll try
- (6) BY MR STOLL
- (7) Q Is this - is this information helpful in terms of your
- (8) analysis of your frequency of sales study before versus after
- (9) the oil spill?
- (10) A No it s not
- (11) Q And why is that?
- (12) MR OPPENHEIMER Your Honor foundation expert
- (13) opinion testimony
- (14) THE COURT I ll allow it Go ahead
- (15) A This data here represents the total amount of transfers
- (16) not sales and as such it would take much better understanding
- (17) of the market and the transactions in order to determine the
- (18) actual frequency of arm s length transactions in the market
- (19) BY MR STOLL
- (20) Q Okay Now this says on here sales this is actually
- (21) written by Mr Diamond on Mr MacSwain s - the rest of it I
- (22) think is Mr MacSwain s writing
- (23) So you re saying this is - these numbers here relate to
- (24) transactions?
- (25) A These numbers based on what I understand to be here

- (1) volume of sales are in a given market that you re studying
- (2) because you re just looking at the total amount of transfers
- (3) but you may have say a corporate entity that owns 40 tracts
- (4) that changes their name so they transfer 40 parcels but in
- (5) effect it s still owned by the same parties
- (6) Q What about this 15 mile radius of the City of Kodiak
- (7) what - is that - is that helpful in terms of analyzing what s
- (8) happening in terms of the remote real property market in Kodiak
- (9) Island Borough?
- (10) A No it s not
- (11) Q Why is that?
- (12) A Well the 15-mile radius would include what we consider to
- (13) be our rural areas on the road system out the road towards
- (14) Chiniak Anton Larsen Bay and of course it would also include
- (15) the villages The remote market is - is distinct from the
- (16) village market and the urban residential area of Kodiak So
- (17) the 15 mile area would basically not segregate out the remote
- (18) market
- (19) Q So if you included all transactions - I m referring now to
- (20) Exhibit 1354A - the road system I think you previously
- (21) testified in our case in chief is the area around the city of
- (22) Kodiak and extend up here and then there s a little road that
- (23) goes down here towards Pagashak (sic)?
- (24) MR OPPENHEIMER Pasagshak
- (25) BY MR STOLL



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- (1) Q Pasagshak – right?
- (2) A Yes that s correct
- (3) Q And the remote area you say does that also include the
- (4) villages?
- (5) A That s correct
- (6) Q Is there a difference in the price of property in the
- (7) villages versus remote areas?
- (8) A Oh yes very much
- (9) Q What kind of range are we talking about?
- (10) A Well when you re dealing with the village markets of
- (11) course you re dealing with properties that have off-site sewer
- (12) and water they ve got roads they ve got power they ve got
- (13) daily air flights You ve got a community and the values in
- (14) those areas tend to be a dollar dollar fifty a foot for
- (15) oceanfront property versus 10 15 20 cents a foot in the
- (16) remote areas
- (17) Q You say a dollar a foot that s like \$40 000 an acre
- (18) \$43 000 an acre?
- (19) A Yeah 30 40 000 depending on your location for
- (20) oceanfront
- (21) Q Now you did an analysis of the frequency of sales of the
- (22) remote properties alone that s what s contained on
- (23) Exhibit 2902A?
- (24) A That s correct
- (25) Q And the jury may recall this This is – and what did you

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- (1) include in this in terms of sales?
- (2) A Well throughout the study time frame I looked at all
- (3) transactions compiled them into master data base I think
- (4) there was something in excess of 400 transactions during that
- (5) time frame Then I went through and I analyzed the
- (6) transactions determined the ones that were actually sales of
- (7) property
- (8) Q You mean arm s length transactions?
- (9) A Basically a – yeah a full transfer from distinct parties
- (10) and then compiled that data As you can see we had in 88 25
- (11) 27 transactions I believe the Hurley report indicates
- (12) something like 60 or something So you could see what
- (13) happens
- (14) with the information once you deal with just the actual sales
- (15) Q So the Hurley thing would include more than just arm s
- (16) length sales?
- (17) A In my – yes that s correct
- (18) Q Now there was a analysis also that Mr MacSwain did which
- (19) is contained in DX10227 Could I have that on the screen
- (20) please?
- (21) MR OPPENHEIMER I m sorry counsel the number of
- (22) the exhibit?
- (23) MR STOLL 10227
- (24) MR OPPENHEIMER Thanks
- (25) BY MR STOLL
- (26) Q And are you familiar with this document Mr Carlson?

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- (1) A Yes I am
- (2) Q And with respect to the Onion – let s take the Onion Bay
- (3) transactions in the first instance He s made a comparison
- (4) here of five parcels that sold at various times here during
- (5) 1985 and one in 1989 and four in December of 1990?
- (6) A Yes that s correct
- (7) Q These four in December 1990 – or three in December 1990 –
- (8) the so-called auction that occurred the silent auction that
- (9) occurred at the end of that year?
- (10) A That s correct
- (11) Q Now did you prepare a – strike that
- (12) First of all with respect to the 1985 transaction this
- (13) one right here – do I have to get rid of this color first
- (14) before I blow up this end of the –
- (15) MR GROSS Yes
- (16) MR STOLL Now that the trial s just about over
- (17) I m –
- (18) BY MR STOLL
- (19) Q Okay Now with respect to this 1985 transaction is this
- (20) property in any way different than these other properties?
- (21) A Substantially so yes
- (22) Q And how is it different? Would you tell the jury please?
- (23) A Well as a basis of comparison to the other properties it
- (24) has a number of problems Number one it was not one
- (25) five acre tract that sold for 25 000 It was two lots that sold

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- (1) together for 50 000 There was a cabin on one of the lots
- (2) There was a section line easement that cut one of the lots in
- (3) half The access to the property is by a trail from the
- (4) ocean You cannot directly access the property because it s on
- (5) top of a cliff and because the existing zoning setbacks the
- (6) view is restricted by pushing the buildings back onto the –
- (7) back into the lot and away from where you would have the
- (8) oceanfront view
- (9) Q Now I want to show you what has been marked as Exhibit
- (10) 8441 on the – show you this on the Elmo here And this –
- (11) what is this document?
- (12) A This is a copy of the assessor records for this – this was
- (13) one of two tracts and I m not certain which tract Mr MacSwain
- (14) used as his basis of comparison but this is one of the two
- (15) five acre tracts that sold in that transaction
- (16) Q In the 1985 transaction?
- (17) A That s correct
- (18) Q And on this card you ve got a minus up here What does
- (19) this minus refer to?
- (20) A The minus there is the view It takes away from the value
- (21) of the property because of the restriction from the view
- (22) because of the setback issue
- (23) Q So you can t actually see the water from – if you re
- (24) sitting in the house you basically look out at the sky?
- (25) A Well we re dealing in oceanfront Typically on an

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- (1) oceanfront lot you can move back on your lot and still retain a  
 (2) view but when you have a cliff if you get moved back as in  
 (3) the case where we have a flat lot on top of a cliff the view  
 (4) actually becomes restricted  
 (5) Q Then you've got another minus here of 25 percent What's  
 (6) that for?  
 (7) A All the properties that were on the top of this cliff that  
 (8) had to go around and up the hill to get to them and people had  
 (9) to haul all their stuff back and forth they all received 25  
 (10) percent negative adjustment for that  
 (11) Q And this was done on the assessment rolls regardless -  
 (12) this had nothing to do with litigation or anything of that  
 (13) nature?  
 (14) A No This - these adjustments were put in place by me in  
 (15) 1990 As I recall the property was adjusted down from 25 000  
 (16) which was its sales price to 20 000  
 (17) Q Now did you then to do a comparison - can we go back to  
 (18) the last one? Did you do a comparison of these five  
 (19) properties did you then do a - an analysis - and  
 (20) incidentally I want to show one other thing on this  
 (21) This has the - the chart that Mr MacSwain has has the  
 (22) gross sale price of the parcels?  
 (23) A Yes it does  
 (24) Q It's not broken down in any unit?  
 (25) A That's correct

- (1) transaction is quite a bit higher than the other not quite a  
 (2) bit it's higher than the others and it is - but on the chart  
 (3) that Mr MacSwain used it's lower Could you explain why  
 (4) there's that difference?  
 (5) A Well in this case all I did was apply the adjustment  
 (6) for - in other words to bring it make it comparable to the  
 (7) Onion Bay transactions that took place after the spill in  
 (8) December of '90 I had to adjust the negative factors that this  
 (9) property had and after adjusting for that it allowed - it  
 (10) indicated a higher value per acre when compared directly to  
 (11) those Onion Bay sites  
 (12) Q Are those those same factors at ten percent for lack of  
 (13) view and 25 percent for access having to take your groceries  
 (14) up the hill?  
 (15) A That's correct  
 (16) Q And so once you just added that 35 percent this is what  
 (17) that bar looked like on this - on your chart here?  
 (18) A And it's still somewhat conservative because we still have  
 (19) not dealt with the fact that the party bought two five-acre  
 (20) tracts at once which normally would give you a discount so  
 (21) that would - but that's not been factored in  
 (22) Q If you took that into account it would even show a higher  
 (23) price relative to the other properties?  
 (24) A That's correct  
 (25) Q All right And did you make any other adjustments to any

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- (1) Q Now did you do an analysis of these five properties in a  
 (2) chart?  
 (3) A Yes I did  
 (4) Q Okay could we - I show you what - this is Plaintiffs  
 (5) Exhibit 8605 Is this the chart that you prepared?  
 (6) A Yes it is  
 (7) Q And the center portion of this relates to this Onion Bay  
 (8) these same five transactions?  
 (9) A That's correct  
 (10) Q And why in your - you've got a price here - I hate to  
 (11) keep moving this back and forth  
 (12) You've got on the left-hand side - what does that  
 (13) indicate 7 000 6500 et cetera? What does that indicate?  
 (14) A That's the indicate value per unit In this case per acre  
 (15) of the properties instead of the gross selling price because  
 (16) if you use the gross selling price you distort the data  
 (17) because you have differences in sizes You might have a  
 (18) ten-acre lot sell for 40- and a five-acre lot sell for 30 If  
 (19) you didn't use a price per unit you wouldn't get a good  
 (20) indication of what's going on  
 (21) Q Is the price per unit is that reflected in the per-acre  
 (22) is that reflected in the market in remote properties?  
 (23) A That's generally what the market utilizes in those areas  
 (24) Q Now turning your attention then Mr Carlson to the -  
 (25) the bar chart here for Onion Bay your bar for the June 1985

- (1) of these other properties?  
 (2) A I did adjust the September '89 transaction  
 (3) Q And how did you do that?  
 (4) A I applied my standard size adjustment because all these  
 (5) other properties were in the five- to six-acre range The  
 (6) September '89 was a three and-a-half-acre tract and the market  
 (7) pays more on a per-acre basis for a smaller tract all things  
 (8) being equal  
 (9) I also - I used the ten percent size adjustment that's in  
 (10) my report for that difference in sizes and I also applied ten  
 (11) percent for the property because it's on a little slough it's  
 (12) not directly on the water and directly accessible as are the  
 (13) Onion Bay lots  
 (14) Q And so then the other three that sold in the auction at or  
 (15) slightly over the minimum bid price those are the ones that -  
 (16) have you made any adjustments to those?  
 (17) A No I did not I just took the gross sales price divided  
 (18) by the acreage  
 (19) Q Now you have on this chart two groups of other  
 (20) transactions?  
 (21) A Yes I do  
 (22) Q And what are those?  
 (23) A These are another area in the case of Village Islands it's  
 (24) an area down in Uganik Bay which is on the west side of  
 (25) Kodiak so it's quite a bit different location than Onion Bay

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- (1) and it shows four ten acre lots They were all ten to ten and
- (2) a half acres They d all sold for \$40 000 apiece but on a
- (3) per acre basis because of the size differences adjusted and
- (4) prior to the spill and after the spill an idenucal all -
- (5) you know everything s equal except for the spill event and the
- (6) tme of a year and a half the property just like all the
- (7) other ten sold for thirty-seven five
- (8) Q And the Alitak Bay is that the property that you testified
- (9) to previously that just got a couple arms I think called
- (10) Deadman s Bay and Portage Bay?
- (11) A Yes these are in my report And there s a map in there
- (12) that shows them but basically the two lots on the left are at
- (13) the head of Deadman s Bay on the west side and then the next
- (14) bay over the head of Portage Bay on the west side was the
- (15) other two transactuons Except for small differences in size
- (16) these properties are virtually identical The use patterns
- (17) seller motivation buyer motivation except for the case of the
- (18) Fish & Wildlife purchase are basically the same
- (19) Q And on all of these the blue bar represents what? Why is
- (20) it blue?
- (21) A The blue bar represents the sales price before the spill
- (22) Q And what does the red bar indicate?
- (23) A The per-unit sales price after the spill
- (24) MR STOLL Your Honor we d offer PX8605
- (25) (Exhibit PX8605 offered)

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- (1) MR OPPENHEIMER Your Honor I d like to reserve
- (2) rather than take time for it now
- (3) THE COURT You can reserve that s fine
- (4) MR STOLL Could we go back to exhibit - yes
- (5) BY MR STOLL
- (6) Q Now Mr Carlson are there any other differences turning
- (7) your attention to the Hidden Bay analysis that Mr MacSwain
- (8) on here are there any differences with respect to the Hidden
- (9) Basin properties?
- (10) A Yes The pre-spill sale is much steeper than the other
- (11) post spill sales It also has no creek or fresh water
- (12) available to it And it s some - it s what we call the dark
- (13) side of Hidden Basin It s on the inside as you first go in
- (14) whereas the other two have much sunnier locations much
- (15) better
- (15) topography and have access to fresh water
- (16) Q That s this one here?
- (17) A That s correct
- (18) Q And what angle does that - what does that face?
- (19) A It - well I m trying to picture it
- (20) Q Is that a northern exposure?
- (21) A Yes That s correct
- (22) Q And then the other two are - have a southern - southern
- (23) exposure?
- (24) A Well they - they just have a sunnier location They re
- (25) not in the shade of the hill like this parcel is

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- (1) Q Does that make a difference in terms of the price per -
- (2) per lot?
- (3) A It - it can It - all things being equal I think the
- (4) steepness and the lack of fresh water and the poor beach also
- (5) make - is part of that but all in all I think the point is
- (6) is that it s not - the other two are virtually are very
- (7) comparable parcels But this one is not it s inferior
- (8) Q Okay and the other two have fresh water on them as well as
- (9) the oceanfront?
- (10) A They ve got the good topography the good beach the
- (11) sunnier location and the water
- (12) Q Now turning your attention - do you know which sales are
- (13) involved in Ugak Bay?
- (14) A No I ve not been provided with that information I m not
- (15) certain
- (16) Q Then with respect to Pasagshak - Pasagshak do you know
- (17) the - are you familiar with these properties?
- (18) A Yes I am
- (19) Q And how are these different if at all?
- (20) A Well I think the biggest issue is time We re dealing
- (21) with a time frame of 87 to 92 which confuses things The
- (22) other issue is is this is a road system property basically
- (23) It has recreational uses to it but also some you know rural
- (24) residential context
- (25) The properties were bought by the same party Mike

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- (1) Anderson and in 87 when he bought it, the road there was
- (2) actual - the old log bridge that accesses this area was in the
- (3) process of washing out Now in 92 when he bought the
- (4) adjoining lot number one he - he spoke to me and said he
- (5) felt he paid too much but he needed to do that because he
- (6) didn t want anybody building a cabin next door The other
- (7) issue is at that time there was a brand new bridge under
- (8) construction and direct vehicular access was available to the
- (9) properties
- (10) Q The new bridge was coming in in 92 whereas it wasn t
- (11) there in 87?
- (12) A It wasn t even under contemplation, I don t believe at
- (13) that time
- (14) Q Now Mr MacSwain testified at one point that he got a note
- (15) from somebody at Kodiak that all communications with him and
- (16) the borough should go through attorneys
- (17) MR OPPENHEIMER Your Honor, I think that misstates
- (18) the testimony If there s a question, it shouldn t be
- (19) proceeded by facts not in evidence
- (20) THE COURT You re going to have to show him, if
- (21) you re going to bring it in terms of a transcript.
- (22) MR STOLL That s fine
- (23) BY MR STOLL
- (24) Q At any time were you directed to not deal directly with
- (25) Mr MacSwain?

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- (1) A Yes I was
- (2) Q And why was that?
- (3) A As I recall we had a fairly free and open relationship
- (4) and then at some point there was a document filed with the
- (5) court that -
- (6) MR OPPENHEIMER Your Honor this is hearsay no
- (7) foundation
- (8) MR STOLL That s fine I ll just withdraw that
- (9) That s fine
- (10) BY MR STOLL
- (11) Q Could we show DX10285A?
- (12) MR OPPENHEIMER Counsel let me take a look
- (13) 10285A?
- (14) MR STOLL Yes
- (15) MR OPPENHEIMER That s fine
- (16) BY MR STOLL
- (17) Q Now I want to turn your attention to the testimony of
- (18) Mr Papke Mr Papke is with Clarion Associates in Chicago?
- (19) A Yes
- (20) Q And he used this exhibit which he called comparison of
- (21) full - what he called full value real estate in the spill area
- (22) compared to the remainder of the state And do you - do you
- (23) find that - well let me ask this question first of all
- (24) The full value as I understand his testimony was the -
- (25) the assessed value according to the state assessor s office

- (1) properties affected by the oil spill?
- (2) MR OPPENHEIMER Actually three questions so it s
- (3) compound and it s beyond the scope of the expertise that was
- (4) discussed in connection with this report
- (5) THE COURT I didn t get your last -
- (6) MR OPPENHEIMER I should back up Your Honor
- (7) It s compound More importantly it s beyond the scope of
- (8) the work that this witness has done and was discussed
- (9) yesterday well beyond
- (10) MR STOLL Well I don t know if it s compound but
- (11) it s not beyond what -
- (12) THE COURT Well I know it s compound counsel We
- (13) all know it s compound
- (14) MR STOLL I ll rephrase the question
- (15) THE COURT Okay
- (16) BY MR STOLL
- (17) Q First of all Mr Carlson I want you to assume that the -
- (18) for the purposes of this question full value is a meaningful
- (19) term as far as the fair market value is concerned of property
- (20) real property in Alaska Is the spill area as defined by
- (21) Mr Papke is that a meaningful concept or area as far as
- (22) evaluating the remote properties in Kodiak Island Borough and
- (23) the Prince William Sound and Kenai?
- (24) MR OPPENHEIMER I think it s still compound but my
- (25) primary objection Your Honor is it s well beyond any sort of

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- (1) Did you review his testimony?
- (2) A Yes I believe that s correct
- (3) Q That full value is that an indication of the true fair
- (4) market value first of all?
- (5) A No not necessarily
- (6) Q Okay And why is that? Could you explain that to the
- (7) jury please?
- (8) A Well the full value - I mean as an assessor we go out
- (9) and appraise property as fast and good as we can but in any
- (10) given area you may or may not be at full market value for that
- (11) property The full values that we submit to the state of
- (12) Alaska is basically the tally of the assessed values be they
- (13) right or wrong We also submit a ratio report which says
- (14) here s what the sales are and here here s how they compare to
- (15) the assessed values It may or may not tell you anything about
- (16) any given area within that market without doing quite a bit
- (17) more study of the information
- (18) Q All right Now what I d like to ask you is this Let s
- (19) assume though that this was a meaningful number that full
- (20) value as used by the state assessor s office is a meaningful
- (21) number as far as fair market value is concerned
- (22) Making that assumption can you - would a comparison of
- (23) what Mr Papke calls the spill area and the other - and the
- (24) other areas in the state of Alaska be indicative of what is
- (25) happening to the fair market values of properties remote

- (1) lay opinion testimony
- (2) THE COURT Well beyond -
- (3) MR OPPENHEIMER Well beyond any lay opinion
- (4) testimony
- (5) THE COURT Yeah I think it is too counsel
- (6) Objection sustained
- (7) BY MR STOLL
- (8) Q Is the - what is Mr - Let me ask you this question
- (9) What does Mr Papke s spill area contain?
- (10) A As I recall it contains the cities of Valdez Cordova
- (11) Whittier the Kenai Peninsula Borough and the Kodiak Island
- (12) Borough
- (13) Q Is DX10263 on the Trial Link?
- (14) Is this the map that was used by Mr Papke as his so-called
- (15) spill area?
- (16) A That s my understanding yes
- (17) Q And how does this compare to the remote areas of Kodiak
- (18) and
- (19) Kenai?
- (20) MR OPPENHEIMER Your Honor I think the question is
- (21) compound to the extent it s asking the witness for testimony
- (22) outside of Kodiak I d object on grounds of foundation and
- (23) again it s beyond any sort of lay opinion testimony
- (24) THE COURT The objection s overruled
- (25) A Well I think if you re looking at these areas but you re

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- (1) anything that s going on on the remote areas
- (2) BY MR STOLL
- (3) Q Why is that?
- (4) A Well the full values are basically the values of the
- (5) cities and all it ll tell you is what s going on in the urban
- (6) markets The taxable value in the remote areas which covers
- (7) 95 percent of this land mass much of the area isn t even
- (8) taxable It wouldn t tell you anything at all what s going on
- (9) there because it s such a miniscule portion of the total value
- (10) of the property which is really the urban market
- (11) Q And why doesn t the remote market simply follow the urban
- (12) market?
- (13) A Well the remote market is - I m speaking of Kodiak - is
- (14) very distinct from the urban market
- (15) Q Why? How is that? Why is that?
- (16) A Largely because in the urban market especially in terms of
- (17) the full value determinations it s driven by residential
- (18) means People s main priority is get a house get a roof over
- (19) their head
- (20) Now if they re feeling good about life and they ve got
- (21) some disposable income they may go out and purchase some
- (22) recreational property If they re a fisherman in the area and
- (23) they re feeling good about life and coming fisheries they may
- (24) purchase in the remote areas But it s secondary to that other
- (25) market

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- (1) So if you want to see the health or how people are feeling
- (2) about life you look in the remote areas because that would be
- (3) the barometer That s where you first see the hit
- (4) Q Did you do an analysis Mr Carlson of a comparison
- (5) between the remote - the remote market the tax code areas
- (6) and
- (7) the rural areas of Kenai and Kodiak versus Mr Papke s
- (8) so called oil spill areas?
- (9) MR OPPENHEIMER Your Honor I object to the form of
- (10) the question There s no foundation that he has the slightest
- (11) idea of what Mr Papke actually did Mr Papke testified about
- (12) it Much of his research which we haven t heard any testimony
- (13) about - and I think the question ought to just be asked I
- (14) believe with respect to work he did as opposed to a contrast
- (15) with Mr Papke for foundation
- (16) MR STOLL I don t mind rephrasing it for
- (17) Mr Oppenheimer
- (18) BY MR STOLL
- (19) Q Did you do an analysis Mr Carlson of a comparison of the
- (20) full values as that term is used by the state assessor s
- (21) office for the oil spill area as defined by Mr Papke versus
- (22) the full values used by the state assessor s office for the
- (23) remote areas in Kenai and Kodiak peninsula - Kodiak Island
- (24) Borough and Kenai Peninsula Borough?
- (25) A Yes I did
- (26) Q And is that - that s 8603A And is that the graph that

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- (1) you prepared the pie chart?
- (2) A Yes it is
- (3) Q Okay and what is the - what is the figure down at the
- (4) bottom the \$89 million what does that represent?
- (5) A That represents the taxable value in - of all taxable
- (6) property from basically from Valdez to the southern tip of
- (7) Kodiak archipelago throughout the spill area
- (8) Q No I m talking the smaller the small -
- (9) A Yes That basically represents the total value that s
- (10) taxable in the remote areas throughout that whole oiled area
- (11) down at the bottom
- (12) Q I see What is the 2 962 000 000 nearly three billion
- (13) dollar figure? What does that represent?
- (14) A That would be the full value based on Mr Papke s
- (15) definition of the area that he described as being the quote
- (16) oiled area
- (17) Q What s the significance of this if any?
- (18) A I think the most dramatic thing is the fact that you re
- (19) dealing with such a very small value proportionately to what
- (20) he considered to be the oiled area and now in terms of land
- (21) mass the full value of remote oiled area value represents
- (22) about 90 percent of the total area throughout the spill area
- (23) This other represents about ten percent but it s by far the
- (24) most value
- (25) Q And if the value in the urban - I ll call it the urban

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- (1) areas or the non remote areas went up while the value of the
- (2) remote areas went down what - what relationship would
- (3) happen
- (4) there terms of the overall effect?
- (5) MR OPPENHEIMER Your Honor the question s
- (6) compound It seems to be an incomplete hypothetical it s
- (7) ambiguous and I think it assumes facts not in evidence
- (8) THE COURT Sustained
- (9) BY MR STOLL
- (10) Q If the - if the entire - what I m going to call the Papke
- (11) oiled area the blue area went up by one percent, what would
- (12) that - in the assessed valuation what would that increase
- (13) represent?
- (14) MR OPPENHEIMER Your Honor the question s vague and
- (15) ambiguous and I think again it s calling for expert testimony
- (16) beyond the expertise
- (17) THE COURT I m going to let him answer this one
- (18) counsel The objection s overruled
- (19) A The one percent increase in Mr Papke s oiled areas would
- (20) represent about a \$29 million almost a \$30 million increase in
- (21) value one percent
- (22) Q What would a 25 percent decrease in the remote areas be?
- (23) A About 25 million
- (24) Q So one percent of the whole area would be - would drown
- (25) out the - the other?
- (26) A Yeah If you had - had you know normal infrastructure

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- (1) or whatever one percent increase in that oiled areas and a 25  
 (2) percent decrease in the remote areas you would still show a  
 (3) net increase in the total value You wouldn't see anything at  
 (4) all in the remote areas  
 (5) Q Now I want to show you what has been identified as  
 (6) plaintiffs Exhibit 8602A And could you tell the jury  
 (7) please what that is?  
 (8) A This is a pie chart of again the remote taxable areas  
 (9) Mr Papke's oiled areas and then Mr Papke's full value for the  
 (10) other areas of Alaska  
 (11) Q And then the \$89 million is remote areas?  
 (12) A That's correct  
 (13) Q And then the blue corresponds to the blue on 8603A?  
 (14) A That's correct  
 (15) Q And did you prepare a line chart also showing - showing  
 (16) how these values change -  
 (17) MR OPPENHEIMER Counsel?  
 (18) MR STOLL Exhibit 8604  
 (19) MR OPPENHEIMER Your Honor we're not going to have  
 (20) an objection to publishing this to the jury but we are going  
 (21) to have some voir dire on this chart  
 (22) THE COURT Fine  
 (23) BY MR STOLL  
 (24) Q Now is this a chart that you prepared Mr Carlson?  
 (25) A Yes it is

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- (1) Q What does 8604 indicate?  
 (2) A This shows on a line graph the annual percent change in  
 (3) the full value of real property for each of these various  
 (4) categories  
 (5) Q And what is the green line first of all what does that  
 (6) indicate? The green line is the one on the screen here I  
 (7) don't know if the jury can see it very well that's this line  
 (8) here  
 (9) A The green line is the annual percent change for the Kenai  
 (10) Peninsula Borough and Valdez which is that - most of that  
 (11) \$3 billion that we -  
 (12) MR OPPENHEIMER Your Honor I think the witness  
 (13) misspoke Are we referring to the green line?  
 (14) THE COURT Yes  
 (15) MR OPPENHEIMER I believe counsel that's the state  
 (16) wide total  
 (17) A I'm sorry I can't see it  
 (18) MR STOLL The colors don't show up very well on the  
 (19) TV  
 (20) A Okay so the green one is statewide totals  
 (21) BY MR STOLL  
 (22) Q Yeah  
 (23) A That would be the total full value for real property  
 (24) statewide and it shows the annual percent change  
 (25) Q And what is the - then the purple line I think is the

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- (1) Kenai and Valdez that's this line here?  
 (2) A And that again would be the same percent change in the  
 (3) full value for those two areas  
 (4) Q And what - is that a significant influence of the total of  
 (5) the contained of assessed values in the Papke oiled areas?  
 (6) MR OPPENHEIMER Your Honor the question is  
 (7) ambiguous beyond lay testimony lay opinion testimony no  
 (8) foundation  
 (9) THE COURT You want to rephrase it?  
 (10) MR STOLL I'll rephrase it  
 (11) THE COURT Okay  
 (12) BY MR STOLL  
 (13) Q Is the Kenai and Valdez as assessed values is that a large  
 (14) or small percentage of the total value for the Papke oiled  
 (15) areas?  
 (16) MR OPPENHEIMER Your Honor the question is  
 (17) ambiguous We're now referring to assessed values and  
 (18) Papke's  
 (19) data is full values  
 (20) MR STOLL Okay fine I'll use the word full  
 (21) then  
 (22) BY MR STOLL  
 (23) Q Is the Kenai and Valdez a full value as determined by the  
 (24) state assessor's office is that a large or small percentage of  
 (25) the total full value as determined by the state assessor's  
 office for the Papke oiled areas?

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- (1) A It would be the vast majority probably 80 percent of it  
 (2) 85 percent of it  
 (3) Q Okay And finally what's the red line?  
 (4) A I don't know  
 (5) Q The red line is the Papke oiled areas?  
 (6) A That would be based on Mr Papke's definition that would  
 (7) be the annual full value change for those oiled areas  
 (8) Q And with respect to - between 1988 and 1989 what  
 (9) happened  
 (10) to the full values of remote properties in Kenai and Kodiak  
 (11) Island Borough?  
 (12) A They went down  
 (13) Q And this shows that the change went up for these other  
 (14) areas?  
 (15) A Yes and if you refer back to the pie charts you know  
 (16) this is a two percent change in these categories would  
 (17) completely wipe out any negative change that truly happened  
 (18) in  
 (19) the remote areas and that may be why he couldn't find the  
 (20) change  
 (21) MR OPPENHEIMER Your Honor calls for speculation  
 (22) THE COURT I'll allow it  
 (23) BY MR STOLL  
 (24) Q Now I want to show you another exhibit that was used by  
 (25) Mr Papke which is deeds recorded with mortgages This is  
 DX10298A and is this a helpful figure in terms of determining  
 whether or not the - there was any change in the number of

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- (1) transactions sales arm s length sales after the oil spill in
- (2) remote areas in the oil spill affected areas?
- (3) MR OPPENHEIMER Your Honor lay opinion testimony
- (4) foundation as to the study and on this one relevance
- (5) because Mr Papke never testified that that s what this was
- (6) doing
- (7) THE COURT Overruled
- (8) A No this absolutely would not be any use in determining
- (9) what happened in the remote markets
- (10) BY MR STOLL
- (11) Q Why is that?
- (12) A Well the – when you deal with a deed recorded with a
- (13) mortgage basically you re looking at the urban market again
- (14) All you re dealing with then is how many houses are selling and
- (15) what s going on with the housing market The – there s very
- (16) very few deeds recorded with mortgages in the remote areas
- (17) Plus it s getting back to that percentage again you know even
- (18) if there were a few out there such a small percentage of the
- (19) total that you wouldn t be able to see anything at all that s
- (20) going on in the remote oiled areas
- (21) Q What is mortgages – are transactions in remote areas are
- (22) those typically done with mortgages?
- (23) A No they re – it s very rare that they are They may have
- (24) a promissory note attached but when somebody speaks to me
- (25) about a mortgage I m talking about a house sale

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- (1) Q That s more with a bank?
- (2) A Correct
- (3) Q So much for my glasses
- (4) Let me ask you a question Mr Norman Lee testified that
- (5) he had a conversation with you sometime in 1990 and do you
- (6) recall ever meeting Mr Lee in 1990?
- (7) A Yes I do
- (8) Q And would you tell the jury what kind of an interview or
- (9) how did this occur?
- (10) A As I recall Mr Lee and I believe somebody else stopped by
- (11) my office and we sat down and had a cup of coffee and talked
- (12) about stuff
- (13) Q And what if anything did you tell Mr Lee with respect to
- (14) any analysis you were or were not doing of Kodiak remote
- (15) properties? –
- (16) A Well as I recall –
- (17) Q – and the effect of the oil spill?
- (18) A As I recall that was the time that I was beginning to put
- (19) my summer activities together and do my field work and I was
- (20) planning on working in the remote areas that summer I do
- (21) recall telling him that I had not you know been out there to
- (22) look at the properties field check the data and I did have
- (23) some information I had historical sales data that s indicated
- (24) on the comp sheets But I didn t know hadn t gone out and
- (25) factually checked everything but it was certainly available to

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- (1) him if he wanted it
- (2) Q I m sorry What did you say?
- (3) A I told him that that information was available to him if he
- (4) wanted it
- (5) Q The information in your office?
- (6) A That s correct
- (7) Q Did you also tell him after you did your analysis you d
- (8) make that information available to him?
- (9) A Yes I didn t know what my time frame was it was going to
- (10) be a long project
- (11) Q Now finally Mr Don Dorchester testified and what –
- (12) there was some confusion as to the population of Kodiak How
- (13) big is the City of Kodiak?
- (14) A Well when people talk discretely about the City of Kodiak
- (15) within the actual municipal boundaries it s on the order of
- (16) six or 7 000 Actually when we talk about the urban area –
- (17) that s the area around Kodiak and this would be excluding the
- (18) Coast Guard base – you re up around ten- 11- 12 000
- (19) Q How many people live on the island of Kodiak?
- (20) A Last census I think was on the order of 15 500
- (21) Q And Mr Dorchester found that there were only a few
- (22) transactions in Prince William Sound that had occurred that
- (23) were over ten acres each Did you do a – any analysis as to
- (24) how many transactions there were in Kodiak Island Borough
- (25) over
- (25) the last ten years in excess of ten acres?

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- (1) MR OPPENHEIMER Your Honor I stood up because I
- (2) thought this was a Prince William Sound question Is this just
- (3) Kodiak?
- (4) MR STOLL Yes just asking that
- (5) THE COURT Okay So there s no objection
- (6) MR STOLL I guess there s no objection.
- (7) MR OPPENHEIMER No there s not, Your Honor
- (8) A Yes I did
- (9) BY MR STOLL
- (10) Q And how many did you find that were of that size?
- (11) A I did a quick mental tally of somewhere in the order of 50
- (12) approximately 45 46 000
- (13) Q Recently – incidentally there was one – the only example
- (14) of what he called limited-use properties that he used on the
- (15) chart was that was located in Kodiak was one of Salome
- (16) Creek And are you familiar with that transaction?
- (17) A Yes I am
- (18) MR OPPENHEIMER Your Honor unfortunately because of
- (19) the preface I have to object to the question There s no
- (20) foundation we re using with the same terminology and when
- (21) we – I m sorry the objection is foundation and compound
- (22) THE COURT Sustained
- (23) Counsel it s the end of the trial I can tell because
- (24) both of you are gulping your words and I can t understand a
- (25) word you re saying So speak up both of you

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- (1) MR STOLL Sorry Your Honor  
 (2) MR OPPENHEIMER Yes Your Honor  
 (3) BY MR STOLL  
 (4) Q Are you familiar with a transaction called Salome Creek?  
 (5) A Yes I am  
 (6) Q And have you reviewed the testimony of Mr Dorchester where  
 (7) he said that was one of his comparable – actually the only  
 (8) comparable that was located in Kodiak Island Borough of what  
 he  
 (9) called limited-use properties?  
 (10) A Yes  
 (11) Q Now would you tell the jury whether the Salome Creek  
 (12) property is comparable to the properties the parcels that are  
 (13) owned by Kodiak Island Borough?  
 (14) MR OPPENHEIMER It s irrelevant Your Honor It has  
 (15) nothing to do with the conclusions that Mr Dorchester drew  
 (16) You re looking at the screen so I m probably still mumbling  
 (17) but it s relevance  
 (18) THE COURT Thank you counsel The objection s  
 (19) overruled  
 (20) MR OPPENHEIMER I should have continued to mumble  
 (21) THE COURT Yeah you won that mumbling one  
 (22) A Now I ve forgotten the question  
 (23) MR STOLL I ll try to get through this  
 (24) BY MR STOLL  
 (25) Q Is the Salome Creek property the transaction – well is

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- (1) the property is that comparable to the remote properties that  
 (2) you appraised for Kodiak Island Borough?  
 (3) A No it s absolutely not  
 (4) Q Why isn t it? Tell the jury please  
 (5) A Well basically the Salome Creek property it s an old  
 (6) rifle range it s approximately 680 690 acres It s located  
 (7) about eight road miles from the city of Kodiak near Womens  
 Bay  
 (8) right next to the Coast Guard base sits up a river valley  
 (9) about a mile And probably 60 percent of the property is up on  
 (10) two mountain tops and then the river bottom area is where the  
 (11) old military rifle range is  
 (12) And of course Kodiak Island Borough purchased that because  
 (13) we own the rest of the valley we wanted that it was an  
 (14) inholding plus we had a local sportsman s club that wanted to  
 (15) use the range and at the time the Native corporation needed  
 (16) the money so we put together the deal  
 (17) But it doesn t tell you anything at all about the remote  
 (18) markets this property is basically in the urban market It  
 (19) only tells you what real lousy land with a gunnery range on it  
 (20) is worth  
 (21) Q Was that property contaminated?  
 (22) A We didn t do a site assessment as part of our process but  
 (23) I d be amazed if it did not have substantial amounts of  
 (24) nitrates on it  
 (25) Q That s from the shells spent shells and so on?

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- (1) MR OPPENHEIMER Your Honor this is pure  
 (2) speculation  
 (3) THE COURT Overruled  
 (4) BY MR STOLL  
 (5) Q Go ahead From the shells and things like that?  
 (6) A Yes As part of our process we did investigate the  
 (7) environmental hazards The EPA did hold that spent lead from  
 a  
 (8) bullet was not considered toxic but that still didn t deal  
 (9) with the balance of the chemicals and shot and powder and  
 what  
 (10) have you that s on the site But for our purposes it was  
 (11) acceptable to take on that liability  
 (12) Q All right Now there was a – was there an attempted  
 (13) transaction involving the Ayakulik Native Corporation?  
 (14) A Yes there was  
 (15) Q And where is that property located?  
 (16) A The Ayakulik parcel is located at the mouth of the Ayakulik  
 (17) River on the southern end of Kodiak Island  
 (18) Q That s down in this area here Mr Carlson?  
 (19) A Up a little  
 (20) Q Up here?  
 (21) A Down a little  
 (22) Q Right in here?  
 (23) A Yes  
 (24) Q That s where I thought it was originally right in this  
 (25) area?

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- (1) A Yes  
 (2) Q And was this property oceanfront property incidentally?  
 (3) A It has two little pieces that touch the ocean The west  
 (4) majority of the property is not oceanfront property  
 (5) Q How big a parcel was that?  
 (6) A Surveyed out at about 580 acres  
 (7) Q Was there a cash offer for that property?  
 (8) A Yes Million dollars cash  
 (9) Q And who was that from?  
 (10) A A group called the Conservation Fund  
 (11) Q Okay And was that accepted by the Ayakulik Native  
 (12) Corporation?  
 (13) MR OPPENHEIMER Hearsay foundation  
 (14) A I spoke to –  
 (15) THE COURT Hold on hold on Sustained  
 (16) BY MR STOLL  
 (17) Q What does that work out to an acre?  
 (18) A About \$1700 an acre  
 (19) Q And with your Exhibit 8605 Mr Carlson do you – do you  
 (20) know of any event that occurred other than the oil spill that  
 (21) explains any of these changes in the prices?  
 (22) MR OPPENHEIMER Your Honor lay opinion testimony –  
 (23) THE COURT Sustained sustained  
 (24) MR STOLL That s all  
 (25) Oh Your Honor I d like to move into evidence 8605 8604



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- (1) 8602A 8603A - I think the defendants exhibits are in 8441
- (2) I think the rest are in - and 9011 I think 9011 may already
- (3) be in evidence
- (4) (Exhibits 8605 8604 8602A 8603A and 9011 offered)
- (5) MR OPPENHEIMER Your Honor I d like to reserve
- (6) until after cross
- (7) THE COURT All right
- (8) MR OPPENHEIMER Your Honor what is the Court s
- (9) preference? We can start or we can take a brief break
- (10) THE COURT How long is it going to take?
- (11) MR OPPENHEIMER 20 minutes half an hour
- (12) THE COURT We ll take a break
- (13) THE CLERK Please rise This court stands in
- (14) recess
- (15) (Jury out at 10 37 a m )
- (16) (Recess from 10 37 a m to 10 55 a m )
- (17) (Jury in at 10 55)
- (18) THE CLERK This court now resumes its session
- (19) Please be seated
- (20) BY MR OPPENHEIMER
- (21) Q Mr Carlson good to see you again
- (22) A Hi Randy
- (23) Q Feels like kind of a second date
- (24) Joel could we get 8604?
- (25) Pat I m going to tell you in advance I m not good with

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- (1) these types of charts
- (2) MR STOLL It s not on -
- (3) MR OPPENHEIMER Oh thanks may I borrow it?
- (4) MR STOLL Sure
- (5) CROSS REBUTTAL EXAMINATION OF PAT CARLSON
- (6) BY MR OPPENHEIMER
- (7) Q Pat I m going to show you what s been marked as
- (8) Defendants s 16377 This I will represent to you is provided
- (9) to us as backup to part of this chart I d like to have you
- (10) tell me what this is and which part of the chart it helps us -
- (11) which part of the chart it backs up
- (12) A As I recall this is a spread sheet and it takes the
- (13) tallies of the values for the various categories from the full
- (14) value from the Alaska Taxables which is the document that the
- (15) state assessor produces every year and it has on here the
- (16) values for Kenai Valdez Cordova Kodiak sub totals This
- (17) would represent your movement in value for Kenai Valdez and I
- (18) also believe it would represent the movement in value from
- (19) Mr Papke s oiled areas
- (20) Q Okay Now this is very hard to see but are you referring
- (21) Pat to the line that starts at about 11 percent then moves
- (22) over to about 16 percent is that the line for Kenai and
- (23) Valdez?
- (24) A I ve got a problem here I can t - yeah the Kenai Valdez
- (25) values would be the total of those that would represent the

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- (1) percent change from each year
- (2) Q Okay Now the jury can t see this yet but I d like - I
- (3) think this might speed things up
- (4) You have a couple of columns there headed Kenai Valdez
- (5) Subtotal do you see that?
- (6) A Correct
- (7) Q And then if you read over one more column you get to some -
- (8) percentages?
- (9) A Correct
- (10) Q Okay now are those the percentages which show up on the
- (11) chart for the Kenai and Valdez line?
- (12) A I m sorry
- (13) Q Are those the percentages of change for the Kenai-Valdez
- (14) data?
- (15) A If this is the spread sheet yeah that should be correct
- (16) Q Okay Let me grab that back from you if I may I ll put
- (17) it back on the screen Great isn t it?
- (18) A Is it just me or -
- (19) Q No it s not It is absolutely not
- (20) MR STOLL I got my glasses fixed too
- (21) MR OPPENHEIMER There we go
- (22) A Oh that s better
- (23) BY MR OPPENHEIMER
- (24) Q Voila all right
- (25) Now I m going to put this in yellow this is the

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- (1) percentage changes for the Valdez and the Kenai columns and
- (2) so
- (3) this column I ve highlighted here is the percentage change
- (4) column for those two areas?
- (5) A That may be the case Again I m not exactly certain on
- (6) this spread sheet I ve got so what s going on - can I have
- (7) that back?
- (8) Q Sure can
- (9) A Aren t they the same the two?
- (10) Q There are two pages
- (11) A There s two pages?
- (12) Q And this was provided to us as backup for this document
- (13) A But these are basically the same correct?
- (14) Q Yeah
- (15) A Here you can have them
- (16) Q All right
- (17) Now is that column that I put in yellow is that the - is
- (18) that the percentage changes for Kenai and Valdez?
- (19) A I believe so yes
- (20) Q Now let me put the chart back on Just help me read
- (21) through this for a second Pat
- (22) 1985 when we start it looks to me like your chart your
- (23) column says 6 07 percent And I must be reading incorrectly
- (24) because we re over 10 percent on the graph?
- (25) A That would be the percent change from 85 from 84

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- (1) from - that should be represented on '85 and that's '74
- (2) percent but I don't see that up there?
- (3) A Yeah I - the '74 would be the top of the line here in
- (4) the '85 year
- (5) Q Let me remind you that the Valdez and Kenai that we're
- (6) reading off the spreadsheet on is this top - the one that
- (7) starts at 11 percent. So if you could tell me again where is
- (8) the '74 percent?
- (9) A If you look in - in the January 1, 1986 percent change for
- (10) that area it's '74 percent which represent the amount '86
- (11) changed over '85 and it's - but it's based on the values in
- (12) '85
- (13) Q Are you saying that that's this point here this apex over
- (14) '86?
- (15) A Could I expand on my -
- (16) Q Please
- (17) A The problem we have is these values are tallied every year
- (18) as of January 1st and they're using sales in the prior year so
- (19) the sales that took place in '85 that are tallied for January
- (20) 1, 1986 represent the values in '85 and the percent changes as
- (21) a function over '84
- (22) Q Correct
- (23) A So as I recall the way this was placed into this data was
- (24) the January '85 - or the '85 annual values as a function of
- (25) '84 were went up '74 percent which doesn't show up until

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- (1) your January 1, '86 data
- (2) Q Right. And so then explain for the jury so we can move
- (3) on to the next question here why you have 16 percent over
- (4) '86
- (5) A I'm sorry?
- (6) Q Why do you have 16 percent - explain to the jury why you
- (7) have 16 percent over the point on the chart that says '86
- (8) instead of 23 percent
- (9) A I don't know I'd have to go back through this data and
- (10) work it up again. As I recall this is one spreadsheet I
- (11) don't know the Alaska Taxables is what I worked off of and
- (12) I'm not certain that this is the spreadsheet
- (13) Q All I can tell you Pat this is the only sheet we were
- (14) provided. If you can - if you look down that column that
- (15) we've identified the percentages of can you identify for me
- (16) any percentages on the worksheet that correspond to any
- (17) percentage changes on the Kenai and Valdez line?
- (18) A Well I think counsel was provided with the Alaska
- (19) Taxables and the Alaska Taxables are a state document and
- (20) those are the values that I used. This spreadsheet is one of
- (21) numerous ones I've done so this one was not used as I recall
- (22) to generate the graph. The data was taken directly from the
- (23) Alaska Taxables. So if you did the '85 and '86 Alaska Taxables
- (24) and take the total for Kenai and Valdez for real property full
- (25) values you'll see that percent change

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- (1) Q Okay Let's talk about that then in this context just
- (2) to see if I have this right
- (3) Each year on the graph represents the assessed value as of
- (4) January 1 of that year?
- (5) A It represents the full value for real property as of
- (6) January 1 of that year
- (7) Q All right So for example for 1987 that's the full value
- (8) as of January 1, 1987?
- (9) A No this would be the - the percent change in that full
- (10) value
- (11) Q Correct
- (12) A From the prior year
- (13) Q Correct I misspoke
- (14) It is - it is a measurement of the change as of January 1
- (15) 1987 correct?
- (16) A That's correct
- (17) Q Okay Now you had said earlier I believe - correct me
- (18) if I'm wrong - that - and I don't know whether it was
- (19) assessed values or full values went down between '88 and '89?
- (20) A In the remote areas that's correct
- (21) Q In the remote areas and which were you referring to
- (22) assessed values or full values?
- (23) A Both
- (24) Q Both went down. And when you say '89 what date are you
- (25) talking about?

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- (1) A That would be January 1, 1989
- (2) Q So before the oil spill the remote property assessed and
- (3) full values were going down in the remote property market?
- (4) A Well they were adjusted down that's correct
- (5) Q Okay Now and that's before the oil spill
- (6) Now on this chart - and you and I both probably have
- (7) trouble seeing this I know the jury does - if we could
- (8) January - pardon me 1989 this is the percentage change as
- (9) of - do I have this correct - January 1, 1989?
- (10) A As compared to January 1, '88 right
- (11) Q And this 1990 is the change over '89 as of January 1
- (12) 1990?
- (13) A That's correct
- (14) Q Okay So as of January 1, 1990 the remote areas - I'll
- (15) rephrase
- (16) Kenai and Valdez and Papke's oiled areas are going up
- (17) faster than the state as a whole?
- (18) A A few percent yeah
- (19) Q Sure but - I admit these percentages by the way are
- (20) all very closely packed aren't they? In other words just so
- (21) the jury understands these lines this total spread here is
- (22) five percent the spread between zero and the next line up is
- (23) just five percent right?
- (24) A I think you hit the whole point of the graph That's the
- (25) point

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- (1) Q Right
- (2) A Is that this data tells you nothing about what was going on
- (3) in the remote areas in the oil spill area It just tells you
- (4) what was going on generally in the urban markets and that they
- (5) were all moving together and Mr Papke had difficulty finding
- (6) any differences and the reason he didn't find any differences
- (7) is because the data he's looking at won't tell you any
- (8) differences
- (9) Q Pat were you here for all of your Gary's -- Mr Papke's
- (10) testimony?
- (11) A I don't know if I was here for all of it but most of it
- (12) yeah
- (13) Q Were you here when he explained that for his analysis he
- (14) was prepared to assume that the remote properties were a
- (15) minuscule part of the reporting data the deed with mortgage
- (16) data the taxable base data or any other data you want to
- (17) choose because that wasn't the point he was making with those
- (18) charts?
- (19) MR STOLL I don't think that's an accurate
- (20) characterization
- (21) THE COURT You're going to have to --
- (22) MR OPPENHEIMER I'll withdraw the question
- (23) THE COURT Wait Don't answer it don't answer it
- (24) BY MR OPPENHEIMER
- (25) Q In so far as this data is available to us Pat you would

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- (1) agree that insofar as you have been able to distinguish the
- (2) Kenai and Valdez and Papke's oiled areas from the state areas
- (3) they are as of a period of time at the beginning of '90 as of
- (4) the spill going up a little bit faster than the state as a
- (5) whole?
- (6) A No I mean slightly but that's not a sufficient
- (7) difference
- (8) Q Sure I agree not substantially
- (9) I took the liberty of blowing up your chart
- (10) A Thanks
- (11) Q Okay Can you see? Pat importantly can you see?
- (12) A Yes
- (13) Q Okay Now this was a kind of before-and after chart that
- (14) you did correct?
- (15) A Well this is just yeah the information and it shows
- (16) those transactions prior to the spill and after
- (17) Q Now I think -- hopefully we won't have to backtrack into a
- (18) lot of documents I think a lot of this you'll be able to
- (19) remember Let me just fill in -- by the way we're looking
- (20) here at Plaintiffs 8605 The -- when did you do your
- (21) appraisal in this case?
- (22) A I don't remember It was '92 I believe
- (23) Q March of '92?
- (24) A Yes
- (25) Q And you testified about it in deposition in -- various

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- (1) times in '93?
- (2) A '92 '93 and '94 yeah
- (3) Q And you had all of this data all of that time correct?
- (4) A Yes
- (5) Q And in fact on the Village Islands they were comparables
- (6) in your work weren't they?
- (7) A Yes they were
- (8) Q Designated W-8 W-9 W-6 W-11 W-7
- (9) A That's correct
- (10) Q And Alitak same thing In fact we talked about this on
- (11) your direct right there's really nothing new here we've got
- (12) S 1 S 2 S-4 S-3 correct?
- (13) A Correct
- (14) Q Okay and then these lines here are your N-3 N-5 N-7
- (15) N-6 So the only -- the only bar on this chart that you didn't
- (16) actually use in the appraisal was the June '85 bar correct?
- (17) A Correct
- (18) Q So you had all these things previously -- by the way do
- (19) you consider this analysis a matched pairs analysis?
- (20) A I think with the exception of the June '85 transaction
- (21) which was not one I think these -- this represents what we'd
- (22) call a compared-paired analysis not a direct sale of the same
- (23) property but adjusted or sales of like properties
- (24) Q You consider it a comparable property analysis?
- (25) A Well again I take issue with the June '85 transaction

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- (1) which I would not have used but other than that --
- (2) Q I would exclude that
- (3) A Correct
- (4) Q Okay In your appraisal report and again in your
- (5) deposition was it not your view that after reviewing the
- (6) remote recreational market you weren't able to come up with
- (7) sufficient data to get a trend analysis?
- (8) A As I recall for purposes of determining the time factor to
- (9) apply to my model there was not sufficient sales to do that
- (10) that's correct
- (11) Q Pat you'll probably recall this this is Exhibit 15491
- (12) your time trend analysis from your report?
- (13) A Yes
- (14) Q The jury may remember this
- (15) Pat the time trend analysis was a device you used in order
- (16) to adjust for the fact that the market in remote properties
- (17) would go up and down over time and you were comparing
- (18) properties that were selling at different times from the
- (19) property you were looking at and you wanted to make
- (20) adjustments
- (21) in the value of the property right?
- (22) A Correct
- (23) Q Okay And isn't it the case that -- and I'm not suggesting
- (24) that what you've said today is inconsistent with this but
- (25) isn't it the case that having looked at all of this data

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- (1) looked at all of that data what you decided was that you had  
 (2) to - you couldn't find paired sales or comparable sales that  
 (3) would show you a trend in the remote recreational market and  
 (4) that instead you had to do this analysis in order to  
 (5) determine how prices were moving so you could make a time  
 (6) adjustment?  
 (7) A Be - over that spread of time that's correct yes And  
 (8) again it's the relative movement - or the relative impact of  
 (9) time over that time frame  
 (10) Q And again for the benefit of the jury this table which I  
 (11) probably should - this table has three bars has a residential  
 (12) trend a vacant trend and a weighted trend correct?  
 (13) A Correct  
 (14) Q And the weighted trend was the trend that you used to deal  
 (15) with adjusting the market for remote recreational market in  
 (16) your appraisal?  
 (17) A The further remote property in the transactions right  
 (18) Q Right And again this is the point March of '89 of the  
 (19) oil spill and the bar it shows the weighted trend continues  
 (20) to go up after that and doesn't return to the same level until  
 (21) June or July of '90  
 (22) Now you've mentioned a couple of times that the - some of  
 (23) the data is different from the urban data some of the remote  
 (24) data is different from the urban data It is true isn't it  
 (25) that when you looked at all this for the appraisal and we re

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- (1) trying to get a handle on the remote property market and how it  
 (2) moved that you concluded that it basically tracked the  
 (3) movement it was not identical to but it tracked the movement  
 (4) of the urban market?  
 (5) A As I recall my testimony and it was restated today was  
 (6) that the remote market responds to how folks are feeling about  
 (7) their lives how much disposable income they have Though in  
 (8) the case where they have disposable income you tend to see a  
 (9) better market out there or the fisheries impact but it's -  
 (10) it's distinct from the residential market to a large degree  
 (11) Q I'm going to put on the Barco here page 38 of your  
 (12) appraisal it's PX906 and DX16412  
 (13) MR DIAMOND Randy have to keep it to the right  
 (14) because otherwise you're blocking -  
 (15) MR OPPENHEIMER I'll move it in just a second  
 (16) BY MR OPPENHEIMER  
 (17) Q Can that be seen?  
 (18) A Yes I can see that  
 (19) Q And you still agree today do you not that the value of  
 (20) remote recreational property has been up and down over the  
 (21) last  
 (22) ten years and has moved along with the same trend found in the  
 (23) urban market in and around the city of Kodiak?  
 (24) A Except for around the spill time frame that's correct  
 (25) Q And it's on the basis of that concept that this trend line  
 came into being?

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- (1) A Well again counselor this is being used to value  
 (2) property before the spill So you would not want to use this  
 (3) analysis for purposes of doing a spill data - I mean this was  
 (4) to deal with damages that's dealing with the value of the  
 (5) property the day before the spill excluding spill effect  
 (6) Q Sure and I understand you're not giving us a professional  
 (7) opinion on damages what you did with this chart if you did -  
 (8) you did an appraisal of the property the day before the spill  
 (9) right Pat?  
 (10) A Correct  
 (11) Q And when you were using a comp from a sale after the spill  
 (12) and you had to compare it you had to know whether it was in a  
 (13) hotter market or a colder market because you had to make a  
 (14) price adjustment right? Correct?  
 (15) A Correct  
 (16) Q And what you did was to look at comps in the period after  
 (17) the spill and what this chart told you was that market was  
 (18) hotter than the market before the spill you had to make an  
 (19) adjustment down in the price to compare it right here  
 (20) Correct?  
 (21) A Correct and this is -  
 (22) Q Okay that's - that's -  
 (23) MR STOLL Can he finish his answer?  
 (24) MR OPPENHEIMER Was there something else Pat?  
 (25) A Yeah as I stated in my previous testimony too this is a

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- (1) weighted trend using the residential and vacant trends in the  
 (2) Kodiak market I did have a few sales in the remote areas to  
 (3) check the trend against and it fell within acceptable range  
 (4) for the purposes of what I was using it for It was not meant  
 (5) to demonstrate what actually was going on in the remote market  
 (6) with - from the cause of the spill  
 (7) Q No I understand that But it was the basis for your  
 (8) appraisal?  
 (9) A No it was the basis for one small component of one part of  
 (10) the appraisal  
 (11) Q Fair enough It was used in your appraisal?  
 (12) A That's correct  
 (13) Q And you used this data rather than - rather than assume  
 (14) that you should bring properties down because the market was  
 (15) going down after the spill you had this data but you reached  
 (16) this conclusion correct?  
 (17) A Well if I would have adjusted them for the spill data  
 (18) then I would be in fact dealing with a value that was adjusted  
 (19) because of the spill  
 (20) Q No Pat The fact of the matter is your trend chart shows  
 (21) the market getting hotter not colder It doesn't start to get  
 (22) colder again until the summer of 1990 correct?  
 (23) A Well in the urban market that's correct  
 (24) Q And it's your weighted trend average which you used to  
 (25) adjust remote recreational properties for your appraisal in

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- (1) this case correct?
- (2) A That s correct
- (3) Q Okay let s put this chart back up Let s talk about the
- (4) Village Islands This was a development was it not - a
- (5) subdivision pardon me I misspoke A subdivision?
- (6) A I guess yeah it was subdivided homestead yes
- (7) MR OPPENHEIMER Counsel DX16371
- (8) MR STOLL What?
- (9) MR OPPENHEIMER 16371
- (10) MR STOLL Thank you
- (11) BY MR OPPENHEIMER
- (12) Q Do you recognize this as Village Islands?
- (13) A Yes I do
- (14) MR STOLL Would you mind can we move that down here
- (15) so we can see?
- (16) MR OPPENHEIMER Sure Does that make it any
- (17) better?
- (18) MR STOLL That s fine thank you
- (19) BY MR OPPENHEIMER
- (20) Q Pat can you still see this?
- (21) A Yes I can
- (22) Q Okay Now first question s a real simple one
- (23) You had Village Islands when you did your appraisal and
- (24) when you were deposed right? You knew all about these?
- (25) A Correct

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- (1) Q And you were asked whether you concluded from this
- (2) information whether you had a professional opinion that this
- (3) W 7 reduction was a result of the oil spill and you said no
- (4) Do you recall that?
- (5) A As I recall the context of that conversation was I was
- (6) trying to stress to counsel that I had not conducted any damage
- (7) analysis and as such as a professional appraiser had no
- (8) opinion
- (9) Q Okay This W-7 was the last tract - well I need to add
- (10) something so the jury understands Pat you can check this
- (11) against that on your screen but in terms of what s up there on
- (12) the board -
- (13) MR STOLL Your Honor could we take something up
- (14) with the Court just a moment?
- (15) (Bench Conference on the Record)
- (16) MR STOLL Your Honor if he s going to inquire - I
- (17) just want to know what we re going to hear If he s going to
- (18) inquire as to his opinion as to the effects of the oil spill
- (19) then it s going to be open hunting for me on redirect about him
- (20) expressing a professional opinion on the effects of the oil
- (21) spill
- (22) MR OPPENHEIMER I won t do it
- (23) MR STOLL You re doing it right now Otherwise I
- (24) don t think that - you can t have it both ways
- (25) THE COURT I ll evaluate the questions and I ll

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- (1) decide whether he s doing it He thinks he s not and you think
- (2) he is
- (3) MR STOLL I understand that s fine
- (4) THE COURT Be careful
- (5) MR OPPENHEIMER I will Your Honor
- (6) (Bench Conference concluded)
- (7) BY MR OPPENHEIMER
- (8) Q We are back Pat do this real quick
- (9) Tell me if you agree this is B 1 this is B-2 this is
- (10) A 1 this is C-1 this is A-2 on this plat map we ve got up
- (11) here so that the one that is the lowest one is tract A 2?
- (12) A Yeah I m not absolutely convinced on the others but -
- (13) Q But you re sure about A-2?
- (14) A Well A 2 is Lindburgh (ph) right?
- (15) Q That s correct
- (16) A Which one is Rittenhouse (ph)?
- (17) Q That I don t know Does that help you?
- (18) A Yes
- (19) Q Maybe I can shorten this up
- (20) This was the last one to sell correct?
- (21) A Lindburgh s right
- (22) Q Okay so you have a group of lots They sell in - well
- (23) in periods of time you ve got indicated here but - and they
- (24) were all on the market statement but this one sells last?
- (25) A Correct

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- (1) Q Could have been purchased earlier but it wasn t?
- (2) A Correct
- (3) Q Now some of these lots are better than others aren t
- (4) they? For example let me direct your attention to C 1 It
- (5) sold pretty early on didn t it?
- (6) A Well as I recall C 1 -3 and 2 sold in one 90-acre
- (7) transaction it was basically Daniel Boone sold half of it to
- (8) Helga Fox (ph)
- (9) Q And one of the things it had was very good anchorage in
- (10) C-1?
- (11) A It s not any superior to the one out in front of the A-1
- (12) A 2 area
- (13) Q I won t quarrel with you In fact in many of the cases
- (14) where we are talking about whether something is comparable to
- (15) something else - for example where you took the June 85
- (16) transaction and increased the value of that because you felt it
- (17) was not as good a property and say Mr MacSwain did not this
- (18) happens doesn t it? Appraisers reach different conclusions
- (19) about the value of a piece of property and how desirable it is?
- (20) A Yes they do
- (21) Q And by the way was the June 85 property adjustment where
- (22) it was the R-file I believe you called it was adjusted to
- (23) show that the property wasn t as desirable as other properties
- (24) in the area was that the adjustment that was made in 1990?
- (25) A That was - yes that s correct It was made in 1990

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- (1) Q And you made that adjustment?  
 (2) A That s correct  
 (3) Q After the oil spill?  
 (4) A That s correct  
 (5) Q By the way where were you in the process at that point of  
 (6) working with Mayor Selby on appraisals for this case? Had you  
 (7) started it?  
 (8) A I don t remember four years ago but --  
 (9) Q I understand no it s a long time ago  
 (10) You re familiar with Mr Shorett he s issued a report in  
 (11) this case?  
 (12) A Yes I am  
 (13) Q Are you aware that he does not share your view of the  
 (14) values of Village Islands?  
 (15) A I m not --  
 (16) MR STOLL That assumes a fact not in evidence Your  
 (17) Honor  
 (18) BY MR OPPENHEIMER  
 (19) Q Have you ever discussed with Mr Shorett your valuation of  
 (20) the Village Islands properties?  
 (21) A I don t recall one way or the other  
 (22) Q Counsel I m going to be discussing with the witness  
 (23) Exhibit 15614 and 16413  
 (24) Pat I m showing you the two exhibits I ve just mentioned  
 (25) These are Dr Shorett s report damage report These are

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- (1) referenced in his damage assessment in this case Have you  
 (2) ever had a chance to review those?  
 (3) A Dr Shorett?  
 (4) Q Yes  
 (5) A No I haven t  
 (6) Q Never looked at them?  
 (7) A No  
 (8) Q Did anyone ever discuss with you the fact that in those  
 (9) reports --  
 (10) MR STOLL Well excuse me Your Honor --  
 (11) THE COURT Objection sustained  
 (12) BY MR OPPENHEIMER  
 (13) Q Has anyone ever discussed with you the ratings that Dr  
 (14) Shorett gave the Village Island properties in terms of their  
 (15) desirability?  
 (16) A I don t recall one way or the other  
 (17) Q Did you ever express an interest in knowing how Dr Shorett  
 (18) had valued the same properties you were valuing in this case?  
 (19) A I don t recall having -- were you speaking to the KIB  
 (20) properties?  
 (21) Q Yes these are KIB -- well these are properties on the  
 (22) island correct?  
 (23) A Yes they are  
 (24) Q And you other aware that Dr Shorett had used comparables  
 (25) from Kodiak?

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- (1) A I hadn t seen his report --  
 (2) Q All right So you were unaware that in fact Dr Shorett  
 (3) had actually used the Village Islands as part of his comp base?  
 (4) A No I would be surprised if he did appraise properties in  
 (5) Kodiak without using sales in Kodiak  
 (6) Q Okay but you never had occasion or desire to talk to him  
 (7) about the conclusions he reached?  
 (8) A I had no involvement in his conclusions no  
 (9) Q Pardon me I ve given him a degree Dr Seldin s degree I  
 (10) guess  
 (11) MR STOLL That s all right  
 (12) BY MR OPPENHEIMER  
 (13) Q Onion Bay?  
 (14) MR STOLL He s be pleased with the accolade I m  
 (15) sure  
 (16) BY MR OPPENHEIMER  
 (17) Q Onion Bay -- racing right along this chart does not  
 (18) include the sale from Kodiak to Mrs Holme?  
 (19) A That s correct  
 (20) Q That s your N-9 your comp N-9?  
 (21) A Yes  
 (22) Q And that comp worked out to over \$7 000 an acre And that  
 (23) was a sale at the same time December of 90?  
 (24) A Is that Lot 1?  
 (25) Q Yes

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- (1) A About 47 000  
 (2) Q I can check for you  
 (3) A That sounds correct yeah  
 (4) Q So that s -- and again if I were to ask you about  
 (5) Mr Shorett s appraisal of the Onion Bay properties in his  
 (6) comp you would not be able to discuss that with me because  
 (7) that s not something you reviewed?  
 (8) A No and I would not want to represent that that would be  
 (9) the value that I would place on that graph for that comp  
 (10) Q Well just so we re -- we re clear on that the June 85  
 (11) price is your adjusted price as you ve told the jury it s not  
 (12) the price that was actually paid correct? It s an adjustment  
 (13) you ve made to it based on your judgment?  
 (14) A It s an adjusted price based on comparing it to those three  
 (15) Onion Bay transactions which are inferior lots to Mrs Holme s  
 (16) and that one is also inferior to them so to be on a level  
 (17) playing field if I was to put -- place her sale in the  
 (18) transaction or into this graph it would not end up at the  
 (19) 7 000 an acre you have  
 (20) Q Right No you would adjust this down?  
 (21) A That s correct  
 (22) Q And you adjusted this blue line up?  
 (23) A That s correct  
 (24) Q I understand That s based not on what was actually paid  
 (25) Because do you remember what was paid for the June 85

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- (1) transaction?  
 (2) A \$50 000  
 (3) Q It was – so basically what you did I m not being  
 (4) critical I m just saying in your judgment you added 30  
 (5) percent to bring that blue line up right?  
 (6) A Well –  
 (7) Q 35 percent pardon me  
 (8) A In my judgment I would never have used that sale because  
 (9) it distorts the data and does not give you a good indication of  
 (10) what happened  
 (11) Q I understand Pat I understand that s your view But I m  
 (12) just asking mechanically when you did this or had this chart  
 (13) prepared for us you increased this blue line up by 35 percent  
 (14) over what the actual price was?  
 (15) A That s correct  
 (16) Q Alitak Bay we discussed this previously This is the S 1  
 (17) S 2 S-3 S-4 conversation we had the last time you were here?  
 (18) A Yes  
 (19) Q This really is like a second date Do you recall a sale in  
 (20) April of 1988 to Steele (ph)?  
 (21) A Jeff and Katherine?  
 (22) Q I don t know if it s Katherine but Jeff yes  
 (23) A Yes  
 (24) Q And do you recall that that sale worked out to about \$5800  
 (25) an acre?

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- (1) A Is that – is that the – what about a 12-acre tract on  
 (2) the southwest?  
 (3) Q 10 27 United States Survey 1911  
 (4) A And that s on the south – be in what Portage Bay on the  
 (5) east side?  
 (6) Q Hang on I ll check  
 (7) Counsel this is Exhibit DX16376 Steele transaction up  
 (8) Portage Bay  
 (9) A May I?  
 (10) Q Yes sure Pat if it s easier to see Right there  
 (11) A Yeah that s it  
 (12) Q Okay And that was in – get it from my notes let s call  
 (13) it the spring of 88  
 (14) Okay and then there s another sale I want to call your  
 (15) attention to Are you familiar with this transfer to Edwards  
 (16) also up Portage Bay here?  
 (17) A Correct  
 (18) Q Okay and that works out about \$6700 an acre?  
 (19) A That s correct  
 (20) Q Okay And that s December of 89  
 (21) A That s correct  
 (22) Q You can sit down Thanks Pat appreciate it  
 (23) The transactions in Alitak Bay that are on this chart  
 (24) are – I ll turn this a little bit so you can see it a little  
 (25) better They re the ones in yellow on Defendants 16376

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- (1) A Correct  
 (2) Q And the ones that I ve added are in red on the same  
 (3) exhibit?  
 (4) A Yes  
 (5) Q Pat in your own – in your own appraisal you – you dealt  
 (6) with the value of these lots as comparables right?  
 (7) A Yes  
 (8) Q And you went through a process where you looked at the  
 (9) terms by which those lots were bought right?  
 (10) A Yes  
 (11) Q In other words you took a look at the price the parties  
 (12) had agreed to pay but you made an adjustment for it based  
 (13) upon  
 (14) how long they had to pay that sort of thing and you created  
 (15) what you called a cash equivalency?  
 (16) A That s correct  
 (17) Q And then you divided the cash equivalency by the number of  
 (18) acres of the property to get a unit value?  
 (19) A Yes  
 (20) Q Do me a favor and take a look at Defendants 16364 and tell  
 (21) me – I think you can probably do this from memory but if not  
 (22) I ll give you some materials – if that corresponds to the cash  
 (23) equivalency as you determined for the Village Islands  
 (24) properties?  
 (25) A I don t recall specifically but that seems relative  
 (26) yeah

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- (1) Q I m sorry seems – seems about right?  
 (2) A I wouldn t know without double-checking  
 (3) Q Let me show you this is from Plaintiffs 906 I ve  
 (4) selected some pages here that deal with your – your data  
 (5) base Let me just –  
 (6) MR STOLL I m sorry what pages? Randy what  
 (7) pages?  
 (8) MR OPPENHEIMER I m sorry It s up there  
 (9) A Yes it is  
 (10) BY MR OPPENHEIMER  
 (11) Q Okay  
 (12) MR STOLL What s this exhibit?  
 (13) BY MR OPPENHEIMER  
 (14) Q So when we adjust the prices for the Village Islands lands  
 (15) the way you did when you actually used them in your  
 (16) appraisal – and I ve said it before I ll say it again you re  
 (17) good at your job – what you did was to derive a set of unit  
 (18) values which was the price of the property adjusted for terms  
 (19) to take into account any differences if somebody had longer to  
 (20) pay than someone else or anything else divided by the number  
 (21) of acres to get something called the unit value  
 (22) And if we look at it that way it s – it s the case is it  
 (23) not that the August 90 sale W-7 the little one over there  
 (24) is higher than the August 88 sale and pretty close to the  
 (25) September 88 sale and to my way of thinking but I won t

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- (1) quarrel with you not much different from any of the green bars Do you agree?
- (2) A The way I m looking at it now – and I can see I made a mistake on the August of 90 sale because it should have received the same ten percent adjustment the others have they all sold for the same type of terms and this one s loaded at five percent
- (3) Q They didn t sell for the same terms did they?
- (4) A Roughly the same terms
- (5) Q Roughly but you made an adjustment?
- (6) A The owner of the two received an adjustment for the same category five percent for the typical Trillium terms and ten percent for the owner terms in this case but for some reason this 90 sale as a five percent adjustment
- (7) Q There would have been documents transaction documents that gave the terms and conditions of the sale that you would look at to determine what terms were to cause you to make an adjustment some five some ten?
- (8) A As I recall
- (9) Q You don t have those documents in front of you you re just saying you think you made a mistake?
- (10) A No I recall talking to – or getting the information confirmed from Mr Lindburgh I believe
- (11) Q So the – the appraisal as it is does look like that chart?

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- (1) A As it stands that s correct
- (2) MR OPPENHEIMER To everyone s great pleasure what I m trying to do is eliminate as many of the topics as I can One second Your Honor
- (3) Almost over
- (4) BY MR OPPENHEIMER
- (5) Q Are you aware that Mr Shorett used the same recording data as Mr Papke in his work in this case?
- (6) A No I m not familiar with his report
- (7) MR OPPENHEIMER No further questions
- (8) MR STOLL I just have a few questions
- (9) REDIRECT REBUTTAL EXAMINATION OF PAT CARLSON
- (10) BY MR STOLL
- (11) Q When you put together 8605 before Mr Oppenheimer did these writings on here your adjustments your figures on here are the same figures that Mr – excuse me they re the – these are the same comparables that Mr MacSwain – you just took the same transactions that Mr MacSwain used here isn t that right?
- (12) A That s correct
- (13) Q And so is that why you didn t add this other transaction I think it was the Edwards – excuse me it was the – oh anyway these are the same ones that he used?
- (14) A That s correct
- (15) Q And why didn t you – when you did your comparable

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- (1) analysis why didn t you use the June 85 transaction earlier in the appraisal report?
- (2) A Well if I was conducting a before-and-after study –
- (3) Q No you weren t doing that I m just saying why didn t you use that in your appraisal?
- (4) A It s not very comparable to the other parcels
- (5) Q And N-9 that Mr Oppenheimer added on here that was not in MacSwain s analysis was it?
- (6) A No it was not
- (7) Q And is that comparable to these other properties?
- (8) A No it s not
- (9) Q Why is that?
- (10) A It s vastly superior in terms of topography It s all beach with a nice building site It s the very first property as you come in the bay It also because of its location has a nice big buffer all the way around it It is actually one of the best parcels in the whole bay
- (11) Q So neither you nor Mr MacSwain used that as a comparable?
- (12) A Yes that s correct
- (13) Q And on – there was some sales that were – oh here it is over here in Alitak on the so-called Edwards property why wasn t that contained as a comparable?
- (14) A It was sufficiently as with the Steele sufficiently different in terms of size and physical attributes and location as to not make it as comparable as the other transactions

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- (1) Q So you didn t – for the same reason that you didn t include this one here this N 9?
- (2) A Well I could have incorporated it but again I was trying to find parcels that were the only major difference between them was the short time span from the summer before and after the spill
- (3) Q Could you show the jury please the ones you used and why you thought these were comparable these so-called matched pairs or whatever you called them?
- (4) A Well one issue was I wanted to deal with – these all had the same seller the four that I used The buyers three of them were recreational buyers recreational lodge-type purchasers and then the other one is the federal government But none of the buyers had any fishing interests they had no former leases they had no former use of the sites so generally the buyers and the sellers were sufficiently alike
- (5) The time frame was tight from 88 to 89 The sizes are fairly tight you ve got six and nine acres for an average around seven and a half you ve got 7 8 and 7 3 for an average of around seven and a half The only thing that went on here was the oil spill and you can see the dramatic decrease in price
- (6) Now Steele s lot which is this one is ten acres and you know that one s nine it s offset by the six That tended to get outside of that but you d have to make a size adjustment



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- (1) in order to use it in the report
- (2) Same thing here this one s 5 97 plus it s on the other
- (3) side of the bay And neither one of these are as much alike as
- (4) these two are with those two
- (5) Q And if you had made the -- this other adjustment that you
- (6) had made -- you know if you hadn t made that apparently some
- (7) mistake in the thing this would show even more of a decrease
- (8) here in August of 90 than it already shows?
- (9) MR OPPENHEIMER Assumes facts not in evidence Your
- (10) Honor we don t have the underlying materials
- (11) MR STOLL He said he only made a five percent
- (12) adjustment and the others he made a ten percent adjustment
- (13) MR OPPENHEIMER We ll stipulate if you change the
- (14) mathematics the numbers would change The question is whether
- (15) there s really a mistake
- (16) BY MR STOLL
- (17) Q Do you believe there was a mistake?
- (18) A I think the point here is this is looking at these lots
- (19) strictly on a per acre basis Now we have the same problem in
- (20) reverse that we had with the Onion Bay deal all these lots
- (21) sold for 40 000 each -- one was ten one was ten and a quarter
- (22) one was ten and a third The sellers and buyers were not
- (23) imputing any difference for size All four sold for 40 000
- (24) each this one sold for 37 5- after the spill
- (25) A better representation of the data would have been to do a

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- (1) gross sales price in this case They were all selling all
- (2) like properties selling for the same total price
- (3) Q Now I just want to ask one area of questions on the
- (4) so called full value term that Mr Papke referred to that s
- (5) used by the state assessor s office
- (6) A Yes
- (7) Q Is that the same as fair market value?
- (8) A No it s not
- (9) Q Is it the same as the assessed value?
- (10) A It is the total of the assessed values times a ratio that
- (11) the state uses
- (12) Q So it s not exactly the same as the assessed values
- (13) either?
- (14) A That s correct
- (15) Q And in 1990 did Kodiak Island Borough acquire some
- (16) additional land into its boundaries?
- (17) A The borough doubled in the --
- (18) MR OPPENHEIMER Scope Your Honor
- (19) MR STOLL No he asked him questions about what
- (20) happened between 1988 89 and 90
- (21) THE COURT The objection s overruled
- (22) BY MR STOLL
- (23) Q Did Kodiak Island Borough did the boundaries of Kodiak
- (24) Island Borough grow?
- (25) A Yes

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- (1) Q How did it grow?
- (2) A We acquired all the lands on the other side of the Shelikof
- (3) straight from the north end of the borough all the way down to
- (4) Chirikof Island
- (5) Q Would you just show to the jury on 1354-A -- I ll just hold
- (6) it up here
- (7) A Okay prior to the -- prior to annexation the Kodiak
- (8) Island Borough was just from the Barren Islands and you don t
- (9) have it on here but to Chirikof Island and back up here to
- (10) Shelikof Strait and we annexed everything from Cape Douglas
- (11) to
- (12) the top of the mountain all the way down to just south of Wide
- (13) Bay back out to Chirikof
- (14) So in terms of land mass including a whole lot of water
- (15) it about doubled
- (16) MR STOLL That s all I have
- (17) MR OPPENHEIMER Real quick Your Honor
- (18) THE COURT Yes
- (19) MR OPPENHEIMER Pat I m sorry Couple of real
- (20) quick questions
- (21) RE CROSS REBUTTAL EXAMINATION OF PAT CARLSON
- (22) BY MR OPPENHEIMER
- (23) Q The August 90 sale all the others were 20 percent down at
- (24) the same time and that was a 27 percent down payment right?
- (25) A As I recall yes
- (26) Q It was not the same terms and conditions?

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- (1) A Actually that s very close
- (2) Q I understand it s close but there was a difference between
- (3) the terms and conditions of the August of 90 sale in the green
- (4) bars?
- (5) A Seven percent
- (6) Q An adjustment was made by you in your appraisal was it
- (7) not?
- (8) A Five percent
- (9) Q And the terms and conditions of that sale were different
- (10) from the other green bars and that view from you did not
- (11) change until today correct?
- (12) A It was not sufficient to affect my decision
- (13) Q You indicated that N-9 was a very undesirable piece of
- (14) property or some such thing which ought not to be compared
- (15) with these others?
- (16) A I m sorry very desirable
- (17) Q Very desirable?
- (18) A Superior yes
- (19) Q In what terms?
- (20) A This again --
- (21) Q Location?
- (22) A Mrs Holmes purchased this site and the site next to it
- (23) because her son has his former setnet site there and they
- (24) wanted to protect the property
- (25) Q My question is the appeal of the property Are you saying

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- (1) it had a location or physical difference or topographical difference?  
 (2) A Yes I can  
 (3) Q And did it?  
 (4) A Yes  
 (5) Q Okay let me show you your appraisal have you look at the data base for N-9  
 (6) Did you make an adjustment for any of those things when you used this in your appraisal?  
 (7) A No I did not.  
 (8) MR OPPENHEIMER No further questions Your Honor  
 (9) MR STOLL No further questions  
 (10) THE COURT You can step down Mr Carlson thank you  
 (11) I m going to let you go - not let you go I m going to recess for a minute I have to consider an evidentiary question that s going to take me a little bit of time so you re free to go get some pop or snacks or something like that I want you back here at 12 30 so I can tell you about the rest of the case  
 (12) (Jury out at 11 55 a m )  
 (13) THE COURT All right counsel the jury s not present We have a few things to wrap up and one of them is Mr Robertson. Do you have him available?  
 (14) MR PETUMENOS We re checking on it right now What

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- (1) I would ask to do if I could to the Court I still don t think you have seen the tape have you?  
 (2) MR STOLL He heard it yesterday  
 (3) MR PETUMENOS Did you see it yesterday the Alyeska control tape?  
 (4) THE COURT Yeah  
 (5) MR PETUMENOS Could we take up that issue based upon my proffer? I don t think there s anything more to do in the way of offer of proof  
 (6) THE COURT Counsel that ruling has been made period It stands  
 (7) MR PETUMENOS I m a little confused Judge  
 (8) THE COURT Look at the record  
 (9) MR PETUMENOS I was told to come in and argue some things today -  
 (10) THE COURT You may be confused counsel but the confusion is conversation with other counsel If you look at the record you will not be confused all right?  
 (11) Now let s move on to the next issue  
 (12) MR PETUMENOS We re going the try to get Robertson on the phone I m not sure - we re having trouble finding him Judge  
 (13) THE COURT If you have trouble finding him that significantly affects what I m going to do doesn t it?  
 (14) MR PETUMENOS I anticipated that as well

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- (1) THE COURT How long do you think it ll take? I m going to give you 15 minutes If you haven t found him in 15 minutes it s just another reason for me not to allow him to testify  
 (2) Now what else would you like to take up counsel?  
 (3) MR STOLL Your Honor we have these matters of some exhibits  
 (4) THE COURT Sure Are you ready to do that everybody?  
 (5) MR PETUMENOS Judge if we end up resting our case here because of the problems with the witness and so forth may we rest subject to getting some exhibits cleaned up?  
 (6) THE COURT Oh sure No problem  
 (7) MR PETUMENOS That s the only thing I need I have some exhibits with Mr Dekin and Mr Teal and a couple others to work out we should get them  
 (8) THE COURT Fine  
 (9) MR STOLL Your Honor the first one we have is 8605 which he was cross-examined on and examined on at some length  
 (10) (Exhibit 8605 offered)  
 (11) MR OPPENHEIMER Your Honor I told Mr Stoll I would not object to the introduction of that if he would not object to the introduction of my markup  
 (12) THE COURT You re in control counsel You tell me what s unobjected to and it ll come in

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- (1) MR OPPENHEIMER Without that stipulation Your Honor object to the exhibit There are adjustments that are made on this that don t correspond to the underlying 1006 data  
 (2) and not all of the adjustments are the subject of his testimony in court  
 (3) MR STOLL I think he was thoroughly examined Your Honor  
 (4) THE COURT I m completely confused counsel I assumed that what you were telling me was that you were going to agree on the exhibits that were going to come in I m wrong about that?  
 (5) MR OPPENHEIMER Well I would - Your Honor I would invite us to try to do that Mr Stoll was not amenable to my suggestion which was that we take my exhibit -  
 (6) MR STOLL What he wants is he wants both of these in  
 (7) THE COURT I ll tell you something If one comes in the other comes in  
 (8) MR OPPENHEIMER That s acceptable  
 (9) MR STOLL They ll both go in  
 (10) THE COURT All right So what are the numbers?  
 (11) MR STOLL 8605  
 (12) MR OPPENHEIMER And we ll have to assign 8605A to the chart  
 (13) (Exhibit 8605A offered)

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- (1) THE COURT They re both admitted
- (2) (Exhibits 8605 and 8605A received)
- (3) MR STOLL The next one Your Honor is 8604 which
- (4) is the line chart
- (5) MR OPPENHEIMER I can t believe Your Honor will be
- (6) surprised at my objection We do not have 1006 data for this
- (7) the witness could not tell us how each of the lines worked we
- (8) couldn t plot data There s no basis for this chart and
- (9) there s no basis for any conclusions to be drawn from it No
- (10) one has and no one could This witness didn t draw
- conclusions
- (11) for it and he couldn t even tell us how - I didn t go into the
- (12) other lines He couldn t tell us how that line was plotted
- (13) MR STOLL Your Honor I think he explained how the
- (14) thing was plotted He used the backup graph I have to
- (15) candidly say that I didn t - I wasn t following it that
- (16) closely but I think -
- (17) THE COURT Well that s the nature of a rebuttal
- (18) case counsel
- (19) MR STOLL I wasn t following -
- (20) THE COURT They are hard to follow
- (21) MR STOLL Pardon me?
- (22) THE COURT They are hard to follow aren t they?
- (23) There s enough material he testified in that document that if
- (24) in fact you feel it s important to address it in final
- (25) argument you need the document in order to explain either that

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- (1) he - his analysis is correct or that he s full of hot air
- (2) right?
- (3) MR OPPENHEIMER Your Honor I have no desire ever to
- (4) make reference to this document again
- (5) THE COURT I suspect so
- (6) MR OPPENHEIMER I don t think it means anything and
- (7) I think it s inherently misleading and to be sent into the
- (8) jury without any sort of adequate explanation for how it was
- (9) created or put together seems to me when he couldn t even
- (10) plot the changes that are here is just begging for confusion
- (11) THE COURT Counsel I don t want it in I don t want
- (12) it in I m not going to let it in
- (13) MR STOLL You re not going to let that in?
- (14) THE COURT No What is the number?
- (15) MR STOLL 8604 Your Honor
- (16) THE COURT Yeah it s not in
- (17) MR STOLL Your Honor Exhibit 8602A
- (18) (Exhibit 8602A offered)
- (19) THE COURT I m going to let the pie charts in
- (20) MR OPPENHEIMER I won t argue
- (21) MR STOLL I m just reading the numbers 8602A and
- (22) 8603A and 8441 there s no objection to
- (23) (Exhibits 8603A and 8441 offered)
- (24) THE COURT All right Those are all admitted
- (25) (Exhibits 8602A 8603A and 8441 received)

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- (1) MR STOLL And I believe that 9011 was already in
- (2) but I just want to double-check
- (3) THE COURT Is it in? PX or DX?
- (4) MR STOLL PX Plaintiffs Exhibit
- (5) THE CLERK It s in
- (6) THE COURT It s in
- (7) MR STOLL Thank you Your Honor
- (8) MR OPPENHEIMER Your Honor and we would move in the
- (9) following exhibits Defendants 16376
- (10) (Exhibit DX16376 offered)
- (11) MR STOLL I don t have any objection
- (12) THE COURT It s admitted
- (13) (Exhibit DX16376 received)
- (14) MR STOLL I couldn t read it before this is the
- (15) first time I ve been able to read it
- (16) MR OPPENHEIMER Defendants 16364
- (17) (Exhibit DX16364 offered)
- (18) MR STOLL No objection
- (19) THE COURT It s admitted
- (20) (Exhibit DX16364 received)
- (21) MR OPPENHEIMER Just to confirm that Defendants
- (22) 15491 is previously been admitted?
- (23) THE COURT 15491? I think I remember it
- (24) THE CLERK It s admitted
- (25) THE COURT Yeah it s in

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- (1) MR OPPENHEIMER Thank you
- (2) Defendants Exhibit 16371
- (3) (Exhibit DX16371 offered)
- (4) MR STOLL What s that?
- (5) That s fine no objection
- (6) THE COURT It s admitted
- (7) (Exhibit DX16371 received)
- (8) MR OPPENHEIMER I believe that s it, Your Honor
- (9) THE COURT Okay
- (10) MR DIAMOND Corrections clarifications?
- (11) THE COURT Clear those exhibits away
- (12) MR DIAMOND We need to confer with counsel We re
- (13) going to try to save ourselves a surrebuttal witness by
- (14) stipulating to a document
- (15) THE COURT I m going to assume you re going to be
- (16) able to do that counsel
- (17) Let s talk about the jury view might as well use this
- (18) time I ve read the memos I understand the positions of the
- (19) parties I d like to know something from you
- (20) Tell me what happened when the federal jury went out for
- (21) their view I mean you didn t even get into some of the
- (22) sites right?
- (23) MR DIAMOND I think they were shut out of some of
- (24) the sites that they planned on going to They did get into -
- (25) MR STOLL Three sites

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- (1) MR. DIAMOND Three sites
- (2) THE COURT Three out of how many?
- (3) MR STOLL Six
- (4) MR DIAMOND Your Honor I don t -
- (5) MR STOLL Three out of six Your Honor
- (6) MR CLOUGH Part of it, the jury chose not to go to
- (7) the last two after seeing the ones that day
- (8) THE COURT They did hey?
- (9) MR DIAMOND I didn t think they d been shut out of
- (10) all three
- (11) THE COURT So anyway you had a planned tour of six
- (12) sites and you only got - you only went into three of them
- (13) whether or not it was the jury's choice One you certainly
- (14) didn t get into right?
- (15) MR DIAMOND One they did not get into because of
- (16) weather
- (17) THE COURT And the protocol that you ve attached to
- (18) your motion is that the - is it the same protocol you re
- (19) asking for now?
- (20) MR DIAMOND The only difference in the protocol that
- (21) we have proposed is that the parties select sites that are
- (22) undisturbed because as you may know from what happened in
- (23) the federal case there was all sorts of frenetic eleventh-hour
- (24) activity to dig up sites to change them and in one instance
- (25) there was mysterious appearances of oily-like substances that

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- (1) hadn t been there two days before the jury was supposed to get
- (2) there
- (3) THE COURT Counsel doesn t that argue against having
- (4) the view?
- (5) MR DIAMOND I don t think so
- (6) THE COURT I mean if the sites can be - if it s
- (7) your view that the sites can be manipulated like that what s
- (8) the point in having the jury go out there?
- (9) MR DIAMOND I think what you ought to do is order
- (10) the parties to select sites and tell them not to manipulate
- (11) sites
- (12) THE COURT Well that s implicit isn t it?
- (13) MR DIAMOND Apparently that was not implicit enough
- (14) in the federal court order and -
- (15) THE COURT I can t imagine you re really accusing
- (16) somebody of taking oil out and dumping it on the sites are
- (17) you counsel?
- (18) MR DIAMOND I m not accusing anybody of that and if
- (19) I created that implication I retract it But what did happen
- (20) was that in a quite open way the plaintiffs dug pits at the
- (21) various sites that were slated for visitation put flags at
- (22) those places and did all sorts of other things to alter the
- (23) normal appearance in a way that had not been sanctioned by
- (24) Judge Holland It just happened
- (25) THE COURT I see

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- (1) MR DIAMOND And what we have suggested is if
- (2) something is going to be done of an experimental nature to
- (3) change the appearance of the terrain that it be done with your
- (4) knowledge and with your approval and not simply done before
- (5) the helicopter lands
- (6) THE COURT Do you contest this proposition - if in
- (7) fact the plaintiffs select sites then if - if you go out to
- (8) the - to the plaintiffs sites and you dig down below the
- (9) surface oil is going to be found do you contest that
- (10) proposition?
- (11) MR DIAMOND Yes
- (12) THE COURT Do you think that they can t select a site
- (13) where you can find oil under the subsurface?
- (14) MR DIAMOND They probably could select a site and
- (15) if they pointed the jury to a - a place that they already know
- (16) about they could find some subsurface oil That s not in
- (17) controversy We know where it is They know where it is And
- (18) if they want to select as -
- (19) THE COURT And you all agree don t you where it
- (20) is?
- (21) MR DIAMOND I don t know I think that probably goes
- (22) too far I don t think the plaintiffs would concur in our list
- (23) of subsurface oiled sites They believe it s much more
- (24) widespread I would imagine
- (25) MR PETUMENOS Well -

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- (1) THE COURT And how many sites do you want to visit
- (2) here?
- (3) MR DIAMOND When we were looking at this wash a
- (4) great - great window of opportunity both tide and daylight
- (5) we suggested a day in Prince William Sound and a day in Kenai
- (6) THE COURT Yes that s why I asked the question about
- (7) the protocol you re not proposing that?
- (8) MR DIAMOND We still are It may be difficult to
- (9) arrange We have - we have a large jury to move That means
- (10) a larger helicopter that puts some constraints on landing If
- (11) you look at the - the windows of opportunity there aren t
- (12) that - aren t that many and we may have to be realistic and
- (13) may not be able to do two days
- (14) THE COURT Tell me what the windows of opportunity
- (15) are
- (16) MR DIAMOND Your Honor I don t have any better
- (17) information than that which I provided you the week before
- (18) last and I think the next low tide coupled with reasonable
- (19) daylight conditions was two days from now I believe it was
- (20) September 9th
- (21) THE COURT So it s Friday you re proposing as the
- (22) time to do this trip?
- (23) MR DIAMOND Well if it can be done that - that
- (24) quickly
- (25) THE COURT You mean you don t think it can?

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- (1) MR DIAMOND I think if you order the parties to get
- (2) it done we will get it done The difficulty is -
- (3) THE COURT Based on your past performance?
- (4) MR DIAMOND - what kind of negotiations are going to
- (5) be conducted you know If everything has to be done by mutual
- (6) concurrence then one side can obviously block and slow down
- (7) and delay and there is a fair amount of lead time I'd have to
- (8) check with my people to see whether if you gave us the green
- (9) light whether we could do it in two days I can't stand here
- (10) and represent that that is possible
- (11) THE COURT Okay
- (12) MR DIAMOND I certainly will inquire
- (13) THE COURT The helicopter which was supposed to be
- (14) gone in mid-August it's here huh?
- (15) MR DIAMOND I can't tell you that because the
- (16) indications that we got - I will find out
- (17) THE COURT I need to know that
- (18) MR DIAMOND I know you do
- (19) THE COURT I need to know it for the record because
- (20) I suspect I will not order this view
- (21) MR DIAMOND I'm sorry?
- (22) THE COURT With all the problems I really suspect
- (23) I'm not going to order this view But I - but the record
- (24) should reflect whether the helicopter's available because if
- (25) the helicopter's not available then you can't -

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- (1) MR DIAMOND It is available
- (2) THE COURT Who says?
- (3) MR CLOUGH We checked with the client as quickly as
- (4) it took the Court to ask We've confirmed that
- (5) THE COURT I want an affidavit to that effect
- (6) counsel
- (7) MR DIAMOND We can get you an affidavit or if you'd
- (8) like I can have Mr Lock who is present in the court state
- (9) on the record the arrangements that have been made
- (10) THE COURT Yes I appreciate that
- (11) MR DIAMOND Do you mind? Your Honor this is George
- (12) Lock of Exxon He was responsible for managing the
- (13) arrangements on the jury view in federal court
- (14) THE COURT Fine thank you
- (15) MR DIAMOND You want to just make a statement about
- (16) the availability of the helicopter
- (17) MR LOCK Indeed the larger Puma helicopter which
- (18) is necessary to transport a group as large as the jury is
- (19) still available
- (20) THE COURT By still available what do you mean
- (21) it's just sitting there waiting for us to go it can go at any
- (22) time?
- (23) MR LOCK Awaiting a decision yes sir
- (24) THE COURT Fine thank you
- (25) MR PETUMENOS May I ask some questions of the

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- (1) gentleman?
- (2) THE COURT No
- (3) MR PETUMENOS I'd like to know what the capacity of
- (4) the helicopter is who gets to go with it
- (5) THE COURT Isn't all that stuff in the motion?
- (6) MR DIAMOND I believe we put it all in the proposed
- (7) protocol
- (8) THE COURT Yes you can ask questions of him but not
- (9) here not now
- (10) MR DIAMOND Your Honor needless to say our very
- (11) strong desire to have that happen has already been expressed
- (12) both orally and in writing The jury collectively has asked
- (13) for that They think it's of some importance
- (14) We will make whatever arrangements necessary to get them
- (15) out to Prince William Sound on whatever timetable you
- (16) establish The practicalities of the situation will give way
- (17) to our strongest desire to make this happen so that ought not
- (18) to be an obstacle
- (19) THE COURT All right thank you Do you want to be
- (20) heard?
- (21) MR PETUMENOS I want to be heard
- (22) THE COURT Make it short counsel
- (23) MR PETUMENOS I will make it very short but I think
- (24) there's some things the Court needs to have in the record about
- (25) this that I think are important

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- (1) First of all the jury view ordered in federal court was
- (2) ordered in Phase Three which is the punitive damages phase
- (3) THE COURT You've briefed on this -
- (4) MR PETUMENOS At this point, some of our logistics
- (5) are that we would need to get - consult with a
- (6) geomorphologist probably Mr Bush or someone from ICF to
- (7) assist us in selecting the sites because unlike in the federal
- (8) court we may have a narrower scope and we own property in
- (9) certain areas and Mr Bush hasn't been in town or his
- (10) commitments are unknown to us at this point, and with the
- (11) amount of time that we have available to us it would be
- (12) problematic to try and determine which sites to go to Plus
- (13) as I think we have briefed the jury view has the potential of
- (14) favoring Exxon's theory of the case which is their theory of
- (15) the case is you look at the surface of the property and
- (16) therefore you determine the nature of the damage that's done
- (17) and we have presented evidence to the contrary which can't be
- (18) observed in a jury view and tends to indicate it would seem to
- (19) me that there is a - by granting the jury view on the part of
- (20) the Court - an indication that Exxon's theory is right, that
- (21) is if you can tell the damage of the beaches by looking at the
- (22) surface of the beach and walking around on it after picking
- (23) three - and we've had a lot of testimony about leaching
- (24) removal of subsurface oil into the environment biological
- (25) evidence and so forth

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- (1) So I think for all the reasons we've described the vast  
 (2) number of acreage and largely different locations the  
 (3) difficulty of getting typical locations both with wave energy  
 (4) and all of those a jury view at this point would do more harm  
 (5) than good plus the potential for mistrial jurors getting  
 (6) hurt jurors having improper contacts  
 (7) This isn't like going down a street and looking at a  
 (8) building This is a hugely complicated process in which our  
 (9) potential for mistrial with 12 jurors left is enormous and I  
 (10) don't think the Court should risk it  
 (11) THE COURT Thank you counsel Anything else?  
 (12) MR. STOLL Your Honor I just add the statements  
 (13) counsel made about the plaintiffs allegedly manipulating sites  
 (14) we take umbrage with that and --  
 (15) THE COURT There's no proof in the record that sites  
 (16) were manipulated  
 (17) MR DIAMOND Your Honor just to respond to one point  
 (18) Mr Petumenos made  
 (19) We've heard a lot of testimony you don't have to dig very  
 (20) deep all you have to do is roll over the rocks and you'll find  
 (21) oil and clearly the federal court jury had the opportunity to  
 (22) roll over rocks and in addition they were each given  
 (23) shovels They were each invited by the parties to go out on  
 (24) even the plaintiffs selected oiled beaches and to dig around  
 (25) to their heart's content and spend as much time as they wanted

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- (1) and in fact, they did do that  
 (2) If there is subsurface oil at any of the locations it's  
 (3) not something that we have any interest in hiding And that's  
 (4) why plaintiffs will be able to select sites as well  
 (5) THE COURT In fact you've admitted there's  
 (6) subsurface oil at locations  
 (7) MR DIAMOND That's true but our desire is to have  
 (8) this jury view what's there in the context, in the context of  
 (9) that environment, and have them assess that assess the  
 (10) consequences and significance of that looking at all of the  
 (11) factors And that's not something that we have been able to  
 (12) replicate in this courtroom despite our most earnest attempts  
 (13) to bring photographs of -- depicting what's out there  
 (14) You simply cannot convey -- I've been out there myself you  
 (15) simply cannot convey some of the things we think you can  
 (16) convey  
 (17) by visiting by looking at pictures and videos  
 (18) THE COURT Tell me what you would convey that you  
 (19) haven't by looking at the documents  
 (20) MR DIAMOND I'm sorry?  
 (21) THE COURT What would it convey The --  
 (22) MR DIAMOND The vastness the remoteness the  
 (23) wilderness nature of that land Even in oiled places that I  
 (24) have been to the significance of what still remains compared  
 (25) to what's out there Putting it in context is simply something  
 that you have to experience in order to completely understand

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- (1) it and I -- I tell you I -- I'm not a fan of helicopters I  
 (2) was not anxious to get on one and tried to avoid this trip but  
 (3) I feel differently about Prince William Sound having been  
 (4) there and having seen this with my own eyes and I think the  
 (5) jury would profit by that same experience  
 (6) THE COURT I appreciate it counsel Thank you very  
 (7) much I've read the briefs in this case and I believe that --  
 (8) that to the extent that an issue on this might have been alive  
 (9) when the opening statements were made the evidence  
 presented  
 (10) at such great length has convinced me that the record's  
 (11) complete with regard to the -- to the positions of both  
 (12) parties I mean if there's any case that I've ever seen that  
 (13) recreates an environment it's this one Exxon has essentially  
 (14) recreated -- and very well I might add no criticism -- has  
 (15) done a wonderful job of presenting this case and that part of  
 (16) that wonderful job is those wonderful photographs  
 (17) I mean if there's anything that shows the vastness of  
 (18) this -- this particular environment and the context in which  
 (19) this dispute takes place it's those photographs and those  
 (20) videotapes and that -- and this incredibly long record of  
 (21) testimony  
 (22) Now if I thought there was some appreciable value to a  
 (23) view I'd certainly order it But frankly I simply don't  
 (24) think that -- that Exxon's established that it's reasonably  
 (25) certain that a jury view will substantially aid the jury in

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- (1) reaching its decision in this case I think they can make that  
 (2) decision based on this huge record that you've created and  
 (3) each one of you has -- has substantial evidence in the record  
 (4) and very graphic evidence in the record concerning the issues  
 (5) that you've raised  
 (6) We also have to remember that the federal case is different  
 (7) than this one and to the extent that the federal judge ordered  
 (8) a view in the punitive phase of the case that's not a part of  
 (9) this case  
 (10) So --  
 (11) MR DIAMOND I know your door is always open for  
 (12) reconsideration if new evidence presents itself  
 (13) THE COURT Not on this one counsel because I don't  
 (14) have the --  
 (15) MR DIAMOND What I was simply going to suggest was  
 (16) that perhaps before you make a final final decision we could  
 (17) arrange to have you go out there without the jury which we  
 (18) could do over the course of the weekend and have you see  
 what  
 (19) we would like the jury to see  
 (20) THE COURT Don't you have some pictures?  
 (21) MR DIAMOND I'm sorry? I didn't hear you  
 (22) THE COURT Don't you have some pictures?  
 (23) MR DIAMOND Not taken through your eyes  
 (24) THE COURT Well I've seen it out there counsel I  
 (25) know what it's like Is there some specific thing that you

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- (1) want me to see that s somehow going to tip the scales?  
 (2) MR DIAMOND I don t think there s some specific  
 (3) thing no I think it would be the general experience would  
 (4) tip the scales  
 (5) THE COURT I doubt that counsel but thank you for  
 (6) the invitation  
 (7) MR DIAMOND Assuming that decision what - what do  
 (8) you plan on telling the jury?  
 (9) THE COURT Well I plan on telling them that I know  
 (10) that they ve made a request it s my determination that they  
 (11) wouldn t be substantially aided by a jury view in this case and  
 (12) that s - and they shouldn t hold it against either party  
 (13) because it s my decision  
 (14) MR DIAMOND Very good  
 (15) THE COURT And I would propose to do that today so  
 (16) that they don t think that somehow they re going to be going  
 (17) out there  
 (18) All right let s talk about Mr Robertson  
 (19) MR PETUMENOS Okay Does anybody have a white towel  
 (20) out here I can throw into the middle of the courtroom?  
 (21) THE COURT I ll get you one  
 (22) MR PETUMENOS I throw in the towel We can t locate  
 (23) him There s no reasonable prospect we will within the time  
 (24) frame you have provided us We are out of luck  
 (25) THE COURT Tough luck counsel

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- (1) So - so prior ruling is still in effect but there s an  
 (2) additional reason and a very compelling reason and that s the  
 (3) witness can t testify  
 (4) MR PETUMENOS Got me there Judge  
 (5) THE COURT Now what else?  
 (6) MR PETUMENOS Well since we have ten minutes before  
 (7) the jury comes back I am getting concerned about  
 (8) instructions I had asked for an exchange of instructions with  
 (9) Exxon Friday  
 (10) THE COURT Let me make a proposition and see if it s  
 (11) acceptable to you  
 (12) MR PETUMENOS Please  
 (13) THE COURT We ve got time this afternoon I think I  
 (14) have a clear calendar Who s going to be doing the  
 (15) instructions in this case? Who s going to be discussing it  
 (16) with me? I need to know  
 (17) MR PETUMENOS I will  
 (18) MR OPPENHEIMER And I will  
 (19) THE COURT And who else?  
 (20) MR OPPENHEIMER Mr Petumenos and I  
 (21) THE COURT Okay so now -  
 (22) MR OPPENHEIMER Perhaps I should withdraw -  
 (23) THE COURT There are two of you going to be  
 (24) discussing jury instructions Implicitly those representations  
 (25) are that Mr Diamond will not get up after the packet is done

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- (1) and say But I want more and Mr Stoll will not come in and  
 (2) say Mr Petumenos didn t talk to me but I wanted another  
 (3) instruction Because if we are going to discuss these things  
 (4) and if we are going to work them out you have to have the  
 (5) authority from everybody on your teams to make the decisions  
 (6) and to live with them  
 (7) Do you have that?  
 (8) MR STOLL Your Honor he will have it at the time  
 (9) that he makes the statements If I m not there he will have  
 (10) the - our authority  
 (11) THE COURT Well I mean I m really serious about  
 (12) this counsel  
 (13) MR STOLL I agree with you completely  
 (14) THE COURT I do not want to field something -  
 (15) MR STOLL No I m being perfectly candid with you  
 (16) I think that that is the situation  
 (17) The issue - you recall the only thing that came up on this  
 (18) Robertson thing that came up today was I didn t know about  
 this  
 (19) objection - you know lack of objection being the basis for  
 (20) keeping Robertson s testimony out and that s the only reason  
 (21) Mr Petumenos didn t come over  
 (22) THE COURT This is not the only time it s happened  
 (23) counsel I just wanted to make it very clear that you re under  
 (24) certain conditions here When I discuss instructions with two  
 (25) lawyers in the case it has to be because the parties

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- (1) understand that I m discussing it with them alone and there s  
 (2) no reconsideration on the basis of somebody voluntarily stayed  
 (3) out of the room  
 (4) MR STOLL We understand  
 (5) THE COURT Now what I suggest is we get together for  
 (6) a brief discussion of the format of the discussions this  
 (7) afternoon off the record I don t intend to discuss substance  
 (8) with you because the Supreme Court doesn t like that I ll  
 (9) discuss substance with you on the record but I do want to show  
 (10) you what I normally use the format I use and see whether or  
 (11) not you have any questions that I can help you with And at  
 (12) that point I m going to - I m going to see whether or not -  
 (13) some productive work can be done to get a basic packet today,  
 (14) and then deal with this - with the substantial controversy in  
 (15) the ensuing two days Okay?  
 (16) MR PETUMENOS That s fine, Judge What I was going  
 (17) to suggest if you think it s productive is we now have our  
 (18) proposed instructions both parties Is there any reason now  
 (19) at this point to file them with the Court so you have an  
 (20) idea -  
 (21) THE COURT No there s no reason. The only reason I  
 (22) can think of would be that it is set - it might set an  
 (23) adversarial tone that s not necessary I mean, every time you  
 (24) file something and there s a counter-filing in this case, and I  
 (25) think what is this all about why are these people arguing and

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- (1) then I say it I mean 50 percent of the time you don't argue  
 (2) anymore  
 (3) I don't - I'd like to have that be the - the way we  
 (4) handle this one too  
 (5) MR PETUMENOS So the answer is no don't file them  
 (6) or -  
 (7) THE COURT Do you have them? Do you have them with  
 (8) you?  
 (9) MR PETUMENOS Yes  
 (10) MR FORTIER We have them - not with us we can have  
 (11) them by 1 00  
 (12) THE COURT I'm going to be letting the jury go soon  
 (13) so by - at 1 30 you can each - you can each bring the packets  
 (14) over and I'll meet with the two of you  
 (15) MR PETUMENOS What time Judge?  
 (16) THE COURT 1 30 I'll meet with you in chambers at  
 (17) 1 30  
 (18) MR PETUMENOS Then we need a short period of time I  
 (19) think to finish the exhibits up probably half an hour or so  
 (20) THE COURT Yes that's fine I can do all that  
 (21) today  
 (22) MR DIAMOND You want to take exhibits up this  
 (23) afternoon?  
 (24) THE COURT This afternoon would be fine  
 (25) MR STOLL Your Honor can we do the exhibits

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- (1) tomorrow?  
 (2) THE COURT No I want to do them today Get the  
 (3) exhibits done and we can get on to the motions and on to the  
 (4) instructions I want to have these instructions finalized by  
 (5) Friday  
 (6) MR PETUMENOS I'd be willing to work hard on them  
 (7) tomorrow because to the extent any party wants to - I don't  
 (8) have a graphic artist down the hall so to the extent anybody  
 (9) wants to prepare the final and the weekend hits us the earlier  
 (10) we have the final instructions the better  
 (11) THE COURT I agree if we can do it on Thursday  
 (12) that's great  
 (13) MR DIAMOND Your Honor we do have one potential  
 (14) rebuttal witness on a plane right now that we're hoping to  
 (15) avoid We're not in a position to tell you that until we sit  
 (16) down with Mr Stoll and show him what we want in evidence  
 (17) THE COURT How long will that take?  
 (18) MR DIAMOND Ten minutes  
 (19) THE COURT Okay, I can give you ten minutes  
 (20) THE CLERK Please rise This court stands in  
 (21) recess  
 (22) (Recess from 12 25 p m to 12 48 p m )  
 (23) (Jury out at 12 48 p m )  
 (24) THE CLERK Please rise This court now resumes its  
 (25) session Please be seated

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- (1) MR OPPENHEIMER Your Honor the matter we attempted  
 (2) to work out involves a piece of testimony which is very short  
 (3) and we think held the potential for being stipulated to since  
 (4) it's based on public records It is a - it is data that  
 (5) supports the following chart which I can show Your Honor - I  
 (6) can put it on the Elmo as well  
 (7) Your Honor this is taken from the state taxable revenue  
 (8) reports and what it shows is that if you take the Kodiak and  
 (9) Kenai remote areas and plot them out that what you get is that  
 (10) they go up after the oil spill and they go up actually at a  
 (11) faster rate over the - the overall oiled areas although they  
 (12) go up too and over the unoled areas interestingly which go  
 (13) up the least fast of all the assessed areas  
 (14) The other piece of testimony we hoped we could stipulate to  
 (15) through the introduction of some parts of Mr Shorett's  
 (16) appraisal in the class action which is referred to and the  
 (17) methodology of which is expressly incorporated in his two page  
 (18) report in this case is simply the manner in which he handled  
 (19) the comps that Mr Carlson testified to today where he - as  
 (20) you'll recall I couldn't go into it because I had a foundation  
 (21) objection on that line of questions  
 (22) And we - we do feel it's useful testimony important  
 (23) testimony and apparently the plaintiffs position is we're  
 (24) going to have to bring Mr Papke back from Chicago to do that  
 (25) I bet you it won't take more than 10 or 15 minutes but it

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- (1) would appear that that -  
 (2) THE COURT Where is he?  
 (3) MR OPPENHEIMER Right now because I had to make a  
 (4) judgment in the middle of the conversations he is on an  
 (5) airplane winging his way here I can't stop that from  
 (6) happening but I can certainly turn him around and send him  
 (7) home  
 (8) if we could find some other solution I had hoped to not have  
 (9) him leave Chicago at all but we had no choice  
 (10) THE COURT Tell me what the proposed stipulation is  
 (11) MR OPPENHEIMER Our proposed stipulation is that  
 (12) Mr Carlson review the materials the 1006 materials behind  
 (13) the - behind the chart we believe it's taken right out of  
 (14) that and that we just have a stipulation that this chart can  
 (15) go in with a description that they come from the public  
 (16) records which they do and that - that a number of pages  
 (17) about six pages from Mr Shorett's comp base in his report  
 (18) come in just so we can argue later that Mr Shorett dealt with  
 (19) the same comps that Mr Carlson did on his chart more the way  
 (20) we did - in fact the way we did rather than the way  
 (21) Mr Carlson did That's all we wanted to do  
 (22) MR STOLL Your Honor I'm not trying to be an  
 (23) obstructionist here but I just was shown this just when we  
 (24) broke about 20 minutes ago I've never seen this exhibit  
 (25) before  
 (26) Let me - these are two different issues



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- (1) First of all I don't know what the 1006 backup is but  
 (2) assuming that the backup is I don't know what the definition  
 (3) of oiled areas is There is a - I assume that when they are  
 (4) referring to Kenai quote remote that they're referring to  
 (5) Tax Code Area 67 and for Kodiak they're talking about Tax  
 Code  
 (6) Area 5 But I don't know that I don't have the backup to  
 (7) confirm whether those numbers are correct  
 (8) I think there's an issue about the explanation which I'd  
 (9) want to - if in fact these numbers are correct I'd want to  
 (10) recall Mr. Carlson to explain why these numbers are - or a  
 (11) witness to explain what these - why these numbers changed  
 (12) They've had our exhibits they've known the line of our  
 (13) examination for Mr. Carlson since last Friday  
 (14) And in fact I think - I think most of this they've had a  
 (15) week ago Friday  
 (16) THE COURT What do you want me to do?  
 (17) MR. STOLL Well I object to this exhibit I  
 (18) can't - I can't stipulate to it I mean that's the problem I  
 (19) have  
 (20) THE COURT So I have to bring them in tomorrow  
 (21) MR. OPPENHEIMER I have a suggestion which may avoid  
 (22) that  
 (23) MR. STOLL There's a separate problem with the other  
 (24) exhibits Your Honor  
 (25) MR. OPPENHEIMER I have a suggestion which may cover

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- (1) both which as Mr. Stoll is talking occurred to me  
 (2) Mr. Stoll's premise is correct Kodiak remote is TCA 5 and  
 (3) Kenai remote is TCA 67 I would be prepared - I know  
 (4) Mr. Carlson is still here - to see if I can't elicit the two  
 (5) bottom lines I would forego the top of the chart if I would  
 (6) have counsel's permission to question him on the bottom of the  
 (7) chart to show that they correspond to the public documents  
 (8) which I have here And then Your Honor as to the parts of  
 (9) the Shorett report which we'd like to get if we can have a  
 (10) stipulation - which assume we'll have no trouble with that  
 (11) those are authentic then I would reserve the right to argue  
 (12) before you that they're properly admissible as exceptions to  
 (13) the hearsay rule as party statements same basis we had with  
 (14) the Katzke tape  
 (15) I win or lose that - I believe I'll win it but I don't  
 (16) believe I need to bring Mr. Carlson back for that and I  
 (17) believe by that way we can avoid having to have the jury back  
 (18) tomorrow  
 (19) Now I forego part of my chart which I'd like to keep and  
 (20) it does require a stipulation with respect to foundation  
 (21) Really the authenticity of the Shorett report which I can't  
 (22) imagine is a problem  
 (23) MR. STOLL Your Honor I don't object to the  
 (24) authenticity of the Shorett if that - that is in fact the  
 (25) Shorett report The problem is I don't think it's proper

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- (1) surrebuttal They've gotten certain work pages of it -  
 (2) THE COURT Isn't this part of the cross-examination  
 (3) counsel?  
 (4) MR. STOLL They asked him - the witness had never  
 (5) seen the Shorett report and Mr. Shorett when he did - this  
 (6) is the - this is his class appraisal He did an appraisal of  
 (7) 1500 parcels and he - in doing that appraisal they took 180  
 (8) comparables they made certain adjustments they were not  
 (9) making adjustments to a particular parcel they were making  
 (10) adjustments in a - in a more or less a mass way and the  
 (11) adjustments were made in the context of that report  
 (12) To just say Well there was an adjustment made it wasn't  
 (13) the same adjustment you made Mr. Carlson is totally mixing  
 (14) apples and oranges because Mr. Carlson made adjustments in  
 (15) connection with a specific parcel  
 (16) In other words you could have two - two parcels and one  
 (17) parcel could be identical to the other parcel but if you're  
 (18) not comparing this parcel and this parcel and you're  
 comparing  
 (19) some other parcel up here you may have to make an  
 adjustment  
 (20) with respect to the price paid for this in connection with  
 (21) that So you can't say that the - what is adjusting for one  
 (22) is adjusting for - for some other parcel  
 (23) THE COURT This is what Mr. Carlson would say?  
 (24) MR. STOLL I don't think Mr. Carlson has ever seen  
 (25) this - this sheet - I'm not talking about this document. I'm

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- (1) talking about the piece of the Shorett thing I don't think  
 (2) he's ever seen that He doesn't know what the methodology  
 (3) was  
 (4) So I don't think that he can make a statement as to you  
 (5) know what the purpose of that was and so on I mean The  
 (6) only person who can do that really is Mr. Shorett to explain  
 (7) what he was doing  
 (8) If they wanted to examine him - and incidentally the  
 (9) documents that they want to examine him on this is another  
 (10) reason why I don't think it's proper surrebuttal is  
 (11) Mr. Shorett's report on Onion Bay parcels which were known to  
 (12) them when Mr. Shorett was on the witness stand - Mr. Shorett  
 (13) followed Mr. Carlson Mr. Carlson's testimony on Onion Bay  
 has  
 (14) been - the only thing that's new now is the June 1985  
 (15) transaction - the Onion Bay one was that new transaction that  
 (16) Mr. MacSwain used that was not -  
 (17) THE COURT Well and the implication from  
 (18) Mr. Carlson's testimony that all of Exxon's case with regard to  
 (19) the graphic exhibits they presented didn't take into account  
 (20) the remote market right?  
 (21) MR. STOLL That's -  
 (22) THE COURT Isn't this exhibit going to that issue?  
 (23) MR. STOLL We're talking about a different exhibit  
 (24) now Your Honor I'm sorry but -  
 (25) THE COURT What?

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- (1) MR STOLL We re talking about a different exhibit  
 (2) THE COURT I m talking about this one  
 (3) MR STOLL This one right in front of us?  
 (4) THE COURT Yes  
 (5) MR STOLL No On this one I think if the figures  
 (6) here are accurate according to - I mean if we had an  
 (7) opportunity to look at the 1006 backup for this and then have  
 (8) Mr Carlson explain that I think - I think that may be okay  
 (9) I don t know that this is really proper surrebuttal though  
 (10) because -  
 (11) THE COURT Doesn t make any difference if in fact it  
 (12) was a proposition is Mr Carlson takes the stand and you don t  
 (13) object right?  
 (14) MR STOLL That s correct Your Honor  
 (15) Could I just have a moment to find out if this -  
 (16) THE COURT Sure  
 (17) MR STOLL I just saw this document for the first  
 (18) time 15 minutes ago  
 (19) THE COURT I m not faulting you counsel  
 (20) (Discussion off record between counsel)  
 (21) MR STOLL Could I have a few minutes Your Honor?  
 (22) THE COURT What s the few minutes counsel?  
 (23) MR STOLL I m sorry?  
 (24) THE COURT What is a few minutes??  
 (25) MR STOLL I just don t know I ve got to go through

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- (1) the tax things to see what the basis -  
 (2) MR OPPENHEIMER It s really it shouldn t take long  
 (3) TCA 5 a number a year  
 (4) THE COURT I know it shouldn t take too long but it  
 (5) shouldn t have taken too much time the last time I took a  
 (6) recess  
 (7) MR OPPENHEIMER I understand  
 (8) THE COURT Yes you can have a few minutes  
 (9) THE CLERK Please rise This court stands in  
 (10) recess  
 (11) (Recess from 12 58 p m to 1 07 )  
 (12) THE CLERK Please rise This court now resumes in  
 (13) session Please be seated  
 (14) MR OPPENHEIMER Your Honor Mr Stoll has agreed to  
 (15) stipulate to the authenticity of two documents which we can  
 (16) read the page numbers in There aren t that many after the  
 (17) remaining testimony and that I may call Mr Carlson back to  
 (18) confirm that the bottom part of the graph I showed earlier -  
 (19) and I ll just put the bottom part on the Elmo - is an accurate  
 (20) depiction of what the public tax records show The trend was  
 (21) for TCA 67 in the case of Kenai remote and TCA 5 in the case  
 (22) of Kodiak remote Mr Stoll then has some questions for  
 (23) Mr Carlson on this  
 (24) MR STOLL It s going to be limited to that  
 (25) THE COURT So we can expect about ten more minutes

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- (1) right?  
 (2) MR OPPENHEIMER Mine will take as long as it takes  
 (3) me to say what I just said  
 (4) MR STOLL Your Honor as far as this is concerned  
 (5) we still object to these exhibits being - going into  
 (6) evidence I don t know that -  
 (7) THE COURT I can handle that I don t need to have  
 (8) the jury here for that  
 (9) MR OPPENHEIMER That s correct We can argue that  
 (10) and -  
 (11) THE COURT Okay let s bring the jury in  
 (12) THE COURT Mr Carlson is he here?  
 (13) (Jury in at 1 10 p m )  
 (14) THE COURT You can be seated The answer to that  
 (15) question is we have about five minutes more on testimony that  
 (16) needs to be put into the record and then I m going to let you  
 (17) go for the day and I ll tell you what ll happen next as soon  
 (18) as I get the testimony in the record All right?  
 (19) Go ahead  
 (20) CONT D RECROSS REBUTTAL EXAMINATION OF PAT  
 CARLSON  
 (21) BY MR OPPENHEIMER  
 (22) Q Mr Carlson thanks  
 (23) Mr Carlson I m showing you what by stipulation of the  
 (24) parties is Exhibit 16362 which shows the two trend lines one  
 (25) for Kenai remote and one for Kodiak remote Based upon your

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- (1) review of the public records underlying Exhibit 16362 does it  
 (2) accurately reflect the values of - assessed values of in the  
 (3) case of Kenai remote Tax Code Area 67 in the case of Kodiak  
 (4) remote tax code area 5?  
 (5) A It doesn t show the assessed values It shows the percent  
 (6) change from 89 to 90 as a total But the graph seems to  
 (7) adequately depict to some degree that change  
 (8) Q But it depicts the percentage change after the spill for  
 (9) the years shown on the graph?  
 (10) A I m confused by that question I don t know -  
 (11) Q You ve reviewed the public records underlying this graph  
 (12) Exhibit 16362?  
 (13) A Yes I have  
 (14) Q And does this graph accurately depict the percentage  
 change  
 (15) in the assessed values in the Kenai remote area and Kodiak  
 (16) remote area defined as - Kenai remote is Tax Code Area 67 and  
 (17) Kodiak remote is tax code area 5?  
 (18) A It is a depiction It s not what I might choose to use  
 (19) but -  
 (20) Q But it is accurate?  
 (21) A It seems to be yes  
 (22) MR OPPENHEIMER No further questions  
 (23) FURTHER REDIRECT REBUTTAL EXAMINATION OF PAT  
 CARLSON  
 (24) BY MR STOLL  
 (25) Q I just have a few questions

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- (1) In the case of Kenai remote by 1990 the assessed values  
 (2) were still lower than they were in '88?  
 (3) A That's correct  
 (4) Q And with respect to Kodiak during - showing this  
 (5) increase was there - was there some timber land that had not  
 (6) previously been assessed?  
 (7) A During 1989 which would have been my work that produced  
 (8) the assessed values of 1990 I worked in the remote areas I  
 (9) did put on the tax roll quite a substantial sum for ANCSA  
 (10) timber lands that had been harvested that were taxable under  
 (11) the law that had not previously been assessed I put on all  
 (12) the properties in the annexed area that was where we spoke  
 (13) about the borough doubling in size and also as I recall I  
 (14) did some re-evaluation on the grazing leases and also  
 (15) incorporated into this would have been the re-evaluation for  
 (16) the village of Old Harbor  
 (17) Q There was about \$4 million of timber lands on Afognak  
 (18) timber lands had not previously been assessed?  
 (19) A Yeah there was something like four or five million  
 (20) Q And there was a reappraisal of Old Harbor?  
 (21) A Yes  
 (22) Q And some grazing leases?  
 (23) A Correct  
 (24) Q And then there was a doubling of the size of Kodiak Borough  
 (25) as well?

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- (1) A That's correct Also there was a series of developed  
 (2) properties which were taxable under the law that previously had  
 (3) not been on the role also  
 (4) Q I'm sorry I didn't hear you  
 (5) A There is a series of what we - ANCSA properties that were  
 (6) developed or leased that were subject to taxation that  
 (7) previously had not been on the roll  
 (8) Q And do you know whether Native-exempt properties in Kenai  
 (9) those would not be - be included in the Kenai remote  
 (10) definition for TCA 67 that wouldn't be in the assessed value?  
 (11) A That's correct I don't know you know that specifically  
 (12) but generally they follow the same rules that I do  
 (13) MR STOLL Thank you very much That's all  
 (14) MR OPPENHEIMER No further questions Your Honor  
 (15) THE COURT You can step down Mr Carlson Again  
 (16) thank you  
 (17) (The Witness Stepped Down)  
 (18) THE COURT Okay I'm going to let you go in a minute  
 (19) and I want to give you sort of a sketch of what happens in the  
 (20) next three or four days  
 (21) As I said this concludes the evidence the evidence in the  
 (22) case I still have to let a number of exhibits in and make  
 (23) rulings on some exhibits and I have to decide a number of  
 (24) legal questions in the next couple of days so that I can  
 (25) determine what the appropriate instructions legal instructions

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- (1) I'll give you are  
 (2) There's one thing I want to discuss with you now and that's  
 (3) the - that's your request to go out and see the scenes that  
 (4) were involved in this case That's a frequent request usually  
 (5) the jury doesn't make it, but the parties do  
 (6) In this case based on the entire record that I have before  
 (7) me including all - this trial everything that's happened at  
 (8) this trial I've decided that a jury view wouldn't be  
 (9) appropriate  
 (10) There are a number of reasons why I've decided that  
 (11) Essentially I've decided it wouldn't be of substantial  
 (12) assistance to you  
 (13) There are also some fairly formidable logistical problems  
 (14) I've taken into consideration in determining whether or not a  
 (15) view would take place It would be a two-day process I'd like  
 (16) you to understand that And I'm really convinced that it  
 (17) wouldn't be of substantial assistance to you in the context of  
 (18) this case  
 (19) So I've determined that there won't be a trip to the Sound  
 (20) to see these scenes and I want you to understand that that's  
 (21) my decision it's not the parties' decision it's mine and the  
 (22) law puts that decision in my hands I simply have to determine  
 (23) whether or not it would be appropriate to send you out to  
 (24) scenes like this or scenes in any case And I've determined  
 (25) that it would not so don't hold it against any of the parties

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- (1) in this case because it is not their decision.  
 (2) The other thing I want to explain to you is - I've given  
 (3) you this instruction throughout this case - don't discuss this  
 (4) case with anyone else including your fellow jurors and don't  
 (5) form or express any opinion on it until it's submitted to you  
 (6) for deliberation It's not submitted to you for deliberation  
 (7) yet we still have to prepare the instructions, that's a fairly  
 (8) formidable task too and you have to hear the final arguments -  
 (9) of the parties which are going to be substantial in length and  
 (10) they can be very helpful to you I'll explain more in detail  
 (11) about what - what final arguments are and what they are not  
 (12) when you hear them on Monday  
 (13) But this case is not over so it's not time for you to be  
 (14) discussing it with anybody including your fellow jurors and  
 (15) it's certainly not time for you to get your minds set in a  
 (16) final opinion as to any of the issues in this case So be  
 (17) diligent about observing that admonition It's extremely  
 (18) important There's more to come and what's coming is  
 (19) important  
 (20) I'd also like you to understand one other thing Of course  
 (21) you know because it's been mentioned a number of times while  
 (22) we've been trying this case that there's another trial going  
 (23) on in the federal court Now that jury is deliberating right  
 (24) now and they may very well come to a decision on the issues  
 (25) that are presented to them between now and Monday You  
 have to

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- (1) be really diligent about avoiding media information in these  
 (2) next few days So avoid the television when the news stories  
 (3) or anything like that that may come from the federal court's  
 (4) decision Stay away from the papers if you see a headline  
 (5) that arguably leads you into information about this or any  
 (6) other - or the federal trial  
 (7) Now there could be some articles in the paper about either  
 (8) one of these trials It's very important that you remember not  
 (9) to read them We all know that what you read in the papers is  
 (10) not what you should be basing decisions on in this case and  
 (11) we  
 (12) also know because I've instructed you before that the issues  
 (13) in the federal court are different than the issues in this  
 (14) case And you're only going to be deciding this case based on  
 (15) the evidence you've heard after you've - after you get all of  
 (16) the instructions and the final arguments of the parties  
 (17) So I'm going to let you go now You're not in session  
 (18) tomorrow and you're not in session on Friday I want you to  
 (19) come in at 9:00 on Monday and you'll hear the final arguments  
 (20) of the parties I haven't discussed the format of those final  
 (21) arguments nor the length with the parties yet but I will tell  
 (22) you when you come in on Monday what you can expect how  
 (23) much -  
 (24) how long they will probably be and - and then what happens  
 (25) next Okay  
 (26) Now I ask with some trepidation are there any questions?  
 (27) All right I'll let you go

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- (1) JUROR WALLINGFORD When we go into deliberation how  
 (2) long a day is that?  
 (3) THE COURT That's a full day It's no longer an  
 (4) 8:30 to 1:30 trial day So you'll - if you go out in the  
 (5) afternoon on Monday I will preset a time for you to be - to  
 (6) recess your deliberations and then to come back the next day at  
 (7) 8:30 You'll deliberate then from on your own schedule  
 (8) because essentially you're the bosses at that point  
 (9) You'll deliberate until you come to a decision so I will  
 (10) not keep you here for 18 hours a day I'll make sure you get  
 (11) to go home at a reasonable hour and always with the  
 (12) admonition  
 (13) that you not discuss the case while you're out of the jury  
 (14) room but we'll set a reasonable schedule for you but it is a  
 (15) full day You'll be deliberating in the afternoons Okay  
 (16) anything else?  
 (17) Is there something else?  
 (18) JUROR BENNETT Monday is a full day?  
 (19) THE COURT Monday will be a full day Surely Monday  
 (20) will be a full day The arguments will take a substantial  
 (21) amount of time  
 (22) Okay thank you very much  
 (23) (Jury out at 1:20)  
 (24) THE COURT Counsel one other thing The issue of  
 (25) the jury view I gave a shorthand version of the decision that  
 (26) I made on that issue but I - I do want you to know one

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- (1) thing  
 (2) I read the briefs in this case I felt that the  
 (3) plaintiff's presentation was very good I mean it was  
 (4) concise but it hit all the issues I could think of and  
 (5) frankly I - all of those reasons are good reasons for me not  
 (6) to grant a jury view in this case let alone the substantial  
 (7) logistical problems  
 (8) I mean it's the whole aspect it's all of the plaintiff's  
 (9) objections I thought were well taken And it's for the other  
 (10) reasons that I've also put on the record that I think the jury  
 (11) view is not appropriate in this case  
 (12) Okay what remains?  
 (13) MR OPPENHEIMER Your Honor I'd like to move in at  
 (14) this time Defendants 16362 which we had Mr Carlson's  
 (15) testimony on  
 (16) (Exhibit DX16362 offered)  
 (17) THE COURT Yes admitted  
 (18) MR STOLL There's no objection  
 (19) (Exhibit DX16362 received)  
 (20) MR OPPENHEIMER And I'd also like to move in those  
 (21) pages of the Shorett report which we've identified They're  
 (22) currently identified as Defendants Exhibit 15614 and 16413  
 (23) those being respectfully Volume One of the real property  
 (24) damage  
 (25) estimate dated February 20 1993 by Larry K Shorett and  
 (26) Volume Two of the same report

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- (1) (Exhibits 15614 and 16413 offered)  
 (2) THE COURT Could I see them? I need to read them  
 (3) MR OPPENHEIMER Yes  
 (4) THE COURT Okay I've read them Now what?  
 (5) MR STOLL Okay Your Honor I think that these few  
 (6) pages of this report - both these reports are very lengthy  
 (7) Here's the - you get some idea of the size of the reports  
 (8) What they have done is they have taken out of context a few  
 (9) pages of - apparently I haven't looked at all of them but I  
 (10) think that they all relate to certain properties and they're  
 (11) going to argue apparently something from these pages I  
 (12) assume or they wouldn't want them in evidence  
 (13) I don't know frankly what all these pages mean I didn't  
 (14) quarrel with the fact that this is from Mr Shorett's report  
 (15) but Mr Shorett was doing as I mentioned earlier and we - I  
 (16) think we got some confusion here about what I was arguing  
 (17) about  
 (18) earlier he was doing an appraisal for - in a class case  
 (19) This was from the class action case not in our case at  
 (20) all He did not do an appraisal in our case This is an  
 (21) appraisal done in the class action in federal court involving  
 (22) 1500 parcels of property not including the Kodiak Island  
 (23) Borough parcels  
 (24) Now the significance of that Your Honor is - if I can  
 (25) just draw on this board here for just a second  
 (26) If you've got a parcel let's call this a KIB parcel here

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- (1) Let s just assume that KIB had one parcel And then you ve got
- (2) a series of comparables out here kept in this case there s
- (3) 150 of them in the class action appraisal that was done If
- (4) you were trying to use these - some of these same comparables
- (5) with respect to this piece of property you might make certain
- (6) adjustments to these various comparables I mean some might
- (7) be identical to this or in the view of the appraiser some may
- (8) require a certain kind of adjustment as it relates to this
- (9) parcel some may have a different kind of adjustment
- (10) If you ve got other parcels out here which I m just for
- (11) the sake of argument going to call these the class parcels
- (12) there were 1500 of them you might make different adjustments
- (13) with respect to these - in other words this is a relative
- (14) matter It s - the adjustments are made relative to the
- (15) particular piece of property that s being appraised It s not
- (16) a - it s not an adjustment in the - you know it s not an
- (17) abstract adjustment that can only be made in - or in -
- (18) without relationship to a particular parcel That s what the
- (19) whole idea of the adjustment is because you re trying to make
- (20) these similar to them
- (21) So there s a substantial chance - again I don t know what
- (22) this - these documents exactly mean I mean I ll agree that
- (23) they came from Mr Shorett s report in the class case that s
- (24) all I ve agreed to but I don t know what you can possibly draw
- (25) from that because he makes an adjustment on one parcel and

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- (1) doesn t make an adjustment on another parcel because he is -
- (2) he is valuing these 1500 parcels and he s not - he s not doing
- (3) the KIB parcels He specifically wasn t doing those
- (4) So it s impossible - I don t know what the relevance is I
- (5) don t know how this goes to surrebuttal I don t know the
- (6) context of this I just think it s - it s - it s not proper
- (7) surrebuttal and I don t think it s relevant and I think it s
- (8) confusing It s going to add tremendous confusion to the jury
- (9) and I think it s - well I think it s objectionable
- (10) THE COURT I hear you
- (11) MR OPPENHEIMER Your Honor even if all of this were
- (12) correct the fact is that we have a statement from Mr Shorett
- (13) in those pages that he s taken a look at the same comparables
- (14) that Mr Carlson looked at and he valued it differently He
- (15) valued them the way our appraiser does and he s their
- (16) appraiser
- (17) and under the rules - which I think the rule s clearly
- (18) applicable here but if there s any question I m going to
- (19) defer to my partner who knows that rule like the back of his
- (20) hand where I don t -
- (21) MR DIAMOND Or the back of something else
- (22) MR OPPENHEIMER Or the back of something else
- (23) But to the extent that Mr Stoll wants under 106 to put
- (24) something in from the report that s fine but it s very
- (25) straightforward
- (26) Mr Shorett went out looked at - looked at comparables

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- (1) and included the comparables that Mr Carlson testified to
- (2) today and his take on them was the same as our appraiser s
- (3) take on them and we want to be able to make that point
- (4) This is a party statement that goes our way and before
- (5) today Mr Carlson never treated these comparables differently
- (6) either
- (7) THE COURT Thanks
- (8) MR PETUMENOS Judge I have some interest in this
- (9) because of the way it s being used case-wide The issue of
- (10) party statements favoring another side from a report has been
- (11) raised only about six or eight times now We had it with
- (12) Dr Mundy s report we had it with Dr - Mr Dorchester s
- (13) report and we talked about putting in section three remember
- (14) from the Mundy report in order to make it - make it in
- (15) context
- (16) I think the consistent ruling throughout the case has been
- (17) it s been in the record you re allowed to argue it but you re
- (18) not putting parts of the reports into the jury There s not
- (19) one part of a report of an appraiser s report that I know of at
- (20) this point that s going into the jury room
- (21) MR OPPENHEIMER There - the data sheets for a
- (22) number of the reports are going in plus we have two articles
- (23) MR PETUMENOS The summary reports have gone in but
- (24) if you recall we had the - I think the record will reflect
- (25) that the Court said This should guide how you handle requests

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- (1) to admit reports in the future
- (2) We were talking about the interviews that were done with
- (3) the federal government and the market and it was the issue I
- (4) want to put the whole Chapter Three in
- (5) I had a similar page that was an admission that favored my
- (6) case in the Dorchester report and I haven t pursued it because
- (7) I - rather like Mr Diamond says he listens and I m trying to
- (8) listen and I think what I heard was the pages from the report
- (9) are not to become real evidence into the jury -
- (10) THE COURT Yes if they re otherwise in the record
- (11) MR PETUMENOS And I don t understand why this isn t
- (12) I guess
- (13) MR STOLL Your Honor -
- (14) THE COURT Because nobody s testified about it
- (15) Right?
- (16) MR OPPENHEIMER I m sorry Your Honor?
- (17) THE COURT Because nobody s testified to put it in
- (18) the record right?
- (19) MR OPPENHEIMER Your Honor it can go in because
- (20) it s an authentic statement
- (21) THE COURT No no that s not what I said You can
- (22) review the record and see if I m right about this but when I
- (23) refused to put parts of the reports in generally it s because
- (24) the witness testified to the substance of the report and the
- (25) evidence is in the record

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- (1) MR OPPENHEIMER That s exactly of course the  
 (2) distinction yes  
 (3) MR STOLL Your Honor I think Mr Petumenos  
 (4) objection is well taken but that s not the basis of my --  
 (5) THE COURT I hear you  
 (6) MR STOLL I mean everything is relative here and  
 (7) if they wanted to cross --  
 (8) THE COURT Most admissions are relative counsel  
 (9) Isn t that the nature of them?  
 (10) MR STOLL No this is not an admission though Your  
 (11) Honor  
 (12) THE COURT It s an admission of a party opponent  
 (13) isn t it?  
 (14) MR STOLL No I don t believe it is Your Honor  
 (15) Because here s the thing If Mr Shorett had done an appraisal  
 (16) of the KIB parcel --  
 (17) THE COURT Wait a minute What was Mr Shorett what  
 (18) was his job?  
 (19) MR STOLL When he did this report here? His job was  
 (20) to appraise certain parcels in the class not including Kodiak  
 (21) Island Borough He was not -- this -- this statement was not  
 (22) made as a -- as an expert for Kodiak Island Borough It s not  
 (23) even an admission of the Kodiak Island Borough appraiser  
 (24) It s made as a statement of him -- if it s an admission  
 (25) It was an admission of the appraiser for the class not

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- (1) including Kodiak Island Borough When he made this  
 statement  
 (2) he was not acting as the appraiser for Kodiak Island Borough  
 (3) THE COURT So what you re saying is he may have been  
 (4) your agent for some purposes but when he made these  
 statements  
 (5) he didn t make them during the existence of the relationship  
 (6) with you is that it?  
 (7) MR STOLL I m not saying that either Your Honor  
 (8) Excuse me but what I am saying is that at the -- at the time  
 (9) that he made the -- when he made this statement and the  
 (10) purpose of making this statement of the -- of the -- these  
 (11) data sheets that are in here is that he made these statements  
 (12) as the appraiser for the class not as the appraiser for Kodiak  
 (13) Island Borough  
 (14) Now if he had gone out and done an appraisal appraisal of  
 (15) Kodiak Island Borough properties and had said that there are  
 (16) certain properties -- other properties and they re worth you  
 (17) know \$10 000 and not \$15 000 then they may have something  
 to  
 (18) talk about But that s not -- that -- I don t even think in  
 (19) that case they have something for another reason but that is  
 (20) not what he did here  
 (21) He made an appraisal of the class -- class property not  
 (22) including the Kodiak Island Borough property Now that s one  
 (23) problem with this these documents The second -- the  
 (24) second -- the second problem is -- is that the -- the -- the  
 (25) adjustments that are made are in the context of a particular

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- (1) property that s being evaluated You cannot say that the  
 (2) adjustments would be the same for parcel A as they would be  
 for  
 (3) parcel B It does not follow It is all a relative matter  
 (4) And so if we re going to get into -- if they re going to be  
 (5) able to put into evidence this document then I should be able  
 (6) to call a witness -- Mr Shorett apparently -- and have him  
 (7) testify that when he was doing this he was making his  
 (8) adjustments in the context of -- of what I ve written on this  
 (9) board as class 1500 because the adjustments are in  
 (10) relationship to those parcels not in relation to the KIB  
 (11) parcels  
 (12) So you have to take the -- you have to take these  
 (13) comparables you cannot simply say An adjustment is an  
 (14) adjustment for all purposes it is an adjustment in  
 (15) relationship to a particular parcel whether it s this parcel  
 (16) or this parcel or some other parcel You have to take that  
 (17) adjustment in relationship to that particular parcel  
 (18) THE COURT I understand  
 (19) MR STOLL It s completely out of context  
 (20) THE COURT Well let s just make sure that we re --  
 (21) we all understand what the problem is all right?  
 (22) Are you saying that this is a representative admission?  
 (23) MR OPPENHEIMER Yes sir  
 (24) THE COURT The same as with the tape of the  
 (25) scientists on the Kodiak beach?

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- (1) MR OPPENHEIMER Yes  
 (2) THE COURT So it has to meet the terms of Rule 801 in  
 (3) order to qualify right?  
 (4) MR OPPENHEIMER Yes sir  
 (5) THE COURT Okay So let s get through the first one  
 (6) Mr Stoll  
 (7) MR STOLL Fine  
 (8) THE COURT We re talking about 801(d)(2)(D) right?  
 (9) This is a statement of -- of your agent isn t it?  
 (10) MR STOLL He was not our agent at the time that --  
 (11) THE COURT Answer my question  
 (12) This is a statement of your agent isn t it? I ll get to  
 (13) that  
 (14) MR STOLL He was subsequently yes sir  
 (15) THE COURT So he is your agent Does it concern a  
 (16) matter within the scope of his agency?  
 (17) MR STOLL I m sorry?  
 (18) THE COURT Does it concern a matter within the scope  
 (19) of his agency?  
 (20) MR STOLL No  
 (21) THE COURT Why?  
 (22) MR STOLL Because his agency was not to do an  
 (23) appraisal of the class cases the class properties His agency  
 (24) was --  
 (25) THE COURT What s his agency with you?

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- (1) MR STOLL That s what I m talking about His agency  
 (2) with us was to do a damage analysis of the KIB parcels It was  
 (3) not to do an appraisal of the class the class parcels  
 (4) THE COURT Well I think - I think this does concern  
 (5) a matter within the scope of his agency Now -  
 (6) MR STOLL Can I be -  
 (7) THE COURT Now the next one the next phrase that  
 (8) we re concerned with is made during the existence of the  
 (9) relationship That s your objection isn t it? This statement  
 (10) was not made during the existence of the relationship?  
 (11) MR STOLL That s true Your Honor except that I  
 (12) want to be clear with the Court I think it was made at a time  
 (13) that he was retained I mean he was - the month that he made  
 (14) that report he was actually under contract separately to KIB  
 (15) THE COURT Okay  
 (16) MR STOLL I just wanted to make -  
 (17) THE COURT So when he made the statements he was  
 (18) working for you right  
 (19) MR STOLL He was working for us but not - he was  
 (20) not - when he made the statement he was not making the  
 (21) statement within the scope of his agency  
 (22) THE COURT Okay  
 (23) MR STOLL That s the point I m trying to make  
 (24) MR OPPENHEIMER Your Honor I don t -  
 (25) THE COURT No no the rule is concerning a matter

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- (1) within the scope of his agency or employment  
 (2) MR STOLL That s right  
 (3) THE COURT That s what the rule is He qualifies  
 (4) this qualifies It s a representative admission  
 (5) So now what do we do with Mr Stoll s second item which  
 (6) is Yeah But I ve got to call somebody to explain this?  
 (7) MR OPPENHEIMER That s - I mean we re in the same  
 (8) position with respect to the Katzke tape I mean that s  
 (9) true - as Your Honor said earlier that could be true of any  
 (10) admission  
 (11) This is very straightforward This is a statement of a  
 (12) comp value It is made at the same time our reports were  
 (13) issued All these reports this case that case all came out  
 (14) the same - within the same period of time and I would draw  
 (15) Your Honor s attention to the fact that in our case the -  
 (16) the opinion of Mr Shorett which is the two pages he appends  
 (17) to Mr Carlson s appraisal the February 22 1993 document  
 (18) it s - I think it s part of Exhibit 906 and if I could  
 (19) just - just read to Your Honor he says I ve not prepared an  
 (20) appraisal report on the borough property and am therefore  
 (21) unable to provide you with an opinion of its value However  
 (22) during the summer of 1992 during the course of performing  
 (23) aerial property inspections in the Kodiak Region I did inspect  
 (24) and videotape all of the parcels that are the subject of  
 (25) Mr Carlson s appraisal as at that time it had not been

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- (1) determined whether or not these parcels would be included in  
 my  
 (2) appraisal  
 (3) Based upon these inspections and a review of Mr Carlson s  
 (4) appraisal I believe that it reason to assume that the same  
 (5) methodology can be used for estimating damages to borough  
 (6) property as is used in my appraisal of February 20 which is  
 (7) the appraisal portion which we ve put in  
 (8) It is - his testimony in his case ultimately reduces to  
 (9) the fact that this methodology is applicable to Mr Carlson s  
 (10) THE COURT Counsel you ve already won that one  
 (11) Thank you certainly bolsters your record  
 (12) MR OPPENHEIMER Good  
 (13) THE COURT But these are admissible  
 (14) Now the question is what do I do with them What do I  
 (15) do because I ve admitted them?  
 (16) MR OPPENHEIMER I don t think you need to do  
 (17) anything but admit it  
 (18) THE COURT Once I do that Mr Stoll gets to make an  
 (19) application right?  
 (20) MR OPPENHEIMER He may I would suspect Your  
 (21) Honor he has an advantage which actually we didn t have with  
 (22) the Katzke tape I suppose which is that If there s  
 (23) legitimate 106 material from the document - which presumably  
 (24) sets forth its methodology - I would think that we would have  
 (25) to address that and that would be the appropriate way to deal

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- (1) with it  
 (2) THE COURT So this is DX16413 and DX15614 They are  
 (3) admitted counsel  
 (4) (Exhibits DS16413 and DX15614 received)  
 (5) THE COURT Now it s up to you to figure out what to  
 (6) do now I ll hear any application you have - not now because  
 (7) I don t think you ve thought this problem out and I don t want  
 (8) you winging it here  
 (9) Is there anything else?  
 (10) MR OPPENHEIMER No Your Honor  
 (11) THE COURT We need to talk about the instructions  
 (12) right  
 (13) MR PETUMENOS Could we push the time back just a  
 (14) bit?  
 (15) THE COURT How about 3 00?  
 (16) MR PETUMENOS That would be fine  
 (17) MR DIAMOND We have exhibits to clean up You  
 (18) wanted to meet informally off the record with jury  
 (19) instructions Do you want to do it in any particular order  
 (20) MR PETUMENOS I would prefer if I have to be back  
 (21) here at three to talk about instructions we work on the  
 (22) exhibits sometime during the day tomorrow  
 (23) THE COURT Is that acceptable?  
 (24) MR CLOUGH I think you get a cleaner record from  
 (25) everybody on that

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- (1) THE COURT Yeah I do too so the exhibits we defer
- (2) until tomorrow Let s set a time for tomorrow 9 00
- (3) MR PETUMENOS That would be fine Judge
- (4) THE COURT That will be to discuss the exhibits and
- (5) motions right?
- (6) MR DIAMOND Yes we also have to talk about motions
- (7) THE COURT We definitely have to talk about motions
- (8) MR PETUMENOS I keep reminding you of that Judge
- (9) MR STOLL Your Honor can we take up our
- (10) application then with respect to the exhibits at that time?
- (11) THE COURT Tomorrow?
- (12) MR STOLL Yes
- (13) THE COURT Yes that s a good idea
- (14) MR STOLL Could I get a copy - I never got a copy
- (15) of the exhibits
- (16) THE COURT Absolutely forth with counsel you can
- (17) get a copy as soon as we recess Anything else?
- (18) MR OPPENHEIMER That s it
- (19) MR STOLL We ll file something on this
- (20) THE COURT I know you will
- (21) MR FORTIER Judge I was going to hand you a set of
- (22) the plaintiffs proposed jury instructions
- (23) THE COURT Oh great thanks I ll see you at 3 00
- (24) THE CLERK Please rise this court stands in recess
- (25) (Recess at 1 42 p m )

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- (1) CONT D RECESS REBUTTAL EXAMINATION OF PAT  
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- (2) BY MR OPPENHEIMER 8445
- (4) FURTHER REDIRECT REBUTTAL EXAMINATION OF PAT  
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- (5) BY MR STOLL 8446

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- (1) INDEX
- (2) VOIR DIRE EXAMINATION OF PAT NORMAN  
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- (3) BY MR FORTIER 8298
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- (11) REDIRECT REBUTTAL EXAMINATION OF PAT  
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- (12) BY MR FORTIER 8334
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- (15) BY MR STOLL 8339
- (17) CROSS REBUTTAL EXAMINATION OF PAT  
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- (18) BY MR OPPENHEIMER 8376
- (20) REDIRECT REBUTTAL EXAMINATION OF PAT  
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- (21) BY MR STOLL 8404
- (23) RECESS REBUTTAL EXAMINATION OF PAT  
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- (24) BY MR OPPENHEIMER 8409

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- (1) EXHIBITS
- (2) DX2179 and DX2181 offered 8308
- (3) 14792 offered 8337
- (4) PX8605 offered 8351
- (5) 8605 8604 8602A 8603A and 9011 offered 8375
- (6) 8605 offered 8413
- (7) 8605A offered 8414
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- (9) 8603A and 8441 offered 8416
- (10) DX16376 offered 8417
- (11) DX16364 offered 8417
- (12) DX16371 offered 8418
- (13) DX16362 offered 8453
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- (16) DX2179 and DX2181 received 8309
- (17) 8605 and 8605A received 8415
- (18) 8602A 8603A and 8441 received 8416
- (19) DX16376 received 8417
- (20) DX16364 received 8417
- (21) DX16371 received 8418
- (22) DX16362 received 8453
- (23) DS16413 and DX15614 received 8466
- (25) 8518 and 8519 withdrawn 8308



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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 2,403  
 TOTAL OCCURRENCES 11,575  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE 35,954

## SINGLE FILE CONCORDANCE

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NOISE WORD LIST(S)  
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## Vol 1 1

(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 EXXON VALDEZ ) Thursday September 8 1994  
 ) 9 10 a m  
 (6) )  
 (8) VOLUME 1 Pages 1 through 52  
 (10) TRANSCRIPT OF PROCEEDINGS (Hearing)  
 (11) Morning Session  
 (12) BEFORE THE HONORABLE BRIAN C SHORTELL  
 Superior Court Judge

APPEARANCES FOR THE PLAINTIFF

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 Los Angeles California 90071 2899  
 (22) 213/669 6000  
 (23)

## Vol 1 3

(1) PROCEEDINGS  
 (2) (Call to Order of the Court)  
 (3) (Jury out at 9 12 a m )  
 (4) THE COURT Good morning We re on the record without  
 (5) the jury Counsel how do you propose to go about these  
 stages  
 (6) of this legal argument?  
 (7) MR DIAMOND Well I thought we could best deal with  
 (8) legal argument by postponing that and jumping into the heart of  
 (9) the matter and the correction of clerical mistakes on the  
 (10) record and the exhibits  
 (11) THE COURT That s true last things first  
 (12) MR DIAMOND I ve been appointed the task of  
 (13) correcting everybody s mistakes I think it s probably  
 (14) fitting  
 (15) Your Honor during the course of the Teal examination we  
 (16) wrongly admitted DX13156A - I m sorry I did it again  
 (17) 13165A - is that what I said? Was incorrectly admitted as  
 (18) 13156A The correct exhibit should be 13165A  
 (19) (Exhibit 13165A received)  
 (20) MR DIAMOND I am told Mr Oppenheimer also committed  
 (21) at least one mistake The Carlson exhibit admitted was not  
 (22) 15253 it was 16253  
 (23) (Exhibit 16253 received)  
 (24) MR DIAMOND During the course of the Dekin  
 (25) examination - well I have to do that over anyway The next

## Vol 1 2

(1) Reported by  
 JOY S BRAUER RPR  
 (2) Registered Professional Reporter  
 Midnight Sun Court Reporters  
 (3) 2550 Denali Street Suite 150b  
 Anchorage Alaska 99503  
 (4) 907/258 7100

## Vol 1 4

(1) one is the Court s mistake Defendants Exhibit DX10461A was  
 (2) admitted and during the course of subsequent colloquy about  
 (3) other exhibits which you declined to admit you I believe  
 (4) inadvertently listed that exhibit amongst the exhibits that  
 (5) you were not admitting but 10461A which was the -  
 (6) Mr Dorchester s chart of damages by corporation was admitted  
 (7) and that should still be admitted I think Mr Petumenos  
 (8) agrees with that  
 (9) (Exhibit 10461A received)  
 (10) MR PETUMENOS I don t know about the others but I  
 (11) do remember that one  
 (12) THE COURT Tell me something Does the clerk  
 (13) understand this?  
 (14) THE CLERK Yes we do  
 (15) THE COURT That s all I need to know  
 (16) MR DIAMOND This has all been scripted out for our  
 (17) purposes  
 (18) THE COURT I ve seen your scripts go awry before  
 (19) MR DIAMOND DX1973A we would like to withdraw  
 (20) because the appropriate pages were admitted separately  
 (21) MR PETUMENOS What is it please?  
 (22) MR DIAMOND Teal Exhibit 1973A  
 (23) (Exhibit 1973A withdrawn)  
 (24) MR DIAMOND And I understand the following  
 (25) photographs have already been admitted but we need to put it

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- (1) back on the record because for some reason it didn't get in the
- (2) record in the transcript These are Dekin photographs they
- (3) are DX12084A 4 14034A 34 -
- (4) MR PETUMENOS Slow down please
- (5) MR DIAMOND 14034A 34 14034B 29 14034A 40
- (6) 14034A 9 14034A 10 14034A 1 16242 14043A I think you've
- (7) already admitted those
- (8) MR PETUMENOS Could you read the last two back?
- (9) MR DIAMOND 16242 - my dyslexia is showing this
- (10) morning - and 14043A
- (11) MR PETUMENOS I'm sorry
- (12) THE COURT 14043A that's what the transcript says
- (13) MR DIAMOND That's what it should be
- (14) THE COURT The ruling is counsel whatever you say
- (15) MR PETUMENOS We've really come down the road
- (16) MR DIAMOND I have some rulings I'd like on the
- (17) directed verdict
- (18) THE COURT I'll tell you when the ruling changes
- (19) (Exhibits DX12084A 4 14034A 34 14034B 29 14034A 40
- (20) 14034A 9 14034A 10 14034A 1 16242 14043A received)
- (21) MR DIAMOND Your Honor you will remember DX13095C
- (22) is an example of several similar bar graphs that you said we
- (23) could - we could use during the course of closing but they
- (24) would not be received I have prepared and given counsel
- (25) DX16439 1 which are the numbers in a graph form in a matrix

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- (1) form
- (2) THE COURT Those are the ones you're going to use?
- (3) MR DIAMOND I'm sorry?
- (4) THE COURT The numbers of those you're going to use
- (5) MR DIAMOND As you remember the objection to this
- (6) exhibit was argumentative not that the data was irrelevant or
- (7) otherwise inadmissible but the portrayal in the graphic form
- (8) was argumentative We don't have the numbers otherwise in
- (9) evidence
- (10) You'll remember that we had Mr. Dorchester simply say
- (11) explain how he prepared these graphs what they purported to
- (12) depict We offered them there was an objection about
- (13) argumentativeness It was reserved When we argued it a day
- (14) later you agreed these were argumentative I asked whether I
- (15) could come back and submit the numbers because we don't
- (16) have
- (17) the numbers in the record anywhere This is simply numbers
- (18) and for record purposes we would like this received in
- (19) evidence
- (20) (Exhibit DX16439 1 offered)
- (21) MR PETUMENOS I object to the exhibit
- (22) THE COURT Well received into evidence for what
- (23) purpose?
- (24) MR DIAMOND For what purpose?
- (25) THE COURT Yes
- (26) MR DIAMOND To prove the truth of the matters

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- (1) asserted that during the years 1984 through '88 the various
- (2) plaintiffs earned in real estate income the amounts depicted
- (3) and that the - the total projected revenues and projected
- (4) revenues received by corporation in the Mundy report are as
- (5) depicted on the - on the matrix
- (6) There is no controversy that these numbers were
- (7) legitimately offered There was never any objection to
- (8) Mr. Dorchester talking about these numbers and putting them in
- (9) evidence They are not in evidence because we simply
- (10) tendered
- (11) the graph The graph was not received
- (12) THE COURT So in other words he didn't testify to
- (13) the actual numbers
- (14) MR DIAMOND Right The numbers are not in the
- (15) record anywhere and should this matter go - go elsewhere
- (16) from
- (17) this courtroom post judgment I mean I would like to have -
- (18) THE COURT I bet you would
- (19) MR DIAMOND I'd like to have the numbers in the
- (20) record I don't think there's any controversy about that and
- (21) just simply set them out in a non-argumentative format
- (22) THE COURT What is the controversy if there is a
- (23) controversy?
- (24) MR PETUMENOS There is a controversy because I
- (25) think what you see before you is the manipulations of a graphic
- (26) artist and we see the same exhibit basically being proffered as
- (27) before What happened of course was that the juxtaposition

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- (1) of the actual rental earned prior to the oil spill to
- (2) Dr. Mundy's rental analysis was what caused you to say this
- (3) exhibit was fine for purposes of illustrating the expert's
- (4) opinion but it was not real evidence to go into the jury room
- (5) What I understood Mr. Diamond to say is that he didn't have
- (6) an exhibit that showed the pre-spill rental actually earned
- (7) rental revenues that he wanted to have into evidence and what
- (8) he has produced is once again the juxtaposition of the rental
- (9) before the spill with the theories of our expert next to them
- (10) which is Exxon's theory of the case
- (11) That's not how those two are related It is our theory of
- (12) the case that they are not related as we put in the
- (13) testimony What you ruled is it's fine for argument it's fine
- (14) to set forth your theory of the case and to illustrate your
- (15) theory of the case in the direct but it is not proper as real
- (16) evidence in the jury room consistent with all the other
- (17) rulings
- (18) What this chart does is take it out of graph form take
- (19) some color out and do the same thing You can see there's the
- (20) oil spill in the middle there's the figures on the right and
- (21) Dr. Mundy's - excuse me the pre-spill figures on the left and
- (22) Dr. Mundy's figures on the right They're still juxtaposed as
- (23) you argued and the defect that caused you not to put it in the
- (24) jury room before is not remedied
- (25) If Mr. Diamond wanted the jury to know what the pre-spill

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- (1) rental was which is what his argument was this chart does a  
 (2) great deal more than that and the only thing I recall being  
 (3) reserved by the Court was If you come to me with something  
 (4) that shows what the pre spill actual revenues were the facts  
 (5) of the actual revenue that s one thing but if you juxtapose  
 (6) them as the other charts did and create the argument you can  
 (7) use it it s not going to the jury  
 (8) So my objection is that he s got the colored ones to argue  
 (9) from but these shouldn t go into the jury any more than the  
 (10) other ones should  
 (11) THE COURT Okay Is the issue - tell me something  
 (12) Mr Diamond Is what you re arguing that the actual land  
 (13) revenues figures should be in evidence?  
 (14) MR DIAMOND Well yes those should be in evidence  
 (15) as well as we don t have anywhere in the record aggregated by  
 (16) Mr - either in total or by year as this breaks out what the  
 (17) individual plaintiff projections are according to Dr Mundy  
 (18) All we have are the parcel work sheets  
 (19) What this does is it aggregates the projected revenue for  
 (20) all 80-some odd parcels breaks them down by plaintiff and sets  
 (21) them forth on an annual basis So neither the data on the left  
 (22) of the bar nor the data on the right of the bar is anywhere in  
 (23) the record of the case  
 (24) Arguably if you got out an adding machine you could do  
 (25) some calculations to give you the data on the right side

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- (1) although I m told that because there are discount present  
 (2) value calculations taken into account it gets a little bit  
 (3) complicated but none of this data is in the record and if the  
 (4) objection is juxtaposing it left to right I m happy to put -  
 (5) put the actual revenues and the Mundy theoretical planned  
 (6) revenues on a separate sheet I think it just makes it  
 (7) unwieldy  
 (8) I think we re entitled to have this data on the record in  
 (9) the case It s not in controversy These are the plaintiffs  
 (10) numbers on the right-hand side as aggregated by  
 (11) Mr Dorchester They are numbers that he calculated on the  
 (12) left hand side There s no dispute that they re the actual  
 (13) numbers and we re not going to use this in argument We re  
 (14) going to use the chart you told us we could use in argument  
 (15) What we want this for is really record purposes  
 (16) THE COURT Well for record purposes I ll  
 (17) certainly - I will allow you to have this exhibit to show what  
 (18) your theory is but I m not going to send it into the jury  
 (19) room  
 (20) MR DIAMOND Would it make a difference if we simply  
 (21) cut out if we put these on different pages?  
 (22) THE COURT Doesn t make a difference at all but let  
 (23) me explain something to you  
 (24) To me when I heard this discussion the first time I  
 (25) thought well the witness has shown the diagram The figures

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- (1) were on the diagram Therefore although he didn t actually  
 (2) repeat the figures the figures are in evidence I just wasn t  
 (3) going to admit the exhibit. But his - I mean I consider it  
 (4) to be part of his testimony I mean I think in terms of final  
 (5) argument you could point to the diagram and say Look this is  
 (6) what the figure is  
 (7) MR DIAMOND Well I certainly can but there s  
 (8) nothing for the jury to then refer to during deliberations to  
 (9) confirm that those numbers are accurate  
 (10) THE COURT Except their memory  
 (11) MR DIAMOND Except - well except I didn t put all  
 (12) these charts up as you ll recall What we did was put one up  
 (13) by way of example and to save time we asked Dorchester  
 (14) whether he prepared similar ones for the other plaintiffs so  
 (15) they don t even have numbers in their notes as to the other  
 (16) corporations  
 (17) If the problem is juxtaposing their theory of the case and  
 (18) Mundy s numbers against the actual numbers I m happy to set  
 (19) these forth in separate exhibits but there s never been any  
 (20) objection to either the actual numbers pre spill or the  
 (21) aggregate numbers of Mundy post-spill and so long as I can  
 (22) accommodate Mr Petumenos concerns about  
 (23) argumentativeness it  
 (24) seems to me that the exhibit ought to be received  
 (25) The data itself is plainly admissible It s important  
 data and it s something that I think the jury ought to have in

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- (1) the jury room so that when they go sift through the various  
 (2) theories of the case if they agree with ours they can go back  
 (3) and look at what were the actual earnings real estate earnings  
 (4) from these corporations and if they want to let s compare  
 (5) those against what s Mundy said That was Diamond s  
 (6) argument  
 (7) let s see if it really makes - holds water  
 (8) THE COURT Here s the choice you put me to counsel  
 (9) I mean I don t have a witness now to testify You ve created  
 (10) an entirely new exhibit  
 (11) MR DIAMOND It is identical to -  
 (12) THE COURT It may very well be counsel but the jury  
 (13) has never seen it and it is something that was never discussed  
 (14) until this very moment so I m - you can understand how I m  
 (15) reluctant to admit it at this time  
 (16) MR DIAMOND I understand you -  
 (17) THE COURT But I don t want to cheat you out of a  
 (18) fair presentation and - and I m not sure that I didn t  
 (19) misapprehend things the first time around Let me see those -  
 (20) the first exhibits again  
 (21) MR DIAMOND This is the one for Chenega  
 (22) Corporation I m actually going to give you the Port Graham  
 (23) too  
 (24) THE COURT You have the transcript? You gave it to  
 (25) me on the first go-around Will you give me the transcript  
 that you feel was foundation for admissibility of these?

Vol 1 13

- (1) Now what we re talking about is a total of four exhibits  
 (2) right the ones that I initially refused to allow in the  
 (3) record?  
 (4) MR DIAMOND I believe there was one for each Native  
 (5) corporation  
 (6) THE COURT So it was Port Graham Chenega - I ve  
 (7) only got those two  
 (8) MR DIAMOND Yeah I don t have all of the bar graphs  
 (9) with me  
 (10) THE COURT You have to get them because I want to  
 (11) identify them for the record  
 (12) MR PETUMENOS If you re going to show the Court the  
 (13) transcript there is quite a substantial record leading up to  
 (14) this offer and the previous pages relating to -  
 (15) THE COURT Previous pages of what?  
 (16) MR PETUMENOS Of whatever number you were just  
 (17) given because I just scanned it back  
 (18) THE COURT 7344 is the page that I m looking at  
 (19) MR PETUMENOS I m going back as far as 7343 7342  
 (20) and finding a fairly substantial recitation of what the theory  
 (21) is that Mr Dorchester is espousing with these exhibits  
 (22) THE COURT Okay let me look  
 (23) MR PETUMENOS Probably beginning about 7340  
 (24) actually  
 (25) MR DIAMOND We actually had a hearing outside the

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- (1) believe should go into the jury room and therefore they will  
 (2) not  
 (3) On the other hand you may indicate that these are the  
 (4) figures and the jury can take them down All right?  
 (5) Now because this is probably incomprehensible problem for  
 (6) any appellate court to deal with I m going to have all of  
 (7) these exhibits placed in one court s exhibit the next in  
 (8) order The black and white one with actual land revenues set  
 (9) next to Mundy s theoretical land revenues which is 16439 1  
 (10) will be on top and the other exhibits which you may use in  
 (11) your final argument and refer to the figures just as if  
 (12) they re in evidence those will be attached in the same exhibit  
 (13) underneath the new exhibit that you ve indicated  
 (14) THE CLERK 36  
 (15) THE COURT All right it s Court s Exhibit 36  
 (16) (Exhibit Court 36 identified)  
 (17) MR PETUMENOS Could I give the Court a report on  
 (18) instructions where we are on that?  
 (19) THE COURT Not yet counsel Yeah - well tell me  
 (20) tell me Go ahead  
 (21) MR PETUMENOS There was a meeting last night between  
 (22) the parties I think fairly soon we are going to be filing  
 (23) with you an agreed upon set of the general instructions  
 (24) unrelated to the issues in controversy Then counsel are  
 (25) planning to go when this hearing is over take some time to

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- (1) presence of the jury about these  
 (2) MR PETUMENOS Right  
 (3) THE COURT Okay  
 (4) MR DIAMOND The Eyak and Tatitlek are one pages  
 (5) each They are 13091A and 14049 that s Eyak and Tatitlek  
 (6) You have Port Graham and Chugach English Bay is 14047 1  
 and  
 (7) 2 and Chugach is 14046B 1 and 2  
 (8) THE COURT Okay Are these extra copies?  
 (9) MR DIAMOND Yes  
 (10) THE COURT Well I m not going to take too much time  
 (11) on this This is the ruling  
 (12) DX16439 1 will not be admitted brand new exhibit I don t  
 (13) know what - what the complexities of it are but it has the  
 (14) same infirmities as the other one and it doesn t have  
 (15) foundational testimony so it s not going to be admitted  
 (16) As to the ruling that was previously made I still think  
 (17) that you have a fair shot at making the argument and that  
 (18) evidence - the evidence is in the record Now the fact that  
 (19) you didn t run this - this witness through the litany by  
 (20) taking every one of these exhibits and saying What were the  
 (21) actual total pre spill revenues doesn t bother me too much  
 (22) You ve got the exhibit you can use - the witness referred to  
 (23) the exhibit You may use these exhibits and recite these  
 (24) figures to the jury as I said before and the previous  
 (25) discussion still holds These - these exhibits I do not

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- (1) begin the process of seeing if we can narrow the ones that are  
 (2) in controversy down and then probably sometime in the  
 (3) afternoon we d probably need to have a hearing with you to  
 (4) iron out our differences  
 (5) The filing that we give you will give you an idea together  
 (6) with the filing we gave you yesterday of how many are in  
 (7) controversy and which ones they are because we will give you  
 a  
 (8) filing of all the ones that are - are agreed upon and the  
 (9) ones that are sort of at the back of both of our packets will  
 (10) be the ones that we ll be trying to negotiate out and will  
 (11) likely have 100 percent success  
 (12) THE COURT Well 98 percent is fine counsel  
 (13) Let me tell you I ve looked at those instructions I ve  
 (14) gone through both of your instructions now and this process  
 (15) could be very time-consuming if you stay with hard positions on  
 (16) these instructions I mean there are many instructions in  
 (17) those packets that are unnecessary For me to go through them  
 (18) all and tell you exactly why so many of them are unnecessary  
 (19) is - is going to be very time consuming  
 (20) So I m going to tell you right up front here If you don t  
 (21) resolve a number of these problems you may be here until next  
 (22) Friday discussing these instructions and I want you both to  
 (23) understand that  
 (24) It s important that you not just toss instructions in to  
 (25) create some sort of a record when it is unnecessary to do

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- (1) that The important thing is to work toward fair instructions  
 (2) that deal with the issues in – the real issues in the case  
 (3) and not with the fanciful ones that some of your instructions  
 (4) deal with  
 (5) Stern word from a Judge  
 (6) MR OPPENHEIMER Nothing to disagree with so I'll  
 (7) sit down  
 (8) MR DIAMOND I'll move to a lighter subject a couple  
 (9) more exhibits that were left unresolved  
 (10) You reserved on DX14788 This was Mr Dorchester's  
 (11) sensitivity analysis that he did in court The reason you  
 (12) reserved was because plaintiffs had anticipated calling as a  
 (13) rebuttal witness Vicki Adams who was not on the witness list  
 (14) Vicki Adams is an associate of Bill Mundy's We had voiced  
 (15) certain reservations about whether Vicki Adams should be  
 (16) allowed to testify and we said so long as she was doing  
 (17) computational matters we would not object If she got into  
 (18) expert we might  
 (19) Mr Petumenos indicated the purpose in calling her was to  
 (20) do an analogue of this from the plaintiffs standpoint You  
 (21) reserved on the admissibility of ours until you determined –  
 (22) you got to see how the Vicki Adams testimony came out  
 (23) Ultimately there was no Vicki Adams testimony These  
 (24) numbers did come in came in without any objection They  
 (25) summarize Mr Dorchester's results of his analysis given

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- (1) various different levels of assumption I think the document's  
 (2) clearly admissible  
 (3) MR PETUMENOS Let me give you my – the aftermath to  
 (4) what my consideration of this document was I wanted to go  
 (5) back and figure out exactly with Ms Adams what Mr Dorchester  
 (6) did to understand what the – what the scenario was here and  
 (7) determine whether or not I wanted to put in some sort of  
 (8) rebuttal or just address the exhibit with the Court and with  
 (9) the jury ultimately  
 (10) What I now understand Mr Dorchester has done is I think  
 (11) clever but – but not properly admitted into evidence He has  
 (12) essential – this is not his opinion of what the damages should  
 (13) be What he has essentially done is invited compromise with  
 (14) the jury in an interesting way by taking other experts  
 (15) assumptions but not all of them and applied them to his  
 (16) methodology  
 (17) And if you take a look for example at one of the  
 (18) controversies that we have pending which is whether or not it  
 (19) is a license a nonexclusive license is the proper analogy  
 (20) under the real estate world or whether a lease is a proper  
 (21) analogy you have a difference between six percent and I think  
 (22) nine or ten or something – something like that between the two  
 (23) experts  
 (24) What is really going on here is because Mr Dorchester's  
 (25) numbers are so low that if you take different variables into

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- (1) account a ten percent difference of Mr Dorchester's numbers  
 (2) ten percent of \$1 000 is – is \$100 ten percent of \$88 million  
 (3) is \$10 million That's all that this chart is doing  
 (4) It is I think misleading in that what it does is attempts  
 (5) to change variables to show how much we would be entitled to  
 (6) if  
 (6) we got our way or our theory of the case and it isn't very  
 (7) much So take for example natural land says this chart and  
 (8) apply it to my analysis and they only get \$30 000 more or  
 (9) whatever it is that's on that chart  
 (10) I find it very misleading and I think it's an invitation to  
 (11) compromise which is improper because there's much more to it  
 (12) than when you – when you determine that land is natural land  
 (13) than what Mr Dorchester has done  
 (14) This isn't part of anybody's methodology This was a  
 (15) document created by counsel essentially as Mr Dorchester  
 (16) testified he said did I – Mr Diamond said Did I ask you to  
 (17) run your methodology with the following numbers did I ask you  
 (18) to do this with the following numbers  
 (19) It is basically counsel's argument and the witness was the  
 (20) conduit by taking a calculator taking Mr Diamond's  
 (21) assumptions and putting them in front of the jury He  
 (22) testified directly that it's not his methodology He's never  
 (23) testified it was scientifically or as an appraiser  
 (24) appropriate He just did what the lawyer told him to do and  
 (25) put this in front of the jury for the purpose it seems to me

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- (1) of confusion and advising a compromise and I don't think the  
 (2) exhibit should be admitted  
 (3) That's what that – those columns are It comes down to 15  
 (4) percent of a million five is a lot less than 15 percent of 88  
 (5) million and that's all it is  
 (6) THE COURT Thanks  
 (7) MR DIAMOND Your Honor I can't ever recall an  
 (8) instance where an expert testified to a series of assumptions  
 (9) leading up to a damage calculation and then was foreclosed  
 (10) from  
 (10) saying Well look if some of my assumptions are wrong that's  
 (11) going to affect the analysis and this is how it's going to  
 (12) affect the analysis That's what this is  
 (13) As Mr Petumenos correctly states this is Dr –  
 (14) Mr Dorchester's analysis The big difference here as we all  
 (15) know is that Mr Dorchester only looks at shoreline-related  
 (16) area and Dr Mundy looks at the entire 30- 40- 50 000-acre  
 (17) parcel and no one disguised that fact  
 (18) What Mr Dorchester did in this exhibit and why it's so  
 (19) helpful is it says Look if you agree with my assumptions my  
 (20) overriding assumption that we ought to look at shore-related  
 (21) areas and you agree with my assumptions concerning  
 (22) persistence  
 (22) but you disagree with my assumption concerning interest  
 (23) rates – or I'm sorry rental rates then this is what happens  
 (24) to my numbers And he explained to the jury that in serialism  
 (25) that's what he did in each of the three columns and then the



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- (1) both column at the far right And it s not misleading in any
- (2) way
- (3) Clearly an expert has the right to say This is my opinion
- (4) but if I m wrong on one two or three things you ought to know
- (5) that the analysis produces a different result And that s all
- (6) that this document purports to do I think it s highly
- (7) significant because as Mr Dorchester explained it is
- (8) essentially a sensitvity analysis and what it told him and
- (9) what I think it will suggest to the jury on analysis is that
- (10) there s a problem with Dr Mundy s numbers because even if
- you
- (11) manipulate or change the assumptions concerning interest rate
- (12) change the assumptions concerning impairment you still don t
- (13) get anywhere near the \$80-plus million that Dr Mundy
- (14) calculates
- (15) It is part of his analysis It is simply altering some of
- (16) the assumptions he used The jury should be entitled to
- (17) consider it
- (18) THE COURT I agree with you they should be entitled
- (19) to consider it The question is how - in what form are they
- (20) entitled to consider it This is - I don t know what the
- (21) difference is between this and a number of exhibits that I ve
- (22) kept out Now I ve let a lot of exhibits in because there
- (23) have not been objections and who am I to jump in there and -
- (24) and essentially change the approach of the parties but when I
- (25) get an exhibit like this which is certainly not

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- (1) self explanatory -
- (2) MR DIAMOND I m sorry not -
- (3) THE COURT Not self-explanatory I look at it to see
- (4) whether or not there s evidence in the record that is
- (5) essentially this diagram to see whether or not the diagram
- (6) should go in or the calculation should go in also
- (7) To me yes this is a legitimate expert conclusions I
- (8) mean I don t know why an expert in this field can t - can t
- (9) make these calculations can t testify essentially that if you
- (10) use certain variables you ll come to certain conclusions But
- (11) that s not the be-all and end all of the question
- (12) The next question is why should I let an exhibit like this
- (13) in when in fact the evidence is already - is in the record and
- (14) the jury can make their own calculations aided by the
- (15) illustrative exhibit that you use in final argument It is the
- (16) exact same question to me It seems to me that I have the
- (17) discretion to keep out things that - that run a danger of
- (18) being misleading as independently submitted in the jury room
- as
- (19) exhibits and there s so many exhibits in this case and the
- (20) record is subject to such confusion anyway I see no reason
- (21) to - to admit this and let it go into the jury room
- (22) Now you have the same leeway with this exhibit that you
- (23) have with those other exhibits You get to say Look this is
- (24) the calculations he made Now if in fact you buy his theory
- (25) these are the figures and they are quite capable of making

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- (1) those calculations themselves and coming up to an appropriate
- (2) figure So I see no reason to treat this any differently than
- (3) other controversial exhibits that I ve ruled on
- (4) MR DIAMOND Your Honor the only difference is those
- (5) calculations are not self explanatory The jury can t go in to
- (6) Mr Dorchester s worksheets certainly not without the aid of a
- (7) computer and somebody reasonably sophisticated in spread
- sheet
- (8) manipulation and run those calculations Without that
- document
- (9) before them they re simply not going to be able to replicate
- (10) it and they re not going to have those numbers
- (11) Again had he testified and had he had a demonstrative
- (12) preprinted nice pretty graphics with rows of numbers - which
- (13) he does have - he does have his initial analysis equaling
- (14) 1 3 And I know we re going to hear from the plaintiffs side
- (15) in closing argument 1 3 you know what that translates into on
- (16) a per acre basis it s 13 cents per acre or whatever they
- (17) calculate in fact that s not all the analysis He s changed
- (18) the assumptions and come up with higher numbers
- (19) Without that in front of them during the course of
- (20) deliberations they re not going to be able to replicate those
- (21) numbers they re not going to have the benefit of that analysis
- (22) and they re not going to be able to see things do change But
- (23) this is the range they do change if you take different
- (24) assumptions It s not argumentative It s part of his
- (25) analysis

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- (1) We have lots of documents in this case I think we
- (2) calculated something in the nature of 800 exhibits This is
- (3) not going to break the back and we certainly have a lot of
- (4) plaintiffs exhibits which portray their damage analysis in a
- (5) favorable light
- (6) THE COURT Yes and I tried to explain to you that
- (7) as far as I m concerned when something - when someone says
- no
- (8) objection then I m not going to edit every exhibit but as to
- (9) controversial exhibits the ones where there is controversy and
- (10) there is objection then I take a look at it and determine -
- (11) to me it looks like this is a discretionary call I have the
- (12) discretion either to keep this in to put this in evidence let
- (13) you use it as illustrative of the testimony or in essence to
- (14) show them in final argument that this is what he said and
- (15) either to put it in the jury room or leave it out My
- (16) conclusion is that I should leave it out
- (17) Maybe we better make this a Court s exhibit too just -
- (18) is this an extra?
- (19) MR DIAMOND Yes
- (20) THE COURT This will be 37
- (21) (Exhibit Court 37 identified)
- (22) MR PETUMENOS I guess Exxon is -
- (23) THE COURT Well don t forget counsel you re
- (24) absolutely free to use that exhibit You may use it in final
- (25) argument You re absolutely free to create it all over again

## Vol 1 25

- (1) if you want to on a piece of paper so that they can actually  
 (2) see those figures and see the methodology  
 (3) MR DIAMOND That s something I won t forget We had  
 (4) a couple of other controversies concerning exhibits  
 (5) MR OPPENHEIMER Your Honor one exhibit that we  
 (6) spoke of during trial was a copy - Joel this is 1150  
 (7) Plaintiffs 1150 This is a copy of a page from the Exxon  
 (8) briefing book which was - I can t remember whether it was  
 (9) admitted or received  
 (10) MR PETUMENOS It s admitted  
 (11) MR OPPENHEIMER Admitted subject to our ability to  
 (12) argue This page is taken from a page in this thing which is  
 (13) the Valdez briefing book and there are a couple of issues  
 (14) about it  
 (15) The first is that it is a heavily contextual document  
 (16) There are statements in the body of this document that go to an  
 (17) explanation of this for example that talk about it in summary  
 (18) or conclusory terms about total recovery times and that sort of  
 (19) thing  
 (20) And though I haven t found them yet I presume there s  
 (21) something that helps with the inherent ambiguity of the graph  
 (22) because if you look at this there are some very short  
 (23) recovery times and then spaces and then these other bars and  
 (24) these short recovery times refer to something called melofauna  
 (25) and these other bars refer to other things and the time

## Vol 1 26

- (1) differences in recovery are quite substantial  
 (2) And there s no testimony about that There s nothing that  
 (3) would explain that to a jury There s nothing that would put  
 (4) it into context and there s also nothing that puts the - the  
 (5) document itself into context By which I mean if you go to  
 (6) the transcript what - what Dr Bush says about this from  
 (7) back in July 14th when Exhibit 1150 - which is on the  
 (8) screen - was placed in front of him he was asked Was this  
 (9) prepared by you and he answered it was in a sense I mean  
 (10) it - this source material was not prepared by us this  
 (11) specific exhibit was prepared by us  
 (12) So the exhibit does depict a table within the Exxon  
 (13) briefing book What is incomplete though about the depiction  
 (14) is that it s out of context of this thing and it does not for  
 (15) example take into account statements with respect to - just  
 (16) give you an example the most severe and long term impacts of  
 (17) the Amoco Cadiz spill - this is from the - all predates our  
 (18) spill nothing to do with our spill Salt marshes and other  
 (19) low tidal energies along the Brittany s coast similarly -  
 (20) okay high energy intertidal environments to ten years or  
 (21) longer in low energy environments such as tidal mud flats  
 (22) Some oil from the Exxon Valdez has reached a small number  
 (23) of sheltered tidal mud flats along the Prince William Sound and  
 (24) in the Kenal Peninsula All of that context is missing from  
 (25) this graph and the thing that becomes most misleading about

## Vol 1 27

- (1) it I think in that sense is that you have no - the jury s  
 (2) not going to have any appreciation for A how to read it - in  
 (3) fact I doubt any of us can figure out whether the short little  
 (4) one-year recovery bars or longer bars are relevant to what  
 (5) we re talking about  
 (6) And relatedly I think they re going to clearly be misled  
 (7) into believing that this has something to do with work that s  
 (8) been done on this oil spill and manifestly it had not  
 (9) This is material that was put together for a briefing book  
 (10) to get out what information could be got out before any of the  
 (11) type of science - by either side that we ve heard about in  
 (12) this courtroom  
 (13) So I m very concerned that out of context even though  
 (14) it - I m not going to argue that if we compare the two  
 (15) charts that it isn t at least within the domain of a fair  
 (16) depiction of one of the graphs It is changed from the graph  
 (17) It s changed Your Honor because the - there s a  
 (18) logarithmic scale on the bottom instead of a linear scale and a  
 (19) few other differences but cutting to the heart of it that s  
 (20) not my primary concern My primary concern is what it really  
 (21) is is a part of this and without this and an understanding of  
 (22) when this was generated or - and what it was used for - which  
 (23) no witness has testified to nor could have - I think the jury  
 (24) is going to assume that this somehow is Exxon s understanding  
 (25) of the recovery periods in this case even though one would be

## Vol 1 28

- (1) hard pressed to figure out how it relates to this case just by  
 (2) looking it over  
 (3) THE COURT I see what you mean  
 (4) MR PETUMENOS I need to remind the Court of how we  
 (5) got to the point where it was admitted  
 (6) THE COURT I don t think you do counsel It s  
 (7) admitted The question is whether I take it out.  
 (8) MR PETUMENOS Right And what I was going to say is  
 (9) this We first moved this document in with Mr Bush s  
 (10) testimony I indicated that many of the issues that  
 (11) Mr Oppenheimer raised would be addressed if we called the  
 (12) biologists that worked for ICF who was a man named Dr Jerry  
 (13) Bakus and I indicated that if that was going to be the  
 (14) problem over this exhibit I was going to call Jerry Bakus and  
 (15) Mr Oppenheimer stood up and said No no no if that s the  
 (16) issue you don t have to call him If you re going to  
 (17) withdraw - the quid pro quo the deal if you will if you re  
 (18) going to withdraw Mr Bakus from this I will withdraw any  
 (19) foundational objection to how the document was used how it  
 (20) came out of the briefing book all that  
 (21) My problem with it right now Judge it s been adapted from  
 (22) the actual graph and you said to me Until you show me that  
 (23) it s been fairly taken from the briefing book and that no  
 (24) license has been taken with the table itself it s not coming  
 (25) in

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(1) I then came in and showed you the original briefing book  
 (2) and showed you the table and let you compare the how we changed  
 (3) the logarithmic - the scale on the X axis so that it was a  
 (4) little clearer Before the problem was it went from ten to 20  
 (5) to 30 or something like that on the bottom and it wasn't  
 (6) linear whereupon you determined that it was a fair depiction  
 (7) offer the chart and the chart came in  
 (8) These objections now to the context and all that are  
 (9) mis - are misplaced in view of the previous record I had  
 (10) Mr Bakus available to come in and testify to all this and it  
 (11) came in with that understanding so that we could shorten the  
 (12) trial and now these objections are coming back  
 (13) What was left open was if this thing didn't accurately  
 (14) depict the table This is very much like the argument that we  
 (15) had yesterday with Mr Stoll in which Mr Stoll was trying  
 (16) to - trying to keep out the pages from Mr Shorett's report  
 (17) and was arguing that Mr Shorett's not here he hasn't  
 (18) testified he can't explain and it's a different - all that  
 (19) that we - late in the day yesterday  
 (20) This is from a book that Exxon provided to its own  
 (21) management It is an admission under 801(d) the same as the  
 (22) admission that you put into evidence yesterday It is what  
 (23) Exxon had prepared for its management to have them  
 understand  
 (24) what could be expected in terms of recoveries and it is a very  
 (25) important exhibit to us which is why we were willing to call

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(1) in Dr Bakus if we had to to make sure that it got in and at  
 (2) this point in time I don't think Mr Oppenheimer's objections  
 (3) on this record what's gone before are well taken  
 (4) What was open was does this chart have we somehow taken  
 (5) license with this chart with the chart that's in the book and  
 (6) Mr Oppenheimer just conceded to you at the podium we  
 (7) haven't It's a fair depiction of that chart If they wanted  
 (8) to add some explanation to the chart given the state of the  
 (9) record they had their own witnesses that could do it Now the  
 (10) evidence is closed and to try to get it out on that basis I  
 (11) think foreclosed  
 (12) THE COURT Thank you  
 (13) MR OPPENHEIMER Your Honor I am not arguing that  
 (14) what we see on the screen doesn't look reasonably like what's  
 (15) in the Valdez briefing book What I'm arguing is and I don't  
 (16) believe this - I agree in essence with what Mr Petumenos is  
 (17) saying about Dr Bakus but the agreement was with respect to  
 (18) testimony that was about to be elicited with respect to the  
 (19) biology on the - on the table  
 (20) The problem with this table is with or without testimony  
 (21) from somebody unfamiliar with the briefing book about it at a  
 (22) minimum we have a problem that the table really can't be  
 (23) understood outside the context of the briefing book That's  
 (24) the problem  
 (25) It is my understanding of what - what we're dealing with

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(1) here is this table in and of itself comprehensible outside  
 (2) the Valdez briefing book And my contention is that it is not  
 (3) and it doesn't matter what kind of testimony would come in from  
 (4) Dr Bakus or anything else  
 (5) Those are really - that's a different issue having to do  
 (6) with substantive testimony on the biology on the chart The  
 (7) issue is - I mean as Your Honor can see really I think it  
 (8) fits into some of what we've been talking about this morning  
 (9) if the jury is just looking at this table it seems to me they  
 (10) to the extent they can as I say figure out what things like  
 (11) melofauna are they're going to be looking at something that  
 (12) has no indications about its context it's going to look as if  
 (13) I think it pertains to this spill It's not going to be clear  
 (14) that it comes from data that was collected for - you know to  
 (15) get some information as much as could be gotten out early on  
 (16) in the days of the spill  
 (17) You know this was a briefing book to get what could be  
 (18) gleaned from the massive literature out as quickly as it could  
 (19) be and it doesn't - it was not a document that I believe was  
 (20) even disseminated It was a talking document  
 (21) So you know at a minimum Your Honor I think we have a  
 (22) problem that separated from the text of that large document it  
 (23) is powerfully ambiguous and I think prejudicial because it  
 (24) tends to look as if it pertains to this specific spill  
 (25) THE COURT Thank you counsel I think there are two

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(1) issues here as I - as I see them You can correct me if I'm  
 (2) wrong  
 (3) One is having had the discussion having the foundation in  
 (4) the record having admitted the document would I now go back  
 (5) and revise that ruling and take the exhibit out of evidence  
 (6) and the answer to that question is no I don't You had the  
 (7) opportunity at the time to keep the - the exhibit out of  
 (8) evidence and I decided that it should be in It's now - to  
 (9) make we me go back now and somehow revise this and take out  
 an  
 (10) exhibit that I felt was admissible on the first go-round  
 (11) essentially you're asking me to reconsider that ruling and I'm  
 (12) choosing not to do that  
 (13) Two -  
 (14) MR DIAMOND Your Honor there's a piece of  
 (15) transcript  
 (16) THE COURT There is?  
 (17) MR DIAMOND Mr Oppenheimer tells me to bite my  
 (18) tongue so -  
 (19) MR OPPENHEIMER I don't think it will change Your  
 (20) Honor's opinion  
 (21) THE COURT Might not change it but if it is  
 (22) something I should consider I'll be happy to listen to it  
 (23) counsel  
 (24) MR DIAMOND I was only going to inform you that  
 (25) there was discussion about reserving on this your statement at

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- (1) 4941 was I m going to admit conditioned on your examination of  
 (2) it to see if it s the same If you have some objection after  
 (3) that once you ve determined it is the same if you want to  
 (4) object further object bring it to my attention but I want it  
 (5) in now so that it doesn t by oversight get left out  
 (6) THE COURT Sure And you re always entitled to try  
 (7) to get me to reconsider things but the timing of this is  
 (8) problematic I mean this document is admissible so the  
 (9) question would be how do you react to that Do you move to  
 (10) get the briefing book in do you have somebody testify about  
 (11) the explanation? Do you give your evidence that s contrary to  
 (12) the information that s in this document?  
 (13) The answer was you had two months to do that and if you -  
 (14) if you did it fine and if you didn t then the admissible  
 (15) document is in the record and that s - that s one of the  
 (16) hazards of trial practice  
 (17) Second there s a huge briefing book you ve just showed  
 (18) me Now do I go back now once the evidence is closed and  
 (19) somehow select out a few more documents that have no  
 (20) sponsoring  
 (21) testimony and - and put them into evidence to be fair to you?  
 (22) And the answer is no because it would be unfair to the  
 (23) plaintiffs So you re stuck with the - with this one on this  
 (24) one you re stuck with the record that s been created So it s  
 (25) still in evidence  
 (25) MR DIAMOND I think that concludes our exhibit

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- (1) presentation of the morning  
 (2) THE COURT Our being everybody s or just yours?  
 (3) MR PETUMENOS No not ours We came prepared to  
 (4) argue the directed verdict motion today and I thought that s  
 (5) what we were doing so I -  
 (6) THE COURT Stop Let me just read this cryptic note  
 (7) from the clerk  
 (8) All right here s what the clerk says The clerk is never  
 (9) wrong One more clarification of the exhibits The Dekin  
 (10) Exhibit DX14034A 29 should be withdrawn as DX14034B 29 was  
 (11) admitted You got that?  
 (12) MR DIAMOND Yes very well We withdraw A and we  
 (13) would substitute B  
 (14) (Exhibit DX14034A 29 withdrawn DX14034B 29 substituted)  
 (15) MR PETUMENOS And Your Honor I have a number of  
 (16) exhibit problems as well but I didn t come prepared to address  
 (17) them in this session  
 (18) THE COURT Well all right  
 (19) Pat 14014A what is that?  
 (20) Okay here s some more that need to be withdrawn 14014A  
 (21) 13310 which is a duplicate 14058 -  
 (22) THE CLERK Don t read those Just the top one just  
 (23) the very top one  
 (24) THE COURT Just 140- - I m sorry strike the thing  
 (25) about 13310 It s only 14014A which should be withdrawn

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- (1) MR DIAMOND We withdraw DX14014A  
 (2) (Exhibit DX14014A withdrawn)  
 (3) THE COURT Okay good that s it  
 (4) Now so plaintiffs when do you want to discuss the exhibit  
 (5) problem? I want to get these exhibits -  
 (6) MR PETUMENOS I understand We are - I need to  
 (7) check with my paralegal We are going through the transcript  
 (8) What has happened to us is there a number of exhibits that we  
 (9) moved into evidence Exxon said we d like to - this is pretty  
 (10) early in the trial we d like to get back to you on that we d  
 (11) like to reserve so forth fine we ll get back to that later  
 (12) and they re not formally admitted We re having to go through  
 (13) the transcript and figure out how many times that happened to  
 (14) us and make sure we get the exhibits in  
 (15) THE COURT Yeah I m sorry about that We ll defer  
 (16) that but we have to get it done today  
 (17) MR PETUMENOS We re shooting for this afternoon  
 (18) They re working on it now  
 (19) THE COURT You can tell me what time you want to take  
 (20) it up on the record Now on the motion s -  
 (21) MR DIAMOND I didn t know we were going to argue  
 (22) motions We have some yet to be made  
 (23) THE COURT You do?  
 (24) MR DIAMOND Directed verdict motions  
 (25) THE COURT Well yes you do but it s about time

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- (1) don t you think?  
 (2) MR DIAMOND Well I think either today or tomorrow  
 (3) would be -  
 (4) THE COURT No no no this has got to be done today  
 (5) counsel I ve got to deal with these instructions and  
 (6) whatever I rule is going to affect the instructions  
 (7) MR DIAMOND Maybe I m taking the cart before the  
 (8) horse but I thought it might be useful for you to go through  
 (9) the instruction process before we make the directed verdict  
 (10) motions  
 (11) THE COURT No I think it s just the other way  
 (12) around If you make the motions I will know what the  
 (13) controversy might be on the - on the instructions and some of  
 (14) the instructions may by virtue of the rulings be - you ll  
 (15) both agree they re unnecessary  
 (16) MR DIAMOND I have two short memoranda I would like  
 (17) to submit to the Court in connection with the directed verdict  
 (18) motions Can we take this up after lunch today? I will get  
 (19) those to you forthwith  
 (20) THE COURT At 1 00?  
 (21) MR DIAMOND 1 00  
 (22) THE COURT Yes I m stuck counsel I have to say  
 (23) yes  
 (24) MR PETUMENOS I realize that but I want the Court  
 (25) to be aware I had no idea they had other directed verdict

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- (1) motions I thought you said yesterday -
- (2) THE COURT So did I
- (3) MR PETUMENOS - we will argue the motion at 9 00
- (4) MR DIAMOND I m sorry I thought we were just -
- (5) THE COURT What I do need to know is what is the
- (6) title of your motions?
- (7) MR DIAMOND Motion for directed verdict
- (8) THE COURT On what basis?
- (9) MR DIAMOND There are a number of bases and we re
- (10) in the process of sort of cogently setting them forth and I
- (11) will read them into the record at 1 00 There are - there s
- (12) the pending archaeology motion -
- (13) THE COURT That s what I was prepared to hear right
- (14) now
- (15) MR DIAMOND That one I m prepared to argue or if
- (16) you have a ruling we re prepared to receive your ruling
- (17) As to Chugach Alaska Corporation we have two motions
- (18) concerning selected but unconveyed lands that implicate OPA
- (19) 90
- (19) issues We have a motion as to Chugach Alaska s
- (20) archaeological
- (20) sites selected under 14(h)(1) but not yet conveyed And both
- (21) of those are the subjects of very short legal memoranda that I
- (22) will get over to Mr Petumenos forthwith and to the Court
- (23) immediately
- (24) We have some more global directed verdict motions
- (25) concerning land damages of the Native corporations directed

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- (1) verdicts going to whether market value diminution of market
- (2) value ought to be a proper consideration and in the event the
- (3) Court agrees that it should not be going to failure of
- (4) evidence with respect to loss of use by these corporate
- (5) parties
- (6) May I confer just for a moment?
- (7) THE COURT Uh huh
- (8) (Discuss off record between counsel)
- (9) MR DIAMOND Also as to land damages on use
- (10) impairment a motion based on failure of proof that there has
- (11) been no demonstrated loss of actual use which we think the law
- (12) requires under the circumstances
- (13) As to Kodiak Island Borough s claims to the extent that
- (14) those are predicated upon a loss of marketability of their
- (15) properties a motion for directed verdict on the basis of
- (16) failure of any proof that they were ready willing and able in
- (17) 1989 to sell any of those properties and the absence of
- (18) evidence of a ready market
- (19) A lot of this dovetails into controversies that I think
- (20) you re going to get involved in in connection with the jury
- (21) instructions and that s why I mistakenly thought maybe you
- (22) wanted to consider the jury instruction briefs first because
- (23) they go to the heart of a lot of these matters but we can do
- (24) it in any order you like
- (25) THE COURT I prefer to do it the motions Mr Stoll

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- (1) has to be here for Kodiak doesn t he?
- (2) MR DIAMOND Yes he does
- (3) THE COURT Okay I m chagnned counsel I mean
- (4) these are fairly complex questions I m very surprised you
- (5) haven t had the time to get these memoranda out earlier so that
- (6) we d all know what we were facing I really don t like this
- (7) I think - I think you could have done this in a timely way
- (8) I m a little bit bothered by the jury instructions but I ve
- (9) tried to be flexible with both of you and I know how complex
- (10) this case is but this one I don t think I can give you the
- (11) leeway I ll criticize you for it but I won t penalize you
- (12) I want those things in and I want them argued today
- (13) MR DIAMOND And I apologize to the Court We had -
- (14) we had not talked about the scheduling of these Given the
- (15) fact that the directed verdict after the plaintiffs case on
- (16) archaeology sort of floated along I did not realize that there
- (17) was an imperative on this
- (18) THE COURT There wasn t an imperative on this that s
- (19) why I m only criticizing You do put me and the opposition at
- (20) a disadvantage when you save up like this you don t give fair
- (21) notice and then you come in at the time scheduled for the
- (22) argument on the motions and tell me you ve got a whole lot
- (23) more
- (23) motions to file I don t think that s fair
- (24) MR DIAMOND I apologize to you and apologize to
- (25) Mr Petumenos

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- (1) MR PETUMENOS Judge on the bright side as I was
- (2) listening to him a number of these were in the summary
- (3) judgment practice and briefing before
- (4) THE COURT Yes they were
- (5) MR PETUMENOS Many of them as I listened to them -
- (6) maybe even all of them - we ve already briefed I think to a
- (7) large extent and maybe we can handle this after lunch
- (8) THE COURT That s the problem I m not saying I
- (9) can t handle them I m saying I would have preferred to handle
- (10) them in a different way with a little more advance notice Now
- (11) what that means is that I have to recess until 1 00
- (12) MR PETUMENOS I don t know why we can t argue the
- (13) directed verdict motion on the archaeology which you
- (14) scheduled
- (14) for 9 00 and I m prepared to go
- (15) THE COURT I agree You are prepared to right
- (16) MR DIAMOND Yes I think I ve argued that basic
- (17) motion once before prior to evidence I m prepared to argue
- (18) it again
- (19) THE COURT Go ahead I know the issues counsel so
- (20) it should be brief
- (21) MR DIAMOND Your Honor the evidence in the case
- (22) really as Professor Dekin pointed out falls into really one
- (23) of three categories with respect to whatever site evidence that
- (24) the plaintiffs have put in There are either archaeological
- (25) resources in places that don t exist There s no evidence that

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- (1) they do exist other than - there is no evidence they do
- (2) exist
- (3) We have testimony from plaintiffs experts saying that
- (4) there is a likelihood that resources might exist on shorefronts
- (5) that were oiled but there s a large category of the 44 sites
- (6) that fall into the category that - no evidence that there is
- (7) anything there other than the baldest assumption on the part
- (8) of plaintiffs experts
- (9) There is a second category of sites that the parties do
- (10) agree are legitimate sites but the archaeological resources
- (11) to the extent the evidence has shown that they exist were not
- (12) in harm s way They were not in the intertidal zone or even on
- (13) the shorefront where they could have been exposed to oil
- (14) And then there s the third category of sites pilings and
- (15) the like things that are on the shorefront but no evidence
- (16) that anything was affected by oiling or cleanup
- (17) So there really is - there s no evidence in the record of
- (18) any direct harms to archaeological resources by oiling or by
- (19) cleanup activity that would justify the damage remedy that
- (20) plaintiffs seek
- (21) I mean at most they have established that there may be
- (22) some scattered artifacts that were oiled but there s no
- (23) evidence of what compensable injury they suffered as a result
- (24) of those artifacts being oiled It is only their expert s ipse
- (25) dixit that it would be nice to conduct millions and millions of

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- (1) dollars of archaeological research The compensation they
- (2) have
- (3) quantified for the jury bears no relationship to any injury
- (4) directly stemming from contact with oil or the presence of
- (5) cleanup workers or the conduct of the cleanup itself
- (6) And so we believe that there s a total failure to connect
- (7) any of the - the damage evidence with any harm suffered by
- (8) these plaintiffs I think as plaintiffs counsel acknowledged
- (9) in opening statement the real theory here is not that the oil
- (10) or the cleanup activity itself caused harm to any
- (11) archaeological resources that are known to exist it is the
- (12) threat of future harm in years to come And as to that we
- (13) think the law is fairly compelling number one that there is
- (14) no duty of confidentiality on the part of Exxon or anybody else
- (15) that happens upon Native corporation property They haven t
- (16) established any basis for duty of confidentiality and the
- (17) briefs in opposition to the directed verdict motion the only
- (18) thing they can cite to are documents that aren t even part of
- (19) the trial record
- (20) There s no - there s no law that says one happening on
- (21) somebody s property and discovers a archaeological resource
- (22) has
- (23) to keep it secret so I don t know from whence this duty
- (24) springs and they haven t really offered any basis for that
- (25) Beyond that even if there was a duty what we re talking
- (26) about is the threat of future harm due to the trespass or
- (27) criminal vandalism of third parties yet to happen and I think

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- (1) the law is abundantly clear that there are serious proximate
- (2) cause problems with that theory
- (3) We re dealing with classic superseding cause Somebody
- (4) comes along years later commits a criminal act which results
- (5) in vandalism to the plaintiffs property that as a matter of
- (6) law attenuated from any initial negligence
- (7) So our position as we stated it several times in court is
- (8) straightforward Whatever direct harms there were to
- (9) archaeological resources the plaintiffs have failed to
- (10) quantify any legitimate damages for There is no connection
- (11) between oiling of artifacts that are known to exist and known
- (12) to have been damaged and the damage remedy they seek and
- (13) as to
- (14) the plaintiffs theory of future harm it is simply not
- (15) compensable It does not arise from a breach of duty and any
- (16) harm suffered could not be proximately related to a breach if
- (17) such were to have occurred in the first place
- (18) THE COURT Thank you
- (19) MR PETUMENOS Judge I think I ll be exceedingly
- (20) brief I just wanted to make a few things clear for the record
- (21) in the opposition
- (22) The issue of - I don t agree with counsel that there isn t
- (23) a duty but the issue is an interesting one that we don t have
- (24) to address because this is a strict liability defense and as
- (25) such you don t go through the negligence We are permitted
- (26) to
- (27) proceed under either negligence or strict liability based upon

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- (1) the stipulations that have been entered into in this case but
- (2) the issue then becomes whether or not under the strict
- (3) liability statute that this is a proper right for which we can
- (4) maintain an action And so I m going to bypass the issue of
- (5) duty because the issue of duty doesn t arise in a strict
- (6) liability context What arises is simply proximate cause and
- (7) compensable damages I think he s wrong about that but let s
- (8) not take the time
- (9) THE COURT You mean you re wrong about the duty
- (10) analysis?
- (11) MR PETUMENOS I think he s wrong about the duty as
- (12) well but there s no need to address it They re liable under
- (13) either strict liability or negligence and once that s
- (14) determined it s to quantify it
- (15) And then with respect to the theory of the plaintiffs I
- (16) went back and read Pretrial Order 77 which was your order
- (17) denying summary judgment on the archaeological claims and
- (18) looked at the pleadings carefully and looked at the affidavits
- (19) that were filed in support of the motion for summary judgment
- (20) in which you denied summary judgment finding There was a
- (21) factual issue and compared it to the record that came in
- (22) before the jury to determine how it compared to the affidavits
- (23) that were filed that made this a question of fact submitable to
- (24) a jury and found that if anything the evidence came in much
- (25) stronger than was placed in our briefing

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(1) And the reason for that was all appraisers agreed that the  
 (2) bundle of-rights theory is textbook fundamental to real  
 (3) property analysis and Dr Green who is not in our papers  
 (4) testified that the right to keep your property confidential and  
 (5) to preserve its integrity is one such right that is recognized  
 (6) within the theory of appraising and within the theory of - of  
 (7) the rights that a property owner holds  
 (8) And I looked at the testimony of Ernie Piper who  
 (9) established that the issue of confidentiality was not only a  
 (10) theoretical one but was a very real and serious one that was  
 (11) being considered at the time and one that they thought was  
 (12) greatly at risk and we entered into evidence an exhibit which  
 (13) was the 1991 State Response Plan which contained in it the  
 (14) requirement that confidentiality be preserved to the extent  
 (15) maximum extent possible And then I reviewed Mr Teal's  
 (16) testimony which established that it was such a serious issue  
 (17) that he kept things on a need-to-know basis  
 (18) So this isn't just a theory that was thought up by the  
 (19) plaintiffs' experts in the abstract but the plaintiffs'  
 (20) experts also testified in very cogent terms - I'm thinking of  
 (21) Dr Lobdell primarily - that this is something that happens  
 (22) routinely in the construction - in construction projects  
 (23) in - any time that a site becomes threatened because the  
 (24) incursion of people and so forth that frequently in advance of  
 (25) the incursion he is called in to do an assessment and the

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(1) right remedy is to excavate and to monitor and do all these  
 (2) things even before the risk happens to prevent the risk from  
 (3) happening  
 (4) In this instance what the plaintiffs have put into issue  
 (5) is that despite Exxon's best efforts the risk was - they may  
 (6) have been partially successful but that we have evidence that  
 (7) damage took place and that evidence I think is stronger at  
 (8) this point on the plaintiffs' side because as you'll recall  
 (9) we argued for some time here as to whether Mr Dekin's  
 (10) summary exhibit ought to be admitted into evidence because it was not  
 (11) backed up by any documentary evidence  
 (12) And if you compare the two exhibits Dr Johnson's and Dr  
 (13) Dekin's you will find that Dr Dekin's is a recitation of his  
 (14) opinion where he has come in and said I've looked at all the  
 (15) material trust me I'm a competent expert this is really  
 (16) really true And you ruled that because it would take too  
 (17) much time for him to go through on a site-by-site basis that  
 (18) that exhibit could come in as a basically testimonial exhibit  
 (19) But by contrast the exhibit that the plaintiffs put into  
 (20) evidence has actual documentation of recordings of incidents  
 (21) and evidence that the sites are sites and what didn't come  
 (22) into evidence but which also supports our opposition to the  
 (23) directed verdict is the same thing for sites that we're not  
 (24) claiming for but are within the spill area suggesting that in  
 (25) fact a substantial risk to these sites has taken place and that

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(1) the proper remedy under these circumstances within the  
 (2) archaeological world and not unusual is a remedy we seek  
 (3) MR DIAMOND The case started off a lot bigger than  
 (4) it currently is but there are 44 sites for which claims are  
 (5) being made Pore through the documents as carefully as you  
 (6) might you'll find evidence of damage to two  
 (7) And that's the only known harm that's in this record The  
 (8) additional graffiti on the wall of the Chenega school house and  
 (9) some digging at the burial cave on north Crafton Island That  
 (10) is it  
 (11) Now there's a lot of documentation that came in which  
 (12) talks about possible archaeological resources at this location  
 (13) or that location There's a lot of documentation appended to  
 (14) Lora Johnson's exhibits that talk about oiling of places not  
 (15) oiling of archaeological resources but oiling of places but  
 (16) there are really only two sites that they can point to out of  
 (17) the 44 that are currently being litigated that had any damage  
 (18) that anybody has been able to point to that's real Everything  
 (19) else is just imaged assumed presumed or just offered as  
 (20) maybe  
 (21) it happened Maybe it's there maybe it got oiled maybe it  
 (22) got hurt by cleanup workers maybe it got damaged by high  
 (23) pressure nozzles But there's no evidence of it other than  
 (24) the ipse dixit of Lora Johnson  
 (25) We have two places that suffered any known harm and as to  
 those two places the record is clear that there has never been

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(1) a connection made to Exxon there's never been a connection  
 (2) made to an Exxon employee or any other person for whom  
 Exxon is  
 (3) legally responsible So the notion that they are legitimately  
 (4) entitled to recover damages for known direct physical impacts  
 (5) to any artifacts is simply not supported by the record  
 (6) Two areas that - the two places that did suffer any harm  
 (7) they cannot in any way connect Exxon Exxon tried to connect  
 (8) it to Exxon nobody could ever find out the perpetrators so  
 (9) there's no evidence of harm other than what they speculate  
 (10) might happen in the future  
 (11) And Mr Petemenos says we're not arguing liability but then  
 (12) he goes on to point to a whole lot of sources of obligation on  
 (13) the part of Exxon to maintain confidentiality  
 (14) You know I agree we're not arguing liability And we've  
 (15) had - we've had numerous bench conferences about whether  
 (16) evidence was gravitating toward fault We could have put on a  
 (17) defense to a fault case that we wrongfully disclosed  
 (18) information or that we did so negligently that we should  
 (19) have - a response to the notion that we should have kept  
 (20) cleanup workers in ignorance and not told anybody about any  
 (21) archaeological resources We didn't litigate any of that You  
 (22) didn't allow any of the evidence of fault to come in because  
 (23) this is a strict liability case  
 (24) The question though is strict liability for what? It's  
 (25) for spilling oil We are strictly liable for spilling oil or

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- (1) all damages proximately ensuing from that act alleged and the
- (2) question is whether future harm is proximately connected to
- (3) spilling oil and I submit to you that it is not
- (4) It is not for the simple reason that number one -
- (5) reasons that number one it s wholly speculative unknown it
- (6) hasn t happened But number two even if we knew it was
- (7) going to happen it would be the result of some future criminal act
- (8) on the part of unknown third parties That s a superseding
- (9) cause That s a classic superseding cause for which a
- (10) tort feasor is not liable That s the way I see the
- (11) archaeological claims stacking up That s why the directed
- (12) verdict is appropriate
- (13) THE COURT You make a very persuasive argument
- (14) counsel but this one s going to go to the jury I feel
- (15) there s a factual dispute here Proximate cause is the issue
- (16) and the jury s going to get the first crack at it No question
- (17) there s a lot of the problems with this claim evidentiary
- (18) problems in the claim just has - to me it s one of the
- (19) relatively weaker claims at least in terms of the huge amount
- (20) of damages that are being claimed but the jury is going to get
- (21) this claim and they re going to make a decision and they re
- (22) eminently qualified to do so
- (23) Now as to the claim itself this is one of those - I
- (24) believe that when jury instructions are discussed or decided
- (25) upon they may further define what the jury is going to

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- (1) decide This is one the parties should be concentrated on I
- (2) think The motion is denied
- (3) Now as to the other motions what time did you want?
- (4) MR DIAMOND 1 00 would be -
- (5) THE COURT 1 00 s fine as long as you get me your
- (6) memos by 11 30
- (7) MR DIAMOND You ll have them
- (8) THE COURT And the other side too
- (9) MR DIAMOND The only two memos we have are on the
- (10) ANCSA issues with respect to Chugach Alaska the others we
- (11) simply will make orally for the record
- (12) THE COURT All right Would you come get your
- (13) documents?
- (14) THE CLERK Please rise This court stands in
- (15) recess
- (16) (Recess at 10 28 a m )

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- (1) EXHIBITS
- (4) DX16439 1 offered 6
- (7) 13165A received 3
- (8) 16253 received 3
- (9) 10461A received 4
- (10) DX12084A 4 14034A 34 14034B 29 14034A 40 14034A 9
- (11) 14034A 10 14034A 1 16242 14043A received 5
- (14) Court 36 identified 15
- (15) Court 37 identified 24
- (18) 1973A withdrawn 4
- (19) DX14034A 29 withdrawn DX14034B 29 substituted 34
- (20) DX14014A withdrawn 35

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- (1) STATE OF ALASKA )
- (2) Reporter s Certificate
- (3) DISTRICT OF ALASKA )
- (6) I Joy S Brauer 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 8th day of
- (15) September 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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 TOTAL OCCURRENCES 3,615  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE  
 11,262

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**CASE SENSITIVE**

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 NOISE NOI**

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**INCLUDES ALL TEXT  
 OCCURRENCES**

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**IGNORES PURE NUMBERS**

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**WORD RANGES @ BOTTOM  
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 10 28 [1] 50 16  
 11 30 [1] 50 6  
 13091A [1] 14 5  
 13156A [1] 3 18  
 13165A [3] 3 17, 18, 19  
 14014A [3] 34 19, 20, 25  
 14034A 1 [2] 5 6, 20  
 14034A 10 [2] 5 6, 20  
 14034A 34 [3] 5 3 5, 19  
 14034A 40 [2] 5 5 19  
 14034A 9 [2] 5 6, 20  
 14034B 29 [2] 5 5, 19  
 14043A [4] 5 6, 10, 12 20  
 14046B 1 [1] 14 7  
 14th [1] 26 7  
 1973A [2] 4 22, 23  
 1 00 [6] 36 20, 21, 37 11,  
 40 11, 50 4 5

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**- 5 -**

5-10-97 [1] 52 22  
 50,000-acre [1] 20 16

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**- 8 -**

80-some-odd [1] 9 20  
 8th [1] 52 14

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**- 9 -**

9 00 [2] 37 3 40 14  
 9 12 [1] 3 3

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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 2503 Civ11
- ) Anchorage Alaska
- (5) The EXXON VALDF? ) Thursday September 8 1994
- ) 1 00 p m
- (6) )
- (8) VOLUME 2 Pages 53 through 117
- (9) TRANSCRIPT OF PROCEEDINGS (Hearing)
- (10) Afternoon Session
- (12) BEFORE THE HONORABLE BRIAN C. SHORTELL  
Superior Court Judge
- (15) APPEARANCES
- (16) FOR THE PLAINTIFF
- N ROBERT STOLL
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- 907/277 4222

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- (1) PROCEEDINGS
- (2) (Jury not present)
- (3) THE CLERK. Please rise This court now resumes in
- (4) session Please be seated
- (5) THE COURT Counsel one thing I want to discuss with
- (6) you before you start whatever you re going to start That is
- (7) the exhibits
- (8) The clerks are getting a little worried about the exhibits
- (9) and I want to make sure that you you the lawyers review and
- (10) certify that you ve reviewed the exhibits so that we know that
- (11) only those exhibits that are admitted actually go to the jury
- (12) It s a problem in any case and in this case it would threaten
- (13) to be a major problem if in fact we had a raft of exhibits that
- (14) weren t admitted and went into the jury room
- (15) MR DIAMOND I believe representatives of our
- (16) respective teams are getting together and when they re finally
- (17) compiled each is going to review the submissions of the others
- (18) to make sure that that happens If you want lawyers trial
- (19) lawyers involved in the process too we could do that but it
- (20) probably would be duplicative
- (21) THE COURT It might be but I want a stipulation
- (22) from - from you so that I know that this isn t just something
- (23) passed on to a staff person and not - not actually
- (24) supervised I want a stipulation that says Yes we have
- (25) carefully reviewed and these exhibits are the exhibits that are

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- (1) admitted and there are no exhibits here that are not
- (2) MR DIAMOND While we were waiting for
- (3) Mr Petumenos -
- (4) MR STOLL He s here
- (5) MR DIAMOND Oh okay
- (6) THE COURT The other thing you have to review is the
- (7) videotapes to make sure that those without the narration don t
- (8) have narration on them
- (9) MR DIAMOND And there s some editing I think
- (10) plaintiffs agreed to undertake that they need to get done as
- (11) well
- (12) I was going to raise two issues with respect to the
- (13) compilation of the exhibits where I believe we have slight
- (14) subtle disagreements with the plaintiffs
- (15) We are compiling as I understand it collections in
- (16) eight and a half by 11 formats notebook size for the jury
- (17) submission Obviously both sides have nice blowups and
- (18) we ve
- (19) made provisions through your clerks to have the blowups on
- (20) hand
- (21) for the jury in the event they want to use them
- (22) With respect to exhibits we have blowups we intend to
- (23) submit eight and a half by 11-size copies of the exhibits so
- (24) the jurors thumbing through these things know what we re
- (25) referring to If they want to go - there ll be a notation
- (26) there s a blowup available If they want to look at the
- (27) blowup they can



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- (1) THE COURT We ve got it arranged so they won t have
- (2) to go look at anything We ve changed the format of the jury
- (3) room and all the blowups will be in the jury room with the
- (4) jury
- (5) MR DIAMOND We thought in the eight and a half 11
- (6) versions though they ought to have a complete set and not
- (7) just sort of blank saying go look at the blowup so as they
- (8) thumb through they ll know what they re looking at I know
- (9) Mr Fortier preferred not to do that and just simply have a
- (10) blank page I don t think that makes a great deal of sense
- (11) THE COURT A blank page saying Go look at the
- (12) exhibit?
- (13) MR DIAMOND Go look for the blowup If they re
- (14) looking for something and they want to turn pages in the
- (15) eight and a half by 11 set just a blank page is not going to
- (16) clue them in what they re looking for
- (17) THE COURT A blank page won t clue them but the
- (18) exhibit number will won t it?
- (19) MR DIAMOND It may or may not If somebody says
- (20) there was an exhibit that came in it was a bar chart and we
- (21) don t remember what the exhibit number was if they thumb
- (22) through the book they ll be able to find it in the
- (23) eight and a half 11 format If they want to look at the big
- (24) one they can look at the big one Rather than a blank page
- (25) A blank page is kind of a mystery

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- (1) MR PETUMENOS The problem we have Judge is that
- (2) this is unequal technology at this point We don t have the
- (3) capacity to do what Exxon s doing What Exxon s going to do is
- (4) put every single blowup they ve got - and their ability to do
- (5) it is impressive because they were blowing up some of our
- (6) exhibits the day of their use We can t do that We are
- (7) not - if we have a blowup we have a blowup
- (8) THE COURT If you could do it it would be
- (9) acceptable?
- (10) MR PETUMENOS Pardon?
- (11) THE COURT If you could do it would it be
- (12) acceptable?
- (13) MR PETUMENOS Sure but it puts us at a
- (14) disadvantage
- (15) THE COURT No it doesn t I ll make them do it
- (16) MR DIAMOND Your Honor I think they served us with
- (17) eight and a half copies of what they used
- (18) MR PETUMENOS ICF maps don t exist in that form
- (19) MR DIAMOND Which ones?
- (20) MR PETUMENOS As an example the ICF oiling maps
- (21) don t exist
- (22) MR DIAMOND We can produce those
- (23) THE COURT Equal - It s got to be equal and if your
- (24) exhibits are in the jury room in two forms one big and one
- (25) small then theirs have to be in exactly the same form so that

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- (1) there s absolute equality
- (2) MR DIAMOND All I need from Mr Petumenos is the
- (3) ones they don t have in eight and a half by 11 and we ll make
- (4) them up
- (5) THE COURT All right here s the deal If for
- (6) instance we get blowups and yours are in color and theirs are
- (7) in black and white -
- (8) MR DIAMOND I ll feel like I ve come full circle
- (9) THE COURT - I ll stop the process right there and
- (10) we simply go with the blowups in the jury room okay?
- (11) MR DIAMOND That s fine Your Honor
- (12) Why does that sound vaguely familiar?
- (13) The other thing we propose to do and do it independently
- (14) of your clerk so they don t have responsibility for it because
- (15) I understand they prefer not to have responsibility for it
- (16) The way I have my exhibits organized and the way it makes
- (17) sense for me dealing with the stuff is break it down have a
- (18) list broken down by witness - and maybe just peculiarities of
- (19) the way my mind works but I tend to remember things in terms
- (20) of what was admitted during the course of somebody s
- (21) testimony We are supplying through your clerks a numerical
- (22) listing of exhibits
- (23) What we have proposed to do and we ll undertake to do it
- (24) and plaintiffs can review it for accuracy is to submit also
- (25) a - a separate index which breaks down exhibits introduced by

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- (1) witness so that the jurors if they want to go look for
- (2) something can find it more easily
- (3) THE COURT That s a - that s an awful big task
- (4) isn t it?
- (5) MR DIAMOND No because we already have it done
- (6) We ve sorted it that way for our own recordkeeping It just
- (7) seems like resource to provide to the jury otherwise they go
- (8) hunting looking for things
- (9) MR PETUMENOS I thought we passed this one because
- (10) this was part of the exhibit protocol and my concern with it
- (11) was with all the filings that are happening here today and - I
- (12) don t have the staff to go sifting through my exhibits reorder
- (13) them and order them by witness This was part of the exhibit
- (14) protocol submitted to the Court which we objected to and we
- (15) were under the impression - we were under the impression this
- (16) was decided it was going like it always does in every other
- (17) court in this jurisdiction exhibits go in One through
- (18) whatever and I don t have the people Judge to get my final
- (19) done and get my instructions done and get this to the jury by
- (20) Monday I just don t have the staff
- (21) THE COURT I m not going to do it that way
- (22) MR DIAMOND We can do it after argument Your
- (23) Honor It doesn t need to be done right now We have -
- (24) THE COURT It s fertile ground for bickering and
- (25) controversy counsel I don t want to do it

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- (1) MR DIAMOND Okay  
 (2) THE COURT Your efforts can be put to much more  
 (3) productive use than arguing over this sort of format  
 (4) MR DIAMOND Have any suggestions?  
 (5) THE COURT No I was hoping you would  
 (6) MR DIAMOND Your Honor the reason that I had - I  
 (7) had sort of misapprehended procedure and thought that it  
 made  
 (8) sense to deal with the issues we wanted to raise by way of  
 (9) directed verdict after the jury instructions is because they re  
 (10) sort of inextricably tied to one another  
 (11) We are basically moving on two grounds and not on the  
 (12) grounds which we submitted brief memoranda concerning the  
 ANCSA  
 (13) problems because those have been withdrawn with my  
 apologies  
 (14) to Mr Petumenos  
 (15) The two principal grounds is the lack of evidence of any  
 (16) real loss of impairment here and secondly the lack of any  
 (17) evidence of a lost opportunity to sell That s the - the  
 (18) theory that has been advanced principally by Kodiak Island  
 (19) Borough that the oil spill suspended marketability of their  
 (20) properties and therefore they lost a year of marketability  
 (21) That s an item of special damage That is separate and  
 (22) apart from the theory that we understand the Native  
 (23) corporations are advancing which is loss of use during the  
 (24) period of persistence however that may be defined by their  
 (25) experts

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- (1) But we start from the general proposition that under GNA  
 (2) contracts we are dealing as we thought - as we suggested we  
 (3) were at pretrial we re dealing with a temporary impairment to  
 (4) property That seems to have been admitted by every witness  
 (5) who s testified on the subject all by the plaintiffs and I  
 (6) don t understand Mr Petumenos to be taking a contrary  
 position  
 (7) except perhaps with respect to 40 acres of archaeological land  
 (8) which we can deal with really separately because that s  
 (9) somewhat de minimis here But by and large we re dealing  
 with  
 (10) temporary impairment to real property  
 (11) Under the restatement when you re dealing with a temporary  
 (12) impairment and under Alaska law as we understand it a party  
 (13) is entitled to recover for loss of use and to the extent not  
 (14) duplicative of loss of use any item of special damages  
 (15) Special damages include a lost opportunity to sell one s  
 (16) property and I think the parties are in agreement the that  
 (17) those are the two measures of damage that are relevant to this  
 (18) case  
 (19) Where I believe we are in disagreement is how those are  
 (20) applied and what the - what the burdens are on the - on a  
 (21) party seeking those categories of damage Let me talk first  
 (22) about loss of actual use  
 (23) As we read the law there has to be a loss of use that  
 (24) really existed in fact evidence that in fact the property  
 (25) could have been put to some money generating profitable use

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- (1) Secondly that the plaintiff would have used this property in  
 (2) that fashion and therefore the impairment created an actual  
 (3) provable loss of use  
 (4) In this case we have no evidence whatsoever of two  
 (5) necessary elements here what uses could the property have  
 (6) been put to that would have generated some pecuniary gain to  
 (7) the Native corporations and then evidence that in fact they  
 (8) would have put their property to those profit generating uses  
 (9) but for the oil spill  
 (10) The only loss of use that s really been discussed in  
 (11) connection with the Native corporations property is the loss  
 (12) of subsistence use and as to that they have not demonstrated  
 (13) any compensable injury to them as corporations It is admitted  
 (14) that to the extent subsistence use was disrupted by the oil  
 (15) spill that resulted in a loss of harvest to subsistence  
 (16) users But the record is replete with admissions from these  
 (17) Native corporations that they don t gain when their  
 (18) shareholders use or do not use subsistence resources that  
 (19) there is no pecuniary benefit to them and therefore the oil  
 (20) spill really did not cause them any injury even if in fact as  
 (21) they claim subsistence harvests were reduced  
 (22) That s the only use that any witness called on behalf of  
 (23) the plaintiff has talked about in terms of what may not have  
 (24) happened that would have happened had there been no oil  
 spill  
 (25) And as we read the law the failure to prove that in fact

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- (1) there were profitable uses to which this property could have  
 (2) been put and the failure to offer proof that in fact the Native  
 (3) corporations lost those opportunities that they otherwise would  
 (4) have had because of the spill is really fatal to a lost use  
 (5) claim  
 (6) KIB is in a slightly different position KIB has never  
 (7) asserted that it suffered a quantifiable damage claim for loss  
 (8) of use Mr Shorett sort of offered his impression his  
 (9) particular notions that KIB lost all uses whatever they might  
 (10) be but we had a stipulation pretrial stipulation that we saw  
 (11) during the course of trial that KIB was not asserting any  
 (12) quantified claim for loss of use Their theory has always  
 (13) been We lost the opportunity to sell these properties because  
 (14) the - the oil spill stigmatized all properties on Kodiak and  
 (15) basically brought the market to a halt  
 (16) As we read the law with respect to lost opportunity to  
 (17) sell there are three elements that the plaintiff had an  
 (18) intent to sell that the plaintiff had an ability to sell and  
 (19) that a sale would have been consummated but for the act of the  
 (20) defendant  
 (21) Now as to all of these properties there may well have  
 (22) been a legal ability to sell but there certainly wasn t any  
 (23) intent to sell all but except I think one parcel and there  
 (24) certainly is no record evidence of any sale that would have  
 (25) been consummated with these properties but for the oil spill

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- (1) of loss of littoral rights that they couldn't dock their boats
- (2) when they wanted to the only evidence of harm that they talked
- (3) about is We couldn't recreate on our properties when we wanted
- (4) to and theoretically we couldn't sell them when we wanted to
- (5) They stipulated they wouldn't assert a quantified damage
- (6) claim for loss of use and as a result no discovery was
- (7) conducted on loss of use
- (8) That really leaves only loss of marketability which
- (9) clearly under the restatement is an item of special damages
- (10) and you can't recover damages simply because of a theoretical
- (11) interference occurrence of a theoretical form of ownership
- (12) You actually have to prove you lost something that requires
- (13) that there was either a ready market that you would have
- (14) pursued or that you were ready willing and able to sell but
- (15) there was some interference with the market They don't even
- (16) contend that
- (17) So if they can't pursue a claim because they for having
- (18) use of their property is interfered with and if they don't
- (19) meet the legal requirements of pursuing a claim for
- (20) compensable
- (21) damages because they lost a sale then there's really nothing
- (22) left And unless we're wrong on the law it seems to me a
- (23) directed verdict would ensue from those facts
- (24) THE COURT All right counsel thank you I
- (25) appreciate it The motion is denied

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- (1) MR DIAMOND That's all
- (2) MR STOLL Your Honor we have a motion that we just
- (3) filed about an hour ago This is in response this relates to
- (4) the exhibits that came in after the close of testimony
- (5) yesterday and you said that we could file a mem - we just got
- (6) the exhibits this was after Carlson testified It relates to
- (7) excerpts from the Shorett report and I - I don't know I
- (8) doubt that the Court has had an opportunity - well it -
- (9) THE COURT I haven't seen it
- (10) MR STOLL Well it was supposed to have been
- (11) delivered during the noon hour
- (12) THE COURT Have you seen it?
- (13) MR STOLL They have not seen it either I'm not
- (14) proposing to argue I just -
- (15) THE COURT I'll take a look It'll probably float to
- (16) my desk pretty quick but I'm not going to hear it now
- (17) MR STOLL No I understand that I just wanted to
- (18) clarify we filed it
- (19) THE COURT Now is that - except for that one
- (20) motion have the parties' motions all been decided?
- (21) MR DIAMOND Yes Your Honor
- (22) THE COURT So what we have to do now is work on the
- (23) instructions right?
- (24) MR PETUMENOS We have instructions and exhibits from
- (25) the plaintiffs' side Judge

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- (1) THE COURT Oh exhibits Are you prepared to do that
- (2) now?
- (3) MR PETUMENOS I can do a good number of them yes
- (4) THE COURT Let's do it
- (5) MR PETUMENOS I'm not sure I can do them all I'll
- (6) try My turn on exhibits
- (7) MR DIAMOND Clerical?
- (8) MR PETUMENOS Generally they are things that were
- (9) deferred or where Exxon said that they would get back to me
- (10) and
- (11) things like that and it never happened So I need to work on
- (12) it
- (13) My first motion is to exhibit number 251-4 251-4 is -
- (14) 251-4A is an exhibit already admitted it was with
- (15) Dr Peterson's testimony He was talking about the fauna and
- (16) flora and 251-4 is the same exhibit more blown up but they go
- (17) together in terms of his observations as to whether the species
- (18) had recovered What happened was I think in the transcript
- (19) was
- (20) it was simply deferred or something like that And I move it
- (21) into evidence
- (22) (Exhibits 251-4 and 251-4A offered)
- (23) MR PETUMENOS Can I show the Court?
- (24) THE COURT Yes
- (25) MR PETUMENOS It's just a picture
- (26) MR DIAMOND Your Honor we have no idea what
- (27) Mr Petumenos is talking about Obviously the lawyer

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- (1) responsible for Mr Peterson would have been here had we
- (2) known
- (3) they were going to move in Peterson exhibits
- (4) MR PETUMENOS I spoke to counsel before because
- (5) this happened to us this morning and I said I need to move in
- (6) my exhibits the Court knew I needed to move in my exhibits I
- (7) asked them to have any counsel required for exhibits to be here
- (8) so I could get my exhibits in
- (9) THE COURT Did you give them the exhibit numbers?
- (10) MR PETUMENOS No I didn't specifically mention Ms
- (11) Smith to him and said -
- (12) THE COURT Let me see the exhibit
- (13) MR PETUMENOS It's not a huge issue
- (14) THE COURT Mr Diamond's a little touchy
- (15) MR DIAMOND If it's not a huge issue it should be
- (16) excluded
- (17) THE COURT Mr Diamond is a little touchy on these
- (18) issues
- (19) MR PETUMENOS I can't help that I have suffered
- (20) all kinds of disadvantage because of that relationship in this
- (21) trial
- (22) THE COURT I'm not going to say anything further
- (23) counsel because I'd get myself in trouble
- (24) MR PETUMENOS I think it's 251-4
- (25) THE COURT They're beautiful pictures counsel
- (26) Should I let them in on that basis alone?

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(1) shareholders in the form of the use of the land and not a check  
 (2) in the form of a dividend is irrelevant It doesn't have to be  
 (3) cash There is nothing in the instructions or in the law that  
 (4) requires that it be so  
 (5) So I agree that the instructions that Exxon's proffering  
 (6) were they to get them would direct a verdict against us It  
 (7) would basically instruct the jury that you have to find  
 (8) somebody wrote a check for these lands Obviously we can't  
 (9) meet that - that burden We don't have checks for rental for  
 (10) the years that the spill was present and they know that but  
 (11) that's not what the law requires or we spent a whole lot of  
 (12) time in this trial unnecessarily  
 (13) MR STOLL Your Honor if I can just -  
 (14) THE COURT Well let me - let me talk about this in  
 (15) terms of the land value damages all right?  
 (16) MR STOLL In terms - I didn't hear you  
 (17) THE COURT In terms of land value damages I think  
 (18) that Exxon's done an excellent job in the memo regarding land  
 (19) damages and I think that the distinction has to be made  
 (20) between  
 (21) measures of damages here and I do not think this is diminution  
 (22) of value case It's - the evidence is - I don't - I can't  
 (23) think of any - any example of testimony that says this is  
 (24) anything but a temporary loss So when we get to the  
 (25) instruction phase I'm skeptical about any other instruction  
 (26) but a temporary revenue temporary lost revenue So that's a

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(1) given there But with regard to the directed verdict as to  
 (2) loss of use for Mr Petumenos clients the motion is denied  
 (3) We'll deal with other issues at jury instructions  
 (4) MR FORTIER Your Honor I suppose this is a point  
 (5) for me to sit down  
 (6) MR STOLL Yes you've won  
 (7) Your Honor with respect to KIB the same thing pertains  
 (8) The stipulation that we entered into related only to the claim  
 (9) of whether we were making any claims for - whether we had any  
 (10) rentals or anything of that nature you know we agreed - our  
 (11) situation is similar to the Native corporations in that KIB did  
 (12) not - was not obtaining any rental income for any of its  
 (13) property It permitted its citizens to use the property for  
 (14) recreational and subsistence purposes and other purposes So  
 (15) our position in that is the same as - as the Native  
 (16) corporations  
 (17) This matter was all thoroughly briefed before trial and  
 (18) you in motions in limine There were two that Exxon filed  
 (19) One was a motion in limine to exclude testimony regarding loss  
 (20) of use because we had the same factual predicate then that we  
 (21) did at the end of the trial in other words we weren't  
 (22) charging rent and so on and we made the same - same  
 (23) arguments  
 (24) and you denied that in pretrial Order Number 62  
 (25) With respect to the marketability issue addressed to KIB  
 (26) that was also thoroughly briefed prior to trial and they

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(1) again sought to exclude expert testimony on that subject on  
 (2) the basis that we had no - KIB had no intention of selling  
 (3) this property We've made no bones about that for a long  
 (4) period of time You denied that in pretrial Order Number 60  
 (5) Now the reason for that the reason for I believe the  
 (6) reason for denying those motions and the reason that we feel  
 (7) that we're still damaged is - goes to this bundle of rights  
 (8) idea and the - the property the property owner has a bundle  
 (9) of rights Some of those is to market the property if they  
 (10) want to market it and not to market it if they don't want to  
 (11) market it to use the property to let their friends use the  
 (12) property to let their citizens use it if they want to or not  
 (13) let them use it to let the shareholders use it if it's a  
 (14) corporation or not let them use it And so on And there's  
 (15) been a lot of testimony about that  
 (16) In fact not only did Mr Shorett testify to it and other  
 (17) people on behalf of the plaintiffs but during the  
 (18) cross-examination of Mr Dorchester I specifically asked him  
 (19) whether there were not a number of these rights that went with  
 (20) the property and I went through loss of use I went through  
 (21) the right to market or not market the property if the person  
 (22) wanted to littoral rights I went through a number of them  
 (23) and I can turn the Court's attention to the transcript when I  
 (24) asked him about these various matters - I don't know if the  
 (25) Court recalls that but I think this has all been gone into

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(1) THE COURT Thank you  
 (2) MR DIAMOND The issue is not really what are the  
 (3) incidents of ownership of property what rights does a property  
 (4) owner have but the question is what harm did they suffer  
 (5) what harm did they prove they suffered what losses did they  
 (6) sustain that are compensable  
 (7) There are really only two - two losses that have been  
 (8) talked about by the KIB witnesses and the KIB experts One  
 (9) they couldn't use their property in a way they would have liked  
 (10) to basically recreation The alternative is they couldn't  
 (11) sell it at a time when they otherwise had a legal right to sell  
 (12) it  
 (13) You remember Mr Oppenheimer asked Mr Shorett If you  
 (14) assume that we take one of those elements out, if you assume  
 (15) that they in fact could have sold would your numbers change?  
 (16) No If you assume they couldn't have sold or they couldn't  
 (17) have sold but they did get to use their property there's no  
 (18) loss of use would your numbers change? No  
 (19) He's bundled it altogether in a fairly ad hoc and creative  
 (20) way that doesn't have a lot of bearing on reality but if you  
 (21) stop and think about it there are only two elements here  
 (22) Either they lost the right to use their property or they lost  
 (23) a right to sell their property which caused them harm  
 (24) There's really nothing else to talk about They didn't put  
 (25) on any evidence that they suffered some economic harm  
 because

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- (1) THE COURT I think the objection was that Mr Diamond  
 (2) would have to pay a fine  
 (3) MR PETUMENOS And things got - things got light at  
 (4) that point I think they were a little light before that  
 (5) but -  
 (6) MR DIAMOND What number are you using?  
 (7) MR PETUMENOS 8525 is the number of the book  
 (8) THE COURT Didn't we have a discussion about how we  
 (9) would admit that book?  
 (10) MR PETUMENOS Right it got solved because the  
 (11) Exxon archaeological expert went to a rare book store  
 (12) MR DIAMOND I thought we admitted portions of it as  
 (13) a DX number portions dealing with Prince William sound  
 (14) MR PETUMENOS PX8525 as the DeLaguna book It may  
 (15) have initially been a defendants book but I move the book  
 (16) (Exhibit PX8525 offered)  
 (17) MR DIAMOND I'm reasonably certain that it's  
 (18) already - all material parts are already in if not in its  
 (19) entirety  
 (20) THE COURT Is that true?  
 (21) MR PETUMENOS If the - if the book has been moved  
 (22) in less than its entirety -  
 (23) THE COURT Why don't we cut through this counsel?  
 (24) The book is admitted  
 (25) (Exhibit PX8525 received)

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- (1) MR DIAMOND I believe - yes I believe it's in  
 (2) I'll get counsel the number  
 (3) MR STOLL Your Honor I have a few -  
 (4) MR PETUMENOS What else do I have? I have some  
 (5) exhibits I know I'm not ready with which are the Dekin  
 (6) cross-examination exhibits I've forgotten where we are  
 (7) frankly but we move into evidence the oil spill contingency  
 (8) plan of Alyeska which we had a stipulation to or  
 (9) acknowledgment as to with respect to foundation And what I  
 (10) recall is that there were portions of the exhibit that we had  
 (11) to come up with because Exxon had - had complained that the  
 (12) entire thing if I'm not mistaken would not be admissible  
 (13) because there are other things in it that they objected to We  
 (14) have a version of the exhibit Plaintiffs Exhibit 3 and  
 (15) Plaintiffs Exhibit 741 that we move into evidence from the oil  
 (16) spill contingency plan relating to what was known and what was  
 (17) of record with respect to the sensitivity - sensitive areas of  
 (18) Prince William Sound  
 (19) (Exhibits PX3 and PX741 offered)  
 (20) MR DIAMOND My recollection is you already ruled  
 (21) this out on a prior offer  
 (22) THE COURT The reason was why?  
 (23) MR DIAMOND I'm trying to remember  
 (24) THE COURT Because there was a stipulation?  
 (25) MR DIAMOND There's not a stipulation as to

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- (1) admissibility  
 (2) THE COURT No wasn't there a stipulation? It  
 (3) essentially said what - I don't remember  
 (4) MR PETUMENOS No that was the 1969 proof with all  
 (5) those witnesses  
 (6) MR DIAMOND I think your recollection is right I  
 (7) think we said - this was being offered to show that it was  
 (8) reasonably foreseeable for us to know that if we spilled oil in  
 (9) Prince William sound we would damage areas and then we  
 (10) responded that we had taken care of that by stipulating  
 (11) THE COURT That's what I remember  
 (12) MR PETUMENOS I defer to Mr McCallion  
 (13) MR McCALLION Your Honor I could get the transcript  
 (14) reference but I believe the status when we originally offered  
 (15) it in plaintiffs case Your Honor did not admit it at that  
 (16) time but left open the door to an offer later on down the road  
 (17) indicating this might be fertile area for transaction let's  
 (18) see how it goes I could get the transcript  
 (19) THE COURT I may have done that but I guess the real  
 (20) issue here is is there something in the record that is the  
 (21) functional equivalent of that document and my feeling is there  
 (22) is but I don't have a specific recollection but I think -  
 (23) MR McCALLION Your Honor the only thing close to it  
 (24) is something really different - and I'll defer to Mr Fortier  
 (25) on it but it's sensitivity maps which came up at a later

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- (1) time We offered these documents Alyeska Oil Company  
 (2) documents two of them one in 1977 and one in 1980 - just  
 (3) those portions which had the location of sensitive parts of  
 (4) Prince William sound on it - basically as an admission of a  
 (5) recognition of the sensitivity of those locations at that  
 (6) time  
 (7) These are the earliest documents which we have relating to  
 (8) the oil company and the issue of sensitivity and the  
 (9) environmental sensitivity of the sound We feel that has been  
 (10) a overarching issue throughout the trial  
 (11) THE COURT Thank you Mr Diamond  
 (12) MR DIAMOND I have the transcript discussion of  
 (13) this if you want to see it  
 (14) THE COURT That depends If it's exactly as I  
 (15) recollect it I want to see it If it isn't I don't  
 (16) MR DIAMOND I'll let you be the arbiter of that  
 (17) THE COURT This is a long discussion  
 (18) (Pause in proceedings)  
 (19) THE COURT Was the document used in the defense  
 (20) case?  
 (21) MR DIAMOND I don't see any reference to it  
 (22) THE COURT I don't think it was  
 (23) MR PETUMENOS I don't think it was Judge  
 (24) THE COURT You want to admit the entire contingency  
 (25) plan?

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- (1) MR PETUMENOS I think they re awfully pretty and  
 (2) they re on the screen there as well and what this is counsel  
 (3) is Dr Peterson discussed the apparent abundance of material  
 (4) and then in the handwritten version showed how he could look  
 at  
 (5) it and determine that it was an area that had not recovered  
 (6) because of the specific species the nature of what was -  
 (7) THE COURT This is in his - in his initial  
 (8) testimony right?  
 (9) MR PETUMENOS Correct in our case in chief  
 (10) THE COURT Here s what I m going to do counsel  
 (11) Sorry if this puts you at a disadvantage  
 (12) 251 04A and 251 04 are admitted Of course you can move to  
 (13) get them out if you think there are grounds to do that  
 (14) (Exhibits 251 04A and 251 04 received)  
 (15) MR PETUMENOS Actually 251 04A one was already  
 (16) admitted I was just trying to get the other one in as well  
 (17) THE COURT Fine  
 (18) MR PETUMENOS The next one I have is Exhibit 8501  
 (19) 8501 is the book ends exhibit The transcript reflects that  
 (20) Exxon objected and you said you wanted to bypass it  
 (21) This exhibit was used on cross-examination it is important  
 (22) to us obviously or we wouldn t be making the motion but in  
 (23) the course of my cross examination of Mr MacSwain we  
 (24) described the fact that the Aleut Corporation land was not a  
 (25) factor We drew the concentric circles in which Mr MacSwain

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- (1) acknowledged that there were not injuries to wildlife within  
 (2) the circles I drew and I pointed out places where the - where  
 (3) Eyak Tatitlek and our clients reside as opposed to where the  
 (4) Aleut Corporation is  
 (5) I move its admission  
 (6) (Exhibit 8501 offered)  
 (7) MR DIAMOND May I see the transcript reference? I  
 (8) remember this was drawn by Mr Petumenos We objected to  
 some  
 (9) of these because the witness did not subscribe to some of the  
 (10) views  
 (11) THE COURT I was thinking you were going to say the  
 (12) circles weren t concentric  
 (13) MR DIAMOND They re somewhat indefinite too  
 (14) Is this 8501?  
 (15) MR PETUMENOS Correct  
 (16) THE COURT I remember it  
 (17) MR PETUMENOS That s a good sign  
 (18) MR DIAMOND May I have a moment to see what the  
 (19) witness said about 8501?  
 (20) THE COURT Absolutely  
 (21) MR PETUMENOS I think I understand counsel -  
 (22) THE COURT Counsel needs a moment We re all going  
 (23) to give him a moment  
 (24) MR DIAMOND Well I m reading my own words as to why  
 (25) I objected at the time And referring to Mr Petumenos he

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- (1) drew circles around Prince William sound and he got  
 (2) non responsive answers  
 (3) THE COURT I remember that too  
 (4) MR DIAMOND What s that?  
 (5) THE COURT I remember that I remember you saying it  
 (6) MR DIAMOND It s on the basis my explanation the  
 (7) witness did not subscribe to his non concentric circles  
 (8) THE COURT That may be true counsel  
 (9) MR OPPENHEIMER I move Mr Diamond s past  
 (10) recollection as quoted  
 (11) THE COURT I m admitting it I m admitting the  
 (12) exhibit cryptic as it is  
 (13) (Exhibit 8501 received)  
 (14) MR PETUMENOS I move into evidence Exhibit 18  
 (15) Plaintiffs Exhibit 18 is the Alyeska - excuse me the  
 (16) admissions of Exxon shipping to plaintiffs first set of  
 (17) requests for admission I think these are moved in before and  
 (18) deferred We read the admissions into evidence but as  
 (19) admissions formal admissions of a party opponent in the  
 (20) discovery process they re admissible seems to me  
 (21) (Exhibit 18 offered)  
 (22) THE COURT If they re in the record they re in  
 (23) right?  
 (24) MR PETUMENOS There s that argument We ve heard  
 (25) that one before I don t know how that applies to written

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- (1) formal admissions to discovery We haven t actually set a  
 (2) precedent for that but it seems to me that admissions are like  
 (3) a stipulation or -  
 (4) THE COURT Tell me what the admissions are  
 (5) MR PETUMENOS The admissions were the super highway  
 (6) our worst fears the high winds all of that in the opening  
 (7) statement and so forth I think that written pleading  
 (8) admissions are in the status of a stipulation or an answer to a  
 (9) complaint which the jury s entitled to have have with them  
 (10) THE COURT Well I think they re entitled to hear  
 (11) them and they ve heard them and they re in the record You  
 (12) have a transcript of them There s no reason independently to  
 (13) admit a document so I won t admit - I won t admit them but  
 (14) of course they are in evidence  
 (15) MR PETUMENOS Okay What do I have next? We also  
 (16) had discussed the Alyeska contingency plan if I m not - well  
 (17) before I get to that I was certain but I must be wrong  
 (18) because I ve been told to move it again that in view of the  
 (19) issues of confidentiality and whether site locations are in  
 (20) existence or not and what has been published and what has not  
 (21) been published what is confidential and what is not that  
 (22) Exhibit 8525 which was the DeLaguna book - I moved into  
 (23) evidence I think the entire book and I don t remember what  
 (24) happened but they re not showing it as admitted I thought it  
 (25) went in without objection but I can t remember

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- (1) part given the testimony of the experts who we contend have  
 (2) been obviously affected somewhat by their role in the case  
 (3) THE COURT Anything else?  
 (4) MR DIAMOND No Your Honor  
 (5) THE COURT The document is admitted Plaintiffs  
 (6) Exhibit 0003 Is that it?  
 (7) (Exhibit PX0003 received)  
 (8) MR PETUMENOS That's one of them And there's  
 (9) another one  
 (10) MR DIAMOND I thought the excerpts were going in  
 (11) THE COURT So did I  
 (12) MR PETUMENOS Those are two different plans those  
 (13) are both excerpts  
 (14) MR DIAMOND I'm sorry I only looked at one  
 (15) MR PETUMENOS They're different years One's the  
 (16) earlier plan one's the later plan and they are both excerpted  
 (17) to include only the sensitive areas as required  
 (18) MR DIAMOND I will accept Mr Petumenos  
 (19) representation  
 (20) MR PETUMENOS I owe you a representation  
 (21) THE COURT All right the other exhibit is 741 It's  
 (22) admitted  
 (23) (Exhibit 741 received)  
 (24) MR STOLL Your Honor I have a few exhibits and some  
 (25) questions

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- (1) MR PETUMENOS Before counsel -  
 (2) THE COURT Are you done?  
 (3) MR PETUMENOS I am done with the exception of the  
 (4) Dekin exhibits and my problem there -  
 (5) THE COURT We won't talk about the Dekin exhibits  
 (6) now  
 (7) MR PETUMENOS What I did is sent papers flying in my  
 (8) cross-examination and I'm trying to put them back together  
 (9) THE COURT That's fine  
 (10) MR STOLL Your Honor I have just a few exhibits and  
 (11) I have some questions and I just don't know whether some  
 (12) things are in evidence or not  
 (13) THE COURT Fine  
 (14) MR STOLL The first one is a question 13167A I  
 (15) don't know whether that's -  
 (16) THE COURT Is it in? 13167A  
 (17) MR STOLL It's a DX Defendants  
 (18) THE CLERK It's offered It's not in  
 (19) MR STOLL We would -  
 (20) THE COURT What is that?  
 (21) MR STOLL It's a shoreline evaluation sheet that  
 (22) was - I had cross-examined Mr Purdom about during his  
 (23) testimony  
 (24) MR DIAMOND Your Honor again I don't know what  
 (25) this exhibit relates to and I would -

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- (1) THE COURT As to the questions here's the way we're  
 (2) going to go about it If there's no objection we go about it  
 (3) if there is objection we'll both know what the question is the  
 (4) next time  
 (5) MR STOLL Okay Why don't I just take the next  
 (6) one? Can I just have a moment Your Honor?  
 (7) THE COURT Uh huh  
 (8) (Discussion off record between counsel)  
 (9) MR DIAMOND I have no objection to PX8228  
 (10) THE COURT 8228?  
 (11) MR STOLL Yes sir  
 (12) THE COURT It's admitted  
 (13) (Exhibit PX8228 received)  
 (14) MR STOLL Apparently you didn't admit A I haven't  
 (15) looked at this before  
 (16) Then Your Honor I think that these are in evidence and  
 (17) that's DX10263 and 10298A  
 (18) THE COURT Is it the whole document the -28?  
 (19) MR STOLL I think that's just a map it's a board  
 (20) THE COURT We have it admitted as just the pages that  
 (21) were testified to  
 (22) MR STOLL That's fine That's 10298A  
 (23) THE CLERK No we were talking about 8228  
 (24) MR STOLL Just a minute 8228 okay  
 (25) THE CLERK Is there an A at the end of that?

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- (1) MR STOLL No no that's right  
 (2) THE CLERK 10263 we don't show it  
 (3) MR STOLL You don't show that?  
 (4) THE CLERK No And that's Defendants right?  
 (5) MR STOLL That's a DX right  
 (6) THE COURT Discuss it with the other side and I'll  
 (7) deal with it later  
 (8) MR STOLL What about 10298A?  
 (9) THE CLERK We don't show that either  
 (10) MR STOLL Okay this I'll just take a minute Your  
 (11) Honor  
 (12) (Discussion off the record between counsel )  
 (13) MR OPPENHEIMER Your Honor at this time without  
 (14) objection defendants would offer DX10298A  
 (15) (Exhibit DX10298A offered)  
 (16) THE COURT It's admitted  
 (17) (Exhibit DX10298A received)  
 (18) MR STOLL 10263 there's no objection  
 (19) (Exhibit 10263 offered)  
 (20) MR OPPENHEIMER No objection  
 (21) THE COURT It's admitted  
 (22) (Exhibit 10263 received)  
 (23) MR STOLL Your Honor there was an exhibit that I'm  
 (24) unclear as to what the status is and I want to take this -  
 (25) bring this up I know what happened initially this - there

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- (1) MR PETUMENOS No no we have - I think part of  
 (2) that discussion suggested we needed to reduce it and we ve  
 (3) done that  
 (4) THE COURT Let me see what you want to admit  
 (5) MR PETUMENOS I will say I have not shared it with  
 (6) counsel Your Honor Have we shared -  
 (7) MR McCALLION It s the same one they had the copy  
 (8) before it s only the sensitivity area  
 (9) MR PETUMENOS We reduced it to the sensitivity  
 (10) areas counsel tells me  
 (11) THE COURT All right Speak now or forever hold your  
 (12) peace I m going to make a ruling in a minute  
 (13) You ve now read the portions of the transcript right that  
 (14) relate to the discussion and at the end of the discussion I  
 (15) said This is highly arguable that this is an admissible -  
 (16) that the statements in this document are admissible And then  
 (17) I left at this at that assuming that perhaps there would be  
 (18) further development in the record regarding this plan  
 (19) There wasn t Let s just assume that So the question is  
 (20) whether what went on before the discussion that I ve just read  
 (21) which ends at page 4961 justifies the admission of this  
 (22) document  
 (23) Tell me in your view why it does not counsel  
 (24) MR DIAMOND Your Honor I have skimmed this on my  
 (25) computer screen I can t put myself back to August 8 and

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- (1) quite frankly don t recall all the intricacies of the  
 (2) discussion I remember what I said was it seemed unfair to  
 (3) bind us to findings of fact investigations made by another  
 (4) organization that we did not expressly participate in or  
 (5) expressly adopt and that I thought that it was a long leap to  
 (6) say that because we were relying on Alyeska s spill contingency  
 (7) planning that findings made by Alyeska regarding what was  
 (8) sensitive and what was not and why things might be sensitive  
 (9) should be binding on us I didn t think that s constituted  
 (10) representative admissions and I thought it was an unfair use of  
 (11) the document  
 (12) I think you reserved with the expectation or at least hope  
 (13) that during the course of either the defense case or  
 (14) cross examination of the defense case that this document  
 (15) would  
 (16) be more closely tied to what Exxon did Exxon s response to the  
 (17) spill In fact I don t think there s any evidence that this  
 (18) was used in connection with the response at all and I just -  
 (19) at least on a quick scan of my computer I didn t come up with  
 (20) any reference during the defense case to this document  
 (21) certainly not by us and I think only one attempted use by  
 (22) Mr Petumenos during the course of someone s examination  
 (23) but  
 (24) it wasn t used  
 (25) I still think it is an unfair use of the document to bind  
 (26) us to factual findings made by Alyeska simply because we in  
 (27) our - in the course of our spill contingency planning that was

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- (1) required by federal law we said we were going to rely on the  
 (2) response plan adopted by Alyeska  
 (3) THE COURT I don t know that that s what the purpose  
 (4) of this document is though It s not to bind you to it it s  
 (5) simply to show what you knew right?  
 (6) MR DIAMOND Then I raise the question of relevance  
 (7) Why is that relevant? We ve already admitted foreseeability of  
 (8) harm to the environment We did that to take out a lot of  
 (9) evidence that otherwise would have come in on the subject I  
 (10) think it s being used to prove the truth of the matters  
 (11) asserted that these are by the admission of Alyeska somehow  
 (12) uniquely sensitive and therefore any damage we did ought to  
 (13) be  
 (14) viewed in that context It s not our document It is not one  
 (15) we participated in preparing It is simply one that we adopted  
 (16) as something we were relying on as I understand it to comply  
 (17) with federal contingency planning requirements  
 (18) MR PETUMENOS I think that issue was behind us The  
 (19) issue was raised in terms of its probative nature and why it s  
 (20) evidence because Exxon in one of their formal admissions in  
 (21) the discovery process referred to it adopted the Alyeska  
 (22) contingency plan as part of what their plan was in the event  
 (23) that they as a company had an oil spill  
 (24) What I recall being reserved by the Court - you just read  
 (25) it - is you wanted to see how the case developed to see  
 (26) whether the sensitive nature of the environment surrounding

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- (1) Prince William sound was a contested issue in the case I  
 (2) don t think that you - you were requiring us to actually  
 (3) physically pick the document up and place it under a witness  
 (4) nose but you wanted to see how the issues developed and my  
 (5) view is that with - when Drs Gilfillan and Page came in and  
 (6) testified to how robust and how strong Mother Nature is and  
 (7) how  
 (8) quickly the environment comes back and how little an oil spill  
 (9) craters the ecosystem the food chain is complex not simple  
 (10) all of that business The fact that these companies are  
 (11) operating under a contingency plan - you don t have them all  
 (12) I have them here Judge counsel is looking at me brought the  
 (13) other one up  
 (14) The fact that they were operating under a contingency plan  
 (15) that discussed the sensitive nature of the sound and which  
 (16) areas of the sound were sensitive contradicts that notion We  
 (17) attempted to put it in our case in chief It was put in the  
 (18) federal trial for the same essential purpose I think and I  
 (19) don t think there s any question but that the way the  
 (20) defendants case has developed with the robust nature of the  
 (21) ecosystem and how strongly it adapts and how tough it is in the  
 (22) face of a ten million gallon spill that what was part of the  
 (23) contingency plan was what they said about it and what they  
 (24) said before there was litigation is important about the  
 (25) sensitive nature of the area  
 (26) I think that would be fertile ground for argument on our



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- (1) THE COURT But enough question was shed on this
- (2) document by intemperate remarks of counsel and the examination
- (3) that I felt that it should be admitted
- (4) Now if I - if I also indicated there were parts of it
- (5) that should come out I'll take another look at it but - but
- (6) that's water that went under the dam a long time ago
- (7) What else?
- (8) MR STOLL Your Honor I have one question and
- (9) that's - it's not an evidentiary - I don't know if this is an
- (10) exhibit or not but it's - we would like to put in evidence
- (11) the defendants denied the liability in their - in their answer
- (12) to the KIB complaint they denied liability to KIB denied any
- (13) damages and denied liability and they have come in and they
- (14) have repeatedly with Mr Harrison as well as other witnesses
- (15) said We accepted all responsibility et cetera
- (16) Now I don't know I'm just asking a question Whether we
- (17) put the pleading in as an exhibit or we have that as an
- (18) instruction I'm just asking for clarification
- (19) THE COURT I don't know There is - there is enough
- (20) self serving testimony in there about how Exxon is - has
- (21) accepted liability that maybe it needs some description of the
- (22) course of this case since Exxon certainly didn't admit
- (23) liability until the late stages of the case
- (24) I don't know how to handle that It may be by virtue of an
- (25) instruction

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- (1) MR STOLL We'll try to draft something Thank you
- (2) MR FORTIER Your Honor I have one thing In the
- (3) course of Professor Green's testimony -
- (4) THE COURT By the way counsel you've also got to
- (5) understand accepting responsibility is not the same thing as
- (6) either denying or admitting liability They may - his
- (7) testimony related to more things than simply an admission of
- (8) liability as it related to this case It related to Exxon's
- (9) response to the oil spill
- (10) MR STOLL I understand that
- (11) THE COURT So inappropriate emphasis on the
- (12) procedural aspects of this case when they actually admitted
- (13) legal liability is a chancy proposition So whatever I do in
- (14) terms of an instruction or otherwise has got to be a measured
- (15) response
- (16) MR STOLL I understand Your Honor I'm not going
- (17) to make it argumentative
- (18) THE COURT Yes?
- (19) MR FORTIER Your Honor I want to withdraw an
- (20) exhibit
- (21) THE COURT Take it out what is it? Some -
- (22) MR FORTIER Professor Green It says 1264 and
- (23) 1264 A - he had a typographical error Port Graham We want
- (24) to withdraw 1264
- (25) MR OPPENHEIMER So you're keeping in 1264 -

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- (1) MR FORTIER 1264A is what we want to keep in
- (2) THE COURT So 1264 is out
- (3) MR FORTIER That's correct Your Honor
- (4) (Exhibit 1264 withdrawn)
- (5) THE COURT Is that it? On to the instructions
- (6) right?
- (7) MR PETUMENOS Judge I wonder are you in a position
- (8) where you feel like you can hear argument on the OPA 90
- (9) issues
- (10) and request for judicial notice at this point? Because that is
- (11) an area of instruction that we are going to disagree about for
- (12) sure
- (13) THE COURT I'm prepared to hear argument Go ahead
- (14) MR PETUMENOS Could we have a short break perhaps?
- (15) THE COURT Sure sure I'll give you ten minutes
- (16) THE CLERK Please rise This court stands in
- (17) recess
- (18) (Recess from 2 28 p m to 2 42 )
- (19) THE CLERK. Please rise This court now resumes its
- (20) session
- (21) MR DIAMOND In all fairness to the defendants you
- (22) should know that our copies of the OPA 90 briefs have not
- (23) arrived and - but Mr Petumenos has every confidence that I
- (24) can wing this so he's elected to go forward
- (25) THE COURT If you wing it wrong I'll correct you
- (26) MR DIAMOND Thank you

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- (1) MR PETUMENOS To start we have Pretrial Order
- (2) Number 49 which was the summary judgment which was
- (3) denied
- (4) and you ruled that the plaintiffs are entitled to bring and
- (5) maintain claims for damages arising from the discharge of oil
- (6) with regard to land selected but not conveyed pursuant to each
- (7) corporations irrevocable election to accept Interim conveyance
- (8) of such land Genuine factual issues exist regarding selected
- (9) land which precludes summary judgment
- (10) You were right and I won't go through the reasons why you
- (11) were right I did indicate to the Court in the event we were
- (12) entitled to the OPA 90 instruction as I thought we were
- (13) entitled to it I think I said this at the bench you may have
- (14) to instruct the jury to undo some of the testimony that was
- (15) allowed in because a number of the jurors - the jurors heard
- (16) testimony about the fact that we couldn't use park land by
- (17) regulation and so forth
- (18) This issue subsumes - the argument I'm about to make
- (19) was - is the culmination and the product of an incredible
- (20) amount of work beginning with congressional work to get the
- (21) statute passed in the first place OPA 90 says Section 8301
- (22) 43 U S Code Section 1642 Solely for the purpose of bringing
- (23) claims that arise from the discharge of oil the Congress
- (24) confirms that all right title and interests of the United
- (25) States in and to the lands validly selected pursuant to ANCSA
- (26) by Alaska Native corporations are deemed to have vested in the

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- (1) was a - during the examination Mr Selby there was this tour  
 (2) book  
 (3) THE COURT Yes  
 (4) MR STOLL And then there was a - Mr Clough in  
 (5) cross examination offered the entire book and I made an  
 (6) interperate which I apologize for comment about certain  
 (7) portions of it then I brought the - you admitted the whole  
 (8) thing I think later you indicated it may have had something  
 (9) to do with my comment but at any rate then subsequently I  
 (10) brought this up and you indicated you thought that this was  
 (11) inadmissible but it wasn't - it's not clear from the record  
 (12) as to whether or not these brochures that are part of the -  
 (13) the tour book are in or out and I just want to clarify it  
 (14) before we go - you know before -  
 (15) THE COURT What's the number?  
 (16) MR STOLL It's DX15488 It's just relating to these  
 (17) two brochures that were in the back of the -  
 (18) THE COURT Is it in?  
 (19) MR STOLL I think the exhibit is in It's a  
 (20) question of whether these are - I don't have objection to the  
 (21) rest of the tour book I just have - I just have an objection  
 (22) to these two brochures  
 (23) THE COURT Well what are the two brochures  
 (24) numbers?  
 (25) MR STOLL They're not a separate number

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- (1) THE COURT Then clearly they're not admitted right?  
 (2) MR DIAMOND Your Honor I think the entirety of the  
 (3) document was admitted I don't want to get embroiled in this  
 (4) controversy it was one between -  
 (5) THE COURT They're all marked as one exhibit?  
 (6) MR DIAMOND Yes  
 (7) THE COURT Then it's all in 15488 in now or  
 (8) earlier?  
 (9) MR STOLL Your Honor can we be heard on this?  
 (10) THE COURT I think if I admitted it I admitted it  
 (11) THE CLERK Judge the Defendants Exhibit DX15488 is  
 (12) admitted which is the same as PX1519 They each have the  
 (13) same exhibit Both of them are in  
 (14) THE COURT Are they the same exhibit do they all  
 (15) have the same parts?  
 (16) MR STOLL No they're not Your Honor  
 (17) MR PETUMENOS May I have my one for-the-day request  
 (18) for reconsideration?  
 (19) THE COURT Not until I finish this discussion  
 (20) counsel  
 (21) MR PETUMENOS It's on this exhibit  
 (22) THE COURT You let Mr Stoll talk please I mean  
 (23) I'm wasting a lot of time here when you should be dealing with  
 (24) jury instructions It's only because you decided you wanted to  
 (25) stand up and talk now Mr Stoll Let's get it done

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- (1) MR STOLL I'm sorry I'm not trying -  
 (2) THE COURT We're wasting a lot of time here just  
 (3) standing there going through the exhibits I have some pretty  
 (4) important things to do So I just said the exhibit was in now  
 (5) I find that one exhibit is not the same as the other Was I  
 (6) ever approached with the - the accompanying two documents  
 or  
 (7) was I only approached with one book? Because what I was  
 (8) approached with is what is admitted  
 (9) MR DIAMOND You were approached with the defendants  
 (10) exhibit which was the entirety of the briefing package in the  
 (11) nice colorful binder That's what we introduced and that's  
 (12) what had been admitted  
 (13) I understand Mr Stoll wants parts of that removed This  
 (14) objection was already ruled on once and I think we ought to  
 (15) leave the record as it lays  
 (16) THE COURT Smart to sit down just now counsel  
 (17) Yes anything further? What I admitted is what's in Now  
 (18) yes you have one minute to talk about reconsideration  
 (19) MR PETUMENOS All right This is my concern At  
 (20) one point in the proceedings you looked at this exhibit I  
 (21) think during the defense case when it came in and you  
 (22) commented that you couldn't imagine by the exhibit was  
 (23) admissible I think what happened in this case is that Mr  
 (24) Stoll made a comment during his examination which was  
 improper  
 (25) and the Court got very short with him as I think it - the

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- (1) Court should have I think he called the document propaganda  
 (2) or something like that and you admitted the document right  
 (3) then and there because of his comment  
 (4) There are more than one plaintiff in the case and I think  
 (5) the document is clearly inadmissible It may have been an  
 (6) improper comment I think it was -  
 (7) MR STOLL It was an improper comment  
 (8) MR PETUMENOS But it is nevertheless - it doesn't  
 (9) make the document any more admissible that he made the  
 improper  
 (10) comment and I was sitting here quietly and my clients are  
 (11) going to get hurt by it It is a clearly self-serving document  
 (12) by Exxon which talks about how great they are and absent the  
 (13) comment of counsel would not have been admitted  
 (14) I'm asking you not to prejudice my clients because the  
 (15) comment was made You made the comment later when you  
 saw it  
 (16) Judge separately in the course of the defense case that you  
 (17) can't imagine the document was admitted in the form you  
 admitted  
 (18) it and I understand why  
 (19) THE COURT Here's the deal If the record supports  
 (20) what you're saying I may reconsider my - my knowledge of  
 (21) this subject is my recollection and my knowledge that I  
 (22) admitted something all right? You show me those portions of  
 (23) the record that you think support your point of view I'll read  
 (24) them and decide whether or not I change my ruling  
 (25) MR PETUMENOS All right

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(1) because Congress has – or the law has given the Native  
 (2) corporations all claims with respect to selected but not  
 (3) conveyed lands  
 (4) THE COURT Thank you very much counsel  
 (5) MR DIAMOND Your Honor there is nothing circular in  
 (6) the position that we re taking and there s nothing that defeats  
 (7) the intent of Congress or is inconsistent with even the instant  
 (8) legislative history that Mr Petumenos suggests that prior  
 (9) proceedings between private litigants may have had  
 (10) The statute says solely for purposes of bringing claims  
 (11) that arise And we don't dispute for a minute that a Native  
 (12) corporation which owns selected but un conveyed lands has  
 (13) standing to bring claims The question is claims for what?  
 (14) This statute is not an assignment as much as Mr Petumenos  
 (15) would like to make it appear to be It says solely for  
 (16) purposes of bringing claims that arise from the discharge of  
 (17) oil  
 (18) Clearly what the statute was intended to do was to remedy a  
 (19) situation where an oil discharge could have a permanent impact  
 (20) on a parcel of land that was slated for conveyance and not  
 (21) give the Native corporation that ultimately would acquire that  
 (22) land the ability to get everything it had coming to it The  
 (23) land plus whatever compensation was due it because of some  
 (24) continuing loss of value that it would still suffer from after  
 (25) the period of conveyance

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(1) There is nothing in this statute that talks about use and  
 (2) the way these cases have developed and the theories that these  
 (3) plaintiffs have chosen to assert as you mentioned earlier  
 (4) this is essentially a loss of use case  
 (5) And they can only sue for those losses which they have  
 (6) actually sustained If they had no right to use property then  
 (7) the oil spill preventing that property from being used did not  
 (8) cause them any harm And there s nothing in OPA 90 that  
 (9) suggests that they had any right to use and in fact the case  
 (10) law is just to the opposite  
 (11) You know Cape Fox Cape Fox clearly holds that Native  
 (12) corporations do not have any right to use selected lands before  
 (13) the conveyance is perfected and there is nothing in OPA 90  
 (14) that says the rule in Cape Fox is overturned The statute is  
 (15) very narrowly defined solely for purposes of bringing claims  
 (16) The language – and I don t know that settlements between  
 (17) the United States and other parties settlements between the  
 (18) United States and Exxon can expand a statutory entitlement  
 (19) And I strongly suspect that they can t Whatever Congress has  
 (20) vested in Native corporations it has vested and I don t know  
 (21) that a settlement by Exxon and a representative of the Attorney  
 (22) General can alter that  
 (23) But even if we – if we considered the settlements to have  
 (24) some bearing on this issue It s very instructive to read the  
 (25) language of the settlement agreements that Mr Petumenos  
 talks

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(1) about because the claims which were preserved were claims  
 for  
 (2) lost or diminished land values and then it goes on to talk  
 (3) about preservation and protection of exploration of  
 (4) archaeological resources  
 (5) But the claim that the Native corporations wanted to  
 (6) preserve was the claim for diminished land value – and that s  
 (7) entirely consistent with our view of OPA 90 If in fact there  
 (8) was diminished market value of these parcels then these  
 (9) plaintiffs by virtue of OPA 90 would have every right to  
 (10) assert that  
 (11) But that s not what the claim is They re claiming they  
 (12) lost the use and in order to do that they have to show that  
 (13) they had some entitlement to use and under Cape Fox they  
 (14) didn t have any  
 (15) That s been confirmed by the trial evidence in this case  
 (16) Mr Propes testified with respect to Chugach Alaska  
 Corporation  
 (17) that Chugach had a strong policy that they did not physically  
 (18) occupy or exploit or otherwise develop lands prior to  
 (19) conveyance because they didn t have any right to It was also  
 (20) confirmed by testimony from I believe it s deposition  
 (21) testimony from Port Graham representatives who  
 acknowledged  
 (22) that on Kenal Fjords lands which are selected but un conveyed  
 (23) they have no right to use How then can they sue for loss of  
 (24) use if they had no right to use  
 (25) We re not saying there is no standing We re simply saying

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(1) that In evaluating their claims of loss of use the jury  
 (2) should be on notice of the fact that the law is such that these  
 (3) Native corporations did not have the right to use those  
 (4) properties and that s our proposed jury instruction number 17  
 (5) which states just – just that Its result is entirely  
 (6) consistent with OPA 90 entirely consistent with the  
 (7) legislative history and not at all circular  
 (8) THE COURT Thank you  
 (9) MR PETUMENOS Very briefly as I listen to counsel s  
 (10) argument I think I see part of the problem I didn t quite see  
 (11) before  
 (12) His argument rests I think upon the same premise as the  
 (13) motion for directed verdict did a moment ago which is you have  
 (14) to actually use the property and pay – you know receive money  
 (15) on it and so forth It s very much the same argument he s  
 (16) saying because you didn t do that you don t have a interest  
 (17) in the property And because that earlier argument fails this  
 (18) one seems to me fails as well  
 (19) And the second thing I d point out is in the consent  
 (20) decree That language goes on to say Or any other property  
 (21) damage interests that – that exist All we re talking about  
 (22) with respect to the property damage that we claim is the  
 (23) methodology by which – not that we choose but that the law  
 (24) requires that we – under GNA that we endeavor to use so that  
 (25) we don t overcompensate ourselves for the damage that is

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(1) respective corporations as of March 23rd 1989 the day before  
 (2) the spill  
 (3) We were involved in the drafting of that legislation in  
 (4) fact and the intent of the statute clearly is that all right  
 (5) title and interest to this land all right title and interest  
 (6) vests to the Native corporation  
 (7) And then the statute goes on to describe how that statute  
 (8) is triggered about which there s no dispute That has to do  
 (9) with the motion of directed verdict that was withdrawn earlier  
 (10) today  
 (11) It didn t stop there however because there was another  
 (12) whole case big enough to dwarf many cases - maybe not this  
 (13) one but there was another whole case that we engaged in at the  
 (14) time that the federal government proposed to settle their  
 (15) claims with Exxon and we were involved in an injunctive  
 (16) action which was both in the Washington D C area as well as  
 (17) eventually moving here  
 (18) In a consent decree that settled that case between the  
 (19) Native corporations and the governments to allow them to  
 (20) settle the case - if I could approach the Court with the  
 (21) language - we made sure paragraph eight of the consent  
 (22) decree - that language was fought hard for  
 (23) The judge Sporkin in Washington D C refused to permit  
 (24) the settlement between the federal government and the \$900  
 (25) million settlement because of the objections raised earlier

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(1) about the potential for the impact on our claims without our  
 (2) being involved and then when Judge Holland approved the  
 (3) consent decree I appeared personally in front of him at a  
 (4) hearing and he added the following language to the final order  
 (5) adopting that consent decree - and there was actually an  
 (6) exchange on the record in which the Judge agreed that the  
 (7) record that we made in the courtroom would be part of the  
 (8) agreement  
 (9) And what I essentially told Judge Holland at that time was  
 (10) that we wanted to walk out of the courtroom with the same  
 (11) causes of action we had going in without regard to the  
 (12) settlement and that s what Judge Holland told us we have  
 (13) received  
 (14) And the last document I ll show you this is the consent  
 (15) decree between Exxon and the government The last document  
 (16) I ll show you is a portion of the consent decree between Exxon  
 (17) and the government when they finally did settle and this  
 (18) language was required to be in it to preserve our position  
 (19) So the Native corporations have toiled long and hard  
 (20) essentially for this moment when we knew Exxon might attempt  
 (21) to contend that we couldn t bring claims on the - as to park  
 (22) land and there is no question but that OPA 90 and our  
 (23) enforcement of it through the federal - through the government  
 (24) settlement process was that all right title and interest in  
 (25) this property insofar as a claim in this court were concerned

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(1) was to be ours  
 (2) And there wasn t much dispute about that until it occurred  
 (3) to Exxon that they might try the following argument Because  
 (4) the damage is temporary and because the use therefore is -  
 (5) the lost use analysis has to be provided and because you  
 (6) couldn t use it because you were shut off from the park  
 (7) regulations and because I can produce depositions that say  
 that  
 (8) you the Native corporations weren t allowed to use the land in  
 (9) the normal way or develop it or any of these things because it  
 (10) was - you were locked out of it you didn t have possessory  
 (11) interest it was a park therefore you don t have any damages  
 (12) and then you don t have any claim  
 (13) And the problem with Exxon s argument is that it is  
 (14) completely circular and if you accept that - that logic you  
 (15) tear up the statute you write it out it s like Congress  
 (16) didn t do a single thing and that s why our position clearly  
 (17) is that we got what the statute says all right title and  
 (18) interest  
 (19) All claims - the reason for this is is under normal  
 (20) circumstances the government would have to take any  
 revenues  
 (21) that it got on selective and not conveyed lands and escrow  
 them  
 (22) and hold them for our benefit and hold them in trust and make  
 (23) an accounting and make sure that they acted accordingly with  
 (24) respect to their beneficiary of their trustees and this  
 (25) bypassed that process and gave the claim to the Native

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(1) corporation directly since the land is eventually going to be  
 (2) conveyed in fee simple title  
 (3) As a matter of state law that kind of a - an interest in  
 (4) property is in fact sufficient equitable title as we indicated  
 (5) in our brief to maintain an action and to collect all the  
 (6) damages  
 (7) In short Congress is presumed as a matter of statutory  
 (8) construction to know the law as it exists at the time that it  
 (9) passes the legislation It is presumed to know that our cause  
 (10) of action would be based upon the rules of law that we re using  
 (11) in this court and all right title and interest in that claim  
 (12) whatever claim it was was given to us by Congress  
 (13) Exxon cannot now write out the language of the statute by  
 (14) saying because it s a lost use analysis and you didn t use it  
 (15) the government did you have no claim because then they tear  
 (16) up the statute and the intent of Congress which was clearly to  
 (17) provide us with the entire claim all of the claim that the  
 (18) government had as long as the preconditions which Exxon now  
 (19) concedes were met were met under OPA 90  
 (20) We re entitled to an instruction at this point and given  
 (21) the testimony that Exxon has put into the record about the  
 (22) depositions of Mr Norman - I can t remember every one but Do  
 (23) you use the land are you allowed to go in the park and subsist  
 (24) and all that We now need an instruction that it doesn t  
 (25) matter whether they actually used the particular land or not

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- (1) going to do that as soon as we were through here
- (2) THE COURT Problem is there s not too much time left
- (3) in the day because of the length of these arguments so give me
- (4) a reasonable proposition counsel You know I do not want to
- (5) be stalled here at 2 00 tomorrow afternoon because I ll tell
- (6) you what my first reaction will be it will be simply okay
- (7) you ve taken this kind of time we re going to just keep
- (8) kicking the final argument off until you get it done I am not
- (9) going to be retyping these instructions on the day that you do
- (10) your final arguments and we still have to deal with the -
- (11) with the verdict form question too
- (12) So what s your - what s your time frame? This time I
- (13) think that I m going to have to require that the two of you who
- (14) are working on the instructions not continually - I mean it
- (15) may be hard on everybody here but you ve got to be out of this
- (16) room if other people are arguing exhibit issues because you re
- (17) not doing productive work
- (18) MR OPPENHEIMER Your Honor makes a good point I
- (19) think in all fairness to Mr Petumenos he s been carrying a
- (20) number of burdens
- (21) THE COURT I m sorry about that counsel
- (22) MR OPPENHEIMER I apologize I have a lozenge in my
- (23) mouth I would have offered Your Honor one but it would be
- (24) too
- (24) much like a commercial
- (25) I have been feverishly working here we have been making up

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- (1) some time
- (2) Tim what do you think is an estimate? I think we re
- (3) clearly going to need two two and a half hours to try to
- (4) scratch things through
- (5) MR PETUMENOS Clearly
- (6) THE COURT Can you do this? If I can make a
- (7) suggestion? Can you in the next say 25 minutes can you be
- (8) here look at the instructions you have and think about the
- (9) substantive instructions you might be able to resolve today
- (10) some block of them? And then at 4 30 give them to me so that
- (11) I can include them in a tentative packet along with the
- (12) boilerplate Those you agreed on at 4 30 just give them all
- (13) to me and I ll put them in the packet and then that way I ll
- (14) be a little more secure because I ll know what you ve been able
- (15) to do productively and what you haven t
- (16) MR OPPENHEIMER Okay
- (17) THE COURT Then tomorrow morning you can come in at
- (18) ten with - with further - the further product of your work
- (19) So I ll give you a couple hours in the morning to refine
- (20) whatever you do this evening and then - my aim here would be
- (21) that all of this work that you have to do in order to put the
- (22) packet in some sort of shape so that we can discuss it on the
- (23) record will be done by 12 00 And then we ll - we ll recess
- (24) and we ll put it on the record at one or two Okay?
- (25) MR OPPENHEIMER Yes sir

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- (1) THE COURT By the way here are all of these
- (2) different things from the plaintiffs
- (3) THE COURT Thanks very much
- (4) THE CLERK Please rise This court stands in
- (5) recess
- (6) (Recess at 3 06 p m )

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- (1) EXHIBITS
- (3) PX3 and PX741 offered 82
- (4) DX10298A offered 92
- (5) 10263 offered 92
- (6) 251-4 and 251-4A offered 75
- (7) 8501 offered 78
- (8) 18 offered 79
- (9) PX8525 offered 81
- (12) 251 04A and 251 04 received 77
- (13) 8501 received 79
- (14) PX8525 received 81
- (15) PX0003 received 89
- (16) 741 received 89
- (17) PX8228 received 91
- (18) DX10298A received 92
- (19) 10263 received 92
- (22) 1264 withdrawn 99

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- (1) included  
 (2) So all we are doing by applying the lost use analysis -  
 (3) which is again the term of art which is the fair economic  
 (4) value of the land for the temporary use - all we are doing is  
 (5) complying with GNA which is what we must do and the fact  
 that  
 (6) the property damage all of it all right all title all  
 (7) interest in it was given to ours requires that we do it in  
 (8) that fashion  
 (9) So this is our claim plain and simple That was the  
 (10) intent of Congress It was the intent of the lawsuit It was  
 (11) the agreement with the government No one but us has sued  
 for  
 (12) these lands no one  
 (13) THE COURT Whose loss of use are you suing for?  
 (14) MR PETUMENOS All of it The government s - if  
 (15) they lost use at the time ours - it s our land for purposes  
 (16) of this lawsuit All right all title all interest is what  
 (17) Congress said and when we went to the courts in Washington  
 and  
 (18) in Alaska and said Wait a minute we have an interest in these  
 (19) lands if they are attempting to settle this land they can t  
 (20) they can t do it  
 (21) And the Judge said That s right you can t do it You  
 (22) must make provision in the settlement to make sure that you re  
 (23) not whereupon that language was forced upon the parties  
 both  
 (24) Exxon and the government so that they would be within the law  
 (25) and within OPA 90

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- (1) THE COURT Okay thank you  
 (2) MR DIAMOND I was just going to respond to the point  
 (3) about the characterization of my argument I m not saying that  
 (4) they have necessarily have failed because they are going to  
 (5) have to demonstrate that they would have generated some  
 (6) income producing activity on this property What we re saying  
 (7) is as a minimum as a first step the law requires that they  
 (8) demonstrate that the property had some profitable use some  
 (9) lawful profitable use by the Native corporation and that s  
 (10) what s key here If the Native corporation could not have used  
 (11) this land the Native corporation has not been deprived by the  
 (12) oil spill of any profitable use of the land And I think you  
 (13) hit the nail on the head Whose use are they suing for? They  
 (14) don t have any right to sue for interference with the use that  
 (15) the government might make during a period prior to  
 conveyance  
 (16) I mean that is Cape Fox Cape Fox says that the  
 (17) government s right And interestingly if you look at the  
 (18) settlement agreement the language Mr Petumenos gave you  
 it  
 (19) talks about private harms resulting from the oil spill harms  
 (20) to these private parties not governmental harms  
 (21) THE COURT It says exclusively private claims  
 (22) MR DIAMOND Depends which language you re looking  
 (23) at I was looking at the Chenega Bay agreement  
 (24) THE COURT The one I was looking at was Exhibit B I  
 (25) think it s B or 13 one of the two B I think The agreement

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- (1) consent decree  
 (2) MR DIAMOND Paragraph eight.  
 (3) THE COURT Page 15  
 (4) MR DIAMOND I have a different document which is -  
 (5) MR PETUMENOS Same document just on a different  
 (6) page  
 (7) THE COURT I understand the issue counsel Thank -  
 (8) you  
 (9) This - this argument has the aspects of - some of the  
 (10) aspects of a directed verdict motion especially as it relates  
 (11) to the way the plaintiffs would have me deal with the case  
 (12) legally but mainly this is an instruction issue I think  
 (13) Mr Petumenos recognized in the end and his opening portion  
 of  
 (14) argument  
 (15) To me this is a factual matter You have the right to  
 (16) claim the loss of use You have the right to claim diminution  
 (17) of value but if you can t prove one of those things then you  
 (18) lose  
 (19) The way Exxon is treating this is a factual matter I  
 (20) think because I see - I see their - their proposed  
 (21) instruction and it does treat this issue as a factual matter  
 (22) and what they re saying is if they can t prove that - if the  
 (23) evidence doesn t show that they were entitled to use things  
 (24) then they shouldn t win on those - those parts of the land  
 (25) that they couldn t use which seems to me to be an eminently

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- (1) logical proposition  
 (2) So the answer is I probably won t use the plaintiffs  
 (3) proposed instruction because I certainly won t direct a verdict  
 (4) on that issue and I probably will use Exxon s but that s for  
 (5) later I mean to me Exxon s position is the correct one  
 (6) here legally How that affects the evidence appears to be  
 (7) that - that the decision will be left up to the jury and they  
 (8) will evaluate the evidence as it relates to what the plaintiffs  
 (9) were using and could use and what they weren t  
 (10) MR PETUMENOS I guess we can defer this to later  
 (11) but I guess it would - where I would ask the Court to take a  
 (12) careful look is on the issue of do we have the government s  
 (13) lost use  
 (14) THE COURT Yes The answer - my answer to that  
 (15) question counsel is no N O you do not have it  
 (16) Is there anything else? Now as I said about an hour ago  
 (17) can we go on to the instructions now? Where are you on the  
 (18) instructions?  
 (19) MR PETUMENOS We have a set of boilerplate to file  
 (20) that are - we ve now reviewed right? And are ready  
 (21) MR OPPENHEIMER We do  
 (22) MR PETUMENOS We have not begun the process to  
 (23) getting to the Court in negotiating the ones that are more  
 (24) substantive and at issue  
 (25) MR OPPENHEIMER Well I was going to say we were



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Vol 1 1

- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
- (2) THIRD JUDICIAL DISTRICT
- (3) In re ) Case No. 3AN 89 7533 Civil
- (4) ) Anchorage Alaska
- (5) The FXXON V. LDFZ ) Friday September 9 1994
- (6) ) 2 00 p m
- (7) )
- (8) VOLUME 1 Pages 1 through 105
- (9) TRANSCRIPT OF PROCEEDINGS (Hearing)
- (10) Arguments on Jury Instructions
- (11) BEFORE THE HONORABLE BRIAN C. SHORTALL
- (12) Superior Court Judge
- (13)
- (14) APPEARANCES
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Vol 1 3

- (1) PROCEEDINGS
- (2) (Jury out at 2 10 p m)
- (3) THE CLERK. Please rise This court now resumes its
- (4) session Please be seated
- (5) THE COURT Counsel we're on the record and you can
- (6) tell me about the - first before we started on the contested
- (7) jury instructions the parties this morning filed a document
- (8) entitled Notice of Parties First Joint Filing of Jury
- (9) Instructions and if I'm not mistaken those are the
- (10) instructions that you agree should be given
- (11) MR PETUMENOS We got mad at each other and took them
- (12) all back
- (13) THE COURT I wanted to nail this one in quick.
- (14) MR OPPENHEIMER Then Mr Petumenos ordered pizza and
- (15) we all calmed down
- (16) Your Honor the only qualification to that is subject to
- (17) the Court's prior ruling We did have - we can do this at the
- (18) end but there was one instruction which based on the rulings
- (19) yesterday on the directed verdict we understand would not
- (20) have
- (21) been acceptable today We wanted to include that as part of
- (22) the Court's record That was an instruction on actual use
- (23) THE COURT I don't remember that being in this packet
- (24) of -
- (25) MR OPPENHEIMER It's not Your Honor Because when
- (26) we submitted it we only submitted the ones that were agreed

Vol 1 2

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Vol 1 4

- (1) to
- (2) MR PETUMENOS This is for the record appellate
- (3) preservation
- (4) MR OPPENHEIMER This is the comment we made on the
- (5) phone this morning
- (6) THE COURT Here's what I'd like to do with this
- (7) Notice of First Joint Filing of Jury Instructions
- (8) These instructions there's no controversy about
- (9) Everybody agrees they should be given I'm going to make
- (10) them
- (11) the Court's next in order 39? - 38 and that will show the
- (12) instructions that you have agreed should be given
- (13) (Exhibit Court's 38 identified)
- (14) But when I get the final packet - which you're going to
- (15) prepare by the way - this is what I'd like to do
- (16) First you should take cite annotations citations out and
- (17) I never have - until now anyway - given a heading on my
- (18) instructions so for instance the jury instruction number
- (19) four Identification of Plaintiff Corporation do you want that
- (20) or -
- (21) MR PETUMENOS I want the headings taken out
- (22) THE COURT Yeah So do I because it's consistent
- (23) with my usual practice So clean copies no citations no
- (24) titles
- (25) MR OPPENHEIMER Yes Your Honor
- (26) MR PETUMENOS The next agreed upon thing is that

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- (1) Mr Oppenheimer s agreed that I could try to give the Court a  
 (2) road map of where we are with respect to the plaintiffs and  
 (3) defendants proposed jury instructions which I m prepared to  
 (4) do next  
 (5) Do you have both of those in front of you Judge?  
 (6) THE COURT Uh huh  
 (7) MR PETUMENOS The plaintiffs proposed one versus  
 (8) defendants proposed one Plaintiffs one is the instruction  
 (9) you gave during the case which we ve repeated here  
 defendants  
 (10) one has an additional paragraph paragraph two I believe  
 (11) about which there is controversy  
 (12) THE COURT Let me see  
 (13) MR OPPENHEIMER I m sorry I didn t know which one  
 (14) MR PETUMENOS I m not going to argue them now I m  
 (15) just going to set up for the Court what the disputes are and  
 (16) we can take them whatever order the Court wants I want to  
 (17) give you an idea of where the disputes are There are some  
 (18) agreements -  
 (19) THE COURT Don t tell me about this I m sorry if I  
 (20) jog you off your planned path but don t tell me about the  
 (21) controversy tell me about the agreements  
 (22) MR PETUMENOS I ll try My reason for wanting to do  
 (23) that is that very often with an instruction that you have in  
 (24) the competing packet much of the instruction is agreed upon  
 (25) and a portion might not be which was why I was proceeding as

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- (1) I -  
 (2) THE COURT If you think there are some you can  
 (3) simply give me the problem and I ll tell you the solution  
 (4) MR PETUMENOS That s what I m trying to do  
 (5) THE COURT Oh fine If that s what you want to do  
 (6) sure  
 (7) MR PETUMENOS The first instruction the agreed upon  
 (8) language is as I ve stated that the disputed language is the  
 (9) second paragraph -  
 (10) THE COURT Is the second paragraph  
 (11) MR PETUMENOS - of the Defendants Proposed 1 The  
 (12) Defendants Proposed 1 and Plaintiffs Proposed 1 are identical  
 (13) as far as I can tell and was the instruction you gave that the  
 (14) transcript cite mentioned in the Plaintiffs Proposed 1 without  
 (15) modification  
 (16) Second paragraph of Defendants 1 is a modification and  
 (17) that s where the dispute is there  
 (18) THE COURT Hang on just a minute  
 (19) Yes and I looked at these prior to the time I came in  
 (20) here Do either one of you want to argue this point because  
 (21) I m prepared to decide it?  
 (22) MR OPPENHEIMER Your Honor I would like to explain  
 (23) the change  
 (24) The second - the second paragraph has two - has one  
 (25) addition and as I told Tim before one deletion that we would

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- (1) actually like to make This is otherwise as Tim says  
 (2) verbatim from the transcript  
 (3) The Court has indicated as we indicated in our footnote  
 (4) that it would in a variety of different contexts do something  
 (5) to ensure - this is a very important point to us - that there  
 (6) not be a double recovery problem here  
 (7) The first three - I m sorry one two three - four  
 (8) sentences of the second paragraph are our attempt to deal with  
 (9) that problem and we thought this was the logical instruction  
 (10) for that point to be made  
 (11) THE COURT Is it the only place in your proposed  
 (12) instructions that you talk about it?  
 (13) MR OPPENHEIMER That s correct it is  
 (14) The second sentence - actually that s not literally true  
 (15) Your Honor There is a - there is a - it s Jury Instruction  
 (16) No 17 deals with a similar issue but it s a double recovery  
 (17) issue but not for the same reason on page - on the  
 (18) archaeological claims I can get to that in a minute  
 (19) The last sentence of the second paragraph which begins  
 (20) evidence of damage to subsistence resources was part of  
 Your  
 (21) Honor s statement to the jury at the transcript cites that we  
 (22) have on the papers each of us and we as I told Tim would  
 (23) like to advocate that that be deleted  
 (24) THE COURT Damage to subsistence resources you want  
 (25) to -

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- (1) MR OPPENHEIMER Yes right  
 (2) And the reason for that At the time it was given you may  
 (3) recall there was considerable discussion why we had all this  
 (4) testimony with respect to commercial fisheries and subsistence  
 (5) resources and this was before a lot of the expert testimony  
 (6) and where we all ended up was that it was there and the jury  
 (7) ought to be told it may be relevant to the interference of the  
 (8) corporation s land use  
 (9) Your Honor I think now that we ve heard all the evidence  
 (10) and we ve heard all the experts and we ve heard from all of the  
 (11) experts explicitly - including Professor Green Dr Mundy  
 (12) Mr Shorett and even my friend Dr Seldin - that none of them  
 (13) took into account subsistence It was either in the case of  
 (14) Dr Mundy a contingent compensation issue which was outside  
 (15) the scope of his valuation in the case of Mr Shorett  
 (16) something he just didn t take into account in the case of  
 (17) Professor Green something he didn t take into account in the  
 (18) case of Mr Seldin something that he didn t give attention too  
 (19) at all except as background  
 (20) I believe this is a very important issue I think it s  
 (21) appropriate it s in the first instruction because it is one of  
 (22) the most important issues I think with our instructions I  
 (23) do not believe that there is a link of relevancy between the  
 (24) matters that have been put into evidence on subsistence and  
 the  
 (25) fisheries damage and the claims for property damage that  
 we ve



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(1) heard in the case and on subsistence explicitly I believe  
 (2) that the subsistence testimony has proved what we thought it  
 (3) would be what the defense thought it would be at the  
 beginning  
 (4) of the case  
 (5) It is not relevant to the calculation of damages in the  
 (6) case and it is highly problematic for us because there has  
 (7) been so much testimony about it that I think the jury may be  
 (8) confused I'd obviously rather have this instruction intact  
 (9) than no instruction but I think to now say to them that it may  
 (10) be relevant to the interference of the corporation's use of the  
 (11) lands suggests to them that corporation may make subsistence  
 (12) use of the lands and that sort of thing and we have experts  
 (13) who haven't even taken that into account Closest that we've  
 (14) come are statements that even though they haven't examined  
 the  
 (15) value of it it would be additive somehow that it would  
 (16) suggest that their current valuations are conservative in some  
 (17) respect  
 (18) There really is no - there's no testimony that helps us  
 (19) understand what subsistence has to do with land damages and  
 so  
 (20) I think the time has come to conclude - we're not asking for  
 (21) an instruction that goes to the other ends of the spectrum but  
 (22) this sentence ought to come out because while it may have  
 been  
 (23) relevant now that the testimony is in it isn't  
 (24) THE COURT Thank you counsel  
 (25) MR PETUMENOS I resist the addition I resist the

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(1) deletion I don't believe as a matter of the record counsel  
 (2) is correct  
 (3) Mr Fortier just showed me an excerpt where Dr Mundy  
 (4) specifically addressed the subsistence and analogized it to a  
 (5) farm and so forth and plaintiffs specifically said that the  
 (6) issue of subsistence was important to his determination of the  
 (7) natural lands highest and best use That is a critical issue  
 (8) in our case because the natural land designation is - has all  
 (9) sorts of corollaries to it that relate to land value  
 (10) You gave this instruction to the jury already They  
 (11) listened reasonably carefully You said you would give it  
 (12) again at the end of the case There is - this is Exxon's I  
 (13) think third try - fourth try by my count - at trying to get  
 (14) you to tell the jury that the Native shareholders have received  
 (15) a settlement in another case  
 (16) You've declined every single time and it's even wrong  
 (17) because the universe of people who received that settlement is  
 (18) not the same universe of the shareholders who are  
 shareholders  
 (19) in this corporation They're not mirrors of one another  
 (20) they're not the same group It is not a double recovery and  
 (21) what we did in Instruction No 1 is put together the exact same  
 (22) instruction that we argued and put together before and nothing  
 (23) has changed with respect to that  
 (24) Mr Shorett also never took subsistence out of his  
 (25) calculations so subsistence is very much in the case has been

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(1) since there's been an enormous amount of testimony on it This  
 (2) language was put in to make sure the jury sees it properly is  
 (3) to evaluate the land damages I think the instruction is  
 (4) correct as written Plaintiffs 1  
 (5) THE COURT Anything else?  
 (6) MR OPPENHEIMER Your Honor the only thing I'd add  
 (7) to what we've said I know Your Honor is familiar with the -  
 (8) issues I think perhaps the most important issue for us today  
 (9) with these instructions is not the deletion of the language I  
 (10) discussed but the additional language at the beginning of that  
 (11) paragraph  
 (12) That's - Your Honor's familiar with our deep seated  
 (13) concern and in thinking about all that we've negotiated over  
 (14) the last day and a half Mr Petumenos and I on the subject of  
 (15) these instructions I - I believe that we want to convey to  
 (16) the Court that we think this is probably the single most  
 (17) important issue for us at this time  
 (18) THE COURT Okay I'm going to give the plaintiffs  
 (19) proposed but I can understand why you'd want the - and I  
 (20) think it's appropriate in these instructions somewhere to say  
 (21) the defendant may not be compelled to pay twice for the same  
 (22) issue  
 (23) Now you tell me and I'll accept that representation it's  
 (24) not in any of the other instructions so the answer to the  
 (25) question is I'll give Plaintiffs 1 And it looks to me like

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(1) if I'm going to use the language the defendant may not be  
 (2) compelled to pay twice for the same injury it should go after  
 (3) the sentence on the first page  
 (4) These claims belong to individuals not to Native  
 (5) corporations and they're not being pursued here The problem  
 (6) with that is it's kind of stuff and awkward and it's got no  
 (7) transition  
 (8) So I'm going to give 1 but I won't - but I will give the  
 (9) language - in essence the language you propose about double  
 (10) recovery somewhere in these instructions You have to find the  
 (11) right spot for them and I will not give language that says  
 (12) Exxon has agreed to compensate So that sentence is out But  
 (13) if you phrase the double recovery sentence or a couple of  
 (14) sentences in neutral nonargumentative language then I'll give  
 (15) it and I'll put it in the appropriate place I just want you  
 (16) to tell me where you think it should go  
 (17) All right?  
 (18) MR OPPENHEIMER Yes Your Honor  
 (19) THE COURT When I say that I will give one party or  
 (20) another's instructions what that means is that that party is  
 (21) to provide me with the clean copy So in this case  
 (22) Mr Petumenos will give me a clean copy with no title and no  
 (23) citation If I choose a defendant's version it will be the  
 (24) same order the defendant will give it to me  
 (25) All right?

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- (1) MR PETUMENOS Yes Judge  
 (2) THE COURT Okay that s the plaintiffs Go on  
 (3) MR PETUMENOS No 2 is an instruction that you told  
 (4) us that you would give at the time that the federal and state  
 (5) government settlement spelled out at the various portions of  
 (6) this case It s a limiting instruction that says that they  
 (7) cannot - well it s a limiting instruction on the  
 (8) federal/state settlement and I m looking for the transcript  
 (9) reference here where you indicated that there would be unfair  
 (10) prejudice It s at page 6023  
 (11) Do you need a copy of that?  
 (12) THE COURT You re talking about the subsequent -  
 (13) those two land sales? That were done with trustee money  
 (14) MR PETUMENOS It came up couple times Came up with  
 (15) respect to the land sales came up when there was discussion  
 (16) about the scientists getting money as a result of the - the  
 (17) settlement we allowed the testimony because of the potential  
 (18) bias It came up with Mr MacSwain put into the record  
 (19) without being asked to the \$900 million settlement on  
 (20) cross-examination And it came up one other time as I  
 (21) recall - well with Mr Gilfillan  
 (22) That s what I was referring to with respect to the  
 (23) statements about the trustees and then we had reference to it  
 (24) in rebuttal to Mr Gilfillan of course when Dr Peterson  
 (25) testified

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- (1) I refer you to the transcript where you ve indicated that  
 (2) we could proffer the instruction This is the instruction and  
 (3) in fairness to Mr Oppenheimer when we were negotiating  
 (4) these  
 (5) instructions we were - we had forgotten about this one but we  
 (6) were reviewing the transcript to make sure we had all the  
 (7) instructions in We didn t have a chance to negotiate this  
 (8) one So I don t know what his position is  
 (9) THE COURT What is your position?  
 (10) MR OPPENHEIMER Well Your Honor I will say this  
 (11) instruction was out of step with the rest of our negotiations  
 (12) In looking at it and looking at the transcript for the first  
 (13) time I immediately see some things that it seems to me are -  
 (14) are simply wrong and I - I question whether if we are - let  
 (15) me give you an example of that they re being instructed not to  
 (16) consider the Exxon settlement for any purpose depending  
 (17) what  
 (18) that means We already have testimony in here about those two  
 (19) sales 93 and 94  
 (20) THE COURT Here s what I feel about this one  
 (21) First you haven t been given an opportunity to work out an  
 (22) version that s acceptable Second it s confusing very  
 (23) confusing and I think it s subject to misinterpretation So I  
 (24) don t reject the thought that I might give a similar  
 (25) instruction or one on this subject I just don t think this is  
 (26) the right one  
 (27) MR PETUMENOS We ll take another crack at it

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- (1) THE COURT I just ask you both to work on it  
 (2) MR PETUMENOS I m going to try to - we tried to  
 (3) take these two sets of instructions and following along with  
 (4) them we tried to number them in a way that the controversies  
 (5) would be -  
 (6) THE COURT 3 and 3 are the same aren t they?  
 (7) MR PETUMENOS They re not  
 (8) THE COURT They re not the same instruction but  
 (9) they re the same question  
 (10) MR PETUMENOS They re the same question and they re  
 (11) very close to the same  
 (12) I will tell you that if you take a look at Plaintiffs  
 (13) Jury Instruction No 4 and the last paragraph the last  
 (14) paragraph the difference between our 3 and their 3 it s the  
 (15) same substantive matter If you struck 5 from our No 3 we d  
 (16) be by No 3 and we could just discuss No 4 as what s in  
 (17) controversy Vice versa doesn t matter  
 (18) The nature of the controversy is we have an instruction  
 (19) telling the jury that the oil is hazardous substance under  
 (20) AS 46 03 822 under your Order Number 16 and we believe it is  
 (21) important to us for a number of reasons because of the  
 (22) testimony of the experts and the conclusions that flow  
 (23) therefrom  
 (24) If you will recall Mr Dorchester filed a supplemental  
 (25) report -

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- (1) THE COURT I remember  
 (2) MR PETUMENOS - and one of the things that he did is  
 (3) he corrected his statement in his first report that oil was not  
 (4) a hazardous substance and pointed out and tried to explain  
 (5) away  
 (6) the fact that he had neglected the fact under Alaska law oil  
 (7) is by definition a hazardous substance  
 (8) We believe there are certain premises that flow from that  
 (9) and that the jury needs to be told definitively that it is  
 (10) under Alaska law under the law that governs this particular  
 (11) lawsuit because it s the same statute that governs this  
 (12) particular lawsuit as defines the substance  
 (13) And it has a relevance to our case and I guess the  
 (14) difference between us is that Exxon does not want any  
 (15) instruction given I don t think they contest the correctness  
 (16) of it but for some reason I guess they don t want this  
 (17) instruction given and we do  
 (18) MR OPPENHEIMER We ve actually had a fair amount of  
 (19) discussion on this Your Honor a couple of things  
 (20) To the extent that this provision is - and whether the oil  
 (21) is a hazardous substance is relevant to this lawsuit it would  
 (22) go to the question of liability and we have stipulated to  
 (23) liability  
 (24) THE COURT I ve read your brief counsel I ve read  
 (25) a brief on this issue  
 (26) MR OPPENHEIMER Indeed you re probably familiar

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- (1) with the material that starts at page 5 of that brief so I  
 (2) won't repeat it if Your Honor doesn't have any questions  
 (3) THE COURT If you won't I'll make the decision I  
 (4) agree with you I think paragraph five is out of place in this  
 (5) case There's no need to engage in the instruction or to  
 (6) resolve a dispute about this It's a hazardous label a  
 (7) hazardous substance under Alaska law There's other law that  
 (8) might suggest it's not a hazardous subject This is a debate  
 (9) that may be going on among legislators but it's not pertinent  
 (10) to the debate that's going on in this case except as it relates  
 (11) to the expert and how he may not have been thorough enough  
 (12) in his preparation So I'm not going to - I mean I simply see  
 (13) no reason to instruct that it's a hazardous substance under -  
 (14) under Alaska law but then wouldn't I have to say under federal  
 (15) law it's not listed as a hazardous substance? Why would I  
 (16) want to do that? What's the point?  
 (17) MR PETUMENOS If I can answer those questions  
 (18) Please understand I'm at a disadvantage Judge because the  
 (19) briefs came in as I explained to you earlier -  
 (20) THE COURT You may be counsel but I don't think I  
 (21) am on this one  
 (22) MR PETUMENOS Okay Well let me - I think I am  
 (23) because I haven't been able to give you my arguments and my  
 (24) brief to the contrary  
 (25) And this is what it is the expert determined that - the

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- (1) Exxon expert determined that stigma was not a viable theory  
 and  
 (2) was only a concern when a product is a hazardous substance  
 and  
 (3) I cross examined him on that point It is contained in his  
 (4) report several times that because it's not a hazardous  
 (5) substance therefore Mr Mundy Dr Mundy is not correct about  
 (6) a number of things  
 (7) We have the right under the evidence code for a judicial  
 (8) notice of law whenever it goes to a relevant proposition in a  
 (9) case to support an issue that is joined and had I been able to  
 (10) write a brief what I would have been responding to is it does  
 (11) not just go to liability  
 (12) Because defendants have made that conclusion and used it as  
 (13) a linchpin for their definition of the case The definitional  
 (14) section under Title 26 tells the reader that for all purposes  
 (15) in the chapter this is the damage statute we're operating  
 (16) under Oil is a hazardous substance that has implications for  
 (17) what an appraiser must report it has implications for what a  
 (18) lender must do with a property It is a judicially noticeable  
 (19) fact from which I need to argue certain propositions and if  
 (20) the jury never hears it is a hazardous substance under Alaska  
 (21) law from anyone or from the Court put on judicial notice I  
 (22) have nothing from which to argue that Mr Dorchester is simply  
 (23) wrong  
 (24) And that's what I would have written in my brief and I  
 (25) think that the evidence code makes clear that judicial notice

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- (1) of law when the issue is relevant is mandatory The Judge -  
 (2) the Court has no discretion you have to judicially notice any  
 (3) proposition of law which is otherwise relevant to the case at  
 (4) issue  
 (5) MR OPPENHEIMER Your Honor the only issue of  
 (6) relevance is liability in this case  
 (7) There are a number of reasons for that One is that  
 (8) Mr Dorchester has said you can have stigma as a result of an  
 (9) oil spill He doesn't dispute that he just doesn't think it's  
 (10) here The other is he made clear he was familiar with the  
 (11) fact that under the Alaska statute this was a hazardous  
 (12) substance for some circumstances and federal law it wasn't  
 and  
 (13) CERCLA - I mean this was subject of cross-examination and  
 (14) the relevance of it if there is any  
 (15) It's in there both parties can argue Mr Petumenos can  
 (16) argue Mr Dorchester was slow off the mark and in realizing  
 (17) that and covering his steps when he should have reached a  
 (18) different appraisal result or whatever but no one is using the  
 (19) fact this isn't a hazardous substance to argue there isn't  
 (20) stigma  
 (21) No one is arguing that the appraisers weren't aware of this  
 (22) issue If they could argue when they learned it how they  
 (23) disclosed it they certainly did they were considered on it  
 (24) There is no issue but liability in this case It's highly  
 (25) inflammatory for the Court to isolate one of the laws in which

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- (1) it is called a hazardous substance and instruct the jury I  
 (2) think it's far outweighing Would the Court consider that we  
 (3) would request an entirely different instruction which talked  
 (4) about the law in a fuller perspective but the point none of  
 (5) that is necessary If we were contesting liability it  
 (6) certainly might be we're not If the Dorchester testimony had  
 (7) come in differently or any other person's testimony had come in  
 (8) differently maybe but it's just not relevant  
 (9) THE COURT Thank you both counsel I'm going to  
 (10) give Defendants Proposed Jury Instruction No 3 without the  
 (11) title and without the citation so defendants can prepare it  
 (12) and give it to me  
 (13) MR PETUMENOS I'd like to go next to Defendants  
 (14) Proposed No 2  
 (15) THE COURT Defendants Proposed No 2?  
 (16) MR OPPENHEIMER Tim before you do that  
 (17) Your Honor Plaintiffs No 4 is really the same issue  
 (18) MR PETUMENOS Yeah I thought I said that With  
 (19) that ruling Plaintiffs No 4 is also gone  
 (20) THE COURT Oh fine okay I won't give Plaintiffs  
 (21) Proposed No 4 either  
 (22) MR PETUMENOS I wanted to go back to your ruling on  
 (23) Plaintiffs 1 with the additional language If you take a look  
 (24) at Defendants 2 the issue about double recovery not being in  
 (25) any other instruction - I'm now blinking my eyes because I

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(1) think Defendants 2 is exactly that I don't know how many  
 (2) times the defendants want this said to the jury  
 (3) THE COURT You got a point there counsel  
 (4) MR PETUMENOS I - either would accept Defendants 2  
 (5) and ask that the language be taken out of Plaintiffs 1 because  
 (6) that wasn't the intent of Plaintiffs 1 and if they're going  
 (7) to give Defendants 2 we should do it once  
 (8) THE COURT Let me tell you what I say about that  
 (9) It does appear to me that this is the place where you might  
 (10) want to deal with the issue of double recovery so you can take  
 (11) this and your prior instruction and sort of rework them if you  
 (12) choose to do so and give me one instruction  
 (13) MR OPPENHEIMER That thought occurred to me too  
 (14) Your Honor Yes  
 (15) MR PETUMENOS Okay  
 (16) The dispute with Plaintiffs No 5 - which you will find  
 (17) at Defendants' 4 as well Same issue This is the  
 (18) stipulation that was entered into that caused the plaintiffs to  
 (19) forego a fairly lengthy proof regarding a fairly abbreviated  
 (20) proof was what I said at the time I was trying to get the  
 (21) evidence in on the 69 promises issue  
 (22) The difference between our instructions is that we want the  
 (23) legal context within which the - the stipulation is made to be  
 (24) before the jury In the Defendants No 4 it - the  
 (25) stipulation is hanging there with no anchor with nothing to

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(1) instruction which is then stipulated away I want the jury to  
 (2) know why we stipulated  
 (3) MR OPPENHEIMER Your Honor we - we have a - what  
 (4) we think is a much more accurate Mattingly instruction We  
 (5) decided to forego it upon the grounds that we would all use the  
 (6) stipulation that was so painstakingly hammered out and that's  
 (7) the one at our 4 Plaintiffs 5 adds this sentence and what  
 (8) changes although not - well somewhat changes in the second  
 (9) paragraph of the stipulation all of these issues about what  
 (10) Mattingly means how it should be presented to the jury what  
 (11) context it would be painstakingly negotiated briefed - and a  
 (12) couple times as I recall even argued to the Court And we  
 (13) ended up with that stipulation and I think Your Honor  
 (14) remembers took a long time to get to and it was - it was -  
 (15) it - what's happening here is that by adding a sentence which  
 (16) is in fact an incorrect loss on Mattingly we are taking the  
 (17) balance in the description of foreseeability that we all agreed  
 (18) to in connection with the evidence in the case the prolonged  
 (19) negotiations and putting it into context which is A not  
 (20) accurate and B was not part of the negotiation  
 (21) We talked about whether there would be language of this  
 (22) type in the stipulation and - and after long negotiation it  
 (23) didn't go in And one of the reasons it didn't go in was that  
 (24) we had just a lot of communication about what Mattingly meant  
 (25) and how it was best described how it fit in here what

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(1) tell the jury why in the world we're doing this and I think it  
 (2) weakens it to the point of having our stipulation have no force  
 (3) and effect What we tried to do here have done here is put  
 (4) forward a one sentence statement of the Mattingly test about  
 (5) which this foreseeability instruction was - stipulation was  
 (6) reached and then the stipulation Otherwise I think what the  
 (7) defendants are trying to do is have the - is weaken the  
 (8) stipulation - we went through a lot of agony over this because  
 (9) we did not want to forego the proof We wanted that - that  
 (10) was very strong compelling proof for the plaintiffs and we were  
 (11) told in no uncertain terms to - to shorten the trial and make  
 (12) sure that we took every effort to stipulate and that we would  
 (13) get the benefit of a stipulation and I don't think that  
 (14) Defendants 4 gives us the benefit of it in the abstract  
 (15) THE COURT Isn't Plaintiffs 5 wrong?  
 (16) MR PETUMENOS Pardon?  
 (17) THE COURT Isn't it wrong?  
 (18) MR PETUMENOS In what we speculate Judge  
 (19) THE COURT Because the legal cause has got to be a  
 (20) substantial factor right?  
 (21) MR PETUMENOS There's two parts of the legal cause  
 (22) One is that it be foreseeable and second that if  
 (23) foreseeable it be a substantial factor We have in the  
 (24) agreed upon instruction the substantial factor instruction  
 (25) It's not in isolation It is the first part of the causation

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(1) evidence related to it  
 (2) THE COURT Which instruction is your Mattingly?  
 (3) MR OPPENHEIMER Ours is 4  
 (4) THE COURT This is Mattingly?  
 (5) MR OPPENHEIMER This is foreseeability Remember  
 (6) Your Honor we don't dispute liability of these parties and  
 (7) the instruction that we have is in fact the stipulation  
 (8) verbatim  
 (9) THE COURT Where's your proximate cause instruction?  
 (10) MR PETUMENOS It's in the - it's in the agreed upon  
 (11) instructions It's in the packet we just served on you as the  
 (12) joint instructions Page 22 of the joint -  
 (13) THE COURT Can I have that back?  
 (14) MR McCALLION I believe it's 22  
 (15) MR PETUMENOS What was the proposed instruction  
 (16) there?  
 (17) THE COURT Yeah you're right page 22  
 (18) MR OPPENHEIMER And this is agreed to Your Honor  
 (19) and to the extent we need a foreseeability instruction at all  
 (20) it should be the verbatim stipulation we worked so hard to  
 (21) get  
 (22) THE COURT Now does that mean that Exxon's position  
 (23) is this that - that it was - since it has stipulated the  
 (24) foreseeability issue that the only issue here that they're to  
 (25) decide is for specific items of damage whether the oil spill

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- (1) was a substantial factor?  
 (2) MR OPPENHEIMER Your Honor I m trying to think if  
 (3) that s the appropriate response under the proximate cause  
 (4) instruction  
 (5) Let me give you an example We have an argument upcoming  
 (6) with respect to vandalism on the archaeology sites We believe  
 (7) that future vandalism for example is a superseding cause and  
 (8) breaks the proximate cause link That is not to say that -  
 (9) that we are disputing those aspects of foreseeability that  
 (10) involve potential adverse consequences to the environment  
 from  
 (11) the oil spill we re not however admitting the entire  
 (12) proximate cause link and I don t think Mattingly requires us  
 (13) to do that  
 (14) So I think the answer to Your Honor s question is that  
 (15) significant factor probably is the - understood as the legal  
 (16) cause probably is an adequate explanation for our vandalism  
 (17) point But I m trying to give you an example that we would not  
 (18) agree that it s just a question of computing whether there  
 (19) would be vandalism and if so how much the damages would  
 be  
 (20) We still contend there would be some legal impediments to  
 (21) recover which -  
 (22) THE COURT I don t think that s what I m asking you  
 (23) What I m trying to figure out is there any place in this case  
 (24) where you re going to say that you - that you - there s no  
 (25) way you could have reasonably foreseen a particular risk and

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- (1) that certain damages would abide?  
 (2) MR OPPENHEIMER Yes Your Honor to the extent that  
 (3) falls outside of what s stipulated as foreseeable in our  
 (4) Instruction 4 So for example we would contend that  
 (5) vandalism by third parties in that sense is not foreseeable  
 (6) THE COURT Don t you need an instruction?  
 (7) MR OPPENHEIMER Let me just take a look at our  
 (8) proximate cause instruction Your Honor  
 (9) THE COURT Doesn t have it  
 (10) MR OPPENHEIMER We do have a proximate cause  
 (11) instruction  
 (12) THE COURT I see it but it doesn t have the  
 (13) foreseeability issue in it  
 (14) MR OPPENHEIMER I guess Your Honor - I guess what  
 (15) I m - maybe I was misleading by - by just referring to  
 (16) Instruction 4 Instruction 4 does refer to archaeological  
 (17) resources so the answer - the answer is that damage to  
 (18) archaeological resources is - is foreseeable under the  
 (19) instruction but not the acts of third party vandals  
 (20) THE COURT But that s covered by the superseding  
 (21) cause issue  
 (22) MR OPPENHEIMER That s covered by the superseding  
 (23) cause issue that s correct and we have an instruction that  
 (24) goes directly to that  
 (25) THE COURT So what you would be arguing is from the

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- (1) superseding cause instruction assuming it s an issue of fact  
 (2) MR OPPENHEIMER Correct correct And we have a  
 (3) specific instruction on that.  
 (4) THE COURT So it s your position that given that  
 (5) that superseding cause is the only foreseeability question in  
 (6) this case that the language in the paragraph one of  
 (7) Plaintiffs Jury Instruction No 5 is not necessary?  
 (8) MR OPPENHEIMER The only reason I m pausing Your  
 (9) Honor - maybe we could have a moment to talk - is that I  
 (10) think that s a satisfactory answer as to the one example I  
 (11) gave but I don t know that it s really responsive to your  
 (12) question Could we have a minute?  
 (13) THE COURT It s partially responsive  
 (14) MR OPPENHEIMER It s partially responsive  
 (15) THE COURT That s all I could hope for  
 (16) MR OPPENHEIMER It s partially but on the  
 (17) broader - if we could have a moment -  
 (18) THE COURT Let me give you some guidelines and then  
 (19) I ll let you know what you can do with the other  
 (20) You ve got a proximate cause instruction in here which  
 (21) looks to me to be correct. One of the issues to me in  
 (22) determining whether or not I set this - this stipulation in  
 (23) context is whether when you stipulated you took away  
 (24) foreseeability questions except for the superseding cause  
 (25) issue If you took it away then nobody in this case can argue

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- (1) that it s in the case and in fact the plaintiffs can say it s  
 (2) not in the case If you didn t take it away then I have to  
 (3) instruct on it  
 (4) MR PETUMENOS Perhaps we can come back to that after  
 (5) we argue the rest of the instructions  
 (6) THE COURT Yeah  
 (7) MR PETUMENOS Defendants Instruction 4-A can be  
 (8) given  
 (9) THE COURT You agree to that?  
 (10) MR PETUMENOS Correct  
 (11) MR OPPENHEIMER I m sorry I was distracted  
 (12) MR PETUMENOS Defendants Instruction 4-A can be  
 (13) given although I can t - 4-A and 5 are identical So let me  
 (14) amend that to say 4 A may not be given and 5 may be given by  
 (15) stipulation  
 (16) THE COURT They are identical 4-A and 5?  
 (17) MR OPPENHEIMER They are Your Honor  
 (18) THE COURT Skip 4 A but I ll give 5 and you can  
 (19) prepare it Mr Oppenheimer  
 (20) MR PETUMENOS Now I m getting to one of the issues  
 (21) that we find real important The distinction between  
 (22) Defendants 6 and Plaintiffs 6 And I think we were moving  
 (23) fast and I think the reason why the defendants have been  
 (24) intractable on this with this one is because when we were  
 (25) arguing the issue of OPA 90 you made the statement on the

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- (1) record yesterday you were going to give the defendants  
 (2) proposed instruction but I want to revisit the issue because I  
 (3) think it went farther than perhaps the Court was aware  
 (4) When we had the colloquy when you made the ruling in OPA  
 (5) 90 you indicated to us you thought it was a factual issue that  
 (6) you thought the parties would have to be in a position to argue  
 (7) the extent to which the property has been used or was available  
 (8) for use The difference between the plaintiffs instruction  
 (9) and the defendants instruction is that the defendants  
 (10) instruction tells the jury that there was no use  
 (11) THE COURT Yeah that's true  
 (12) MR PETUMENOS And it directs the verdict with the  
 (13) use - with the use instruction loss-of use instruction that  
 (14) we have agreed upon which requires that we establish a loss of  
 (15) use if you go so far as to give their 6 you tell the jury  
 (16) there is no use that we had and you direct a verdict and the  
 (17) entire Kenai Fjords property goes out of the case  
 (18) THE COURT I agree with you counsel When I looked  
 (19) at these instructions it looked to me like that's what it was  
 (20) so my question to Mr Oppenheimer was going to be are you - I  
 (21) mean you've never asked for a directed verdict on this point  
 (22) and now are you asking for a directed verdict by virtue of this  
 (23) instruction?  
 (24) MR PETUMENOS I think you denied the directed  
 (25) verdict

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- (1) MR OPPENHEIMER Your Honor I think we did ask for  
 (2) it  
 (3) THE COURT No no no the argument you made as I  
 (4) said on the record it seemed to me to be that you were saying  
 (5) this was a factual issue and the reason that I say that is  
 (6) because you gave - you gave me a proposed in trial instruction  
 (7) that indicated to me that that was your position  
 (8) MR OPPENHEIMER Your Honor I'm corrected you are  
 (9) correct in your recollection But the answer to the question  
 (10) is that I think there is no use that can be identified with  
 (11) selected but un conveyed lands  
 (12) THE COURT And that's what I need to know Is that  
 (13) true? Are you - are you restricted from using that land at  
 (14) all you or your clients?  
 (15) MR PETUMENOS No no  
 (16) THE COURT And why not?  
 (17) MR PETUMENOS There are certain park regulations  
 (18) that certain uses have to be permitted it's a national park  
 (19) but the whole point of OPA 90 was to give the plaintiffs this  
 (20) claim and if the claim is loss of use and we are in a position  
 (21) of establishing the way we have throughout the case there's  
 (22) lots of land that the plaintiffs are establishing that the use  
 (23) of it is as conservation land that the plaintiffs may not be  
 (24) able to establish that on a given date place and time that  
 (25) they were there on the property but that it was part of the

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- (1) ecosystem and that the proper highest and best use is -  
 (2) THE COURT Right There's evidence in the record  
 (3) also that for the Kenai Fjords land that subsistence hunting  
 (4) was prohibited right?  
 (5) MR PETUMENOS That's right That's one use but  
 (6) that's my point We're free to argue the uses that we have and  
 (7) the fact for example that we can now prevent the property  
 (8) from being used in lots of ways because for example the  
 (9) government can't sell it to anybody else they can't develop  
 (10) it there's lots of things they can't do without incurring the  
 (11) problem of having it be interim conveyed to the Native  
 (12) corporations So what our proposed instruction does is it  
 (13) tells the jury exactly what the statute says  
 (14) The other instruction in the case provides that we must in  
 (15) order to establish damage for it establish proximate cause and  
 (16) loss of use and leaves to the facts of the case and to the  
 (17) argument of counsel what uses are available The regulations  
 (18) are in the record the witnesses have testified to what uses  
 (19) are available We've testified to what uses we put to the land  
 (20) and so forth what our plans are for them and it becomes a  
 (21) jury question  
 (22) Defendants 6 telling the jury there is no use read in  
 (23) conjunction with the other instructions does what I think Your  
 (24) Honor did not intend which is leave us no argument before the  
 (25) jury with respect to the uses that we do have

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- (1) THE COURT That's absolutely true I did not intend  
 (2) that Now whether or not I should have intended it is a  
 (3) different question  
 (4) MR OPPENHEIMER Your Honor it's late in the trial  
 (5) mine's a mind's a little blurry these days but going back to  
 (6) yesterday one of the - perhaps we could have done this  
 (7) differently but one of the issues here is that this doesn't  
 (8) apply to all the lands obviously Whether it's appropriate to  
 (9) get a verdict - we did not handle this as a parcel by parcel  
 (10) matter Maybe we should have but we did not  
 (11) Secondly there are - well that's point one Point two  
 (12) under Cape Fox this land - actually I'm - the context for  
 (13) this is now back to me  
 (14) This land is not in fact usable in a fundamental sense  
 (15) by - by the plaintiffs here and to a significant degree not  
 (16) by the U S Government either which is the point I think  
 (17) Mr Petumenos just made I guess I would analogize it to an  
 (18) escrow which is a - one way to look at it though not in all  
 (19) the features The government can't dispose of it because they  
 (20) promised it to Native corporations the Native corporations  
 (21) can't do anything with it because they don't have it and they  
 (22) don't have a possessory interest under Cape Fox  
 (23) They clearly do have a right if there's a form of  
 (24) permanent damage to sue for that and that's I think the  
 (25) intent of the meaning of the OPA 90 statute to convey

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(1) standing They don't want it saying that a nonuse kind of  
(2) claim can't be made but what we are saying is that unless  
(3) somebody can identify it for us I do not believe there is a  
(4) use that could be made of it during this period of time as a  
(5) result of the confluence of the fact that it is in between  
(6) ownership  
(7) Now we sound like the plaintiffs a little bit here today  
(8) because you've heard a lot of talk about the unique status of  
(9) these lands Well this is a unique form of transfer from the  
(10) government to the Native corporations and during that period  
(11) when the land is selected but not conveyed not even interim  
(12) conveyed there are very significant limitations on their  
(13) ability to use the land and frankly the argument we make is  
(14) that if an oil spill occurs in that window and interrupts  
(15) the - affects the property but no one perceives that they can  
(16) use it or can use it because of this particular moment in the  
(17) transfer life of the property then that's - that's relevant  
(18) to - to use standards there aren't any in that particular  
(19) moment  
(20) This does not apply to interim conveyed lands it does not  
(21) apply to conveyed lands and we are not saying that there  
(22) weren't other types of damages had there been permanent  
(23) damage that they couldn't sue for and under OPA 90 clearly  
(24) had standing to do that  
(25) So the fact we we now understand wrongly anticipated we

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(1) would do jury instruction and then the verdicts I think  
(2) explains which this issue is not as clear if we raised it  
(3) straight out as a directed verdict I think the answer  
(4) though is that there are no uses on selected but unconveyed  
(5) lands under Cape Fox that would support an  
interference of use  
(6) claim  
(7) MR PETUMENOS There's a big problem Judge with  
(8) using Cape Fox to support this position  
(9) First of all Cape Fox preceded OPA 90 Secondly the  
(10) issue in Cape Fox was the sale of timber rights on similarly  
(11) suited land and it was resolved by the money being put into  
(12) escrow for the benefit of the ultimate beneficiary in that  
(13) case the Native corporations  
(14) The escrow laws continued throughout the oil spill and in  
(15) OPA 90 the whole point was it divested the government with the  
(16) duty to put it in escrow and allowed the Native corporations to  
(17) obtain the money directly  
(18) That is the point of OPA 90 Cape Fox which they've been  
(19) relying on from the beginning here is not on point and I've  
(20) been perhaps remiss in failing to distinguish it  
(21) This is a - one third of the Native corporations lands  
(22) we're potentially talking about here We're talking about the  
(23) entire Kenai Fjords area we are talking about taking out a  
(24) huge claim in this case All the exhibits that have been  
(25) entered all the testimony at this late date I don't think

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(1) that the situation here is one of directed verdict.  
(2) I can read you back the transcript but what you told us  
(3) was you were not going to allow us to maintain a claim or at  
(4) least instruct the jury based upon the National Park Service  
(5) uses based upon the public's uses because of the - I presume  
(6) because of the language of the settlement agreement when it  
(7) talked about the private land owner rights only having been  
(8) preserved  
(9) That does not mean that what rights we have under OPA 90  
(10) all right title and interest to the extent we are able to  
(11) establish them aren't ours We are stuck with as I  
(12) understand it the standard for loss of temporary use and  
(13) impairment on these lands that's all We still have all  
(14) right title and interest of the property or you tear the  
(15) statute away You can't tear OPA 90 away and pretend it's not  
(16) there We have all right title and interest and we have the  
(17) right to prove as best we can based on facts the loss of use  
(18) we can show based on the other evidence in the case  
(19) This is not a directed verdict issue never has been  
(20) Because right title and interest means we have this claim and  
(21) if we don't have it I'll tell you nobody has it because the  
(22) federal government can't pursue this claim because of OPA 90  
(23) and hasn't  
(24) So that's why I think Plaintiffs 6 has to come in  
(25) THE COURT Well I want to know where in the record

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(1) you see a factual dispute with regard to whether or not you can  
(2) use these selected but unconveyed lands  
(3) MR PETUMENOS I'm at a disadvantage in that regard  
(4) because I wanted to put into evidence some of the - some of  
(5) the evidence of the uses of the OPA 90-related properties and  
(6) the right to bring and so forth and at that - the time that  
(7) that was being raised in the course of Mr Mundy's testimony  
(8) we came to the bench and we said this will be a matter for the  
(9) Court not for the jury and I at one time had all those  
(10) transcripts when the directed verdict motion came in in  
(11) connection with the archaeological you don't own them  
(12) selected but not conveyed  
(13) I had all that together to respond to the motion for  
(14) directed verdict and all the transcript references where we  
(15) came to the Court and said after objection We have to clarify  
(16) the OPA 90 situation and what the situation is and how the land  
(17) relates to the Native corporations on the record  
(18) I think the jury actually asked a question at one point of  
(19) us and said which lands are OPA  
90-selected but not conveyed  
(20) and which aren't and we became very concerned and began  
making  
(21) our request for judicial notice of OPA 90 right then in the  
(22) middle of trial And it was always the case it was going to be  
(23) a case of judicial notice and instructions so to say to us  
(24) now What evidence in the record do you have we were  
(25) explicitly told not to prove it that this will be a matter

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- (1) that will be handled by the instructions
- (2) So I think where we are is all right title and interest
- (3) belongs to the Native corporations in this property and OPA
- (4) 90 - and returning to my instruction here what we've done is
- (5) I think is very neutral We've informed the jury what the law
- (6) is that we're entitled to maintain and bring claims for
- (7) damages and then as we bring and make claims for damages
- (8) the parties are free to argue whether we've made - reached our
- (9) burden or not
- (10) And I think that's all the court can or should do under the
- (11) way this record is unfolding Because to tell us that it was a
- (12) matter for the Court and judicial notice and then say we don't
- (13) have any evidence in the record would be terribly unfair
- (14) MR OPPENHEIMER Your Honor my response to that is
- (15) two-fold First - and I know you're hesitant and
- (16) understandably for counsel to recite the record -
- (17) THE COURT Not here
- (18) MR OPPENHEIMER Not here okay
- (19) The - the conference we had had to do with my
- (20) cross-examination of I believe it was Professor Green and it
- (21) was on the subject of the different types of transfer and
- (22) ownership And I had the board up here and the jury later did
- (23) ask the question
- (24) I was stopped during the course of that because as I
- (25) understood it I was eliciting from the expert witness an

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- (1) opinion as to the ownership status and rights under each of
- (2) those categories and I said that I would drop that line of
- (3) questioning and I did
- (4) Mr Petumenos point that he did not put evidence of use of
- (5) these lands in because of something the Court said about
- (6) interpreting OPA frankly is a non sequitur This is a use
- (7) case There is no conceivable reason with or without an OPA
- (8) issue why available evidence on the use and use impairment of
- (9) land wasn't introduced and there's also no question for
- (10) example that we have questioned people on their perceptions
- (11) of
- (12) what they could and couldn't do
- (13) Your Honor will remember that at one point we had questions
- (14) pertaining to the ability to put a cabin up in the Kenal Fjords
- (15) area We have testimony from the CFRs all that -
- (16) THE COURT Yes I remember that
- (17) MR OPPENHEIMER We would put that evidence on even
- (18) if there was no OPA I mean clearly we will be arguing and
- (19) strenuously that - in closing and pursuant to the law that
- (20) as to lands that aren't implicitly indicated by this - which
- (21) is the majority of the lands obviously - that we - you know
- (22) we don't see any use impairment We don't see any evidence in
- (23) the case that should persuade the jury to award damages of
- (24) use
- (25) impairment This is the bedrock of the case I think for both
- (26) sides
- (27) I believe that the plaintiffs have elected to proceed on a

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- (1) basis that may minimize in retrospect their emphasis of land
- (2) use We've done just the opposite we've emphasized it And
- (3) there's nothing that has occurred in the course of the OPA
- (4) suggestion at any time that would create a situation where the
- (5) plaintiffs shouldn't put on their case on use and it pertains
- (6) to OPA related and non OPA related lands
- (7) MR PETUMENOS Judge I don't think that's the
- (8) passage I'm referring to I know it's not the passage I was
- (9) referring to because I was involved in the discussion and I
- (10) didn't examine Dr Green
- (11) THE COURT Whatever you're referring to counsel you
- (12) have to pull out
- (13) MR PETUMENOS I'll go back and pull it out
- (14) THE COURT Memories are fallible particularly at
- (15) times like this
- (16) MR PETUMENOS Let me see if I can bypass this
- (17) THE COURT Let me say something
- (18) I don't want to spend the rest of my life on this
- (19) particular issue I've always seen this - I've seen this in
- (20) two ways When it occurred in trial I thought maybe this a
- (21) directed verdict issue I waited for the directed verdict
- (22) motion and it never came
- (23) The defendants appeared - and I think the record fairly
- (24) conveys this - the defendants appeared to treat it as a
- (25) factual issue and in fact submitted the proposed instruction

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- (1) that treated it as a factual issue If plaintiffs now want it
- (2) treated as a factual issue they also want an incomplete
- (3) recitation of the law which is the OPA 90 language without
- (4) particular regulations relating to restrictions on subsistence
- (5) use other things that may very well be in the law which I've
- (6) been told are in the law but nobody's submitted to me to take
- (7) judicial notice of
- (8) My feeling is what this does is this The plaintiffs have
- (9) the burden of establishing loss of use It appears to me to be
- (10) a factual issue you resolve by the jury It also appears to
- (11) me if I'm going to take judicial notice of one aspect of the
- (12) law that may relate to particular uses that I must give in
- (13) order to be complete I have to give other provisions of the
- (14) law that may very well restrict uses But nobody has proposed
- (15) anything like that
- (16) So the answer is it's highly unlikely I'm going to grant a
- (17) directed verdict at this time to something I think is a factual
- (18) issue and which Defendants Proposed Jury Instruction No 6
- (19) simply takes out of the case in a way that can't be interpreted
- (20) as anything else but a directed verdict
- (21) So I won't give either one of these instructions because
- (22) the Proposed Instruction No 6 of the plaintiffs is incomplete
- (23) gives an incomplete picture and the defendants grants a
- (24) directed verdict So it's up to you to propose the appropriate
- (25) instruction under the circumstances If neither of these



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- (1) instructions were given loss of use would still be a factual  
 (2) issue to be argued to this jury  
 (3) MR OPPENHEIMER Your Honor one of the results of  
 (4) the negotiations over these instructions is that market value  
 (5) is not a measure of damages because the parties have now  
 (6) agreed that this is a temporary - okay and that was not true  
 (7) at the time that the directed verdicts were to be fought  
 (8) THE COURT Counsel you can make your excuses later  
 (9) I m only telling you the way this record is now That s the  
 (10) way I see it There may be extenuating circumstances but as I  
 (11) said I m not going to spend the rest of the day on these two  
 (12) instructions The answer is I won t give either one of them  
 (13) It s your jobs to adjust to that and give me something I will  
 (14) give or neither one of them goes in  
 (15) MR PETUMENOS Okay I think we re on to -  
 (16) THE COURT Can I take a break counsel?  
 (17) MR PETUMENOS Sure  
 (18) THE COURT I have something else I have to address  
 (19) outside the courtroom  
 (20) THE CLERK Please rise This court stands in  
 (21) recess  
 (22) (Recess from 3 05 p m to 3 50)  
 (23) THE CLERK Please rise This court now resumes its  
 (24) session Please be seated  
 (25) THE COURT Counsel I m very sorry it took so long

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- (1) but I hope you made some progress while I was gone Did you?  
 (2) Not a single step  
 (3) MR PETUMENOS We were so concerned that we might not  
 (4) be paying attention when you took the bench that we wanted to  
 (5) be sure we were ready  
 (6) THE COURT Hope springs eternal counsel Maybe we  
 (7) can make some progress  
 (8) MR DIAMOND Your Honor before Mr Petumenos moves  
 (9) on to bigger and better things may I have leave to appear  
 (10) without proper attire?  
 (11) THE COURT Absolutely not  
 (12) MR DIAMOND I just wanted to add my two cents to the  
 (13) OPA 09 issue and the directed verdict issue because I was the  
 (14) architect of the direct verdicts to the extent there was one  
 (15) and I expressed my concern during the recess to Mr  
 Petumenos  
 (16) There is a very stark legal question here and that is whether  
 (17) the plaintiff Native corporations that have  
 (18) selected but unconveyed lands have the right to use the  
 (19) property  
 (20) It s not a factual issue That is a legal issue We have  
 (21) submitted an instruction to you I understand why you have  
 (22) reservations about the instruction But if it turns out -  
 (23) THE COURT Actually counsel you submitted two  
 (24) instructions to me and they re inconsistent with each other  
 (25) MR DIAMOND I m not at all surprised that what we

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- (1) submitted was inconsistent I didn t recall two of them  
 (2) THE COURT You submitted one some time ago with your  
 (3) memo And it treats it as a factual issue  
 (4) MR DIAMOND I think as you said a lot of water  
 (5) over the dam I had forgotten that one  
 (6) But the point I was going the make is simple If in fact  
 (7) we are correct in our position that there is no right to use  
 (8) selected and unconveyed lands and given the fact that we are -  
 (9) we are proceeding toward a verdict on loss of use if the jury  
 (10) returns a verdict and the verdict is on some combined basis if  
 (11) we prevail on appeal that our position on OPA 90 is correct  
 (12) then Mr Petumenos and I and Mr Oppenheimer and others get  
 to  
 (13) do this all over again  
 (14) THE COURT I d be happy to see you too but I d  
 (15) rather that didn t happen  
 (16) MR DIAMOND And I can t quite figure out any way  
 (17) to -  
 (18) THE COURT That s absolutely true If in fact I  
 (19) should have granted a directed verdict on this issue and I  
 (20) don t and it goes to the jury and there s one line for damages  
 (21) and it s - sure there s no question about it  
 (22) MR DIAMOND We discussed it briefly We don t see  
 (23) any easy way of unbundling the verdict I guess arguably we  
 (24) could break it out on a parcel by parcel basis and try to  
 (25) preserve any verdict in that fashion But I think the easiest

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- (1) curative right now rather than leave it in limbo - because I  
 (2) have a sense that you have some views on the subject - is  
 (3) simply for us to seek leave to make another directed verdict  
 (4) motion or amend the one that we made yesterday and include  
 (5) the - that ground  
 (6) I ll explain to you why we didn t make it At the time I  
 (7) told you yesterday morning what our directed verdict motions  
 (8) were we still were under the impression that there was a  
 (9) possibility of the diminished market value theory going to the  
 (10) jury as well The OPA 90 issue would not resolve that so even  
 (11) if we were correct as a matter of law on OPA 90 we would not  
 (12) have been entitled to a directed verdict yesterday until you  
 (13) decided yesterday afternoon that this was a temporary rather  
 (14) than a permanent harm and the only thing going to the jury was  
 (15) loss of use  
 (16) Once you ruled - ruled that way it should have occurred  
 (17) to us immediately that we had another ground for directed  
 (18) verdict My mind doesn t work that quickly or that agilely  
 (19) and it did not occur to me to raise it in connection with  
 (20) that But I do think the parties are all desirous of getting  
 (21) this resolved one way or the other  
 (22) If you re not in agreement with our position so be it if  
 (23) you are so be it But otherwise we re going to end up with  
 (24) very - potentially end up with a very messy verdict at the end  
 (25) of the proceedings and I don t think Mr Petumenos wants that

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(1) nor do we  
 (2) MR PETUMENOS Well I have a couple - I think it s  
 (3) a very - I hope - that sounds like an invitation to granting  
 (4) a direct verdict but the fact of the matter is we do have  
 (5) plenty of evidence in the record with respect to  
 (6) selected but unconveyed lands and with respect to the  
 (7) loss of use problem the way that this goes to the nature of  
 (8) the theories of the case in general not just on OPA 90 land  
 (9) Our loss of use as we put plenty of evidence in the record  
 (10) as a matter of both appraisal practice and everything else  
 (11) does not require that the land be actually rented actually  
 (12) you know physically possessed by human beings and the loss  
 (13) of use has been quantified and estimated by Dr Mundy in the  
 (14) Kenai Fjords and there s spread sheets and numbers and the basis  
 (15) for it all over the record  
 (16) In addition there was evidence that there was interest in  
 (17) the Kenai Fjords relating to potential exchange value and it  
 (18) is the case that this land right now could be exchanged for  
 (19) value with the federal government and there s actually  
 (20) negotiations and discussions happening and so we have a  
 (21) moment - in a moment here an instruction to argue entitled  
 (22) Equitable Title under Alaska Law which I believe the  
 (23) corporations have  
 (24) Exxon is simply not entitled to a direct verdict I don t  
 (25) think you ve ever said that they were and we have a

(1) because of the spill they lost a concrete opportunity to  
 (2) trade It s like a sale  
 (3) Be that as it may even if one were to say that s a use  
 (4) that is not inhibited by OPA 90 Still seems to me if the  
 (5) Court s in agreement with our position you ought to instruct  
 (6) the jury that for purposes of defining - finding whether or  
 (7) not operations have lost any use they could have made of the  
 (8) land as a matter of law they are not entitled to physically  
 (9) occupy or physically use or exploit their - those parcels  
 (10) until actual conveyance I think he s wrong as a matter of law  
 (11) that he could argue that he s entitled to lost use damages  
 (12) because they also had a right to swap and that somehow in a  
 (13) theoretical way the oil spill interfered with that I don t  
 (14) think that s a use for purposes of use damages  
 (15) THE COURT Counsel you d agree with me that this  
 (16) discussion comes a little late in the game?  
 (17) MR DIAMOND A lot of things come a little - a  
 (18) little late in the game This really didn t ripen until we  
 (19) eliminated lost market value as a theory and that didn t  
 (20) happen until after lunch yesterday We have - we have been  
 (21) trying as you know from our witnesses dual cases Both loss  
 (22) of use and loss of market value and until the latter went out  
 (23) of the case we weren t entitled to a directed verdict even  
 (24) with OPA 90 considerations But whether it comes late or not  
 (25) I think it s not too late to take some steps to deal with this

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(1) loss of use instruction that we ve agreed to and we have to  
 (2) live under it  
 (3) With respect to the verdict forms and attempting to save  
 (4) the very - the numerous issues frankly Judge there are so  
 (5) many issues like that - Robbins Drydock - the whole issue of  
 (6) the verdict forms that are coming up on that that  
 (7) parcelization there are so many issues that it would be hard  
 (8) to know how to carve this land up in a way so that there s a  
 (9) record that could - I don t think there s anything that could  
 (10) be done about that  
 (11) I just think at this point we re where we are And so I do  
 (12) not favor - what Mr Diamond is suggesting is that you enter a  
 (13) directed verdict on a third of our lands I resist that If  
 (14) what he s suggesting we have a lengthy complicated verdict  
 (15) form attempting to divide land up in four or five different  
 (16) ways I resist that as well I think we re taking things out  
 (17) of order but that s my response  
 (18) THE COURT Where are we?  
 (19) MR DIAMOND Your Honor if I understand  
 (20) Mr Petumenos correctly he thinks there are other uses that  
 (21) the oil spill prevented them from making that would not be  
 (22) simply indicated by OPA 09 for example the right to trade the  
 (23) land I think we would be prepared to argue as matter of law  
 (24) that s not a use for which they re allowed to seek  
 (25) compensation absent proof of special damages I e that

(1) and it s - I think these are all quite stark legal issues  
 (2) Either he s right or we re right If he -  
 (3) THE COURT He - either he s right and there s a  
 (4) factual issue or -  
 (5) MR DIAMOND Either he s right and there s a factual  
 (6) issue as to loss of use but we re still entitled to  
 (7) instruction under Cape Fox there is no right to physically  
 (8) use occupy or exploit  
 (9) THE COURT Where is that proposed instruction?  
 (10) MR DIAMOND We will be happy to submit one to you  
 (11) THE COURT As I said just a minute ago counsel  
 (12) Little late in the game to be doing this isn t it?  
 (13) MR DIAMOND I think our understandings - I don t  
 (14) believe he s right and so I think the proposed jury instruction  
 (15) we ve made is correct  
 (16) THE COURT I understand counsel I m really not  
 (17) trying to be more than just a little bit cool all right so  
 (18) depending on what happens here I suppose you re entitled  
 (19) always to submit additional instructions But you - I mean  
 (20) you have to take a position that s clear to me and your  
 (21) position has shifted so I m finding it hard to follow  
 (22) Now let s get on to the other stuff  
 (23) MR PETUMENOS I m ready  
 (24) The next one in order is Plaintiffs Proposed Jury  
 (25) Instruction No 7 which we believe is a correct statement of

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- (1) Alaska law It is based upon the Sabo case primarily in  
 (2) Alaska  
 (3) And this is a related issue I think it may help solve some  
 (4) of the - some of the issues that the OPA 90 issue raises I  
 (5) think hopefully we have been consistent on this Equitable  
 (6) title allows a party that does not have possession or right of  
 (7) possession - I've been waiting to see if this was a way out  
 (8) and I believe if the Court takes a look at Willis and Sabo you  
 (9) will agree with us that this is a correct statement of the law  
 (10) and I think would assist the jury tremendously with respect to  
 (11) selected but not conveyed lands If we have a sufficient  
 (12) interest in this property we could make the claim for it  
 (13) MR OPPENHEIMER Your Honor it gets back to the  
 (14) difference between standing for suit for permanent damage and  
 (15) interference with use I don't think there's an equitable  
 (16) title issue We do not dispute that either as beneficiaries  
 (17) or equitable title holders they have a right to sue for  
 (18) permanent damage to the land  
 (19) THE COURT Your position is there is no explanation  
 (20) because I'm going to tell them they have a right to claim  
 (21) things they just have to prove it proved right?  
 (22) MR OPPENHEIMER Correct Your Honor and it's  
 (23) potentially - this particular instruction is also potentially  
 (24) misleading They might think it applies to use but it  
 (25) doesn't

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- (1) MR PETUMENOS Judge let me tell you why I think  
 (2) it's necessary I understand where you're going The jury  
 (3) asked a question right now they're confused as to why and  
 (4) whether we have a standing to complain They asked a  
 question  
 (5) about it now we don't have a OPA 90 instruction yet we made  
 (6) the request for judicial notice which is of the OPA 90  
 (7) statute which we now don't have before the jury This at  
 (8) least answers the juror's question that as to lands selected  
 (9) but not conveyed we can make the claim That's the question  
 (10) the juror asked the Court  
 (11) THE COURT To me it's only part of the story  
 (12) counsel It's only part of the story You still have to  
 (13) prove - prove loss of use  
 (14) MR PETUMENOS Right  
 (15) THE COURT And that's the big issue  
 (16) MR PETUMENOS Right  
 (17) THE COURT And as long as I tell them that you have a  
 (18) right to claim loss - and you agree now in spite of all the  
 (19) shifting positions in this case you now agree that this is a  
 (20) temporary measure of damages then loss of use is the  
 measure  
 (21) is one of the measures of the damages right?  
 (22) MR PETUMENOS And that instruction is part of the  
 (23) packet  
 (24) THE COURT So if I tell them the loss of use is the  
 (25) issue then I've done exact - I've done - without talking

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- (1) about things like equitable title which confuses Mr Stoll if  
 (2) not me - what's - I mean the only thing that - the only  
 (3) thing that this instruction would do is throw confusion into  
 (4) the record  
 (5) MR PETUMENOS May I ask the Court a question?  
 (6) Perhaps I'm missing something  
 (7) THE COURT Yes  
 (8) MR PETUMENOS Where is the jury told that on  
 (9) selected but not conveyed lands we have the right to claim?  
 (10) THE COURT Well I'll tell them  
 (11) MR OPPENHEIMER And we don't object to it  
 (12) THE COURT Right never have - well you did once  
 (13) You're not objecting to it now right?  
 (14) MR OPPENHEIMER We're self-correcting  
 (15) MR PETUMENOS I take it then Plaintiffs  
 (16) Instruction 7 is out?  
 (17) THE COURT Out  
 (18) MR PETUMENOS Okay I'm going to try to keep this  
 (19) moving if I possibly can The next series of instructions  
 (20) beginning with Defendants 7 and a series of them after on the  
 (21) defendants side are very similar to instructions that were  
 (22) brought and rejected by Judge Holland in federal court  
 (23) Mr Jamin's here to back me up on this They are a series of  
 (24) instructions that we believe direct verdicts against the  
 (25) plaintiffs

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- (1) I'm going to start with - with Defendants 7 and defer to  
 (2) Mr Stoll because it applies to the Kodiak Island Borough and  
 (3) then come back and talk to you about 8 9, 10 - 8 9 and 10  
 (4) which is related to our Jury Instruction 9 Plaintiffs 9  
 (5) I wrote Jury Instruction Plaintiff 9 in retaliation if you  
 (6) will to those others but my principal concern is that  
 (7) neither - none of those be given I believe they direct a  
 (8) verdict against us in a number of instances  
 (9) THE COURT Let me try and structure this discussion  
 (10) so that it can be more productive I've gone over these  
 (11) instructions To me instructions 7 through 10 presumptively  
 (12) will not be given I don't mean by that to cut off the  
 (13) discussion so that Mr Oppenheimer can argue his question  
 but  
 (14) I've looked at them and it's not my intention to give them So  
 (15) I don't want you arguing your position at this point I want  
 (16) you arguing your position in response not in the first  
 (17) go-round  
 (18) MR OPPENHEIMER Your Honor I think the - the heart  
 (19) of the marketing case is that there isn't an abstract right  
 (20) under the law to market that you can recover for if in fact  
 (21) you weren't in the market or entering the market to sell your  
 (22) land  
 (23) City of Los Angeles versus Ricards is one such case but  
 (24) the cases are uniform I believe in requiring that the party  
 (25) meet a couple of very very basic requirements I think

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- (1) they re set out in the instruction but important among them is
- (2) that there be intent and an ability to sell borrow lease and
- (3) in the absence of that there is simply no damage
- (4) The fact that one owns property that you have no intent to
- (5) market and if you – or perhaps you have no ability to market
- (6) means that an allegation that your ability to market the
- (7) property results in no damage
- (8) It is not a – it is not the form of – of right that can
- (9) be damaged when it s in repose You don t have any damage
- to
- (10) your ability to buy or sell any real property if you couldn t
- (11) have bought or sold it and if you weren t going to do one of
- (12) those two things – and the evidence here Your Honor is that
- (13) the – the parties were not actively engaged in selling their
- (14) properties with some very modest exceptions and that there
- was
- (15) not an active market with some very modest exceptions
- (16) The record however is not devoid of evidence of what we
- (17) would consider appropriate marketability damage evidence
- And
- (18) let me give you one example Onion Bay I believe the record s
- (19) quite clear that that sale was delayed
- (20) Now a couple of observations about that It was
- (21) originally to have gone in I believe April of 89 It didn t
- (22) go until November of 90 That is a classic example of an
- (23) appropriate marketability case Two points could have been
- (24) proven up about it I think ultimately only one was but two
- (25) could have been It could have been shown that the property

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- (1) values were lower than they otherwise –
- (2) THE COURT Hang on a minute
- (3) MR OPPENHEIMER Sure
- (4) THE COURT Sorry counsel
- (5) MR OPPENHEIMER No problem Your Honor
- (6) Two points could have been made about that sale and they
- (7) would have fallen right into what we consider to be the
- (8) appropriate set of legal standards
- (9) By the way Your Honor it s not in the record but this is
- (10) exactly the argument that Mr Jamin made when he – he argued
- (11) the damages in this area to the fund The two claims are that
- (12) they re sort of conventional They sold for less than they
- (13) would have if they d sold at the time originally scheduled but
- (14) our activities impeded that Classic example of lost profits
- (15) lost appreciation
- (16) That evidence I don t believe came in There s something
- (17) to argue about there I believe there was some evidence from
- (18) Mr Carlson that he didn t think the sales were as robust
- (19) I think it s very close to the line but Your Honor would
- (20) probably let the argument be made on those sales that in some
- (21) way shape or form they somehow didn t sell for as much as
- they
- (22) could have
- (23) Two that there was a delay in the sale That s classic
- (24) that the profits which would have been achieved in April of 89
- (25) were not achieved until November of 90 when the sale took

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- (1) place Classic example of market impairment Perfectly
- (2) acceptable
- (3) I think they could argue it I think they should argue it
- (4) I think it meets the record I do not believe that the law
- (5) supports a claim of – since I m on Kodiak I ll continue the
- (6) example
- (7) Shuyak Island 24 000 square acres No one had an
- (8) intention to sell you couldn t sell all of it It is a
- (9) purely purely theoretical exercise to postulate the impairment
- (10) of the marketability of Shuyak and if – if Your Honor has
- (11) looked at our brief we focused specifically on these
- (12) components at pages 35 36 and 37 and the cases all make
- the
- (13) same points again and again Norman versus Bozeman
- Again no
- (14) evidence of any proposed real estate transactions with outside
- (15) buyers
- (16) THE COURT By the way do you have a copy of the
- (17) cases?
- (18) MR OPPENHEIMER I do not with me Obviously we
- (19) can –
- (20) THE COURT Yeah I want to look at them
- (21) MR OPPENHEIMER Cases – the McNicola case for
- (22) example is interesting because it involved a situation where
- (23) the generalized intent to sell but not a specific intent to
- (24) sell was not enough
- (25) Your Honor the heart of the dispute here is Do you have a

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- (1) claim for impaired marketability without any evidence that you
- (2) had a market or that you were participating in a market or you
- (3) had an intent to sell
- (4) It s a consequential damage It is a form of damage that
- (5) requires that you show that an opportunity was lost or a market
- (6) was taken from you when you were interested in participating in
- (7) it There is – in fact I don t know of any cases Your
- (8) Honor which support the proposition that you can recover for
- (9) lost marketability under the restatement of any of the case law
- (10) where you did not have these criteria where just the fact that
- (11) you owned property with no intention to sell or perhaps no
- (12) ability to sell allowed you to recover for damage to your
- (13) ability to market when in fact there s no evidence that you
- (14) were going to do that and in some cases no evidence that you
- (15) could have done it
- (16) And that really is the – the heart of our position I
- (17) think what s important to observe is that this case itself
- (18) contains examples of both an appropriate damage analysis
- under
- (19) this There is evidence that fits well within the traditional
- (20) notions of damage here
- (21) And then you have this other notion that because some –
- (22) some appraisers have come in and testified that you have a
- (23) bundle of rights – we ve heard that a lot bundle of rights
- (24) and the bundle of rights includes the right to market sell –
- (25) that s clearly true clearly true And the fact of the matter

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(1) though is that what the law recognizes as a measure of  
 (2) recovery for damages requires that if what you're going to  
 (3) seek is a - is a recovery for a temporary interference with  
 (4) your ability to market that you meet these tests  
 (5) If there's permanent damage surely surely your ability to  
 (6) market has been impaired your ability to enjoy has been  
 (7) impaired all those things follow the bundle is the bundle  
 (8) And I think the experts tended to define that bundle a little  
 (9) differently and somewhat broadly maybe but it's really not  
 (10) terribly important to our concern here because as a matter of  
 (11) law if we permanently intruded upon the market and  
 somebody's  
 (12) ability to sell but that temporary impairment went away before  
 (13) anybody was - was hurt by it because they weren't out there  
 (14) marketing they didn't have an intent to market they - or in  
 (15) some cases didn't have the capacity you can't sell all of  
 (16) Shuyak in a year or two it's just - that makes no sense -  
 (17) then there's no damage  
 (18) And there may be other damages we may have interfered with  
 (19) uses we've discussed that But we haven't interfered with  
 (20) someone's ability to market their property  
 (21) The other point to be made here Your Honor is that if  
 (22) this weren't the rule in a temporary damage case it would  
 (23) create this enormous windfall situation where people who could  
 (24) not have sold you know their - their recreational property  
 (25) in Ellamar because I think the evidence is pretty clear it's

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(1) very hard to move property in Prince William Sound suddenly  
 (2) the oil spill occurs and even though nothing has changed  
 about  
 (3) the reality of that situation they still in the real world  
 (4) cannot sell those lots and there's no chance of it and most of  
 (5) them have no intention of doing it nonetheless suddenly they  
 (6) would be rewarded with a value as if they could do something  
 (7) they were never able to do  
 (8) In that sense a complete windfall It is not  
 (9) compensatory it does not compensate them for an actual loss  
 (10) of any kind And the marketing damages are consequential  
 (11) damages and there is no underlying loss to compensate  
 anybody  
 (12) for it is entirely possible to have a piece of property that  
 (13) is acted upon on a temporary basis oil hits it and the effect  
 (14) is temporary and it turns out during that period of time there  
 (15) was nothing going on with respect to the sale or marketability  
 (16) of that property that was harmed or interfered with  
 (17) The fact that theoretically part of this bundle of rights  
 (18) may have been affected is a permanent damage question it's  
 (19) not a temporary damage question it has nothing to do with  
 (20) consequential damages resulting from the oiling  
 (21) If the rule were anything else people would in effect be  
 (22) able to reap the rewards of selling property that they couldn't  
 (23) have sold or had no intention of selling during that time  
 (24) period Now again if somebody has no intention of selling a  
 (25) very beautiful piece of property but it is permanently damaged

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(1) such that when they finally decide they want to sell the  
 (2) property they can't or they're willing to get a lower price for  
 (3) it then the rule is different understandably because I do  
 (4) not have to have intention to sell my property to prove that my  
 (5) property's value in the market has been permanently damaged  
 (6) That is not a requirement  
 (7) It is however - what I'm saying is I have a temporary  
 (8) impairment of my property and it turns out that the facts are  
 (9) that during that period of temporary impairment I had no  
 (10) intention or ability to sell my property for us frankly it's  
 (11) serendipitous and there is no harm it's a different rule than  
 (12) the permanent harm rule  
 (13) THE COURT Counsel?  
 (14) MR PETUMENOS Do you need a response?  
 (15) THE COURT Yes  
 (16) MR PETUMENOS Okay Instruction No 8 begins In  
 (17) addition to damages of loss use a plaintiff may recover  
 (18) damages and then it goes on  
 (19) Now I want to correct the record We said that we would  
 (20) voluntarily in the course of these instructions rely upon the  
 (21) lost use You did not rule that lost marketability was as a  
 (22) matter of law out We have agreed to do that to simplify the  
 (23) issues We do have evidence in the record of permanent harm  
 (24) We are going to argue this case on a lost use theory  
 (25) What this instruction does is set up another claim for

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(1) damages not also - not all square in the instructions All  
 (2) we have is a lost use instruction That's the only measure of  
 (3) damages we have and explain to the jury why it is we can't do  
 (4) this marketability thing and if you read instruction No 8 it  
 (5) absolutely directs a verdict against us If the jury  
 (6) misapplies it to the lost use damages  
 (7) It says we had the ability to sell borrow or lease against  
 (8) the lands but for the oil spill we would have sold borrowed  
 (9) or leased the land - and the other instructions get worse I  
 (10) can't prove these things never could If this was going to be  
 (11) the law we just wasted a whole lot of time in the trial I  
 (12) couldn't prove this in June, I couldn't prove it in April I  
 (13) couldn't prove it in January I can't prove it now These  
 (14) instructions are designed to confuse the jury and get us a zero  
 (15) verdict  
 (16) MR OPPENHEIMER Your Honor I think you really have  
 (17) to focus on the evolution of these issues We - we have  
 (18) expert reports that purport to take into account damage to  
 (19) everything the whole bundle use marketability We had as  
 (20) recently as three or four days ago instructions on permanent  
 (21) damage We pointed out how inconsistent that was with the -  
 (22) with the statements that counsel had made starting in trial and  
 (23) with the evidence which is overwhelmingly temporary damage  
 (24) evidence When this came up - I don't know literally when it  
 (25) first came up I know when it came up connection with what

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- (1) Your Honor might recall our omnibus -  
 (2) THE COURT How could I forget  
 (3) MR OPPENHEIMER It's not that we haven't been trying  
 (4) to get this issue heard It's understandable why a case as  
 (5) complex as this where frankly I think the evidence has - has  
 (6) come in over time in many different ways and I think perhaps  
 (7) any of us expected on some issues including for the  
 (8) plaintiffs that we had argued then in the omnibus bill what we  
 (9) have here is a - a temporary damage case and we were met  
 with  
 (10) opposition on that point  
 (11) THE COURT I know you were counsel but you aren't  
 (12) now  
 (13) MR OPPENHEIMER We are not now that's correct We  
 (14) are not now as of today we are not And in that context the  
 (15) rules with respect to damage to marketability are the ones that  
 (16) are set out in these instructions  
 (17) Now here's the problem with an analysis that says Well  
 (18) we're not making a marketability claim It's not true The  
 (19) reason it's not true is that if that's the case Your Honor  
 (20) must I believe instruct You can't listen to Dr Mundy you  
 (21) can't listen to Dr Green you can't listen to Mr Shorett  
 (22) And the reason for that is what they do is say We are  
 (23) evaluating a - a bundle of rights here and that includes the  
 (24) ability to market includes the ability to use and we're  
 (25) assigning a value to it and we are - we are taking a

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- (1) hypothetical revenue stream that represents the value of that  
 (2) and we're charging Exxon for it  
 (3) If the jury believes that they're liable and it is -  
 (4) there's no way for that testimony seems to me to - to  
 (5) survive unless one realizes that it's a marketing and - it's  
 (6) both use and marketing testimony  
 (7) The other point is that the law recognizes basically three  
 (8) types of damages for this kind of event  
 (9) There is diminution in market value where you have that  
 (10) permanent damage We all agree and I don't accept it's  
 (11) involuntary linchpin It's the clear result of the fact - the  
 (12) evidence in the case is overwhelmingly the fact it's a  
 (13) temporary harm so diminishment of market value is gone  
 (14) That leaves us with another set of damage claims the law  
 (15) permits you to make You can't just go out and invent a bunch  
 (16) of new ones The fact is we've got use impairment and we have  
 (17) damage to the ability to market or sell the property Those  
 (18) are the damages you've got where you have a temporary  
 (19) impairment of land And we've talked about use and  
 (20) Mr Petumenos and I have agreed to a set of instructions on  
 (21) use We haven't agreed on a set of instructions with respect  
 (22) to marketability because what's happening here Mr  
 Petumenos  
 (23) tried desperately to persuade me this morning he's not going to  
 (24) argue marketability I said to him across the negotiating  
 (25) table then Tim how are you going to argue all these experts

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- (1) who clearly are evaluating and putting in the number for the  
 (2) jury to give us for the impairment of all the bundle of rights  
 (3) including marketability?  
 (4) Each of these measures of damages has a restatement and  
 (5) doctrinal formula to them And we were able to come to terms  
 (6) I think we see it a little bit differently each of us but  
 (7) basically we got within where we could make an agreement on  
 (8) what the rules are on use impairment and we couldn't on  
 (9) marketability  
 (10) But the fact of the matter is the law does have a set of  
 (11) rules for marketability and they really have been set forth in  
 (12) these instructions and if they're not met you can't recover  
 (13) for impairment of marketability in a temporary impairment like  
 (14) this And to allow the doctors to testify and give numbers to  
 (15) the jury without explaining to the jury that to the extent  
 (16) they're measuring those things you have to take these things  
 (17) into account is to allow them in effect to recover for  
 (18) temporary impairment to marketability without showing an  
 intent  
 (19) to sell an ability to sell an available market They would be  
 (20) allowed to recover without meeting the law's requirements  
 (21) In effect Your Honor what they would be doing is kind of  
 (22) combining elements of each of the recognized forms of  
 recovery  
 (23) and really getting a damage measure that is only appropriate -  
 (24) although it's a modified one only appropriate with permanent  
 (25) damage And it's - it's a kind of camouflage permanent

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- (1) damage diminution in market value type argument when in fact  
 (2) you have a temporary impairment you're dealing with  
 (3) consequential damages and as Your Honor knows those  
 require  
 (4) the restatement makes very clear in Sections 917 and 931 - and  
 (5) the cases are consistent with it that you've got to show that  
 (6) in fact you lost - that you were damaged because something  
 you  
 (7) were capable of doing and were going to do was interfered  
 (8) with That's the essence of it essential distinction between  
 (9) the temporary damage and a permanent damage  
 (10) If it's a permanent damage these arguments don't work the  
 (11) same way But a temporary damage is it possible where you  
 (12) have a temporary damage that you can have an event like an  
 oil  
 (13) spill and it turns out not to harm you on these use and  
 (14) marketability matters because luckily you weren't impeded in  
 (15) what you wanted to do with the land or could do with the land  
 (16) in that period and the answer is absolutely Your Honor  
 (17) There can be times when even though a bad event happens it's  
 (18) temporary and during the period of temporary impairment  
 thank  
 (19) goodness it doesn't have an adverse effect  
 (20) If the uses are interfered with we have to pay for that  
 (21) If we got in the way of somebody's ability to market the  
 (22) property as we probably - well I think the evidence supports  
 (23) we don't have any counter evidence as we did in Onion Bay we  
 (24) frankly will have to pay something for that but not all of  
 (25) Prince William Sound's property which no one intended to sell

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- (1) couldn't have been sold and wasn't going to be sold. We  
 (2) didn't interfere with anyone's ability or intention or act to  
 (3) market that during the period.  
 (4) THE COURT: Thank you, counsel.  
 (5) Now, no one will be able to say after this discussion that  
 (6) I haven't allowed a full discussion of this particular issue.  
 (7) I may be wrong in my decision, but I certainly allowed you to  
 (8) argue at length.  
 (9) I'm not going to give these instructions. Thank you. And  
 (10) it's a very articulate position you've made. I'm just not  
 (11) going to give the instruction.  
 (12) MR. PETUMENOS: Those instructions are 7, 8, 9, and 10.  
 (13) THE COURT: It's really 8, 9, and 10. 7 wasn't  
 (14) specifically discussed, but I don't intend to give 7.  
 (15) MR. OPPENHEIMER: May I indulge the Court's - a point  
 (16) of personal privilege, just because of the significance of this  
 (17) point?  
 (18) THE COURT: Sure.  
 (19) MR. OPPENHEIMER: Is there any aspect of the Court's  
 (20) thinking I could address on the side terms of case law or  
 (21) theory?  
 (22) THE COURT: Not now. Not now. I really want to hear  
 (23) you talk about the loss of use instructions.  
 (24) MR. PETUMENOS: The next area is the archaeological  
 (25) area, and I think then we're almost done. The parties could

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- (1) not agree to the instructions on our own because of what the  
 (2) plaintiffs regard as a directed verdict instruction again. And  
 (3) where that happens is in Defendants' Instruction 14 and 15 -  
 (4) THE COURT: Whose?  
 (5) MR. PETUMENOS: Defendants' 14 and 15. We've made  
 (6) some progress on the other instructions but could not make any  
 (7) progress because of the defendants' insistence on 14 and 15.  
 (8) THE COURT: Let me just look at that.  
 (9) Okay, I got it.  
 (10) MR. PETUMENOS: I thought that this was ruled on by  
 (11) the Court. Because our theory of damages is that we lost  
 (12) confidentiality in the archaeological sites. That has always  
 (13) been our theory. It was the subject of motion for summary  
 (14) judgment. It is what we always intended to prove and what we  
 (15) did prove. It's what we denied the directed verdict on  
 (16) yesterday and so forth. What Exxon has done by this  
 (17) instruction is to say that we're not liable for acts of future  
 (18) vandalism, except during the cleanup, but the only purpose for  
 (19) our loss of confidentiality and the only purpose for our being  
 (20) able to do the remediation to protect our sites from future  
 (21) damage is because of that. So if the jury is told Exxon has no  
 (22) responsibility for any additional risk of that because of the  
 (23) oil spill, then why are we remediating the sites? And it  
 (24) absolutely tells the jury that we can't have our remedy, even  
 (25) if we show that the need to - to remediate and restore these

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- (1) sites are proximately caused by the oil spill. Because the  
 (2) jury then says to itself, "Well, they've told us that they need  
 (3) to remediate and restore these properties proximate - which we  
 (4) find is proximately necessary because of the oil spill to  
 (5) protect the sites in this fashion, and now you give them the  
 (6) instruction that says Exxon's not responsible for it. And they  
 (7) will not give us the remedy, even if we show that the need for  
 (8) the remedy is proximately caused by the oil spill.  
 (9) What we proposed in our negotiations was that the - the  
 (10) need for the damage - the need for the remedy needs to be  
 (11) proximately caused by the oil spill, needs to be caused by the  
 (12) harm caused in the instruction, but we could not live with  
 (13) these instructions because the jury would be told that there's  
 (14) no legal responsibility on the part of Exxon to prevent that  
 (15) which the remediation seeks to prevent. And it directs the  
 (16) verdict.  
 (17) We can't win this instruction because the only information  
 (18) that the jury has on the reason for the remedy is to protect  
 (19) this sort of thing, and that's our problem with these  
 (20) instructions. The case is over on archaeology if these two  
 (21) instructions are given over.  
 (22) THE COURT: Okay, I got you, counsel.  
 (23) MR. OPPENHEIMER: And it perhaps should be, "Your  
 (24) Honor, The - the instruction which was proposed by the  
 (25) plaintiffs is interesting. It's Instruction No. 10. And

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- (1) what's interesting about it is that it sort of camouflages the  
 (2) point because it talks about physical injury to resources  
 (3) archaeological resources, physical injury as resulting from  
 (4) vandalism during the cleanup, and then it talks about an  
 (5) impairment of the Native corporations' ability to protect the  
 (6) sites through a policy of confidentiality and secrecy which of  
 (7) course doesn't - that's not a harm.  
 (8) The harm results from future vandalism. If there is to be  
 (9) any harm, and those are acts of third parties unrelated to  
 (10) Exxon. And when the - I think we've been arguing for some  
 (11) time that those are acts for which the corporation is not  
 (12) responsible. It is responsible for the acts of its workers  
 (13) that occurred during the scope of their employment during the  
 (14) cleanup, but the idea that somebody in the future may commit a  
 (15) crime - you know, to the extent it isn't pure speculation -  
 (16) does not create a liability on Exxon's part for that event.  
 (17) There's no question that Exxon was required to clean up the  
 (18) spill. I don't believe there's in evidence, and there is no  
 (19) instruction going to some negligence in the form of the cleanup  
 (20) with respect to these archaeological sites.  
 (21) The claim is simply that somebody in the future may have  
 (22) been alerted to the presence of these sites and may in the  
 (23) future engage in an act of vandalism. And that's not something  
 (24) for which Exxon is responsible. They're - there's no way to  
 (25) know who those people will be, but there's certainly no

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(1) suggestion and there s no proof that they re going to be  
 (2) working for Exxon or working within the scope of Exxon s  
 (3) employment There s no precedent for holding Exxon or any  
 (4) other corporation or any or individual responsible for the  
 (5) criminal acts of third parties that may occur in the future  
 (6) Now that is the only harm that can result and that s the  
 (7) only harm that s been alleged I think Mr Petumenos has been  
 (8) quite candid in saying that s the gravamen of the claim  
 (9) Now to the extent they can argue that the - that the  
 (10) graffiti for example that professor Dekin descnbed which  
 (11) you know there s clearly circumstantial evidence that it  
 (12) occurred at or about the time of the spill We would argue  
 (13) there s not enough evidence to tie it to workers for Exxon  
 (14) there s other graffiti that was there Seems to me  
 (15) Mr Petumenos can argue the contrary Again that is a bona  
 (16) fide damage claim that falls within the conventional rules  
 (17) This idea that Exxon can be responsible for the acts of  
 (18) criminals in the future is not There's simply no  
 (19) responsibility for their acts and as we know from experience  
 (20) the notion that there is some sort of independent  
 (21) confidentiality right that was breached is what was - it was  
 (22) once argued with respect to some federal statutes and it s  
 (23) obviously not being argued again so future vandalism and the  
 (24) responsibility of Exxon for that really isn't the heart of this  
 (25) and there s no - there s simply no basis for holding them

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(1) llable  
 (2) MR PETUMENOS Very bnefly Judge?  
 (3) THE COURT No I don t need it counsel I m not  
 (4) going to give 14 and 15 They re not appropriate in this  
 (5) case No question about that Then the question becomes is  
 (6) your 10 appropriate  
 (7) MR PETUMENOS Is what?  
 (8) THE COURT Is your 10 and 11 appropriate  
 (9) Let me tell you what my concerns are about that It reads  
 (10) as follows - 11 with regard to the archaeological - first  
 (11) 10 is simply a statement of the claims that are being made  
 (12) right?  
 (13) MR PETUMENOS Correct  
 (14) THE COURT So the meat is the damages case is  
 (15) contained in Instruction 11 correct?  
 (16) MR PETUMENOS I m sorry I missed that last part  
 (17) THE COURT The law with regard to the recovery of  
 (18) damages is contained in Instruction 11 you gave right?  
 (19) MR PETUMENOS Yes  
 (20) THE COURT Okay So you say with regard to the  
 (21) archaeological sites for which the plaintiffs are claiming  
 (22) damages if you find it s more likely true than not true that  
 (23) the sites claimed -  
 (24) MR OPPENHEIMER Your Honor we d agreed that this  
 (25) one would be taken out anyway in the negotiation process

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(1) MR PETUMENOS Our negotiation process  
 (2) THE COURT You took it out and you didn t give 14 and  
 (3) 15 What would you have?  
 (4) MR OPPENHEIMER I thought the retaliation Your  
 (5) Honor to use Mr Petumenos language was Instruction No 10  
 (6) THE COURT Well Instruction No 10 doesn t tell  
 (7) them - so in other words you - you thought that their  
 (8) position was you give ten and the proximate cause instruction  
 (9) and that would be it?  
 (10) MR OPPENHEIMER Yes Your Honor  
 (11) THE COURT Okay Was that your position?  
 (12) MR PETUMENOS Well no My concern is our  
 (13) negotiations over the archaeological instructions broke down  
 (14) and we need to -  
 (15) THE COURT I m not going to give 14 and 15 Are you  
 (16) telling me you could productively work now knowing that those  
 (17) two aren t going to be given  
 (18) MR PETUMENOS We might  
 (19) There s one other issue I think we need to resolve and it  
 (20) has to do with our proposed 12 and their proposed -  
 (21) MR OPPENHEIMER Your Honor before we get to that  
 (22) can I - your question -  
 (23) MR PETUMENOS 13  
 (24) MR OPPENHEIMER Your question does raise an issue  
 (25) that ties in earlier - for an earlier discussion with respect

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(1) to the proximate cause issues  
 (2) Just so we are clear the - the acts of a vandal in the  
 (3) future just so - because I m afraid there s a possibility  
 (4) here I did not articulate myself on it  
 (5) The acts of a vandal in the future in our view are  
 (6) clearly an intervening -  
 (7) THE COURT Superseding cause  
 (8) MR OPPENHEIMER - superseding cause  
 (9) THE COURT I thought you had a proposed superseding  
 (10) cause instruction  
 (11) MR PETUMENOS We have an instruction on that  
 (12) THE COURT You do? Okay  
 (13) MR PETUMENOS No no We both do It s subsumed in  
 (14) the proximate cause instruction  
 (15) MR OPPENHEIMER Just so I m clear  
 (16) THE COURT You want me to find as a matter of law?  
 (17) MR OPPENHEIMER Correct We believe it s  
 (18) appropriate for that to occur  
 (19) THE COURT And my answer to you is no I won t  
 (20) MR OPPENHEIMER Understood  
 (21) MR PETUMENOS I agree I think that 11 is a  
 (22) statement of the law for remediation and if you will give  
 (23) 11 -  
 (24) THE COURT I know you do  
 (25) MR PETUMENOS if you give 11 I will withdraw 10



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- (1) THE COURT Well 10 that s an offer that doesn t  
 (2) really do much for me counsel because this - your  
 (3) discussions were incomplete I m simply trying to give you  
 (4) some guidelines now so you know where I am all right?  
 (5) MR PETUMENOS I m with you  
 (6) Let me discuss one more issue that we were not able to  
 (7) resolve and maybe we can productively - do you think we can  
 (8) at this point?  
 (9) THE COURT I doubt if you can but if you listen to  
 (10) me maybe you can give me - one of you can give me an  
 (11) instruction that I ll accept as opposed to what we have here in  
 (12) a number of instances neither of you giving instructions that  
 (13) I ll accept so you have a great void in the instructions  
 (14) MR PETUMENOS We did pretty well on some  
 (15) THE COURT You did just fine counsel I m only  
 (16) telling you that this one - this one s a biggie  
 (17) MR PETUMENOS Yes it is But a major impediment to  
 (18) us were the two that you have -  
 (19) THE COURT Well they aren t there  
 (20) MR PETUMENOS They aren t there And so I don t  
 (21) know - I think there is another one that we need to I think  
 (22) discuss and then I think the others we can resolve if I m  
 (23) not - they can correct me if I m wrong but the instruction is  
 (24) our 12 and their 13 And we had discussed -  
 (25) Do you need to confer with me about this?

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- (1) MR DIAMOND You can argue it and I ll argue it  
 (2) MR PETUMENOS We had discussed a compromised 13  
 (3) which I will tender to the Court You haven t seen it yet  
 (4) THE COURT You had discussed it or you actually  
 (5) agreed on it?  
 (6) MR PETUMENOS We had agreed on it and then -  
 (7) MR OPPENHEIMER Mr Petumenos -  
 (8) MR PETUMENOS We hadn t agreed on it?  
 (9) MR OPPENHEIMER We worked cooperatively for a day  
 (10) and a half That was a slight stretch  
 (11) MR PETUMENOS I won t tell you the full story but  
 (12) we - but these are the three situations  
 (13) Now where we re at is we have a difficulty here we have  
 (14) an ambiguity in the law and it s important and this is in the  
 (15) realm of judicial notice I think of law as well  
 (16) Exxon s - well I think I m going to try to be fair here  
 (17) Exxon s point is that under normal circumstances you don t  
 (18) own below the mean high tide line and then therefore can t  
 (19) claim for damages below the mean high tide line  
 (20) That s important to them I guess because they wanted  
 (21) to - their big thing is whether the property was physically  
 (22) oiled or not We don t think that s as big a deal but they do  
 (23) and they have a right to argue it  
 (24) But there s a wrinkle and that wrinkle is the statute that  
 (25) you find attached to the second version of 13 -

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- (1) THE COURT 12  
 (2) MR PETUMENOS The statute anyway the copy that s  
 (3) attached  
 (4) A proposal that I made was that you state the proposition  
 (5) that the property is at - the dividing line is at mean high  
 (6) tide with the exception that the plaintiffs have the rights  
 (7) and responsibilities as set forth in Exhibit Number - and then  
 (8) I give it an exhibit number and I make it an item of judicial  
 (9) notice a - an exhibit in the trial that the jury can refer to  
 (10) and read If you look at exhibit number 12 - Plaintiffs  
 (11) Proposed Number 12 I attempted to paraphrase the statute  
 and  
 (12) Exxon was unhappy because they didn t feel like it fully set  
 (13) forth the entire statute  
 (14) In my attempt in 13 I said very well I ll attach the  
 (15) entire statute but since it s so long and unwieldy it would be  
 (16) sort of out of place in the context of jury instructions  
 (17) You could simply make it an exhibit refer the jury to it  
 (18) You wouldn t have the lengthy - the statute wouldn t have to  
 (19) be as part of the jury packet and the jury could read it to see  
 (20) what we mean And we will have covered the wrinkle that exists  
 (21) with respect to the unique interests the Native corporations  
 (22) and the state own and share with respect to archaeological  
 (23) sites This is important to us because the statute has  
 (24) implications for site definition  
 (25) THE COURT For what?

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- (1) MR PETUMENOS Site definition Exxon has taken the  
 (2) position that all the sites are in the uplands the tide lands  
 (3) don t count when there is in fact provision in the law made  
 (4) for what happens when a site extends into the intertidal area  
 (5) and -  
 (6) THE COURT I thought your position was that the  
 (7) artifacts that were in the tidal zone the intertidal zone were  
 (8) only indicative of artifacts that might be on the - your  
 (9) clients land and therefore the damage that you claim the  
 (10) possible threat in future damage somehow could be found  
 (11) because there was stuff in the intertidal zone and that meant  
 (12) there was stuff up higher  
 (13) MR PETUMENOS Right And that the site definition  
 (14) that we have - you remember the testimony of Mr Dekin he  
 (15) said Oh well the way that the plaintiffs have defined their  
 (16) site by design is to define it in such a way that they can  
 (17) show that it s oiled But my view is the site exists in the  
 (18) upland only and it s unoiled and therefore unaffected by the  
 (19) oil spill and there s no proximate cause Okay  
 (20) Our request for judicial notice again mandatory is of  
 (21) this statute - and he also said by the way that the only  
 (22) reason that they mapped these artifacts on the beach is so they  
 (23) could divide the ownership up  
 (24) There s no evidence of that that s just him talking but  
 (25) in any event - I need a moment

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- (1) THE COURT Okay Hold on counsel I must wait
- (2) MR STOLL I m not arguing Your Honor I just want
- (3) to talk to my co-counsel
- (4) MR PETUMENOS I gave my copy to the Court
- (5) THE COURT Copy of what?
- (6) MR PETUMENOS The copy of the one with the statute
- (7) attached
- (8) THE COURT I have it
- (9) MR PETUMENOS There s a problem with the
- (10) introductory language that leads into the statute
- (11) MR STOLL I don t know that there is I just
- (12) haven t seen that
- (13) THE COURT On archaeological sites?
- (14) MR PETUMENOS The concern of counsel is that this
- (15) instruction works fine if it s limited to archaeological sites
- (16) but if the jury had the misimpression that it applied to land
- (17) generally -
- (18) THE COURT How could it be when the first sentence in
- (19) each of the instructions is with regard to the archaeological
- (20) sites which the plaintiffs are claiming damages?
- (21) MR FORTIER Sounds fine Your Honor
- (22) MR STOLL Sounds fine I just haven t seen the
- (23) instruction
- (24) MR PETUMENOS They re happy They re happy
- (25) THE COURT That s what it says With regard to

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- (1) one the intertidal zone is defined as the entire tidal zone
- (2) and we own from mean high tide up So first of all within
- (3) the intertidal zone we definitely own
- (4) THE COURT So - but are you claiming it for
- (5) something below the mean mean high tide line?
- (6) MR PETUMENOS Difficult question
- (7) THE COURT Well the answer is no It s been no all
- (8) the way through this case hasn t it?
- (9) MR PETUMENOS I think the answer is no that s
- (10) correct But the concern I have is what I would like with
- (11) respect to the judicial notice request relates to the - it is
- (12) evidence that the archaeological sites extend into the - into
- (13) the state s land and when it does there are certain rights
- (14) and responsibilities that the - that the Native corporations
- (15) have And Exxon s position is that these sites are not
- (16) contiguous through the intertidal zone that they only exist in
- (17) the uplands and by definition if they re in the intertidal
- (18) zone they don t exist and so we need the jury to know about
- (19) that statute
- (20) THE COURT Why?
- (21) MR PETUMENOS Because the statute reflects the
- (22) reality that these sites don t stay within the nice confines of
- (23) the boundaries and tend to go over them as part of a single
- (24) site and when that happens there is provision made for the
- (25) Native corporations to remediate excavate with certain permits

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- (1) archaeological resources on the state owned portion of the tide
- (2) lands below mean high tide
- (3) MR PETUMENOS That s what the statute says
- (4) MR DIAMOND We re reading from a different page
- (5) I m reading Proposed Jury Instruction No 13
- (6) MR PETUMENOS Judge they re talking about the
- (7) typewritten introduction
- (8) THE COURT 12 is - you re paraphrasing the statute
- (9) right?
- (10) THE COURT It starts With regard to the
- (11) archaeological resources on the state-owned portions of the
- (12) tide lines below mean high tide I instruct you et cetera et
- (13) cetera et cetera
- (14) MR PETUMENOS And Plaintiffs proposed 12 is
- (15) acceptable Exxon resisted it That s the problem
- (16) THE COURT That s your problem
- (17) MR PETUMENOS That s my problem
- (18) THE COURT It s not Mr Stoll s problem is it?
- (19) MR STOLL Your Honor I misunderstood because I
- (20) hadn t seen that particular instruction I was confused as to
- (21) what it says
- (22) THE COURT Counsel tell me something
- (23) Are you claiming damage for artifacts or archaeological
- (24) resources that exist in the intertidal zone?
- (25) MR PETUMENOS Absolutely we are because number

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- (1) and under certain circumstances the entire site and while -
- (2) so I guess my answer probably was wrong before it s probably
- (3) yes because if we are in a position - and this is what the
- (4) jury should know - to remediate an entire site and it extends
- (5) into the mean high tide zone under the state law we have the
- (6) ability to do so with certain permits and so forth from the
- (7) state
- (8) So the jury understands that when they award this money
- (9) for remediation for sites that cross over the boundary line
- (10) this statute exists as a tool that the Native corporations can
- (11) use Because what Exxon is arguing is in the intertidal zone
- (12) we have no right reason or remedy in the area
- (13) THE COURT Okay I got you This is a new twist to
- (14) me counsel This position comes as a big surprise to me
- (15) MR PETUMENOS This was -
- (16) THE COURT The plaintiffs position
- (17) MR PETUMENOS This was the request for judicial
- (18) notice that you deferred That s why it s a surprise to you
- (19) You didn t want to hear it until the end of the case I think
- (20) that s why
- (21) THE COURT I don t recall you ever saying that you
- (22) were claiming damages based on things that were in the zone
- (23) below the mean high tide line and I don t remember it being in
- (24) that particular motion was it? Or was it just a simple
- (25) request that I take judicial notice of the statute?

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(1) MR FORTIER Your Honor maybe I can help a little  
(2) bit Part of – it arose during the testimony of Lora Johnson  
(3) and part of her testimony concerned what is an archaeological  
(4) site what is the extent how do you identify it  
(5) THE COURT Counsel counsel listen to my question  
(6) My question was Where in the pleadings or the argument did  
(7) you tell me you were claiming damages for sites that were  
below  
(8) the mean high tide line Where did you do it? You never did  
(9) I don t think you did I don t think you pointed it out  
(10) Some –  
(11) MR FORTIER We pointed out the –  
(12) THE COURT I know what the factual theory is because  
(13) I ve listened to the testimony but to the extent you tell me  
(14) you made it clear you were claiming damages for sites below I  
(15) think you did just as opposite I may be wrong it s a big  
(16) record and I could be just as confused as you but I think you  
(17) said in most of your documents responded to Exxon s position  
(18) We aren t claiming damages below the mean high tide line  
we re  
(19) claiming for our sites above the mean high tide line  
(20) Am I wrong about that?  
(21) MR FORTIER I don t think you are Your Honor  
(22) THE COURT Good thank you Go ahead  
(23) MR DIAMOND I think you ought to give our  
(24) Instruction 13 or some modification of it  
(25) THE COURT 13 s an unlucky number counsel

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(1) MR DIAMOND 7 8 and 12 weren t so great either  
(2) All we are asking for is an instruction to the jury that as a  
(3) matter of law if there are archaeological resources below the  
(4) mean high tide the plaintiffs cannot lay claim for damages to  
(5) those even if they were harmed by the oil spill  
(6) And I don t hear Mr Petumenos to be saying that s not a  
(7) correct statement of the law and I don t hear Mr Fortier  
(8) arguing that that s not – that s inconsistent with his  
(9) position  
(10) THE COURT Yeah and the only kicker in that is Title  
(11) 41 35 020 says Although title and restoring archaeological  
(12) resources in the state local cultural groups in the state may  
(13) retain or retain for study and display artifacts and other  
(14) items of respective cultures and areas if the commission  
(15) created a AS – et cetera – fines right? They have to –  
(16) they have to follow the statute and the statute also says in  
(17) Section A – nothing in this chapter diminishes the cultural  
(18) rights and responsibilities of persons of aboriginal descent or  
(19) infringes upon the right or possession or uses of those  
(20) resources that may be considered historic prehistoric or of  
(21) archaeological value Tell me what that means  
(22) MR DIAMOND You re the judge I thought you were to  
(23) tell us what it means  
(24) THE COURT First I listen to you and frankly so far  
(25) what you ve said bewilders me I mean not you the collective

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(1) you  
(2) MR DIAMOND The way I read these two statutes  
(3) together – I don t have the statute in front of me talking  
(4) about intertidal zone lands but it is clear that tidal – let  
(5) me focus the discussion a little bit  
(6) What we re talking about is who gets damages who s got the  
(7) right to get damages for harm – harm to artifacts if they re  
(8) located below the mean high tide zone  
(9) The first sentence of 41 35 020 is entirely consistent with  
(10) our position that the state does because the state reserves to  
(11) itself all title  
(12) The second sentence of subsection A doesn t vest any title  
(13) in anybody What it says is what this statute doesn t infringe  
(14) upon any right of possession whatever that may be but what it  
(15) refers to is not Native corporations it refers to persons of  
(16) aboriginal descent  
(17) I don t know how the Native corporations qualify as persons  
(18) of aboriginal descent I don t know how they qualify as  
(19) persons but what this says is no preexisting rights are  
(20) infringed by this  
(21) What preexisting rights are they talking about? The state  
(22) has always had and before it I imagine the federal government  
(23) when Alaska was a territory always had right of possession  
(24) below the mean high tide zone exclusive of right of private  
(25) possession of adjacent private property owners So I don t see

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(1) this as really vesting title in anything to anybody It simply  
(2) doesn t diminish some undefined rights whatever they may be  
(3) We ve looked for legislative history on this and there is none  
(4) so your guess is as good as ours here I m just trying to do  
(5) justice to the two sections  
(6) What this statute does is set up some sort of procedure  
(7) administrative procedure if one wants to acquire  
(8) archaeological resources located below the mean high tide  
zone  
(9) you can do so and I would suggest that had the Native  
(10) corporations acquired possessory interest in artifacts and  
(11) Exxon came along and stole them or destroyed them or  
otherwise  
(12) harmed them they might well have a right of action But we re  
(13) talking about artifacts that were ostensibly harmed before any  
(14) application was made any commission created under  
41 35 300 to  
(15) take possession and so any right of action still resides in  
(16) the state of Alaska  
(17) Beyond that we have the problem of Exxon settled with the  
(18) state of Alaska and settled all the archaeological claims  
(19) What did we settle for if we didn t settle all disputes with  
(20) respect to damaged archaeological resources on state land?  
(21) I just simply don t think you can torture the statute to  
(22) create a damage remedy in favor of a private person which is a  
(23) corporation not a person of aboriginal descent who has not  
(24) made application nor received any conveyance by the state  
(25) commission to the right – to any possessory right to

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- (1) artifacts
- (2) So I think the law remains notwithstanding 41 35 020 that
- (3) the state owns the artifacts to the extent that they were
- (4) damaged because of the spill - and I'm talking about artifacts
- (5) below the mean high tide zone the state had that claim the
- (6) state resolved that claim Plaintiffs here can't claim for
- (7) it The jury should be so instructed
- (8) And it's not of just passing interest because our theory
- (9) of the case with respect to over half of these quote unquote
- (10) sites is that the only artifacts at those locations are
- (11) scattered archaeological artifacts in the intertidal zone that
- (12) wash up and down the beach and up and down the beach
- (13) MR PETUMENOS Judge I actually don't disagree
- (14) entirely with what Mr Diamond said but what I want the jury
- (15) to do I want the jury to know is the existence of the statute
- (16) because the - the issue of - just the one he described of
- (17) how is a Native - first of all let me back up
- (18) We are covered by the statute The - as you're aware
- (19) the - in the construction of statutes person includes
- (20) corporations in statutes like this and it is routine - it is
- (21) the case that Native corporations get permits under this
- (22) statute for the land when they attempt to do archaeological
- (23) things I mean that's commonly done so the statute clearly
- (24) applies to us this aboriginal person thing it's not somebody
- (25) wandering up and down the beach It's a Native corporation in

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- (1) this case
- (2) And then secondly I don't think I'm asking you for - I'm
- (3) not asking you for an instruction that tells us we can claim
- (4) for damages on the sea side of mean high tide zone but I do
- (5) want the jury to know about the statute because it has
- (6) implications for how we were damaged by incursion of oil and
- (7) workers and so forth in the intertidal zone because as the
- (8) statute makes clear those materials are available for study by
- (9) us on a certain circumstances they provide us with information
- (10) on matters that are on our sites in the uplands And as a
- (11) matter of judicial notice it is probative of our concern as to
- (12) how our sites were damaged by what happened in the intertidal
- (13) zone
- (14) Your remark earlier was correct when you described the fact
- (15) that our experts have said that you don't have the clues you
- (16) don't have the information you don't have the valuable pieces
- (17) of history that are in the intertidal zone that help you
- (18) discover and find more about the archaeological context and
- (19) the information then you lose those things you're damaged
- (20) THE COURT When you lose what things?
- (21) MR PETUMENOS When you -
- (22) THE COURT The upland?
- (23) MR PETUMENOS The uplands are damaged as a
- (24) consequence of the things that can happen in the intertidal
- (25) zone and that was the point that was made by the experts and

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- (1) when we - I believe when we tried to get into this topic was
- (2) when the issue of the judicial notice of the statute came up
- (3) when the - when the witness began to be cross examined you
- (4) have no interest in that no interest in that intertidal zone
- (5) area It's not true We don't have a - we don't own it we
- (6) don't have a claim but we have the interest that we have and
- (7) what the instruction is designed to do is to provide to the
- (8) jury in the form of judicial notice the fact of what our
- (9) interest is The reason we ran afoul with it before is I tried
- (10) to write a short instruction that paraphrased the statute and
- (11) Exxon took exception because they didn't like the paraphrase
- (12) THE COURT That's not what I heard from Mr Diamond
- (13) That's not what you're saying is it? You don't want me to
- (14) just take the statute itself and put it on a piece of paper?
- (15) MR DIAMOND No
- (16) MR PETUMENOS Then the position changed and now they
- (17) don't want it at all
- (18) That's fair Mr Diamond is the archaeology guy and
- (19) Mr Oppenheimer said it's subject to his approval and he didn't
- (20) get it That's fine that's fair That's how we negotiated
- (21) But this is - if it proves something in our case that
- (22) makes our claim more viable shows we were harmed in some
- (23) way
- (24) in the uplands or the mean high tide up and it proves something
- (25) more likely than not we are - it is mandatory that the Court
- (26) inform the jury of a relevant law that would bear - shed some

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- (1) light on the issue
- (2) THE COURT I appreciate it counsel
- (3) Mr Diamond anything else?
- (4) MR DIAMOND Your Honor I - I don't know if you're
- (5) dealing with our 13 simultaneously -
- (6) THE COURT I am I am
- (7) MR DIAMOND But I think we are then in agreement
- (8) that what's in our 13 is a correct statement of the law
- (9) although I now find the last sentence of the first paragraph to
- (10) be argumentative
- (11) THE COURT The last sentence of the first paragraph
- (12) MR DIAMOND If you find a plaintiff does not own
- (13) the land
- (14) THE COURT That's true It should come out
- (15) MR DIAMOND It's argumentative and I probably put
- (16) that in at two in the morning
- (17) MR PETUMENOS I don't know about that
- (18) THE COURT I think that your instructions probably
- (19) have a computer default that at the end of every paragraph
- (20) says You must return a verdict for the defendants
- (21) MR DIAMOND I don't have any problem with the jury
- (22) being instructed as to the meaning of 41 35 020
- (23) THE COURT You don't?
- (24) MR DIAMOND If you want to undertake to explain this
- (25) in - in language that is susceptible to being understood

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- (1) I don't know what it means I don't think Mr Petumenos
- (2) knows what it means and I don't know that it advances the ball
- (3) very much It's sort of an evidentiary more evidence on the
- (4) issue Giving them this language is horribly confusing
- (5) MR PETUMENOS Some of the testimony of the experts
- (6) was horribly confusing but it doesn't mean it wasn't evidence
- (7) THE COURT Let's not admit weaknesses in our own
- (8) case counsel
- (9) MR PETUMENOS I was talking about the collective
- (10) argument
- (11) THE COURT I'm going to give you a decision 13's a
- (12) lucky number Mr Diamond You get 13
- (13) The next is do I instruct on 14 Frankly I think it has
- (14) a tendency to confuse more than it has a tendency to
- (15) enlighten It certainly has confused the parties here and I
- (16) really don't think it's going to aid the jury's determination
- (17) The important thing is that claim is being made for sites
- (18) that are above the mean high tide line has always been the
- (19) position of the plaintiffs and it's not - and they can argue
- (20) that but if I could see somehow that this - this statute was
- (21) pertinent to that particular inquiry and more than just sort
- (22) of a tangential way I might be willing to either give it or
- (23) paraphrase it If I gave it I believe if I just repeated the
- (24) language to the jury they'd be so confused by it that they
- (25) couldn't - they could not determine what I was trying to tell

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- (1) them by virtue of just the language of the statute
- (2) MR PETUMENOS Judge I'll accept the ruling but I
- (3) think Exxon has slipped one by you here on - on No 13
- (4) THE COURT Why?
- (5) MR PETUMENOS Paragraph two is wrong The
- (6) intertidal zone includes part of the land that we own And
- (7) paragraph three is totally unnecessary it shouldn't be in
- (8) there I mean that's the -
- (9) THE COURT That's a different question Those are
- (10) different questions than you're arguing
- (11) MR PETUMENOS You said 13 was in and I got scared
- (12) THE COURT What's incorrect about this statement
- (13) Plaintiffs do not own land within the intertidal zone?
- (14) MR PETUMENOS Because the intertidal zone is from
- (15) the highest high tide point to the lowest high tide point
- (16) THE COURT Should read the mean high tide ?
- (17) MR DIAMOND It should read Plaintiffs do not own
- (18) land below the mean high tide line
- (19) THE COURT Right
- (20) MR PETUMENOS Thank you
- (21) THE COURT So all of that the first sentence and the
- (22) second sentence should be revised to reflect that right?
- (23) MR DIAMOND Yes
- (24) MR PETUMENOS And then the last sentence of the
- (25) thing is once again Exxon trying to tell us that they paid

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- (1) money to somebody else
- (2) THE COURT It's irrelevant That's out too
- (3) Well thank goodness we go to the final question I hope
- (4) Do you have anything else -
- (5) MR PETUMENOS Well we still have to sit down and
- (6) negotiate the rest of the archaeological instructions I
- (7) believe we can with those guides from the Court
- (8) THE COURT Counsel how many more discussion do we
- (9) have to do on these instructions?
- (10) MR PETUMENOS I think we're down to the verdict
- (11) form Your Honor
- (12) THE COURT The verdict form is simply whether I say
- (13) unoiled and oiled
- (14) MR PETUMENOS Right
- (15) THE COURT I do not say unoiled and oiled
- (16) MR OPPENHEIMER Would it benefit the Court to hear
- (17) an argument on it?
- (18) THE COURT You think you can change my mind?
- (19) MR OPPENHEIMER I don't know Your Honor my batting
- (20) record today is not so good
- (21) MR DIAMOND Maybe I should try this?
- (22) MR OPPENHEIMER Yeah why don't you try?
- (23) MR DIAMOND The Robbins issue floats around and will
- (24) float may float depending on the outcome up to the Supreme
- (25) Court We are endeavoring to keep retrials to a minimum

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- (1) THE COURT Sure
- (2) MR DIAMOND If there is a right-line task that oil
- (3) versus unoiled there really is no controversy on these
- (4) parcels The jury knows which ones were oiled and which ones
- (5) were not oiled If the Alaska Supreme Court looks at it
- (6) differently than you did then we save ourselves a retrial
- (7) That was the only thought
- (8) THE COURT I understand that I guess I knew that
- (9) because of our telephone conversation off the record today
- (10) Mr Oppenheimer and Mr Petumenos told me that and that's a
- (11) valid consideration It's just that I think the verdict form
- (12) as done in those terms is inappropriate and as I found the law
- (13) to be so I'm - I'm secure in the knowledge that the Supreme
- (14) Court will find that I'm right and the United States Supreme
- (15) Court will find I'm right and I'll be totally vindicated in
- (16) this case
- (17) MR DIAMOND You got a little boost from the First
- (18) Circuit
- (19) THE COURT I did thank you very much
- (20) MR PETUMENOS We forgot one Plaintiffs No 14 is
- (21) an instruction that you told us that we could submit and have
- (22) submitted I believe this was in a conversation with
- (23) Mr Stoll We have tried to write it the way you told us to
- (24) write it You told us there was a difference between Exxon
- (25) accepting responsibility for the oil spill and denying

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(1) liability for damages And Plaintiffs Proposed 14 is in  
 (2) response to your telling us we could submit such an  
 (3) instruction Exxon resists it  
 (4) I believe we ve written it the way you wanted us to write  
 (5) it If we haven t we re pleased to hear argument but any  
 (6) revisions but this was in response as Mr Stoll indicated to  
 (7) the - I guess it s a judicial notice of your own file is what  
 (8) it is and Mr Harrison s statement that we accept full  
 (9) responsibility and the wording of his statement was not just  
 (10) full responsibility for the cleanup but to pay whatever damages  
 (11) we think are appropriate and fair whatever - and we ve  
 (12) written it to say that although they may have accepted  
 (13) responsibility for among other things the cleanup of oil  
 (14) they denied liability and I thought that was what we were  
 (15) supposed to do  
 (16) THE COURT In other words even though Mr Harrison  
 (17) said they accept responsibility they really didn t The Judge  
 (18) is telling you that  
 (19) MR PETUMENOS Isn t that what we were asked to come  
 (20) in -  
 (21) THE COURT I told you I d consider it and I am  
 (22) considering it  
 (23) MR OPPENHEIMER Your Honor I think it s clear when  
 (24) you see this in black and white this way that this is a really  
 (25) highly prejudicial -

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(1) THE COURT I agree counsel and I don t want to  
 (2) spend a whole lot of time on it  
 (3) MR OPPENHEIMER I won t argue I think -  
 (4) THE COURT I m not going to give it It s not  
 (5) appropriate There might be some conceivable instruction I  
 (6) might give to set the procedural history of this case but this  
 (7) is not it  
 (8) I want to finish this as I said prior to Monday And the  
 (9) only way I can think about doing that is to go - to come back  
 (10) into session on Saturday  
 (11) MR PETUMENOS Well Judge why don t we try if we  
 (12) can figure out a way to see if we can t with the rulings of  
 (13) the Court and what we have left to do file a final set of  
 (14) instructions over the weekend or get them to you somehow over  
 (15) the weekend? I don t think we need another - frankly I am  
 (16) getting very concerned about my final - I haven t - I ve got  
 (17) to go to work And I m ready to defer to others we have the  
 (18) guidance now we can negotiate the instructions I don t want  
 (19) the reargue them  
 (20) THE COURT I don t blame you counsel but I want the  
 (21) instructions to be done and the only way I know how to get  
 (22) them done is to get you in here because you have a tendency -  
 (23) a legitimate tendency - to argue and just infinitely hoping -  
 (24) the other side will give in and they do too So the only way  
 (25) that you get a resolution is to have me around

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(1) Now we started a long time ago today and we ve gotten -  
 (2) we ve made some substantial progress But I m - I want to -  
 (3) I want to tie it up by Saturday so that at least you have  
 (4) Sunday and I know that on Monday I ve got a set of written  
 (5) instructions to give this jury  
 (6) MR OPPENHEIMER Your Honor we re perfectly prepared  
 (7) to meet and appear again on Saturday I think it s important  
 (8) that we still have some issues that are hard to close and if  
 (9) we can t - I think the parties who are arguing the case need  
 (10) to know as soon as possible  
 (11) THE COURT I agree with that counsel I understand  
 (12) your concerns completely Mr Petumenos Is what you re  
 (13) saying yeah I m not going to have enough time to prepare?  
 (14) I ll give you an extra day  
 (15) MR PETUMENOS I ll take it  
 (16) THE COURT I can have the jury called and they come  
 (17) in on Tuesday  
 (18) MR PETUMENOS I make that application If I have to  
 (19) spend more time on the instructions tomorrow I make the  
 (20) application This is a big case long case I can t be ready  
 (21) for final only Monday under the circumstances  
 (22) MR OPPENHEIMER Your Honor the other thing I would  
 (23) like to do if I can impose upon the Court s time further is  
 (24) that we have - we have some of the source materials on the  
 (25) marketing point and particularly the restatement provisions

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(1) and the records case  
 (2) THE COURT I wanted some of that Now I want those  
 (3) cases cited in the memo I want those copies of those cases  
 (4) any material you can give me that helps me on this but  
 (5) frankly I think Mr Petumenos argument is right here I  
 (6) mean think -  
 (7) MR OPPENHEIMER What argument did he make?  
 (8) THE COURT I think you re instructing on theories  
 (9) that aren t in the case I think you want me to instruct on  
 (10) theories that aren t in the case  
 (11) MR OPPENHEIMER Your Honor Is your position based  
 (12) upon an understanding that references are not going to be  
 (13) made  
 (14) THE COURT Yes Well my - it s based on the - I  
 (15) don t know That s a good question Are you intending to talk  
 (16) about loss of marketability?  
 (17) MR PETUMENOS I m intending on talking about loss of  
 (18) use I am intending to argue loss of use  
 (19) THE COURT Does that involve loss of marketability?  
 (20) MR PETUMENOS I will not refer to loss of  
 (21) marketability  
 (22) THE COURT What about you Mr Stoll?  
 (23) MR STOLL No I won t either  
 (24) MR OPPENHEIMER Well Your Honor I m confused We  
 (25) have for example a stipulation with KIB that they will not

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- (1) raise a separate quantifiable claim for use impairment and now
- (2) they re not going the talk about marketability I don t
- (3) understand why the stipulation doesn t preclude Mr Stoll s
- (4) argument?
- (5) THE COURT What argument the argument he doesn t
- (6) intend to make which is the marketability argument? Let s
- (7) start with the thing we were just discussing Marketability
- (8) they ve both said they don t intend to argue it
- (9) MR OPPENHEIMER Because I genuinely am confused by
- (10) this - if we take the testimony for example of Mr Carlson
- (11) in respect to value of property before and after the spill
- (12) does that mean that that won t be discussed?
- (13) MR PETUMENOS No Judge I think it s impossible
- (14) to - the instruction says that we are only entitled to loss of
- (15) use The only instruction the jury s getting and I -
- (16) THE COURT Wait a minute Let me answer the
- (17) question because it might clarify things
- (18) You are claiming loss of use As part of that claim you
- (19) are not claiming loss of marketability right?
- (20) MR PETUMENOS That s right
- (21) THE COURT Why shouldn t I just instruct them in
- (22) that?
- (23) MR OPPENHEIMER That would work because then it
- (24) would be clear
- (25) THE COURT Yeah

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- (1) MR OPPENHEIMER Then it would be in that case Your
- (2) Honor what we d like to do is prepare an instruction that
- (3) embodies that
- (4) MR PETUMENOS Have to see the charge I m worried
- (5) about it being overreached If it s -
- (6) THE COURT Remember the computer default should be
- (7) defeated in this case should not say grant a verdict for
- (8) Exxon
- (9) MR PETUMENOS If it says there s no claim for loss
- (10) of marketability and besides the subsistence class got \$20
- (11) million I ll know that they -
- (12) MR OPPENHEIMER We ll see if we can negotiate
- (13) something Your Honor
- (14) THE COURT Good Maybe that s a step forward
- (15) MR OPPENHEIMER Will we be scheduling a time?
- (16) THE COURT 2 00 tomorrow afternoon
- (17) MR OPPENHEIMER Two p m
- (18) THE COURT How do we get them in the building
- (19) THE CLERK I ll meet them downstairs and let them in
- (20) between 1 30 and two
- (21) THE COURT On the west side door
- (22) THE CLERK Where the elevator is the library K
- (23) Street
- (24) THE COURT Please try to resolve the question so we
- (25) don t have these long discussions I mean I d really like to

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- (1) be able to have you agree to most of these things Now you
- (2) either agree or you give me a packet that you don t agree to
- (3) and I ll tell you as briefly as I can yes or no and then we ll
- (4) just get on with the final packet together go home and
- (5) prepare right?
- (6) MR OPPENHEIMER I think it s fair to say Your
- (7) Honor that it s been a constructive day and a half and we ll
- (8) try and make tonight constructive too
- (9) MR PETUMENOS You re buying pizza
- (10) THE COURT Counsel we ll start with closing
- (11) arguments on Tuesday at 9 o clock Okay?
- (12) MR DIAMOND Yeah we were going to talk to you at
- (13) some point about your ideas of the schedule for that We can
- (14) hold it till tomorrow if you prefer How many hours per
- (15) side -
- (16) THE COURT Why don t we do it now because I ve
- (17) already talked to Mr Oppenheimer and Mr Petumenos about
- (18) this
- (19) and they say two and a half hours apiece Is that acceptable?
- (20) MR PETUMENOS I thought we said that I represented
- (21) to the Court that you and I had had a conversation and that s
- (22) what we d agreed
- (23) THE COURT Okay
- (24) MR DIAMOND And with loss of marketability my
- (25) argument just got shorter
- (26) MR PETUMENOS Two hours for you and two and a half

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- (1) for me
- (2) THE COURT Two and a half hours is acceptable for
- (3) me
- (4) The plaintiffs are going to reserve right?
- (5) MR PETUMENOS Yes
- (6) THE COURT You got a half hour out of that two and a
- (7) half hours
- (8) MR PETUMENOS Well can we reserve the way we want
- (9) to reserve? I d like to have at least 45
- (10) THE COURT You can reserve but the 45 minutes comes
- (11) out
- (12) MR PETUMENOS Sure sure
- (13) MR DIAMOND Going to go straight through break for
- (14) lunch?
- (15) THE COURT I ll go in the morning with - yeah
- (16) that - that is a problem isn t it?
- (17) MR DIAMOND If they reserve 45 and we start at 9 00
- (18) that means they re done -
- (19) THE COURT It s an hour and 45 minutes they re done
- (20) MR DIAMOND 10 45 I d start at 11 If we went from
- (21) 11 we d have to break
- (22) MR PETUMENOS I don t want to argue an hour and 45
- (23) straight I m going to want to recess after an hour
- (24) THE COURT I ll give you - you want an hour and 45
- (25) minutes total right?

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(1) MR PETUMENOS In the opening  
 (2) THE COURT So essentially I'll give you 50 minutes  
 (3) take a break and give you another 50 minutes  
 (4) MR PETUMENOS Fine  
 (5) MR DIAMOND Does that mean my argument gets split  
 (6) between lunch?  
 (7) THE COURT Two hours they'd finish around 11:30 and  
 (8) I'll take a lunch break  
 (9) Did you hear me? They go in the morning and with the  
 (10) break it's going to be around 11:30 when they finish So I'll  
 (11) take a break then I'll allow a lunch break  
 (12) MR DIAMOND 11:30 when they finish?  
 (13) THE COURT And I'll let you argue when they come  
 (14) back and then I'll let them do the rebuttal  
 (15) MR DIAMOND So you're not planning on starting until  
 (16) 9:45?  
 (17) THE COURT No planning on starting at nine because  
 (18) I know how time slips away in this case  
 (19) MR PETUMENOS Judge I have a problem with that  
 (20) Let me tell you what it is  
 (21) THE COURT You want me to start at ten?  
 (22) MR PETUMENOS No if anything earlier My concern  
 (23) is that if Mr Diamond argues for two and a half hours in the  
 (24) afternoon and all we have is ten minute breaks in between then  
 (25) I'm required to give any rebuttal final so now we're up to

(1) MR PETUMENOS I'm learning It's late but I'm  
 (2) learning  
 (3) THE COURT Okay Is one of the problems Instruction  
 (4) No 23?  
 (5) MR STOLL No Your Honor I think you resolved that  
 (6) because that's the same as 7  
 (7) THE COURT Oh okay Well you can bring it up  
 (8) tomorrow  
 (9) MR STOLL Mr Jamin left because he was the author  
 (10) of - or with the others he went back to Kodiak actually  
 (11) because when you said that 7 was out because 7 is the same  
 (12) as  
 (13) 23  
 (14) THE COURT I see I don't know there's a pleading  
 (15) up here that says Kodiak Island Borough's Objection to  
 (16) Defendants Proposed Instruction No 14 stricken 23  
 (17) MR STOLL That turns the same as -  
 (18) THE COURT Tell Mr Oppenheimer I don't want anybody  
 (19) to be anxious when they leave this courtroom  
 (20) All right I'll see you at 2:00 tomorrow  
 (21) THE CLERK Please rise This court stands in  
 (22) recess  
 (23) (Recess at 5:19 p.m.)

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(1) three hours and 15 minutes and then instructions late in the  
 (2) day  
 (3) I'm concerned that my last appearance before the jury the  
 (4) jury is going to be exhausted I would like to see that some  
 (5) of Mr Diamond's argument gets on before the noon break I  
 (6) think that would in essence favor him because it allows him to  
 (7) get you know primacy again after the break But I have had  
 (8) too much experience with long arguments where rebuttal final is  
 (9) lost because the jury is simply exhausted without some breaks  
 (10) in between  
 (11) MR DIAMOND Mr Petumenos has been trying to  
 (12) convince me for two days it's in my interest to split the  
 (13) argument My preference is not to  
 (14) THE COURT Mine is too I don't like to break up a  
 (15) party's argument I don't think it's fair It will be them in  
 (16) the morning you after the break and the rebuttal - and if you  
 (17) need some period of time to give more than just the ten minutes  
 (18) I ordinarily give them I'll do that  
 (19) Anything else? Remind me of this will you? I know that  
 (20) you'll have a transcript of it  
 (21) MR PETUMENOS It's way late We have some minor  
 (22) exhibit issues Tomorrow morning at two - tomorrow afternoon  
 (23) at two  
 (24) THE COURT I don't want to do it now My blood sugar  
 (25) may be low and you'll all suffer

(1) EXHIBITS  
 (2) Court's 38 Identified 4



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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 1,876  
TOTAL OCCURRENCES 7,561  
NOISE WORDS 385  
TOTAL WORDS IN FILE 23,327

## SINGLE FILE CONCORDANCE

## CASE SENSITIVE

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 18 23, 22 15, 17, 47 10, 65 7,  
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 28 6, 29 11, 55 20 82 10,  
 91 22, 97 25, 99 12  
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 32 6, 44 4, 7, 12, 13, 47 20,  
 66 16  
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 you've [8] 14 1, 29 21, 33 8,  
 45 25, 62 18, 64 5, 65 10,  
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 79 1, 3, 16, 18, 80 5 11, 22,  
 83 4, 8, 24, 84 8, 85 5, 11,  
 86 4, 7, 13 17, 25, 87 4, 90 6,  
 13 14

## Vol 2 106

(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 EXXON VALDEZ ) Saturday September 10 1994  
 ) 3 00 p m  
 (6) )  
 (8) VOLUME 2 Pages 106 through 187  
 (10) TRANSCRIPT OF PROCEEDINGS (Hearing)  
 (11) Arguments On Jury Instructions (Continued)  
 (13) BEFORE THE HONORABLE BRIAN C SHORTALL  
 Superior Court Judge

(16) APPEARANCES  
 (17) FOR THE PLAINTIFF

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(1) PROCEEDINGS  
 (2) (Jury out at 3 03 p m)  
 (3) THE COURT On the record  
 (4) THE CLERK On record  
 (5) MR PETUMENOS Okay Judge as the papers have been  
 (6) flying back and forth fast and furiously we have at this time  
 (7) handwritten notes lots of agreements not very many  
 (8) disagreements but I will have to apologize to you a little bit  
 (9) if some of our documents are less than all in order the way  
 (10) they were yesterday  
 (11) I think I should probably go through the agreements first  
 (12) if I can Could we have - you have another Defendants  
 (13) Proposed Instruction?  
 (14) Judge this is not what s going to happen but it ll help  
 (15) you follow along and tell you where we re at The first one  
 (16) you re going to have to bypass because we have a dispute and  
 (17) it relates to OPA 90 The second one is an instruction about  
 (18) the double recovery which Exxon proposed and I agreed to it  
 (19) can be given It s page 3 of the document I ve just shown  
 (20) The next one is agreed to and it s modified or not  
 (21) modified  
 (22) MR OPPENHEIMER This is not modified sorry  
 (23) MR PETUMENOS The next one is agreed to and it is to  
 (24) read as follows In addition to proving that Exxon s conduct  
 (25) was a legal cause of their harm it must be shown that - and

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(1) the language it is plaintiffs burden to prove also that - is  
 (2) stricken so instead it reads It must be shown that it is more  
 (3) probable than not  
 (4) Do you see that Judge?  
 (5) THE COURT Uh huh  
 (6) MR PETUMENOS And then paragraphs four and five are  
 (7) stricken and that is the agreement we have with respect to the  
 (8) intervening cause instruction  
 (9) The next one - the language in the first paragraph that  
 (10) says or has irrevocably selected that land - or selected  
 (11) language is stricken The words or has irrevocably selected  
 (12) are stricken from the instruction Then the instruction is to  
 (13) be given as read with the understanding that -  
 (14) Mr Oppenheimer has to confirm but with the understanding  
 and  
 (15) the stipulation that Exxon is not going to argue that  
 (16) selected but not conveyed archaeological sites are other than  
 (17) owned by us  
 (18) This is designed to address the mean high tide issue not  
 (19) the selected but not conveyed issue  
 (20) MR OPPENHEIMER That is correct Your Honor and all  
 (21) I need to do - and maybe I can do it before the hearing s  
 (22) over but get Mr Diamond who had the most recent  
 conversation  
 (23) on that but we think we re fine We ll double-check  
 (24) MR PETUMENOS We have also to argue with respect to  
 (25) this instruction some additional language which is not agreed

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(1) upon on the issue of the statute below the mean high tide We  
 (2) have redrafted it so it s not confusing or we hope it s not  
 (3) confusing That s what s being addressed  
 (4) The last instruction is agreed to with the following  
 (5) dispute and the dispute is - comes down to this  
 (6) MR OPPENHEIMER Your Honor just to make sure we re  
 (7) on the same page was this your last page?  
 (8) THE COURT Uh huh  
 (9) MR PETUMENOS The issue that is raised by the  
 (10) instruction - well actually this is - it may be an  
 (11) instruction issue it may be a final argument issue I don t  
 (12) know  
 (13) Frankly the plaintiffs can live without this language if  
 (14) we have the following understanding with respect to the final  
 (15) arguments While we have been willing to restrict our claims  
 (16) to loss of use there has been a lot of evidence in this case  
 (17) about lost marketability of other people s lands that we  
 (18) believe is persuasive and is evidence of our lost use  
 (19) For example all the parties have talked about Ellamar It  
 (20) is in the eastern side of the sound It is an unrolled area  
 (21) We have to be free to argue that what happened at Ellamar is  
 (22) evidence of our lost use of our lands in that area the fact  
 (23) that the real estate was impacted that it got hurt I think  
 (24) there s some confusion between the parties about that because  
 (25) think Exxon is fixing to try to preclude us from arguing about

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(1) problem with that he and I agreed to until we got to the  
 (2) courthouse and Mr Stoll provided the - the other  
 (3) instruction which I believe totally eviscerates the  
 (4) significance of our instruction  
 (5) THE COURT Are you talking about the one that says  
 (6) However evidence of lack of ability to sell or lease property  
 (7) similar in locale and type of the plaintiffs may be considered  
 (8) by you in determining under and to what extent the plaintiffs  
 (9) have been damaged for loss of use of their property?  
 (10) MR OPPENHEIMER Yes yes yes  
 (11) THE COURT So in other words you are willing to live  
 (12) with your - the last instruction in this packet you just gave  
 (13) me but Mr Stoll brought in the extra language right?  
 (14) MR OPPENHEIMER That s correct That s the sequence  
 (15) of it And the - and I think what it does is indicate that in  
 (16) fact the - the lost marketing claims really aren t out or  
 (17) people aren t really going to step up and live with the  
 (18) consequences of their not being out To have the jury look at  
 (19) the Reid sale think about the testimony on the both sides of  
 (20) the Reid sale which is the sale that plaintiffs believed  
 (21) witnesses believed went down in value went - it was  
 (22) attributable to the road and the marketing  
 (23) What on earth does that have to do with lost use on Eyak or  
 (24) Tatitlek land or Kodiak? I mean we do have evidence of lost  
 (25) use but we don t have - that s not it To the extent it is

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(1) that and that s not something we can live with  
 (2) MR OPPENHEIMER Your Honor I think this  
 (3) crystallizes the issue as I thought it existed in some respects  
 (4) yesterday because we believe that the evidence of the Ellamar  
 (5) market is not in fact evidence of lost use and that in fact  
 (6) the concern I had yesterday that under the name of lost use  
 (7) really a market theory is being advocated and that there are  
 (8) criteria there are requirements for a market theory which the  
 (9) jury is not being instructed on because we re told it s not in  
 (10) the case And my concern yesterday was it - it actually still  
 (11) is in the case and I think this - I think the proof is in  
 (12) today s pudding which is that if these claims are really out  
 (13) then we should not be discussing with the jury a loss in value  
 (14) of property matched pairs  
 (15) I mean it turns out in fact those things don t tell you  
 (16) what lost uses you had unless going back to this notion you  
 (17) have a bundle of rights and one of the rights is the ability of  
 (18) market and it really is an inability to market theory  
 (19) masquerading as a lost use theory without the requirements of  
 (20) proof being instructed on  
 (21) And so we in fact - we explored with Mr Petumenos this  
 (22) morning - I should make a couple of points the chronology is  
 (23) that the instruction that Your Honor has - that s our last  
 (24) page was one that Mr Petumenos and I had agreed to subject  
 (25) to his talking to the other people - I m not suggesting there s a

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(1) being used it s just a labeling issue The lost use label is  
 (2) being put on a marketing case If it s a marketing case we  
 (3) ought to instruct on marketing issues  
 (4) THE COURT Thank you counsel  
 (5) MR PETUMENOS This is not just a Mr Stoll issue  
 (6) THE COURT I wasn t suggesting that counsel  
 (7) MR PETUMENOS And it is not even - and Mr Stoll  
 (8) agrees that this language doesn t have to be put into the case  
 (9) into the instruction so long as we understand where we are for  
 (10) purposes of the arguments because -  
 (11) THE COURT I don t understand where you are Tell me  
 (12) how it is you intend to argue the evidence of lower values and  
 (13) things like that in the area  
 (14) MR PETUMENOS Okay I will say to the jury that we  
 (15) are not contending - I m not backing off of our position  
 (16) yesterday I will say to the jury openly that we are not  
 (17) contending that we lost money because of a lost sale or  
 (18) inability to lease our lands I will want to - I mean  
 (19) Dr Mundy did not put any methodology into his analysis any  
 (20) differently than that He doesn t - he says you don t have to  
 (21) sell or lease it and he hypothecates the lease rate for the  
 (22) temporary use he does everything appropriately to what we re  
 (23) saying  
 (24) But what Exxon says these lands are miles and miles and  
 (25) miles away from the oiled area - Tatitlek and Eyak for

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- (1) example – and they are therefore not impacted and they re in  
 (2) a clean area and there are no – there are no real estate  
 (3) impacts And we say there are because we use the waters and  
 we  
 (4) use the creatures and we use the resources offshore and let s  
 (5) take a look at what happened on these other lands to see if in  
 (6) fact they were harmed you know in a real way That is  
 (7) evidence that helps us prove our lost use case and if Exxon  
 (8) has their way – and this is what I thought was insidious about  
 (9) it and I m glad it came up in the course of instruction because  
 (10) I didn t want to hear it in the middle of my argument fully 50  
 (11) minutes of it or something like that is gone – they are saying  
 (12) that we can t point to a fact that happened in the – in the  
 (13) marketplace or in the area or in the – or in the sound to  
 (14) support our claim that makes it more likely that we suffered  
 (15) lost use  
 (16) They are saying that yesterday we just took a good portion  
 (17) of our evidence and threw it away We didn t do that We  
 (18) agreed that we were going to make one claim for loss of use  
 and  
 (19) that was an appropriate measure of damages  
 (20) And remember the restatement says there are different ways  
 (21) to value real estate We re talking about what claims we re  
 (22) making what theories and the only one that s in the case is  
 (23) the lost use case but the restatement says nothing about what  
 (24) evidence you can use to prove that lost use  
 (25) MR STOLL Prove the damage

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- (1) MR PETUMENOS Prove the damage in this case lost  
 (2) use So we don t want to be precluded from arguing all the  
 (3) evidence we have in the case on other people s lands and then  
 (4) we don t need the instruction but the instruction brought up  
 (5) the issue that – that was very troublesome to us  
 (6) THE COURT All right thank you  
 (7) MR OPPENHEIMER I m sorry Your Honor I ve had a  
 (8) sore throat for three days I keep doing the lozenges at just  
 (9) the wrong time  
 (10) I think what s going on here is that there are some  
 (11) requirements that the law sets out for a lost-market case And  
 (12) it s kind of an interesting argument You can t meet those  
 (13) requirements so you say Well I won t call it that but I ll  
 (14) introduce evidence on a completely different theory  
 (15) The idea that a market drop in the value of an Ellamar lot  
 (16) tells you whether someone in Eyak or Tatitlek had their uses  
 (17) impaired is to say that I m really going to try a marketing  
 (18) case without being able to show you I was intending to market  
 (19) my land  
 (20) It is if anything a statement that there was a diminution  
 (21) in value of the land because the natural resources which  
 (22) contribute to the value of the land were impaired but that s a  
 (23) standard that we were long past that That s not a standard  
 (24) that anybody believes the jury should be instructed on because  
 (25) it s not in the case

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- (1) The problem we have is that we wanted instructions that  
 (2) dealt with the situation where someone was claiming that their  
 (3) ability to sell or lease was impaired and we argued what those  
 (4) instructions ought to be and we were met with the response  
 (5) that You don t need them and you don t need to worry about it  
 (6) because we re not making those claims  
 (7) What we were really being told I think is We can t  
 (8) satisfy the standards for that claim so we re not going to call  
 (9) it that We re going to call it a use claim and have this  
 (10) logic disconnect where we use all the same evidence but  
 (11) because we can t make out all the cause of action for a  
 (12) lost market claim we re going to call it a lost use claim  
 (13) The fact is when you put on evidence from Mr Carlson that  
 (14) matched pairs show a drop in the value of property on Kodiak  
 (15) you are not telling us whether there s been any lost use value  
 (16) you re not giving an example of lost use You are giving an  
 (17) example potentially of diminution in value You are giving an  
 (18) example that could be part of a lost marketability case but  
 (19) you are not instructing on lost use  
 (20) Maybe one – Your Honor I can show you Plaintiffs 1049  
 (21) This is from the – these were factors in determining –  
 (22) MR PETUMENOS I don t remember what 1049 was  
 (23) MR OPPENHEIMER 1049 was Shorett s factors in  
 (24) determining land damage  
 (25) And if you would Your Honor look at how many times

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- (1) marketability comes up here And I think that that s clear  
 (2) when you look at the opening statement because I went back –  
 (3) I had a very clear recollection of this but because I heed the  
 (4) admonitions of the Court, I went back – and if you look at Mr  
 (5) Stoll s opening statement what he says is that after the  
 (6) spill land on Kodiak became unmarketable You ll see and  
 hear  
 (7) testimony as to how property in Kodiak could not – there just  
 (8) weren t any transactions for a period of time  
 (9) And then a little later he says it s the same idea of  
 (10) stigma the municipalities had to hire appraisers and they have  
 (11) estimated what the loss was on the lack of marketability and to  
 (12) the value of this land for only a one-year period of time And  
 (13) then a little later he says well – he s talking about Exxon  
 (14) and Exxon s response to this and he refers to something that he  
 (15) calls excuse number two and he says Well you weren t going  
 (16) to sell the property and you didn t sell it thus you have  
 (17) suffered no loss  
 (18) I think the common sense is and the evidence will be  
 (19) whether the property is on the market or not you can have a  
 (20) loss in value You can I mean diminution of market value  
 (21) doesn t require you have an intent to sell or ability to sell  
 (22) but loss of marketability on temporary impairment does And I  
 (23) think what we re seeing is a situation where in fact this is  
 (24) still going to be argued to the jury as a marketability case  
 (25) Now one proposal that I had – had named which I think

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(1) maybe helped to crystallize this issue with Mr Petumenos was  
 (2) actually - I did not make the proposal - as I reflect it was  
 (3) originally from Tim - but that none of us would talk about the  
 (4) market evidence in closing subject only to the fact that we  
 (5) wanted - and I had not reached this point in my conversation  
 (6) with Mr Petumenos but I was willing to stipulate to that  
 (7) subject only to my request to him - would have been in  
 (8) negotiation with him I want Mr Diamond to be able to explain  
 (9) to the jury that in fact that issue is no longer in the case  
 (10) and that specifically I mean because our position is very  
 (11) clear  
 (12) We're not - theoretically we understand the implications  
 (13) of this that they can't ignore the testimony that came in from  
 (14) people like Roddewig because in point of fact it doesn't -  
 (15) it doesn't go to use  
 (16) And that was unacceptable and I think I understand why  
 (17) it's because the plaintiffs don't really want to give up the  
 (18) marketability theory and what they would like is to be able to  
 (19) argue to the jury argue all the evidence of lower value and  
 (20) whatnot but without an instruction on what the law is  
 (21) MR PETUMENOS The problem that we have here Judge  
 (22) is that it sounds very confusing It's because I think Exxon  
 (23) has created more to this than there really is If there is a  
 (24) piece of property out there next to our property that has an  
 (25) amenity that amenity being recreation and it goes on the

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(1) market and it sells for markedly less than it should have or  
 (2) would have before the spill - assuming for a moment that we  
 (3) had a crystal clear case of that - that would be powerful  
 (4) evidence to a piece of property next to it that didn't go on  
 (5) the market never intended to be put on the market and  
 (6) therefore that's the wrong measure of remedy for that  
 (7) property  
 (8) That would be powerful evidence that that property lost use  
 (9) as well those same amenities have been lost that the person  
 (10) who didn't try to market it or didn't sell it has lost use when  
 (11) a market transaction happens nearby right next to it at a  
 (12) sharply reduced value  
 (13) You can't deprive a plaintiff of making that proof to  
 (14) prove the lost use there's nothing plaintiffs have cited  
 (15) elsewhere to make it it's not proper use It makes it more  
 (16) probable than not under 401 that it's lost use  
 (17) That's why I think this is less an issue of instructions  
 (18) perhaps and one of the ways this might be - this instruction  
 (19) might - I'd like to have it but I want it real clear that  
 (20) we're not going to be seeing three quarters of this case go out  
 (21) because of the - the evidence go out because we always had a  
 (22) lost use theory in this case  
 (23) Dr Mundy's theory of the case always was an income stream  
 (24) for the period of temporary time so forth And what he has  
 (25) been showing is and the reason why this is supported by

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(1) this - my theory is supported by the evidence is because we  
 (2) look at the market we see what's happening what does an oil  
 (3) spill do to the market and this is what we found and it makes  
 (4) his analysis more persuasive  
 (5) Now Exxon has a lot of evidence that they put in that says  
 (6) there hasn't been this sort of an impact and they're free to  
 (7) argue that but we can't undo and we shouldn't undo because  
 (8) it was perfectly admissible when it was admitted before and it  
 (9) is now and that's the - the way this happened is not our  
 (10) agreeing upon an instruction  
 (11) It was when the instruction came up and Exxon said Oh  
 (12) well but you're not arguing any of that I said Wait whoa  
 (13) I'm not claiming it for my lands but I'm not deprived of hours  
 (14) and hours of proof in the courtroom and that's how this -  
 (15) THE COURT I got you  
 (16) MR STOLL Your Honor could I just explain how I -  
 (17) we are - Kodiak none of the plaintiffs have ever asked to -  
 (18) not making a claim for lack of marketability per se We're  
 (19) not saying that that's the damage  
 (20) THE COURT Let's not say ever counsel Let's say  
 (21) now because it certainly was very murky I'll give you the  
 (22) benefit of the doubt and say it's murky and hard for both the  
 (23) defendants and I to figure out what the theories were Now I  
 (24) don't know -  
 (25) MR STOLL There's certainly no question now but we

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(1) may have been inarticulate in what we were saying but at any  
 (2) rate that's what we were trying to prove was the lost use  
 (3) THE COURT Okay  
 (4) MR STOLL The measure of damages I think there's  
 (5) some - Mr Petumenos this morning or last night asked me to  
 (6) do  
 (7) some work on this issue that's why I was the author of this  
 (8) little squib here on the end of the thing while he was  
 (9) negotiating the other things  
 (10) I want to just go through the sequence very quickly of what  
 (11) happened with GNA contractors and all that It'll just take  
 (12) just a moment  
 (13) GNA contractors were - was a 1974 case and it cited the  
 (14) Restatement 1st and it relied upon the business about  
 (15) diminution of value Diminution of value didn't apply -  
 (16) didn't rely upon Restatement for that proposition It quoted  
 (17) in a footnote an Am Jur citation Since that time the  
 (18) Restatement 2d came out and the Restatement 2d - and I've  
 (19) got  
 (20) copies of this Your Honor - actually is slightly different  
 (21) We don't need to argue this whether it's loss of use or  
 (22) diminution in value but actually the Restatement 2d says that  
 (23) you can obtain diminution in value as a measure even when  
 (24) there's a temporary taking and they've got an example in  
 (25) here  
 (26) Can I just hand this to the Court?  
 (27) In 929 which is the first one I gave you there's an



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- (1) example of oiling of property and they point out that it s
- (2) going to take some time for the oil to evaporate and the owner
- (3) is entitled to recover for the lessening of the value of the
- (4) land The condition though not permanent would affect the
- (5) offer of a reasonable purchaser
- (6) There s no suggestion in that that that piece of property
- (7) for the loss of use of that property the loss of utility of
- (8) that property has to be on the market to recover for the loss
- (9) of use
- (10) This needs to be read in connection - in conjunction with
- (11) Section 931 and 931 has some examples also That s the
- (12) second section that s stapled together there Your Honor
- (13) THE COURT I ve got it
- (14) MR STOLL And in that section page 552 there s
- (15) some illustrations at the bottom of that page and it shows that
- (16) the loss of-use damage even though the property was not
- (17) going
- (18) to be used during that period of time and so on you re still
- (19) entitled to recover for that damage for what they use a fair
- (20) rental value
- (21) Now we have agreed through stipulation that the
- (22) instruction on the measure of damages is the fair rental
- (23) There s - that loss of use measure of damages
- (24) But the significance of this difficulty of other people
- (25) selling their property and their property being sold a piece
- (26) of property that s immediately adjoining to Mr Petumenos

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- (1) clients property having a difficulty being sold is indicative
- (2) of the fact that that property if it s similar in type and so
- (3) on and it s used for the same purpose that the purchasers out
- (4) in the marketplace are seeing that even though it s a
- (5) temporary change in use or loss of use that there has been
- (6) damage that there is a measurable damage to that property
- (7) because of the lack of use or loss of use It is not a claim
- (8) for loss of marketability but the - the loss in marketability
- (9) is indicative of the fact that there has been a loss of use
- (10) I hope I haven t totally confused you
- (11) THE COURT No that last sentence sort of clarified
- (12) it Thank you
- (13) MR STOLL I don t know if it did or not But any
- (14) way I tried
- (15) THE COURT Counsel here s the issue I think - and
- (16) I m talking to all of you now You have a jury instruction
- (17) that you ve agreed to The question is whether Mr Petumenos
- (18) says what he says he s going to say in final argument whether
- (19) I will restrict him from making that argument The answer is I
- (20) won t
- (21) MR OPPENHEIMER Will not?
- (22) THE COURT What he said I won t restrict him
- (23) MR OPPENHEIMER Then Your Honor I think we re
- (24) entitled to our marketability instruction
- (25) THE COURT Yes and I disagree Now that makes it

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- (1) crystal clear doesn t it?
- (2) MR OPPENHEIMER That does and Your Honor has one
- (3) decided advantage over me in that regard You have the power
- (4) to enforce your opinion
- (5) May I - I guess come at this in two different ways One
- (6) if I understand what s being said here we have a situation
- (7) where we have - let s take Shuyak on Kodiak and we have the
- (8) recreational lots in Ellamar up in Prince William Sound that
- (9) we ve heard so much about The argument is that if the - if
- (10) there s some market transaction at Ellamar that arguably shows
- (11) that the value of those lots have gone down we can infer from
- (12) that that there s been a use impairment on Shuyak? And I
- (13) would
- (14) contend Your Honor that that s a logic break It isn t - it
- (15) does not pass the common sense test
- (16) THE COURT That s a great argument Make it to the
- (17) jury
- (18) MR OPPENHEIMER Further question Your Honor If
- (19) we re going to do this - and first of all for the record we
- (20) would of course like to have the understanding we re not going
- (21) to get the marketing instruction?
- (22) THE COURT Right And you re not going to get it
- (23) but I have some problems because now I m getting new
- (24) submissions and I want to have a clear record here and I m
- (25) trying to figure out a way to make it plain
- (26) MR OPPENHEIMER My suggestion would be we could -

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- (1) we quickly set up the instructions we believe have been
- (2) rejected and treat them as court s exhibits?
- (3) THE COURT That s a good idea What I thought we
- (4) could do is this -
- (5) MR OPPENHEIMER I have one further question I
- (6) assume though Your Honor is not going to give the other
- (7) instruction tagged on
- (8) THE COURT No I m not going to give this other
- (9) instruction
- (10) Now that s with - that s without objection The language
- (11) that I read into the record is not being sought by the
- (12) plaintiffs because I m allowing them the arguments that they
- (13) intended to make
- (14) MR PETUMENOS That s right
- (15) MR STOLL That s fine Your Honor We can live with
- (16) that
- (17) THE COURT So you get it back Let me make a
- (18) suggestion Mr Oppenheimer
- (19) I have a basis for your court s instructions that were
- (20) accepted and were not and the basis is yesterday s
- (21) submissions Plaintiffs Proposed Jury Instructions is one and
- (22) Defendants Proposed Jury Instructions is two
- (23) Now yesterday when I accepted some I marked them with
- (24) yellow tabs here they can be the Court s exhibit I believe
- (25) that the Defendants Proposed Instructions you even
- (26) numbered

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- (1) them your marketing – your marketing instructions were 8 –  
 (2) well actually they were this 7 – 7 is not directly on the  
 (3) marketing theory but 8 9 10 – 8 9 and 10 right?  
 (4) MR OPPENHEIMER That's correct Your Honor  
 (5) THE COURT Those are the ones I will not give  
 (6) They're here in the packet so you'll have a record if they're  
 (7) part of the Court's exhibit  
 (8) MR OPPENHEIMER That's fine Your Honor  
 (9) THE COURT And 7 I won't give you  
 (10) MR OPPENHEIMER And we're also going to include in  
 (11) the Court's exhibit I don't know whether it's in your packet  
 (12) 16-A and Your Honor I guess at this time we thought the other  
 (13) logical thing to do is to include our proposed instruction 28  
 (14) which is the Robbins Drydock instruction  
 (15) THE COURT Yes that's fine  
 (16) MR OPPENHEIMER If they're not in Your Honor's  
 (17) packet –  
 (18) THE COURT I saw it it's in one of the packets  
 (19) What I want to do I want to keep these because they give me a  
 (20) method of reviewing the final packet when you submit it to me  
 (21) all right because I have to compare what you submit to me with  
 (22) what you said you've agreed to but then you have to use the –  
 (23) you have copies of these right?  
 (24) MR OPPENHEIMER Yes  
 (25) THE COURT What you need to do is take out all of

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- (1) those that there is no controversy on all those that you've  
 (2) agreed to and only put in for each of you those that you  
 (3) propose that I refused to give or – yes those that you  
 (4) proposed that I've refused to give  
 (5) MR PETUMENOS We'll do that Judge I have a  
 (6) separate number for the plaintiffs  
 (7) THE COURT It will be next in order I think it's 39  
 (8) and 40  
 (9) MR OPPENHEIMER Your Honor I'm told definitely 16-A  
 (10) is not in your packet  
 (11) THE COURT What is 16 A?  
 (12) MR OPPENHEIMER It's the intent the burden to  
 (13) establish use This was the – based on your directed verdict  
 (14) rulings and negotiation with counsel we agreed to a use  
 (15) instruction which has been submitted but it was with the  
 (16) understanding that this was – we would treat this as a  
 (17) rejected instruction It follows logically from the directed  
 (18) verdict  
 (19) THE COURT Have I seen it?  
 (20) MR OPPENHEIMER I thought you had Maybe I should  
 (21) show it to you I think you have but it's 16 A which I'll  
 (22) hand you  
 (23) MR PETUMENOS This is what existing before we  
 (24) negotiated the one we agreed  
 (25) THE COURT That's fine You can put it in

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- (1) MR PETUMENOS The next issue I have Judge is  
 (2) proposed jury instruction relating to the archaeological  
 (3) statute that we discussed yesterday and this is what happened  
 (4) to me I want you to understand the sequence  
 (5) What happened was I had drafted a relatively short  
 (6) instruction on that statute Exxon objected because they  
 (7) thought it was – they wanted other stuff added in I then  
 (8) agreed to attach the entire statute as we – as I showed you  
 (9) yesterday and Mr Oppenheimer had said this is subject to  
 (10) Mr Diamond's review He brought it back to Mr Diamond and  
 (11) Mr Diamond said I don't want it I'm going to fight it and  
 (12) then yesterday you said it was too confusing and wouldn't give  
 (13) it and I felt at a disadvantage because that's what I thought  
 (14) at first too I thought it was too confusing to attach the  
 (15) entire statute because it had a lot of extraneous material in  
 (16) there that wasn't my proposal in the first place  
 (17) I was doing that to compromise with the defendants and  
 (18) they later withdrew the compromise and I was proffering an  
 (19) instruction that I thought had problems because of its length  
 (20) and – so I have today gone back to a shorter instruction on  
 (21) that topic which is very important to the plaintiffs because  
 (22) right now the only thing the jury's being instructed is that  
 (23) the state owns down to the mean high tide They know nothing  
 (24) about our interest in those – that area below the mean high  
 (25) tide Know nothing at all because the problem with the

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- (1) instruction yesterday was – it was too confusing  
 (2) I have another for the Court which I hope is less so This  
 (3) one here you have it? I just want to make sure you have a  
 (4) copy  
 (5) MR OPPENHEIMER Your Honor our position on this –  
 (6) Mr Petumenos is aware of this – is that this was completely  
 (7) argued and resolved yesterday  
 (8) This in fact Your Honor is the – this is the subject of  
 (9) the – what had been our instruction 14 which has been treated  
 (10) as a stipulated instruction with two very modest – or one  
 (11) phrase deleted today This is the instruction that Your Honor  
 (12) has –  
 (13) THE COURT It's No 12  
 (14) MR OPPENHEIMER We don't have them numbered  
 (15) unfortunately  
 (16) THE COURT No 12 isn't it?  
 (17) MR OPPENHEIMER I'm sorry 13 in the transcript  
 (18) THE COURT No it's 12 It was Plaintiffs Proposed  
 (19) 12 right?  
 (20) MR PETUMENOS Plaintiffs proposed 12 but then the  
 (21) one that I proffered to you which was the judicial notice with  
 (22) the exhibit was 13  
 (23) MR OPPENHEIMER I misspoke Your Honor  
 (24) MR PETUMENOS Was a substitute 13  
 (25) MR OPPENHEIMER It's 13 And Your Honor may

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- (1) remember this exchange with Mr Diamond you said I m going  
 (2) to give you a decision 13 s a lucky number Mr Diamond  
 (3) THE COURT His 13 his 13  
 (4) MR OPPENHEIMER Mr Diamond s 13 In other words  
 (5) what s happening that what s being proposed to you is an  
 (6) additional piece of instruction that would - that the  
 (7) instruction that we submitted to you today was supposed to  
 deal  
 (8) with based on the rulings yesterday In other words -  
 (9) THE COURT Wait Now I m getting really confused  
 (10) Let me see if you ll be confused when you hear what I say  
 (11) I accepted Defendants 13 I said I d give it I said I  
 (12) wouldn t give the Plaintiffs 12 which was the paraphrase of  
 (13) the statute  
 (14) MR OPPENHEIMER Right  
 (15) THE COURT I said as an alternative I might simply  
 (16) give the language of the statute but I wouldn t do that either  
 (17) because it was totally totally confusing That was discussed  
 (18) yesterday and that s where we left it  
 (19) MR PETUMENOS Here s the confusion When I attached  
 (20) the statute the entire one I called it 13 and so I no  
 (21) longer - I did -  
 (22) MR OPPENHEIMER Mr Petumenos there s no mistake on  
 (23) the record that this was Defendants 13  
 (24) THE COURT Anyway there s no mistake now because  
 (25) it s exactly what happened 13 was the one I accepted And it

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- (1) apparently was not good enough for the defendants because it  
 (2) didn t include enough I guess and the statute that I attached  
 (3) to include all of it to try to take care of that problem was  
 (4) too confusing  
 (5) I m trying to get to a scenario where the jury understands  
 (6) what the situation is below mean high tide It s not too  
 (7) little and not too much and that s what I proffered to you  
 (8) today  
 (9) THE COURT All right I understand - I understand  
 (10) what you re saying Now counsel I know enough about this  
 (11) issue to know what I m going to do  
 (12) Mr Oppenheimer you ve got to listen to me  
 (13) MR OPPENHEIMER Sorry Your Honor  
 (14) THE COURT I know enough about this issue to know  
 (15) what I m going to do given all of these proposed  
 (16) instructions So here s what I m going to do  
 (17) I m going to do what I said I would do yesterday I accept  
 (18) Defendants 13 which is the instruction that s in their packet  
 (19) that is captioned Ownership of Archaeological  
 (20) Resources Intertidal Zone That s what I accepted yesterday  
 (21) that s what I intended to accept yesterday  
 (22) I refuse to give the original Plaintiffs Proposed Jury  
 (23) Instruction No 12 which has a caption Native Interest In  
 (24) Archaeological Resources Below Mean High Tide I refuse to  
 (25) give the new one which has been captioned by Mr - or titled

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- (1) was Defendants 13 And I did not accept 12 and I don t know  
 (2) anything about Plaintiffs 13  
 (3) MR PETUMENOS This is the one that I was talking  
 (4) about  
 (5) THE COURT Because Plaintiffs 13 to me is the one  
 (6) that s in the packet here and that is nondisclosure of  
 (7) archaeological sites  
 (8) MR PETUMENOS Do you have this one?  
 (9) THE COURT Oh yes that s - that s in a loose -  
 (10) MR PETUMENOS That s the confusion because that s  
 (11) the one I called Defendants 13 but I drafted it  
 (12) THE COURT You misnumbered it  
 (13) MR PETUMENOS I drafted it The reason I drafted it  
 (14) is at one time I thought it was agreed upon and it was subject  
 (15) to Mr Diamond saying - Mr Oppenheimer reserved to go to  
 (16) Mr Diamond and see if he would agree and he wouldn t  
 (17) That s why it says Defendants 13 That was supposed to be  
 (18) an agreed upon substitute for it  
 (19) THE COURT I see I get it  
 (20) I was referring to Defendants 13 as it exists in the  
 (21) packet that I had in front of me at the time and that was the  
 (22) one that has a caption Ownership of Archaeological  
 (23) Resources - Intertidal Zone  
 (24) MR PETUMENOS Right And that didn t address of  
 (25) course anything about the statute at all And our Proposed 12

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- (1) by Mr Petumenos Defendants Proposed Jury Instruction No  
 13  
 (2) and that reads Plaintiffs do not own the land below the mean  
 (3) high tide line Plaintiffs have cultural rights to and  
 (4) responsibility for the archaeological resources below the mean  
 (5) high tide line as set forth in exhibit number blank and  
 (6) attached to that instruction as proposed would be the  
 (7) statute  
 (8) I refused to do that yesterday I refuse to do it today I  
 (9) will not talk about it any further I will simply not give  
 (10) either one of these instructions  
 (11) MR PETUMENOS The only issue is that when you gave  
 (12) Defendants 13 there were a couple of paragraphs that we  
 (13) revised because there was some things in there that - that  
 (14) were wrong and that has been done  
 (15) THE COURT Yes right That s true and that s on  
 (16) the record too  
 (17) MR OPPENHEIMER That s on the record and we ve done  
 (18) that and that s in the packet we submitted today  
 (19) MR PETUMENOS That s in the packet you have now the  
 (20) revised 13 as fixed  
 (21) THE COURT Oh good That s in the packet I have  
 (22) today It is?  
 (23) MR PETUMENOS Yes it s - I ve lost mine now  
 (24) THE COURT Yes yes I see what you mean yeah  
 (25) MR PETUMENOS It s there

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- (1) THE COURT The problem is of course these aren't  
 (2) numbered so I can't -  
 (3) MR OPPENHEIMER I understand Your Honor  
 (4) MR PETUMENOS We'll take care of that  
 (5) MR OPPENHEIMER We've conferred and it does conform  
 (6) to Your Honor's instructions  
 (7) THE COURT In order to make the record clear in order  
 (8) to propose a packet that you can understand this Defendants  
 (9) Proposed Jury Instruction No. 13 that Mr. Petumenos submitted  
 (10) has to be renumbered because it's a plaintiffs proposed  
 (11) instruction and it probably should be renumbered 12-A so that  
 (12) it goes right after the original  
 (13) MR PETUMENOS I have no objection if the Court does  
 (14) that by the pen right now  
 (15) THE COURT No I want those packets to be yours  
 (16) because I want you to have reviewed them give me a packet -  
 (17) I'm going to look at it I always look at the Court's exhibit  
 (18) packets to make sure that there's nothing slipping in there  
 (19) that you didn't claim on the record here The verbal record  
 (20) you've made is important but these exhibits have to be  
 (21) consistent with it and if they're not and I read - and I see  
 (22) something like that I will let you know  
 (23) MR PETUMENOS This is what I will do I will  
 (24) renumber the one that has the statute attached as 12 A I will  
 (25) renumber the one I submitted today as 12 B I submitted yet

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- (1) another one today as 12 B  
 (2) THE COURT Whatever you do I'll take a look at it  
 (3) I don't care how they're numbered I only want to make sure  
 (4) that the language - I've read the language of one into the  
 (5) record so I don't think there could be any mistake about  
 (6) that  
 (7) MR PETUMENOS Okay  
 (8) The next issue we have for the Court is OPA 90  
 (9) Yesterday - this is the one I submitted this morning that's  
 (10) going to be 12 B  
 (11) THE COURT And this is 12 A  
 (12) MR PETUMENOS That's correct  
 (13) Yesterday we discussed OPA 90 Both instructions were  
 (14) rejected My understanding was - and you correct me if I'm  
 (15) wrong - but that the parties were instructed to go if they  
 (16) wanted one they had to go back and take another crack to get  
 (17) it under terms that were more acceptable  
 (18) THE COURT Right  
 (19) MR PETUMENOS I have a long one I'm willing to take  
 (20) a shorter one but if I could approach the Court I need to -  
 (21) what's my final plaintiffs in order? Proposed in order? I  
 (22) want to add this one in order so we have a record  
 (23) MR McCALLION We didn't number them  
 (24) MR PETUMENOS I want a number the last one in  
 (25) order add it to the packet - do you have the plaintiffs

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- (1) proposed instructions? Give me the last number in order  
 (2) please  
 (3) MR ERST 15 - or 14 was the last one  
 (4) MR PETUMENOS Plaintiffs Proposed 15 is the OPA 90  
 (5) instruction You have a copy of it counsel?  
 (6) MR OPPENHEIMER Your Honor our proposed instruction  
 (7) on this is the first page in the packet you have today  
 (8) MR PETUMENOS That's the one I said we'd get back to  
 (9) because it would take some time  
 (10) MR OPPENHEIMER I think Your Honor you've got  
 (11) theirs  
 (12) THE COURT It's Native Corporations Obtain Title  
 (13) MR OPPENHEIMER Yes and I - to put this in just a  
 (14) little perspective that - our proposal is typed there  
 (15) Mr. Petumenos and I had reached tentative agreement  
 (16) tentative  
 (17) subject to talking to other counsel on language which was  
 (18) slightly different that would have simply said For lands that  
 (19) were selected but not conveyed plaintiffs may bring claims for  
 (20) damages in this lawsuit but they must establish that they could  
 (21) have used such lands and that they lost some use of such  
 (22) lands  
 (23) After that the next proposal is the longer one that you're  
 (24) about to see and I think that brings us up to where we are and  
 (25) that proposal from plaintiffs not us  
 (26) THE COURT The language you just read that's

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- (1) acceptable to you?  
 (2) MR OPPENHEIMER Yes  
 (3) THE COURT Why isn't it acceptable to you?  
 (4) MR PETUMENOS The language is acceptable to me but  
 (5) I need another instruction and here's the reason why  
 (6) We are in a situation where we indicated on the OPA 90  
 (7) issues when we were trying the case during the case when the  
 (8) evidence could have come in that this would be an issue for the  
 (9) Court and we did not - we were taking the position at the  
 (10) time before the Court that we had all right title and  
 (11) interest and full assignment and therefore didn't have to  
 (12) prove what uses we do have under OPA 90  
 (13) At the end of the case it became the fact that we had to  
 (14) prove some use of it based upon your recent ruling and that  
 (15) we didn't - we didn't have all right title and interest but  
 (16) we had to show what actual uses we put to the land  
 (17) The Proposed Plaintiffs 15 which is - which is backed up  
 (18) by the public laws that - for each provision of it tells the  
 (19) jury what uses the Native corporations have to  
 (20) selected but not-conveyed lands It is a matter of law It is  
 (21) judicial notice -  
 (22) THE COURT Let me see it  
 (23) Okay I got you I've read it So what's your position on  
 (24) this Mr. Oppenheimer?  
 (25) MR PETUMENOS He's probably going to ask to read it

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- (1) THE COURT I m sorry you haven t read it? Always  
 (2) tough to come to a position when you ve only read the first  
 (3) sentence huh?  
 (4) MR OPPENHEIMER Just one second Your Honor  
 (5) Well I don t - I think this is a rehash of where we ve  
 (6) been I don t see anything here that in fact helps -  
 (7) THE COURT Is there anything in it that s wrong?  
 (8) MR OPPENHEIMER I have no idea to be perfectly  
 (9) honest because I do - I will stipulate that it probably  
 (10) reflects Mr Fortier s view of what various statutory  
 (11) provisions are And I do respect his views on these things  
 (12) but I don t always agree with them So Your Honor in all  
 (13) candor without doing some statutory research I don t know  
 and  
 (14) I don t think it s relevant to what we re doing  
 (15) THE COURT Here s the problem I think it s probably  
 (16) right  
 (17) The bottom line is is that they have to prove loss of use  
 (18) though and another instruction in the proposed says that The  
 (19) only reason I can see for excluding it is that it s possibly  
 (20) unnecessary But I don t have any doctrinal objections to  
 (21) including it in the packet  
 (22) MR OPPENHEIMER For example Your Honor look at the  
 (23) sentence - this is just loaded with stuff - the Native claims  
 (24) against Exxon were not settled in either of those matters I  
 (25) assume we re talking about the settlements in connection with

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- (1) the statute But just a lot of stuff in here that - that the  
 (2) governments and Exxon both recognize the rights of the - the  
 (3) right of these Native corporations to bring and maintain  
 (4) lawsuits I mean Your Honor -  
 (5) THE COURT Wait wait This is all in the  
 (6) negotiating process Sometimes I m involved sometimes the  
 (7) parties are So what if that paragraph s out?  
 (8) MR OPPENHEIMER Let me tell you something Your  
 (9) Honor that may be of help here  
 (10) If this in fact is truly a negotiating process the one  
 (11) paragraph we were told that was desperately needed in this -  
 (12) and I rejected it in negotiation Had I been told I would be  
 (13) confronted with all of these - maybe I should have heeded the  
 (14) little voice that says one paragraph may be better than all of  
 (15) them It was the paragraph denominated here paragraph  
 second  
 (16) so long as the lands are in selected but not conveyed status  
 (17) and that was the only paragraph I was told was imperative At  
 (18) least that s the one I recognize  
 (19) THE COURT I don t see it paragraph second?  
 (20) MR OPPENHEIMER Maybe we re not looking at the same  
 (21) document  
 (22) MR PETUMENOS Judge I don t think that that s fair  
 (23) because the conversation that I had with Mr Oppenheimer was  
 (24) without co-counsel participating  
 (25) THE COURT Always very interesting for me to learn

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- (1) the history of these disputes though counsel and has very  
 (2) little to do with what I finally decide  
 (3) MR OPPENHEIMER I m not sure we re looking at the  
 (4) same document What I was shown was -  
 (5) THE COURT I think it s been changed  
 (6) MR OPPENHEIMER We re not looking at the same  
 (7) document  
 (8) THE COURT Are you talking about the paragraph that  
 (9) says Selected but not conveyed lands which are called Native  
 (10) lands under ANILCA however are treated somewhat  
 differently  
 (11) MR OPPENHEIMER No What I was told was important  
 (12) was the Secretary of Interior has a continuing duty  
 (13) THE COURT I see Starts with the word secondly  
 (14) MR OPPENHEIMER I am concerned Your Honor Is this  
 (15) the same document that you have?  
 (16) THE COURT Yes it is  
 (17) MR OPPENHEIMER Well I did not mean to imply that  
 (18) Mr Petumenos - although I thought he had I guess I did mean  
 (19) to imply it but I was wrong - had conferred with anyone else  
 (20) about that and so I did - I read that paragraph  
 (21) THE COURT So that s the paragraph is that a  
 (22) critical paragraph? Why is it a critical paragraph?  
 (23) MR PETUMENOS Why is it a critical paragraph?  
 (24) THE COURT Because we want it?  
 (25) MR FORTIER That is not only the - that paragraph

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- (1) has to be read - I didn t agree - I don t know what  
 (2) Mr Oppenheimer is talking about as far as that one paragraph  
 (3) it is not solely the critical paragraph I think it s also  
 (4) important that we get in Section 8301 something about right  
 (5) title and interest because that s what the issue was that the  
 (6) jury raised  
 (7) THE COURT That s not in that paragraph  
 (8) MR FORTIER It s not in that paragraph  
 (9) THE COURT Right  
 (10) MR OPPENHEIMER Your Honor that s - this is -  
 (11) THE COURT Here s the problem with that paragraph  
 (12) Let me see if I understand what you think the problem is  
 (13) Mr Oppenheimer  
 (14) It tends to throw confusion into the record because it sort  
 (15) of suggests there s some amorphous uses out there that the  
 (16) secretary could consult with the Natives and allow But  
 (17) there s been no evidence that the secretary has allowed such  
 (18) uses so what s the point of the paragraph?  
 (19) MR FORTIER Your Honor there has been a little bit  
 (20) of evidence of such uses and in fact such consultation  
 (21) THE COURT What uses are those?  
 (22) MR FORTIER As a for-instance I believe during the  
 (23) reading of Port Graham s deposition during the defense part of  
 (24) the case there was evidence that cabins were being built in  
 (25) the area and that the Park Service was consulting with - with

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- (1) Port Graham Corporation in the construction of those cabins  
 (2) THE COURT I remember some evidence about cabins I  
 (3) do remember that That s true there was evidence about that  
 (4) MR OPPENHEIMER Your Honor my problem with this is  
 (5) that I - there s much about it that I just don t know whether  
 (6) it s right or wrong It seems to me it s confusing It goes  
 (7) well - I mean let s remember the way this all started was  
 (8) just a request by the plaintiffs for a stipulation that quoted  
 (9) that provision of OPA 90 and now we have a treatise on OPA  
 90  
 (10) including - I mean this paragraph that I know the least  
 (11) about don t know the degree to which I should be troubled by  
 (12) it although on its face it is confusing to me is the  
 (13) second to-the last but it s indicative of the - of the  
 (14) problem that I have which is that this is I think a quickly  
 (15) written treatise I know it s quickly written because not even  
 (16) I use three Os in conveyed but it is - I haven t had a  
 (17) chance to really determine whether any of this is right and it  
 (18) doesn t seem to me that it takes our discussion or our debate  
 (19) about what would be an appropriate OPA instruction from what  
 (20) we ve been debating all this time whether the statute should be  
 (21) quoted or whether we should have something that is simpler  
 and  
 (22) just allowed the jury to decide on its facts And I - into  
 (23) something that s two pages of - treatise  
 (24) THE COURT That s fine and the most persuasive thing  
 (25) you ve said is that you haven t had time to evaluate it But

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- (1) I m in a position where I have to get some things done here  
 (2) you know and there s lots of things that you haven t had time  
 (3) to do because you ve been doing other things Now I want you  
 (4) to - I want you to be able to do this so I ll tell you  
 (5) something  
 (6) This issue came up in front of the jury The jury voiced  
 (7) concern about it So to the extent that they voiced concern  
 (8) I d like to tell them what the difference between  
 (9) selected and not conveyed lands and land that they own lands  
 (10) that they own are  
 (11) So I think it s appropriate to do that You - up until  
 (12) this point neither of you the collective you have not given  
 (13) me appropriate instructions on that issue So I ve rejected  
 (14) everything you ve proposed On the other hand I won t reject  
 (15) the one you ve agreed to because it looks right to me and  
 (16) that s the first instruction in the packet the one paragraph  
 (17) instruction that you ve said you agreed to Nobody s objecting  
 (18) to that instruction Right?  
 (19) MR OPPENHEIMER Your Honor no that s - I didn t  
 (20) mean to convey that impression The - the first instruction  
 (21) that is typed was never agreed to  
 (22) THE COURT Well the one you read  
 (23) MR OPPENHEIMER The language I read thereafter  
 (24) THE COURT The one you read which is entirely  
 (25) acceptable to me And appears to be acceptable to the

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- (1) plaintiffs too All right?  
 (2) So if there s no controversy on that and if the jury has  
 (3) voiced some confusion about OPA 90 then I don t see that it s  
 (4) harmful to give a - give an explanation of what selected and  
 (5) not conveyed is  
 (6) Now to extent that there s anything wrong legally in the  
 (7) proposed instruction of course I don t want to give it To  
 (8) the extent there s something that s right but confusing or  
 (9) irrelevant then I don t want to give it So having those  
 (10) guidelines in mind I can t imagine that it is impossible for  
 (11) all of you to get together and draft an appropriate  
 (12) instruction I would say that on the basis of experience my  
 (13) imagination is lacking Because I m sure you will find it  
 (14) difficult  
 (15) MR PETUMENOS Mr Fortier and Mr Oppenheimer will  
 (16) give it a good try Judge  
 (17) THE COURT And then you ll argue counsel  
 (18) MR OPPENHEIMER I ll allow Mr Diamond to volunteer  
 (19) me but not Mr Petumenos  
 (20) THE COURT Will you take these back? I have so many  
 (21) papers I don t know -  
 (22) MR PETUMENOS So many papers you don t know what to  
 (23) do  
 (24) THE COURT I m not ruling on that instruction I m -  
 (25) if you give me something that s confusing argumentative

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- (1) over long or argumentative I ll reject it because I don t have  
 (2) the time to draft these things for you and besides you ve had  
 (3) lots of time to think about this issue You should be able to  
 (4) give me an acceptable instruction  
 (5) MR PETUMENOS Finally - I think finally I ll have  
 (6) to have my counsel watching me - we proffered an instruction  
 (7) yesterday on the - you indicated to us that the Plaintiffs  
 (8) Proposed Jury Instruction No 2 regarding the limiting  
 (9) instruction on the settlement that you would give a limiting  
 (10) instruction if we proposed it and the instruction that we  
 (11) proposed yesterday was wrong  
 (12) MR OPPENHEIMER And I thought - I didn t think we  
 (13) were still - I didn t think this was still in  
 (14) MR PETUMENOS We are - we are proposing a limiting  
 (15) instruction that - what we did yesterday was we proposed a  
 (16) limiting instruction which said that you cannot consider the  
 (17) settlement for any purpose and that was wrong I think  
 (18) THE COURT That s true  
 (19) MR PETUMENOS Because there are purposes you can  
 (20) consider it I have an Amended Proposed No 2 which is a  
 (21) limiting instruction which I think is right and says the  
 (22) purposes for which they can consider it but not for any other  
 (23) purpose  
 (24) THE COURT Let s see it  
 (25) Okay counsel?

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(1) MR OPPENHEIMER Your Honor I was under the  
 (2) impression that this had been withdrawn but I have very strong  
 (3) opposition to this for a variety of reasons  
 (4) I mean I don't think this does do justice to the testimony  
 (5) that dealt with the effect on the market of the settlement  
 (6) but more importantly you know we have been unable to -- to  
 (7) get any instruction that goes to the express provisions of the  
 (8) settlement with the subsistence class  
 (9) And I think to me this is -- what this is doing is  
 (10) addressing and minimizing factually a settlement that the  
 (11) plaintiffs really ought not to have any more instruction on  
 (12) than we have with respect to the subsistence in other words  
 (13) what we have at the most what we've been able to achieve  
 (14) I understand the Court's reasoning As Your Honor knows  
 (15) we consider it a very strong issue and strongly disagree I  
 (16) understand the Court's rulings but have sought for a long time  
 (17) to have an explanatory instruction that we would like to have  
 (18) seen more detailed and more directly related to the settlement  
 (19) on the -- the Native subsistence claims because we have long  
 (20) believed that there's a very serious danger of confusion over  
 (21) what issues the jury's awarding damages for We have a set of  
 (22) instructions now with respect to double recovery which under  
 (23) the circumstances are the best we can achieve and they  
 (24) represent our attempts to live within the Court's rulings  
 (25) This is taking a different settlement and is going into a

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(1) level of explanation which in all fairness if they're  
 (2) entitled to this kind of an instruction to balance out whatever  
 (3) they think is the negative implication of the testimony we  
 (4) had -- for example with respect to Seal Bay and other trustee  
 (5) purchases -- then I really think in all fairness though  
 (6) they're different topics the fundamental issues are the same  
 (7) to avoid confusion we're entitled to a more definitive  
 (8) instruction on the Native subsistence claims  
 (9) Now I think the fact is we didn't open the door to those  
 (10) issues I don't need to remind Your Honor I'm sure you do  
 (11) remember the testimony that -- the voir dire we had on the  
 (12) exhibits and the '93 and '94 sales and I just think this is  
 (13) going to stand out in a way that is going to have more than a  
 (14) balancing effect by far  
 (15) Your Honor did say you'd consider an instruction -- I don't  
 (16) dispute that At the time I thought it was going to prove to  
 (17) be unnecessary I'm convinced it's unnecessary now and it  
 (18) seems to me that the -- in fairness if they're entitled to  
 (19) this much detail on our settlement with the state and federal  
 (20) governments that we should be entitled to more detail on the  
 (21) Native subsistence settlement and moreover if we're going to  
 (22) get into this kind of an instruction it seems to me it would  
 (23) also be appropriate to instruct on natural resource damages  
 (24) that were part of that settlement  
 (25) I mean there are a lot of things that arguably are a part

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(1) of an appropriate detailed instruction on the various  
 (2) settlements that we haven't heard to clarify certain things for  
 (3) the jury Your Honor has taken a position with respect to  
 (4) subsistence issues we understand -- greatly disagree with but  
 (5) understand -- this is a different topic overkill and it's  
 (6) going to create the impression that certain issues have been --  
 (7) have been resolved which haven't  
 (8) I don't think it's necessary and I don't think that it --  
 (9) the last sentence there is really that much more accurate than  
 (10) the first version And I had thought this was out of our  
 (11) packet  
 (12) MR PETUMENOS The words of the Court I have here  
 (13) transcript 6023 The issue is not whether to instruct it  
 (14) seems to me but whether I have submitted an appropriate one  
 (15) And I didn't hear anything from Mr Oppenheimer as to what's  
 (16) wrong with this instruction and if there's something wrong  
 (17) with it I'm pleased to try and make it better but you did say  
 (18) that you would permit the testimony and you did say that there  
 (19) would be unfair prejudice if it came in and you would deal with  
 (20) it by instructing and if there's something wrong with my  
 (21) instruction Judge I haven't heard it I thought there was  
 (22) something wrong yesterday with the way it was worded but I'm  
 (23) pleased to make it better if there's something wrong with it  
 (24) I don't see what's wrong with it  
 (25) THE COURT I think after all the evidence is in

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(1) that this issue -- this issue -- now you can correct me if I'm  
 (2) wrong but this evidence was only relating to the possibility  
 (3) of settlement moneys to fund scientific projects as an  
 (4) incentive for scientists applying for those moneys to overstate  
 (5) the damage that might have occurred in the spill areas That's  
 (6) the -- that's what the -- the testimony related to and only  
 (7) that Am I wrong?  
 (8) MR FORTIER I think Your Honor it was also for  
 (9) showing that there was more demand to purchase natural lands  
 (10) after the spill than before the spill I think that's where it  
 (11) came in with MacSwain Roddewig --  
 (12) THE COURT That's true There was also evidence with  
 (13) settlement money related to those two sales transactions after  
 (14) the spill right?  
 (15) MR FORTIER That's correct Your Honor  
 (16) THE COURT Well I don't know I don't know what the  
 (17) record specifically says and I can understand how the  
 (18) plaintiffs could have a view that what I said was Yes I will  
 (19) instruct on this but frankly I simply don't think it's  
 (20) necessary  
 (21) MR PETUMENOS I don't mean to make you guess  
 (22) THE COURT Let me see it yes  
 (23) MR PETUMENOS Counsel showing 6023 -4  
 (24) THE COURT I think I already have it  
 (25) MR PETUMENOS You might I want -- the top of this

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- (1) page too just the first yellow sticky note  
 (2) THE COURT Okay yeah I can see why you would think  
 (3) that I was saying to you \*Yes I definitely will instruct  
 (4) but I always have the ability after two and a half months of  
 (5) trial to know what the whole trial record holds and determine  
 (6) whether or not an instruction is appropriate and I don't think  
 (7) it's appropriate here I don't think there's anything needed  
 (8) so I won't give it  
 (9) MR PETUMENOS The last issue we have is that the  
 (10) plaintiffs - do you still have the Plaintiffs Proposed  
 (11) Instructions there?  
 (12) THE COURT Yeah I have everything you gave me in the  
 (13) first two packets  
 (14) MR PETUMENOS The instruction I was pretty clear  
 (15) that Instruction No 10 was in  
 (16) THE COURT 10?  
 (17) MR PETUMENOS And -  
 (18) THE COURT 10 your 10?  
 (19) MR PETUMENOS Yes  
 (20) THE COURT I may not have specifically said that  
 (21) MR OPPENHEIMER Your Honor when Mr Petumenos and I  
 (22) were negotiating a - what we were trying to achieve as a  
 (23) package of things on archaeology what I told him was I  
 (24) couldn't remember whether you had or not I thought you had  
 (25) not but -

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- (1) THE COURT I think I used it as a frame of  
 (2) reference I think I referred to it as part of my discussion  
 (3) of whether or not 11 was appropriate  
 (4) MR OPPENHEIMER Where we are is that we thought the  
 (5) other archaeology instructions that Mr Petumenos and I have  
 (6) been discussing and I think - I think Tim we had closure on  
 (7) it  
 (8) MR PETUMENOS I think we did too  
 (9) MR OPPENHEIMER Is that we objected to 10 for a  
 (10) couple of reasons  
 (11) One it's a statement of the case instruction which is  
 (12) something that - or arguably is but it doesn't - it doesn't  
 (13) go to anything that actually requires instruction given the  
 (14) other instructions that are in the package and importantly on  
 (15) Subsection C the - this really amounts even though it's a  
 (16) statement of the case instruction amounts to the Court I  
 (17) think lending legitimacy to one of the - one of the  
 (18) plaintiffs arguments with respect to confidentiality  
 (19) There is a dispute here obviously as to which - which we  
 (20) have built out of the instructions I think the length of  
 (21) argument as to whether or not confidentiality breaches have  
 (22) led to any actual damages to archaeological resources and  
 (23) certainly whether there's any independent harm that flows from  
 (24) breaching confidentiality which we of course contend that  
 (25) there doesn't

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- (1) So we would have to get into an argument over whether this  
 (2) is in fact an appropriate theory of the case argument anyway  
 (3) because if it is then frankly we need to do - we need to ask  
 (4) the Court to enter one for us  
 (5) THE COURT That's right I think that's - that's the  
 (6) answer  
 (7) MR OPPENHEIMER Well except Your Honor what I  
 (8) would suggest is that Mr Petumenos and I have actually  
 labored  
 (9) a fair amount of time on all of the other archaeological  
 (10) instructions and we've taken from each other there's been a  
 (11) lot of compromising and what I would like to do is to have  
 (12) this question as to whether we really need to state the case -  
 (13) MR PETUMENOS I withdraw it  
 (14) THE COURT Very good solution counsel 10 is  
 (15) withdrawn  
 (16) MR PETUMENOS Can I get a piece of candy for that?  
 (17) Everybody in this courtroom has candy but me  
 (18) THE COURT Two spearmint leaves  
 (19) So where are we?  
 (20) MR PETUMENOS We're at the OPA 90 review by Exxon  
 (21) and the negotiation with us and Mr Fortier and Mr Diamond  
 (22) whoever's going to do that And we're done  
 (23) MR OPPENHEIMER Just because the record might not  
 (24) reflect my -  
 (25) THE COURT Does that mean we have a full - I can

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- (1) expect on Monday morning to get a full clean packet of those  
 (2) instructions that go in and - and to get your exhibits that  
 (3) relate to those instructions that I've refused to give and  
 (4) those instructions that I've given over objection?  
 (5) MR PETUMENOS Yes  
 (6) MR OPPENHEIMER I believe that's correct  
 (7) THE COURT And a verdict form that's consistent with  
 (8) what I said?  
 (9) MR OPPENHEIMER Your Honor that reminds me that  
 (10) this was my omission  
 (11) There was one verdict form which we did not raise with the  
 (12) Court and it's my fault It was at the back of my package and  
 (13) I apologize because I was going to raise that with  
 (14) Mr Petumenos before the hearing It went over to  
 (15) Mr Petumenos but if he like me looked at the first pages  
 (16) he probably missed it  
 (17) It's page - Tim this is Special Verdict Form for  
 (18) Archaeological Resources  
 (19) MR PETUMENOS Oh well this is - this is a  
 (20) complete - the verdict form contains language that we've  
 (21) already negotiated out of the instructions  
 (22) MR OPPENHEIMER Tim you and I never negotiated over  
 (23) this because we never saw it  
 (24) MR PETUMENOS But it contains language that is not  
 (25) in the instructions now because we negotiated it away



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- (1) THE COURT Can I see it? Before you start to rage at  
 (2) each other I can see that this is innocuous and -  
 (3) MR PETUMENOS It s not innocuous  
 (4) MR OPPENHEIMER Your Honor this is our Proposed  
 (5) 21  
 (6) THE COURT Well is this the only special verdict  
 (7) you d have them answer?  
 (8) MR OPPENHEIMER That s correct  
 (9) MR PETUMENOS It would require a special verdict for  
 (10) each and every site by number  
 (11) THE COURT Yeah that s what it looks like Would  
 (12) it?  
 (13) MR PETUMENOS That s just an example  
 (14) MR OPPENHEIMER For those for which they find  
 (15) damages yes which should only be two forms  
 (16) THE COURT As I said see you should have shown it  
 (17) to me earlier I could have made the decision quicker I won t  
 (18) give it  
 (19) MR OPPENHEIMER May we include that Your Honor as  
 (20) part of the Court exhibit?  
 (21) THE COURT Sure  
 (22) MR PETUMENOS I m assuming the Plaintiffs Proposed  
 (23) Verdict Form is what we re submitting?  
 (24) THE COURT Yes because as I understand the record  
 (25) the defendants only object to the part that doesn t split the

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- (1) damages between oiled and unoled parcels is that right?  
 (2) MR OPPENHEIMER Well and Your Honor -  
 (3) THE COURT And the fact that -  
 (4) MR PETUMENOS And this  
 (5) THE COURT And the fact I m not giving special  
 (6) verdicts with regard to every archaeological site right?  
 (7) MR OPPENHEIMER That s correct Your Honor  
 (8) THE COURT All right I am not giving verdicts that  
 (9) require them to find specific damages for each archaeological  
 (10) site that s one answer to the question Two I m not giving a  
 (11) verdict form that splits the damages between oiled and unoled  
 (12) property Therefore the plaintiffs version is consistent  
 (13) with those rulings right?  
 (14) MR PETUMENOS Right And the other thing that was  
 (15) on this one - so that the record s clear - is they had a  
 (16) reasonable certainty standard in the - in the verdict form  
 (17) which also makes it defective  
 (18) MR OPPENHEIMER Although I assume Your Honor s  
 (19) ruling is not based on that?  
 (20) THE COURT It wasn t I didn t - I was never told  
 (21) about any dispute about that  
 (22) MR OPPENHEIMER It was on our form Your Honor but  
 (23) just so the record was clear if we were willing to delete  
 (24) that I assume Your Honor s decision would still be the same  
 (25) with respect to the special verdict form?

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- (1) THE COURT Oh yes I m not going to require special  
 (2) verdict answers on every archaeological site  
 (3) MR PETUMENOS Judge I think - I hate to say this  
 (4) but I think we need to take the time to move in exhibits  
 (5) because the clerk wants closure tomorrow  
 (6) THE COURT I certainly hate to say that too How  
 (7) long is it going to take to do that?  
 (8) MR PETUMENOS Not very long  
 (9) THE COURT Okay do it  
 (10) MR PETUMENOS The first motion is Plaintiffs  
 (11) Exhibit 1111 I don t think you ll - maybe you ll have a  
 (12) problem maybe you won t but listen to it first  
 (13) (Exhibit PX1111 offered)  
 (14) MR PETUMENOS This is the Native corporation video  
 (15) that Mr Gordaoff played to the jury and we are redacting it  
 (16) to remove all other videos but Mr Gordaoff s It had other  
 (17) ones on it initially originally that were for witnesses that  
 (18) did not testify We will only enter into evidence the video of  
 (19) Mr Gordaoff which was played to the jury  
 (20) MR OPPENHEIMER Your Honor I apologize I don t  
 (21) know what s on - I m not familiar with the tape  
 (22) THE COURT It s the tape that was played during his  
 (23) testimony  
 (24) MR PETUMENOS It was previously admited played  
 (25) during the testimony

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- (1) THE COURT Wasn t previously admitted otherwise you  
 (2) wouldn t be moving it in right?  
 (3) MR PETUMENOS The problem is I couldn t move in the  
 (4) whole thing it had other people s video on it And we didn t  
 (5) call them so I ve had to amend the offer  
 (6) THE COURT What s the number?  
 (7) MR PETUMENOS 1111  
 (8) THE COURT It s admitted under these conditions The  
 (9) defendants can take a look at it at the finished version,  
 (10) determine that it s what was played for the jury during  
 (11) Mr Gordaoff s testimony And raise any objections to it that  
 (12) they choose to do prior to the time there are final arguments  
 (13) in this case and that ll be fine I doubt if there will be  
 (14) objection  
 (15) (Exhibit PX1111 received)  
 (16) THE COURT If there is no objection if there s  
 (17) nothing further on the record then it s admitted without  
 (18) objection  
 (19) MR PETUMENOS While we re on videotapes in the  
 (20) exchange of exhibits and the auditing process that you required  
 (21) over the weekend there has been a misunderstanding I think  
 (22) and we need your help to clarify it At some point during the  
 (23) defense case we objected to testimony being repeated in the  
 (24) videotape and going into the jury room Mr MacSwain and  
 (25) Mr Dorchester both have videotapes where they essentially

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(1) testify and the offer was we ll be able to move quicker if you  
(2) allow me to put the audio in and you allowed it but then you  
(3) ruled you were not going to allow the testimony to be repeated  
(4) or repeatable in the jury room so the audio was withdrawn and  
(5) the defendants pointed out I had a video of Mr Costello which  
(6) also had audio and I agreed to withdraw the audio from mine  
(7) I m all correct so far  
(8) The dispute appears to be that I thought that what we had  
(9) agreed to is with the exception of admissions tapes which have  
(10) no other function like Mr - Mr Harrison s or the science  
(11) ones or with the exceptions of the admissions tapes all of the  
(12) audio is therefore out of both sides videos And that s what  
(13) I think there s some confusion about We just need to  
(14) understand it  
(15) MR OPPENHEIMER Your Honor again this was a topic  
(16) with which I have no familianty I am told by my paralegal  
(17) however that there is one exception to this  
(18) THE COURT What is it?  
(19) MR PETUMENOS I guess the dispute is over the Page  
(20) video I don t understand the distinction  
(21) THE COURT The Page video?  
(22) MR PETUMENOS Dr Page was throwing balls around and  
(23) telling us on the video that he could - Nerf balls I don t  
(24) know why that s different than anybody else s video  
(25) THE COURT If I ordered a jury view I was worried

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(1) the jury would have asked for Nerf balls  
(2) MR DIAMOND Audio out except for one exception  
(3) THE COURT The Nerf track We call it the Nerf  
(4) track  
(5) MR DIAMOND The Nerf track is pretty harmless and  
(6) it s present sense impression anyway There are videos that  
(7) the plaintiffs have put in with sound The -  
(8) THE COURT What does it say? I don t remember what  
(9) it says Here I am and throwing over my shoulder now -  
(10) MR PETUMENOS 50 minutes long  
(11) THE COURT Their video isn t that long I mean if  
(12) they watch it they got to watch the video so the length of  
(13) the commentary isn t at issue I don t remember anything in it  
(14) that -  
(15) MR DIAMOND What he says is Okay this is now my  
(16) seventh try on Smith Island I am now turning around I am  
(17) throwing the Nerf ball over my head backwards This is where  
(18) it landed Then you see him with a shovel I m now picking  
(19) up rocks I m looking down I ll tell you what I see He s  
(20) describing what he sees  
(21) MS SMITH This actually - this actually is also not  
(22) the only video when - when the science guys were on there  
(23) was  
(24) no turn off the audio request made and none given  
(25) MR PETUMENOS That s right  
(26) MS SMITH So there s another video there s -

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(1) unless you re not objecting to it I should just be quiet but I  
(2) mean he was silent and let the video do the talking I mean  
(3) obviously -  
(4) MR PETUMENOS I understand that  
(5) MR DIAMOND What I had understood we had agreed to  
(6) was that when there was testimonial type narrative on a video  
(7) as there was with Dorchester and MacSwain we were going to  
(8) pull it out There is sound on some of their videos For  
(9) example Mr Costello motoring around Bligh island and talking  
(10) about what he is seeing We did not require the plaintiffs  
(11) when they propounded that to take out his description of  
(12) what -  
(13) MR PETUMENOS You did but if you re withdrawing it  
(14) that s fine  
(15) THE COURT Hold it I can t really resolve this  
(16) exhibit by exhibit because it would be very wasteful to do  
(17) that Most of these exhibits the video - the audio track is  
(18) either the record reflects that it won t be in there for the  
(19) jury or the track is innocuous I consider the Nerf track to  
(20) be one of those examples  
(21) But you put me at a severe disadvantage here because I  
(22) can t make a comprehensive ruling regarding every sound track  
(23) on these videos so the only thing I can tell you is the basic  
(24) rule I would follow here is if I ruled it out and then it  
(25) doesn t go in if I haven t ruled it out then presumptively it

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(1) goes in Because I don t remember anything in the record that  
(2) says all these sound tracks will be off  
(3) MR DIAMOND I don t care I think Costello should go  
(4) in with the sound because it s somewhat - it s somewhat  
(5) inexplicable without the sound And it was played for the jury  
(6) with the sound I nave no problem with that going in in any  
(7) format so long as the plaintiffs aren t going to try to turn  
(8) around and try to extract from the record things that we put in  
(9) with sound without any objection I e the Nerf ball  
(10) MR PETUMENOS We won t do that counsel What about  
(11) Dr Johnson s - I understand there was some controversy with  
(12) the people over Dr Johnson?  
(13) MR DIAMOND Dr Johnson was played without sound  
(14) THE COURT Anything played without sound the tract  
(15) doesn t go in  
(16) MR PETUMENOS It was  
(17) THE COURT Well the record will say whether or not  
(18) it s correct right?  
(19) MR FORTIER There were two tapes Judge One of the  
(20) tapes had no sounds the other tape was Exxon cultural  
(21) resources production so it contained admissions we had those  
(22) played  
(23) MR PETUMENOS That goes in  
(24) THE COURT That goes in  
(25) MR PETUMENOS I think we ll work this out Judge

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- (1) THE COURT Don t bring it back to me
- (2) MR PETUMENOS This helped You bring it back to
- (3) him
- (4) I m glad Mr Diamond s here because I have some exhibits
- (5) to move in which -
- (6) MR DIAMOND That s why Mr Diamond is here If he
- (7) had no objections he wouldn t be here
- (8) THE COURT Great timing
- (9) MR PETUMENOS Let s find out what they are
- (10) We move in DX16144 3 16141 45 DX16143 1 without
- (11) objection
- (12) (Exhibits DX16144 3 16141 45 DX16143 1 offered)
- (13) THE COURT They re admitted
- (14) THE CLERK What was the first number?
- (15) MR PETUMENOS 16144 3 Those are all defendants
- (16) exhibits
- (17) (Exhibits DX16144 3 16141 45 DX16143 1 received)
- (18) MR PETUMENOS I move in PX8516
- (19) (Exhibit PX8516 offered)
- (20) MR DIAMOND I object to this
- (21) THE COURT What is it?
- (22) MR PETUMENOS Article written by defendants
- (23) archaeologist
- (24) THE COURT What was the foundation for that?
- (25) MR PETUMENOS This was in the cross-examination -

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- (1) all of these are in the cross examination of defendants
- (2) archaeological expert which we pointed out to him the
- (3) principles that his own client had suggested existed
- (4) THE COURT Who produced this?
- (5) MR PETUMENOS The -
- (6) THE COURT Who produced it?
- (7) MR PETUMENOS These individuals who are on the
- (8) article are all Exxon archaeologists from the cultural
- (9) resources program
- (10) THE COURT What s the objection?
- (11) MR DIAMOND It was not offered into evidence Your
- (12) Honor At most he was asked about one line on one page I
- (13) don t even believe this was even identified in the record If
- (14) a document - if this document had been offered in its entirety
- (15) to prove all of the truth of the matters asserted while the
- (16) trial was still on going as is the case with numerous other
- (17) exhibits plaintiffs now want to get in now evidence is closed
- (18) we could have been in position to offer explanatory testimony
- (19) we would know which parts of the things they re talking about
- (20) These are very lengthy reports Coming in after the close
- (21) of evidence and offering new exhibits seems to me is
- (22) somewhat
- (23) unprecedented If they cross examined Dekin about a line in
- (24) there then it s in the record but they ought not to put the
- (25) entire document into evidence without any kind of foundation

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- (1) MR PETUMENOS Judge we rested our case We rested
- (2) our case - there s three more to go or something like that
- (3) but we explicitly rested as did everybody else in the case with
- (4) the understanding we had exhibits in We ve been doing that
- (5) this whole case if that s the grounds of getting a exhibit
- (6) out
- (7) THE COURT I understand the dispute I won t admit
- (8) it
- (9) MR PETUMENOS I move into evidence Exhibit 9030
- (10) (Exhibit 9030 offered)
- (11) MR DIAMOND Your Honor this is an article written
- (12) by Dr Dekin He was cross-examined about a paragraph of it
- (13) If I m correct this was never identified I think he was
- (14) simply asked about whether he d written something
- (15) MR PETUMENOS Judge I think this is a different
- (16) category This is the witness own statement
- (17) THE COURT I don t remember the questioning that went
- (18) on about this
- (19) MR DIAMOND I m pulling the transcript right now
- (20) Your Honor
- (21) MR PETUMENOS I don t remember either Judge
- (22) THE COURT Counsel -
- (23) MR DIAMOND Your Honor It s probably a good thing
- (24) that I pulled the - pulled the transcript because apparently
- (25) you had sustained my objection to Mr Petumenos reading this

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- (1) into the record
- (2) THE COURT I must have been wrong This is on what
- (3) page?
- (4) MR DIAMOND It s highlighted 9030 is the exhibit
- (5) number
- (6) THE COURT You re right
- (7) MR PETUMENOS I think he s right I withdraw the
- (8) offer
- (9) THE COURT 9030 is not admitted
- (10) MR PETUMENOS I move into evidence Exhibit 9023 and
- (11) I m going to venture forth to say I think I did read this one
- (12) and it s Mr Dekin s I think that was read into the record
- (13) it is a statement of the witness
- (14) THE COURT If it was read -
- (15) MR DIAMOND The part that he wants is already in the
- (16) record
- (17) THE COURT Then it s not going to be admitted if
- (18) it s in the record
- (19) MR PETUMENOS Even if it s his own statement as
- (20) opposed to -
- (21) THE COURT If it s read into the record and made
- (22) clear it s his own statement as far as I m concerned the
- (23) transcript is the same thing as the book
- (24) MR PETUMENOS Just a minute Judge
- (25) This is an objection to their exhibit

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- (1) Oh it's a bigger problem than that I think that Exhibit  
 (2) DX15495 is a page of the SNA report I think - maybe that's  
 (3) been taken - Randy I thought the issue on reports was  
 (4) solved I think the problem here is this may have gone in  
 (5) before we got to the issue of whether pages of reports come  
 (6) in it's the in the record problem  
 (7) THE COURT If it's in we have a discussion on the  
 (8) record about why it's in  
 (9) MR PETUMENOS There was a discussion on the record  
 (10) at transcript 4019 that the assumptions portions in which -  
 (11) assumptions and limiting conditions of that exhibit could go in  
 (12) as well  
 (13) MR OPPENHEIMER I'm confused as to the issue This  
 (14) was the SNA appraisal Your Honor in Kachemak 2 that Mr  
 Mundy  
 (15) did I think We're going back a long time going back to July  
 (16) 28th here but - and Mr Petumenos had wanted to have the  
 (17) statement of - I'm not sure what they're called but the  
 (18) assumptions and limiting conditions added and I had no  
 (19) objection to that  
 (20) MR PETUMENOS Apparently in the audit they did  
 (21) yesterday it wasn't in so it needs to be  
 (22) MR OPPENHEIMER It needs to be added to it  
 (23) MR PETUMENOS We couldn't get them to do it on their  
 (24) own  
 (25) THE COURT Is it just a piece of the exhibit that's

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- (1) not there?  
 (2) MR OPPENHEIMER Apparently Your Honor I'm not  
 (3) aware  
 (4) THE COURT Get the piece and put it there  
 (5) MR PETUMENOS Mr McCallion has a motion  
 (6) THE COURT A motion?  
 (7) MR PETUMENOS To admit a document  
 (8) THE COURT Don't scare me like that Mr Petumenos  
 (9) I was going to have to work myself up today  
 (10) MR McCALLION I could have taken the day off or  
 (11) listened to this  
 (12) THE COURT What was it?  
 (13) MR McCALLION This was an issue that had been  
 (14) deferred during the cross-examination of Dr Gilfillan We had  
 (15) moved in a report the three pages of an abstract of a report  
 (16) of a Dr Houghton which Dr Gilfillan was cross-examined  
 (17) about Your Honor indicated that you would like to see the  
 (18) transcript references relating to the cross examination of Dr  
 (19) Houghton on that issue which we have which is page 5524 and  
 (20) consecutively and the examination related primarily to  
 (21) paragraph on page 2 of the abstracts  
 (22) THE COURT May I see it please?  
 (23) THE COURT Starts on this page  
 (24) MR McCALLION Yes and subsequent to that  
 (25) THE COURT Okay I see it It's a three page

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- (1) document that's PX1974 that the discussion regarding  
 (2) Dr Houghton's paper is on page 5526 and 5527 of the  
 (3) transcript I think and that's it in its entirety  
 (4) MR McCALLION Your Honor if I could just clarify  
 (5) the record We are offering at this time just the abstracted  
 (6) first three pages of the document which is rather voluminous  
 (7) in order to cut down on paper  
 (8) THE COURT Okay  
 (9) MS SMITH Your Honor originally they wanted the  
 (10) whole thing in which we clearly had problems with Three  
 (11) pages is more reasonable Our position is that the only thing  
 (12) he asked him about was on page 2 He read it into the record  
 (13) He said Do you agree Gilfillan said no  
 (14) They changed their mind immediately thereafter and  
 (15) published another study the next year saying recovery was  
 much  
 (16) more rapid and I don't know why the three pages need to come  
 (17) in He was asked about it it was read in and he disagreed and  
 (18) we went on  
 (19) THE COURT Yeah I'm sorry there is also discussion  
 (20) of this on - on page 5524 and 5525 of the transcript I agree  
 (21) with your position Ms Smith It's not coming in  
 (22) MR PETUMENOS Next I have something light and easy  
 (23) I have the issue of propaganda and you told me before that I  
 (24) should get - gather together the transcript for you and I've  
 (25) done it This is of course the propaganda - I say that

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- (1) with you know trying to get the Court focused on what the  
 (2) problem was  
 (3) MR DIAMOND I must be missing something I thought  
 (4) you ruled on this definitively  
 (5) THE COURT I'm not sure I did  
 (6) MR PETUMENOS No no I was allowed to go look at  
 (7) the transcript as of the last hearing You said I was allowed  
 (8) to go back and look at the transcript and show it to you  
 (9) THE COURT Let's just say right now the record favors  
 (10) you Mr Diamond  
 (11) MR PETUMENOS At page - not sure what page it is  
 (12) Volume 1 page 38 on August 15 those documents were placed  
 in  
 (13) your hand Judge and in a different context You looked at  
 (14) them and you concluded that they were -  
 (15) THE COURT Is that it? The discussion is on pages  
 (16) 37 38 and 39  
 (17) MR PETUMENOS Didn't take very long  
 (18) THE COURT That's all of it?  
 (19) MR PETUMENOS I hope so You have my only copy now  
 (20) MR DIAMOND Which transcript are you looking at  
 (21) now?  
 (22) THE COURT Volume 1 August 15th 94 page 37 38  
 (23) and 39  
 (24) MR PETUMENOS I think probably we must have gotten a  
 (25) daily that day as opposed to the -

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- (1) MR DIAMOND I have the August 4th discussion about  
 (2) the request that this be taken out of evidence and I have the  
 (3) September 8th discussion about this as well  
 (4) THE COURT What did I do on August 4?  
 (5) MR DIAMOND You said It is definitely  
 (6) objectionable counsel but it's also admissible The  
 (7) objection is overruled  
 (8) THE COURT All right What was the final reference  
 (9) in the transcript?  
 (10) MR DIAMOND This was September 8th Mr Stoll  
 (11) requested it be taken out of evidence again  
 (12) MR PETUMENOS Show him the whole thing because that  
 (13) was only a few days ago because I remember that one I was  
 (14) given leeway in that hearing to - to show you the transcript  
 (15) references  
 (16) THE COURT All right so what I did was on August the  
 (17) 4th? I admitted it over Mr Stoll's objection correct?  
 (18) MR PETUMENOS Correct  
 (19) MR DIAMOND I think you may have - I think it had  
 (20) already been admitted It stayed in over Mr Stoll's request  
 (21) it be withdrawn  
 (22) MR PETUMENOS Could I give you Petumenos version of  
 (23) how it feels from here?  
 (24) THE COURT No wait I'm trying to recreate the  
 (25) record

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- (1) MR DIAMOND I stand corrected -  
 (2) THE COURT You moved it in and Mr Stoll objected and  
 (3) I admitted it right?  
 (4) MR DIAMOND Correct  
 (5) THE COURT Then on August 15th -  
 (6) MR STOLL Excuse me Your Honor In the interim I  
 (7) had given you a copy of it You hadn't read it on August 4th  
 (8) THE COURT Yes  
 (9) MR STOLL On the 14th of August I gave you a copy  
 (10) of the - if I can just approach here's - well this says  
 (11) the - I'm a little unclear as to - any rate we gave you a  
 (12) copy and you were going to read it over night and next day you  
 (13) read it and then that's when you made the comment on the  
 (14) transcript about it being objectionable  
 (15) And Your Honor this is a low point for me in the trial so  
 (16) I feel very badly about this my comment on that I say that  
 (17) again but -  
 (18) MR PETUMENOS The - cutting to it what happened I  
 (19) think here Judge is that in my view the document is hearsay  
 (20) and it's very self serving and very damaging to the  
 (21) plaintiffs Mr Stoll made a remark in front of the jury that  
 (22) was not called for The Court in all candor got very angry  
 (23) with Mr Stoll It was not a time that I was about to pop up  
 (24) and say - but I didn't make the comment I don't want the  
 (25) exhibit in and then I thought about it and I thought about it

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- (1) and I realized I feel like I have the obligation for my  
 (2) clients that a document which I believe is clearly  
 (3) inadmissible - welcome you to review it again - ought not to  
 (4) be entered against our clients because of the Court's reaction  
 (5) to Mr Stoll  
 (6) I've asked you to take a look at these documents to see if  
 (7) you really think they are admissible under 801 or if the  
 (8) appropriate remedy for Mr Stoll's remark is the admission of  
 (9) the documents and ask you to reconsider  
 (10) That's the concern Mr Stoll made an inappropriate  
 (11) remark Mr Stoll's prepared to be responsible for it  
 (12) personally but I don't think it ought to be to the clients  
 (13) detriment at this point that a document like this go into  
 (14) evidence  
 (15) There's actually Exhibits DX15488 is it?  
 (16) MR STOLL No it's confusing  
 (17) THE COURT Okay Give me the books again counsel  
 (18) I want to look at the books again I think it's fair to say -  
 (19) I've looked at all the pages of transcript It's fair to say I  
 (20) admitted them I admitted them for a specific purpose but what  
 (21) Mr Petumenos said is true he didn't say anything at the  
 (22) time Understandable probably excusable if - I mean in  
 (23) other words he doesn't waive his objection  
 (24) And then the last reference in the transcript on September  
 (25) 8th I did say I would reconsider once I was given the whole

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- (1) letter  
 (2) MR DIAMOND I'm not going to recharacterize the  
 (3) history I would like to say that Mr Petumenos starts off  
 (4) with the presumption this is inadmissible Given Mr Selby's  
 (5) testimony I don't know these would be inadmissible  
 (6) themselves  
 (7) they weren't offered to prove the truth of the matters  
 (8) asserted They were offered to rebut his testimony about how  
 (9) he was quote unquote handled by the Exxon people on this  
 (10) trip  
 (11) and what false information he was given  
 (12) The statement that may have pushed the Court over the  
 (13) evidentiary edge was not in the nature of a sanction against  
 (14) Mr Stoll It was in the nature of let's be fair you have  
 (15) now characterized in front of the jury Exxon's conduct Exxon's  
 (16) nondisclosures to Mr Stoll in a very pejorative way let the  
 (17) jury - to Mr Selby I'm sorry let the jury see what we're  
 (18) talking about and this is not a case where Mr Petumenos is  
 (19) being harmed merely because one of his co-counsel was being  
 (20) sanctioned It went in for a different reason  
 (21) MR PETUMENOS And my response to that is if you  
 (22) look at the documents I think you will find that the remedy is  
 (23) way overbroad to the injury and I think that the jury at the  
 (24) time was well apprised of the - that the inference Mr Stoll  
 (25) was trying to make was improper, and I don't think that the  
 (26) entire - this entire document - there's much more in those  
 (27) documents that was drawn into issue than the Selby

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- (1) examination
- (2) Right now the offer is the entire exhibit
- (3) THE COURT Thanks All right Anything further?
- (4) MR DIAMOND No
- (5) THE COURT They re out they re out It s just not
- (6) right to put all these documents in for that one limited
- (7) purpose and I believe that the cross-examination and what I
- (8) said to Mr Stoll and – and the evidence as a whole is
- (9) entirely sufficient to make your point Mr Diamond These
- (10) booklets do not need to go in
- (11) So DX15488 is that the only number that this exhibit has?
- (12) MR DIAMOND Well this is part of a collection
- (13) When we submit the – the briefing book to – as an exhibit we
- (14) just won t include those two brochures
- (15) MR STOLL Your Honor again I m sorry about the –
- (16) THE COURT The briefing book as an exhibit what
- (17) number will it be?
- (18) MR STOLL 15488
- (19) THE COURT It simply won t include those booklets
- (20) okay that s good
- (21) MR STOLL Your Honor again I m sorry for the
- (22) comment
- (23) THE COURT Counsel you don t have to apologize more
- (24) than five or six times to me or maybe seven or eight
- (25) MR PETUMENOS Now I m doing some housekeeping I

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- (1) think Now I m a parrot a puppet not a lawyer So if I m
- (2) doing this wrong –
- (3) THE COURT I have five minutes Five more minutes
- (4) MR PETUMENOS I need to withdraw Exhibit 222 – I
- (5) need to withdraw page 222 of Exhibit 688 I also need to
- (6) correct the record that and page 710 could be withdrawn and
- (7) in its place 720 should be admitted
- (8) THE COURT And you re going to do those things
- (9) right counsel?
- (10) MR PETUMENOS We re going to do those things and
- (11) this was misspeaking on the record I m told The last one is
- (12) that the Cornett videotape of which we ve had substantial
- (13) controversy the clerk shows it not having ever been offered
- (14) If that s the case I consider it offered don t you?
- (15) THE COURT I never – that s not my recollection
- (16) MR PETUMENOS The Cornett videotape we moved to
- (17) play before the jury a number of times
- (18) THE COURT I m sure that s true
- (19) MR PETUMENOS And you said we could not My concern
- (20) is that the record reflects that we didn t offer it
- (21) (Exhibit 722A offered)
- (22) THE COURT You ve offered it now and it s not
- (23) admtd
- (24) THE CLERK What s the number?
- (25) MR PETUMENOS 722A

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- (1) We wish to withdraw 906 and place instead 906 A
- (2) MR STOLL No 906 is the – we ve agreed that
- (3) this – it s just a – Mr Oppenheimer we ve worked this out
- (4) It s a non issue
- (5) THE COURT I see heads nodding I m assuming you can
- (6) do that
- (7) MR DIAMOND Mr Petumenos addressed all these as
- (8) housekeeping issues We assume he s going to keep a tidy
- (9) house
- (10) and not take advantage of us
- (11) MR STOLL I ve got two other – one is housekeeping
- (12) one is –
- (13) THE COURT Now I have three minutes The clock is
- (14) ticking
- (15) MR STOLL Your Honor we have an objection that we
- (16) filed a motion on with respect to their surrebuttal exhibits
- (17) DX15614 and DX16413 we filed a little memorandum on Friday
- (18) –
- (19) Thursday
- (20) THE COURT I remember that counsel I don t have it
- (21) up here with me
- (22) MR STOLL Can I give you a copy?
- (23) THE COURT Yes
- (24) MR STOLL These are excerpts These are two
- (25) worksheets
- (26) THE COURT I remember I ve read this memo I
- (27) remember it Are you prepared to make a response on this

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- (1) anybody from Exxon s side?
- (2) MR OPPENHEIMER Your Honor you told me that I
- (3) didn t get to read these papers when they first came up you
- (4) recall I hadn t seen the document the memorandum I inferred
- (5) from that that the arguments we d originally made about their
- (6) admission were persuasive I can address it if it still needs
- (7) to be
- (8) THE COURT That s not my recollection My
- (9) recollection is I said you could read it but you didn t have to
- (10) file something if you felt comfortable arguing it it would be
- (11) fine with me I think that s what I said
- (12) MR STOLL I was present that s what I understood
- (13) you to say
- (14) MR OPPENHEIMER Whichever Your Honor
- (15) These were materials that were put in as a result of a
- (16) stipulation as to the authenticity of those materials and
- (17) you ll recall that they had to do with the cross examination on
- (18) rebuttal of Mr Carlson and it s really very simple and very
- (19) straightforward The doctor or Mr Shorett has treated the
- (20) certain properties differently in terms of making – treating
- (21) them alike as opposed to Mr Carlson who thought they should
- (22) be treated separately so our point was Mr Shorett and our
- (23) experts had used the properties in the same way
- (24) The objection is that the – these properties weren t used
- (25) in an appraisal in this case In point of fact they were part

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- (1) of the February 20 1993 report that Mr Shorett did that he  
 (2) cross referenced  
 (3) I think we showed the Court the two pages from that  
 (4) document clearly within the scope clearly within the meaning  
 (5) of the rules we discussed at the last argument  
 (6) 801(2)(d)(2) (sic) I believe The only point that really  
 (7) comes up in the memorandum - which was made orally but it is  
 (8) even clearer in the memorandum I think when you look at it -  
 (9) we re not arguing we never argued that somehow anybody is  
 (10) using these properties in question differently with respect to  
 (11) appraising the Kodiak Island Borough properties We don t  
 (12) dispute that Shorett did not do an appraisal of Kodiak Island  
 (13) The point is that he clearly took the same properties that  
 (14) Mr Carlson took and told the jury - Mr Carlson told the jury  
 (15) that you ought not to treat these properties as being similar  
 (16) in terms of the kind of matched pairs Mr MacSwain did  
 (17) Turns out Mr MacSwain and Mr Shorett in all of their work  
 (18) treat them - treat them as similar properties And that was  
 (19) the - that was the point of the submission  
 (20) THE COURT Okay Got you  
 (21) MR STOLL Your Honor very briefly These are two  
 (22) papers if you look at the exhibit - if I can approach the  
 (23) bench to show you what I m talking about here The exhibits  
 (24) are these pages here  
 (25) THE COURT I see them I ve looked at them

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- (1) MR STOLL They ve got these adjustments on there  
 (2) which are meaningless unless you look at the whole report and  
 (3) this was a report that Mr Shorett did not for these  
 (4) plaintiffs these were not statements made by Shorett as an  
 (5) agent for these plaintiffs they were statements made by  
 (6) Shorett as an agent of other clients and the adjusted price  
 (7) goes to a totally collateral issue It s not proper  
 (8) surrebuttal it s hearsay  
 (9) There s no exception to the hearsay rule that is  
 (10) applicable We ve attached the cases They re right on point  
 (11) on this issue and Mr Carlson even though he was - he was  
 (12) asked Are you familiar with these pages and he said I m  
 (13) not that was the end of the discussion  
 (14) Now to put in those pages into evidence is - again it s  
 (15) hearsay and it s going to cause tremendous confusion because  
 (16) I don t know what they re going to argue from this I mean -  
 (17) THE COURT You just heard what they re going to  
 (18) argue  
 (19) MR STOLL Well it doesn t say that though then if  
 (20) they re going to argue that then then that is hearsay because  
 (21) here we ve never had the opportunity for the declarant - to  
 (22) cross-examine this declarant on this matter Mr Shorett  
 (23) testified in our case in chief He was never examined on  
 (24) this - on this material  
 (25) THE COURT They didn t have an opportunity to

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- (1) cross-examine those scientists on the beach either did they  
 (2) counsel? But they were admitted for an entirely different  
 (3) evidentiary basis This was an admission by a party opponent  
 (4) under the rule  
 (5) MR STOLL Well Your Honor the difference between  
 (6) the scientists on the beach - and I make this point in those  
 (7) things - we attached the cases in fact that Sable versus  
 (8) Meade Johnson case (ph) is right on point - is that at the  
 (9) time that the scientists were making those statements on the  
 (10) beach in Shuyak they were working for Exxon on the matter  
 that  
 (11) they were speaking about  
 (12) When Mr Shorett made the statements that are contained in  
 (13) this report he was not working for Kodiak Island Borough He  
 (14) was working for other plaintiffs and so -  
 (15) THE COURT Yeah I ve heard those arguments before  
 (16) counsel  
 (17) MR STOLL I think that - I mean the case law I  
 (18) think that we ve established there you don t agree with I  
 (19) guess?  
 (20) THE COURT Oh I wouldn t say that counsel  
 (21) MR STOLL Well -  
 (22) THE COURT What I said was these were admissible  
 (23) under the rule  
 (24) MR DIAMOND I know you re leaving I need ten  
 (25) seconds

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- (1) THE COURT Wait a second I haven t resolved this  
 (2) question  
 (3) MR DIAMOND Sorry  
 (4) THE COURT You know counsel this is such a  
 (5) confusing point and it s such a sort of peripheral debate that  
 (6) I m really very tempted to take this out.  
 (7) MR DIAMOND Your Honor it s - having looked at  
 (8) this in terms of the closing argument it s not at all  
 (9) peripheral and it s not something that we delayed in bringing  
 (10) up This came up solely in rebuttal with Mr Carlson  
 (11) Mr Carlson took Mr MacSwain s matched pairs and said  
 they re  
 (12) wrong they don t prove what they re intended to prove because  
 (13) he didn t properly weight things  
 (14) We turned to Mr Shorett s report He s using the same  
 (15) comparables and he weights them the same way we do It s  
 (16) directly contrary to Mr Carlson s analysis of these parcels  
 (17) THE COURT Now you do know what they re going to  
 (18) argue don t you?  
 (19) MR DIAMOND Absolutely And as to all these  
 (20) arguments about who it was prepared for this very report was  
 (21) incorporated by reference to our report in our case the report  
 (22) that Mr Shorett prepared on these properties  
 (23) MR OPPENHEIMER And there s an additional point to  
 (24) be made Your Honor though There was - hearsay objection  
 (25) was made Part of the discussion that Mr Stoll and I had in

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- (1) the hall on this document had to do with avoiding surrebuttal  
 (2) and it was well understood what the substance was going to be  
 (3) of the testimony about these  
 (4) MR STOLL No  
 (5) MR OPPENHEIMER That s correct  
 (6) THE COURT I don t want to have you - not again  
 (7) counsel Not in the last day of trial You just don t get to  
 (8) say that he said and she said and I said The question is what  
 (9) the record shows and whether this document is admissible  
 (10) The document - all right the document s admissible It s  
 (11) in the record I m not going to take it out of the record  
 (12) Now the question is do I do something about that? Do I  
 (13) open up the record again so Mr Shorett can testify? The  
 (14) answer is no it s too late Too late  
 (15) MR STOLL Your Honor can we put in the entire  
 (16) document though?  
 (17) THE COURT The entire document? How many pages is  
 (18) it?  
 (19) MR STOLL It s a thick document The problem I  
 (20) have though Your Honor is it says adjusted price It does  
 (21) not explain the adjustment  
 (22) THE COURT Is there a section in there that gives it  
 (23) in your point of view?  
 (24) MR STOLL Explains the adjustments?  
 (25) THE COURT How many pages?

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- (1) MR OPPENHEIMER It s in Your Honor it s the other  
 (2) exhibit which in my copy here doesn t have those pages only  
 (3) the cover page  
 (4) MR STOLL That s what you gave as the exhibit  
 (5) MR OPPENHEIMER No Bob You ve got Volume 1 which  
 (6) is Exhibit 15614 I hardly believe I gave you just a title  
 (7) page then you have the exhibit  
 (8) MR STOLL If you look on here it says one this  
 (9) is what you faxed me  
 (10) MR DIAMOND We will include the explanatory part on  
 (11) the -  
 (12) THE COURT All right That will be admitted The  
 (13) explanatory part will be admitted  
 (14) (Exhibit 15614 Attachments received)  
 (15) MR DIAMOND I just need to clarify the record on an  
 (16) important matter so I don t waive rights to make - to move  
 (17) JNOV With respect to my archaeology motion which I made at  
 (18) the close of plaintiffs case it was deferred until the close  
 (19) of all evidence It was my understanding that that constituted  
 (20) making a motion for directed verdict on the archaeology claims  
 (21) at the close of all evidence such that I can now move for JNOV  
 (22) post trial  
 (23) MR PETUMENOS Judge we ll stipulate his JNOV s not  
 (24) waived  
 (25) THE COURT Counsel you passed your five minutes

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- (1) You passed your five minutes I m telling you every time I  
 (2) give you five you take 20 This is it I m going off the  
 (3) record Resolve your problems and tell me how you resolve  
 them  
 (4) on Monday and if it takes less than ten minutes I ll let you  
 (5) do it  
 (6) Now here s what I want on Monday I want the clean packet  
 (7) of instructions just the way they re going to be given with a  
 (8) title page - you know the caption of the case and a page at  
 (9) the back just like the pattern that has my signature line on  
 (10) it No citations no titles  
 (11) I want your - the plaintiffs exhibit regarding the  
 (12) exhibit - their instructions that I refused to give I want  
 (13) the same for the - for the defendants I want - and I  
 (14) want - I probably want a separate packet from each of you  
 (15) that - that - that has instructions that have been discussed  
 (16) that were objected to and I gave over your objection  
 (17) Okay that s what I need from you on Monday Anything  
 (18) else?  
 (19) MR PETUMENOS Judge you have some of our  
 (20) materials  
 (21) THE COURT I do and here they are I think these  
 (22) are defendants these are plaintiffs  
 (23) MR OPPENHEIMER Your Honor I m sorry it was that  
 (24) last category it s late -  
 (25) THE COURT First you have plaintiffs that I ve

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- (1) refused to give right?  
 (2) MR OPPENHEIMER Correct and we ll be giving you  
 (3) defendants that you refuse to give  
 (4) THE COURT Yes but then there will be - I don t  
 (5) know if there are any of these but are there instructions that  
 (6) I have given proposed by both of the parties over objection?  
 (7) MR PETUMENOS Right  
 (8) THE COURT Do you need an exhibit for those?  
 (9) MR PETUMENOS Right He needs to know from the  
 (10) final instructions going to the jury which instructions are  
 (11) agreed upon and which instructions for which there s been an  
 (12) objection reserved  
 (13) THE COURT When I get the clean packet only the  
 (14) discussions would reflect what instructions were given and  
 some  
 (15) of them aren t numbered so there s no way they can be  
 (16) identified  
 (17) MR OPPENHEIMER Okay  
 (18) THE COURT Thanks 10 00 on - well get the packet  
 (19) to me at 8 30 I want to review it from 8 30 to ten and then  
 (20) ten we ll go on the record just to finalize things  
 (21) THE CLERK Off record  
 (22) (Recess at 5 00 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 1,483  
 TOTAL OCCURRENCES 5,383  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE  
 17,422

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**SINGLE FILE CONCORDANCE**

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**CASE SENSITIVE**

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**NOISE WORD LIST(S)  
 NOISE NO1**

---  
**INCLUDES ALL TEXT  
 OCCURRENCES**

---  
**IGNORES PURE NUMBERS**

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**WORD RANGES @ BOTTOM  
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Vol 1 1

- (1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
- (2) THIRD JUDICIAL DISTRICT
- (3) In re ) Case No. 3AN-89-2533 Civil
- (4) ) Anchorage Alaska
- (5) The EXXON VALDEZ ) Monday September 12 1994
- (6) ) 10:00 a.m.
- (7) )
- (8) VOLUME 1 Pages 1 through 98
- (9) TRANSCRIPT OF PROCEEDINGS (Hearing)
- (10) Arguments on Jury Instructions (Continued)
- (11) BEFORE THE HONORABLE BRIAN C. SCOTTELL
- (12) Superior Court Judge

APPEARANCES

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Vol 1 2

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- (1) PROCEEDINGS
- (2) (Jury out at 10:04 a.m.)
- (3) THE CLERK: Please rise. The Superior Court for the
- (4) State of Alaska Third District with the Honorable Brian
- (5) Shortell is now in session. Please be seated.
- (6) (Call to Order of the Court)
- (7) THE COURT: Good morning everybody. We're on the
- (8) record without the jury present.
- (9) Yes, counsel.
- (10) MR. PETUMENOS: I've seized the podium because I
- (11) didn't want to be here today. I wanted to prepare my final so
- (12) I'd like to get my issues out of the way and be excused if I
- (13) can.
- (14) THE COURT: Sure.
- (15) MR. PETUMENOS: I have one jury instruction issue
- (16) Mr. Fortier will address the OPA 90 jury instruction issue that
- (17) we have outstanding. I have another one and there is a couple
- (18) miscellaneous things I have after that before I ask to be
- (19) excused.
- (20) My co-counsel pointed out to me that I booted it in our
- (21) session on Saturday and it has to do with the foreseeability
- (22) instruction that the Court bypassed waiting to see what Exxon
- (23) was going to contend and what issues they were going to leave
- (24) in the case and we were going to go back to it and see where we
- (25) were. I don't know if the Court recalls that but I have the

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- (1) transcript of it. We never went back to it. And that's
- (2) Defendants' Proposed No. 4 and Plaintiffs' Proposed No. 5. So
- (3) I'll give the Court copies of that.
- (4) The defendants have in fact raised the issue of
- (5) foreseeability in the jury instruction relating to intervening
- (6) cause and that's - these are no longer numbered. I guess
- (7) but it's on page 4 of my final packet.
- (8) THE COURT: Page 4?
- (9) MR. PETUMENOS: Yes.
- (10) MR. McCALLION: It's actually page 35 of Exxon's
- (11) packet.
- (12) MR. PETUMENOS: The one that - it's page 35. Jury
- (13) Instruction No. 28 of the set that Exxon filed. But it's the
- (14) instruction about the superseding cause relating to the
- (15) archaeological claims.
- (16) THE COURT: Well, is it in your packet, the packet
- (17) that you submitted?
- (18) MR. PETUMENOS: Yes.
- (19) THE COURT: What page is it in your packet?
- (20) MR. PETUMENOS: Is it page 4 of our packet?
- (21) THE COURT: No, can't be.
- (22) MR. PETUMENOS: What page of our packet is it? Page
- (23) 39.
- (24) THE COURT: Now, just so that I understand, this is
- (25) one we did not discuss.

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(1) MR OPPENHEIMER Your Honor what s happening - no  
 (2) that s not correct The ones on 35 and 39 are fully agreed to  
 (3) they re in  
 (4) MR PETUMENOS That s right  
 (5) MR OPPENHEIMER What s going on here Your Honor it  
 (6) I may be -  
 (7) THE COURT Wait wait let me ask the questions all  
 (8) right counsel? It s okay you ll get a full chance to be  
 (9) heard  
 (10) MR OPPENHEIMER All right I know I will  
 (11) THE COURT As I understand it this instruction we  
 (12) did not discuss it it s an agreed upon instruction right?  
 (13) MR PETUMENOS Which one are we talking about now?  
 (14) THE COURT 39 the superseding cause instruction  
 (15) MR PETUMENOS That s right that s right The issue  
 (16) is not that  
 (17) THE COURT I m just tryin<sub>g</sub> to narrow it down so that  
 (18) I understand as opposed to you  
 (19) MR PETUMENOS Right  
 (20) Now that Exxon - our position is now that Exxon wants  
 (21) this instruction I previously had given counsel a case called  
 (22) Osborne versus Russell which I think the Court needs to take a  
 (23) look at on intervening cause Osborne versus Russell  
 (24) discusses  
 (25) the law on intervenin<sub>g</sub> cause and makes it clear it is a  
 (26) question of reasonable foreseeability and this instruction

(1) THE COURT Okay Let me see now what your proposed  
 (2) is  
 (3) MR PETUMENOS The two instructions I handed up is -  
 (4) the one that s currently in the packet is the stipulation  
 (5) without the reasonable foreseeability language which is the  
 (6) defendants proposed My request is that the plaintiffs  
 (7) version of that be given and that it be merged with the  
 (8) instruction on archaeology  
 (9) And this is very important since the way this is written  
 (10) now Exxon has now skirted the stipulation and skirted the  
 (11) reasonable foreseeability test by givin<sub>g</sub> the factors that  
 (12) relate to reasonable foreseeability not the test and not the  
 (13) stipulation in context as to why we entered that stipulation  
 (14) and as I understand what - where we were on Saturday when I  
 (15) made that argument the Court said we ll wait and see whether  
 (16) reasonable foreseeability is in this case or not then I ll  
 (17) consider whether or not the plaintiffs version needs to be  
 (18) given  
 (19) We got past this instruction and I neglected to go back and  
 (20) tell the Court reasonable foreseeability is in the case  
 (21) because of Exxon s request for this instruction and now  
 (22) hence my proposal I want -  
 (23) THE COURT I think I understand the position  
 (24) Now just so the record is clear on the packet you gave  
 (25) me you re - the instruction you re talkin<sub>g</sub> about is

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(1) without the reasonable foreseeability instruction right now is  
 (2) wrong The real test for intervening cause has to include a  
 (3) reasonable foreseeability component These are factors that  
 (4) would cause the jury to determine whether there is reasonable  
 (5) foreseeability but nowhere in the packet right now are they  
 (6) instructed that reasonable foreseeability is a test and that s  
 (7) the problem  
 (8) THE COURT Except in this instruction  
 (9) MR PETUMENOS The way the instruction is now just  
 (10) the stipulation is in  
 (11) THE COURT I m sorry I understand now I m talking  
 (12) about 39 - in 39 foreseeability is included right?  
 (13) MR PETUMENOS No It is -  
 (14) THE COURT Will the act of the third person bring  
 (15) about a harm different from the kind of harm that could  
 (16) reasonably be expected from the oil spill  
 (17) MR PETUMENOS Those are factors that guide the jury  
 (18) in the reasonable foreseeability test But the reasonable  
 (19) foreseeability test is nowhere in this instruction And my  
 (20) proposal is that the plaintiffs - the plaintiffs instruction  
 (21) with the stipulation and the language on reasonable  
 (22) foreseeability be merged into this instruction into a single  
 (23) instruction so that the jury knows the test is reasonable  
 (24) foreseeability and the jury knows about the stipulation at the  
 (25) same time they consider these factors

(1) Instruction No 28  
 (2) MR OPPENHEIMER Page 28 Your Honor?  
 (3) THE COURT Yeah page 28 Down at the bottom of the  
 (4) page 28 And it has two paragraphs in it one of which is  
 (5) bracketed You want the whole instruction to be given  
 (6) includin<sub>g</sub> the bracketed portion?  
 (7) MR PETUMENOS That s right And I want it merged  
 (8) with -  
 (9) THE COURT You want it merged with the superseding  
 (10) cause instruction  
 (11) MR PETUMENOS That s correct  
 (12) THE COURT And the superseding cause instruction is  
 (13) page 39 of this packet is -  
 (14) MR PETUMENOS You have my request  
 (15) MR OPPENHEIMER Couple of things We wholly object  
 (16) to 28 This was resolved and negotiated yesterday We made  
 (17) compromises on it  
 (18) THE COURT You what?  
 (19) MR OPPENHEIMER Mr Petumenos is telling us now he  
 (20) just neglected the jury instruction that s set forth on page  
 (21) 28 In point of fact we modified - we discussed the  
 (22) superseding cause instruction at great length Mr Petumenos  
 (23) and I including the case he provided to you I ve given him a  
 (24) response to that  
 (25) That case stands for - its only relevance to any of us is

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(1) if as a matter of law there is a superseding cause. It is  
 (2) error to instruct the jury on superseding cause since it was a  
 (3) matter of fact. That is not the case here. We suggested a  
 (4) series of instructions throughout the archaeology set and  
 (5) throughout the factors listed in the superseding cause set. I  
 (6) gave up on two of them. A lot of back and forth. And part of  
 (7) that was the jury instructions on 28 isn't necessary anymore.  
 (8) wasn't going to be given.  
 (9) The first sentence has always been objectionable to us  
 (10) because it's wrong on the law. It's unnecessary and it's not  
 (11) part of the original stipulation in any event. But even the  
 (12) stipulation below that upsets the balance that we have in the  
 (13) instructions.  
 (14) They're now neutral on superseding cause. The test is set  
 (15) out in what is at - well, it's on plaintiffs page just to  
 (16) keep us on the same set page 39. We have it numbered a little  
 (17) differently, but the addition of the stipulation language -  
 (18) put aside the bracketed first sentence because the Court in the  
 (19) past has agreed with us that is not in fact a correct statement  
 (20) of the law, but the - the stipulation does not address the  
 (21) question of superseding cause. It wasn't designed to do that.  
 (22) Its only effect, the thing we're worried about and the reason  
 (23) we were prepared to balance the other instructions, is that  
 (24) it's very likely that it's going to be understood by the jury  
 (25) to mean that it was foreseeable that these third party vandals

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(1) needed to tell Mr. Petumenos I had to wait, put a pin in it and  
 (2) come back, there were two or three occasions like that. I was  
 (3) very specific. Those have all been resolved.  
 (4) When we left the courthouse on Saturday, the only open  
 (5) issue was OPA 90. Now we made some changes in typos. We  
 (6) have - there was a sentence that Mr. Ertz believed was dropped  
 (7) out of the instruction. I actually do recall talking to  
 (8) Mr. Petumenos thinking it had been intentionally removed. It  
 (9) was not important, we're going to put the sentence back in.  
 (10) Those are ministerial. This is not. This goes back to  
 (11) negotiations that went over two and a half days and where both  
 (12) parties I thought had compromised their positions to get a  
 (13) balance in the instructions which is reflected in our  
 (14) submission, which does not include the instruction on page 28.  
 (15) It's just not necessary in this context.  
 (16) The only superseding cause issue is going to go to  
 (17) vandalism and the parties know that that's a factual issue  
 (18) given the Court's ruling for the jury. And if this  
 (19) instruction goes in, under no circumstances should it go in  
 (20) with the first sentence, but if it goes in, the effect is going  
 (21) to be to unbalance the instructions. It's basically going to  
 (22) be to cause the jury I think to conclude - and I predict it  
 (23) will be argued as such - that it was foreseeability in the  
 (24) sense of requiring liability for the facts of the third-party  
 (25) vandals, and it would undercut the superseding cause.

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(1) would act on these archaeological resources.  
 (2) And that's the whole point of having the superseding cause  
 (3) instruction. That's an issue that the Court has decided the  
 (4) jury is going to have to decide. And there's a superseding  
 (5) cause instruction on that issue.  
 (6) Now originally when Mr. Petumenos raised this O'borne case  
 (7) with me, the point he was making, you can't have a superseding  
 (8) cause instruction if you have a foreseeability instruction.  
 (9) The fact is that we went over this on Friday in our  
 (10) negotiations and we went over it again on Saturday in our  
 (11) negotiations, and when it was raised again, not by  
 (12) Mr. Petumenos yesterday, but Mr. McCallion raised this issue  
 (13) through, I believe it was Mr. Ertz to me - in any event, it  
 (14) was attributed to Mr. McCallion.  
 (15) And I said at that time - and I believe it's why  
 (16) Mr. Petumenos is probably wearing a suit today - this is one  
 (17) of the few times when I'm genuinely angry about the process  
 (18) because we were told we could negotiate with each other, we  
 (19) were told who would take responsibility, I took responsibility  
 (20) for my team, and I can tell Your Honor, I've gone back to my  
 (21) colleagues who've said to me, frankly, on a couple of  
 (22) occasions, how the heck didn't you negotiate a better result  
 (23) get the Judge to give you something different, you're wrong in  
 (24) the law, this or that.  
 (25) I was the negotiator, I went out and did it. Where I

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(1) instruction.  
 (2) And the process was closed yesterday - it was closed on  
 (3) Saturday, excuse me, and it was closed with compromises on a  
 (4) number of these instructions, not the least of which is the one  
 (5) on page 39.  
 (6) THE COURT: Tell me something, counsel. Your side is  
 (7) not - except for superseding cause, is not going to argue that  
 (8) these damages, that the damages that are claimed are not  
 (9) reasonably foreseeable, right?  
 (10) MR. OPPENHEIMER: That's correct, Your Honor. As we  
 (11) understand the arguments that are being made, that's correct.  
 (12) Our issue with respect to proximate cause is this notion that  
 (13) we can be held liable for the acts of third-party vandals on  
 (14) the archaeological resources, as we understand the evidence.  
 (15) THE COURT: You're only arguing that on a superseding  
 (16) cause theory?  
 (17) MR. OPPENHEIMER: Superseding cause theory, correct.  
 (18) THE COURT: And the proximate cause issues for you are  
 (19) as they are listed in - and the law as shown in instruction at  
 (20) page 27?  
 (21) MR. OPPENHEIMER: Yes.  
 (22) THE COURT: So the only argument you have there is  
 (23) substantial factor, correct?  
 (24) MR. OPPENHEIMER: I believe that's correct, Your  
 (25) Honor, with the exception of damages.

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(1) THE COURT Okay  
 (2) MR OPPENHEIMER And theoretically may even be  
 (3) correct as to that with the understanding that the superseding  
 (4) cause analysis would remain And the problem I have with  
 (5) the - when the foreseeability instruction was initially  
 (6) agreed - well it was not agreed to but when it arose in the  
 (7) context of our discussion there was a question about whether  
 (8) the parties might walk away from any sort of liability I  
 (9) suppose even though we protested that that wasn't the  
 (10) situation  
 (11) And this instruction I believe came into being in that  
 (12) context We're not arguing that the other damages that have  
 (13) been identified that are going to be argued and which have  
 (14) been identified now in the instructions were unforeseeable The  
 (15) problem then is that the foreseeability instruction I had this  
 (16) very definitely at the forefront of my mind expressed this  
 (17) view during our negotiations is that I think is no longer a  
 (18) clarifying instruction  
 (19) It's a complicating instruction because I think the jury  
 (20) will take it to mean we're responsible for those vandals and I  
 (21) think that's going to be the argument If it's not the  
 (22) argument it's not necessary  
 (23) THE COURT Haven't I already read the stipulation  
 (24) into the record?  
 (25) MR OPPENHEIMER I believe you have Your Honor Not

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(1) fought about it  
 (2) And I indicated - and it's always been our position that  
 (3) the stipulation bare by itself without any context for the  
 (4) jury as to why we reached it is like no stipulation at all  
 (5) And there were eight or nine witnesses that we forewent in  
 (6) order to get that stipulation As you recall this started  
 (7) before the trial when we were talking about motions in limine  
 (8) and so forth and the Court urged us to try and reach a  
 (9) stipulation and we did  
 (10) The stipulation bare does nothing for us And when we  
 (11) argued this the first time the Court clearly stated not that  
 (12) the - you know venturing into the record not that the first  
 (13) paragraph was wrong but my recollection is that the Court  
 (14) stated you were going to wait and see whether Exxon raised the  
 (15) issue  
 (16) THE COURT No I said it was wrong It is wrong  
 (17) because all it talks about is the reasonable foreseeability  
 (18) issue It doesn't talk about the other - the other  
 (19) requirement that's in instruction page 27 about substantial  
 (20) factor That's - I mean that is the classic definition of  
 (21) proximate cause  
 (22) MR PETUMENOS Right  
 (23) THE COURT So to the extent that it's called - that  
 (24) foreseeability is the only thing that's mentioned in an  
 (25) instruction that deals with - that defines legal cause is

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(1) the first sentence but the second paragraph is the instruction  
 (2) you read  
 (3) THE COURT Yes The second paragraph not the  
 (4) bracketed portion  
 (5) MR OPPENHEIMER Right  
 (6) THE COURT All right  
 (7) Mr Petumenos? And by the way I'd like to see the  
 (8) discussion in the record  
 (9) MR PETUMENOS Yes I have it here  
 (10) MR OPPENHEIMER Is that Friday's transcript?  
 (11) MR PETUMENOS Yes  
 (12) MR OPPENHEIMER That's Friday's transcript  
 (13) THE COURT You think there's one on Saturday?  
 (14) MR OPPENHEIMER I think Mr Petumenos and I came in  
 (15) here with a set of instructions and it was not further  
 (16) discussed because it didn't need to be  
 (17) MR PETUMENOS This happened some time -  
 (18) THE COURT Let me just read this  
 (19) MR PETUMENOS Sure  
 (20) THE COURT All right I've read it  
 (21) MR PETUMENOS I'm sorry that Mr Oppenheimer feels  
 (22) that way about the negotiations We've done pretty well  
 (23) together The fact of the matter is we never reached  
 (24) agreement on the foreseeability instruction and the removal of  
 (25) that language and when we came into court the first time we

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(1) wrong  
 (2) MR PETUMENOS I see what you're saying  
 (3) The reason it says that like that is because we do have a  
 (4) substantial factor instruction and the instructions of course  
 (5) are to be read together I think if I'm understanding you  
 (6) it's not that it's wrong it's incomplete because it doesn't  
 (7) have the substantial factor  
 (8) THE COURT Incomplete in this context means wrong  
 (9) MR PETUMENOS We need to get it right because I  
 (10) don't want the instruction to fail for that problem because  
 (11) Mr Oppenheimer and I never reached agreement on that  
 (12) instruction And what happened was the Court indicated that  
 (13) if there was a reasonable foreseeability issue in this case  
 (14) then we were going to revisit this instruction  
 (15) THE COURT Yes but I don't think - the only  
 (16) reasonable foreseeability issue in this case that I could see  
 (17) is the superseding cause issue now  
 (18) MR PETUMENOS I agree I agree And the problem is  
 (19) that if you take a look at the Osborne case and if you take a  
 (20) moment to read it I think you will conclude that the  
 (21) touchstone of the superseding cause problem is reasonable  
 (22) foreseeability They are - they are in that area  
 (23) The Court talks about some of the factors that I've agreed  
 (24) to that are in the instruction that Exxon proposes but those  
 (25) are factors explanatory of and that shed light upon the

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(1) reasonable foreseeability test and right now this jury  
 (2) doesn't have one  
 (3) Now I agree with a lot of what Mr. Oppenheimer says. I  
 (4) agree with a lot of what the Court says that the reasonable  
 (5) foreseeability test is only alive in this case as to this  
 (6) issue but the problem is the jury never gets that instruction  
 (7) as to this issue which is why my application was to merge  
 (8) these two instructions together. And that's the - that's the  
 (9) problem. And -  
 (10) MR OPPENHEIMER Your Honor -  
 (11) THE COURT Don't interrupt counsel.  
 (12) Go ahead.  
 (13) MR PETUMENOS Now perhaps the remedy to the  
 (14) introductory language is to refer to or incorporate the  
 (15) instruction on proximate cause by adding a phrase that says in  
 (16) addition to the requirements as set forth in instruction number  
 (17) blank which would refer to the proximate cause instruction  
 (18) so that it was - so that the entire causation issue is before  
 (19) them. But to fail to give a reasonable foreseeability  
 (20) instruction and to fail to put the stipulation into effect  
 (21) Exxon is free to argue that the stipulation that we wrote does  
 (22) not extend to this issue on archaeology just as we are free to  
 (23) argue that it does. And the stipulation is not so specific as  
 (24) to archaeology as to prevent them from arguing it.  
 (25) But the way the instructions read now the stipulation is

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(1) left in space in Exxon's version. It has - it's not tied to  
 (2) any issue. It doesn't tell the jury what the reasonable  
 (3) foreseeability test is and as I understand - I think the  
 (4) Court was correct in saying that. If reasonable foreseeability  
 (5) is still in this case I have to give this instruction. I have  
 (6) to tell the jury about it.  
 (7) And I don't think there's any doubt but after reading  
 (8) Osborne that superseding cause is the test for - that  
 (9) reasonable foreseeability is the touchstone for superseding  
 (10) cause. When there's an intervening factor one has to  
 (11) determine whether the intervening factor was foreseeable  
 (12) whether it was reasonably foreseeable and whether the risk  
 (13) that that would happen was enhanced by the acts of the  
 (14) wrongdoer. If that's the case it's not a superseding cause.  
 (15) And right now we have nothing that tells the jury that.  
 (16) And you know I'm sorry for the misunderstanding between  
 (17) counsel but the other touchstone is here is that the  
 (18) instructions have to be right and they have to be correct and  
 (19) my thesis is that they are not.  
 (20) THE COURT Just a second let me read Osborne.  
 (21) MR PETUMENOS I can point the Court to the area I  
 (22) have a highlighted version of it Judge if you'd like to have  
 (23) that.  
 (24) THE COURT I think I've got it.  
 (25) MR PETUMENOS It's head notes 7 and 8 I think 6

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(1) 7 and 8  
 (2) THE COURT Okay What language are you referring to  
 (3) in Osborne?  
 (4) MR PETUMENOS The top of the second column on page  
 (5) 356 uses the term in the elements of the instruction the  
 (6) reasonable foreseeability language and if you take a look at  
 (7) the citation to Sharp which is later and the bottom of  
 (8) page - we have a - a lot of the - at that page says we have  
 (9) also endorsed Professor Prosser's position that intervening  
 (10) causes which are in the scope of foreseeable risk or have some  
 (11) reasonable connection with it are not superseding causes  
 (12) which  
 (13) relieve the tortfeasor from liability.  
 (14) There's a cite to Prosser on page 357 and later on that  
 (15) same column the quote is from the Restatement where the  
 (16) negligent conduct of the actor creates or increases the  
 (17) foreseeable risk of harm through the intervention of another  
 (18) force and is a substantial factor in causing the harm such  
 (19) intervention is not a superseding cause.  
 (20) And all of those are expressions of the Mattingly test the  
 (21) reasonable foreseeability. That is the touchstone for what  
 (22) we're dealing with here. And there's got to be something in  
 (23) this instruction that informs the jury that the test is  
 (24) reasonable foreseeability and that we put the benefit of the  
 (25) stipulation or we're not - we're not instructing correctly.  
 (26) And I think that's what we were talking about in the

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(1) transcript when we said. There's no reason to give the  
 (2) reasonable foreseeability instruction so long as Exxon's not  
 (3) raising the issue and they're not with the exception of this  
 (4) issue and they clearly are here.  
 (5) Which is why I was suggesting the merger of the instruction  
 (6) rather than giving it separately because then at least the  
 (7) jury is focused on what part of the issue is raised.  
 (8) THE COURT I got you.  
 (9) MR OPPENHEIMER Your Honor first I've heard of all  
 (10) this merger business and whatnot I think what this all  
 (11) reduces to is the following. If this interpretation of the  
 (12) stipulation is given our discussion over the last week over  
 (13) the relevance of superseding cause for vandalism in the future  
 (14) to archaeological resources is a complete waste of time.  
 (15) What's being argued here is the stipulation they now contend  
 (16) should be read to rule that there's no superseding cause.  
 (17) That's what's really going on here and the reason that it came  
 (18) out the way it did in our proposed instructions and this  
 (19) instruction was not included is that Mr. Petumenos and I -  
 (20) and I agree with him we have negotiated many many hard  
 (21) things  
 (22) successfully but there's been a very serious miscommunication  
 (23) here because we spoke at length about the arguments on  
 (24) Osborne  
 (25) that were just discussed page references that were just  
 (26) discussed. We talked about how the factors in the superseding  
 (27) cause instruction at page 39 and there used to be five

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(1) related to those criteria in Osborne and how the one thing I  
 (2) didn't want to have happen would make the whole exercise  
 (3) annul it. What's being suggested today is that there be a  
 (4) determination through the instructions of satisfaction or  
 (5) failure to satisfy those criteria.  
 (6) And that's really what's being proposed here. Your Honor.  
 (7) The instruction on superseding cause -  
 (8) THE COURT: Is what you're saying that what  
 (9) Mr. Petumenos' position really requires would require a  
 (10) revamping of Instruction No. 39 page 39?  
 (11) MR. OPPENHEIMER: Well, I don't - I think it might  
 (12) but I think that more importantly what I hear them saying is  
 (13) that they're going to argue that the stipulation is a  
 (14) stipulation that we're liable for the acts of third party  
 (15) vandals and it's clear that that's not what the stipulation  
 (16) does. The parties have never treated it that way.  
 (17) THE COURT: It's clear from the language that that's  
 (18) it isn't it?  
 (19) MR. OPPENHEIMER: It's clear from the language that's  
 (20) not the case. So what I thought we had been striving to do was  
 (21) create a superseding cause instruction that was not perfect for  
 (22) either of us because I had to give up some factors and  
 (23) Mr. Petumenos I thought was relinquishing the literal  
 (24) language of Osborne in favor of factors that make the same  
 (25) point. But I think in slightly easier to understand language.

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(1) a little more concrete and we weren't going to have to  
 (2) stipulation because it tended to convey the impression that  
 (3) there was some sort of ruling by the Court that the jury was  
 (4) being instructed on that in fact there was no superseding  
 (5) cause because the kind of damage to archaeological resources  
 (6) was foreseeable. And that's why I try if we add back in the  
 (7) instructions it's not minor tinkering it upsets the balance  
 (8) that I had understood we had achieved where if you read the  
 (9) instructions together the only area where a - where an issue  
 (10) of proximate cause and superseding cause are joined is on  
 (11) archaeology. Doesn't come up any place else.  
 (12) We're not going to argue it. Their theories are such that  
 (13) it's not going to raise the issue. It was - the superseding  
 (14) cause instruction is suitable for raising the kinds of factors  
 (15) that Osborne talks about. And if we add onto it the  
 (16) foreseeability language that was appropriate at the time I  
 (17) think it was given in the trial now when the only issue of  
 (18) superseding cause is those archaeological issues I think the  
 (19) jury's going to understand it as an instruction to them they  
 (20) can ignore the superseding cause instruction and they will  
 (21) think I believe that they're being instructed by you Your  
 (22) Honor that the damage by the vandals was foreseeable and we  
 (23) agreed it was. And of course nobody has seriously ever  
 (24) contended that was our intent or that was the language of or  
 (25) the meaning of the stipulation. We never obviously would have

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(1) done it  
 (2) So that's the problem and that's why I say that it is  
 (3) disturbing at this late hour for this issue to come up  
 (4) because Mr. Petumenos and I negotiated a whole set of  
 (5) instructions that I think ended up being pretty balanced and I  
 (6) don't think look for any of the elements of superseding cause  
 (7) or proximate cause to the extent the jury needs it. It may be  
 (8) expressed a little differently than Osborne but I don't think  
 (9) that matters and in fact I can't imagine Mr. Petumenos really  
 (10) wants me to invert in the superseding cause instruction a  
 (11) different expression of foreseeability because it's going to  
 (12) sound like another requirement and one of the things he and I  
 (13) spent a lot of time on was not setting up in the superseding  
 (14) cause instruction more barriers to be satisfied than really  
 (15) needed to be. And that's why when we had five factors we  
 (16) talked about the fact that factors four and five were not  
 (17) phrased too well were redundant and took them out.  
 (18) THE COURT: What were factors four and five?  
 (19) MR. OPPENHEIMER: Well Your Honor let's see if I  
 (20) can - I don't know that I have an old copy of that frankly  
 (21) I did not bring the old marked up copy. But they were - they  
 (22) were ones we wanted that we took out.  
 (23) For the life of me I can't remember.  
 (24) THE COURT: Well was it foreseeability?  
 (25) MR. OPPENHEIMER: No no I don't believe so.

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(1) MR. PETUMENOS: My problem with four and five was they  
 (2) were wrong that they were back to the instruction about future  
 (3) vandalism and all that.  
 (4) THE COURT: The only thing I care about is whether or  
 (5) not foreseeability was in four or five.  
 (6) MR. PETUMENOS: They were not.  
 (7) THE COURT: Then the existing 39 that you've given me  
 (8) today in your view before you walked in here today dealt with  
 (9) the foreseeability issue.  
 (10) MR. OPPENHEIMER: I think to the extent it needs to be  
 (11) dealt with in superseding cause yes Your Honor.  
 (12) MR. PETUMENOS: And you know there's another point.  
 (13) This is worse than I thought because we have another  
 (14) miscommunication I think and that is that the debate between  
 (15) the parties on the stipulation was whether the introductory  
 (16) language on foreseeability and the stipulation came in or  
 (17) whether just the stipulation came in and now I understand that  
 (18) the whole thing is out right now the stipulation isn't even in  
 (19) front of the jury. And that -  
 (20) THE COURT: Of course it's in front of the jury.  
 (21) I counsel it's in the record.  
 (22) MR. PETUMENOS: No but in the two proposed -  
 (23) defendants proposed and plaintiffs proposed Judge the  
 (24) defendants proposed had the stipulation by itself with no  
 (25) introductory language.



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(1) THE COURT That's true  
 (2) MR PETUMENOS The plaintiffs proposed had the - it  
 (3) they dropped the stipulation out entirely I've never agreed to  
 (4) that and that is another whole problem  
 (5) MR OPPENHEIMER Our proposed does not include the  
 (6) stipulation It previously did when there was a full  
 (7) instruction on vandalism and two of our instructions were  
 (8) deleted as part of the process  
 (9) MR PETUMENOS We definitely missed each other so it  
 (10) was never my understanding that the stipulation was out  
 (11) THE COURT How am I supposed to resolve this  
 (12) counsel?  
 (13) MR PETUMENOS I think on the law  
 (14) MR OPPENHEIMER I think the law's properly set forth  
 (15) on page 39  
 (16) THE COURT It worries me counsel because I don't  
 (17) think foreseeability is clearly instructed on at page 39 My  
 (18) inclination is to say Fine I see no reason to do more than  
 (19) has already been done The stipulation is in the record it  
 (20) can be read verbatim to the jury If it's the basis for a  
 (21) legitimate argument by the parties and the foreseeability  
 (22) language is not necessary as long as page 39 deals with the  
 (23) foreseeability issue correctly and it may - it - it does  
 (24) deal with it but it may not deal with it completely If I were  
 (25) the drafter of this instruction I would not draft it this

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(1) somehow conceded that third party vandalism was foreseeable  
 (2) THE COURT Well I - that's - that's I think  
 (3) maybe - may very well be true counsel  
 (4) MR PETUMENOS I'm sorry Judge I was trying -  
 (5) THE COURT The stipulation doesn't stipulate away the  
 (6) foreseeability issue regarding the third party vandalism  
 (7) MR PETUMENOS I agree I'm not asking for directed  
 (8) verdict on this issue  
 (9) THE COURT You're not going to argue that right  
 (10) MR PETUMENOS I'm going to argue the facts but I  
 (11) can't - I can't argue it because it simply doesn't say that  
 (12) THE COURT You've got to in the context of the law  
 (13) you have to argue that this vandalism would be foreseeable  
 (14) a foreseeable right result of the spill right  
 (15) MR PETUMENOS That's right that's exactly right  
 (16) MR OPPENHEIMER Your Honor I didn't hear the answer  
 (17) to your question Are they going to argue that that  
 (18) stipulation is an agreement by us?  
 (19) THE COURT No You're not intending to do that are  
 (20) you counsel? Did you hear that?  
 (21) MR PETUMENOS I'm sorry Judge  
 (22) THE COURT Say it again  
 (23) MR OPPENHEIMER The question that wasn't answered is  
 (24) whether the plaintiffs will be arguing to the jury that the  
 (25) stipulation constitutes a stipulation that the acts of

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(1) WIV  
 (2) MR OPPENHEIMER Your Honor if the stipulation is  
 (3) going to be read then I think as part of the instructions  
 (4) then I think it's very important that we clarify that in fact  
 (5) it does not govern the outcome of the superseding cause issue  
 (6) on archaeology issue  
 (7) THE COURT I don't think you heard me I said I  
 (8) don't see that the stipulation needs to be the subject of an  
 (9) instruction as long as page 39 is appropriately drafted  
 (10) MR OPPENHEIMER I see what you're saying Sorry  
 (11) MR PETUMENOS If we're going to do that then I have  
 (12) an instruction that we drafted based on Osborne I can show the  
 (13) Court that is short and simple and I think -  
 (14) THE COURT I think you need to show it to  
 (15) Mr Oppenheimer at the very least  
 (16) MR PETUMENOS He's seen it  
 (17) MR OPPENHEIMER Your Honor I can't - I guess my  
 (18) point is that I don't think my debate over instruction on  
 (19) superseding cause and whether the page 39 instruction does  
 (20) the  
 (21) best job it could of capturing Osborne or the other law in  
 (22) this case is really what we're talking about  
 (23) The question is under any circumstances at all would it be  
 (24) permissible to use the stipulation to create the impression  
 (25) that my - whatever the superseding cause is that it's been  
 (26) satisfied by agreement of the parties and therefore we've

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(1) third party vandals was foreseeable  
 (2) MR PETUMENOS Could I see the language of the  
 (3) stipulation again?  
 (4) THE COURT Yeah it's right here You've probably  
 (5) got 15 copies of it now  
 (6) MR OPPENHEIMER Your page 28  
 (7) THE COURT 30  
 (8) MR PETUMENOS But Judge what about the last  
 (9) sentence?  
 (10) THE COURT Well the only thing they've stipulated to  
 (11) is that it could cause significant damage to archaeological  
 (12) resources That doesn't - that isn't a stipulation of third  
 (13) parties coming in 20 years after the oil spill damaging  
 (14) archaeological resources is a foreseeable result of the oil  
 (15) spill It's simply not is it?  
 (16) MR PETUMENOS Wouldn't that be a question for the  
 (17) jury?  
 (18) THE COURT Exactly  
 (19) MR OPPENHEIMER But not the meaning of the  
 (20) stipulation That's not a question for the jury  
 (21) THE COURT Exactly but you can't say they stipulated  
 (22) the issue away  
 (23) MR PETUMENOS If I can get the instruction I just  
 (24) handed up to the Court I think that will be agreeable  
 (25) THE COURT I don't want to disrupt the delicate

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(1) balance of your negotiations To me instruction on 39 is - I  
 (2) would have given it if there would have been no objection The  
 (3) problem I have here now is that I - that on in appellate  
 (4) review with one party objecting to a particular instruction I  
 (5) have to look at the law and see what - whether the instruction  
 (6) is appropriate I think that this instruction may be flawed in  
 (7) that it does not explicitly raise - define the issue of  
 (8) reasonable cause - I mean of reasonable foreseeability and I  
 (9) think that it is - that that problem is easily resolved either  
 (10) by you or by me I just want to give you the first crack at it  
 (11) because after all you've been negotiating for so long - and  
 (12) in fact there is some language in Osborne that could be  
 (13) incorporated in this instruction that would make it entirely  
 (14) appropriate far as I'm concerned and would - and without the  
 (15) instruction relating to the stipulation at all would be  
 (16) entirely adequate for the parties  
 (17) MR PETUMENOS Very well I have tendered our  
 (18) attempt to -  
 (19) THE COURT Yours is not You see the problem is  
 (20) what Mr Oppenheimer's been saying repeatedly - and it  
 appears  
 (21) to me that he has equity on his side here - is he negotiated  
 (22) the language of this other instruction How can you now come  
 (23) in dump a different completely different instruction on him  
 (24) and then expect him either to agree to it or me to give it  
 (25) when in fact all you need to do is read - is put another

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(1) paragraph in instruction - in page 39?  
 (2) MR PETUMENOS That's what I'm suggesting I'm not  
 (3) disagreeing with you  
 (4) THE COURT You wanted to substitute -  
 (5) MR PETUMENOS I'll amend If you will give the  
 (6) paragraph that we - look at the case Judge and see if we've  
 (7) done it fairly and whether we've done it in a balanced way but  
 (8) if you add this paragraph to the instruction as written and if  
 (9) you then don't want to read the stipulation my objections are  
 (10) satisfied  
 (11) In addition - in other words in addition to the language  
 (12) that we've agreed upon if the language I proffer which I  
 (13) think accurately discusses Osborne - leave the stipulation  
 (14) out I won't argue the stipulation but I think this paragraph  
 (15) needs to be added to the instruction  
 (16) I welcome the Court to look at the instruction to see if we  
 (17) fairly characterized Osborne We tried to be objective about  
 (18) it and the last thing I want to make sure that's corrected  
 (19) here - this is not Mr McCallion and Mr Fortier talking -  
 (20) when I got back to the office and I realized what I had done -  
 (21) it was late in day on Saturday and I made a mistake because I  
 (22) intended to go back to this issue after the Court determined  
 (23) that in fact reasonable foreseeability was still in the case  
 (24) and I simply forgot And it's true that they pointed it out to  
 (25) me but it was not them going around or underneath they were

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(1) pointing out to me an error that I had made and I made that  
 (2) error So anyway my proposal is this paragraph with the  
 (3) instruction as written And I'll not argue the stipulation in  
 (4) the fashion that you've indicated I'll argue the evidence on  
 (5) the issue of whether it's foreseeable and I'm taken care of  
 (6) MR OPPENHEIMER Your Honor I have a suggestion I  
 (7) really do not want to go back in this instruction I spent  
 (8) over a course of a day and a half on this instruction or one  
 (9) very much like it before we got to the one on page 39 I do  
 (10) have a suggestion though for the one on page 39  
 (11) Page 39 factor one says Will the act of the third person  
 (12) bring about a harm different in kind from the harm that could  
 (13) reasonably have been expected from the oil spill Let's just  
 (14) change the word expected to foreseen I believe the intent  
 (15) of these factors has always been to have the basic point of  
 (16) the law in this area I think it does it now but change  
 (17) expected to foreseen and I think it clearly does  
 (18) MR PETUMENOS The language that we need from Osborne  
 (19) that I think is the accurate statement of the law is the issue  
 (20) of whether the - whether the risk was created If you read  
 (21) our instruction if you read Osborne that doesn't do it for  
 (22) us If the risk was - of harm was increased by the acts of  
 (23) the defendant then it's not a superseding cause And that's  
 (24) the language that we - we are looking for from our proposed  
 (25) MR OPPENHEIMER Your Honor Mr Petumenos and I have

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(1) gone through this in connection with instructions that dealt  
 (2) with expressed statements by the Court with respect to  
 (3) confidentiality We went through this very point when we  
 (4) discussed Osborne in connection with the jury instruction We  
 (5) ended up balancing out in 39 though I think changing the word  
 (6) expected to foreseen is acceptable and I think what  
 (7) happening is Mr Petumenos is now clearly agreed that the  
 (8) plaintiffs are not going to argue that the jury is going to be  
 (9) allowed to decide that the stipulation is a stipulation from  
 (10) Exxon to the effect that vandalism in the future was  
 (11) foreseeable but he's now coming to the same problem of going  
 (12) back into the negotiations and adding things that don't need to  
 (13) be added to 39 to deal with the foreseeability problem that  
 (14) have to do with express statements about factual applications  
 (15) under legal standards whether a particular risk has been  
 (16) increased  
 (17) That concept was discussed and we agreed was picked up  
 (18) adequately in the three factors and even if - even if  
 (19) Mr Petumenos is right that - well let me take him - of  
 (20) course I take him at his word If Mr Petumenos thought that  
 (21) your instruction was going in it doesn't have anything to do  
 (22) with the point just made the point he just made about putting  
 (23) something into 39 or any of the superseding cause instructions  
 (24) about increased the superseding risk all that  
 (25) He and I did talk about that it was negotiated out and

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(1) one of the reasons we did we lost the two vandalism  
 (2) instructions specifically on the other side of that equation  
 (3) 39 gives both parties a right to argue their positions  
 (4) Mr Petumenos can argue his If we change the word  
 expected  
 (5) to foresee I think it solves whatever problems could seem to  
 (6) come up  
 (7) THE COURT Stop both of you We're going to take a  
 (8) recess and I'm going to draft some language that I'm going to  
 (9) give to you and see whether or not it resolves this problem  
 (10) all right?  
 (11) MR PETUMENOS Yes Your Honor  
 (12) THE CLERK Please rise This court stands in  
 (13) recess  
 (14) (Recess from 10:51 a.m. to 11:05 a.m.)  
 (15) THE CLERK Please rise This court now resume its  
 (16) session Please be seated  
 (17) THE COURT Counsel I have some suggestions for you  
 (18) and I have also looked at this instruction now attempting to  
 (19) redraft it I think it has some problems that neither of you  
 (20) mentioned unfortunately  
 (21) First who has the burden of proof on this issue?  
 (22) MR PETUMENOS That's a good question I don't think  
 (23) that it was researched by either side but I think it may be  
 (24) defendants  
 (25) THE COURT It's definitely the defendant's burden

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(1) MR PETUMENOS That's not the law and what it used  
 (2) to say is the plaintiff's must prove and what I changed was it  
 (3) must be shown And I didn't attribute it but I realize now  
 (4) that I didn't fix it all the way because you're right  
 (5) MR OPPENHEIMER Your Honor I apologize because  
 (6) since we had negotiated it through I didn't bring all the  
 (7) materials I am concerned that this is in fact not correct  
 (8) that it is not defendant's burden and -  
 (9) THE COURT I think it's a fair question  
 (10) MR OPPENHEIMER Yes I think my only point I  
 (11) guess is procedural one that Your Honor may - may be right I  
 (12) respectfully think not but if so we'd obviously like an  
 (13) opportunity to just check our original sources  
 (14) THE COURT I'd like you to do that I'm only raising  
 (15) the question I'm not resolving it at this point It appears  
 (16) to me and I've always thought of superseding cause as a  
 (17) doctrine that requires the defendant's that puts the burden of  
 (18) proof on the persons asserting it  
 (19) Now let's just bypass that I'll give you some time to  
 (20) show me what you - what your positions are but if you - if  
 (21) we assume that the one you've drafted gives the appropriate  
 (22) burden of proof and it's going to have to ultimately then why  
 (23) wouldn't this be appropriate just using your instruction and  
 (24) redrafting it a little bit  
 (25) One if you go to the second sentence of that

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(1) isn't it Mr Oppenheimer?  
 (2) MR OPPENHEIMER Your Honor I don't know the answer  
 (3) to that I have a reason for that It's that set forth in  
 (4) Oshorn? And the reason I ask -  
 (5) THE COURT No it's not that's some of the problem  
 (6) is that if you look at - if you look at the commentary to  
 (7) pattern Instruction 307 it doesn't specifically say who the  
 (8) burden is on but it's phrased in terms of the burden is on the  
 (9) defendant The burden is on the person asserting superseding  
 (10) cause to prove it  
 (11) MR PETUMENOS And the instruction that Exxon had  
 (12) previously offered had placed the burden on the plaintiffs and  
 (13) I refused it and in the instruction -  
 (14) THE COURT I think the instruction you've given me  
 (15) places the burden on the plaintiffs  
 (16) MR PETUMENOS If it does I made another error I  
 (17) think it was in another - I can't remember now  
 (18) THE COURT Here's what it says - this is as you  
 (19) drafted it In addition to proving that Exxon's conduct was a  
 (20) legal cause of their harm it must be shown that it is more  
 (21) probable than not that the chain of event leading from the oil  
 (22) spill that plaintiffs' damages for lost confidentiality of  
 (23) archaeological resources does not include a superseding  
 (24) cause  
 (25) It puts the burden on the plaintiffs to prove this was not  
 a superseding cause That's not the law

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(1) instruction - have you got it in front of you?  
 (2) MR PETUMENOS Which one now Judge?  
 (3) MR OPPENHEIMER This is page 39 of plaintiffs -  
 (4) THE COURT Yeah it's page 39 All right the second  
 (5) sentence which begins the superseding cause if you drafted  
 (6) it as follows A superseding cause is a reasonably foreseeable  
 (7) act of a third person which by its intervention prevents the  
 (8) defendant from being liable for harm to the plaintiff  
 (9) That puts the reasonable foreseeability into the  
 (10) instruction And in order to make sure that it's clear that  
 (11) it's in the instruction you could then do another paragraph  
 (12) and the paragraphs would be this one that I'm suggesting now  
 (13) and then the existing one two three in order So this would  
 (14) be paragraph one in that instruction  
 (15) MR PETUMENOS I'm sorry Judge could you read that  
 (16) first paragraph back?  
 (17) THE COURT Yes the first is in - is not one of the  
 (18) numbered paragraphs it simply says it changes your language  
 (19) in the second sentence of your first paragraph A superseding  
 (20) cause is a reasonably foreseeable act of a third person which  
 (21) by its intervention prevents the defendant from being liable  
 (22) for harm to the plaintiff Okay that's one change Two  
 (23) change is you insert a new paragraph one which says one  
 (24) period is the fact of the third person reasonably  
 (25) foreseeable

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(1) MR PETUMENOS Judge I think it's backwards. If the  
 (2) act is reasonably foreseeable, there is no superseding cause.  
 (3) You are stating that if the act is reasonably foreseeable it  
 (4) is a superseding cause. It's just the opposite.  
 (5) THE COURT I'm sorry. I'm sorry. You're right.  
 (6) You're absolutely right. Yes, you're right. It would have  
 (7) to - the language would have - you are absolutely right.  
 (8) A superseding cause is an act of a third person, comma, not  
 (9) reasonably foreseeable, comma, which by its intervention  
 (10) prevents the defendant from being liable for harm to the  
 (11) plaintiff.  
 (12) Right?  
 (13) MR PETUMENOS Right.  
 (14) THE COURT And then paragraph one would be, is the  
 (15) act of the third person not reasonably foreseeable?  
 (16) MR OPPENHEIMER I'm sorry, Your Honor, where does  
 (17) your last -  
 (18) THE COURT Paragraph one, now paragraph one. Okay,  
 (19) do you understand what I'm suggesting?  
 (20) MR PETUMENOS I think so, Your Honor.  
 (21) THE COURT So whatever problems you had in drafting  
 (22) the instruction, it appears to me they can be resolved without  
 (23) doing violence to your agreements. On the other hand, if  
 (24) you've agreed to put a burden on the plaintiffs when it should  
 (25) be on the defendants, I can't agree with that.

(1) understand it instead of hearing it, but what I heard sounded  
 (2) acceptable.  
 (3) MR OPPENHEIMER Sounds acceptable, Your Honor.  
 (4) THE COURT So I have it here.  
 (5) MR OPPENHEIMER Just so we're clear.  
 (6) THE COURT My indecipherable handwriting.  
 (7) MR OPPENHEIMER Just so we're clear, we're not going  
 (8) to have the foreseeability instruction, we're going to have -  
 (9) THE COURT You're not going to have the  
 (10) foreseeability instruction, you're not going to have the  
 (11) stipulation recited in the instructions. You do have available  
 (12) to you the verbatim transcript of the stipulation which you can  
 (13) use in final argument. You cannot argue that that's stipulated  
 (14) away the factual issue of superseding cause.  
 (15) MR OPPENHEIMER Understood.  
 (16) MR PETUMENOS Right, understood.  
 (17) THE COURT After we recess, you can make a copy for  
 (18) Mr. Oppenheimer, too.  
 (19) So now let's - let's go on, now let's make it explicit  
 (20) here, so nobody's - nobody's - has the wrong impression. This  
 (21) instruction is still open for discussion, and the two things  
 (22) that I've said have to happen. One, you agree to the language  
 (23) and two, that the burden of proof be placed on the right party  
 (24) on this issue, those things are still open for resolution. So  
 (25) what else remains now?

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(1) MR PETUMENOS No, we've not made that agreement. In  
 (2) fact - in fact, in the draft that was before, it said the  
 (3) plaintiffs must prove, and I demanded it to be taken out so it  
 (4) was worse, and I have apparently failed to take it out  
 (5) elsewhere in the instruction, because it was the intent of the  
 (6) parties - I believe Mr. Oppenheimer will confirm this - that  
 (7) the burden on the plaintiff was not to be in the instructions.  
 (8) That it was part of the negotiations.  
 (9) MR OPPENHEIMER I - rather than get back into the  
 (10) negotiations, let's just check.  
 (11) THE COURT It doesn't matter, you both agree that  
 (12) whatever the burden - whatever burden the law puts on a party  
 (13) is the burden that you accept, right?  
 (14) MR OPPENHEIMER Yes.  
 (15) MR PETUMENOS Yes.  
 (16) THE COURT You can do your research, and I believe  
 (17) the burden should be on the defendants, and I may be wrong.  
 (18) So  
 (19) you can do your research on that one, but let's assume now  
 (20) that the burden that's properly placed on the party that it is  
 (21) on, I suggest that the language I have just read to you  
 (22) resolves the questions that you've raised and is entirely  
 (23) acceptable, should be entirely acceptable to you, and it's  
 (24) within the context of your negotiations.  
 (25) MR PETUMENOS I think that's - that's true. I'd  
 (26) like - I'd like to see it in written form so I make sure I

(1) MR PETUMENOS I have a couple of easier issues, I  
 (2) think. And then I'd like to be excused, if I could.  
 (3) THE COURT Counsel, until this one's resolved, you  
 (4) ain't going to be excused. I'm going to resolve this - the  
 (5) one, the issue you've raised this morning. I'm going to resolve  
 (6) this morning. And then you'll be excused.  
 (7) MR PETUMENOS All I meant was, while the Court goes  
 (8) on to other things in the hearing, here - I understand what  
 (9) we're going to do is resolve this after counsel looks at the  
 (10) law and determines the burden of proof issue and whatever  
 (11) else.  
 (12) THE COURT Right.  
 (13) MR PETUMENOS So I'll be available. I'm just saying,  
 (14) I'd like to get back to my office.  
 (15) Order No. 40, page 7.  
 (16) THE COURT No, 40.  
 (17) MR PETUMENOS I have a page for you here.  
 (18) THE COURT Oh, Order 40.  
 (19) MR OPPENHEIMER Mr. Petumenos, what -  
 (20) THE COURT The Pretrial Order 40?  
 (21) MR OPPENHEIMER I have no idea what the issue is.  
 (22) MR PETUMENOS I tried to get agreement on this and I  
 (23) can't, but Order Number 40 provided that the parties may put  
 (24) together a notebook that contained the photographs of the  
 (25) witnesses.  
 (26) We have 15 individually taken photographs of our witnesses.

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(1) This is important to us because this case is so long and the  
 (2) reason for the photo notebook the jury notebook was that the  
 (3) case is so long that some of the witnesses are lost on the  
 (4) jury I have trouble remembering what they testified to I  
 (5) know because I'm trying to prepare the final argument. It's  
 (6) been so long.  
 (7) It provided that the parties may put together a notebook to  
 (8) give the jury with photographs of the witnesses who testified.  
 (9) We have carefully done that. We have a photo notebook with  
 (10) our  
 (11) witnesses pictures in it so that the jury will be reminded who  
 (12) the people were who testified. It's a recollection device.  
 (13) The photo notebook consists of the photo and their name for  
 (14) each witness that the plaintiffs called. And we have been -  
 (15) we were allowed to do it in Order 40 and prepared to do it.  
 (16) Apparently the defendants neglected to do it and now they wish  
 (17) to keep our photo notebook from going to the jury.  
 (18) MR OPPENHEIMER Your Honor I'm totally caught off  
 (19) guard I don't know the facts. My paralegal who is better  
 (20) organized than I suggests that she's not aware of the -  
 (21) apparently we do so I would suggest I can't speak to the  
 (22) order I haven't read it. I'm not involved in the notebooks  
 (23) and I think maybe if Mr. Petumenos and I spoke we would find  
 (24) out if we have a problem.  
 (25) THE COURT Do you have the photographs?  
 (26) MR OPPENHEIMER Back at the office.

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MR PETUMENOS I'm sorry I spoke to Mr. Diamond and  
 Mr. Diamond told me you didn't have one and therefore you  
 were  
 going to object to it. If they have one.  
 THE COURT You have a trial notebook?  
 MR OPPENHEIMER I'm at a loss because I don't know  
 whether - I don't know what the order says.  
 THE COURT What else is going to be in this trial  
 notebook?  
 MR PETUMENOS Nothing.  
 THE COURT Just the photographs of the witnesses?  
 MR PETUMENOS Just the photographs of the  
 witnesses. That's it. So they can remember what they looked  
 like and recall what the testimony was.  
 THE COURT I tell you if you agree to it and you  
 both have photographs that's fine.  
 MR OPPENHEIMER Well I can't represent that Your  
 Honor because I just don't know what the facts are. I think  
 that situation may be the situation but I cannot represent  
 that to the Court.  
 THE COURT Counsel who am I to interfere with -  
 with this - this new twist on trial law. You take a  
 photograph of all of your witnesses and you give it to the jury  
 in the jury room.  
 MR OPPENHEIMER It sounds like Your Honor but for  
 some authority for that I would in the normal course of events

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(1) object to it but whether we should be objecting to it because  
 (2) we have some understanding or some order I just can't speak  
 (3) to  
 (4) the issue.  
 (5) THE COURT I don't see how - I mean it strikes me  
 (6) that there's no problem because it - as long as you put some  
 (7) page says this is merely to identify the witnesses so you may  
 (8) recollect them better but you know this paragraph relates to  
 (9) trial notebooks things that we're going to go on during the  
 (10) trial which never occurred.  
 (11) MR PETUMENOS The only thing I think that didn't  
 (12) occur by agreement was the glossary was going to be such a  
 (13) time consuming problem for us to agree on glossary of terms  
 (14) that we gave up and -  
 (15) THE COURT Sure Not only that but the notebook was  
 (16) going to have notes in the notebook and take the notebooks  
 (17) into  
 (18) deliberation. We've substituted for that the thing we always  
 (19) do is just give them a pad.  
 (20) MR OPPENHEIMER Your Honor I guess one of the  
 (21) things I don't know is whether one group had in mind to do this  
 (22) and the other group has matched photographs which aren't as  
 (23) presentable - which I think may be the case perhaps doesn't  
 (24) have a - I'm not sure both parties were intending to do this  
 (25) I just don't know.  
 (26) THE COURT I'm certainly not going to - I'm not  
 (27) going to interfere with this because I see it as being

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(1) absolutely unprejudicial if both parties have the trial  
 (2) notebooks.  
 (3) MR OPPENHEIMER Your Honor I guess the position I  
 (4) find myself in without knowing more than I do know I would  
 (5) object to the notebook going in. I am hesitant - only reason  
 (6) I'm hesitant to do that is that if there's an understanding to  
 (7) the contrary or both parties were planning to do this I don't  
 (8) know the facts -  
 (9) THE COURT Sounds to me that Mr. Diamond was not  
 (10) saying no they can't go in to the jury but he was saying we  
 (11) don't have the photographs and he apparently was wrong.  
 (12) MR OPPENHEIMER I'm not sure. He may well have in  
 (13) mind that we do have materials and he's not using them and  
 (14) his  
 (15) objection -  
 (16) THE COURT All I'm saying all you need to do is  
 (17) check.  
 (18) MR PETUMENOS Just so it's clear I thought Order 40  
 (19) allowed it so I thought we were in a position to -  
 (20) THE COURT Order 40 being a drafting effort by  
 (21) people who were not involved in the trial has many infirmities  
 (22) in it. And this may be one of them but I don't care.  
 (23) MR STOLL Your Honor just so that Mr. Oppenheimer  
 (24) their side doesn't - isn't too concerned these are not  
 (25) professionally done photographs these were taken out in the  
 (26) hallway with -

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(1) THE COURT Polaroids huh?

(2) MR STOLL Not even a polaroid Your Honor it was one of those \$6 throw away cameras Kodak so by the time they're made into eight by ten they ain't too nice it

(3) THE COURT I tell you one thing counsel Only thing I don't want to see is a wall sized photograph of every witness blown up on a large piece of cardboard

(4) MR OPPENHEIMER As Mr Petumenos would say you're cutting the heart out of our case

(5) MR STOLL Your Honor don't say that

(6) MR OPPENHEIMER Just so I'm clear - I'm a little behind the curve here Are we postponing the ruling until we have a chance to talk?

(7) THE COURT I don't think a ruling will be necessary counsel because I have a feeling when you both talk to each other that you'll resolve this but if you want to bring it to me for a ruling please save it for the last so that I can hear it thoroughly

(8) MR PETUMENOS The last thing is I don't know whether we've resolved it is that - I think we will resolve it but I'd just like to have the Court's assistance We need to split the time - does the Court know whether the courtroom can be available if we hire a bailiff in the evening?

(9) THE COURT The courtroom?

(10) MR PETUMENOS The courtroom

(1) think?

(2) MR OPPENHEIMER That's what we'll do under the circumstances

(3) THE COURT Okay Two to five and five to six

(4) MR PETUMENOS Okay

(5) THE COURT Now we need to make sure that there's somebody here The bailiffs are here so there's no problem

(6) MR PETUMENOS Joel will be and I've indicated to Joel put it on the record that the confidentiality order that we required of Joel to assist us with the technology is in effect and he agrees to that

(7) THE COURT Oh great Okay thanks

(8) MR PETUMENOS The remaining issues I think are the ones upon which I would like to be excused Mr Fortier is going to argue the OPA 90 issue and then we have a - an issue that Mr Stoll wants to raise on the final argument schedule and I fully concur with his position so he can give it

(9) MR FORTIER Thanks Your Honor

(10) On the OPA 90 issue we did submit instruction with some backup to the Court earlier today

(11) THE COURT I see I have it here

(12) MR FORTIER I received the Defendants Proposed Instruction earlier this morning We didn't have a whole lot of time to talk about it I think what - what separates the two different versions of the instruction is probably what

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(1) THE COURT What did we finally decide? Somebody's going to get it this afternoon right?

(2) MR PETUMENOS That's the issue The somebody at this point is Exxon and we need to share it I spoke to Mr Diamond and he indicated that he would work with me on that but I haven't heard back

(3) THE COURT You want it this evening?

(4) MR PETUMENOS It would help both sides I think so Exxon has the time that they need If we're able to have it in the evening then we have enough time between us I was getting worried -

(5) THE COURT Exxon has it from two to six

(6) MR PETUMENOS I was - that's why I need the Court's intervention I can't use it this morning and two to six would take the whole day I would have it not at all unless either Exxon agreed to share the two to six time or we were allowed to use it in the evening That's the issue

(7) THE COURT And is it acceptable for you to use it in the evening?

(8) MR PETUMENOS I'd like to get it earlier than six if that's possible so I can get some sleep

(9) THE COURT How about two to five for Exxon and five to eight for the plaintiffs?

(10) MR OPPENHEIMER So we go two to five?

(11) THE COURT I think that should be enough don't you

(1) Native land is one issue and the other issue would be whether or not the Court should make a finding or instruction as to the legal consequences of OPA 90 So I'd like to address those in order I guess

(2) With regard to the first issue the Native lands issue we submitted to the Court a copy of ANILCA I think it's 16 -

(3) THE COURT I got it

(4) MR FORTIER Okay and that defines what Native lands are The reason why we think it's important is because Mr Duncaster in his testimony indicated first of all that he knew what ANILCA was and second of all he read a portion that -

(5) THE COURT Can I break in on you here?

(6) MR FORTIER Sure

(7) THE COURT I came in here early this morning and Mr Oppenheimer had I believe an instruction that had editing in it right?

(8) MR OPPENHEIMER Editing and annotation

(9) THE COURT It may be easier - I don't object to giving an instruction on this I just want it to be either agreed upon by the parties or not to contain a whole lot of extraneous material or confusing material So I want to know let's just go through Exxon's edited version and see whether or not there's substantial controversy

(10) Do you disagree with the first paragraph?

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(1) MR FORTIER No  
 (2) THE COURT I'm asking Exxon  
 (3) MR FORTIER I'm sorry  
 (4) MR OPPENHEIMER You're talking about now as  
 (5) modified?  
 (6) THE COURT Of the plaintiffs proposed  
 (7) MR OPPENHEIMER With the deletion of the language at  
 (8) footnote one no  
 (9) THE COURT Well I've lost it  
 (10) MR OPPENHEIMER Your Honor do you have the  
 (11) annotated?  
 (12) THE COURT I have the proposed jury instructions  
 (13) MR OPPENHEIMER What I provided this morning Your  
 (14) Honor to you was - this is what we provided This is an  
 (15) annotated version of changes  
 (16) THE COURT Okay I'm sorry counsel I've probably  
 (17) mislaid it Yeah here it is  
 (18) MR OPPENHEIMER And it has a footnote explaining why  
 (19) we proposed each change and provided it to Mr Fortier  
 (20) THE COURT I have it  
 (21) Mr Fortier you have it?  
 (22) MR FORTIER Yes I do Your Honor  
 (23) THE COURT Let me just look at that form  
 (24) I agree that that language is redundant It is right?  
 (25) MR FORTIER I agree We fixed it up last night

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(1) MR FORTIER Okay The third paragraph Your Honor  
 (2) it's been rewritten or edited It's fine We have no  
 (3) disagreement with it at all  
 (4) THE COURT So it should read now First these lands  
 (5) are administered by the federal government which has the  
 (6) authority to make contracts and issue leases permits  
 (7) rights of way or easements for such lands - you agree that can  
 (8) be used?  
 (9) MR FORTIER That's correct that's fine  
 (10) THE COURT Okay  
 (11) MR FORTIER The next paragraph Your Honor the  
 (12) first sentence is edited There's no problem with  
 (13) THE COURT You mean consult with the Native  
 (14) corporation is stricken from the instruction?  
 (15) MR FORTIER Right And simply to reflect what the  
 (16) regulation actually says is we - we have no objection to it  
 (17) THE COURT Okay  
 (18) MR FORTIER The second sentence of that paragraph  
 (19) we do have a problem with its instruction of court of claims  
 (20) case Court of claims cases aren't controlling of this over  
 (21) the superior court  
 (22) MR OPPENHEIMER Well Your Honor actually what it  
 (23) is it - as the footnote makes clear it's based on the  
 (24) regulations It's quite clear the regulations have  
 (25) consideration and not a consent obligation with respect to the

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(1) THE COURT So paragraph one is struck upon  
 (2) MR FORTIER Yes  
 (3) THE COURT Now tell me about your view of the  
 (4) editing in the second paragraph yours Mr Fortier  
 (5) MR FORTIER Well my reaction Your Honor is that  
 (6) if we take out the first sentence we kind of get what the term  
 (7) Native land means and that's important to an understanding  
 (8) of first of all the rights under - of a Native corporation  
 (9) under ANCSA and ANILCA What we're talking about is uses  
 (10) and  
 (11) one of the uses that ANILCA recognizes for Native corporations  
 (12) as justified about was the right of subsistence uses and the  
 (13) priority or privacy of subsistence uses on Native lands  
 (14) So it's important and it's also I think a proper subject  
 (15) for - for judicial notice  
 (16) THE COURT Okay The defendant's position on this  
 (17) paragraph is that this should be admitted because it's merely a  
 (18) definition of the term Native land as used in ANILCA It  
 (19) makes no sense in the context of this instruction there is no  
 (20) need to define the term Native land because it is not used  
 (21) anywhere except in this spot in the instructions  
 (22) That's their position I agree with them I mean the  
 (23) important part is is that the part that's left in  
 (24) selected but not conveyed lands are treated somewhat  
 (25) differently under the law than conveyed lands  
 (26) So go on to the third paragraph

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(1) lands at issue here  
 (2) MR FORTIER Then it's unnecessary Your Honor  
 (3) THE COURT Hang on just a minute Well I think it  
 (4) is necessary and I'll use it So the - the controversy  
 (5) sentence in this particular paragraph is However the  
 (6) secretary does not have to have consent of the Native  
 (7) corporation before permitting uses to be made of the lands  
 (8) I'll leave that in over the plaintiffs' objection  
 (9) What about the paragraph that starts third?  
 (10) MR FORTIER We have strong objections to this  
 (11) paragraph Your Honor It states a negative that the Native  
 (12) corporations do not have legal title or right of possession of  
 (13) the lands It's contrary to federal law to ANILCA which says  
 (14) that Native - that lands selected but not yet conveyed are  
 (15) considered as owned by the Natives and are considered as  
 (16) Native  
 (17) lands We also have objection to it because it makes a finding  
 (18) of fact and it goes contrary to Alaska law on the issue of  
 (19) equitable title which you know we briefed at some length I  
 (20) don't know back in January or February  
 (21) THE COURT Haven't you admitted that - on these at  
 (22) least some of these lands that you don't have the right to  
 (23) possession?  
 (24) MR FORTIER No we haven't admitted that at all  
 (25) Your Honor I mean there's no - there's nothing in the  
 (26) record on that In fact when we were going to put on evidence

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(1) to the contrary you ruled it was a question for you  
 (2) So I mean you know we're kind of - this is like a  
 (3) directed verdict sort of thing without us having the  
 (4) opportunity to have presented the evidence  
 (5) THE COURT Mr Oppenheimer you've used the word  
 (6) use synonymously with the record possession haven't you?  
 (7) THE COURT It's not true that Cape Fox says they  
 (8) can't use lands it just says they don't have the right to  
 (9) immediate possession  
 (10) MR OPPENHEIMER Well Your Honor without that  
 (11) right there's certainly a curtailment of use It's hard to  
 (12) conceptualize the sort of uses that could be made that aren't  
 (13) just public uses and of course public uses can't be sued for  
 (14) here and I don't - the fact of the matter is that this  
 (15) proposition is - is quite clear and I think we had quite a bit  
 (16) of - well we had testimony that that's the way the land  
 (17) owners understood the situation and understandably because  
 (18) they were following the law  
 (19) THE COURT We certainly have a lot of testimony in  
 (20) the record that indicates that much of this land can't be used  
 (21) because the federal government isn't allowing it to be used  
 (22) MR OPPENHEIMER Well and with respect to  
 (23) subsistence by regulation expressly in the case of other  
 (24) selected lands that aren't conveyed that people just - people  
 (25) are not as confused about this issue in the real world as -

(1) yet conveyed So they're outside the realm of public lands  
 (2) which a park is They've been withdrawn  
 (3) So this is - it's simply an incorrect statement of the law  
 (4) that they don't have the right to use those lands If the  
 (5) government wants to use those lands it has to come to them  
 (6) and - and obtain their - or consult with them anyway  
 (7) There's been evidence in the record on that score  
 (8) THE COURT I hear you I've always seen this as a  
 (9) factual issue what uses could be made of these lands If  
 (10) there's - if the legal issue is are these lands as matter of  
 (11) law forbidden to use by the Natives I don't think that's  
 (12) established by the authorities I've read If Cape Fox says  
 (13) that uses the word use I'm not aware of it  
 (14) MR FORTIER Let me explain to you  
 (15) THE COURT Hold on I'm ruling in your favor  
 (16) counsel  
 (17) MR FORTIER I'll sit down  
 (18) THE COURT I think this is an overstatement  
 (19) Therefore Native corporations do not have a right to use lands  
 (20) that have been selected but not conveyed The way I  
 (21) understand  
 (22) the issue it breaks down to this The Natives many of the  
 (23) Native - some of the Native witnesses in this case have freely  
 (24) admitted they are not able to use these lands including not  
 (25) being able to use them for subsistence hunting But that  
 (26) doesn't preclude - that concession nor Cape Fox nor any

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(1) I think the position Mr Fortier's taking would suggest They  
 (2) know they can't use this land because they don't have it  
 (3) MR FORTIER Your Honor our response to that - I'm  
 (4) not confused about it I know what the - what the situation  
 (5) is  
 (6) THE COURT What use can your clients make of this  
 (7) land?  
 (8) MR FORTIER Well they can hunt on it they can -  
 (9) THE COURT Some of - wasn't there some testimony  
 (10) from one of the Native witnesses that the federal government  
 (11) wasn't allowing subsistence hunting on some of this property?  
 (12) MR FORTIER That's true Your Honor but you've also  
 (13) ruled that that's a legal question that you handle yourself  
 (14) Let me show you ANILCA which you know we've had some  
 (15) testimony on in which Mr Dorchester read indicates that the  
 (16) continuation of the opportunity for subsistence uses on Native  
 (17) lands I'm paraphrasing is essential to Native physical and so  
 (18) on - physical well being  
 (19) That's the section of ANILCA called Section 3111 which  
 (20) follows the definition of Native lands It's pretty clear  
 (21) there's a congressional purpose that Native corporations are to  
 (22) have the use of Native lands for the well being of their Native  
 (23) shareholders as a matter of law it's a congressional  
 (24) purpose  
 (25) Native lands again includes lands that are selected but not

(1) statute or regulation that I've read - does not say  
 (2) categorically they cannot use these lands even though they've  
 (3) been selected irrevocably selected  
 (4) Therefore I see it as a factual issue I'm not going to  
 (5) foreclose it from argument on the record that these parties  
 (6) have made So the sentence comes out  
 (7) MR OPPENHEIMER Your Honor could I just address  
 (8) that?  
 (9) THE COURT Yeah  
 (10) MR OPPENHEIMER A practical possible solution and to  
 (11) respond to Your Honor's specific argument - and I'm looking  
 (12) for the citation which I think I can get here in just a  
 (13) second - what the government has with respect to  
 (14) selected but unimpaired lands is the continuing unimpaired  
 (15) right - there's language which is quite often cited for this  
 (16) proposition with respect to the government's continuing  
 (17) unimpaired right of administration  
 (18) And we'll find that in just a second here but the - the  
 (19) suggestion I would make with respect to the sentence is that we  
 (20) could add some language which I think clarifies this while  
 (21) we're at it It's in the reg Your Honor CFR 2650 I which  
 (22) if I can hand you a copy -  
 (23) THE COURT You've already cited it You cited it for  
 (24) authority for the sentence at the top of the page However  
 (25) the secretary does not have to have consent of the Native



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(1) corporations before permitting uses to be made of the land  
 (2) MR OPPENHEIMER Right  
 (3) THE COURT So it is in there right?  
 (4) MR OPPENHEIMER Right It seems to me that the  
 (5) meaning of that is that it is the government which controls use  
 (6) of the land and what I would propose is that in the sentence  
 (7) that says Therefore Native corporations do not have a right  
 (8) to use lands that have been selected but not conveyed we  
 (9) could add the language without the consent or approval of the  
 (10) federal government That I believe satisfies the concern  
 (11) THE COURT I think that is the law don't you?  
 (12) MR FORTIER Well Your Honor I - you know I don't  
 (13) think it's right It's the uses that the government and the  
 (14) Natives make of Native lands is kind of equitable between the  
 (15) two The Native corporation has equitable title to the lands  
 (16) It has basically an unimpaired right to use the lands for  
 (17) certain purposes including subsistence purposes For other  
 (18) purposes it was going to put up a lodge until it filed an  
 (19) irrelevant revocable election couldn't do that probably  
 (20) THE COURT Counsel do you have a copy of  
 (21) 2650 1(a)(2)?  
 (22) MR OPPENHEIMER Yes  
 (23) THE COURT I just want to read it so I'm sure on  
 (24) this  
 (25) Now where is the next page? It's incompletely copied

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(1) just want to read all the passages Page 217 is interesting  
 (2) MR OPPENHEIMER 218  
 (3) THE COURT But I just want to read it  
 (4) MR OPPENHEIMER And perhaps 219  
 (5) THE COURT Yes it could be But tentatively I  
 (6) think that's appropriate language and it resolves this  
 (7) particular dispute to my satisfaction but not the  
 (8) plaintiffs  
 (9) Now where are we now?  
 (10) MR FORTIER Your Honor on the next paragraph the  
 (11) first two sentences we don't have a problem with They're  
 (12) fine  
 (13) The next paragraph - or the next sentence I'm sorry is  
 (14) not okay Your Honor and the reason it's not okay is because I  
 (15) think it's unnecessary and probably erroneous construction of  
 (16) the law  
 (17) THE COURT What the - the italics that start This  
 (18) law?  
 (19) MR FORTIER That's correct  
 (20) THE COURT I think you're right I think you're  
 (21) right It's too strong a statement  
 (22) MR FORTIER Next paragraph -  
 (23) MR OPPENHEIMER Your Honor before we leave that  
 (24) the - the concern we have is that just the OPA language all  
 (25) right title interest in and to the lands without some

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(1) here  
 (2) MR OPPENHEIMER Your Honor we don't have a copy of  
 (3) page 218  
 (4) THE COURT I need it  
 (5) MR OPPENHEIMER We can get it for Your Honor It  
 (6) may take us - we may have to - obviously I guess we will  
 (7) have to bring it from the office  
 (8) THE COURT Let's move on then  
 (9) Keep that language in mind Counsel because I have not  
 (10) memorized it  
 (11) MR OPPENHEIMER I have it written down Your Honor  
 (12) The other point I'd make is directly from Cape Fox an  
 (13) oft cited provision at page 236 of the opinion  
 (14) It notes that really the full quote - we gave you part of  
 (15) it - says that it is clear on the selection date Cape Fox did  
 (16) not acquire legal title or right to possession Legal title  
 (17) under ANCSA did not vest until conveyance The right to  
 (18) possession does not vest until the completion of the  
 (19) numerous  
 (20) procedural steps in the statutory copy that we quoted  
 (21) It goes on to make it clear quote In the period between  
 (22) selection and conveyance Congress deliberately permitted  
 (23) defendants authority to manage drawn lands to continue to  
 (24) impair - then it says This story includes then it goes on to  
 (25) cite the specific applications  
 (26) THE COURT Actually Counsel I think you're right I

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(1) direction to them as to what it means is terribly misleading in  
 (2) this context -  
 (3) THE COURT It may be I concede you that Counsel  
 (4) the statement - but it does not mean that corporations or  
 (5) their shareholders could use such land at the time of the spill  
 (6) or afterwards That could be interpreted  
 (7) MR OPPENHEIMER I do have a suggestion If after  
 (8) Your Honor sees the regulations we're getting we've all  
 (9) reviewed the language we were going to add earlier makes  
 (10) sense  
 (11) we could add the same concept to the sentence which means  
 (12) the  
 (13) shareholders could use the land at the time of the spill or  
 (14) thereafter except with the concurrence of the government  
 (15) something like that  
 (16) THE COURT That may be a resolution to the problem  
 (17) But as it exists I wouldn't give it  
 (18) MR FORTIER Okay the next paragraph Your Honor  
 (19) they deleted we think ought to be in  
 (20) THE COURT Let me just read it  
 (21) MR FORTIER Okay  
 (22) THE COURT I'm going to keep it out I tried my best  
 (23) to keep settlement discussion out of this case and sometimes -  
 (24) most of the times I've been successful It's not necessary in  
 (25) this instruction  
 (26) MR FORTIER Well I'm not going to argue with Your  
 (27) Honor on that point

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(1) The next matter is a rewriting of the last paragraph. We  
 (2) wanted to keep it real simple and their language it appears  
 (3) is argumentative.  
 (4) THE COURT I don't know I think it's absolutely  
 (5) true. It's what they do have to consider whether the Native  
 (6) corporations were permitted to use the  
 (7) selected but not conveyed lands for which they are asserting  
 (8) claims and whether the corporation suffered any loss or  
 (9) interruption of uses for such lands. It's the factual question  
 (10) that they have to make they have to determine.  
 (11) MR FORTIER If I can be heard Your Honor?  
 (12) THE COURT Sure.  
 (13) MR FORTIER Okay. The first point I guess the  
 (14) first number is asking the jury to determine whether the Native  
 (15) corporations were permitted to use the  
 (16) selected but not conveyed lands from which they are asserting  
 (17) claims. The words were permitted to use it would appear are  
 (18) at least ambiguous. The inquiry is not whether or not I  
 (19) think whether or not they were permitted to use those lands  
 (20) but what those uses were.  
 (21) THE COURT You know in a perfect world I suppose I  
 (22) could redraft this and make it acceptable to both of you but I  
 (23) mean the upshot of what you're saying counsel would simply  
 (24) be I think to make it one phrase and say whether the  
 (25) corporation suffered any loss or interruption of permitted uses

(1) but I'll just try to -  
 (2) THE COURT Hope springs eternal counsel.  
 (3) MR STOLL I don't know about that but anyhow Your  
 (4) Honor first of all on a schedule for tomorrow we have a  
 (5) proposal here if I can give this to the Court sort of in  
 (6) outline.  
 (7) MR OPPENHEIMER Your Honor I was unaware that this  
 (8) was up again today. Just as a point since Mr Diamond will be  
 (9) arguing I think it only fair that I have an opportunity to  
 (10) confer with him I was not provided with this.  
 (11) MR STOLL I don't know whether Mr Petumenos has  
 (12) talked to him or not.  
 (13) THE COURT It doesn't matter. Let's hear what the  
 (14) proposal is and I'll tell you what I think.  
 (15) MR STOLL Okay Your Honor basically the proposal  
 (16) is that we would get all of the - the question is where is the  
 (17) lunch break and I - Mr Petumenos and I started outlining  
 (18) where this was and there was some discussion I think on  
 (19) Friday or Saturday I can't remember which day about having  
 (20) lunch break after the plaintiffs did their opening argument  
 (21) if that happened we'd be having a lunch break at 11:00 in the  
 (22) morning two hours after we started it's pretty early then  
 (23) we'd be faced with a problem of having you know four hour  
 (24) afternoon or three and a half four hour afternoon. So we  
 (25) I think that most people would be fresher in the morning.

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(1) for such land I mean that's the - they can't use these lands  
 (2) unless unless the government consents to use.  
 (3) MR FORTIER Well I guess we'll have to take a look  
 (4) at the regulation and I'll argue after we have a chance to look  
 (5) at it.  
 (6) THE COURT It's acceptable to me at this point. Now  
 (7) it's the defendants' proposed instruction - well it's the  
 (8) defendants' editing that I've accepted in many cases in this -  
 (9) in this particular issue so I want the defendants to give me  
 (10) the clean copy.  
 (11) MR OPPENHEIMER Yes Your Honor.  
 (12) THE COURT And I'm going to want it this afternoon  
 (13) too.  
 (14) MR OPPENHEIMER Understood.  
 (15) THE COURT Is that the conclusion of the OPA 90  
 (16) issue?  
 (17) MR OPPENHEIMER Yes sir.  
 (18) THE COURT What remains now if anything? Nothing  
 (19) from Mr Fortier and Mr McCallion correct?  
 (20) MR FORTIER Nothing further.  
 (21) THE COURT Nothing from Mr Petumenos because he's  
 (22) not here.  
 (23) So all we have is Mr Stoll. Go ahead.  
 (24) MR STOLL Your Honor I usually get this five  
 (25) minutes at the end of the day. Usually not too successfully

(1) Now we don't much care whether the defendants want to  
 (2) divide up their argument before and after the lunch hour we  
 (3) don't care about that. We frankly maybe it's too late now to  
 (4) call the jury and have them come in at 8:30 in the morning  
 (5) that would be fine with us also but any rate working with a  
 (6) 9:00 schedule we would be done with our - there'd be a break  
 (7) after Tim does his opening statement (sic) I'm going to have  
 (8) 30 minutes on KIB and then the defendants would start at 11  
 (9) And then basically the jury would be on the same schedule  
 (10) that they have been heretofore except that it's like half an  
 (11) hour later than now. In other words they usually come at  
 (12) 9:30 they usually leave at 1:15 to 1:30. Under this schedule  
 (13) they don't get here till - they wouldn't be in the courtroom  
 (14) until nine and they'd have their break at 1:45 and we'd have a  
 (15) lunch break then and come back and we'd be all done by 4:15  
 (16) I think actually the instructions will take less than half an  
 (17) hour.  
 (18) THE COURT They'll take about a half an hour.  
 (19) MR STOLL There's nothing magical about this  
 (20) really.  
 (21) MR OPPENHEIMER Your Honor I - the only thing I'm  
 (22) fairly certain of when we're discussing this I think  
 (23) yesterday I think we were all clear Mr Diamond's argument  
 (24) would start after lunch and I think that certainly without  
 (25) conferring with him I wouldn't want to go around changing the

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(1) schedule. I know that there were conversations that he had  
 (2) with folks about whether he would accept a schedule very much  
 (3) like this and he had preferred not to and brought those issues  
 (4) in here yesterday.  
 (5) THE COURT Well I resolved this question once  
 (6) before. I'm going to resolve it now too. And the resolution  
 (7) is based on what I consider to be a fairness question and the  
 (8) fairness question is do I make somebody break up an  
 (9) argument.  
 (10) And the answer to that question is no. I do not which means  
 (11) that I can't accept a schedule that would break the defendants'  
 (12) final argument because I just don't think that's fair.  
 (13) I also don't think that them going out at 11 - they won't  
 (14) go out at 11 anyway. They'll be here at nine one of them will  
 (15) be late we won't start before 9:15 we may not start till  
 (16) 9:20. That inevitably happens so - probably and I  
 (17) considered this when I first made the decision it's going to  
 (18) be after 11:15 that the plaintiffs' opening arguments end  
 (19) probably closer to 11:30. I see nothing wrong with giving them  
 (20) an hour from 11:30 to 12:30 and bringing them back in and  
 (21) letting Mr. Diamond do his argument.  
 (22) You can break up your closings as you choose. An hour and  
 (23) 25 minutes is a long time to be talking to these jurors in one  
 (24) lump.  
 (25) MR STOLL This is an hour and 15 minutes Your  
 (26) Honor.

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(1) pages out of the report and these two are not enough and the  
 (2) problem I have -  
 (3) THE COURT How many pages do you want?  
 (4) MR STOLL Well I'd like to have five pages if  
 (5) that's the way it's going to be.  
 (6) THE COURT Tell them what pages they are.  
 (7) MR STOLL I gave them a copy this morning.  
 (8) MR OPPENHEIMER You showed me a copy I have no  
 (9) copy.  
 (10) MR STOLL I gave you a copy it's right there.  
 (11) MR OPPENHEIMER Oh my fault.  
 (12) THE COURT Let's see if there's controversy.  
 (13) MR OPPENHEIMER Your Honor we would object to this  
 (14) but I'm going to have to go through it on a fair careful  
 (15) basis. There's lots of material I don't think has anything to  
 (16) do with these adjustments.  
 (17) MR STOLL Your Honor the problem -  
 (18) THE COURT Counsel you know we could be spending  
 (19) our time on much more important things than this. If it's five  
 (20) pages of the Shorett report and plaintiffs' counsel thinks he  
 (21) needs it in order to explain the issue it just doesn't seem  
 (22) reasonable to me to take all of the time that - I mean to use  
 (23) your time on rebuttal.  
 (24) MR OPPENHEIMER Your Honor the problem is there's  
 (25) more testimony substantively on important issues that

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(1) THE COURT I'm sorry an hour and 15. It's still a  
 (2) long time to be doing it. But if you want to do that I'll let  
 (3) you do it but what I'm going to say to you now and it's going  
 (4) to be final is the plaintiffs are in the morning and the  
 (5) defendants are in the afternoon. The definition of afternoon  
 (6) is a little different than what we normally think of as  
 (7) afternoon because it doesn't start at 1:30 when we normally  
 (8) do it probably starts sometime around 12:30.  
 (9) MR STOLL Okay Your Honor the next matter I  
 (10) brought up with Mr. Oppenheimer yesterday - and this is simply  
 (11) a question of a lot of numbers in this case - and it's my  
 (12) experience that when this happens the jury probably is going to  
 (13) ask at some point in time for a calculator.  
 (14) THE COURT Yeah I've already thought about that  
 (15) we'll get a calculator. They need to have a calculator at  
 (16) least one.  
 (17) MR STOLL Your Honor the next matter that we  
 (18) hadn't - you recall on Saturday we had objected to two  
 (19) exhibits. These were the Shorett the - in the Shorett  
 (20) report and one of the issues was I did not have what they  
 (21) proposed to be the - the complete exhibit. They sent over to  
 (22) me I got last night what they proposed and the difficulty I  
 (23) have if I can just approach the bench -  
 (24) THE COURT Just tell me what the difficulty is.  
 (25) MR STOLL I - the difficulty is they've taken two

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(1) Mr. Carlson raised that Mr. Shorett never talked about was  
 (2) never subjected to cross examination about.  
 (3) MR STOLL This is precisely my basis of my objection  
 (4) to this exhibit.  
 (5) THE COURT Give me an example of what you're saying.  
 (6) Mr. Oppenheimer.  
 (7) MR OPPENHEIMER Our discussions with borough  
 (8) assessors of sales information indicates demand for remote  
 (9) property increases during prosperous times. Pat Carlson of the  
 (10) borough assessor's office has noted the value changes of  
 (11) property currently don't follow any more dramatic a trend than  
 (12) in and around the City of Kodiak. I mean this is testimony  
 (13) about something that Mr. Carlson said that has nothing to do  
 (14) with the provisions that we were dealing with.  
 (15) MR STOLL Could I just show the Court what we're  
 (16) talking about?  
 (17) This is the problem with this exhibit. They took these  
 (18) pages you recall from Volume Two. Then last night they gave  
 (19) me these two pages which are taken out of the middle of a  
 (20) section entitled Adjustments starts on page 36. They've got  
 (21) I think 39 and 40 and so what I want to do is if you take  
 (22) adjustments here you need the whole adjustment section. And  
 (23) that's - that's what I've tried to do here is just put in the  
 (24) adjustment section because -  
 (25) THE COURT Let me see let me just - so in other

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(1) words they've conceded in 39 and 40 but you want 36 37 and  
 (2) 38  
 (3) MR STOLL Yeah because these adjustments actually  
 (4) don't apply to the adjustments that are contained in here. It  
 (5) you read the whole thing - and this is frankly the problem  
 (6) we had with this exhibit in the first place is it's more or  
 (7) less like the objection that was sustained to the offer that  
 (8) Mr. Putumenos made on Saturday of the Dukin documents  
 where  
 (9) Dukin was actually on the stand and he was asked questions  
 (10) about a article that he had prepared himself you know on  
 (11) another - on another matter and Mr. Putumenos asked to get  
 (12) that entire article in evidence about five pages long and you  
 (13) sustained defendant's objection because you said that the -  
 (14) MR OPPENHEIMER Your Honor I have - I've had a  
 (15) chance to go through this I don't object to this anymore  
 (16) THE COURT Thank you counsel I really appreciate  
 (17) that  
 (18) MR OPPENHEIMER Page numbers are 36 -  
 (19) THE COURT 36 37 38 39 and 40  
 (20) MR STOLL For the record Your Honor we still  
 (21) object to the exhibit -  
 (22) THE COURT What exhibit?  
 (23) MR STOLL We object to -  
 (24) THE COURT Their exhibit  
 (25) MR STOLL DX but I understand you've overruled our

(1) in evidence. The only issue here and I suggested to Mr. Stoll  
 (2) before this started that there ought to be a way for he and I  
 (3) to not take the Court's time. You recall I put on the Elmo  
 (4) something for Mr. Carlson he was called back in and what I'm  
 (5) sure all of us thought was the never ending sequence of  
 (6) testimony and all we're trying to do is blow it up. And we  
 (7) blow up one version which my graphics people swear to me  
 even  
 (8) though to the naked eye - and I admit to both of us looked  
 (9) like it had changed the scale they said You're wrong and  
 (10) they showed me mathematically  
 (11) I said I don't care Mr. Stoll's got a point here looks  
 (12) different to the eye from what I showed the witness so let's  
 (13) go back. And they went back and they produced what Mr. Stoll  
 (14) has which they once again measured for me and it is exactly  
 (15) the same thing as what was up on the Barco  
 (16) And what I told Mr. Stoll was I would - I would bring him  
 (17) both and show him and he could see because it's just a blowup  
 (18) of an admitted exhibit. And to the extent - to the extent  
 (19) that there's an objection no objection is being made here to  
 (20) the underlying chart as it was admitted because as Your Honor  
 (21) will recall that was the subject of considerable discussion  
 (22) and rulings when the evidence closed so that's in. Just a  
 (23) question of blowing it up  
 (24) THE COURT First are you moving to get the small  
 (25) copy out of evidence?

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(1) objection  
 (2) THE COURT Your record's clear. You objected to it  
 (3) I admitted it and now you've gotten this in order to more  
 (4) fully explain what was said  
 (5) MR STOLL Your Honor there's another exhibit I got  
 (6) last night from Mr. Oppenheimer -  
 (7) THE COURT Another exhibit one that has -  
 (8) MR STOLL Let me explain just a minute  
 (9) This was an exhibit that was admitted it was a part of a  
 (10) page. It was admitted on Wednesday last day of trial. It's  
 (11) DX16362. And it is a - an assessed value it was part of a  
 (12) page an assessed value graph. When I looked at - when I  
 (13) heard - this came in so called surprise exhibit at the end  
 (14) It has no scale on it and the problem I have - if I can just  
 (15) show the Court I brought my little scale with me - is that  
 (16) well you can eyeball this and see it but if you take the  
 (17) distance between the floor of this there's no scale on the  
 (18) side and this thing here and you take - they say this goes  
 (19) up 24 73 percent 25 percent - the distance between this line  
 (20) and this line makes it look like this  
 (21) It's a very misleading exhibit and so we object to this  
 (22) exhibit  
 (23) THE COURT Wait a minute is this exhibit in the  
 (24) record?  
 (25) MR OPPENHEIMER This exhibit had - this exhibit is

(1) MR STOLL Small copy?  
 (2) THE COURT Yeah the copy that was admitted  
 (3) MR STOLL Yes Your Honor  
 (4) THE COURT The motion is denied  
 (5) Now there's a secondary issue here and that is does the  
 (6) little exhibit somehow change the proportions and make it  
 (7) somehow misleading?  
 (8) MR OPPENHEIMER Right and we're -  
 (9) THE COURT Your contention is no it doesn't right  
 (10) MR OPPENHEIMER Correct  
 (11) THE COURT And to me the exhibit that's in the  
 (12) record is the exhibit that's going to go to the jury room. The  
 (13) big one will not go into the jury room  
 (14) MR OPPENHEIMER Your Honor what we did was to told  
 (15) over an exhibit. It wasn't even - Your Honor recalls the top  
 (16) part by stipulation we weren't going to get into it with the  
 (17) witness so we folded over an exhibit and we have not  
 (18) previously had a rule that you couldn't - well actually all  
 (19) Your Honor is saying is that it won't go in with the jury  
 (20) there's no restriction on our ability to blow it up and show it  
 (21) to the jury in closing argument  
 (22) THE COURT No that's exactly right  
 (23) MR OPPENHEIMER That will be fine  
 (24) THE COURT If in fact folding it over makes it  
 (25) somehow not pleasing to the eye you're welcome to create the

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1) same exhibit on a normal page size  
 MR OPPENHEIMER In which case Mr Stoll is now  
 holding the small version of that  
 MR STOLL Your Honor I m not - my point I don t  
 want to misstate this  
 I don t know I haven t compared - they have the only -  
 there s only one copy that exists of the fold over copy I  
 never got my own copy My objection because I never got a  
 copy before that my objection my motion was that if -  
 assuming this is a copy of the fold over edition without a  
 scale on the side and just cancelling it here it is - you  
 know when I had the time to look at the thing the next copy I  
 got looked like this which was clearly wrong I mean  
 Mr Oppenheimer -  
 THE COURT Counsel what I m trying to tell you in no  
 uncertain terms is I made the ruling it s in evidence I m  
 not taking it out  
 MR STOLL Your Honor the next matter is I have an  
 Exhibit 1041 - 1040 I m sorry I don t have the original of  
 it - it s simply our KIB land damage board has a list of -  
 can I just approach the bench show you what it shows?  
 THE COURT Sure  
 MR STOLL It has items 1 through 13 parcels 1  
 through 13 and this is - this is what it looks like except  
 it in color The thing it is in color it does not have

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THE COURT The answer is provide them with the copy  
 as you want it  
 MR STOLL I gave it to them yesterday Your Honor  
 THE COURT You did?  
 MR STOLL Yes I did  
 THE COURT All right so you ve done that  
 MR STOLL Yeah  
 THE COURT I don t hear any specific objections  
 MR OPPENHEIMER I would have a request though I  
 would like to be able to have the citations and I m sure they  
 can give me a copy of just which pages they are using so we  
 can  
 check to make sure it s not being referred to something  
 that s -  
 THE COURT That s a different -  
 MR OPPENHEIMER Right that it s accurate  
 THE COURT All you want to do is check the accuracy  
 of the new references  
 MR OPPENHEIMER Right  
 THE COURT Given that I m assuming you can do that  
 easily and I ll allow the change  
 MR STOLL Thank you Your Honor  
 THE COURT If there s a problem counsel when you  
 finally resolve this issue you have to let me know  
 MR OPPENHEIMER Understood  
 MR STOLL For the record we ll call this 1041A

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the description of what the parcel is it just has - just has  
 a number here It s just through our inadvertence What I d  
 like to do is add the name of the parcel after where it says  
 the number  
 THE COURT Counsel?  
 MR OPPENHEIMER Your Honor my only objection is  
 that we have adopted the following practice where people  
 started annotating back to other evidence  
 THE COURT What s the prejudice?  
 MR OPPENHEIMER Pardon me?  
 THE COURT What s the prejudice?  
 MR OPPENHEIMER Well I guess what I - what I would  
 like to look at our tables and see if we measure the same  
 thing By Your Honor s expression I take it that if we re to  
 do that we should certainly do it promptly  
 THE COURT No I just envision this process by which  
 you re hanging your exhibit and you think that one - one  
 thing justifies what I have had other things and I  
 certainly don t want to see you here at 12 00 tonight to  
 discuss these things  
 MR OPPENHEIMER I understand Your Honor and that  
 one of the reasons why I had suggested to Mr Stoll that we  
 shouldn t be changing them but I can tell the Court that I m  
 not presently aware of any exhibits that we would annotate so  
 it s probably a non issue

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THE COURT All right  
 THE COURT Was the original 1041?  
 MR STOLL Yes Your Honor  
 THE COURT So you want 1041A to be substituted  
 MR STOLL I don t care whatever s the simplest for  
 the Court Maybe we can call this 1041 doesn t make any  
 difference to me  
 THE COURT 1041 will be the new exhibit with the new  
 parcel names on it  
 MR STOLL That s fine Your Honor  
 THE COURT And it s already admitted  
 (Exhibit 1041 amended)  
 MR STOLL Your Honor the last two items one is  
 simply a - we need a ruling on a question is there s an  
 Exhibit 915 which was the Emergency Service Council minutes  
 Mr Sulby testified about having the daily Emergency Service  
 Council meetings and in the record these were offered at the  
 conclusion of Mr Sulby - or maybe it was during I can t  
 remember testimony - and that s on Page 4384 I offered  
 Exhibit 915 I got the transcript right here And the  
 following day - the following day at the conclusion of his  
 testimony there was a number of exhibits that were admitted  
 including according to the transcript was 915 These are the  
 minutes  
 THE COURT Okay

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(1) MR STOLL Now the issue arises that Mr Clough has  
 (2) a recollection and I have to say that I have a similar  
 (3) recollection but there is nowhere in the record that we could  
 (4) find anyhow that it is - and the receipt of this was page  
 (5) 4599 Do you have the transcript there?  
 (6) THE COURT No  
 (7) MR STOLL Can I just -  
 (8) THE COURT Yes  
 (9) MR STOLL Here is where it is offered and the second  
 (10) tab is where it is received  
 (11) MR CLOUGH Can you show me where it was offered?  
 (12) THE COURT Page 4384 counsel  
 (13) MR CLOUGH Where did you say it was received?  
 (14) MR STOLL 4899 - excuse me 4599  
 (15) THE COURT What do you think this shows?  
 (16) MR STOLL Well it shows that it was offered and  
 (17) then the following day it was received  
 (18) THE COURT The following day?  
 (19) MR STOLL Well that is on 4599 That is the second  
 (20) tab there  
 (21) THE COURT I got you okay  
 (22) MR STOLL There is a discussion about some exhibits  
 (23) and one of which is the minutes This is the conclusion of  
 (24) Mr Selby's testimony  
 (25) THE COURT What are the books and - the book and the

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(1) You want to argue Mr Clough  
 (2) MR CLOUGH I merely wanted to state I thought that  
 (3) was the best argument I offered in the course of the case  
 (4) MR STOLL Okay moving ahead I have one last  
 (5) matter  
 (6) THE COURT Please I've got so much paper - these  
 (7) are yours  
 (8) MR CLOUGH I came over for that -  
 (9) MR STOLL You came over for that argument  
 (10) THE COURT What a useless trip  
 (11) MR CLOUGH Your Honor I got more billing work done  
 (12) today than I have in three months  
 (13) THE COURT It - it was admitted erroneously I'm  
 (14) taking it out  
 (15) MR STOLL Your Honor the last matter is there is a  
 (16) DX15487 which our paralegal who is in charge of all exhibits  
 (17) tells me - told me on Saturday was I was supposed to review -  
 (18) I mean it was one of these that was admitted and I was  
 (19) supposed to review and frankly I completely forgot all about  
 (20) it never did review it I - and then Saturday she told me  
 (21) about it so I did review it It deals with Ouzinkie monitoring  
 (22) forms and respectfully since Ouzinkie is out of the case  
 (23) they're this thick I ask that they get - not be in  
 (24) THE COURT Anybody know anything about this on the  
 (25) defense side?

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(1) minutes?  
 (2) MR STOLL The books are the famous four book issue  
 (3) The minutes are the 915  
 (4) THE COURT Okay I got you I've read it  
 (5) MR STOLL Now the issue is Judge Mr Clough  
 (6) recalls - and I think his recollection is - it is my  
 (7) recollection also - there was some discussion which I never  
 (8) could find in the transcript that we were going to try to see  
 (9) if there was some ground where we could agree on which  
 (10) minutes  
 (11) were -  
 (12) THE COURT I kind of remember that  
 (13) MR STOLL - were acceptable and I don't question  
 (14) that We never got together about it Okay we never - it  
 (15) never occurred I mean we got off on other things and it  
 (16) never happened We would like to offer the exhibit and he  
 (17) objects to it  
 (18) THE COURT Which exhibit?  
 (19) MR STOLL 915 which is the minutes  
 (20) THE COURT Even though I erroneously admitted it once  
 (21) before  
 (22) MR STOLL I'm not sure you erroneously admitted it  
 (23) You admitted it that is the issue and that will be the end of  
 (24) it  
 (25) THE COURT Erroneously admitted it It is not  
 (26) admitted

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(1) MR CLOUGH Yes Your Honor that is me Again I  
 (2) didn't know it was coming up but I'm very glad I'm here We'd  
 (3) say that they are still relevant to still go in The purpose  
 (4) for these was that they indicate the oiling discovered on the  
 (5) properties not just purely on the City of Ouzinkie but the  
 (6) areas around the City of Ouzinkie during the winter monitoring  
 (7) program '89 to '90 what they show - which is why we  
 (8) cross examined - it is virtually nothing there That goes to  
 (9) general oiling around there  
 (10) THE COURT General oiling in the Kudlak area right  
 (11) MR CLOUGH They go area by area and they check off  
 (12) no oil no oil no oil  
 (13) MR STOLL Well they go to four - they go to I  
 (14) can't remember three or four monitoring sites hundred yard  
 (15) monitoring sites specifically on Ouzinkie They're not the  
 (16) general - I don't agree with that You can see them they go  
 (17) strictly to Ouzinkie Every one of them is the same four sites  
 (18) on different times in Ouzinkie  
 (19) THE COURT Thanks They're in They're in the  
 (20) record right now I'm not taking them out  
 (21) MR STOLL That's all Your Honor  
 (22) MR OPPENHEIMER The CFR  
 (23) THE COURT Good can I see it?  
 (24) MR OPPENHEIMER Yes It's a well thumbbed part of  
 (25) the CFR The pages are coming loose

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1) THE COURT I see it  
 2) MR OPPENHEIMER One day I'm going to learn how to  
 3) use the index  
 4) MR STOLL Your Honor may I be excused now?  
 5) THE COURT If you're excused who do I have to hammer  
 6) on if I make a decision?  
 7) MR STOLL That's why I want to leave  
 8) THE COURT Yes you can be excused  
 9) MR STOLL Thank you  
 10) THE COURT Well I could see why you didn't copy  
 11) 218 It just doesn't seem to resolve any questions that I  
 12) might be resolving  
 13) MR OPPENHEIMER What we would propose on that second  
 14) sentence Your Honor and I'll just - I'll show it to you in  
 15) context it's the same language adds previously added it would  
 16) say except with the content or approval of the federal  
 17) government and it would I think - that symmetry I think  
 18) solves the problem  
 19) THE COURT Yeah I think it probably does  
 20) THE COURT Have you looked at this Mr Fortier?  
 21) MR FORTIER I have not Your Honor  
 22) THE COURT Just look at it I'm more than inclined  
 23) to give it I'm - I've decided to give it  
 24) MR FORTIER Well then Your Honor if I could be  
 25) heard a bit -

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1) THE COURT Uh huh  
 2) MR FORTIER It seems to me it is of the utmost  
 3) importance then to go back to the paragraph that follows that  
 4) and to discuss at least the consent decree between the  
 5) governments and the Native corporations on the one hand and  
 6) Exxon on - and the governments on the other because both of  
 7) those consent decrees had to do with the right of the Native  
 8) corporations to use and make claims for - or to make claims  
 9) for the lands that had been selected but not yet conveyed And  
 10) also specifically referenced archaeological sites protection  
 11) preservation and so on as a sort of use It's a part of  
 12) those - part of those agreements  
 13) So if you add this part it seems to me that it is  
 14) necessary to put the whole thing in context to also reinsert  
 15) that paragraph and perhaps you know based upon Your  
 16) Honor's  
 17) not wanting to use the term settlement agreement why not  
 18) consent decree? That's what it was called  
 19) THE COURT I've already resolved this question  
 20) counsel I'm going to use the language I said I was going to  
 21) use Maybe unsatisfactory to you because you don't get  
 22) everything you want but it's not incorrect That's the thing  
 23) I'm concerned about  
 24) MR FORTIER Your Honor if I could be heard just a  
 25) little bit more  
 26) Kind of is incorrect in a way I mean because we're

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1) leaving out the fact that any of the uses that the government  
 2) allows on these lands has to be put into an escrow account for  
 3) the Native corporations they don't get the money The Native  
 4) corporations get it when the land is conveyed It's kind of an  
 5) equitable title - well it is an equitable title It's not  
 6) the government enjoying those uses it's the Native  
 7) corporations that do That's one issue  
 8) THE COURT Wait a minute does that rewrite your  
 9) argument made at some point in this case you inherited all the  
 10) federal government's claims for loss of use?  
 11) MR FORTIER Yeah  
 12) THE COURT That's out counsel I already said that  
 13) was out  
 14) MR FORTIER Well Your Honor -  
 15) THE COURT You don't -  
 16) MR FORTIER And I don't imagine you want any more  
 17) argument  
 18) THE COURT No I've already made the decision  
 19) counsel and I'm absolutely convinced just as I am about  
 20) Robbins Drydock that I'm right on it  
 21) MR OPPENHEIMER Your Honor the only other issue -  
 22) MR FORTIER Your Honor if I could - I'm sorry one  
 23) more issue Your Honor  
 24) There may be an ambiguity between - well there's some  
 25) question I guess arises in the second paragraph on the  
 second

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1) page the one that begins in 1990 after the oil spill it  
 2) talks about the law What I would request is a last sentence  
 3) be added to that which simply states the requirement - this  
 4) requirement - in other words the requirement of a notice of  
 5) irrevocable election has been met as I previously advised you  
 6) because that ties into a jury instruction which if I could  
 7) I'll show to the Court  
 8) THE COURT What does it say now?  
 9) MR FORTIER I'm sorry let me show you what I'm  
 10) talking about Your Honor  
 11) THE COURT So you want it to simply say this  
 12) requirement has been met as I have previously advised  
 13) MR FORTIER Yes that's correct  
 14) THE COURT Do you understand the question?  
 15) MR OPPENHEIMER Your Honor I'm not sure what you're  
 16) reading from I believe I understand the question The only  
 17) thing I don't know - I know Mr Diamond and Mr Petumenos  
 18) had  
 19) a conversation about the status of these irrevocable elections  
 20) results of which I know we withdrew - we withdrew a motion  
 21) which had been predicated on that So there may well not be a  
 22) problem here but if I could have an opportunity to check with  
 23) Mr Diamond -  
 24) THE COURT Here's what I'll do I'm going to give  
 25) the additional language unless you bring it to my attention  
 26) MR OPPENHEIMER Just so we're clear the additional

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(1) language is what? Where does it go  
 (2) THE COURT On page 2 the part of the instruction  
 (3) the paragraph beginning in 1990 at the end it now stops at the  
 (4) phrase March 23 1989  
 (5) MR OPPENHEIMER Yes  
 (6) THE COURT And there s an additional sentence that  
 (7) would go right after that This requirement has been met as I  
 (8) previously advised you period  
 (9) MR OPPENHEIMER I understood Your Honor  
 (10) THE COURT So that s the way the final submission  
 (11) will come to me  
 (12) Was there anything else?  
 (13) MR FORTIER Nothing further on that score Your  
 (14) Honor  
 (15) THE COURT Thanks  
 (16) THE COURT So did you have something  
 (17) Mr Oppenheimer?  
 (18) MR OPPENHEIMER Yes I m sorry Just very quickly  
 (19) on the instructions and I m not sure the degree of which  
 (20) there s an issue here but there s a difference in the ordering  
 (21) of the instructions  
 (22) What I would propose I - I m not sure whether we have a  
 (23) serious problem but perhaps Mr McCallion and I can talk  
 (24) about  
 (25) this  
 (26) THE COURT You mean the order in which they re placed

(1) it so that - so that we know what submission it was and then  
 (2) I will renumber them at the top consecutively and so the jury  
 (3) won t be confused  
 (4) MR OPPENHEIMER So we will endeavor to bring back an  
 (5) agreed upon -  
 (6) THE COURT So I want the clean copy I want the clean  
 (7) verdict form and I want the cover sheet which is merely the  
 (8) caption of the case - if you don t - if you don t know the  
 (9) way I deal with cover sheets we can do that okay? But I do  
 (10) want all of the instructions in the order that they re going to  
 (11) be given so if you can t - and I - I find it hard to believe  
 (12) you won t be able to do that  
 (13) MR OPPENHEIMER I do also Your Honor  
 (14) THE COURT Then at the same time we ll talk about  
 (15) the superseding cause instruction and that ll be it I think  
 (16) that s it  
 (17) MR OPPENHEIMER That s it Now I say that on that  
 (18) we do have three quick exhibit issues  
 (19) THE COURT Yeah but I ll deal with those in just a  
 (20) minute So what I want to do is set a time this afternoon for  
 (21) final - for you to submit the final copy to me and for us to  
 (22) determine what the superseding cause instruction I m going to  
 (23) give  
 (24) And now with all of that said -  
 (25) MR OPPENHEIMER Your Honor the courtroom I guess

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(1) in the packet?  
 (2) MR OPPENHEIMER Correct or Your Honor may have -  
 (3) THE COURT There was some - I saw some difficulty  
 (4) with some of the pages but I didn t know how much you saw  
 (5) Causation instructions for instance they re separate  
 (6) MR OPPENHEIMER There are some that are intermixed  
 (7) and I guess what I would like to do is try to work that out  
 (8) without taking the Court s time  
 (9) THE COURT Well yeah In fact here s what I d  
 (10) suggest You can resolve that problem at the same time you  
 (11) submit the clean - the really clean final copy of the  
 (12) instructions just as I ve ordered that they be given That -  
 (13) that really should be a joint submission I shouldn t get two  
 (14) separate clean copies because then I ll have to compare them  
 (15) What I should do - I mean right now the only question that  
 (16) remains to be resolved if I m not mistaken unless you bring  
 (17) something else up after you ve reviewed things that I ve  
 (18) admitted is the superseding cause instruction  
 (19) MR OPPENHEIMER Page 39 of plaintiffs submission  
 (20) THE COURT Right So I m going to want to set a time  
 (21) this afternoon where we ultimately resolve that question and  
 (22) I ll do that At the same time I want the clean copy and I  
 (23) want you - the problem of course is there could be  
 (24) numbering but numbering can be handled easily All you have  
 (25) to do is put the page number down at the bottom with an A after

(1) is going to be taken up with wild theater  
 (2) THE COURT Right At two correct?  
 (3) MR OPPENHEIMER Correct  
 (4) THE COURT Well I should get a preview shouldn t  
 (5) I?  
 (6) MR OPPENHEIMER You might want to see the finished  
 (7) product This will be like watching it in Boston as opposed to  
 (8) New York  
 (9) THE COURT I have a document up here called  
 (10) Plaintiffs Rejected Jury Instruction packet And I have a  
 (11) packet up here called Jury Instruction Verdict Forms Used Over  
 (12) Defendants Objections I haven t looked at the second  
 (13) document but Plaintiffs Rejected Jury Instruction packet will  
 (14) be Courts Exhibit 39 Defendants Jury Instruction Verdict Form  
 (15) Used Over Defendants Objection will read Exhibit 40  
 (16) (Exhibits Court 39 and 40 identified)  
 (17) MR OPPENHEIMER I m sorry Exhibit 40 was  
 (18) Defendants -  
 (19) THE COURT 40 is yours  
 (20) MR OPPENHEIMER Defendants Rejected  
 (21) THE COURT Yes And plaintiffs in theirs as I ve  
 (22) already looked at theirs they included as Exhibit B your  
 (23) instruction about mean high tide that I gave over their  
 (24) objection That was their Exhibit B and their Exhibit A was  
 (25) all the instructions that they proposed that I re fused to give



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(1) they re still objecting to  
 (2) Now on the plaintiffs side this is the entire record of  
 (3) what you objected to supposed to be So if it s incomplete  
 (4) you better get it in the record because otherwise you ve  
 (5) waived your objections  
 (6) MR OPPENHEIMER Your Honor does that - just by way  
 (7) of inquiry you mentioned Court s 40 was the Defendants  
 (8) Rejected and I think we also gave and this will also be true  
 (9) for the plaintiffs we also gave you instructions that were  
 (10) being used over our objection  
 (11) THE COURT Yes and that s - that s what I m  
 (12) saying They ve done the very same thing There s one  
 (13) instruction here that is your proposed that I m giving over  
 (14) their objection The rest of them are all their instructions  
 (15) that I refused to give and I m assuming the same format goes  
 (16) for yours  
 (17) MR OPPENHEIMER Actually it didn t We gave you two  
 (18) separate submissions then I m glad you pointed that out We  
 (19) probably need an exhibit in addition to 40  
 (20) THE COURT I ll make it Court s Exhibit 40  
 (21) Defendants Proposed But Objected Jury Instruction Forms so  
 (22) there s over objections and rejected  
 (23) MR OPPENHEIMER And they re both the Court s 40  
 (24) THE COURT They re both Court s 40 right  
 (25) MR FORTIER So point of clarification if I could

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(1) Your Honor with regard to the OPA instruction  
 (2) There were certain portions of that that you struck I know  
 (3) that s part -  
 (4) THE COURT You need to include that in 39 so it s  
 (5) clear what you proposed and how I edited it  
 (6) MR FORTIER Okay  
 (7) THE COURT All right So now -  
 (8) MR OPPENHEIMER So I guess Your Honor we will  
 (9) need - you want us to add to the Court s 40 because you ll  
 (10) be -  
 (11) THE COURT You ve got to look at 40  
 (12) MR OPPENHEIMER I will That s what I ll do  
 (13) THE COURT Now I - I want to get some lunch And I  
 (14) don t know that we ll - well first maybe I ought to ask you  
 (15) what time do you want to come back here and finalize all these  
 (16) things It s going to take some time  
 (17) MR OPPENHEIMER It is Your Honor because we have  
 (18) some paperwork we ll want to get to you that s clean  
 (19) THE COURT Can I we just resume in Courtroom k?  
 (20) THE CLERK We re going to be in k taking exhibits  
 (21) THE COURT We ll get another courtroom You come up  
 (22) here well tell you what the courtroom is and this courtroom  
 (23) will be reserved for your people the defendants who will be  
 (24) preparing for final argument from two to five  
 (25) MR OPPENHEIMER So we ll just come back at what

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(1) time?  
 (2) THE COURT We ll just give you a courtroom We re  
 (3) going to be using k for exhibits but I ll get a courtroom on  
 (4) this floor  
 (5) MR OPPENHEIMER What time?  
 (6) THE COURT What time do you want? 3 30 how s 3 30?  
 (7) MR OPPENHEIMER 3 30  
 (8) THE COURT Now at 3 30 I don t want to hear a lot  
 (9) of new arguments What I want us to do is I want to receive a  
 (10) final packet and I want to have it done so that it s - if I  
 (11) were to instruct at 3 45 I would do it with the instructions  
 (12) you give me  
 (13) MR OPPENHEIMER Understood Your Honor Real quick  
 (14) exhibits we have - and I can read the numbers but all of us  
 (15) on both sides have been using these wonderful maps Your  
 (16) Honor  
 (17) of the parcels and it turns out we need to get these admitted  
 (18) I ve got the numbers here  
 (19) It s these - I think this should be completely  
 (20) uncontroversial They are DX13197 13198 13199 13200  
 (21) 15457  
 (22) 15458  
 (23) (Exhibits DX13197 13198 13199 13200 15457 15458  
 (24) offered)  
 (25) MR FORTIER Your Honor if I could have just a  
 (26) little bit of time maybe at 3 30 I can let you know?  
 (27) THE COURT All right But let s do it this way

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(1) I ll admit them all You can tell me if I should take them  
 (2) out  
 (3) MR OPPENHEIMER We have to turn over exhibits at  
 (4) 2 00 Your Honor these are the boards - do you really have an  
 (5) objection?  
 (6) MR FORTIER I have to take another look I can t  
 (7) think of any objection  
 (8) THE COURT So the issue is do I admit them?  
 (9) MR OPPENHEIMER Yes Your Honor  
 (10) THE COURT I admit them subject to somebody telling  
 (11) me that one or more of them should come out at 3 30  
 (12) (Exhibits DX13197 13198 13199 13200 15457 15458  
 (13) received)  
 (14) MR OPPENHEIMER Your Honor then Plaintiffs 1366A  
 (15) B and C are the backup documents for the archaeological  
 (16) charts plaintiffs archaeological charts The only problem  
 (17) here apparently when the exchange of information was going  
 (18) forward it turns out that parts of the backup material have  
 (19) been highlighted and they were not highlighted previously for  
 (20) the jury s view so that I guess what s happened is that the  
 (21) back up documentation if I have this correctly has been  
 (22) highlighted on the copy That wouldn t go to the jury hasn t  
 (23) previously been highlighted or subject to testimony about  
 (24) highlighted  
 (25) THE COURT I seem to remember their being highlighted

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(1) in all that discussion  
 (2) MR OPPENHEIMER I have to rely upon Mr Diamond  
 (3) THE COURT It should not be highlighted  
 (4) MR OPPENHEIMER Should not be PX1366A B and C  
 (5) THE COURT There s no reason - well who highlighted  
 (6) it?  
 (7) MR FORTIER Your Honor it was highlighted  
 (8) THE COURT I remember it being highlighted but if  
 (9) you can do it without any substantial difficulty I don t think  
 (10) it should be highlighted  
 (11) MR FORTIER Your Honor I don t know how we can  
 (12) between now and 2 00 this afternoon I think it presents a  
 (13) grave difficulty We did give the defendants a complete set  
 (14) with highlighted as well and there wasn t an objection  
 (15) MR OPPENHEIMER I m at a loss Your Honor because  
 (16) Mr Diamond said they were not highlighted when they were  
 used  
 (17) in court I don t have an independent recollection  
 (18) THE COURT I kind of remember when I first saw them  
 (19) they were highlighted but I might be wrong  
 (20) MR OPPENHEIMER I wish I could be more helpful in  
 (21) this but I think if - perhaps we can - if they weren t it  
 (22) seems to me -  
 (23) THE COURT They were highlighted by you - if I  
 (24) remember correctly they were highlighted by you and it was in  
 (25) order to show me -

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(1) MR OPPENHEIMER Yes that I believe  
 (2) THE COURT What you want to - to have attached  
 (3) MR OPPENHEIMER Well I do recall that during one of  
 (4) the arguments and showing some of the things concerned  
 about  
 (5) Mr Diamond did have a highlighted set he was working on but I  
 (6) don t think that was published to the jury  
 (7) THE COURT Well first I don t know how difficult  
 (8) this is going to be but if you want them unhighlighted you  
 (9) have to provide the unhighlighted copies  
 (10) MR OPPENHEIMER We ll try to do that And then  
 (11) there are two videos PX1287A and B which apparently are  
 being  
 (12) proposed to go in with audio and there s never been an audio  
 (13) review of those by us so -  
 (14) THE COURT They weren t played the audio was not  
 (15) played  
 (16) MR OPPENHEIMER That s my understanding  
 (17) THE COURT They can t go in - I already said this  
 (18) they can t go in with audio if in fact the audio was not played  
 (19) in court Unless I gave some specific permission that was -  
 (20) that indicated that you could just play the video and not the  
 (21) audio and I d still admit the whole tape  
 (22) MR FORTIER Your Honor my understanding - I may be  
 (23) wrong it was my understanding 1287A and B were - were  
 videos  
 (24) of Exxon archaeologists taken by Exxon so they constitute  
 (25) admissions I thought we talked about this several days ago

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(1) THE COURT That s not the question counsel The  
 (2) question is if you didn t play the audio during the  
 (3) presentation of the case why should the audio now go into the  
 (4) jury room? And there s - there may be a couple of answers to  
 (5) that question One is if you reserve the right to do that so  
 (6) it may - you gave fair notice of the issue I suppose and two  
 (7) is if the other side agreed But I don t hear that that s what  
 (8) happened  
 (9) MR FORTIER There were two  
 (10) THE COURT Two what?  
 (11) MR FORTIER Two videos One was played without  
 (12) sound and if there s sound on it which would surprise me  
 (13) we ll take it off There is sound?  
 (14) THE COURT All right  
 (15) MR FORTIER The other one was played with the  
 (16) admissions to the jury in other words it was -  
 (17) THE COURT Anything that was - well wait a minute  
 (18) If it was played to the jury then the question becomes since  
 (19) it s in the record do I have to send the sound exhibit in I  
 (20) don t even know what tape you re talking about What is it?  
 (21) MR FORTIER It s one of Crafton Island and going to  
 (22) a place called Kake Cove where there was - it s an  
 (23) archaeological tape  
 (24) THE COURT So the commentary on it identifies sites  
 (25) MR FORTIER Identified the site identified what the

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(1) archaeologists were seeing and said this place was cleaned  
 (2) before it was surveyed this place looks like it s got some  
 (3) potholes in it recent potholes  
 (4) THE COURT I kind of remember that  
 (5) MR OPPENHEIMER Your Honor again one of these A  
 (6) or B apparently was not played Mr Fortier believes the other  
 (7) one was but I don t - I don t recall it  
 (8) THE COURT I vaguely - you know there s been a lot  
 (9) of tapes and everything To me if it s a commentary that  
 (10) identifies the sites the audio can be valuable and if it wa  
 (11) played to the jury there s no reason not to - not to send it  
 (12) in  
 (13) MR OPPENHEIMER I tell you what why don t we when  
 (14) we come back at 3 30 I ll check this tape  
 (15) THE COURT Since the other one I think it s conceded  
 (16) was not played to the jury the audio will not be in  
 (17) MR OPPENHEIMER Your Honor I think that s it  
 (18) THE COURT I hope so  
 (19) Been a pleasure all Here s your CFR  
 (20) THE COURT Thank you very much I ll see you at 3 30  
 (21) somewhere  
 (22) THE CLERK Off record  
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(1) STATE OF ALASKA )  
 2) Reporter's Certificate  
 (1) DISTRICT OF ALASKA )  
 (6) I Joy S. Brauer RPR a Registered Professional  
 1) Reporter and Notary Public  
 (1) DO HERBY CERTIFY  
 (7) That the foregoing transcript contains a true and  
 (8) 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  
 (1) JOY S. BRAUER RPR  
 Notary Public for Alaska  
 (1) My Commission Expires 5/10/97

Look-See Concordance Report

UNIQUE WORDS 1,586
TOTAL OCCURRENCES 6,534
NOISE WORDS 385
TOTAL WORDS IN FILE 20,744

SINGLE FILE CONCORDANCE

CASE SENSITIVE

NOISE WORD LIST(S)
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 12 13 13 20 21 15 22 22  
 28 1  
 venturing [1] 15 12  
 verbatim [2] 25 20 39 12  
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 48 23 49 15 71 7 73 3  
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 92 20  
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Wait [3] 5 7 70 23 83 8  
 wait [5] 5 7 7 15 11 1 15 14  
 95 17  
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 waived [1] 89 5  
 walk [1] 13 8  
 walked [1] 24 8  
 wall sized [1] 45 6  
 wanted [5] 3 11 23 22 30 4  
 61 2 79 2  
 wanting [1] 82 16  
 wants [4] 5 20 23 10 47 16  
 55 5  
 waste [1] 20 14  
 watching [1] 88 7  
 We'd [1] 80 2  
 we'd [5] 35 12 63 21 23  
 64 14 15  
 We'll [3] 90 21 91 2 94 10  
 we'll [12] 7 15 47 2 56 18  
 62 3 66 15 75 25 87 14  
 90 14 18 22 25 95 13  
 We're [6] 3 7 13 12 22 12  
 33 7 90 20 91 2  
 we're [27] 9 22 11 9 13 20  
 19 21 24 21 14 26 11 21  
 39 5 7 8 40 9 43 8 46 9  
 50 9 53 2 56 21 60 8 64 22  
 68 15 71 6 72 8 74 14  
 82 25 84 25  
 We've [2] 14 22 43 16  
 we've [8] 26 25 30 6 7 12  
 38 1 45 20 54 14 60 8  
 wearing [1] 10 16  
 Wednesday [1] 70 10  
 week [1] 20 12  
 welcome [2] 30 16 72 25  
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 well-thumbed [1] 80 24  
 weren't [4] 22 1 72 16 93 21  
 94 14  
 whatnot [1] 20 10  
 who've [1] 10 21  
 wholly [1] 8 15  
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 witness [4] 41 13 45 6  
 71 12 72 17  
 witnesses [12] 15 5 40 24  
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 43 6 54 10 55 22  
 won't [6] 30 14 65 12 14  
 72 19 87 3 12  
 wonderful [1] 91 15  
 word [6] 31 14 32 5 20 33 4  
 53 5 55 13  
 words [6] 30 11 61 17 64 11  
 69 1 84 4 95 16  
 work [3] 46 5 79 11 86 7

working [2] 64 5 94 3  
 world [2] 53 25 61 21  
 worried [2] 9 22 46 11  
 worries [1] 25 16  
 worse [2] 24 13 38 4  
 Wouldn't [1] 28 16  
 wouldn't [5] 35 23 60 15  
 64 13 25 92 22  
 written [5] 7 9 30 8 31 3  
 38 25 58 11  
 wrong [18] 6 2 9 10 10 23  
 15 13 16 16 1 6 8 24 2  
 38 17 39 20 44 11 65 18  
 71 9 73 13 93 19 94 23  
 wrongdoer [1] 18 14  
 wrote [1] 17 21

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Yeah [12] 8 3 28 4 36 4  
 49 17 56 9 66 14 69 3 72 2  
 75 7 81 19 83 11 87 19  
 yeah [1] 86 9  
 years [1] 28 13  
 yesterday [7] 8 16 10 12  
 12 2 64 23 65 4 66 10 75 3  
 York [1] 38 8  
 you'd [1] 18 22  
 you'll [4] 5 8 40 6 45 16  
 90 9  
 You've [4] 27 12 28 4 56 23  
 90 11  
 you've [15] 24 7 29 11 31 4  
 34 14 35 21 37 24 38 21  
 40 5 53 5 54 12 69 25 70 3  
 75 6 86 17 89 4  
 Yours [1] 29 19  
 yours [4] 50 4 79 7 88 19  
 89 16  
 yourself [1] 54 13

## Vol 2 99

(1) IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
 (2) THIRD JUDICIAL DISTRICT  
 (4) In re ) Case No JAN 89 2533 Civ11  
 ) Anchorage Alaska  
 (5) The EXXON VALDEZ ) Monday September 12 1994  
 ) 3 40 P M  
 (6) )  
 (8) VOLUME 2 Pages 99 through 138  
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)  
 (11) Arguments on Jury Instructions (Continued)  
 (12) BEFORE THE HONORABLE BRIAN C SHORTELL  
 Superior Court Judge

## (15) APPEARANCES

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(1) PROCEEDINGS  
 (2) THE CLERK. Please rise This court now resumes in  
 (3) session Please be seated  
 (4) THE COURT Counsel where are we anyway? Do you  
 (5) have the packet?  
 (6) MR OPPENHEIMER Yes we have a package of jury  
 (7) instructions This - the only thing this does not contain is  
 (8) the superseding cause instruction and it s otherwise in the  
 (9) order that I believe everyone has agreed to We have numerous  
 (10) copies Your Honor and we left them unnumbered at the top  
 but  
 (11) the pages are sequentially numbered  
 (12) On the superseding cause instruction Your Honor a couple  
 (13) of things Under -  
 (14) THE COURT By the way do you have a verdict form?  
 (15) MR OPPENHEIMER I thought it was at the back Your  
 (16) Honor, we can have - there s no remaining disagreement about  
 (17) that  
 (18) THE COURT I need it  
 (19) MR OPPENHEIMER Can we get it within the hour?  
 (20) THE COURT No problem  
 (21) MR OPPENHEIMER You may have copies of it  
 (22) MR McCALLION We have a clean set I think  
 (23) MR OPPENHEIMER This is all for Chenega Do you  
 (24) have one for each or - why don t you put together one set  
 (25) Your Honor on the superseding cause instruction two

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(1) observations We have done two - actually Your Honor we ve  
 (2) done four different versions but they re really - it s  
 (3) simpler than that might imply We took Your Honor s advice  
 and  
 (4) went back and looked at the pattern instruction and found it  
 (5) was very workable We also did what we said we would do and  
 (6) researched the law on the burden Interestingly enough under  
 (7) Williford versus L J Carr it appears to us to be the  
 (8) plaintiffs burden  
 (9) THE COURT Interestingly enough there s a California  
 (10) case that says it s the defendants version  
 (11) MR OPPENHEIMER This is Alaskan, Your Honor I  
 (12) haven t had a chance to say that yet  
 (13) THE COURT It must give you great glee to say that  
 (14) MR OPPENHEIMER I have been addressing that argument  
 (15) for two months  
 (16) THE COURT Let me see where -  
 (17) MR OPPENHEIMER I think, Your Honor, the provisions  
 (18) that I would draw your attention to in Williford page 237  
 (19) subsection three starts the superseding cause And under -  
 (20) under the second full paragraph it establishes the part of the  
 (21) standard which is picked up in our instruction and then on  
 (22) page 240 the bottom of the first column the Court observes  
 (23) that plaintiff must establish all other elements of proximate  
 (24) cause including the necessary assertion that the chain of  
 (25) events leading from the alleged negligence to death was not in

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- (1) retrospect highly extraordinary which in the context of the  
 (2) statement page 237 is a reference to superseding cause  
 (3) MR FORTIER Your Honor if I could Mr Petumenos is  
 (4) coming down  
 (5) THE COURT I know he is He s already called I  
 (6) just wanted to come in here and start the -  
 (7) MR FORTIER Okay  
 (8) MR OPPENHEIMER Your Honor what we did just so we  
 (9) could be ready to go however this worked out is that we have  
 (10) generated an instruction which is based on our old instruction  
 (11) with the plaintiffs' burden We have one where it is the  
 (12) defendants' burden though we do not think that s consistent  
 (13) with the case And we then also have done the same thing with  
 (14) the two different burdens using the 3 07 the pattern  
 (15) instruction which would be fine as well We have whatever we  
 (16) decide to do I think -  
 (17) MR PETUMENOS Catch me up Judge I m sorry I m  
 (18) late  
 (19) THE COURT Question number one whose burden is it  
 (20) MR PETUMENOS We ve done some research and we  
 (21) believe the burden is on the defendant  
 (22) THE COURT So far, I ve got a California case that  
 (23) says it is and I ve got an Alaska case that says it isn t  
 (24) MR PETUMENOS That it is not?  
 (25) THE COURT Yes

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- (1) MR PETUMENOS That one we didn t find  
 (2) THE COURT That s Williford versus L J Carr  
 (3) Investments page 240 240 says Plaintiff must establish all  
 (4) elements of proximate cause including the necessary assertion  
 (5) that the chain of events leading from Oaken Keg s alleged  
 (6) negligence to Tomaganuk s death was not in retrospect highly  
 (7) extraordinary see Osborne versus Russell That s what they  
 (8) said  
 (9) MR PETUMENOS The explanation I have for that is  
 (10) that the Restatement is pretty clear that when there are two  
 (11) or more actors involved in a problem that then it becomes an  
 (12) affirmative defense that must be proved by the defendant That  
 (13) is the Restatement Section 440 and we have found - and the  
 (14) Restatement Section 433(b) which I can hand up and that  
 (15) seems  
 (16) to include the situation where you would have two or more  
 (17) actors as in this case which is what the defense is  
 (18) apparently alleging as opposed to whether you have to prove  
 (19) proximate cause and whether the proximate cause as you re  
 (20) asserting is an extraordinary result from the - the act that  
 (21) led to it  
 (22) So I would interpret the case you re talking about as  
 (23) distinguishable as being a proximate cause case wherein the  
 (24) plaintiff has the burden as opposed to where you have  
 (25) different actors where the defendant has the burden And I -  
 (26) if I can hand up the Restatement sections and I have a case

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- (1) called Morrow versus Newman Homes (ph) which merely says  
 that  
 (2) in affirmative defense the defendant bears the burden and I  
 (3) too have some out-of state cases indicating that intervening  
 (4) cause is an affirmative defense - excuse me superseding cause  
 (5) is an affirmative defense And that is a case from 1993 case  
 (6) from Virginia and a 1966 case from California And that s the  
 (7) one that the Court found Sparks versus Bledsoe (ph)?  
 (8) THE COURT No mine's Maupin versus Widling 237  
 (9) California Reporter 521  
 (10) MR PETUMENOS All of these materials suggest when  
 (11) you have two or more actors and the plaintiff has proved  
 (12) proximate cause that that is when the defendant has the  
 burden  
 (13) of proving that the other actors actions are an intervening  
 (14) cause And I think the case that - in Alaska stands for the  
 (15) proposition that you must prove proximate cause as a plaintiff  
 (16) and that's not -  
 (17) THE COURT It might except that it talks about the  
 (18) extraordinary, highly extraordinary chain of events leading  
 (19) from Oaken Keg s alleged negligence to Tomaganuk s death  
 and  
 (20) in retrospect highly extraordinary it seems to me to be - I  
 (21) mean I think it s a dictum not a whole  
 (22) MR PETUMENOS May I confer with counsel?  
 (23) THE COURT Yeah By the way I want to do - I hate  
 (24) to do this, because I know you ve worked very hard on this, but  
 (25) I ve been looking at these cases Matingly and Sharp and

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- (1) frankly I think this is a proximate cause problem I don t  
 (2) think it's a superseding cause problem And here s the  
 (3) reason because the acts of third parties are not - are not  
 (4) claimed in this case that have cut off liability The damage  
 (5) that is asserted is the loss of confidentiality and the need to  
 (6) spend money in order to remediate it That s - that - the  
 (7) question of foreseeability there and being within the risk  
 (8) those seem to me to be the initial proximate cause  
 (9) determinations  
 (10) MR OPPENHEIMER Your Honor there s no damage that  
 (11) flows from the confidentiality Even if you assume  
 (12) responsibility -  
 (13) THE COURT Think of it this way counsel Suppose  
 (14) because there were people flooding onto the land the  
 (15) defendants had decided all of their archaeological sites were  
 (16) in danger and they went out and spent the money It wouldn t  
 (17) be the acts of the third parties that caused the damage it  
 (18) would be the acts of the plaintiffs  
 (19) And that s exactly what they re claiming We ve got to  
 (20) spend this money that s our damage  
 (21) MR OPPENHEIMER Your Honor the reason they re  
 (22) saying We have to spend this money is so vandals don t get to  
 (23) the property Without that risk there is no basis  
 (24) whatsoever  
 (25) THE COURT The damage is the exposure counsel

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(1) MR OPPENHEIMER The damage is exposure to acts which  
 (2) we would not be liable because they would be superseding  
 (3) causes  
 (4) THE COURT I know what your position is but I really  
 (5) would like to take a nice calm look at this I think there s a  
 (6) serious problem with the analysis of this case is if it s a  
 (7) superseding cause case I think it s a proximate cause case  
 (8) MR PETUMENOS I think the Court might be right and I  
 (9) think another way of analyzing that is if the defendants were  
 (10) to be found liable and were to pay the remediation money and  
 (11) there were to be vandalism they would owe not one dollar  
 And  
 (12) that s the flaw in Mr Oppenheimer s logic They are either  
 (13) responsible for the remediation for prevention of damages or  
 (14) they re not a matter of proximate cause and if they are found  
 (15) liable then they re no longer liable for anything that happens  
 (16) thereafter because they have done the remediation of damages  
 (17) which would suggest the entire instruction would go And what  
 (18) the Osborne case actually stood for as I think counsel for  
 (19) Exxon pointed out the error of giving the instruction in the  
 (20) first place when it wasn t a superseding cause problem  
 (21) So the other – the other possibility here is simply not  
 (22) give it and make the matter a proximate cause  
 (23) THE COURT In that connection you know I haven t  
 (24) had the time to do any research This is one of those  
 (25) late breaking but important issues This case out of

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(1) the scope of the risk that is provided I mean I think  
 (2) that s – if you look at Mattingly I think that question is a  
 (3) very serious thing to have to overcome and it would be  
 (4) overcome in the proximate cause determination  
 (5) MR PETUMENOS Just so our position is clear our  
 (6) first position would be to strike the instruction entirely and  
 (7) not give it  
 (8) I have drafted an instruction that would place the burden  
 (9) of proof on the defendants if there is to be a superseding  
 (10) instruction and then of course we have the one as the Court s  
 (11) written then the third possibility but my primary position  
 (12) here would be that the – I would object to the instruction and  
 (13) ask that it be withdrawn  
 (14) MR OPPENHEIMER And our position Your Honor would  
 (15) be that the only basis for harm in this case is the threat of  
 (16) conduct by third parties for whom we re not responsible and  
 (17) that that is the one aspect of foreseeability which we ve never  
 (18) conceded And I – therefore the instruction that should be  
 (19) given is the – either the pattern instruction or the  
 (20) instruction we submitted and we would submit based on the  
 (21) Alaska Supreme Court decision the Williford decision from 89  
 (22) that the burden would be on – on the plaintiffs  
 (23) THE COURT Okay now just let me – let me explain  
 (24) something to you because it seems that I should  
 (25) The way I read Mattingly there are a number of things that

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(1) California holds its error to give the superseding cause  
 (2) instruction in similar circumstances they re not – they re  
 (3) not exactly like this case but – but you might want to read  
 (4) the case and rethink your positions  
 (5) It seems to me that the foreseeability issue and the scope  
 (6) of the risk issue are encompassed in the principle of proximate  
 (7) cause so that the instruction should be the same and the  
 (8) burden s on the plaintiffs  
 (9) MR OPPENHEIMER Your Honor the problem is that  
 (10) there what you re doing is setting the stage for them to be  
 (11) able to argue that if it was foreseeable that there would be a  
 (12) disclosure of the location of these sites that they can  
 (13) recover remediation damages  
 (14) MR PETUMENOS That s the law  
 (15) MR OPPENHEIMER That s not the law I don t  
 (16) believe  
 (17) THE COURT Say I m doing what?  
 (18) MR OPPENHEIMER Where we re headed in this is that  
 (19) they re going to be able to argue that if it was foreseeable  
 (20) that our acts would disclose the location of these sites that  
 (21) they can recover for remediation  
 (22) THE COURT I don t think so because the – because  
 (23) the damages they re claiming \$40 million for remediation  
 (24) under Mattingly I think may very well not be – there s a very  
 (25) serious factual issue as to whether – whether they re within

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(1) have to happen in order for it to be proximate cause Under  
 (2) that case under Mattingly the loss asserted – and the loss  
 (3) asserted here is the expense flowing from the presence of oil  
 (4) spill workers and associated people on the land and the need to  
 (5) remediate archaeological sites The damage is the expense  
 (6) according to the plaintiffs  
 (7) The question under Mattingly would first be are these  
 (8) expenses reasonably to be anticipated by Exxon to be within  
 the  
 (9) risk created by the oil spill That s the – that s the  
 (10) foreseeability issue That would be Mattingly at 361  
 (11) And then I think there s also a question as to whether  
 (12) reasonable persons could conclude that the remediation costs  
 (13) would not have occurred but for the oil spill and the spill  
 (14) was so important in requiring the expenditure of the costs of  
 (15) remediation that reasonable persons would regard the –  
 Exxon s  
 (16) behavior or Exxon s action as a legal cause of the damage  
 (17) these remediation costs and attach responsibility to it All  
 (18) of which has to be proved by the plaintiff  
 (19) MR PETUMENOS Is that an instruction the Court is –  
 (20) THE COURT No I m just telling you that when I read  
 (21) Mattingly and when I read Sharp that s what it appears to me  
 (22) to be a proximate cause problem not a superseding cause  
 (23) problem There is no superseding cause here  
 (24) MR OPPENHEIMER Your Honor the problem I have –  
 (25) Your Honor raises an interesting point I m trying to work



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(1) through this with you  
 (2) I think that what we are doing here is confusing their  
 (3) remedy with the claimed damage Their remedy is the cost of  
 (4) remediation or so they assert and it is a remedy to cure a  
 (5) situation that they argue we have created where the  
 (6) archaeological resources are vulnerable to future vandalism  
 (7) which we claim - of course we believe is a matter of law But  
 (8) we certainly believe it is a factual matter should be  
 (9) determined to be not our responsibility and therefore the  
 (10) costs of remediation which have not yet been incurred and  
 (11) therefore have not - they have no more occurred than the acts  
 (12) of vandalism in the future Neither should occur  
 (13) We don't not believe they will occur but that's not the  
 (14) issue Even if they do occur we do not believe they are  
 (15) responsible - we are responsible for them in a legal sense  
 (16) Therefore we are - to protect against those acts by the  
 (17) Native corporations would be an act of volunteerism It's not  
 (18) an act we believe should be undertaken It's not a cost for  
 (19) which we should be liable It is a remedy not a damage The  
 (20) damage is the - is the exposure of these resources allegedly  
 (21) to future vandalism and if we are not responsible for the  
 (22) future vandalism as a matter of law or because it's determined  
 (23) to be a superseding cause we can't be responsible for the cost  
 (24) of remediation  
 (25) That would be the argument and in that sense it seems to

(1) there's no harm here  
 (2) THE COURT There's no damage  
 (3) MR OPPENHEIMER And there would be no damage  
 (4) correct  
 (5) THE COURT So there's no damage to have been  
 (6) proximate cause  
 (7) MR OPPENHEIMER That's right But the damage Your  
 (8) Honor, has - only arises if we are responsible for paying for  
 (9) the steps that are alleged to be necessary to protect against  
 (10) future harm that we say - or future act excuse me which we  
 (11) say we're not responsible for The one thing that gets lost in  
 (12) just treating it as a general proximate cause issue and a  
 (13) general foreseeability issue is that the jury receives no  
 (14) instruction on this all-important issue of the - of the acts  
 (15) of future vandals and I thought where we were headed here is  
 (16) that they should be allowed to focus on whether the - we are  
 (17) responsible for those acts And certainly a part of the answer  
 (18) to that turns on whether as you can see both in the patterned  
 (19) instruction you directed us to and I think in our old  
 (20) instruction the way we modified it, does turn in part on  
 (21) foreseeability but it's the foreseeability of the acts of that  
 (22) third party And it's important that the jury I think be  
 (23) allowed to focus on the fact that what's being asserted here is  
 (24) that we should pay for steps to be taken now for the acts not  
 (25) of our people not for what our oil did but for the acts of a

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(1) me to still best understood as a superseding cause argument  
 (2) Nobody has incurred costs for lost costs that the remediation  
 (3) costs haven't occurred They're just a remedy It's not a  
 (4) broken leg for which we're going to ascertain the money  
 (5) damages  
 (6) for cost and suffering where all of the things but the pain and  
 (7) money have occurred It is a remedial act which is only  
 (8) necessary to protect against future acts of vandals that we're  
 (9) not responsible for That is our legal position  
 (10) THE COURT Okay, but - well I understand what  
 (11) you're saying counsel I still see this as - as an aspect of  
 (12) probable cause and they're both aspects of probable cause  
 (13) superseding cause and the normal proximate cause  
 (14) determination  
 (15) are both aspects of proximate cause No question about it  
 (16) MR OPPENHEIMER That's right It's a continuum I  
 (17) suppose Your Honor and what I guess I'm focusing on here is  
 (18) we've taken a bit of a journey the defendants in the course  
 (19) of the jury instructions We were at one end where we started  
 (20) with two very specific instruction requests on vandalism and  
 (21) we've migrated to the point where we have a general discussion  
 (22) on superseding cause and now we are talking about potentially  
 (23) not having that And the problem I have is that this is an  
 (24) unusual claim in that it doesn't - it's not focused on the  
 (25) fact that oil got into anything or anything was broken or  
 (26) dislodged In that sense it's very unconventional What it is  
 (27) is a claim for a future act because without the future act

(1) third party and I don't think that really comes through if  
 (2) we - what we ask them to do is ascertain the damage for the  
 (3) money they would spend for remediation It's really why are  
 (4) we being asked to be held accountable for the - responsible  
 (5) for the remediation  
 (6) The answer is the acts of the third parties in the future  
 (7) And unless we can get the jury to think about that issue I  
 (8) think it won't and therefore they won't make the connection  
 (9) that I think needs to be made between the remedial measures  
 (10) and  
 (11) the actual harm that those measures are designed to protect  
 (12) which again we think is the acts - the acts of individuals  
 (13) we're not responsible for legally And I would remind the  
 (14) Court that it is still our position that it is - that as a  
 (15) matter of law we cannot be responsible for the acts of  
 (16) vandals  
 (17) THE COURT I know that and that's a separate  
 (18) question  
 (19) MR OPPENHEIMER I'm not arguing that  
 (20) MR PETUMENOS I don't know how much more to add  
 (21) except I think this is -  
 (22) THE COURT I'm trying to figure out what the position  
 (23) really is Are you objecting to a superseding cause  
 (24) instruction?  
 (25) MR PETUMENOS I'm sorry?  
 (26) THE COURT Are you objecting to a superseding cause

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- (1) instruction?
- (2) MR PETUMENOS Yes I think after looking at these
- (3) cases and I think this is - this is something that in law
- (4) school was covered by Pfalzgraf (ph) not my strongest point in
- (5) law school and probably the reason why I m getting around this
- (6) position rather than in the discussion but it seems to me to
- (7) be a straight Pfalzgraf problem It is a straight proximate
- (8) cause problem because it is certainly the case once you prove
- (9) a defendant has caused a risk of harm to exist which requires
- (10) remediation if you can prove that that property right that
- (11) risk of harm that property right has been trespassed on by the
- (12) defendant - which is what we are contending - then it is for
- (13) the jury to determine All the arguments that Mr Oppenheimer
- (14) is making are made under the guise of proximate cause
- (15) instruction in which the jury can determine that our - that
- (16) they have no reasonable foreseeability that this happened we
- (17) have the evidence in the record contrary that it is
- (18) reasonably foreseeability And we argue it as a matter of fact
- (19) under the proximate cause instruction our position is that
- (20) should be the instruction given
- (21) If you look at the pattern of proximate cause instruction
- (22) it talks about this very issue and it says If two forces
- (23) operated to cause the harm one because of the defendants
- (24) and the other not and each force by itself was sufficient to
- (25) cause the harm the defendants act or failure to act is a

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- (1) proximate cause of the harm if it was so important in bringing
- (2) about the harm that a reasonable person would regard it as a
- (3) cause and attach responsibility to it
- (4) And that s the language that the defendants have to assert
- (5) that they did not have reason to believe that this was within
- (6) the ambit of what would happen with the oil spill
- (7) MR OPPENHEIMER Your Honor I think there are a
- (8) couple of responses to that It s an interesting argument
- (9) actually but I think - let me do Pfalzgraf and let me do the
- (10) legal clause instruction because I think it helps
- (11) The reason this isn t Pfalzgraf is the point Mr Petumenos
- (12) started our discussion with We have another actor involved
- (13) That s the classic distinction between what is sometimes taught
- (14) as attenuated circumstances and Pfalzgraf I think it was
- (15) dynamite that fell off the train whatever it was that
- (16) ultimately injured the person And the question about in the
- (17) act itself as it occurs is there some point in time when you
- (18) say that the effect no longer can be said to be the legal cause
- (19) of the harm it s just too odd the series of events is too
- (20) unpredictable
- (21) Where you have the act of another party intruding on the
- (22) sequence of events you then have intervening cause That s a
- (23) different set of rules It implies shared responsibility and
- (24) in the most extreme case the total responsibility of the
- (25) intervening party for the intervening effect

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- (1) That s what Williford is You have a truck driver
- (2) intervenes in the sequence of the case and the question is what
- (3) is the effect of his independent act on the ultimate outcome
- (4) The legal cause instruction that refers to two forces
- (5) operating I believe this is not critical to my argument I
- (6) believe that what that is talking about is two simultaneous
- (7) causes the multiple cause event Again it does not address
- (8) the situation which is classic superseding cause where you
- (9) have
- (10) an event of intervention down the line down the sequence of
- (11) events from the original event
- (12) And that s what s so unique about this case Your Honor
- (13) This is - as much as we disagree with it and believe it s a
- (14) thin climb on the facts and on the theory nonetheless I have
- (15) to - you know I have to give it to plaintiffs that it s an
- (16) interesting intellectual notion this idea that we are
- (17) responsible for the acts of parties who are not our employees
- (18) or our agents and who would be acting illegally in the future
- (19) on the sites allegedly
- (20) But however one views the ultimate merits of that theory
- (21) it seems to me on its face structurally morphologically is a
- (22) classic case of intervening or superseding cause It s not
- (23) that those vandals and we were working the sites at the same
- (24) time and there s a question which of us is more responsible
- (25) how do we allocate responsibility it s not a question of our
- (26) agents or representatives It s a totally - but for learning

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- (1) of the sites through us wouldn t have arguably vandalized
- (2) them One has to assume they would be acting against the law
- (3) and against the rights of the property owners and that that
- (4) will cause the damage
- (5) So I believe that that s why we need to have the
- (6) superseding cause instruction because it fits the classic
- (7) definition and It s actually helpful to consider Mr Petumenos
- (8) example of Mrs Pfalzgraf and to consider the way in which this
- (9) case differs from that and the way it differs from the
- (10) simultaneous joint cause in the legal cause instruction which
- (11) immediately precedes it 306 which is legal cause that
- (12) precedes 307 is different and set apart as a different
- (13) explanation I think because this distinction is implicit in
- (14) the two instructions and so I think we do need a superseding
- (15) cause argument
- (16) Your Honor has hit upon a point here which is that you ve
- (17) said these acts haven t occurred yet and I think that s an
- (18) argument that we obviously will be making strongly on the
- (19) facts apart from whatever the instruction is you know we
- (20) obviously argue that there is no reason to believe these acts
- (21) are going to occur They haven t occurred for five years but
- (22) that s a different issue
- (23) THE COURT But that argument is were they damaged
- (24) MR OPPENHEIMER Well Your Honor the problem - we
- (25) would argue no

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(1) THE COURT They say they were damaged and you say no  
 (2) right? You say no because for five years there s been none of  
 (3) these acts of vandalism they simply were not damaged?  
 (4) MR OPPENHEIMER They will then argue You should  
 (5) allow us to prevent against the possibility of damage because  
 (6) they through their conduct let the world know where these  
 (7) resources were and at that point we must be able to say, Wait  
 (8) a minute that s not a bill we should pay and the reason for  
 (9) that is that they re referring to acts that will occur in the  
 (10) future that we are simply not responsible for because they re  
 (11) intervening acts  
 (12) THE COURT Or what you re saying is these acts -  
 (13) this form of damage, not reasonably to be anticipated by us to  
 (14) be within the risk created by the oil spill Mattingly  
 (15) MR OPPENHEIMER Although as I said the problem I  
 (16) have with that is that it will - they will argue I think  
 (17) Your Honor, that what the jury should focus on is the  
 (18) foreseeability of the disclosure of the breach of  
 (19) confidentiality, and what as a matter of law the jury must  
 (20) consider is our liability for the future acts of those other  
 (21) individuals as well - I mean I believe both can be argued  
 (22) But frankly, Your Honor I don t think we have a very  
 (23) significant chance of persuading the jury that there wasn t  
 (24) some possibility that people would learn about some of the  
 (25) sites as a result of the cleanup

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(1) I mean I think there s - the evidence is - certainly  
 (2) it s there for them to argue and if I had to flip a coin or  
 (3) make a bet I d say they are going to have an easier point on  
 (4) that  
 (5) Our legal point that begins but does not end the analysis  
 (6) because the question then becomes, Even if that s true let s  
 (7) assume for the moment that they could argue that that was  
 (8) foreseeable under Mattingly and otherwise that people would  
 (9) learn where the sites where The question then becomes what  
 (10) harms flows from that are we responsible for it And the  
 (11) answer is that the harm that has been identified is potential  
 (12) acts of future vandals and our position is that we are not  
 (13) responsible for because it s a superseding cause or would be  
 (14) if it occurred  
 (15) THE COURT Why is that?  
 (16) MR OPPENHEIMER It s the act of a third party over  
 (17) whom we have no control  
 (18) THE COURT That s one aspect of superseding cause  
 (19) but -  
 (20) MR OPPENHEIMER It s not foreseeable  
 (21) THE COURT It s not foreseeable  
 (22) MR OPPENHEIMER That s correct But of course  
 (23) that s built into the superseding cause instruction The  
 (24) benefit in terms of the legal analysis for the jury to  
 (25) consider it in the context of superseding cause is that

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(1) they - they may - they need to answer the question whether we  
 (2) are responsible for the acts of those parties in the future  
 (3) They need to address that question and to address the - as  
 (4) part of that the foreseeability of that as well as the other  
 (5) factors that are discussed and if it s just a proximate cause  
 (6) instruction I m very concerned Your Honor, that the reason  
 (7) we re going to have serious error is that they I believe will  
 (8) only in the real world make a decision as to whether it was  
 (9) foreseeable that we disclose the presence of the sites and they  
 (10) won t make the next analysis which I believe the law requires  
 (11) them to do which is even if that were true, do you - was it  
 (12) foreseeable that these third-party vandals would come in and  
 (13) vandalize and the other requirements of superseding cause  
 met  
 (14) THE COURT Okay I think I understand your position  
 (15) counsel I d like you to read this - let me tell you that  
 (16) this - I m not saying that this California case is a  
 (17) beautifully written piece of legal literature It s - in fact  
 (18) when you read it you may find it just about as confusing as I  
 (19) did and I had some quarrels with it It was - stands for the  
 (20) proposition that this court at least thought the burden was  
 (21) on the defendants to prove intervening cause  
 (22) I need to read your Williford case and go back over these  
 (23) cases I really need you to think about this because it s a  
 (24) very important issue in this case  
 (25) And frankly I m leaning toward just a proximate cause

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(1) instruction I don t want to do that without giving you an  
 (2) opportunity to read things and think these things out  
 (3) MR PETUMENOS I want to give you a short  
 (4) hypothetical I think will help, and say one more thing about  
 (5) our claim  
 (6) Assume that we had property and the defendants tore down a  
 (7) fence and that property had within it valuable heavy equipment  
 (8) and we sued the defendants to say put the fence back up  
 (9) because we are at risk of losing our material on the property  
 (10) It would not be a defense to that action to put the fence back  
 (11) up that if somebody came in and stole the property, it would be  
 (12) the intervening act of a third party The cases are Lee John  
 (13) that, when you put an increased risk of harm because of your  
 (14) tortfeasance upon a plaintiff you - one of the remedies they  
 (15) have is to be put back to where they are safe and that s the  
 (16) construct that I think of the argument and secondly  
 (17) remember that vandalism is not the only harm that we have  
 (18) asserted with respect to the need to remediate There has been  
 (19) other kinds of harms respect to the physical intrusion the  
 (20) changing of the beaches the -  
 (21) THE COURT That s not why they want the superseding  
 (22) cause instruction  
 (23) MR PETUMENOS I know but the problem is that s why  
 (24) it s a matter of proximate cause because that s not the only  
 (25) harm that s here

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- (1) That superseding cause instruction the way we - if we re  
 (2) not careful would apply to everything we're claiming under the  
 (3) archaeological claim That s only one aspect I think the  
 (4) fence analogy is on point that you can t trespass cause a  
 (5) change in the circumstances around property put that property  
 (6) at increased risk and not be charged with remediation to make  
 (7) the property safe again  
 (8) THE COURT Thank you I ll read the cases  
 (9) MR OPPENHEIMER And if I can borrow Your Honor s  
 (10) California case -  
 (11) THE COURT Sure Please  
 (12) MR OPPENHEIMER The irony of studying a California  
 (13) case to over come an Alaska case I can t understand it  
 (14) THE COURT Well it s almost shocking  
 (15) MR OPPENHEIMER It is almost shocking  
 (16) THE COURT But believe me It won t be because it was  
 (17) a California case I ve always thought superseding cause was  
 (18) the burden was on the - on the defendant Always And the  
 (19) instruction the patterned instruction seems to put it there  
 (20) MR OPPENHEIMER Your Honor one of the observations  
 (21) about the pattern instruction was it was written before  
 (22) Williford  
 (23) THE COURT It was what?  
 (24) MR OPPENHEIMER It was written before Williford  
 (25) This may not - as sometimes happens this may not be the first

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- (1) time that the high court has reasoned wrongly but it - it s  
 (2) decided  
 (3) THE COURT The problem with a case like this is it  
 (4) can be interpreted your way and it can be interpreted  
 (5) Mr Petumenos way It could be just a proximate cause  
 (6) problem  
 (7) MR OPPENHEIMER That s what I was going to say  
 (8) here The irony here in theory is we come all the way to the  
 (9) proximate cause instruction that takes out vandalism then of  
 (10) course the burden will be back on Mr Petumenos  
 (11) MR PETUMENOS I m lost as to what we re doing next  
 (12) THE COURT You re going the read the cases I m  
 (13) going to read this one and I m going to come back in and tell  
 (14) you what I m going to do If I decide it s a proximate cause  
 (15) instruction - do you have one?  
 (16) MR OPPENHEIMER Your Honor I think very clearly if  
 (17) that turns out to be the case I think we ought to be entitled  
 (18) to try to come up to a proximate cause instruction that does  
 (19) take into account the vandalism issue  
 (20) THE COURT Absolutely  
 (21) MR PETUMENOS We re getting another proximate cause  
 (22) instruction than the one that s in there  
 (23) THE COURT No you have to have a proximate cause  
 (24) instruction that deals with all of the issues foreseeability  
 (25) scope of the risk and -

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- (1) MR OPPENHEIMER And acts of third parties  
 (2) THE COURT And substantial factor but for cause  
 (3) Those things have to be dealt with  
 (4) MR OPPENHEIMER Some point Your Honor at some place  
 (5) we must deal with acts of third parties The jury has to be  
 (6) given an instruction with respect to acts of third parties  
 (7) whether it s part of a proximate cause instruction -  
 (8) THE COURT You can propose one I m not sure I m  
 (9) going to deal with the specific fact of the circumstances I  
 (10) feel it s my duty to give you an instruction that allows you to  
 (11) argue your - your position  
 (12) MR PETUMENOS I don t know whether I m -  
 (13) THE COURT Do you understand what I mean? I mean  
 (14) I ll draw a loose distinction argumentative instructions I m  
 (15) not going to give an instruction that unduly emphasizes your  
 (16) theory On the other hand if you give me an instruction, I ll  
 (17) certainly look at it to see whether it should be given  
 (18) independently of a proximate cause instruction I don t  
 (19) normally deal with the factual situations when I instruct on  
 (20) proximate cause I just put it down what the law is Okay  
 (21) anything else?  
 (22) MR PETUMENOS I have my cases to give you Judge is  
 (23) all  
 (24) THE COURT Please give it to me  
 (25) MR FORTIER Your Honor there was one more matter

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- (1) with the OPA instruction I just had a chance to look at it  
 (2) now You removed the paragraph begins third Native  
 (3) corporations do not have any legal title or right of possession  
 (4) for lands that have been selected but not conveyed and it s  
 (5) back in the instruction Maybe that was an oversight  
 (6) THE COURT I ll be back in here in a minute and we ll  
 (7) talk about that when I come back in  
 (8) MR FORTIER Okay  
 (9) THE COURT Here s the California case You can read  
 (10) over each other s shoulders  
 (11) (Recess from 4 15 p m to 4 35 p m )  
 (12) THE CLERK Please rise This court now resumes in  
 (13) session Please be seated  
 (14) MR OPPENHEIMER We have a proposal Your Honor  
 (15) THE COURT Uh oh  
 (16) MR OPPENHEIMER We think it works  
 (17) MR PETUMENOS Because I m not sure where this is  
 (18) going to end up in the way of a proximate cause instruction  
 (19) I m just - and I m running out of time because I need to get  
 (20) to my final, I m prepared to stipulate with the defendants and  
 (21) I think both of us are withdrawing all objections to the  
 (22) instructions on this so there s no further issue to the  
 (23) instruction that the Court wrote this morning on the  
 (24) intervening cause where the burden of proof is left  
 (25) essentially - I guess it tends to be leaning towards the

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- (1) plaintiff but it's fairly ambiguous as to who has it and I  
 (2) show it to the Court and by stipulation we will accede to  
 (3) this instruction  
 (4) THE COURT Is this a proposal by both of you?  
 (5) MR PETUMENOS Yes  
 (6) MR OPPENHEIMER Yes Your Honor That is the workup  
 (7) that was done this morning It deletes the express provision  
 (8) of it being Exxon's burden  
 (9) THE COURT All right Now you both agree to this  
 (10) instruction?  
 (11) MR PETUMENOS Yes  
 (12) THE COURT You agree it can be given?  
 (13) MR OPPENHEIMER Yes Your Honor  
 (14) THE COURT That's in the face of the knowledge that  
 (15) I'm leaning toward a proximate cause instruction right and  
 (16) not a superseding cause instruction both of you accept that?  
 (17) MR OPPENHEIMER Yes Your Honor  
 (18) MR PETUMENOS Yes Your Honor  
 (19) THE COURT Now I believe that this is not the  
 (20) situation where a party proposes an instruction and the other  
 (21) party doesn't object It's more than that It's a waiver and  
 (22) it - It's an estoppel situation In good conscience neither  
 (23) of you having lost can come back on appeal and claim that  
 (24) this was an erroneous instruction I believe that that's what  
 (25) your agreement means

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- (1) MR OPPENHEIMER With one exception on our part Your  
 (2) Honor that we do not wish to waive our position that this is  
 (3) a - that there is a superseding cause as a matter of law based  
 (4) on the theory of the case  
 (5) THE COURT Well that's fine I mean that's -  
 (6) well wait a minute that there is a -  
 (7) MR OPPENHEIMER I don't think that's inconsistent  
 (8) with the resolution  
 (9) THE COURT You are claiming there's a superseding  
 (10) cause as a matter of law  
 (11) MR OPPENHEIMER Correct  
 (12) THE COURT And you don't waive that position  
 (13) MR OPPENHEIMER We do not wish to waive that  
 (14) position  
 (15) THE COURT And I certainly believe there is not a  
 (16) superseding cause as a matter of law I might go further than  
 (17) that proposition and say there is not a superseding cause but  
 (18) your agreement does away with that the need for me to do  
 (19) that As long as you understand that you'll be bound by your  
 (20) positions -  
 (21) MR PETUMENOS The only -  
 (22) MR OPPENHEIMER The only thing I - go ahead  
 (23) MR PETUMENOS My concern as I understood where the  
 (24) Court was going is you were going to write more than the  
 (25) proximate cause instruction that's in the packet right now

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- (1) which I believe covers the issue and when you left the bench  
 (2) before you were indicating to us that you were going to write  
 (3) something else -  
 (4) THE COURT No I was indicating to you that I would  
 (5) certainly - because of this late breaking development It  
 (6) would be unfair to the defendants for me to reject a  
 (7) superseding cause instruction that you had so painstakingly  
 (8) negotiated out and not give them an opportunity to give me -  
 (9) to draft an instruction that allowed them a fair opportunity to  
 (10) argue their position  
 (11) What I would give is not something that I necessarily would  
 (12) draft It might be something that you would draft or that  
 (13) opposing counsel would draft but when you make an  
 (14) agreement  
 (15) like this you - you step past those issues and you agree that  
 (16) this is an appropriate instruction to be given in the course of  
 (17) this case And you - and you can't later come back - I  
 (18) believe the law is you can't later come back and say oops I  
 (19) was wrong and this is such a horrendous error that I ought to  
 (20) be able to claim it on appeal because I believe you're  
 (21) estopped in good conscience from changing your position  
 (22) MR OPPENHEIMER Your Honor our position is that  
 (23) insofar as the superseding cause instruction is to be given and  
 (24) at our request which is sort of clear for an instruction that  
 (25) we - that the acts of third party vandalism in the future  
 would be a superseding cause as a matter of law would cut off

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- (1) our liability that given that that instruction is requested  
 (2) but denied instruction that if a superseding cause instruction  
 (3) is to be given we're prepared to live with this instruction  
 (4) and we understand we would be waiving our right to an appeal  
 on  
 (5) a differently worded superseding cause instruction  
 (6) THE COURT And certainly you're waiving your right to  
 (7) claim that the burden of proof was wrong  
 (8) MR OPPENHEIMER That's correct  
 (9) THE COURT All right counsel  
 (10) MR PETUMENOS I need a moment to confer  
 (11) THE COURT All right  
 (12) (Discussion off record between counsel)  
 (13) MR PETUMENOS We don't have agreement on the  
 (14) plaintiffs' side for the waiver  
 (15) THE COURT Excuse me?  
 (16) MR PETUMENOS We don't have agreement on the  
 (17) plaintiffs' side for the waiver So the position of all of the  
 (18) plaintiffs is that it is not unanimous on the waiver so I  
 (19) believe that we have to - there is objection on the part of  
 (20) Port Graham and English Bay and Chenega to the superseding  
 (21) cause instruction So we look back to the Court on the  
 (22) proximate cause instruction  
 (23) THE COURT Are you going to give me the issue then or  
 (24) do you want further argument?  
 (25) MR PETUMENOS Yes the issue's yours

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- (1) MR OPPENHEIMER Your Honor I think we ve probably  
 (2) talked this -  
 (3) THE COURT Don t forget counsel the risk you run  
 (4) here is that not having done this that if I instruct and  
 (5) don t give a superseding cause instruction and I m wrong you  
 (6) get reversed You know that  
 (7) MR PETUMENOS We don t think you're wrong That s  
 (8) not the issue We are in some trepidation based upon the  
 (9) Court s remarks that further error might be committed in the  
 (10) drafting of the proximate cause instruction  
 (11) THE COURT That s always a possibility  
 (12) MR PETUMENOS And it is not out of trepidation  
 (13) that - we think the Court s right that the superseding cause  
 (14) instruction is - is not correct on these facts So I guess  
 (15) the situation is there s not unanimity on the plaintiffs side  
 (16) to the agreement of the waiver I agree with you what we would  
 (17) be doing is making the waiver I can t represent that all  
 (18) plaintiffs will make it so we can t do it The issue is back  
 (19) to the Court  
 (20) THE COURT Counsel?  
 (21) MR OPPENHEIMER Your Honor our position is that  
 (22) it s of the utmost importance that the jury reason through our  
 (23) responsibility if any for future acts of third parties I  
 (24) don t think there is an argument that we haven t discussed this  
 (25) afternoon on that subject

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- (1) I look at the proximate cause instruction on page 26 and I  
 (2) do not think it goes through all of the provisions that are set  
 (3) forth in either 3 07 or the instruction that we had this  
 (4) morning It has no discussion with respect for example to  
 (5) the harm being different in kind from that which could have  
 (6) been reasonably expected from the original act And it doesn t  
 (7) discuss future acts of third parties and the only reference it  
 (8) makes to the acts of more than one force I believe, in context  
 (9) are pretty clearly simultaneous forces operating which would  
 (10) be the 3 06 issue from the standard or pattern instructions  
 (11) I believe it is vitally important for the defendants to be  
 (12) able to talk with the jury about the notion of a superseding  
 (13) event and I don t think as a practical matter we can do that  
 (14) without an appropriate instruction and that s our concern  
 (15) We - you know we persist Your Honor in our view for the  
 (16) reasons stated and I don t think that the instruction on page  
 (17) 26 of the joint submission which is the proximate cause  
 (18) instruction does an adequate job of identifying the thinking  
 (19) they have to do on the third party  
 (20) THE COURT So I m going to give you a step by step  
 (21) decision two steps The first is I do not believe that I  
 (22) should instruct on superseding cause here because I don t see  
 (23) it I don t see one fairly raised by the argument  
 (24) Second I see what - I see the defendants problem and I  
 (25) think that page 26 the instruction on proximate cause may be

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- (1) inadequate to explain the concept of proximate cause as it  
 (2) relates to the circumstances in this case to this jury So I  
 (3) leave open the possibility - the possibility that I ll accept  
 (4) another proximate cause instruction This one may  
 (5) unfortunately be what I m left with now that I ve decided  
 (6) that superseding cause is not legitimately before the jury  
 (7) But I m certainly willing to accept other versions of a  
 (8) proximate cause instruction and I would direct you to  
 (9) Mattingly which I mean I ve been looking in Mattingly for  
 (10) the situation that we re faced with here and it seems to me  
 (11) that it s on page 361 where they say and this may not - I m  
 (12) not suggesting this should be adopted verbatim but at least it  
 (13) seems to treat the issue It says In this context those  
 (14) economic losses are recoverable as damages when they are  
 (15) the  
 (15) natural and probable consequence of a defendants negligence  
 In  
 (16) the sense that they are reasonably to be anticipated in view of  
 (17) defendants capacity to have foreseen that the particular  
 (18) plaintiff or identifiable class of plaintiffs is demonstrably  
 (19) within the risk created by the defendants negligence  
 (20) Now that doesn t - and if you go on in the case the next  
 (21) two paragraphs you see that the Court says Mattingly still  
 (22) faces a difficult task in proving his damages particularly  
 (23) lost profits to the degree of certainty required in negligence  
 (24) cases He will also have to demonstrate that he could not have  
 (25) reasonably replaced his injured employees and thereby  
 continued

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- (1) with the - you need to be able to argue first the damage did  
 (2) not occur and second this is an absolutely unforeseeable  
 (3) consequence of an oil spill  
 (4) I think those are legitimate issues raised by the evidence  
 (5) in this case and I ll give you a fair opportunity to get the  
 (6) appropriate instruction on those issues  
 (7) MR PETUMENOS Then Judge I have a further issue and  
 (8) that is that if we are that far into Mattingly at this point  
 (9) every important stipulation that we have reached in this case  
 (10) has been part of the packet  
 (11) THE COURT Has what?  
 (12) MR PETUMENOS Has been part of the packet Every  
 (13) single one is -  
 (14) THE COURT Counsel that may very well be true  
 (15) counsel but you face me with the problem and I deal with the  
 (16) problem  
 (17) MR PETUMENOS I understand  
 (18) THE COURT You gave me a problem and I dealt with  
 (19) it  
 (20) MR PETUMENOS I have a motion though in view of  
 (21) the Court s ruling on that and that is that the stipulation  
 (22) regarding foreseeability in the case should be added to the  
 (23) instructions that list the stipulations reached in the case  
 (24) because now we are definitely in the area where the stipulation  
 (25) is critical

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- (1) THE COURT You can take that position counsel, and I  
 (2) may or may not reject it  
 (3) MR PETUMENOS I understand  
 (4) THE COURT The point is I have to have a drafted  
 (5) instruction In the absence of a drafted instruction that I  
 (6) accept page 26 will be given and you live with the record  
 (7) you've created both of you If I have an alternative  
 (8) instruction that's acceptable to me I'll substitute it for  
 (9) page 26 If I have two competing versions one of them  
 (10) including the stipulation I will tell you whether or not I  
 (11) will - I will give the language of the stipulation But I  
 (12) won't tell you now what I will do  
 (13) MR PETUMENOS You need the instruction first  
 (14) THE COURT Right I have to look at the instruction  
 (15) Frankly I think your arguments are all there on this proximate  
 (16) cause instruction, but to the extent that fairness requires you  
 (17) to make your - to be allowed to argue specific language, I  
 (18) think that I - I need to try and draft an appropriate  
 (19) instruction that's fair to both of you  
 (20) MR OPPENHEIMER I would just say Your Honor that  
 (21) the only thing that disturbs me about Mr Petumenos comment  
 (22) is  
 (23) that I assume nothing's been undone about our conclusions  
 (24) yesterday that that stipulation is not going to be argued to  
 (25) the jury as a stipulation by us that the acts of third party  
 (26) vandalism in the future is foreseeable

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- (1) THE COURT It can't be No matter what instruction I  
 (2) give it can't be  
 (3) MR PETUMENOS That's not what it says  
 (4) MR OPPENHEIMER It won't be argued  
 (5) THE COURT That's exactly right But the danger is  
 (6) they might think the problem is it's in the record anyway and  
 (7) could be repeated verbatim back to them  
 (8) MR OPPENHEIMER But not for that proposition  
 (9) THE COURT Yes it certainly cannot be or hinted at  
 (10) for that proposition  
 (11) MR OPPENHEIMER Your Honor terms of the timing -  
 (12) THE COURT What do we do?  
 (13) MR OPPENHEIMER We can certainly try to do something  
 (14) right now as soon as this is over We can try to do  
 (15) something - well does Your Honor have any sort of  
 (16) preference? I realize your preference is we not pursue this  
 (17) but I would like to at least see if I can produce something  
 (18) that addresses the issue for us  
 (19) THE COURT I don't think that it's my preference not  
 (20) to pursue -  
 (21) MR OPPENHEIMER I didn't mean to say it that way  
 (22) THE COURT I want you to pursue it I think it's  
 (23) only fair to pursue it I know it will take some time I'm  
 (24) willing to work tonight if that's what it takes So what do  
 (25) you want to do, meet sometime later on this evening?

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- (1) MR OPPENHEIMER Well actually yes Your Honor or we  
 (2) could have a provision -  
 (3) THE COURT I don't want to do it tomorrow  
 (4) MR OPPENHEIMER Pardon?  
 (5) THE COURT I don't want to do it tomorrow  
 (6) MR PETUMENOS Judge I have the courtroom from 5 15  
 (7) to eight if you recall That's 25 minutes from now  
 (8) MR McCALLION Your Honor could we have the use of  
 (9) the courtroom for perhaps 15 minutes? Perhaps we could try  
 (10) and  
 (11) address the issue now  
 (12) THE COURT Sure I'll give you 15 minutes If you  
 (13) don't - if you can't resolve anything in 15 minutes I'm going  
 (14) to let you go and I'm going to bring you back here at eight and  
 (15) we'll talk about it at eight  
 (16) MR OPPENHEIMER Okay  
 (17) (Recess at 4 50 p m)

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- (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

**Look-See Concordance Report**

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 UNIQUE WORDS 880  
 TOTAL OCCURRENCES 2,726  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE 8,610

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 SINGLE FILE CONCORDANCE

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 CASE SENSITIVE

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 NOISE WORD LIST(S)  
 NOISE NOI

---  
 INCLUDES ALL TEXT  
 OCCURRENCES

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 IGNORES PURE NUMBERS

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 WORD RANGES @ BOTTOM  
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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 September 12 1994  
 ) 8 00 p m  
 (6) )  
 (8) VOLUME 3 Pages 139 through 159  
 (9) TRANSCRIPT OF PROCEEDINGS (Hearing)  
 (10) Arguments on Jury Instructions (Continued)  
 (12) BEFORE THE HONORABLE BRIAN C SHORTELL  
 Superior Court Judge
- (15) APPEARANCES  
 (16) FOR THE PLAINTIFF  
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## Vol 3 140

- (1) Reported by  
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 Midnight Sun Court Reporters  
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 (4) 907/258 7100

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- (1) PROCEEDINGS  
 (2) (Jury out at 8 12 p m )  
 (3) THE CLERK. On record  
 (4) THE COURT I ve been given two competing  
 (5) instructions I need to know one thing The plaintiffs  
 (6) proposed instruction is one paragraph instruction that  
 (7) paraphrases possibly in quotes language straight out of  
 (8) Mattingly correct?  
 (9) MR PETUMENOS Correct  
 (10) THE COURT The defendants use concepts that are  
 (11) stated in Mattingly but doesn t closely paraphrase or quote  
 (12) the language isn t that is right?  
 (13) MR OPPENHEIMER Correct Your Honor Well it - I  
 (14) think it does closely paraphrase some aspects of it but it  
 (15) uses the concepts  
 (16) THE COURT What I need to know The plaintiffs I  
 (17) think are using this instruction as a supplement to the  
 (18) proximate cause instruction  
 (19) MR PETUMENOS Correct  
 (20) THE COURT What are defendants doing?  
 (21) MR OPPENHEIMER The same Your Honor Some of the  
 (22) additional material in defendants Your Honor is from the  
 (23) patterned instruction  
 (24) MR PETUMENOS Judge I have just given a temble  
 (25) final argument in preparation next door and the instructions I

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- (1) gave my staff were it s late in the day I didn t want to try  
 (2) and get any - we listened - I told them to listen carefully  
 (3) to what you said on the record in the last proceeding to  
 (4) review Mattingly to stick right to the language not try to  
 (5) take any license or any advantage and to hope to end this  
 (6) quick  
 (7) I have a huge problem with paragraph three of the  
 (8) defendants proposed It s I believe dead wrong The but  
 (9) for language at the end of that paragraph would mean that the  
 (10) Exxon defendants would be exonerated if there were for  
 (11) example a very slight risk of incursion on the sites  
 (12) MR OPPENHEIMER If I delete three is it  
 (13) acceptable?  
 (14) MR PETUMENOS No it s not  
 (15) And the other problem I have with it is that there are -  
 (16) as I indicated in the last hearing future vandalism is not the  
 (17) only damage that has caused us to need to remediate There is  
 (18) evidence in the record that the traffic in the area has caused  
 (19) erosion that there has been a need to - to excavate because  
 (20) of other reasons relating to incursion of oil and traffic and  
 (21) other things in addition to the loss of confidentiality and  
 (22) our instruction covers that and you know it s - my position  
 (23) was to be very conservative with the language have it  
 (24) supplement the proximate cause instruction as given so that  
 (25) this court wouldn t have much controversies and I was hoping

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- (1) that's where we'd be  
 (2) MR OPPENHEIMER Your Honor the problem that we  
 (3) have - first of all with respect to Mr Petumenos point  
 (4) about future vandalism is not the only reason to remediate  
 (5) This jury instruction deals with one aspect of causation  
 (6) however we want to call it that is problematic to us which is  
 (7) the lost confidentiality business It doesn't speak to the  
 (8) other damages for which they would be seeking remediation  
 (9) There is a separate instruction that deals with remediation for  
 (10) archaeology There's a restoration and remediation  
 (11) instruction  
 (12) THE COURT Which one is it?  
 (13) MR OPPENHEIMER That is -  
 (14) MR PETUMENOS It's an instruction we agreed upon  
 (15) Judge that tells the jury a remedy is available if we  
 (16) establish proximate cause It doesn't address the proximate  
 (17) cause issue  
 (18) MR OPPENHEIMER It's page 35 Your Honor And the  
 (19) reason that we have been focused on this particular issue this  
 (20) particular set of additional instructions is that the proposed  
 (21) instruction that you got tonight underscores the problem we  
 (22) have with an instruction that simply says that you look to see  
 (23) whether the loss of confidentiality is a natural and probable  
 (24) consequence of the oil spill Insofar as we were talking  
 (25) confidentiality and not other damages which is - which might

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- (1) require remediation and restoration which is picked up at page  
 (2) 35 insofar as we're focused on confidentiality it's our  
 (3) strong position that an instruction that simply says the jury  
 (4) can determine that there are damages from determining that  
 (5) loss  
 (6) of confidentiality is the natural and probable consequence of  
 (7) the oil spill will inevitably lead them to conclude that they  
 (8) don't have to deal with the issue of whether the acts of third  
 (9) parties in the future is - is itself something for which Exxon  
 (10) is responsible within the - within the foreseeable results of  
 (11) the oil spill and that is important because disclosing the  
 (12) arc - the site of the archaeological resources in and of  
 (13) itself is not harmful It doesn't yield a cognizable tort  
 (14) claim under strict liability or any other theory It is not a  
 (15) harm There's no injury that flows from it  
 (16) What is being complained about in connection with this one  
 (17) aspect of the spill's consequences on the archaeology loss of  
 (18) confidentiality is that it - it will lead to the acts of  
 (19) third-party vandalism and it's imperative that the jury have  
 (20) an understanding that not only do they have to find that the  
 (21) lost confidentiality flows from the oil spill but what they're  
 (22) being asked to determine that acts that haven't yet occurred  
 (23) but may be incurred in the future by third parties are the  
 (24) responsibility of Exxon and that the foreseeability of that is  
 (25) something they have to determine separate and apart from  
 (26) confidentiality

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- (1) And they're going to be led into - I think quite clearly  
 (2) from these other instructions - into concluding that if the  
 (3) rather unexceptionable conclusion is reached that the cleanup  
 (4) workers that there was going to be some disclosure of the  
 (5) sites in the course of cleanup that's the end of the issue  
 (6) and it isn't because that in and of itself doesn't lead to any  
 (7) damage What leads to the harm and damage and cognizable  
 (8) claim as far as confidentiality is concerned is that it - it  
 (9) is the predicate - it's the thing that causes the possibility  
 (10) of these third party acts for which Exxon's alleged to be  
 (11) responsible and they have to determine the foreseeability of  
 (12) that  
 (13) That's why when we came back we were going through the  
 (14) same exercise of trying to hew as carefully as we could to  
 (15) Mattingly We obviously went back into Mattingly as well as  
 (16) the form instructions and the concept that we had here was  
 (17) that if you see point one this is right out of Mattingly  
 (18) We should have foreseen these plaintiffs were an  
 (19) identifiable class of plaintiffs were that risk of damage to  
 (20) the archaeological resources - and this is critical - as a  
 (21) result of loss of confidentiality lead to potential acts by  
 (22) third parties that have not yet occurred And then pertaining  
 (23) to the case archaeological damages would ensue and just to  
 (24) use an instruction that says they have to find that the natural  
 (25) and probable consequence of the oil spill was lost

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- (1) confidentiality is going to guarantee to get a verdict against  
 (2) us on this but not on the basis of any acts of vandalism in the  
 (3) future and whether it's reasonably foreseeable that they would  
 (4) perpetrate these acts in the future and that's the last  
 (5) remnant we have of an instruction that focuses attention on  
 (6) third party acts in the future acts which have not yet  
 (7) occurred  
 (8) THE COURT Hang on a minute I'm going back to  
 (9) Mattingly to see how close the instruction is  
 (10) MR OPPENHEIMER The language Your Honor is at page  
 (11) 361 that's what we went back to  
 (12) THE COURT 360 isn't it?  
 (13) MR OPPENHEIMER 360 and 361  
 (14) MR PETUMENOS When you're finished reading I have a  
 (15) brief response  
 (16) MR OPPENHEIMER In fact two and three Your Honor  
 (17) are right out of the instruction  
 (18) THE COURT I'm sorry What did you say about two and  
 (19) three?  
 (20) MR OPPENHEIMER Factors two and three are right out  
 (21) of the patterned instruction  
 (22) THE COURT Yes but they're also an instruction on  
 (23) page 26  
 (24) MR PETUMENOS And in 26 it's phrased differently  
 (25) it's not phrased in terms of the facts of the claim There's a

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(1) huge difference and anyway I want to just show the Court a  
 (2) Restatement section  
 (3) MR OPPENHEIMER Your Honor in this case we think  
 (4) that the - that the facts of the claim are critical because  
 (5) the facts of the claim are that there will be a particular type  
 (6) of injury so I agree with Mr Petumenos this does - it  
 (7) contains the smallest reference that we could make to make  
 (8) sense to the facts of the case We definitely did not want it  
 (9) to be argumentative we don't think it is but it does try to  
 (10) calibrate itself giving both sides the opportunity to argue  
 (11) that you know these acts were or were not - let me use the  
 (12) shorthand here foreseeable but it - it does something for us  
 (13) that I think is very important which is that it is an  
 (14) instruction that will allow the jury to think through the fact  
 (15) that an element of this claim is the acts of third parties  
 (16) MR PETUMENOS I still think paragraph three is dead  
 (17) wrong And I will - if I can approach the Court with a  
 (18) Restatement section that applies as Mr Oppenheimer points  
 (19) out kind of claim section - for the record Section 448  
 (20) Restatement and -  
 (21) THE COURT 448 is the superseding cause instruction  
 (22) counsel  
 (23) MR PETUMENOS I know that  
 (24) THE COURT Superseding cause I thought we were past  
 (25) that

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(1) MR PETUMENOS We are but the point is this What I  
 (2) think that they are putting into this instruction is the  
 (3) equivalent of the superseding cause instruction you rejected  
 (4) before and here's the reason why The damage to the  
 (5) archaeological resources resulting from the potential acts of  
 (6) third parties have not yet occurred but for the oil spill is  
 (7) wrong because if there were a modest or mild or very unlikely  
 (8) risk that the sites could be damaged by the kinds of incursions  
 (9) we're talking about and that risk were greatly enhanced by the  
 (10) actions of the tortfeasor they are still liable under the  
 (11) proximate cause law of this state for that enhanced risk  
 (12) And they must - they can still be liable as a substantial  
 (13) factor in bringing about the need for remediation which is the  
 (14) point of the section I'm reading to you the third party  
 (15) actors  
 (16) I would understand - I guess my point is I'm not sure  
 (17) Mr Oppenheimer is correct that he is insulated from  
 (18) liability He is insulated from liability in the sense he pays  
 (19) remediation and the jury finds it's appropriate He's not  
 (20) liable for any actions of third parties The issue is has the  
 (21) risk been so substantially increased by Exxon that they should  
 (22) pay the remediation and prevention of loss  
 (23) I go back to my hypothetical If they tear down a fence  
 (24) it's a factual question of whether tearing down the fence  
 (25) requires the remediation and under our instruction they're

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(1) free to argue that if you take a look at it they're perfectly  
 (2) free to argue that the - in the last sentence that these  
 (3) particular plaintiffs or class of plaintiffs were demonstrably  
 (4) within the risks created by the defendants' actions  
 (5) If they want to argue that despite the confidentiality  
 (6) issues that their conduct in protecting the confidentiality  
 (7) for example resulted - was effective and resulted in there  
 (8) being no increased risk that this remedy isn't necessary or  
 (9) that there was never any risk in the first place and they were  
 (10) humoring us when they engaged in the conduct all of those  
 (11) arguments are fair game under the concise language of  
 (12) Mattingly without - for the first time our instructions  
 (13) incorporating the claims and making it argumentative  
 (14) I thought this was not what we were supposed to do If it  
 (15) wasn't what we were supposed to do I would have tried to write  
 (16) something different myself I tried to stay close to the  
 (17) language and not put some of the argumentative stuff in I  
 (18) think this instruction can be misread if in fact the jury  
 (19) concludes that the risk of harm was greatly increased although  
 (20) it may have - frankly I think that's what the evidence  
 (21) shows we can't prove there was never any vandalism on a site  
 (22) before the oil spill and we're not held to that standard of  
 (23) proof but we can prove it seems to me that the risk was so  
 (24) heightened by the tortfeasor that remediation remedy is  
 (25) appropriate

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(1) This instruction says that they have to be the sole cause  
 (2) of any risk and that's not the law And they are -  
 (3) everything that Mr Oppenheimer said he wanted to argue is in  
 (4) the plaintiffs instruction There's nothing to prevent him  
 (5) from doing that  
 (6) MR OPPENHEIMER Your Honor the but for isn't the  
 (7) sole clause  
 (8) THE COURT The but for isn't the sole clause the  
 (9) but for is in the instruction  
 (10) MR OPPENHEIMER It's in  
 (11) THE COURT It's in there You've given me two  
 (12) versions I have to choose or I have to adopt my own  
 (13) instruction  
 (14) I'm going to choose the plaintiffs but I want to make a  
 (15) suggestion to you and I think that this should be incorporated  
 (16) in the existing thing so it's all one continuous instruction  
 (17) That paragraph should be inserted in number 26 but here's the  
 (18) thing that I - that I worry about  
 (19) The Mattingly has language that sort of leads us to the  
 (20) concepts but may not be precise enough for an instruction The  
 (21) fact is that these particular plaintiffs have to be foreseeable  
 (22) plaintiffs and the risks - better not say risks the damage  
 (23) that they claim has to be within the risk created by the  
 (24) defendants' action This language doesn't say that  
 (25) Mattingly doesn't - Mattingly and - I've forgotten the

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- (1) New Jersey case it comes from which is basically the basis for  
 (2) Mattingly – does not say that but I think this is more  
 (3) accurate if you say that in the last phrase In view of  
 (4) Exxon s capacity to have foreseen that these particular  
 (5) plaintiffs – strike the words or class of plaintiffs we re  
 (6) not talking about the class of plaintiffs we re talking about  
 (7) these plaintiffs So you would say In view of Exxon s  
 (8) capacity have foreseen that these particular plaintiffs and the  
 (9) damage claimed by them were demonstratively within the risk  
 (10) created by defendants action Or some variant of that  
 (11) MR PETUMENOS Judge in the interest of getting to  
 (12) bed tonight and – I m prepared to accept that that language  
 (13) MR OPPENHEIMER Your Honor a couple of  
 (14) observations I d really rather – I have lots of problems  
 (15) with this instruction and obviously we re going to include our  
 (16) instruction in Court s 40  
 (17) THE COURT Sure  
 (18) MR OPPENHEIMER But I think it makes it worse to put  
 (19) it in 26 I think it s – I think 26 is – is workable in its  
 (20) current form I d just as soon put this behind 26  
 (21) MR PETUMENOS That s fine I have no objection to  
 (22) that  
 (23) MR OPPENHEIMER But what – Your Honor what still  
 (24) troubles me is that I think the jury inevitably will conclude  
 (25) from this instruction as it s currently worded that if they

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- (1) find that it was reasonably to be anticipated that there would  
 (2) be a loss of site location confidentiality they can award  
 (3) damages for the acts of third parties and I believe that that  
 (4) is –  
 (5) THE COURT That s why I say and the damage claimed  
 (6) by them because essentially there may have been a risk of  
 (7) loss of confidentiality but there may also a fact pattern in  
 (8) this case that the jury will find is terribly inflated claim of  
 (9) damages and – and you have the basis for the argument if the  
 (10) damages are not within the risk  
 (11) These damages wholesale claiming of remediation for every  
 (12) possible site in the entire Prince William Sound area may very  
 (13) well be found by this jury to be not damage that plaintiffs  
 (14) suffered And I think that s what this particular issue  
 (15) revolves around  
 (16) MR OPPENHEIMER I have a suggestion Your Honor We  
 (17) have – we say here loss of site location confidentiality and  
 (18) other harms I suggest that the word other should be  
 (19) replaced with resulting  
 (20) MR PETUMENOS The problem with that is we do have  
 (21) other harms in the case as I just stated Confidentiality is  
 (22) not the only theory upon which the remediation is being put  
 (23) forward That s the reason why other harms is there  
 (24) THE COURT What was the word you wanted?  
 (25) MR OPPENHEIMER Instead of saying other harms was

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- (1) reasonably to be anticipated it would say loss of site  
 (2) location confidentiality and resulting harms was reasonably to  
 (3) be anticipated  
 (4) MR PETUMENOS Do you understand my point Judge?  
 (5) THE COURT I see your point I m sure that  
 (6) reasonable people can find something that would say more  
 (7) appropriate to me  
 (8) MR PETUMENOS I m sorry  
 (9) THE COURT I m sure reasonable people could find a  
 (10) solution to this problem so find it  
 (11) MR OPPENHEIMER Your Honor we could say with  
 (12) respect to plaintiffs claims for damages for lost  
 (13) confidentiality of archaeological resources so it would be  
 (14) clear that this only speaks to that issue It does not speak  
 (15) to other harms that follow those are picked up in 26 along  
 (16) with any other harms We re not arguing  
 (17) THE COURT How about this With respect to  
 (18) plaintiffs claims for archaeological remediation  
 (19) MR OPPENHEIMER That won t address Mr Petumenos  
 (20) point because he I guess has an argument he s entitled to  
 (21) other forms of remuneration from –  
 (22) MR PETUMENOS I have one archaeological damages  
 (23) based upon confidentiality – based upon loss of  
 (24) confidentiality Will that work counsel? After the first  
 (25) line the comma is insert the words based upon loss of

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- (1) confidentiality  
 (2) MR OPPENHEIMER So we would add after damages based  
 (3) upon loss of confidentiality we would change in the fourth  
 (4) line from the bottom the word other harms to resulting harms  
 (5) We would strike or class of plaintiffs and replace it with and  
 (6) the damage claimed by them  
 (7) MR PETUMENOS Right  
 (8) MR OPPENHEIMER Your Honor in the spirit of getting  
 (9) everyone home tonight we – we have not articulated this  
 (10) correctly We can live with this given we re not getting the  
 (11) instruction we asked for We would still like to – for our  
 (12) record we would still like to include our instruction without  
 (13) waiver in Court s 40  
 (14) THE COURT All right  
 (15) MR OPPENHEIMER That includes of course the prior  
 (16) to vandalism requests which were made earlier We had two  
 (17) specific –  
 (18) THE COURT Whatever –  
 (19) MR OPPENHEIMER Whatever s in 40 We re not  
 (20) waiving  
 (21) THE COURT Yes I want you both to check your  
 (22) exhibits so you know that it s clear I don t want – I don t  
 (23) want the specter of a waiver occurring because somebody  
 (24) didn t  
 (25) look at the exhibits to see that the appropriate instructions  
 the rejected instructions were left out



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- (1) MR OPPENHEIMER Your Honor I understood -  
 (2) THE COURT Frankly I haven't reviewed the  
 (3) defendants yet  
 (4) MR OPPENHEIMER We'll include in 40 then what I  
 (5) showed Your Honor this evening as our proposal which we'll  
 (6) just call Jury Instruction No. September 12 8:30 p.m. for  
 (7) lack of anything else and we'll include that with Court's 40  
 (8) THE COURT Okay I'm not understanding are you  
 (9) talking about the instruction I've got here that you proposed?  
 (10) MR OPPENHEIMER Yes the alternative we proposed  
 (11) THE COURT You've got a version  
 (12) MR OPPENHEIMER I do and I just called it September  
 (13) 12th  
 (14) THE COURT That's fine It can simply be placed at  
 (15) the end of your other packet of instructions  
 (16) MR OPPENHEIMER That's what we'd like to do  
 (17) THE COURT So I can toss this one  
 (18) Now with regard to the proximate you want this  
 (19) instruction to be a separate instruction?  
 (20) MR OPPENHEIMER Yes Your Honor  
 (21) MR PETUMENOS To follow proximate cause  
 (22) THE COURT Right after the proximate cause  
 (23) instruction  
 (24) MR OPPENHEIMER It doesn't matter We can do that  
 (25) or it can go with the archaeological instruction

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- (1) MR PETUMENOS I think it should go right after the  
 (2) proximate cause  
 (3) MR OPPENHEIMER Okay  
 (4) THE COURT And - all right so you agree that this  
 (5) instruction can be given given the fact that I've - I've  
 (6) insisted that this is a proximate cause issue one and two  
 (7) that I've rejected your proposed instruction on the  
 (8) archaeological damages confidentiality theory right?  
 (9) MR OPPENHEIMER Correct Your Honor understanding  
 (10) you to mean that our request for a superseding cause  
 (11) instruction has been denied and the alternative this evening  
 (12) has been denied  
 (13) THE COURT Right  
 (14) MR OPPENHEIMER Yes that's correct  
 (15) THE COURT So that's it?  
 (16) MR PETUMENOS Thanks for staying late  
 (17) MR OPPENHEIMER Thanks Your Honor  
 (18) THE COURT You're going to give me a clean one  
 (19) tomorrow?  
 (20) MR OPPENHEIMER We'll give you a clean one  
 (21) tomorrow  
 (22) THE COURT Why don't you do this Give me three and  
 (23) I'll put them in the packets and give you each a copy I will  
 (24) have these instructions the one that - I'll have two copies  
 (25) made number them and give you - once you give me this one

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- (1) I'll put it in and it will have the whole instruction packet  
 (2) that I'm going to give  
 (3) MR OPPENHEIMER Your Honor you're going to number  
 (4) it A after the jury instruction on page 26 or you just want to  
 (5) make a note?  
 (6) THE COURT I don't think I have to I'll just leave  
 (7) a space I'll just jump a number on these and I'll fit yours  
 (8) in the one in the next consecutive number  
 (9) MR OPPENHEIMER So you have the set you don't need  
 (10) another separate set  
 (11) THE COURT I have a set but what I don't have is the  
 (12) verdict form  
 (13) MR FORTIER Then Your Honor I'll take care of some  
 (14) of the OPA  
 (15) THE COURT Just one second counsel I just want to  
 (16) look at one more thing  
 (17) MR McCALLION It's next door  
 (18) THE COURT This is yours Mr. Petumenos and I don't  
 (19) think it has any place in these discussions of either of the  
 (20) exhibits And here's your Restatements I don't want to  
 (21) confuse the criminal judges coming in in the morning  
 (22) MR PETUMENOS If life was so simple as who hit who  
 (23) with a bottle  
 (24) MR OPPENHEIMER I think we're close to the point  
 (25) where Mr. Petumenos can put his shoes back on

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- (1) THE COURT Thank goodness Is that it?  
 (2) MR OPPENHEIMER I believe so Your Honor  
 (3) THE COURT Did you have something else Mr. Fortier?  
 (4) MR FORTIER The other thing I said is I'll put my  
 (5) objections to the OPA instruction tomorrow  
 (6) THE COURT Your what?  
 (7) MR FORTIER My proposed OPA instruction that you  
 (8) rejected today The parts of it I need to put it in the  
 (9) record  
 (10) THE COURT It's not in the Court's exhibit  
 (11) MR FORTIER Right  
 (12) THE COURT Okay When you do that give it to the  
 (13) clerk tell her what it is so that I can look at it I just  
 (14) want to make it's consistent with our discussions  
 (15) Thank you very much  
 (16) MR McCALLION Your Honor may I hand up the verdict  
 (17) forms?  
 (18) THE COURT Yes absolutely please do that  
 (19) MR McCALLION Give it to the clerk  
 (20) THE COURT You can hand them to me And we can go  
 (21) off the record  
 (22) (Recess at 8:37 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 12th day
- (15) of September 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 534  
 TOTAL OCCURRENCES 1,339  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE 4,013

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SINGLE FILE CONCORDANCE

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CASE SENSITIVE

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NOISE WORD LIST(S)  
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INCLUDES ALL TEXT OCCURRENCES

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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 September 13 1994  
                       ) 9 00 a m  
 (6) )  
 (8) VOLUME 53 Pages 8472 through 8686  
 (10) TRANSCRIPT OF PROCEEDINGS (Continued)  
 (11) TRIAL BY JURY  
 (12) BEFORE THE HONORABLE BRIAN C SHORTELL  
           Superior Court Judge  
 (16) APPEARANCES  
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## Vol 53 8473

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## Vol 53 8474

(1) PROCEEDINGS  
 (2) (Jury In at 9 18 a m)  
 (3) (Call to Order of the Court)  
 (4) THE COURT Good morning everybody I d like to -  
 (5) before we start with the final arguments I want to give you I  
 (6) want to tell you what s going to happen and how you use final  
 (7) argument in the case because you might - might have  
 forgotten  
 (8) some of the things that I said at the beginning of this ace  
 (9) You re going to hear the final arguments of the parties  
 (10) and the plaintiffs final argument because the plaintiff has  
 (11) the burden of proof on most issues the plaintiffs will split  
 (12) their argument Each of the arguments in this case I mean  
 (13) from each side will be approximately two and a half hours in  
 (14) length  
 (15) So what you re going to hear is the opening portions of the  
 (16) plaintiffs final arguments, then you ll hear the entire  
 (17) defense argument then you will hear a brief brief rebuttal  
 (18) argument maybe about a half an hour from the plaintiffs So  
 (19) the way I ve set it up is the morning belongs to the  
 (20) plaintiffs and they will do that opening portion in the  
 (21) morning Then I will give you an hour s break  
 (22) Then after that break the defense entire final argument  
 (23) will occur the rebuttal will occur and, at the end of the  
 (24) trial day I will then read these instructions to you and then  
 (25) you will be excused to go deliberate

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(1) Now I d like you to understand one very important thing  
 (2) and that is that what you re about to hear is not evidence in  
 (3) this case Remember I told you very early in the case that  
 (4) the arguments statements and remarks of counsel are not  
 (5) evidence in the case so you don t base your factual decisions  
 (6) on what the lawyers say  
 (7) On the other hand this is a very complicated case it s  
 (8) lasted a long time and there s a lot of evidence here and the  
 (9) lawyers know this evidence better than anybody else so when  
 (10) they - when they state what they believe the facts are in the  
 (11) case you should listen very carefully to what they say  
 (12) As the jury though you re the judges of the facts so  
 (13) it s your job if the versions of the facts that you hear in  
 (14) final argument conflict it s your job to figure out what the  
 (15) facts really are and if you disagree with the recollection of  
 (16) counsel as counsel stated to you what s in the record what s  
 (17) in the evidentiary record then it s your job to find the facts  
 (18) and using the instructions I give you come to factual  
 (19) decisions in this case  
 (20) You ll have a verdict form at the end of the case that will  
 (21) allow you to do that for individual parties So remember now  
 (22) this is not evidence you re about to hear It s extremely  
 (23) important because it tells you the positions of the parties  
 (24) and at this point the lawyers are entitled to do what we call  
 (25) argue to you in other words try to persuade you that the

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(1) evidence justifies a certain conclusion by you So listen very  
(2) carefully  
(3) Mr Petumenos will be giving the larger part of the  
(4) plaintiffs' argument Mr Stoll will then give about a half an  
(5) hour - right counsel?  
(6) MR STOLL That's correct Your Honor  
(7) THE COURT And then we will take break for lunch  
(8) Mr Petumenos  
(9) CLOSING ARGUMENT BY MR PETUMENOS  
(10) MR PETUMENOS May it please the Court Mr Diamond  
(11) my co-counsel and members of our trial jury Good morning  
(12) We made it I have learned a little bit in this trial and  
(13) I remember my opening statement so I brought - I forgot to  
(14) bring a handkerchief this morning so I asked my staff to bring  
(15) me a handkerchief and this trial being what it is, I have  
(16) three now, so if anybody gets warm, let me know and I'll have  
(17) one  
(18) I wanted - I'm a little nervous this morning and I wanted  
(19) to start I think to calm myself down by thanking you for your  
(20) service A long time ago you got a little slip in the  
(21) paper - little slip of paper that was a jury summons if you  
(22) remember that came to court and you found out you were on  
(23) the  
(24) Exxon Valdez case and you said - and then you ended up in a  
(25) room with a hundred and some people and you said Well,  
that s  
good because that means maybe it won't be after all And then

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(1) comes to the land and we have a dispute here about culture  
and  
(2) certain clashes of culture and what's important about all  
(3) that  
(4) And we have a big problem Members of the Jury because we  
(5) have one side that says this whole thing amounts to a million  
(6) and a half dollars and we have another side when you add it  
(7) up it comes to over a hundred and ten or 120 million  
(8) It's not like we're real together here this morning and I  
(9) want to discuss with you in my final argument how is it this  
(10) has happened what are the battle lines that have been drawn  
(11) what are the differences between us that cause this enormous  
(12) disparity in the analysis of what has occurred here  
(13) Now obviously when you have a dispute like this, the  
(14) issues of credibility rise right to the top because you've got  
(15) people on both sides saying very different things  
(16) The law the instructions that Judge Shortell is going to  
(17) give you when this is over helps you with some of these  
(18) things and these are instructions that have been given for  
(19) years and years over how to evaluate the credibility of  
(20) witnesses One of the most important it's the first on the  
(21) list is the witness appearance attitude and behavior on the  
(22) stand and the way the witness testified And you became, it  
(23) seems to me after two years - after two years - after two  
(24) months fairly expert at listening to the way the interchanges  
(25) go on the witness stand Think about who the witnesses were

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(1) there was a bunch of jurors here and some of you felt Well  
(2) that's good  
(3) And now we're down to the final day and here you are and  
(4) it's a big case It's an important case and we have to thank  
(5) you for giving us your summer because we know it was no  
small  
(6) sacrifice and it's a sacrifice for the jury system which is  
(7) something that is very precious, because when we get to the  
end  
(8) of an endeavor like this it's ultimately the folks who come in  
(9) and listen to this and decide what should happen and it's a  
(10) big case and the world is watching and we have a good portion  
(11) of the world with us today it seems like It's broader than  
(12) that because the issues of the case were so big and so  
(13) important and I wanted to kind of go through with you what  
(14) they are why they're so important and why the world is  
(15) watching  
(16) We have an enormous environmental event that occurred here  
(17) under unique and interesting circumstances We have the issue  
(18) of the land what kind of land is this what kind of value do  
(19) we place on land like this It's unique in so many ways, it's  
(20) important in so many ways and there's been a big dispute here  
(21) as to what this land is what it means and what the value of it  
(22) is and that's important to your consideration and to your  
(23) decision and we have a big dispute here about what happens  
to  
(24) the environment when 11 million gallons of oil is dumped into  
(25) the ecosystem and what it means and how it's valued when it

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(1) who were able to say in response to a question on  
(2) cross examination if it was right and if it was true that s  
(3) correct and who it was that had to fight every single answer  
(4) no matter how obvious Do you remember when Mr Stoll asked  
(5) the question of Mr Dorchester, are there any glaciers on  
(6) Kodiak Island and Mr - Mr Dorchester's response was well  
(7) there's snow on the mountains in Alaska in the winter on Kodiak  
(8) Island  
(9) Compare and contrast that sort of performance with Keith  
(10) Gordaoff John Christensen Edgar Blatchford Pat Norman  
Now  
(11) perhaps some of these witnesses are at a disadvantage  
because  
(12) they don't know how all this - not used to this lawyer land  
(13) that we're in But I put it to you when you get into the jury  
(14) room and you start evaluating the credibility of some of these  
(15) things that were said that will be a valuable thing for you to  
(16) consider  
(17) You will also find out that elsewhere in this instruction  
(18) you will hear that the - a witness who will testify falsely as  
(19) to one aspect of his testimony is to be distrusted in others  
(20) and we'll come back to that in a moment  
(21) There is another instruction that relates to expert  
(22) witnesses - same problem isn't it? We have experts who  
(23) appear to be diametrically opposed as to what happened and  
what  
(24) went on in this case The special qualification of the  
(25) expert - and I know it seems sometime painful when we went

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- (1) through each and every expert and we talked about you know  
 (2) where they went to school what they did and after the sixth  
 (3) or seventh witness and you're hearing that  
 (4) But it wasn't just the Judge saying yes he may testify as  
 (5) an expert was not the only reason we were going through that  
 (6) exercise because the law tells you that when you actually  
 (7) evaluate their credibility you look to the experience and the  
 (8) acquaintance that the expert has with the subject area  
 (9) And I also would like you to remember that a good and  
 (10) skillful examiner on direct examination can make an expert  
 (11) sound very skilled very experienced and you may want to  
 (12) remember the opening questions on cross examination to  
 (13) determine if the expert witness really did have the skill and  
 (14) experience that we were talking - that he professed to have  
 (15) And we'll get to that in a minute  
 (16) How the expert got the information is a critical factor  
 (17) and we will talk about that with respect to some of the  
 (18) experts what facts they relied upon and where they got them  
 (19) and the clarity of the testimony  
 (20) Now what I would like to do in this final argument is I  
 (21) would like to take you through the direct examination which  
 (22) was so long ago of Dr Mundy I want to use that as the  
 (23) structure of the argument and talk about the things that keep  
 (24) us so far apart and they will be the highest and best use of  
 (25) the land because the lost use of the land and how you

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- (1) calculate the lost use of the land will help you determine how  
 (2) this issue of what the land means and what it's worth whether  
 (3) it's natural land whether it's limited use land and not of  
 (4) much value will be very important and this is on the screen  
 (5) because this you recall is a map of the experience and the  
 (6) background of Dr Mundy This is the number of times that he  
 (7) had been in Alaska working on Alaska lands  
 (8) And you'll also remember that Dr Mundy had a huge amount  
 (9) of experience in the area of contaminated lands He had  
 worked  
 (10) for oil companies before in evaluating contaminated lands He  
 (11) had written on it And he was one of the - I put it to you  
 (12) one of the most experienced expert that you heard in the real  
 (13) estate area relating to those two important topics Alaska and  
 (14) wilderness Native lands and contamination  
 (15) We're going to go through his examination and we're going  
 (16) to talk about highest and best use and lost use because one of  
 (17) the other instructions you're going to get is that we are not  
 (18) going to be asserting in this lawsuit claims for lost  
 (19) marketability or the inability to sell this land because as  
 (20) you've heard the Native corporations in this case don't try  
 (21) and sell the land they're interested in keeping the land and  
 (22) using it but they don't get rent from it, they don't get lots  
 (23) of money in cash paid out So the issue of highest and best  
 (24) use and the unique aspects of this land its subsistence  
 (25) value the wilderness and pristine nature of it and its

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- (1) source ANCSA leading to the conclusion of what its highest  
 (2) and best use is will be critical because what we're going to  
 (3) in this case is not whether - why did we put on all the  
 (4) evidence of the marketing and whether Ellamar sold and so  
 (5) forth It is because that those that tried to market their  
 (6) property and had difficulty produced evidence if it's lands  
 (7) that are nearby of what the lost use of the land like the  
 (8) wilderness land is  
 (9) It helps you determine what the lost use of the land is  
 (10) because when we get to the instruction - Judge, I might mess  
 (11) your courtroom up here a little bit - on what we are going to  
 (12) be talking about damages we'll be talking about something  
 (13) called fair rental value  
 (14) The fair rental value will determine the lost use of the  
 (15) property - and note the words of the instruction Imagine  
 (16) that a plaintiff puts his land up for rent and was allowed a  
 (17) rental time to rent it In arriving at this figure you must  
 (18) assume that the plaintiff would be free to rent, because the  
 (19) approach of Dr Mundy I think it's a valid one, is to  
 (20) determine what the highest and best use of the property is as  
 (21) conservation land as park land not to develop it but to keep  
 (22) it in its pristine condition determine what the value of land,  
 (23) that is, that has that highest and best use goes for, determine  
 (24) a rental rate assume a rental rate as the instruction states,  
 (25) and then help you determine for the period of time that the

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- (1) land is impaired determine the dollar value of it That is a  
 (2) big issue in this case And that's the one I want to address  
 (3) first  
 (4) Highest and best use is a term that Dr Mundy used And  
 (5) remember that we've called Dr Seldin at the end of the case  
 (6) who talked to you about what can happen if you get the wrong  
 (7) highest and best use It is a critical issue in this case and  
 (8) it is what brings you to the issue of what is this kind of land  
 (9) worth Is it - is the only measure of the land what  
 (10) Mr Dorchester would say is well you can't build a lodge on  
 (11) it you can't get a boat into it because it's got rocks or is  
 (12) it more like what Dr Peterson said when he said it is  
 (13) prolific, it is important it is critical to the ecosystem and  
 (14) that's what gives this land its highest value And that's the  
 (15) controversy, those are the battle lines that have been drawn  
 (16) Could we have the next exhibit, please?  
 (17) What will help you understand where we're going with  
 (18) respect to that is some of the - some of the information I  
 (19) read to Mr Dorchester on cross-examination This comes from  
 (20) the congressional declaration of findings from ANILCA some of  
 (21) the statutes that actually created this land in the first  
 (22) place and it talks about subsistence uses by residents of  
 (23) rural Alaska The Native physical economic traditional and  
 (24) cultural existence of the people those are clues that tell you  
 (25) what the highest and best use of this land is because from



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(1) it - from its inception at the time that it was selected at  
 (2) the time that Congress decided to give this to the people who  
 (3) are not according to Dr Green, a conquered people this is  
 (4) what got it started This was the use at the time  
 (5) Mr Gordaoff testified to you that at the time they were  
 (6) selecting the lands, they were thinking about the exchange  
 (7) value for park land what they could get in the way of an  
 (8) economic benefit to still keep the land as conservation land  
 (9) as pristine land for use by the Native peoples and for use by  
 (10) all of us  
 (11) The exchanges that are discussed in the statute talk about  
 (12) the secretary they re to be for equal value unless the  
 (13) secretary determines that it s in the public interest that the  
 (14) exchange be for other than equal value And what s going on  
 (15) here Members of the Jury is a recognition that there is value  
 (16) in this kind of property that gives it its highest and best  
 (17) use  
 (18) And when Mr Seldin came on he talked to you about what  
 (19) gives property its value and it doesn t always come in the  
 (20) form of a check When we think about the Native corporation  
 (21) and when it provides some of these services to the  
 (22) shareholders It is not unlike a corporation that writes a  
 (23) dividend check to its shareholders except you don't see it  
 (24) but it is every bit an economy as Mr Christensen told you It  
 (25) is not an emotional thing it's the thing that people use to

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(1) provide their very livelihood and more than that because the  
 (2) entire social structure out there is at stake  
 (3) This was a memorandum from the deputy secretary of the  
 (4) interior that I read to Mr Roddewig I believe it was that  
 (5) talked about the factors relating to the value for exchanges in  
 (6) ANWR and the Secretary of Interior wrote they re unique  
 (7) environmental qualities and productivity as the second item of  
 (8) consideration  
 (9) Now that brings me I think to the issue of Mr Green and  
 (10) the bundle of rights the right of quiet use and enjoyment the  
 (11) right to not develop your lands if you don t want to the  
 (12) actual policy of the Native corporations to make sure that the  
 (13) economic uses of the property didn t interfere with some of the  
 (14) higher interests of the corporation relating to conservation  
 (15) And riparian - excuse me littoral rights is a very  
 (16) important concept to our point of view Littoral rights  
 (17) remember are the right that a property owner has in the  
 (18) surrounding water the right to the resources around it  
 (19) Remember this land was a marine environment These people  
 (20) were a marine people as we learned from the archaeological  
 (21) proof for hundreds of years The value of this land is taken  
 (22) from the water and it is a - It is a common notion in real  
 (23) estate littoral - that the value of the land includes the  
 (24) value of the water Now why is that important?  
 (25) Well Members of the Jury we ve talked a lot about oiling

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(1) in this case and we ll talk about it some more I want to show  
 (2) you the instruction that requires you to find that the land has  
 (3) to be oiled before you can award money Watch carefully  
 (4) There it is That s the instruction that tells you that the  
 (5) land has to be oiled before you can award money It s not  
 (6) there It isn t in there and it isn t in there because the  
 (7) law is not a fool  
 (8) When the waters of Prince William Sound are polluted and  
 (9) the people who rely on the waters of Prince William Sound are  
 (10) polluted - and we ll see a clip of the Costello video in a  
 (11) moment - and the pollution is hanging off the shore and the  
 (12) creatures are dead and all the things that have happened have  
 (13) happened the law is not a fool and it doesn t require you to  
 (14) find oil on the shoreline before you find that the land has  
 (15) been impacted and the people who use the land have been  
 (16) impacted  
 (17) Remember the testimony of Mr Fall about the subsistence  
 (18) economy and what happened to it  
 (19) And now, I have to talk about the defendants the Nerf  
 (20) ball I call this Page and Gilfillan ball It says no damage  
 (21) on it It says no damage on it everywhere you look If I turn  
 (22) around and I throw it over my head and every time it falls,  
 (23) every time you catch it it s going to say no damage Now  
 (24) what do I mean?  
 (25) If you take - it s a big case and if you take the amount

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(1) of money that is spent per hour on this witness stand for some  
 (2) of the testimony that you heard It is staggering It is  
 (3) staggering if you divide it up on a per hour basis  
 (4) Remember Mr Nagel - who worked for Chugach and now  
 works  
 (5) for Alyeska - came in and said the subsistence economy is not  
 (6) that big a deal and we showed you the map that he wrote when  
 (7) he was at Chugach and every single village said subsistence  
 was  
 (8) the major industry of the village when he was working with us  
 (9) And then he gets laid off and he works for Alyeska And it s a  
 (10) sad thing, but keep in mind the stakes here and what s being  
 (11) contributed  
 (12) Remember the Blatchford testimony He was there when this  
 (13) land was selected He talked about what happened in  
 (14) Washington D C and how the land was selected not primarily  
 (15) for subsistence but subsistence was involved in every single  
 (16) parcel and they talk about it and they forego business  
 (17) opportunities to keep the land the way it is And then the  
 (18) appraisers line up  
 (19) Green calls it environmental lands Wallace who was the  
 (20) appraiser for the Seal Bay transaction he s the one that  
 (21) pointed out to you that the whole land had to go they weren t  
 (22) going to sell it just for the timber and leave the mountains -  
 (23) mountains behind because it went as a block Native  
 (24) corporations aren t that stupid and that s what you consider  
 (25) when you determine a highest and best use of property how  
 was

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(1) it being dealt with on the market and Mr Shorett agreed with  
 (2) the natural land theory was appropriate Mr Lee came in and  
 (3) disputed it but when I cross examined him I pointed out to him  
 (4) that he had approved a parcel where the term was management  
 for  
 (5) conservation purposes  
 (6) And all of these transactions come up and we get a graph  
 (7) like this Page and Gilfillan ball from Mr Roddewig It says  
 (8) Okay well there are not many transactions so there really is  
 (9) no market for natural land but none of the exchanges are on  
 (10) them There were a number of - of transactions that I asked  
 (11) him about where are they? Well they re not on there  
 (12) Page and Gilfillan ball  
 (13) And Maury Seldin amounted to this He came in and he told  
 (14) you and - I had a bad teacher in junior high school I can t  
 (15) remember who it is it s Galileo or somebody when they re  
 (16) having this debate about is the world flat or is the world  
 (17) round anyway Mr Galileo kept on saying somebody the  
 moon s  
 (18) round the day - goes from day to night, sure seems to me that  
 (19) the world is round  
 (20) That s the kind of debate that we re having here Exxon  
 (21) does not want to concede that the world is round They don t  
 (22) want to concede that natural land exists They don t want to  
 (23) concede that there's a market for it and there's a good reason  
 (24) for it  
 (25) Remember when we played the - when I played the video of

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(1) Mr Dorchester I took the video to the point where there was a  
 (2) rocky shore as close as I could get it to Mr Peterson s  
 (3) board remember with all the little things that stuck on it  
 (4) And showed him that rocky shore and I started asking him  
 about  
 (5) It Do you consider what this land can produce did you  
 (6) consider how this land could be a farm for the people  
 (7) No it wasn t a factor The market " he says "doesn t  
 (8) value it you won t see it  
 (9) That s the difference between us That s why we have a big  
 (10) reason as to why we have big disparity in damage It s an  
 (11) important case and the world is watching That s an important  
 (12) issue How are you going to decide it? What does this land  
 (13) mean? How is it important? What s its value?  
 (14) Mr Dorchester was cross examined don t you remember I  
 (15) talked to him about - I want to clear-cut the land I want to  
 (16) get the timber off there and the other party says no I want to  
 (17) have it for a park and the Native corporation says no at that  
 (18) price I m going to cut the land - cut the timber no I want  
 (19) it for a park and then it sells  
 (20) And when it sells that s the value of the land and when  
 (21) it sells in a block like it does Exxon oiled an island talk  
 (22) about the real world here Mr Dorchester divides things up  
 (23) into the quote shoreline related area LaTouche island has  
 (24) never been divided up that way never ever Knight Island has  
 (25) never been divided that way never ever

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(1) Mr Dorchester does it for a reason because he can lower  
 (2) the value to 500 bucks an acre he can divide it make it a  
 (3) limited shoreline related area and he can lower the damage  
 (4) And that s a big difference between us  
 (5) We talked - could I have the Roddewig deposition segment  
 (6) please?  
 (7) We talked about training and experience of the experts that  
 (8) came and talked to you and I seem to recall that  
 (9) Mr Dorchester prior to the Exxon Valdez oil spill didn t  
 (10) have a whole lot of wilderness experience He fudged around a  
 (11) bit that he had one or two and on contamination he was talking  
 (12) about some swampland in Florida We didn't have much of that  
 (13) either  
 (14) (Videotape Played)  
 (15) BY VIDEO SPEAKER  
 (16) Q Do Alaska natives have aboriginal rights to hunting and  
 (17) fishing in Alaska?  
 (18) A Yes  
 (19) Q Upon what do you base that?  
 (20) A Articles that I ve reviewed conversations I ve had with  
 (21) people during the course of our work  
 (22) Q What was the -  
 (23) (End of tape )  
 (24) MR PETUMENOS That was wrong The very fundamental  
 (25) basis for the Alaska Native Claims Settlement Act was the

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(1) giving up of aboriginal hunting and fishing rights in return  
 (2) for ANCSA and that s the problem with the witness who comes  
 in  
 (3) as an expert who has no acquaintance with what he s dealing  
 (4) with This was the most fundamental point about this land and  
 (5) do you hear what he said from talking to experts from reading  
 (6) articles all that?  
 (7) Folks that never happened He never did those things He  
 (8) never talked to an expert he never read an article because it  
 (9) wasn t true  
 (10) Page and Gilfillan ball throw the ball up and it comes  
 (11) down no damages  
 (12) You want to hear about deposition testimony, I ll wager,  
 (13) where they bring in a Native witness someone from the  
 (14) corporation and say Can you think of any uses this land was  
 (15) put to that were interfered with by the oil spill? And they  
 (16) say No I can t think of any uses Some - some fellow in a  
 (17) deposition  
 (18) Well, Members of the Jury I think we re beginning to see  
 (19) what the use of this land is what the highest and best use of  
 (20) this land is and why the valuation proceeds the way it does  
 (21) The villages are required to select the land near the  
 (22) village so that they can preserve Native culture There are  
 (23) three things that the Native corporations were required to do  
 (24) One was reserve the culture preserve the way of life and the  
 (25) economics and culture and history and we talked about that in

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- (1) our opening statement
- (2) So as you see you know in the opening statement of Exxon
- (3) everything looks so simple Bring in the charts Joel bring
- (4) up the video Bill come on show this photograph of the clean
- (5) rock Bob and run the video let's take the helicopter ride
- (6) Joe I had dreams at night of Exxon lawyers coming at me
- (7) half man half-bar chart with pants coming out from under the
- (8) bar chart
- (9) But slow down there's more to this than that Take it
- (10) slow
- (11) It's an ecosystem it's productive Fish swim from oiled
- (12) shoreline to unoiled shoreline to oil slick and things happen
- (13) to them So do seals Birds fly into these uplands that we're
- (14) talking about and that's what gives the land its value
- (15) Before that I need to see the - I'm going to close this
- (16) off I'm at the end of my discussion with you about highest
- (17) and best use I want to go next to the next topic But before
- (18) I do remember that there's an instruction in here that talks
- (19) about difference between the shareholders in the Native
- (20) corporations and an issue of there not being double recovery
- (21) The Native corporations are the only people who own the
- (22) land They're the only people that can do anything about it
- (23) They're the only title holders to the land If any restoration
- (24) is to be done if anything is to be done with this land to fix
- (25) it they're the only ones that can take the money and do it

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- (1) and they are distinct from the shareholders in this case
- (2) And we are asking for recovery based upon the land and
- (3) when this instruction is read by you you should keep that in
- (4) mind The shareholders and the Native corporations are
- (5) separate and distinct from the shareholders and the
- (6) shareholders don't own one square inch of the property not
- (7) one You recall the testimony that there was a - there are
- (8) resolutions in place regarding the return of some of this money
- (9) and the corporation's desire to use it to restore and rebuild
- (10) Shareholders can't do it This is the only shot that the land
- (11) owner has
- (12) Could I have the Mundy exhibit please on the screen
- (13) relating to severity?
- (14) When you don't - in conclusion when you don't get the
- (15) highest and best use right you get the value wrong, you get
- (16) the parcel definition wrong and you make a huge mistake and
- (17) that's a big part of the problem between Exxon and the Native
- (18) corporations
- (19) Moving on Dr Mundy then talked about how contamination
- (20) affects value He talked about physical oiling and he talked
- (21) about severity And that's the thing that I want to talk to
- (22) you about next
- (23) Roll the video if you would please Starting to sound
- (24) like Exxon
- (25) Peterson talked about - Dr Peterson talked about the fact

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- (1) that one of the most important things he wanted to tell you was
- (2) that most of the species that he was talking about had not been
- (3) studied that that whole restoration business in the early part
- (4) of the spill came to an end before many of the species were
- (5) studied so most of the species that were hit by the spill
- (6) initially were not studied
- (7) But he did - when he talked about that he said that one
- (8) of the most important sources of information are the indigenous
- (9) people's observation about the land and remember when he
- (10) talked
- (11) about the fact that - with me Joel? - Remember when he
- (12) talked about the fact that I guess it was some
- (13) cross-examination about some Life Magazine photographer or
- (14) editor or something that went through the sound and said, Oh
- (15) it looks terrific to me He said, Depends how often you go out
- (16) there It depends whether you have the practiced eye to be
- (17) able to see and it's the indigenous people that we turn to
- (18) that are able to tell us
- (19) And you remember the testimony of Mr Christensen about the
- (20) wildlife video we saw about the fellow that gets into the sound
- (21) about once or twice a week couple weeks a season in Prince
- (22) William Sound seventy in this oil spill was unbelievable
- (23) 51 percent of the harbor seals were killed, according to
- (24) Dr Peterson 10 to 90 percent decline in fucus a heavy kill
- (25) of Harlequin ducks not recovered much at all 17 percent were

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- (1) reduction of 90 percent from 1989 to 1991 and a poor
- (2) recovery
- (3) This is 1989 folks and we talk about this because of the
- (4) severity of the impacts to the environment Dr Mundy Phil
- (5) Mundy talked about how it was like turning off a switch the
- (6) shock was so severe
- (7) Mr Peterson told you that the hot water wash removed from
- (8) 50 to 90 percent of the biota on the beach in a lose lose
- (9) situation
- (10) The defendants by the way did things like this I
- (11) promised Mr Stoll I would show you this because he worked so
- (12) hard at it The water column study down to a hundred meters
- (13) I don't know if any of you are scuba divers you know what a
- (14) hundred meters is like you know how dark and cold it is down
- (15) there
- (16) What Dr Kocan told you the microlayer the pollutants are
- (17) 100 to 1 000 times the density of elsewhere in the water
- (18) column and that was the one thing that the water column study
- (19) didn't measure for Exxon
- (20) Page and Gilfillan ball Throw the ball over your head
- (21) It lands and says no damages
- (22) Dr Kocan talked to you about a species that Mr Peterson
- (23) told you was a keystone species in the food web Do you
- (24) remember the food web where Dr Peterson was crawling
- (25) around

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- (1) take some time in deliberations I guess and he was telling
- (2) you how complex it was and how they were key - that's good
- (3) enough I'm not going to go through too much of it There were
- (4) key species among them the sea otter the herring upon which
- (5) lots of animals feed
- (6) And Members of the Jury what happened to the herring?
- (7) That's an interesting story that Exxon likes to twist
- (8) The herring you remember were described by Dr - by
- (9) Dr Kocan as having immediate lethal effects and immediate
- (10) kill We saw the - the larvae that were deformed as a result
- (11) of being around the microlayer after they're being hatched
- (12) The egg mortality in the oiled areas It affected them in a
- (13) number of ways one of which was the immediate lethality of the
- (14) herring
- (15) He talked about the fact that there are acute effects
- (16) subchronic effects and chronic effects We're talking about
- (17) severity now and Dr Mundy's consideration of severity We'll
- (18) come back to some of the ones that might relate to the
- (19) persistence of oil over time but right now we're talking about
- (20) the severity of the impact And Exxon came in and said why we
- (21) had the best herring runs in history in 1990 and 1991 as if
- (22) that were a good thing
- (23) When are we going to stop simplifying the issue of
- (24) pollutants on the environment? When are we going to stop
- (25) saying that once it's off the beaches - and I think it's one

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- (1) of the admirals said it once it's into the water or wherever
- (2) it goes that we're finished with the consideration of the
- (3) issue
- (4) Because there's another explanation for what went onto that
- (5) weird record run of herring in 1991 and that is of course
- (6) that the otters were dead the birds were dead the animals
- (7) that preyed and kept the ecosystem in balance were dead
- (8) And in 1993 Members of the Jury what happened? The
- (9) biggest crash in the herring population in the history of
- (10) Prince William Sound I don't mean a slow run or a low run I
- (11) mean a crash and lesions on the scales and blood on the fish
- (12) and people were scared And the record run in 1990 and 1991
- (13) is
- (14) a simple answer and a bad answer to what's happened here to
- (15) this land and to this environment
- (16) Dr Kocan talked to you remember about the field
- (17) mortality and the laboratory mortality and he had graphs that
- (18) he put up and he would duplicate in the laboratory the same
- (19) level of mortality and the graphs would match - Ms Johnston
- (20) is working frantically to get them up here for you
- (21) What he did remember was he took the field data on - one
- (22) of the ones I'm going to show you is the weight of larvae by
- (23) oiled and unoiled area - that's not the one - then he took
- (24) the one in the laboratory and they matched
- (25) Members of the Jury the severity of the initial impacts of
- (26) the oil spill was enormous in this oil spill which was the

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- (1) largest oil spill in the North American continent and here
- (2) come the graphs now
- (3) The laboratory reared - laboratory reared larvae and the
- (4) field-exposed larvae, and look at the graph And he talked to
- (5) you about what the concentrations were of the oil that
- (6) revealed - could we run the video please?
- (7) The concentrations of the oil that revealed the
- (8) laboratory reared larvae and he told you that when he ran the
- (9) test in the laboratory the oil was so diluted that you
- (10) couldn't see it And what I'm going to show you next is a
- (11) little portion of the video from Herring Bay where the divers
- (12) go down with their little - take a moment and look
- (13) (Videotape Played)
- (14) MR PETUMENOS This is what happened in 1989 and it
- (15) is no wonder that Dr Kocan was able to match in the laboratory
- (16) with the infusion of oil what was found in the field This
- (17) diver is taking his cloth and he is rubbing it onto fucus where
- (18) the herring lay their eggs and that's what's coming off of
- (19) them and in the laboratory Dr Kocan couldn't even see the
- (20) oil and he was getting the kind of mortalities that he was
- (21) talking about and he told you that, with this kind of
- (22) concentration it was way beyond way beyond what he was
- (23) doing
- (24) In the laboratory
- (25) Let's go to persistence If we could put the Mundy exhibit
- (26) back up

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- (1) Dr Mundy remember, had studied how contamination affects
- (2) value You have - by the way let me go back to natural land
- (3) I forgot something
- (4) The two articles that we - we put them into evidence on
- (5) natural land they'll be interesting for you to read One's by
- (6) Mundy and one's by Roddewig There's a big difference and it
- (7) relates to my ball here
- (8) This was a publication by Mr Roddewig in the appraisal
- (9) journal with no disclosure no disclosure that before the thing
- (10) went to the appraisal journal it was sent to an Exxon lawyer
- (11) for review in a draft form Now Members of the Jury this is
- (12) going into the professional literature to influence what
- (13) happens not just in this case but all over
- (14) The second thing that we talk about is how contamination
- (15) affects value and that relates to the persistence of the oil
- (16) and how it - how it impacts the land over time
- (17) And Joel if you'd be ready with my video as well
- (18) Mr Bush told you that he had some serious concerns about
- (19) the joint surveys And remember that the joint surveys were
- (20) conducted according to Mr Piper, under emergency
- (21) situations
- (22) under emergency conditions in 1989 and only Exxon went and
- (23) he
- (24) had a very serious concern that those many shoreline surveys
- (25) did not find the oil for purposes of determining persistence
- (26) and these are the shoreline history maps that he presented to
- (27) you and remember he looked at them and the colors would
- (28) be

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(1) the - the shoreline surveys over time and it'd go the wrong  
 (2) direction in subsequent years there would be more oil on them  
 (3) than there were in previous years and he'd say wait a minute  
 (4) that's a problem  
 (5) And we talked about the surveys having covered a huge  
 (6) amount of area at the beginning, but if there wasn't a reason  
 (7) to go back and survey them again they weren't looked at after  
 (8) 1989 and we talked about the fact that the 1989 surveys didn't  
 (9) show - the 1989 surveys didn't show the amount of beach that  
 (10) was walked per segment because Mr Teal conceded that each  
 (11) segment was not walked in its entirety And they have no data  
 (12) none on how much of the segment they looked at  
 (13) See what happens here 1989 Exxon was out by themselves  
 (14) 1990 they go out in the joint survey, and look how much  
 (15) they're surveying  
 (16) Every witness in this case conceded that these surveys were  
 (17) not done for the purpose of determining persistence for  
 (18) damage Who were they? Mr Harrison even - and there's an  
 (19) exhibit for Mr Harrison that I want you to - remember that  
 (20) one we talked about that related to the admiral and we had the  
 (21) dispute about whether it was part of the admiral's - it's a  
 (22) memorandum, and you'll find it in there from a Mr Chipper  
 (23) Loggie discussing the problems with the surveys and the  
 (24) difficulties they were having and the infighting that was going  
 (25) on between the various agencies and so forth Yet we got the

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(1) Impression from Mr Harrison that everything was going  
 (2) smoothly  
 (3) But take him at his word He told you that those surveys  
 (4) had nothing nothing to do with this litigation or with any  
 (5) litigation That's not what they were for, and Mr Piper told  
 (6) you that same thing And he went back to Green Island and he  
 (7) walked Green Island, and he went to some of the places that he  
 (8) knew were affected by the survey process because he knew  
 (9) that  
 (10) what was going on there was an - a given segment might be  
 (11) abandoned for purposes of treatment and still have oil  
 (12) And he went back to one of those Green Island beaches and  
 (13) he walked it remember, it had shale on it and slate he said  
 (14) and it was hard to clean And there between the slate, as he  
 (15) walked there was oil everywhere And it wasn't on the survey  
 (16) because it couldn't be cleaned  
 (17) Remember this document - this is on the joint surveys and  
 (18) on this issue that - that the Native corporations had input  
 (19) and remember they had to write in the box that said "treatment  
 (20) required" because Exxon had only put a little box for no  
 (21) treatment required and they would write in these comments  
 (22) Well let me tell you something about this We wasted a  
 (23) lot of time on this because Mr Teal told you in his  
 (24) cross-examination that these - this - these inputs from the  
 (25) Native corporations and from everybody else didn't get into the  
 SMAD data base that resulted in the oiling maps

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(1) Isn't that something? It didn't get into the information  
 (2) that they used to determine oiling So it doesn't matter  
 (3) What Dorchester used despite the fact he said he  
 (4) considered other oiling what he really used was the shoreline  
 (5) data was the survey data  
 (6) Members of the Jury the only persistence data in this case  
 (7) designed to tell you how to evaluate the damage is the  
 (8) plaintiffs It's the only persistence data in the case It's  
 (9) the only analysis that has been done The persistence curves  
 (10) are the only thing in the case  
 (11) So what did Mr Bush do? He found these problems and he  
 (12) went and he looked His work and testimony has been brutally  
 (13) mischaracterized by Exxon in their case in chief They're  
 (14) throwing the ball  
 (15) Mr Bush looked for areas where he knew the surveys didn't  
 (16) make sense to confirm that those surveys were not reliable for  
 (17) determining the persistence of oil Confirmed what Mr Piper  
 (18) said and others said in the case to the same effect and so he  
 (19) built his transects - not because he was, as Exxon says  
 (20) looking for oil but because he was trying to figure out if  
 (21) these surveys were accurate And the answer is that they  
 (22) weren't  
 (23) He went to a special investigation site and looked at what  
 (24) the impact of the cleanup was on subsurface oil - and  
 (25) remember that on the issue of subsurface oil Mr Piper

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(1) testified and Mr Taft which was a deposition that may have  
 (2) escaped you we read it - the one deposition we forced you to  
 (3) listen to in our case he said they didn't begin looking or  
 (4) mapping subsurface oil until 1991  
 (5) And this takes more time in the jury room but this is what  
 (6) happens and this nice looking one here this is mechanical  
 (7) tilling This is what destroys a beach This is what you do  
 (8) with a bulldozer This beach is already gone and this is what  
 (9) happens if you do medium cleaning and this is what happens if  
 (10) you do none at all and for every beach out there that they  
 (11) missed you can count on there being some subsurface oil out  
 (12) there  
 (13) Run the video please Oh very briefing that was a -  
 (14) that photograph is an example of the beaches bleeding from  
 (15) 1989 bleeding off the beach and reoiling other beaches  
 (16) That's what Mr Bush was trying to show you This is why the  
 (17) surveys can be wrong  
 (18) Could we run the video please I'm going to show you a  
 (19) segment of the Bush video that further illustrates the point of  
 (20) persistence  
 (21) (Videotape Played)  
 (22) MR PETUMENOS This was the swash bars, you remember,  
 (23) and you'll see here on the video it's a little grainy but this  
 (24) is the sand that covers the gravel This is where they went  
 (25) and somebody said This is a clean beach And they started

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- (1) looking at the swash bars and trying to figure out what
- (2) happened and they took samples along the edge where the sand
- (3) was covering it up and this is what they found In 44 I think
- (4) it was of 48 sample sites that Mr Bush went to from that
- (5) other map I had out they found oil The surveys don't work
- (6) This map - you see all these little black triangles?
- (7) Oiling not shown by SCAT2 mapping This is where cleanup crews
- (8) actually went and picked oil up off the Veco crews What were
- (9) they doing out there? SCAT2 didn't get it
- (10) So Mr Bush - where'd my video go? Let it run
- (11) 1992 Squirrel Island Chugach archaeological site You'll
- (12) see another one coming up for 1994 This is the one where they
- (13) had to squeeze around in front of the sun so you could see it
- (14) Remember that one of the things that Exxon says Oh well
- (15) you know, there are asphalt from - from an earthquake of 30
- (16) years ago and that gets mistaken for Exxon oil
- (17) Excuse me? 30 years getting mistaken for Exxon oil? What
- (18) do you suppose is going to happen with the Exxon oil 30 years
- (19) from now if that's the case? I think they maybe proved a
- (20) little too much on that one
- (21) (Video concluded)
- (22) MR PETUMENOS And Mr Bush did something else, he
- (23) went to the other oil spills and there's a key that goes with
- (24) this and he found that the persistence was fairly lengthy on a
- (25) number of these other oil spills and there's a sheet that

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- (1) matches these numbers to every one and you can look at it you
- (2) can see what kind of spill it was you can evaluate the
- (3) differences and I think you'll come to the conclusion we have
- (4) the only persistence analysis in this case
- (5) I'd like the Exxon briefing book exhibit please because
- (6) the Exxon briefing book exhibit is really interesting This is
- (7) your key to this map when you go to look for it
- (8) Sometimes you have to look for clues Members of the Jury
- (9) when people say what they really think when they're not in a
- (10) trial and it's not 'Bring up the video log and come up here
- (11) with this Bill ' I want to show you an exhibit that I think
- (12) you'll find most interesting
- (13) Briefing book please - sorry? No the briefing book that
- (14) has the little graph of the - that's the one
- (15) This is an exhibit that Mr Bush used to check his
- (16) persistence values It came from Exxon's briefing of their own
- (17) management at the beginning of the spill when they were trying
- (18) to tell them what to expect from the Exxon Valdez oil spill
- (19) Take a look at this when you get into the jury room it's
- (20) most interesting It's an Exxon document It talks about the
- (21) persistence of oil It was not intended for purposes of
- (22) litigation, and it tells you a lot Up this chart here are the
- (23) kinds of beach and this is the time required for ecological
- (24) recovery You got to look for clues sometimes
- (25) FINSAP remember was named FINSAP before the details of

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- (1) the survey was worked out And Mr Piper told you that - his
  - (2) words were interesting he said - you know talked about
  - (3) everything being a negotiation and struggle between them all
  - (4) and he said that was politically okay to call it FINSAP The
  - (5) state could do its own thing but realistically very stupid
  - (6) You see FINSAP final survey program was called FINSAP
  - (7) before they went out and looked because it was time folks to
  - (8) get off the beaches
  - (9) Take a look at the Tumeo tape if that doesn't give you a
  - (10) clue
  - (11) And let's go back finally to Mr Kocan Because Mr Kocan
  - (12) talks to you about the same sort of graphs on the genetic and
  - (13) chromosomal damage the sublethal effects the things that go
  - (14) on and on the things that go on and on from generation to
  - (15) generation in fish that's a form of persistence, and the
  - (16) persistence that we used in the case folks was not
  - (17) persistence related to biology but in fact was persistence -
  - (18) was much narrower than that
  - (19) Field observed chromosomal damage and
  - (20) laboratory observed
  - (21) chromosomal damage coming up next That's something that isn't
  - (22) lethal It doesn't happen right away, but it goes from
  - (23) generation to generation and it's a form of persistence and
  - (24) it's the same thing This is what Mr Kocan duplicated in the
  - (25) laboratory
- (25) How we doing? You hot and tired and need a break or need

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- (1) me to keep going for a while?
  - (2) THE COURT It is about time to take a break
  - (3) counsel
  - (4) MR PETUMENOS If I could just finish this one area
  - (5) THE COURT Sure
  - (6) MR PETUMENOS I'm going to talk to you now about
  - (7) what the defendants do with their persistence and we'll take a
  - (8) break We're going to talk about the Gilfillan ball one more
  - (9) time
  - (10) Run the video if you would You got to look for clues
  - (11) you see because not once did Mr Dorchester - he had
  - (12) interesting terms throughout his report and throughout his
  - (13) testimony but do you remember when I asked him this
  - (14) Go ahead and run the video please Joel This is what he
  - (15) said folks on his resume when he goes to look for his next
  - (16) job served as a consultant to the legal team handling one of
  - (17) the world's largest contamination accidents
  - (18) And remember when I asked him what that was and he said
  - (19) wait that was a nuclear contamination case I showed it to
  - (20) him and he said yeah you're right It's this case Look for
  - (21) the clues of what people really think what they really say
  - (22) when no one's looking
  - (23) Got the video coming?
  - (24) Remember the meeting when we play this video of Roddewig
  - (25) and Papke and Page and Gilfillan? That was in 1990 before
- many

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- (1) of the trips and the green dots on the map were - came into
- (2) being in that 1990 meeting -
- (3) (Videotape Played)
- (4) MR PETUMENOS - they talked about tough creatures
- (5) rough environment winter storms oil seeps and they were
- (6) talking about the Amoco Cadiz case This is the Raynor video
- (7) taken from 1993 This is the fellow who went in the Knight
- (8) Island area and filmed
- (9) The excuses of Exxon were it s a complex ecosystem the
- (10) food chain is not affected, they can always eat something
- (11) else It sounds like Marie Antoinette and the French
- (12) Revolution let them eat cake
- (13) Tanks from the 1984 quake the fish processing plant
- (14) fishing boats make pollutants the media exaggerates - you
- (15) always got to blame the media right? Toxic shellfish
- (16) poisoning wasn't that a good one? We've been eating clams in
- (17) this state for years and years and years and they come in and
- (18) say to you We spilled 11 million gallons of oil in the area
- (19) and killed all the clams but don't forget why there s toxic
- (20) shellfish poisoning out there
- (21) And what you heard in the meeting between Page and
- (22) Gilfillan was the creation of a defense Let s get our story
- (23) together And how do we know that? Because remember
- (24) when I
- (25) asked Mr Roddewig how that meeting came to be? Remember
- (26) that? I said How did you end up meeting Page and Gilfillan

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- (1) and Page and - and Mr Roddewig said, I was cruising through
- (2) the literature and I found Page and Gilfillan s name and I
- (3) thought they d be interesting guys to talk to and so I tried to
- (4) figure out how to get hold of them and Exxon insisted on
- (5) having the lawyer present It wasn't me
- (6) And then we talked to Mr Papke - these are some of the
- (7) notes from that meeting and these are not in evidence so
- (8) you re going to have to remember it from the record but they
- (9) talked about some of the same things Here s the seeps and
- (10) the
- (11) microbial process and so forth that you heard in this
- (12) courtroom and when we asked Mr Papke how the meeting
- (13) came
- (14) about he was a little more forthright and he said Yeah we
- (15) went to Exxon told them we wanted to talk to somebody
- (16) scientifically knowledgeable and they set us up with Page and
- (17) Gilfillan and they had a lawyer present
- (18) Why was Mr Roddewig doing that? Why wouldn't he say so?
- (19) Why was he saying he was cruising through the literature found
- (20) Page and Gilfillan s name and just happened to - to set up the
- (21) meeting? The reason is the ball The reason is the sample
- (22) sites near glaciers where there isn't much biota in the first
- (23) place that Mr Peterson talked about that they compared with
- (24) others
- (25) The reason is that they were putting together their case
- (26) instead of doing an objective investigation
- (27) Now the proximate cause instruction tells you that when

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- (1) two acts - this is the cause of what happens to something in
- (2) response to an actionable event like an oil spill when two
- (3) acts act in concert and one is a substantial factor they re
- (4) still liable for the damage
- (5) So if you ve got a seal population in decline if you got
- (6) things that make the ecosystem fragile and they hurt it more
- (7) folks they can't get out of it because of toxic shellfish
- (8) poisoning or the seals were declining or anything else
- (9) Read the instructions
- (10) I want to talk next about stigma and about the numbers and
- (11) archaeology and then I'll be done but first Judge let s take
- (12) a break
- (13) THE COURT Okay
- (14) THE CLERK. Please rise This court stands in
- (15) recess
- (16) (Jury out at 10 20 a m )
- (17) (Recess from 10 20 a m to 10 32 a m )
- (18) (Jury in at 10 32 a m )
- (19) THE CLERK Please rise This court now resumes its
- (20) session Please be seated
- (21) THE COURT Counsel
- (22) MR PETUMENOS Judge I was worried about running out
- (23) of time so I left an instruction up for them to read on the
- (24) way in This was the one we talked about with two actors
- (25) working in concert, the defendants are one of them and they re

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- (1) a substantial factor, you don't get out of it because the seals
- (2) were in decline or whatever the other business is It s part
- (3) of the proximate cause instruction, which will be in your
- (4) packet Persistence curves the closing off Other analysis in
- (5) the case the kind of oiling that s present the kind of beach
- (6) that s here this was an analysis that went oil spill
- (7) area wide It covered areas that - it took care of the
- (8) problem that places were surveyed and not returned to It is
- (9) an average
- (10) Mr Bush said that he went out and checked his persistence
- (11) curves found some higher, found some lower, but found some
- (12) he
- (13) could confirm and generally speaking the oiling the kind of
- (14) beach how protected it was And all that dovetailed to tell
- (15) him how long the persistence would last
- (16) And folks It s interesting he did not include at
- (17) Dr Mundy s request the ecosystem and biological persistence
- (18) which very well could have been part of the persistence factor
- (19) and as a consequence these numbers are low
- (20) And just so we understand this is an interesting thing
- (21) that you can do you take Mr Mundy s spread sheets and you
- (22) look at them over time and see how the damage is calculated
- (23) over time each color being a - this is a final argument
- (24) exhibit so it won't be in the jury room but you could recreate
- (25) it real easy
- (26) These are the different colored corporations one for each

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(1) one These are the amount of damages over time in the years  
 (2) across here And you ll find that most of Dr Mundy s damage  
 (3) is in fact fairly front end loaded for all of the  
 (4) protestations of Exxon on the issue of persistence  
 (5) Let s go to 1196 again which is how contamination affects  
 (6) value and go to the next thing that Dr Mundy talked about He  
 (7) talked about stigma And he talked about how contamination  
 (8) affects value in terms of disruption of the activities of the  
 (9) uses that can be made of Prince William Sound, how  
 observable  
 (10) is the contamination - we ve heard a lot about that - What  
 (11) it does to the aesthetic effect some of the others the fear  
 (12) peril and uncertainty and risk that accompanies the - a  
 (13) catastrophe like this  
 (14) We had a lot of testimony about how that can - can affect  
 (15) value and if we could have the Mundy Exhibit 1144 up please  
 (16) The magnitude of the spill itself In terms of how it can  
 (17) affect some of these factors relating to stigma is demonstrated  
 (18) on this exhibit Massachusetts to Virginia some people called  
 (19) it - I can t remember it all but from Washington down to  
 (20) northern California the shear size of this thing had an  
 (21) enormous affect upon the impact of the ecosystem upon the  
 (22) fear, upon the uncertainty And if there s one thing I told  
 (23) you would happen in the opening statement which I m certain I  
 (24) did is that when you were done listening to the scientific  
 (25) experts on both sides there would be nothing if there wasn t

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(1) uncertainty about what the effect of this thing And  
 (2) uncertainty is the enemy of the - of the peaceful use of one s  
 (3) property and you heard testimony of Dr Bridgen about risk and  
 (4) about the information that came out and about how the  
 (5) information was conflicting and incomplete and how people  
 were  
 (6) frightened  
 (7) Could we have the Costello tape please? And I want to go  
 (8) back to Dr Green s discussion with you of littoral rights and  
 (9) the use of the water and the fact that -  
 (10) (Videotape Played)  
 (11) MR PETUMENOS - this was a tape that we played at  
 (12) the beginning of the case and it s taping near Tatitlek and  
 (13) Bligh Island, and my reason for playing you this tape is that  
 (14) you will see the lands of Tatitlek close by an area where  
 (15) Mr Costello filmed incredibly thick toxic - at this point  
 (16) this is the day after - after the spill oil on the water and  
 (17) remember this these are the two ducks that he said that he  
 (18) said were going to die because he d seen them earlier with oil  
 (19) on them And those are the Tatitlek lands surrounding the huge  
 (20) and toxic slick on the water  
 (21) Remember this video If you will when you see the  
 (22) little round zeros next to Tatitlek and Eyak, because Exxon  
 (23) says that the property wasn t oiled and so therefore the use  
 (24) of the property wasn t affected zero nothing send them  
 (25) home

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(1) The plaintiffs have the only value appraisal for the  
 (2) Tatitlek and Eyak lands in this case I suggest to you in the  
 (3) absence of an appraise to the contrary by Exxon on Tatitlek and  
 (4) Eyak Give them their damages don t discount it a dollar  
 (5) The arrogance of Exxon in refusing even to appraise those  
 (6) lands based upon the notion that the oil didn t touch the  
 (7) beaches is unbelievable And you can send them a message  
 by  
 (8) telling them that these lands up here were indeed harmed This  
 (9) is my bookends exhibit and I wasn t going to argue this I was  
 (10) going to let - some bookends have birds and some don t This  
 (11) was the Aleut Corporation which way down here on the chain  
 (12) which Mr MacSwain made the point well they didn t find land  
 (13) contamination an issue and Tatitlek and Eyak and the Aleut  
 (14) Corporation are like bookends do you remember that? And we  
 (15) talked to Mr MacSwain about what got killed in here what got  
 (16) killed in here what got killed up here, Mr MacSwain?  
 (17) Page and Gilfillan ball Bookends? Excuse me?  
 (18) Remember the blank page I showed you in the instructions  
 (19) Remember Mr Homan talking about the perception of land and  
 the  
 (20) Level One audits and so forth We re not suing for lost  
 (21) marketability and selling property under those circumstances  
 (22) It is evidence of what happens to the value of property It is  
 (23) evidence of what lost use is all about when you have - when  
 (24) you re required by the law to imagine the rental situation and  
 (25) to assume the fair rental rate Those issues are evidence that

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(1) will help you determine what the fair rental rate is for this  
 (2) property And there is no requirement that the property be  
 (3) oiled  
 (4) Now Exxon did a study about stigma and came to the  
 (5) conclusion there wasn t any stigma in the form of  
 (6) Mr Roddewig and these are the places he chose to study The  
 (7) Florida barge spill back when I was in high school I suppose  
 (8) that s not too long ago  
 (9) One of these I can t remember which next to Disneyland in  
 (10) which the beaches were being opened in two weeks you  
 remember  
 (11) that And the issue was the life guard and the people would  
 (12) swim on the beach and they cleaned it up relatively quickly and  
 (13) every single one of these had the same story  
 (14) One of them there was a boom around the ship and they got  
 (15) most of the oil before it left the ship, and so when he looks  
 (16) at all this property and he omits the Nova Scotia spill, four  
 (17) million gallons was - yeah four million gallons was one spill  
 (18) and two million in the same area was another And we talked to  
 (19) him about was it a cobble beach was there Native land present  
 (20) did the fisheries crash? It didn t make it into the detailed  
 (21) studies and so they say well there s no stigma despite the  
 (22) fact that Roddewig Dorchester both agreed that stigma can  
 (23) happen from an oil spill It s just that the biggest oil spill  
 (24) in the history of the North American continent didn t have  
 (25) any



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- (1) Page and Gilfillan ball toss it up in the air and it comes
- (2) down no damage
- (3) So turning back then to Mr Mundy and his final figures
- (4) he goes through his spread sheet he does the stream of income
- (5) for you At the conclusion of which he provides you with some
- (6) final - remember how this works? Down in this corner one
- (7) little - one little item of explanation that we went by
- (8) quickly and might leave you Remember they have archaeology
- (9) sites in this case - and we're going to be talking about them
- (10) here in a minute
- (11) And there is restoration damages that have been asked for
- (12) in other words, to remediate get the archaeological context
- (13) out and when that happens the use of that land as an
- (14) archaeological site is gone It no longer is it's excavated
- (15) It turns into what Mr Mundy calls the next highest and best
- (16) use below that because archaeology was the highest value per
- (17) acre of any of the highest and best uses so what he's done
- (18) down in this corner and it's not a lot of acreage and I don't
- (19) want to spend a lot of time on it but he has taken out the
- (20) value from the highest and best use from archaeology and
- (21) dropped it to the next highest and best use to account for that
- (22) use
- (23) And here's the income stream and you can take a close look
- (24) at those charts
- (25) And then he gives you the surface estate value He values

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- (1) for natural land values
- (2) By the way Dr Mundy never testified to a premium for
- (3) natural land values He never did That's what Exxon wishes
- (4) he had done He didn't He used natural land as a highest and
- (5) best use found the comparables and those are the figures he
- (6) used
- (7) And then he takes off for persistence basically and comes
- (8) up with Mr Dorchester's numbers That's all he's doing He's
- (9) backing out Exxon's theory from Mr Mundy's theory and that's
- (10) how he comes out
- (11) Let's show the next one
- (12) Now I want to talk to you about Mr Dorchester's numbers
- (13) What happened here was most interesting as well This is how
- (14) Mr Dorchester comes out and remember the way he does it is
- (15) land's worthless limited use so the Chicago approach to land
- (16) valuation can't build McDonalds on it so it isn't worth very
- (17) much low value to start with Then he has a low persistence
- (18) based upon the - the surveys and then he uses as his model
- (19) not a lease not a fair rental value But remember it went by
- (20) quick - remember the picture I showed him of a permit of a
- (21) license? He uses a license he says it's a nonexclusive use
- (22) and you can still use the land
- (23) And we showed him a picture of a cabin and we - this is
- (24) like when you have somebody come in and they have
- (25) permission to bring their kayaks on the beach as a permit and he analogizes

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- (1) the subsurface the same way as you would anything else
- (2) Remember that there's a split estate here The surface and
- (3) subsurface estate are owned by two different entities and you
- (4) have to divide up the damages and there have been comparable
- (5) sales and comparable situations with conservation land where
- (6) both have been sold separately, because they have to be and
- (7) when you try to obtain a park you don't want people digging
- (8) mines in it so you have to take care of both estates and the
- (9) rights of both
- (10) And here we are, natural land, severity persistence
- (11) stigma, after years of study and now I want to talk about the
- (12) defendants numbers, because that's most interesting
- (13) First we have Mr - I don't know which one is coming up
- (14) first but we have a number of different approaches here
- (15) 5 900 000 This is Mr Roddewig's effort
- (16) And Members of the Jury all this is taking Dr Mundy's
- (17) analysis and turning it in to Mr Dorchester's analysis He
- (18) takes out the uplands Sometimes they call it uplands
- (19) sometimes they call it landlocked properties because we have
- (20) this dispute over parcel definition related to highest and best
- (21) use
- (22) Then he takes out the unrolled property because he wants
- (23) to - to impose a requirement on you that the law does not
- (24) Then he takes out the subsurface and by the time he gets done
- (25) here he gets down to this figure and then he says no premium

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- (1) that activity to the oil spill So it's a low rate And he
- (2) comes up with \$1 330 000, total damage all corporations
- (3) English Bay folks four pickup trucks except you probably
- (4) couldn't get them to English Bay for \$83 000, it takes a
- (5) little - costs a little more to put them on a barge for that
- (6) Four pickup trucks for the oil spill and send the people from
- (7) English Bay home and tell them everything's okay
- (8) And you know what? I think Exxon's embarrassed I think
- (9) they're embarrassed by that, because the next thing that they
- (10) do is they get Mr Dorchester to start negotiating with
- (11) himself Exxon negotiates with themselves at the end of this
- (12) This is where he goes and puts in the nine percent rent and six
- (13) percent rent and both and adds another column assuming that
- (14) the value for natural lands is \$950 - and let me tell you
- (15) what's going on here They're hoping that you the jury will
- (16) negotiate with Exxon and compare this number with the
- (17) Dorchester numbers and it will get drawn into Exxon negotiating
- (18) with itself because all this is is if you take a low number
- (19) and you move one variable Dorchester has it at 400 an acre
- (20) and we have it at 950 an acre it'll go up 20 percent and you know
- (21) what 20 percent of \$84 000 and four pickup trucks is very
- (22) different than 20 percent of a whole bunch of millions of
- (23) dollars according to Dr Mundy's numbers And that's the
- (24) debate they're trying to get us into
- (25) It's clever but it's like Page and Gilfillan's ball

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(1) Don't get sucked in. Don't get sucked into that compromise  
 (2) with Exxon negotiating with itself because that's what they're  
 (3) trying to get you to do. Stick with the issues.  
 (4) That wasn't Mr. Dorchester's chart, remember that last one  
 (5) with the handwriting we put up. If you listen carefully, he  
 (6) said Mr. Diamond asked me to run the numbers.  
 (7) That was his lawyer's chart, that wasn't part of his - he  
 (8) said one more thing that was quite startling for a man who has  
 (9) earned \$3.5 million on this case, and another one who earned  
 (10) 1.5 million. Mr. Roddewig, and then Mr. MacSwain had a  
 (11) million something else - and that was the scientist, he said  
 (12) That's a lot of money in my family. Look at those Native  
 (13) corporations in the eye and saying that's a lot of money. You  
 (14) think about the amount of money that was spent per minute on  
 (15) the witness stand and what is going on?  
 (16) Let's talk about archaeology and then I'll sit down.  
 (17) Confidentiality. Mr. Gordaoff was the first to say there  
 (18) was always a - there was always a policy of protecting the  
 (19) sites. Map of the Chugach sites, there's others in the - in  
 (20) the folder there. And it was consistent, said Lora Johnson, of  
 (21) the Native way that the sites were to be left alone, the Indian  
 (22) way that they be left alone and not disturbed, if at all  
 (23) possible.  
 (24) Now Ms. Johnson was a very interesting lady.  
 (25) As you may have been able to figure out, I'm Greek, and my

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(1) dad was from the old country, and I was raised. I have some  
 (2) familiarity with oral tradition, the stories that are told, and  
 (3) I was told lots of stories.  
 (4) I can tell you that, after I went and studied mythology,  
 (5) not all of them are that accurate, but I was told lots of  
 (6) stories by my dad about my culture and my background, so  
 (7) forth.  
 (8) and I found her testimony very compelling because here was a  
 (9) lady who began studying my culture and then discovered that  
 (10) her  
 (11) own culture was worth studying, that her own culture was  
 (12) something to be an archaeologist for, and she came back home.  
 (13) And we presented for you, I think, one of the most qualified  
 (14) experts in the form of Dr. Jack Lobdell, and wasn't it  
 (15) interesting when he told us about the culture that existed in  
 (16) Kachemak Bay at the time that Rome was being built, and he  
 (17) came  
 (18) to the conclusion that it was more advanced in many ways than  
 (19) the culture that existed at that time. I had no idea, I had  
 (20) no idea.  
 (21) And Dr. Johnson came back and began studying her own  
 (22) culture, and then we somehow got into a debate about whether  
 (23) confidentiality of these archaeological sites was something  
 (24) real.  
 (25) And I find it extraordinary because here is a memo going  
 too quick for the - the memo to Andy Teal, who is - you know  
 about who testified, and Jim Haggarty and Chuck Mobley  
 dated  
 January 10, 1990, who were Exxon archaeologists. And when  
 you

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(1) go through the cultural resources program that Exxon was  
 (2) putting into place, they were working to keep the  
 (3) confidentiality of these sites whole throughout the entire  
 (4) spill. That's what they were working on.  
 (5) And Ms. Johnston's going to blow up some of the passages  
 (6) from this exhibit, and you'll see it, some of the suggestions  
 (7) that were made by the Exxon archaeologists to keep these sites  
 (8) confidential. They should be resurveyed because we  
 (9) missed  
 (10) some. It says, They could be endangered by treatment. Says  
 (11) the cursory reconnaissance conducted under emergency  
 (12) circumstances in 1989 undoubtedly missed sites as confirmed  
 (13) by  
 (14) the reassessment program. The archaeological monitoring  
 (15) program and the post cleanup assessment program.  
 (16) We should consider expanding the scope of the monitoring  
 (17) program to include other means of site protection. This  
 (18) approach is in line of the quality of work consideration for  
 (19) the resources from Exxon to the Native benefit, and so that  
 (20) Exxon Cultural Resource Program retained control over the  
 (21) compliance expert - to the compliance effort.  
 (22) And do you have the Dekin article? Because when I  
 (23) cross examined Mr. Dekin, you know, I showed him an article of  
 (24) his own relating to confidentiality, and remember that  
 (25) Dr. Johnson said and Otto Harrison said they had  
 archaeologists  
 on site within a week after the oil spill started, within a  
 week.

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(1) And she did say there was 11 for hundreds and hundreds of  
 (2) workers, but the control of cleanup personnel - this is from  
 (3) his article, Dekin's article. This is not in evidence because  
 (4) it's an article, but it is in the record, and you should  
 (5) consider it, so here it is.  
 (6) The control of cleanup personnel is a difficult task.  
 (7) Given the large numbers of people involved and the way in  
 (8) which  
 (9) they were organized, which vessels and tasks, an important  
 (10) element of protecting archaeological sites and historic  
 (11) resources was to restrict access by unauthorized personnel.  
 (12) The restriction of cleanup personnel to the beach and off the  
 (13) adjacent uplands was important, albeit a difficult mission to  
 (14) advance both when people were working and when they were  
 (15) off  
 (16) duty.  
 (17) Now I asked Mr. Teal whether - Mr. Teal tried to tell you  
 (18) that Chugach Alaska Corporation, the Native corporations were  
 (19) the only ones that were concerned about this, as if we made it  
 (20) up, and I said to him, Does the state have some interest in  
 (21) this, too? And he said, I don't seem to recall that issue.  
 (22) And I said, Well, Mr. Piper testified - and I think the jury  
 (23) does, and you do, because in your exhibits is the state  
 (24) response plan from 1991, and in the state response plan in  
 (25) 1991  
 was this language written by the state and written by  
 Mr. Piper. The work plan must include a program approved by  
 Alaska Department of Natural Resources for preservation and

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(1) protection of significant cultural and archaeological sites to  
 (2) prevent desecration or destruction of sites access to  
 (3) information about the location or description of the sites may  
 (4) be restricted at the discretion of the commissioner of natural  
 (5) resources  
 (6) They were worried too Because the state has a lot of  
 (7) archaeological sites as well and we went through a long and  
 (8) tortuous and difficult cross-examination of Dr Johnson over  
 (9) the issue of whether confidentiality was an issue with these  
 (10) sites  
 (11) Carroll Kompkoff we called to the stand to try to bring  
 (12) some light to this issue Remember Mr Kompkoff was a fellow  
 (13) who perhaps has some personal reason to care about the  
 (14) things  
 (15) that we're talking about here and I hope we were successful in  
 (16) letting you understand that these things are not just  
 (17) interesting to these people they're part of their lives  
 (18) They're real Within months after he lost his dad, he went and  
 (19) was in an archaeological site  
 (20) This is an instruction, and I went over all this to tell  
 (21) you that one of the tests for this archaeological - the  
 (22) archaeological damages is whether this was a foreseeable  
 (23) event  
 (24) was it foreseeable by Exxon when this oil spill happened that  
 (25) this could be a damage and a need for remedy that the Native  
 (26) corporations were entitled to and this is the instruction  
 (27) You must consider whether the damage was a natural and  
 (28) probable

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(1) consequence of the oil spill and subsequent cleanup effort -  
 (2) and it says that the loss and location of confidentiality and  
 (3) resulting harms were reasonably to be anticipated  
 (4) Remember we had a stipulation as to foreseeability and  
 (5) I'm going to put it up here and you can read it  
 (6) Remember that we were going to prove in the case this  
 (7) business about what was said - you have to remember way  
 (8) back  
 (9) to opening statement for this that we were going to prove what  
 (10) happened between the oil companies and the Natives when  
 (11) they  
 (12) laid claim to land on the pipeline and the promises and the  
 (13) conversations that were made between them as to Okay we'll  
 (14) give up our property but you have to promise us certain  
 (15) things  
 (16) We forewent that proof and in return this was the  
 (17) stipulation that Exxon entered into It is not in the jury  
 (18) packet instructions It was read to you during the case but  
 (19) take careful note of it please because it relates to  
 (20) foreseeability  
 (21) Now while you're doing that I want to bring you over  
 (22) here When you look at exhibits about the archaeological  
 (23) proof these are the plaintiff exhibits Backed up each one  
 (24) with the notes and the field notes and the state historical  
 (25) preservation descriptions for every entry that we have put into  
 (26) these summary charts  
 (27) Compare and contrast that with Mr Dekin's testimony where

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(1) he goes Type I Type II and Type III because you won't find  
 (2) the backup to that exhibit to his Mr Dekin's testimony  
 (3) is - trust me I've looked at the records it's there  
 (4) After the Page and Giffillan ball and the number of times  
 (5) I've had to take that out of that box are you willing to do  
 (6) that or do you want to rely on what's over there? Compare and  
 (7) contrast Mr Dekin's thoroughness and the way he backs up  
 (8) that  
 (9) effort with the way the plaintiffs have done  
 (10) And the other thing I want to tell you when we get to  
 (11) Mr Lobdell - remember Mr Lobdell who's spent more time in  
 (12) Alaska doing this work than anybody worked for oil companies  
 (13) worked for large firms putting together remediation programs -  
 (14) has the only testimony in the case for how to run this  
 (15) remediation program  
 (16) When I cross-examined Mr Dekin - remember that I  
 (17) cross-examined Mr Dekin about a site that he did on Kodiak  
 (18) and didn't it sound like Dr Lobdell's First you do the  
 (19) literature search then you do the monitoring then you do the  
 (20) surveys and then you do the excavation then you write a  
 (21) report then you do the curation and then you write your final  
 (22) report  
 (23) And Dr Lobdell went through this with float planes,  
 (24) accounted for man hours everything that you'd have to do, and  
 (25) came up with the damage numbers And it's a long way out  
 (26) there  
 (27) and it's not cheap It is the only evaluation in the case like

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(1) Tatitlek and Eyak And if you conclude that these sites were  
 (2) damaged I would put it to you that you ought to tell Exxon  
 (3) that having failed to even consider whether these numbers are  
 (4) properly the correct ones you ought not to discount them you  
 (5) ought not to compromise them you ought to put it down just  
 (6) exactly the way it is because it's the only evidence in the  
 (7) case by a man who's done it for folks like oil companies who's  
 (8) done it in Alaska and knows  
 (9) MR PETUMENOS Your Honor I reserve the remainder of  
 (10) my time and I believe Mr Stoll has - needs a short break  
 (11) Members of the Jury I will be addressing you as the Judge  
 (12) said again in the rebuttal argument Thank you for your  
 (13) attention and we'll see you this afternoon  
 (14) THE COURT Thank you Mr Petumenos  
 (15) Do you want a break counsel?  
 (16) MR STOLL I just need a few minutes to set up  
 (17) THE COURT Sure that's fine  
 (18) THE CLERK Please rise This court stands in  
 (19) recess  
 (20) (Jury out at 11 03 a m )  
 (21) (Recess from 11 03 a m to 11 12 a m )  
 (22) (Jury in at 11 12 a m )  
 (23) THE CLERK This court now resumes its session  
 (24) Please be seated  
 (25) (Bench Conference off the Record)

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- (1) MR OPPENHEIMER Your Honor very briefly this was  
 (2) from our conference with respect to exhibits  
 (3) MR STOLL Your Honor -  
 (4) THE COURT Hold on It was a joke counsel  
 (5) MR OPPENHEIMER Then I'll sit down  
 (6) THE COURT It was a joke That's my problem  
 (7) MR STOLL Thank you Your Honor  
 (8) (End of bench conference)  
 (9) MR STOLL Thank you  
 (10) CLOSING ARGUMENT OF MR STOLL  
 (11) MR STOLL Your Honor Mr Petumenos counsel ladies  
 (12) and gentlemen I have 30 minutes to talk to you a little bit  
 (13) about Kodiak Island Borough my client  
 (14) As you can see I put a - some photographs up there It's  
 (15) been a long time since you saw some of these folks Mr Selby  
 (16) is in the courtroom and some of the other people but these are  
 (17) some of the witnesses that testified about Kodiak and you've  
 (18) heard a lot of testimony over the last two and a half months  
 (19) and I'm sure you may have forgotten some of these people  
 (20) Just as the Native corporations have a responsibility to  
 (21) their shareholders the Municipality of Kodiak Island Borough  
 (22) has a serious responsibility to its taxpayers and its citizens  
 (23) to protect its assets and those assets of course include  
 (24) most importantly the land on the borough and the property  
 (25) that's owned by the borough And the comments that

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- (1) Mr Petumenos made about the use of the land and the lack of  
 (2) use the interference with that use being the value the use  
 (3) of the property is the value of the property in Kodiak  
 (4) We started off this case we talked about the interaction  
 (5) of the sea the resources in the sea and the land and that's  
 (6) what we talk about when we talk about uses and loss of uses as  
 (7) a result of the Exxon Valdez oil spill  
 (8) You recall that there was testimony about what happened  
 (9) before what Kodiak was like before there was the oil spill  
 (10) It was a - even Mr Dorchester conceded that it was a  
 (11) relatively stable economy it's a fishing industry based  
 (12) economy It was a fairly stable economy  
 (13) And the fishing industry as you will recall was based  
 (14) upon primarily red salmon and remember we got into this  
 (15) testimony about the cycle of pink salmon and red salmon and  
 (16) so  
 (17) on  
 (18) Now what happened with the oil spill? Just as in Prince  
 (19) William Sound and Lower Kenai in Kodiak also there was  
 (20) tremendous disruption You heard about the testimony of the  
 (21) Daily Emergency Service Council meetings that lasted I think  
 (22) until late August or September Not until then did they  
 (23) meet - go down to I think three days a week  
 (24) Those meetings continued you'll recall the testimony of  
 (25) Mayor Selby into 1990 because of the concern of what was  
 going to happen with their industry the concern of what was

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- (1) happening with the oil the concern about the uses and the  
 (2) interference with the uses on the property  
 (3) And this fear and uncertainty was borne out unfortunately  
 (4) and this is why we put on some of the evidence about the cycle  
 (5) of red salmon  
 (6) You'll recall that the testimony was that there was a  
 (7) five year life cycle for red salmon I don't have the  
 (8) photograph up there but Dr Phil Mundy who was the biologist  
 (9) for the Trustees who testified about what happened at the Red  
 (10) Lake area - could we have that on the Barco please?  
 (11) You recall that the Red Lake area is down in this area of  
 (12) Kodiak It's one of the four major fishing areas in Kodiak  
 (13) And because of the closure of the fishing season for all of  
 (14) Kodiak in - virtually all of Kodiak for 1989 the  
 (15) overescapement into the Red Lake system was over three times  
 (16) what the escapement goal was And what did that do? That  
 (17) depleted the resources in the Red Lake area So when the fish  
 (18) went out the mortality was higher the whole cycle was thrown  
 (19) off and the worst - worst concern that people had in Kodiak  
 (20) was met out this year because five years later 1994 the red  
 (21) salmon season in the Red Lake area was nonexistent It never  
 (22) opened because those fish - because of this overescapement  
 (23) problem And there's no testimony, no testimony at all  
 (24) contradicting that That was the significance of that  
 (25) And you heard the testimony - remember Mr Keplinger

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- (1) Mr Keplinger - not a very good photograph of him we took  
 (2) these snapshots as these people came up to testify - but  
 (3) Mr Keplinger and Mr Knault who are young fishermen that  
 have  
 (4) lived in Kodiak most their lives Mr Keplinger is also a  
 (5) teacher during the school year  
 (6) And they described how the usage - uses of the - of the  
 (7) Kodiak property had diminished the oil the picnic I think  
 (8) Mr Keplinger was talking about - you heard testimony about  
 (9) people having problems with just taking their animals for a  
 (10) walk on the beaches because the paws the animals were  
 messed  
 (11) up with the oil  
 (12) This obviously had a significant effect on the uses of the  
 (13) Kodiak parcels  
 (14) Now Exxon complains or says Well you didn't have this  
 (15) property on the market You weren't earning income This is  
 (16) property that Kodiak holds for its citizens for their use If  
 (17) you can't use it you lose the value  
 (18) That's what - that is what the value is and there's been  
 (19) a lot of testimony about that  
 (20) Now you will have with you in the jury room these  
 (21) exhibits and these are Exhibits 1521 through 1526 There's  
 (22) six of these boards They cover the 13 parcels that are  
 (23) involved on - for Kodiak Island Borough  
 (24) The situation in Kodiak the oiling in Kodiak was a lot  
 (25) different than we heard about in the Exxon opening statement

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(1) Could we have the famous picture pen and boot?  
 (2) I know you got sick of this during my examination because  
 (3) we heard testimony about tar balls mousse and so on but if  
 (4) you'll recall the testimony I think it was of Mr. Chichenoff  
 (5) Mr. Chichenoff here - or maybe it was Mr. Squartsoff or both  
 (6) of them - I showed them this and said is this what we're  
 (7) talking about and one of them laughed. They couldn't even  
 (8) believe we were talking about the same thing.  
 (9) And you recall the testimony about the eight miles of beach  
 (10) where the tar balls and mousse were ten to 20 inches apart and  
 (11) they said that's just light oiling.  
 (12) Maybe it's light oiling when you have the largest oil spill  
 (13) in North America history but it's very very significant as  
 (14) far as the usages of these properties are concerned and you'll  
 (15) recall that down in Sitkinak Mr. Kepfinger testified he was  
 (16) the fellow that went around with his boat for the Alaska  
 (17) Department of Fish and Game, and was supposed to - he  
 (18) covered the area from Old Harbor down around Sitkinak and back. And  
 (19) he testified that the worst oiling he saw altogether was down here  
 (20) in Sitkinak. And that the oil was going through this lagoon  
 (21) here through here and was getting oiled through this area that  
 (22) was used for picnicking and other recreational uses.  
 (23) And on the oiling maps that Exxon wanted to use or has  
 (24) used there's no evidence on there of any oiling.  
 (25) Now as I mentioned to you - one other example I might

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(1) mention to you and that is another place that they didn't show  
 (2) any oiling - was in Larsen Bay. Could we see Larsen Bay  
 (3) photographs please?  
 (4) You recall Natalie Fobes' testimony - got it upside down  
 (5) You recall her testimony. One of the places that she visited  
 (6) and photographed was Larsen Bay. This is in marked contrast  
 (7) to  
 (8) the - what I call the pen and boot photograph.  
 (9) And this area likewise was shown on Exxon's map as not  
 (10) being oiled. Of course there were thousands and thousands  
 (11) of - of bags of debris that were picked up in that area.  
 (12) With these parcel maps we have prepared a blowup of  
 (13) Exhibit 1041. And this exhibit 1041 is a summary - you'll  
 (14) have this with you in the jury room - is a summary of the  
 (15) appraisal that was made by Mr. Carlson.  
 (16) When we talk about damages in Kodiak or anywhere for that  
 (17) matter you have to take three variables into account. One is  
 (18) what is the fair market value of the property the second is  
 (19) what is a reasonable rental rate or damage calculation rate  
 (20) and the third is the number of years of - that there was  
 (21) damage there.  
 (22) Now everyone agrees that as far as Kodiak is concerned  
 (23) Mr. Pat Carlson the assessor - and here's his picture up  
 (24) here you saw him he testified last week - is the most  
 (25) knowledgeable person in Kodiak as to the value of property in  
 Kodiak and what was going on there.

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(1) And Mr. Carlson evaluated the 13 parcels that are owned by  
 (2) Kodiak Island Borough and he issued a report that you will  
 (3) have with you in the jury room it's Exhibit 906A and it's  
 (4) a - it's a thick report and on the - could we have page 9  
 (5) please?  
 (6) For each parcel involved you'll recall this is page 9  
 (7) this deals with Sitkinak and the Sitkinak Lagoon property  
 (8) which is contained on this board that you'll have also with  
 (9) you this is just an example Mr. Carlson did a detailed  
 (10) analysis - could I have the following page please?  
 (11) And he took you'll recall comparable sales comparable  
 (12) properties that's this column here. And he's got a list of  
 (13) them and he's got the sale dates and he's got the per acre  
 (14) price he's got the size of the acreage. He makes a time  
 (15) adjustment which is relatively minor, he does a size  
 (16) adjustment which can be very significant and he makes  
 (17) various  
 (18) other adjustments and then he ends up with a net value  
 (19) And this - in this case he ends up with an ocean acre  
 (20) value of \$1300 per acre. This is for Sitkinak notwithstanding  
 (21) the fact that a lot of his comparables are in substantially  
 (22) higher value but he diminishes that. He takes a very  
 (23) conservative approach. And then he has what he calls excess  
 (24) land, which is the land that is further back from the ocean  
 (25) and he discounts this figure by 73 percent in other words he  
 takes 27 percent of this value for this upland property. And

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(1) so in this instance it would be 400-and some dollars an acre  
 (2) and he ends up with a total figure for each parcel.  
 (3) And you will see ladies and gentlemen on Exhibit 1041 for  
 (4) each parcel there is a cross reference here to Exhibit 906A  
 (5) as to the page number. And you can see in the subsequent  
 (6) pages each - each description is two or three pages long.  
 (7) And in the back of Exhibit 906 is the very thorough analysis of  
 (8) all of the comparables that Mr. Carlson utilized.  
 (9) Okay. Once we had this appraisal, then we retained  
 (10) Mr. Shorett who was the head of one of the largest appraisal  
 (11) firms in the Northwest. He has a large office in Seattle and  
 (12) for over 20 years he's had an office here in Anchorage.  
 (13) presently it's right across the street from this courthouse.  
 (14) And he started doing appraisal work you'll recall in Alaska  
 (15) following the 1964 earthquake and tsunamis.  
 (16) And he found that a standard method of computing damages  
 (17) was using what's called a discount factor. In this case he  
 (18) said the standard rate at the time of the oil spill 1989 was  
 (19) 14 percent a 14 percent discount factor which works out to  
 (20) approximately a 12 percent interest or rental rate. And so if  
 (21) you take 12 percent for instance of this \$56 million figure  
 (22) you end up with this figure here of \$6,818,000. And a discount  
 (23) factor was taken because you had at that time a ten percent  
 (24) prime rate and a four percent inflation rate and he explained  
 (25) how that was the standard that was used in the real estate.

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(1) industry at that period of time So he calculated this damage  
 (2) the damage for only one year  
 (3) Now ladies and gentlemen we know that the damage – that  
 (4) the oil in Kodiak lasted well into 1990 in a number of areas  
 (5) in particular there was testimony in Shuyak which is one of  
 (6) the – is the largest parcel here with a value of over \$32  
 (7) million Shuyak Island the northern part of Kodiak where  
 (8) there was tremendous – there used to be tremendous kayaking  
 (9) and fishing all through these lagoons and hunting up here – of  
 (10) course to get to the hunting you had to go through the – you  
 (11) had to get access up through the shoreline  
 (12) But we know that there were thousands – remember the  
 (13) testimony of Mayor Selby there were thousands of bags of  
 (14) debris that were still being taken off of Shuyak in 1990  
 (15) So once you reach the damage calculation for one year you  
 (16) can then – it is up to you to determine how long to continue  
 (17) this damage calculation in all or in part In other words  
 (18) should this be for one year should it be for two years or  
 (19) should part of it be for one year or two years And if you  
 (20) think that part of it for instance the Shuyak part should  
 (21) continue for a second year then you would simply take the \$32  
 (22) million figure multiply that by 12 percent and add that onto  
 (23) this figure  
 (24) If you thought that the rental rate of 12 percent was too  
 (25) high and it should be 10 percent you can take 10 percent of

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(1) this number and do a calculation as to what it should be per  
 (2) year  
 (3) Now what did we get from the defendants in response to  
 (4) this? First of all Mr MacSwain testified well there was no  
 (5) damage and he took a – he wrote on a board – this is a  
 (6) photocopy of what he wrote on you'll have the original of this  
 (7) exhibit in the jury room with you  
 (8) He said Oh there was no damage because all the  
 (9) transactions just continued, and he wrote it down I thought  
 (10) it was very curious This was data he said he got from  
 (11) Mr Hurley the title person in Kodiak I think it's very  
 (12) interesting Well there's no damage because the number of  
 (13) transactions continued And he said Well this is  
 (14) Mr Diamond's writing here Kodiak sales it wasn't actually  
 (15) Mr MacSwain  
 (16) But it's interesting that he wrote this down as opposed to  
 (17) introducing to you the actual letter of Mr Hurley  
 (18) Could we have that on the Elmo please? And then the  
 (19) second page  
 (20) What's interesting is – this is a plaintiffs' exhibit  
 (21) This is Plaintiffs Exhibit 9011 This is Defendants Exhibit  
 (22) 14784 And the significance of this is that this when you  
 (23) read the letter and look at the actual data that Mr Hurley  
 (24) presented the fact of the matter is this contains all  
 (25) transactions It doesn't mean whether there's a divorce and

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(1) one person is transferring the property from one spouse to the  
 (2) other or it's a name change of a corporation or it's a gift or  
 (3) it's a death All of these things this doesn't mean anything  
 (4) about arm's length transactions let alone dealing with what  
 (5) happens in a – in the remote property area  
 (6) And you look in this letter this isn't even on his page  
 (7) here you'll find that there's a later column here that shows  
 (8) Larsen Bay Tribal Council transfers The Larsen Bay Tribal  
 (9) Council, lot of these transactions were transferring property  
 (10) to their shareholders  
 (11) Now the much more meaningful I would suggest to you  
 (12) evidence of what happened on Kodiak is shown by Mr  
 (13) Carlson's  
 (14) study of sales of remote property This is Exhibit 2902 A and  
 (15) it shows a steady increase in the sales and then the Exxon  
 (16) Valdez oil spill and the fall off and you'll recall also his  
 (17) testimony in rebuttal this is Exhibit 8605 as to what  
 (18) happened to prices before and after the oil spill  
 (19) Now the significance of these is not that Kodiak was  
 (20) trying to sell their property They weren't The significance  
 (21) is that when the use of the property is diminished is value of  
 (22) the property diminishes And that's what the significance of  
 (23) these things are  
 (24) Then the defendants used – had Mr Papke testify and he  
 (25) did some studies of what he called the oiled areas He said  
 (26) Oh there's no difference

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(1) Could we have Mr Papke's oiled – the screen here Look  
 (2) at the size of the area that he's considering here He's not  
 (3) looking at the remote market in Kodiak or the remote Kenai and  
 (4) Prince William Sound He's got an area that extends far and  
 (5) wide It's what I would consider I submit to you is  
 (6) irrelevant data as opposed to looking at the actual  
 (7) transactions that were going on in the subject area and that  
 (8) is a marked difference between these experts  
 (9) Mr Dorchester, he testified about some comparables This  
 (10) is not evidence This is my handwriting on the exhibit I had  
 (11) a picture made of my scribbling It's not a very good  
 (12) scribbling and it's not a very good reproduction of it I  
 (13) don't know if you can see that but I think this tells you  
 (14) something about the kind of information the million dollar  
 (15) multi million dollar experts were giving you  
 (16) First of all he takes three – he has private  
 (17) transactions he said this is his justification for his value  
 (18) three to \$700 an acre He takes three transactions private –  
 (19) what he calls private transactions Two of these are in  
 (20) Wasilla under water He didn't tell you that I – that was  
 (21) brought out in cross examination I don't know if you recall  
 (22) that or not and I wrote on there "water"  
 (23) The third one turns out wasn't actually a transaction  
 (24) This was an appraisal that was at \$500 an acre I don't know  
 (25) who – if Mr Dorchester or somebody else did the appraisal

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(1) But it was an appraisal The buyer or the potential buyer  
 (2) made an offer out here in the seven to \$800 range and the  
 (3) seller wouldn't accept the price because he said it wasn't  
 (4) enough So this isn't a transaction even He's got it in  
 (5) his - in his graph This is the kind of data that they're  
 (6) furnishing you  
 (7) They say Well let's look at public purchases The only  
 (8) purchase that he used that was in Kodiak is the Salomie Creek  
 (9) and in cross-examination it comes out that this 700 nearly  
 (10) 800 acres that was purchased for \$800 an acre, nearly \$800 an  
 (11) acre was a gunnery range that had been used as a gunnery  
 range  
 (12) since the Second World War  
 (13) Do you know how many nitrates there are, how many unspent  
 (14) and spent shells there are, what the contamination problems  
 (15) would be what the market - marketability of that property  
 (16) would be and even that property eight miles away it's - I  
 (17) think Mr Carlson testified to this it's between - there's  
 (18) two mountain peaks and it comes down between and there's  
 the  
 (19) gunnery range, I think over half of that property is the  
 (20) mountain peaks Eight miles from any water from the ocean  
 (21) and that property, with all its contamination still sold for  
 (22) nearly \$800 an acre  
 (23) So utilizing this data Mr Dorchester comes in and then  
 (24) as Mr Petumenos said slicing off the access to the property  
 (25) by taking the narrow strip along the shoreline and saying

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(1) Well it doesn't matter, you can't get access to your property  
 (2) we're just going to rent the beaches and the access He then  
 (3) does a calculation even though he acknowledges that five - at  
 (4) least five of the parcels on Kodiak - which incidentally he  
 (5) didn't visit until 1992, but at least five of the parcels are  
 (6) oiled  
 (7) He says Well there's only damage on three He had done  
 (8) some appraisal of only those portions of three He does a six  
 (9) percent rental rate which he says he doesn't call it a rental  
 (10) rate he calls it a compensation this is what I consider to be  
 (11) fair compensation and I would say to you, ladies and  
 (12) gentlemen whether you take his number or our number or  
 some  
 (13) other number it's not a question of what the expert says is  
 (14) fair compensation it's what you determine is fair  
 (15) compensation  
 (16) But he takes those figures and somehow miraculously comes  
 (17) up with a hundred thousand dollars of damage 46,000 acres  
 (18) \$2.26 an acre for Kodiak  
 (19) Ladies and gentlemen what I would simply ask you is this  
 (20) Not to simply split the difference This is not a situation  
 (21) where Kodiak is asking for one year of damages \$6.8 million  
 (22) You take that on one end and you take \$105,000 on the other  
 and  
 (23) three and a half million dollars is about halfway in between  
 (24) and that should split the baby, so to speak  
 (25) I think what you need to do is look at the hard evidence,

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(1) do your own judgment look at Exhibit 906 Look at the  
 (2) calculations look at what the prime rate was in 1989 of ten  
 (3) percent and the inflation rate of four percent do your own  
 (4) calculations do your own calculations as to how long this -  
 (5) this oil lasts how long this interfered with the use  
 (6) You recall the testimony of these witnesses wherever they  
 (7) are back here about how their families are still concerned  
 (8) about using the shellfish eating the shellfish because of the  
 (9) oil You make the evaluation what those damages are  
 (10) Now I'm about to rest and I'd like to say this that I'm  
 (11) sure this afternoon Mr Petumenos - and I know that you're  
 (12) going to hear and see a very, I'm sure colorful show with lots  
 (13) of video and lots of pictures but it's for you to evaluate the  
 (14) evidence I know you will, and look at the substance of the  
 (15) evidence  
 (16) Look at what Mr Petumenos has shown you the  
 (17) archaeological data that was used or you look at the substance  
 (18) of Mr Carlson's report Exhibit 906A, you contrast that with  
 (19) the kind of data that Exxon gave you keep an open mind  
 Thank  
 (20) you very much for your time Remember that the jury system is  
 (21) how our system works The largest corporation in the world  
 (22) the largest corporations in the world are equal before you with  
 (23) the humblest person and the most remote areas of Alaska  
 Thank  
 (24) you very much  
 (25) THE COURT Counsel could you take that down for just

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(1) a minute?  
 (2) MR STOLL Surely  
 (3) Where are you anyhow, Judge?  
 (4) THE COURT Move that please Thanks very much Mr  
 (5) Stoll  
 (6) Okay I'm going to let you go and I want you back here at  
 (7) 12:30 Now remember this is a critical stage of the trial  
 (8) so you have to avoid contact with anybody who's involved in  
 (9) this case So be very careful about that You do not want to  
 (10) come into contact with or hear the conversations of people who  
 (11) are involved in the trial They know what the rules are they  
 (12) will avoid you But you have to know what the rules are also  
 (13) so you completely avoid them  
 (14) Remember there's more to come This case is not over  
 (15) There are other arguments to be heard and I have to give you  
 (16) the instructions in the case to give you the full picture So  
 (17) keep an open mind and this case will be submitted to you for  
 (18) deliberation this afternoon  
 (19) All right we'll take a 45-minute break come back at  
 (20) 12:30 - yes 12:30 I'll excuse you  
 (21) (Jury out at 11:45 a.m.)  
 (22) THE COURT Counsel you wanted to bring something  
 (23) up?  
 (24) MR OPPENHEIMER Yes Your Honor Your Honor I have  
 (25) a concern about the juxtaposition of the - it's exactly what I

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- (1) was afraid of the juxtaposition of the instruction with  
 (2) respect to foreseeability on archaeological damages and the  
 (3) foreseeability stipulation right at the end of the discussion  
 (4) about confidentiality I don't know that it's appropriate to  
 (5) seek a curative on that issue right now but I do see a problem  
 (6) developing for rebuttal which I think perhaps we can head  
 (7) off  
 (8) I'm quite sure we will be arguing as we've said to Your  
 (9) Honor repeatedly on the subject of the need to establish  
 (10) independently the foreseeability of the acts of third party  
 (11) vandals in the future and my - my concern Your Honor is  
 (12) that if a similar juxtaposition of the foreseeability  
 (13) stipulation and the instruction is made after Mr. Diamond makes  
 (14) his argument it is going to walk right into that mine field  
 (15) we've been talking about for two days in connection with these  
 (16) instructions  
 (17) Your Honor's statement last night was to reiterate that  
 (18) there can't even be a hint of the proposition that the  
 (19) foreseeability stipulation covers the acts of third party  
 (20) vandals in the future which is something Mr. Diamond is going  
 (21) to be talking about And I - if that is the last time that  
 (22) the stipulation is going to be mentioned perhaps we don't have  
 (23) a problem but it seemed to me that the line got crossed I  
 (24) don't think intentionally but it got crossed already this  
 (25) morning in exactly the way we were concerned it would be

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- (1) THE COURT Tell me how  
 (2) MR. OPPENHEIMER Because the instruction with respect  
 (3) to foreseeability of archaeological claims which includes all  
 (4) harms was - was up on the board and the other board that was  
 (5) up here for three or four minutes was the foreseeability  
 (6) stipulation and all of that came at the end of the discussion  
 (7) of confidentiality  
 (8) The reason I'm not asking Your Honor for a curative at this  
 (9) point is because the - the matter that cannot be hinted at as  
 (10) a result of our discussions over the last two days is that the  
 (11) foreseeability stipulation somehow covers the acts of  
 (12) third party vandals Because Mr. Diamond had not yet made  
 (13) that  
 (14) explicit analysis to the jury in argument about the fact that  
 (15) Exxon has to be found - if it's going to be found  
 (16) responsible - to have been responsible for acts that have not  
 (17) yet occurred of third party vandals  
 (18) I think we're just shy of the point where a curative would  
 (19) be required But if Mr. Diamond finishes his argument and  
 (20) Mr. Petumenos or anyone else juxtaposes that instruction with  
 (21) that foreseeability stipulation again certainly if they say  
 (22) anything beyond that what we'll have is exactly the implication  
 (23) that Your Honor has been saying now for days cannot be drawn  
 (24) and which was the basis for some of our jury instruction  
 (25) resolutions  
 (26) THE COURT I understand your position

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- (1) MR. PETUMENOS I couldn't disagree with  
 (2) Mr. Oppenheimer more about any of what he said The only  
 (3) thing  
 (4) the Court said was the stipulation says what the stipulation  
 (5) says I put the stipulation on the board at the time of the  
 (6) foreseeability instruction because the - there is only one  
 (7) foreseeability instruction in the case It's the only one we  
 (8) have And there is only one stipulation on foreseeability in  
 (9) the case and if we're to have the benefit of the  
 (10) foreseeability instruction It has to be viewed in the context  
 (11) of the jury instruction  
 (12) I didn't do anything more than put the stipulation up and  
 (13) then argue the evidence as it relates to Exxon's conduct and  
 (14) what everybody knew in the state's 1991 response plan  
 (15) Mr. Oppenheimer is taking very great license with the  
 (16) record if he's to say that we have a stipulation that can't  
 (17) relate to the only foreseeability instruction that we have If  
 (18) that's the case the stipulation is worthless The  
 (19) stipulation - we should have put the proof on because it's  
 (20) the only place where foreseeability's an issue in the case Is  
 (21) the foreseeability of this particular area And all I did  
 (22) Judge was put it on the easel and then argue the evidence  
 (23) And that's exactly what you said I could do because you also  
 (24) refused to put it into the instruction - the packet of  
 (25) instructions and the only time that they could see it was when  
 (26) the evidence was played and you told me I could put it up on

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- (1) the board make sure the jury remembered it and understood it  
 (2) and they can take the foreseeability stipulation for whatever  
 (3) weight they want to put to it  
 (4) And so I don't know frankly, what Mr. Oppenheimer's  
 (5) talking about If I can't put the stipulation up in connection  
 (6) with the foreseeability instruction then the stipulation has  
 (7) no - no weight None  
 (8) MR. OPPENHEIMER Your Honor the discussion we had  
 (9) yesterday this was at our evening -  
 (10) THE COURT I remember the discussion counsel and  
 (11) you're reporting it accurately There's two questions here  
 (12) One has there - has something improper happened in final  
 (13) argument and my answer to that question is no it hasn't  
 (14) Two Is there a danger that somehow there may be misleading  
 (15) information given to this jury in the rebuttal and my answer  
 (16) to that is no there won't be, because I'll guard against it  
 (17) And - and clearly Mr. Diamond's going to have an explicit view  
 (18) of what that stipulation means and what it doesn't mean that  
 (19) everybody in this case agrees with and if in fact there's a  
 (20) disagreement or some misleading method of presentation in the  
 (21) rebuttal then I'll step right in  
 (22) MR. OPPENHEIMER Thank you Your Honor Understood  
 (23) THE COURT All right Now I want to ask you a very  
 (24) trivial question  
 (25) I have the - the cover sheet that you gave me for the -



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- (1) for the jury instructions here
- (2) MR OPPENHEIMER Yes
- (3) THE COURT It includes case No 3KO9213H City of
- (4) Seward et al versus Exxon That shouldn't be on the cover
- (5) sheet should it?
- (6) MR PETUMENOS It's been settled
- (7) MR OPPENHEIMER I'm glad you said the question was
- (8) trivial Your Honor because I don't have an immediate answer
- (9) for you Let me just check for you
- (10) THE COURT You only answer Petumenos questions
- (11) MR OPPENHEIMER Yes Well, those are the only ones
- (12) I prepare for I'm not sure I answer them We'll correct it
- (13) THE COURT Well I can correct it no problem
- (14) MR OPPENHEIMER Thank you
- (15) THE CLERK Please rise This court stands in
- (16) recess
- (17) (Recess from 11 52 a m to 12 37 p m)
- (18) (Jury in at 12 37 p m)
- (19) THE CLERK Please rise This court now resumes in
- (20) session Please be seated
- (21) MR DIAMOND May I proceed, Your Honor?
- (22) THE COURT You may counsel
- (23) CLOSING ARGUMENT OF MR DIAMOND
- (24) MR DIAMOND Ladies and Gentlemen of the Jury
- (25) distinguished opposing counsel my colleagues on this side of

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- (1) the podium
- (2) The Exxon Valdez oil spill was a terrible thing It was a
- (3) terrible accident and it did a lot of damage No one's denying
- (4) that It damaged principally wildlife It damaged habitat It
- (5) did short term damage The spill also hurt people and it hurt
- (6) entities and it hurt to some extent some of the plaintiff
- (7) Native corporations in this case and they just like everybody
- (8) else are entitled to be compensated for their losses
- (9) We make no bones of that fact They're entitled to be made
- (10) whole and that's your job to make them whole But they're
- (11) not entitled to end up better off as a result of the oil spill
- (12) than they would have been had it never happened and keeping
- (13) that from happening is part of your job as well
- (14) I'd like to make some preliminary points I've wanted to
- (15) make them to you now for 46 days of trial about who we're
- (16) dealing with here who the parties are and truly what the
- (17) issues are for you to decide
- (18) Counsel for plaintiffs frequently lapse into talking about
- (19) individual losses about harm to subsistence harm to
- (20) fisheries harm to way of life harm to culture harm to
- (21) lifestyle Those are legitimate grievances but they're
- (22) grievances that individuals have Individuals subsist
- (23) corporations don't subsist Individuals have lifestyles
- (24) corporations don't have lifestyles
- (25) You know and you've heard from the instructions that Judge

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- (1) Shortell has given you in the course of the trial that there
- (2) are other claims pending in other courts being decided by other
- (3) juries like you and the individual claims - claims of lost
- (4) subsistence loss of culture loss to folks who make their
- (5) living from the fisheries - are going to get resolved there
- (6) and they're going to get taken care of
- (7) The plaintiffs here are not individuals They're
- (8) for-profit corporations Their purpose is to make money for
- (9) their shareholders just like the company I work for and I
- (10) imagine just like the companies many of you work for And
- (11) that's not to say that they shouldn't be compensated for their
- (12) loss but corporations suffer economic harm not individual
- (13) harm And they ought to be compensated for the economic
- (14) harm
- (15) that they've suffered and you ought to do that because that
- (16) will make them whole But you ought not to compensate them
- (17) for
- (18) harms they've never suffered because if you do that, it'll
- (19) make them better off
- (20) Another point I've wanted to make to you for some time
- (21) Counsel for the Native corporations suggests to you that we
- (22) don't value the land that we have no sense of appreciation for
- (23) Prince William Sound for the Gulf of Alaska That's wrong
- (24) Those of us who have been fortunate enough as a result of this
- (25) case to spend time in Prince William Sound are awestruck It
- (26) is magnificent It is beautiful But that's really not the
- (27) issue here We don't devalue the land

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- (1) In fact Mr Dorchester came pretty close to Dr Mundy
- (2) Dorchester's valued the land at 300 to \$700 an acre Mundy's at
- (3) 950 It doesn't really make a big difference in this case
- (4) But we do place value on this land, we place appropriate
- (5) value but bear in mind that the plaintiffs' plaintiff
- (6) corporations in this case view the land principally in
- (7) economic terms, too Recall the testimony of Carl Propes the
- (8) young land manager for Chugach Alaska who was probably
- (9) much
- (10) younger some 14 years ago when he participated in
- (11) negotiations
- (12) in Washington over what land Chugach was going to select
- (13) And
- (14) he told you that you know the corporation would have
- (15) preferred acquiring properties in Southeast Alaska in fact
- (16) would have preferred acquiring timber stands in Washington
- (17) and
- (18) Oregon would have preferred coal properties in Utah and
- (19) Wyoming but they couldn't get those
- (20) Now that's not to say that these lands aren't important to
- (21) people but the corporations that are in this court view these
- (22) assets principally as such Now that's not to say that they
- (23) shouldn't be compensated for any harm legitimately suffered
- (24) that you determine to have occurred under the instructions that
- (25) Judge Shortell will shortly be giving you They should They
- (26) should be made whole they shouldn't be made better off
- (27) I fear that to a large degree that's what's happening in
- (28) this case They want to be made better off and I think that
- (29) was nowhere better illustrated than the statement that

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(1) Mr Peterson - I m sorry Dr Peterson made during the course  
(2) of his cross examination when Linda was examining him during  
(3) his rebuttal appearance here He admitted to having written a  
(4) letter to the editor of the New York Times two weeks ago in  
(5) which he said Exxon should pay even if the claims are  
(6) exaggerated or are imagined And there s a feeling that Exxon  
(7) ought to pay even if the claims are exaggerated or imagined  
(8) A lot of the claims in this case I submit to you ladies  
(9) and gentlemen are just that They re not real At a minimum  
(10) they re exaggerated and most of them are imagined How can  
an  
(11) oil spill really damage mountains and glaciers? How can an oil  
(12) spill do harm to landlocked properties like the Snow River  
(13) parcel that sits right on top of the Seward Highway?  
(14) We ve all been through it 30 miles from the nearest body  
(15) of water How could that have been harmed by the oil spill?  
(16) How can an oil spill harm underground mineral rights that  
(17) Mr Petumenos client Chugach Alaska is seeking tens of  
(18) millions of dollars for? How can an oil spill justify claims  
(19) for archaeological damage to resources that are nowhere near  
(20) the water?  
(21) We re here you know not because we quarrel with the  
(22) plaintiffs over natural lands we re here not because we don t  
(23) recognize the value of their lands or we don t concede that  
(24) they ve been harmed to some extent we re here because they  
(25) want compensation for harms they didn t suffer

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(1) I ask you to use your common sense in evaluating some of  
(2) these claims You re going to find something quite startling  
(3) I think as lay people not exposed to the law that the law is  
(4) going to match what you would do simply as a matter of  
common  
(5) sense  
(6) I have the instructions here with me I didn t bring Jeff  
(7) Bob Mike and Joe I do have Mr Clough and Mr  
Oppenheimer  
(8) however who will going to assist me in putting up some  
(9) boards I want to show you what we believe to be the principal  
(10) law in this case that you ought to focus your attention on  
(11) And let s start with No 24 The measure of damages for  
(12) harm to land in the circumstances of this case is the fair  
(13) rental value attributable to any use of the property that could  
(14) have been made but for the oil spill  
(15) What that says to me ladies and gentlemen is did the  
(16) spill disrupt any uses that the plaintiffs in this case would  
(17) have made of their property If so they ought to be  
(18) compensated To the extent that it did they ought to be made  
(19) whole  
(20) What don t you see in this instruction? Do you see  
(21) anything about stigma? Do you see anything about market  
value  
(22) somebody s property being worth less than - than it was before  
(23) the spill? Do you see anything in this instruction about lost  
(24) subsistence use by shareholders?  
(25) It s the fair rental value attributable to any use of the

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(1) property that could have been made but for the oil spill and  
(2) it wasn t because there was an oil spill  
(3) In the words of one of the most distinguished judges I ve  
(4) ever known there may be a dozen and a half words in this  
(5) sentence and I asked counsel for the plaintiffs which one of  
(6) them don t they understand Let s assume that some uses were  
(7) disrupted and we concede that uses were disrupted of their  
(8) property and I m going to be talking to you about that What  
(9) do they get?  
(10) They get the fair rental value attributable to that use,  
(11) and instruction No 24 is going to tell you what that means  
(12) It s the amount of rent that the plaintiff would receive from a  
(13) fully informed renter of that land in an open rental market  
(14) If I could have the next board  
(15) When you retire to consider 46 days of testimony - I ve  
(16) lost count fifty some-odd witnesses not including depositions  
(17) 800 exhibits you have four questions to ask yourself What  
(18) uses could the plaintiffs have put the parcels to before the  
(19) spill did the spill interfere with any of those uses and if  
(20) so what would an arm s length renter have paid to use the land  
(21) in that way and how long did the interference last  
(22) That s the law of the case You re going to be instructed  
(23) probably for a half hour 40 minutes This is the meat of the  
(24) case  
(25) Let s talk now about the extent to which - you can take

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(1) these down - the extent to which the plaintiffs in this case  
(2) could not have used their property because of the oil spill I  
(3) think there are really three things you ought to ask  
(4) yourself - this is the way I ve sort of divided it up in my  
(5) own mind How much got oiled how long did that oil stick  
(6) around that interfered with anybody s use of the property what  
(7) effect did it have on use of the property  
(8) Let s talk about how much The startling fact in this case  
(9) is that in Prince William Sound 80 to 85 percent of the  
(10) shorelines were never even touched by oil and of those that  
(11) were touched by oil 70 percent were either lightly oiled or  
(12) very lightly oiled  
(13) We haven t heard a lot about most of the plaintiffs  
(14) parcels in this case Anybody remember Nelson Townsite?  
There  
(15) hasn t been a lot of discussion about Nelson Townsite except  
(16) we brought it up Culross - a whole host of parcels that we  
(17) mentioned the plaintiffs don t talk about them Why? Because  
(18) in Prince William Sound they re amongst the 80 percent that  
(19) were never oiled or they re amongst the 70 percent of oiled  
(20) parcels that were very lightly or lightly oiled and quickly  
(21) recovered  
(22) Let s go to the Kenai 90 percent of the Kenai according  
(23) to the SCAT2 data was never touched by oil You ve seen the  
(24) maps Plaintiffs parcels line the Kenai Most of that wasn t  
(25) oiled most of that which was oiled was just lightly oiled

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(1) And in Kodiak we'll talk about later Kodiak was an  
 (2) entirely different oil spill. It was mostly mousse. It was  
 (3) mostly tar patties. But realistically we're not talking about  
 (4) the horrible pictures that Mr. Petumenos likes to put up on the  
 (5) Barco everywhere. Those were a handful of places. They don't  
 (6) typify what happened and you ought not to base judgments on  
 (7) what happened in one place and just assume that it was all like  
 (8) that because that wasn't the case.  
 (9) How long?  
 (10) David Page came and talked to you. I don't know, not as  
 (11) a - as a paid professional witness, although he was being  
 (12) compensated for his time. He's done a lot of work as a paid  
 (13) witness or as a scientist. You be the judge of that.  
 (14) But David Page knows Prince William Sound. He spent what  
 (15) did he tell us 130 or so days in Prince William Sound since  
 (16) 1989. He's been to literally hundreds and hundreds of  
 (17) shorelines. He's really devoted himself to studying the effects  
 (18) of the Exxon Valdez oil spill in the sound, along the gulf, and  
 (19) in Kodiak.  
 (20) What's - what did he do in this case? He simply didn't do  
 (21) some walking and looking. You heard when Linda examined  
 (22) him, he described the program that he and others initiated in 1989  
 (23) of sampling, and they picked 64 randomly selected sites and  
 (24) they dropped three transects, and along each of those three  
 (25) transects they dug three holes, one in the upper intertidal

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(1) In 1994 he went out looking for oil. Wasn't scientific  
 (2) research. He went out looking for oil. And he asked land  
 (3) owners, many people you saw who testified, where to go.  
 (4) Mr. Petumenos told us in 40 out of 44 places that he looked at  
 (5) in 1994 there was some remnants of oil. What did he tell us?  
 (6) There's no doubt this time when you were headed back out  
 (7) you were looking for oil. And he answered Mr. Oppenheimer's  
 (8) question that's correct.  
 (9) That is your prime consideration. Go out find the oil.  
 (10) Study the oil.  
 (11) Answer. I wouldn't say it was to find the oil. We were out  
 (12) looking at oil that others had already observed and claimed to  
 (13) be present or that we knew was there.  
 (14) What did he say when he was cross-examined about what he  
 (15) saw? Basically the same thing David Page has been telling  
 (16) you, that if you know where to go and you know what to look for in  
 (17) wave shadows and other protected places, you can turn over a  
 (18) rock, if you know which one to turn over, and you can find some  
 (19) remnants of oil.  
 (20) The question for you to decide is whether the presence of  
 (21) any of that oil is interfering with the plaintiffs  
 (22) corporation, plaintiff corporations, use of their land, and  
 (23) we'll talk about use a little bit later. But I submit to you a  
 (24) spatter of tar under a rock, a patch of asphalt under a  
 (25) boulder-cobble beach is not preventing anybody from making  
 any

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(1) one in the middle, one in the lower, two beneath the water, 15  
 (2) pits they dug or 15 cores at each of these sites, 64 times 15  
 (3) thousands of holes.  
 (4) You've seen the terrain here. You've seen pictures of what  
 (5) it looks like. That was an awful lot of work. That was an  
 (6) enormous undertaking. And he did it in 1989 and he did it in  
 (7) 1990 and he returned in 1991 and 1992.  
 (8) What did he tell you? He told you that really, by 1990 in  
 (9) most locations there had been a dramatic, dramatic  
 (10) improvement. Lightly and very lightly oiled shorelines were  
 (11) basically clean. Those that had been more heavily oiled were  
 (12) well on their way to recovery.  
 (13) We have a quote from - as of today he was asked, the oil  
 (14) that was left on the shorelines in 1989, is all that oil still  
 (15) there today?  
 (16) And his answer, the part that is of interest to me. Unless  
 (17) you know where to look, unless you know what beach to go to  
 (18) you would be hard-pressed to find anything.  
 (19) You know, it's interesting that there's no big controversy  
 (20) about this. The plaintiffs' principal expert stacked up  
 (21) against David Page. Jim Bush, basically told you the same  
 (22) thing. He did his transect analysis - we'll get to that  
 (23) later, because that involved coming up with his scientific  
 (24) wild - swag estimates of persistence that we'll talk about a  
 (25) little bit later, but what did he say in 1994?

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(1) valuable use out of these properties that they would be making  
 (2) had there been no oil spill.  
 (3) Let's talk about subsurface oil, the bugaboo of this case.  
 (4) The plaintiffs would have you believe that Prince William Sound  
 (5) is literally floating on a sea of subsurface oil and that it's  
 (6) highly dangerous, it's toxic, it threatens their use of the  
 (7) property. Does that comport with the evidence that you heard  
 (8) in this courtroom?  
 (9) Can we have the map?  
 (10) You will remember David Page told you about a 1973 - I'm  
 (11) sorry, 1993 program that was undertaken to locate all of the  
 (12) subsurface oil in Prince William Sound and the gulf, and do you  
 (13) know what? We know where it is.  
 (14) Here's what he told you. As of July 1993, 80 percent of  
 (15) it was in five locations. Half of it, half of that 80 percent  
 (16) is at Point Helen, the rest is as you see. There's some at  
 (17) North LaTouche, there's some at Sleepy Bay, there's some at  
 (18) Knight and there's some at Smith, which isn't even a parcel.  
 (19) Everybody knows it's there. Everybody knew it was there in  
 (20) 1992 when the commandant of the Coast Guard determined to  
 (21) suspend cleanup operations, but nothing was done in an  
 (22) attempt  
 (23) to remove that because, as Mr. Page told you, most of it's  
 (24) located well under the beach where it's not in a position to do  
 (25) harm to the biota. You've heard from others that, Yeah, we  
 could dig that up, but it would probably do more harm than it

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(1) would benefit anything Because any subsurface oil that s  
 (2) there is not hurting anything It s at the high intertidal  
 (3) it s not near where any of Ed Gilfillian s critters live  
 (4) Plaintiffs aren t even asking us to go back and dig all  
 (5) this up Subsurface oil is in this case principally for its  
 (6) scare value And I submit you ought not be scared about that  
 (7) This is a use case plain and simple It s an impaired use  
 (8) case What uses of the property have plaintiffs lost because  
 (9) of the oil spill? How can they not use their land anymore in a  
 (10) way that they would have?  
 (11) Linda says a picture is worth a thousand words and I  
 (12) couldn t come here without bringing these pictures but let s  
 (13) take a look at some of the places that David Page took us to  
 (14) He was really the only one who took you to every oiled parcel  
 (15) in Prince William Sound  
 (16) There were two Chugach Alaska parcels in Prince William  
 (17) Sound only two that were oiled and my companions have -  
 oh  
 (18) this is southeast LaTouche thank you  
 (19) MR OPPENHEIMER Shocking  
 (20) MR DIAMOND Shocking  
 (21) This is southeast LaTouche Remember what he told you  
 (22) Heavily oiled in 1989 This is an example of a high energy  
 (23) beach the waves pounded this over the winter by 1990 clean  
 (24) Does it look to you looking at this photograph that  
 (25) Chugach Alaska can t make use of this parcel that they would

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(1) have had there not been any oil had there not been a spill?  
 (2) The other Chugach Alaska parcel Bay of Isles he took you  
 (3) to  
 (4) Glad I m doing the talking  
 (5) You remember the Bay of Isles This is 29 miles of  
 (6) coastline the distance from here to Girdwood Some of it was  
 (7) heavily oiled Take a look at it Right now the only  
 (8) remnants of the oil are at the far end of the bay at the peat  
 (9) bog You remember the peat bog the size of a McDonalds  
 (10) parking lot Yes you can go find some oil there yes you  
 (11) can and I ve been there You can see it if you go looking for  
 (12) it But the Bay of Isles otherwise has no oil on it  
 (13) Does it look to you that this land is not usable?  
 (14) David took us on a journey down the Bay of Isles  
 (15) (Videotape Played)  
 (16) MR DIAMOND He took us along all the coastline we  
 (17) can see on that picture He showed you the lichen the biota  
 (18) the lushness of all of this that s returned He explained to  
 (19) you how and where this had been heavily oiled  
 (20) Look at it for yourself use your own eyes Don t listen  
 (21) to what the lawyers tell you all this means Can you think of  
 (22) any use that the corporations in this case can t make of this  
 (23) lush beautiful parcel because there was an oil spill? It s  
 (24) breathtaking It s magical This is gorgeous land  
 (25) As Mr Petumenos says this is breathtaking But it s

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(1) every bit restored, it s every bit as usable as it was on March  
 (2) 22 1989  
 (3) Here s the peat bog That s it That s where if you look  
 (4) hard enough you can find that there was an oil spill in 1989  
 (5) Come out of the peat bog and you wouldn t know it had  
 (6) happened  
 (7) We think Chugach Alaska ought to be compensated for the  
 (8) period of time when they couldn t use this property, but that  
 (9) period has long since ended That period according to their  
 (10) experts is grossly exaggerated It is restored now  
 (11) (Tape concluded)  
 (12) MR DIAMOND On Knight Island final parcel, Chugach  
 (13) Alaska Rua Cove Heavily heavily hit Look at it with your  
 (14) own eyes Does it look like it s awash in oil? Does it look  
 (15) like it s in disrepair, no one would use that for any purpose?  
 (16) When David Page was asked whether it was awash in oil he  
 (17) said No it s awash in salmon  
 (18) Let s go to some of the Chenega parcels North Chenega,  
 (19) another parcel heavily oiled Look at it today Does it look  
 (20) like it s still in a sea of oil? Does it look like it s not  
 (21) usable for any purpose?  
 (22) This is a beautiful spectacular shot We didn t only show  
 (23) you these pictures David came with near shots and close-ups  
 (24) They re all in evidence They re all available for you to look  
 (25) at

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(1) I urge you take the time take a look at them and ask  
 (2) yourself whether this land looks like it s in disrepair from  
 (3) the standpoint of whether it could be used  
 (4) Sleepy Bay how many times have we heard about Sleepy Bay?  
 (5) If I call them up on my computer, doing a search on the  
 (6) transcript, it takes forever to scan through them all  
 (7) This is Sleepy Bay now though Look at it It s one of  
 (8) the most gorgeous spots in Prince William Sound Does it look  
 (9) like it s not usable?  
 (10) This is the site of the Tesoro test You re going to see  
 (11) that on video when I sit down I guarantee it  
 (12) is there oil on this beach? David walked this beach, he  
 (13) walked it with you and he showed you exactly where you can  
 find  
 (14) oil exactly what you will find exactly what it looks like  
 (15) He told you where the subsurface oil is located and he  
 (16) explained to you why it wasn t hurting anyone  
 (17) Does it look like this is in disrepair?  
 (18) Here s a closeup Ask yourself, given the lushness of this  
 (19) biota and just the awesome beauty of that spot Does that look  
 (20) to you like the folks at Chenega can t use it? It s been  
 (21) rendered totally unusable? I don t think so  
 (22) North LaTouche This is around the corner from Sleepy  
 (23) Bay Sleepy Bay is over here This is another area that was  
 (24) heavily hit It s beautiful It s recovered Can you believe  
 (25) anybody who tells you this is not recovered?

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- (1) Eshamy This is over on the mainland This is another
- (2) Chenega parcel and the last that we'll show you This you
- (3) will recall was Jim Bush's transect site This was - this
- (4) was oiled during the oil spill And it was ugly
- (5) Look at it now Does it look ugly? You remember Jim Bush
- (6) told you that there was a continuous tar mat underneath the
- (7) sand He explained to you how theoretically oil can
- (8) penetrate - theoretically oil can penetrate and create long
- (9) continuous bands the spoiling of property
- (10) This is David Page remember? He dug up the tar mat and he
- (11) dug one of his doughnuts and that's all there is There's
- (12) some asphaltic material that's like road tar You held it in
- (13) your hands or at least some of you did If you crumble it it
- (14) crumbles like dirt
- (15) Can you imagine any use that the Chenega Corporation could
- (16) not be making of this land now because there was an oil spill
- (17) in 1989?
- (18) We showed you pictures of places that weren't even
- (19) parcels Least I forget Point Helen
- (20) Least I forget Point Helen How many times have we heard
- (21) about Point Helen? David walked you on both sides of this
- (22) beach You recall the oil came from the northeast and washed
- (23) up on this shoreline and you remember that there was a buoy
- (24) here some period of time, trying to catch oil, and you saw
- (25) pictures David showed you pictures of what this looked like in

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- (1) 1989 Remember this is where half of the 80 percent of the
- (2) subsurface oil that I talked about earlier is located but it's
- (3) hidden It's buried high up on the shoreline where it's not
- (4) hurting anything
- (5) And David walked you along this side and then walked you
- (6) along this side and said that today it's indistinguishable
- (7) from what was virtually never oiled to what was amongst the
- (8) worst in Prince William Sound It's recovered
- (9) Can you imagine any use that the Chenega Corporation can't
- (10) make of this parcel because in 1989 there was an oil spill?
- (11) David took you to parcels that weren't even parcels in this
- (12) case the Natalie Fobes collection of places
- (13) Meares Point It's not a parcel but Natalie Fobes said
- (14) this was terrible This is where she got a lot of her
- (15) photographs from Look at it today Does this look like it
- (16) has not recovered to you? Does this look like it's not
- (17) usable?
- (18) Let's go to Kenal quickly That's fast
- (19) Verdant Cove Verdant Cove David said was typical of the
- (20) type of lightly oiled beach he found on Kenal That's what it
- (21) looks like today Lush full of biota teeming with life
- (22) Beautiful
- (23) Taroka Arm a Bush transect site This was a - I believe
- (24) moderately oiled beach in 1989 Look at it now
- (25) Can we jump to Kodiak? Let's go to Kodiak You know it's

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- (1) interesting that Mr Stoll has shown you a lot of photographs
- (2) of Kodiak, you have yet to see from him one photograph taken
- (3) on
- (4) a parcel that's in dispute in this case
- (5) There were three places on Kodiak that were heavily hit
- (6) Chief Harbor which he showed you the workers cleaning up
- (7) He
- (8) said it was Larsen Bay it wasn't Larsen Bay it was Chief
- (9) Harbor Perevalnie Passage Shuyak Harbor
- (10) You remember you heard from Mr Purdom he was the guy
- (11) who
- (12) volunteered to come up from Louisiana and spent a year in
- (13) Kodiak working on the spill He said there were three places
- (14) in all of Kodiak where they had to use any kind of mechanical
- (15) cleaning Perevalnie Pass Shuyak Harbor and Chief Harbor
- (16) Look at two of them today Can you think of any use that
- (17) the borough can't make of these parcels because there once
- (18) was
- (19) oil? They're breathtaking They've recovered, they're fully
- (20) usable and they've been fully usable for years
- (21) I want to talk to you about - I want to talk to you about
- (22) Ed Gilfillan I want to talk to you about the only biologist
- (23) who's come to court and told you from a firsthand perspective
- (24) what it's like out there Bear in mind the only biologist that
- (25) the plaintiffs have called to the stand is Mr Peterson -
- (26) Dr Peterson and Dr Peterson has spent a total of - what did
- (27) he tell us - six days in five years? He's been to he
- (28) believes eight parcels or eight sites
- (29) Ed Gilfillan has lived and breathed the Exxon Valdez oil

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- (1) spill for the past five years He spent over 500 days studying
- (2) it He's spent over 130 days in the field He has walked
- (3) something like 400 beach segments many of them over and
- (4) over
- (5) again
- (6) And he came and told you about the condition that he's seen
- (7) them and what did he conclude? He concluded that by 1990
- (8) 70
- (9) to 90 percent of the - of the biota of the nearshore ecology
- (10) the shorelines that he inspected had recovered And why? He
- (11) explained to us something that - that most of us don't really
- (12) understand, that the critters his critters the plants and
- (13) animals that live in Prince William Sound get hammered and get
- (14) battered and basically get wiped out every year, and they've
- (15) evolved to regenerate themselves And one of the great
- (16) surprises to come out of this oil spill has been the fact that
- (17) recovery was so quick
- (18) Again don't listen to me don't listen to Mr Petumenos
- (19) Use your own eyes
- (20) Can we put up the comparison boards?
- (21) Do you remember these? These aren't 1990 photos they're
- (22) not 1993 photos these are 1990 comparisons, comparisons
- (23) that
- (24) he did between heavily oiled and never oiled What did he tell
- (25) you? That they were virtually indistinguishable
- (26) Could I have the next one?
- (27) The difference between heavily oiled and never oiled - and
- (28) he showed you pictures for each of the shoreline types

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- (1) sheltered bedrock I forget what the last one was – but he  
 (2) told you that just after a year there was not an appreciable  
 (3) difference not a measurable difference between never oiled  
 (4) heavily oiled at 70 to 90 percent of the places that he looked  
 (5) at  
 (6) Let s take a look at the next one  
 (7) Boulder cobble never oiled versus heavily oiled What did  
 (8) he tell you? That the action of the winter storms just throws  
 (9) these things around scours these beaches cleans them and  
 what  
 (10) lives regenerates in the next springtime and he was amazed to  
 (11) find the recovery had happened as quickly as it did  
 (12) Let s see the final one Pebble gravel never oiled  
 (13) heavily oiled One year later Do you see a difference? Do  
 (14) you see anything that would suggest to you that this shoreline  
 (15) was not fully usable in 1990?  
 (16) The – the plaintiffs in this case have disturbingly talked  
 (17) not about the quality of the work that our people have done  
 (18) not about the quality and the reliability of the results that  
 (19) they presented to you, but really about sort of the quality of  
 (20) the people that they had there and I don t want to engage  
 (21) Mr Petumenos in a discussion of reliability and believability  
 (22) and trustworthiness but the people that we brought in the  
 (23) courtroom the scientists and the appraisers everyone from the  
 (24) top down had hands on experience they knew what they were  
 (25) talking about

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- (1) Mr Dorchester Mr Dorchester was paid a lot of money  
 (2) Not what Mr Petumenos said or maybe Mr Stoll, not three and  
 a  
 (3) half million dollars to work on this case He was paid a lot  
 (4) of money to work on a lot of cases to do a lot of things But  
 (5) he was paid a lot of money but he put in enormous effort and  
 (6) he assembled a team that put in an enormous effort and he  
 (7) deserved to get paid for his time and deserved to get paid for  
 (8) his labors, as did everybody else  
 (9) In the case of Mr Gilfillan Mr Peterson came back from  
 (10) North Carolina on rebuttal to take him on where he lives and –  
 (11) and Peterson testified that Ed just messed up his science and  
 (12) I m sure we ll hear about it from Mr Petumenos on the rebuttal  
 (13) case but that all the samples that Mr Gilfillan took could  
 (14) fit on a board the size of a Barco And that s – he was  
 (15) basing all of his findings and all of the testimony he gave  
 (16) based upon that sample size  
 (17) That wasn t true You know Mr Peterson was talking about  
 (18) a very small portion sheltered bedrock middle intertidal  
 (19) Ed Gilfillan told you that his analysis was based on much  
 (20) much more It was based on literally hundreds and thousands  
 of  
 (21) samples and it was based on literally months and months of  
 (22) walking shorelines It was based on photographic  
 comparisons  
 (23) It was based on his years and years of experience doing the  
 (24) work he was doing And I suggest to you ladies and  
 gentlemen  
 (25) that he is a reliable and credible informer for you to make

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- (1) judgments about concerning the condition of Prince William  
 (2) Sound  
 (3) Ultimately what he told you was that most of these  
 (4) shorelines 70 to 90 percent of them were well on the road to  
 (5) recovery by 19- – I m sorry, were recovered by 1990 and that  
 (6) the remaining were clearly on the road to recovery and had  
 (7) recovered by 1993 from an ecological standpoint and he  
 wasn t  
 (8) wrong  
 (9) We ve heard time and time again about how quiet Prince  
 (10) William Sound is, things are not there where they re supposed  
 (11) to be things that used to be there are not there Use your  
 (12) own eyes  
 (13) Could we have the Day video?  
 (14) (Videotape Played)  
 (15) MR DIAMOND Nassau Fjord this is near Columbia  
 (16) Glacier This is a principal place where subsistence  
 (17) activities are conducted Does this look barren, does this  
 (18) look desolate? Wildlife is there sound s not quiet Sound s  
 (19) teaming teaming with wildlife  
 (20) Iktua Bay – this is just off the runway from the Chenega  
 (21) Village airport This is where you can t find seals anymore  
 (22) The Chenegans have to go far away Is that right? Right off  
 (23) the runway  
 (24) Everywhere you go in the sound it s teaming with birds  
 (25) it s teaming with wildlife

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- (1) Ladies and gentlemen use your own eyes We brought in  
 (2) video we brought in photographs we brought in people who  
 (3) tried to describe the best they knew how what it s like out  
 (4) there We tried to transport you to Prince William Sound We  
 (5) tried to take you there through the visuals and through the  
 (6) descriptions If you ever go this is what you ll see  
 (7) Your Honor may we take a break?  
 (8) THE COURT Yes  
 (9) THE CLERK Please rise This court stands in  
 (10) recess  
 (11) (Jury out at 1 24 p m )  
 (12) (Recess from 1 24 p m to 1 34 p m )  
 (13) (Jury in at 1 34 p m )  
 (14) THE CLERK. This court now resumes its session  
 (15) Please be seated  
 (16) MR DIAMOND I apologize Your Honor Mr Petumenos  
 (17) and I share a common malady middle age  
 (18) MR PETUMENOS You re more middle aged than I am  
 (19) MR DIAMOND I thought this was my closing argument  
 (20) MR PETUMENOS Sorry  
 (21) MS SMITH You can argue about that later  
 (22) MR DIAMOND Ladies and gentlemen the message that I  
 (23) know David Page hoped to leave you with was that it s okay out  
 (24) there It s been okay out there for a long long time If you  
 (25) know what to look for and you know where to go you can find

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- (1) out that there once was an oil spill but basically the land  
 (2) has recovered  
 (3) It s not only David Page telling you that and it s not only  
 (4) Exxon telling you that Cleanup involved literally tens of  
 (5) thousands of people, all under the supervision of the Coast  
 (6) Guard and the Coast Guard and their science advisors NOAA  
 (7) had the final word They could have kept Exxon working until  
 (8) 2004 or 2014 What did we hear from the Coast Guard?  
 (9) (Videotape Played- Examination of Admiral Robbins)  
 (10) BY VIDEO EXAMINER  
 (11) Q Having spent the summer of '89 there having seen the oil  
 (12) firsthand uncleaned - I mean hit the beach in '89 - what was  
 (13) your reaction to the beach as you saw when you went back in  
 (14) '91?  
 (15) A Frankly I was surprised, because I had said that I thought  
 (16) that we were looking at seven to ten years before the shoreline  
 (17) would be as clean as it is now and as clean as it was in '91  
 (18) I was quite surprised that it had been as effective as it was  
 (19) I think that s a combination of the cleanup a combination of  
 (20) the winter storms and the bioremediation activities  
 (21) (Examination of Admiral Ciancaglini)  
 (22) BY VIDEO EXAMINER  
 (23) Q As of June of 1982 - of 1992 when it was determined to  
 (24) cease cleanup operations were there shorelines which  
 (25) remained contaminated by oil spilled by the Exxon Valdez?

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- (1) A Well your definition of "contamination There were  
 (2) shorelines that had oil still on them but as I said in my  
 (3) previous testimony, you couldn t remove every bit of oil on  
 (4) those shorelines To the best of our knowledge there were no  
 (5) large concentrations of shoreline - of oil anywhere on any of  
 (6) the shorelines in Prince William Sound Kenai Kodiak and the  
 (7) Katmai areas We took care of that  
 (8) Q So your understanding is that there did remain oil on the  
 (9) surface of some of the shorelines but not in heavy or marked  
 (10) concentrations?  
 (11) A If there were - if there was oil remaining on the  
 (12) shoreline it was extremely light and as far as we were  
 (13) concerned posed no harm to the public or the environment If  
 (14) it did then we would not have released that shoreline we  
 (15) would have continued working on it  
 (16) Q And again as of June of 1992 was there oil remaining  
 (17) underneath the surface of shorelines for example underneath  
 (18) the surface of beaches on some - in some areas?  
 (19) A There was some subsurface oil in - in some locations in  
 (20) Prince William Sound yes there was  
 (21) Q And -  
 (22) A But again in our mind it posed no problem If it did we  
 (23) would have effected a cleanup on it  
 (24) Q In June of 1992, did there remain oil within the waters of  
 (25) Prince William Sound?

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- (1) A To the best of my knowledge no there was no leaching  
 (2) caused by the Exxon Valdez spill  
 (3) They are very very close to the pre spill condition and  
 (4) the way they differ is the small amount of oil that remains in  
 (5) very very scattered remote locations throughout Prince William  
 (6) Sound the Kenai Katmai and Kodiak areas There s very very  
 (7) little oil There s traces of oil out there now and with  
 (8) time Mother Nature as it has done in other spills it will be  
 (9) gone  
 (10) (Tape concluded)  
 (11) MR DIAMOND Let s remember this is a land case and  
 (12) that s what we ll talk about a little bit later We ve already  
 (13) talked about measure of damages what loss of use has there  
 (14) been of the land  
 (15) It may have baffled many of you, why you were hearing so  
 (16) much about fish It baffles me to this day why we ve heard so  
 (17) much about fish but we have  
 (18) Plaintiff corporations don't fish They're not fishermen  
 (19) They don t - they can t even by law as Mr Parker told us  
 (20) own a fishing permit They don t use any of their lands as  
 (21) marinas or harbors or staging areas for fishing such that the  
 (22) spill caused them any harm  
 (23) But we have heard witness after witness talk about fish so  
 (24) I better talk about fish  
 (25) Herring Dr Kocan Dr Kocan came into court and told

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- (1) you that in his laboratory studies that he dosed the oil  
 (2) herring larvae to the same extent that they were dosed  
 (3) according to him by the oil spill he could produce genetic  
 (4) mutations  
 (5) He didn t entirely come clean with you He didn t tell you  
 (6) that genetic mutations and deformities in herring are the norm  
 (7) that somewhere between 50 and 80 percent of herring larvae  
 (8) are born with deformities and he didn t tell you that when he  
 (9) replicated, or at least said he was replicating the Exxon  
 (10) Valdez oil spill in his laboratory, what he was really doing  
 (11) was dosing these - these larvae every 48 hours with new fresh  
 (12) oil Mr Brannon had to come tell you about that  
 (13) Basically he subjected his test samples to a new oil spill  
 (14) every two days And could he define detectable differences?  
 (15) Yes he found detectable differences in the number of  
 (16) deformities But Dr Kocan has a problem explaining record  
 (17) catch year after year after year after the spill and prior to  
 (18) the crash What did he tell us?  
 (19) Would you agree that in 1990 '91 and '92 that the spill  
 (20) had no perceptible population impact on the herring biomass  
 (21) as shown by the outstanding harvests in '90 '91, '92?  
 (22) "Yes I ll agree that there were outstanding harvests "  
 (23) Now, ladies and gentlemen you don t have to be a rocket  
 (24) scientist to scrutinize the testimony of somebody who comes in  
 (25) and tells you that all these herring were exposed to all this

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- (1) oil that created bad things for the herring and yet there are  
 (2) record harvests in the three years after the spill  
 (3) So Dr Kocan had a little bit of a problem What he did  
 (4) was he pointed to the crash in 1993 Everybody recognizes  
 (5) that the crash was attributable to this virus that the herring  
 (6) in Prince William Sound contracted Not a new virus it's been  
 (7) around elsewhere But he went a step further and he blamed  
 the  
 (8) spread of the virus on the oil spill that in some way he really  
 (9) couldn't explain to us it had weakened their immuno - immune  
 (10) system  
 (11) He or counsel drew the analogy to AIDS Unprecedented No  
 (12) one else had ever suggested this before  
 (13) Dr Kocan in an effort to bolster his views referred to  
 (14) Dr Meyers I'm not the only one he said who subscribes to  
 (15) this oil spill virus theory Dr Meyers the state  
 (16) toxicologist also subscribes to it In fact I was talking to  
 (17) him just the other day and he confirmed for me that he thought  
 (18) my theories were all impeccably correct  
 (19) Didn't take Dr Meyers long to agree to jump on a plane  
 (20) from Juneau come here before you and say, Hogwash This  
 (21) theory is ridiculous it can't be explained by herring  
 (22) statistic populations I have never subscribed to it and the  
 (23) conversation that Dr Kocan told you about was a complete and  
 (24) utter fabrication  
 (25) So much for herring There was a time in this case that

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- (1) the principal focus of attention was on salmon What have we  
 (2) heard about salmon recently? Virtually nothing In fact  
 (3) Mr Petumenos didn't even raise it at all Mr Stoll made  
 (4) reference to Red Lake but if you'll recall the testimony on  
 (5) Red Lake salmon from Dr Mundy Phil Mundy the fish expert  
 he  
 (6) said We don't know whether there's a problem with Red Lake  
 (7) because it takes three years and we're only halfway through so  
 (8) we don't know if there's a problem with Red Lake salmon  
 (9) But let's step back Red Lake salmon is only one of many  
 (10) many many Kodiak lakes which is a source of salmon for  
 (11) Kodiak And what does this have to do with the borough's use  
 (12) of its land anyway?  
 (13) As to the pinks Well you know the trustees told us that  
 (14) really it would take a decade decade before the pinks  
 (15) returned And Dr Peterson who - I'm sorry plaintiffs  
 (16) salmon expert whose name escapes me for the moment said  
 really  
 (17) that the two sort of linchpin fish species here were herring  
 (18) and salmon and that the spill had done terrible things to the  
 (19) salmon  
 (20) Well what do we know about salmon in 1994? We know that  
 (21) since the oil spill 1990 was the largest commercial salmon  
 (22) catch in the history of record keeping for salmon and those  
 (23) were the salmon that fed in the streams at the time of the oil  
 (24) spill And the 1991 catch was the second largest catch in  
 (25) recorded history of salmon records for those who keep them  
 and

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- (1) those were the same fish that incubated in allegedly oiled  
 (2) streams and have salmon crashed the way the trustees have  
 told  
 (3) us that's what's happened wouldn't be back for ten years?  
 (4) What do we know about the 1994 salmon catch? Could we  
 have  
 (5) the video?  
 (6) (Videotape Played)  
 (7) Snug Harbor August 1994 What you're about to see the  
 (8) part of the third largest salmon catch in reported history  
 (9) What did we hear? The pinks are back They're back in record  
 (10) numbers This at opening statement was one of the linchpins  
 (11) of the plaintiffs case We had decimated the value of their  
 (12) lands because we had killed off the most important fishery to  
 (13) Prince William Sound and Gulf of Alaska Does it look like the  
 (14) oil spill killed off the salmon?  
 (15) (Tape concluded)  
 (16) MR DIAMOND Ladies and gentlemen the scientific  
 (17) evidence that you've heard is - is really sort of just  
 (18) confirmation that these - these lands recovered quickly and  
 (19) that plaintiffs really didn't lose very much use of anything  
 (20) for very long  
 (21) One of the things I found most striking and I mentioned  
 (22) this briefly earlier What have we heard about and what have  
 (23) we not heard about? When it comes to the effects of the oil  
 (24) spill on land we hear about the same handful of places in  
 (25) Prince William Sound Point Helen Sleepy Bay, North  
 LaTouche

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- (1) Rua Cove maybe the Bay of Isles  
 (2) Where do all the photographs that the plaintiffs show you  
 (3) come from? Where are all the videos taken? What are all their  
 (4) witnesses talking about? They're talking about four or five  
 (5) places There are 1200 miles of shoreline on the parcels for  
 (6) which plaintiffs want damages The ones that I've just  
 (7) mentioned comprise two three miles five miles - give them  
 (8) ten miles There are 1200 miles of shoreline  
 (9) You haven't seen any pictures of anything over here any of  
 (10) the Eyak properties You haven't really seen anything from  
 (11) Tatitlek except we saw Mr Costello's home video of Bligh  
 (12) Island And incidentally, Mr Bush and ICF after talking to  
 (13) or getting an anecdotal report of oiling there said 26 miles  
 (14) of shoreline oiled I believe  
 (15) What did Mr Costello show you it was one-eighth of a mile  
 (16) along the rocky outcropping When he came back a week later  
 (17) it was gone  
 (18) But we've heard virtually nothing about anything here  
 (19) What about the parcels up here? Really, nothing  
 (20) In the Kenai we have 16 parcels that are owned by English  
 (21) Bay Harris Bay McArthur and Taroka Arm You've heard  
 (22) mention from the plaintiffs witnesses three of 16 English Bay  
 (23) parcels that's it What about the other 13? Why do they get  
 (24) damages for 13 parcels they haven't even shown you pictures  
 (25) of? No one's come in with any evidence that there was oiling



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- (1) of a nature that prevented any use of those In fact they  
 (2) haven't even put on a witness from English Bay  
 (3) Port Graham 14 parcels Two out of 14 have been  
 (4) mentioned in this case with the exception of their part of  
 (5) McArthur We've heard about the southeast block Kenal -  
 (6) that's Windy Bay We heard that from Pat Norman in the closing  
 (7) week of the trial Chugach Bay Mr Bush I think talked  
 (8) about Chugach Bay  
 (9) You heard no mention of anything at the end of the  
 (10) peninsula You heard no mention of any oiling of any harm to  
 (11) the Kachemak Bay parcels  
 (12) Ask yourself Does it make sense if you're trying a land  
 (13) damage case and your property really has been despoiled  
 (14) wouldn't you come forward with evidence? Wouldn't you have  
 (15) somebody talk about the English Bay property and how - how it  
 (16) was affected by the spill and what the consequences were?  
 (17) All we hear about - and all you'll hear about when  
 (18) Mr Petumenos gets up again I imagine Sleepy Bay Bay of  
 (19) Isles Point Helen northeast LaTouche maybe Rua Cove  
 maybe  
 (20) not We ought to pay them for the five for the six or seven  
 (21) parcels that really were oiled and really were affected But  
 (22) there are 97 parcels they're seeking damages for and you've  
 (23) heard virtually nothing about any of them  
 (24) Kodiak You know all we hear is Shuyak Harbor Chief  
 (25) Harbor Perevalnie Pass Not parcels You know, if they

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- (1) really had suffered a loss of use why didn't they come forward  
 (2) with much more credible evidence of it?  
 (3) There's another piece of evidence you ought to consider  
 (4) terms of what really was damaged and for how long You heard  
 a  
 (5) bit about it from Admiral Ciancaglioni on this video snippet  
 (6) but remember there was land owner participation Before  
 (7) anybody walked off of Bear Cove or east Alalk Bay whether  
 (8) anybody said west arm of Nuka bay is done we're not going to  
 (9) clean it up anymore there was land owner input  
 (10) You know you heard from Pat Norman sitting up here that he  
 (11) could sort of bring down the - the head of the Coast Guard  
 (12) operation the head of Exxon's operation to the Kenal  
 (13) Peninsula because he had a complaint  
 (14) He acknowledged when Mr Clough was cross-examining him  
 (15) it had been that way in 1990 91 92 all of these parcels  
 (16) had to be signed off on by somebody And probably the best  
 (17) evidence is not litigation evidence not what people say in  
 (18) depositions not what people say on the witness stand but  
 when  
 (19) they're dealing with one another as people to people land  
 (20) owner to Coast Guard land owner to Exxon - isn't really  
 (21) that the most persuasive evidence? And they signed off on all  
 (22) of these parcels years and years before Mr Bush predicts  
 (23) persistence will end  
 (24) What did - thank you  
 (25) You'll remember Chenega and Admiral Ciancaglioni told us

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- (1) the Chenegans were real sticklers they were the hardest to  
 (2) deal with they wanted every spot of oil removed they wanted  
 (3) their lands returned to their pre spill conditions  
 (4) Steve Ward lives in the village 1992 no one's holding a  
 (5) gun to his head He's not thinking about lawsuits he's not  
 (6) thinking about juries and judges What does he say? Major  
 (7) mechanical has done a great job This beach looks great A  
 (8) mess in '89 and a very good cleanup job has returned this  
 beach  
 (9) to normal  
 (10) You know that was Sleepy Bay Here is LA 15 down from  
 (11) Sleepy Bay  
 (12) This beach very usable by residents of Chenega  
 (13) This one is Point Helen This beach is usable to the  
 (14) village people for any and all subsistence activities a very  
 (15) good surprise  
 (16) Ladies and gentlemen your job is going to be to decide  
 (17) whether the oil spill disrupted the plaintiff corporations use  
 (18) of their properties And I submit to you that this is probably  
 (19) the best evidence of what happened and when it happened and  
 (20) when the property was restored  
 (21) Bear in mind the plaintiffs are seeking damages for years  
 (22) and years and years on these parcels Steve Ward said they  
 (23) were very usable by the people of Chenega in 1992  
 (24) There's one other piece of evidence What did Admiral  
 (25) Ciancaglioni tell us? Very very few disputes We're dealing

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- (1) with literally thousands of shoreline segments 1200 miles of  
 (2) parcel shoreline very few disputes as to whether the cleanup  
 (3) had ended  
 (4) Could we have the clip?  
 (5) (Videotape Played)  
 (6) BY VIDEO EXAMINER  
 (7) Q Cleanup operations were terminated whether it was on a  
 (8) shoreline or for the summer only upon approval of the Coast  
 (9) Guard?  
 (10) A By the federal on scene coordinator yes That's right  
 (11) Let me - let me backtrack It just wasn't the Coast Guard  
 (12) saying we're done it - we had people on the shoreline that -  
 (13) that represented the state of Alaska the land manager whoever  
 (14) that may be If we were working - if we were in the southern  
 (15) part of the Sound, normally Chenega Village Corporation or  
 (16) Chugach Corporation or - or the state - state department of  
 (17) wildlife or the state department of natural resources we had  
 (18) about 30 40 different land managers  
 (19) So what I'm saying to you is that before my decisions were  
 (20) made to whether or not to walk off I had an input from the  
 (21) land manager from the state of Alaska from the Coast Guard  
 (22) from Exxon, and from my scientific advisor, NOAA  
 (23) Most of - mostly all the shorelines most of them most of  
 (24) them we were in agreement Where we weren't then we had a  
 (25) decision making process to resolve those disputes

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- (1) (End of tape)
- (2) MR DIAMOND Sleepy Bay Point Helen Rua Cove -
- (3) same names over and over again Why have we heard so much
- (4) about so few places and so little about so many? It s
- (5) ultimately the plaintiffs want compensation for landlocked
- (6) parcels miles away from the nearest shorefront They want
- (7) compensation for never oiled parcels They want
- compensation
- (8) for underground mineral rights and that s why we haven t
- heard
- (9) about them
- (10) Can I have blowup of Instruction No - that s it
- (11) MR CLOUGH Can you all see it?
- (12) MR DIAMOND Now let me talk law to you something
- (13) I m more comfortable with than geomorphology and intertidal
- (14) biology I know something about this
- (15) This is a jury instruction You ve seen the jury
- (16) instructions on the measure of damages and the circumstances
- of
- (17) this case a land case loss of use There are a couple of
- (18) things that are no longer in this case things for which you
- (19) may not award damages because under the circumstances
- they re
- (20) not appropriate
- (21) Let me focus first on any alleged reduction in the market
- (22) value of any of the plaintiffs properties as a result of the
- (23) oil spill You may be asking yourself why in heaven s name
- (24) did we listen to so many witnesses who told us about pre spill
- (25) and post spill market values?

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- (1) On our side of the case Steve MacSwain probably spent a
- (2) day of your time Norm Lee the parks department appraiser
- (3) Wayne Haerer from Kenai - all talking about market values all
- (4) discussing whether market values in the spill affected areas
- (5) had gone down as a result of the spill
- (6) Well ladies and gentlemen it s no longer in the case
- (7) There s a reason for that Everyone concedes that the Exxon
- (8) Valdez oil spill did no permanent harm to the plaintiffs
- (9) property
- (10) Dr Peterson said it s a matter of time Mr Bush said
- (11) it s a matter of time The real estate experts Dr Mundy
- (12) said No this is only a temporary harm And when your land
- (13) has only been temporarily damaged you don t get any
- damages
- (14) for lost market value
- (15) Now there s a reason for that You know suppose my
- (16) towering spruce tree on my yard falls over and it lands on your
- (17) yard either because my teenage son ran into it or because I
- (18) didn t take care of it or just because it got hit by lightning
- (19) it s covering your driveway you can t get your car in and out
- (20) it s covering the walkway you can t get into your house very
- (21) conveniently
- (22) As soon as that tree falls on your property it s worth
- (23) less It may have been worth \$75 000 before but if you had
- (24) somebody walking up ready to sign escrow papers they
- probably
- (25) would want to renegotiate that point

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- (1) Now once I go out there and chop down the tree and haul it
- (2) away and clean up your yard and make whatever repairs have
- to
- (3) be made, your property is worth every penny that it was worth
- (4) before my tree fell down on it and you haven t lost any market
- (5) value
- (6) That s what s happened in this case There is agreement
- (7) that there is no long term permanent harm to plaintiffs
- (8) property and as a result of that the measure of damages in
- (9) this case is not the reduction in market value because
- (10) ultimately if you compensate the plaintiffs for a reduction in
- (11) market value you give them something they didn t lose
- (12) Under the circumstances of this case the measure is loss
- (13) of use My neighbor can t get his car in and out he s got to
- (14) go rent a car I m on the hook for that
- (15) If he was having a grand piano delivered that day and they
- (16) have to come back another day and they charge him extra I
- have
- (17) to pay for that But his property isn t worth any less
- (18) The plaintiffs agree that ultimately their property will
- (19) not be worth any less today or any less in the future than on
- (20) March 22nd 1989 So they re not entitled to recover for lost
- (21) market value And I regret to be the one to inform you you
- (22) sat through a lot of testimony unnecessarily
- (23) You may not award damages for any alleged harm for
- (24) plaintiffs ability or right to sell or lease their property
- (25) If you had your house on the market when my tree fell down on

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- (1) It and you lost a sale because the guy walking up the path
- (2) couldn t get to your front door to sign the escrow papers and
- (3) you ended up having to sell for \$5,000 less you can recover
- (4) for damages to your right to sell or lease the property
- (5) But unless that happens unless you put your property on
- (6) the market and you can prove that you lost the sale you don t
- (7) get recompense for temporary impairment for a temporary harm
- to
- (8) the property because if you do you end up better off
- (9) Plaintiffs in this case admit that they never intended to
- (10) sell any of this property They never would have sold any of
- (11) this property Some of the witnesses you heard from our
- (12) depositions said that was a cornerstone of - of their
- (13) contract with their shareholders We don t sell ANCSA
- (14) property
- (15) They have not lost any sales So you cannot award them
- (16) damages because they ve lost an ability to sell
- (17) Where does that leave you with all the witnesses who ve
- (18) told you about bundle of rights Professor Green s whole
- (19) damage analysis sort of rests on the notion that the land owner
- (20) lost a bundle of rights I don t think Professor Green s
- (21) analysis has really very much relevance to this case anymore
- (22) Can I go to Mr Stoll s famous words? This was Kodiak
- (23) Island Borough s property - I m sorry Kodiak Island Borough s
- (24) claim at the beginning of this case according to Mr Stoll
- (25) Did we start on July 5? That was a long time ago

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(1) What does he say? 'After the spill land on Kodiak became  
 (2) unmarketable You'll see and hear testimony as to how  
 property  
 (3) in Kodiak could not - there just weren't any transactions for  
 (4) a period of time '  
 (5) And Kodiak's entire approach to this case is based on the  
 (6) notion that they lost an opportunity to sell  
 (7) Remember what Larry Shorett did, their expert? He took  
 (8) Mr. Carlson's pre-spill evaluation and said essentially let's  
 (9) assume that Kodiak Island Borough had sold these properties  
 for  
 (10) their pre-spill value We'll invest that money at 12 percent  
 (11) Wish I could get 12 percent but we'll invest that money at 12  
 (12) percent They've lost that year's worth of income  
 (13) His entire approach to damages in this case was predicated  
 (14) on the assumption of a recovery for the loss of the ability or  
 (15) right to sell or lease property  
 (16) Well not surprisingly the Kodiak Island Borough didn't  
 (17) have a for-sale sign on Shuyak Island Didn't have a for sale  
 (18) sign on Raspberry Island didn't have a for sale sign on any of  
 (19) the properties in dispute Given that fact they can't recover  
 (20) for lost opportunity to sell, and given that fact I wonder  
 (21) what relevance Mr. Shorett's testimony has to any issue in this  
 (22) case He certainly didn't talk about loss of use  
 (23) There's something - something else they - they can't  
 (24) recover for And I mentioned this briefly in my first five  
 (25) minutes with you Subsistence

(1) What do we know about subsistence? What do we know about  
 (2) whether the loss of subsistence has had any effect on the  
 (3) corporations? We know that the corporations gain no economic  
 (4) benefit from subsistence  
 (5) Keith Gordaoff first witness to testify before you  
 (6) testified quite frankly So you mean whether the shareholders  
 (7) hunt or fish on the land has no financial impact one way or  
 (8) another on the Chugach Alaska Corporation? Answer 'Not to  
 (9) my knowledge It doesn't  
 (10) 'And as we've already discussed the subsistence activities  
 (11) that are conducted on Chugach Alaska Corporation's lands  
 don't  
 (12) pay anything to the corporation correct?  
 (13) Answer 'That's correct '  
 (14) Chuck Totemoff second witness in the trial Now, did  
 (15) Chenega Corporation, before the spill, have policies regarding  
 (16) shareholder uses of the land?  
 (17) 'Yes  
 (18) Question Can you tell us what those were please?  
 (19) Answer 'Well the policy before the oil spill was that our  
 (20) shareholders had the right to go onto our lands and subsist and  
 (21) do other subsistence activities at no charge '  
 (22) Corporations have not been hurt Maybe the individuals  
 (23) have something we don't have to argue about in this court  
 (24) Maybe elsewhere but not in this court  
 (25) Mr. Petumenos drew an analogy at the very beginning of this

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(1) I guess the relevance to all of the testimony that we heard  
 (2) about concerning the intertidal zone and health of the  
 (3) nearshore biota and its ability to support fish and its ability  
 (4) to support wildlife all comes in because of the notion that  
 (5) that had an impact on the ability of corporate shareholders to  
 (6) subsist  
 (7) Well, what have you heard in this case? Subsistence is  
 (8) done by individuals Corporations don't subsist They may  
 own  
 (9) lands on which people subsist but they themselves don't  
 (10) subsist  
 (11) What else do you know about subsistence claims? Judge  
 (12) Shortell instructed you months ago that the loss of subsistence  
 (13) harvests is something that the individuals own They own that  
 (14) claim Corporation can't bring it for them  
 (15) What else do you know? They're bringing that claim  
 (16) That's being adjudicated elsewhere  
 (17) The shareholders of Chenega the shareholders of Port  
 (18) Graham and English Bay Tatitlek and Eyak will eventually be  
 (19) compensated what they're due for all past present and future  
 (20) loss of subsistence harvests Do you award the corporation  
 (21) damages for the same thing?  
 (22) Purpose of this lawsuit is to make the plaintiff  
 (23) corporations whole, not make them better off Your goal also  
 (24) should be to make Exxon pay for what it legitimately owes but  
 (25) not make Exxon pay twice

(1) case to a farm He said that Native corporation was like a  
 (2) farm like a maritime farm We've had abundant maritime  
 (3) resources right at its doorstep and the value of the land was  
 (4) like the value of a crop to the farmer And if somebody does  
 (5) something which despoils the crop there ought to be  
 recompense  
 (6) and therefore his clients - Chugach Alaska Eyak Tatitlek  
 (7) and Port Graham English Bay, Chenega and Port Graham  
 ought to  
 (8) be compensated  
 (9) Is that a proper analogy? The proper analogy ladies and  
 (10) gentlemen I suggest is the one that Mr. Dorchester  
 (11) mentioned It's like a farm co-op The co-op exists to  
 (12) collect the crops from the farmers It goes out into the  
 (13) market and sells them and then it distributes the revenues and  
 (14) gives them to the farmers  
 (15) If something happens to the community farm land and all the  
 (16) farm crops are wiped out then the farmers sue and recover  
 what  
 (17) they're entitled to why should the co-op be allowed to sue and  
 (18) collect the same damages? The co-op here because it doesn't  
 (19) charge the shareholders for the right to subsist are the  
 (20) Native corporations The farmers here are the subsistence  
 (21) users  
 (22) Ladies and gentlemen I suggest to you it would be totally  
 (23) unjust totally unfair and just not right to hit Exxon twice  
 (24) for the same loss  
 (25) All right Subsistence is out no reduction in market

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(1) value can be recovered no recovery for any impairment of the  
 (2) right for the ability to sell or lease What does that leave  
 (3) us with? It leaves us with what we started out with loss of  
 (4) use  
 (5) The test boils down to what uses did the plaintiffs lose  
 (6) the ability to make of their lands for which somebody would pay  
 (7) them a fair market value rent  
 (8) MS SMITH Chuck we have a juror who needs a pad  
 (9) MR DIAMOND Glad to know something I m saying to one  
 (10) is reasonably important  
 (11) I think we ought to start by asking ourselves a very basic  
 (12) question Based on the evidence in this case what uses could  
 (13) the - were the plaintiffs making of their property before the  
 (14) oil spill  
 (15) We subjected you to one of the most painful processes a  
 (16) civil jury can go through, and that is making you sit through  
 (17) the reading of deposition testimony And for that I apologize  
 (18) on behalf of Mr Oppenheimer who did more of it than anybody  
 (19) else  
 (20) But there was a method to our madness We spent a lot of  
 (21) time you can imagine going out and taking depositions of  
 (22) people from all of these Native corporations and people from  
 (23) the borough and asking them in the setting of a conference  
 (24) room but under oath under penalty of surgery important facts  
 (25) and we can t drag everybody here and we can t take your time

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(1) out to parade 16 witnesses before you when really there s only  
 (2) one or two facts we need and that s why we subjected you to  
 (3) the painful process of listening to deposition testimony  
 (4) But one of the facts we went out to collect was Tell me  
 (5) Mr Director tell me Mr Officer of Plaintiff Corporation  
 (6) how did you use your land before the spill?  
 (7) And I have my cheat sheet here so I get it right but you  
 (8) heard through deposition - and if you want these during  
 (9) deliberations read back to you you probably can get them  
 (10) You heard from Feona Sawden the Port Graham - Port  
 Graham  
 (11) director from 1976 to 1989 and she knew of no pre spill uses  
 (12) of any corporation lands That s what she testified to  
 (13) Don Emmal the president of English Bay could recall  
 (14) quote no serious proposals regarding any development or  
 (15) building on English Bay lands  
 (16) Robert Kvasnikoff, the chairman of the board of English  
 (17) Bay from 1977 to 1992 Corporation explored every opportunity  
 (18) to make some sort of profitable use of their lands only  
 (19) conducted one timber sale No other business conducted on its  
 (20) land no leases sales tourism related activities permits for  
 (21) hunting and fishing  
 (22) Edgar Blatchford who did appear in the rebuttal case we  
 (23) had deposed him and we asked him about Chugach s lands  
 Other  
 (24) than the Growler Island lease Stan Stephens that Mr  
 MacSwain  
 (25) told you went up after the oil spill Edgar Blatchford knew of

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(1) no uses CAC was making of its land prior to the spill  
 (2) And that s consistent with live testimony you heard  
 (3) You remember Peter Nagel the fellow who had worked for  
 (4) Chugach and before that two other Native corporations and  
 (5) had some difficult time of it but he told you that except for  
 (6) clear cut timber - which was not disrupted in any way - CAC  
 (7) did not at the time he left the employment of the corporation  
 (8) 1991 make any uses of its lands He did mention Growler  
 (9) Island  
 (10) So the fact of the matter is these lands were not being put  
 (11) to a lot of uses before the spill and we had a piece of  
 (12) evidence that I want to show you you ve seen before but just  
 (13) to remind you how little productive use any of these  
 (14) corporations made of their parcels  
 (15) This is the chart for Chugach Alaska Corporation that  
 (16) Mr Dorchester prepared which compared revenues that Mr  
 Mundy  
 (17) projected the corporation would make in his damage analysis  
 (18) versus real ones  
 (19) And what he did - you can forget about everything this  
 (20) side of the line What I want to focus on is what Chugach  
 (21) Alaska was doing with its land in the five years prior to the  
 (22) oil spill  
 (23) And you - if you didn t write down these numbers and you  
 (24) think they re important, you may want to write them down now  
 (25) because this will not be available during deliberations - but

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(1) the total revenues of Chugach Alaska from all of its land based  
 (2) activities all uses of its land in the five years prior to the  
 (3) spill amounted to \$487 000  
 (4) It s not a tiny small sum but bear in mind how much  
 (5) profit 12 parcels some of them ranging up to 30 000 or more  
 (6) acres That s the total revenue including clear-cut timbering  
 (7) being conducted on Patton Bay  
 (8) Chenega five years prior to the spill all revenue  
 (9) generated by use of its land \$2 751 That s it  
 (10) Rather than pull up all the boards I ll tell you what they  
 (11) show  
 (12) Did we bring them all?  
 (13) MR CLOUGH I don t think so  
 (14) MR DIAMOND Okay  
 (15) For oil - for Port Graham it is 239 580 and for the  
 (16) other plaintiff corporation with oiled properties English Bay  
 (17) it was \$4 917  
 (18) My point here is not to despair the land in any way and not  
 (19) say that it doesn t have enormous value to the people that own  
 (20) it My point here is in terms of uses they could have made of  
 (21) the land for which people would pay fair market rent When you  
 (22) look at what was going on before the spill the corporations  
 (23) weren t making a lot of use of their property  
 (24) Did the spill prevent them from making any use of these  
 (25) parcels? I remind you of Mr Nagel s testimony Really,

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- (1) Mr Nagel is the only one who s come in to this court and he  
 (2) was a defense witness and he took us on a tour of  
 (3) corporations parcels  
 (4) You didn t get that from anybody from English Bay English  
 (5) Bay was unrepresented in the case  
 (6) Pat Norman didn't take you for a tour to the parcels that  
 (7) were owned by Port Graham You didn't really get - didn t get  
 (8) a tour of any of the Eyak or Tatitlek parcels but what did  
 (9) Nagel leave you with? What he said was that there were 12  
 (10) parcels and that use on all 12 had not been disrupted in any  
 (11) way by the oil spill  
 (12) That was - that was confirmed, if you want to check by  
 (13) deposition testimony  
 (14) Paul Tweeten who testified by deposition who is another  
 (15) CAC land manager confirmed No interruptions of corporate  
 (16) use  
 (17) of the land because of the spill  
 (18) Collin Middleton corporate counsel for English Bay and the  
 (19) designated representative of the corporation when the  
 (20) corporation was deposed, No harm to any of the corporation s  
 (21) activities  
 (22) Emily Swenning, English Bay director since 1987 Knew of  
 (23) no ongoing or planned use of the corporation in the Kenal  
 (24) Fjords that was disrupted  
 (25) Mary Gordaoff president of Tatitlek Spill did not change  
 the corporation's ability to use its lands in any way

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- (1) John Black Chugach Alaska executive vice president No  
 (2) interference with any CAC leases or any interference with its  
 (3) business operation  
 (4) Steven Ujloka Eyak s controller These revenues increased  
 (5) before the spill  
 (6) Chuck Totemoff who testified in person said pretty much  
 (7) the same thing  
 (8) It s not surprising and I don't know that it should be  
 (9) surprising to you that there wasn't a whole lot of use being  
 (10) made of these parcels before the spill and there weren t a  
 (11) whole lot of - whole lot of disruption on account of the  
 (12) spill  
 (13) As a reminder, let me show you a clip from one of Steve  
 (14) MacSwain s videos This is just assembled footage of what  
 (15) we're dealing with  
 (16) (Videotape Played)  
 (17) MR DIAMOND These are not Hawaiian beaches These  
 (18) are wilderness lands They are rugged They are isolated  
 (19) There re not a whole lot of productive uses to which these  
 (20) lands can be put That's not to depreciate them  
 (21) (Tape concluded)  
 (22) MR DIAMOND That s not to say they re not valuable  
 (23) to those that own them but in terms of generating fair market  
 (24) rental which is the measure of damages for lost use there s  
 (25) not much of a basis for them

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- (1) Just to remind you they re pretty desolate Steve  
 (2) MacSwain gave you some population numbers  
 (3) Here s Prince William Sound population outside Chenega  
 (4) Village on the Western Prince William Sound the side that was  
 (5) oiled In all of these census districts which are much larger  
 (6) than the parcels, remember there are 42 people If you add  
 (7) the 50 or 60 or 70 that live in Chenega there s under 125  
 (8) people that live here This is not land that has intensive use  
 (9) potential  
 (10) Kenai is much the same thing If you put to one side the  
 (11) villages of Port Graham and English Bay which are about 125  
 (12) 150 each all the way from Resurrection Bay down all the way  
 (13) just before you get to the Kachemak turn there are 26 people  
 (14) There s not a lot of use that s being made of this land  
 (15) today There wasn t a lot of use being made of this land  
 (16) before the spill, and the spill didn t disrupt a lot of ongoing  
 (17) uses  
 (18) Let me remind you what uses to which these parcels were  
 (19) being put We saw some subdivisions basically unsuccessful  
 (20) LaTouche town site was one of two private subdivisions  
 (21) (Videotape Played)  
 (22) MR DIAMOND Both economic failures  
 (23) The only other productive use that the Native corporations  
 (24) have made of any of their parcels - English Bay Port Graham  
 (25) and Chugach Alaska particularly - is clear cut timber come

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- (1) in and mow it down  
 (2) This is Windy Bay We heard from Pat Norman who testified  
 (3) last week he was one tree stand away from clearcutting one  
 (4) line of trees between the shoreline and clearcutting  
 (5) (Tape concluded)  
 (6) MR DIAMOND That s the productive use that was made  
 (7) the principal productive use that was made of these parcels  
 (8) and guess what? The spill had no impact on that  
 (9) May I take a break?  
 (10) THE COURT Sure  
 (11) THE CLERK Please rise This court stands in  
 (12) recess (Time now 2 27 p m  
 (13) (Jury out at 2 27 p m )  
 (14) (Recess from 2 27 p m to 2 38 p m )  
 (15) (Jury in at 2 38 p m )  
 (16) THE CLERK Please rise This court now resumes its  
 (17) session Please be seated  
 (18) MR DIAMOND I want to talk to you very briefly about  
 (19) KIB lands what uses were arguably not made I want to talk to  
 (20) you about OPA 90 and selected but un conveyed lands I d like  
 (21) to talk to you briefly about damage calculations and then I  
 (22) will be done  
 (23) But let s talk about KIB Totally different kind of  
 (24) oiling Wayne Purdom came in told you about the places that  
 (25) were heavily oil told you what it was like in the balance of

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- (1) the borough and told you that the plaintiffs parcels in the
- (2) balance of the borough
- (3) We've seen 400 - basically 400 feet of heavily oiled
- (4) shoreline in Kodiak none of it owned by the borough versus
- (5) 3 000 miles of shoreline
- (6) There was no little oil in Kodiak of substance that I'd
- (7) like to remind my friend Mr Stoll that he had to go to
- (8) Malaysia to bring us a mousse patty or at least that's what
- (9) the chemists say it was
- (10) Let's talk recreational uses of Kodiak Island Borough
- (11) property because really that's the only impairment that
- (12) anyone has ever suggested might have happened
- (13) You'll remember when Mayor Selby who is with us today was
- (14) on the stand John Clough took us through the statistics the
- (15) hunting fishing statistics And the numbers don't lie
- (16) Hunting and fishing in Kodiak did not decline in fact
- (17) increased from 1988 to 1989
- (18) Let's take a brief look at some video from Kodiak just as
- (19) a reminder of what the oiling was like and ask yourself Do
- (20) you think that any significant impairment was made to any use
- (21) of this property
- (22) (Videotape Played)
- (23) MR DIAMOND This is the Sitkinak parcel These were
- (24) Fred Byars videos you remember he was the fellow who had
- (25) his own helicopter And this is July of 1989 at the height of the

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- (1) worst for Kodiak
- (2) Does that look like it's awash of oil? Does it look like
- (3) it's in a sea of tar balls or mousse?
- (4) And bear in mind these are parcels These are pictures of
- (5) the land that we're litigating over unlike the pictures that
- (6) Mr Stoll has shown you of land that we're not litigating
- (7) over This is the delta parcel the south arm parcel
- (8) And we are coming up on a - right here is a setnet site
- (9) July of 1989 fishing continued Here's the Hidden Basin
- (10) parcel
- (11) Does it look like these parcels are any less usable than
- (12) you could imagine them before the oil spill?
- (13) As we turn the corner we're coming up on a fisherman in
- (14) the water This is Pasagshak Again ask yourself Does it
- (15) look like these parcels were not available to the community for
- (16) recreational purposes?
- (17) These are pictures of what we're fighting over not
- (18) pictures of what we're not fighting over
- (19) Somebody in the water at the very end kids swimming July
- (20) 11 1989 Pictures don't lie
- (21) (Tape concluded)
- (22) MR DIAMOND But bear in mind not only did we have
- (23) pictures from KIB we had two alleged - two representatives of
- (24) KIB government who testified in court - I'm sorry testified
- (25) by way of deposition Could we put up the Cassidy quote?

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- (1) Chuck Cassidy who is KIB's land manager and resource
- (2) manager testified about recreational use in 1989
- (3) "Have you spoken with anyone who has had their recreational
- (4) plans affected as a result of the oil spill's effect on
- (5) property?"
- (6) On borough property anyway not just borough property?
- (7) Let's start with just borough property
- (8) You're saying subsequent to the oil spill?
- (9) Correct
- (10) Answer No I can't think of any
- (11) Now come on ladies and gentlemen this is the land use
- (12) manager Who would know better if the spill disrupted the
- (13) borough's principal use of these parcels for recreation? You
- (14) know maybe the only person who would know better would be
- (15) Linda Freed the community development director who also
- (16) testified by way of deposition who told you that she could not
- (17) think of any affect on the use of any borough property with the
- (18) exception of somebody who she thought delayed a kayaking
- (19) trip
- (20) to Shuyak Island
- (21) Now Kodiak's not a big place We've heard that from Mr
- (22) Stoll Linda Freed and Chuck Cassidy would know if the oil
- (23) spill truly disrupted recreational use of borough property
- (24) These people aren't lying to you They're telling you it just
- (25) didn't happen What other uses could they have made of the

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- (1) Let's talk an issue only pertains to Port Graham English
- (2) Bay and Chugach Alaska And I know it's an issue that at
- (3) least one of you is curious about Selected but un conveyed
- (4) parcels Could we have the whole jury instruction for that on
- (5) the Barco?
- (6) MS SMITH It's so long I had to put it on two
- (7) pages
- (8) MR DIAMOND Jury Instruction No 2 is so long that
- (9) it's been put on two pages
- (10) It will tell you everything you ever wanted to know about
- (11) selected but un conveyed parcels and what the legal status of
- (12) those parcels are under the law But here's page 1 of 2
- (13) You will find out that Native corporations do not have any
- (14) legal title or right of possession for lands that have been
- (15) selected but not conveyed Therefore Native corporations do
- (16) not have a right to use lands that have been selected but not
- (17) conveyed without the consent or approval of the federal
- (18) government
- (19) In short sweet terms they may be getting legal title
- (20) eventually but in the interim they have no right to possess
- (21) no right to exploit no right to use
- (22) This is a use case If you don't have the right to use the
- (23) property then you haven't lost any use and you're not entitled
- (24) to compensation
- (25) Now you heard testimony about this Peter Nagel with CAC

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- (1) talked about CAC s parcels You may want to write this down  
 (2) because he identified three parcels which in their entirety  
 (3) were simply selected but not conveyed at the time of the oil  
 (4) spill and continued in that status until he left at least  
 (5) until he left employment with CAC in April of 1991  
 (6) And they re big parcels They were the Silver Lake parcel  
 (7) Nellie Juan and Comfort Cove Three Silver Lake parcels that  
 (8) CAC did not have any right to use He also said portions of  
 (9) the Snow River parcel, that s the parcel on the Seward Highway  
 (10) and MacLeod Harbor that s down on Montague  
 (11) It s their adjunct timber parcel he told you about They  
 (12) did not have the right to use them at the time of the spill and  
 (13) through 1991 And if they didn't have the right to use them  
 (14) it s hard to see how they have been harmed in terms of loss of  
 (15) use  
 (16) Pat Norman admitted - Pat Norman is Port Graham -  
 (17) admitted during the deposition portion that was read to you  
 (18) that it would be at least three years before the land in the  
 (19) Kenai Fjords that Port Graham had selected would be conveyed  
 (20) and that was as of 1992 so they don t anticipate getting that  
 (21) land at least until 1995 and he said until they get it they  
 (22) have no benefit from it They can't use it  
 (23) Again if they can't use the land, what are they doing  
 (24) suing for loss of use of the land? It doesn t make sense And  
 (25) it s not small potatoes, ladies and gentlemen we re talking

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- (1) about a lot of parcels that fall into this category I ll read  
 (2) them to you quickly but go back and look at plaintiffs  
 (3) Exhibit 1126 and Plaintiffs Exhibit 1127 They re the Port  
 (4) Graham maps and they distinguish what's been conveyed and  
 (5) what  
 (6) hasn t  
 (7) And there are eight Port Graham parcels that Port Graham  
 (8) has no right to use and maybe that's why we didn t hear very  
 (9) much about them They re East Alalik Bay Harris Bay - don t  
 (10) write them down, you can look them up McArthur Peninsula  
 (11) Paguna Bay Sandy Bay South Surprise and Quartz Bays West  
 (12) Alalik Bay and the West Arm of Nuka Bay  
 (13) Of the \$17.8 million that Port Graham is seeking under  
 (14) Dr Mundy s analysis those eight parcels represent  
 (15) \$9,138,000 If they didn t have the right to use them then  
 (16) the oil spill didn t prevent them from making any use of them  
 (17) and therefore they re not entitled to damages for them  
 (18) Finally English Bay Don Emmal English Bay's president  
 (19) admitted that English Bay residents were restricted from using  
 (20) the Kenai Fjords parcels because quote it s in the park and  
 (21) not owned by us That was deposition testimony that was read  
 (22) to you It s consistent with Jury Instruction 26 which is the  
 (23) law of this case that Judge Shortell will give to you  
 (24) in terms of English Bay parcels I think it s - I ve  
 (25) forgotten the count, I think it s eight of 14 but look at  
 PX1132 and PX1133 those are the English Bay maps They ll

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- (1) tell you which ones are selected and which ones are conveyed  
 (2) The ones that aren t conveyed are simply selected but  
 (3) unconveyed They are Bear Cove Beauty Cove Harris  
 Peninsula  
 (4) James Lagoon McArthur Pass North Arm of Nuka Bay Paguna  
 Arm  
 (5) Ragged Island Sandy Bay North and Taroka Arm  
 (6) Those account for \$8,138,000 for English Bay s 11 million  
 (7) dollar claim in this case If they didn t have any right to  
 (8) use them then the oil spill didn t prevent them from using  
 (9) them and they ought not to be compensated for them  
 (10) Your job is to make English Bay Port Graham and CAC whole  
 (11) it s not to put money in their pocket representing uses that  
 (12) they never had a right to engage in That s all I m going to  
 (13) say on selected but unconveyed  
 (14) Let s talk about how the Native corporations calculate  
 (15) their damages I have selected by way of example the  
 (16) worksheet - and you re going to get a package of these these  
 (17) are PX1541 there s one for each parcel There is one for each  
 (18) subsurface estate that Chugach Alaska is seeking damages for  
 (19) They re all laid out in the same way  
 (20) These are Dr Mundy s analyses of the parcels and if you  
 (21) can keep yourself from looking at the marginal notes before I  
 (22) get there, let me take you through how the calculation is  
 (23) done  
 (24) Basically he added up the number of acres and came up with  
 (25) a price per acre and came up with three million - this is I

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- (1) should have told you the north LaTouche Island parcel  
 (2) Remember LaTouche is divided CAC owns south LaTouche  
 North  
 (3) LaTouche is owned by Chenega This is the Chenega portion  
 (4) He came up with a total value of three million and-change  
 (5) Carried it over to here assumed a rent rate of nine percent  
 (6) and nine percent times this three million generates this stream  
 (7) of numbers which he carries out for 37 years \$277,277 per  
 (8) year  
 (9) He then said Okay this is what they would have got had  
 (10) there been oil spilled and this is what they got because of the  
 (11) oil spill, zero Here s the difference I m going to  
 (12) present-value the difference so it s expressed in terms of  
 (13) today s dollars and I m going to come up with an impaired  
 (14) valuation and the impaired valuation is in the damage  
 (15) conclusion it s right here total damage to parcel actually  
 (16) here economic rent loss 2,441,000  
 (17) So his analysis is that on this parcel over the next 30  
 (18) years the Chenega Corporation is going to lose \$2.4 million  
 (19) that it otherwise would have earned had there been no oil  
 (20) spill and he does this for all the parcels He does this for  
 (21) all the subsurface estates  
 (22) Let s talk about some problems with this analysis Number  
 (23) one what does he start off with as impaired property? The  
 (24) total acreage of the north Chenega parcel on LaTouche - I m  
 (25) sorry the Chenega parcel on North LaTouche is 3,243 acres  
 He

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- (1) assumes that Chenega lost rent on all 3 200 acres
- (2) Now that includes ladies and gentlemen the mountains on
- (3) that island It includes every bit of property And you have
- (4) to ask yourself whether that makes sense whether in fact the
- (5) oil spill caused the Chenega Corporation to lose the use of the
- (6) entire parcel
- (7) You have to ask yourself first what would they have done
- (8) with it? The interior is mountainous We have a short video
- (9) clip on North LaTouche Let s run it
- (10) Bear in mind we were told by Carl Propes that this was a
- (11) parcel that the federal government basically abandoned in
- (12) negotiations they didn t really see any great need for it
- (13) (Videotape Played)
- (14) MR DIAMOND It s got a mountainous interior It s
- (15) got abandoned mines no present mineral resources The
- (16) timber
- (17) is scrub timber, not usable for any commercial purpose and
- (18) it s got two failed town sites, two failed subdivisions on it
- (19) (Tape concluded)
- (20) MR DIAMOND Yet Dr Mundy says that the corporation
- (21) could have used the entire thing Ask yourself whether that
- (22) makes sense This is probably not the best example You
- (23) know
- (24) the best example is the Silver Lake parcel and you ll remember
- (25) Mr Dorchester took you on a flight over the Silver Lake
- (26) parcel I won t make you do that all over again But just
- (27) remember what it looked like

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- (1) (Videotape Played)
- (2) MS SMITH Sorry, I ll make you do it all over
- (3) again
- (4) MR DIAMOND Chugach Alaska property
- (5) Now seriously folks how were they going to use this
- (6) before the spill? I mean it s beautiful it s grandeur it s
- (7) spectacular but we re 5 000 feet up These are truly
- (8) mountains and glaciers Dr Mundy says the oil spill prevented
- (9) the use of this land
- (10) Give me a break How were they going to use it before the
- (11) spill? They didn t use it at all before the spill What uses
- (12) did it prevent? It s gorgeous beautiful spectacular natural
- (13) land but the owner of this land didn t lose any use by virtue
- (14) of the oil spill
- (15) (Tape concluded)
- (16) MR DIAMOND Dr Mundy does this throughout On
- (17) every parcel, he s got the whole parcel, lock stock, barrel,
- (18) mountain and glacier Ask yourself whether that makes sense
- (19) Let s assume it does I won t quarrel with it for the time
- (20) being He comes up with a value total value by multiplying
- (21) all of the acres by his price comes up with a land rent using
- (22) a nine percent figure And the nine percent figure was based
- (23) on the fact that these are natural lands that the government
- (24) would acquire them for preservation value Keep them
- (25) available
- (26) for posterity

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- (1) Hold it a second folks Maybe the federal government and
- (2) the trustees buy land for posterity, but they don t lease
- (3) lands Who is going to pay nine percent of \$3 million Where
- (4) does that come from?
- (5) There is - could I have Mr Mundy speak to us?
- (6) (Videotape Played)
- (7) BY VIDEO EXAMINER
- (8) Q And based on your research do you believe there is a
- (9) rental or a lease market for natural lands in Alaska?
- (10) A I do not believe that there s a rental market for natural
- (11) lands
- (12) (End of tape)
- (13) MR DIAMOND Mr Seldin s partner was asked Does it
- (14) make any sense if you can t - there s no lease market to do
- (15) an analysis which assumes that you use a nine percent lease
- (16) rate? Look at this
- (17) (Videotape played)
- (18) BY VIDEO EXAMINER
- (19) Q Now Dr Mundy has testified there really is no rental
- (20) value or lease - no rental market or lease market for lands
- (21) as natural lands That being the case, do you see any
- (22) theoretical problem with him applying a rental rate based on a
- (23) underlying fee value established by a highest and best use of
- (24) natural lands?
- (25) A Well, if I can assume that what you said is correct and

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- (1) accurate I would say yes, there is a problem
- (2) (End of tape )
- (3) MR DIAMOND We got a big problem, because this is
- (4) Dr Mundy s analysis and his analysis is based on the
- (5) assumption that you could find somebody to pay this fair market
- (6) rent and remember, that s the instruction Find what uses
- (7) they lost find what somebody would pay as fair market value
- (8) rent He uses nine percent to derive a rent of \$277 000 a
- (9) year, but he admits that nobody would pay that because there is
- (10) no rental market for this property
- (11) Problem number two But problem number two leads to
- (12) problem number three \$277 000? Can you imagine anybody
- (13) paying \$277 000 for rent on north Chenega? Why in heaven s
- (14) name would they do it? It s lovely to look at, it doesn t cost
- (15) you anything to look at it You take your boat by it There s
- (16) no productive economic use of that parcel, and if you look at
- (17) the total - its relationship to Chenega s total rents earned
- (18) in the five years before the oil spill, it s a hundred times a
- (19) hundred times what they earned on all of their parcels
- (20) Dr Mundy assumes they would earn on just this parcel in one
- (21) month
- (22) Somebody s trying to put one over on you Because this is
- (23) just not real world
- (24) Ultimately Mr Mundy - or Dr Mundy admitted it under
- (25) penetrating cross-examination that these are simply fictions



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- (1) of one's imagination Mr Oppenheimer asked him about
- (2) hypothetical revenue stream and he asked him "There is not a
- (3) single number on this worksheet that represents any actual
- (4) income isn't that right?
- (5) "That's correct
- (6) "Not a single one? I just want to be sure" -
- (7) Mr Oppenheimer really likes to be careful when he does
- (8) cross examination
- (9) Am I right, there's not a single revenue number there?
- (10) If I'm not missing anything that - that is an actual
- (11) revenue number
- (12) "No that's correct"
- (13) Now you could put whatever numbers you want down on
- (14) paper
- (15) and Dr - Dr Mundy could have just easily moved the decimal
- (16) point to the left or to the right We could be talking about
- (17) \$2 million a month in rent \$2 billion a month in rent Where
- (18) does it come from? You're entitled to compensate the plaintiff
- (19) corporations to make them whole but this is not representative
- (20) of anything that they lost any use they could have made of the
- (21) property that would have generated any income
- (22) Well that takes us to number four I don't really want to
- (23) engage in the great debate of the appraisal industry over
- (24) natural lands versus unnatural lands because I don't think it
- (25) makes a whole heck of a lot of difference when you get down to

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- (1) Jim Bush is a lovely guy he has to - he looks so much
- (2) like my partner Mr Oppenheimer
- (3) What did he say? You know no one had ever tried to
- (4) estimate - estimate persistence and he coined the phrase that
- (5) will live in the annals of this case Scientific wild ass
- (6) guess It's just swag
- (7) You know - and the next - the very next witness was
- (8) Dr Mundy who got up - just lean it against the chart
- (9) The very next witness to get up was Bill Mundy who said
- (10) Well my appraisal is sort of like this It's like Mr Bush
- (11) said scientific wild ass guess we do the best we can
- (12) I believe he's doing the best he can with very limited
- (13) information and on behalf of clients who want him to be able
- (14) to come up with the longest persistence estimates possible
- (15) Mr Petumenos showed you a sheet from the Exxon briefing
- (16) book, and I urge you to take a look at that sheet Didn't put
- (17) in the entire briefing book
- (18) That's something that Jerry Neff prepared before anybody
- (19) did any research on the Exxon Valdez oil spill before anybody
- (20) had the benefit of any of the scientific work and even if you
- (21) look at it it's got two bars and some of them are very short
- (22) and some of them are very long for persistence But it was
- (23) done before anybody knew what persistence would be like in
- (24) Prince William Sound and the Gulf of Alaska
- (25) But I have a final problem with this 19 years? Come on

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- (1) what the federal government paid for a piece of park land
- (2) adjacent to Disney World in Florida and that's the fair market
- (3) value for land wilderness land in Alaska?
- (4) Every witness has told you that you know you can call it
- (5) natural lands whatever you want the government only pays
- (6) going rates So to the extent that he comes up with a value
- (7) number to generate income numbers it's got to be real And
- (8) 950 ladies and gentlemen is not real It's a figment of
- (9) Dr Mundy's imagination It's what Mr Seldin told us the
- (10) government should pay but it's too cheap Mr Lee told us
- (11) they never paid that they pay what the commercial going rate
- (12) is for property in the area
- (13) And we had Mr Wallace who the plaintiffs called as a
- (14) rebuttal witness he's the appraiser who did the appraisals on
- (15) Seal Bay and Tonki Cape down in Kodiak That's the - the land
- (16) that the trustees bought for \$38 million
- (17) And he admitted the reason the trustees paid \$38 million
- (18) was because it had timber on it valuable stands of timber that
- (19) made the going rate in the commercial market that much but
- (20) when we boiled it all down the value of the land on a per acre
- (21) basis was \$282 Dr Mundy uses 950
- (22) One more I could go on on this chart, but one more
- (23) impairment 19 years of impairment on this parcel
- (24) Mr Petumenos said, you know they've really been the only
- (25) ones that have come forward with impairment estimates

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- (1) 19 years the Chenega Corporation's not going to be able to use
- (2) this land? I mean does that strike you right? Based on
- (3) everything you've heard about the speed of recovery of
- (4) property
- (5) in this area 19 years? It has no bearing It may be
- (6) scientifically accurate that for 19 years you could find specks
- (7) of oil or asphaltic material somewhere on the shoreline but it
- (8) has no relationship whatsoever to whether the land can be
- (9) used
- (10) Let's go to Steve Ward's comments on north LaTouche
- (11) parcel
- (12) What does Mr Ward tell us about the very parcel that
- (13) Mr - that Dr Mundy says is going to be impaired for 20
- (14) years? He says this beach looks great this is a very high use
- (15) area for the village It's a mess in 89 and a very good
- (16) cleanup has returned the beach to normal in 1992
- (17) Ladies and gentlemen, 1992 was right here and Dr Mundy's
- (18) got this - this parcel impaired for another 15 years
- (19) Somebody's trying to pull one over on you
- (20) What else did he say elsewhere on this island? Area has
- (21) light asphalt in a few places We agree we acknowledge that
- (22) Heavily oil also removed by team This beach very usable by
- (23) residents of Chenega
- (24) No one's holding a gun to Steve Ward's head He's got
- (25) every interest in the world every incentive in the world to

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- (1) And what does he tell them? Signs off, no further treatment  
 (2) required very usable by residents of Chenega 15 years before  
 (3) Dr Mundy's persistence estimates end  
 (4) There's a real problem with this analysis a real problem  
 (5) The persistence numbers are unreal The rental rate numbers  
 (6) are unreal The valuation numbers of the land on a per acre  
 (7) basis are unreal and assuming that the corporation lost the  
 (8) entire use of the entire parcel is unreal  
 (9) Now you can criticize Mr Dorchester and Mr MacSwain for  
 (10) lots of things, you know you can criticize them for running up  
 (11) a tab and doing too much work and spending too many days in  
 the  
 (12) field and hiring too many people and buying too expensive  
 (13) computer equipment but at least they didn't make fundamental  
 (14) stupid assumptions like this is based on In computing  
 (15) damages maybe you want to start with this and maybe you  
 want  
 (16) to try to fix it up and maybe you want to make adjustments for  
 (17) some of the grandiose assumptions that are not based on  
 (18) anything except absolute fantasy land Maybe that's a starting  
 (19) place if you prefer that than starting with Mr Dorchester  
 (20) That's what Mr Roddewig did and I'm going to get to that  
 (21) in a minute but I got to talk to you about archaeology I  
 (22) just have to take a couple of minutes  
 (23) 44 sites that you've heard about They really do fall in  
 (24) four categories sites which aren't sites sites which are  
 (25) sites but weren't in harm's way and sites that were close

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- (1) misses They could have been hurt by the oil for one reason or  
 (2) another but weren't with two possible exceptions But I want  
 (3) to talk first about sites which aren't sites  
 (4) You heard from Professor Dekin who spoke at 40 miles an  
 (5) hour that 22 of the 44 sites all they are artifacts that have  
 (6) fallen out of decayed now no-longer existent middens and  
 (7) every day they wash up and down in the intertidal zone and to  
 (8) the best of anyone's knowledge there is nothing else there  
 (9) Well, \$30 million 20 years worth of archaeological  
 (10) expeditions and digs to deal with artifact that Professor Dekin  
 (11) said Once they fall out of context they're simply objects  
 (12) Mr Petumenos said the plaintiffs really have the only  
 (13) evidence of what's there and what's not there These are the  
 (14) summary sheets the summary sheets that Lora Johnson  
 testified  
 (15) that she prepared based on the paralegal's work in  
 (16) Mr Fortier's office  
 (17) They're very thorough They attach all of the Exxon field  
 (18) notes I invite you I urge you before you award a dollar's  
 (19) worth of archaeological damage to comb through these and do  
 it  
 (20) on a site by site basis And as to the 22 sites that Professor  
 (21) Dekin says are really not sites, they're just isolated  
 (22) artifacts see if you can find anybody who says There're  
 (23) really sites there  
 (24) What's in here are - maybe this is a site indication of a  
 (25) site but not sites and in any event they put them in places

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- (1) nowhere close to where the oil was  
 (2) If you stop and think about it it makes a great deal of  
 (3) sense We didn't oil trees We didn't oil uplands What got  
 (4) oiled was what got carried in with the tides And the oil got  
 (5) as far as the top of the upper intertidal In some instances  
 (6) it may have splashed into the splash zone and arguably maybe  
 (7) it got to the storm berms that you've seen pictures of  
 (8) Well, most of that is not owned by the Native corporations  
 (9) in the first place The intertidal zone - and you're going to  
 (10) get an instruction from Judge Shortell on this - is owned by  
 (11) the state of Alaska You folks own it You own those  
 (12) artifacts To the extent any harm was done, we ought to pay  
 (13) you not them  
 (14) But what artifacts were there that could have been oiled?  
 (15) I mean if it was in the intertidal zone the middens or  
 (16) whatever was there would have decayed a long time ago and  
 would  
 (17) have fallen and we'd just have artifact scatter  
 (18) Where there are artifacts, where there are intact  
 (19) artifacts where there are true sites that are worthy of  
 (20) investigation they're in the uplands And I spent a fair  
 (21) amount of time - and maybe I bored you a little bit talking to  
 (22) Lora Johnson about sites - this fox farm up here and this old  
 (23) tent frame and bunch of springs here and the 15 50-gallon  
 drums  
 (24) over here my point wasn't to disparage her or insult her It  
 (25) wasn't to bore you It was to bring home the point that most of

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- (1) these materials are in the uplands and they weren't even close  
 (2) to being oiled And I invite you to look at the record and see  
 (3) if you can find any evidence that says I'm wrong  
 (4) We have eight sites that were within harm's way Six of  
 (5) them are like the - the Short Arm Shipyard you saw pictures  
 (6) of All that remains of the site are creosoted pilings in the  
 (7) water  
 (8) Could they have been oiled? Arguably Maybe those were  
 (9) oiled But were they harmed in any way? I mean seriously  
 (10) you award damages based on that?  
 (11) There are only two places two places that were at all  
 (12) affected by the oil spill There is Chenega schoolhouse  
 (13) Lunch break?  
 (14) MS SMITH You forgot the Lobdell chart  
 (15) MR DIAMOND All right we'll skip the Lobdell  
 (16) chart The Chenega schoolhouse it got graffitied on It  
 (17) was one of the sites that was harmed in 1989 Has anybody  
 been  
 (18) able to connect this up to Exxon?  
 (19) You know the quote here - when you go into the jury room  
 (20) and you read this - I think it says 'Exxon sucks'  
 (21) Now that could have been written by an Exxon employee I  
 (22) don't know any of those people and I certainly would not have  
 (23) done that It could have been and maybe that's connected up  
 (24) with Exxon but has that been proved by a preponderance of  
 the  
 (25) evidence

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(1) But so what award damages for this what you think is  
 (2) appropriate to fix up that graffiti  
 (3) Here is the only other archaeological site that anybody has  
 (4) said was harmed in any way This is - this is a test I'm  
 (5) going to know it without looking It's North Crafton North  
 (6) Crafton burial cave  
 (7) You remember there was some testimony and some video  
 (8) footage that Lora Johnson showed us of some digging and  
 (9) scratchings Nobody knows who did it This has been a site of  
 (10) prior acts of vandalism No known connection to Exxon If you  
 (11) think we ought to pay for it you know come up with a  
 (12) reasonable number to enclose that to cover it up so that it  
 (13) doesn't happen anymore but I submit to you it's got no  
 (14) connection with the oil spill  
 (15) All right let's get to the truth of the matter The heart  
 (16) of the archaeological claim is not that anything got damaged by  
 (17) oil because anything that got damaged by oil could have been  
 (18) cleaned off could have been repaired could have been  
 (19) curated  
 (20) as it was  
 (21) Nothing - the heart of the matter is not that during the  
 (22) course of the cleanup people with high pressure nozzles ruined  
 (23) known archaeological intact resources This is all about the  
 (24) threat of future vandalism what they call the loss of  
 (25) confidentiality  
 (26) Now I don't want to disparage confidentiality, but no

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(1) one's testified that it's a method of resource protection and  
 (2) it really doesn't stack up very well because if you want to  
 (3) find out where artifacts are in Prince William Sound it's not  
 (4) real hard to do that That's not the principal grounds why I  
 (5) think you ought to just turn a deaf ear to this claim  
 (6) What they're telling you is that because Exxon brought  
 (7) cleanup workers to some of these sites - and it's not 11,000  
 (8) because Andy Teal told you we never had more than 3,000  
 (9) people  
 (10) in the field put that aside Because we brought oil spill  
 (11) workers to some of these sites they will one day pillage  
 (12) desecrate vandalize and loot  
 (13) Now I leave you with two simple thoughts What's the  
 (14) basis of it? It hasn't happened in five years Today is  
 (15) Tuesday Thursday will mark the fifth anniversary of the  
 (16) termination of the 1989 cleanup In five years no one's  
 (17) returned to vandalize pillage desecrate or otherwise harm a  
 (18) single one of these 44 sites It defies credulity to think  
 (19) that it's going to happen in the sixth or the seventh year or  
 (20) that they have proven by a preponderance of the evidence that  
 (21) it's going to happen It's a fiction It's just not real  
 (22) world It's just like Dr Mundy's charts  
 (23) Make them whole not better off They're not going to be  
 (24) harmed by future vandalism and there's no evidence to the  
 (25) contrary  
 (26) But even if there was ask yourselves after you've gotten

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(1) the instructions and after you've read them and after you've  
 (2) thought about them Is it reasonable to hold Exxon responsible  
 (3) if after five years one of its employees comes back and digs  
 (4) around at the Chenega schoolhouse or Disk Island or Crafton  
 (5) Island burial cave or any of the others? There's an  
 (6) instruction that's called proximate cause and ultimately what  
 (7) it says is Is it reasonable to hold the person responsible for  
 (8) the conduct of somebody else or for the consequences of the  
 (9) conduct of somebody else  
 (10) I pose it to you the following hypothetical My tree has  
 (11) fallen down and instead of cutting it all up myself I hire  
 (12) some kids in the neighborhood And during the course of  
 (13) cutting up that tree that fell down over your driveway they  
 (14) happened to discover that under the tarpaulin in the garage is  
 (15) a vintage 1954 Fairlane in mint condition And then five years  
 (16) later one of those teenagers who goes bad comes back and  
 (17) steals that Fairlane  
 (18) Are you going to hold me responsible for that? Are you  
 (19) going to hold Exxon responsible, if somebody they hired in  
 (20) 1989  
 (21) returns in 1995 '96 '98 years later for doing an act not  
 (22) under the company's control and commits an act of vandalism?  
 (23) Even if there was some evidence that this was going to happen  
 (24) I submit to you it would be unfair unjust and unreasonable  
 (25) for you to attach responsibility to Exxon  
 (26) Enough on archaeology Let's go back to land damages and

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(1) I'll close  
 (2) I said you could start with Dr Mundy's numbers and you  
 (3) could try to fix them up or you could start from scratch and  
 (4) work your way from the bottom up Let's start from the top  
 (5) down  
 (6) You've seen this chart before I think Mr Roddewig talked  
 (7) about it I think Mr Dorchester talked about it If you  
 (8) could put up on the screen just so that the jury knows what it  
 (9) looks like if we could have DX14037?  
 (10) Okay this chart will not be available for you for among  
 (11) other reasons these magnets are so big it will demagnetize  
 (12) your watches We have put in simple tabular form for those of  
 (13) you who write these things now DX14037 It's got the same  
 (14) information  
 (15) But if you want to start with Mr Mundy's numbers or  
 (16) Dr Mundy's numbers and try to make some reasonable  
 (17) real world  
 (18) adjustments for what really got harmed here this is what you  
 (19) want to work from And I'll caution you these numbers already  
 (20) start off as high because we've included the \$6.9 million for  
 (21) CAC's claims that are selected but unconveyed and 9.1 million  
 (22) for Port Graham and English Bay 6.1 million Those are in  
 (23) here so we're not taking those numbers out  
 (24) In fairness some of them would fall off by themselves  
 (25) because some of those for example are landlocked The  
 (26) Silver  
 (27) Lake parcel as an example or the Nellie Juan parcel is an

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- (1) example of that But start with 86 million 751 (sic) and if  
 (2) you take off for parcels like Snow River that sits off the  
 (3) Seward Highway you know and if you take off all of the other  
 (4) unoiled parcels Eyak Tatitlek and if you take off the  
 (5) underground mineral rights of CAC -  
 (6) I ask you something How could those have been hurt by an  
 (7) oil spill? Did that stop anybody from digging for gold did it  
 (8) stop anybody from exploiting these resources?  
 (9) And here s the big one mountains and glaciers Did it  
 (10) stop any of the Native corporations from using their uplands?  
 (11) Could they have used them? Should they get rents for them if  
 (12) they couldn t have used them? You take those off you get  
 down  
 (13) to 18 8 Then you got to make some other adjustments  
 (14) Could I have the other board?  
 (15) We talk about natural lands If you put in a reasonable  
 (16) figure more than the \$262 an acre that Mr Wallace told you  
 (17) was really the land value at Seal Bay but if you put in a  
 (18) reasonable number, say three \$400 an acre instead of the 950  
 (19) that Dr Mundy uses, continuing land use he assumes that the  
 (20) corporations get zero value You saw the LaTouche numbers  
 (21) zero value during the first couple of years regardless of  
 (22) whether they were partially usable mostly usable he says  
 (23) zero  
 (24) We say you got to give us credit for continuing uses  
 (25) It s not fair to say that even the oiled shoreline segment had

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- (1) no use and no long term effects Get rid of swag and plug in a  
 (2) four year max number period of persistence and it gets you  
 (3) down to 5 951 000 There s still some discount rates that will  
 (4) make your head spin if you work in financial markets There s  
 (5) some other assumptions that if you look in your notes our  
 (6) witnesses talked about - but this is a far cry from  
 (7) 86 751 000  
 (8) Let s work from the bottom up What did Mr Dorchester  
 (9) do? I submit to you, if you think about it what he did is  
 (10) exactly what Judge Shortell is going to instruct you to do He  
 (11) looked at which lands really were rendered not usable by the  
 (12) spill and he eliminated non oiled parcels because they were  
 (13) unoiled It didn t - the spill did not prevent anybody from  
 (14) using them And then he said okay let s assume that the oil  
 (15) spill had an effect on these parcels what portions of those  
 (16) parcels could they not use?  
 (17) And then he said what uses what use could they have made  
 (18) He looked at marine commercial are they valuable for setnet  
 (19) sites are they valuable for log transfer facilities are they  
 (20) valuable for potential subdivisions and he assigned some  
 (21) reasonable rental rate for those values to the extent that he  
 (22) had them and he used reasonable persistence numbers then  
 he  
 (23) used reasonable rental rates and he came up with - his working  
 (24) assumption was that Exxon should pay - sounds like  
 (25) Dr Peterson - but we put oil on these properties we took

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- (1) over the use of at least the shoreline-related properties where  
 (2) we did put oil we put people there we ought to pay just  
 (3) compensation for that which we really used and therefore  
 (4) prevented the plaintiff from using  
 (5) These are the numbers You heard how he derived them  
 (6) Even if you have problems with some of his assumptions  
 (7) even if as Mr Petumenos said he s too stingy and that a six  
 (8) percent rental rate just doesn't cut it where does it get  
 (9) you? And I think at least one of you took most of these  
 (10) numbers down - if they're important to you, you should, I  
 (11) don t think this will be available to you, but even if you use  
 (12) the most generous assumptions, you get up to \$3 250 000 and  
 (13) change If you jump over and use the natural lands value of  
 (14) Dr Mundy assuming we capitulate and we think the federal  
 (15) government is in the business of giving the money away for  
 park  
 (16) land you only get the \$2 6 million  
 (17) I suggest to you ladies and gentlemen that the plaintiffs  
 (18) here have bloated these numbers They re entitled to what they  
 (19) lost but that s really the limit of it  
 (20) You re going to hear when we re done - you heard it a  
 (21) preview of it - that how could it be, how could you spill 11  
 (22) million gallons and over 1200 miles and only be responsible for  
 (23) damages amounting to a million three or 3 2 or 2 67 The  
 reason  
 (24) is under the law, we did not interfere with the Native  
 (25) corporations use of these properties This could have been a

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- (1) lot worse One of the reasons the numbers are so low is that  
 (2) Exxon didn t sit on its haunches after the Valdez went aground  
 (3) on Bligh Reef It acted in a way that a lot of American  
 (4) corporations might not  
 (5) But what you ve heard in this courtroom is a testament to  
 (6) the spiritual commitment the monetary commitment the  
 (7) commitment of people and resources to fixing what went wrong  
 (8) You heard it from Otto Harrison, you heard it from Andy Teal,  
 (9) you heard it from others who were outside of Exxon Exxon  
 (10) brought the best people here in the organization and the best  
 (11) people delivered their best product and this got taken care of  
 (12) a lot faster than it otherwise would have And these people s  
 (13) property was restored a lot sooner than it otherwise might have  
 (14) been and you ought to take that into account  
 (15) And you don t have to take my word for it let s listen to  
 (16) the admirals  
 (17) (Videotape Played Examination of Admiral Yost)  
 (18) A I had a professional relationship with Otto Harrison I  
 (19) considered him a - a responsible professional, and we sat  
 down  
 (20) and discussed the plan He was extremely frank and so was I  
 (21) And where there were differences of opinion we'd largely work  
 (22) those out between us largely  
 (23) BY VIDEO EXAMINER  
 (24) Q Did you state that in your opinion Exxon had behaved as an  
 (25) outstanding corporate citizen in connection with its response

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- (1) to the spill of the Exxon Valdez?  
 (2) A I did say that I've said it several times I thought the  
 (3) result of that cleanup was - was very very good and it was  
 (4) gone about in a craftsman like manner That doesn't mean that  
 (5) everything was done in my view just exactly the way that I  
 (6) would do it but you know it was a craftsman like job and I  
 (7) take my hat off to Exxon and Otto Harrison for the job they  
 (8) did  
 (9) Q Is it - is it accurate to say Admiral Yost that when you  
 (10) became involved you found that - that Exxon was able to - to  
 (11) mount such an effort more effectively than the United States  
 (12) government would have been in the same circumstances?  
 (13) A That - that was my impression, and I so stated it Both  
 (14) publicly and up my chain of command I never felt that money  
 (15) was an issue in the cleanup If equipment was needed if it  
 (16) was - if there was a way in this world of getting it there  
 (17) Exxon was able to get it Money just wasn't an issue  
 (18) I thought the quality of the management team that Exxon had  
 (19) put together was very high If I had a like incident that I  
 (20) was going to manage I would try to get Otto Harrison to head  
 (21) it I thought that he did a superb job in very difficult  
 (22) conditions That doesn't mean that he was 'Charlie Nice Guy  
 (23) by any stretch of the imagination He's a tough individual  
 (24) that - that does a very good job of managing an extremely  
 (25) large and complicated operation

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- (1) (Examination of Admiral Ciancaglini)  
 (2) A And so it was a monumental task for everyone and Exxon  
 (3) they acted as responsibly as anybody could in that incident  
 (4) and - you know and I have praise for them I have praise for  
 (5) the Coast Guard people, I have praise for the state of Alaska  
 (6) people who were out there working very very hard the whole  
 (7) time and the federal agencies and - and just the people from  
 (8) the communities Everybody worked hard they all did  
 (9) Q In bringing the cleanup operations to a close were you  
 (10) satisfied with the performance of Exxon that you had overseen  
 (11) for almost four years four summers?  
 (12) A Yes I was It was - and I'll add on to that, not only  
 (13) yes but it was totally professional and superb  
 (14) (End of tape)  
 (15) MR DIAMOND Ladies and gentlemen I began by saying  
 (16) that your mission in this case should be to make plaintiffs  
 (17) here whole not better off The law gives you the means with  
 (18) which to do that Follow the instructions the instructions  
 (19) say you're to compensate them for any losses of use that they  
 (20) could have made of their property And you are to compensate  
 (21) them according to the fair rental value which is defined as  
 (22) what somebody really would pay And think about that  
 (23) Mr Petumenos said the world is watching and indeed it  
 (24) is The world is awaiting what you do with this case Mr  
 (25) Stoll said equal justice under the law for the littlest as well

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- (1) as the big I ask you to deal with Exxon as an oil corporation  
 (2) the way you would deal with any corporation as a Native  
 (3) corporation They are one in the same And I ask you to do  
 (4) justice in this case by making the plaintiffs whole not better  
 (5) off  
 (6) On behalf of my colleagues who have enjoyed spending as  
 (7) much time as we have with you over the last two and a half  
 (8) months I thank you for paying attention to us I thank you  
 (9) for putting up with us I thank you for listening as intently  
 (10) as each and every one of you have And on behalf of them and  
 (11) on behalf of themselves myself and on behalf of my client  
 (12) the Exxon Corporation we await your word Thank you  
 (13) THE COURT Thank you very much Mr Diamond I'm  
 (14) going to give you a break It's going to be about a 20-minute  
 (15) break here and then we'll hear rebuttal  
 (16) THE CLERK. Please rise This court stands in  
 (17) recess  
 (18) (Jury out at 3 30 p m )  
 (19) (Recess from 3 30 p m to 3 52 p m )  
 (20) (Jury in at 3 52 p m )  
 (21) THE CLERK Please rise This court now resumes its  
 (22) session Please be seated  
 (23) THE COURT Counsel  
 (24) REBUTTAL CLOSING OF MR STOLL  
 (25) MR STOLL Thank you Your Honor I'm going to speak

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- (1) to you very briefly and then Mr Petumenos is going to talk to  
 (2) you a little more  
 (3) I put up these photographs again because I think there is a  
 (4) clear implication in Mr Diamond's statements Mr Keplinger  
 (5) Mr Knault Mayor Selby, some of these other witnesses Zack  
 (6) Chichenoff, some of these people were lying when they said  
 (7) that  
 (7) they saw oil on the beaches and they couldn't use the beaches  
 (8) their families couldn't use the beaches their friends couldn't  
 (9) use the beaches for their picnics for their hiking for their  
 (10) kayaking for the fishing and for the other uses they'd used  
 (11) the beaches, including the KIB properties  
 (12) And you'll recall that I went through with Mr Keplinger  
 (13) and Mr Knault and the others and identified the locations of  
 (14) these various parcels and they described how they went into  
 (15) the various coves - for just as an example Mr Keplinger  
 (16) Matt Keplinger school teacher who worked for the Department  
 (17) of  
 (17) Fish and Game that summer described how he went into Ugak  
 (18) Bay  
 (18) which is located down here went to the various parcels, saw  
 (19) the various parcels and observed the oil on those parcels But  
 (20) the point is as Mr Petumenos told you during his prior  
 (21) statement as the Judge will instruct you the total  
 (22) instruction requiring that there be proof of oiling of the  
 (23) parcels consists of this There's no instruction to that  
 (24) effect  
 (25) Exxon has now gone from this light oiling what they called

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(1) light oiling which is their term from the pen and boot  
 (2) photograph that you are sick of seeing I know to now saying  
 (3) Well there was some tar balls and mousse on the beaches of  
 (4) Kodiak  
 (5) And you'll recall some of the exhibits that were some of  
 (6) the monitoring reports that are - were testified to where  
 (7) there was mousse and tar balls for miles You remember my  
 (8) asking about - there was one with 4 4 kilometers another one  
 (9) 15 300 meters that's five and a half miles of mousse and tar  
 (10) balls And you look at this map of 1354A and look at the  
 (11) beaches that are identified on here as being oiled under  
 (12) various programs and the summary of the evidence of where  
 Veco  
 (13) had been picking up thousands of bags of oil and where the  
 (14) ADF&G had located oil notwithstanding what the SCAT maps  
 may  
 (15) or may not have shown in 1989 and ask yourself again What  
 (16) were these people doing in 1989 and 1990 when they were  
 (17) removing thousands of bags of debris  
 (18) This was clearly oil as Mr Keplinger said in 19 - in  
 (19) the first summer when his family went out to picnic and they  
 (20) couldn't find - they got oil on what they thought had been  
 (21) previously a clean beach that stopped their usage and it was  
 (22) a common and reasonable reaction  
 (23) Now Mr Diamond said Look at the properties today I  
 (24) want to tell you ladies and gentlemen Kodiak Island Borough  
 (25) is not making any claim for damages today We're making  
 damage

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(1) claims for what happened in 1989 It's unfortunate that these  
 (2) witnesses who came in here and testified before you did not  
 (3) have a film maker with them or a video crew with them that  
 (4) they could do some nice movies for you to show what the  
 beaches  
 (5) looked like in 1989 They did not anticipate that they were  
 (6) going to have to testify in a court of law to - on this - on  
 (7) this matter  
 (8) The aerial photos I think the witnesses have all  
 (9) testified - they showed these nice aerial photos There's a  
 (10) lot you cannot see from an aerial photograph in terms of the  
 (11) mousse and tar balls  
 (12) Mr Diamond said that I had said in my opening statement  
 (13) that our entire case was based on an attempt to sell We never  
 (14) said that and you use your own - own recollection of the  
 (15) record but in no - no way have we ever said that Kodiak  
 (16) Island Borough was trying to sell its property It's always  
 (17) held its property as recreational property Occasionally it  
 (18) sells some lands  
 (19) The significance of all the testimony about the properties  
 (20) being sold is to identify a value for that property out of  
 (21) which you can determine what is a fair rental rate And Judge  
 (22) Shortell will instruct you and Mr Petumenos will refer to this  
 (23) further but there's no requirement that the property actually  
 (24) be up for rent or that it actually be on the market to sell  
 (25) We know the law just as well as Mr Diamond knows the law

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(1) Then the question was asked Why is this all this  
 (2) testimony on fish The reason ladies and gentlemen of  
 (3) course is that this property is tied to the sea He says  
 (4) Well the Red Lake system is just one area I think you'll  
 (5) recall that the Red Lake system which involves this drainage  
 (6) area on the south end of Kodiak is one of the four major  
 (7) fishing areas in Kodiak And red salmon do not have a  
 (8) three year life cycle they have a five year life cycle, and so  
 (9) when you wipe out a quarter of the - of the - of the fishing  
 (10) areas there it has a significant impact on what's going on in  
 (11) that - in that area  
 (12) The evidence of decrease in the market value and the  
 (13) decrease in the sales of remote properties is relevant because  
 (14) it shows that the market values the lack of use If this - if  
 (15) you have this property and you cannot use that property how is  
 (16) that reflected? It is reflected in the fact that the  
 (17) property's value surrounding property's value has decreased  
 (18) and transactions are diminished That's the relevance of  
 (19) those - of that data  
 (20) Thank you very much for your attention Mr Petumenos will  
 (21) address you now and I ask you only that you not simply split  
 (22) the baby down the middle and take the \$6 8 million that Kodiak  
 (23) is asking for and the 105 000 that Exxon says is a reasonable  
 (24) compensation to Kodiak and look at Exhibit 906A the appraisal  
 (25) data and Exhibit 1041 which is the damage analysis done for

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(1) Kodiak  
 (2) Thank you very much  
 (3) MR PETUMENOS How much time do I have Judge?  
 (4) THE COURT Counsel you've got 20 minutes  
 (5) MR PETUMENOS Okay Let's try something novel and  
 (6) do most of this without bars bar charts and pictures I'm  
 (7) going to talk to you  
 (8) REBUTTAL CLOSING OF MR PETUMENOS  
 (9) MR PETUMENOS You know there wasn't a whole lot  
 (10) surprising I suppose that we heard in Exxon's argument The  
 (11) battle lines are I think fairly well drawn but one of the  
 (12) things that struck me is as we watched the Exxon air force do  
 (13) their thing they went through miles and miles of beach you  
 (14) notice from about anywhere I think a thousand feet to 2 000  
 (15) feet and showed you the shorelines and showed you how  
 terrific  
 (16) they were And the testimony of Mr Bush who was on the  
 (17) ground and who did the research and who talked about wave  
 (18) energy and he talked about what he was finding in the transects  
 (19) and so forth is really what we ought to be talking about when  
 (20) it comes to persistence isn't it?  
 (21) I mean the loss of use of this land still comes down to  
 (22) not a minor issue of natural land as to whether it's 950 or  
 (23) 500 It comes down to the highest and best use of this land  
 (24) and it comes down to parcel definition and let me tell you a  
 (25) short story

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(1) I managed to get in the evidence that I grew up on  
 (2) Nantucket Island and in the summertime we used to have to go  
 (3) down to the bunk room it was called which was really an old  
 (4) coal bin because my mom used the house for - as a guest  
 house  
 (5) for people who came down to the island to use the beaches  
 and  
 (6) if the oil spill had hit Nantucket Island the way it hit this  
 (7) land you'd have had a hard time explaining to my mom that  
 (8) something went wrong or didn't go wrong with the property and  
 (9) she hadn't lost the use of it  
 (10) And it may be a little clearer to think of a guest house  
 (11) and rental rooms in a - in a house but the same is true of  
 (12) natural land  
 (13) And you know thinking about this mountaintop and glacier  
 (14) thing - incidentally do take a look at the path that the  
 (15) helicopter ran into Silver Lake It followed a mountain ridge  
 (16) straight through There's lots of other ways through there's  
 (17) a map that shows you the way in  
 (18) There's a topo look at it They followed the ridge all  
 (19) the way through but natural lands Doesn't mean there's a loss  
 (20) of use to the parcel And that's the crux of what we're  
 (21) talking about here  
 (22) Remember Mr Green talked about the shoreline related hear  
 (23) and said it was worth a lot of money 1300 to 1400 dollars an  
 (24) acre and divide that all up but Mr Dorchester came to the  
 (25) conclusion that it was worth, the whole thing shoreline or

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(1) not mountain or not 500 an acre  
 (2) And what this comes down to as I told you in the opening  
 (3) argument was Exxon simply misperceives or doesn't want to  
 (4) perceive what a Native corporation is Did you hear them when  
 (5) they said it's a for profit corporation just like any other -  
 (6) just like Exxon  
 (7) I'll bet you there's some people in the back of that room  
 (8) that would take exception to that statement Because a Native  
 (9) corporation does three things It preserves the culture, it  
 (10) preserves the Native way of life it provides economic benefit  
 (11) to its shareholders as best it can, and it preserves the  
 (12) archaeological and cultural history of the people  
 (13) And we said that at the beginning of the opening statement  
 (14) and it's ironic that the Native corporation lands were  
 (15) conveyed if you remember Mr Roddewig's testimony in  
 (16) connection with the very construction of the pipeline and the  
 (17) transport of oil through Prince William Sound, itself And I  
 (18) don't get the sense - and it's a little scary to think that  
 (19) the people who are transporting the oil through that Sound  
 (20) still don't get it when it comes to what this land and what  
 (21) these corporations are all about Because they're not a co-op  
 (22) they're nothing like a co-op They provide benefits to their  
 (23) shareholders just like a corporation might provide a check and  
 (24) they don't ignore the subsistence value and what the people  
 (25) told you who testified is there are many commercial valuable

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(1) economic uses that are foregone in order to provide those  
 (2) benefits to the shareholders  
 (3) There is no other Native corporation like it - no other  
 (4) corporation like a Native corporation What set them up makes  
 (5) them different What their duties are are different And  
 (6) that's why the world is waiting It is to see how the modern  
 (7) world dealing with an issue like this is going to interrelate  
 (8) to these sorts of - of new ideas as to how we handle natural  
 (9) lands the environment and land for the purpose of not  
 (10) building on it  
 (11) And what we heard from Mr Diamond all through his argument  
 (12) was Let's take a look at the amount of money that the  
 (13) corporation made on the lands prior to 1989 Isn't it horrible  
 (14) that Mr - Dr Mundy talks about a rental rate that no one  
 (15) will pay he says  
 (16) And that is exactly where Dr Seldin takes him to task  
 (17) isn't it? Because both sides of this case talk about  
 (18) hypothetical rental rate Mr Dorchester did it, too  
 (19) Mr MacSwain in his cross examination admitted readily that  
 (20) when you are dealing with a temporary loss, you have to  
 (21) hypothecate a rental rate So we're not talking about whether  
 (22) you should hypothecate a rental rate or whether it should be  
 (23) based on what was actually paid we're just talking about the  
 (24) amount folks  
 (25) What Dr Mundy did is he took the amount of money -

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(1) remember Seal Bay? For mountains cliffs the whole unit was  
 (2) not 250, what Mr Diamond said it was 925 an acre And he  
 (3) spread the rent out over time so you could understand on a  
 (4) per-year basis how much that value is worth And he took the  
 (5) period of persistence that Mr Bush gave him which was  
 decades  
 (6) and decades he said and he gave you the result  
 (7) Now Members of the Jury it was not me who took on  
 (8) people It was Mr MacSwain who destroyed notes in violation  
 (9) of a court order and it was Mr Roddewig who only when asked  
 (10) the question on the - on the surveys if he got the right  
 (11) answer - remember the oiling question that he asked? How  
 they  
 (12) would only ask the question if - Be careful asking this  
 (13) question it's not wise to ask it And they took the question  
 (14) out when they faxed it to the lady  
 (15) Remember that cross-examination?  
 (16) And if you want to talk about cheap shots, let's talk about  
 (17) scientific wild ass guess  
 (18) Now these lawyers are very thorough And they're very  
 (19) careful And way down buried down in some notes when one  
 (20) scientist was trying to wrestle with this problem talking to  
 (21) another at the very beginning of the process they began to  
 map  
 (22) out their ideas as scientists do and he said, This is my idea  
 (23) said Mr Bush to his other scientist what do you think we  
 (24) need to develop it we need to work on it we need to make it  
 (25) come alive we need to make this thing work

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(1) And that's what they pulled out and repeated and repeated  
 (2) and repeated hoping it would be become bigger than life And  
 (3) the fact of the matter is that the persistence numbers that  
 (4) Dr Mundy used in this loss of use relates to a way of looking  
 (5) at this problem that Exxon simply will not see  
 (6) If you can't build on it if you can't develop it if it's  
 (7) not got enough people on it then it doesn't matter And it  
 (8) makes one fear for the people who own the property in Prince  
 (9) William Sound one would think if that's how they view the  
 (10) issue  
 (11) And another point Members of the Jury don't the - don't  
 (12) the admirals love Exxon and doesn't Exxon love the admirals  
 (13) Here's the situation here We've got a cleanup to do The  
 (14) federal government has no way of federalizing the cleanup  
 (15) You  
 (16) have - I'll give you one of the tougher fellows in the oil  
 (17) industry coming in to do the job  
 (18) And we got admirals moving in and out And there's  
 (19) something going on here Members of the Jury Remember  
 (20) that  
 (21) opening instruction when we talked about the credibility? Did  
 (22) you see the way the questions were served up to the admirals?  
 (23) It might be helpful to go back and listen to it  
 (24) They didn't just answer the question They went on and on  
 (25) and on and on, and that has implications for issues relating to  
 (26) the credibility that you might want to think about  
 (27) And the admirals were in a tough spot Remember the

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(1) admiral who talked in the beginning about I had some  
 (2) problems  
 (3) with the - with the way the cleanup was going and so I went  
 (4) and talked to my superiors the Secretary of the Department of  
 (5) Transportation and he decided that it would be all right so I  
 (6) said it would be okay There's something going on Members  
 (7) of  
 (8) the Jury with respect to this  
 (9) Remember Mr Piper's testimony about the state having a  
 (10) weak hand and having not much to negotiate with vis a vis the  
 (11) federal government? And when the federal government finally  
 (12) signed off at the end they had an action to defend by the time  
 (13) these depositions were taken They had to agree that it was  
 (14) time to end the cleanup  
 (15) Now, all of that said remember what the cleanup was - and  
 (16) it goes back to this business of oiling and the percentage of  
 (17) the shorelines and so forth The only decision that's made by  
 (18) the admirals is stop the cleanup stop intruding on the land  
 (19) it's not going to be worth it anymore  
 (20) It is not a determination that the persistence has  
 (21) stopped There's a stipulation that was entered into in this  
 (22) case relating to that We'll put on the Elmo here in a minute  
 (23) and the stipulation that we read to you was exactly to that  
 (24) effect It was to the effect that there's nothing about the  
 (25) signoff of the - of the admirals that tells you that  
 (26) persistence has stopped And it's important to remember that  
 (27) when we talk about - it's important to remember that when we

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(1) talk about persistence because it is still the case that  
 (2) aside from fly-overs in a helicopter, the only analysis of  
 (3) persistence in the case that was done was done by Mr Bush  
 (4) I also want you to be careful I'm going to run out of  
 (5) time but I had some breakout boards here about the testimony  
 (6) of the plaintiffs witnesses and the characterization of the  
 (7) testimony of plaintiffs witnesses by other witnesses  
 (8) For example, this business of a continuous band of asphalt  
 (9) that was on the beach that Mr Bush is to have testified to he  
 (10) didn't say that He said it was a discontinuous band and the  
 (11) testimony of the Exxon witnesses mischaracterized him  
 (12) Dr Kocan didn't testify the way Mr - Mr Diamond said he  
 (13) did about the conversation with Meyers or any of that If you  
 (14) have any doubts, you can get transcript and you'll find that  
 (15) the testimony is quite a bit different than what we heard  
 (16) Let's talk about the OPA 90 instruction Because they  
 (17) didn't show you all of it  
 (18) Can you see that from there? Kind of? I'll try and read  
 (19) it to you  
 (20) The part that they didn't read you was in 1990 after the  
 (21) oil spill the Alaska Native Claims Settlement Act was amended  
 (22) to provide that Native corporations could elect to accept  
 (23) interim conveyance of selected but not-yet-conveyed lands by  
 (24) filing a notice called an irrevocable election The law  
 (25) provides that, upon a filing of the notice of irrevocable

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(1) election, all right title and interest in and to the lands are  
 (2) deemed to have vested in the respective Native corporations as  
 (3) of March 23rd 1989  
 (4) Do you know what is significant about that date Members of  
 (5) the Jury what Congress did here? The day before the spill  
 (6) that's what they did  
 (7) The only thing that the Court is asking you to do is think  
 (8) about the uses that - to which this land is put and  
 (9) everything we have talked about up until now about natural  
 (10) lands and the ecosystem and how it works and the persistence  
 (11) applies equally to these lands as it does to any other so  
 (12) that's the whole story on OPA 90  
 (13) Congress's intent was to turn the claim over to the Native  
 (14) corporations as of March 23rd 1989 While you still have to  
 (15) find lost use remember that the use that we are asserting is  
 (16) the use to natural land and the use to the ecosystem and the  
 (17) use to preserve the Native way of life, and to preserve the  
 (18) culture And those are the things that a Native corporation  
 (19) does different than any other corporation you can think of  
 (20) Mr Diamond is baffled about fish And I didn't hear  
 (21) Mr Diamond talk once about the littoral rights of a property  
 (22) owner Did you? And the reason he didn't talk about the  
 (23) littoral rights of the property owner is the entire structure  
 (24) of the argument whether it's persistence or any form of  
 (25) damages by Mr Diamond is tied to the issue of the oiling



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(1) How much oil was on the beach how many flecks of oil remain on  
 (2) a - on a rock and you know that - that Mundy board that he  
 (3) put up do you know what - after all this do you know what  
 (4) land that was that Dr Mundy had all of the lost use for for  
 (5) all that time?  
 (6) That was Sleepy Bay It was one of the most heaviest-oiled  
 (7) properties, it's the lands that the Tesoro film was made  
 (8) about - which is why he thought I was going to play it for you  
 (9) in the rebuttal  
 (10) So he takes to try and ridicule Dr Mundy's work the area  
 (11) which almost everyone would concede was the most severely hit  
 (12) most long lasting beach in the whole case and that's where he  
 (13) has the big problem  
 (14) And so Members of the Jury Exxon can't make the Native  
 (15) corporations whole They can't do it Exxon did what they did  
 (16) because they were required by law to do it They were required  
 (17) by law to respond to the oil spill that they created and they  
 (18) were required by law to do as good a job as the federal  
 (19) on scene coordinator could jawbone them into doing And the  
 (20) federal on scene coordinator had to justify his decision to  
 (21) stop  
 (22) And when we talked about all those Steve Ward exhibits from  
 (23) Chenega, that was a little - that was an interesting approach  
 (24) by Mr Diamond and good advocacy on his part When you  
 take a  
 (25) look at Mr Ward's notes you'll find that Mr Ward didn't

(1) And the instruction that deals with the foreseeability of  
 (2) the damages we're asserting we're not asserting damages for  
 (3) somebody coming in and stealing artifacts That's not -  
 (4) Exxon's not liable for that We're asserting restoration  
 (5) damages because when two actors under the proximate cause  
 (6) instruction serve to increase a risk the risk may be little  
 (7) when it starts but if the act of the - of the wrong - the  
 (8) party that's wrong greatly increases the risk that something  
 (9) might happen then you've got as long as it's a substantial  
 (10) factor damages to prevent the harm that that risk created  
 (11) And the evidence is overwhelming from the beginning of this  
 (12) case that the risk was known understood and there were huge  
 (13) attempts made to try and prevent it throughout the spill with  
 (14) 11 archaeologists conducting what they could do on miles and  
 (15) miles and miles of shoreline  
 (16) How am I doing on time Judge?  
 (17) THE COURT Just about there counsel  
 (18) MR PETUMENOS Thank you  
 (19) I just have a few more things to say As an officer of the  
 (20) Court and as somebody who believes in this system a lot I have  
 (21) some people to thank on the record here - and I could thank  
 (22) them in the hallway I could thank them somewhere else But I  
 (23) am glad to have been your lawyer I am pleased to have done  
 my  
 (24) best for you I hope I've carried your cause well at a time  
 (25) when probably the most devastating thing that's ever happened

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(1) spell things real well he was not a geomorphologist And we  
 (2) cross examined Mr Ward with some other documents  
 (3) I'll give you the numbers if it'll help Plaintiff 9066  
 (4) 9064 9067 Those are documents that relate to some of the  
 (5) work that was done and the evaluations that were done on  
 those  
 (6) very same beaches after Mr Ward was done  
 (7) Mr Ward was not the definitive word on loss of use to  
 (8) those beaches and the work and the issues on those beaches  
 (9) that they're talking about is still going on today And these  
 (10) are the notes and the documents that relate to some of the  
 (11) surveys that have gone on sometimes called POSTSAP since  
 the  
 (12) time that those notes were made  
 (13) Now remember the map on the archaeology that I showed  
 (14) you? I don't know if you have it there B J but there was a  
 (15) map I cross examined Mr Dekin with that showed all of the  
 (16) artifacts that were carefully mapped over the course of the  
 (17) beach And if you go back into the testimony of some of the  
 (18) stuff you'll find that what the Exxon - what the Exxon  
 (19) Cultural Resources Program concluded was these artifacts  
 were  
 (20) clues to sites that extended from the intertidal zone up into  
 (21) the uplands  
 (22) And by the way Mr Diamond misspoke We own the property  
 (23) to the mean high tide line and that's smack dab in the center  
 (24) of the intertidal zone He indicated to you that we owned  
 (25) nothing in the intertidal zone That's wrong

(1) to the owners of this property happened since the '64 quake  
 (2) And I implore my clients to accept the judgment of this jury  
 (3) just as I implore you to see the issues that are before you  
 (4) through the right eyes  
 (5) These corporations are different Their duties are  
 (6) different under the law and they're different in fact We do  
 (7) have to stop looking at the issues the way Exxon's looking at  
 (8) them if we're going ever to be sure that what befell these  
 (9) people in 1989 1990 as far as you think it ought to be taken  
 (10) is not to happen again  
 (11) Put it in your hands and we thank you  
 (12) THE COURT Thank you Mr Petumenos  
 (13) Could you do me one favor and move this - move this easel  
 (14) here?  
 (15) MR PETUMENOS Absolutely Judge  
 (16) THE COURT I have the instructions to read to you  
 (17) Legality instructions can be kind of dry and if you need a  
 (18) break I'll give you one but generally what I do is I read the  
 (19) instructions as a whole after the arguments That's what I'm  
 (20) going to do  
 (21) Members of the Jury You have now heard and seen all the  
 (22) evidence in the case and you have heard argument about the  
 (23) meaning of the evidence Now your duty is to decide a number  
 (24) of questions I will explain to you the instructions I am now  
 (25) about to give you cover several different topics They cover

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- (1) your responsibilities as jurors and how you are to proceed to
- (2) decide the questions you are given
- (3) These instructions offer some suggestions as to how you
- (4) might wish to think about the witnesses and the evidence that
- (5) have been presented. They also cover the law that you must
- (6) apply in this case.
- (7) It is important that each of you listen carefully to the
- (8) instructions. Your duty as jurors does not end with your fair
- (9) and impartial consideration of the evidence. It includes your
- (10) careful attention to the instructions so that the law will
- (11) properly and justly be applied to the parties in this case.
- (12) You will have a copy of my instructions with you when you
- (13) retire to the jury room to deliberate to reach your verdict
- (14) but it is still absolutely necessary for you to pay careful
- (15) attention to the instructions now. Sometimes the spoken word
- (16) is clearer than the written word and you should not miss the
- (17) chance to hear the instructions. I will give them to you as
- (18) clearly as I can in order to assist you as much as possible.
- (19) The order in which the instructions are given has no
- (20) relation to their importance. The length of instructions also
- (21) has no relation to importance. Some concepts require more
- (22) explanation than others but this does not make longer
- (23) instructions more important than shorter ones.
- (24) All of the instructions are important. All should be
- (25) carefully considered. You should understand each instruction.

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- (1) and how - understand how it relates to the others given
- (2) When I finish the instructions you will go to the jury
- (3) room to begin your deliberations. I will have more to say
- (4) about that at the close of these instructions. Now I will give
- (5) instructions on evaluating the testimony given by the witnesses
- (6) and the evidence presented to you.
- (7) You should not assume that I have any views about the case
- (8) because of the instructions I am now giving you. What I am
- (9) telling you in these instructions is the law that applies to
- (10) all parties appearing before the Court. Nothing I'm saying
- (11) should lead you to think I favor or disfavor any party. I try
- (12) to be fair and impartial just as you are required to be. But
- (13) if anything I've said or done during the trial or in these
- (14) instructions has caused you to believe I favor or disfavor any
- (15) party I now instruct you it is your duty to ignore those
- (16) actions and to decide the case without favor or prejudice on
- (17) the basis of the evidence and the law as it is explained to
- (18) you.
- (19) As you know, the plaintiffs in this lawsuit are comprised
- (20) of six Native corporations. Plaintiffs including five Village
- (21) Corporation plaintiffs - Chenega Corporation, Port Graham
- (22) Corporation, English Bay Corporation, Tattletale Corporation and
- (23) Eyak Corporation, one regional corporation plaintiff Chugach
- (24) Alaska Corporation and one municipal plaintiff Kodiak Island
- (25) Borough.

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- (1) For purpose of lawsuits and awarding of damages Alaska law
- (2) recognizes any corporation as a person distinct from its
- (3) shareholders. Just as an individual is entitled to own land
- (4) and recover for injury to his or her property so too does a
- (5) corporation, without regard to the number of shareholders it
- (6) may have.
- (7) The defendants in this case are Exxon Shipping Company and
- (8) Exxon Corporation. They have been referred to as the Exxon
- (9) defendants or Exxon and may for purposes of this trial be
- (10) considered one party.
- (11) Exxon Corporation is liable in this litigation for the acts
- (12) and omissions of Exxon Shipping Company, its agents and
- (13) employees. Captain Hazelwood, an employee of Exxon
- (14) Shipping Company, was negligent in leaving the bridge of the Exxon
- (15) Valdez on or about 11:53 Alaska Standard Time on March
- (16) 23rd, 1989, and such negligence was a proximate cause of the
- (17) grounding of the Exxon Valdez.
- (18) The Exxon defendants are liable for that act and strictly
- (19) liable for all damages legally caused by the oil spill. Thus
- (20) your role in this trial is not to determine who if anyone was
- (21) at fault, rather your job will be to determine what, if any
- (22) actual damages were caused to the plaintiffs by the discharge
- (23) of oil from the Exxon Valdez.
- (24) Many of you may be aware that a trial against Exxon
- (25) Corporation is also proceeding in the United States District

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- (1) Court. As you may have heard the claims being litigated there
- (2) include claims of commercial fishermen for lost fish catch and
- (3) claims of Alaska Natives for lost subsistence harvests of
- (4) traditional foods. These claims belong to individuals, not to
- (5) Native corporations and they are not being pursued here.
- (6) Evidence of damage to subsistence resources and damage to
- (7) commercial fisheries has been allowed here because it may be
- (8) relevant to whether the oil spill reduced the value of Native
- (9) corporation properties or caused them damages by interfering
- (10) with the corporations' uses of their lands.
- (11) You are instructed not to consider any aspect of the
- (12) federal court proceeding, whether by comment of counsel or
- (13) media.
- (14) information or other source. You are to consider the claims
- (15) before you on their own merit, only on the basis of information
- (16) and instructions presented to you in this courtroom. You are
- (17) not to consider whether any other party will or may recover for
- (18) any claims in the federal action. If you hear or see anything
- (19) pertaining to the federal trial or a result there, you should
- (20) disregard that information because the evidence and issues in
- (21) that court are different from those in this court.
- (22) Also, the information you receive may be incomplete or
- (23) inaccurate as it will be second- or third-hand and it is not
- (24) evidence in this trial.
- (25) In fulfilling your duties as jurors in this trial, you

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(1) in this trial and you should consider only the issues  
 (2) presented in this trial Exxon and the municipal plaintiffs in  
 (3) the case before you have now settled the claims that were  
 (4) before you that do not relate to the municipalities' land  
 (5) damages thus the claims of all the plaintiffs in this case  
 (6) both the Native corporations and the municipalities relate to  
 (7) damages to their lands as a result of the Exxon Valdez oil  
 (8) spill  
 (9) You may award damages only for losses suffered by the  
 (10) plaintiffs in this case not other persons or entities Exxon  
 (11) may not be compelled to pay twice for the same injury A  
 (12) Native corporation is separate and distinct from its  
 (13) shareholders  
 (14) Attorneys for either side may have objected to an item of  
 (15) evidence I want to tell you that objections are not to be  
 (16) held against either party An objection is a way of asking me  
 (17) to determine whether the law allows certain evidence to come  
 (18) before you Unless parties object I may not know there is a  
 (19) possible problem with the evidence so when an objection is  
 (20) made you should keep in mind that it is a normal part of a  
 (21) trial and it signifies that one party wants me to decide  
 (22) whether the law allows you to hear certain evidence If I  
 (23) decide that it does the evidence will come before you and you  
 (24) will decide how much weight if any to give it If I decide  
 (25) that it does not, the evidence will be excluded Remember that

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(1) questions are not evidence If I direct a witness not to  
 (2) answer a question the question should be completely  
 (3) disregarded  
 (4) From time to time the parties and I may have had a  
 (5) conversation out of your presence or we may have excused you  
 (6) from the courtroom Sometimes it is necessary for complex  
 (7) legal matters to be resolved before I can decide whether to  
 (8) admit or exclude evidence as the law requires All parties  
 (9) have a right to have the law properly applied to them This  
 (10) requires that all legal questions be carefully considered so  
 (11) that you can hear all the relevant evidence  
 (12) You have heard a number of witnesses testify in this case  
 (13) You must decide how much weight to give to the testimony of  
 (14) each witness In deciding - in deciding whether to believe a  
 (15) witness or how much weight to give a witness testimony you  
 (16) should consider anything that reasonably helps you to assess  
 (17) the testimony Among the things you should consider are the  
 (18) following the witness appearance attitude and behavior on  
 (19) the stand and the way the witness testified the witness age  
 (20) intelligence and experience the witness opportunity and  
 (21) ability to see or hear things about which he or she testified  
 (22) the accuracy of the witness memory any motive of the witness  
 (23) not to tell the truth, any interest that a witness had in the  
 (24) outcome of the case any bias of a witness opinion or  
 (25) reputation about the witness' truthfulness and the internal

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(1) consistency of the witness testimony and its support or  
 (2) contradiction by other evidence  
 (3) If you believe a witness testified falsely as to part of  
 (4) his or her testimony you may choose to look with distrust on  
 (5) other parts also but you are not required to do so You  
 (6) should bear in mind that inconsistencies and contradictions in  
 (7) a witness testimony or between his or her testimony and that  
 (8) of others does not necessarily mean that you should disbelieve  
 (9) the witness  
 (10) Memory failures and mistaken memories are common and may  
 (11) explain some inconsistencies and contradictions and it is  
 (12) common for two honest people to witness the same event and  
 (13) see  
 (13) or hear things differently It may be helpful, when you  
 (14) evaluate inconsistencies and contradictions to consider  
 (15) whether they relate to important or unimportant facts  
 (16) You may believe all part or none of the testimony of any  
 (17) witness You need not believe any witness even though the  
 (18) testimony is uncontradicted but you should act reasonably in  
 (19) deciding whether or not you believe a witness and how much  
 (20) weight to give the particular testimony You are not required  
 (21) to accept testimony as true simply because a number of  
 (22) witnesses agree with each other You may decide even the  
 (23) unanimous testimony of witnesses is erroneous You should  
 (24) act  
 (24) reasonably in deciding whether to reject uncontradicted  
 (25) testimony

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(1) When witnesses are in conflict you need not accept the  
 (2) testimony of a majority of witnesses You may or you may not  
 (3) find the testimony of one witness or a few witnesses more  
 (4) persuasive than the testimony of a larger number The test is  
 (5) not which side brings the great number of witnesses or presents  
 (6) the greater quantity of evidence but which witness and which  
 (7) evidence appeals to your minds as being most accurate and  
 (8) otherwise trustworthy  
 (9) Additionally you should not assume because a witness holds  
 (10) an important position in the community that the witness'  
 (11) testimony is more likely to be correct than the testimony of  
 (12) another witness You should not assume because a witness  
 (13) holds  
 (13) a position with less prestige that his testimony is less likely  
 (14) to be correct than any other witness You may however,  
 (15) consider any special trainings or skills of the witness that  
 (16) relate to the testimony given  
 (17) Several witnesses testified as experts because of special  
 (18) ed - training education skills or knowledge In deciding  
 (19) whether to believe experts and how much weight to give to their  
 (20) testimony you should consider the same things you would  
 (21) when  
 (21) any other witness testifies in addition you should consider  
 (22) the following things the special qualifications of the  
 (23) expert the expert's knowledge of the subject matter involved  
 (24) in the case how the expert got the information that he  
 (25) testified about the nature of the facts upon which an opinion

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- (1) is based and the clarity of the expert s testimony
- (2) As with other witnesses you must decide whether or not to
- (3) believe an expert and how much weight to give to expert
- (4) testimony You may believe all part or none of the testimony
- (5) of an expert witness You need not believe any expert witness
- (6) even though his or her testimony is uncontradicted but you
- (7) should act reasonably in deciding whether or not you believe a
- (8) witness and how much weight to give to testimony
- (9) You are not required to accept expert testimony as true
- (10) simply because a number of expert witnesses agree with each
- (11) other You may decide even the unanimous testimony of expert
- (12) witnesses is erroneous but you should act reasonably in
- (13) deciding whether to reject uncontradicted expert testimony
- (14) When expert witnesses are in conflict, you need not accept the
- (15) testimony of the majority You may find the testimony of one
- (16) witness or a few witnesses more persuasive than the testimony
- (17) of a larger number
- (18) If an expert gives an opinion based in whole or in part on
- (19) assumed facts you should consider the following questions in
- (20) deciding how much weight to give the testimony What are the
- (21) facts assumed by the expert remember that you are to decide
- (22) which facts are true on the basis of the evidence in the case
- (23) does the expert s opinion take into account most or all of the
- (24) important facts you are to - you decide are true does the
- (25) expert s opinion adequately account for the important facts you

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- (1) decide are true
- (2) Yes answers to these questions may offer support for an
- (3) expert s opinion No answers may suggest reasons for concern
- (4) about the expert s opinion
- (5) You also may consider whether the expert has relied on
- (6) facts that you decide are false If so this may be an
- (7) additional reason for concern about the expert s testimony
- (8) The testimony of some witnesses was read to you from
- (9) depositions as shown to you on videotape When a deposition
- (10) is taken whether videotaped or not the witness takes an oath
- (11) that is identical in purpose to the oath given to the witnesses
- (12) who testified before you here in the courtroom A witness who
- (13) takes an oath at a deposition is promising to tell the truth
- (14) and is subject to the same penalties for failure to testify
- (15) truthfully that are applicable to the witnesses who appeared
- (16) here in the courtroom
- (17) All parties are given an opportunity to ask questions of a
- (18) witness during a deposition Deposition testimony should be
- (19) weighed by you as you would weigh any other testimony
- (20) However you may consider that the witness did not actually
- (21) testify in your presence or that you have not seen or heard the
- (22) witness testify It is for you to decide whether this is
- (23) significant Where witnesses testify by videotape you can
- (24) consider the fact that the witness could be seen and heard on
- (25) the videotape

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- (1) A witness may be discredited or impeached by contradictory
- (2) evidence or by evidence that at some time some other time the
- (3) witness has said or done something or has failed to say or do
- (4) something which is inconsistent with the witness present
- (5) testimony
- (6) If you believe any witness has been impeached and thus
- (7) discredited it is your exclusive province to give the
- (8) testimony of that witness such credibility if any as you may
- (9) think it deserves If a witness has been shown knowingly to
- (10) have testified falsely concerning any material matter you have
- (11) a right to distrust such witness testimony in other
- (12) particulars and you may reject all the testimony of that
- (13) witness or give it such credibility as you think it - as you
- (14) may think it deserves
- (15) An act or omission is knowingly done if done voluntarily
- (16) and intentionally and not because of mistake or accident or
- (17) some other innocent reason
- (18) The evidence that you have heard also includes oral
- (19) written - oral and written statements attributed to persons
- (20) who when they made their statements were not testifying here
- (21) in court or in a deposition in this case If you are deciding
- (22) whether or not to accept these statements as true you should
- (23) judge these statements as you would the testimony of any
- (24) witness I already have told you some of the factors you
- (25) should consider in evaluating the testimony of witnesses

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- (1) In addition you might find it helpful to consider the
- (2) following questions when judging each of these statements
- (3) Was
- (4) the statement made under oath, is it clear what the speaker
- (5) intended to say when he spoke, did the party against whom the
- (6) statement is being used have a chance to ask the speaker
- (7) questions about the statement was there anything about the
- (8) circumstances in which the statement was made to suggest
- (9) whether or not the speaker was careful to speak the truth can
- (10) you tell from the statement or the circumstances in which the
- (11) statement was made anything about the memory of the speaker
- (12) at
- (13) the time he spoke and his opportunity to observe the matter
- (14) about which he spoke can you tell from how detailed the
- (15) statement was how much knowledge the speaker had of the
- (16) matters
- (17) about which he spoke
- (18) The more certain you are that the speaker was sincere that
- (19) his statement was carefully and clearly made that his memory
- (20) was good when he spoke and that he was in a position to
- (21) observe
- (22) the event about which he spoke, the more confidence you may
- (23) have in the statement Please also remember that evidence
- (24) about some statements was given to you for one purpose only
- (25) you must confine your use of such evidence as previously
- (26) instructed
- (27) Statements that the plaintiffs or defendants made to anyone
- (28) to the other side - to a friend to a witness to anyone -
- (29) can be used against that party by any other party in the case

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- (1) You must decide what weight to give the statements but be
- (2) cautious in using oral statements of a party especially if you
- (3) find they were made in a casual or offhand way
- (4) In evaluating the statements made by a party you might
- (5) find it helpful -- evaluating the statements made by a party
- (6) you might find it helpful to consider whether or not the
- (7) statements were detailed since they were made at a time when
- (8) the party knew the facts about -- of which he or she spoke
- (9) since knowledge of the facts might tend to support the accuracy
- (10) of the statements whether or not when the party made the
- (11) statements there was time to make them complete since
- (12) hurried
- (13) or incomplete statements might tend to be less valuable than
- (14) ones made more deliberately, whether or not the party had
- (15) legal
- (16) assistance in making the statements since a party with legal
- (17) help may be more careful than someone without a lawyer and
- (18) whether the physical or mental condition of the party or the
- (19) circumstances in which the statement was made impaired the
- (20) ability to make an accurate statement
- (21) Statements by a party, other than those made here in court
- (22) are to be used only against the party who made them
- (23) A stipulation is simply a way of resolving what might be
- (24) contested issues of fact As you know, you are the judges of
- (25) the facts in this case so normally you would hear evidence and
- (26) then decide what the facts were But the parties in the case
- (27) are allowed to stipulate that certain facts are true and once

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- (1) they do stipulate then you the jury are to accept the facts
- (2) that are stated in the stipulation as true
- (3) There are also exhibits to consider as evidence In
- (4) deciding how much weight if any to give the exhibit you should
- (5) examine its contents and see how it relates to the other
- (6) evidence in the case The exhibits will go with you when you
- (7) deliberate However the fact that an exhibit may be given to
- (8) you for your examination does not mean that it is entitled to
- (9) more weight than oral testimony
- (10) I want to tell you there is something about this
- (11) instruction that is not written down here but I need to tell
- (12) you many of these exhibits that you've seen in blowup form
- (13) have
- (14) not been admitted in this case they've been used for
- (15) illustrative purposes It is -- everything that you've seen is
- (16) not in the evidence I've admitted some of the things and I've
- (17) kept -- and I've not admitted others so don't be surprised if
- (18) you -- if you don't see every single piece of documentary
- (19) evidence here that you see in this courtroom
- (20) On the other hand if you think that I have admitted
- (21) something and you don't see it you're entitled to ask about it
- (22) and I'll let you know whether or not it is admitted
- (23) Statements and questions by the lawyers are not evidence
- (24) thus statements by the lawyers as to purported facts are not
- (25) evidence of the facts Also any question which an objection
- (26) was sustained must be disregarded You must not speculate

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- (1) about what answer might have been given Although questions
- (2) are not evidence you will have to refer to the questions asked
- (3) in order to understand the answers of the witness And this is
- (4) permissible of course
- (5) There are rules of law that prevent some types of
- (6) information from being presented as evidence in a court of
- (7) law This is why during trial objections are made to certain
- (8) questions of counsel answers of witnesses or exhibits and
- (9) objections are designed to two things -- to do two things
- (10) First they try to help you focus on important and reliable
- (11) evidence by keeping out unimportant or unreliable information
- (12) Second the rules help you to decide the case objectively
- (13) without being swayed by information that might cause you to
- (14) respond emotionally It is because the law protects what we
- (15) hear that we have such confidence in the impartiality and the
- (16) integrity of the jury
- (17) The rest of this instruction is duplication counsel I'm
- (18) not going to give it I'm not going to read it I'll leave it
- (19) in the instruction
- (20) In a moment I'm going to tell you about the specific law
- (21) that you are to use in this case These instructions on the
- (22) law will require you to answer several questions about this
- (23) case
- (24) I first want to remind you that you are to answer these
- (25) questions on the basis of the evidence presented The law

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- (1) relies on you to fairly evaluate the evidence you've heard
- (2) You must not be governed by mere sentiment unsupported
- (3) conjecture sympathy passion prejudice public opinion or
- (4) public feeling You should consider the evidence in light of
- (5) your own observations and experiences in every day life You
- (6) may not consider other sources of information not presented to
- (7) you in this court
- (8) There are generally speaking two types of evidence from
- (9) which a jury may properly find the truth as to the facts of
- (10) the case One is direct evidence such as the testimony of an
- (11) eyewitness The other is indirect or circumstantial evidence,
- (12) the proof of a chain of circumstances pointing to the existence
- (13) or nonexistence of certain facts
- (14) To find the truth as to the facts of the case you are
- (15) permitted to use this evidence and draw such reasonable
- (16) inferences as may seem justified in light of your experience
- (17) and the evidence presented As a general rule the law makes
- (18) no distinction between direct and circumstantial evidence but
- (19) simply requires that the jury find the facts in accordance with
- (20) the preponderance of all of the evidence in the case, both
- (21) direct and circumstantial
- (22) Many of the instructions that follow ask you to decide
- (23) whether something is more likely than not true something is
- (24) more likely true -- true than not true If you believe the
- (25) chance that it is -- it is true -- wait a minute there's

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- (1) something wrong with this one
- (2) Yes Something is more likely true than not true if you
- (3) believe the chance that it is true is even the slightest bit
- (4) greater than the chance that it is false The more familiar
- (5) language something is more likely true than not true if you
- (6) believe there s a greater than 50 percent chance that it is
- (7) true 51 percent certainty is sufficient No more is required
- (8) for you to decide that something is more likely than not -
- (9) more likely true than not true
- (10) If you believe that the chance that something is true is
- (11) 50/50 or less you must decide that it is false In other
- (12) words, when you find something to be more likely - likely true
- (13) than not true you are to accept it as true When you find
- (14) otherwise you will accept it - you reject it as false
- (15) Please forgive me for the my reading of this instruction
- (16) It s a bad proofreading I ve done on this one and I had to
- (17) correct it myself but I ll correct it and you ll see my
- (18) handwriting on it and when I do it with my own handwriting It
- (19) will probably be correct
- (20) I will now define proximate cause for you
- (21) A proximate cause of harm is an action or a failure to act
- (22) which is a substantial factor in bringing about the harm
- (23) caused For the oil spill to be a substantial factor in
- (24) bringing about harm caused in this case the evidence must
- (25) show
- (25) that it is more likely true than not true that first the oil

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- (1) spill was so important in bringing about the harm that a
- (2) reasonable person would regard it as a cause and attach
- (3) responsibility to it and two the harm would not have
- (4) occurred but for the oil spill
- (5) There is however one exception to the requirement that
- (6) the harm would not have occurred but for the act or failure to
- (7) act of the defendants If two forces operated to cause the
- (8) harm one because of the defendants and the other not and
- (9) each
- (9) force by itself was sufficient to cause the harm then the
- (10) defendants' act or failure to act is a proximate cause of the
- (11) harm if it was so important in bringing about the harm that a
- (12) reasonable person would regard it as a cause and attach
- (13) responsibility to it
- (14) With respect to plaintiffs claims for archaeological
- (15) damages based upon loss of confidentiality you must consider
- (16) whether the damages are the natural and probable
- (17) consequence of
- (17) the oil spill and subsequent cleanup effort in the sense that
- (18) the alleged loss of site location confidentiality and resulting
- (19) harms was reasonably to be anticipated in view of Exxon s
- (20) capacity to have foreseen that these particular plaintiffs and
- (21) the damages claimed by them were demonstrably within the
- (22) risk
- (22) created by the defendants actions
- (23) As I have previously instructed you Exxon is strictly
- (24) liable for these - those damages proximately resulting from
- (25) the oil spill Therefore, your task is to decide how much

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- (1) money if any will fairly compensate the plaintiffs You may
- (2) not assume that because I list an item of loss or explain how
- (3) to measure a particular loss that you are required to make an
- (4) award for that loss
- (5) The items of loss claimed by the plaintiffs are the
- (6) following first the first item of claimed loss is damages to
- (7) real property second the second item of claimed loss is for
- (8) damage to archaeological resources The measure of damages
- (9) for
- (9) temporary impairment or loss of use of plaintiffs lands as a
- (10) result of the oil spill is the lost or impaired fair rental
- (11) value of the property for the period of lost use
- (12) I will now instruct you on the damages that the plaintiffs
- (13) may be entitled to for harm to their lands The measure of
- (14) damages for harm to land in the circumstances of this case is
- (15) the fair rental value attributable to any use of the property
- (16) that could have been made but for the oil spill
- (17) I will now tell you that - what is meant by fair rental
- (18) value and under what circumstances the plaintiffs are entitled
- (19) to compensation for a use of their land that was lost as a
- (20) result of the oil spill
- (21) I will now explain the concept of fair rental value
- (22) Imagine that a plaintiff put its land up for rent and was
- (23) allowed a reasonable time to rent it The fair rental value is
- (24) the amount of rent that the plaintiff would receive from a
- (25) fully informed renter of that land in an open rental market.

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- (1) In arriving at this figure you must assume that the plaintiff
- (2) would be free to rent or not to rent and the prospective
- (3) renters would also be free to rent or not to rent
- (4) Native corporations obtain title to their lands under a
- (5) selection process set forth in the Alaska Native Claims
- (6) Settlement For lands that were selected but not conveyed
- (7) plaintiffs may bring a claim for damages in this action but
- (8) they must establish that they could have used such lands and
- (9) that they lost some of those uses
- (10) The parties agree that some of the lands of the Native
- (11) corporations have been selected but not conveyed under the
- (12) provisions of the Alaska Native Claims Settlement Act The law
- (13) recognizes interim-conveyed lands as titled property with the
- (14) same rights as if they were patented
- (15) Selected but not-conveyed lands are treated somewhat
- (16) differently under the law than conveyed lands First, these
- (17) lands are administered by the federal government, which has
- (18) the
- (18) authority to make contracts and to issue leases, permits,
- (19) rights of way or easements for such land Second so long as
- (20) the lands are in selected but not conveyed status the Secretary
- (21) of the Interior has a continuing duty to obtain and consider
- (22) the views of the Native corporations that have selected the
- (23) lands concerning any proposed uses of the selected but not
- (24) conveyed lands
- (25) However, the secretary does not have to have consent of the

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- (1) Native corporations before permitting uses to be made of the
- (2) lands
- (3) Third Native corporations do not have any legal title or
- (4) right of possession for lands that have been selected but not
- (5) conveyed Therefore Native corporations do not have a right
- (6) to use lands that have been selected but not conveyed without
- (7) the consent or approval of the federal government
- (8) In 1990 after the oil spill the Alaska Native Claims
- (9) Settlement Act was amended to provide that Native corporations
- (10) could elect to accept interim conveyance of
- (11) selected-but not yet conveyed lands by filing a notice called
- (12) an Irrevocable election The law provides that upon the
- (13) filing of the irrevocable election all right title and
- (14) interest in and to the lands are deemed to have vested in the
- (15) respective Native corporation as of March 23 1989
- (16) This requirement has been met as I have previously advised
- (17) you This law allows the Native corporations to bring claims
- (18) for selected-but not-conveyed lands but it does not mean that
- (19) the corporations or their shareholders could use such lands at
- (20) the time of the spill or afterward except with the consent or
- (21) approval of the federal government
- (22) In determining what damages if any were suffered by the
- (23) Native corporations for selected-but not-conveyed lands you
- (24) must consider first whether the Native corporations were
- (25) permitted to use the selected but not-conveyed lands for which

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- (1) they are asserting claims and second, whether the corporations
- (2) suffered any loss or interruption of uses for such lands
- (3) Plaintiffs are not asserting any of the following as a
- (4) basis for any of their claims and therefore you may not award
- (5) damages for any alleged harm to plaintiffs ability or right
- (6) to sell or lease any of their property as a result of the oil
- (7) spill any alleged reduction in the market value of any of
- (8) their properties as a result of the oil spill
- (9) Neither harm to plaintiffs ability or right to sell or
- (10) lease nor reduction in the market value of any of their
- (11) properties is a lost use for which you may award damages
- (12) With regard to the archaeological resources for which
- (13) plaintiffs are claiming damages If you find that it is more
- (14) likely true than not true that the resources claimed were
- (15) damaged as a proximate result of the oil spill or subsequent
- (16) cleanup activities the appropriate measure of damages is the
- (17) cost to repair restore or remediate those resources
- (18) Before you may award damages for harm to archaeological
- (19) resources, you must first decide whether the plaintiff making
- (20) the claim for that location owns the land where the
- (21) archaeological resource is located You must consider this
- (22) question individually for each location
- (23) Plaintiffs do not own land below the mean high tide line
- (24) That is the land located within the average high and low
- (25) tides Nor do they own land below the low tide zone All of

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- (1) this land is owned by the state of Alaska and any
- (2) archaeological resources on or underneath this land is the
- (3) property of the state
- (4) The purpose of the dollar damages award is primarily to put
- (5) an injured person in a position as nearly as possible
- (6) equivalent to his or her position prior to the injury As I
- (7) previously instructed however the plaintiffs are not entitled
- (8) to a double recovery In considering whether Native
- (9) corporation plaintiffs are entitled to an award of damages for
- (10) injury to their archaeological resources you should bear in
- (11) mind that these plaintiffs also ask you to award them damages
- (12) caused by the effect of oil on their land including the land
- (13) containing archaeological resources
- (14) In order to recover damages for injury to archaeological
- (15) resources plaintiffs must prove injury to those resources and
- (16) that injury must be separate distinct and different from the
- (17) injury of oil to their land
- (18) You may not make an award of damages based on mere
- (19) speculation However as long as there are - is a reasonable
- (20) basis in the evidence for plaintiffs damages as established by
- (21) such evidence as might reasonably be expected to be available
- (22) under the circumstances the defendants may still be held
- (23) responsible even though there is difficulty in proving those
- (24) damages exactly Remember that the burden is on the plaintiffs
- (25) to establish by a preponderance of the evidence the amount of

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- (1) their damages as explained in these instructions
- (2) The law forbids you to decide any question in this case by
- (3) relying on chance For example it would be unlawful for each
- (4) juror to make an individual estimate of damages and for the
- (5) jury as a whole to agree in advance to use the average of these
- (6) estimates as the proper measure of any damages that are to be
- (7) awarded Each juror may express views on the correct measure
- (8) of damages so that all jurors may thoughtfully consider each
- (9) other s views in order to determine - to determine what
- (10) damages if any, should reasonably be awarded in light of the
- (11) law and the evidence
- (12) I will finish instructing you in a few moments I have
- (13) told you how to evaluate the evidence and the witnesses and
- (14) what the law - what law applies to this case Here s what
- (15) happens next
- (16) Until now I ve asked you not to discuss the case with
- (17) anyone else not even with other members of the jury I told
- (18) you this was important to assure that every member of the jury
- (19) independently sees and hears all of the evidence before
- (20) making
- (21) even tentative comments to someone else and also to prevent
- (22) anyone from influencing you before all of the evidence was
- (23) presented
- (24) When I finish instructing you you will go to deliberate in
- (25) the jury room When you reach the jury room you can and you

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- (1) act upon his or her own judgment concerning the evidence in
- (2) this case But all of you should listen to each other with
- (3) open minds Each of you should consider whether your views are
- (4) fair and reasonable and try your best to decide the questions
- (5) you have been given according to these instructions
- (6) You should not hesitate to change an opinion if you are
- (7) convinced that it is wrong However you should not agree to
- (8) decide any question in a particular way just because some of
- (9) the jurors even a majority favor such a decision
- (10) In order to reach a verdict in this case ten of you must
- (11) be in agreement You will take my instructions the exhibits
- (12) the jury verdict forms with you to the jury room In the jury
- (13) room you will select one jury member to be a spokesperson for
- (14) the jury This person will preside over your deliberations
- (15) will communicate with me on your behalf if that is necessary
- (16) and will complete and sign any verdicts to which ten of you
- (17) agree
- (18) If you believe that it is necessary to ask for further
- (19) questions - for further instructions the spokesperson should
- (20) write a note to me indicating as specifically as possible what
- (21) assistance you need I will then meet with the parties and
- (22) decide what help if any I can provide
- (23) In order to reach a verdict in this case ten of you must
- (24) be in agreement The same - same ten of you need not agree on
- (25) each answer When at least ten of you reach a verdict you

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- (1) should have your foreperson date and sign it and then advise
- (2) the bailiff by a written note that you have reached a verdict
- (3) The bailiff will advise the Court which will contact the
- (4) parties and counsel It may take a while but as soon
- (5) thereafter as the parties and counsel and the Court can
- (6) assemble you will return your verdict together with the
- (7) exhibits and the instructions into open court in the presence
- (8) of the entire jury
- (9) You are to deliberate between the hours of 8 30 a m and
- (10) 4 30 p m each day except Sunday until you reach a verdict
- (11) You may decide among yourselves when you will take your lunch
- (12) break
- (13) That won't be today
- (14) At the beginning of the trial I told you that it was for
- (15) you to decide individually whether or not you wanted to take
- (16) notes When you begin your deliberations you may have your
- (17) notes with you Remember that one juror's notes are not
- (18) necessarily to be given more weight in your deliberations than
- (19) the memory of another jury who chose to carefully consider the
- (20) evidence without taking notes When the case is over your
- (21) notes will be collected and kept as confidential material in
- (22) the records of the Court I've dated and signed this on the
- (23) last page
- (24) Now when you're in the jury room first these instructions
- (25) will come into the jury room so that you can read them while

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- (1) you're deliberating And what will also come in with them are
- (2) verdict forms There are individual verdict forms for each
- (3) plaintiff's claims in this case, and they are
- (4) self-explanatory They're really not that complicated but
- (5) there are a number of questions you'll have to answer
- (6) Remember for each verdict you fill out ten of you have to
- (7) be in agreement
- (8) All right That concludes the instructions in this case
- (9) I said - I usually say 8 30 to 4 30 for deliberations If
- (10) you're deliberating for a full day I'm going to send you out
- (11) now
- (12) You can - I always tell jurors at this point in the trial
- (13) this is the point where you become the boss So you can - you
- (14) can govern your own deliberations as you see fit Once you
- (15) elect your spokesperson you can decide how - for what periods
- (16) you will deliberate when you'll take your lunch breaks when
- (17) you might take smaller breaks during your deliberations All
- (18) of those things are your responsibility with the help of the
- (19) bailiff
- (20) Now if you have any questions you're of course entitled
- (21) to write a note to me and I'll try to help you if you have any
- (22) of those questions You can choose - if you go out of here
- (23) right now you can choose because it's been a very long day
- (24) to go home immediately, just tell the bailiff and you can do
- (25) that Or you can - you can choose to start your

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- (1) deliberations elect a spokesperson and maybe set the - set
- (2) the structure for your deliberations And that's your -
- (3) you're entitled to do that
- (4) The only thing that I'll do is if you want to deliberate
- (5) past the 4 30 time there will be a time during any day that
- (6) you're deliberating that I will probably say You've been in
- (7) there long enough you can recess and go to your homes
- (8) Now when you do that if you have to recess and you
- (9) certainly - you certainly will have to do that today,
- (10) remember, when you're not deliberating in the jury room, you
- (11) shouldn't be discussing this case with anyone even another
- (12) juror because this is a collective process The 12 of you
- (13) have to make these decisions the 12 of you have all to be
- (14) consulted in the same room when you're deliberating So if I
- (15) excuse you it is always with the admonition that you don't
- (16) talk about the case at all don't talk to your family or to a
- (17) fellow juror
- (18) All right I think that will do it for the instructions
- (19) I'm going to excuse you now to deliberate It will take time
- (20) to get the exhibits that are admitted to you And you can
- (21) choose whether to start your deliberations now or start them at
- (22) 8 30 tomorrow morning
- (23) If you start them at 8 30 tomorrow morning I want you back
- (24) here promptly at 8 30 so everybody can start and start
- (25) discussing the case as soon as you come in



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- (1) I really want to thank you This has been a very long and  
 (2) very complicated trial and I m very impressed with the way  
 (3) you ve concentrated on the evidence and I know you ll do a fine  
 (4) job when you're deliberating so I ll excuse you now to do  
 (5) that  
 (6) (Jury out at 4 59 p m )  
 (7) THE COURT All right The jury is out of the  
 (8) courtroom  
 (9) Counsel I want to say as to Instruction No 18 I had a -  
 (10) there were a couple misprints in it I believe that I ve  
 (11) corrected them Before - if you saw any other misprints that  
 (12) I didn t slide over you should let me know all right? I  
 (13) think I got the ones that were necessary to get and this was  
 (14) the only one that really threw me so you can certainly let me  
 (15) know  
 (16) I want to cover a couple of other things before I give you  
 (17) your much needed -  
 (18) MR OPPENHEIMER Your Honor I was under the  
 (19) impression it was 58 percent but -  
 (20) THE COURT 58 That was your instruction, counsel  
 (21) but I rejected it didn t I?  
 (22) There s been a document filed that's called Plaintiffs'  
 (23) Objection to Defendants Filing of Proposed Jury Instruction  
 (24) Regarding OPA 90  
 (25) MR FORTIER Right I told you I was going to do

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- (1) I m thrown off by the objection concept being part of the  
 (2) Court s record  
 (3) THE COURT Because you don t think there was an  
 (4) objection to this instruction?  
 (5) MR PETUMENOS No Judge I think the issue was you  
 (6) initially said there should be one packet of objections one  
 (7) packet of instructions not given but this one was late and you  
 (8) told Mr Fortier late in the evening indicated that he needed  
 (9) time to file on this one That s the only difference between  
 (10) this one and the others  
 (11) THE COURT Well except that to the extent that this  
 (12) particular filing might indicate that what I did was I simply  
 (13) refused to give the proposed instruction I don t think that s  
 (14) correct What I did was I said it needed editing and the  
 (15) parties agreed to edit in many respects so it may very well  
 (16) be when you - when the appellate court would evaluate this  
 (17) they might find that there was no objection  
 (18) MR PETUMENOS Judge the only caveat to that that I  
 (19) have, and I was not part of the discussions, is that just so  
 (20) long as the record s not misperceived with respect to the issue  
 (21) that the plaintiffs, before we started drafting this  
 (22) instruction took the position that all right title and  
 (23) interest and that it was an assumption of the entire claim -  
 (24) THE COURT Yes  
 (25) MR PETUMENOS - is preserved and there s nothing

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- (1) that yesterday Your Honor  
 (2) THE COURT I ve got it and I looked at it  
 (3) Now have you seen it?  
 (4) MR OPPENHEIMER No  
 (5) THE COURT All right It - it contains the proposed  
 (6) instruction the original proposed instruction and it contains  
 (7) the instruction I gave but what it doesn t do is it doesn t  
 (8) talk about the - about the concessions that were made during  
 (9) the discussion of the instruction itself  
 (10) Now, in order to determine what I gave over objection, this  
 (11) document the Plaintiffs Objection to Defendants filing Of  
 (12) the Proposed Jury Instruction Regarding OPA 90 I believe  
 (13) can t - can t be fully evaluated unless the whole record is  
 (14) looked at because as I see this process I said that the  
 (15) instruction needed editing editing  
 (16) The editing was discussed and certain concessions were made  
 (17) by the plaintiffs And so all I m saying is, this will go in  
 (18) and will be attached to the plaintiffs exhibits rejected or  
 (19) those given over objection but the full question can t been  
 (20) considered unless the record is referred to  
 (21) All right do you understand me?  
 (22) MR OPPENHEIMER Your Honor the reason I don t is  
 (23) that I thought the only submission that was going to be made  
 (24) was for the Court s record exhibit in two categories  
 (25) Instructions Given Over Objection and Rejected Instructions

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- (1) about the instruction process we lost that issue then we  
 (2) began negotiating the instruction  
 (3) THE COURT That s true  
 (4) MR OPPENHEIMER Your Honor I think the state of the  
 (5) record should be that Mr Fortier s original proposal and ours  
 (6) should each be in our court s record as requested rejected  
 (7) instruction  
 (8) THE COURT That may very well be so, counsel but  
 (9) yours - I don t think yours is here I only have the one that  
 (10) they proposed and the one that I finally gave  
 (11) MR OPPENHEIMER Could - I m just confused by the  
 (12) issue  
 (13) THE COURT That s why I brought it up I want you to  
 (14) look at this and, to the extent you want to make a record in  
 (15) supplementation you re welcome to do so  
 (16) I think the record s complete The discussions make it  
 (17) plain what was accepted and what wasn t, I think  
 (18) MR PETUMENOS The only matter I have Judge is  
 (19) Exhibit 9900 is the photographs of the witnesses I don t know  
 (20) if I technically need to move it into evidence There s no  
 (21) objection to it If I do then I do it and I m doing that I  
 (22) believe the defendants have one as well  
 (23) MR OPPENHEIMER Looks like tit for tat Your Honor  
 (24) except our - and two different colored notebooks  
 (25) MR PETUMENOS Yours is white and mine is black

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- (1) MR OPPENHEIMER That s not an accident  
 (2) Mr Petumenos  
 (3) THE COURT Are there pictures of the lawyers in  
 (4) there too?  
 (5) MR OPPENHEIMER Your Honor I have no idea what s in  
 (6) this notebook It appears to be pictures -  
 (7) MR CLOUGH Artist sketches Your Honor  
 (8) MR OPPENHEIMER - of one of the witness  
 (9) granddaughters  
 (10) MR PETUMENOS That might not be a bad idea There  
 (11) are some lawyers that came through this case that the jury may  
 (12) not remember  
 (13) THE COURT I was afraid we were going in that  
 (14) direction  
 (15) MR OPPENHEIMER Your Honor for the record our  
 (16) exhibit is Defendants DX14795  
 (17) THE COURT Is there a cover sheet that says why those  
 (18) things are going in?  
 (19) MR OPPENHEIMER Is there a cover sheet what?  
 (20) THE COURT Is there a cover sheet that says these are  
 (21) the witnesses that testified?  
 (22) MR OPPENHEIMER Yes  
 (23) THE COURT Is there in the plaintiffs?  
 (24) MR OPPENHEIMER It s on the cover  
 (25) MR PETUMENOS It s on the binding

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- (1) MR OPPENHEIMER We prefer it on the cover We can  
 (2) meet later Your Honor  
 (3) THE COURT You can resolve the question without me  
 (4) Is there anything else?  
 (5) MR PETUMENOS Not that I know of Judge  
 (6) MR STOLL Nothing for the record Your Honor  
 (7) MR PETUMENOS I thought you learned not to ask that  
 (8) question  
 (9) THE COURT I m just waiting  
 (10) MR McCALLION Your Honor there are a couple of  
 (11) evidentiary housekeeping issues In getting the evidence into  
 (12) the boxes ready for the jury for example some of the evidence  
 (13) used during closing arguments was not formally entered  
 (14) obviously it s being used here  
 (15) THE COURT Not formally entered what do you mean?  
 (16) MR McCALLION Not formally placed in the boxes and  
 (17) checked off last night  
 (18) MR PETUMENOS We had to withdraw exhibits from the  
 (19) boxes to use in final argument Now we have to put them back  
 (20) THE COURT The clerk will help you to do that  
 (21) counsel It s your responsibility after I walk out of this  
 (22) courtroom to make sure that everything that s admitted goes to  
 (23) that jury so you have to make a final check  
 (24) Anything else?  
 (25) MR McCALLION Your Honor there s a couple of items

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- (1) that were loose ends from last night that we would go over with  
 (2) the other side Will you be available for a couple of  
 (3) minutes -  
 (4) THE COURT No  
 (5) MR McCALLION - If we can't resolve the issue?  
 (6) THE COURT No I won't be So if there are loose  
 (7) ends you better tie them up yourself counsel  
 (8) MR McCALLION Your Honor I d raise the issue, then  
 (9) THE COURT I ll be here for about 15 minutes All  
 (10) right?  
 (11) MR McCALLION Thank you very much  
 (12) MR DIAMOND I had understood there was some  
 (13) discussion yesterday concerning calculators  
 (14) THE COURT Yeah we re going to - my secretary  
 (15) assured me that she would find two calculators with tapes that  
 (16) they could use  
 (17) MR DIAMOND May I suggest that we wait for the jury  
 (18) to request calculators? I think it sends a message that  
 (19) calculations are necessary Part of my closing argument was  
 (20) that calculations are not necessary  
 (21) THE COURT You mean I had to marshal all the -  
 (22) MR DIAMOND I think they may very well ask for them  
 (23) and they ought to be given them but if they don t ask for them  
 (24) they shouldn't  
 (25) THE COURT I m going to give them calculators

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- (1) counsel After having gotten the whole court system machinery  
 (2) in operation to get two calculators you really don t want me  
 (3) to stop that do you?  
 (4) MR PETUMENOS Judge I think the problem is there s  
 (5) a - there s an exhibit a videotape exhibit about which  
 (6) there s some controversy I m not familiar with the  
 (7) controversy we better resolve it  
 (8) THE COURT That s unusual  
 (9) MR PETUMENOS Yes Lora Johnson video is there  
 (10) some problem?  
 (11) THE COURT We re going off the record to change  
 (12) tape  
 (13) (Off record)  
 (14) THE COURT All right we re going to be done in just  
 (15) a second  
 (16) Okay go back on the record Counsel we re back on the  
 (17) record  
 (18) I generally do this at the end of the trial You know how  
 (19) much I hate to compliment lawyers but this is really - it s  
 (20) been a privilege for me to sit on this case  
 (21) MR PETUMENOS Quiet I want to hear this  
 (22) THE COURT It really has been a privilege for me to  
 (23) sit on this case I guess enjoyment isn t the right word but  
 (24) I ve been very impressed with all of you and there ve been very  
 (25) few really rough spots that I ve had to go through and that s

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- (1) because your efforts were so professional and I really
- (2) appreciate that for all of you so I hope you ll take that as
- (3) a sincere compliment
- (4) MR CLOUGH Thank you Your Honor
- (5) MR DIAMOND Thank you Your Honor
- (6) THE COURT Off record
- (7) THE CLERK. Off record
- (8) (Recess at 5 10 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 13th day of September 1994
- (20) JOY S BRAUER RPR
- Notary Public for Alaska
- (21) My Commission Expires 5 10 97

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**Look-See Concordance Report**

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 UNIQUE WORDS 3,699  
 TOTAL OCCURRENCES 17,294  
 NOISE WORDS 385  
 TOTAL WORDS IN FILE 50,938

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 SINGLE FILE CONCORDANCE

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 CASE SENSITIVE

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 NOISE WORD LIST(S)  
 NOISE NOI

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 INCLUDES ALL TEXT OCCURRENCES

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 IGNORES PURE NUMBERS

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