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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

JOINT BRIEF OF APPELLANTS EXXON SHIPPING AND EXXON CORPORATION RE: DISCOVERY MASTER'S ORDER OF DECEMBER 15, 1990 COMPELLING DEPOSITIONS

I. INTRODUCTION

Appellants Exxon Shipping Company and Exxon Corporation (collectively "Exxon Defendants" or "Appellants") submit this opening brief pursuant to ¶ VI.D.3. of the Federal District Court's Discovery Order No. 2 and the State Court's

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Pre-Trial Order No. 13 (collectively "Discovery Plan") in support of their simultaneous appeal to both the state and federal courts of the Discovery Master's Order of December 15, 1990 compelling depositions.[1]

The appellants undertake this appeal reluctantly. They are fully aware of the intent of the Discovery Plan that in the lion's share of instances, the Discover Master's resolution of discovery disputes should represent the final word. They are in full agreement with that intent, and so feel compelled to explain at the outset that this matter is of special importance.

The Discovery Master's Order creates serious and perhaps irremediable risks for the conduct of the criminal case of United States of American v. Exxon Corp. and Exxon Shipping Co., (No. A90-015). The federal court, in particular, must attempt to cope with how those proceedings may become tainted, and how the appellants can receive a fair trial in light of any taint. It thus is especially appropriate that the court have an early opportunity to resolve the issue presented in a fashion that will allow the related civil cases to proceed without prejudice to the

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[1]We believe the depositions the Discovery Master has ordered to commence were noticed with the intent that they would be conducted for purposes of both the state and federal litigation. Accordingly, this appeal is properly directed to both the federal and state courts. See Discovery Plan ¶ VI.D.3. ("In the event of simultaneous appeals in the state and federal court[s], the state judge and the federal judge will coordinate the disposition of the appeals.").

integrity of the related criminal trial. It is to that end that the appellants have filed this appeal.[2]

II. STATEMENT OF THE CASE

This appeal concerns the plaintiffs' demand that they depose certain former and current Exxon Shipping Company ("Exxon Shipping") seamen who had served aboard the M/V EXXON VALDEZ, and who will be potential trial witnesses in the upcoming criminal proceedings. Moreover, the subject matter of these depositions will be identical to the factual issues which will be decided by the jury in the criminal trial.

On November 21 and 29, 1990, the plaintiffs served on the appellants Mandatory and Amended Mandatory Deposition Notices scheduling the subject depositions.[3] The appellants objected to those notices on the basis, among other reasons, that the discovery imperiled the conduct of the criminal trial. The appellants requested that the plaintiffs postpone the proposed depositions until after the conclusion of the trial phase of the criminal proceedings, which we assume will

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[2]Appellants suggest respectfully that this appeal is one in which matters of coordination and comity among the state and federal courts are especially important, and therefore request the state court to defer to Judge Holland's views concerning what is necessary for the fair conduct of the criminal case pending before him.

[3]The plaintiffs acted in flagrant disregard of the terms of the Discovery Plan in pursing the discovery in question. See Joint Memorandum of Defendants Exxon Shipping Company and Exxon Corporation in Opposition to Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees ("Jt. Mem.") at 4-7, to which reference is made. The Discovery Master's Order has mooted some of the objections the appellants properly raised to those procedural irregularities.

allow these depositions to occur in June 1991. See Order (Scheduling and Trial Set), dated June 22, 1990, issued by Judge Holland in United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015. The appellants also offered to make available to the plaintiffs other possible deponents, and volunteered to make whatever changes in the deposition schedule would be necessary to accommodate the delayed conduct of the requested depositions. The Exxon Defendants' answers to plaintiffs' Phase One Interrogatories identified 1,647 individuals, many of whom could be deposed without raising the issues presented here. The plaintiffs responded with a motion to compel, which the Discovery Master granted in pertinent part. This appeal timely followed.

III. ISSUE PRESENTED

Did the Discovery Master err in ordering that certain depositions proceed in these civil cases when their conduct creates the risk of undermining the integrity of a related criminal trial because that discovery will quite likely (a) give rise to prejudicial publicity that will make choice of a fair and impartial jury extremely difficult; and, (b) provide the prosecution access to evidence that is not properly available to it under Federal Rule of Criminal Procedure 16(b)?

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IV. THE DISCOVERY MASTER'S ORDER MUST BE REVERSED BECAUSE THE PLAINTIFFS' PROPOSAL CREATES UNJUSTIFIABLE RISK TO THE CONDUCT OF THE PENDING CRIMINAL ACTION

A. These Courts Should Reverse the Discovery Master So That Civil Discovery Does Not Generate Undue Publicity That Taints The Criminal Trial And Prejudices The Defendants.

It is essential to grasp the nature of the risk plaintiffs' proposal has created. The case of United States of American v. Exxon Corp. and Exxon Shipping Co., is a complicated criminal action concerning the same course of events that gave rise to the plaintiffs' private actions. That case will be tried in Anchorage, before Judge Holland with a jury selected from the citizens of that city and its surrounding communities. At the same time, it is virtually certain that any significant facts uncovered during the course of the proposed depositions of crewmen would become common knowledge in that same region. The press follows this litigation closely. For example, the Anchorage Daily News alone had published over 600 articles on the EXXON VALDEZ oil spill as of January 22, 1990. See Jt. Mem., Ex. 5. The court can take judicial notice that the number of articles from that paper, and all others, since that date no doubt reflects a continuing pattern of interest and a high level of scrutiny. This creates the potential for publicity that undermines the integrity of the criminal proceeding and the ability to select a jury.

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Indeed, even the instant litigation before the Discovery Master regarding plaintiffs' motion to compel the depositions in question has generated additional publicity and press interest. An article appearing in the Anchorage Times on December 14, 1990, quotes plaintiffs' liaison counsel, Mr. Lloyd B. Miller, on the nature and significance of the proceedings held before the Discovery Master. See Exhibit "A", attached hereto.

Nor does the fact that the grounding of the Exxon Valdez and related legal proceedings received publicity in the past lessen the Exxon Defendants' concern about the impact which prospective press coverage would have upon the criminal trial scheduled to begin on April 10, 1991. Publicity concerning the grounding of the Exxon Valdez, the NTSB proceedings, the Hazelwood trial, and the like occurred months ago. By contrast, publicity arising from civil depositions held during the few months remaining before the commencement of the criminal trial will increasingly taint the local community and potential jury panel and thereafter appellants' ability to obtain a fair trial in such proceeding. And, the closer in time to the start of the criminal trial such publicity occurs, the greater the potential taint and threat.

The courts recognize that such publicity can make a fair trial extremely difficult to obtain, and have clearly indicated that it is proper to take protective action. See, e.g., United States v. Kordel, 397 U.S. 1, 12, 90 S. Ct. 763

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(1970); United States v. American Radiator & Standard Sanitary Corporation, 388 F.2d 201, 204-205 (3rd Cir. 1967), cert. denied, 390 U.S. 922 (1968).

There is substantial authority for the proposition that prejudicial publicity can so affect a community that a fair criminal trial cannot be conducted without special protective measures. The United States Supreme Court has repeatedly emphasized that pretrial publicity may severely undermine the constitutional rights of the criminally accused:

> Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and relevant law.

Chandler v. Florida, 449 U.S. 560, 574, 101 S. Ct. 802, 809, 66 L.Ed.2d 740 (1981).

In Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966), the United States Supreme Court noted that constitutional problems occur when there exists a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." Id. at 363. When the right of the defendant to a fair trial is not protected, the verdict can and has been reversed. See, e.g., Sheppard v. Maxwell, supra; Rideau v.Louisiana, 373 U.S. 723, 726-27, 83 S. Ct. 1417, 10 L.Ed.2d 663 (1963); Marshall v. United States, 360 U.S. 310, 313, 79 S. Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959). The Ninth Circuit also has emphasized the importance of

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controlling the effects of pretrial publicity: "When the trial judge becomes aware through massive news coverage that a fair trial cannot be had in the place where the action was filed, the judge has a duty to protect the defendant's right to a fair trial." Washington Pub. Util. Group v. U.S. District Court, 843 F.2d 319, 326 (9th Cir. 1987) (right to fair trial protected against pervasive, prejudicial pretrial publicity in a civil case). The Ninth Circuit has stated that when a defendant stands accused of a crime, "the judge has a duty and obligation to attempt to protect the right of the defendant[] to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy." Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975), cert. denied, 427 U.S. 912, 96 S. Ct. 3200, 49 L.Ed.2d 1203 (1976).

The United States Supreme Court has stressed that the best remedy for pretrial publicity is to contain it at the trial level. "To safeguard the due process rights of the accused, a trial judge has an affirmative duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378, 99 S. Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). As the Supreme Court noted in Sheppard, "the cure lies in those remedial measures that will

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prevent the prejudice at its inception." Sheppard, 384 U.S. at 363, 86 S. Ct. at 1522.

Thus, these courts should take this opportunity to remove the inescapable publicity that these depositions will create by simply deferring them. This will cause no prejudice to plaintiffs, who have themselves characterized these witnesses as "lower level" witnesses. Other depositions can go forward and depositions of criminal trial witnesses can proceed more efficiently after such witnesses have testified in the criminal proceeding. The law provides ample authority for these courts to rely upon in shaping such a safeguard.

A trial court has wide discretion in determining the scope, effect, and timing of discovery. See, e.g., Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir. 1988). It follows that "the taking of any deposition lies within the sound discretion of the court." Clark v. General Motors Corp., 20 Fed. R. Serv. 2d 679, 689 (D. Mass. 1975). The courts have recognized that this discretion may be utilized in controlling civil discovery to safeguard criminal proceedings from unnecessary risks such as the one plaintiffs propose. See, e.g., SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980) ("a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions" in light of a pending criminal proceeding if the interests of justice so require); Brock v. Tolkow, 109 F.R.D.

116 (E.D.N.Y. 1985) (copy attached to Jt. Mem.) (staying all civil discovery in light of potential criminal proceeding); Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 58-59 (E.D. Pa. 1980) (limiting discovery).

The Discovery Master apparently discounted this authority. The plaintiffs, however, did not provide the Master with any authority for the contrary position; it is clear that the law provides a court great leeway in reordering discovery so that the results of that discovery create less risk of prejudice to related criminal proceedings. Indeed, a case the plaintiffs relied upon below, Driver v. Helms, 402 F. Supp. 683 (D.R.I. 1975), specifically endorses the use of civil discovery limitations in light of a parallel criminal proceeding. Id. at 685.[4]

B. These Courts Should Reverse The Discovery Master To Prevent The Possibility That Civil Discovery Will Provide The Prosecution With Evidence Beyond That To Which It Is Entitled Under The Rules of Criminal Procedure.

The need to control discovery in this instance is all the more apparent in light of the correlative danger that

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[4]The authorities the plaintiffs relied upon before the Discovery Master are clearly inapposite. Those authorities concern broad stays, embracing entire proceedings. They do not speak to the mere reordering of eleven depositions, which is all the appellants seek. See, e.g., Landis v. North American Co., 299 U.S. 248, 57 S. Ct. 163 (1936); Silberkleit v. Kantrowitz, 713 F.2d 433, 434 (9th Cir. 1983) ("Stayed all proceedings"); CMAX, Inc. v. Hall, 300 F.2d 265, 266 (9th Cir. 1962) ("postponing the trial"); Driver v. Helms, 402 F. Supp. at 684 (motion "for a stay of all proceedings").

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the wide dissemination of the results of civil discovery will allow the federal prosecutors to gain access to evidence that is not available to them under the Federal Rules of Criminal Procedure. Federal Rule of Criminal Procedure 16(b)(2) provides:

> **Information Not Subject to Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

This rule expresses a clear policy choice to curtail the extent of discovery available to the government in a criminal proceeding. If the plaintiffs are allowed to proceed with their proposed depositions of former and current Exxon Shipping crewmen, they will be opening a backdoor through which the government may circumvent Rule 16(b)'s injunction. It is incumbent on a court to avoid this risk. See generally Manual for Complex Litigation (2d) (1985) §31.2. See also, Fed. R. Crim. Pro. 16(b); SEC v. Dresser Industries, Inc., 628 F.2d at 1375-76 (authorizing a postponement of discovery to, among other purposes, prevent expansion of the "rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b)"). Compare Resek v. State, 706 P.2d 288, 293-294 (Alaska 1985). This tribunal must act to prevent this unnecessary risk.

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c. Postponement Of The Depositions Is The Only Practically Available, Adequate Remedy

It is no answer to propose that these depositions go forward under a protective order that requires them to be sealed. As a practical matter, such an avenue is unavailable. Defendants previously attempted to negotiate a protective order that would protect such information. A number of plaintiffs refused to agree to any confidentiality orders. In addition, as these courts are aware, the press has previously intervened in this litigation to assert a First Amendment right to access to the results of discovery. See Jt. Mem., Ex. 5.

Plaintiffs would have these courts imperil the conduct of a criminal trial merely for the sake of a five-month postponement in the deposing of eleven, by plaintiffs' characterization, "lower level" witnesses. There has been no particularized showing of need for this discovery. Rather, the plaintiffs rest on their allegedly broad entitlement to pursue discovery in the order they will. Any rational balancing of the potential dangers to the criminal proceedings and the potential benefits of plaintiffs' proposal necessitates the rejection of their position, and the rescheduling of these particular depositions.

In fact, rescheduling the depositions until after the witnesses have testified at the criminal trial will also be much more efficient and less costly for plaintiffs and defendants. The criminal trial testimony of the witnesses

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will surely assist in plaintiffs' deposition preparation, and may even eliminate the need for some depositions. See Brock v. Tolkow, 109 F.R.D. 116 (E.D.N.Y. 1985).

V. CONCLUSION

For the foregoing reasons, these courts should reverse the Discovery Master's Order of December 15, 1990 compelling depositions, and should enter an order rescheduling the proposed depositions for some time following the conclusion of the trial phase of United States of American v. Exxon Corp. and Exxon Shipping Co.

Respectfully submitted at Anchorage, Alaska this 21st day of December, 1990.

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Exxon wants to delay tanker crew interviews until after trial

By CHRIS HUMPHREY
News Writer

Exxon wants a delay that could add up to "months and months" in the lawsuits filed against it by fishermen and other victims of the Exxon Valdez oil spill, an Anchorage lawyer said Thursday.

The oil giant wants interviews with its employees, who were on the tanker at the time of the spill, delayed until after its criminal trial scheduled for next April, said Lloyd B. Miller, who represents about 34 Native villages and others.

Miller, a master appointed by state and federal judges presiding over the massive lawsuits likely will decide today whether or not to grant Exxon's request, Miller said.

Exxon lawyers could not be reached for comment Thursday afternoon.

The oil company stands to lose billions of dollars if it is unsuccessful in defending itself against hundreds of civil lawsuits.

Exxon is also fighting the federal government on five criminal charges resulting from the spill. An April criminal trial is set, but no date has been set for the civil actions.

Exxon is also fighting the federal government on five criminal charges resulting from the spill. An April criminal trial is set, but no date has been set for the civil actions.

Miller and other lawyers want to interview under oath 14 crew members for the civil litigation. The list does not include Capt. Joseph Hazelwood, the skipper of the tanker at the time of the spill, or the two men he gave control of the tanker, Miller said. But the three eventually will be asked to submit to questioning, he said.

The depositions of the crew members are part of the evidence discovery stage of the lawsuits. They will shape the cases each side will present if the lawsuits go to trial.

"Any delay invariably works to the advantage of Exxon and Alyeska," Miller said. Alyeska is the consortium of oil companies overseeing the trans-Alaska oil pipeline.

Meanwhile, the owner of a consulting firm hired by 22 Alaska communities to determine the social and economic impact of the oil spill is angry that his company is being dragged into the civil legal battle.

Exxon sent Impact Assessment Institute a deposition subpoena requiring the company to submit all documents, from rough notes to its final report issued last month to mayors of the communities. The lawyers representing the fishermen, villagers and others suing Exxon also want the information.

The company conducted confidential interviews with Alaskans about the impact the spill had on their lives, said John Petterson, president of the institute. While he said he does not mind sharing findings and results, he is concerned about the privacy of the people interviewed.

"It won't happen," Petterson said of the production of the material requested.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

MOTION FOR EXPEDITED CONSIDERATION OF (OR FOR ORDER SHORTENING TIME FOR) DEFENDANT-APPELLANTS EXXON SHIPPING COMPANY (D-2) AND EXXON CORPORATION'S (D-1) APPEAL OF THE DISCOVERY MASTER'S ORDER OF DECEMBER 15, 1990 COMPELLING DEPOSITIONS

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Pursuant to Civil Rule 77(i) of the Alaska Rules of Civil Procedure, General Rule 5(G) of the Local Rules of the United States District Court for the District of Alaska, and Paragraph VI.D.4. of Discovery Order No. 2 entered by the U.S. District Court on February 9, 1990, in Case No. A89-095 Civ. and Pretrial Order No. 13 entered on the same date by the Alaska Superior Court in Case No. 3AN-89-2533 Civ. ("Discovery Plan"), Defendant-Appellants Exxon Shipping Company and Exxon Corporation ("Exxon Defendants" or "Appellants") hereby respectfully move this court for an order expediting or shortening time for the briefing, consideration and disposition of the instant appeal by the Exxon Defendants from the Discovery Master's Order of December 15, 1990, compelling depositions of certain Exxon Shipping Company current and former employees prior to the conclusion of the criminal trial in United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015.

As is set forth in greater detail in the accompanying memorandum and affidavit of counsel, expedited consideration of the instant appeal is necessitated by the fact that the depositions at issue in the instant appeal are currently scheduled to commence during the week of January 7, 1991 -- prior to the 20-day responsive briefing period normally allowed by Paragraph

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VI.D.3. of the Discovery Plan governing the Exxon Valdez oil spill litigation in state and federal court.

In order to facilitate such expedited consideration of the instant appeal, the Exxon Defendants are willing to submit this matter to the courts on the parties' briefs, and to waive any right to oral argument and to file a reply brief, unless the courts prefer otherwise.

DATED at Anchorage, Alaska this 21st day of December, 1990.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

MEMORANDUM IN SUPPORT OF EXXON SHIPPING COMPANY AND EXXON CORPORATION'S MOTION FOR EXPEDITED CONSIDERATION OF (OR FOR ORDER SHORTENING TIME FOR) DEFENDANT-APPELLANTS EXXON SHIPPING COMPANY AND EXXON CORPORATION'S APPEAL OF THE DISCOVERY MASTER'S ORDER OF DECEMBER 15, 1990 COMPELLING DEPOSITIONS

Pursuant to Civil Rule 77(i) of the Alaska Rules of Civil Procedure, General Rule 5(G) of the Local Rules of the United States District Court for the District of Alaska, and Paragraph VI.D.4. of Discovery Order No. 2 entered by the U.S. District Court on February 9, 1990, in Case No. A89-095 Civ. and Pretrial Order No. 13 entered on the same date by the Alaska Superior Court in Case No. 3AN-89-2533 Civ. ("Discovery Plan"), Defendant-Appellants Exxon Shipping Company and Exxon Corporation ("Exxon Defendants" or "Appellants") have moved this court for an order expediting or shortening time for the briefing, consideration and disposition of the instant appeal by the Exxon Defendants from the Discovery Master's Order of December 15, 1990, compelling depositions of certain Exxon Shipping Company current and former employees prior to the conclusion of the criminal trial in United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015.

Expedited consideration of the Exxon Defendants' appeal from the Discovery Master's Order dated December 15, 1990, is occasioned by the fact that the depositions at issue in the instant appeal are presently set to commence during the week of January 7, 1991. The twenty-day responsive briefing period normally allowed in Paragraph VI.D.3. of the Discovery Plan,

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however, would permit plaintiffs to submit their appellate brief on January 10, 1991. Thus, even absent any reply brief and/or oral argument, the issue presented by the instant appeal would not be joined, and the briefing in regard thereto would not be ripe for consideration by the courts, until after the challenged depositions had already commenced.[1]

Accordingly, in order to obtain review and disposition of the issue raised in the instant appeal prior to the commencement of the deposition schedule in question, it is necessary to accelerate the briefing schedule for plaintiffs-appellees' responsive memorandum, and for the courts to give this matter expedited consideration. In this connection, in order to facilitate review and disposition of the instant appeal, the Exxon Defendants are willing to waive any right to submit a reply brief and/or present oral argument on the issue, and to submit this matter to the courts on the opening and responsive briefs only, unless the courts prefer otherwise.

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[1]The factual and procedural background regarding the timing of the development of the instant appeal are set forth in the accompanying affidavit of counsel attached hereto as Exhibit "A".

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DATED at Anchorage, Alaska this 21st day of December, 1990.

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IN THE UNITED STATES DISTRICT COURT

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the EXXON VALDEZ	)	
	)	(Consolidated)
	)	

RE: ALL CASES

AFFIDAVIT OF DOUGLAS J. SERDAHELY

STATE OF ALASKA)
:
THIRD JUDICIAL DISTRICT)

I, Douglas J. Serdahely, being duly sworn upon oath hereby depose and testify as follows:

1. I am a partner in the law firm of Bogle & Gates, which is counsel of record for defendant Exxon Shipping Company in the Exxon Valdez oil spill litigation.

2. I also serve as the liaison counsel for all defendants in the Exxon Valdez oil spill litigation, and further serve as a co-member, along with Charles P. Flynn, of Defendants' Coordinating Committee. As a result of these capacities, I have been personally involved in, and am personally familiar with, the various communications and developments between plaintiffs and defendants in connection with the scheduling of the parties' first deposition segment, currently set to commence the week of January 7, 1991.

3. Communications from Plaintiffs' Discovery Committee Co-Chairmen (Harold Berger, Charles Ray, and other plaintiffs' counsel), and defendants' representatives, over the scheduling of the parties' first deposition segment commenced in late October, 1990, when plaintiffs' representatives informed defendants' representatives that plaintiffs wanted to depose various Alyeska Pipeline Service Co. Valdez Terminal employees and eleven current or former Exxon Shipping Company employees who were crewmen on the Exxon Valdez.

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4. At such time, and during subsequent communications, counsel for the Exxon Defendants advised plaintiffs that the Exxon Defendants would object to the taking of depositions of present or former Exxon Shipping Company personnel who were likely to be witnesses in the criminal trial, United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015. Plaintiffs' counsel were requested to delay such depositions until after the conclusion of the criminal trial and were urged to schedule depositions of any of the numerous other individuals identified by defendants' interrogatory answers, who were not likely to be criminal trial witnesses.

5. As Mr. Berger recites in plaintiffs' original Mandatory Notices of Depositions dated November 21, 1990, "Designated counsel for plaintiffs and these defendants have conducted negotiations concerning this issue . . . since at least the first week of November, 1990, and in regard thereto, have exchanged various correspondence and held specific telephone conferences on the following dates: November 14, 1990, November 19, 1990, and November 20, 1990."

6. On November 21, 1990, plaintiffs served their original "Mandatory Notices of Depositions", scheduling depositions of eleven present and former Exxon Shipping Company personnel who

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were crewmen aboard the Exxon Valdez for ten days of depositions in Anchorage, commencing on January 7, 1991.

7. In response to these Mandatory Deposition Notices, the Exxon Defendants served on November 28, 1990, their written objections to the depositions scheduled by plaintiffs. The grounds for defendants' objections included the potential interference which such depositions would cause with the Exxon Defendants' criminal trial, as well as the inconvenience of the Anchorage location for the depositions.

8. Without further consultation with defendants' representatives (as required by the Discovery Plan), plaintiffs served on defendants "Amended Mandatory Deposition Notices" dated November 29, 1990, and subpoenas. These "amended" deposition notices rescheduled the previously noticed depositions of Exxon Shipping Company crewmen for eleven different locations in the United States over ten consecutive days.

9. On December 6, 1990, the Exxon Defendants served their written objections to plaintiffs' "Amended Mandatory Deposition Notices", raising the same grounds for objection as before, along with various other procedural violations under the Discovery Plan.

10. On December 4, 1990, plaintiffs filed with the Discovery Master their Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees and for Expedited

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Proceeding, and supporting memorandum and materials. Plaintiffs requested, and received from the Discovery Master, expedited consideration of their motion. On December 12, 1990, the Exxon Defendants submitted to the Discovery Master their opposition memorandum and attachments. No reply brief was allowed by the Discovery Master.

11. Oral argument on plaintiffs' Motion to Compel (and another matter) was held during a telephonic conference with the Discovery Master on December 14, 1990 (Anchorage date)(or December 15, 1990, Singapore date). (Discovery Master Ruskin participated by telephone from Singapore.) The Discovery Master rendered a tentative oral ruling at such conference, granting plaintiffs' motion. The Master then faxed to the parties a written order to the same effect, dated December 15, 1990. See Exhibits "A" and "B" attached to the Exxon Defendants' Notice of Appeal.

12. It is from the foregoing oral and written rulings of the Discovery Master that the Exxon Defendants now appeal. A "Notice of Appeal", as required by Paragraph VI.D.2. of the Discovery Plan, has been timely filed with the Discovery Master simultaneously with defendants' instant Motion for Expedited Consideration.

GLE & GATES

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FURTHER AFFIANT SAYETH NAUGHT.

Dated: December 21, 1990

Douglas J. Serdahely

Subscribed and sworn to
before me this 21st day
of December, 1990.

Notary Public
My Commission Expires: 9/15/92

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

EXXON VALDEZ OIL SPILL LITIGATION This Document Relates to: ALL CASES	Case No. 3AN-89-2533 Civil (Consolidated)

DISCOVERY MASTER'S CERTIFICATION OF RECORD

Pursuant to §VI.D.2 of the Discovery Plan For All Proceedings entered in this case, the Discovery Master, David B. Ruskin who is currently traveling outside the country, through Mary Louise Molenda, an attorney in his office, hereby certifies and files the following documents in the Appeal dated December 21, 1990 by Exxon Shipping Company (D-2) and Exxon Corporation (D-1) from the Discovery Master's order of December 15, 1990 compelling depositions of certain current and former employees of Exxon Shipping Company. Because Mr. Ruskin has in his possession several of the original documents pertaining to the motion at issue in this appeal, some documents are provided by copies only, but the undersigned counsel represents that these copies are true and accurate copies of the original record presented to Mr. Ruskin for his decision.

EXHIBIT TO 1/21
IN EXHIBIT
FOLDER

LAW OFFICES OF
DAVID B. RUSKIN
RESOLUTION TOWER
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RECORD

12/4/90 Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees and for Expedited Proceeding

Proposed Scheduling Order of the Discovery Master Granting Plaintiffs' Motion for Expedited Proceeding Upon Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees

12/4/90 Plaintiffs' Memorandum of Points and Authorities In Support Of Their Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees and for Expedited Proceeding. Attached to the Memorandum are the following:

Affidavit of H. Laddie Montague, Jr., Esq. dated December 4, 1990

Exhibit A: Exxon Defendants' Objection to Plaintiffs' Mandatory Notices of Deposition

Exhibit B: Letter of November 28, 1990 to Harold Berger, Esq. and Charles W. Ray, Jr., Esq. from Douglas J. Serdahely

Proposed Order of the Discovery Master Granting Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees

12/12/90 Joint Memorandum of Defendants Exxon Shipping Company and Exxon Corporation in Opposition to Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees. Attched to the Memorandum are the following:

Copy of Brock v. Tolkow, 109 F.R.D. 116 (E.D.N.Y. 1985);

Exhibit 1 - Plaintiffs' Deposition Notices and Subpoena

Exhibit 2 - Exxon Defendants' Objection to Plaintiffs' Amended Mandatory Notices of Deposition

Exhibit 3 - Federal Court Discovery Order No. 2 (Discovery Plan)

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Exhibit 4 - Individual Deponents' Objections to Subpoenas

Exhibit 5 - Press Motions to Intervene

Affidavit of R. Carl Clark, December 12, 1990, with attachment "Private Plaintiffs Who Have Not Produced Documents"

Affidavit of Karen L. Ezell, December 14, 1990, with attachment "Names and Interrogatories Response List"

Proposed Order of the Discovery Master Denying Plaintiffs' Motion to Compel Depositions of Certain Current and Former Exxon Shipping Company Employees

12/15/90 Faxed Order dated 12/15/90 signed by David R. Ruskin

Transcript of Telephonic Proceedings Conducted on Friday, December 14, 1990, on Plaintiffs' Motion to Compel Production of Witnesses and Motion to Quash Deposition Notice

DATED at Anchorage, Alaska, this 26 day of December, 1990.

Law Offices of
DAVID B. RUSKIN, P.C.

By: Mary Laurie Yelenda
for David B. Ruskin

LAW OFFICES OF
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The undersigned hereby certifies that on the 26th day of December, 1990 a true and correct copy of this document was served by courier on: Delaney & Pidgeon By Linda L. Johnson

Melvyn I. Weiss
Jerome M. Congress
Steven R. Weinmann
MILBERG, WEISS, BERSHAD,
SPECTHRIE & LERACH
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New York, NY 10119
(212) 594-5300

David W. Oesting
DAVIS WRIGHT TREMAINE
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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: the EXXON VALDEZ	Case No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ALL CASES	

P1; P3; P8-12; P13-15; P16-18; P19; P21; P22; P24-28; P30-39; P40-41; P42; P43-44; P46; P48; P50; P52; P54-62; P64-67; P73; P74-76; P77; P81-94; P96; P97-111; P112; P113; P118; P120; P122; P124; P126; P128; P130; P132; P135-138; P139-144; P145; P146-147; P165-166; P170-188; P189; P195-196; P202-206; P246-247; 267-277; (CONSOLIDATED CLASS ACTION PLAINTIFFS)[6] AND P78-80; P95; P167; P168; P279 (WISNER PLAINTIFFS)

PLAINTIFFS' SUBMISSION REGARDING PROPOSED ISSUANCE OF NOTICES

In its order of December 14, 1990, the Court directed that the proponents of class certification submit "a proposed notice to the putative class members. The notice that the classes are

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not certified should also inform putative class members of their need to file a timely TAPAA claim with the Fund." Order No. 35 at 8. Per the Court's direction, a proposed notice is attached.

Proponents of class certification submit that there are practical reasons making such notice premature and legal reasons making it improper. The Superior Court has not yet issued most of its rulings regarding class certification, but intends to do so within the next six weeks. Moreover, this Court has not yet reached a final decision on class certification or the consequences of not filing claims with the Fund. Likewise, it is unclear whether the period of limitations for filing a claim against the Fund or commencing an action in this Court or in the Superior Court is tolled by the pendency of this action and the open questions of class certification. See American Pipe & Construction Co. v. Utah, 38 L.Ed.2d 713 (1974). These decisions will greatly impact the choices facing the persons receiving the proposed notice. Finally, with respect to informing putative class members of their need to file a timely TAPAA claim with the Fund, the Court should be aware that the Fund, pursuant to its own undertaking,[1] has already initiated notice to putative class members of their need to file claims against the Fund pursuant to

[1]See Memorandum of Trans-Alaska Pipeline Liability Fund (D-4) Concerning the Court's Comments of September 13, 1990 at 19 filed October 9, 1990.

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the Court's December 14, 1990 Order.[2] At a minimum, some coordination of the proposed notices ought to occur.

Class proponents submit that there is a legal impediment to dissemination of the notice the Court has requested. See Pan American World Airways, Inc. v. United States District Court for the Central District of California, 520 F.2d 1073 (9th Cir. 1975). In that decision, the Ninth Circuit held that a proposed notice to potential plaintiffs was not "permitted by any ascertainable source of judicial authority" and issued a writ of prohibition forbidding the issuance of such a notice. Id. at 1077. The court held that issuance of a notice in the absence of an order certifying a class could allow "circumvent[ion of] Rule 23 by creating a mass of joined claims that resembles a class action but fails to satisfy the requirements of the rule. For that reason, notice for the purposes of bringing the claims of unnamed members of the plaintiff class before the court may not issue before a class action has been certified." Id. at 1079. In light of Pan American, the Court is prohibited from issuing any notice to putative class members absent class certification.

[2]See Affidavit of David W. Oesting Regarding Notice Published by Trans-Alaska Pipeline Liability Fund.

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In light of the foregoing, at a minimum this Court should stay further proceedings relating to the notice, pending rulings by the Superior Court regarding class certification.

DATED this 2nd day of January, 1991.

MILBERG, WEISS, BERSHAD,
SPECTHRIE & LERACH

By: Melvyn I. Weiss
Chairman, Ad Hoc Committee
on Class Certification
Jerome M. Congress
Steven R. Weinmann

DAVIS WRIGHT TREMAINE

By: _____
David W. Oesting
Local Counsel

JAMIN, EBELL, BOLGER & GENTRY
Attorneys for Wisner Plaintiffs

By: Matthew D. Jamin

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1273B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re: The EXXON VALDEZ	No. A89-095 Civil (Consolidated)
This Document Relates to: ALL CASES	

NOTICE

TO: ALL PERSONS WHO MAY HAVE BEEN INJURED BY THE EXXON VALDEZ OIL SPILL OF MARCH 24, 1989 INCLUDING AMONG OTHERS, CERTAIN ALASKA NATIVES AND NATIVE ORGANIZATIONS, RURAL SUBSISTENCE USERS, PERSONS ENGAGED IN COMMERCIAL FISHING AND RELATED ACTIVITIES, PERSONS CONDUCTING BUSINESS IN AREAS AFFECTED BY THE SPILL, PERSONS WHO CUSTOMARILY USE AND ENJOY NATURAL RESOURCES IN THE AREAS AFFECTED, OWNERS OF REAL PROPERTY IN THE AREAS AFFECTED, AND ALL CITIES AND OTHER GOVERNMENTAL ENTITIES EXISTING UNDER THE AUTHORITY OF THE LAWS OF ALASKA.

This Notice is provided to you by order of the United States District Court for the District of Alaska. It is not intended to provide legal advice to anyone.

If you believe you were damaged as a result of the Exxon Valdez oil spill, please read this Notice carefully, as it reports certain actions of the United States District Court and the Superior Court for the State of Alaska which could significantly affect your rights. You may want to consult a lawyer promptly concerning questions raised by this Notice.

OVERVIEW OF THE FEDERAL
AND STATE COURT ACTIONS

On March 24, 1989, the tanker Exxon Valdez ran aground on Bligh Reef in Prince William Sound and spilled approximately 11 million gallons of crude oil into Prince William Sound (the "Oil Spill"). In response to the Oil

Spill, numerous lawsuits were brought in the United States District Court for the District of Alaska (the "Federal Court") and the Superior Court for the State of Alaska (the "State Court"). The Federal Court actions have been consolidated before Judge H. Russell Holland of this Court, and the State Court actions have been consolidated before Judge Brian Shortell.

Plaintiffs in a number of the lawsuits in both Federal Court and State Court ("class action plaintiffs"), requested Court authorization to prosecute their cases as class actions on behalf of the following classes: Alaska Native Class (and an ANILCA subclass in the Federal Court), Commercial Fishing Class, Area Business Class, Use And Enjoyment Class, Property Owner Class, and Municipal Government Class. Cannery and seafood processor employee plaintiffs sought class certification only in the State Court. The definitions of these classes are set forth in papers filed with the Courts.

A class action is a lawsuit brought by some individuals on behalf of themselves and others who suffered injuries from the same event. If a lawsuit is permitted by a court to proceed as a class action, it is not necessary for class members to individually hire lawyers and file their own lawsuits.

In order to counter the massive resources that defendants would employ to oppose plaintiffs' efforts to obtain compensatory and punitive damages and to require defendants to expend the amounts believed to be necessary to adequately clean up and restore the environment, plaintiffs' counsel, who include Alaskan lawyers and national specialists in mass tort and class action lawsuits, organized to maximize their efficiency and effectiveness and agreed to work together as a team. The Federal Court and the State Court jointly designated certain plaintiffs' counsel to coordinate the litigation.

Defendants

Defendants include Exxon Corporation, two of its subsidiary corporations ("the Exxon defendants"); Alyeska Pipeline Service Company, its oil company owners and their parent corporations; George M. Nelson; Joseph Hazelwood; Gregory Cousins; and the Trans-Alaska Pipeline Liability Fund ("TAP Fund").

Claims Made and Relief Sought

Plaintiffs in the Federal and State Court class actions claim that the Oil Spill inflicted massive damage upon fishing and related industries, other businesses and property, area cities and boroughs, wildlife and natural resources, the subsistence way of life and the economy and ecology of the area generally. Furthermore, plaintiffs claim that these damages resulted from willful and knowing or reckless wrongdoing by the Exxon defendants and the Alyeska defendants, including the failure to prepare for and control the spill in the manner previously promised to governmental authorities and the public, lack of a seaworthy vessel, and recklessness (or negligence) in the supervision and control of the operation of the vessel.

The Federal Court class actions include claims for strict liability against the Trans-Alaska Pipeline Liability Fund (the "TAP Fund") established under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. § 1653(c)) (TAPAA"), and claims for unseaworthiness and negligence under federal maritime law. TAPAA does not permit the recovery of punitive damages and limits recovery of compensatory damages under that statute to $14 million against the Exxon defendants and $86 million against the TAP Fund for each oil spill incident. The defendands countered that the Oil Spill was a single incident and, therefore, only a total of $100 million can be recovered by all claimants against the TAP Fund.

The relief sought by the class action plaintiffs in Federal Court is, in summary: compensatory damages for all class members for their economic injuries, injuries to property, and impairment of subsistence interests and use and enjoyment of the property and resources harmed by the Oil Spill; damages for the disruption and distress generally suffered by individual class members (known as "hedonic" damages); and equitable relief to provide for cleanup, restoration and related remedies by defendants and other appropriate entities. Some, but not most, class action plaintiffs also seek punitive damages in Federal Court.

The relief sought by the class action plaintiffs in State Court is more extensive than that sought by them in Federal Court. In the State Court actions, class action plaintiffs allege that the Exxon defendants are strictly liable as owners of the spilled oil under the Alaska Environmental Conservation Act (A.S. 46.03.822 et seq.), and that all defendants are strictly liable for consequences of the ultra-hazardous transport of oil. Strict liability means that defendants must pay damages upon a showing that their actions caused the injuries suffered by the claimant without regard to whether or not such defendant acted intentionally, recklessly or negligently. In contrast with the strict liability claims in

the Federal Court under TAPAA, recovery on the strict liability claims in State Court is not limited as to dollar amount. Class action plaintiffs also claim that defendants created public and private nuisances and committed a trespass. Furthermore, all class action plaintiffs in the State Court seek punitive damages sufficient to punish defendants and to deter similarly egregious conduct by others, in addition to compensatory damages, hedonic damages and equitable relief.

COURT ORDERS THAT MAY AFFECT YOUR RIGHTS

The Federal Court recently issued orders that may affect your right to recover damages resulting from the Oil Spill in Federal Court, as follows:

. The Federal Court ruled that the Federal Court cases should not presently proceed as class actions. However, whether the cases should proceed as class actions may be reconsidered after proceedings before the TAP Fund are completed.

. The Federal Court has not yet reached a final decision but has indicated that it may rule in the future that persons who fail to timely file a Trans-Alaska Pipeline Authorization Act claim are barred from filing or prosecuting claims in Court against the TAP Fund and, maybe, against other defendants, or that other adverse consequences may follow.

. The Federal Court ruled that all persons who intend to file a Trans-Alaska Pipeline Authorization Act claim should do so before March 23, 1991 or be forever barred from filing such a claim.

. The Federal Court ruled that the Federal Court actions may not proceed against the TAP Fund until further order of the Court after the TAP Fund makes a determination with respect to all Oil Spill claims filed with it. The Federal Court actions will continue against the other defendants.

The State Court recently issued several orders and a notice that are related to the Federal Court orders and may affect your right to recover damages resulting from the Oil Spill in State Court, as follows:

. The State Court authorized the cannery and seafood processor employee plaintiffs to proceed with their claims as a class action in the State Court on behalf of cannery and seafood processor and/or maintenance employees who had a reasonable expectation of employment after March 23, 1989, in the areas affected by the Oil Spill. If you are a member of this class, you will likely receive a notice shortly from the State Court with respect to that case.

. The State Court soon will decide whether other class action plaintiffs will be authorized to prosecute their State Court claims as class actions on behalf of the members of the classes they seek to represent.

. The State Court actions will proceed at this time as to all defendants, but the effect on the State Court proceedings of the Federal Court order regarding whether claims must first be filed with and determined by the TAP Fund, which has not yet been issued, is unknown.

. Defendants Exxon Corporation and Exxon Shipping Corporation are liable to allpersons and entities damaged by the Oil Spill, without regard to fault, under Alaska statute, A.S. 46.03.822. Damages and the persons who can recover damages under this ruling will be determined in subsequent proceedings.

As a result of these rulings, your status as a class member and the need for you to take individual action are uncertain. If the State Court certifies additional classes and/or if the Federal Court changes its current position upon reconsideration at a later time, you may be a member of a certified class and individual action by you may not be necessary. However, if the State Court does not certify each of the remaining classes and the Federal Court does not amend its denial of class certification, you will not be a member of a certified class (except for those cannery and seafood processor employees who are members of the class certified by the State Court). In that event, you may have to hire your own lawyer and file your own individual lawsuit if you want to make a claim in Federal or State Court for your Oil Spill damages.

Class action plaintiffs have presented to the Federal Court their positions that filing a TAPAA claim with the TAP Fund is not a prerequisite to recovering damages in Federal or State Court; that proceedings before the Fund may take a

long time to resolve and the total aggregate recovery of $100 million from the TAP Fund will not compensate all claimants for their full damages, much less be sufficient to cover all environmental damages. Punitive damage claims cannot be asserted against the TAP Fund. As a result, class plaintiffs' counsel believe that even if the claims are pursued against the TAP Fund, further substantive court proceedings against all defendants will be required to satisfy all claimants and all claims.

Given the uncertainties created by the rulings of the Federal Court and the State Court, persons or entities injured by the Oil Spill who have not brought a lawsuit or filed a TAPAA claim on their own behalf may want to consult an attorney promptly as to the most appropriate course of action under the circumstances. YOU MAY FOREVER BE BARRED FROM STARTING AN ACTION IN COURT OR FILING A TAPAA CLAIM, IF YOU DO NOT DO SO BEFORE THE DEADLINES SET BY STATUTE AND OTHER LAW.

EXAMINATION OF PLEADINGS AND PAPERS

The foregoing references to the classes sought, claims made, and motions and orders filed are only summaries of the pertinent documents. Copies of the pleadings and all other papers filed in connection with the Federal Court proceedings described above are available for inspection through the Clerk of the Court, United States Courthouse, 222 West 7th Avenue, Room 261, Anchorage, Alaska 99513-7564, during regular business hours. Similarly, copies of the pleadings and all papers filed in connection with the State Court action are available for inspection through the Clerk of the Court, Superior Court for the State of Alaska, Third Judicial District, 303 K Street, Anchorage, Alaska 99501, during regular business hours.

Dated: Anchorage, Alaska
_____, 1991

BY ORDER OF THE COURT

Clerk of the Court
United States District Court
District of Alaska

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and Co-Member of Defendants'
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Assistant Director, Torts Branch
U.S. Department of Justice
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

STIPULATION BETWEEN ALL DEFENDANTS AND THE UNITED STATES AND ORDER

All Defendants in the federal and state actions arising out of the EXXON VALDEZ Oil Spill (hereinafter "Requestors") and the United States of America (hereinafter "United States") HEREBY STIPULATE AS FOLLOWS:

1. This Stipulation pertains to the federal response to the various subpoenas duces tecum directed to the United States Coast Guard, National Oceanic and Atmospheric Administration,

National Marine Fisheries Service, United States Forest Service, United States Park Service and Minerals Management Service (hereinafter, the "Pending Subpoenas").

2. The time within which the United States may serve written objections, pursuant to Rule 45(d) of the Federal Rules of Civil Procedure, to the Pending Subpoenas, is extended to and including the expiration of 30 days from the date on which counsel for the Requestors gives written notice to the undersigned counsel for the United States that any objections should be filed. The return dates of the Pending Subpoenas are extended to dates to be agreed on by the undersigned counsel, which dates shall be not less than 45 days from the giving of notice as described in this paragraph.

3. The United States hereby agrees that it will make a good faith effort to identify and locate documents requested hereunder by the Requestors, and further agrees to continue its good faith efforts to locate the documents requested by the Pending Subpoenas, notwithstanding the postponement of the return dates of the Pending Subpoenas and the extension of the period for serving objections.

4. Nothing in the Stipulation shall limit the right of the United States to seek a Protective Order to quash or limit any Pending Subpoena, or any subpoena which is issued after execution of this agreement. Nor shall anything in this agreement be

construed as waiving any objection the United States may have to the requests for production of specific documents.

SEEN AND AGREED TO:

DATED: 12/31/90

for David V. Hutchinson
Assistant Director, Torts Branch
U.S. Department of Justice

DATED: January 2, 1991

BOGLE & GATES

By Douglas J. Serdahely
Douglas J. Serdahely
Liaison Counsel for Defendants
and Co-Member of Defendants'
Coordinating Committee

DATED: Jan 2 1991

BURR, PEASE & KURTZ

By
Charles P. Flynn
Co-Member of Defendants'
Coordinating Committee

IT IS SO ORDERED this 7 day of January, 1991.

Hon. H. Russel Holland
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

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Attorneys for Defendant D-4
The Trans-Alaska Pipeline Liability Fund

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	No. A 89-95 CIV
	)	(Consolidated)
the EXXON VALDEZ	)	

Re: All Cases

FIRST REPORT OF D-4, THE TRANS-ALASKA PIPELINE LIABILITY FUND

The Trans-Alaska Pipeline Liability Fund ("Fund") submits this Report in response to the Court's Order of December 14, 1990. As outlined below, the Fund is ready and able to perform the functions contemplated by the Court's Order and has already made substantial progress to that end. This Report has

four basic purposes: (1) to inform the Court about the steps that the Fund has taken to date to implement the Court's December 14 ruling; (2) to set out briefly the Fund's view of the nature of the task that lies ahead; (3) to describe the manner in which the Fund proposes to accomplish that task; and (4) to advise the Court (in response to the Court's December 14 Order, note 4, p.5) of the ways that Court guidance could assist in expediting the completion of the Fund's work.

I. THE STEPS THE FUND HAS TAKEN TO DATE TO IMPLEMENT THE COURT'S ORDER

The Fund has moved promptly to implement the Court's Order:

A. Notice

Given the impending March 25, 1991 bar date for the filing of claims, it was essential to provide prompt notice to potentially affected parties who might wish to file or pursue claims with the Fund. To that end, the Fund placed an advertisement describing the Court's Order and advising potential claimants of the need to register their claims with the Fund by March 25, 1991. To register -- and hence preserve -- a claim, the claimant need only provide at this time certain basic identifying information, a brief narrative description of the nature of the claim, and the amount of damages the claimant believes he or she

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sustained as a result of the Exxon Valdez spill. Claimants are advised that they will be notified of what additional information might be required. Claims can be registered in writing by returning the form included in the advertisement or sent to the claimant by the Fund, or by providing the same information in any other written format. The Fund has now established an "800" number to request a registration form or answer any questions and thereby facilitate claims registration.

In an effort to reach potential claimants who are residents of Alaska, the Fund initially placed the advertisement in the following newspapers: the Anchorage Times, the Anchorage Daily News, the Cordova Times, the Peninsula Clarion, the Valdez Vanguard, and the Kodiak Daily Mirror; the Fund then broadened the list (at the suggestion of the Alaska members of the Board of Trustees) now to include the Tundra Times, the Fairbanks Daily News Miner, the Juneau Empire and the Ketchikan Daily News. The advertisement is to run three times a week for one month (or as many times as the paper is published each week if fewer than three). (A copy of the form of the advertisement is Attachment A.) To further assure that the advertisement would be read by potential claimants, especially those who might now reside outside of Alaska, the Fund has taken steps to mail a notice and claim registration form to the last known address of the individuals and entities who have filed approximately 17,000 claims with Exxon. The Fund believes that, taken together, the

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above two steps constitute appropriate notice to those who would most likely wish to file a claim with the Fund. The Fund is, of course, prepared to provide additional forms of notice (in addition to that required by the Court's December 14 Order to be made by counsel for plaintiff classes) should the Court deem such notice to be necessary or desirable.

B. Claims Processing Capability

The Court's December 14 order clearly contemplates a de novo review by the Fund of every claim presented to it, regardless of whether that claim had previously been submitted to Exxon. In anticipation of that task, over the last several weeks the Fund has significantly increased the adjuster resources that will be devoted to the Exxon Valdez spill. As previously reported to the Court (in the Fund's October 9, 1990 Brief, at 5), the Fund, in April 1989 retained Hull and Cargo Surveyors, Inc. ("H&CSI"), a nationally known firm, to evaluate claims asserted against the Fund. In response to the Court's December 14 Order, the Fund directed H&CSI to increase its staff, which now totals 25 professionals and six administrative support staff. H&CSI has assured the Fund that it has committed to the task its most experienced senior professionals to make certain that the work can be completed as carefully and expeditiously as possible. H&CSI has moved into new, much larger space in Anchorage; its staff is now on-site, and it has commenced operation.

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C. Transition of Claims Handling From Exxon

Claimants ought not be required to submit to the Fund documentation previously submitted to Exxon in support of their claims. To avoid imposing this burden, the Fund met with Exxon for the purpose of effecting a smooth transition in claims handling responsibilities. As a result of those meetings, Exxon has undertaken to provide to the Fund all documentation previously submitted by claimants to Exxon.

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The following procedure will be used to assure that the Fund has adequate documentation to evaluate a claim: Once a claim has been registered with the Fund, H&CSI will review all documentation that has been submitted by the claimant to either Exxon or the Fund. A determination will then be made whether further documentation is needed. If so, the claimant will promptly be notified, and told specifically what further material will be required. It is hoped that through this process any burden on the claimant can be minimized.

D. Claims Intake

As of December 31, 1990, some 1,160 claims had been registered with the Fund. H&CSI has begun the process of reviewing those claims. In addition, the Fund is in the process

of designing claim forms, particularized for each category of claims, that will be sent to each claimant.

II. THE TASK THAT LIES AHEAD

Over 17,000 claims were submitted to Exxon. H&CSI understands that Exxon has made payment on over 12,000 of those claims in an aggregate amount of over $245 million. In light of prior payments and other considerations, it is uncertain how many claimants will choose to pursue their claims against the Fund. The number of claims that will have to be reviewed is, however, expected to be substantial.

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But the number of claims does not tell the whole story. At its core, each of the categories of claims presents issues that require the exercise of highly specialized expert judgments. We briefly catalogue the broad categories of claims that are likely to be presented to the Fund and the types of expertise and analysis each requires.

A. Fishing claims. Claims have been made to Exxon (and have already been made to the Fund) by commercial fishermen, fishing crew, and spotter pilots. The overwhelming majority of these claims arise from five different (and individually distinct) fishing areas in Alaska -- Prince William Sound, Upper Cook Inlet, Lower Cook Inlet, Chignik, and Kodiak. While the principal stock

affected was salmon, some of the affected fisheries included herring and other varieties of fish. We are advised that 3,291 fishermen, 5,574 crew members, and 154 spotter pilots have filed claims with Exxon. Exxon paid money to the vast majority of fishing claimants; few if any releases were obtained.

The evaluation of the various fishing claims involves both a careful review of each claim file and a resolution of a number of complex issues of marine biology, fish measurement devices, and economics. In essence, the claims asserted cannot fairly be valued without making certain essential judgments about the number of fish that were available to be caught (and hence lost as a result of the spill) and the price at which those fish could have been sold. These expert judgments must be formed for each impacted species in each of the impacted fisheries.

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B. Processors, canneries, and related claims. The Fund can also expect to receive claims from processors, canneries, and claims related to cannery or processor operations -- such as fish tender claims and cannery worker claims. Each cannery and processor claim is in itself an individualized business-interruption case. In addition to the expert judgments required to quantify the supply of fish lost to the processor or cannery, and the price at which those fish could have been sold, each claim raises complicated accounting judgments relating to the efficiency and profitability of the enterprise.

We are advised that 162 processors and canneries filed claims with Exxon. Exxon has made payment on 73 of those claims; partial releases were obtained from 61. In addition, we are advised that Exxon received claims from 6,326 cannery workers. Exxon made payment on 4,529 of those claims, and obtained partial releases from 4,418. Finally, we are advised that 378 fish tenders submitted claims to Exxon. Exxon made payments on 202 of these claims, and obtained 158 partial releases.[1/]

C. Other businesses. It is likely that the Fund will receive claims from businesses other than processors, canneries, and tenders. Apart from the legal question whether such claims are cognizable under TAPAA, each of these claims -- like the processor claims -- presents individual, and in some case quite complex, business-interruption cases. Each claim calls for the application of accounting judgments and, in some cases, judgments of individuals with expertise in the impacted industry.

D. Miscellaneous. In addition to the above, a variety of miscellaneous claims have been filed with Exxon. Among these are claims of property owners which, if pursued against the Fund, would require individual appraisals of each impacted property.

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1/ The Fund has not yet determined whether the terms of these releases executed by processors, canneries, tenders, and cannery workers would bar the assertion of part or all of a claim against the Fund.

E. Governmental claims. As the Court recognized in its December 14 Order, the filing of a claim by the United States Government would have a substantial impact on the manner in which the Fund discharges its responsibilities to injured claimants (as indeed would filing of a claim by the State of Alaska). Not only could such claims materially dilute the funds available to be distributed to individual claimants, but also the need to value the governmental claims would likely prolong the process. Among the most complex of the claims that could be presented to the Fund (subject to a determination whether such a claim is compensable under TAPAA) would be natural resource damage claims. Experience with such claims has shown that the evaluative questions presented are exceedingly complex and time-consuming.

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III. OVERVIEW OF THE FUND'S PROPOSED CLAIMS-APPRAISAL PROCESS

The Fund believes that the ultimate utility of the Fund determinations will turn on the extent to which claimants, the defendants, and the Court perceive that the claims have been addressed fairly and that the judgments of the Fund are authoritatively based. We believe, therefore, that the Fund should conduct its work in a manner that will command the greatest possible acceptance of the Fund's decision. To enhance the chances of such acceptance while completing the task expeditiously, the Fund believes that it should adopt the following procedural steps.

A. Selection of a Neutral Claims Judge

In contemplating how to implement the Court's ruling, the Fund Board sought to resolve an inherent tension posed by TAPAA and its implementing regulations. On the one hand, the Fund Trustees have a fiduciary responsibility to assure that the decisions of the Fund are lawful under TAPAA and its implementing regulations. On the other hand, the Fund Trustees are subject to the Fund's conflict of interest regulations. As the Court is aware, those regulations (43 C.F.R. § 29.3(b)(2)) provide that

> Where any activity of the Fund creates a conflict of interest, or the appearance of a conflict of interest, on the part of any member of the Board of Trustees, the member involved shall excuse himself or herself from any consideration of such activity by the Board of Trustees.

In the normal case -- where a potential conflict might exist with regard to an oil company responsible for a spill -- the Trustee representative involved would recuse himself, leaving the rest of the Board free to discharge its responsibility to administer TAPAA by making the individual claims decision. But, in the Exxon Valdez situation, seven of the Fund Trustees are officers or employees of pipeline right-of-way holders (or their parent corporations), which, along with Alyeska Pipeline Service Company, are defendants in court actions. Another Trustee, as a Deputy Assistant Secretary of the Department of the Interior, is an officer of the United States, a potential claimant.

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Although all Fund Trustees are confident that they could fairly and impartially decide claims notwithstanding these affiliations, the Board also recognizes that arguments can be made -- and, in briefs to this Court following the Court's September 13 oral comments, were made -- that there is an appearance of a conflict of interest. Given the concerns raised by claimants and given the Fund's belief that its claims-resolution process can be of most benefit if claimants perceive the process to be fair and impartial, the Board believes that measures should be taken to meet the claimants' concerns. To that end, the Fund proposes to proceed in a manner that removes the Board from a decision-making role with regard to individual claims, while reserving to the Board the authority -- that it must retain -- to assure that ultra vires acts are avoided.

For these reasons, the Fund Board believes that it should delegate its claims responsibilities to a neutral unaffiliated Claims Judge of demonstrable and unquestioned integrity and ability. (As the Court will recall, the Fund's October 9, 1990 brief (at 23-24 & n.29) proposed this as a possible course of action, and set forth the authority by which the Fund is empowered to take this course.) The Claims Judge will have broad powers generally to oversee and control the claims-adjustment process and to allow or deny claims. The Fund expects that the Claims Judge would coordinate the work of Fund experts, adjusters, and counsel in resolving the factual and legal issues

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raised by the claims; the Claims Judge would see to it that claims filed with the Fund were decided in accordance with the opinions of qualified experts and correct legal principles. The Board would reserve to itself only the right to assure that the acts of the Claims Judge are within the statutory powers conferred on the Board by TAPAA and the regulations. In the unlikely event that the Board were to conclude that some action by the Claims Judge went beyond the statute, it would set forth its reasoning in writing, and make that writing available to the Court, the claimants, and defendants.

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The Fund has discussed the Claims Judge role with several distinguished individuals and hopes to be able to retain a Claims Judge within the next 10 days. Under these circumstances, and given the substantial work already done by personnel retained by the Fund, the proposed delegation to a Claims Judge should not delay the completion of the Fund's claims-adjustment effort. Absent any indication from the Court that the Fund Board may not or should not delegate authority in the way here described, the Fund Board would proceed accordingly.

B. Opportunity for Early Submissions by the Parties of their Views on Procedural and Substantive Issues

The Fund believes that the parties to the litigation are likely by now to have developed positions about some of the key issues that underlie particular categories of claims (set out in

Part II supra). To the extent that the parties have developed expert opinion on substantive issues of fact, or views about methodology, or positions as to issues of law, the Fund wants to hear those early in its claims-appraisal work.[2/] Likewise, if the parties have views concerning the appropriateness of the procedures outlined below, the Fund is interested in those. Any comments should be forwarded to undersigned Fund counsel.

C. Retention of and Reliance on Qualified Experts

As outlined above, the Fund anticipates that the evaluation of claims will require the judgments of experts in various disciplines relevant to particular claim categories. To command the greatest possible acceptance by both the claimants and the Court, these judgments should be based on advice from well-regarded experts in the various disciplines involved after such experts have had an adequate opportunity to study the underlying facts.

The Fund is considering two approaches to the retention of experts. First, where an expert of the requisite stature and ability is available (not previously retained by the litigants), and has the time necessary for the task, the Fund would retain

---

2/ Indeed, the Fund has already been contacted by counsel for one group of plaintiffs for such purpose and is in the process of scheduling a meeting with them.

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such an expert. We have already had discussions with a number of such experts who indicate that they are available and willing to serve. Second, where the best-qualified experts in a particular discipline have already been retained by the parties, the Fund might pursue a different approach. It could, with the consent of the affected parties, retain two experts (one affiliated with plaintiffs, one with defendants), with instructions to these two experts to attempt to resolve any differences they may have. If that proves impossible, the Claims Judge could then decide how the differences can most appropriately be resolved.

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D. Opportunity for Claimants To Be Heard

The Fund expects to follow procedures designed to achieve expedition and fair results:

1. Shortly after a claim is registered, the Fund will itemize for the claimant any additional information and documentation that the Fund needs to evaluate the claim. As noted, the Fund has access to Exxon files and would not expect to need materials previously furnished to Exxon. In addition, the Fund will, of course, make the required submission as simple as circumstances permit and will keep required documentation to a minimum. And the Fund will request claimants to submit any other information the claimant believes to be pertinent. Finally, the Fund hopes that, time permitting, Fund representatives would be

available to meet with a claimant at a mutually agreed on date and time should the claimant so request.

2. The Fund expects to assemble the cadre of experts necessary for the job promptly, to instruct them to work quickly, and to have its adjusters apply their conclusions to specific claims as soon as it is possible to do so, and on a "rolling" basis.

3. Once a claim evaluation is made, the Fund expects to provide each claimant with its determination accompanied by a brief statement of reasons explaining the factors that resulted in its evaluation of his or her claim.

4. The Fund will invite submission from any claimant as to why the Fund's evaluation is in error. In addition to the opportunity for written submission, the Fund intends to afford to any such claimant the right to be heard orally (by telephone or, time and logistics permitting, in person).

5. The Fund will advise any claimant who continues to be aggrieved of his/her right to appeal.

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IV. FUND REQUESTS FOR ASSISTANCE

Pursuant to note 4 (p. 5) of the Court's December 14 Order, the Fund seeks assistance from the Court on a number of matters.[3/]

1. It is imperative that by March 25, 1991 the Fund knows (a) the identity of all claimants, (b) the nature of the claims asserted, and (c) the total amount of damages each claimant seeks from the Fund as a result of the Exxon Valdez spill. The Fund simply cannot hope to complete its work within a reasonable time frame unless the number and identity of the claimants, the nature of the claims, and the aggregate dollar value of the claims are all fixed as of March 25, 1991. To assure that these ground rules are understood, the Fund requests the Court to rule (a) that, in order to have a claim considered by the Fund, a claimant must register his or her claim in writing with the Fund on or before March 25, 1991 (postmarked on or before that date if filed by mail), and that, to be effective, such registration must identify the nature of the claim and the amount of damages sought as a result of the spill; and (b) that no amendments making new claims or increasing the amounts of damages demanded may be made

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3/ The Fund expects in future monthly reports to the Court to present to the Court its views on some of the critical legal issues.

subsequent to March 25, 1991. (A proposed form of order is Attachment B ¶1.)[4/]

2. Previous experience has shown that one of the sources of delay in the completion of a claim-evaluation is obtaining needed information from the claimant. The Fund further believes that the legitimacy of its claims evaluation program would be greatly enhanced if claimants were free to raise questions and discuss their concerns directly with the Fund. For these reasons, the Fund requests the Court to confirm that, where a claimant initiates a communication with the Fund, the Fund and its agents may communicate directly with such claimant (in person, by telephone, or in writing), and need not ascertain whether the claimant initiating such communication with the Fund is represented by counsel. In addition, the Fund believes that its information-gathering process would be greatly facilitated if the Fund could initiate requests for information directly with a claimant, even where represented by counsel. The Fund believes that such direct access is precisely what TAPAA and the regulations contemplate.[5/] At the same time, there may be ethical constraints on such communications when initiated by the

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[4/] The Fund does not believe that the pendency of class action allegations in court litigation would operate to toll the two-year limitations period imposed by the TAPAA regulations for the filing of claims for administrative claims disposition.

[5/] Where a claimant is represented by counsel and such representation is known to the Fund, the Fund would expect to copy counsel on correspondence with claimants.

Fund. To resolve this issue, the court may want to invite claimants' counsel to waive any objection to such communication.[6/]

3. The fact that the Fund will be seeking information from the parties involved in ongoing litigation poses certain practical problems that could, if not resolved, deprive the Fund of valuable sources of information. First, as discussed above, resolution of the claims will in many instances require the exercise of expert judgments. The Fund's claims evaluation would undoubtedly be expedited if the parties felt free to share with the Fund and its experts their respective views about the expert questions presented. Moreover, there may be instances where the Fund concludes that expert questions can be best addressed by experts already affiliated by the parties. But the parties may well be reluctant to share with the Fund the work of their experts lest that disclosure waive whatever discovery protections might otherwise attach to that work.

Second, the parties may well have developed other material or data that might be entitled to "work product" protection; sound litigation tactics might counsel the parties to withhold this information from the Fund, in the absence of an

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6/ Because the Fund is not sure how the Court may wish to go about this, it has not included a provision on the point in the attached proposed order.

assurance that the confidentiality of the information would be preserved. Finally, the parties might have in their possession confidential or proprietary information that is most appropriately produced in response to compulsory process and subject to protective order.

To accommodate these kinds of concerns and to assure that the Fund have available to it the fullest amount of information possible, the Fund requests that the Court enter an order establishing the following ground rules for the submission of information to the Fund: All parties are entitled to submit documents, information, or any other materials relevant to the claims ("Claims Materials") to the Fund as though production of such information was compelled by compulsory process. All Claims Materials submitted to the Fund will be used by the Fund solely for the purpose of evaluating claims submitted and in the defense of any appeals of Fund decisions by aggrieved parties. Apart from those uses, the submission of Claims Materials to the Fund shall not waive any privileges or protection that might otherwise attach to them. (A proposed order is Attachment B ¶2).

Conclusion

The Fund has devoted, and will devote, all of the resources at its command to the expeditious completion of the claims-adjustment effort pursuant to the Court's December 14

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Order. As noted, the Fund invites any party to submit comments or views about any procedural or substantive aspect of the Fund's claims adjustment.

Respectfully submitted,

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Attorneys for The
Trans-Alaska Pipeline
Liability Fund

January 3, 1991

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NOTICE TO PERSONS INJURED BY THE EXXON VALDEZ OIL SPILL

Pursuant to the December 14, 1990 Order of the United States District Court for the District of Alaska, the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. Section 1653 (c) ("TAPAA") and its implementing regulations (43 C.F.R. Part 29), all persons with claims for economic loss sustained from the Exxon Valdez oil spill should promptly contact the Trans-Alaska Pipeline Liability Fund (the "Fund") if they wish to file a claim with the Fund. Claimants may contact the Fund either in person or in writing at 510 "L" Street, Suite 404, Anchorage, AK 99501, or by telephone at (907) 276-5375 or inside Alaska (800) 478-4855, outside Alaska (800) 659-4595.

UNDER THE REGULATIONS AND THE COURT'S ORDER, CLAIMS MUST BE FILED WITHIN TWO YEARS OF THE DATE OF DISCOVERY OF DAMAGES CAUSED BY AN INCIDENT OR OF THE DATE OF THE INCIDENT CAUSING THE DAMAGE, WHICHEVER IS EARLIER. THUS, TO BE VALIDLY ASSERTED, CLAIMS MUST BE FILED WITH THE FUND BY MARCH 25, 1991.

Persons who contact the Fund should provide their name, business name if any, address (and business address), telephone number (and business phone), social security number (or tax ID number), an identification of the business or property that is the subject of the claim, the amount of the claim, and a brief description of how the damage was sustained (Claimants who previously filed claims with Exxon Shipping Company ("ESC") should so advise the Fund). For convenience, a claim registration form is reprinted at the bottom of this notice. On receipt of this information, the Fund will promptly advise claimants what further information will be necessary to permit the Fund to evaluate the claim fully.

Trans-Alaska Pipeline Liability Fund
Claim Registration Form

Name: _____

Address: _____ Suite/Floor: _____

City: _____ State: _____ Zip: _____

Work Phone: ( ) _____ Home Phone: ( ) _____

Fed. Tax ID #: _____ SSN: _____

Have you filed a claim with Exxon? ☐ Yes ☐ No

Description of your claim:

_____

_____

_____

_____

_____

_____

Amount Claimed: _____

Signature: _____ Date: _____

Please mail this form to: Trans-Alaska Pipeline Liability Fund
510 L Street, Suite 404
Anchorage, AK 99501

(For Office Use Only) File Number:

ATTACHMENT "A"

N. Robert Stoll
Richard H. Braun
Stoll, Stoll, Berne & Lokting
209 S.W. Oak Street, Suite 500
Portland, Oregon 97024
503-227-1601

Matthew D. Jamin
Jamin, Ebell, Bolger & Gentry
323 Carolyn Street
Kodiak, Alaska 99615
907-486-6024

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

A89-095
In Re Case No. ~~A89-103~~ Civil

P-22 STIPULATION AND ORDER FOR SUBSTITUTION OF COUNSEL

The law firms of Stoll, Stoll Berne & Lokting and Jamin, Ebell, Bolger & Gentry hereby substitute as counsel for plaintiff Steven T. Olsen (P-22) in the place and stead of the law offices of John C. Pharr, which respectfully requests leave to withdraw as counsel for the aforementioned plaintiff. This stipulation is submitted pursuant to Local District Court Rule 3F(3).

Counsel are requested to amend their service list accordingly.

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BOLGER & GENTRY
323 CAROLYN STREET
KODIAK, AK 99615
(907) 486-6024

1127

STOLL, STOLL, BERNE & LOKTING

DATED: 12/24/90

JAMIN, EBELL, BOLGER & GENTRY

By _____
Matthew D. Jamin

DATED: 12/18/90

LAW OFFICES OF JOHN C. PHARR

By _____
John C. Pharr

FILED
JAN 8 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
by _____ Deputy

ORDER

Based upon the foregoing stipulation, IT IS SO ORDERED.

DATED: 1/7/91

_____
Honorable H. Russel Holland
U.S. District Court Judge

cc: L. Miller
D. Serdahely
D. Ruskin

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Charles P. Flynn
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

ALL DEFENDANTS' MOTION FOR LEAVE TO FILE RESPONSE TO "PLAINTIFFS' SUBMISSION REGARDING PROPOSED ISSUANCE OF NOTICES"

All Defendants move for leave to file the attached alternative "Notice" and memorandum regarding "Plaintiffs'

1128

Submission Regarding Proposed Issuance of Notices" dated January 2, 1991. This motion is supported by the accompanying memorandum.

Dated at Anchorage, Alaska on this 4th day of January, 1991.

BOGLE & GATES

By _____
Douglas J. Serdahely
Liaison Counsel for Defendants
and Co-Member of Defendants'
Coordinating Committee

BURR, PEASE & KURTZ

By _____
Charles P. Flynn
Co-Member of Defendants'
Coordinating Committee

ORDER

IT IS SO ORDERED.

Dated: January 4, 1991

The Honorable H. Russel Holland
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

MEMORANDUM IN SUPPORT OF ALL DEFENDANTS' MOTION FOR LEAVE TO FILE RESPONSE TO "PLAINTIFFS' SUBMISSION REGARDING PROPOSED ISSUANCE OF NOTICES"

Pursuant to this Court's Order of December 14, 1990 (Order No. 35), counsel for the various purported classes filed on January 2, 1991 a proposed "Notice" to potential TAPAA claimants. In defendants' view, plaintiffs' "Notice" was neither a fair nor objective Notice, as requested by the Court.

Accordingly, defendants seek herein the Court's permission to file an alternative "Notice" which in defendants' view is objective and fair and which complies with the intent of Order No. 35. Defendants' alternative proposed Notice is attached hereto as Exhibit A.

Respectfully submitted at Anchorage, Alaska on this 4th day of January, 1991.

BOGLE & GATES

By _____
Douglas J. Serdahely
Liaison Counsel for Defendants
and Co-Member of Defendants'
Coordinating Committee

BURR, PEASE & KURTZ

By _____
Charles P. Flynn
Co-Member of Defendants'
Coordinating Committee

GLE & GATES
600
West 4th Avenue
orage, AK 99501
276 4557

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

NOTICE

TO: ALL PERSONS WHO MAY HAVE BEEN INJURED BY THE EXXON VALDEZ OIL SPILL OF MARCH 24, 1989 INCLUDING AMONG OTHERS, CERTAIN ALASKA NATIVES AND NATIVE ORGANIZATIONS, RURAL SUBSISTENCE USERS, PERSONS ENGAGED IN COMMERCIAL FISHING AND RELATED ACTIVITIES, PERSONS CONDUCTING BUSINESS IN AREAS AFFECTED BY THE SPILL, PERSONS WHO CUSTOMARILY USE AND ENJOY NATURAL RESOURCES IN THE AREAS AFFECTED, OWNERS OF REAL PROPERTY IN THE AREAS AFFECTED, AND ALL CITIES AND OTHER GOVERNMENTAL ENTITIES EXISTING UNDER THE AUTHORITY OF THE LAWS OF ALASKA

This Notice is provided to you by order of the United States District Court for the District of Alaska. It is not intended to provide legal advice to anyone. If you have any

questions regarding this Notice, you may want to consult a lawyer. Please do not direct questions to the Court or to the Clerk of Court, as they cannot provide legal advice to you.

If you believe you were damaged as a result of the Exxon Valdez oil spill, please read this Notice carefully, as it reports certain actions of the United States District Court which could significantly affect your rights.

OVERVIEW OF THE FEDERAL COURT ACTIONS

On March 24, 1989, the tanker Exxon Valdez ran aground on Bligh Reef in Prince William Sound and spilled approximately 11 million gallons of crude oil into Prince William Sound (the "Oil Spill"). In response to the Oil Spill, numerous lawsuits were brought in the United States District Court for the District of Alaska (the "Federal Court"). The Federal Court actions have been consolidated before United States District Court Judge H. Russel Holland.

Plaintiffs in a number of lawsuits ("class action plaintiffs"), requested Court authorization to prosecute their cases as class actions on behalf of the following classes: Alaska Native Class (and an ANILCA subclass), Commercial Fishing Class,

Area Business Class, Use and Enjoyment Class, Property Owner Class, and Municipal Government Class. The definitions of these classes are set forth in papers filed with the Federal Court.

A class action is a lawsuit brought by some individuals on behalf of themselves and others who suffered injuries from the same event. If a lawsuit is permitted by a court to proceed as a class action, it is not necessary for class members to pursue their claims individually.

Defendants include Exxon Corporation, two of its subsidiary corporations (the "Exxon defendants"); Alyeska Pipeline Service Company and its oil company owners (the "Alyeska defendants"); George M. Nelson; Joseph Hazelwood; Gregory Cousins; and the Trans-Alaska Pipeline Liability Fund ("TAP Fund").

Claims Made and Relief Sought

Plaintiffs in the Federal Court class actions claim that the Oil Spill caused damage to fishing and related industries, other businesses and property, area cities and boroughs, wildlife and natural resources, the subsistence way of life and the economy and ecology of the area generally. Furthermore, plaintiffs claim that these damages resulted from alleged wrongdoing by the Exxon defendants and the Alyeska defendants.

The Federal Court class actions include claims for strict liability against the TAP Fund established under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. § 1653(c)) ("TAPAA").

In TAPAA, Congress established strict liability to the extent of $100 million for all damages suffered by anyone as a result of a spill of oil that has been transported through the Trans-Alaska Pipeline System ("TAPS oil"). The vessel owner and operator are jointly and severally liable for the first $14 million in damages. The TAP Fund is liable for the remaining $86 million. The Secretary of the Interior has prescribed regulations establishing an administrative process for injured persons to utilize in making claims against the $100 million. If the total claims exceed $100 million, TAPAA provides that all claims will be proportionally reduced. Injured parties can pursue any unpaid portion of a TAPAA claim in state or federal court under applicable state or federal law, other than TAPAA.

COURT ORDERS THAT MAY AFFECT YOUR RIGHTS

The Federal Court recently issued orders that may affect your right to recover damages resulting from the Oil Spill, as follows:

The Federal Court ruled that TAPAA creates an administrative remedy that was intended by Congress to quickly and efficiently compensate those damaged by a spill of TAPS oil. The Federal Court ruled that this remedy should be exhausted before injured parties can pursue litigation.

The Federal Court ruled that the Federal Court cases should not proceed as class actions because individual issues of damages predominate over any common issues, and because a class action is not a superior method of handling the controversy. However, whether the cases should proceed as class actions may be reconsidered after all TAPAA claims have been adjusted by the TAP Fund.

The Federal Court has not yet reached a final decision, but has indicated that it may rule in the future that persons who fail to timely file a TAPAA claim are barred from filing or prosecuting claims in Court against the TAP Fund and against other defendants, or that other adverse consequences may follow.

The Federal Court ruled that all persons who intend to file a TAPAA claim should do so before March 23, 1991 or be forever barred from filing such a claim.

The Federal Court ruled that the Federal Court actions may not proceed against the TAP Fund until further order of the Court after the TAP Fund makes a determination with respect to all Oil Spill claims filed with it. The Federal Court actions will continue against the other defendants.

Given these rulings of the Federal Court, persons or entities injured by the Oil Spill should timely file a TAPAA claim if they mean to do so. YOU MAY BE BARRED FROM OBTAINING COMPENSATION FOR ANY INJURY YOU SUFFERED AS A RESULT OF THE OIL SPILL IF YOU DO NOT FILE A TAPAA CLAIM BY MARCH 23, 1991.

EXAMINATION OF PLEADINGS AND PAPERS

The foregoing references to the classes sought, claims made, and motions and orders filed are only summaries of the pertinent documents. Copies of the pleadings and all other papers filed in connection with the Federal Court proceedings described above are available for inspection through the Clerk of the Court, United States Courthouse, 222 West 7th Avenue, Room 261, Anchorage, Alaska 99513-7564, during regular business hours.

Dated at Anchorage, Alaska this _____ day of _____, 1991.

BY ORDER OF THE COURT:

Clerk of the Court
United States District Court
District of Alaska

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

ORDER NO. 37

Appeal of Discovery Master's Order of
December 15, 1990, Compelling Depositions

Defendants Exxon Shipping Company (D-2) and Exxon Corporation (D-1) filed a motion for expedited consideration of their appeal of the discovery master's order of December 15, 1990, compelling depositions of certain current and former Exxon Shipping Company employees. The depositions are scheduled to begin

January 7, 1991. Defendants' motion for expedited consideration is granted.

The issue defendants raise on appeal is whether it was error to order depositions in the civil case which might undermine the integrity of the related criminal trial, United States v. Exxon Corporation and Exxon Shipping Company (No. A90-015 CR), because that discovery might: (1) give rise to prejudicial publicity that will make choice of a fair and impartial jury extremely difficult; and (2) provide the prosecution access to evidence that is not properly available to it under Federal Rule of Criminal Procedure 16(b). This court concludes that there was no error.

There has been sufficient pre-trial publicity from the grounding of the Exxon Valdez, in general, and from the criminal trial of Joseph Hazelwood, in particular, that whatever publicity is generated from these depositions will have a relatively insignificant impact on the task of selecting a fair and impartial jury. Furthermore, the court is not convinced that deposing these non-managerial crew members poses any risk of revealing unauthorized evidence to the prosecution. Crew member evidence is ground already covered by the prosecution in Hazelwood's criminal trial.

It would assist this court in the appeal process if future rulings made by the discovery master specified the findings of fact or conclusions of law, and supporting authority or reasoning, that the discovery master relied upon in making his decision.

The discovery master's order of December 15, 1990, compelling depositions is affirmed.

DATED at Anchorage, Alaska, this 9 day of January, 1991.

United States District Judge

cc: D. Serdahely
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D. Ruskin

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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

This Document Relates To Case Nos. A89-095; A89-135; A89-136; A89-139; A89-238; A89-265

P24-28; P40-41; P43-44; P46-55; P65-67; P74-76; P78-79; P80; P95; P118-138; P139-144; P146-147; P167; P189; P195-96; P279

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs listed in the attached Appendix hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Court's order of December 14, 1990, pursuant to 28 U.S.C. § 1291.

DATED this 8th day of January, 1991.

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APPENDIX

The following persons and entities are the Appellants herein:

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John Herschlab
Kent Herschleb
Dave Horne
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Tony Lee
Alaska Sport Fishing Association
Joseph Klouda
Bill Simmons
Allen Tigert
Zenas Edward Zeine
Old Harbor Native Corporation
Timberline, Inc.
Kodiak Island Borough