David W. Oesting
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re All Cases

STIPULATION

IT IS HEREBY STIPULATED between all defendants, through their coordinating committee, and all plaintiffs, through their lead counsel, as follows:

Class Plaintiffs' reply memoranda in support of the motions for class certification may be deemed served and filed on March 26, 1990 if on that date class plaintiffs place the same in the custody of an overnight courier service for delivery the next day.

DATE: March 21, 1990

DAVIS WRIGHT TREMAINE
Attorneys for Plaintiffs
(P-65 through P-67)

By _____
DAVID W. OESTING
for Lead Counsel for Plaintiffs

859

the seal of said court this

DATE: March 21, 1990

BURR, PEASE & KURTZ
Attorneys for Defendants (D-3, D-9, D-11, D-12, D-14, D-19 through D-21)

By _____
CHARLES P. FLYNN
Co-Member, Defendants' Coordinating Committee

DATE: March 21, 1990

BOGLE & GATES
Attorneys for Exxon Defendants (D-2 and D-6)

By Douglas Serdahely (By R.M. C.)
DOUGLAS J. SERDAHELY
Co-member, Defendants' Coordinating Committee

* * *

IT IS SO ORDERED.

DATE: 3/26/90 nunc pro tunc

H. RUSSEL HOLLAND
UNITED STATES DISTRICT JUDGE

cc: D. Serdahely
D. Ruskin
L. Miller

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re:	
the EXXON VALDEZ	No. A89-095 Civil

RE: A89-095, A89-135, A89-136, A89-139
A89-144, A89-238, AND A89-239

CLASS PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80 P95-P96, P112-P113, P116, P118, P120, P122, P124, P126 P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-P247, AND P267)
MOTION TO PERMIT FILING OF DOCUMENTARY EVIDENCE WITH REPLY BRIEF

COME NOW the above plaintiffs and request that they be permitted to file documentary evidence, including portions of deposition testimony, affidavits, and other materials with their Reply Brief on the class certification issues. This motion is supported by the attached memorandum in support.

Dated this 26th day of March, 1990, at Kodiak, Alaska.

JAMIN, EBELL, BOLGER & GENTRY

By: _____
Matthew D. Jamin

mot

863

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re: the EXXON VALDEZ	No. A89-095 Civil

RE: A89-095, A89-135, A89-136, A89-139
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CLASS PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80 P95-P96, P112-P113, P116, P118, P120, P122, P124, P126 P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-P247, AND P267)
MEMORANDUM IN SUPPORT OF
MOTION TO PERMIT FILING OF DOCUMENTARY EVIDENCE WITH REPLY BRIEF

Because Local General Rule 5 (B) (3) does not specifically authorize the filing of documentary evidence and affidavits with a reply brief, as do Local General Rule 5(B)(1)(a) and 5(B)(2)(a) for original and opposition briefs respectively, those plaintiffs who are signatories to the Reply Brief filed in support of Class Certification have filed a motion requesting that they be permitted to file documentary evidence, including portions of deposition testimony, affidavits, and other materials with their reply brief. The motion should be granted to permit plaintiffs to present their version of the materials from the

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class certification discovery process to the court, and to answer some of the positions espoused by defendants and others opposing class certification.

Plaintiffs filed their motions for class certification on September 22, 1989. It was not then apparent whether there would be any opposition to classes, and if there was, what positions in opposition would be espoused. Subsequent to those filings, defendants asked to engage in substantial discovery, and pursuant to agreed upon procedures, served interrogatories, and requests for production on each of the class representatives. Depositions followed from January 5 through February 9, 1990.

Defendants and others filed opposition memoranda to the September 22, 1989 motions on February 23, 1990, and attached extensive references to depositions, affidavits, and other materials. Plaintiffs seek through this motion to file responsive materials to those documents; they include deposition references, affidavits and other materials.

Plaintiffs' motion should be granted so that the court can have before it the materials necessary to make an informed judgment on the important issues presented through the motions.

Respectfully submitted this 26th day of March, 1989, at Kodiak, Alaska.

JAMIN, EBELL, BOLGER & GENTRY

By: _____
Matthew D. Jamin

memo

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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 CLASS ACTIONS	

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

KIM LAMOUREUX, being first duly sworn, upon oath, deposes and says that she is employed in the offices of Davis Wright Tremaine, 550 West 7th Avenue, Suite 1450, Anchorage, Alaska 99501 and that service of:

MOTION TO PERMIT FILING OF DOCUMENTARY EVIDENCE WITH REPLY BRIEF, MEMORANDUM IN SUPPORT OF MOTION TO PERMIT FILING OF DOCUMENTARY EVIDENCE WITH REPLY BRIEF, ORDER PERMITTING FILING OF DOCUMENTARY EVIDENCE WITH REPLY BRIEF

has been made upon all counsel of record based upon the Court's Master Service List of February 23, 1990, postage prepaid on this 26th day of March, 1990.

Kim Lamoureux
KIM LAMOUREUX

SUBSCRIBED AND SWORN TO before me this 26th day of March, 1990.

Linda Munro
Notary Public in and for Alaska
My Commission Expires: 4/22/98

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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 CLASS ACTIONS	

INDEX TO AFFIDAVITS

10. Affidavit of Linden O'Toole

11. Affidavit of Dan Ogg

12. Affidavit of Geoffrey Y. Parker

13. Affidavit of Thea Thomas

14. Affidavit of Fred Torisi

15. Affidavit of Bob Van Brocklin

16. Affidavit of Philip R. Volland

17. Affidavit of John Young

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re: Case Numbers A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, and A89-446

PLAINTIFF NATIVE CORPORATIONS' (P-81 through P-94) MEMORANDUM IN OPPOSITION TO MOTION BY DEFENDANTS D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21 FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Chugach Alaska Corporation and the Native village corporations of Chenega, Eyak, Tatitlek, Port Graham and English Bay are Native Corporations incorporated pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et. seq. ("ANCSA"). Plaintiffs are hereafter referred to as the "Native Corporations". Collectively, the Native Corporations hold title to the surface and/or subsurface estates of approximately 1,000,000 acres of land, including lands in and around Prince William Sound directly impacted by the EXXON VALDEZ oil spill.

As alleged in the Native Corporations' Amended Complaint, the Native Corporations assert claims for damage to their landholdings and the resources appurtenant thereto and therein as well as other economic losses proximately caused by the EXXON VALDEZ oil spill. For example, Chugach Alaska Fisheries, Inc., is

the largest seafood processor in Prince William Sound. In 1988 its revenues from product sales of its fisheries operation exceeded $44,000,000.

Alyeska's brief in support of its Motion for Judgment on the Pleadings acknowledges that the Native Corporations claims are outside the scope of the motion and any alleged applicability of Robins Drydock & Repair Co. v. Flint. 275 U.S. 303 (1927), presumably because Alyeska cannot seriously contend that the Native Corporations' claims for impact to their lands and the resources located thereto do not arise directly from the physical impact of the oil. In fact, the Native Corporations' actions themselves are not targeted in the motion or even mentioned in the brief.

Notwithstanding, to the extent that any of the arguments set forth in Alyeska's memorandum in support of its motion could be construed to apply to the claims of the Native Corporations, the Native Corporations specifically join in the Joint Memorandum for Plaintiffs in Opposition to the Alyeska Defendants Motion for Judgment on the Pleadings filed herewith.

With respect to any specific claims asserted by the Native Corporations, for economic losses not directly related to the physical impact of the oil, as the brief of Alyeska itself concedes, disposition of those claims must await the development of a factual record and cannot be addressed at this stage of the proceedings. Moreover, as has been amply demonstrated in the Memorandum of Plaintiff Seafood Processors (P-170 through P-188) in opposition to the Alyeska motion, which the Native Corporations also specifically join in, the economic losses suffered by the

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Native Corporation's processing activities are properly assertable under Alaska's strict liability statute, AS 43.03.822 et. seq., Alaska common law as construed in Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987) and the general maritime law (if held to apply) as construed by the Ninth Circuit in Union Oil Company v. Oppen, 501 F.2d 558 (9th Cir. 1974).

CONCLUSION

For the above stated reasons, the Alyeska defendants' motion for judgment on the pleadings, to the extent it can be read to apply to any claims of the Native Corporations, should be denied in all respects.

Respectfully submitted this 26th day of March, 1990.

ATTORNEYS FOR PLAINTIFFS

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HENRY WILSON

HILL, BETTS & NASH

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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) **AFFIDAVIT OF SERVICE BY MAIL**

Re: All Cases

Linda J. Durr, an employee of Birch, Horton, Bittner & Cherot, 1127 West Seventh Avenue, Anchorage, Alaska, being duly sworn states that on March 26, 1990, service of Plaintiff Native Corporations' (P81 through P-94) Memorandum in Opposition to Motion by Defendants D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21 For Judgment on the Pleadings and Native Corporations' (P-81 through P-94) Memorandum Pursuant to Pre-Trial Order 23 Relating to Class Certification Issues has been made upon all counsel of record based upon the Court's most recent service list of March 19, 1990, by placing a true and correct copy of same into the U.S. Mail with proper postage thereon.

Dated: 3/26/90

By: Linda J. Durr
Linda J. Durr

Subscribed and sworn to before me this 26th day of March, 1990.

Judy A Tipton
Notary Public in and for Alaska
My Commission Expires: 12/5/92

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re: A-89-110; A89-099; A89-297; A89-109; A89-166; A89-102; A89-104; A89-265; A89-299; A89-111; A89-126; A89-129; A89-141; A89-096; A89-103; A89-107; A89-125; A89-108; A89-173; A89-095; A89-165; A89-135; A89-136; A89-139; A89-144; A89-238; A89-239; and A89-138

NATIVE CORPORATIONS' (P-81 through P-94)
MEMORANDUM PURSUANT TO PRE-TRIAL ORDER 23
RELATING TO CLASS CERTIFICATION ISSUES

Plaintiffs Chugach Alaska Corporation and the Village Corporations of Eyak, Tatitlek, Chenega, Port Graham and English Bay (the "Native Corporations") submit this memorandum pursuant to Federal Pre-Trial Order 23 to request that the Property Owners Class as proposed by the Class Action Plaintiffs be defined to exclude the Native Corporations because of their unique quasi-sovereign claims and because their claims are not appropriate for class treatment. Although the Native Corporations strongly support class certification generally and believe that it is appropriate for the remaining proposed class members, they respectfully submit that, because of the unique nature of their claims as Native Corporations, they should be excluded from the definition of the Property Owners Class.

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STATEMENT OF FACTS

Chugach Alaska Corporation is an Alaska Native regional corporation incorporated pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C.A. §1601 et seq. ("ANCSA"). The Village Corporations of Eyak, Tatitlek, Chenega, Port Graham and English Bay are Native village corporations created under ANCSA and are located within the Chugach Region. The Native Corporations collectively hold title to the surface and/or subsurface estates of approximately one million acres of land, including lands in and around Prince William Sound, and are, by far, the largest private landholders in the area directly impacted and damaged by the Exxon Valdez oil spill.

Native Corporations, including these Native Corporations, were created by Congress in the 1970's as part of the settlement of long-standing Native Alaskan land claims, a settlement which was spurred by the desire to build the Trans-Alaska Pipeline and the Terminal at the Port of Valdez. The Native Corporations' shareholders are an amalgam of primary Native peoples of the Prince William Sound area, including Eskimos, Indians and Aleuts, who have occupied the area for thousands of years. Through ANCSA, Congress created a special relationship between the Native Corporations and their shareholders. Primarily, ANCSA granted the Native Corporations title to over a million acres of land in the Prince William Sound area to enable the Corporations to protect the Native Alaskan subsistence lifestyle, to provide economic opportunities

for Native Alaskans and to provide Native Alaskans control over their future. See Senate Report 92-405 at 105.

Congress has taken extraordinary steps to ensure that the Native Corporations retain control over the land for the benefit of the Native Alaskans. Thus, unlike other private parties, the Native Corporations have unique rights and obligations with respect to the land held by them. Lands conveyed to the Corporations that are not commercially developed cannot be taxed for a period of twenty years, 43 U.S.C.A. §1620(d)(1); in addition, the lands cannot be subjected to certain liens or judgments, 43 U.S.C.A. §1621(a). The Native Corporations are also given significant tax advantages on the sale of any commercially developed land, 43 U.S.C.A. §1620(b), and preferential treatment for purposes of eminent domain, 16 U.S.C.A. §3192(b).

Under ANCSA, the Native Corporations are granted the following additional, unique rights and powers so that they may benefit their Native Alaskan shareholders socially and culturally, as well as economically: (1) originally shares were issued only to Native Alaskans as defined in ANCSA, only shares held by Native Alaskans have voting rights (43 U.S.C.A. §1606(g)) and the corporations' Boards of Directors must be entirely composed of Native Alaskans (43 U.S.C.A. §1606(f)); (2) a shareholder's stock escheats to the regional corporation if he or she fails to dispose of the stock by will or by intestacy (43 U.S.C.A. §1606(h)); (3) Native Corporations can transfer assets into a Settlement Trust in order to promote the health, education and welfare of their beneficiaries

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and preserve the heritage and culture of Native Alaskans (43 U.S.C.A. §1629(e)); and (4) pursuant to the 1987 Amendments to ANCSA, Native Corporations may make preferences in favor of Native Alaskans in hiring (43 U.S.C.A. §1627(g)).

The Native Corporations, unlike regular for-profit corporations, may engage in non-profit activities to assist their shareholders and have specific statutory authority to facilitate the exercise of Native Alaskan subsistence privileges. 43 U.S.C.A. §1629(e). They also have the obligation to protect Native Alaskan religious and historical sites. 43 U.S.C.A. §1613(h)(1).

As noted above, the lands owned by the Native Corporations were those most severely impacted by the Exxon Valdez oil spill. The cleanup further damaged the Native Corporations' land and destroyed many religious and historical sites. To fulfill their statutory obligations to their shareholders and redress their injuries, the Native Corporations have filed complaints in this Court seeking damages, not only for the devastation to their land resulting from the Exxon Valdez oil spill and the cleanup, but also for their resulting inability to preserve, protect and develop the resources entrusted to them on behalf and for the benefit of their shareholders.

Although class treatment may be appropriate for claims of ordinary private property owners generally, the unique nature of the Native Corporations' claims, like those of the State of Alaska, should be excluded from the definition of the Property Owners Class because of the Native Corporations' statutory rights and

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obligations with respect to their land. Moreover, the Native Corporations have sufficient initiative and resources to more than adequately prosecute their own claims. Class treatment for such claims is both inappropriate and unnecessary. The Native Corporationfs therefore submit this memorandum to request that the Court exclude them from the definition of the Property Owners Class.

ARGUMENT

THE NATIVE CORPORATIONS HAVE UNIQUE CLAIMS AND THUS SHOULD NOT BE INCLUDED IN THE PROPERTY OWNERS CLASS

As noted above, the Native Corporations strongly support the certification of the classes proposed by the Class Action Plaintiffs, including a Property Owners Class. The requirements of Alaska Rule of Civil Procedure 23 ("Rule 23") have clearly been satisfied with respect to the non-Native Corporation private property owners. However, the Property Owners Class should be defined to exclude the Native Corporations because they have unique claims which cannot be adequately represented by the class representatives. Moreover, because of their quasi-sovereign status, common issues do not predominate and the class action device is not a superior method of adjudicating their claims. The Court should therefore certify the Property Owners Class, but exclude the Native Corporations from the definition.

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A. The Native Corporations' Claims Are Not Typical of Ordinary Fee-Simple Property Owners and Therefore Should Not Be Included in Such Class.

As correctly noted in Class Action Plaintiffs' Memorandum in Support of Motion for Class Certification ("Class Memorandum"), a class representative must meet all of the requirements of Rule 23 (a)(1)-(4) to be entitled to class certification. Specifically, the Court must find that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

The Class Action Plaintiffs have amply demonstrated the fulfillment of these requirements for the vast numbers of fee-simple private property owners who were injured by the Exxon Valdez incident. See Class Memorandum at 27-39. However, the typicality and adequacy of representation requirements have not been met with respect to the claims of the Native Corporations, despite the fact that one of the proposed representatives of the Property Owners Class is a Native corporation. Old Harbor Native Corporation, one of the proposed representatives, is in the process of attempting to exchange the land it holds in the area affected by the oil spill for land in the Alaska National Wildlife Reserve. These peculiar circumstances make it impossible to expect that the Old Harbor Native Corporation will adequately represent the

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interests of the Native Corporations. Indeed, if its negotiations are successful, Old Harbor Native Corporation may not have standing to assert a claim at all.

Moreover, as alleged in their complaint, the Native Corporations herein are by far the largest group of private landowners in Prince William sound. In total, the Native Corporations own one million acres in the area impacted by the spill. Indeed, defendants have conceded that these Native corporations have "suffered by far the greatest oiling of Native landholdings." Defendants' Memorandum in Opposition to the Motion of Certain Plaintiffs for Class Certification at p. 65. Clearly, the substantial interests of these Native Corporations are not adequately represented by the proposed representative.[1]

Because of the important due process considerations involved, see Hansberry v. Lee, 311 U.S. 32 (1940), putative class members who possess special claims, such as the Native Corporations here, are properly excluded from the class. See, e.g., Forsberg v. Pacific Northwest Bell Telephone Co., 623 F. Supp. 117, 125 (D. Or. 1985) (court excluded individuals' claims of coercion from class where representative only alleged coercion of union; class limited to class members' claims of coercion of union), aff'd, 840 F.2d

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[1] Further, these deficiencies would not be resolved by the creation of a subclass with a proper representative. A subclass of the Native corporations would not satisfy the numerosity requirements of Rule 23(a)(1) because of the small number of Native corporations in the affected area.

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1409 (9th Cir. 1987); Beebe v. Pacific Realty Trust, 99 F.R.D. 60, 72 (D. Or. 1983) (court excluded certain shareholders from definition of class because class representatives' claims were not typical of the claims of the excluded shareholders, such as arbitrageurs); Ouellette v. International Paper Co., 86 F.R.D. 476, 483 (D. Vt. 1980) (court excluded residents near one lake from definition of class in water pollution case where none of the class representatives resided in the area and there were different issues of fact relating to the pollution in that area).

Although the named representatives can and will adequately represent the claims of the non-Native corporation property owners, the atypical nature of the Native Corporations' claims presents unique questions which require exclusion from the class. The class should be limited accordingly.

B. Because of the Unique Nature of Native Corporations' Claims, Common Issues Do Not Predominate with Respect to Them and the Class Should Be Defined to Exclude Them.

The Class Action Plaintiffs have also demonstrated that the requirements of Rule 23(b)(3) have been met with respect to the Property Owners Class generally. See Class Memorandum at 39-49. However, those requirements dictate that the Native Corporations be excluded from the definition. Rule 23(b)(3) requires that:

> the court finds that the questions of law or facts common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members

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> of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Although there are many common issues of fact or law between the claims of the class generally, those issues do not predominate over the issues affecting only the Native Corporations. Resolution of the Native Corporations' claims will involve determinations of their unique status and the special damages incurred by them because of that unique status. (e.g., under ANCSA the Native Corporations have unique obligations to preserve and protect their shareholders subsistence rights.) Further, it may well require substantial reliance on ANCSA and its legislative history as well as other statutes and decisional law unique to the Native corporations but entirely irrelevant to the status and claims of ordinary property owners. These differences are enough to destroy the predominance of common issues that clearly exists with respect to the claims of the other proposed members of the property owner class and requires exclusion of the Native Corporations. See Ouellette, 86 F.R.D. at 476 (the court limited class certification by excluding residents of a town which fronted on a different lake than the name representatives; although both lakes were alleged to have been polluted by the same defendant in the same manner, the

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court reasoned that different factual issues existed between the two and common questions did not predominate).

In addition, while the class action device will provide the superior method of a fair and efficient adjudication of the Property Owners Class generally, inclusion of the Native Corporations' claims will substantially complicate the issues, denying the other class members the advantages of class treatment. Moreover, the Native Corporations have amply demonstrated their desire and ability to control the prosecution of their very substantial claims. Significantly, they have retained separate, highly competent counsel, including one of the largest firms in Alaska and New York counsel experienced in maritime and environmental matters and major oil spill litigation. Thus, the very rationale for class treatment of the Native Corporations' claims, viz. the superiority of the class vehicle over individual action, is simply not present where the Native Corporations with by far the largest landholdings and most significant claims are not dependent upon the certification of 9 classes of claimants, whose relatively small claims need to be aggregated for the vigorous prosecution of the claims.

Finally, because all of the Exxon Valdez actions are consolidated in this Court, there is no special problem of manageability if the Native Corporations' claims are not included in the class. Thus, inclusion of the Native Corporations' claims in the Property Owners Class is not appropriate under the

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requirements of Rule 23 and that Class should be limited to non-Native corporation property owners.[2]

Conclusion

For the foregoing reasons, the Native Corporations respectfully request that the Court exclude them from the definition of the Property Owners Class.

DATED this 26th day of March, 1990.

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[2] If the Court should certify a class of property owners which includes the Native Corporations' claims, the Native Corporations reserve their rights under Rule 23(c)(2) to request exclusion from such class.

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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
THIS DOCUMENT RELATES TO: ALL CASES	

MEMORANDUM OF PLAINTIFF SEAFOOD PROCESSORS (P-170 - P-188) IN RESPONSE TO THE COURT'S QUESTIONS REGARDING CLASS CERTIFICATION

The seafood processors submit this brief response to the Court's Pretrial Order No. 23 dated March 1, 1990. The seafood processors previously filed a Memorandum in Opposition to Plaintiffs' Motion for Class Certification of a Mandatory

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Punitive Damages Class. That brief addressed the proposed punitive damages class since the seafood processors are potential members of that class only. This memorandum addresses the Court's questions only insofar as the proposed mandatory punitive damages class is concerned.

Question No. 1. Assuming that there are similar motions for class certification pending in state court, what would the practical effects be on the litigation in this court if identical classes were certified in both the state and federal courts? Which court would have jurisdiction over the class?

Response: Since no motion for a mandatory punitive damages class has been made in federal court, there is no prospect that identical classes could be certified in both the state and federal courts.[1]

Question No. 2. Again assuming that there are similar state court motions, what would the practical effects be if a proposed class were certified in state court but not in federal court, or vice versa?

Response: While no punitive damages class is sought in federal court, the implications and practical effects of such a

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[1] While motions have been made for various classes, no class is sought, in state or federal court, which would include seafood processors other than the mandatory punitive damages class sought in state court only.

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class being certified in state court are far-reaching. If the state court, notwithstanding the lack of precedent, or support, were to certify a mandatory punitive damages class, those with punitive damages claims pending in federal court[2] would be effectively enjoined from proceeding with the prosecution of those claims. This situation would raise serious supremacy clause issues and create the potential for needless conflict between the federal and state courts.[3] See Memorandum of Seafood Processors in Opposition to Plaintiffs' Motion for Certification of a Mandatory Punitive Damages Class at 20-22.

Question No. 3. If a class were not certified, or if large numbers of plaintiffs opted out of a certified class, how specifically should those numerous non-class claims be handled? The court is searching for a more detailed response than simply: "by coordinated consolidation" or "like the Glacier Bay case."

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[2]Plaintiffs in at least 10 federal actions seek punitive damages.

[3]Nor is it an answer to say that a party who is a member of a state court certified mandatory punitive damages class should be prohibited from pursuing punitive damages in federal court. Members of a mandatory class in state court would not and should not be barred from continuing to pursue their claims in federal court. In re Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir.), cert. denied sub nom., 459 U.S. 988, 103 S. Ct. 342, 74 L.Ed.2d 383 (1982). The federal and state court actions could be pursued until one ends in a judgment which would be given preclusive effect in the other court. 1-Pt. 2 Moore's Federal Practice, §30.3 at 223 (1986).

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Response: Regardless of how the courts rule on class certification, there will be a number of direct non-class actions pending for various plaintiffs. The claims of the seafood processors, except possibly for their punitive claims, the state, the environmental groups, and others will not be in any class. Thus, there will be an ongoing need to manage, supervise and coordinate a number of lawsuits in state and federal court. If one or more classes are certified, e.g., fishermen, then the coordination problem is greater because not only will there be opt-outs, which cases will then need to be coordinated with other direct actions, but there will also be a class for fishermen who do not opt-out (or perhaps two classes, one in state court and one in federal).

Turning to punitive damages, it makes no sense to strip all of the punitive claims from the direct action plaintiffs, do the same for class action members (e.g., for non-opt-out fishermen if a fishermen class is certified), and set up a new class to litigate only punitive claims.

At a minimum, punitive damages claims of all plaintiffs should be left with that plaintiff for now. There is no need at this time to bifurcate a portion of someone's claim for special handling. When all is done, there may or may not be large numbers of claims left for trial. Certainly, settlement

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prospects will be impeded if a party does not have the ability to settle and release all of his claims, including punitive damage claims.

In the last analysis, the organization the courts have established is adequate to coordinate the claims of all plaintiffs, non-class and class, through the discovery stage. Thereafter, the issue of organization and methodology for moving into the settlement and trial stages must be carefully examined. Various options can be employed depending upon the issues and parties remaining. These include mini-trials, test cases, alternative dispute resolution, joint trials, and other innovative devices. The determination of which one of these options will be most efficient and effective is best determined after the cases have proceeded through a coordinated discovery and issue refinement process under the existing case management organization.

Question No. 4. Specifically, how would a class action be a superior form of litigation for the proposed classes?

Response: A mandatory punitive damages class only in state court would be an inferior, not superior, form of litigation. To parse a plaintiff's claim into damage components would not eliminate or minimize coordination issues. To the contrary, it would exacerbate them. Even if compensatory classes are certified, the punitive damages claims of these class members

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should be in the same class in which all of their other damage claims reside. They should not be segregated out and placed in a new class to which all punitive claims (those of processors, environmentalists, the state, etc.) would also be directed.

DATED this 26th day of March, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bradley S. Keller, hereby certify that on the 26th day of March, 1990, service of the Memorandum of Plaintiff Seafood Processors in Response to the Court's Questions Regarding Class Certification has been made by United States Mail upon all counsel of record based upon the court's Master Service List of February 13, 1990.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re	)	
	)	Case No. A89-095 Civil
EXXON VALDEZ OIL SPILL LITIGATION	)	
	)	(Consolidated)

RE: Case Nos. A89-146; A89-095; A89-117; A89-118; A89-140; A89-149; A89-238; A89-264; A89-446

SUPPLEMENTAL MEMORANDUM OF PLAINTIFF SEAFOOD PROCESSORS (P-170 - P-188) IN OPPOSITION TO MOTION OF CERTAIN DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19-21) FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Plaintiff Seafood Processors,[1] pursuant to state licenses granting them the right to do so, make their living directly from the Alaska fisheries affected by the oil spill. Like fishermen, a significant portion of the Seafood Processors' business operations are conducted away from land, and in and on the seas that were contaminated by oil due to the grounding of the EXXON VALDEZ. Indeed, many Seafood Processors operate floating processor vessels that spend weeks at a time on the seas traveling from fishing ground to fishing ground. In this respect, they are substantively indistinguishable from commercial fishermen in terms of drawing their economic livelihood directly from the Alaska fisheries that were devastated by the oil spill. Like fishermen, the Seafood Processors' direct use of the fisheries is fundamentally different than that of the general public.

The enormous economic losses the Seafood Processors sustained were not only foreseeable by the Alyeska defendants, they were foreseen. Alyeska reassured the Seafood Processors and

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[1] This memorandum is submitted on behalf of all plaintiffs in Icicle Seafoods, et al. v. Alyeska Pipeline Service Company, et al., Cause No. A89-264. These plaintiffs (hereinafter "Seafood Processors"), all of which are seafood processors, would have processed in excess of 70 percent of the seafood in the areas impacted in 1989 by the oil spill. In 1989 alone the Seafood Processors sustained compensatory damages in excess of $125 million.

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others that it had both the equipment and an adequate Contingency Plan in place that would prevent widespread damage or interruption to Alaska's fisheries and thereby prevent the substantial losses that occurred.

Full development of the facts in this case will show that the Alyeska defendants, as well as Exxon, owed a duty to the Seafood Processors to exercise reasonable care, and that they actually foresaw that a breach of their duty would cause the Seafood Processors to sustain substantial economic losses. The facts that will establish this legal duty arise from the particular manner in which the Seafood Processors conduct their Alaska business operations, the sui generis events and legislative enactments surrounding approval of Valdez as the location for the pipeline terminal facility, Alyeska's conduct, which was designed to reassure the Seafood Processors that Alyeska would exercise due care to protect their economic interest in Alaska's fisheries, and the fact that Alyeska knew that economic harm to the Seafood Processors was a foreseeable and direct consequence of its misfeasances. Under controlling Ninth Circuit precedent, Union Oil Company, et al. v. Oppen, 501 F.2d 558 (9th Cir. 1974) ("Oppen") -- a landmark case virtually ignored by the moving defendants -- such facts enable the Seafood Processors to state a claim to recover economic losses regardless of whether they also sustained physical injury or property damage.

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Moreover, most, if not all, of the Seafood Processors can both plead and prove sufficient physical contact with oil-fouled waters and oil-contaminated fish such that they may recover economic losses even under the so-called "bright line" rule advocated by the moving defendants -- a rule rejected by the Ninth Circuit in Oppen in favor of more traditional tort doctrines that focus on the particular plaintiff, the type of losses sustained, and the foreseeability of injury to that plaintiff. Many processors' shore-front facilities were in oil-contaminated waters. Oil "mousse," "mousse patties" and oil sheens were observed at processors' plants, washed ashore on some processors' properties and came into contact with processors' wharfs, piers and other waterfront facilities. Other processors owned vessels that plied oil-polluted waters. In a few cases, oil-fouled fish were delivered to processors' plants. In fact, there was at least one instance of several thousand pounds of oil-contaminated salmon being ground into meal on orders from governmental authorities.

In addition, the Seafood Processors have alleged independent claims for their economic losses against the Alyeska defendants under Alaska common and statutory law. Alaska negligence law and the Alaska Environmental Conservation Act both permit the Seafood Processors to recover their economic losses without regard to physical injury or property damage. The Seafood Processors' state law claims against the Alyeska

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defendants supplement remedies already available under federal law. As such, they complement rather than interfere with maritime law. The state law claims further a compelling state interest. Moreover, they are not precluded by maritime law, especially in light of Congress' approval of supplemental state remedies, the uncertainty that prevails in maritime law regarding the so-called "bright line" rule, and the marginal nexus between the conduct of Alyeska at issue and the traditional characteristics of maritime law.

Finally, the Seafood Processors have asserted claims against Alyeska under the Trans-Alaska Pipeline Authorization Act ("TAPAA"), both under 43 U.S.C. §1653(a) and an implied right of action for negligence created by that Act. These federal statutory-based claims -- derived from laws enacted by Congress -- permit recovery of economic loss without regard to physical injury. These claims do not appear to be the subject of the Alyeska defendants' motion so they will remain regardless of the outcome of this motion. Alyeska's efforts to entice the court into a precipitous ruling in its favor with promises of "simplifying" the litigation therefore is a hollow one.

The Alyeska defendants' motion was filed under Rule 12(c) Fed. R. Civ. P. As such, it must be evaluated under the exacting standards of that rule. Only if it appears beyond doubt that the Seafood Processors cannot prove any set of facts

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entitling them to relief should the motion be granted. E.g., United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (citations omitted). The Seafood Processors can prove facts establishing their right to recover economic losses under Oppen, as well as under Alaska common and statutory law and TAPAA. Moreover, even if physical contact with oil-fouled waters or oil-contaminated fish is deemed a prerequisite, which it is not, the Seafood Processors can prove such physical contact. It therefore would be both premature and inappropriate to dismiss the claims under Rule 12(c) and, at a minimum, leave to replead should be granted.

Working within the organizational structure in place as a result of the court's pretrial rulings, the Seafood Processors have coordinated their briefing with plaintiffs' Law and Motions Committee. The Seafood Processors hereby join in the comprehensive memorandum filed on behalf of all plaintiffs in opposition to this motion.[2] The Joint Memorandum establishes that:

1. Alaska common and statutory law expressly rejects the limiting principle advocated by the Alyeska defendants and permits the Seafood Processors to recover economic loss without regard to physical injury or property damage;

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[2] Joint Memorandum for Plaintiffs in Opposition to Alyeska Defendants' Motion for Judgment on the Pleadings as to Plaintiffs Said to Have No Physical Impact or Injury (hereinafter "Joint Memorandum").

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2. The Seafood Processors' claims are not wholly governed by federal maritime law to the entire exclusion of Alaska state law and federal maritime law does not preclude the state law claims; and

3. Federal maritime law in the Ninth Circuit, specifically Oppen, rejects the "bright line" distinction upon which the motion is premised and permits recovery by the Seafood Processors because they can prove that their economic livelihood is drawn directly from Alaska's fisheries, they make their living in and on the seas, and they sustained unique damages that were specially foreseeable.

Due to coordination regarding the briefing, the Seafood Processors will not repeat at length those arguments. Instead, this supplemental memorandum is submitted to highlight the principal contentions and emphasize that (i) the Seafood Processors can establish facts entitling them to recover under Oppen, and (ii) the Seafood Processors TAPAA claims against Alyeska will remain regardless of the outcome of this motion.

II. ARGUMENT

A. The Ninth Circuit's Oppen Decision Permits the Seafood Processors to Recover Their Economic Losses from the Oil Spill.

The Joint Memorandum (Section II) sets forth in detail Oppen's rejection of the "bright line" rule advocated by defendants in an oil spill case. Instead, in Oppen, the issue of whether a particular plaintiff in a particular case has the right to sue for economic injuries caused by negligence was examined under traditional tort doctrines. Oppen at 568. The issue in Oppen was whether the defendant oil company owed the

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plaintiffs in that case (commercial fishermen) a duty to refrain from negligent conduct in its operations, when the conduct reasonably and foreseeably could have been anticipated to cause the plaintiffs to sustain business losses. 501 F.2d at 568. The existence of a duty turned primarily on foreseeability (ibid. at 569), but the Oppen court also discussed several other pertinent factors. Alyeska unpersuasively argues that Oppen merely substituted one "bright line" for another by moving the line to include commercial fishermen. In fact, Oppen rejected the mechanistic "bright line" approach in favor of traditional tort analysis: duty, foreseeability and proximate cause.[3] Under the Oppen standard, the Seafood Processors have stated cognizable claims for economic losses.

First, the Seafood Processors' complaint specifically alleges that the Alyeska defendants owed the Seafood Processors a duty to act prudently and to have adequate resources available to promptly and effectively contain and clean up an oil spill.

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[3]The Ninth Circuit's reluctance to adopt arbitrary mechanistic distinctions in favor of a more flexible duty-oriented analysis in the area of tort law is not confined to this area. Three years after the Oppen decision, in White v. Abrams, 495 F.2d 724, cert. denied, 434 U.S. 829 (1977), the Ninth Circuit adopted a multi-factor "flexible duty" standard for determining when there existed a duty of disclosure under Rule 10b-5 of the federal securities laws.

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Complaint, ¶¶39, 47.[4] The Seafood Processors' complaint alleges that that duty arises from the fact that Alyeska in fact foresaw that its negligence would cause economic losses to the Seafood Processors,[5] and (i) the Alyeska defendants' repeated reassurances to the Seafood Processors, and others, that it could effectively contain a spill and prevent the resultant staggering economic losses (Complaint, ¶37), (ii) the Contingency Plan (Complaint, ¶¶16 and 38), and (iii) the legislative enactments related to the Trans-Alaska Pipeline and the regulations implementing them (Complaint, ¶39).

Second, full consideration of the nature of the Seafood Processors' commercial operations establishes that, under Oppen, the Alyeska defendants were under a duty to refrain from negligently inflicting economic losses on them. The Seafood Processors are not land-based businesses that passively await dockside delivery of the catch. They are an integral component of a common enterprise that draws its economic livelihood directly from the fisheries affected by the oil spill. Moreover,

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[4]All references to "Complaint" refer to the complaint filed herein on behalf of the Seafood Processors, Icicle Seafoods, et al. v. Alyeska Pipeline Service Company, et al., Cause No. A89-264.

[5]Alyeska's awareness that an oil spill would severely diminish aquatic life and injure the economic interests of the Seafood Processors is apparent from the Contingency Plan itself. See Pertinent portions of the Contingency Plan attached as Appendix B to the Joint Memorandum.

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like commercial fishermen, they conduct their business activities in and on the waters that were contaminated by the EXXON VALDEZ.

Many of the Seafood Processors conduct their operations almost entirely at sea on floating processor vessels. These vessels spend weeks at a time at sea traveling from fishing ground to fishing ground with an accompanying fleet of tender and fishing vessels.[6] Communicating closely with fishermen and tendermen through constant radio contact and aerial monitoring, the floating Seafood Processors coordinate the harvest of Alaska's rich fishery resource.

Shore-front processors are not substantively different. They line up fishing and tender vessels during the preseason and advance funds to fishermen for fuel, food and repairs. In some cases, they finance the retrofitting of a vessel or the purchase of a new vessel. Like floating processors, shore-front processors also coordinate closely the activities of their fishermen and tender fleets during the harvest by aerial monitoring and constant radio contact. In essence, they act like a taxi dispatcher coordinating the harvest.

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[6]Many of the Seafood Processors actually own all or a portion of their tender fleet. These continuous operations at sea, directly utilizing Alaska's fisheries for their economic livelihood, make the Seafood Processors the type of especially foreseeable plaintiffs referred to in Oppen.

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By virtue of the way they conduct their operations in and on the seas, and by directly making use of the affected fisheries, Seafood Processors fall within the class of specially foreseeable plaintiffs identified in Oppen when the court stated:

> The plaintiffs in the present action lawfully and directly make use of a resource of the sea, viz. its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and defendants conduct their business operations away from land and in, on and under the sea. Both must carry on their commercial enterprises in a reasonably prudent manner. Neither should be permitted negligently to inflict commercial injury on the other.

558 F.2d at 570.

The Seafood Processors lawfully and directly make use of the oil-affected fisheries in the ordinary course of their business; they have governmental permits entitling them to do so; and they conduct a significant portion of their business operations away from land in and on the seas. Under Oppen, both the Seafood Processors and Alyeska should be required to carry on their commercial enterprises in a reasonably prudent manner and neither should be permitted negligently to inflict commercial injury on the other.[7]

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[7] The highly coordinated and intertwined manner in which the Seafood Processors and fishermen engage in a common enterprise to harvest the oil-affected fisheries makes their relationship analogous to the common adventure concept, a "venerable" and

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Another factor mentioned in Oppen is that: "The injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature, limited to the class of commercial fishermen which they represent." The injury sustained by the Seafood Processors also is a pecuniary loss of a particular and special nature, limited to the Seafood Processors, and not sustained by others. The losses sustained by the Seafood Processors, who are required to have governmental operating permits, are very different from that sustained by the general public.

The other two pertinent factors considered by the Oppen court -- the strong public policy of preventing injuries that flow directly from an oil spill and an economic analysis based on allocation of risk (Oppen at 569-70) -- are equally applicable to the Seafood Processors. Those policy considerations are

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(Footnote 7 Continued)

"well established" rule of admiralty law that permits an owner of cargo on one vessel to recover damages from another at-fault vessel notwithstanding the absence of physical injury or impact to the cargo. See Amoco Transport Co. v. S/S MASON LYKES, et al., 768 F.2d 659, 667 (5th Cir. 1985). Due to advances, financing, and other agreements, by the time fishing season commences, Seafood Processors and fishermen are substantively bound together in a common venture. Also like the common adventure cargo concept, the Seafood Processors share in the risk of loss to the fishery in that they frequently guarantee minimum tender payments to tenders regardless of the size of the catch.

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discussed in the Joint Memorandum.

That the Seafood Processors are entitled to recover their economic losses under Oppen is supported by the well reasoned, sharply worded dissent in State of Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1035-1053 (5th Cir. 1985), cert. denied sub nom. 477 U.S. 903 (1986). Judge Wisdom, in an opinion joined by four other judges, noted, first, that Robins Dry Dock Repair Co. v. Flint, 275 U.S. 303 (1927) ("Robins"), was inapposite in that it applied only to claims for negligent interference with contract. 752 F.2d at 1039. Judge Wisdom then went on to state that the claims should be analyzed under conventional tort principles of negligence, foreseeability, and proximate causation. Id. at 1046. The "check" on open-ended liability, in addition to foreseeability and proximate cause, being that the particular plaintiff has suffered some "particular" damage different from that of the general public. This is the same standard established in Oppen. Applying that standard, Judge Wisdom concluded:

> Finally, seafood processors and seafood wholesalers that provide services for the condemned area should recover.

752 F.2d at 1050.

The Alyeska defendants' fears of never-ending liability for every "economic ripple" are unfounded. As the Oppen court pointed out, the Seafood Processors still must show that the oil spill did in fact diminish the available aquatic life, that this

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diminution reduced profits the Seafood Processors would have realized, and that proof of lost profits must be established with certainty and must not be speculative or conjectural. Oppen at 570. The Seafood Processors are entitled to have the determination of whether that standard has been met made on a consideration of all of the evidence, not based upon the pleadings.

B. The Seafood Processors Can Allege Physical Impact to Their Property From Oil Precluding Dismissal of Their Claims.

Alyeska concedes that its motion is not directed to those plaintiffs who can state an impact to their property from oil spilled in the grounding of the EXXON VALDEZ.[8] Even under the erroneous physical impact rule advocated by Alyeska, the Seafood Processors' claims should not be dismissed. Oil-polluted waters came into physical contact with Seafood Processors' property. Several Seafood Processors' vessels were utilized in connection with the oil clean up and otherwise plied oil-contaminated waters. Still other Seafood Processors' shore-front plants were physically located in oil-contaminated waters. Oil polluted water therefore came into physical contact with the Seafood Processors' piers, wharfs and other shore-front property. Oil sheens, oil "mousse," and "oil mousse patties"

[8] Memorandum in Support, p. 2, f.n. 1.

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processors actually received oil-contaminated fish at their facilities. One processor, under orders from governmental authorities, was required to ground into meal several thousand pounds of pink salmon due to oil contamination.

The Alyeska defendants would have this court believe that principles of justice and fair compensation turn on the mechanistic application of a physical contact rule. According to Alyeska, the right to recover enormous economic losses -- losses that no one disputes were sustained as a direct result of the oil spill -- hinges on an inquiry similar to a game of "tag." As explained supra, under Oppen that is not the case. However, even if it is, many Seafood Processors sustained physical contact with oil polluted waters and oil-contaminated fish sufficient to withstand the Robins hatchet.[9] Alyeska's motion should be denied because Seafood Processors can establish physical impact of oil with their property. At a minimum, the Seafood Processors should be granted leave to replead that there were, in fact, instances of physical contact with oil-contaminated fish and oil-polluted

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[9] Even in Burgess, et al. v. M/V TAMANO, 370 F. Supp. 247 (D. Maine 1973), aff'd mem. 559 F.2d 1200 (1st Cir. 1977), a case cited by Alyeska involving an oil spill in Maine, the claims of area businesses which owned real or personal property claimed to have been physically damaged by the oil spill were not the subject of defendants' motion to dismiss. 370 F. Supp. at 251.

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waters. 6 Moore's Federal Practice ¶56.10 at 56-96 (1988) ("[A] complaint should not be summarily dismissed if there is any reasonable ground for believing that it may state a valid cause of action if repleaded.")

C. Alaska Common Law and the Alaska Environmental Conservation Act Both Permit the Seafood Processors to Recover Economic Losses Without Regard to Physical Impact or Injury.

1. Alaska Negligence Law Provides a Remedy for Economic Injury to the Seafood Processors Whose Injury Was Specially Foreseeable.

Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987), expressly provides a common law negligence remedy to specially foreseeable plaintiffs who have not suffered any physical impact or injury. The Alyeska defendants specifically knew that an oil spill could potentially cause the Seafood Processors to sustain economic damages, and the Seafood Processors' complaint alleges that Alyeska continuously assured the Seafood Processors "that there existed an emergency clean-up plan such that any major oil spill could be promptly and successfully contained" so that such losses could be avoided. Complaint, ¶37. The Seafood Processors have the right to recover economic losses under Mattingly. The legal authorities and reasoning supporting the Seafood Processors' right to recover under Mattingly are set forth in the Joint Memorandum (Section I(A)).

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2. The Alaska Environmental Conversation Act Provides an Alaskan Statutory Remedy for the Seafood Processors' Economic Injuries.

The Seafood Processors also have asserted independent claims against the Alyeska defendants under the strict liability provisions of the Alaska Environmental Conservation Act ("AECA"), AS §43.03.822, et seq. Complaint, Fifth Claim, ¶¶48-52. AECA provides for the recovery of "all damages to persons or property, whether public or private." AS §46.03.822. Damages under AECA are defined at §46.03.824, providing:

> Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit. (Emphasis added)

AECA gives the Seafood Processors the right to recover "loss of income," "loss of the means of producing income," and the "loss of an economic benefit" without regard to physical injury or harm. AECA therefore provides for the remedies sought by the Seafood Processors.

D. The Seafood Processors' State Law Claims Are Not Precluded by Federal Maritime Law.

The Joint Memorandum establishes that (i) state law remedies are commonly available in maritime actions in federal court, (ii) there is no conflict between federal substantive law and Alaska law providing remedies for purely economic injury, and (iii) allowing the remedies provided by Alaska law will not impair national uniformity regarding any fundamental,

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well-established tenet of maritime law.[10] Those arguments are adopted herein.

With respect to the creation of additional remedies for losses suffered as a result of an oil spill, the Supreme Court has held that such legislation supplements and is not precluded by federal jurisdiction over maritime activities. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 336, 411 (1973); see also Huron Portland Cement v. City of Detroit, 362 U.S. 440 (1960) (local air pollution ordinance not preempted because it imposed greater restrictions than federal regulations).

Moreover, insofar as the Seafood Processors' claims are concerned, due to the Oppen decision in the Ninth Circuit permitting them to recover, there is no conflict between state and federal maritime law. Under both Oppen and state law, the Seafood Processors are especially foreseeable plaintiffs that may recover economic losses. As discussed in the Joint Memorandum, the absence of any tension or conflict between state and federal law is further established by TAPAA, in which Congress expressly manifested its intent that Alaska was free to provide for additional remedies and was not precluded from doing so by federal law. TAPAA expressly provides that it "shall not be

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[10] Joint Memorandum Sections I(B), (C), and (D).

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interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." 43 U.S.C. §1653(c)(9).

However, even assuming that there exists some tension between Alaska law providing recovery for purely economic injury and federal maritime law, that does not end the inquiry. Both the Alyeska defendants and the Joint Memorandum catalog an array of authorities where, in some cases, state law seemingly different from federal maritime law was enforced and, in others, where it was not. The seemingly inconsistent cases in this area can be reconciled by balancing, as in a conflicts of law analysis, the competing state and maritime interests presented by the particular issue. See Steelmet v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986) ("If there is an admiralty-state law conflict, the comparative interests must be considered -- they may be such that admiralty shall prevail, as in Kossick, or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect.").

Here, Alaska's interest in providing supplemental remedies to its citizens whose economic livelihood is so dependent on fisheries and capable of being devastated by an oil spill within state waters is compelling. In fact, it has been recognized as such by the United States Supreme Court. Askew v. American Waterways Operators, Inc., supra, at 328-29 (describing oil pollution as "an insidious form of pollution of vast concern

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to every coastal city or port and to all of the estuaries on which the life of the ocean and the life of the coastal people are greatly dependent.")

Conversely, the admiralty rule allegedly at issue is not strong and the failure to apply it would have little or no effect on a well-established characteristic of maritime law. The physical impact requirement advocated by the moving defendants was rejected by the Ninth Circuit in Oppen in favor of more enlightened principles of modern tort law; it is not followed by the Second and Sixth Circuits;[11] and it remains in effect in the Eleventh Circuit by default when an equally divided en banc court could not agree regarding its continued validity.[12] Even in the Fifth Circuit case relied on so heavily by Alyeska, five judges, in a stinging dissent, characterized Robins as the "Tar Baby of tort law" and "out of step with contemporary tort doctrine, works substantial injustice on innocent victims, and is unsupported by the considerations that justified the Supreme Court's 1927 decision." State of Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1035 (1985) cert. denied sub nom. 477 U.S. 903 (1986). (Wisdom, J., dissenting) Thus, no well-established,

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[11] See Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968); and In re Complaint of Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980), cert. denied, 450 U.S. 921 (1981).

[12] See Hercules Carriers, Inc. v. State of Florida, 720 F.2d 1201 (11th Cir. 1983), aff'd on pet. reh'g. 728 F.2d 1359 (11th Cir. 1984) (en banc) (6-6 decision).

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universally recognized tenet of admiralty law is at issue. Instead, what is at issue is a rapidly eroding, much criticized, arcane vestige of admiralty law that has been discarded by the Ninth Circuit as being out of touch with conventional tort doctrine.

Admiralty law also has no interest in shielding Alyeska from liability in this case for the severe economic losses it inflicted on the Seafood Processors. The conduct of Alyeska that is at issue here is not of the type or character which lies at the core of maritime law. Alyeska was not engaged in the navigation of a vessel at sea -- an area traditionally associated with and of principal concern to maritime law.[13] Nor do the Seafood Processors seek to hold Alyeska liable in this case because of its misfeasance in connection with maritime commerce either directly as a vessel owner or operator. Instead, Alyeska's negligence was in failing to establish and provide for an adequate Contingency Plan, inadequately planning the clean-up effort, unreasonably delaying the clean-up effort, choosing inadequate tactics in the ensuing clean-up effort, and possessing inadequate equipment, supplies and personnel for deployment in the clean up. Complaint, ¶42. Thus, the nexus between the conduct at issue and traditional concerns of admiralty law is minimal.

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[13] See Joint Memorandum, Section I(C) and authorities cited therein.

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Finally, the Alyeska defendants' suggestion that a "uniform" rule is desirable carries little weight where, as here, the state law at issue concerns supplemental remedies rather than directing the manner in which maritime commerce is to be conducted, such as, for example, directing the manner in which a vessel in navigable waters is to be equipped, staffed or operated. See Joint Memorandum.

The contention that uniformity is desirable also is further belied by already existing enactments of Congress. In granting Alyeska the right to conduct a pipeline operation, Congress recognized that, due to the potential for significant economic and environmental disruption, Alyeska and other companies transporting North Slope crude oil would be subjected to different rules regarding the extent of their liability to injured parties. Strict statutory liability for all damages was imposed up to certain monetary limits and Congress expressly provided that claims exceeding the limits "may be asserted and adjudicated under other applicable Federal or state law." 43 U.S.C. §1653(c)(3) (emphasis added). Moreover, Congress was fully aware of AECA and its provisions at the time it passed TAPAA and stated that TAPAA did not "preclude any State from imposing additional requirements." 43 U.S.C. §1653(c)(9). That Congress was aware of the strict liability provisions of AECA (which contain no monetary cap) is apparent because the Alaska statute was discussed several times during floor debates and the

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hearings, and the full text of AECA's strict liability provisions were placed into the Congressional Record.[14] Congress fully recognized that it was imposing "liability standards [for vessels that transport North Slope oil in the coastal trade] that are much stricter than those that apply to vessels that transport oil in the coastal or foreign trade." H.R. Conf. Rep. No. 93-624. 93rd Cong., 1st Sess. (1973), reprinted in [1973] U.S. Code Cong. & Ad. News 2417,2530 (emphasis added). Full and adequate compensation to all victims of an oil spill of North Slope crude oil, either under state or federal law, was Congress' goal, not uniformity.

E. The Seafood Processors Have Asserted Separate Claims Against Alyeska under TAPAA That Apparently Are Not the Subject of This Motion.

The Seafoods Processors asserted an independent claim against Alyeska under TAPAA, specifically, 43 U.S.C. §1653(a). Complaint, First claim, ¶¶6-30. Subsection (a) of TAPAA makes holders of the pipeline right-of-way, such as Alyeska, strictly liable for damages up to $50 million "in connection with or resulting from activities along or in the vicinity of the . . . trans-Alaska Pipeline right-of-way." 43 U.S.C. §1653(a)(1). Subsection (a)(1) further provides that Alyeska shall be:

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[14] See, e.g., 119 Cong. Rec. at 36604,27658,22820 (1973); House Hearings, Part I at 537 (1973).

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> . . . strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes. (Emphasis added)

Thus, the statute expressly eliminates any requirement of ownership of any affected lands or fish or other resources so long as they are utilized for economic purposes. This reflects the significant liabilities Congress sought to impose as a precondition to permitting construction of the pipeline and the transporting of oil through Alaska's resource rich waters.[15]

Alyeska's motion does not address the Seafood Processors' claim under subsection (a) of TAPAA. Similarly, Alyeska does not address the Seafood Processors' negligence claim based upon an implied cause of action under TAPAA. Complaint, Third Claim, ¶¶36-45. Because recovery under TAPAA is not barred by the erroneous "bright line" Alyeska advocates, the Seafood Processors have adequately stated a claim under these provisions.[16]

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[15] See discussion supra.

[16] Alyeska does not contend in its motion that it is not liable under subsection (a) of TAPPA or that no implied cause of action exists. At best, Alyeska's motion could be construed to tangentially touch on whether a party's right to recover economic losses under subsection (a) is dependent upon also having

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III. CONCLUSION

For the foregoing reasons, the Alyeska defendants' motion to dismiss on the pleadings should be denied. In the alternative, the Seafood Processors should be granted leave to replead so that physical contact with oil-polluted waters and oil-contaminated fish can be pled -- even though no such pleading requirement exists either under Oppen or in order to state a claim for relief under the independent claims under AECA, Alaska common law, and TAPAA.

DATED this 26th day of March, 1990.

Respectfully submitted,

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(Footnote 16 Continued)

sustained some physical contact with the released oil. As seen, subsection (a) permits recovery without regard to ownership of affected lands, fish or other natural resources relied upon for economic purposes. 43 U.S.C. §1653(a)(1).

CERTIFICATE OF SERVICE

I, Bradley S. Keller, hereby certify that on the 26th day of March, 1990, service of the Supplemental Memorandum of Plaintiff Seafood Processors (P-170 - P-188) in Opposition to Motion of Certain Defendants (D-3, D-9, D-11, D-12, D-14, D-19-21) for Judgment on the Pleadings has been made by United States mail upon all counsel of record based upon the court's Master Service List of February 13, 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: CASE NOS. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

EXXON DEFENDANTS' (D-1, D-2, D-10) RESPONSE TO CERTAIN DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On February 23, 1990, defendant Alyeska Pipeline Service Company (D-3) ("Alyeska"), and its owner companies (D-9, D-11,

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D-12, D-14, D-19, D-20, D-21), except Exxon Pipeline Company (D-10), filed a "Motion of [Certain] Defendants for Judgment on the Pleadings," and supporting memorandum.

Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company (D-1, D-2 and D-10, respectively) ("Exxon defendants") did not join in the motion of Alyeska because the Exxon defendants anticipated that motions to determine the applicability of federal maritime law would be brought after the factual record in this litigation was better developed.

The Exxon defendants are, however, in complete agreement with the legal principles and authorities ably presented in Alyeska's supporting memorandum. Plaintiffs in these cases range from fishermen who claim that they were unable to fish because of spilled oil, to fishermen whose ability to fish was unimpaired, but who claim an impact on price, to hairdressers, chiropractors or taxidermists, whose alleged injuries were purely consequential and many steps removed from the grounding of the Exxon Valdez. Somewhere in this maze of concentric claims, some judge-made line will have to be drawn.

The inappropriateness of many plaintiffs' claims will become apparent after the factual record in this litigation is further developed. Accordingly, the Exxon defendants intend, as

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soon as discovery provides an adequate basis for doing so, to seek leave of the Court to bring appropriate motions for summary judgment upon a well-developed factual record.

Dated at Anchorage, Alaska this 22 day of March, 1990.

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	)	Case No. A89-095 Civil
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	)	(Consolidated)
	)	

RE: A89-095, A89-117, A89-118, A89-140
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Joy C. Steveken, being duly sworn, upon oath, deposes and says: that she is employed as a legal secretary in the offices of Bogle & Gates, 1031 West 4th Street, Suite 600, Anchorage, Alaska 99501; that she has served upon Lloyd Benton Miller, Sonosky, Chambers, Sachse & Miller, 900 West Fifth Avenue, Suite 700, Anchorage, Alaska 99501 as plaintiffs' liaison counsel pursuant to Pretrial Order No. 9, Liaison Counsel, section (2), dated December 22, 1989, and courtesy copies sent, on March 26, 1990 via U.S. Mail, postage prepaid, to the following attorneys:

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Exxon Defendants' (D-1, D-2, D-10) Response to Certain Defendants' Motion for Judgment on the Pleadings.

Joy C. Steveken

Joy C. Steveken

SUBSCRIBED AND SWORN to before me this 26th day of March, 1990.

Mary Margaret Bingham
Notary Public for Alaska
My Commission Expires: 1/12/1991

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FOR THE DISTRICT OF ALASKA

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

RE: A89-095, A89-135, A89-136, A89-139 A89-144, A89-238 AND A89-239

EXXON DEFENDANTS' (D-1, D-2 AND D-10) RESPONSE TO ORDER NO. 23

Defendants Exxon Shipping Company, Exxon Corporation and Exxon Pipeline Company ("Exxon Defendants") (D-1, D-2 and D-10, respectively) submit this joint memorandum in response to the specific concerns the Court articulated in Order No. 23.

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1. Under the Court's hypothesis that "identical classes were certified in both the state and federal courts," there would be concurrent jurisdiction over the separate, but parallel class actions. A party may initiate and pursue in personam actions on the same claim in state and federal courts simultaneously. See, e.g., Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922); Theodore v. Zurich General Accident & Liability Ins. Co., 364 P.2d 51, 54 (Alaska 1961). This principle holds true even when the parallel suits are class actions. See generally Manual For Complex Litigation - Second (1985) §§ 30.3 & 31.32. The first judgment entered would control the rights of the class.

It should be noted, however, that the Court's hypothesis of "identical" classes is inconsistent with the plaintiffs' pending certification motions. Those motions present some differences. In the state court the plaintiffs seek certification under Rule 23(b)(1) of a mandatory class for purposes of all claims for punitive damages. In this Court there is no such request, but there is a motion for certification of classes under Rule 23(b)(3) for purposes of punitive damages. Further, in this Court the plaintiffs seek certification of an ANILCA class, while in the State court they do not.

Assuming the movants succeed in securing certification in both forums, therefore, that dual certification will not lead to completely uniform classes, and this inconsistency would aggravate the management problems the defendants discussed in

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their brief in opposition to class certification.[1] Such inconsistent certifications could also embroil the Courts in conflict of law questions that would add to management difficulties. For example, assuming certification on the plaintiffs' terms of a federal ANILCA class and a state Native class, the courts would face the need for joint administration of classes pursuing subsistence recoveries based on inconsistent priorities. Compare 16 U.S.C. § 3101, et seq. (granting a preference to rural Alaskans in regard to subsistence harvesting of wildlife), with, McDowell v. State of Alaska, No. S-2732 (Alaska S. Ct., December 22, 1989) (holding unconstitutional Chapter 52 SLA 1986, which granted a preference to rural Alaskans to take fish and game for subsistence). The need to address these difficulties would add unnecessarily to this Court's responsibilities. As discussed below, however, dual certification of classes would represent a lesser evil than certification of classes in only one court.

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[1] Defendants previously explained that the most expeditious and superior way to handle this litigation is for both courts to deny class certification. However, dual certification by both courts would be preferable to one court certifying classes and the other court not certifying. A common decision on class certification is essential to the continued coordination, efficiency and cooperation that exists between the two court systems.

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2. If only one forum certified classes in this litigation, it would most likely have a devastating impact on continued federal-state coordination and the orderly and efficient administration of this litigation.

The intersystem cooperation that has thus far characterized this litigation has made manageable what would otherwise be administratively infeasible. Continued coordination of these cases in the federal and state forums is no less than essential to the orderly prosecution of this litigation. One forum's choice to certify classes in the face of its counterpart's refusal will, however, generate inconsistencies in scheduling and procedures that would seriously hinder continued coordination. To predict with absolute precision how that will come to pass is not possible, but the pressures that foreshadow this result are readily apparent. In essence, the pressures and difficulties that would arise are those that will afflict a single court attempting to manage parallel class and individual actions, compounded by the fact that those difficulties and pressures will create implications for both courts and thus trigger the additional concerns of comity.

The forums faced with this litigation must attempt to meet the needs of the litigants that have invoked their respective jurisdictions. As the pleadings filed in these cases reveal, however, class and nonclass litigants have competing, and in some instances fundamentally incompatible needs. Once one forum

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certifies classes for purposes of compensatory recoveries, and the other does not, these conflicting perspectives will have to be accommodated if coordination is to continue. All coordinated decisions concerning discovery, motion practice, settlement, and trial framework must be developed in light of the implications they present both for the individual and the class claims for compensatory relief. Each joint step in the cases must be made in reference not only to the traditional concerns of individual litigants, but to the additional requirements Rule 23 imposes.

For example, if a class is not certified in one court, but is certified in the other, overlapping individual claims will remain pending in each court. Moreover, individual plaintiffs in the non-class court will have every incentive to push ahead in that jurisdiction, while proceedings in the class action court will be obstructed with cumbersome class notice and opt-out procedures. Plaintiffs who are spending money on depositions and discovery on one schedule may be unwilling to share expenses and coordinate with similarly situated plaintiffs who are proceeding on the class action schedule. The intersystem cooperation that has thus far characterized this litigation would thus become progressively more difficult.

It is difficult enough for one court to manage such problems. When they are imported into two courts that are attempting to coordinate parallel consolidated proceedings with

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a minimum of intersystem friction, the difficulties become multiplied. Inevitably, those difficulties will make continued coordination extremely problematic.

State-federal friction such as this is unnecessary and counterproductive. Moreover, at this stage of the proceedings it is most likely not within this Court's power to prevent. See 28 U.S.C. § 2283. In sum, certification solely in one forum of classes seeking compensatory relief will not only bring to the certifying forum the problems the defendants have previously demonstrated to be associated with class certification, but will cause many of those problems to be visited on the non-certifying forum. In so doing, that certification decision will generate conflicts and friction that will seriously obstruct continued intersystem coordination of this litigation. Both courts should do their part to avoid this result by denying all the pending motions for class certification.

3. In their prior briefing in opposition to class certification, the defendants tried to explain in as much detail as is currently feasible the manner in which these cases should procedurally be resolved. See Mem. In Opp. at 67-77. To summarize, the Exxon Defendants envision: (a) coordinated, consolidated discovery in the civil damages cases addressing those issues relevant to compensatory claims; (b) private claims processing in which Exxon's claims personnel assess claims and provide compensation for plausible, oil-spill related harms; (c)

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continued private negotiations designed to resolve disputes between Exxon and those claimants desiring more compensation than Exxon initially offers; (d) aggressive, extensive use of private alternative dispute resolution procedures to provide prompt, fair solutions to those disputes that cannot be negotiated to conclusion; and (e) a coordinated, consolidated motion plan to resolve, in an orderly way, many legal issues that will clarify or eliminate claims and thereby promote settlement (examples of such issues include the application of Robins Dry Dock); (f) separate trials of "bottleneck issues," including, perhaps, summary trials by stipulation; and (g) consolidated trials of remaining, unsettled claims. During the course of these undertakings, the Exxon Defendants envision that the public administrative process, coupled with the defendants' cooperative activities, will ensure that the environmental concerns the spill generated are addressed.

The Exxon Defendants believe that as this litigation proceeds through discovery and motion practice, a precise decision on the most efficient means of trial will become possible. Until then, Exxon will continue to demonstrate its good faith in attempting to resolve this litigation expeditiously through private settlements. To date, Exxon has paid over $185,000,000 in claims. Over 9,700 individuals and entities have participated in these payments. Exxon continues to cooperate in the clean up efforts.

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The Court should handle this litigation by fostering these efforts and continuing its coordination with the state court.

4. The defendants have explained in detail the multiple reasons that require the conclusion that class actions would not be the superior way to handle this litigation. See Mem. In Opp., passim.

Dated at Anchorage, Alaska, this 26th day of March, 1990.

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: ss.
THIRD JUDICIAL DISTRICT)

Joy C. Steveken, being duly sworn, upon oath, deposes and says: that she is employed as a legal secretary in the offices of Bogle & Gates, 1031 West 4th Street, Suite 600, Anchorage, Alaska 99501; that she has served upon Lloyd Benton Miller, Sonosky, Chambers, Sachse & Miller, 900 West Fifth Avenue, Suite 700, Anchorage, Alaska 99501 as plaintiffs' liaison counsel pursuant to Pretrial Order No. 9, Liaison Counsel, section (2), dated December 22, 1989, and courtesy copies sent, on March 26, 1990 via U.S. Mail, postage prepaid, to the following attorneys:

David W. Oesting, Esq.
Davis, Wright & Tremaine
550 West Seventh Avenue, Suite 1450
Anchorage, Alaska 99501

Jerry S. Cohen, Esq.
Cohen, Milstein, Hausfield & Toll
1401 New York Avenue, N.W.
Suite 600
Washington, D.C. 20005

Exxon Defendants' (D-1, D-2, D-10) Response to Order No. 23.

Joy C. Steveken

Joy C. Steveken

SUBSCRIBED AND SWORN to before me
this 26th day of March, 1990.

Mary Margaret Bingham
Notary Public for Alaska
My Commission Expires: 1/12/1991

OGLE & GATES
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