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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION, et al., in personam, and the T/V EXXON VALDEZ, in rem, Defendants.	Civil Action No. A91-082 CIV GOVERNMENTS' MEMORANDUM IN SUPPORT OF AGREEMENT AND CONSENT DECREE

STATE OF ALASKA, Plaintiff, v. EXXON CORPORATION, et al., Defendants,	Civil Action No. A91-083 CIV GOVERNMENTS' MEMORANDUM IN SUPPORT OF AGREEMENT AND CONSENT DECREE

INTRODUCTION

The United States and the State of Alaska (collectively "the Governments") have requested entry of the Agreement and Consent Decree (the "Decree") lodged with the Court on September 30, 1991. If approved, the Decree would represent the largest civil settlement ever in an environmental case. The Decree would resolve the United States' claims against Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ (collectively "Exxon") in Civil Action No. A91-082, and all other pending or potential civil claims between the Governments and Exxon arising out of the March 23-24, 1989 oil spill from the T/V EXXON VALDEZ (the "Spill"). Most importantly, the Decree would settle the Governments' claims for natural resource damages resulting from the Spill.

The United States has separately filed a plea agreement in United States v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR (D. Alaska), which if accepted by the Court would resolve the federal criminal charges against Exxon Corporation and

Exxon Shipping for their part in the Spill. Among other things, the plea agreement would require Exxon to make restitution payments totalling $100 million to the Governments -- $50 million to the United States and $50 million to Alaska -- for use in restoring natural resources injured by the Spill. The payments required by the instant civil Decree would be in addition to those restitution payments. The United States suggests that the Court consider entry of the Decree at the same time it considers acceptance of the criminal plea agreement, because the full amount of judicially ordered compensation to the Governments for the consequences of the Spill -- more than $1 billion -- results from the two agreements together.

The United States brought this civil action primarily to ensure that the oil released into Prince William Sound and the Gulf of Alaska is cleaned up insofar as is practicable and to recover monies sufficient to restore or otherwise compensate the public for any harm to natural resources that remains after the cleanup is done. Due in part to Exxon's cooperation and its voluntary expenditure of over $2.5 billion to address the consequences of the spill, and in particular for cleanup activities, the first of these objectives has largely been achieved. Although there is continuing harm to some natural resources, much of the affected environment is on the road to recovery. The settlement presented to the Court in this Decree would allow the Governments immediately to begin the actions necessary to restore those resources that are not already fully recovering without the delays and risks inherent in continued

litigation.

As described in more detail below, the proposed Decree would provide an unprecedented recovery of at least $900 million to reimburse the Governments' costs and to restore, replace, or acquire the equivalent of the natural resources affected by the Spill. This amount will be paid over ten years, reflecting the Governments' expectation that understanding and repairing the remaining resource injuries will require many years of effort. The Decree also contains a "reopener" requiring Exxon to pay up to an additional $100 million to the Governments for restoration of presently-unknown and unanticipated injury to populations, species or habitats. The Decree further requires Exxon to perform any oil cleanup work remaining to be done in accordance with the Governments' directions.

The $900 million base settlement amount in the Decree is by far the largest recovery ever obtained in an environmental enforcement case. It is more than 80 times the size of the largest previous natural resource damages recovery by the United States or any state government.[1] Although the EXXON VALDEZ spill was one-sixth the size of the world's largest, involving the AMOCO CADIZ, Exxon is paying over six times the amount awarded to the French

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[1] See United States v. Shell Oil Company, No. C-89-4220-CAL (N.D. Cal. Mar. 26, 1990)(entry of consent decree), arising out of the San Francisco Bay oil spill. The Shell natural resource damages settlement may soon be surpassed by a currently pending settlement for $24 million, which the City of Seattle agreed to pay to restore contaminated areas of Elliott Bay under a consent decree lodged on September 9, 1991, in United States v. City of Seattle, No. C90-395WD (W.D. Wash.).

plaintiffs, after 12 years of litigation, for the environmental harm caused by the AMOCO CADIZ oil spill -- and payment of the AMOCO CADIZ award is still being held up by appeals.[2] The proposed settlement is thus advantageous not only because of its size, but also because it has been achieved promptly, avoids litigation risks that the Governments believe are substantial, and provides adequate funding for restoration of the environment at the time it is needed.

The Governments believe that the Decree is fair, reasonable, and adequate, that it is fully in accord with the Clean Water Act and State law, and that it is the most appropriate and most expeditious way to achieve the Governments' objective of restoring the natural resources of Prince William Sound and the Gulf of Alaska that were injured by the Spill. Accordingly, the Governments request the Court to enter the Decree.

BACKGROUND

On March 13, 1991, the United States filed this action in admiralty and maritime jurisdiction for cleanup costs and natural resource damages resulting from the Spill, and for injunctive relief, against Exxon Corporation, Exxon Shipping Company, Exxon

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[2] The AMOCO CADIZ spilled approximately 68 million gallons of crude oil -- more than six times the amount of oil spilled from the EXXON VALDEZ -- off the north coast of France on March 16, 1978. In July 1990, the U.S. District Court for the Northern District of Illinois entered a final order awarding the French government and several local government plaintiffs approximately $125 million from Amoco Oil Co. for damages caused by the AMOCO CADIZ spill. The parties filed cross-appeals from this judgment, and the matter is pending before the U.S. Court of Appeals for the Seventh Circuit.

Pipeline Company, and Alyeska Pipeline Service Company ("Alyeska") and its owner-companies, in personam, and the T/V EXXON VALDEZ, in rem. This action arises under a number of federal environmental statutes, including Section 311 of the Clean Water Act, 33 U.S.C. § 1321. Complaint, ¶ 6. Section 311 authorizes the United States and the State to recover their costs for removal of oil discharged from the T/V EXXON VALDEZ. Section 311 further authorizes the United States and the State, acting on behalf of the public, to recover natural resource damages resulting from the Spill, including the costs of restoration, replacement and acquisition of the equivalent of injured natural resources and the costs of assessing damages to natural resources. 33 U.S.C. § 1321(f)(1), (4) and (5). The Exxon Defendants have asserted counterclaims against the United States, seeking damages, contribution and indemnity.

The State has also brought natural resource damage claims under Section 311 before this Court in Alaska v. Exxon Corp., No. A91-083 CIV (D. Alaska). As in the United States' action, defendants Exxon Corporation and Exxon Shipping Company have counterclaimed against the State for damages, contribution and indemnity. In addition, the State previously asserted state statutory and common law claims for damages, including natural resource damages, against Exxon and Alyeska in the Superior Court for the State of Alaska. Alaska v. Exxon Corporation, Civil No. 3AN-89-6852 (Super. Ct. Alaska filed Aug. 16, 1989). Exxon has counterclaimed in this case as well.

These Government actions are in the context of a multitude of interlocking lawsuits in federal and state courts and related proceedings before the Trans Alaska Pipeline Liability Fund ("TAPL Fund"). Thousands of fishermen, fish processors, Native groups, and other private parties ("private plaintiffs") and several local governments and local and national environmental groups have asserted claims against Exxon relating to the Spill. Many of the private plaintiffs have sued the State, alleging that it bears some responsibility for the inadequacy of initial efforts to contain the Spill. The United States also sued the State in this Court, alleging that the it has primary trusteeship over the natural resources injured by the Spill, and the State counterclaimed alleging that its trusteeship of those resources should have precedence over that of the United States. United States v. State of Alaska, No. A91-081 CIV (D. Alaska).

Several Alaska Native Villages and Native Corporations sued both the State and the United States, asserting among other things that by settling their natural resource damages claims with Exxon, the Governments would compromise claims belonging to Alaska Natives. See Native Village of Chenega Bay v. Lujan, No. 91-CV-483 (D.D.C. filed Mar. 5, 1991) and Chenega Corporation v. Lujan, No. 91-CV-484 (D.D.C. filed Mar. 6, 1991) (consolidated). These multiple claims for natural resource damages led Exxon to file a Complaint in Interpleader in this Court, naming as defendants the heads of the six federal and state natural resource trustee agencies, five Native Villages and three Native Corporations ("the

Native Interests"). Exxon Shipping Company v. Lujan, No. A91-219 CIV (D. Alaska filed May 16, 1991).

The proposed Decree is the culmination of a series of final and pending settlements that, if they are all approved, will favorably resolve the most complex and novel claims among all those in the Spill-related litigation -- the claims for natural resource damages. It also resolves, or contributes to the resolution of, other pieces of this litigation, as discussed below. As the Court is well aware, the Governments and Exxon attempted to resolve those claims among themselves in March of this year, only to see that proposed settlement collapse after the Court rejected the first proposed criminal plea agreement. During the five months since the March 1991 Agreement was terminated, the Governments have negotiated a series of agreements which resolve many of the collateral disputes that motivated objections to their previous proposed settlement of natural resource damage claims.

First, the Governments have resolved any potential competition between their respective natural resource damage claims, by agreeing, in the MOA approved by the Court on August 28, 1991 in Civil Action No. A91-081, to act as co-trustees of all of the resources affected by the Spill and to jointly use any recoveries for natural resource damages obtained from defendants. Second, the Governments and the Alaska Native groups have entered into a proposed Consent Decree and Stipulation of Dismissal, lodged with the Court on September 25, 1991 in newly-filed Native Village of Chenega Bay v. United States, No. A91-454 CIV ("Chenega Bay"),

which among other things stipulates that the Governments have the right, to the exclusion of the Native groups, to assert natural resource damages claims arising from the Spill.

Third, the Governments recently reached an agreement with many of the private plaintiffs, soon to be filed in Alaska Superior Court, under which the private plaintiffs will release the State and the United States for all claims arising from the Oil Spill in return for commitments by the Governments to give the private plaintiffs access to the scientific information gathered by the Governments in their ongoing natural resource damage assessment.[3] The agreement between the Governments and the private plaintiffs will substantially decrease the possibility of lengthy discovery battles over release of the scientific data. Approval of that agreement, the proposed Chenega Bay Consent Decree and Stipulation of Dismissal, and the instant Decree would remove the Governments as parties in virtually all Spill-related cases filed in federal and state court and would clear the way for more expeditious resolution of the remaining claims in the Oil Spill litigation.

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[3] The preliminary results of the Governments' damage assessment were outlined in the Summary of Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archeological Resources (March 1991), which the United States lodged with the Court in this case on April 8, 1991. After the March 1991 Agreement was lodged, many of the private plaintiffs and others commented that the results of the Governments' resource injury assessment should be made available to the public and to other litigants. The information collected in the damage assessment has been kept confidential for sound litigation reasons, but will be made available to those private claimants who have entered into this recent agreement.

SUMMARY OF TERMS OF THE DECREE

The most significant terms of the proposed Decree are as follows.

1. Payments by Exxon

Exxon is required to pay a total of $900 million to the Governments over a ten-year period. Decree ¶ 8. The first payment of $90 million became payable 10 days after the parties signed the decree and will be disbursed to the Governments upon "final approval" of the Decree, i.e., as soon as the Decree has been entered as a judgment and the time for appeal from that judgment has expired.[4] The remaining payments are to be made on the following schedule:

December 1, 1992	$150,000,000[5]
September 1, 1993	$100,000,000
September 1, 1994	$ 70,000,000
September 1, 1995	$ 70,000,000
September 1, 1996	$ 70,000,000
September 1, 1997	$ 70,000,000
September 1, 1998	$ 70,000,000
September 1, 1999	$ 70,000,000
September 1, 2000	$ 70,000,000
September 1, 2001	$ 70,000,000

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[4] In accordance with Paragraph 9 of the Decree, Exxon has already deposited this first payment in an interest-bearing escrow account. The payment will be disbursed to the Governments, with the accrued interest, within five days after final approval of the Decree. See Decree ¶ 9. If the escrow account earns less interest than the Treasury bond rate calculated as described in the Decree, Exxon must pay the difference to the Governments. Id.

[5] As set forth in subparagraph 8(b) of the Decree, Exxon will receive a credit against this payment equal to its costs for cleanup work performed in accordance with directions of the Federal On-Scene Coordinator ("FOSC") from January 1, 1991 through March 12, 1991, up to a cap of $4 million, plus its costs of cleanup in accordance with directions of the FOSC or the State On-Scene Coordinator after March 12, 1991.

The monies paid by Exxon under the Decree will be allocated and used in accordance with the Memorandum of Agreement and Consent Decree ("MOA") between the Governments, which this Court approved on August 28, 1991 in United States v. State of Alaska, No. A91-081 CIV (D. Alaska). See Decree ¶ 10. As provided in the MOA, the United States will receive $67 million and the State will receive $75 million in reimbursement for their cleanup costs before January 1, 1991, their natural resource damages assessment costs through March 13, 1991, and the State's litigation costs through the latter date. The Governments will also be reimbursed for the cleanup and damages assessment costs that they have incurred since those dates. The State will be reimbursed for its litigation costs after March 13, 1991, at a rate not to exceed $1 million per month. All of the remaining monies paid by Exxon under the Decree will be deposited in the Registry of the Court and will be used by the Governments jointly (1) to complete the ongoing assessment of environmental damage and planning for restoration or replacement of injured resources; and (2) to implement the plans developed in the assessment process to restore or replace injured natural or archaeological resources and, if certain resources cannot be restored, to acquire equivalent resources.[6]

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[6] After entry of the Decree, the Governments will submit to the Court a proposed order, pursuant to Fed. R. Civ. P. 67, establishing the Registry account. Subject to the Court's approval, the Governments intend that these monies be deposited in the Court Registry Investment System (CRIS) operated by the Clerk's Office of the U.S. District Court for the Northern District of Texas. The CRIS is designed to hold and invest securely large sums of money under judicial supervision.

The Decree also contains a novel provision requiring Exxon to pay to the Governments, between September 1, 2002 and September 1, 2006, up to an additional $100 million for restoration of population(s), habitat(s) or species which have suffered a substantial loss or substantial decline in Spill-affected areas, where the loss or decline was unknown to and could not reasonably have been anticipated by the federal and state natural resource trustees when they entered into the Decree. Decree ¶¶ 17-19. This provision differs from the "reopeners" or reservations of rights that the United States has often required in consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The reservations in CERCLA consent decrees typically allow the United States to reopen litigation if new information or previously unknown conditions are discovered, but the United States must then establish liability of the defendant for such conditions. Under the Instant Decree, Exxon commits to pay up to $100 million for restoration of unanticipated environmental harm, without any need for the Governments to establish Exxon's liability.

2. Obligation to Continue Cleanup

In addition to its monetary terms, Exxon must continue its Oil Spill cleanup work in accordance with the directions of the Federal On-Scene Coordinator (FOSC) and subject to the FOSC's prior approval of the costs of such work. Decree ¶ 11. Exxon is also required to perform any additional cleanup work directed by the State On-Scene Coordinator, so long as that work does not interfere

or affirmatively conflict with the directions of the FOSC or federal law. Id. Expenditures made by Exxon for this additional cleanup work will be credited against the next payment owed to the Governments.[7]

3. Mutual Releases and Covenants Not to Sue

The proposed Decree resolves all civil claims between the Governments and Exxon arising from the Spill and resolves all of the Governments' claims for natural resource damages resulting from the Spill, without in any way impairing or impeding the Spill-related claims of third parties.

Under Paragraph 20 of the Decree, Exxon Corporation, Exxon Shipping, and Exxon Pipeline release and covenant not to sue both Governments for any and all civil claims arising from the Spill. In addition, the Decree requires Exxon to indemnify and hold harmless the Governments for any liability they may have to the TAPL Fund or other third parties based on contribution or any other theory of recovery arising from any payments by those entities to Exxon. Decree ¶¶ 21, 26(b). These provisions ensure that the Governments will not be exposed to any risk of loss if Exxon recovers on an affirmative Spill-related claim against the TAPL Fund or another third party and the Fund or other third party sues

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[7] Even if the Decree were not approved by the Court, Exxon would be bound by the requirement in paragraph 11 of the Decree that it continue cleanup work as directed by the Federal or State On-Scene Coordinators. See Decree ¶ 12. In that circumstance, however, Exxon may be entitled to set off certain post-Decree cleanup costs against its liability to the Governments. Id. The parties presently anticipate only minor additional cleanup work, if any.

the Governments for contribution, indemnity, subrogation rights, or under any other theory of recovery over.

Paragraph 13 of the Decree states that, effective upon final approval, the Governments release and covenant not to sue Exxon Corporation and Exxon Shipping Company for any and all civil claims arising from the Oil Spill. The Governments similarly release and covenant not to sue Exxon Pipeline Company, except insofar as it may be liable as a part owner of Alyeska Pipeline Service Company. Decree ¶ 14. The Governments also agree not to sue any present or former officer, director, or employee of Exxon Corporation, Exxon Shipping, or Exxon Pipeline in connection with the Spill, unless such an individual brings suit against the Governments. Id. ¶ 15. Notwithstanding these broad covenants, Paragraph 13 expressly states that nothing in the Decree affects or impairs (a) claims for enforcement of the Decree; (b) claims by the State of Alaska for tax revenues which it would have collected or would collect in the future under state statute AS 43.75 but for the Oil Spill; (c) private claims of Alaska Native Villages and individual Natives; and (d) private claims by Native Corporations.

Paragraph 16 of the Decree requires the parties to enter into stipulations for dismissal, with prejudice, of each of the pending claims by the Governments against Exxon or by Exxon against either of the Governments in these federal court actions or in the state court litigation, with the exception of claims by the State of Alaska for tax revenues that it would have collected or would collect in the future under state statute AS 43.75 but for the Oil

Spill.

The payments required by the Decree and the additional $100 million to be paid for restitution under the criminal plea agreement are intended as full compensation to the Governments for the injury to natural resources caused by the Spill. Accordingly, the Decree includes a covenant by the Governments not to sue Alyeska and its seven owner companies for natural resource damages resulting from the Spill once the Decree has become effective. Decree ¶ 22. The Governments' claims against Alyeska in this civil action for relief other than natural resource damages would remain pending and would not be affected by the Decree. In view of the fact that Exxon Pipeline Company owns a 20.34 percent share of Alyeska, the Decree contains several provisions designed to ensure that no recovery by Alyeska would inure to Exxon's benefit, that no recovery by the Governments against Alyeska would have any financial impact on Exxon, and that no recovery by Exxon against Alyeska could be passed on to the Governments. Id. ¶¶ 21 (last sentence), 22-25.

4. Changes from March 13, 1991 Agreement

As previously noted, the Decree is quite similar to the Agreement and Consent Decree lodged with this Court on March 13, 1991, and subsequently terminated. The material differences between the prior Agreement and the current Decree are as follows:

(1) Subparagraphs 13(c) and (d) of the current Decree contain new language confirming that the Decree does not affect or impair any private claims of Alaska Native Villages,

individual Alaska Natives, or Alaska Native Corporations. This language is consistent with Paragraphs 7 and 8 of the proposed Consent Decree and Stipulation of Dismissal lodged with this Court on September 25, 1991, in the new Chenega Bay case, Civil Action No. A91-454.

(2) The current Decree expressly states that the payments by Exxon may to be used for restoration or replacement of "archaeological sites and artifacts" damaged by the Spill. Decree ¶ 10(5). The March 1991 Agreement did not address archaeological resources.

(3) The current Decree (consistent with the MOA) permits the State to be reimbursed out of Exxon's payments for the costs it incurred for the Spill-related litigation after March 13, 1991, up to a cap of $1 million per month. Decree ¶ 10(6).

(4) The date of Exxon's second payment has been changed from September 1, 1992 under the Agreement to December 1, 1992 under the Decree. Decree ¶ 8(b). All other payment dates are unchanged.

(5) The current Decree expressly provides the Governments the right to audit any cleanup costs after March 13, 1991 which Exxon seeks to use as an offset against the December 1992 payment. Id. The March 1991 Agreement was silent on this subject.

(6) Subparagraphs (b) and (c) have been added to Paragraph 16 of the current Decree to require dismissal of the

actions between the Governments and Exxon that have been filed since the March 1991 Agreement was executed.

(7) Subparagraph 26(b) was added to the current Decree to ensure that the Governments are protected from any loss in the situation where Exxon sues a third party for damages arising from the Spill and the third party seeks contribution from one or both of the Governments.

(8) The references in the March 1991 Agreement to public notice and comment have been deleted from the Decree.[8]

DISCUSSION

A. Standard of Review

The standard of review to be applied by a district court in reviewing a settlement is whether it is "reasonable, fair, and consistent with the purposes of the statute under which the action is brought". United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990); United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990); Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied sub nom. Byrd v. Civil Service Comm'n, 459 U.S. 1217 (1983) ("Officers for Justice"). The questions to be resolved in reviewing the settlement and the degree of scrutiny afforded them are distinct from the merits of the underlying action. The Court's inquiry should be directed not to

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[8] There is no legal requirement for public notice and comment on this settlement. See footnote 11, infra. Nonetheless, since this settlement is substantially similar in all major respects to the March 1991 Agreement for which public comment was submitted, the United States is responding to those comments in this memorandum.

whether the court itself would have reached the particular settlement terms but, rather, to whether the proposed settlement is a reasonable compromise and otherwise in the public interest. Officers for Justice, 688 F.2d at 625; Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, 467 U.S. 1219 (1984). See Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980) (court should not substitute its judgment for that of the parties and their counsel in reviewing a settlement).

In instances where the federal government is the plaintiff, as is the case here, a legal presumption of validity attaches to the settlement agreement. Officers for Justice, supra, 688 F.2d at 625; Securities & Exchange Comm'n v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984); United States v. Rohm & Haas Co., 721 F. Supp. 666, 681 (D.N.J. 1989). Moreover, the Court should be mindful of the fact that there is a strong policy in the law favoring settlements. See United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985) (trial judge should exercise discretion to further strong public policy of voluntary settlement of litigation); accord Securities & Exchange Comm'n v. Randolph, supra, 736 F.2d at 528; Citizens for a Better Environment v. Gorsuch, supra, 718 F.2d at 1126; Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862 (1976); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). The consent decree, in particular, is a "highly useful tool for

government agencies," for it "maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975). See Securities & Exchange Comm'n v. Randolph, supra, 736 F.2d at 528 ("use of consent decree encourages informal resolution of disputes, thereby lessening the risks and costs of litigation").

Further, in cases where the public interest is represented by the Department of Justice and its client agencies, the courts should give "proper deference to the judgement and expertise of those empowered and entrusted by the Congress to prosecute the litigation as to the appropriateness of the settlement." United States v. Monterey Investments, No. C 88-422-RFP, slip op. at 6 (N.D. Cal. Jul. 31, 1990)(citing Rybachek v. United States Environmental Protection Agency, 904 F.2d 1276 (9th Cir. 1990)). See Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 689 (1961)("[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."); United States v. Assoc. Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied sub nom. Nat'l Farmers' Org., Inc. v. United States, 429 U.S. 940 (1976) (Attorney General must retain discretion in "controlling government litigation and determining what is in the public interest."); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454

U.S. 1083 (1981) (the balance to be struck among competing interests in the formulation of an agreement resides initially in the Attorney General's discretion).

B. The Decree is Reasonable, Fair, Adequate, and Consistent With the Clean Water Act

The central purpose of section 311 of the Clean Water Act, 33 U.S.C. § 1321, and the other federal laws that give rise to this action, is the cleanup and restoration of resources injured by oil spills. As noted above, the proposed Decree provides an unprecedented recovery for achieving that objective in this case. The settlement proceeds will allow the Governments to conduct restoration measures to enhance recovery of the environment affected by the Spill without the long delay and uncertainty as to outcome that would inevitably occur in continued litigation; the settlement also requires Exxon to complete any remaining cleanup that the Governments believe to be needed. Accordingly, the Decree is clearly reasonable, fair and consistent with the Clean Water Act, and should be entered by the Court.

The reasonableness of the Decree should also be considered in light of the inevitable and serious risks of continued litigation, which is the alternative to settlement. Obviously, the parties to this case believe that the settlement is reasonable in light of their respective litigation risks. For example, from the viewpoint of the United States, it should be emphasized that one of the primary federal statutes upon which the United States is relying in this case contains a conditional limitation of liability far lower

than the amount of the settlement. See Section 311(f)(1) of the Clean Water Act, 33 U.S.C. § 1321(f)(1).[9] Surmounting that limitation on recovery would require substantial litigation effort and is not a certainty. Moreover, given the novelty and extraordinary legal and technical complexity of natural resource damage litigation, the risks, expense and the inherent uncertainty of recovery make voluntary settlement especially attractive, particularly where the settlement terms provide for a substantial recovery fairly comparable to that which is probable after litigation. See In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1030 (D. Mass. 1989).

Continued litigation would, of course, create serious burdens on public resources. The needs of litigation are already requiring the attention of government scientists whose time is better spent on restoring the environment. The need to begin active restoration measures is another factor in favor of settlement. The earlier the Governments can begin restoration, the more effective it will be in enhancing the recovery of the environment. Even if further litigation led to greater recovery, "any benefits above those provided by the decree would likely be substantially diluted by the delay inherent in acquiring them." Officers for Justice, supra,

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[9] Applicable provisions of Section 311 of the Clean Water Act limit Exxon's liability under that statute to $150 per gross ton of the EXXON VALDEZ. This limitation under the Clean Water Act may only be broken if the United States proves that the discharge of oil "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner . . . ." 33 U.S.C. § 1321(f)(1). Thus, unless the Clean Water Act limitation is broken, liability under the statute is limited to $16,624,650.

688 F.2d at 629.

The reasonableness of the Decree should also be evaluated in light of the environmental problem to be addressed. The results of the Governments' damage assessment, as outlined in the Summary of Effects lodged with the Court on April 8, 1991, show significant injury to the environment, manifested in several important resources.[10] At the same time, many resources appear to be recovering either naturally or as a result of ongoing efforts. The critical need at the present time is to undertake those restoration measures that will best enhance natural recovery of the resources that have suffered continuing injury.

The Decree will provide the funding needed by the Governments to undertake the necessary restoration measures. Based on the results of the damage assessment, the Governments believe that the settlement provides adequate money to conduct effective restoration. The Court should allow the Governments the discretion to make that determination because the negotiations were conducted with the participation of, and on behalf of, administrative agencies "specially equipped, trained and oriented in the field . . . ." United States v. Nat'l Broadcasting Co., Inc., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978).

The fairness of the Decree is further illustrated by the

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[10] Exxon has stated strongly differing views regarding the effects of the Spill, thus underlining the risks of the litigation. See Attachment A of the Joint Sentencing Memorandum of Exxon Corporation and Exxon Shipping Company filed in United States v. Exxon Corp., No. A90-015 CR (D. Alaska) on September 30, 1991.

process through which it was developed. The Governments have conducted a two-year, multi-million dollar effort to assess the effects of the Spill. Based on this information, they have engaged in months of hard fought, arm's length negotiations with Exxon to reach the present Decree.

In the light of the scope of the injury, the risks of trial and the burdens of further litigation, it is clear that the Decree is reasonable, fair, consistent with the Clean Water Act, and provides the Governments with an outstanding, unprecedented, and immediate opportunity to address the environmental problems caused by the Spill. The Decree is plainly in the public interest and should be entered without delay.

C. Responses to Public Comments

There is no legal requirement for public notice and comment on the proposed Decree.[11] Nonetheless, because of the unusual nature of this case, when the Governments lodged the March 1991 Agreement with the Court, they published a notice containing the full text of the Agreement in the Federal Register and solicited public comments

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[11] Neither the Clean Water Act nor any of the other statutes relied upon by the United States or the State in these actions requires public notice and comment on consent decrees. Department of Justice policy, codified at 28 C.F.R. § 50.7, requires notice and an opportunity for comment on consent decrees in actions to enjoin the discharge of a pollutant. However, the instant actions do not seek such an injunction, and that policy is therefore inapplicable. Some commenters have incorrectly stated that the public notice and comment requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., apply to this case. CERCLA does not apply here because it imposes liability for releases of hazardous substances, and petroleum is explicitly excluded from the definition of "hazardous substance." See 42 U.S.C. § 9601(14).

even though they were not required to do so. See 56 Fed. Reg. 11636-42 (March 19, 1991). Written comments were accepted for a period of 30 days after publication.

The Governments carefully reviewed and considered the comments on the March 1991 Agreement before entering into the instant Decree.[12] Because of the close similarity of the Decree with that Agreement, a summary of the Governments' responses to the most significant of those comments may be helpful to the Court.

While there was a large volume of material submitted, the most significant issues fall into seven headings: (1) the extent of damage assessment information available to the public; (2) the adequacy of the amount of the settlement; (3) the absence of civil penalties; (4) the lack of provision for archaeological and cultural resources; (5) the effect of the settlement on Alyeska; (6) alleged conflicts of interest of the Governments as a result of the counterclaims that Exxon asserted against each of them; and (7) the effect of the Decree on third parties.

1. Availability of Scientific Data

A number of commenters expressed concern that the publicly available data on the injuries to the resources affected by the Spill was insufficient to support an informed decision on the

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[12] The following agencies of the Governments participated in the review of public comments: the U.S. Departments of Agriculture and the Interior, the National Oceanic and Atmospheric Administration ("NOAA"), the Environmental Protection Agency ("EPA"), and the U.S. Department of Justice; and, for the State, the Departments of Fish and Game ("ADF&G"), Environmental Conservation ("DEC"), and Natural Resources ("DNR"), as well as the Department of Law.

adequacy of the March 1991 Agreement. The Governments believe that there is sufficient information to evaluate the overall adequacy of the Decree. First and most importantly, the United States lodged with this Court on April 8, 1991 the report, Summary of the Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources ("Summary of Effects"), which summarized the results of two years of damage assessment studies. This report provides a reasonably detailed description of the injuries caused by the Spill. In addition, in March 1991, NOAA published its "Review of the Status of Prince William Sound Shorelines Following Two Years of Treatment By Exxon", which summarizes some of the available data on the state of shoreline areas that were directly affected by the Spill.

Second, the intense public and scientific interest in the Spill has resulted in a significant and growing body of literature -- both technical and non-technical -- concerning the Spill's environmental effects. The Governments have collected much of this literature and have made it readily available to all parties and to the public in the Oil Spill Public Information Center (OSPIC) in Anchorage, as part of OSPIC's repository for information relating to oil spills in general and the EXXON VALDEZ oil spill in particular.

Third, the Governments are making scientific data available to the groups most directly interested in the damage assessment. Recent agreements with Alaska Native organizations and certain private plaintiffs will ensure that these groups have access to the

results of the damage assessment. (See discussion at pp. 8-9, infra.)

The Governments support eventual disclosure of all scientific data collected during the damage assessment. To unilaterally disclose the data and reports that form the basis of its case would, however, seriously handicap the Governments in litigation, and would be contrary to Governments' primary duty of obtaining an award that will protect and restore the environment. Settlement of this case, in conjunction with agreements recently reached with private plaintiffs and Alaska Natives, should expedite eventual release of scientific data.

2. The Amount of the Settlement

A number of commenters questioned the amount of the settlement in light of uncertainty regarding the full extent of damages.[13] The Governments believe that there is adequate information available to enter into this settlement, and that the recovery is adequate to allow the Governments to restore the environment. Moreover, it is worth reemphasizing that the recovery afforded by this settlement is worth far more to the public because it comes relatively soon after the Oil Spill, instead of after many years of litigation, and because it will make substantial sums available for restoration work immediately, with the remaining payments scheduled to correspond to the Governments' expectation of when they will be

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[13] Some commenters suggested that the amount of the settlement was simply too low -- i.e., that the actual damages exceeded one billion dollars. However, none provided any concrete information supporting this contention.

needed.[14]

The Governments have spent over two years and tens of millions of dollars in an effort to assess the damages resulting from the Spill. While not all of the results of the damage assessment are final, the Governments believe that the results to date, as reported in the Summary of Effects, provide an adequate basis for evaluating the overall damage to the environment at a level of generality sufficient to evaluate the settlement. In light of what the Governments now know about the extent of injury to the environment, the settlement is clearly sufficient to allow the Governments to achieve their primary objective of restoring the resources injured by the Spill.

The benefits of a settlement now far outweigh the marginal improvement in scientific information that might occur in the next several years. Most significantly, the settlement provides money to begin restoration activities now, which will speed recovery of the environment. Moreover, the burden and expense of further litigation is considerable, and distracts government scientists from the more important job of restoring the environment. Furthermore, the serious litigation risks that this case presents counsels against unnecessarily prolonging litigation.

As additional insurance against uncertainty in the scope of

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[14] It is not unusual for consent decrees in environmental cases to impose financial obligations regarding environmental cleanup which extend for years into the future. This is particularly true where it is not possible or wise to spend the entire amount immediately.

injury, the Decree provides a "reopener" clause that provides an additional $100 million in restoration funds for injuries that are unknown and could not reasonably be foreseen at this time.[15] See Decree at ¶¶ 17-19. Based on the results of the damage assessment, the Governments do not believe that they will ever need to invoke this clause. Nonetheless, if currently unknown injuries are discovered in the future, the reopener provides additional insurance that the environment can be fully restored.

In sum, based on two years' worth of study, the Governments believe that they have sufficient information to evaluate the amount of the settlement in light of the extent of injury to the environment. The Governments believe that the settlement will allow them to achieve their objective of restoring the environment. Accordingly, they believe that the settlement is in the public interest.

3. Absence of Civil Penalties

A number of commenters questioned the absence of civil penalties in the settlement.[16] The need for civil penalties is obviated by the large criminal fine imposed as part of the plea agreement settling the United States' criminal case against Exxon

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[15] The reopener also requires a finding that the cost of a proposed restoration project is not "grossly disproportionate" to the benefits of restoration. Decree at ¶ 17. This factor would likely be considered by the Court in any event under existing case law. See Ohio v. United States Dep't of the Interior, 880 F.2d 432, 443 n.7, 456, 459 (D.C. Cir. 1989).

[16] The $900 million which Exxon will pay under this Decree is 28 times more than all civil penalties imposed by federal courts for civil violations of environmental laws in 1990.

Corp. and Exxon Shipping, United States v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR (D. Alaska). The Governments believe that the criminal fine is sufficient to achieve the punitive and deterrence objectives of civil penalties, and that it was preferable to direct the civil settlement towards restoration of the environment.

4. Treatment of Archaeological and Cultural Resources

Several commenters expressed concern that the definition of "natural resources" in ¶ 6(c) of the March 1991 Agreement did not include archaeological and cultural resources. The Governments based the definition of "natural resources" on the definition in DOI's natural resource damages assessment regulations, 43 C.F.R. § 11.14(z). The Governments nevertheless believe that restoration of injured archaeological and cultural resources on public lands is a valid use of settlement proceeds. Accordingly, the Decree now presented to the Court provides explicitly that the money recovered under the Decree may be used for "restoration, replacement, or rehabilitation of . . . archaeological sites and artifacts injured, lost, or destroyed as a result of the Oil Spill." Decree ¶ 10(5).

5. Treatment of Alyeska

There is apparently some confusion regarding treatment of Alyeska under the Decree. Some commenters interpret the Decree as releasing all claims by the Governments against Alyeska. This is incorrect. The Decree provides a covenant not to sue Alyeska for natural resource damages to protect Exxon from having to pay contribution claims with respect to damage claims settled under the

Decree. See Decree at ¶¶ 22-25. The Governments believe that this is appropriate, because the settlement provides an adequate recovery for restoration of those natural resources that are not already recovered. The Governments have retained their other pending civil claims against Alyeska.

6. Potential Conflicts of Interest as a Result of Claims Against the Government

One commenter suggested that the United States may have a conflict of interest in pursuing claims for natural resource damages because of potential claims against the U.S. Coast Guard. The United States does not believe that there is any conflict of interest, either legally or practically.

First, as a legal matter, it is the obligation of the United States to take into consideration all aspects of a potential claim in settlement negotiations. The Supreme Court has recognized that it is simply "unrealistic" for the United States to follow "the fastidious standards of a private fiduciary . . . ." Nevada v. United States, 463 U.S. 110, 128 (1983). The United States' many and varied interests "reflect[] the nature of a democratic government that is charged with more than one responsibility; it does not describe conduct that would deprive the United States of the authority to conduct litigation on behalf of diverse interests." Nevada v. United States, 463 U.S. at 135-38 n.15. Accordingly, the Supreme Court has stated:

> the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such duties it does not by that

reason alone compromise its obligation to any of the interests involved.

Nevada v. United States, 463 U.S. at 128. See also White Mountain Apache Tribe v. Hodel, 784 F.2d 921 (9th Cir. 1986), cert. denied, 479 U.S. 1006 (1986). Thus, in United States v. Olin Corp., 606 F. Supp. 1301, 1306-07 (N.D. Ala. 1985), the Court rejected the argument that the United States faced a conflict of interest in negotiating claims for cleanup and restoration of a hazardous waste site because of claims against the U.S. Army.

In the case of oil spills, Congress explicitly designated the state and federal governments as trustees for natural resources, 33 U.S.C. § 1321(f)(4) and (5), notwithstanding its recognition that the United States might itself face claims for damages, see, e.g., 33 U.S.C. § 1321(i). Accordingly, as a matter of law, the United States does not face any conflict of interest in acting as a natural resource trustee while defending the Coast Guard from claims arising out of the spill.

Second, as a practical matter, there are institutional safeguards that minimize any potential for the concerns of defensive litigation to color the United States' evaluation of the scope of natural resource damages. The natural resource damage assessment has been conducted by federal and state natural resource trustees, not the Coast Guard. The trustees have independently evaluated and approved the settlement in light of their assessment of damages.

7. Effect of the Decree on Third Parties

Some commenters expressed the opinion that the settlement should be a "global" settlement involving resolution of third party claims against Exxon as well as the Governments' claims. A number of commenters expressed concern over the effects of the Decree on the claims of third parties.

Many third parties have brought private claims against Exxon. The Governments have done their utmost to protect third party interests. First, the Decree explicitly provides that it is not intended to affect third party claims against Exxon. See Decree at ¶ 32. Second, the Decree provides that it does not limit the Governments' ability to provide funding or other assistance to parties affected by the Spill. See Decree at ¶ 34. As discussed above, the Governments have entered into an agreement with many of the private plaintiffs in the EXXON VALDEZ litigation that will make available to them the results of the Governments' damage assessment scientific studies.

The concerns expressed by Alaska Natives with respect to the previous consent decree in this case will be entirely mooted by the language in the instant Decree essentially incorporating key provisions of the proposed Chenega Bay settlement. See Decree ¶ 13(c) and (d). In the Chenega Bay consent decree, currently pending before the Court in Civil Action No. A91-454, Alaska Natives and the Governments agreed to a division of rights with respect to pursuing damage claims against Exxon. The provisions of that proposed agreement are reflected in the provisions of the

current Decree. Thus, the Decree preserves the ability of Alaska Natives to bring claims for injury to Native subsistence well being, community, culture, tradition or way of life, as well as private claims for injury to Alaska Native villages and individuals resulting from the impairment, loss or destruction of natural resources caused by the Spill, and any other exclusively private claims by Native villages and individuals. See Decree at ¶ 13(c).

In addition, the Decree preserves the right of Alaska Native corporations to bring claims for lost or diminished land values, protection of archaeological or cultural sites or resources, as well as other private claims for injuries caused by the Spill on lands in which Native corporations have a present right, title or interest. See Decree at ¶ 13(d). The concerns expressed by Alaska Natives are further addressed by the United States' commitment in the proposed agreement between the Governments and the Natives to conduct a joint study with the Natives on the effect of the spill on natural resources relied upon by Alaska Natives for subsistence.

The Governments believe that a global settlement resolving these private claims is impractical at this time. To delay or lose an advantageous settlement of the Governments' claims solely to accommodate the private interests of third parties would be inconsistent with the Governments' responsibility to secure restoration of the environment with the least burden and expense on public resources.

Thus, the concerns raised by the public comments have already been considered and addressed by the Governments in the settlement

and/or are now or will soon be mooted by the various agreements reached between the Governments and third parties during the five months since the March 1991 Agreement was terminated. In light of the extent of the environmental injury and the burdens and risks of further litigation if there is no settlement, it is clear that the Decree is reasonable, fair, and furthers the purposes of the Clean Water Act.

CONCLUSION

For the reasons set forth above, the Court should approve and enter the Decree as a reasonable, fair and lawful settlement of the Governments' civil claims against Exxon arising from the EXXON VALDEZ oil spill.

Respectfully submitted this 8th day of October, 1991 at Anchorage, Alaska.

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