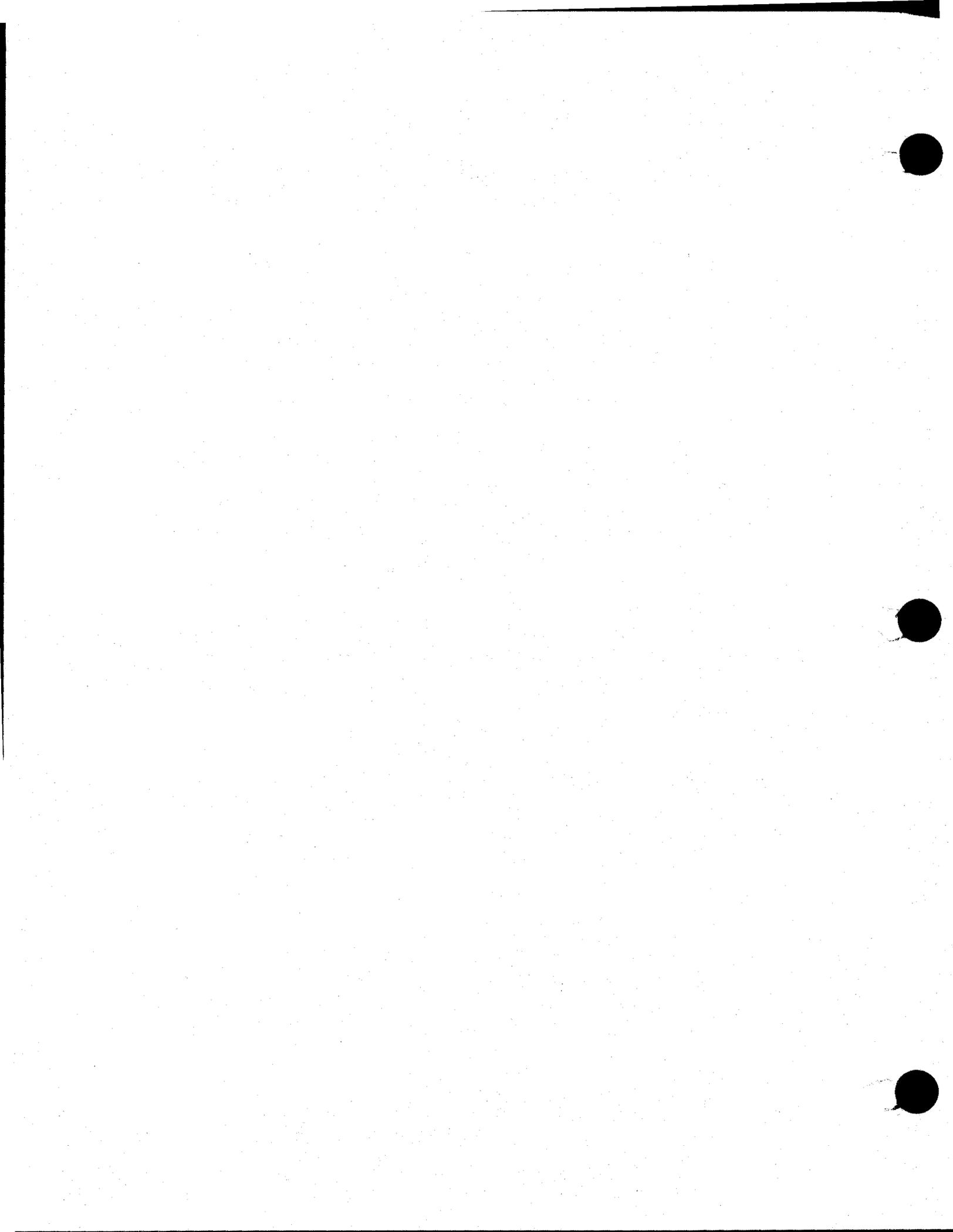


STATUS OF EXXON VALDEZ LITIGATION

David Oesting

Davis Wright Tremaine
Anchorage, Alaska



STATUS OF THE EXXON VALDEZ OIL SPILL LITIGATION

Honorable H. Russell Holland

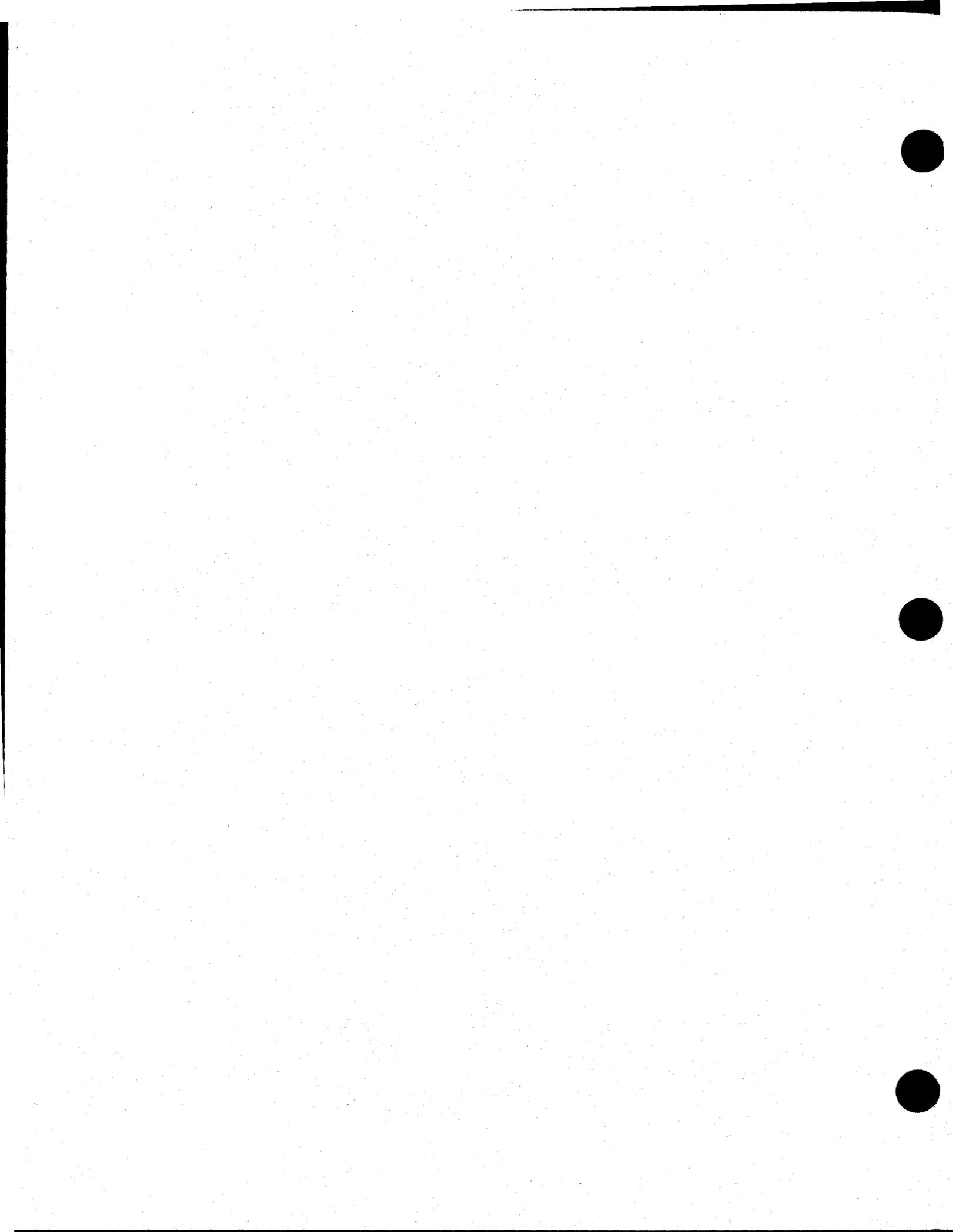
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

Honorable Brian C. Shortell

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In re)
EXXON VALDEZ OIL SPILL LITIGATION)
)
-----)
THIS DOCUMENT RELATES TO)
ALL CASES)
)
)
-----)
Case No. 3AN-89-2533 Civil (Consolidated)



I. THE PARTIES

A. Plaintiffs.

The more than 200 named plaintiffs in the consolidated litigation (whom with the addition of putative class members may exceed 10,000 persons or entities) may be broken into the following subgroupings by the nature of their interests and claims:

1. Alaska Natives consisting of individuals, Native villages, incorporated and unincorporated Native entities and associations and tribal entities who rely upon a subsistence way of life dependent upon preservation of uncontaminated natural resources, marine life and wildlife, and in their pursuit of personal, economic, psychological, social, cultural, communal, and religious activities.
2. Commercial fishing interests consisting of all persons and entities engaged in the commercial cultivation, fishing and/or harvesting of fish, other seafood and marine resources including along the line bottom fishermen, kelp pounders, herring seiners, herring gill netters, wild row on kelp harvesters, salmon seiners, salmon gill netter, setnetters, crabbers, tendermen, and their crews and employees.

3. Processors and distributors who purchase fish and other marine resources and process and market or otherwise distribute these products, including seafood processors, packagers, cold storage operators, wholesale and retail distributors.
4. Persons and entities who operate businesses in the, or dependent upon the health of, the area affected by the spill including tour operators, charterers of boats, guides, and timber harvesters and developers.
5. Recreational users of the area affected including persons who engage in sport and recreational fishing, berry gathering, hiking, photography and other consumptive and nonconsumptive recreational uses of the resources.
6. The State of Alaska as the trustee owner of the common natural resources in the area including lands, waters, and the flora and fauna thereof for the benefit of the people of Alaska.
7. Environmentalists groups as follows:
 - a. National Wildlife Federation
 - b. Natural Resources Defense Council
 - c. Wildlife Federation of Alaska
 - d. Prince William Sound Conservation Alliance
 - e. Alaska Center for the Environment

- f. Defenders of Wildlife
- g. Greenpeace U.S.A.
- h. National Audubon Society
- i. Northern Alaska Environmental Center
- j. Sierra Club
- k. Trustees for Alaska

B. The Defendants.

1. Exxon Defendants.

- a. Exxon Corporation, the multinational corporation engaged in the business of exploration for and production of crude oil and natural gas, manufacturing petroleum products, transportation and sale of crude oil, natural gas and petroleum products, and exploration for and mining and sale of coal.
- b. Exxon Shipping Company, a wholly-owned maritime subsidiary of Exxon Corporation, the registered owner and operator of the Exxon Valdez.
- c. Exxon Transportation Company, a wholly-owned subsidiary of Exxon Corporation and the registered owner of the Exxon Baton Rouge.

2. Alyeska Defendants.

- a. Alyeska Pipeline Service Company, owned by subsidiaries of seven major oil companies, operators

the Trans-Alaska Pipeline System ("TAPS") and the shipping terminal facilities at the Port of Valdez. The Alyeska Pipeline Service Company owners are BP Pipelines Alaska, Inc., ARCO Pipeline Company, Exxon Pipeline Company, Mobil Alaska Pipeline Company, Unocal Pipeline Company, Phillips Alaska Pipeline Corporation, Amerada Hess Pipeline Corporation. Alyeska Pipeline Service Company is managed by a owners committee with a representative named by each of the owner companies.

3. Individual Defendants.

- a. Joseph Hazelwood, Master of the Exxon Valdez.
- b. Gregory Cousins, Third-Mate on the Exxon Valdez.
- c. George M. Nelson, President of Alyeska Pipeline Service Company.

4. Trans-Alaska Pipeline Liability Fund ("TAPS Fund").

- a. TAPS Fund, a non-profit corporate entity, established pursuant to the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. § 1653(c)(4), is administered by the holders of the Trans-Alaska Pipeline right of way under regulations prescribed by the Secretary of the United States Department of Interior.

C. Missing Parties?

1. The United States Coast Guard
2. The United States Department of the Interior
3. The United States Department of Agriculture

II. **SPECIFIC CLAIMS MADE**

A. Federal Law Claims.

1. Strict Liability.

TAPAA, 43 U.S.C. § 1653(a)

2. Strict Liability.

TAPAA, 43 U.S.C. § 1653(c)

3. Negligence.

TAPAA, See 43 U.S.C. § 1653(c)(8)

4. Maritime Negligence.

5. Alaska National Interest Land Conservation Act.

16 U.S.C. § 1301, et seq.

6. Maritime Unseaworthiness.

7. Clean Water Act.

33 U.S.C. § 1251(a)

8. Resource Conservation and Recovery Act.

42 U.S.C. § 6972(a)

B. State Law Claims--Superior Court.

1. Strict Liability.
AS 46.03.822
2. Public Nuisance.
3. Private Nuisance.
4. Inherently Dangerous Activity.
5. Common Law Negligence.
6. Fraud.
7. Negligent Misrepresentation.
8. Trespass.
9. Tortious Interference With Contractual Expectancy.
10. Nuisance per se.
AS §§ 05.25.060, 08.62.160, 16.10.010, 46.03.745,
46.03.780, 46.03.800 and 46.03.822 [NWF]

C. Legal Causation.

1. Nature of Damages Cataloged.
 - a. Commercial Activity Economic Losses.
Fishermen, Processors, Area Businesses, Tour
Operations, Hatchery Operators, Land Owners, Guides
 - b. Diminution in Market Value Losses.
Land Owners, Municipalities
 - c. Extraordinary Expense Burden on Governmental
Entities.
Municipalities

d. Subsistence Activities.

Consumptive Resource Use: Alaskan residents

e. Subsistence Activities.

Cultural Anthropological Structure: individual
Natives and unincorporated tribal entities

f. Hedonic Consumptive Resource Harvesting.

Sport Fishermen and Hunters

g. Hedonic Non-Consumptive Resource Enjoyment.

Private individual sightseers, boaters, hikers

h. Destructive Impact on Ecological Status Quo.

State of Alaska, National Wildlife Federation,
Wildlife Federation of Alaska, Natural Resources
Defense Council, Prince William Sound Conservation
Alliance, Alaska Center for the Environment,
Defenders of Wildlife, Greenpeace, U.S.A., National
Audubon Society, Natural Resources Defense Council,
Northern Alaskan Environmental Center, Sierra Club,
Trustees for Alaska

2. Standing of Each Claimant Group as to Damages Claimed.

a. Commercial activity losses:

Fishermen, Processors, Area Businesses, Tour
Operators, Hatchery Operators, Land Owners, Guides

b. Diminution in market value losses:

Land Owner, Municipality

c. Extraordinary expense burden on governmental entities:

Municipalities

d. Subsistence activities-consumptive resource use:

Participating Alaska residents

e. Subsistence activities-cultural anthropological structure:

Individual Natives, Unincorporated tribal entities

f. Hedonic consumptive resource harvesting:

Sport Fishermen, Hunters, Berry gatherers, etc.

g. Hedonic non-consumptive resource enjoyment:

Private individual sightseers, Boaters, Hikers

h. Destructive impact on ecological status quo:

State of Alaska, National Wildlife Federation, Wildlife Federation of Alaska, Natural Resources Defense Council, Prince William Sound Conservation Alliance, Alaska Center for the Environment, Defenders of Wildlife, Greenpeace, U.S.A., National Audubon Society, Natural Resources Defense Council, Northern Alaskan Environmental Center, Sierra Club, Trustees for Alaska

III. LITIGATION HISTORY AND CURRENT STATUS

A. The Beginning.

On the morning of March 27, 1989, 80 hours after the Exxon Valdez struck Bligh Reef, the first complaints initiating the Exxon Valdez Oil Spill Litigation were filed in the United States District Court and the Superior Court for the State of Alaska. Between then and now, 181 lawsuits (127 in State Court and 54 in Federal Court) have been filed on behalf of over 10,000 claimants. Eighteen of that number are class actions.

B. The Organizational Phase.

Immediately after the litigation started various groups of plaintiffs' counsel, roughly divided by whether pursuing class actions or direct actions, began meeting and endeavoring to organize themselves into working teams with an eye toward offering their teams to the courts for approval under the Manual for Complex Litigation, Second (1985). Such teams immediately began deluging the court with pleadings suggesting their appointment under the Manual and ideas for organizing the prosecution of the case.

By way of response, on April 25, 1989, the United States District Court entered Pretrial Order No. 1 advising that a scheduling and planning conference would be held approximately 90 days to consider organization of plaintiffs' counsel,

organization of defendants' counsel, and class certification procedures. On June 8, 1989, the Superior Court entered a similar order scheduling a hearing for June 30, 1989 on the various motions then pending for orders directing the organization of counsel and the case.

Both courts stayed discovery pending such hearings.

At the conclusion of the June 30, 1989 Superior Court hearing, the court announced it would defer ruling on the various motions pending completion of a scheduling and planning conference by the United States District Court. (This extraordinary degree of unified attention and coordination to the handling of the Exxon Valdez litigation in both the Federal Court and State Court has continued to date with remarkable uniformity.)

The District Court held its scheduling and planning conference on August 24, 1989, at which time plaintiffs and defendants again presented their proposed plans for organization of their respective attorney teams. On August 25, 1989, both courts entered orders directing the parties to submit proposed orders by September 12, 1989, for the organization of counsel, dealing with discovery, and scheduling class certification proceedings.

Both plaintiffs and defendants complied. After another scheduling and planning conference on December 6, 1989, both

courts entered pretrial orders on December 22, 1989 providing as follows:

Organization of Plaintiffs' Counsel

Plaintiffs' cases shall be managed through a case management team constituted as follows:

Plaintiffs' Lead Counsel

Jerry S. Cohen (Cohen, Milstein, & Hausfeld) and David W. Oesting (Davis Wright & Jones) are appointed as plaintiffs' lead counsel.

Plaintiffs' lead counsel shall be generally responsible for coordinating the activities of plaintiffs during pre-trial proceedings and shall:

(1) Determine and present to the court and opposing parties the position of the plaintiffs on all matters arising during the pre-trial proceedings;

(2) Coordinate the initiation and conduct of discovery on behalf of plaintiffs consistent with the requirements of Rule 26(g), Federal Rules of Civil Procedure, including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

(3) Conduct settlement negotiations on behalf of plaintiffs, but without authority to enter binding agreements except to the extent expressly authorized;

(4) Delegate responsibilities for specific tasks to other counsel in a manner to assure that pre-trial preparation for the plaintiffs is conducted effectively, efficiently, and economically;

(5) Monitor the activities of co-counsel to assure that schedules are met and unnecessary expenditures of time and money are avoided; and

(6) Perform such other duties as may be incidental to proper coordination of plaintiffs' pre-trial activities or authorized by further order of the court.

Lead counsel shall provide oversight for all committees and the co-chairmen shall formulate the controlling policies for coordination and management of all plaintiffs' cases, including any hereafter filed.

The Executive Committee

The Executive Committee shall consist of the following:

- (1) Jerry S. Cohen (Cohen, Milstein & Hausfeld)
- (2) Richard F. Gerry (Bixby, Cowan & Gerry)
- (3) David W. Oesting (Davis Wright & Jones)
- (4) Peter Byrnes (Byrnes & Keller)
- (5) Kenneth Adams (Dickstein, Shapiro & Morin)
- (6) N. Robert Stoll (Stoll, Stoll, Berne & Lokting)
- (7) Macon Cowles (Williams, Trine, Greenstein & Griffith)

The Executive Committee shall have day-to-day operational and management authority for all cases in areas not specifically delegated to the Operations Committees, subject only to the policies established by lead counsel. This authority includes, but is not limited to, dealing with the defendants and the courts on all issues and matters not otherwise specified herein except as to settlement. It shall also coordinate the work of all committees.

Operations Committees

The chairpersons of the Operations Committees shall be the following:

(1) Discovery Committee

David Berger (Berger & Montague)

Charles Ray (Hansen & Ray)

The Discovery Committee shall perform the following functions:

(a) To prepare, pursuant to order of the Court, a structured plan of discovery which will assure, to the greatest degree possible, a streamlined and consolidated discovery procedure to effectuate and maximize economies in the expenditure of judicial and law firm time.

(b) In accordance with such structured plan of discovery, as approved by the court, to prepare and serve on behalf of all plaintiffs the following:

(i) interrogatories;

(ii) requests for production of documents on parties and subpoenas duces tecum on non-parties;

(iii) requests for inspection of the vessel and other physical things;

(iv) notices of depositions; and

(v) requests for admissions.

(c) To maximize the use of consistent methods for authentication and identification of documents and things.

(d) To organize discovery to ensure that in every respect the requirements for the plaintiffs to establish their cases in full and to support all complaints, including the consolidated amended complaint, are met, while avoiding unnecessary duplication.

(e) To structure a plan for conferring with counsel for adverse parties in order to resolve, to the extent possible, issues arising in the course of discovery in order that extensive briefing and court appearances may be avoided.

(f) To structure a plan for the most effective and economical use of the Discovery Master.

(g) To submit to the court and the Discovery Master for consideration a deposition protocol to control all deposition discovery on a uniform basis, with a view to avoiding as far as possible resort to the court for resolution of controversies which frequently arise during the course of depositions.

(h) To prepare a plan for the creation of the most convenient and economical document depository.

(2) Law Committee

Melvyn I. Weiss (Milberg, Weiss, Bershad, Specthrie & Lerach)

Jeffrey Smyth (Adolph & Smyth)

The Law Committee shall perform the following functions:

(a) The Law Committee shall have responsibility to plaintiffs' lead counsel and the Executive Committee for identifying, analyzing, evaluating, and researching all issues which will require legal briefing and/or the filing of motions, regarding both class actions and direct actions. However, class certification issues shall be dealt with separately by an ad hoc committee chaired by Melvyn I. Weiss, comprised of counsel for class plaintiffs.

(b) The Law Committee shall have responsibility for entering into agreements and stipulations with defendants with respect to law and motions, and for scheduling the briefing of motions, responses, and replies.

(c) The Law Committee shall have responsibility for coordinating the preparation of legal memoranda and the trial briefs in this action, as well as responses to opposing legal memoranda and trial briefs.

(d) The Law Committee shall participate in the presentation of legal issues to the court in coordination with the Executive Committee and plaintiffs' lead counsel.

(e) The Law Committee shall also participate in the development of the legal theories upon which this case will be prosecuted, in preparations for trial, and shall assist in the trial of the case.

(f) In the event of an appeal of any issue, interlocutory or otherwise, or any application for an extraordinary writ with respect to any issue arising in this case, the Law Committee shall have responsibility

for making such appeals for applications, or any responses in reply thereto.

(3) Damages Committee

Michael E. Withey (Schroeter, Goldmark & Bender)

Tim Petumenos (Birch, Horton, Bittner & Cherot)

John G. Young (John G. Young & Associates)

Melvin Belli (Belli, Belli, Brown, Monziona, Fabbro & Zakaria)

The Damages Committee shall perform the following functions:

(a) Recommending the retention of experts, including the approval of fees and disbursements for the work of such experts;

(b) Working with those experts retained by the committee in developing discrete theories of damages common to all parties;

(c) Coordination and monitoring of experts' work, including regular contact, possible participation in field studies, monitoring of experts' record-keeping procedures, and other incidentals relating to the investigations to be carried out by such experts;

(d) Quantifying damages and preparing experts' testimony for presentation at trial, including, but not limited to, working with experts on the development of reports, visual aids, and all things necessary for the preparation of expert testimony at trial;

(e) Researching and reporting on legal theories of damages;

(f) Preparing appropriate damage discovery of Exxon and Alyeska, and responding to Exxon- and Alyeska-initiated damage discovery of plaintiffs;

(g) Liaison with state and federal authorities on damage issues;

(h) Defending, analyzing, and refuting Exxon's evidence tending to minimize or disprove damages claimed by plaintiffs; and

(i) Developing proofs necessary for the establishment of punitive and/or statutory damages.

(4) Government Liaison Committee

Lewis Gordon (Ashburne & Mason)

Raymond Gillespie

The Government Liaison Committee will perform the following functions:

(a) Serve as liaison for the private plaintiffs to the State of Alaska, including all of its agencies and governmental bodies, both administrative and legislative.

(b) Serve as liaison for the private plaintiffs with the United States Government, including all of its agencies and governmental bodies, both administrative and legislative.

(5) Equitable Relief Committee

The plaintiffs may agree upon such a committee, with duties as described in paragraph 5 of plaintiffs' proposed pre-trial order, if they deem it necessary and if they propose a slate of candidates from which the court may appoint appropriate members. The court has chosen not to create an Equitable Relief Committee at this time because of the lack of specific candidates for membership and its uncertainty as to the need for such a committee.

The Operations Committees shall have responsibility in each of their designated areas to perform all tasks as are appropriate to carry out such responsibility, including the authority to deal directly with the defendants and the courts subject to the policies established by lead counsel and coordination by the Executive Committee.

Liaison Counsel

Lloyd Benton Miller (Sonosky, Chambers, Sachse & Miller) shall be plaintiffs' liaison counsel to the court. His duties are:

- (1) To maintain and distribute to co-counsel and to defendants' liaison counsel an up-to-date service list;
- (2) To receive and, as appropriate, to distribute to co-counsel orders from the court and documents from opposing parties and counsel;
- (3) To attend all Executive Committee meetings as a non-voting member and assume such duties as designated by lead counsel and the Executive Committee;
- (4) To serve as liaison to the court on procedural and scheduling matters; and
- (5) To maintain and make available to counsel at reasonable hours a complete file of all documents served by or upon each party (except such documents as may be available at a document depository).

State of Alaska

The State of Alaska shall designate an individual who shall serve as an ex officio member of the Executive Committee. The State shall cooperate and work fully with the lead counsel. However, the State shall have the right to present matters to the court or pursue discussions or discovery with the defendants independently of lead counsel under appropriate circumstances and subject to the court's discretion.

Other Counsel

Plaintiffs' counsel who disagree with an action or inaction of lead counsel, or of the Executive Committee, or any of the Operations Committees (or those acting on behalf of those committees), or who have individual or divergent positions, may present written and oral arguments, conduct examination of deponents, and otherwise act separately on behalf of their clients as long as:

(1) They first attempt to resolve the matters involved with the appropriate persons or committees;

(2) They are not duplicative of those efforts undertaken by lead counsel, or one or more committees or their representatives; and

(3) They comply with all existing orders and directives of the court.

Fees

The matter of fees for those designated above has not been discussed in this order. On or before January 31, 1990, plaintiffs' counsel shall agree upon a fee structure for those counsel appointed herein, agree upon a method for payment, and advise the court in camera of the terms of this agreement. In the event no such agreement can be reached, counsel shall advise the court what disagreements have arisen. The court will resolve any disagreements after soliciting such information from plaintiffs as it deems necessary.

DATED at Anchorage, Alaska, this 22nd day of December, 1989.

Russell Holland
UNITED STATES DISTRICT COURT JUDGE
DISTRICT OF ALASKA

The parties have been living under this organizational structure since.

C. Procedural Posture.

1. Discovery.

From July through December 22, 1989, informal designated counsel for plaintiffs and defendants met and negotiated the terms of a discovery plan. On February 9, 1990, both courts entered orders approving the plan and lifted the stay on discovery. The plan provides that general

discovery will commence immediately and be concluded within 18 months from February 9, 1990, with the Discovery Master authorized to grant one six month extension.

a. Interrogatories.

Interrogatories shall be submitted in four phases:

- (i) witness/document identification;
- (ii) general discovery
- (iii) contention discovery
- (iv) expert discovery.

Plaintiffs served 283 phase one interrogatories on February 29, 1990. Defendants served 513 phase one interrogatories on March 30, 1990. Answers and formal objections were exchanged by both sides on June 21, 1990.

b. Document requests.

Each side is permitted one comprehensive set of document requests regarding matters related to the subject matter of the litigation. Any subsequent document requests are restricted to specific information, the existence of which was unknown to the requesting party at the time the comprehensive request was served. The respective sides (plaintiffs and defendants) serve comprehensive

document requests shortly thereafter. Both sides began producing documents pursuant to such requests on October 1, 1990 after numerous, contentious meetings attempting to resolve the various objections interposed to the other side's request.

c. Requests for Admissions.

On June 10, 1990, plaintiffs served 468 individual requests for admissions on the defendants for which objections and/or responses were served on September 7, 1990.

d. Depositions.

The parties are permitted to initiate depositions at any time. For purposes of scheduling, the calendar is divided into two week segments. Plaintiffs may take depositions only during odd numbered segments defendants only during even numbered segments. Between each segment there shall be a one-week break. Depositions may run simultaneously. Forty-five days notice of the scheduling of a deposition and exhibits must be pre-designated at least thirty days prior to commencement of a deposition. Neither side has yet formally scheduled any depositions.

2. Status of Class Certification Proceedings.

In the court's August 25, 1989 order, the court set September 22, 1989 as the date for filing motions for class certification. Class plaintiffs proposed that if defendants sought discovery with respect to class certification issues (which such plaintiffs opposed), it be commenced not later than October 15, 1989 and concluded by November 15, 1989. Class plaintiffs also requested that opposing papers be filed by November 30, 1989 with proponents replies to be due by December 15, 1989. After much pushing and shoving, the court entered an order on December 7, 1989 directing that defendants could propound interrogatories to class plaintiffs on or before December 1, 1989 with the answers to be due by December 22, 1989. The defendants did so and class plaintiffs responded. In addition, the court permitted defendants to depose as many class representatives as they deemed necessary in a window commencing on January 8 and ending on February 9, 1990. Opposition papers to class certification were due February 23, 1990 and class plaintiffs' replies on March 26, 1990.

On May 14, 1990, at a joint conference with the courts, oral argument was scheduled on the motions for class certification for September 13, 1990.

D. Status of Legal Issues.

1. Plaintiffs Motion for Judgment on the Pleadings on the Issue of Liability Under AS 43.03.822, Strict Liability for Discharge of Hazardous Substances.

In an effort to simplify the liability issues pertaining to the Exxon defendants' liability for compensable damages under AS 43.03.822, the private plaintiffs submitted the following argument to the State Court:

STATEMENT OF FACTS

1. On the evening of March 23, 1989, the EXXON VALDEZ left the Port of Valdez, Alaska, bound for Long Beach, California. (Admitted in Answer of Exxon Shipping Company to Complaint filed August 15, 1989, by the State of Alaska ("Exxon Shipping Answer"), p.6, ¶ 39; also admitted in Answer of Exxon Corporation to Complaint for Compensatory and Punitive Damages, Civil Penalties and Injunctive Relief filed August 15, 1989, by the State of Alaska ("Exxon Answer"), p.7, ¶ 39.)

2. When the EXXON VALDEZ sailed on the subject voyage, it carried a cargo of crude oil which was under the control of Exxon Shipping and owned by Exxon. (Exxon Shipping Answer. p.18, ¶ 118; Exxon Answer, p.17, ¶ 118.)

3. During the voyage, the EXXON VALDEZ was under the command of Captain Joseph Hazelwood, an employee of Exxon Shipping. (Exxon Shipping and Exxon Answers, p.7, ¶ 42.)

4. Bligh Reef is a navigational hazard depicted on nautical charts. (Exxon Shipping and Exxon Answers, pp.8-9, ¶ 47.)

5. On Friday, March 24, 1989, shortly after midnight, the EXXON VALDEZ struck Bligh Reef. (Exxon Shipping and Exxon Answers, pp.8-9, ¶ 47.)

7. As a result of striking and becoming grounded on Bligh Reef, eight of the vessel's oil tanks and three of its ballast tanks were breached, causing approximately 258,000 barrels of crude oil to spill into Prince William Sound, the largest oil spill in the history of the United States from a single vessel. (Exxon Shipping and Exxon Answers, p.9, ¶ 51.)

7. The crude oil spilled into Prince William Sound by the EXXON VALDEZ was a hazardous substance as defined by AS 46.03.826(4)(B) and (5). (Exxon Shipping Answer, p.18, ¶ 117; Exxon Answer, p.27, ¶ 117.)

8. Exxon Shipping and Exxon are "persons" under and for purpose of AS 46.03.822. (AS 46.03.900(17); Exxon Shipping Answer, p.3, ¶ 8; Exxon Answer, p.3, ¶ 6.)

. . . .

DISCUSSION

AS 46.03.822 imposes strict liability for the unpermitted release of hazardous substances within the State of Alaska:

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs or response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance; . . .

A. Elements of Strict Liability Under AS 46.03.822.

Under AS 46.03.822, if there is an unpermitted release of a hazardous substance, the owner and the person with control of the hazardous substance are strictly liable for the relief authorized in the statute. These elements have been admitted by defendants Exxon Shipping and Exxon.

1. Unpermitted release.

The EXXON VALDEZ ran aground on Bligh Reef, releasing millions of gallons of crude oil into Prince William Sound. There is no allegation, affirmative defense or argument by Exxon Shipping or Exxon that this release of crude oil was permitted. Thus, there was an "unpermitted release" under the terms of the statute.

2. Hazardous substance.

For purposes of AS 46.03.822, the term "hazardous substance" means:

(A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; or

(B) oil; or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);

AS 46.03.826(4). As used in AS 46.03.826(4), the term "oil" includes crude oil:

(5) "oil" means a derivative of a liquid hydrocarbon and includes crude oil. . . .

AS 46.03.826(5)

Exxon Shipping and Exxon have admitted that the crude oil released into Prince William Sound by the EXXON VALDEZ was a hazardous substance:

Answering paragraph 117, Exxon Shipping admits that "hazardous substance" as defined by AS 46.03.826(4)(B) includes oil and that approximately 11 million gallons of crude oil were released into Prince William Sound as a result of the spill

(Exxon Shipping Answer, p.18, ¶ 117.)

. . . admits that the crude oil discharged from the EXXON VALDEZ was "oil" as that term is used and defined in AS 46.03.826(4)(B) and (5)

(Exxon Answer, p.17, ¶ 117.)

3. Ownership or control of hazardous substance.

Exxon Shipping has admitted that it owned the EXXON VALDEZ at the time of the grounding and spill, and that it controlled the crude oil being transported by the EXXON VALDEZ:

. . . Exxon Shipping admits that it is the registered owner and operator of the EXXON VALDEZ and that it controlled the crude oil cargo carried on the vessel on March 24,

1989, some of which was discharged into the waters of Prince William Sound . . .

(Exxon Shipping Answer, p.3, ¶ 8.)

Exxon has admitted that it was the owner of the crude oil that was being transported on the EXXON VALDEZ:

. . . admits . . . that Exxon was owner of the crude oil cargo on board the EXXON VALDEZ on March 24, 1989, some of which was discharged into the waters of Prince William Sound.

(Exxon Answer, p.3, ¶ 6.)

4. Defendants are "persons" under the statute.

For purposes of AS 46.03.822, the term "person" means:

. . . any . . . private corporation . . . or any other entity whatsoever.

AS 46.03.900(17).

Defendants Exxon Shipping and Exxon have admitted that they are corporations, and thus that they are persons as defined under the statute:

8. Answering paragraph 8, Exxon Shipping admits that is a wholly-owned domestic maritime subsidiary of Exxon Corp., separately incorporated in Delaware with its executive offices in Houston, Texas . . .

(Exxon Shipping Answer, p.3, ¶ 8.)

6. . . . admits that Exxon is a corporation organized under the laws of the State of New Jersey with its principal place of business as 1251 Avenue of the Americas, New York, New York 10020 . . .

(Exxon Answer, p.3, ¶ 6.)

The foregoing analysis clearly establishes that the elements necessary for imposition of strict liability on defendants Exxon Shipping and Exxon are present. There was an unpermitted release of crude oil, a hazardous substance; Exxon Shipping was the "person" with control of the hazardous substance at the time of the release; and Exxon was the "person" that owned the hazardous substance which was released.

B. Statutory Affirmative Defenses.

AS 46.03.822(b) relieves a person from strict liability under specific and limited circumstances which are not present in the case herein:

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person
...

(C) an act of God; (emphasis added.)

Although no Alaska case has yet addressed application of AS 46.03.822(b), section 107(b) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") contains substantially identical language, and has been a subject of discussion and analysis by federal courts. Section 107(b) provides in pertinent part as follows:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of hazardous substance and the damages resulting therefrom were caused solely by--

(1) an act of God;

(2) an act of War;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with the defendant . . . (emphasis added).

The statutory defenses allowed pursuant to section 107(b) are narrow and have been discussed as follows:

The defenses provided in section 107(b) are very narrow defenses; they require that the release and damage be caused solely by acts of God, war, or acts of (sic) omissions of a third party. These affirmative defenses essentially serve to shift the burden of the proof of causation to the defendants. (emphasis in original.)

Violet v. Picillo, 648 F. Supp. 1283, 1293 (D.R.I. 1986).

Where there is more than one cause of a release, the affirmative defenses allowed by CERCLA section 107(b) are inapplicable:

In addition, the defendants allege that the third party defense under section 107(b)(3) applies because the cause of the release was the negligent and reckless conduct of the State of California. However, section 107(b)(3) provides a defense of liability only where a totally unrelated third party is the sole cause of the release or threatened release of a hazardous substance. The Court concludes that there

were multiple causes of the release and threats of release at the Stringfellow site. Therefore, the third party defense of section 107(b) does not apply in the instant action. (emphasis in original.)

U.S. v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

The statutory affirmative defenses contained in AS 46.03.822(b) are inapplicable to this case.

1. Act of war/act of God.

Neither Exxon Shipping nor Exxon have alleged as affirmative defenses that the spill was caused solely by an act of war or an act of God. These statutory affirmative defenses are not in issue.

2. Intentional or negligent acts or omissions of a third Party.

Neither Exxon Shipping nor Exxon have alleged as an affirmative defense that the spill was caused solely by the intentional or negligent acts or omissions of a third party. This statutory affirmative defense is not in issue.

Because the elements necessary to establish strict liability under AS 46.03.822 have been established, and because there is no allegation or issue that the spill occurred solely as the result of an act of war, an act of God, or an intentional or negligent act or omission of a third party, plaintiffs are as a matter of law entitled to judgment on the pleadings on the issue of liability.

Plaintiffs' Memorandum in Support of Motion for Judgment on the Pleadings on the Issue of Liability Under AS 43.03.822, Strict Liability for the Liability for the Discharge of Hazardous Substances, April 10, 1990.

On September 26, 1990, after the foregoing motion was argued to the Superior Court on September 13, 1990, the court entered the following order:

ORDER GRANTING, IN PART, PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

PRETRIAL ORDER NO. 16

Plaintiffs have moved for judgment on the pleadings on statutory liability issues in this case. Pursuant to Alaska Civil Rules 12(c) and 56, I hereby grant the motion, to the following extent:

1. AS 46.03.822 provides that persons owning or having control over hazardous substances which are spilled into Alaskan waters or on Alaskan lands are strictly liable for damages caused by those spills. Corporations are "persons" who may be liable under the statute. AS 46.03.900(7). Compensable damages may include "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." AS 4603.824.

2. The pleadings and evidence submitted on this motion establish beyond factual dispute that Exxon Shipping Corporation and Exxon Corporation are persons owning or having control over the crude oil released into Alaskan waters by the Exxon Valdez oil spill on March 24, 1989. Crude oil is a "hazardous substance" as defined by AS 46.03.822 and AS 46.03.826(4)(B);

3. Exxon Shipping Corporation and Exxon Corporation are strictly liable without regard to fault for all damages which are compensable under AS 46.03.824.

4. Causation is a factual issue which has not yet been established by any of these plaintiffs. However, Exxon Shipping

Corporation and Exxon Corporation will be strictly liable for all damages allowed by AS 46.03.824 proved to have been proximately caused by the spill;

5. The statutory defenses listed in AS 46.03.822 which might under other circumstances relieve these defendants of liability are not available to either Exxon Shipping Corporation or Exxon Corporation.

As Exxon Shipping Corporation and Exxon Corporation are "persons" who owned or controlled the hazardous substance which was released into Alaskan waters on March 24, 1990, partial judgment is hereby entered establishing that the Exxon Valdez oil spill constituted a violation of AS 46.03.822 for which each of these defendants will be liable to pay the moving parties all compensable damages which are proved at trial to have been proximately caused by the spill.

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

BRIAN SHORTELL
SUPERIOR COURT JUDGE

Superior Court Pretrial Order No. 16, September 26, 1990.

2. Alyeska's Motion for Judgment on the Pleadings- Dismissing All Plaintiffs' Claims Not Founded on Actual Physical Impact of The Spilled Oil.

THE TERRAIN OF THE LEGAL BATTLEFIELD ON THE PRINCIPLE FRONT OF THE WAR.

The present principle area of legal dispute between plaintiffs and defendants in the Exxon litigation poses the question: "Are purely economic damages indisputably caused by the discharge of oil from the Exxon Valdez recoverable when there has been no physical injury or

contact by such oil with the claimant's person or property."? The debate is whether state (or some amalgam of state and non-maritime federal) law or federal maritime law supplies the rule of decision governing these claims.

a. Defendants' Thesis.

Article III, § 2, of the United States Constitution extends the federal judicial power to "all cases of admiralty and maritime jurisdiction." The Supreme Court has held that admiralty jurisdiction attaches to a tort when two standards have been met - the "locality" test and "maritime nexus" test. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972).

The locality test requires the wrong to have occurred on the high seas or navigable waters. Executive Jet Aviation, 409 U.S. at 266. Under this test, "the tort 'occurs' where the alleged negligence took effect." Id. Thus, admiralty jurisdiction attaches even though it is claimed that the source of the wrong was on land, provided that the effect of the wrongful conduct took place on the high seas. See e.g., Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976) (admiralty jurisdiction

attached to plaintiffs' claims that the Coast Guard, by making a land-based decision not to rescue a drowning victim, was negligent).

The "maritime nexus" test requires that the wrong bear "a significant relationship to traditional maritime activity" described as that "involving navigation or commerce on navigable waters." Executive Jet Aviation, 409 U.S. at 268, 256; Foremost Insurance Co. v. Richardson, 457 U.S. 668, 672-75 (1982). This test is a flexible one, requiring only some relationship of the conduct in question to "navigation" broadly defined, or to maritime commerce. See e.g., Oppen v. Aetna Insurance Co., 485 F.2d 252, 257 (9th Cir. 1973). Arguably, the Exxon Valdez was engaged in maritime commerce upon the navigable waters of the United States when it struck Bligh Reef in Prince William Sound.

Defendants contend that under maritime law, plaintiffs may not recover for purely economic damages in the absence of a direct physical injury to person or property under the teachings of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). In Robins Dry Dock, the Supreme Court (per Justice

Holmes) held that a negligent dry dock company was not liable to third-party charterers of a ship for economic losses suffered when the vessel was not provided to them on time. The court ruled that the charterers could not recover economic damages for loss of the vessel's use because there was no physical injury to the charterers or their property. Despite the early beginnings of this rule, it continues to have outcome determinative impact on maritime tort litigation. See e.g., State of Louisiana, ex rel. Guste v. M/V Test Bank, 752 F.2d 1019 (5th Cir. 1985); Getty Refining & Marketing Co. v. M.T. Fadi-B, 766 F.2d 829 (3rd Cir. 1985); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985); Holt Hauling & Warehousing Systems, Inc. v. M/V Ming Joy, 614 F. Supp. 890 (E.D. Pa. 1985).

As noted above, Exxon Corporation and Exxon Shipping Company are liable under Alaska law (and the law of this case pursuant to Judge Shortell's September 26, 1990 order, supra) for damages including loss of income, loss of means of producing income, or the loss of an economic benefit. See AS 46.03.824. Thus, the framework for a direct clash between Alaska law permitting recovery for

purely economic loss resulting from negligent acts, and maritime law disallowing the recovery of such damages if defendants' thesis is accepted.

Defendants argue that the Fifth Circuit's opinion in State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) ("Testbank") definitively resolves the issue. In Testbank, a massive spill of hazardous chemicals into a navigable waterway resulted in suspension of all fishing, shrimping, and associated activities on the waterway within 400 square miles surrounding Louisiana waterways and marshes, the embargo of seafood and shellfish caught in the area, widespread notice of the embargo to the population, and distribution of an acid cloud upon a small town down wind of the spill. The following claimants presented both maritime and state law claims for the resultant damages:

- (i) Commercial fishermen, crabbers, oystermen, and shrimpers who routinely operated in and around the closed areas;
- (ii) Fishermen, crabbers, oystermen, and shrimpers who engaged in these practices only for recreation;

- (iii) Operators of marinas and boat rentals, and marine suppliers;
- (iv) Tackle and bait shops;
- (v) Wholesale and retail seafood enterprises not actually engaged in fishing, shrimping, crabbing or oystering in the closed area;
- (vi) Seafood restaurants;
- (vii) Cargo terminal operators;
- (viii) An operator of railroad freight cars seeking demurrage;
- (ix) Vessel operators seeking expenses, demurrage, crew costs, tug hire, and losses of revenues caused by the closure of the waterway.

752 F.2d at 1036.

On a motion for summary judgment the trial court, relying upon Robins Dry Dock, dismissed all claims except those of the commercial fishermen. The Fifth Circuit affirmed, relying upon the Robins Dry Dock rule, that physical damage to a proprietary interest is a prerequisite for recovery for economic loss in cases of unintentional maritime tort, whether viewed as a limit upon the duty of the defendant or upon the range of the doctrine of proximate cause. The court opined that without this limitation,

"foreseeability loses much of its ability to function as a rule of law." (752 F.2d at 1021) The interests of maritime commerce dictate a rule of certainty and predictability in defining what claims arising from a maritime incident are to be compensable. In doing so, the court rejected the expansion of the common law concept of foreseeability to encompass purely economic losses as dysfunctional because of the impossibility of discerning a workable line beyond which the "wave upon wave of successive economic consequences," 752 F.2d at 1028, will not trigger a legal consequence. With respect to state law claims premised upon the Louisiana Environmental Affairs Act of 1980, the court held that they originated from a maritime incident "within the admiralty and maritime jurisdiction of the federal court," involving "a collision on a navigable waterway of the United States" resulting in damages "which required" application of federal admiralty law rather than state law. The court justified this conclusion by citing the necessity for and federal interest in the establishment of uniform rules of conduct for maritime commerce. Id. at 1031-32.

b. Plaintiffs' Thesis.

FEDERAL MARITIME LAW IS NOT OMNIPOTENT AND EXCLUSIVE IN MATTERS OF PRIMARILY LOCAL AND SERIOUS CONCERN, SPECIFICALLY WITH RESPECT TO THE TRANSPORTATION OF TAPS OIL.

State law is commonly applied in maritime cases, particularly to expand the remedies available. It has long been accepted that

"With respect to maritime torts * * * the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation, * * * [i.e., when it] 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.'
* * *

"This criterion * * * is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction."

Just v. Chambers, 312 U.S. 383, 388, 389, 391 (1941)
(holding that Florida rule on survival of actions applied in admiralty where maritime tort occurred on navigable waters within the State's territory,

notwithstanding the absence of any right to survival under established maritime law); see also e.g., Hess v. United States, 361 U.S. 314, 319 (1959) ("in an action for wrongful death in state territorial waters the conduct said to give rise to liability is to be measured not under admiralty's standards but under the substantive standards of the state law"). In Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961), the Court explained that it is incorrect to assert

"that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. * * *

"Thus, for instance, it blinks at reality to assert that because a longshoreman, living ashore and employed ashore by shoreside employers, performs seaman's work, the State with these contacts must lose all concern for the longshoreman's status and well-being. * * * [T]his Court has attempted an accommodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach."

The latter -- rules governing the extent of recovery -- are what is involved here, and they are

ordinarily determine by State law when State contacts predominate. See also, e.g., Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 672 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) (holding that application of local statute creating a right of action for a breach of maritime law could not be challenged as "run[ning] counter to the essential features of federal jurisdiction").

In Askew v. American Waterways Operators, Inc., 411 U.S. 325, 338 (1973), the Court confirmed these principles and observed that there are only "isolated instances where 'state law must yield to the needs of uniform federal maritime law when this Court finds inroads on a harmonious system.'" The Court explained, quoting from its earlier opinion in Romero v. International Terminal Operating Co., 358 U.S. 354, 373-74 (1959), that

"[T]his limitation still leaves the States a wide scope. State-created remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance -- all these laws and

others have been accepted as rules of decision in admiralty cases, even, at times, when the conflicted with a rule of admiralty law which did not require uniformity."

The Court went on to refer to "[t]he many instances in which state action had created new rights, recognized and enforced in admiralty." Id. at 339.

In Askew v. American Waterways Operators, Inc., supra, the Supreme Court held that a statute imposing strict liability for injury from an oil spill in a State's territorial waters is neither preempted by any federal statute nor constitutionally inconsistent with federal jurisdiction over maritime activities. Askew rejected a challenge to the State of Florida's Oil Spill Prevention and Pollution Act, holding that the Federal Water Quality Improvement Act of 1970 (the predecessor of the Clean Water Act, 33 U.S.C. §§ 1251-1376) did not preclude, but in fact allowed, state regulation of water pollution from oil discharges, 411 U.S. at 329, and that there was no fundamental constitutional bar to application of state law. In Chevron U.S.A., Inc. v. Hammond, 776 F.2d 483 (9th Cir. 1984), cert. denied, 471 U.S. 1140 (1985), the Court of Appeals for the Ninth

Circuit, after closely examining the entire federal maritime environmental protection scheme, similarly held that Congress had not occupied the field of regulating discharges of pollutants from tankers into a State's territorial waters. Thus, in the field of oil pollution control, federal maritime law does not preclude the States from enacting and enforcing their own laws, and such State laws have full force and effect "absent a clear conflict with the federal law." Askew, 411 U.S. at 341. With respect to creation of additional remedies, Askew expressly held that

"[S]ince Congress dealt only with 'cleanup' costs, it left the States free to impose 'liability' in damages for losses suffered both by the States and by private interests. The Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose."

411 U.S. at 336.

With respect to oil that has been transported through the Trans-Alaska Pipeline, the absence of any conflict between federal law and the remedies provided by Alaska law is especially clear. The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653 (TAPAA), the federal legislation which most

directly concerns oil spills in Prince William Sound, expressly provides that it "shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." 43 U.S.C. § 1653(c)(9). Moreover, TAPAA is entirely compatible with both the Alaska strict liability statute and the Alaska common law rule established in Mattingly v. Sheldon Jackson College, 743 P.2d 856 (Alaska 1987) in terms of both the liabilities and the remedies they establish. Federal law makes the holders of the pipeline right-of-way, and the owners and operators of vessels carrying oil transported through the pipeline, strictly liable for damages. 43 U.S.C. § 1653(a)(1), (c)(1). State statutory law similarly makes owners and operators of vessels or facilities from which there is a release of a hazardous substance, and persons having control over a released hazardous substance, strictly liable for damages. AS § 46.03.822.

Under both federal and Alaska law, a person damaged by a discharge of oil which has been transported through the Trans-Alaska Pipeline can recover damages without any physical impact

requirement. Under TAPAA, plaintiffs can recover "all damages" up to the statutory dollar limits. 43 U.S.C. §§ 1653(a)(1), (c)(1). Such damages include "loss of use of natural resources" and "loss of profits or impairment of earning capacity due to injury to or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing, and gathering opportunities." 43 C.F.R. § 29.1(e) (1988). These damages rules match both the Alaska Act and Alaska common law as previously discussed.

Even if general federal maritime law would otherwise have placed any limits upon the scope of the damages available to remedy a spill of Alaska oil, any such limits would plainly be superseded by TAPAA. Indeed, when TAPAA was considered by the Joint House and Senate Conference Committee, the Conferees expressed concern about limitations imposed by federal maritime law and an intent to override any such limitations by establishing "a rule of strict liability for damages from discharges of oil transported through the Trans-Alaska Pipeline up to \$100,000,000." Conference Rep. No. 93-924, 1973 U.S. Code Cong. & Admin. News 2523, 2530. The

Conferees went on to note that "[t]he States are expressly not precluded from setting higher limited * * *," id. at 2531; the implication is clear that those "higher limits" would encompass the same kinds of damages as the statutory damages.*

Application of the Alaska statutory and common law damage principles in the Exxon Valdez litigation would do no more than raise the "limits" on the liabilities of persons who would otherwise be strictly liable or liable for negligence under federal maritime law. The award of damages for economic losses would complement and extend, not frustrate, the federal scheme for imposing liability for oil discharges. See e.g., California v. ARC America Corp., 109 S. Ct. 1661, 1667 (1989) ("Ordinarily, state causes of action are not preempted solely because they impose liability over

*That Congress did not intend to preclude the States from setting higher limits for damages from oil spills is confirmed by the last sentence of 43 U.S.C. § 1653(c)(3) which, in regard to discharges of oil from vessels loaded at terminal facilities of the pipeline provides: "The unpaid portion of any claim [for damages arising out of an oil spill against the TAPS fund] may be asserted and adjudicated under other applicable federal or state law." (Emphasis added.) During the floor debates, specific reference was made to the Alaska Act, leaving no doubt that Congress specifically contemplated that it would apply to oil spills in Alaska waters. See 119 Cong. Rec. 24296-97.

and above that authorized by federal law"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984) (award of punitive damages does not frustrate federal remedial scheme of Atomic Energy Act).

Federal maritime law has been particularly receptive to application of State law to expand upon the remedies available to injured plaintiffs:

"The Supreme Court, especially in recent years, has allowed the application in admiralty of state laws which broaden the scope of a party's liability beyond that recognized in the maritime law * * *, while it has tended to reject the application in admiralty of state laws which narrow or wholly defeat a previously recognized maritime right of recovery."

In re M/T Alva Cape, 405 F.2d 962, 969-70 (2d Cir. 1969) (citations omitted); see also St. Hilaire Moye v. Henderson, 496 F.2d 973, 980 (8th Cir.), cert. denied, 419 U.S. 884 (1974) (refusing to apply a State statute that would have limited recovery, but noting that "[t]he Supreme Court has sustained the applications of state laws which broaden the scope of liability beyond the general maritime standard").

The Supreme Court decisions discussed above recognize that there is considerable room for difference from State to State in the consequences of negligence or other violation of law occurring in

State territorial waters. In Askew, the Court opined that impermissible intrusion upon the uniformity of maritime law would be found only in "isolated instances." 411 U.S. at 338. In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 n.2 (1986), the Court reiterated (but had not occasion to consider applying) the rule of deference to the law of the "forum state" in an admiralty case where that State has a "'pressing and significant' interest in the tort action." It cited in this regard Kossick v. United Fruit Co., supra, which had framed the question as to whether the matter before the Court in admiralty was "of such a 'local' nature that its validity should be judged by state law." 365 U.S. at 735. The primacy of local interests over any principle of national uniformity has been especially recognized in pollution cases. Askew, supra; see Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960).

3. The Possibility of Forum Dislocation.

On September 13, 1990, at the conclusion of oral argument motions for class certification and defendant Alyeska's motion to dismiss claims for purely economic loss, Judge Holland stated in oral comments:

When Congress enacted TAPAA in 1973, it addressed the issue of liability for TAPS oil spills in a marine environment in Section 1653(c). The express purpose of Congress in enacting Section 1653(c) was to provide adequate compensation for all victims of TAPS oil spills. Having concluded that existing maritime law would not provide adequate compensations, Congress established strict liability to the extent of \$1 million for all damages suffered by anyone as a result of a TAPS oil spill. We have concluded that such liability is not limited or otherwise affected by maritime law, including the rule of Robins Dry Dock.

Oral comments of the Honorable H. Russell Holland, September 13, 1990. Simultaneously, the court shared its tentative conclusion with the parties that the amendments to TAPAA contained in the Oil Pollution Act of 1990 (Pub. No. 101-380, signed into law August 18, 1990), made clear that Congress intended that persons injured by a spill of TAPS oil must first pursue their claims against the Trans-Alaska Pipeline Liability Fund ("Fund") before they may resort to litigation in state or federal courts. Id.

Judge Holland stated that his comments and observations were not final and asked that the parties brief their views on the foregoing observation. Plaintiffs' brief was due and filed on September 28, 1990. Defendants' response is due October 8, 1990, with reply by plaintiffs, if any, due on October 18, 1990.

Plaintiffs respectfully disagree with the basic premise of Judge Holland's observations. That is, that the Fund was established and intended by Congress to be the original and primary source of compensation to persons injured by a spill of TAPS oil.

First, plaintiffs contend that requiring initial exhaustion of the Fund would directly conflict with the history and purpose of TAPAA. The Fund is simply a secondary source, though an important avenue, for redress in small spills for claimants who choose not to pursue judicial remedies. The Fund is not, however, a primary remedy that must be pursued before a party goes to court. Congress took pains to provide that TAPAA "shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." 43 U.S.C. § 1653(c)(9). An aggrieved party may present a claim to the Fund or to court, at his or her election:

No claim may be presented, nor any action be commenced, for damages . . . unless that claim is presented to or that action is commenced . . . within two years.

43 C.F.R. § 29.9(g).

Congress' intent not to impose any exhaustion requirement in TAPAA is consistent with Congress' longstanding refusal to enact any anti-pollution

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legislation that restrict state court remedies. See e.g., 43 U.S.C. § 1653(c)(9) (TAPAA); 33 U.S.C. § 134(o)(2), (3) (Clean Water Act); 42 U.S.C. §§ 9607, 9614 (CERCLA). The recently enacted Oil Pollution Act of 1990 ("Oil Pollution Act") reaffirms Congress' "long-standing policy in environmental laws of not preempting state authority and recognizing the rights of states to determine for themselves the best way in which to protect their citizens" Report of the Senate Committee on Environment and Public Works, No. 101-94, S.686 (July 28, 1989) at 17.

Section 1013(a) of the Oil Pollution Act generally requires initial presentation of a claim to the responsible party, not to the Oil Spill Liability Trust Fund. If (as in the Exxon Valdez scenario) the responsible party agrees to pay, no claim against that fund is necessary. If the responsible party refuses to pay (as in the Glacier Bay scenario), the claimant has the option of claiming against that fund or commencing a court action against the responsible party. Section 1013(b). If the claimant does both, the 1990 Act gives primacy to the court proceeding. Section 1013(b)(2). See also H. R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 117 (1990). The jurisdictions of

both state and federal courts are specifically preserved without any requirement of exhausting the Oil Spill Liability Trust Fund. See Section 1017(a)-(c).

Second, plaintiffs submit that the Fund is not a governmental administrative agency thereby precluding application of the doctrine of exhaustion of administrative remedies as suggested by Judge Holland. McKart v. United States, 395 U.S. 195, 193 (1969). The Administrative Procedure Act defines "agency" as an "authority of the Government of the United States . . ." 5 U.S.C. § 551(1) (emphasis added). This definition excludes the Fund. Congress established the Fund merely as "a non-profit corporate entity" which "shall be administered by the" defendant oil companies--that is, private corporations. 43 U.S.C. § 1653(c)(4). This fact also raises serious questions involving the constitutional guarantees under the due process clause, Article III and the Seventh Amendment. The placement of plaintiffs' rights in the hands of a politically unaccountable private entity, in place of governmental decision makers sworn to uphold the Constitution, has been prohibited by the Supreme Court for decades. Eubank v. City of Richmond, 226 U.S. 137, 143-44 (1912). Likewise, under Article III and the Seventh Amendment,

however one characterizes the Fund, it is clearly not a federal forum exercising "[t]he judicial power of the United States" under Article III, Section 1, of the Constitution, with the attendant salary and ten year protections, presiding over a jury trial on legal claims. It would violate Article III and the Seventh Amendment to require plaintiffs to submit this "'wholly private tort . . . case'" to the Fund. GranFinanciera S. A. v. Nordberg, 492 U.S. _____, 109 S. Ct. 2782, 2795-97, 106 L.Ed.2d 26, 46-49 (1989) (citation omitted).

Plaintiffs also perceive serious practical and legal problems with the court's suggestion even if the Fund met the criteria of an administrative agency. "Exhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious." Southeast Alaska Conservation Council, Inc. v. Watson, 697 F.2d 1305, 1309 (9th Cir. 1983). See Coit Independent Joint Venture v. FSLIC, 489 U.S. 1361, 1375, 103 L.Ed.2d 602, 623 (1989).

On the practical side, the Fund has no authority to deal with certain highly contested issues at the heart of this litigation; claims for punitive damages and

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state statutory penalties. Neither can the Fund fully resolve the claims that are within its authority to consider. If all claims are presented to the Fund, the claims will be far in excess of \$100,000,000.00. Thus, all claims allowed by the Fund will be reduced pro rata to an amount likely to be a few cents on the dollar. 43 U.S.C. § 1653(c).

Finally, even if the Fund had the authority to resolve all of the claims asserted in this litigation, it lacks the motivation to do so. On September 25, 1990, presumably in response to the court's request for a full written discussion by way of briefs of the court's tentative observations of September 13, 1990, Exxon Shipping filed a copy of a document entitled "Agreement between Exxon Shipping Company ("Exxon") and the Trans-Alaska Pipeline Liability Fund ("Fund")" dated June 23, 1989. It would appear from the content of this Agreement that at the very least, the Fund has abdicated its perceived role as arbiter of claims by persons injured as a result of the spill of TAPS oil. The agreement was entered into within three months of the Exxon Valdez spill and presumably represents a major motivational component to the voluntary process established by the Exxon defendants for dealing with

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claims arising from the spill. Likewise, this agreement explains why the Fund has not operated at all. It is has no claim forms, no claims personnel, and absolutely no process in place for evaluating and settling claims. Following the spill, all claims were simply directed to the Exxon claims program; hardly an impartial body to fairly deal with claims against itself for damages caused by its oilspill! Even if the Fund were able to expeditiously establish a claims process, there are other obstacles to the timely completion of the same. Claims can be filed against the Fund at least until March 24, 1991, 43 C.F.R. § 29.9(g). Thereafter, the Fund would be required to evaluate and allow or disallow the same. Upon completion of such quantification, it is certain that the total amount of allowed claims will exceed the dollar amount available under the Fund. 43 C.F.R. § 29.7(c)(2) (Exxon Corporation has represented in these proceedings that it has voluntarily paid over \$235 million to more than 10,000 persons or entities since the spill.) As a result, payments of settled claims would have to be prorated before any monies could be disbursed to claimants from the Fund. Thereafter, claimants would be returning to courts to pursue penalties, punitive damages and the unpaid

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portions of their claims, after the attendant inevitable delay of having detoured through a presently non-existent claims process.

Admittedly, the foregoing is an argumentative and biased commentary on the September 13, 1990 observations of Judge Holland. By October 12, 1990, the litigants will receive the defendants' views on the court's observations and share them with the reader.

September 29, 1990
David W. Oesting
Plaintiffs Co-Lead Counsel
Davis Wright Tremaine

entirely, the...
Fund would be required to evaluate and allow or disallow...
certain that the total amount of allowed claims will...
exceed the amount available under the Fund.
43 C.F.R. § 20.101(c)(2), Exxon Corporation has...
represented in these proceedings that it has voluntarily...
paid over \$125 million for more than 10,000 barrels of...
entireties since 1981. As a result, the...
settled claims would have to be treated as...
Funds could be used to pay claims from the Fund.
Thereafter, claims could be returned to...
future penalties, damages and unpaid

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