No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX VOLUME THREE [Pages 1368 - 1494]

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APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:	)	
	)	No. A89-0095-CV
the EXXON VALDEZ	)	(HRH)
	)	(Consolidated)
	)	
	)	
This Order Relates to All Cases	)	
	)	

ORDER NO. 223

MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGE CLAIMS FOR UNOILED REAL PROPERTY AND ECONOMIC LOSSES NOT ARISING FROM PHYSICAL IMPACTS OF OILING

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have filed a motion for partial summary judgment on damage claims for unoiled real property and economic losses not arising from physical impacts of oiling.[1] Plaintiffs oppose the motion,[2] and Exxon has replied.[3] Having been fully briefed and oral argument having been heard, the motion is ready for ruling.

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[1] Clerk's Docket No. 4055.

[2] Clerk's Docket Nos. 4381 and 4112.

[3] Clerk's Docket No. 4487, 4085 and 4248.

Through the instant motion, Exxon seeks summary judgment on:

> (1) all claims for parcels of land that were not touched by oil from the Exxon Valdez spill; (2) the portions of all claims for "oiled" parcels seeking to recover for unoiled portions of those parcels above the immediate shoreline; and (3) all claims for economic losses that do not arise from physical impacts of the oil spill upon plaintiffs' lands.

Clerk's Docket No. 4055 at 2.

Exxon argues that the first category includes claims brought by plaintiffs whose parcels of land were landlocked, located on the eastern side of Prince William Sound which was unoiled, or received no oil on their land even though oil was in the area. Regarding the second category, Exxon argues that simply because a strip of shoreline was oiled does not mean that a landowner can recover for all upland portions of the parcel that were not oiled. Exxon argues that the third category overlaps the first two categories and encompasses most land claims asserted in the litigation. The third category includes plaintiffs who are seeking damages for alleged losses of property value resulting from a "stigma" or "loss or marketability". Exxon argues that such indirect economic loss claims are not recoverable.

Resolution of the issues raised by Exxon centers around the court's interpretation of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical

harm to a proprietary interest to recover economic losses. See Imtt-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1194 (5th Cir. 1993), cert. denied, 114 S. Ct. 880 (1994). The limited exception to this rule created for commercial fishermen who may recover economic damages without accompanying physical harm, Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974), has no application to the issues raised by this motion.

In responding to Exxon's arguments, plaintiffs argue that the Robins Dry Dock rule bars claims for the loss of the financial benefits of a contract or prospective trade, but does not apply to non-commercial claims or those involving real property.[4] Plaintiffs' narrow interpretation of Robins Dry Dock has been rejected by numerous courts. See IMTT-Gretna v. Robert E. Lee SS, 993 F.2d at 1194 (After examining the history and central purpose of Robins Dry Dock, the court held that recovery for economic loss is unavailable absent physical damage to property), citing Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986); and Naviera Maersk Espana S. A. v. Cho-Me Towing, Inc., 782 F.Supp. 317, 319 (E.D.La. 1992) ("Robins stands for the proposition that a party may not recover for economic loss not associated with physical damages.") (footnote omitted), quoting Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983); and Holt Hauling & Warehousing Sys., Inc. v. M/V

[4] Plaintiffs "assume for the sake of argument" that this action is a maritime tort. The court has held on numerous occasions that the case is a maritime tort to be governed by maritime law. See e.g. In re the Exxon Valdez, 767 F.Supp. 1509 (D. Alaska 1991)

Ming Joy, 614 F.Supp. 890, 896 n.13 (E.D. Pa. 1985) ("[T]o the extent Robins Dry Dock's principle 'is essentially a principle of disallowance of damages because of remoteness, ' . . . harm to non-contractual interests will typically be more remote than harm to contractual interests.") (citations omitted). See Order No. 121, Clerk's Docket No. 3194 at 13 ("Robins Dry Dock does not allow the award of purely economic damages.") (footnote omitted). For the above stated reasons, the court finds, pursuant to Robins Dry Dock, that plaintiffs may not recover economic damages absent physical damages.[5]

Plaintiffs also argue that their claims are cognizable under Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). Oppen established a commercial fishermen's exception to the Robins Dry Dock rule and allows commercial fishermen to recover economic losses absent physical impact. Plaintiffs argue that the Oppen exception applies to any plaintiffs who have suffered foreseeable harm of a "particular and special nature," different in kind from the harm suffered by members of the general public. Id. at 570.

The court has held on various occasions that the Oppen exception applies to those who "lawfully and directly make use of a resource of the sea". Id. at 570. These persons are, primarily, commercial fishermen. See Order No. 121, Clerk's Docket No.

[5] Plaintiffs cite Penzoil Producing Co. v. Offshore Express, Inc., 943 F. 2d 1465, 1473 (5th Cir. 1991), for the proposition that Robins Dry Dock does not apply when a plaintiff suffers physical damage to property. Plaintiffs seriously misconstrue Penzoil which stands for the obvious proposition that Robins Dry Dock will not bar a claim for economic damages which are accompanied by physical damages to a proprietary interest. Id.

3194 at 5 n.10; and Order No. 174, Clerk's Docket No. 4444. In creating the commercial fishermen's exception to Robins Dry Dock, the Oppen court stated "it must be understood what our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill . . . ." Oppen, 501 F.2d at 570. The court concludes that the Oppen commercial fishermen's exception to Robins Dry Dock, does not apply to the landowner plaintiffs herein.

Plaintiffs next argue that oiling of the intertidal zone interfered with their littoral rights, constituting a physical impact to a proprietary interest.[6] Plaintiffs apparently argue that the oil spill interfered with their littoral rights even though it may not have physically touched their property. According to plaintiffs, the interference alone constitutes a physical impact. Plaintiffs cite several cases in support of their argument that property interests include littoral rights. See Clerk's Docket No. 4381 at 16 and cases cited therein.

Plaintiffs' case cites, however, do not circumvent the Robins Dry Dock rule which requires actual physical impact before recovery is cognizable. Getty Ref. & Mktg. Co. v. M/T Fadi B, 766 F.2d 829 (3d Cir. 1985), considered the rights of an owner of riparian land within the context of Robins Dry Dock

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[6] Littoral rights are "[r]ights concerning properties abutting an ocean, sea or lake rather than a river or stream (riparian). Littoral rights are usually concerned with the use and enjoyment of the shore." Black's Law Dictionary, 842 (5th Ed. 1979).

and is instructive on this issue.[7] In Getty, the Coast Guard ordered the M/T Fadi B to dock at a marine terminal upon discovery of defects in the vessel's hull. The marine terminal operator suffered no physical damage but sued for lost access to his dock on account of the Fadi B's negligence. The terminal operator argued as follows:

> [A]s an owner of riparian land it had the right of access to the navigable water immediately in front of its property and also a right of access to the whole body of navigable water connected with the water in front of this property; that although the riparian landowner does not own the water in front of his property and must share with the public, its right of access is a property interest that is an accessory to its land ownership. From these assertions appellant constructs the theory that it has suffered an invasion of this property interest by the negligence of the FADI B and that this invasion created liability.

Id. at 834.

In rejecting the terminal operator's argument, the court stated that "[h]owever innovative this theory may be . . . we are left with the brute fact that there was no physical damage to a person, chattel, or real property." Id. The court further stated that the arguments were inconsistent with the body of

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[7] A riparian owner is "[o]ne who owns land on bank of river, or one who is owner of land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with river." Black's Law Dictionary, 1192 (5th ed. 1979).

negligence law. See also In re Oriental Republic of Uruguay, 821 F.Supp. 934, 938 (D. Del. 1993) ("[T]he Robins rule precludes recovery by [claimant] of its economic loss damages because [claimant's] demurrage charges and change-in-schedule losses resulted not from the pollution damage which [claimant] sustained to its property, but, as in FADI B, from the inability of ships to gain normal access to claimant's terminal.") (emphasis added).[8]

The court finds that mere interference with littoral use, without physical oiling of shoreline property, does not satisfy Robins Dry Dock and such claims are not cognizable. On the other hand, owners of oiled property may have had their littoral rights impacted and would satisfy Robins Dry Dock. Exxon does not dispute this point and, in fact, "concede[s] for purposes of this motion that owners of waterfront property where adjacent shorelines were oiled do satisfy the physical impact rule." Clerk's Docket No. 4487 at 13 (footnote omitted).

With the above principles in mind, the court considers first claims based upon parcels of land that were not touched by oil from the Exxon Valdez oil spill. The owners of land not physically contacted by oil obviously have no possibility of a recovery for physical damage to their property and, on the above authorities, are precluded from pursuing a claim for economic damages. This category of property includes, but is not limited to, landlocked parcels. Because the owners of unoiled properties have no claim for physical damages, and therefore have no

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[8] Demurrage charges are those charges related to the detention of a vessel beyond the allowed number of days for loading or unloading cargo. Black's Law Dictionary, 389 (5th ed. 1979).

possible claim for economic damages, summary judgment is granted in favor of Exxon and against all land-owner plaintiffs whose property was not physically impacted by oil.

The court addresses next the situation of properties which have suffered some physical contact with oil spilled from the Exxon Valdez. As to such properties, the plaintiffs are entitled to recover for such actual, physical damage as the land is demonstrated to have suffered.

Obviously, pure physical damage does not exhaust the possibilities for loss by landowners. For example, the presence of oil on a given parcel of property may or may not interfere with the owner's use of that property; and, if there is such interference, it may be of brief or long duration. Here, we deal with economic damages. These economic damages probably (although perhaps not necessarily) affect a larger portion of any given parcel of land than the area of actual impact.

The court has previously considered the geographic aspect of damages to land in an order regarding claims presented to the Trans-Alaska Pipeline Liability Fund (Fund). Case No. T92-1000, Order No. 20, Clerk's Docket No. 98. In that order, the court recognized that entire parcels of land or just the immediate shoreline might be affected, and that "common sense and the immense size of the parcels at issue in this appeal dictate that the entire land holding was not affected and therefore cannot be considered for a determination of damages." Id. at 17-18 (footnote omitted).

In Order No. 20, Case No. T92-1000, the court dealt with this same problem. The court affirmed a

decision of the Fund which made determinations of the territorial extent of allowable economic damages. In doing so, the court acted in an appellate capacity, determining that the findings of the Fund were not clearly erroneous. As to these proceedings, the court's posture and role is very different. On motion for summary judgment, the court may address legal issues which do not depend for their resolution on disputed facts. Fed. R. Civ. P. 56(c).

Plaintiffs argue that they may recover for injury to their entire parcel of property as opposed to recovering only for oiled shorelines. Clerk's Docket No. 4381 at 17-22. In making their argument, plaintiffs fail to distinguish between physical damage and economic losses. We have dealt with the former in preceding paragraphs. We now address the territorial extent of potential economic losses as to property physically contacted by oil from the Exxon Valdez.

Having suffered physical contact with oil, a landowner, upon due proof, may recover economic losses which are caused by the oiling. A landowner may, for example, prove that he was deprived of one or more specific uses of his property for a certain period of time, and might establish the value of that lost usage. The landowner might establish interference with some ongoing use of his property (albeit a use that was not preempted by the presence of oil on the property). Thus, economic damages may have both a geographic and a temporal aspect. Interference with land use may be total or partial in either aspect. How much land is affected and for how long is a matter for proof. On motion for summary judgment, it is not possible for the court to determine for the parties the geographic or temporal

extent of liability as to any particular parcel, unless there is no disagreement as to the evidence on these points. On the present record, it is not possible for the court to make these determinations because of factual disputes.

The difficulty of applying the foregoing guidelines for the determination of liability for economic damages is compounded by Exxon's motion to strike.[9]

As a general proposition, the court will not permit a party opposing a motion for summary judgment to contradict his prior deposition testimony by affidavit. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). However, in Kennedy, the court also stated that:

> Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence . . . . In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition.

Id. (citations omitted). Kennedy further noted that an affiant could have been confused at the deposition, could have lacked access to material

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[9] The motion to strike is filed at Clerk's Docket No. 4549, plaintiffs opposed the motion at Clerk's Docket No. 4596, and Exxon replied at Clerk's Docket No. 4628. Exxon contends that many landowners have submitted affidavits which assert physical property damage in direct contradiction of earlier depositions which disavowed any such damage. These diverse positions of plaintiffs are not insignificant; they go to the heart of the plaintiffs' claims and their rights against Exxon.

facts, or could have newly discovered evidence.

Finally, Kennedy also suggests that a district court should not reject an affidavit without first conducting an evidentiary hearing to determine if the affidavit at issue was a "sham". Id. at 267. Given the immensity of this case and the number of landowner plaintiffs, the latter approach is not feasible. Upon review, the motion to strike is denied.

The court denies summary judgment as to landowners of oiled properties who seek economic damages directly related to the oiling of a property interest. However, these economic damages may not include damages based on "stigma" or "public fear", loss of marketability, or diminution in property value. These damage issues are addressed below.

Exxon argues that the plaintiffs cannot recover for diminution in the value of their properties because those claims arise from a "stigma" or "public fear", but not the actual oiling of a proprietary interest.[10]

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[10] Essentially, plaintiffs argue that their property has a "troubled reputation" resulting from the oil spill. Plaintiffs refer to their brief in opposition to Exxon's motion for summary judgment on claims of commercial fishermen based on price diminishment (Clerk's Docket No. 4165), in which they argue that:

> [T]he tortfeasor is legally responsible for the impact his actions had on the demand for plaintiff's [land], even though the harm is visited on the plaintiff through the intervening force of the impacted market.

Id. at 13. Plaintiffs also argued that the oil spill was the proximate and foreseeable cause of the drop in the demand for and price of their fish. Id. at 20. By analogy, plaintiffs herein argue that the oil spill resulted in the drop in demand for and

The court concludes that property owner claims (whether the property was oiled or not) based upon claims that a "stigma" or "public fear" depressed property values are not actionable. Such claims are too speculative and remote and are not reflective of damages caused by the oiling of property.[11]

Plaintiffs must prove that their economic loss was causally connected to the spilling of oil. Imtt-Gretna v. Robert E. Lee SS, 993 F.2d 1193 (5th Cir. 1993), cert. denied, 114 S.Ct. 880 (1994) ; Union Oil v. Oppen, 501 F. 2d 558 (9th Cir. 1974) ; In re oriental Republic of Norway, 821 F.Supp. 934 (D. Del. 1993); and Naviera Maersk Espana S.A. v. Cho-Me Towing,

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price of their land. The court's decision regarding commercial fishermen's claims of price diminishment was governed by Oppen, which specifically excludes commercial fishermen from Robins Dry Dock and allows the fishermen to pursue claims for lost profits. In the instant motion, the landowner plaintiffs must meet the Robins Dry Dock requirements to pursue their claims.

The fish-pricing dispute involves circumstances under which fish that were on the market for sale were either not sold or were sold at a depressed price. In this motion, plaintiffs have submitted evidence of only one landowner who had property on the market which did not sell because of the spill. Claimant Michael Bullock states in his declaration that on March 1, 1989, prior to the oil spill, he entered into a purchase agreement with Sam Devon for the sale of Country Club Estates on Kachemak Bay. The agreed sale price was $385,000.00. Two of the three tracts involved were oiled (tracts 2 and 4). Because of the spill, Mr. Devon rescinded the agreement on April 3, 1989. Exxon's motion for summary judgment is denied regarding Bullock's claim, and Bullock is entitled to pursue his claim for tracts 2 and 4 which were oiled by the spill.

[11] Of course, if a given property was not oiled at all, this kind of claim is even more remote and more speculative than that discussed in the following text.

Inc., 782 F.Supp. 317 (E.D. La. 1992). This the plaintiffs cannot possibly do. Alleged losses based upon "stigma" or "public fear" are inherently speculative and conjectural and do not "flow directly from the alleged physical damage to plaintiff's property". Naviera Maersk Espana S.A., 782 F.Supp. at 320. The court denied analogous commercial fishermen claims which were remote, speculative or conjectural.[12] Moreover, the alleged "stigma" or "public fear" damages are remote in the sense that there is no way of knowing when a particular parcel of land will in fact be placed on the market. While it is, of course, theoretically possible to develop a present value appraisal, any purported losses suggested by such an appraisal are not real when the property was not actually for sale. When a given property is actually placed on the market, the "stigma" or "public fear" which might currently exist could very well have totally dissipated. Moreover, all manner of future economic (supply and demand) factors, not presently known or knowable, will affect future sale prices of property. Again, the claims for diminution in value asserted by the landowner plaintiffs are too speculative, conjectural, and remote, and do not "derive[] directly from the plaintiff's physical property damage." Republic of Uruguay, 821 F.Supp. at 940. Being remote and conjectural, the claims are not cognizable under Robins Dry Dock because, Robins Dry Dock is "'essentially a principle of disallowance of damages because of remoteness"'. Holt Hauling & Warehousing Sys., Inc. v. M/V Ming Joy, 614 F.Supp. 890, 896 (E.D. Pa. 1985). As stated in Oriental Republic of Uruguay, "[t]he Robins rule of preclusion

[12] Order No. 188, Clerk's Docket No. 4707.

prevents this unending chain of potential tort liability for economic losses by setting forth a bright line rule of limitation which discards traditional precepts of foreseeability. . . ." Oriental Republic of Uruguay, 821 F.Supp. at 939.[13] The court concludes that, as a matter of law, these alleged "stigma" damages are not damages caused by the physical effects of the Exxon Valdez oil spill,[14] and are not cognizable under Robins Dry Dock.

Exxon's motion for summary judgment is granted in part and denied in part to the extent explained in this order. Exxon's motion to strike is denied.

DATED at Anchorage, Alaska, this 8 day of June, 1994.

/s/_____
United States District Judge

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[13] Such "traditional precepts of foreseeability" include damage concepts discussed in Restatement (Second) of Torts §§ 928 & 929. Regardless, the situations discussed by the Restatement do not apply here. Section 929 of the Restatement contemplated recovery of depreciated market value when an oil spill destroyed the fertility of a field for several years. In the case at bar, the strip of rocky shoreline or beach was only effected at the time it was oiled, prospective damages to future use simply do not exist. Damages to marketability must be based on something more tangible than an unknown prospective buyer's potential fear of purchasing property because of the "stigma" associated with a once oiled strip of shoreline. of course, to the extent that a landowner could show the type of damages discussed in the Restatement, those damages would be recoverable, assuming they were directly caused by the Exxon Valdez oil spill. Neither the Restatement nor Robins Dry Dock will allow "stigma" damages, however.

[14] See supra n.11.

APPENDIX P

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
the	)	No. A89-0095-CV
the EXXON VALDEZ	)	(HRH)
	)	(Consolidated)
	)	

SPECIAL VERDICT
FOR PHASE I OF TRIAL

Interrogatory No 1: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was negligent, as that term has been defined in the instructions, and that his negligence was a legal cause of the grounding of the Exxon Valdez on March 24, 1989?

Yes: X No: ___

Interrogatory No 2: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was reckless, as that term has been defined in the instructions, and that his recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: X No: ___

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the Exxon defendants were reckless, as that term has been defined in the instructions, and that their recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: X No: ___

If you have completed all of the answers to the questions required of you by this verdict, please have your presiding juror sign the verdict and date it and return it to the court.

DONE at Anchorage, Alaska, this 13th day of June, 1994.

/s/ Ken S. Murray
Presiding Juror

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV
the EXXON VALDEZ	)	(HRH)
	)	
	)	(Consolidated)
	)	
This Order Relates to All Cases	)	
	)	

ORDER NO. 242

MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS'

CLAIMS FOR NON-ECONOMIC INJURY

Exxon Corporation (D-1) and Exxon Shipping (D-2) (Exxon) have moved for summary judgment on plaintiffs' claims for non-economic injury.[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3] Oral argument has not been requested and is deemed unnecessary.

In Order No. 190, the court granted Exxon's motion for summary judgment on Alaska natives' non-economic injuries.[4] The instant motion addresses non-economic injuries for the remaining plaintiffs. Such claims involve emotional distress and hedonic

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1 Clerk's Docket No. 5205.

2 Clerk's Docket No. 5399.

3 Clerk's Docket No. 5468.

4 Clerk's Docket No. 4709.

damages which include loss of quality of life and loss of enjoyment of life.

Plaintiffs describe their claims as follows:

> First, numerous Plaintiffs bringing commercial fishing claims for economic losses are also asserting claims for loss of enjoyment of life, sometimes also referred to as lost quality of life . . . .
>
> Second, certain direct action commercial fishing Plaintiffs are asserting claims for negligent infliction of emotion distress arising from Defendants' reckless conduct . . . .

Plaintiffs' opposition at 2.

Plaintiffs argue that quality of life claims are recoverable under the maritime law of public nuisance applicable to commercial fishermen. Plaintiffs further argue that emotional distress claims are recognized under general maritime law principles.[5]

In considering the issues involved in this motion, the court will be guided by Robins Dry Dock v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings an injured person must

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[5] Plaintiffs also argue that individuals who suffered physical harm may recover under maritime law and general common law. Exxon withdraws their motion regarding 69 plaintiffs who have submitted affidavits claiming physical injuries. See Exxon's reply at 2 n.3 and affidavits attached to plaintiffs' opposition. The Jameson plaintiffs have requested a 75-day continuance to obtain additional affidavits from plaintiffs who Mr. Jameson claims have physical injury. This is not the first time that Mr. Jameson has requested leave to submit after-the-fact affidavits despite having five years to develop his case. As on the previous occasions, the court denies Mr. Jameson's request.

have suffered direct physical harm to recover economic losses. A limited exception was created for commercial fishermen who may recover certain economic losses without physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974). Neither Oppen nor Robins Dry Dock specifically address non-economic damage. Nonetheless, Robins Dry Dock offers guidance because the "Robins Dry Dock principle 'is essentially a principle of disallowance of damages because of remoteness . . . . '" Holt Hauling & Warehousing, Inc. v. M/V Ming Joy, 614 F. Supp. 890, 896 n. 13 (E.D. Pa. 1985) (citations omitted).

I. Loss of enjoyment of life under maritime nuisance.

In Order No. 190, the court considered whether Alaska natives could state a claim under federal common law or maritime nuisance. The court stated:

> [I]t is doubtful whether a claim for public nuisance can be asserted under federal common law or maritime law.[6] In Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1985), the court stated that "'the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the [Federal Water Pollution Control Act].'" Conner, 730 F. 2d at 842, (quoting Middlesex County

[6] Although most courts distinguish between federal common law and maritime law, at least one court has suggested that "[t]o the extent that maritime law is judge-made, it can be viewed as simply one branch of federal common law." Matter of Oswego Barge Corp., 664 F.2d 327, 333-334 (2d Cir. 1981).

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981)). Conner held that Sea Clammers encompassed "all federal judge-made law of nuisance whether maritime or general federal law." Conner, 730 F.2d at 842. See also, Louisiana v. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1030 n.13 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (the Supreme Court has apparently foreclosed a federal cause of action for public nuisance claims regarding obstruction of navigable waterways); Marquez-Colon v. Reagan, 668 F.2d 611, 614 n.2 (1st Cir. 1981) (the Supreme Court held in City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) and Sea Clammers "that the federal common law of nuisance for interstate and coastal water pollution has been entirely preempted by the [FWPCA]"); Matter of Oswego Barge Corp., 664 F.2d 327, 338 n.13 (2d Cir. 1981) (suggesting that the Supreme Court understood in Sea Clammers that the FWPCA preempted both federal common law and maritime nuisance); Secko Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993) (federal common law does not recognize a cause of action for public nuisance in a water pollution case). In Nat'l Audubon Soc'y v. Dept. of Water, 869 F.2d 1196, 1200 (9th Cir. 1988), the Ninth Circuit, while not addressing maritime nuisance, held that federal common law nuisance claims for water pollution are preempted by the FWPCA.

> In the last analysis, what the Alaska natives seek is a recovery which is not

> founded upon any legal theory currently recognized by maritime law.

Order No. 190 at 8-9

The fact that the plaintiffs in the case at bar are commercial fishermen as opposed to Alaska natives does not change the court's analysis of maritime public nuisance. Oppen created a very narrow exception to the limitations imposed by Robins Dry Dock, and although Oppen permits commercial fishermen to recover limited economic damages without physical harm, it did not create a nuisance cause of action for commercial fishermen. This court has specifically limited Oppen to claims of lost profits of commercial fishermen, and will not extend Oppen to commercial fishermen's non-economic lifestyle claims. Like the Alaska natives, the commercial fishermen here seek "'a recovery which is founded upon any legal theory currently recognized by maritime law.'" Order No. 190 at 9.[7]

II. Plaintiffs' claim for emotional distress.

In support of their claim that emotional distress damages are cognizable under maritime law, plaintiffs refer to the Jones Act, 46 U.S.C. § 688, which covers work-place injuries to seamen and incorpo-

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[7] Even if maritime law recognized a claim for public nuisance, the commercial fishermen have not enunciated a claim different in kind from that of the general public, an essential element of a public nuisance claim. The commercial fishermen's "special relationship" with the sea is not different from an Alaska Natives' relationship with the sea, or from a recreational fishermen, nature photographer, kayaker, or other recreational user's relationship with the sea. A commercial fishermen's relationship with the sea may differ in intensity from that of another member of the public, but that does not make the relationship different in kind. See Order 190 at 3-7.

rates the underlying Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 et seq.

In Consolidated Rail Corp. v. Gottshall, ___ U.S. ___, 62 USLW 4609, No. 92-1956 1994 WL 276652 (June 24, 1994), the Supreme Court held that in FELA cases, claims for emotional distress unaccompanied by physical injury are recoverable only if the "zone of danger" test is satisfied. Id. at *14.

> [T]he zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot."

Id. at *10 (citation omitted).

Plaintiffs in the case at bar have not shown that they can satisfy the "zone of danger" test. Accordingly, damages for emotion distress are not available.[8]

III. Alaska state law and TAPPA.

Plaintiffs argue that they can recover damages for emotional distress and hedonic claims under Alaska state law and the Trans-Alaska Pipeline Authorization Act (TAPPA). The court has held on numerous occasions that this case is governed by maritime principles and not Alaska state law or TAPPA. Regardless, the statutes upon which plaintiffs rely

[8] In any event, it is doubtful that emotional distress damages would be available under the remoteness principles of Robins Dry Dock.

permit recovery for loss of economic damages as opposed to non-economic hedonic damages.

IV. Conclusion

For the above stated reasons, Exxon's motion for summary judgment on plaintiffs' claim for non-economic injuries is granted.

DATED at Anchorage, Alaska, this 19 day of July, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:	) Case No. A89-095 (HRH)
	) (Consolidated)
THE EXXON VALDEZ	) This Document Relates to
	) All Cases
	)

AMENDED STIPULATION REGARDING IMPACTS FOR PHASE III[1]

This stipulation is entered into solely for purposes of the Phase III federal jury trial, and for no other purpose. The parties agree that this stipulation shall not be used for any other purpose. This stipulation supersedes and replaces "Stipulation Regarding Impacts For Phase III" dated July 18, 1994. Subject to the foregoing, Sections I, II, III and IV of this stipulation may be read to the jury at the commencement of Phase III. Section V shall not be read to the jury.

I. The following Phase IIB claims for actual damages were resolved:

1. A class consisting of Alaska Natives made claims that their subsistence harvests were reduced as a result of the *Exxon Valdez* oil spill. Exxon has

[1] Nothing in this Stipulation shall be concaved as a waiver of certain plaintiffs' right to be remanded to state court. Plaintiffs do not by this Stipulation submit to the jurisdiction of the federal court. Nor is anything in this stipulation to be deemed as a waiver by defendants of any defense of law or fact to any claim referenced herein or a consent to assertion of a barred or non-cognizable claim.

agreed to pay $20 million to the class on these claims.

II. The following claims for actual damages will be resolved in Phase IV proceedings:

1. Commercial fishermen in fisheries affected by the oil spill were unable to fish certain fisheries as a result of the *Exxon Valdez* Oil Spill, including pot shrimp, trawl shrimp, dungeness crab, brown king crab, tanner crab, king crab, halibut, sablefish, miscellaneous fin fish, miscellaneous shellfish, miscellaneous groundfish, smelt, scallops, and bait herring. Commercial fishermen participating in these fisheries contend their damages are $24,764,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

2. Commercial fishermen in the Lower Cook Inlet salmon seine and set net fisheries sustained losses due to closures as a result of the oil spill. Commercial fishermen in these areas contend that these damages for 1989 amount to $787,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

3. Commercial fishermen in fisheries affected by the oil spill contend that they have sustained losses because the prices at which their fishing vessels sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of vessels sold and contend that the actual damages, if any, were less than the amount claimed.

4. Certain commercial fishermen from fisheries affected by the oil spill who sold their fishing permits

after September 1993 contend that the prices at which their fishing permits have sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of these permits, and contend that the actual damages were less than the amount claimed.

5. Landowners (including certain Native Corporations), who own shoreside lands in the oiled areas of Prince William Sound, Kenai Peninsula and Kodiak contend that oiling of those lands by the *Exxon Valdez* Oil Spill resulted in damage of at least $130,000,000. Defendants assert that many of the lands involved were never oiled by oil from the *Exxon Valdez*. As to lands which were oiled, defendants admit that they are responsible for damages, if any, caused by the oil, but defendants contend that such lands have been, for the most part, cleaned up, and that any residual damages are temporary.

6. The Cook Inlet Aquaculture Association, Kodiak Regional Aquaculture Association, and Prince William Sound Aquaculture Corporation contend they sustained losses due to a reduction of the price paid for fish actually harvested in 1989, and state that these damages are $18,860,000. Defendants contend that the hatcheries' damages, if any, were less than the amount claimed.

III. The following claims for actual damages are to be resolved in the Alaska State courts:

1. The municipalities of Kodiak Island Borough, Larsen Bay, Old Harbor, Ouzinkie, Port Lions, and Cordova, contend that they have sustained losses due to the *Exxon Valdez* Oil Spill and state the damages they have suffered at issue in the present trial

are $ 8,784,567. Defendants contend that the damages suffered were less than $75,000.

2. Other municipalities including Seward, Valdez, Kenai, Kenai Peninsula Borough, Homer, Lake and Peninsula Borough, Chignik, Akhiok, City of Kodiak, and Whittier contend that they have sustained losses in an amount which is, at a minimum, equivalent to those municipalities presently in trial (in paragraph l above). Defendants deny that these municipalities were damaged by the *Exxon Valdez* Oil Spill or contend that the damages suffered, if any, were lower.

2. The Native Corporations of English Bay, Port Graham, Chenega, Chugach, Eyak, and Tatitlek contend that they have sustained losses from the oiling of their land due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $ 110,898,000. Defendants contend that lands far back from the shoreline and other lands that were not touched by oil were not damaged at all, and contend that the damage attributable to oiled lands amounts to about $1,500,000.

3. The Native Corporations of English Bay, Port Graham, Chenega, and Chugach, contend that they have sustained losses to archeological sites on their lands due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $35,571,000. Defendants deny that archeological sites were damaged by the *Exxon Valdez* Oil Spill.

4. Certain commercial fishermen in fisheries affected by the oil spill have claims in state court for losses they claim for the depressed sales price of their permits and vessels. The Exxon defendants dispute these claims.

5. The Native Corporations of Chugach and Port Graham own and operate seafood processing operations that were impacted by the *Exxon Valdez* Oil Spill. Exxon paid these processors $9,515,000 in settlement of their claims.

6. Certain commercial fish processors claimed that they were damaged as a result of the *Exxon Valdez* Oil Spill. Exxon paid these processors $113,500,000 in settlement of their claims.

IV.Members of Punitive Damage Class:

1. Each and every claimant entitled to recover damages from defendants for damage resulting from the *Exxon Valdez* Oil Spill is a member of the punitive damage class and is a plaintiff in this action for purposes of this Phase III. No other jury will award punitive damages to these plaintiffs in any other lawsuit.

V. Phase III Evidence

1. This paragraph shall not be read to the jury. No evidence of damages claimed by the plaintiffs or claimants identified in Parts I through IV hereof shall be offered or admissible in the trial of Phase III; rather the entire Phase III record as to the fact or amount of such damages shall consist of this stipulation and the Phase II record and verdicts. Nothing in this stipulation is intended or shall operate to limit argument or to preclude plaintiffs or defendants from introducing appropriate cross-examination or rebuttal evidence or questioning.

So Stipulated: Dated 26 July 1994

/s/
DAVIS WRIGHT TREMAINE
David W. Oesting
Co-Lead Counsel for Plaintiffs
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(907) 276-4488

/s/
BOGLE & GATES
Douglas Serdahely
Lead Counsel for Defendants
Suite 600
1031 West Fourth Avenue
Anchorage, AK 99501
(907) 276-4557

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 27 day of July 1994.

/s/
UNITED STATE DISTRICT JUDGE
The Honorable H. Russel Holland

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
the EXXON VALDEZ	)	No. A89-0095-CV (HRH)
	)	(Consolidated)
	)	

SPECIAL VERDICT
FOR PHASE II-A OF TRIAL

Salmon / 1989

Interrogatory No. 1: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound:	Yes	X	No	
Upper Cook Inlet:	Yes	X	No	
Kodiak:	Yes	X	No	
Chignik:	Yes	X	No	
Balboa-Stepovak:	Yes	X	No	

Interrogatory No. 2: For each area for which your answer to Interrogatory No. 1 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of salmon in that area in 1989 that was caused by the oil spill?

Answer:

Prince William Sound:	$ 7,689,714
Upper Cook Inlet:	$ 45,905,758
Kodiak:	$ 43,042,724
Chignik:	$ 5,052,400
Balboa-Stepovak:	$ 0

Setnetters' Catch / 1989

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of increased harvests of salmon by set net fishermen in Upper Cook Inlet in 1989?

Answer: Yes X No ___

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", please state how many additional salmon were caught by set net fishermen in Upper Cook Inlet in 1989 as a result of the oil spill.

Answer: $ 3,242,254

Pink Salmon / Prince William Sound Area / 1990-95

Interrogatory No. 5: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of pink salmon by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1990:	Yes ____	No X
1991:	Yes ____	No X
1992:	Yes X	No ____
1993:	Yes X	No ____
1994:	Yes ____	No X
1995:	Yes ____	No X

Interrogatory No. 6: For each year for which your answer to Interrogatory No. 5 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of pink salmon in that year?

Answer:

1990:	$ 0
1991:	$ 0
1992:	$ 11,277,125.53
1993:	$ 11,111,200.00
1994:	$ 0
1995:	$ 0

Sockeye Salmon / Upper Cook Inlet Area / 1994-95

Interrogatory No. 7: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1994? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in

the Upper Cook Inlet area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No X

Interrogatory No. 8: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Upper Cook Inlet area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No X

Interrogatory No. 9: For each year for which your answer to Interrogatory Nos. 7 and 8 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction in their harvest of sockeye (red) salmon in Upper Cook Inlet in that year?

Answer:

1994: $ 0

1995: $ 0

Sockeye Salmon / Kodiak Area / 1994-95

Interrogatory No. 10: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1994? (If you find that the State's management of the sockeye fishery

is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No X

Interrogatory No. 11: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No X

Interrogatory No. 12: For each year for which your answer to Interrogatory Nos. 10 and 11 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of sockeye (red) salmon in the Kodiak area in that year that was caused by the oil spill?

Answer:

1994: $ 0

1995: $ 0

Herring / 1989

Interrogatory No. 13: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of

reduced harvests of herring by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound:	Yes	X	No	
Lower Cook Inlet:	Yes	X	No	
Kodiak:	Yes	X	No	

Interrogatory No. 14: For each area for which your answer to Interrogatory No. 13 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that area in 1989?

Answer:

Prince William Sound:	$ 15,872,720
Lower Cook Inlet:	$ 188,400
Kodiak:	$ 585,480

Herring / Prince William Sound Area / 1993-94

Interrogatory No. 15: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of herring by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1993:	Yes	X	No	
1994:	Yes		No	X

Interrogatory No. 16: For each year for which your answer to Interrogatory No. 15 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that year?

Answer:

1993:	$ 7,021,593
1994:	$ 0

Salmon Prices / 1989

Interrogatory No. 17: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1989 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes	X	No	
Sockeye (Red):	Yes	X	No	
Chum:	Yes	X	No	
King (Chinook):	Yes	X	No	

Interrogatory No. 18: For each salmon species for which your answer to Interrogatory No. 17 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1989?

Answer:

Pink:	$ 28,807,647.59
Sockeye (Red):	$ 67,594,619.28

Chum:	$ 22,620,650.91
King (Chinook):	$ 672,504.91

Salmon Prices / 1990

Interrogatory No. 19: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1990 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes ___	No X
Sockeye (Red):	Yes ___	No X
Chum:	Yes ___	No X
King (Chinook):	Yes ___	No X

Interrogatory No. 20: For each salmon species for which your answer to Interrogatory No. 19 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1990?

Answer:

Pink:	$ 0
Sockeye (Red):	$ 0
Chum:	$ 0
King (Chinook):	$ 0

Salmon Prices / 1991

Interrogatory No. 21: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1991 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes ___	No X
Sockeye (Red):	Yes ___	No X
Chum:	Yes ___	No X
King (Chinook):	Yes ___	No X

Interrogatory No. 22: For each salmon species for which your answer to Interrogatory No. 21 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1991?

Answer:

Pink:	$ 0
Sockeye (Red):	$ 0
Chum:	$ 0
King (Chinook):	$ 0

Herring Prices

Interrogatory No. 23: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of the

decline in prices paid for herring caught by plaintiffs?

Answer:

1989:	Yes	X	No	
1990:	Yes		No	X
1991:	Yes		No	X

Interrogatory No. 24: For each year for which your answer to Interrogatory No. 23 is "yes", what sum of money will reasonably compensate the plaintiffs for the decline in prices paid for herring caught by plaintiffs in that year?

Answer:

Prince William Sound:	1989:	$ 5,831,429.61
	1990:	$ 0
	1991:	$ 0
Cook Inlet:	1989:	$ 2,683,913.23
	1990:	$ 0
	1991:	$ 0
Kodiak:	1989:	$ 1,454,617.16
	1990:	$ 0
	1991:	$ 0
Chignik:	1989:	$ 0

Value of Fishing Permits

Interrogatory No. 25: Do you unanimously find from a preponderance of the evidence that the oil

spill was a legal cause of a decline in the value of plaintiffs' limited entry fishing permits?

Answer: Yes X No ___

Interrogatory No. 26: If your answer to Interrogatory No. 25 is "yes", what sum of money will reasonably compensate plaintiffs for any decline in value of plaintiffs' limited entry fishing permits?

Answer: $ 9,375,242

DONE at Anchorage, Alaska, this _____ day of July, 1994.

_____

Presiding Juror

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
The EXXON VALDEZ	)	No. A89-0095-CV (HRH)
	)	(Consolidated)

SPECIAL VERDICT
FOR PHASE III OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against defendant Hazelwood is necessary in this case to achieve punishment and deterrence?

Answer: Yes X No ____

Interrogatory No. 2: If your answer to Interrogatory No. 1 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $ $5,000.00

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against the Exxon defendants is necessary in this case to achieve punishment and deterrence?

Answer: Yes X No ____

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $ 5 Billion

DONE at Anchorage, Alaska, this 16th day of August, 1994.

/s/ Ken S. Murray
Presiding Juror

APPENDIX U

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re:	)	
	)	Case No. A89-0095-CV
The EXXON VALDEZ	)	(HRH)
	)	(Consolidated)
	)	
This Order Relates to All Cases	)	
	)	

STIPULATION AND [~~PROPOSED~~] ORDER CLARIFYING DATE FOR FILING OF POST-TRIAL MOTIONS

WHEREAS, through their First Amendment to the third Amended Revised Trial Plan (Docket No. 5382), adopted by this Court on June 22, 1994, the parties set forth certain dates for the filing of Rule 50 and 59 motions;

WHEREAS, in so doing, the parties intended such motions to be governed by the provisions of the Federal Rules of Civil Procedure, including Rule 6(a), pertaining to the computation of time under the Rules;

NOW, THEREFORE, IT IS HEREBY STIPULATED AS FOLLOWS:

1. The First Amendment to Third Amended Revised Trial Plan is clarified as provided herein; and

2. The parties' Rule 50 and 59 post-trial motions pertaining to verdicts returned in Phases I, II, and III of this proceeding shall be filed by close of business on Friday, September 30, 1994.

BOGLE & GATES

Dated: September 21, 1994

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

DAVIS WRIGHT
TREMAINE

Dated: September 21, 1994

By: s/ David W. Oesting
David W. Oesting
Co-Lead Counsel for
Plaintiffs

ORDER

IT IS SO ORDERED.

DATED this 26 day of September, 1994.

/s/ H. Russel Holland
THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT COURTJUDGE

APPENDIX V

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
the EXXON VALDEZ	)	No.A89-0095-CV
	)	(HRH)
This Order Relates to All Cases	)	(Consolidated)
	)	

ORDER NO. 268

JOSEPH HAZELWOOD'S MOTION FOR JUDGMENT

AS A MATTER OF LAW (PHASE I ISSUES)

Joseph Hazelwood has filed a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.[1] Plaintiffs oppose the motion[2] and Hazelwood has replied. [3] Oral argument has not been requested and is deemed unnecessary.

According to Rule 50:

> [(a)(1)] If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

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[1] Clerk's Docket No. 5955.

[2] Clerk's Docket No. 6043.

[3] Clerk's Docket No. 6100.

> that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. …
>
> (b) … Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

Fed. R. Civ. P. 50. Pursuant to Rule 50, Hazelwood argues that there is insufficient evidence to support the jury's Phase I verdict that Hazelwood was both negligent and reckless.

I. Standard for judgment as a matter of law

Judgment as a matter of law:

> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (citations omitted); See George v. City of Long Beach, 973 F.2d 706, 709 (9th Cir. 1992), cert. denied, 113 S. Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence") (citations omitted); Glover v. BIC Corp., 6 F.3d 1318, 1330 n.5 (9th Cir. 1993) (the court must consider all evidence and not just evidence favoring the nonmoving party). In Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990), the Supreme Court stated:

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor").

Id. at 554-55 (citations omitted). See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1537 (9th Cir. 1993), cert. denied, 114 S. Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); Dean v. Trans World Airlines, Inc., 924 F.2d 805, 810 (9th Cir. 1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the

verdict.") (citations omitted). See also Vaughn v. Ricketts, 950 F.2d 1464, 1468 (9th Cir. 1991); Cockrum v. Whitney, 479 F.2d 84, 85 (9th Cir. 1973).

To grant Hazelwood's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence". Id. at 256-59. If the court finds evidence sufficient to support the jury's verdict, then Hazelwood's motion must be denied. Id. at 253-54. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. Id. at 255-56.

II. Jury instructions on negligence and recklessness

The jury received the following instruction regarding whether Hazelwood's conduct was negligent the night of the grounding:

> Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use under similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

> In this case, you must decide whether defendant Hazelwood used reasonable care under the circumstances.

Phase I Jury Instruction No. 21.

Upon finding Hazelwood acted negligently, the jury also found that Hazelwood's negligence was a legal cause of the grounding. Regarding legal cause, the jury was instructed as follows:

> A legal cause of an occurrence is an act or failure to act which is a substantial factor in bringing about the occurrence. In order to determine that particular conduct was a substantial factor in bringing about the grounding of the Exxon Valdez, you must find by a preponderance of the evidence that it is more likely true than not true that:
>
> (1) the grounding would not have occurred but for that conduct; and
>
> (2) the conduct was so important in bringing about the grounding that a reasonable person would regard it as a cause and attach responsibility to it.
>
> This does not mean that the law recognizes only one legal cause of an occurrence, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause an occurrence; and in such a case, each may be a legal cause.

Phase I Jury Instruction No. 22.

The following instruction was given regarding recklessness:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28.[4]

III. Substantial evidence regarding Hazelwood's conduct[5]

(a) Hazelwood left the bridge

Hazelwood argues that substantial evidence does not exist to support a finding that his conduct was either negligent or reckless the night of the grounding. Hazelwood argues that a reasonable person would not have foreseen any risk in leaving the bridge in the command of Cousins and that leaving the bridge did not create a grave danger or risk of harm. Hazelwood argues that his departure from the bridge was not a gross deviation from appropriate standards of conduct and that there was no evidence that he was subjectively conscious of a grave risk of harm.

It is not disputed that Hazelwood turned the Exxon Valdez out of the traffic lane to avid ice, headed the ship into the direction of Bligh Reef, gave certain navigation instructions to Third Mate Cousins, and left the bridge. Several minutes later, the supertanker ran aground.

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[4] Hazelwood devotes several pages of his brief to the curious argument that maritime law uniformly rejects punitive damages. Hazelwood's argument is directly contrary to Protectus Alpha Navigation Co., Ltd. v. North Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985), which holds that "[p]unitive damages are available under the general maritime law." Id. at 1385 (citations omitted).

[5] The court has reviewed the relevant facts in pretrial proceedings, during the trial, and in post-trial motion practice. All the facts need not be repeated here, although pertinent facts will be discussed when warranted.

Cousins was to turn back into the traffic lane when the vessel came abeam of Busby Island light. The turn should have commenced two minutes after Hazelwood left the bridge, but Cousins did not engage the turn until approximately 8½ minutes after Hazelwood left the bridge and 6½ minutes after the Exxon Valdez came abeam of Busby Island light. By that time, it was too late to avoid running aground at Bligh Reef.

The jury heard evidence that Cousins was a highly regarded mate who had been on the bridge an previous Prince William Sound voyages. The jury also heard evidence that Hazelwood carefully instructed Cousins on when and how to make the turn at Busby Island and that Cousins reviewed the chart and radar images before Hazelwood left the bridge. Hazelwood presented evidence that he would not have left the bridge had Cousins not consented. For these reasons, Hazelwood argues that a reasonable person could not have foreseen the danger nor believed that a significant risk of harm existed.

The jury also heard evidence that the conning instructions were vague, although Hazelwood argues that he purposely allowed Cousins certain discretion. The jury heard evidence that Hazelwood and Cousins referenced a different spot as the point where the turn was to commence. The jury heard evidence that Cousins had never been left alone when heading toward a reef and that helmsman Kagan was known to be unreliable. Evidence was submitted that Hazelwood should have checked with Cousins after two minutes when the turn had not commenced. The jury also heard disputed evidence on whether Cousins was fatigued and whether there

was a pilotage requirement for the specific waters. Additionally, the jury heard disputed evidence on whether it was the Master's duty to remain on the bridge during the entire Prince William Sound transit.

The evidence must be considered in the light most favorable to plaintiffs. Credibility determinations, weighing of the evidence, and the drawing of legitimate inferences are jury functions. Given applicable standards for deciding a motion for judgment as a matter of law, and the above evidence, in particular that the turn was several minutes late and that supertankers respond slowly to the helm, the court finds that a reasonable jury could have found that Hazelwood was both negligent and reckless. Hazelwood knew that Bligh Reef was a "very nasty spot", yet he remained off the bridge even though the vessel was several minutes late in turning. At the very most, Hazelwood has shown that it is possible to draw two inconsistent conclusions from the verdict, but that is not enough to grant judgment as a matter of law.[6] The evidence was sufficient to support a verdict that Hazelwood negligently and recklessly left the bridge and that leaving the bridge was a legal cause of the grounding.[7]

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[6] The parties dispute whether Hazelwood adequately informed the Coast Guard of his intentions when he left the traffic lane. The manner in which Hazelwood notified the Coast Guard did not cause the grounding, though the jury may have considered it in determining whether Hazelwood was intoxicated.

[7] The parties also offered disputed evidence over whether Cousins was fatigued and, if so, whether Hazelwood left a fatigued Cousins on the bridge in violation of the "six hour

(b) Alcohol impairment

It is not disputed that Hazelwood consumed alcohol on March 23, 1989. The amount he drank is uncertain, but it was the jury's responsibility to judge the credibility of witnesses who allegedly saw Hazelwood drink. The jury heard evidence that Hazelwood did not appear intoxicated, and that he behaved appropriately both before and after the grounding.[8] On the other hand, there was evidence that Hazelwood's blood alcohol level was .061 at 10:50 a.m. on March 24, 1989, and .241 at the time of the grounding. Hazelwood disputed the blood alcohol evidence, but it is the jury's function to weigh the evidence and draw legitimate inferences therefrom.

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rule". 46 U.S.C. § 8104. The evidence regarding fatigue is sufficient to allow reasonable minds to reach inconsistent conclusions.

The parties also dispute whether Hazelwood violated Exxon policy when he left the bridge. Hazelwood argued that Exxon policy permitted him to use his discretion regarding when he should be on the bridge. Plaintiffs offered evidence that at least two officers were required to be on the bridge. When all of the evidence is viewed in the light most favorable to plaintiffs, the jury could have found that Hazelwood was negligent and reckless the night of the grounding regardless of how it considered Exxon policy on manning the bridge.

[8] After Cousins belatedly turned the vessel, he reported to Hazelwood the presence of ice in the traffic lanes. Plaintiffs presented evidence that Hazelwood should have returned immediately to the bridge and that his failure to do so is evidence of alcohol impairment. Hazelwood argues that Cousins had assured him that he could handle the situation. The evidence allows reasonable minds to reach inconsistent conclusions on whether Hazelwood's failure to return to the bridge upon the report of ice in the traffic lanes establishes alcohol impairment.

Hazelwood challenged the validity of the blood test, offering evidence that there were breaks in the chain of custody and threats to the integrity of the specimens. Dr. Peat of ChemWest, the laboratory which tested the specimens, testified that the blood samples had hemolyzed, although sometime after the tests were made.[9] Plaintiffs submitted evidence that the specimens were not compromised despite evidence of mishandling. Here again, the jury had the opportunity to weigh the evidence and draw legitimate inferences from the facts. In viewing the evidence in the light most favorable to the plaintiffs, the most that Hazelwood can show is that reasonable minds might reach two inconsistent conclusions. That alone is insufficient to grant a motion for judgment as a matter of law.

The jury also heard disputed evidence on whether Hazelwood was alcohol dependent. Hazelwood argues that plaintiffs did not present substantial evidence that he was an alcoholic. However, the jury heard evidence that he entered an alcohol rehabilitation program, participated in Alcoholics Anonymous, and that his wife attended A1-Anon. There was evidence that Hazelwood lied about drinking and had a faulty memory after drinking. There was also evidence that Hazelwood relapsed after treatment and drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers. When viewed in the light most favorable to plaintiffs, the most that Hazelwood could establish is that

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[9] The court considered this issue in detail in denying Exxon and Hazelwood's motion for new trial based on newly discovered evidence (validity of blood tests). Order No. 265.

reasonable minds could reach two inconsistent conclusions on whether he was alcohol dependent.

The evidence was sufficient to support a jury verdict that Hazelwood's alcohol impairment on March 23, 1989, was negligent and reckless and a legal cause of the grounding.[10]

IV. Conclusion

The court cannot ignore the heavy burden which Hazelwood must meet to warrant granting a motion for judgment as a matter of law. As the court has noted, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, . . . and all justifiable inferences are to be drawn in [plaintiffs'] favor'". Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990) (citations omitted). Upon consideration of the above standard, Hazelwood cannot establish that the only possible conclusion is that Hazelwood's conduct was neither negligent nor reckless and the legal cause of the grounding. At the very most, Hazelwood has only shown that reasonable minds could reach two inconsistent conclusions. When reasonable minds could differ over the verdict, then judgment as a matter of law is improper. Venegas v. Wagner, 831

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[10] At trial, plaintiffs argued that Hazelwood violated the "four hour rule". 33 C.F.R. § 95.045(a). The rule states that a crew member should not perform duties within four hours of consuming alcohol. Hazelwood argues that plaintiffs did not have any evidence to show that he was impaired by alcohol and, therefore, that he could not have violated the four hour rule. There was substantial evidence, however, for the jury to find that Hazelwood was impaired by alcohol quite apart from the question of whether he violated the four hour rule.

F.2d 1514, 1517 (9th Cir. 1987). The jury's verdict regarding Captain Hazelwood was supported by substantial evidence, and Hazelwood's motion for judgment as a matter of law (Phase I issues) is denied.

DATED at Anchorage, Alaska, this 27th day of January, 1995.

/s/

United States District Judge

cc: Lloyd Benton Miller
Douglas Serdahely
David Ruskin

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

AMENDED JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict on each of three phases of trial.

IT IS ORDERED AND ADJUDGED that:

1. As compensatory damages, the members of the subclasses listed on Exhibit A and the direct action plaintiffs listed in Exhibit B are awarded as against defendants Exxon Corporation (D-1), Exxon Shipping Company (D-2) and Joseph Hazelwood (D-7), jointly and severally, the total sum of $19,590,257.00.

2. For pre-judgment interest on the award of compensatory damages, the members of the subclasses listed on Exhibit A and the direct action plaintiffs listed in Exhibit B are awarded as against defendants Exxon Corporation (D-1), Exxon Shipping Company (D-2) and Joseph Hazelwood (D-7), jointly and severally, the total sum of

$37,971,043.91.

3. The mandatory punitive damages class (consisting of all persons or entities who possess or have asserted claims for punitive damages against defendants Exxon Corporation (D-1) or Exxon Shipping Company (D-2) that arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill) is awarded punitive damages as follows:

A. against defendant Joseph Hazelwood (D-7), the sum of $5,000.00.

B. against defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2), jointly and severally, the sum of $5,000,000,000.00.

4. The awards set forth in paragraphs 1, 2 and 3, above, shall bear interest from and after September 24, 1996, in accordance with 28 U.S.C. § 1961.

5. Plaintiffs shall recover their costs of this action, with the exception of costs attributable to Phase IV.

6. All claims of all parties not otherwise adjudicated in paragraphs 1, 2, 3, 4 and 5, above, are dismissed.

DATED this 30th day of January, 1997.

/s/ Michael Hall
Michael D. Hall
Clerk of the Court
By: /s/
Deputy Clerk

Approved for entry

/s/ H. Russel Holland
Hon. H. Russel Holland
United States District Judge

*Costs taxed in favor of plaintiffs and against defendants in the amount of $415,354.66. 1-30-97 tm

APPENDIX X

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

DECLARATION OF SAMUEL J. FORTIER

Samuel J. Fortier declares as follows:

1. I am admitted to practice before this Court in these proceedings, and am an attorney for Plaintiffs. I make this Declaration of my own personal knowledge, and if called to do so, I could, and would, testify competently to the facts set forth below.

2. I have personal knowledge of the TAPL Fund proceedings from representing the Native corporations, Chenega Corporation, Port Graham Corporation, and English Bay Corporation, before the Fund. I note from my own personal knowledge that thousands of dollars were expended retaining scientists, appraisers and archeologists. The Native Corporations, together with their consultants and lawyers, also participated in a day-long presentation of evidence in Newark, New Jersey before retired Judge John Gibbons (The TAPL Fund Administrator), Fund lawyers and Fund consultants.

3. Exxon made its own appearance before the

Fund and argued that the land damages claims were by and large meritless and the Native Corporations' claims for damages to cultural sites were frivolous.

4. Following the Fund Administrator's awards to the Native corporations (then totaling over $20 million dollars) the Native Corporations appealed the decisions to this court in 1992. Exxon sought to intervene, and following motion practice, the court denied Exxon's motion.

5. Subsequently, following the 1994 trials, the TAPL Fund sued Exxon in order to recover claims subrogated to it upon payment of such claims, including the Native Corporations' claims. In December 1994, shortly before Christmas, Exxon sued the Native Corporations and virtually every other successful Fund claimant, asserting, *inter alia* that claimants were liable to the Fund, and that Exxon was not so liable. With respect to the Native Corporations, Exxon also asserted that they had fraudulently misrepresented their damages to the Fund.

6. In addition, Exxon also sent letters to each of the three Native Corporations instructing each not to distribute any of the funds recovered from the TAPL Fund to Native shareholders. Exxon asserted that it had a lien on such funds. That letter was submitted within a week after the Native Corporations were served with the third-party complaint, described in ¶ 6, above.

7. The third-party litigation was finally resolved in February 1996, when the Native Corporations and the Fund entered into a settlement in which the Native Corporations agreed to pay the Fund a portion of punitive damages.

8. I hereby declare under penalty of perjury that

the foregoing is true and correct. I understand that this Declaration is made subject to the provisions of 28 U.S.C. § 1746, relating to unsworn declarations.

DATED this 16 day of July, 2002.

s/ Samuel J. Fortier
Samuel J. Fortier

APPENDIX Y

TAPAA LEGISLATIVE HISTORY

For the Court's convenience, the following legislative history materials relating to the consideration and passage of the Trans-Alaska Pipeline Authorization Act, which are cited in Plaintiffs' Memorandum, are attached:

No.	Document
1.	U.S. Dep't of the Interior, Final Environmental Impact Statement, Proposed Trans-Alaska Pipeline (1972) (excerpts)
Proposed Trans-Alaska Pipeline: Hearings Before the Department of Interior:	
2.	Statement of Governor William Eagan (excerpts)
3.	Statement of ADF&G Commissioner Wallace Noerenberg (excerpts)
4.	Exhibit 56(a): Letter of Cordova District Fisheries Union Chair Knute Johnson
5.	Exhibit 56(b): Statement of Pr. Chehalis Packers, Inc. Superintendent Ken Roemhildt
6.	Exhibit 56(c): Cordova District Fisheries Union News Release & Telegram of Seward Chamber of Commerce Board Chair Linne Bardardson
7.	Exhibit 143: Letter of Janet O'Meara

TAB 1

UNITED STATES DEPARTMENT OF THE INTERIOR

FINAL

ENVIRONMENTAL IMPACT STATEMENT

PROPOSED TRANS-ALASKA PIPELINE

VOLUME 1 0F 6

INTRODUCTION AND SUMMARY

PREPARED BY A SPECIAL INTERAGENCY TASK FORCE

FOR THE

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

IN

FULFILLMENT OF SECTION 102(2)C

OF THE

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

1972

Summary Sheet

( ) Draft (X) Final Environmental Statement

U.S. Department of the Interior

1. Type of Action: (X) Administrative ( ) Legislative

2. Brief Description of Action: Applications from Alyeska Pipeline Service Company for a 48-inch oil pipeline right-of-way across Federal lands in Alaska

between a point south of Prudhoe Bay on the North Slope and Port Valdez, a port on the south coast. The company would design, construct, operate, and maintain the 789 mile long pipeline system.

3. Summary of Environmental Impact and Adverse Environmental Effects: Environmental impact would result from the construction, operation, and maintenance of the proposed oil pipeline system (including the accompanying haul road), of a gas transportation system of some kind, from oilfield development, and from operation of the proposed tanker system. Because of the scale and nature of the project, the impact would occur on abiotic, biotic, and socioeconomic components of the human environment far beyond the relatively small part (940 square miles out of 572,000 square miles of land area) of Alaska that would be occupied by the pipeline system and oilfield. The impact paths between the project and the affected parts of the environment would be of varying complexity and length, and would involve linkage factors that are not all well known.

Of the impact effects that would occur, some, like those that would be associated with the wilderness intrusion and public access north of the Yukon River, could be considered either beneficial or adverse, depending on the value framework used. Some effects would occur on socioeconomic parts of the environment which many would classify as beneficial. Most of the remaining impact effects would in some way decrease the existing quality of the parts of the environment affects and would in that sense be adverse. Such effects would occur on both natural physical systems and on the superposed socioeconomic systems.

Some impact effects are unavoidable and can be evaluated with some certainty. Other effects would result from the occurrence of a threatened event which impacts the oil transportation system; these cannot be evaluated with as much certainty.

The principal unavoidable effects would be those disturbances of terrain, fish and wildlife habitat, and human environs during construction, operation, and maintenance of the oil pipeline, haul road, oil field, and of the gas pipeline that would probably follow; the effects of the discharge of effluent from the tanker ballast treatment facility into Port Valdez and of some indeterminable amount of oil into the ocean from tank cleaning operations at sea; and those associated with increased human pressures of all kinds on the environment. Other unavoidable effects would be those related to increased State and Native corporation revenues; accelerated cultural change of the Native populace; and the extraction of the oil and gas resource.

Changes in stable terrain caused by construction and maintenance procedures could produce rapid and unexpected effects, including slope failure, modifications of surface drainage, accelerated erosion and deposition, and other terrain disturbances as a result of the thawing that would follow destruction of the natural insulating properties of tundra vegetation. Placement of gravel pads and berms would especially affect surface drainage. The excavation of borrow materials and pipeline ditch in and near flood plains and stream beds would also cause some changes in stream erosion and deposition. About 83 million cubic yards of construction material, mostly gravel, would be required. The general noise, commotion, and

destruction of local habitat could cause many species of wildlife to leave the construction sites, which amount to an area of about 60 square miles for the oil pipeline.

Socioeconomic effects during construction would include accelerated inflation; increased pressures on existing communities for accommodations and public services; and job opportunity for perhaps 25,000 persons at peak times (including multiplier effects), but unemployment would probably continue to be relatively high.

The main operational disturbances would be heat loss and from the hot-oil pipeline and resulting changes in permafrost when the ice present (particularly if in segregated masses) thaws and causes possible instability and differential settlement; some barrier effects of aboveground oil pipeline sections on large mammal (especially caribou) migrations in the Brooks Range, Arctic Coastal Plain, and Copper River Basin areas and similar effects of any aboveground sections of gas pipeline that would eventually be built; and adverse but unquantifiable effects on the marine ecosystem of Port Valdez and perhaps Valdez Arm and Prince William Sound proper from the discharge of an estimated 2.4 to 26 barrels of oil per day from the ballast treatment facility at the terminal and on the marine ecosystem in general from discharge of any indeterminate amount of oil from tank cleaning operations at sea. These last effects would in turn affect the fishing industry to some unquantifiable extent.

Other main operational effects would include the gradual conversion of about 880 square miles of the

North Slope wildlife habitat to an area with widely spaced drilling pads, roads, pipelines, and other structures with accompanying adverse effects on the tundra ecosystem; the many diverse effects on wilderness, recreational resources (including hunting and fishing), and general land use patterns that would result from increased public access to the relatively inaccessible region north of the Yukon River; acceleration of the cultural change process that is already underway among Alaska Natives and some adverse modification of local Native subsistence resource base as a result of secondary effects; and State revenues of about $300 million per year from extraction of the oil and subsequent expenditures of those revenues for public works and activities throughout Alaska. Immediately after the end of construction unemployment would probably increase.

The main threatened environmental effects would all be related to unintentional oil loss from the pipeline, from tankers or in the oil field. Oil losses from the pipeline could be caused by the direct effects of earthquakes, destructive sea waves, slope failure caused by natural or artificial processes, thaw plug instability (in permafrost), differential settlement of permafrost terrain, and bed scour and bank erosion at stream crossings. Any of these processes could occur at some place along the route of the proposed pipeline. Oil loss from tankers could be cased by accidents during transfer operations at Valdez and at destination ports like Puget Sound, San Francisco Bay, and Los Angeles, and by tanker ship casualties due to collision, grounding, ramming, or other causes.

The potential oil loss from pipeline failure cannot

be evaluated because of the many variables involved, but perfect no-spill performance would be unlikely during the lifetime of the pipeline. Various models of oil loss from the tanker system indicate that an average of 1.6 to 6.0 barrels per day could be lost from the whole system during transfer operations and an average of 384 barrels per day or about 140,000 barrels per "average" year could be lost from tanker casualties. This modeled amount would occur in incidents of undetermined size at unknown intervals and at unknown locations. This is considered to be a maximum or "worst case" casualty discharge volume.

Oil spilled from the pipeline as a consequence of one of the threats mentioned, could, depending on location, volume, time of year, and other factors, result in adverse effects on all of the biota involved; not all of the linkage factors are know, but vegetation, waterfowl, and freshwater fisheries could all be affected and in turn affect Native subsistence use to some unquantifiable extent.

Oil spilled in tanker casualties or transfer operations would affect the marine ecosystem to an extent that would be determined by many variable factors. The salmon and other fishery resources of Prince William Sound would be especially vulnerable to such spills. Over the long term, however, persistent low-level discharge from the ballast treatment facility and tank cleaning operations at sea could have a greater adverse effect than could short-lived larger spills.

The probable eventual construction and maintenance of a gas pipeline would, if it were not in the oil pipeline corridor, result in a separate corridor

with some of the same effects described for the proposed oil pipeline corridor.

4. Alternatives Considered:

A. Alternatives available to the Secretary: granting, denial, and deferral.

B. Alternative routes and transportation systems: 1) Pipelines from Prudhoe Bay to alternate ice-free ports in southern Alaska Redoubt Bay, Whittier, Seward, Haines; 2) Marine transport systems ice-breaking tankers and subsurface tankers; 3) Pipelines to terminal ports on Bering Sea: offshore and overland; 4) Tans-Alaska-Canada pipelines: coastal offshore and onshore routes to Mackenzie River delta and up the valley to Edmonton; inland route across eastern Brooks Range to Fort McPherson and up the Mackenzie valley to Edmonton; and across central Brooks Range (same as part of proposed route) to Fairbanks, Big Delta, and east along Alaska Highway and other corridors to Edmonton; 5) Railroad and highways: Alaska Railroad extension from Prudhoe Bay to southern Alaska port and a new trans-Alaska-Canada railroad route and highway system development; 6) Other oil transportation schemes: land, sea, air, and in other energy forms.

* * *

be offset somewhat by the improved economic status of Natives employed in pipeline-related activities. Natives in areas far from the project would be less adversely affected economically but would feel a rise in prices primarily during the period of construction.

The threat of adverse impacts on the Native subsistence resources would come primarily during the operational stage of the proposed project. These could stem from (1) damage to subsistence resources resulting from losses oil, (2) increased recreational activities and other competition on lands close to the transport corridor, or (3) possible shifts in migratory patterns of caribou.

The greatest threat would be that of potential oil spillage, especially in a major river. Local water supplies, fish and wildlife harvests, and transport corridors could be adversely affected. Such impacts on the resource base, depending on the extent of damage and on the extent of Native dependence upon the subsistence base in the affected area, could be detrimental to the livelihood of the local population. An accidental spill could be much more significant in the relatively well populated Yukon River watershed than in the Copper and Lowe River systems, where the reliance on a subsistence economy is less, both in terms of numbers of villages and numbers of Natives.

Commercial Fisheries. - - For many Alaska communities fish are the sole product produced locally and sold outside the area. For these communities, the commercial fishing industry is the principal base that supports the remainder of the local economy. The economic impact of the pipeline upon commercial fisheries would likely occur in three principal ways: (1) biological effects causing reduced catches, unmarketable rates, or closure of fisheries due to oil pollution; (2) physical effects, such as gear losses and interruptions in fishing activities caused by tanker traffic; and (3) diversion of capital and labor.

The salmon harvest south of Prince William Sound to California was worth about $25 million to the fishermen in 1969 and it is likely that this resource would suffer some damage from population associated with the proposed project. The State of Alaska has estimated that the maximum financial loss to salmon fishermen resulting from maximum toxic effects of oil pollution in Valdez Arm could amount to 400,000 per year. Damage would be most likely to occur in the approaches to Prince William Sound, Puget Sound, and San Francisco Bay, where out-migrating feeding salmon would be most abundant and where accidental spillage rates could be highest. Harvest of other stocks of fish that spawn or rear in estuarine systems traversed by the tankers could also be affected. Herring eggs and larvae appear particularly vulnerable to the effects of oil pollution and production from Valdez Arm could be affected by chronic oil pollution associated with the terminal operation. The effects of project operations upon the current and potential harvest of other fin-fish resources cannot be estimated because of the low level of existing information.

Tainting due to spills of crude oil have caused extensive damage to harvests of oysters and clams in many areas. The persistence of the oily taste varies considerably, but a crude spill could close an area or at least an entire season. Even though tainting of a fishery product might occur infrequently and affect only a localized area, a single bad experience could adversely affect marketing of similar fishery products from adjacent areas over an extended period of time. Such an indirect effect, resulting in loss of market advantage, could be more damaging to the fishermen and processor than extensive direct

mortality of the resource. Markets once lost for this reason might be difficult to regain.

Crude oil spills can result in closure of both sport and commercial crab fishing, and where the oil settles on the sea bottom, the period of the closure may be extended. It is likely that the commercial and recreational harvest of Dungeness crabs in Port Valdez would be lost as a result of normal terminal operations.

The harvest of clams, oysters and Dungeness crabs south of Prince William Sound have annually yielded about $17 million. It is likely that the local losses of these fisheries would occur as a result of the marine transport of oil, although the extent of these losses cannot be predicted.

The tanker traffic through Prince William Sound and movements by other vessels associated with the operation of the marine terminal would interfere to some extent with fishing operations. Such interferences would be more severe in a tanker traffic corridor, tanker anchorages, the swinging area for pilot transfers, and in Port Valdez. Fishing operations in Prince William Sound include seining, trolling, longlining, drift and set gill netting, and pot fishing. The establishment of a

* * *

1442

UNITED STATES DEPARTMENT OF THE INTERIOR

FINAL

ENVIRONMENTAL IMPACT STATEMENT

PROPOSED TRANS-ALASKA PIPELINE

VOLUME 3

ENVIRONMENTAL SETTING BETWEEN PORT VALDEZ, ALASKA, AND WEST COAST PORTS

PREPARED BY A SPECIAL INTERAGENCY TASK FORCE

FOR THE

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

1972

* * *

reviewed below.

Prince William Sound

Historically, the principal fishery in the Prince William Sound area has been for salmon. More than 300 watersheds are utilized by salmon for spawning along the 3,000 miles of coastline on islands and mainland in this area. Immediately adjacent on the east of the Sound, and included in this discussion, the deltas of the Copper and Bering Rivers extend along the coast for about 50 miles. The economy of this area depends almost entirely on commercial fishing, the processing of the catch, and related activities. Fishermen here were paid nearly $7

million for their catches in 1969, exclusive of halibut (Alaska Department of Fish and Game, 1969b). The estimated value of products made from these landings amounts to about $13.0 million and totaled more than $90.0 million during the past decade. Exploratory fishing data and past harvest records indicate that presently underutilized and unutilized species could sustain harvests estimated to be worth an additional $4.2 million to $11.4 million to the fisherman (State of Alaska, 1971, p. 31-34).

In Prince William Sound proper, pink salmon usually comprise about 75 percent of the annual salmon catch, whereas chum and sockeye salmon usually account for about 15 percent and 10 percent of the total respectively (Noerenberg, 1961). Catches in recent years have averaged about 3.8 million salmon of all species, but this figure could be increased by about three-quarters of a million fish by suing catch data from the years prior to the 1964 earthquake which destroyed significant amounts of inter-tidal spawning area used by pink and chum salmon (Myren, 1971, p. 40). Pink salmon production in Prince William Sound does not have the marked * * *

TAB 2

DEPARTMENT OF INTERIOR

In the Matter of

Proposed Trans-Alaska Pipeline

Place: Washington, D.C. Pages: 1 thru 250
Date: February 16, 1971 Volume:

* * *

one voice at these hearings and for that reason, I would ask you to place my statement in the record and permit the Governor of Alaska to speak for Alaska here today.

STATEMENT OF THE HONORABLE WILLIAM A. EGAN,

GOVERNOR OF ALASKA

GOVERNOR EGAN: Thank you, Senator Stevens.

Mr. Secretary, just a few short years ago, the Congress of the United States conferred on the people of Alaska, with their solemn consent, the sovereign responsibility of statehood. It did so not only in recognition of the need for social, political and economic self-government in the territory, but in acknowledgment of the wisdom of the people resident in Alaska in the determination of proper and wise management of public land.

As a part of the compact upon which Alaska became a state of the United States, the United States transferred to the State of Alaska the right to select 103 million acres of land out of the 365 million acres which comprise the total acreage of the state.

In accepting this grant, the State and its people, by the constitution adopted by us in 1956 in anticipation of statehood, disclaimed all right or title in or to any property, including fishing rights, the right of title to which may be held by an Indian, Eskimo or Aleut, or community thereof, as that right or title is defined in the act of admission.

* * *

Alaskan route, and ill-timed, because of its far greater environmental complications, its economic disadvantages and unavoidable adverse geo-political implications.

The Valdez pipeline travels through a zone experiencing much more recent serious seismic disturbance than the Canadian route. However, the dangers to a carefully planned pipeline from seismic disturbance should not be exaggerated either. The pipelines that pass from the Kenai gas fields to Anchorage were unaffected by the great earthquake that nearly tore Anchorage asunder on Good Friday seven years ago. That was the most violent disturbance in the history of North America. We know what earthquakes can do and we expect that the technical stipulations will ensure that the terminal facility is constructed to withstand earthquakes of the magnitude of the 1964 tremor.

The real environmental concern we had to assess was whether an all-pipeline route posed a lesser hazard than a combined pipeline-tanker route.

In considering this question, we had to evaluate the record of the tanker industry worldwide.

Several factors have led us to consider tanker transportation acceptable. First, as I have already

mentioned, I expect practices in the Alaska trade to be first, not last or average, in world trade in their respect for safety and ecological standards.

I have already mentioned our strengthened ballast * * *

TAB 3

* * *

very real way and we appreciate your presentation. Please be assured it will receive full consideration.

Thank you.

HEARING OFFICER MESCH: Do you want your statement as an exhibit?

Let's mark Mr. Anderson's statement as Exhibit No. 3

(Exhibit No. 3 was marked.)

HEARING OFFICER MESCH: The next group of witnesses are representatives of the State of Alaska and since I have no names as such, will the first witness please come forward and state his name and identify himself for the reporter.

STATEMENT OF WALLACE H. NOERENBERG, COMMISSIONER DEPARTMENT OF FISH AND GAME, STATE OF ALASKA

COMMISSIONER NOERENBERG: Mr. Chairman, my name is Wallace H. Noerenberg. I am the Commissioner or Head Administrative Officer of the Department of Fish and Game of the State of Alaska. I hold a B.S. degree in fisheries from the University of Washington, College of Fisheries, and have had 23 years of experience with Alaskan fish and game resources.

I might say I am the first of seven witnesses for the State of Alaska who will give short oral summaries of their written reports which will be submitted.

My department is one of the nation's largest State fish and game agencies with a current fiscal year budget exceeding $10 million. The professional biological and * * *

* * *

The individual pled guilty and was fined $700.

A contractor at one of the construction camps was arrested and fined for dumping raw sewage into one of our pristine streams in violation of 16.05.870 of the Alaska Statutes. This violation was detected June 12, 1970, at the construction camp on the Kuparuk River, north of the Brooks Range on the Arctic Slope of Alaska. The camp was using a 4" sewer pipe to transport raw sewage to the river. Water samples revealed a high pollution rate. The company was fined $1,000, which is the maximum under this statute, and was ordered to take steps to remedy pollution at the Kaparuk River.

To base the assumption of acceptable damages on strict adherence to rules, regulations or stipulations is presenting a false picture. It would be more to the point to base a final assumption upon an "acceptable level of compliance".

Next, I am going to impacts on fish and wildlife. The choice of Prince William Sound as the terminus will require new and stronger measures on oil spill control. There are important fish and wildlife resources there which must be protected from spill damages.

The fish and wildlife resources of Prince William Sound are of major importance to Alaska and the nation. Presently the economic basis of the principal settlements, Cordova, Valdez and the native village of Tatitlek are almost entirely dependent upon these resources. Recent evaluations of income from commercial operations in the fisheries alone indicated average values to fishermen of $4 million per year and first wholesale values of products produced of $9.9 million per year. Estimates of the comparable value of recreational fisheries, hunting and trapping activities are not precisely known, but would value at hundreds of thousands of dollars per year.

Now, the commercial salmon fishery of the area is the dominant factor in the area's economy. The section immediately adjacent to the proposed Valdez pipeline terminal; i.e., Valdez Arm and Port Fidalgo are extremely critical elements in salmon production for the Sound and State as a whole. As much as 13 percent of the pink salmon and nine percent of the chum salmon caught in the entire Alaska fishery have been produced in this NE section of the Sound in some recent years. Salmon are found in the local marine environment nearly 12 months of the year -- thousands of feeding immature king salmon mid-winter, hundreds of thousands of adult pink, chum, coho and red salmon migrants in the June-September period and hundreds of millions of fry and fingerling salmon during late spring and summer months. Extremely important is the fact that in excess of 70 percent of the eggs deposited by salmon adults in the streams are placed in the intertidal zone which twice each day are flooded by the fiord tidal waters to be used by the proposed

tanker operations.

Char, cutthroat, trout, herring and various ground fishes are also important elements in the Sound's fish populations. Shellfish resources of moderate importance include shrimp, oysters, king, tanner and dungeness crab. These, as well as the abundant claim resources, would be greatly affected by large spills or chronic small incidents.

Big game species, such as brown bear, black bear, Sitka black-tail deer and wolverine are dependent upon the littoral zone in this area. During severe winters with heavy snowfall, deer primarily subsist upon food which is deposited upon open tide-swept beaches.

Furbearing animals, such as land otter, mink, weasel and wolverine are also critically dependent upon the littoral zone for winter survival. All of these species could be seriously jeopardized by pollution which might effect either the habitat, primary food sources, or food chain organisms, which these animals depend upon. There are conservatively 1,000 to 1,500 sea otters using the kelp beds of the Sound, which lie from a few yards to 1/8 mile off the beaches, although sea otter pods are frequently seen three-four miles offshore in many areas of Prince William Sound.

Waterfowl are year round residents of this area and spend much of their time each day searching the tideline for food. The immediately adjacent Cooper River Delta is an * * *

TAB 4

UNITED STATES

DEPARTMENT OF THE INTERIOR

TRANS-ALASKA PIPELINE HEARINGS

Supplemental Testimony

Volume VII

Exhibits 40 - 68

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(a)

Cordova District Fisheries Union

Headquarters: Box 939, Cordova, Alaska
Seattle Office: 34 Union Street

February 24, 1971

Secretary Rogers Morton
U.S. Department of the Interior
Washington, D.C.

Dear Secretary Morton:

The Cordova District Fisheries Union has been very worried about the threat of oil pollution in Prince William Sound in the Gulf of Alaska with the marine transportation of oil from Valdez to the state of Washington.

The Cordova fisherman feel that marine shipment of oil from Prince William Sound to Washington will decimate the fisheries. It is only a matter of how long it will take for the fisheries to be decreased--especially the pink salmon which spawn in Prince William Sound.

Frequently we hear of oil tanker collisions and oil spills from offshore platforms. It is apparent by the now available studies of oil pollution impact on marine life that damage to fish and wildlife is a result of such spills. The environmental impact study mentions briefly such likely damages. We feel that there are too many unknowns about the results of oil spills and the possible disastrous consequences of such pollution on marine life.

Because of our concern, we took action at a meeting on Thursday, February 18, 1971 as follows:

a. We favor the passage of SCR-8 because it is in the economic interest of the entire state to know about comparative costs and possible benefits to the state of Alaska regarding a trans-Canadian pipeline route.

b. We oppose an oil terminus at Prince William Sound because of the proven hazards of oil transported by tankers.

c. This organization is not opposed to removal of oil from Prudhoe Bay. As a matter of fact, we want the oil to go all the way to continental U.S. by pipeline. We are opposed to partial shipment by pipeline and partial shipment by oil tanker.

The Cordova District Fisheries Union felt that we should give you a written statement of our reasons for the action we felt was necessary to take.

We would appreciate your support.

Respectfully yours,

CORDOVA DISTRICT FISHERIES UNION

s/ Knute A. Johnson
Knute A. Johnson, Chairman

TAB 5

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(b)

STATEMENT DELIVERED AT THE BUREAU OF LAND MANAGEMENT HEARINGS,
Anchorage, Alaska - February 26, 1971

I am Ken Roemhildt, Superintendent of Pt. Chehalis Packers, Inc., a salmon and crab processing plan in Cordova.

I'm here today to speak in opposition to a Valdez pipeline terminus, or to one anywhere on Prince William Sound. Let me emphasize right from the start that I am not against the pipeline itself; only against the probably detrimental effects that a Valdez terminus would have on the fishing industry in Prince William Sound.

My objections fall into three major categories:

1. Lack of study of the problems associated with the marine transport of oil.

2. Probable adverse effects on the fishing economy of Prince William Sound and Cordova.

3. The possibility of alternate routes.

And now to detail my objections:

1. Lack of study of marine transportation problems. Your preliminary Environmental Impact Study is good, as far as it went. Unfortunately, the scope of its investigations stopped at the tank farm in Valdez, just where many of the really serious problems begin. As former Secretary of the Interior Hickel and others

have suggested, marine transportation of petroleum products is ten times as hazardous as transport by pipeline.

For instance, we all know that there will be loading spills at Valdez; there is no way to avoid them. Even if the surface accumulations of oil are cleaned up, and no one is guaranteeing that they can be, what effects will dissolved hydrocarbons or the oil that goes to the bottom have on the marine environment?

Or as another example, safe navigation of Prince William Sound, with its normal stormy weather, high winds, large tidal variations and numerous hazards to navigation cannot be assured. If tankers can collide beneath the Golden Gate Bridge or oil barges run aground at West Falmouth, Massachusetts, then a catastrophe of this nature could and undoubtedly will happen in Prince William Sound.

I understand from remarks made Wednesday that a study of these problems is being planned. I hope that it is comparable in depth to the study of the overland portion of the route.

2. Probable adverse effects on the fishing economy of Prince William Sound and Cordova.

Cordova's economy is solely dependent upon the fishing industry. Any adverse effect that marine transportation of oil may have on the Prince William Sound fishery will have a marked effect on Cordova's economy.

The Prince William Sound fishery is a substantial one, one that has been a consistent producer, and a consistent contributor to the State's economy

for many years.

Pt. Chehalis Packers last year purchased raw fish products from 442 fishermen at a raw fish cost of nearly $2,000,000. In addition, we employed up to 100 cannery workers at our busiest times, with our payroll approaching $400,000. And Pt. Chehalis is only one of four major and several smaller canners in the Cordova area. Obviously this economy is a substantial one and more importantly, one that is based upon continually renewable resources.

As has been stated before, the effects of oil pollution on Prince William Sound's marine environment haven't been studies yet, but it seems that certain assumptions can safely be made.

First, pink salmon, the Sound's most economically important specie, spawn to a large extent in intertidal zones. Fry are also known to spend extended periods of time in intertidal zones. Consequently, they could easily be effected by an oil spill through eggs or fry being killed directly by the oil. Or should a spill occur when no eggs or fry are present, oil pollution of these intertidal zones, ineffective clean up or possible residues of clean up operations could all render an area unfit for future spawning. If a change in the silt content of a spawning bed can make it an inhospitable area for spawning, oil pollution can certainly do the same.

Second, crabs and clams are also a mainstay of our fishing economy. As bottom dwellers, these species will undoubtedly be hard hit, since many of the oil dispersants now in use only serve the

purpose of sending the oil to the bottom, where both it and the oil can only do harm.

Third, we heard testimony on Thursday that a tanker holding area is being considered east of Knowles Head and Johnstone Point. This happens to be the exact area where the bulk of Cordova's Tanner or Snow Crab comes from. It isn't hard to see that thousand foot tankers and crab fishing aren't compatible in this area. The snow crab operation is a relatively new one, developed by my company and fishermen in an attempt to stimulate Cordova's otherwise dormant wintertime economy. The practical effect of this operation has been to put about $350,000 cash money into Cordova's wintertime economy, to reduce unemployment, and to provide income for fishermen, who as a group, are not eligible to draw unemployment.

Fourth, what effects will oil pollution have on the canning industry? Will we be forced to test every fish to determine that it is safe to can or freeze? Will costs be added to the already high price of our products because of oil pollution?

I might add here that it seems strange that the State Department of Fish and Game hasn't testified on the effects of oil pollution on fisheries. It is quite likely that they would have, had general knowledge been optimistic about oil's effect on marine life.

Many other unanswered (or even unasked) questions remain.

What recourse would fishermen and processors have against the oil people should a major disaster completely wipe out the Prince William

Sound fishery?

Simply, it boils down to this: We in the Prince William Sound fishery stand the chance of losing our livelihood either all at once or by slow strangulation. Cordova stands the chance of becoming a ghost town.

3. Alternate routes.

From previous testimony, it appears clear that there are several alternate routes; trans-Canada pipelines or a pipeline to Seward to mention only a few. This has been covered before by much more knowledgeable men than myself so I will pursue it no further at this time.

To recap:

I am not opposed to the pipeline itself, but only to a pipeline terminus in Prince William Sound.

My reasons are these:

1. No study has been made of marine transportation problems.

2. It will adversely affect Prince William Sounds fishery and economy.

3. Alternate routes are available.

Thank you very much, gentlemen, for your kind attention.

TAB 6

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(c)

CORDOVA DISTRICT FISHERIES UNION
CORDOVA, ALASKA

NEWS RELEASE

Cordova fishermen Thursday afternoon voted overwhelmingly to support Senator Hammond's SCR 8 and indicated their intent to pursue any and all action necessary to protect and preserve their economic livelihood.

Thursday night the fishermen held an open public meeting in the high school gymnasium to inform all the citizens of Cordova of the seriousness of the problem of transferring hugh quantities of oil from pipeline to tanker and possible consequences of transporting this oil through Prince William Sound along the Pacific coast to Puget Sound. The possible hazards to the fishing industry was discussed should the oil be transported by the proposed routs. More than half the adult population of Cordova attended this meeting and many of them express their fear for the survival of the fishery resource in this area. A local businessman commented, "The only thing that could get a bigger turn-out than this could be another dock fire."

Ross Mullins, acting chairman of the public meeting, said the environmental impact data report devotes only a half page to Prince William Sound and dealt inadequately with the ramifications of the transfer of such quantities of oil from pipeline to tanker on the nearby coastal area. The fishermen are not against the pipeline, but we feel that there

are too many unknowns about the results of oil spills, Mullins said. "Why add another potential polluter to an area of our environment about which very little is known?"

A Coast Guard Representative, speaking at the meeting, estimated oil tanker traffic at Valdez would be comparable in tonnage to what now passes through Rotterdam, Holland. "Valdez Arm presents some very serious navigational problems," Mullins said. An estimated 1400 tankers per year would be loading in Valdez, the Coast Guard representative said. There would be two tankers loading at all times.

Aside from the possibility of a calamitous tanker accident, fishermen and environmentalists have expressed worry about the inevitable day to day spillage at Valdez which, while amounting to far less than one per cent of the total volume transferred would still be significant, Mullins said.

Mullins quoted from an article in January, 1971 issue of the FISH BOAT saying: Max Blumer, an oceanographer at the Woods Hole Oceanographic Institute, Woods Hole, Mass., told the Technical Conference on Pollution and Its Effects on Living Resources and Fishing (sponsored by the United Nations Food and Agriculture Organization held in Rome in December that no effective method currently exists for neutralizing the up to 10 million tons of oil spilled annually in the world's oceans. He also said there is no known way to neutralize the toxic effect on all forms of marine animals. Blumor said the only way to avert further pollution of the ocean environment and to preserve it's resources as a source of protein-rich food is to prevent the

spillages from taking place at all.

Attorneys George Dickson of Anchorage and James Fisher of Kenai were asked to attend the meeting because of their extensive background in environmental matters. Dickson noted a spill in Prince William Sound "is a very different thing than say the Santa Barbara area. A spill can do tremendous amounts of damage particularly in colder northern areas. If the oil got into the spawning grounds of the Copper River and Valdez Arm, it would probably cause enormous irreparable damage, Dickson said. "The fishermen of Cordova shouldn't be concerned about opposing great industries," the fishermen are going on record as being on the side of the future."

At the Thursday night meeting more than 300 signatures were affixed to a petition in support of SCR 8. This measure asks for a comparative analysis of the benefits of the proposed trans-Alaska pipeline and possible alternate Canadian route.

T E L E G R A M

HCA Alaska
Communications, Inc.

SEWARD ALASKA 1050A AST

ROSS MULLINS CHAIRMAN PIPELINE COMMITTEE, CORDOVA DISTRICT FISHERIES UNION CORDOVA, YOU HAVE MY PERSONAL WHOLEHEARTED SUPPORT REGARDING RESOLUTION. WE FEEL THAT FURTHER STUDY REGARDING ALTERNATE ROUTES IS ABSOLUTELY NECESSARY, THE CONSIDERATION OF A MAJOR SPILL IN THE VALDEZ AREA WOULD CAUSE INCURABLE DISASTER TO THE RICH FISHERIES AND WILDLIFE AT THE PRINCE WILL SOUND AREA. I WILL BRING THIS MATTER TO THE ATTENTION OF THE SEWARD CHAMBER OF COMMERCE BOARD OF DIRECTORS AT TODAY'S MEETING.

[illegible] CHAIRMAN BOARD OF DIRECTORS SEWARD

CHAMBER OF COMMERCE

TAB 7

UNITED STATES

DEPARTMENT OF THE INTERIOR

TRANS-ALASKA PIPELINE HEARINGS

Supplemental Testimony

Volume X

Exhibits 124 - 161

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 143

Janet V. O'Meara
800 So. Lane St., #1
Anchorage, Alaska 99504

March 7, 1971

Director,
Bureau of Land Management
Department of Interior
Washington, D.C. 20240

Attention: 320

Gentlemen:

I wish to express my appreciation for the opportunity granted to express my views on the proposed Trans-Alaska Pipeline project and the Environmental Impact Statement covering that project.

I oppose the pipeline as presently conceived, for several reasons. Foremost among these reasons is the intention of the Alyeska Pipeline Service Co. to terminate the line at Valdez. After arrival in Valdez, the oil will then be shipped by tanker through Prince William Sound, across the Gulf of Alaska, and along

the coast of Southeast Alaska, British Columbia, and Washington, to ports in "the Lower 48."

It is my opinion that such an operation would be extremely, and critically, damaging to the marine environment and to the sports and commercial fisheries of the area. Of course, damage to the commercial fisheries would result in loss of income for the people of the coastal areas. who are almost totally dependent upon fishing for their livelihood.

That such damage will result is almost guaranteed, despite protests to the contrary advanced by proponents of the pipeline. One has only to read the newspaper--almost any newspaper, on almost any day--to find reports of one oil disaster after another. Oil spills have become so common as to be almost the rule rather than the exception. Suffice it to say that when oil is transported by tanker the odds are very high that a spill will occur, at some time or another.

Even if spills were not so common, the mere possibility of a spill which could so disastrously affect the lives of so many people would, it seems to me, prohibit the transport of oil across ours seas--particularly where alternatives exist. In the present instance alternatives do exist--the pipeline can be routed through Canada, perhaps along an existing right-of-way; the Alcan Highway. I have heard it said that the Canadian route may not really be a true alternative inasmuch as Canada has made no proposal to our government which would make this possible. It seems to me that in this instance it is up to <u>our</u> government to make the proposal and open negotiations with Canada. Certainly, if it were Canada seeking a route through the United States, we would expect her to make the proposal to us.

That we exhibit reluctance to do this indicates to me the grossest lack of concern for the lives of coastal residents and protection of the environment.

Even if spills were not so common as we know them to be, we are still faced with the storage tanks at Valdez and the ballast treatment facilities. With regard to the storage area we are told that it is of no consequence that Valdez and Prince William Sound are areas of heavy earthquake activity. We are told that since the terminus is to be located on bedrock, no damage would occur should there be an earthquake--even of the magnitude of that which leveled Valdez in 1964. This argument is hardly reassuring. An earthquake is generally more than just a "quake"--many times an earthquake results in uplifting or lateral sliding of bedrock. If the bedrock forming the foundation of the pipeline terminus at Valdez uplifts or slides, obviously the storage area will not remain undamaged. No, in that event damage would occur, and a massive spill of oil into Valdez Bay would probably result. Surely no guarantee can be given that any quake in the Valdez/Prince William Sound area would not result in the uplifting or sliding of bedrock. No responsible geologist would make such a claim.

As regards the ballast treatment facility--this is an ecological disaster all by itself. Initially, the facility plans to dump about 175 tons of oil (in the form of treated ballast water) per year into Valdez Bay. Estimated discharge at full development could reach 700 tons of oil per year. This will be legal under federal and state law because the standards are based on parts per litre. The size of the operation determines the amount of oil to be "dumped". While the massive amounts of oil will be "legal," it is

obvious that they will also be extremely damaging to the marine ecology of the area.

Even if the problem of ballast treatment were solved--by using ships with separated tanks, for instance--the possibility of spills remains a problem. There can be no guarantee that spills will not occur. They will occur. The only question is how many, how often, and how large.

It seems incredible to me that a tanker operation is even being casually considered, in light of the disastrous effects of such operations on our fragile fisheries.

Our world is in the throes of a population explosion so critical that we may never recover. We are gobbling up our agricultural areas at an alarming rate, just to make room for our increasing numbers. It has been calculated that "the growth of the population is now so rapid that the multitude of humans is doubling every 35 years" Ehrlich, Paul, "The Population Explosion: Facts and Fiction", a sermon delivered at Grace Cathedral, San Francisco, Sept. 1, 1968. If we are to survive our population must be fed, but how can this be accomplished? That this is a major problem is evidenced by the fact that some 2 billion people today are undernourished, and that somewhere between 4 and 10 million people starve to death each year. Ehrlich, Paul, "Population Explosion: Facts and Fiction," ibid. Thomas R. Malthus, the economist, has stated that while food production increases in arithmetical progression (1, 2, 3, 4, 5, 6), population increases in geometrical progressior (1, 2, 4, 8, 16, 32). Paddock, William & Paul. Famine 1975!, p. 39

I have previously indicated that much of our

agricultural land is being lost to the urban sprawl. To verify that this is so, one need only look at California--one of the world's richest agricultural areas--and observe the way cities such as Los Angeles and San Francisco have voraciously swallowed up surrounding farmland. The orange groves of Los Angeles are a thing of the past. One the Los Angeles River Delta, where the topsoil was 1000 feet deep, truck farms have given way to row after row of neat little nondescript houses--the suburb Westchester. The San Fernando Valley, previously an area of small but productive farms, has become yet another victim of the urban malignancy. And the growth of cities such as this has not stopped.

The question remains--How are we going to feed our rising population? Our vast agricultural surpluses are a thing of the past. Since our agriculture is already highly efficient, it is doubtful that we can massively increase production. How are we going to feed our people? One traditional answer has been the sea--"We will farm the sea." Let us look, then, at the sea.

We know that the greatest fisheries of the world are confined to the continental shelves Carson, Rachel, The Sea Around Us, p. 65, -- our coastal regions. This region, upon which our hope for the future is based, is the very region over which the oil tankers would travel. That is taking quite a chance with our future, it seems to me.

We also know that our fisheries are dependent upon microscopic green plants which are known as phytoplankton.

The enormous importance of the

> phytoplankton to the economy of the sea cannot be too strongly stressed. The phytoplankton forms the base of nearly all the food chains. It is vitally important to all the harvests of the sea, whether these be the food fisheries, sponge fisheries, whaling, or sealing. Plants alone can manufacture food from such inorganic chemicals as the minerals and gases. But they can do this only in the presence of light . . . .
> Deacon, G.E.R., Oceans, p. 108

Since our fisheries are dependent upon phytoplankton, and since phytoplankton is dependent upon light, what happens when the ocean surface is coated with oil? Of course, the oil does not remain on the surface--some of it sinks, poisoning all within its reach. In either case, the result is the same--a major break in the food chain, and a disaster to our fisheries. If we are to depend upon our seas to avert mass famine, does it make sense to gamble with them and allow the operation of oil tankers in these vulnerable areas. It would seem that the better course would be to eliminate tanker traffic wherever possible--whatever the cost to private industry.

To summarize my point, I oppose the proposed pipeline and the Environmental Impact Statement because I feel they are incomplete--they both end at the sea. I feel further, in-depth, consideration should be given to an all-land pipeline.

Very truly yours,

s/

Janet V. O'Meara
(Mrs. Michael O'Meara)