MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Richard I. Eliason, Chair
Senate Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

The Honorable Max F. Gruenberg, Jr., Chair
House Special Committee on the Exxon
Valdez Oil Spill Claims Settlement

DATE: ~~April 2, 1991~~

FILE NO.:

TELEPHONE NO.: (907) 465-3600

SUBJECT: Authority of the Governor and Attorney General to Enter into the EXXON VALDEZ Settlement Agreement

FROM: Charles E. Cole
Attorney General

As you know, the Agreement and Consent Decree (hereinafter "Settlement Agreement") in the EXXON VALDEZ litigation was reached between Exxon,[1] the State, and the Federal governments after several weeks of discussing about the pending and potential litigation between them. The terms of the Settlement Agreement reflect many hours of hard bargaining among the parties, an effort to resolve on mutually acceptable terms their respective claims related to the EXXON VALDEZ oil spill ("Oil Spill") without additional expensive, potentially interminable, and uncertain litigation.

This memorandum will discuss the reasons why the Governor and the Attorney General have the authority to negotiate and agree to the Settlement Agreement on behalf of the State of Alaska.

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

The basic economic terms related to the Settlement Agreement are the

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[1] The Exxon entities involved in the Settlement Agreement are Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, the supertanker that caused the Prince William Sound oil spill. Those entities will be referred to in this memorandum collectively as "Exxon."

provisions pertinent to this memorandum's discussion and, therefore, merit summary at the outset.

A. The Federal Criminal Plea Agreement

The State played no role in the negotiations between Exxon and the Federal government with respect to the Plea Agreement in the Federal government's criminal case against Exxon (Case No. A-90-015 CR., United States District Court for the District of Alaska). However, under that Plea Agreement, the State is to receive half of the fine to be paid by Exxon.

Under the Plea Agreement, Exxon Shipping pleads guilty to violations of the Clean Water Act, 33 U.S.C. §§1311(a) and 1319(c)(1)(A), the Refuse Act, 33 U.S.C. §§407 and 411, and the Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a); Exxon Corporation pleads guilty to Migratory Bird Treaty Act violations, 16 U.S.C. §§703 and 707(a). Exxon will pay $100 million as a criminal fine under the Plea Agreement.

The Plea Agreement provides that $50 million of that fine is to be paid as restitution to the State of Alaska within 30 days of the Court's acceptance of the Plea Agreement. It further provides that those monies "are to be used by the State of Alaska exclusively for restoration projects" relating to the Oil Spill. Restoration is defined to include "restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills." Plea Agreement ¶4(A). Those monies will be entirely under the control of the State and will thus be subject to the legislative appropriations process, though with that restriction on their use. Plea Agreement ¶4(B).

B. The Agreement and Consent Decree

The Settlement Agreement requires Exxon to make a total of $900 million in payments.[2] After the first installment of $90 million is paid within ten days after the effective date of the Settlement Agreement, payments are to be made annually on September 1st, over a ten-year period beginning in 1992, in amounts set out in the payment schedule in paragraphs 9(b) and (c) of the Settlement Agreement.

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[2] The Settlement Agreement also includes a "reopener" provision that provides for Exxon to pay up to $100 million for additional restoration projects in areas affected by the Oil Spill, if the projects meet a cost/benefit criterion and the injury being redressed was not reasonably known or anticipated based on information available at the time of the Settlement Agreement's effective date. Settlement Agreement ¶¶17-19.

The Settlement Agreement includes two basic types of recoveries from Exxon related to the settlement of the State's civil claims. The first type, in a amount of up to $72 million, is in settlement to reimburse the State (1) for response and clean-up costs incurred prior to January 1, 1991, (2) for its natural resource damages assessment costs, and (3) for its litigation costs, including attorneys' fees, experts' fees and other costs. Settlement Agreement ¶10.

The second type governs the balance of the $900 million to be paid, after deductions are made for the State reimbursement payments, for the similar federal reimbursement payments of up to $62 million, and for expenditures made by Exxon with respect to continuing Oil Spill clean-up, as defined in paragraph 11 of the Settlement Agreement. In addition, the related Memorandum of Agreement ("MOA") provides for reimbursements to the State and Federal government for "all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990," as certified by their spill response coordinators, "shall be paid directly to the Governments by Exxon over a period of 5 years." MOA ¶V (B). These reimbursements will thus be paid to the State and subject to the Legislature's appropriations power, like the $72 million in reimbursements to the State for pre-1991 costs and the $50 million in restitution to be received under the Plea Agreement.

The remaining balance of Exxon's settlement payments will be held in and administered through a joint trust fund ("Trust Fund"). Those monies must be used by the Trust Fund's trustees "to assess injury resulting from the Oil Spill, and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the oil spill, or the acquisition of equivalent resources or services." The Settlement Agreement provides that the Trust Fund monies are to "be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska." ¶10.

Pursuant to the MOA, the Trust Fund will be administered by the State and Federal governments as "co-trustees." MOA ¶III (A). A group of six Trustees designated by the President and the Governor, three each from the State and Federal governments, are to act as co-trustees: the Administrator of the National Oceanic and Atmospheric Administration, the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney General. The MOA requires that the Trustees act jointly in the collection and use of all damage recoveries.

Decisions on use of the monies in the Trust Fund for restoration are to be made by unanimous agreement of the Trustees, though provisions are made in the MOA for methods to resolve any disputes. MOA ¶IV(A)(3). The MOA provides that the Trustees "shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group . . . ." MOA ¶IV(A)(3). The funds are to be held subject to this co-trusteeship in a joint Trust Fund under the supervision of the United States District Court for the District of Alaska. MOA ¶IV(A)(2).

II. DEFINING THE REAL ISSUE

The only real issue presented by the joint Trust Fund aspect of the settlement is whether the executive branch of the State government has authority to negotiate and agree to such a settlement mechanism.

In framing that issue, it is *critical* to understand that the Trust Fund monies are *not* monies to be received by or belong to either the State or the Federal governments. While the State's position is that it owns and is the trustee for most of the resources impacted by the Oil Spill, the Federal government contends otherwise. As a compromise of both governments' claims to exclusive control of monies recovered, the governments agreed that the monies would instead be placed in the joint Trust Fund established by Consent Decree under the Clean Water Act.

Thus, under the Settlement Agreement, those monies comprise a trust *res*, as to which neither government has sole ownership or control, held jointly for the benefit of certain damaged natural resources.[3] Consistent with well-established trust law, the governments, as co-trustees, have joint ownership control over the Trust Fund monies and must exercise that control jointly and consistently with the terms of the Settlement

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[3] The rights and obligations of the governments with respect to the Trust Fund are governed by the terms of the Settlement Agreement, construed in light of common law trust principles. *See* Restatement (Second) of Trusts §4 (1959) (terms of trust are defined by instrument creating trust). *See also State v. Weiss*, 706 P.2d 681, 683-83 & n.3 (Alaska 1985) (applying common law trust principles to State's obligations with respect to public lands; state legislature had no power to alter status of Mental Health Lands granted by United States, because doing so effectively terminated trust in violation of the State's duties as trustee); *State v. University of Alaska*, 624 P.2d 807, 814 (Alaska 1981) (private trust law principles applied to evaluation of State's obligation with respect to University lands).

Agreement. *See generally* Restatement (Second) of Trusts §§2, 34, 185, 194 (1959) (two or more co-trustees hold trust property as joint tenants; unless terms of trust provide otherwise, co-trustees share duties and powers, which can properly be exercised only by all trustees).[4]

A. The Trust Fund Does Not Violate the Legislature's Appropriations Authority

While there has been concern expressed about whether the Trust Fund violates the Legislature's appropriations power, that power simply does not extend to monies that are not public revenues or assets of the State and can not be placed in the State Treasury.[5]

The Alaska Supreme Court has discussed the definition of "appropriations" in delineating the scope of the governor's line item veto power.

> "An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."
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> For our purpose, the operative phrase "public revenue" is critical since it is the basis of the general fund and special funds from which the legislature may allocate money. Thus, any time the legislature

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4 *See also Mitchell v. Mitchell*, 655 P.2d 748, 752 (Alaska 1982) (person seeking recovery as representative for surviving family members is "a nominal party only and holds the recovery in trust"); *Thomson v. Wheeler Construction Company*, 385 P.2d 111, 114 (Alaska 1963) ("A trust is a fiduciary relationship with respect to property, subjecting the person who helds. . .the property to equitable duties to deal with it for the benefit of another person."). *Cf., In re Cornelius*, 520 P.2d 76, 85 (Alaska 1974) (one who receives money on behalf of another is a fiduciary; "the funds are impressed with a trust and conversion by the [person to his or her own uses] is a breach of that trust").

5 The provision of the Alaska Constitution concerning appropriations provides, in relevant part:

> No money *shall be withdrawn from the Treasury* except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

Alaska Const., Art. IX, §13 (emphasis added).

> allocated monies from the general fund or special funds, the governor's line item veto would be appropriate. However, the sale of general obligation bonds is the commitment of the state to a debtor relationship with those who purchase the bonds, and is therefore distinguishable from such allocations.

Thomas v. Rosen, 569 P.2d 793, 796-97 (Alaska 1977) (citations omitted) (governor lacks constitutional power to line item veto general obligation bonds authorizations, since they "do not qualify as appropriations").

Most broadly interpreted, the Legislature's appropriations power extends both to "public revenues" and to all "state assets," all property owned by the State. *Thomas v. Bailey*, 595 P.2d 1, 4-9 (Alaska 1979) (Beirne initiative to transfer State lands to private persons based on residency violated constitutional prohibition against making "appropriations" by initiative). As the Supreme Court later explained, invalidating initiative provisions requiring the University of Alaska to transfer real and personal property to Community College System:

> The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of *state assets* among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of *state money*, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of *assets the State already owns*. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of *state assets*, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

McAlpine v. University of Alaska, 762 P.2d 81, 87-88 (Alaska 1988) (emphasis added). *See also Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936 (Alaska 1987) (initiative seeking to require sale of municipally owned utility to private, nonprofit cooperative for $1 would unconstitutionally make "appropriation," where utility had $32.7 million in equity; "prohibition against appropriations by initiative applies to all state and municipal assets") (emphasis added).

However, that power obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control.[6]

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[6] Courts in other jurisdictions have ruled that funds received by a state for specific purposes are trust funds and are not subject to the legislative appropriations power, even where they are received and held solely by the state and not in a joint trust fund subject to co-trusteeship obligations. The Massachusetts Supreme Court well stated the rationale for that conclusion:

> If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by Federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the Legislature. The recipient of such funds has no choice but to comply with the requirements imposed by Federal Law.
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> Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws.

Opinion of the Justices to the Senate, 378 N.E.2d 433, 436 (Mass. 1978) (citations omitted). *See, e.g., Colorado General Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (expenditure of federal block grant funds, not subject to state matching requirement or other legislative decision making, was within governor's executive power to make resource allocation decisions, since funds were essentially custodial in nature); *Colorado General Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985) (oil company's payment to state pursuant to consent order resolving administrative proceeding alleging that company violated regulations in marketing petroleum and natural gas products was not subject to General Assembly's appropriation power, and governor's exercise of authority over fund was not an impermissible invasion of Assembly's right to appropriate public funds); *Opinion of the Justices to the House of Representatives*, 471 N.E. 2d 1266 (Mass. 1984) (even if revenues received pursuant to bill establishing Development Bank constituted "money received on account of the Commonwealth" within meaning of State Constitution's article establishing process by which revenues are to be received and disbursed, revenues would not be subject to those requirements, since funds were impressed with a trust established to secure debt obligations of Bank, which could disburse those funds pursuant to specific conditions and limitations). *See also Navajo Tribe v. Arizona Dept. of Administration*, 528 P.2d 623 (Arizona 1974); *MacManus v. Love*, 499 P.2d 609, 610 (Colo. 1972); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974); *Application of State ex. rel. Dept. of Transportation*, 646 P.2d 605, 609-10 (Okla, 1982). *Contra, Shapp v. Sloan*, 391 A.2d 595, 604-07 (Pa. 1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979)

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B. The Trust Fund Does Not Violate the Constitution's Prohibition Against Dedicated Funds

For similar reasons, the Alaska Constitution's prohibition concerning dedicated funds is not violated by the Trust Fund. The relevant sentence in the Constitution states:

> Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 [the Constitution's Permanent Fund provisions] of this article or when required by the federal government for state participation in federal programs. . . .

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. *State v. Alex*, 646 P.2d 203 (Alaska 1983). In *Alex*, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. *Id.* at 208-10. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply *not* "revenues" of the State.[7]

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(custodial Federal funds must be appropriated by the legislature or returned to the Federal government).

The Alaska Supreme Court has not decided the issue whether the Legislature can or must exercise its appropriations power in order to authorize the State to expend trust monies or custodial funds held by the State, though a Superior Court decision has ruled (without elaboration) that the governor could not expend custodial funds without a legislative appropriation. *Kelly v. Hammond*, Case No. 77-4 Civ. (Juneau, 4/19/78).

[7] There is obviously a strong link between the Alaska Constitution's appropriations language and the dedicated funds prohibition. That prohibition is aimed at restraining the Legislature's creation of dedicated funds from certain State revenues through its appropriations power. *See* Alaska Constitutional Convention Proceedings 2364 (dedications of funds had the undesirable effect of preventing the "legislature" from "decid[ing] each case on its merits," causing it to "lose[ ] [the] control that it should have over the workings over state government"; appropriations should be made only after legislature "decide[s] each case on its merits"); *id*. at 2367-70 ("eventually you get so many funds earmarked that the legislature just does not have the money to work with for current

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Furthermore, even if the Trust Fund monies *were* State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: (1) the monies would be received by the State subject to co-trusteeship obligations; and (2) the monies would be received by the State subject to a federal statutory requirement as to their use.[8]

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operating expenses").

[8] In a thorough analysis of the dedicated funds prohibition after the *Alex* decision, the Attorney General concluded that even under the *strictest* conceivable interpretation, monies received in trust would not be subject to that prohibition. 1982 Op. Att'y Gen. No. 13, File No. 366-649-80 (Nov. 30, 1982) ("[E]ven under the strict view, there would be some kinds of monies received by the state which it could not, for independent legal reasons, deposit into the general fund. These monies would include trust funds, restricted gifts, and funds subject to restrictions by contract."). That opinion also concluded that the fact that some State revenue was subject to federal statutory requirements that it be spent in a particular way did not violate the prohibition. *Id*. ("The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. *See* 16 U.S.C. §669."). *See also* Op. Att'y Gen., File No. 366-403-85 (Aug. 13, 1985) (trust obligation exists with respect to public school fund; dedication of revenues to public school fund would not violate dedicated fund prohibition because "the legislature has removed the lands from a federally-created trust and substituted a monetary fund. We believe the exceptions to the prohibition on dedicated funds contained in article IX, section 7, of the Alaska Constitution — i.e., for dedicated funds 'required by the federal government' or 'existing upon the date of ratification of this section by the people of Alaska' — authorize the dedication of revenues to the public school fund, since the dedication of revenues is an alternate form to the pre-statehood federal dedication of lands."); Op. Att'y Gen., File No. 388-140-82 (June 22, 1982) (federal statute specifying use to which State could put its share of receipts from oil and gas leasing in National Petroleum Reserve; "federal legislation directing payment of the money to the state attaches conditions to the state's receipt of that money" and thus "impose[s] a requirement which is exempt from the dedicated fund prohibition").

A commonsense reading of the exemption where a dedication of funds is "required by the federal government for state participation in federal programs" would allow funds to be taken under the restrictions embodied in the Settlement Agreement, even were those funds considered "public revenues." The purpose of this exemption is to ensure that the State may receive monies available under federal law subject to restrictions. Though recoveries under the Clean Water Act might not be received literally from a federal "program," it is likely that the dedicated funds prohibition would be interpreted by the courts to allow the State to benefit from such recoveries with the statutory restrictions as to their use.

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C. The Real Issue

The Trust Fund monies are not "State assets" or "public revenues," subject to the Legislature's appropriations power of the constitutional prohibition against dedicated funds.

The issue then, purely and simply, is whether the Governor and the Attorney General of the State of Alaska *have the power and authority* to agree to a settlement of the Exxon litigation in which a portion of Exxon's settlement payments are made into a Trust Fund, supervised by the United States District Court and administered by the State and Federal governments as co-trustees, or whether they are legally constrained to settle the Exxon litigation *only* on terms that require all monies to be paid directly to the State.

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.[9]

The Alaska Supreme Court has long and consistently recognized that although "the Alaska Constitution does not expressly address itself to the doctrine of separation of powers," that principle is clearly "implied" from the Constitution's separate articles creating the executive, legislative, and judicial branches of the Alaska government. *Rust v. State*, 582

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[9] The historical and intellectual origins of the separation of powers doctrine have been extensively reviewed and analyzed by scholars. *See, e.g.*, W. Gwyn, The Meaning of the Separation of Powers (1965); M. Vile, Constitutionalism and the Separation of Powers (1967); Sharp, "The Classical American Doctrine of 'the Separation of Powers'," 2 U.Chi.L.Rev. 385 (1935). The doctrine is generally considered to have been derived primarily from the writings of John Locke, concerning the delineation of functions in the English government, and the writings of Montesquieu, who strongly "argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions." The doctrine was incorporated into the state constitutions that predated the American Constitution and has been embodied in subsequent state constitutions. J. Nowak, R. Rotunda, and J. Young, Constitutional

Law (1983), *citing*, J. Locke, Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government); Montesquieu, The Spirit of Laws (Nugent trans. 1949).

P.2d 134, 138, n.11 (Alaska 1978).[10] "Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, the executive power in the governor, and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature." *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976) (footnotes omitted).

There is no doubt that the countervailing principle of "checks and balances" allows each branch of the State government to directly and indirectly affect the other.[11] Thus, the legislature may enact laws that are to be executed by the executive and interpreted by the judiciary in accordance with legislative intent;[12] the executive may enforce those laws in accordance with its discretionary view of the public interest and governmental priorities; and the judiciary may review the actions of both the other branches in light of applicable constitutional and other legal constraints.[13]

However, the Alaska Supreme Court has embraced a strict view of the

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[10] *See also Alaska State-Operated School System v. Mueller*, 536 P.2d 99, 103 (Alaska 1975) ("Those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial.").

[11] *See, e.g., Bradner v. Hammond*, 553 P.2d at 5:

> A problem inherent in applying the doctrine of "separation of powers" stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.

[12] For purposes of the analysis presented below in this memorandum, it is important to bear firmly in mind that the legislature can restrict the executive's constitutional discretion to execute the law *only* by means of a lawfully enacted statute. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).

[13] *See also, e.g., State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984) (doctrine of separation of powers avoids dangerous concentration of power through checks and balances each branch of government has against other by assigning each branch powers and functions appropriate to it; generally, "legislative power" is power to make, amend or repeal laws, whereas "executive power" is power to enforce laws, and "judicial power" is power to interpret and apply laws in actual controversies).

autonomy of the State's governmental branches, which precludes each branch from improperly interfering with the autonomy and discretion of the others with respect to their core constitutional powers. *See, e.g., Bradner v. Hammond*, 553 P.2d at 6-8 ("the separation of powers doctrine requires that the blending of governmental powers [between the branches] will not be inferred in the absence of an express constitutional provision").

IV. THE GOVERNOR'S CONSTITUTIONAL AUTHORITY TO EXECUTE AND ENFORCE THE LAWS

"There is no dispute that our constitution was designed with a strong executive in mind." *Bradner v. Hammond*, 553 P.2d 1, 3 n.3 (Alaska 1976). *See* Alaska Constitutional Convention Proceedings 1102, 1741, 1986-88, 2038, 3103. Article III, Section 1 of the Constitution provides that "[t]he executive power of the State is vested in the governor."

Principal among the governor's express constitutional powers is his or her responsibility for executing and enforcing the laws. The constitutional provision concerning that power makes clear the governor's plenary authority to initiate and control litigation brought for that purpose:

> Governor's Authority. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. . . .

Alaska Const., Art. III, §16.[14]

The Constitutional Convention considered the discretion of the executive branch to enforce the law to be an essential element of the strong executive intended under the Alaska Constitution:

In order to enforce the strong executive and to bulwark his power we

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[14] *See, e.g., Alexander v. State By and Through Allain*, 441 So. 2d 1329 (Miss. 1983) ("Executive power" is the power to administer and enforce the laws; "execution" is at the core of executive power).

> have given him power by appropriate actions or proceedings in the court, brought in the name of the state, to enforce compliance with any constitution [sic] or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive.

Alaska Constitutional Convention Proceedings 1986. Thus, the governor has the constitutional mandate to use his or her judgment in enforcing the law to best protect the public's interest. *See State v. Lewis*, 559 P.2d 630, 635 (Alaska), *cert. denied*, 432 U.S. 901 (1977).

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law.[15] In that respect, the

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[15] The Alaska Constitutional Convention strongly rejected proposals offered by a minority of its Judiciary Committee members either to create an elected Attorney General's position in the Constitution (defeated by a 40-12 vote) or to have the Governor appoint the Attorney General, by a process similar to that adopted for judicial appointments, from candidates determined to be qualified by the Judicial Council (defeated by a 36-18 vote). In doing so, the Convention expressly reaffirmed the Constitution's intention to have a "strong executive" and made it clear that the Governor should have full authority to appoint his or her Attorney General, in order to assure that the Attorney General could work effectively in the executive department and would be compatible with the Governor and the Governor's programs. Alaska Constitutional Convention Proceedings 2193-2202, 2215-23 (Delegate McLaughlin stating that an elected Attorney General would put "a diverse and possibly a discordant element into the executive branch" undercutting the Attorney General's "attorney-client relationship" with the Governor, which "has to be based on faith and personal selection"; instead, Attorney General should be an "executive appointee" and "an attorney largely for the executive department"; Delegate Stewart stating that rather than giving independent advice to both the executive and the legislature, "the attorney general [should be] purely and simply the adviser for the executive"; Delegate Rivers, a territorial attorney general, agreeing that the Attorney General should not be expected to counsel both the governor and the legislature, and that an elected attorney general would undercut the constitutional intention to have a strong executive, because an elected attorney general might be of an "opposite political faith," otherwise not "see eye-to-eye" with the governor, or be "inadequate or hostile to [the governor]"; Delegate Buckalew opposing the Judicial Council proposal as inconsistent with the commitment to a strong executive). *See also id*. 2284 (Delegate Taylor explaining that by not making the attorney general a constitutional office, the Convention was recognizing that "it was a legal department of the executive

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Attorney General has broad common law powers and responsibilities. For the historically inclined, the common law roots of the attorney general's powers were recently, tersely summarized by the Alabama Supreme Court:

> The office of attorney general had its nascence in the attornatus regis of the thirteenth and fourteenth century England. The attornatus regis served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute. . . .
>
> The most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, "the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest. . . . [H]e may abandon, discontinue, dismiss or compromise it." In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a suit when he determines that continued litigation would be adverse to the public interest.

Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (footnote omitted) (attorney general had authority to dismiss state insurance department's proceedings in appeals court despite objection of commissioner of insurance).[16]

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branch and . . . the governor would have the right . . . to appoint the attorney general who sets up the legal department of the executive department").

[16] *See also* 6 W. Holdsworth, A History of English Law 467-68 (1924); National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 9-17 (1980); Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am.J. of Legal History 304 (1958).

Alaska takes a similarly expansive view of the Attorney General's common law powers. Because the nature and extent of those powers is fundamental to the issue addressed in this memorandum, the Alaska Supreme Court's seminal discussion of the subject deserves extended quotation:

> Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020 indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law:
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> (b) The attorney general shall . . .
>
> (7) perform all other duties required by law or which usually pertain to the office of the attorney general in a state.
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> *Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.*
>
> *When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers.* Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine.
>
> Both federal and state courts have consistently and carefully observed the line which divides their branch of government from that of the executive. They have held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceedings.
>
> > "In that field, the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is

> beyond the control of any other officer or department of the state."
>
> The order to prosecute by the Superior Court overstepped this line and was an infringement upon the discretionary powers residing in the executive branch. Such an order is not within the province of the court.
>
> We conclude that, although we have jurisdiction to entertain this case and to find, as we have, the existence of legal authority, we do not have power to control the exercise of the Attorney General's discretion

> as to whether he will take action in any particular cases of contempt for non-support.

Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975) (footnotes and citations omitted) (emphasis added).[17]

It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation.[18]

A. The Attorney General Has the Authority to Agree to a Settlement That Includes a Joint Trust Fund

The Trust Fund settlement device agreed to by the Attorney General in the Exxon litigation is appropriate under both common law and state and federal statutes.

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[17] In addition to AS 44.23.020, which codifies certain of the Attorney General's inherent powers and provides other duties for him or her, other statutes, far too numerous for citation, expressly provide for the Attorney General to initiate or defend administrative and judicial proceedings. However, "[t]he duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them." *State ex rel. Olsen v. Public Service Commission*, 283 P.2d 594, 598-99 (Mont. 1955).

[18] *See also State of Oklahoma ex rel. Wilson v. Blankenship*, 308 F. Supp. 870, 875 (W.D. Ok. 1969), *rev'd. on jurisdictional grounds*, 447 F.2d 687 (10th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) ("Ordinarily, the Attorney General both under the common law and by statutes, may control and manage all litigations in behalf of the state and is empowered to make any disposition of the state's litigation, which he deems for its best interest"); *Island-Gentry Joint Venture v. State Through State Board of Land and Natural Resources*, 554 P.2d 761 (Haw. 1976) (attorney general has exclusive authority to control and manage for state all phases of civil litigation in which state has an interest, and such authority necessarily includes control of settlement of actions); *Sarkeys v. Independent School District*, 592 P.2d 529, 536 (Okla. 1979) ("The authority of the Attorney General to settle or compromise the litigation in question, in the absence of fraud or collusion is exclusive."); *State ex rel. Derryberry v. Kerr-McGee*, 516 P.2d 813 (Okla. 1973) (attorney general had authority to settle and compromise asphalt price-fixing case; absent "fraud or collusion," court will presume that case settled for valid reasons, based on Attorney General's judgment as to the state's best interests); *State v. Jones*, 41 So.2d 280 (Ala. 1949) (attorney general had power to enter into good faith settlement, despite constitutional provision forbidding compromise or release of obligations owed the state).

First, as part of the Attorney General's common laws authority to initiate, participate in, and settle litigation, the Attorney General may seek any available legal or equitable remedy, even if a particular remedy is not expressly provided by statute.[19]

Thus, in *State v. First National Bank of Anchorage*, 660 P.2d 406 (Alaska 1982), the Alaska Supreme Court held that the State's Consumer Protection Act did not regulate real property sales and that the State's Uniform Land Sales Practices Act would not apply retroactively to certain land purchases. However, the Court held that neither statute restricted "the court's traditional equity powers" to award restitution "at the instance of the state," as a remedy to benefit defrauded land purchasers. 660 P.2d at 416.[20]

Furthermore, the Court held that the Attorney General, on behalf of the State, had the authority to pursue the common law fraud claims of land purchasers and to seek restitution for them based on those claims. Quoting and reaffirming its recognition of the Attorney General's broad common law powers in the *Public Defender* case, discussed previously, the Court concluded:

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[19] Attorneys general have been recognized to have numerous common law litigation powers, including: to institute and intervene in civil suits to protect the public interest, in their discretion; to challenge the constitutionality of legislative or administrative actions; to bring suits under federal law to protect members of the public; to intervene in regulatory rate cases; to litigate *parens patriae* (for the benefit of the state's citizens) in cases involving a wide range of matters; to bring proceedings against public officers; to sue for abatement of nuisances; to enforce charitable trusts; to intervene in will contests; to seek revocation of corporate charters; to represent state agencies; and to initiate criminal prosecutions, even where local prosecutors have not done so. *See* National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 36-71 (1980).

[20] In reaching this conclusion, the Court found "persuasive" the California Supreme Court's reasoning in a case involving a substantially similar issue. In that case, *People v. Superior Court*, 507 P.2d 1400 (Cal. 1973), the Court ruled that while a California statute only expressly authorized the California Attorney General to sue *to enjoin* misleading advertising, that statute "did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference' . . . ." Therefore, the California Court held that courts retained their "inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the consumers found to have been defrauded." 507 P.2d at 1402 (citations omitted and emphasis added). The Alaska Supreme Court's *First National Bank* opinion noted that "a number of analogous federal cases . . . had reached the same conclusion." 660 P.2d at 416.

> We believe that the above language [from the *Public Defender* decision] forecloses any argument that the State is without authority to bring suit in the absence of express statutory authority. This view finds ample support in the decisions of other jurisdictions where the attorney general's common law powers are recognized. . . . This authority has been held to confer standing on the attorney general to seek redress for common law fraud.
>
> We therefore hold that the State has the authority to bring suit in the public interest on the basis of common law fraud to obtain restitution for defrauded land purchasers. . . . [I]t is not the court's function to pass upon the Attorney General's determination of what is or is not in the "public interest" . . . .

660 P.2d at 420-21.

The trust, used as the vehicle for the Exxon settlement, is an ancient equitable creature. Litigants have long asked courts to infer or create trusts as a way to remedy legal or equitable wrongs. *See, e.g., Klondike Industries Corp. v. Gibson*, 741 P.2d 1161, 1171 (Alaska 1987) (court may impose constructive trust where it concludes that holders of legal title to property should be considered to have duty to act consistently with the equitable interests of other persons in property); *Ayers v. Jackson Township*, 525 A.2d 287, 314 (N.J. 1987) (citing authorities in support of creation of equitable fund so that (1) damages from toxic discharge would not have to be estimated in advance; (2) recovery could be used for medical monitoring; and (3) trustees could make decisions on disbursements on equitable grounds). *See also Milliken v. Bradley*, 433 U.S. 267, 281 (1976) (courts have "broad" "equitable powers to remedy past wrongs").[21]

For almost 40 years, environmental trusts have been created by settlements and court orders as a method to use monies paid by a polluter to benefit the resource damaged by the polluter's activities. *See For Lands's Sake* 1 (New Jersey Conservation Foundation, Morristown, N.J., 1990). Such trusts have been established with both private plaintiffs and

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[21] The creation of common or trust funds for recoveries in class action litigation is one notable and well-established example of the courts' willingness to create such funds as a remedy. *See generally* 2 H. Newberg, Newberg on Class Actions §§10.01 *et seq*., 11.15 - .21, 12.01 *et seq*. (2d ed. 1985) (classwide damage awards and lump sum fund settlements).

governmental trustees making the decisions about expenditures of trust monies.[22]

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[22] Some examples gleaned from research done by the National Wildlife Federation as a result of the Exxon litigation:

The Chesapeake Bay Foundation and Natural Resources Defense Council sued Bethlehem Steel for polluting the Chesapeake Bay in violation of its clean water permit. The resulting consent decree gave them extensive oversight powers in administering a $1.1 million trust fund, with monies to be spent on projects which "further the goals of the Clean Water Act by contributing to the restoration and protection of the Chesapeake Bay and its resources," consistent with the "mitigation project criteria" set forth in the EPA's Clean Water Act settlement policies. *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, Civ. No. Y-84-1620 (D.Md., July 14, 1987).

The Hudson River Foundation was the result of a protracted case brought by environmental organizations and Hudson River fishermen opposed to the construction of the Storm King power plant. The settlement established a $12 million endowment for scientific research on the ecology of the Hudson River. Representatives from the state and federal government, from the different plaintiff groups, and from New York utilities sit on a panel which recommends projects for a trustee panel. Final authority for administration of funds rests with the trustee panel, comprised of ten distinguished persons independent of government. *See generally* R. Sandler and D. Schoenbrod, *The Hudson River Plant Settlement* (New York University, 1981).

The Virginia Environmental Endowment began with a $13.2 million deposit from Allied Chemical Corporation, which has been found guilty of polluting the James River with the toxic chemical kepone. The presiding federal judge approved Allied's suggestion that, instead of paying a fine, it would create an environmental trust. The judge appointed independent, prominent citizens to administer the Endowment. Projects undertaken range from educating citizens to tackling pollution problems in the Virginia area. *See* Virginia Environmental Endowment, Annual Report (1987).

The Ohio Fund was established pursuant to a consent decree between the EPA and parties responsible for the administration of the Hamilton County municipal sewer system, the Metropolitan Sewer District of Greater Cincinnati, which failed to comply with its NPDES permit. The purpose of the trust is to fund "environmentally beneficial project(s)" for enumerated purposes in accordance with certain criteria. The project(s) are required (1) to further the statutory goals of the Clean Water Act, (2) to address the kinds of environmental problems caused by the defendants' noncompliance, (3) to supplement any existing legal requirements, and (4) to benefit the general public rather than any of the defendants or any governmental units. *U.S. v. Bd. of County Commissioners of Hamilton County, Ohio, et al.*, C-1-89-0693 (S.D. Ohio, March 11, 1985).

The Whooping Crane Trust is a $7.5 million "trust in perpetuity" created in a consent decree between an electric power company and plaintiffs, the State of Nebraska and the National Wildlife Federation. Each of the three parties to the agreement (the power company, the governor of Nebraska, and the National Wildlife Federation) appoints one trustee, who may be replaced at the pleasure of the party who appointed him. The purpose of the trust is “to protect and maintain the

(continued …)

Trust funds have often been created by consent decrees entered in Clean Water Act actions for injunctive relief and other remedies.[23] *See, e.g., PIRG v. Powell Duffryn*, 913 F.2d 64, 82 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 1018 (1991) ("in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy"; district court can create trust fund as part of equitable relief, but civil penalties must be paid into U.S. Treasury).

The environmental trust fund most analogous to that created under the Exxon Settlement Agreement was established as a result of litigation relating to the Shell Oil Company's discharge of oil from its Martinez, California, complex. That discharge affected

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(…continued)
migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska"; the trustees may choose to fund "programs, activities, and acquisitions . . . formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life support system for the whooping crane and other migratory species which utilize it." Platte River Whooping Crane Maintenance Trust, Trust Declaration. *See also U.S. v. Metropolitan District Commission*, No. 85-0489-MA (D.Mass. 1988) (establishing Boston Harbor Massachusetts Bay Trust). *Cf.*, *United States v. Browning-Ferris Industries Chemical Services, Inc.*, 704 F.Supp. 1355 (M.D. La. 1988) (attorney general had defendant pay a portion of recovery to university to endow environmental research program).

[23] The remedies expressly available under the CWA also arguably exist at common law. The courts have long recognized common law "public trust" and "*parens patriae*" doctrines, under which a government is entitled to seek damages and injunctive relief in order to protect land or water resources in which it has a "public trust" interest. *See, e.g., Maine v. M/V Tamano*, 357 F. Supp 1097, 1101 (D. Me. 1973) (state can seek both injunctive relief and damages for oil discharge under public trust and *parens patriae* theories); *Aerojet-General Corp. v. San Mateo County Superior Court*, 257 Cal. Rptr. 621 (Cal. App. 1989) (State's public trust interest in navigable portions of river was sufficient for standing to claim damages caused by environmental pollution). *See generally* 1 V. Yannacone, B. Cohen, S. Davison, Environmental Rights and Remedies §2.1 *et seq*. (1972) (discussing development of trust doctrine). Under common law theory then, the State might see as an equitable remedy, and a court might order created, a fund to benefit damaged resources. *See, e.g., Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 495-96 (1971) (fund sought for restoration of waters polluted by mercury); *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986) (settlement fund for class members created in *parens patriae* consumer action brought by Attorney General). *See also* 1 W. Rodgers, Environmental Law §2.13D (1986) (range of equitable remedies possible in environmental cases is "virtually unlimited").

lands and waters, including wetlands around the Shell Marsh and Payton Slough, and entered into the Carquinez Strait and Suisun Bay, near San Francisco.

The Consent Decree in that case, a copy of which is available to the Legislature, resolved the claims of the United States Government, as well as those of numerous California state and local governmental entities and agencies that were also plaintiffs. *U.S., et al. v. Shell Oil Company*, Civ. No. C-89-4220 (N.D. Cal., Nov. 29, 1989). Like the present case, the Consent Decree used a Clean Water Act trust as the mechanism for collectively resolving claims for natural resources and other damages sought under various state and federal statutes, as well as common law theories. *See* Shell-Martinez Consent Decree ¶¶1(D)-(J), V.

Prominent among its settlement payment provisions, the Consent Decree provides for approximately $11 million to be placed in a joint trust fund.[24] A Memorandum of Agreement incorporated into the Consent Decree provides for decisions concerning disbursement and management of the trust fund to be made by a committee comprised of representatives of federal, California, and local governmental entities. *See* Shell-Martinez MOA ¶II.

Cooperation with the Federal government and the creation of a joint trust fund are clearly appropriate under the circumstances of the Exxon litigation, as they were in the Shell-Martinez case.

B. The Clean Water Act Trust Remedy

The Clean Water Act ("CWA") provides that the State and Federal governments are to act as "trustees" in seeking recovery for natural resource damages and that all recoveries by the trustees are to be used for restoration and resource acquisition purposes. *See* 33 U.S.C. §1321(f)(5) ("The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.").

Consistent with the trustee status under which the governments may recover natural resource damages, the statute is interpreted to require that such recoveries be held in trust for the damaged resources. *See Commonwealth of Puerto Rico v. the SS Zoe Colocotroni*, 628 F.2d 652, 675 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (requirement that recoveries be used to benefit damaged resource is "[i]n accordance with the trust analogy"). *See also* W. Fratcher, *Scott on Trusts* §§170, 192 (4th ed. 1987) (trustee's duty is to act with respect to trust property in the interests of the trust's beneficiaries).

The regulations promulgated under the CWA concerning such trusts expressly address only the situation where a single sovereign recovers money. "All sums recovered .

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[24] Like the Exxon Settlement Agreement, the Shell-Martinez Consent Decree, although dedicating the majority of the recovery to an environmental trust fund, also provided for significant monies to be paid directly to the numerous governmental parties as reimbursement for their costs and clean-up efforts, as well as penalties. *See* Shell-Martinez Consent Decree ¶IV(A).

. . by the Federal government acting as trustee shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." 43 C.F.R. §11.92(a)(1). "All sums . . . recovered . . . by a State government acting as trustee shall either: (i) be placed in a separate account in the state Treasury; or (ii) be placed by the responsible parties in an interest bearing account payable in trust to the state agency acting as trustee." 43 C.F.R. §11.92(a)(2). These sums must be spent "out of the account . . . only for those actions described in the Restoration Plan . . . ." 43 C.F.R. §11.92(c). The regulations further provide the State trustee responsible for the Restoration Plan and spending trust proceeds in accordance with that Plan is to be an "agency designated by the governor." 43 C.F.R. §11.14(rr).

However, relevant to the joint Trust Fund created by the Exxon Settlement Agreement, the regulations also provide that the state and federal trustees should cooperate to "[d]evise and carry out a plan" for restoration and resource acquisition where the affected resources are "contiguous," or under joint trusteeship. 40 C.F.R. §§300.615(a), (b)(4).[25] The CWA and its accompanying regulations therefore strongly support the conclusion that joint recoveries should be placed in a joint trust fund and administered cooperatively. *See also* Alaska Const., Art. XII, §2 ("The state . . . may cooperate with the United States . . . on matters of common interest.").

Based on these statutory and regulatory provisions, a joint trusteeship was considered the appropriate basis for the Consent Decree in the Shell-Martinez oil spill litigation, discussed previously in this memorandum. A joint trusteeship will almost certainly be upheld by the courts as an appropriate settlement mechanism, authorized by federal law, in the Exxon case as well.

C. No Statutory Provision Expressly Precludes the Trust Fund Settlement

The Attorney General's authority to enter into the joint Trust Fund settlement with Exxon and the Federal government is certainly subsumed within the Attorney General's broad, *inherent* settlement powers. Because of the inherent nature of those powers, "[i]t is

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[25] *See also* 43 C.F.R. §§11.32(a)(1)(ii), (a)(1)(iii) (trustees *encouraged* to cooperate in assessing inseparable damages and *required* to cooperate in pursuing such damages); 40 C.F.R. §§300.73 -.74 (*requiring* trustee coordination and cooperation in fulfilling duties which, under 33 U.S.C. §1321(f)(5), include pursuing damage claims and implementing restoration plan).

the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law," the Attorney General retains all his or her common law powers "in the absence of *express* restrictions" imposed by constitution or statute. *Hansen v. Barlow*, 456 P.2d 177, 178 (Utah 1969) (emphasis added).[26]

No Alaska statutory provision *expressly* precludes the Attorney General from settling litigation like the EXXON VALDEZ case by means of a settlement which includes a joint Trust Fund.[27]

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[26] *Accord*, *Weaver v. Blue Cross and Blue Shield of Alabama*, 570 So.2d 675, 684 (Ala. 1990); *Olsen v. Public Service Commission*, 283 P.2d 594 (Mont. 1955); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) (attorney general "may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights"); *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987) ("[i]n the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity . . . , and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers"); *State ex rel. Derryberry v. Kerr-McGee Corporation*, 516 P.2d 813 (Okla. 1973). *See also* National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 24 (1980) ("In states which recognize common law powers, codification does not affect such powers unless the statutes expressly state so.").

[27] Given the absence of any such express prohibition, it is unnecessary to speculate concerning the issue whether and to what extent the Legislature *might* prohibit the Attorney General from so settling the litigation. However, it is clear that the separation of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest. *See Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976) (appointment of executive officers clearly an executive function, and legislature could not require legislative confirmation of lesser executive officers in addition to those made subject to confirmation by the Alaska Constitution); *In re Mackay*, 416 P.2d 823 (Alaska 1965), *cert. denied*, 382 U.S. 803 (1965) (inherent power of Supreme Court over suspension and disbarment of attorneys cannot be defeated by legislative branch of government). *Cf., Granato v. Occhipinti*, 602 P.2d 442 (Alaska 1979) (superior court could not constitutionally require state executive agency to perform home-study in private child custody dispute); *Rust v. State*, 582 P.2d 134 (Alaska 1978) (sentencing court could recommend that defendant be incarcerated in particular facility, but ultimate responsibility for classification and placement of defendant was vested in Division of Corrections, and court lacked authority to order defendant incarcerated in a designated facility); *State v. Carlson*, 555 P.2d 269 (Alaska 1976) (separation of powers principles precluded trial court from accepting guilty plea to lesser charge of manslaughter over the opposition of the prosecution). *See also Bowsher v. Synar*,

(continued …)

The only statutes that have been suggested to have potential impact on that settlement authority are the Alaska statutes concerned with oil and hazardous substance release remedies. However, those statutes can not be fairly said *to preclude expressly* the Settlement Agreement or its joint Trust Fund mechanism, for several reasons.

First, AS 46.08.020 and AS 46.08.010 require "*[m]oney received by the state*" to be "deposited in the general fund and credited to the special account called the 'oil and hazardous substance release account.'" As discussed earlier in this memorandum in the context of the appropriations and dedicated fund issues, the joint Trust Fund monies are *not* monies "received by the state." Therefore, the statutory requirement to deposit such monies in the general fund, as a matter of plain statutory language, simply does not apply.

(…continued)
478 U.S. 714 (1986) (powers vested in the Comptroller General under "reporting provisions" of Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws); *State Board of Ethics for Elected Officials v. Green*, 545 So.2d 1031 (La. 1989) (to extent statute authorized Supervisory Committee on Campaign Finance Disclosure to file civil proceedings to collect penalties for violation of Campaign Finance Disclosure Act, it unconstitutionally violated separation of powers; Committee members were legislatively appointed, and thus could not constitutionally be authorized to enforce the law); *In re Opinion of the Justices*, 532 A.2d 195 (N.H. 1987) (once legislature has made appropriation for executive branch, requirement of fiscal committee approval of contracts made pursuant thereto is unconstitutional intrusion into executive branch of government); *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986) (constitutional provision that duties of state executive "shall be prescribed by law" does not allow the legislature to transfer inherent or core functions of executive officers); *General Assembly of State of New Jersey v. Byrne*, 448 A.2d 438 (N.J. 1982) (any legislative action which excessively interfaces with executive's ability to faithfully execute the laws passed by Legislature violates separation of powers); *Aiken County Bd. of Ed. v. Knotts*, 262 S.E.2d 14 (S.C. 1980) (legislature may not, consistent with separation of powers, undertake to both pass laws and execute them by its own members); *State ex rel. Guste v. Legislative Budget Committee*, 347 So.2d 160 (La. 1977) (legislature may not appoint officers to enforce its laws because that would invade the exclusive realm of the executive).

Some courts have held that the legislature may *not* restrict the attorney general's common law powers. *See, e.g., Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority*, 456 N.E.2d 50, 55 (Ill. 1983) (Attorney General's duties are prescribed by law and include those powers traditionally held by Attorney General at common law; while legislature may add to his powers, it cannot reduce his common-law authority in directing legal affairs of state); *Murphy v. Yates*, 348 A.2d 837 (Md. 1975) (legislature may not abrogate common-law powers of Attorney General).

Furthermore, the most plausible reading of these statutes is that they deal only with monies recovered by the State as *reimbursement* for costs, as the February 15, 1991, memorandum to Senator Cotten from the Assistant Revisor of Statutes stated at page 4, ¶II(C). Alaska Statute 46.08.070(a) empowers the Attorney General to seek compensation for State cleanup related expenditures. That section states:

> The commissioner shall seek reimbursement promptly under this section, AS 46.03.760(e), or federal law for *the cost incurred in the cleanup or containment* of oil or a hazardous substance that has been released.

(emphasis added).

Alaska Statute 46.08.020 similarly makes clear the cost reimbursement nature of the recoveries subject to the statutory chapter, in outlining potential appropriations of these proceeds:

> (a) The legislature may appropriate from the following sources to the ["Oil and Hazardous Release Response] fund:
>
> . . .
>
> (2) money recovered or otherwise received from parties responsible for the *containment and cleanup* of oil or a hazardous substance at a specific cite [sic] . . . ; [and]
>
> (3) fines, penalties, or damages recovered under this chapter or other law *for costs incurred* by the state as a result of the release or threatened release of oil or a hazardous substance.
>
> (b) Money received by the state under (a)(2) and (a)(3) of this section shall be deposited in the general fund and credited to the special account called the "oil and hazardous substance release mitigation account."

The relevant sections thus require on their faces that only those damages, penalties, or fines recovered for "costs incurred by the State" for "clean up and containment" be placed in the special account in the general fund.[28]

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[28] The Legislature's concern was that the general fund be reimbursed for outlays of money. The legislative Fiscal Note to HB 205, the source of AS 46.04.010 as it presently reads, states, "This (continued …)

(…continued)
procedure is designed to reimburse the general fund and thus hold down overall state cleanup costs. It is intended that about 20% of all cleanup costs can be recovered." 1980 House Journal Supp. No. 43, Apr. 8, 1980. Similarly, in introducing this legislation, Representative Miles stated that "it provides for prompt clean up of oil spills and for prompt reimbursement of those spills." House Floor debates, Apr. 15, 1980.

With respect to AS 46.08, Representative Navarre noted in support of the new fund that "it appeals to me because although it offers the opportunity to charge back to the responsible party, if we can identify them, the cost of cleaning up these areas as we discover them." House Resources Comm., Jan. 29, 1986. Former DEC Commissioner Ross similarly told the House Finance Committee on Feb. 17, 1986, that "we would anticipate operating this fund in exactly the same manner, of looking for liability, and assigning it accordingly when we found it, and *reimbursing* the state." (emphasis added). *See also* Statement by Representative Pourchot before House Finance Committee, Mar. 10, 1986; statement by Representative Davis on House Floor, Mar. 19, 1986.

Additionally, it is important to recognize that if any Alaska statute were interpreted to preclude the Attorney General from pursuing or agreeing to Clean Water Act trust fund remedies, serious federal supremacy and preemption issues would be raised.[29] While the State may in many contexts provide remedies more liberal or protective than those provided by federal law,[30] the courts might well rule invalid an attempt by the Legislature effectively to eliminate a remedy clearly provided under federal law.

In brief, were a State statute interpreted to preclude the State from participating in trust fund recoveries under the Clean Water Act, that statute would likely be held preempted, because it would frustrate and serve as an obstacle to the Clean Water Act's purposes. *See International Paper Company v. Ouellette*, 479 U.S. 481, 491 (1987) ("[i]n addition to express or implied preemption, a state law also is invalid to the extent that it 'actually conflicts with a . . . federal statute'"; Clean Water Act preempts private water pollution suit based upon the common law of nuisance of the state in which the alleged injury occurred, when the source of the alleged injury is located in another state).

Finally, it would make little sense for the legislature expressly to constrain the Attorney General's discretion by prohibiting him or her from agreeing to a settlement, based on federal laws, that establishes a joint State-federal environmental restoration trust fund, even when that settlement mechanism would provide the best overall outcome for the State. The Legislature clearly, and wisely, has not done so.

VI. THE SETTLEMENT STRUCTURE WAS NEGOTIATED AND AGREED TO REASONABLY AND IN GOOD FAITH

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[29] The Supremacy Clause provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Art. VI.

[30] *See, e.g., Webster v. Bechtel*, 621 P.2d 890 (Alaska 1980) (federal Fair Labor Standards Act did not preempt State from providing greater protection and more expansive remedies under the Alaska Wage and Hour Act).

It was thus certainly within the Attorney General's authority and discretion to decide to settle the State's oil spill litigation with Exxon, in part by agreeing to the creation of a resource restoration Trust Fund jointly administered by State and Federal Trustees. As quoted previously in this memorandum, the Alaska Supreme Court has strongly declared that where the Attorney General has the "legal authority" to make a particular decisions with respect to the State's litigation, Alaska's courts "do not have power to control the exercise of the Attorney General's discretion . . . . " To attempt to do so would be "an infringement upon the discretionary powers residing in the executive branch not within the province of the court." *Public Defender Agency*, 534 P.2d at 951.

Even if the Supreme Court's clear statement in that regard were disregarded, *at most* an Attorney General's decision concerning the conduct and disposition of State litigation can be legally challenged only if that decision was made in bad faith or, perhaps, for entirely arbitrary and capricious reasons. *See Weaver v. Blue Cross and Blue Shield of Alabama*, 570 So.2d 675, 677 (Ala. 1990) (courts have either "refused to interfere with the attorney general's use of his discretionary power" or "left undisturbed the use of the power to control litigation as long as the attorney general's actions are not arbitrary, capricious, or in bad faith").[31]

The Governor and the Attorney General must be allowed to exercise discretion to settle cases in good faith and on whatever lawful basis they think to be in the State's best interests. They are not required to doggedly pursue in every case all potential State positions and claims. In some cases, they might decide for a variety of reasons, including litigation strategy or problems of proof, simply to abandon potential claims, without seeking any recovery for them. In other cases, they might determine that injunctive relief would provide the best settlement consideration (for instance, an agreement by Exxon itself to undertake certain cleanup or restoration work at the direction of State and federal agencies), rather than

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[31] *See also Severns v. Wilmington Medical Center, Inc.*, 421 A.2d 1334 (Del. 1980) (Supreme Court will not interfere with performance of attorney general's discretionary duties, absent bad faith); *Feeny v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977) (attorney general's discretionary power not to be used in arbitrary or capricious manner); *State ex rel. Carmichael v. Jones*, 41 So.2d 280 (Ala. 1949) (consent agreement between attorney general and taxpayer settling unliquidated claim for taxes was lawful because made in good faith and within power of Attorney General); *Cooley v. South Carolina Tax Commission*, 28 S.E.2d 445 (S.C. 1943) (attorney general acted in good faith in compromising estate tax).

seek *any* recovery under the state or federal law.[32]

There is no sense in which the Exxon Settlement Agreement was negotiated and agreed to in bad faith or arbitrarily and capriciously. Instead, for the reasons discussed in this memorandum and which will be discussed further with the Legislature during the public comment and legislative approval process, the conclusion was reached that it was in the best interests of the State of Alaska to settle the oil spill litigation in large part through the mechanism of a joint Trust Fund, rather than pursue separately the State's various claims for damages. For present purposes, this memorandum will merely summarize the basic reasons why the joint Trust Fund was a reasonable, even essential, component of a settlement.

As a fundamental matter, it was important for the State and Federal governments to act in concert in seeking a settlement. By acting and settling together with the Federal government, the State was able to achieve a better overall settlement for the people of Alaska, both in terms of receiving reasonable reimbursement damages (as to which the Legislature will have appropriations authority), and obtaining the greatest benefit for Alaska's damaged natural resources.

A joint Trust Fund recovery for natural resource damages and restoration was reasonably necessary to such a joint settlement because of potential disputes concerning which sovereign is trustee for which resources. It was desirable to avoid such disputes for several reasons, including: (1) the expense and considerable time unquestionably required for litigating -- undoubtedly including through the available appeals processes -- the numerous resource trusteeship issues presented; (2) the uncertain outcome, always attendant to litigation even in more clearly charted legal waters, of such disputes because of numerous unsettled questions of law concerning trusteeships of various resources; (3) the arguable prospect that some resources or restoration efforts might ultimately be held by the courts to be subject to joint trusteeship by the State and Federal governments; (4) the practical fact that even with respect to resources that might be identified with some confidence as subject to the trusteeship of a single sovereign (*e.g.*, state tidelands and federal uplands), both the damage to those resources and restoration efforts affecting them are very much intertwined; and, finally 5) as a tactical matter, resource trusteeship disputes could certainly have been

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[32] *See also Rubin v. Board of Environmental Protection*, 577 A.2d 1189, 1192 (Me. 1990) ("Attorney General is entitled under the common law to seek injunctive relief against violations" of law).

used *by Exxon* to complicate hugely the litigation by interjecting at various stages issues as to which sovereign could recover and bore the burden of proving damages with respect to which resources, thereby both dividing the State and Federal governments and likely prolonging further Exxon's day of reckoning and payment.

The State believes that it has a stronger claim to many of the fish, wildlife, and other natural resources impacted by the spill than does the Federal government and might well have prevailed to that effect after lengthy and costly litigation. However, in light of the considerations mentioned above, it was made appropriate and in the best interests of the State to agree instead to a settlement that in part employed a joint State-Federal resource restoration Trust Fund. Such a Trust Fund was a necessary ingredient of a settlement designed to produce the greatest benefit to the people of Alaska.

CONCLUSION

This memorandum has discussed the clear authority of the Attorney General to agree to the settlement of the EXXON VALDEZ litigation on the terms contained in the Settlement Agreement.

However, despite that authority, the settlement is obviously politically sensitive, not only because of the magnitude of the resource and economic issues addressed by the Settlement Agreement, but also because of the profound impact of the EXXON VALDEZ oil spill on both Alaska's political culture and -- very directly -- on the lives of many Alaskans.

Therefore, in recognition of the public's interest in the settlement and the Legislature's perceived desire to review the Settlement Agreement, the Settlement Agreement was made subject to both a public comment period and review by the Alaska Legislature. As paragraph 37 of the Agreement provides, if the Legislature does not approve the Settlement Agreement within a prescribed time period, the Agreement may be terminated by the State merely by giving notice to Exxon and the United States government.