

RPLWG
G

MEMORANDUM OF UNDERSTANDING
BETWEEN THE UNITED STATES OF AMERICA AND CERTAIN OF ITS AGENCIES
AND THE STATE OF ALASKA AND CERTAIN OF ITS AGENCIES

WHEREAS, the United States of America (United States) and the State of Alaska (State) are either trustees or co-trustees for natural resources damaged as a result of the EXXON VALDEZ Oil Spill (Oil Spill);

WHEREAS, Section 311 of the Clean Water Act, 33 U.S.C. § 1321, section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, the National Contingency Plan, 40 C.F.R. § 300.105(a)(3), and the Natural Resource Damage Assessment Regulations, 43 C.F.R. § 11.32(a)(1)(ii), provide for the state and federal trustees to cooperate with each other in carrying out their responsibilities for protecting natural resources;

WHEREAS, the United States Departments of the Interior and Agriculture and the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities related to the natural resources damaged by the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

WHEREAS, the United States Departments of the Interior and Agriculture and NOAA have established by a Memorandum of Agreement dated April 28, 1989 a Trustee Council through which damage assessment and restoration planning has been and will continue to be coordinated, with the participation and cooperation of the State of Alaska;

WHEREAS, the State Departments of Fish and Game and Natural Resources have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities relating to the natural resources damaged by the Oil Spill;

WHEREAS, the United States Department of Justice (Justice) and the State Department of Law (Law) have responsibility for litigation management and specifically for prosecuting claims for damages for injury to the natural resources affected by the Oil Spill;

WHEREAS, all of the above state and federal entities find that it is in furtherance of their statutory and trust responsibilities to make sure that all injuries, loss or damage to state and federal natural resources are fully compensated by those parties responsible for the injury;

WHEREAS, the United States and the State have created a Trustee Council, sitting in Alaska, to coordinate the activities in Alaska of the federal and state trustees to assess and restore, replace, rehabilitate, or otherwise acquire the

equivalent of the natural resources injured, lost or damaged by the Oil Spill;

WHEREAS, all of the above state and federal entities find that the procedures set forth in this Memorandum of Understanding (MOU) will best enable them to fulfill their duties as trustees, to assess damages, to collect natural resource damages and to restore, replace, rehabilitate or otherwise acquire the equivalent of the natural resources injured, lost or destroyed as a result of the Oil Spill;

NOW THEREFORE, the United States, through the United States Departments of the Interior, Agriculture, and Justice, NOAA and EPA (Federal Government) and the State of Alaska, through the State Departments of Fish and Game, Natural Resources and Law (State Government) (together "the Governments") hereby agree as follows:

I. JOINT TRUSTEESHIP

A. The Governments agree to cooperate as joint or co-trustees in the use of natural recoveries and any interest earned thereon for the benefit of all natural resources injured, lost or damaged as a result of the Oil Spill to the extent permitted by law as provided for by this MOU.

B. The Governments acknowledge and agree that this MOU is entered into solely for the purpose of facilitating the natural resource damage assessment, the restoration process and full and just natural resource damage recoveries by the Governments. Except as expressly provided in this MOU, nothing herein shall be

deemed an admission of law or fact by either Government concerning ownership, title, management or control authority over natural resources or the right to recover for injury to such resources. [The Governments agree that this MOU may not be used by one Government against the other for any reason.]

C. Nothing in this MOU shall be construed to affect in any manner the rights and obligations, if any, of Indian tribes to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of or loss of natural resources affected by the Oil Spill and expending any proceeds derived therefrom; [the rights and obligations, if any, of other parties not signatory to this MOU;] and the rights and obligations, if any, of the United States or the State or both relating to such Indian tribes and other parties.

D. The Governments acknowledge that the President has assigned to EPA the role of coordinating the long-term restoration of natural resources injured, lost or damaged and any services injured, lost or damaged in those areas affected as a result of the Oil Spill and that the State has similar responsibilities. Subject to the statutorily designated duties and responsibilities of the natural resource trustees, EPA and the State shall, in close cooperation with the Trustee Council:

1. Generally advise the Trustees as to the progress of the restoration process.
2. Establish the long-term goals and objectives for

achieving full and expeditious restoration of the affected natural resources;

3. Develop a restoration framework and plan to implement the long-term goals and objectives;

4. Develop a framework and plan for replacement or acquisition of equivalent resources as appropriate.

5. Monitor progress in restoring Prince William Sound and the Western Gulf of Alaska and other areas affected by the Oil Spill on an ongoing basis and advise on changes in restoration activities or additional restoration activities that would further restoration.

6. Advise the Trustee Council on individual restoration-related projects to ensure they are consistent with the expeditious achievement of the long-term goals and objectives;

7. Recommend implementation to the Trustee Council of appropriate restoration-related projects that will most effectively achieve long-term goals and objectives.

To carry out these purposes, EPA and the State of Alaska shall serve as co-chairs of the Trustee Council's restoration subgroup.

II. ORGANIZATION

A. General Provisions

1. The Trustees shall consist of the Departments of Fish and Game and Natural Resources for the State and the Departments of Agriculture and the Interior and NOAA for the United States. EPA and the Department of Justice shall be

notified of and may participate in all Trustee meetings as advisors to the Federal Trustees. The Department of Law shall be notified of and may participate in all Trustee meetings as advisor to the State Trustee.

2. The Governments agree that all decisions relating to the use of natural resources damage recoveries and any interest earned thereon, including all decisions regarding the allocation of available funds, the planning, evaluation, and conduct of damage assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the Trustees, in consultation with the Administrator of EPA as specified in paragraph D of Article I. All such decisions must be made by unanimous agreement of the Trustees. The Governments agree that all decisions relating to the pursuit of any claim available to either Government for natural resource damages may be made unilaterally, except that the Governments agree to consult each other and to cooperate in good faith to develop a joint approach to state and federal civil litigation and any civil settlement process.

3. To aid in the implementation of this MOU, the Trustee Council shall operate under the supervision and direction of the Trustees. The membership of the Trustee Council shall include an individual from each Trustee identified in subparagraph A.1. of Article II. EPA, the Department of Justice and the Department of Law shall be advisors to the Trustee Council.

4. If the Trustees cannot reach unanimous agreement on a decision pursuant to subparagraph A.2 of this Article, and a Government so certifies, [either Government may resort to litigation. At any time,] the Governments may, by mutual agreement, submit the dispute to nonbinding mediation or other means of conflict resolution.

B. Damage Assessment and Restoration Process

1. The Governments shall coordinate decision-making for the damage assessment and restoration process through the Trustee Council under the supervision and direction of the Trustees.

[2. The Governments acknowledge and agree that nothing herein limits or affects the right of each Government to unilaterally perform any function described in paragraph B. of this Article, outside of the joint damage assessment and restoration process, using its own funds outside of the Joint Trust Fund.]

III. JOINT TRUST FUND FOR NATURAL RESOURCE DAMAGE RECOVERIES

A. The Governments agree to establish a Joint Trust Fund for purposes of depositing, disbursing and managing all natural resource damage recoveries received by either Government in connection with the Oil Spill Litigation and any interest earned thereon. [The administration of such a Joint Trust Fund shall be as provided in this MOU, provided that with respect to natural resource damage recoveries deposited in the Joint Trust Fund as the result of a criminal plea agreement, the Governments agree,

at the request of either Government, to negotiate in good faith to establish mutually acceptable procedures for the administration of those recoveries.]

B. The United States and the State of Alaska shall each establish an Administrator (United States Administrator and State Administrator, respectively) to administer, on behalf of the United States and the State, the Joint Trust Fund established by this MOU, which is intended to receive monies from potentially responsible parties for purposes of restoring, replacing, rehabilitating or otherwise acquiring the equivalent of natural resources injured by the Oil Spill and the reduced or lost services provided by such resources. [With respect to amounts received as restitution in any criminal proceeding, the Governments agree, at the request of either Government, to negotiate in good faith concerning joint use of those amounts for such purposes; provided that this provision shall not in any way limit or otherwise affect the prosecutorial discretion of the State of Alaska or of the United States.]

C. The Administrators shall manage the Joint Trust Fund pursuant to instructions issued by the Trustees.

D. The Governments agree that the Joint Trust Fund shall be established as a separate account, the location and arrangements to be determined by mutual agreement. Any interest earned on the Joint Trust Fund shall become part of the Joint Trust Fund and be subject to the terms of this MOU.

E. The Governments agree that, to the extent permitted by law and except as otherwise provided in this MOU, all natural resource damage recoveries and any interest earned thereon will be paid into the Joint Trust Fund. In the event that a court in the future finally concludes that a Government lacks legal authority to continue in such an arrangement, this agreement shall terminate and each Government shall withdraw funds in proportion to its recoveries deposited into the Joint Trust Fund, including any proportionate share of interest earned thereon and may use any remaining natural resources damage recoveries and any interest earned thereon at its disposition in accordance with its applicable authorities.

F. The Governments agree that the following costs shall be advanced or reimbursed to each Government, at the election of each Government, out of any natural resource damage recoveries deposited in the Joint Trust Fund and any interest earned thereon: reasonable unreimbursed costs agreed upon for the planning, conduct, evaluation and coordination, of all natural resource damage assessment and restoration activities pursued by the Governments under this MOU to address the injuries caused by the Oil Spill to natural resources and the services that they provide. Any reimbursement under this paragraph shall be made prior to the use of the Joint Trust Fund monies and any interest earned thereon for any other purpose except as the parties may, in the future, otherwise agree.

[G. Reasonable unreimbursed costs of experts and counsel (including those costs incurred for the purpose of allowing recovery for natural resource damages to exceed any limitations set forth in any natural resource damage recovery laws) previously incurred in connection with the preparation of the natural resource damage litigation may be deducted from the recovery obtained by each Government before it deposits such recovery in the Joint Trust Fund. To the degree that civil recoveries are jointly obtained by the Governments as co-plaintiffs, each government may deduct its costs of experts and counsel from its share of the recovery to the extent permitted by law. For purposes of this MOU, a jointly obtained recovery shall include any recovery under the Clean Water Act or CERCLA.]

H. Except as otherwise provided in this MOU, the Governments agree that all natural resource damage recoveries and any interest earned thereon will be spent on restoration of natural resources in Alaska unless otherwise agreed or where [the Trustees agree that] spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured, lost or damaged in Alaska and services provided by such resources].

I. Nothing in this MOU shall be construed as obligating the Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

J. Relationship with Court Ordered Trust Funds.

Subject to Paragraph I.C., the Governments agree to cooperate in opposing any attempt by any private litigant to create a separate trust or other fund for the receipt of natural resource damage recoveries resulting from injury to natural resources within the trusteeship of the federal or state governments, other than funds all of whose proceeds are available to fund damage assessment and restoration projects undertaken by the Governments pursuant to this MOU. If, however, a final judgment by a court of competent jurisdiction requires creation of such a separate trust or other fund, and the judgment requires that only one Government can be on the governing body of that fund, then the government that is on the governing body of that fund agrees to cooperate and consult with the other Government to help insure that the goals of this MOU are achieved.

IV. LITIGATION AND SETTLEMENT

A. The Governments, through the Departments of Law and Justice, agree, to the extent practicable, to consult with respect to the civil Oil Spill Litigation to facilitate full and just recovery for natural resource damages, consistent with the provisions of Article I, Paragraph C and Article II, Paragraph A.2.

B. The Governments agree to share scientific work product in accordance with the agreement executed on _____, attached as Exhibit A.

C. The Governments agree to share economic research in accordance with the agreement [executed on _____,

1990,] [executed simultaneously with this MOU] attached as Exhibit B.

D. Legal Work Product and Privileged Information: [The Governments, through the Departments of Law and Justice, agree that they may in their discretion share with each other or with private and/or public plaintiff litigants scientific and economic work product pursuant to the agreements referred to in paragraphs B. and C. of this Article. The Governments may share legal work product and other confidential or privileged information subject to the following terms and conditions:]

1. Each Government shall take all steps necessary to maintain work product and other applicable privileges and exemptions from the Freedom of Information Act and AS 09.25.110 et seq.

2. No Government may voluntarily share with another party information jointly prepared or prepared by the other Government without the express written consent of the other Government's legal counsel.

E. Adversity

[If the Governments become adverse to each other in the course of the Oil Spill Litigation, this MOU shall remain in effect, except that the Governments will not be required to share future scientific or economic research work product except to the extent provided in those separate Agreements concerning such work product.]

F. Settlement

1. The Governments agree to consult each other and cooperate in good faith in any civil settlement discussions with opposing parties. In reaching such a settlement, the settling Government may not purport to represent or otherwise bind the non-settling Government without the express written consent of the latter.

2. With regard to negotiated criminal pleas and awards of restitution with any of the corporate defendants in the Oil Spill Litigation, the settling Government agrees that it will not purport to represent or bind the non-settling Government without the express written consent of the latter.

3. [It is agreed that nothing contained in this MOU modifies or supersedes authority existing within either Government to approve or disapprove any settlement.] (To be redrafted by Van Cleve/Tillery).

G. Relationship with NRDA Regulations: Nothing in this MOU constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 C.F.R. Part 11.

H. (To be redrafted by Van Cleve/Tillery) [In the event that a party in any court challenges the right of either Government to full recovery of its natural resource damage claims in that court due to the absence of the other Government as a party in the proceeding, the Governments agree to consult each other and take appropriate action to address the concern at that time.]

[V. GOVERNING LAW AND VENUE

This MOU shall be interpreted under the laws of the United States and the State of Alaska, as may be amended from time to time, and any disputes between the Governments arising out of the interpretation and enforcement of this MOU shall be determined by the United States District Court for the District of Alaska.]

VI. MULTIPLE COPIES AND EFFECTIVE DATE

This MOU shall be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. This MOU shall not be effective until all Parties have signed the MOU except that the signatures may be on separate counterparts.

VII. INTEGRATION AND MERGER

A. This MOU [(including the agreements cross-referenced)] constitutes the entire agreement between the Federal Government and the State Government as to the matters addressed herein, and there exists no other agreement of any kind, which is inconsistent with this MOU with respect to the subjects addressed in this MOU, provided, that the agreement reached among the Trustees as to disbursements of the original \$15 million paid by Exxon in April, 1989 shall remain in full force and effect, and the Memorandum of Agreement signed by the Federal Trustees on April 28, 1989 shall remain in full force and effect for the federal government. Except as provided above, this MOU shall govern over previous agreements between the Governments arising

out of the Oil Spill, and all differences between this MOU and those previous agreements shall be resolved in favor of this MOU.

B. This MOU may be modified, amended, or supplemented only by a writing signed by authorized representatives of the State Government and the Federal Government.

VIII. TERMINATION (To be redrafted)

[Any monies remaining in the Joint Trust Fund seven years after full and final settlement of the Oil Spill Litigation shall revert to each Government in an amount equal to the proportion of funds originally contributed by each Government, adjusted to reflect interest earned thereon.]

X. DEFINITIONS

For purposes of this MOU,

A. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. as amended.

B. "Clean Water Act" means 33 U.S.C. §§ 1251-1376 as amended.

C. "National Contingency Plan" means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

D. "Natural resources" or "resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State of Alaska.

E. "Natural resource damage recovery" means any award, judgment, settlement or other payment to either Government which is received as a result of a claim or demand for natural resource damage arising from the Oil Spill. [The term includes, without limitation, all claims for natural resource damages under the Clean Water Act, CERCLA, the Trans-Alaska Pipeline Authorization Act, state and federal common law, state and federal right-of-way lease covenants, and any recoveries for natural resource damages obtained from or in connection with a civil [or criminal] proceeding. The term excludes all recoveries of punitive damages, federal civil penalties, sums other than restitution obtained under all federal criminal proceedings, penalties under AS 46.03.758 or AS 46.03.760(a), penalties under other state criminal or civil fine or penalty provisions, and court awarded attorney fees.]

F. "NRDA process" means the procedural framework for assessing and quantifying natural resource injury, loss or damage and determining economic and restoration, replacement and acquisition cost damages described in 43 C.F.R. Part 11.

G. "Oil Spill" means the grounding of the EXXON VALDEZ on Bligh Reef on March 24, 1989 and the consequent oil spill.

H. "Oil Spill Litigation" means any criminal or civil, administrative or court proceeding relating to or arising out of the Oil Spill which includes the State of Alaska or the United States as a party.

I. "Restore" or "Restoration" means any action in addition to cleanup response activities required or authorized by State and federal law which serves to restore any natural resource injured, lost or damaged by the Oil Spill and the services provided by that resource to their pre-spill condition, or which replaces or substitutes for the injured, lost or damaged resource and affected services. Restoration includes without limitation acquisition of equivalent resources and services, to the extent permitted by law, long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.

J. "Restoration costs" include general administrative expense or overhead that is allocable to particular damage assessment or restoration projects or groups of projects or to general damage assessment and restoration actions that which the Governments jointly agree to undertake. Restoration costs also include activities undertaken by EPA to coordinate the long-term restoration of areas affected by the oil spill. Any other general overhead expenses will be borne separately by each Government.

X. JUDICIAL REVIEW

[This MOU creates no rights of action on the part of any persons and shall not be subject to judicial review.]

This MOU is executed by the Governments at the time and on the dates set forth below.

MEMORANDUM OF UNDERSTANDING
BETWEEN THE UNITED STATES OF AMERICA AND CERTAIN OF ITS AGENCIES
AND THE STATE OF ALASKA AND CERTAIN OF ITS AGENCIES

WHEREAS, the United States of America (United States) and the State of Alaska (State) are either trustees or co-trustees for natural resources damaged as a result of the EXXON VALDEZ Oil Spill (Oil Spill);

WHEREAS, Section 311 of the Clean Water Act, 33 U.S.C. § 1321, section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, the National Contingency Plan, 40 C.F.R. § 300.105(a)(3), and the Natural Resource Damage Assessment Regulations, 43 C.F.R. § 11.32(a)(1)(ii), provide for the state and federal trustees to cooperate with each other in carrying out their responsibilities for protecting natural resources;

WHEREAS, the United States Departments of the Interior and Agriculture and the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities related to the natural resources damaged by the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

WHEREAS, the United States Departments of the Interior and Agriculture and NOAA have established by a Memorandum of Agreement dated April 28, 1989 a Trustee Council through which damage assessment and restoration planning has been and will continue to be coordinated, with the participation and cooperation of the State of Alaska;

WHEREAS, the State Departments of Fish and Game and Natural Resources have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. § 1321, and CERCLA, 42 U.S.C. § 9607, and otherwise have statutory responsibilities relating to the natural resources damaged by the Oil Spill;

WHEREAS, the United States Department of Justice (Justice) and the State Department of Law (Law) have responsibility for litigation management and specifically for prosecuting claims for damages for injury to the natural resources affected by the Oil Spill;

WHEREAS, all of the above state and federal entities find that it is in furtherance of their statutory and trust responsibilities to make sure that all injuries, loss or damage to state and federal natural resources are fully compensated by those parties responsible for the injury;

WHEREAS, the United States and the State have created a Trustee Council, sitting in Alaska, to coordinate the activities in Alaska of the federal and state trustees to assess and restore, replace, rehabilitate, or otherwise acquire the

equivalent of the natural resources injured, lost or damaged by the Oil Spill;

WHEREAS, all of the above state and federal entities find that the procedures set forth in this Memorandum of Understanding (MOU) will best enable them to fulfill their duties as trustees, to assess damages, to collect natural resource damages and to restore, replace, rehabilitate or otherwise acquire the equivalent of the natural resources injured, lost or destroyed as a result of the Oil Spill;

NOW THEREFORE, the United States, through the United States Departments of the Interior, Agriculture, and Justice, NOAA and EPA (Federal Government) and the State of Alaska, through the State Departments of Fish and Game, Natural Resources and Law (State Government) (together "the Governments") hereby agree as follows:

I. JOINT TRUSTEESHIP

A. The Governments agree to cooperate as joint or co-trustees in the use of natural resource damage recoveries and any interest earned thereon for the benefit of natural resources injured, lost or damaged as a result of the Oil Spill to the extent permitted by law as provided for by this MOU.

B. The Governments acknowledge and agree that this MOU is entered into solely for the purpose of facilitating the natural resource damage assessment, the restoration process and full and just natural resource damage recoveries by the Governments. Except as expressly provided in this MOU, nothing herein shall be

deemed an admission of law or fact by either Government concerning ownership, title, management or control authority over natural resources or the right to recover for injury to such resources. The Governments agree that this MOU may not be used by one Government against the other for any reason.

C. Nothing in this MOU shall be construed to affect in any manner the rights and obligations, if any, of Indian tribes to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of or loss of natural resources affected by the Oil Spill and expending any proceeds derived therefrom; [the rights and obligations, if any, of other parties not signatory to this MOU;] and the rights and obligations, if any, of the United States or the State or both relating to such Indian tribes and other parties.

D. The Governments acknowledge that the President has assigned to EPA the role of coordinating the long-term restoration of natural resources injured, lost or damaged and any services injured, lost or damaged in those areas affected as a result of the Oil Spill and that the State has similar responsibilities. Subject to the statutorily designated duties and responsibilities of the natural resource trustees, EPA and the State shall, in close cooperation with the Trustee Council:

1. Generally advise the Trustees as to the progress of the restoration process.
2. Establish the long-term goals and objectives for

achieving full and expeditious restoration of the affected natural resources;

3. Develop a restoration framework and plan to implement the long-term goals and objectives;

4. Develop a framework and plan for replacement or acquisition of equivalent resources as appropriate.

5. Monitor progress in restoring Prince William Sound and the Western Gulf of Alaska and other areas affected by the Oil Spill on an ongoing basis and advise on changes in restoration activities or additional restoration activities that would further restoration.

6. Advise the Trustee Council on individual restoration-related projects to ensure they are consistent with the expeditious achievement of the long-term goals and objectives;

7. Recommend implementation to the Trustee Council of appropriate restoration-related projects that will most effectively achieve long-term goals and objectives.

To carry out these purposes, EPA and the State of Alaska shall serve as co-chairs of the Trustee Council's restoration subgroup.

II. ORGANIZATION

A. General Provisions

1. The Trustees shall consist of the Departments of Fish and Game and Natural Resources for the State and the Departments of Agriculture and the Interior and NOAA for the United States. EPA and the Department of Justice shall be

notified of and may participate in all Trustee meetings as advisors to the Federal Trustees. The Department of Law shall be notified of and may participate in all Trustee meetings as advisor to the State Trustee.

2. The Governments agree that all decisions relating to the use of natural resources damage recoveries and any interest earned thereon, including all decisions regarding the allocation of available funds, the planning, evaluation, and conduct of damage assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the Trustees in consultation with the Administrator of EPA as specified in paragraph D of Article I. All such decisions must be made by unanimous agreement of the Trustees. The Governments agree that all decisions relating to the pursuit of any claim available to either Government for natural resource damages may be made unilaterally, except that the Governments agree to consult each other and to cooperate in good faith to develop a joint approach to state and federal civil litigation and any civil settlement process.

3. To aid in the implementation of this MOU, the Trustee Council shall operate under the supervision and direction of the Trustees. The membership of the Trustee Council shall include an individual from each Trustee identified in subparagraph A.1. of Article II. EPA, the Department of Justice and the Department of Law shall be advisors to the Trustee Council.

4. If the Trustees cannot reach unanimous agreement on a decision pursuant to subparagraph A.2 of this Article, and a Government so certifies, [either Government may resort to litigation. At any time,] the Governments may, by mutual agreement, submit the dispute to nonbinding mediation or other means of conflict resolution.

B. Damage Assessment and Restoration Process

1. The Governments shall coordinate decision-making for the damage assessment and restoration process through the Trustee Council under the supervision and direction of the Trustees.

[2. The Governments acknowledge and agree that nothing herein limits or affects the right of each Government to unilaterally perform any function described in paragraph B. of this Article, outside of the joint damage assessment and restoration process, using its own funds outside of the Joint Trust Fund.]

III. JOINT USE OF NATURAL RESOURCE DAMAGE RECOVERIES

A. The Governments agree to establish standards and procedures governing the joint use of all natural resource damage recoveries received by either Government in connection with the Oil Spill Litigation and any interest earned thereon for purposes of restoring, replacing, rehabilitating or otherwise acquiring the equivalent of natural resources injured by the Oil Spill and the reduced or lost services provided by such resources. [The Governments further agree that any amounts received as

restitution in any criminal proceeding shall be subject to the standards and procedures governing the joint use of natural resource damage recoveries established hereby, provided that this provision shall not in any way limit or otherwise affect the prosecutorial discretion of the State of Alaska or of the United States.]

B. The Governments agree that, to the extent permitted by law and except as otherwise provided in this MOU, all natural resource damage recoveries and any interest earned thereon will be jointly used in accordance with the terms and conditions of this MOU. In the event that a court in the future finally concludes that a Government lacks legal authority to continue in such an arrangement, this MOU shall terminate and each Government shall use any remaining natural resource damage recoveries and any interest earned thereon at its disposition in accordance with its applicable authorities.

C. The Governments agree that the following costs shall be advanced or reimbursed to each Government, at the election of each Government, out of any natural resource damage recoveries and any interest earned thereon: reasonable unreimbursed costs agreed upon for the planning, conduct, evaluation and coordination of all natural resource damage assessment and restoration activities pursued by the Governments under this MOU to address injuries caused by the Oil Spill to natural resources and the services that they provide. Any reimbursement under this paragraph shall be made prior to the use of natural resource

damage recoveries and any interest earned thereon for any other purpose except as the parties may, in the future, otherwise agree.

[D. Reasonable unreimbursed costs of experts and counsel (including those costs incurred for the purpose of allowing recovery for natural resource damages to exceed any limitations set forth in any natural resource damage recovery laws) previously incurred in connection with the preparation of the natural resource damage litigation may be deducted from the recovery obtained by each Government before it dedicates such recovery to Joint Use. To the degree that civil recoveries are jointly obtained by the Governments as co-plaintiffs, each government may deduct its costs of experts and counsel from its share of the recovery to the extent permitted by law. For purposes of this MOU, a jointly obtained recovery shall include any recovery in an action under the Clean Water Act or CERCLA in which both Governments are parties.]

E. Except as otherwise provided in this MOU, the Governments agree that all natural resource damage recoveries and any interest earned thereon will be spent on restoration of natural resources in Alaska unless (1) otherwise provided in this MOU; or (2) [the Trustees agree that] spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured in Alaska and services provided by such resources.

F. Nothing in this MOU shall be construed as obligating the Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

G. Subject to Paragraph I.C., the Governments agree to cooperate in opposing any attempt by any private litigant to create a separate trust or other fund for the receipt of natural resource damage recoveries resulting from injury to natural resources within the trusteeship of the federal or state governments, or otherwise direct the joint use of such funds other than funds all of whose proceeds are available to fund damage assessment and restoration projects undertaken by the Governments pursuant to this MOU. If, however, a final judgment by a court of competent jurisdiction requires creation of such a separate trust, other fund, or joint use other than as herein agreed, and the judgment requires that only one Government can be on the governing body of that fund, or in control of the funds, then the government that is on the governing body of that fund, or in control of the funds agrees to cooperate and consult with the other Government to help insure that the goals of this MOU are achieved.

IV. LITIGATION AND SETTLEMENT

A. The Governments, through the Departments of Law and Justice, agree, to the extent practicable, to consult with respect to the civil Oil Spill Litigation to facilitate full and just recovery for natural resource damages, consistent with the

provisions of Article I, Paragraph C and Article II, Paragraph A.2.

B. The Governments agree to share scientific work product in accordance with the agreement executed on _____, attached as Exhibit A.

C. The Governments agree to share economic research in accordance with the agreement [executed on _____, 1990,] [executed simultaneously with this MOU] attached as Exhibit B.

D. Legal Work Product and Privileged Information: [The Governments, through the Departments of Law and Justice, agree that they may in their discretion share with each other or with private and/or public plaintiff litigants scientific and economic work product pursuant to the agreements referred to in paragraphs B. and C. of this Article. The Governments may share legal work product and other confidential or privileged information subject to the following terms and conditions:]

1. Each Government shall take all steps necessary to maintain work product and other applicable privileges and exemptions from the Freedom of Information Act and AS 09.25.110 et seq.

2. No Government may voluntarily share with another party information jointly prepared or prepared by the other Government without the express written consent of the other Government's legal counsel.

E. Adversity

[If the Governments become adverse to each other in the course of the Oil Spill Litigation, this MOU shall remain in effect, except that the Governments will not be required to share future scientific or economic research work product except to the extent provided in those separate Agreements concerning such work product.]

F. Settlement

1. The Governments agree to consult each other and cooperate in good faith in any civil settlement discussions with opposing parties. In reaching such a settlement, the settling Government may not purport to represent or otherwise bind the non-settling Government without the express written consent of the latter.

2. With regard to negotiated criminal pleas and awards of restitution with any of the corporate defendants in the Oil Spill Litigation, the settling Government agrees that it will not purport to represent or bind the non-settling Government without the express written consent of the latter.

3. [It is agreed that nothing contained in this MOU modifies or supersedes authority existing within either Government to approve or disapprove any settlement.] (To be redrafted by Van Cleve/Tillery).

G. Relationship with NRDA Regulations: Nothing in this MOU constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 C.F.R. Part 11.

H. (To be redrafted by Van Cleve/Tillery) [In the event that a party in any court challenges the right of either Government to full recovery of its natural resource damage claims in that court due to the absence of the other Government as a party in the proceeding, the Governments agree to consult each other and take appropriate action to address the concern at that time.]

IV. GOVERNING LAW AND VENUE

This MOU shall be interpreted under the laws of the United States and the State of Alaska, as may be amended from time to time, and any disputes between the Governments arising out of the interpretation and enforcement of this MOU shall be determined by the United States District Court for the District of Alaska.]

VI. MULTIPLE COPIES AND EFFECTIVE DATE

This MOU shall be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. This MOU shall not be effective until all Parties have signed the MOU except that the signatures may be on separate counterparts.

VII. INTEGRATION AND MERGER

A. This MOU [(including the agreements cross-referenced)] constitutes the entire agreement between the Federal Government and the State Government as to the matters addressed herein, and there exists no other agreement of any kind, which is inconsistent with this MOU with respect to the subjects addressed

in this MOU, provided, that the agreement reached among the Trustees as to disbursements of the original \$15 million paid by Exxon in April, 1989 shall remain in full force and effect, and the Memorandum of Agreement signed by the Federal Trustees on April 28, 1989 shall remain in full force and effect for the federal government. Except as provided above, this MOU shall govern over previous agreements between the Governments arising out of the Oil Spill, and all differences between this MOU and those previous agreements shall be resolved in favor of this MOU.

B. This MOU may be modified, amended, or supplemented only by a writing signed by authorized representatives of the State Government and the Federal Government.

VIII. TERMINATION

[The obligations of the parties under this MOU shall terminate seven (7) years from the date of this MOU unless otherwise agreed.]

X. DEFINITIONS

For purposes of this MOU,

A. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. as amended.

B. "Clean Water Act" means 33 U.S.C. §§ 1251-1376 as amended.

C. "National Contingency Plan" means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

D. "Natural resources" or "resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State of Alaska.

E. "Natural resource damage recovery" means any award, judgment, settlement or other payment to either Government which is received as a result of a claim or demand for natural resource damage arising from the Oil Spill. [The term includes, without limitation, all claims for natural resource damages under the Clean Water Act, CERCLA, the Trans-Alaska Pipeline Authorization Act, state and federal common law, state and federal right-of-way lease covenants, and any recoveries for natural resource damages obtained from or in connection with a civil [or criminal] proceeding. The term excludes all recoveries of punitive damages, federal civil penalties, sums other than restitution obtained under all federal criminal proceedings, penalties under AS 46.03.758 or AS 46.03.760(a), penalties under other state criminal or civil fine or penalty provisions, and court awarded attorney fees.]

F. "NRDA process" means the procedural framework for assessing and quantifying natural resource injury, loss or damage and determining economic and restoration, replacement and acquisition cost damages described in 43 C.F.R. Part 11.

G. "Oil Spill" means the grounding of the EXXON VALDEZ on Bligh Reef on March 24, 1989 and the consequent oil spill.

H. "Oil Spill Litigation" means any criminal or civil, administrative or court proceeding relating to or arising out of the Oil Spill which includes the State of Alaska or the United States as a party.

I. "Restore" or "Restoration" means any action in addition to cleanup response activities required or authorized by state or federal law which serves to restore any natural resource injured, lost or damaged by the Oil Spill and the services provided by that resource to their pre-spill condition, or which replaces or substitutes for the injured, lost or damaged resource and affected services. Restoration includes without limitation acquisition of equivalent resources and services, to the extent permitted by law, long-term environmental monitoring [and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.]

Interesting interpretation of what "restoration" is. wof

J. "Restoration costs" includes general administrative expenses and overhead that is allocable to particular damage assessment or restoration projects or groups of projects or to general damage assessment and restoration actions that the Governments jointly agree to undertake. Restoration costs also include activities undertaken by EPA to coordinate the long-term restoration of areas affected by the oil spill. Any other general overhead expenses will be borne separately by each Government.

X. JUDICIAL REVIEW

This MOU creates no rights of action on the part of any persons and shall not be subject to judicial review.

This MOU is executed by the Governments at the time and on the dates set forth below.