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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
EXXON CORPORATION, et al.,	)	
	)	No. 3:91-CV- 0082 Civil (HRH)
Defendants.	)	
	)	
___________________________________	)	

MOTION AND MEMORANDUM IN SUPPORT FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Movant, Richard Steiner, hereby respectfully moves this Court for an order granting leave to file an *amicus curiae* brief in the above-titled case, pursuant to Federal Rule of Appellate Procedure 29. The brief is conditionally filed *pro se* with the Court in accordance with the rule. Movant has not sought nor received the consent of the parties to permit the filing of this *amicus curiae* brief.

This motion is appropriate and necessary for the following reasons:

1. There remains a substantial amount of Exxon Valdez oil in beach substrates (see photos from June 28, 2013, attachment A),

2. The lingering oil is still toxic,
3. The lingering oil is still causing ecological injury,
4. The governments filed in June 2006 a *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury*, in accordance with the court approved Reopener provision, including a specific timeline for actions they committed to take to remedy this unanticipated and ongoing injury,
5. The timeline established that the governments would begin implementing the full lingering oil restoration program in 2009,
6. The governments have demonstrated effective techniques to remediate this ongoing injury,
7. The governments have sufficient funds at present to begin implementing their full Reopener Restoration program, thus restoration need not await payment of the government demand by Exxon,
8. The governments may presume that expenditures to implement the Reopener Restoration Plan will be reimbursed from the demand when paid by Exxon,
9. The funding of the Reopener Restoration plan with existing government EVOS funds should not diminish or otherwise affect the governments' Reopener claim,
10. The government status reports have reported no effort to resolve the Reopener dispute with Exxon,
11. The tolling agreement between the governments and Exxon was terminated by Exxon on June 25, 2010, which triggered a period of limitation on any Reopener claim that Exxon may argue expires in 6 years, thus terminating the possibility of bringing such claim on June 24, 2016.
12. The governments are now at least 5 years behind the timeline they committed to the court and the public, and
13. The governments' unreasonable delay in implementing the Reopener Restoration Plan continues to harm the injured ecosystem.

The Movant is acting in this matter *pro se,* and asks the court to grant due consideration and discretion to this request. This *amicus curiae* brief is intended to aid the court's review of the ongoing dispute between parties regarding the Reopener for Unknown Injury claim, including the recent Status Reports filed by the governments, and to catalyze long overdue action to restore unanticipated environmental injuries from the 1989 Exxon Valdez Oil Spill. Movant respectfully asks the court to review his previous amicus motions pertaining to the EVOS Reopener for Unknown Injury, dated as follows: 08-30-02; 12-07-10; 09-19-11; 10-11-11; 10-17-11.

MEMORANDUM IN SUPPORT OF *AMICUS CURIAE* BRIEF

The recent Status Reports filed with the court by the governments continue to reflect an alarming and inexcusable lack of progress in resolving the Reopener for Unknown Injury claim, as well as the governments' inexcusable delay in implementing the June 2006 *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury.*

On this, the court's 07-01-13 order expressed the following:

> "The court is dismayed that so few of the projects that the Governments had expected to be completed by now have been completed."

Many Alaskans and Americans resonate with the court's frustration at the governments' and Exxon's recalcitrance in failing to resolve this important issue. This is why Movant filed the 2010 and 2011 motions asking the court to order Exxon to pay the governments' 2006 demand for payment. As the legal case pertaining to environmental damage from the Exxon Valdez Oil Spill (EVOS) now approaches a quarter-of-a-century in duration, this is believed to now be the longest-lasting environmental legal case in history, and one of the longest-lasting cases of any kind. And, government Trustees today continue to list most of the monitored injured resources and services as not fully recovered, indeed some

are still listed as “not recovering” (www.**evostc**.state.ak.us/recovery/status.cfm). Further, injury from lingering oil continues to harm the coastal ecosystem, delaying recovery.

As cited in Movant’s 2010 and 2011 motions and oral argument before the court, the governments presented to Exxon in June 2006, in accordance with the court approved Reopener provision, a specific sequence of activities they would undertake and a specific timeline for implementing the *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury* (p. 18). As the government’s recent status reports attest, to date they have only completed preliminary modeling, and are in the process of finalizing additional studies and pilot remediation projects.
In the Comprehensive Plan and *Subsurface Lingering Oil Restoration Timeline* filed in 2006 (also appended to Movant’s 12-07-10 motion), the governments asserted that they would complete a Draft Restoration Plan and an Environmental Assessment in 2008, and begin implementing the full lingering oil remediation program in early 2009. The timeline asserted that the full program would be well underway, if not mostly complete, by now.

As the court is aware, the recent status reports filed with the court provide no evidence that any of this additional work has commenced, much less been completed. Further, it will take at least a year, likely longer, after developing the Draft Restoration Plan to complete a full NEPA review, including Environmental Assessment, alternatives, public comment; develop the Final Lingering Oil Restoration Plan; and then begin full implementation of the restoration program.

At present, the governments are at least 5 years behind the *Subsurface Lingering Oil Restoration Timeline* they committed to in 2006.

Further, government studies, including those referenced in the most recent status report and published on the Lingering Oil page of the governments’ EVOSTC website (www.evostc.state.ak.us/recovery/lingeringoil.cfm), report that lingering EVOS oil is still relatively unweathered and toxic, still contains the toxic 2-4 ring polycyclic aromatic

hydrocarbon (PAH) compounds found in fresh EVOS oil, and is:

> "…nearly as toxic as it was the first few weeks after the spill."

And, at the rate this subsurface oil is naturally degrading:

> "…the remaining oil will take decades and possibly centuries to disappear entirely."

Further, the lingering oil is still ecologically available, as evidenced by elevated cytochrome P450 levels found in several vertebrate species, including birds, fish, and mammals (http://www.evostc.state.ak.us/Projects/ProjectInfo.cfm?project_id=2186). As stated in the lingering oil discussion of the EVOSTC website:

> "…elevated levels of P450…indicate a continuing exposure to oil."

The governments' pilot lingering oil remediation projects have reportedly demonstrated effective bioremediation techniques (injection of nutrients and oxygen compounds), which have reduced concentrations of toxic components (e.g., PAH levels) by 50% on some pilot beach plots.

Thus, as stated in previous documents and argument by the governments:

1. These lingering oil findings were unanticipated by government Trustees at the time of settlement in 1991,
2. Remediation of this ongoing injury is necessary, and
3. There exist cost-effective means with which to mitigate these injuries.

Therefor, remediating this injury is appropriate in terms of the Reopener for Unknown Injury provision of the 1991 consent decree, and should proceed.

And, the governments have funded this preliminary lingering oil assessment work out of their existing EVOS funds, which currently amount to approximately $195 million in total, a substantial part of which is available to fund the Reopener Restoration plan (http://treasury.dor.alaska.gov/dnn/Investments.aspx).

Further, although recent status reports filed by the governments state that they would seek to resolve the Reopener claim with Exxon, subsequent reports present no indication that such efforts have actually been made. This is consistent with results from a recent Public Records Act request made by Movant of the Alaska Department of Law.

In its June 1, 2006 press release announcing the Reopener restoration plan, the U.S. Department of Justice stated the following:

> "By sending our plan in accordance with the Reopener provision, we are aggressively seeking to restore natural resource damages unforeseen at the time of the 1991 settlement."

Yet it is difficult to see how a 5-year delay in implementing a plan is "aggressively" seeking to do anything. This is not simply a matter of a few late studies, "unforeseen contracting issues," delays in peer review, and such, as claimed by the governments.

Rather, this constitutes a willful and blatant disregard for the schedule the governments filed and committed to in the 2006 Restoration Plan. Movant asserts that the 2006 timeline should be considered a legal commitment - a promise – made to the court and the public in fulfillment of the court approved Reopener provision, one that the governments have knowingly and blatantly violated.

The court's 03-07-11 order stated the following:

> "The court urges the governments and their trustees to proceed with all possible speed to complete studies that are underway and any necessary

evaluation which they may require."

The court's 02-15-12 order reiterated this desire:

> "…the court urges the parties to quickly resolve this matter themselves, if they are able to do so..."

Movant agrees. Aside from the continuing refusal by Exxon to pay the governments' 2006 Demand for Payment, the government's willful and blatant betrayal of the clearly specified timeline filed in accordance with the Reopener provision is inexcusable, and should be remedied.

RELIEF SOUGHT

1. Accordingly, Movant respectfully asks the court to sanction the U.S. Department of Justice, representing the United States, and the Alaska Department of Law, representing the State of Alaska, for their inexplicable and inexcusable delay in implementing the *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury* they committed to in June 2006. Movant is unclear what, if any, sanction instruments may be available to the court to remedy this inexcusable failure on the part of the governments. But it is clear that the governments have been disingenuous in their representations to the court and public, and they should immediately remedy their willful evasion and delay of actions they promised the court and public in 2006. This would clearly be in the public interest.

It continues to be Movant's view that Exxon should immediately pay this long-overdue $92,240,982 government demand made in 2006, plus interest, and be done with this quarter-of-a-century long case. But until it does, or the governments assert and collect the claim in court, the governments can, and should, fund the urgently needed lingering oil restoration program out of existing funds, with the presumption that they will reimburse these expenditures from the Reopener claim when it is finally paid by Exxon.

Funding the urgently needed lingering oil restoration plan out of the governments' existing EVOS funds should in no way affect the final government Reopener claim.

2. Movant also requests, as he did in the 08-30-02 *amicus curiae* brief filed under the Coastal Coalition name (filed when the Reopener claim first became available), that the court appoint an independent Special Master / Post Decree Monitor to oversee and expedite resolution of the Reopener for Unknown Injury claim. The Court Appointed Special Master would work with government trustees to oversee and expedite completion of studies, expedite the NEPA process for the Reopener Restoration Plan, and expedite implementation of the Final Lingering Oil Restoration Plan. The Special Master would also seek to mediate and negotiate a settlement between parties of the financial demand by the governments to Exxon in 2006.

Movant respectfully asks the court to review the argument presented in the 08-30-02 *amicus curiae* regarding the need for such a Special Master in the EVOS Reopener case. Indeed, many of the problems anticipated in Movant's 2002 motion have manifested in the subsequent handling of the Reopener claim. And while the court denied the 2002 *amicus* requesting appointment of a Special Master to oversee implementation of the Reopener claim, it did so because at that time there had been no motion placed before it, or any other actions taken by the parties, regarding the Reopener claim.

But now, 11 years later, the governments have filed a Restoration Plan and Demand for Payment, Exxon refuses to pay the Demand, and there have been many subsequent court motions from the parties, indicating a significant dispute among the parties regarding the Reopener claim. Thus, appointment of a Special Master / Post Decree Monitor is necessary and timely. It is abundantly clear that the parties are either unwilling or unable to act in an expeditious manner to implement this urgently needed restoration program. Given the lack of resolution of the court approved EVOS Reopener for Unknown Injury claim, this seems precisely the sort of situation that would benefit from appointment of an independent Special Master.

REQUEST FOR ORAL ARGUMENT

Movant respectfully requests permission to present oral argument on this current *amicus* motion. In its 10-13-11 order regarding Movant's 09-19-11 motion and request to present oral argument, the court ruled that:

> "Absent extraordinary circumstances, and the court does not perceive there to be such in this case, a grant of amicus status (which the court has not yet decided) does not carry with it the right to present oral argument."

On this, Movant notes that the court's prior 01-14-11 order granted Movant's request to present oral argument on his 12-07-10 motion, in the court hearing on 03-04-11. Apparently, the court felt at that time the circumstances of this case were sufficiently extraordinary to permit his oral argument.

It is the Movant's feeling that extraordinary circumstances of this case have increased substantially in the ensuing 3 years, indeed, are now time-critical as the tolling agreement was terminated 3 years ago and thus the time period for perfecting this claim is closing. Most importantly, every day the governments' delay implementing their full Lingering Oil Restoration Plan further injures the coastal ecosystem. And, this entire case was/is supposed to be focused on aiding recovery of the coastal environment injured by the Exxon Valdez Oil Spill, yet somehow this goal seems to have been lost in the mind-numbing, endless legal maneuvering by the parties. Movant feels these extraordinary circumstances would benefit from his oral argument, and that the parties are unlikely to request oral argument on this present *amicus* motion.

There is considerable public interest in the ongoing injury from the Exxon Valdez Oil Spill, which would be served by permitting the Movant to present oral argument on this motion. The Exxon Valdez litigation is now approaching a quarter-of-a-century in duration, and remains unresolved. As far as Movant has been able to determine, the Exxon Valdez case is now the longest-lasting environmental litigation in history, and one

of the longest lasting cases of any kind.

When agreeing to the Consent Decree and Plea Agreement in 1991, the parties agreed, and this court approved, what seemed at the time to be a reasonable process to address unanticipated environmental injuries. In accordance with that agreement, the governments clearly identified in June 2006 specific unanticipated injuries and a plan for mitigating such injuries. Indeed, they have demonstrated that lingering EVOS oil continues to injure the coastal ecosystem. Yet since 2006, the governments have done virtually nothing to actually remedy this ongoing injury.

Clearly, the injured ecosystem should not have to wait any longer for this long overdue attention. As the governments have delayed implementing the restoration actions they promised in 2006, the environment continues to be injured and recovery is further delayed. This should be unacceptable to all parties and the court, and constitutes an extraordinary circumstance for which Movant should be permitted to present oral argument.

It is the Movant's position that, if not allowed to present oral argument along with the recalcitrant parties, the interests of the public and environment would be marginalized, and this would certainly be contrary to the court and public interest.

Thus, Movant hereby respectfully requests to be allowed to present oral argument on the present motion. Regardless of the court's decision on oral argument, Movant respectfully asks the court to admit/approve the *amicus*, and to order the relief sought.

Dated: July 29, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served by first class mail on July 29, 2013 a copy of the above (and attachments) to the following parties in the above referenced case:

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Attachment A. (following two pages)
Lingering Exxon Valdez oil in shoreline sediments Eleanor Island #1,
Prince William Sound
June 28, 2013
Photos by David Janka; www.auklet.com