

No. 07-219

In The
Supreme Court of the United States

EXXON SHIPPING COMPANY, et al.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

**BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF
AMERICAN INDIANS, ALASKA FEDERATION OF
NATIVES, ALASKA INTER-TRIBAL COUNCIL,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS,
RURAL ALASKA COMMUNITY ACTION PROGRAM,
NORTH SLOPE BOROUGH, INDIGENOUS PEOPLES
COUNCIL FOR MARINE MAMMALS, AND ADDITIONAL
ALASKA NATIVE ORGANIZATIONS, CORPORATIONS
AND TRIBES IN SUPPORT OF RESPONDENTS
(Full listing of *Amici Curiae* in Appendix)**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI</i>	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE <i>EXXON VALDEZ</i> OIL SPILL WAS A TECHNOLOGICAL DISASTER THAT WREAKED INCALCULABLE DAMAGE AND LOSS ON THE ALUTIIQ SUBSIS- TENCE COMMUNITIES IN ITS PATH....	4
A. The Alutiiq Subsistence Communities...	4
B. The Scope and Significance of Alutiiq Subsistence.....	7
C. The Effect of the Oil Spill on Alutiiq Subsistence.....	12
D. The Effect of the Oil Spill on the Alu- tiiq People.....	26
CONCLUSION.....	33
FIG. 1 Pacific Eskimo Villages	6
TABLE 1 Injured Resources and Services	21
APPENDIX	
Description of <i>Amici</i>	App. 1

TABLE OF AUTHORITIES

Page

CASES

<i>Alaska Native Class v. Exxon Corp.</i> , 104 F.3d 1196 (9th Cir. 1997).....	2
<i>In re Exxon Valdez</i> , 296 F.Supp.2d 1071 (D. Alaska 2004).....	4, 30
<i>Robins Dry Dock & Repair v. Flint</i> , 275 U.S. 303 (1927).....	1, 2
<i>Union Oil v. Oppen</i> , 501 F.2d 558 (9th Cir. 1974).....	2

STATUTES

16 U.S.C. § 1371(b).....	11
16 U.S.C. § 3113.....	8
25 U.S.C. §§ 479a, 479a-1.....	7
ALASKA STATUTES § 16.05.094	8
ALASKA STATUTES § 16.05.940(33).....	8

OTHER AUTHORITIES

72 Fed. Reg. 13648, 13651-13652 (March 22, 2007)	7
Berger, T., <i>Village Journey</i> , Hill and Wang, New York (1985).....	7
<i>Cohen's Handbook of Federal Indian Law</i> , LEXIS-NEXIS Matthew Bender, NJ (2005)	7
Davidson, A., <i>In the Wake of the Exxon Valdez</i> , Serria Club Books, San Francisco (1990)	13, 31, 32

TABLE OF AUTHORITIES – Continued

	Page
<i>Exxon Valdez Oil Spill Trustee Council, Exxon Valdez Exxon Restoration Plan – Update on Injured Resources 2006</i> , November 2006 http://www.evostc.state.ak.us/Policies/restplan.htm (2008)	20, 24, 25
Fall, James A., <i>Exxon Valdez Oil Spill Restoration Project Final Report – Update of the Status of Subsistence Uses in Exxon Valdez Oil Spill Communities</i> , Alaska Department of Fish and Game – Division of Subsistence” (August 2006)	<i>passim</i>
Fall, James, Affidavit, Paragraph 17, Plaintiff’s Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH)	9
Gill, D.A.P., and Picou, J.S., <i>The Day the Water Died; Cultural Impacts of the Exxon Valdez Oil Spill, in the Exxon Valdez Disaster; Readings on a Modern Social Problem</i> (J. Steven Picou, ed., 1997)	16, 17
Impact Assessment, Inc., <i>Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume II: Final Analysis of Social Factor by Social Factor Basis</i> , U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001)	8, 9, 26, 29, 30

TABLE OF AUTHORITIES – Continued

	Page
Impact Assessment, Inc., <i>Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume I: Final Analysis of Social Factor by Social Factor Basis</i> , U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001).....	17, 28
U.S. Census Bureau – American Indian and Alaska Native Area, and Alaska Native Regional Corporation; GCT-P16; Alaska Native Village Statistical Area, Total Population, Data Set: Census 2000 Summary File 4 (SF 4) Sample Data.....	3
Palinkas, L.A., <i>Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill</i> , <i>Am. J. Psychiatry</i> 1993; 150:1517-1523	28
Smithsonian, <i>5 Handbook of North American Indians</i> , Sturtevand, ed., Smithsonian Institution (1984).....	5, 6, 8
Thorne, R.E., & Thomas, G., <i>Herring and the “Exxon Valdez” Oil Spill: an Investigation into Historical Data Conflicts</i> , <i>ICES Journal of Marine Science</i> , 65:44-50 (2008).....	24, 25
<i>Webster’s Third New International Dictionary, Unabridged</i> , Merriam-Webster, 2002. http://unabridged.merriam-webster.com (24 Jan. 2008)	7

TABLE OF AUTHORITIES – Continued

	Page
Wolfe, R., and Ellanna, L., <i>Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities</i> , ADF&G Division of Subsistence (March 1983)	10

INTEREST OF *AMICI*

Amici National Congress of American Indians, Alaska Federation of Natives, Alaska Inter-Tribal Council, Rural Alaska Community Action Program, North Slope Borough, Association of Village Council Presidents, Indigenous Peoples Council for Marine Mammals, and several other Alaska Native Tribes, Corporations and Marine Mammal Commissions submit this brief to describe the centuries-old subsistence way of life that prevails across rural Alaska and to highlight the enormous impact the *Exxon Valdez* disaster had on that way of life. *Amici* support the punitive damages recovery below in light of the deep but uncompensated injury to the subsistence way of life suffered by thousands of Alaska Native people. The *Amici* are described in greater detail in the attached Appendix.¹



STATEMENT OF THE CASE

This Court has held that in maritime settings a party must suffer direct physical harm in order to recover for economic losses arising out of a maritime tort. *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

(1927). The appellate courts have recognized a limited exception to the *Robins Dry Dock* requirements for commercial fisherman who may recover economic damages without a showing of actual physical harm. *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974). The lower courts concluded in this case that the Alaska Native Class fit within the *Oppen* exception because:

[W]here commercial fisherman survive by catching an aquatic resource and selling it, native subsistence harvesters survive by catching an aquatic resource and eating it.

Order 222 J. A. at 7. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997).

Under the *Oppen* exception, the Alaska Native Class was able to obtain compensation only for the commodity value of the fish and game that its members would have taken absent the spill. The class members did not recover any compensation for the dire consequences of the oil spill on their cultures, communities and unique way of life. This brief describes those consequences in detail.



SUMMARY OF ARGUMENT

Some 69,000 Alaska Natives live in more than 200 villages along the remote and sinuous coasts of

Alaska's oceans and rivers.² They are the largest intact population of traditional, aboriginal cultures in the United States and perhaps the world. Despite modern changes, they live largely off the sea and the land in still-unique cultures whose world view attributes an animistic spirit to all life. Their communities are literally knit together by a reverence for the lives of the animals that sustain them and the reciprocal responsibilities, borne out of time immemorial, to share the lives of animals taken or harvested with their extended families and others in the village. These villages are federally recognized tribes whose subsistence rights are supported by long-standing federal policies in Alaska. Those subsistence rights remain as important today to the village members as the air they breathe.

Petitioners repeatedly assert that the punitive damages class members were fully compensated for the injuries they suffered as a result of the wholly avoidable wreck of the *Exxon Valdez*. Pet. Br. at 17, 41, 47 *et seq.* This is a remarkably shallow, and callous, claim. Based on its intimate familiarity with the facts, the district court found that: "The huge oil spill obviously caused harm beyond the purely economic . . . [including] a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress." Pet.

² U.S. Census Bureau – American Indian and Alaska Native Area, and Alaska Native Regional Corporation; GCT-P16; Alaska Native Village Statistical Area, Total Population, Data Set: Census 2000 Summary File 4 (SF 4) Sample Data.

App. 150a-151a, *In re Exxon Valdez*, 296 F.Supp.2d 1071 at 1094 (D. Alaska 2004). The Alaska Native Class has not been compensated for any of that loss.

This brief describes the “non-economic” (but devastating) injuries suffered by Alaska’s Native subsistence communities as a result of the *Exxon Valdez* oil spill. Properly acknowledged, those injuries underscore the egregiousness of Exxon’s actions and the corresponding appropriateness of the punitive damages award in this case. They further underscore the need for deterrence embodied in the award. Another marine disaster like the *Exxon Valdez* anywhere on Alaska’s vast coast will cause further devastating, non-compensable damage to Alaska’s unique Native subsistence communities. No award can fully reflect the searing nature of the harm that Petitioners have inflicted on the Alaska Natives’ subsistence way of life, but this award is certainly an appropriate step in that direction.

◆

ARGUMENT

I. THE *EXXON VALDEZ* OIL SPILL WAS A TECHNOLOGICAL DISASTER THAT WREAKED INCALCULABLE DAMAGE AND LOSS ON THE ALUTIIQ SUBSISTENCE COMMUNITIES IN ITS PATH.

A. The Alutiiq Subsistence Communities

Anthropologists document some 58 historic, Alutiiq (formally called “Pacific Eskimo”) villages that at the end of the 19th century clung to Kodiak Island

and Alaska's North Pacific Coast.³ By 1980, following an all-too-familiar history of disease and exploitation, 15 occupied villages remained, stretching from Tatitlek located in Prince William Sound just outside the Port of Valdez to Ivanof Bay, some 600 miles to the southwest on the Alaska Peninsula.⁴ The Alutiiq are the "southernmost village Eskimo" and are located in four distinct geographic areas, running northeast to southwest from Prince William Sound (Tatitlek and Chenega Bay), to the southern Kenai Peninsula (Port Graham and English Bay),⁵ to the Kodiak Island archipelago, known today as the "Koniag" region (Ouzinkie, Port Lions, Larsen Bay, Old Harbor, Karluk, Akhiok) and finally the western Alaska Peninsula villages (Chignik, Chignik Lagoon, Chignik Lake, Perryville and Ivanof Bay).⁶ All 15 of

³ Smithsonian, *5 Handbook of North American Indians*, Sturtevant, ed., Smithsonian Institution (1984) at 198-199.

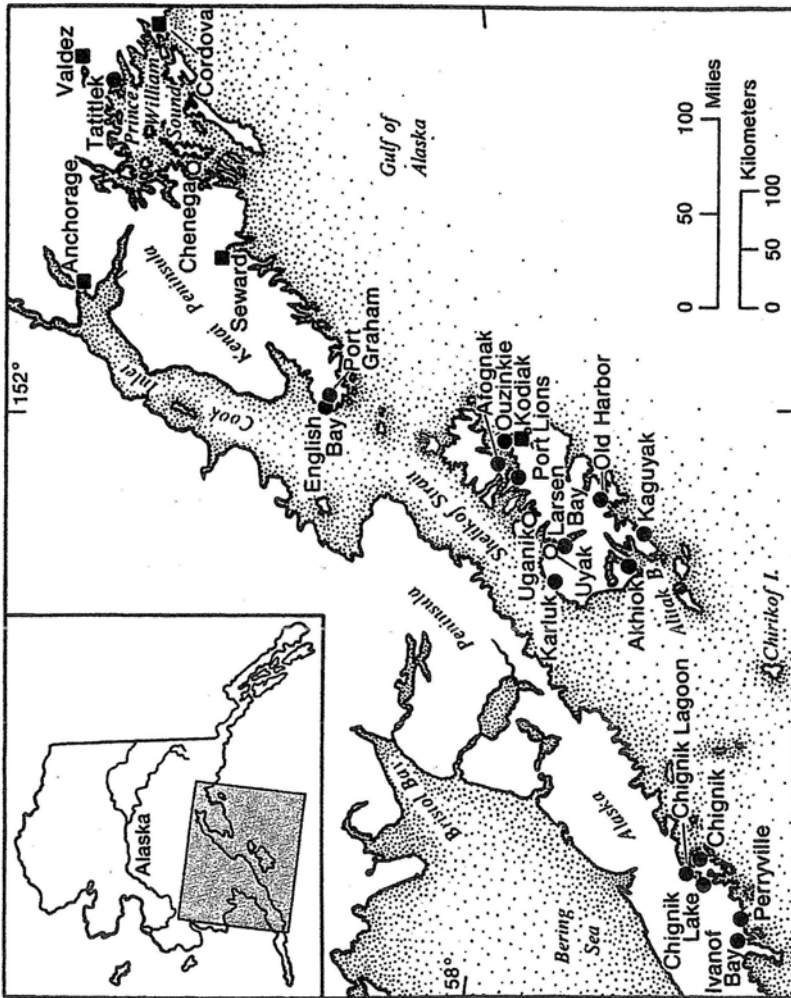
⁴ *Id.* See Map at Figure 1 enlarged and adapted from *5 Handbook of North American Indians* at 198.

⁵ *Id.* English Bay is now called by its traditional Alutiiq name "Nanwalek." Chenega is shown at Figure 1 in its old location and is now located a little further south at Chenega Bay. The 1964, Good Friday earthquake and Tsunami destroyed the original Chenega village site. The village was reconstructed at Chenga Bay in 1984, just five years prior to the Good Friday grounding of the *Exxon Valdez*.

⁶ Natives from all of the villages may also be found in the larger south central Alaska towns of Anchorage, Valdez, Cordova, Seward and Kodiak City. *5 Handbook of North American Indians* at 199.

Fig. 1. Pacific Eskimo villages.

Source: 5 Handbook on North American Indians at 198 (1984).



these villages are governed in some respect by tribal governments duly recognized by the United States Department of the Interior.⁷

B. The Scope and Significance of Alutiiq Subsistence

Alutiiq communities and culture are centered on the cluster of activities collectively called “subsistence.” To many people, “subsistence” connotes the bare eking out of an existence.⁸ To the Alutiiq and all other Alaska Natives living off the water and land, “subsistence” is an entire way of life, a rich way of living. It defines not only an economy, but also the identity of the people in the community and their relationships to one another.⁹

The Alaska Department of Fish and Game (“ADF&G”) has a “Division of Subsistence” created by

⁷ See 72 Fed. Reg. 13648, 13651-13652 (March 22, 2007), listing tribes as required under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. §§ 479a, 479a-1.

⁸ “Subsist” 1 a: to have existence : be or remain alive. 2 *archaic*: to exist in a particular way or condition or have a particular form. 3: to be maintained with food and clothing : have the necessities of life. *Webster’s Third New International Dictionary, Unabridged*, Merriam-Webster (2002). <http://unabridged.merriam-webster.com> (January 24, 2008).

⁹ See generally T. Berger, *Village Journey*, Hill and Wang, New York (1985) at 48-72 (“*Subsistence More Than Survival, A Way of Life*”). See also *Cohen’s Handbook of Federal Indian Law*, LEXIS-NEXIS Matthew Bender, NJ (2005), at § 4.07[3][c] “*Native Hunting and Fishing Rights*.”

statute in 1978.¹⁰ Its broad mandate is to compile existing data and to gather information on all aspects of the role of subsistence in the life of the state's residents. Both Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") and Alaska law define subsistence in substantially the same terms as:

the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicrafts articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113; ALASKA STATUTES § 16.05.940(33).

Beyond these statutory definitions lie the realities of subsistence for these 15 Alutiiq villages. The first is their isolation. They are not connected by roads to cities and grocery stores and of necessity depend on the sea and land for their food.¹¹ Prior to the wreck of the *Exxon Valdez*, it was well established that virtually all of the residents of the 15 Native communities affected by the spill participated in extensive subsistence activities.¹²

¹⁰ ALASKA STATUTES 16.05.094.

¹¹ *5 Handbook of North American Indians* at 198.

¹² Impact Assessment, Inc., *Exxon Valdez Oil Spill, Cleanup and Litigation: a Collection of Social-Impacts Information*
(Continued on following page)

Unlike sport hunting and fishing familiar to mainstream Americans, subsistence is not an individual activity. Nor is it a question of “fair chase” or “fun,” or even of providing food to just one’s own family. Rather “sharing” is the most common word used by Natives to describe their participation in subsistence. Hence, it is typical of the Native subsistence community that:

Subsistence harvests in these communities are characterized by intricate and extensive kinship-based methods of production, distribution and sharing. While the vast majority of households participate in subsistence harvest, the majority of the harvest is accomplished by a relatively small group of very productive households. Fish and game products are distributed and exchanged by these “super households” community-wide, supplying subsistence food to the elderly and others unable to provide for themselves.¹³

The word “sharing” is not really adequate to the task of describing what this means. Dr. Robert Wolfe,

and Analysis, Final Report Volume II: Final Analysis of Social Factor by Social Factor Basis, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001) at Section 4.3. (Hereinafter “MMS, Vol. II”).

¹³ James Fall Affidavit, Paragraph 19, Plaintiff’s Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH).

then the Director of Research for the ADF&G Subsistence Division, explained it this way:

Subsistence uses appear to be elements of a socio-economic system that is larger than the individual participant. The cases show that in subsistence-based economic systems fishing and hunting commonly occur *within cooperative and extended kinship groups linking several households*. Fish and game products are distributed and exchanged along community-wide, non-market networks. The community is *dependant socially and economically* on the productive activities in the *non-market* fishing and hunting sector. These traditional and customary modes of production, distribution, and exchange *provide the social and economic integration of entire communities*.¹⁴

The human reality behind such academic phases as “subsistence-based economic systems” and “cooperative and extended kinship groups linking several households” is that whole households in extended families (“super households” in Dr. Fall’s terms)¹⁵ are

¹⁴ R. Wolfe and L. Ellanna, *Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities*, ADF&G Division of Subsistence (March 1983) at 3-4; Exhibit F. Plaintiff’s Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH).

¹⁵ James A. Fall, *Exxon Valdez Oil Spill Restoration Project Final Report – Update of the Status of Subsistence Uses in Exxon Valdez Oil Spill Communities*, Alaska Department of Fish and
(Continued on following page)

working together to provide for themselves and the entire community. These collective efforts are a source of individual identity as well as of community prosperity. That is the real significance of the Alaska Native, and specifically here the Alutiiq, subsistence culture.¹⁶

The composition of subsistence resource harvests varies by region, but the subsistence way of life in coastal villages universally depends on the health of the water and the resources found therein. In general, Alutiiq communities rely on salmon, halibut, cod, rockfish, herring, herring roe, shrimp, octopus, clams, mussels, harbor seals, sea lions, deer, and moose. In Chenega Bay, prior to the spill (1985/86), the subsistence harvest consisted of 21.1% salmon, 16.6% other fish, 37.5% marine mammals, 1.9%

Game – Division of Subsistence (August 2006) at Chapter IV – “Tatitlek” (hereinafter, “Fall 2006”).

¹⁶ Congress has long recognized the importance of Alaska Native subsistence rights. In a variety of statutes it has accorded significant protection to those rights. As one example, the Marine Mammal Protection Act (“MMPA”) generally prohibits the taking of marine mammals. Under the Act, however, unless a marine mammal species or stock is listed as endangered or threatened under the Endangered Species Act, Alaska Natives enjoy the exclusive right to the unregulated taking of these mammals for subsistence purposes, including the manufacture, trade and barter of traditional clothing, arts and crafts, and food. 16 U.S.C. § 1371(b).

marine invertebrates, 20.9% land mammals, 1.3% wild plants, and 0.8% birds and eggs.¹⁷

C. The Effect of the Oil Spill on Alutiiq Subsistence

The *Exxon Valdez* spill wreaked havoc on the subsistence culture of the Alutiiq, triggering a severe decline in the availability of subsistence resources that persists to this day. After first explaining the delight of the typical traditional spring harvest, Walter Meganack, Sr., the Chief of the Village of Port Graham at the time of the spill, described the damage in poignant terms:

When the days get longer, we get ready. Boots and boats and nets and gear are prepared for the fishing time. The winter beaches are not lonely anymore, because our children and grownups visit the beaches in the springtime and gather the abundance of the sea: the shellfish, the snails, the chitons. When the first salmon is caught, our whole village is excited. It is an annual ritual of mouth-watering delight. When our bellies are filled with the fresh new life, then we put up the food for the winter. We dry and smoke and can hundreds of fish to feed each family.

But when the *Exxon Valdez* grounded on Good Friday 1989:

¹⁷ Fall 2006 – Chapter II: “Chenega Bay” at 21-41.

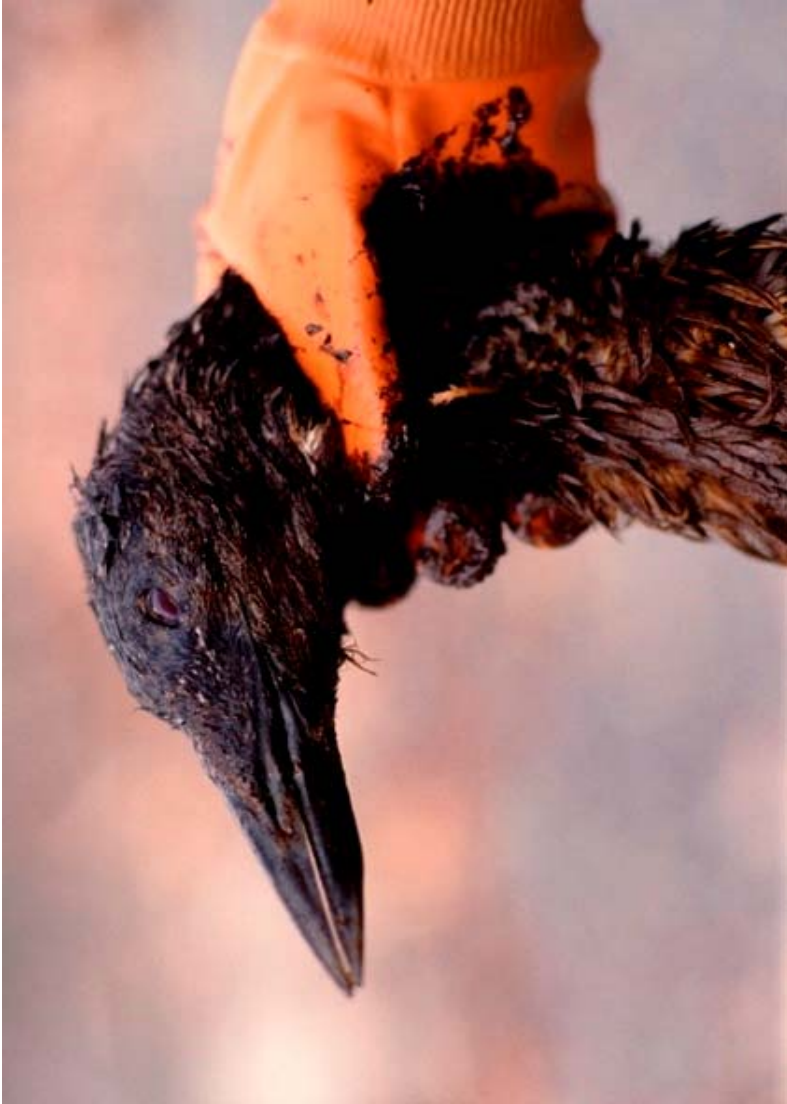
It was the early springtime. No fish yet. No snails yet. But the signs were with us. The green was starting. Some birds were flying and singing. The excitement of the season had just begun. And then we heard the news. Oil in the water – lots of oil, killing lots of water. It's too shocking to understand. Never had we thought it possible for the water to die. But it is true. We walk our beaches. And the snails and the barnacles and the chitons are falling off the rocks. Dead. Dead water.

We caught our first fish – the annual first fish, the traditional delight of all – but it got sent to the state to be tested for oil. No first fish this year. We walk our beaches, but instead of gathering life, we gather death. Dead birds. Dead otters. Dead seaweed.¹⁸

In the aftermath of the devastation, the Alutiiq communities suffered enormous declines in their subsistence harvesting. For example, the village of Tatitlek harvested 644 pounds of subsistence resources per capita in 1988, but saw harvests drop by two-thirds to 215 pounds in 1989 and to 153 pounds in 1990. There was an increase to 346 pounds in 1991

¹⁸ Chief Walter Meganack, Sr., quoted in A. Davidson, *In the Wake of the Exxon Valdez* (1990) at 288-289 (hereinafter “Davidson”). See photos of the dead on following pages.

Alaska. Valdez. Volunteers try to save oil coated birds (dead Loon) following the Exxon Valdez oil spill. Photographed at one of the many beaches of Prince William Sound. © (April) 1989 Ken Graham



Casualty – A dead sea otter found by cleanup workers in 1989. Photo downloaded from the Exxon Valdez Oil Spill Trustee Council Website – http://www.evostc.state.ak.us/Universal/Images/GalleryImages/spill/downloadable%20jpgs/WLO_015.jpg (2008)



but harvests receded to 270 pounds in 1993 with the crash of the herring fishery.¹⁹

The decline in subsistence resources of Tatitlek was matched elsewhere. In Chenega Bay, for example, harvests of subsistence resources dropped by more than half from 374 pounds per person in 1985 (the year the village was last surveyed prior to the spill) to 148 pounds in 1989 and to 139 pounds in 1990. There was an increase in 1991 and 1992, but, as with Tatitlek, harvests fell again in 1993.²⁰ Cordova also experienced a steady decline in the harvest of subsistence resources, with a drop from 233.8 pounds per person in 1988 to 189.2 in 1991, 163.5 in 1992, and 127.8 in 1993.²¹ Data from a sample of Alaska Natives in Cordova revealed that in 1991 over half of all respondents could no longer obtain subsistence foods they had previously consumed.²² Almost

¹⁹ The herring run in 1993 was about half of what it was expected to be, and village residents observed abnormal behavior and physical deformities in the herring that spurred even greater fears about the safety of food and the health of the ecosystem. D.A.P. Gill and J.S. Picou, *The Day the Water Died; Cultural Impacts of the Exxon Valdez Oil Spill, in the Exxon Valdez Disaster; Readings on a Modern Social Problem* (J. Steven Picou, ed., 1997), at 176, available at: <http://www.jomiller.com/exxonvaldez/articles/picougill1.html> (hereinafter “Gill and Picou”). The concern was particularly acute because herring is a keystone species that affects the health of many other resource populations. Fall 2006 at 385.

²⁰ Gill and Picou at 176.

²¹ Fall 2006, at 61.

²² Gill and Picou at 178.

75 percent reported engaging in fewer subsistence pursuits than they had prior to the oil spill.²³

Further south, the Alutiiq communities on Kodiak Island likewise endured sharp declines in the harvest of subsistence resources from the sea. The oil reached Kodiak Island about 7 weeks after the spill, and the Natives of Larsen Bay struggled vainly to save their shellfish beaches with kitchen utensils and paper towels, all they had available for the purpose.²⁴ In Ouzinkie, salmon harvests plummeted from 1986 levels of 192.7 pounds per person to 29.4 in 1989, 75.5 in 1990-91, and 88.5 in 1991-92. Marine mammal consumption dropped from 30.0 pounds per person in 1986 to 8.6 in 1989-90, 10.4 in 1990-91 and 6.9 in 1991-92.²⁵ Ouzinkie's 1989 overall subsistence harvest was 76.6% less than its average in previous study years.²⁶ Karluk saw marine mammal harvests drop 78% from 25.4 pounds per person in 1986 to 5.6

²³ *Id.*

²⁴ See photos of Larsen Bay "clean-up" on following pages.

²⁵ Fall 2006 at 245.

²⁶ Impact Assessment, Inc., *Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume I: Final Analysis of Social Factor by Social Factor Basis*, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001) at Section 3.2.1.6. (Hereinafter "MMS, Vol. I").

May 14, 1989. On Mother's Day the villagers of Larsen Bay tried to clean up the crude oil that had washed up on their shellfish beaches. ©1989 Natalie Fobes, www.fobesphoto.com



Villagers of Larsen Bay used spoons, paper towels and shovels in an attempt to remove the oil from their shellfish beaches. ©1989 Natalie Fobes, www.fobesphoto.com



in 1989, 5.3 in 1990, and to a mere 0.9 pounds in 1991.²⁷

Nearly two decades later, the damage persists. While some subsistence resources have shown signs of recovery, the overall availability and safety of subsistence resources for the Alutiiq still falls far short of pre-wreck levels. The reports of the Exxon Valdez Oil Spill Trustee Council (“EVOS Council” or “Trustee Council”) confirm this fact in considerable detail. The Trustee Council, which is a Division of Alaska’s Department of Fish and Game, consists of three state and three federal trustees (or their designees). It is responsible for monitoring recovery from the spill, using funds from the state and federal civil settlement, and is advised by members of the public and the scientific community. Beginning in 1994, the EVOS Council adopted an official “List” of animal resources and human services injured by the spill to monitor as part of its Restoration Plan.²⁸

²⁷ Fall 2006 at 170.

²⁸ *Exxon Valdez Oil Spill Trustee Council, Exxon Valdez Exxon Restoration Plan – Update on Injured Resources 2006* (November 2006), website at <http://www.evostc.state.ak.us/Policies/restplan.htm> (2008) (hereinafter “Trustee Council 2006”). Although the fish and wildlife resources that appear on the List experienced chronic injury from the spill, not every species that suffered some degree of injury was included. For example, carcasses of about 90 different species of oiled birds were recovered in 1989, but only 10 species of birds were included on the List.

Table 1: Historical and current overview of the status of injured resources and services during each reassessment year. Source: EVOS Council website (2008)

Resource	1996 Status	1999 Status	2002 Status	2006 Status
Archaeological Resources	Recovering	Recovering	Recovered	Recovered
Bald Eagles	Recovered	Recovered	Recovered	Recovered
Black Oystercatchers	Unknown	Recovering	Recovered	Recovering
Clams	Unknown	Recovering	Recovering	Recovering
Common Loons	Unknown	Not Recovering	Not Recovering	Recovered
Common Murres	Recovering	Recovering	Recovered	Recovered
Cormorants	Not Recovering	Not Recovering	Not Recovering	Recovered
Cutthroat Trout	Unknown	Unknown	Unknown	Unknown
Designated Wilderness	Unknown	Unknown	Recovering	Recovering
Dolly Varden	Unknown	Unknown	Unknown	Recovered
Harbor Seals	Not Recovering	Not Recovering	Not recovering	Recovered
Harlequin Ducks	Not Recovering	Not Recovering	Not recovering	Recovering
Intertidal Communities	Recovering	Recovering	Recovering	Recovering
Killer Whales	Not Recovering	Not Recovering	Recovering	Recovering
Kittlitz's Murrelets	Unknown	Unknown	Unknown	Unknown

Marbled Murrelets	Not Recovering	Recovering	Recovering	Recovering	Unknown
Mussels	Recovering	Recovering	Recovering	Recovering	Recovering
Pacific Herring	Not Recovering	Recovering	Recovering	Not recovering	Not recovering
Pigeon Guillemots	Not Recovering	Not Recovering	Not Recovering	Not recovering	Not recovering
Pink Salmon	Recovering	Recovering	Recovering	Recovered	Recovered
River Otters	Unknown	Recovered	Recovered	Recovered	Recovered
Rockfish	Unknown	Unknown	Unknown	Unknown	Unknown
Sea Otters	Not Recovering	Recovering	Recovering	Recovering	Recovering
Sediments	Recovering	Recovering	Recovering	Recovering	Recovering
Sockeye Salmon	Recovering	Recovering	Recovering	Recovered	Recovered
Subtidal Communities	Recovering	Recovering	Recovering	Unknown	Unknown
Human Service					
Commercial Fishing	Recovering ^a	Recovering	Recovering	Recovering	Recovering
Passive Use	Recovering ^a	Recovering	Recovering	Recovering	Recovering
Recreation and Tourism	Recovering ^a	Recovering	Recovering	Recovering	Recovering
Subsistence	Recovering ^a	Recovering	Recovering	Recovering	Recovering

^a Classified as "Lost or Reduced Service" in 1996 Update, meaning that the service was negatively indirectly impacted by the spill due to its connection with impacted natural resources

In 1996, the bald eagle was the only species that the Trustee Council deemed to have “recovered” from the spill. In March 1999, species that it classified as “not recovering” included killer whales, harbor seals, harlequin ducks, the common loon, cormorants, and pigeon guillemots. The only “recovered” species were bald eagles and river otters. In 2002, the Trustee Council deemed 6 species to have recovered from the effects of the oil spill; 14 species had not yet recovered; and the recovery of 5 species was considered unknown. By 2006, a full 17 years after the spill, the EVOS Council deemed only 9 species to have recovered. Eight species were still designated as recovering, but pigeon guillemots and herring are not recovering at all. The recovery of 5 species is still unknown. See EVOS Council Table 1, *supra*.

The Trustee Council has also studied the recovery of 4 “human services”: commercial fishing, passive use, recreation and tourism, and subsistence. In 2006, the Council did not find any of these “services” to have yet recovered – like many of the resources in the Sound, they are still suffering from the dreadful damage inflicted by the *Valdez* spill. See EVOS Council Table 1, *supra*.

The status of subsistence resources and activities in Prince William Sound and adjacent waters is well exemplified by the Pacific herring. As noted above, herring are a critical ecological and commercial species in the Sound ecosystem. “They are central to the marine food web, providing food to marine mammals, birds, invertebrates and other fish. Herring are also

commercially fished for food, bait, sac-roe and spawn on kelp.”²⁹ Prior to the spill, herring populations in the Sound were increasing as recorded by record harvests in the late 1980s.³⁰ However, in 1993, a near-total collapse of the fishery occurred, as herring born in 1989 proved to be one of the smallest cohorts on record to return as spawning adults.

Recent data suggests that the oil spill was the primary catalyst for the collapse of the Pacific herring in Prince William Sound and that the oil spill had an even broader and more profound impact than previously realized.³¹ Researchers have concluded that the herring were “highly vulnerable” to surface toxins from the oil spill and that this likely led to the premature hatching, low larval weights, reduced growth, and elevated morphological and genetic abnormalities observed in Prince William Sound in the years after 1989.³² The exposure to surface oil in herrings’ gills leading to mechanical suffocation could have caused an even greater number of fish to die than the effects of oil toxicity itself.³³ The study also found a “notable similarity” between the pattern of sea lion decline and the herring disappearance between 1989-1994

²⁹ Trustee Council 2006 at 25.

³⁰ *Id.*

³¹ R. E. Thorne and G. Thomas, *Herring and the “Exxon Valdez” Oil Spill: an Investigation into Historical Data Conflicts*, ICES Journal of Marine Science, 65:44-50 (2008).

³² *Id.* at 48.

³³ *Id.*

and a highly detrimental effect on many marine birds because of the herring decline.³⁴ The herring population has never recovered. As a result, the herring fishery in the Sound has been closed for 11 of the 17 years since the spill, including every year since 1999. No signs of recovery have been observed.³⁵

The spill severely injured many other subsistence resources, including clams, mussels, and various species of marine mammals, that continue to evidence significant ill effects today. As the Trustee Council concluded in November 2006: “For these reasons, subsistence continues to recover from the effects of the oil spill, but has not yet recovered.”³⁶ A well-respected researcher concluded to similar effect in 2003:

In the Alaska coastal ecosystem, unexpected persistence of toxic subsurface oil and chronic exposures, even at sublethal levels, have continued to affect wildlife . . . Oil persisted beyond a decade in surprising amounts and in toxic forms, was sufficiently bioavailable to induce chronic biological exposures, and had long-term impacts at the population level.³⁷

³⁴ *Id.*

³⁵ Trustee Council 2006 at 25.

³⁶ *Id.* at 38.

³⁷ Fall 2006 at 384, citing Peterson, Charles H., Stanley D. Rice, Jeffrey W. Short, Daniel Esler, James L. Bodkin, Brenda E. Ballachey, and David B. Irons. 2003. *Long-Term Ecosystem* (Continued on following page)

The science is clear: the entirely avoidable grounding of the *Exxon Valdez* wreaked massive havoc on Alutiiq subsistence from which the Alutiiq way of life still suffers nearly twenty years later.³⁸

D. The Effect of the Oil Spill on the Alutiiq People

The experts and the courts below all uniformly acknowledge that the wreck of the *Exxon Valdez* had long term, painful sociological consequences for the Alutiiq communities.³⁹ Household surveys reflected a 48% increase in drinking problems, a 40% increase in drug problems and a 49% increase in domestic violence for those highly exposed to the spill and relatively high numbers even for individuals who were

Response to the Exxon Valdez Oil Spill. Science 302:2082-2086. Peterson et al. (2003:2082).

³⁸ See EVOS Council Table 1, noting that clams and other intertidal species are still recovering. See EVOS Photo “Lingering Oil,” *infra*.

³⁹ This is, sadly, not uncommon in a technological disaster. The essential reality of a technological disaster is that it is human caused. It raises issues of blame and responsibility for what is often, as in this case, an entirely preventable event. As in the case of the *Exxon Valdez*, a technological disaster often causes a release of toxic substances and engenders debilitating sociological consequences. Social scientists identify 14 such consequences characteristic of technological disasters that are described as some form of “alienation.” As discussed *infra*, the Alutiiq communities suffered most of these consequences. See MMS, Vol. II at § 2.2.2.

Lingering Oil – A worker's hand reveals the persistent nature of oil contamination on a beach (circa 2000). Photo downloaded from the Exxon Valdez Oil Spill Trustee Council Website – http://www.evostc.state.ak.us/Universal/Images/GalleryImages/spill/downloadable%20jpps/CLE_190.jpg (2008)



not as directly exposed to the spill's effects.⁴⁰ A psychological study conducted one year after the wreck of 599 men and women found that members of the high-exposure group were 3.6 times more likely than those not exposed to have generalized anxiety disorder, 2.9 times more likely to have posttraumatic stress disorder and 2.1 times more likely to have depressive symptoms.⁴¹ The study also concluded that Alaska Natives were particularly vulnerable to depressive symptoms despite no significant difference in levels of exposure to the effects of the spill.⁴²

The federal Minerals Management Service ("MMS") used the term "alienation" to define this complex of issues, concluding that: "[T]he process of

⁴⁰ MMS Vol. I at § 5.4.2.

⁴¹ L. A. Palinkas, *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, *Am. J. Psychiatry* 1993; 150:1517-1523. Level of exposure was assessed on the basis of responses to 6 different questions: 1) Did you or anyone in your household use, before the spill, areas along the coast that were affected by the spill? 2) Did you work on any of the shoreline or water cleanup activities of the oil spill? 3) Are there any other ways that you came into contact with the oil spill or cleanup activities, such as during recreation, hunting, fishing, or gathering activities? 4) Did you have any property that was lost or damaged because of the oil spill or cleanup? 5) Did the oil spill cause any damage to the areas where you or other household members fish commercially? 6) Has the oil spill directly affected the hunting, fishing, or gathering activities of any members of this household?

⁴² *Id.*

alienation organizes many of the disrupted relationships experienced by Native communities” as a result of the *Exxon Valdez* oil spill.⁴³

According to MMS:

Individuals were alienated from meaningful social activities such as subsistence harvesting and the sharing of subsistence resources, which forms a basis for social integration in these communities. Individuals were also alienated from meaningful cultural values about respect for nature and the continuity between subsistence practices and a Native identity. Furthermore, the social activities and practices such as harvesting resources, engaging children in subsistence as a way of life, sharing harvested resources and consuming preferred foods were alienated from cultural values about the meaningfulness and significance of wild foods in Native ways of life.⁴⁴

MMS concluded that:

Alienation of any one of these connections could be socially significant. But, when individuals perceive an alienation of themselves from their culture and social activities; and, simultaneously cultural values are alienated from the social activities, then the combined effect is potentially traumatic and disruptive. This trauma itself exists within the context

⁴³ MMS Vol. II at § 4.0.

⁴⁴ *Id.* (Citations omitted).

of the culture, which has experienced other “cultural traumas” in their dealings with non-Native societies. Indeed, the [*Exxon Valdez* oil spill], for many Natives, becomes another assault from non-Natives on the cultural integrity of their communities.⁴⁵

The federal district court put it more directly:

The social fabric of Prince William Sound and lower Cook Inlet was torn apart. “[R]esearch on the community impacts of the Exxon Valdez Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress.” Communities affected by the spill “reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems and occupation related problems.” Also, several studies found that a high percentage of the affected fisherman suffered from severe depression, posttraumatic stress disorder, generalized anxiety disorder, or a combination of all three. The spilling of 11 million gallons of crude oil in Prince William Sound and Lower Cook Inlet *disrupted the lives (and livelihood) of thousands of claimants and their families for years.*

Pet. App. 150a-151a. *In re Exxon Valdez*, 296 F.Supp.2d at 1094 (citations omitted; emphases added).

⁴⁵ *Id.*

One observer writing contemporaneously to the oil spill noted that: “Kodiak’s mental health workers reported a 700% increase in emotional problems in the months after the spill.”⁴⁶ Dolly Reft, a Native leader from Kodiak explained why:

If people don’t have authority over their environment or themselves, their spirit and their will to live get weaker and they are more vulnerable to things they can normally handle. We are experiencing a high rate of alcoholism and suicide. This summer we have had eight suicides in six weeks.

Reft also noted that:

The village people need their environment. Without it they cannot exist, can’t be who they are. When you pick up these dead carcasses day after day after day, you go through a mourning process. It’s not only death in your environment, but in a sense it is a death of yourself, because you are part of that environment.

When Exxon offered to fly fish into the villages, Reft observed:

The outside world still needs to be educated on what subsistence is. When you send fish into a village, what you’ve done is taken the people’s spirit away because they don’t have that joy of going out and providing for their families and

⁴⁶ Davidson at 291.

getting the food. It'd be like me taking your job away with you having five children to feed. You'd have to go to a welfare system, and that would destroy your self-confidence.⁴⁷

In sum, the *Exxon Valdez* disaster wreaked extended and continuing havoc on the vulnerable Alutiiq villages that lay in the path of Exxon's 11,000,000 gallon flood of crude oil. The punitive damages award in this case can never provide full redress to these Alutiiq villages for the damages they have suffered and continue to suffer, but it does appropriately reflect the egregious nature of the harm Exxon inflicted. It will also serve as an appropriate deterrent to future dereliction of the kind that led to such disastrous consequences here.



⁴⁷ *Id.* Quoting Reft.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

Descriptions of the Alaska Native and Native American Entities joining *Amici Curiae* Brief in Support of Respondents

The National Congress of American Indians (“NCAI”) is the Nation’s oldest and largest national organization formed to advocate for the protection of American Indian and Alaska Native interests, including the protection of the Alaska Native subsistence way of life. NCAI was formed in 1944 and has a membership of over 250 federally recognized tribes situated in Alaska and over 30 other States.

The Alaska Federation of Natives (“AFN”), the Rural Alaska Community Action Program, Inc. (“RurAl CAP”) and the Alaska Inter-Tribal Council (“AI-TC”) are statewide Alaska Native organizations committed to educational activities and to advocacy before regulatory agencies, Congress and the courts to protect the integrity and continuation of the subsistence way of life in all Alaska Native communities. AFN was formed in the 1960s to advocate for passage of the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 *et seq.* (“ANCSA”). Today, its membership includes over 200 villages, both federally-recognized tribes and ANCSA village corporations, the 13 regional Alaska Native corporations formed under ANCSA, and the 12 regional nonprofit and tribal consortiums that contract and run federal and state social service programs.

AI-TC, a voluntary association of 180 Alaska Native tribes, was formed in significant part to advance and protect the subsistence interests of Alaska Native tribes and their members. Most of AI-TC's member tribes are located on Alaska's extensive coastline or along major rivers, reflecting the fact that over sixty percent of their subsistence diet is from fish and other aquatic resources.

The Rural Alaska Community Action Program ("RurAl CAP") is one of over 1,000 "Community Action Agencies" in the United States, but the only one in Alaska. Its goal is to promote maximum participation by people in overcoming all forms of poverty. RurAl CAP follows the belief that rural Alaskan communities have the right to maintain their cultural heritage and close relationship to the land while promoting their economic and human potential. RurAl CAP also provides information to the public about the vital importance of subsistence hunting, fishing and gathering to the nutritional, economic, spiritual and cultural lives of Alaska's indigenous peoples.

The Indigenous Peoples Council for Marine Mammals ("IPCoMM") is a statewide consortium of 16 regional and statewide Native marine mammal organizations representing Alaska Native interests in marine mammal conservation and co-management of subsistence uses. IPCoMM was formed in 1992 to advocate for full and equal participation by Alaska Natives in decisions affecting the subsistence uses of marine mammals.

The North Slope Borough is the Nation's largest and northern-most state chartered local government. It encompasses eight Inupiaq Native villages that depend upon pristine marine waters to continue their centuries-old subsistence-based traditions, including the hunting and sharing of whale and other marine mammals.

Sealaska Corporation and Koniag, Inc. are two of the regional corporations formed under ANCSA. Koniag owns lands throughout the Kodiak Island archipelago and Sealaska owns lands throughout southeast Alaska. The lands and adjacent waters owned by the corporations, like the lands and adjacent waters of most other regional corporations formed under ANCSA, provide critical habitat sustaining the subsistence way of life upon which their villages and member shareholders depend.

The Association of Village Council Presidents ("AVCP") is one of 12 regional Native nonprofit corporations in Alaska. Located in the Yukon-Kukokwim Delta, in the South Western region of Alaska, AVCP provides social services to 56 federally recognized Alaska Native tribes and approximately 6,000 Alaska Native residents of the region.

The Alaska Eskimo Whaling Commission, Aleut Marine Mammal Commission, Alaska Native Harbor Seal Commission, the Ice Seal Committee, the Sitka Marine Mammal Commission and the Alaska Sea Otter and Steller Sea Lion Commission, are Alaska Native commissions formed for the express purpose of

App. 4

preserving particular species of marine mammals that form the backbone of the subsistence way of life for most coastal Alaska Native communities.

The Aleut Community of St. George Island is a federally recognized tribe situated in the Bering Sea amidst one of the world's richest fishing grounds and home to fur seal, sea lion and other marine mammals critical to the subsistence way of life.
