

**Climate Change
in the Northwest:
"Tribal Perspectives"**

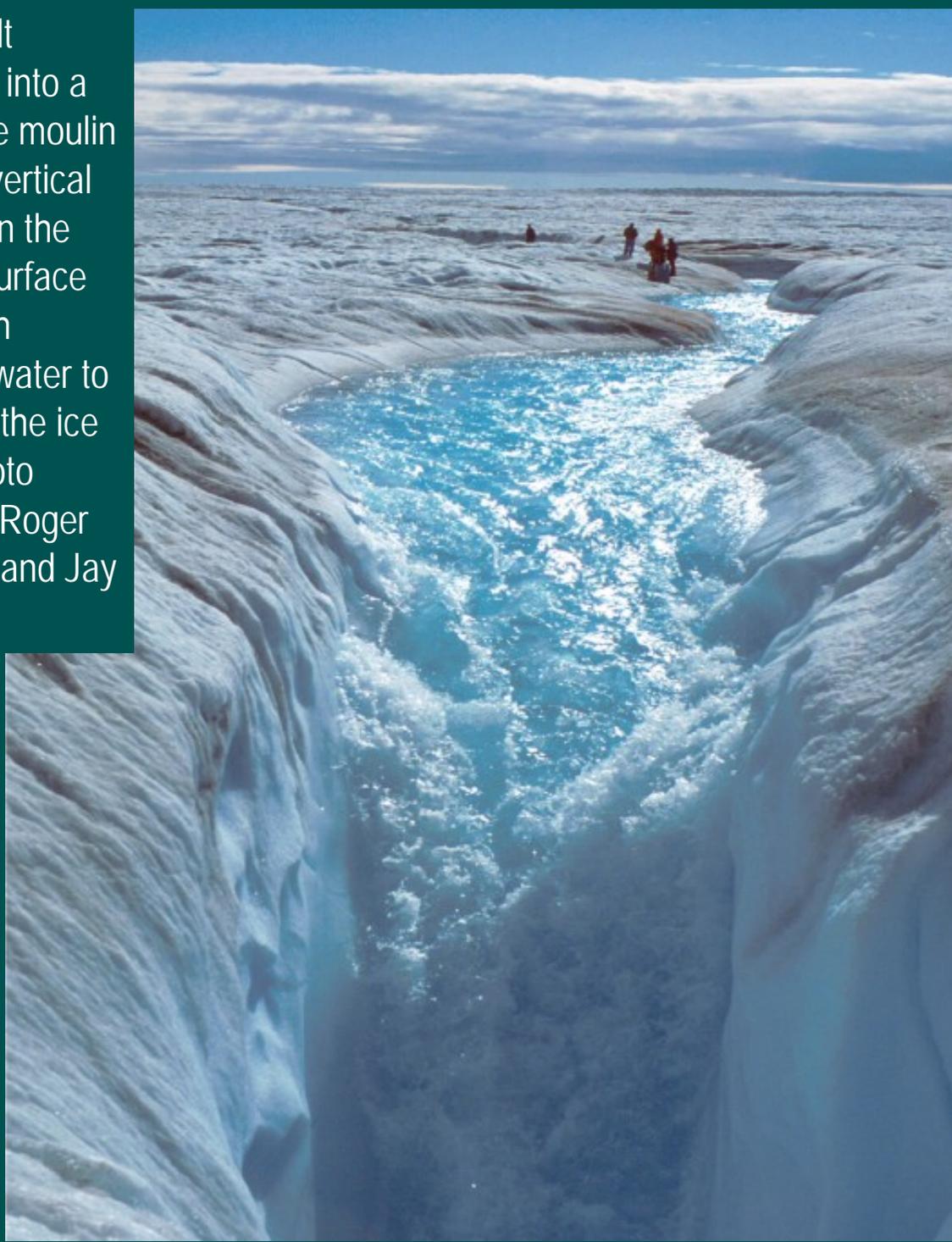
**Seattle Public Library
Downtown
Seattle, Washington**

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**William H. Rodgers, Jr.
Stimson Bullitt Professor of
Environmental Law
University of Washington School of Law
408 William H. Gates Hall
Seattle, Washington
(206) 543-5182
whr@u.washington.edu**

Surface Melt on the Greenland Ice Sheet

Surface melt descending into a moulin. The moulin is a nearly vertical shaft worn in the glacier by surface water, which carries the water to the base of the ice sheet. (Photo courtesy of Roger Braithwaite and Jay Zwally.)



Global Warming and Good Science

Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp.2d 295 (D.Vt. 2007) (Sessions, Chief Judge)

(Upholding Vermont regulations that would establish greenhouse gas emission standards for new autos). The auto industry makes a *Daubert* motion to strike the testimony of JIM HANSEN, preeminent climate scientist of the times, director of the Goddard Inst. for Space Studies, singled out for censorship. The industry did not want you to hear about

- his testimony regarding the impact of the regulation, and more specifically his "tipping point" theory, including his testimony regarding ice sheet disintegration. They apparently do not seek to exclude his testimony regarding species extinction and regional effects of global warming, except insofar as these effects are presented as consequences of the Earth passing a "tipping point";

Global Warming and Good Science

Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp.2d 295 (D.Vt. 2007) (Sessions, Chief Judge)

•*id.* at 313-14: "[Hansen's] 'tipping point' theory posits that at a certain point the changes associated with global warming will become dramatically more rapid and out of control. The 'tipping point' is the point at which very little, if any, additional forcing is needed for substantial changes to occur";

•*id.* at 314: "Hansen testified that sea level rise is likely to take place in nonlinear fashion because of multiple positive feedbacks";

– Instead of this disturbing information about "tipping points" and "nonlinear" sea level rise, the industry offered you a more satisfying informational diet— Dr. John Christy, a "skeptic" who replaced Dr. Patrick Michaels, another "skeptic" who decided not to testify.

***United States v. Washington (Culverts Decision),
August 22, 2007) (Martinez, J.)***

— **"Treaties do impose a duty upon the State to refrain from building or maintaining culverts" that block fish passage.**

"It was thus the right to take fish, not just the right to fish, that was secured by the treaties."

"These assurances would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource."

Culverts

In 1998, the Washington State Legislature found

- **that there are over 2,000 barriers to fish passage at road crossings throughout the state**
- **these barriers block fish access to as much as 3,000 miles of freshwater spawning and rearing habitat**

**Washington Association of Counties,
Memorandum in Support of the State's
Motion for Summary Judgment, Sept.
29, 2006, p. 6.**

"The Tribes are seeking to force the State, and presumably later, the counties, to immediately repair all fish-blocking culverts. . . . [Absent specific language in the treaties], neither the State nor the counties can be found to have a duty to immediately return every culvert to a condition that allows for the same flow of fish as existed prior to the erection of the culvert. . . ."

**Washington's Opposition to [Tribes']
Motion for Partial Summary Judgment
[in the Culvert Case], Sept. 27, 2006,
pp. 18, 19:**

"The Tribes' claim, carried to its logical conclusion, would give them a right to demand restoration of 1855 conditions and to control all future land management decision in the *United States v. Washington* case area. . . . The potential scope of the right sought by the Tribes cannot be underestimated."

Wash. Const., Art. 2, § 40:

"All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes."

**Adopted by Amendment 18,
approved Nov. 1944.**

Native Village of Kivalina and City of Kivalina v. Exxon Mobil Corp. et al., Complaint Filed Feb. 26, 2008 (N.D. Cal), alleges –

41. Exxon Mobil has taken the lead in the industry efforts to disseminate false information about global warming. . . .

. . . .

189. There has been a long campaign by power, coal, and oil companies to mislead the public about the science of global warming. . . .

. . . .

190. The industries have . . . formed and used front groups, fake citizens organizations, and bogus scientific bodies, such as the Global Climate Coalition ("GCC"), the Greening Earth Society, the George C. Marshall Institute, and the Cooler Heads Coalition. The most active company in such efforts has been defendant Exxon Mobil.

Native Village of Kivalina and City of Kivalina v. Exxon Mobil Corp. et al., Complaint Filed Feb. 26, 2008 (N.D. Cal), alleges –

192-93. One of the earliest and most prominent front groups has been the Advancement of Sound Science Coalition (TASSC). . . . TASSC has funded a web site, JunkScience.com, which was founded by a public relations consultant working at TASSC. . . . Exxon Mobil has funded TASSC. The Orwellian use of the terms 'junk science' and 'sound science' were adopted by the power, coal and oil industries – including some of the Conspiracy Defendants – to subvert the global warming debate.

197-204. The Global Climate Coalition [founded in 1989] met at a variety of locations, including the offices of Exxon. [Among its works, it] distributed a video to hundreds of journalists claiming that increased levels of carbon dioxide will increase crop production and help feed the hungry people of the world."

Native Village of Kivalina and City of Kivalina v. Exxon Mobil Corp. et al., Complaint Filed Feb. 26, 2008 (N.D. Cal), alleges –

••••

213. On April 10, 1996, the George C. Marshall Institute, as part of the Conspiracy Defendants' disinformation campaign, issued a report falsely claiming that peer-reviewed studies indicated temperature increases were consistent with 'natural climate change.'

214. Since Exxon Mobil began to support its efforts, the Marshall Institute has served as a clearinghouse for global warming contrarians, conducting round-table events and producing frequent publications. The Marshall Institute has been touting its new book, SHATTERED CONSENSUS: THE TRUE STATE OF GLOBAL WARMING, edited by long-time contrarian Patrick Michaels. Michaels has, over the past several years, been affiliated with at least ten organizations funded by Exxon

Native Village of Kivalina and City of Kivalina v. Exxon Mobil Corp. et al., Complaint Filed Feb. 26, 2008 (N.D. Cal), alleges –

• • • •

231. Relying on tactics developed by the tobacco industry to discredit health risks associated with tobacco use, Exxon Mobil has channeled \$16 million over the 1998 to 2005 period to 42 organizations that promote disinformation on global warming.

• • • •

234. Rather than meet its social and legal responsibilities, Exxon Mobil engaged in a multi-faceted attack on global warming which included exploiting science, denying the consensus on global warming, running misleading advertising denying the existence of global warming or its causes, and funding organizations who attacked global warming on these bases and / or the factors causing global warming.

Native Village of Kivalina and City of Kivalina v. Exxon Mobil Corp. et al., Complaint Filed Feb. 26, 2008 (N.D. Cal), alleges –

235. Exxon Mobil has funded and continues to fund groups like the George Marshall Institute, the Frazier Institute, and Free Enterprise to prop up discredited studies and to disseminate misleading information to downplay the severity of global climate change.

• • • •

246. Exxon Mobil marshaled its considerable resources [to undermine the 2004 Arctic Climate Impact Assessment] that combined the work of some 300 scientists and was four years in the making.

• • • •

Alien Tort Claims Act

Sarei v. Rio Tinto PLC, 456 F.3d 1069 (9th Cir. Aug. 7, 2006) (Raymond C. Fisher, joined by Nevada District Judge James C. Mahan, dissent by Jay S. Bybee)

28 U.S.C.A. § 1350 reads:

“[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

[Remarkable complaint alleging that the residents of Bougainville, Papua New Guinea, were victims of numerous violations of international law caused by mining operations “and the 10-year civil conflict that followed an uprising at the Rio Tinto mine.]

Alien Tort Claims Act

***Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. Aug. 7, 2006) (Raymond C. Fisher, joined by Nevada District Judge James C. Mahan, dissent by Jay S. Bybee)**

p. 8944:

“In November 1988, Bougainvilleans engaged in acts of sabotage that forced the mine to close. Rio Tinto sought the assistance of the PNG government to quell the uprising and reopen the mine. The PNG army mounted an attack on February 14, 1990, killing many civilians. In response, Bougainvilleans called for secession from PNG, and 10 years of civil war ensued. During the 10-year struggle, PNG allegedly committed atrocious human rights abuses and war crime at the behest of Rio Tinto, including a blockade, aerial bombardment of civilian targets, burning of villages, rape and pillage. Plaintiffs assert that the war has ravaged the island and devastated its inhabitants. Thousands of Bougainville’s residents have died; those who survived suffer health problems, are internally displaced and live in care centers or refugee camps or have fled the island.

The plaintiffs filed suit in federal district court seeking compensatory, punitive and exemplary damages, as well as equitable and injunctive relief on environmental contamination and medical monitoring claims, and attorney’s fees and costs. They also seek disgorgement of all profits earned from the mine.”

6.

Let's close with a discussion of playing the system. Shooting first and asking questions later. The cumbersome, casual, brutally expensive, and monumentally expensive legal system protects first shooters

All you can do is fight back. Many have.

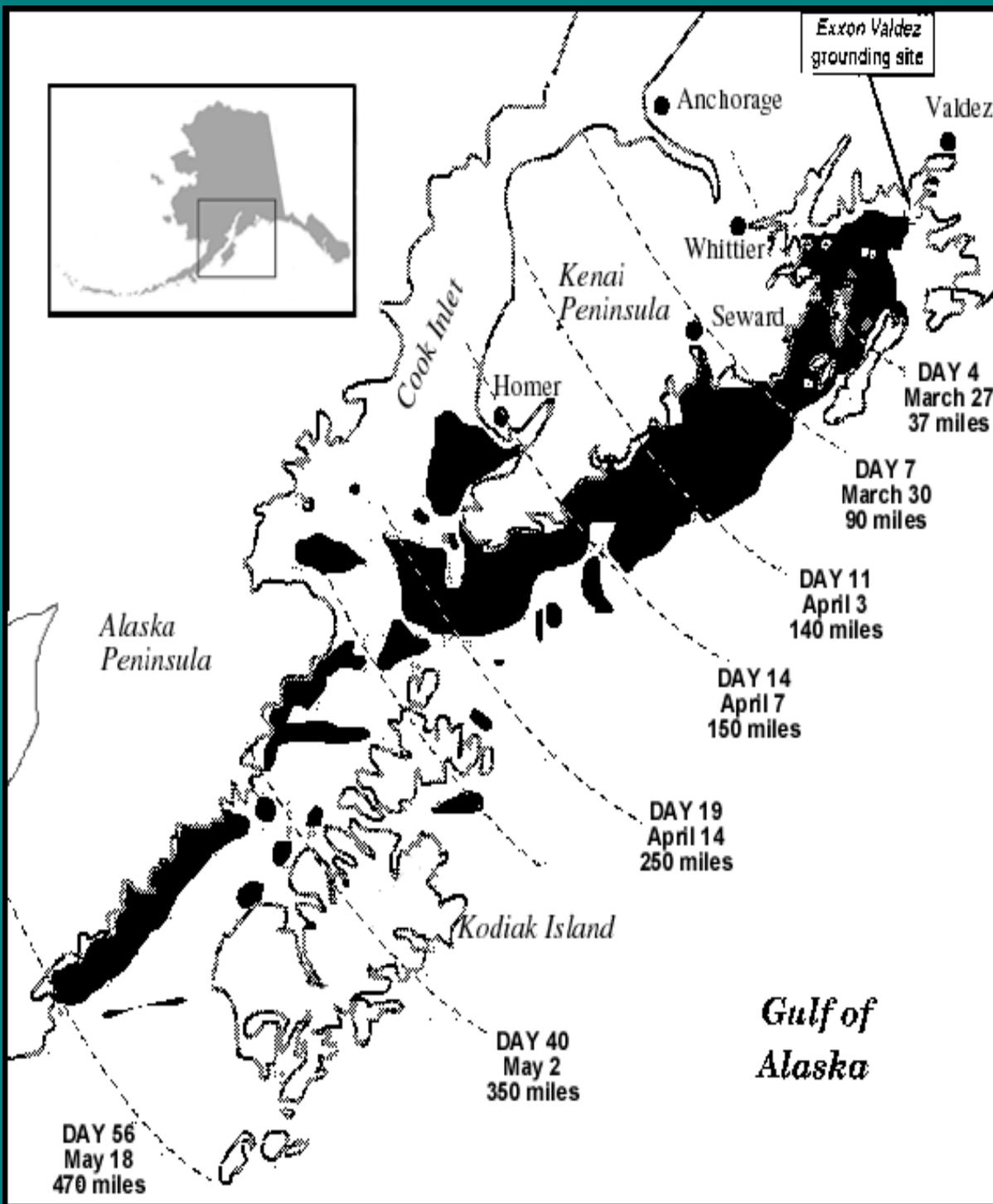
The case study has to be the spill of the *Exxon Valdez* – a case study in the U.S. legal system.

Exxon Valdez Grounded on Bligh Reef



- **March 24, 1989 *Exxon Valdez* runs aground on Bligh Reef with 53 million gallons of crude oil on board**
- **11 million gallons spilled (approximately 125 Olympic-sized swimming pools)**

Oil Spill Progression (March 24 – May 18, 1989)



The Punitive Damage Rollercoaster

- **1994: Certification of mandatory punitive damages class**
- **1994: Jury award of compensatory damages of \$287 million and punitive damages of \$5 billion**
- **1999: 9th Circuit vacated / remanded to reduce the amount**
- **On remand, Judge Holland reduced the amount of punitive damages to \$4 billion**
- **2003: the 9th Circuit vacated / remanded the judgment**
- **2004: Judge Holland reassessed the amount of actual harm and found that \$5 billion was justified, but reduced amount to \$4.5 billion to comply with 9th Circuit order**
- **2006: The 9th Circuit vacates and sets punitive damages at \$2.5 billion**
- **2007: Exxon seeks justice in the U.S. Supreme Court and the high court takes the case**
- **Feb. 27, 2008: Oral argument before the U.S. Supreme Court**

Trespass – Punitive Damages

In re: the Exxon Valdez, ____ F.3d ____ (9th Cir. Dec. 22, 2006) (per curiam) (Schroeder, Kleinfeld, Browning, dissenting), continued

There are five factors to be weighed in a "due process" review of punitive damages—

- whether the harm was solely economic
- whether the conduct showed indifference to (or reckless disregard of) others' health and safety
- whether the conduct's target was financially vulnerable
- whether the conduct involved repeated actions
- whether the harm resulted from intentional malice or mere accident

[Browning, J., dissents from the majority view] that post-spill mitigation ("prompt cleanup and compensatory payments") should be considered.

Trespass – Punitive Damages

In re: the Exxon Valdez, _____ F.3d _____ (9th Cir. Dec. 22, 2006) (per curiam) (Schroeder, Kleinfeld, Browning, dissenting)

- Issue:** Whether a \$4.5 billion punitive damage award for the 1989 spill of the Exxon Valdez offended the proper ratio of punitive to actual damages under Supreme Court jurisprudence.
- Holding:** YES.
A remittitur of \$2 billion is ordered, leaving punitive damages at \$2.5 billion.
- Reasoning:** "We reiterate our previous holding that Exxon's conduct was not willful. Accordingly, a punitive damages award that corresponds with the highest degree of reprehensibility does not comport with due process when Exxon's conduct falls squarely in the middle of a fault continuum."

Exxon Shipping v. Baker, Supreme Court of United States, Transcript of Oral Argument, Feb. 27, 2008

Walter Dellinger, Esq., for Exxon (p. 79):

"In the criminal case, the U.S. and Alaska agreed that the amount of the penalty was 'sufficient to provide punishment and deterrence for the conduct in question'"

AN OPEN LETTER TO THE PUBLIC

On March 24, in the early morning hours, a disastrous accident happened in the waters of Prince William Sound, Alaska. By now you all know that our tanker, the Exxon Valdez, hit a submerged reef and lost 240,000 barrels of oil into the waters of the Sound.

We believe that Exxon has moved swiftly and competently to minimize the effect this oil will have on the environment, fish and other wildlife. Further, I hope that you know we have already committed several hundred people to work on the cleanup. We also will meet our obligations to all those who have suffered damage from the spill.

Finally, and most importantly, I want to tell you how sorry I am that this accident took place. We at Exxon are especially sympathetic to the residents of Valdez and the people of the State of Alaska. We cannot, of course, undo what has been done. But I can assure you that since March 24, the accident has been receiving our full attention and will continue to do so.


L. G. Rowland
Chairman



Judgments and Law: The Value of Natural Resources

1. How did the reopener get set at \$100 million?

No reason. William Reilly, EPA Administrator in 1991, "insisted" that it be \$300 million.

2. What were the original damages calculated to be from the spill of the *Exxon Valdez*?

\$3 – \$15 billion. These were the so-called contingent valuation studies, done by economists such as a Gardner Brown. But they would not be embraced by the administration in 1991.

Judgments and Law: The Value of Natural Resources

4. What was the value of the famous *Exxon Valdez* apology? What is the price of remorse? The value of regret?

\$125 million. This amount was "remitted" ("to forgive or pardon," "to refrain from exacting") because Exxon was a good corporate citizen.

5. Another \$100 million was declared "restitution" and went to the federal government and the State of Alaska for "restoration projects" in Alaska. What is "restitution"?

A "giving back to the rightful owner of something that has been lost or taken away." Stolen property. We don't call this "natural resource damages." This is the criminal side of the street.

Judgments and Law: The Value of Natural Resources

6. So you subtract this \$125 million that was "remitted" (disappears like the mist in the morning) and another \$100 million that was "restitution" (the "side deal" for the state and federal government). What's left?

That leaves the \$900 million that was the business of the EVOS Trustee Council.

Exxon Shipping v. Baker, Supreme Court of United States, Transcript of Oral Argument, Feb. 27, 2008

Jeffrey L. Fisher, for Respondents (p. 76):

"In the wake of the spill, . . . , Exxon fired one person – Captain Hazelwood. They reassigned the third mate. Everybody else up – further up the chain of command that allowed this to happen received bonuses and raises."

Exxon Shipping v. Baker, Supreme Court of United States, Transcript of Oral Argument, Feb. 27, 2008

(p. 55):

"We showed 33 instances in the record of Exxon employees drinking with Hazelwood or showing that he drank."

Exxon Shipping v. Baker, Supreme Court of United States, Transcript of Oral Argument, Feb. 27, 2008

(p. 78):

"What you have today are 32,000 plaintiffs standing before this Court, each of whom have received only \$15,000 for having their lives and livelihood destroyed and haven't received a dime of emotional distress damages."

Judgments and Law: The Value of Natural Resources

7. Where did the \$5 billion in punitive damages come from?

After-tax net profit. Take away the company's profits for a year. *See David Lebedoff, Cleaning Up: The Story Behind the Biggest Legal Bonanza of Our Time*, ch. 15 at 259-60 (1997, The Free Press, N.Y., N.Y.):

1988	--	\$5.26 billion
1989	--	\$3.52 billion
1990	--	\$5.01 billion
1991	--	
1992	--	
1993	--	\$5.28 billion

Judgments and Law: The Value of Natural Resources

8. *See David Kravets, "Exxon asks reduction of Valdez damage award," Seattle Post-Intelligencer, Jan. 28, 2006 (3rd quarter earnings of 10 billion; does this mean a \$40-billion punitive damage award)?*

Of course not.

Exxon Valdez Oil Spill

"Earnings: Exxon makes \$39.5 billion (or \$4.5 million an hour) [for 2007]," Seattle Post-Intelligencer, Feb. 2, 2007.

Barnson_v_United_States.ppt

"Oil giant Exxon Mobil Topped its own record for the biggest annual profit for a U.S. company last year."

Exxon Shipping v. Baker, Supreme Court of United States, Transcript of Oral Argument, Feb. 27, 2008

(p. 31):

"[U.S. and Alaska authorities] imposed a criminal fine of \$150 million, which was reduced to \$25 million because of the cleanup efforts and the fact that Exxon prepaid \$300 million of the losses in advance."

Exxon Valdez Oil Spill

Kellie Kvasnikoff, *EXXON VALDEZ*: 18 YEARS AND COUNTING 38, 39 (2007) (6,000 (of the 32,000 plaintiffs seeking punishment) are now dead)

"The gloating predictions of Exxon's chief strategist have turned out to be true, and the case has stretched into the 21st Century. After 18 years justice has turned out to be misspelled, it is JUST-US. Those with the deep pockets that can manufacture legal arguments, use the law, buy science, keep Supreme Court Justices and Presidents in their hip pockets and play them like puppets when it is to their benefit."