An Emergency Resource Requisitioning System for Response to Future Oil Spills

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"AN EMERGENCY RESOURCE REQUISITIONING SYSTEM FOR RESPONSE TO FUTURE OIL SPILLS"

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"An Emergency Resource-Mobilization Requisitioning System for Future Oil Spill Emergencies"

I. Prospectus

This report analyzes one proposed component for the State of Alaska's future oil spill prevention and response program: a system for requesting and requisitioning a variety of necessary private resources and services in the event of a declared oil spill emergency. In such an event, on land or water, codification and application of existing and proposed Alaska law will provide for necessary quick access to resources by the state's emergency response command, and legal and economic protections to the persons and private property interests affected.

Proposals

- The State of Alaska should create a comprehensive emergency resource-requisitioning process for requisitioning corporate and private resources and services in the event of major declared public emergencies.

- The emergency resource-requisitioning process should make a basic distinction between requisitions made of responsible corporate parties and those made of private third-parties.

- The emergency resource-requisitioning process should provide for appropriate protections for requisitionees, to the fullest extent when applied to private third-parties, in terms of compensation, coverage against injuries, and tort law immunities.

- By statute, the emergency resource-requisitioning process should incorporate a shift in tort law duties, so that persons refusing to provide requisitioned resources and services can be sued by injured parties in subsequent civil litigation for injuries to persons and property that occur because of such refusals.
II. Introduction and Background

Privatization, dominating the process by which Alaska oil transport is administered and supervised, has been repeatedly identified as a significant contributing cause of the laxities that produced the Exxon Valdez oil spill and other oil spills.

The dominating presence of the oil industry was evident throughout the course of response to the Exxon Valdez oil spill, as well as prior to the spill in the ongoing management of the oil transport system — operation, maintenance, testing, oversight, "prevention," and spill-response preparation, including contingency planning.

A private lockup of virtually all necessary cleanup resources was one of the strategic causes, in the confusion and turmoil that followed the Exxon Valdez spill, that allowed the private corporation to dominate the oil-spill response and clean up. As soon as the tanker's grounding was known, many or most of the logistical requirements and equipment for oil spill response and clean-up were quickly locked up by private purchase, lease, or contract, so that only the private industry entities had the wherewithal to undertake response efforts.

The encumbered resources included aircraft and boats, other transport vehicles, radio and telephone systems, cleaning equipment, fuel supplies, and the like, as well as facilities for housing response workers and staff (in a community with severely-limited hotel and motel space available.) The short supply of some resources was made even tighter by the influx of media personnel, who often desired exactly the same kind of resources that were necessary to facilitate the cleanup itself. In circumstances where state and federal officials arriving on the scene could not even be sure of having a place themselves to spend the night, it becomes clear in retrospect that such industry lockups of resources can be a major logistical problem in the event of major oil spills. Beyond the short-term lockup problem, moreover, is the fact that in some urgent circumstances governments may have to request and requisition various other private resources from third parties, when government-owned equipment cannot be brought on site sufficiently quickly to respond to the emergency.

In these circumstances, if the State decides that future oil spill response must never again be so privatized as to relegate governmental participation to the backseat role it played in the Exxon Valdez incident, then state governmental officials must be able to request and requisition available resources for governmental clean-up efforts. The following system sets out a basis for temporary governmental acquisition of volunteered or requisitioned resources by the state's disaster response coordination center.

There are, of course, major consequences to private property rights when a governmental entity requests or requisitions private assets. Circumstances may vary according to whether the assets and resources requisitioned belong to parties
implicated in the cause of the spill, or are sought from third parties in the locality with no responsibility for the spill or its clean-up. Circumstances may also vary according to the type of use that is sought to be made, the length of time for which the requisition is sought, the necessity for private personnel to work with the government in deploying and using resources, and the differing needs for immediate short-term compensation thereafter.

Current Alaska law already provides many of the powers and procedures to be applied in the event of a civil emergency, and these include the power of requisitioning private assets as necessary. AS 26.23.020(g)(4). In the following analysis of the requisitioning mechanism, existing authority is noted, and areas in which further statutory authority is necessary are likewise noted. Precedents and analogies have been drawn from other states that have considered the problem.

This proposal is based upon general assumptions about the State of Alaska's future emergency response system as set out in the attached report, "Some Suggested Elements for an Improved Oil Spill Response System".

III. Description of the Proposed Legal Mechanism

Under the authority of existing statutes, with the addition of certain further required statutory provisions as noted, the State of Alaska should define, by regulation, a comprehensive format for requisitioning required oil spill response resources.

The requisitioning system would be primarily directed toward "un-locking" resources that are critical to the State's response to a spill that have been "locked-up" in the immediate aftermath of a major spill by the industry itself. [If necessary it could also be applied to third-party resources; politically, as well as in terms of appropriateness, however, the industry is a far more practical object of the process and powers set out here.]

A declaration of oil spill emergency [or on-site "preliminary declaration" in urgent cases] is the threshold requirement for the requisitioning process. It triggers the existing powers of the State, and the proposed statutory powers of the State and the on-site command center, to respond to the emergency, including the proposed power to requisition.

Take as an example four possible emergency requisition requests:

- The State requests that the Village Inn in Valdez turn over 20 rooms for the use of the State's response team personnel, for a period of 20 days, even though the corporation responsible for the oil spill has already contracted with the Village Inn to reserve all the Inn's rooms for a 30 day period.
- The State requests that Alyeska provide two bulldozers, five trucks, and portable pumping equipment, present at a North Slope location [or at a pumping station near the Brooks Range], to be turned over to the State's on-
site command center, along with the personal services of those employees necessary to operate the equipment, in order to respond to a spill of oil in tundra along the pipeline corridor.

- The State requests that Alyeska make available the use of three large cargo helicopters rented by Alyeska from a Houston company and recently flown to the locality of the spill.
- The State requests the use of a fishing boat to transport urgently needed booms to protect the port of Homer.

The requisition system set out here operates in each case, by either voluntary or mandatory compliance. The written requisition is defined initially as a "request," and if the persons requested to provide resources/services in an emergency do acquiesce in the request, they will receive benefits of legal protection, qualified legal immunities, and rights to compensation for the value of resources/services provided, as applicable.

Note on oil industry and third-party applicability:
The primary motivating circumstance that requires a requisitioning system is the corporate lockup of resources already noted. In some cases, however, private third-party resources may be necessary. Past experience in the Exxon Valdez spill indicates that third-party private resources will usually be made readily and willingly available. In such circumstances the primary effect of the proposed requisition system is to provide legal and economic protections to the private third-party resources and services. Most requisition requests, in fact, can be expected to be honored, whether made of corporate parties or private third parties, especially if the system proposed here is in place and well known. Where, however, the industry parties responsible for the spill and its cleanup are the objects of requisition orders, some of the legal and economic protections may proposed here may be inappropriate. Reimbursement for use of corporate cleanup equipment, for example, would seem to miss the point of corporate responsibility for response preparedness and liability for spills. Oil and pipeline company requisitions might well be directed into a special arbitral tribunal to take account of their special nature. The legislation implementing this proposed requisitioning system should establish differing categories of protections, depending upon the role and responsibilities of the various second and third parties.

The full range of protections presented below are primarily directed toward private third-party requisitionees.

Enforcement authority

If persons requested to provide resources/services initially refuse to acquiesce, the order to provide resources and services operates as a mandatory requisition, and there are three consequences possible:

- immediate enforcement by law enforcement officials;
- prosecution [as a misdemeanor]; and
• (by a proposed statutory change), a new degree of responsibility and civil liability for any injury or loss of life to persons or property that is caused in whole or part by the unavailability of the resources/services requested.

If the requisition must be mandatorily enforced, it nevertheless carries with it, once transfer of dominion and control of the resources/services has occurred, the benefits of qualified legal protections and immunities previously noted, and the right to compensation for the value of resources/services provided.

The administrative and procedural components of the proposed requisitioning system are straightforward.

The liability, qualified immunity, and compensation provisions are slightly more complex, but not problematic.

The potential legal constraints upon the State's ability to requisition resources and services lie in:
(a) the federal pre-emption problem, which may be quite serious in special cases (like a State attempt to requisition a nearby empty tanker for offloading a grounded tanker, in circumstances where the Coast Guard has declined to make such an order);
(b) the federal constitutional due process and takings clause [not a major concern];
(c) the federal constitutional contracts clause [likewise not a major concern]; and
(d) the need to compensate for the value of resources/services taken [not, however, a major issue where the requested party is the corporation responsible for the discharge of the oil, which in any event will eventually have to reimburse Alaska for the State's expenditures, including any payments for use by the State of the corporation's own assets.]
(e) the need to compensate for injuries to persons whose services are requisitioned.

IV. Legal Analysis

Requisitioning Authority
AS 26.23.020(g)4, and other authority
Property
Personal Services

Administrative and Procedural Requirements
Declaration of emergency
Master C-plan
Decisional officers
Notice of request and requisition
Filing in Registry
Enforcement, civil and penal

**Liability and Compensation Provisions**
Compensatory coverage for injury to property and persons requisitioned
Qualified immunity
Liability for damages caused by failure to provide
Compensation system, and quantifying compensation amounts

**Constitutional Constraints**
Pre-emption
Due process, takings
Contract clause
Compensation

**Requisitioning Authority: AS 26.23.020(g)(4) and other**

**Requisitions of Property**

A significant part of the powers necessary to operate a requisitioning system already exist within Alaska law. Under the Alaska Disaster Act, AS 26.23.020(g)(4), the governor, upon the proclamation of a civil emergency, specifically may "commandeer or utilize any private property [except for news media] if the governor considers this necessary to cope with the disaster emergency," following the required procedures for declaration of emergency, notice, [see Rep't No. 6.2], compensation, etc.

By citing this authority, and making the assertions noted below in §IV and in the Draft Requisitioning Request Form [see Appendix], it is clear that the Governor already possesses the necessary powers to take short-term dominion and control of needed private property so long as the emergency lasts. This power in turn can be delegated to an oil spill command center. AS 26.23.020(f).

**Requisitions of Services**

As noted in the second example above, of a requisitioning request made to Alyeska to provide equipment and equipment operators, the State's oil spill response command center will sometimes need to requisition personal services, in cases where personnel trained to run the equipment may be as necessary to the clean-up effort as the equipment itself.

The Alaska Disaster Act, however, does not specifically authorize commandeering the services of individuals. Other states have enacted statutory authority for the requisitioning of personal services in the event of an emergency. In Alaska, that power must be derived from other statutory and common law sources.
Several statutory sources of authority to requisition personal services lie within the more general provisions of the Disaster Act. If such services are determined to be critical to a spill response, the power to requisition them could be grounded initially in §26.23.020(a) and (b):

(a) The governor is responsible for meeting the dangers presented by disasters to the state and its people...
(b) [and] may issue orders, proclamations, and regulations necessary to carry out the purposes of this chapter....These orders, proclamations, and regulations have the force of law.

This general grant of necessary powers is supported by a specific reference to the governor's ability [in specifically non-military or paramilitary circumstances, 26.23.200(4)] to exercise the powers of a "commander-in-chief of the...unorganized militia." AS 26.23.020(e) and (f). The "unorganized militia" is specifically defined as including "all able-bodied persons between the ages of 17 and 59 years, inclusive, who reside in the state." AS 26.23.230(7). This particular authority thus clearly allows the requisitioning of services by the governor, at least if the requisitioned personnel are residents of the State. And the Act also affirms the governor's martial law powers. AS 26.23.200(4).

Beyond the statutory powers, the State of Alaska, along with other American state governments, possesses the inherent authority to mobilize emergency resources and services under the common law doctrines of posse comitatus. When law enforcement officers reasonably demand the assistance of private persons and property in responding to an ongoing violation of law, the citizens have a legal duty to respond. See Kagel v. Brugger, 119 NW2d 394, 397 (Wisc. 1963); Babington v. Yellow Cab Co., 250 NY 14, 164 NE 726 (1928); Application of U.S., 427 F2d 639 (1970). The comitatus powers apply to crimes "in exigent circumstances." To extend them to the oil spill response setting may require a showing that the discharge is punishable under penal laws, that each day of discharge be defined as a separate count, and that cleanup response actions be deemed law enforcement, but in the spill setting these elements are readily shown. The Alaska cases mentioning "emergency impressment" may support such an interpretation. The authority for requisition is likely to be carefully scrutinized by the Alaska Supreme Court. See Seward v. Wisdom, 413 F2d 931 (1966).

Delegation of Governor's Powers

The Disaster Act specifically says that the governor may delegate his/her emergency command authority by appropriate orders or regulations. AS 26.23.020(f). As suggested in Report No. 6.2, "Some Suggested Elements for an Improved Oil Spill Response System," the governor should provide for a delegation of the full range of emergency powers to ADEC's OHSR or whatever other on-site command authority the State creates to handle response and clean-up functions. To accommodate the sensitive political question of requisitioning resources and services from third parties, the governor might choose to delegate only certain portions of the
emergency powers, so that, for instance, the declaration of emergency in a particular spill might delegate only those requisition system powers needed for unlocking the resources of corporations involved in oil transport or responsible for the oil spill emergency.

**Administrative and Procedural Requirements:**

**Declaration of Emergency**

As noted in Report 6.2, "Some Suggested Elements for an Improved Oil Spill Response System," the declaration of emergency in the event of oil spills triggers an array of powers and duties under existing Alaska law. There is currently a multiple jurisdiction over oil spills, where the Department of Emergency Services ["DES"] has jurisdiction up to the amount of 100,000 barrels, concurrent with ADEC, which has the ability to exercise some emergency powers, but does not get full powers unless the spill reaches the full 100,000 barrel level. AS26.23.040; AS46.03.865; AS46.04.080.

As recommended in the "Suggested Elements" report, oil spill jurisdiction should be centered in one entity, and the 100,000 barrel trigger for full response powers should be eliminated. The 100,000 barrel standard was set up by the federal government to define those catastrophes in which the federal government would assert federalization. The levels of concern over an oil spill and the range of interests involved, differ markedly between the state and federal governments, and accordingly the 100,000 barrel defining line does not appear to serve a useful purpose in triggering full Alaska state response efforts. Moreover, because of the fact that future oil spills may well occur inland, where relative dangers differ proportionately from ocean spills, the 100,000 barrel trigger is doubly inappropriate, and deserves amendment.

Also as noted in the "Suggested Elements" report, there may be a need for on-site personnel to order an immediate civil emergency declaration to mobilize resources, in the form of a "preliminary declaration of oil spill emergency" which will require new legislation.

**The Master Contingency Plan**

The "Suggested Elements" report [6.2] discusses some of the requirements for improved contingency planning. A competently structured contingency plan, in place and clear enough to guide the immediate responses of state personnel, is a requirement of this requisition system because it will identify the kinds of efforts and kinds of resources necessary to the state's response, which likewise justifies the requisition requests to be made hereunder. See the recently enacted requirement of a statewide master plan, AS 46.04.200ff, discussed in Report 6.2.
Decisional Officers

Decisions about what particular equipment or personnel are needed are likely to be best made on-site, not back in the state capital. Accordingly, it is important that the power to requisition be delegated by the governor in each emergency, or via a prior-designated delegation under regulations issued in the recodified emergency response system, so that on-site officials can exercise an immediate response effort including necessary requisitioning powers. It is presumed that the person in command of the on-site response command center would be the one who would have to authorize each particular requisition request.

Notice of Request of Requisition

The draft form appended at the end of this report (Appendix: "Draft Requisitioning Request Form," ) identifies the requirements of a requisition order[and see AS 9.55.430]: multiple citations of authority, a request and requisition for particular identified resources/services, a statement of the particular purpose under the contingency for which the request is made, the duration of the request, and statement of rights and liabilities for voluntary or mandatory provision of resources/services.

Filing in Registry

It is a simple requirement of administrative process and private property rights that the requisitioning orders be filed in some appropriate registry, either at the relevant Registry of Deeds, or with the municipal clerk in the area where the requisition is made, as is required with the initial declaration of emergency. See AS 26.23.020(d). The requisitioning orders should also be filed in one central state office which will manage compensation requests thereafter, so a state filing is administratively as necessary as the local filing required by property rights.

Enforcement, Civil and Penal

Where a requested person does not respond affirmatively to a requisition request, the statutes should be amended to clarify that law enforcement officials have the ability to take dominion and control of private property for requisitioned uses without a prior hearing, if the requirements of the requisition order are otherwise in order. Under the Maine oil spill statutes the state officials' emergency orders and regulations are not to be stayed, even if appeals are filed. 38 MRS §557. There also is the possibility that in some cases an immediate possession of the resources is not necessary, and in that circumstance the statute may allow normal condemnation action to take place under the state's powers of eminent domain, although a "quick-take" procedure is advisable so that the matter would be put immediately at the front of the docket of whatever court has jurisdiction.

Violation of the order would appear to be a misdemeanor under existing statutes. Enforcement, of course, must follow all the requirements of procedural due process;
these requirements, however, allow for a balancing in emergency situations that
takes account of urgent public exigencies. See the three-part balancing test in

Liability and Compensation Provisions

Compensatory Coverage for Injury to Requisitioned Property or Persons

Under principles of constitutional due process protections of private property rights
and personal rights, the state government must not only compensate persons for
the value of resources taken, but also must reimburse them for injuries or
destruction which may occur during the requisitioned period. This proposition
holds irrespective of language in AS 26.20.140(b) which purports to eliminate tort
liability on the part of the State or those working for the State. Further, the
protections of worker’s compensation laws extend to persons providing
requisitioned services because they are legally regarded as state employees. See
Gulbrandson v. Midland, 36 NW2d 655 (SD 1949).*

Qualified Immunity

As noted above, it is appropriate and apparently normal practice for states which
make emergency use of private resources or services to extend affirmative
immunity in tort law to persons and property requisitioned. The exception is in
cases of gross negligence or intentional misconduct. Alaska has adopted this
approach for a part of its emergency response law, and should probably apply it
generally to all emergency requisitions. See AS 26.20.140(b); 46.03.823; 46.08.160. See
also Restatement of Torts 2d §265. The alternative approach of adjusting insurance
coverages for requisitionees and volunteers is the subject of ongoing federal studies
by the Department of Justice, but appears to be primarily directed at settings different
from the emergency response situation.

In this case it is also advisable to extend statutory immunities as well. It is
altogether foreseeable that clean-up and response equipment will itself have
incidental discharges and other circumstances which could open the owner of the
equipment to further statutory liability, and it appears advisable that, except in the
case of gross negligence, or where the equipment is not being used according to the
requirements of the state’s response system, that qualified immunity from state
statutory liability also be extended. See AS 46.08.160 [where immunity “from costs or
damages” may cover some statutory liabilities.] The state, of course, has no ability to

* The opposite result is likely, however, in the case of “pure volunteers,” persons who
provide emergency services to the public on their own unfettered initiative, without
having been requested to provide such services by an authorized emergency official.
City of Seward v. Wisdom, 413 P2d 913 (1966); local political subdivisions can
nevertheless include volunteer firefighters, police, and ambulance drivers under
worker’s comp. AS 23.20.092. Members of the newly authorized volunteer Response
Corps would appear to be covered by worker’s comp. AS 46.08.110.
extend such immunity for actions violating federal law, except insofar as the state has assumed federal authority, under the Clean Water and Clean Air Acts. (NPDES, 33 USCA §1342ff; SIP, 42 USCA § 7410ff).

Liability for Damages Caused by Failure to Provide

This is a provision that substantially increases the practical incentives upon private parties to acquiesce in a requisitioning order. If they do not, the proposal is that the oil spill act (AS.46. 04.010ff, and the Civil Disaster Act, AS26.23.010ff) be amended to reverse, in effect, the traditional tort law that does not hold a person to any "duty to rescue". If the statute is drafted to state that— "failure to provide resources or services upon the proper requisition and request of a civil emergency official shall constitute a breach of duty to persons and properties injured by the failure of the person to so provide"— major tort damages may follow. For a stubborn property owner, this may be a more persuasive incentive to cooperate with state efforts than the uncertain possibility of conviction for a misdemeanor. In the event that major injuries to persons or property occur, a person or corporation could lose the entire value of the requisitioned resources, or much more.

Analogues for this kind of statutory creation of a special tort duty can be found under the law of posse comitatus. See Babington v. Yellow Cab Co., 250 NY 14, 164 NE 726 (1928); Application of U.S., 427 F2d 639 (1970); Blackman v. Cincinnati, 35 NE2d 164,166 (Ohio 1941).

Compensation System

Under AS 26.23.020(g)(4), compensation is required under the terms of subsection 160 for any property that has been "commandeered." In that section, a person files claims for compensation with DES, although presumably if ADEC was exercising the same power by delegation under its oil spill authority, claims would be filed directly with ADEC.

Compensation claims should be directed to one single state office, to permit coordination and uniformity in the compensation process. An arbitration panel could be set up administratively to facilitate the process. See 38 Maine RSA §551(3). Ultimately, all claims may be taken to a court as with regular eminent domain condemnation.

The question of quantifying compensation amounts is treated in the next section.

Constitutional Constraints

Preemption

Under preemption, where the federal government has jurisdiction over an area and expressly preempts the area, the state has no power to regulate. There do not appear to be any areas of express exemption in the oil transport system, with the possible
exception of the Coast Guard standards. Implied preemption, however, is an ever present concern where a regulated industry can resist state efforts on the argument that the function being exercised is properly a federal function, and that congress impliedly intended to occupy the entire field, whether or not congress or a federal agency is acting in a particular area.

The requisition system discussed here largely does not run afoul of preemption concerns. The federal emergency management agency administration (FEMA) has indicated that it does not itself wish to exercise the requisitioning role, and fully expects that the State would requisition required resources and services, perhaps turning them over to the Federal On-site Coordinator in the event of federalization. Likewise, in a number of areas of response effort, the federal agencies may be expected to be relieved that the state is taking the initiative. The on-land response actions of the state, including requisitioning, do not appear to raise any substantial preemption issues. On the tanker route sector of the system, however, the Coast Guard exercises predominant control over the navigation and design and equipment standards of the tanker trade, so that short-term requisitioning of a vessel that is otherwise under Coast Guard jurisdiction might run afoul of the preemption doctrine. This issue is to be treated further in another report.

Due Process, takings

Under the principles of due process and takings, the requisition system proposed here does not raise major concerns. The authority for a taking will be clearly established, there is clearly a proper public purpose sounding in health, safety, and welfare; the requisition order, if it follows the terms of a rational contingency plan, is clearly rationally related to achieving the purposes of the state's oil spill response effort; and any burdens upon the private property are straightforwardly handled by the existence of the compensation remedy. The statutory change in tort liability, proposed to increase the incentives to cooperate with a requisition, does not raise takings issues because the courts have held that individuals and corporations do not have a right to the continuation of particular common law rules.

Contract Clause

In some cases, as the examples show, a requisition order may directly interfere with contracts made between a corporation that has locked up resources and the supplier of those resources. This clearly is a state action "impairing" a contract, which raises questions under the Contracts Clause of the U.S. Constitution, Art. I § 10. The Contracts Clause, however, has repeatedly been interpreted to permit a state to modify or abrogate contracts when the requirements of due process and valid regulatory actions have otherwise been fulfilled. The leading case in the area is Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933): "...The State...continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect'....[T]he reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order....This
principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U.S. at 434-435. While the State's power is not unlimited, the effective result of Supreme Court holdings is that the same balance that supports an action against due process and takings challenges will concurrently satisfy the Contracts Clause.

Compensation

Under Alaska and federal law, it is clear that in many, if not all instances, compensation must be paid for property which is taken; the due process requirements of the eminent domain proceeding are statutorily codified in the condemnation provisions of Alaska Statutes, §§9.55.290-340 and 420-460.

Several special questions arise, however. If it occurs that the state orders, for instance, the destruction of a grounded tanker with all its remaining cargo by burn technology, there is some authority to indicate that the state does not have to compensate the owners of the vessel therefor. See* U.S. v Caltex, 344 US 149 (1952); Srb v. Larimer, 601 P2d 1082 (Colo. 1979); Franco-Italian Packing Co. v. U.S., 128 F.Supp. 408 (Ct. Claims, 1955); Miller v. Schoene, 276 US 272 (1928), and cases involving the destruction of houses in the path of fire. In such cases, moreover, the corporation that owns the grounded tanker will often be responsible for the cost of clean-up, so that the action of destroying a ship and cargo, if necessary to effective response, in such circumstances would be part of the corporation's clean-up response obligation and hence not compensable.

There is also the question of assessing the amount of compensation. In the example of requisitioning hotel rooms, where the corporation has already reserved the same hotel rooms, it might be argued that it is not enough that the state itself pay the hotel for the rooms used by the State. The corporation that had reserved those rooms, of course, does not have to pay for rooms it did not use (and if it prepaid the rooms, the State would have to repay that amount). But the corporation may well argue that the value of the contract to the corporation in the emergency circumstances was greater than the actual cost of the rooms, in effect a "special benefit" of the bargain. In these circumstances, could the corporation that has been ousted from its reservations demand compensation for the loss of those reservations? This does not appear so much the loss of a property interest as a contract clause claim. The language of the Supreme Court of the United States in determining whether such contract losses would have to be compensated does not offer much support to the corporate position.

A further question arises with the amount to be paid where the existence of the oil spill emergency dramatically raises the on-site going market rate for available resources. If the corporation responsible for the spill is the target of the requisition request, it is hardly likely that it can demand inflated premium values from the State. Even were it to do so, the state is authorized to recoup clean-up expenses from responsible parties under AS 46.04.010, and, accordingly, whatever the State would
have to pay out to the corporation in compensation, it would probably demand as a
reimbursement from the corporation under that statute and AS 46.03.760(e), and
46.08.070.

The more difficult question occurs in the case where the state will be taking third-
party resources. In the event of a spill, one of the small compensations to a local
community is that responsible corporations may pay greatly inflated prices for the
rental or purchase of desired resources. In those circumstances, does the state
government have to pay the same price? The Alaska statutes indicate that the
measure of compensation will be the same as that in other condemnation cases. AS
26.23.160. This generally means that just compensation will be measured by fair
market value at the time of the taking. There is some authority, however, that
government need not pay inflated values for property that is taken by eminent
domain, where the reason for the inflated value is attributable to governmental
demand or governmental orders. See U.S. v. Cors, 337 U.S. 325 (1949). In that case,
the federal government had requisitioned a steam tug for use in the war effort.
Many steam tugs had been so taken, and the price for remaining unrequisitioned
tugs was going ever higher on the private market. The statute involved, however,
the Merchant Marine Act of 1936, section 902A, stated explicitly that "in no case shall
the value of property taken or used be deemed enhanced by the causes necessitating
the causes or use". This is a provision that might well be replicated in an Alaska
Disaster Act amendment. The Supreme Court decided that there was no
constitutional reason why the government had to pay a higher price for private
assets when the price had been driven up by the government's own actions, in that
case mobilizing resources for the war. In the oil spill situation, the inflated market
prices for goods are both generally the result of the emergency situation, and
specifically the result of the government's own requirements applied to the
corporation that it undertake immediate response and clean-up efforts. To make
the government pay the higher premium owing to its own order appears to be both
inappropriate and constitutionally unnecessary.

V. Summary

For the foregoing reasons, it appears that a requisition system, both voluntary and
mandatory, is both desirable and administratively, legally, and constitutionally
feasible for implementation by the state of Alaska, with the regulatory and statutory
changes noted as required.
[DRAFT] REQUISITIONING REQUEST FORM

State of Alaska
[Oil Spill Emergency Command Center] [or whatever response entity is authorized]

Under the authority of the Declaration of Oil Spill Emergency issued by [authority] on [date] and according to the regulations for emergency oil spill response set out in Alaska Administrative Code [statute], as authorized by the Statutes of the State of Alaska [statute], and pursuant to the terms of the Master Oil Spill Contingency Plan for [denoting sector of oil transport system] adopted by the State on [date], 1990,

You are hereby requested to provide the following resources/services to the responsible official signing this order or his/her appointed agent:

________________________________________________________________________

The resources/services requested under this order will be utilized for the following purposes, consistent with the terms of the Master Oil Spill Contingency Plan noted above:

________________________________________________________________________

This requisition will continue until [date]. During this time the resources/services are to be used according to the terms of this order, the laws of the State of Alaska, the applicable state contingency plans, and directives of state officials authorized to direct oil spill cleanup and response efforts.

Your co-operation with the State of Alaska’s oil spill emergency response efforts is important, and deeply appreciated by the State, as well as being required by Alaska law.

If this order is not complied with, you are on notice that law enforcement officers have the duty to enforce it, and violations are punishable as [misdemeanors] under the terms of Alaska law [statute]. Furthermore, if this order is not complied with, you and your property by statute will become civilly liable for any injury or loss of life to persons or property that is caused in whole or part by the unavailability of the resources/services here requested. AS 26.***

FOR REQUISITIONS OF THIRD PARTY RESOURCES AND SERVICES:
You have a right to be compensated for the full, fair value of the resources/services provided to the oil spill emergency response efforts. Compensation claims may be filed at the following [time], [place], [manner].

Because the State assumes dominion and control of the resources/services during the time covered by this order, absent gross negligence you and your property will not be liable under state statutes or common law for actions taken according to the terms of this order. Damages to persons or property are likewise the responsibility of the State so long as actions with the requisitioned resources/services are being taken according to the terms of this order.

Authorized official, address, contact tel. no., Date