

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)	
)	
the EXXON VALDEZ)	
_____)	
This Document Relates to)	No. 3:89-cv-0095-HRH
)	
ALL CASES)	
_____)	

MEMORANDUM DECISION

Motion for Reconsideration

By order of December 1, 2010,¹ the court ruled on a motion to reconsider² filed by certain members of the cannery worker claim category. In that order, the court explained its reasons for treating the motion for reconsideration as one for rehearing under Rule 59(a)(2), Federal Rules of Civil Procedure, and confirmed its order of November 10, 2010,³ granting the sixteenth application for distribution of funds from the Exxon Qualified Settlement Fund (EQSF).

The moving cannery workers initially sought to have the court require that the EQSF Administrator retain a reserve previously set

¹Docket No. 9681.

²Docket No. 9659. While the foregoing motion was developing, the court received and considered objections to its November 10, 2010, order from John Michael Monasmith, Docket Nos. 9663 & 9665, and from Richard A. McQuade, Docket Nos. 9652 & 9673.

³Docket No. 9658.

up at the request of Lead Counsel and the EQSF Administrator in the amount of \$1,547,593.26 for potential disbursement to cannery workers. By the time the court heard oral argument on the cannery workers' motion to reconsider, the cannery workers' request had expanded to \$3,067,646.00, the amount of the settlement reached between the Cannery Worker Settlement Class and Exxon with respect to cannery workers' claims for losses subsequent to 1989. In the sixteenth application for distribution of funds and in opposition to the motion to reconsider, the EQSF Administrator sought leave to vacate the cannery worker reserve, arguing that such a reallocation of funds to the cannery worker claim category would be contrary to the court-approved Plan of Allocation and the court-approved Cannery Worker Plan of Distribution. The cannery workers would have the court take from all of the other EQSF claimants, funds to which the other claimants are entitled under the Plan of Allocation and their respective plans of distribution. The moving cannery workers seek the amelioration of a shortage which some in the cannery worker claim category have suffered as a result of the success of other cannery workers in achieving substantial recoveries outside of the EQSF proceedings. The cannery worker claim category has been overpaid, even though some individuals within that category have been underpaid. As explained below, what the moving cannery workers seek would violate the Plan of Allocation and would be contrary to the agreed terms of the Cannery Worker Plan of Distribution.

The possibility of a shortage in the cannery worker claim category was known in 1997, when the Cannery Worker Plan of Distribution was negotiated, and has long been a matter of concern to Lead Counsel and the EQSF Administrator. What has happened is not the result of a mistake by the Administrator or anyone else. There is no one to blame for what has happened. When the Plan of Allocation and the 50 plans of distribution were agreed upon and approved by the court, it was expected that there would be a huge punitive damages recovery⁴ – which, under the Plan of Allocation, would have resulted in the allocation of sufficient funds to the cannery worker claim category to equalize distributions among cannery workers – to adjust for the fact that some cannery workers were very successful in negotiating settlements outside the EQSF, whereas others were not. What the cannery workers seek would cause the EQSF Administrator to incur great expense to either renegotiate or litigate changing the Plan of Allocation⁵ which was agreed to by the joint prosecution plaintiffs and approved by the court in 1996.⁶ It is far too late to have second thoughts about the Plan of Allocation.

History of Cannery Worker Claim Category

In August of 1994, counsel for the moving cannery workers became signatories to a Joint Prosecution, Settlement, and Damages

⁴At the time, All Plaintiffs had the benefit of a \$5 billion jury verdict.

⁵See Docket No. 6591, Ex. C.

⁶Docket No. 6806.

Allocation Agreement.⁷ That agreement was entered into by virtually all of the plaintiffs "for the purpose of maximizing the recovery from Exxon on behalf of their clients."⁸ Relevant to the present controversy, the Joint Prosecution Agreement provided that: "[a]ll recoveries from defendants by any plaintiff or group of plaintiffs, whether by settlement or trial, will be shared among all plaintiffs...."⁹

In furtherance of the Joint Prosecution Agreement, Lead Counsel for the plaintiffs, on January 12, 1996,¹⁰ proposed to the court a "Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation Arising from the Exxon Valdez Oil Spill" (herein referred to as the Plan of Allocation). With minor variations and with amendments having to do with fish processors which are not relevant to the moving cannery workers' contentions, the court granted final approval of the Plan of Allocation by its Order No. 317, June 11, 1996.¹¹ Under the Plan of Allocation, the cannery workers' matrix share of all recoveries was set at 0.53%. The Plan of Allocation contemplated the negotiation of a plan of distribution for each claim category, including the cannery worker claim category. The Plan of Allocation expressly provided that:

⁷See Docket No. 9669-1. This agreement replaced an earlier Joint Prosecution Agreement.

⁸Id. at 1.

⁹Id.

¹⁰Docket No. 6591, Ex. C.

¹¹Docket No. 6806.

This Plan of Allocation and the Plan of Distribution will apply to all recoveries in which signatory plaintiffs [parties to the Joint Prosecution Agreement] share, including recoveries already collected, the collected but undistributed Native/Municipality Settlements, uncollected recoveries identified herein, and any additional recoveries which signatories obtain through trial or settlement."^[12]

In identifying the cannery worker claim category, reference was made to only the 1989 losses of cannery workers because, at the time the Plan of Allocation was negotiated and approved, the cannery workers had no other pending claims. However, as discussed below, the cannery workers' claims for 1990 and thereafter were reinstated by the Ninth Circuit Court of Appeals, which led to a further settlement by cannery workers with Exxon and the recovery of an additional \$3,067,646.00.

In due course, the Cannery Worker Plan of Distribution was negotiated¹³ and approved by the court.¹⁴ The plan sets forth the recoveries which are subject to distribution pursuant to a supplemental claims program, projected future recoveries, and a final distribution. In the latter regard, the Cannery Worker Plan of Distribution expressly recognized the fact that the cannery worker claim category had then exceeded its 0.53% matrix share of recoveries by all plaintiffs. In this regard, the plan provided: "[i]n the Final Distribution to be conducted once all of signatories' recoveries are collected, distributions to cannery workers

¹²Docket No. 6591, Ex. C, p. 40 (emphasis supplied).

¹³See Docket No. 9285-1.

¹⁴Docket No. 7105.

will be adjusted to account for these 'prepayments.'"¹⁵ The Plan of Distribution discussed future recoveries and the expectations of the parties. However, the plan also recognized that:

Exxon has appealed the judgments against it, thereby delaying the date when signatories ultimately collect all their recoveries, and creating risk that the full amounts might never be collected.^[16]

The plaintiffs expected to prevail in Exxon's appeals. Had that result been achieved, there would have been no difficulty whatever in making the final adjustments to equalize distributions to all of the cannery workers – those who had received excess payments as well as those who had not, and have not, received their full, final share. The plaintiffs did not prevail on appeal, and some cannery workers remain underpaid.

The Cannery Workers' Settlement with Exxon

As mentioned above, this district court had dismissed the cannery workers' complaints against Exxon for compensatory damages, and that decision was reversed. In re the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001). In October of 2003, a settlement was reached between Exxon and the Cannery Workers Settlement Class.¹⁷

¹⁵Docket No. 9285-1 at 6. At this point, the Plan of Distribution makes express reference to a like provision in the Plan of Allocation, pages 38-39.

¹⁶Id. at 6-7 (emphasis supplied). Counsel "expect[ed]" and in considering the Cannery Worker Plan of Distribution there was an "assumption" that the cannery worker claim category would be allocated over \$27 million. As we shall see, because of the results of Exxon's appeals, the cannery worker allocation was far less than expected.

¹⁷Docket No. 9672-2.

The Settlement Agreement with Exxon begins with a full recitation of the relevant underlying facts, including provision for the creation of a Cannery Workers Settlement Class in place of a state court certified cannery workers class. Designated settlement class counsel were Davis Wright Tremain LLP (Lead Counsel for All Plaintiffs in the Exxon litigation) and Randall Simpson of Jermain Dunnagan & Owens PC. Exxon agreed to pay the settling cannery workers \$3,067,646.00. The Settlement Agreement expressly provided that: "[t]he QSF [EQSF] is designated as an escrow fund to receive and designate the settlement proceeds of the Settlement Agreement as provided herein."¹⁸

The Settlement Agreement contemplated application to this court for both preliminary and final approval of the Settlement Agreement and the entry of a final judgment, dismissing with prejudice all claims of the settling cannery workers. The Settlement Agreement also contemplated the issuance of an agreed upon, form notice to the cannery workers.

Lead Counsel and separate cannery workers' class counsel moved for an order granting preliminary approval of the cannery workers' Settlement Agreement.¹⁹ As had been the procedure in this litigation since the initial organization of plaintiffs' counsel in 1989, Liaison Counsel made all filings in this litigation available to all counsel. In a declaration²⁰ in support of the foregoing motion,

¹⁸Id. at 5, ¶ 2.17.

¹⁹Docket No. 7815.

²⁰Docket No. 7816.

Lead Counsel represented, consistent with the Settlement Agreement, that:

[a]fter settlement between the parties, the Cannery Workers Settlement Class will have no other compensatory damages Claims remaining against Exxon in this Action or in any State Court Action based in whole or in part on the Exxon Valdez oil spill. However, the Cannery Workers Settlement Class will participate in a punitive damages recovery as absent class members of the mandatory punitive damages class certified by the district court in the Action.[²¹]

Also consistent with the Settlement Agreement, Lead Counsel's declaration states:

[d]istribution of the Settlement Amount will be by court-approved plan and the Parties shall bear their own costs and attorney fees.[²²]

Consistent with the Settlement Agreement, Lead Counsel proposed the required publication and notification of the settlement. The motion for preliminary approval was granted;²³ and, when the notice time had run, Lead Counsel and cannery workers' counsel moved for an order granting final approval of the Settlement Agreement.²⁴ The motion was supported by numerous affidavits reflecting compliance with the publication and mailing of notice to all members of the Cannery Workers Settlement Class as required by the order granting preliminary approval. No objections were received. By Order No. 367, the court granted final approval of the settlement between

²¹Docket No. 7816 at 4, ¶ 7.

²²Id. at 5-6, ¶ 8.

²³Docket No. 7828.

²⁴Docket No. 7892.

the Cannery Workers Settlement Class and Exxon.²⁵ No appeal was taken, and the settlement amount was deposited in the EQSF.

Before moving forward, and because the moving cannery workers rely upon the substance of the notice which they were given, the court has focused upon the express terminology of the notice.²⁶ The notice recites that:

- (1) the settlement agreement provides for the payment of \$3,067,646.00, less certain attorney fees and costs, in settlement of the cannery workers' lost income claims after January 1, 1990;
- (2) the settlement "does **NOT** bar the participation" of members of the Cannery Workers Settlement Class in the mandatory punitive damages class;
- (3) the \$3,067.646.00 paid under the settlement:
will not be paid to you, or other class members, at this time. Rather, monies from this settlement will be deposited into a fund managed by a court-appointed administrator. Monies from other settlements, as well as from any jury verdicts will be paid into the fund. The monies collected in the fund will be paid to all plaintiffs according to a plan of distribution, which has been approved by the Court.[²⁷]
- (4) individual cannery workers may exclude themselves from the class upon giving notice to Lead Counsel;
and

²⁵Docket No. 7954.

²⁶The original, large type version of the notice that was mailed and published appears in the record at Docket No. 7815, Ex. C.

²⁷Id. at 4 (emphasis supplied).

(5) individual cannery workers might object to the settlement, in person or through counsel.

No cannery workers opted out of the settlement, nor did individual cannery workers or their counsel object to the settlement. No appeal having been taken from the court's order granting final approval of the Settlement Agreement, the settlement monies were paid into the EQSF by Exxon for distribution in accordance with the Plan of Allocation and the 50 plans of distribution, including the Cannery Worker Plan of Distribution.

In a jury trial in 1994, the mandatory punitive damages class of All Plaintiffs was awarded \$5 billion. That award was approved by the district court and was appealed. In a first remand, the district court was directed to reduce the punitive damages award. The court reduced the award to \$4 billion. Another appeal was taken, and again the case was remanded for reconsideration in light of new United States Supreme Court law regarding the due process implications of large awards of punitive damages. This time the court after reconsideration increased the punitive damages award from \$4 billion to \$4.5 billion. Exxon appealed again, and the Ninth Circuit Court of Appeals reduced the punitive damages award to \$2.5 billion. Exxon sought and was granted a writ of certiorari by the United States Supreme Court, which in due course significantly revised maritime law so as to "cap" punitive damages in admiralty cases at no more than the amount of compensatory damages,

in this instance \$500 million.²⁸ Once the case was returned to this court, final judgment was entered reducing the jury verdict by 90% (to \$500 million), which was then paid (with interest) to the EQSF Administrator. The EQSF Administrator has since been and is now in the process of disbursing all funds received, after allowance for attorney fees and costs, to all of the claimants pursuant to the Plan of Allocation and their respective 50 plans of distribution.

Sixteenth Application for Distribution

In August of 2009, in recognition of the advanced stage of these distributions, Lead Counsel on behalf of the EQSF Administrator applied to the court for a seventh distribution of punitive damages.²⁹ The seventh application was in fact not one for "distribution," but rather sought authorization for the EQSF Administrator to set aside from the ongoing distributions to all claimants the funds anticipated to be necessary for purposes of resolving either uncertainties or disagreements about the distributions. At this time, the EQSF Administrator calculated that it would take \$1,547,593.00 to bring underpaid cannery workers' distributions to 100% of their final percentage shares pursuant to the Cannery Worker Plan of Distribution.³⁰ This action was taken at the request of "various individual cannery workers" who were currently scheduled to receive less than their final percentage

²⁸Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

²⁹Docket Nos. 9269.

³⁰Docket No. 9270 at 5-6, ¶ 8.

shares.³¹ By order of October 30, 2009,³² the court granted Lead Counsel's seventh application authorizing the creation of certain reserves, including one for cannery workers. As reflected in the order, cannery workers appeared in connection with the seventh application through counsel and sought additional information, which was provided to them by the EQSF Administrator while the seventh application was under consideration. The court itself sought additional information from the EQSF Administrator, asking for his explanation of how it could be that some cannery worker claimants had been overpaid while others had been underpaid.

The EQSF Administrator responded with a supplemental declaration,³³ which affords the court and counsel for the objecting cannery workers a full, detailed explanation of what has taken place. As this court has done in preceding paragraphs of this decision, the EQSF Administrator leads the court and others interested in the seventh application through the various agreements. The EQSF Administrator explains how it was that the cannery worker claim category received more than its 0.53% matrix share of recoveries. In his declaration, the EQSF Administrator explains that the total amount he has received for all claimants participating in the Plan of Allocation from all sources, including monies received from Exxon, amount to \$1,105,689,467.82 such that the cannery worker claim category share of 0.53% amounts to

³¹Id. at 5.

³²Docket No. 9395.

³³Docket No. 9285.

\$5,865,648.66. "In fact, the members of the Cannery Worker category have already received \$9,101,986.24 from all sources to date."³⁴ In short, because of substantial recoveries achieved by some cannery workers outside the EQSF process, cannery workers as a claim category are overpaid, even though some individual cannery workers who did not receive significant distributions from other sources are underpaid.

In approving the seventh application and creating a reserve for cannery workers, the court expressed its skepticism about the cannery workers' arguments that they were somehow entitled to additional distributions even though the claim category had, as demonstrated by the EQSF Administrator, received more than its 0.53% matrix allocation. Nevertheless, the court approved the EQSF Administrator's request to create a \$1,547,593.00 reserve "for the potential benefit of cannery worker claimants."³⁵ The seventh application was granted October 30, 2009. The court heard nothing further from the cannery workers until Lead Counsel filed the EQSF Administrator's application for a sixteenth distribution, a final distribution to those plaintiffs having unimpaired claims.³⁶ The

³⁴Docket No. 9285 at 7-9, ¶¶ 9, 10 & 11.

³⁵Docket No. 9395 at 19.

³⁶Processing of claims that are subject to liens, judgments, assignments, etc., take much longer to process.

moving cannery workers objected³⁷ to the sixteenth application, which was granted by this court's order of November 10, 2010.³⁸

The moving cannery workers had sought to have the court preserve rather than vacate the \$1,547,593.00 reserve created by the court's order on the seventh application for distribution. The court rejected the moving cannery workers' arguments, explained its reasons for doing so, and authorized the EQSF Administrator to proceed with the sixteenth distribution. The motion for reconsideration now before the court followed.

Motion for Reconsideration

With the foregoing history of the cannery worker claim category during the twenty-year development of this case, the court now turns to the moving cannery workers' arguments in support of their motion for reconsideration. As indicated and explained in the court's order of December 1, 2010,³⁹ the court is treating the motion for reconsideration as one brought pursuant to Rule 59(a)(2), Federal Rules of Civil Procedure. As explained in that earlier order, because of the way in which the moving cannery workers' arguments have evolved while the motion for reconsideration was being briefed, the court has in substance determined to reconsider its order of November 10, 2010. However, and for the specific reasons set out below, the court has concluded that there has been no manifest error of fact or law, nor is there any newly

³⁷Docket No. 9653.

³⁸Docket No. 9658.

³⁹Docket No. 9681.

discovered evidence pertinent to the court's resolution of the sixteenth application for distribution of funds.

The moving cannery workers contend that they were misled by the notice of the class settlement with Exxon, that the settlement dealt with losses not covered by the Cannery Worker Plan of Distribution, and that the \$3 million settlement funds obtained for cannery worker losses after 1989 should be distributed to cannery workers only. Based upon the record of proceedings with respect to the cannery worker claim category, the court finds that the moving cannery workers were not misled. The notice of settlement expressly stated that no money would go directly to the settling cannery workers and that the money would be disbursed out of the EQSF to "all plaintiffs."⁴⁰ Lead counsel's declaration in support of preliminary approval of the cannery workers' settlement did not state otherwise and could not change the Settlement Agreement in any event. Moreover, the Settlement Agreement was available to counsel for all cannery workers through court-appointed Liaison Counsel. The Settlement Agreement and the published notice of the settlement leave no doubt whatever that the parties to the Settlement Agreement contemplated that the full \$3 million settlement would go to the EQSF Administrator for distribution in accordance with the various plans of distribution.

The moving cannery workers correctly point out that their settlement with Exxon expressly dealt with cannery worker losses after

⁴⁰Docket No. 7815, Ex. C at 4, ¶ III. See also, Oesting Declaration appended to Docket No. 7892, Exs. B-K.

1989. But each of the Joint Prosecution Agreement, the Plan of Allocation, and the Cannery Worker Plan of Distribution has application to all recoveries achieved by the cannery workers.⁴¹ The court-approved Settlement Agreement between cannery workers and Exxon, as well as the notice published and mailed to all cannery workers, expressly advised the cannery workers that: (1) the settlement monies would not go directly to them, and (2) the monies would go to the EQSF for all plaintiffs. The settlement funds did in fact properly go to the EQSF for management and distribution pursuant to the Plan of Allocation and the 50 plans of distribution. The Plan of Allocation entitles the cannery worker claim category to a 0.53% matrix share of all recoveries, which the cannery workers have, as a claim category, received. The moving cannery workers have no direct claim upon the \$3 million settlement reached with Exxon with respect to post-1989 cannery worker losses.

The moving cannery workers point out that they may be underpaid. As a result of distributions prior to that now under consideration, cannery workers have received from the EQSF their pro-rata share of funds allocated to the cannery worker claim category. As has been recognized since the time of negotiating the Cannery Worker Plan of Distribution, some cannery workers achieved significant recoveries on account of losses suffered by them as a result of the Exxon Valdez oil spill, but outside the Plan of Allocation and the Cannery Worker Plan of Distribution. As a con-

⁴¹Joint Prosecution Agreement, Docket No. 9669-1, ¶ 2.a; Plan of Allocation, Docket No. 6591, Ex. C at 40; Cannery Worker Plan of Distribution at 3 & 14, Docket No. 9285-1.

sequence of the latter recoveries, it has been known since at or before the time the Cannery Worker Plan of Distribution was negotiated that some cannery workers were and might remain underpaid because some others had been significantly overpaid for Exxon Valdez oil spill losses which were in whole or partly compensated outside the EQSF proceedings. The Cannery Worker Plan of Distribution made it very clear that such under-payments/over-payments were known when the plan was agreed upon and approved by the court. The Plan of Distribution called for a final accounting or equalization.

In 1997, when the Plan of Distribution was executed, it was anticipated that All Plaintiffs would benefit from a huge punitive damages award. Had that award been affirmed and collected, the cannery worker claim category would have received 0.53% of the punitive damages award, plus interest paid by Exxon. But the punitive damages award took a 90% "hit" (a reduction from \$5 billion to \$500 million) as a consequence of the favorable ruling received by Exxon from the United States Supreme Court. As a consequence, the cannery worker claim category remains overpaid because of non-EQSF payments received by some cannery workers. All of the funds presently held by the EQSF Administrator are, pursuant to the Plan of Allocation, committed to claim categories other than the cannery workers. There is no more money to allocate to the cannery worker claim category. The Cannery Worker Plan of Distribution expressly recognized that the over-payment/under-payment situation could persist, "creating [a] risk that the full amounts [anticipated] might

never be collected."⁴² Some or all of the moving cannery workers have suffered a proportionate share of the shortfall. What has happened is no one's fault. There is no one to blame. The results achieved by some of the cannery workers are certainly not what they hoped for and expected; but the moving cannery workers have not been paid less than what was agreed to and approved by the court in the Cannery worker Plan of Distribution.⁴³

At oral argument, counsel for the EQSF Administrator expressed the Administrator's as well as Lead Counsel's long-standing concerns for the cannery workers' situation. They recognize, however, as does the court, that the EQSF Administrator is bound to follow the Plan of Allocation and the Cannery Worker Plan of Distribution. The EQSF Administrator has done so in seeking the vacatur of the \$1.5 million reserve set aside for potential distribution to cannery workers by the court's order on the seventh application for distribution of funds. The Plan of Allocation and Cannery Worker Plan of Distribution obligate the EQSF Administrator to refuse any further allocation to the cannery worker claim category because it has received \$9,101,986.24, whereas the cannery worker claim category matrix share was \$5,865,648.66.⁴⁴

⁴²Docket No. 9285-1 at 6-7.

⁴³What has befallen the cannery workers is of course true for all of the plaintiffs. No doubt all of the plaintiffs expected to share in a \$5 billion-plus-interest punitive damages award. Also, Lead Counsel reports that members of one or more other claim categories are also underpaid for that reason.

⁴⁴Docket No. 9285 at 7, ¶ 9.

Because the moving cannery workers have no direct claim upon or right to the funds received by the EQSF Administrator as a result of the Cannery Worker Settlement Agreement, the \$1.5 million reserve created by the court's order of October 30, 2009, on the seventh application for distribution was necessarily and appropriately vacated by the court's order of November 10, 2010, on the sixteenth application for distribution. The reserve must be distributed in accordance with the Plan of Allocation and the 49 other plans of distribution. The moving cannery workers' request that the full settlement proceeds – just over \$3 million – be reserved for them must be rejected.

Counsel for the moving cannery workers argues that he has insufficient information to understand what has been distributed to his clients. If counsel was unable to get that information from his clients (each of whom would have received written explanations of disbursements from the EQSF Administrator as they were made), there were other sources of information. Moving cannery workers might have gotten information from other counsel for cannery workers provided by the EQSF Administrator in the course of proceedings with respect to the seventh application. The EQSF Administrator provided all concerned with his sixteenth application for distribution with information about the cannery workers' situation. As indicated above, the court itself sought more information from the EQSF Administrator with respect to his initial explanation of the under-payment/over-payment situation, and the EQSF Administrator then filed his Supplemental Declaration of

August 31, 2009,⁴⁵ which explained in great detail the cannery workers' situation and how it came about. Counsel for the moving cannery workers had access to all of the foregoing from either or both of direct mailings and CM/ECF.⁴⁶ In the Supplemental Declaration, the EQSF Administrator adequately explains to the court and counsel for the moving cannery workers how the allocation to the cannery worker claim category has been calculated. The court is unpersuaded that the moving cannery workers need any further information to understand their situation, which is: there is no more money to allocate to the cannery worker claim category. Because the bar to any further money being available for distribution to the moving cannery workers has to do with the Plan of Allocation – an over-allocation to the cannery worker claim category rather than a distribution issue – it is quite irrelevant for purposes of the EQSF Administrator's sixteenth application for distribution who amongst the cannery workers are overpaid and who are underpaid.

Counsel for the moving cannery workers argues that his clients were not told of Lead Counsel's agreement to offset fees and costs owed by All Plaintiffs in connection with a failed claim against Exxon by the municipal plaintiffs against money owed by Exxon to the EQSF because of the cannery workers' settlement agreement. The offsetting agreement⁴⁷ cost the moving cannery workers nothing and

⁴⁵Docket No. 9285.

⁴⁶Complete filings in this case have been available to all claimants' counsel through CM/ECF since February, 2006.

⁴⁷Declaration of Oesting (Mar. 24, 2004), Docket No. 7892 at 5, ¶ 7.

made good practical sense. Because of the Joint Prosecution Agreement and the Plan of Allocation, the cannery workers/Exxon settlement proceeds went into the EQSF where those proceeds were subject to joint prosecution costs, just as were all other recoveries that went into the EQSF. Thus, the offsetting agreement had no effect upon the cannery workers' allocation. Had Exxon paid the full settlement funds to the EQSF and the EQSF Administrator paid out to Exxon the costs which it was entitled to recover, the same result would have been achieved for the moving cannery workers as well as all other claimants.

In requesting the court to reserve \$3 million – the cannery workers/Exxon settlement funds – the moving cannery workers in substance ask the court to take monies from all of the other 49 claim categories and hold it for cannery workers who are charged with knowing, from the time the Cannery Worker Plan of Distribution was approved, that: (1) the category was overpaid, (2) that the cannery workers as a class might end up with an overpayment, and (3) that there could be a shortfall for some of the cannery workers which they would have to suffer. The cannery workers have gotten no less than they agreed to as a group. What the moving cannery workers seek would visit an unfair result on everyone but the cannery workers. What the moving cannery workers ask could only be implemented by altering the 1996 Plan of Allocation. It is far too late, and would be far too costly (for all plaintiffs) for the court to require the EQSF Administrator to undertake a change in the Plan of Allocation.

In its November 10, 2010, order on the sixteenth application for distribution, the court suggested that the EQSF Administrator pursue his suggestion of a possible cy-pres payment once the EQSF Administrator is ready to close out the EQSF. The EQSF Administrator and the court are thus considering an avenue for equitable relief for claimants who are underpaid. In final briefing and in oral argument, counsel for the moving cannery workers appears to reject the idea of a cy-pres remedy, suggesting that it creates a false hope and is inconsistent with the Plan of Allocation.

The court acknowledges counsel's concern for consistency, and the court has no desire to create any false hope. But after the court had orally indicated a willingness to take any possible cy-pres remedy off the table for the moving cannery workers, counsel for the EQSF Administrator persisted that the idea should not be abandoned. It is not at all uncommon in very large class action proceedings such as this for a fund administrator to complete his duties with a modest surplusage that cannot economically be distributed to all claimants. In those cases, and quite likely here where we have over 30,000 claimants and many more separate claims, it would surely be uneconomical at the very end to make what would likely be a de minimus distribution to so many people. Such an attempt could incur costs in excess of the amount to be distributed. It is not unusual for residual funds to go to charity. Here, it might not be amiss to distribute any remaining funds to the small number of claimants who are underpaid. Whether or not there will be any such surplus for a possible cy-pres to anyone is

of course an open question. What with the ongoing costs of general administration, including continuing appeals to the Ninth Circuit Court of Appeals which continue to run up the costs of closing out the EQSF, the EQSF Administrator's costs could exceed reserves, unclaimed distributions, and earned interest. However, if there is a surplus, the EQSF Administrator should consider an appropriate cy-pres remedy.

Conclusion

Treating the moving cannery workers' motion for reconsideration as a Rule 59(a)(2) motion for rehearing, and having in fact reconsidered the November 10, 2010, order, the court after full briefing and oral argument concludes that there has been no manifest error of fact or law, that there is no newly discovered evidence, and therefore the motion for reconsideration is denied. The court confirms its order of November 10, 2010. The EQSF Administrator shall proceed as directed by the order of November 10, 2010 (pages 11 through 13).

DATED at Anchorage, Alaska, this 7th day of December, 2010.

/s/ H. Russel Holland
United States District Judge