AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 20:3 (1996) 167–170

LETTER

Dear Dr. Champagne:

An article by Professor Joseph G. Jorgensen entitled "Ethnicity, Not Culture? Obfuscating Social Science in the *Exxon Valdez* Oil Spill" recently appeared in the *American Indian Culture and Research Journal*. The article discussed Order No. 190 of *In re the Exxon Valdez*, Case No. A89-0095 (March 23, 1994), in which the court granted Exxon Corporation's motion for summary judgment on Native Alaskans' claims for non-economic damages stemming from the *Exxon Valdez* oil spill. The article is based on several serious misconceptions.

In Order No. 190, a copy of which is enclosed,[1] the court considered the Alaska Natives' claims that the *Exxon Valdez* oil spill damaged their culture and subsistence way of life. The Alaska Natives argued that their claims were cognizable as a maritime public nuisance. Private individuals can recover for a maritime public nuisance if they can show a special injury, different in kind from that suffered by the general public. The court, after considering the applicable case and statutory law, ruled that Alaska Natives' cultural claims were not of a kind different from those suffered by the general public. The court noted that all Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives. Thus, the court held that the Alaska Natives' claims were not different in kind from that of the general public and did not state cognizable claims for maritime public nuisance.

The court also held that the Alaska Natives could not establish a claim for private nuisance because they did not have a possessory interest in the oiled land. A claimant must have a possessory interest in the burdened land to support a private nuisance claim. The land in question was owned by either the United States, the State of Alaska, or various Native Corporations who pursued their own damage claims.

Next, the court held that even if the Alaska Natives could develop a claim for nuisance, such a claim could not be asserted under either federal common law or maritime law. Such claims, the court held, are preempted by the Federal Water Pollution Control Act.

Finally, the court concluded that:

> In the last analysis, what the Alaska Natives seek is a recovery which is not founded upon any legal theory currently recognized by maritime law. [Order No. 190 at 9]

After reaching its decision, the court concluded with four pages of *dicta,* in which the court addressed its concern that "rural Alaska residents might view this decision as evidencing a lack of understanding of their commitment to a subsistence lifestyle. . . ." *Id.* at 10. *Dicta* is an incidental opinion which does not embody the resolution or determination of the court.

Professor Jorgensen wrongly leaves the impression that Order No. 190 granted Exxon's motion for the reasons stated in the court's *dicta,* as opposed to the legal conclusions stated earlier in the order. None of the legal reasons which the court relied upon in granting Exxon's motion are mentioned in Professor Jorgensen's article.

The article compounds the error of focusing on the court's *dicta* by claiming that the court's decision was influenced by social scientists hired by both plaintiffs and Exxon. In particular, the article states that the court was unduly influenced by Paul Bohannon, whom Professor Jorgensen declares to be a social scientist hired by Exxon. The article states that the court's "findings appear to have been strongly shaped either by a report prepared by . . . Bohannon . . . or by Bohannon's testimony on deposition." Article at 6. In briefing and arguing its motion before the court, Exxon neither relied upon nor mentioned Bohannon. Rather, Exxon's briefs were devoted to the legal arguments discussed above.

A second, perhaps more serious error, occurs at pages 91–92 of the article. Professor Jorgensen states that 15,000 non-native commercial fishing plaintiffs will share the jury award of $5 billion in punitive damages. He then makes an assumption about attorneys' fees and states that the commercial fishermen will collect $253,333 each. The article further states that Native Alaskans will not share in the punitive damages award but will only share in the $20 million settlement the Native Alaskans made with Exxon.

Professor Jorgensen assumes that attorneys' fees will deduct $4 million from the settlement, leaving the 3,500 Native Alaskan plaintiffs with $4,570 each.

Professor Jorgensen's assumptions about how damage awards will be allocated are wrong in a number of respects. First, sharing in the punitive damages award is not limited to commercial fishermen. All plaintiffs, including the Native Alaskans, share in the punitive damages award. The plaintiffs are not limited to either commercial fishermen or Natives, but include another twelve categories of claimants. Second, the punitive damages are not divided equally, but will be distributed according to a damage matrix recently submitted to the court for approval. Third, once the unnamed class members are identified, the total number of plaintiffs may exceed—by tens of thousands—the numbers reported by Jorgensen. Fourth, the amount of attorneys' fees varies depending upon what type and class of plaintiff the attorney represents.

Professor Jorgensen's assertion that the Native Alaskans will collect only $4,570, while non-native commercial fishermen will collect $253,333 is patently wrong. Moreover, Professor Jorgensen fails to mention that the Native Alaskans shared in the $41.7 million distributed by the Trans-Alaska Pipeline Liability Fund and the $98 million settlement with the Alyeska Pipeline Service Company. The Native Alaskans will also benefit from the multi-million-dollar awards that Native corporations have received from the same sources. Additionally, as mentioned in the *dicta* of Order No. 190, the Native Alaskans will derive indirect benefits from Exxon's payment of over $1 billion in criminal sanctions and civil damages to governmental entities. These funds are used in restoring, rehabilitating, and augmenting natural resources in spill affected areas.

Professor Jorgensen concludes by stating that the Native Alaskans were "ill served by their attorneys and their own social scientists. . . ." Article at 93. The criticism is unfair. Professor Jorgensen fails to recognize that social science alone could not surmount the legal hurdles the Native Alaskans faced in attempting to make a claim for cultural damages. He states that Exxon's social scientists "muddied the waters but carried the day," resulting in "grave" consequences for the Alaska Natives. *Id.* Exxon's social scientists, however, had no impact on Order No. 190. Moreover, given that the Native Alaskans will benefit from over $1 billion in payments before the $5 billion punitive damages are

distributed, the consequences are not nearly as "grave" as Professor Jorgensen suggests.

Anyone who studies the *Exxon Valdez* litigation should keep in mind that the court has issued, as of February 29, 1996, 313 substantive orders. Nearly 6,700 documents have been filed, many accompanied by box-loads of exhibits. Hundreds of other documents have been filed and scores of orders entered in related cases involving the Trans-Alaska Pipeline Fund and the governmental entities' suits against Exxon. To focus on the *dicta* of a single order without considering the legal conclusions of that order in relation to the complete case results in the unfortunate dissemination of misinformation. The court has ignored the numerous errors that continually appear in newspapers and the like. The fact that here misinformation has found its way into a scholarly journal causes us to respond in the hope that your readers can be informed that the outcome of the *Exxon Valdez* litigation for Alaskan Natives is not what they have been led to believe.

Sincerely,

H. Russel Holland

NOTE

1. See Order No. 190 of *In re the Exxon Valdez*, case no. A89-0095 (March 23, 1994), U.S. District Court for the District of Alaska.