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Attorneys for defendants
Exxon Corporation, Exxon Shipping Company
Exxon Company, USA, Exxon Shipping Company,
as owner of the EXXON VALDEZ and/or
Exxon Pipeline Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

SECOND NOTICE OF ONGOING DISCUSSIONS AND REQUEST FOR EXTENSION OF TIME P-1 THROUGH P-12, P-16 THROUGH P-18, P-13 THROUGH P-15, P-22, P-40 THROUGH P-42, P-73 THROUGH P-76, P-114, P-115, D-1, D-2, D-5, D-6, D-10, D-3, D-11 THROUGH D-17, AND D-22 (Document Retention -- All Cases)

As reported to the Court in the parties' initial Notice of Ongoing Discussions and Request for Extention of Time filed on May 31, 1989, the undersigned parties have, pursuant to this

283

Court's Order No. 3, been meeting and engaging in substantive discussions in an attempt to agree upon a proposed document and physical evidence retention order for all cases in this consolidated proceeding. Thus, the parties met on May 30 and 31, 1989 to discuss the proposed retention order and the Court's tentative rulings and suggested modifications. The parties have met and/or telephonically conferred again on May 31, 1989, and June 2 and 4, 1989. As previously reported, these discussions have been productive.

The parties believe that they are very close to a final proposal. Given the number of individuals, entities, owner-companies, state agencies and the like who or which need to review and approve the revised proposal, however, the parties require another 48 hours in which to conclude their discussions and submit their proposal. The parties now anticipate that such discussions can be concluded and that a revised proposed retention order, along with any final comments of the parties relating thereto, can be presented to the Court by 4:30 p.m. on Wednesday, June 7, 1989.

Accordingly, the undersigned parties respectfully request this Court to again extend the filing deadline for the submission of their revised proposed document and physical

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evidence retention order and any final comments relating thereto, to 4:30 p.m., on Wednesday June 7, 1989. No additional request for extension of time is contemplated.

Respectfully submitted at Anchorage, Alaska this 5th day of June, 1989.

Dated: June 5, 1989 BOGLE & GATES

By _____
Douglas J. Serdahely
Richard M. Clinton

Attorneys for defendants
Exxon Corporation (D-1)
Exxon Shipping Company (D-2),
Exxon Company, USA (D-5)
Exxon Shipping Company, as owner
of the Exxon Valdez (D-6) and/or
Exxon Pipeline Company (D-10)

Dated: June 5, 1989 BURR, PEASE & KURTZ, P.C.

By _____
for Charles P. Flynn

Attorneys for Defendants
Alyeska Pipeline Service Company (D-3),
Amerada Hess Corporation (D-11),
ARCO Pipe Line Company (D-12),
British Petroleum Pipelines, Inc. (D-13),
Mobil Alaska Pipeline Company (D-14),
Phillips Petroleum Company (D-15),
Sohio Alaska Pipeline Company (D-16) and
Union Alaska Pipeline Company (D-17)

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Dated: June 5, 1989 PRESTON, THORGRIMSON, ELLIS & HOLMAN

By _____
Frederick H. Boness

Attorneys for Defendant
State of Alaska (D-22)

Dated: June 5, 1989 SUSMAN, GODFREY & McGOWAN and
ASHBURN & MASON

By _____
Stephen D. Susman

By _____
Lewis F. Gordon

Attorneys on behalf of Plaintiffs
(P-1 through P-12 and P-16 through P-18

Dated: June 5, 1989 LAW OFFICES OF JOHN C. PHARR

By _____
Laurence Keyes

Attorneys on behalf of Plaintiffs
(P-13 through P-15, P-22,
P-40 through P-42, P-73 through P-76
P-114 and P-115)

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ORDER

IT IS SO ORDERED this _____ day of June, 1989

Honorable H. Russel Holland
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE	
THE EXXON VALDEZ	CASE NO. A89-095 CIVIL (Consolidated)

This document pertains to: ALL CASES.

MEMORANDUM OF DEFENDANTS D-3, D-11 THROUGH D-17, D-19 THROUGH D-21, AND D-24 RE PROPOSED ORDER FOR DOCUMENT AND PHYSICAL EVIDENCE RETENTION

Defendants, Alyeska Pipeline Service Company (D-3), et al. (hereinafter "Alyeska defendants"), respectfully submit the following Memorandum regarding the Order for Document and Evidence Retention under consideration by the Court:

1. INTRODUCTION.

Contemporaneous with the filing of this Memorandum, the Exxon defendants are filing a Memorandum, with Exhibits, concerning this matter. The Alyeska defendants join in Exxon's Memorandum and further join in requesting that the court adopt in full and without modification the proposed Order set forth in Exhibit A to the Partial Stipulation accompanying the Exxon Memorandum.

The following sections briefly detail the position of the Alyeska defendants on the issues remaining in dispute. These issues are: (1) the treatment of attorney work-product documents, and (2) the prospective application of this Order to class members in the event of any class certification. In addition, the Alyeska defendants address an issue of interpretation of the term "retain" as used in the proposed order.

2. THE PARTIES' COUNSEL, BOTH OUTSIDE AND IN-HOUSE, MUST BE ALLOWED TO DISPOSE OF THEIR WORK-PRODUCT MATERIALS.

A preservation order which effectively precludes the parties' attorneys from ever throwing away any piece of paper on which they have written is simply unworkable. By definition, virtually every document created by a party's attorney, or the attorney's assistants, in connection with this oil spill litigation falls within the scope of the proposed Order. Thus, any order which does not recognize and realistically deal with this fact would literally force the parties' attorneys to retain

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and store every piece of paper. Compliance with such an order would not only present onerous logistical and security problems, it would also have an undeniable chilling effect on counsels' efforts to gather and analyze information, communicate with clients, and generally prepare for the prosecution and defense of these actions.

The purported justification for such an order is the hypothetical possibility that some document created by or for a party's counsel, whether outside or in-house, might, despite its confidential, work-product, and privileged status, become discoverable at some indeterminate time in the future under some unspecified circumstances. Based on this possibility, the argument goes, all other parties should be given an opportunity to review "privilege lists" of all such documents and obtain some sort of judicial ruling on their discoverability in the future.

This highly speculative argument is without force. The likelihood is extremely remote that any such documents -- prepared by the parties' attorneys containing opinions, mental impressions, legal theories, etc., and relating to the oil spill and this litigation -- would ever be subject to discovery. Balanced against that remote possibility, however, is the absolute certainty of a very real and immediate burden on the attorneys and the Court, and the chilling effect it would impose on client communications. Indeed, the size and scope of the litigation

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would appear to require the immediate and on-going full-time involvement of the Court to go through the mountains of documents -- or lists prepared by counsel detailing such documents -- to determine their discoverability and/or their suitability for disposal. At the same time, the flow of information to and from the parties' attorneys would likely be severely and adversely impacted.

By contrast, defendants' proposal, set forth at Paragraph 5(b)(4) of defendants' proposal, provides ample protection of any legitimate need for preservation of such documents. Indeed, the language of defendants' current proposal is substantially broader (i.e., more burdensome and more potentially intrusive on work-product and attorney-client communication protections) than defendants' original proposal, inasmuch as defendants have worked vigorously in an effort to reach a workable compromise. Accordingly, to require retention in any respect beyond that provided for in defendants' proposal would create an unjustifiable burden wholly inconsistent with the rationale of federal discovery rules.

3. PROVISION SHOULD BE MADE IN THIS ORDER FOR APPLICATION TO PROSPECTIVE FUTURE CLASS MEMBERS.

The Alyeska defendants join in Exxon's argument on this issue and request that the language of Defendant's proposal be adopted. It is not premature to make this Order prospectively applicable to any new action that is

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filed. Moreover, it makes considerably more sense to deal with the document preservation issue in one order, at one time, rather than on a seriatim basis or separately in each action as it may be certified for class treatment.

4. USE OF TERM "RETAIN" MUST BE PROPERLY UNDERSTOOD.

Paragraph 5(a) of the defendants' proposal requires parties to "retain" subject evidence. Plaintiffs' counsel have insisted on the inclusion of such language. If this word is interpreted to permit parties to give evidence to non-parties with the understanding that the evidence so transferred is still subject to the "control of the parties" (that is, such evidence must be returned to the transferring party on demand), it is acceptable. If, however, the word "retain" would not permit a transfer even with such an understanding, it is unacceptable and should be stricken, since it unnecessarily restricts the parties from investigating and preparing their cases with no real benefit to be gained by such restriction. The prohibition against destroying or permitting the destruction of such evidence, along with the requirement that a legible copy (for documents) or an accounting (for physical evidence) be retained satisfies every legitimate need without the additional restrictions imposed by the "retention" requirement.

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DATED: June 7, 1989.

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By _____
Charles P. Flynn

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State of Alaska, Department of Environmental Conservation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	

D-22's COMMENTS ON ORDER NO. 3
(DOCUMENT RETENTION -- ALL CASES)

Pursuant to this Court's Order No. 3, counsel for class plaintiffs and defendants have been meeting for the purpose of developing a mutually agreeable pretrial order concerning evidence retention.

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Attached to this memorandum is a Proposed Order prepared by some of the defendants in this action, including the State of Alaska. The State understands that the class action plaintiffs have two main objections to the attached Order. First, the State understands the class action plaintiffs object to the inclusion of paragraph 3, which relates to notice to class members. The State further understands that defendants Alyeska and Exxon believe this paragraph should be included in the Proposed Order. The State does not have a position on whether this paragraph should or should not be included.

Second, the State understands that plaintiffs will object to paragraph 5(b)(4), which relates to preservation of documents which may be subject to the claim of attorney-client privilege or attorney work product. The State likewise objects to paragraph 5(b)(4) of the attached Proposed Order.

The State's objection is two-fold. First, the State believes that notes and/or transcripts of witness interviews, even if conducted only by an attorney or an employee of the attorney, should be preserved. The attached Order would allow the destruction of such notes or transcripts. The State recognizes that attorney's notes from a witness interview may be subject to a claim of attorney work product and, therefore, not discoverable. On the other hand, the attorney work product privilege is only a qualified privilege and, under appropriate circumstances, the court

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may require production of materials which would otherwise be privileged. The State, therefore, believes that attorney notes from witness interviews should be retained so that the court can require production if it decides in an appropriate instance that the attorney work product privilege does not preclude their production.

Second, the State believes that if a document is prepared by an attorney and transmitted outside that attorney's office or law firm to either a client or attorneys in another law firm, then at least one copy of the document so transmitted should be preserved. In discussion between counsel for class plaintiffs, defendants and the State, counsel for Exxon and Alyeska contended that the requirement that counsel keep a copy of documents transmitted outside the attorney's office would be burdensome. The State recognizes that a requirement to retain a copy of any document transmitted outside the office will add some burden to counsel. The State, however, believes that the incremental burden is minor in comparison to the greater need to preserve documents which may be subject to discovery, either because a court rules they are not subject to the attorney-client privilege or attorney work product privilege.

In conclusion, the State, therefore, does not support the language of paragraph 5(b)(4) of the attached defendants' draft and does not take a position with respect to the inclusion or exclusion

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of paragraph 3. In all other respects, the State does support approval by the court of the attached Proposed Order.

DATED this 7th day of June, 1989.

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: for: Barbara Herman
Assistant Attorney General

PRESTON, THORGRIMSON,
ELLIS & HOLMAN

By:
Frederick H. Boness

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

ORDER NO. ___
(Document and Physical Evidence Retention--All Cases)

The Court, having considered the parties' initial proposals and briefing regarding a requested order requiring the retention of documents and physical evidence during the course of this consolidated litigation, and having further issued Order No. 3 herein, giving the parties the Court's tentative guidance on remaining issues in dispute, directing the parties to meet and attempt to "fine tune" the proposals consistent with the Court's guidance, and allowing all parties an opportunity to comment on

the proposed order, and having further considered all parties' submissions pursuant to Order No. 3, now hereby orders as follows:

1. Interim Document Retention Order Superseded.

This Court's interim document retention order in Case No. A89-096, issued on April 24, 1989, is hereby superseded by the instant order, which shall take effect immediately.

2. Application of Order to All Named Parties.

The instant order shall apply to all named parties to this consolidated litigation.

3. Application and Notice to Class Members in the Event of Certification.

In the event that this matter is certified as a class action, the substance of the evidence preservation requirements of this Order shall be included in the initial notice to class members and the terms hereof shall immediately thereafter become binding on all such persons or entities who have not previously become subject thereto by virtue of their capacities as named plaintiffs. The form, contents and manner of such notification, and the financial responsibility therefor, will be addressed by the parties and/or the Court at a later date. Prior to any such certification, however, this Order shall not apply to persons or entities who or which are not named parties herein.

4. "Document" Defined.

As used in this Order, "document" shall mean and include any writing, field notes, drawing, film, videotape, chart, photograph, phono or tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained and any other form of tangible preservation of information.

5. Preservation of Documents and Physical Evidence Generally.

(a) Documents and Physical Evidence to be Preserved. During the pendency of this litigation, each of the named parties herein and their respective officers, agents, servants, employees and attorneys, shall retain and neither destroy nor permit the destruction of any document or physical evidence within the parties' possession, control or custody, that relates, refers or pertains to or which may lead to evidence relevant to: (1) (a) the terms, development or amendment since 1977 of any marine oil spill contingency plan of any party pertaining to waters in and around the United States, and the implementation of any such plan, since January 1, 1983, in response to spills greater than 5,000 barrels; (b) any Prince William Sound oil spill contingency plan and its development,

amendment, review, analysis, approval, disapproval, comments and communications in regard thereto, and implementation at any time; (2) (a) the T/V EXXON VALDEZ, its crew and its maintenance generally from the date it was placed in service; (b) cargo and operations information regarding the loading and voyage of the T/V EXXON VALDEZ to Valdez on or about and after March 23, 1989; (3) the oil spill in Prince William Sound which is the subject of this litigation ("the oil spill"); (4) the efforts by any person, entity or agency to clean up, contain, disperse, burn and/or monitor the oil spill and any review, analysis, testing, observation, approval and disapproval of such efforts; (5) any investigation by any person, entity or agency (including any law enforcement agency) into the circumstances, effects and/or causes of the oil spill; (6) any claims or damages alleged to result, directly or indirectly, from the oil spill or its aftermath; (7) the selection, training and supervision of, and rules, regulations and operating procedures for, crews and vessels transporting oil through or on Prince William Sound since January 1, 1980; and, (8) any policies relating to alcohol and drug abuse and enforcement of such policies on vessels transporting oil through or on Prince William Sound since January 1, 1977.

(b) Documents Which Need Not Be Preserved. Documents specifically excluded from paragraph 5(a) above are (1) interim drafts of writings prepared subsequent to June 1, 1989; (2) telephone message slips and electronically recorded or transmitted messages, provided that at least one copy of the original telephone logbooks and the electronically recorded or transmitted messages (whether in "hard copy" form or by electronic storage) be preserved; (3) exact duplicates of any documents, provided that one copy of such be preserved and provided further that any modification of and/or handwriting upon such duplicate transforms such "duplicate" into an original writing which must be preserved; and, (4) documents prepared subsequent to the initiation of this litigation, by parties' counsel, or their assistants, which have not been transmitted to management representatives of institutional clients (not including in-house counsel), to individual clients or to third persons.

(c) Use and/or Removal of Equipment. Equipment used and/or to be used by defendants and/or their contractors in oil spill cleanup activities may be removed from the Prince William Sound area and Alaska and/or may be used for any other normal business purpose anywhere else without consent of other parties or authorization of this Court, provided, however, that defendants and/or their contractors shall retain records which

are generated in the ordinary course of business which will demonstrate the acquisition, application and disposition of such equipment.

(d) Physical Evidence Which Need Not Be Preserved. Physical evidence specifically excluded from paragraph 5(a) above includes the following, which may be handled as indicated:

(1) Clothing, materials, hand tools, and other items of nominal value, the utility of which has been expended through use in the cleanup effort, may be disposed of in the normal course of business.

(2) Any equipment, vessels, vehicles or items that are salvageable may be salvaged in the ordinary course of business and redeployed or reapplied elsewhere as appropriate; provided, however, that defendants shall retain, and shall request their independent contractors to retain, records which are generated in the ordinary course of business which will demonstrate the acquisition, application and disposition of such equipment, vessels, vehicles or items. The defendants are to cooperate with plaintiffs in photographing or

otherwise recording the use of particularly identified pieces of major equipment used during the course of the cleanup effort.

(e) Transfer of "Original" Documents and Physical Evidence. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, may relinquish custody or control of any document subject to this Order to any governmental body or agency upon retaining an identical and legible copy of any document transferred. Except as otherwise provided in paragraphs 5(c) and (d) above, any party transferring any item of physical evidence subject to this Order to any governmental body or agency shall prepare a complete accounting of the transfer of any physical evidence including an identification of the evidence transferred, the name and address of the person or entity to whom the evidence was transferred, the name and address of the person who transferred the evidence, the date of the transfer and the address of the location(s) to which the evidence was transferred. Copies of transferred documents and the accountings for transferred items of physical evidence shall be maintained by the named parties or their counsel. In the event that this matter is certified as a class action, the unnamed class members shall themselves maintain copies of any transferred documents and accountings for the transfer of any items of physical evidence.

The foregoing obligations shall not apply to the State of Alaska to the extent that the State of Alaska transfers documents or items of physical evidence between or within agencies of the State of Alaska.

6. Permissible Destruction of Otherwise Preservable Evidence Prior to Termination of Litigation.

Counsel are to confer to resolve questions as to the scope of this Order regarding the preservation of documents or physical evidence which need not be preserved and as to an earlier date for permissible destruction of particular categories of documents or physical evidence. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Order upon reasonable notice. A party which, within 60 days after receipt by counsel of record of written notice from another party that specified documents or things will be destroyed or altered, fails to indicate to counsel of record its written objection to such destruction or alteration, shall be deemed to have agreed to such destruction or alteration.

7. Modification. Any party may seek a modification of this Order from the Court, after counsel for the parties have consulted in good faith regarding any such proposed modification.

8. Reservation of Objections. The documents and physical evidence preservation provisions of this Order do not create any presumption as to the discoverability or admissibility

at or before trial of documents and items required to be preserved under this Order, nor do they preclude any party from asserting any objections he/she/it may have as to the discoverability, admissibility at or before trial and/or privileged nature of such documents and items.

DATED at Anchorage, Alaska, this _____ day of _____, 1989.

_____
Hon. H. Russel Holland
United States District Judge

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Barbara Herman
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

TINA D. MORTON, being first duly sworn on oath, deposes and states: service of D-22's COMMENTS ON ORDER NO. 3 (DOCUMENT

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RETENTION -- ALL CASES) has been made upon all counsel of record based upon the court's Master Service List of May 18, 1989.

DATED this 7th day of June, 1989 at Anchorage, Alaska.

Tina D. Morton

SUBSCRIBED AND SWORN TO before me this 7th day of June, 1989.

Notary Public in and for Alaska
My commission expires: 6-14-89

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

MEMORANDUM OF D-1, D-2, D-5, D-6 AND D-10 REGARDING PROPOSED DOCUMENT AND PHYSICAL RETENTION ORDER -- ALL CASES

INTRODUCTION

Pursuant to this Court's Order No. 3, issued in this consolidated proceeding on May 15, 1989, the parties met and attempted to "fine tune" the proposed document and physical evidence retention order and address the Court's suggested modifications. Although considerable progress was made by the parties on the proposed retention order, two aspects of such proposal remain in dispute: (1) whether the instant order should

indicate that its provisions will be extended to class members in the event of any class certification (see ¶¶ 3 and 5(e) of Exhibit A to the Partial Stipulation); and (2) the scope of the exception from the general preservation requirements of the Order for documents falling within the attorney-client and work product privileges (see ¶5(b)(4) of Exhibit A).

Defendants Exxon Corporation, Exxon Shipping Company, Exxon Company, USA, Exxon Shipping Company as owner of the EXXON VALDEZ and Exxon Pipeline Company (D-1, D-2, D-5, D-6 and D-10, respectively) (hereinafter "Exxon") hereby submit their comments regarding these two issues.

DISCUSSION

1. Reference to Extension of Order to Class Members in the Event of Certification (¶¶ 3 and 5(e) of Exhibit A).

Defendants maintain that this Order should expressly provide that in the event of any class action certification, class members will be notified of the evidence preservation requirements of the Order.

To begin with, this aspect of the proposed retention order was incorporated in paragraphs 4 and 6 of defendants' original partial stipulation, which the Court previously approved in Order No. 3, noting that, "The Court is generally in agreement with the provisions of the partial stipulation between defendants Exxon . . . and Alyeska Pipeline Service Company . . . ." Id. at

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1. Regarding the application of the Order to future class members, the Court further observed in Order No. 3 that any retention order would not extend to non-parties, "unless and until there is a certification of a class action." Id. at 3 (emphasis added). The clear implication of the Court's language is that the Court did indeed intend to extend the evidence preservation requirements to class members in the event of any certification, and intended to so indicate in the instant order.

Exxon submits that in fairness to all existing and future parties to this action, notice of the preservation requirements should be given now to all litigants and potential litigants so that they may know what their duties are or will be in this litigation. Thus, fishermen who may become class members in the future will have as much notice as possible of their obligation to preserve such highly relevant damages evidence as tax returns, business records, fish tickets, vessel repair and expense records, and the like. Further, inclusion of such provision in this Order will avoid duplicating and wasting the Court's and parties' resources, especially given the extensive amount of time and resources which counsel for the parties have already invested in the process of discussing and redrafting the instant proposed evidence retention order. The provisions extending this order to class members in the event of certification should, in short, be left in the order.

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2. Scope of Exception for Attorney-Client and Work Product Privilege (¶5(b)(4) of Exhibit A).

The second issue in dispute is more substantive; plaintiffs and defendant State of Alaska ("State") seek an exceedingly narrow exception to the general preservation requirements for documents falling within the attorney-client and work product privileges, while defendants propose an exception broad enough to permit full and frank communications between all counsel representing the same party and to allow effective case preparation in this complex civil litigation. In defendants' view, plaintiffs' narrow exception is unduly burdensome and unworkable, and would have a "chilling" effect on attorney-to-attorney communications. Plainly, in a case of this magnitude and complexity, all counsel must be free to communicate to co-counsel, whether by letters, memoranda, facsimile transmissions, notes or the like, without fear of violating the Court's records preservation order.

Defendants' proposal, by comparison, is consistent with the well-established law that the attorney-client and work product privileges must be broadly construed. Upjohn Company v. U.S., 449 U.S. 383, 389, 101 S.CT. 677, 682 66 L.Ed.2d 584 (1981). It has also been recognized that limitations to such privilege must be drawn narrowly. See, Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) affirmed in part and reversed in part on other grounds, 740 F.2d 36, citing Clark v. United States, 289 U.S. 1, 53 S.Ct.. 465, 77 L.Ed. 993 (1933). The importance of

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the attorney-client privilege in the context of communications between outside counsel and in-house attorneys for the corporate client has specifically been recognized by courts. Natta v. Zletz, 418 F.2d 633 (7th Cir. 1969).

Similarly, the work product doctrine provides very broad protection to materials prepared by an attorney in anticipation of litigation. See In re Subpoena Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir 1984), citing Hickman v. Taylor, 329 U.S. 495, 67 S.Ct.. 385, 91 L.Ed.. 451 (1947). See also Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) cert. den. 474 U.S. 903, citing Upjohn, supra, at 401. U.S. v. Nobles, 422 U.S. 225, 236-40, 95 S.Ct.. 2160, 45 L.Ed.2d 141 (1975). It has been recognized that the rationale underlying the protection of work product material applies a fortiori to communications between attorneys for the same client, including communications between outside counsel and in-house counsel. Dura Corp. v. Milwaukee Hydraulic Products, Inc., 37 F.R.D. 470 (E.D. Cis. 1965).

Consistent with the foregoing principles, Exxon submits that the exception to any documents preservation order for privileged communications between counsel and work product must be at least as broad as defendants have proposed in Exhibit A.

CONCLUSION

For the foregoing reasons, Exxon respectfully urges the Court to adopt defendants' proposed retention order, Exhibit A.

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Suit
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Respectfully submitted at Anchorage, Alaska the 7th day of June, 1989.

BOGLE & GATES

By _____
Douglas J. Serdahely
Richard M. Clinton

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Exxon Corporation (D-1)
Exxon Shipping Company (D-2),
Exxon Company, USA (D-5)
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Attorneys for defendants
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Exxon Shipping Company, Exxon Shipping
Company, as owner of the EXXON VALDEZ
and Exxon Pipeline Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

Re: All Cases

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
: ss.
THIRD JUDICIAL DISTRICT)

Joy C. Steveken, being first duly sworn, upon oath, deposes and says: that she is employed as a legal secretary in the offices of Bogle & Gates, 1031 West 4th Street, Suite 600,

BOGLE & GATES
Suit
1031 th Avenue
Anchorage, AK 99501
(907) 276-4557

Anchorage, Alaska 99501; that service of the Partial Stipulation of Defendants Exxon, Alyeska and TAPAA Fund (D-1 Through D-6 and D-10 Through D-17) Regarding Proposed Document and Physical Evidence Retention Order; Memorandum of D-1, D-2, D-5, D-6 and D-10 Regarding Proposed Document and Physical Retention Order; and proposed Order has been made upon all counsel of record based upon the court's Master Service List of May 31, 1989 on the 7th day of June, 1989 via U.S. Mail, postage prepaid.

Joy C. Steveken

Joy C. Steveken

SUBSCRIBED AND SWORN to before me this 7th day of June, 1989.

Notary Public for Alaska
My Commission Expires: 9/10/89

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Exxon Company, USA, Exxon Shipping Company,
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Exxon Pipeline Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

PARTIAL STIPULATION OF DEFENDANTS EXXON, ALYESKA AND TAPAA FUND (D-1 THROUGH D-6 AND D-10 THROUGH D-17) REGARDING PROPOSED DOCUMENT AND PHYSICAL EVIDENCE RETENTION ORDER--ALL CASES

The undersigned defendants, by and through their respective counsel, hereby stipulate to the entry of the proposed document and physical evidence retention order in this consolidated proceeding, attached hereto as Exhibit A.

With respect to two issues which are still in dispute between the parties, the defendants Exxon and Alyeska have filed, simultaneously herewith, memoranda not exceeding five pages in length.

Dated: June 7, 1989 BOGLE & GATES

By _____
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Exxon Shipping Company (D-2),
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Dated: June 7, 1989 BURR, PEASE & KURTZ, P.C.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

ORDER NO. ___
(Document and Physical Evidence Retention--All Cases)

The Court, having considered the parties' initial proposals and briefing regarding a requested order requiring the retention of documents and physical evidence during the course of this consolidated litigation, and having further issued Order No. 3 herein, giving the parties the Court's tentative guidance on remaining issues in dispute, directing the parties to meet and attempt to "fine tune" the proposals consistent with the Court's guidance, and allowing all parties an opportunity to comment on

EXHIBIT A

the proposed order, and having further considered all parties' submissions pursuant to Order No. 3, now hereby orders as follows:

1. Interim Document Retention Order Superseded.

This Court's interim document retention order in Case No. A89-096, issued on April 24, 1989, is hereby superseded by the instant order, which shall take effect immediately.

2. Application of Order to All Named Parties.

The instant order shall apply to all named parties to this consolidated litigation.

3. Application and Notice to Class Members in the Event of Certification.

In the event that this matter is certified as a class action, the substance of the evidence preservation requirements of this Order shall be included in the initial notice to class members and the terms hereof shall immediately thereafter become binding on all such persons or entities who have not previously become subject thereto by virtue of their capacities as named plaintiffs. The form, contents and manner of such notification, and the financial responsibility therefor, will be addressed by the parties and/or the Court at a later date. Prior to any such certification, however, this Order shall not apply to persons or entities who or which are not named parties herein.

4. "Document" Defined.

As used in this Order, "document" shall mean and include any writing, field notes, drawing, film, videotape, chart, photograph, phono or tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained and any other form of tangible preservation of information.

5. Preservation of Documents and Physical Evidence Generally.

(a) Documents and Physical Evidence to be Preserved. During the pendency of this litigation, each of the named parties herein and their respective officers, agents, servants, employees and attorneys, shall retain and neither destroy nor permit the destruction of any document or physical evidence within the parties' possession, control or custody, that relates, refers or pertains to or which may lead to evidence relevant to: (1) (a) the terms, development or amendment since 1977 of any marine oil spill contingency plan of any party pertaining to waters in and around the United States, and the implementation of any such plan, since January 1, 1983, in response to spills greater than 5,000 barrels; (b) any Prince William Sound oil spill contingency plan and its development,

amendment, review, analysis, approval, disapproval, comments and communications in regard thereto, and implementation at any time; (2) (a) the T/V EXXON VALDEZ, its crew and its maintenance generally from the date it was placed in service; (b) cargo and operations information regarding the loading and voyage of the T/V EXXON VALDEZ to Valdez on or about and after March 23, 1989; (3) the oil spill in Prince William Sound which is the subject of this litigation ("the oil spill"); (4) the efforts by any person, entity or agency to clean up, contain, disperse, burn and/or monitor the oil spill and any review, analysis, testing, observation, approval and disapproval of such efforts; (5) any investigation by any person, entity or agency (including any law enforcement agency) into the circumstances, effects and/or causes of the oil spill; (6) any claims or damages alleged to result, directly or indirectly, from the oil spill or its aftermath; (7) the selection, training and supervision of, and rules, regulations and operating procedures for, crews and vessels transporting oil through or on Prince William Sound since January 1, 1980; and, (8) any policies relating to alcohol and drug abuse and enforcement of such policies on vessels transporting oil through or on Prince William Sound since January 1, 1977.

(b) Documents Which Need Not Be Preserved. Documents specifically excluded from paragraph 5(a) above are (1) interim drafts of writings prepared subsequent to June 1, 1989; (2) telephone message slips and electronically recorded or transmitted messages, provided that at least one copy of the original telephone logbooks and the electronically recorded or transmitted messages (whether in "hard copy" form or by electronic storage) be preserved; (3) exact duplicates of any documents, provided that one copy of such be preserved and provided further that any modification of and/or handwriting upon such duplicate transforms such "duplicate" into an original writing which must be preserved; and, (4) documents prepared subsequent to the initiation of this litigation, by parties' counsel, or their assistants, which have not been transmitted to management representatives of institutional clients (not including in-house counsel), to individual clients or to third persons.

(c) Use and/or Removal of Equipment. Equipment used and/or to be used by defendants and/or their contractors in oil spill cleanup activities may be removed from the Prince William Sound area and Alaska and/or may be used for any other normal business purpose anywhere else without consent of other parties or authorization of this Court, provided, however, that defendants and/or their contractors shall retain records which

are generated in the ordinary course of business which will demonstrate the acquisition, application and disposition of such equipment.

(d) Physical Evidence Which Need Not Be Preserved. Physical evidence specifically excluded from paragraph 5(a) above includes the following, which may be handled as indicated:

(1) Clothing, materials, hand tools, and other items of nominal value, the utility of which has been expended through use in the cleanup effort, may be disposed of in the normal course of business.

(2) Any equipment, vessels, vehicles or items that are salvageable may be salvaged in the ordinary course of business and redeployed or reapplied elsewhere as appropriate; provided, however, that defendants shall retain, and shall request their independent contractors to retain, records which are generated in the ordinary course of business which will demonstrate the acquisition, application and disposition of such equipment, vessels, vehicles or items. The defendants are to cooperate with plaintiffs in photographing or

otherwise recording the use of particularly identified pieces of major equipment used during the course of the cleanup effort.

(e) Transfer of "Original" Documents and Physical Evidence. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, may relinquish custody or control of any document subject to this Order to any governmental body or agency upon retaining an identical and legible copy of any document transferred. Except as otherwise provided in paragraphs 5(c) and (d) above, any party transferring any item of physical evidence subject to this Order to any governmental body or agency shall prepare a complete accounting of the transfer of any physical evidence including an identification of the evidence transferred, the name and address of the person or entity to whom the evidence was transferred, the name and address of the person who transferred the evidence, the date of the transfer and the address of the location(s) to which the evidence was transferred. Copies of transferred documents and the accountings for transferred items of physical evidence shall be maintained by the named parties or their counsel. In the event that this matter is certified as a class action, the unnamed class members shall themselves maintain copies of any transferred documents and accountings for the transfer of any items of physical evidence.

The foregoing obligations shall not apply to the State of Alaska to the extent that the State of Alaska transfers documents or items of physical evidence between or within agencies of the State of Alaska.

6. Permissible Destruction of Otherwise Preservable Evidence Prior to Termination of Litigation.

Counsel are to confer to resolve questions as to the scope of this Order regarding the preservation of documents or physical evidence which need not be preserved and as to an earlier date for permissible destruction of particular categories of documents or physical evidence. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Order upon reasonable notice. A party which, within 60 days after receipt by counsel of record of written notice from another party that specified documents or things will be destroyed or altered, fails to indicate to counsel of record its written objection to such destruction or alteration, shall be deemed to have agreed to such destruction or alteration.

7. Modification. Any party may seek a modification of this Order from the Court, after counsel for the parties have consulted in good faith regarding any such proposed modification.

8. Reservation of Objections. The documents and physical evidence preservation provisions of this Order do not create any presumption as to the discoverability or admissibility

at or before trial of documents and items required to be preserved under this Order, nor do they preclude any party from asserting any objections he/she/it may have as to the discoverability, admissibility at or before trial and/or privileged nature of such documents and items.

DATED at Anchorage, Alaska, this _____ day of _____, 1989.

_____
Hon. H. Russel Holland
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re)
)
the EXXON VALDEZ)
)
)
)

No. A89-095 Civil

(Consolidated)

MEMORANDUM OF P-1 THROUGH P-21, P-23 THROUGH P-29, P-40 THROUGH P-62, P-64 THROUGH P-67, P-73 THROUGH P-77, P-81 THROUGH P-94, P-97 THROUGH P-112, P-114 THROUGH P-164 REGARDING DOCUMENT AND PHYSICAL RETENTION ORDER PROPOSED BY D-1 THROUGH D-6 AND D-10 THROUGH D-17 -- ALL CLASSES

The Exxon defendants (D-1, D-2, D-5, D-6, and D-10) correctly state that there are only two remaining areas of disagreement regarding the proposed Document and Physical Evidence Retention Order attached as Exhibit A to Defendant's "Partial Stipulation" filed on June 8, 1989. This memorandum addresses both.

1. Application of Order to Unnamed Class Members After Certification

Plaintiffs have been unsuccessful in requesting defendants to leave for another day the extent to which the proposed order will bind non-parties such as unnamed class members. There is absolutely no need to cross that bridge now, before the Court determines which, if any, classes will be certified, and if and how they will be given notice. The classes as presently described include all possible victims of the oil spill from large sophisticated businesses to native hunters and sports fishermen. These different types of claimants are likely to have different

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types of records. Yet the proposed order would impose on each the same detailed obligations for retaining, copying, and logging documents and physical evidence relating to various subjects. Many of these provisions seem irrelevant to many types of class members, yet the proposed order would require that they all be notified of the entire substance of the order. Under Rule 23(b), an action may be certified as a class action for various reasons. Only one of the various types of class actions, one certified under Rule 23(b)(3), even requires notice. Even then the Court has considerable discretion as to how notice shall be given.

Until the Court determines to certify a class or classes and whether and how the class will receive notice, it is premature to address the question of obligations that may be imposed upon those who are unnamed class members. Defendants' proposed order seems to recognize that until a class member receives notice of the order, he would not be bound by it. Yet defendants suggest that "in fairness to all . . . future parties to this action, notice of the preservation requirements should be given now to all . . . potential litigants." How would one give notice to class members until the class is certified?

Defendants also misconstrue how a class action operates. First, a person who does not elect to opt out of a class is not a "future party" or "litigant." An unnamed class member, even after class certification, is not necessarily subject to party discovery, or to imposition of sanctions, or costs. Second, there is no such thing as "fishermen who may become class members." All fishermen

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are to be treated as class members until the Court declines to certify the class or until they opt out. The cases are clear that participation in a class action is not to be conditioned upon an affirmative act by class members. But even if there is a class of fishermen, even if no document retention order is entered as to those who do not elect to opt out, the Court may still ultimately require certain types of documentation to support a claim for damages. Again, what, if any, obligations should be imposed on non-parties need not be determined now. By the time the Court certifies a class, designates class representatives, and designs a notice, class counsel and the Court will have a much better idea of what kind of records were made, what kind need to be kept, and how best to assure that non-parties are notified about what really matters. It makes no sense to deal with these thorny issues now.

2. Scope of Exception for Privileged Documents

Defendants propose that they should be able to destroy what is non-discoverable -- documents protected by the attorney/client work product privilege. For each of the following reasons, they are wrong:

A. In Order No. 3, the Court said it did not understand defendants' proposal to permit the destruction of records "which would not be discoverable." Apparently, the Court would have looked askance at such a proposal. And properly so, since there is a difference between what must be retained and what must be produced, between what is relevant and what is discoverable. There are very sound policy reasons to require that retention of what

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might otherwise appear to be privileged and nondiscoverable.

B. The only privilege that can automatically be claimed to apply to "documents prepared . . . by parties' counsel" is the work-product privilege. Certainly, a great many documents prepared by attorneys are not necessarily covered by the attorney/client privilege. But even the work-product privilege is not absolute. It may by overcome by a showing of compelling need. A statement taken by a lawyer from a witness who is unavailable to the other side is a prime example of work product that is discoverable. The work product privilege may be waived by testimony on a subject or lost by disclosure to third parties. And finally, it is usually the lawyer's mental impressions, not the entire document, that is protected.

C. Whether a document is privileged can often only be determined by in camera inspection. That's why litigants are often required to identify documents withheld from production on account of a privilege -- it is the only way the privilege assertion can be tested. It makes no sense to allow the destruction of any relevant document simply because one side claims they are privileged.

D. To require the retention of certain privileged documents does not chill attorney-to-attorney communications. Lawyers are not discouraged from communicating with clients or their inside counsel simply because the law firms or law departments are required to keep files. To retain is not to disclose or produce. Plaintiffs have drafted an alternative to paragraph 5(b)(4) that reads:

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(4) documents (other than notes or memorandum of witness interviews) prepared subsequent to June 1, 1989, by parties' counsel or their assistants, which have not been transmitted beyond counsel's offices.

This provision allows lawyers to dispose of intraoffice memos and notes of most meetings and phone calls. But when lawyers begin communicating with clients and transmitting documents beyond their offices -- and communication with large corporate clients is often through in-house counsel -- the communications are significant enough to retain. In fact, in the ordinary course of business, such communications, because easily recognized, are usually retained and filed.

Conclusion

For the above reasons, plaintiffs suggest that the order proposed by defendants be modified as suggested on the revised pages of **Exhibit A** that are attached hereto. Plaintiffs have requested defendant's counsel to use its word processor to provide the Court a revised copy of their proposed order, and counsel has agreed to do so should the Court agree with Plaintiff's proposed changes.

Respectfully submitted this 8th day of June, 1989.

BIRCH, HORTON, BITTNER, CHEROT

By: _____
TIMOTHY PETUMENOS
On Behalf of all Plaintiffs Except P-1 through P-21, P-23 through P-29, P-40 through P-62, P-64 through P-67, P-73 through P-77, P-81 through P-94, P-97 through P-112, P-114 through P-164

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the proposed order, and having further considered all parties' submissions pursuant to Order No. 3, now hereby orders as follows:

1. Interim Document Retention Order Superseded.

This Court's interim document retention order in Case No. A89-096, issued on April 24, 1989, is hereby superseded by the instant order, which shall take effect immediately.

2. Application of Order to All Named Parties.

The instant order shall apply to all named parties to this consolidated litigation.

3. Application and Notice to Class Members in the Event of Certification.

In the event that this matter is certified as a class action, the substance of the evidence preservation requirements of this Order shall be included in the initial notice to class members and the terms hereof shall immediately thereafter become binding on all such persons or entities who have not previously become subject thereto by virtue of their capacities as named plaintiffs. The form, contents and manner of such notification, and the financial responsibility therefor, will be addressed by the parties and/or the Court at a later date. Prior to any such certification, however, this Order shall not apply to persons or entities who or which are not named parties herein.

Exhibit A page 1 of 3

(b) Documents Which Need Not Be Preserved. Documents specifically excluded from paragraph 5(a) above are (1) interim drafts of writings prepared subsequent to June 1, 1989; (2) telephone message slips and electronically recorded or transmitted messages, provided that at least one copy of the original telephone logbooks and the electronically recorded or transmitted messages (whether in "hard copy" form or by electronic storage) be preserved; (3) exact duplicates of any documents, provided that one copy of such be preserved and provided further that any modification of and/or handwriting upon such duplicate transforms such "duplicate" into an original writing which must be preserved; and, (4) documents (other than memos or notes of witness interviews prepared subsequent to June 1, 1989 by parties' counsel, or their assistants, which have not been transmitted to management representatives of institutional clients (not including in-house counsel), to individual clients or to third persons.

(c) Use and/or Removal of Equipment. Equipment used and/or to be used by defendants and/or their contractors in oil spill cleanup activities may be removed from the Prince William Sound area and Alaska and/or may be used for any other normal business purpose anywhere else without consent of other parties or authorization of this Court, provided, however, that defendants and/or their contractors shall retain records which

otherwise recording the use of particularly identified pieces of major equipment used during the course of the cleanup effort.

(e) Transfer of "Original" Documents and Physical Evidence. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, may relinquish custody or control of any document subject to this Order to any governmental body or agency upon retaining an identical and legible copy of any document transferred. Except as otherwise provided in paragraphs 5(c) and (d) above, any party transferring any item of physical evidence subject to this Order to any governmental body or agency shall prepare a complete accounting of the transfer of any physical evidence including an identification of the evidence transferred, the name and address of the person or entity to whom the evidence was transferred, the name and address of the person who transferred the evidence, the date of the transfer and the address of the location(s) to which the evidence was transferred. Copies of transferred documents and the accountings for transferred items of physical evidence shall be maintained by the named parties or their counsel. ~~In the event that this matter is certified as a class action, the unnamed class members shall themselves maintain copies of any transferred documents and accountings for the transfer of any items of physical evidence~~.

Exhibit A page 3 of 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-095 Civil
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	

Re: All Cases (Except P-78 through P-80, P-95, P-96, P-113, and P-68 through P-72)

AFFIDAVIT OF SERVICE

Deborah Smith, being first duly sworn upon oath, deposes and states: that she is employed as a legal assistant in the offices of Birch, Horton, Bittner & Cherot, 1127 West 7th Avenue, Anchorage, Alaska 99501; that service of the Memorandum of All Plaintiffs (Except P-78 through P-80, P-95, P-96, P-113, and P-68 through P-72) Regarding Proposed Document and Physical Retention Order -- All Cases has been made upon all counsel of record based upon the court's Master Service List of May 3, 1989 on the 8th day of June, 1989, via U.S. Mail, postage prepaid.

Deborah Smith

DEBORAH SMITH

SUBSCRIBED AND SWORN to before me this 8th day of June, 1989.

Vera C. Gehring

Notary Public for Alaska
My Commission Expires: 4/19/93

OFFICIAL SEAL
STATE OF ALASKA
VERA C. GEHRING
NOTARY PUBLIC
My Comm. Expires: April 19, 1993

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